

DO NOT REMOVE
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

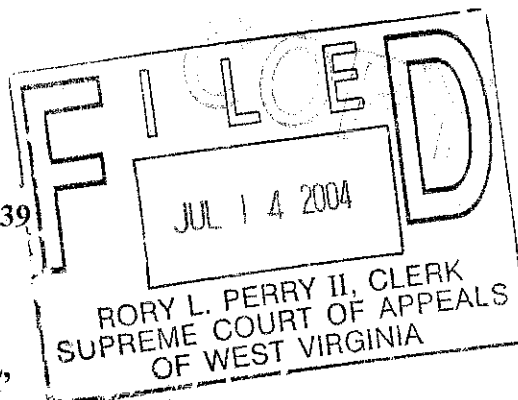
CHARLESTON

THERESA D. MESSER,

Appellant/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,

Appellees/Defendants.

REPLY BRIEF OF THE APPELLANT/PLAINTIFF

I. Reply to Appellees/Defendants' Introduction

There is no support in the record for several assertions made in the introduction to Appellee's brief because there has been no factual development in this matter. The proceedings were interrupted by the Defendant's Motion to Dismiss, which the Circuit Court granted. Thus, for instance, no depositions of the Plaintiff or any of the Defendants have been taken. No other discovery has been undertaken either.

The complaint in this matter does allege that Appellees (hereinafter collectively referred to as "HAG") failed to participate in the interactive process required by the West Virginia Human Rights Act ("WVHRA") and that HAG's failure to do so resulted in the exacerbation of her pre-existing physical condition. Complaint ¶¶ 12-14. The ad damnum clause demands "damages for mental and emotional distress, lost wages, value of lost benefits, costs and

attorneys fees, reinstatement, [and] injunctive relief against future violations of the law. Of the six items of damages sought, five are unavailable in any form or at any level through the West Virginia Workers' Compensation Act ("WCA").

As this Court is well aware, workers' compensation provides a wage replacement remedy for a portion of lost wages attributable to a Claimant's on-the-job injury. Also, workers' compensation provides reimbursement for medical expenses related to on-the-job injuries, an item of damage not sought by the Plaintiff in her WVHRA complaint at issue in this matter.

However, a workers' compensation claim does not provide any Claimant with damages for mental and emotional distress, nor the value of lost benefits suffered as a result of the loss of employment - including substantial benefits, such as retirement. The WCA does not provide for fee shifting of the expenses of litigation as does the WVHRA. Perhaps most significantly, WCA remedies do not include reinstatement or injunctive relief, which are core remedies central to the elimination of discrimination as provided for under the WVHRA.

HAG correctly asserts that the Plaintiff sought recovery for injuries which she received as a result of HAG's refusal to accommodate her disability, that statement standing alone is misleading. Plaintiff sought relief available under the WVHRA which is both broader than and narrower than the relief available under the WCA as it is directed to a different injury and protects a different public policy. Indeed, as HAG points out in its brief, "[t]he underlying policy and purposes of the WVHRA and WCA are vastly different." Brief of Appellees, Page 7.

II. ARGUMENT

1. Defendant misapprehends the scope of the Plaintiff's Complaint and Relief Sought.

HAG proceeds in its argument upon its initial observation that, "Appellant is attempting

to recover damages for a compensable workplace injury under the WVHRA.” Brief of Appellees, Page 6. The Complaint includes a claim for physical injury stemming from HAG’s failure to abide by Plaintiff’s work restrictions, but it is not limited to damages recoverable for a compensable physical workplace injury under the WCA. The Plaintiff’s claims under the WVHRA claim seeks both monetary damages and structural and injunctive relief which is available exclusively under the WVHRA.

Emotional distress which Plaintiff experienced as a result of HAG’s refusal to accommodate - and refusal to interact with her to determine whether accommodation could be provided - certainly did not stem exclusively from Plaintiff’s resulting physical injury. There was, as set forth in the complaint, a long history of failure to accommodate which eventually resulted in progression of Plaintiff’s injury. The emotional distress which she experienced through this time - although admittedly intertwined with the stress from the physical pain which she suffered - certainly was not exclusively caused by physical pain, but was also caused by the willful refusal of the employer to comply with its obligation to provide her with accommodations which were required by the WVHRA.

