



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. ~~15-0973~~  
16-0164

**KENNITA THOMAS and the  
WEST VIRGINIA HUMAN RIGHTS  
COMMISSION,**

**Petitioners;**

**v.**

**Appeal from a Final Order of  
the Circuit Court of Kanawha County  
CIVIL ACTION NO. 15-AA-100  
Honorable Charles E. King**

**COPY**

**TRG CUSTOMER SOLUTIONS, INC.,**

**Respondent.**

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**RESPONDENT'S BRIEF**

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## I. STATEMENT OF THE CASE

Respondent Kennita Thomas's former employer, TRG Insurance Solutions, Inc. ("Insurance Solutions") shut down its call center located in Beckley, West Virginia in early 2010. During this process, Insurance Solutions laid off its entire workforce, including Thomas. The Respondent, TRG Customer Solutions, Inc., leased Insurance Solutions's former space. Petitioner and Insurance Solutions are separate and distinct corporate entities. (App. at 250 n. 1). Respondent hired some of Insurance Solutions's former employees, but not all. Thomas did not initially apply for a position with Petitioner; it was only after being approached by a recruiter that she submitted an application for a position as a trainer. (*See id.* at 1336-37, pp. 117-121).

Noting that Thomas might not qualify for the trainer position, the recruiter suggested that Thomas apply for other jobs as well. (*See id.*, pp. 121). Thomas subsequently submitted a partial application for a customer service representative position in which she answered only two (2) of the fourteen (14) questions. (*See id.* at 1300-1303). Thomas was interviewed for the trainer position for which she submitted a completed application. She did not meet the minimum qualifications for that position, however, and accordingly she was not offered the job. She subsequently filed this action against Respondent, alleging retaliatory failure-to-hire based upon a discrimination complaint she had filed against her *previous* employer, Insurance Solutions.

A public hearing on this matter was held before ALJ *pro tempore* Frank T. Litton, Jr. on December 17-18, 2012. The parties submitted post-hearing briefs, and the ALJ entered his Final Decision on March 14, 2014. The ALJ correctly concluded that Ms. Thomas was not qualified for the trainer position for which she was interviewed. (*Id.* at 260). The ALJ erroneously found, however, that Thomas was not hired for the customer service position (for which she submitted an incomplete application) solely in retaliation for the complaint filed against her previous

employer. This conclusion was based upon the ALJ's erroneous determination that Petitioner "failed to meet its burden of proving a legitimate nondiscriminatory reason" for failing to hire Thomas. (*Id.* at 258) (emphasis added). No such burden exists under any applicable discrimination analysis framework, and thus the ALJ's Final Decision was arbitrary, capricious, characterized by an abuse of discretion, and not in conformity with the law of West Virginia. The Commission's attempt to rescue the ALJ's clear error was dubious at best, and serves merely to compound the error in this case as a whole.

Simply put, Thomas did not submit a completed application for the customer service position. Thus, she was not hired into it. For the reasons laid out in more detail below, the Circuit Court of Kanawha County was correct in reversing the Final Order of the Human Rights Commission as contrary to applicable law and not supported by substantial evidence on the record. Accordingly, as more fully explained below, this Court should affirm the circuit court's judgment in favor of Respondent.

## **A. BACKGROUND**

### **1. Factual Background**

Respondent Customer Solutions and Insurance Solutions are separate companies and distinct corporate entities. (*See App.* at 250, n.1). Respondent, a Delaware corporation, is an inbound telecommunications customer relations firm. (*See id.* at 2-3). Insurance Solutions, Thomas's former employer, was a Florida corporation that employed licensed insurance agents at a facility in Beckley, West Virginia to sell insurance through outbound telemarketing. Insurance Solutions is not a party to this matter.

In 2009, Thomas filed a racial discrimination complaint with the Beckley Human Rights Commission against her employer, Insurance Solutions. (*See App.* at 1429). She alleged that a

less-qualified employee was given a payroll administrator position that Thomas had been occupying while another employee was on maternity leave. (*See id.* at 1316, pp. 39-40). Thomas had not applied for the position, but asserted that she was not offered it because of her race. (*See id.* at 1331, 1429). Insurance Solutions denied any wrongdoing, but nevertheless offered Thomas a position as a quality analyst. (*See id.* at 1433-37). Thomas accepted the quality analyst position and the matter was settled. (*See id.* at 1332, pp. 103:3-6).

In late 2009, Insurance Solutions sold its business and began liquidating its assets, finally ceasing all operations in January 2010. As part of the asset liquidation, Insurance Solutions sold its Beckley, West Virginia outbound call center. Employees of Insurance Solutions were told that the company was closing and they would be laid off. (*See App.* at 1329, pp. 91:1-92:20). Thomas was part of the closing team for Insurance Solutions, and thus was one of the last employees to be laid off. (*See id.*, pp. 89:7-90:2, 91:11-93:3). Her last day with Insurance Solutions was January 24, 2010. (*See id.* at 141). Respondent entered into a standalone lease with landlord Kenny Crook with the intention to open an AT&T inbound customer service call center at the former Insurance Solutions facility. (*Id.* at 238; 1478-92). Former Insurance Solutions employees were encouraged to apply for employment with Petitioner, but there were no guarantees made that they would be hired. (*See id.* at 1329, pp. 91:11-93:3).

On January 19, 2010, a recruiter for Respondent approached Thomas and asked whether Thomas intended to apply for a job. (*See App.* at 117). The recruiter provided her with applications for trainer and customer service positions. (*See id.* at 117-121). One of the preferred qualifications for the trainer position was a college degree, which Thomas did not have.<sup>1</sup> (*See id.*

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<sup>1</sup> Both successful applicants for the trainer position had college degrees. (*See App.* at 1118-19).

at 1118-19). The recruiter suggested that Thomas should submit both applications in case she did not meet the qualifications for the trainer position. (*See id.* at 1336-37, pp. 117-121).

Thomas submitted a complete application for the trainer position and an incomplete application for the customer service position. (*See id.* at 122-23). On the customer service application, Thomas filled out only her name, the date, and two (2) of the fourteen (14) questions on the application. (*See id.* at 1300-1303; *id.* at 1337, pp. 122-23). The remaining twelve (12) questions and the rest of the application were left blank, and the application was not signed. (*See id.* at 1300-1303).

Thomas was given a telephone interview for the trainer position by Donna Williams, an African-American woman who was then the Senior Vice President of Respondent. (*See App.* at 1340, pp. 133, 136). Following her telephone call with Ms. Williams, Thomas never followed up on the interview, nor did she ever inquire about the status of her application. (*See id.* at 1342, pp. 141-44).

