

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**THERESA L. WEIMER,**

**Plaintiff Below/Petitioner,**

v.

**No. 12-0477**

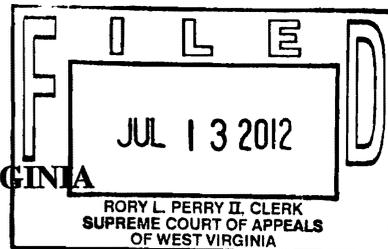
**THOMAS SANDERS, individually and  
in his official capacity; C.C. LESTER, in  
his official capacity; and POCAHONTAS  
COUNTY BOARD OF EDUCATION,**

**Defendant Below/Respondent.**

***AMICUS CURIAE* WEST VIRGINIA  
EMPLOYMENT LAWYERS ASSOCIATION'S BRIEF  
SUPPORTING THE PETITIONER**

Respectfully submitted by:

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**BRIEF FILED  
WITH MOTION**

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**II.**  
**TABLE OF AUTHORITIES**

West Virginia Code

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**III.**  
**IDENTITY OF AMICUS CURIAE**

The West Virginia Employment Lawyers Association is dedicated to protecting the fundamental rights of all West Virginia employees, public and private, to be free from unlawful discrimination. Its members represent employees throughout West Virginia with respect to vindication of their constitutional and statutory legal rights. WVELA respectfully submits this *amicus curiae* brief in support of the proposition that public employees should not as class be treated differently than private employees when it comes to enforcing fundamental rights protected by the West Virginia Human Rights Act. W. Va. Code § 5-11-1 *et seq.*

**IV.**  
**ARGUMENT<sup>1</sup>**

**A. All Employees, Public and Private, Have the Fundamental Right to be Free from Unlawful Discrimination as Prohibited By the West Virginia Human Rights Act**

West Virginia Code 5-11-2 [1998] states:

It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment...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...The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

Notwithstanding that these fundamental rights are statutorily applicable to **all** employees, public and private, the practical effect of the lower court's ruling in the instant case is to

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<sup>1</sup> Pursuant to RAP, Rule 30 (e) (5) the undersigned certifies that no party to this appeal authored this brief in whole or in part and furthermore, that no monetary contribution of any type whatsoever has been made by any party to support the preparation of this brief. It was prepared entirely *pro bono publico* in the hope that it would be of some small assistance to this Court.

divide public employees into a separate class from private employees – separate because the class of public employees must for some indefinite period of time defer vindication of their fundamental rights pending exhaustion of a grievance process that is not by definition, procedure or purpose intended or designed to vindicate the right to be free from unlawful discrimination as prohibited by the WVHRA.

There is no constitutional or statutory basis for the separate treatment of the class of public employees and doing so is fraught with risk that public employees will be entirely denied their fundamental rights for two reasons: First, preclusive effect cannot be accorded the grievance process to the detriment of the fundamental rights protected by the WVHRA. This is obvious upon examination of the differing definitions, due process procedures, and public policies of the statutory Grievance procedure as compared against the WVHRA. For example, the term “Discrimination” as it must be applied by the Public Employees Grievance Board is defined as meaning “any differences in the treatment of similarly situated employees, unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.” W. Va. Code § 6C-2-2 (d). Compare that definition to the definition of “discrimination” under the West Virginia Human Rights Act: “The term ‘discriminate’ or ‘discrimination’ means 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.” W. Va. Code 5-11-3 (h) [bold face added]. A comparison of the two distinct definitions demonstrates that the issue of motive is absent from the grievance definition of discrimination but critical to a finding of

discrimination under the WVHRA. Thus only in the broadest and vaguest sense do the two definitions of “discriminate” overlap.<sup>2</sup>

Indeed, the manifest differences in the procedures before the Grievance Board versus the procedures before the Human Rights Commission<sup>3</sup> or in circuit court evidence the different purposes of the two statutes. The WVELA urges this Court to reaffirm its decision in *Vest v. Board of Educ.*, 193 W. Va. 222, 228, 455 S.E.2d 781, \_\_\_ (1995):

