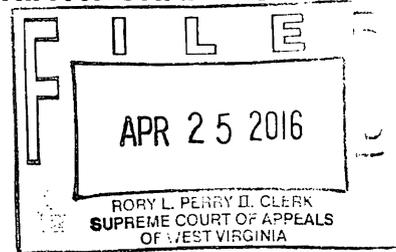


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AT CHARLESTON

Docket No. ~~15-0073~~
16-0164



**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 REPLY BRIEF

Counsel For Petitioner, Kennita Thomas

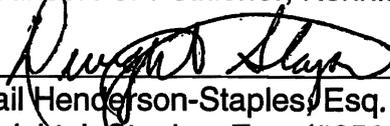

Gail Henderson-Staples, Esq. (#1676)
Dwight J. Staples, Esq. (#3566)
Henderson, Henderson & Staples, L.C.
711 Fifth Avenue
Huntington, WV 25701
Telephone: (304) 523-5732
Facsimile: (304) 523-5169
E-mail: hhstaples@aol.com

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ARGUMENT

1. THE CIRCUIT COURT EXCEEDED ITS SCOPE OF REVIEW.

Simply stated, the lower court exceeded its scope of review by substituting its judgment for the Commission's judgment. *Frank's Shoe Store v. Human Rights Commission*, 179 W. Va. 53 365 S.E.2d 251 (1986). The Commission's findings were thorough and substantially supported by all critical facts. Although the Respondent argues that the agency's findings were based on hearsay, they fail to cite any hearsay allegedly relied upon by the Commission.

Furthermore, a careful review of the Commission's Conclusions of Law clearly indicates that the conclusions were consistent with existing law that make it unlawful (f)or **any** employer... to engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden... or because he or she has filed a complaint... in any proceeding under this article." *W. Va. Code §5-11-9(7)(C)[1998]*.

An agency's findings of fact may be reversed only if the decision is clearly wrong. *Mayflower Vehicle Systems v. Cheeks*, 218 W. Va. 703, 629 S.E.2d 762 (2006).

Furthermore, if there is conflicting evidence or conflicting inferences that may be drawn from the evidence, deference must be given to the resolution arrived at by the Administrative Law Judge. *Brammer v. West Virginia Human Rights Commission*. 183 W. Va. 108, 394 S.E.2d 340, 343 (1990).

2. **THE CIRCUIT COURT IMPROPERLY FOUND THAT MS. THOMAS DID NOT HAVE A CAUSE OF ACTION FOR RETALIATORY FAILURE TO HIRE UNDER WEST VIRGINIA LAW.**

Respondent misinterprets Ms. Thomas's argument on this point. By misstating her argument, TRG attempts to counter an argument that Ms. Thomas never made. In fact, Ms. Thomas argues that the question of the existence of this cause of action is an open question in this State. Because the Court has never rejected the case of action, it could adopt it without overturning existing precedent. Indeed, the applicable body of both West Virginia administrative and civil rights law mandates such a result. What is more, the particular facts of this dispute underscore Ms. Thomas' entitlement to the relief she seeks. The Court will close a loophole which entails a result that is patently at odds with the goals of the West Virginia Human Rights Law (Appellant's Brief p. 14).

Ms. Thomas discussed in detail the case law either relied upon by the circuit court or relevant to the inquiry. *Toth v. Board of Park & Recreation Commissions*, 215 W. Va. 51, 55, 593 S.E.2d 579, 580 (2003); *Burkhamer v. City of Montgomery*, 2014 W. Va. Lexis 585 (Mem. Op., filed May 30, 2014). She pointed out why neither of those cases precluded the Commission's grant of relief (Appellant's Brief pp. 12-14). As she explained in her Brief, the circuit court distorted existing law. TRG then followed in its footsteps by repeating that erroneous interpretation in its own submission (Respondent's Brief pp. 8-9).

TRG then accuses the Commission of improperly creating new law in a way that exceeded its legal powers (*Id.* p. 10). This argument misunderstands the nature of

administrative law. First, it is undeniable that those powers are not unlimited but must be exercised within proper boundaries:

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 2, *Mountaineer Disposal Serv., Inc. v. Dyer*, 156 W.Va. 766, 197 S.E.2d 111 (1973).

