

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

No. 35439

**LYNDA YOUNG,  
PLAINTIFF BELOW, APPELLEE**

VS.

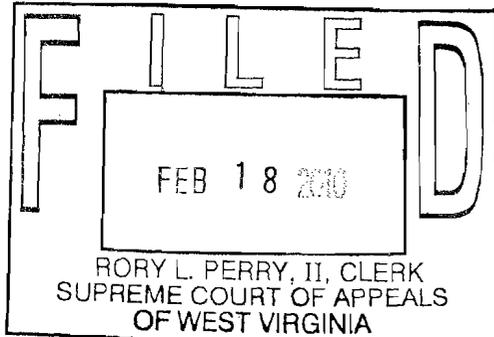
**BELLOFRAM CORPORATION, D/B/A MARSH  
BELLOFRAM CORPORATION, AND JOSEPH COLLETTI,  
DEFENDANTS BELOW, APPELLANTS**

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

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**BRIEF OF THE *AMICI CURIAE***



**WEST VIRGINIA CHAMBER OF  
COMMERCE and WEST VIRGINIA  
MANUFACTURERS ASSOCIATION as  
*Amici Curiae***

By Counsel

A.L. EMCH (WV Bar No. 1125)  
W. SCOTT EVANS (WV Bar No. 5850)  
JACKSON KELLY PLLC  
P.O. Box 553  
Charleston, WV 25322-0553  
Telephone (304) 340-1172

## I. INTRODUCTION

This is a brief *amici curiae* by the West Virginia Chamber of Commerce (the “Chamber”) and the West Virginia Manufacturers’ Association (the “WVMA”).

At stake in this appeal is the ability of employers large and small to control their workplaces through their supervisors and to comply with the law. The West Virginia Human Rights Act (the “Act”) imposes an obligation upon employers to enforce the Act by protecting their employees from acts of discrimination, harassment, and retaliation on the basis of their race, sex, religion, national origin, age and other protected categories. This Court has held the employers that fail, through the inaction of their supervisors, to adequately respond to acts of discrimination and harassment among coworkers will be held liable for that conduct under the Act.

The Circuit Court in this case found that Appellee, Lynda Young, had acquiesced to serious and disturbing incidents of harassment and discrimination in the workplace. Bellofram, cognizant of its responsibilities under the Act and its own policies, responded decisively to remedy the situation. Bellofram’s response included the discharge of two male employees who had engaged in the harassment and their female supervisor, Young, who had ignored her subordinates’ conduct. Even though the Circuit Court found the reasons for Bellofram’s decision to be legitimate (*i.e.*, Young had in fact acquiesced to serious harassment and discrimination by her subordinates), at trial years later, the Circuit Court substituted its judgment for that of Appellant Colletti by holding that the discipline imposed on Young was too severe and that she should have been demoted instead of discharged. To meet their obligations under the Act and avoid a Catch-22, employers

must be free of the judicial second guessing of their decisions that the Circuit Court's decision in the instant case represents.

The Circuit Court further applied an improper legal standard to determine when two employees are similarly situated. In failing to hold that similarly situated employees must have dealt with the same supervisor, the Circuit Court binds the hands of employers, by requiring a new company president to be forever bound to decisions made by prior supervisors. The Circuit Court failed to apply a rule of law that is generally accepted nationally in employment discrimination cases. The *amici* request that this Court clarify that the same supervisor rule is also to be applied in cases arising under the Act.

Given the impact of this case on the public policy of the state, the *amici* in this case have a clear interest. The Chamber, with a 5,000 member reach, is the recognized voice of business in West Virginia. In that role, it strives to encourage public policies that foster the relocation of new business to and the expansion of existing businesses within the state, so that all West Virginians can enjoy the benefits of a robust economy. In furtherance of this goal, the Chamber has been a consistent advocate of a legal system that is predictable in its outcomes and functions within the mainstream of established jurisprudence, so as to ensure that businesses in West Virginia and the employees of those businesses benefit from the operation of the same general ground rules as their competitors across the country.

