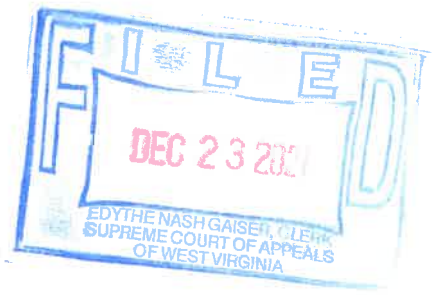
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0484



CYNTHIA D. PAJAK

Petitioner,

v.

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

Respondents.

RESPONSE BRIEF OF RESPONDENTS UNDER ARMOUR, INC. AND UNDER ARMOUR RETAIL, INC.

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I. STATEMENT OF THE CASE[1]

Respondents Under Armour, Inc. and Under Armour Retail, Inc. (collectively, "Under Armour") submit this brief on the following question certified by the United States District Court for the Northern District of West Virginia pursuant to the Uniform Certification of Questions of Law Act, W. Va. Code § 51-1A-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)?

J.A. at 473. The answer to the question is **No**, when the entity in question has an employment relationship with the plaintiff-employee.

Under Armour contends the question should be reformulated[2] as follows:

> Whether a plaintiff-employee can maintain an action under West Virginia Code § 5-11-9(7) against an entity with which the plaintiff has an employment relationship when that entity is exempt from the West Virginia Human Rights Act because it does not employ at least twelve persons within the state.

The answer to the reformulated question is **No**.

Count 2 of the Complaint (and Amended Complaint) alleges violations of the West Virginia Human Rights Act (sometimes referred to as "WVHRA" or "the Act") against Under Armour and an individual defendant, Brian Boucher. Specifically, Pajak alleges all defendants are liable pursuant to § 5-11-9(7) of the WVHRA for acts related to her employment relationship with

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[1] Under Armour recognizes the facts as presented in Petitioner's brief are taken from the District Court's Memorandum Order and Opinion Granting Motion to Certify Questions to the West Virginia Supreme Court of Appeals. J.A. at 340-43. Those facts were taken from Pajak's Complaint and are disputed (and vigorously denied) by Under Armour.

[2] "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 . . . . " Syl. Pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993). The arguments set forth in this brief are applicable to the District Court's question as well as the proposed reformulated question.

Under Armour, including her employment discharge and placement on a performance improvement plan.[3] J.A. at 78-79, 358, 372. Whether Under Armour can be liable under the Act has been contested among the parties since the inception of this litigation. Following removal of the case from circuit court, Under Armour filed a partial motion to dismiss arguing, in part, that Count 2 of the Complaint should be dismissed because Pajak failed to plead the numerosity threshold found in the WVHRA's definition of "employer." J.A. at 141. Specifically, because an employer that does not employ at least twelve persons working within the State of West Virginia is not a covered employer, and because Pajak did not plead the numerosity requirement, Under Armour argued Count 2 should be dismissed. J.A. at 189-91, 231-38.

In response, Pajak argued that she was entitled to discovery on whether Under Armour is an employer under § 5-11-3(d) of the Act. J.A. at 201. The District Court agreed with Pajak and, after holding a hearing, denied Under Armour's motion. J.A. at 246.[4] The parties then engaged in discovery, including regarding whether Under Armour satisfies the definition of "employer" under the Act. Pajak initially requested discovery with respect to "every employee and every contract work[er] living in West Virginia and working for [Under Armour] in West Virginia for calendar years 2017 and 2018." J.A. at 320. Under Armour responded to the requests by stating

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[3] The Amended Complaint is replete with allegations and claims regarding the employment relationship between Pajak, on the one hand, and Under Armour, Inc. and Under Armour Retail, Inc., on the other hand, including the following: "hostile work environment" (J.A. at 356; 366); "inappropriate workplace conduct" (J.A. at 356); "retaliatory and wrongful discharge" (J.A. at 357); "terminated her employment" (J.A. at 357); "wrongful discharge under *Harless*" (J.A. at 358); "wrongfully terminated" (J.A. at 359); "retaliatory discharge because she reported inappropriate conduct in the workplace" (J.A. at 360); "performance improvement plan" (J.A. at 362); "job performance" (J.A. at 362; 367); "human resources" (J.A. at 363; 366); "severance package" (J.A. at 367); "performance reviews" (J.A. at 367); "wrongful and retaliatory discharge" (J.A. at 369); and "legitimate job expectations" (J.A. at 370).

[4] At the hearing on the motion, the District Court noted that the West Virginia Supreme Court of Appeals has not yet addressed whether a plaintiff must affirmatively plead the numerosity threshold regarding an employer sued under the Act. In light of this, the District Court opined that Pajak should be given latitude to conduct discovery on whether Under Armour satisfies the Act's definition of "employer." J.A. at 269-70.

that Pajak was the only person employed by Under Armour who *worked* in West Virginia in 2017 and 2018. J.A. at 325. Under Armour further objected to the requests, arguing that whether Under Armour employed persons who *live* in West Virginia was irrelevant because the WVHRA defines "employer" as one who employs at least twelve persons *working* within the State of West Virginia. J.A. at 320.

Pajak then argued in support of a motion to compel that the definition of "employer" found in the WVHRA may be satisfied if twelve or more persons employed by Under Armour *live* within the State of West Virginia, even if they work in a neighboring state. J.A. at 273. Finding no definitive case on point in West Virginia, Magistrate Judge Aloi permitted discovery to proceed on the issue. J.A. at 273-74. Later, with respect to a second motion to compel, Pajak argued before the District Court that she was entitled to additional discovery regarding employees of Under Armour who lived in West Virginia but worked outside the state. J.A. at 264 ("we're trying to get the information regarding the employees who lived in West Virginia and worked elsewhere."). Specifically, Pajak requested various categories of discovery regarding employees who lived in West Virginia and either performed remote work or worked in a physical location outside the state. J.A. at 325. In response, Under Armour provided Pajak with information regarding two employees who lived in West Virginia and worked remotely for Under Armour, one of whom was Pajak herself. J.A. at 325-26. Under Armour objected, though, to providing information about other employees who lived in West Virginia but did not work within the state, arguing such information was irrelevant to any claims or defenses asserted in the case. J.A. at 325.

At a hearing before the District Court, Pajak's counsel acknowledged she intended to argue at the summary judgment stage that the WVHRA's definition of "employer" includes employees who reside in West Virginia, even if they work outside the state. J.A. at 268. Pajak's

counsel also acknowledged that no case in West Virginia has addressed this issue. *Id.* Finding that the definition of "employer" under the WVHRA is arguably ambiguous, the District Court overruled Under Armour's objection and ordered it to respond to Pajak's discovery requests regarding West Virginia residents who worked for Under Armour outside the state. J.A. at 269-70. Under Armour provided this information. J.A. at 329-35.

