Case No. 23-ICA-118

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MELISSA K. BOND
Petitioner and Plaintiff Below,
v.
UNITED PHYSICIANS CARE, INC.
DBA SALEM FAMILY HEALTHCARE
Respondent and Defendant Below.

Civil Action No. 22-C-176
In the Circuit Court of Harrison County, West Virginia
(The Honorable Christopher McCarthy, Judge)

BRIEF OF PETITIONER MELISSA K. BOND

Erika Klie Kolenich, Esq. (9880)
Klie Law Offices, P.L.L.C.
21 E. Main Street, Suite 160
Buckhannon, West Virginia 26201
(304) 472-5007
ehklie@klielawoffices.com

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ASSIGNMENT OF ERROR

Assignment of Error 1: The Court erred by considering facts outside of the Complaint. During the hearing on the Motion to Dismiss, the Court questioned Defendant on its process in determining medical exemptions from getting the COVID-19 vaccination. In doing so, the Court obtained facts to consider that were not pled in the Complaint. At the Motion to Dismiss stage the Court can only look to the facts pled in the complaint in a light most favorable to the Plaintiff.

Assignment of Error 2: The Court erred by interpreting the COVID-19 Jobs Protection Act as prohibiting even disability discrimination and failure to accommodate claims arising from a termination from employment because a disabled individual was not able to get the COVID-19 vaccination due to her disability. In doing so, the Court ignored the stated purpose of the act which was merely to "provide assurances to businesses that reopening will not expose them to liability for a person's exposure to Covid-19."

Assignment of Error 3: The Court erred by not finding that the present case falls within an exception to the COVID-19 Jobs Protection Act. Specifically, the Court did not consider whether Plaintiff pled that Defendant acted intentionally with malice which would have excluded Defendant from and COVID-19 Jobs Protection Act.

STATEMENT OF THE CASE

This appeal is based upon a Circuit Court improperly granting a Motion to Dismiss. In her Complaint filed September 19, 2022, Petitioner pled claims for Disability Discrimination and Failure to Accommodate. (Appx. 003-5 & 077). The Complaint contained the following:

Petitioner was hired by Respondent on June 27, 2016, and had never had problems performing her job duties in a satisfactory manner. (Appx. 001-2). She never committed a

dischargeable offense. (Appx. 002). In 2021, Respondent implemented a policy, the COVID-19 Vaccination Program Policy, which required employees to provide proof of their COVID-19 vaccination or have an exemption granted by March 15, 2022. *Id*. Petitioner provided Respondent with the required medical exemption form as filled out by her doctor because she had reactions to vaccines in the past. *Id*. Petitioner received a letter from Respondent denying her medical exemption request. *Id*. Petitioner submitted an appeal request form also signed by her doctor. *Id*. She was notified that her appeal was denied by Respondent. *Id*. Within a month of being notified of this denial and five days before the deadline for Petitioner to either get an exemption or get the vaccine, Respondent posted a job listing for what appeared to be Petitioner's position. *Id*.

The day after the March 15, 2022, deadline, Petitioner received counseling on her failure to comply with the vaccination policy. (Appx. 003). Her "Final Written Warning" came on March 23, 2022, and she was terminated on March 29, 2022. *Id*. Said termination was based on Petitioner's disability. *Id*. Petitioner's disability was the medical condition she had relating to vaccinations which caused her to suffer from adverse reactions which have led to hospitalization at times and impacted her ability to work and perform other life activities. *Id*. Respondent knew of this disability because Petitioner provided Respondent with medical documentation. *Id*. Instead of terminating Petitioner, Respondent should have granted the accommodations that Petitioner requested and provided medical documentation for. (Appx. 004). Said accommodations include but are not limited to being given a medical exemption from the COVID-19 Vaccination Program Policy. *Id*.

The acts and omissions described in the Complaint caused Petitioner to "suffer injuries, damages and losses, including but not limited to: back pay, front pay, emotional distress, anxiety,

fear, embarrassment, humiliation, financial hardship, and attorney fees." (Appx. 005). "All of the acts of [Respondent] and its agents, servants, and employees, as alleged in each count of this Complaint were willful, wanton, and malicious and/or reckless and/or in reckless disregard for the civil rights of [Petitioner]." *Id*. Punitive damages were also appropriate. (Appx. 006).

