IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35439

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

LYNDA YOUNG,
PLAINTIFF BELOW, APPELLEE

VS.

BELLOFRAM CORPORATION, D/B/A MARSH BELLOFRAM CORPORATION, AND JOSEPH COLLETTI,
DEFENDANTS BELOW, APPELLANTS

HONORABLE ARTHUR M. RECHT, JUDGE
CIRCUIT COURT OF HANCOCK COUNTY
CIVIL ACTION NO. 06-C-55R

BRIEF OF THE APPELLANTS

Counsel for Appellants

Ancil G. Ramey, Esq.
WV Bar No. 3013
Peter J. Raupp, Esq.
WV Bar No. 10546
STEPTOE & JOHNSON PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8112

G. Ross Bridgman, Esq.
Nelson D. Cary, Esq.
Daniel J. Clark, Esq.
VORYS, SATER, SEYMOUR AND PEASE, LLP
P.O. Box 1008
Columbus, OH 43216-1008
Telephone (614) 464-6396

Counsel for Appellee

M. Eric Frankovitch, Esq.
WV Bar No. 4747
Kevin M. Pearl, Esq.
WV Bar No. 8840
FRANKOVITCH, ANETAKIS, COLANTONIO & SIMON
337 Penco Road
Weirton, WV 26062-3828
Telephone: (304) 723-4400

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I. INTRODUCTION

In the face of undisputed evidence that plaintiff, Lynda Young ("Ms. Young" or "plaintiff"), was promoted to supervisor when she was 59, terminated when she was 60, and replaced by a woman over the age of 40, the trial court found that the defendant, Bellofram Corporation ("Bellofram" or "defendant"), guilty of "age and/or sex" discrimination[1] when it terminated her employment after she failed to enforce the company's anti-harassment policy. Significantly, not only was plaintiff terminated, but Bellofram also terminated the employment of younger two men and suspended one man who were her subordinates and perpetrators of blatant violations of company policy, including but not limited to using the terms "nigger," "sand nigger," "spic," "slut," "whore," "bar whore," and other derogatory terms, and who inappropriately touched both male and female employees. Indeed, their actions were so outrageous that even the trial court characterized them as "miscreants" and their union would not dispute their punishment.[2]

Through her condonation of their behavior, plaintiff subjected defendant to potential legal liability. Indeed, this Court had held, "Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is <u>strictly liable</u> for the damages that result."[3]

In this case, the trial court found that plaintiff told one of her subordinates to "ignore" harassment from co-workers[4] and found that plaintiff's "antidote" to the conduct of her

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[1] Order at 8 ("Ms. Young's age and/or sex was a determinative factor").

[2] Order at 5 ("Ms. Young's antidote to the conduct of the three miscreants was indifference.").

[3] *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995)(emphasis supplied).

[4] Order at 5 ("At this time, Ms. Young's response to Mr. Jackson was to ignore the harassment.").

subordinates was "indifference."[5] Indeed, plaintiff admitted that she personally overheard one of her subordinates use clearly racist language like "nigger," "sand nigger," and "spic," in the workplace, but did not take disciplinary action. The evidence is undisputed that the sexist, racist, and ethnic conduct of plaintiff's subordinates was so severe that it caused one employee, Amanda Chipps ("Ms. Chipps"), to take an anti-depressant and ultimately quit her employment.[6]

In the absence of any direct evidence of discrimination, and in the face of every legal inference against discrimination, the trial court found that in its judgment, which it improperly substituted for Bellofram's, plaintiff should have been demoted instead of terminated. It reached that conclusion because some two and one-half years earlier, under different management, a male supervisor had been demoted by a different manager for completely different conduct, i.e., failing to police employee rest breaks and other like conduct. Aside from the fact that even this comparison employee was over 40 and was not comparable to plaintiff, the trial court simply ignored any evidence that did not fit with its subjective judgment that Bellofram's treatment of plaintiff, in its view, was "shabby."[7]

Plaintiff's treatment in this case, however, was far from "shabby." It was plaintiff who placed the company at risk by permitting subordinates to repeatedly use derogatory terms such as "nigger," "sand nigger," "spic," "slut," "whore," and "bar whore." No other supervisor and certainly not the comparison employee engaged in conduct remotely similar.

Plaintiff was a 59 year old woman when she was promoted and was a 60 year old woman when she was terminated. Obviously, plaintiff's age and sex were non-issues in Bellofram's

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[5] *Id.* ("Ms. Young's antidote to the conduct of the three miscreants was indifference.").

[6] Tr. at 555-56. Bellofram reinstated Ms. Chipps as part of its remedial response to the misconduct. *Id.* at 563-64.

[7] Tr. at 352.

decision to send the appropriate message to its workforce that this conduct will never be condoned by either hourly or supervisory employees. Plaintiff and two of her subordinates were fired because of the hostile work environment they were in the process of creating, not due to age, gender, or anything else, and Bellofram makes no apologies for its decision.

The trial court's imposition of liability upon an employer which acted reasonably by discharging a supervisor who was complicit in racial, sexual, and ethnic harassment is inconsistent with both the law and the evidence. It places employers in the untenable position of firing employees who abuse and harass fellow employees, but demoting their supervisors, which will almost certainly give rise to claims of disparate treatment by the discharged employees. It also places employers in the position of demoting supervisors to work beside subordinates who were the victims of harassment condoned by those supervisors.

II. STATEMENT OF FACTS

A. Bellofram Corporation. Bellofram, located and headquartered in Newell, manufactures a variety of products and employs approximately 500 people.[8] While Bellofram has a human resources department, it contracts with Desco, an affiliated company, for assistance with a variety of operational services, including human resources and finance.[9] Bellofram has implemented a number of policies proscribing inappropriate employee conduct.[10] These policies include rules of conduct applicable to both salaried and hourly employees.[11]

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[8] Colletti Depo. at 14-16; Grilli Depo. at 17; Trial Tr. at 651, 709.

[9] Colletti Depo. at 18.

[10] Trial Tr. at 281, 653, 657, 660, 663; Defendants' Trial Exhibits 4, 6, 13.

[11] Defendants' Trial Exhibits 4, 6.

Bellofram's rules of conduct allow for progressive discipline for certain violations.[12] Other violations, such as harassment and discrimination, may result in immediate termination.[13]

B. Plaintiff's Employment. Plaintiff worked for Bellofram for a period of eleven years.[14] Until her promotion to supervisor, she worked as either a molder or "lead" molder in the diaphragm division's second shift.[15] She was a lead for six years.[16] Donnie Shuman ("Mr. Shuman"), a male over 40 years old, was at first either her lead or supervisor for most of this time.[17] After her promotion to supervisor, Mr. Shuman was one of plaintiff's subordinates.[18]

C. Shuman's Employment. In 2003, Joseph Grilli ("Mr. Grilli"), director of operations of the diaphragm division, informed Mr. Shuman,[19] the diaphragm division's second shift supervisor, that his performance was not satisfactory.[20] Mr. Grilli did not believe that Mr. Shuman was able to properly control his shift.[21] More specifically, Mr. Shuman allowed employees to take longer breaks than they were allowed.[22] As discipline, Mr. Shuman was

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[12] Defendants' Trial Exhibit 4.

[13] Defendants' Trial Exhibits 3, 13; Trial Tr. at 660.

[14] Trial Tr. at 235-237.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Mr. Shuman, according to his own testimony, was over 40 at the time. *Id.* at 48.

[20] Trial Tr. at 52.

[21] Trial Tr. at 596-597. ("Q: He was demoted for inadequate work performance, and he did not have good control of shop personnel in handling day to day activities of personnel, is that right? A: Yes. Q: He wanted to be friends with everyone, right? A: Yes. Q: He wouldn't try to discipline people if they were doing anything inappropriate, correct? A: Yes.").

[22] Grilli Depo. at 25-26; Trial Tr. at 608-609.

demoted to his previous position as a lead on the second shift.[23] There was no evidence that Mr. Shuman's subordinates engaged in the pervasive racial, sexual, and ethnic harassment that resulted in plaintiff's termination.

First, Mr. Shuman testified that although he had received some complaints during his tenure as supervisor,[24] he was unaware that there had been any unaddressed racial, sexual, or ethnic harassment on his watch.[25] Second, Mr. Grilli, who recommended Mr. Shuman's demotion, was unaware that any racial, sexual, or ethnic harassment had taken place under Shuman's supervision.[26] Finally, Candy Travis ("Ms. Travis"), a woman over forty and another of Mr. Shuman's supervisors, knew that he had problems, but was unaware of any harassment.[27]

Moreover, several management personnel involved in the decision to terminate plaintiff were not employed by Bellofram at the time of Mr. Shuman's demotion. Indeed, neither Sharon Coleman ("Ms. Coleman"), Bellofram's human resources manager, a woman over forty[28] nor Mr. Colletti, a man over forty,[29] were employed by Bellofram when Mr. Shuman was demoted.[30] Indeed, Mr. Colletti was unaware of the circumstances of Shuman's demotion.[31]

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[23] Trial Tr. at 52.

[24] *Id.* at 51-52.

[25] *Id.* at 63-64. *See also id.* at 289 (the plaintiff herself testified that Mr. Shuman "didn't have a clue" about this kind of conduct).

[26] *Id.* at 608-609.

[27] *Id.* at 221. ("Q: What type of issues did Donnie have? A: Again, not possibly following through with things, reporting information back to us, that type of thing.").

[28] *Id.* at 647.

[29] *Id.* at 711.

[30] *Id.* at 744.

[31] *Id.* at 65, Colletti Depo. at 46.

D. Plaintiff's Promotion at Age Fifty-Nine. Upon his demotion, Mr. Shuman was replaced by Mr. Smith,[32] who lasted about a year.[33] Eventually, despite qualified male candidates and candidates under forty,[34] Mr. Grilli, after consulting with Ms. Travis,[35] decided to promote plaintiff.[36] Mr. Grilli approached plaintiff and asked her if she would be interested in the supervisor position.[37] Importantly, plaintiff was fifty-nine years old at the time.[38]

Plaintiff accepted the promotion[39] and she assumed the position effective June 28, 2004.[40] Plaintiff continued as second shift supervisor until October 2005.[41] Ms. Travis, also a woman over the age of fifty, was plaintiff's immediate supervisor during this time.[42]

E. Bellofram's Anti-Discrimination/Harassment Policy. Plaintiff was aware of Bellofram's rules regarding employee conduct. She knew that harassment and discrimination were prohibited, and had been trained on the conduct and behavior that constituted harassment and discrimination.[43] Plaintiff also knew that derogatory name-calling was prohibited in the

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[32] Trial Tr. at 55.

[33] *Id.*

[34] *Id.* at 607.

[35] *Id.* at 577.

[36] Trial Tr. at 585. Mr. Grilli believed that plaintiff was the most qualified individual.

[37] *Id.* at 586.

[38] *Id.* at 243.

[39] *Id.* at 590.

[40] Defendant's Trial Exhibit 2.

[41] Defendant's Trial Exhibit 7.

