

NO. 35439

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

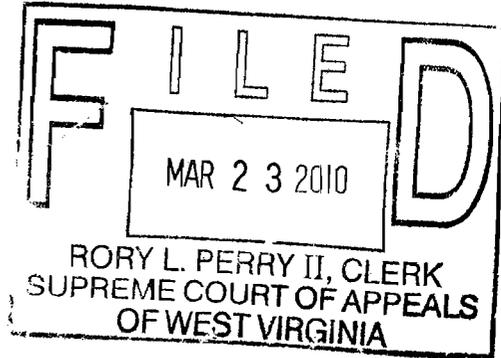
LYNDA YOUNG,

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 APPELLEE, LYNDA YOUNG**

---

**Counsel for Appellants**

Ancil G. Ramey, Esq. (#3013)  
Peter J. Raupp, Esq. (#10546)  
Steptoe & Johnson, PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588  
(304) 353-8112

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

**Counsel for Appellee**

M. Eric Frankovitch, Esq. (#4747)  
Kevin M. Pearl, Esq. (#8840)  
Frankovitch, Anetakis, Colantonio & Simon  
337 Penco Road  
Weirton, WV 26062  
(304) 723-4400

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. CLARIFICATION OF FACTS.....	2
A. Lynda Young’s employment with Bellofram Corporation.....	3
B. Lynda Young’s limited knowledge of the inappropriate conduct of her subordinates.....	3
C. Harassment occurred during Donald Shuman’s tenure as supervisor.....	5
D. J.D. Harris was aware of harassment and took no action.....	6
E. Joseph Grilli was aware of harassment and engaged in inappropriate conduct.....	7
F. The Ellis investigation was targeted at Lynda Young.....	11
G. Joseph Colletti was prejudiced against Lynda Young.....	12
H. Lynda Young’s age at the time of her promotion is immaterial.....	14
I. Lynda Young was replaced by a younger male supervisor.....	14
J. Lynda Young’s separation from Homer Laughlin China was involuntary.....	15
III. THE TRIAL COURT’S DECISION WAS CORRECT.....	15
IV. DISCUSSION OF THE LAW.....	16
A. Standard of Review.....	16
B. Whether a prima facie case was established is no longer at issue because this matter was fully tried on the merits.....	17
C. A prima facie case was established.....	19
1. Bellofram misrepresents the holding in <i>Barefoot v.</i> <i>Sundale Nursing Home</i> .....	21
2. Ms. Young’s promotion and replacement are irrelevant.....	21

D.	West Virginia law does not recognize the decision maker rule proposed by Bellofram and the Amici.....	23
E.	The rule proposed by Bellofram and the Amici would not change the result.....	27
F.	Bellofram’s reason for the termination of Lynda Young was pretextual.....	32
	1. Lynda Young was suspended before there was any evidence that she had committed any wrongdoing.....	33
	2. The Mary Ellis investigation showed evidence of pretext.....	34
	3. The failure to follow progressive discipline is evidence of pretext.....	36
	4. The failure to provide Lynda Young an opportunity to return to the bargaining unit is evidence of pretext.....	37
G.	The National Labor Relations Act has no application to Lynda Young or this case.....	37
H.	Bellofram did not carry its burden that Lynda Young failed to mitigate her damages.....	39
I.	The Circuit Court’s finding on the issue of attorneys’ fees was appropriate.....	42
V.	CONCLUSION AND RELIEF PRAYED FOR.....	44
	CERTIFICATE OF SERVICE.....	45

## TABLE OF AUTHORITIES

### CASES

<i>Adkins v. Stacy</i> , 214 W. Va. 371, 589 S.E.2d 513 (W.Va. 2003).....	16
<i>Baggett v. Program Resources, Inc.</i> , 806 F.2d 178 (8 <sup>th</sup> Cir. 1986).....	24
<i>Barefoot v. Sundale Nursing Home</i> , 193 W.Va. 475, 457 S.E.2d 152 (W.Va. 1995).....	17, 18, 19, 20, 21, 32
<i>Bhaya v. Westinghouse Electric Corp.</i> , 832 F.2d 258 (3 <sup>rd</sup> Cir. 1987), <i>cert. denied</i> , 488 U.S. 1004, 109 S. Ct. 782, 102 L.Ed.2d 774 (1989).....	18
<i>Bishop Coal Co. v. Salyers</i> , 181 W. Va. 71, 380 S.E.2d 238 (W. Va. 1989).....	43
<i>Brewer v. Board of Trustees of University of Illinois</i> , 479 F.3d 908 (7 <sup>th</sup> Cir. 2007).....	24
<i>Caperton v. A.T. Massey Coal</i> , 2009 W.Va. LEXIS 107 (W.Va. Nov. 12, 2009).....	17
<i>Chaves v. Blue Ridge Acres</i> , 174 W.Va. 218, 324 S.E.2d 361 (W.Va. 1984).....	16
<i>Conaway v. Eastern Associated Coal Corp.</i> , 178 W. Va. 164, 358 S.E.2d 423 (W.Va. 1986).....	19, 20, 32
<i>Conrad v. ARA Szabo</i> , 198 W. Va. 362, 480 S.E.2d 801 (W.Va. 1986).....	23
<i>Cooper v. City of North Olmstead</i> , 795 F.2d 1265 (6 <sup>th</sup> Cir. 1986).....	24
<i>Dix v. ICT Group, Inc.</i> , 160 Wn.2d 826, 161 P.3d 1016 (Wash. 2007).....	17
<i>Dodd v. Potomac Riverside Farm, Inc.</i> , 222 W.Va. 299, 664 S.E.2d 184 (W.Va. 2008).....	42
<i>E.E.O.C. v. Century Broadcasting Corp.</i> , 957 F.2d 1446 (7 <sup>th</sup> Cir. 1992).....	18

<i>E.E.O.C. v. Ethan Allen, Inc.</i> , 44 F.3d 116 (2 <sup>nd</sup> Cir. 1994).....	18
<i>Fourco Glass Company v. State of West Virginia Human Rights Commission</i> , 179 W. Va. 291, 367 S.E.2d 760 (W.Va. 1988).....	24
<i>Hanlon v. Chambers</i> , 195 W.Va. 99, 464 S.E.2d 741 (W.Va. 1995).....	17, 23
<i>Heldreth v. Rahimian</i> , 219 W. Va. 462, 637 S.E.2d 359 (W.Va. 2006).....	42, 43
<i>Heyward v. Monroe</i> , 166 F.3d 332 (4 <sup>th</sup> Cir. 1998).....	24
<i>Johnson v. Killmer</i> , 219 W.Va. 320, 633 S.E.2d 265 (W.Va. 2006).....	21, 22
<i>Lettieri v. Equant, Inc.</i> , 478 F.3d 640 (4 <sup>th</sup> Cir. 2007).....	22
<i>Little v. Little</i> , 184 W.Va. 360, 400 S.E.2d 604 (W.Va. 1990).....	16
<i>Lontz v. Tharp</i> , 220 W.Va. 282, 647 S.E.2d 718 (W.Va. 2007).....	38
<i>Lontz v. Tharp</i> , 413 F.3d 435 (4 <sup>th</sup> Cir.2005).....	39
<i>Mayflower Vehicle Systems, Inc. v. Cheeks</i> , 218 W.Va. 703, 629 S.E.2d 762 (W.Va. 2006).....	32
<i>McDaniel v. Romano</i> , 155 W.Va. 875, 190 S.E.2d 8 (W.Va. 1972).....	16
<i>Miles v. Dell, Inc.</i> , 429 F.3d 480, 489 (4 <sup>th</sup> Cir. 2005).....	22
<i>Moore v. Consolidation Coal Co.</i> , 211 W.Va. 651, 567 S.E.2d 661 (W.Va. 2002).....	32
<i>N.L.R.B. v. Yeshiva University</i> , 100 S.Ct. 856, 444 U.S. 672, 63 L.Ed.2d 115 (1980).....	38

<i>National Labor Relations Board v. Oakes Machine Corporation</i> , 897 F.2d 84 (2 <sup>nd</sup> Cir.1990).....	38
<i>Orndorff v. West Virginia Dept. of Health</i> , 165 W.Va. 1, 267 S.E.2d 430 (W.Va. 1980).....	43
<i>Paxton v. Crabtree</i> , 184 W. Va. 237, 400 S.E.2d 245 (W.Va. 1990).....	39
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	24
<i>Public Citizen, Inc. v. First Nat'l Bank in Fairmont</i> , 198 W.Va. 329, 480 S.E.2d 538 (W.Va. 1996).....	16
<i>Rodriguez v. Consolidated Coal Co.</i> , 206 W. Va. 317, 524 S.E. 2d 672 (W.Va. 1999).....	39
<i>Skaggs v. Elk Run Coal Co., Inc.</i> , 198 W.Va. 51, 479 S.E.2d 561 (W.Va. 1996).....	20, 32
<i>Sprint/United Mgmt. Co. v. Mendelsohn</i> , 128 S. Ct. 1140 (2008).....	24
<i>State ex rel. Hoover v. Bergen</i> , 199 W.Va. 12, 483 S.E.2d 12 (W.Va. 1996).....	16
<i>State ex rel. State of W. Va. Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc.</i> , 174 W. Va. 711, 329 S.E.2d 77 (W.Va. 1985).....	19
<i>State v. Head</i> , 198 W. Va. 298, 480 S.E.2d 507 (W.Va. 1996) (J. Cleckley concurring).....	16
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981).....	18
<i>Thornburgh v. Columbus and Greenville Railroad Co.</i> , 760 F.2d 633 (5 <sup>th</sup> Cir. 1985).....	23
<i>United States Postal Serv. Bd. of Governors v. Aikens</i> , 460 U.S. 711, 103 S. Ct. 1478. 75 L.Ed.2d 403 (1983).....	18, 19
<i>Walker v. W. Va. Ethics Comm'n</i> , 201 W. Va. 108, 492 S.E.2d 167 (1997).....	17

*Wheeling-Pittsburgh Steel Corp. v. Rowing*,  
205 W. Va. 286, 296, 517 S.E.2d 763, 773 (W.Va. 1999).....40

**STATUTES**

W.Va. Code § 5-11-2.....25  
W.Va. Code § 5-11-13.....42  
W.Va. Code §21-1A-2(a)(3).....38  
29 U.S.C. §152.....37, 38

**I. INTRODUCTION:**

On October 25, 2005, Appellants, Bellofram Corporation d/b/a Marsh Bellofram Corporation and Joseph Colletti (hereinafter referred to collectively as “Bellofram”) terminated Lynda Young due to her age and sex in violation of the West Virginia Human Rights Act.

This case was filed on March 13, 2006, and proceeded through discovery over a period of nearly two (2) years. Twelve (12) depositions were taken. Motions for summary judgment were filed by Bellofram and responded to by the Appellee. After argument, the motions were overruled.

