

No. 31739

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

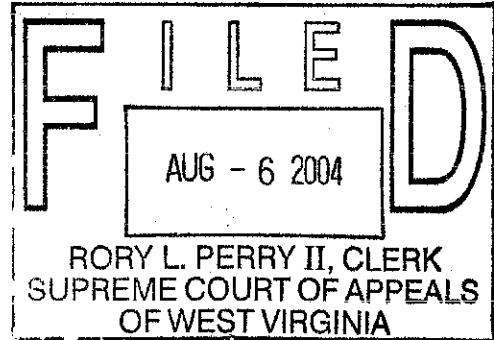
TERESA D. MESSER,

Appellant,

v.

HUNTINGTON ANESTHESIA GROUP, INC.,
DR. FAROUK ABADIR, DR. HOSNY S. GABRIEL,
DR. MARK NEWFELD, DR. RICARDO RAMOS,
DR. ALFREDO RIVAS, DR. D. GRANT SHY,
DR. STANISLAV STRIZ, DR. MICHAEL VEGA
and DAVID EASTER,

Appellees.



FROM THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 02-C-0635

BRIEF OF THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
AS AMICUS CURIAE

DARREL V. MCGRAW, JR.
ATTORNEY GENERAL

JAMIE S. ALLEY, State Bar ID No. 7682
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
PAUL R. SHERIDAN, State Bar ID No. 3373
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
812 Quarrier Street, 2nd Floor
Post Office Box 1789
Charleston, West Virginia 25326-1789
(304) 558-0546
Counsel for the West Virginia
Human Rights Commission

August 6, 2004

TABLE OF CONTENTS

	<u>Page</u>
I. INTEREST OF THE AMICUS CURIAE	1
II. QUESTION PRESENTED	2
III. STATEMENT OF THE CASE	2
IV. STANDARD OF REVIEW	5
V. ARGUMENT	5
A. APPELLANT HAS ASSERTED A VALID CLAIM OF DISABILITY DISCRIMINATION PURSUANT TO THE WEST VIRGINIA HUMAN RIGHTS ACT.	6
B. THE LEGISLATIVE MANDATE OF THE WVHRA IS FAR BROADER THAN THE WCA IN ITS SCOPE AND ABILITY TO REDRESS DISCRIMINATORY HARM CAUSED TO EMPLOYEES THROUGH REMEDIAL AND EQUITABLE RELIEF. THE WCA IS NOT EQUIPPED TO ADDRESS THE PUBLIC POLICY OBJECTIVES OF THE WVHRA.	10
C. THE EXCLUSIVITY PROVISION OF THE WCA DOES NOT APPLY TO MS. MESSER'S CLAIM OF BREACH OF DUTY TO ACCOMMODATE.	15
1. Appellant's HRA claim cannot be construed as primarily about workplace injury.	15
2. The WCA compensates workplace injuries. The HRA enables qualified employees with disabilities to continue in employment with reasonable accommodation.	16
D. HOSTILE ENVIRONMENT AND/OR DISPARATE TREATMENT HRA CLAIMS THAT INVOLVE A COMPENSABLE INJURY SHOULD NOT BE BARRED BY THE WCA EXCLUSIVITY PROVISION.	21
E. THIS COURT HAS ACKNOWLEDGED THAT OVERLAPPING JURISDICTION IS PERMISSIBLE WITH RESPECT TO THE WVHRA AND OTHER STATUTORY SCHEMES AIMED AT REDRESSING UNFAIR TREATMENT OF EMPLOYEES.	23
F. BARRING MS. MESSER'S HRA CLAIM WOULD RESULT IN A RESTRICTION OF DISABILITY RIGHTS IN WEST VIRGINIA AND RENDER JURISDICTION OF THE HRA UNCERTAIN IN THE VAST MAJORITY OF CLAIMS ALLEGING WORKPLACE DISCRIMINATION AND ASSOCIATED INJURY.	25

1. The ruling below injects uncertainty into the system inasmuch as identical conduct by an employer can either give rise to an HRA claim or not, depending upon the consequences of the unlawful conduct. 25

2. This Court should strive to ensure that the promise of protection from discrimination contained in state law is available to all West Virginia employees. 26

VI. CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362,
45 L. Ed. 2d 280 (1975) 12

Allen v. West Virginia Human Rights Commission, 174 W. Va. 139,
324 S.E.2d 99 (1984) 11, 22, 23

Alley v. Charleston Area Medical Center, 2004 WL 1433272 (W. Va. S. Ct.
June 24, 2004) 8, 13, 25

Baisden v. West Virginia Secondary Schools Activities Commission,
211 W. Va. 725, 568 S.E.2d 32 (2002) 8, 10

Bell v. Inland Mutual Ins. Co., 175 W. Va. 165, 332 S.E.2d 127 (1985) 12

Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989) 13

Byers v. LIRC, 208 Wis. 2d 388, 561 N.W.2d 678 (1997) 20

Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305 (1989) 12

Chapman v. Kane Transfer Co., 160 W. Va. 530, 236 S.E.2d 207 (1977) 5

Chrystal R.M. v. Charlie A.L., 194, W. Va. 138, 459 S.E.2d 415 (1995) 5

Coffman v. West Virginia Board of Regents, 182 W. Va. 73,
386 S.E.2d 1 (1988) 8, 16, 17, 18, 19

Cropp v. State Workmen's Compensation Commissioner, 160 W. Va. 621,
236 S.E.2d 343 (1977) 19

Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d
494 (1992) 12, 13

Dunlap v. Friedman's, Inc., 213 W. Va. 394, 582 S.E.2d 841 (2003) 5

Dunlap v. State Workmen's Compensation Commissioner, 160 W. Va. 58,
232 S.E.2d 343 (1977) 19

Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53,
365 S.E.2d 251 (1986) 12

Frye v. Future Inns of America-Huntington, 211 W. Va. 350,
566 S.E.2d 237 (2002) 13

Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission,
187 W. Va. 318, 418 S.E.2d 764 (1992) 12

Harrison County Board of Education v. Carson Leggett, 195 W. Va. 596,
466 S.E.2d 447 (1995) 24

<u>Haynes v. Rhone-Poulenc, Inc.</u> , 206 W. Va. 18, 521 S.E.2d 331 (1999)	12
<u>Hensley v. West Virginia Department of Health and Human Resources</u> , 203 W. Va. 456, 508 S.E.2d 616 (1998)	12
<u>Howell v. City of Princeton</u> , 210 W. Va. 735, 559 S.E.2d 424 (2001)	5
<u>John W. Lodge Distributing Co., Inc. v. Texaco, Inc.</u> , 161 W. Va. 603, 245 S.E.2d 157 (1978)	5
<u>Liller v. West Virginia Human Rights Commission</u> , 180 W. Va. 433, 376 S.E.2d 639 (1988)	24
<u>Longwell v. Board of Education</u> , 213 W. Va. 486, 583 S.E.2d 109 (2003)	5
<u>Meadows v. Lewis</u> , 172 W. Va. 457, 307 S.E.2d 625 (1983)	14
<u>Meritor Savings Bank, FSB v. Vinson</u> , 477 U.S. 57, 106 S. Ct. 2399 (1986)	9
<u>Morris Mem. Convalescent Nursing Home, Inc. v. West Va. Human Rights Commission</u> , 189 W. Va. 314, 431 S.E.2d 353 (1993)	8
<u>Nestor v. Bruce Hardwood Floors, L.P.</u> , 210 W. Va. 692, 558 S.E.2d 691 (2001)	14
<u>Paxton v. Crabtree</u> , 184 W. Va. 237, 400 S.E.2d 245 (1990)	11
<u>Pittinger, et al. v. Shepherdstown Volunteer Fire Dep't</u> , Docket No. PAS-48-77	13
<u>Posey v. State Workmen's Compensation Commissioner</u> , 157 W. Va. 285, 201 S.E.2d 102 (1973)	19
<u>Price v. Boone County Ambulance Authority</u> , 175 W. Va. 676, 337 S.E.2d 913 (1985)	24
<u>Rodriguez v. Consolidation Coal Co.</u> , 206 W. Va. 317, 524 S.E.2d 672 (1999)	12
<u>Shaffer v. Charleston Area Medical Center, Inc.</u> , 199 W. Va. 428, 485 S.E.2d 12 (1997)	5
<u>Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission</u> , 172 W. Va. 627, 309 S.E.2d 342 (1983)	13
<u>Skaff v. West Virginia Human Rights Commission</u> , 191 W. Va. 161, 444 S.E.2d 39 (1994)	11
<u>Skaggs v. Elk Run Coal Co.</u> , 198 W. Va. 51, 479 S.E.2d 561 (1996)	7, 8, 10, 17
<u>Smith v. West Virginia Human Rights Commission</u> , 2004 WL 1489057 (W. Va. Sup. Ct., July 2, 2004)	6, 18
<u>State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.</u> , 194 W. Va. 770, 461 S.E.2d 516 (1995)	5
<u>Sticklen v. Kittle</u> , 168 W. Va. 147, 287 S.E.2d 148 (1981)	3

