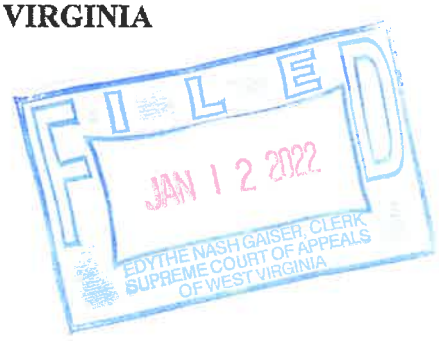
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 21-0484



CYNTHIA D. PAJAK,

Petitioner,

v.

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

Respondents.

REPLY BRIEF OF PETITIONER CYNTHIA D. PAJAK

Robert M. Steptoe, Jr. (W. Va. Bar # 3605)
Larry J. Rector (W. Va. Bar # 6418)
Amy M. Smith (W. Va. Bar # 6454)
Allison B. Williams (W. Va. Bar # 11329)
Dylan T. Hughes (W.Va. Bar # 13893)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8000
amy.smith@steptoe-johnson.com

Counsel for Petitioner Cynthia D. Pajak

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I. INTRODUCTION

Petitioner Cynthia D. Pajak submits this reply brief on a question certified by the United States District Court for the Northern District of West Virginia, regarding construction of the West Virginia Human Rights Act ("WVHRA"), W. Va. Code § 5-11-1, *et seq.* Defendants Under Armour, Inc. and Under Armour Retail, Inc. (collectively, "Under Armour") and Brian Boucher fail to recognize that the Legislature has dictated that the provisions of the WVHRA shall be liberally construed to accomplish its objectives and purpose to provide West Virginia citizens equal opportunity for employment. Under Armour studiously avoids the plain language of § 5-11-9(7), which proscribes certain conduct by *any person.*

Although this Court has not determined the precise issue 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 defined in § 5-11-3(a). In addition, several other courts that have squarely addressed the issue have held under statutes analogous to the WVHRA that an entity that does not meet the definition of an "employer" may nonetheless be subject to liability for retaliation as a "person" as that term is defined. Defendants' attempts to distinguish the cases cited in Ms. Pajak's opening brief fail. Moreover, the cases relied upon by Defendants do not support their positions.

Therefore, 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 also 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 of West Virginia to be subject to liability as an "employer" within the plain meaning of § 5-11-3(d).

II. ARGUMENT

A. Standard of Decision

Ms. Pajak and Under Armour agree that a *de novo* standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district 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). All parties further agree that this Court retains the power to reformulate questions certified under the Uniform Certification of Questions of Law Act, W. Va. Code § 51-1A-1, *et seq.* *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74, Syl. Pt. 3 (1993). *See Michael*, 828 S.E.2d 811 at Syl. Pt. 2 (same).

Defendants, however, fail to recognize that pursuant to West Virginia Code § 51-1A-6(b), "[i]f the parties cannot agree upon a statement of facts, then the certifying court shall determine the relevant facts and shall state them as a part of its certification order." W. Va. Code § 51-1A-6(b). *See Blanda v. Martin & Seibert, L.C.*, 242 W. Va. 552, 836 S.E.2d 519, 521 & n.4 (2019) (relying on the facts as relayed by the District Court, citing to § 51-1A-6(b)).

The facts as presented in Ms. Pajak's brief are taken from the Memorandum Order and Opinion Granting Motion to Certify Questions to the West Virginia Supreme Court of Appeals. Under Armour nonetheless notes that "[t]hose facts were taken from [Ms.] Pajak's Complaint and are disputed (and vigorously denied) by Under Armour." Resp. Br. at 1 n.1. For purposes of this matter, Under Armour cannot dispute or deny and Mr. Boucher cannot add to the facts as determined by the District Court in its Memorandum Order and Opinion Granting Motion to Certify Questions to the West Virginia Supreme Court of Appeals, which is incorporated in the Order of Certification to the Supreme Court of Appeals of West Virginia. J.A. at 474, 481–84.

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's 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 also meets the definition of "employer" in § 5-11-3(d). As discussed in Ms. Pajak's opening brief, the West Virginia Legislature has declared the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment as expressed in West Virginia Code § 5-11-2. Defendants fail to recognize that 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 this action, Ms. Pajak's WVHRA claim against Under Armour and Mr. Boucher was brought under § 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.

Id. (emphasis added.)

By its plain terms § 5-11-9(7) proscribes certain conduct by *any person*, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution. Section 5-11-3(a) defines "person" to mean "one or more individuals, partnerships, associations, organizations, *corporations*, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers and other organized groups of persons." *Id.* (emphasis added). Under Armour is a corporation. Because Under Armour is a corporation, Under Armour is a "person" as defined in § 5-11-3(a). Because Under Armour is a "person" as defined in § 5-11-3(a), Under Armour is subject to liability under the provisions of § 5-11-9(7) regardless of whether it is also an "employer" as defined in § 5-11-3(d).

