

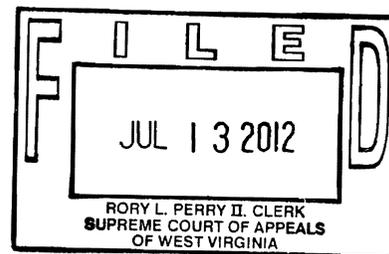
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 12-0477

**THERESA L. WEIMER,**  
Plaintiff Below/Petitioner,

v.

**THOMAS SANDERS, individually and  
in his official capacity; C. C. LESTER,  
in his official capacity; and POCAHONTAS  
COUNTY BOARD OF EDUCATION,**

Defendants Below/Respondents.



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FROM THE CIRCUIT COURT OF  
POCAHONTAS COUNTY, WEST VIRGINIA  
CIVIL ACTION NO. 11-C-54  
(THE HONORABLE JOSEPH C. POMONIO, JR.)

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BRIEF OF THE  
WEST VIRGINIA HUMAN RIGHTS COMMISSION  
AS AMICUS CURIAE  
IN SUPPORT OF PETITIONER

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THE AMICUS CURIAE BRIEF OF THE WEST VIRGINIA  
HUMAN RIGHTS COMMISSION SEEKS REVERSAL OF  
THE CIRCUIT COURT'S *ORDER GRANTING MOTION TO  
DISMISS FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES.*

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## **INTRODUCTION AND INTEREST OF THE AMICUS CURIAE**

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

This Amicus Brief is submitted in support of the Petitioner, Theresa L. Weimer [hereinafter "Weimer" or "Petitioner"]. As an agency of the State of West Virginia, the Commission files this Amicus Brief pursuant to Rule 30(a) of the West Virginia Revised Rules of Appellate Procedure and in accordance with the deadlines set forth in the Court's April 16, 2012, Scheduling Order in this matter.

The Commission has a compelling interest in this appeal and in the Court's resolution of the issues presented. This case involves the creation of a significant and impermissible constraint upon the statutory rights of public employees to enforce their human rights in the time and manner prescribed by the WVHRA. The Commission urges this Court to hold that a public employee is not required to file a West Virginia Public Employees Grievance Board [hereinafter "WVPEGB"] grievance as a condition precedent to filing a WVHRA complaint, and that the Circuit Court has jurisdiction to hear Petitioner's WVHRA complaint. To do otherwise would be inconsistent with the substantial public policy established within the West Virginia Human Rights Act.

## **STATEMENT OF THE CASE**

This case raises the question of whether a public employee, whose employment confers grievance rights before the WVPEGB, is required to exhaust administrative grievance remedies before initiating a complaint alleging violations of the WVHRA. In the proceeding below, Petitioner filed a complaint before the Circuit Court of Pocahontas

County against her former employer, the Pocahontas County Board of Education<sup>1</sup> [hereinafter “PCBOE” or “employer”] alleging three counts of disability discrimination in violation of the WVHRA. The employer filed a Motion to Dismiss pursuant to Rule 12(b)(1) of the West Virginia Rules of Civil Procedure, claiming that the Circuit Court lacked jurisdiction to hear Petitioner’s WVHRA complaint because she had not exhausted her administrative grievance remedies before the WVPEGB.

On March 12, 2012, the Circuit Court entered its *Order Granting Motion to Dismiss for Failure to Exhaust Administrative Remedies*. In this Order, the Circuit Court opined that Weimer’s complaint included factual assertions unrelated to disability discrimination that might support claims “properly addressed by the grievance procedure,” and that “it would be more efficient and expedient for the Plaintiff to argue the proper claims before the Grievance Board.” Appendix, p. 4. The Circuit Court granted the employer’s motion and dismissed Weimer’s complaint, essentially stating that Weimer must exhaust her administrative grievance remedies before the court would entertain her WVHRA complaint.<sup>2</sup>

### **STANDARD OF REVIEW**

This case involves review of an Order granting Defendants’ 12(b)(1) Motion to Dismiss for lack of subject matter jurisdiction. “Appellate review of a circuit court’s order granting a motion to dismiss a complaint is *de novo*.” State ex. rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., Syl. pt. 2, 194 W. Va. 770, 461 S.E.2d 516 (1995); see also Beichler v. West Virginia University at Parkersburg, Syl. pt. 1, 226 W. Va. 321, 700 S.E.2d 532 (2010).

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<sup>1</sup>The complaint also named the Pocahontas Board of Education Superintendent and the Pocahontas High School principal as Defendants.

<sup>2</sup>The Circuit Court noted in its Order that Petitioner “is not precluded from bringing a WVHRA claim before the Circuit Court if necessary.” Appendix, p. 5.

