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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31739

THERESA D. MESSER,

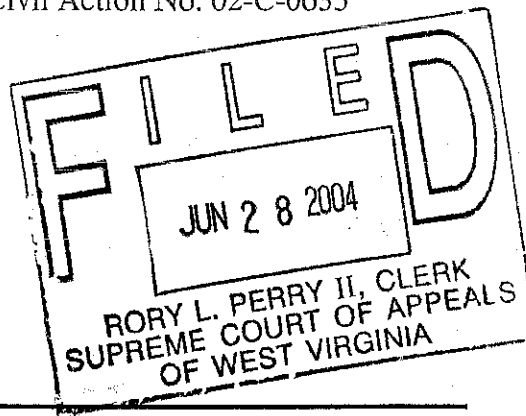
Appellant,

v.

Circuit Court of Cabell County
Civil Action No. 02-C-0635

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 and DR. MICHAEL VEGA,

Appellees.



**BRIEF OF APPELLEES 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 AND DR. MICHAEL VEGA**

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Pursuant to Rule 10 of the Rules of Appellate Procedure, Appellees Huntington Anesthesia Group, Inc. ("HAGI"), Dr. Farouk Abadir, Dr. Hosny S. Gabriel, Dr. Mark Newfeld, Dr. Ricardo Ramos, Dr. Alfredo Rivas, Dr. D. Grant Shy, Dr. Stanislav Striz and Dr. Michael Vega¹ (collectively referred to as "HAGI" or "Appellees"), by counsel, submit the following arguments and authorities in response to Appellant Theresa D. Messer's ("Appellant") brief filed on or about May 28, 2004. For the reasons set forth below, Appellees respectfully request that this Court affirm the judgment of the Circuit Court of Cabell County, West Virginia.

INTRODUCTION

In her appeal to this Court, Appellant improperly seeks to expand the scope of the West Virginia Human Rights Act ("WVHRA"), West Virginia Code §§ 5-11-1, et seq., to create a cause of action for workplace injuries in contravention of the exclusivity provisions of the West Virginia Workers' Compensation Act ("WCA"), West Virginia Code §§ 23-1-1, et seq. Sanctioning such an unwarranted extension of law would contravene the comprehensive statutory framework of the WVHRA and WCA, the plain language of the exclusivity provisions contained in the WCA and the intent of the West Virginia Legislature.

By way of background, Appellant was actively employed by HAGI as a Nurse Anesthetist from September of 1988 until September of 2000. During the course of her employment with HAGI, she sustained a compensable workers' compensation injury in August of 1997. A few years later, Appellant experienced an exacerbation of that injury which required reopening of her workers' compensation claim in October of 2000. Although Appellant's last active date of employment was in September of 2000, HAGI continued her on its payroll and

¹ David Easter, who was included in the case style of Appellant's filing, is deceased. On January 28, 2003, the Circuit Court entered a "Voluntary Dismissal Order of Defendant David Easter and Agreed Order to Amend Case Style." In that Order, the Circuit Court dismissed Mr. Easter from this civil action, with prejudice, and amended the case style accordingly.

group health insurance plan. Nearly two years after she reopened her workers' compensation claim, Appellant filed the instant action seeking to obtain additional compensation for her workplace injuries under the WVHRA. In her lawsuit, she contends that HAGI's purported failure to accommodate her alleged disability caused her to sustain personal injuries and that she is no longer able to perform her duties as a Nurse Anesthetist.

As the authorities cited herein make plain, Appellant is attempting to have this Court adopt a cause of action that is contrary to the plain language, statutory schemes and underlying purposes of the WVHRA and WCA. Appellant has a remedy available for her workplace injuries through the workers' compensation system, which she has received. The WVHRA is simply not a proper avenue to seek redress for alleged workplace injuries.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellant filed a civil action on August 1, 2002, in the Circuit Court of Cabell County, West Virginia, alleging that HAGI failed to participate in the interactive process required by the WVHRA in order to determine whether a reasonable accommodation of her alleged disability was possible. She further contends that this alleged violation of the WVHRA caused her personal injuries for which she is seeking recovery in the instant civil action.

Appellees filed a Motion to Dismiss Appellant's Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure on October 17, 2002. In support of that Motion, Appellees argued that Appellant's claim for workplace injuries was barred by the exclusivity provisions of the WCA and that the WVHRA does not provide a cause of action for workplace injuries.

On November 20, 2002, Appellant served a response in opposition to Appellees' Motion to Dismiss. Appellees filed a reply to Appellant's response brief on November 22, 2002, when the parties' counsel appeared before the Circuit Court for a hearing on Appellees' Motion to Dismiss. (A copy of the transcript prepared from the November 22, 2002 hearing is attached hereto as Exhibit 1.) At the conclusion of the hearing, the Circuit Court took the Motion under advisement.

After reviewing the parties' briefs and supplemental filings, and considering their oral arguments, the Circuit Court entered an Order Granting Defendants' Motion to Dismiss ("Dismissal Order") on August 18, 2003. The Circuit Court ruled that Appellant's Complaint should be dismissed and made the following findings:

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.

(Dismissal Order, at pp. 1-2.) Based upon these findings, the Circuit Court held that Appellant failed to state a cause of action and granted Appellees' Motion to Dismiss. (Id. at p. 2.)

On December 17, 2003, Appellant filed a Petition for Appeal seeking reversal of the Circuit Court's Dismissal Order. On January 14, 2004, Appellees filed their response to the Petition. The Petition was presented orally during this Court's Motion Docket on April 27, 2004. On April 28, 2004, this Court entered an Order granting the Petition for Appeal.

Because the Circuit Court's ruling is fully supported by the applicable law as applied to the allegations set forth in Appellant's Complaint, Appellees urge this Court to affirm its decision.

STATEMENT OF FACTS²

Appellant was actively employed as a Certified Registered Nurse Anesthetist by HAGI from September 13, 1988, until September of 2000. (Complaint ¶s 2-3.) Thereafter, Appellant was continued on HAGI's group health insurance plan and, at no time, was her employment terminated by HAGI. (Exhibit 1 to Appellees' Brief; Hr. Tr. at pp. 10-11.) During this time, Appellant alleges that she suffered from a herniated disc at L4-L5 that limited her ability to lift, stand and work, and substantially limited her in one or more major life activities. (Complaint ¶5.) She sustained this compensable workers' compensation injury in the course of her employment with HAGI on August 8, 1997. (Exhibit 1 to Petition for Appeal; EEOC Determination dated September 12, 2002, at p.1.) Since January of 1998, she has received treatment for her back problems from her primary treating physician, Timothy R. Deer, M.D., of the Center for Pain Relief in Charleston, West Virginia, since (Id. at ¶6.)

On or about February 10, 1999, Appellant presented HAGI with a note from Dr. Deer indicating that she was limited to eight hour workdays and should refrain from overtime. (Id. at ¶7 and Exhibit A to the Complaint.) On or about May 1, 2000, HAGI was provided with another note indicating that Appellant should be restricted to an eight hour work

² Because Appellant's Complaint was dismissed at the pleading stage of the underlying civil action, this statement of facts is drawn largely from the unproven allegations of her Complaint. To be clear, Appellees deny those allegations and further deny that they are liable to the Appellant for any reason whatsoever. However, for purposes of a Rule 12(b)(6) motion, Appellees acknowledge that Appellant's Complaint is construed in the light most favorable to her and that the allegations contained in her Complaint are taken as true. Sticklen v. Kittle, 168 W. Va. 147, 163, 287 S.E.2d 148, 157 (1981).

day because of her injury. (Id. at ¶9 and Exhibit B to the Complaint.) By letter dated June 26, 2000, Dr. Deer wrote to Mr. Easter advising him that Appellant had some work limitations, which included not being able to work more than eight hours per day and not lifting more than twenty-five pounds. (Id. at ¶10 and Exhibit C to the Complaint.) Appellant contends that HAGI ignored and violated these restrictions. (Id. at ¶11.)

