IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0484

CYNTHIA D. PAJAK,

Petitioner,

v.

UNDER ARMOUR, INC.,
UNDER ARMOUR RETAIL, INC., and
BRIAN BOUCHER,

Respondents.

BRIEF OF PETITIONER CYNTHIA D. PAJAK

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I. INTRODUCTION

Petitioner Cynthia D. Pajak submits this brief on a question certified under the Uniform Certification of Questions of Law Act, W. Va. Code § 51-1A-1, *et seq.* The United States District Court for the Northern District of West Virginia has certified the following question regarding construction of the West Virginia Human Rights Act ("WVHRA"), 5-11-1, *et seq.*:

> Whether an entity that does not meet the definition of "employer" in West Virginia Code § 5-11-3(d) is nonetheless subject to liability under West Virginia Code § 5-11-9(7) as a "person" defined in West Virginia Code § 5-11-3(a).

This Court should reformulate the certified question and hold affirmatively that Defendants Under Armour, Inc. and Under Armour Retail, Inc. (collectively, "Under Armour") are subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether Under Armour meets the definition of "employer" in § 5-11-3(d). The WVHRA's declaration of a broad and beneficial policy to protect the citizens of West Virginia, requirement of liberal construction to effectuate its objectives and purposes, and plain language subject Under Armour to liability under § 5-11-9(7). Under its plain terms "person" in § 5-11-3(a) means "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Section 5-11-9(7) provides in pertinent part that it shall be unlawful:

> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:
>
> > A. Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;
> >
> > B. Willfully obstruct or prevent any person from complying with the provisions of this article, ... or

> C. Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified, or assisted in any proceeding under this article.

Although this Court has not determined the precise issue raised in the certified question, the Court has held that the term "person" as defined in § 5-11-3(a) includes both employees and employers and recognized that claims under § 5-11-9(7) may be brought against any "person" as that term is defined in § 5-11-3(a). Thus, the Court has found that a co-employee, a chiropractor employer sued individually and doing business as a chiropractic company, a jail authority and its chief corrections officer, and an insurer were subject to liability under § 5-11-9(7) as "persons" within the meaning of § 5-11-3(a). The Court recently held that a plaintiff had waived the issue of whether a county commission that did not meet the definition of "employer" under § 5-11-3(d) could still be subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a). Justice Walker opined separately that under the WVHRA's plain terms an entity that does not fit the definition of "employer" may potentially be held liable as a "person" as that term is defined.

Other Courts have held under statutes analogous to the WVHRA that an entity that does not meet the statutory definition of an "employer" may nonetheless be subject to liability for retaliation as a "person" as that term is defined. Those cases have relied on the remedial nature of the statutory schemes, requirement of liberal construction, and plain language.

This Court should likewise reformulate the certified question and affirmatively hold that Under Armour is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether Under Armour meets the definition of "employer" in § 5-11-3(d). Alternatively, the Court may hold that the certified question is not determinative and need not be reached because Under Armour employs a sufficient number of persons within the state to be subject to liability as an "employer" within the plain meaning of § 5-11-3(d).

II. STATEMENT OF THE CASE

A. Statement of Facts[1]

This action stems from the discharge of Ms. Pajak by Under Armour. Ms. Pajak alleges that after she reported inappropriate conduct that created a hostile work environment she was the victim of gender discrimination and a retaliatory discharge. J.A. at 64–91.

In November 2012, Under Armour hired Ms. Pajak as its director of the East and Canada regions. J.A. at 67. Ms. Pajak worked remotely from Bridgeport, West Virginia and reported to Defendant Brian Boucher. In January and April 2018, female employees reported several instances of inappropriate workplace conduct to Ms. Pajak. Such conduct included a district manager taking off his shirt and pretending to do a striptease and posting a photo of himself on Under Armour's internal social media site posing for a body building competition in a speedo, and another district manager making comments about a female colleague's appearance. J.A. at 67–68. Ms. Pajak encouraged these employees to submit written statements, which she then provided to Mr. Boucher. J.A. at 68–69. According to Ms. Pajak, Mr. Boucher minimized the employees' concerns and directed Pajak to "move on." J.A. at 68–70.

On June 12, 2018, Mr. Boucher delivered Ms. Pajak's midyear review, which raised no concerns about her job performance. J.A. at 70. But a mere nine days later, Mr. Boucher, for the first time, raised concerns about Ms. Pajak's job performance and asked her to voluntarily leave her position at Under Armour. Mr. Boucher had not consulted Under Armour's human resources department before approaching Ms. Pajak. J.A. at 70–71. Ms. Pajak declined to leave her position, and, on September 10, 2018, Mr. Boucher placed her on a sixty-day Performance Improvement Plan ("PIP"), although the typical "PIP period" at Under Armour is ninety days. J.A. at 71–72.

[1] In accordance with West Virginia Code § 51-1A-6, the facts are taken from the Memorandum Order and Opinion Granting Motion to Certify Questions to the West Virginia Supreme Court of Appeals. J.A. at 340–43, J.A. at 481–84. The District Court took the facts from Ms. Pajak's complaint. J.A. at 340, 481.

Ms. Pajak contends Mr. Boucher provided no guidance in the PIP as to what areas of her performance needed to improve. J.A. at 71. She further alleges that the PIP contained only subjective performance metrics, and that, although Mr. Boucher told her he would meet with her regularly during the PIP period, he did so only once and that was at her request. J.A. at 72.

Ms. Pajak further asserts that the culture at Under Armour created a hostile work environment. During her PIP period, for example, Under Armour's workplace culture attracted national notoriety, prompting Under Armour's CEO to publicly pledge to improve the workplace environment for its employees.[2] J.A. at 72.

Ms. Pajak, however, contends that Under Armour was never committed to this promise, as evidenced by its failure to respond to inappropriate comments made by a district manager during a conference call, the sole purpose of which was to discuss the media's criticisms of Under Armour's corporate culture. Although Ms. Pajak and other female employees reported their discomfort with the district manager's comments and the company's failure to address them on the call, no action was taken. J.A. at 72. Finally, on December 10, 2018, Mr. Boucher fired Ms. Pajak after her PIP period expired. J.A. at 75.

B. Procedural History

Ms. Pajak filed her original complaint in the Circuit Court of Harrison County, West Virginia against Under Armour and Mr. Boucher on July 16, 2019. The complaint alleged that Under Armour, Inc. and Under Armour Retail, Inc. are duly formed corporations. The complaint further alleged that Ms. Pajak resides in Bridgeport, West Virginia, that her employment relationship with Defendants arose and occurred in West Virginia, and that many of the acts complained of occurred in West Virginia or through communications in West Virginia. *See* J.A.

