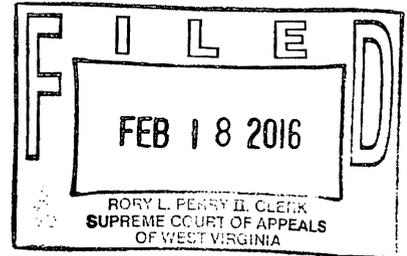


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AT CHARLESTON

Docket No. 160164



**KENNITA L. THOMAS and The WEST VIRGINIA
HUMAN RIGHTS COMMISSION,**

Petitioners

vs.

**APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF
KANAWHA COUNTY (15-AA-100)**

TRG CUSTOMER SOLUTIONS, INC.,

Respondent.

PETITIONER'S BRIEF

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I.

ASSIGNMENTS OF ERROR

1. The lower court erred by failing to follow the appropriate standard of review in reviewing the Findings of Facts and Conclusions of Law of the West Virginia Human Rights Commission.

2. The lower court erred when it failed to apply the plain language of the West Virginia Human Rights Act that states "It shall be an unlawful discriminatory practice...for any..person, (or) employer.. to engage in any form of reprisal.

3. The lower court erred when it improperly found that Petitioner did not have a cause of action for retaliatory failure to hire under the West Virginia Human Rights Act.

4. The lower court erroneously substituted its Findings of Fact and found that the Petitioner was not interested in a customer service representative job.

5. The lower court erred when it ruled that the Commission failed to apply the correct legal standard and could not modify the final decision of the Administrative Law Judge.

6. The lower court erred by refusing to apply *McDonnell Douglas v. Green* in a retaliatory failure to hire case filed pursuant to the West Virginia Human Rights Act.

7. The lower court erred when it substituted several findings of fact contrary to the substantial evidence of record.

II.

STATEMENT OF THE CASE

A. INTRODUCTION

The Final Order of the West Virginia Human Rights Commission accurately held that Brian Helton, Vice President of Operations for the Respondent, TRG Customer Solutions, Inc. (hereinafter TRG) told Jackie Denise Ward, Respondent's Director of Client Services, not to hire Kennita Thomas because she had actually filed a prior complaint of discrimination against TRG Insurance Solutions, Inc., and opposed unlawful discriminatory practices. At the time of Ms. Thomas' prior complaint, Brian Helton was vice president of TRG Insurance Solutions, Inc.

The finding was a result of the unrefuted testimony of Jackie Denise Ward, an employee in charge of hiring for Respondent TRG. This testimony was unrebutted and, in fact, substantiated when Janice Gwinn, the Respondent's Human Resources Manager, testified that she investigated this matter for the Respondent TRG Customer Solutions and determined that Kennita Thomas was not hired because she had filed a prior complaint of discrimination. Accordingly, there was direct evidence of illegal retaliation by the Respondent's Vice President which clearly demonstrated discriminatory animus.

As a direct result of the illegal retaliation against Kennita Thomas for expressing opposition to discriminatory treatment and participating in a prior lawsuit filed in the Beckley Human Rights Commission which she believed in good faith violated the West Virginia discrimination laws, Ms. Thomas suffered substantial damages.

The Final Order of the West Virginia Human Rights Commission was supported by substantial and overwhelming unrefuted evidence. The judgment of the Commission should have been affirmed. The vestiges of illegal retaliation which violate the West Virginia Human Rights Act must be eliminated.

B. STATEMENT OF FACTS

Kennita Thomas began working in telemarketing in October, 1996 with SOMAR. She began as a Sales Verifier wherein she would verify the agent's sales and make sure the agent was following script. In approximately 2000, SOMAR became TeleSpectrum. In addition to being a verifier, Ms. Thomas was a customer service representative and a licensed insurance agent at SOMAR and Telespectrum. As a customer service representative, she sold out-bound products such as Sprint Long Distance. App. 2 – 985.

In 2006 / 2007, TeleSpectrum became TRG Customer Solutions, Inc. While she was employed by the Respondent TRG Customer Solutions, Inc., her job duties included working as a licensed insurance agent and as an associate trainer. App. 2 – 988. As an associate trainer, Ms. Thomas had been trained on all the necessary systems for a campaign. App. 2 - 1316. In approximately 2002, Ms. Thomas received a promotion to become a mentor where she was trained to become a supervisor.

Between 1996 until the end of 2009, Ms. Thomas performed an array of duties in both out – bound calling and in –bound calling. Moreover, Kennita Thomas, as an associate trainer, was a part of a supervisory team. App. 2 - 1312. She attended the supervisors meetings. App. 2 - 1313. She had her own office. At one time, Ms.

Thomas did employee interviews. App. 2 - 1315. She also filled in for supervisors. App. 2 - 1316.

When TRG Customer Solutions, Inc. and TRG Insurance Solutions, Inc. split in 2008, Ms. Thomas was employed with TRG Insurance Solutions and performed several jobs in the licensing department, a trainer associate, quality analyst / trainer, and client auditing. App. 2 – 1314, 1315.

As a client auditor, Ms. Thomas was responsible for making sure the sales representatives adhered to the company's policies and procedures. App. 2 - 1315. As a quality analyst, Ms. Thomas monitored and coached customer service representatives. Ms. Thomas also worked as a payroll administrator for TRG Insurance Solutions. App. 2 - 1316. Kennita Thomas always received good evaluations and was an exemplary employee. App. 2 - 1318.

On July 29, 2009, Kennita Thomas filed a race discrimination complaint with the Beckley Human Rights Commission against TRG Insurance Solutions alleging that they removed her from her job as a payroll administrator and replaced her with a white female with less experience. App. 2 – 1316, 1317. Ms. Thomas actively participated in this litigation. The complaint was settled and a resolution Order was entered on October 19, 2009. Ms. Thomas filed her claim of discrimination with the Beckley Human Rights Commission in good faith. App. 2 - 1325.

TRG Insurance Solutions closed but most of their employees transitioned to TRG Customer Solutions, Inc., in the beginning of 2010. App. 2 - 987. In January, 2010, **just two and a half months after the resolution Order was entered Ms. Thomas applied for jobs with TRG Customer Solutions, Inc. (Tr. Vol. 2, p. 48).** Ms. Thomas

submitted written applications for the jobs of customer service representative and trainer along with a complete resume. Kennita Thomas was advised during her training position interview with the respondent that she would definitely be recommended to get a position within the company because of her qualifications and the time she had spent with TRG. (Tr. Vol. 2, p. 68). Kennita Thomas was not hired or offered any position by the Respondent.

A purported scheduling agreement to train for the position of customer service professional was never shown to Kennita Thomas or given to her during the application process of the Respondent. (Tr. Vol. 2, p. 56).

Kennita Thomas credibly testified that if she had been offered employment at TRG Customer Solutions, Inc., in January and February 2010, she would have accepted that employment because “(she) had three children to support and (she) had worked for that company for over – well over 13 years at that point and (she) was comfortable there.” (Tr. Vol. 2, p. 59).

Brian Helton held a high level management position for both TRG Insurance Solutions and Respondent TRG Customer Solutions. Janice Gwinn, Respondent’s Human Resources Manager, also testified that Brian Helton worked for TRG Insurance Solutions before it closed, then worked for TRG Customer Solutions. (Tr. Vol. 1, pgs. 310 -311).

