WEST VIRGINIA
SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA

KATHERINE ASBURY and
WANDA KEENER,

Plaintiffs Below, Petitioners,

v.

CLAY COUNTY DEVELOPMENT CORPORATION,

Defendant Below, Respondent.

CASE NO. 21-0267
Civil Action No. CC-08-2018-C-6
(Clay County)

PETITIONERS' BRIEF

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I. Assignment of Error

1. The Circuit Court erred in its finding that ancestral discrimination is duplicative with the WVHRA's protections against national origin and ethnic discrimination. The Circuit Court further erred in its finding that ancestral discrimination does not include discrimination based on familial relation.
2. The Circuit Court erred in its finding that the handbook did not form a contract between Petitioners and Respondent. The Circuit Court further erred in this finding by holding that Respondent was within its rights to terminate Petitioners pursuant to other terms of the handbook even if it had formed a contract.
3. The Circuit Court erred in its finding that Petitioners were at-will employees who could be terminated for any nondiscriminatory reason.

II. Statement of the Case

Petitioner Wanda Keener worked at Respondent Clay County Development Corporation (hereinafter "CCDC") for thirty years in several different positions, ultimately working as a filing clerk for the past twenty years. Petitioner Katherine Asbury worked at Respondent Clay County Development Corporation for forty-six years, also in several different positions, but ultimately worked as the 3B Project Director for the past forty years. Petitioners were sisters of the now-infamous Pamela Taylor, who made a Facebook post describing Michele Obama as "an ape in high heels." In response to the enormous public outcry against this posting, Taylor was fired. However, Respondent was still under fire from the public backlash for this statement. Respondent began working with Robert Roswall from the West Virginia Bureau of Senior Services to "investigate" Respondent's operations. As part of this investigation, Petitioners' coworkers were questioned about the relationship between them and their sister, Pamela Taylor.

Ultimately. Respondent decided to terminate Petitioners. A member of the Board of Directors for the Clay County Development Center, Eunice Thomas, approached Petitioner Asbury to inform her that Petitioners were being terminated, and that they could either resign or be fired. Thomas indicated that this was due to Respondent's desire to get rid of them for their connection to Pamela Taylor. Petitioners were terminated after this interaction.

Petitioners brought suit under the West Virginia Human Rights Act ("WVHRA") for wrongful termination based on their relation to their sister, both under the theory of familial status and ancestry discrimination. Petitioners also sued under a breach of contract theory, alleging that the handbook under which they had worked for Respondent was an implied contract which forbade their termination except for the reasons specified therein.

III. Summary of the Argument

The Circuit Court's holding that Petitioners could not bring a claim against Respondent based on the ancestral discrimination protections of the West Virginia Human Rights Act was based in whole or in part upon the Circuit Court's expressed reasoning that ancestry discrimination was actually the same as ethnicity or natural original discrimination, not its own type of discrimination. This line of reasoning is diametrically opposed to one of the most basic tenets of statutory interpretation as it totally flouts the rule against surplusage while also ignoring the plain meanings of the words in the statute.

The Circuit Court held that the CCDC handbook had a proper disclaimer which destroyed any implied contract between Petitioners and Respondent. This is incorrect, as that disclaimer is not conspicuous or clear when viewed in context. Furthermore, the implied contract rights created by the CCDC handbook mean that Petitioners were not at-will employees of Respondent, but rather

were workers whose employment was governed by this implied contract, breached by Respondent when it terminated them.

IV. Statement Regarding Oral Argument and Decision

Petitioners assert that oral argument is necessary for the resolution of this appeal. Petitioners bring before this Court a question of legislative intent in interpreting the West Virginia Human Rights Act. The decision of the types of discrimination are forbidden the WVHRA will resonate throughout the state, either to curtail further claims based on familial relation or to certify that such discrimination can serve as the basis of a WVHRA claim. A question such as this, one of legislative intent which has not previously been addressed by this Court, is ripe for oral argument. As to the second facet of Petitioners' appeal, that regarding the contract issues with Respondent's handbook, Petitioners assert that this Court can clarify the appropriate framework appropriate for parties to determine what is a "sufficient" disclaimer such that implied contractual rights such as those at issue are extinguished.

