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IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA

LYNDA YOUNG,

Plaintiff,

vs.

CIVIL ACTION NO. 06-C-55R

BELLOFRAM CORPORATION, d/b/a
MARSH BELLOFRAM
CORPORATION, et al.,

Defendants.

December 2 2008
Entered In Civil Order Book
No. 15 Page 223
Bruna R. Jackson
Clerk of said Court

MEMORANDUM OF OPINION AND ORDER

On June 10 through June 12, 2008, came the Plaintiff, in person and by her counsel, M. Eric Frankovitch and Kevin M. Pearl, and came the Defendants, in person and through their counsel, Nelson D. Cary and Daniel J. Clark, this matter having been set as a bench trial before this Court upon the Plaintiff's Amended Complaint.

The Plaintiff's Amended Complaint states six causes of action against Marsh Bellofram Corp.:

- 1) Wrongful termination on the basis of age and/or gender in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia;
- 2) Discrimination on the basis of age in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia;
- 3) Discrimination of the basis of sex in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia;

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- 4) Breach of contract arising out of Defendants' promise of continued employment to the Plaintiff;
- 5) Breach of contract arising out of the Defendants' failure to follow its progressive discipline policy in regard to the Plaintiff's termination; and
- 6) The tort of outrage, along with a request for punitive damages.

Ms. Young alleges that her termination was motivated by her age and gender. Ms. Young further alleges that at the time she accepted the supervisor position she was promised that she could have the position until retirement, and that if the promotion was not successful, she could be returned to her former position in the bargaining unit.

The Defendants allege that the termination of Ms. Young was not motivated by her age or gender. They maintain that the termination of the Plaintiff was solely due to her failure to properly supervise or discipline three employees under her supervision, Bill Friley, Adam Farmer, and Alan Lockwood, who are alleged to have engaged in sexual and/or racial harassment. The Defendants further allege that their decision to terminate Ms. Young was based upon a report made by Mary Ellis, an independent investigator hired by the Defendants. The Plaintiff maintains that Defendants' proffered reasons for her termination are pretextual in nature.

FINDINGS OF FACT

1. The Plaintiff, Lynda Young, was employed by Defendant, Bellofram Corporation d/b/a Marsh Bellofram for approximately eleven years beginning in 1994, and progressed through the ranks from molder, to senior molder, to master molder, to lead. Ms. Young served in the lead position for approximately six years and was

demoted to master molder following the demotion of her supervisor, Donnie Shuman, to the lead position.

2. On June 28, 2004, Ms. Young was promoted to the position of supervisor, a non-bargaining unit 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.
3. At the time of her termination the Plaintiff was sixty (60) years old.
4. The reason proffered by Defendants for Ms. Young's termination was that she tolerated or allowed sexual and/or racial harassment to occur under her supervision.
5. In order to investigate employee complaints of harassment by Mr. Friley, Mr. Farmer, and Mr. Lockwood the Defendant, working through Desco Corporation, an affiliated entity, hired a consultant named Mary Ellis to conduct an investigation.
6. The finding that Ms. Young had tolerated or allowed harassment to occur was based on the findings of the report of Mary Ellis.
7. The investigation was initiated on the basis of a complaint from an employee, Ron Jackson, who complained to Defendant's human resource employee, Sharon Coleman, regarding alleged racial harassment by Mr. Friley, Mr. Lockwood, and Mr. Farmer.
8. Mary Ellis conducted her investigation by interviewing 27 employees as well as Mr. Friley, Mr. Farmer, Mr. Lockwood, and Plaintiff Lynda Young.