At one point, Ms. Gwinn testified that as an employee of Respondent TRG Customer Solutions Inc., she placed the ad for Human Resources Generalist in Beckley and helped screen job applications for the Respondent. (Tr. Vol. 1, pgs. 314, 315).

Even though she was helping TRG Insurance Solutions, Janice Gwinn remained on Respondent TRG Customer Solutions' payroll.

Jackie Denise Ward, the Director of Client Services for Petitioner TRG Customer Solutions, who was partially in charge of hiring in 2009/2010, testified that she had worked with Kennita Thomas since 1996. Additionally, Ms. Ward opined that Kennita Thomas was qualified for the **custom service representative** position.

On or about August 5, 2010 the petitioner, Kennita Thomas, filed a verified amended complaint with the West Virginia Human Rights Commission properly alleging that TRG Customer Solutions, Inc. had engaged in one or more unlawful discriminatory practices including illegal retaliation in violation of W. Va. Code §5-11-9. The amended complaint states, in pertinent part, as follows:

On or about January 24, 2010, Respondent TRG Customer Solutions, Inc treated me differently from co-workers who had not previously filed a discrimination complaint. As an act of reprisal, Respondent failed to hire me.

I have been discriminated against due to Respondents' Act of Reprisal, in that: **Respondent failed to offer me any other position.**

On or about January 24, 2010, based upon information and belief, because of my race and/or reprisal for previously filing and participating in a race discrimination complaint; Respondent failed to hire me.
App. 1 – 15.

C. PROCEDURAL BACKGROUND

This matter matured for public hearing on December 17, 2012 at the Mine Safety Health Administration Academy, Airport Road, Beckley, West Virginia pursuant to

proper notice. The hearing concluded on December 18, 2012 as the parties were able to present their case in two (2) days.

The evidence was presented before Administrative Law Judge *Pro Tempore*, Frank Litton, Jr. The Complainant, Kennita L. Thomas, was present and represented by her counsel, Dwight J. Staples, Esq. and Gail Henderson-Staples, Esq. of the Law Firm of Henderson, Henderson & Staples, L.C. The Respondent, TRG Customer Solutions, appeared through its corporate representative, Steve Thomas, and was represented at the public hearing by Justin M. Harrison, Esq. and Shantel Walker, Esq. of the Law Firm of Bowles Rice McDavid Graff & Love, LLP. Subsequent to the public hearing, Attorney Maryl Sattler and the law firm of Bailey & Glasser, LPP filed their "Notice of Substitution Of Counsel" on or about March 21, 2013. On March 14, 2014, the Administrative Law Judge *Pro Tempore* filed a Final Order finding in favor of the Complainant.

On July 15, 2014, the Commission issued an Order of Remand and Denying Respondent's Motion To Stay as Moot upon Remand for specific findings on: one, a sum certain calculation as to Complainant's damages including back pay; two, Complainant's petition for additional costs and fees; and three, an assessment of the Commission's costs.

Administrative Law Judge *Pro Tempore* Frank T. Litton, Jr. issued a Supplemental Final Order on October 30, 2014. Pursuant to the Supplemental Final Order, Kennita Thomas was awarded a sum certain for back pay, additional attorney fees and costs. The Administrative Law Judge *Pro Tempore* also ruled that the Commission was entitled to recover its costs in this matter against the Respondent.

On November 26, 2014, Bryan R. Cokeley, Esq. and Mark C. Dean, Esq., of the Law Firm of Steptoe & Johnson, PLLC filed an agency level appeal contesting both the Final Decision dated March 14, 2014 and the Supplemental Final Decision dated October 30, 2014. The Complainant, Kennita Thomas filed a "Memorandum in Opposition To Respondent's Petition on December 16, 2014.

The West Virginia Human Rights Commission reviewed all documents filed by the parties, the Final Decision and Supplemental Final Decision of the Administrative Law Judge Pro Tempore, Frank T. Litton, Jr. On July 17, 2015, the Commission's Final Order was entered affirming the administrative law judge's decision in part and modifying the decision.

The Respondent TRG Customer Solutions, Inc., filed their Notice of Appeal and Petition To Appeal with the Circuit Court of Kanawha County, West Virginia on August 14, 2015. The Petitioners Kennita Thomas and the agency, the West Virginia Human Rights Commission, filed memorandums in Opposition; and, the Respondent filed replies thereto. On January 19, 2016, the Honorable Charles King of the Circuit Court of Kanawha County reversed the Final Order of the West Virginia Human Rights Commission.

III.

SUMMARY OF ARGUMENT

First, the lower court usurped the role of the Commission and the Administrative Law Judge and substituted his findings of fact. Second, the lower court abused its discretion in reversing the Commission's findings which were supported by the reliable, probative and substantial evidence of the record. Third, the lower court failed to follow

the plain language of the West Virginia Human Rights Act in determining the ultimate question of whether TRG Customer Service Solutions, Inc. failed to hire Kennita Thomas because she had previously opposed unlawful discriminatory practices. Finally, the lower court's decision was clearly wrong.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully asserts that oral argument is necessary due to: 1) the lower court's misapplication of settled law 2) the lower court's abuse of discretion where the law governing that discretion is settled, and 3) the lower court's ruling is based upon insufficient evidence and the decision was against the substantial weight of the evidence.

V.

ARGUMENT

A. STANDARD OF REVIEW

THE SCOPE OF JUDICIAL REVIEW IS LIMITED AND THE FINDINGS OF FACT OF THE HUMAN RIGHTS COMMISSION ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

The standard of review for contested cases brought pursuant to the West Virginia Human Rights Act is set forth in *Shepherdstown Volunteer Fire Department v. State ex rel. Human Rights Commission*, 172 W.Va. 627, 309 S.E. 2d 342 (1983). In syllabus point 2, the Supreme Court set forth:

Upon Judicial review of a contested case, under the West Virginia Administrative Procedure Act, Chapter 29A, Article 5, Section 5 (g), the circuit court may affirm the order or decision of the agency or remand the case for further proceedings. The circuit court

shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decisions or order are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedures; or (4) Affected by other error of law; or (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Based upon the foregoing, it has been held that a finding of fact by the West Virginia Human Rights Commission should be sustained if either supported by substantial evidence or unchallenged. *West Virginia Human Rights Commission v. United Transportation Union, Local 655,167 W.Va. 282, 280 S.E. 2d 653 1981*). Such a finding of fact should not be reversed on review unless "clearly wrong in view of the reliable, probative and substantial evidence on the whole record, *State ex rel. State Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W.Va. 711, 329 S.E. 2d 77, 86 (1985).

The United States Supreme Court has repeatedly held that in disparate treatment discrimination cases a finding that there was intentional discrimination is a finding of fact. *Pullman-Standard v. Swint*, 456 U.S. 273, 72 L. Ed. 2d 66, 102 S. Ct. 1781 (1982); *Anderson v. Bessemer City* 470 U.S. 564, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). In *Pullman-Standard* the court states:

Discriminatory intent is a finding of fact to be made by the trial court; it is not a question of law and not a mixed question of law and fact of the kind that in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent. Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a

factual showing of something less than actual motive. (Emphasis Added).

In applying the “clearly wrong” standard of review, the Supreme Court mandates that it should be applied in an extremely narrow manner.

This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently... If the district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Where there are two permissible views of the evidence, the fact finder’s choice between them cannot be clearly erroneous.** [Emphasis Added].

