INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Case No. 24-ICA-40

HELEN BRADLEY,
Plaintiff/Petitioner,

v.

THE OHIO COUNTY BOARD OF EDUCATION AND KATRINA LEWIS,
Defendants/Respondents.

PETITIONER'S APPEAL BRIEF

On Appeal from the Ohio County Circuit Court
Case No. 22-C-21

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I. ASSIGNMENTS OF ERROR

1. When ruling on a 12(b)(6) motion, a trial court must not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1997). Mrs. Bradley alleged in her complaint that the Ohio County Board of Education's ("BOE") failure to hire her for sixteen positions contributed to intolerable working conditions such that a reasonable person would have been compelled to resign. The lower court did not address this allegation in its dismissal of Mrs. Bradley's constructive discharge claim but instead dismissed this claim based on its conclusion that Mrs. Bradley failed to state a claim for a hostile work environment based on her principal's behavior. Did the lower court err in dismissing Mrs. Bradley's constructive discharge claim?

2. In West Virginia, it is illegal for an employer to "discriminate against an individual with respect to compensation, hire, tenure, terms, conditions, or privileges of employment." W. Va. Code § 5-11-3(h). To state a *prima facie* claim of employment discrimination under the West Virginia Human Rights Act, a plaintiff must prove that she is a member of a protected class, that her employer made an adverse decision about her, and that, but for her protected status, the adverse decision would not have been made. Syl. Pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986). Did the lower court err when it determined as a matter of law that Mrs. Bradley was not harmed by the BOE's failure to transfer her to at least twelve open positions?

3. In deciding a motion for summary judgment, a court must construe disputed material facts in favor of the non-moving party. *Hanlon v. Chambers*, 195 W. Va. 99, 242 S.E.2d 741 (1995). Did the lower court err when it entered summary judgment in Defendant's favor on Mrs. Bradley's age discrimination claim and ignored the West Virginia Human Rights Commission's ("WVHRC") probable cause finding and the undisputed material facts surrounding the BOE's discriminatory choices to hire only substantially younger, less experienced teachers?

4. In West Virginia, individuals asserting age discrimination claims are entitled to tort damages. *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786 (1995). Mrs. Bradley asserted claims for lost wages, out of pocket losses, substantial emotional and mental distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance, and inconvenience. However, the court below ruled that Mrs. Bradley was not entitled to these tort damages because it characterized these damages as arising only from her dismissed constructive discharge claim. The court further found that Mrs. Bradley's expert's opinion was irrelevant because Mrs. Bradley retired and the only lost wages she would be entitled to would be any pay differential between her position at Middle Creek and the positions to which she wanted to transfer. Did the lower court err when it granted summary judgment in favor of Defendant on Mrs. Bradley's damages claims because it limited her lost wage and emotional distress claims to her constructive discharge cause of action?

II. STATEMENT OF THE CASE

a. Introduction

The West Virginia Human Rights Act is clear: discrimination based on a person's age is illegal. W. Va. Code Ann. § 16B-17-2 (stating that West Virginians are entitled to "[e]qual opportunity . . . without regard to . . . age . . . ."). In its decision below, the lower court effectively created a carveout for the West Virginia Human Rights Act's bar on age discrimination. Specifically, it determined that Mrs. Bradley could not proceed on her claim because it concluded she could not demonstrate a "reduction in pay" or a "substantial change in working conditions." The lower court effectively blessed discrimination based on age—so long as there is no dollars-and-cents effect.

That holding was wrong when the lower court rendered it. There is no doubt that it is wrong today. On April 17, 2024, the Supreme Court of the United States issued its decision in *Muldrow v. City of St. Louis, Missouri*. In that case, the Court definitively determined that Title VII—just like the West Virginia Human Rights Act— does not include the requirements of a "reduction in pay" or a "substantial change in working conditions" in its statutory language. It then *specifically* rejected the Fourth Circuit case that the lower court used to graft those requirements onto the West Virginia Human Rights Act. The reason for the Supreme Court's rejection of the lower court's formulation is simple: "Title VII [and the West Virginia Human Rights Act do] not require a separate showing of some harm. The discrimination is harm." *Muldrow v. City of St. Louis, Missouri*, 601 U.S. ___ (Apr. 17, 2024) (Kavanaugh, J., concurring). Put simply, the West Virginia Human Rights Act was intended to protect against age discrimination—regardless of its pecuniary effect. The lower court was wrong when it held otherwise.

In addition to weakening the West Virginia Human Rights Act, the lower court also summarily disregarded Mrs. Bradley's evidence of age discrimination and her damages during the

summary judgment phase. Mrs. Bradley showed that she was passed over in favor of younger candidates *sixteen times,* that the BOE inconsistently applied hiring criteria to Mrs. Bradley's disfavor, and that Mrs. Bradley testified she was subjected to daily discriminatory treatment based on her age. It also determined that she failed to adduce any evidence of harm—even though she produced an expert showing her pecuniary damages and she repeatedly testified about the negative effect the discrimination had on her. That evidence was more than sufficient to survive summary judgment. Again, the lower court erred when it held otherwise.

Finally, the lower court erred from the get-go when it dismissed several of Mrs. Bradley's claims at the motion to dismiss phase. Specifically, it determined—without meaningful consideration of evidence—that Mrs. Bradley's claims could not be equitably tolled. It also determined—again, without the benefit of evidence—that certain conduct alleged by Mrs. Bradley was not bad enough to qualify as discriminatory. Those fact-laden determinations were improper at the motion to dismiss phase. Accordingly, Mrs. Bradley brings this appeal and asks this Court to both overturn the lower court's erroneous decisions and to reaffirm that the West Virginia Human Rights Act prohibits age discrimination—regardless of the scope of its dollars-and-cents effect.

b. The BOE Overlooks Mrs. Bradley in Favor of Younger Candidates

Since 2004, Mrs. Bradley served as a teacher in Ohio County, West Virginia in various roles. First, she worked as a part-time ESL teacher, then she transitioned to a long-term substitute role, and finally she obtained a full-time, permanent position with the BOE as a media specialist in 2010. J.A.000533 at 16:1-12, J.A.000534 at 20:24-25, J.A.000535 at 25:19-22, J.A.000536 at 26:5-7, 26:18-20, J.A.000537 at 28:2-4. In 2013, Mrs. Bradley fulfilled her childhood dream and became a classroom teacher at Middle Creek Elementary School. J.A.000536 at 26:18-20, J.A.000537 at 28:2-4.