Under Armour studiously avoids the plain language of § 5-11-9(7), which again proscribes certain conduct by *any person*, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution. Instead, Under Armour consistently swaps in "employer or other person" throughout its brief. Resp. Br. at 8, 10, 18. In some instances, Under Armour cites *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741, Syl. Pt. 11 (1995), when using this phrase. *Hanlon*'s Syllabus Point 11 reads in full:

> 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.

Hanlon actually supports Ms. Pajak's position. In *Hanlon*, 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 reference to "any employer or other person" in *Hanlon* does not place limitations on the definition of "person" in § 5-11-3(a) but merely identifies one alternative to *any person* subject to liability under § 5-11-9(7). *See State v. Woodrum*, 243 W. Va. 503, 845 S.E.2d 278, 285–86 & n.17 (2020) ("Generally, "[t]he word 'or' denotes an alternative between the two phrases it connects.). Thus, it did not matter for purposes of the holding whether the defendant in *Hanlon*, Terry Chambers, individually and doing business as Chambers Chiropractic Offices, C.C., was an "employer" under § 5-11-3(d) or a "person" under § 5-11-3(a).

Under Armour's reliance on West Virginia Code § 5-11-9(1) is misplaced. Ms. Pajak did not bring her WVHRA claim under § 5-11-9(1). Section 5-11-9(7), which prohibits specific conduct, including retaliation, 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 of the WVHRA. Section 5-11-9(1) applies only to the conduct of "any employer."

Indeed, § 5-11-9(6) is the only other provision to proscribe conduct by "any person," but that phrase 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 that the Legislature deliberately chose who would be subject to liability under each individual provision proscribing discriminatory practices. In addition, 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 *any person*, including corporations such as Under Armour.

Under Armour's argument that the definition of "employer" in § 5-11-3(d) exempts employers employing fewer than twelve persons within the state from liability under all provisions of the WVHRA is circular. Section 5-11-3(d) merely removes such persons from the definition of "employer."[1] Section 5-11-3(d) defines "employer" to include "any person employing twelve or more persons within the state." *Id. Any person* employing fewer than twelve persons within the state is not an "employer" under the WVHRA but is still a "person" defined in § 5-11-3(a). *Any person* may be subject to liability under the plain language of § 5-11-9(7).

Contrary to Under Armour's argument, the definition of "employer" in § 5-11-3(d) does not create an exemption from liability under all provisions of the WVHRA for any person employing fewer than twelve persons within the state. The term "definition" is defined in Black's Law Dictionary as follows: "The meaning of a term as explicitly stated in a drafted document such as a contract, a corporate bylaw, an ordinance, or a statute." Bryan A. Garner, *Definition, Black's Law Dictionary* (11th ed. 2019). As the Supreme Court has recognized: "A definition does not provide an exception, but instead gives meaning to a term – and [the Legislature] well knows the difference between those two functions." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018).

[1] Such persons are not an "employer" for any purpose in the WVHRA. *See* § 5-11-3 ("[w]hen used in this article").

Under Armour's argument regarding statutory nullification is similar to the argument rejected by this Court in *Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 701 S.E.2d 116 (2010). 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.

This Court's prior decision in *Kalany v. Campbell*, 220 W. Va. 50, 640 S.E.2d 113 (2006), which is cited by Defendants, 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) because it is a "person" defined in § 5-11-3(a). 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. The *dicta* in *Kalany*'s footnote 13 upon which Under Armour relies is not well reasoned. As discussed above, the definition of "person" in § 5-11-3(a) does not create a statutory nullity. The

definition of "employer" in § 5-11-3(d) includes "the state or any political subdivision thereof, and any person employing twelve or more persons within the state." Neither the state nor any political subdivision thereof is included in the definition of "person" in § 5-11-3(a). Accordingly, the state or any political subdivision thereof is only subject to liability under § 5-11-9(7) as something else such as an "employer" as defined in § 5-11-3(d). On the other hand, any person employing fewer than twelve persons within the state is still a "person" as defined in § 5-11-3(a) and subject to liability under § 5-11-9(7).[2]

Under Armour further argues that in *Kalany* this Court acknowledged the "rational basis for enacting state and federal legislation which addresses prohibited discriminatory conduct in a manner that does not apply to employers whose business interests do not require the use of more than a minimal number of employees." Resp. Br. at 11. The rational basis recognized by the Court in *Kalany*, however, does not extend further than the plain language of § 5-11-9(7), which again proscribes certain conduct by *any person*, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution.[3]

Similar to *Hanlon* and *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). The Court should reject Under Armour's argument to the contrary and hold in accordance with the WVHRA's 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).

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[2] For this same reason, the Amicus Curiae's argument that adopting Ms. Pajak's construction renders inclusion of the word employer in § 5-11-9(7) superfluous or surplusage, *see* Amicus Curiae Br. at 6–7, is meritless.