The West Virginia Supreme Court had adopted the standard as applied in *Anderson v. Bessemer City*, *supra*, *Frank’s Shoe Store v. Human Rights Commission*, 365 S.E.2d 2511 W. Va. 1986. In *Frank’s Shoe Store*, our Honorable Supreme Court warns against frustrating the administrative process.

If in reviewing administrative decisions or orders in contested cases, the courts routinely substitute their judgments for those of the agencies, the utility of administrative adjudication would be lost. A. Neely, *Administrative Law In West Virginia* 5.57 at 438 (1982).

Moreover, the West Virginia Supreme Court has explained the reviewing court’s role in *Frank’s Shoe Store*, supra:

[A] reviewing court must evaluate the record of the agency’s proceeding to determine whether there is evidence on the record as a whole to support the agency’s decision. The evaluation is conducted pursuant to the administrative body’s findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts. (citation omitted) ___ W.Va. at ___, 365 S.E.2d at 254.

The Administrative Law Judge *Pro Tempore* carefully listened, evaluated, and

perused the entire transcript and exhibits, assessed the credibility of the witnesses according to their demeanor during the trial, and prepared thorough Findings. After reviewing the entire record, the Commission concurred with the finding of illegal discrimination based on retaliation. Accordingly, the Commission adopted said Findings with a modification to the Administrative Law Judge's wording.

B. THE CIRCUIT COURT IMPROPERLY FOUND THAT MS. THOMAS DID NOT HAVE A CAUSE OF ACTION FOR RETALIATORY FAILURE TO HIRE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT.

The Circuit Judge treated this issue in his discussion of Assignment of Error No. 1. App. 1 – 6. Ms. Thomas asserts that she was not hired by the Respondent TRG in retaliation for her earlier filing of a civil rights complaint against its corporate predecessor. The Circuit Judge rejected that cause of action on the ground that the “Supreme Court of Appeals has stated in no uncertain terms that it ‘has not recognized a cause of action for failure to hire based upon an applicant’s history of filing a lawsuit against a former employer” (Final Order p. 6, quoting *Toth v. Board of Park & Recreation Commissioners*, 215 W.Va. 51, 55, 593 S.E.2d 579, 580 (2003)).

It is important to note that the Court did not actually reject such a cause of action. In fact, the Court did not consider the issue of its existence in West Virginia jurisprudence at all:

After clarifying that partial summary judgment orders, like summary judgment orders, must contain adequate findings and conclusions to permit meaningful review, we conclude that we need not reach the issue of whether to recognize the cause of action suggested by Ms. Toth. *We need not reach the issue* because, assuming arguendo we were to recognize such a cause of action, Ms. Toth did not present sufficient evidence to resist summary judgment in favor of the defendant on this claim.

Id., 215 W.Va. at 52, 593 S.E.2d at 579 (emphasis supplied). As a result, the Circuit Court's statement that this Court has not recognized a cause of action for a failure to hire is technically true but overbroad and highly misleading. In short, this Court neither recognized nor precluded such a cause of action. It simply never discussed it. The Circuit Court reliance on *Toth* for its finding could hardly be more insubstantial.

Although the Circuit Judge did not discuss the decision in his Final Order, this Court had earlier considered another case in which the "failure to hire" concept made another appearance. *Burkhamer v. City of Montgomery*, 2014 W.Va. Lexis 585 (Mem.Op., filed May 30, 2014). As in *Toth*, this Court never ruled on the existence or nonexistence of the "failure to hire" cause of action. In that case Mr. Burkhamer charged he suffered a "failure to hire" retaliation because he had (a) arrested the local Street Commissioner for DUI; and (b) testified on behalf of an officer at an administrative hearing. The Court rejected his argument, as follows:

In the present appeal, petitioner argues that respondent refused to hire him because he arrested respondent's Street Commissioner for DUI and provided testimony favorable to Lt. Ivy during his administrative hearing. Petitioner argues that he should have been able to perform his job of keeping impaired drivers off the road and to testify truthfully about a fellow officer's performance without fear of being denied employment for doing so. In a very cursory manner, and without articulating a clear legal analysis, petitioner asserts that his "refusal to hire" claim involves the same "rationale and public policy concerns" as those set forth in *Harless [vs. First National Bank of Fairmont]*, 162 W.Va. 116, 246 S.E.2d 270 (1978), in which this Court first recognized that an employee has a claim for retaliatory discharge where an employer's motivation for discharging employee contravenes some substantial public policy principle. 162 W.Va. at 124, 246 S.E.2d at 275. *Petitioner's brief includes neither a discussion nor analysis of Harless, and fails to include any other legal authority tending to support his argument that West Virginia should recognize a failure to hire claim and that the circuit court committed error in granting respondent's motion for*

summary judgment. Accordingly, we find no error in the circuit court's order.

Id. at *6 to *7 (emphasis supplied).

Conceptually, the “failure to hire” cause of action is inexorably intertwined with wrongful discharge cases. There can be no doubt under West Virginia law that it is unlawful to fire an employee because of their sex, race, or disability. Likewise, there can be no doubt that under West Virginia law it is unlawful to refuse to hire someone on account of their sex, race or disability. In the absence of any retaliatory “failure to hire” cause of action, it is easy to see that a loophole arises in the application of West Virginia Human Rights Law. Thus, an employer cannot refuse to hire an applicant on account of their sex, race or disability. If, however, that same person had earlier lodged a claim of discrimination prior to the date they sought to be rehired by the same vice president who worked for another employer, then the employer would be free to refuse to hire them even though they would not have that right if the applicant were seeking employment for the first time. Of course race, sex or disability would be at the bottom of both failures to hire. One of them would have a remedy under State (and federal) law; the other would not. Surely, this result cannot satisfy the West Virginia public policy against discrimination in hiring, whether initially or by way of a rehire.

The West Virginia Human Rights Act includes a substantial public policy.

W. Va. Code §5-11-2, states as follows:

It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human rights or civil

right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. Equal opportunity in housing accommodations or real property is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability or familial status.

The denial of these rights to property 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.

The Administrative Law Judge and the West Virginia Human Rights Commission properly applied the West Virginia Human Rights Act and determined that the statute prohibits this retaliatory conduct and that Ms. Thomas satisfied a prima facie case of retaliatory failure-to-hire. App. 1 – 680.

Specifically, the Commission found that Section 5-11-9 of the Human Rights Act defines illegal discrimination which is prohibited by the Act. App. 1 – 680. Retaliation, in particular, is prohibited as an unlawful employment practice pursuant to W. Va. Code §§ 5-11-9(7) (A) and 5-11-9(7)(C), which provide that:

It shall be an unlawful discriminatory practice . . . [f]or **any person**, [or] **employer**. . .to:

- (A) **Engage in any form of threats or reprisal**, or to engage in, acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;

. . .

- (C) **Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint**, testified or assisted in any proceeding under this article. [Emphasis Added].

To establish a prima facie case of retaliation, the burden is on the complainant to prove, ultimately by a preponderance of the evidence, the following facts: (1) that the complainant engaged in a protected activity, e.g., opposing unlawful employment practices; (2) that the employer was aware of the protected activity; (3) that an adverse action was subsequently taken against the complainant, and (4) that the adverse action was retaliatory in nature or, in the absence of such evidence, was sufficiently temporally related to the protected activity to all an inference of retaliatory motive on the part of the employer. *Mace v. Pizza Hut, Inc.*, 180 W. Va. 469, 377 S.E.2d 461, 463 (1988); see also *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986); and *Brammer v. West Virginia Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990).

