INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

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LISA R. DANIELS,

Plaintiff Below, Petitioner

v.

No. 23-ICA-212
(Civil Action #21-C-650)

DAL Global Services, LLC,

Defendant Below, Respondent

PETITIONER'S APPEAL BRIEF

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I. <u>ASSIGNMENTS OF ERROR</u>

The Circuit Court erred in granting DAL Global's Rule 56 Motion for Summary Judgment and in denying Ms. Daniels' Rule 59(e) Motion to Alter and Amend Judgment and to Obtain Relief from Such Judgment. App. 00475-00492, 513-517. Ms. Daniels specifically challenges the following findings as errors justifying reversal under a de novo appeal standard:

A. *FINAL ORDER GRANTING MOTION FOR SUMMARY JUDGMENT:*

1. Failure To Accommodate Under West Virginia Human Rights Act

i. In rejecting Ms. Daniel's failure to accommodate claim under the *West Virginia Human Rights Act* ("WVHRA"), the trial court committed error by finding, without citation to any supporting legal authority, that by having residual traces of medical marijuana in her blood system, Ms. Daniels violated West Virginia's laws even though Ms. Daniels' actual use of medically approved marijuana occurred in Ohio and in full accordance with Ohio law. This error led the trial court to find, as a matter of law, that DAL Global had no legal obligation to provide an accommodation to Ms. Daniels under the WVHRA because her alleged illegal drug conduct prevented her from meeting the definition of being "disabled" under the Act. App. 00482.

ii. The trial court committed error in finding that, even if DAL Global had a legal duty to provide a reasonable accommodation to Ms. Daniels, such an accommodation would have, as a matter of law, constituted an undue hardship on DAL Global. This error is evident because DAL Global failed to assert this affirmative defense in its Answer and failed to produce any supporting evidence within its motion for summary judgment. *See Hayes v. Rhone-Poulenc, Inc.*, 206 W.Va. 18, 521 S.E.2d 331 (W.Va. 1999) (undue hardship is an affirmative defense upon which the employer bears the burden of persuasion), *Nellas v. Loucas,* 156 W.Va. 77,191 S.E.2d 160, 163 (W.Va. 1972) (a failure to plead an affirmative defense results in waiver of that defense). Further, even if DAL Global had properly plead this defense and was prepared to produce some evidence

to support it, the trial court should have found that genuine issues of fact remained to be decided by the jury.

2. Retaliation Claim Under The West Virginia Human Rights Act

i. In rejecting Ms. Daniels' retaliation claim under the WVHRA, the trial court made the same error as described above by finding that the mere presence of residual traces of medical marijuana in her blood system constituted a violation of West Virginia's drug laws even though the uncontroverted evidence showed Ms. Daniels' only use of medical marijuana occurred in Ohio and in full compliance with Ohio law. Based upon this erroneous conclusion the Court found that Ms. Daniels had been stripped from her protections under the WVHRA. This error, in turn, led to the conclusion by the trial court that Ms. Daniels' request for an accommodation, as a matter of law, did not constitute protected activity under the WVHRA, and that Ms. Daniels had therefore failed to establish a prima facie case for retaliation.

ii. The trial court committed error by concluding that Ms. Daniels did not engage in any "protected activity" applicable under the WVHRA by requesting to be exempted from a drug test. Ms. Daniels alleged in her Complaint and testified repeatedly that she had requested a reasonable accommodation relating to her disability, e.g. chronic pain which was legally treated by medical marijuana, to which requests DAL Global's only response was to terminate her. A claim for retaliation in violation of WVHRA can be properly predicated, as asserted in Ms. Daniels' Complaint, upon the termination of a disabled employee for having sought and requested a reasonable accommodation.

iii. The trial court committed further error by ruling that Ms. Daniels had not demonstrated that "but for" her request for an accommodation she would not have been fired in that such an issue is a pure question of motive and therefore is a question of fact to be determined solely by a jury.

iv. The trial court committed error by ruling that Ms. Daniels had waived her retaliation claim by not addressing DAL Global's summary judgment arguments relating to such retaliation claim. However, because DAL Global's respective arguments relating to Ms. Daniels' reasonable accommodation claim and her retaliation claim involved common issues and the same rationale in responding to one as the other, Ms. Daniels effectively responded to Global's retaliation claim arguments when she responded to the related accommodation claim arguments.

3. <u>Wrongful Termination Under The West Virginia Medical Cannabis Act</u>

i. The trial court committed error in finding that no private cause of action existed for wrongful termination under the *West Virginia Medical Cannabis Act* ("WVMCA"). In refusing to allow enforcement of the Act's express anti-discrimination protection by way of private cause of action, the Court failed to follow the West Virginia Supreme Court's well established precedent for accepting implied causes of actions for statutory violations as is "deeply engrained" in the Court's past decisions. *Jenkins v. J.C. Penney Cas. Ins. Co.,* 167 W.Va. 597, 280 S.E.2d 252 (1981), overturned on other grounds by *State ex rel. State Farm Fire Cas. Co. v. Madden* 192 W.Va. 155, 451 S.Ed.2d 721 (1994). Moreover, Ms. Daniels clearly satisfied the elements set forth in *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980) for determining the existence of a private cause of action.

ii. The trial court committed error by finding that Ms. Daniels' lawful use of medical cannabis in accordance with an Ohio Medical Marijuana Registry card was not statutorily protected under the WVMCA. Specifically, the WVMCA's anti-discrimination protections apply to all West Virginia employees without regard to their state residency or the situs of their protected use of medical marijuana.

iii. The trial court committed error in finding that Ms. Daniels discharge for her lawful use of medical cannabis under an Ohio Medical Marijuana Registry card was not a violation

of public policy under West Virginia common law as articulated in *Harless v. First Nat. Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978). Specifically, the WVMCA contains specific language that bars employment-related discrimination of individuals who legally use medical cannabis and thus establishes a substantial public policy enforceable under the West Virginia law.

iv. The trial court committed error by ruling that Ms. Daniels' residency in Ohio precluded her from enjoying the same legal protections as are afforded under the WVMCA to employees residing in West Virginia thereby violating the Dormant Commerce Clause of the Constitution of the United States.

4. <u>Invasion Of Privacy</u>

i. The trial court committed error by finding that the principles of *Baughman v. Wal-Mart Store*, 215 W.Va. 45, 592 S.E.2d 824 (2003) precluded Ms. Daniels from enjoying common law privacy protections since *Baughman,* on its face, only pertained to pre-employment drug testing and not to drug testing procedures implemented for existing employees. As an existing employee of DAL Global, Ms. Daniels was entitled to a higher expectation of privacy when required to undergo drug testing than the more limited privacy protections afforded to prospective employees.

ii. The trial court committed error in finding that, as a matter of law, Ms. Daniels was employed in a "safety sensitive" position under *Twigg v. Hercules Corp.,* 185 W.Va. 155, 406 S.E.2d 52 (1980). The uncontroverted evidence showed that a) DAL Global never treated Ms. Daniels' position as a Passenger Service Agent as "safety sensitive, " and b) the Federal Aviation Administration ("FAA") has specifically determined that the duties of a Passenger Service Agent are not safety related and therefore not subject to mandated random drug screenings.

iii. The trial court committed error in rejecting Ms. Daniels' invasion of privacy claim as a matter of law to the extent that the issues surrounding this privacy claim and the issues related to safety sensitivity, involved genuine questions of fact that should have been properly left for jury determination.

B. *ORDER DENYING PLAINTIFF'S MOTION TO ALTER AND AMEND JUDGMENT AND OBTAIN RELIEF FROM SUCH JUDGMENT*

1. West Virginia Human Rights Act Claims (Failure To Accommodate And Retaliation)

i. The trial court committed clear error of law in denying Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and to Obtain Relief from Such Judgment in that the trial court's order failed to address or reference Plaintiff's arguments regarding her *West Virginia Human Rights Act* (WVHRA) causes of action.