Appellant also alleges Appellees did not engage in the interactive process required by the WVHRA to determine whether a reasonable accommodation was available for her restrictions. (Id. at ¶12.) As a direct result of Appellees' alleged failure to follow her restrictions and refusal to participate in the interactive process, Appellant contends that her herniated disc progressed and worsened to the point that she was no longer able to perform her duties as a Certified Registered Nurse Anesthetist as of September of 2000. (Id. at ¶13.) She suggests the "*exacerbation of [her] physical condition*" was a direct result of the failure and refusal of Appellees to comply with their legal obligations of accommodation and interaction under the WVHRA. (Id. at ¶14) (emphasis added). In October of 2000, Appellant re-opened her previous workers' compensation claim. (Exhibit 1 to Petition for Appeal.) Nearly two years after these events, Appellant filed the instant action seeking recovery under the WVHRA for the compensable workplace injury she sustained in the course of and resulting from her employment with HAGI.

STANDARD OF REVIEW

This case involves an appeal of the Circuit Court's Dismissal Order granting the Appellees' Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Very recently, this Court has reaffirmed that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Longwell v. Board of Education,

213 W. Va. 486, 488-89, 583 S.E.2d 109, 111-12 (2003) (quoting syl. pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995)). Likewise, as the instant appeal involves a pure question of law in the nature of immunity under the WCA, “[t]he ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine.” Syl. pt. 1, in part, Hutchinson v. City of Huntington, 198 W. Va. 139, 479 S.E.2d 649 (1996).

ARGUMENT

1. THE EXCLUSIVITY PROVISIONS OF THE WEST VIRGINIA WORKERS’ COMPENSATION ACT BAR APPELLANT’S ATTEMPT TO RECOVER DAMAGES FOR HER COMPENSABLE WORKPLACE INJURIES UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT.

The issue presented for this Court’s consideration in the instant appeal is whether the exclusivity provisions of the WCA bar an employee from seeking to recover damages for workplace injuries through a cause of action under the WVHRA. The plain language of these two statutes indicates that the exclusive remedy for Appellant’s compensable workplace injuries is the workers’ compensation system. Likewise, the comprehensive statutory framework along with the discernable legislative intent clearly indicates that Appellant’s purported cause of action is barred by workers’ compensation exclusivity.

A. The Comprehensive Statutory Framework Of the West Virginia Workers’ Compensation Act And West Virginia Human Rights Act Conclusively Demonstrates That Appellant Is Barred From Asserting A Cause Of Action For Workplace Injuries Under The West Virginia Human Rights Act.

In the instant action, Appellant is attempting to recover damages for a compensable workplace injury under the WVHRA rather than the WCA, which is the exclusive remedy for such injuries. Appellant claims that her physical condition (a herniated disc at L4-L5) progressed and worsened to the point that she could no longer perform her job as of

September of 2000. Likewise, she contends that her injury was proximately caused by HAGI's alleged failure to comply with their legal obligation of accommodation and interaction under the WVHRA. Unfortunately for Appellant, the comprehensive statutory framework of the WVHRA and WCA illustrate the fundamental flaw in her claim and clearly demonstrate that the WCA is the sole remedy for her workplace injuries.

The underlying policy and purposes of the WVHRA and WCA are vastly different. The declared public policy of the WVHRA is to provide citizens of the State of West Virginia with an equal opportunity for employment. West Virginia Code § 5-11-2 (2003). Enacted in 1967, the WVHRA provides that "[i]t shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . . [f]or any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able to perform the services required even if such individual is blind or disabled[.]" West Virginia Code § 5-11-9(1) (2003).³ Under the WVHRA, the terms "discriminate" or "discrimination" are defined as meaning "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status and includes to separate or segregate[.]" West Virginia Code § 5-11-3(h) (2003). There are no provisions in the WVHRA that allow an employee to pursue a cause of action to recover damages for workplace injuries.

In contrast to the underlying purpose of the WVHRA, the "workers' compensation system is supposed to benefit injured workers by providing benefits and full compensation through a basic 'no-fault' system . . . and to protect employers 'from the financial

³ Under the WVHRA, "[t]he term 'unlawful discriminatory practices' includes only those practices specified in section nine [§ 5-11-9] of this article[.]" West Virginia Code § 5-11-3(i).

consequences of civil liability to injured employees.” Miller v. City Hospital, Inc., 197 W. Va. 403, 407, 475 S.E.2d 495, 500 (1996) (citing and quoting Mayles v. Shoney’s, Inc., 185 W. Va. 88, 91, 405 S.E.2d 15, 18 (1990)). Furthermore, this broad immunity not only applies to employers, but to their officers, managers, employees and agents as well. See West Virginia Code § 23-2-6a (2003); Redden v. McClung, 192 W. Va. 102, 104, 450 S.E.2d 799, 801 (1994) (“It appears to this Court that two provisions of the Workers’ Compensation Act [West Virginia Code §§ 23-2-6 and 23-2-6a], acting in tandem, grant an employee, acting in furtherance of his employer’s business, immunity from actions for non-intentional torts inflicted on co-employees who are also acting in the course of the employer’s business.”). Thus, each Appellee is immune from liability for the workplace injury Appellant alleges that she sustained in the course of and resulting from her employment at HAGL.

Because Appellant alleges that she sustained a workplace injury in the course of and resulting from her employment at HAGL, it is apparent that she meets the test for compensability for purposes of the WCA. Barnett v. Commissioner, 153 W. Va. 796, 798, 172 S.E.2d 698, 700 (1970). In fact, Appellant has received workers’ compensation benefits for the injuries she alleges in the instant action. Therefore, her sole recourse for those injuries is the workers’ compensation system. As such, Appellees are immune from her claim for workplace injury and cannot be deprived of that statutory immunity.

B. West Virginia Code §§ 23-2-6 and 23-2-6a, Containing The Exclusivity Provisions Of The West Virginia Workers’ Compensation Act, Bars A Claim Under The West Virginia Human Rights Act To The Extent An Employee Seeks Recovery For Workplace Injuries.

In order to resolve the issue presented in this appeal, it is necessary for this Court to consult the statutory provisions of the WCA and the WVHRA in order to determine whether

the exclusivity of remedies provided under § 23-2-6 of the WCA has been preempted, repealed or superceded by the WVHRA. Based upon the plain language of these statutory provisions and the intent of the Legislature, it is clear that West Virginia Code § 23-2-6 provides the sole and exclusive remedy for Appellant's workplace injuries.

1. **The plain language of West Virginia Code § 23-2-6 provides an absolute bar to Appellant's claim for workplace injuries under the West Virginia Human Rights Act.**

The beginning of this analysis requires a review of the plain language of these statutory provisions. This Court has previously recognized that in circumstances "where the language of a statute is clear and unambiguous the plain meaning is to be accepted without resorting to the rules of interpretation." State v. Elder, 152 W. Va. 571, 575, 165 S.E.2d 108, 111 (1968). See also, syl. pt. 2, State v. Epperly, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). As stated by this Court in Elder, "[t]his and other courts will always endeavor to give effect to what they consider the Legislative intent; but, we do not change plain and simple language employed in framing a statute unless there is a compelling reason for so doing." Elder, 152 W. Va. at 575, 165 S.E.2d at 111 (quoting The Baird-Gatzmer Corp. v. Henry Clay Coal Mining Co., 131 W. Va. 793, 50 S.E.2d 673 (1948)).