This matter was tried to the bench for three (3) full days on June 10 through June 12, 2008, before the Honorable Arthur M. Recht. At trial eighteen (18) witnesses appeared and testified under both direct and cross-examination, and the court below had the opportunity to hear their testimony, view their demeanor, and weigh their credibility. Four additional witnesses were presented by the parties through depositions. The parties submitted twenty-four (24) exhibits, the import and weight of which were discussed by the witnesses, and the court determined the weight and relevance of the exhibits. At the close of Ms. Young’s case, Bellofram presented motions and arguments pursuant to Rule 50 which were carefully considered by the court and overruled.

Following trial, after a transcript was prepared, the parties were given an opportunity to submit proposed findings of fact and conclusions of law which were reviewed by the Circuit Court. On December 1, 2008, after carefully considering, reviewing, and weighing the testimony, the exhibits, the arguments of counsel, and the proposed findings of fact and conclusions of law, the trial court issued its *Memorandum of Opinion and Order* which concluded that Bellofram had discriminated against Ms. Young by treating her differently than

similarly situated younger male employees and had thereby engaged in activity that violated the West Virginia Human Rights Act.

Bellofram's appeal is nothing more than a second trial of the merits, but before this Court, which has no opportunity to view the evidence in the manner it was presented to the court below. No clear error or abuse of discretion exists in the record of this case that would support overruling the verdict. If this matter were reversed and remanded the Circuit Court would hear the exact same testimony from the exact same witnesses, consider the exact same exhibits, and hear the exact same arguments. Presumably, the Circuit Court would make the exact same ruling.

In this appeal Bellofram mischaracterizes the evidence that was submitted to the trial court. Rather than making a legitimate effort to identify clear errors of fact or abuse of discretion by the Circuit Court, Bellofram instead misstates the evidence in an attempt to garner a basis for reversal where none exists. In fact, the inaccuracies in the evidence as presented to this Court are so numerous that Appellee will devote a portion of this brief to clarifying the record.

The overwhelming evidence in this case demonstrates that Bellofram discriminated against Lynda Young because of her age and sex. The Circuit Court's ruling in this case is in line with well-established West Virginia law and is supported by the evidence. As set forth below, each of Bellofram's arguments is completely without merit both legally and factually. As such, the Circuit Court reached the correct result, and its decision should be affirmed.

## **II. CLARIFICATION OF FACTS:**

Rather than re-hash facts already presented to the Court in this matter, and in accordance with Rule 10(d) of the West Virginia Rules of Appellate Procedure, Ms. Young presents the following clarification of the facts of this case.

**A. Lynda Young's employment with Bellofram Corporation:**

Lynda Young was employed by Bellofram for approximately eleven (11) years beginning in 1994, and progressed through the ranks from molder, to senior molder, to master molder, to lead.<sup>1</sup> (Amended Compl. ¶ 8; Tran. 235-237.) Ms. Young served in the lead position for approximately six (6) years, but was demoted to master molder following the demotion of her supervisor, Donald Shuman, to the lead position. (Tran. 236-241, 52-55.) As discussed more fully below, Mr. Shuman was demoted due to his failure to control and discipline his subordinates.

On June 28, 2004, Ms. Young was promoted to the position of supervisor, a non-union salaried position, and was terminated from that position on October 25, 2005, following an unpaid suspension of her employment that began on October 7, 2005. (Def.'s Exhibits 2; Plaintiff's Exhibit 7; Def.'s Exhibit 7; Tran. 243-251.) At the time of her termination, she was sixty years old. (Tran. 243-244.)

**B. Lynda Young's limited knowledge of the inappropriate conduct of her subordinates:**

Bellofram accused Lynda Young of failing to discipline employees under her supervision who were alleged to have made inappropriate racial and sexual comments. In particular, Bellofram alleged that William Friley used racial slurs such as "nigger," "sand nigger," and "spic." Bellofram further alleged that both Mr. Friley and Adam Farmer had used terms such as "slut," "whore," and "bar whore." Also, Alan Lockwood was alleged to have inappropriately stared at female employees and put his arm around them. Finally, Mr. Friley, Mr. Farmer, and Mr. Lockwood were all alleged to have referred to their co-employee, Ron Jackson, as a "rat" and made non-specific threats regarding what happens to rats.

---

<sup>1</sup> The "lead" is essentially a working foreman, and is a non-salaried position.

When a complaint was made by Ron Jackson that he was receiving non-specific threats from Mr. Friley, Mr. Farmer, and Mr. Lockwood, their supervisor, Ms. Young, was placed on an unpaid suspension. (Def.'s Exhibits 2; Plaintiff's Exhibit 7, Def.'s Exhibit 7; Tran. 243-251.) After an investigation, Bellofram terminated Lynda Young for the proffered reason of failing to discipline Mr. Friley, Mr. Farmer, and Mr. Lockwood. She was terminated despite the fact that other younger male supervisors were likewise aware of inappropriate conduct and failed to take any action just as she was alleged to have done. (Depo. of Wells, pp. 16-18; Tran. 51, 447-48, 287-88, 765, 686-87, 76-82, 452-54.) She was also terminated despite the fact that Mr. Shuman had been only demoted for the same conduct. (Tran. 52-53, 596-97.)

At trial, the only employees who testified that they complained to Lynda Young about improper conduct during her time as supervisor were Ms. Kirkbride, who testified that she talked to Ms. Young about Alan Lockwood staring at her, and Mr. Jackson<sup>2</sup> who testified that Ms. Young may have heard him be threatened by Mr. Friley and Mr. Farmer. (Tran. 542-43, 479-81; Order Findings of Fact ¶ 12.) Notably, both Ms. Young and Mr. Jackson indicated that Ms. Young talked to Mr. Friley about his conduct toward Mr. Jackson.<sup>3</sup> (Tran. 299-300, 305-307, 480.) Both Ms. Kirkbride and Mr. Jackson indicated that they liked Ms. Young, and did not feel she should have been terminated. (Tran. 493, 540.)

The only other evidence pointed to by Bellofram in support of Ms. Young's knowledge of harassing conduct is her admission that Mr. Friley was known by everyone at the Bellofram facility to use racial slurs in his speech. (Tran. 272-73.) However, while she may have heard Mr. Friley use such language she never heard Mr. Friley direct it at anyone. (Tran. 274-76.) By

---

<sup>2</sup> Mr. Jackson's credibility was called into serious question at trial. (Tran. 494-510.)

<sup>3</sup> This was the same reaction that Mr. Grilli took in regard to Mr. Farmer's conduct toward Amanda Chipps. (Tran. 480, 299-300, 305-307, 793-94, 685-86.)

contrast, Joseph Grilli, a younger male supervisory employee was confronted with a situation prior to Ms. Young's promotion in which Mr. Friley had, in fact, directed racial slurs at a co-employee when Mr. Shuman was the supervisor. (Depo. of Wells, pp. 16-18.) Just like Ms. Young, both Mr. Grilli and Mr. Shuman failed to take disciplinary action against Mr. Friley. (Id.) Obviously, Bellofram applied two different standards – one to Ms. Young, and a different more lenient standard toward younger male supervisors.

**C. Harassment occurred during Donald Shuman's tenure as supervisor:**

Bellofram concedes that Mr. Shuman was demoted from a supervisory position to an hourly position approximately one year prior to Lynda Young's promotion due to his inability to control the employees working on his shift. (Appellants' Brief p. 4; Tran. 596-97.) The most egregious racial harassment allegedly committed by anyone in this case occurred during Mr. Shuman's tenure as supervisor. (Depo. of Wells, pp. 16-18.)<sup>4</sup>

In her testimony, Ms. Wells described, in detail, a dispute that arose between William Friley and her when an employee's wallet came up missing. (Id.) According to Ms. Wells, Mr. Friley racially harassed her in connection with the missing wallet:

Bill Friley made the comment to where it was automatically me because I have biracial children. And he made the comment to two people that once you hang out with niggers you act like them.

(Id. pp. 16-17.)

Ms. Wells further testified that this incident occurred just before Mr. Shuman's demotion from supervisor to a bargaining unit position. (Id. p. 18.) Bellofram asked the Circuit Court to believe that this event had nothing to do with Mr. Shuman's demotion. It now asks this Court to make the same finding.

---

<sup>4</sup> Ms. Wells' deposition was admitted into evidence when she failed to honor the subpoena requesting her attendance at trial. (Tran. 345.)

Additionally, it is clear that Mr. Shuman was aware of the harassing conduct allegedly directed at Amanda Chipps by Adam Farmer. Mr. Shuman himself testified that the conduct directed at Ms. Chipps occurred during his tenure as supervisor:

Q: How long were those individuals employees of yours while you were supervisor?

A: I guess the whole time; well, except for Bill Friley. I'm not sure, maybe three years with him.

Q: Did you have any complaints about them when you were supervisor?

A: With Bill Friley?

Q: About any of them from other employees?

A: Just Adam and Bill Friley.

Q: What kind of complaints did you have?

A: Adam was with – something about Mandy Chipps. He was always picking on her, so she said. Bill Friley? I don't know, just comments here and there about other people.

(Tran. 51.)

Mr. Shuman further testified that when these issues arose, he would simply have a talk with the employees. (Id.) Mr. Shuman's inability to control the employees working under him led to his demotion. (Tran. 52-53, 596-97.) The same conduct led Lynda Young to be terminated.

**D. J.D. Harris was aware of harassment and took no action:**

J.D. Harris, another younger male supervisor on the second shift<sup>5</sup> was likewise aware of inappropriate conduct on Ms. Young's shift. (Tran. 447-48, 605, 764-65.) Unlike Ms. Young, Mr. Harris received no discipline despite his knowledge and failure to act. Bellofram's investigator, Mary Ellis, testified as follows:

---

<sup>5</sup> Tran. 746-47

Q: What's J.D. Harris' position?

A: I believe he is, as I recall, he's another supervisor in another area.

Q: So he's a supervisor on the second shift?

A: I believe so.

Q: Now, he did express to you that he had heard some things and seen some things?

A: Yes, he did.

Q: Did he indicate to you that he had reported those to management?

A: No, he did not indicate to me.

(Tran. 447-48.)

The report created by Mary Ellis states that Mr. Harris was aware that Mr. Farmer inappropriately touched other employees. (Def.'s Trial Exhibit 8.) It further indicated that Mr. Harris had had issues with Mr. Friley in regard to fabrication of sexual harassment charges. (Id.) Mr. Harris took no action in regard to this conduct.

Just like Ms. Young, Mr. Harris was a supervisor of the afternoon shift in charge of the trim department. (Tran. 287-88.) In fact, Mr. Farmer was Mr. Harris' direct subordinate. (Tran. 485, 336.) Mr. Harris reported to Bellofram's investigator that he was aware of inappropriate conduct, yet he was not disciplined in any way. (Tran. 765.) Meanwhile, Ms. Young was terminated.

**E. Joseph Grilli was aware of harassment and engaged in inappropriate conduct:**

Lynda Young's superior, Joseph Grilli, a management employee with the ability to hire and fire employees, was aware of the conduct that allegedly formed the basis for Ms. Young's

termination. He did nothing different from what Ms. Young did, but he was not even disciplined.

