

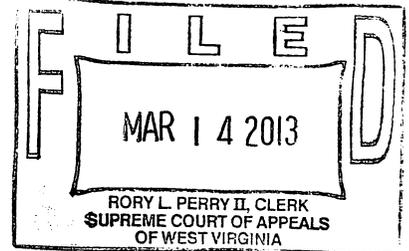
BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

at

CHARLESTON, WEST VIRGINIA

No. 12-1506

COPY



VICKY LOU HUGHES
Plaintiff/Petitioner

v.

WEST VIRGINIA UNIVERSITY,
JEANETTE MOTSCH and MARY ROBERTA
"Bobbie" BRANDT,
Defendant/Respondents.

PETITIONER'S BRIEF ON BEHALF OF VICKY LOU HUGHES

On appeal from the
Circuit Court of Monongalia County, West Virginia
Judge Phillip D. Gaujot, presiding
Monongalia County Civil Case # 12-C-321

Walt Auvil #190
Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058
Counsel for Vicky Hughes

I. TABLE OF CONTENTS

II. Table of Authorities iii

III. Assignments of Error 2

IV. Statement of Case.....2

V. Summary of Argument5

VI. Statement Regarding Oral Argument6

VII. Argument of Law6

VIII. Conclusion14

TABLE OF AUTHORITIES

A. CASES

<i>Beichler v. West Virginia University at Parkersburg,</i> 226 W.Va. 325, 700 S.E.2d at 536	6
<i>Vest v. Board of Education of the County of Nicholas,</i> 193 W.Va. 222, 455 S.E.2d 781 (1995) (Cir. Crt. Order page 8-9)	7
<i>Ewing v. Board of Education of County of Summers,</i> 202, W.Va. 228, 303 S.E.2d 541 (1998)	8
<i>McCourt v. Oneida Coal Company, Inc.,</i> 188 W.Va. 647, 653, 425 S.E.2d 601, 608 (1992)	8
<i>Collins v. Elkay Mining Co.,</i> 179 W.Va. 549, 371 S.E.2d at 647	10
<i>Davis v. Kitt Energy Corp.,</i> 179 W.Va. 37, 365 S.E. 2d 82 (1987)	10
<i>Wiggins v. Eastern Associated Coal Corp.,</i> 178 W.Va. 63, 357 S.E.2d 745 (1987)	10

B. STATUTE

W.Va. Code § 6C-2-2(d)	10
W.Va. Code § 5-11-9(1)	10
W.Va. Code §5-11-10	11
W.Va. Code § 6C-2-1(d)	12
W.Va. Code § 6C-2-1	14

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**Vicky Lou Hughes, Plaintiff Below
Petitioner**

vs). No. 12-1506

**West Virginia University, Jeanette Motsch,
and Mary Roberta "Bobbie" Brandt, Defendants Below,
Respondents**

BRIEF OF PLAINTIFF/PETITIONER

III. Assignment of error

1. The Circuit Court erred in dismissing the complaint because the Plaintiff had not completed the grievance process under W.Va. Code §6C-2-1, et seq.
2. The Circuit Court erred in equating the preclusive effect of the pendency of the grievance system administered by the West Virginia Public Employees Grievance Board with pendency of a human rights act administrative complaint pending before the West Virginia Human Rights Commission.

IV. Statement of the Case

Plaintiff was employed by West Virginia University as a TBI Resource

Coordinator/Clinical Associate¹ assigned to the Big Chimney (Kanawha County) office of the

¹The job description for Resource Coordinator/Clinical Associate provides the following position summary:

The Resource Coordinator/Clinical Associate will be part of the Traumatic Brain Injury (TBI) State Program. The primary work role of this person is to: provide resource coordination services to individuals with TBI so that they can effectively access available services and to facilitate a seamless continuum of services across agencies; identify unmet needs and barriers to accessing effective traumatic brain injury services; collect relevant data to support the development of a funding stream for statewide brain injury services and supports; conduct regional outreach to identify and assist individuals with TBI who need access to services and supports; and provide training and technical assistance to increase the

Center for Excellence in Disabilities (CED). CED is a branch of West Virginia University.

Her employment began in December 2007. The CED works with consumers, state, local and federal agencies to assist people with developmental and other disabilities to realize opportunities and tackle and overcome challenges. CED is West Virginia's only federally designated Center for Excellence in Disabilities and provides resources in all fifty-five counties of the State. Traumatic Brain Injury (TBI) services are provided by six coordinators based in Morgantown and Big Chimney, West Virginia. Plaintiff was one of these six coordinators.

