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 REPLY BRIEF

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

Christopher D. Smith (WVSB #13050)
Mary Pat Statler (WVSB #11456)
Elizabeth L. Stryker (WVSB #13270)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
(304) 342-1110
mstatler@baileyglasser.com
estryker@baileyglasser.com
csmith@baileyglasser.com
Counsel for Plaintiff and Petitioner HELEN BRADLEY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Mrs. Bradley's appeal focuses on three overarching errors by the lower court. First, the lower court erred when it determined that failure to transfer claims were only cognizable when the damages met a certain severity threshold. That is wrong—discrimination violates the law when it affects any term or condition of an individual's employment regardless of the severity of that effect. Second, the lower court erred when it construed the facts *against* Mrs. Bradley in addressing the BOE's motion for summary judgment. Finally the lower court erred when it declined to equitably toll the statute of limitations on Mrs. Bradley's constructive discharge claim and when it, once again, construed the facts in Mrs. Bradley's complaint against her, in contravention of the appropriate standard of review

The BOE, by and large, continues to argue its tilted view of the facts, derisively presenting Mrs. Bradley—an employee who was passed over for transfer *sixteen times* in favor of younger applicants—as a malcontent. Regardless of how the BOE views its former employees, a jury—not the BOE and not the lower court—should have been given the chance to weigh the evidence presented by Mrs. Bradley. The lower court erred when it entered skewed orders prepared by the BOE that summarily disregarded the evidence of discrimination presented by Mrs. Bradley.

Indeed, the lower court did exactly what the Supreme Court of Appeals of West Virginia cautioned trial courts against by entering orders that borrow so heavily from the BOE's motion that it renders the order "heavily partisan" and "over-reaching." *Taylor v. West Virginia Dept. of Health and Human Resources*, 237 W.Va. 549, 557–58, 788 S.E.2d 295, 303–04 (2016). Because the orders granting the BOE's motion for partial dismissal and motion for summary judgment so closely follow its motions, the orders necessarily "consist[] entirely of [Respondent's] version of the disputed facts and advocated inferences[.]" *Id.*

The facts—particularly, when they are construed in Mrs. Bradley's favor—tell a different story. Mrs. Bradley was bullied by Katrina Lewis while her younger colleagues were left alone. *Sixteen times* Mrs. Bradley applied for a transfer to escape that harassment. *Sixteen times* she was denied a transfer in favor of a younger colleague. That is more than enough to survive summary judgment. That is especially true because the lower court applied the wrong legal standard in its order granting summary judgment to the BOE. The United States Supreme Court's decision in *Muldrow* is clear: discrimination is wrong, even if the lower court did not believe that it was sufficiently severe. This Court should reverse the lower court's opinions and remand this case so that a jury—not the lower court—can resolve the contested issues of material fact in this case.

ARGUMENT

I. Mrs. Bradley identified a change in the terms or conditions of her employment sufficient to create an issue of material fact.

The lower court applied the wrong legal standard, and its decision must be reversed. *Muldrow v. City of St. Louis, Missouri*, 144 S. Ct. 967, 974 (2024), a United States Supreme Court decision that sets the "analytical framework" for WVHRA claims, undermined the entire rationale for the lower court's decision. *Willis v. Wal-Mart Stores, Inc.*, 202 W. Va. 413, 417, 504 S.E.2d 648, 652 (1998) (stating that the Supreme Court of Appeals of West Virginia has a "longstanding practice of applying the same [Title VII] analytical framework used by the federal courts when deciding cases arising under the [WVHRA]"). *Muldrow* unequivocally rejected the Fourth Circuit precedent on which the lower court relied determining that a party challenging a discriminatory decision to—or in this case, to not—transfer "does not have to show, according to the relevant text, . . . that the harm incurred was 'significant.'" *Muldrow*, 144 S. Ct. at 974. Instead, a party must only show "some harm respecting an identifiable term or condition of employment." *Id.* The lower

court erred when it set itself up as the gatekeeper of whether Mrs. Bradley's harm was severe enough to constitute a claim under the WVHRA.