[3] In any event, the rational basis recognized in *Kalany* does not support a public policy to exclude multi-national, publicly traded corporations such as Under Armour from the reach of the WVHRA. The public policy is to provide West Virginia citizens equal opportunity for employment, and the WVHRA should be broadly construed to effectuate that policy. *See* W. Va. Code §§ 5-11-2, 5-11-15. Arguments regarding a public policy to exempt Under Armour from the reach of the WVHRA altogether despite the plain language of § 5-11-9(7) are frivolous.

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). Defendants' attempts to distinguish the cases cited in Ms. Pajak's opening brief fail. 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 the plaintiff's supervisor, Michael Counts, and held that a plaintiff may maintain a cause of action against a co-employee under § 5-11-9(7). The Court expressly rejected the 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 that the proposed interpretation clearly contradicted the explicit definition of "person" in § 5-11-3(a), which includes "one or more individuals [in this case, Counts] ... [and] corporations [in this case, Norandex]." *Id.* at. 477 (alterations in original). In addition, the Court stressed that § 5-11-15 requires that the WVHRA "shall be liberally construed to accomplish its objectives and purposes." *Holstein*, 461 S.E.2d at 476–77. Contrary to Defendants' argument, the broad holding in *Holstein* supports Ms. Pajak's position:

> 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.

Id. at Syl. Pt. 3 (emphasis added).

As discussed above, *Hanlon* supports Ms. Pajak's position. Under Armour concedes there is no discussion in *Hanlon* of whether the defendant chiropractic company was an "employer" under § 5-11-3(d). Resp. Br. at 18. Under Armour's argument that *Hanlon* holds that if a defendant does not meet the definition of "employer" under § 5-11-3(d) only another person outside the employment relationship may be liable under § 5-11-9(7) is meritless. *Hanlon* holds:

> 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.

Hanlon, 464 S.E.2d at Syl. Pt. 11.

The reference to "any employer or other person" in *Hanlon* does not place limitations on the definition of "person" in § 5-11-3(a) but merely identifies one of several alternatives to persons subject to liability under the WVHRA. *See Woodrum*, 845 S.E.2d 278, 285–86 & n.17 ("Generally, "[t]he word 'or' denotes an alternative between the two phrases it connects.). Thus, it did not matter to the Court for purposes of its holding whether the defendant in *Hanlon*, Terry Chambers, individually and doing business as Chambers Chiropractic Offices, C.C., was an "employer" under § 5-11-3(d) or a "person" under § 5-11-3(a).

Also contrary to Under Armour's argument, in *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996), this Court again broadly held in Syllabus Point 9 as follows:

> 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.

The Court in *Conrad* 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....

Id., 480 S.E.2d at 816.[4]

Under Armour's argument regarding *State ex rel. Grant County Commission v. Nelson*, 244 W. Va. 649, 866 S.E.2d 608 (2021), fails to recognize that although the majority opinion concluded that the plaintiff waived any argument that even if the county commission was not an "employer" as defined in § 5-11-3(d) it was nonetheless a "person" subject to liability under § 5-11-9(7), the majority acknowledged that § 5-11-9(7) broadly 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). Justice Walker's separate opinion 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. Justice Walker further 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.* Justice Wooton separately concurred. 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 noted that a political subdivision was not included in the definition of a "person." *Id.* at n.3. Justice Wooton concluded that "even assuming the majority graciously attempted to temporarily salvage" the

[4] The Court held that the Jail Authority was an employer under § 5-11-3(d) because the Jail Authority was part of the state. *Conrad*, 480 S.E.2d at 817.

plaintiff's claims against the county commission, Justice Walker did not explain why the county commission would not be immune. *Id.* at 621.[5]

Defendants' reliance on *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997), is misplaced. Under Armour concedes that *Williamson* 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).[6] Instead, the issue was waived in *Williamson* because 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). 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 affirmative, *see id.* at 30–33. 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. Manifestly, Syllabus Point 8 of *Williamson* could not make a holding on an issue that it did not consider because it was waived, i.e, the issue of 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).

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[5] Under Armour's suggestion that Ms. Pajak may not have sufficiently alleged that Under Armour is a "person" as defined in § 5-11-3(a) subject to liability under § 5-11-9(7) is meritless. The complaint and amended complaint contain allegations that Under Armour, Inc. and Under Armour Retail, Inc. are duly formed corporations. J.A. at 65, 357. Both the complaint and the amended complaint contain claims under § 5-11-9(7), expressly quoting "any person, employer, employment agency . . . ." J.A. at 78–79, 372–73. Despite filing motions for partial dismissal of both complaints, Under Armour never raised a pleading deficiency. Clearly the complaints are sufficiently pled to put Under Armour on notice that Under Armour, Inc. and Under Armour Retail, Inc. may be subject to liability under § 5-11-9(7) as persons or employers.

[6] 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.