[42] Trial Tr. at 218, 237, 579. Ms. Travis, despite being a woman and fifty-five years of age, was still a supervisor at Bellofram at the time of the trial. *Id.* at 576.

[43] *Id.* at 279-80.

workplace.[44] Supervisors were responsible for ensuring that harassment and discrimination was addressed and plaintiff understood that such conduct would not be tolerated in the workplace.[45] Plaintiff understood that permitting sexual harassment and discrimination to take place could result in immediate termination and that a supervisor could expect to be terminated for failing to properly address discrimination and/or harassment in the workplace.[46]

F. Complaints of Misconduct. In October 2005, Ron Jackson ("Mr. Jackson"), an employee, complained to Sandy Chambers ("Ms. Chambers"), a union steward, that three male employees on the second shift, Bill Friley ("Mr. Friley"), Adam Farmer ("Mr. Farmer"), and Alan Lockwood ("Mr. Lockwood"), were engaging in inappropriate conduct.[47] Mr. Jackson had previously confided in Ms. Chambers that the three had used threatening language towards him and had directed racially and sexually inappropriate language towards other employees.[48]

Mr. Jackson met with Ms. Coleman and told her that: (i) the three men were harassing employees; (ii) he had reported the problems to plaintiff; (iii) plaintiff may have witnessed the harassing conduct; and (iv) instead of addressing the conduct, plaintiff laughed at the comments and told Mr. Jackson to ignore them.[49] Ms. Coleman went to Mr. Colletti[50] who directed her[51] to interview employees and obtain more details regarding the alleged misconduct.[52]

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[44] *Id.* at 284.

[45] *Id.* at 287.

[46] *Id.* at 284.

[47] *Id.* at 488.

[48] *Id.* at 488-90.

[49] *Id.* at 663-665.

[50] *Id.* at 665.

Ms. Coleman was deeply disturbed by the results of her employee interviews. She testified that, during her initial investigation, employees told her that (i) Mr. Farmer told a female employee to stop "teasing" him with her "tits" and just show them to him;[53] (ii) Mr. Farmer and Mr. Friley called a female employee a slut and whore;[54] (iii) Mr. Farmer and Mr. Friley referred to Hispanics as "spics;"[55] and (iv) they made fun of another employee's disability.[56]

In addition, Ms. Chambers advised Ms. Coleman that: (i) Mr. Friley, referring to an African-American employee, said that "he wasn't going to have any nigger come and tell him what to do";[57] (ii) that Mr. Friley, Mr. Farmer, and Mr. Lockwood, made fun of a disabled employee;[58] and (iii) that they referred to female employees as "sluts" and "whores."[59] Ms. Chipps stated that Mr. Farmer called her a "slut" and "bar whore."[60]

Eventually, after satisfying herself that Mr. Jackson's allegations against the three employees were more than well-founded, Ms. Coleman interviewed plaintiff, who admitted that

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[51] Ms. Coleman had experience conducting investigations into employee misconduct. *Id.* at 648. In addition, she had experience teaching classes on preventing sexual harassment. *Id.*

[52] *Id.* at 665-666, 716.

[53] *Id.* at 666.

[54] *Id.*

[55] *Id.* at 667. This was disturbing to the employee since her children were part-Hispanic. *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.* at 669.

Mr. Jackson had complained to her regarding this conduct.[61] Moreover, plaintiff advised Ms. Coleman that she hears a lot of things, but that she simply ignores what she hears and tells other people to do the same.[62]

Obviously, plaintiff's attitude came as a shock to Ms. Coleman. Accordingly, after completing her interviews, Ms. Coleman, a woman over the age of fifty, informed Mr. Colletti that there appeared to be serious problems on the second shift:

> Q: Why did you consider this to be a serious situation?
>
> A: I've never been involved in anything like this before, where there was so much ridicule and harassment and the racial slurs. It was just nothing like I'd never seen before. So, naturally that's very serious, No. 1, because of us having the sexual harassment policies and our plant rules dealing with unlawful conduct and all those things. So knowing we had so many individuals that had been victims of all this behavior, it was a very serious matter.[63]

At this point, Mr. Colletti and Ms. Coleman contacted Diane Kana ("Ms. Kana"), another woman over the age of forty, who served as human resources director at Desco.[64] Mr. Colletti directed Ms. Kana to contact an independent third-party to conduct an investigation.[65] Mr. Farmer, Mr. Friley, Mr. Lockwood, and plaintiff were all suspended during the investigation.[66]

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[61] *Id.* at 670. The plaintiff admitted that Mr. Jackson came to her with his concerns <u>at least</u> two times, *id.* at 305-306.

[62] *Id.* at 670. ("Q: What do you recall Lynda Young telling you? A: I asked Lynda if she knew of anything that was going on the second shift that was inappropriate. She said that Ronnie had come to her and complained about Bill Friley at one point in time calling him a rat, and she said that she would talk to him. <u>And she said that – you know, that she hears a lot of things and stuff, but just kind of ignores it and tells the people to ignore it.</u>") (emphasis supplied).

[63] *Id.* at 671.

[64] *Id.* at 672, 719.

[65] *Id.* at 972-673, 719-720.

[66] Defendants' Exhibit No. 24; Trial Tr. at 246.

Ms. Kana contacted Mary Ellis ("Ms. Ellis"), a human resources consultant and woman over the age of forty,[67] to conduct the investigation. Ms. Ellis had three decades of experience and had conducted similar investigations of workplace harassment and discrimination for other employers.[68] Ms. Kana told Ms. Ellis that Bellofram was looking for a neutral third-party to come in and find the truth. Ms. Ellis was provided with the suspension notices and copies of the company's rules, policies, and standards of conduct.[69] Mr. Colletti testified that he deferred to Ms. Ellis's judgment, as a human resources consultant, on how to conduct the investigation.[70]

G. Ellis Investigation. Ms. Ellis interviewed twenty-seven current and former Bellofram employees, as well as plaintiff and the three suspended employees.[71] During her investigation, Ms. Ellis was told that plaintiff's "favorites" were Mr. Farmer, Mr. Friley, and Mr. Lockwood,[72] which apparently had emboldened them to engage in multiple acts of racial and sexual harassment disclosed to Ms. Ellis by numerous past and current Bellofram employees.

Ms. Chipps informed Ms. Ellis that she had quit her position at Bellofram because of abusive treatment.[73] Moreover, Ms. Chipps told Ms. Ellis that plaintiff would overhear offensive comments and, instead of addressing them, plaintiff would simply shake her head.[74] In other

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[67] Trial Tr. at 372.

[68] *Id.* at 370-371, 386.

[69] *Id.* at 373, 387.

[70] *Id.* at 770.

[71] Trial Tr. at 398.

[72] *Id.* at 466.

[73] *Id.* at 411.

[74] *Id.* at 430.

words, plaintiff was complicit in the abuse of Ms. Chipps, which resulted in her resignation and could have subjected Bellofram to a sexual harassment suit.

Ray Gonzales ("Mr. Gonzales") told Ms. Ellis that he transferred shifts because he was uncomfortable with the conduct on the second shift.[75] Mr. Gonzales was Hispanic and the conduct of the three employees in which plaintiff was complicit could have subjected Bellofram to a hostile work environment suit.

Heather Wells ("Ms. Wells") stated that she told Ms. Ellis that Mr. Lockwood put his arm around women's shoulders (including her own) and that she brought this to plaintiff's attention, but that plaintiff would ignore employees' complaints or even laugh with the perpetrators at the inappropriate conduct.[76] Again, plaintiff's supervisory complicity could have subjected Bellofram to a hostile work environment suit.

Melissa Farmer ("Ms. Farmer") told Ms. Ellis about an incident in which a doorknob had been greased. When Ms. Farmer confronted Mr. Friley about the prank, she was informed that she was not the intended target. Because the only other employee in that particular area was an African-American employee,[77] Ms. Farmer reported this incident to plaintiff – who did nothing,[78] which again could have subjected Bellofram to a racial harassment suit.

Angela Coleman Kirkbride ("Ms. Kirkbride") told Ms. Ellis that she went to plaintiff to complain about Mr. Lockwood putting his arms around women's shoulders, but plaintiff told her

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[75] *Id.* at 411.

[76] *Id.* at 431.

[77] *Id.* at 432-33.

[78] *Id.*

to ignore it.[79] Ms. Kirkbride told Ms. Ellis that plaintiff was within twenty feet when a number of inappropriate comments were made.[80] According to Ms. Kirkbride, plaintiff watched and laughed when a male employee kicked Tammy Little ("Ms. Little"), a disabled female employee, in the butt.[81] Obviously, this could have subjected Bellofram to liability.

Mr. Jackson, threatened by the three men, went to plaintiff, who told him to just ignore them.[82] Later, when Mr. Jackson went back to plaintiff to complain about the comments directed towards him and female employees, plaintiff told him that she ignores the language.[83]

Not only did these reports indicate that these employees were out of control because plaintiff was complicit in their conduct, Ms. Ellis was "struck by the amount of fear that people expressed about their work environment."[84] She concluded that there had been pervasive abusive language and behavior[85] and that the misconduct had been brought to plaintiff's attention.[86]

H. Plaintiff's Termination and Replacement by a Woman Over Forty. Mr. Colletti reviewed the Ellis report[87] which was consistent with Ms. Coleman's findings during the course

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[79] *Id.* at 433-34.

[80] *Id.* at 433.

[81] *Id.* at 438. The plaintiff, in rebuttal, stated that the incident with Ms. Little was a "joke." (*Id.* at 789-790).

[82] *Id.* at 434-35.

[83] *Id.* at 435, 483-485.

[84] *Id.* at 413.

[85] *Id.* at 416.

[86] *Id.* at 417.

[87] *Id.* at 725-726.

of her internal investigation.[88] Mr. Colletti was concerned with a number of the findings in the report, including: (i) plaintiff's statement to Ms. Ellis that the three men were "just kidding;"[89] (ii) reports that a disabled female employee had been mocked;[90] (iii) reports that plaintiff either dismissed or laughed at offensive comments;[91] and (iv) plaintiff's insensitive response to questions regarding unwelcome physical contact.[92]

After digesting Ms. Ellis' report,[93] Mr. Colletti believed that plaintiff should be fired. He considered whether she should be allowed the option of requesting a return to her prior hourly position, but concluded that the severity of conduct alleged to have taken place, along with the tension it would create within the shift (inasmuch as certain employees had provided negative information about plaintiff), weighed in favor of termination.[94] Mr. Colletti consulted Ms. Coleman and Ms. Kana regarding plaintiff's fate.[95] Ms. Coleman, a woman over the age of fifty, recommended that plaintiff be fired:

> A: My recommendation was that the people that were involved in the inappropriate behavior, being Adam Farmer, Bill Friley should be terminated due to the serious nature of everything we talked about; and that Lynda Young, being a supervisor and from the investigation that I conducted indicating that she knew what was happening and did not take action and, because of being a representative

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[88] *Id.* at 730.

[89] *Id.* at 733.

[90] *Id.* at 733, 741.

[91] *Id.* at 733-734, 738-739.