## **2. Procedural History**

Ms. Thomas filed a complaint with the West Virginia Human Rights Commission alleging that she had been retaliated against by Respondent for engaging in protected activity. A public hearing on this matter was held before ALJ *pro tempore* Frank T. Litton, Jr. on December 17-18, 2012. The parties submitted post-hearing briefs, and the ALJ entered his Final Decision in favor of Ms. Thomas on March 14, 2014. (*App.* at 235-67). On November 26, 2014, Respondent appealed the Final Decision to the Commission,<sup>2</sup> which upheld the ALJ *pro*

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<sup>2</sup> There are some procedural quirks regarding appeal at the administrative level. Upon initial appeal, the Commission determined that the ALJ's "purported *Final Decision* . . . [was] not, in fact a final decision subject to appeal" and remanded the case to the ALJ for a limited ruling on issues relating to damages and fees. In its Order of Remand, the Commission specifically preserved the parties' right of appeal on the merits. The ALJ *pro tempore* issued a Supplemental Final Decision, rendering the case ripe for appeal to the Commission. Respondent then appealed and the Commission issued its Final Order.

*tempore*'s decision via Final Order dated August 17, 2015 and adopted the ALJ's reasoning. (*Id.* at 670-738).

Respondent timely appealed the Commission's Final Order to the Circuit Court of Kanawha County pursuant to the State Administrative Procedures Act, W. VA. CODE § 29A-5-1, *et seq.*, on the grounds that: a cause of action for retaliatory failure to hire by a prospective employer does not exist under current West Virginia law; the ALJ impermissibly shifted the burden of proof to Respondent; and that the ALJ's determination that Brian Helton's alleged comments were the "but-for" cause of Appellant's failure to hire Thomas for the customer service position was not supported by substantial evidence in the record. (*Id.* at 739-826, 919-938). By Order dated January 19, 2016, the circuit court reversed the Commission, finding in favor of Respondent on all assignments of error in liability. (*Id.* at 1-13).

Ms. Thomas now has filed an appeal of the circuit court's decision, in which the Human Rights Commission joins.

## II. SUMMARY OF ARGUMENT

The circuit court below was correct in reversing the Commission's findings that Thomas was not hired for the customer service position (for which she submitted an incomplete application) solely in retaliation for the complaint filed against her previous employer. This conclusion was based upon the ALJ's erroneous determination that Respondent "failed to meet its burden of *proving* a legitimate nondiscriminatory reason" for failing to hire Thomas. (App. at 258) (emphasis added). No such burden exists under any applicable discrimination analysis framework, and thus the ALJ's Final Decision was arbitrary, capricious, characterized by an abuse of discretion, and not in conformity with the law of West Virginia. The Commission's attempt to rescue the ALJ's clear error was dubious at best, and served merely to compound the

error in this case as a whole. Moreover, the Commission's findings of fact were contrary to the substantial evidence on the whole record.

Simply put, Thomas did not submit a completed application for the customer service position. Thus, she was not hired into it. For the reasons laid out in more detail below, the Commission's Final Order, adopting the reasoning of the ALJ *pro tempore*'s Final Decision, was not in conformity with the law of West Virginia and not supported by substantial evidence on the whole record. Accordingly, the circuit court was correct in reversing the egregiously flawed Final Order.

### **III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. In addition, this appeal is appropriate for disposition by memorandum decision under the criteria of West Virginia Rule of Appellate Procedure 21(c) because there was no prejudicial error committed below.

### **IV. ARGUMENT**

#### **A. STANDARD OF REVIEW**

Factual findings of the Human Rights Commission are afforded deference, but should only be "sustained by reviewing courts if they are supported by substantial evidence or are unchallenged by the parties." Syl. Pt. 1, *W. Va. Human Rights Comm'n v. United Transp. Union, Local No. 655*, 167 W. Va. 282, 280 S.E.2d 653 (1981). "[L]egal rulings made by the Commission are subject to *de novo* review." *Fairmont Specialty Servs. v. W. Va. Human Rights*

*Comm'n*, 206 W. Va. 86, 90, 522 S.E.2d 180, 184 (1999) (citing *Ruby v. Insur. Comm'n*, 197 W. Va. 27, 475 S.E.2d 27 (1996)).

This case was appealed from the Commission pursuant to the State Administrative Procedures Act, W. VA. CODE § 29A-5-4(a), which “**requires** a court to ‘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.’” *Smith v. W. Va. Human Rights Comm'n*, 216 W. Va. 2, 6, 602 S.E.2d 445, 449 (2004) (quoting Syl. Pt. 2, *Shepherdstown Vol. Fire Dep't v. W. Va. Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983)) (emphasis added).

## **B. DISCUSSION**

- 1. The Circuit Court below correctly applied the appropriate standard of review when it reversed the Final Order of the West Virginia Human Rights Commission; indeed, the law *required* reversal of the Commission.**

Although factual findings of an administrative agency are given deference, those findings are not ironclad. Deference is given *only* when those findings are supported by substantial evidence on the record. Syl. Pt. 1, *W. Va. Human Rights Comm'n v. United Transp. Union, Local No. 655*, 167 W. Va. 282, 280 S.E.2d 653 (1981). The ALJ *pro tempore*'s (and, by adoption, the Commission's) erroneous factual findings were not, however, simply the result of choice between “two permissible views.” *Frank's Shoe Store v. W. Va. Human Rights Comm'n*,

179 W. Va. 53, 56, 365 S.E.2d 251, 254 (1986). Rather, as discussed below, the findings were replete with omission of critical facts and reliance on hearsay. The circuit court below reviewed the record as a whole and determined, properly taking the omitted facts, reliance on hearsay, and ALJ *pro tempore*'s unsubstantiated leaps of logic into account, that the Commission's findings were not supported by substantial evidence on the whole record. Accordingly, the Commission's findings of fact were not entitled to deference, and the circuit court committed no error in reversing them.

Moreover, as also discussed below, the ALJ *pro tempore* and the Commission committed multiple egregious errors of law, which are reviewed *de novo*. *Fairmont Specialty Servs.*, 206 W. Va. at 90, 522 S.E.2d at 184 (1999). Thus, there can be no error in the standard used by the circuit court in reviewing the Commission's myriad legal flaws in deciding this matter. In sum, when factual and legal errors such as those committed by the Commission are present, the reviewing court is explicitly **required** to reverse the Order. *Smith*, 216 W. Va. at 6, 602 S.E.2d at 449 (2004). For these reasons, not only did the circuit court apply the correct standard, it in fact clearly followed the command of the law in reversing the Commission's Final Order.

**2. The circuit court did not err in concluding that a cause of action against a prospective employer for retaliatory failure-to-hire does not exist in West Virginia.**

***a. Petitioner Thomas conflates nonexistence with rejection; moreover, as an administrative agency, the Commission is not empowered to create new claims.***

Petitioner embarks on an analysis of the history of a retaliation cause of action against a prospective employer and concludes that because this Court has never explicitly rejected it, she is entitled to relief. Her discourse is a red herring – the issue at bar is not one of rejection of such a cause of action, but of its ***nonexistence***. Quite simply, the Commission took it upon itself to

perform the judicial function of creating a new cause of action in this case – which, as an administrative agency, it is not empowered to do.

