

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

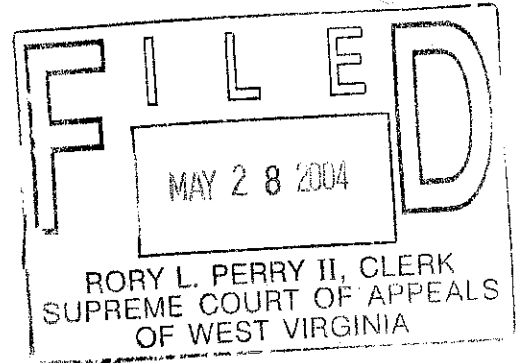
CHARLESTON

**THERESA D. MESSER,**

**Petitioner/Plaintiff,**

v.

No. 040039



**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,**

**Respondents/Defendants.**

**BRIEF OF THE APPELLANT**

This appeal arises from the dismissal by the Circuit Court of Cabell County, the Honorable John R. Cummings presiding, of the Petitioner's civil action for discrimination. This action alleged a violation of the West Virginia Human Rights Act. Based upon the exclusivity provision of the West Virginia Workers' Compensation Act, the Circuit Court dismissed this claim pursuant to Rule 12(b)(6) stating, in toto, that "the West Virginia Human Rights Act does not create a cause of action for workplace injuries; Any injuries as alleged and sustained are the exclusive jurisdiction of the Workers' Compensation Act." Because this ruling is contrary to West Virginia law, contrary to the holdings of the overwhelming majority of state courts which have considered the issue, and contrary to formal guidance from the EEOC on analogous federal civil rights protections, the Circuit Court's order should be reversed.

## I. FACTS

Plaintiff was employed as a Certified Registered Nurse Anesthetist (CRNA) by the Defendant, Huntington Anesthesia Group, Inc. (hereinafter "HAG") from September 13, 1988, until September of 2000. Complaint ¶ 2-3. She suffered a herniated disc in her back. Complaint ¶ 4. As a result she has limitations in her ability to lift, stand, and work. She is substantially limited in one or more major life activities. Complaint ¶ 5.

The Plaintiff's primary treating physician is Timothy R. Deer, M.D., of the Center for Pain Relief, Charleston, West Virginia. On February 10, 1999, the Plaintiff presented HAG with her doctor's return to work slip, (Exhibit A to the Complaint the Petition for Appeal). By and through Exhibit A, Dr. Deer informed HAG that the Plaintiff was "limited to 8 hr. work days. She should refrain from overtime." Despite the restrictions placed upon the Plaintiff by her treating physician, the Defendants consistently and regularly ignored both the Plaintiff's limitation to work only an eight hour day and the limitation that she should refrain from overtime. Complaint ¶ 8.

On May 1, 2000, Dr. Deer informed HAG, again in writing (Exhibit B to the Complaint and the Petition for Appeal), that the Plaintiff "should restrict to a (sic) 8 hour work day due to her injury." The restrictions set forth in Exhibit B were also ignored by the Defendants. On June 26, 2000, Dr. Deer provided to Defendant Easter - former HAG office manager - a third written doctor's slip (Exhibit C to the Complaint and the Petition for Appeal), wherein Dr. Deer noted that "the patient does have some work limitations which include that she not work more than 8 hours a day and she not lift any more than 25 lbs." Once again, the doctor's instructions and restrictions were ignored by the Defendants. Complaint ¶¶10-11.

In addition to refusing to comply with the restrictions established by Dr. Deer, Defendants refused to engage in the interactive process required by the West Virginia Human Rights Act to determine whether a reasonable accommodation of the Plaintiff's restrictions was possible. Complaint ¶ 12. As a result of the Defendants' refusal to follow the restrictions set forth in Exhibits A, B, and C, and the Defendants' refusal to participate in the interactive process required by the West Virginia Human Rights Act, the Plaintiff's herniated disc progressed and worsened to the point that, in September 2000, the Plaintiff was no longer able to perform her duties as a CRNA for HAG at all. The exacerbation of the Plaintiff's physical condition was a direct result of the failure and refusal of the Defendants to comply with their legal obligations of accommodation and interaction under the West Virginia Human Rights Act. Complaint ¶ 14.