Respondent filed a Motion to Dismiss and Supporting Memorandum of Law on October 31, 2022, arguing that Respondent was immune from suit under the COVID-19 Jobs Protection Act. (Appx. 009 & 077). On November 11, 2022, Petitioner filed a memorandum in opposition to this motion and argued that the Covid-19 Jobs Protection Act was not meant to protect against the present matter. (Appx. 023-27 & 077). Defendant filed a reply on December 12, 2023, and argued the there was no explicit carve-out for the present matter and that Plaintiff did not specifically plead any exception to the COVID-19 Jobs Protection Act. (Appx. 029-35).

Parties were heard, through counsel, on the issues during a December 19, 2023, hearing. Respondent was heard first as it made the Motion to Dismiss. During its argument, Respondent went outside the bounds of the Complaint. For example, Respondent stated,

> As per [Respondent's] policy, [Petitioner's] request was denied…
>
> [Petitioner] was separated from employment. And they view it as a voluntary separation, rather than a termination…
>
> the medical panel that we have follows the contraindication for the actual vaccines, and there's three of them available. and if you don't meet those them you don't get a medical exemption…
>
> It's in our policy actually, and it's on the form that she completed. Exemptions to the COVID-19 vaccine employee mandate are, number one, severe allergic reaction, anaphylaxis, after a previous dose or to a component of the COVID-19 vaccine. So, in other words, if you take the first dose and you have a bad anaphylactic reaction we will give you an exemption. Number 2, immediate allergic reaction of any severity to a previous dose or known diagnosed allergy to a component of the vaccine, either polyethylene glycol or the Pfizer, Moderna vaccines, or polysorbate for the J&J vaccine. An immediate allergic reaction is defined as any hypersensitivity related signs or symptoms such as urticaria,

> angioedema, respiratory distress or anaphylaxis that occur within four hours following administration. And then the third is myocarditis or pericarditis after the first does of a mRNA COVID vaccine, which is a the Pfizer or Moderna. So, those are the only three, and those are by the vaccine manufacturer, they are listed as contraindications…
>
> it was a fear that because she had an adverse reaction to a different vaccine, I believe it was that she would have a bad reaction to this, yes. And she had a doctors note from her primary care physician that was submitted with it. They reviewed that, our panel of experts, who are – they're from various disciplines, there's pharmacology, and there's one from, I can tell you actually all of their specialties…
>
> it's ' form that the employee completes. They attach a letter from their physician if they have one, or the physician can complete the form. That's submitted to the employee health department for the system, and a decision is made based on the initial criteria of do you meet the contraindications. If you don't it's sent back. The employee then has an opportunity to appeal, provide additional information if they care to. It's all done on paper, through paper submissions. I believe in some cases if there was some ambiguity in what the physician submitted to our panel they would call the physician and ask to clarify, but there's no interview or, you know, hearing, or anything like that other than the paperwork.

(Appx. 059, 065-066, & 072).

The Court below encouraged this type of factual argument which included facts not pled in the Complaint because it asked multiple questions throughout the argument regarding the specifics of Respondent's policy and how it was effectuated in this case. *Id*. Some of the facts revealed as a result of this questioning were facts that Petitioner was learning in real time as no discovery had commenced. For example, the Court asked the following questions about the process Respondent used to decide on whether to accommodate Plaintiff and the details inquired about were not in the Complaint.

> Well, did that letter from the primary care physician, that's one of the things I was kind of thinking about a little bit when I was reading the filings, did he rely on a specific part of the makeup of the vaccine or was there anything that specifically that he relied upon in preparing that letter?
>
> What's the process like? What process did she go through? Did she appear before anybody as part of that, or was it just strictly on paper, or how does that work?

(Appx. 066-67 & 071-72).

Respondent also argued that Petitioner's claims were based on an application of a COVID related policy, so the COVID-19 Jobs Protection Act must apply. (Appx. 061). Respondent felt that the claims could not fall under any exception. *Id*. It argued that Petitioner did not plead actual malice and instead pled "garden-variety discrimination." *Id*. Respondent argued that the only specific carve-out was for deliberate intent claims and that this carve-out shows that the legislature could have created a carve-out for Human Rights Act Claims such as are present here. (Appx. 062). Respondent took leaps to argue that the legislature must have intentionally chosen not to make a carve-out for Human Rights Act Claims because it had intentionally chosen to make a carve-out for deliberate intent claims. (Appx. 063). Respondent additionally argued, only when first quizzed by the lower Court, that Petitioner does not have a disability because her allergy was not a "disease that is a contraindication of that vaccine." (Appx. 064). Respondent characterized Petitioner's allergy as merely "an underlying condition that makes [her] fearful." (Appx. 065).