<u>Stone v. St. Joseph's Hospital of Parkersburg</u> , 208 W. Va. 91, 100, 538 S.E.2d 389, 398 (2000)	8
<u>Vandevender v. Sheetz, Inc.</u> , 200 W. Va. 591, 490 S.E.2d 678 (1997)	24
<u>Vest v. Board of Education of Nicholas County</u> , 193 W. Va. 222, 455 S.E.2d 781 (1995)	23, 24
<u>Walk v. State Compensation Commissioner</u> , 134 W. Va. 223, 58 S.E.2d 791 (1950)	19
<u>West Virginia Human Rights Commission v. Pauley</u> , 158 W. Va. 495, 212 S.E.2d 77 (1975)	11
<u>West Virginia Human Rights Commission v. Pearlman Realty Agency</u> , 161 W. Va. 1, 239 S.E.2d 145 (1977)	11, 13
<u>West Virginia Institute of Technology v. West Virginia Human Rights Commission</u> , 181 W. Va. 525, 383 S.E.2d 490 (1989)	12
<u>Whittington v. Monsanto Corp.</u> , Docket No. ES-2-77	13
<u>Wriston v. Raleigh County Emergency Services Authority</u> , 205 W. Va. 409, 518 S.E.2d 650 (1999)	14

STATUTES

42 U.S.C. § 12112(b)(5)	8
W. Va. Code § 5-11-1	6
W. Va. Code 5-11-2	18
W. Va. Code § 5-11-4	1
W. Va. Code § 5-11-8(d)(6)	13
W. Va. Code § 5-11-9	9
W. Va. Code § 5-11-9(1)	25
W. Va. Code § 5-11-9(7)	22
W. Va. Code § 5-11-11 (1989)	23
W. Va. Code § 5-11-13 (1983)	23
W. Va. Code § 5-11-13(c)	12
W. Va. Code § 5-11-3(h)	6
W. Va. Code § 18-29-2	23

W. Va. Code § 23-2-6	1, 16
W. Va. Code § 23-4-1(f)	21
W. Va. Code § 23-5A-1	14, 19
W. Va. Code 29A-1-2(d)	6
W. Va. Code § 56-6-31	12
Wis. Stat § 102.03(2)	20

MISCELLANEOUS

6 W. Va. C.S.R. § 77-1-4.9	7
77 W. Va. C.S.R. 1, § 4.4 (1994)	8
<i>West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities, 6 W. Va. C.S.R. § 77-1-4.1</i>	7
<i>West Virginia Human Rights Commission's Legislative Rules Regarding Waiver of Rights, 6 W. Va. C.S.R. § 77-6-3 (2002)</i>	23

No. 31739

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THERESA D. MESSER,

Appellant,

v.

HUNTINGTON ANESTHESIA GROUP, INC.,
DR. FAROUK ABADIR, DR. HOSNY S. GABRIEL,
DR. MARK NEWFELD, DR. RICARDO RAMOS,
DR. ALFREDO RIVAS, DR. D. GRANT SHY,
DR. STANISLAV STRIZ, DR. MICHAEL VEGA
and DAVID EASTER,

Appellees.

BRIEF OF THE
WEST VIRGINIA HUMAN RIGHTS COMMISSION
AS AMICUS CURIAE

I.

INTEREST OF THE AMICUS CURIAE

The West Virginia Human Rights Commission [hereinafter Commission] is a statutory agency charged with the duty to "strive to eliminate all discrimination" in employment, places of public accommodation and housing opportunities occurring by virtue of race, religion, color, national origin, ancestry, sex, age, blindness, handicap or familial status. West Virginia Code § 5-11-4 (2001); West Virginia Code § 5-11A-5 (1992). The Commission has specific statutory responsibilities related to the investigation and adjudication of alleged violations of the West Virginia Human Rights Act and the West Virginia Fair Housing Act, W. Va. Code §§ 5-11-8 and 5-11A-9.

This case involves a purported conflict between the prohibition against discrimination in the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.*, and the exemption from liability provision of the Workers' Compensation Act, W. Va. Code § 23-2-6. The potential impact of the Court's resolution of this matter on the reach of West Virginia

discrimination laws cannot be overstated. If the Court reverses the Circuit Court decision and clearly repudiates the Appellees' arguments, this state's commitment to eradicating unlawful workplace discrimination will be reaffirmed. If this Court affirms the Circuit Court Order dismissing Appellant's Human Rights Act complaint, the authority of the WVHRA to prohibit discrimination "on the job" would be eviscerated. Accordingly, the Commission has a compelling interest in this case and in the Court's resolution of the issues presented.

As an agency of the state of West Virginia, the Human Rights Commission files this Amicus Brief pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. The Commission files this Amicus Brief to urge this Court to reverse the lower court's dismissal of Appellant's Human Rights Act claim. Applied across the spectrum of potential human rights violations, the decision below signals a sweeping reversal of the availability of human rights protections to persons who are in an ongoing employment relationship when they sustain an on-the-job injury in association with unlawful employer discrimination. Clearly such a result would be inconsistent with the legislative mandate to eliminate discrimination in West Virginia.

II.

QUESTION PRESENTED

Can employers evade liability for violations of the West Virginia Human Rights Act by seeking to invoke the exclusivity provision of the Worker's Compensation Act when an act of employment discrimination contributes to or results in mental and/or physical injury to the employee?

III.

STATEMENT OF THE CASE

Theresa D. Messer was employed as a Certified Registered Nurse Anesthetist with the Huntington Anesthesia Group, Inc. [hereinafter HAG] from September 1998 through

September 2000.¹ During her employment with HAG, Ms. Messer suffered from a herniated disk at L4-L5. This condition substantially limited one or more of Ms. Messer's major life activities.² On February 10, 1999, Ms. Messer presented HAG a note from her doctor that limited her to eight hour work days. The note also indicated that Ms. Messer should refrain from working overtime. HAG did not honor the limitations imposed by Ms. Messer's doctor. Ms. Messer was consistently and regularly called upon to work in excess of eight hours per day and overtime hours.

In early May 2000, Ms. Messer provided HAG another note from her doctor limiting Ms. Messer to an eight-hour work day. This limitation was also ignored by HAG.

On or about June 26, 2000, Ms. Messer's treating physician provided HAG³ with a third letter identifying the eight-hour shift limitation and a lifting restriction of twenty-five pounds. HAG failed to comply with the limitations set forth in this letter as well.

From receipt of the first note of limitation in February 1999 through the third written notice of limitation on June 26, 2000, HAG ignored the presented restrictions and failed or refused to engage in the interactive process to determine whether a reasonable accommodation was possible. HAG's conduct in this regard violated the anti-discrimination provisions of the West Virginia Human Rights Act [hereinafter WVHRA or HRA].

As a consequence of HAG's violation of the WVHRA, Ms. Messer was no longer able to maintain her employment with HAG. Her physical condition worsened so significantly that by September 2000, Ms. Messer was no longer able to perform her duties as a CRNA for HAG.

¹It is from the Complaint that the factual history presented herein was obtained. The facts of this case are not developed. As this matter was dismissed pursuant to a 12(b)(6) motion filed in lieu of an answer, the only record of the factual allegations of this case appears in Appellant's Complaint. For purposes of a 12(b)(6) motion, the complaint is construed in the light most favorable to the plaintiff, and the allegations of the complaint are taken as true. Sticklen v. Kittle, 168 W. Va. 147, 163, 287 S.E.2d 148, 157 (1981).

²Ms. Messer was limited in her ability to lift, stand and work.

