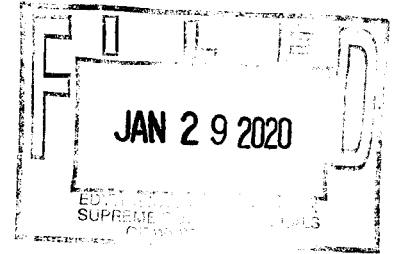


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**WEST VIRGINIA
SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

FILE COPY

**DIANA BOONE,
Plaintiff Below, Petitioner,**

v.

**ACTIVATE HEALTHCARE, LLC,
Defendant Below, Respondent.**

**CASE NO. 19-1007
Civil Action No. 18-C-96
(Jackson County)**

PETITIONER'S BRIEF

A handwritten signature in black ink, appearing to be "WALT AUVIL", written over a horizontal line.

**WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
Counsel for Plaintiff Below/Petitioner**

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I. ASSIGNMENT OF ERROR

1. The Circuit Court Applied an Incorrect Standard of Review, and Misapplied the Standard it Elected to Use
2. The Circuit Court erred in finding that the West Virginia Medical Professional Liability Act ("MPLA") applies to Petitioner's claim against Activate
3. Petitioner properly alleged that Activate Aided and Abetted Constellium in violating the West Virginia Human Rights Act ("WVHRA")

II. STATEMENT OF THE CASE

Petitioner worked as a laborer for Defendant Constellium. She has the disability of acrophobia, otherwise known as fear of heights. Defendant Constellium assigned Petitioner job duties which required her to operate an overhead crane, suspended from a warehouse ceiling, which triggered this acrophobia. Petitioner visited her physician regarding her anxiety and panic attacks resulting from this assignment. Petitioner's physician wrote accommodations for Petitioner to present to Defendant Constellium. Defendant Constellium referred Petitioner to its contractor, Defendant Activate, to translate her physician's accommodations into Physical Capacity Reports ("PCRs") which would then be communicated back to Defendant Constellium to inform its decision of how to assign Petitioner to work.

Petitioner attempted to do so, but Defendant Activate, in collaboration with Constellium, repeatedly failed to accurately translate Petitioner's physician's instructions into workable PCRs. According to Defendant Constellium, it terminated Petitioner upon these incorrect PCRs, stating that their proscriptions against certain activities prevented Petitioner from holding her job altogether. Petitioner sued Constellium for wrongful termination under the West Virginia Human Rights Act, and Activate for aiding and abetting Constellium in its misconduct against her under the same provisions of the Act.

Activate brought a motion to dismiss as to its role in Petitioner's termination on the basis that Petitioner had failed to allege that it had played a role in the decision to terminate her, and that Petitioner's claims against it were barred by the West Virginia Medical Professional Liability Act ("MPLA"). The Circuit Court granted this motion to dismiss, and Petitioner appeals therefrom.

III. SUMMARY OF THE ARGUMENT

Petitioner avers that the Circuit Court erred in finding that the MPLA applies to Petitioner's claim against Activate. Neither the language nor the purpose of the MPLA merit its inclusion in the adjudication of Petitioner's claims.

Additionally, Petitioner properly alleged that Activate aided and abetted Constellium in violating the West Virginia Human Rights Act. Petitioner has alleged substantial involvement by Activate in attempting to help Constellium give its termination of Petitioner a patina of legitimacy. At the stage of resolving a motion to dismiss, the Circuit Court was required to assess all facts alleged by Petitioner in the light most favorable to her. Petitioner's Amended Complaint contained more than mere allegations, however; it provides substantial documentary evidence demonstrating Activate's role in abetting Constellium's WVHRA violations against Petitioner. The Circuit Court improperly concluded that Petitioner failed to allege a claim that Activate aided and abetted Constellium in its violation of the WVHRA.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner requests that this Court grant oral argument in this matter. Petitioner believes that oral argument is necessary to clarify the application of the MPLA to cases arising under the West Virginia Human Rights Act involving disability discrimination. Furthermore, Petitioner believes that this case involves a substantial breach by the Circuit Court in its application of the

standard by which it was required to assess a motion to dismiss as it related to Petitioner's pleadings.