Defendants' reliance on *Kalany*, which is discussed above, is equally misplaced. *Kalany* 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) because it is a "person" defined in § 5-11-3(a). Again, the issue was waived by the plaintiff as it was in *Williamson* because it was never raised on appeal. 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. Thus, the only pertinent issue 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, this 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. Contrary to Under Armour's argument, the issue decided in *Kalany* – whether a party can recover statutory attorney's fees and costs on a jury verdict for a common law claim – is substantially different from the certified question presented to this Court.

Finally, as noted above, Ms. Pajak has separately alleged that Under Armour, Inc. and Under Armour Retail, Inc. are corporations, either or both of which may be liable under § 5-11-9(7) as a "person" defined in § 5-11-3(a) regardless of whether they also meet the definition of "employer" in § 5-11-3(d).[7] As noted above, the complaint and amended complaint contain allegations that Under Armour, Inc. and Under Armour Retail, Inc. are duly formed corporations. J.A. at 65, 357. Both the complaint and the amended complaint contain claims under § 5-11-

[7] Although Under Armour views this as a separate issue and discusses it in a separate portion of its response brief, See Resp. Br. at 31–33, Ms. Pajak views this issue as being part of the same question of whether a corporation 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).

9(7), expressly quoting "any person, employer, employment agency ...." J.A. at 78–79, 372–73. The reference to an "employment relationship" in the jurisdiction and venue section of the complaint and amended complaint, J.A. at 66, 358, is not sufficient to negate the breadth of the claim under § 5-11-9(7) as Under Armour suggests. Despite filing motions for partial dismissal of both complaints, Under Armour never raised a pleading deficiency and the District Court refused to dismiss the claim. Clearly the complaints are sufficiently pled to put Under Armour on notice that Under Armour, Inc. and Under Armour Retail, Inc. may be subject to liability under § 5-11-9(7) as persons or employers.[8] Moreover, Under Armour concedes that it identified this issue and requested its certification, J.A. at 389, and acknowledges that the issue should be determined by this Court. Resp. Br. at 31 n.13. Contrary to Under Armour's argument, Ms. Pajak cited *Larry v. Marion County Coal Co.*, 302 F. Supp. 3d 763, 776 & n.1 (N.D.W. Va. 2018), as authority for her position in her opening brief. In *Larry*, the Northern District of West Virginia noted that it was undisputed that the employer's parent corporation qualified as a "person" subject to liability under § 5-11-9(7). *Billiter v. Jones*, 3:19cv288, 2020 WL 5646901, at *4 (S.D. W. Va. Sept. 22, 2020), which is cited by Under Armour, Resp. Br. at 33, assumed *arguendo* that § 5-11-9(7) applies to any person including a joint employer.

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). The Court should hold in accordance with Justice Walker's separate opinion in *Nelson*, that 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 also fits the definition of "employer" in § 5-11-3(d).

[8] Ms. Pajak is entitled to plead and argue in the alternative in federal and state court. *See* Fed. R. Civ. P. 8(a)(3); W. Va. R. Civ. P. 8(a).

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.

Several 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. In addition to the cases cited in Ms. Pajak's opening brief, in *Clorite v. Somerset Access Television, Inc.*, No. 14cv10399, 2014 WL 6983350, at *5 (D. Mass. Dec. 9, 2014), the United States District Court for the District of Massachusetts denied a motion to dismiss and for summary judgment on the plaintiff's retaliation claims under Massachusetts General Laws chapter 151B § 4(4) brought against the defendants Somerset Access Television ("SATV") and its president Thomas C. Norton. The Court expressly rejected the defendants' argument that SATV had fewer than the requisite number of employees to subject them to liability under the retaliation provision, holding that a retaliation claim under chapter 151B § 4(4) could be brought against "any person." *Id.* at *3. In *Clorite*, the statutory definition of "person" included "corporations." *Clorite*, 2014 WL 6983350 at *4 (citation omitted). The retaliation provision at issue provided that it was unlawful "[f]or any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under section five." *Id.* (citation omitted). The Court soundly reasoned as follows:

> "In neither case does [§ 4(4) or § 4(4A)] expressly require that an employer-employee relationship exist at the time of the wrongful conduct, or at any other time." *Psy–Ed Corp. v. Klein,* 459 Mass. 697, 708, 947 N.E.2d 520 (2011). "In light of [ ] 151B's broad remedial purposes, it would be an error to imply such a limitation where the statutory language does not require it." *Id.; see Lopez v. Commonwealth,* 463 Mass. 696, 706, 978 N.E.2d 67 (2012) (explaining that

> "[u]nlike § 4(1), which by its terms prohibits discrimination by employers, the division need not be an employer to be subject to an interference claim under § 4(4A)," employing the same language as § 4(4)).

Id.