Even if this Court were to accept HAG’s formulation of its argument - that the WCA exclusivity provisions bar the Plaintiff “from asserting a cause of action for workplace injuries under the West Virginia Human Rights Act” - the Plaintiff should still be afforded her right to proceed with her WVHRA claim for all matters other than the actual physical injury caused by HAG’s actions. That is, Plaintiff should be permitted to proceed with her claims for emotional distress, mental distress and anguish, punitive damages, as well as injunctive relief prohibiting future discrimination by HAG even if the Court accepted the exclusion of Plaintiff’s claim for

physical injury. However, for reasons set forth below, the Court should not accept HAG's formulation of WCA exclusivity.

2. West Virginia Code § 23-2-6 Does Not Bar The Appellant's WVHRA Claim

West Virginia Code § 23-2-6 provides, in pertinent part:

“[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, 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).

Plaintiff's complaint is not seeking “damages at common law or by statute for her injury.” Rather, it is a suit seeking damages and non-monetary relief for a violation of HAG's WVHRA obligation of accommodation and interaction. The Plaintiff's suit seeks recovery for both physical and non-physical injury stemming from HAG's refusal of accommodation of her disability. Plaintiff's WVHRA claim does not depend for its viability upon a physical injury to the Plaintiff - that is merely incidental to the WVHRA claim and constitutes no more than one of several elements of damages.

By reference to the complaint this is easily demonstrated. If the Plaintiff had chosen to simply delete paragraphs 13 and 14 of her complaint, the issue currently before the Court would never have been raised. The remaining complaint would state a valid cause of action under the WVHRA, giving rise to the potential for recovery of each and every item set forth in the ad damnum clause discussed above, including mental and emotional distress, lost wages, the value

of lost benefits, costs and attorneys fees, reinstatement, and injunctive relief. Thus, the Plaintiff's WVHRA claim cannot be held to be coterminous with "damages at common law or by statute for [her] injury."

3. Non-West Virginia Cases on Workers' Compensation Exclusivity

HAG's brief gloss of City of Moorpark v. Superior Court of Ventura County, 18 Cal. 4th 1143, 959 P.2d 752 (1998), is not false but is misleading. The lengthy decision by the California Supreme Court in City of Moorpark discussed the development of the workers' compensation exclusivity provisions of the California Labor Code which provides, in pertinent part, that:

"proceedings '[for] the recovery of compensation, or concerning any right or liability arising out of or incidental thereto' 'shall be instituted before the [Workers' Compensation] [A]ppeals [B]oard *and not elsewhere . . .*' (Lab. Code § 5300, subd. (A), italics added; see Portillo, *supra*, 131 Cal. App. 3d at p. 287.)"

The Court in Moorpark discussed at length the previous California decisions which had held that a separate section of the Labor Code, § 132a, provided the exclusive remedy for employees who claimed discrimination based on a work-related disability. Id at 1151, 757. In Moorpark, the Court summarized its previous case law on the statutory exclusivity provision of the California Labor Code and noted that it had previously decided that the exclusivity provision "cannot encompass conduct, such as sexual or racial discrimination, 'obnoxious to the interests of the state and contrary to public policy and sound morality.'" City of Moorpark v. Superior Court of Ventura County, 18 Cal. 4th 1143, 1153, 959 P.2d 752, 758 (1998), citing Gantt v. Sentry Insurance, 1 Cal. 4th 1083, 1097, 4th Cal. Rptr. 874, 824 P.2d 680 (1992).

The California Supreme Court based its decision not only on the particular specifics of the California Labor Code, but upon the more generally applicable principle that the

“compensation bargain” which lies at the heart of the California WCA and the West Virginia WCA simply did not apply to certain employer misconduct. The California court formulated the “compensation bargain” as follows:

“The Portillo court also relied on the ‘compensation bargain’ underlying the workers’ compensation law, whereby ‘[t]he Workers’ Compensation Act . . . afford[s] workers quick determination of their claims’ but ‘limit[s] the employee to . . . a single forum, the Workers’ Compensation Appeals Board.’ (Portillo, *supra*, 131 Cal. App. 3d at p. 287.)”
Portillo v. G.T. Price Products, Inc., 131 Cal. App. 3d 285, 182 Cal. Rptr. 291 (1982).¹