First, the racial harassment of Heather Wells by Bill Friley discussed above was brought directly to Mr. Grilli's attention (Depo. of Wells, pp. 16-18.) Mr. Grilli's response was simply to yell at the employees – no employees were suspended, and no discipline was administered. (Id.) Bellofram took no action whatsoever against Mr. Grilli even though he failed to discipline Mr. Friley for his racial harassment.

Ms. Chipps also complained to Mr. Grilli about Mr. Farmer's conduct. Again, Mr. Grilli took no action different from that of Lynda Young:

Q: Mandy Chipps indicated also that she had gone to Mr. Grilli about Mr. Farmer, didn't she?

A: I don't think on Mr. Farmer.

Q: Are you sure about that?

A: I thought it was Mr. Friley.

Q: Who was harassing Mandy Chipps, was it Mr. Farmer or Mr. Friley?

A: She said Mr. Farmer. When I talked to Mandy, Mandy told me that Farmer had called her derogatory names and things like that. She went to Joe Grilli regarding an incident with a mouse in her – that was put in her pocket which they thought was – she thought was Bill Friley that put that mouse in her pocket.

Q: She had talked to Joe Grilli about the throwing of tools and swearing. Joe told her he would talk to Adam?<sup>6</sup>

A: Okay. It's been a while since I've looked –

Mr. Pearl: MB0495

A: I can't recall them word for word, but I remember she complained about the mouse about Bill Friley with Joe.

Q: So Mr. Grilli was aware?

---

<sup>6</sup> Counsel for Ms. Young was at this point reading from a document created by the witness.

A: Of?

Q: Mr. Farmer's conduct toward Mandy Chipps?

A: In that instance, yes.

Q: Was Mr. Grilli disciplined?

A: I don't know. I mean for what?

Q: He knew that Adam Farmer was harassing Mandy Chipps.

MR. CLARK: Objection, totally mischaracterizes the testimony.

THE COURT: Objection be overruled. The question is: Was Grilli in any way disciplined because he failed to take action once he found out about the misconduct?

THE WITNESS: He took action. So that's why he was not disciplined.

THE COURT: What action did he take?

THE WITNESS: He went to Adam Farmer and had a discussion with him regarding his behavior and verbalized to him that he could not continue that behavior or he would have further discipline.

THE COURT: And that was fine and, if Lynda Young did the same thing to Jackson, then that wasn't fine; is that what you're saying?

(Tran. 686-88.)

Further, the "investigation" that led to Ms. Young's termination revealed that Mr. Grilli was aware of sexual harassment in the workplace and took no action, engaged in sexual harassment himself, and was aware of the complaints of Ron Jackson and was not taking the complaints seriously – all things Ms. Young was accused of doing. (Tran. 76-82.) The trial testimony of Sandra Chambers established that all of these facts were presented to Bellofram:

Q: Do you have any recollection of telling Ms. Coleman that Mr. Grilli was not taking Mr. Jackson seriously?

A: Yes, I did at the time.

Q: And that Mr. Grilli was, in fact, discrediting Mr. Jackson?

A: I don't know if I would have used those words.

Q: But he wasn't taking it seriously?

A: No, I didn't -- at the time I didn't think he was taking it seriously.

(Tran. 76.)

Q: Did you also report to Ms. Ellis that there was an employee who was flirting with Mr. Grilli?

A: There was -- yes, I did at the time. At that time.

Q: Do you remember which employee that was?

A: There was a couple of them.

Q: Why don't you go and ahead and tell us which employees?

A: There was Melissa Farmer and Maria Swiger (phonetic), I think is her last name. And there was another girl, and I can't remember her name.

Q: Did you feel that Mr. Grilli was responding appropriately to that conduct?

A: I don't really have an opinion about that because they were teasing back and forth; it didn't...

Q: So, and you reported that to Ms. Ellis, correct?

A: Yes.

(Tran. 79.)

According to Ms. Chambers, Mr. Grilli also failed to respond appropriately to employee complaints of sexual harassment. (Tran. 81-82.) More specifically, Ms. Chambers reported to Ms. Ellis that Mr. Grilli took some complaints seriously, and dismissed others as "kidding or playing around, horsing around," just like Lynda Young allegedly did. (Tran. 82.)

Again, absolutely no disciplinary action was taken against Mr. Grilli, despite the fact that evidence was presented to Bellofram that he was not only aware of much of the conduct at issue, but that he had participated in inappropriate conduct. (Tran. 452-54.) Mr. Grilli was neither questioned nor investigated by Ms. Ellis. Under the circumstances, the lack of any discipline or even any investigation of Mr. Grilli, is evidence of both disparate treatment and pretextual motives on the part of Bellofram.

**F. The Ellis investigation was targeted at Lynda Young:**

The aim of the investigation conducted by Mary Ellis and overseen by Joseph Colletti was to eliminate Lynda Young. The investigation conducted by Mary Ellis uncovered evidence that younger male supervisors were aware of inappropriate conduct and failed to take action, but resulted in no discipline to those supervisors. It was only after the third party investigation overseen by Mr. Colletti that Bellofram had any information suggesting that Lynda Young had failed to perform her duties in any respect. (Tran. 681-84, 453<sup>7</sup>, 724.)

During the Ellis investigation individuals who had *any* information regarding wrongdoing by Lynda Young were interviewed twice. The *only* individuals interviewed twice were those who said anything even remotely bad about Lynda Young in their first interview. The second interviews conducted by Ms. Ellis were directed solely at obtaining further information regarding Lynda Young regardless of whether the information was firsthand, hearsay, triple hearsay, or mere speculation, or as Ms. Ellis put it, “what people said happened, what they said they reported to [Ms. Young], what they said she saw, what they said she heard, what they said she was likely to have heard.” (Tran. 83-84, 452-54, 461-63.) Ms. Ellis discounted or disbelieved individuals who praised Lynda Young, or had nothing bad to say about her. (Tran. 444-52.)

---

<sup>7</sup> Ms. Ellis met with Mr. Colletti at the end of each day of her investigation.

Ms. Ellis failed to confine her investigation to any particular time period. (Tran. 76-77, 443-45, 449, 566-67, Depo. of Wells pp. 16-21.) Although the investigation uncovered conduct that occurred before Ms. Young was a supervisor, Ms. Young was made the scapegoat for all of the conduct that had ever occurred, regardless of whether she was in a position of authority at the time. (Tran. 76-77, 443-45, 449, 566-67; Depo. of Wells pp. 16-21.)

Additionally, Joseph Grilli<sup>8</sup> and Candy Travis, supervisory employees directly above Lynda Young in the chain of command were not even interviewed by Mary Ellis. (Tran. 459-60, 219, 226-229.) Both Mr. Grilli and Ms. Travis testified that Ms. Young was performing satisfactorily as a supervisor. (Depo. of Grilli pp. 49-61; Tran. 226.) The failure to interview the employees responsible for supervision of Ms. Young who held opinions that she was performing her job well is indicative of a desire by Bellofram and Mr. Colletti to skew the results of the investigation.

Finally, as discussed above, Ms. Ellis' investigation revealed that other younger male supervisory employees were aware of the conduct at issue and took no action. (Tran. 447-449, 455.) These other male supervisory employees were not disciplined in any way. (Id.; Tran. 687-88, 781-83.) As such, Bellofram's characterization of Ms. Ellis' investigation as being an independent third party investigation not aimed at any particular individuals is clearly not supported by the facts.

**G. Joseph Colletti was prejudiced against Lynda Young:**

Long before Lynda Young was ever suspended or terminated, Joseph Colletti showed his lack of regard for her. (Tran. 258-59, 267-69.) The testimony presented to the Circuit Court made this abundantly clear:

---

<sup>8</sup> As discussed above, Mr. Grilli was not interviewed despite evidence revealing that he may have participated in sexual harassment. (Tran. 76-82.)

Q: What was your relationship with Joe Colletti when you were at Bellofram?

A: Joe Colletti apparently didn't like me very well. I don't think the man has ever said two words to me. He would come downstairs, and he would talk to the other male supervisor, and he would talk to Donnie, which was my lead that was underneath me, but Joe Colletti never would talk to me. He never came down and even said – I bet he hasn't said three words to me in the whole time I've known him.

(Tran. 258-59.)

Q: Well, the way he treated you – the way he treated you, you're referring to the testimony you just gave about him not talking to you and instead talking to Mr. – allegedly – to Mr. Shuman and to Mr. Harris, correct?

A: Exactly, I was his supervisor.

Q: But that's what you're referring to when you say he didn't treat you very nice?

A: He didn't treat me with respect.

(Tran. 268.)

Notably, Mr. Colletti did not deny that he had never spoken to Lynda Young. (Tran. 746-47, 762-63.) Instead, he attempted to justify why he spent time talking to Mr. Harris, a younger male supervisor. (Tran. 746-47.) Further, when Ms. Young attempted to speak with Mr. Colletti after her suspension she was rebuffed. (Tran. 247.) The best that Mr. Colletti could indicate was that he “more than likely” said hello to Ms. Young. (Tran. 745.) Appellee submits that this conduct is evidence of a discriminatory animus on the part of Mr. Colletti, whom Bellofram has indicated was the decision maker in regard to Ms. Young's termination.

Mr. Colletti also took adverse action against Lynda Young without any evidence that she had done anything wrong. The initial investigation into Mr. Jackson's complaints of being called a rat conducted by Sharon Coleman revealed absolutely no wrongdoing on the part of Ms.

Young.<sup>9</sup> (Tran. 681-84.) Nonetheless, Joseph Colletti suspended Ms. Young based on Ms. Coleman's findings, but failed to take any action against Joseph Grilli who Ms. Coleman reported was aware of Adam Farmer's conduct toward Amanda Chipps. Appellee submits that the elimination of Lynda Young was Mr. Colletti's aim all along.

**H. Lynda Young's age at the time of her promotion is immaterial:**

Bellofram makes much of the fact that Lynda Young was promoted to her supervisory position at the age of fifty-nine. (Appellants' Brief p. 6-7.) However, Ms. Young was promoted by Joseph Grilli, not Joseph Colletti, the man who terminated her. (Tran. 585-87, 714-15; Depo. of Grilli pp. 33-35.) According to all of Bellofram's witnesses, Mr. Grilli played no role in the decision to terminate Ms. Young. (Tran. 714-15.) Inasmuch as Joseph Grilli had no role in terminating Ms. Young, his conduct in promoting her cannot be evidence of a lack of discriminatory animus on the part of Mr. Colletti and Bellofram in terminating her.

**I. Lynda Young was replaced by a younger male supervisor:**

Bellofram would have the Court believe that Lynda Young was replaced by Chris Smith, a female supervisor over the age of forty. (Appellants' Brief, p. 14.) First, this fact is immaterial, as Ms. Smith is not a female over the age of sixty. Moreover, in actuality, Ms. Smith was a temporary replacement, and Lynda Young was replaced on a permanent basis by Joe Ebert, a younger male. (Tran. 153-54, 335-36, 612.) Finally, it was Mr. Grilli, not Joseph Colletti, who made the decision to have Ms. Smith fill in for Lynda Young on a temporary basis. (Tran. 592, 153-54, 335-36, 612.)