This action is indistinguishable from *Clorite*. Similar to the definition of "person" in § 5-11-3(a), the statutory definition of "person" included "*corporations*." *Clorite*, 2014 WL 6983350 at *4 (emphasis added). Also, similar to § 5-11-9(7), which proscribes retaliatory conduct by "*any person*, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution," the retaliation provision in chapter 151B § 4(4) provided that it was unlawful "[f]or *any person*, employer, labor organization or employment agency" to engage in retaliatory conduct. *Clorite*, 2014 WL 6983350 at *4 (emphasis added). In *Clorite*, the Court rejected the defendants' argument that they were not subject to liability for retaliation based on SATV's assertion that it did not have the requisite number of employees to meet the statutory definition of "employer" because the retaliation provision proscribed retaliation by persons. Similarly, this Court should reject Under Armour's assertion that it is not subject to liability for retaliation under § 5-11-9(7) because Under Armour is a person regardless of whether it is also an employer as defined in § 5-11-3(d).

Under Armour cannot meaningfully distinguish the cases cited in Ms. Pajak's opening brief. For example, in *Dana Tank Container, Inc. v. Human Rights Commission*, 292 Ill. App. 3d 1022, 687 N.E.2d 102, 103–04 (1997), the Illinois Court of Appeals held that a defendant that did not meet the definition of "employer" under the Illinois Human Rights Act ("IHRA") because it did not employ the statutory minimum number of employees could nonetheless be subject to liability for retaliation as a "person." Similar to the definition of "person" in § 5-11-3(a), the definition of "person" in the IHRA "include[d] one or more *corporations*." *Id.*, 687

N.E.2d at 103 (emphasis added). Also, similar to the definition of "employer" in § 5-11-3(d), the definition of "employer" in the IHRA included "[a]ny *person* employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation." *Id.* (emphasis added). Finally, similar to § 5-11-9(7), the retaliation provision in the IHRA provided that it was unlawful for a *person* to retaliate. *Id.* at 104. The court rejected the defendant's argument that it was unreasonable to assume that the legislature would expressly exclude employers with fewer than 15 employees from liability for unlawful discrimination, and then intend to make them liable for retaliation as persons. *Id.* *See Igwe v. Decatur Mem. Hosp.*, No. 4-5-153, 2016 WL 691881, at *5–6 (Ill. App. Feb. 19, 2016) (applying *Dana Tank Container* and holding that although the plaintiff could not maintain race and gender discrimination claims because the defendant was not a place of public accommodation, the defendant was a person subject to liability for retaliation under the IHRA).

In addition, in *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d 364, 376–77 (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 number of persons. Similar to the definition of "person" in § 5-11-3(a), the definition of "person" in the THRA included "*corporations*." *Id.* at 376 (emphasis added). Also, similar to the definition of "employer" in § 5-11-3(d), the definition of "employer" in the THRA included "*persons* employing eight (8) or more persons within the state." Tenn. Code Ann. § 4-21-102, *cited in Emerson*, 187 S.W.2d at 376 (emphasis added). Finally, similar to § 5-11-9(7), the retaliation provision in the THRA provided that it was unlawful for a *person* to retaliate. Tenn. Code Ann. § 4-21-301, *cited in Emerson*, 187 S.W.2d at

376. The Tennessee Court of Appeals concluded that the plaintiff pled a valid claim of retaliation and that both ORRI and an individual defendant were persons subject to liability:

> 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.

Emerson. 187 S.W.3d at 377.

Also, in *Smith v. Lewis*, No. 2018-CA-000180, 2019 WL 2896018, at *2–3 (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"). Similar to the definition of "person" in § 5-11-3(a), the definition of "person" in the KCRA included "*corporations*." *Id.* at *3 (emphasis added). Also, similar to the definition of "employer" in § 5-11-3(d), the definition of "employer" in the KCRA included "a *person* who has eight (8) or more employees within the state in each of twenty (20) or more calendar weeks in the current or preceding calendar year." *Id.* at *2 (citation omitted) (emphasis added). Finally, similar to § 5-11-9(7), the retaliation provision in the KCRA provided that it was unlawful for a *person* to retaliate. *Id.* at *3. After reviewing these statutory provisions, the Kentucky Court of Appeals concluded: "Accordingly, Dr. Smith is a 'person,' as is the PLLC because a corporation is included within the definition of a 'person.' ... Kentucky permits 'persons' like Dr. Smith and the PLLC to be held liable for retaliation." *Id.* at *3. *See also, e.g., Lewis v. Quaker Chem.*

Corp., No. 99-5405, 2000 WL 1234356, at *7 (6th Cir. Aug, 24, 2000) ("Because Kentucky prohibits retaliation by a 'person' we find that liability for unlawful retaliation under § 344.280 of the KCRA does not depend on the person's status as an "employer" under § 344.030(2).").

Under Armour's argument that unlike § 5-11-9(7), which provides that it is unlawful for a listing of any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman to retaliate, the retaliation provisions in the IHRA, THRA, and KCRA only apply to persons makes a distinction without a difference. First, as discussed above, similar to § 5-11-9(7), the retaliation provision in Massachusetts General Laws chapter 151B proscribed conduct by a long list of entities including but not limited to persons or employers, creating liability in the alternative. *See Woodrum*, 845 S.E.2d at 285–86 & n.17 (2020) ("Generally, "[t]he word 'or' denotes an alternative between the two phrases it connects.). Second, it makes no difference that the retaliation provisions in the IHRA, THRA, and KCRA only apply to persons because similar to § 5-11-3(a), the term "person" in the IHRA, THRA, and KCRA was defined broadly enough to include persons that did not employ the requisite number of employees to meet the statutory definition of "employer." That is all that matters.