Syl. pt., *Reed v. Thompson*, 235 W.Va. 211, 722 S.E.2d 617 (2015)(emphasis supplied). The fact remains that administrative bodies like the Commission are charged with the task of enforcing and applying the West Virginia Human Rights Act to the facts before it. Absent the ability to interpret the statute, no enforcement or application would be possible. To administer a statute is to interpret it. It is as simple as that.

Nonetheless, TRG denied this was so, arguing that "[i]t is axiomatic that the function of interpreting a statute is a function which is reserved 'peculiarly for the judicial branch of government.'" *Morgan v. Grace Hosp., Inc.*, 149 W.Va. 783, 790, 144 S.E.2d 156, 160 (1965)" (Respondent's Brief p. 10). In the process of trying to argue that the Commission has no power to construe the Act, TRG has brutally ripped the quotation from *Morgan* out of context. The full statement and context from the case is as follows:

It is contended in behalf of the defendant that we cannot change the rule announced in the two medical malpractice cases previously referred to in this opinion without invading the province of the legislature. We consider this contention wholly untenable. We readily and willingly recognize that this Court cannot change the limitation period from one year, as it was at the time the alleged tort was committed in this case, or from two years, as it is at present. We are merely

called upon to construe the statute as it was enacted by the legislature and that function is one peculiarly for the judicial branch of government.

Morgan v. Grace Hospital Inc., 149 W.Va. 783, 144 S.E.2d 156, 160 (1965). What the Court is saying is that while the Court must apply a statute as written by the legislature, it is able to construe and interpret that language in its application to the facts before it. In other words, the legislature enacts; the Court interprets and construes. Such a rule has nothing to say about the administrative law of the kind involved in this case and thus nothing to do with a proper outcome in this case.

The Commission found a remedy for Ms. Thomas "within the statute [so as to] warrant ... the exercise of [the] authority which they claim." *Id.* TRG's error lies in understating the power the Commission actually has in its administration of the Act. TRG seemingly sees the Commission as little more than a collection of clerks whose sole task is to total up figures and announce the result. To the contrary, as experts in the human rights law before it, the Commission properly construes and interprets the Act that is within its administrative bailiwick.

In his dissent in *Reed*, Justice Loughry recognized the breadth of the powers and described them. Although they appear in a dissent, Ms. Thomas argues that these principles accurately state West Virginia law, as follows:

This Court has repeatedly recognized that in addition to express powers, "administrative agencies also possess 'such powers as are reasonably and necessarily implied in the exercise of their duties in accomplishing the purposes of the act.'" *McDaniel v. West Virginia Div. of Labor*, 214 W.Va. 719, 727, 591 S.E.2d 277, 285 (2003) (quoting *State Human Rights Comm'n v. Pauley*, 158 W.Va. 495, 498, 212 S.E.2d 77, 78 (1975)); accord, *PNGI Charles Town Gaming, LLC v. W.Va. Racing Comm'n*, 234 W.Va. 352, 234 W. Va. 352, 765

S.E.2d 241, 253 (2014). Moreover, "[a]n administrative agency has, and should be accorded, every power which is indispensable to the powers expressly granted, that is, those powers which are necessarily, or fairly or reasonably, implied as an incident to the powers expressly granted.' *Pauley*, 158 W.Va. at 497-98, 212 S.E.2d at 78-79 (quoting 1 Am.Jur.2d *Administrative Law* § 44 and citations omitted)." *Walker v. W.Va. Ethics Comm'n*, 201 W.Va. 108, 120-21, 492 S.E.2d 167, 179-80 (1997).

Reed v. Thompson, supra, 722 S.E.2d at 624-25 (Loughry, J., dissenting). As applied to the Commission's treatment of Ms. Thomas's case, the Commission has at least the implied power to interpret, construe and then apply the Human Rights Act. In the Commission's judgment, the language of the Act entailed Ms. Thomas' success in her discrimination. That reading was wrongfully rejected by the Circuit Court but should be reinstated in this forum.

