IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0480

STATE OF WEST VIRGINIA ex rel. GABRIEL DEVONO and THE BOARD OF EDUCATION OF THE COUNTY OF RANDOLPH,

Petitioners,

v.

HONORABLE DAVID H. WILMOTH, Judge of the Circuit Court of Randolph County, West Virginia, SHERMAN ARBOGAST, and MARLENE ARBOGAST,

Respondents

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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STATEMENT OF THE CASE

Marlene Arbogast had been the "head-cook" at Beverly Elementary for several years when she learned that her son (and numerous other children) had been confined in a closet while attending preschool at Beverly Elementary. She reported this wrongdoing and her intent to seek legal action to the principal and superintendent who thereafter, engaged in a pattern of discrimination and harassment with the intent to coerce Marlene Arbogast not to speak about the abuse or seek legal action for the injuries to her son. Defendant Gabriel Devono and the principal stymied and blocked her Constitutional rights to free speech by threatening her with reprisals and adverse employment actions if she disclosed the abuse or joined other parents in proceeding with litigation, and by actually committing reprisals for exercising her free speech rights.

These school personnel also engaged in a pattern of abuse and intimidation highlighted by the repeated creation of bogus employment infractions as retribution for Plaintiff's disclosures and with the purpose of fabricating a basis for her termination. In addition to these threats and reprisals, Superintendent Devono learned that Marlene Arbogast had a part time job with U-Haul and deliberately caused her termination. As set forth in the amended complaint, Defendant Devono demanded Plaintiff's private information from her employer including her work schedule and also interfered with her employment with such extreme measures that she was fired.

Additionally, while Marlene Arbogast was off work, on sick-leave due to the anxiety caused by the threats and reprisals, Defendant Devono interfered with her medical care and disrupted the physician-patient relationship by demanding the healthcare provider disclose

confidential medical information. In addition to violating her privacy rights, Defendant Devono prevented her from receiving necessary medical care.

Respondents have asserted seven causes of action. Counts I and II allege wrongful and constructive discharge in violation of the Human Rights Act. Count III alleges violation of the Whistle Blower Act. Counts IV and V allege violations of her constitutional rights to free speech and to seek access to the courts. Counts VI and VII allege tortious interference with employment and medical care. Petitioners seek dismissal of every claim except tortious interference with employment.

Petitioners in their "kitchen sink" approach, insist that Plaintiffs must file employee grievances for their constitutional claims despite the grievance board lacking any authority to adjudicate constitutional claims. Petitioners also attempt to re-write the amended complaint by mis-stating the claims asserted and insisting, despite the plain language asserting claims under the Human Rights Act, §5-11-9(7)(A), that Plaintiffs are not pursuing claims under this statute. Finally, in an attempt to block any potential claim, Petitioners argue that the claims for tortious inferences with medical care are not legally recognized claims, notwithstanding the plethora of legal precedent permitting these claims.

SUMMARY OF THE ARGUMENT

Motions to dismiss are viewed unfavorably and rarely granted because courts prefer an adjudication on the merits rather than dismissal on a technicality without the ability to fully develop the evidence. All that is necessary at this stage is for Plaintiffs to demonstrate a prima facie case; i.e., factual allegations sufficient to create an inference in support of those causes of action. If the complaint (or amended complaint in this case) recites the legal elements of each claim and includes factual support for those claims, motions to dismiss must be denied. Courts

must allow discovery and full development of the evidence once a prima facie case is established.

There is not any legal or factual basis to support a writ of prohibition summarily dismissing the lawsuit without any ability to develop the evidence necessary to prove these claims. Writs of prohibition are only available to remedy clear-cut legal errors or where the court lacks jurisdiction. Petitioners offer hyperbole and unrelated precedent involving completely different causes of action including recent memorandum decisions; however, they have not provided a single court decision or statute directly on point or even remotely suggesting that the claims asserted by Marlene Arbogast must initiated as an employee grievance. None of these claims involve compensation, hours and terms of employment, incidents of favoritism or policies constituting a substantial detriment to or interference with effective job performance or workplace safety which are the areas delineated as grievances under West Virginia Code §6C-2-2(i)(1).

Dismissal under Rule 12(b)(6) W.Va. Rules of Civil Procedure is completely inappropriate unless the Court determines beyond any doubt that Plaintiffs cannot possibly recover under any scenario. *Mason v. Torrellas* 238 W.Va. 1, 792 S.E.2d. 12 (2016). All factual allegations in the amended complaint must be accepted as true and all inferences must be construed in a light most favorable to Plaintiffs. The amended complaint contains detailed and thorough factual recitations which satisfy each element of the causes of action asserted by the Arbogasts. These claims are beyond the limited scope of the public employee grievance process. Jurisdiction exists, thus precluding dismissal under Rule 12(b)(1).