[2] On November 5, 2018, the Wall Street Journal published an article entitled "Under Armour's #METOO Moment: No more Strip Clubs on Company Dime."

at 65–66. The complaint contained four counts, including one count under the WVHRA for violations of § 5-11-9(7). *See* J.A. at 78.

Thereafter, Under Armour filed a notice of removal to the District Court. *See* J.A. at 53. Under Armour filed an answer to the complaint. J.A. at 108. In addition, Under Armour filed its motion for partial dismissal of three of Ms. Pajak's claims, including the claim for violations of the WVHRA. Under Armour argued in pertinent part that the WVHRA claim should be dismissed because Ms. Pajak failed to allege that Under Armour satisfied the numerosity requirement to be treated as a statutory employer. J.A. at 141.

Ms. Pajak responded to Under Armour's motion for partial dismissal. Ms. Pajak argued that she adequately pled a claim against Under Armour under § 5-11-9(7), which by its plain terms applies to any "person" as well as an "employer." Because Under Armour is either a "person" as defined in § 5-11-3(a) or an "employer" as defined in § 5-11-3(d), Ms. Pajak argued that Under Armour is subject to liability under § 5-11-9(7). J.A. at 201.

The District Court entered its Order Denying Partial Motion to Dismiss by Under Armour Retail, Inc. and Under Armour, Inc. J.A. at 246. Pursuant to an Amended Scheduling Order, the discovery completion date was scheduled for February 15, 2021, a dispositive motions deadline was scheduled for March 1, 2021, and a jury trial was set to begin on September 20, 2021. J.A. at 247.

Prior to the close of discovery, Under Armour moved to certify the following legal question to this Court: "Whether an 'employer' as defined in West Virginia Section 5-11-3(d) means one who employs twelve or more persons **working** within the state for twenty or more calendar weeks in the calendar year the discrimination allegedly took place or in the preceding calendar year." J.A. at 260 (emphasis in original).

Ms. Pajak responded in relevant part that that resolution of the proposed certified question was not necessary to the decision in this action because the WVHRA claim is pled under § 5-11-9(7)(C), which prohibits retaliation by an employer or other person, and Under Armour indisputably meets the definition of "person." Ms. Pajak also argued that the District Court should construe the definition of "employer" in accordance with the statutory language, canons of construction, and stated policy in the WVHRA to protect West Virginia citizens without grafting a new term "working." J.A. at 284.

The District Court heard oral argument on Under Armour's motion and on March 5, 2021 entered its Memorandum Order and Opinion Granting Motion to Certify Questions to the West Virginia Supreme Court of Appeals. J.A. at 339. The District Court granted Under Armour's motion and initially proposed that the following questions be certified:

> 1. Whether an "employer" as defined in West Virginia Code § 5-11-3(d) means one who employs twelve or more persons working within the state for twenty or more calendar weeks in the calendar year the discrimination allegedly took place or in the preceding calendar year?
>
> 2. Whether a corporate employer is a "person" as defined in West Virginia Code § 5-11-3(a), regardless of whether it is also an "employer" as defined in § 5-11-3(d)?

J.A. at 339.[3]

Subsequently, on June 11, 2021, the District Court entered a Memorandum Order and Opinion Vacating in Part the Court's Prior Order. J.A. at 462. The District Court vacated that part of its prior Memorandum Order and Opinion that certified question one. J.A. at 462–66. The District Court reasoned as follows:

[3] On March 8, 2021, the District Court entered an Order Following Motion Hearing, which, among other things, granted Ms. Pajak's motion for leave to amend her complaint to add an intentional spoliation claim against all Defendants, held in abeyance Ms. Pajak's motion for an adverse inference jury instruction, and granted additional discovery limited to Ms. Pajak's intentional spoliation claim. J.A. at 380. Ms. Pajak filed her amended complaint on that same day. The claim for intentional spoliation alleges that Defendants had knowledge of a pending or potential civil action and failed to preserve and willfully destroyed relevant evidence. The allegations pertaining to Ms. Pajak's original claims, including her claim under the WVHRA, remain the same. J.A. at 339.

> Per *Williamson* [*v. Greene*, 490 S.E.2d 23, 28 (W. Va. 1997)], the Court is not permitted to interpret or construe the WVHRA's definition of an "employer," but instead, must apply the statute as written. The term "employ" means "to make use of" or "to commission and entrust with performance of certain acts or functions." EMPLOY, Black's Law Dictionary (11th ed. 2019). The plain language of the WVHRA thus mandates that an "employer" have at least twelve employees who perform their assigned tasks and responsibilities within the State of West Virginia. In other words, to qualify as an "employer" under the WVHRA an entity must have at least twelve employees actually working within the state.
>
> Undoubtedly, employees working at a brick and mortar location in West Virginia or performing their job responsibilities from a remote workplace located in West Virginia satisfy this requirement. But here, discovery has established that, in the relevant 2017 and 2018 calendar years, although more than twelve Under Armour employees lived in West Virginia, fewer than twelve worked in the State. And, as *Williamson* and *Kalany* [*v. Campbell*, 640 S.E.2d 113 (W. Va. 2006),] teach, West Virginia citizenship alone is insufficient to satisfy the WVHRA's numerosity requirement.
>
> . . . Therefore, as fewer than twelve Under Armour employees performed their job responsibilities within the State of West Virginia in 2017 and 2018, Under Armour does not meet the numerosity requirement of § 5-11-3(d) and is not an "employer" under the WVHRA.

J.A. at 465.[4]

On that same day, the District Court entered an Order of Certification to the West Virginia Supreme Court of Appeals. J.A. at 473. The District Court certified the following question:

> Whether an entity that does not meet the definition of "employer" in West Virginia Code § 5-11-3(d) is nonetheless subject to liability under West Virginia Code § 5-11-9(7) as a "person" defined in West Virginia Code § 5-11-3(a)?

J.A. at 473.

[4] The District Court also entered a Memorandum Order and Opinion Denying Brian Boucher's Motion to Certify Question to the West Virginia Supreme Court of Appeals. J.A. at 467.

III. SUMMARY OF THE ARGUMENT

This Court should reformulate the certified question and affirmatively hold that Under Armour is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether Under Armour meets the definition of "employer" in § 5-11-3(d). The WVHRA's declaration of a broad and beneficial policy to protect the citizens of West Virginia, requirement of liberal construction to effectuate its objectives and purposes, and plain language subject Under Armour to liability under § 5-11-9(7). Under its plain terms "person" in § 5-11-3(a) means "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Section 5-11-9(7) provides in pertinent part that it shall be unlawful:

> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:
>
> > A. Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;
> >
> > B. Willfully obstruct or prevent any person from complying with the provisions of this article, ... or
> >
> > C. Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified, or assisted in any proceeding under this article.