The Moorpark court specifically rejected the idea that the compensation bargain included employer conduct which discriminated against an employee based upon a work-related disability. Id at 1155, 759. Indeed, the California Supreme Court relied upon the broad public policy set forth in the anti-discrimination statute at issue the California Fair Employment and Housing Act (FEHA), which mirrors quite closely the pronouncement of public policy set forth by the West Virginia legislature and the West Virginia Human Rights Act. As the California Supreme Court noted:

“The FEHA broadly announces ‘the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of . . . physical disability [or] mental disability . . .’ (Gov. Code § 12920.) The FEHA further provides that ‘[i]t shall be an unlawful employment practice . . . [P] . . . [f]or an employer, because of the . . . physical disability [or] mental disability . . . of any person, to . . . discriminate against the person . . .’ (Gov. Code § 12940, subd. (a).) Nothing in these provisions suggests that the FEHA only applies to physical or

¹Similarly, in West Virginia the legislative immunity afforded by the WCA was designed to remove negligently caused industrial accidents from the common law tort system. Smith v. Monsanto Co., 822 F. Supp. 327 (S.D.W.Va. 1992), Persinger v. Peabody Coal Co., 196 W. Va. 707, 474 S.E.2d 887 (1996).

mental disabilities that are unrelated to work. Moreover, the FEHA declares that its 'provisions . . . shall be construed liberally for the accomplishment of the purposes thereof.' (Gov. Code § 12993, subd. (a).) A construction of section 12940, subdivision (a), that narrows the term 'disability' to disabilities unrelated to work seems inconsistent with the principle of liberal construction." Id. at 1157.

Similarly, the West Virginia legislature set forth the broad public policy of the West Virginia Human Rights Act as follows:

"It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or a civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.

The denial of these rights to properly qualified persons by reasons of race, religion, color, national origin, ancestry, sex, age, blindness, disability of familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." West Virginia Code § 5-11-2 (2003).

Nothing in the statutory scheme of the WVHRA includes any indication that the legislature intended to narrow the protections provided by the WVHRA to disabled West Virginians to only that class of West Virginians whose disabilities were unrelated to their work. This is true despite the fact that the WVHRA was adopted over 50 years after the adoption of the first version of the workers' compensation exclusivity provisions now embodied at West Virginia Code § 23-2-6. To do so would fly in the face of the legislature's mandate of liberal

construction of the WVHRA. West Virginia Code § 5-11-5.

The California Supreme Court opinion in City of Moorpark was, in this regard, unanimous. The dissenting opinion by Justice Brown related only to the Court's ruling on the public policy discharge portion of the decision. Brown and his fellow dissenter expressly joined in the majority's conclusion that the Plaintiff may pursue her state human rights act claim for disability discrimination and that such a claim is not barred by workers' compensation exclusivity. Id at 1161-1162, 764.

The West Virginia legislature has indicated its intention that the exclusivity provision of the WCA would not bar a WVHRA claim not only through the adoption of the WVHRA without any limitation on the scope of its disability coverage, but also through the adoption of legislative regulations interpreting and expanding on the anti-discrimination provisions of the WVHRA regarding individuals with disabilities. These 1994 regulations are collected at W. Va. CSR § 77-1-1, et seq. The purpose of the regulations is stated as follows:

"1.1 Scope – The following legislative regulations of the West Virginia Human Rights Act set forth rules for complying with the disability provisions of the West Virginia Human Rights Act, W. Va. Code § 5-11-1 et seq., and are intended to interpret and implement the provisions of the West Virginia Human Rights Act, particularly the 1989 amendments relating to handicap disability discrimination, and to assist all persons in understanding their rights, obligations, and duties under the law. (emphasis added).

W. Va. CSR § 77-1-4 ("Employment Discrimination Prohibited") provides, in pertinent part, that:

"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: . . .

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

West Virginia CSR § 77-1-4.5 defines reasonable accommodations as follows:

“Reasonable accommodations include, but are not limited to: . . .
4.5.2 Job restructuring, part-time or modified work schedules . . .”

West Virginia CSR § 77-1-4.13 provides:

“When an individual acquires a disability in the course of employment, the employer shall, if possible through reasonable accommodation, continue the individual in the same position, or may reassign the employee to a new position for which she/he is qualified or for which, with training, she/he may become qualified. The requirements of this subsection shall be interpreted in such a way as to be consistent with W. Va. Code §23-5A-1, which prohibits employers from discriminating against employees because they have applied for or received Workers’ Compensation benefits.” (emphasis added).