The Circuit Court correctly determined that exhausting administrative remedies was not necessary in accordance with well-settled legal precedent. This includes claims for employment

discrimination under the West Virginia Human Rights Act §5-11-9(7)(A) which are exempt from the employee grievance process. *Weimer v. Sanders* 232 W.Va. 367, 752 S.E.2d 398 (2013). Furthermore, claims for violations of Constitutional Rights secured by the West Virginia and Untied States Constitutions cannot be adjudicated by the employee grievance process. The decisions in *Orr v. Crowder* 173 W.Va. 335, 315, S.E.2d 593 (1984) grants this right to public employees and *Corbett v. Duerring* 780 F. Supp.2d 486 (S.D. W.Va. 2011) unequivocally establishes that an employee grievance is not a prerequisite to pursuing these particular constitutional claims. An administrative board established to adjudicate run of the mill employment issues cannot supersede a person's Constitutional Rights.

There is also not any merit in arguing that the Whistle Blower claim and tortious interference with medical care are subordinate to and controlled by the grievance statute. The Whistle Blower Act specifically permits lawsuits to vindicate this claim. West Virginia Code §6C-1-4 permits causes of action where an employee is the victim of retaliation or adverse employment action as a result of the employee reporting wrong-dong. In this particular case, the employee reported a teacher placing her son and other pre-school students in a dark closet with a glow in the dark Frankenstein poster. This child abuse was a matter of serious public concern, and as a result, Marlene Arbogast must be protected from retaliation.

There is not anything in the Whistle Blower Act or employee grievance statute granting jurisdiction to the grievance board. Petitioners have not offered any legal authority requiring a grievance for this claim; instead, they offer contradictory arguments that there is not a cause of action for tortious interference with medical care (despite the decisions in *Morris, Keplinger,* and

RK v. St. Mary's) but if a cause of action exists, an employee grievance is necessary.[1] The grievance board could not possibly grant any meaningful relief to a patient who lost her physician due to someone's interference. No employment action exists to remedy. Granting a promotion or pay raise does not solve the problem.

It is a gross exaggeration and complete mischaracterization to claim that denial of the motion to dismiss was clearly erroneous when a plethora of legal authority clearly permits these causes of action independent of the employee grievance process. The conclusion regarding the existence of prima facia claims was completely within the Court's discretion and based on the thorough factual allegations and precedent requiring denial of the motion to dismiss unless it is proven that plaintiffs cannot prevail under any circumstance. *Mason v. Torrellas* 238 W.Va. 1, 792 S.E.2d. 12 (2016). Petitioners cannot sustain the high standard for proving a clear-cut legal error or lack of jurisdiction and as a result, the writ should be denied.

STATEMENT REGARDING ORAL ARGUMENT

Respondents request oral argument of the petition. Oral argument is appropriate under W.Va. R. App. P. 19(a) which provides for argument in cases involving assignments of error in the application of settled law, and cases involving a narrow issue of law. The case is appropriate for resolution by memorandum decision.

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[1] *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 446 S.E.2d 648 (1994), *Keplinger v. Virginia Elec. & Power Co.*, 208 W.Va. 11, 537 S.E.2d 632 (2000) and *RK v. St. Mary's Medical Center*, 229 W.Va. 712, 735 S.E. 2d 715 (2012)

ARGUMENT

The extraordinary relief sought by the Petitioners is not warranted and lacks any legal or factual basis. The Circuit Court correctly concluded based on the detailed and thorough factual allegations and applicable law, that Marlene Arbogast has asserted prima facia claims supporting her causes of action, and consequently, the motion to dismiss was without merit. Motions to dismiss are rarely, if ever granted because the Court must be convinced beyond any doubt that the Plaintiff cannot prove any set of facts which would entitle her to relief. *Mason v. Torrellas* 238 W.Va. 1, 792 S.E.2d. 12 (2016); and *J.F. Allen Corp. Sanitary Bd. Of City of Charleston* 237 W.Va. 77, 785 S.E.2d 627 (2016). When considering the circumstances in a light most favorable to Marlene Arbogast and construing all inferences in her favor, it is abundantly clear that Marlene Arbogast has asserted causes of action that are completely appropriate and which have been recognized by our courts for decades.

A writ of prohibition is only appropriate to correct substantial, clear-cut legal errors plainly in contravention of a clear statutory, constitutional or common law mandate. *State ex rel United States Fidelity and Guaranty Company v. Canady* 194 W.Va. 431, 460 S.E.2d 677 (1995). Petitioners have not identified a single statute, constitutional provision or other mandate requiring the filing of an employee grievance as a prerequisite for filing these particular causes of action. No clear-cut legal error has been identified, and consequently, it is impossible to find a substantial abuse of discretion. Furthermore, a writ of prohibition is not available unless the purported legal error can be "resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." *Canady* Syllabus point 1, citing *Hinkle v. Black* 164 W.Va. 112, 262 S.E.2d 744 (1979). Petitioners cannot satisfy this stringent standard.

Cases must be decided on their merits after full development of the evidence. *Corbett v. Duerring,* 780 F. Supp.2d 486 (S.D. W.Va. 2011) and *Connick v. Myers* 461 U.S. 138, 103 S. Ct. 1684 (1983). To justify immediate dismissal, the legal error must be clear, substantial and unmistakable. Those circumstances certainly do not exist and cannot be overcome by legal acrobatics mischaracterizing the causes of action and attempting to re-write the amended complaint by mis-stating the actual claims asserted and placing their own self-serving labels to convert the causes of action into something subject to the employee grievance process. There is absolutely nothing in the amended complaint or circuit court order suggesting that any of these claims are within the legal framework of *Harless v. First National Bank,* 162 W.Va. 116, 246 S.E.2d 270 (1978). Counts I and II allege wrongful and constructive termination in violation of the West Virginia Human Rights Act. The decision in *Harless* is not applicable or relied upon in any manner.