The Petitioner filed a pro se complaint with the U.S. Equal Employment Opportunity Commission, Charge No. 172-A-11170. By its determination issued September 12, 2002, the EEOC found "Respondent [HAG] failed to adhere to the medical restrictions requested for Charging Party" and that "the Commission fails to credit the Respondent's [HAG's] reasons for failing to provide reasonable accommodation." The EEOC found "the investigation does establish a violation of the Americans with Disabilities Act (ADA) with respect to the reasonable accommodation matter."

Thereafter Petitioner retained counsel and pursued efforts at mediation through the EEOC. After these efforts failed, she filed suit in Cabell County Circuit Court, alleging violations of the West Virginia Human Rights Act essentially mirroring the allegations made in the EEOC investigation. The Cabell County case never proceeded beyond the pleading stage because, pursuant to the Defendants' Rule 12(b)(6), the motion to dismiss, the Circuit Court

dismissed the complaint on the basis of Workers' Compensation exclusivity. This appeal follows.

## II. ISSUE PRESENTED

**Does West Virginia Workers' Compensation Act exclusivity bar a claim for discrimination under the West Virginia Human Rights Act when an employer's refusal to accommodate a handicapped employee causes the employee physical and emotional injury?**

## III. AUTHORITIES RELIED UPON

<u>Ash v. Pacific Bell</u> , 1995 WL 866185 (S. D. Cal.) .....	12
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<u>Reese v. Sears, Roebuck &amp; Co.</u> , 731 P.2d 497 (Wash. 1987) .....	11
<u>Roberts v. Roadway Express, Inc.</u> , 149 F. 3d 1098 (10 <sup>th</sup> Cir. 1998) .....	7
<u>Schachtner v. Dept. of Industry, Labor, and Human Relations</u>	
422 N.W.2d 906 (Wisc. Ct. App. 1988) .....	11
<u>Smith v. Lake City Nursing Home</u> , 771 F Supp 985, 986-987 (D Minn 1991) .....	7
<u>Stone v. St. Joseph's Hospital of Parkersburg</u>	
208 W. Va. 91, 103-107, 438 S.E.2d 389, 401-404 (2000) .....	7
<u>St. Peter v. Ampak-Division of Gatewood Products, Inc.</u>	
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<u>Tolliver v. Kroger Co.</u> , 201 W. Va. 509, 498 S.E.2d 702 (1997) .....	13
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Wood v. Alameda, 875 F Supp 659, 665 (ND Cal 1995) (ADA) ..... 7

Worthington v. City of New Haven, 1999 WL 958627, at \*8,  
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**IV. ARGUMENT**

**1. EEOC GUIDANCE**

In 1996 the Equal Opportunity Commission issued “formal guidance” on workers’ compensation and the Americans with Disabilities Act<sup>1</sup>. The EEOC guidance discussed the relationship between the Americans with Disabilities Act and state workers’ compensation exclusivity provisions:

**Exclusive Remedy Provisions**

30. Do exclusive remedy provisions in workers’ compensation laws bar employees from pursuing ADA claims?

No. The purpose of workers’ compensation exclusivity clauses is to protect employers from being sued under common law theories of personal injury for occupational injury. Courts have generally held that the exclusive remedy provisions of state workers’ compensation laws cannot bar claims arising under federal civil rights laws, even where a state workers’ compensation law provides some relief for disability discrimination. Applying a state workers’ compensation law’s exclusivity provision to bar an individual’s ADA claim would violate the Supremacy Clause of the U.S. Constitution and seriously diminish the civil rights protection Congress granted to persons with disabilities.”

Clearly, state workers' compensation statutes do not bar federal ADA or Rehabilitation

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<sup>1</sup>A copy of the EEOC guidance on workers’ compensation and the Americans with Disabilities Act was provided to the Circuit Court as Exhibit A to the Petitioner’s response to Defendants’ motion to dismiss.

