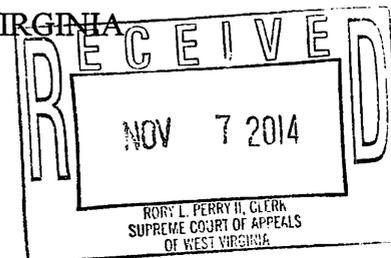


BRIEF FILED
WITH MOTION

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



MARTHA KNOTTS,

Plaintiff Below, Appellant,

v.

No. 14-0752

GRAFTON CITY HOSPITAL,

Defendant Below, Appellee.

**BRIEF OF *AMICUS CURIAE* AARP
IN SUPPORT OF REVERSAL**

KATHRYN R. BAYLESS, WV BAR # 272
Bayless Law Firm, PLLC
1607 W. Main St.
Princeton, WV 24740
kay@baylesslawfirm.com
304-487-8707

Counsel for Amicus Curiae AARP

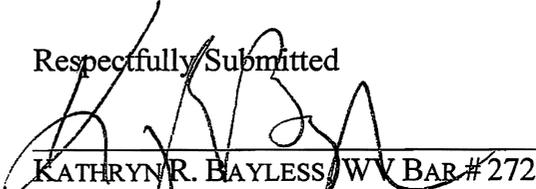
CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) (1993) of the Internal Revenue Code and is exempt from income tax. AARP is also organized and operated as a non-profit corporation pursuant to Title 29 of Chapter 6 of the District of Columbia Code 1951.

Other legal entities related to AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, Experience Corps, d/b/a. AARP Experience and AARP Financial.¹

November 6, 2014

Respectfully Submitted



KATHRYN R. BAYLESS/WV BAR #272
Bayless Law Firm, PLLC
1607 W. Main St.
Princeton, WV 24740
On behalf of Amicus Curiae AARP

¹ Pursuant to W. Va. R. App. Proc. 30(e)(5), Amicus Curiae AARP states that no counsel for any party authored this brief in whole or in part and that no party or entity other than amicus curiae, its members, or counsel made any monetary contribution to the preparation or submission of this brief.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIESiii

STATEMENT OF INTEREST, IDENTITY, AND AUTHORITY TO FILE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. Like the Federal Courts and Every Other State That Has Considered *O’Connor v. Consolidated Coin Caterers Corp.*, the Court Should Adopt the “Substantially Younger” Standard, Which Fulfills the Purpose of West Virginia’s Prohibition on Age Discrimination, Instead of Focusing on the “Utterly Irrelevant” Question of Whether the Comparator is Under 40 4

 A. To Fulfill Its Statutory Purpose, the West Virginia Human Rights Act Should be Construed in a Manner Consistent With Federal Law, Which Does Not Require Plaintiffs to Provide Evidence That Their Comparators Are Under Age 40..... 5

 B. Every State to Consider the Issue Has Adopted *O’Connor’s* “Substantially Younger” Test Instead of Requiring Evidence of a Comparator That is Outside the Protected Group..... 7

II. The Circuit Court Applied the Wrong Legal Standard in Assessing Whether Knotts Met Her Burden to Show That the Hospital’s Proffered Reason for Her Termination Was Pretextual, Using a Framework That is Inconsistent With Both West Virginia Law and U.S. Supreme Court Precedent Construing the ADEA 10