The record shows an exceedingly close relationship between Insurance Solutions and TRG. As Ms. Thomas pointed out, "TRG Insurance Solutions closed but most of their employees transitioned to TRG Customer Solutions, Inc., in the beginning of 2010. *App 2: 987*" (Appellant's Brief p. 4). Apart from putting up an only partially revised sign in the window and possibly repainting the front door, the TRG that closed was essentially the same entity that reopened its doors in 2010. The claim that TRG Customer Solutions, Inc. was "a *prospective* employer" (Respondent's Brief p. 11 (emphasis in the original), simply cannot withstand scrutiny, therefore. This is especially true since Brian Helton was the Vice President of both TRG Insurance Solutions and TRG Customer Solutions and he is the one that blocked the hiring of Ms. Thomas.

TRG's attempt to derail Ms. Thomas's reliance on the decision of *Harless v. First National Bank of Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978), is misplaced. First, Ms. Thomas is fully entitled to prevail under even a narrow interpretation of the WVHRA so that the Court need not even consider the *Harless* opinion. Nonetheless, TRG objects to Ms. Thomas secondary reliance upon *Harless* on the asserted ground that "the Commission '**ha[s] no common law powers** but only such as have been conferred upon [it] by law explicitly or by implication" (Respondent's Brief p. 12 (emphasis supplied), quoting *Appalachian Regional Health Care, Inc. v. W.Va. Human Rights Commission*, 180 W.Va. 303, 376 S.E.2d 317 (1988)).

TRG's reliance upon *Appalachian* is unavailing. The "common law powers" the Court was talking about in that case had to do with procedural, not substantive powers. Indeed, the principle is the same one that the Court recently restated in the syllabus point in *Reed*. Moreover, the statement was a limitation on *judicial* bodies as much as on *administrative* agencies:

The question of whether an administrative body can create a common law doctrine—which seems to be the argument TRG is trying to make—is left unanswered, therefore. But in any event it is not a question that properly arises in this case. In its invocation of *Harless*, the Commission did not create a common law doctrine but merely applied one that this Court had already formulated and announced. Certainly, the Commission has been charged to deal with the evils of employment discrimination. To that end, the West Virginia Human Rights Act is to be liberally construed to accomplish its objective and purpose. Syl. pt., *May Department Stores Co. v. West Virginia Human Rights Commission*, 191 W. Va. 470, 446 S.E.2d 692 (1994). In addition, the

Commission does not in its adjudicative process treat the Act like a vending machine into which it inserts a factual situation, presses a button and then waits for a predetermined answer to pop out. Rather, the Commission adjudicates the matters before it in a judicial fashion. *1 Neeley, Administrative Law in West Virginia* §5.49 at 413(1982), quoted in *Appalachian Regional Health Care, Inc. v. W.Va. Human Rights Commission, supra*, 376 S.E.2d at 321.

It is in the very nature of administrative adjudication that gaps will remain when the bare language of the Act is applied to the facts of a particular case. It is black letter law that the Commission is given the power to fill in those gaps so that the goals of the Act can be fleshed out:

The necessity of interstitial development and interpretation of skeletal statutory schemes by the executive branch has been noted by this Court on several occasions. With respect to both formal and informal procedures developed in connection with the administration of the public employees' retirement system, this Court stated in *In re Dostert*, 324 S.E.2d at 420 n.40, "This administrative overlay or patchwork approach has developed as a means of filling in the interstices between the statutory provisions of the respective retirement systems." Similarly, in *State ex rel. D.D.H. v. Dostert*, 165 W. Va. 448, 460, 269 S.E.2d 401, 410 (1980), this Court, observing the interrelationship between procedure and policy, noted that, "As David Dudley Field, author of the *Field Code*, once pointed out, substantive law can be 'gradually secreted in the interstices of procedure.'"

DePond v. Gainer, 177 W.Va.173, 351 S.E.2d 358, 369 n. 12 (1986). Ms. Thomas's invocation of *Harless* amounts to no more than this time-honored practice of filling in the statutory gaps.

3. THE UNCONTROVERTED AND SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING OF FACT THAT THE COMPLAINANT ESTABLISHED A PRIMA FACIE CASE.

a. PETITIONER KENNITA THOMAS APPLIED FOR A JOB WITH THE RESPONDENT TRG.