## ARGUMENT

There is no statutory basis or judicial precedent for requiring public employees to exhaust grievance remedies as a condition precedent to filing a WVHRA claim in circuit court. Not only does the imposition of an exhaustion requirement here extend beyond the text of the WVHRA and W. Va. Code § 6C-2-1 *et seq.*, but it thwarts the purposes of the WVHRA.

The Circuit Court's misapplication of the exhaustion of administrative remedies doctrine in this case undermines the substantial public policy established in the WVHRA to eliminate discrimination in West Virginia workplaces. The Circuit Court's approach would render the protections of the Act outside the reach of public employees who may have legitimate human rights claims, but who are foreclosed from seeking enforcement of their WVHRA rights because they did not file a WVPEGB grievance. This is a particularly harsh and unjust outcome in light of the fact that the WVPEGB does not have jurisdiction to find liability or award damages pursuant to the WVHRA. Finally, if they are required to exhaust the grievance process before filing a WVHRA claim, public employees involved in protracted or delayed grievance processes may miss the filing deadline for bringing a WVHRA claim.

**A. THE EXHAUSTION OF WVPEGB ADMINISTRATIVE GRIEVANCE REMEDIES IS NOT A CONDITION PRECEDENT TO FILING A WVHRA COMPLAINT BEFORE THE HRC OR IN CIRCUIT COURT.**

There is no statutory basis or judicial precedent for requiring public employees to exhaust grievance remedies as a condition precedent to filing a WVHRA complaint in circuit court or before the West Virginia Human Rights Commission.

Petitioner's WVHRA disability discrimination complaint, which alleges three cognizable counts of unlawful discriminatory practices pursuant to W. Va. Code § 5-11-9, was properly filed before the Circuit Court. The WVHRA clearly confers circuit courts jurisdiction to hear WVHRA claims, and does not require the exhaustion of available administrative remedies prior to filing suit. There is no basis in either statute to conclude that grievance remedies must be exhausted before WVHRA claims may be pursued.

**1. The WVHRA Grants Aggrieved Individuals the Independent Right to File WVHRA Claims in Circuit Court Without Exhausting Administrative Remedies.**

The WVHRA is a comprehensive police power measure enacted to combat discrimination in West Virginia workplaces. The West Virginia Legislature enacted the WVHRA with the public policy goal of establishing mechanisms to eliminate unlawful discrimination in West Virginia. Pursuant to the Act, it is an unlawful discriminatory practice “for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment . . . .” W. Va. Code § 5-11-9(1) (1998). The term “discriminate” or “discrimination” as defined in the Act means “to exclude from, or fail or refuse to extend to, a person equal opportunities because of . . . disability. . . .” W. Va. Code § 5-11-3(h) (1998). The Act applies to almost all West Virginia employers, including government employers and private companies with twelve or more employees.<sup>3</sup> W. Va. Code § 5-11-3(d) (1998).

The primary tool created by the Legislature for achieving the anti-discrimination goals of the WVHRA was the creation of the West Virginia Human Rights Commission. The WVHRA empowers the HRC to investigate, conciliate and adjudicate complaints of unlawful discrimination. W. Va. Code § 5-11-4 (2001); § 5-11-8 (1998). However, the WVHRA does not require victims of discrimination to bring their discrimination complaints to the Commission. The statute creates an independent right to file a complaint in circuit court. Even though there is an administrative remedy built right in to the WVHRA, the Legislature intended to provide victims of unlawful discrimination alternative options for bringing WVHRA claims and did not incorporate an exhaustion requirement into the Act.

West Virginia Code § 5-11-13 authorizes circuit court complaints as an alternative to filing an administrative complaint before the Commission. Price v. Boone County Ambulance Authority, 175 W. Va. 676, 679, 337 S.E.2d 913, 916 (1985). This section sets forth both an exclusivity provision and the exceptions thereto. Even a complainant who

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<sup>3</sup>West Virginia Code § 5-11-3(d) (1998) defines "employer" as “the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year[.]”

initially files an administrative complaint with the Commission may subsequently opt out of the administrative process and seek a notice of right to sue in circuit court at any time before a decision on the merits is rendered by the HRC. W. Va. Code § 5-11-13(b) (1998). If a complainant first files a WVHRA claim in circuit court or another forum, she may not subsequently seek to utilize the Commission's administrative process. W. Va. Code § 5-11-13(a) (1998). Thus, while the HRC was created by the Legislature as the "primary enforcement mechanism for rights created by the [Human Rights] Act," the Legislature also intended "to preserve the ability of a complainant to resort to circuit court when either he had an independent right to do so or when the administrative process proved ineffective." Price, 175 W. Va. at 678, 337 S.E.2d at 915. Authorizing alternative avenues for pursuing human rights claims, and making such avenues available at the election of victims of discrimination, is in accord with W. Va. Code § 5-11-15 (1967), which requires that the provisions of the WVHRA "be liberally construed to accomplish its objectives and purposes."