Clearly, there was no intent on the part of the legislature that an individual who acquired a disability in the course of employment be excluded from the protections against disability discrimination provided by the WVHRA. If such were the case, the regulations interpreting the WVHRA would not include an explicit discussion of the obligation of the employer to “continue the individual in the same position . . . or . . . reassign the employee to a new position for which she/he is qualified or for which, with training, she/he may become qualified.” If the exclusivity provision of the WCA were as broad as HAG would have this Court believe, there could be no application of the WVHRA to protect an employee against disability discrimination under the WVHRA nor could the WVHRA impose any obligation on the employer as regards an individual who acquired a disability in the course of employment. The legislature did not adopt the approach urged by HAG when adopting its legislative regulations interpreting the scope of the

WVHRA's prohibition against disability discrimination.

HAG's quibble with the Plaintiff's citation to Cox v. Glazer Steel Corp., 606 So. 2d 518 (La. 1992), is somewhat difficult to understand. The issue posed to the Supreme Court of Louisiana in Cox was exactly the same issue posed to this Court in the case herein. In Cox an employee was injured while working for his employer. The employee resolved his workers' compensation claim. Thereafter, the employee filed a handicap discrimination claim under the Louisiana state civil right law. The employer objected, contending that the workers' compensation law of the State of Louisiana provided the exclusive remedy for an on-the-job injury, and that the Plaintiff's later civil rights claim for disability discrimination was barred by the WCA exclusivity provision of Louisiana law, La. Rev. Stat. Ann. § 23:1032(A)(1)(a).

This code section provides that, "[t]he compensation remedy: 'shall be exclusive of all other rights and remedies of such employee, . . . , against his employer, . . . , for said injury, . . .'"

Id at 519. The Louisiana Supreme Court noted that:

"The purposes of the Workers' Compensation law and the law guaranteeing civil rights to the handicapped are also different. The Workers' Compensation law provides compensation for accidental industrial injury or death. Guaranteeing civil job rights for the handicapped is intended to assure the handicap equal employment opportunity. The two pieces of legislation are directed at distinct problems." Id at 520.

The concurrence by Justice Lemmon, joined in by Justice Hall raises the interesting point that, "Plaintiff's cause of action for discrimination is not based on the employer's liability for the injury, but on the employer's liability for subsequent conduct that, although incidentally related to the on-the-job injury, gave rise to entirely separate liability under an entirely separate statute." That is certainly true here, although herein the Employer's conduct was during and after the

Plaintiff's on-the-job injury, and the injury worsened over time. Id at 521.

HAG's updating of the status of Maine's law is also instructive. As HAG points out, the Maine Supreme Judicial Court has more recently addressed - and expanded upon - its previous holding in King v. Bangor Federal Credit Union, 568 A.2d 507 (Me. 1989), in Gordan v. Cummings, 756 A.2d 942 (Me. 2000). HAG's quibble with the applicability of Maine's authority in this regard ignores the applicability of the broader policy considerations discussed by the Supreme Judicial Court of Maine in King.² As the Supreme Judicial Court of Maine noted in King:

“... the Human Rights Act is designed primarily to protect civil rights. 5 M.R.S.A. § 4571 declares that the right to be free of unlawful employment discrimination is a civil right. The injury that King's complaint seeks to redress under the Human Rights Act is the indignity of the loss of an employment opportunity because of her physical handicap. This is an injury distinct from the physical injury for which she was compensated and concerning which she signed a release under the Workers' Compensation Act. Compensation for back pay is not the only remedy King is seeking nor the only remedy available to her under the Human Rights Act. n5 See 5 M.R.S.A. § 4613(2).”

The analysis by the Supreme Judicial Court of Maine in King is equally applicable to the case sub judice.

HAG argues that the WVHRA does not preempt the exclusivity provisions of W. Va. Code § 23-2-6 of the WCA. However, in discussing the principles of statutory construction set forth in Henderson v. Meredith Lumber Company, 190 W. Va. 292, 297, 438 S.E.2d 324, 329 (1993), HAG proves too much. In passing the WVHRA 54 years after the adoption of the first

²Although the Maine workers' compensation exclusivity provision was amended in 1995 - between the King decision in 1989 and the Gordan decision in 2000 - Appellant's research was not able to determine whether the amendment affected the exclusivity provision language pertinent to the Maine Supreme Court's two decisions.

version of the exclusivity provisions now embodied in West Virginia Code § 23-2-6, the West Virginia legislature chose to enact a law which expressly provided for employer liability for discrimination against individuals with disabilities, regardless of the source of those disabilities.