Although this Court has not determined the precise issue raised in the certified question, the Court has held that the term "person" as defined in § 5-11-3(a) includes both employees and employers and recognized that claims under § 5-11-9(7) may be brought against any "person" as that term is defined in § 5-11-3(a). Thus, the Court has found that a co-employee, a chiropractor

employer sued individually and doing business as a chiropractic company, a jail authority and its chief corrections officer, and an insurer were subject to liability under § 5-11-9(7) as "persons" within the meaning of § 5-11-3(a). The Court recently held that a plaintiff had waived the issue of whether a county commission that did not meet the definition of "employer" under § 5-11-3(d) could still be subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a). Justice Walker opined separately that under the WVHRA's plain terms an entity that does not fit the definition of "employer" may potentially be held liable as a "person" as that term is defined.

Other Courts have held under statutes analogous to the WVHRA that an entity that does not meet the statutory definition of an "employer" may nonetheless be subject to liability for retaliation as a "person" as that term is defined. Those cases have relied on the remedial nature of the statutory schemes, requirement of liberal construction, and plain language.

This Court should likewise reformulate the certified question and affirmatively hold that Under Armour is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether Under Armour meets the definition of "employer" in § 5-11-3(d). Alternatively, the Court may hold that the certified question is not determinative and need not be reached because Under Armour employs a sufficient number of persons within the state to be subject to liability as an "employer" within the plain meaning of § 5-11-3(d).[5]

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

On September 21, 2021, this Court entered an Order that held that this matter will be scheduled for oral argument under West Virginia Rule of Appellate Procedure 20 during the January 2022 Term of Court. The Court may decide the case by issuing a published decision.

[5] The term "employer" is defined in § 5-11-3(d) to include "the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year." As discussed below, the District Court erroneously grafted the word "working" into the definition of "employer" and held that Under Armour is not an "employer" under § 5-11-3(d).

V. ARGUMENT

A. Standard of Decision

West Virginia's Uniform Certification of Questions of Law Act, West Virginia Code § 51-1A-1, *et seq.*, provides in relevant part as follows:

> The supreme court of appeals of West Virginia may answer a question of law certified to it by any court of the United States . . . if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision, or statute of this state.

W. Va. Code § 51-1A-3.

This Court has consistently held that "[a] *de novo* standard is applied by this court in addressing the legal issues presented by a certified questions from a federal district or appellate court." *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64, Syl. Pt. 1 (1998). *See Michael v. Consolidation Coal Co.*, 241 W. Va. 749, 828 S.E.2d 811, Syl. Pt. 1 (2019) (same); *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582, Syl. Pt. 1 (2017) (same); *Leggett v. EQT Prod. Co.*, 239 W. Va. 264, 800 S.E.2d 850, Syl. Pt. 1 (2017) (same). *Accord* Bower v. Westinghouse Elec. Corp., 206 W. Va. 133, 522 S.E.2d 424 (1999) ("This Court undertakes plenary review of legal issues presented by certified question from a federal district or appellate court.").

Moreover, in *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993), this Court recognized:

> 3. When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under . . . the Uniform Certification of Questions of Law Act found in W. Va. Code, 51-1A-1, *et seq.* and W. Va. Code, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.

Id. at Syl. Pt. 3. *See Michael*, 828 S.E.2d 811 at Syl. Pt. 2.

B. Under Armour is Subject to Liability Under § 5-11-9(7) As a "Person" Defined in § 5-11-3(a) Regardless of Whether it Meets the Definition of "Employer" in § 5-11-3(d).

1. The statutory declaration of policy, requirement of liberal construction, and plain language subject Under Armour to liability.

The WVHRA'a declaration of policy, requirement of liberal construction, and plain language subject Under Armour to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether it meets the definition of "employer" in § 5-11-3(d). The West Virginia Legislature has declared the public policy in the WVHRA broadly as follows:

> It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment, equal access to places of public accommodations, and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. 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.

W. Va. Code § 5-11-2.

In addition, the Legislature has dictated that the provisions of the WVHRA "shall be liberally construed to accomplish its objectives and purposes." W. Va. Code § 5-11-15.

In *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473 (1995), this Court recognized the Legislative mandates regarding the public policy and construction of the WVHRA. *Id.*, 461 S.E.2d at 476–77.[6] Accordingly, the Court held that the following fundamental rules of statutory construction apply:

> 1. """"""A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and

[6] The Court noted in *Holstein* that the declaration of policy at West Virginia Code § 5-11-2 explains the objectives and purposes of the WVHRA, which include in pertinent part the public policy to provide all West Virginia citizens equal opportunity for employment. *Id.* at 477 n.3.

design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385 (1908).' Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, [172] W. Va. [312], 305 S.E.2d 268 (1983)." Syl. Pt. 3, *Shell v. Bechtold*, 175 W. Va. 792, 338 S.E.2d 393 (1985).' Syl. Pt. 1, *State v. White*, 188 W. Va. 534, 425 S.E.2d 210 (1992)." Syllabus point 7, *State ex rel. Goff v. Merrifield*, 191 W. Va. 473, 446 S.E.2d 695 (1994).

Id. at Syl. Pt. 1.

Subsequently, in *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997), this Court held that the following rules of statutory construction apply to cases under the WVHRA:

> 2. "A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. Pt. 1, *Consumer Advocate Division v. Public Service Commission*, 182 W. Va. 152, 386 S.E.2d 650 (1989).
>
> 3. """When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Point 1, syllabus, *State ex rel. Fox v. Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, et al.*, 148 W. Va. 369 [135 S.E.2d 262 (1964)].' Syllabus Point 1, *State ex rel. Board of Trustees v. City of Bluefield*, 153 W. Va. 210, 168 S.E.2d 525 (1969)." Syl. pt. 1, *W. Va. Radiologic Technology Bd. v. Darby*, 189 W. Va. 52, 427 S.E.2d 486 (1993).

Id. at Syl Pts. 2–3.

Similarly, in *Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 701 S.E.2d 116 (2010), this Court held that the WVHRA should be construed in accordance with the following rules of construction:

> 3. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W. Va. 108, 219 S.E.2d 361 (1975).
>
> 4. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

Id. at Syl. Pts. 3–4.

In this action, Under Armour falls within the definition of "person" in § 5-11-3(a), which means "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons" because Under Armour is a corporation. Under Armour is therefore subject to liability under § 5-11-9(7) regardless of whether it is also an "employer" as defined in § 5-11-3(d). Because Under Armour is a "person" as defined in § 5-11-3(a), Under Armour is clearly subject to the provisions of § 5-11-9(7).

