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)

RESPONDENT'S BRIEF

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I. STATEMENT OF THE CASE

Typically, Respondent's brief need not set forth a statement of the case. However, Rule 10(d) does provide that a Statement of the Case in Respondent's brief "may be deemed necessary in correcting any inaccuracy or omission in Petitioners' brief." W. Va. R. App. P. 10. As a result of various inaccuracies contained in the Petitioners' Statement of the Case, Respondent is compelled to include a Statement of the Case in order to address the inaccuracies contained in Petitioners' brief.

This matter arises out of claims of discrimination in violation of the West Virginia Human Rights Act or alternatively breach of an implied contract resulting in the Petitioners' discharge from their employment with the Clay County Development Corporation ("CCDC"; n/k/a Clay Senior and Community Services). The CCDC is a non-profit organization that provides relevant and appropriate services to Clay County, West Virginia's senior citizen population. CCDC provides in-home and community-based services, including medical care, funded by federal and state monies, including Medicaid and various grants.

In November 2016, shortly after the Presidential election of the successor to President Barack Obama, the then Executive Director of the CCDC made indecorous remarks about the former First Lady Michele Obama on Facebook's social media platform. As a result of that social media post, the Executive Director was suspended and ultimately discharged as an employee by the CCDC Board of Directors. The Petitioners in this case are siblings of the former Executive Director.

Along with, and as a result of, the international attention that the social media post brought, the CCDC was investigated and monitored by the State of West Virginia Bureau of Senior Services and the Appalachian Area Agency on Aging (AAAOA) fund source providers. The CCDC was

the target of the investigation and not a partner to, or with, the West Virginia Bureau of Senior Services.

Contrary to the assertions made by the Petitioners, CCDC did not begin "working with Robert Roswall" but rather complied with the directives of the Commissioner of the West Virginia Bureau of Senior Services. Robert Roswall, Commissioner of the West Virginia Bureau of Senior Services, was appointed by the Governor in January 2012 and is the Chief Administrative Officer and oversees all program and fiscal operations related to senior services. Roswall is not, nor have the Petitioners alleged that he is, in any way affiliated with Respondent CCDC. His conduct and actions, in the exercise of his state mandated official duties, cannot be imputed to the Respondent CCDC; nor are these relevant to the issues presented in this appeal.

During the course of the investigation and audit, a significant deficit was discovered in the CCDC budget (a quarter of a million dollars). As provided in the Clay County Development Corporation, Inc. Employment Guide ("the Guide" or "Guide"), there are justifiable instances upon which an employee may be involuntarily separated from employment. The instance most critical to the analysis of this case is lack of funding.

In order to save the organization and bring the finances out of a deficit, the two highest paid employees (Petitioners), who had the least number of duties in the organization, were discharged and their job duties were absorbed by the remaining employees.

Petitioners assert that they were discharged from their employment based upon their familial relationship to the former Executive Director and/or in violation of an implied employment contract. Nowhere in the Guide can a promise of indeterminate employment be found, which Petitioners admitted in their depositions. In fact, the opposite is true. Not only does the Guide state that it does not create an employment contract with this agency, but there are also at least two

instances where the employee is advised that they are subject to involuntary termination. In this case, the Petitioners were terminated based upon circumstances beyond their control (financial deficit of the organization), termed "Positive Dismissal" in the Guide.

As discussed herein, the Petitioners' attempt to create a new classification of protected persons under the West Virginia Human Rights Act, and their argument that they were contract employees of the CCDC fails as stated in the lower court's Order granting summary judgment to the CCDC.

II. SUMMARY OF ARGUMENT

In 1987, the United States Supreme Court reviewed the legislative history involving civil rights employment discrimination in the context of ancestry, concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry ***or*** ethnic characteristics. "Such discrimination is racial discrimination that Congress intended to forbid, whether or not it would be classified as racial in terms of modern scientific theory" *Saint Francis College v. Al–Khazraji,* 481 U.S. 604, 613 (1987). Ancestry employment discrimination protection has never been extended to siblings.

Similarly, West Virginia does not recognize familial status in the context of employment law. In fact, the Supreme Court of Appeals of West Virginia has treated ancestry and race almost synonymously. *See Barefoot v. Sundale Nursing Home,* 193 W. Va. 475, 485, 457 S.E.2d 152, 162 (1995), *(ancestry was used to describe the Plaintiff's Native American heritage).* Familial status is simply not the kind of innate characteristic that anti-discrimination laws like the West Virginia Human Rights Act were enacted to protect. More importantly, had the Legislature wanted to include familial status under the West Virginia Human Rights Act pertaining to employment, it could have easily done so. It chose not to do so.