Additionally, Count IV clearly asserts a First Amendment retaliation claim and Count V asserts constitutional claims for violations of the right to retain counsel and seek access to the courts. The right of a public employee to file standalone constitutional claims against her employer has been confirmed by the U.S. Supreme Court in *Pickering v. Board of Education* 391 U.S. 563, 88S.Ct. 1731, 20 L.Ed. 2d 811 (1968) and this Court in *Orr v. Crowder* 173 W.Va. 335, 315, S.E.2d 593 (1984).

"It is well-settled that a public employer may not retaliate against a public employee who exercises her First Amendment right to speak out on a matter of public concern." *Love-Lane v. Martin* 335 F.3d 766. (4th Cir. 2004). Additionally, "a plaintiff asserting whistle blower type claims whose expressions related to a matter of public concern and are alleged to have provoked retaliatory action are afforded First Amendment protection." *Connick v. Myers* 461 U.S. 138,

103 S. Ct. 1684 (1983). Accordingly, Plaintiffs may pursue these claims without consideration of the grievance process.

The attempt to label the Whistle Blower claim (Count III) in this manner is equally futile. This cause of action is specifically permitted by a West Virginia Code §6C-1-4 which creates a cause of action in a circuit court for public employees who are terminated or receive adverse employment actions in retaliation for reporting wrongdoing including a teacher confining pre-school children in a dark Frankenstein closet.

In addition to seeking the wholesale abandonment of well-settled legal precedent unequivocally establishing direct causes of action for these clearly defined statutory and constitutional claims, Petitioners incorrectly label the cause of action for tortious interference with medical care as a claim for invasion of privacy. This is simply not accurate. These causes of action are distinctly different and require entirely different elements to prove. There is absolutely no attempt in the amended complaint to pursue an invasion of privacy claim. Count VII clearly alleges the elements for tortious interference with medical care; nothing else, and most importantly the grievance board lacks the authority to grant any type of relief for this harm.

Substantial legal authority supports the Circuit Court's conclusion that these causes of action are independent from the employee grievance process and therefore, it was not necessary to exhaust administrative remedies. In the absence of precedent rejecting or overruling these decisions or indicating that the claims are subordinate to and contingent upon an employee grievance, the writ of prohibition is not warranted. Jurisdiction exists, no clear-cut legal error occurred, and there is no basis for a writ of prohibition. The non-binding memorandum decisions cited by Petitioners that were decided underly starkly different factual scenarios involving unrelated causes of action do not change the outcome in this particular case.

A. The Circuit Court indisputably has jurisdiction to adjudicate these causes of action because Marlene Arbogast is not required to exhaust her administrative remedies as a prerequisite to pursuing these clearly defined statutory and constitutional claims.

The grievance process is a statutorily created procedure to address routine administrative issues including for example, an employee not being promoted to a new position, salary disputes, absenteeism and other routine matters involving the administration of the school system. This statute provides limited jurisdiction and importantly, the remedies available to the grievant are extremely limited. The statute was never intended to address the claims asserted by Marlene Arbogast.

None of the traditional tort claims and damages can be pursued in a grievance proceeding including annoyance and inconvenience, inability to enjoy life, emotional stress, lost future income and other economic and non-economic damages. The differences between the procedures and remedies "are of profound significance." *Vest v. Board of Education of the County of Nicholas* 193 W.Va. 222, 455 S.E.2d 781 (1995), and have been repeatedly cited as justification for allowing separate lawsuits independent from and without the necessity of filing an employee grievance.

The non-binding memorandum decisions cited by Petitioners do no alter the substantial legal authority clarifying that Human Rights Act and Constitutional claims are exempt from the employee grievance process, *Weimer v. Sanders* 232 W.Va. 367, 752 S.E.2d 398 (2013), *Orr v. Crowder,* and *Corbett v. Duerring* 780 F. Supp.2d. 486 (S.D. W.Va. 2011) or the clear and unmistakable statutory cause of action under the Whistle Blower Act and the grievance board's obvious inability to adjudicate the disruption of a patient's healthcare.

These memorandum decisions involve wholly different facts and legal claims regarding run of the mill administrative issues involving the failure to promote a professor, changes in an

employee's salary, and eliminating a WVU employee's position due to the loss of grant funding. These routine administrative matters are precisely what is intended to be within the grievance process and are clearly distinguishable and not applicable.

These decisions explicitly state that they do not apply to claims asserted under the Human Rights Act, *Ragione v. The Board of Education of Preston County* 2018 WL 300576 (2018). They do not involve the constitutional deprivations suffered by Marlene Arbogast and furthermore, no one could credibly suggest that a statutorily created administrative body could adjudicate these fundamental constitutional rights.

