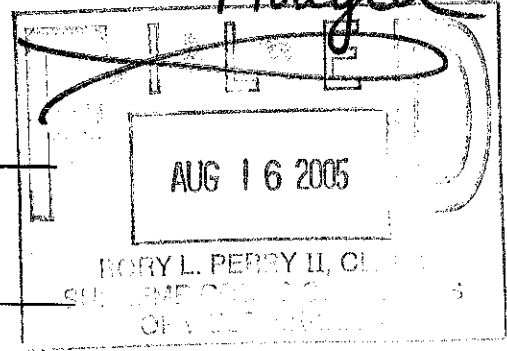


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No. 32779 (Circuit Court 02-C-782-3)

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

HOLLY D. HELDRETH,

Appellant (Plaintiff Below),

VS.

DR. ALI A. RAHIMIAN & REGIONAL WOMEN'S HEALTH CARE, INC.

Appellees (Defendants Below).

**On Appeal From Circuit Court of Harrison County, Third Division
Honorable Judge James A. Matish**

APPELLANT'S BRIEF

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HELDRETH**

CERTIFICATE OF INTERESTED PERSONS

**Harrison County Circuit Court; No. 02-C-782-3 (Hon. James A. Matish)
Holly D. Heldreth v. Dr. Ali A. Rahimian; and Regional Women's Healthcare, Inc.**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal. The names of all such persons and the connection and interest are as follows:

List of Parties With Potential Interest in Trial Court's Final Judgment & Orders			
Party Name	At Trial	On Appeal	Interest
Holly Heldreth	Plaintiff	Appellant	Financial Interest
Dr. Ali A. Rahimian	Defendant	Appellee	Financial Interest
Regional Women's Health Care, Inc.	Defendant	Appellee	Financial Interest
Drew M. Capuder	Counsel for Plaintiff	Counsel for Appellant	Financial Interest; Counsel for Ms. Heldreth
Manchin & Aloï, LLC	Counsel for Plaintiff at Trial		Financial Interest; Counsel for Ms. Heldreth
Jerald E. Jones West & Jones	Counsel for Defendants	Counsel for Appellees	Counsel for Defendants

Drew M. Capuder
Attorney of record for Plaintiff Heldreth

STATEMENT REGARDING ORAL ARGUMENT

Appellant Holly Heldreth and her counsel request oral argument. The issues on appeal, concerning the award of attorneys' fees under a sexual harassment judgment for plaintiff under the West Virginia Human Rights Act, are important issues impacting on the viability of plaintiffs prosecuting employment discrimination cases.

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NOTES ON RECORD REFERENCES

References in the brief below are to Exhibit A, which is attached to this brief. The Exhibit are as follows:

- A Order Regarding Plaintiff's Motion For Attorneys' Fees and Expenses (11/16/04)

References in the brief below are also made to the following documents (which were attached to the original Petition for Appeal, and please see the note below):

- B Plaintiff's Original Complaint (12/18/02)
- C Plaintiff's Contentions [for trial] (3/29/04)
- D Trial Order (6/4/04)
- E Plaintiff's Motion for Attorneys' Fees and Expenses (6/14/04)
- F Defendants' Response to Plaintiff's Motion for Attorneys' Fees and Expenses (6/23/04)
- G Order Concerning July 16, 2004 Hearing (8/11/04)

Please note: The undersigned counsel learned after this Court's Order of July 5, 2005 (granting Ms. Heldreth's Petition for Appeal) that the Clerk of this Court had sent the undersigned counsel a letter dated April 19, 2005 informing the undersigned counsel that, because of attachments, Ms. Heldreth's original Petition for Appeal exceeded the Court's limit of 50 pages. A prior legal assistant working for the undersigned counsel had apparently filed the April 19 letter without informing the undersigned counsel, and the undersigned counsel did not see the letter until after receiving the July 5 Order. The undersigned counsel apologizes to the Court and the Clerk for not correcting the problem, and he would have immediately refiled the brief within the page limit had he known about the April 19 letter.

No. 32779 (Circuit Court 02-C-782-3)

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

HOLLY D. HELDRETH,

Appellant (Plaintiff Below),

VS.

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Appellees (Defendants Below).