V. STANDARD OF REVIEW

An order granting a motion to dismiss is reviewed de novo. Factual findings are reviewed under a clearly erroneous standard. However, where a finding of fact is intimately connected to the lower court's legal conclusion, that finding of fact is reviewed de novo.

VI. FACTS AND PROCEDURAL HISTORY

Petitioner appeals from an order of the Circuit Court of Jackson County granting Respondent Activate Healthcare, LLC's (hereinafter "Activate") motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. For the reasons set forth herein Activate's motion should have been denied.

Petitioner's complaint alleges discrimination and retaliation against the Petitioner by her employer, Constellium Rolled Products Ravenswood, LLC ("Constellium") and individual Constellium managers Stemple and Murray. The sufficiency of Petitioner's claims against Constellium, Stemple and Murray was not challenged in Activate's motion.

Activate operates a medical facility at Constellium. In the course of operating this facility agents of Activate aided and abetted Constellium in its discrimination against the Petitioner in violation of the West Virginia Human Rights Act. First Amended Complaint ¶ 4, APP 2-3.¹

On May 18, 2018, Activate issued Exhibit B to the complaint, a Physical Capacities Report (PCR) restricting Petitioner from being required to train on the overhead crane at Constellium. Complaint ¶ 18, Complaint Exhibit B, APP 5, 13. Exhibit B contains a written notation indicating that the Petitioner's requested accommodation had been approved by Jim Lynch and provides

¹ References to the Joint Appendix will be abbreviated "APP", followed by the page number within the Appendix where the cited document appears.

Lynch's telephone extension within Constellium. Lynch was a Constellium supervisor, not an Activate employee. Thus, Activate was working with Constellium management in deciding what, if any, accommodations it would provide to the Petitioner. Complaint ¶¶ 17-18, APP 5.

Despite Petitioner's medical accommodation, she was again directed by Constellium to train on the overhead crane. Complaint ¶ 22, APP 6. As a result, Petitioner again contacted Activate and was provided with a second PCR, obtained only after Activate's interaction with Defendant Murray (Petitioner's supervisor) as documented on Exhibit E. Complaint ¶¶ 22-24, APP 6. During her interaction with Activate, Petitioner attempted to supply to Activate with a medical slip from her personal physician requesting that she be exempted from training in high positions due to her anxiety about heights. Complaint ¶ 24, Complaint Exhibit C. Based upon Exhibit E, Petitioner was directed to human resources within Constellium. Complaint ¶ 25, APP 6-7.

Upon returning to Activate, Petitioner explained that the PCR (Exhibit E) was not correct. Based upon Petitioner's interaction with Constellium human resources, she was then provided with Exhibit D. Complaint ¶¶ 25-27, APP 6-7.

The following day, June 26, 2018, Petitioner returned yet again to Activate, this time with her union grievance chair, Kevin Gaul. Complaint ¶ 30, APP 7-8. After interactions between the Petitioner, Gaul and Activate, Exhibit F was issued by Activate. APP 17. Exhibit F finally correctly described Petitioner's sole limitation as being unable to operate the overhead cab operated crane. Complaint Exhibit F.

As set forth in Exhibit G, an email exchange between Constellium human resources and Petitioner's union representatives dated June 25, 2018, Constellium took the position that the PCRs issued by Activate attached to the complaint as Exhibits B, D and E resulted in Constellium

refusing to accommodate the Petitioner in her employment: "Upon review by Activate she was given a permanent PCR for not heights above 6 feet (sic). When the department was ask, they cannot accommodate this, thus the Company cannot accommodate. (sic)" Complaint Exhibit G, APP 18. Constellium further noted that "since, we cannot accommodate the [Activate] PCR, Ms. Boone would be not be able to perform her job, thus, she disqualified herself from her job and would have to exercise her bidding rights to open positions to which her seniority would permit." Complaint Exhibit G, APP 18. Thus, Activate's PCRs - which were issued in collaboration with Constellium - resulted in the Petitioner's removal from her employment by Constellium.

Petitioner's claim against Activate is set forth in Count V of the complaint: "Activate Healthcare aided and abetted CRPR's refusal to accommodate Petitioner's disabilities as described herein above by refusing to review Petitioner's medical documentation and by repeatedly issuing erroneous 'PCRs' without interacting with Petitioner regarding her actual accommodation request." Complaint ¶ 42, APP 10.