CONCLUSION..... 14

CERTIFICATE OF COMPLIANCE 15

CERTIFICATE OF SERVICE AND FILING 16

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Human Rights Comm'n</i> , 731 N.E.2d 371 (Ill. App. Ct. 2000)	10
<i>Bergen Commer. Bank v. Sisler</i> , 723 A.2d 944 (N.J. 1999)	9
<i>Bd. of Educ. of Norwalk v. Comm'n on Human Rights & Opportunities</i> , 832 A.2d 660 (Conn. 2003)	8
<i>Cates v. Regents of the N.M. Institute of Mining & Tech.</i> , 954 P.2d 65 (N.M. 1998)	9
<i>City of Hollywood v. Hogan</i> , 986 So. 2d 634 (Fl. Dist. Ct. App. 2008)	7
<i>Coryell v. Bank One Trust Co. N.A.</i> , 803 N.E.2d 781 (Oh. 2004)	8
<i>Fisher v. Vassar Coll.</i> , 114 F.3d 1332 (2d Cir. 1997)	12
<i>George v. Ute Water Conservancy Dist.</i> , 950 P.2d 1195 (Colo. App. 1997)	9
<i>Guz v. Bechtel Nat'l, Inc.</i> , 8 P.3d 1089 (Cal. 2000)	8
<i>Hardy v. GE</i> , 270 A.D.2d 700, 704 (N.Y. App. Div. 2000)	8
<i>Hartis v. Mason & Hanger Corp.</i> , 7 S.W.3d 700 (Tex. App. 1999)	9
<i>Hill v. BCTI Income Fund-I</i> , 23 P.3d 440 (Wash. 2001)	8
<i>Ind. Dep't. of Envtl. Mgmt. v. West</i> , 838 N.E.2d 408 (Ind. 2005)	7
<i>Kanhawa Reg'l Transp. Auth. v. W. Va. Human Rights Comm'n</i> , 181 W. Va. 675, 383 S.E.2d 857 (1989)	2, 5, 7
<i>Knight v. Avon Prods.</i> , 780 N.E.2d 1255 (Mass. 2003)	8
<i>Kroptavich v. Pa. Power & Light Co.</i> , 795 A.2d 1048 (Pa. Super. Ct. 2002)	8
<i>LaMontagne v. Am. Convenience Prods., Inc.</i> , 750 F.2d 1405 (7th Cir. 1984)	13
<i>Lyle v. Malady</i> , 566 N.W.2d 582 (Mich. 1997)	9
<i>Maxfield Sinclair Int'l</i> , 766 F.2d 788 (3d Cir. 1985)	6
<i>McCain v. City of Lafayette</i> , 741 So. 2d 720 (La. Ct. App. 1999)	9

<i>McCorstin v. U.S. Steel Corp.</i> , 621 F.2d 749 (5th Cir. 1980).....	6
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	3
<i>O'Connor v. Consolidated Coin Caterers Corp.</i> , 517 U.S. 308 (1996)	<i>passim</i>
<i>Price Waterhouse v. Hopkins</i> , 490 U.S. 228 (1989).....	13
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133 (2000).....	1, 3, 11, 12
<i>Seivers v. Iowa Mut. Ins. Co.</i> , 581 N.W.2d 633 (Iowa 1998).....	9
<i>Skaggs v. Elk Run Coal Co., Inc.</i> , 198 W. Va. 51, 479 S.E.2d 561 (1996)	3, 11
<i>Thornbrough v. Columbus & Greenville RR. Co.</i> , 760 F.2d 633 (5th Cir. 1985)	13
<i>U.S. Postal Serv. Bd. of Governors v. Aikens</i> , 460 U.S. 711 (1981)	13
<i>Vaughan v. MetroHealth Cos., Inc.</i> , 145 F.3d 197 (4th Cir. 1998)	12
<i>Villaflores v. Ak. State Comm'n for Human Rights</i> , 170 P.3d 663 (Ak. 2007).....	7
<i>West v. Conopco Corp.</i> , 974 S.W.2d 554 (Mo. Ct. App., W. Dist. 1998).....	9
<i>Williams v. Wal-Mart Stores, Inc.</i> , 184 S.W.3d 492 (Ky. 2005)	8
<i>Wilson v. Rubin</i> , 104 S.W.3d 39, 52 (Tenn. Ct. App. 2002)	8
<i>Young v. Bellofram Corp.</i> , 227 W. Va. 53 (W. Va. 2010).....	1, 2, 4, 5

Statutes, Rules and Regulations

Age Discrimination in Employment Act (ADEA)	
29 U.S.C. §§ 621-34	1, 5
29 U.S.C. § 623(a)(1).....	7
West Virginia Human Rights Act	
W. Va. Code § 5-11-3(k)	7
W. Va. Code § 5-11-9(1)	1
West Virginia Rules of Appellate Procedure	
W. Va. R. App. Proc. 30(e)(5)	i