---

<sup>9</sup> Notably, Ms. Coleman's investigation also did not reveal that Amanda Chipps had been sexually harassed, despite the fact that Ms. Coleman interviewed Ms. Chipps. (Tran. 682.) Ms. Chipps' story changed when Mary Ellis interviewed her. (Tran. 554.)

**J. Lynda Young's separation from Homer Laughlin China was involuntary:**

Bellofram completely failed in its attempt to prove that Ms. Young failed to mitigate her damages. Ms. Young testified that beginning at the time of her suspension, and continuing through the trial date, she attempted to obtain other employment. (Tran. 251-253.) For a short period after her termination, she was employed by Homer Laughlin China Company. (Tran. 253-255.) All of the evidence presented in the case indicated that Ms. Young left that employment involuntarily. (Tran. 617-44.) Mitigation was Bellofram's burden, and it failed to carry that burden.

**III. THE TRIAL COURT'S DECISION WAS CORRECT:**

All of the foregoing facts were placed into evidence before the trial court. Based upon the fact that younger male supervisors at Bellofram were either not disciplined or were merely demoted for engaging in the same conduct Ms. Young was accused of, the Circuit Court found that Bellofram's decision was motivated by Ms. Young's age and sex. Contrary to what Bellofram and the Amici<sup>10</sup> would have this Court believe, the court below did not act as a "super personnel department." Rather, the Circuit Court weighed all of the evidence in the case, and rightly concluded that Ms. Young was the victim of discrimination.

Nearly five years have passed since Ms. Young was victimized by Bellofram, and nearly two years have passed since the trial of this matter. Bellofram continues to victimize Ms. Young by failing to take responsibility for their conduct. This Court should put a stop to Bellofram's conduct, bring this matter to an end, and affirm the Circuit Court's decision.

---

<sup>10</sup> West Virginia Chamber of Commerce and West Virginia Manufacturers Association (hereinafter "Chamber/WVMA")

#### **IV. DISCUSSION OF THE LAW:**

##### **A. Standard of Review:**

Bellofram's burden in this appeal is high, and they cannot meet it. This Court has made clear that in reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is utilized. Syl. Pt. 1 *Adkins v. Stacy*, 214 W. Va. 371, 589 S.E.2d 513, (W.Va. 2003); Syl. Pt. 1, *Public Citizen, Inc. v. First Nat'l Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (W.Va. 1996). The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. *See* Syl. Pt. 1 *Adkins*, 214 W.Va. at 371, 589 S.E.2d 513; Syl. Pt. 1 *Public Citizen, Inc.*, 198 W.Va. at 329, 480 S.E.2d at 538. Questions of law are subject to a *de novo* review. *See id.*

A trial court's findings of fact are entitled to peculiar weight on appeal. Syl. Pt. *Chaves v. Blue Ridge Acres*, 174 W.Va. 218, 324 S.E.2d 361 (W.Va. 1984); Syl. Pt. 1 *Little v. Little*, 184 W.Va. 360, 400 S.E.2d 604 (W.Va. 1990). A trial court's findings of fact will not be set aside unless they are clearly wrong. Syl. Pt. 1, *McDaniel v. Romano*, 155 W.Va. 875, 190 S.E.2d 8 (W.Va. 1972).

Abuse of discretion is likewise a high standard. A circuit court abuses its discretion when it makes an error of law, or when its ruling is marred by a fundamental defect which inherently results in a miscarriage of justice. *See State ex rel. Hoover v. Bergen*, 199 W.Va. 12, 483 S.E.2d 12, 17 (W.Va. 1996); *State v. Head*, 198 W. Va. 298, 306, 480 S.E.2d 507, 515 (W.Va. 1996) (J. Cleckley concurring). This Court has likewise endorsed the Supreme Court of Washington's definition of abuse of discretion:

[A] trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. If the trial court's ruling is based on an erroneous

view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion.

*Caperton v. A.T. Massey Coal*, 2009 W.Va. LEXIS 107 at \*134 (W.Va. Nov. 12, 2009) quoting *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 161 P.3d 1016, 1020 (Wash. 2007); see also Syl. Pt. 2, *Walker v. W. Va. Ethics Comm'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

As such, for Bellofram to prevail in this appeal, they must prove that the Circuit Court's ruling is wrong in all respects and that there was no reasonable basis for the ruling. Moreover, they must do so in the context of an employment matter where motive is at issue and judgment regarding witness credibility and pretext are issues for the factfinder. See *Hanlon v. Chambers*, 195 W.Va. 99, 106, 464 S.E.2d 741, 748, fn 4 (W.Va. 1995) ("employers are rarely so cooperative as to include a notation in the personnel file' that their actions were motivated by factors expressly forbidden by law"). Ms. Young was not required to prove that Bellofram's discriminatory animus was the only reason for her termination, just *a* reason, and it was the province of the Circuit Court to determine that issue. See *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 487, 457 S.E.2d 152, 164 (W.Va. 1995).

Regardless of how they attempt to warp the facts of this matter to suit their theories, Bellofram cannot meet its burden. The Circuit Court's ruling was correct, and there was more than enough evidence presented to support its finding. As such, the verdict should be affirmed.

**B. Whether a prima facie case was established is no longer at issue because this matter was fully tried on the merits.**

This Court has joined the United States Supreme Court in finding that when a Rule 50 motion has been denied, and a discrimination claim has been fully tried on the merits, whether the plaintiff proved a prima facie case is no longer at issue. See *Barefoot*, 193 W.Va. at 484, 457 S.E.2d at 161. "Where the defendant has done everything that would be required of [it] . . . if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer

relevant.” *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 1482, 75 L.Ed.2d 403, 410 (1983); *see also E.E.O.C. v. Ethan Allen, Inc.*, 44 F.3d 116, 119 (2<sup>nd</sup> Cir. 1994); *Bhaya v. Westinghouse Electric Corp.*, 832 F.2d 258, 260 (3<sup>rd</sup> Cir. 1987), *cert. denied*, 488 U.S. 1004, 109 S. Ct. 782, 102 L.Ed.2d 774 (1989); *E.E.O.C. v. Century Broadcasting Corp.*, 957 F.2d 1446, 1455 (7<sup>th</sup> Cir. 1992).

This Court has stated:

We concur with United States Supreme Court’s standards and hold that when a trial court has overruled a defendant’s motion to direct a verdict for failure to establish a *prima facie* case and the defendant presented evidence sufficient for the trier of fact to make an adequate ruling on the merits, the question of whether the plaintiff made a *prima facie* case is not a necessary consideration for the disposition of the case on appeal.

*Barefoot*, 193 W.Va. at 484, 457 S.E.2d at 161.

As this Court and the United States Supreme Court have held, to concentrate on whether a *prima facie* case was established is to avoid the issue of whether there was actual discrimination. *See Aikens*, 460 U.S. at 715, 103 S. Ct. at 1482, 75 L.Ed.2d at 410; *Barefoot*, 193 W.Va. at 484, 457 S.E.2d at 161. Once the Circuit Court found evidence sufficient to deny Bellofram’s Rule 50 motion, the question of whether a *prima facie* case was established dropped from the case. *See Aikens*, 460 U.S. at 715, 103 S. Ct. at 1482, 75 L.Ed.2d at 410; *Barefoot*, 193 W.Va. at 484, 457 S.E.2d at 161; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

Although Ms. Young established a *prima facie* case, whether she did or not is no longer at issue. This matter was fully tried on the merits, Bellofram’s Rule 50 motion was denied, and all of the evidence was put before the Circuit Court. As a matter of law, the question of a *prima facie* case is no longer at issue. Bellofram’s focus on this issue is yet another example of its ongoing attempts to, “unnecessarily evad[e] the ultimate question of discrimination *vel non*.”

*Aikens*, 460 U.S. at 714, 103 S. Ct. at 1481, 75 L.Ed.2d at 409. All of Bellofram's arguments regarding the establishment of a prima facie case are meaningless and meritless.

C. A prima facie case was established.<sup>11</sup>

To state a prima facie case for discrimination under the West Virginia Human Rights Act or substantial public policy of the State of West Virginia, a plaintiff need only show by a preponderance of the evidence that she: (1) is a member of a protected class; (2) that she 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 she was, though both engaged in similar conduct. See *Barefoot*, 193 W. Va. at 485-86, 457 S.E.2d at 162; Syl. 2 *State ex rel. State of W.Va. Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W. Va. 711, 329 S.E.2d 77 (W.Va. 1985); *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 171, 358 S.E.2d 423, 430 fn. 16 (W.Va. 1986). Proof of the link between the employer's decision and the plaintiff's status as a member of a protected class can be shown by direct or circumstantial evidence, or by inferential evidence. See *Barefoot*, 193 W.Va. at 484, 457 S.E.2d at 161.

All that is required of a plaintiff in setting forth a prima facie case is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on a discriminatory motive. See *Barefoot*, 193 W.Va. at 484, 457 S.E.2d at 161. As stated by this Court in *Barefoot*,

At the outset, we note some confusion about the *prima facie* case may have developed from the third prong of the analysis we set forth in *Conaway* that "but for the plaintiff's protected status, the adverse decision would not have been made." 178 W. Va. at 170, 358 S.E.2d at 429. **Use of the "but for" language in that test may have been unfortunate, at least if it connotes that a plaintiff must establish anything more than an inference of discrimination to make**

---

<sup>11</sup> As set forth above, the existence of a prima facie case is no longer at issue. Appellee addresses the issue herein solely in the interests of completeness.

**out a *prima facie* case...** Rather, *Conaway* said its general test was inclusive of the analyses in those cases. **To further clarify, we now hold the “but for” test of discriminatory motive in *Conaway* is merely a threshold inquiry, requiring only that a plaintiff show an inference of discrimination.**

193 W.Va. at 484, 457 S.E.2d at 161 (emphasis added); *see also Skaggs v. Elk Run Coal Co., Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (W.Va. 1996).

Ms. Young was a member of two protected classes, being both female and over the age of sixty, and it is undisputed that her employment was terminated. Bellofram either failed to discipline younger male supervisors or were merely demoted them for the same conduct. Specifically, Mr. Shuman, a younger male supervisor was only demoted for failing to control his employees. (Tran. 51-53<sup>12</sup>, 596-97<sup>13</sup>; Depo. of Wells, pp. 16-18.<sup>14</sup>) Mr. Harris and Mr. Grilli, also younger male supervisors, were aware of inappropriate conduct, did not act to stop it, and were neither disciplined nor terminated. (Depo. of Wells, pp. 16-18<sup>15</sup>; Tran. 76-82<sup>16</sup>, 686-87<sup>17</sup>, 447-48, 605, 764-65.<sup>18</sup>) As such, Bellofram’s argument that a *prima facie* case was not proven is unavailing.

---

<sup>12</sup> Mr. Shuman testified that he was aware of complaints regarding the conduct of Adam Farmer and Bill Friley.