Courts have long utilized the exhaustion of administrative remedies doctrine as a "rule of judicial administration." Daurelle v. Traders Fed. Sav. & Loan Assn., 143 W. Va. 674, 682, 104 S.E.2d 320, 326 (1958). "The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act." Sturm v. The Board of Education of Kanawha County, Syl. pt. 2, 223 W. Va. 277, 672 S.E.2d 606 (2008); Daurelle, at Syl. pt. 1.

The enforcement mechanisms authorized by W. Va. Code § 5-11-13 are an exception to the general rule of exhaustion of administrative remedies. Even though there are administrative remedies built into the WVHRA itself, which provide for resolution of the very same claims, aggrieved individuals are not required to exhaust administrative remedies before the West Virginia Human Rights Commission prior to filing a WVHRA claim in circuit court. This Court has acknowledged that the WVHRA's alternative administrative and judicial avenues for redress run "counter to the general rule of statutory construction that where a new right is created by statute, the remedy provided for its violation is exclusive." Price, 175 W. Va. at 678, 337 S.E.2d at 915-916.

The WVHRA is not unique in this regard. While it is unusual for a statute to both create an administrative remedy and authorize an independent right to a judicial remedy, it is not unprecedented. The West Virginia Wage Payment and Collection Act, W. Va. Code § 21-5-1 *et seq.* (1987), includes administrative and judicial remedies for unpaid wage claims. Like the WVHRA, the WPCA is a remedial statute that promotes important public policy. The statute is “designed to protect working people and assisting them in the collection of compensation wrongly withheld.” Beichler, 226 W. Va. at 325, 700 S.E.2d at 536 (*quoting Mullins v. Venable*, 171 W. Va. 92, 94, 297 S.E.2d 866, 869 (1982)). Also like the WVHRA, the WPCA includes alternative mechanisms for enforcing the statutory rights it creates. An unpaid wage claim may be filed with the West Virginia Division of Labor. W. Va. Code § 21-5-11(b) (1975). Elsewhere, the WPCA authorizes “any person” to bring “any legal action necessary to collect a claim under this article.” W. Va. Code § 21-5-12(a) (1975).

In Beichler, a former university professor filed a circuit court complaint seeking unpaid wages and liquidated damages pursuant to W. Va. Code § 21-5-12(a). Beichler, 226 W. Va. at 323, 700 S.E.2d at 534. The circuit court dismissed Beichler’s complaint for lack of jurisdiction, asserting that Beichler’s claim was barred by sovereign immunity and because Beichler, a former public employee, did not exhaust his available<sup>4</sup> administrative remedies. Id.

This Court reversed the circuit court and concluded that “the pursuit and exhaustion of administrative remedies do not constitute a condition precedent to instituting a wage payment action in circuit court.”<sup>5</sup> Beichler, 226 W. Va. at 325, 700 S.E.2d at 536. In support of its conclusion, the Court referenced Syllabus Point 1 of the Price opinion: “A plaintiff may, as an alternative to filing a complaint with the Human Rights Commission, initiate an action in circuit court to enforce rights granted by the West Virginia Human Rights Act.”

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<sup>4</sup>Beichler was a public employee with grievance rights pursuant to W. Va. Code § 6C-2-1 *et seq.* The circuit court specifically found that Beichler had not exhausted either his Division of Labor remedies or his grievance remedies. Order, pp. 7-8. This Order is available on the web page of the West Virginia Supreme Court of Appeals at <http://www.courtswwv.gov/supreme-court/calendar/2010/briefs/sept10/35435order.pdf>.

<sup>5</sup>The Court also reversed on sovereign immunity grounds.

Beichler, 226 W. Va. at 325, 700 S.E.2d at 536 (*quoting Price v. Boone County Ambulance Authority*, Syl. pt. 1, 175 W. Va. 676, 337 S.E.2d 913 (1985)).

The Court's discussion of Beichler's decision not to file a WVPEGB grievance is limited. Much of the exhaustion of administrative remedies discussion centers upon "available administrative remedies provided by the Wage Payment and Collection Act[.]"<sup>6</sup> Beichler, 226 W. Va. at 323, 700 S.E.2d at 534. However, the Court did note that "[n]othing in the record before this Court indicates that Beichler filed a grievance challenging his termination or instituted any other proceedings in that regard." Id. Moreover, the Court ultimately concluded that "Beichler was entitled to file an action for the alleged unpaid wages directly in the Circuit Court without having to pursue and exhaust *available* administrative remedies." Beichler, 226 W. Va. at 326, 700 S.E.2d at 537 (emphasis added).