Section 5-11-9(7) provides in pertinent part that it shall be unlawful:

> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:
>
> > A. Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section;
> >
> > B. Willfully obstruct or prevent any person from complying with the provisions of this article, ... or
> >
> > C. Engage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified, or assisted in any proceeding under this article.

Section 5-11-9(7), which prohibits specific conduct, including retaliation, engaged in by "any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution," applies to a substantially broader set of potential defendants than other provisions that proscribe discriminatory practices under the WVHRA. Section 5-11-9(1) applies only to the conduct of "any employer." Section 5-11-9(2) applies only to the conduct of "any employer, employment agency or labor organization." Section 5-11-9(3)

applies only to the conduct of "any labor organization." Section 5-11-9(4) applies only to the conduct of "an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs." Section 5-11-9(5) applies only to the conduct of "any employment agency." Section 5-11-9(6) applies only to the conduct of "any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations." Indeed, § 5-11-9(6) is the only other provision to proscribe conduct by "any person," but that term is further limited to a very specific list of persons related to a place of public accommodation. Section 5-11-9(7) by its plain terms applies to "any *person*, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution" without placing any further limitations on any of those terms. These provisions demonstrate two important points. First, the Legislature deliberately chose who would be subject to liability under each individual provision proscribing discriminatory practices. Second, the Legislature knew how to limit or qualify a defined term such as "person" but did not do so in § 5-11-9(7). There can be no doubt that the Legislature intended § 5-11-9(7) to be construed broadly to include all "persons," including corporations such as Under Armour.

In *Michael*, this Court recognized that the breadth of the plain language in § 5-11-9(7) may well exceed even the WVHRA's policy declaration in § 5-11-2. *Michael*, 701 S.E.2d at 122–23. Nonetheless, the Court observed that the policy declaration does not nullify the application of § 5-11-9(7) and concluded that "it is not within the province of this Court to ignore the plain language of that code section." *Id.* at 123. The Court further explained that the WVHRA unambiguously proscribes specified acts of discriminatory conduct by any "person," and an insurer that engages in those acts of discriminatory conduct violates the WVHRA. *Id.* at 124. The Court expressly rejected the defendant's argument that because the Unfair Trade

Practices Act ("UTPA") precludes a third-party claim against an insurer an insurer is not subject to liability under § 5-11-9(7). *Id.* at 125. Accordingly, the Court held that an insurer is included within the definition of "person" in § 5-11-3(a) and subject to liability as such a "person" under § 5-11-9(7) despite the prohibition of a third-party claim against an insurer under the UTPA, West Virginia Code § 33-11-4a(a). *Id.* at Syl. Pts. 6–8.

Similar to *Michael*, because Under Armour is a "person" under § 5-11-3(a) it is subject to liability under the plain language of § 5-11-9(7) regardless of whether Under Armour may be subject to liability under other statutory provisions as an "employer" as defined in § 5-11-3(d). Ms. Pajak has pled that both Under Armour, Inc. and Under Armour Retail, Inc. are duly formed corporations. Under Armour is a "person" as defined in § 5-11-3(a) to include corporations. In addition, Ms. Pajak has pled that Under Armour and Mr. Boucher have violated § 5-11-9(7). Specifically, Ms. Pajak has alleged that she suffered retaliation, harassment, and discrimination based on sex because of her protected activity described above, in that Defendants placed her on a pretextual PIP and subsequently discharged her within a short period of time as the result of her protected activity in violation of § 5-11-9(7). Ms. Pajak has further alleged that as a result of the actionable conduct by Defendants she has damages, including past and future lost income and benefits, consequential damages, emotional distress, and attorneys' fees. J.A. at 372–73. It is not within the province of this Court to ignore the plain language of § 5-11-9(7). The Court should reject Under Armour's argument to the contrary and hold in accordance with the WVHRA'a declaration of policy, requirement of liberal construction, and plain language that Under Armour is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether Under Armour fits the definition of "employer" in § 5-11-3(d).

2. This Court has held that the term "person" as defined in § 5-11-3(a) includes both employees and employers and recognized that claims under § 5-11-9(7) may be brought against any "person" as that term is defined in § 5-11-3(a).

Although this Court has not determined the precise issue raised in the certified question, the Court has held that the term "person" as defined in § 5-11-3(a) includes both employees and employers and recognized that claims under § 5-11-9(7) may be brought against any "person" as that term is defined in § 5-11-3(a). For example, in *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473, 478 (1995), this Court reversed the circuit court's dismissal of a supervisor Michael Counts as a defendant and found that a plaintiff may maintain a cause of action against a co-employee under § 5-11-9(7). The Court expressly rejected the plaintiff's argument that the term "person" in § 5-11-9(7)(A) should be construed to exclude the supervisor because as an employee he could not be a "person," and to exclude the employer Norandex because as an employer it could not be a "person." *Id.* at 476. The Court reasoned:

> We cannot adopt this interpretation. The appellee cites no authority or legislative history in support of this "legislative intent" he urges. More importantly, the appellee's proposed interpretation clearly contradicts the explicit definition of "person" set forth in § 5-11-3(a), wherein it is stated that the term "person" shall include "one or more individuals [in this case, Counts] ... [and] corporations [in this case, Norandex]." And finally, we are not unmindful that W. Va. Code § 5-11-15 (1994) emphasizes that the HRA "shall be liberally construed to accomplish its objectives and purposes."

Id. at 476–77 (alterations in original).[7]

Accordingly, the Court held in *Holstein*:

> 3. The term "person," as defined and utilized within the context of the West Virginia Human Rights Act, includes both employees and employers. Any contrary interpretation, which might have the effect of barring suits by employees against their supervisors, would be counter to the plain meaning of the statutory language and contrary to the very spirit and purpose of this particular legislation.

[7] The Court noted in *Holstein* that the declaration of policy at West Virginia Code § 5-11-2 explains the objectives and purposes of the WVHRA, which include in pertinent part the public policy to provide all West Virginia citizens equal opportunity for employment. *Id.* at 477 n.3.

Id. at Syl. Pt. 3.