9. Ms. Ellis did not interview Candy Travis, the Plaintiff's direct supervisor, nor did she interview Joe Grilli, another supervisor of the Plaintiff, both of whom testified that Ms. Young was performing satisfactorily in her position as supervisor.
10. In conducting her interviews, Ms. Ellis did not confine the interviewees to any particular timeframe for the complaints they had regarding Mr. Friley, Mr. Farmer, Mr. Lockwood, and Ms. Young. As such, Ms. Ellis learned and reported conduct that had occurred before Ms. Young was the supervisor of the department, including periods where a gentleman named Donnie Shuman was the supervisor.
11. Mr. Friley, Mr. Farmer, and Mr. Lockwood did admit to engaging in some of the conduct alleged, but indicated that it was significantly milder than what was alleged against them, and that no conduct occurred in the presence of Ms. Young. They also indicated that their conduct had not changed at all from the time they were supervised by other individuals to the time they were supervised by Ms. Young.
12. The only employees who testified that they complained to Lynda Young about improper conduct during her time as supervisor were Angela Kirkbride who testified that she talked to Ms. Young about Alan Lockwood staring at her, and Ron Jackson who testified that he spoke to Ms. Young about the threatening comments and gestures that were made toward him by Mr. Friley and Mr. Farmer.
13. After Mr. Jackson reported to Ms. Young, she spoke to Mr. Friley and Mr. Lockwood about their actions. The harassment stopped for about a week before it

resumed. Mr. Jackson again reported the harassment to Ms. Young along with reports of sexual harassment towards female employees.

14. At this time, Ms. Young's response to Mr. Jackson was to ignore the harassment.

She also told Mr. Jackson that she was the target of sexual harassment but that she ignored the comments. Ms. Young's antidote to the conduct of the three miscreants was indifference.

15. Ms. Ellis' investigation revealed that other male supervisory employees, J.D.

Harris and Donnie Shuman, were aware of the conduct alleged by Mr. Friley, Mr. Farmer, and Mr. Lockwood.

16. Prior to Ms. Young's promotion to supervisor, Donnie Shuman was her supervisor.

17. During Mr. Shuman's tenure as supervisor, much of the misconduct that allegedly formed the basis for the termination of Mr. Friley, Mr. Farmer, and Ms. Young, and the suspension of Mr. Lockwood also occurred.

18. Mr. Shuman was demoted from the salaried position of supervisor and was permitted to return to an hourly position in the bargaining unit when he failed to control the employees working under him.

19. Ms. Young was not given the option of returning to an hourly position in the bargaining unit when she was terminated from her supervisor position despite assurances by the Defendant that this opportunity would be available if her promotion proved to be unsuccessful.

20. Defendants' trial exhibit No. 6, Marsh Bellofram's "Office Rules and Standards of Conduct," in Rule No. 15 provides for progressive disciplinary action for

violation of any rules or standards of conduct. The First and Second offense require a written warning. The Third offense requires a two-day suspension. The Fourth offense requires discharge from employment.

21. Rule No. 8 in Marsh Bellofram's "Office Rules and Standards of Conduct" provides that employees shall "[p]erform duties and responsibilities of job properly and on time. Perform all work assigned."
22. Ms. Young violated Rule No. 8 and was suspended for 18 days before she was ultimately terminated. Marsh Bellofram did not follow its progressive disciplinary policy.

CONCLUSIONS OF LAW

1. "A complainant in a disparate treatment, discriminatory discharge case ... may meet the initial *prima facie* burden by proving, by a preponderance of the evidence, (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct." Syllabus Point 3, Barefoot v. Sundale Nursing Home, 193 W.Va. 475, 457 S.E.2d 152 (1995).
2. Once the plaintiff has stated a *prima facie* case, the burden then shifts to the defendant to provide a non-discriminatory basis for the plaintiff's discharge. *Id.* at 160.
3. If the defendant provides a non-discriminatory reason for the discharge, the plaintiff is accorded the opportunity to demonstrate that either age, gender, or

ancestry was a determinative factor in the defendant's employment decision or the defendant's articulated rationale was merely a pretext for discrimination. *See Id.*