The circuit court below did not err in reversing the Final Order of the Commission because, in adopting the ALJ *pro tempore*'s reasoning, the Commission awarded relief pursuant to a retaliatory failure-to-hire claim against a prospective employer – a theory which this Court has declined to recognize. See *Toth v. Bd. of Parks & Recreation Comm'rs*, 215 W. Va. 51 593 S.E.2d 576 (2003); *Burkhamer v. City of Montgomery*, No. 13-0930, 2014 WL 2404321 (W. Va. May 30, 2014) (memorandum decision).<sup>3</sup> Thus, the Commission's Final Order was not in conformity with applicable law, and **required** reversal. *Smith*, 216 W. Va. at 6, 602 S.E.2d at 449 (2004).

In *Toth*, the plaintiff brought a claim against a prospective employer which she alleged failed to hire her because she had filed a wrongful discharge claim against her former employer. *Toth*, 215 W. Va. at 55. Although addressed through the lens of upholding summary judgment in favor of the employer, this Court explicitly noted that it had never recognized a cause of action for retaliatory failure-to-hire based upon legal actions against a former employer. See *id.* at 56.

This Court was recently afforded the opportunity to revisit the issue head on in *Burkhamer*, where the plaintiff, a police officer, attempted to bring a retaliatory failure-to-hire claim against a prospective employer, alleging that he was not hired because he had once arrested an official of the defendant prospective employer for DUI. See *Burkhamer*, 2014 WL 2404321 at \*1. Although it acknowledged that the *Toth* Court had failed to reach the issue directly, the *Burkhamer* Court stated that there was no “legal authority tending to support [plaintiff's] argument that West Virginia **should** recognize a failure to hire claim” in the same

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<sup>3</sup> The Supreme Court of Appeals has stated that its “[m]emorandum decisions may be cited in any court or administrative tribunal in this State.” W. VA. TRIAL CT. R. 21(e)

manner as it does a retaliatory discharge claim. *Id.* at \*2 (emphasis added). This Court’s implication in its choice of language is clear – West Virginia does not, nor has it ever, recognized a cause of action for failure-to-hire against a *prospective* employer.

In her Brief, Petitioner Thomas points out that this Court “did not actually reject such a cause of action,” (Pet. Brief at 12), and broadly concludes that, therefore, such a claim must exist. Such a leap in logic is a *non sequitur* – Thomas’s attempt to convert this Court’s refusal to affirmatively reject the cause of action to a tacit adoption of it is a red herring. In fact, *Toth* and *Burkhamer* stand for the opposite implication – when the Court’s statements in those cases are taken fully in context, the state of the law becomes abundantly clear – this Court has never recognized that a claim of retaliatory failure to hire against a prospective employer exists in West Virginia. Accordingly, the Commission’s Final Order was not in conformity with applicable law and required reversal.

Moreover, for Petitioner Thomas to prevail on a theory previously unrecognized by West Virginia statute or case law, the Commission necessarily must have created or recognized it from whole cloth as a matter of first impression.<sup>4</sup> This is impermissible. It 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). The Commission is an executive branch agency. As the circuit court below correctly noted, until such time as the judicial branch recognizes a cause of action, it is the function of the Commission as an executive agency to apply the law as it exists, not create new law through the court function of interpretation.

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<sup>4</sup> Indeed, the ALJ *pro tempore* explicitly recognized that whether a claim for retaliatory failure-to-hire against a prospective employer exists was an issue of first impression. (App. at 251).

Even if West Virginia did presently recognize a retaliatory failure-to-hire claim (which it does not), the traditionally accepted form would be that of claims against the employer who was the target of the original complaint. *See, e.g., Pina v. The Children's Place*, 740 F.3d 785 (1<sup>st</sup> Cir. 2014). In *Pina*, the plaintiff had filed a race discrimination lawsuit against her employer, which then terminated her and failed to re-hire her, sparking the cited lawsuit. The First Circuit proceeded to analyze the retaliation claim as based upon a failure to re-hire the plaintiff by the same company she originally sued. *See id.*; *see also Velez v. Janssen Ortho LLC*, 467 F.3d 802 (1<sup>st</sup> Cir. 2006) (retaliation claim similarly based on failure to re-hire).

Here, Thomas has brought a claim not against Insurance Solutions – the employer against whom her original discrimination complaint was filed – but against Petitioner, a *prospective* employer. As recently as 2014, this Court has declined to recognize such a theory. Accordingly, the circuit court did not err in holding that Respondent's rights were substantially prejudiced when the Commission usurped the role of the judiciary to recognize a brand-new cause of action out of whole cloth and awarding relief pursuant to it.

***b. The Commission has no common-law powers; accordingly, Petitioner Thomas cannot rescue her case by inserting a common-law Harless theory on appeal.***

The remainder of Section V(B) of Petitioner Thomas' Brief is not concerned with the state of the law as it exists; rather, she implores this Court to find "another solution" under the common-law public policy tenets of *Harless v. First Nat'l Bank of Fairmont*, 162 W. Va. 673, 246 S.E.2d 270 (1978). Petitioner's prayer blithely ignores the narrow scope of review in this matter and begs this Court to introduce theories not present (or in any way authorized by law) below.

The Commission is an administrative agency, and, thus, its power (and authority to hear claims) is entirely dependent on statute. More specifically, the Commission “ha[s] *no common-law powers* but only such as have been conferred upon [it] by law expressly or by implication.” Syl. Pt. 3, *Appalachian Reg’l Health Care, Inc. v. W. Va. Human Rights Comm’n*, 180 W. Va. 303, 376 S.E.2d 317 (1988). In other words, the Commission is bound by the provisions of enforcement of the WVHRA. Common-law claims such as *Harless* are entirely outside its statutory authority. Accordingly, Petitioner Thomas’s attempted insertion of a *Harless* theory now is yet another *post-hoc* red herring – one which broadens the narrow scope of review of the record below far beyond permissible bounds.

Of course, Petitioner Thomas could have pursued a common-law *Harless* theory in circuit court. She affirmatively chose to file her claim, however, before the Commission. She is therefore bound by the statutory limitations on the Commission’s authority, and should not now be allowed to raise new theories outside that authority.

- 3. Substantial evidence on the record shows that Petitioner Thomas was not interested in a customer service position at the time and that there was no causal link between Brian Helton’s comments and Thomas’s nonselection; thus, the circuit court did not err.**

In her brief, Petitioner Thomas rests her argument on two assertions, both of which are hypothetical assumptions. First, she asserts that she testified at hearing of this matter that she “would have accepted” a customer service position. (Pet.’s Brief at 20). Her citation solely to *ex post facto* testimony, however, is a tacit admission that there are no actual facts supporting her claim. Petitioner Thomas’s self-serving hypothetical scenario she presented to the Commission years after the fact is just not relevant to the decision making done at the time of the non-hire.