2. West Virginia Medical Cannabis Act

i. The trial court committed clear error of law in denying Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and To Obtain Relief from Such Judgment by finding that such Act does not provide a private cause of action even though Ms. Daniels satisfied the criteria set forth for a private cause of action in *Hurley v. Allied Chemical Corp.*, 164 W.Va. 268, 262 S.E.2d 757 (1980); and even though W.Va. Code §16A-15-4 contains broad anti-discrimination provision and places no limitations upon its application to West Virginia employees who reside and legally use medical marijuana in another state.

ii. The trial court committed "obvious injustice" in denying Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and To Obtain Relief from Such Judgment by accepting DAL Global's spurious argument that Ms. Daniels had improperly raised criminal law questions in a case involving only civil law issues. DAL Global's assertion that Ms. Daniels had engaged in

illegal conduct involving the use or possession of drugs was the linchpin of its defense. Specifically, DAL Global asserted that Ms. Daniels was properly terminated because she had engaged in conduct that violated its policies prohibiting an employee from engaging in the illegal use or possession of drugs. In responding to DAL Global's assertion, Ms. Daniels has demonstrated, by citing to extensive legal authority, that there is no viable legal or factual theory upon which to find that she engaged in any illegal conduct that violated DAL Global's drug policies.

iii. The trial court committed clear error of law in denying Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and to Obtain Relief from Such Judgment and not reinstating Ms. Daniel's WVMCA claim based upon the violation of the Dormant Commerce Clause. Specifically, the trial court erred in concluding that principles of the Dormant Commerce Clause, as articulated by our state Supreme Court in *Matkovick v. CSX Transportation*, 238 W.Va. 238, 793 S.E.2d 888, 894 (2015), were not applicable even though the effect of the trial court's ruling resulted in discriminating against out-of-state residents employed in West Virginia by denying them the same WVMCA's protections as afforded to West Virginia residents.

3. Invasion of Privacy

i. The trial court committed clear error of law in denying Ms. Daniels' s Rule 59(e) Motion to Alter and Amend Judgment and To Obtain Relief from Such Judgment in that the trial court's order failed to take into account Ms. Daniels' arguments that DAL Global had required Ms. Daniels to submit to a return-to-work drug test in violation of her privacy rights recognized in of *Twigg v. Hercules Corp*., 185 W.Va. 155, 406 S.E.2d 52, 55 (1990).

II. STATEMENT OF THE CASE

A. Procedural History

On August 4, 2021, Ms. Daniels filed her Complaint herein against her former employer, DAL Global, LLC, and one of her supervisors, Jennifer Kuhn[1], as defendants. Ms. Daniels' suit alleges, in part: 1) DAL Global wrongfully terminated her in violation of the West Virginia Human Rights Act after it failed to engage in the interactive process and denied her request for a reasonable accommodation due to her disability status; 2) DAL Global wrongfully terminated her in violation of the WVMCA's anti-discrimination protections which bar any adverse employment action based upon her status as an individual using medical marijuana as well as in violation of public policy as expressed by the WVMCA and in accordance with *Harless v. First Nat. Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978); and 3) DAL Global violated her right to privacy by requiring her to submit to a drug test without legal justification. App. 00001-00017.

Following the close of discovery, both parties filed dispositive motions, which were set for oral argument on January 31, 2023. App. 00040-00210, 00211-00357.A few days prior to the hearing, the trial court unexpectedly canceled the hearing and requested both parties to supply proposed findings and conclusion for inclusion in proposed orders. Soon thereafter, the trial court entered an order granting DAL Global's motion for summary judgment and accepting nearly verbatim all of by DAL Global's proposed findings of facts and conclusions of law. App. 00474-00491. No separate order was entered relating to Ms. Daniels' motion for summary judgment. Ms. Daniels timely filed her Rule 59(e) Motion to Alter and Amend Judgment and to Obtain Relief from Such Judgment which was denied on May 1, 2023. App. 00492-00505, 00512-00516.

[1] Prior to the close of discovery, Ms. Daniels voluntarily dismissed Ms. Kuhn as a defendant in the litigation. App. 00038.

B. Statement of Facts

Lisa Daniels worked as a Passenger Service Agent for DAL Global Services, LLC ("DAL Global" or "Unifi") at Yeager Airport for nine (9) years before being terminated on October 27, 2020. App. 00045, 00103. DAL Global purports to be the largest aviation services provider in North America with over 20,000 employees and annually servicing over 200 airports worldwide. *See* www.unifiservice.com Ms. Daniels was assigned by DAL Global to work at Yeager Airport in Charleston West Virginia where her primary duties consisted of providing customer service to airline passengers at the Delta Airlines' ticketing counter. App. 89-90. During her employment with DAL Global, Ms. Daniels maintained her primary residence in Proctorville, Ohio and commuted to work in Charleston, West Virginia. App. 00084-00085.[2]

For several years, Ms. Daniels had suffered from fibromyalgia and chronic pain. App. 00134. Because of past negative reactions to pain medications, Ms. Daniels received an Ohio Medical Marijuana Registry card permitting her to legally use medical marijuana for pain relief. App. 00134, 00054, 00095, Ms. Daniels has been treated for pain management by Dr. Allen Guehl of Kettering, Ohio since July 7, 2020. App. 00136. Dr. Guehl has testified:

> As part of my medical care and treatment of Ms. Daniels, I evaluated and certified Ms. Daniels for the use of medical cannabis due to chronic pain and fibromyalgia starting July 7, 2020 to present.

Id. Ms. Daniels only used prescribed medical cannabis at her Ohio home and at such times to ensure she never reported to work for DAL Global under the influence of cannabis. App. 00100,

[2] From approximately 2019, Ms. Daniels maintained a second residence in the State of West Virginia so she could legally assist in providing foster care to her grandson who was under the jurisdiction of West Virginia's Child Protective Services. App. 00084-00085.

00102, 00107-00112.

In June of 2020, Ms. Daniels began experiencing increased pain due to her medical disabilities that impaired her ability to perform manual tasks, such as lifting and grasping objects with her hands. App. 00105-00106, 00069-00073. Ms. Daniels' doctor, Dr. Francis Farhadi, thereby certified to DAL Global that it was medically necessary for Ms. Daniels to undergo carpal tunnel surgery which she underwent in the early Fall of 2020. App. 0069-00073. Based upon this certification, DAL Global granted Ms. Daniels' request for continuous ADA medical leave from August 6, 2020 until September 23, 2020. App. 00051-00052,00104-00105. Upon further medical certification that she needed additional time to heal from her surgery, this ADA leave was extended until October 19, 2020. App. 00069-00073. During her approximate two-month leave of absence, Ms. Daniels used lawfully prescribed medical cannabis for the management of her pain. App. 00116, 00118-00121.

On Friday, October 16, 2020, while she was still out on employer-approved ADA leave, Ms. Daniels was ordered by her supervisor, Station Manager Jennifer Kuhn, to undergo a drug test as a condition for returning to work from her medical leave of absence. App. 00045-00046, 00069-00073, 00113-00117, 00147, 00055. DAL Global's policies at such time required that any employee on leave for more than 30 days undergo a drug test before returning to work. App. 00101, 0068, 00045.

On Saturday, October 17, 2020, prior to Ms. Daniels being placed back on the work schedule and while she was still out on ADA leave, Ms. Daniels reported to the Med Express location in Kanawha City, West Virginia to undergo her mandated testing. App. 00113-00117, 00047, 00056, 00140-00141, 00147. Before taking this drug test, Ms. Daniels confided in Ms. Kuhn that she was concerned she might test positive as she had used prescribed medical

cannabis while on ADA leave. App. 00118-00119, 00124, 00126, 00148, 00046, 00051-00052. Despite Ms. Daniels' request for more time before taking the drug test due to her use of medical cannabis, Ms. Kuhn ordered that the test proceed. App. 00124-00125.