**On Appeal From Circuit Court of Harrison County, Third Division
Honorable Judge James A. Matish**

APPELLANT'S BRIEF

Ms. Holly D. Heldreth ("Ms. Heldreth" or "Heldreth") files this Appellant's Brief, and would show the Court the following:

I. Statement of Proceeding and Ruling by Trial Court

A. Sexual Harassment Case

1. This is a sexual harassment case which was asserted primarily under the West Virginia Human Rights Act, filed on December 18, 2002 (Plaintiff's Original Complaint). The particular causes of action which were asserted will be discussed below, because they are relevant to the Trial Court's ruling on attorneys' fees.

B. Appealed Order: Ruling on Attorneys' Fees

2. Trial in this case took place on May 10, 12, and 13, 2004, resulting in a jury verdict for Plaintiff Heldreth on her claim that she was subjected to a hostile work environment, and that she was constructively discharged (Trial Order). The Trial Court entered judgment for Plaintiff, awarding lost income, emotional distress, and punitive damages.

3. Plaintiff's counsel then filed Plaintiff's Motion for Attorneys' Fees and Expenses on June 23, 2004 (Plaintiff's Motion for Attorneys' Fees and Expenses). After a hearing on July 16, 2004 (Order Concerning July 16, 2004 Hearing), the Trial Court awarded Plaintiff all of her requested expenses \$3,328.87, but reduced the Plaintiff's requested attorneys' fees of \$43,085.00, and reduced that amount by 80% to the awarded \$8,617.00. The Trial Court's rationale was that Plaintiff had asserted 5 causes of action in her Original Complaint; Plaintiff's Original Complaint) but had prevailed at trial on only one of those original five causes of action (20% of the original causes of action), and the Trial Court therefore awarded only 20% of the requested attorneys' fees (\$43,085.00), resulting in a fee award of \$8,617.00 (20% of the requested fees; Exhibit A at 4; Order Regarding Plaintiff's Motion for Attorneys' Fees and Expenses). It is this award concerning

attorneys' fees (Exhibit A), and the reduction by the percentage allocation method, that is being appealed.

II. Assignment of Error

Issue No. 1: The Trial Court abused its discretion in utilizing a "percentage allocation" method of awarding attorneys' fees to a prevailing party in a sexual harassment case under the West Virginia Human Rights Act, in that the Trial Court inappropriately determined the number of causes of action originally alleged (5, Plaintiff's Original Complaint) and divided that number by the number of causes of action on which Plaintiff prevailed (1, Trial Order of 6/4/04), and then awarded only 20% of the requested attorneys' fees—without otherwise determining whether the claimed fees were reasonably expended in prosecuting Plaintiff's sexual harassment claim. *See Brodziak v. Runyon*, 145 F.3d 194, 196-197 (4th Cir 1998) (rejecting "mathematical comparison" and "ratio" of prevailing to non-prevailing claims for award of attorneys' fees under federal anti-discrimination law).

Issue No. 2: The Trial Court erred, in awarded attorneys' fees to a prevailing sexual harassment Plaintiff under the West Virginia Human Rights Act, by failing to (a) determine whether the claimed fees were reasonably expended in prosecuting the claim, and (b) determine whether any fees expended on the non-prevailing causes of action could be segregated and subtracted from the claimed amount. *See W. VA. CODE § 5-11-13(c)* (allowing award of "reasonable" attorneys' fees); *Shafer v. King's Tire Service, Inc.*, 215 W. Va. 169, 178, 597 S.E.2d 302, 311 (2004) (methodology for "reasonable" award of attorneys' fees).

III. Statement of Facts

A. Plaintiff's (Appellant's) Claims and Her Original Causes of Action

4. This is a sexual harassment case which was asserted primarily under the West Virginia Human Rights Act, filed on December 18, 2002 (Plaintiff's Original Complaint). The

sexual harassment events centered around conduct by Plaintiff's (Appellant's) boss and gynecologist, Defendant Dr. Rahimian, in November and December 2001 (Plaintiff's Original Complaint at 3-4, ¶¶ 12-15).