In *Pride, Inc., v. State ex rel. State of W. Va. Human Rights Com'n*, 176 W. Va. 565, 346 S.E.2d 356 (W. Va. 1986), the complainant had worked for Pride, Inc. from 1971 until August, 1974. The nonprofit organization lost funding for their family planning program and the complainant was one (1) of two (2) employees let go out of six (6). The complainant, an African American female, repeatedly let Pride's Executive Director know of her interest in a job; however, when a job became available, Pride, Inc. hired a white woman to fill the position.

Although the *Pride* decision affirmed the Circuit Court's Order reversing the Commission's finding of discrimination because the complainant could not prove the respondent's reason for not hiring her was pretext, the *Pride* decision **upheld** the Commission's findings that the failure to complete an application does not bar the prima facie case of discrimination since the employer was aware of the complainant's interest in employment.

The reason given by Pride for not hiring the complainant to fill the vacancy resulting from Messer's promotion was that the complainant had not filed a written application as she had been instructed to do.

The Commission properly found the establishment of a prima facie case at the time Pride hired Melinda Cline. Although Pride contends that the complainant did not apply for the vacancy filled by Cline, and was therefore not rejected, the evidence supports the Commission's finding

that the complainant was rejected in the sense that Pride's administrators knew of her availability and interest but failed to consider her candidacy for her position. *Id.* At 359.

In the case at bar, the uncontradicted evidence presented at the hearing overwhelmingly supports the Administrative Law Judge's Finding that the Petitioner Kennita Thomas met her burden of proving a prima facie case:

1. Kennita Thomas submitted two (2) signed job applications with a complete resume. (App. 2: 1319)
2. Kennita Thomas had a job interview. (App. 2: 1322)
3. Kennita Thomas was told by one of Respondent's hiring official's that they would find her a job somewhere (App. 2: 1323, 1338)
4. Kennita Thomas was told by one of Respondent's hiring official's to submit the customer service representative application and she did. (App. 2: 1336)
5. Kennita Thomas informed them during the interview process she would have taken any job. (App. 2: 1322, 1338)
6. A hiring official, Jackie Denise Ward, sought to hire Kennita Thomas for a position regardless of her application status. (App. 2: 1307)

The facts are sufficient to raise an inference of discrimination based on illegal retaliatory conduct.

b. THE RESPONDENT TRG PRESENTED NO EVIDENCE AT THE HEARING THAT KENNITA THOMAS WAS NOT HIRED BECAUSE SHE FAILED TO COMPLETE AN APPLICATION.

Respondent's argument is replete with innuendos and references to isolated transcript phrases to create their argument that Kennita Thomas' failure to complete an

application for Customer Service Representative was the reason she was not hired. A careful review of the hearing transcript clearly shows that not only did the respondent fail to present any evidence supporting this argument, but the Respondent through Roy Steven Thomas, its sole witness and Human Resource Director, stated that the failure to complete an application for Customer Service Representative was **NOT** the reason Kennita Thomas was not hired.

- Q. And because Ms. Thomas didn't complete the application, then she wasn't afforded the job or an opportunity to have the job; is that your testimony?
- A. No, that's **not** my testimony.
(App. 2: 1010)

As a matter of fact, Mr. Thomas had no knowledge about Kennita Thomas' application process, her interview process, or her rejection by the Respondent TRG.
(App. 2: 1388)

c. **JACKIE DENISE WARD WANTED TO HIRE KENNITA THOMAS IRRESPECTIVE OF A REVIEW OF HER APPLICATIONS.**

The Respondent TRG repeatedly asserts that Jackie Denise Ward, a hiring officer with the Respondent, did not know Kennita Thomas was interested in a Customer Service Representative job, therefore, the fact that Ms. Ward would have hired her as a Customer Service Representative is speculative. The fatal flaw in Respondent's argument is that Jackie Denise Ward prospectively sought to hire Kennita Thomas because she valued her experience and believed she would make a great employee.

- A. Well, when we got into 2010 and I want to say it was probably in the January-February time frame. We'd finally got to the point where we were looking to start hiring specifically for the new program that was going to start. And actually Kennita was one of the – one of the first people who came to mind for a quality assurance position.
App. 2: 1353.

Simply stated, Jackie Denise Ward had no knowledge of Kennita Thomas' application status when she approached Brian Helton about hiring her.