The exclusivity provisions of the WCA are broad and provide, in pertinent part, that

[a]ny employer subject to this chapter who shall subscribe and pay into the workers' compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as herein provided *shall not be liable to respond in*

*damages at common law or by statute for the injury or death of any employee, however occurring,*⁴ after so subscribing or electing, and during any period in which such employer shall not be in default in the payment of such premiums or direct payments and shall have complied fully with all other provisions with this chapter.

West Virginia Code § 23-2-6 (2003) (emphasis added). This broad immunity also extends to the officers, managers, agents, representatives and employees of the employer:

The immunity from liability set out in the preceding section [§ 23-2-6] shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

West Virginia Code § 23-2-6a (2003). Thus, the WCA expressly exempts employers, such as HAGI, from liability for workplace injuries. Moreover, this broad exemption plainly and unambiguously applies to both common law and statutory causes of action for workplace injuries.⁵

The plain language of § 23-2-6 is such that this Court need look no further than the text of the statute to find that Appellant's cause of action under the WVHRA is barred. Section 23-2-6, entitled "Exemption of contributing employers from liability," explicitly provides an employer "shall not be liable to respond in damages at common law or by statute for the injury or death of any employee." Appellant claims that her compensable injuries were

⁴ The phrase "however occurring," which is used in this section, has been construed as meaning "an employee who is injured in the course of, and as a result of his employment, and one who, under common law principles of a master and servant, could have maintained an action against his employer." Cox v. United States Coal & Coke Co., 80 W. Va. 295, 301, 92 S.E. 559, 561 (1917).

⁵ The only exception to the immunity conferred upon employers by the WCA is a "deliberate intention" cause of action pursuant to West Virginia Code § 23-4-2. Bell v. Vecellio & Grogan, Inc., 197 W. Va. 138, 475 S.E.2d 138 (1996). Appellant has not alleged a deliberate intention cause of action nor has Appellant claimed that her injuries are not compensable under the WCA.

caused by alleged violations of the WVHRA, which occurred during her employment with HAGI. Based upon the plain language of § 23-2-6, her claims for workplace injury are excluded because they are predicated on an alleged injury covered by the WCA. Simply put, the plain language of § 23-2-6 leaves no room for interpretation – all employee claims for injury, whether arising by common law or statute, are subject to the exclusivity provisions of the WCA.

2. **A simple comparison between the exclusivity provisions contained in the West Virginia Workers' Compensation Act and those contained in workers' compensation statutes from other jurisdictions confirms that the West Virginia Legislature did not intend to allow a recovery for workplace injuries under the West Virginia Human Rights Act.**

Having established that the exclusivity provisions set forth in § 23-2-6 of the WCA do not allow recovery for workplace injuries under the WVHRA, it is equally clear that the Legislature did not intend to permit such a cause of action. A close examination of cases from other jurisdictions dealing with workers' compensation exclusivity and civil rights claims, including cases cited by Appellant, signifies that Appellant's claims are barred by the exclusivity of the WCA. Unlike the exclusivity provisions contained in the workers' compensation statutes of other states, the broad exclusivity provisions of West Virginia Code §§ 23-2-6 and 23-2-6a are not limited to common law claims and do not contain certain enumerated exceptions. The following cases illustrate the disparities between these Code provisions and the exclusivity provisions found in comparative workers' compensation statutes.

In her brief, Appellant cites the California Supreme Court's decision in City of Moorpark v. Superior Court of Ventura County, 18 Cal. 4th 1143, 959 P.2d 752 (1998) as support for her position that the exclusivity of the WCA should be preempted by the WVHRA. The Moorpark court did not address the issue presented in this appeal; instead, that court was asked to construe § 132a of the California Labor Code, dealing with remedies for discrimination

against injured workers, in order to determine whether § 132a barred claims under California's Fair Employment and Housing Act. In considering that issue, the court found that § 132a "does not itself contain an exclusive remedy clause, and . . . the general exclusive remedy provisions of the workers' compensation law expressly do not apply to section 132a." Moorpark, 18 Cal. 4th at 1154, 959 P.2d at 759.

Appellant also cites to Cox v. Glazer Steel Corp., 606 So.2d 518 (La. 1992), in support of her contention that the exclusivity of the WCA should not bar a WVHRA claim for workplace injuries. In Cox, the Louisiana Supreme Court considered the issue of whether an employee who settled a claim for industrial injury could sue the employer for handicap discrimination. Cox, 606 So.2d at 519. Unlike Appellant's claim that HAGI *caused* her workplace injury in violation of the WVHRA, the plaintiff in Cox alleged that his employer failed to rehire him because of his handicap in violation of Louisiana's civil rights act. Id. at 520. In analyzing that issue, the court examined the exclusivity provision of the Louisiana's workers' compensation statute and found that "[s]ince LSA-R.S. 23:1032(B) provides that worker's compensation shall not affect the liability of the employer under any other statute, the worker's compensation remedy does not bar other statutory causes of action." Id.

Thus, not only is the nature of the discrimination claim at issue in Cox entirely different from the claim alleged by Appellant in the instant action, but the language of the Louisiana workers' compensation statute is markedly different from West Virginia Code § 23-2-6. In addition, the Cox decision also demonstrates the type of language that the West Virginia Legislature could have used if it had intended to preempt or except other statutory causes of action from the coverage of workers' compensation exclusivity provided by § 23-2-6.

The Maine Supreme Judicial Court's decision in King v. Bangor Federal Credit Union, 568 A.2d 507 (Me. 1989), is also cited by Appellant in support of her contention that the WVHRA should preempt § 23-2-6 exclusivity. However, a much more recent decision issued by the Maine Supreme Judicial Court more accurately addresses the issue presented to this Court. In Gordan v. Cummings, 756 A.2d 942 (Me. 2000), the court considered whether certain claims alleged by the plaintiff were barred by the exclusivity provisions of Maine's Workers' Compensation Act. The Gordan court concluded that claims brought under the Maine Human Rights Act ("MHRA") were not barred by workers' compensation exclusivity. Gordan, 756 A.2d at 945 n.3. This result stemmed from the plain language of Maine's workers' compensation statute. As the Court cogently stated, the workers' compensation exclusivity of the Maine statute "only bars common law actions and certain enumerated statutory claims involving personal injuries and the MHRA is not one of those specifically cited statutes." Id. (citing 39-A.M.R.S.A. § 104 (Supp. 1999)).

In conclusion, the exclusivity provisions of the California, Louisiana and Maine workers' compensation statutes demonstrate the possible statutory language that the West Virginia Legislature might have chosen when enacting or considering amendments to the WCA. However, unlike the legislatures in those states, the West Virginia Legislature has chosen to exclude recovery for all common law *and* statutory causes of action under the plain language of West Virginia Code § 23-2-6. Although West Virginia Code § 23-2-6 has been amended at least five times since its enactment in 1913, the Legislature has chosen not to diminish the immunity provided employers of this State by legislative amendment. Accordingly, the plain language of the WCA demonstrates the intent of the Legislature and this Court must follow that language by

refusing to permit Appellant to proceed under the WVHRA for injuries which are otherwise compensable under the WCA.