<sup>13</sup> Mr. Grilli testified that Mr. Shuman was demoted for failing to control the employees on his shift.

<sup>14</sup> Ms. Wells testified that some of the most egregious racial harassment by Mr. Friley occurred just before Mr. Shuman’s demotion.

<sup>15</sup> Ms. Wells reported Mr. Friley’s racial harassment to Mr. Grilli.

<sup>16</sup> Mr. Grilli was aware of Mr. Jackson’s complaints and was not taking them seriously.

<sup>17</sup> Mr. Grilli was aware of Mr. Farmer’s conduct toward Ms. Chipps, and merely talked to him about the behavior, just as Ms. Young did in regard to Mr. Jackson’s complaints. (Tran. 480, 299-300, 305-307, 793-94, 685-86.)

<sup>18</sup> Mr. Harris reported knowledge of inappropriate conduct occurring under his supervision, and was not disciplined in any way.

**1. Bellofram misrepresents the holding in *Barefoot v. Sundale Nursing Home*.**

In a clear misstatement of the law, Bellofram argues that because Mr. Shuman was over the age of forty, Ms. Young did not prove a prima facie case of discrimination. (Appellants' Brief, p. 25.) Bellofram cites *Barefoot v. Sundale Nursing Home* in support of this proposition. (Id.) However, *Barefoot* actually stands for the exact opposite of the proposition Bellofram posits to this Court:

Unless a comparison employee and a plaintiff share **the same 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.

*Barefoot*, 193 W.Va. at 475, 457 S.E.2d at 163 (emphasis added).

The fact that Mr. Shuman was over the age of forty cannot be used to rebut Ms. Young's prima facie case because Mr. Shuman was not a woman over the age of sixty. Moreover, Bellofram ignores the fact that neither Mr. Grilli nor Mr. Harris were disciplined at all despite their knowledge of the same inappropriate conduct – a fact not ignored by the trial court. (Order Findings of Fact ¶ 15.) Neither Mr. Grilli nor Mr. Harris are women over the age of sixty either.

Ms. Young proved that she was a member of a protected class, that she was discharged from employment, and that three nonmembers of the protected group were not disciplined or were disciplined less severely than she was though all of them engaged in similar conduct. Therefore, she proved a prima facie case of discrimination.

**2. Ms. Young's promotion and replacement are irrelevant.**

The *Johnson* case cited by Bellofram is inapposite to the facts of this matter, as Ms. Young was terminated by Mr. Colletti, but promoted by Mr. Grilli, who, according to Bellofram, was not even consulted on the decision to terminate her. See *Johnson v. Killmer*, 219 W.Va. 320,

633 S.E.2d 265 (W.Va. 2006); (Tran. 585-87; Depo. of Grilli pp. 33-35; Tran. 714-15.)

According to Bellofram, the act of promoting Ms. Young to supervisor should be attributed to the Appellants, regardless of Mr. Colletti's lack of participation, but the act of merely demoting Mr. Shuman, because it was not done by Mr. Colletti, cannot be considered as evidence of discrimination. (Appellants' Brief, pp. 26-28, 30-39.) Since Mr. Grilli promoted Ms. Young, and was not even consulted in her termination, his conduct cannot act as a defense to Bellofram's later discriminatory discharge of Ms. Young. *See Lettieri v. Equant, Inc.*, 478 F.3d 640 (4<sup>th</sup> Cir. 2007) (hiring and termination by different supervisors relieves the plaintiff of proving her position was filled by someone who was not a member of the protected class in Title VII case); *Miles v. Dell, Inc.*, 429 F.3d 480, 489 (4<sup>th</sup> Cir. 2005) (where one individual makes the hiring decision and another the firing decision the hiring decision has no probative value).

Likewise, Ms. Young's temporary replacement<sup>19</sup>, Chris Smith, a woman over the age of forty, was chosen by Mr. Grilli. (Tran. 592.) Again, since Mr. Colletti, the alleged decision maker in Ms. Young's termination, was not an active participant in selecting Ms. Young's temporary replacement, and Mr. Grilli was not an active participant in the decision to terminate Ms. Young, Mr. Grilli's conduct cannot be utilized to show a lack of discriminatory animus. Bellofram's arguments to the contrary are without merit, and should be rejected by this Court.

Finally, even assuming an inference was created in Bellofram's favor by Ms. Young's promotion or replacement, those inferences were more than rebutted in this case by the evidence that younger male supervisors were treated far less harshly for exactly the same conduct, as well

---

<sup>19</sup> Ms. Smith's responsibility for the second shift in the molding department was temporary. (Tran. 153-54, 335-36, 612.) In actuality, Ms. Young was replaced on a permanent basis by Joe Ebert, a younger male. (Tran. 153-54, 335-36, 612.)

as the treatment Ms. Young received from Mr. Colletti once she held the position.<sup>20</sup> (Tran. 447-449, 455, 687-688, 77-83, 258-264.) As such, Ms. Young proved a prima facie case of discrimination.

**D. West Virginia law does not recognize the decision maker rule proposed by Bellofram and the Amici.**

Bellofram and Amici, Chamber/WVMA, ask this Court to hold that when two employees are disciplined by two different supervisors that the disciplined employees are, as a matter of law, not similarly situated for purposes of an analysis of disparate treatment. More specifically, they argue that Ms. Young could not be compared to Donald Shuman because they were disciplined by different supervisors.

According to Bellofram and the Amici, a bright line test is widely accepted and is necessary to protect employers from having to relive the mistakes of the past. Contrary to their arguments, no such bright line test exists. Moreover, the real effect of a bright line test would be to provide employers a virtually impenetrable shield, allowing them to engage in discriminatory or retaliatory conduct simply by having different supervisors involved in administering employee discipline.

This Court has recognized that “[e]mployers are rarely so cooperative as to include a notation in the personnel file that their actions were motivated by factors expressly forbidden by law.” *See Hanlon*, 195 W. Va. at 106, 464 S.E.2d at 748 citing *Thornburgh v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 638 (5<sup>th</sup> Cir. 1985). So finding, this Court has held that the resolution of cases like this one is for the finder of fact, and requires analysis of the entire case. *See id.*; *see also Conrad v. ARA Szabo*, 198 W. Va. 362, 370, 480 S.E.2d 801, 809-810 fn 5

---

<sup>20</sup> Ms. Young provided clear testimony indicative of Mr. Colletti’s disdain toward her, neglecting to talk to her and instead interacting with her subordinates or J.D. Harris, a younger male supervisor on the same shift who was not disciplined despite his knowledge of inappropriate conduct and failure to act. (Tran. 258-264.)

(W.Va. 1986); *Fourco Glass Company v. State of West Virginia Human Rights Commission*, 179 W. Va. 291, 294, 367 S.E.2d 760, 763 (W.Va. 1988).

Further, while some courts have held that employees disciplined by different supervisors are not similarly situated, each case turned on its individual facts and circumstances, all of which were taken into consideration. *See e.g. Cooper v. City of North Olmstead*, 795 F.2d 1265 (6<sup>th</sup> Cir. 1986); *Heyward v. Monroe*, 166 F.3d 332 (4<sup>th</sup> Cir. 1998); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (lack of “smoking gun” evidence renders evidence of discrimination very difficult to uncover requiring a factual analysis); *Brewer v. Board of Trustees of University of Illinois*, 479 F.3d 908 (7<sup>th</sup> Cir. 2007) (explaining “cat’s paw” theory). Courts considering the issue have made clear that it is not the decision-maker that is relevant, but the employment policies. *See Baggett v. Program Resources, Inc.*, 806 F.2d 178, 181-182 (8<sup>th</sup> Cir. 1986); *see also Sprint/United Mgmt. Co. v. Mendelsohn*, 128 S. Ct. 1140, 1147 (2008) (use of a bright line rule excluding evidence of the conduct of other supervisors would constitute an abuse of discretion).<sup>21</sup> In short, the fact that different decision makers were involved is merely a factor in determining disparate treatment.

In the face of this Court’s clear precedent, as well as United States Supreme Court precedent, counseling against bright line rules regarding evidence to be considered in discrimination cases, Bellofram and the Amici nonetheless propose a bright line rule that employees cannot be considered similarly situated if they were disciplined by different supervisors. The effect of such a rule would be to enable institutionalized discrimination that employers could and would effectively and permanently disguise by having different supervisors administer employee

---

<sup>21</sup> Plaintiff submits that the United States Supreme Court’s statement against bright line evidentiary rules in the *Sprint/United Mgmt. Co.* case is indicative of the Court’s disfavor of bright line standards in employment cases generally.

discipline. Indeed, employers are already counseled to utilize different supervisors in taking adverse action against employees within protected classes. A bright line rule such as Bellofram and the Amici propose would serve as nothing less than a license to discriminate and retaliate against employees, and would undermine the very purpose of the West Virginia Human Rights Act. W.Va. Code § 5-11-2.<sup>22</sup> Bellofram and the Amici, in effect, ask this Court to close the courthouse door to wrongfully terminated employees.

The Circuit Court evaluated all of the evidence<sup>23</sup> presented in the case, including, but not limited to, the different supervisor theory advanced by Bellofram here. In the present case, Bellofram had the opportunity to argue, and in fact, did argue no less than three times<sup>24</sup> that Mr. Shuman and Ms. Young were not similarly situated. The trial court heard, and considered the argument, weighed all of the evidence, and correctly found that Ms. Young and Mr. Shuman were similarly situated.

---

<sup>22</sup> It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status. The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

<sup>23</sup> In fact, the evidence considered by the Circuit Court included extensive hearsay evidence that could not have been presented to a jury, and which Bellofram would have been without had this matter been tried to a jury.

<sup>24</sup> Bellofram argued this same theory in support of their motion for summary judgment, in support of their Rule 50 motion at the close of Ms. Young's case, in a post-trial brief, and in their proposed findings of fact and conclusions of law.

Ms. Young and Mr. Shuman were, in fact, similarly situated. The most egregious racial harassment allegedly committed by anyone in this case occurred during Mr. Shuman's tenure as supervisor shortly before his demotion. (Depo. of Wells, pp. 16-18.) It is also clear that Mr. Shuman was aware of the harassing conduct allegedly directed at Amanda Chipps by Adam Farmer and Mr. Friley's inappropriate conduct. (Tran. 51.) Both Ms. Ellis' investigation and Ms. Coleman's investigation revealed unequivocally that the conduct allegedly tolerated by Lynda Young also occurred when Mr. Shuman was the supervisor, and that Bellofram was aware of the conduct when Mr. Shuman was demoted.<sup>25</sup> (Tran. 49-52, 76-77, 107-110, 157-59, 443-45, 447-49, 455, 566-67, 686-87; Depo. of Wells, pp. 16-21; Depo. of Grilli, pp.23-27.) Ms. Ellis' investigation as well as the investigation performed by Ms. Coleman revealed that Mr. Grilli was aware of the conduct when he demoted Mr. Shuman. Mr. Shuman's failure to control this conduct led to his demotion and return to a non-salaried position. (Tran. 595-97.) The same conduct by Ms. Young led to her termination.