It is obvious in reviewing these decisions that they are completely different and not binding in this case. *Ragione* involved a breach of contract claim by a mechanic who alleged that as part of his recruitment, the board of education promised to base his salary on his years of experience as a mechanic. The plaintiff in *Subramani v. West Virginia University Board of Governors* No.14-0924, 2015 WL 7628720 (W.Va. 2015) filed multiple repetitive grievances and at least two lawsuits regarding the same issue: his inability to be promoted. He never completed any of the grievances and then, filed lawsuits claiming lack of due process in how those grievances were conducted. Due to the inherent fallacy of his position – one cannot realistically claim lack of due process in an administrative proceeding when that person refuses to participate in the actual proceeding – the court dismissed the lawsuit for failing to exhaust administrative remedies. [2]

The circumstances in *Redd v. McDowell County Board of Education,* No, 15-0566 2016 WL 2970303 (W.Va. 2016) are also completely unrelated to Marlene Arbogast's claims. An employee's claims of racial and sexual discrimination were dismissed because the pro se plaintiff

[2] The Court emphasized that the employee cannot raise due process claims in circuit court because it is not the proper forum for challenging routine personnel decisions related to an employer's internal guidelines.

failed to set forth any factual basis supporting those claims. These decisions do not have any bearing on this case.

The breach of contract action regarding the mechanic's salary, failure to promote a professor who is a serial filer of duplicitous and frivolous grievances, and dismissal for failing to present adequate evidence of racial discrimination, do not affect Marlene Arbogast's claims arising under entirely different causes of action and unrelated factual circumstances.

B. The Circuit Court correctly concluded that Marlene Arbogast has asserted prima facia claims under the Human Rights Act which are beyond the limited scope of the employee grievance process.

The law in West Virginia is clear and unmistakable. State employees are not required to file an administrative grievance as a prerequisite for filing a lawsuit under the Human Rights Act, because "the West Virginia Education and State Employees Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, W.Va. Code §5-11-1. et seq." Syllabus Point 1, *Vest v. The Board of Education of the County of Nicholas*, 193 W.Va. 222, 455 S.E.2d 81 (1995).

A public employee "is not required to exhaust the administrative grievance procedure before initiating a complaint in the circuit court alleging violations of the WVHRA." Additionally, " a public employee *may* file a written grievance to the West Virginia Public Employees Grievance Board pursuant to W.Va. Code §61-2-4(a)(1); however, such filing is permissible and not mandatory under the clear wording of the statute." Syllabus point 6 of *Weimer*. *Weimer v. Sanders* 232 W.Va. 367, 752 S.E.2d 398 (2013)

The wrongful and constructive discharge claims in Counts I and II rely exclusively on the Human Rights Act. Marlene Arbogast alleges that after informing the superintendent that her son had been unlawfully confined in a preschool closet and intended to seek legal action, the

superintendent and other school officials retaliated against her, criticized her work and physical age-related abilities and restrictions and ultimately, terminated her employment. These causes of action are based exclusively on the Petitioners' violations of §5-11-9(7)(A) of the Human Rights Act which makes it unlawful to engage in threats or reprisals against an employee with the intent to harass, degrade, embarrass or cause financial harm.

The Defendants have mischaracterized the nature of Plaintiff's claims and scope of the Human Rights Act. First, the amended complaint specifically alleges facts within the precise scope of §5-11-9(7)(A). Moreover, this statute specifically applies to the misconduct committed against her. This includes persistent threats, reprisals, harassment, deliberate efforts to degrade and embarrass her and to cause financial harm. West Virginia Code §5-11-9(7)(A) clearly establishes causes of action completely consistent with the assertions set forth in the amended complaint.

Section 5-11-9 states that "**It shall be an unlawful discriminatory practice** unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the State of West Virginia, or its agencies or subdivision:

(7) **For any person, employer**, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution **to**:

(A) **Engage in** any form of **threats or reprisal**, or to **engage in**, or hire, or conspire with **others to commit acts** or activities of any nature, the **purpose** of which is to **harass, degrade, embarrass** or **cause** physical harm, or **economic loss; or** to aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section."

The amended complaint clearly sets forth causes of action permitted by §5-11-9(7)(A). For example, Defendant Devono threatened adverse employment consequences if Marlene Arbogast retained counsel or joined in the lawsuits filed by parents whose children had been unlawfully confined in a preschool closet. Defendant Devono, after being informed that her son had been falsely imprisoned, informed Plaintiff not to disclose this evidence and that it would be best for her job not to disclose the wrongdoing or seek access to the courts to address this wrongdoing. She also became the sudden victim of age and physical related criticisms allegedly affecting her work performance.

This conduct was committed with the intent to pressure and coerce Plaintiff and to harass and degrade Marlene Arbogast. Furthermore, Defendant Devono took adverse employment actions, created false and bogus infractions, and enlisted the support of other school personnel to create bogus employment infractions with the intent to intimidate, harass and embarrass her in order to force her silence, cause financial loss, and pressure her not to proceed with litigation. The amended complaint contains numerous allegations completely consistent with §5-11-9(7)(A) and at this stage of the litigation, all of these allegations must be accepted as true. The circuit court found that Marlene Arbogast had established prima facia claims of violation of this statute based on the factual allegations and the reasonable inferences that can be drawn therefrom. Petitioners certainly cannot demonstrate that it is impossible to recover under any scenario. The standard is quite liberal at this stage. It is only necessary that the amended complaint provide "fair notice of what the ... claim is and grounds upon which it rests." *Corbett v. Duerring* 780 F.Supp.2d-486 (S.D. W.Va. 2011) citing *Bell Atlantic Corp. v. Twombly* 550 U.S. 544, 127 S.Ct. 1955 (2007). There can be no doubt that Counts I and II allege violations of the Human Rights Act with specific facts and quoting the statutory section violated.