Petitioner argued that the issue here is not a COVID-19 related policy but a policy on granting accommodations to disabled employees which has nothing to do with minimizing the spread of COVID-19. (Appx. 070). Petitioner argued that the COVID-19 Jobs Protection Act was not promulgated to provide protections for employers not accommodating the disabled. *Id*. Instead, the statute lays out that its purpose is to protect against the liability for those who get sick from COVID. *Id*. Petitioner argued that Respondent's intent and Petitioner's disability could only be found through discovery because, as was pled in the Complaint, Petitioner's own doctor provided documentation that Petitioner was at serious medical risk of a reaction if she got the

required COVID vaccine, yet Respondent provided her no outlet other than get the vaccine or be fired. (Appx. 071).

After the hearing, though counsel, parties submitted proposed findings of fact and conclusions of law for the lower Court's review echoing their respective arguments. (Appx. 037-49). The Court below then entered Respondent's proposed findings and conclusions which focused only on two words in the COVID-19 Jobs Protection Act to find that Respondent was immune from Petitioner's suit because of two words that the Court focused on from the Act. (Appx. 050-56). The Court did not consider the rest of the Act. *Id*. Petitioner timely appealed and now perfects her appeal.

SUMMARY OF ARGUMENT

Petitioner appeals after her Disability Discrimination and Failure to Accommodate claims were erroneously dismissed below. Petitioner had sufficiently pled all elements of her claims. However, Respondent attacked her claims on the basis that the COVID-19 Jobs Protection Act provided certain immunities to hospitals. Specifically, Respondent argued that it was immune from Petitioner's employment claims because they arose when Respondent failed to provide Petitioner an exemption from getting the COVID-19 vaccine even though she had a history of allergic reactions to vaccines. The lower Court agreed with Respondent.

In ordering that the claims be dismissed, the lower Court erred in three ways. First, the lower Court erroneously considered facts outside the Complaint. Motions to Dismiss are to be rarely granted and only granted when the plaintiff has not pled facts to even imply that the elements of her claim could be met. Here, Petitioner was the plaintiff below and pled the necessary facts. However, the lower Court allowed and encouraged discussion of facts outside

the Complaint. The facts were also unrelated to the elements of the claims in the complaint. Thus, the lower Court erred in considering unnecessary facts outside the Complaint.

Second, the lower Court failed to properly interpret the COVID-19 Jobs Protection Act's intent. The lower Court concluded that the COVID-19 Jobs Protection Act was to bar all claims. This is not true. The Act did not contemplate barring suits where the harm was not a COVID-19 infection which is evident based on the language used in the Act. The harm here is discrimination, failure to accommodate, and, ultimately, termination. The legislature therefore did not intend for disabled employees being discriminated against, such as Petitioner, not to have any avenue of redress.

Third, even if the lower Court was correct in finding that the COVID-19 Jobs Protection Act applied to claims such as in this case, the Circuit Court failed in finding that the case did not fall within the malice exception. The Act does not bar claims that arise from actual malice. Here, Petitioner pled facts that suggested Respondent acted with actual malice. Respondent knew that it was asking Petitioner to risk her health or lose her job. Even with this knowledge, Respondent refused to provide an accommodation and terminated Petitioner instead. Petitioner even pled that Respondent acted with "willful, wanton, and malicious and/or reckless and/or in reckless disregard for the civil rights of [Petitioner]." These pleadings should have been enough to allow this case to survive the Motion to Dismiss, so parties could better determine the issue of malice through discovery.

Regardless of what Respondent may argue, these errors have harmed Petitioner. Petitioner anticipates that Respondent will argue that this appeal is moot because the case could not have proceeded without Petitioner having a known disability. Respondent argued below that Petitioner does not have a disability. However, this is not true. Petitioner pled facts to support her

having a disability. She pled that she had a history of allergic reactions to vaccines which have resulted in hospitalization. She pled that this medical condition impacted some life activities, such as work. She pled that Respondent was aware of this as she had presented Respondent with doctor's notes. These pleadings were enough to establish that she had a disability for the purposes of surviving the Motion to Dismiss. Because Petitioner pled facts to support that she has a disability, the Circuit Court's errors were not harmless.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under Rule of Appellate Procedure 20 because it involves an issue of public importance. Further, Petitioner is seeking a reversal of the Circuit Court decision and respectfully suggests that the Court would benefit from hearing counsel's oral argument.