[92] *Id.* at 739. Plaintiff agreed that the contact was indeed unwelcome, but instead of addressing it she simply told employees to ignore it and go back to work. *Id.*; *see also* Defendant's Exhibit 8 at MB0294.

[93] Trial Tr. at 749.

[94] *Id.* at 770-771, 783.

[95] *Id.* at 676, 742.

> of the company, we felt that we needed to terminate Lynda because, if we did not, then we were going to suffer the consequences of any of those individuals bringing forth lawsuits against us because it really would appear that we were okay with all that behavior happening because we, the company, allowed it to happen. . .
>
> Q: How did it make you feel to terminate Lynda Young's employment?
>
> A: I felt horrible. I know Mr. Colletti did. It was not an easy decision for any of us . . . I don't like terminating anybody, but unfortunately we had to look at the facts and the problems that we had with all the individuals that were victims. And therefore we decided that we had to terminate the people involved.[96]

In addition to the recommendation of Ms. Coleman, Ms. Kana also recommended that plaintiff be fired.[97] Based upon the report and recommendations of Ms. Ellis, Ms. Coleman, and Ms. Kana, all women over the age of forty, plaintiff was terminated on October 25, 2005.[98]

Chris Smith ("Ms Smith"), a woman over 40, who was already a supervisor at Bellofram, assumed the role as second shift supervisor.[99] Mr. Grilli, who demoted Mr. Shuman over two years before, had no role in plaintiff's termination.[100] Rather, the evidence was clear that the decision-makers acted based upon the internal and external investigation of her misconduct.

I. Plaintiff's Trial Testimony. Plaintiff effectively testified that she did not even believe her own claims. Rather than directly attributing her termination to her age and/or gender, she testified, on direct examination, that she believed Mr. Farmer and Mr. Friley were fired for supporting opposing union leadership and that Bellofram, in order to fabricate non-union reasons to justify their terminations, fired her to make the story look more believable:

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[96] *Id.* at 675-677 (emphasis supplied).

[97] *Id.* at 742.

[98] Defendants' Trial Exhibit No. 24; Order at p. 2 (¶ 2).

[99] Trial Tr. at 339, 591-592.

[100] *Id.* 348-350 (granting dismissal of Mr. Grilli as a named defendant), 592.

> Q: Lynda, do you believe that your age or sex have anything to do with your termination?
>
> A: Yeah, I really do, because - -
>
> Q: Why?
>
> A: I think Mr. Colletti just decided to sort of make an example out of me, use me as a - - to make a case against these guys on account of the union, and they just fired me to make it look legitimate. They wanted them guys gone, and he fired me with them to make it look like they didn't just trump it all up against them.[101]

Later, on cross-examination, plaintiff persisted in her testimony that she was fired in an attempt to cover up the union related reason for firing the male employees: "I think that he fired me because they wanted to get those guys that was getting involved with the union, and they wanted to make it look good to where nobody would think it would, so he fired me too."[102]

In other words, plaintiff, while superficially concurring with her attorney's not so subtle prompt that her "age or sex" had something to do with her firing, claimed twice during her own testimony, not that she was fired because she was a woman and/or over the age of forty, but that she was fired in order to legitimize an elaborate plot by Bellofram to get rid of Mr. Friley and Mr. Farmer for their subversive activities in opposition to the current union leadership.[103]

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[101] Trial Tr. at 263-264 (emphasis supplied).

[102] *Id.* at 330 (emphasis supplied).

[103] Mr. Farmer, Mr. Friley, and Mr. Lockwood filed a complaint with the National Labor Relations Board ("NLRB"), which concluded, "[T]he evidence established that the Employer . . . took no adverse action against you until receiving a complaint regarding your . . . alleged inappropriate workplace misconduct . . . . At this point, the Employer hired an outside consultant to investigate these complaints, and the consultant's investigation corroborated the allegations. . . . Furthermore, the evidence indicated that the Employer also discharged a supervisor who was aware of the above conduct and complaints, but took no steps to investigate and/or correct any inappropriate behavior in the work place." Defendants' Ex. 15. Thus, the whole "union" issue, which occupies much of the trial transcript, has no merit.

In further "support" of her discrimination claims, plaintiff testified that she did not believe that Mr. Colletti liked women and/or older women. As her evidentiary basis for this subjective belief, plaintiff testified that Mr. Colletti, the company's president, did not talk much to her: "I don't think he's ever actually – he might have said hi on passing or something. To ever coming down and actually talk to me, he never did. . . You would have thought he would have wanted to talk to me and get to know me, but he never gave me the time of day. He wouldn't acknowledge me at all."[104] She further testified that Mr. Colletti appeared to be more conversant with Mr. Shuman and Mr. Harris, both male employees.[105] Plaintiff admitted on cross-examination, however, that she had no idea what Mr. Colletti spoke to Mr. Shuman or Mr. Harris about[106] and that she never actually had any problems with Mr. Colletti during the course of her employment.[107] While noting that there was also allegedly "trouble" under Mr. Harris's supervision, plaintiff failed to address at all what this "trouble" was[108] and certainly never testified that he allowed the types of outrageously harassing conduct under his supervision that she had allowed and, indeed, passively participated in, under her supervision. The remainder of plaintiff's trial testimony actually justified the termination of her employment.

On cross-examination, for example, plaintiff admitted the following facts regarding Mr. Friley: (i) she heard him refer to African-Americans as "niggers;"[109] (ii) she heard him refer to

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[104] *Id.* at 265-266.

[105] *Id.*

[106] *Id.* at 269-271

[107] *Id* at 268.

[108] *Id.* at 266.

[109] *Id.* at 272.

people of Arabic descent as "sand niggers;"[110] (iii) she heard him refer to Hispanics as "spics;"[111] and (iv) he used these terms in every day conversation.[112] In addition, plaintiff admitted that she heard Mr. Friley use this racist language while she was his supervisor:

> Q: You've heard him use those terms when you were the supervisor in the molding department, right?
>
> A: Not – in general conversation, yeah. He never actually called people it to their face. If he had, I'd have called him on it.
>
> Q: So it was okay in your view that Mr. Friley could use terms like "nigger, "sand nigger," and maybe "spic" as long as he didn't say it to the face of the person; that would be the differential for you to take disciplinary action?
>
> A: No, that's not what I mean at all.
>
> Q: Ah. . .
>
> A: I'm not saying I think it's right. I'm saying that's the way Bill talked, and it wasn't directed at anyone specifically.
>
> Q: And you heard him talk like that when you were a supervisor, just to make sure we're clear on that, correct?
>
> A: When he was on breaks and stuff, but Bill watched what he said around me. They didn't talk bad in front of me.
>
> Q: I heard that testimony from Mr. Friley as well, but my question is, Ms. Young: He used these terms in front of you when you were his supervisor, right?
>
> A: Now and then I heard him say those things like that, yes.[113]

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[110] *Id.* at 273. ("Q: Let me just back up then, Ms. Young. Is it true that Mr. – you've heard Mr. Friley refer to those of Arab descent as "sand niggers"? A: (after having her recollection refreshed by reviewing her deposition transcript) I guess I have.").

[111] *Id.* at 273-274.

[112] *Id.* at 274-275. ("Q: He used these terms everyday, right? A: In his general conversation. He didn't walk up to somebody and call them a bad name that I heard him say. Q: But you're familiar with the fact that Mr. Friley used these kinds of terms every day? A: Yes, he did. Q: Because in your own words that's just the way he was; isn't that right? A: That's the way he talks, yes.")(emphasis supplied).

[113] *Id.* at 275-276 (emphasis supplied).

Moreover, the plaintiff admitted that she was aware that this language was prohibited and that failure to correct it justified a supervisor's termination:

> Q: You understood – I think you've just acknowledged, but let me make clear also that all of these terms, "nigger, "sand nigger, "spic," they're all, inappropriate, right?
>
> A: Yes, to me they're inappropriate.
>
> Q: They're all slurs?
>
> A: Yes, they're inappropriate.
>
> Q: They're all slurs against someone because of their race, right, or national origin, right?
>
> A: Right.[114]
>
> * * *
>
> Q: Now, I think this is clear from your direct, but let's make sure. You knew the company prohibited sexual and other forms of harassment, right?
>
> A: Yes.
>
> Q: And that the company wouldn't tolerate such conduct if it occurred?
>
> A: Yes.
>
> Q: <u>And that the policy against sexual harassment was one of the policies you were required to enforce as a supervisor</u>?
>
> A: <u>Yes</u>.
>
> Q: And you were fully aware of what types of conduct constituted sexual and racial harassment, right?
>
> A: Yes.[115]
>
> * * *

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[114] *Id.* at 276.

[115] *Id.* at 279-280 (emphasis supplied).

Q: You understood as a result of your training that dirty jokes, racy stories, foul language, they could be sexual harassment if they offend anyone at work, right?

A: Yes, if someone complains about them.

Q: You further understood that, just because no one complained about the inappropriate language, it did not mean the conduct was not offensive, right?

A: It's offensive to me. I don't like bad language and dirty jokes.

Q: Okay. Let me back up. I think I may have confused you, Ms. Young. You understood from your training that harassment and discrimination could still be offensive, even if no one complained about it, correct?

A: Yes.

Q: You also knew that other forms of name calling were not appropriate as well, right?

A: Yes, I know.

Q: And you were also fully aware that, if one of the employees you supervised engaged in this type of behavior, that would violate the plant rules of conduct, right? Ms. Young, would you agree with me that if a company determined that a supervisor was aware of comments and conduct of a sexual, racial, or national origin nature but didn't stop the comments, it would be appropriate to terminate that employee?

A: If the supervisor was aware of it or made aware of it, yes.[116]

Finally, having admitted that (i) she heard this language; (ii) this language was prohibited; and (iii) as a supervisor, she had a duty to correct this misconduct or face termination, plaintiff admitted that she did not correct the racist and sexist language on the second shift: "Q. You didn't write up Mr. Friley for his language, did you? A. No, I didn't write anybody else when they used foul language either; some of my supervisors did."[117] Thus, the testimony of

[116] *Id.* at 283-284. (emphasis supplied).

[117] *Id.* at 276-277 (emphasis supplied).

plaintiff herself, largely ignored by the trial court in its findings of fact, demonstrated more than ample non-discriminatory grounds on which plaintiff's employment could be terminated.

J. Testimony of Plaintiff's Subordinates. In addition to Mr. Jackson's and Ms. Ellis's testimony, other witnesses confirmed that this pervasive behavior occurred, that in many cases plaintiff was aware of it, and that they relayed this information to Ms. Ellis.