Petitioners' assertion that they had an implied contract of employment likewise fails. The Petitioners have produced no clear and convincing evidence to prove that an implied contract existed between them and the CCDC. There is no evidence, other than the Petitioners' subjective interpretation of events, to suggest that they were anything but at-will employees. In other words, the Petitioners have failed to prove by clear and convincing evidence that a promise containing definitive and ascertainable terms was made to each of them, or to either of them.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The parties to this appeal have not waived oral argument, nor have issues authoritatively been decided related to familial status discrimination. In this case oral argument is appropriate in addressing Petitioners' first assignment of error related solely to protected class status of siblings, as it involves issues of first impression or issues of fundamental public importance. W. Va. R. App. P. 18, 19.

Petitioners' second and third assignment of error are part and parcel of the same issue, i.e., Petitioners' failure to present sufficient evidence to meet their clear and convincing burden to prove that an implied contract existed between the parties. Because the facts and legal arguments are adequately presented in the briefs and record on appeal and that the dispositive issues or issues have been authoritatively decided, Respondent submits that oral argument would not aid the decisional process and therefore is not needed. W. Va. R. App. P. 18.

IV. STATEMENT OF FACTS

Established in 1964, the CCDC is a non-profit organization that provides relevant and appropriate services, including medical services, to Clay County, West Virginia's ever-growing senior citizen population. CCDC provides in-home and community-based services through federal and state monies including Medicaid and various grants.

Following the 2016 Presidential election, CCDC gained international notoriety due to a racial social media post made by the then Executive Director Pam Taylor (the Petitioners' sister). As a result of that social media post, Ms. Taylor was suspended and ultimately discharged as an employee.

Along with, and as a result of, the worldwide publicity that the social media post brought, the CCDC was investigated and monitored by the State of West Virginia Bureau of Senior Services and the AAAOA, fund source providers. (Appendix 000105). On December 14, 2016, Robert Roswall, Commissioner of the West Virginia Bureau of Senior Services, and Ramona McNeely-Stanley, Director of AAAOA, advised CCDC, in writing, that under its Service Provider agreement and conditions, they had the right to "monitor and/or evaluate its programs." *Id.* Further, the agreement and conditions provided that the Service Provider (CCDC) "**shall, if requested, have access to all documents relating to the operation of the Service Provider, including but not limited to, documents providing information relating to the following: payroll, tax, travel, purchasing, financial management, and any internal or external audit information generated by the Service Provider or a third party.**" *Id.* (emphasis added). The letter further advised, "Failure to do so shall result in suspension of the Grants and may lead to the termination of the Grants." *Id.*

It is also noteworthy that, during this time frame, CCDC had outstanding debt in excess of Two Hundred Fifty Thousand Dollars ($250,000). (Appendix 000108). This debt was comprised of unpaid payroll taxes with associated penalties and interest, Medicaid reimbursements due to overpayment to CCDC, and various outstanding bank loans. (Appendix 000108). In fact, during 2016, CCDC received several "Notice of Intent to Seize ("levy") Property or Rights to Property" from the Internal Revenue Service ("IRS") related to its failure to pay payroll taxes. *Id.* In addition

to this debt, the CCDC had an ongoing semi-monthly payroll obligation of approximately $60,000 to $75,000, depending on the number of days in the month and the amount of services delivered to Clay County senior citizens at the time. *Id.* To make financial matters worse, the CCDC ended 2016 with a checking account balance of only Thirty-Three Thousand Two Hundred Twenty-One Dollars and Ninety-Six Cents ($33,221.96). (Appendix 000109).

During the State of West Virginia Bureau of Senior Services and AAAOA's involvement with the CCDC in November and December 2016, there was emphasis on aggressively reducing the CCDC's debt and addressing the various outstanding IRS payments, penalties, and interest, as well as repaying the State of West Virginia for previous Medicaid overpayments made to the CCDC. (Appendix 000109). As a result of concerns regarding prior management, CCDC ultimately agreed to let AAAOA take over the management of the organization for six months.

Indeed, on December 21, 2016, there was a Board Meeting consisting of three board members. During this meeting, the Board voted to execute a contract with AAAOA to effectuate the handoff of CCDC's management to AAAOA. (Appendix 000109).[1]

There was a policy and procedure manual (Guide) at the CCDC in effect at the time of the events which are the subject of this litigation. (Appendix 000161- 000248). On the third page of the Guide there is an introduction to the manual. (Appendix 000163). The bottom of that page states "*Note-Receipt of this Employment Manual does not constitute an employment contract with this agency." *Id.* The Guide specifically states that "[T]he manual should be used as a guide in dealing with agency personnel matters. (Appendix 000168). Additionally, each Petitioner

[1] During this Board Meeting, it adopted a new Personnel Policies and Procedures Handbook. The petitioners dispute that this new Personnel Policies and Procedures Handbook was properly adopted prior to their discharge. While the CCDC disputes this assertion, it nevertheless has chosen to proceed under the Clay County Development Corporation, Inc. Employment Guide, which petitioners' assert was the applicable and controlling employee handbook.

admits that there is nothing in this Guide that could be interpreted as creating a contract between the parties. (Appendix 000263-000265); (Appendix 000303-000305). In essence, Petitioners admit that the Guide did not alter their at-will employment status.