The Court was persuaded that the Legislature could have included an exhaustion of administrative remedies requirement in the WPCA if it had intended to require an exhaustion of administrative remedies as a precondition to filing a circuit court action. Beichler, 226 W. Va. at 324, 700 S.E.2d at 535. Similarly, had the Legislature intended to require public employees to exhaust "available" administrative remedies as a condition precedent to filing a WVHRA claim with the HRC or in circuit court, it could have incorporated language to that effect into the WVHRA.

Petitioner elected to file her WVHRA claim in circuit court. The complaint sets forth three counts of unlawful discriminatory practices: discriminatory discharge; hostile work environment; and disparate discipline. The complaint further alleges that each of the adverse actions were motivated by Petitioner's disabilities, her record of disability and/or

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<sup>6</sup>The Court properly devoted much of its analysis to whether exhaustion was required under the WPCA rather than the grievance process. If the doctrine of exhaustion of administrative remedies were to apply to Beichler's claim, the obligation would have been to exhaust the WPCA administrative remedies, not the WVPEGB grievance process because the WPCA, and not W. Va. Code § 6C-2-1 *et seq.*, is the statute that creates the rights he sought to pursue in circuit court. A grievance is not the administrative remedy created by the WPCA. See Sturm v. The Board of Education of Kanawha County, Syl. pt. 2, 223 W. Va. 277, 672 S.E.2d 606 (2008); Daurette, at Syl. pt. 1. Likewise, if WVHRA claims were subject to administrative remedy exhaustion requirements, the obligation would be to exhaust the administrative remedies in the WVHRA itself. However, like the WPCA, the WVHRA is not subject to the exhaustion of administrative remedies.

PCBOE's perception of Petitioner as disabled. Each of these three counts set forth cognizable claims of disability discrimination which may be prosecuted and remedied pursuant to the West Virginia Human Rights Act.<sup>7</sup> Petitioner's disability discrimination complaint was properly filed before the Circuit Court of Pocahontas County, the Circuit Court has jurisdiction to adjudicate her WVHRA claims, and she is not required to pursue and exhaust available administrative remedies to proceed.

**2. West Virginia Code § 6C-2-1 et seq. Contains No Provisions Which Justify Disturbing the Statutory Scheme for Relief Created by the WVHRA.**

Nothing in W. Va. Code § 6C-2-1 *et seq.* supports the contention that an employee must pursue and exhaust grievance rights prior to filing a WVHRA claim. The public employees grievance system was developed to resolve public employee grievances in a quick and efficient manner. In 2007, the West Virginia Legislature enacted W. Va. Code § 6C-2-1 *et seq.*, consolidating the grievance processes for state government and public school employees into a unified grievance procedure. The prior grievance board was dissolved and replaced by the newly created West Virginia Public Employees Grievance Board. W. Va. Code § 6C-3-1 *et seq.* (2007). The stated purpose under the new statutory scheme is "to provide a procedure for the resolution of employment grievances raised by public employees . . . in a fair, efficient, cost-effective and consistent manner[.]" W. Va. Code § 6C-3-1(a)-(b) (2007).

By nature, the WVPEGB grievance procedure is directed at resolving typical workplace complaints, such as pay disputes and challenges of workplace discipline. This grievance system has no mandate to vindicate the public interest or eliminate unfair employment practices as defined by the WVHRA. The remedies available pursuant to the WVPEG are not adequate to protect the substantial public policy interests embodied in the

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<sup>7</sup>While Petitioner's complaint sets forth numerous, complicated facts related to her employment relationship with the PCBOE, it clearly articulates claims pursuant to the WVHRA. The focus of this Brief is on Petitioner's right to file a WVHRA complaint in circuit court without first exhausting administrative grievance remedies before the WVPEGB. The Commission takes no position with regard to whether any non-WVHRA claims which might be part of a circuit court complaint are subject to dismissal for failure to exhaust administrative remedies.

WVHRA. Cf. Collins v. Elkay Mining Co., 179 W. Va. 549, 371 S.E.2d 46 (1988), and Wiggins v. Eastern Associated Coal Corp., 178 W. Va. 63, 357 S.E.2d 745 (1987) (discussing the availability of Harless-type tort actions in state court for wrongful termination claims of coal miners who opposed unsafe work practices in coal mines and who were also entitled to some administrative remedies under mine safety laws).

This Court has been reluctant to preclude WVHRA claims in situations where the employee also pursued civil service appeals or grievances arising out of the same underlying facts and circumstances. In Liller v. West Virginia Human Rights Commission, 180 W. Va. 433, 376 S.E.2d 639 (1988), the Court concluded that filing a civil service claim did not “automatically preclude” an employee from “subsequently filing a complaint with the Human Rights Commission alleging a violation of the West Virginia Human Rights Act.” Liller, 180 W. Va. at 440, 376 S.E.2d at 645-646.