Ms. Chambers testified that: (i) Mr. Farmer referred to Angela Coleman as a slut; (ii) Mr. Friley referred to African-American co-workers as "niggers;" (iii) Mr. Farmer teased "other male employees, acting like he's gay and propositioning them;" (iv) Mr. Farmer yelled "sooee" when he passed Ms. Little's workstation; (v) Mr. Farmer introduced Ms. Wells to new employees as "the ho;"[118] and (vi) Mr. Friley referred to bi-racial children as "oreos" and women involved in inter-racial relationships as "nigger lovers."[119]

Ms. Chambers also testified that she told Ms. Ellis that: (i) Mr. Farmer, Mr. Friley, and Mr. Lockwood were plaintiff's pets and that plaintiff was happy as long as the three kept making parts; (ii) plaintiff was present when the three said that they were going to beat the "F'ing out of the rat;" (iii) Mr. Friley referred to Darren Keys as Ms. Kirkbride's bitch; (iv) Mr. Farmer pretended to be gay to intimidate new employees; and (v) Mr. Friley or Mr. Farmer stated that Heather Wells ("Ms. Wells") "would do anything for a happy meal."[120]

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[118] *Id.* at 85-86.

[119] *Id.* at 92.

[120] Ms. Wells testified that Mr. Farmer "would call somebody, like, a bar whore, a gutter skank. . . . And he brought the kid over on his first day and he said, 'If you want her,' he said, 'I'll go buy—" He said, "If you ain't got the money to go buy a Big Mac, she'll blow you for a Big Mac.'" Wells Depo. at 15. Ms. Wells, whose husband is African-American, testified that Mr. Friley "made the comment that if it wasn't for my mother, he would consider me another worthless nigger lover." *Id.* at 28.

Ms. Kirkbride testified that she told Ms. Ellis that: (i) Mr. Friley used racial slurs towards other employees;[121] (ii) Mr. Friley referred to Mr. Grilli as a "WOP" and Mexicans as "Spics;" (iii) Mr. Friley questioned how Ms. Wells could be in a relationship with an African-American man; (iv) Mr. Friley made fun of Tammy Little's ("Ms. Little") growth disorder;[122] (v) Mr. Lockwood put his arm around her;[123] (vi) Mr. Farmer made homosexually charged comments to a new employee;[124] and (vii) plaintiff heard many of these comments.[125] Ms. Kirkbride also testified that she told Ms. Coleman that Mr. Farmer asked to see her breasts and Mr. Friley referred to Mr. Jackson as a "narc" and a "rat."[126]

Ms. Chipps testified that Mr. Farmer's conduct was so egregious that she quit and ended up on anti-depressants.[127] Mr. Farmer would call her a "bar whore" during breaks. This conduct occurred during the three months preceding her July 2005 departure from Bellofram, when plaintiff was her supervisor.[128] It did not occur, therefore, when Mr. Shuman was her supervisor.

Among the other conduct Ms. Chipps witnessed and testified to: (i) Mr. Farmer called Ms. Wells a "ho"; (ii) Mr. Friley called Ms. Chipps a "bar whore;" (iii) Mr. Friley called Ms. Wells a "nigger lover" and made derogatory comments about her children; (iv) Mr. Friley referred to Mexicans as "wetbacks"'; and (v) Mr. Farmer spit cherry juice on Donna Malone's

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[121] Specifically, he referred to African-American employees as "niggers." Trial Tr. at 528-529.

[122] *Id.* at 528-533.

[123] *Id.* at 535-536.

[124] *Id.*

[125] *Id.* at 538.

[126] *Id.* at 534.

[127] *Id.* at 554-555.

[128] *Id.* at 555.

("Ms. Malone") shirt, told another employee to lick it off, and then called Ms. Malone a "bar whore."[129] Ms. Chipps told Ms. Ellis about the "bar whore" comments, the incident with Ms. Malone, that Mr. Farmer would yell and curse (and that people were afraid of him), and that Mr. Friley made an inappropriate request that she sit on his lap.[130] Ms. Chipps testified that she told Ms. Ellis that plaintiff overheard these racist and sexist comments.[131]

Ms. Wells testified that her complaints fell on deaf ears: "[S]ometimes she would laugh because it was just stupid stuff and say that they were just joking around. Or you'd go to her . . . I would go in there yelling and screaming about the stuff that he would say. And she would say, '<u>Oh, just ignore him</u>.'"[132] In fact, Ms. Wells stated, "[S]upervisor-wise I hated her."[133]

Mr. Friley admitted that: (i) he used the word "nigger" at work (and told Ms. Ellis this);[134] and (ii) not only was this language prohibited, but it could also be cause for termination.[135] More importantly, he testified that he did not believe that plaintiff's termination was based on her age or gender.[136]

III. TRIAL COURT'S DECISION

In light of the factual record presented to the trial court, one would have thought the result would have been different. There was no evidence to support a finding that "but for"

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[129] *Id.* at 556-562.

[130] *Id.* at 561-562, 571-573.

[131] *Id.* at 564-566.

[132] Wells Depo. at 32-33 (emphasis supplied).

[133] *Id.* at 39.

[134] Trial Tr. at 117.

[135] *Id.*

[136] *Id.* at 147-148.

plaintiff's age and/or sex she would have been demoted and not terminated. There was no evidence that the reason given for her termination, that she had been complicit in racial and sexual harassment, was a pretext for discrimination. Indeed, the nature of the record evidence reveals the perverse nature of the trial court's reasoning in this case and the lengths to which the trial court went in order to impose its own sense of fairness on defendants.

Given the reasoning in the decision below, it becomes immediately apparent that no decision against defendants could have rested on age discrimination. The only other employee on which the trial court relied and to whom plaintiff compared herself, Mr. Shuman, was also over the age of forty. Thus, by the trial court's own reasoning, there is no prima-facie case of age discrimination. Indeed, the only facts in the trial court's order even referencing age are: (1) "At the time of her termination the Plaintiff was sixty (60) years old"[137] and (2) "First, being a woman at the age of 60 when she was terminated puts her in a protected class."[138] This evidence is not legally sufficient to establish an age discrimination claim.

With respect to plaintiff's gender discrimination claim, her subordinates who were disciplined were all male.[139] With respect to Mr. Shuman, who formerly held her position, there was no evidence that the same type of outrageous conduct occurred during his tenure and, even for the violation of work rules that did occur, Mr. Shuman had been demoted. The facts set forth in the trial court's order that reference gender are as follows: "First, being a woman at the age of 60 when she was terminated puts her in a protected class."[140] The trial court made no other

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[137] Order at 3.

[138] *Id.* at 7.

[139] Mr. Friley and Mr. Farmer were terminated and Mr. Lockwood received a suspension and probation. Defendants' Ex. 24.

[140] Order at 3.

findings that specifically reference gender as the reason for termination and, because Mr. Shuman's circumstances and plaintiff's circumstances were not similar, the trial court should have granted judgment to Bellofram as a matter of law because of plaintiff's failure to prove that "but for" her gender, she would have been treated differently.

With respect to pretext, the trial court could not rely upon the same evidence it relied upon to satisfy the "but for" test; so, it relied upon its conclusion that, "The Defendant failed to follow its progressive disciplinary policy in regards to Ms. Young."[141] The problem with this conclusion, which was the trial court's sole basis for finding pretext, is that it is contrary to the plain language of Bellofram's policies and ignores the fact that, if Mr. Shuman is plaintiff's counterpart, the policies were not applied in the manner suggested by the trial court.[142]

IV. ASSIGNMENTS OF ERROR

A. PLAINTIFF FAILED TO PRESENT A PRIMA FACIE CASE OF DISCRIMINATION AND THE TRIAL COURT'S RELATED FINDINGS AND CONCLUSIONS WERE CLEARLY ERRONEOUS AND CONTRARY TO LAW.

In Syllabus Point 3 of *Conaway v. Eastern Associated Coal Corp.*,[143] this Court held:

> In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq. (1979), the plaintiff

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[141] *Id.*

[142] Curiously, even though the trial court concluded that Bellofram engaged in "age and/or sex discrimination," it awarded the plaintiff nothing for non-economic damages and did not award lost wages based upon her supervisory position, but held that the "total wage and benefit loss . . . is $180,376.00 based upon the assumption that Ms. Young had been retained as an hourly employee in the bargaining unit." Id. at 8. In addition to $238,717.78 in lost wages, benefits, and prejudgment interest, the trial court also awarded, in an order entered March 24, 2009, a total of $172,961.95 in attorney fees, court costs, and litigation expenses. Order, March 24, 2009. The trial court did not reduce the attorney fee award even though the plaintiff failed to prevail on her lifetime employment claim, on her breach of contract claim, and her tort of outrage claim, concluding instead that, "the Plaintiff's claims involve a common core of facts and are inextricably linked to each claim." Id. at 4-5. Thus, the amount of the judgment from which the petitioner takes this appeal is $238,717.78 as of December 1, 2008, and $172,961.95 as of March 24, 2009, for a total of $411,679.73 plus post-judgment interest.

[143] 178 W. Va. 164, 358 S.E.2d 423 (1986) (emphasis supplied).

> must offer proof of the following: (1) That the plaintiff is a member of a protected class[;] (2) That the employer made an adverse decision concerning the plaintiff[; and] (3) But for the plaintiff's protected status, the adverse decision would not have been made.

In this case, although there was evidence that plaintiff was a member of two protected classes and her employment was terminated, there was no competent evidence that "but for" her age and gender her employment would not have been terminated.

1. Plaintiff's Age Discrimination Claim Fails as a Matter of Law as it Was Undisputed that Mr. Shuman was Also Over the Age of Forty.

To prevail in a disparate treatment case, this Court has held "a plaintiff can create a triable issue of discriminatory animus through direct or circumstantial evidence."[144] Here, the trial court found no direct evidence of discrimination. Rather, it relied upon evidence that, in its view, plaintiff was treated differently than Mr. Shuman. Plaintiff's age discrimination claim, however, fails as a matter of law because it was undisputed that Mr. Shuman was also over forty. For example, in *Barefoot v. Sundale Nursing Home*,[145] this Court held:

> Unless a comparison employee and a plaintiff share the same disputed characteristics, the comparison employee cannot be classified as a member of a plaintiff's class for purposes of rebutting prima facie evidence of disparate treatment. Therefore, so long as the employee in this case was not a Native American, it is irrelevant whether she was black, white, yellow, or purple.

Conversely, "It is generally required in a disparate treatment case that plaintiff prove . . . a similarly situated employee not of the protected class was treated more favorably, or some variation of that formula."[146] Where a comparison employee is of the same protected class, a

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[144] Syl. pt. 7, in part, *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 479 S.E.2d 561 (1996).

[145] 193 W. Va. 475, 486, 457 S.E.2d 152, 163 (1995)(emphasis supplied).

[146] 14A C.J.S. *Civil Rights* § 647 (2009)(emphases supplied and footnote omitted).

plaintiff's disparate treatment case fails as a matter of law.[147] Thus, in *Hitt v. Harsco Corp.*,[148] the court held that allegedly more lenient treatment was not evidence of age discrimination where the comparison employee was a member of plaintiff's protected class. Because Mr. Shuman was also over forty, the allegation that he received more lenient treatment was no evidence of age discrimination.

2. Plaintiff's Age and Gender Discrimination Claims Fail as a Matter of Law as it Was Undisputed that Plaintiff Was Promoted Shortly Before Her Termination When She Was Over the Age of Forty and Her Replacement Was a Woman Over the Age of Forty.