ARGUMENT

A. Standard of Review

"In reviewing a circuit court's order granting a motion to dismiss, this Court applies a *de novo* standard of review." *Painter v. Ballard*, 237 W. Va. 502, 506, 788 S.E.2d 30, 34 (2016) (internal citations omitted). The *de novo* standard does not give any deference to the ruling below. *Blake v. Charleston Area Med. Ctr*., 201 W. Va. 469, 475, 498 S.E.2d 41, 47 (1997). The present appeal is based upon the Circuit Court granting Respondent's Motion to Dismiss, so this Court should use the *de novo* standard.

B. The lower Court erred when it improperly prompted and allowed consideration of facts outside the Complaint.

Generally, the Motion to Dismiss below was based on Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Rule 12(b)(6) of the West Virginia Rules of Civil Procedure permits a motion to dismiss to be granted if the ***complaint*** fails to state a claim upon which relief can be

granted. The purpose of a motion to dismiss, under this Rule, is to test the formal sufficiency of the ***complaint***. *Mandolidis v. Elkins Industries, Inc.*, 246 S.E.2d 904, 161 W. Va. 695 (1978) modified on other grounds; *Handley v. Union Carbide Corp.*, 804 F.2d 265 (4th Cir. 1986) (emphasis added).

The plaintiff's burden in resisting a motion to dismiss for failure to state a claim is a relatively light one. *McCormick v. Walmart Stores*, 600 S.E. 2d 576, 215 W. Va. 679 (2004), on remand 2009 WL 8680794. To resist a motion to dismiss, the pleader is only required to set forth sufficient information to outline the elements of a valid legal claim. See *John W. Lodge Distribution Company v. Texaco, Inc.*, 245 S.E.2d 157, 161 W. Va. 603 (1978). For the purposes of the motion to dismiss, the complaint is construed in the light most favorable to the Plaintiff, and its allegations are to be taken as true. See *John W. Lodge Distribution Company*, 161 W. Va. 603 (1978). The Circuit Court, in appraising the sufficiency of a complaint, on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Syl. Pt. 3, *Chapman v. Kane Transfer Company*, 160 W. Va. 530, 236 S. E. 2d 207 (1977) quoting *Conley v. Gibson* 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 80 (1957). A trial Court should not dismiss a complaint merely because it doubts that the plaintiff will prevail; whether the Plaintiff can prevail is a matter properly determined on the basis of proof and not merely on the pleading. *Bowden v. Monroe County Comn*, 750 S. E. 2d 263, 232 W. Va. 47 (2013).

The West Virginia Supreme Court has held that a motion to dismiss for the failure to state a claim should be looked at with disfavor and rarely granted. See, *Mandolidis v. Elkins Industries Inc.*, 246 S.E.2d 907, 161 W. Va. 695 (1978), modified on other grounds; *Handley v. Union Carbide Corp.*, 804 F. 2d 265 (4th Cir. 1986); *Stricklen v. Kittle*, 287 S.E.2d 148, 168 W. Va. 147

(1981). In conclusion, the standard to overcome a motion under subdivision of Rule 12(b)(6) is a liberal standard which few complaints fail to satisfy. *John W. Lodge Distributing Co., Texaco, Inc.*, 245 S.E.2d 157, 161 W. Va. 603 (1978).

In addition to Rule 12, it is important to examine the requirements of Rule 8 of the West Virginia Rules of Civil Procedure. Rule 8(f) provides that "all pleadings shall be so construed as to do substantial justice." The policy of Rule 8(f) is to decide cases upon their merits, and if the complaint states a claim upon which relief can be granted under any legal theory, a motion under Rule 12(b)(6) must be denied. *John W. Lodge Distributing Co.*, 161 W. Va. 603, 245 S.E.2d 157 (1978). The other portion of Rule 8 that is relevant to this issue is Rule 8(a). Rule 8(a) in part provides:

> Rule 8 GENERAL RULES OF PLEADING
>
> (a) Clams for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks.

West Virginia Rules of Civil Procedure, Rule 8(a) (2019).

Rule 8(e)(1) requires that each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required. West Virginia Rules of Civil Procedure, Rule 8(a)(1) (2019). The Supreme Court has interpreted this to require that while entitlement to relief must be shown in the complaint, the Plaintiff is not required to set out facts upon which a claim is based. *State ex rel McGraw v. Scott Runyan Pontiac-Buick Inc*., 461 S.E.2d 516, 194 W. Va. 770 (1995).