Founded in 1915, the WVMA represents the interests of manufacturers through advocacy and educational efforts to policy makers at both the state and federal levels of government. WVMA's membership represents thousands of employees and all segments of manufacturing throughout the state. WVMA's primary goal is to focus on protecting

West Virginia's manufacturing base and to work toward a business climate that stimulates investment and job growth. In furtherance of this goal, the WVMA has advocated for a legal system that applies the law consistently with established precedent and with the accepted jurisprudence from across the country. In doing so, the WVMA seeks to make the state an attractive location for manufacturing investment and job growth.

The Chamber and the WVMA respectfully submit that a trial court, applying the Act, should not be empowered to second guess an employer's legitimate business decision. In such cases the court's role should be limited to determining if the employer's decision was based upon legitimate factors other than a plaintiff's race, age, or sex. Once the court finds the decision to be nondiscriminatory, the court should not be empowered to make its own determination as to the appropriate level of discipline. To find otherwise would subject every employee disciplinary decision to an after-the-fact, judicial review under the Act.

## **II. STATEMENT OF FACTS**

### **A. Bellofram Prohibits Harassment and Discrimination**

Like most responsible employers in the state, Bellofram maintains a sexual harassment policy. (654-655). Bellofram also conducts regular training on the sexual harassment policy. (280, D. Ex. 1). The policies on sexual harassment convey the Company's strong disapproval of such conduct, and warn that sexual harassment is a "serious offense." The policy also provides that any person who believes he or she has been subject to sexual harassment should report the incident to any manager of the Company. *Id.* Supervisors, like Young, are aware that tolerating or failing to respond to

prohibited harassment or discrimination of their subordinates is grounds for their discharge. (284).

**B. Donny Shuman Was Demoted By Another Manager**

Before Joe Colletti was even employed as Bellofram's President, Donny Shuman was demoted by Bellofram from his supervisor position for inadequate work performance. Specifically, Shuman permitted his subordinates to take extended unauthorized breaks. (608). They took fifteen-minute breaks instead of ten minutes. (608). Shuman never tolerated sexual harassment or racial harassment by anyone. (60-61, 64, 609). Even Young herself testified that Shuman "didn't have a clue" about the sexual and racial harassment occurring on second-shift at Bellofram. (289).

**C. Bellofram Hired and Promoted Young**

Bellofram hired Young in September 1994; she worked as a molder in the diaphragm area of the plant on second shift. As a part of her training, Young reviewed Bellofram's sexual harassment policy, attended harassment training classes, and took quizzes to test her understanding of harassment. (280, D. Ex. 1). In January 2004, Bellofram offered Young the second shift supervisory position for the molding and preform departments in the diaphragm division. She accepted the promotion and assumed her supervisory duties on June 28, 2004. (589-590, D. Ex. 2). Young's supervisory responsibilities, of which she was admittedly aware, included enforcing plant policies and procedures, and issuing disciplinary action if necessary. (279-280, 283-284).

**D. Young's Subordinates Reported Harassing and Threatening Conduct**

In early September 2005, Sharon Coleman, Human Resources Manager for Bellofram, met with an hourly employee, Ron Jackson, whom Young supervised on

second shift. (663). Jackson reported misconduct by three other hourly employees, Bill Friley, Adam Farmer and to a lesser extent, Alan Lockwood. (664). Jackson reported that Farmer and Friley had been making harassing and intimidating comments to him and statements to a new female employee with suggestive sexual innuendo. (664-667). Friley, Farmer and Lockwood were hourly employees assigned to the second shift supervised by Young. (665).

Coleman reported Jackson's complaints to Bellofram's President, Joseph Colletti. (671). Colletti had been employed by Bellofram for only a short time at the time these issues came to his attention. Coleman considered these reports to be the most serious she had seen in her career. (671). Coleman discovered that the incidents Jackson reported only scratched the surface of Friley, Farmer, and Lockwood's misconduct. (669-670). Thereafter, Bellofram retained an outside human resources consultant to conduct a full investigation and to report any findings to the Company. (672-673).