Second, she asserts that Jackie Ward “would have” selected Thomas for the customer service position on two conditions: 1) if Brian Helton had not made his alleged comments; and 2)

if Ward had known Thomas was a candidate. (Pet.'s Brief at 22). This is speculation from Ms. Ward. Ms. Ward's speculative testimony does not establish that Ms. Ward *actually* declined to select Thomas because of Helton's alleged comments – merely that this would have been the case *if she had known Thomas was a candidate*. Again, a cherry-picked hypothetical from Ms. Ward does not constitute credible evidence of a causal link to Petitioner Thomas's alleged injury.

Rather, as the circuit court correctly recognized, the evidence “on the whole record” tells a markedly different tale. Petitioner Thomas was interested in supervisory positions and, in fact, applied and interviewed for one – the trainer position. Her interest in the customer service position (which was not supervisory and did not meet her desired salary) was halfhearted at best. Her contemporaneous blasé feelings toward the customer service position are underscored by the undisputed facts that she 1) did not voice interest in the position to anyone at Respondent at the time; 2) only submitted an “application” at the behest of a recruiter; 3) turned in an application which was incomplete; and 4) never checked on the status of her application.

Given the evidentiary problems with the trainer position,<sup>5</sup> Petitioner Thomas turned the focus of her complaint before the Commission to Plan B – emphasizing the customer service position. She had no facts, however, which indicated retaliation *at the time* and, accordingly, manufactured this secondary theory from quotes gleaned during hearing of this matter. Each component of Petitioner Thomas's theory is based upon pure speculation, ultimately leading to an outcome which is entirely hypothetical. Her case assumes that her customer service application was valid (which it was not); *and* that Jackie Ward was aware of Thomas's candidacy for the position (which she was not). Without these two critical facts – which *are not present in the record* – Brian Helton's alleged comments exist in a vacuum. There simply is no

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<sup>5</sup> As discussed above, Petitioner Thomas was not qualified for the trainer position due to her lack of a college degree. The Commission did not find discrimination or retaliation with regard to the trainer position.

causal link to Petitioner Thomas's alleged nonselection for the customer service position, and her case must fail.

As discussed below, the circuit court did not err in finding that retaliation regarding the customer service position was not supported by substantial evidence on the whole record. Quite the opposite, in fact -- the circuit court astutely saw through Petitioner Thomas's *ex post facto* arguments and recognized that the purpose of a hearing is to present extant evidence, not serve as a laboratory in which to "grow" facts which did not exist at the time.

***a. Petitioner Thomas did not submit a valid application for the customer service position.***

Even if the Commission were empowered to award relief pursuant to cause of action of retaliation by a *prospective* employer, in order to establish a *prima facie* case of retaliation under Title VII of the Civil Rights Act of 1964 (the basis for the federal retaliatory failure-to-rehire cases), a claimant must prove that she was subjected to a material adverse employment action. *See, e.g., Burlington N. & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 67 (2006); *Velez*, 467 F.3d at 803. In the context of a retaliatory failure-to-rehire case, the adverse employment action element of the *prima facie* case requires the plaintiff to show: (1) that she applied for a particular position; (2) that was vacant; (3) for which she was qualified; and (4) that she was not hired for the position. *Pina*, 740 F.3d at 800-01; *Velez*, 467 F.3d at 807. "Put simply, in the absence of a job application, there cannot be a failure to hire." *Id.*

While Petitioner Thomas submitted paperwork for two positions – trainer and customer service representative – ***she only completed the application for the trainer position*** (App. at 243 ¶ 17; *id.* at 1300-1303; *id.* at 1427-28). Her application for the customer service position was left mostly blank. Thomas only filled out her name, the date, and two (2) of the fourteen (14) questions on the application. (*See id.*). She did not answer twelve (12) of the questions; did not

sign the application; did not complete the attached Scheduling Agreement; and did not date or verify that she understood the terms and conditions of employment. (*See id.*).

While former Insurance Solutions employees were indeed encouraged to apply for positions with Respondent, they were required to submit a completed application. Respondent's Human Resources Manager, Steve Thomas, testified that in order for an applicant to be considered for a position with Respondent, he or she must submit a completed application:

Q: And then you state that [Ms. Thomas] was afforded an opportunity to apply for a customer service representative position. Did she apply for a customer service job?

A: There was a partially completed application.

Q: So did you consider that an application for the position or not?

A: Not a completed application, no.

Q: So is it your testimony that in order for the company to know what position an individual is applying for, ***the application needs to be completed; is that correct?***

A: ***That is correct.***

(App. at 1010, pp. 112:1-11) (emphasis added). The Commission did find (based on her “experience” and “training”) that she was qualified for the customer service position. In the absence of a completed application for the customer service position, however, it is impossible for Petitioner Thomas to carry her burden of proving that she actually applied for the position for which she alleges to be qualified. *See Pina*, 740 F.3d at 800-01; *Velez*, 467 F.3d at 807. Tellingly, Petitioner Thomas entirely ignores her lack of a completed, and thus valid, application in her appeal brief.

- b. ***Petitioner Thomas did not express interest in the customer service position to Respondent at the time of the application process; in fact, she did not even express interest in that position to the Commission itself until hearing.***

Petitioner Thomas testified that she verbally expressed interest ***only in supervisory positions*** because she wished to receive the same rate of pay she received with her former employer as an insurance agent:

Q: Okay, tell the Judge about those other positions that you told whoever interviewed you that you were interested in.

A: I verbally expressed that I would be interested in, you know, any other position that I was able to work, you know, I was to take like ***as far as supervisor positions***. Cause my thing was that ***I really needed to stay in the same rate of pay*** because of my children . . . I considered myself management as well.

(App. at 1319, pp. 51:7-11) (emphasis added). As a licensed insurance agent, Thomas made \$15.00 per hour with her former employer, Insurance Solutions. The customer service position with Petitioner pays between \$9.00 and \$12.75 per hour. (See App. at 1205-31; *id.* at 247). It is not a supervisory position.

In addition to the woefully incomplete application and her explicit admission that she did not verbally express interest in a customer service position, Petitioner Thomas's lack of interest is further supported by documentary evidence. Indeed, Petitioner Thomas's ***own Complaint*** before the Commission makes no mention of being denied a customer service position by Petitioner. Further, during discovery, Thomas submitted a document to the Commission listing five positions with Respondent in which she was interested. (See *id.* at 1339, pp. 130-32). The position of customer service representative was likewise not included on ***Thomas's own list***:

Q: So "Jobs that Complainant was interested in" and then read for me numbers one through five.

A: Trainer, operations supervisor, quality supervisor, sales supervisors, payroll administrator.