The Commission found that the complainant had engaged in a protected activity under the statute by filing a discrimination complaint against TRG Insurance Solutions with the Beckley Human Rights Commission on July 29, 2009. TRG Customer Solutions was aware of the complaint or protected activity since Brian Helton was the vice president of both TRG Insurance Solutions and TRG Customer Solutions. The Commission also found that there was an adverse employment decision or action taken when TRG Customer Solutions failed to hire Ms. Thomas even though she had submitted a completed application for the position of trainer, a partial application for the position of customer service representative and a complete resume for all jobs. Additionally, the failure to hire Ms. Thomas was retaliation since she would have been hired but for Brian Helton, Vice President, telling the hiring official not to hire Ms. Thomas because she had filed a prior complaint of discrimination.

In fact, the decision in *Harless vs. First National Bank of Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978) offers another solution that supports Ms. Thomas's right to relief. Certainly, a failure to hire somebody because they had earlier sought redress on account of an alleged act of racial discrimination implicates "some substantial public principle. *Burkhamer v. City of Montgomery*, *supra*, 2014 W.Va. Lexis 585 at *6. Indeed, the rationale for *Harless* supports Ms. Thomas's right to a remedy for the "failure to hire" injury she alleges. A recent federal decision from West Virginia explained the meaning of *Harless* in this context, as follows:

The proposition for which *Harless* stands is clear: When an employee is discharged in contravention of a substantial public policy, but no cause of action is provided under that policy, courts may infer a cause of action. Accordingly, a *Harless* cause of action is superfluous when a public policy is enforceable by a statutory cause of action. See e.g. *Hope v. Bd. of Dirs.*, 2013 U.S. Dist. LEXIS 92513, *8-9 (S.D. W. Va. July 2, 2013) ("With a clear mechanism in place to enforce this public policy, a *Harless* cause of action is unavailable."); *Hill v. Stowers*, 224 W. Va. 51, 680 S.E. 2d 66, 76 (W. Va. 2009) ("In *Harless*, this Court found that a private cause of action was appropriate because there was no other mechanism available to enforce the public policy at issue."); *Guevara v. K-Mart Corp.*, 629 F. Supp. 1189, 1192 (S.D. W. Va. Mar. 13, 1986) (noting another instance of a court implying a cause of action, stating that "[t]he Court noted in *Hurley* that without the implied cause of action there was an 'absence of any other method of enforcing the declared right.'").

Jackson v. Vaughn, 2015 U.S. Dist. Lexis 143472 at *6 to *7 (N.D.W.Va., filed October 22, 2015).

Thus, if there is no remedy for a retaliatory "failure to hire" under the West Virginia Human Rights Act, then *Harless* suggests that a remedy should be fashioned since the conduct violates a substantial public policy. In other words, even if one assumes, *arguendo* only, that there is no cause of action for a retaliatory "failure to hire"

under the West Virginia Human Rights Act, then principles from *Harless* can be used to fill the gap. Otherwise, the loophole noted above will continue to be available to employers like TRG to evade both the letter and the spirit of West Virginia antidiscrimination law.

In fact, however, the Court need not resort to a *Harless*—type remedy in this case. This Court has already found that a failure to rehire gives rise to a remedy under the Human Rights Act. *Vandevender v. Sheetz, Inc.*, 200 W.Va.591, 490 S.E.2d 678 (1997). The case involved the concepts of retaliatory discharge and a refusal to rehire.

The Human Rights and the Workers' Compensation Acts were both implicated:

In her original complaint, Appellee asserted two theories against Sheetz, both predicated on the company's failure to rehire her following discharge subsequent to a work-related injury. In her amended complaint, she included theories of liability for Sheetz' alleged failure to accommodate her physical limitations and for committing an unlawful reprisal in retaliation for Appellee's filing of a workers' compensation claim. Appellee's theories of recovery in both her original complaint and the amended complaint were expressly pled as violations of the Human Rights Act and the Workers' Compensation Act.

Id., 200 W.Va. at 600. 490 S.E.2d at 687.

The jury in *Sheetz* returned a verdict for Ms. Vandevender that Justice Starcher characterized as “outrageous” in amount. 200 W.Va. at 607-08. 490 S.E.2d at 694-95. Yet on appeal this Court was concerned only with the amount of the punitive damages award, not the propriety of an award for a failure to rehire in the first place.

Ms. Thomas can therefore justify an award for a “refusal to hire” on a number of grounds. First, that the West Virginia Human Rights Act specifically prohibits illegal retaliation by **any person or an employer**. The legislature has already determined that

this type of retaliation is illegal. Second, if the existence of the cause of action is still an open question in West Virginia, such an award is appropriate because in its absence an unseemly loophole exists in West Virginia discrimination law. Surely, that is a matter of fundamental West Virginia public policy. Third, even if, arguendo only, the Human Rights Act does not explicitly provide for such an award, the principles outlined in *Harless* can be utilized to fill that gap. Finally, by following the example this Court set in *Sheetz*, it can be seen that damages are available to redress a failure to rehire. Surely that principle applies with equal force to Ms. Thomas in this case. Accordingly, the Circuit Judge's refusal to recognize the retaliatory failure to hire claim and approve the award of damages on this score is reversible error.

C. THE LOWER COURT ERRONEOUSLY SUBSTITUTED ITS FINDINGS OF FACT AND FOUND THAT THE PETITIONER WAS NOT INTERESTED IN A CUSTOMER SERVICE REPRESENTATIVE JOB.

1. KENNITA THOMAS ARTICULATED HER INTEREST IN A CUSTOMER SERVICE REPRESENTATIVE POSITION.

The lower Court erroneously found that the Petitioner, Kennita Thomas was not interested in a customary service position when, in fact, Ms. Thomas testified that she would have taken a position as a customer service position because she wanted to work.

Q. What position did you apply for?

A. Associate trainer and I also filled out an application for customer service representative.

Q. And attached to your employment applications that you applied, was your resume attached to those?

A. Yes.

App. 2 – 1319.

...

Q. And so that the record is clear, would you have accepted the position of trainer if you had been selected ma'am?

A. Yes.

Q. **Would you have accepted the position of customer service representative had you been selected?**

A. **Yes.**

Q. Would you have accepted other supervisory positions that were available had you been selected?

A. Yes.

Q. Did you tell people or employees of TRG Insurance Solutions that you wanted to work?

A. Yes.

App. 2 – 1322.

Ms. Thomas also gave unrefuted credible evidence that one of her interviewers expressed that she would “recommend for (her) me to get another position somewhere within the company because of my qualifications and the time that I had spent with TRG.” App. 2 – 1323.

Ms. Thomas gave unrefuted testimony that she would have accepted a customer service position if offered.

Q. Were you ever contacted, ma'am, by TRG and told that you had the position of a customer service representative and to show up for training?

A. No.

Q. **Were you ever contacted by TRG Customer Solutions and told that you had the position -- you had been hired in the position of customer service representative?**

A. **No.**

Q. And to report to work?

A. No.

Q. Were you ever e-mailed?

A. No.

- Q. Were you ever called?
A. No.
Q. Were you sent anything in writing, a letter?
A. No.
Q. **If you had gotten such an offer, would you have accepted an offer of employment from TRG Customer Solutions?**
Q. **If you have gotten such an offer, would you have accepted employment with TRG Customer Solutions at the time that they were hiring people in January and February of 2010?**
A. **Yes.**
Q. And why would you have taken a job with TRG Customer Solutions when they were hiring people in January and February of 2010?
A. Cause I had three children to support and I had worked for that company for over – well, over 13 years at that point and that’s, you know, I was comfortable there.