Further, this Guide provides for two classifications of involuntary termination. The first is Positive Dismissal, defined as a termination "based on circumstances beyond the employee's control." (Appendix 000219). The second is Negative Dismissal, which is based upon behavior that is controlled by the employee. *Id.* The causes for involuntary termination are also set forth in the Guide. The applicable cause of termination related to this case, and as permitted by the Guide, provides:

> D. Involuntary Termination
>
> **2 Causes for Involuntary Termination**
>
> **(1) Positive Termination**
>
> . . .
>
> **b. Insufficient Funding**
> Termination of an employee may be necessary prior to the time indicated in the work plan when there is a short fall in funds, or the program is defunded.
>
> **c. Reorganization and Discontinuance of a Particular Position or Area of Service**
> Termination of an employee (except when on extended sick leave) may result when reorganization and discontinuance of a particular position or area of service occurs.

(Appendix 000219).

Petitioners were involuntarily terminated under the Positive Termination category because their termination arose out of circumstances beyond their control, i.e., CCDC's onerous financial situation. Accordingly, Petitioners were terminated pursuant to the "Insufficient Funding and Reorganization and Discontinuance of a Particular Position or Area of Service" sections of the

Positive Dismissal Category found in the Guide—the same Guide that Petitioners argue is controlling in this matter. (Appendix 000219). In other words, Petitioners' positions were dissolved, their work duties were easily absorbed by others, and the dissolution of these positions resulted in a savings to the non-profit organization in excess of one hundred ten thousand dollars ($110,000) per year. (Appendix 000110).

To further support this fact, Stephanie Duffield, current CCDC Executive Director, testified as the agency's 30(b) designated representative, when was asked why the Petitioners were terminated, she responded, "They were at-will employees. And our agency had to make some tough decisions. We were a quarter of a million dollars in debt and we had to terminate the positions that were the most easily absorbed. We had to make some tough decisions." (Appendix 000355, p. 47, line 7-14). Duffield further explained that Petitioners did not have as many duties and responsibilities as most of the rest of the employees. Thus, their jobs were easily absorbed. (Appendix 000357, p. 53, line 7-14).

Petitioners' counsel later summarized the CCDC's position regarding the Petitioners' termination, requesting the corporate representative confirm his summary as follows:

> Q: And let me ask you if this fairly characterizes your position as the CCDC on that issue. You were confronted in December of 2016 with a budget shortfall, the two plaintiffs in this case had the jobs with the least duties and therefore the jobs most easily absorbed; therefore you chose to eliminate their jobs, terminate their employment for that reason and that reason alone?
>
> A: Correct.

(Appendix 000358, p. 57, ln. 13-20). Duffield also testified that these dissolved positions were never reconstituted: "So – and they are still being done by employees that were there at the time and doing them now. So they were just easily absorbed." (Appendix 000355, p. 54, lines 13-15).

Both Petitioners testified that they had no knowledge of the financial condition of the organization. (Appendix 000297-000298); (Appendix 000260, p.35, line 21-24). Nor have the Petitioners produced any testimony or documents to evince that the CCDC was not in significant debt at the time of their termination requiring the CCDC to reorganize and discontinue their particular positions.

Petitioners then filed this lawsuit, alleging violations of WV Code §5-11-2 and §5-11-9 (West Virginia Human Rights Act), breach of contract, and wrongful discharge[2]. Petitioners identified only three witnesses they intend to call at trial to prove their case: the two petitioners and an individual who did not work for CCDC during any of the relevant times related to this case. Thus, the Petitioners' entire case rested solely upon their own testimony.

Petitioners have failed to point to a single piece of evidence in the record that supports that they were discharged for being related to Pam Taylor. To the contrary, the record is conclusive, incontrovertible, and shows that:

a) Respondent CCDC was faced with significant financial realities;

b) Petitioners were the two highest paid non-professional staff members at the CCDC;

c) Their job functions were easily absorbed by other employees; and,

d) Their positions were never replaced and have not been to this day.

(Appendix 000108).

[2] Nowhere in the Complaint do the Petitioners allege any improper conduct on the part of Respondent CCDC in effecting the discharge; thus, failing to state or establish a *Harless* type claim. *Harless v. First Nat. Bank in Fairmont*, 132 W.Va. 116; 246 S.E.2d 270 (1978). Further, "a party may not bring a Harless-type, tort-based action to gain redress for violations of the West Virginia Human Rights Act." *Guevara v. K–Mart Corp.*, 629 F.Supp. 1189, 1192 (S.D.W.Va.1986); *Burgess v. Gateway Commc'ns, Inc.- WOWK TV*, 984 F. Supp. 980, 983 (S.D.W. Va. 1997).

Petitioners cannot establish, by clear and convincing evidence, that they had any type of employment contract with CCDC. Petitioners were at-will employees and could be terminated for any non-discriminatory reason. As discussed herein, Petitioners' termination was not in violation of the West Virginia Human Rights Act, as they were not discharged for any discriminatory reason. Thus, Petitioners were not wrongfully discharged by the CCDC. Their claims fail as a matter of law, and the Order granting Defendant's Motion for Summary Judgment must be affirmed.