Not only was Bellofram entitled to judgment as a matter of law on the plaintiff's age discrimination claim because of her failure to identify another supervisor under the age of forty who was treated differently, as this Court held in *Johnson v. Killmer*,[149] Bellofram is entitled to judgment on both of her discrimination claims because the plaintiff was promoted to her supervisory position shortly before her termination and her successor was a woman over forty.

In *Johnson*, the plaintiff, as in this case, was a supervisor over the age of forty who was promoted shortly before her termination, but discharged because of her failure to properly supervise her subordinates. This Court observed that Johnson "satisfied the first two elements required by Conaway. The record shows that Ms. Johnson was 52 years of age when she was terminated by the employer, and therefore was a member of a protected class. Additionally, the

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[147] *Slotterback v. Knoebel*, 2009 WL 1011052 at * 12 (M.D. Pa.)("Comparing employees of the same age or older cannot show that any advantage was given to younger workers, or any disadvantage to older workers."); *Vara v. Mineta*, 2004 WL 2002932 at *9 (S.D.N.Y.)("both Yancoskie and Roache are women over forty and any possible disparate treatment would not give rise to an inference of sex or age discrimination.").

[148] 356 F.3d 920, 925 (8th Cir. 2004).

[149] 219 W. Va. 320, 633 S.E.2d 265 (2006).

evidence is clear in showing the employer made an adverse decision concerning Ms. Johnson when her employment was terminated."[150]

As this case, however, the Court stated, "The problematic issue for Ms. Johnson is the evidence she adduced to satisfy the third requirement set forth in Conaway, i.e., 'but for' her age the decision to terminate her would not have been made."[151] The Court's analysis in *Johnson* applies with equal force in this case:

> [W]e find that Ms. Johnson failed to show any sort of nexus between her age and the employer's decision to terminate her. In other words, Ms. Johnson did not provide evidence which would sufficiently link the termination decision to her status as a member of a protected class so as to give rise to an inference that the decision was based on her age. The case of Proud v. Stone, 945 F.2d 796 (4th Cir. 1991) illustrates Ms. Johnson's evidentiary problem.
>
> In *Proud*, the plaintiff was hired by the defendant as a Chief Accountant. At the time of the hiring, the plaintiff was 68 years old. Within six months of being hired, the plaintiff was fired because of poor work performance. The plaintiff thereafter filed an action in federal court alleging that he was terminated because of his age. During the trial of the case, the district judge dismissed the action at the close of the plaintiff's case-in-chief. On appeal, the Fourth Circuit Court of Appeals affirmed. . . .
>
> We find the reasoning in *Proud* persuasive.
>
> In the instant proceeding, <u>the employer hired Ms. Johnson when she was 51 years old. Within ten months of hiring Ms. Johnson the employer fired her. Under this set of facts alone, it would be "irrational" to infer that Ms. Johnson was fired because of her age</u>. Ms. Johnson had to present some plausible evidence, not hollow assertions, in order to overcome the "strong inference" that age was not a determining factor for her termination. Adding to the difficulty of proof is the fact that the employer promoted Ms. Johnson, after she had turned 52, and allowed two other employees to quit rather than take an adverse employment decision against her. <u>In view of Ms. Johnson's lack of evidence on the "but for" element, the circuit court was correct in disposing of this claim at the summary judgment stage</u>.[152]

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[150] *Id.* at 324, 633 S.E.2d at 269.

[151] *Id.*

[152] *Id.* at 324-25, 633 S.E.2d at 269-70 (emphasis supplied).

Likewise, it is "irrational" in this case to infer that the plaintiff, a woman promoted at age fifty-nine, was fired fifteen months later at age sixty because of her age and gender.

B. THE TRIAL COURT ERRED IN FINDING DISPARATE TREATMENT WHERE THE ALLEGEDLY COMPARABLE EMPLOYEE WAS DISCIPLINED BY A DIFFERENT SUPERVISOR FOR COMPLETELY DIFFERENT CONDUCT.

For purposes of its disparate treatment analysis, the trial court relied exclusively on Mr. Shuman status as an allegedly comparable employee. This reliance, however, was mistaken as a matter of law because Mr. Shuman was disciplined by different supervisors for different conduct. Employers must be permitted to deal with sexual and racial harassment in the workplace without the second-guessing of their decisions based upon prior discipline under different circumstances.

1. Courts Are Precluded From Substituting Their Judgment for the Employer's in the Imposition of Employee Discipline, Particularly Where There Are Differences in the Conduct for Which Discipline is Imposed.

In Syllabus Point 2 of *State ex rel. Human Rights Comm'n v. Logan-Mingo Mental Health Agency, Inc.*,[153] this Court held:

> A complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, Code, 5-11-1, et seq., may meet the initial prima facie burden by proving, by a preponderance of the evidence, (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct.

In order for another person to be used as a comparison employee, it is insufficient that their conduct be remotely similar. Rather, "[i]n disparate treatment cases," other courts have held, "the plaintiff-employee must show 'nearly identical' circumstances for employees to be

[153] 174 W. Va. 711, 329 S.E.2d 77 (1985).

considered similarly situated."[154] Otherwise, courts run the risk of becoming super-personnel departments of employers charged with discrimination.

For example, in rejecting a complaint that an employee had been the subject of discrimination because she had been punished more severely than employees who had engaged in similar misconduct, this Court held in *FMC Corp. v. Human Rights Commission*,[155] as follows:

> Ms. Frymier's claim that she was disciplined more severely than other employees who had engaged in "out of plant without permission" behavior, at least with regard to the 16 June 1984 incident, is particularly weak, because her conduct differed from the other absent employees' conduct in one important regard. When confronted about her conduct, she responded with a boldfaced lie, and stuck to it even when she should have realized she was caught in the lie. When other employees who were absent without authorization were confronted, they admitted what they had done. . . .
>
> The circuit court held the Commission's finding that the firing was not justified to be "clearly in error and abuse of discretionary authority of the Human Rights Commission." The court said, "Ms. Frymier was fired because she lied to management, and because the culmination of her prior employment history progressively supported a discharge upon violation of the company's rules on the evening in question. The West Virginia Human Rights Act does not limit an employer in this instance." (Cir. Ct. Final Order (Rec. p. 52)). We agree.

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[154] *Berquist v. Washington Mutual Bank*, 500 F.3d 344, 353 (5th Cir. 2007), *cert. denied*, 128 S. Ct. 1124 (2008); *see also Perez v. Tex. Dep't of Criminal Justice, Inst. Div.*, 395 F.3d 206, 213 (5th Cir.), *cert. denied* 546 U.S. 706 (2005) (*citing Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991)("We, however, have specifically addressed the plaintiff-employee's burden of proof in disparate treatment cases involving separate incidents of misconduct and have explained consistently that <u>for employees to be similarly situated those employees' circumstances, including their misconduct, must have been 'nearly identical.'</u>"')(emphasis supplied).; *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990)); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994)("In order for two or more employees to be considered similarly-situated for the purpose of creating an inference of disparate treatment . . . , <u>the plaintiff must prove that all of the relevant aspects of [her] employment situation are 'nearly identical' to those of the [male] employees who [she] alleges were treated more favorably</u>. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.")(emphasis supplied and citation omitted).

[155] 184 W. Va. 712,715-16, 403 S.E.2d 729, 732-33 (1991)(footnote omitted).

In a separate opinion Justice McHugh further observed, "This situation is analogous to the situation in which unlawful discrimination is not proved, but the discipline seems harsh to a reviewing court. Under those circumstances it has been held that absent discrimination, and assuming no contractual limitations, the choice of discipline is a matter left to the employer's best business judgment in light of all considerations."[156] Of course, that which Justice McHugh cautioned against is precisely what occurred in this case, i.e, there was no proof of unlawful discrimination, but the discipline seemed harsh to the trial court.

2. Where Two Employees are Disciplined by Different Decisionmakers, the Employees Are Not Comparable to One Another.

Even if misconduct by two employees is "similar," different supervisors can decide to impose different disciplinary measures without creating any inference of discriminatory animus. Otherwise, a company's management is forever bound by the mistakes of the past. Accordingly, the cases are legion in which courts have determined that employees disciplined by different supervisors are not similarly situated.[157]

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[156] *Id.* at 721, 403 S.E.2d at 738 (emphasis supplied and citations omitted).

[157] *See Cooper v. City of North* Olmstead, 795 F.2d 1265, 1271 (6th Cir. 1986)(reversing trial court's finding of discrimination based upon different punishments imposed for allegedly similar conduct by different supervisors); *Heyward v. Monroe*, 1998 WL 841494, *2 (4th Cir. 1998) ("[i]f different decisionmakers are involved, employees are generally not similarly situated"); *Shumway v. United Parcel Serv.*, 118 F.3d 60, 64 (2d Cir. 1997) (employees not similarly situated because they were not supervised by the same person); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) ("to be deemed 'similarly-situated', the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor"); *Timms v. Frank*, 953 F.2d 281, 287 (7th Cir. 1992) ("it is difficult to say that the difference was more likely than not the result of intentional discrimination when two different decision-makers are involved."); *Tate v. Weyerhaeuser Co.*, 723 F .2d 598, 606 (8th Cir. 1983)(different disciplinary measures distinguished because different supervisors were involved); *Thomas v. Florida Power & Light Co.*, 532 So.2d 1060 (Fla. Ct. App. 1988) (plaintiff not similarly situated to comparative employee where they had different supervisors); *Lynch. v. Dean*, 1985 WL 56683 (M.D. Tenn. 1985), *rev'd on other grounds*, 817 F.2d 380 (6th Cir. 1987)(proof that plaintiff was disciplined more severely than workers under supervision of another foreman did not aid plaintiff in showing she was victim of discrimination); *Talley v. U.S. Postal Service*, 238 (E.D. Mo. 1982), *aff'd*, 720 F.2d 505 (8th Cir. 1983)(none of employees worked for plaintiff's supervisor, whose motivation was at issue; therefore, employees to whom plaintiff compared herself were not similarly situated); *Williams v. TWA, Inc.*, 507 F.

In this case, the evidence was undisputed that Mr. Colletti was not employed by Bellofram when Mr. Shuman was disciplined. Therefore, under *FMC*, the relevant aspects of the circumstances of Mr. Shuman and the plaintiff were not similar and different punishments imposed by different supervisors could not serve as a basis for finding discrimination.

At the time of plaintiff's discharge, for example,[158] Mr. Colletti was unaware that Mr. Shuman had ever been a supervisor or had been demoted. When Mr. Colletti was confronted with was overwhelming evidence of persistent and outrageous acts of racial and sexual harassment, he was not using Mr. Shuman as a reference point because he had no knowledge of Mr. Shuman's history or the circumstances that result in the imposition of discipline by a different supervisor, Mr. Grilli, several years earlier. Rather, Mr. Colletti's reference point was Bellofram's anti-discrimination policies, the potential liability to Bellofram if he did not act decisively, and the findings of a professional, independent investigator.