It is not "even necessary that the complaint contain every fact or forecast the evidence sufficient to prove an element of the claim. *Corbett.* "Instead, the opening pleading need only contain factual allegations sufficient to raise a right to relief above the speculative level." *Corbett.* Citing *Twomby.* If the pleading allows the court to draw a reasonable inference of the basis for the claim, the pleading satisfies the minimal standard. Thus, to the extent that the amended complaint does not precisely contain every possible factual allegation, that inadequacy is not critical at this stage. Petitioners are certainly aware that these claims are based on the Human Rights Act, and the Arbogasts should not be required to try their case without the benefit of discovery which will more fully establish the necessary elements of the claims. The judicial preference clearly compels deciding these issues through summary judgment after full development of the evidence necessary for a meaningful analysis of the claims and whether they have been proven. *Connick v. Myers,* 461 U.S. 138, 103 S. Ct. 1684 (1983). The Circuit Court's decision was not the result of a clear-cut legal error; it was based on settled legal precedent and the factual allegations establishing a prima facia claim.

C. **The Whistle Blower Statute specifically creates a civil cause of action for adverse employment actions taken in retaliation for a school employee reporting wrongdoing, without the necessity of filing an employment grievance.**

Petitioners incorrectly argue that as a school employee, Marlene Arbogast had to file a grievance as a prerequisite to filing a cause of action under the Whistle Blower Act. This argument is completely inconsistent with and specifically negated by the statutes comprising the Whistle Blower Act. First, §6C-1-3 prohibits an employer from discharging, threatening retaliating or taking adverse actions against an employee who reports or is about to report wrong-doing.

More importantly, §6C-1-4 specifically authorizes a cause of action, completely independent of and separate and apart from the grievance process, for any public employee who suffers adverse employment actions for reporting wrong doing. Section 6C-1-4, subsection (a) confirms that "A person who alleges that he or she is a victim of a violation of this article may bring a **civil action** in a **court** of competent jurisdiction for appropriate injunctive relief or **damages**, or both, within two years after the occurrence of the alleged violation." (emphasis added). An employee must show by a preponderance of evidence that she has reported or was about to report the wrong doing as set forth in subsection (b), and importantly, the right to bring this cause of action cannot be impaired.

Furthermore, under §6C-1-5, "A **court** rendering a **judgment** for the complainant in an action brought under this article, shall order, as the court considers appropriate, reinstatement of the employee, the payment of back wages, full reimbursement of fringe benefits and seniority rights, actual damages or any combination of these remedies." The Court may also award litigation costs, attorneys fees and other damages.

There is absolutely nothing in these statutes requiring the filing of an employee grievance as a prerequisite to filing a lawsuit. Furthermore, Petitioners have not offered a scintilla of legal support for their claim that a grievance is necessary because that is simply not the law. Section 6C-1-4 is clear. This statute was enacted to provide public employees with an immediate cause of action in state court separate and apart from the grievance process. In the absence of a statute or constitutional provision limiting its applicability, §6C-1-4 must be fully enforced, and therefore, the Circuit Court was completely correct in finding that this statute permitted Marlene Arbogast to pursue this claim.

These statutes must be read and applied in accordance with the plain language creating a direct cause of action. There is no limitation or condition precedent for filing the cause of action. The specific intent and purpose of the Whistle Blower Act is to provide jurisdiction in circuit court to award damages for the retaliation. This exclusive circuit court jurisdiction is explicitly granted in §6C-1-4. This statute must be enforced as written and given its plain meaning and intention. Requiring an employee grievance would conflict with the plain statutory language. There is nothing in the Whistle Blower Act imposing this additional impediment and importantly, Petitioners have not cited a single authority requiring a separate grievance.

D. Marlene Arbogast is not Required to Pursue Administrative Remedies as a Prerequisite to Filing a Lawsuit for Deprivation of her Constitutional Rights to Free Speech, the right Retain Counsel and Seek Access to the Courts.

The right of a teacher, cook or other public employee to file a lawsuit for violations of their constitutional rights has been well-settled since the U.S. Supreme court decision in *Pickering v. Board of Education* 391 U.S. 563, 88S.Ct. 1731, 20 L.Ed. 2d 811 (1968) which held that "a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." This decision was specifically adopted in West Virginia in *Orr v. Crowder* 173 W.Va. 335, 315, S.E.2d 593 (1984) involving a librarian who was permitted to pursue a First Amendment retaliation claim. She claimed that her employment was terminated in retaliation for her criticism of the administration's proposed remodeling plan, in violation of her First Amendment right to free speech which is also the exact claim asserted by Marlene Arbogast.