In addition, Under Armour's and Mr. Boucher's reliance on *dicta* in *U.S. Equal Employment Opportunity Commission v. Fred Fuller Oil Co.*, 168 N.H. 606, 134 A.3d 17 (2016), is misguided. In *Fred Fuller Oil*, the New Hampshire Supreme Court answered the following two certified questions from the United States District Court for the District of New Hampshire in the affirmative:

> 1. Whether sections 354-A-2 and 354-A-7 of the New Hampshire Revised Statutes impose individual employee liability for aiding and abetting discrimination in the workplace.
>
> 2. Whether section 354-A-19 of the New Hampshire Revised Statutes imposes individual employee liability for retaliation in the workplace.

Id., 132 A.3d at 18.

In that case, the plaintiffs sued their former employer Fred Fuller Oil Co. and its employee Frederick J. Fuller for sexual harassment and retaliation. The claims against Fred Fuller Oil Co. were stayed because of bankruptcy, and only the individual defendant, Mr. Fuller, was a party to the certification proceeding. *Id.* With regard to the retaliation claim, the statutory provision at issue provided:

> It shall be an unlawful discriminatory practice for any person *engaged in any activity to which this chapter applies* to discharge, expel or otherwise retaliate or discriminate against any person because he has opposed any practices forbidden under this chapter or because he has filed a complaint, testified or assisted in any proceeding under this chapter.

Id. at 21 (citation omitted).

The Supreme Court of New Hampshire rejected the defendant's sole argument that "as to employment, the only 'person engaged in any activity to which this chapter applies' is an employer and, therefore, only employers can be liable for retaliation," reasoning that "we do not read the phrase 'engaged in any activity to which this chapter applies,' as limiting liability for retaliation to employers." *Id.* (citation omitted). The Court explained:

> The defendant's interpretation of the statute would require us to ignore the statutory definition of "person." This we will not do. "It is a basic precept of statutory construction that the definition of a term in a statute controls its meaning." We presume the legislature knew the meaning of the words it chose, and that it used those words advisedly. We will not modify, through judicial construction, the legislature's explicit definition of the word "person" as used in RSA chapter 354-A. Had the legislature intended to limit liability for retaliation in the workplace to employers, it could have expressly done so. Instead, as relevant in the employment context, the legislature specified that any "person" may be held liable for retaliation without regard to whether that person is also an "employer" within the meaning of the chapter.

Id. at 22.

After answering the certified question, the Court continued that "it would be illogical to hold individual employees liable for retaliation when they are employed by an employer that is

exempt from liability under the chapter." *Id.* That statement, however, is *dicta* because there was no finding that Fred Fuller Oil Co., which was not a party to the proceedings, was exempt from the chapter. In addition, the *dicta* is not well reasoned because the Court never considered cases such as *Dana Tank Container* and *Emerson*, which had held in thoroughly considered opinions prior to *Fred Fuller Oil* that an employer that did not meet the statutory definition of "employer" because it employed fewer than the requisite number of persons could nonetheless be held liable for retaliation as a "person" as that term is defined. Moreover, the *dicta* is inapposite because the definition of "employer" and the retaliation provision in the New Hampshire statute, particularly the phrase construed by the Court, are substantially different from the definition of "employer" in § 5-11-3(d) and the retaliation provision in § 5-11-9(7). Even the *dicta* in *Fred Fuller Oil* does not support Under Armour's position insofar as *Fred Fuller Oil* only commented on the potential liability of an individual employee, which is not at issue in this certified question.[9] In any event, neither Under Armor nor Mr. Boucher have cited to any authority that has approved and applied the *dicta* in *Fred Fuller Oil* in any manner, let alone a manner that would support their separate arguments. Ms. Pajak has been unable to find any such authority.

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, as have courts from other jurisdictions, this 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).

[9] Mr. Boucher's argument for a separate certified question regarding whether he is subject to liability for retaliation under § 5-11-9(7) was soundly rejected by the District Court. *See* J.A. at 467–72. Ms. Pajak has addressed Mr. Boucher's argument and the cases cited in his brief in the context of her discussion of Under Armour's arguments.

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 of West Virginia to be subject to liability as an "employer" within the plain meaning of § 5-11-3(d). Under Armour concedes that more than twelve Under Armour employees lived in West Virginia during the relevant 2017 and 2018 calendar years but argues that it is not an employer because fewer than twelve Under Armour employees worked within the state during that period. *See* Resp. Br. at 27. Under Armour's argument is contrary to the plain meaning and proper construction of § 5-11-3(d). Manifestly, Under Armour is a "person employing twelve or more *persons within the state*" within the meaning of § 5-11-3(d) because it is sufficient that the persons live within the state.