V. Standard of Review

An order granting a motion for summary judgment 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

Facts

Petitioner Wanda Keener worked at Respondent Clay County Development Corporation (hereinafter "CCDC") from 1992 until 2016 in several different positions, ultimately working as a filing clerk for the past twenty years. APPENDIX 000257. Petitioner Katherine Asbury worked at

Respondent Clay County Development Corporation for forty-six years, also in several different positions, but ultimately working as the 3B Project Director for the past forty years. APPENDIX 000281. Petitioner Keener received no disciplinary action at any point during her employment with Respondent CCDC. Petitioner Asbury received no disciplinary action at any point during her employment with Respondent CCDC. APPENDIX 000290.

On or about the 14th day of November 2016, Pamela Ramsey Taylor, the Clay County Development Corp. director, made a Facebook post stating as follows: "It will be refreshing to have a classy, beautiful, dignified First Lady in the White House. I'm tired of seeing an Ape in heels." This Facebook post became notorious as it went viral and spread throughout American media, bringing infamy to West Virginia as a whole and Clay County in particular. Petitioners Wanda Keener and Katherine Asbury are the sisters of Pamela Taylor. APPENDIX 000265, 000295-000296.

On or about the week of December 19, 2016, Robert Roswall, the Commissioner of Senior Services, brought approximately twelve of his staff members to the CCDC office where Petitioners worked. APPENDIX 000294, 000300-000301. At this time, Mr. Roswall and his staff each took CCDC employees to different rooms where he questioned them regarding the Petitioners' connections to their sister, Pamela Taylor. APPENDIX 000301-000302. One of Roswall's staff members questioned Petitioner Asbury during this visit to the CCDC office, asking if she was related to Pamela Taylor and if Asbury knew what Taylor had posted to Facebook. APPENDIX 000302. The staff member questioned Petitioner Asbury about Taylor's involvement with the florist business renting space in the same building as the CCDC, asking if Taylor had been giving flowers to Asbury or the CCDC. APPENDIX 000302. Asbury answered that no such activity had taken place and that any transactions between the florist business and employees of the CCDC

were personal in nature. APPENDIX 000302. Petitioner Asbury told the staff member that she did have a Facebook account, and that she did not agree with what Taylor had posted to Facebook. APPENDIX 000302.

The staff member then questioned Petitioner Asbury about "senior trips" wherein CCDC staff members would take Clay County senior citizens on trips to various places. Petitioner Asbury told the staff member that she had been on a few of those trips during her 46 years of employment with the CDC, the last one being about eight years prior. APPENDIX 000302. The staff member asked Petitioner Asbury how the CCDC raised money for the senior trips, which occurred sporadically based on the amount of funds that the CCDC was able to raise. Petitioner Asbury asked the staff member why she was being questioned, and the staff member replied that she did not know why, but that she was given that set of questions to ask Asbury. APPENDIX 000302.

On or about December 21, 2016, the CCDC Board President, Eunice Thomas, met with Petitioner Asbury at the CCDC office in Clay. APPENDIX 000297. Mrs. Thomas arrived upset and advised Asbury that a board meeting had been held on December 20, 2016, wherein Thomas was advised by Robert Roswall and Romana Stanley to fire Petitioners Katherine Asbury and Wanda Keener as well as Pamela Taylor. APPENDIX 000297-000299. Mrs. Thomas asked Petitioner Asbury if she and Petitioner Keener wanted to resign or be fired. APPENDIX 000297. Petitioner Keener was not present at this meeting. APPENDIX 000297. During the meeting, Petitioner Asbury refused to resign. APPENDIX 000297. Thomas then informed Petitioner Asbury she would be terminated along with Petitioner Keener. APPENDIX 000297-000299