App. 2 – 1321.

In Kennita Thomas’ verified complaint, she states that the Respondent failed to offer her any position.

The substantial evidence of record is contrary to the lower court’s finding of fact that Kennita Thomas was “interested only in supervisory positions with (Respondent), and/or positions which paid at the same rate of pay as her previous job with Insurance Solutions.” App. 1 – 3.

2. THE RESPONDENTS’ EMPLOYEES TESTIFIED THAT KENNITA THOMAS WAS QUALIFIED FOR A CUSTOMER SERVICE POSITION AND WOULD HAVE HIRED HER.

The Respondent hiring officer, Jackie Denise Ward, testified that she was interested in hiring “people who were interested in maintaining employment.” App. 2 –

1363. She specifically wanted the Petitioner Kennita Thomas to be hired. App. 2 – 1363.

Ms. Ward gave credible testimony that Kennita Thomas was “clearly qualified” for the customer service position.

Furthermore, Ms. Ward testified that she would have hired Kennita Thomas for a position as a customer service representative except for Brian Helton’s comments directing her to not hire Ms. Thomas.

- Q. And made a decision to hire a customer service representatives?
A. Right, not the sole decision but I’m sure that there were several individuals that I did.
Q. Did you know that Kennita Thomas had applied for that position?
A. No, I did not.
Q. If you’d have known that, would you have hired her?
A. Yes.
Q. **Would you have hired her even after your conversation with Brian Helton?**
A. **No, because of that.**
Q. Because of –
A. I felt like that threatened my job. That’s to me, I would have viewed that as insubordination.
App. 2 – 1366, 1367.

D. THE TRIAL COURT ERRED WHEN IT RULED THAT THE COMMISSION FAILED TO APPLY THE CORRECT LEGAL STANDARD AND COULD NOT MODIFY THE FINAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

The question presented is whether the West Virginia Human Rights Commission erred in applying the correct legal standard in analyzing a retaliation claim and whether it can modify a Final Decision of an Administrative Law Judge. Pursuant to the Rules of Practice and Procedure Before the West Virginia Human Rights Commission, W. Va. St.

R. §77-2-10.6, the West Virginia legislature has explicitly given the Human Rights Commission the authority to “modify” a final Order of an Administrative Law Judge. The rule states,

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the Commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the Commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

The lower court states in “Assignment No. 4” that use of the word “prove” by the Administrative Law Judge voids the Commission’s ruling. App. 1 – 10, 11. It is quite obvious that the Commission applied the correct legal standard.

First, the Final Decision of Administrative Law Judge Frank Litton, Jr. entered on March 14, 2014 states,

A discrimination case may be proven under a disparate treatment theory, which requires that the Complainant prove a discriminatory intent on the part of the Respondent. The Complainant may prove discriminatory intent by a three step inferential proof formula first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); and adopted by the West Virginia Supreme Court in *Shepardstown Volunteer fire Dept. v. West Virginia Human Rights Comm’n*, 172 W. Va. 627, 309 S.E.2d 342 (1983). Under this formula, The Complainant must first establish a prima facie case of discrimination; **the Respondent has the opportunity to articulate a legitimate nondiscriminatory reason for its actions**; and finally the Complainant must show that the reason proffered by the Respondent was not the true reason for the decision, but rather pretext for discrimination.
App. 1 – 247, 248.

In explaining his finding of discriminatory intent, Administrative *Pro Tempore* Law Judge Frank Litton, Jr. states in his Final Decision as follows:

... the Complainant has proven by a preponderance of the credible evidence that the Respondent failed to hire her in reprisal for her actions taken against Insurance Solutions in opposition to practices or acts forbidden under the West Virginia Human Rights Act, W. Va. Code §5-11-1, et seq. App. 1 - 249.

More importantly, the Administrative Law Judge *Pro Tempore* specifically found that “the Respondent’s stated reasoning for not hiring the Complainant as a customer service representative is not credible”. App. 1-257. Specifically, the Judge stated,

The Respondent’s stated reasoning for not hiring the Complainant as a customer service representative is not credible. Ms. Ward testified she would have hired the Complainant as a customer service representative. The evidence in the records demonstrates that the Complainant was qualified to perform the duties of a customer service representative. **The Respondent claims that the Complainant did not appear for training for the customer service position; however, the Complainant testified that she was never notified of any training.** Further, the Respondent failed to adduce any evidence whatsoever that the Complainant had been offered a customer service representative position or that she had been notified to attend any training. App. 1 - 257.

A proffered reason is pretext if it is not the true reason for the decision. Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 (W. Va. 1995).

Further, the Administrative Law Judge *Pro Tempore* hereinafter ALJPT stated:

Based upon the weight of the credible evidence in the entire record the Respondent has failed to meet its **burden of proving** a legitimate nondiscriminatory reason for failing to hire the Complainant for a customer service representative position. App. 1 – 258.

The West Virginia Human Rights Commission’s Final Order was entered on July 17, 2015 and it modified the Final Order of the Administrative Law Judge’s Decision.

Later, the ALJPT states "...the Respondent has failed to meet its burden of proving a legitimate nondiscriminatory reason..." (ALJPT's Final Decision, p. 24). The Commission finds that after a review of the legal discussion and framework, in addition to the articulation of the McDonnell Douglas test, the ALJPT applied the proper standard and did not hold the Respondent to a higher standard, despite the typographical error of "burden of proving." **The Commission believes that the sentence should read "...burden of providing..." Because it does not appear to have had an effect on the ALJPT's Final Decision, the Commission sees no further action to take, other than correct the typographical error. App. 1 – 679.**

Hence, the Commission correctly modified the Final Order of the ALJPT in accordance with its authority as outlined in Rule 10.6 of the Rules of Practice and Procedure Before the West Virginia Human Rights Commission. Simply put, the Commission understood that the wording was wrong and a modification of the wording to "burden of providing" was within its authority, consistent with West Virginia law and the evidence on record.

The Commission found that the respondent failed to provide or articulate a "**legitimate**" reason for failing to hire Ms. Thomas. First, the respondent alleges she did fill out a complete application for the customer service position. Next, the respondent states that we hired her as a customer service representative but she just did not show up for work. These positions are contradictory on their face and certainly the ALJPT and the Commission were correct in finding that the respondent did not articulate or **provide** "a **legitimate** nondiscriminatory reason" for failing to hire Ms. Thomas. The respondent can not have it both ways.

E. THIS COURT SHOULD NOT APPLY THE “BUT FOR” CAUSATION STANDARD SET OUT IN THE U.S. SUPREME COURT’S NASSER CASE.

In his disposition of TRG’s Assignment of Error No. 3, App. 1-89, the Circuit Judge determined that the proper standard to be applied was “the ‘but for’ causation standard espoused by the United States Supreme Court in “*Univ. of Texas Sw. Med. Cir. v. Nasser*, [570 U.S. ____], 133 S. Ct. 2517, [186 L. Ed. 2d 503] (2013)” App. 1-8. The rationale for this holding was the supposed “command[ment] that the WVHRA is to be construed consistent with the prevailing application of Title VII unless the statute’s language demands otherwise” App. 1-8. Here, as we will see, the language does demand otherwise.