In 2017, Katrina Lewis was hired as Middle Creek Elementary School's principal. J.A.000585 at 13:22-23. Under Mrs. Lewis's leadership, Mrs. Bradley felt she was treated differently from the younger teachers at Middle Creek Elementary. J.A.000539 at 18-20. Mrs. Bradley felt extreme stress and anxiety due to what she described as Mrs. Lewis's constant nitpicking. J.A.000539 at 4-6. Mrs. Bradley observed Mrs. Lewis socializing with younger teachers and that those teachers did not have the same work-related problems as Mrs. Bradley. J.A.000541 at 107:18-20.

Mrs. Lewis prevented Mrs. Bradley from requiring her class to participate in the science fair, even though Mrs. Bradley required her classes to do so since 2013. J.A.00257 at 51:16-52:24. Mrs. Lewis also chose another, less senior teacher for a position on the school's textbook adoption committee. J.A.000264 at 80:14-25, J.A.000265 at 81:1-4. The other fourth grade classroom teacher, Stephanie Crow, was not assigned a mentor or given classroom observations, like Mrs. Bradley was, even though Mrs. Crow's class's math scores dropped more than Mrs. Bradley's. J.A.000394 at 75:7-14; J.A.000397 at 87:18-89:24.

In June 2018, Mrs. Bradley first applied for another position in Ohio County, and she applied for fifteen positions between May and August 2019 because she was unhappy under Mrs. Lewis's leadership. J.A.000269 at 100:19-25. Yet, no matter how many times she applied for other positions, Mrs. Bradley was never selected to work at other schools in Ohio County. Mrs. Bradley applied for sixteen positions, twelve of which were at issue in the case below.[1] All sixteen were filled by individuals substantially younger than Mrs. Bradley:

[1] The Court previously dismissed four of Mrs. Bradley's claims due to the statute of limitations. *See* J.A. 000037-38.

- The English Language Arts Teacher position at Bridge Street Middle School (Position 2380), was filled by an individual 15 years younger than Mrs. Bradley. J.A.000561 at 60:1-5; J.A.000562 at 63:2-17.

- The English Language Arts Teacher position at Bridge Street Middle School (Position 2394), was filled by an individual 32 years younger than Mrs. Bradley. J.A.000562 at 65:16 to J.A. 000564 at 66:1; J.A.000565 at 67:13-19.

- The Elementary Teacher position at Steenrod Elementary School (Position 2391), was filled by an individual 36 years younger than Mrs. Bradley. J.A.000566 at 68:13 to J.A.000567 at 69:3; J.A.000567 at 69:24-70.

- The Elementary Teaching positions at Woodsdale Elementary (Positions 2393 and 2409),[2] were filled by individuals 31 and 28 years younger than Mrs. Bradley, respectively. J.A.000568 at 73:7-19.

- The English Language Arts Teacher position at Warwood School (Position 2427), was filled by an individual 24 years younger than Mrs. Bradley. J.A.000569 at 74:12-18; J.A.000570 at 76:24 to J.A.000571 at 77:2.

- The Third Grade Elementary Teacher position at Ritchie Elementary School (Position 2457), was filled by an individual 31 years younger than Mrs. Bradley. J.A.000571 at 77:20-25; J.A.000574 at 83:25 to J.A.000575 at 84:4.

- The Elementary Teacher position at West Liberty Elementary (Position 2507), was filled by an individual 28 years younger than Mrs. Bradley. J.A.000572 at 80:24 to J.A.000573 at 81:10; J.A.000574 at 83:20-24.

[2] These two positions were filled from a single set of interviews and evaluations, and the candidates were evaluated on a single matrix.

- The Media Specialist position at Bridge Street Middle School (Position 2477) was filled by an individual 36 years younger than Mrs. Bradley and who did not have any prior teaching experience. J.A.000575 at 84:5-22; J.A.000577 at 86:17 to J.A.000578 at 87:9.

- The Elementary Teacher position at Warwood Elementary (Position 2505) was filled by an individual 31 years younger than Mrs. Bradley. J.A.000578 at 87:10-13; J.A.000579 at 88:12-14.

- The Elementary Teacher position at West Liberty Elementary (Position 2392) was filled by an individual 11 years younger than Mrs. Bradley. J.A.000579 at 88:15-18; J.A.000580 at 91:19 to J.A.000581 at 92:1.

- The Elementary Teacher position at Warwood School (Position 2509) was filled by an individual 12 years younger than Mrs. Bradley. J.A.000581 at 92:2-5; J.A.0000582 at 94:16-19.

- The Elementary Teacher position at Woodsdale Elementary (Position 2485) was filled by an individual 37 years younger than Mrs. Bradley. J.A.000776 at 94:20 to J.A.000778 at 96:9.

- The Elementary Teacher position at Ritchie Elementary School (unnumbered position) was filled by an individual 38 years younger than Mrs. Bradley. J.A.000778 at 96:21 to J.A.000781 at 99-15.

Mrs. Bradley had significantly more years of teaching experience and seniority compared to these other individuals, some of whom had little to no teaching experience at all. J.A.000748 at 66:2-16 (discussing successful applicant with three years of teaching experience); J.A.000750 at 69:4-9 (discussing successful applicant with one year of teaching experience); J.A.000758 at 76:14-23 (discussing successful applicant whose only prior teaching experience was teaching English to kindergartners in China); J.A.000768 at 86:17-25; J.A.000769 at 87:1-2 (discussing successful applicant with no prior teaching experience).

The BOE ignored the statutory criteria mandated to be considered when hiring full-time employees. In West Virginia, full time, permanent classroom teaching positions are filled through what is intended to be a standard process. W. Va. C.S.R. § 126-126-6.7. The purpose of this process, controlled by Policy 5000, is to ensure that only the best qualified teachers are hired for open positions. W.Va. C.S.R. § 126-126-6.1.

The Policy 5000 process includes an evaluation of candidates using eleven factors. W. Va. C.S.R. § 126-126-6.2. These factors are mandatory and must be considered for each candidate. *Id.* Policy 5000 also provides the recommendations from two evaluators, the principal and faculty senate representative from the school may be double-weighted if "one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards in the job posting" and the principal and representative do not agree on which applicant to recommend. W. Va. C.S.R. § 126-126-6.3-6.4. This recommendation must be for the best-qualified candidate for the position, after considering all the mandatory factors. W. Va. C.S.R. § 126-126-6.5

Here, the BOE did not follow this mandatory process. For those positions for which an evaluation was provided in discovery, the evaluators ignored criteria points and gave too many points for certain factors. *See* infra, c.2. The evaluators also did not recommend the best qualified candidate for each position. *Id.*

After the BOE repeatedly passed her over for younger candidates and faced with continued poor treatment from Mrs. Lewis, Mrs. Bradley retired on October 15, 2019. J.A.000542 at 129:1-18; J.A.000252 at 30:15-17. Had this constant rejection and a hostile work environment not forced her to retire, Mrs. Bradley testified that she would have worked as a teacher for at least another

eleven years and obtained full pension benefits. J.A.000547 at 111:2-4, J.A.000548 at 243:21-22; J.A. 000659.