³The June 26, 2000, letter was provided to David Easter. The Appellant named the Huntington Anesthesia Group, Inc., eight doctors who are shareholders in HAG, and David Easter (presumably an administrative employee of HAG) as Defendants in this matter. To the extent this Brief references HAG, Appellees and/or Defendants, it is the Commission's intention that the term be understood to reference all named Defendants.

On August 1, 2002, Appellant filed a timely Complaint in the Circuit Court of Cabell County alleging violations of the West Virginia Human Rights Act. Specifically, Ms. Messer alleged HAG did not reasonably accommodate her disability by following her doctor's work restrictions. Further, HAG failed to engage in the interactive process regarding Ms. Messer's request for accommodation. Ms. Messer's Complaint also asserted that Appellees' identified failures exacerbated her disability and resulted in her inability to perform her duties as a CRNA.

In association with her Complaint, Ms. Messer sought damages pursuant to the WVHRA for mental and emotional distress, lost wages, value of lost benefits, costs and attorney's fees, reinstatement, injunctive relief against future violations of the WVHRA and such other relief deemed appropriate.

On October 16, 2002, Appellees filed a 12(b)(6) Motion to Dismiss Ms. Messer's Complaint. As support for its Motion, HAG asserted two arguments.⁴ First, HAG asserted that the Complaint failed to state a claim for breach of the duty of reasonable accommodation pursuant to the WVHRA. Second, HAG mischaracterized the Appellant's claim as one exclusively governed by the Workers' Compensation Act.

On November 22, 2002, arguments were heard regarding Defendants' 12(b)(6) Motion in the Circuit Court of Cabell County. On August 18, 2003, Judge Cummings entered an Order granting HAG's Motion to Dismiss, finding:

1. The West Virginia Human Rights Act does not create a cause of action for workplace injuries;
2. Any injuries as alleged and sustained are the exclusive jurisdiction of the Workers' Compensation Act.⁵

The Circuit Court Order did not address HAG's argument that the Complaint failed to state a claim for breach of duty to reasonably accommodate Ms. Messer.⁶ Appellant

⁴Memorandum in Support of Defendants' Motion to Dismiss, pp. 4-7.

⁵Order Granting Motion to Dismiss (August 18, 2003), pp. 1-2.

⁶Although the court below did not base its decision on both of Appellee's arguments, the Commission addresses both herein and rejects Appellee's assertion that Ms. Messer did not state a cause of action pursuant to the WVHRA.

appeals this dismissal Order. The Commission provides this Amicus Brief in support of Ms. Messer.

IV.

STANDARD OF REVIEW

This case involves review of an Order granting HAG's 12(b)(6) Motion to Dismiss. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., Syl. pt. 2, 194 W. Va. 770, 461 S.E.2d 516 (1995); see also Longwell v. Board of Education, 213 W. Va. 486, 488-89, 583 S.E.2d 109, 111-12 (2003), Dunlap v. Friedman's, Inc., 213 W. Va. 394, 582 S.E.2d. 841 (2003). "Where matters heard on a 12(b)(6) motion do not extend outside the pleading, our standard of review from an order dismissing a claim under Rule 12(b)(6) is *de novo*["] Howell v. City of Princeton, 210 W. Va. 735, 737, 559 S.E.2d 424, 426 (2001) (*quoting Shaffer v. Charleston Area Medical Center, Inc.*, 199 W. Va. 428, 433, 485 S.E.2d 12, 17 (1997)). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Chrystal R.M. v. Charlie A.L., Syl. pt. 1, 194 W. Va. 138, 459 S.E.2d 415 (1995).

"The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Chapman v. Kane Transfer Co., Syl. pt. 3, 160 W. Va. 530, 236 S.E.2d 207 (1977). "The policy of the rule is thus to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied." John W. Lodge Distributing Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 605, 245 S.E.2d 157, 158-59 (1978).

V.

ARGUMENT

This Brief asserts that the Circuit Court erred in granting Appellees' Motion to Dismiss. In support of this assertion, the Commission offers several arguments detailing:

the availability of relief to Ms. Messer under the HRA for breach of duty to reasonably accommodate; the strong public policy interest to eliminate discrimination in West Virginia workplaces embodied within the HRA; a harmonization of the HRA and WCA that does not necessarily preclude application of either in the instant case; the devastating effect exclusivity preclusion could have on a variety of currently accepted HRA causes of action; circumstances in which this Court has approved of coexisting jurisdiction over similar workplace unfairness by the HRA and other statutory schemes (including workers' compensation discrimination); the potential for a constriction of state recognized disability rights in West Virginia; the uncertainty inherent in the approach adopted by the lower court; and, perhaps, most compelling, the contradictory outcomes in terms of the availability of HRA protection as applied to identical facts when one claim involves workplace injury and the other does not. Each of these arguments is addressed in detail herein below.

A. APPELLANT HAS ASSERTED A VALID CLAIM OF DISABILITY DISCRIMINATION PURSUANT TO THE WEST VIRGINIA HUMAN RIGHTS ACT.

The prohibitions against unlawful discrimination by an employer are set forth in the West Virginia Human Rights Act. W. Va. Code §§ 5-11-1 to -21. Section 5-11-9(1) of the Act makes it unlawful "for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment"

The term "discriminate" or "discrimination" as defined in the Act means "to exclude from, or fail or refuse to extend to, a person equal opportunities because of . . . disability. . . ." W. Va. Code § 5-11-3(h). Legislative regulations, promulgated pursuant to the West Virginia Human Rights Act, detail the prohibition against disability discrimination:⁷

⁷The HRA legislative regulations have the force and effect of law.

A regulation that is proposed by an agency and approved by the Legislature is a "legislature rule" as defined by the State Administrative Procedures Act, W. Va. Code, 29A-1-2(d) [1982], and such a legislative rule has the force and effect of law.

Smith v. West Virginia Human Rights Commission, 2004 WL 1489057 (W. Va. Sup. Ct., July 2, 2004).

4.1 No employer shall, on the basis of disability, subject any qualified individual with a disability to discrimination in employment as it relates to:

...
4.1.4. Job assignments, job classifications, organizational structures, position description, lines of progression, and seniority lists;
...

4.1.9 Any other terms, conditions, or privileges of employment.

West Virginia Human Rights Commission's Legislative Rules Regarding Discrimination Against Individuals With Disabilities, 6 W. Va. C.S.R. § 77-1-4.1. et seq. (1994).

The legislative regulations also make it clear that reasonable accommodations include, but are not limited to job restructuring, implementation of part-time or modified work schedules and reassignment to a vacant position. 6 W. Va. C.S.R. § 77-1-4.9.

The Human Rights Act requires that employees with disabilities be treated "equally." In some circumstances, to achieve equality of opportunity, the law requires differential treatment for persons with disabilities. In these cases, persons with disabilities must be provided with reasonable accommodation. Reasonable accommodation is defined in the legislative regulations as:

reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or to remain in the position for which he was hired. Reasonable accommodation requires that an employer make reasonable modifications or adjustments designed as attempts to enable an individual with a disability to remain in the position for which she/he was hired.

6 W. Va. C.S.R. § 77-1-4.4 (emphasis added).

Failure to provide necessary reasonable accommodations to a qualified employee with a disability violates the West Virginia Human Rights Act. This theory of liability pursuant to the WVHRA is described by Justice Cleckley in Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 479 S.E.2d 561 (1996).

In addition to legislating against those traditionally recognized forms of discrimination, the ADA also expressly

provides that unlawful discrimination can occur when an employer fails to consider an applicant's or employee's disability where its adverse effect on the individual's job performance can be avoided. ADA, § 102(b)(5); 42 U.S.C. § 12112(b)(5). That is, employers have an affirmative obligation to provide reasonable accommodation for disabled individuals. Although our Human Rights Act does not have an explicit analogue to Section 102(b)(5), the West Virginia Human Rights Commission (Commission) and this Court have inferred that our Human Rights Act imposes this duty of reasonable accommodation. See 77 W. Va. C.S.R. 1, § 4.4 (1994); Morris Mem. Convalescent Nursing Home, Inc. v. West Va. Human Rights Comm'n, 189 W. Va. 314, 431 S.E.2d 353 (1993); Coffman v. West Va. Bd. of Regents, 182 W. Va. 73, 386 S.E.2d 1 (1988).