As set forth above, Petitioner's complaint is that Activate, instead of interacting with the Petitioner regarding her accommodations, interacted with Constellium regarding Petitioner's accommodations and would not accept information from the Petitioner regarding the actual accommodations she needed. By working hand in glove with Constellium to deny Petitioner accommodations for no reason, Activate aided and abetted Constellium in its violation of its duty of accommodation under the West Virginia Human Rights Act (WVHRA).

VII. ARGUMENT

A. The Circuit Court Applied an Incorrect Standard of Review, and Misapplied the Standard it Elected to Use

Respondent Activate misstated the applicable standard of review in its motion to dismiss in Circuit Court. This Court has enunciated the following standard for the evaluation of motions to dismiss employment discrimination cases under the West Virginia Human Rights Act:

The Court notes that our interpretation of West Virginia Rule of Civil Procedure 8 is more liberal than what is allowed under the federal rules. The United States Supreme Court in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and Ashcroft v. Iqbal, 129 S.Ct. 1937, 173 L. Ed. 2d 868 (2009), required that "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to 'state a claim to relief that is plausible on its face.'" Iqbal, 129 S.Ct. at 1949. Thus, under the federal rules, more than a notice pleading is required insofar as a plaintiff is required to plead facts to show that the plaintiff has stated a claim entitling him to relief. Under West Virginia law, however, this Court has not adopted the more stringent pleading requirements as has been the case in federal court and all that is required by a plaintiff is "fair notice." Scott Runyan Pontiac-Buick, Inc., 194 W. Va. at 776, 461 S.E.2d at 522.

Roth v. Defelicecare, Inc., 226 W. Va. 214, 220 n.4, 700 S.E.2d 183, 189 (2010).

This standard was enunciated in the context of West Virginia Human Rights Act employment discrimination case but was not properly applied by the Circuit Court herein. The order granting Defendant Activate's motion to dismiss (APPENDIX 215) bears no evidence that the Circuit Court applied the proper standard of review in granting Defendant Activate's Motion to Dismiss. There is little discussion of the facts Petitioner alleges in her amended complaint, and little discussion of the documentary evidence provided by Petitioner. The Circuit Court states that "Plaintiff does not allege Activate had any involvement in Constellium's decisions regarding Plaintiff's employment, which occurred after Activate provided Plaintiff her desired medical restriction." This is incorrect.

First, there is no basis for the conclusion that Plaintiff “desired” the PCR’s Activate provided. Constellium forced her to go through Activate to attempt to secure appropriate accommodations, and Activate then refused to interact with Petitioner, instead interacting with Constellium.

Second, Petitioner did allege that Activate had involvement in Constellium’s decisions regarding her employment. Petitioner alleged that Constellium used the improper PCR’s it developed with Activate as a pretext to terminate her. The allegation that Activate negligently or intentionally provided Constellium with the documentation they admit they relied on in terminating Petitioner is absolutely an allegation that Activate was involved in Constellium’s decision to terminate Plaintiff. The Circuit Court’s interpretation of the facts, threadbare as it is, is shocking in the context of a motion to dismiss, where the Circuit Court was required to view all facts alleged by Petitioner in the light most favorable to her.

Beyond all of that, Petitioner’s Amended Complaint was not a mere assembly of naked allegations; it contained substantial documentary evidence to accompany its assertions, particularly Petitioner’s claims that Activate continually refused to interact with Plaintiff, disregarded the restrictions given to her by her physician, and recasting them inaccurately after consulting with Constellium. APPENDIX 13-17. Petitioner alleges that Activate also failed to engage in the interactive process by refusing to consult with her regarding the inaccurate PCR’s it continued to issue to her detriment. Of course these allegations are not proven at this point, but to somehow read these allegations out of existence to support a finding that Petitioner failed to make them is a confusing exercise in circular reasoning by the Circuit Court.