This reading of legislative intent is reinforced by the 1994 adoption by the legislature of regulations expressly incorporating the protections of the disability provisions of the WVHRA into the context of a disability acquired as a result of an on-the-job injury. W. Va. CSR § 77-1-4.13, supra.

4. West Virginia Code § 23-4-2 (“Deliberate Intention”) Has No Application to a WVHRA Claim. Miller v. City Hospital, Inc.

HAG cites Miller v. City Hospital, Inc., 197 W. Va. 403, 475 S.E.2d 495 (1996), in support of its argument that the Plaintiff’s exclusive remedy for her handicap discrimination claim is through a deliberate intention action pursuant to West Virginia Code § 23-4-2. The judgment affirmed by the Supreme Court in Miller v. City Hospital, Inc., 197 W. Va. 403, 475 S.E.2d 495 (1996), stemmed from summary judgment granted by the Circuit Court to the employer. Therein, the Plaintiff alleged (1) on-the-job problems which she contended constituted intentional infliction of emotional distress and (2) that the employer had ratified defamatory statements made about her by a coworker. Id. at 406, 498. This Court noted that there had been substantial discovery by the parties, followed by a motion by the employer for summary judgment alleging that the hospital was not responsible for the claimed intentional infliction of emotional distress because of workers’ compensation exclusivity. The employer also argued that it did not ratify the alleged defamatory remarks. The Court noted that Miller brought her intentional infliction of emotional distress claim as a deliberate intention claim

pursuant to West Virginia Code § 23-4-2(c)(2)(ii). Id. at 409, 501. The Court concluded that Miller's failure to offer sufficient proof that the employer's acts violated a specific safety statute or standard doomed her deliberate intention claim.

It is not correct to suggest - as HAG does in its brief - that Miller was resolved by this Court as a common law claim. The Plaintiff's claim in Miller was treated by this Court as a claim under the deliberate intention provision of the WCA and summary judgment by the Circuit Court was affirmed explicitly on that ground. Id. 410, 502.

HAG's quote of footnote 5 from the Miller decision is, in context, quite misleading. The footnote as quoted by HAG in its brief was appended to that portion of the Miller opinion where the Court noted that the Plaintiff had failed to offer sufficient evidence to support a finding that the employer's actions had violated a "specific safety statute or standard" as required by West Virginia Code § 23-4-2(c)(2)(ii)(C). The footnote, read in context, was clearly meant by the Court simply to convey that Miller's workers' compensation claim was not affected by its opinion and that she was free to proceed under the WCA to seek compensation and medical coverage for her on-the-job injury. HAG's effort to read the footnote more broadly is misplaced.

Contrary to HAG's argument, the Appellant's reliance on Stone v. St. Joseph's Hospital, 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), is appropriate. While it is true that neither case explicitly addresses the exclusivity provision of the WCA, both cases do explicitly address the fact that both workers' compensation claims and claims of disability discrimination which were maintained by the Plaintiffs in both cases.

HAG admits, as it must, that Stone dealt with a situation in which the employee was

permitted to pursue his WVHRA claim for discrimination based upon a perception of disability stemming from his work-related injury. The attempt at distinguishing Stone made by HAG is based upon its argument - correct as far as it goes - that Stone's WVHRA claim did not seek compensation for the physical aspects of his workplace injury directly. However, that is neither here nor there as regards the argument which HAG made about the absolute prohibition against pursuing a WVHRA claim. If this Court were to accept HAG's formulation of the scope of preemption under West Virginia Code §23-2-6 then the Plaintiff in Stone should not have been permitted to pursue a WVHRA claim stemming from the employer's perception of disability resulting from Stone's on-the-job injuries. However, without explicitly discussing this issue, this Court had no difficulty in permitting Stone to proceed with his WVHRA claim even in light of the fact that it was based upon disability discrimination stemming from his on-the-job injuries. Stone is inconsistent with HAG's proposed interpretation of the sweep of the exclusivity provisions of the WCA.

