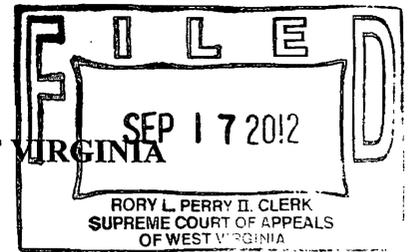


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**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**

**PETITIONER'S REPLY BRIEF**

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**Defendants Below/Respondents**

**PETITIONER'S REPLY BRIEF**

**ARGUMENT**

- A. The West Virginia Human Rights Act, W.Va. Code §5-11-1 et seq. does not require that a state employee file, pursue, or exhaust a grievance pursuant to W.Va. Code §6C-2-1 et seq. before seeking relief either through the administrative process before the Human Rights Commission or in Court.**

The law is very clear, despite Respondents' efforts to obfuscate it. No state employee must file a grievance on Human Rights Act claims, even if human rights jurisdiction overlaps with the jurisdiction of the Grievance Board. To the degree Respondents argue to the contrary, the very strong and convincing amicus brief filed by the West Virginia Human Rights Commission (hereinafter "Commission") disposes of those arguments with reasoned clarity. The brief of the Commission makes it clear that the lower court and the Respondents are wrong.<sup>1</sup>

In *Security National Bank and Trust Co., et al. v. First W.Va. Bankcorp. Inc., A. Corp., et al.*, 166 W.Va. 775; 277 S.E.2d 613 (1981), this court published syllabus point 4 which states

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<sup>1</sup>The Grievance Board has not filed an amicus or expressed an opinion on the issue at bar.

“interpretation of statutes by bodies charged with their administration are given great weight unless erroneous.” The court’s discussion of this syllabus point at p. 626 cites favorably to prior state and U.S. Supreme Court authority.

In its response to the amici, including the Commission, at p. 25 of Respondents’ brief, they acknowledge that the Commission “provides for more avenues of compensatory damages and there is an element of punishment...”

Respondents, in arguing for exhaustion, attempt to distinguish this Court’s opinion in *Beichler v. West Virginia University at Parkersburg*, 226 W.Va. 321, 700 S.E.2d 532 (2010). The argument presented herein is without merit. *Beichler*, was a case brought under the Wage Payment and Collection Act by a state employee in a state court.

Mr. Beichler had an option to pursue a grievance, an administrative remedy through the West Virginia Labor Department or to sue in the circuit court. The record is silent as to whether or not Mr. Beichler filed a grievance. This court reversed a lower court’s decision which dismissed his case for failure to exhaust administrative remedies provided for in the Wage Payment and Collection Act. The Wage Payment and Collection Act, like the Human Rights Act allows the option of an agency administrative action which can be bypassed by filing instead in court.

A Human Rights Act claim, like a wage payment and collection claim, is not subject to a mandatory filing of a grievance. While there is clearly a preference in the law for exhaustion of administrative remedies in many, if not most cases, this preference is not absolute. Human rights claims and wage payment collection cases are exceptions.

*Dworning v. City of Euclid*, 892 N.E.2d 420 (Ohio 2008), is a well-reasoned case which addresses the issues herein. The Ohio Supreme Court discusses why human rights cases are an exception to the policy of exhaustion of administrative remedies.

The dismissal of this case by the circuit court for failure to file a grievance is a harsh and unreasonable result. Dismissal, as it occurred in this case, violates the public policy of the Human Rights Act as codified at *W. Va. Code* §5-11-2.

**B. The Grievance Board does not have exclusive jurisdiction over Human Rights Act claims.**

The Respondents argue that *Vest v. Board of Educ.*, 193 W. Va. 222, 455 S.E.2d 781 (1995), confers exclusive jurisdiction over human rights claims, indeed all state employee grievances initially with the Grievance Board. This proposition is wrong. *Vest*, cannot be interpreted by excerpting selective sections.

*Vest* answered two certified questions from th U.S. District Court:

1. “Does the West Virginia Education and State Employees Grievance Board (“Grievance Board”) have subject matter jurisdiction over claims alleging discrimination because of gender-based discrimination?”
2. “If the Grievance Board has such jurisdiction, is a civil action filed pursuant to the West Virginia Human Rights Act precluded by a prior grievance proceeding involving the same parties and arising out of the same facts and circumstances, but which did not result in any findings of fact or conclusions of law regarding the discrimination claim?”

This Court answered the first question “yes” and the second “no”. These answers are dispositive of the case before this Court, as obviously, filing and exhausting a grievance on the issue of discrimination was not a necessary prerequisite for a civil action to go forward.

The court goes on to explain that while the Grievance Board has jurisdiction over claims of “discrimination” “favoritism” and “harassment” it cannot determine liability under the Human Rights Act. It is obvious that *Vest* holds that there are two parallel systems and either or both can be utilized by litigants. The opportunity to litigate in court was not precluded by the failure to exhaust before the Grievance Board. Ms. Vest did indeed forego the administrative process.

Respondents argument to the contrary ignores the facts and is clearly wrong.

Respondents' reliance on *Bank of Wheeling v. Morris Plan Bank & Trust Co.* 155 W.Va. 245, 183 S.E.2d 692 (1971), is not well taken and does not apply to Human Rights Act cases. It was also decided twenty-four years before *Vest* and does not relate to the case herein. The language is relevant to many other grievances, but not to "discrimination".

**C. Petitioner is not attempting to inflame this court with passion.**

Petitioner remains factual in her argument. The result of the decision(s) of the Circuit Court of Pocahontas County are indeed unfair and not in accordance with the well articulated legislative purpose of the Human Rights Act.

The only court which has rendered a decision dismissing a Human Rights Act claim for failure to exhaust administrative remedies is the Circuit Court of Pocahontas County. This case is not a pitch for sympathy, it is an appeal of a clearly wrong decision below..

**D. The claims made before the Circuit Court are human rights claims.**

Respondents single out a few paragraphs from the Complaint and make an absurd argument that the claims are not Human Rights Act claims. The argument is without merit. The claims are clearly all based upon the Human Rights Act. Respondents single out three paragraphs but ignore the entirety of the Complaint. (See Complaint pp. 6-19, Appendix Index)

**E. The lower court did not properly apply *Vest*.**

*Vest* holds that jurisdiction of Human Rights Act claim for state employees is conferred separately on the circuit court, the Human Rights Commission and the Grievance Board and it does not require that "discrimination" claims be brought exclusively before the Grievance Board.

There is no special rule for a public employee, so limiting her rights under the law of West Virginia.

**CONCLUSION**

The decision of the Circuit Court of Pocahontas County is clearly wrong and should be reversed by this Court.

**Theresa Weimer  
By counsel**



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**CERTIFICATE OF SERVICE**

I, Roger D. Forman, do hereby certify that I have this 17<sup>th</sup> day of September, 2012, served the foregoing PETITIONER'S REPLY BRIEF by first class mail, postage prepaid, on the following:

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