B. The MPLA Has no Application to Petitioner's Claim Against Activate

The West Virginia Medical Professional Liability Act (MPLA) is codified at W. Va. Code § 55-7B-1, et seq. The Legislature defined the purpose of the MPLA as follows:

Therefore, the purpose of this article is to provide a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to:

- (1) Compensation for injury and death;
- (2) The regulation of rate making and other practices by the liability insurance industry, including the formation of a physicians' mutual insurance company and establishment of a fund to assure adequate compensation to victims of malpractice; and
- (3) The authority of medical licensing boards to effectively regulate and discipline the health care providers under such board. W. Va. Code § 55-7B-1

Thus, as is pertinent to this case, the purpose of the MPLA was to adopt a legislative framework for dealing with compensation for injury or death occurring in the medical setting. In this regard, the Legislature defined the area of healthcare to include acts, services or treatments "during the patient's medical care".²

² (e) "Health care" means:

- (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
- (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and
- (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers. W. Va. Code § 55-7B-2.

Further, the Act provides that it addresses medical injury and medical professional liability. These are defined as including “injury or death to a patient” or “liability for damages resulting from the death or injury of a person”.³

The MPLA imposes pre-suit notices of claim and screening certificates of merit as a requirement for filing an MPLA a claim. W. Va. Code § 55-7B-6(b). However, the Act itself and its various pre-suit and filing requirements have no application to claims arising against healthcare providers which are outside of the provisions of the MPLA itself. W. Va. Code § 55-7B-2(e). R.K. v. St. Mary's Med. Ctr., Inc., 229 W. Va. 712, 735 S.E.2d 715, 2012 W. Va. LEXIS 826 (W. Va. 2012), cert. denied, 569 U.S. 905, 133 S. Ct. 1738, 185 L. Ed. 2d 788, 2013 U.S. LEXIS 2681 (U.S. 2013). As the Court noted in R. K. v. St. Mary's Med. Ctr., Inc., *supra*, a patient’s claim that a hospital improperly accessed and disclosed his medical records did not fall within the MPLA’s definition of healthcare.

The fact that the Petitioner’s claims herein similarly do not fall within the MPLA is made evident by the fact that the MPLA claim includes the following statutory requirements:

“a) The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and

(2) Such failure was a proximate cause of the injury or death.” W. Va. Code § 55-7B-3

³ (h) “Medical injury” means injury or death to a patient arising or resulting from the rendering of or failure to render health care.

(i) “Medical professional liability” means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services. W. Va. Code § 55-7B-2

As may be seen from comparing the elements above to the claims made against Activate in this matter, it would be irrational and impossible for the Petitioner to attempt to meet the standard set forth in W. Va. Code §55-7B-3 because there is no “injury or death from the failure of a healthcare provider” that is alleged in the complaint against Activate. What is plead is that Activate aided and abetted the employer in its refusal to interact with the Petitioner and its refusal to accommodate the Petitioner with regard to her employment. Thus, there can be no proof that a failure by Activate “was a proximate cause of . . . injury or death” when no “injury or death” is claimed. Instead, what is alleged is a refusal to interact with the Plaintiff at all, in violation of the WVHRA.

The Circuit Court framed the central issue as follows: “The critical inquiry is whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care. Minnich v. MedExpress Urgent Care, Inc., 238 W. Va. 533, 538, 796 S.E.2d 642, 647 (2017).” The Circuit Court then accurately notes that “Plaintiff does not allege the required elements of a medical negligence claim under the MPLA, and the facts alleged cannot be construed to allege or support facts that comply with the MPLA.” However, the Circuit Court’s order’s treatment of the MPLA issue simply ignores the actual basis for the cause of action alleged by the Petitioner and concludes “[i]n the instant case, Plaintiff’s ‘aiding and abetting’ claim against Activate is based solely upon Activate’s actions in assessing and issuing work restrictions in the PCR’s for Plaintiff and at Plaintiff’s request.” This finding by the trial court is in conflict with the allegations of the complaint which, inter alia, state that “Activate Healthcare aided and abetted CRPR’s refusal to accommodate Petitioner’s disabilities as described herein above **by refusing to review Petitioner’s medical documentation and by repeatedly issuing erroneous ‘PCRs’**

without interacting with Plaintiff regarding her actual accommodation request.” Complaint ¶ 42 (emphasis added).