Eight years later, the Court decided Vest v. Board of Education of Nicholas County, 193 W. Va. 222, 455 S.E.2d 781 (1995). This Court held that when an employee pursues a state employee grievance, it is not preclusive upon that employee’s Human Rights Act claims. The Court made it clear that this holding was based in large measure upon the fundamental nature of the rights protected by the Human Rights Act and the differences in the procedural mechanisms before the Commission and the grievance board:<sup>8</sup>

[T]he Legislature designed the grievance process to be simple and expeditious. Consequently, the process is streamlined and lacks many of the adversarial accoutrements found in judicial and Commission’s proceedings. In the vast majority of grievances, for example, the grievant is not represented by a lawyer. Moreover, and more importantly, the grievance process does not provide for any of the discovery mechanisms available under the Rules of Civil Procedure and the Commission’s procedural rules. Finally, in stark contrast to the Human Rights Act, the grievance statute does not provide for the right to an independent investigation of each grievance filed before the Board, does not make available at public expense representation by a lawyer for cases that proceed to a hearing before an administrative law judge, and does not give employees the option of skipping the administrative process and pursuing their claims *de novo* in circuit court

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<sup>8</sup>Vest was decided in 1995, under the prior grievance board and grievance procedure statutes. However, nothing in W. Va. Code § 6C-2-1 *et seq.* is inconsistent with the Vest Court’s description of the grievance system.

where jury trials and the full array of legal and equitable remedies are obtainable.

The issues in a human rights case--especially unlawful motive and disparate impact--are extremely difficult and often complex. Invariably, they require substantial degrees of fact gathering and familiarity with the concepts of discrimination law. A grievant without a lawyer could not possibly be expected to grasp the significance of that law, put together a case of discrimination, and comprehend the full impact of claim and issue preclusion doctrines. A grievant with a lawyer would have an unfairly difficult task trying to prove illicit motive or disparate impact without access to the full panoply of discovery opportunities. The problem especially is apparent by the fact that in matters of motive and disparate impact the employer ordinarily possesses the crucial evidence.

Vest, 193 W. Va. at 228, 455 S.E.2d at 786. Moreover, the Court concluded that while the subject matter jurisdiction of the grievance board and the WVHRA may overlap, "the grievance board does not have authority to determine liability under the Human Rights Act." Vest, 193 W. Va. at 225, 455 S.E.2d at 785. The Court also observed that "[t]he grievance procedures and the HRA provide enforcement mechanisms to accomplish different legislative purposes and neither pre-empts the other." Vest, 193 W. Va. at 229, 455 S.E.2d at 788. In Harrison County Board of Education v. Carson-Leggett, 195 W. Va. 596, 466 S.E.2d 447 (1995), this Court went a step further and made it clear that there was no preclusion, even if the state grievance procedure had been pursued through completion and purported to litigate the same discrimination claim.

A comparison of the objectives and powers of the WVHRA and WVPEGB illustrates the importance of harmonizing the application of each statutory scheme to achieve the maximum possible implementation of the respective policy objectives. The HRA seeks to protect individual employees and members of the public from the effects of unlawful discrimination. The WVPEGB establishes an expedient procedure to resolve the general grievances of public employees; it is not equipped or empowered to eliminate unlawful discrimination in West Virginia workplaces. Contrary to the Circuit Court's assessment in the dismissal order issued below, the grievance mechanism is not an "efficient and expedient" procedure for addressing these vital concerns related to the elimination of unlawful discrimination. While there is some overlapping of subject matter jurisdiction between the two statutory schemes, the primacy of the Legislature's commitment to

eradicating workplace discrimination compels the determination that a public employee's decision not to pursue a grievance should have no bearing whatsoever on her ability to pursue a WVHRA claim.

Given that: (1) the WVPEGB has no jurisdiction to determine liability pursuant to the WVHRA; (2) the WVPEGB has no authority to disturb the enforcement mechanisms set forth in the Human Rights Act; and (3) WVPEGB grievance decisions have no preclusive effect on subsequent WVHRA claims, there is no legitimate interest to be served by requiring the exhaustion of grievance remedies as a precondition to filing a WVHRA claim.

### **3. Other Jurisdictions Have Declined to Dismiss State Human Rights Claims for Failure to Exhaust Civil Service Remedies.**

In Dworning v. City of Euclid, 892 N.E.2d 420 (Oh. 2008), the Ohio Supreme Court considered whether a public employee, who had appeal rights pursuant to a municipal Civil Service Commission,<sup>9</sup> was required to exhaust those administrative remedies prior to initiating a civil action alleging employment discrimination under Ohio's state civil rights statute.<sup>10</sup> Michael Dworning was the fire chief of the City of Euclid when he was terminated from his employment by the Mayor. As fire chief, Dworning was a member of the City's classified service, and could have appealed his termination to the Euclid Civil Service Commission pursuant to the Euclid Municipal Code. Dworning did not file an administrative appeal with the Euclid Civil Service Commission. Rather, he instituted a civil action alleging a disability discrimination claim pursuant to Ohio's state civil rights statute. The City and other defendants sought summary judgment,<sup>11</sup> contending that Dworning's failure to file a

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<sup>9</sup>While Dworning involved an administrative procedure developed pursuant to a municipal code, and not a state statute, the principles applied in that case are very similar to the principles at issue in the instant matter.