Plaintiff advised Defendants that she suffered a disability and required accommodation during the interview process and before she was actually hired. She was initially afforded reasonable accommodations. She informed Defendants that she has a condition diagnosed as multiple chemical sensitivity which makes it difficult for her to breathe around certain chemicals and fumes. For instance, in 2008 Plaintiff provided a physician's statement that her use of a rental car would be contraindicated due to Plaintiff's multiple chemical sensitivity. Plaintiff was initially allowed to use her personal vehicle for work related travel.

In 2009, in response to Plaintiff's requests for accommodation, CED requested medical verification of Plaintiff's restrictions. Upon receipt of documentation, Defendants referred Plaintiff to Medical Management and to WVU ADA compliance officer, Brandt. Medical Management is an internal WVU program designed to work with employees under medical restrictions. However, in November, 2009, Defendants requested Medical Management cease assistance to Plaintiff.

capacity of direct service providers to provide effective, person-centered TBI services.

In January 2010, Plaintiff requested that, due to her multiple chemical sensitivities, she be permitted to work at a location other than Big Chimney during the renovation of an office in the building. Additionally, Plaintiff supplied medical documentation supporting her position that her chemical sensitivities rendered the Big Chimney location one for which she needed accommodation. Plaintiff had her first ADA meeting with Jennifer McIntosh, Executive Officer for Social Justice and Charles Morris, Special Assistant to the Chief of Staff and Executive Officer for Social Justice, in February, 2010. Plaintiff was allowed to continue to work with reasonable accommodations..

On April 6, 2010, Defendant Motsch and Chris George, coordinator, met with Plaintiff to discuss alleged consumer complaints regarding Plaintiff's performance. An investigation ensued, resulting in the issuance of a letter of warning dated June 11, 2010, attached to the complaint as Exhibit A. In that letter Mr. George advised Plaintiff that her performance was unsatisfactory. Following the April 6, 2010, meeting, Mr. George alleged that Plaintiff had engaged in additional inappropriate and potentially unethical clinical procedures and client interactions.

Plaintiff alleges that all these allegations were false and known by the Defendants to be false at the time they were made. She further alleges that these allegations were made with the purpose and intent of harassing her due to her request for accommodation and with a goal of obtaining the Plaintiff's resignation from employment with Defendants.

In June 2010, Plaintiff suffered an orthopaedic injury which resulted in a medical leave of absence of approximately one year. Upon Plaintiff's attempt to return to work from this injury, Plaintiff was once again referred to Medical Management and ADA Compliance Officer Defendant Brandt . By letter date June 30, 2011, Defendant Brandt advised Plaintiff that

Defendants had considered and rejected several accommodations which Plaintiff had requested in order to be able to return to work. Plaintiff alleges that this determination by Defendants was a violation of the Defendants' obligation of reasonable accommodation pursuant to the West Virginia Human Rights Act. Plaintiff's position could have been modified by Defendants to accommodate Plaintiff's return to work and the Defendants' decision to refuse to allow the Plaintiff to return to work is a violation of Plaintiff's rights pursuant to the West Virginia Human Rights Act (WVHRA).

Therefore, Plaintiff participated in the ADA monitoring process run by Defendants for four months, during which time Defendants failed to accommodate the Plaintiff by returning her to work. Said monitoring process ended on October 31, 2011, with Defendants' termination of Plaintiff from employment. Plaintiff's efforts to obtain employment during the ADA monitoring process were frustrated by Defendants' refusal to aid the Plaintiff in locating opportunities for continued employment with WVU.

These facts, derived from the Plaintiff's complaint, are adopted by the Circuit Court in its order granting Defendants' Motion to Dismiss (Findings of Fact, pages 3 - 4).

V. SUMMARY OF ARGUMENT

All employees, public and private, have the fundamental right to be free from unlawful discrimination as prohibited by the West Virginia Human Rights Act. Requiring Plaintiff and other 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. It is not required by law and is contrary to the letter and spirit of West Virginia

jurisprudence.

VI. STATEMENT REGARDING ORAL ARGUMENT

Oral argument under Rule 19 is requested. A memorandum decision may be appropriate depending upon the resolution of Weimer v. Sanders, WVSCT No. 12-04-77.