Activate herein relies upon a statutory immunity pursuant to the MPLA much in the same way that the employer in Messer v. Huntington Anesthesia Grp., Inc., 218 W. Va. 4, 6, 620 S.E.2d 144, 146 (2005) relied upon the exclusivity provision of the West Virginia Workers Compensation Act to defend itself against a claim of failure to accommodate pursuant to the West Virginia Human Rights Act. In Messer, the Plaintiff had suffered a back injury on the job and then returned to work. She alleged that, due to the employer’s failure to accommodate, her back injury worsened to the point that she was unable to continue in her job. She sued under the West Virginia Human Rights Act alleging a failure to accommodate. The employer defended in part by relying upon the exclusive jurisdiction of the West Virginia Workers Compensation Act for on-the-job injuries, as provided in W. Va. Code § 23-2-1, et seq. The employer’s point was that that the Workers Compensation Act provided the sole remedy for on-the-job injuries and the damages resulting therefrom. The Court rejected this argument and noted that:

“Thus, while an aggravation or worsening of an employee's physical injury by the conduct of his/her employer may be compensable under and thus subject to, the exclusive remedy provided by the Workers' Compensation Act, an employee's claim against an employer for violation of The West Virginia Human Rights Act and resulting non-physical injuries, such as mental and emotional distress and anguish, directly and proximately resulting from such violation and not associated with the physical injury or the aggravation or worsening thereof are not barred by the exclusivity provisions of the Workers Compensation Act, W. Va. Code § 23-2-6 (2003) and -6a (1949). Such violation and the resulting nonphysical injuries are not within the scope of the Workers' Compensation Act. Rather, they are separate liabilities from the physical injury and were created by The West Virginia Human Rights Act, an entirely different statute from the Workers' Compensation Act with different policy objectives.” Messer v. Huntington Anesthesia Grp., Inc., 218 W. Va. 4, 20-21, 620 S.E.2d 144, 160-61 (2005)

The Court in Messer noted that Messer’s WVHRA claim was directed at a different harm than the claim for physical injury compensated pursuant to the Workers Compensation Act.

Similarly, the protections provided by the MPLA are directed toward a different purpose and addressed to different claims than those protected by the West Virginia Human Rights Act. The Petitioner's claims against Activate for aiding and abetting Constellium are entirely within the claims for emotional distress and anguish resulting from a violation of the duty of accommodation protected by the West Virginia Human Rights Act. They do not stem from any injury covered by the MPLA.

C. Petitioner Properly Alleged that Activate Aided and Abetted Constellium in Violating the WVHRA

As described above, Respondent Activate refused to interact with the Petitioner with regard accommodations regarding her employment and, instead, interacted with and took direction from Defendant Constellium. This is contrary to the obligations imposed by WV CSR § 77-1-4.4 which states:

“Reasonable Accommodation” means reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or to remain in the position for which he was hired. Reasonable accommodation requires that an employer make reasonable modifications or adjustments designed as attempts to enable an individual with a disability to remain in the position for which she/he was hired.” WV CSR § 77-1-4.4.

The decision as to whether an individual is able to perform a particular job “must be assessed on an individual basis”. WV CSR § 77-1-4.7. An employer's decision must be based “upon the individual's actual abilities, and not upon general assumptions or stereotypes about persons with particular mental or physical disabilities”. WV CSR § 77-1-4.7.

In Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 67-68, 479 S.E.2d 561, 577-78 (1996), the West Virginia Supreme Court considered the obligations imposed on both the employer and the employee with regard to interaction when a request for accommodation is made:

“The employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined

through a flexible, interactive process that involves both the employer and the [employee] with a disability.’ Neither the West Virginia statutes nor the federal law assigns responsibility for when the interactive process is not meaningfully undertaken, but we infer that neither party should be able to cause a breakdown in the process. The trial court should look for signs of failure to participate in good faith or to make reasonable efforts to help the other party determine what specific accommodations are necessary and viable. A party that obstructs or delays the interactive process or fails to communicate, by way of initiation or response, is acting in bad faith. When information necessary for a meaningful determination of accommodation only can be provided by one party, the failure to provide that information is considered an obstruction. The determination must be made in light of the circumstances surrounding a given case.”

The Court has noted that an employer may request documentation from an appropriate professional, but that such a request is appropriate only as part of an interactive process beneficial to both the employer and employee.⁴

What is alleged by the Petitioner herein is that, rather acting as “an appropriate professional” Activate aided and abetted Constellium in removing the Petitioner from her position without justification, when, in fact, the Petitioner was fully qualified to perform the duties of her position and male co-workers with identical restrictions as those imposed upon the Petitioner had been accommodated.