3. **The West Virginia Human Rights Act does not preempt the exclusivity provisions contained in West Virginia Code § 23-2-6.**

The clear and unambiguous text of the WVHRA does not demonstrate any intent by the Legislature to preempt, repeal or supersede the exclusivity provisions of the WCA.

Indeed, the only provision of the WVHRA dealing with exclusivity provides that

nothing contained in this article shall be deemed to repeal or supersede any of the provisions of any existing or hereafter adopted municipal ordinance, municipal charter or of any law of the this state relating to discrimination because of . . . disability . . .

West Virginia Code § 5-11-13(a).

Nowhere in the plain language of the WVHRA is there manifested an intent to preempt or repeal any other provision of the West Virginia Code, including the WCA. To the contrary, West Virginia Code § 5-11-13(a) specifically indicates nothing in the WVHRA is to be construed to repeal or supersede other laws of the state relating to disability discrimination. The importance of this provision, along with the absence of any other preemptive or repealing language, is illuminated when compared to similar anti-discrimination statutes from other states.

By way of example, Washington's civil rights law, as codified at § 49.60.020 of the Revised Code of Washington, provides that "[n]othing contained in this chapter shall be deemed to repeal any of the provisions of any other law of this state relating to discrimination . . . other than a law which purports to require or permit doing any act which is an unfair practice under this chapter." In construing this provision, the Washington Supreme Court found that the "Legislature expressly foreclosed the possibility that discriminatory actions might be insulated

from remedy by virtue of earlier enacted laws.” Reese v. Sears, Roebuck & Co., 107 Wn.2d 563, 570, 731 P.2d 497, 501 (1987), overruled on other grounds, Phillips v. Seattle, 11 Wn.2d 903, 766 P.2d 1099 (1989).

Similarly, California Government Code § 12993(a) provides that “[n]othing contained in this part shall be deemed to repeal any of the provisions . . . of any other law of this state . . . unless those provisions provide less protection to the enumerated classes of persons covered under this part.” Prior to the 1993 amendment which added the repeal provisions of § 12993(a), § 132a of the California Labor Code provided workers’ compensation exclusivity for injuries arising out of employment discrimination and workers were precluded from recovering damages for physical and mental injury under Fair Employment Housing Act (“FEHA”). See Buckley v. Gallo Sales Co., 949 F. Supp. 737, 744 (N.D.Cal. 1996).

Courts addressing the issue after the 1993 amendment went into effect have held that § 12993(a) repealed the exclusivity provisions of § 132a to the extent § 132a precludes recovery under the FEHA. See Ash v. Pacific Bell, 1995 U.S. Dist. LEXIS 21885, at *6 (S.D.Cal. 1995) (the 1993 amendment appeared to “repeal Labor Code Section 132(a) to the extent that courts could construe that section to preclude an action under FEHA.”); Gallo v. Board of Regents of the University of California, 916 F. Supp. 1005, 1009 (S.D.Cal. 1995) (“The Court holds that the 1993 amendment to the FEHA reverses the prior doctrine that disability discrimination claims stemming from a work-related injury fall exclusively within the worker’s compensation scheme.”); Buckley, 949 F. Supp. at 744 (“After the amendment, the FEHA can be read to repeal that exclusive aspect of the workers’ compensation act and the jurisprudence that had confirmed it.”).

As the foregoing cases and statutes from other jurisdictions clearly indicate, interpretation of workers' compensation exclusivity turns on the statutory language contained in the Act. When analyzing legislative intent and considering the interrelation among various provisions of the West Virginia Code, this Court has indicated that it will be guided by the following principles:

A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Henderson v. Meredith Lumber Co., 190 W. Va. 292, 297, 438 S.E.2d 324, 329 (1993) (quoting State v. Snyder, 64 W. Va. 659, 63 S.E. 385 (1908)).

Based on the canons of interpretation recognized by this Court in Henderson, the Legislature is *presumed* to have been aware of all existing law and to have intended its legislative enactments to harmonize with existing law. Accordingly, it is presumed that the Legislature was aware of the exclusivity provisions of West Virginia Code §§ 23-2-6 and 23-2-6a, and declined to preempt or repeal any portion of those provisions when enacting or amending the WVHRA. If the Legislature intended to preempt other statutes by the enactment of WVHRA, it could have used statutory text similar to the language found in the California and Washington civil rights statutes. Such language unambiguously provides that other statutes that are inconsistent with (or provide less protection than) the anti-discrimination statutes are repealed to the extent of their inconsistencies. Alternatively, the Legislature could have amended the WVHRA after its enactment in 1967 to exempt WVHRA claims from workers'

compensation exclusivity. However, the fact remains the Legislature has not taken any steps to amend the WVHRA in that fashion despite amending that Act on multiple occasions.

II. THIS COURT HAS PREVIOUSLY CONSTRUED THE PLAIN LANGUAGE OF THE EXCLUSIVITY PROVISIONS OF THE WORKERS' COMPENSATION ACT TO BAR CLAIMS FOR WORKPLACE INJURIES WHICH WERE NOT PLED AS "DELIBERATE INTENTION" CLAIMS PURSUANT TO WEST VIRGINIA CODE § 23-4-2.

Appellant does not dispute the fact that she is using the WVHRA as a vehicle to recover damages for workplace injuries sustained in the course of and resulting from her employment with HAGI. The WCA expressly provides that employers are not liable for workplace injuries under any common law or *statutory* cause of action, such as the WVHRA. In order to avoid the immunity conferred upon employers by the WCA, a plaintiff must satisfy the "deliberate intention" exception to the immunity provisions of the WCA. Appellant has not alleged a "deliberate intention" action against Appellees nor could she sustain such an action based upon the allegations set forth in her Complaint.

In Miller v. City Hospital, Inc., 197 W. Va. 403, 475 S.E.2d 495 (1996), this Court affirmed a circuit court's dismissal of a former employee's claim for intentional infliction of emotional distress/tort of outrage on the ground that such a claim was barred by of workers' compensation exclusivity. In Miller, the plaintiff alleged that the hospital's manager and other employees intentionally caused her to suffer emotional distress by spreading rumors about an alleged affair she had with a supervisor, denying her personal leave for an illness and overworking her. Miller, 197 W. Va. at 406, 475 S.E.2d at 498. The issue presented to this Court was whether the plaintiff's claim for intentional infliction of emotional distress was "barred by the employer immunity provided for employers participating in the Workers'

Compensation Fund” Id. at 407, 475 S.E.2d at 499. After a careful review of the evidence, this Court concluded that the plaintiff’s claim did not satisfy the “deliberate intention” exception to the employer immunity provisions of the WCA. Id. at 410, 475 S.E.2d at 502. The Miller court went on to explain that

[a]lthough [the plaintiff’s] claim does not fall within the ‘deliberate intention’ exception, because her claim is work-related, any remedy she may have is set forth in the Workers’ Compensation Act, W. Va. Code 23-1-1 (1995) et seq. This opinion addresses neither the merits of her claim, nor its compensability under the Workers’ Compensation Act.

Id. at n. 5.

Although the Miller decision involved a *common law* claim that was barred by the immunity provisions of the WCA, the plain language of West Virginia Code § 23-2-6 compels the same result in the instant action. The exclusivity provisions of the WCA bar both common law and *statutory* actions for workplace injuries. In the instant action, where Appellant has not alleged and could not satisfy the “deliberate intention” exception to the employer immunity conferred by the WCA, it is evident that Appellees are exempt from liability for Appellant’s workplace injury claim.