Under Armour then filed its Motion to Certify Legal Question to the West Virginia Supreme Court of Appeals. J.A. at 260. Specifically, Under Armour requested that the Court certify the question of whether the WVHRA's definition of "employer" means one that employs at least twelve persons working within the state. J.A. at 260. In her response brief, Pajak argued that Under Armour is an "employer" because at least twelve Under Armour employees live in West Virginia and that it can be liable under West Virginia Code § 5-11-9(7) as a "person" even if it does not satisfy the definition of "employer." Under Armour noted in its reply brief that this second question raised by Pajak also should be certified to this Court. J.A. at 302.

Following briefing, the District Court held a hearing on the Motion to Certify on December 4, 2020. J.A. at 337. At that hearing, Pajak argued for the first time that, even if Under Armour is not an "employer" subject to the Act, and even if the collective Under Armour entity is not a "person" subject to liability under § 5-11-9(7), then Under Armour, Inc. is subject to liability as a "person" because it was not her employer at the time the alleged discrimination took place. J.A. at 389; *see also* Petitioner's Brief at n.9. Pajak merely stated the theory on the record but never briefed the issue and never requested that the District Court certify the question to this Court.

A second hearing regarding the Motion to Certify was held on March 4, 2021, at which counsel for Under Armour represented that three questions had been raised by Pajak since the original briefing on the request for certification. J.A. at 338, 388. Following this hearing, the

District Court 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 noted it would certify two questions to this Court: (1) whether a covered employer under the Act must employ at least twelve persons working within the state; and (2) whether a corporate employer can be liable under § 5-11-9(7) as a "person" even if it does not satisfy the Act's definition of "employer." J.A. at 339.

The District Court invited the parties to propose reformulations of the questions to be certified. J.A. at 355. Under Armour and Pajak both proposed reformulations of the questions. J.A. at 397, 401. Under Armour and Defendant Boucher also requested certification of the third question raised by Pajak: whether a person or an entity can be liable as a "person" under § 5-11-9(7) when a plaintiff's employer does not satisfy the Act's definition of "employer." J.A. at 399, 382.[5] That request was denied. J.A. at 468. The District Court then vacated its previous order in part and held that the Act's definition of "employer" requires the employer to employ at least twelve persons who work, and not just live, within the state. J.A. at 462. The District Court reasoned that the law is clear on this issue, and certification was not necessary. J.A. at 463. Consequently, only one question was certified to this Court:

> 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.

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[5] The Court was presented with this question in *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23, n.12 (1997), but did not decide the issue because it had not been addressed in briefing. The Court in its discretion could address this issue in these proceedings. *See Shell v. Metropolitan Life Ins. Co.*, 181 W.Va. 16, 25, 380 S.E.2d 183, 192 (1989). The answer would address whether Defendant Boucher can be liable under the Act as a "person," and also whether Under Armour, Inc., can be liable as a "person" under § 5-11-9(7) as asserted in footnote 9 of Petitioner's Brief. The answer to the reformulated question posed by Under Armour likewise would resolve this issue.

II. SUMMARY OF THE ARGUMENT

This Court should reformulate the certified question and hold that Pajak has no claim under the Act when Under Armour is specifically exempt from coverage as an employer because it employs fewer than twelve persons working within the State of West Virginia. To hold otherwise would nullify the clear and unambiguous statutory definition of "employer," the Legislature's purposeful distinction between "employer" and "person" in § 5-11-9(7), and prior holdings of this Court. The Legislature's intent to exempt small employers from liability under the Act is clear and should not be disturbed.

This Court has consistently held that small employers exempt from the WVHRA are not liable under any section of the Act when sued in their capacity as employers. Rather, in furtherance of the public policy underlying the Act, this Court has held small employers may be liable for common law retaliation claims similar to those addressed in the Act. The public policy underlying the WVHRA as emphasized in Pajak's brief is not disputed by Under Armour. This notwithstanding, this Court already has considered the public policy behind the Act and determined that the alternative remedy for employees of small employers exempt from the Act is a common law claim rather than an expansion of the definition of "person" under § 5-11-9(7).

It is undisputed that Under Armour, Inc. and Under Armour Retail, Inc. employ fewer than twelve persons within the State of West Virginia and are thus exempt from liability under the Act as employers. Pajak's attempt to "save" Under Armour from the statutory exemption should fail as contrary to legislative intent and prior holdings of this Court.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

On September 21, 2021, this Court entered an Order scheduling this matter for oral argument under West Virginia Rule of Appellate Procedure 20 during the January 2022 Term of Court.

IV. ARGUMENT

A. Standard of Decision

The Court reviews *de novo* questions of law posed by a certified question from a federal district court. Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998); *see also* Syl. Pt. 1, *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999). Moreover, "[w]hen 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. Syl. Pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993) (citing W. Va. Code § 51-1A-1, *et seq.*).

B. Under Armour is not liable under West Virginia Code Section 5-11-9(7) as a "person" when it is specifically exempt from liability under the WVHRA as an "employer" because it employs fewer than twelve persons working within the State of West Virginia.

1. Relevant Statutory Language

The West Virginia Human Rights Act prohibits unlawful discriminatory practices by employers with respect to "compensation, hire, tenure, terms, conditions or privileges of employment. . . ." W. Va. Code § 5-11-9(1). "When used in th[e] article" that is known as 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 for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year. . . ." W. Va. Code § 5-11-3(d).

> Further, it is unlawful for any employer or other person 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 to resist, prevent, impede or interfere with the commission or any of its members or representatives in the performance of a duty under 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.

W. Va. Code § 5-11-9(7); *see also* Syl. Pt. 11, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995). The term "person" 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." W. Va. Code § 5-11-3(a).

2. Rules of statutory construction dictate that an employer exempt from liability under the WVHRA cannot be liable as a "person" under the Act.

The Legislature clearly delineated what employers are subject to liability under the Act and what employers are exempt from liability under the Act. *See* W. Va. Code § 5-11-3(d). Only employers employing at least twelve persons within the State of West Virginia are covered by the Act. *Id.* The Legislature made clear that this definition of "employer" applies for purposes of the entire article known as the West Virginia Human Rights Act. *Id*; *see also* W. Va. Code § 5-11-1.

Rules of statutory construction are applicable to the WVHRA. *See, e.g.,* Syl. Pt. 3, *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997) ("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.") (citations omitted); *see also* Syl. Pt. 3, *Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 701 S.E.2d 116 (2010) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.") (citation omitted); Syl. Pt. 1, *Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473 (1995) ("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. . . .") (citations omitted).

Applying these rules to the statutes in question, the Legislature clearly intended that only employers with at least twelve employees working within West Virginia be subject to liability under the WVHRA. *See* W. Va. Code § 5-11-3(d) ("When used in th[e] article, . . . [t]he term 'employer' means 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. . . ."). The legislative intent to exempt small employers from liability under the Act could not be more plain, and this is true regardless of where the term "employer" is found in the Act. *See id.* ("When used in this article . . .").

While not disputing that Under Armour does not employ at least twelve persons working within the state, Pajak argues the plain language of § 5-11-9(7)(C) requires the Court to hold that any person, including a corporate employer that does not satisfy the Act's definition of "employer" because it employs fewer than twelve persons in West Virginia, can be liable under

the Act for retaliation.[6] This interpretation, however, requires the Court to ignore the Legislature's clear intent to exclude small employers from the reach of the WVHRA and creates a statutory nullity regarding the inclusion of "employer" in § 5-11-9(7) as a potential defendant.