4. Ms. Young has stated a prima facie case of employment discrimination arising out of her termination. First, being a woman at the age of 60 when she was terminated puts her in a protected class. Second, she was discharged from employment. Third, a nonmember of the protected group, Donnie Shuman, was disciplined less severely than she was, though both engaged in similar conduct.
5. The Defendants' non-discriminatory reason for Ms. Young's termination, based on the report of Mary Ellis, is that she permitted racial and sexual harassment to take place under her supervision and for failing to respond appropriately to employee complaints.
6. The Defendant failed to follow its progressive disciplinary policy in regards to Ms. Young. Under the policy, she should have been given at least two written warnings before being put on a two-day suspension. Only after committing a fourth offense and after receiving three previous warnings, should Ms. Young have been terminated.
7. Despite assurances by the Defendant, Ms. Young was not allowed to return to the bargaining unit if her supervisor tenure was unsuccessful. Conversely, when Donnie Shuman was demoted from the same supervisor position, he was allowed to return to the bargaining unit. Being a similarly situated individual, Donnie Shuman was disciplined less severely than Ms. Young.

8. THEREFORE, this Court concludes that the Defendants' reason for terminating Ms. Young was pretextual in nature and that Ms. Young's age and/or sex was a determinative factor in its decision to terminate her employment.
9. As such, this Court finds that the conduct of Defendants, Bellofram Corporation and Joseph Colletti, violated the West Virginia Human Rights Act and substantial public policy of the State of West Virginia, and Judgment should be entered for the Plaintiff as set forth below.

DAMAGES

1. In support of her claim for damages, Plaintiff submitted 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.
2. The total wage and benefit loss of the Plaintiff as calculated by Dr. Raymond is \$180,376.00 based upon the assumption that Ms. Young had been retained as an hourly employee in the bargaining unit.
3. 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 diligence shifts to the defendant. Syllabus Point 4, Paxton v. Crabtree, 400 S.E.2d 245 (W.Va. 1990).
4. 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. Consolidation Coal Co., 524 S.E.2d 672, 682 (W.Va. 1999).

5. In support of their mitigation defense, Defendants 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 Defendants.
6. Mr. Furbee attempted to testify that Ms. Young voluntarily left Homer Laughlin indicating that she quit without notice and would not work shifts.
7. Ms. Young testified that she attempted to look for other employment beginning at the time of her suspension, and continuing through the trial date.
8. Ms. Young denied that she left Homer Laughlin willingly, and stated that she was told that she was not strong enough to perform the job she was hired for and was terminated.
9. Mr. Furbee was not able to verify that Ms. Young left her employment from Homer Laughlin for any reason other than the reasons proffered by the Plaintiff, and Plaintiff's unemployment compensation began again following the termination of her employment from Homer Laughlin.
10. THEREFORE, this Court finds that the Plaintiff attempted to obtain work following her termination from Bellofram Corporation. This Court also finds that the Plaintiff did not leave the employment of Homer Laughlin China Company willingly and the Defendants have failed to satisfy their burden on the issue of mitigation of damages.

JUDGMENT

Having reviewed the law and the evidence and having made the foregoing findings of facts and conclusions of law, the Court enters judgment in favor of the

Plaintiff in the amount of **\$180,376.00** in compensatory damages for lost wages and benefits on the Plaintiff's claims for (1) Wrongful termination on the basis of age and/or gender in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia; (2) Discrimination on the basis of age in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia; and (3) Discrimination on the basis of sex in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia.¹

In determining whether an award of prejudgment interest is appropriate, the Court must determine whether West Virginia law expressly forbids inclusion of interest. *See Miller v. Fluharty*, 500 S.E.2d 310 (W.Va. 1997). An award of prejudgment interest is mandated by statute unless the law expressly forbids it. *See Grove by and through Grove v. Myers*, 382 S.E.2d 536 (W.Va. 1989); W.Va. Code §56-6-31. The purpose of prejudgment interest is to fully compensate the injured party for the lost use of the funds that have been expended. *See Wilt v. Buracker*, 443 S.E.2d 196 (W.Va. 1993). Pursuant to West Virginia Code §56-6-31, and the Administrative Order of the Supreme Court, prejudgment interest, for judgments and decrees entered during the year 2008 is **8.25%**.

