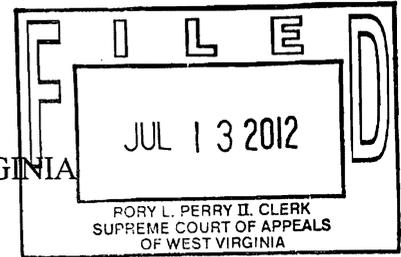


BRIEF FILED
WITH MOTION



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.

BRIEF OF *AMICI CURIAE*

WEST VIRGINIA ADVOCATES, INC.
THE WEST VIRGINIA CONFERENCE OF BRANCHES OF THE NAACP
WV FREE
THE MOUNTAIN STATE BAR ASSOCIATION
AMERICAN CIVIL LIBERTIES UNION OF WEST VIRGINIA

IN SUPPORT OF THE PETITION OF THERESA L. WEIMER
TO REVERSE THE DECISION OF THE CIRCUIT COURT

Respectfully submitted by:

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The West Virginia Advocates, Inc., the West Virginia State Conference of Branches of the National Association for the Advancement of Colored People, WV FREE, the Mountain State Bar Association, and the American Civil Liberties Union of West Virginia submit this brief as *amici curiae*, pursuant to Rule 30 of the Revised Rules of Appellate Procedure, in support of the appeal of Theresa Weimer.¹ *Amici* support the appeal of Ms. Weimer because they share a common interest in ensuring that the West Virginia Human Rights Act continues to provide West Virginians with viable and effective remedies for unlawful discrimination. They have joined in presenting this brief because they have concluded that the decision of the Circuit Court of Pocahontas County, if upheld, will have a substantial and adverse impact on the ability of victims of discrimination in the public sector to effectively pursue their rights under the Human Rights Act. By requiring those public employees to exhaust their remedies before the Public Employees Grievance Board before filing their Human Rights Act complaint, the Circuit Court's decision increases the expense and delay involved in a case, removes the right of a party to choose his forum, requires an unnecessary hearing before an administrative law judge ("ALJ") of the Grievance Board, and otherwise prejudices the victim of discrimination in a manner that is inconsistent with the provisions of the Human Rights Act, incompatible with the public policy that the Act reflects, and contrary to the important role of the Act articulated by prior decisions of this Court.

In addressing the Court, *amici* observe that the employment provisions of the Human Rights Act are more than rules for resolving private disputes between employees and their employers. The Human Rights Act is intended to ensure the enforcement of basic human rights and its effectiveness should be a matter of concern to every West Virginian. In passing it, the legislature recognized that

¹ Pursuant to Rule 30(e)(5) counsel states that Ms. Weimer's attorneys did not authorize any portion of this brief and did not make any monetary or in-kind contribution toward its preparation or submission. No person contributed toward the preparation or submission of this brief other than counsel who are also members and/or supporters of each of the various organizations that have joined as *amici* and attorney Lonnie Simmons, Charleston, West Virginia, who made copies of the brief and arranged for the brief and motion to be delivered to this Court.

“[i]t is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment.” W. Va. Code § 5-11-2. The Declaration of Policy goes on to declare that “[e]qual 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.” *Id.* The legislature added that “[t]he denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness or handicap is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.” *Id.* Any decision that requires a person seeking to vindicate rights protected by the Act to jump through extra hoops, suffer unnecessary delay, incur unnecessary expense, and suffer other prejudice in pursuing his or her claim is inconsistent with the announced purpose of the Human Rights Act and the rights it was enacted to protect. The decision of the Circuit Court should therefore be reversed.

