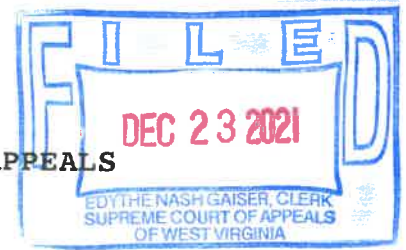


FILE COPY



IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 21-0484

United State District Court for the Norther District of West
Virginia

Civil Action No. 1:19-CV-160

CYNTHIA D. PAJAK,

Petitioner,

v.

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

Respondents.

DO NOT REMOVE
FROM FILE

BRIEF OF RESPONDENT BRIAN BOUCHER

Scott H. Kaminski, Esq. (WVSB #6338)
Ray, Winton & Kelley, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
T: 304-342-1141
F: 304-342-0691
ScottKaminski@rwk-law.com
Counsel for Respondent Brian Boucher

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	3
III. STATEMENT OF FACTS	3
IV. SUMMARY OF ARGUMENT	3
V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION	5
VI. ARGUMENT	5
VII. CONCLUSION	9

TABLE OF AUTHORITIES

Cases

<i>Charter Communications v. COMMUNITY ANTENNA</i> , 561 S.E.2d 793 (W. Va. 2002)	2
<i>Holstein v. Norandex, Inc.</i> , 461 S.E.2d 473 (W.Va. 1995)	4
<i>Kalany v. Campbell</i> , 640 S.E.2d 113 (W.Va. 2006)	4, 8
<i>Kincaid v. Mangum</i> , 432 S.E.2d 74 (W.Va. 1993)	2
<i>State v. Rollins-Ercolino</i> , 821 A.2d 953 (N.H. 2003)	7
<i>U.S. Equal Employment Opportunity Commission v. Fred Fuller Oil Company, Inc.</i> , 134 A.3d 17 (N.H. 2016)	7
<i>Williamson v. Greene</i> , 490 S.E.2d 23 (W.Va. 1997)	4, 6

Statutes

RSA 354-A:2, VII	7
RSA 354-A:7	7
RSA 354-A:19	7, 8
West Virginia Code §5-11-1, <i>et seq</i>	2
West Virginia Code § 5-11-3(d)	1
West Virginia Code § 5-11-9(7)	1
West Virginia Code §51-1A-1	1, 2
West Virginia Code § 58-5-2	2

I. INTRODUCTION

Respondent Brian Boucher submits this brief on the question certified to this Court by the United States District Court for the Northern District of West Virginia under the Uniform Certification of Questions of Law Act, W.Va. Code § 51-1A-1, *et seq.* 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).

At the District Court, Boucher submitted his own proposed certified question to be answered in addition to the one above:

Whether a cause of action under the West Virginia Human Rights Act may properly be maintained against a "person" as defined in West Virginia Code §5-11-3(a) based upon an alleged violation of [West Virginia] Code Section 5-11-9(7) when the employer of both the complaining employee and employee's supervisor is not a covered "employer" under the Act as defined in West Virginia Code Section 5-11-3(d)?

J.A. 473.

Boucher submits that this Court should reformulate the certified question presented by the District Court to include this question pertinent to his role in this case. Boucher was merely the supervisor of Petitioner, he was not her employer.

Thus he had no control over the location of her work being in West Virginia. Furthermore, it would be an absurd result if Respondents Under Armour, Inc. and/or Under Armour Retail, Inc. (collectively "Under Armour") were held by this Court not to be subject to the West Virginia Human Rights Act ("WVRHA"), W.Va. Code §5-11-1, et seq. but one of its employees were to be held liable under the Act.

The question presented by Boucher is pertinent to the issues in the case and allegations made by Petitioner and guidance from this Court would assist the District Court in determining matters to come before it. Boucher maintains that the precedent relied upon by the District Court is not as clear as that Court contends and it is for this Court to make that clarification as a matter of West Virginia law.

This Court can and should exercise its power to reformulate the question certified by the District Court to include this question. This Court, of course, derives broad authority to reformulate questions as it sees fit under W.Va.Code, 51-1A-1, et seq. and W.Va.Code, 58-5-2 (1967), Syl. Pt. 3, *Kincaid v. Mangum*, 432 S.E.2d 74 (W.Va. 1993), *Charter Communications v. COMMUNITY ANTENNA*, 561.S.E.2d 793 (W. Va. 2002).

II. STATEMENT OF THE CASE

The certified question from the District Court pertains to Respondent Under Armour and Boucher adopts and supports its argument set forth in its brief. The District Court refused to certify a question presented by Boucher and pursuant to this Court's power to reformulate questions, Boucher asks this Court to include his question in its consideration of this matter as it will come before the District Court in the future at the summary judgment stage.