V. ARGUMENT

A. STANDARD OF REVIEW

"Summary judgment is the 'put up or shut up' moment in a lawsuit." *Siegel v. Shell Oil Co.*, 612 F.3d 932, 937 (7th Cir.2010) (quoting *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir.2003)); see also, *Jones v. Bolster*, No. 1:19CV479 (LO/MSN), 2020 WL 809375, at *4 (E.D. Va. Feb. 14, 2020). A party seeking to defeat a motion for summary judgment is required to "wheel out all the artillery to defeat it." *United States v. Laketek*, No. 06 C 5140, 2007 WL 2728840, at *1 (N.D. Ill. Sept. 17, 2007) (quoting, *Caisse Nationale de Credit v. CBI Indus., Inc.*, 90 F.3d 1264, 1270 (7th Cir.1996).

Rule 56(c) of the West Virginia Rules of Civil Procedure governs the circumstances under which a moving party is entitled to judgment as a matter of law:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In interpreting and applying Rule 56(c), the Supreme Court of Appeals of West Virginia has advised that little discretion is afforded a trial court when there are no genuine issues of material fact: "Summary judgment is not a remedy to be exercised at the circuit court's option; *it*

must be granted when there is no genuine dispute over a material fact." *Payne v. Weston*, 466 S.E.2d 161 (W.Va. 1995) (emphasis added).

Further, "[o]nce a party has made a properly supported motion for summary judgment, the nonmoving party may not simply rest upon the pleadings but must instead submit evidentiary materials that 'set forth specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting Fed. R. Civ. P. 56(e)). *Cartwright v. Cooney*, No. 10-CV-1691, 2013 WL 842655, at *2 (N.D. Ill. Mar. 6, 2013). "The movant does not need to negate the elements of the claims on which the nonmoving party will bear the burden at trial." *Powderidge Unit Owners Ass'n v. Highland Properties, Ltd.*, 474 S.E.2d 872, 879 (W.Va. 1996). Rather, the movant's burden is "only [to] point to the absence of evidence supporting the nonmoving party's apparent case." *Id.* (internal citation omitted). If the moving party meets this burden, "the nonmoving party must identify specific facts in the record and articulate the precise manner in which that evidence supports its claim." *Id.* at 878.

A dispute about a "material fact is genuine only when a reasonable jury could render a verdict for the nonmoving party if the record at trial were identical to the record compiled in the summary judgment proceedings." *Crum v. Equity Inns, Inc.*, 685 S.E.2d 219, 226 (W.Va. 2009). An opposing party's mere contention that issues are disputable is not sufficient to overcome summary judgment. *Brady v. Reiner*, 157 W. Va. 10, 198 S.E.2d 812 (1973) (overruled on other grounds, *Board of Church Extension v. Eads*, 159 W. Va. 943, 230 S.E.2d 911 (1976)). Further, "[s]ummary judgment is appropriate where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has a burden to prove." Syl. Pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

A determination of what constitutes a contract is a question of law and not a question of fact. *Williams v. Precision Coil, Inc.,* 194 W. Va. 52, 459 S.E.2d 329 (1995). The employee's burden of proof regarding an implied contract is one of "clear evidence" of the employer's behavior, and that evidence must be sufficient to justify a reasonable person to believe that a continuing contractual relationship exists. Syllabus Point 3, *Adkins v. Inco Alloys Intern., Inc.,* 187 W. Va. 219, 417 S.E.2d 910 (1992) ("[w]here an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence"). *Adkins v. Gatson*, 192 W. Va. 561, 566–67, 453 S.E.2d 395, 400–01 (1994).

"On appeal, this Court accords a plenary review to the circuit court's order granting summary judgment: "[a] circuit court's entry of summary judgment is reviewed *de novo.*" Syl. Pt. 1, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994). In conducting our de novo review, we apply the same standard for granting summary judgment that is applied by the circuit court. Under that standard,

> "'[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).'"

Id. at 756, syl. pt. 2.

Petitioners failed to take any depositions of any fact witness other than the Respondent's corporate representative, who only confirmed that Petitioners' involuntary separation from employment was the direct result of the financial condition of the non-profit organization. Petitioners also failed to submit any countervailing affidavit(s) or even challenge the affidavit of

Leslie McGlothlin, the acting Executive Director of the CCDC at the time of the discharge, in an effort to create a genuine issue of material fact. Accordingly, this Court should affirm the decision of the lower court.