II. ARGUMENT

A. The Decision of the Circuit Court Is Predicated upon a Misunderstanding of this Court’s Decision in *Vest v. Board of Education*

In its Order Granting Motion to Dismiss for Failure to Exhaust Administrative Remedies (“Order”), the Circuit Court misunderstood *Vest v. Board of Educ.*, 193 W. Va. 222 (1995).² *Vest* is a case that ensured a public employee who pursued a grievance would not find herself precluded from filing a Human Rights Act claim. The decision ensured that a public employee did not effectively give up rights under the Human Rights Act by pursuing a grievance. *Vest* does recognize that some conduct prohibited by the Human Rights Act may also be the subject of a hearing before the Grievance Board. Syl. Pt. 1, 193 W. Va. 222. However, nothing in the decision even remotely suggests the result reached by the Circuit Court. To the contrary, *Vest* observes that “[t]he two

² Neither the amended grievance statute nor the revised procedural rules abrogate this Court’s holding in *Vest*. In 2007, the West Virginia Legislature rewrote the grievance procedure for public employees in this state, creating a standardized procedure for all public employees. § 6C-2-1 *et seq.* As a result of this statutory change, the procedural rules for grievances were also changed. *See* 156 C.S.R. § 1-1 *et seq.* (2008). However, neither the statutory change nor the rule change negate reasons upon which this Court relied in its opinion in *Vest*. *See* 193 W. Va. at 227.

statutes may, in a given case, *provide alternative remedies* to aggrieved persons.” 193 W. Va. at 225 (emphasis added). Providing “alternative remedies” means that an aggrieved person can choose among the remedies, not that she is required to exhaust all remedies before the Grievance Board prior to pursuing her remedies under the Human Rights Act. Moreover, the thrust of this Court’s discussion in *Vest* recognizes that a party alleging discrimination has a choice of forums and can, in an appropriate situation, pursue claims before the Grievance Board, under the Human Rights Act or, in some cases, both:

Obviously, a state educational employee who is denied a job benefit solely because of her gender would have a meritorious grievance based on either “discrimination” or “favoritism” and also would have a claim for relief under the Human Rights Act. Similarly, a victim of sexual harassment would be entitled to relief in a grievance that alleged “harassment” and in a claim (administrative or judicial) under the Human Rights Act.

193 W. Va. at 225. *Vest* was a decision that protected an aggrieved person’s option of proceeding under the Human Rights Act even if she had already pursued a remedy through the grievance system. Relying on *Vest* to make every public employee first exhaust the grievance procedure is contrary to both the language and the spirit of the of the opinion.

The Circuit Court also misconstrued *Vest* when it relied on this Court’s comment that “[a] grievance procedure [decision] in favor of the grievant may, in many cases, end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and, it does so by a procedure that is much faster and less expensive.” Order at 4, quoting *Vest*, 193 W. Va. at 226. Read in context, this Court’s statement was acknowledging the fact discussed above that the grievance procedure is a useful remedy for some disputes that may involve allegations of discrimination. However, the Court did not suggest that the grievance procedure should be required in every dispute that implicated rights protected by the Human Rights Act. The judgment as to whether the grievance procedure is useful in a particular dispute is a decision left to the public employee. That decision should be honored by the courts.

B. The Decision Will Unreasonably Obstruct the Ability of West Virginians to Pursue Their Remedies under the Human Rights Act

1. The Circuit Court erred in concluding that a public employee should be required to exhaust grievance procedures because “it would be more efficient and expedient”

The Circuit Court’s decision includes a misconception of the time, cost, and expense involved in pursuing a case before the Grievance Board.³ In discussing the reasons for its unprecedented decision, the Circuit Court concluded that “it would be more efficient and expedient for the Plaintiff to argue the proper claims before the Grievance Board as *required* by Chapter 6(c) Section 2 of the West Virginia Code.” Order, 4 (emphasis added). There are two problems with the Circuit Court’s conclusion. First, nothing in West Virginia Code § 6(c)-2-1 *et seq.* requires a victim of discrimination to argue any claims before the Grievance Board.⁴ The Circuit Court grafted this new requirement into the Human Rights Act as applied to public employees without any statutory authority.

Second, the Circuit Court seriously misconstrues the real world impact of its decision. Requiring a public employee asserting Human Rights Act claims to first exhaust all remedies before the Public Employees Grievance Board is neither more efficient nor more expedient than allowing that employee to pursue his Human Rights Act claim and will, in many cases, substantially prejudice the public employee’s case.