Thereafter, in *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995), this Court reversed the circuit court's grant of summary judgment for the defendant employer Dr. Terry Chambers, who was sued individually and doing business as the Chambers Chiropractic Offices, C.C. In *Hanlon*, the question was whether a supervisor could bring a retaliation claim against her employer Dr. Terry Chambers individually and doing business as Chambers Chiropractic Offices, C.C. The Court did not discuss the number of persons employed by the defendant chiropractic company. Instead, the Court noted the definition of "employee" in § 5-11-3(e), "employer" in § 5-11-3(d), and "person" in § 5-11-3(a). The Court explained:

> These comprehensive definitions make apparent the legislative desire that they be broadly construed to maximize the Act's protection and in a manner consistent with their ordinary, common-sense meaning. *See* W. Va. Code 5-11-2 (1989) (declaration of legislative policy); *Skaff v. West Va. Human Rights Comm'n*, 191 W. Va. 161, 162, 444 S.E.2d 39, 40 (1994) ("'[t]he West Virginia Human Rights Act "shall be liberally construed to accomplish its objective and purpose," W. Va. Code, 5-11-15 (1967)[,]'" quoting Syl. pt. 1, in part, *Paxton v. Crabtree*, 184 W. Va. 237, 499 S.E.2d 245 (1990)).

Id. at 749 n.6.

The Court held in *Hanlon*:

> 11. W. Va. Code 5-11-9(7)(C) (1992), prohibits an employer *or other* person from retaliating against any individual for expressing opposition to a practice that he or she reasonably and in good faith believes violates the provisions of the West Virginia Human Rights Act.

Id. at Syl. Pt. 11 (emphasis added).

Subsequently, in *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996), this Court reversed the circuit court's dismissal of the plaintiff's claims against his employer, the West Virginia Regional Jail and Correctional Facility Authority, which contracted with his employer for services, and the Jail Authority's chief corrections officer Edward Rudloff under § 5-11-9(7). Relying on *Holstein*, the Court reasoned:

> [W]e address whether the Jail Authority or Lt. Rudloff can be held liable under W. Va. Code § 5-11-9(7). The circuit court held that the Jail Authority was not an entity which could be held liable under that section, and we are assuming that the court used the same reasoning for dismissing Lt. Rudloff from that cause of action. In light of our decision in *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473 (1995), the circuit court's rulings are clearly wrong....
>
> ...
>
> *Holstein* held that this section permitted a cause of action against an employee for aiding or abetting an employer engaging in an unlawful discriminatory practice. An employee is, plainly, a "person" who would be liable if he engages in any of the prohibited acts, W. Va. Code § 5-11-3(a) ("'person' means one or more individuals. . . ."), and Lt. Rudloff is, just as plainly, such a "person." As we have already stated, the Authority is an "employer" under the Act. Thus, both it and Lt. Rudloff can be defendants under § 5-11-9(7).

Id., 480 S.E.2d at 816–17.[8]

The Court held in *Conrad*:

> The term "person," as defined and utilized within the context of the West Virginia Human Rights Act, includes both employees and employers.

Id. at Syl. Pt. 9.

Then, in *Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 701 S.E.2d 116, 126 (2010), this Court answered in the affirmative a certified question regarding whether a plaintiff has a cause of action against a tortfeasor's insurer pursual to § 5-11-9(7)(A), when it is alleged that the insurance carrier discriminated against the plaintiffs. The Court reasoned that "this plainly worded definition clearly includes an insurance company, as an "organization" or "corporation" within the meaning of the term "person." *Id.* at 124. The Court noted that *Holstein* previously rejected an attempt to limit the application of the term "person" as used in § 5-11-9(7). *Id.* at 124 n.15. The Court held in *Michael*:

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[8] The Court held that the Jail Authority could be liable as an employer under West Virginia Code § 5-11-9(1) even though the plaintiff was employed by ARA Szabo and not the Jail Authority. The Court held that "W. Va. Code § 5-11-9(1) (1992) prohibits any person who is an employer from discriminating against any "individual" regarding his or her employment opportunities irrespective of whether the individual is an employee of or seeks work with that employer." *Conrad*, at Syl. Pt. 8.

> 6. The term "person" is defined by the Human Rights Act, in W. Va. Code § 5-11-3(a) (1998) (Repl. Vol. 2006), as "one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Therefore, an insurance company is included within the meaning of the term "person" as used in W. Va. Code § 5-11-9(7) (1998) (2006).
>
> 7. W. Va. Code § 5-11-9(7)(A) (1998) (2006) of the West Virginia Human Rights Act, prohibits unlawful discrimination by a tortfeasor's insurer in the settlement of a property damage claim when the discrimination is based upon race, religion, color, national origin, ancestry, sex, age, blindness, disability, or family status.

Id. at Syl. Pts. 6–7. *See also, e.g., St. Peter v. Ampak – Div. of Gatewood Prods., Inc.*, 199 W. Va. 365, 199 S.E.2d 481, 489–90 (1997) (per curiam) (holding that individual supervisor could be held liable under § 5-11-9(7) and that there was genuine issue of material fact as to whether stockholder for corporation should also be held liable); *Markus v. Mingo Health Partners, LLC*, No. 2:19cv00619, 2021 WL 4189946, at *5 (S.D. W. Va. Sept. 14, 2021) (holding that individual owners of limited liability company that purchased the hospital that employed the plaintiff could be held liable under § 5-11-9(7) as "persons" defined in § 5-11-3(a)); *Larry v. Marion County Coal Co.*, 302 F. Supp. 3d 763, 776 & n.1 (N.D.W. Va. 2018) (noting that it was undisputed that employer's parent corporation qualified as a "person" subject to liability under § 5-11-9(7)).[9]

More recently, in *State ex rel. Grant County Commission v. Nelson*, 244 W. Va. 649, 866 S.E.2d 608 (2021), this Court rejected the plaintiff's argument that the defendant county commission, which owned a hospital, was the employer of individuals who work at the hospital. *See id.* at Syl. Pt. 3. The majority opinion acknowledged that in addition to employer liability § 5-11-9(7) lists discriminatory practices prohibited by any "'person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution[.]'" *Id.* at 866 S.E.2d 615 n.4 (citation omitted). The majority concluded, however,

[9] Discovery has revealed that Under Armour Retail, Inc. actually employed Ms. Pajak. Under Armour, Inc. is the parent company. Thus, at a minimum Under Armour, Inc. is a "person" subject to liability under § 5-11-9(7).

that the plaintiff waived any argument that even if not a statutory "employer" the county commission was nonetheless a "person" subject to liability under § 5-11-9(7) because the argument was not properly raised. *Id.* In a separate opinion concurring in part and dissenting in part, Justice Walker explained that under the WVHRA's plain terms an entity such as the county commission that does not fit the definition of "employer" may potentially be held liable as a "person" as defined in § 5-11-3(a). *Id.* at 622 & n.14.[10] Justice Wooton separately concurred with the majority opinion. Justice Wooton took issue with Justice Walker's opinion, noting that the term "person" does not necessarily mean anyone who does not otherwise qualify as one of the other designations under the WVHRA. *Id.* at 620 n.2. Justice Wooton further noted that "the term "political subdivision" is not included in the definition of a "person" subject to liability under the [WVHRA]." *Id.* at n.3. Justice Wooton concluded that "even assuming the majority graciously attempt to temporarily salvage" the plaintiff's claims against the county commission, Justice Walker did not explain why the county commission would not be immune. *Id.* at 621.