- Q. Your testimony here today about your conversation with Brian Helton was actually what happened; is that right?
A. Yes
Q. And that stopped your consideration of Kennita for an employee?
A. Right, because I wasn't aware that she had even applied. This was a proactive – what I thought was a proactive communication on my behalf. I had no idea that she had applied for anything.
Q. Or expressed interest in any other jobs; if that right?
A. Right.
App. 2: 1367

Ms. Ward further testified that Kennita Thomas “was always very diligent, intelligent, could work independently, you know, stayed on task. All very positive.” *App. 2: 1361.*

Ms. Ward testified that Kennita Thomas was qualified for a customer service representative position and she would have hired her for same except for Brian Helton's Statement that she could not hire Ms. Thomas because of her prior complaint against TRG Insurance. (*App. 2: 1365 – 1367*).

d. **KIM FOX WAS HIRED AS A TRAINER BUT ONLY APPLIED FOR A JOB AS A CUSTOMER SERVICE REPRESENTATIVE.**

It is significant that TRG argues that an applicant had to complete an application for a specific job in order for the company to consider them for a particular position.

Resp. brief, p.15.

Contrary to Respondent TRG's own argument, they hired Kimberly Cox as a trainer when, in fact, a review of her application clearly shows that she only applied for a customer service representative position. She signed and completed TRG's applicant profile for a Customer Services Representative. *App. 2*: 1276 – 1277, 1283 – 1284.

e. **KENNITA THOMAS' COMPLAINT BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION CLEARLY STATES THAT THE RESPONDENT FAILED TO OFFER HER ANY EMPLOYMENT.**

Kennita Thomas' complaint filed with the West Virginia Human Rights Commission specifically states the following: "Respondent failed to offer me **any other position.**" *App. 1*: 16. The Respondent TRG erroneously states that because Ms. Thomas' "...own Complaint before the Commission makes no mention of being denied a customer service position"; she had no interest in a customer service representative. *Resp. brief*, p. 16.

Furthermore, Respondent's reference to a list Kennita Thomas had submitted during discovery is misplaced. *Resp. brief*, 16 - 17. As discussed during the hearing, the **purpose** of the list was for the Complainant to obtain additional discovery materials

from the Respondent regarding specific supervisory positions that Kennita Thomas had been interested in when she applied for a position. (*App. 2*: 1339).

Contrary to Respondent's argument, Kennita Thomas expressed interest in not only supervisory positions but any jobs. (*App. 2*: 1321 – 1323).

4. **THE CIRCUIT COURT'S DECISION CLEARLY PROHIBITS THE COMMISSION'S AUTHORITY TO MODIFY THE ADMINISTRATIVE LAW JUDGE'S DECISION.**

The Respondent filed their appeal to the Circuit Court of Kanawha County from the Final Order of the West Virginia Human Rights Commission. The Final Order of the Commission does not say that TRG Customer Solutions, Inc. failed to meet its burden of "proving" a legitimate nondiscriminatory reason but it does say TRG failed to meet its burden of **providing a legitimate** nondiscriminatory reason. The Respondent admits in footnote 7 of their brief "the ALJ cited the correct standard early in his Final Decision." *Resp. brief*, p. 20.

The reason why the Respondent did not provide a **legitimate** nondiscriminatory reason for failing to hire Ms. Thomas is simple. On the one hand, the Respondent stated and the Administrative Law Judge found that they hired her for the customer service representative position and she did not show up for the training. On the other hand and on appeal, they now argue that they did not hire her because her application for the customer service position was incomplete. The Respondent provided two completely opposite positions which can never be explained away.

Respondent contends that they articulated a legitimate nondiscriminatory reason for not hiring the Complainant in that “Ms. Thomas was not selected for the customer service position” since “she did not complete the application.” (Respondent’s Brief p. 21); however, the Respondent’s only witness, Roy Steven Thomas, testified that he did not even know whether she was selected or not.

BY MR. STAPLES:

Q. Did you ever state, sir, that she was selected to be a customer service rep but just didn’t show up for her interview? I’m sorry for her training?

A. I don’t know if she selected. What I think was there was she had started a partial application for the position.

Q. **But you don’t know if she was selected or not?**

A. **No, sir, I do not.**

Q. Okay, that’s fine.

(App. 2: 1016).