During the meeting between Eunice Thomas and Petitioner Asbury, Robert Roswall called the CCDC, was put through to the phone line in the room where Thomas and Petitioner Asbury were meeting and yelled at Thomas to get out of the meeting immediately because she had no

business speaking with Petitioner Asbury. APPENDIX 000297-000299. Thomas replied that she had spoken with the attorney for the Board of Directors for the CCDC, Andrew Brison. APPENDIX 000297. Thomas said that Brison had told her she could speak with Asbury to offer this arrangement. APPENDIX 000297. Thomas began crying. APPENDIX 000297. Petitioner Asbury heard the aforementioned portions of this phone call due to the volume with which Roswall was shouting over the phone. APPENDIX 000297-000299. After taking a few moments to think, Petitioner Asbury told Thomas that she was not quitting, and they would have to fire her. APPENDIX 000298-000300. Petitioner Asbury gathered some of her belongings and left the premises immediately following her meeting with Thomas. APPENDIX 000300. The Petitioners each received a termination letter from Respondent on December 22, 2016. APPENDIX 000303.

Procedural History

Initially, Respondent moved to dismiss Petitioners' claims, succeeding in eliminating the familial status claim as the Circuit Court held that provision of the WVHRA applied only to discrimination in housing. After discovery concluded, Respondent moved for summary judgment.

Respondent argued that there was no breach of contract, as the disclaimer in the handbook was sufficient to prevent the formation of a contract, and even if the disclaimer was not sufficient, that other terms of the handbook justified Petitioners' termination pursuant thereto. Respondent also moved to dismiss Petitioners' remaining WVHRA claim for ancestral discrimination on the grounds that the Act did not protect persons based on their familial relations to other persons. Respondent argued that this ancestral discrimination provision was essentially a restatement of the proscriptions against ethnic discrimination also enumerated in the

Act. Respondent also raised the defense of financial necessity as the justification for its termination of Petitioners.

The Circuit Court granted Respondent's Motion for Summary Judgment, stating that the ancestry discrimination provision of the WVHRA does not include discrimination based on familial relationships as Petitioners alleged. The Circuit Court further held that the CCDC handbook at issue did not form a contract, and that Respondent had not violated any provisions of that handbook in terminating Petitioners. Petitioners seek a reversal of the Circuit Court's order granting Respondent's Motion for Summary Judgment and ask this Court to remand their claims to Clay County Circuit Court to try this matter before a jury.

VII. Argument

1. The Circuit Court erred in its finding that ancestral discrimination is duplicative with the WVHRA's protections against national origin and ethnic discrimination. The Circuit Court further erred in its finding that ancestral discrimination does not include discrimination based on familial relation.

Ancestral discrimination and ethnic discrimination are distinct categories of discrimination identified by the WVHRA, and interpreting them as duplicative contradicts the rule against surplusage. The Circuit Court's order granting summary judgment states that "other jurisdictions have found that ancestry discrimination is identical as a factual matter to discrimination based on ethnicity or national origin." The Circuit Court follows that statement with this holding:

> **The Court finds that ancestry discrimination does not include discrimination based upon a family relationship. Ancestry has a broader meaning than just a relationship to one specific other person. The Petitioners' claim that they were terminated because of their family relationship with their sister is not an actionable claim under the W.Va. Human Rights Act, and the Court GRANTS the Respondent summary judgment on this issue.**

Order Granting Defendant's Motion for Summary Judgment, Paragraph 47. APPENDIX 000472.

It is a longstanding rule in American jurisprudence that when analyzing issues of statutory interpretation, where one reading of a statute would make one or more parts of the statute redundant and another reading would avoid any redundancy, the non-redundant reading is preferred. This precept of statutory interpretation is typically referred to as "the rule against surplusage." The rule against surplusage is a textualist judicial tenet which has been enshrined in American jurisprudence since the 1800s. See Montclair v. Ramsdell, 107 U.S. 147, 2 S. Ct. 391 (1882) at 11; United States v. Menasche, 348 U.S. 528, 75 S. Ct. 513 (1955); Colautti v. Franklin, 439 U.S. 379, 99 S. Ct. 675 (1979). Indeed, in Colautti v. Franklin, the Supreme Court wrote that it is"[an] elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." Colautti v. Franklin, at 392.