5. Some of the details of the allegations were set out in Plaintiff's statement of contentions prepared before trial (Plaintiff's Contentions [for Trial] (3/29/04)):

1. Ms. Heldreth worked in Clarksburg as a receptionist for Regional Women's Healthcare, Inc. ("Regional Women's Healthcare") and Dr. Ali Rahimian ("Dr. Rahimian") from August 2000 until she was forced to quit on December 5, 2001, a few work days after Ms. Heldreth was sexually assaulted and harassed by Dr. Rahimian.
2. Dr. Rahimian was also Ms. Heldreth's gynecologist. In August 2001, Ms. Heldreth had talked to Dr. Rahimian about changing her birth control method to the injection, Depo-Provera (Plaintiff's Exhibit 6). Dr. Rahimian refused, in part because Ms. Heldreth had been depressed over the death of her father.
3. Near November 21, 2001, Ms. Heldreth spoke again with Dr. Rahimian as a patient about her switching to Depo-Provera for her birth control system, and Ms. Heldreth explained that her period was coming up (and the Depo-Provera injection had to be given near the beginning of a woman's period).
4. Dr. Rahimian, around November 21, 2001, Dr. Rahimian gave Ms. Heldreth an unexpected bonus, kissed her on the forehead, and asked her to tell none of the other employees about the bonus.
5. On November 29, 2001, in the afternoon, Dr. Rahimian returned from seeing patients at another of his offices, in Philippi, and came back to his Clarksburg office at a time when no patients were in the offices. Dr. Rahimian then made sure that he and Ms. Heldreth were alone, and he took Ms. Heldreth into one of the patient rooms. Dr. Rahimian then sexually assaulted Ms. Heldreth, forcibly attempting to fondle her, attempting to pull Ms. Heldreth towards him, and attempting to put his hand down her pants. After Ms. Heldreth forcibly resisted and pushed him away, Dr. Rahimian gave up. The attack was so traumatic for Ms. Heldreth that she was later diagnosed by counselor Sandy James with Post Traumatic Stress Disorder. Ms. Heldreth went to her desk sobbing and Dr. Rahimian followed her

and insisted that he give her the Depo-Provera injection they had discussed in August and again in November, 2001. Ms. Heldreth, thinking that Dr. Rahimian was talking about giving her the injection the next day when another woman would be present, reluctantly agreed. But Dr. Rahimian wanted to give Ms. Heldreth the injection himself immediately, with no one else present, which violated his office practice of having a female employee present when he treated patients. Dr. Rahimian would later testify that he would be in trouble if it weren't for the fact that he gave Ms. Heldreth the Depo-Provera injection. Dr. Rahimian then left his office and Ms. Heldreth immediately called her mother, Joyce Mayfield, sobbing.

6. Ms. Heldreth, a single mother with a very young child, living with her mother (Joyce Mayfield) after the recent death of Ms. Heldreth's father, tried to work another few days, but Dr. Rahimian intimidated her in the following days, and Ms. Heldreth was constructively discharged on December 5, 2001.

7. Defendants' conduct constitutes hostile work environment and quid pro quo sexual harassment, intentional infliction of emotional distress, assault and battery, and wrongful discharge in violation of public policy (*Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, 275 (1978)).

(Plaintiff's Contentions [for Trial] (3/29/04) at 1-3, ¶¶ 1-7).

6. While Plaintiff (Appellant) asserted several causes of action, all of the causes of action arose out of precisely the same facts: the sexually suggestive conduct, then the sexual assault, and the following intimidating leading to Ms. Heldreth's constructive discharge. In Plaintiff's Original Complaint, she asserted the following causes of action. Following each cause of action in the indented item is a discussion of whether Plaintiff presented the cause of action to the jury, and whether she prevailed:

1. **"Hostile work environment" sexual harassment under the West Virginia Human Rights Act. Plaintiff's Original Complaint at 5-6, ¶¶ 20-27, with a claim of constructive discharge (id. at 4, ¶ 15).** This claim involved the full range of facts relevant to the sexual harassment, including the sexually suggestive conduct, the sexual assault, and the intimidation leading to Ms. Heldreth's construction

discharge. *This is the cause of action on which Ms. Heldreth prevailed at trial.*