Similarly in St. Peter the allegation was that the employer explicitly based his termination of the Plaintiff's employment on the fact that - as a result of Plaintiff's workplace injury - the Plaintiff was "half a man" and could no longer perform his duties. This Court had no difficulty in permitting the Plaintiff to proceed with his WVHRA claim, despite the fact that the Plaintiff had admittedly sustained a compensable injury which formed the basis for the employer's termination of the Plaintiff. Again, St. Peter is inconsistent with the broad sweep of the exclusivity provision of the WCA urged by HAG.

5. Non-West Virginia Cases Cited by HAG

In concluding its brief, HAG cites several non West Virginia cases which it claims

support its position, beginning with Konstantopoulos v. Westvaco Corp., 690 A.2d 936 (Del. 1996). However, HAG's citation to Konstantopoulos does not accurately reflect the relevant portion of the opinion.

Crucially, the claims at issue in the Konstantopoulos action were common law claims, not claims pursuant to the state anti-discrimination statute, 19 Del. C. § 711 ("Unlawful Employment Practices: Employer Practices"). It is this statutory provision which is properly analogous to the provisions of the WVHRA at issue herein. As regards a claim under the Delaware human rights statute, the Konstantopoulos court noted that its holding "does not preclude relief for an employee under Delaware law for sexual harassment that occurs in the workplace. **Sexual harassment may give rise to a Workers' Compensation claim, and it may be actionable under 19 Del. C. § 711 which, like the parallel statute, prohibits discriminatory employment practices.**" Id. at 940 (emphasis added). Thus, contrary to HAG's intimation, Konstantopoulos stands for the proposition that the Delaware workers' compensation exclusivity provision does not preclude a claim under the Delaware human rights statute for discrimination.

HAG's attempt to distinguish Byers v. Labor Industry Review Comm'n, 208 Wis.2d 388, 561, N.W.2d 678 (1997), approaches the ludicrous. HAG proceeds from the accurate observation that the exclusivity provision of the Wisconsin WCA differs from that found in the West Virginia WCA. However, no explanation is offered for HAG's assertion that the sweeping language of the Wisconsin exclusivity provision is less all-inclusive than the language of the West Virginia provision.

The Supreme Court of Wisconsin's opinion in Byers was authored by Chief Justice Abrahamson and was unanimous. Chief Justice Abrahamson's opinion notes that - just as in

West Virginia - the Wisconsin WCA and the Wisconsin Fair Employment Act (WFEA) do not mention one another although they “are both potentially applicable to the same set of facts.” *Id.* at 394-395, 681. The Court noted that, “because the statutes and the legislative history are silent about the relationship between the two acts, resolution of any conflict requires consideration of the purposes of the two statutes.” *Id.* at 395, 681. The exclusivity provision of the Wisconsin WCA, Wis. Stat. § 102.03(2) provides that, “the right to the recovery of compensation under this chapter [WCA] shall be the exclusive remedy against the employer.” *Id.* Just as in West Virginia, the Wisconsin WCA was adopted decades before the state civil rights anti-discrimination law.

The Wisconsin Court notes that a complainant under the state’s civil rights law acts as a private attorney general to enforce the rights of the public and implement public policy. *Id.* at 398, 682. The WCA does not identify a remedy or deter an employer’s discriminatory conduct by contrast. The Court concluded that the Wisconsin legislature intended the “**WCA exclusive remedy provision not to bar the Petitioner’s sex discrimination claim, even if her claims were covered under the WCA.**” *Id.* at 400, 683 (emphasis added). The Wisconsin Supreme Court noted that if it adopted the interpretation urged by the employer therein, identical to that urged by HAG in the case sub judice - then “[t]hose employees whose claims were not covered under the WCA would be afforded relief under the WFEA. 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. Nothing in the WFEA indicates that its effect is to be limited to only those acts of employment discrimination which do not result in a claim covered under the WCA.” *Id.* at 401, 683. This

analysis is, of course, directly applicable to the situation presented herein. If the Court were to adopt the interpretation urged by HAG then employees most egregiously injured - ones whose injuries could have easily been prevented by accommodations explicitly required by the WVHRA - would be excluded from protection under the WVHRA. Nothing in the WVHRA indicates that its effect is to be limited only to those claims which were not covered under the West Virginia WCA.