Legislative History

113 Cong. Rec. 31,255 (1967).....	6
-----------------------------------	---

Miscellaneous

Circuit Ct. Order 12, 14

Mem. from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Baylson,
(Aug. 13, 2008), available at <http://1.usa.gov/10skB4g> (last visited Nov. 5, 2014)..... 13

STATEMENT OF INTEREST, IDENTITY, AND AUTHORITY TO FILE

AARP is a nonpartisan, nonprofit organization with a membership that helps people turn their dreams into real possibilities, strengthens communities, and fights for issues that matter most to families, such as employment, healthcare, income security, retirement planning, affordable utilities and protection from financial abuse. AARP is dedicated to addressing the needs and interests of older workers, and strives through legal and legislative advocacy to preserve the means to enforce their rights. About one third of AARP members work or are seeking work and thus are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34 (2012) and by state and local age discrimination prohibitions such as the West Virginia Human Rights Act, W. Va. Code 5-11-9(1).

One of AARP's primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and programs, AARP seeks to eliminate ageist stereotypes, to encourage employers to hire and to retain older workers, and to help older workers overcome the obstacles they encounter related to their age. Vigorous enforcement of age discrimination laws is of paramount importance to AARP and the many millions of older workers on whose behalf AARP regularly engages in legal advocacy in state and federal courts. In particular, AARP has participated as an *amicus curiae* in numerous cases in the United States Supreme Court, including *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), and *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-49 (2000), whose holdings are central to this *amicus* brief. AARP also participated as *amicus* in a petition for rehearing before this Court in *Young v. Bellofram Corp.*, 227 W. Va. 53, 705 S.E.2d 560 (W. Va. 2010), on which the circuit court relied.

SUMMARY OF THE ARGUMENT

This case presents an opportunity to ensure that the West Virginia Human Rights Act is not out of step with federal law and with the law of virtually every other state to weigh in on a basic precept of age discrimination law. The Court should interpret the West Virginia Human Rights Act as requiring proof of a prima facie case of age discrimination consistent with *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), and thereby harmonize the state statute with relevant federal and state case law. To accomplish this result, the Court should overturn *Young v. Bellofram Corp.*, 227 W. Va. 53, 705 S.E.2d 560 (2010), on which the circuit court relied.

Young held, without any analysis, that an age discrimination plaintiff cannot establish a prima facie case unless the comparator is outside the protected class – *i.e.*, under 40. The *Young* Court did not even consider the United States Supreme Court's directly contrary decision in *O'Connor*, which held that to make out a prima facie case under the Age Discrimination in Employment Act ("ADEA"), a protected plaintiff need only show that a "substantially younger" worker was treated more favorably under similar circumstances, regardless of whether that younger worker was also over 40. This rule accords with the reality that many experienced older workers are replaced by employees who are ten or twenty years younger than they are, but who are experienced enough themselves to be over 40. And, as *O'Connor* explained, the difference in age between the plaintiff and her comparator is far more indicative of age discrimination than is whether the comparator is over 40 – a factor the Supreme Court described as "utterly irrelevant." 517 U.S. at 313.

This Court has held that the West Virginia Human Rights Act should be interpreted at least as broadly as federal discrimination prohibitions. *Kanhawa Reg'l Transp. Auth. v. W. Va.*

Human Rights Comm'n, 181 W. Va. 675,678, 383 S.E.2d 857, 860 (1989). *O'Connor* is as logically and practically consistent with the purpose of the West Virginia Human Rights Act as it is with the goals of the ADEA, and every state to consider the issue has applied the *O'Connor* rule to age discrimination cases brought under state law. This Court has every reason to do the same.

In addition, the circuit court mischaracterized the legal framework for proving discrimination under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The court incorrectly suggested that at the “pretext” stage of the analysis, it is not enough for the plaintiff to show that the employer’s proffered reason for taking an adverse action was false; the plaintiff must also show that the proffered reason “masks” a discriminatory motive. This articulation of the framework conflicts with *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 74, 479 S.E.2d 561, 584 (1996), which expressly states that a plaintiff need *not* show that the stated motive concealed a discriminatory motive to prove pretext. The court’s characterization also conflicts with *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000), in which the U. S. Supreme Court held that “a plaintiff’s *prima facie* case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.”