Specifically, given the nature of the claims made in the motion to dismiss, it was premature to dismiss this case without a development of the underlying facts. Given that no discovery has been conducted to be able to respond to the pending motion, a substantive ruling

on the merits would be premature. The West Virginia Supreme Court has held that granting summary judgment prior to the completion of adequate discovery is inappropriate. See *Board of Education v. Van Buren and Firestone Architects Inc.*, 267 S. E. 2nd 440, 164 W. VA. 140 (1980); *Elliott v. Schoolcraft*, 576 S.E. 2nd 796, 213 W. Va. 69 (2002). If that is the standard for summary judgment clearly the standard would be applicable to a motion to dismiss.

"Where a court relies on facts not contained in the pleadings in ruling on a motion to dismiss, it effectively converts such motion to a motion for summary judgment." *Riffle v. C.J. Hughes Constr. Co.*, 226 W. Va. 581, 587, 703 S.E.2d 552, 558 (2010). In such cases, the Court must give reasonable opportunity to present all pertinent material. *Id*. the motion for summary judgment also must be served at least ten days before the hearing. *Id*. at 588. "To treat a motion to dismiss as a motion for summary judgment without permitting the adverse party a reasonable opportunity to submit pertinent material is error." *Id*. at 589.

Here, the lower Court flew in the face of these long-standing policies when it spent extensive time discussing alleged facts not stated in the Complaint during the hearing on the Motion to Dismiss. Specifically, the Court prompted and allowed discussion of Respondent's policy on giving accommodations for the COVID vaccination policy and how it was effectuated in this case. This is a particularly egregious topic during a hearing on a Motion to Dismiss for a failure to accommodate case because "the wisdom of the accommodation policy itself is not before the court in disability discrimination cases." *Speaks v. Health Sys. Mgmt.*, 2022 U.S. Dist. LEXIS 146840, *16, 2022 WL 3448649 (U.S. W. Dist. Of N.C. Statesville Div. Aug. 17, 2022). Petitioner here was not able to fully answer questions or counter Respondents factual claims because discovery had not occurred, and Petitioner therefore did not have the necessary information to respond. Admittedly, these facts were not memorialized in the Order Granting

Motion to Dismiss. However, the fact that so much of the hearing below was focused on these outside facts serves as evidence of the Court considering the outside facts in making its decision.

Further, considering facts outside the Complaint converted the Motion to Dismiss to a Motion for Summary Judgment. This was an error because the parties were not given notice or opportunity to discover necessary facts. The parties did not know that they were to prepare to present facts outside the Complaint until the Court began encouraging the presentation of such facts during the hearing which was supposed to be on the Motion to Dismiss. Parties were not given the opportunity to present necessary materials because parties were not permitted to engage in discovery. Because the Circuit Court spent a significant amount of the hearing on the Motion to Dismiss discussing topics outside the Complaint, this Court should find that the lower Court erred in considering facts outside the Complaint and essentially converting the motion to a Motion for Summary Judgment without any notice to the parties or an opportunity to present pertinent information.

C. The lower Court erred in failing to properly interpret the Complaint as it applied to the COVID-19 Jobs Protection Act.

1. The Act was not intended to leave employees with disabilities without redress for discrimination and failures to accommodate.

Courts look to the legislative intent when interpreting statutes. *Cunningham v. Hill*, 226 W. Va. 180, 185, 698 S.E.2d 944, 949 (2010). The COVID-19 Jobs Protection Act ("the Act") was not meant to protect employers from disability discrimination claims such as is pled in this matter.

> (a) The West Virginia Legislature finds that:
> …
> (10) Lawsuits are being filed across the country against health care providers and health care facilities ***associated with care provided*** during the COVID-19 pandemic and ***illness of health care workers due to exposure*** to COVID-19 while providing essential medical care, and against businesses ***seeking damages***

associated with a person's exposure to COVID-19.
(11) The threat of liability poses an obstacle to efforts to *reopen and rebuild* the West Virginia economy and to continue to provide medical care to impacted West Virginians.
…
(b) It is the purpose of this article to:
…
(2) Provide assurances to businesses that reopening will not expose them to ***liability for a person's exposure to COVID-19***.

W.Va. Code § 55-19-2 (emphasis added).