This Court has repeatedly warned West Virginia employers that they must act in these circumstances in order to avoid creating a racially or sexually hostile work environment. How are West Virginia employers to comply with those admonitions when they are made to suffer if they discipline supervisors who condone what occurred in this case? Here, because the evidence was that Mr. Colletti's decision regarding the plaintiff's discipline was made completely independently of Mr. Shuman's discipline, which was imposed by Mr. Grilli before Mr. Colletti became employed at Bellofram, it was error for the trial court to use Mr. Shuman as a comparable employee for purposes of its disparate treatment analysis.

Supp. 293 (W.D. Mo. 1980), *aff'd in part rev'd in part*, 660 F.2d 1267 (8th Cir. 1981) (evidence of disparate treatment of little probative value where disciplinary measures were imposed by different supervisors).

[158] Trial Tr. at 744.

3. The Circumstances Surrounding the Discipline of Plaintiff and Mr. Shuman Were Completely Different.

Other than holding the same supervisory positions, there were very few similarities in the circumstances of Mr. Shuman and plaintiff, including all of the following:

1. Mr. Shuman's demotion was the result of his poor performance as a supervisor, not the conduct of his subordinates,[159] but plaintiff was fired solely for her complicity in the conduct of her subordinates.[160]

2. The misconduct of Mr. Shuman's subordinates did not involve multiple, outrageous acts of racial and sexual harassment, but the trial testimony was extremely detailed concerning the multiple outrageous acts of racial and sexual harassment by plaintiff's subordinates.[161]

3. Consequently, although none of Mr. Shuman's subordinates were terminated in conjunction with his demotion, two of plaintiff's subordinates were terminated and one was suspended.

4. None of Mr. Shuman's subordinates were accused of threatening co-workers who reported their alleged misconduct, but plaintiff's subordinates were accused of saying that "they were going to beat the F'ing out of the rat" when Ms. Young was present in reference to a co-worker who had complained about their misconduct.[162]

5. Mr. Shuman was not accused of showing favoritism to any particular group of his subordinates, but plaintiff was accused of showing favoritism to the three subordinates who were terminated.[163]

6. Mr. Shuman had personal problems that interfered with his performance as a supervisor,[164] but plaintiff offered no mitigating circumstances.

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[159] *Id.* at 221; *id.* at 25-26.

[160] *Id.* at 224; Grilli Depo. at 50.

[161] *Id.* at 85-92.

[162] *Id.* at 90.

[163] *Id.* ("Mr. Friley, Mr. Lockwood, and Mr. Farmer were Lynda Young's pets.").

[164] *Id.* at 65-66; *id.* at 117.

7. No consultant was hired to conduct an investigation of Mr. Shuman, but Ms. Ellis was hired to conduct an investigation of plaintiff.

8. Mr. Shuman was not suspended pending investigation of the circumstances which resulted in his demotion, but plaintiff and her three subordinates were suspended pending an investigation.

9. Mr. Colletti, who was involved in plaintiff's termination, was not involved in the discipline of Mr. Shuman.[165]

10. Ms. Coleman, who was involved in plaintiff's termination, was not involved in the discipline of Mr. Shuman.

11. Mr. Grilli, who was involved in Mr. Shuman's demotion, was not involved in the discipline of plaintiff.

12. Senior management received no complaints from Mr. Shuman's subordinates about his condoning harassment, but several of plaintiff's subordinates complained to management about her condoning harassment.[166]

13. Mr. Shuman testified that he dealt with only one complaint of sexual harassment during his tenure as a supervisor,[167] to which he responded,[168] but there were multiple complaints of sexual and racial harassment during plaintiff's tenure.

In her response to the petition for appeal, the plaintiff repeatedly represented that there was evidence that "the conduct that Ms. Young allegedly tolerated was ongoing at the time she was promoted to supervisor,"[169] but notably absent from the response is the actual testimony of any witness and the transcript references cited in the response do not support this assertion.

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[165] *Id.* at 64.

[166] *Id.* at 75-76. In fact, Mr. Friley admitted that the plaintiff informed him that Mr. Jackson had complained that "Alan and I were harassing him . . . and she said: Well, he said he was going to go upstairs about this." *Id.* at 146-47.

[167] *Id.* at 61.

[168] *Id.*

[169] Response at 3; *see also id.* at 5-6; ("Ms. Ellis learned and reported conduct that had occurred before Ms. Young was the supervisor . . . including periods when Don Shuman was the supervisor . . . ."); *id.* at 7 ("During Mr. Shuman's tenure as supervisor, it was undisputed that the misconduct . . . also occurred."); *id.* at 13 ("Mr. Shuman . . . was only demoted for allowing the same conduct to occur . . . .");

For example, the plaintiff cites to transcript pages containing Mr. Shuman's testimony allegedly in support of her assertion that the same misconduct occurred under his supervision,[170] but here is his actual testimony:

> Q. Were Lockwood, Friley and Farmer's conduct substantially different from the conduct of the other employees you had working for you?
>
> A. No.[171]
>
> Q. [Did] you never witnessed Adam Farmer engage in any sexual harassment or racial discrimination while you were a supervisor?
>
> A. No.[172]
>
> Q. And did you ever ignore any conduct by Mr. Friley that you believe constituted sexual or racial discrimination?
>
> A. No.[173]

The plaintiff had every opportunity at trial to ask Mr. Shuman whether his subordinates used epithets like "nigger," "sand nigger," "wop," "spic," "whore," "slut," and "wetback," but never did so. Rather, she asked only general questions concerning whether Mr. Shuman received unspecified "complaints" about Mr. Farmer, Mr. Friley, and Mr. Lockwood, to which he responded that he occasionally received complaints about many of his subordinates, including

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id. at 18 ("Ms. Ellis' investigation revealed unequivocally that the conduct allegedly tolerated by Lynda Young also occurred when Mr. Shuman was the supervisor."); *id.* at 19 ("neither Ms. Coleman nor Ms. Ellis confined their inquiries to the time period during which Ms. Young was the supervisor, and both discovered conduct that had taken place when Mr. Shuman, as well as others, were the supervisor.").

[170] Response to Petition for Appeal at 3.

[171] Trial Tr. at 52.

[172] *Id.* at 63-64.

[173] *Id.* at 64.

those three, but never described them as similar to the complaints made about those same employees when under the plaintiff's supervision.[174]

Incredibly, plaintiff cites Ms. Chipps' testimony,[175] who actually quit because of the harassment she suffered at the hands of the plaintiff's "pets," but she flatly rejected any contention that the work environment was the same under plaintiff as it was under Mr. Shuman:

Q. . . . Lynda Young was not your supervisor in June of 2000?

A. No.

Q. Was this conduct going on back then?

A. No.

Q. It was not?

A. No, I was not even in the same department when I started.

Q. When did you start working in that department?

A. I think it was in April of 2003.

Q. April of 2003, was Ms. Young your supervisor then?

A. I don't think so, no.

Q. This conduct went on then, correct?

A. No.

Q. It did not?

A. No.

Q. When did this all start then?

A. . . . I had quit . . . in July of 2004, and it started probably a few months before that. . . . Oh, I'm sorry, 2005.[176]

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[174] *Id.* at 49-52.

[175] Response to Petition for Appeal at 3.

Obviously, this testimony undermines, rather than supports the plaintiff's theory of her case.

The plaintiff cites Mr. Friley's testimony,[177] but he did not indicate that he engaged in the same misconduct under the plaintiff that he engaged in under Mr. Shuman; rather, he denied engaging in any misconduct at all:

> Q. Was your conduct while you were employed at Bellofram any different when Donnie Shuman was your supervisor than when Lynda Young was your supervisor?
>
> A. I tried – when Lynda was around, we didn't tell any jokes like we would with Don or Kip. I tried to watch – I didn't cuss around her; I knew she didn't approve of that. So we minded our manners much better.[178]

Of course, Mr. Friley's testimony on this point is largely irrelevant because plaintiff herself admitted that Mr. Friley used racial epithets when she was his supervisor.[179]

Similarly, the plaintiff cites Mr. Lockwood's testimony,[180] but like Mr. Friley, he did not indicate that he engaged in the same misconduct under the plaintiff that he engaged in under Mr. Shuman; rather, he denied engaging in any misconduct at all:

> Q. To your knowledge had anyone complained about you to Lynda Young?
>
> A. Not to my knowledge.
>
> Q. Did you ever use abusive, threatening, or profane language in front of Lynda Young when she was your supervisor?
>
> A. Not to my knowledge.

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[176] Trial Tr. at 565-66.

[177] Response to Petition for Appeal at 3.

[178] Trial Tr. at 109.

[179] *Id.* at 272.

[180] Response to Petition for Appeal at 3.

Q. Are you aware of anybody complaining that you did that?

A. No, I am not.

Q. Did you ever engage in any type of sexual harassment in front of Lynda Young when she was your supervisor?

A. No.[181]

The denials of the plaintiff's subordinates that they ever engaged in any misconduct, whether under Mr. Shuman's or the plaintiff's supervision, is hardly evidence supporting the plaintiff's assertion that they engaged in the same misconduct attributed to her supervision that they engaged in under Mr. Shuman.

The plaintiff cites Ms. Ellis' testimony,[182] but her description of that testimony, like that of Mr. Shuman, is less than accurate. For example, when asked whether she learned "[t]hings from when Mr. Shuman was the supervisor," she did not answer in the affirmative, as the plaintiff would have the Court believe from her response, but stated, "I learned some things . . . when somebody else was a supervisor,"[183] and explained that those things did not involve Mr. Shuman, but actually involved a complaint made <u>to the plaintiff</u> by a co-worker.[184] Something never brought to the attention of management, including Mr. Shuman, is hardly evidence that (1) Mr. Shuman ignored complaints by his subordinates or (2) management treated Mr. Shuman differently than the plaintiff.

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[181] Trial Tr. at 157.

[182] Response to Petition for Appeal at 3.

[183] *Id.* at 449.

[184] *Id.* at 450.

The plaintiff cites Mr. Grilli's testimony,[185] but he testified that Mr. Shuman was demoted for failing to enforce work rules, not for condoning a hostile work environment:

> Q. Why was Donny Shuman demoted?
>
> A. At the time he was a second shift supervisor his performance was not adequate. . . .
>
> Q. What type of inappropriate activities were there that Donny didn't correct?
>
> A. An example might be people leaving the department for 15 minutes at a time?
>
> Q. Can you think of anything else?
>
> A. Not specifically.
>
> Q. Did you have any problem with inappropriate behavior by the employees?
>
> A. Not that I'm aware of. . . .
>
> Q. Making inappropriate sexual remarks?
>
> A. Again, not that I'm aware of."[186]

Critically, even plaintiff herself testified that Mr. Shuman "didn't have a clue" about this kind of misconduct[187] of which she would have been aware as his subordinate at the time.

These differences in circumstances were not just "apples and oranges;" but were "apples and orangutans."[188] That both held the same supervisory position and were disciplined does not satisfy the test, under *FMC*, for proving "disparate treatment."

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[185] Response to Petition for Appeal at 3.

[186] Grillo Depo. at 25-26.