Mrs. Bradley filed a complaint before the WVHRC on September 30, 2019. J.A.000047-49. Following an investigation, the WVHRC issued a Letter of Determination on August 27, 2021, determining that there was probable cause to believe that the BOE violated the WVHRA. J.A.000050-52. After receiving this Letter, Mrs. Bradley sought and received a Right to Sue Letter on January 31, 2022. J.A.000053-54. On February 4, 2022, Mrs. Bradley timely filed a three-count complaint against the BOE and her former principal, Katrina Lewis. J.A.000009-25. Mrs. Bradley alleged in her complaint that the BOE discriminated against Mrs. Bradley on the basis of her age; that Mrs. Lewis discriminated against Mrs. Bradley on the basis of her age by favoring and treating her differently from other substantially younger teachers; and that the BOE constructively discharged Mrs. Bradley. *Id.*

c. The Lower Court Erroneously Dismisses Counts II (Age Discrimination – Against Katrina Lewis) and III (Constructive Wrongful Discharge) of Mrs. Bradley's Complaint.

On March 17, 2022, the BOE filed a Motion to Dismiss. In that Motion, the BOE argued that several of Mrs. Bradley's claims at Count I, and all of her claims at Counts II and III were untimely. J.A. 000031-46. The BOE further argued that, even if Counts II and III were not time-barred, they failed to state a claim for age discrimination and wrongful constructive discharge. *Id.* The trial court granted Defendants' motion and dismissed Counts II and III of Plaintiff's Complaint, all claims against Mrs. Lewis, and Mrs. Bradley's age discrimination claims for four job positions. *Id.* Specifically, it found that Count II was untimely filed and dismissed it. *Id.* It also dismissed Count III as untimely. *Id.* Despite finding that these claims were untimely, the Court dismissed Counts II and III on their merits because the Court concluded that Mrs. Bradley could

not allege a hostile work environment based on Mrs. Lewis's treatment of her. *Id.* On appeal, Mrs. Bradley contends dismissing those claims was erroneous because her claims were timely filed, and the Court failed to analyze her allegations that she was constructively discharged due to the BOE's failure to hire her for numerous positions at other schools in Ohio County.

d. The Lower Court Erroneously Grants Summary Judgment on Mrs. Bradley's Remaining Claim for Age Discrimination (Against the BOE).

On December 8, 2023, after the close of discovery, BOE moved for summary judgment on Mrs. Bradley's remaining claim. J.A.000229-242. The court below granted BOE's motion without oral argument. The court below found that Mrs. Bradley did not suffer an adverse employment action as a matter of law because she did not suffer any harm by not being transferred to another position in Ohio County. J.A.000814. The lower court also determined that Mrs. Bradley did not adduce any evidence that her age was the reason she was not transferred to another position. J.A.000815. The lower court determined that Mrs. Bradley could not defeat the BOE's legitimate, non-discriminatory reasons for failing to transfer her. J.A.000819. The lower court also ruled that Mrs. Bradley could not claim lost wages or emotional distress based on age discrimination because the court had already dismissed her wrongful constructive discharge claim. J.A.000820.

On all of these points, the trial court did not appropriately consider the facts in the light most favorable to Mrs. Bradley and inappropriately entered summary judgment in Defendant's favor because there were numerous disputes about the conclusions to be drawn from the facts at issue in the case. This judgment and the trial court's dismissal of several of her claims at the outset of the case were in error and this Court should reverse the Circuit Court's decision and remand the case for trial.

e. Identification of Case Records Determined to be Confidential

Pages 244 to 374, 403 to 438, 489 to 504, and 529 to 548 of the Joint Appendix filed contemporaneously with this opening brief were previously determined to be confidential by the Circuit Court of Ohio County. On December 11, 2023, the Circuit Court of Ohio County granted Defendant's motion to file exhibits under seal, which encompassed Pages 244 to 374, 403 to 438, and 489 to 504 of the Joint Appendix. On December 18, 2023, the Circuit Court of Ohio County granted Plaintiff's motion to file an exhibit under seal, which constitutes pages 529 to 548 of the Joint Appendix. The lower court granted these motions to seal in accordance with the agreed Protective Order entered by that court.

III. SUMMARY OF ARGUMENT

The lower court committed four separate errors across two orders. Its latest order, which granted the BOE summary judgment on Mrs. Bradley's age discrimination claim erred in three regards. It first wrongly determined that Mrs. Bradley could not show that the BOE took an adverse employment action against her because she could not show a "reduction in pay" or anything beyond a minor change in working conditions. In so holding, the lower court's order reads an additional requirement into W. Va. Code § 5-11-3(h)—nowhere does the statute require a "reduction in pay" or harm beyond a change in working conditions. Simply put, neither West Virginia Law nor Title VII, as noted by the United States Supreme Court in *Muldrow v. City of St. Louis, Missouri*, requires a showing of anything more than "some harm" for discriminatory failure to transfer claims. The lower court erred when it held otherwise. The lower court's error distorts the WVHRA beyond recognition. Indeed, if the lower court is right, discrimination under the WVHRA is permissible so long as it lacks quantifiable economic harm. That is not the law in West Virginia.

Building on that error, the lower court erred when it determined that Mrs. Bradley could not demonstrate damages. Beyond the fact that Mrs. Bradley produced an expert showing pecuniary damages that the lower court summarily disregarded, Mrs. Bradley suffered tort damages—such as humiliation, embarrassment, and emotional harm—because of the BOE's discrimination. The lower court erred when it summarily disregarded those damages.

In addition to warping WVHRA precedent on both adverse employment decisions and damages, the lower court wrongly determined that Mrs. Bradley could not show that the BOE's employment decisions were based on her age. But Mrs. Bradley produced plenty of evidence—including a probable cause letter, the BOE's own policies, the BOE's assessment of Mrs. Bradley as compared to other, substantially younger job candidates, and Mrs. Bradley's testimony—showing that the finder of fact could determine the BOE refused to transfer Mrs. Bradley to another position based on Mrs. Bradley's age and that she was treated poorly based on her age. The lower court simply ignored that evidence. That is plainly error—facts must be construed in the non-movant's favor at the summary judgment phase and not summarily disregarded.

The lower court's errors are not isolated to its summary judgment order. Instead, its first error arose when it dismissed Mrs. Bradley's constructive discharge claim on the grounds that it was untimely and that Mrs. Bradley failed to state a claim for a hostile work environment. The lower court did not consider the fact that Mrs. Bradley's constructive discharge claim arises from the BOE's failure to hire her for sixteen positions and instead dismissed Mrs. Bradley's arguments as "creative." Additionally, the lower court did not consider Mrs. Bradley's allegation that the BOE's failure to hire her for sixteen positions contributed to a hostile work environment, such that a reasonable person would have been compelled to resign. This is legal error, as the trial court did

not view the facts in the light most favorable to Mrs. Bradley, as the non-moving party. These significant legal errors require reversal of the lower court's decisions and remand for trial.