The trial court made the appropriate inquiry into the facts of Ms. Young's termination, specifically allowing and hearing testimony and arguments that Ms. Young and Mr. Shuman were not similarly situated employees. The Circuit Court viewed the evidence as a whole, as this Court has directed, rejected Bellofram's argument, and found that Ms. Young and Mr. Shuman were indeed similarly situated.<sup>26</sup> Clearly, the trial court did not abuse its discretion and was not clearly wrong in finding that Ms. Young was treated differently than Mr. Shuman, and a finding

---

<sup>25</sup> In fact, the evidence in this case revealed that Ms. Young was actually punished for conduct that occurred when Mr. Shuman was the supervisor.

<sup>26</sup> The Circuit Court's comparison of Ms. Young to Mr. Shuman, as opposed to Mr. Grilli and Mr. Harris, actually acted to reduce Ms. Young's damages, as the Court determined that Ms. Young should have been demoted to a non-supervisory position at a lower wage instead of being retained as a supervisory employee at a higher wage.

of discrimination could have been made on that basis alone. As such, the Circuit Court's ruling should be affirmed.

**E. The rule proposed by Bellofram and the Amici would not change the result.**

Bellofram misrepresents the evidence utilized by the trial court in its disparate treatment analysis, arguing that the trial court relied exclusively on Bellofram's conduct toward Mr. Shuman as a comparable employee. This is simply false. The Circuit Court explicitly found that younger male supervisory employees were aware of the same conduct, failed to take action, and were not disciplined. (Order Findings of Fact ¶ 15.) The evidence presented in this case demonstrated that the conduct of these male supervisory employees, Joseph Grilli and J.D. Harris, was reported to Mr. Colletti, the alleged decision maker in this case. Mr. Colletti took no action at all against these employees, but terminated Lynda Young, an older female to whom he showed no respect. (Tran. 268.)

Joseph Grilli was aware of the same conduct that allegedly formed the basis for Ms. Young's termination and acted just as Lynda Young did. Heather Wells reported directly to Mr. Grilli that Bill Friley racially harassed her. (Depo. of Wells, pp. 16-18.) Mr. Grilli's response was simply to yell at the employees, and he administered no further discipline. (Id.) This evidence came to light in Bellofram's investigation, but no action was taken against Mr. Grilli.

Mr. Grilli was also aware of the conduct of Adam Farmer toward Amanda Chipps. (Tran. 686-88.) Sharon Coleman admitted on cross-examination that this was the case:

Q: She had talked to Joe Grilli about the throwing of tools and swearing. Joe told her he would talk to Adam?<sup>27</sup>

A: Okay. It's been a while since I've looked –

Mr. Pearl: MB0495

---

<sup>27</sup> Counsel for Ms. Young was at this point reading from a document created by the witness.

A: I can't recall them word for word, but I remember she complained about the mouse about Bill Friley with Joe.

Q: So Mr. Grilli was aware?

A: Of?

Q: Mr. Farmer's conduct toward Mandy Chipps?

A: In that instance, yes.

Q: Was Mr. Grilli disciplined?

A: I don't know. I mean for what?

Q: He knew that Adam Farmer was harassing Mandy Chipps.

MR. CLARK: Objection, totally mischaracterizes the testimony.

THE COURT: Objection be overruled. The question is: Was Grilli in any way disciplined because he failed to take action once he found out about the misconduct?

THE WITNESS: He took action. So that's why he was not disciplined.

THE COURT: What action did he take?

THE WITNESS: He went to Adam Farmer and had a discussion with him regarding his behavior and verbalized to him that he could not continue that behavior or he would have further discipline.

THE COURT: And that was fine and, if Lynda Young did the same thing to Jackson, then that wasn't fine; is that what you're saying?

(Id.)

Mr. Grilli's knowledge of the harassment of Ms. Chipps by Mr. Farmer was uncovered by Sharon Coleman in her initial investigation even before the third party investigator was hired.

(Id.) However, unlike Lynda Young, Mr. Grilli was not suspended, was not investigated, and was not terminated.

The investigation conducted by Mary Ellis revealed that Mr. Grilli was aware of sexual harassment in the workplace and took no action, engaged in sexual harassment himself, and was aware of the complaints of Ron Jackson and was not taking the complaints seriously. (Tran. 76-82.) All of these facts were presented to Bellofram as established by the trial testimony of

Sandra Chambers:

Q: Do you have any recollection of telling Ms. Coleman that Mr. Grilli was not taking Mr. Jackson seriously?

A: Yes, I did at the time.

Q: And that Mr. Grilli was, in fact, discrediting Mr. Jackson?

A: I don't know if I would have used those words.

Q: But he wasn't taking it seriously?

A: No, I didn't -- at the time I didn't think he was taking it seriously.

(Tran. 76.)

Q: Did you also report to Ms. Ellis that there was an employee who was flirting with Mr. Grilli?

A: There was -- yes, I did at the time. At that time.

Q: Do you remember which employee that was?

A: There was a couple of them.

Q: Why don't you go and ahead and tell us which employees?

A: There was Melissa Farmer and Maria Swiger (phonetic), I think is her last name. And there was another girl, and I can't remember her name.

Q: Did you feel that Mr. Grilli was responding appropriately to that conduct?

A: I don't really have an opinion about that because they were teasing back and forth; it didn't...

Q: So, and you reported that to Ms. Ellis, correct?

A: Yes.

(Tran. 79.)

According to Ms. Chambers, Mr. Grilli also failed to respond appropriately to employee complaints of sexual harassment. (Tran. 81-82.) More specifically, Ms. Chambers reported to Ms. Ellis that Mr. Grilli took some sexual harassment complaints seriously, and dismissed others as “kidding or playing around, horsing around.” (Tran. 82.) This exact same conduct was attributed to Lynda Young and she was terminated. Mr. Grilli was not even suspended or investigated.

Likewise, J.D. Harris, another younger male supervisor on the second shift<sup>28</sup> was aware of inappropriate conduct on the shift he and Ms. Young supervised together. (Tran. 447-48, 605, 764-65.) Unlike Ms. Young, Mr. Harris received no discipline despite his knowledge and failure to act. Mary Ellis testified as follows:

Q: What’s J.D. Harris’ position?

A: I believe he is, as I recall, he’s another supervisor in another area.

Q: So he’s a supervisor on the second shift?

A: I believe so.

Q: Now, he did express to you that he had heard some things and seen some things?<sup>29</sup>

A: Yes, he did.

Q: Did he indicate to you that he had reported those to management?

A: No, he did not indicate to me.

(Tran. 447-48.)

---

<sup>28</sup> Tran. 746-47

<sup>29</sup> Ms. Ellis’ report indicated that Mr. Harris was aware of inappropriate touching on the part of Adam Farmer. (Def.’s Trial Exhibit 8.)

Just like Ms. Young, Mr. Harris was a supervisor of the afternoon shift. (Tran. 287-88.) In fact, Mr. Farmer, one of the alleged perpetrators of the conduct that led to Ms. Young's termination, was Mr. Harris' direct subordinate. (Tran. 485, 336.) Mr. Harris reported to Bellofram's investigator that he was aware of inappropriate touching that he had not acted on in terms of discipline or reporting, yet he was not disciplined in any way. (Tran. 765; Def.'s Trial Exhibit 8.) Meanwhile, Ms. Young was terminated.

Further, similar conduct occurred after Ms. Young's termination, and Bellofram did not terminate the offending employee, who is male, or his supervisors, all of whom are significantly younger than Ms. Young. (Tran. 20-31.) Specifically, Michael Hoit testified that Rick Humphrey, who is still an employee of Bellofram, has called female co-employees bitch, lesbian co-employees dyke, and other employees motherfucker, fucker, and bastard without any recourse taken against him or his supervisor. (Id.) The failure to terminate Mr. Humphrey or his supervisor is evidence of disparate treatment.

Mr. Grilli and Mr. Harris are clearly comparable employees to Ms. Young. They were both supervisory employees who were aware of inappropriate conduct on the second shift at Marsh Bellofram who failed to take action. Their knowledge and failure to act in any way different from the way Ms. Young did under the same circumstances was known and reported to Bellofram and Mr. Colletti. Neither Mr. Grilli nor Mr. Harris were suspended, disciplined, investigated, or terminated by Mr. Colletti despite their involvement in the same conduct as Lynda Young. As such, even if Mr. Shuman's demotion is not considered, Ms. Young proved her discrimination claim.

**F. Bellofram's reason for the termination of Lynda Young was pretextual.**

Once Ms. Young proved her prima facie case the burden shifted to Bellofram to provide a non-discriminatory basis for her discharge. *See Barefoot*, 193 W.Va. at 482-483, 457 S.E.2d at 160; *Conaway*, 178 W. Va. at 171, 358 S.E.2d at 430. When Bellofram proffered a reason, the burden then shifted back to Ms. Young to prove that the proffered reason was pretextual. *See Barefoot*, 193 W.Va. at 482-483, 457 S.E.2d at 160.

To prevail on the pretext issue all that was necessary was that the finder of fact disbelieve Bellofram's proffered reason for termination. This Court has stated:

In disparate treatment cases under the West Virginia Human Rights Act, W.Va.Code, 5-11-9 (1992), proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination. Therefore, **if the plaintiff raised an inference of discrimination through his or her prima facie case and the fact-finder disbelieves the defendant's explanation for the adverse action taken against the plaintiff, the factfinder justifiably may conclude that the logical explanation for the action was the unlawful discrimination.**

Syl. Pt 5, *Skaggs*, 198 W.Va. 51, 479 S.E.2d 561 (emphasis added); *see also* Syl. Pt. 5 *Mayflower Vehicle Systems, Inc. v. Cheeks*, 218 W.Va. 703, 629 S.E.2d 762 (W.Va. 2006).

Pretext may be shown through direct or circumstantial evidence of falsity of the employer's proffered reasons for termination, or through discrimination; and, where pretext is shown, discrimination may be inferred. *See* Syl. Pt 5, *Skaggs*, 198 W.Va. 51, 479 S.E.2d 561 (W.Va. 1996); *see also* Syl. Pt. 5 *Mayflower Vehicle Systems, Inc.*, 218 W.Va. 703, 629 S.E.2d 762; Syl. Pt. 2 *Moore v. Consolidation Coal Co.*, 211 W.Va. 651, 567 S.E.2d 661 (W.Va. 2002). "A finding of pretextuality allows a juror to reject a defendant's proffered reasons for a challenged employment action and, thus, permits the ultimate inference of discrimination." *Barefoot*, 193 W.Va. at 487, 457 S.E.2d at 164.