As is outlined in the Act quoted above, the Act was meant to protect against suits that were arising as a result of would-be plaintiffs contracting COVID-19 while in the business or medical facility; the Act was meant to exclude lawsuits for general negligence related to COVID-19 but not claims where the cause of action arises from another statute, such as the West Virginia Human Rights Act. The business or medical facility was saved from being would-be defendants when people contracted COVID-19 in their facilities. This is not that type of case. Here, to use the Defendant's own terminology, this is a "garden variety discrimination" case with a failure to accommodate issue, not a personal injury case related to contracting COVID which is the type of case anticipated by the Act.

The COVID-19 Jobs Protection Act is considered a reason that Respondent should have accommodated Petitioner. The Act would have protected Respondent from being sued if the unvaccinated Petitioner were to get sick or get others sick at the medical facility. The Act provided a safeguard for Respondent, protecting it from any harm that may have come to others as a result of Petitioner's accommodation.

This Court found that there is a carve-out for Workers Compensation cases where the Workers Compensation system is supposed to treat employees that have a claim arising from COVID-19 to be analyzed like any other Workers Compensation claim arising from an illness.

Primecare Med. of WV, Inc. v. Foster, 2023 W. Va. App. LEXIS 72, *7, 885 S.E.2d 171, 174 (W.Va. I.C.A. 2023). Respondent argued below that the carve-out for Workers Compensation cases meant there was no carve-out for Human Rights Act cases. However, the fact that there was a carve-out for Workers Compensation cases but not Human Rights Act cases only confirms that the legislature's intent was to prevent suits resulting from a person being damaged by contracting COVID.

Additionally, the COVID-19 Jobs Protection Act was a temporary measure taken to protect employers. In contrast, the West Virginia Human Rights Act, which is the legislation establishing state claims for Failures to Accommodate and Disability Discrimination, is a long-established act meant to protect West Virginia public policy. "It is the public policy of the State of West Virginia to provide all of its citizens equal opportunity for employment [and] equal access to places of public accommodations. . . Equal opportunity in the areas of employment and public accommodations is hereby declared to be a human right or civil right of all persons without regard to. . . disability. . ." W.Va. Code §5-11-2. It therefore is illogical to expect the same state that so unequivocally established civil rights for the disabled to back track and take those same rights away. Respondent essentially argued that West Virginia had chosen to rip away the civil rights of disabled employees because of COVID-19 when it argued that the COVID-19 Jobs Protection Act meant that disabled employees had no recourse for failures to accommodate or acts of discrimination that were even distantly related to COVID-19. The Court then agreed with this illogical argument in its Order. To allow the Order below to stand would be to allow disabled people's rights to be ripped from them.

Further, there is federal law, the Americans with Disabilities Act (ADA), establishing the rights of the disabled and to find that those rights were taken by the West Virginia COVID-19

Jobs Protection Act would be to find that state law can preempt federal law which it cannot. The ADA's purpose is to:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities;
> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(b) (1990).

This language makes it clear that the ADA is the ultimate authority on matters of disability discrimination and failures to accommodate. The United States Constitution's Supremacy Clause also provides that "the Laws of the United States which shall be made in Pursuance thereof. . . and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. The law is clear; states and state courts are bound by federal law. This means that the West Virginia Covid-19 Jobs Protection Act cannot eliminate the rights provided to the disabled in the ADA. However, the Court below erroneously flew in the face of this long-established law when it decided that the COVID-19 Jobs Protection Act protected employers from claims of disability discrimination and failures to accommodate. Because the Act was not meant to protect hospitals from liability for discriminating against and not accommodating a disabled employee, the Circuit Court erred in finding that the Complaint was barred by the Act.

2. If the Act does apply to the present case, the Complaint should have fallen under the actual malice exception to the Act because Petitioner pled facts to support malice.

This case should have fallen within the Act's exception for defendants "who engaged in

intentional conduct with actual malice." W.Va. Code § 55-19-7. Though actual malice has not been defined in the context of the Act, the term has been defined in other contexts. For example, in a bad faith claim against an insurer, actual malice meant that "the insurance company actually knew that the policyholder's claim was proper, but willfully, maliciously and intentionally utilized an unfair business practice in settling, or failing to settle, the insured's claim." Syl. Pt. 2, *McCormick v. Allstate Ins. Co*., 202 W. Va. 535, 536, 505 S.E.2d 454, 455 (1998). Another example is provided in the context of defamation claims against public figures where actual malice was "present where the statement at issue was made 'with knowledge that [the statement] was false or with reckless disregard of whether it was false or not.'" *Chafin v. Gibson*, 213 W. Va. 167, 172, 578 S.E.2d 361, 366 (2003) (internal citation omitted).