IV. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, Mrs. Bradley requests a Rule 19 oral argument. This appeal is appropriate for oral argument pursuant to Rule of Appellate Procedure 19(a)(1) because this appeal involves assignments of error in the application of settled law. The lower court did not appropriately consider facts in the light most favorable to Mrs. Bradley, the non-moving party. These issues are settled by the governing law and Rules of Civil Procedure of West Virginia. Further, the lower court erred in finding that Mrs. Bradley could not assert a *prima facie* case of employment discrimination under the West Virginia Human Rights Act. Accordingly, because this Appeal satisfies Rule 19 of the West Virginia Rules of Appellate Procedure, oral argument is both necessary and appropriate.

V. ARGUMENT

a. The lower court erred when it determined that Mrs. Bradley failed to demonstrate an adverse employment action because she could not demonstrate a "reduction in pay" or a substantial change in working conditions.

"Title VII does not require a separate showing of some harm. The discrimination is harm." *Muldrow v. City of St. Louis, Missouri*, 601 U.S. ___ (Apr. 17, 2024) (Kavanaugh, J., concurring).

The West Virginia Human Rights ("WVHRA") is clear: employers cannot discriminate against their employees based on their age. *See, e.g.*, W. Va. Code Ann. § 16B-17-2 (stating that West Virginians are entitled to "[e]qual opportunity . . . without regard to . . . age . . . ."). Neither the WVHRA nor Title VII—the federal analogue to the WVHRA—requires plaintiffs to suffer pecuniary harm before they can bring a claim for discrimination. Instead, being treated differently based on a protected characteristic is *the* central harm in a discrimination case. Discrimination is forbidden—even if there is not a hard dollars-and-cents number attached to it.

Here, Mrs. Bradley applied for sixteen positions in the Ohio County school system. Each and every time, the BOE overlooked Mrs. Bradley and hired individuals who were younger and less qualified. According to the lower court, the BOE's repeated refusals to transfer Mrs. Bradley to a new position—which were ostensibly based on her age—were not adverse employment decisions because Mrs. Bradley could not show a "reduction in pay" or more than a minor change in working conditions. The lower court's decision was flawed when it rendered it, and the Supreme Court of the United States's decision in *Muldrow v. City of St. Louis, Missouri*, 601 U.S. ___ (Apr. 17, 2024) —which contravenes the lower court's decision—highlights why the lower court's decision is wrong.

In determining that Mrs. Bradley was required to demonstrate a "reduction in pay" or more than a minor change in working conditions to show an adverse employment decision, the lower court relied primarily on Fourth Circuit case law which noted that without, *inter alia*, decreased pay, responsibilities, or promotion opportunities, a plaintiff cannot allege an "adverse employment action" under the law. J.A.000812 (citing *Pope v. W. Tidewater Cmt. Servs. Bd.*, No. 2:21-cv-449, 2022 WL 3162193 (E.D. Va. Aug. 8, 2022) (quoting *Boone v. Goldin*, 178 F.3 253, 256-57 (4th Cir. 1999) (cleaned up)). The lower court noted that "[t]his principle regarding the decision *to* laterally transfer an employee applies with equal force to the decision *not* to laterally transfer an employee." J.A.000812 (citing *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 427 F. Supp. 2d 595, 608 (E.D.N.C. 2006). Based on this jurisprudence, the lower court found that Mrs. Bradley "d[id] not allege an 'adverse employment action' under the law." J.A.000812.

The lower court's ruling is now contrary to controlling law. Under West Virginia law, the West Virginia Human Rights Act "should be construed to coincide with prevailing federal application of Title VII unless variations in statutory language or other compelling reasons require

a different result." *Henegar v. Sears, Roebuck and Co.*, 965 F. Supp. 833 (N.D. W. Va. 1997). In a recent decision, the Supreme Court of the United States rejected the reasoning on which the lower court relied, holding that an employee challenging a job transfer under Title VII "must show that the transfer brought about some harm with respect to an identifiable term or condition or employment, but that harm need not be significant." *Muldrow v. City of St. Louis, Missouri*, 601 U.S. ___ (Apr. 17, 2024). Indeed, the lower court noted that the *Muldrow* decision was pending before the Supreme Court but declined to consider that case because "the relevant case law establishes that lateral transfers, without more, are not adverse employment actions under Title VII and, in turn, the WVHRA. While that case law may change *someday*, the law in effect *right now* is clear." J.A.000813 (emphasis in original).

Certainly, with the Supreme Court's recent decision in *Muldrow*, the law in effect "*right now*" is clear. Discrimination is insidious and illegal, regardless of the degree of harm. In West Virginia, it is unlawful for an employer to "discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment[.]" W. Va. Code § 5-11-9(1). "Discrimination" means to "exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age, blindness, disability, or familial status[.]" W. Va. Code § 5-11-3(h).

In order to make a *prima facie* case of employment discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-1 *et seq.*, a plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class;
(2) That the employer made an adverse decision concerning the plaintiff;
(3) But for the plaintiff's protected status, the adverse decision would not have been made.

Syl. Pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986). A plaintiff need not demonstrate a "significant change" or even tangible harm to state a

prima facie case of discrimination. Instead, West Virginia law requires only evidence of an "adverse decision."

And Title VII does not require evidence of a "significant change" for discrimination claims to be actionable, either. By its plain language, Title VII outlaws discrimination against an employee "with respect to the employee's terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). Title VII outlaws practices that "treat[] a person worse" because of a protected trait. *Muldrow* at 6, citing *Bostock v. Clayton County*, 590 U.S 644, 658 (2020).

"Like 'refus[ing] to hire' or 'discharg[ing] an employee,' refusing a request for a transfer deprives the employee of a job opportunity." *Chambers v. District of Columbia*, 35 F.4th 870, 875 (D.C. Cir. 2022). An employer that does this because of an employee's protected characteristic "has surely discriminated against the first employee" because of that characteristic. *Id.*

Indeed, the Court in *Muldrow* specifically cited and rejected *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999), which was cited approvingly by the lower court in its decision granting summary judgment. Significantly, the Court wrote that "[the employee in *Boone v. Goldin*] suffered some injury in employment terms or conditions (allegedly because of race or sex). Their claims were rejected solely because courts rewrote Title VII, compelling workers to make a showing that the statutory text does not require." *Muldrow* at 7.