Q: And of those, the *only one that you submitted an application for was the position of trainer; is that true?*

A: *Yes.*

(*Id.*) (emphasis added). Thus, the record as a whole clearly shows that the only position that Petitioner Thomas both wanted *and* applied for was the trainer position, for which she was not qualified. Petitioner simply did not express any interest in the customer service position to Respondent – or indeed, even the Commission – *until hearing*. Substantial evidence on the whole record clearly establishes that Petitioner was not interested in a customer service position at the time of the application process, and therefore the circuit court’s determination was not in error.

*c. Jackie Denise Ward did not know that Petitioner Thomas was a candidate for the customer service position; her speculative testimony does not constitute substantial evidence as a matter of law.*

In her Brief, Petitioner Thomas again conflates *ex post facto* knowledge gleaned at hearing with knowledge available at the time of the hiring process. It is true that Ms. Ward testified that she “would have” hired Petitioner Thomas for a customer service position, but this testimony was adduced years after the fact. At the time of the application process, Ms. Ward did not even know that Petitioner Thomas had applied for the customer service position, as she testified:

Q: Did you know that Kennita Thomas had applied for [the customer service] 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.

(App. at 1367, pp. 241) (emphasis added). Ward’s testimony that she would not have hired Thomas due to Brian Helton’s alleged comments necessarily depends on the first condition – Ward knowing that Thomas had allegedly applied for a customer service position in the first place.<sup>6</sup> Because she did not know that Thomas had allegedly applied, Ward’s statement regarding what she might have done is pure speculation. Ward’s speculation on what she *might* have done is patently inadequate to satisfy the element of “but-for” causation. Nor can such speculation constitute “reliable, probative, and substantial evidence” upon which to rest the ALJ and Commission’s decision as a matter of law. *See White v. Apfel*, 167 F.3d 369, 375 (7<sup>th</sup> Cir. 1999) (“Speculation is, of course, no substitute for evidence, and [an agency] decision based on speculation is not supported by substantial evidence.”)

Ward’s testimony further makes clear that Helton’s alleged statements could not have been the cause of Respondent’s failure to hire Petitioner Thomas. In addition to the lack of a valid application, Ward was entirely unaware that Petitioner Thomas even wanted the position. (See App. at 1367, pp. 241). Ward testified that, at the time, she believed Petitioner Thomas was “*undecided*” about whether she even wanted a job with Respondent at all. (See *id.* at 1369, pp. 250).

Because Ward was unaware that Petitioner Thomas had applied for a customer service representative position – and indeed, believed that Thomas was unsure whether she even wanted to work for Respondent at all – the whole evidence on the record shows that Respondent’s failure

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<sup>6</sup> As discussed above, Thomas actually did not properly apply for the customer service position because she left the majority of the application woefully blank.

to hire Thomas cannot be attributed to Helton's alleged statements. In other words, Helton's alleged statements (if any) essentially occurred in a vacuum – the record as a whole simply does not reflect any causal link between them and the nonselection of Petitioner Thomas. Accordingly, the circuit court below did not commit error.

- 4. The circuit court did not err in holding that Commission's modification of the ALJ *pro tempore's* Final Decision failed to properly address the clear distortion of the applicable burden of proof; the threshold issue of the Commission's authority to do so was never at issue.**

Petitioner Thomas again mischaracterizes the circuit court's holding below in her Brief. The court did *not* hold that the Commission "could not modify" the ALJ *pro tempore's* Final Decision as Petitioner disingenuously asserts, nor was that argument even advanced in the proceedings below. Indeed, the Commission clearly has the authority to do so. *See* W. VA. CODE R. § 77-2-10.6.

Rather, the issue confronted by the circuit court was that the ALJ *pro tempore's* Final Decision distorted the fundamental law of West Virginia by holding Respondent to a burden of proof which is expressly prohibited. Although the Commission attempted to gloss over the ALJ *pro tempore's* clear error as a "typographical error," changing only one word cannot, and did not, rescue the clearly flawed analysis surrounding the error.

- a. The ALJ pro tempore impermissibly distorted fundamental law of West Virginia in holding that Petitioner had the burden to prove a legitimate, nondiscriminatory reason for failing to hire Thomas.*

In order to fully analyze the Commission's misguided modification of the ALJ *pro tempore's* Final Decision, the error originally committed by the ALJ must first be examined. Even if it can be assumed that Petitioner Thomas proved a *prima facie* case of retaliation pursuant to a valid cause of action (which she did not), the ALJ *pro tempore* committed a fundamental error of law when he distorted the applicable burden of proof to hold that Thomas

should prevail because “the Respondent has *failed to meet its burden of proving a legitimate nondiscriminatory reason* for failing to hire the Complainant for a customer service position.” (App. at 258) (emphasis added). In fact, no such burden exists for defendants/respondents under either the WVHRA or Title VII. Thus, the ALJ’s Final Decision was clearly not in conformity with the applicable discrimination law of West Virginia.

In analysis of discrimination and retaliation claims, West Virginia follows the three-step inferential proof formula first articulated in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). See *Shepherdstown Vol. Fire Dep’t v. W. Va. Human Rights Comm’n*, 172 W. Va. 627 (1983). Under this framework, the complainant must first carry her burden of proof, by a preponderance of the evidence, of establishing a *prima facie* case of discrimination. Second, a respondent has the opportunity to “*articulate* some legitimate nondiscriminatory reason” for its action. *Id.* at 637; App. at 248.<sup>7</sup> Should the defendant do so, the plaintiff must then carry her burden of proof, again by a preponderance of the evidence, that the proffered reason was pretextual.

It is the second step, that of producing a legitimate, nondiscriminatory reason, where the ALJ *pro tempore* made a grievous error of fundamental law. Under both the WVHRA and Title VII, a *prima facie* case is merely “in essence, a rebuttable presumption.” *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 71, 479 S.E.2d 561, 581 (1996) (citing *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). In the event the plaintiff satisfies this burden, “the burden of *production* then shifts to the employer to *come forward* with a legitimate, nondiscriminatory reason for its actions.” *Id.* at 73 (citing *Burdine*, 450 U.S. at 254). “The burden of production merely requires a party to present some evidence to rebut evidence offered by the party having

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<sup>7</sup> Indeed, the ALJ cited the correct standard early in his Final Decision, yet nevertheless inexplicably distorted that standard when applying it to the facts.

the burden of persuasion.” *Mayhew v. Mayhew*, 205 W. Va. 490, 497, 519 S.E.2d 188, 195 n. 15 (1999). At no time does the burden of proof shift to a respondent under either the WVHRA or Title VII, but rather “**at all times** the burden of proof or the risk of nonpersuasion . . . **remains on the plaintiff.**” *Skaggs*, 198 W. Va. at 72, 479 S.E.2d at 582 (citing *Burdine*, 450 U.S. at 253).