This Court finds that an award of prejudgment interest is permitted by law in this case. *Rodriguez v. Consolidation Coal Co.*, 524 S.E.2d 672, 684-685 (W.Va. 1999). The

¹ The Plaintiff's Amended Complaint seeks damages for emotional distress, along with a request for punitive damages. Upon review of this record, this Court cannot find a factual or legal basis to sustain such an award.

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Plaintiff's cause of action accrued on October 25, 2005, the date of her termination. As such, the Plaintiff is entitled to prejudgment interest in the amount of \$58,341.78.²

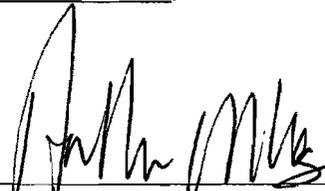
Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Plaintiff is awarded judgment against the Defendants, Bellofram Corporation and Joseph Colletti, in the amount of **\$238,717.78**, to which post-judgment interest shall be added from the date of entry of this Order until paid at a rate **8.25%**.

Pursuant to West Virginia Code §5-11-13(c), this Court may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the Plaintiff. Counsel for the Plaintiff is to submit a motion for an award of attorney fees and costs, specifically setting forth the fees and costs incurred by the Plaintiff in this litigation. Thereafter, this Court shall have a hearing on the motion and rule by separate Order.

The objections and exceptions of the parties are preserved.

It is so **ORDERED**.

Entered this 10th day of December, 2008.



Arthur M. Recht, Judge
Circuit Court of Hancock County

² Pre-judgment interest was calculated from October 25, 2005 to December 1, 2008.

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A certified copy of this Memorandum of Opinion and Order has been sent to the following counsel of record:

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IN THE CIRCUIT COURT OF HANCOCK COUNTY, WEST VIRGINIA **VSSP**

LYNDA YOUNG,

Plaintiff,

Vs.

CIVIL ACTION NO. 06-C-55

BELLFRAM CORPORATION, d/b/a
MARSH BELLOFRAM
CORPORATION, et al.,

Defendants.

**MEMORANDUM OF OPINION AND ORDER REGARDING
ATTORNEY FEES AND COSTS**

This is an action for wrongful termination, age and sex discrimination, breach of contract and the tort of outrage arising out of Defendant's improper termination of the Plaintiff, Lynda Young, on October 25, 2005. The Plaintiff's Amended Complaint states six causes of action against Marsh Bellofram Corp.:

- 1) Wrongful termination on the basis of age and/or gender in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia;
- 2) Discrimination on the basis of age in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia;
- 3) Discrimination on the basis of sex in violation of the West Virginia Human Rights Act, West Virginia Code §§5-11-1, *et seq.* and substantial public policy of the State of West Virginia;
- 4) Breach of contract arising out of Defendants' promise of continued employment to the Plaintiff;

- 5) Breach of contract arising out of the Defendants' failure to follow its progressive discipline policy in regard to the Plaintiff's termination; and
- 6) The tort of outrage, along with a request for punitive damages.

The case was tried to the Court on June 10 through June 12, 2008. By a *Memorandum of Opinion and Order* dated December 1, 2008, the Court found in favor of the Plaintiff in regard to Counts I and II of her Complaint, and awarded the Plaintiff damages in the amount of \$180,376.00, plus an additional \$58,341.78 in prejudgment interest. The Courts Order also directed counsel for the Plaintiff to submit a motion for an award of attorney fees and costs within the framework set forth in Aetna Casualty & Surety Co. vs. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986).