³ Nor does the decision explain what “exhaustion” requires. Does a public employee have to pursue a judicial appeal of the ALJ’s decision pursuant to W. Va. Code § 6C-2-5 for the grievance procedure to be exhausted?

⁴ The Circuit Court seems to believe that Ms. Weimer’s Complaint mistakenly included allegations that were not properly brought under the Human Rights Act claim, but that would be appropriate for the Grievance Board. Order, 4. However, even if the Court is correct in its assertion, nothing in any statute or case known to *amici* authorizes a court to direct a Human Rights Act litigant to first test some of her allegations before the Grievance Board. If some of Ms. Weimer’s allegations prove to be outside the scope of a Human Rights Act claim, the appropriate remedy may be to prohibit Ms. Weimer from presenting those allegations at trial, but there is no authority for the Circuit Court to dismiss the entire case on the pleadings.

2. The Circuit Court's requirement, if adopted by this Court, would hinder and prejudice public employees in pursuing Human Rights Act cases

The Circuit Court's exhaustion requirement places an unreasonable burden on public employees that is not applicable to analogous employees in the private sector, that is without any justification under the Human Rights Act, and that may implicate constitutional principles of equal protection. First, requiring public employees to exhaust the steps of the grievance procedure, including a Level 3 hearing before an ALJ, unnecessarily delays a final result in the employee's case. This delay will occur in every case, but it is even more extreme where there is an appeal to the Kanawha County Circuit Court. In some cases, it may jeopardize a timely filing of a Human Rights Act case, particularly before the Human Rights Commission where a complainant must file "within three hundred sixty-five days after the alleged act of discrimination."⁵ W. Va. Code § 5-11-10.

Second, many public employees will have difficulty retaining counsel for the grievance process. The Grievance Board can, at most, award back wages for a maximum of 18 months in extreme circumstances.⁶ Where the issue is harassment, there is unlikely to be any financial award at all because, unlike the Human Rights Act, the Grievance Board does not provide for tort-like damages.⁷ Because there is rarely an opportunity for a large financial award and because the grievance procedure does not include a provision to award attorney fees to a prevailing employee for work done on the grievance itself, a public employee will either have to retain counsel on an

⁵ Under the law, the limitation period for filing a Human Rights Act claim begins to run from the date "when the employer unequivocally notifies the employee of the termination decision," not when a subsequent grievance procedure concludes. Syl. Pt. 2, *Independent Fire Co. No. 1 v. West Virginia Human Rights Comm'n*, 180 W. Va. 406 (1988); see also Syl. Pt. 1, *Naylor v. West Va. Human Rights Comm'n*, 180 W. Va. 634 (1989) (quoting Syl. Pt. 2 in *Independent Fire Co. No. 1*). Cf. *Del. State College v. Ricks*, 449 U.S. 250, 261 (1980) (holding that the time period for filing with the EEOC runs from the date of the unlawful employment practice, not from the date a subsequent grievance is decided, stating "[t]he grievance procedure, by its nature, is a *remedy* for a prior decision, not an opportunity to *influence* that decision before it is made.") (emphasis in original).

⁶ W. Va. Code § 6C-2-3 (limiting back pay to "one year prior to the filing of a grievance" or to 18 months where there is proof that "the employer acted in bad faith in concealing the facts giving rise to the claim for back pay").