Ms. Daniels' test result was returned on October 25, 2020 and indicated the presence of cannabis metabolites. App. 00080. DAL Global's applicable *Anti-Drug and Alcohol Misuse Prevention Program* includes specific procedures for addressing situations in which such a "non-negative" result comes from the laboratory. App. 00074-00078. Under these procedures, a designated Medical Review Officer (MRO) is required to interpret the results and assess whether there may be a legitimate medical explanation for the positive result. *Id.*

In this case, DAL Global's assigned MRO was Dr. Terri Hellings. App. 00080. Upon receiving the non-negative lab result showing the presence of cannabis metabolites, Dr. Hellings telephoned Lisa Daniels to determine if there was a legitimate medical explanation for this result. App. 00122. In turn, Lisa Daniels explained that she had lawfully used medical cannabis in accordance with a certificate issued by the State of Ohio. App. 00123. On October 26, 2020, Dr. Hellings issued his *Medical Review Officer Report* stating that Ms. Daniels had provided this information and that state laws regarding medicinal use might be applicable to explain this positive result. App. 00080. The MRO report specifically stated:

> "Donor claims medical marijuana certificate. Company policy and state laws regarding medicinal marijuana use may be applicable."

Id.

Upon learning from Dr. Hellings that she had tested positive, Ms. Daniels promptly text messaged Jennifer Kuhn and again pleaded for an accommodation that no adverse employment decision be taken against her. App. 00057-00064. Ms. Daniels provided Ms. Kuhn with an article authored by West Virginia lawyers discussing the use of medical cannabis as

protected under the West Virginia Medical Cannabis Act. *Id.* In turn, this information was forwarded to Michael James, the DAL Global Human Resources ("HR") Manager responsible for making any relevant employment decision. App. 00151, 00163, 00165-00167.

Upon Mr. James' request, Ms. Daniels drafted a narrative explaining her situation which was emailed to Station Manager Jennifer Kuhn and subsequently forwarded to HR Manager Michael James. This narrative stated:

> On March 2016, I had an accident that has required me to have four surgeries in the last four years. My doctor suggested medical marijuana for the pain management because the opiates have an adverse effect on me. I only use the edibles when the pain is uncontrollable. Approximately two weeks ago I had some gummies that has THC in the ingredients. Upon arrival at the drug test center I called my manager and made her aware that 1 was prescribed medical cannabis before I took the test. I have never used or been impaired on my job.

App. 00053-00054, 00127-00131, 00154-00155. Ms. Daniels also attached a copy of her Ohio medical cannabis card to her statement. App. 00053-00054, 00154-00157.

Having received this information, HR Manager Michael James consulted Kevin Ingham, DAL Global's Chief People Officer ("CFO") who exercised supervisory authority over DAL Global Human Resources Department. App. 00079. Mr. James emailed to CFO Ingham the relevant information and documentation he had received along with a recent article written by West Virginia employment lawyers which explained West Virginia medical cannabis and drug testing laws. *Id*.

Based upon the information and documentation forwarded by Mr. James, CFO Ingham had in his possession multiple sources of information demonstrating why Ms. Daniels' positive test result should not form the basis of any adverse employment decision against her.

This information and documentation included:

- Ms. Daniels' written explanation that she had lawfully used medical cannabis at her healthcare provider's recommendation for pain management.

- Documentation showing that Ms. Daniels' lawful usage of medical cannabis at issue had occurred while she was on legally protected ADA leave approved by her employer.

- A copy of Ms. Daniels lawfully issued Ohio Medical Cannabis Card.

- The MRO report verifying that Ms. Daniels' provision of information about her medical cannabis use and notice to the employer that there might be applicable state laws and company policies excusing Ms. Daniels' positive test result.

- A recently published article from West Virginia lawyers explaining the legal protections to which Ms. Daniels was entitled to regarding her employment and her legal use of medical cannabis.

- Ms. Daniels' written verification that she had never reported to work under the influence of cannabis.

App. 00053-00054, 00079, 00165-00167. Instead of conducting a further inquiry to address Ms. Daniel's request for an accommodation in this situation, Mr. Ingham hastily issued a brief three sentence email response to Mr. James approving Lisa Daniels' termination based upon the wholly unsubstantiated finding that she had reported to work under the influence of marijuana. App. 00079. CFO Ingham's response stated:

> Happy to talk about this if we need to, but a medical card permits an employee to legally use marijuana, but it does not permit an employee to be under influence at work, especially when there are safety sensitive issues involved like those in our industry. The law in West Virginia does not contradict that. Therefore, I approve the termination.

Id.

Michael James admitted during his deposition that DAL Global failed to engage in any interactive process to respond Ms. Daniels' request that she be granted an accommodation and not disciplined because of her use of medical cannabis while on ADA leave.

> Q. Mr. Ingham's response to you makes no reference to any potential reasonable accommodations that might be considered in her situation, correct?
>
> A. Correct.
>
> Q. And his e-mail to you makes no reference to engaging in an interactive process with Ms. Daniels to learn more about her situation and to assess whether reasonable accommodations might be possible; do you agree with that?
>
> A. Yes.
>
> Q. And just to be clear, prior to terminating Ms. Daniels, you are not aware of any steps that were undertaken by DAL Global to engage in an interactive process with Ms. Daniels about her health conditions or about her use of medical cannabis; is that true?
>
> * * * * * * *
>
> A. None that I am aware of.
>
> Q. No such interactive process was initiated by you; is that fair?
>
> A. Correct.
>
> Q. You never had any direct communications with Ms. Daniels about any of these issues, did you?
>
> A. No communications.
>
> Q. To the best of your knowledge, Mr. Ingham did not have any interactive process with Ms. Daniels, correct?
>
> A. None that I am aware.
>
> Q. And you did not direct Ms. Kuhn or Ms. Smith or anyone else to engage in any interactive process, did you?

> A. No.
>
> Q. And to the best of your knowledge, Mr. Ingham did not direct Ms. Kuhn or Ms. Smith to engage in any interactive process with Ms. Daniels?
>
> A. Not that I am aware.

App. 00168-00169.

Michael James was fully aware Ms. Daniels had been on ADA leave when she had used medical marijuana. App. 00147, 00164, 00148, 00152, 00153, 00157. There was no evidence presented in this case that Ms. Daniels ever reported to work under the influence of marijuana, and her narrative presented to DAL Global specifically denied any such occurrence. App. 00053-00054

Nevertheless, with knowledge that CFO Ingham's had erroneously concluded that Ms. Daniels had reported to work under the influence of cannabis, Mr. James promptly notified Jennifer Kuhn that Ms. Daniels' situation had "been reviewed and was supported by Human Resources for termination due to Failed Drug Test." App. 00049-00050. Mr. James concluded his email by emphasizing that there was no longer any internal appeal process that would allow Ms. Daniels to challenge this termination decision. *Id.*

Although DAL Global's CPO, Kevin Ingham, had initially justified the firing of Ms. Daniels based upon the clearly erroneous finding that she had reported to work under the influence of marijuana, DAL Global materially altered its asserted justification for this termination during the course of this litigation. App. 00079. During his May 2, 2022 deposition, Michael James testified that Ms. Daniels was terminated because she had violated DAL Global's *Employee Handbook* policy that prohibits the unlawful use or possession of drugs. App. 00414-00415. DAL Global has not since asserted that Ms. Daniels reported to work under the influence of marijuana.

III. SUMMARY OF ARGUMENT

A. Trial court erred in dismissing Ms. Daniels' WVHRA claims for the failure to accommodate and failure to retaliate based upon the incorrect conclusion of law that the presence within the blood system of medical marijuana used in Ohio and in accordance with Ohio law constituted a violation of West Virginia drug laws and thus disqualified Ms. Daniels from meeting the definition of "disabled" as defined by the WVHRA.