At the same time, however, one notes that *Nasser* has never once been cited in any decision by this Court. That fact alone throws the Circuit Court’s certainty on this point into question. In addition, this Court has declined to apply a federal interpretation of the ADA to the disability provisions of the WVHRA. *Stone v. St. Joseph’s Hospital*, 208 W.Va. 91, 538 S.E.2d 389 (2000). As the Court noted, the disability provisions of the WVHRA “represent an independent approach to the law of disability determination that is not mechanically tied to federal disability discrimination jurisprudence.” *Stone, supra*, 208 W.Va. at 106, 538 S.E.2d at 404. It is true that *Stone* involved disability law, W.Va. Code §5-11-9(1), whereas the case at hand involves retaliation, which is governed by W.Va. Code § 5-11-9(7)(C), but there seems little reason to carve up the WVHRA into different interpretative schemes with respect to the alleged primacy of federal interpretative law. To do so would “amount to nothing more than Pavlovian responses to federal decisional law.” *Stone, supra*, 208 W.Va. at 112, 538 S.E.2d at 410

(McGraw, J., concurring and dissenting). *See also Eastern Associated Coal Corp. v. Massey*, 373 F.3d 530, 536 (4th Cir. 2004) (“it is not clear that West Virginia courts have interpreted the WVHRA as federal courts have construed the ADA”).

The Circuit Court’s error is particularly underscored by the decision in *Foster v. University of Maryland—Eastern Shore*, 787 F.3d 243 (4th Cir. 2015). In *Foster* the Fourth Circuit considered the effect of *Nassar* upon retaliation cases, of which the case at hand is one:

Historically, we have considered Title VII retaliation claims under the same standard as discrimination claims ... In *Nassar*, however, the Supreme Court held that the lessened causation standard of § 2000e-2(m) does not apply to retaliation claims. 133 S. Ct. at 2533. Unlike discrimination plaintiffs, retaliation plaintiffs are limited to “traditional principles of but-for causation” and must be able to prove that “the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” *Id.*

Id. at 249. In other words, the question to ask is “what effect, if any, *Nassar* has on a retaliation plaintiff’s burden under the McDonnell Douglas framework.” *Id.* at 250.

The Fourth Circuit determined that the effect of *Nassar* on this burden was nonexistent for the following reasons:

As an initial matter, the causation standards for establishing a prima facie retaliation case and proving pretext are not identical. Rather, the burden for establishing causation at the prima facie stage is “less onerous.” *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1989). Adopting the contrary rule (and applying the ultimate causation standard at the prima facie stage) would be tantamount to eliminating the McDonnell Douglas framework in retaliation cases by restricting the use of pretext evidence to those plaintiffs who do not need it: If plaintiffs can prove but-for causation at the prima facie stage, they will necessarily be able to satisfy their ultimate burden of persuasion without proceeding through the pretext analysis. Conversely, plaintiffs who cannot satisfy their ultimate burden of persuasion without the support of pretext evidence would never be permitted past the prima facie stage to reach the pretext stage. Had

the *Nassar* Court intended to retire McDonnell Douglas and set aside 40 years of precedent, it would have spoken plainly and clearly to that effect. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (stating that the Conley pleading standard "has earned its retirement" and "is best forgotten"). But it did not do so. *We therefore hold that Nassar does not alter the causation prong of a prima facie case of retaliation.*

Id. at 251 (emphasis supplied). Accordingly, the court went on to state:

We next consider whether *Nassar* alters the pretext stage of the McDonnell Douglas framework. *Because the pretext framework already requires plaintiffs to prove that retaliation was the actual reason for the challenged employment action, we conclude that it does not.*

Id. at 252 (emphasis supplied).

Any attempt to graft a *Nassar*-type test onto Ms. Thomas's burden of proof misunderstands both *Nassar* and the McDonnell Douglas framework that has been applied for so long to discrimination cases in West Virginia:

Nassar's but-for causation standard is not the "heightened causation standard" described by the district court, J.A. 1166-67, and does not demand anything beyond what is already required by the McDonnell Douglas "real reason" standard. A plaintiff who can show that retaliation "was the real reason for the [adverse employment action]," *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007), will necessarily be able "to show that the harm would not have occurred in the absence of--that is, but for--the defendant's conduct," *Nassar*, 133 S. Ct. at 2525 (internal quotation marks and citation omitted). In other words, the statements "the real reason for Foster's termination was her employer's retaliation" and "Foster would not have been terminated but for her employer's retaliatory animus" are functionally equivalent.

Id. In short, the court stated:

We conclude ... that the McDonnell Douglas framework has long demanded proof at the pretext stage that retaliation was a but-for cause of a challenged adverse employment action. *Nassar* does not alter the legal standard for adjudicating a McDonnell Douglas retaliation claim.

Id. Thus, what *Nassar* supposedly would add to WVHRA retaliation law is in fact something that was inherent in that law from the beginning. Any application of *Nassar* to the case at hand would be not only incorrect but redundant as well. TRG's *Nassar* argument is simply a red herring and need not have any effect on the proper disposition of this petition for appeal.

In its response to TRG's Petition of Appeal to the Circuit Court ("the Response"), the Human Rights Commission discussed the Fourth Circuit decision in *Foster* at some length (Response pp. 14-15). The Commission then cited retaliatory employment cases from other jurisdictions in which *Nassar* was found not to be determinative or even applicable (Response pp. 15-16). TRG then filed a Petitioner's Reply ("the Reply") to the Response. Remarkably this Reply does not even mention *Foster*, let alone counter its analysis. One can only assume that TRG has no good response to the results reached by the Fourth Circuit. Moreover, this Court has repeatedly applied the McDonnell Douglas standard in retaliation claims. (Syl. pt. 4, *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986) Syl. pt. 1, *Brammer v. Human Rights Commission*, 183 W. Va. 108, 394 S.E.2d 340 (1990) Syl. pt. 10, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995).

Instead, what TRG did do was to attempt to distinguish the Commission's authorities on the fallacious ground that the cases and the underlying statutes are entirely different App. 1-932. This argument focuses on the trees while ignoring the forest. The important point is not the specific nature of the statutes and cases cited by the Commission but the fact they all share the existing "but for" standard of proof that

predated *Nassar*. As the Commission found in its Final Order, the proper standard is not found in *Nassar* but in the traditional three-step legal framework employed in the McDonnell Douglas standard App. 1-678.

As the Commission points out, the Administrative Law Judge *Pro Tempore* (“the ALJPT”), did discuss *Nassar* App. 1-678. The most logical reading of his Decision entails that he did not intend to adopt *Nassar* as an interpretative standard but merely to point out that Ms. Thomas could have prevailed under either *Nassar* or McDonnell Douglas. Indeed, an examination of *Nassar* reveals that the decision was based on the statutory history of Title VII, the location of the remedies within the statute and the ills that a “but for” standard was intended to prevent. None of this has the slightest connection with the WVHRA. Compare 42 U.S.C. §2000e-3 with W.Va. Code §5-11-9(7)(C). The language of the two statutes is different; the scope of the two statutes is different in that the federal scheme is much broader than its West Virginia counterpart. Any analytic comparison reveals that the two statutes are like apples and oranges. It would make no sense for them both to be governed by the same interpretative standard.