B. SIBLINGS ARE NOT A PROTECTED EMPLOYMENT CLASS UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT.[3]

The West Virginia Supreme Court does not sit as "a superlegislature.... It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions." *Boyd v. Merritt,* 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986); *see also State v. Anderson,* 212 W.Va. 761, 765, 575 S.E.2d 371, 375 (2002). "As this Court stated in *Motto v. CSX Transportation, Inc.,* 220 W.Va. 412, 647 S.E.2d 848 (2007), '[w]here the Legislature itself has not acted, it is improper for this Court, under the guise of statutory interpretation, to amend legislative enactments in order to judicially impose upon the Legislature a result it did not intend.' *Id.* at 420, 647 S.E.2d at 856" *Thomas v. McDermitt*, 232 W. Va. 159, 167, 751 S.E.2d 264, 272 (2013).

This is the framework upon which this case must be analyzed. To proceed otherwise would open a pandora's box of new theories of liability under the West Virginia Human Rights Act not intended by the West Virginia Legislature.

West Virginia's public policy related to equal opportunity is found in the West Virginia Human Rights Act. West Virginia Code § 5-11-2, entitled "Declaration of policy" sets forth the public policy related to equal opportunity in the workplace and in housing accommodations or real

[3] Because Petitioners denied in deposition that they were separated from employment or discriminated against on the basis of their race, religion, color, sex, age, blindness, or disability, this appeal need not address these issues under the West Virginia Human Rights Act. (Appendix 000266, pp. 58-60), (Appendix 000298-296 pp.70- 75).

property. While found within the same paragraph, these two separate and distinct ideas are separated by separate sentences.

The Human Rights Act as it relates to employment provides:

> Equal opportunity in the **areas of employment and public accommodations** is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or disability. . .

Id. (emphasis added). The next sentence, related to housing accommodations or real property, the West Virginia legislature separately included familial status:

> Equal opportunity in **housing accommodations or real property** is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability **or familial status**.

Id. (emphasis added).

The West Virginia Legislature had the manifest authority to add familial status to the areas of employment and public accommodations. It did not do so. Likewise, the West Virginia Legislature had the authority to simply add "housing or real property" to the first sentence and dispense with creating a separate category of equal opportunity found in the second sentence. Again, it did not do so.

In *Motto*, this Court held that "Our role in interpreting a statute is well-settled. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, *Smith v. State Workmen's Compensation Comm'r,* 159 W.Va. 108, 219 S.E.2d 361 (1975). Where the statutory language is clear and unambiguous, it should be applied as written. *See,* Syl. pt. 5, *Walker v. West Virginia Ethics Comm'n,* 201 W.Va. 108, 492 S.E.2d 167 (1997) ("Where the language of a statute is clear and without ambiguity the plain meaning is to be

accepted without resorting to the rules of interpretation." (internal quotations and citations omitted)); Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.")." *Id* at 417, 853.

In this case, Petitioners argue that this Court should add familial status to the equal opportunity for employment and public accommodations under a theory that the West Virginia Legislature simply meant to include it but did not. This position invites this Court to do that which it has loathed to do as illustrated above.

Petitioners alternatively argue that the term "ancestry" includes siblings, despite the West Virginia Legislature's refusal to include familial status in the areas of employment and public accommodations in the West Virginia Human Rights Act. There is no legal authority in this country that supports Petitioners' position.

While there is no definition of "national origin" or "ancestry" provided in the West Virginia Human Rights Act,

> The Supreme Court of the United States, in *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86, 88, 94 S. Ct. 334, 336, 38, L.Ed.2d 287, 291 (1973), held that "[t]he term 'national origin' . . . refers to the country where a person was born, or more broadly, the country from which his or her ancestors came." That definition is valid under our statute, too, which refers to "national origin [or] ancestry."

W. Va. Institute of Tech. v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 537, n.6, 382 S.E.2s 490 (1989).

Petitioners' brief tortures reasoning in their attempt to convince this court that the term ancestry and sibling status are synonymous. Petitioners reference Black's Law Dictionary to support their theory. However, Petitioners' own use of a 1979 Black's Law Dictionary belies their claim. In their brief, Petitioners quote Black's Law Dictionary definition of ancestor as "one from

a person lineally descended or may be descended." Petitioners' Brief p. 9. The more current Black's Law Dictionary defines ancestry as "[a] line of descent; collectively, a person's forebears; lineage." *Ancestry, Black's Law Dictionary* (11th ed. 2019). The Merriam-Webster Unabridged Dictionary's definition includes "persons initiating or comprising a line of descent." "Ancestry." *Merriam-Webster's Unabridged Dictionary*, Merriam-Webster, https://unabridged.merriam-webster.com/unabridged/ancestry. Accessed 2 Oct. 2021. Regardless of which source is used, it is clear that siblings are not forbears of one another nor do they initiate a line of descent between each other.[4]

Nonetheless, Petitioners argue that they are protected persons based on their familial status with the former CCDC Executive Director. Astoundingly, Petitioners' counsel failed to inform this court that they had made this very argument in the United States District Court of Southern West Virginia. Their failure to mention this case may be the result of their argument failing as a matter of law.