Williamson v. Greene, 200 W. Va. 421, 490 S.E.2d 23 (1997), did not consider whether an entity that did not meet the definition of "employer" under § 5-11-3(d) could nonetheless be subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a).[11] Instead, similar to *Nelson*, the issue was waived in *Williamson*. After answering a certified question as to whether the Coalition for the Homeless of Jefferson County was an "employer" within the definition of § 5-11-3(d) in the negative, *see id.* at 28–29, the Court answered an additional certified question as to whether an at-will employee can maintain a tort action at common law for retaliatory discharge based on allegations of nonphysical sexual discrimination and/or harassment in the

[10] Justice Walker noted that because the county commission owned the hospital the plaintiff should have been granted leave to allege liability under § 5-11-9(7) on that basis as well. *Id.*

[11] The Court seemed to understand that an employer may be a person because it noted that the definition of employer includes the term person. *Id.*, 490 S.E.2d at 27 & n.6.

affirmative, *see id.* at 30–33. Significantly, the plaintiff failed to argue that an employer that failed to meet the definition of "employer" under § 5-11-3(d) is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a). *Williamson* did not overrule or distinguish *Holstein*, *Hanlon*, or *Conrad* or otherwise discuss whether an employing entity that may not meet the definition of an "employer" under § 5-11-3(d) may nonetheless be held liable under § 5-11-9(7) as a "person" defined under § 5-11-3(a). Indeed, *Williamson* quoted Syllabus Point 11 in *Hanlon*, which held that § 5-11-9(7)(C) "prohibits an employer or other person from retaliating against any individual ...." *Williamson*, 490 S.E.2d at 31.

Nor did the Court in *Kalany v. Campbell*, 220 W. Va. 50, 640 S.E.2d 113 (2006), consider whether an entity that did not meet the definition of "employer" under § 5-11-3(d) could nonetheless be subject to liability under § 5-11-9(7) because it is a "person" defined in § 5-11-3(a). Again, the issue was waived by the plaintiff as it was in *Nelson* and *Williamson*. In *Kalany*, the defendant argued that the circuit court erred in awarding costs and fees to the plaintiff under the WVHRA in view of the circuit court's ruling – not challenged on appeal – that based on the number of employees the WVHRA was inapplicable. *See id.* at 115. Again, the plaintiff failed to argue that an employer that failed to meet the definition of "employer" under § 5-11-3(d) is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a). Thus, the only pertinent question presented was whether the circuit court erred in awarding attorney's fees and costs under the WVHRA when the jury's verdict was based on a common law claim for retaliatory discharge. *Id.* at 116–17. Framed this way, the Court held only that the circuit court was acting outside of its statutory authority in making an award of attorney's fees and costs under the WVHRA in connection with a common law claim of retaliatory discharge. *Id.* at 121.

In sum, *Holstein* held that the term "person" as defined in § 5-11-3(a) and used in § 5-11-9(7) plainly applies to both employees and employers. Accordingly, the Court has broadly construed the term "person" as defined in § 5-11-3(a) to include a co-employee (*Holstein*), a chiropractor employer sued individually and doing business as a chiropractic company (*Hanlon*), a jail authority and its chief corrections officer (*Conrad*), and an insurer (*Michael*).

In this action, similar to *Holstein* and its progeny the Court should reject Under Armour's attempt to limit the application of the term "person" as used in § 5-11-9(7). In accordance with Justice Walker's separate opinion in *Nelson*, under the WVHRA's plain terms Under Armour may be subject to liability under § 5-11-9(7) as a "person" as that term is defined in § 5-11-3(a) regardless of whether Under Armour fits the definition of "employer" in § 5-11-3(d).

This action does not implicate the concerns raised by Justice Wooton in *Nelson*. First, although a county commission may not fit within the definition of "person" as defined in § 5-11-3(a),[12] as a "corporation" Under Armour fits squarely within the plain definition of "person," which includes "one or more individuals, partnerships, associations, organizations, corporations labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." Ms. Pajak is not arguing for an overly expansive definition of "person" that would be a catchall for anyone who does not otherwise qualify under any of the other definitions in the WVHRA. Second, unlike the county commission in *Nelson*, Under Armour cannot assert a defense of immunity in this action. Thus, holding that Under Armour may be subject to liability under § 5-11-9(7) as a "person" would not be overly expansive or an exercise in futility. The Court should hold in accordance with *Holstein* and its progeny that Under Armour is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether Under Armour fits the definition of "employer" in § 5-11-3(d).

[12] A "political subdivision" is only listed in the definition of "employer" in § 5-11-3(d).

3. Other courts have held under analogous statutes that an entity that does not meet the definition of "employer" may nonetheless be subject to liability for retaliation as a "person" as that term is defined.

Other courts that have squarely addressed the issue have held under statutes analogous to the WVHRA that an entity that does not meet the statutory definition of an "employer" may nonetheless be subject to liability for retaliation as a "person" as that term is defined. For example, in *Dana Tank Container, Inc. v. Human Rights Commission*, 292 Ill. App. 3d 1022, 687 N.E.2d 102 (1997), the Illinois Court of Appeals held that a defendant that did not meet the definition of "employer" under the Illinois Human Rights Act because it did not employ the statutory minimum number of employees could nonetheless be subject to liability for retaliation as a "person." The court soundly rejected the defendant's argument that it could not be a "person" subject to liability for retaliation, relying on the plain language of the statute as follows:

> Petitioner argues that it "is simply unreasonable to assume that the legislature would expressly exclude small employers [fewer than 15 employees] from liability for unlawful discrimination, and then intend to implicitly make them liable for retaliating against charges for which they could never have been held liable [in the first place]." We disagree. Article 2 of the Act, which governs employment discrimination, expressly prohibits "employers" from unlawfully discriminating. An "employer" is defined as persons with 15 or more employees. 775 ILCS 5/2–101(B)(1)(a) (West 1992). By contrast, section 6–101(A) expressly prohibits a "person" from retaliating against another person because he made a charge under the Act. A "person" as defined in the Act can include an employer with fewer than 15 employees. *See* 775 ILCS 5/1–103(L) (West 1992). Where the legislature uses certain words in one instance and different words in another, it intended different results. *Costello v. Governing Board of Lee County Special Education Ass'n*, 252 Ill. App. 3d 547, 558, 191 Ill. Dec. 376, 623 N.E.2d 966 (1993). Thus, we find that the legislature intended section 6–101(A) to apply to employers with fewer than 15 employees.