The court’s inaccurate formulation of the burden-shifting framework effectively requires plaintiffs to provide direct evidence of discriminatory intent, but plaintiffs can very rarely adduce direct evidence in discrimination cases because employers are not forthcoming about their discriminatory motives. The Court should correct the circuit court’s misstatement of the law to ensure that meritorious employment discrimination claims can reach a jury trial.

ARGUMENT

I. Like the Federal Courts and Every Other State That Has Considered *O'Connor v. Consolidated Coin Caterers Corp.*, the Court Should Adopt the “Substantially Younger” Standard, Which Fulfills the Purpose of West Virginia’s Prohibition on Age Discrimination, Instead of Focusing on the “Utterly Irrelevant” Question of Whether the Comparator is Under 40.

Despite the fact that Knotts showed that the hospital replaced her with and imposed less stringent disciplinary measures on multiple employees ranging from 12 to 24 years younger than she, the circuit court held that she had failed to establish a prima facie case of age discrimination because she had not provided evidence of appropriate comparators outside the protected class – *i.e.*, under the age of 40. Circuit Ct. Order at 9-10. The court based this conclusion on *Young v. Bellofram Corp.*, 227 W. Va. 53, 705 S.E.2d 560 (2010). *Young* held that a 60-year-old plaintiff in a state age discrimination case, who sought to show that a similarly-situated younger employee had received more favorable treatment than her, had nonetheless failed to demonstrate a prima facie case of age discrimination solely because her proposed comparator was also over 40 years of age. *Id.* at 59-60, 705 S.E. 2d at 566-67.

Young’s holding both fails to mention and deviates entirely from the United States Supreme Court’s decision in *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), which held that to make out a prima facie case under the ADEA, a plaintiff need only show that a “substantially younger” worker was treated more favorably under similar circumstances, irrespective of whether that younger worker was also at least 40 years of age. The difference in age between the plaintiff and the comparator, the Court ruled, “is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.” *Id.* at 313.

The parties in *Young*, however, did not bring this Court's attention to *O'Connor* at the initial briefing stage, and consequently, *Young* does not address *O'Connor* or its rationale. See 227 W. Va. at 60, 705 S.E.2d at 567. This case presents the Court with a timely opportunity to embrace *O'Connor*'s reasoning, and to ensure that victims of age bias in West Virginia will enjoy the same protections as their counterparts bringing suit under federal law and under the discrimination prohibitions of every state to consider the issue.

A. To Fulfill Its Statutory Purpose, the West Virginia Human Rights Act Should be Construed in a Manner Consistent with Federal Law, Which Does Not Require Plaintiffs to Provide Evidence That Their Comparators are Under Age 40.

The West Virginia Human Rights Act “tracks the wording of Title VII of the Civil Rights Act of 1994 . . . but includes protection on the basis of age. Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621-634, to meet this goal.” *Kanhawa Reg'l Transp. Auth. v. W. Va. Human Rights Comm'n*, 181 W. Va. 675, 677 n.2, 383 S.E.2d 857, 859 n.2 (1989)). In particular, in discussing the test for establishing a prima facie case of age discrimination, this Court has historically interpreted the West Virginia statute in light of applicable federal case law in an effort to avoid “creat[ing] a more narrow standard of analysis in discrimination cases than is undertaken in the federal courts.” *Id.* at 678, 860. Accordingly, the West Virginia Human Rights Act's protections in age discrimination cases should be, at a minimum, coextensive with the ADEA's protections.

The *O'Connor* rule is as vital to ensuring that the West Virginia Human Rights Act fulfills its statutory purpose as it is to effectuating the purpose of the ADEA. The legislative history of the ADEA speaks strongly to the sponsors' intent to prohibit intra-age group discrimination, with one sponsor stating that the law

does not say that the discrimination must be in favor of someone younger than age 40. In other words, if two individuals age 52 and 42 apply for the same job and the employer selected the man age 42 . . . because he is younger than the man 52 . . . then he will have violated the act