Judge Robert C. Chambers in *Billiter v. Jones*, No. CV 3:19-0288, 2020 WL 5646901, at *7 (S.D.W. Va. Sept. 22, 2020), while analyzing the West Virginia Human Rights Act in a mother/daughter wrongful discharge case, found that familial status is applicable **only** to equal opportunity in housing accommodations or real property. *Id.* Judge Chambers spent considerable effort discussing the history of ancestry as it is utilized in the context of workplace discrimination.

Billiter noted that West Virginia's Human Rights Act does not define the word "ancestry," nor does any decision of the West Virginia Supreme Court of Appeals. As in this case, Petitioners' counsel argued, in *Billiter,* that "ancestry" is to be broadly interpreted and cited dictionary definitions in support of their argument. *Billiter's* counsel argued "that ancestry discrimination

[4] Respondent chooses not to comment on the Petitioners' use of the for-profit website ancestory.com as it has no precedential value as an application of settled principles of law.

'concerns claims of discrimination on the basis of race, ethnicity, and national origin; not the identity of a parent'" *Id* at *6.

Petitioners argue in the current case that the lower court treated ancestral discrimination and ethnic discrimination as duplicitous in violation of the "rule against surplusage." However, that is not what the court said or intended. In fact, the lower court in this case adopted the rationale stated in the *Billiter* case. Judge Chambers addressed Petitioner's current argument by stating that "the Court did not believe that the including of "ancestry" in the Human Rights Act is merely redundant or meaningless." *Id.*

Discussing two West Virginia cases[5] involving ancestry discrimination, Judge Chambers determined that ancestry is a meaningful part of the act. *Id.* "Discrimination based on ancestry means discrimination based on some type of characteristic like race, ethnicity, or national origin that is passed down by lineal ascendants." *Id.* In *Barefoot*, both race and ancestry were used to describe the discrimination involving plaintiff's Native American heritage. Similarly, in *Fairmont Specialty Servs.*, this Court upheld an award based discrimination against plaintiff's Mexican ancestry. Judge Chambers concluded that "this kind of actionable discrimination relates to innate characteristics that are shared by a class of persons." *Billiter* at *7. "This can be seen in the other protected classes under the West Virginia Human Rights Act. W.Va. Code § 5-11-2 ("Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national, origin, ancestry, sex, age, blindness or disability.").

In the case at bar, Petitioners' discrimination claim is based upon a familial/sister relationship. "This is simply not the kind of innate characteristic that anti-discrimination laws like

[5] *Barefoot v. Sundale Nursing Home*, 457 S.E.2d 152 (W. Va. 1995), and *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 522 S.E.2d 180 (W. Va. 1999).

the West Virginia Human Rights Act were enacted to protect." *Id.* at *7. The Court in *Billiter* concluded and ruled that there is "no claim for familial status discrimination because the Human Rights Act does not prohibit employment discrimination based on familial status." *Id.*

Should this court broaden the term "ancestry" to include sisters or familial status, a new generation of discrimination claims will find their way into the court system. First, sisters can file discrimination actions, then cousins, then cousins twice removed. This court will find itself being asked to determine whether adopted siblings and step siblings can bring discrimination suits. In the context of employment discrimination law, Judge Chambers accurately determined that familial relationships are not the kind of innate characteristic that anti-discrimination laws were enacted to protect. Accordingly, the lower court's order granting summary judgment must be affirmed.

C. PETITIONERS WERE AT-WILL EMPLOYEES THAT COULD BE TERMINATED FOR ANY NONDISCRIMINATORY REASON, AND THEY CANNOT PREVAIL ON A BREACH OF IMPLIED CONTRACT THEORY.

i. Petitioners were at will employees and could be terminated for any nondiscriminatory reason.

"In the absence of other evidence, West Virginia law presumes that employment is at-will." *Eaton v. City of Parkersburg,* 198 W. Va. 615, 619 (1996). "As a general rule, West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law." *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 63, 459 S.E.2d 329, 340 (1995). A "party asserting that an employment was other than at-will bears the burden of rebutting the at-will presumption." *Younker v. E. Associated Coal Corp.,* 214 W. Va. 696, 591 S.E.2d 254 (2003). Moreover, such claim must be established by clear and convincing evidence. *Id.*

While Petitioners do not contest that employment in the State of West Virginia is presumptively at-will, they assert they had a contract for employment established solely by or through the Guide (Appendix 000002). As discussed below, their assertion fails.

ii. No implied employment contract existed between the parties.

An employee handbook may form the basis of unilateral contract if there is a definite promise by the employer not to discharge covered employees except for specific reasons. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). However, such a unilateral contract does not arise merely by the fact that the employer has alerted its employees that certain conduct may form the basis of a discharge. *Edmonds v. Altice Tech. Servs. US LLC*, 413 F. Supp. 3d 488 (S.D.W. Va. 2019). In order to form the basis of a unilateral employment contract that would rebut the at-will presumption, *it must contain a promise of job security. Id.* (emphasis provided). Further, the West Virginia Supreme Court held that any implied promise that one could infer from an employer's policy manual was insufficiently definite to form a basis of a unilateral contract modifying an employment at-will relationship when the manual stated the employer could discharge new employees without cause at the end of or during the employee's probationary period and even the enumeration of causes for discipline and discharge did not limit the right to discharge employees for any other cause. *Suter v. Harsco Corp.,* 184 W. Va. 734, 403 S.E.2d 751 (1991).