Count 2 of the Complaint alleges a violation of § 5-11-9(7) of the WVHRA. Pajak is correct that this section provides that both "persons" and "employers" can be liable for the acts prohibited in subsections (A) through (C). She is also correct that the Act's definition of "person" includes corporations. *See* W. Va. Code § 5-11-3(a). Pajak misstates the law, though, when she argues that the same corporate employer exempted from the Act because it does not satisfy the definition of "employer" can nonetheless be liable under § 5-11-9(7) as a "person." Such an interpretation strains the bounds of reasonableness and ignores the plain statutory language found in that section as well as in § 5-11-3(d). Plainly, there would be no need to include "employer" as a potential defendant in § 5-11-9(7) if an employer exempt from liability could be considered a "person." The creation of such a statutory nullity is just the kind of absurd result this Court has previously rejected. *See, e.g., Kalany v. Campbell*, 220 W. Va. 50, 57 n.13, 640 S.E.2d 113, 120 n.13 (2006) ("Clearly, the trial court was reaching in trying to bring [plaintiff's small employer] within the parameters of the Act by characterizing him as 'person.'"); *Woodall v. Int'l. Brotherhood of Electrical Workers, Local 596*, 192 W. Va. 673, 453 S.E.2d 656 (1994) (holding that employer must satisfy the numerosity requirement under the Act when sued for discriminatory practices in its capacity as an employer).

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[6] Count 2 of the Complaint asserts a cause of action under § 5-11-9(7) generally and cites to all three subsections. J.A. at 372. In her brief, however, Pajak asserts that her "claim is pled under § 5-11-9(7)(C), which prohibits retaliation by an employer or other person. . . ." Petitioner's Brief at 6. This is consistent with Pajak's proposed reformulation of the question to be certified as found in Plaintiff's Comments and Proposed Reformulations of Proposed Certified Questions. J.A. at 401 ("for purposes of § 5-11-9(7)(C)"). Under Armour's argument is the same regardless of the subsection at issue in § 5-11-9(7).

Pajak devotes much of her brief to arguing that the public policy principles set forth in the Act at § 5-11-2 require the Court to find Under Armour is subject to liability as a person, but those principles do not override the clear will of the Legislature to exempt small employers from the WVHRA. Moreover, this Court already has decided that the very public policy principles on which Pajak relies give rise to a common law claim of discrimination against employers employing fewer than twelve persons in West Virginia. *See* Syl. Pt. 8, *Williamson*, 490 S.E.2d 23. The Legislature's decision to exempt certain employers from the reach of the Act is a policy preference that should not be ignored or manipulated. 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." 640 S.E.2d at 120 (citing *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 174 (4th Cir. 2000) (legislative "line drawing" such as that at play in the WVHRA is "inherent to lawmaking")); *see also Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (recognizing legislative prerogative not to burden small entities with the costs of litigating discrimination claims); *Thibodeau v. Design Group One Architects, LLC*, 260 Conn. 691, 715, 802 A.2d 731, 745 (2002) (declining to create even a common law claim against small employers exempted from Connecticut's Fair Employment Practices Act and noting, "we are constrained to recognize the balance that the legislature has struck between the state's dual interest in policing and eliminating sex discrimination in employment, on the one hand, and protecting small employers from the potentially heavy costs associated with defending against discrimination claims, on the other.").

Under Armour does not dispute the public policies articulated in the WVHRA. It is not for the courts, however, to ignore an unambiguous statutory definition that exempts small

employers from liability under the Act under the guise of furthering a public policy objective. This Court already has determined that the Act's public policy objectives may give rise to a common law retaliatory discharge claim. It should not expand such policy objectives by disregarding the Legislature's clear intent to engage in legislative "line drawing" and exempt small employers from liability under the Act.

3. This Court has consistently refused to subject employers with fewer than twelve employees within the state to liability under the WVHRA, and it has never held that an exempt employer can be liable under the WVHRA as a "person."

Pajak cites to a litany of cases in support of her argument that a small employer otherwise exempt from the Act is subject to liability under § 5-11-9(7) as a "person." The fatal flaw in Pajak's reliance on such cases is that not one of them addresses the statutory language at issue here. This Court has never held that a small employer exempt from the Act can nonetheless be held liable as a "person." Rather, the Court has consistently held that small employers are exempt from the Act, and the only remedy available to a potential plaintiff for retaliatory discharge is a common law claim.

Under Armour does not dispute that prior holdings of this Court make clear that individual supervisors, and even corporations that have no employment relationship with a plaintiff-employee, are subject to liability under § 5-11-9(7) under certain circumstances. These holdings are consistent with unambiguous statutory language prohibiting "person[s]" from engaging in the acts listed in that section. *See* W. Va. Code § 5-11-9(7)(A)-(C). Pajak's attempt, however, to stretch these holdings to expand liability under the Act to small employers who are specifically exempt from the Act goes too far. This Court has held that small employers are exempt from liability under the Act, and it has held that exempt employers cannot be stripped of such exemption by being reclassified as a "person."

First, this Court has held unequivocally that an employer that does not employ at least twelve persons within the state is not liable under the WVHRA. In *Williamson*, the Court instructed:

> ***Even though a discharged at-will employee has no statutory claim for retaliatory discharge under W.Va. Code 5-11-9(7)(C)[1992] of the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed, as required by W.Va. Code 5-11-3(d)[1994]***, the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, W.Va. Code 5-11-1, *et seq*.

Syl. Pt. 8, 490 S.E.2d 23 (emphasis added).

Syllabus Point 8 in *Williamson* is dispositive for two reasons. First, it makes clear that there can be no statutory claim against an employer that does not employ at least twelve persons within the state. *See also Woodall*, 453 S.E.2d at 661 (Holding because Local 596 did not satisfy the numerosity requirement set forth in § 5-11-3(d), the Court held that it "is not liable for unlawful discriminatory acts under the [WVHRA]" in its capacity as an employer). Second, it instructs that plaintiffs whose former employers do not satisfy the definition of "employer" under § 5-11-3(d) can proceed with a common law claim against their former employers. Logically, there is no reason to recognize the availability of a common law claim predicated upon § 5-11-9(7), the same section relied upon by Pajak in her Complaint, if a plaintiff can simply avoid the numerosity requirement of § 5-11-3(d) by arguing that an employer exempt from the Act can, alternatively, be treated as a "person."