<sup>10</sup>Like the WVHRA, Ohio's civil rights statute authorizes two mechanisms for redress: "administrative relief through the OCRC [Ohio Civil Rights Commission] or a civil suit filed in a court of common pleas." Dworning, 892 N.E.2d at 425.

<sup>11</sup>Under Ohio law, exhaustion of administrative remedies is an affirmative defense, not a jurisdictional defect. Dworning, 892 N.E.2d at 424 (*citing Jones v. Chagrin Falls*, 674 N.E.2d 1388 (Oh. 1997)).

civil service appeal was a failure to exhaust administrative remedies that should bar the litigation of Dworning's claims.

"[T]his case involves the interaction between two public policies: the policy requiring exhaustion of administrative remedies and the policy against discrimination in an employment setting which is codified in [Ohio's civil right's statute] R.C. Chapter 4112." Dworning, 892 N.E.2d at 423. The Ohio Court recognized the serious and practical implications of requiring the exhaustion of civil service processes before allowing state civil rights claims:

Appellants argue that requiring public employees to exhaust their administrative remedies is consistent with the mandate of R.C. Chapter 4112. They view the administrative exhaustion requirement as simply a precondition, rather than an obstacle, to filing suit. But certain discrimination claims, such as age discrimination under R.C. 4112.02(N), must be filed within 180 days. Furthermore, discrimination may not be immediately evident. An employee might not become aware of the public employer's discriminatory act (such as hiring a younger worker or reinstating a male but not a female employee) within the ten-day period allowed for an appeal to the city's civil service commission. The employee would then be prohibited from pursuing a discrimination claim under R.C. 4112.99 unless he or she had already filed an administrative appeal. We will not permit a rule of judicial convenience to frustrate R.C. Chapter 4112's goals of eliminating discrimination and providing redress to its victims.

Dworning v. City of Euclid, 892 N.E.2d 420, 426 (Oh. 2008) (footnote omitted).

This is a particularly powerful explanation of why it is impractical to impose a requirement for the exhaustion of grievance or civil service remedies upon human rights claims. The WVPEGB filing deadline is similarly brief. Public employees must file their grievances within fifteen days of the "occurrence of the event upon which the grievance is based." W. Va. Code § 6C-2-4(a)(1) (2008). It is entirely likely that the filing deadline will have passed in many cases before a discrimination claim will become evident.

Ultimately, the Court concluded that "The protection of an individual's right to pursue private remedies is too central an aspect of Ohio's commitment to nondiscrimination to be limited to, or delayed by, an administrative process[.]" and held that "a public employee alleging employment discrimination in violation of R.C. Chapter 4112 need not exhaust the

administrative remedy of appeal to a civil service commission before pursuing the civil action allowed in R.C. 4112.99.” Dworning, 892 N.E.2d at 428.

In Moore v. Nashville Electric Power Board, 72 S.W.3d 643 (Tenn. Ct. App. 2001), appeal denied (Tenn. 2002), the Court of Appeals of Tennessee held that civil service employees are not required to exhaust administrative civil service remedies before filing a claim pursuant to the Tennessee Human Rights Act [hereinafter THRA].<sup>12</sup> Moore, 72 S.W.3d at 648. The Court of Appeals determined that “[w]hile Plaintiffs were clearly entitled to pursue remedies under the civil service rules, the THRA provides them with another, independent right of redress for any perceived wrongs committed by Defendants.” Moore, 72 S.W.3d. at 650. The Court of Appeals could find no basis in the THRA “believe that civil service employees should be treated differently from other employees.” Id. In further support of its decision, the Moore court indicated that Tennessee courts have been reluctant to bar human rights claims when other administrative procedures and remedies were available. This reluctance is born of a desire to ensure that remedies providing for a “full recovery” were available to victims of unlawful discrimination. Id.; see also Anderson v. Sav-A-Lot, Ltd., 989 S.W.2d 277, 298 n.10 (Tenn. 1999).

This Court should adopt the reasoning of Dworning and Moore and refuse to require the exhaustion of public employee grievance remedies as a precondition to filing suit pursuant to the WVHRA.

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<sup>12</sup>The Tennessee Human Rights Act also provides a legislative scheme similar to the WVHRA to the extent that it permits employees to file discrimination claims either before the Tennessee Human Rights Commission or in Tennessee state court. Moore, 72 S.W.3d at 649.