To escape the lower court's plain error, the BOE fields a bevy of unpersuasive arguments. It first disingenuously argues that the standard announced in *Muldrow* "appears to function in the same fashion as the old standard." BOE Br. 12. Tellingly, the block quote that follows is not from the majority's decision in *Muldrow*; instead, it is a non-binding concurrence. And the BOE is simply wrong when it says "while the acceptable verbiage may have changed, the results have not." *Id.* at 13. In fact, *Muldrow* expressly singled out Fourth and Tenth Circuit precedent—including *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999), a case on which the lower court's opinion relies—and stated that precedent was wrong because the plaintiff's claims "were rejected solely because courts rewrote Title VII, compelling workers to make a showing that the statutory text does not require." *Muldrow*, 144 S. Ct. at 975. Obviously, *Muldrow* changed more than verbiage—it plainly held that courts who set a "severity" threshold for the change in conditions or terms of employment are wrong. The lower court did just that, and it must be reversed.

Next, the BOE contends that "[w]hether *Muldrow* even *applies* to a failure to transfer is unclear." BOE Br. 13. *Muldrow* plainly reaches failure to transfer cases. The opinion itself notes that it applies to lawsuits "challenging transfer decisions"—not merely forced transfers. *Muldrow*, 144 S. Ct. at 969. Except for the lone *Cavanaugh v. Wal-Mart Stores E., LP.*, No. 3:22-CV-1908, 2024 WL 2094010, at *4 (M.D. Pa. May 9, 2024) cited in the BOE's Response, it appears that courts, by and large, treat failures to transfer the same as involuntary transfer. For example, the United States District Court for the Eastern District of North Carolina held that case law "regarding the decision to laterally transfer an employee applies with equal force to the decision not to laterally transfer an employee." *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 427 F. Supp. 2d 595,

608 (E.D.N.C. 2006); *see also LePique v. Hove*, 217 F.3d 1012, 1014 (8th Cir. 2000) (finding "no reason to suppose" that a failure to transfer should be "treated any differently" than an actual transfer). That makes good sense—there is no reason that an involuntary transfer based on discriminatory intent should be treated any differently than a failure to transfer based on discriminatory intent.

And the BOE knows that the claims are not substantially different. Below, it argued that case law governing forced transfer cases applies with equal force to failure to transfer cases. J.A. 236 (quoting *McDougal-Wilson*, 427 F. Supp. 2d at 608). It convinced the lower court to adopt that position. *Id.* at 812. The BOE offers no compelling reason to depart from the commonsense proposition that failing to transfer an employee is governed by the same legal principles that govern involuntarily transferring an employee. Both actions affect the "terms and conditions" of an employee's job, and if they are undertaken discriminatorily, they are equally illegal.

The BOE next contends that Mrs. Bradley cannot show that the BOE's failure to transfer her "brought about some 'disadvantageous' change in an employment term or condition." BOE Br. 13. Of course, she can. In fact, the lower court implicitly recognized as much when it held that Mrs. Bradley's transfer involved "a minor change in working conditions." J.A.814. Regardless of whether it was major or minor, the BOE's failure to transfer disadvantageously affected Mrs. Bradley much like the employee in *Muldrow*. In *Muldrow*, the Court noted that the transfer affected "chang[ed] nothing less than the what, where, and when of her police work." *Muldrow*, 144 S. Ct. at 974. Therefore, because the alleged discrimination reached the reached the terms and conditions of the plaintiff's employment, the Supreme Court of the United States determined that the Eighth Circuit's order granting summary judgment because the effects of the discrimination were not severe enough was erroneous.

In this case, the BOE's decision affected the *who* of Mrs. Bradley's job. Specifically, she wanted to transfer out of a position where her supervisor treated her materially worse than her younger colleagues, but was denied a transfer in favor of a younger applicant *sixteen times*. *See, e.g.*, J.A.000542 at 129:8-9; J.A.000542 at 129:13-15. The people one works with are plainly a "term and condition" of employment. Indeed, *Muldrow* made it clear that "the 'terms [or] conditions' phrase, we have made clear, is not used 'in the narrow contractual sense'; it covers more than the 'economic or tangible.'" *Muldrow*, 144 S. Ct. at 974. One's supervisor—particularly a supervisor who allegedly treated younger employees better than Mrs. Bradley—is one of the most impactful conditions in one's employment. Plainly, a discriminatory failure to transfer Mrs. Bradley to a position with a different supervisor is a "harm respecting an identifiable term or condition of employment." *Id.*