2. **“Quid Pro quo” sexual harassment under the West Virginia Human Rights Act. Plaintiff’s Original Complaint at 6-8, ¶¶ 28-35, with a claim of constructive discharge (id. at 4, ¶ 15).** This claim involved precisely the same facts and events as the hostile work environment cause of action. Ms. Heldreth did not prevail on this claim at trial.
3. **Intentional infliction of emotional distress, under West Virginia common law. Plaintiff’s Original Complaint at 8-9, ¶¶ 36-42.** This claim involved precisely the same facts and events as the hostile work environment cause of action. Ms. Heldreth did not present this claim to the jury.
4. **Assault and battery, under West Virginia common law. Plaintiff’s Original Complaint at 10-11 ¶¶ 43-49.** This claim arguably involved precisely the same facts and events as the hostile work environment cause of action, but arguably involved the subset of facts relating to the actual battery on November 29, 2001. Ms. Heldreth did not present this claim to the jury.
5. **Wrongful discharge under *Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, 275 (1978). Plaintiff’s Original Complaint at 11-12, ¶¶ 50-58.** This claim involved precisely the same facts and events as the hostile work environment cause of action and the quid pro quo cause of action. It was asserted because there was some doubt as to whether the Defendants had the 12 or more employees required by the West Virginia Human Rights Act, and this Court has held that the *Harless* claim can be applied to sexual harassment circumstances where the employer did not have the requisite 12 employees for application of the Human Rights Act. *See Williamson v. Greene*, 200 W. Va. 421, 430, 490 S.E.2d 23, 32 (1997) (sexual harassment and sex discrimination violate West Virginia public policy, so a *Harless* claim exists where employer has fewer than 12 employees). Ms. Heldreth did not present this claim to the jury.

B. Trial; and Ms. Heldreth’s Counsel’s Decision to Narrow the Number of the Causes of Action Presented to the Jury

7. Trial in this case took place on May 10, 12, and 13, 2004, resulting in a jury verdict for Plaintiff Heldreth on her claim that she was subjected to a hostile work environment, and that she was constructively discharged (Trial Order).

8. Before trial, Ms. Heldreth's counsel decided to present the fewest possible number of causes of action to the jury, to simplify and speed the trial, and to avoid confusion for the jury. Therefore the jury instructions and questions narrowed Ms. Heldreth's case to the first 2 causes of action described above—hostile work environment (Trial Order at 2, ¶¶2-3) and quid pro quo sexual harassment (Trial Order at 1, ¶ 1) under the West Virginia Human Rights Act. Both of those claims involved the identical facts, and presentation of those claims to the jury involved precisely the same work in preparing the case for trial, and in conducting the trial. Those two claims also encompassed all of the facts present in the claims for intentional infliction of emotional distress, assault and battery, and the *Harless* wrongful discharge claim.

9. The jury answered "yes" to questions 2 and 3, which were for the hostile work environment cause of action and the constructive discharge allegation; and the jury answered "no" to question 1, which was the quid pro quo cause of action. Trial Order at 1-2, Questions 1-3. The other causes of action were not presented to the jury.

10. The jury awarded Ms. Heldreth \$5,000 for emotional distress, \$6,300 for lost wages, and \$1,000 for punitive damages (after a "yes" answer to the malice question). Plaintiff's Original Complaint at 2-3, Questions 4-5. Thus, the jury found for Ms. Heldreth on hostile work environment sexual harassment (question 2), constructive discharge (question 3), and malice (question 5), and awarded total damages of \$12,300 (questions 4-5). Trial Order.

11. The Trial Court entered judgment for Plaintiff, awarding lost income, emotional distress, and punitive damages of \$12,300 plus prejudgment interest and costs (Trial Order at 3).

12. Plaintiff's counsel then filed Plaintiff's Motion for Attorneys' Fees and Expenses on June 23, 2004 (Plaintiff's Motion for Attorneys' Fees and Expenses). Plaintiff's counsel presented evidence supporting an hourly rate of \$175 (later found to be reasonable by the Trial Court) and 246.90 hours (later reduced by 80% by the Trial Court). Plaintiff's Motion contained a detailed accounting of time expended on the case, contemporaneously recorded, and broken down to 10ths of an hour (Plaintiff's Motion for Attorneys' Fees and Expenses, Plaintiff's Original Complaint); and also contained an affidavit by the undersigned counsel discussing the work involved in preparing the case for trial, and applying the applicable standards (Plaintiff's Motion for Attorneys' Fees and Expenses, Exhibit A).