And Mrs. Bradley can show that she was subjected to numerous discriminatory, adverse employment decisions. The BOE made discriminatory, adverse decisions when it failed to offer Mrs. Bradley employment for any one of the sixteen positions for which she applied and was more qualified than the substantially younger candidates. Although these other positions had the same rate of pay as Mrs. Bradley's Fourth Grade classroom teaching position at Middle Creek Elementary, the other positions were all at other schools. J.A. 000750 at 68:13 to J.A. 000752 at

70:2 (discussing position at Steenrod Elementary School); J.A.000766 at 84:5 to J.A.000769 at 87:9; (discussing Media Specialist Position at Bridge Street Middle School); J.A.000769 at 87:10 to J.A.000770 at 88:14 (discussing Elementary Teacher Position at Warwood Elementary School); J.A.000774 at 92:2 to J.A.000776 at 94:19 (discussing Elementary Teacher position at Warwood School); J.A.000594-597 (evaluation documentation for English Language Arts position at Bridge Street Middle School); J.A.000599-608 (evaluation documentation for English Language Arts position at Bridge Street Middle School); J.A.000610-0618 (evaluation documentation for Elementary Teacher positions at Woodsdale Elementary); J.A.000620-622 (evaluation documentation for English Language Arts position at Warwood School); J.A.000624-634 (evaluation documentation for Elementary Teacher position at Ritchie Elementary School); J.A.000636-647 (evaluation documentation for 5th Grade teacher position at West Liberty Elementary School); J.A.000649-655 (evaluation documentation for Elementary Teacher position at West Liberty Elementary School); J.A.000776 at 94:20 to J.A.000778 at 96:9 (discussing Elementary Teacher position at Woodsdale Elementary); J.A.000778 at 96:21 to J.A.000781 at 99-15 (discussing Elementary Teacher position at Ritchie Elementary School).

Mrs. Bradley would have had different supervisors and co-workers at these other schools. And Mrs. Bradley herself testified that a change in position was important to her because she hoped to go to new school and start fresh with "someone who might be more accepting of me as a person or teacher." J.A.000323 at 118:13-16. Accordingly, the "terms" and "conditions" of those employment positions would have been different from Mrs. Bradley's Fourth Grade classroom teacher position.

Mrs. Bradley also testified during her deposition that she felt like less of a person under Mrs. Lewis's leadership. J.A.000542 at 129:8-9. Mrs. Bradley testified that she attempted to

transfer so many times because she felt micromanaged, mistreated, and unhappy. J.A.000542 at129:13-15. Yet, by denying Mrs. Bradley the opportunity to transfer, the BOE did not permit Mrs. Bradley to work under different conditions, which certainly impacted the terms and conditions of her employment.

Indeed, as the Supreme Court held, an action alleging a discriminatory job transfer or, as here, a failure to transfer, "must show that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant. Syl., *Muldrow v. St. Louis*, at 2. As Justice Kavanaugh noted in his concurrence, "[t]herefore, anyone who has been transferred because of race, color, religion, sex, or national origin should easily be able to show some additional harm—whether in money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like. *Id.* at 22.

In light of the *Muldrow* decision, the lower court's grant of summary judgment cannot stand. The court below required Mrs. Bradley to show that the Ohio County Board of Education's failure to transfer her to another school caused a reduction in pay or more than a minor change in working conditions. This ruling is now in conflict with the prevailing interpretation of Title VII. The law is clear: discrimination is illegal, regardless of its dollars-and-cents effect. Accordingly, this Court should reverse the lower court's ruling that Mrs. Bradley could not show an adverse employment decision.

b. The lower court erred in summarily determining that Mrs. Bradley suffered no damages despite the BOE's discriminatory actions.

In addition to wrongly holding that the BOE was entitled to discriminate against Mrs. Bradley on the basis of her age so long as it did not affect her pay, the lower court also erred by summarily determining that Mrs. Bradley adduced no evidence of damages. The lower court found

that Mrs. Bradley retired from her job and, because the lower court had already dismissed her claims for wrongful constructive discharge, she could not assert a claim for lost wages. J.A.000820. However, even if Mrs. Bradley could not claim lost wages, which she can,[3] she has a significant emotional distress claim based on BOE's failure to transfer her. Tort damages are available to plaintiffs alleging age discrimination. *Vest v. Board of Education of County of Nicholas*, 193 W. Va. 222, 227, 455 S.E.2d 781, 786 (1995).

First, because the lower court erroneously granted summary judgment in the BOE's favor on Mrs. Bradley's failure to transfer claim, it did not consider her emotional distress claims independent of her constructive discharge claim. Instead, the lower court declined "to permit Plaintiff to claim damages" regarding the significant emotional distress she sustained as a result of the BOE's repeated failure to transfer her to another school, causing her to continue to endure daily micromanagement and discriminatory treatment. The lower court erroneously construed this allegation as a constructive discharge claim. However, Mrs. Bradley testified that she suffered emotional distress due to the BOE's failure to transfer her—and the Court was required to construe that evidence in her favor at the summary judgment phase instead of summarily disregarding it. Although she alleged that this emotional distress and hopelessness lead to her decision to prematurely retire, it arose *independent* of her constructive discharge claim J.A.000318 at 97:21-98: 9; J.A.000323 at 118:13-16. Mrs. Bradley felt rejected time and time again because, despite being the most qualified, others were hired instead. J.A.000323 at 118:13-16. This rejection caused Mrs. Bradley to feel low self-esteem, sadness, rejection, and like she was inadequate. J.A.000318 at 98:10-21. Accordingly, Mrs. Bradley's claims for out of pocket losses, emotional and mental

[3] Mrs. Bradley produced an expert who showed that she suffered $847,170 in pecuniary damages based on the BOE's discriminatory actions. J.A.000658-663.

distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance and inconvenience, and punitive damages, survive and should be considered by a jury.

Additionally, Mrs. Bradley can still recover her lost wages. As noted below, the lower court erroneously dismissed Mrs. Bradley's constructive discharge claim as it pertains to the BOE. Indeed, the BOE's failure to transfer Mrs. Bradley into sixteen positions for which she was qualified—and certainly more qualified than the younger candidates who were ultimately hired—caused Mrs. Bradley to prematurely retire. This premature retirement, brought about by the BOE's actions, caused Mrs. Bradley to lose wages and past and future benefits. Therefore, the lower court erred in granting summary judgment to the BOE on Mrs. Bradley's damages claim.

c. The lower court erred when it determined Mrs. Bradley failed to adduce evidence that the BOE took its adverse actions against her based on her age.

The law is clear: "At the summary judgment stage, the benefit of the doubt is to be given to the nonmoving party. All inferences drawn are to be made in favor of the nonmoving party." *Harris v. Jones*, 209 W. Va. 557, 561, 550 S.E.2d 93, 97 (2001). Mrs. Bradley adduced evidence that the BOE took adverse employment actions against her on the basis of her age. The lower court disregarded that evidence. Specifically, the lower court erred when it ignored the WVHRC's finding of probable cause that Mrs. Bradley was discriminated against. The lower court further erred when it ignored evidence like Mrs. Bradley's testimony showing that she was treated differently because of her age and the BOE's repeated hiring of substantially younger, less qualified teachers instead of Mrs. Bradley.