Nothing that the BOE cites suggests otherwise. It concedes that the Seventh Circuit case it cites is inapposite and does not present "the facts of this case." BOE Br. 14. Because the BOE lacks case law or evidence, it resorts to derision. For example, it contends that "[t]he idea that any member of a protected class could maintain a discrimination action simply because they were not transferred away from a boss they did not like is, of course, ridiculous." BOE Br. 15. But the BOE's derision is aimed at an entirely different case. In this case, Mrs. Bradley sought to transfer away from a supervisor who treated her differently than her younger colleagues. The mere failure to transfer to a position with a different supervisor is not the genesis of Mrs. Bradley's case; instead, it is the BOE's systemic decision to pass her over—sixteen times—in favor of younger employees. Mrs. Bradley's case is not, as the BOE disingenuously puts it, about the right "to transfer jobs until you find coworkers and supervisors of whom you approve." It is about the right to be treated fairly in the transfer process, regardless of one's age, gender, race, or other protected characteristic.

And *Muldrow* is clear: a *jury*—not a judge—must resolve whether Mrs. Bradley was treated fairly. Judges can no longer dismiss a case merely because they do not believe the harm suffered was severe enough. The lower court erred when it usurped the jury's role and determined that Mrs. Bradley's harm was not severe enough to proceed. That erroneous decision must be reversed.

II. Mrs. Bradley developed evidence for her damage claims sufficient to create issues of material fact.

1. Mrs. Bradley lost wages.

Mrs. Bradley suffered a loss of income when, after being rejected sixteen times for other positions at the BOE, she retired. Mrs. Bradley pleaded and developed substantial evidence for her age discrimination case against the BOE. Lost wages are a form of compensatory damages recoverable in age discrimination cases. As explained above, the lower court erred in granting summary judgment in the BOE's favor on Mrs. Bradley's failure to transfer claim, given the Supreme Court's decision in *Muldrow*. The BOE's failure to transfer Mrs. Bradley to any of these sixteen positions lead to her feeling rejected in favor of less qualified candidates. J.A. 000323 at 118:13-16. Further, the BOE's characterization of Mrs. Bradley's expert witness's calculation of her lost wages underscores the issues of material fact in this case. There are significant factual questions about the amount of wages Mrs. Bradley lost in this case, and the lower court erred in granting summary judgment in the BOE's favor.

2. Mrs. Bradley suffered emotional distress.

Further, the lower court erred when it summarily disregarding Mrs. Bradley's emotional distress claims. The BOE takes issue with Mrs. Bradley's supposed "self-serving" testimony on this point, but it is impossible to fathom what kind of evidence would satisfy the BOE. Emotional distress claims are, by their very definition, uniquely personal. Emotional distress injuries,

"[a]lthough generally subjective . . . may be evidenced by one's conduct and observed by others." *Carey v. Piphus*, 435 U.S. 247, 264, 98 S.Ct. 1042 (1978). In cases where an injured plaintiff provides the sole evidence, she must "reasonably and sufficiently explain the circumstances of her injury and not resort to mere conclusory statements." *Rakovich v. Wade*, 819 F.2d 1393, 1399 n. 6 (7th Cir. 1987), *vacated on other grounds*, 860 F.2d 1180 (7th Cir.), *cert. denied*, 488 U.S. 968, 109 S.Ct. 497 (1988). Likewise, West Virginia courts do not require plaintiffs who have suffered emotional distress damages to provide corroborating evidence at the peril of having their claims extinguished. *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W. Va. 144, 152, 423 S.E.2d 547, 555 (1992). "It is for the court to determine whether, on the evidence, severe emotional distress can be found; it is for the jury to determine whether, on the evidence, it has, in fact, existed." *Tanner v. Rite Aid*, 194 W. Va. 643, 646 (1995).

Here, the lower court improperly cast Mrs. Bradley's emotional distress claims as a wrongful discharge claim. However, Mrs. Bradley testified that she felt like she was inadequate and had low self-esteem because she was rejected in favor of less qualified candidates. J.A. 000318 at 98:10-21; J.A. 000323 at 118:13-16. These feelings, although they also ultimately led to her decision to retire prematurely, arose from the rejections themselves and were inextricably tied to Mrs. Bradley's failure to transfer claim. The lower court's decision effectively held that Mrs. Bradley could only suffer emotional distress from wrongful discharge and could not suffer emotional distress from an allegedly discriminatory failure to transfer. There is no legal support for that position, and if any should be tasked with parsing what event led to Mrs. Bradley's emotional distress, it is the jury. Instead, lower court usurped the jury's role and improperly determined that Mrs. Bradley's emotional distress was solely linked to her improperly dismissed wrongful discharge claim despite the fact that she adduced testimony showing the emotional toll the BOE's

discriminatory failure to transfer took on her. Accordingly, Mrs. Bradley's claims for emotional distress damages should have survived the BOE's motion for summary judgment.