Here, the Complaint contained facts and pleadings to establish actual malice. Petitioner explicitly pled that Respondent acted with "willful, wanton, and malicious and/or reckless and/or in reckless disregard for the civil rights of [Petitioner]." (Appx. 005). Petitioner was instructed to get a vaccine that she was allergic to. Even in the face of a note from a doctor explaining Petitioner's need to be allowed an exclusion from getting the vaccine, Respondent denied any accommodation. In doing so, Respondent knew that it was essentially asking Petitioner to take a serious health risk or lose her job. This is reckless disregard for Petitioner's safety. Respondent made a purposeful decision not to accommodate Petitioner. Respondent may have done so maliciously which is evidenced by the fact that they knowingly and recklessly put Petitioner in danger of suffering severe medical issues or losing her job and suffering financial loss. To make a more definite conclusion on the malice issue and whether the W.Va. Code § 55-19-7 exception applies, discovery on the matter was necessary. However, the lower Court dismissed the matter before discovery could commence. The lower Court erred in doing so because it ignored the facts

in the Complaint and denied Petitioner of opportunity to discover more supportive facts.

D. Petitioner pled facts to support her having a disability worthy of an accommodation, though Respondent denied it in the hearing and the lower Court failed to address the matter in its Order.

Petitioner anticipates that whether Petitioner had a disability will also be an issue on appeal in that Respondent might raise the issue of harmless error and argue that even if the Circuit Court did err as outlined in the Assignments of Error, Petitioner was not harmed as she did not have a disability as required for disability discrimination and failure to accommodate cases. Whether Petitioner had a disability was a topic that the lower Court and Respondent debated during the hearing on the Motion to Dismiss. Though the Circuit Court erred and dismissed the matter below before it had opportunity to make a decision on whether Petitioner has a disability, Petitioner addresses the topic herein.

An essential element of disability discrimination and failure to accommodate claims is that the individual has a disability. *Skaggs v. Elk Run Coal Co*., 198 W. Va. 51, 479 S.E.2d 561, (1996). A disability in these claims is defined as "(1) a mental or physical impairment which substantially limits one or more of such person's major life activities, such as functions of caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; (2) a record of such impairment; or (3) being regarded as having such an impairment." *Woods v. Jefferds Corp*., 241 W. Va. 312, 319, 824 S.E.2d 539, 546 (2019).

Beyond this basic definition, there has been national debate in the courts as to whether not being able to take a vaccine is an disability warranting a workplace accommodation. West Virginia courts have, thus far, remained silent on the issue. In Ohio's Southern District, the Court granted a preliminary injunction to stop the United States Air Force from taking further actions against a reservist who refused to get the COVID-19 vaccine on religious grounds. *Poffenbarger*

v. Kendall, 588 F. Supp. 3d 770, 2022 U.S. Dist. LEXIS 34133, 2022 WL 594810 (S.D. Oh., W. Div., February 28, 2022).

In North Carolina's Western Federal District, a health care employee never asserted that she had a disability and instead claimed that she was refusing vaccination due to her "right of informed consent and the right to refuse to take part in clinical trials." *Speaks*, 2022 U.S. Dist. LEXIS at 6. After not getting the COVID vaccine required by her employer's policy, she brought a pro se ADA disability discrimination claim without alleging any disability of her own. *Id*. The Court dismissed the claim because the worker did not plead that she had a disability or that the employer thought she had a disability. *Id*. at 11.

In Virginia's Eastern Federal District, an employee brought claims after an employer implemented a mask policy, requested a survey be completed on the employee's vaccination status, and allowed customers to require that the employees working on their grounds take COVID tests. *LeGgo v. M.C. Dean, Inc.*, 2023 U.S. Dist. LEXIS 21561, 2, 2023 WL 1822383 (Va. E.D., Feb. 7, 2023). Because the assignment that the employee was on did not require masks, COVID tests, or vaccines, the employee's religious exemption request was merely put in his file. *Id*. He was still asked to fill out the survey and he would get reminders about expectations on getting tested and vaccinated for other cites, where he did not work. *Id*. He got these notifications only because he was a supervisor who needed to be kept in the loop and encourage vaccination, not because he needed to comply with the expectations. *Id*. The employee then complained to human resources based on disability discrimination and withdrew the religious exemption request. *Id*. The employee claimed that he was considered disabled because he was treated as if he had a contagious disease. *Id*. at 6. When policies were implemented requiring vaccines or being tested regularly at the employee's work location, the employee's