In adopting the *Pickering* decision, the *Orr* Court held in syllabus point 3: "under *Pickering v. Board of Education* 391 U.S. 563, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968), public

employees are entitled to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment rights." Additionally, "where the Plaintiff claims that he was discharged for exercising his First Amendment right of free speech, the burden is initially on the plaintiff to show: (1) that his conduct was constitutionally protected; and (2) that his conduct was a substantial or motivating factor for his discharge." Syllabus point 4, *Orr*. Since the claim involves a Constitutional violation beyond the scope of the administrative employee grievance procedure, it is not necessary to file a grievance.

The amended complaint sets forth significant facts supporting both of these requirements. Counts IV and V of the amended complaint explains Defendant Devono's efforts to prevent Plaintiff from seeking legal redress for the mental and physical abuse of her son, his attempts to stymie her free speech, threats of reprisal and actual reprisals for disclosing the abuse, culminating in her termination. These allegations certainly create an inference or prima facie case, and considering the allegations as true and in a light most favorable to Plaintiff, constitute clearly cognizable claims of retaliatory discharge in violation of state and federal constitutions.

It is also clear and indisputable after the decision in *Corbett v. Duerring* 780 F. Supp.2d 486 (S.D. W.Va. 2011) that employees of county boards of education are in fact permitted to pursue First Amendment retaliation claims without filing an employee grievance. Corbett was a Kanawha County assistant principal who filed two different lawsuits related to his termination. The first case included two causes of action for wrongful discharge and negligent supervision that were dismissed for failing to exhaust administrative remedies; while the third cause of action alleging a First Amendment violation was dismissed without prejudice based on the failure to allege sufficient acts to establish a prima facia claim. To be clear, the First Amendment claim

was **not** dismissed for failure to exhaust administrative remedies See *Corbett v. Duerring* 726 F. Supp.2d 648 (S.D. W.Va. 2010) (the first lawsuit).

The First Amendment claim was revived in the second lawsuit, 780 F. Supp2d 486, and permitted to proceed without requiring the exhaustion of administrative remedies.

The *Corbett* decision emphasizes that it is well-settled that a public employer "may not retaliate against a public employee who exercises her First Amendment right to speak out on a matter of public concern." *Corbett, Love-Lane v. Martin* 355 F. 3d766, 776 (4th Cir. 2004) (citing *Pickering v. Bd. Of Educ.,* 391 U.S. 563, 573, 88 S.Ct. 1731, 20 L.Ed.2d.811 (1968). To prove that a retaliatory employment action violated a public employee's free speech rights, the employee must satisfy the following three prong test formulated by the court of appeals in *McVey v. Stacy* 157 F.3d 271 (4th Cir.1998):

"First, the public employee must have spoken as a citizen, not as an employee, on a matter of public concern. Second, the employee's interest in the expression at issue must have outweighed the employer's interest in providing effective and efficient services to the public. Third, there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action." *Corbett* at Id.

Marlene Arbogast has clearly asserted a First Amendment retaliation claim consistent with the *McVey* test. She spoke out in public on a matter of public concern; specifically, the unlawful and abusive confinement of preschool students in a dark Frankenstein closet. The concern for the safety and well-being of the students out-weighed any interest in school efficiency, and she was immediately subjected to adverse employment actions, reprimands, improvement periods, and told she was too old and incompetent to be efficient, and ultimately,

forced to terminate her employment. She was also told that she would face backlash for hiring legal counsel and seeking redress for the harm caused to her son, which is exactly what happened.

In affirming the school employee's right to bring this cause of action, the *Corbett* decision noted that the employee (like Ms. Arbogast) spoke out on a matter of public concern, which outweighed the school's interest in providing efficient and effective public services, and there was a causal nexus between the protected speech and retaliatory employment action. Exhausting administrative remedies was not and cannot be a predicate for vindicating this constitutional claim. The right to bring this cause of action is also secured by 42 U.S.C. §1983 as confirmed in *Orr v. Crowder* and *Corbett v. Duerring.* A First Amendment retaliation claim alleging the three-prong *McVey* test is in fact a §1983 claim as this statute grants the authority to vindicate that violation; and in this particular case, Marlene Arbogast set forth specific facts supporting each *McVey* element which is being pursued under this statute and constitutions which clearly pre-empt the grievance board's limited jurisdiction.

The attempt by Petitioners to misconstrue the two decisions in *Corbett v. Duerring* 780 F.Supp.2d 486 (S.D. W.Va. 2011) and *Corbett v. Duerring* 726F.Supp.2d 648 (S.D. W.Va. 2010) by claiming that the District Court dismissed Mr. Corbett's First Amendment Claim for failing to exhaust administrative remedies is unavailing and totally inaccurate. The Court specifically and unequivocally permitted this claim to proceed completely independent from the employee grievance process. Mr. Corbett filed two lawsuits against Superintendent Duerring. The District Court's explanation of the procedural background in the second case directly contradicts Petitioner's claim.

"Before initiating this action, Corbett filed a broader action in the Circuit Court of Kanawha County on December 23, 2009, alleging three counts in in his complaint: Count I – Wrongful Termination; Count II – Negligent Supervision; and Count III – 42 U.S.C. §1983 (First Amendment retaliation) Defendants removed to this court on January 29, 200, and subsequently moved to dismiss on February 9, 2010. On July 21, 2010, the court granted defendants' motion and dismissed the first two counts for failure to exhaust administrative remedies and the third count for failure to state a claim, all without prejudice.