**B. THIS COURT SHOULD STRIVE TO ENSURE THAT THE STRONG PROMISE OF PROTECTION FROM DISCRIMINATION CONTAINED IN THE WEST VIRGINIA HUMAN RIGHTS ACT IS AVAILABLE TO ALL WEST VIRGINIA EMPLOYEES AND TO THE BROADEST EXTENT POSSIBLE.**

**1. Requiring Public Employees to Exhaust Their Grievance Rights Pursuant to W. Va. Code § 6C-2-1 et seq. As a Condition Precedent to Filing an Unlawful Discriminatory Practice Claim Pursuant to the West Virginia Human Rights Act Would Significantly Undermine the Substantial Protections Promised to Public Employees by the West Virginia Human Rights Act.**

The HRA includes substantial consequences for violations of the Act to achieve its legislative mandate. These consequences are remedial and prospective and involve both monetary and equitable relief. With respect to damages, the West Virginia Human Rights Act authorizes both remedial and equitable relief:

In any action filed under this section, if the court finds that the respondent has engaged in or is engaging in, an unlawful discriminatory practice . . . the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay or any other legal or equitable relief as the court deems appropriate. In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees, and witness fees, to the complainant.

W. Va. Code § 5-11-13(c) (1998).

Courts and the HRC are empowered to award the complainant such relief as will effectuate the purposes of the Human Rights Act and "make persons whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S. Ct. 2362, 45 L. Ed. 2d 280 (1975). Such relief includes back pay, reinstatement and front pay. Gino's Pizza of West Hamlin v. West Virginia Human Rights Commission, 187 W. Va. 318, 418 S.E.2d 764 (1992); Dobson v. Eastern Associated Coal Corp., 188 W. Va. 17, 422 S.E.2d 494 (1992); Casteel v. Consolidation Coal Co., 181 W. Va. 501, 383 S.E.2d 305, 311 (1989); Frank's Shoe Store v. West Virginia Human Rights Commission, 179 W. Va. 53, 365 S.E.2d 251 (1986). Punitive

damages are available as remedial relief pursuant to the Act. W. Va. Code § 5-11-13(c) (1998); Haynes v. Rhone-Poulenc, Inc., Syl. pt. 5, 206 W. Va. 18, 521 S.E.2d 331 (1999). In circuit court, plaintiffs, like Petitioner, may seek emotional distress damages. Alley v. Charleston Area Medical Center, Inc., 216 W. Va. 63, 602 S.E.2d 506 (2004); Dobson, 188 W. Va. at 24, 422 S.E.2d at 501.

WVHRA remedies address both individual harm and the public interest. In addition to damages that compensate for lost employment and punitive measures, plaintiffs are also entitled to other relief, including cease and desist orders and other equitable relief such as injunctive relief. W. Va. Code § 5-11-8(d)(6) (1998); W. Va. Code § 5-11-13 (1998). In addition to the make whole remedy available to a complainant, cease and desist orders may make provisions which will aid in eliminating future discrimination.

It would be contrary to the strong public policy embodied within the WVHRA to bar human rights claims in circumstances where public employees elect not to pursue grievance remedies. Moreover, because the WVHRA addresses both individual harm and the public interest, imposing restrictions upon the filing of WVHRA claims also stunts efforts to further the public interest in eliminating unlawful discrimination.

**2. Barring a WVHRA Claim Because a Grievance Was Not Filed Within 15 Days, When the WVHRA Gives Aggrieved Individuals at Least 365 Days to File a Claim, Would Be Unjust.**

The WVHRA allots aggrieved individuals 365 days from the alleged act of discrimination to file an administrative complaint with the Commission. W. Va. Code § 5-11-10 (1994). The deadline to file a complaint in circuit court is two years. W. Va. Code § 5-11-13 (1998); W. Va. Code § 55-2-12 (1959). Public employees must file their grievances within fifteen days of the “occurrence of the event upon which the grievance is based.” W. Va. Code § 6C-2-4(a)(1) (2008). It would be unjust to deny public employees access to the Human Rights Commission or the state’s courts because they did not file a grievance within fifteen days of experiencing unlawful discrimination. The Commission urges this Court to adopt the rationale of the Ohio Supreme Court in Dworning and decline to apply a doctrine of “judicial convenience” in a manner that would frustrate the “goals of

eliminating discrimination and providing redress to its victims.” Dworning v. City of Euclid, 892 N.E.2d 420, 426 (Oh. 2008).