[187] Trial Tr. at 289.

[188] *See Natural Gas Pipeline Co. of America v. State Bd. of Equalization and Assessment*, 237 Neb. 357, 385, 466 N.W.2d 461, 477 (1991)("Thus, DOR's equalization method was not an attempt to compare apples with oranges, but an abortive attempt to establish a comparative similarity between oranges and orangutans.").

Rather, it is required that the "quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges."[189] For example, the court in *Sweis v. Hyatt Corp.*,[190] stated:

> Finally, and most importantly, Sweis and Riegelman did not engage in the same or even similar conduct. Sweis was terminated for failing to follow the prescribed medical leave policies; Riegelman, on the other hand, was reprimanded for his alleged sexual harassment. That the two received disparate treatment is of no consequence, because comparing their behaviors is like comparing apples to oranges. "Incomplete or arbitrary comparisons reveal nothing concerning discrimination . . . [m]ore evidence than the mere fact that other employees were not discharged for at best arguably similar misconduct must be demonstrated to sustain a charge of intentional discrimination." . . . In this case, Sweis has failed to demonstrate that similarly situated male employees were treated more favorably for failing to adhere to company medical leave policies which is fatal to her claims."

In the instant case, the trial court was plainly wrong as a matter of law in holding that Mr. Shuman was similarly-situated to plaintiff and incorrectly held that plaintiff satisfied her burden of proving that "but for" her age and gender, different discipline would have been imposed.

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[189] *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir. 1999); *see also Morris v. Emory Clinic, Inc.*, 402 F.3d 1076, 1082 (11th Cir. 2005)("Without showing that a comparable female received 'nearly identical' complaints, we cannot adequately compare the Clinic's actions towards Morris and other female physicians.") ; *See Berquist, supra* at 353 ("In disparate treatment cases, the plaintiff-employee must show 'nearly identical' circumstances for employees to be considered similarly situated.")(emphasis supplied); *Perez, supra* at 213 (*citing Little v. Republic Ref. Co.*, 924 F.2d 93, 97 (5th Cir. 1991)("We, however, have specifically addressed the plaintiff-employee's burden of proof in disparate treatment cases involving separate incidents of misconduct and have explained consistently that for employees to be similarly situated those employees' circumstances, including their misconduct, must have been 'nearly identical.'")(emphasis supplied).; *Smith v. Wal-Mart Stores*, 891 F.2d 1177, 1180 (5th Cir. 1990)); *Pierce, supra* at 802 ("In order for two or more employees to be considered similarly-situated for the purpose of creating an inference of disparate treatment . . . , the plaintiff must prove that all of the relevant aspects of [her] employment situation are 'nearly identical' to those of the [male] employees who [she] alleges were treated more favorably. The similarity between the compared employees must exist in all relevant aspects of their respective employment circumstances.")(emphasis supplied and citation omitted).

[190] 2001 WL 619509 (N.D. Ill. 2001)(emphasis supplied and citation omitted).

C. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FOUND THAT PLAINTIFF SATISFIED HER BURDEN OF PROVING PRETEXT.

The only evidence relied upon by the trial court for plaintiff's proof that the reasons given for her termination were pretextual was Bellofram's alleged failure to follow its own progressive disciplinary policy. The trial court's reasoning, however, was fundamentally flawed because (1) progressive discipline was not imposed in the case of Mr. Shuman; (2) plaintiff's discharge was not the result of her own violation of Bellofram's conduct rules, but permitting their repeated violation by her subordinates; (3) the sexual harassment policy expressly permits immediate discharge; (4) the trial court relied upon rules which did not apply and were not applied to plaintiff; and (5) the trial court relied upon a rule which was never applied to plaintiff in order to justify the substitution of its disciplinary judgment for Mr. Colletti's.

First, Mr. Shuman was demoted without the imposition of any intervening punishment; rather, he was immediately demoted. Accordingly, the fact that progressive discipline was not used for plaintiff is no evidence of pretext as it also was not used for Mr. Shuman.[191] Employers reserve the right to take action against their management personnel who engage in conduct placing employers at risk of liability. Here, because plaintiff was allowing the creation of a hostile work environment that had caused one employee to quit and others to complain, Bellofram was entitled to terminate her employment.

Second, when she was suspended, plaintiff was provided a form by Ms. Coleman, which plaintiff refused to sign, which stated, "Suspended from employment due to her response to

[191] *See Randle v. City of Aurora*, 69 F.3d 441, 454 (10th Cir. 1995) (holding that an employer's failure to follow its policy is not evidence of pretext where the employer didn't follow its policy with respect to actions taken against other employees); *Williams v. Michigan City Police Dep't*; 1993 WL 592725 (N.D. Ind. 1993)("A uniform disregard of the regulations does not support any inference of discriminatory intent.").

inappropriate behavior of employees during second shift."[192] The form noted violations of plant rules number 16, 22, and 30, and company policy 202. Obviously, plaintiff was not charged with violating these rules, but was charged with allowing her subordinates to violate these rules. Thus, the trial court's reliance upon a progressive discipline policy based upon the violation of rules for which plaintiff was never charged was erroneous.

Third, company policy 202 provides, "Persons engaging in sexual harassment are subject to disciplinary action by the Company, up to and including dismissal . . . ."[193] Thus, company policy 202 expressly warned that its violation could result in immediate dismissal. When similar circumstances were presented in *Wilson v. Long John Silver's, Inc.*,[194] this Court expressly rejected a supervisor's argument that his termination was prohibited because his employer failed to comply with its progressive discipline policy, stating that, "Wilson was not entitled to progressive discipline because the rule he violated called for immediate discharge . . . ." This same analysis applies to this case as it is ridiculous to conclude that Bellofram's rules were intended to provide a sexual harasser four strikes before being discharged, or to provide the supervisor of a sexual harasser the same four strikes. As Mr. Grilli testified, "Depending on the plant rules that are being violated, you may actually have a first step which might be a verbal warning, a second step which may be a written warning, then comes suspension and eventually termination in a series of steps. Some of the plant rules though provided if they are violated . . .

[192] Defendants' Ex. 5.

[193] Plaintiff's Ex. 13 (emphasis supplied).

[194] 188 W. Va. 254, 423 S.E.2d 863 (1992).

you go straight to termination and/or suspension."[195] Apparently, because it was inconsistent with the desired result, the trial court simply chose to ignore policy 202.

Fourth, the trial court applied the wrong set of rules. As previously noted, plaintiff's suspension notice specifically referenced Rules 16, 22, and 30, which are in the "Plant Rules and Standards of Conduct" and "Rule 15" of those rules, erroneously cited by the trial court, deals with remaining in the assigned department until the completion of one's shift; it has nothing to do with progressive discipline. Rule 17 of those rules, again erroneously cited by the trial court, which deals with progressive discipline, only applies to violations of Rules 1 through 16, but the next section, "THE FOLLOWING ARE ACTS OF CONDUCT PROHIBITED ON COMPANY PREMISES," which contain Rules 22 and 30, expressly stated that their violation may "lead to disciplinary action up to and including immediate termination."[196] It is under these rules that two of plaintiff's subordinates were terminated and one was suspended;[197] specifically, for violating Rule 22 ("abusive, threatening, or profane language") and Rule 30 ("immoral, indecent, or unlawful conduct"). Thus, the trial court applied the wrong set of rules.

Finally, stepping squarely into Bellofram's shoes, the trial court decided that plaintiff violated Rule 8 which clearly has no application: "Employees Shall: Perform duties and responsibilities of job properly and on time. Perform all work assigned." Plaintiff was not discharged because she did not perform her duties properly and on time, or failed to perform all

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[195] Grilli Depo. at 66.

[196] Defendants' Ex. 4 (emphasis supplied). This was explained in the testimony of Mr. Grilli, but ignored by the trial court. Grilli Depo. at 67.

[197] As Mr. Farmer testified, "Q. What were you told? A. That I had violated the company's sexual harassment protocol, I believe. . . . I think one was using abusive, threatening, and profane language and . . . I don't remember the third reason." Farmer Depo. at 41. Moreover, when asked specifically about the rules the violations of which he was charged, Mr. Farmer admitted that upon their violation "I would expect to be terminated." *Id.* at 45.

the work assigned. Rather, Bellofram's management, after an outside investigation, concluded that she was complicit in conduct that violated at least three rules justifying her subordinates' immediate termination. Respectfully, for the trial court to conclude that anything beyond "two written warnings" and a "two-day suspension" was proof of "pretext" is absurd. Even the plaintiff herself conceded as much:

> Q: And you were also fully aware that, if one of the employees you supervised engaged in this type of behavior, that would violate the plant rules of conduct, right? Ms. Young, would you agree with me that if a company determined that a supervisor was aware of comments and conduct of a sexual, racial, or national origin nature but didn't stop the comments, it would be appropriate to terminate that employee? A: If the supervisor was aware of it or made aware of it, yes.[198]

Again, plaintiff was a supervisor, not a union employee. She admitted that she knew that if her subordinates engaged in certain conduct and she did not intervene, she was subject to immediate termination. She disputed that some of the conduct occurred and she disputed knowledge of some of the conduct, but she admitted that some of the conduct did occur and that it was brought to her attention. The trial court's analysis should have stopped at that point. Instead, it effectively permitted plaintiff to prosecute a quasi-contract action in direct contravention to the plain language of Bellofram's policy manual, which states:

> No policy or provision of this policy is intended to create a contract binding the employee or the Company to an agreement of employment for a specified period of time. In consideration of their employment, employees . . . understand that employment . . . can be terminated, with or without cause, and with or without notice, at any time, at the option of either the Company or the employee.[199]

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[198] Trial Tr. at 283-284 (emphasis supplied).

[199] Defendants' Ex. 23 (emphasis supplied).

This Court has repeatedly held that, in the presence of such disclaimers, employee handbooks form no basis for a cause of action for wrongful termination.[200] Indeed, in *Bine v. Owens*,[201] this Court expressly held:

> Athough the Bines in the present case claim that the handbook issued to Mr. Bine altered the at-will nature of Mr. Bine's employment, and implicitly established that Mr. Bine's employment could only be terminated by the procedures established in the handbook, the record shows that the handbook issued to Mr. Bine contained a prominent disclaimer indicating that nothing in the handbook was intended to alter Mr. Bine's at-will employment relationship. Specifically, the handbook stated:
>
> > The manual is not intended to alter the employment-at-will relationship in any way. Moreover, it neither creates an employment contract or term nor limits the reasons or procedures for termination or modification of the employment relationship.
>
> In light of the fact that *Suter v. Harsco Corporation, id.*, holds that a disclaimer such as the one used by Bayer, Inc., relieves the employer from being bound by the statements in the handbook, this Court concludes that Bayer, Inc., <u>was not bound by disciplinary procedures contained in its handbook when it discharged Mr. Bine and that the Bines' claim that Mr. Bine was improperly discharged because Bayer, Inc., did not follow the procedures in the handbook is without merit</u>.