Skaggs, 198 W. Va. at 63-64, 479 S.E.2d at 573-74.

To state a claim for breach of the duty to reasonably accommodate, a plaintiff must prove the following elements:

- (1) The plaintiff is a qualified person with a disability;
- (2) The employer was aware of the plaintiff's disability;
- (3) The plaintiff required an accommodation in order to perform the essential functions of the job;
- (4) A reasonable accommodation existed that would meet the plaintiff's needs;
- (5) The employer knew or should have known of the plaintiff's needs and of the accommodation; and
- (6) The employer failed to provide the accommodation.

Skaggs, at Syl. pt. 2, 479 S.E.2d at 575 (footnotes omitted); see also Alley v. Charleston Area Medical Center, 2004 WL 1433272 (W. Va. S. Ct., June 24, 2004); Baisden v. West Virginia Secondary Schools Activities Commission, 211 W. Va. 725, 568 S.E.2d 32 (2002); Stone v. St. Joseph's Hospital of Parkersburg, 208 W. Va. 91, 100, 538 S.E.2d 389, 398 (2000).

In support of its Motion to Dismiss below, HAG asserts that Ms. Messer failed to state a claim for failure to accommodate.⁸ HAG argues that Ms. Messer identified no

⁸Memorandum in Support of Defendants' Motion to Dismiss, pp. 4-5. While the Circuit Court Order dismissing Ms. Messer's Complaint did not speak to this argument asserted by HAG, it is patently inaccurate.

adverse action in her Complaint.⁹ In asserting this argument, HAG relies exclusively on the statutory language of W. Va. Code § 5-11-9. This proposition is clearly contrary to West Virginia law, and harkens back to the arguments employers used to make regarding hostile work environment claims.¹⁰ The harm, or adverse action experienced by Ms. Messer was HAG's failure to accommodate or engage in the interactive process. The result of such action by HAG was an exacerbation of the Appellant's disability.

There can be no doubt but that Appellant's Complaint states a cause of action pursuant to the West Virginia Human Rights Act. Construing the Complaint in the light most favorable to the Appellant: (1) at the time of her accommodation requests Ms. Messer was a qualified person with a disability; (2) HAG was aware of Ms. Messer's disability; (3) the Appellant required the accommodation of a modified work schedule and lifting restrictions to perform the essential functions of her job; (4) Ms. Messer's accommodation requests were reasonable;¹¹ (5) HAG was aware of Ms. Messer's accommodation needs,

⁹Id.

¹⁰Early sexual harassment/hostile work environment litigation produced a series of defeats for plaintiffs who sought to challenge their treatment based upon harassing conduct alone under Title VII. Early plaintiffs faced challenges asserting Title VII required a tangible financial loss or other overt adverse action in addition to harassing conduct. The United States Supreme Court first recognized a cause of action for sexual harassment absent an adverse action in the case of Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 (1986). In so deciding, the Court stated: "The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women" in employment." Id., 477 U.S. at 64.

Appellees' argument that Ms. Messer identifies no adverse action similarly misses the harm that occurs when an employer fails to reasonably accommodate its employees. In Ms. Messer's case, the adverse action is the failure to accommodate and/or participate in the interactive process itself. The resultant harm is Appellant's inability to maintain her job with HAG. To require an additional adverse action beyond the failure to accommodate would be similar to requiring an adverse action in addition to the existence of a hostile work environment in the harassment context. For a person with a disability in need of accommodation, the refusal by an employer to engage in an interactive process to find a reasonable accommodation is to deny a "privilege of employment" and to adversely affect the "conditions" of employment.

¹¹

Determinations about the reasonableness of an accommodation or the impact of its hardship must be done on a case-by-case basis, with careful attention to the particular circumstances and guided by the Human Rights Act's policy of enhancing employment opportunities for those with disabilities through workplace adjustments. Essentially, the law mandates

as evidenced by three doctor's requests; and (6) HAG failed to provide Ms. Messer with the requested accommodation. In addition to failing to accommodate Ms. Messer, HAG did not engage in the interactive process as envisioned in Skaggs. A reasonable accommodation must be provided where it is necessary to ensure a person with a disability an equal employment opportunity. Failure to do so denies the employee a "privilege of employment" and adversely affects the "conditions" of employment. It is a violation of the Human Rights Act where the failure to provide a reasonable accommodation denies an employee this equal opportunity.

B. THE LEGISLATIVE MANDATE OF THE WVHRA IS FAR BROADER THAN THE WCA IN ITS SCOPE AND ABILITY TO REDRESS DISCRIMINATORY HARM CAUSED TO EMPLOYEES THROUGH REMEDIAL AND EQUITABLE RELIEF. THE WCA IS NOT EQUIPPED TO ADDRESS THE PUBLIC POLICY OBJECTIVES OF THE WVHRA.

A comparison of the objectives and powers of the HRA and WCA illustrates the importance of maximizing the availability of each statutory scheme to achieve the maximum possible implementation of the respective policy objectives. The HRA seeks to protect individual employees and members of the public from the effects of unlawful discrimination. The WCA establishes a no-fault compensation plan for injuries sustained on the job. The WCA is not equipped to eliminate discrimination in West Virginia workplaces. Allowing Ms. Messer's HRA complaint to proceed is the only way to address the individual and public interest in stopping workplace discrimination.

The WVHRA is a comprehensive police power measure enacted to combat discrimination in West Virginia workplaces. Equal opportunity is a fundamental principle

common sense courtesy and cooperation. "Accommodation" implies flexibility, and workplace rules, classifications, schedules, etc., must be made supple enough to meet that policy.

Skaggs, 479 S.E.2d at 577 (footnote omitted); see also Baisden v. West Virginia Secondary Schools Activities Commission, Syl. pt. 3, 211 W. Va. 725, 568 S.E.2d 32, 39 (2002). Without any factual development in this case, either through the interactive process or discovery, it must be assumed that Ms. Messer's requests were reasonable and not an undue hardship for HAG.

emanating from the State Constitution, and is embodied in the provisions of the HRA. Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 149, 324 S.E.2d 99, 109 (1984). This Court has opined that “every act of unlawful discrimination in employment, housing, or public accommodations is akin to an act of treason, undermining the very foundations of our democracy.” Id., 174 W. Va. at 148, 324 S.E.2d at 108. The denial of equal opportunity in employment by reason of disability “is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.” Id. The legislative declaration of public policy contained in HRA is both “broad and beneficial.” Skaff v. West Virginia Human Rights Commission, 191 W. Va. 161, 162, 444 S.E.2d 39, 40 (1994). Because of the strong public policy to eliminate discrimination, the Act is granted liberal construction with respect to the substantive and procedural provisions to achieve these policy objectives. Paxton v. Crabtree, Syl. pt. 1, 184 W. Va. 237, 241, 400 S.E.2d 245, 249 (1990).

The HRA includes substantial consequences for violations of the Act to achieve its legislative mandate.¹² These consequences are remedial and prospective and involve both monetary and equitable relief.

With respect to damages, the West Virginia Human Rights Act authorizes both remedial and equitable relief:

¹² “[I]t is readily discernible that the Legislature, by its recent enactments in the field of human rights, intended to and did provide the Commission the means with which to effectively enforce the law and meaningfully implement the legislative declaration of policy. If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement. The forceful language used by the Legislature mandates the eradication of unlawful discrimination. If this mandate is to be carried to fruition the provisions of the 1967 Human Rights Act and the amendments thereto must be given the significance intended so as to provide for meaningful enforcement.

Allen v. West Virginia Human Rights Commission, 174 W. Va. 139, 149, 324 S.E.2d 99, 109 (1984). (quoting West Virginia Human Rights Commission v. Pauley, 158 W. Va. 495, 499-500, 212 S.E.2d 77, 79 (1975), overruled on other grounds, West Virginia Human Rights Commission v. Pearlman Realty Agency, 161 W. Va. 1, 5, 239 S.E.2d 145, 147 (1977)).

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 . . . 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.