Act claims. Wood v. Alameda, 875 F Supp 659, 665 (ND Cal 1995) (ADA); Smith v. Lake City Nursing Home, 771 F Supp 985, 986-987 (D Minn 1991) (Rehabilitation Act); Worthington v. City of New Haven, 1999 WL 958627, at \*8, 1999 U.S. Dist. LEXIS 16104 (D Conn 1999).<sup>2</sup>

## 2. WEST VIRGINIA LAW

This Court has rejected the notion that the West Virginia Human Rights Act provides less protection than that available under the Americans with Disabilities Act. In Stone v. St. Joseph's Hospital of Parkersburg, the Court discussed in great detail a situation in which the Plaintiff had sustained on-the-job injuries resulting in reassignment by his employer. The Court's extensive discussion in Stone contrasted the liberal interpretation of the West Virginia Human Rights Act by the West Virginia Supreme Court with the far more restrictive interpretation of the Americans with Disabilities Act by some federal courts. Stone v. St. Joseph's Hospital of Parkersburg, 208 W. Va. 91, 103-107, 438 S.E.2d 389, 401-404 (2000). Despite the fact that the sole basis for the Plaintiff's disability claim in Stone was his treatment resulting from two compensable on-the-job back injuries, the Court had no difficulty in Stone concluding that the Plaintiff was entitled to bring a claim of discrimination based upon disability and perception of disability under The West Virginia Human Rights Act, W. Va. Code § 5-11-1, et seq.

Similarly, in St. Peter v. Ampak-Division of Gatewood Products, Inc., 199 W. Va. 365,

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<sup>2</sup> "The ADA is not an exclusive remedy and does not prevent a plaintiff from additionally seeking workers' compensation benefits. 42 U.S.C. §§ 12201(b) (1994). See generally, Equal Employment Opportunity Commission, Enforcement Guidance No. 915.002, (February 12, 1997). However, an ADA plaintiff is not required to exhaust other remedies before filing his or her ADA claim, and the exclusive remedy provisions of a workers' compensation statute does not preempt the ADA. Mangin v. Westco Security Systems, Inc., 992 F. Supp. 563 (M.D. Fla. 1996); Wood v. County of Alameda, 875 F. Supp. 659 (N.D. Cal. 1995)." Fail v. Community Hosp., 946 P.2d 573, 581 (Colo App 1997). In Roberts v. Roadway Express, Inc., 149 F. 3d 1098 (10<sup>th</sup> Cir. 1998), the 10<sup>th</sup> Circuit reaffirmed that the exclusivity provisions of state workers' compensation statutes cannot restrict the availability of relief under the federal civil rights laws. Id. at 1105.

484 S.E.2d 481 (1997), the Court considered a claim for handicap discrimination in which the sole basis for the Plaintiff's claim was the Defendants' perception of the Plaintiff as handicapped as a result of a workers' compensation on-the-job injury. The Circuit Court entered summary judgment for the employer and this Court reversed. The Supreme Court considered St. Peter's argument that - on the first day of his return from his compensable injury - the employer told him that "half a man" was not needed by the employer. The Court rejected the employer's argument that the nature of the Plaintiff's injury did not support a claim under the Act and affirmed the availability in one civil action of claims for handicap discrimination and workers' compensation discrimination arising from the exact same employer misconduct. The Court reversed the Circuit Court's summary judgment in favor of the employer on the Plaintiff's workers' compensation claim, noting that the Plaintiff had established a prima facie case of discrimination by establishing that he had sustained an on-the-job injury, instituted proceedings under the Workers' Compensation Act, and established a nexus between the filing of his workers' compensation claim and his discharge. The Court also affirmed the availability based upon the exact same employer misconduct, of a claim under the West Virginia Human Rights Act for handicap discrimination. Id. 370, 486.

This Court noted in Vandevender v. Sheetz, Inc., 200 W. Va. 591, 490 S.E.2d 678 (1997), that an employee whose back injury was exacerbated by an employer's failure to accommodate was not limited to the remedies available under the West Virginia Workers' Compensation Act.

### **3. OTHER JURISDICTIONS**

Most courts have been unwilling to allow employers to hide behind the workers' compensation exclusivity "screen" to escape liability for their discriminatory actions.