The reason why the Commission ruled that the Respondent did not provide a legitimate nondiscriminatory reason for the nonselection of Ms. Thomas is because their Human Resources Director and only witness did not even know whether she was selected for the customer service representative job. Simply put, Mr. Thomas did not participate in the selection process. Moreover, the Respondent did not call one witness who did participate in the selection process.

Therefore, the Commission properly modified the wording of the Administrative Law Judge’s decision by changing “proving” to “providing” a legitimate nondiscriminatory reason for their failure to hire Ms. Thomas. (See *W. Va. Code R. §77-2-10.6*).

5. **THE CIRCUIT COURT IMPROPERLY APPLIED THE U.S. SUPREME COURT'S NASSER CASE'S "BUT FOR" STANDARD.**

In his disposition of TRG's Assignment of Error No. 3 , the Circuit Court 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 - 9*). In her Petitioner's Brief, Ms. Thomas pointed out, first, that *Nasser* has never once been cited in any decision by this Court (Petitioner's Brief p. 26). Against TRG's argument that federal and state discrimination law walked in lockstep, Ms. Thomas noted, second, that this Court declined to apply a federal interpretation of the federal 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 [West Virginia] approach to the law of disability determination that is not mechanically tied to federal disability discrimination jurisprudence"(Petitioner's Brief p. 26, quoting *Stone v. St. Joseph's Hospital, supra*, 538 S.E.2d at 404). One notes that TRG neglects to mention the *Stone* decision in its Respondent's Brief but apparently seeks to distinguish the case by ignoring it. Perhaps if TRG had addressed *Stone* it could have avoided making the patently false statement that "[i]t is telling that Petitioner Thomas has consciously declined to address this Court's consistency command in her Brief" (Respondent's Brief, p. 25, n. 11).

Ms. Thomas then noted, third, that the Fourth Circuit Court of Appeals decided in *Foster v. University of Maryland—Eastern Shore*, 787 F.3d 243, 251 (4th Cir. 2015) “that *Nassar* does not alter the causation prong of a prima facie case of retaliation.” Nor, the court found, did *Nasser* “Alter[] the pretext stage of the McDonnell Douglas framework” *Id.* at 252. In short, “*Nassar* does not alter the legal standard for adjudicating a McDonnell Douglas retaliation claim.” *Id.*

A remarkable aspect of TRG’s submissions in response to both the Commissions’ Final Order and Ms. Thomas’s Petitioner’s Brief is a determination, far from seeking to distinguish or rebut *Foster*, not to mention that decision at all. See Petitioner’s Brief p. 29. In other words, “[o]ne can only assume that TRG has no good response to the results reached by the Fourth Circuit.” (*Id.*). Given TRG’s silence in its Respondent’s Brief, that assumption still holds good at this later stage of the appeal. As in the case of *Stone*, TRG’s chosen method of advocacy is to ignore its opponent’s authority.

Clearly, Ms. Thomas relies on the Fourth Circuit’s *Foster* decision to counter the effect of the *Nassar* “but for” rule. Certainly, *Foster* is not binding upon this Court but must be deemed to be highly persuasive. Of course, *Nassar* is likewise not binding on this Court, a circumstance that authority like *Stone* demonstrates is consistent with the perceived relationship between State and federal law. Yet Respondent TRG somehow argues that “the Commission gave no reason *whatsoever* for rejecting *Nassar*” (Respondent’s Brief p. 25)(emphasis in the original). In making this statement, TRG somehow manages to overlook the fact that the Commission discussed both *Foster* and

Nassar in its decision and set out very clearly its reasons for not following *Nassar*. *App. 1: 678*. See TRG's Petition of Appeal to the Circuit Court, *App. 1: 754 - 756*. Of course, as Ms. Thomas pointed out, application of the *McDonnell Douglas* standard to retaliation claims has a long history in this Court. See Petitioner's brief, p. 29.

6. **THE SUBSTANTIAL AND UNCONTRADICTED DIRECT EVIDENCE ON THE RECORD SHOWS THAT KENNITA THOMAS WAS NOT SELECTED FOR A JOB BECAUSE SHE HAD FILED A PRIOR DISCRIMINATION COMPLAINT.**

The Respondents' employees gave direct testimony that Kennita Thomas was not given a job with TRG Customer Solutions because she had filed a prior complaint of racial discrimination against TRG Insurance Solutions. *App. 2: 1059, 1063, 1353, 1367 - 1368*.