Likewise, specifically rejecting an argument that violation of a company's progressive discipline policy constituted evidence of disparate treatment where the handbook containing that policy had a similar disclaimer, the Nevada Supreme Court held, "Condoning the jury's implicit determination that a progressive discipline policy, as a matter of contract, is guaranteed to all

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[200] *Younker v. Eastern Associated Coal Corp.*, 214 W. Va. 696, 591 S.E.2d 254 (2003); *Hogue v. Cecil I. Walker Machinery Co.*, 189 W. Va. 348, 431 S.E.2d 687 (1993); *Bowe v. Charleston Area Medical Center, Inc.*, 189 W. Va. 145, 428 S.E.2d 773 (1993); *Reed v. Sears, Roebuck & Co., Inc.*, 188 W. Va. 747, 426 S.E.2d 539 (1992); *Suter v. Harsco Corp.*, 184 W. Va. 734, 403 S.E.2d 751 (1991).

[201] 208 W. Va. 679, 682-83, 542 S.E.2d 842, 845-46 (2000) (emphasis supplied).

Southwest employees would ignore the plain language of Southwest's policy statements."[202]

Similarly, the Tenth Circuit recently held:

> Mr. Masterson concluded, moreover, that the most severe form of discipline was appropriate in this case because, in his view, Ms. Officer's mishandling of Ms. Felix's case "not only harmed the client but jeopardized public safety" and "represente[ed] a pattern of deficiencies in job performance detailed in the personnel file." Id. at 391. Whether or not we agree with that conclusion, we are not entitled to act as a "super personnel department that second guesses employers' business judgments." *Simms v. Oklahoma ex rel. Dept. of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1330 (10th Cir. 1999) (quotation omitted). It is dispositive for our purposes as a reviewing court that Mr. Masterson's decision to terminate Ms. Officer was within the discretion afforded to him by the relevant discipline policy and not, as we have previously held, pretext for discrimination.[203]

In the instant case, however, the trial court acted as a super personnel department second-guessing Mr. Colletti's decision, which was within his discretion. Consequently, this Court should set aside its order and enter judgment for the appellants.

D. THE TRIAL COURT VIOLATED FEDERAL LAW BY FAILING TO RULE THAT PLAINTIFF'S CLAIMS ARE PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Plaintiff presented evidence that she was terminated in retaliation for the union activities of her subordinates that are protected by the National Labor Relations Act.[204] Indeed, the only reason plaintiff offered for her termination was related to union activity. Plaintiff's opening statement and an early evidentiary proffer made similar allegations. The trial court also heard evidence that two of plaintiff's subordinates filed complaints with the NLRB after their

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[202] *Southwest Gas Corp. v. Vargas*, 111 Nev. 1064, 1080, 901 P.2d 693, 703 (1995).

[203] *Officer v. Sedgwick County*, 226 Fed. Appx. 783, 793 (10th Cir. 2007)(emphasis supplied and footnote omitted).

[204] 29 U.S.C. § 158.

termination alleging retaliation, which the NLRB, exercising its exclusive jurisdiction, ruled against.

With respect to state court actions arising from claims implicating the National Labor Relations Act, this Court has stated:

> The general rule is that state courts must defer to the primary and exclusive jurisdiction of the NLRB to determine all controversies arising out of activities protected by Section 7 or prohibited by Section 8 of the Act. . . . The reason for this exclusivity is to ensure a uniform national labor policy by avoiding the conflicting or incompatible adjudications that would inevitably result from "[a] multiplicity of tribunals and a diversity of procedures."[205]

Indeed, this Court recently held that a supervisor's wrongful discharge claim was preempted where, as in this case, it was based upon anti-union retaliation:

> Here, the appellants allege in their amended complaint that the management at the Holiday Inn Express used both legal and illegal means in an attempt to defeat the employees' efforts to unionize. Lontz alleges that she was constructively discharged because she refused to engage in unlawful conduct to have a union organizer arrested. Pettit alleges that she was wrongfully discharged because she was blamed for commencing union activity. Specifically, Pettit asserts that the appellees engaged in a conspiracy to discharge her based on their belief that she assisted, cooperated and encouraged various employees to participate in union organizing activities. Plainly, those allegations implicate the scope and reach of sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. § 157 (1947), and 29 U.S.C. § 158 (1974), in that they suggest both a violation of the right to form, join or assist labor organizations as protected under section 7 and a violation of section 8 concerning unfair labor practices. Consequently, the allegations of transgressions of State public policy notwithstanding, this Court is of the opinion that the Circuit Court was correct in concluding that the appellants' wrongful discharge action is preempted by the National Labor Relations Act.[206]

In the instant case, where plaintiff's allegations implicated Sections 7 and 8 of the NLRA, the trial court interfered with a dispute for which the NLRB has exclusive jurisdiction, and laid waste to the idea that federal law exclusively governs national labor policy.

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[205] *Riesbeck Food Markets, Inc. v. United Food and Commercial Workers' Union, Local Union 23*, 185 W. Va. 12, 14, 404 S.E.2d 404, 406 (1991).

[206] *Lontz v. Tharp*, 220 W. Va. 282, 647 S.E.2d 718 (2007)(emphasis supplied).

E. THE TRIAL COURT ERRED BY FAILING TO REDUCE PLAINTIFF'S DAMAGES IN LIGHT OF DOCUMENTARY EVIDENCE SHE VOLUNTARILY QUIT SUBSEQUENT COMPARABLE EMPLOYMENT.

After her employment was terminated, plaintiff secured a position at Homer Laughlin. Eric Furbee ("Mr. Furbee"), Homer Laughlin's human resources manager, testified about the history of her employment. The trial court found, with respect to plaintiff's post-termination employment, that, "Mr. Furbee was not able to verify that Ms. Young left her employment from Homer Laughlin for any reason other than the reasons proffered by plaintiff."[207] This conclusion is clearly erroneous as a factual matter and legally incorrect.

Examining the factual question first, Mr. Furbee's testimony gave ample reasons for plaintiff's voluntary departure from Homer Laughlin. He testified that when plaintiff applied for employment with Homer Laughlin, she indicated on both her application and orally that, "she was available for Saturdays and Sundays and rotating shifts."[208] Next, he testified that she submitted to a physical evaluation prior to her employment indicating that she was physically able to perform her duties.[209] Finally, testifying from Homer Laughlin's personnel records, Mr. Furbee testified that she "quit without notice" because "she wouldn't work shifts."[210]

The trial court's decision was also incorrect on the law. "Unless a wrongful discharge is malicious," this Court has held, "the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have

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[207] Order at 9.

[208] Trial Tr. at 622 (emphasis supplied).

[209] *Id.* at 624-25.

[210] *Id.* at 625-26.

received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer."[211] Moreover, "Once a discrimination victim finds 'interim' employment with another employer not only are those earnings deducted from his backpay, but he also has a responsibility under his duty to mitigate losses to maintain that employment or risk additional reductions in his backpay award for failing to exercise 'reasonable diligence.'" Finally, "Resigning from 'substantially equivalent' employment because of personal reasons unrelated to the job, or as a matter of personal convenience, also constitutes a lack of 'reasonable diligence . . . .'"[212]

Here, where there was documentation that plaintiff resigned comparable employment because she did not want to perform shift work, particularly as she had performed shift work at Bellofram and indicated on her application that she would perform shift work at Laughlin, the trial court erred as a matter of law by not ruling that plaintiff had failed to mitigate her damages.

F. THE TRIAL COURT ERRED BY FAILING TO REDUCE ATTORNEY FEES FOR CLAIMS UPON WHICH PLAINTIFF DID NOT PREVAIL.

As previously noted, the trial court did award plaintiff's attorney fees even though she failed to prevail on her lifetime employment claim, on her breach of contract claim arising from the alleged failure to comply with the disciplinary policy, and her tort of outrage claim. In *Heldreth v. Rahimian*,[213] as in the instant case, plaintiff prevailed on only one of several causes of action asserted. Under well-established precedent, this Court noted, "The calculation of attorney's fees in a human rights action requires, as this Court has previously recognized, the

[211] Syl. pt. 2, *Mason County Bd. of Educ. v. State Superintendent of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982).

[212] 7 EMP. COORD. EMPLOYMENT PRACTICES § 72:52 (2009)(internal citations omitted).

[213] 219 W. Va. 462, 637 S.E.2d 359 (2006).

exclusion of hours spent on unsuccessful claims."[214] In *Heldreth*, because the trial court had failed to reduce the attorney fee award by the time expended on unsuccessful claims, this Court reversed and remanded, stating that, "When this matter is remanded to the circuit court, the trial court must first determine whether there was a separate and distinct factual development that was required to support the four additional theories of recovery originally pursued by Appellant."[215] Likewise, the trial court in this case erred by failing to reduce plaintiff's attorney fees.

V. CONCLUSION

Unless employers can terminate the employment of supervisors who permit the existence of a racially, sexually, and ethnically hostile work environment, they will be exposed to multiple claims by their employees who are forced to work in such environments. Here, Bellofram acted decisively in response to employee complaints of racial, sexual, and ethnic harassment; hired an outside consultant; relied upon the consultant's factual conclusions; and terminated plaintiff, terminated two of her subordinates, and suspended another. It should not be punished for acting responsibly, particularly in the absence of evidence that it treated the plaintiff any differently than it would have treated any supervisor under nearly identical circumstances. Moreover, the trial court should not have assumed jurisdiction, but should have recognized that because the plaintiff's claims were predicated upon a theory of anti-union retaliation, those claims were preempted under the National Labor Relations Act. Finally, even assuming some award was appropriate, the plaintiff failed to mitigate her damages and should not have been awarded attorney fees for claims upon which she did not prevail.

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[214] *Id.* at 467, 637 S.E.2d at 364 (emphasis supplied).

[215] *Id.* at 468, 637 S.E.2d at 365.

WHEREFORE, the appellants, Bellofram Corporation and Joseph Colletti, respectfully request that this Court reverse the judgment of the Circuit Court of Ohio County and remand with directions to enter judgment in their favor.

By Counsel

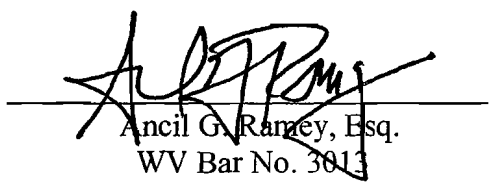
Anil G. Ramey, Esq.
WV Bar No. 3013
STEPTOE & JOHNSON, PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone: (304) 353-8112

G. Ross Bridgman, Esq.
Nelson D. Cary, Esq.
Daniel J. Clark, Esq.
Vorys, Sater, Seymour and Pease, LLP
P.O. Box 1008
Columbus, OH 43216-1008
Telephone (614) 464-6396

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on the 18th day of February, 2010, I served the foregoing "Brief of the Appellants" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

M. Eric Frankovitch, Esq.
Kevin M. Pearl, Esq.
Frankovitch, Anetakis, Colantonio, & Simon
337 Penco Road
Weirton, WV 26062-3828
Counsel for Appellee



Ancil G. Ramey, Esq.
WV Bar No. 3013