The theories used to allow these actions to proceed vary. For example, if a state has excluded non-physical injuries from compensability, then workers' compensation exclusivity will not be a valid defense: since the claim is explicitly excluded from compensation and employees are barred from receiving compensation, employers are deemed to have relinquished the protection of the workers' compensation laws. On the other hand, in those jurisdictions in which these so-called 'mental-mental' claims are still compensable, most courts have nevertheless held that torts related to civil rights or retaliatory discharge should be allowed. In Michigan, for example, the state court held that discrimination claims established by statute should not be barred. Boscaglia v. Michigan Bell Tel. Co., 362 N.S.2d 642 (Mich. 1984).

In Florida, as in West Virginia, where co-worker assaults are clearly within the scope of workers' compensation remedies (and exclusivity), sexual harassment and related claims for intentional infliction of emotional distress were nevertheless found to be actionable. Noting the strong federal and state public policy against sexual harassment embodied in Title VII and the state's discrimination statutes, the Florida court noted:

[W]e have an equal obligation to honor the intent and policy of other enactments and, accordingly, may not apply the exclusivity rule in a manner that effectively abrogates the policies of other law. . . Our clear obligation is to construe both the workers' compensation statute and the enactments dealing with sexual harassment so that the policies of both are preserved to the greatest extent possible. . . In light of this overwhelming public policy, we cannot say that the exclusivity rule of the workers' compensation statute should exist to shield an employer from all tort liability based on incidents of sexual harassment. The clear public policy emanating from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment. Applying the exclusivity rule of workers' compensation to preclude any and all tort liability effectively would abrogate this policy, undermine the Florida Human Rights Act, and flout Title VII of the Civil Rights Act of 1964. This, we cannot condone. Public policy now requires that employers be held accountable in tort for the sexually harassing

environments they permit to exist, whether the tort claim is premised on a remedial statute or on the common law. We find this conclusion harmonizes with the policies and scope of workers' compensation. As often has been noted, workers' compensation is directed essentially at compensating a worker for lost resources and earnings. This is a vastly different concern than is addressed by the sexual harassment laws. While workplace injuries rob a person of resources, sexual harassment robs the person of dignity and self esteem. Workers' compensation addresses purely economic injury; sexual harassment laws are concerned with a much more intangible injury to personal rights. To the extent these injuries are separable, we believe that they both should be, and can be, enforced separately. Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099 (Fla. 1989).

Ohio, New Mexico and Wisconsin have also considered and rejected the argument posited by the Defendant that workers' compensation exclusivity precludes a discrimination claim based upon overlapping facts. Kerans v. Porter Paint Co., 61 Ohio St.3d 486 (1991) (workers' compensation statute does not provide the exclusive remedy for anti-discrimination claims, whether they are statutory or based on common law); Coates v. Wal-Mart Stores, 976 P.2d 999 (N.M. 1999) (workers' compensation laws do not bar claims for sexual harassment); Byers v. Labor and Industry Review Comm'n, 561 N.W.2d 678 (Wisc. 1997) (The exclusivity provisions of the Wisconsin workers' compensation statutes do not bar a claim for employment discrimination) ("Unlike the WCA, the WFEA is concerned with deterring and remedying intangible injuries which rob a person of dignity and self-esteem and with eliminating a discriminatory environment in the workplace that affects not only the victim of discrimination but the entire workforce and the public welfare.").

Courts initially differed on whether disability discrimination claims associated with an occupational injury should be preempted by workers' compensation remedies, particularly when the workers' compensation law provides a separate remedy for failure to rehire an injured