Pajak counters that the Court in *Williamson* did not consider whether an employer that does not satisfy the WVHRA definition of employer (because it does not employ twelve or

more persons) could nonetheless be subject to liability as a "person" under the Act. The Court specifically stated, though, that an employer must employ twelve persons to be liable under § 5-11-9(7) of the WVHRA and that, if the employer does not employ at least twelve persons, a plaintiff can assert a common law claim. Syl. Pt. 8, *Williamson*, 490 S.E.2d 23. The Court identified the common law claim as the alternative remedy when an employer has fewer than twelve employees. Such a claim is superfluous if the same result can be achieved by reclassifying an exempt employer as a "person" under the Act. At issue in *Williamson* was § 5-11-9(7)(C) of the WVHRA, the same subsection under which Pajak's claim is made. *See supra* note 6. The holding in *Williamson* applies with equal force to Pajak's claim. She has no statutory claim for retaliatory discharge under § 5-11-9-7(C) because Under Armour employed fewer than twelve persons within the state at the time of the alleged unlawful discriminatory acts, but she may maintain a common law claim for retaliatory discharge in contravention of the public policy articulated in the WVHRA.[7]

Next, this Court's holding in *Kalany* expressly rejected Pajak's argument here that an employer exempt from the Act is nonetheless subject to liability under the Act as a "person." In *Kalany*, the plaintiff-employee prevailed at trial on her common law retaliatory discharge claim. 640 S.E.2d 113. She did not prevail on her statutory claim under the WVHRA because the trial court determined that the employer-defendant—a sole proprietor—did not satisfy the definition of "employer" found in § 5-11-3(d) when it did not employ at least twelve persons within the State of West Virginia. Following the verdict, the plaintiff-employee filed a motion for attorney's fees and costs under the WVHRA. In support of the motion, the plaintiff-employee argued that the

[7] Pajak makes this claim in both the Complaint and the Amended Complaint at Count 1. J.A. at 77, 371.

employer was a "person" as defined under the WVHRA. The circuit court agreed and awarded fees and costs pursuant to the Act.

On appeal, the Court rejected this approach:

> The trial court was acting outside of the statutory authority by the Legislature in making an award of attorney's fees and costs under the Act in connection with a common law claim for retaliatory discharge. Mr. Campbell, ***as an employer who does not come within the protections of the Act based on the minimal number of employees he hires, cannot be deemed a statutory "person"*** for purposes of relying on the Act's authority to make an award of fees and costs at the discretion of the trial court.

Id. at 121 (emphasis added). As the Court observed, "[c]learly, the trial court was reaching in trying to bring Mr. Campbell within the parameters of the Act by characterizing him as 'person' subject to the Act's provisions." *Id.* at 120. Recognizing the Legislature's clear intent to exempt small employers from the reach of the Act, the Court noted that there is a "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." *Id.* (citing *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 174 (4th Cir. 2000)). Importantly, the Court agreed that if the statutory definition of "person" was intended to broadly encompass all individuals, then the separate references to "person" and "employer" set forth in § 5-11-9(7) would be meaningless. *Id.* at n.13.

Pajak argues the holding in *Kalany* is not instructive here because the plaintiff in that case failed to argue that an employer exempt from liability under the Act is subject to liability as a "person." Petitioner's Brief at 21. Pajak's attempt to limit the holding in *Kalany* is unpersuasive because the plaintiff in *Kalany* made the same argument Pajak makes here. It is inconsequential that the argument was made in the context of a request for attorney's fees when the request was made pursuant to the WVHRA. The Court in *Kalany* takes Under Armour's

argument even further in holding that, just as an employer exempt from the WVHRA cannot be considered a "person" under § 5-11-9(7) for liability purposes, any "attempt to extend the statutory award of fees and costs to common law actions based on the theory that the same underlying public policy rationale that seeks to encourage the prosecution of actions instituted under the Act should also apply to actions brought outside of the Act" is not permitted under the law. 640 S.E.2d at 120.

This does not mean the inclusion of "person" in § 5-11-9(7), and the inclusion of a corporation as a "person" in § 5-11-3(a), are rendered meaningless. Both support the well-settled principle that "persons" *other than a former employer* (or persons outside the employment relationship) may be held liable for discriminatory acts under the WVHRA. The cases cited by Pajak in her brief confirm this principle. *See, e.g., Holstein v. Norandex, Inc.*, 194 W. Va. 727, 461 S.E.2d 473 (1995). In *Holstein*, the Court's holding is specific and limited: "[W]e find that a cause of action may be maintained by a plaintiff employee as against *another employee* under the West Virginia Human Rights Act." *Id.* at 478 (emphasis added). The holding in *Holstein* simply stands for the proposition that employees are "persons" under the WVHRA; it does not expand the definition of employer or otherwise hold that a former employer that does not satisfy the definition of "employer" can be held liable as a "person." *See also St. Peter v. Ampak-Division of Gatewood Products, Inc.*, 199 W. Va. 365, 484 S.E.2d 481 (1997) (supervisor who engaged in discriminatory acts may be liable under the WVHRA). The Fourth Circuit's decision regarding an earlier version of the WVHRA arrived at a similar conclusion. *See Marshall v. Manville Sales Corp.*, 6 F.3d 229 (4th Cir. 1993) (holding the WVHRA does not limit potential defendants to employers in finding that plaintiff's manager could be found liable for his discriminatory acts as a person).

It is well-settled law that individual supervisors employed by a *covered employer* are subject to liability as persons under § 5-11-9(7) of the Act. Pajak relies on Syllabus Point 3 in

Holstein which states that the Act's definition of "'person' . . . includes both employees and employers" to argue that this Court has considered and accepted the argument that a small employer exempt from the WVHRA is subject to liability as a person under § 5-11-9(7). Syl. Pt. 3, *Holstein*, 461 S.E.2d 473. Pajak's reliance on the syllabus point is misplaced. In *Holstein*, the plaintiff-employee sued his former employer and former supervisor for violations of the WVHRA. Specifically, Holstein alleged his former employer violated § 5-11-9(1) of the Act based on age discrimination and alleged his former supervisor violated § 5-11-9(7) by aiding and abetting the employer's unlawful discrimination. The circuit court dismissed the former supervisor, and this Court reversed, holding that a plaintiff-employee can maintain a claim against another employee under § 5-11-9(7).

While Syllabus Point 3 may lend support for Pajak's argument when read in isolation, it is clear that, when read in the context of the case and the definitions found in the WVHRA, the point stands only for the proposition that both employees and their *covered* employers with twelve or more employees can be liable under the WVHRA. The syllabus point merely reflects the definitions found in § 5-11-3 of the Act. "The term 'employer' means . . . any *person* employing twelve or more persons within the state . . . ." W. Va. Code § 5-11-3(d) (emphasis added). Thus, an "employer" is a "person" that employs twelve or more persons within the state. Pajak reads too much into the syllabus point when she argues that the *Holstein* court determined a small employer exempt from the Act is a "person" subject to liability under § 5-11-9(7). The Court did not address whether a small employer that does not satisfy the Act's definition of "employer" is subject to liability under the Act under an alternative definition. That issue was not before the Court. The case merely holds that an individual employee can be liable under the Act as a "person" when he or she aids and abets a covered employer's unlawful discrimination.

Pajak relies further on the following syllabus point in *Hanlon*:

> 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.