**E. Bellofram Hired an Independent Investigator**

Bellofram retained Mary Ellis, President of Mary Ellis Associates, LLC. (722, D. Ex. 22). Ellis had over 28 years of human resources management experience and has a degree in labor and human resources management from The Ohio State University. She had experience in performing investigations of employee misconduct. (370, 386). The Company provided Ellis with all she needed to complete her investigation in the manner she felt was best suited to discover the truth. (388-389). Bellofram hired Ellis to ensure a fair and comprehensive investigation was conducted into these very serious allegations. (720). Ultimately, Ellis completed interviews of twenty-seven employees at the plant

over the course of four days. She also interviewed Young, Friley, Farmer, and Lockwood. (398-399).

**F. Young Is Terminated**

After Ellis completed her investigation, she reported her findings to the Company. (D. Ex. 8). Ellis's investigation determined that: (1) Friley used racially and sexually inappropriate language, intended to harass a black co-worker, and intimidated and threatened other employees; (2) Farmer made inappropriate sexual comments to female co-workers, engaged in inappropriate conduct with other male employees, and made threatening comments to other employees; and (3) Lockwood stared at female employees' breasts, put his arm around female co-workers, and stared at women. (426-441, D. Ex. 8).

With regard to Young, Ellis concluded that Young witnessed several instances of inappropriate language and/or conduct, yet never acknowledged the conduct and never took remedial action to stop or prevent the behavior. (427, 434, 436, D. Ex. 8). Ellis also found that Young failed to take remedial action following complaints from her employees regarding various instances of verbal and physical harassment, instead ignoring or laughing off each of the complaints. (436, 438). Ellis' report identified no other supervisors who had ignored Friley, Farmer and Lockwood's misconduct and no other supervisors who failed to respond to employee harassment complaints. (D. Ex. 8).

Based upon Ellis' findings, Colletti terminated Young's employment for permitting racial and sexual harassment to take place under her supervision and for acquiescing to such conduct. (725, 733-742, D. Ex. 7). At the same time, Bellofram terminated Friley and Farmer, both men younger than Young.

### III. DISCUSSION OF LAW

#### A. THE COURT SHOULD HOLD THAT TO BE SIMILARLY SITUATED THE PLAINTIFF MUST HAVE DEALT WITH THE SAME SUPERVISOR.

The Circuit Court found that Young was similarly situated to Donny Shuman. See Order and Opinion, Conclusions of Law ¶ 7. The legal definition of “similarly situated” is of significant concern to employers. The Circuit Court erred in its application of this legal standard when it found that Shuman was similarly situated.

There is no dispute that Donny Shuman was demoted from his supervisory position before Joseph Colletti was even hired as Bellofram’s President. It is further undisputed that Colletti was the decisionmaker responsible for Lynda Young’s discharge. The *amici* understand that the conduct Shuman was demoted for was significantly different than the conduct for which Young was discharged. Regardless, this Court should hold that because the decision to demote Shuman was made by a different decisionmaker than was the decision to discharge Young, the two cannot be found to be similar.

##### 1. “Similarly Situated” Standard Under West Virginia Law

To prevail in this case, Young bore the burden to prove that a nonmember of the protected class was not disciplined, or disciplined less severely than she was for similar conduct. *State ex rel. Human Rights Com’n v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W. Va. 711, 719, 329 S.E.2d 77, 85 (1985). To satisfy this similar conduct requirement, employees must have been “engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.” *Mayflower Vehicle Sys., Inc. v. Cheeks*, 218 W.

Va. 703, 716-717, 629 S.E.2d 762, 775-76 (2006) (quoting *Perkins v. Brigham & Women's Hosp.*, 78 F.3d 747, 751 (1st Cir. 1996) (quoting *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992))).