The ALJPT’s mention of *Nassar* does support the result ordered by the Commission. As we have seen, the gloss put on the statute by *Nassar* is already part of the adjudicative process in West Virginia. As pointed out above, an abundance of probative evidence supports the finding of retaliation by the Commission under the McDonnell Douglas standard. Those findings are entitled to strong deference in this Court. See *Brammer v. West Virginia Human Rights Commission*, 183 W.Va. 108, 394 S.E.2d 340, 343 (1990); *Fairmont Specialty Services v. West Virginia Human Rights*

Commission, 206 W.Va. 86, 522 S.E.2d 180 (1999). The evidence is so conclusive, in fact, that the decision could pass muster under *Nasser* as well as under McDonnell Douglas. That does not change the fact that it is to McDonnell Douglas to which the Court should look, not *Nassar*.

This same issue has arisen in other jurisdictions and led to a similar conclusion.

As one recent case stated:

Defendants urge this Court to apply *Univ. of Texas Southwestern Med Ctr. v Nassar*, U.S. ; 133 S Ct 2517, 2525; 186 L Ed 2d 503 (2013), and require that plaintiff prove that the adverse employment action would not have occurred "but for" the defendant's conduct. As applied to this case, however, we conclude that the result would be the same under either standard.

Hensley v. Botsford General Hospital, 2016 Mich.App. Lexis 30 at *15 n. 1 (Mich. Ct. App., filed January 12, 2016). TRG's attempt to graft *Nassar* onto West Virginia jurisprudence fails either because the case is inapplicable to the statutory scheme before the Court or because, even if it were applicable, the same result—a finding of actionable retaliation—would obtain nevertheless.

F. THE LOWER COURT COMMITTED ERROR WHEN IT SUBSTITUTED SEVERAL FINDINGS OF FACT CONTRARY TO THE SUBSTANTIAL EVIDENCE OF RECORD.

In an apparent attempt to justify reversing the Commission's Final Order, the lower court made several findings of fact that are arbitrary, capricious and an abuse of discretion. Contrary to West Virginia jurisprudence, the Circuit Court usurped the role and function of the fact finder in this matter by substituting his evaluation of the witnesses' testimony.

1. **THE RESPONDENT'S SOLE WITNESS TESTIFIED THE UNCOMPLETED APPLICATION WAS NOT THE REASON KENNITA THOMAS DID NOT GET JOB.**

The lower court erroneously found that Kennita Thomas was not interested in the customer service position because she did not complete the application. App. 1 - 7.

Roy Steven Thomas, **the Petitioner's sole witness, had no knowledge of Kennita Thomas' job application process.** Mr. Thomas was the Respondent's Regional Human Resources Director at the time in question. He credibly testified that he was not privy to Ms. Thomas' application process, that he had not spoken to anyone about why she was rejected, that he had not spoken to anyone about Brian Helton's comments, and that Brian Helton had hiring and firing authority. App. 2 – 1388.

Moreover, Mr. Thomas testified that Ms. Thomas uncompleted application was **not** the reason she did not receive the job. App. 2 – 1010.

2. **THE RESPONDENT'S EMPLOYEES GAVE DIRECT, CREDIBLE AND SUBSTANTIAL TESTIMONY THAT KENNITA THOMAS DID NOT GET HIRED BECAUSE OF BRIAN HELTON'S COMMENTS.**

The lower court erroneously found that Brian Helton's comments regarding the refusal to hire Kennita Thomas were not supported by substantial evidence in the record.

Janice Gwinn, the Petitioner's Human Resources Generalist Manager for their Charleston office, was asked to investigate the Petitioner's discrimination complaint filed against the Respondent TRG Customer Solutions, Inc. As a direct result of that investigation, Ms. Gwinn testified that the Respondent's failure to hire Kennita Thomas

was, **in fact**, because of Ms. Thomas' previously filed discrimination complaint against TRG Insurance Systems.

A. When I talked to Denise, she said that she didn't want to be a part of it. She didn't want any retaliation, but **she was told not to hire Kennita Thomas because she filed a complaint with CS over IS.**

App. 2 – 1057.

A. **Denise said Brian Helton told her not to hire Kennita Because -**

THE WITNESS: - she filed against IS

Q. **Brian Helton had made that statement to Ms. Ward?**

A. **Yes.**

Q. **Is that what she told you?**

A. **Yes.**

Q. **Who is Brian Helton?**

A. **Brian has had a lot of different job titles. I don't know if he was VP of Operations then. He was initially with IS and I guess when they split, he was coming over to CS.**

Q. **Did Brian Helton have input, ma'am, into who would be hired in the Beckley office for positions?**

A. **Yes, sir.**

Q. **While Customer Solutions was hiring back in January of 2010?**

A. **Yes.**

Q. **Did Brian Helton have the authority, ma'am to stop or block the hiring of Kennita Thomas?**

A. **Yes.**

App. 2 – 1058.

Ms. Gwinn, testified that she informed her boss, Roy Steven Thomas, why Kennita Thomas was not hired. App. 2 – 1058.

Simply put, Jackie Denise Ward, the hiring officer, and the Human Resources Generalist Janice Gwinn gave **unrefuted, credible, and direct** evidence that Kennita Thomas was not given a job with the Respondent TRG Customer Solutions, Inc., because she had filed a prior complaint of race discrimination against TRG Insurance

Solutions; Inc. App. 2 – 1059. As a matter of fact Janice Gwinn testified that Jackie Denise Ward specifically wanted to hire Kennita Thomas at TRG Customer Solutions, Inc. App. 2 – 1063. The ALJPT findings of fact include the fact that the Respondent’s Sole Witness Roy Steve Thomas endorsed the credibility of Ms. Gwinn. App. 1 – 255.

3. NO OTHER FACTOR PLAYED A ROLE IN KENNITA THOMAS NOT BEING HIRED.

Moreover, Janice Gwinn testified that **no other factors, i.e. education or qualifications, played a role in Kennita Thomas not being hired.** App. 2 – 1059.

4. FORMER TRG INSURANCE SOLUTIONS EMPLOYEES WERE NOT REQUIRED TO FOLLOW RESPONDENT’S STANDARD APPLICATION PROCESS.

The substantial evidence of record is contrary to the lower court making a finding of fact that the Respondent **“did not make any guarantees of employment”** and **“former TRG Insurance Solutions employees were required to follow (Respondent’s) standard application process.”** App. 1 – 3.

Jennifer Webb, a supervisor at TRG Insurance Solutions when they closed, became a supervisor at TRG Customer Solutions. She credibly articulated how Brian Helton told her how to get a job with Respondent TRG Customer Solutions, Inc., and it did not include the standard interview. App. 2 – 989.

Even the Human Resources Director, Respondent’s sole witness Roy Steven Thomas, testified that Jennifer Basham Sears, went from TRG Insurance Solutions to a payroll administrative position with TRG Customer Solutions without an interview. App. 2 – 1019, 1020.

Janice Gwinn, the Human Resources Generalist employed by the Respondent, testified that when she investigated the Kennita Thomas' Complaint for the Respondent, she learned that the other supervisors were hired at TRG Customer Solutions without an interview: App. 2 - 1065.

5. **THE ALJPT MADE NO FINDING OF FACT THAT KENNITA THOMAS WAS NOT SELECTED FOR THE TRAINER POSITION BECAUSE SHE DID NOT HAVE A COLLEGE DEGREE OR WAS NOT QUALIFIED.**

The lower court's finding of fact that the Petitioner was not selected for the trainer position because she was not qualified is not substantiated by the record. The lower court's evaluation of the record is an abuse of discretion and clear error.