Syl. Pt. 11, 464 S.E.2d 741 (emphasis added). In *Hanlon*, there is no discussion of whether the defendant-employer satisfied the Act's definition of "employer."[8] The Court held that a supervisory employee (who is not an owner of the employer entity) can state a claim against his or her employer for a hostile work environment created by a subordinate employee if the employer knew or should have known of the hostile acts. *Id.* The syllabus point Pajak cites throughout her brief simply recites the statute that prohibits both employers and persons from engaging in retaliation against an employee who expresses opposition to a discriminatory practice. *See* W. Va. Code § 5-11-9(7)(C). The syllabus point actually supports Under Armour's position because it makes clear that a plaintiff-employee's covered employer *or other* person may be liable for retaliation under the Act. The language used in the syllabus point distinguishes between a defendant-employer and *another* person who is not the employer of the plaintiff-employee. In other words, a defendant-employer must satisfy the definition of "employer" under the Act if it is to be subject to liability, but if the defendant-employer does not satisfy the definition, only *another* person outside of the employment relationship may be liable for aiding and abetting discrimination.

Neither is the *Michael* case nor the *Conrad* case helpful to Pajak's position. A corporation may be liable under the WVHRA as a "person," but no case holds that such a

[8] The Court quotes the definition of "employer" in the opinion, so it may be presumed that there was no dispute the defendant-employer satisfied the numerosity requirement for employers covered by the Act. *See Hanlon v. Chambers*, 195 W. Va. 99, 107 n.6, 464 S.E.2d 741, 749 n.6 (1995).

corporation can be the same employer that does not satisfy the WVHRA's definition of "employer." Holding otherwise would render the statutory definition of "employer" meaningless. Rather, a corporation may be liable when, for example, a tortfeasor's insurance carrier discriminated against plaintiffs residing in public housing based on their race. *See Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 701 S.E.2d 116 (2010). In *Michael*, this Court answered a certified question regarding whether a plaintiff has a cause of action against a tortfeasor's insurance carrier pursuant to the WVHRA based on discrimination in the settlement of a property damage claim. *Id.* The Court answered the question in the affirmative based on the plain language of the definition of "person" in W. Va. Code § 5-11-3(a). *Id.* The case, though, did not involve an employment relationship, and the Court did not hold that a defendant-employer that does not employ at least twelve persons within the state can be liable under the WVHRA as a "person." No employer was even a party to the action, and this was notable in the opinion. *Id.* at 123-24 ("In the context presented in this case, the insurance company is not functioning as an employer . . . . Thus, [§5-11-9(7)] is applicable to an insurance company only if the insurance company falls within the meaning of the term 'person.'").

In *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996), the plaintiff sued his employer, ARA Szabo, for violations of the WVHRA. ARA Szabo provided food services to the Jail Authority where plaintiff worked. The plaintiff also sued the Jail Authority and an individual corrections officer employed by the Jail Authority for violations of the WVHRA. It was undisputed that the Jail Authority was not plaintiff's employer. The circuit court dismissed both the Jail Authority and the individual defendant from the suit. On appeal, the court reversed, holding that the individual defendant was subject to liability as a "person" under § 5-11-9(7) and that the Jail Authority was subject to liability as an "employer" under § 5-11-9(1) because, although it was

not the plaintiff-employee's employer, it satisfied the definition of "employer" under the Act because it is "part of 'the state.'" *Id.* at 816; *see also* W. Va. Code § 5-11-3(d) ("employer" means "the state").

The Court in *Conrad* held that the individual defendant was subject to liability as a "person" under § 5-11-9(7), but it did not hold that the Jail Authority was subject to liability as a "person." The case stands only for the proposition that an employer may be subject to liability under the WVHRA as an "employer" if it satisfies the definition of "employer" *and* obstructs a plaintiff-employee's employment opportunities, even if the entity does not have an employment relationship with the plaintiff-employee. *Id.* at 816. The holding does not address liability under the Act of a small employer exempt from the Act and is thus not applicable to the question before this Court.

Finally, Pajak's reliance on Justice Walker's opinion in *State ex rel. Grant County Commission v. Nelson*, 244 W. Va. 649, 866 S.E.2d 608 (2021), is not helpful to her cause. In *Nelson*, the plaintiff-employee sued the county commission over her termination from Grant Memorial Hospital. The commission owned the hospital that employed the plaintiff. The circuit court denied the commission's request to dismiss on the basis that it was not plaintiff's employer. This Court disagreed, finding that the commission was not the employer and not a proper defendant under the WVHRA.[9] The majority opinion did not evaluate the WVHRA definitions of "employer" and "person," and there was no analysis of whether the commission could be a "person" under the Act because the majority found that Nelson had waived the issue by not raising it during the appeal. *Id.* at n.4.

[9] Nelson also alleged claims under the Patient Care Act and the Whistle-Blower law that are not relevant to this matter.

Justice Walker, concurring in part and dissenting in part, noted that the complaint alleged that the commission was both a "person" and an "employer" under the WVHRA. *Id.* at 622. Justice Walker disagreed with the majority decision that plaintiff had waived the argument that the commission was a "person" under the Act because the issue was not before the Court in the context of the commission's appeal of the denial of its motion to dismiss. *Id.* at 623. Justice Walker believed the plaintiff should be permitted to proceed with discovery of her claims. *Id.* at 622. As noted by the District Court in its Order of Certification, Justice Walker observed that there "is potential for liability for violations of the Human Rights Act for those not fitting the definition of employer." *Nelson*, 866 S.E.2d at 622. This is true as evidenced by the above-cited cases. Importantly, though, Justice Walker's statement has no bearing on whether an employer, expressly exempt from the Act because it employed fewer than twelve persons within the state, should be treated as a person on an alternative basis. Moreover, Justice Walker's opinion rested largely on the premise that the plaintiff-employee alleged in her complaint that the commission was both a "person" and an "employer" for purposes of the Act.[10] In contrast, Pajak's Complaint does not allege that Under Armour is a "person" under the WVHRA. Rather, Pajak asserts liability under the WVRHA based upon her "employment relationship" with Under Armour, which allegedly involved a hostile work environment, a pretextual performance improvement plan, and retaliatory discharge from employment. J.A. at 064-66. Moreover, Pajak's Amended Complaint simply reiterates these allegations despite the fact that she was permitted to engage in discovery regarding these issues. J.A. at 256-57.

Although Justice Walker noted that entities other than "employers" may be liable under the WVHRA, she qualified her observation: "This is not to suggest that the term 'person' is

[10] Justice Walker held that the plaintiff-employee should be permitted to proceed with discovery on her claims, not that she would ultimately be successful in holding the commission liable as a "person."

all encompassing. . . ." *Nelson*, 866 S.E.2d at 623. Accordingly, Justice Walker's statement is not as sweeping as Pajak argues. Likewise, Justice Wooton in a concurring opinion made this same qualification. "The . . . view that 'person' necessarily means anyone who does not otherwise qualify as one of the other designations under the Human Rights Act was expressly rejected by this Court in *Kalany*. . . ." *Id.* at 620 n.1 (citing *Kalany*, 640 S.E.2d at 120 n.13). Justice Wooton's concurrence establishes that the holding in *Kalany* applies with full force to this case. This Court already held in *Kalany* that an employer exempt from coverage under the WVHRA is not subject to liability as a "person" under § 5-11-9(7).