As noted by the West Virginia Supreme Court in Michael v. Appalachian Heating, LLC, 226 W. Va. 394, 701 S.E.2d 116 (2010):

“5. W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act establishes three distinct causes of action. More specifically, pursuant to W. Va. Code § 5-11-9(7)(A), unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions, it is an unlawful discriminatory practice for any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to: (1) engage in any form of threats or reprisal, or; (2) engage

⁴ When an employee requests a reasonable accommodation and the employer has doubt as to the employee's disability, the employer may request documentation from an appropriate professional (e.g., a doctor, rehabilitation counselor, etc.), describing the employee's disability or limitations. Our law does not require an employer to wear blinders at the preaccommodation stage but contemplates an interactive process beneficial to both an employer and employee.

Skaggs v. Elk Run Coal Co., 198 W. Va. 51, 68 n.15, 479 S.E.2d 561, 578 (1996)

in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss, or (3) aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in W. Va. Code § 5-11-9.” Michael v. Appalachian Heating, LLC, 226 W. Va. 394, 395, 701 S.E.2d 116, 118 (2010)

In Michael, the Court rejected the notion that the aid and abet provision was dependent upon a violation of other provisions of the West Virginia Human Rights Act. Rather, the Court noted that this provision is an expansion of the general policy declaration of the Human Rights Act. The Court specifically noted that it was unlawful discriminatory practice for any person or organization to engage in any acts or activities to harass, degrade or embarrass or to aid or abet any other person to engage in such practices. *Id.* at 400-401, 122-123. As in Messer, the Court in Michael rejected the Defendant’s arguments that a statutory immunity applied to restrict the Defendant’s potential liability under the West Virginia Human Rights Act.

Similarly in St. Peter v. Ampak-Division of Gatewood Prods., the West Virginia Supreme Court noted that any person may be held liable for engaging in acts of any nature with the purpose of degrading or embarrassing an employee or to aiding or abetting any other person to engage in discrimination against an employee. St. Peter v. Ampak-Division of Gatewood Prods., 199 W. Va. 365, 373-74, 484 S.E.2d 481, 489-90 (1997). And in Holstein v. Norandex, Inc., the Court noted that potential defendants under the Act are not limited to employers and that other persons may be liable for aiding or abetting an employer in engaging in unlawful discriminatory practices. Holstein v. Norandex, Inc., 194 W. Va. 727, 731-32, 461 S.E.2d 473, 477-78 (1995).

Thus, the Circuit Court’s conclusion in its order dismissing Activate that “Plaintiff does not allege Activate had any involvement in Constellium’s decisions regarding Plaintiff’s employment, which occurred after Activate provided Plaintiff her desired medical restriction” is inaccurate. Complaint ¶ 42. Ignoring Petitioner and repeatedly writing incorrect PCRs in

collaboration with Constellium constitutes aiding and abetting in activities to harass, degrade or embarrass the Petitioner. Activate is alleged to have engaged in these illegal activities and dismissal of Petitioner's aiding and abetting claim was improper.

VIII. CONCLUSION

Because the MPLA has no application to the Petitioner's claim and because the Petitioner properly plead a claim of aiding and abetting discrimination against Activate, Respondent Activate's motion to dismiss Petitioner's first amended complaint should have been denied. The Circuit Court failed to apply the appropriate standard of review and adopted two legally incorrect conclusions in dismissing Petitioner's claim against Activate. This Court should reverse that order, reinstate Activate as a defendant in this action and remand this matter for further proceedings thereafter.

Respectfully submitted,

DIANA BOONE,
Petitioner by Counsel,

A handwritten signature in black ink, appearing to read 'WALT AU VIL', is written over a horizontal line.

WALT AU VIL (WVSB # 190)
KIRK AU VIL (WVSB # 12953)

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**BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**

DIANA BOONE,

Plaintiff Below, Petitioner,

v.

ACTIVATE HEALTHCARE, LLC,

Defendant Below, Respondent.

**Case No. 19-1007
Civil Action No. 18-C-96
(Jackson County)**

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2020, I served **Petitioner's Brief** upon counsel for Respondent Activate Healthcare, LLC, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

Christopher L. Slaughter and
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