Regarding Corbett's § 1983 First Amendment retaliation claim, the court observed that Corbett "merely alleges that the defendants retaliated against him by disciplining him for statements he made regarding matters of public concern. He does not provide any indication as to the content, form, or context of his statements. *Corbett v. Duerring*, 726 F. Supp.2d 648, 658 (S.D.W.Va.2010). Accordingly, the court dismissed the claim inasmuch Corbett presented "insufficient factual matter to determine whether he has pled a claim for relief that is plausible on its face." Id. at 659.

Corbett filed the current complaint with this court on August 27, 2010. The sole count of the complaint, titled Count I-42 U.S.C. §1983, asserts that defendant unlawfully terminated his employment in retaliation for his hot dog sale protest, which Corbett claims was protected First amendment expression."

There is absolutely no merit in claiming that the First Amendment claim was dismissed for failing to exhaust administrative remedies. The Court concluded "In as much as the complaint has satisfied all three prongs of the *McVey* test, Corbett has sufficiently alleged a First Amendment retaliation claim. The Court accordingly orders that Defendants' motion to dismiss be and it hereby is denied." Id at 497.

To be clear, the decisions in *Corbett* did not require exhaustion of administrative remedies. The right to bring constitutional claims for violations of free speech and the right to seek legal redress through our courts has also been recognized in *Burke v. Wetzel County Commission* 240 W.Va. 709, 815 S.E.2d 520 (2018) and *McClung v. Marion County Commission* 178 W.Va. 444, 360 S.E.2d 221 (1987). The Court clarified in *Burke* that "This Court has held that public employees are protected from adverse employment consequences resulting from the exercise of their free speech rights, as well as other First Amendment Rights." *Burke* at 537, citing *Orr v. Crowder* 173 W.Va. 335, 315 S.E.2d 593 (1983), and *McClung v.*

Marion County Commission 178 W.Va. 444, 360 S.E.2d 221 (1987) which emphasized that public employees may assert these constitutional claims without any impediments or prerequisites imposed as a result of being a public employee. "Stated succinctly, our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." Public employees may pursue claims for "violation of rights under the Constitution of West Virginia to petition for redress of grievances and to have courts of this State open to him for an alleged injury to his person, property or reputation." *McClung* at 226, 449, see also, *Connick v. Myers* 461 U.S. 138 103 S.Ct. 1684 (1983).

Judge Keeley also recognized this cause of action and applied the same standard in *Austin v. Preston County Commission* Civil Action No. 1:13 CV 135, although the public employee did not prevail because her comments were made on the employer's Facebook page, and it was part of her job duties at the animal shelter to make posts. Thus, her comments were made as an employee and not actionable, but the legal precedent clearly permits this cause of action when supported by the facts; and most importantly, the *Duerring* decision clarifies that an employee grievance is not a prerequisite for this cause of action.

An objective analysis of the facts clearly demonstrates a prima facia claim. She spoke out on an important matter affecting numerous preschool students and faced immediate backlash that culminated in her loss of employment. She was also warned that if she pursued legal claims for the confinement of her son in the Frankenstein closet, her employment would be in jeopardy. The threats were carried out and she lost her job.

E. Marlene Arbogast has asserted a Prima Facie Case of Tortious Interference with her Medical Care which is completely independent of her employment and outside the scope of the grievance process.

Every patient is entitled to keep her medical care confidential and not have someone interfere with her on-going treatment. Petitioners suggest that public employers should be afforded a special immunity to disrupt someone's medical care without any consequences; and incredibly, suggest that the employee must file a grievance for this tortious conduct which is not related in any manner to her employment. The identity of the wrongdoer is immaterial. No one is entitled to commit this conduct without being held responsible. The cause of action is not dependent on the existence of an employment relationship and the conduct did not interfere with or affect her employment in any way. Those are not elements of the cause of action. Since she did not suffer adverse employment consequences that could be remedied by the grievance board, it lacks jurisdiction.

The elements of a cause of action for tortious interference with medical care are similar to claims for interfering with employment. In accordance with syllabus point 5 of *Morris v. Consolidation Coal Co.* 191 W.Va. 426, 446 S.E.2d 648 (1994) a cause of action exists against a third party who induces a physician to breach his fiduciary relationship if (1) the third party knew or reasonably should have known of the existence of the physician-patient relationship; (2) the third party intended to induce the physician to wrongfully disclose information or should have reasonably anticipated that his actions would induce the physician to wrongfully disclose such information; (3) the third party did not reasonably believe that the physician could disclose that information to the third party without violating the duty of confidentiality that the physician owed the patient; and (4) the physician wrongfully divulges confidential information to the third party.

No one could credibly suggest that the conduct in this case does not meet this standard. As the amended complaint explains, Defendant Devono was angry that Marlene Arbogast took

sick-leave to deal with the stress and anxiety caused by Defendant Devono's persistent abuse. Devono communicated with her healthcare provider and demanded confidential medical information, knowing full well that he was not entitled to this information. Undeterred, Devono sought and obtained information and interfered with Plaintiff's ability to obtain necessary medical care. The disclosure and his conduct caused clearly demonstrable damages including destroying the physician-patient relationship.