Often, the exhaustion of administrative remedies takes longer than 365 days, particularly if the grievance is contested through judicial appeal.<sup>13</sup> In such cases, an aggrieved individual may not have exhausted grievance remedies until after the deadline to file a complaint with the Commission (or even the circuit court) has already passed. All an employer would need to do is prolong the grievance process as long as possible in an attempt to “run out the clock” on the grievant’s human rights claims. Absent the application of equitable tolling, the exhaustion process could operate to extinguish an employee’s opportunity to file a human right complaint. This result is incompatible with the mandate of the HRA to eliminate discrimination in West Virginia workplaces and is a clear example of why seeking to impose the administrative mechanisms (and exhaustion requirements) of one statutory scheme upon another is impractical and problematic.

In Vest v. Board of Education of Nicholas County, 193 W. Va. 222, 455 S.E.2d 781 (1995), this Court refused to give preclusive effect to public employee grievance decisions preclude WVHRA claims, and acknowledged that “[t]he sense of betrayal is even greater when the discriminator is . . . a public servant.” Vest, 193 W. Va. at 228, 455 S.E.2d at 787. The Court thoughtfully acknowledged the important purpose of the WVHRA and weighed it favorably against procedural technicalities:

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<sup>13</sup>In the January 2012 Term, this Court issued published opinions in three grievance appeals. See Armstrong v. West Virginia Div. of Culture and History, No. 11-0698, 2012 WL 236888 (W. Va. Sup. Ct. June 18, 2012) (grievance filed November 16, 2007); Watkins v. McDowell County Bd. of Educ., et. al., No. 11-0420, 2012 WL 2226446 (W. Va. Sup. Ct. June 13, 2012) (grievance filed October 2008); and Hammond v. West Virginia Dept. of Transp., Div. of Highways, No. 11-0284, 2012 WL 166067 (W. Va. Sup. Ct. May 9, 2012) (grievance filed in or around July 2005). Complete exhaustion of grievance rights in these cases took years. The WVPEGB grievance process alone can take greater than 365 days. The three most recent decisions published by the WVPEGB were rendered more than a year after the initial grievance was filed and, therefore, more than a year after the occurrence giving rise to the grievance. See Shamburg v. Berkeley County Board of Educ., Docket No. 2011-0232-BERED (June 27, 2012) (grievance filed August 2010) available at <http://www.state.wv.us/admin/grievanc/decision/dec2012/Shamburg.pdf>; Shillingburg v. Workforce West Virginia & Division of Personnel, Docket No. 2011-0936-CONS (June 26, 2012) (grievances filed August 3, 2010, and December 20, 2010) available at <http://www.state.wv.us/admin/grievanc/decision/dec2012/Shillingburg.pdf>; and Tibbs v. Hancock County Board of Educ., Docket No. 2012-0102-HANED (June 21, 2012) (grievance filed December 14, 2010) available at <http://www.state.wv.us/admin/grievanc/decision/dec2012/Tibbs2.pdf>.

We cannot allow the substantial protections promised by the Human Rights Act from such assaults on our personal and institutional integrities to be compromised by unthinking adherence to technical doctrines. If we permit public employers to use prior decisions rendered by a loose administrative apparatus--engaged in by unwary and often uncounseled employees and lacking important procedural rudiments--to preclude victims of discrimination from subsequently invoking the promises made by the Human Rights Act, we, thereby, would add our own breach of trust to those already committed by public discriminators.

Vest, 193 W. Va. at 228, 455 S.E.2d at 787. This Court should similarly hold that the doctrine of exhaustion of administrative remedies does not apply to limit the availability of WVHRA claims against public employers.

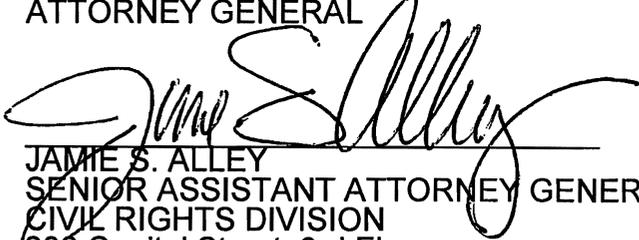
### CONCLUSION

For the reasons set forth above, the West Virginia Human Rights Commission respectfully requests that this Court hold that public employees need not exhaust WVPEGB grievance remedies as a precondition to pursuing WVHRA claims before the Commission or in circuit court, and further order that Petitioner's complaint be reinstated.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 12-0477

THERESA L. WEIMER,  
Plaintiff Below/Petitioner,

v.

THOMAS SANDERS, individually and  
in his official capacity; C. C. LESTER,  
in his official capacity; and POCAHONTAS  
COUNTY BOARD OF EDUCATION,

Defendants Below/Respondents.

CERTIFICATE OF SERVICE

I, Jamie S. Alley, Senior Assistant Attorney General of the State of West Virginia, do hereby certify that the foregoing *Brief of the West Virginia Human Rights Commission As Amicus Curiae In Support of Petitioner* was served upon the following, by depositing a true copy thereof in the United States mail, first class postage prepaid, on the 13<sup>th</sup> day of July 2012, addressed as follows:

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