W. Va. Code § 5-11-13(c).

Courts and the HRC are empowered to award the complainant such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). Because the Human Rights Act is a remedial statute, compensatory and equitable relief should be granted to the fullest extent possible. West Virginia Institute of Technology v. West Virginia Human Rights Commission, 181 W. Va. 525, 536, 383 S.E.2d 490, 501 (1989). Such relief includes back pay,¹³ reinstatement and front pay.¹⁴ Punitive damages are available as remedial relief pursuant to the Act.¹⁵ In circuit court cases pursuant to the HRA, plaintiffs,

¹³Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). With respect to back pay, plaintiffs may be awarded interest. Interest is payable on back pay awards at a rate of ten percent (10%) per annum. Rodriguez v. Consolidation Coal Co., 206 W. Va. 317, 524 S.E.2d 672 (1999); Hensley v. West Virginia Dep't of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986); Bell v. Inland Mutual Ins. Co., 175 W. Va. 165, 332 S.E.2d 127 (1985); W. Va. Code § 56-6-31.

¹⁴Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 318, 418 S.E.2d 764 (1992); Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992); Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305, 311 (1989).

¹⁵W. Va. Code § 5-11-13(c); Haynes v. Rhone-Poulenc, Inc., Syl. pt. 5, 206 W. Va. 18, 521 S.E.2d 331 (1999).

like Ms. Messer, may seek emotional distress damages.¹⁶ The purpose of the available relief is: to make the victim of discrimination whole; acknowledge the effect of discrimination upon the claimant; to eliminate the discriminatory conduct and to create disincentives for future acts of discrimination.

Litigation of HRA cases address both individual harm and the public interest. In addition to damages that compensate for lost employment and punitive measures, plaintiffs are also entitled to other relief, including cease and desist orders and other equitable relief. The greatest priority in civil rights law enforcement is the elimination of discrimination, and virtually every statute and ordinance provides for authority to issue cease and desist orders. W. Va. Code § 5-11-8(d)(6). In addition to the make whole remedy available to a complainant, cease and desist orders may make provisions which will aid in eliminating future discrimination.¹⁷

As part of its cease and desist orders, the WVHRC is empowered to award incidental damages "as compensation for humiliation, embarrassment, emotional and mental distress, and loss of personal dignity, without proof of monetary loss." Frye v. Future Inns of America-Huntington, Syl. pt. 1, 211 W. Va. 350, 566 S.E.2d 237 (2002); Bishop Coal Co. v. Salyers, 181 W. Va. 71, 380 S.E.2d 238 (1989); Pearlman Realty Agency v. West Virginia Human Rights Commission, 161 W. Va. 1, 239 S.E.2d 145 (1977).

¹⁶Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 24, 422 S.E.2d 494, 501 (1992). This Court recently discussed the appropriateness of a \$150,000 emotional distress damages award in Alley v. Charleston Area Medical Center, Inc., 2004 WL 1433273, at *8-9 (W. Va. S. Ct., June 24, 2004). In the Alley case, the plaintiff alleges that she was subject to retaliatory discharge based upon her disabilities and that CAMC refused to make reasonable accommodations for the plaintiff's known impairments, in violation of the HRA. The complaint further alleged that CAMC "with knowledge of Appellee's [plaintiff's] asthma, [CAMC] exposed her to substances that exacerbated her condition." Alley, at *4 (emphasis added).

¹⁷In cases adjudicated before Human Rights Commission ALJs, such equitable relief has included cease and desist orders, requirements to provide anti-discrimination training to managers and employees, and monitoring of employment practices. A cease and desist order may require an affirmative action program and a sworn affirmation from a responsible officer of the Respondent that the tribunal's order has been implemented and will continue to be implemented. Whittington v. Monsanto Corp., Docket No. ES-2-77, and Pittinger, et al. v. Shepherdstown Volunteer Fire Dep't, Docket No. PAS-48-77; see also Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission, 172 W. Va. 627, 309 S.E.2d 342 (1983).

By contrast, workers' compensation programs were developed in this and other states as a way to systematically provide medical and indemnity benefits to employees injured on the job. The central purpose of the workers' compensation system is to provide no-fault compensation that allows an employee who was injured at work an adequate means of support while he or she is unable to work due to the injury. Theoretically, this system is mutually beneficial to employers, who avoid the possibility of negligence actions, and employees, who have a mechanism to obtain some benefits without undertaking wrongful injury litigation. "The benefits of this system accrue both to the employer, who is relieved from common-law tort liability for negligently inflicted injuries, and to the employee, who is assured prompt payment of benefits." Meadows v. Lewis, 172 W. Va. 457, 469, 307 S.E.2d 625, 638 (1983).

By nature, the workers' compensation system avoids any consideration of fault when it compensates workplace injuries. This system has no mandate to vindicate the public interest or eliminate unfair employment practices. However, even in enacting the WCA, the Legislature was mindful of the importance of legal safeguards against workplace discrimination. Section 23-5A-1 *et seq.* prohibits an employer from discriminating against an employee on the basis of receipt of or application for workers' compensation benefits. W. Va. Code § 23-5A-1.¹⁸ This narrow provision does not address any other prohibition against discrimination, and is insufficient to cover a charge of disability discrimination as provided within the HRA. Nevertheless, it does support the strong commitment of West Virginia to prohibiting workplace discrimination.

The lower court's broad application of the WCA exclusivity provision, to extend to all injuries caused on the job whether the result of discrimination or not, raises a question about the viability of some WCA discrimination cases as well as HRA discrimination. For

¹⁸"No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive benefits under this chapter." W. Va. Code § 23-5A-1. The prima facie case for workers' compensation discrimination requires proof that (1) an on-the-job injury was sustained; (2) proceedings were instituted under the WCA; and (3) the filing of a workers' compensation claim was a significant factor in the employer's decision to discharge or otherwise discriminate against the employee. Nestor v. Bruce Hardwood Floors, L.P., 210 W. Va. 692, 558 S.E.2d 691 (2001); Wriston v. Raleigh County Emergency Services Authority, 205 W. Va. 409, 518 S.E.2d 650 (1999).

example, an employee files a workers' compensation claim related to an on-the-job injury. He is off from work for six months. Upon his return to work, the employer verbally abuses the employee for filing the WCA claim and systematically gives the employee the worst, most unpleasant work responsibilities it can. The employee sustains a new physical injury as a result of the job assignments. The employee's pursuit of a workers' compensation discrimination claim and his subsequent physical injury arise from the same factual scenario. However, the workers' compensation discrimination claim and the workplace injury claim seek to remedy two separate harms: physical injury and discrimination. Does this discrimination claim survive the WCA bar because it arises out of the WCA itself and not another statute? Certainly the exclusivity rule should not bar a workers' compensation discrimination claim because the discrimination resulted in a workplace injury. It would undermine the policy objective of the WCA anti-discrimination provision to hold the claim barred. However, as discussed herein above, the HRA deals with the protection of fundamental human and civil rights. The protection of the HRA's broad prohibition on employment discrimination should be no less far reaching than § 23-5A-1. Arguably, as the HRA deals with the fundamental principles of equal opportunity, it should receive even greater deference.

The WCA system is wholly incapable of addressing the policy objectives of the HRA: eradicating discrimination, promoting the public interest and focusing on upholding civil rights. Accordingly, the WCA bar should not be read so as to interfere with the reach of the HRA.

C. THE EXCLUSIVITY PROVISION OF THE WCA DOES NOT APPLY TO MS. MESSER'S CLAIM OF BREACH OF DUTY TO ACCOMMODATE.

1. Appellant's HRA claim cannot be construed as primarily about workplace injury.

Appellant's failure to accommodate claim does not trigger application of § 23-2-6. In pertinent part, the workers' compensation employer exemption from liability states:

Any employer subject to this chapter who subscribes and pays into the workers' compensation fund. . . as provided in this section is not liable to respond in damages at common

law or by statute for the injury or death of any employee,
however occurring . . .

W. Va. Code § 23-2-6 (emphasis added).

In order for a claim to be barred by the exclusivity provision, it must be brought for the purpose of compensating a workplace injury or death. As part of the compensation bargain, in exchange for swift and certain compensation, employees forego the ability to seek tort relief for the compensation of workplace injuries.