In short, this Court has consistently held that employers with fewer than twelve persons within the state are exempt from liability under the WVHRA. It has never held that such employers can be liable under § 5-11-9(7) as "persons," and rightly so. To hold otherwise would ignore the clear will of the Legislature and render inclusion of the term "employer" in § 5-11-9(7) meaningless. *See Banker v. Banker*, 196 W. Va. 535, 546–47, 474 S.E.2d 465, 476–77 (1996) (Noting that courts are not to add to statutes things that were purposely omitted, "[j]ust as courts are not to eliminate through judicial interpretation words that were purposely included. . . .") (citations omitted). Pajak asks this Court to disregard the definition of employer and expand the scope of the Act further than this Court has ever been willing to extend it before. She goes too far. The Legislature's intent to exempt small employers from liability under the WVHRA is clear, and this Court has fashioned an alternative avenue of relief under common law for employees alleging retaliatory acts by exempt employers. *See* Syl. Pt. 8, *Williamson*, 490 S.E.2d 23.

C. Other state laws prohibiting employment discrimination by all "persons" are not analogous to the more narrow Section 5-11-9(7) that distinguishes between "persons" and "employers" in retaliation claims.

In her brief, Pajak asks the Court to adopt the reasoning of courts in other jurisdictions that hold an employer not meeting the statutory definition of "employer" can nonetheless be subject to liability for retaliation under employment discrimination statutes. Pajak cites three state court decisions from Illinois, Tennessee, and Kentucky and argues those state courts have held under similar anti-discrimination statutes that an organization may be subject to liability for retaliation as a "person" even where that entity does not meet the laws' definitions of "employer." The statutes cited in those cases, however, are distinguishable from the WVHRA in that they do not make separate references to "person" and "employer" under the relevant anti-retaliation provisions.

Pajak first cites *Dana Tank Container, Inc. v. Human Rights Commission*, 292 Ill. App. 3d 1022, 687 N.E.2d 102 (1997), which involved the Illinois Human Rights Act ("IHRA"). The IHRA contains a discrimination provision applicable to employers. 775 ILCS 5/2-102(A). "Employer," at the time of the *Dana* decision,[11] was defined as "[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[.]" 775 ILCS 5/2-101(B)(1)(a) (1992). The IHRA also contains a retaliation provision, which provides that "[i]t is a civil rights violation for a *person*" to retaliate against another "*person*" for opposing a practice declared discriminatory under the Act. 775 ILCS 5/6-101(A) (emphasis added).

[11] The current version of the statute defines an "employer" as "[a]ny person employing one or more employees within Illinois . . . ." 775 ILCS 5/2-101(B)(1)(a) (2021).

Notably, unlike the WVHRA, the Illinois retaliation provision does not make separate references to "person" and "employer." Thus, it was appropriate for the *Dana* court to broadly interpret the word "person" to include employer, regardless of whether it also met the definition of "employer" under the discrimination statute. Under the WVHRA's retaliation provision, however, "person" and "employer" are referenced separately, evidencing a clear intent to distinguish an employer not meeting the Act's definition of "employer" and another person. *See* W. Va. Code § 5-11-9(7). Had the Legislature intended the term "person" to encompass all employers regardless of size, the separate reference to the term "employer" in the statute would be meaningless.

Next, Pajak cites *Emerson v. Oak Ridge Research, Inc.*, 187 S.W.3d 364 (Tenn. Ct. App. 2005), *overruled on other grounds by Haynes v. Formac Stables, Inc.*, 463 S.W.3d 34 (Tenn. 2015), where a Tennessee appellate court considered the same question under the Tennessee Human Rights Act ("THRA"). The THRA, similar to the IHRA, has separate employment discrimination and general retaliation and discrimination provisions. *See* Tenn. Code §§ 4-21-301, 4-21-401. The employment discrimination provision applies to "employers" or "persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indirectly[.]" Tenn. Code §§ 4-21-401, 4-21-102(5). The general retaliation and discrimination provision applies only to "persons." Tenn. Code §§ 4-21-301, 4-21-102(14). Again, this statutory scheme is not analogous to the WVHRA, which provides that a "person" *or* an "employer" can be liable for engaging in retaliatory acts. W. Va. Code § 5-11-9(7).

Last, Pajak cites *Smith v. Lewis*, No. 2018-CA-000180, 2019 WL 2896018 (Ky. Ct. App. July 5, 2019), *review denied* (Dec. 13, 2019) (unpublished decision), which addressed the scope of the Kentucky Civil Rights Act ("KCRA"). Like the IHRA and THRA, the KCRA's

employment discrimination statute, found at KRS § 344.040, applies to any "employer," meaning "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 . . . ." KRS 344.030(2). The general retaliation and discrimination statute of the KCRA applies only to "persons." KRS § 344.280.

In contrast to Indiana, Tennessee and Kentucky, the West Virginia Legislature has expressed its intent to prohibit retaliation by any "employer" – defined as one employing fewer than twelve persons within the state – *or another* "person." W. Va. Code § 5-11-9(7); Syl. Pt. 11, *Hanlon*, 464 S.E.2d 741. New Hampshire's interpretation of its Human Rights Act is more instructive here. In *U.S. Equal Employment Opportunity Commission v. Fred Fuller Oil Co., Inc.*, 168 N.H. 606, 611, 134 A.3d 17, 21 (2016), the Supreme Court of New Hampshire analyzed the state's various discrimination statutes, which are structured similar to the WVHRA. First, the court summarized the employer discrimination statute, which prohibits discriminatory practices by any covered employer - an employer that employs six or more persons. RSA § 354–A:7; RSA § 354-A:2, VII. Next, the court considered who may be liable under the aiding and abetting provision of the statute: "Under RSA 354–A:2, XV(d), '[u]nlawful discriminatory practice' also includes "[a]iding, abetting, inciting, compelling or coercing another or attempting to aid, abet, incite, compel or coerce another to commit an unlawful discriminatory practice or obstructing or preventing any person from complying with this chapter or any order issued under the authority of this chapter." The court reasoned that because "employers" with fewer than six employees are exempt from liability under the chapter, "[i]t follows [] that an individual employee of an 'employer' with fewer than six employees would not have committed an unlawful discriminatory practice under RSA 354–A:2, XV(d)." *Id.* at 611–12.

Finally, the court considered the retaliation statute, which provides:

> 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.

RSA § 354–A:19. Despite the broad definition of "person" and the exclusion of the term "employer" in the retaliation provision, the court concluded that, like the aiding and abetting provision, the retaliation provision can only impose individual liability on employees who work for covered employers within the meaning of the Act:

> 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*, 149 N.H. 336, 341, 821 A.2d 953 (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* W.Va. Code 5-11-9(7)(C). 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.

Id. at 613.

The WVHRA is unique compared with the state laws referenced in Pajak's brief. The West Virginia Legislature expressed its intent that employers with fewer than twelve employees within the state be exempt from liability under the Act. It expressed the same intent when it included the term "employer" in the list of potential defendants under § 5-11-9(7). The retaliation provision in the WVHRA is not akin to the state laws cited in Pajak's brief, and the will of the West Virginia Legislature should not be disturbed.