employee; courts are ultimately choosing to allow these actions to survive challenges based on exclusivity. See Byers v. Labor and Industry Review Comm'n, 561 N.W.2d 678 (Wisc. 1997) [characterizing the issue as whether the exclusive remedy provision of the Worker's Compensation Act bars a claim brought under the Wisconsin Fair Employment Act (WFEA), when the facts that are the basis for the discrimination claim might also support a worker's compensation claim and overruling Schachtner v. Dept. of Industry, Labor, and Human Relations, 422 N.W.2d 906 (Wisc. Ct. App. 1988)]; King v. Bangor Federal Credit Union, 568 A.2d 507 (Maine 1989); Reese v. Sears, Roebuck & Co., 731 P.2d 497 (Wash. 1987); Cox v. Glazer Steel Corp., 606 So.2d 518 (La. 1992); Davis v. Dillmeier Enterprises, Inc., 330 Ark. 545 (1997) (all holding that the injured claimant may sustain an action under the state disability discrimination law); City of Moorpark v. Superior Court of Ventura County, 77 Cal. Rptr. 2d 445, 959 P.2d 752 (1998); compare Karst v. F.C. Hayer Co., 447 N.W.2d 180 (Minn. 1989) (holding that the exclusive remedy provision of the Workers' Compensation Act precludes a state discrimination action by a disabled worker against his former employer when he became disabled as a result of work-related injuries and the former employer refused to rehire him due to the disability).

The history of the ruling in California is instructive. In that state, prior judicial decisions had allowed employees to sue employers in tort for religious discrimination, public policy retaliatory discharges, false imprisonment, and sexual harassment. But one appellate court drew the line in a case involving a claim for wrongful termination under the state disability discrimination law where the worker suffered from compensable bilateral carpal tunnel syndrome. Because the workers' compensation statute had explicit provisions forbidding

discrimination against workers with occupational injuries, and the newer disability discrimination law did not indicate any intention to abrogate the normal rules of exclusivity, the court upheld the employer's demurrer to an action brought under the state's civil rights statute.

Cammack v. GTE California Inc., 55 Cal.Rptr.2d 837 (1996) petition for review granted 926 P.2d 968. In 1998, the California Supreme Court rejected this lower court's ruling, holding that the exclusivity of workers' compensation did not encompass statutory or common law claims for disability discrimination, even when the disability arose from a compensable injury. City of Moorpark v. Superior Court of Ventura County, 77 Cal. Rptr, 2d 445, 959 P.2d 752 (1998) (holding that the workers' compensation law section that prohibited disability discrimination on basis of work-related injury did not provide an exclusive remedy precluding statutory discrimination and common-law wrongful discharge claims by employee who was allegedly terminated because of work-related knee injury and that disability discrimination could form the basis of a common law wrongful discharge claim. The court noted: "the... 'compensation bargain' cannot encompass conduct, such as sexual or racial discrimination, 'obnoxious to the interests of the state and contrary to public policy and sound morality.'" 77 Cal. Rptr 2d at 451).

The other California courts have consistently agreed with this later ruling. See Gallo v. Board of Regents of the University of California, 916 F.Supp. 1005 (S.D. Calif 1995); Buckley v. Gallo Sales Co., 949 F.Supp. 737 (N.D. Calif 1996); Ash v. Pacific Bell, 1995 WL 866185 (S.D.Cal.) (all applying California law).

In Ford v. Revlon, Inc., 153 Ariz. 38, 734 P. 2d 580 (1987), the Supreme Court of Arizona considered the availability of the tort of assault and battery against an employer who failed to investigate the Plaintiff-employee's complaint of sexual harassment by her supervisor.

Specifically rejecting the argument accepted by this Court in Tolliver v. Kroger Co., 201 W. Va. 509, 498 S.E.2d 702 (1997), the Arizona Supreme Court noted that the workers' compensation exclusivity provisions of Arizona law posed no barrier to the availability of the tort of assault and battery against the supervisor committing the misconduct. Id. at 42, 584, citing Davis v. United States Steel Corp., 779 F. 2d 209, 211 (4<sup>th</sup> Cir. 1985). Noting that the misconduct alleged by the Plaintiff was not accidental in nature, the Arizona Supreme Court rejected the employer's claim of immunity under the workers' compensation exclusivity provisions of Arizona workers' compensation law.