13. Defendants opposed the Motion for Attorneys' Fees and Expenses and filed Defendants' Response to Plaintiff's Motion for Attorneys' Fees and Expenses (Defendants' Response to Plaintiff's Motion for Attorneys' Fees and Expenses). Defendants argued that the award of attorneys' fees was discretionary, but Defendants did not argue that there were any fees expended on non-prevailing claims that could be segregated from the work spent on Ms. Heldreth's prevailing claim.

14. After a hearing^{1/} on July 16, 2004 (Order Concerning July 16, 2004 Hearing (8/11/04)), the Trial Court awarded Plaintiff all of her requested expenses \$3,328.87 (Exhibit A at 4-5), but reduced the Plaintiff's requested attorneys' fees of \$43,085.00 and reduced that amount to

^{1/} At the hearing on Plaintiff's motion for attorneys' fees on July 16, 2004 (Exhibit G), the undersigned counsel explained that the 5 original causes of action arose out of the same set of facts, and that there wasn't any attorney's time that could be allocated solely or even primarily to the non-prevailing causes of action. The transcript for that hearing is being requested for this appeal.

the awarded \$8,617.00 (Exhibit A at 4). The Trial Court's rationale was that Plaintiff had asserted 5 causes of action in her Original Complaint but had prevailed at trial on only one of those original five causes of action (20% of the original causes of action), and the Trial Court therefore awarded only 20% of the requested attorneys' fees (\$43,085.00), resulting in a fee award of \$8,617.00 (fees; Exhibit A at 4).

15. The Trial Court explained its rationale for reducing the awarded attorneys' fees by 80% as follows:

The hourly rate of \$175 is an appropriate rate based on prevailing market rates of other similar attorneys in this area. However, the total number of hours expended (246.90 hours) should not be used, as the Plaintiff only prevailed as to one count which provided for the recovery of attorney fees. It is impossible to discern from the detailed invoice which Plaintiffs counsel has submitted how many hours were devoted to each distinct cause. Therefore, the Court will use a percentage basis. Since only one of the causes of action allowed for the recovery of attorneys' fees and the Plaintiff prevailed on that one cause of action, then 20 percent of the total attorneys' fees or the sum of \$8,617.00 should be awarded to Plaintiff's counsel, in addition to the forty (40) percent of the total verdict he will receive from the Plaintiff under their contingency fee arrangement.

(Exhibit A at 4).

IV. Argument: The Trial Court Abused Its Discretion in Awarding Attorneys' Fees by Applying a "Ratio" or "Percentage Allocation" Method Based on the Number of Prevailing Causes of Action Compared to the Total Number of Asserted Causes of Action

16. The Trial Court erred in awarding only 20% of the requested attorneys' fees, and abused Its discretion in applying a "ratio" or "percentage" method.

17. Ms. Heldreth was the prevailing party under her “hostile work environment” claim (with constructive discharge) under the West Virginia Human Rights Act, *see* WEST VIRGINIA HUMAN RIGHTS ACT of 1967, W. VA. CODE § 5-11-1 *et al.* (1998), and was entitled to an award of reasonable attorneys’ fees and expenses. *See* W. Va. Code 5-11-13(c).

18. Under the Human Rights Act, “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.” W. VA. CODE § 5-11-13(c). While the language of the statute states that the Court “may” award attorneys’ fees, under comparable statutes the West Virginia Supreme Court has held that attorneys’ fees “should be awarded to the prevailing plaintiffs *as a matter of course* in the absence of special circumstances which would render such an award unjust.” *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 671, 584 S.E.2d 523, 527 (2003) (emphasis added; applying same fee language in Wage Payment and Collection Act, § 21-5-12); *accord Farley v. Zapata Coal Corporation*, 167 W. Va. 630, 639, 281 S.E.2d 238, 244 (1981). The award of fees should include time expended in filing and defending the attorneys’ fee application, and should include time spent on a successful appeal. *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 674, 584 S.E.2d 523, 530 (2003). Specifically concerning the Human Rights Act and employment discrimination, the West Virginia Supreme Court explained the importance of a full award of attorneys’ fees:

The goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain the legal counsel necessary to vindicate their rights. *Full enforcement of the civil rights act requires adequate fee awards.*

Bishop Coal Company v. Salyers, 181 W. Va. 71, 80, 380 S.E.2d 238, 247 (1989) (emphasis added); accord *Shafer v. King's Tire Service, Inc.*, 215 W. Va. 169, 178, 597 S.E.2d 302, 311 (2004).