III. STATEMENT OF FACTS

The salient facts as they pertain to Boucher related to the question pertaining to allegations against him are contained in the Amended Complaint. Boucher is a resident of New Hampshire. J.A. 363. Nowhere in the Amended Complaint is it alleged that Boucher ever worked physically in West Virginia. While Boucher takes issue with the Statement of Facts set forth by Petitioner in her brief, these are the only facts of import to the issue before this Court.

IV. SUMMARY OF ARGUMENT

Respondent Boucher contends that he should not be held personally liable under the WVHRA as a "person" as both his and Petitioner's employer, Respondent Under Armour, is not a covered "employer" under the WVHRA. To hold Boucher personally responsible under the WVHRA when his and Petitioner's employers

is not a covered "employer" produces an absurd result. Boucher had no connection to West Virginia other than to supervise Petitioner, which he did from outside the state. He did not choose to hire a subordinate located in West Virginia nor did he voluntarily submit himself to this jurisdiction.

Boucher contends that if his employer cannot be held responsible under the WVHRA per the numerosity requirement of the Code, then he cannot either as his only contact with Plaintiff was through his employment with Under Armour. A similar issue arose and was presented to this Court in *Williamson v. Greene*, 490 S.E.2d 23 (W.Va. 1997), however, the issue was not answered. Now is an appropriate time to reformulate the question and provide guidance to this and other similarly situated litigants.

Boucher has searched for cases in which an individual person was held liable for acts under the WVHRA. In the case of *Kalany v. Campbell*, 640 S.E.2d 113 (W.Va. 2006), an individual was accused of sexual harassment and retaliation. However, upon closer inspection, that individual was the owner of the business.

Petitioner relied on the case of *Holstein v. Norandex, Inc.*, 461 S.E.2d 473 (W.Va. 1995). Syllabus Point 4 states that "[A] cause of action may be maintained by a plaintiff employee as against another employee under the West Virginia Human Rights

Act. Further, the cause of action may properly be based upon an allegation that the defendant employee aided and abetted an employer engaging in unlawful discriminatory practices." But, what *Holstein* did not address is whether a defendant employee is individually subject to the jurisdiction of a West Virginia Court under the WVHRA if his employer is not due to the numerosity requirement.

So, whether Boucher as a New Hampshire resident is subject to the WVHRA is a matter that the District Court will need to address in this case and one which has not been definitively answered by this Court.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court has already entered an Order indicating this matter would be set for oral argument pursuant to Rule 20, and Respondent Boucher concurs in that judgment.

VI. ARGUMENT

The District Court should have included Boucher's proposed question among those certified to this Court and this Court should reformulate the question certified to include that suggested by Boucher as it pertains to an important and unsettled matter of law in West Virginia. Petitioner seeks to impose the WVHRA against an individual party who did not physically supervise her work from within the state of West Virginia. Boucher is unaware of any case in which this has

previously been done, particularly where the employer of both the supervisor and supervised employee is not subject to the WVHRA due to the numerosity requirements. This Court previously declined to answer this question in the matter of *Williamson v. Greene*, 490 S.E.2d 23 (W.Va. 1997). Now, the opportunity presents itself again for clarification of this important issue so that out of state individuals who have no ties to the state of West Virginia may know whether the WVHRA can be applied to them though they do not set foot within the state.

The District Court contends the question certified in *Williamson* was substantially different from the facts presented here. Boucher respectfully disagrees. The question presented in *Williamson* was:

Can an employee maintain an action directly against her supervisor for sexual discrimination/harassment under the West Virginia Human Rights Act for actions of a "statutory employer" even though the employer of both the accused supervisor and complaining employee lacks a sufficient number of employees to be subject to the West Virginia Human Rights Act?

This question is not at all different from that presented here. Petitioner was an employee. She claims her supervisor retaliated against her for reporting sexual harassment. Their employer, Under Armour, lacks the requisite number of employees to be subject to the WVHRA. Where the *Williamson* Court declined to answer this question (because the

Petitioner in that case failed to argue it in her brief), this Court should address this issue raised by Boucher and important to this issue before both this Court and the District Court.

New Hampshire ironically has addressed the absurd result of the issue presented by Petitioner here. Petitioner seeks to hold Boucher responsible under the WVHRA where Respondent Under Armour is not subject to the WVHRA due to the numerosity requirement. What out of state employer would ever hire a West Virginia employee if doing so would subject the supervisor to the laws of this state, even though the employer may not be?