1. The lower court erred when it failed to consider the WVHRC's probable cause finding.

In its opinion, the lower court noted that Mrs. Bradley's "only 'evidence' that she was allegedly discriminated against because of her age is her allegation that the BOE did not comply with West Virginia law in evaluating candidates for the positions to which Mrs. Bradley applied.

J.A.000815 This is not the case. First, the WVHRC issued a probable cause finding that the BOE discriminated against Mrs. Bradley. J.A.000590-92. Specifically, it determined, after its investigation, that there was probable cause to believe the BOE violated the West Virginia Human Rights Act. J.A.000050-51. The lower court wholly ignored this decision in its order granting summary judgment in the BOE's favor.

Instead of ignoring the WVHRC's finding, the lower court should have considered it, because it is significant evidence in Mrs. Bradley's favor on her *prima facie* case of age discrimination. Although there are no cases in West Virginia on point, similar determinations issued by the Equal Employment Opportunity Commission ("EEOC") are "highly probative of the ultimate issue involved" in discrimination cases. *Smith v. Universal Servs., Inc.*, 454 F.2d 154, 157 (5th Cir. 1972); *see also Brown v. Town of Chapel Hill*, 79 F.3d 1141 (table), No. 95-1247, 1996 WL 119932, at *3 (4th Cir. Mar. 19, 1996) (affirming submission of an EEOC determination letter into a jury room during deliberations). Likewise, the WVHRC's finding of probable cause, which was issued following an investigation into Mrs. Bradley's claims, is strong evidence that Mrs. Bradley stated a *prima facie* case for age discrimination, and the lower court erred by disregarding it.

2. The lower court erroneously ignored issues of material fact and did not construe them in the light most favorable to Mrs. Bradley, the non-moving party.

Second, the lower court ignored evidence that the BOE continually bypassed Mrs. Bradley to hire substantially younger, less qualified employees. Mrs. Bradley need not have direct proof of discrimination because it is "essentially an element of the mind." *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 170-71, 358 S.E.2d 423, 429-30 (1986). All Mrs. Bradley must show is "some evidence" that sufficiently links the employer's decision and her member of a protected

class "so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." *Id.*

a. The lower court erred in considering subjective hiring criteria in its analysis of whether Mrs. Bradley could prove a prima facie case of age discrimination and in failing to view the evidence in the light most favorable to Mrs. Bradley.

"If a failure to satisfy subjective hiring criteria could defeat an employee's *prima facie* case, 'the court would not be required to consider evidence of pretext.'" *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 681 (5th Cir. 2001) (quoting *Burrus v. United Tel. Co. of Kansas, Inc.*, 683 F.2d 339, 342 (10th Cir. 1982)). Considering subjective hiring criteria at the *prima facie* stage of a court's analysis is legal error because it essentially "collapse[s] the analysis into a single step at which all issues would be resolved." *Id.* Accordingly, it is inappropriate to decide as a matter of law that an employee was not discriminated against because she may not have met entirely subjective hiring criteria. *Medina*, 238 F.3d at 681 (citing *Lindsey v. Prive Corp.*, 9087 F.2d 324, 327 (5th Cir. 1993)). Here, the lower court determined that Mrs. Bradley had not proven a *prima facie* case for age discrimination because the faculty senate representative and principal agreed upon each candidate. J.A.000815-816. However, the faculty senate representative and principal's endorsement of a candidate is entirely subjective, as these decisions were divorced from objective criteria West Virginia law requires the BOE to consider.

Under Policy 5000, interviewers at the BOE are required to consider eleven criteria in hiring full-time, permanent classroom teachers. These mandatory criteria are:

1. Appropriate certification, licensure or both;
2. Amount of experience relevant to the position or, in the case of a classroom teaching position, the amount of teaching experience in the required certification area;
3. The amount of course work, degree level, or both in the relevant field and degree level generally;
4. Academic achievement;

5. In the case of a classroom teaching position or the position of principal, certification by the National Board for Professional Teaching Standards;
6. Specialized training relevant to the performance of the job duties;
7. Past performance evaluations conducted pursuant to W. Va. Code § 18A-2-12 and § 18A-3C-2 or, in the case of a classroom teacher, past evaluations of the applicant's performance in the teaching profession as a certified educator;
8. Seniority;
9. Other measures or indicators upon which the relative qualifications of the applicant may fairly be judged;
10. The recommendation, if any, of the principal of the school at which the applicant will be performing a majority of [her] duties; and
11. The recommendation, if any, resulting from the process established by the faculty senate of the school at which the employee will be performing a majority of [her] duties.

W. Va. CSR § 126-126-6.2. These criteria are to be given equal weight, except that, in the event that "one or more permanently employed instructional personnel apply for a classroom teaching position and meet the standards set forth in the job posting, [criteria 10 and 11] shall each be double weighted." *Id.* at § 126-126.6.3. However, this double-weighting only applies "when the faculty senate and the principal do not agree on a recommendation, when either the faculty senate or principal forfeit or cannot make a recommendation, or when the superintendent does not concur with the recommendation of the principal and the faculty senate." *Id.* at § 126-126-6.4.

Eight of these criteria are arguably objective, but all of these factors were applied subjectively by the principals and faculty senate representatives evaluating the applicants for the positions at issue here. For example, a candidate whose only teaching experience was teaching English as second language to kindergarteners in China was hired over Mrs. Bradley for an English Language Arts teaching position at a middle school in Ohio County. J.A.000570 at 76:14-23. The successful candidate was 24 years younger than Mrs. Bradley and is not a member of her protected class.