Logic dictates that if all other factors are similar and different decisions are made with respect to individuals that fall within and outside of the protected category, an inference of discrimination can be raised. However, logic also dictates that when different decision-makers make different decisions, no inference of discrimination is created because different supervisors can be expected to handle similar circumstances differently. Although apparently a question of first impression in this state, this Court should hold that to be considered “similarly situated” two individuals must have dealt with the same supervisor.

## **2. Employers Must Not Be Bound to Old Decisions of Prior Supervisors**

Even if Shuman had engaged in the exact same misconduct in which the Circuit Court found Young to have engaged, the need to consider whether or not the individuals had dealt with the same decision-maker is obvious. If Shuman had responded to serious acts of harassment and discrimination with indifference, as did Young, he too should have been discharged. If Shuman had acted as Young did and Bellofram had not responded by discharging him, Bellofram would face liability if Shuman’s misconduct were to lead to a claim under the Act. However, even if Colletti had been aware of the Company’s prior decision to demote as opposed to terminate Shuman, Colletti, as the new President of Bellofram, must be free to make a different and, indeed, better decision than had been made in the past by prior decision-makers. (744)

The issue for the Circuit Court should have been whether Colletti was motivated by Young's age or sex in making his decision to discharge her. It is logical to expect that different decision-makers will often make different decisions when faced with similar circumstances. For this reason, courts across the country have recognized that individuals must have been dealing with the same decision-maker in order to be similarly situated. If this were not the case, employers, such as Bellofram, would be forever tied to the precedent of bad decisions of a prior supervisor.

Certainly, this Court expects employers to take appropriate action in each case in responding to incidents of harassment and discrimination. To bolster employers' efforts to protect their employees, this Court should make it clear that employers will not be condemned to forever stay consistent with the potentially poor decisions of prior managers. To hold otherwise would bind employers to their prior decisions and prevent a new manager such as Colletti from making sure that his first decision in dealing with a problem supervisor is a good decision. Accordingly, this Court should make it clear to trial courts that in inquiring into the motives of a decision-maker in an employment discrimination case filed under the Act, they should consider only prior decisions of that same decision-maker when determining whether two individuals are similarly situated. Applying this rule to the instant case necessitates a reversal of the Circuit Court's decision.

**3. The "Same Supervisor" Standard Has Been Adopted Across the Country.**

In addition to the policy reasons underlying adoption of the "same supervisor" requirement, this Court should adopt it because it is consistent with the weight of authorities in the United States. This Court and the courts of West Virginia rely upon

federal case law interpreting federal employment discrimination statutes in deciding cases under the Act. *See Mayflower*, 218 W. Va. at 715-716, 629 S.E.2d at 774-75 (citing a number of federal decisions in adopting its standard); *Kanawaha Valley Reg'l Transp. Comm'n. v. Human Rights Comm'n.*, 181 W. Va. 675, 678, 383 S.E.2d 857, 860 (1989) (noting West Virginia's "reliance on applicable federal cases" in applying state discrimination law). The guidance from these decision shines a light on the current path of the law under the Act.

Across the country, federal courts have consistently found that dealing with the same supervisor or decisionmaker is critical when determining whether two individuals are similarly situated. *Tolen v. Ashcroft*, 377 F.3d 879, 882 (8th Cir. 2004) ("To be similarly situated, the comparable employees 'must have dealt with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.'"); *Bio v. Federal Express Corp.*, 424 F.3d 593, 597 (7th Cir. 2005) (To be similarly situated for purposes of a Title VII employment discrimination action, two employees must be "directly comparable...in all material respects...including whether the employees...were subordinate to the same supervisor."); *Shumway v. United Parcel Serv.*, 118 F.3d 60, 64 (2d Cir. 1997) (denying similarity when compared employees had different supervisors); *Timms v. Frank*, 953 F.2d 281, 287 (7th Cir. 1992) (stating that "it is difficult to say that the difference was more likely than not the result of intentional discrimination when two different decision-makers are involved."); *Kendrick v. Penske Transp. Svcs. Inc.*, 220 F.3d 1220, 1232 (10th Cir. 2000) ("An employee is similarly situated to the plaintiff if the employee deals with the same supervisor and is subject to the 'same standards governing performance evaluation and

