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12-0477

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

THERESA L. WEIMER
Plaintiff,

v.

11-C-54

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

ORDER GRANTING MOTION TO DISMISS
FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

Now comes the Court regarding the above captioned matter and makes the
following ruling dismissing the case from the active docket of this Court at this
time.

HISTORY:

1. The Plaintiff filed her complaint on November 30th, 2011, and claiming violations of the West Virginia Human Rights Act (WVHRA), arising from her termination from employment, namely that she was discharged due to her disability or perceived disability. She further claims a Hostile Working Environment and alleges harassment in the work place, and Disparate Discipline. She seeks damages in the form of lost income and fringe

POCAHONTAS COUNTY
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benefits, mental anguish and emotional distress, and punitive damages, as well as attorney's fees.

2. On December 23rd, 2011, the Defendants filed a Motion to Dismiss, claiming the Court lacked subject matter jurisdiction because of the plaintiff's failure to exhaust administrative remedies by not participating in the grievance procedure provided in West Virginia Code Chapter 6C, Section 2.
3. A hearing on the Motion to Dismiss was scheduled with the Court for February 22nd, 2012.
4. On February 15th, 2011, the Plaintiff's filed a Memorandum of Law in Opposition to Defendants' Motion to Dismiss, claiming that their claims are squarely within the circuit court's jurisdiction under the WVHRA, and .
5. On February 21st, 2011, the Defendants' filed a Reply to Plaintiff's Response to Motion to Dismiss.
6. The hearing on the Motion to Dismiss took place on February 22nd, 2012, and the Court gave Plaintiff's counsel time to respond to the Reply before making a ruling.
7. Plaintiff promptly filed their Response on February 29th, 2012.

After reviewing the complaint, motion to dismiss, and briefs that came afterwards, the Court is now prepared to make its ruling as follows:

DISCUSSION

Plaintiffs argue in their Memorandum of Law in Opposition to Defendants' Motion to Dismiss, that the Defendants confuse "discrimination" and "harassment." They further rely on *Price v. Boone County Ambulance Authority*, 337 S.E.2d 913, 175 W.Va. 676 (W.Va. 1985), to argue that the Plaintiff, as the "master of her complaint" is entitled to file in circuit court. Such reliance is misplaced. In their Reply, the Defendants cite *Vest v. Board of Education of County of Nicholas*, 455 S.E.2d 781, 193 W.Va. 222 (W.Va. 1995), and further clarifies that the grievance procedures do not "preempt" a claim of discrimination under the WVHRA. Plaintiff filed a Memorandum of Law in Response to Defendants' Reply in Support of Motion to Dismiss, arguing that *Vest* "makes clear why exhaustion of remedies is not required...WVHRA claims cannot be adjudicated by the [g]rievance board (italics omitted).

This Court adheres to the theories in *Vest*, that a civil action is not precluded by a prior grievance decided...which arises out of the same facts and circumstances (*Vest, supra*), although the Plaintiff (who attached the *Gorby* decision of this Court to its Response) is correct that "(...)the identity of the issues litigated is a key component to the application of administrative res judicata or collateral estoppel (*Vest, supra*)."

Plaintiff's complaint alleges many facts that point to "discrimination" and "harassment" and "favoritism" that are not due at her disability or perceived disability, as well as to other matters that may be "violations" properly addressed by the grievance procedure, such as the allegations of changing a student's grade for football, and improper supervision by a P.E. teacher. Adjudicating these claims by the grievance procedure does not preclude the Plaintiff from later litigating a legitimate claim of the WVHRA. See *Vest* (supra). And she could indeed bring that action in front of the Circuit Court. However, 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. After all, "[a] grievance procedure 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." *Supra*.

For the foregoing reasons, the Court makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. That the Plaintiff complains of "discrimination," "harassment," and "favoritism" which must be heard by the West Virginia Public Employees Grievance Board.

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2. That the Plaintiff must first exhaust her administrative remedies.
3. That the Plaintiff is not precluded from bringing a WVHRA claim before the Circuit Court if necessary.

Therefore this Court hereby **ORDERS** that:

1. The Defendant's Motion to Dismiss for failure to exhaust administrative remedies is GRANTED.
2. This matter is hereby dismissed from the active docket of this Court.

ENTERED this the 12th day of March, 2012.



Honorable Joseph C. Pomponio, Jr.

CIRCUIT COURT
POCAHONTAS COUNTY, W.VA.

ENTERED


Date March 12, 2012

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CERTIFICATE OF SERVICE

I, Roger D. Forman, do hereby certify that I have this 10th day of April, 2012, served the foregoing Notice of Appeal, by first class mail, postage prepaid, on the following:

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