Marlene Arbogast has clearly asserted a prima facie case. Moreover, *Keplinger v. Virginia Elec. & Power Co.* 208 W.Va. 11, 537 S.E.2d 632 (2000) does not impede Plaintiff's cause of action. To the contrary, it supports this claim and indeed, recognizing a cause of action for Marlene Arbogast is a logical extension of *Keplinger* and *Morris*. *Keplinger* involved an attorney obtaining medical records by subpoena. This Court held that the discovery rules apply when issuing a subpoena and that (1) prior notice must be provided to the patient and (2) the party must seek court approval if these records are subject to a discovery dispute as evidenced by the patient already objecting to the disclosure. This Court did not sanction a lawsuit against the attorney for obtaining the records because the process for obtaining medical records during litigation was not clear at that time. Now that the procedure has been clarified, liability would attach.

More importantly, the circumstances involving Defendant Devono are substantially different. No litigation existed. Devono did not subpoena the records or have a good faith belief that he was entitled to the information. He knew the medical information was confidential and that his conduct was interfering with Marlene Arbogast's medical care. The *Keplinger* Court recognized that under other factual scenarios, this cause of action would be completely appropriate.

Subsequent decisions including *RK v. St. Mary's Medical Center* 229 W.Va. 712, 735 S.E.2d 715 (2012) recognize common law tort causes of action for wrongfully obtaining medical information and interfering with medical care. No one could possibly dispute the violation of HIPAA which as recognized in *RK,* may be used to supply the standard of care for tort claims. This Court recognized several potential claims, and did not exclude any particular tort. "Based on the foregoing authority, we conclude that state common-law claims for the wrongful disclosure of medical or personal health information are not inconsistent with HIPAA. Rather, as observed by the court in *Yath,* such state-law claims compliment HIPAA by enhancing penalties for its violation and thereby encouraging HIPAA compliance. Accordingly, we now hold that common-law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996."

These common law claims have also been extended to tortious interference with parental rights in *Kessel v. Leavitt,* 204 W.Va. 95, 511 S.E.2d 720 (1998). Judge Chambers also recognized a cause of action for tortious interference with medical care in *Justin Adkins v. St. Mary's Medical Center, Inc.* Civil Action No. 3:18-0321 (S.D. W.Va. 2021) although the plaintiffs could not ultimately prove their claims and thus, did not survive summary judgment. Allowing this cause of action for Marlene Arbogast would be completely consistent with and a logical extension of these decisions.[3]

Patients clearly have the right to vindicate the violation of HIPAA and interference with their healthcare. Otherwise, third parties could obtain confidential medical information, disclose

[3] This cause of action has also been permitted in Texas. See, e.g. *In Re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation, MDL Docket No. 3:11-MD-2244-K (N. Dist., Texas 2016).*

that information without consequences and use this information against the patient. The suggestion that *Keplinger* sanctions and permits this behavior and precludes vindication of these privacy rights is absurd. Additionally, the suggestion by Petitioners that an employee **may** file a grievance (although inaccurate and illogical) is not synonymous with the employee being required to do so.

It is ludicrous to suggest that a workers compensation claimant has a cause of action when an employer tortiously interferes with a physician-patient relationship, but a public employee is not entitled to this same protection. The public employee grievance board has absolutely no jurisdiction over this type of claim and could not possibly adjudicate those rights. The claim does not arise out of an adverse employment action which may trigger the grievance process. It involves the disruption of her relationship with her physician and the disclosure of confidential medical information. It is impossible for the grievance board to fashion any type of relief.

Marlene Arbogast was not terminated or reprimanded; nor has she asserted a cause of action for invasion of privacy as claimed by Petitioners, and which require completely different elements than the tortious interference claim. Moreover, the fact that this cause of action is outside the grievance board is confirmed by the plain statutory language limiting its reach to routine employment matters, and more importantly, the fact that Petitioners did not challenge the separate cause of action for tortious interference with her part time employment at U-Haul. There is no legal significance or logical distinction in these tortious interference claims to justify requiring exhaustion of administrative remedies in one, but not the other. To the contrary, it demonstrates the absurdity of Petitioners' argument.

Marlene Arbogast has established a prima facie case and she must be permitted to proceed.

CONCLUSION

The Circuit Court's denial of the motion to dismiss was completely consistent with the applicable law requiring denial unless it appears beyond doubt that a party cannot prevail under any circumstances. The amended complaint presents prima facia claims supporting each cause of action, and more importantly, none of these claims are subject to the employee grievance process. There is not any merit in the premise that the court lacks jurisdiction for the failure to exhaust administrative remedies. It is impossible to prove clear error involving a clear-cut legal standard when settled legal precedent permits these claims without the necessity of filing an administrative grievance.

Accordingly, no basis exists for a writ of prohibition.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0480

STATE OF WEST VIRGINIA ex rel. GABRIEL DEVONO and THE BOARD OF EDUCATION OF THE COUNTY OF RANDOLPH,

Petitioners,

v.

HONORABLE DAVID H. WILMOTH, Judge of the Circuit Court of Randolph County, West Virginia, SHERMAN ARBOGAST, and MARLENE ARBOGAST

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July 2022, I served a true and complete copy of the Response to Petition for Writ of Prohibition upon the following:

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