Appellant does seek damages associated with her workplace injury. If the lower court considered this an impermissible encroachment into the workers' compensation arena, it could have invoked § 23-1-6 to disallow damages associated with the workplace injury and left the accommodation provisions of the Complaint intact.¹⁹ However, the central issue of her Complaint is HAG's violation of the HRA by virtue of its failure to accommodate the Appellant. An action alleging breach of the duty to reasonably accommodate is not an action for workplace injury compensation. To consider it such is to ignore the purpose and benefit of the cause of action. Associated with Appellant's allegations is a prayer for relief seeking emotional distress damages associated with the discrimination she experienced and injunctive relief. The injunctive relief sought is only available pursuant to the HRA. Injunctive and structural relief is designed not only to redress the harm sustained by Ms. Messer, but also to protect other employees and to achieve the public policy objectives of the HRA.

**2. The WCA compensates workplace injuries.
The HRA enables qualified employees with
disabilities to continue in employment with
reasonable accommodation.**

This Court has not previously directly addressed the issue raised by this appeal. However, in the earlier case of Coffman v. West Virginia Board of Regents, 182 W. Va. 73,

¹⁹If this Court is in agreement with this proposition, it could likewise rule.

386 S.E.2d 1 (1988),²⁰ both in *dicta* in the majority opinion and in Justice Miller's dissent,²¹ the interplay between newly developed disability discrimination law and the WCA was tangentially addressed.

In Coffman, this Court considered an appeal from an order of the trial court denying West Virginia Board of Regents' motion to set aside a jury verdict in favor a former employee. The former employee, Ms. Coffman, filed a wrongful termination claim alleging disability discrimination pursuant to the HRA. Id. 182 W. Va. at 74, 386 S.E.2d at 2. At trial, the jury found in favor of Ms. Coffman and awarded her \$55,600. Id., 182 W. Va. at 75, 386 S.E.2d at 3. The Board of Regents moved for a directed verdict and appealed the Circuit Court of Monongalia County's denial thereof. Id. As the basis for its motion and subsequent appeal, the Board of Regents argued that, as a matter of law, Ms. Coffman was not a "qualified handicapped person" entitled to a reasonable accommodation. In considering this case, the Court determined that reasonable accommodations do not include job re-assignment. Id., 182 W. Va. at 78, 386 S.E.2d at 6. Applying this determination to the facts of Ms. Coffman's case, the Court found that the Board of Regents had no obligation to retain Ms. Coffman because a reasonable accommodation would not allow her to perform the essential functions of her job without job reassignment, and that the lower court erred in failing to enter a directed verdict. The Court held that further reasonable accommodation requirements do not include job reassignment. Id., 182 W. Va. at 78-79, 386 S.E.2d at 6-7.

In *dicta*, the Coffman majority wrote:

No party has challenged the fact and we, therefore, acknowledge that Coffman was handicapped as defined by West Virginia law. We, however, note that she became handicapped as a result of an injury sustained on the job during the course of her employment. In this regard, we are concerned as to why Coffman did not pursue a claim for workers' compensation benefits beyond the 30-day period of temporary total disability. The appellants do not raise the issue of workers' compensation and we, therefore, do not address it.

²⁰This Court overruled its decision in Coffman in Skaggs v. Elk Run Coal Co., Inc., 198 W. Va. 51, 479 S.E.2d 561 (1996).

²¹Coffman, 182 W. Va. at 15, 386 S.E.2d at 87 (Miller, J., dissenting).

We note that the intent of the legislature inherent in the enacting of the handicapped provisions of the West Virginia Human Rights Act was to assure equal opportunities for the handicapped in housing and employment. W. Va. Code 5-11-2. Thus we cannot conclude that the legislature intended the handicapped provisions of the West Virginia Human Rights Act as an alternative source of compensation for injuries sustained on the job.

Coffman, 182 W. Va. at 79 n.16, 386 S.E.2d at 7 n.16.

Coffman was this Court's first disability discrimination case decided pursuant to the amended HRA.²² It was decided in 1988, before the passing of the Americans with Disabilities Act, and during the infancy of state statutory claims for disability discrimination. Eight years later, the majority opinion in Coffman was overruled by this Court in Skaggs, and the current standard for analyzing disability discrimination claims pursuant to the HRA was established. The differences in Coffman and Skaggs illustrate the progression of the legal analysis and understanding of rights regarding disability in the workplace and discrimination.²³ Justice Miller's dissent, progressive in 1988, is much more consistent with the current standards developed by this Court. His dissent addresses footnote sixteen of the majority opinion, and argues that the majority failed to consider the differing purposes of the respective legislation:

Finally, I am at a loss to understand footnote 16 of the majority's opinion. It seems to suggest that the legislature did not intend to accord handicapped workers any rights if they were injured on the job. This, according to the majority, is because the injured worker can obtain workers' compensation benefits, and therefore, the majority intones: "[W]e cannot conclude that the legislature intended the handicapped provisions of the West Virginia Human Rights Act as an alternative source of compensation for injuries sustained on the job."

This statement is so outrageously fallacious that it is hard to believe that it was meant to be taken seriously. First,

²²Coffman, 182 W. Va. at 2, 386 S.E.2d at 79.

²³For a detailed discussion of the reasonable accommodation framework established in Skaggs, see *supra* Part A. For a discussion of interplay of legislative regulations regarding disability promulgated pursuant to the WVHRA, Skaggs and Coffman, see Smith v. West Virginia Human Rights Commission, 2004 WL 1489057 (W. Va. S. Ct. July 2, 2004).

workers' compensation benefits are for the medical and hospital expenses incurred from the injury. Cropp v. State Workmen's Compensation Comm'r, 160 W. Va. 621, 236 S.E.2d 343 (1977). Temporary total disability benefits are paid while the injured worker is recovering, and, thus, compensation to some extent is for loss of earnings. Dunlap v. State Workmen's Compensation Comm'r, 160 W. Va. 58, 232 S.E.2d 343 (1977). Awards for permanent disability are designed to reimburse the injured worker for the injury's impact on his physical and mental condition, as well as the impairment of his earning capacity and his ability to enjoy the normal pursuits of every day life. Posey v. State Workmen's Compensation Comm'r, 157 W. Va. 285, 201 S.E.2d 102 (1973); Walk v. State Compensation Comm'r, 134 W. Va. 223, 58 S.E.2d 791 (1950). It is obvious that workers' compensation benefits relate to the employee's injuries and have nothing to do with his status under the handicap law. This latter provision is designed to prevent discrimination against a person who has a handicap.

The potential for handicap discrimination occurs when the injured employee is well enough to return to work and has a handicap defined by the Act. As cases recognize, the handicap can occur from a job-related injury, a non-work related injury, or a disease or other disorder. In most cases the employee is already employed when the disability arises, but, of course, the handicap law applies to new hirees.

Nor is it possible to ascribe any legislative intent that employees handicapped as a result of occupational injuries were to be excluded from the coverage of the handicap discrimination law. The wording of the Act is very broad since it prohibits discrimination "with respect to compensation, hire, tenure, terms, conditions or privileges of employment[.]" The term "tenure" obviously applies to someone who has already been hired.

Moreover, any such construction as intimated by the majority would be contrary to the plain language of W. Va. Code 23-5A-1 (1978), which prohibits discrimination for receiving or attempting to receive workers' compensation benefits. . . .

The Workers' Compensation Act affords compensation for a worker's injuries and permanent disabilities. The handicap provisions of the Human Rights Act enables him to continue in employment if his injuries do not prevent him from performing the essential functions of his job with the help of reasonable accommodation.

Id., 182 W. Va. 85-86, 386 S.E.2d 13-14 (Miller, J., dissenting) (footnotes omitted).

Justice Miller accurately identified the contrasting purposes of the WVHRA and the WCA. That an employee could benefit from the applicable provisions of each statute is clearly conveyed in his dissent.

The state of Wisconsin identified similar considerations in its decision that its workers' compensation exclusivity provision did not preclude a state human rights claim.

If we were to interpret the WCA exclusive remedy provision as the employer proposes, only employees whose claims were not covered under the WCA would be afforded relief under WFEA [Wisconsin Fair Employment Act]. Those employees whose claims for physical or mental injuries were covered by the WCA, those perhaps most harmed by discriminatory conduct violating the WFEA would be limited to workers' compensation.

