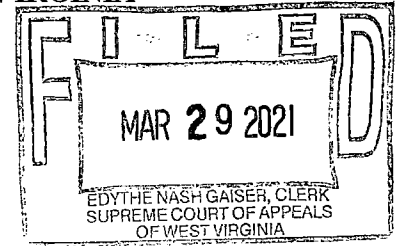


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 21-0004



DIANE SIGISMONDI JUDY,
Plaintiff Below, Petitioner

v.)

Appeal from an order
of the Circuit Court of Hardy
County (20-C-28)

**EASTERN WEST VIRGINIA
COMMUNITY AND TECHNICAL
COLLEGE,**
Defendants Below, Respondents

FILE COPY

Petitioner's Brief

Counsel for Petitioner, Diane Sigismondi Judy

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TABLE OF AUTHORITIES

West Virginia Cases

<i>Ashcroft v. Iqbal</i> , 556 US 662, 129 S. Ct. 1937 (2009).....	5, 6
<i>Barefoot v. Sundale Nursing Home</i> , 193 W.Va. 475, 457 S.E.2d 152 (1995).....	6,7
<i>Bell Atlantic Corp. v. Twombly</i> , 550 US 544, 127 S. Ct. 1955 (2007).....	5, 6
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ASSIGNMENTS OF ERROR

1. Whether losing a job is an adverse employment decision?
2. Whether allegations that an employer was motivated by the employee's protected status to deny her the opportunity to reapply for a job was sufficient to allege a violation of the West Virginia Human Rights Act.

STATEMENT OF THE CASE

Diane Judy was replaced as the Commercial Driver's License Instructor at Eastern West Virginia Community and Technical College (hereinafter referred to as Eastern).

The replacement instructor was younger and male. The trial court found as a matter of law that Ms. Judy was a member of a protected class due to her sex and age. (#19 of December 7, 2020 order, Appendix page 103).

The trial court likewise found that Ms. Judy's complaint alleged that Eastern was motivated, in part, to discriminate against her because of her age and gender. ("h" and "i" of the Court's analysis of Ms. Judy's complaint, Appendix page 98).

The trial court acknowledged that it was a discriminatory practice for any employer to discriminate against an individual with respect to compensation, hire, tenure terms, conditions or privileges of employment. (#16 of December 7, 2020 order, Appendix page 102-103). The court further acknowledged that discrimination means:

"to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age."

Additionally the trial court acknowledged that Eastern refused to renew Ms. Judy's contract and replaced her with a younger male instructor. (See "a", "e", "f", "g", "h", and "i" of the Court's December 7, 2020 order under "The complaint", Appendix page 97-98).

The trial court then concluded:

"The Court finds that Plaintiff is a member of a protected class due to her sex and age. However, the Court further finds that Plaintiff has failed to state what equal opportunities she was denied because of her age or sex. The Court further finds that Plaintiff has not explicitly stated what action Eastern took that was an "adverse decision," other than alleging that Eastern informed her she would no longer be needed as a CDL Instructor."

"Nevertheless, the Court further finds that even if Eastern made an adverse decision, Plaintiff has failed to state any allegations that, but for her protected status, the adverse decision would not have been made. The Court further finds that just because the current CDL Instructor at Eastern is male and younger than Plaintiff, does not mean that Plaintiff has pleaded an actionable HRA claim. The Court further finds it appears beyond doubt that Plaintiff can prove no set of facts in support of her claim which would entitle her to relief. The Court is mindful that motions to dismiss are viewed with disfavor and rarely granted. Keeping that standard in mind, the Court has construed the allegations in the *Complaint* as true, but finds Plaintiff has not alleged sufficient facts that, but for Plaintiff's protected status, Eastern's alleged adverse decision of no longer using Plaintiff as a CDL Instructor, would not have been made."

"Therefore, the Court concludes that the allegations in the *Complaint* are not an actionable claims against Eastern under the HRA for age or sex discrimination. As a result, the Court concludes Plaintiff has failed to establish a violation of clearly established statutory law pursuant to A.B. Furthermore, the Court finds Plaintiff has failed to allege that Eastern's actions toward her were fraudulent, malicious, or oppressive, pursuant to A.B. In sum, the Court concludes that Eastern is entitled to qualified immunity."

SUMMARY OF ARGUMENT

- A. The loss of a job is an adverse employment decision.
- B. Petitioner in her complaint sufficiently alleged a violation of the West Virginia Human Rights Act (West Virginia Code § 5-11-1 et seq.) by asserting that Respondent was motivated to discriminate against her because of her age and gender.

ORAL ARGUMENT

Pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, Petitioner requests that oral argument be held in this matter because this case includes assignments of error in the application of settled law.

Pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure, Petitioner requests that oral argument be held in this matter because: (1) this case involves issues of fundamental public importance.

ARGUMENTS

(A) Standard of Review

This Court has repeatedly declined to adopt the Federal plausibility pleading standard as set forth in *Bell Atlantic Corp. v. Twombly*, 550 US 544, 127 S. Ct. 1955 (2007), and *Ashcroft v. Iqbal*, 556 US 662, 129 S. Ct. 1937 (2009). See *The West Virginia Regional Jail and Correctional Facility Authority v. The Estate of Cody Lawrence Grove*, Supreme Court of Appeals of West Virginia No. 18-1083, Footnote 16, filed November 20, 2020. Therefore the standard of appraising the sufficiency of Diane Judy's complaint is whether it appears beyond doubt that Ms. Judy can prove no set of facts in support of her claim which would

entitle her to relief. *Mountaineer Fire & Rescue Equipment, LLC, Cavender and Cavender v. City National Bank of West Virginia*, Supreme Court of Appeals of West Virginia No. 18-0984, Syl. pt. 2, filed November 20, 2020.

(B) Discussion

1. Adverse Employment Decision

Losing a job is an adverse employment decision. In fact losing a job is the ultimate adverse employment decision.

Ms. Judy's complaint was clear enough for the trial court to understand that Ms. Judy is a member of protected classes due to her sex and age. See paragraph #19 of December 7, 2020 order, Appendix page 103. Ms. Judy's claim was an employment discrimination claim filed pursuant to the West Virginia Human Rights Act, § 5-11-1 et seq., and the trial court found that the Human Rights Act is the clearly established statutory law in West Virginia. The trial court understood the meaning of a discriminatory practice includes conduct involving hiring, tenure, terms, conditions or privileges of employment.

The trial court adopted a more narrow pleading standard than *Twombly* and *Iqbal*. Under the trial court's new standard, a complaint which merely sets forth a "plausible" claim is insufficient. Ms. Judy's complaint asserts that she was discriminated against in violation of West Virginia Code § 5-11-9 because of her gender and that she was replaced by a substantially younger instructor. Apparently a short and plain statement of the claim is not enough. The trial court analyzed Ms. Judy's claims pursuant to *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 457 S.E.2d 152 (1995), and found that Ms. Judy did not meet the "but for" test. Without

any opportunity to engage in any discovery the trial court concluded that Eastern had proved beyond doubt that Ms. Judy can prove no set of facts in support of her claim which would entitle her to relief, even though she lost her job and was replaced by someone outside her protected class. But *Barefoot* found that a Plaintiff establishes a *prima facie* case by showing that she was replaced by someone outside her protected class. Of course an employer can rebut this presumption, but this case never went beyond Eastern's motion to dismiss.

Barefoot explained that the *prima facie* case is necessary to "smoke out" an employer who controls most if not all of the facts. Pursuant to *Barefoot* it would be unfair to dismiss an employment discrimination case prior to discovery where the Plaintiff was a member of two (2) protected groups and replaced by someone outside the protected groups.

(2) Sufficient Allegations

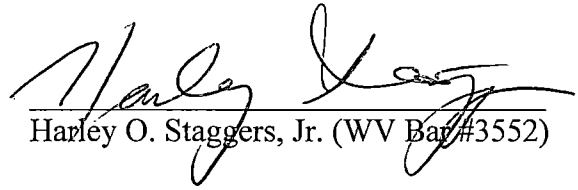
Ms. Judy alleged in her complaint that Eastern was motivated by her age and gender to deny her opportunity to reapply and retain her employment as a college instructor. Rule 8 of the West Virginia Rules of Civil Procedure requires a short and plain statement of the claim showing that the pleader is entitled to relief. Rule 8 does not require the party to anticipate the defendant's response and rebut any and all presumptions created by the opposing party's allegations.

CONCLUSION

The trial court's order was obviously wrong and should be reversed.

PETITIONER

By Counsel



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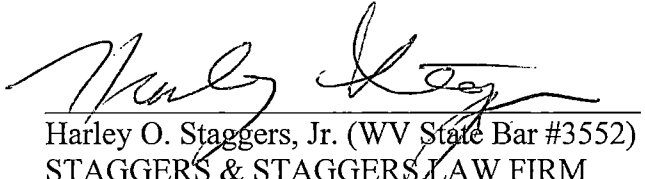
**EASTERN WEST VIRGINIA COMMUNITY
AND TECHNICAL COLLEGE,**
Defendant Below, Respondents

CERTIFICATE OF SERVICE

I, Harley O. Staggers, Jr., a practicing attorney, hereby certifies that a true copy of the **Petitioner's Brief and Petitioner's Appendix** has been served by United States Mail postage prepaid, on this the 24th day of March, 2021 upon the following:

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