113 Cong. Rec. 31,255 (1967).

Under a contrary interpretation, as federal courts have long recognized, the ADEA “would be of virtually no use to persons at the upper ages of the protected class whose jobs require experience since even an employer with clear anti-age animus would rarely replace them with someone under 40.” *Maxfield Sinclair Int’l*, 766 F.2d 788, 792 (3d Cir. 1985). Indeed, the practical reality is that “[s]eldom will a sixty-year-old be replaced by a person in the twenties.” *McCorstin v. U.S. Steel Corp.*, 621 F.2d 749, 754 (5th Cir. 1980). Requiring plaintiffs to provide evidence of comparators who are under 40 thus “fails to take the reality of the working place into account.” *Id.*

Nor is preferential treatment for a younger employee who is within the protected group any less injurious than preferential treatment given to a person outside the protected group. “That the person is replaced by a person ten years younger rather than twenty years does not diminish the discrimination; the subtlety only tends to disguise it.” *Id.* These realities are just as present and just as much in need of a remedy for plaintiffs bringing state law age discrimination claims as for plaintiffs bringing suit under the ADEA.

Moreover, the *O’Connor* decision’s logic is equally applicable under the West Virginia Human Rights Act. As the Court explained,

The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to “40 or over” discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.

517 U.S. at 312. The Court described as “utterly irrelevant” whether the comparator is also over 40, because “the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.” *Id.* at 313. Nothing about the West Virginia Human Rights Act, which protects the same age group (*compare* W. Va. Code § 5-11-3(k), *with* 29 U.S.C. § 623(a)(1)) and tracks federal discrimination prohibitions in purpose and structure (*see Kanhawa Reg'l Transp. Auth.*, 181 W. Va. at 677 n.2, 383 S.E.2d at 859 n.2) suggests that whether the plaintiff's comparator is over 40 years of age has any more probative value under state law than it does under the ADEA.

B. Every State to Consider the Issue Has Adopted *O'Connor's* “Substantially Younger” Test Instead of Requiring Evidence of a Comparator That is Outside the Protected Group.

Since *O'Connor*, only one state has required evidence of a comparator outside the protected age group, and that state did not consider *O'Connor* at all. *See Villaflores v. Ak. State Comm'n for Human Rights*, 170 P.3d 663, 665 (Ak. 2007). As far as undersigned counsel has been able to discover, no state has expressly rejected *O'Connor*. The *O'Connor* rule is definitively the prevailing view in state jurisprudence. At least 18 state courts, including the highest appellate courts in 11 states, have applied the “substantially younger” test from *O'Connor* in state law age discrimination cases, rather than requiring plaintiffs to provide evidence that under-40 comparators were treated more favorably. *See City of Hollywood v. Hogan*, 986 So. 2d 634, 641-43 (Fl. Dist. Ct. App. 2008) (adopting “substantially younger” test from *O'Connor* and noting that the Court decided that the comparator did not have to be outside the protected class in age discrimination cases); *Ind. Dep't. of Env'tl. Mgmt. v. West*, 838 N.E.2d 408, 414 (Ind. 2005) (citing *O'Connor* and adopting its rationale for “substantially younger”

test); *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 496 (Ky. 2005) (“In age discrimination cases the fourth element is modified to require replacement not by a person outside the protected class, but replacement by a significantly younger person.”); *Coryell v. Bank One Trust Co. N.A.*, 803 N.E.2d 781, 785-89 (Oh. 2004) (“A ‘substantially younger’ test serves [the Ohio state discrimination law]’s purpose because it is logically connected to the discrimination that [the law] seeks to prevent.”); *Hardy v. GE*, 270 A.D.2d 700, 704 (N.Y. App. Div. 2000) (using *O’Connor*’s “significantly younger” test under state age discrimination law, where plaintiff and comparator were both more than 40 years of age); *Bd. of Educ. of Norwalk v. Comm’n on Human Rights & Opportunities*, 832 A.2d 660, 669 (Conn. 2003) (“In an age discrimination case, the complainant need not establish that the person who ultimately was offered the position does not fall within the protected class.”); *Knight v. Avon Prods.*, 780 N.E.2d 1255, 1263-64 (Mass. 2003) (“age discrimination may only logically be inferred when a plaintiff in the protected class, who is performing adequately, is terminated and replaced by someone who is ‘substantially younger.’”); *Kroptavich v. Pa. Power & Light Co.*, 795 A.2d 1048, 1056 (Pa. Super. Ct. 2002) (describing the fourth element of the prima facie case of age discrimination as showing that the plaintiff “suffered dismissal under circumstances giving rise to an inference of discrimination, such as the fact that the plaintiff was replaced by someone substantially younger.”) *Wilson v. Rubin*, 104 S.W.3d 39, 52 (Tenn. Ct. App. 2002) (“The fourth element of a prima facie age discrimination claim may be satisfied by presenting proof that the employee was replaced by someone substantially younger.”); *Hill v. BCTI Income Fund-I*, 23 P.3d 440, 450 & n.10 (Wash. 2001) (superseded by statute on other grounds) (applying *O’Connor* to state age discrimination case); *Guz v. Bechtel Nat’l, Inc.*, 8 P.3d 1089, 1121 (Cal. 2000) (stating that a “logical inference of age discrimination may arise where replacement is significantly younger, even if not below