The evaluation matrix submitted for this open job, Position 2427, reveals that not all criteria were actually considered. J.A.000622 For instance, the criteria points for academic achievement, Certification by the National Board for Professional Teaching Standards, specialized training relevant to performance of the duties of the job, past evaluations of the applicant's performance in the teaching profession, and other measures or indicators upon which the relative qualifications of the applicant may be fairly judged are all blank. J.A.000622 Moreover, Mrs. Bradley's relevant experience was not appropriately credited. Although the successful candidate was credited for relevant experience through his work teaching Chinese kindergartners English as a Second Language, the hiring committee apparently ignored Mrs. Bradley's years of teaching English as a Second Language in Ohio County, as they gave her a zero for this criteria. J.A.000622

Other evaluators likewise discounted Mrs. Bradley's years of experience as an educator. The evaluators for one position did not give Mrs. Bradley any criteria points for her six years of classroom teaching, while other evaluators at other schools gave her one or two points for this experience. J.A.000630; J.A.000654; J.A.000602**.** Still other evaluators gave improper weight to criteria, which should have been limited to a single point in accordance with Policy 5000. J.A.000596 (double-weighting teaching experience, course work, and recommendations); J.A.000602 (double-weighting teaching experience, course work, "other measures," and recommendations); J.A.000616-617 (double-weighting teaching experience, course work, and seniority, and quadruple-weighting recommendation of faculty senate and principal); J.A.000622 (improperly double-weighting recommendations and failing to credit Mrs. Bradley with any points for her teaching experience); J.A.000630 (double-weighting recommendations and not crediting Mrs. Bradley for nine years of teaching experience); J.A.000639 (double-weighting teaching experience and seniority, and triple-weighting recommendations); J.A.000654-655 (double-

weighting teaching experience [but failing to credit Mrs. Bradley with the appropriate weight specified on the matrix for her years of experience], course work, specialized training, "other measures", and recommendations). An interviewer also marked "newer" next to the name of an applicant who was substantially younger than Mrs. Bradley and was ultimately hired for a position for which Mrs. Bradley applied. J.A.000781 at 99:2-15.

The purpose of Policy 5000 and requiring interviewers to use the specified criteria is so that the processes and procedures in this policy are "consistent among schools and counties and are designed to avoid litigation or grievance." W. Va. C.S.R. § 126-126-6.7. Clearly, that consistency was not met here. Instead of fairly evaluating Mrs. Bradley against the other applicants, the interviewers used inconsistent criteria, improperly weighted criteria, and ultimately hired much younger and less-experienced candidates in place of the older Mrs. Bradley. And they did so *sixteen times. Sixteen times,* Mrs. Bradley was passed over for younger, less qualified candidates, and *sixteen times*, the BOE misapplied objective criteria or subjectively overrode that criteria in favor of a younger candidate. The lower court also did not consider the fact that, out of the twelve positions that it considered in this case, only seven evaluation matrices were produced in discovery. The serious inconsistencies in evaluation matrices (and missing matrices), repeated hiring of substantially younger candidates over Mrs. Bradley, and Mrs. Bradley's poor treatment at the hands of Mrs. Lewis were sufficient to create an issue of material fact as to whether the BOE discriminated against Mrs. Bradley based on her age. The lower court erred when it determined otherwise.

b. The lower court further erred by ignoring the operative section of Policy 5000.

The lower court erred in finding that W. Va. C.S.R. § 126-126-6.4 controls over all other sections of Policy 5000. Instead, an agreed-upon candidate "may be hired *notwithstanding any*

other provision of Policy 5000 to the contrary." J.A.000817. Critically, the very next section, W. Va. C.S.R. § 126-126-6.5 states that recommendations made by principals and faculty senates "shall be made based on a determination as to which of the applicants it the highest qualified for the position. When making recommendations, principals and faculty senates shall consider each criterion listed in sections 6.2.a through 6.2.i." However, the evidence developed in this case demonstrates that the principals and faculty senate did not consider each criterion or, at the very least, an issue of material fact exists as to whether they did.

The double-weighting issue noted above that the lower court rejected, coupled with the fact that a substantially younger individual was offered each position instead of Mrs. Bradley, is compelling evidence of the BOE's discrimination against Mrs. Bradley on the basis of her age. The seven evaluation matrices produced by the BOE demonstrates that the mandatory criteria were not considered appropriately, and none of the principals and faculty senates followed the requirements of § 126-126-6.4 (that the double-weighted criteria only applies when the faculty senate and principal do not agree on a candidate).

The purpose of Policy 5000 and requiring interviewers to use the specified criteria is so that the processes and procedures in this policy are "consistent among schools and counties and are designed to avoid litigation or grievance." W. Va. C.S.R. § 126-126-6.7. Clearly, that consistency was not met here. Instead of fairly evaluating Mrs. Bradley against the other applicants, the interviewers used inconsistent criteria, improperly weighted criteria, and ultimately hired much younger and less-experienced candidates in place of the older Mrs. Bradley.

c. Finally, the lower court erred when it apparently determined that the BOE had given a legitimate, non-discriminatory reason not to transfer Mrs. Bradley.

In its opinion granting summary judgment in the BOE's favor, the lower court never explicitly found what the BOE's legitimate, non-discriminatory reason for failing to transfer Mrs.

Bradley was. However, despite failing to make this explicit finding, the lower court went on to reject Mrs. Bradley's pretext argument.

Mrs. Bradley alleged that any reason the BOE asserts for failing to transfer her was pretextual. It is unclear how the individuals that Mrs. Bradley interviewed with would be aware of any supposed performance issues because Mrs. Lewis testified that she did not speak to any of them. J.A.000587 at 95:11 to J.A.000588 at 96:3. The lower court rejected this argument because the BOE "explain[ed] that the interviewers [had] access to Ms. Bradley's files and [could] review them." J.A.000818. This may be perhaps the most glaring instance of the lower court not viewing the facts in the light most favorable to Mrs. Bradley. Indeed, the BOE did not assert any evidence, although it was its burden to do so, that Mrs. Bradley's interviewers had actually accessed her files and that any issues with her performance were the reason for choosing another applicant over her. Instead, the lower court accepted the BOE's assertions wholesale. However, importantly, the testimony on which the lower court relied conflicts with a statement in the same deposition that the BOE did not make teacher's past evaluations available for interview or review purposes. J.A.000713 at 31:12-15.

Further, the lower court erroneously considered a list of the BOE's employees that "show[ed] that Defendants employee 152 employees the same age as Plaintiff or older." J.A.000818. The lower court focused only on Mrs. Bradley's argument that the court should disregard this chart because it was not produced in discovery. Mrs. Bradley went on to argue, however, that this list included employees who were service personnel, administrators, or employees in positions other than full-time, permanent classroom positions. Accordingly, those employees were not adequate comparators for Ms. Bradley because those types of employees are not subject to the same hiring standards and processes as full-time, permanent classroom teachers.

Indeed, service employees are hired *only* on seniority. J.A.000781 at 99:16-23 (There is a difference in the criteria considered for teaching positions as opposed to service positions. "Service positions are filled solely through seniority."). Moreover, Mrs. Bradley does not assert a disparate impact case, which would challenge the existence of a discriminatory policy. Here, Mrs. Bradley alleges disparate treatment because she was rejected from sixteen open positions due to her age. For those reasons, in addition to the fact that the list was from three years after the operative time period in this case, the lower court should have afforded it no weight.

These gross inconsistencies are issues of material fact as to whether the BOE discriminated against Mrs. Bradley on the basis of her age and, therefore, the lower court erred in granting summary judgment in favor of the BOE on Mrs. Bradley's age discrimination claim.

d. The lower court erred in dismissing Mrs. Bradley's constructive discharge claim.