Similarly, the Supreme Court of Wisconsin noted that the employer's proposed interpretation conflicted with the Wisconsin legislature's expressed policy that the WFEA be "liberally construed to achieve the important societal goal set forth therein." This is directly analogous to the broad public policy set forth in the WVHRA at West Virginia Code § 5-11-2 quoted and discussed above. As the Wisconsin Court noted, "reading the WFEA so that no one is excluded from its protection because of the WCA exclusive remedy provision, and reading the WCA so that employees receive a sure but limited remedy for their work-related injuries and employers remain protected from court actions in tort arising out of those injuries gives both statutes maximum effect." *Id.* at 401, 683. The Supreme Court of Wisconsin gathered numerous other authorities which supported its view that Workers' Compensation exclusivity statutes do not - as a general matter - preclude state law human rights act claims arising from the same facts. *Id.* at 406-407, 685-686.³

6. EEOC Guidance

In the portion of its brief related to the EEOC guidance on the relationship between state

³HAG's effort to distinguish Byrd v. Richardson-Greenshields Secs., Inc., 552 So.2d 1099 (Fla. 1989), is as strained as its effort to distinguish Byers. Because Byers is the more modern authority and relies upon Byrd and other decisions from around the country, Appellant sees no need to engage in an extensive discussion of Byrd.

WCAs and the protections afforded under the ADA, HAG erects and defeats a paper tiger. The paper tiger has no relationship to the arguments made by the Appellant.

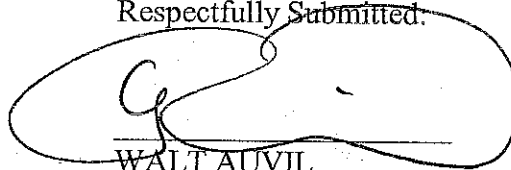
As stated in the Petition for Appeal filed in this matter, the relevance of the EEOC guidance was that it was based on "analogous federal civil rights protections" provided under the ADA. Petition for Appeal, Page 1. As noted in the Petition for Appeal, the 1996 EEOC "Formal Guidance" on the exclusive remedy provisions of state workers' compensation acts embodied a recognition that "state workers' compensation statutes do not bar federal ADA or Rehabilitation Act claims." Petition for Appeal, Page 5.

Appellant never suggested - either in her petition or her initial brief in this matter - that this Court was under a mandatory duty to follow the EEOC guidance, nor to conform with federal interpretations of the ADA when interpreting the WVHRA. Indeed, that is the point. This Court has staked out a position on the WVHRA independent from extremely restrictive federal interpretations of the ADA. Stone v. St. Joseph's Hospital, 208 W. Va. 91, 103-107, 438 S.E.2d 389, 401-404 (2000). It would be ironic indeed if the Appellant herein was faced with a situation in which the EEOC - relying on the crabbed and restrictive interpretations of the ADA by federal courts - found probable cause to believe that the Plaintiff had been the victim of disability discrimination, but West Virginia refused to permit her claim to even be heard under the WVHRA. Such a result would be contradictory to the thrust of this Court's opinion in Stone. West Virginia law clearly points to the opposite result. In keeping with the nearly universal holdings of all states which have considered the issue, this Court should hold that the exclusivity provision of the WCA does not bar a WVHRA claim arising from the same facts.

II. CONCLUSION

The Appellant properly pled a claim under the WVHRA. Her claim is not prohibited under the exclusivity provisions of the WCA. The Circuit Judge's ruling that it was incorrect as a matter of law and should be reversed.

Respectfully Submitted.

A handwritten signature in black ink, appearing to read 'Walt Auvil', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

WALT AUVIL
Counsel for Appellant
State Bar No. 190

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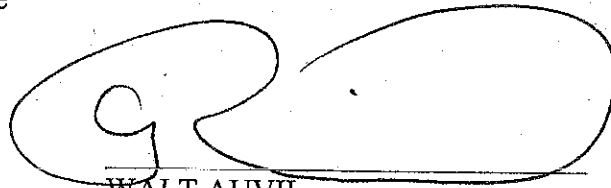
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Appellees/Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel for the Appellant hereby certifies that on the 13th day of July, 2003, he served the foregoing **REPLY BRIEF OF THE APPELLANT/PLAINTIFF** upon **ELIZABETH D. HARTER** and **MARK H. DELLINGER**, Counsel for Respondents, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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