A year after the *Suter* decision, this Court ruled that "In order to form basis of unilateral contract, an employment handbook must contain "definite promise" not to fire covered employee except for specified reasons." *Mace v. Charleston Area Med. Ctr. Found., Inc.,* 188 W. Va. 57, 422 S.E.2d 624 (1992). Additionally, "[u]nder West Virginia law, employment that is not for a fixed term is presumed to be employment that is terminable at-will by either party." *Edmonds v. Altice Tech. Servs. US LLC*, 413 F. Supp. 3d 488 (S.D.W. Va. 2019).

Petitioners mistakenly put great stock in their argument that the Guide (Appendix 000161-000248) was an implied contract because it did not sufficiently display a "disclaimer that prevents it from contractually limiting the employer's discretion to discharge employees." To be clear, whether a disclaimer was or was not clearly and conspicuously present in the Guide is not the determinative factor in determining whether there was the creation of an implied contract.

In 2019, while interpreting and adhering to West Virginia employment law precedent, Judge Faber, Senior District Judge for the Southern District of West Virginia, held that in order to form the basis of a unilateral employment contract, *a handbook must contain a promise of job security. Id., see also, Mace v. Charleston Area Med. Ctr. Found., Inc.,* 188 W. Va. 57, 422 S.E.2d 624 (1992).

Here, Petitioners allege that this Guide constituted a contract between them and the CCDC (Appendix 000002, ¶30), or alternatively, the CCDC failed to follow its own procedures related to their separation from employment (Appendix 000002, ¶33). Petitioners have produced absolutely no evidence that the Guide created an employment contract between the parties.

In their Responses to Requests for Production of Documents, Petitioners produced a bate-stamped copy of the Guide they assert was controlling at the time of their discharge. (Appendix 000161-000248). Each of the Petitioners testified that they provided the Guide to their lawyer for production in this case. (Appendix 000261, p. 40, lines 12-19); (Appendix 000287, p. 38, lines 18-24. Additionally, Petitioner Keener admitted that all employees had a copy of the policy. (Appendix 000262, p. 42-43. Petitioners' counsel even represented that the Guide was provided to him by Petitioners. (Appendix 000288, p. 41; 14-18).

Each Petitioner was questioned extensively about this Guide during their deposition. As stated herein, on the third page of the Guide, prominently displayed and addressed to the

employees it is written "***Note, receipt of this Employment Manual does not constitute an employment contract with this agency."** (Appendix 000163). Neither of the Petitioners deny this page/provision existed as part of the Guide. (Appendix 000288, p. 42, lines 8-23); (Appendix 000262, pp.41-44). Nor can they claim that it was serendipitously inserted after their termination, since they alone were the ones who provided it to their attorney and subsequently produced this document in discovery.

Additionally, both Petitioners were asked to locate anywhere in the Guide that would evince the creation of a contract. They could not do so. Section I of the Guide entitled "EMPLOYMENT" consists of six pages that addresses recruitment, employment, promotion, and employee qualifications. (Appendix 000172-000177). After reviewing those six pages, Petitioner Keener testified that she could not point out anywhere in those six pages that suggest an employee of CCDC has an employment contract. (Appendix 000263, pp. 46-47). Similarly, Petitioner Asbury agreed that under the "Confirmation of Employment" section found on page 4 of the Guide, there were no provisions that suggested that an employee had a contract of employment with the CCDC. (Appendix 000303-304, pp. 104-105). Indeed, neither Petitioner could point out any section of the Guide that they believed established that an employee had a contract of employment with the CCDC. (See generally, Appendix 000277-309; Asbury deposition; and Appendix 000251-267; Keener deposition).

Likewise, based upon the plain reading of the Guide, Petitioners cannot establish by clear and convincing evidence, that it contained a promise of job security. To the contrary, under the expressed provisions found in the Guide, it is only to "be used as a guide in dealing with agency personnel matters." (Appendix 000168)

The confirmation of employment provisions in the Guide cannot reasonably be interpreted as creating a unilateral contract. Under this section "New employees will receive written notice of his/her employment prior to or at the start of his/her first working day. This hiring letter/form will include job title, date employment begins, starting salary, and job location." (Appendix 000175). Nowhere does the confirmation of employment process provisions suggest or imply that an employee has a promise of job security nor employment for a fixed term.

Even more compelling, the Guide provides that: "*Every* regular employee is hired subject to a six (6) month probationary period with a mid-term (3 months) written evaluation." (Appendix 000181) (emphasis provided). At the conclusion of the probationary period, a determination/recommendation would be made regarding continued employment. *Id.* There is/was no guarantee of employment at the end of a probationary period, and therefore, any claim that an implied employment contract formed provided job security or employment for a fixed term fails.