B. Trial court erred in dismissing Ms. Daniels failure to accommodate claim based upon an undue hardship defense because DAL Global failed to assert undue hardship as an affirmative defense, failed to present any substantive evidence to support this defense, and failed to argue this defense in its motion for summary judgment. *Haynes v. Rhone-Polenc, Inc.*, 206 W.Va. 18, 521 S.E.2d 331 (W.Va. 1999). Further setting aside the failure to assert undue hardship as an affirmative defense, the court erred in dismissing the claim on summary judgment as the issue of undue hardship is a question of fact to determined by a jury.

C. Trial court errored by concluding that Ms. Daniels did not engage in any "protected activity" by requesting to be exempt from a drug test, thus failing to establish a claim for retaliatory discharge in violation of the WVHRA. Ms. Daniels alleged in her Complaint and testified that she repeatedly requested a reasonable accommodation to her disability, e.g. chronic pain which was legally treated by medical marijuana, to which DAL Global's only response was her termination. To terminate an employee for requesting a reasonable accommodation is a violation of a fundamental right guaranteed under the WVHRA, and specifically protected by W.Va. Code §5-11-9(7), given that this right to a "reasonable accommodation" is squarely embedded in the West Virginia Human Rights Commission's regulatory definition of an "qualified individual with a disability" and is an express right of a qualified disabled employee.

D. Trial court erred in dismissing Ms. Daniels retaliation claim finding she had not causally established that requesting an accommodation was the motivating fact in her termination as motivation is a question of fact and should be resolved by a jury and not by the trial court.

E. Trial court erred in ruling that Ms. Daniels' failed to address DAL Global's challenge to her WVHRA retaliation claim. Specifically, Ms. Daniels addressed DAL Global's argument in her response in opposition to summary judgment in that the argument was premised on the same argument raised by DAL Global challenging the failure to accommodate claim.

F. Trial court erred in finding that the WVMCA does not provide a private cause of action given that per the criteria of *Hurley v. Allied Chemical Corp*., 164 W.Va. 268, 262 S.E.2d 757 (1980), Ms. Daniels falls within the class of persons the Act was designed, in part, to protect; the express anti-discrimination provision contained in the Act reflects the legislature's intent to protect West Virginia employees from discrimination related to their use of medical marijuana and a private cause of action would be the only way to enforce the legislature's intent; and, finally, recognizing a private cause of action would not "intrude" into an area exclusively federal in nature.

G. Trial court erred in finding that WVMCA did not cover Ms. Daniels' use of medical marijuana under Ohio law because the Act contains no language that would limit its protections in favor of West Virginia employees only to West Virginia users of medical marijuana.

H. The trial court committed "obvious injustice" in denying Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and to Obtain Relief from Such Judgment by accepting DAL Global's spurious argument that Ms. Daniels had improperly raised questions of criminal law in a case involving only civil law issues. DAL Global's attacks on Plaintiff's WVHRA claims were

based upon an assertion that Ms. Daniels violated its employee policies that prohibited the illegal use or possession of drugs. Therefore, it was DAL Global and not Ms. Daniels, who had initially injected issues of criminality into this case. In her Rule 59 motion, Ms. Daniels cited to extensive legal authority to demonstrate that there was no viable legal or factual theory upon which to find that she violated West Virginia's simple possession law so as to support a conclusion that she had violated DAL Global's employee policies that prohibited the illegal use or possession of drugs.[3]

I. Trial court erred in finding that Ms. Daniel, who was an Ohio resident who commuted to work in West Virginia, was not entitled to the same legal protections as her coworker who resided in West Virginia and thereby the trial court's ruling was in violation of the Dormant Commerce Clause of the U.S. Constitution.

J. Trial court erred in citing *Baughman v. Walmart Stores*, 215 W.Va. 45, 592 S.E.2d 824 (2003) as supporting the dismissal of Ms. Daniels claim that the drug test violated her right to privacy in that the *Baughman* decision only addressed the drug testing of an applicant for employment and not a current employee which have totally different levels of expectation of privacy.

K. Trial court erred in finding that Ms. Daniels held a "safety sensitive" position under *Twigg v. Hercules, Corp*., 185 W.Va. 155, 406 S.E.2d 52 (1980) thus could not pursue a privacy claim due to workplace drug testing because: 1) DAL Global never treated Ms. Daniels nor any other Passenger Service Agents ("PSA") as "safety sensitive" thus subject to random drug testing as required under federal law; 2) FAA did not consider PSA's as "safety sensitive" thus subject to

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[3] Ms. Daniels has not addressed this particular argument during the summary judgment briefing phase because DAL Global only first made this argument within its proposed Order submitted following the closing of all briefing.

random drug testing. Setting aside the above cited reasons, whether Ms. Daniels' held a "safety sensitive" position, was a question of fact to be determined by a jury and not by the trial court.

L. Trial court erred in failing to address Ms. Daniels arguments related to the dismissal of the WHRA claims as well as her invasion of privacy claim as asserted in Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and To Obtain Relief from Such Judgment.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, the Petitioner believes that the decisional process would be significantly aided by oral argument and therefore herein requests that the ICA set this case for a Rule 20 argument.

V. ARGUMENT

A. Standard Of Review

"A circuit court's entry of summary judgment is reviewed de novo." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Sy. Pt. 6, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of N.Y.* 148 160, 133 S.E.2d 770 (1963). "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but is to determine whether there is a genuine issue for trial." Syllabus point 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, *Aetna Casualty Surety Co. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

B. WVHRA Claims

On February 10, 2023, the trial court entered its *Final Order Granting Defendant's Motion for Summary Judgment.* App. 00475-00492. The trial court's rulings dismissing Ms. Daniels's *West Virginia Human Rights Act* failure to accommodate claim (Count 1) and her related *West Virginia Human Rights Act* retaliation claim (Count 2) turned directly upon the conclusion set forth in paragraph 50 and repeated in paragraph 61 of the Court's conclusions of law:

> Any marijuana in her [Plaintiff's] system was not legal in the state of West Virginia, and any drug test for marijuana in West Virginia would have been testing Plaintiff for an illegal drug in the state.

App. 00480, 00482.

This argument attributing illegal conduct to Ms. Daniels because she had marijuana in her system when she had tested in West Virginia had not been raised by DAL Global in any of its extensive briefing either in support of its own motion for summary judgment or in its opposition to Ms. Daniels' motion for summary judgment. DAL Global failed to cite within the proposed order first asserting this argument any supporting cases, statutes or other legal authorities.

Persuading the trial court to adopt this belatedly concocted legal conclusion was critical for DAL Global to prevail upon its motion for summary judgment. During this litigation, DAL Global had changed it theory of defense from a claim that Ms. Daniels had reported to work under the influence of marijuana[4] to a claim that she had violated DAL Global's *Employee Handbook* policy that provides: "Possession, use, sale, exchange, or manufacture of any illegal drug will result in termination." App. 00414-00415. Under its recast theory of defense, it became incumbent

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[4] There was absolutely no evidence presented in this case that Ms. Daniels had ever reported to work under the influence of marijuana as Mr. Ingham had initially asserted in approving her termination. When she took her drug test in October 2020, Ms. Daniels had been out of work on approved ADA leave for several months. App. 00113-00117, 00047, 00056, 00140-00141. Ms. Daniels expressly denied she had ever reported to work under the influence of marijuana, and, Defendant has failed to produce any credible evidence during this case refute this denial. App. 00053, 00112.

upon DAL Global to show in some way that Ms. Daniels had violated West Virginia law in connection with her use of legally prescribed medical marijuana in Ohio. DAL Global accomplished this goal by burying paragraphs 50 and 61 within its proposed order and inducing an unwary trial court to accept this bald conclusion even though it came without any legal support whatsoever. App. 00480 By doing so, DAL Global induced the trial court to erroneously rule that Ms. Daniels had engaged in illegal conduct in violation of DAL Global's policies because traces of **lawfully** ingested Ohio medical marijuana were in her blood system when DAL Global required her to undergo a return to work drug test in West Virginia.