That was the case in *U.S. Equal Employment Opportunity Commission v. Fred Fuller Oil Company, Inc.*, 134 A.3d 17 (N.H. 2016). While New Hampshire's version of its Human Rights Act is not the same as the WVHRA, it is substantially similar in its prohibited conduct. Specifically, the New Hampshire Court held:

Nonetheless, we agree with the defendant 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. *See State v. Rollins-Ercolino*, 821 A.2d 953 (N.H. 2003)(court will not interpret statute to require an illogical result). RSA 354-A:19 relates to those persons "engaged in any activity to which this chapter applies." The chapter applies only to those employers with six or more employees. *See* RSA 354-A:2, VII. Thus, consistent with our interpretation of liability under RSA 354-A:2 and RSA 354-A:7, I, we interpret RSA

354-A:19 as imposing liability for retaliation on individual employees in the workplace of a qualifying employer under the chapter. *See, id.*

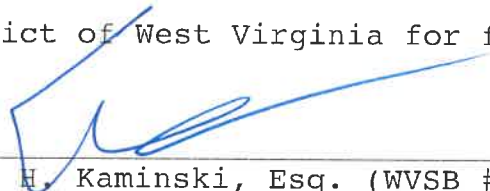
The New Hampshire court understood that it makes no logical sense to hold that an employer is not subject to its Human Rights Act but that an individual employee could be held liable under the act. Here, it similarly creates an absurd and illogical result to hold that Boucher could be held liable under the WVHRA where Respondent Under Armour cannot. Particularly in light of the fact that but for the employment of both Petitioner and Respondent Boucher by Respondent Under Armour, Respondent Boucher would have had absolutely no ties whatsoever to the state of West Virginia. If his employer has insufficient ties to West Virginia under the numerosity requirements of the WVHRA to be subject to jurisdiction here, how then can Respondent Boucher as a mere employee of Respondent Under Armour be subject to jurisdiction here under the WVHRA. The illogic of this result is obvious.

In the case of *Kalany v. Campbell*, 640 S.E.2d 113 (W.Va. 2006), an individual was accused of sexual harassment and retaliation. However, upon closer inspection, that individual was the owner of the business. Petitioner relied on *Kalany* for the assertion that Boucher too is subject to the WVHRA. However, *Kalany* is distinguishable. Boucher was not the owner

of Defendant Under Armour. It further appears that the individual Defendant-owner in *Kalany* committed the alleged sexual harassment at his place of business in West Virginia. Boucher was never present in West Virginia.

VII. CONCLUSION

Respondent Boucher respectfully requests that this Court reformulate the certified question to include his question and to answer that question in the negative and remand this matter to the United States District Court for the Northern District of West Virginia for further proceedings.



Scott H. Kaminski, Esq. (WVSB # 6338)
Ray, Winton & Kelley, PLLC
109 Capitol Street, Suite 700
Charleston, WV 25301
304-342-1141
304-342-0691 fax
ScottKaminski@rwk-law.com
Counsel of Record for the Respondent, Brian Boucher

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

Case No. 21-0484
United State District Court for the Norther District of West
Virginia
Civil Action No. 1:19-CV-160

CYNTHIA D. PAJAK,

Petitioner,

v.

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

Respondents.

CERTIFICATE OF SERVICE

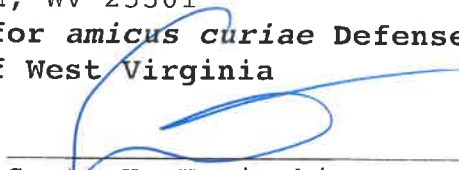
I, Scott H. Kaminski, counsel for Brian Boucher, certify that I served a true and correct copy of the foregoing "**Brief of Respondent Brian Boucher**" by U.S. Mail, postage prepaid on this 23rd day of December, 2021:

Robert M. Steptoe, Jr.
Larry J. Rector
Amy M. Smith
Allison B. Williams
Dylan T. Hughes
Steptoe & Johnson PLLC
400 White Oaks Boulevard
Bridgeport, West Virginia 26330
Counsel for Petitioner

Justin M. Harrison
Grace E. Hurney
Laura Ann Hoffman
Jackson Kelly PLLC
500 Lee Street, East, Suite 1600
Post Office Box 553
Charleston, West Virginia 25322
**Counsel for Respondents Under Armour, Inc.
and Under Armour Retail, Inc.**

Amy Estelle Askew
Kramon & Graham, PA
1 South St., Suite 2600
Baltimore, Maryland 21202
**Counsel for Respondents Under Armour, Inc.
and Under Armour Retail, Inc.**

Mychal S. Schulz
Babst Calland
300 Summers Street, Suite 1100
Charleston, WV 25301
**Counsel for *amicus curiae* Defense Trial
Counsel of West Virginia**



Scott H. Kaminski (WV Bar #6338)