The Circuit Court's holding that Petitioners could not bring a claim against Respondent based on the ancestry discrimination protections of the West Virginia Human Rights Act was based in whole or in part upon the Circuit Court's expressed reasoning that the Act's proscriptions against ancestry discrimination are redundant with its proscriptions against ethnicity or natural original discrimination. This reasoning is diametrically opposed by this basic tenet of statutory interpretation, the rule against surplusage. The Circuit Court's decision to ignore this bedrock principal of American jurisprudence deprived Petitioners of their day in court, as it is an expressed basis of the Circuit Court's decision to dismiss this case.

Furthermore, the Circuit Court's analysis regarding ancestral discrimination versus race or national origin discrimination focuses on interpretations of federal law, specifically Title VII of the Civil Rights Act of 1964, not the WVHRA. Order Granting Defendant's Motion for Summary Judgment, Paragraphs 44-46. APPENDIX 000471-000472. However, the matter at hand is not a Title VII issue, it is a WVHRA issue. West Virginia has never strictly interpreted the WVHRA in

lockstep with other jurisdictions' interpretations of Title VII. Furthermore, the language of Title VII is far from the last word in a discussion of the WVHRA which bears substantially different language and operates under state law precedents. West Virginia does not always follow Title VII precedent when interpreting protections afforded to its citizens by the WVHRA. See Stone v. St. Joseph's Hosp., 208 W. Va. 91, 103, 538 S.E.2d 389, 401 (2000).

Black's Law Dictionary reinforces the self-evident point that ancestry, ethnicity, and national origin have entirely different legal meanings. Doubtless that is why West Virginia's legislature included three different words exist to express those three different concepts in the same sentence of the WVHRA. The Act specifically names "race, religion, color, national origin, ancestry, sex, age, blindness or disability," as categories protected from discrimination in housing or employment. W. Va. Code § 5-11-2.

The Circuit Court stated that the categories of race and national origin were redundant with that of ancestry in the WVHRA. That cannot be. National origin discrimination can be defined by examining the legal definition of nationality. Nationality is "that quality or character which arises from the fact of a person's belonging to a nation or state." Black's Law Dictionary 922 (5th ed. 1979).The Act's proscription against racial discrimination is synonymous with such a proscription against ethnic discrimination. Race is defined as "an ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities constituting a comprehensive class appearing to be derived from a distinct primitive source." Black's Law Dictionary 1132 (5th ed. 1979). By contrast, an ancestor is "one from whom a person lineally descended or may be descended." Black's Law Dictionary 78 (5th ed. 1979).

One need not look inside the musty confines of a legal dictionary to understand that ancestry refers to one's descendants; even the popular website Ancestry.com demonstrates this

fact. Ancestry.com allows users to research their own familial lineage. The site's tagline reads, "Ancestry® helps you understand your genealogy. A family tree takes you back generations—the world's largest collection of online family history records makes it possible." Ancestry.com. Hence, society at large, from legal scholars to the common man, is totally at odds with the Circuit Court's head-scratching decision to define ancestry as a reference solely to ethnicity and/or national origin. It may be the case that other jurisdictions have turned their backs on plain meaning and common sense in interpreting Title VII, but this Court need not do so in its interpretation of the WVHRA.

It is not wrong to say, as the Circuit Court did, that racial discrimination can include discrimination based on ancestry. Yet there are multiple types of discrimination that can overlap, even as seen within the WVHRA's aforementioned language regarding protected classes. The WVHRA forbids race discrimination, but it also forbids discrimination based on color. It is typical that someone being discriminated against based on race is also being discriminated against based on color, but that is not always the case. The cause of action for discrimination based on color does not evaporate merely because it most commonly arises in the context of race discrimination. It is entirely possible for someone to be discriminated against based on skin color, not race, just as it is possible for someone to be discriminated against based on their ancestry, not their ethnicity or national origin.