The Respondent's employees specifically stated "that there was no other reason for Kennita Thomas' nonselection". *App. 1: 1059*.

7. **BRIAN HELTON'S STATEMENTS WERE ADMISSIONS AND PROPERLY ADMITTED INTO EVIDENCE.**

The Respondent's argument that Janice Gwinn's testimony regarding Brian Helton's statements being hearsay is erroneous. (Respondent's brief, p. 28 - 29). Janice Gwinn had been working for the Respondent's Human Resources Department for fourteen (14) years at the time of the hiring process and was charged with investigating the Respondent's internal process as to why Kennita Thomas was not

hired. Her investigation revealed the direct comments made to Jackie Denise Ward by Brian Helton.

4. "A statement is not hearsay if the statement is offered against a party and is a statement by his [or her] agent or servant concerning a matter within the scope of his [or her] agency or employment, made during the existence of the relationship. W.Va.R.Evid. 801(d)(2)(D)". Syllabus Point 3, *Canterbury v. West Virginia Human Rights Commission*, 181 W. Va. 285, 282 S.E. 2d 338 (1989). *Torrence v. Kusminsky*, 185 W. Va. 734, 408 S.E.2d 684 (1991).

Brian Helton's statement was the reason Kennita Thomas was not hired by TRG and said statement was properly admitted into evidence.

CONCLUSION

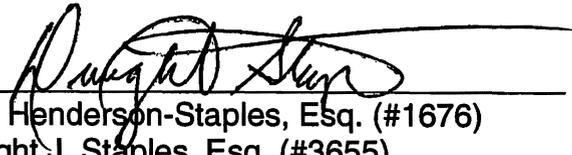
Pursuant to the West Virginia Human Rights Act, Kennita Thomas met her burden by the overwhelming weight of the evidence that she first applied for a job with TRG Customer Solutions, Inc.; second, that TRG failed to provide a legitimate nondiscriminatory reason for not hiring her and, third, by direct uncontroverted evidence from one of TRG's hiring officers she was told to not hire Kennita Thomas because she had filed a prior complaint of racial discrimination. The West Virginia Human Rights Commission's Final Order is consistent with the law, is supported by substantial evidence and is not clearly wrong, arbitrary, capricious, or an abuse of discretion. Kennita Thomas respectfully requests that the Circuit Court Order be reversed and the

Commission's decision be reinstated and for such other relief the Court deems proper and in order. Ms. Thomas also requests that her reasonable attorney fees and costs in prosecuting this appeal be awarded.

Respectfully submitted,

KENNITA L. THOMAS

Counsel For Petitioner, Kennita Thomas



Gail Henderson-Staples, Esq. (#1676)
Dwight J. Staples, Esq. (#3655)
Henderson, Henderson, & Staples, L.C.
711 Fifth Avenue
Huntington, WV 25701
Telephone: (304) 523-5732
Facsimile: (304) 523-5169
E-mail: hhstaples@aol.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA AT CHARLESTON

Docket No. 15-0973

**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 REPLY BRIEF**" by depositing a true and correct copy thereof in the United States mail, postage prepaid on this 25th day of April, 2016, upon the following counsel of record and agency.

Bryan R. Cokeley, Esq.
Mark C. Dean
Steptoe & Johnson PLLC
Eighth Floor. Chase Tower
Post Office Box 1588
Charleston, WV 25326-1588

Marykaye Jacquet, Executive Director
W. Va. Human Rights Commission
1321 Plaza East, Room 108A
Charleston, WV 25301-1400

Ann Haight, Esq.
Office of the Attorney General
Civil Rights Division
208 Capitol Street, 3rd Floor
Post Office Box 1789
Charleston, WV 25326

Counsel For Petitioner, Kennita Thomas



Gail Henderson-Staples, Esq. (#1676)
Dwight J. Staples, Esq. (#3655)
Henderson, Henderson, & Staples, L.C.
711 Fifth Avenue
Huntington, WV 25701
Telephone: (304) 523-5732
Facsimile: (304) 523-5169
E-mail: hhstaples@aol.com