statutorily protected age”); *Hartis v. Mason & Hanger Corp.*, 7 S.W.3d 700, 705 (Tex. App. 1999) (“We agree with the logic exemplified in *O'Connor*. And, given that it dealt with the federal equivalent to section 21.051 of the Texas Labor Code, we too hold that when one attempts to establish a prima facie case of age discrimination under section 21.051 by comparing his treatment with that of a younger individual, the difference in age between the two must be significant.”); *McCain v. City of Lafayette*, 741 So. 2d 720, 728-29 (La. Ct. App. 1999) (applying *O'Connor* rule for establishing a prima facie case under state age discrimination law); *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197-98 (Colo. App. 1997) (applying *O'Connor* to state age discrimination analysis); *Bergen Commer. Bank v. Sisler*, 723 A.2d 944, 956 (N.J. 1999) (“Similarly, in the age-discrimination context, the fourth element of the *McDonnell Douglas* test has been altered to eliminate the requirement that the plaintiff be replaced with someone outside the protected class”); *Seivers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 639-40 (Iowa 1998) (internal citations omitted) (“As the *O'Connor Court* concluded, ‘the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.’”); *West v. Conopco Corp.*, 974 S.W.2d 554, 559 (Mo. Ct. App., W. Dist. 1998) (applying *O'Connor* test to state age discrimination law); *Cates v. Regents of the N.M. Institute of Mining & Tech.*, 954 P.2d 65, 70-71 (N.M. 1998) (citing *O'Connor* and explaining that “In this case, both [plaintiff] and his alleged replacement are members of the protected class. At the termination, [plaintiff] was fifty-seven and Laws was fifty-six. However, the U.S. Supreme Court has held that the [ADEA] prohibits discrimination on the basis of age and not class membership.”); *Lytle v. Malady*, 566 N.W.2d 582, 599 (Mich. 1997) (“[W]e are guided by the

decision of the Supreme Court in *O'Connor v Consolidated Coin Caterers Corp*, 517 U.S. 308 (1996)).

Illinois, which has not expressly adopted *O'Connor*, has nonetheless held that state age discrimination plaintiffs need not show that their comparators are outside the protected age group. *Anderson v. Human Rights Comm'n*, 731 N.E.2d 371,383 (Ill. App. Ct. 2000) (internal citations omitted) (“While older cases have required that the discharged employee establish as part of the prima facie case that she was replaced by someone not a member of the protected class . . . recent cases have taken a more flexible approach . . . ‘an employee could be replaced by someone of the same class for a reason consistent with discharge based on unlawful discrimination. One such reason could be to strengthen the employer's defense against charges filed by the discharged employee.’”).

Overwhelming state authority weighs in favor of adopting the “substantially younger” standard rather than applying an “outside the protected class” standard that is of no probative value. West Virginia should join these states in taking this logical and effective approach in cases brought under the West Virginia Human Rights Act.

II. The Circuit Court Applied the Wrong Legal Standard in Assessing Whether Knotts Met Her Burden to Show That the Hospital’s Proffered Reason for Her Termination was Pretextual, Using a Framework That is Inconsistent With Both West Virginia Law and U.S. Supreme Court Precedent Construing the ADEA.