Moreover, Appellant does not cite *any* West Virginia cases that permit an employee to maintain a claim against an employer for a workplace injury under the WVHRA. Rather, as in the Circuit Court below, Appellant relies upon the cases of Stone v. St. Joseph’s Hospital of Parkersburg, 208 W. Va. 91, 538 S.E.2d 389 (2000), and St. Peter v. Ampak-Division of Gatewood Products, Inc., 199 W. Va. 365, 484 S.E.2d 481 (1997). Appellant’s reliance on these two cases is simply misplaced. Neither of these cases address the issue of

whether a plaintiff can maintain an action under the WVHRA against an employer for a workplace injury sustained in the course of and resulting from his or her employment.

In Stone, a case in which this Court concluded that there was insufficient evidence to sustain a jury finding of illegal discrimination as a matter of law, the plaintiff asserted a claim of disability discrimination based upon a temporary job transfer and permissible medical examination. Stone, 208 W. Va. at 110, 538 S.E.2d at 408. The plaintiff did not allege that his employer *caused* his compensable workplace injuries and then attempt to seek recovery for those personal injuries pursuant to the WVHRA. Likewise, in St. Peter, the plaintiff asserted a claim for discriminatory discharge in violation of the WCA and the WVHRA because of the plaintiff's alleged disability or the defendant employer's alleged perception of that disability. St. Peter, 199 W. Va. at 368, 484 S.E.2d at 484. Again, unlike Appellant's claim in the instant action, the St. Peter plaintiff did not allege that his employer *caused* his workplace injuries and then attempt to seek recovery for those injuries pursuant to the WVHRA.

Neither of these two cases were personal injury cases seeking recovery for workplace injuries pursuant to the WVHRA. Appellant ignores this glaring distinction and instead seems to believe that those cases are analogous because the plaintiffs had compensable injuries and were able to maintain discrimination claims under the WVHRA. Such an argument is inapposite because in the instant action, Appellant maintains that Appellees *caused* her workplace injury in violation of the WVHRA - a claim not asserted in either the Stone or St. Peter cases. As Miller and West Virginia Code §§ 23-2-6, 23-2-6a and 23-4-2 make plain, common law and statutory claims for workplace injuries are barred by the exclusivity of the WCA.

III. THE PLAIN AND UNAMBIGUOUS LANGUAGE CONTAINED IN THE EXCLUSIVITY PROVISIONS CONTAINED OF THE WEST VIRGINIA WORKERS' COMPENSATION ACT SHOULD GUIDE THIS COURT'S ANALYSIS.

As the following cases illustrate, the clear and unequivocal language set forth in the WCA must be applied in determining the scope of workers' compensation exclusivity.

In Konstantopoulos v. Westvaco Corp., 690 A.2d 936 (Del. 1996), the Delaware Supreme Court construed language similar to West Virginia's WCA and declined to create an exception to Delaware workers' compensation statute for sexual harassment torts that was not provided for by the statute. In Konstantopoulos, the United States Courts of Appeals for the Third Circuit certified two questions of law to the Delaware Supreme Court, one of which was: "Are an employee's claims against her employer for intentional infliction of emotional distress⁶ and sexual assault and battery caused by acts of sexual harassment . . . barred by the Delaware Workmen's Compensation Act . . .?" Konstantopoulos, 690 A.2d at 938. The Delaware Supreme Court answered this question in the affirmative, concluding that "[u]nder the Delaware Workers' Compensation Act . . ., an employee's claim against her employer for personal injuries sustained during the course of employment, even if the offending conduct was of a sexual nature, is limited to the compensation provided by the Act" Id.

In examining the exclusivity provisions of Delaware's Workers' Compensation Act, the Konstantopoulos court reasoned that unless a personal injury claim was otherwise excluded by the Act's coverage, the exclusive remedy for all claims involving workplace injuries was the workers' compensation system. Id. at 938-39. After reviewing the provisions of the

⁶ In Miller, supra, this Court has also held that the exclusivity provisions of the WCA barred the plaintiff's claim for intentional infliction of emotional distress.

Act, the court concluded that “[n]o exclusion exists in the Act for injuries caused by sexual harassment or sexual assault.” Id. at 939. The court held as follows:

It would not be appropriate for us to create a new exception to the Delaware Workers’ Compensation Act for sexual harassment claims It is not our role to assume the prerogative of the General Assembly and change the comprehensive statutory framework crafted by it for compensating employment related injuries by creating an exception for sexual harassment. Any changes in Delaware Workers’ Compensation Law must come from the Legislature.

Id. at 940 (internal and external citations omitted). The Delaware Supreme Court properly declined to do what Appellant asks this Court to do – ignore the clear and unambiguous language of West Virginia Code § 23-2-6, by creating an exception that does not exist under the WCA.

In contrast to Konstantopoulos, Appellant cites several cases that purportedly support the position that this Court should contravene the plain and unambiguous language of the WCA and WVHRA by holding that claims for workplace injuries brought under the WVHRA are exempt from the exclusivity provisions of the WCA. While many of the cases cited by Appellant are not relevant to the issue before the court, some of those cases clearly demonstrate the seriously flawed statutory interpretation Appellant would have this Court follow in order to reach a decision contrary to the plain and unambiguous statutory language of the WCA and WVHRA.

In Byers v. Labor and Industry Review Comm’n, 208 Wis.2d 388, N.W.2d 678 (1997), the Wisconsin Supreme Court found Wis. Stat. § 102.03(2) did not bar a claimant covered under the Wisconsin Workers’ Compensation Act from pursuing a claim for employment discrimination under the Wisconsin Fair Employment Act (“WFEA”). Byers, 208 Wis. 2d at 391, 561 N.W.2d at 679. After examining the language of the relevant statutes and

attempting to construe the intent of the Wisconsin legislature in enacting the WCA and WFEA, the Court held “the legislature intended that the WCA exclusive remedy provision does not bar a complainant whose claim is covered under the WCA from pursuing a discrimination in employment claim under the WFEA.” Id. at 686. By citing this decision in support of her appeal, Appellant fails to appreciate the important distinction between § 102.03(2) of the Wisconsin WCA and West Virginia Code § 23-2-6.

Section 102.03(2) provides that when an employee’s injuries are covered under the WCA, “the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employee of the same employer and the workers compensation insurance carrier.” Section 102.03(2) lacks the clarity and specificity found in § 23-2-6 of the WCA which expressly provides that all common law and statutory claims involving workplace injuries are barred by the WCA. Therefore, the analysis of Byers is predicated on a statute with fundamentally different provisions than the WCA and WVHRA.

Appellant also relies on Byrd v. Richardson-Greenshields Secs., Inc., 552 So.2d 1099 (Fla. 1989), in support of her position. In Byrd, the Florida Supreme Court held that employers were not shielded from all tort liability for sexual harassment by the exclusivity rule of the workers’ compensation statute. Byrd, 552 So.2d at 1103-104. Key to the Byrd court’s holding was the conclusion that “we cannot find that acts constituting sexual harassment were ever meant to fall under workers’ compensation.” Id. at 1102. As with the Wisconsin statute, Florida’s exclusivity rule fails to specifically exclude statutory claims.⁷ Again, the distinction

⁷ “The liability of an employer . . . shall be exclusive and in place of all other liability . . . at law or in admiralty . . .” Fla. Stat. § 440.11.

between Florida's exclusivity rule and the clear and unambiguous language of West Virginia Code § 23-2-6 necessitates that this Court not follow the analysis and holding of Byrd.