Hence the Court can see that the mere possibility of potential overlap in the categories of the WVHRA is not destructive to other categories; those forbiddances remain. The Circuit Court's misapprehension of this concept can be seen in its statement, "Ancestry has a broader meaning than just a relationship to one specific other person." Ancestry **can** have a broader meaning than one's relationship to one specific other person, but it **does not have to**. The existence of a lesser

included category is not eliminated by its inclusion in a larger category. It is unclear why the Circuit Court ruled that it does; this ruling was certainly not based on its interpretation of any cases dealing with the WVHRA. Therefore, it is apparent that the Act's proscription against ancestral discrimination is not redundant with, or somehow precluded by, the protections for ethnicity and/or national origin. While it is conceivable, and even likely, that there would be overlap among these categories when applied to many real-world circumstances, the legal meanings of each category are clearly distinct from one another and guard against different harms.

Accordingly, not only does the Circuit Court's ruling violate a common, uncontroversial rule of statutory interpretation, it also contorts the plain language of the WVHRA to avoid enforcing the protections clearly enumerated therein. This is plain error on both counts. And given that the Circuit Court's reading of the WVHRA flies in the face not only of the rule against surplusage, but also the plain English meaning of the Act, it is clear that this decision must be overturned.

2. **The Circuit Court erred in its finding that the handbook did not form a contract between Petitioners and Respondent. The Circuit Court further erred in this finding by holding that Respondent was within its rights to terminate Petitioners pursuant to other terms of the handbook even if it had formed a contract.**

The primary case on when and how an employee handbook may come to be considered a contract is Williams v. Precision Coil, Inc., 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995). In the Williams case, the Court discussed the specifics of when and how an employee handbook could come to constitute an employment contract, either expressly or impliedly. Id. Part of that discussion touched on the matter of the sufficiency of disclaimers in a handbook. Id.

Concerning that, the Williams court wrote, "An employer may include in a handbook a disclaimer that prevents it from contractually limiting the employer's discretion to

discharge employees. To make such a disclaimer effective, however, the employer must do so in language that is clear, conspicuous, and likely to be understood by the subject employees." Williams v. Precision Coil, Inc. The Williams Court expounded on the topic further, writing, "[m]oreover, we look with disfavor upon an employer who induces or requires its employees to adjust their conduct in significant ways, who expressly or impliedly promises job security, or who attracts or retains good workers with that promise, but who then attempts to avoid all mutuality of obligations by inserting an obscure or obtuse disclaimer into a handbook." Id.

In its dismissal order, the Circuit Court discussed the issue of the handbook's effect on Respondent's ability to terminate its workers. "The Guide does not contain a promise of job security," the Circuit Court wrote, "[i]n fact, the Guide specifically identifies that involuntary termination may occur for several different reasons, although it does not state the termination could only be for those reasons." Order Granting Defendant's Motion for Summary Judgment, Paragraph 61, APPENDIX 000474. This finding is plainly wrong for the following reasons.

The circumstances contemplated in Williams v. Precision Coil have manifested in the instant case. An employer has impliedly promised job security, attracting good workers with that promise, and is now attempting to avoid mutuality of obligations. The employer is doing so by gesturing to the insufficient disclaimer it slipped into its handbook. But what kinds of promises exist in the CCDC handbook which might limit Respondent's ability to terminate its workers? The first page of the manual promises "fair and equal treatment to all CCDC employees," stating that "employment at CCDC is more than a job. It is a meaningful career and requires unusual dedication and loyalty." APPENDIX 000163. Lest the Court mistake that for an isolated instance of such assurances, the handbook contains far more damning language.

Page 11 of the CCDC handbook guarantees stronger equal employment protections than those set forth by the WVHRA, reading "[i]t is the policy of Clay County Development Corporation, Inc. (CCDC) to provide equal employment for all people irrespective of race, sex, religion, age, national origin, political affiliation, disability, citizenship, or **any other non-job related factors** [emphasis added]." APPENDIX 000171. There is also the matter of the discipline policies Petitioners identified in their brief opposing summary judgment. Essentially that entire section of the handbook, Section 3 titled "Conditions of Continued Employment," is evidence that the handbook is creating an implied employment contract. Of particular import to this topic are headings A through C of that section, detailing how CCDC executives are to deal with employees on probation for the various reasons set forth therein. APPENDIX 000181-000182. These policies make no mention of discretionary enforcement; they are written in clear language indicating that they will be followed.