The legal proposition that the presence of marijuana in one's blood system renders them guilty of illegal possession has no support under West Virginia law and has been overwhelmingly rejected within other jurisdictions that have confronted analogous situations.

1. Ms. Daniels was disabled within the meaning of the West Virginia Human Rights Act at the time she lawfully used prescribed medical cannabis thus she was protected under the Act for both her failure to accommodate and retaliation claims.

The legal conclusion articulated in paragraph 50 (regarding the failure to accommodate claim) and paragraph 61 (regarding the retaliation claim) of the Court's Order is that Ms. Daniels engaged in illegal conduct in West Virginia because traces of lawfully ingested medical marijuana were detected in her system when she underwent a West Virginia drug test. App. 00480, 00482. DAL Global has cited no statutes, regulations. or case law to support this critical legal conclusion. DAL Global has not even cited *W.Va. Code* §60A-4-401(c) which is the controlling West Virginia statute that criminalizes illegal "possession" of marijuana.[5] DAL Global is straining to portray Ms. Daniels' legal consumption of medical marijuana in Ohio as being illegal under West Virginia

[5] Although DAL Global repeatedly and groundlessly accused Ms. Daniels of being an illegal drug user throughout its summary judgment briefings, nowhere in such briefing did DAL Global allege that she was guilty of illegal possession of marijuana until this issue was first raised in its proposed order unwarily accepted by the trial court. App. 00217, 00219, 00223, 00224, 00437, 00439, and 00440-00443.

so as to disqualify her from meeting the definition of "disabled" under WVHRA, *W.Va. Code* §5-11-3(m).

Nonetheless, a review of applicable West Virginia law together with a review of overwhelming authority from other jurisdictions confirms that DAL Global induced the trial court to commit an error of law by incorporating Paragraphs 50 and 61 into her Order granting summary judgment in favor of DAL Global. *Id.* The West Virginia's criminal statute that addresses possession of illegal substances is commonly referred to as our simple possession law. *W. Va. Code* §60A-4-401(c) provides:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this act.

To violate this criminal statute, a person must ***knowingly*** and ***intentionally possess*** the controlled substance at the time of the alleged offense. Our Supreme Court has never addressed a case with the unique facts of this case. However, our Court has addressed the elements of dominion and control that must be present before a person's conduct will be found to constitute criminal possession of marijuana.

In *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (W.Va. 1978) a defendant challenged a criminal charge that he had illegally possessed marijuana that was found in an apartment in Morgantown. The evidence established that, although the defendant paid rent for the apartment, he did not live there and had moved his belongings to another apartment. The defendant argued that "he was not in control of the premises" and therefore it was improper to instruct the jury "that mere presence upon premises in which a controlled substance is found raises a presumption against the defendant of unlawful possession." *Id* at 466-467.

The Supreme Court ruled that the correct statement of the law was contained in Defendant's instruction No. 5 that stated:

> The Court instructs the jury that possession of marijuana is the conscious and intentional physical possession giving the Defendant immediate and exclusive control over marijuana. The offense of possession of marijuana also includes constructive possession if the State can establish beyond a reasonable doubt that the Defendant had knowledge of the marijuana and that it was subject to his dominion and control.

In turn, Syllabus Pt. 4 of *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458, 467 (W. Va. 1975) succinctly stated:

> The offense of possession of a controlled substance also includes constructive possession, but the State must prove beyond a reasonable doubt that the defendant had knowledge of ***the controlled substance and that it was subject to defendant's dominion and control.*** [Emphasis added.]

Lisa Daniels admittedly exercised control and dominion over her legally prescribed medical marijuana when she lawfully acquired it from an Ohio dispensary and drove it back to her Ohio home. She also exercised dominion and control over her medical marijuana when she procured it from her medicine cabinet and lawfully ingested it inside her Ohio residence. However, after this medical marijuana was ingested and absorbed into her blood system, Ms. Daniels had no further ability to exercise dominion or control over it. She could not leave it behind at her Ohio home when she travelled to West Virginia, and she had no human ability to expel the remaining traces of marijuana from her body any sooner than nature allowed. Thus, an application of the *Dudick* principles support the conclusion that Lisa Daniels was not in criminal "possession" of marijuana when she underwent an employer-mandated drug test because she had no control or dominion at such time over the remaining traces of medical marijuana in her system.

Courts in other jurisdictions have addressed similar situations and have held that the presence of drugs in one's blood system at the time of a drug test does not constitute criminal possession. *Benton v. Commonwealth*, No. 2019-CA-1901-MR (Ky. Ct. App. 2021) (once a controlled substance is within a person's system the substance is beyond the scope of regulation contemplated in the possession statute); *State v. Thronsen*, 809 P.2d 941, 943 (Alaska Ct.App.1991) (positive drug test could not sustain conviction for cocaine possession because defendant ceased having control of it once it entered his body); *State v. Vorm*, 570 N.E.2d 109, 111 (Ind.Ct.App.1991) (positive drug test alone fails to prove defendant knowingly and voluntarily possessed cocaine); *State v. Downes* 572 P.2d 1328, 1330 (Or. Ct. App. 1977), superseded by statute as stated in *Employment Div. v. Smith* 485 U.S. 660, 108 S.Ct. 1444, 99 L.Ed.2d 753 (1988) (the exercise of dominion or control over the property was necessary and that after a drug is ingested or injected into the body, the host body can no longer exercise dominion or control over it); *State v. Flinchpaugh*, 232 Kan. 831, 659 P.2d 208, 211 (1983) (once drug is in a person's blood, he no longer controls it, and positive drug test alone is insufficient to establish knowledge); *State v. Lewis*, 394 N.W.2d 212, 217 (Minn. Ct. App. 1986) ("evidence of a controlled substance in a person's urine specimen does not establish possession ... absent probative corroborating evidence of actual physical possession"); *In re R.L.H.*, 327 Mont. 520, 116 P.3d 791, 795-96 (2005) (presence of drug in body insufficient evidence that such drug was knowingly and voluntarily ingested); *Jackson v. State,* 833 S.W.2d 220, 223 (Tex.App.1992) ("[t]he results of a test for drugs in bodily fluids does not satisfy the elements of the offense of possession of cocaine"); *State v. Sorenson,* 758 P.2d 466, 468 (Utah Ct. App.1988) ("the mere presence of alcohol in the bloodstream does not constitute possession"); *State v. Griffin*, 220 Wis.2d 371, 584 N.W.2d 127, 131 (1998) ("mere presence of drugs in a person's system is insufficient to prove that the drugs are

knowingly possessed by the person or that the drugs are within the person's control"); *Franklin v. State*, 258 A.2d 767, 769 (Md. Ct. Spec. App. 1969) (once a narcotic drug is injected into the vein, or swallowed orally, it is no longer in the individual's control for purposes of unlawful possession); *Nethercutt v. Commonwealth* 241 Ky. 47, 43 S.W. 2d 330 (1931) (the presence of alcohol in one's stomach does not constitute possession within the meaning of the law).

A legal conclusion that remaining traces of marijuana in one's system constitutes criminal conduct under West Virginia law would have serious implications well beyond the facts of this case. It is medically established that a urine test may detect marijuana in a person's system for up to 30 days.[6] This means that, under DAL Global's novel legal proposition, any person lawfully using marijuana in another state would become guilty of violating West Virginia's criminal possession statute if they entered our State while any detectible amount of lawfully consumed marijuana remained in their blood system. Such a legal conclusion would stand West Virginia's criminal drug laws on their head.