IV. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION GUIDANCE BULLETIN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION "REASONABLE CAUSE" DETERMINATION AND THE CASES FROM OTHER JURISDICTIONS CITED BY APPELLANT DO NOT ADDRESS THE ISSUE PRESENTED TO THIS COURT OR PROVIDE ANY SUPPORT FOR APPELLANT'S POSITION.

A. The Equal Employment Opportunity Commission Guidance Bulletin Does Not Have The Force of Law Nor Does It Address The Issue Presented To This Court.

The Equal Employment Opportunity Commission ("EEOC") guidance bulletin cited by Appellant does not have the force of law. It is neither a federal statute nor part of the Code of Federal Regulations. Furthermore, this government agency bulletin does not address the issue of whether a plaintiff may pursue a personal injury action under a state civil rights statute as Appellant has attempted to do in the instant action. Accordingly, this agency bulletin, which has no application to the WVHRA or WCA, does not provide any support for the proposition that a plaintiff can pursue a claim for workplace injury and recover damages for that injury pursuant to the WVHRA.

Moreover, the EEOC guidance and several federal district court decisions cited by Appellant only address the issue of whether the exclusive remedy provisions in workers' compensation laws bar employees from bringing claims under the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. Without question, West Virginia Code § 23-2-6 does not bar an employee from pursuing claims under appropriate federal statutes. However, preemption by federal anti-discrimination statutes is based not on any policy concern relevant to

this appeal as Appellant intimates, rather it is based on the Supremacy Clause of Article IV of the United States Constitution and considerations of federal preemption.

The EEOC guidance merely states that the application of state workers' compensation exclusivity "would violate the Supremacy Clause of the U.S. Constitution" (Appellant's Brief, at p. 6). The cases Appellant cites with the EEOC guidance merely address this principle. In Worthington v. City of New Haven, 1999 U.S. Dist. LEXIS 16104, at *23-24 (D.Conn. 1999), the district court held a "state law making recovery under a worker's compensation statute the exclusive remedy for work-related injuries cannot bar an employee from seeking relief for employment discrimination under the ADA or Section 504 in light of the Supremacy Clause of Article VI of the Constitution." Similarly, in Wood v. County of Alameda, 875 F. Supp. 659 (N.D.Cal. 1995), the district court found that "[u]pon application of settled principles of preemption . . . the exclusive remedy provision of the California Workers' Compensation Act is preempted by the ADA because that provision stands as an obstacle to the accomplishment of Congress' purposes and objectives in passing the ADA." Wood, 875 F. Supp. at 665. The issue before this Court has nothing to do with preemption by federal anti-discrimination statutes.

B. The Equal Employment Opportunity Commission "Reasonable Cause" Determination Does Not Address The Issue Presented To This Court And Is Often Rejected By Courts.

As a further consideration, the EEOC determination cited by Appellant involves an alleged violation of ADA, and not the WVHRA. More importantly, however, the EEOC's investigative determination does not in any way address the issue of whether the exclusivity of

the WCA bars Appellant's claim for workplace injury brought pursuant to the WVHRA.⁸ Apart from not addressing the issue presented in this appeal, the EEOC determination letter is merely an investigative finding which is frequently rejected in a court of law. In fact, courts do not even hesitate to grant dispositive motions in cases where the EEOC has issued a reasonable cause determination. See, e.g., EEOC v. Exel, Inc., 208 F. Supp. 2d 1013 (E.D.Mo. 2002) (granting summary judgment in disability discrimination claim brought under the ADA); Fletcher v. ADT Security Services, Inc., 2000 U.S. Dist. LEXIS 20380 (N.D.Ga. July 13, 2000) (granting summary judgment where plaintiff failed to make out *prima facie* case of retaliation discrimination). Accordingly, the EEOC determination cited by Appellant did not consider the issue presented in her brief and is merely an investigative finding that is routinely rejected by courts.

West Virginia law is clear and unequivocal. Employers, such as HAGI, are statutorily exempt from liability for workplace injuries under the provisions of the WCA. This Court has repeatedly recognized the exclusivity of the WCA and the authorities cited in Appellant's brief does not contravene this well established legal authority.

CONCLUSION

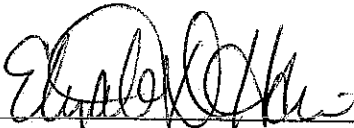
Appellant has failed to state a cause of action under the WVHRA as her compensable claim for workplace injuries is barred by the exclusivity provisions of the WCA. Allowing Appellant to pursue such a claim would be contrary to the plain language of the WCA and the discernable legislative intent and comprehensive framework of both Acts. In dismissing Appellant's civil action, the Circuit Court followed and correctly applied the existing law to the

⁸ Curiously, Appellant neglects to disclose the fact that the EEOC rejected her alleged violations of the ADA with respect to her benefits and compensation claims.

specific allegations in her Complaint. Accordingly, the Dismissal Order entered by the Circuit Court of Cabell County, West Virginia, should be affirmed.

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 and DR. MICHAEL VEGA

By Counsel



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Dated: June 28, 2004
1259990

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31739

THERESA D. MESSER,

Appellant,

v.

Circuit Court of Cabell County
Civil Action No. 02-C-0635

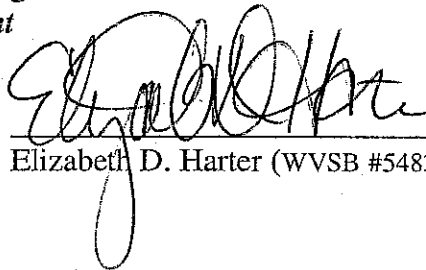
HUNTINGTON ANESTHESIA GROUP,
INC., DR. FAROUK ABADIR, DR. HOSNY S. GABRIEL,
DR. MARK NEWFELD, DR. RICARDO RAMOS,
DR. ALFREDO RIVAS, DR. D. GRANT SHY,
DR. STANISLAV STRIZ and DR. MICHAEL VEGA,

Appellees.