But both of those sections are minor examples of limitations on Respondent's discretion to terminate its employees compared to the next two sections. Heading J of this same "Conditions of Continued Employment" section of the handbook sets forth an entire progressive discipline system, again without any language indicating the employer may disregard this section as it wishes. APPENDIX 000187-000190. The progressive discipline steps also purport to limit the Respondent's ability to dismiss employees. Page 19 of the handbook (APPENDIX 190) states that dismissal will occur "[w]hen an employee under corrective disciplinary action does not make the necessary corrections during the allotted time period to justify his/her retention."

The next relevant portion of the CCDC handbook, Section 7, governs when and how Respondent can terminate its employees. APPENDIX 000There are only two possible purposes for Respondent to have included this section governing termination. First, Respondent included

this section intending for its procedures to be followed in dealing with its employees. Second, Respondent included this section intending for its guarantee of procedures governing termination to entice or retain good workers without really intending to cleave to the policies. In practice, the effect is the same. The combined effect of these four policies governing when and how Respondent can terminate its employees serve as the type of implied promises of job security that are enforceable, particularly when set alongside the single stealthy disclaimer contained in a tiny footnote which contradicts the very text to which it is appended. See Williams v. Precision Coil.

This section of the handbook is the source of the potential for "involuntary termination," of CCDC employees referenced by the Circuit Court in Paragraph 61 of its dismissal order. APPENDIX 000474. To be clear, this section provides that employees can be involuntarily terminated by setting forth the bases for such terminations, including when and how they can occur. Nothing in the aforementioned cases discussing when handbooks form implied contracts require that the employer totally forfeit its right to terminate employees in order for that contract to materialize. See Williams v. Precision Coil. All that is required is that an employer have language in its handbook which limits its discretion to discharge employees. Id.

Nothing in Section 7 of this handbook can be read to reserve such discretion for terminations to the Respondent. APPENDIX 000218-000223. It sets forth circumstances under which employees may be terminated, nothing further. The Circuit Court badly misapprehended either the law or the facts when it assessed potential rationales for involuntary termination in this section as somehow undermining the existence of an implied contract. The key inquiry is not whether an employer can involuntarily discharge employees, but whether it retains absolute discretion to do so by the terms of its own handbook. See Williams v. Precision Coil.

The Circuit Court's analysis of the handbook and West Virginia law as applied to it is muddled. First, one of the bases for its ruling that the handbook is not an implied contract, as the Circuit Court focuses on a line from the handbook stating that "this manual should be used as a guide in dealing with personnel matters." APPENDIX 000475.. It is quite strange that the Circuit Court chose to cite to the handbook's confirmation that it was intended to govern personnel issues, including grounds for termination, progressive discipline policies, and the terms and conditions of employment, as evidence that the handbook was not intended to create guarantees that could serve as the basis of an implied contract. Nothing in this Court's prior caselaw suggests that labeling a handbook as pertinent to "personnel matters" somehow curtails its application as an implied contract.

Second, the Circuit Court's analysis of the sufficiency of the disclaimer in the CCDC handbook is found in Paragraph 53 of the Circuit Court's order:

> The disclaimer in the Guide is in clear and easy to understand language. While it is only contained on one page of the Guide, it is on page 3 which is the first page of the Guide with any significant text (the first 2 pages are essentially title pages), and it is under the heading "To the Employee." If the Guide were read in chronological order, it would be one of the very first sentences the employee would read.
>
> Order Granting Respondent's Motion for Summary Judgment, Paragraph 53. APPENDIX 000453.

The page containing this disclaimer appears thusly (APPENDIX 000163):

To the Employee:

This manual* has been developed for use as a CCDC employee. It is designed to provide information and direction on personnel matters and to assure fair and equal treatment to all CCDC employees.