19. The fact that the attorneys' fees may substantially exceed the awarded damages does not preclude a *full* award of attorneys' fees. For example, in *Hollen*, under the Wage Payment and Collection Act's comparable fee provision, the West Virginia Supreme Court awarded \$13,520 in attorneys fees (104 hours at \$130 per hour) plus the additional fees incurred on appeal, whereas the actual damages that the parties settled upon amounted to only \$2250. *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 669, 674, 584 S.E.2d 523, 525, 530 (2003); see also *Rice v. Sunrise Express, Inc.*, 2002 U.S. Dist. LEXIS 22181 (N.D. Ind. 2002) (damages of \$2,000 under FMLA claim; award of \$129,000 in attorneys' fees); *Roberts v. Interstate Distributor Co.*, 242 F. Supp. 2d 850 (D. Or. 2002) (worker's comp retaliation case under Oregon law; \$2,773.68 in economic damages; \$30,340 in attorneys' fees, plus costs; plaintiff *sought but did not receive* \$8,606 in economic damages, \$500,000 in noneconomic (presumably emotional distress), and \$500,000 in punitive damages).

20. West Virginia's position--that the amount of awarded damages is not an arbitrary or decisive limitation on the amount of recoverable attorneys' fees--is fully consistent with comparable federal decisions under federal attorneys' fees provisions. For example, the United State Supreme Court in *City of Riverside v Rivera*, 477 U.S. 561 (1986) addressed similar issues under 42 U.S.C. § 1988 and held that a "rule of proportionality" between awarded damages and attorneys' fees "would make it difficult, if not impossible, for individuals with meritorious civil rights claims but relatively small potential damages to obtain redress from the courts. This is totally inconsistent with Congress' purpose in enacting § 1988." 477 U.S. at 578 (affirming award of \$245,000 in attorneys' fees after plaintiff recovered \$33,350 in damages).

21. Ms. Heldreth was clearly the prevailing party. The jury found for Ms. Heldreth, in that the jury found that Defendants created a hostile work environment for Ms. Heldreth (Question 2); that Ms. Heldreth was constructively discharged (Question 3); and that Dr. Rahimian's misconduct was malicious (Question 5). The jury awarded lost income (Question 4), emotional distress (Question 4), and punitive damages (Question 5). *See* Trial Order (6/4/04).

22. Once a plaintiff is the prevailing party, reasonable attorneys' fees should be determined by "(1) multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate-the lodestar calculation-and (2) allowing, if appropriate, a contingency enhancement." *Shafer v. King's Tire Service, Inc.*, 215 W. Va. 169, 178, 597 S.E.2d 302, 311 (2004) (disability discrimination case under Human Rights Act; citing Syllabus Point 4 in *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986)). Then the following factors should be considered to determine the reasonableness of both time expended and hourly rate charged; and the allowance and amount of a contingency enhancement:

- a. the time and labor required;
- b. the novelty and difficulty of the questions;
- c. the skill requisite to perform the legal service properly;
- d. the preclusion of other employment by the attorney due to acceptance of the case;
- e. the customary fee;
- f. whether the fee is fixed or contingent;
- g. time limitations imposed by the client or the circumstances;
- h. the amount involved and the results obtained;
- i. the experience, reputation, and ability of the attorneys;
- j. the undesirability of the case;
- k. the nature and length of the professional relationship with the client; and
- l. awards in similar cases.

Shafer v. King's Tire Service, Inc., 215 W. Va. 169, 178-9, 597 S.E.2d 302, 311-2 (2004) (citing Syllabus Point 4 in *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986)); accord *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 673, 584 S.E.2d 523, 529 (2003).