D. Under Armour is not an employer covered by the WVHRA because it employs fewer than twelve persons working within the State of West Virginia.

1. For purposes of the WVHRA, an "employer" is one that employs at least twelve persons who work within the State of West Virginia.

Finally, Pajak argues that the Court need not address the question certified by the District Court because it is not determinative of the case. Specifically, she argues that Under Armour satisfies the Act's definition of "employer" because it employs at least twelve persons who *live* in West Virginia, even though they *work* in another state. Pajak made this same argument early in the litigation and in her briefing opposing Under Armour's Motion to Certify Legal Question. J.A. 284. The District Court disagreed, ruling that the WVHRA's definition of employer in § 5-11-3(d) is unambiguous and requires that an employer employ at least twelve persons who work within the State of West Virginia. J.A. at 498. As affirmed by the District Court, "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." J.A. at 501.

The law is clear that only employers who employ at least twelve persons within West Virginia are "employers" for purposes of the WVHRA. *See Williamson*, 490 S.E.2d 23. The question, then, is whether the WVHRA requires an employer to employ persons who actually **work** within the state. It clearly does. The language of §5-11-3(d) unambiguously provides that liability under the WVHRA applies only to employers who *employ* at least twelve persons *within* West Virginia. In arguing that an employer satisfies the statutory definition of "employer" if at least twelve of its employees *live* in West Virginia, even though they do not work in West Virginia, Plaintiff would have the Court focus only on the phrase, "within the state." W. Va. Code § 5-11-3(d). This, however, requires the Court to ignore the word "employs" as it relates to the phrase,

"within the state." *Id.* Although Pajak wholly ignores the term in making her argument, an employer cannot "employ" persons "within" West Virginia if they do not work in West Virginia.

Failing to give meaning to the term "employing" violates the principles of statutory construction. *See Banker*, 474 S.E.2d at 476–77 (Courts are not to add to statutes things that were purposely omitted, "[j]ust as courts are not to eliminate through judicial interpretation words that were purposely included. . . .") (citations omitted). Ignoring the term also flouts plain and ordinary vocabulary. Simply, an employer cannot "employ" persons in West Virginia if they do not work in West Virginia.

Black's Law Dictionary defines "employ" as follows:

> **employ** *vb.* (15c) **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.

Black's Law Dictionary (11th ed. 2019), *available at* Westlaw; *see also* J.A. at 501. If one substitutes these definitions for the word "employ" as set forth in the WVHRA, it is clear that only employers who employ persons *working* within the state are subject to liability under the Act. Under Armour is an employer for purposes of the WVHRA only if it: "make[s] use of" twelve persons within the state; "hire[s]" twelve persons within the state; "use[s] as an agent or substitute in transacting business" twelve persons within the state; or "commission[s] or entrust[s] with the performance of certain acts or functions or with the management of one's affairs" twelve persons within the state. *Id.* Employees working in a state outside West Virginia are not of use to their employer within West Virginia, are not hired within West Virginia, are not used as agents within West Virginia, and are not entrusted to perform functions within West Virginia. It cannot be disputed, then, that employers do not "employ" twelve or more persons "within the state" if those persons are working outside the State of West Virginia.

The definition of "employer" found in the WVHRA is unambiguous. "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." Syl. Pt. 3, *Williamson*, 490 S.E.2d 23 (internal citations omitted). To the extent, however, the Court believes the definition is ambiguous, the Court should look to the interpretation of the statute afforded by the agency charged with carrying out the law. *See generally Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). "Under what is known as the *Chevron* doctrine, statutory ambiguities are to be resolved, within the bounds of reasonable interpretation, not by courts but by the administering agency." 2 Am. Jur. 2d Administrative Law § 470; *see also West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 472 S.E.2d 411 (1996).

"Legislative power may be constitutionally delegated to an administrative agency to promulgate rules and regulations necessary and proper for the enforcement of a statute." Syl. Pt. 3, *State ex rel. Callaghan v. West Virginia Civil Serv. Comm'n*, 166 W. Va. 117, 273 S.E.2d 72 (1980) (citing W. Va. Const. art. VI, § 1; art. V, § 1). The only legislative rule on point instructs that an "employer" is one who *employs* twelve or more persons within West Virginia. *See* W. Va. CSR § 77-7-2.1.[12] The Human Rights Commission is charged with carrying out the directives set forth in the pronounced policies of the WVHRA. *See* W. Va. Code § 5-11-4 ("The commission shall have the power and authority and shall perform the functions and services as in this article prescribed and as otherwise provided by law."). The Commission is empowered "[t]o do all other

[12] Pajak's reliance on W. Va. CSR § 77-7-2.2 in support of her argument is entirely misplaced. Section 77-7-2.2 provides additional guidance for calculating the number of employees "employ[ed]" by the employer "within the state" as set forth in § 77-7-2.1. It does not stand independently of § 77-7-2.1 and does not revise the definition of "employer" as set forth in that section.

acts and deeds necessary and proper to carry out and accomplish effectively the objects, functions and services contemplated by the provisions of this article. . . ." W. Va. Code § 5-11-8(h).

The Commission has specifically addressed the issue raised in Pajak's brief. The Commission interprets the WVHRA to permit employees to sue their employers only if such employees *work* within the State of West Virginia. In the Human Rights Commission's Guide to Frequently Asked Questions In Discrimination, the issue is squarely addressed:

> **30. I live in West Virginia, but work in another state. Can I file an employment discrimination complaint with the HRC?**
>
> No. The HRC can only investigate complaints of discrimination which occur in West Virginia. If discrimination occurs in another state, you should file with that state's agency which investigates unlawful discrimination.

West Virginia Human Rights Commission, *Your Guide to Frequently Asked Questions in Discrimination*, http://hrc.wv.gov/SiteCollectionDocuments/FAQ%20GUIDE%20PUBLISHER%20VERSION%20%20REVISED%203-12-2012.pdf (last accessed December 23, 2021).

The Commission clearly has stated that employees who work outside the State of West Virginia are not protected by the state's Human Rights Act. "If the ambiguity or gap remains after examining the legislative rules, the final question for this Court to address is whether it is appropriate to look to other sources. . . ." *Boone Mem'l Hosp.*, 472 S.E.2d at 418. The source cited above and adopted by the agency charged with carrying out the purposes of the WVHRA is dispositive of the issue. The Commission's interpretation of the exact issue presented for certification should be afforded deference by the Court.

Based on a plain reading of the WVHRA's definition of "employer," Under Armour cannot be liable under the WVHRA because it did not employ at least twelve persons within the

State of West Virginia at the time the alleged discriminatory acts took place. The certified question presented to this Court is thus dispositive of Count 2 of the Amended Complaint.

2. The Under Armour entities have never been distinguished in this case, and there is no authority for treating Under Armour, Inc. as a "person" under Section 5-11-9(7).