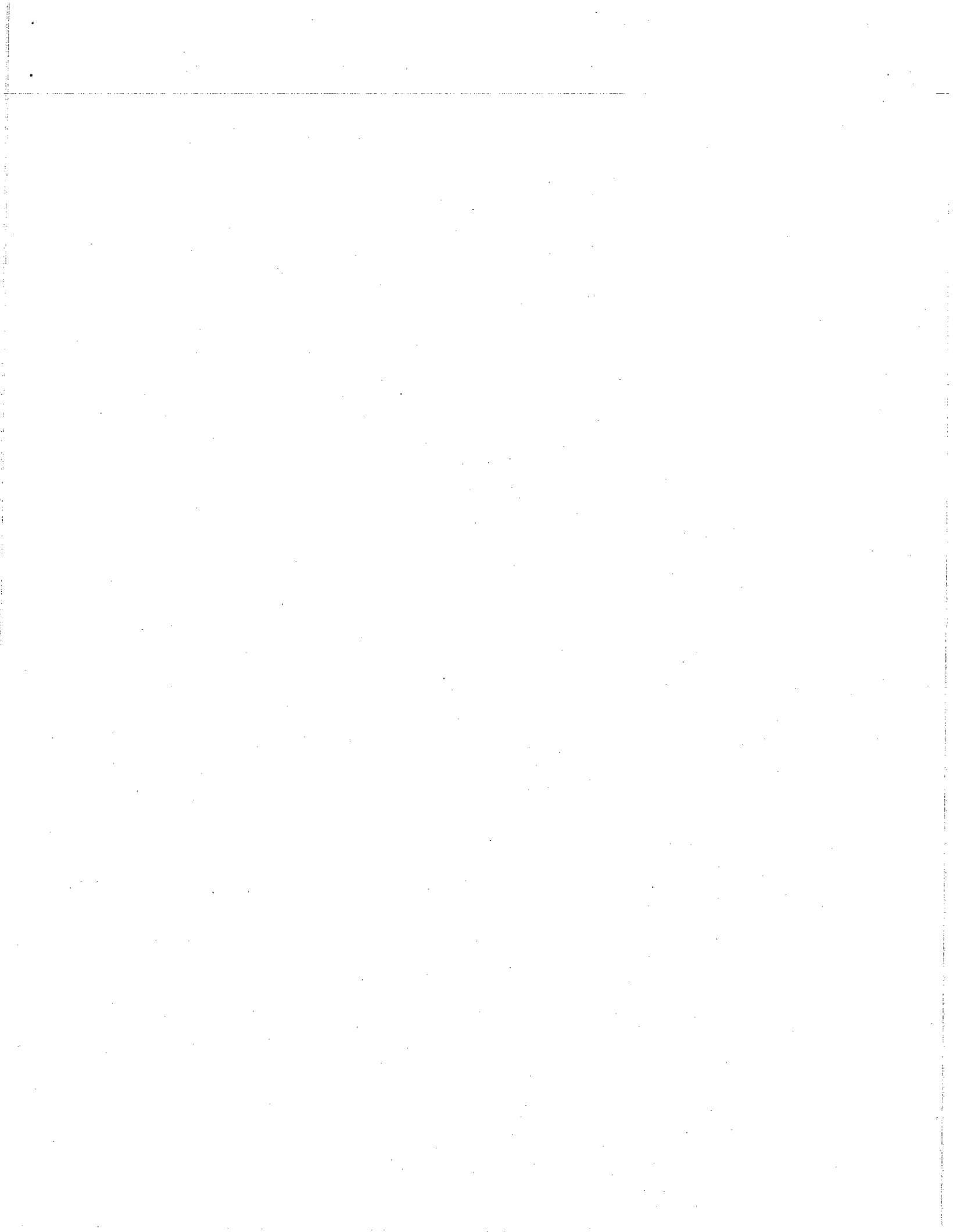
CERTIFICATE OF SERVICE

I, Elizabeth D. Harter, counsel for Appellees, do hereby certify that I have served the foregoing "*Brief of Appellees 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 and Dr. Michael Vega*" upon counsel of record by depositing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 28th day of June, 2004, addressed as follows:

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



Elizabeth D. Harter (WVSB #5483)



IN THE CIRCUIT COURT OF CABELL COUNTY
WEST VIRGINIA

THERESA D. MESSER,

PLAINTIFF,

VS.

HUNTINGTON ANESTHESIA GROUP,
ET AL,

DEFENDANT.

COPY

CIVIL ACTION NO. :
02-C-635

HEARING

Transcript of proceedings had in the hearing of the above-styled action before the Honorable John L. Cummings, Judge, on Friday, the 22nd day of November, 2002.

APPEARANCES:

WALT AUVIL, Esq., Parkersburg, West Virginia, Counsel for the Plaintiff.

ELIZABETH HARTER, Esq., and MARK DELLINGER, Esq., Charleston, West Virginia, Counsel for the Defendant.

JO ANN BETLER, RPR
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(304) 526-8605

JO ANN BETLER, RPR

1 BE IT REMEMBERED that heretofore, to wit, on
2 Friday, the 22nd day of November, 2002, in the hearing of
3 the above-styled action, the following proceedings were
4 had:

5 THE COURT: The matter of Messer versus Huntington
6 Anesthesiology Group, also known as HAGI, 02-C-635.

7 Motion to dismiss here; is that correct?

8 MS. HARTER: Yes, your Honor.

9 THE COURT: You are?

10 MS. HARTER: Elizabeth Harter, and my associate Mark
11 Dellinger, for defendants, all of the defendants.

12 MR. AUVIL: Good morning, Judge. Walt Auvil for the
13 plaintiff.

14 THE COURT: You filed this motion to dismiss, what
15 do you have to say about it?

16 MS. HARTER: Judge, this is a case where -- a
17 12(b)(6) motion, of course, so everything set forth in
18 the complaint is presumed to be true, at least for
19 purposes of argument -- where Ms. Messer worked for
20 Huntington Anesthesia Group as a certified registered
21 nurse anesthetist and did so until toward the end of 2000
22 when, as it says in the complaint, she was no longer able
23 to work as a result of a back injury. This claim is one
24 under the Human Rights Act, the discrimination statute.

1 And it claims that she had in previous -- on previous
2 occasions presented to the anesthesiology group notes
3 from her treating physician saying this person is to work
4 no more than eight hours. She claims that the group's
5 failure to honor those were a failure to -- was a failure
6 to provide reasonable accommodation under the Human
7 Rights Act; therefore, unlawful discrimination for which
8 she seeks redress in this case.

9 The basis for our motion to dismiss is very
10 simply the nature of her claim. She claims -- and it's
11 in paragraph 14 of the complaint -- that her physical
12 condition was exacerbated as a result of the failure to
13 comply with what they contend were obligations to provide
14 a reasonable accommodation under the Human Rights Act.
15 In other words, her physical injury was caused or
16 exacerbated by the group's alleged failure to honor an
17 eight-hour work restriction.

18 It's our contention in this motion to dismiss
19 that the claim under the Human Rights Act does not exist
20 by virtue of the worker's compensation immunity law.
21 Very simply, if she claims that she was injured
22 physically as a result of the defendant's actions, then
23 her redress is the worker's compensation system. If she
24 claims that her employer deliberately caused her injury,

1 her redress is a Mandolitis case. But, in no event, in
2 this case, is her redress, our position is, the Human
3 Rights Act.

4 Based on -- and it is simply not a claim that
5 an employment wrong was done here. There is no adverse
6 impact, which is the bad thing that has to happen in
7 order to have a discrimination case. That's what we've
8 argued in our response.

9 Plaintiff filed a response a couple of days
10 ago and we have a reply to present to the Court
11 addressing the two cases, which I'll just do orally. And
12 if I can approach at some point, I can --

13 THE COURT: Mr. Auvil, in those cases you cited to
14 me, I believe they were from New Mexico or someplace like
15 that?

16 MR. AUVIL: I imagine what Ms. HARTER is referring
17 to is the two West Virginia cases, Judge, but I'm not
18 sure.

19 MS. HARTER: Actually, if I can approach, and
20 whatever appropriate time to present our memo. We've
21 addressed the two West Virginia cases, which are Stone
22 and St. Peter. And also, I believe there is a New Mexico
23 case, a Wisconsin case, a California case -- two
24 California cases.

1 THE COURT: I was not supplied with a copy of the
2 New Mexico or the out-of-jurisdiction cases, therefore, I
3 have not read them. It came in by fax night before last.

4 MS. HARTER: The two cases that the plaintiff cites
5 to support her position that her case should not be
6 dismissed are West Virginia cases Stone and St. Peter.
7 And in both of those cases, the employee was claiming
8 that he or she was discriminated against, that an
9 employment action was taken against that employee. And
10 Stone, I believe, it was a reassignment to a different
11 position. And in St. Peter, I believe it was the
12 employer's refusal to return them to work.