Id., 687 N.E.2d at 181 (alterations in original).

In addition, in *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d 364 (Tenn. App. 2005), the Tennessee Court of Appeals held that the trial court erroneously dismissed a claim for retaliation under the Tennessee Human Rights Act ("THRA") where the employer defendant

Oak Ridge Research, Inc. ("ORRI") did not fit within the definition of "employer" because it did not employ the statutory minimum number of persons. The Court of Appeals agreed with the plaintiff's argument that both ORRI and an individual defendant Nathanial Revis could nonetheless be held liable under provisions of the THRA that applied to "persons" as defined therein as follows:

> While it is true that only an "employer" can be liable for sexual harassment pursuant to the THRA (*see* Tenn. Code Ann. § 4-21-401), a person, which is defined as "individuals, governments, governmental agencies, public authorities, labor organizations, corporations, legal representatives, partnerships, associations", can be liable for retaliating or discriminating "in any manner against a person because such person has opposed a practice declared discriminatory by this chapter or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under this chapter". *See* Tenn. Code Ann. §§ 4-21-102 and 301. Plaintiff made a claim of such retaliation in her Amended Complaint, and both Revis and ORRI are persons pursuant to Tenn. Code Ann. § 4-21-102.

Id. at 376.

After discussing case law that held, similar to this Court's opinions under the WVHRA beginning with *Holstein*, that an individual could be held liable under certain provisions of the THRA, the Court of Appeals in *Emerson* continued:

> In sum, the THRA is a remedial statutory scheme, and we are required to give a liberal construction to further its intent. While the legislature arbitrarily decided that sexual harassment would not be actionable against the employer unless there were eight or more employees, the legislature created an independent cause of action in favor of any employee who is retaliated against for reporting any acts or practices declared discriminatory, and also protects the individual employee from individuals who aids, abets, and otherwise commands [sic] an employer to engage in employment-related discrimination, whether or not such employer has eight or more employees. To read the Act otherwise, would give "persons" in any organization which employs less than eight employees free rein to engage in discriminatory practices which the Act condemns.

Id. at 377.

Also, in *Smith v. Lewis*, No. 2018-CA-000180, 2019 WL 2896018 (Ky. App. July 5, 2019), the Kentucky Court of Appeals held that the defendants, a pediatrician and his

professional liability company, with arguably fewer than the statutory minimum number of employees to be an "employer" subject to a claim for discrimination, were nonetheless "persons" subject to a claim for retaliation under the Kentucky Civil Rights Act ("KCRA"). The court rejected the defendants' argument that the retaliation claim should have been dismissed because the professional liability company had fewer than the statutory minimum number of employees, explaining that the defendants confused the requirements for a discrimination claim with a retaliation claim. *Id.* at *2. Based on cases like *Holstein* and the plain language of the KCRA, the court reasoned that the plaintiff Julie Lewis stated a claim for retaliation against the defendants as persons as follows:

> Dr. Smith and the PLLC argued otherwise, but the trial court correctly held Julie did not need to prove Dr. Smith and the PLLC had eight or more employees for the jury to decide the retaliation claim. Retaliation is not confined by the "employer" definition. Rather, that statute permits a "person" to be individually liable for retaliation.
>
> Kentucky courts, as well as our federal brethren, have repeatedly addressed whether an individual can be held liable under the KCRA.... Under the KCRA, an individual can be liable for retaliation. *See Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 793–94 (6th Cir. 2000); *Brooks v. Lexington-Fayette Urban County Housing Authority*, 132 S.W.3d 790, 808 (Ky. 2004).
>
> Simply put, Kentucky's retaliation statute is not the same as the federal retaliation statute. While Kentucky's Civil Rights Act was based on the Federal Civil Rights Act (Title VII), it does not mirror it. *Morris*, 201 F.3d at 794. Title VII forbids retaliation by an "employer," while Kentucky law forbids retaliation by a "person." 42 U.S.C. § 2000-e-3(a); KRS 344.280.
>
> The retaliation provision of the KCRA states: "it shall be an unlawful practice for a person, or for two (2) or more persons to ... retaliate ...." KRS 344.280. "Person" is defined in the KCRA to include "one (1) or more individuals, labor organizations, joint apprenticeship committees, partnerships, associations, corporations ... KRS 344.010(1). Accordingly, Dr. Smith is a "person," as is the PLLC because a corporation is included within the definition of a "person." And, therefore, Kentucky permits "persons," like Dr. Smith and the PLLC to be held liable for retaliation.

Id. at *2–3.

In this action, similar to *Dana Tank Container*, *Emerson*, and *Smith*, the Court should rely on the remedial nature of the WVHRA, the plain language of § 5-11-3(a) and § 5-11-9(7), and cases such as *Holstein* and its progeny to soundly reject Under Armour's argument that it cannot be a "person" subject to liability for retaliation under § 5-11-9(7). As the courts in other jurisdictions have concluded under analogous statutes, it is not unreasonable that the legislature would expressly exclude employers that employ fewer than a statutory minimum of employees from liability for unlawful discrimination but make them liable for retaliating against charges for which they could not have been liable. Like the courts in Illinois, Tennessee, and Kentucky, this Court should likewise recognize the remedial nature of the WVHRA and mandate that it be given a liberal construction to further its intent to protect the citizens of West Virginia. Specifically, the court should recognize that because the Legislature limited liability for discrimination under § 5-11-9(1) to any "employer" but expanded liability for other conduct including retaliation to any "person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution" it intended different results. *See* 2A Norman Singer & Shambie Singer, *Sutherland Statutes & Statutory Construction* § 46.6 ("Courts assume that every word, phrase, and clause in a legislative enactment is intended and has some meaning and that none was inserted accidentally.").

Ms. Pajak has stated a claim for retaliation against Under Armour under § 5-11-9(7), which by its plain terms applies to any "person." As a corporation, Under Armour is a "person" as defined in § 5-11-3(a). Therefore, in accordance with courts from other jurisdictions the Court should hold that Under Armour is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether it meets the definition of "employer" in § 5-11-3(d).

C. The Certified Question Is Not Determinative and Need Not be Reached because Under Armour Employs a Sufficient Number of Persons within the State to be Subject to Liability as an "Employer" within the Plain Meaning of § 5-11-3(d).