The circuit court’s alternative holding – that, assuming *arguendo* that Knotts had established a prima facie case, she was unable to show that the hospital’s proffered reason for her termination was a pretext – is also unfounded. The court mischaracterized the burden-shifting framework for proving age discrimination based on indirect evidence by suggesting that at the “pretext” stage of the analysis (step 3 of the *McDonnell Douglas* framework), the plaintiff must

show *both* that the employer's proffered reason for the adverse action was a smokescreen *and* that it actually concealed a specific discriminatory motive.

The court's formulation of the burden-shifting framework runs afoul of the seminal West Virginia case on which it purported to rely: *Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 74, 479 S.E.2d 561, 584 (W. Va. 1996). The court stated that to demonstrate pretext, the plaintiff must show that "a reasonable fact-finder could infer that [the defendant]'s proffered reason masks a decision based on an illicit factor, *i.e.*, age." Circuit Ct. Order at 8. In contrast, *Skaggs* pointed out that "pretext can be proved *without* establishing that the defendant is covering up an illicit motive." 198 W. Va. at 74, 479 S.E.2d at 584 (emphasis added). Moreover, while *Skaggs* explained that "pretext means . . . that the explanation offered by the defendant was not the reason that actually motivated the action taken against the plaintiff," *id.*, the court stated that "[t]he defendant is not required to persuade the Court that the proffered reason was the actual motivation for its decision," Circuit Ct. Order at 8. Although this statement correctly places the burden of persuasion on the plaintiff, it is misleading because it suggests that proving that the defendant's proffered reason is false is not sufficient to show pretext – a proposition that cannot be reconciled with *Skaggs*.

The court's formulation is likewise inconsistent with federal precedent construing the ADEA. In *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-49 (2000), the Court held that "a plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." The Court made clear that "pretext" is synonymous with a showing that the employer's proffered reason was not its actual reason, and that the inference of discrimination created by the *prima facie* case, in conjunction with a showing that the employer's

proffered reason is false, is ordinarily sufficient to survive summary judgment. *Id.* at 149. The Court clarified that a plaintiff need not present “additional, independent evidence of discrimination” at the pretext stage because “once the employer’s justification has been eliminated, discrimination may well be the most likely explanation, especially since the employer is in the best position to put forth the actual reason for its decision” *Id.* at 149, 147. Here, the circuit court’s articulation of the burden-shifting standards is in discord with these principles because it suggests that even where a plaintiff has established a prima facie case of discrimination, to withstand a summary judgment motion, he or she must do more than show that the employer’s proffered reason for the adverse action was not the actual one. *See* Circuit Ct. Order at 8.

The court’s formulation of the burden-shifting framework is worse than a semantic deficiency because it takes an incremental but significant step towards eroding plaintiffs’ rights in discrimination cases. The *Reeves* decision was necessary because a less precise formulation of the *McDonnell-Douglas* framework in a prior case led to confusion among the federal courts of appeals, some of which had adopted impermissibly stringent standards. *See Reeves*, 530 U.S. at 140 (discussing the varying formulations of the pretext standard used by the federal courts of appeals). Indeed, before *Reeves*, several federal courts applied a standard that, like the test articulated by the circuit court in the instant case, required plaintiffs to adduce additional evidence beyond a prima facie case and a showing that the employer’s proffered reason was false to survive summary judgment. *See, e.g., Reeves v. Sanderson Prods., Inc.*, 197 F.3d 688, 691 (5th Cir. 1999); *Vaughan v. MetroHealth Cos., Inc.*, 145 F.3d 197, 201-202 (4th Cir. 1998); *Fisher v. Vassar Coll.*, 114 F.3d 1332, 1336-37 (2d Cir. 1997). Just as the Supreme Court intervened to correct these decisions, this Court should step in to correct the standard used below

and to prevent later decisions from relying on its inaccurate formulation of the applicable framework.