Byers v. LIRC, 208 Wis.2d 388, 401, 561 N.W. 2d 678, 683 (1997).²⁴

In Byers, the Supreme Court of Wisconsin considered whether a sexual harassment claim resulting in emotional injury was barred by the Wisconsin workers' compensation exclusivity provision.²⁵ For purposes of its analysis, the Byers Court presumed that the facts and injury underlying the discrimination claim would equally support a workers' compensation claim. Byers, 561 N.W.2d at 681 n.4. Given a set of facts within the purview of state workers' compensation and discrimination laws, the Wisconsin Court determined that workers' compensation did not bar exclusivity.²⁶ Byers, 561 N.W.2d at 686. In reaching this conclusion, the Byers Court heavily relied on the respective purposes behind the statutory schemes, noting the "intangible injuries which rob a person of dignity and self-esteem" and the effect of a discriminatory environment "that affects not only the victims of discrimination, but the entire workforce and the public welfare." Id. at 681-82.

The objectives of § 23-2-6 are not undermined by allowing an employee to pursue a disability discrimination claim even if the employee is eligible for workers' compensation for a workplace injury. There should be no concern that allowing Ms. Messer's claim would open the floodgates for litigation, because to proceed under the HRA, employees would

²⁴The parties to this matter have spent significant time addressing the various approaches to this issue taken by different jurisdictions. The Commission joins with Appellant's presentation of the different approaches.

²⁵It appears that the injury resulting from the sexual harassment was purely emotional and/or mental. Id.

²⁶The language of the Wisconsin exclusivity provision is general and broad and indicates that "the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer[.]" Wis. Stat § 102.03(2).

have to meet the requirements of the Act for employment discrimination.²⁷ In light of the allegations central to the complaint, Justice Miller's dissent in Coffman and policy considerations raised in other jurisdictions, it is clear that the most equitable resolution of this matter would allow Appellant to proceed on her HRA claim.²⁸

D. HOSTILE ENVIRONMENT AND/OR DISPARATE TREATMENT HRA CLAIMS THAT INVOLVE A COMPENSABLE INJURY SHOULD NOT BE BARRED BY THE WCA EXCLUSIVITY PROVISION.

The court below specifically found that “[t]he West Virginia Human Rights Act does not create a cause of action for workplace injuries.”²⁹ The Commission asserts that discrimination is commonly a “workplace injury.” When discrimination and injuries compensable pursuant to the WCA coexist, the WCA should not bar pursuit of the discrimination claim pursuant to the HRA.

Cases most directly affected by the outcome of this matter are those that arise in the context of an on-going employment relationship. For example, a discrimination claim alleging failure to hire, even if such failure resulted in an injury to the applicant, could not result in the availability of workers’ compensation benefits. By contrast, an employee’s ability to file an HRA claim asserting harassment and/or hostile work environment could be jeopardized by affirming the lower court ruling.³⁰ Pursuant to the Circuit Court’s rationale,

²⁷Presumably, employment discrimination involving purely mental injury is not an issue with regard to increased litigation, as the WCA does not recognize mental-mental claims as compensable. W. Va. Code § 23-4-1(f).

²⁸That an employee can maintain an HRA claim and a WCA claim arising from similar facts does not mean that double recovery should be allowed.

²⁹Order Granting Motion to Dismiss (August 18, 2003), pp. 1-2.

³⁰The jeopardy arises in such cases where the employee alleges injuries resulting from the hostile work environment that are compensable pursuant to the WCA. Presumably, if the resulting injury were purely emotional in character, such a claim would not be a compensable injury pursuant to §23-4-1(f), which disallows compensation claims for mental-mental injuries. The WCA does not appear to bar physical-mental or mental-physical claims. In the context of employment discrimination, harassment and hostile work environments can certainly result in physical injury as well as mental injuries that manifest into physical injury.

such a claim could potentially be barred pursuant to the WCA exclusivity. Clearly, such an outcome is inconsistent with the clear policy mandate of the HRA and with previous rulings of this Court.

At arguments on Appellees' Motion to Dismiss, counsel for Ms. Messer raised the following question:

Just to use an example, let's assume you have a workplace in which you have all white employees, but just one black employee. And you consistently assign the black employee the dangerous and dirty job of going in and cleaning out the hazardous waste in a dump. And as a result of that, the black employee sustains a compensable injury from exposure to poison. Well, the black employee has a comp claim, no doubt. But is it – would it be the defendant's contention that he doesn't have a race discrimination claim under the Human Rights Act?

Transcript of November 22, 2002, Hearing on Motion to Dismiss, p. 8.

An employee's ability to seek remedies pursuant to the HRA for conduct this Court has described as "akin to an act of treason, undermining the very foundations of our democracy"³¹ should not be undermined because the discrimination was so significant as to result in physical injury.

Likewise, an employee who engages in the protected activity of complaining of employment discrimination could similarly be given more dangerous jobs in retaliation for his complaint. Retaliation for engaging in protected activity is prohibited by the HRA. W. Va. Code § 5-11-9(7). If the employee sustains a physical injury as a result of the employer's retaliation or other disparate treatment, it should not rob him of the protection of the anti-retaliation provisions of the HRA. Similarly, a failure to accommodate should remain actionable even if the employer's failure to accommodate resulted in a compensable injury.

³¹Allen, 174 W. Va. at 148, 324 S.E.2d at 108.

E. THIS COURT HAS ACKNOWLEDGED THAT OVERLAPPING JURISDICTION IS PERMISSIBLE WITH RESPECT TO THE WVHRA AND OTHER STATUTORY SCHEMES AIMED AT REDRESSING UNFAIR TREATMENT OF EMPLOYEES.

This Court has held that the resolution of a state employee grievance by adjudication is not preclusive on the adjudication of Human Rights Act claims. In Vest v. Board of Education of Nicholas County, 193 W. Va. 222, 455 S.E.2d 781 (1995), this Court held that when an employee pursues a state employee grievance, it is not preclusive upon that employee's Human Rights Act claims. The Court made it clear that this holding was based in large measure upon the fundamental nature of the rights protected by the Human Rights Act.

In so holding, we particularly remain mindful of the primacy that the Legislature has accorded to eliminating invidious discrimination in this State. As we stated in Allen v. State Human Rights Commission, 174 W. Va. 139, 149, 324 S.E.2d 99, 109 (1984), "[e]qual opportunity in this State is a fundamental principle" grounded in several provisions of our State Bill of Rights. "[E]very act of unlawful discrimination in employment. . . is akin to an act of treason, undermining the very foundations of our democracy." 174 W. Va. at 148, 324 S.E.2d at 108. The sense of betrayal is even greater when the discrimination is, as alleged in this case, a public servant. We cannot allow the substantial protections promised by the Human Rights Act from such assaults on our personal and institutional integrities to be compromised by unthinking adherence to technical doctrines.

Vest, 193 W. Va. at 228, 455 S.E.2d at 787.

Just as a resolution of a grievance by adjudication does not bar the assertion of an HRA claim, the resolution of a grievance by agreement should not bar HRA claims, unless the agreement is specific about releasing HRA claims, and otherwise complies with the protections set out in the *West Virginia Human Rights Commission's Legislative Rules Regarding Waiver of Rights*, 6 W. Va. C.S.R. § 77-6-3 (2002).

Clearly, the Grievance Board's authority extends only to resolving grievances made cognizable by its authorizing legislation, that is, those grievances recognized in W. Va. Code, 18-29-2. Just as certainly, there is no authority in the statute for the Grievance Board to decide whether a person states a claim under the Human Rights Act. In fact, W. Va. Code, 5-11-10 (1994), W. Va. Code, 5-11-11 (1989), and W. Va. Code, 5-11-13 (1983), commit interpretation and enforcement of the

Human Rights Act to the Human Rights Commission and to the courts of this State.

Vest, 193 W. Va. at 225, 455 S.E.2d at 784; see also Price v. Boone County Ambulance Authority, 175 W. Va. 676, 337 S.E.2d 913 (1985).