discipline.”); *Smith v. Leggett Wire Co.*, 220 F.3d 752, 762 (6th Cir. 2000) (To be similarly situated, ‘the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.”); and *Childs-Pierce v. Utility Workers Union of America*, 383 F. Supp. 2d 60, 70 (D.D.C. 2005) (To be similarly situated for purposes of Title VII, co-workers “must have dealt with the same supervisor, have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.”)

The Sixth Circuit has given the issue the most treatment, and takes the strongest stance. In *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6<sup>th</sup> Cir. 1992), which this Court quoted favorably in *Mayflower*, through its citation to *Perkins*, the Sixth Circuit held that in order to be similarly situated, the employees in question must have dealt with the same supervisor. 964 F.2d at 583.

The First Circuit too has recognized this principle. In *Rodriguez-Cuervos v. Wal Mart Stores, Inc.*, 181 F.3d 15 (1<sup>st</sup> Cir. 1999), the plaintiff alleged disparate treatment when he was given worse job evaluations than a white co-worker, and was later demoted. 181 F.3d at 21. The court recognized that the evaluations were performed by different supervisors, and called this a “material” factor. *Id.* The court, rejecting discrimination on this ground, dismissed the evaluations as “evidence of different opinions by different evaluators under different circumstances.” *Id.*

The Fourth Circuit has noted that “[i]f different decisionmakers are involved, employees are generally not similarly situated.” *Heyward v. Monroe*, 1998 WL 841494, at \*2 (4th Cir. Dec. 7, 1998); see *Brown v. Runyon*, 1998 WL 85414, at \*2 (4th Cir. Feb. 27, 1998) (refusing to find employees similarly situated when different supervisors made decisions independently). Given this Court’s rulings that the Act be applied consistently with Title VII, the Circuit Court should have applied this generally accepted legal principle. It did not, thus warranting reversal and given the undisputed facts, entry of judgment in Appellants’ favor.

**B. THE COURT SHOULD HOLD THAT CIRCUIT COURT JUDGES DO NOT SIT AS SUPER-PERSONNEL DEPARTMENTS IN DISCRIMINATION CASES**

Once the Circuit Court determined that harassment had occurred and that Young had responded to that harassment with “indifference,” the inquiry should have ended and Bellofram’s decision to discharge Young for her lack of response to serious misconduct should have been affirmed. The Circuit Court found that Young had responded poorly to harassment by three of her friends, who were described by the Circuit Court as “miscreants.” See Opinion and Order, Findings of Fact ¶ 14. The Circuit Court further agreed that Young was not fit to be a supervisor and was legitimately disciplined for her role in these incidents. Yet, in finding that Young should have been demoted instead of discharged, the Circuit Court engaged in second guessing of the employer’s business decision. This is simply not the role for a court in an employment discrimination case.

Courts do not sit as super personnel departments. *Smith v. University of N. Carolina*, 632 F.2d 316, 346 (4th Cir.1980); *Bender v. Hecht’s Dep’t Stores*, 455 F.3d 612, 627-28 (6th Cir. 2006). The law does not require an employer to make, in the first

instance, employment choices that are wise, rational, or even well-considered. An employer's decision need only be nondiscriminatory. *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1156-57 (2d Cir. 1978); *Rodriguez-Cuervos*, 181 F.3d at 22.