Employment at CCDC is more then a job. It is a meaningful career and requires unusual dedication and loyalty.

Welcome Aboard.

CCDC Board of Directors

*Note - Receipt of this Employment Manual does not constitute an employment contract with this agency.

The Circuit Court based its finding that the CCDC handbook did not form a contract between Petitioners and Respondent due to its reasoning that the disclaimer was included on the third page of the handbook. The Circuit Court merely states that the disclaimer appeared early in handbook, and that its language was clearly understandable. It is unclear how these two conclusions led the Circuit Court to reason that the disclaimer was sufficient. As stated in Williams v. Precision Coil, Inc., it is not enough for a disclaimer to merely exist; the disclaimer must be clear, conspicuous, and understandable. Williams v. Precision Coil, Inc. It is evident that the Circuit Court concluded that the disclaimer was understandable and that it was clear, but its only observation regarding the conspicuousness of the disclaimer is its location within the handbook. That evidence does not support a finding that this disclaimer is conspicuous. Perhaps the fine print may seem conspicuous to a judge accustomed to parsing contracts for every small detail, but as this Court can see, the disclaimer is one small line mentioned as a tiny footnote at the bottom of one page of an 88-page handbook.

That is the only appearance of any writing that could constitute a disclaimer in the 1995 CCDC handbook. This small and inadequately conspicuous disclaimer is insufficient to extinguish Petitioners' implied contract rights under West Virginia law, particularly given the handbook's numerous clauses which purport to protect its employees from arbitrary or capricious termination, along with termination for "any non-job related factor." In fact, the disclaimer is at odds with the very passage it is linked with. Employees are told that this manual provides them information and direction on personnel matters, assuring that they will receive fair and equal treatment, while the disclaimer whispers that this promise in unenforceable. Placing this disclaimer at odds with the very passage to which it is linked demonstrates the obtuse, confusing nature of the line's inclusion

in this section. It is included here in a manner that is disfavored under West Virginia law. See Williams v. Precision Coil Inc.

3. **The Circuit Court erred in its finding that Petitioners were at-will employees who could be terminated for any nondiscriminatory reason.**

In Dent v. Fruth, the Court wrote that "[c]ontractual provisions relating to discharge or job security may alter the at-will status of a particular employee." Dent v. Fruth, 192 W. Va. 506, 507, 453 S.E.2d 340, 341 (1994) (citing Syl. Pt. 3, Cook v. Heck's, Inc., 176 W. Va. 368, 342 S.E.2d 453 (1986)). In Suter v. Harsco Corp., 184 W. Va. 734, 403 S.E.2d 751 (1991))., this Court addressed the issue of whether a handbook could destroy the presumption that employees working under the terms of that handbook were still employees at-will. The Suter Court wrote that implied promises in the handbook would be defeated by express disclaimers, but that employers needed to include such express disclaimers and seek acknowledgment thereof by employees to avoid creating these implied promises which could destroy the at-will status of employees abiding by handbooks that created such promises. See Id.

The 1995 CCDC Handbook is such a handbook; its language plainly created rights for CCDC employees, limiting the authority of the CCDC and its Board of Directors to discharge employees without following its progressive discipline policies and/or termination guidelines. The handbook contains an extensive policy on disciplinary action which limits the circumstances and methodology with which employees will be disciplined or discharged, what types of infractions merit what types of discipline, and so forth. APPENDIX 000218-000223. That section of the handbook constitutes a contractual provision relating to discharge and/or job security for CCDC employees, and its existence plainly altered the status of their employment with Respondent. This

section contradicts the disclaimer discussed above as well, pushing it further into the category of "obtuse" disfavored by this Court.