13 In both of those cases, the employer said
14 they're barred by the worker's compensation statute and
15 the supreme court said, no, they can proceed on those
16 employment discrimination claims, which are different.
17 They were seeking to be -- to recover damages as a result
18 of, in one case, being reassigned and in another not
19 being brought back to work. There is no employment
20 damage, no adverse impact even alleged here. We don't go
21 beyond the complaint. This plaintiff has never been
22 terminated and she doesn't allege that she has been
23 terminated from employment. She simply alleges that she
24 was injured or that she has injuries that were

1 exacerbated as a result of something that the employer
2 allegedly did. And that's pure workers comp or pure
3 Mandolitis should she claim there is some deliberate
4 intent involved.

5 And we believe that neither the Stone or St.
6 Peter's cases nor the EEOC enforcement guidance is
7 contrary to our position, because, very simply, there is
8 no employment injury here.

9 THE COURT: Mr. Auvil, what do you have to say?

10 MR. AUVIL: Thank you, your Honor.

11 The defendant focuses on one part of the
12 complaint but doesn't, I think, focus on the gravamen of
13 the complaint, as the Court can see, set forth in
14 paragraph 12. Paragraph 12 alleges that the defendants
15 in this case failed to engage in the interactive process
16 to determine whether there were reasonable
17 accommodations, which could have been made which would
18 have allowed Mrs. Messer to continue her employment.
19 That's not a comp claim. There is no duty under comp law
20 to do that. The duty to engage in an interactive process
21 to determine whether this --

22 THE COURT: Let me interrupt here.

23 Was she fired from there?

24 MR. AUVIL: Well, your Honor, she wasn't permitted

1 to continue to work. So whether she's been formally
2 terminated or not is kind of neither here nor there. No
3 one ever came out and said, "You are fired," but they
4 were not ever -- they did not ever permit her to
5 continue.

6 THE COURT: Proceed.

7 MR. AUVIL: Okay.

8 The gist of it -- I think the defendant's
9 motion goes to the claim of if you have a physical injury
10 at work, can you -- and it would arguably be covered by
11 the worker's compensation. Can you proceed with a Human
12 Rights Act claim based on that? And the answer clearly
13 is yes. And what we really come down to and what the
14 argument comes down to is whether particular damages are
15 excludable, not whether the claim can be brought. And
16 that's where I think the defendants missed the point with
17 this motion to dismiss.

18 When we get around to trial in this case and
19 the defendants want to argue to the Court, well, the jury
20 shouldn't be permitted to consider the physical injuries
21 of this person as part of damages they may award, then we
22 might have an argument. And we are going to have to
23 debate that issue. But that isn't the question the
24 Court's being asked to address today, isn't an issue of

1 damages. The Court is being asked to dismiss this claim,
2 the Human Rights Act claim, saying you can't bring a
3 cause of action under the Human Rights Act, if you
4 sustain a compensable injury. And that's clearly not
5 true.

6 Just to use an example, let assume you have a
7 workplace in which you have all white employees, but just
8 one black employee. And you consistently assign the
9 black employee to the dangerous dirty job of going in and
10 cleaning out the hazardous waste in a dump. And as a
11 result of that, the black employee sustains a compensable
12 injury from exposure to poisons. Well, the black
13 employee has a comp claim, no doubt. But is it -- would
14 it be the defendant's contention that he doesn't have a
15 race discrimination claim under the Human Rights Act?
16 No, clearly not.

17 THE COURT: What if he were hired for that purpose?
18 Say that was the evidence, to clean out toxic waste.

19 MR. AUVIL: If he was hired for that purpose because
20 he was black, he still has a Human Rights claim.

21 THE COURT: No, he was the only one that applied.

22 MR. AUVIL: Well, that's another -- we can posit a
23 lot of things.

24 THE COURT: You're saying you can't fire anyone,

1 right?

2 MR. AUJIL: Well, your Honor, I would like to
3 believe that's true. It would certainly be good for
4 business on my end, but it's entirely --

5 THE COURT: You've never fired anyone in your
6 office, right? You never had a bad employee?

7 MR. AUJIL: Oh, I certainly have. I have fired them
8 and I've told many, many people, probably 95 percent of
9 the people I see they have no claim. But in this case,
10 what the defendants are asking the Court to say is that
11 as a matter of law you can't maintain both a compensation
12 claim and a Human Rights Act claim where the facts
13 overlap. And the law simply doesn't support that in West
14 Virginia.

15 I can tell the Court that in both Stone and
16 St. Peter, the facts of the compensation claims were
17 directly the fact, the liability facts, that brought the
18 Human Rights Act claim. In Stone the employer refused to
19 accommodate and allow the employee to continue in his
20 duties as an EMT because of a back injury. The
21 defendants in that case argued that, you know, he
22 shouldn't be permitted to maintain his Human Rights Act
23 claim. The supreme court rejected that argument.

24 The same thing in St. Peter. St. Peter

1 sustained an on-the-job injury and requested physical
2 therapy. The employer said, you can't go to physical
3 therapy.

4 THE COURT: I'm going to cut this short for a
5 second.

6 MR. AUJIL: Yes, your Honor.

7 THE COURT: You're doing fine. But due to the fact
8 that from another branch of Huntington Anesthesiology
9 Group, I've been in trial all week, all day, have not
10 read -- I have read the briefs sent in, but not the
11 underlying cases. And thought again as I was reading
12 this and see Dr. Deer testifying in that case and same
13 parties, well, except for the plaintiff -- I'm going to
14 read your response. If you wish, send in a copy of the
15 two other cases you have that are out of jurisdiction.
16 Frankly, I don't have them and I'm not going to look them
17 up.

18 MR. AUJIL: Yes, sir.

19 THE COURT: And you may respond, if you wish, but
20 I'm going to rule on memos and briefs.

21 MS. HARTER: Judge, I just want to clear one thing
22 up on the record. And that is to take serious issue with
23 plaintiff's assertion that she was not permitted to
24 continue to work. That is not in the complaint. The

1 complaint alleges that she was no longer able to perform
2 her duties. If she would report to work right now, she
3 would be permitted to work. My understanding is -- and I
4 know this is going outside of the pleadings -- but that
5 she is even continuing on health insurance. This is
6 absolutely not a case where this plaintiff was told that
7 she couldn't work anymore, was terminated, was
8 transferred, was demoted or anything of that nature.

9 THE COURT: I will review the memos.

10 (Hearing concluded.)

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1 STATE OF WEST VIRGINIA,
2 COUNTY OF CABELL, to wit:
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4 I, Jo Ann Betler, RPR, Official Reporter of
5 the Circuit Court of Cabell County, West Virginia, do
6 hereby certify that the foregoing is a true and correct
7 transcript of the proceedings had in THERESA D. MESSER
8 VS. HUNTINGTON ANESTHESIA GROUP, ET AL, Civil Action No.
9 02-C-635, on Friday, the 22nd day of November, 2002, as
10 reported by me in machine shorthand.

11 I hereby certify that the transcript within
12 meets the requirements of the Code of the State of West
13 Virginia, Section 51-7-4, and all rules pertaining
14 thereto as promulgated by the Supreme Court of Appeals.

15 Given under my hand this 10th day of May,
16 2004.
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19

20 
21 Official Reporter, Circuit Court
22 of Cabell County, West Virginia
23
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