Alternatively, the Court may hold that the certified question is not determinative and need not be reached because Under Armour employs a sufficient number of persons within the state to be subject to liability as an "employer" within the plain meaning of § 5-11-3(d). As discussed above, § 5-11-2 provides that "[i]t is the public policy of the state of West Virginia to provide *all of its citizens* equal opportunity for employment[.]" (Emphasis added.) Section 5-11-15 further provides that "[t]he provisions of this article shall be liberally construed to accomplish its objectives and purposes." Pursuant to § 5-11-3(d) an "employer" is defined to include "the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year."

Under familiar rules of grammar and construction, in the context of § 5-11-3(d) the phrase "within the state" refers solely to the proximate term "persons" and not to the remote word "employing." *See, e.g., State v. Woodrum*, 243 W. Va. 503, 845 S.E.2d 278, 286 & n.21 (2020) (citing 3C Shambie Singer, Sutherland Statutes & Statutory Construction § 77:1 (8th ed. 2018) and applying the last antecedent rule). Thus, the definition of "employer" requires only that the "persons" be "within the state," not that "employing" occur "within the state." If the Legislature had intended a different construction, it could have worded the definition of "employer" differently to require that the statutory minimum number of persons all perform work within the state. For example, the Legislature could have chosen a different wording in the definition of "employer" that would have required employment within the state rather than citizenship within the state by defining an "employer" to include those "employing within the

state twelve or more persons." The Legislature did not choose this wording in the context of the WVHRA. Instead, the wording chosen by the Legislature is in keeping with the public policy to give all West Virginia citizens equal opportunity for employment.[13]

Similarly, West Virginia Code of State Regulations § 77-7-2.2 places a gloss on the definition of "employer," which focuses on an employment relationship rather than on where an employee is performing tasks and without mention of the term working, as follows:

> For purposes of this rule, the number of employees shall be calculated by including *all persons with whom the employer has an employment relationship*, whether or not the person is performing tasks or receiving compensation from the employer on a particular day. Individuals employed by his or her parent, spouse, or child shall not be counted.

Id. (emphasis added).

The District Court erred in grafting the word "working" into the definition of "employer" and making an interlocutory finding that Under Armour is not an "employer" under § 5-11-3(d). Instead of consulting Black's Law Dictionary for the definition of "employ," the District Court should have consulted §§ 5-11-2 and 5-11-15 for the declaration of policy and statutory construction. Then, the District Court should have consulted § 77-7-2.2 and held that the term "employer" under the plain meaning of § 5-11-3(d) is focused on an employment relationship with persons within the state rather than the work, if any, performed in that relationship. *Cf. Carmichael v. Enerfab, Inc.*, No. 14-1216, 2015 WL 7628697, at *3 (W. Va. Nov. 20, 2015) (rejecting petitioner's argument that he was not employed at time of orientation; holding prescription drug inquiries during orientation were therefore permissible under WVHRA).

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[13] By contrast, the Legislature has required working within the state in the definition of "employee" in another context. The Parental Leave Act defines "employee" in pertinent part to include "any individual ...who has worked for at least twelve consecutive weeks performing services for remuneration within this state ...." W. Va. Code § 21-5D-2(c)(1). The Legislature's manifest choice to define "employee" in another context to require work within the state demonstrates that the Legislature did not chose to do so in the context of the definition of "employer" in § 5-11-3(d).

Even if the District Court properly determined that the term "employ" means "to make use of" or "to commission and entrust with performance of certain acts or functions," its conclusion that "to qualify as an 'employer' under the WVHRA an entity must have at least twelve employees actually working within the state," J.A. at 465, is erroneous as a matter of law. This is so because not only did the District Court graft the word "working," which appears nowhere in § 5-11-3(d) into its conclusion, the District Court improperly shifted the new word "working" to be in proximity to "within the state" although, as discussed above, the actual term "employing" is remote. Thus, the District Court reorganized the sentence in a way that substantially changed its meaning under the rules of grammar and construction, including the last antecedent rule.

The District Court's reliance on *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997), was misplaced as that case supports Ms. Pajak's argument that the Courts cannot graft new terms into the WVHRA. At the time *Williamson* was decided, § 5-11-3(d) did not specify a time period during which an employing entity must employ twelve or more persons within the state in order to meet the definition of "employer." *Id.*, 490 S.E.2d at 27. This Court held that the circuit court erroneously determined, as a matter of law, that the period of time during which twelve or more employees must be employed by an employing entity under § 5-11-3(d) was that period of time set forth in 42 U.S.C. § 2000e(b) ("for each working day in each of twenty or more calendar weeks in the current or preceding calendar year"). *Id.* at 28.[14] The Court reasoned as it had previously, that "[i]t is not for [courts] arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, *we are obliged not to add to statutes something the Legislature*

[14] It is worth noting that although § 2000e(b) contains the term "working," when the West Virginia Legislature subsequently amended § 5-11-3(d) it did not adopt that term. Such a Legislative omission is significant.

purposely omitted." *Id.* (citations omitted). In *Williamson*, after setting forth the general rules of statutory construction in Syllabus Points 2 and 3 as set forth above, the Court simply held:

> 4. Pursuant to *W. Va. Code*, 5-11-3(d) [1994] of the West Virginia Human Rights Act, the term "employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state: Provided, That such term shall not be taken, understood or construed to include a private club. To be an "employer" under *W. Va. Code*, 5-11-3(d) [1994], a person must have been employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed.

Id. at Syl. Pt. 4.

In this action, it is undisputed that in the relevant 2017 and 2018 calendar years more than twelve Under Armour employees lived in West Virginia. J.A. at 465. These Under Armour employees were West Virginia citizens within the public policy mandate of § 5-11-2. In accordance with the mandate of liberal construction in § 5-11-15 and the plain language of § 5-11-3(d), Under Armour is a "person employing twelve or more *persons within the state*" during the relevant time period. Therefore, the Court may hold that the certified question is not determinative and need not be reached because Under Armour employs a sufficient number of persons within the state to be subject to liability as an "employer" within the plain meaning of § 5-11-3(d).

VI. CONCLUSION

For all of the foregoing reasons, this Court should reformulate the certified question and hold affirmatively that Under Armour is subject to liability under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether Under Armour meets the definition of "employer" in § 5-11-3(d). Alternatively, the Court may hold that the certified question is not determinative and need not be reached because Under Armour has a sufficient number of employees within the state to be subject to liability as an "employer" within the plain meaning of § 5-11-3(d).

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November 2021, I caused the foregoing "***Brief of Petitioner Cynthia D. Pajak***" to be served on counsel of record via U.S. Mail in a postage-paid envelope addressed as follows:

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