Bellofram argues that the Circuit Court relied only on Bellofram's failure to follow its progressive discipline policy in finding that the proffered reason for Ms. Young's termination was

pretextual. (Appellants' Brief, p. 40.) That is not true. The record in this case is rife with evidence of pretext on the part of Bellofram. Specifically, the following evidence of pretext was presented to the trial court: 1) Ms. Young was suspended prior to the investigation conducted by Mary Ellis even though there was no evidence at that point that she had committed any wrongdoing; 2) the manner in which Bellofram conducted its investigation of Lynda Young revealed that it was skewed in an attempt to amplify Ms. Young's conduct and eliminate her; 3) Bellofram failed to follow its progressive discipline policy in regard to Lynda Young even though the policy clearly applied; 4) Bellofram failed to take action against younger male supervisory employees guilty of the same conduct as Lynda Young; and 5) Bellofram failed to provide Lynda Young an opportunity to return to her prior position in the bargaining unit. All of these matters were considered by the Circuit Court in reaching its verdict. (Order Findings of Fact ¶¶ 9; 10; 15; 16-19.)

Whether an employer's proffered reason for termination was pretextual is the province of the finder of fact. Bellofram requests this Court to act as the factfinder. This Court, however, does not have the benefit of hearing the testimony, viewing the demeanor, and weighing the credibility of the witnesses. Nonetheless, Bellofram is re-trying its case to this Court in its appeal.

**1. Lynda Young was suspended before there was any evidence that she had committed any wrongdoing.**

Bellofram's initial investigation by Sharon Coleman revealed no wrongdoing on the part of Ms. Young.<sup>30</sup> (Tran. 681-686.) At best, Ms. Coleman's investigation revealed that Ms. Young was aware that Mr. Friley and Mr. Farmer had called Ron Jackson a rat. (Id.) What Ms.

---

<sup>30</sup> At trial, Ms. Coleman attempted unsuccessfully to make up a new version of events totally inconsistent with her deposition or the written documents created in connection with her investigation. Ms. Coleman's new story collapsed on cross.

Coleman's investigation also revealed was Mr. Grilli's knowledge of Mr. Farmer's conduct toward Amanda Chipps of swearing and throwing tools.<sup>31</sup> (Id.) Mr. Grilli was not suspended nor was he investigated any further by Mary Ellis, Bellofram's allegedly independent third party investigator. The failure by Bellofram to further investigate Mr. Grilli shows that the Ellis investigation was a sham used to manufacture a reason to terminate Lynda Young.

**2. The Mary Ellis investigation showed evidence of pretext.**

The allegedly independent investigation conducted by Mary Ellis shows evidence of pretext and evidence of a motive on the part of Bellofram to eliminate Lynda Young. Ms. Ellis failed to confine the investigation to the time period when Ms. Young was actually the supervisor. (Tran. 449, 76-77, 566-67, 685-86; Depo. of Wells, pp. 16-21.) As a result, Ms. Young was made the scapegoat for all inappropriate conduct no matter when it occurred. Indeed, Mr. Colletti testified at trial that he took into account information that was allegedly relayed to Ms. Young prior to the time that she was even a supervisory employee. (Tran. 736-37.) Meanwhile, J.D. Harris and Joseph Grilli, younger male supervisory employees, were not disciplined at all regardless of what was stated in Ms. Ellis' report about them.

Moreover, Ms. Ellis admittedly chose to disbelieve any employees who stated they had no information to provide, or who indicated they had no complaints regarding Lynda Young. (Tran. 444-52.) The minority employees Ms. Ellis interviewed indicated they had no issue with the conduct of Ms. Young. (Id.; Def.'s Trial 8.) Further, the statements made by the minority employees were not included in Ms. Ellis' final report, which concluded that Ms. Young had

---

<sup>31</sup> Ms. Chipps did not allege any sexual harassment when she was interviewed by Ms. Coleman, but after being re-hired by Bellofram appeared at trial and testified that she was sexually harassed. (Tran. 554-75.)

tolerated racial harassment by her subordinates.<sup>32</sup> (Id.) In fact, no positive comments regarding Ms. Young were given any credence by Ms. Ellis. (Id.)

Ms. Ellis also decided not to review any of the interviewees' employment files before conducting her interviews, and thus knew nothing of the employment or disciplinary history regarding the employees she interviewed or any axes they had to grind with the people she was investigating. (Tran. 460-62.) Clearly, Amanda Chipps, one of Bellofram's star witnesses had a motive against Adam Farmer who had disciplined her for huffing chemicals on company time. (Id., 574; Depo. of Farmer, pp. 14-20.) Appellee submits that the failure to learn the back stories of the people she was interviewing is evidence of Ms. Ellis' lack of a desire to find the truth in her investigation.

Additionally, Ms. Ellis conducted second interviews directed solely at obtaining information regarding Lynda Young, which is demonstrative of Bellofram's motive against her. (Tran. 452-54, 83-84.) No additional interviews were conducted to gain additional information about any of the other individuals, and it is clear that the second interviews were specifically aimed at augmenting the evidence against Lynda Young as much as possible, most often with extremely unreliable and inconsistent evidence. (Def.'s Trial Exhibit 8; Tran. 369-473.) Ms. Ellis testified that she conducted second interviews to gain more information about "what people said happened, what they said they reported to [Ms. Young], what they said she saw, what they said she heard, what they said she was likely to have heard." (Tran. 461-63.)

Ms. Ellis also failed to interview Ms. Young's direct supervisors, Joseph Grilli and Candy Travis. (Tran. 459-60, 219, 226-29.) Both Mr. Grilli and Ms. Travis testified that Ms. Young was performing satisfactorily as a supervisor. (Tran. 459-60; Depo. of Grilli pp. 49-61;

---

<sup>32</sup> Ms. Young is the grandmother of four grandchildren of Mexican heritage, a fact that is noticeably absent from Bellofram's brief. (Tran. 274.)

Tran. 219, 226-29.) The failure to interview the employees responsible for direct supervision of Ms. Young who held good opinions about her is indicative of a desire by Bellofram and Mr. Colletti to skew the results of the investigation.<sup>33</sup>

At the end of every interview day, Ms. Ellis met with Joseph Colletti and discussed her findings. (Tran. 453, 724.) Appellee submits that these meetings were nothing less than an attempt by Mr. Colletti to steer the investigation in a manner that suited his end of eliminating Lynda Young. Simply put, the investigation was a sham and a witch hunt, and it was exposed as such at trial.

### **3. The failure to follow progressive discipline is evidence of pretext.**

All of the evidence in this case showed that Ms. Young herself was not involved in any harassing conduct. The only employees who testified that they even complained to Lynda Young about improper conduct during her time as supervisor were Ms. Kirkbride, who testified that she talked to Ms. Young about Alan Lockwood staring at her, and Mr. Jackson who testified that Ms. Young may have heard him be threatened by Mr. Friley and Mr. Farmer. (Tran. 542-543, 479-481.) Ms. Young testified that aside from the complaints of Ron Jackson, which she addressed, she was unaware of any inappropriate conduct. (Tran. 263-264.)

As such, the only misconduct by Ms. Young supported by the evidence was a failure to perform job tasks. Failure to perform job tasks is misconduct subject to Bellofram's progressive discipline policy, and the most that Ms. Young should have received is a suspension. (Def.'s Trial Exhibit 6.) Bellofram's failure to follow their own progressive discipline policy is evidence of pretext.

---

<sup>33</sup> Indeed, it was Mr. Grilli's decision to promote Ms. Young in the first place, which he did with Ms. Travis' input, and without the input of Mr. Colletti who terminated Ms. Young. (Tran. 585-87, 223-24.) It would be expected that both Mr. Grilli and Ms. Travis would have good opinions of Lynda Young, and as supervisory employees, their opinions would carry additional weight.

**4. The failure to provide Lynda Young an opportunity to return to the bargaining unit is evidence of pretext.**

Ms. Young should have had an opportunity to petition to return to her position as a non-salaried employee following her termination, and indeed she was promised that she could return if things did not work out after her promotion. (Tran. 678-680, 595-97; Depo. of Grill, pp. 39-40.) Bellofram attempted to argue at trial that the reason Ms. Young was not returned to a non-salaried position following her termination was her own failure to petition to the review committee. (Tran. 678-80.) However, Ms. Young was never even informed of the process by which she could make such a petition. (Tran. 688-89.) Joseph Colletti later testified that he chose not to give Ms. Young this opportunity.<sup>34</sup> (Tran. 758-60.)

It is undisputed that Mr. Shuman was permitted to return to a position in the bargaining unit after he failed as a supervisor. Bellofram presented no evidence that Mr. Shuman was required to go before a review committee in order to return to his position as a non-salaried employee, and did not even give Ms. Young an opportunity to petition for her return. This is clear evidence of pretext.

**G. The National Labor Relations Act has no application to Lynda Young or this case.**

Lynda Young's case was not predicated on her being terminated for engaging in union activities. Indeed, at the time of her termination, Ms. Young was not even a member of the union, nor did she participate at all in the activities that her subordinates alleged formed the basis for their terminations. (Tran. 244-45.) In any case, the National Labor Relations Act has no application to Ms. Young because she was a supervisory employee. 29 U.S.C. §152(11). The

---

<sup>34</sup> This was another change in the storyline resulting from Ms. Coleman's collapse on cross-examination. Bellofram attempted to rehabilitate its conduct in failing to inform Ms. Young of the petition process by having Mr. Colletti testify that he determined that Lynda Young would not receive an opportunity to petition for reinstatement to the union.

National Labor Relations Act explicitly states that it has no application to supervisors. *Id.* The Act defines supervisors as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

*Id.*<sup>35</sup>

Indeed, Bellofram’s proffered reason for Ms. Young’s termination was her alleged failure to act as a supervisor and discipline other employees. *See N.L.R.B. v. Yeshiva University*, 100 S.Ct. 856, 444 U.S. 672, 63 L.Ed.2d 115 (1980) (an employee is excluded as managerial if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy). The only exception to the exclusion of supervisors from the National Labor Relations Act has no application here; that being that an employer may not discharge a supervisor in retaliation for his testimony or his threat to testify in NLRB proceedings. *See National Labor Relations Board v. Oakes Machine Corporation*, 897 F.2d 84 (2<sup>nd</sup> Cir.1990). Bellofram’s reliance upon this Court’s ruling in *Lontz v. Tharp*, is misplaced. 220 W.Va. 282, 647 S.E.2d 718 (W.Va. 2007).

In *Lontz* the plaintiffs alleged that they were discharged for commencing union activity, and/or for failing to take illegal action against employees engaged in attempting to unionize. *See id.* at 286, 722 (“Lontz alleges that she was constructively discharged because she refused to engage in unlawful conduct to have a union organizer arrested...Petit alleges that she was wrongfully discharged because she was blamed for commencing union activity.”) By contrast, Ms. Young never asserted or presented any evidence that she was terminated for any conduct

---

<sup>35</sup> The corresponding West Virginia statute uses similar language excluding supervisory employees. W.Va.Code §21-1A-2(a)(3): “‘Employee’... shall not include any individual... employed as a supervisor”

connected with union activity. Rather, the evidence she presented, which has been set forth exhaustively herein, all pointed toward the Appellants terminating her due to her age and sex.