23. In determining the reasonableness of the requested fees, the trial court should make appropriate findings of fact and conclusions of law. *Shafer v. King's Tire Service, Inc.*, 215 W. Va. 169, 178, 597 S.E.2d 302, 311 (2004); accord *Chevy Chase Bank v. McCamant*, 204 W. Va. 295, 304, 512 S.E.2d 217, 226 (1998) (*per curiam*) ("When a trial court awards attorney fees, it is required to make findings for this Court's determination of the reasonableness of the award."). While Ms. Heldreth was not seeking a "contingency enhancement" in her Motion, it is worth noting that Ms. Heldreth's case had difficult aspects that might support such a claim. The fact that Ms. Heldreth had no eyewitnesses to the event, and had substantially a "single event" case, would potentially deter some lawyers from prosecuting her case. Additionally, the fact that Dr. Rahimian argued that the depo-provera injection was inconsistent with Ms. Heldreth's allegations might also deter some layers from accepting such a case. Overall, Ms. Heldreth was a receptionist complaining about a sexual assault involving an established doctor in the community, and that circumstance might also deter counsel from accepting the case. Such circumstances would suggest that a contingency enhancement might be reasonable. That would be especially true where the damages appear to be relatively modest. See *Hollen v. Hathaway Electric, Inc.*, 213 W. Va. 667, 674 n.5, 584 S.E.2d 523, 530 n.5 (2003) ("We agree that when a plaintiff is litigating a case involving a significant issue of general application, where the likelihood of success is small and the economic value in terms either of money or of injunctive relief to the prevailing plaintiff is small, it is appropriate for a court to

consider those factors in awarding attorneys' fees and allow a contingency enhancement to a prevailing party.”)

24. The Trial Court did not examine the reasonableness of Plaintiff's claimed attorneys' fees, and noted “It is impossible to discern from the detailed invoice which Plaintiffs counsel has submitted how many hours were devoted to each distinct cause.” Exhibit A at 4. But that fact alone is certainly not dispositive, and does not lead to the “percentage” or “ratio” method employed by the Trial Court. Indeed, the fact that the detailed accounting of time submitted by the undersigned counsel did not allow the Trial Court to segregate fees amongst causes of action was simply an illustration of the fact that all five causes of action involved substantially the same facts, and that the hostile work environment cause of action encompassed the facts of all of the other claims.

25. This Court, in *Bishop Coal Company v. Salyers*, 181 W. Va. 71, 83, 380 S.E.2d 238, 250 (1989) set out its analysis for attorneys' fees in a claim under our Human Rights Act which rejects the Trial Court's “percentage reduction” method. This Court in *Bishop Coal* addressed a sex discrimination claim under the Human Rights Act, 181 W. Va. at 72, 380 S.E.2d at 239, which also included sexual harassment, 181 W. Va. at 83, 380 S.E.2d at 250. The plaintiff Salyers prevailed on some causes of action, but not on others, and this Court set out the rule that demonstrates that reductions in fees are not appropriate where the non-prevailing claims arise out of the same facts as the prevailing claims:

In the case before us the appellant argues that Ms. Salyers did not prevail on all counts of her complaint and therefore, the attorney's fees should be reduced to the extent that hours were devoted to issues on which Ms. Salyers did not prevail. We agree with appellant's general principle, but we find that in Ms. Salyers' case the appellant failed to refine its general argument to apply to the specific facts before us.

As we review the record, we find that the gravamen of Ms. Salyers complaint was that she should have been made a scoop operator and would have been promoted to that position had she not been a woman. On this issue she prevailed entirely and the other allegations of sexual harassment were simply part and parcel of her basic complaint. *Often plaintiffs will have one basic problem which, in a complaint, they express in numerous alternative ways, each corresponding to a slightly different legal theory. When this occurs, as it did in the case before us, the fact that the commission or court selects one of the theories upon which to award relief does not necessarily mean that the plaintiff has not substantially prevailed. However, when 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, the appellant is correct that attorneys' fees for the unsuccessful causes of action should not be awarded. However, Ms. Salyers' third issue, namely, pattern discrimination, was an extension of her other issues and not a distinct cause of action. Further, limited effort was expended to develop additional facts beyond the facts alleged under her prevailing theory.*

181 W. Va. at 82-83, 380 S.E.2d at 249-250 (emphasis added).

26. Similar to the facts in *Bishop Coal*, Ms. Heldreth prevailed on her claim of sexual harassment and malice for punitive damages, and all of the causes of action in her original Complaint arose out of the same sexual harassment.