Finally, the lower court erred in its order granting the BOE's Motion to Dismiss for two reasons. First, it erroneously dismissed her claim as time-barred. Second, it did not consider her allegations that the BOE's failure to hire her contributed to a hostile work environment because it did not construe the allegations in Mrs. Bradley's complaint in the light most favorable to her.

Count III of Mrs. Bradley's complaint states, in pertinent part, that "the working conditions created by Defendant Lewis as facilitated by OCS, and OC's failure to hire Mrs. Bradley for sixteen positions for which she applied between June 2019 and August 2019, were so intolerable that a reasonable person would have been compelled to resign their position." J.A.000023 at ¶ 102. Mrs. Bradley further alleged that "Defendant OCS's failure to hire her for positions for which she was otherwise qualified arose due to the Defendants' discrimination against Mrs. Bradley based on her age and protected status." J.A.000023 at ¶ 105.

1. The lower court erroneously declined to equitably toll Mrs. Bradley's constructive discharge claim.

The lower court first erred when it declined to equitably toll Count III of Mrs. Bradley's Complaint. However, the Supreme Court of Appeals of West Virginia has applied equitable tolling in employment discrimination cases. *See Ind. Fire Co. v. No. 1 v. W. Va. Human Rights Comm'n*, 180 W. Va. 406, 376 S.E.2d 612, 615 (1988) (finding the statute of limitations in the state's Human Rights Act is subject to equitable tolling). Equitable tolling "focuses on the plaintiff's excusable ignorance of the limitations period and on the lack of prejudice to the defendant." *Id.* at 409, 376 S.E.2d at 614. This principle applies here.

At the WVHRC level, Mrs. Bradley proceeded *pro se*. Mrs. Bradley, a lay person, would not know that she had to expressly allege a constructive discharge claim at that level, and trusted the agency to pursue her claims. The involvement of a government agency in a case can lead plaintiffs to believe that their claims are being pursued. *Taylor v. Commtec/Pomeroy Computer Resources, Inc.*, No. Civ. A. 2:05-CV-00445, 2006 WL 362463 (S.D. W. Va. Feb. 15, 2006). In *Taylor*, the United States District Court for the Southern District of West Virginia applied equitable tolling to a prevailing wage matter. *Id.* After the Division of Labor purported to pursue a claim on his behalf and he rejected a negotiated settlement, the plaintiff chose to pursue his claim individually. *Id.* The defendant moved to dismiss plaintiff's claims as time-barred, but the Court rejected this argument. *Id.* The Court reasoned that "[f]airness and equity dictate that the statute of limitations should not bar the plaintiff's suit. . . . Naturally, a common citizen would have little reason to question the purported authority of a state agency. No facts exist suggesting the plaintiff knew, or even should have known, of a reason to question the agency's purported authority." *Id.* The Court also found that the defendant was not unduly prejudiced by the application of equitable

tolling to the case because defendant was aware of the claim and that the plaintiff could bring suit against it. *Id.*

So too here. At the outset of her WVHRC case, Mrs. Bradley was proceeding *pro se*. The WVHRC's Letter of Determination informed Mrs. Bradley that an Assistant Attorney General would present her case. J.A.000053-55. Naturally, if an Assistant Attorney General was pursuing her case, Mrs. Bradley would not believe she had to contend with the statute of limitations for a cause of action that related squarely to her age discrimination case. Moreover, the BOE was aware at the time it responded to Mrs. Bradley's WVHRC complaint that she alleged age discrimination, was subjected to unfair treatment at Middle Creek Elementary School, and that she had retired in October 2019. J.A.000097. Indeed, all of Mrs. Bradley's claims that were dismissed as time-barred relate back to her age discrimination claim against the BOE. The lower court's analysis on declining to equitably toll Mrs. Bradley's wrongful constructive discharge claim was that "[t[hese arguments, while creative, lack any meaningful legal support and are without merit." J.A.000162-163. However, Mrs. Bradley's constructive discharge claim depends on and relates back to her age discrimination claim. Thus, the lower court erred in declining to equitably toll the statute of limitations for Mrs. Bradley's constructive discharge claim.

2. The lower court erroneously failed to view the facts in the light most favorable to Mrs. Bradley and dismissed her constructive discharge claim.

Notwithstanding this decision, the trial court also addressed Mrs. Bradley's constructive discharge claim on its merits and erroneously granted judgment in the BOE's favor.

Trial courts, when considering the sufficiency of a complaint on a Rule 12(b)(6) motion, "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Jones v. Logan County Board of Education*, 247 W. Va. 463, 881 S.E.2d 374, 380 (2022) (quoting Syl. Pt. 3, *Chapman v. Kane*

Transfer Company, 160 W. Va. 530, 236 S.E.2d 207 (1977) (cleaned up). Motions to dismiss are generally viewed with disfavor in West Virginia "because the complaint is to be construed in the light most favorable to the plaintiff and its allegations are to be taken as true." *Fass v. Nowsco Well. Serv., Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 563 (1986).

Here, the lower court found that Mrs. Bradley's allegations were "far less severe" than the incidents in *Blessing v. Supreme Ct. of Appeals of W. Virginia*, No. 13-0953, 2014 WL 2208925 (May 27, 2014) (affirming dismissal where employee's complaint alleged "general harassment" that was not perpetrated on the basis of a protected status), and *Johnson v. Killmer*, 219 W. Va. 320, 326, 633 S.E.2d 265, 271 (2006) (affirming grant of summary judgment in favor of employer where plaintiff failed to show a nexus between her age and the employer's decision to terminate her despite the employer's disparaging remarks about the plaintiff's age). Notwithstanding that both *Blessing* and *Johnson* are inapposite here because Mrs. Bradley alleges more than general harassment and can prove a nexus between her age and the BOE's failure to hire her, the lower court subsequently ruled that "As Plaintiff's claims against *Ms. Lewis* at Count III could never form the basis of a wrongful constructive discharge action, those claims would be dismissed for failure to state claims upon which relief could be granted." J.A.000167. (emphasis added). Notably, the lower court did not address Mrs. Bradley's claims against the BOE as to her constructive discharge claim, which all relate to the BOE's failure to hire her for sixteen positions. These findings do not address Mrs. Bradley's constructive discharge claim as it relates to the BOE's failure to hire her and, accordingly, the lower court's decision must be reversed.

CONCLUSION

For the reasons stated above, Mrs. Bradley asks this Court to reverse the lower court's dismissal of her constructive discharge claim and its grant of summary judgment in the BOE's favor, and to remand this case for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 2024, I electronically filed a true and exact copy of the forgoing *Petitioner's Appeal Brief* with the Clerk of this Court using the File & Serve Xpress system, which will send notification of such filing to the following:

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