As noted in Ms. Pajak's opening brief, in contrast to the definition of "employer" in § 5-11-3(d), the definition of "employee" in the Parental Leave Act includes in pertinent part "any individual ... who has worked for at least twelve consecutive weeks performing services for renumeration within this state." W. Va. Code § 21-5D-2(c)(1). The Legislature's manifest choice to define "employee" in the context of a different statutory scheme to require work within the state demonstrates that the Legislature did not choose to do so in the context of the definition of "employer" in § 5-11-3(d) of the WVHRA.

Parroting the District Court's interlocutory finding that Under Armour is not an "employer" under § 5-11-3(d), Under Armour's argument improperly grafts an additional word "working" into the definition of employer. The definition of the term "employ" in *Black's Law*

Dictionary does not support Under Armour's argument.[10] No part of that definition contains the word "working." Even if the word "working" was included within the definition of "employ," the definition of "employer" makes no grammatical or logical sense if the word "working," is substituted for the word "employing" to read: "person [working] twelve or more persons within the state." To the extent that the definition of "employ" in *Black's Law Dictionary* may have any relevance to the definition of "employer" under the WVHRA, it is found in the word "hire." The definition of "employer" still makes grammatical and logical sense if the word "hiring" is substituted for the word "employing" to read "person [hiring] twelve or more persons within the state." In any event, the word "employing," however defined, is a verb linked only to the subject noun in the sentence; it is too remote to be linked to the phrase "within the state."

Under Armour's proposed construction of the term "employer" ignores basic rules of statutory construction such as the last antecedent rule: "The rule provides that 'a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows.'" *Lockhart v. U.S.*, 577 U.S. 347 (2016) (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). *Black's Law Dictionary*, which is cited in *Lockhart*, defines the "rule of the last antecedent" as follows:

> rule of the last antecedent (1919) 1. The doctrine that a pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent. • Strictly speaking, "last antecedent" denotes a noun or noun phrase referred to by a pronoun or relative pronoun — since grammatically speaking, only pronouns are said to have antecedents. But in modern practice, and despite the misnomer, it is common to refer to the *rule of the last antecedent* when what is actually meant is the *nearest-reasonable-referent canon.* *See* NEAREST – REASONABLE – REFERENT CANON. 2. An interpretive principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing. • For example, an

[10] *Black's Law Dictionary* defines "employ" as follows: "employ *vb.* 1. To make use of. 2. To hire. 3. To use as an agent or substitute in transacting business. 4. To commission and entrust with the performance of certain acts or functions or with the management of one's affairs." *Employ, Black's Law Dictionary.*

> application of this rule might mean that, in the phrase *Texas courts, New Mexico courts, and New York courts in the federal system*, the words *in the federal system* might be held to modify only *New York courts* and not *Texas courts* or *New Mexico courts*. — Also termed *doctrine of the last antecedent*; *doctrine of the last preceding antecedent*; *last-antecedent canon*. Cf. SERIES-QUALIFIER CANON.

Rule of the Last Antecedent, Black's Law Dictionary.[11]

Applying the last antecedent rule, the definition of "employer" requires only that the "persons" be "within the state," not that "employing" occur "within the state." To be clear, Ms. Pajak's argument does not ignore the term "employing" in § 5-11-3(d), it just gives the term its natural meaning in its context, i.e., hiring, and keeps it in its place in the sentence structure.

Contrary to Under Armour's argument, an employer can employ persons in West Virginia if those persons live in West Virginia and are citizens of this state regardless of whether those persons work in this state. Under Armour's proposed construction of "employer," not only grafts a new word – "working" – into the definition it causes the word "working" to up and move from its subject noun to another part of the definition altogether, elbowing itself between the object noun "persons" and its prepositional phrase "within the state." This construction clearly defies the rules of grammar and possibly rules of physics as well.

Under Armour's tortured construction of the term "employer" further ignores the WVHRA's declaration of a broad remedial and beneficial policy in § 5-11-2 "to provide all of its citizens equal opportunity for employment" and the requirement of liberal construction to effectuate its objectives and purposes in § 5-11-15.

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[11] As discussed in Ms. Pajak's opening brief, this Court recognized and applied the last antecedent rule in *Woodrum*, 845 S.E.2d at 286 & n.21 (explaining that "referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent and do not extend to or include others more remote") (citing 3C Shambie Singer, Sutherland Statutes & Statutory Construction § 77:1).

Construing the definition of "employer" in § 5-11-3(d) to mean "person [hiring] twelve or more persons within the state" is supported by West Virginia Code of State Regulations § 77-7-2.2, which places a gloss on the nearly verbatim definition of "employer" in both § 5-11-3(d) and W. Va. C.S.R. § 77-7-2.1, that focuses on an employment relationship rather than on where an employee is performing tasks 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." W. Va. C.S.R. § 77-7-2.2.