There is an additional factor that makes DAL Global's ill-conceived argument even more meritless than the arguments regarding unlawful possession rejected in the cases cited above. In the cases cited above, the prosecution's argument that illegal possession existed at the time of drug testing was logically tied to the argument that some actual illegal possession must have necessarily preceded the drug test. However, in this case, Lisa Daniel's ***actual possession*** of medically prescribed marijuana occurred in Ohio and was completely legal. In other words, DAL Global has sought to criminalize Lisa Daniels' lawful consumption of medical marijuana in Ohio solely upon the basis that she was mandated to cross state lines to undergo a West Virginia drug test.

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[6] *See* National Center on Substance Abuse and Child Welfare/Substance Abuse and Mental Health Services Administration (SAMHSA), [October 10, 2015]; *Drug Testing Practice Guidance*, available at https://ncsacw.samhsa.gov/files/IADrug Testing Bench Card 508.pdf.

Finally, the trial court erred in ruling that providing any requested accommodation to Ms. Daniels regarding her marijuana use would have been an undue hardship on DAL Global. App. 00481. DAL Global's reliance upon an undue hardship defense in this case to obtain summary judgment was plainly improper for multiple reasons. DAL Global failed to plead this affirmative defense in its Answer and it failed to offer any evidence to support it within its motion for summary judgment. App. 00018-00037, 00211-00233. *See Hayes v. Rhone-Poulenc, Inc.*, 206 W.Va. 18, 521 S.E.2d 331 (W.Va. 1999) (undue hardship is an affirmative defense upon which the employer bears the burden of persuasion), *Nellas v. Loucas,* 156 W.Va. 77,191 S.E.2d 160, 163 (W.Va. 1972) (a failure to plead an affirmative defense results in waiver of that defense). Moreover, even if DAL Global had properly plead an undue hardship defense and was prepared to present evidence at trial to support it, this would give rise to genuine issues of fact that should be decided by a jury and not by the trial court.

2. Ms. Daniel's West Virginia Human Rights Act retaliation claim is legally valid and was wrongfully dismissed on summary judgment.

The trial court wrongly rejected Ms. Daniels' retaliation claim by finding that Ms. Daniels had failed to address and had thereby waived its right to challenge DAL Global's arguments related to the WVHRA retaliation claim. App. 00482. However, DAL Global's erroneous rationale for arguing against Ms. Daniels' failure to accommodate claim under the WVHRA was premised on the same erroneous rationale for challenging the WVHRA retaliation claim, namely, whether Ms. Daniels has acted illegally so as to negate the applicability of the WVHRA. By addressing and destructing this argument as to DAL Global's challenge to the reasonably accommodation claim, Ms. Daniels necessarily addressed and deconstrued this argument as applied to any other claims. *See* App. 00358-00364.

Second, the trial court also committed error by concluding, without citing legal authority, that Ms. Daniels did not engage in any "protected activity" by requesting to be

exempt from a drug test, thus failing to establish a claim for retaliatory discharge in violation of the WVHRA. Ms. Daniels alleged in her Complaint and produced evidence that she repeatedly requested a reasonable accommodation as to her disability, e.g. chronic pain which was legally treated by medical marijuana, and to which DAL Global's only response was her termination. App.00004-7,00051-64, 00115-117, 000124, 00127-28, 00131, ,00151-152.

To terminate an employee for requesting a reasonable accommodation is a violation of a fundamental right guaranteed under the WVHRA, and specifically protected by W.Va. Code §5-11-9(7), and given that this right to a "reasonable accommodation" is squarely embedded in the West Virginia Human Rights Commission's regulatory definition of an "qualified individual with a disability" and is an express right of a qualified disabled employee. *See* West Virginia Human Rights Commission's Regulation 77CSR 1-4.2 ("'Qualified Individual with a Disability' means an individual who is able and competent, with reasonable accommodation to perform the essential functions of the job…") and 77CSR 1-4.5 ("An employer shall make reasonable accommodation to the known physical or mental impairments of qualified individual with disabilities where necessary to enable a qualified individual with a disability to perform the essential functions of the job.") In short, a claim of retaliation can be predicated, as asserted in Ms. Daniels' Complaint, upon the termination of a disabled employee for seeking a reasonable accommodation.

Finally, there are two remaining errors related to the trial court's rejection of Ms. Daniels' WVHRA retaliation claim. First, the trial court erred in ruling that Ms. Daniels had not demonstrated that "but for" her request for an accommodation she would not have been fired. App. 00483-00484.This issue of causation issue is a pure question of motive and therefore is a question of fact to be determined solely by a jury. *Hanlon v. Chambers,* 195 W.Va. 99, 464 S.E. 2d 741, 755 (1995) (Genuine issues of material fact existed as whether employer discharged a supervisor as a result of a recommendation of an expert management consultant or in retaliation for her complaints about sexual harassment, precluding summary

judgment on retaliatory discharge claim.) Second, once the retaliation issue was again before the trial court pursuant to Ms. Daniels' Rule 59(e) Motion to Alter and Amend Judgment and To Obtain Relief from Such Judgment, the trial court erred in failing to address or reference Ms. Daniels' arguments regarding her *West Virginia Human Rights Act* (WVHRA) causes of action in its May 1, 2023 Order denying Ms. Daniels' motion, thus violating Ms. Daniels' basic and fundamental due process rights. App. 00512-00516.

C. West Virginia Medical Cannabis Act Claim.

1. Ms. Daniels was wrongfully terminated under the West Virginia Medical Cannabis Act due to her lawful use of medical marijuana to treat chronic pain.

The trial court granted DAL Global's motion for summary judgment and dismissed Ms. Daniels' *West Virginia Medical Cannabis Act* ("WVMCA") claim upon two erroneous grounds: (1) that the Act did not give rise to a private cause of action; and (2) that WVMCA only applies individuals certified to use medical cannabis under West Virginia law. App. 00483-00485. As addressed below, neither position has merit.

While the WVMCA does not expressly provide for a private cause of action for the violation of the Act's anti-discrimination protections, these provisions were obviously designed by our legislature to provide protections to employees who have a "serious medical condition" that requires the use of medical cannabis. *See W.Va. Code* §16A-15-l(a)(31). Specifically, the broad anti-discrimination protections in the Act provide, in part, the following:

> [n]o employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.

W.Va. Code §16A-15-4(b)(l). Ms. Daniel's wrongful termination proximately resulted from her status as a person who was lawfully certified to use medical cannabis. DAL Global's decision to terminate Ms. Daniels was directly tied to the fact that she tested positive for using lawfully prescribed

medical cannabis. Therefore, DAL Global would not have terminated Daniels but-for her "status as an individual who is certified to use medical cannabis." *W.Va. Code* §16A-15- 4(b)(l).

Without recognizing a private cause of action to address such a clear violation of *W.Va. Code* §16A-15-4(b)(l), these statutory protections would be illusory and meaningless. Given the strong language prohibiting discrimination under this Act, it cannot be reasonably concluded that our Legislature intended to impose such limitations without affording some civil recourse. In West Virginia, the acceptance of implied causes actions for statutory violations is deeply ingrained. See *Jenkins v. J.C. Penney Cas. Ins. Co.,* 167 W. Va. 597,280 S.E.2d 252 (1981), *overruled on other grounds by State ex rel. State Farm Fire Cas. Co. v. Madden,* 192 W. Va. 155,451 S.E.2d 721 (1994). "When the remedy is necessary or at least helpful in the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Hurley v. Allied Chemical Corp.* 262 S.E. 2d. 757 762 (W.Va. 1980) [quoting from *Cannon v. University of Chicago,* 441 U.S. 677, 703].