VII. ARGUMENT

The Circuit Court notes that it relied upon the Defendants' presentation of the Plaintiff's involvement of the varying levels of the grievance process "Defendants' motion to dismiss is the only place in the record that addresses it." Id. at Footnote 4, page 5. The Circuit Court also noted that the record does not contain copies of the actual grievances which the court addresses in the order's procedural history. Id. at Footnote 5, page 5. The Circuit Court, adopting language from the Defendants' motion, concludes that

"The Defendants' Motion to Dismiss should be granted because Ms. Hughes has failed to exhaust her available administrative remedies by pursuing an action in Circuit Court while the grievance process she had previously commenced is still pending. Additionally, West Virginia caselaw concerning the WVHRA supports *alternatives* to administrative exhaustion, as opposed to justifying incomplete exhaustion."

Thus the Circuit Court concluded that if the Plaintiff had never begun the grievance process she might have been able to proceed with her Human Rights Act civil complaint but because she had begun but not finished the grievance process she could not do so. This is contrary to law and to common sense.

As this case exemplifies the grievance process may take longer than the Circuit Court process. Thus, the Circuit Court's ruling would lead to a situation in which a Plaintiff would be required to decide within fifteen days of the employment action taken against her whether to sue

or not because once the grievance process begins it may take the employee past the statute of limitations. The grievance process, running past the statute of limitations, would then preclude the Plaintiff from filing a civil claim based on the termination of her employment. Thus, effectively, a normally unrepresented state employee would be given fifteen days to choose whether to sue to protect her statutory remedies or to proceed under the grievance process. The statutes governing the grievance procedure and the Human Right Act do not require such a result. Neither public policy nor common sense supports such a result.

In fact, the Circuit Court notes correctly that the Beichler decision issued by this Court in 2010 is contrary to the result which it reaches in this matter, Beichler v. West Virginia University at Parkersburg, 226 W.Va. 325, 700 S.E. 2d at 536;

In Beichler v. West Virginia University at Parkersburg, the Plaintiff was initially an assistant professor, and after being denied tenure, filed a complaint against the University in Kanawha County Circuit Court, grounded in the Wage Payment and Collection Act. 226 W.Va. 321, 700 S.E. 2d 532 (2010). Alleging that the University had failed to compensate him per several discretionary contract he had entered into with it, the University filed a motion to dismiss, charging that Beichler had failed to exhaust available administrative remedies. On appeal, the Court held that “a person whose wages have not been paid in accord with the West Virginia Wage Payment and Collection Act may initiate a claim for the unpaid wages *either* through the administrative remedies provided under the Act or by filing a complaint for the unpaid wages directly in circuit court” *Beichler*, 226 W.Va. At 325, 700 S.E.2d at 536 (emphasis added).

However the Circuit Court added the emphasis to the word “either”, as reflected in the quote above and concluded that the use of the word “either” means that Beichler supports the position that the Defendants urge in this matter which is that once a Plaintiff elects an administrative proceeding he or she may not proceed in Circuit Court until that Administrative process is finished. Beichler supports no such conclusion.

The Circuit Court, in its discussion of Vest v. Board of Education of the County of Nicholas, 193 W.Va. 222,455 S.E.2d 781(1995) (Cir. Cr. Order page 8 - 9), stands Vest on its head and concludes that because of Vest filed a Human Rights Act proceeding about the same adverse employment action she had also grieved which a prior grievance has been filed Vest could only proceed by relinquishing her administrative remedies (dropping the grievance before its conclusion). Thus, the Court would apparently have found that if the Plaintiff herein had dropped her grievance there would have been no preclusion of her Human Rights Act remedy. This holding is contrary to the principal that the grievance procedure should be favored to attempt to resolve the matter at the lowest level of expense and time for all parties involved. There is nothing in the Administrative Procedures Act which requires this result.

The Circuit Court's discussion of Ewing v. Board of Education of County of Summers, 202, W.Va. 228, 303 S.E.2d 541 (1998) is also misplaced. The court characterizes the Plaintiff's actions in Ewing as an effort to "pursue an alternative form of relief before the grievance process she began is complete." This is true at the broadest possible level of generality. Critically, however, Ewing involved an attempt at a writ of mandamus, which is an extraordinary remedy. Therein the employee filed a civil action in Circuit Court. This distinction is not simply between alternative forms of relief, but rather, between an extraordinary remedy and a civil claim based upon a fundamental statutory right to be free from discrimination.