Under Armour's reliance on the Commission's booklet captioned "*Your Guide to Frequently Asked Questions in Discrimination*" is likewise misplaced. As a threshold matter, page 5 of the booklet contains a disclaimer that it is not providing legal advice as follows:

> This booklet is meant to be a guide for individual [sic] who are considering filing or who have filed a complaint with the West Virginia Human Rights Commission. Inside are answers to common questions that individuals have asked about the Human Rights Commission and the complaint process. *This booklet is not intended to provide any legal advice and should not be taken as such.* you [sic] have any questions about the West Virginia Human Rights Commission, your human rights, or the complaint process, please do not hesitate to call, write, or fax, or walk in to the Human Rights Commission office and speak to a staff member.

Http://hrc.wv.gov.SiteCollectionDocuments/FAQ%20GUIDE%20PUBLISHER%20VERSION%20%REVISED%203-12-2012.pdf (emphasis added).

In any event, contrary to Under Armour's argument, question 30 does not squarely address or even have anything to do with the proper construction of the term "employer" under § 5-11-3(d). Manifestly, the Commission's answer to question 30 does not indicate as Under Armour suggests, that employees who work in another state but live in West Virginia are not "persons within the state" within the meaning of § 5-11-3(d). Question 30 only addresses whether the Commission investigates complaints of employment discrimination filed by

someone who works in another state. Indeed, Ms. Pajak lives and worked for Under Armour in West Virginia. *See* J.A. at 481. She did not file a complaint with the Commission; instead, she filed her complaint in court. Nonetheless, the Commission's booklet does not suggest that Ms. Pajak could not have filed her complaint with that body or that it would not have done an investigation.[12]

Finally, Under Armour's reliance on *Williamson* is vexing. In *Williamson*, the Court adopted the following relevant Syllabus Points:

> 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).
>
> 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.

Williamson, 490 S.E.2d 23, at Syl. Pts. 2–4.

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[12] It should be noted that the Commission also has a brochure titled "*Human Rights Are Everyone's Rights*," which may be found at https://hrc.wv.gov/about/Pages/Rules-and-Regulations.aspx. That brochure has the following question and answer:

> WHO MAY FILE A COMPLAINT WITH THE WEST VIRGINIA HUMAN RIGHTS COMMISSION?
>
> If you believe you have been a victim of the type of discrimination outlined in the West Virginia Human Rights Act, you may file a complaint with the Commission.

The Court in *Williamson* rejected the plaintiff's and the amicus West Virginia Human Rights Commission's (the "Commission") contention that the Court should defer to the Commission's interpretation of the term "employer" in § 5-11-3(d) because it is the governmental body charged with administration of the WVHRA. The Court explained:

> Though we are mindful that the Commission's interpretation of *W. Va. Code*, 5-11-3(d) [1994] should be given "great weight" unless it is clearly erroneous, syl. Pt. 7, *Lincoln County Bd. of Educ. v. Adkins*, 188 W. Va. 430, 424 S.E.2d 775 (1992), "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review." Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dept.*, 195 W. Va. 573, 466 S.E.2d 424 (1995).

Id. at 28 & n.9.

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. 465. These Under Armour employees were West Virginia citizens within the public policy 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).

III. 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).

Respectfully submitted this 12th day of January 2022.

Robert M. Steptoe, Jr. (W. Va. Bar # 3605)
Larry J. Rector (W. Va. Bar # 6418)
Amy M. Smith (W. Va. Bar # 6454)
Allison B. Williams (W. Va. Bar # 11329)
Dylan T. Hughes (W. Va. Bar # 13893)
STEPTOE & JOHNSON PLLC
400 White Oaks Boulevard
Bridgeport, WV 26330
(304) 933-8000
amy.smith@steptoe-johnson.com

Counsel for Petitioner Cynthia D. Pajak

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of January 2022, I caused the foregoing "***Reply 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:

Justin M. Harrison, Esq.
Grace E. Hurney, Esq.
Jill E. Hall, Esq.
Laura Ann Hoffman, Esq.
Jackson Kelly PLLC
500 Lee Street, East, Suite 1600
PO Box 553
Charleston, WV 25322

Amy Estelle Askew, Esq.
Kramon & Graham, PA
1 South St., Suite 2600
Baltimore, MD 21202

Counsel for Respondents Under Armour, Inc. and Under Armour Retail, Inc.

Scott H. Kaminski, Esq.
Franki L. Parsons, Esq.
Ray, Winton & Kelley, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301

Counsel for Respondent Brian Boucher

Mychal Sommer Schulz, Esq.
Babst Calland
300 Summers Street, Suite 1000
Charleston, WV 25301

Todd A. Mount, Esq.
Shaffer & Shaffer, PLLC
P.O. Box 38
Madison, WV 25130

Counsel for Amicus Curiae Defense Trial Counsel of West Virginia

Amy M. Smith

13504336