In this case, the creation of a private cause of action to enforce the rights set forth under *W Va. Code* §16A-15-4(b)(l) is necessary to protect employers from discriminating against employees who are certified to use medical cannabis due to some serious health condition. Our State Supreme Court has established the following test for determining whether a private cause of actions exists:

> The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.

Hurley v. Allied Chemical Corp. 262 S.E.2d 757, 762 (W.Va. 1980).

Lisa Daniels satisfies each of these elements under *Hurley* for establishing a private cause of action. First, as a person employed within West Virginia with a serious medical condition for which she was lawfully certified to use medical cannabis as part of her treatment, Ms. Daniels falls within the class of persons the Act is designed to protect. Further, with respect to elements number 2 and 3 of the *Hurley* analysis, the clear intent of the Legislature is to to sanction any West Virginia employer who may "discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee" due to the "employee's status as an individual who is certified to use medical cannabis." A private cause of action to enforce these protections is the only way to give force to this objective and is entirely consistent with the purpose of the overall statute. To rule there is no private cause of action would render these anti-discrimination protections illusory. Finally, the fourth element is satisfied as this West Virginia law does not "intrude" into any area exclusive to federal law. There is nothing in federal law that is contrary to the protections articulated under the anti-discrimination provisions of the WVMCA.

By recognizing an implied cause of action under West Virginia's anti-discrimination statute, this Court would be acting in concert with other jurisdictions that have found implied causes of actions to exist under nearly identically worded statutes. *Palimiter v. Commonwealth Health System Inc.,* 260 A.3d 967, 975-976 (Pa. Superior Court 2021); *Callaghan v. Darlington Fabrics Corp*. No. PC-2014-5680, 2017 WL 2321181 (R.I. May 23, 2017); *Noffsinger v. SSC Niantic Operating Co*., 273 F. Supp 3d 326 (D. Conn. 2017); *Chance v. Kraft Heinz Food Co*., No. K18C-01-056, 2018 WL 6655670 (Del. Super. Ct. Dec. 17, 2018); and *Whitmire v. Wal-Mart Stores, Inc*., 359 F. Supp 3d 761 (D. Ariz. 2019).

DAL Global further argued and the trial court erroneously held that the *West Virginia Medical Cannabis Act* only provides employment-related protection for individuals who are certified to use medical cannabis under the provisions this particular Act. App. 00484-00485. However, the anti-discrimination provisions upon which Ms. Daniels rely make no distinction between those "certified to use medical cannabis" in West Virigina and those legally certified under the laws of another state. W.Va. Code §16A-15-4 contains very broad employment-related protections and is not restricted by any state boundaries at to where medical certification was procured:

> "[n]o employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliates against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana." W.Va. Code §16A-15-4(b)(1).

DAL Global relies upon the last section of the provision that defines the protected class as an "individual who is certified to use medical marijuana." This section does not in any way limit its application to only individuals "certified" under West Virginia law to "use medical marijuana." There is no language in W.Va. Code §16A-15-4(b)(1) to suggest that this law's anti-discrimination protections are any less applicable to West Virginia employees who have obtained their medical cannabis certifications in some other state. In short, there is no basis as DAL Global insists to read into this statute limitations that our state Legislature simply did not include or intend.

If our Legislature had intended to limit the anti-discrimination protections as DAL Global contends, it could have easily provided that its prohibitions applied only to by adding to the phrase "under the Act" thus making the provision at issue read as follows: "an individual who is certified ***under the Act*** to use medical marijuana." Due to the lack of any such limiting language, one must conclude that our Legislature intended to provide protections to all West

Virgina employees who legally to use medical cannabis – whether under West Virginia law or some other state law. Basic fairness supports this interpretation since there is no logical basis to deny equal protection under this law to employees, such as Ms. Daniels, who live in Ohio and commute to West Virginia.

Even in the absence of finding a private cause of action under the WVMCA, the trial court committed error of law in finding that Ms. Daniels discharge for her lawful use of medical cannabis under an Ohio Medical Marijuana Registry card was not violation of public policy under West Virginia common law as articulated in *Harless v. First Nat. Bank in Fairmont*, 162 W.Va. 116, 246 S.E.2d 270 (1978) given that the WVMCA contains very specific language that expressly and broadly bars employment-related discrimination of individuals who legally use medical cannabis and thus is evidence of a substantial public policy enforceable under the West Virginia law. App. 00485. *Id*. at 277) ("…the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.")

The trial court committed "obvious injustice" in denying Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and To Obtain Relief from Such Judgment by accepting DAL Global's spurious argument that Ms. Daniels had improperly raised questions of criminal law in a case involving only civil law issues. App. 00513. DAL Global's attack on Plaintiff's civil claims has been based upon an assertion that Ms. Daniels violated its employee policies that prohibited the illegal use or possession of drugs. App. 00414-00415, 00222-00226. In turn, the trial court's most crucial ruling in this case was in accepting DAL Global's wholly unsupported assertion that, by having traces of lawfully consumed medicinal marijuana in her blood system when undergoing a

drug test in West Virginia, Ms. Daniels violated DAL Global's policies prohibiting the illegal possession or use of drugs. App. 00477-00481. Ms. Daniels has demonstrated, by citing to extensive legal authority in her Rule 59 briefing, that there is no viable legal theory or underlying factual basis upon which to find that she engaged in any criminal conduct that violated DAL Global's employee policies. *Id.*; App. 00501-00503.

Finally, the trial court's order granting DAL Global's motion for summary judgment discriminates between citizens of different states engaged in commerce. Specifically, in *Matkovich v. CSX Transportation*, 238 W.Va. 238, 244, 793 S.E. 2d 888, 894 (2015) our Supreme Court recognized the application of the dormant Commerce Clause which precludes States from "discriminat[ing] between transactions on the basis of some interstate element." [citing to *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 332, n. 12, 97 S. Ct. 599, [608, n. 12,] 50 L. Ed. 2d 514 (1977)]. This doctrine is most often applied to prevent a State from taxing a transaction more heavily when it crosses state lines. *Id.* However, the same principles apply to a ruling by a State Court that makes the validity of an employee's termination turn upon whether she crossed state lines to undergo an employer mandated drug test.

DAL Global persuaded the trial court to accept its belated and unsupported position that Lisa Daniels' termination was justified because her drug test conducted in West Virginia detected traces of Ohio ingested medical marijuana. App.00479-00484. It is undisputed that Ms. Daniels lawfully possessed and used her medical marijuana in Ohio. Therefore, if she had been mandated by Defendant to undergo the same drug test in Ohio, there would have been no basis to assert that she engaged in any illegal act and there would have been no proper basis to terminate her employment. In sum, according to DAL Global's controlling theory of the case, the justification for firing Ms. Daniels turned upon the fact that she was compelled by DAL Global to cross state

lines to undergo her drug test. The trial court's adoption of this position was not only an erroneous application of law, it was also unconstitutional.

D. Invasion of Privacy Claim

1. DAL Global's drug testing violated Ms. Daniels' right to privacy per Twigg decision.

In *Twigg v. Hercules Corp.* 406 S.E.2d 52 (W.Va. 1990), our Supreme Court held the following regarding workplace drug testing: "[W]e likewise recognize that it is contrary to public policy in West Virginia for an employer to require an employee to submit to drug testing, since such testing portends an invasion of an individual's right to privacy." 406 S.E.2d at 55. In *Twigg*, the Court recognized two limited exceptions to the prohibition on workplace testing:

> We do, however, temper our holding with two exceptions to this rule. Drug testing will not be found to be violative of public policy grounded in the potential intrusion of a person's right to privacy where it is conducted by an employer based upon reasonable good faith objective suspicion of an employee's drug usage or where an employee's job responsibilities involves public safety or the safety of others.

Id. at 55.