This Court has instructed that “common sense must be applied to the facts in each case to determine whether the employer took direct and prompt action reasonably calculated to end the harassment.” *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995), . In light of the standards imposed by this Court upon employers and their responsibility to take “swift and decisive action” in response to incidents of harassment, courts should not second guess an employer's decision to deal decisively with a problem supervisor that allows her friends to engage in horrific harassment at the expense of her subordinates. Accordingly, once the Circuit Court determined that Young was legitimately disciplined for a reason that she admitted to be a terminable offense, its inquiry should have stopped. Courts are not empowered to second guess the fairness or rationality of an employer's nondiscriminatory business decision. *Rodriguez-Cuervos*, 181 F.3d at 22.

**C. THE CIRCUIT COURT'S RULING WILL HAVE A CHILLING EFFECT ON EMPLOYER RESPONSE TO WORKPLACE HARASSMENT AND DISCRIMINATION**

The policy of the Act was well-served when Bellofram terminated Young for allowing her friends to engage in habitual and vile acts of harassment and discrimination of their coworkers, Young's subordinates. Bellofram recognized that not only were the harassers unfit to keep in the workforce, but also that a supervisor who witnesses such acts has a legal duty to act. Indeed, had Young's subordinates brought a claim of harassment under the Act, Young herself would have no doubt been a named defendant.

In this case, Bellofram and Colletti did what the Act requires. When they became aware of the conduct that had occurred under Young's supervision, they took decisive action to ensure that it would not happen again. The Circuit Court's ruling punished them for acting in accordance with the law. This decision, if allowed to stand, will have a chilling effect on the ability and willingness of employers to respond to acts of harassment and discrimination in their workplaces.

**1. This Court Has Imposed an Obligation Upon Employers to Act through their Supervisors to Prevent and Respond to Incidents of Harassment**

In *Hanlon*, this Court made it clear that “[w]here an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result.” 195 W. Va. at 108, 464 S.E.2d at 750. As this Court recently explained,

[O]nce an employer knows of the unlawful conduct executed by a victim's coworkers, this Court has directed that [t]he aggravated nature of discriminatory conduct, together with its frequency and severity, are factors to be considered in assessing the efficacy of an employer's response to such conduct.” Instances of aggravated discriminatory conduct in the workplace, where words or actions on their face clearly denigrate another human being on the basis of race, ancestry, gender, or other unlawful classification, and which are clearly unacceptable in a civilized society, are unlawful under the West Virginia Human Rights Act, West Virginia Code §§ 5-11-1 to -20 (1999), and are in violation of the public policy of this State. When such instances of aggravated discriminatory conduct occur, *the employer must take swift and decisive action to eliminate such conduct from the workplace.*

Syl. pt. 2, *Colgan Air, Inc. v. West Virginia Human Rights Comm'n*, 221 W. Va. 588, 656 S.E.2d 33 (2007) (citing Syl. pt. 3, *Fairmont Specialty Servs. v. West Virginia Human Rights Comm'n*, 206 W. Va. 86, 522 S.E.2d 180 (1999)).

The *amici* recognize that the law of West Virginia imposes upon employers the serious and important obligation to ensure that workplaces are free of the sort of harassment and discriminatory conduct which the Human Rights Act is designed to prohibit. Indeed, employers face significant legal liability when a supervisor acquiesces to or contributes through inaction to workplace harassment and discrimination. The burden imposed upon employers is high and the risks are significant. Moreover, the only way an employer has to act is through its supervisors, who are its agents in carrying out the policies and legal obligations of their employer. By imposing liability on Bellofram and Colletti, the Circuit Court tied the hands of employers in this state, who are attempting to respond to incidents of harassment and discrimination. *Amici's* members want to do the right thing for their employees, but they need this Court's help. Therefore, *amici* urge the Court to reverse the Circuit Court and remand with instructions to enter judgment in Appellants' favor.