The Court has also stated that "[a]n employer may protect itself from being bound by statements made in an employee handbook by having each prospective employee acknowledge in his employment application that the employment is for no definite period and by providing in the employment handbook that the handbook's provisions are not exclusive." Dent v. Fruth, 192 W. Va. 506, 507, 453 S.E.2d 340, 341 (1994). (citing Syl. Pt. 4, Suter v. Harsco Corp., 184 W. Va. 734, 403 S.E.2d 751 (1991)). The Cook court wrote that "[r]ecognizing that a personnel manual may constitute a unilateral contract requires no radical departure from settled principles of contract law." Cook v. Heck's, Inc. at 373.

Furthermore, no part of the handbook or any associated documentation asked the employees at CCDC to acknowledge that they were at-will or purported to limit the employees' reliance on the terms and guarantees set forth by the handbook. CCDC employees were never asked to acknowledge that they were employees at-will. Respondent's handbook makes no mention of any CCDC employees being at-will. It is of course true that employees are presumed to be at-will under West Virginia law. However, given the various rights created by the handbook for Respondent's employees, particularly those protecting its employees from dismissal without following handbook procedures, Respondent's failure to take such measures as suggested by the Court in Suter, coupled with the CCDC handbook's promises regarding the terms and conditions of Petitioners' employment, results in the existence of an implied contract between Respondent and Petitioners. The existence of that contract means that Petitioners were no longer at-will employees, and their discharge by Respondent violated the terms of that contract.

VIII. Conclusion

As the Court can see, the Circuit Court's crabbed misinterpretation of the WVHRA cannot be allowed to stand. To do so would destroy an entire cause of action provided for by the Act in a manner totally at odds with the plain meaning of the statute and a proper textualist analysis of the Act. Ancestry is not race, nor is it national origin. Ancestry is, however, an immutable characteristic one possesses from birth; that same type of characteristic as others that the WVHRA forbids employers to consider when making employment decisions. Just as with other immutable characteristics, the WVHRA acts to shield workers from being treated differently based on who they are related to, a fact that nobody can control.

The contract matter is simple. The Court can see the handbook at issue. Regardless of whether Respondent claims some new handbook was set to take effect at the time of Petitioners' termination, Petitioners never worked under the terms and conditions of such a handbook and so its terms are irrelevant. What is relevant are the terms of the 1995 CCDC handbook under which Petitioners worked, and whether this Court finds those terms to have been substantial enough to convert the handbook to an implied contract. Petitioners have identified the provisions of that handbook they believe support that conclusion. The disclaimer in that handbook, such as it is, is not sufficiently conspicuous to extinguish implied contract rights, and thus Petitioners were not at-will employees, but rather workers under the implied contract created by the handbook.

Respondent targeted Petitioners for termination based on who they were related to. Then, Respondent flouted its own handbook to terminate Petitioners after Respondent's own "investigation" failed to yield any dirt on Petitioners. The Court can see this act for what it is: a craven ploy for Respondent to save face due to its embarrassment over Pamela Taylor's actions. Petitioners are not their sister, nor should they have been held accountable for Taylor's conduct.

By finding in favor of the Petitioners, this Court can state unequivocally that families are a source of strength in the Mountain State, not a source of anxiety should the newest wave of cancel culture sweep in. Nobody should lose their job as a consequence of their relative's social media blunder. To hold otherwise will jeopardize the freedom Mountaineers hold so dear. No employer should be allowed to hang a Mountaineer from their own family tree.

For these reasons, this Court should reverse the dismissal of Petitioners' claims and remand the matter back to circuit court.

Respectfully submitted,

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

WANDA KEENER and KATHERINE ASBURY,

Petitioners,

v. **No. 21-0267**

CLAY COUNTY DEVELOPMENT CORPORATION,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, 2021, I filed the foregoing **Petitioner's Brief and Appendix** with the Clerk of Court for the Supreme Court of Appeals of West Virginia by hand delivery to the office of its Clerk of Court and with counsel for the Respondent by depositing a true copy thereof in the United States Mail, postage prepaid. This **Certificate of Service** for the same was included therewith. The documents were addressed as follows:

Hand-delivered to

Edythe Nash Gaiser, Clerk of Court
State Capitol Rm E-317
1900 Kanawha Blvd. East
Charleston WV 25305

Mailed to
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