Initially, it should be recognized that the trial court erroneously accepted DAL Global's flawed interpretation of our Supreme Court's holding in *Baughman v. Wal-Mart, Inc*., 592 S.E.2d 824 (2003) by hold that *Baughman* excludes *Twigg's* protections from employees returning to work from a leave of absence. App. 00487-0488. *Baughman* contains no such holding or anything remotely suggesting such an interpretation. Rather, the Supreme Court in *Baughman* found that plaintiff's right to privacy were not violated by Wal-Mart "requiring her ***prior to starting work*** to give a urine sample for drug testing purposes." [Emphasis added.] *Id.* at 828. Significantly, Baughman focused on the fact that "a person clearly has a lower expectation of privacy" in the pre-employment context.[7] The trial court in

[7] The court in *Baughman* was careful to limit its ruling to the facts before it and did not rule out the possibility that a set of facts may later be presented before the Court under which a pre-employment drug test could possibly be a wrongful invasion of privacy. The Court stated: "In light of the important issues involved, we are not prepared in

Baughman did not purport to address the entirely different factual scenario of an employer requiring an **existing employee** to take a drug test upon returning from a leave of absence as was the case with Ms. Daniels.

Indeed, the principles expressed in *Baughman* only amplify the reasons why Ms. Daniels' privacy rights deserved extra protection:

> The principle and right of personal autonomy and privacy is just as important as the more traditional civil rights of freedom of assembly, speech, and religion. It is central to our constitutional system of government. Its protection needs strong and sometimes controversial and fearless bulwarks., especially in an age of ever-more sophisticated and intrusive technologies, and cries for heightened surveillance and mentoring of every aspect of life. It is a crucial role of courts in a constitutional system to see that these bulwarks of privacy, autonomy, and ultimately freedom remain strong even in the face of short-sighted efforts to erode them or to make an end-run around them.

Id.

Ms. Daniels had every right to expect that her privacy rights would be upheld by DAL Global while she was out of work on approved disability leave. The assertion that Ms. Daniels lost her privacy rights solely because she was on approved disability leave is inherently discriminatory in and of itself. Indeed, if anything, Ms. Daniel's expectations of privacy under these circumstances should have been greater and not less than her co-employees who were not on leave. Due to her disability, Ms. Daniels was undergoing medical treatment for which she was entitled to medical privacy protection. Her use of lawfully prescribed medical cannabis while on leave had no immediate nexus to her ability to perform her job. In other words, these factors called for greater privacy protection and not less.

The second dubious way DAL Global argued away *Twigg* is by asserting that Ms. Daniels possessed a "safety-sensitive" position that justified mandatory drug testing. App. 00488-00489. *Twigg* held that an employer may require an employee to submit to a drug test where the "employee's job

deciding this case to paint with an unnecessarily broad brush and to say that under no set of particular circumstances could a person successfully assert an invasion of privacy-based claim arising from a particular pre-employment drug testing requirement." *Baughman* at 828.

responsibility involves public safety or the safety of others." The Court went on to hold that an employer bears the burden to show that "employees required to undergo such testing have responsibilities or duties which are connected to the safety concerns of others." Id. at 56.[8]

Ms. Daniels was a Passenger Service Agent (PSA) who checked in passengers and their luggage when they arrived at the airport. Specifically, Ms. Daniels was asked and answered the following:

> Q: What type of things would you do at the counter as part of your job duties?
>
> A: If someone had a bag, then I would check their-I would check them in, or I would-if they didn't have luggage, I would refer them to the kiosk, help them with the kiosk, printing out their boarding passes, things like that.

App. 00090. None of these directly related to ensuring the safety of aircraft or the safety of passengers.

The Federal Aviation Administration ("FAA") which is charged to ensure the safety of the United States aviation industry, has published a bulletin titled "*Safety-Sensitive Job Categories for FAA-Mandated Drug and Alcohol Testing*". This bulletin provides "guidance to help aviation employers understand what types of safety-sensitive job categories are subject to the drug and alcohol testing requires under 14 Code of Federal Regulations (CFR) part 120." App. 00420-00432. Under this FAA guidance, neither "ticketing" nor "baggage handling or loading", such as performed by Ms. Daniels as a Passenger Service Agent, were considered by the FAA as "safety-sensitive" job functions and therefore are not subject to drug and alcohol testing mandates under FAA regulations. App.00182.By contrast, the FAA guidance identifies as "safety-sensitive" and subject to mandatory FAA drug and alcohol testing such obvious positions, for example, as flight crewmembers, flight

[8] While the Court *in Twigg* did not provide any specific definition of "public safety or safety of others", the Court did cite other court decisions as providing examples of the types of positions where significant safety issues would potentially support drug testing. Those positions cited included workers at a chemical weapons factory, workers with direct contact with young school children and involved in their physical safety, pipefitters in a nuclear energy facility, and employees involved in the business of distributing volatile natural gas. *Id.* at 58.

attendants, flight instructors, aircraft maintenance, ground security coordinators, and air traffic control. App. 00173-174. Thus, according to the FAA, Ms. Daniels did not hold a safety-sensitive position.[9]

Perhaps most damaging to DAL Global's argument is the simple fact that neither Ms. Daniels nor other employees performing the same PSA duties were treated by DAL Global as holding "safety-sensitive" positions that warranted mandatory drug testing. App 00386-00387, 00435. The drug test that Ms. Daniels was required to take on October 17, 2020 was related to her return to work from an extended leave and had nothing to do with a "safety-sensitive" job. App. 00435. Her supervisor, Jennifer Kuhn, admitted that ordinary ticket agents like Ms. Daniels, who did not have special ground security duties, were not subject to random drug testing for safety-sensitive reasons. App. 00386-00387. In short, there is no credible evidence that Ms. Daniels' job as a Passenger Service Agency was a "safety-sensitive" position as contemplated by our Supreme Court in *Twigg*. Therefore, DAL Global's drug testing of Ms. Daniels directly violated her fundamental right of privacy.

Finally, two additional errors were committed by the trial court. First, setting aside the safety sensitive issue, at the very minimum, Ms. Daniels' invasion of privacy claim raised questions of fact that should have been submitted to the jury for a proper determination and not left to the trial court's judgment to resolve per DAL Global's motion for summary judgment. Second, the trial court committed error of law in denying Plaintiff's Rule 59(e) Motion to Alter and Amend Judgment and To Obtain Relief from Such Judgment in that the trial court's order failed to even address or reference Plaintiff's arguments regarding her Invasion of Privacy causes of action, thus violating Ms. Daniels' fundamental right of due process. App. 00512-00516.

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[9] Provisions of the *West Virginia Alcohol and Drug-Free Workplace Act* are instructive as to what our law defines as a "safety-sensitive" position subject to drug testing. That Act provides that: "The term 'safety-sensitive duty' means any task or duty fraught with such risks of injury to the employee or others that even a momentary lapse of attention or judgment, or both, can lead to serious bodily harm or death." W.Va. Code §21-1D-2(n). The duties of a PSA such as Ms. Daniels in checking tickets and luggage are not so fraught with risk such that a momentary lapse of attention or judgment could lead to serious bodily harm or death.

VI. CONCLUSION

For the above stated reasons, Ms. Daniels respectfully that this Court vacate the trial court's 02/10/23 Final Order Granting Defendant's Motion for Summary Judgment and remand this case back to the trial court for further proceedings consistent with its rulings.

Respectfully submitted,

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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

LISA R. DANIELS,

Plaintiff Below, Petitioner

v. **No. 23-ICA-212**
(Civil Action #21-C-650)

DAL Global Services, LLC,

Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, W. Scott Evans, Counsel for the Petitioner, Lisa R. Daniels, certify that on 1st day of September, 2023, I served a true and correct electronic copy of the foregoing "***Petitioner's Appeal Brief***" with the Clerk of the Intermediate Court of Appeals using the File & ServeXpress electronic filing system, which will send an electronic notification of such filing to the following:

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