**2. The Circuit Court's Ruling Creates a Catch-22 for Bellofram and All Employers in the State.**

Upon concluding its investigation into the conduct that had taken place under Young's supervision in second shift, Bellofram's Human Resource Manager described the findings as the most serious reports of harassment that she had seen in her career. (671). The Circuit Court agreed that Friley, Farmer, and Lockwood had engaged in serious misconduct. The Circuit Court also appropriately found that Young's response to these incidents was wholly inadequate, describing her as indifferent.

Given the results of the investigation, Bellofram's new president was charged with deciding how to respond. The law required Colletti to take action to eliminate the conduct from the workplace. In this case that meant not only removing the harassers but

also discharging Young. Young knew that Bellofram prohibited this conduct. Young knew that, as a supervisor, she would have to take disciplinary action or even report it to Human resources or her manager but she did not do so. Young had ignored the complaints raised with her and, through her failure to act, forced an employee to resign rather than continue to be subjected to the harassment and subjected many of her subordinates to the “miscreants” continued conduct. (555-56). Given that Young knowingly enabled the harassment, Colletti made the decision to discharge Young.

The relevant inquiry is whether or not Colletti was motivated by Young’s age and or sex in making the discharge decision. Plainly, he was not. At the same time Colletti discharged Young, he also decided to discharge two younger men and to hire as Young’s replacement a woman who was herself within the protected age category.

Unless the Circuit Court’s ruling is reversed, employers will be placed in a Catch-22 situation. They are required to respond swiftly and decisively to reports of harassment in order to avoid liability under the Act. On the other hand, if their response is more swift or decisive than the Circuit Court determines, years later, to have been “fair” they will face liability under the Act. This no-win scenario will cause confusion and discourage employers from acting in response to incidents of harassment and discrimination in their workplaces.

#### **IV. CONCLUSION**

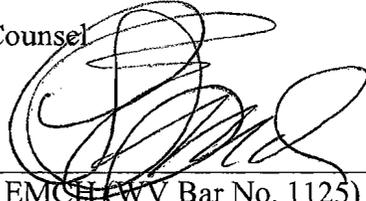
The Opinion and Order of the Circuit Court of Hancock County improperly considered decisions made by different supervisors in finding that Appellants treated a similarly situated individual more favorably than they did Appellee. Furthermore, the Circuit Court improperly second guessed what it found to be a legitimate decision of

Appellants. Second guessing legitimate business decisions of employers is not the proper role of the courts, and in this case such second guessing, if allowed to stand, would interfere with the ability of employers across the state to respond to incidents of harassment and discrimination as they must to avoid legal liability.

WHEREFORE, the *amici curiae*, the West Virginia Chamber of Commerce and the West Virginia Manufacturers' Association, respectfully request that the rulings of the Circuit Court of Hancock County be reversed and remanded with instructions to enter judgment in Appellants' favor.

**WEST VIRGINIA CHAMBER OF  
COMMERCE and WEST VIRGINIA  
MANUFACTURERS ASSOCIATION as  
*Amici Curiae***

By Counsel



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A.L. EMCH (WV Bar No. 1125)  
W. SCOTT EVANS (WV Bar No. 5850)  
JACKSON KELLY PLLC  
P.O. Box 553  
Charleston, WV 25322-0553  
Telephone (304) 340-1172

## CERTIFICATE OF SERVICE

I, A.L. Emch, Esq., do hereby certify that on the 18th day of February, 2010, I served the foregoing "BRIEF OF THE *AMICI CURIAE*" upon the following by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

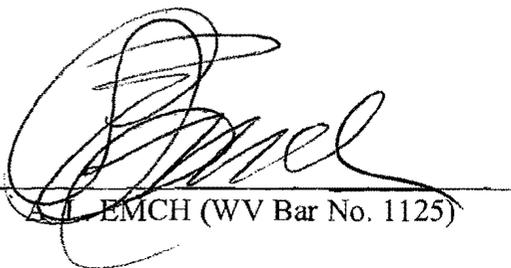
### Counsel for Appellants

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

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

### Counsel for Appellee

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



A.L. EMCH (WV Bar No. 1125)

7696244