In his Final Decision, the ALJ *pro tempore* **explicitly acknowledged** that Petitioner, through its Human Resources Director, had presented evidence that Thomas was not selected for the customer service position, at least in part, for the legitimate, nondiscriminatory reason that she did not complete the application. (App. at 256). Under applicable law, this should have been the end of Petitioner’s burden of production, and Thomas should have been required to present evidence that Petitioner’s reasons were pretextual.

Rather than follow the correct framework of analysis, however, the ALJ embarked on a lengthy discourse on the credibility of **Respondent’s** evidence (**not** Petitioner Thomas’s), as viewed through the lens of whether Respondent had proven its legitimate, nondiscriminatory reasons. The end result is that the ALJ improperly shifted the burden of persuasion to the Respondent, explicitly holding Respondent to a higher standard than the mere burden of production required by law – and indeed, finding for Petitioner Thomas on the sole basis that Respondent failed to meet a standard to which the law commands it must **not** be held. (*Id.* at 258). Notably, the ALJ did **not** hold that Petitioner Thomas carried her required burden of proving pretext; indeed, any analysis of pretext is entirely absent from the ALJ’s Final Decision. (*Id.* at 258, 264).<sup>8</sup>

In sum, the ALJ’s Final Decision hinged entirely on his determination that Petitioner “failed to meet its burden of **proving** a legitimate nondiscriminatory reason” for its

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<sup>8</sup> Again, the ALJ cited the standard for pretext as part of the *McDonnell-Douglas* framework, but utterly failed to apply it to the facts.

actions. Such a burden, however, is explicitly rejected under all applicable WVHRA and Title VII jurisprudence. Thus, the ALJ's finding for Thomas on the basis that Petitioner failed to carry a burden of proving legitimate, nondiscriminatory reasons was an egregious distortion of the law of West Virginia.

- b. The Commission's rebranding of the ALJ's error as "typographical" was clearly not consistent with the ALJ's reasoning and, read in context, did not rescue the clear error of law committed in holding Petitioner to an incorrect burden.***

In its Final Order, the Commission dubiously attempted to rescue the ALJ *pro tempore's* fundamentally flawed analysis by branding the ALJ's phrase "burden of *proving*" a mere "typographical error," and summarily rewriting it to read "burden of *providing*." (App. at 679). With its unilateral revision, the Commission then asserted that the ALJ *pro tempore's* analysis applied the proper standard and did not hold Respondent to a higher standard forbidden by law. The Commission's Order was illogical. As the circuit court properly found, one simple typographical change<sup>9</sup> was insufficient to rescue the totality of the ALJ *pro tempore's* flawed reasoning.

Indeed, the Commission's typographical revision was inconsistent with the ALJ's decision, both on its face and in context. In its Final Order, the Commission's revisionism resulted in a statement that the Petitioner had failed to carry its "burden of providing" a legitimate, nondiscriminatory reason. (App. at 679). However, the ALJ *pro tempore explicitly acknowledged* that Respondent had presented evidence of a legitimate, nondiscriminatory reason for its actions. (*Id.* at 256). Thus, as the circuit court properly found, the Commission's assertion was incompatible with the plain text of the ALJ's Final Decision and resulted in an Order that was internally inconsistent even with itself. Indeed, given the ALJ *pro tempore's*

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<sup>9</sup> The Commission changed only one word. It explicitly stated that it "[a] no further action to take" with regard to the ALJ's analysis as a whole. (App. at 679).

explicit acknowledgement, Petitioner Thomas's unfounded assertion in her Brief that the Commission did not articulate a legitimate, nondiscriminatory reason, [Petitioner's Brief at 25] deliberately mischaracterizes the findings, is contrary to the record, and thus irrelevant to this appeal.

Moreover, the Commission's typographical revision was inconsistent with the context of the ALJ *pro tempore's* Final Decision. Once the Respondent articulates a legitimate, nondiscriminatory reason for its actions, the *prima facie* inference has dropped from the case, and analysis "proceeds to a new level of specificity" where a complainant must "demonstrate that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 255-56. *Nowhere* in the ALJ *pro tempore's* Final Decision did he analyze, or even mention, evidence of pretext. Nor does he so couch his analysis of Petitioner Thomas's proffered evidence – rather, he embarks on a lengthy, entirely improper analysis of the credibility of *Respondent's* statement of its legitimate, nondiscriminatory reason. The practical effect is that the ALJ *pro tempore* deemed the Respondent's production of a legitimate, nondiscriminatory reason unsatisfactory – essentially, requiring the Respondent to meet a burden of persuasion rather than production. The Commission explicitly stated that it saw no issue with this flawed reasoning. Distilled to its essence, the ALJ and Commission placed the burden of proof and risk of nonpersuasion on Petitioner – directly defying the command that it remain on the complainant "*at all times.*" *Skaggs*, 198 W. Va. at 72, 479 S.E.2d at 582 (emphasis added).

In sum, ALJ *pro tempore* declared that Respondent articulated a legitimate, nondiscriminatory reason, but required more than "articulation." This is clear error of law. The Commission attempted to put a gloss of legitimacy on the error by addressing it on

“typographical” grounds, but utterly failed to address the heart of the ALJ’s faulty analysis.<sup>10</sup> These defects together constituted an egregious error of law which, in practical terms, rose above mere “typographical error” to hold the Respondent to a standard explicitly forbidden by the applicable *McDonnell-Douglas* framework. As such, the Final Order was contrary to all applicable law, and the circuit court was *required* to reverse it. *Smith*, 216 W. Va. at 6, 602 S.E.2d at 449 (2004).

5. **The circuit court did not err in holding that the Commission erred in rejecting the *Nassar* “but for” causation standard; however, even if Petitioner Thomas *Nassar* is redundant to *McDonnell-Douglas*, the circuit court was still correct in reversing the decision on other grounds.**
  - a. *Petitioner Thomas fails to identify any difference whatsoever in statutory language, which mandates that the WVHRA be construed inconsistent with the principles of Title VII espoused in Nassar.*

In *Univ. of Texas Sw. Med. Ctr. v. Nassar*, the United States Supreme Court declared that retaliation claims under Title VII, the federal analogue to the WVHRA, are subject to strict “but-for” causal analysis. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517 (U.S. 2013). To establish a *prima facie* case of retaliation under *Nassar*, a plaintiff must necessarily show that, but for protected activity, the alleged adverse employment action would not have occurred. *Nassar*, 133 S.Ct. at 2534. The “but-for” standard is stricter than that required for discrimination claims; showing that retaliation was merely one motivating factor is not enough. *Id.* In other words, if Thomas cannot show that she would be employed with Respondent “but for” Brian Helton’s comments, then she has failed to make a *prima facie* case of retaliation.