We stated in *Liller*, 180 W. Va. at 441, 376 S.E.2d at 647, "that where separate legislative enactments exist which provide separate administrative remedies, preclusive doctrines will not necessarily be applied. *See Collins v. Elkay Mining Co.*, 179 W. Va. 549, 371 S.E.2d 46 (1988); *Davis v. Kitt Energy Corp.*, 179 W. Va. 37, 365 S.E.2d 82 (1987); *Wiggins v. Eastern Associated Coal Corp.*, 178 W. Va. 63, 357 S.E.2d 745 (1987)." Indeed, our cases require us to determine "whether applying the doctrines [of preclusion] is consistent with the express or implied policy in the legislation which created the body." Syllabus Point 3, in part, *Mellon-Stuart Co.*, *supra*. In this case, we have W. Va. Code, 18-29-1, et seq., a legislatively provided administrative remedy for state employees that is designed to assure them of a fast, easy-to-use, and inexpensive procedure for resolving the entire spectrum of legitimate employee complaints. We also have in the Human Rights Act a complex array of procedures and protections designed to give effect to the "civil right of all persons" to equal employment opportunity and to end the invidious discrimination that "is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code, 5-11-2 (1989). We think our answers to the certified questions best accommodate the different legislative goals that support the two statutes involved in this case.

*Vest* was decided in 1995 when the grievance process was codified at Chapter 18 of the West Virginia Code. Effective in July 2007 the grievance process was moved and referenced to Art. 2 of Chapter 6C of the West Virginia Code. *See* W. Va. Code § 6C-2-1

(d). Your *Amicus* can discern no valid reason why this Court’s decision in *Vest* is not

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<sup>2</sup> The WVHRA defines unlawful discriminatory practices in W. Va. Code § 5-11-9 (1) – (7) and there is a significant body of case law that further develops and explains the application of the West Virginia Human Rights Act.

<sup>3</sup> *Cf.* W. Va. Code 5-11-10 [setting forth procedures for proceeding on a charge of discrimination before the HRC] with W. Va. Code § 6C-2-3 and 6C-2-4 [grievance hearing procedures].

applicable to the grievance process now moved to Chapter 6C and the lower court did not articulate any such reason.

**B. Requiring Public Employees to First Exhaust the Limited Rights and Remedies Available Under the Public Employees Grievance Procedures Before Proceeding with a Charge of Unlawful Discrimination Will, as a Practical Matter, Prejudice Public Employees' in the Vindication of their Fundamental Rights**

The second reason why the lower court's determination jeopardizes the ability of public employees to vindicate their fundamental rights under the WVHRA is a practical one: a claimant only has 365 days from the date of the last discriminatory act to file a claim of unlawful discrimination with the West Virginia Human Rights Commission. The delays common in the grievance process could easily cause a public employee to miss the 365 day deadline. While one could argue that any employee has up to two years to file a discrimination claim in circuit court, it cannot be disputed that the right to proceed before the Human Rights Commission is an important and valuable right conferred by the Legislature that public employees should not have to sacrifice in the absence of clear and unequivocal legislative intent.

Conversely, and as it appears to have happened in the instant case, a public employee may miss the fifteen day deadline to file a grievance. Should that public employee then be foreclosed from filing a charge of discrimination for failure to exhaust administrative remedies? Such a result would mean, in effect, that private employees have 365 days to file a charge of unlawful discrimination with the HRC, but public employees would have but fifteen days to file a grievance that included specific allegations of unlawful discrimination or risk being precluded from any remedy for a violation of their fundamental rights. In addition to being contrary to the Legislature's

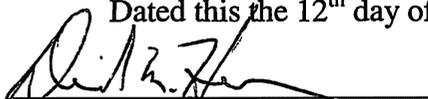
intent to afford all employees 365 days to file a charge of unlawful discrimination, the practical result of such a ruling would mean that public employees would, out of caution, have to allege unlawful discrimination in each grievance filed where there was a even a possibility of discrimination or risk issue preclusion/res judicata. The complex litigation that will result from so many prophylactic allegations of intentional discrimination cannot possibly be what the Legislature intended when it stated a purpose of the grievance procedure as “Resolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia.” W. Va. Code § 6C-2-1.

V.

**CONCLUSION**

WHEREFORE, the West Virginia Employment Lawyers Association respectfully asks that this Court reaffirm its holding in *Vest v. Board of Education* as applicable to W. Va. Code § 6C-2-1 *et seq.* and thereby preserve the right of all employees, public and private, to proceed upon claims of unlawful discrimination in violation of the WVHRA without requiring exhaustion of the grievance procedure set forth in Chapter 6C of the West Virginia Code.

Dated this the 12<sup>th</sup> day of July, 2012.

  
David M. Hammer, Esq., #5047

*On behalf of Amicus Curiae,  
The West Virginia Employment Lawyers Association*

*Joined also by:  
The West Virginia Association for Justice*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that true and accurate copies of "*Amicus Curiae* West Virginia Employment Lawyers Association's Brief Supporting the Petitioner" were served this 12th day of July 2012, via first class mail, postage pre-paid, to the following individuals:

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