The Plaintiff's seek attorney fees of \$174,245.00 and expenses of \$11,481.95, for a total of \$185,726.95. In calculating the attorney fees, the Plaintiff's used two hourly rates. Plaintiff attorney Eric Frankovitch used an hourly rate of \$350 and attorney Kevin Pearl used an hourly rate of \$250. The Defendant argues that the rate charged by attorney Eric Frankovitch is unreasonable and that the Plaintiff seeks fees for time spent on unsuccessful claims.

ANALYSIS

West Virginia law provides for an award of attorney fees and costs for Plaintiff's claims under Counts I and II of the Amended Complaint in the event that the Plaintiff prevails on her claims that the Defendant violated the West Virginia Human Rights Act in terminating her employment. West Virginia Code §5-11-13(c) states:

In any action filed under this section, if the court finds that the respondent has engaged in or is engaging in an unlawful discriminatory practice charged in the complaint, the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative

action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay or any other legal or equitable relief as the court deems appropriate. In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.

The purpose of fee-shifting statutes, such as 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, and not to serve as a fee enhancement mechanism for attorneys representing complainants in human rights actions. See Heldreth v. Rahimian, 637 S.E.2d 359, 219 W.Va. 462 (2006). “Inherent in any statutory fee award made pursuant to the statute authorizing attorney fees in human rights actions is a recognition that the economic incentive provided by such a fee-shifting mechanism is necessary to attract competent counsel for the purpose of enforcing civil rights laws that serve to protect the interests of West Virginia's citizenry.” *Id.* at Syllabus Point 2. “The trial court is vested with a 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 the Supreme Court of Appeals unless it clearly appears that it has abused its discretion.” *Id.* at Syllabus Point 1.

When determining a fee award from a third party, West Virginia courts apply the twelve factors set forth in Aetna Casualty & Surety Co. vs. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986). The factors are as follows: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations

imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

After consideration of the *Pitrolo* factors and the affidavits submitted by both parties regarding reasonable fees, this court determines that the customary fee in similar employment cases is \$300 per hour.¹ Therefore, applying the lodestar method², this Court calculates the attorney fees to be awarded as follows:

Eric Frankovitch	\$300 x 251.9 =	\$75,570.00
Kevin Pearl	\$250 x 339.3 =	\$84,825.00
Mark Colantonio	\$300 x 3.4 =	\$1,020.00
Paralegal	\$50 x 1.3 =	\$65.00
Expenses		<u>\$11,481.95</u>
TOTAL FEES		\$172,961.95

Furthermore, in Bishop Coal Company v. Salyers, the court stated, “[w]hen a complainant sets forth distinct causes of action so that the facts supporting one are entirely different from the facts supporting another, and then fails to prevail on one or more such distinct causes of action, attorneys’ fees for the unsuccessful causes of action should not be awarded.” Syllabus Point 4, 181 W.Va. 71, 380 S.E.2d 238 (1989). “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* at 467. In this case, the Plaintiff’s claims involve a common core of facts and

¹ According to affidavits submitted by Defendant, employment attorneys Walt Auvil and Frank Duff routinely charge \$300/hour. Also, a letter submitted by Plaintiff states that attorney Allan Karlin routinely charged \$300/hour in employment cases.

² Multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. See *Heldreth* at 366.

are inextricably linked to each claim. Therefore, this court finds no need to demarcate fees amongst successful and unsuccessful claims.

Accordingly, it is hereby **ORDERED, ADJUDGED, and DECREED** that the Plaintiff is awarded attorney fees and costs against the Defendant Bellofram Corporation in the amount of **\$172,961.95**, to which post-judgment interest shall be added from the date of entry of this Order until paid at a rate **8.25%**.

The objections and exceptions of the parties are preserved.

It is so **ORDERED**.

Entered this 24 day of March, 2009.



ARTHUR M. RECHT, JUDGE
Circuit Court of Hancock County

A certified copy of this Memorandum of Opinion and Order Regarding Attorney Fees and Costs has been sent to the following counsel of record:

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