In Harrison County Board of Education v. Carson Leggett, 195 W. Va. 596, 466 S.E.2d 447 (1995), this Court went a step further and made it clear that there was no preclusion, even if the state grievance procedure had been pursued through completion. Even a final resolution of the grievance was not a bar to asserting rights under the HRA.³²

Where claims involving the same factual background overlap, there can be concern that an individual could benefit from double recovery. Double recovery is not allowed and can easily be avoided through offset of damages. "We emphasize, however, that employees can recover only once for each injury. Thus, for example, if the Grievance Board awards back pay to a discharged employee who later, based on the same set of facts, prevails on a Human Rights claim, the grievance award would be set off against the employee's recovery under the Human Rights Act." Vest, 193 W. Va. 222, 229 n.15, 455 S.E.2d 781, 788 n.15; see also Liller v. West Virginia Human Rights Commission, 180 W. Va. 433, 441, 376 S.E.2d. 639, 647 n.19 (1988). Similarly, while Appellant should be allowed to proceed on her complaint, double recovery can be avoided through an offset of damages. In other cases where WCA and HRA claims can be made with regard to workplace discrimination and a workplace injury, similar offsets would be appropriate. Such an approach limits the possibility of double recovery for the workplace injury and allows employees to combat workplace discrimination.

³²West Virginia courts also regularly hear claims alleging both workers' compensation discrimination and violations of the HRA. See Vandevender v. Sheetz, Inc., 200 W. Va. 591, 490 S.E.2d 678 (1997) (employee alleged workers' compensation discrimination and disability discrimination related to employer's refusal to rehire her after workers' compensation injury and/or because of her disability, as well as a claim for failure to accommodate subsequent to her on-the-job injury, and received emotional distress and punitive damages).

F. BARRING MS. MESSER'S HRA CLAIM WOULD RESULT IN A RESTRICTION OF DISABILITY RIGHTS IN WEST VIRGINIA AND RENDER JURISDICTION OF THE HRA UNCERTAIN IN THE VAST MAJORITY OF CLAIMS ALLEGING WORKPLACE DISCRIMINATION AND ASSOCIATED INJURY.

Perhaps the most serious consequence of affirming the lower court opinion would be the uncertainty resulting from such a decision. Rather than looking at the unlawful conduct of an employer to determine HRA jurisdiction, courts would look to the presence or absence of "workplace injury" with regard to the employee.

- 1. The ruling below injects uncertainty into the system inasmuch as identical conduct by an employer can either give rise to an HRA claim or not, depending upon the consequences of the unlawful conduct.**

A failure to accommodate cause of action can exist independent of actual physical injury. In Ms. Messer's case, HAG's failure to accommodate her exacerbated her disability and resulted in her inability to maintain her employment. However, the failure to accommodate Ms. Messer would be actionable under the HRA with or without the workplace injury.³³ This result illustrates the uncertainty invited by the lower court's approach.

Consider the application of the decision below in the following circumstances where the employer has failed to accommodate and/or failed to engage in the interactive process with a qualified employee with a disability: (1) Employer disciplines and subsequently terminates employee when she refuses overtime that is inconsistent with her doctor's restrictions;³⁴ (2) Employee is forced to resign her position because she cannot continue in her current position absent accommodation without risk of additional physical injury; (3) While working without accommodation, employee files an HRA claim alleging failure to reasonably accommodate and failure to participate in the interactive process; and (4)

³³The refusal by an employer to engage in an interactive process to find a reasonable accommodation is to deny a "privilege of employment" and to adversely affect the "conditions" of employment. W. Va. Code § 5-11-9(1).

³⁴For another scenario involving failure to accommodate and termination see Alley v. Charleston Area Medical Center, Inc., 2004 WL 1433273 (W. Va. S. Ct. June 24, 2004).

Employee works without accommodation until such time as the lack of accommodation results in her inability to maintain her job through exacerbation of her disability.

In each of these four examples, the employer's conduct in not providing an accommodation and not participating in the interactive process is the same. However, only the first three scenarios could result in an HRA claim according to the decision below. This inconsistent treatment of identical conduct underscores the uncertainty and confusion that results when claims that are targeted to eliminate unlawful discrimination are mischaracterized and treated as claims designed to compensate for the effect of workplace injuries. The Circuit Court's approach could act as a disincentive to take accommodation requests seriously if employee injury can get the employer off the hook for disability discrimination. It would also unfairly penalize workers who stay in positions without accommodation in an effort to maintain employment. Most employment doctrines are designed to encourage continued employment. As this hypothetical illustrates, invoking § 23-2-6 where a discrimination claim and a workplace injury coexist can easily result in those who suffer the most harm receiving the fewest human rights protections.

2. This Court should strive to ensure that the promise of protection from discrimination contained in state law is available to all West Virginia employees.

Barring Ms. Messer's claim constricts disability discrimination jurisprudence in West Virginia by rendering HRA protection unavailable to any employee whose allegation of workplace discrimination occurs in a context where a workplace injury results from such discriminatory conduct. This Court has taken great pains to develop a thoughtful and equitable approach to the development of disability discrimination jurisprudence pursuant to the HRA, as befits such an important public interest. There are federal parallel anti-discrimination laws. Often the protections afforded by state employment discrimination law are broader than the federal counterpart.³⁵ It would be tragic to deny persons with

³⁵The federal EEOC has made a determination that the WVHRA is "substantially equivalent" to the federal parallel statutes which it enforces, and this determination permits cooperative agreements and revenue sharing with the West Virginia Human Rights Commission. In the event that this Court would uphold the lower court decision, restricting access to employment discrimination laws for persons with workplace injuries, West

disabilities the benefit of state discrimination protection because the employer's discriminatory conduct contributed to a compensable injury. A harmonization of the WCA and HRA that reaches such a conclusion erects a barrier between the protection of state anti-discrimination laws and the victims of discrimination who have sustained mental and physical injuries as a result of an employer's discriminatory conduct. This result is incompatible with the mandate of the HRA to eliminate discrimination in West Virginia workplaces.

VI.

CONCLUSION

For the reasons set forth above, the West Virginia Human Rights Commission respectfully requests that this Court reverse the Circuit Court of Cabell County and remand this case for further development.

WEST VIRGINIA HUMAN
RIGHTS COMMISSION,
Amicus Curiae,
By Counsel.

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL



JAMIE S. ALLEY, State Bar ID No. 7682
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
PAUL R. SHERIDAN, State Bar ID No. 3373
DEPUTY ATTORNEY GENERAL
CIVIL RIGHTS DIVISION
812 Quarrier Street, 2nd Floor
Post Office Box 1789
Charleston, West Virginia 25326-1789
(304) 558-0546
Counsel for the West Virginia
Human Rights Commission

G:\CIVL\Jsaal\Briefs\Moessen\HRC AMICUS BRIEF

Virginia law on this point would no longer be substantially equivalent with federal law, as federal claims cannot be excluded by state workers' compensation law.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THERESA D. MESSER,

Appellant,

v.

HUNTINGTON ANESTHESIA GROUP, INC.,
DR. FAROUK ABADIR, DR. HOSNY S. GABRIEL,
DR. MARK NEWFELD, DR. RICARDO RAMOS,
DR. ALFREDO RIVAS, DR. D. GRANT SHY,
DR. STANISLAV STRIZ, DR. MICHAEL VEGA,
and DAVID EASTER,

Appellees.

CERTIFICATE OF SERVICE

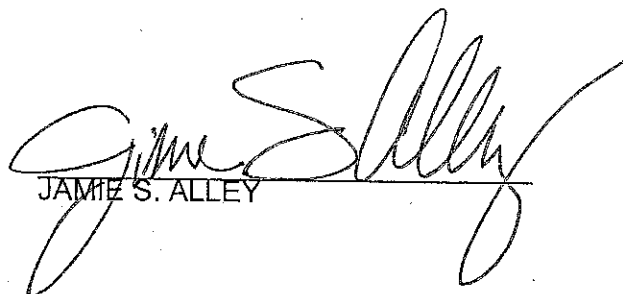
I, Jamie S. Alley, Assistant Attorney General of the State of West Virginia, do hereby certify that true copies of the foregoing West Virginia Human Rights Commission's Motion for Leave to File Amicus Brief Out of Time and Brief of the West Virginia Human Rights Commission, As Amicus Curiae, were served upon the following, by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 6th day of August, 2004, addressed as follows:

To: Walt Auvil, Esquire
The Employment Law Center PLLC
1208 Market Street
Parkersburg, West Virginia 26101
Counsel for Appellant

Elizabeth D. Harter, Esquire
Mark H. Dellinger, Esquire
BOWLES RICE McDAVID GRAFF & LOVE LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
Counsel for Appellees

The originals were hand delivered this date to:

The Honorable Rory L. Perry II, Clerk
West Virginia Supreme Court of Appeals
Building 1, Room E-317
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0830


JAMIE S. ALLEY