Preserving the correct burden-shifting framework ensures that meritorious employment discrimination cases will continue to reach jury trial. Plaintiffs in employment discrimination cases will rarely be able to present direct evidence of discriminatory intent because “[e]mployers are rarely so cooperative as to include a notation in the personnel file, ‘fired due to age’; or to inform a dismissed employee candidly that he is too old for the job.” *Thornbrough v. Columbus & Greenville RR. Co.*, 760 F.2d 633, 638 (5th Cir. 1985); *see also LaMontagne v. Am. Convenience Prods., Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984) (“Even an employer who knowingly discriminates on the basis of age may leave no written records . . . and may communicate it orally to no one.”); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1981) (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental process.”). Consequently, most employment discrimination plaintiffs must rely on circumstantial evidence, and, to survive an inevitable motion for summary judgment,² they must prove their cases using the *McDonnell Douglas* framework. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O’Connor, J., concurring) (“The entire purpose of the *McDonnell Douglas prima facie* case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by.”).

However, interpreting the “pretext” stage of that framework to require the plaintiff to show both that the employer’s proffered reason is false and that it “masks” a discriminatory motive essentially requires the plaintiff to show direct evidence of discriminatory intent. That

² Summary judgment is entirely or partially granted in approximately 77 percent of employment discrimination cases. *See* Mem. from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Baylson, (Aug. 13, 2008), available at <http://1.usa.gov/10skB4g> (last visited Nov. 5, 2014).

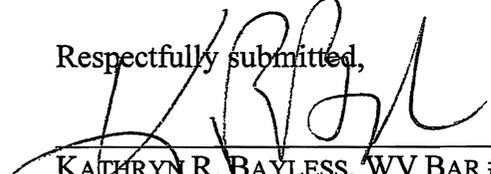
requirement defeats the entire purpose of the burden-shifting analysis and prevents worthy plaintiffs' cases from ever reaching the jury.

In the instant case, the circuit court's mischaracterization of the burden-shifting framework is particularly problematic because it comprises nearly all of the court's analysis. *See* Circuit Ct. Order at 10-11. The remainder of the court's discussion of this point is a cursory description of Knotts' pretext argument and a conclusory statement that a reasonable fact-finder could not find that the evidence met the stated standard. *See id.* In the absence of any further analysis, it is difficult to surmise that the court based its reasoning on anything other than its misstatement of the applicable legal standard.

CONCLUSION

For the foregoing reasons, the Court should reverse the circuit court's decision and remand for further proceedings.

Respectfully submitted,



KATHRYN R. BAYLESS, WV BAR # 272
Bayless Law Firm, PLLC
1607 W. Main St.
Princeton, WV 24740
kay@baylesslawfirm.com
304-487-8707

Counsel for Amicus Curiae AARP

November 6, 2014

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of W. Va. R. App. Proc. 38(c) because this brief is 14 pages long.
2. This brief complies with the typeface and type style requirements W. Va. R. App. Proc. 38(a) because the brief has been prepared in a proportionally spaced font using 12-point typeface for the text and 11-point font for the footnotes using Microsoft Word 2010.

Respectfully submitted,



KATHRYN R. BAYLESS, WV BAR # 272
Bayless Law Firm, PLLC
1607 W. Main St.
Princeton, WV 24740
kay@baylesslawfirm.com
304-487-8707

Counsel for Amicus Curiae AARP

November 6, 2014

CERTIFICATE OF SERVICE AND FILING

I, Kathryn R. Bayless, do hereby certify that service of the foregoing Brief of Amicus Curiae AARP in Support of Reversal was made upon the parties hereinbelow by depositing a true copy of the same in the United States Mail, postage prepaid, addressed as follows:

Allan N. Karlin
Sarah W. Montoro
Allan N. Karlin & Assocs.
174 Chancery Row
Morgantown, WV 26505

Mario R. Bordogna
Julie A. Arbore
Steptoe & Johnson PLLC
1005 Van Voorhis Rd., Ste. 400
PO Box 1616
Morgantown, WV 26507

Respectfully submitted,



KATHRYN R. BAYLESS, WV BAR # 272
Bayless Law Firm, PLLC
1607 W. Main St.
Princeton, WV 24740
kay@baylesslawfirm.com
304-487-8707

Counsel for Amicus Curiae AARP

November 6, 2014