This Court has consistently commanded that the WVHRA is to be construed consistent with the prevailing application of Title VII unless the statute’s language demands otherwise. *See*

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<sup>10</sup> Quite to the contrary, the Commission wholeheartedly endorsed the erroneous analysis. (App. at 679).

*Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 484, 457 S.E.2d 152, 161 (1995).<sup>11</sup> As a United States Supreme Court decision, *Nassar* unquestionably represents the “prevailing” analysis of Title VII retaliation claims. In her Brief, Petitioner Thomas adamantly states (more than once) that “the language does demand” a differing interpretation because the two statutes are “different . . . like apples and oranges.” [Pet.’s Brief at 26, 30]. She conspicuously has declined, however, to provide any explanation on what those differences are. The reason is simple: there is almost *no* functional difference whatsoever between the operative language of the WVHRA the equivalent portion of Title VII on which the *Nassar* decision was based. See W. VA. CODE § 5-11-9(7)(C); 42 U.S.C. 2000e-3.

The Commission is under an obligation, a command from this very Court no less, to unify its interpretation of the WVHRA with the prevailing authority on Title VII, including the *Nassar* decision. In its Final Order, however, the Commission shirked this obligation when it explicitly stated that it “does not adopt the *Nassar* ‘but-for causation’ standard.” (App. at 678). The Commission did not describe the language in the WVHRA which it deemed to demand a differing interpretation – in fact, the Commission gave no reason *whatsoever* for rejecting *Nassar*. Neither does Petitioner Thomas do so here. Thus, the circuit court was correct in finding that the Commission’s failure to adopt *Nassar* was legal error.

- b. Even if Petitioner Thomas is correct that the principles of Nassar are already contained in the McDonnell-Douglas scheme, it does not change the outcome because the Commission fundamentally misapplied the McDonnell-Douglas scheme; nor is it sufficient to reverse the circuit court, as there are multiple legal grounds by which to sustain the circuit court.***

Even if it is assumed that Petitioner Thomas is correct that the strict “but for” principles of *Nassar* were already included in the *McDonnell-Douglas* framework such that a “decision

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<sup>11</sup> It is telling that Petitioner Thomas has consciously declined to address this Court’s consistency command in her Brief.

under *Nasser* [*sic*] as well as under *McDonnell-Douglas*[,]”her arguments nevertheless undermine her position. The circuit court did not base its substantive decision on *Nassar*, but correctly recognized that the Commission’s Final Order was based on speculation, hearsay, and cherry-picked quotations rather than substantial evidence on the whole record. (App. at 679). Indeed, as the circuit court clearly and correctly recognized, the Commission egregiously misapplied the *McDonnell-Douglas* burden-shifting scheme *altogether*. (See *id.* at 9-11).

In any event, Petitioner Thomas’s discourse on *Nassar* is a red herring designed to distract this Court from the substantive issues which are clearly fatal to her case. The circuit court below did not base its decision on *Nassar*. As discussed more fully in other sections of this brief, the circuit court correctly found that the Commission committed multiple egregious errors of both law and fact – including holding Respondent to a burden of proof prohibited by law and making findings of fact unsupported by substantial evidence on the whole record. Accordingly, because there are clearly other substantive grounds to uphold the circuit court here, *Nassar* is of no moment. *Yourtee v. Hubbard*, 196 W. Va. 683, 474 S.E.2d 613 n. 9 (1996) (*citing* Syl. Pt. 2, *Work v. Rogerson*, 149 W. Va. 493, 142 S.E.2d 188 (1965) (This Court is “not confined to affirming the judgment strictly on the grounds given by the lower court. In reviewing an appeal of a circuit court's order, we look not to the correctness of the legal ground upon which the circuit court based its order, but rather, to whether the order itself is correct, and we will uphold the judgment if there is another valid legal ground to sustain it.”)).

**6. Substantial evidence on the record shows that Petitioner Thomas was not selected due to a legitimate, nondiscriminatory reason; she has not carried her burden to prove pretext.**

In her Brief, Petitioner Thomas repeatedly takes the circuit court to task for making a finding (in her view) not supported by “substantial evidence in the record.” [Pet.’s Brief at 31,

32]. Petitioner conspicuously (and perhaps deliberately) omits a key word – *whole*. As this Court has commanded, “[a] reviewing court must evaluate the record of an administrative agency’s proceeding to determine whether there is evidence *on the record as a whole* to support the agency’s decision.” Syl. Pt. 1, *Walker v. W. Va. Ethics Comm’n*, 201 W. Va. 108, 563 S.E.2d 167 (1997) (emphasis added). The reason she has omitted this key requirement is clear: Petitioner Thomas’s cherry-picked examples she presents on appeal are not consistent with the evidence on the “whole record” the circuit court was tasked with reviewing. Accordingly, the circuit court did not err.

*a. Petitioner Thomas’s assertion that Mr. Thomas did not link her nonselection to the uncompleted application is a patent falsehood; moreover, the number of witnesses Respondent called in its case in chief is irrelevant as to evidence developed.*

Petitioner Thomas’ statement to this Court that Roy Steven Thomas, Respondent’s Human Resources Director, admitted that Petitioner’s uncompleted application was not the reason for her nonselection to the customer service position, is false. Mr. Thomas testified (with Petitioner Thomas’s counsel questioning him, no less) that “[Petitioner Thomas] was offered an opportunity to apply for a customer service representative position. *She did not complete the application* and she did not appear for the training.” (App. at 1010, pp. 110:11-14) (Emphasis added.) Again, with Petitioner Thomas’s own counsel questioning him, Mr. Thomas testified that in order to be considered for a position with Petitioner, one must submit a completed application. (*See id.*, pp. 112:1-7).

In any event, Petitioner cannot have it both ways – she (falsely) asserts that Mr. Thomas stated that the uncompleted application was not the reason she did not receive the customer service position. (Pet. Brief at 32). In the very same breath, however, she states (in boldface type, no less) that Mr. Thomas “had no knowledge of Kennita Thomas’ job application process .

. . . that he had not spoken to anyone about why she was rejected, [and] that he had not spoken to anyone about Brian Helton’s comments.” (*Id.* at 32). Petitioner Thomas cannot have it both ways – if Mr. Thomas had “no knowledge” as she claims, then she cannot (falsely) assert that his statement on the reasons for her nonselection is binding.

Petitioner Thomas attempts to take Respondent to task for only presenting one witness in its case in chief, and characterizes such as a lack of evidence. Her attempt to (again) shift the burden of persuasion to Respondent ignores several fundamental truisms of the legal process. First, the ultimate burden of persuasion is on Petitioner Thomas, not on Respondent. Respondent’s burden of production merely required it to “present some evidence to rebut evidence proffered by [Petitioner Thomas.]” *Mayhew*, 205 W. Va. at 195, 519 S.E.2d at 497 n. 15 (internal citations omitted). Moreover, as the party with the burden of persuasion, Petitioner Thomas’s case in chief came first; she called seven (7) separate witnesses, several of whom were employees (or former employees) of Respondent. (App. 983, 1307). Respondent cross-examined each. (*Id.*) It is axiomatic that cross-examination is a valid (and valuable) means of developing evidence. As this Court has succinctly noted, “[t]he weight of evidence does not depend on mere number of witnesses.” *Crowl v. Buckhannon & N.R. Co.*, 92 W. Va. 188, 188, 114 S.E. 521, 522 (1922).