previous request for a disability related exemption was denied. *Id*. The employee was no longer able to work at his job cite and was only assigned jobs that were not for customers wanting workers to be vaccinated and tested. *Id*. However, his pay and responsibilities did not change. *Id*. at 11. The *LeGgo* Court found that the employer was not treating the employee as disabled as it would be impossible to have COVID for as long as the policies were in place. *Id*. There was no disability. *Id*. Further, there was no adverse action taken against the employee. *Id*. at 14. The *LeGgo* Court therefore dismissed the claim. *Id*. at 22. A similar string of cases can be found across the Fourth Circuit which is the Circuit where West Virginia sits. See eg. *Schneider v. Cnty. of Fairfax*, 2023 U.S. Dist. LEXIS 35469, 2023 WL 2333305 (Va. E.D., Alexandria Div., March 2, 2023); *Friend v. Astrazeneca Pharms. LP*, 2023 U.S. Dist. LEXIS 83749, 2023 WL 3390820 (Md., May 11, 2023); *Jorgenson v. Conduent Transp. Sols., Inc*., 2023 U.S. Dist. LEXIS 18463, 2023 WL 1472022 (Md., Feb. 2, 2023).

Here, Petitioner's disability was the medical condition she had relating to vaccinations which caused her to suffer from adverse reactions and has led to hospitalization at times and impacted her ability to work and perform other life activities. (Appx. 003). Respondent was aware of this physical impairment. (Appx. 003). Therefore, Petitioner pled sufficient facts to support her claims that she had a disability, and the lower Court should have allowed discovery on the matter.

Regarding how to consider the narrow issue of whether not being able to receive a vaccine should warrant accommodation, this Court should decide that Petitioner should not have been subjected to negative employment actions as the *Poffenbarger* Court found. Petitioner was wrongly subjected to negative employment actions including a written warning and termination. Petition did nothing to deserve this other than not receive a COVID-19 vaccine. Petitioner did

not receive the COVID-19 vaccine based upon advice from her doctor and due to her likelihood to react poorly to vaccines which is a disability.

This case is unlike *Speaks* because Petitioner pled that she had a disability which Respondent knew about, so this Court should not decide against Petitioner as the *Speaks* Court did. This case is unlike *LeGgo* and its companion cases because Petitioner clearly pled her disability and failure to accommodate claims without adding confusing, inconsistent factors such as a religion discrimination claim. Additionally, Petitioner was clearly subjected to negative employment actions. She was given a written warning and terminated while the employee in *LeGgo* was not stripped of pay or treated differently than he had been treated before. Therefore, if the lower Court had allowed itself opportunity to make a decision on whether Petitioner has a disability, the lower Court should have found in the affirmative. This means that Petitioner's case could have been successful below and the Circuit Court's err in interpreting the COVID-19 Jobs Protection Act was not harmless error.

CONCLUSION

Wherefore, Petitioner requests that this Court REVERSE the decision below and REMAND the matter to allow for discovery.

Respectfully Submitted,
Melissa K. Bond,

/s/ Erika Klie Kolenich
Of Counsel,

Erika Klie Kolenich, Esq. (9880)
Klie Law Offices, P.L.L.C.
21 E. Main Street, Suite 160
Buckhannon, West Virginia 26201
(304) 472-5007
Facsimile: (304) 472-1126
ehklie@klielawoffices.com

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

MELISSA K. BOND
Petitioner and Plaintiff Below,

v. Case No. 23-ICA-118

UNITED PHYSICIANS CARE, INC.
DBA SALEM FAMILY HEALTHCARE
Respondent and Defendant Below.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and accurate copy of the foregoing "**Brief of Petitioner"** was served upon the Respondent by this Courts electronic filing system this 27th day of June, 2023, to:

Jacqueline Sikora, Esq.
West Virginia United Health System, Inc.
1238 Suncrest Towne Centre Dr.
Morgantown, WV 26505
Counsel for Respondent

Respectfully Submitted,
Melissa K. Bond,

/s/ Erika Klie Kolenich
Of Counsel,

Erika Klie Kolenich, Esq. (9880)
Klie Law Offices, P.L.L.C.
21 E. Main Street, Suite 160
Buckhannon, West Virginia 26201
(304) 472-5007
Facsimile: (304) 472-1126
ehklie@klielawoffices.com