27. Under the comparable federal anti-discrimination law, Courts have also rejected the "percentage" or "ratio" method. For example, the Fourth Circuit addressed this precise issue and rejected a limited, proportional award of fees:

As the Supreme Court has recognized, "the most critical factor" in calculating a reasonable fee award "is the degree of success obtained"; when "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Hensley v. Eckerhart*, 461 U.S. 424, 436, 76 L. Ed. 2d 40, 103 S. Ct. 1933 (1983); see *Farrar v. Hobby*, 506 U.S. 103, 114-15, 121 L. Ed. 2d 494, 113 S. Ct. 566 (1992). However, the *Hensley* Court explicitly rejected the notion that a court may calculate an

award of attorneys' fees by means of a purely mathematical comparison between the number of claims pressed and the number prevailed upon, observing that "such a ratio provides little aid in determining what is a reasonable fee in light of all the relevant factors." Hensley, 461 U.S. at 435 n.11. Rather, the appropriate inquiry concerns whether the claims on which the plaintiff prevailed are related to those on which he did not. When successful claims are unrelated to unsuccessful claims, it is not appropriate to award fees for the latter. See id. at 435. When, however, all claims "involve a common core of facts ... much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." Id.; see Johnson, 974 F.2d at 1419 (remanding for reconsideration of a fee award when the district court may have reduced the award to account for the fact that the plaintiff prevailed on only one of three claims, when all of the claims arose from the same operative facts and the plaintiff achieved a sizeable verdict); see also Hensley, 461 U.S. at 435 (explaining that "litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.").

Here, the magistrate judge awarded only 40 percent of the requested fees and costs based on a determination that Brodziak prevailed on only 40 percent of his claims. This reasoning contravenes the principle set forth in Hensley that awards of fees and costs should not be based simply on the ratio of claims raised to claims prevailed upon. Accordingly, we vacate the award of attorneys' fees and costs. On remand, the magistrate judge should consider the relationship between various claims raised by Brodziak and the degree of overall success obtained in determining an appropriate award of fees and costs. See Hensley, 461 U.S. at 434-35.

Brodziak v. Runyon, 145 F.3d 194, 196-197 (4th Cir. 1998) (emphasis added).

28. The Fourth Circuit's analysis in *Brodziak* is compelling for the case at bar. If the non-prevailing claims are "unrelated" to the prevailing claims, then it makes sense to segregate the fees and reduce the awarded fees by the amount of time expended on the "unrelated" non-prevailing claims. But where, as in the case at bar, all 5 causes of action arose out of the same facts, there is

no factual or logical basis for excluding certain fees, or for applying a percentage reduction methodology.

29. For these reasons, the Trial Court abused its discretion, and erred in reducing Plaintiff's claimed fees of \$43,085.00 by 80%, to \$8,617.00.

V. Conclusion

30. Ms. Heldreth (Plaintiff; Appellant) requests that the Trial Court be reversed and that this Court issue an order directing the Trial Court to award Ms. Heldreth (Appellant) the full amount of fees requested below (\$43,085.00) plus appropriate interest. Alternatively, Ms. Heldreth requests that the Trial Court be reserved and that this case be remanded with appropriate instructions. Ms. Heldreth also requests that she be awarded her reasonable fees and expenses incurred in prosecuting this appeal, and in connection with any further proceedings on remand. Ms. Heldreth requests such other relief to which she may be justly entitled.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Appellant's Brief has been forwarded to the following parties or attorneys of record by the means indicated, on this 15th day of August, 2005:

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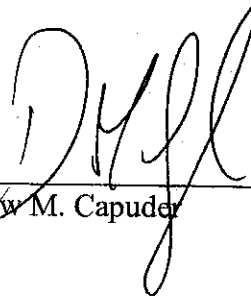
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