The “sine qua non of complete preemption is a pre-existing federal cause of action that can be brought in the district courts.” *Lontz v. Tharp*, 413 F.3d 435, 442 (4<sup>th</sup> Cir. 2005). Ms. Young had no cause of action before either the National Labor Relations Board or the District Court due to her status as a supervisory employee. The argument in favor of preemption advanced by Bellofram here is a red herring. Bellofram argues that the Circuit Court “laid waste to the idea that federal law exclusively governs national labor policy,” but the federal law cited has no application to Lynda Young.

**H. Bellofram did not carry its burden that Lynda Young failed to mitigate her damages.**

Bellofram completely failed to prove its mitigation defense. Once a claimant establishes a prima facie case of discrimination and presents evidence on the issue of damages, the burden of producing sufficient evidence to establish the amount of interim earnings or lack of due diligence shifts to the defendant. Syl. Pt. 4, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (W.Va. 1990). The defendant may satisfy his burden only if he establishes that: 1) there were substantially equivalent positions which were available; and 2) the claimant failed to use reasonable care and diligence in seeking such positions. *See id.*; *Rodriguez v. Consolidated Coal Co.*, 206 W. Va. 317, 327, 524 S.E. 2d 672, 682 (W.Va. 1999).

During her case-in-chief, Ms. Young testified that beginning at the time of her suspension, and continuing through the trial date, she attempted to secure other employment. (Tran. 251-253, 787-88.) Further, in support of her claim for damages, Ms. Young presented the expert testimony of Richard Raymond, Ph.D., who was recognized by the Court as being an expert in the fields of economics generally, forensic economics specifically, and calculation of

wage loss. (Tran. 175-215.) Inasmuch as Ms. Young established a prima facie case, and presented evidence of her damages, the burden of production shifted to Bellofram.

In an unsuccessful attempt to carry the burden on their mitigation defense, Bellofram presented the testimony of Eric Furbee, the human resources manager for Homer Laughlin China Company, where the Plaintiff was employed for a short period following her termination by Appellants. (Tran. 617, 253-55.) During Mr. Furbee's testimony, he attempted to demonstrate that Ms. Young voluntarily left Homer Laughlin China Company indicating that she quit without notice and would not work shifts. (Tran. 625-27.) Simply put, Mr. Furbee's testimony was completely inconsistent, and unsupported by the evidence.<sup>36</sup> (Tran. 629-45.)

Mr. Furbee abandoned his attempt to prove to the Unemployment Compensation Board that Ms. Young had voluntarily quit her employment, when he realized that his company was without any evidence to prove this fact.<sup>37</sup> (Tran. 637-643.) Therefore, Ms. Young received unemployment compensation benefits after her termination from Homer Laughlin China Company. (Tran. 637.) Indeed, Mr. Furbee admitted during his testimony that he had absolutely no basis to make the claim that Bellofram was asking him to make – that Lynda Young quit her employment at Homer Laughlin China Company without notice and without justification:

Q: Now, my question to you, first off, is, when it says "Foreman Remarks" and says "Probationary," and there's a line through it, there a line through yours?

A: Yes, there's a line through this one here.

Q: What does that mean?

---

<sup>36</sup> It is difficult to imagine a witness more utterly discredited than Mr. Furbee was in this case. Nonetheless, Bellofram relies solely on his testimony in advancing their mitigation argument.

<sup>37</sup> "It is now well-established that 'the doctrine of res judicata may be applied to quasi-judicial determinations of administrative agencies.'" *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 296, 517 S.E.2d 763, 773 (W.Va. 1999).

A: Well, originally it was written in as probationary, and then a line was drawn through that. I believe by my office, but I don't know by whom.

Q: Does that mean that she was not a probationary employee?

A: No, it would mean then, rather than being terminated probationary, that it was considered a quit without notice; however, on my file, the quit without notice in my file is whited out at the time when this was copied because, **when we were doing the review of the file at the time when these records or after these records were copied, it was clear from what was stated in the – our response to the unemployment, her unemployment claim, that indeed we couldn't back up that she quit.** So we whited that out.

Q: Well, I think I understand what you just said. But in the top part it says: Check reason for separation, right?

A: Yes.

Q: And you have four categories?

A: Yes, sir.

Q: One of those categories is quit without notice?

A: That is correct.

Q: And but you didn't mark that?

A: The timekeeper did not mark that.

(Tran. 642-43 (emphasis added).)

Further, Mr. Furbee was unable to contradict Ms. Young's testimony that she was unable to perform the duties of her job at Homer Laughlin China Company, and was therefore, terminated. (Tran. 634-35.) Specifically, Mr. Furbee testified that he did not know whether Ms. Young could physically perform the job. (Id.)

Because of the lack of reliable evidence provided by Bellofram, on whom the burden of production rested, the trial court had no choice but to conclude that Lynda Young left her employment from Homer Laughlin China Company for the reasons she proffered. (Tran. 636-37,

641-644.) The fact that Ms. Young's unemployment compensation was approved following the termination of her employment from Homer Laughlin China Company is demonstrative of the veracity of Ms. Young's testimony, and the lack of veracity of Mr. Furbee's testimony. (Tran. 636-637, 641-644.)

Based on the evidence and testimony, the trial court did not err. The Circuit Court was correct in concluding that Bellofram failed to satisfy its burden on the issue of mitigation of damages. Had the Court ruled otherwise it would have been a clear abuse of discretion.

**I. The Circuit Court's finding on the issue of attorneys' fees was appropriate.**

West Virginia Code § 5-11-13(c), provides for an award of attorney fees and costs to a prevailing plaintiff like Ms. Young. The purpose of the statute authorizing attorney fee awards in successful actions under the West Virginia Human Rights Act is to benefit the employee, who would otherwise have to pay the contractual attorney fees out of his or her benefits recovered in the litigation. *See Heldreth v. Rahimian*, 219 W. Va. 462, 471, 637 S.E.2d 359, 368-369 (W.Va. 2006).

The statutory fee award authorized under the Human Rights Act is a recognition by the West Virginia Legislature that the economic incentive provided by a fee-shifting mechanism is necessary to attract competent counsel for the purpose of enforcing civil rights laws that protect the interests of West Virginia citizens. *See id.* The trial court is vested with wide discretion in determining the amount of court costs and counsel fees, and the trial court's determination of such matters will not be disturbed upon appeal to this Court unless it clearly appears that it has abused its discretion. *See id.*; *Dodd v. Potomac Riverside Farm, Inc.*, 222 W.Va. 299, 308, 664 S.E.2d 184, 193 (W.Va. 2008).

In a case where the plaintiff does not prevail in all claims, this Court has held that the plaintiff should receive the attorney fees and costs related to the successful claims. *See Heldreth*, 219 W.Va. at 469, 637 S.E.2d at 366-367. “What is critical in parsing out fees for unsuccessful claims, as *Bishop Coal* makes clear, is determining whether a separate and distinct factual development was required to support those alternative theories of recovery upon which recovery was not obtained.” *See Heldreth* 219 W.Va. at 467, 637 S.E.2d at 364-365 *citing Bishop Coal Co. v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (W. Va. 1989).

In this case, although Ms. Young did not prevail in her claims for breach of contract or her tort of outrage claim, all of the proof relative to those claims was common to her Human Rights Act claim. Indeed the facts relative to Ms. Young’s unsuccessful contract claims were relevant to her claims of pretext in this matter, as the Circuit Court concluded that Bellofram’s failure to follow its progressive disciplinary policy was evidence of pretext. The evidence gathered relating to Ms. Young’s tort of outrage claim was simply the facts surrounding her termination, which is likewise indistinguishable from her discrimination claim. There are no facts and no work distinguishable as being only related to Ms. Young’s unsuccessful claims.

In fact, Bellofram does not even attempt to point to any reduction that it believes would be appropriate. (Appellants’ Brief, pp. 48-49.) Instead, Bellofram requests a blanket reduction of the type this Court has previously rejected and that runs contra to this Court’s rulings in *Bishop Coal* and *Heldreth*. The Circuit Court conducted an evidentiary hearing on the issue of fees and costs, and based its ruling on the evidence presented. Its ruling should be affirmed.

Finally, inasmuch as Ms. Young has now been forced to further litigate her rights in this appeal, she is entitled to her attorney fees and costs incurred in the appellate process. *See Heldreth*, 219 W.Va. at 473, 637 S.E.2d at 370; Syl. Pt. 2 *Orndorff v. West Virginia Dept. of*

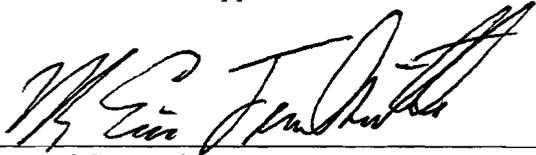
*Health*, 165 W.Va. 1, 267 S.E.2d 430 (W.Va. 1980). For all of the reasons set forth above, Bellofram's appeal is completely without merit. Therefore, this matter should be remanded to the Circuit Court for the sole purpose of determining an appropriate fee and cost award.

V. **CONCLUSION AND RELIEF PRAYED FOR:**

The Circuit Court did not err. Each of its findings was supported by substantial evidence, and the Court was well within its discretion in making the findings it made in this case. In fact, had the Circuit Court found as Bellofram proposes, such findings would have been against the manifest weight of the evidence, and would have been clearly erroneous.

The treatment of Ms. Young by Bellofram was inappropriate and illegal. There is no question that she was discriminated against due to her age and sex. The West Virginia Human Rights Act exists to provide relief to people mistreated the way Ms. Young was in this case. The Circuit Court's verdict in this case should be affirmed, and Ms. Young awarded her fees and costs expended in this appeal.

LYNDA YOUNG, Appellee, Plaintiff Below

By   
Of Counsel

M. Eric Frankovitch, Esq. (#4747)  
Kevin M. Pearl, Esq. (#8840)  
FRANKOVITCH, ANETAKIS, COLANTONIO & SIMON  
337 Penco Road  
Weirton, WV 26062  
(304)723-4400

**CERTIFICATE OF SERVICE**

Service of the foregoing *Brief of the Appellee, Lynda Young* was had upon the following, by mailing a true and correct copy thereof by United States mail, postage prepaid, this 22 day of March, 2010, in accordance with Rule 15 of the West Virginia Rules of Appellate Procedure:

Ancil G. Ramey, Esq.  
Peter J. Raupp, Esq.  
Step toe & Johnson, PLLC  
P.O. Box 1588  
Charleston, WV 25326-1588

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

A.L. Emch, Esq.  
W. Scott Evans, Esq.  
Jackson Kelly PLLC  
P.O. Box 553  
Charleston, WV 25322-0553

Joyce Goldstein, Esq.  
Goldstein Gragel LLC  
526 Superior Avenue, East  
1040 The Leader Building  
Cleveland, OH 44114

By   
Of Counsel

M. Eric Frankovitch, Esq. (#4747)  
Kevin M. Pearl, Esq. (#8840)  
FRANKOVITCH, ANETAKIS, COLANTONIO & SIMON  
337 Penco Road  
Weirton, WV 26062  
(304)723-4400