Courts have routinely held that employees were excused from mitigation when the worker suffered damage from discrimination which prevented the employee from performing other jobs. These are analogous to the situation in the case at bar. Courts have allowed the employer to reap the benefits of the effects of its intentional discriminatory actions. For instance, in Maturo v. National Graphic, Inc., 722 F. Supp. 916, 926 (D. Conn. 1989), the Court noted that a Plaintiff was excused from finding other work when unable to work due to emotional injuries resulting from discrimination. Similarly, in Wells v. The North Carolina Board of Alcoholic Control, 714 F. 2d 340, 342 (4<sup>th</sup> Cir. 1983), the Plaintiff had been denied promotion from stock clerk to sales clerk because of his race. After being denied the promotion, the Plaintiff injured his back lifting boxes and had to leave the stock room job when he could no longer perform its duties. The 4<sup>th</sup> Circuit found that if he had been promoted he would not have suffered the injury, because sales clerks did light duty work. The Court held that the Plaintiff had adequately mitigated his damages by leaving the position he could no longer physically perform because of the employer's wrongful discriminatory conduct. In Mason v. The Association for Independent Growth, 817 F.

Supp. 550 (E. D. Penn. 1993), the Court determined that the Plaintiff would not have been injured in a work-related car accident if she had been promoted, because her promotion would have involved a substantial reduction in her driving duties. Plaintiff was therefore allowed to recover back pay beyond the date she left the job. *Id.* at 554. The rationale for this was that the employer's discrimination against her in refusing her promotion resulted in physical damage that made the Plaintiff unable to perform her job. In *Jurgens v. EEOC*, 903 F. 2d 386, 389 (5<sup>th</sup> Cir. 1990), the 5<sup>th</sup> Circuit Court of Appeals held that when an employee is discriminated against in the denial of a promotion and subsequently develops a condition which makes continuing in the same job a hardship, the employee may claim front and back pay damages stemming from the employee's voluntary resignation from the job which the employee could no longer perform due to an on-the-job injury as a result of the discriminatory failure to promote.

Thus, with only one exception, states courts which have addressed this issue have all ultimately concluded that the scope of workers' compensation immunity does not shield employers from harms related to discriminatory or retaliatory employment practices, when that conduct flows from a compensable occupational injury or disease. These state courts have recognized that the goals of their anti-discrimination statutes, like the West Virginia Human Rights Act, are much different than the goals of their workers compensation laws.

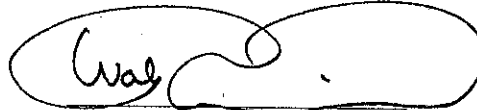
The remedies available are radically different as well. For instance, no recovery for emotional distress is permitted under the West Virginia Workers' Compensation Act, nor are attorneys fees or costs recoverable under that Act. Both are available under Human Rights Act. Injunctive relief is unavailable under the Workers' Compensation Act, yet it is often an important aspect of relief under the Human Rights Act, taking the form of reinstatement,

employee training and reporting requirements. Finally, punitive damages may be available for aggravated cases of discrimination under the Human Rights Act, whereas these type of damages are unavailable under the Workers' Compensation Act. All of the remedies available under the West Virginia Human Rights Act have been recognized as vital to the realization of its beneficent purposes by this Court, yet all are stripped from the Petitioner herein.

#### V. CONCLUSION

To allow the ruling of the Circuit Court to stand would set our State apart by depriving its citizens of the protections of its civil rights laws if they sustain an on the job injury. There is no reason in law or policy for this Court to permit such an unjust and anomalous result. For all of these reasons Petitioner respectfully requests that this petition be granted, that the order of the Circuit Court dismissing this action be reversed and that this matter be remanded for further proceedings.

Respectfully Submitted:

A handwritten signature in cursive script, appearing to read "Walt", enclosed within a hand-drawn oval.

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DR. STANISLAV STRIZ, DR. MICHAEL VEGA,  
and DAVID EASTER,**

**Respondents/Defendants.**

**CERTIFICATE OF SERVICE**

The undersigned counsel for the Plaintiff hereby certifies that on the 27<sup>th</sup> day of May, 2003, he served the foregoing **BRIEF OF THE APPELLANT** upon ELIZABETH D. HARTER, Counsel for Defendants, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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