Perhaps the most convincing evidence to establish that Petitioners did not have an implied contract can be found in Section VII A entitled "Tenure of Employment." This provision in the Guide unequivocally states that "As most Federal/State Funds are appropriated on a yearly basis, *no guarantee of employment can be made beyond the grant period.*" (Appendix 000218) (emphasis provided). Simply stated, this provision is conclusive evidence that Petitioners never had an implied contract for employment.

Finally, while Petitioners may argue that, because they were discharged within a grant period (though they have no evidence to offer this as fact) they should have been subjected to progressive discipline prior to termination as provided for on page 19 entitled "Disciplinary Action." (Appendix 000006, ¶33). Further, they assert that they did not commit any of the offenses "set forth as grounds for immediate termination." (Appendix 000006, ¶34).

However, while Respondent admits that Petitioners did not commit any offense that would lead to immediate termination as identified in the Guide, Petitioners completely ignore the provisions of the Guide that permit the organization to reduce its workforce by involuntarily separating employees from employment. (Appendix 000218). As previously stated, there are two classifications of involuntary termination: Positive Dismissal and Negative Dismissal. (Appendix 000219-000220). Petitioners' involuntary termination fell under the Positive Dismissal category because their termination arose out of circumstances beyond their control, i.e., CCDC's onerous financial situation. Accordingly, Petitioners were terminated pursuant to the "Insufficient Funding and Reorganization and Discontinuance of a Particular Position or Area of Service" sections of the Positive Dismissal Category found in the Guide—the same Guide that Petitioners argue is controlling in this matter. (Appendix 000219). In other words, Petitioners' positions were dissolved, because their work duties were easily absorbed by others, and the dissolution of these positions resulted in a savings to the non-profit organization in excess of one hundred ten thousand dollars ($110,000) per year. (Appendix 000108).

As discussed above, the Respondent's 30b designated representation confirmed, through deposition testimony, the reason for Petitioners' discharge. (Appendix 000357, p. 53, line 7-14); (Appendix 000358, p. 57, ln. 13-20). (Appendix 000355, p. 54, lines 13-15). This testimony has never been refuted.

Consequently, Petitioners cannot establish, by clear and convincing evidence, that they had any type of employment contract with CCDC. Petitioners were at-will employees and could be terminated for any non-discriminatory reason. As discussed herein, Petitioners' termination was not in violation of the West Virginia Human Rights Act, as they were not discharged for any discriminatory reason. Thus, Petitioners were not wrongfully discharged by Respondent CCDC.

Accordingly, their claims fail as a matter of law, and the Order granting summary judgment must be affirmed.

VI. CONCLUSION

Petitioners' attempt to create a new class of protected status employees, i.e., siblings, must fail. Familial status is applicable **only** to equal opportunity in housing accommodations or real property as clearly set forth in the West Virginia Human Rights Act. Contrary to Petitioners' assertions, ancestry discrimination is based on some type of characteristic like race, ethnicity, or national origin that is passed down by lineal ascendants. Being the sister of someone, is simply not the kind of innate characteristic that anti-discrimination laws like the West Virginia Human Rights Act were enacted to protect. Accordingly, this court must find that there is no claim for familial status discrimination, because the Human Rights Act does not prohibit employment discrimination based on familial status. The lower court's order in this regard must be affirmed.

The Petitioners are at-will employees and have provided no evidence to the contrary. West Virginia law provides that the doctrine of employment-at-will allows an employer to discharge an employee for good reason, no reason, or bad reason without incurring liability unless the firing is otherwise illegal under state or federal law. Petitioners do not contest this point.

However, while they do not contest this basic tenant of law, Petitioners assert that an implied contract for indefinite employment exists based entirely on a 1995 employee handbook. Petitioners bears the burden of rebutting the at-will presumption.

Petitioners have failed to establish by clear and convincing evidence that the Guide, at issue here, formed the basis of a unilateral contract because there was no definite promise not to discharge them except for specific reasons. Moreover, the mere fact that a progressive discipline was available in the Guide, its presence does not magically create an implied contract for indefinite

employment. The Guide at issue in this case clearly sets forth multiple instances when an employee can be involuntarily separated from employment. Thus, there was no promise of job security. The lower court's order in this regard must be affirmed, as well.

CLAY COUNTY DEVELOPMENT CORPORATION

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IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

WANDA KEENER and KATHERINE ASBURY,

Appellants,

v. **No. 21-0267**

CLAY COUNTY DEVELOPMENT CORPORATION,

Appellee.

CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellee, Clay County Development Corporation, do hereby certify that I have served the ***"Respondent's Brief"*** upon the following counsel of record by depositing the same in the United States mail, with postage prepaid, on this 4th day of October, 2021, addressed as follows:

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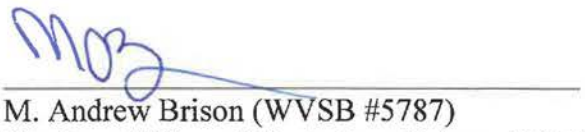

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