Pajak makes a similar argument that the question certified is not dispositive of the case when she suggests that, even if the Court agrees that Under Armour cannot be liable under the Act as a "person," Under Armour, Inc. alone may be liable as a "person" under § 5-11-9(7) because it was not her employer.[13] *See* Petitioner's Brief at n.9. The entirety of Pajak's argument is set forth in footnote 9 of her brief with no citation to the record or to applicable law: "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)." *Id.* Pajak fails to cite to the record or any law in support of this assertion, and her characterization is inaccurate. Regardless, her argument has no merit when she has consistently alleged throughout the litigation, including in her brief to this Court, that both Under Armour entities served as her employer and that her lawsuit is predicated upon the "employment relationship" that she had with both entities. J.A. at 358. The plain language of the WVHRA exempts both Under Armour entities from coverage under the Act, and Pajak's relief, if any, must come from common law.

[13] Under Armour raised this issue as one that may require certification at the March 4, 2021, hearing regarding the Motion to Certify. J.A. at 389. Under Armour again requested that the question be certified to this Court in its Proposed Certified Questions in Response to Court's March 5, 2021 Memorandum Order and Opinion. J.A. at 399. Because Under Armour does not know what Pajak's factual or legal argument is in support of her assertion that Under Armour, Inc. is subject to liability as a "person" under the Act, it is constrained from responding fully to the same at this time. Under Armour acknowledges, however, that the question should ultimately be answered by this Court.

Pajak has never distinguished among the two Under Armour defendants. In her Amended Complaint, Pajak refers to the two Under Armour entities collectively. J.A. at 357 ¶ 2.b ("UA and UA Retail are collectively referred to as 'Under Armour.'"). She does the same in her brief to this Court. *See* Petitioner's Brief at 1. The Amended Complaint does not identify either Under Armour entity as an "employer" or a "person" for purposes of the WVHRA. Instead, all allegations in the Amended Complaint refer to Pajak's "employment relationship" with Under Armour collectively.[14] J.A. at 358, ¶ 4. Certainly, nowhere does Pajak allege that only one of the entities employed her.[15]

To the contrary, Pajak alleges all Defendants with whom she had an "employment relationship" placed her on a performance improvement plan and subsequently discharged her. J.A. at 372 ¶62. Pajak's unsupported assertion that Under Armour, Inc. was not her employer is further belied by the allegation that she "was hired by Under Armour, Inc., in November 2012." J.A. at 359 ¶ 8. In short, there is no allegation in any pleading – nor any evidence in the Joint Appendix – that Under Armour, Inc. acted as anything other than Pajak's employer. The same is true regarding Pajak's brief filed with this Court with the exception of the bald assertion contained in footnote 9. The footnote claiming that only one entity employed Ms. Pajak contains no citation to the record and is not accurate. It should be disregarded. *See* W. Va. R. App. P. 10(c)(7) ("The Court may disregard errors that are not adequately supported by specific references to the record on appeal.").

[14] Pajak has emphasized the "employment relationship" she had with all defendants throughout the litigation. J.A. at 66, 110, 285, 298, 358, 391, 426.

[15] This is especially telling because the Amended Complaint was not filed until March 8, 2021, well after all discovery regarding these issues was complete. J.A. at 356.

Neither does the law support Pajak's assertion that Under Armour, Inc. can be liable under the Act as a "person." Regardless of whether Pajak's theory is that Under Armour, Inc. is a corporate affiliate or joint employer of Under Armour Retail, Inc. – neither of which is apparent from her briefing – the Act makes clear that a plaintiff-employee has a statutory cause of action under the Act for employment discrimination or retaliation against only covered employers. Any contrary holding would defeat the purpose of the exemption for small employers found in § 5-11-3(d). It would be absurd for the Legislature to exempt small employers from liability under the Act on the one hand and permit the same cause of action against a related entity that likewise does not satisfy the definition of "employer" on the other. The statutory intent to exempt small employers from the Act for alleged discriminatory or retaliatory acts is clear, and this Court's holdings as cited herein further such intent.

Whether a corporate affiliate or joint employer of an exempt employer is subject to liability as a "person" has not been directly answered by this Court.[16] A district court judge, however, recently cast doubt on the possibility noting that, "While [§ 5-11-9(7)] has been used to hold co-employees liable for aiding and abetting discriminatory acts, . . . it is debatable whether it can be used to hold a joint *employer* liable." *Billiter v. Jones*, No. 3:19-CV-0288, 2020 WL 5646901, at *4 (S.D.W. Va. Sept. 22, 2020) (J. Chambers) (citing *Holstein*, 461 S.E.2d at 732 (1995)). The district court's skepticism of such a possibility is well-founded. A corporate affiliate

[16] This Court has never held an otherwise exempt entity with an employment relationship with the plaintiff-employee liable under the Act as a "person." The Court considered whether an employer who was not the complaining employee's employer, or otherwise affiliated with the employer, was subject to liability under the Act in *Conrad v. ARA Szabo*, 198 W. Va. 362, 480 S.E.2d 801 (1996). The employer in that case satisfied the definition of "employer" because it was "part of the state." *See id.*; *see also* W. Va. Code § 5-11-3(d) ("employer" includes "the state"). This Court did not address in *Conrad* whether an employer with no employment relationship to the plaintiff-employee was subject to liability under the Act as a "person." In *Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 701 S.E.2d 116 (2010), the Court held that a tortfeasor's insurer can be liable under the Act as a "person." This holding was not made in the employment context.

(Under Armour, Inc.) of a non-covered entity (Under Armour Retail, Inc.) cannot be held liable under the Act when both entities have an employment relationship with the plaintiff-employee. The certified question applies equally to both Under Armour entities, and the alternative theory posed by Ms. Pajak in footnote 9 of her brief should be rejected.

V. CONCLUSION

The law is clear. The West Virginia Legislature made plain in § 5-11-3(d) that employers employing fewer than twelve persons within the state are exempt from liability under the WVHRA. The definition applies wherever the term "employer" appears throughout the article, including in § 5-11-9(7) which distinguishes between "employers" and other "persons." This Court has repeatedly upheld the Legislature's intent to exempt small employers from liability under the Act and has fashioned a common law remedy for plaintiffs alleging discrimination by such exempt employers. That is the appropriate avenue of relief for Pajak.

Respectfully submitted this 23rd day of December, 2021.

UNDER ARMOUR, INC. and
UNDER ARMOUR RETAIL, INC.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0484

CYNTHIA D. PAJAK

Petitioner,

v.

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

Respondents.

CERTIFICATE OF SERVICE

I, Justin E. Harrison, hereby certify that true and correct copies of the foregoing ***Response Brief of Respondents Under Armour, Inc. and Under Armour Retail, Inc.*** were served upon the following by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows, on this the 23rd day of December, 2021:

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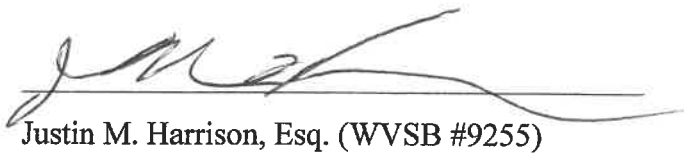

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