In short, the fact that Respondent called one witness in its case in chief is of no moment; Petitioner Thomas’s clear (if unspoken) implication that Respondent somehow failed to develop evidence is erroneous.

***b. Petitioner Thomas’s reliance on the hearsay testimony of Janice Gwinn is unpersuasive in the face of the record as a whole.***

As discussed more thoroughly above, the customer service position was one for which Petitioner Thomas ***did not apply and did not even want***. In an attempt to buttress her claim that

Brian Helton's comments to Jackie Denise Ward were the "but for" cause of Respondent's failure to hire Petitioner Thomas for the customer service position, Petitioner Thomas submits in her brief a lengthy discourse on the testimony of Janice Gwinn, Respondent's Human Resources Generalist, that Ms. Ward told her that Mr. Helton told Ms. Ward not to hire Respondent Thomas. Respondent Thomas ultimately claims that this constitutes "but for" proof that "no other factors, i.e. education or qualifications, played a role in Kennita Thomas not being hired." (Pet. Brief at 34).

Ms. Gwinn's testimony, however, is hearsay. Moreover, Petitioner Thomas's reliance on it entirely ignores the direct testimony from Ms. Ward herself that she *did not even know* Respondent Thomas had (allegedly) applied for the customer service position. (See App. at 1367, pp. 241). Given that fact, Ms. Ward's testimony on what she "would have done" is entirely speculation. *See id.* Indeed, Ms. Ward was unaware that Respondent Thomas was even interested in the customer service position. (See *id.*)<sup>12</sup> Quite simply, Respondent Thomas's cherry-picked morsels of evidence rooted in hearsay and speculation cannot satisfy proof of "but for" causation in the face of substantial, probative evidence to the contrary. *See, e.g., White v. Apfel*, 167 F.3d 369, 375 (7<sup>th</sup> Cir. 1999) ("Speculation is, of course, no substitute for evidence, and [an agency] decision based on speculation is not supported by substantial evidence.").

***c. Evidence of other employees may not have received an interview is irrelevant; Ms. Thomas failed to even apply.***

Petitioner Thomas's attempt to conjure reversible error through a reference to employees of respondent who may or may not have received an interview is puzzling, as she has entirely failed to suggest how the comparison is relevant to her claim that she was retaliated against. As

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<sup>12</sup> Indeed, as discussed above, Respondent Thomas's own testimony clearly shows that she was interested *only* in supervisory positions. (See App. at 1319, pp. 51:7-11; *id.* at 1339, pp. 130-132). The customer service position is not supervisory.

discussed thoroughly above, the operative facts behind Petitioner Thomas nonselection for a customer service position hinged on her failure to submit a completed, valid application for that position, nor did she in any other way express any interest in a customer service position to Respondent. Petitioner Thomas has not claimed that Ms. Webb, Ms. Sears, or others did not submit applications; thus, these other employees are not similarly situated to Petitioner Thomas and her reliance on their not being interviewed is yet another red herring.

*d. Sufficient evidence was adduced at hearing that Respondent Thomas's nonselection flowed from her failure to submit a completed application; thus, such an argument is not judicially estopped.*

It is axiomatic that “[j]udicial estoppel is an extraordinary remedy that should be invoked only when a party’s assertion of a contrary position will result in a miscarriage of justice.” *W. Va. Dep’t of Transp. v. Robertson*, 217 W. Va. 497, 504, 618 S.E.2d 506 (2005) (quoting *Puder v. Beuchel*, 362 N.J.Super. 479 (2003)). In this case, the Respondent has *not* taken contrary positions – indeed, sufficient evidence was adduced at hearing that Petitioner Thomas’s nonselection was motivated by her failure to complete an application. At hearing, Steve Thomas testified (with Petitioner Thomas’s counsel questioning him) that “[Petitioner Thomas] was offered an opportunity to apply for a customer service representative position. *She did not complete the application* and she did not appear for the training.” (App. at 1010, pp. 110:11-14) (emphasis added.) Again, with Petitioner Thomas’s own counsel questioning him, Mr. Thomas testified that in order to be considered for a position with Petitioner, one must submit a completed application. (*See id.*, pp. 112:1-7).

Further, ample documentary evidence was adduced to support the fact that Respondent Thomas’s application for the customer service position was incomplete. (*See App.* at 1010, pp. 110:11-14; *id.* at 1334, pp. 112:1-7; *id.* at 1300-1303; *id.* at 1427-28). Moreover, Petitioner

Thomas herself testified that *she was not even interested* in positions other than supervisory positions. (*See id.* at 1319, pp. 51:7-11). The customer service position is not supervisory. For Petitioner Thomas to now feign surprise regarding her lack of a completed application is disingenuous. Ample evidence was adduced at hearing, and made a part of the record, to show that her nonselection for the customer service position flowed in material part from her failure to complete the application. Thus, arguing such evidence at the post-hearing stage cannot “injuriously affect [her] and the integrity of the judicial process.”

#### V. CONCLUSION

Respondent’s decision not to hire Thomas was simple: Thomas applied for only one job with Appellant (the trainer position) and was not qualified for the position. For the reasons given above, the circuit court below was correct in finding that the Commission’s Final Order. Specifically, the circuit court was correct to overturn the Commission’s finding that Petitioner Thomas should have nonetheless been offered another position in which she showed no interest, pursuant to a cause of action that has not been recognized in this state, while egregiously distorting the applicable standard of proof. In sum, the Commission’s Final Order was not in conformity with the law of West Virginia and not supported by substantial evidence on the whole record.

**WHEREFORE**, Respondent TRG Customer Solutions, Inc. respectfully requests that the judgment of the Circuit Court of Kanawha County be **AFFIRMED**.

Dated this 4<sup>th</sup> day of April 2016.

**Respectfully submitted,**

**TRG CUSTOMER SOLUTIONS, INC.**

**By Counsel,**



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 15-0973

**KENNITA THOMAS and the  
WEST VIRGINIA HUMAN RIGHTS  
COMMISSION,**

**Petitioners;**

v.

**Appeal from a Final Order of  
the Circuit Court of Kanawha County  
CIVIL ACTION NO. 15-AA-100  
Honorable Charles E. King**

**TRG CUSTOMER SOLUTIONS, INC.,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing "*Respondent's Brief*" was served on all the parties hereto via U. S. First Class Mail, this 4<sup>th</sup> day of April 2016, to counsel as follows:

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