⁷ See, e.g., *White v. Monongalia County Board of Education*, Docket No. 2008-0586-CONS (December 16, 2008) at page 6, Conclusions of Law, paragraph 2 (stating that the Grievance Board "does not award tort like damages) attached as Ex. A.

hourly basis or pursue the grievance *pro se*.⁸ In contrast, a Human Rights Act litigant may be awarded attorney fees if he or she is represented by private counsel. W. Va. Code § 5-11-13(c) (“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.”) In fact, as this Court has observed, “[i]nherent in any statutory fee award made pursuant to West Virginia Code § 5-11-13(c) . . . is a recognition that the economic incentive provided by such a fee-shifting mechanism is necessary to attract competent counsel for the purpose of enforcing civil rights laws that serve to protect the interests of this state’s citizenry.” Syl. Pt. 2, *Heldreth v. Rahimian*, 219 W. Va. 462 (2006). Yet, fees for work before the Public Employees Grievance Board are limited to those incurred where there is an appeal to circuit court. W. Va. Code § 6C-2-6 (stating that expenses for levels one through three “shall be borne by the parties” and that reasonable attorney’s fees may be recovered “for the appeal” to court).

Moreover, if the Human Rights Act litigant pursues a complaint before the Commission, he or she can be represented by an attorney in the Civil Rights Division of the Attorney General’s office without charge to the complainant.⁹ There is no similar provision for a public employee pursuing a grievance under the Public Employees Grievance Procedure.

Thus, public employees alleging that they have been a victim of unlawful discrimination have a realistic opportunity to be represented by counsel knowledgeable about proving discrimination under the Human Rights Act through the Attorney General’s office if they file with the Commission or from the private bar given the applicable fee shifting statute. On the other hand, where a public

⁸ *Amici* recognize that some public employees are members of organizations that may provide counsel or, more often, lay representatives in some cases, but many public employees will have to fend for themselves in the grievance process and sometimes do so against an attorney for the school board, the university or other public sector employers.

⁹ See *Vest*, 193 W. Va. at 227, fn. 10 (“the State prosecutes all claims in which probable cause is found and in which the complainant is not represented by private counsel, and the Attorney General has a mandatory duty to furnish all legal services required by the Commission.”); Syl. Pt. 12, *Allen v. State Human Rights Comm’n*, 174 W. Va. 139 (1984) (“The Attorney General has a mandatory duty, under West Virginia Code § 5-11-7 . . . to furnish all legal services required by the Human Rights Commission.”).

employee is required to go through the grievance procedure, he or she may well have to appear *pro se*.

Third, even though *Vest* may prevent an adverse result in the grievance process from later precluding a Human Rights Act case, the public employee's testimony at that grievance hearing will follow him or her into the subsequent Human Rights Act case. Where the grievant pursued the grievance *pro se*, without the help or guidance of counsel and often against the employer's attorney, the transcript of testimony of an unprepared witness may well prove harmful to any subsequent Human Rights Act case.

Fourth, requiring a grievance proceeding as a predicate to a Human Rights Act proceeding not only delays finality, it also requires the parties to unnecessarily engage in multiple hearings in different forums adding time and expense for all parties to the dispute. If the public employee loses the grievance, he or she may nonetheless pursue a Human Rights Act case under *Vest* because the grievance decision does not preclude filing a new case under the Human Rights Act. Syl. Pt. 3, 193 W. Va. at 222. Alternatively, even if the public employee wins his or her grievance, the relief awarded may be incomplete given the limited remedies available in the grievance procedure whereas Human Rights Act litigants can obtain "the full array of legal and equitable remedies" in circuit court. *Vest*, 193 W. Va. at 227. Even if the public employee chooses the Human Rights Commission as a forum, he or she can still obtain both economic damages and a limited amount of damages for "humiliation, embarrassment, emotional and mental distress, and loss of personal dignity." Syl. Pt. 2, *Bishop Coal Co. v. Salyers*, 181 W. Va. 71 (1989). As a result, a public employee who prevails in a grievance may presumably pursue a subsequent Human Rights Act case to seek additional relief.

Thus, the Circuit Court's belief that requiring exhaustion of the grievance procedure before pursuing a Human Rights Act claim is "more efficient and expedient" is based upon a misunderstanding of those procedures.

III. CONCLUSION

For the foregoing reasons, *amici curiae* request that the Supreme Court reverse the decision of the Circuit Court of Pocahontas County and issue a decision protecting the rights of a public employee to pursue a Human Rights Act case without first exhausting his/her public employee grievance rights.

Respectfully submitted,



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