The lower court ignored the finding of facts made by the ALJPT that "**The Complainant's lack of college degree was not a factor in the decision not to hire her as a trainer**". App. 2 – 1020.

The findings of fact by the administrative law judge are accorded deference unless the reviewing court believes they are clearly wrong. Syl. Pt. 1, in part. *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2 518 (1996).

6. **THE RESPONDENT GAVE DIFFERENT POSITIONS REGARDING WHY KENNITA THOMAS WAS NOT HIRED.**

The lower court ignored the extensive discussion of the ALJPT regarding the Respondent's rationale for not hiring the Petitioner. App. 1: 256 – 258. The Respondent has taken numerous positions as to why Kennita Thomas was not hired: The failure to complete the application was their position **AFTER THE HEARING**. For the first time, the Respondent argued in their "Petition In Support of Appeal" to the

Commission that Kennita Thomas failed to present a prima facie case of retaliatory failure to hire **because she failed to show that she completed an application for the particular position of customer service representative** and she was not hired for that position. App. 1-326.

Prior to the hearing of this matter, the Respondent stated in their Pre-Hearing Memorandum **“Respondent selected Complainant for a Customer Service Representative position based upon her prior application and scheduled her for training class. Inexplicably, Complainant did not appear for the scheduled class.”** App. 1-38.

During the hearing in this matter, the Respondent’s sole witness, Roy Steven Thomas, **did not testify** that Ms. Thomas did not get the customer service representative job because she failed to complete the application. App. 2-1010. As a matter of fact, Roy Steven Thomas had no independent personal knowledge as to why she was not hired.

After the hearing, the Respondent submitted proposed Findings of Fact and Conclusions of Law that were void of any argument that Ms. Thomas failed to prove her retaliation claim because she did not complete a customer service representative application. Rather, the Respondent argued that **she was not hired because she did not have a college degree.** App. 1-129.

The Respondent is barred from taking different positions:

“Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with the position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the

inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.” Syllabus Point 2, *West Virginia Department of Transportation, Division of Highways v. Robertson*, 217 W. Va. 497, 816 S.E.2d 506 (2005).

Riggs v. W. Va. Univ. Hospital, Inc., Syl. Pt. 3, 656 S.E.2d 91 (W. Va. 2007)

In a Memorandum Opinion, *King v. Cardinal Health*, C.A. No. 5:10CV112 (N.D. W. Va. 2011), the Court explained that judicial estoppel..” bars contradicting a court’s determination that was based on that party’s position.” *King*, at 7 citing *W. Va. Dept. of Transp. v. Robertson*, 618 S.E.2d 506, 513 (W. Va. 2005).

G. ADMINISTRATIVE LAW JUDGE’S AWARD OF BACK PAY WAS CORRECT.

Since it ruled that there was no discrimination, the lower court declined to address the Respondent’s argument that the Petitioner was not entitled to back wages because she was in school.

(1) THE COLLATERAL SOURCE RULE PREVENTS ANY OFFSET WHILE KENNITA THOMAS WAS ATTENDING SCHOOL UNDER EMPLOYMENT COMPENSATION BENEFITS PROGRAM

In *Powell v. Wyoming Cablevision, Inc.* 403 S.E.2d 717 (W. Va. 1991) the West Virginia Supreme Court affirmed that benefits under the unemployment compensation program can not be used to reduce an award of damages under the collateral source rule. The West Virginia Supreme Court states,

Finally, the employer contends that the trial court erred in refusing to offset Mr. Powell’s unemployment compensation benefits against the jury verdict. We addressed and rejected this same

argument in *Orr v. Crowder*, 173 W. Va. At 351, 315 S.E.2d at 610, and held: “[T]he trial court did not commit error in holding that unemployment benefits may not be used to reduce an award of damages under the collateral sources rule.” (Citations omitted).

As aptly stated by the California Court of Appeals in *Billetter v. Posell*, 94 Cal.App.2d 858, 860, 211 P.2d 621, 623 (1949): **“Benefits of this character are intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee.”** (Citations omitted). *Powell*, supra, at 725.

Therefore, benefits under the unemployment compensation program can not be used as a set off to reduce a back pay award.

In *Miller v. AT & T*, 83 F.Supp.2d 700 (S.D. W. Va. 2000), the court discussed at length the issue of allowing an offset of backpay benefits due to school attendance. The employer argued that Ms. Miller failed to mitigate her damages by enrolling full time at West Virginia University and effectively removing herself from the job market. Ironically, United States District Judge Goodwin noted the cases of *Floca v. Homcare Health Servs. Inc.*, *Taylor v. Safeway Stores, Inc.*, *Miller v. Marsh*, *Washington v. Kroger Co.*, and rejected the notion that an employee’s backwages should be offset by an employee’s school attendance.

2. THE DAMAGES AWARD WAS APPROPRIATE.

The determination as to whether an award of back pay should be granted is within the discretion of the fact finder. In this case, the Administrative Law Judge determined that back pay was appropriate. The back wages are reflective of the loss wages of Kennita Thomas from January 24, 2010 through August 4, 2014, a total of 4 years and 7 months. The prejudgment interest award has long been the law of this

State. Additionally, the post-judgment interest at the statutory rate was in accordance with West Virginia jurisprudence. The incidental damages of \$6,200.00 was the result of a prehearing Stipulation entered into by the parties.

Moreover, the attorney fees and costs are reasonable in that the representation began on February 4, 2010 and continues until today, a total of 6 years. As Administrative Law Judge Pro Tempore Frank T. Litton, Jr., explained, **“this case has a long and contentious history and the itemized time records submitted by Complainant’s counsel are reasonable in light of the record in this case.”** (App. 1-263). Literally, hundreds of applications had to be reviewed, thousands of pages of documents were disclosed during discovery, the parties engaged in mediation, multiple motions and briefs were filed, and attendance at prehearing and hearing.

VI.

CONCLUSION

For the reasons outlined herein and the substantial evidence apparent on the face of the record, Kennita Thomas requests that the Circuit Court’s Order be reversed and the Final Order of the West Virginia Human Rights Commission be reinstated. The Final Order of the agency is supported by substantial evidence and is a correct application of the law. Moreover, Kennita Thomas requests on Order requiring the Petitioner to pay all of the reasonable attorney fees and costs in defending this appeal and all of the other Damages and Relief set forth in the Commission’s Final Decision.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AT CHARLESTON

Docket No. _____

**KENNITA L. THOMAS and The WEST VIRGINIA
HUMAN RIGHTS COMMISSION,**

Petitioners

vs.

**APPEAL FROM A FINAL ORDER
OF THE CIRCUIT COURT OF
KANAWHA COUNTY (15-AA-100)**

TRG CUSTOMER SOLUTIONS, INC.,

Respondent.

CERTIFICATE OF SERVICE

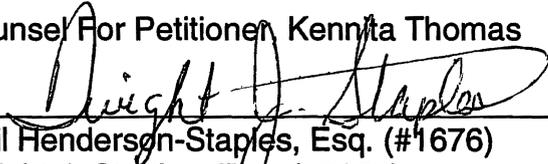
I, Dwight J. Staples, Esq. co-counsel for Petitioner, Kennita Thomas, hereby certify that I served a copy of the foregoing "**PETITIONER'S BRIEF**" by depositing a true and correct copy thereof in the United States mail, postage prepaid on this 18th day of February, 2016, upon the following counsel of record and agency.

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