The Court's entire discussion of the untenable situation in which its ruling places the state employee plaintiff in a Human Rights Act case is dealt with in the following paragraph:

"The Plaintiff may argue that the potential for unfairness and/or prejudice exists because if a Plaintiff is forced to choose between remedies and carry her selection to completion, she may miss filing deadlines while awaiting the completion of a

grievance process. However, this argument is not highly persuasive; not only does it seem to simply be a risk that a plaintiff may have to take, but the Court has addressed it. In *Independent Fire Company No. 1 v. West Virginia Human Rights Commission*, the Court said that “[u]nder West Virginia Code 5-11-10, the time period for filing a complaint with the Human Rights commission alleging a violation of the Human Rights Acts is not jurisdictional in nature and is subject to waiver and equitable doctrines of tolling and estoppel.” Syl. Pt. 1, 180 W.Va. 406, 376 S.E.2d 612 (1998)”

Recognizing the weakness of this position, the Circuit Court notes that “deadlines are not impermeable”. However, statutes of limitations - as a general matter - are impermeable. The argument that a court might give extraordinary relief through equitable estoppel is not greatly comforting to a Plaintiff who is sitting in a grievance proceeding watching his or her Human Rights Act statute of limitations expire. See e.g., *McCourt v. Oneida Coal Company, Inc.*, 188 W.Va. 647, 653, 425 S.E.2d 601, 608 (1992).

West Virginia Code 5-11-2 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 Circuit Court action is to divide the Plaintiff - and all other public employees - into a separate class from private employees - separate because the class of public employees must defer vindication of their fundamental rights pending exhaustion of a grievance process that is not 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 risks 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 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). 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.²

Indeed, the differences in the procedures before the Grievance Board versus the

² 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.

procedures before the Human Rights Commission³ or in circuit court evidence the different purposes of the two statutes. The West Virginia Supreme Court recognized this in Vest v. Board of Educ., 193 W. Va. 222, 228, 455 S.E.2d 781, 787 (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 as 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 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. Vest observes that “[t]he two 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

³ See W.Va. Code 5-11-10 (setting forth procedures for proceeding on a charge of discrimination before the HRC) with W.Va. Code § 6C-2-4 (grievance hearing procedures).

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 the 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. 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). However, there is no valid reason why the Supreme Court's decision in Vest is not applicable to the grievance process now moved to Chapter 6C because the process is substantially the same as it was when Vest was decided.

The second reason why the Defendants' motion to dismiss jeopardizes the ability of Plaintiff and all other 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.

In this case Plaintiff filed grievances dating back to April 27, 2010, which are still pending and unresolved. The reason - in part - for this extraordinary delay in the processing of grievances is the Defendants policy of suspending all processing of a grievance when the employee is on medical leave, regardless of the employee's request that the process continue.

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, 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

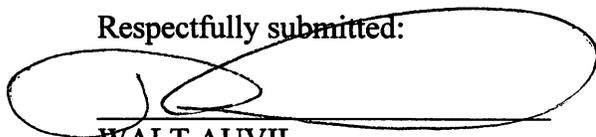
manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia.” W. Va. Code § 6C-2-1.

VIII. CONCLUSION

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 her Human Rights Act claim and will, in many cases, substantially prejudice the public employee’s case. This should be reversed and remanded for reinstatement of Plaintiff’s complaint.

VICKY LOU HUGHES,
Plaintiff by Counsel,

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'Walt Auvil', is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

WALT AUVIL
State Bar No. 190
Counsel for Plaintiff

Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101
(304) 485-3058
(304) 485-6344 fax

BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

**Vicky Lou Hughes, Plaintiff Below
Petitioner**

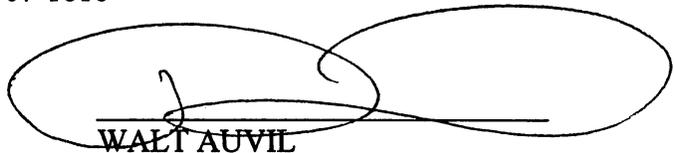
vs). No. 12-1506

**West Virginia University, Jeanette Motsch,
and Mary Roberta "Bobbie" Brandt, Defendants Below,
Respondents**

CERTIFICATE OF SERVICE

The undersigned Counsel for the Claimant hereby certified that on the 14th day of MARCH, 2013, he served the foregoing and hereto annexed **PETITIONER'S BRIEF ON BEHALF OF VICKY LOU HUGHES** upon Monte L. Williams and Deva A. Solomon, Counsel for the Respondents by Vicky Hughes, Petitioner, by e-mail and U.S. mail to the following:

Monte L. Williams
Deva A. Solomon
United Center, Suite 400
1085 Van Voorhis Road
P.O. Box 1616
Morgantown, WV 26507-1616



WALT AUVIL
State Bar No. 190
Counsel for Plaintiff
Rusen & Auvil, PLLC
1208 Market Street
Parkersburg, WV 26101