III. Mrs. Bradley has provided ample evidence that the BOE discriminated against her because of her age.

1. The West Virginia Human Rights Commission's probable cause finding helps establish Mrs. Bradley's prima facie case of age discrimination.

The West Virginia Human Rights Commission ("HRC") investigates complaints of discrimination and issues probable cause findings when sufficient evidence supports these claims. These probable cause findings mean that, following an investigation, the HRC determined that it was likely that the complainant was discriminated against by the respondent employer. *See* W. Va. Code § 16B-17-10; WEST VIRGINIA HUMAN RIGHTS COMMISSION, *Your Guide to Frequently Asked Questions in Discrimination* 1–8 (2012).

Further, the BOE's quibble with Mrs. Bradley's authority is of no matter to this Court. Indeed, courts from various jurisdictions say the same thing: "A finding of probable cause by an administrative agency, such as the EEOC, though not determinative, is admissible to help establish a prima facie case of discrimination." *Sadruddin v. City of Newark*, 34 F. Supp. 2d 923, 926 (D.N.J. 1999); *see also Philbrook v. Ansonia Bd. of Educ*, 757 F.2d 476, 481 (2d Cir. 1985) (" a finding of probable cause by an administrative agency, such as the EEOC, though not determinative, is admissible to help establish this prima facie case."); *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5th Cir. 1972) (explaining why probable cause determinations should be admissible); *Goldberg v. B. Green and Co., Inc.*, 836 F.2d 845, 848 (4th Cir. 1988); *Rowe v. Eckerd Youth Alternatives, Inc.*, CIVIL DOCKET NO.: 5:10CV153-V, at *4 (W.D.N.C. Sep. 19, 2011) ("While the Fourth Circuit has never expressly so held, other circuits have held that the EEOC's administrative findings and determinations are admissible in later Title VII court proceedings pursuant to Fed. R. Evid. 803(8)(C)."); *Mew Sporting Goods, Llc. v. Johansen*, 992 F. Supp. 2d

665, 677 (N.D.W. Va. 2014) ("[A]n administrative record is a duly authenticated record that enjoys a presumption of verity.") (citing *American Arms International v. Herbert*, 563 F.3d 78, 86 n.12 (4th Cir. 2009)).

The BOE argues that these findings are not evidence and should be disregarded, but it is critical to consider the purpose of a finding of probable cause before the HRC. When the HRC determines that there is probable cause to substantiate the allegations of a complaint "the commission shall immediately endeavor to eliminate the unlawful discriminatory practices complained of by conference, conciliation, and persuasion." W. Va. Code § 16B-17-10. If these probable cause findings were truly meaningless, as the BOE posits, then it simply does not make sense that the HRC would immediately begin efforts to rectify the discrimination that occurred and put a stop to any future wrongs. Thus, the lower court should have considered this evidence as further proof of Mrs. Bradley's prima facie case of age discrimination.

2. The lower court ignored issues of material fact and did not construe the facts in the light most favorable to Mrs. Bradley.

The BOE misstates the evidentiary burden Mrs. Bradley must and has met. "[T]he showing the plaintiff must make as to the elements of a prima facie case of discrimination in order to defeat a motion for summary judgment is *de minimis*." *Longerbeam v. Shepherd University*, No. 22-609, No. 22-610, 2024 WL 1571403 (Apr. 11, 2024) (citing Syl. Pt. 4, *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)). Generally "once a plaintiff's allegations and evidence create a *prima facie* case . . . the conflict between the plaintiff's evidence establishing a *prima facie* case and the employer's evidence of a nondiscriminatory reason reflects a question of fact to be resolved by the factfinder at trial." *Id.* (citing *Hanlon*, 195 W. Va. at 105–06, 464 S.E.2d at 747-48)."The function of the circuit court on a summary judgment motion is to determine whether the proffered admissible evidence shows circumstances that would be sufficient to permit a rational finder of

fact to infer a discriminatory motive. It is not the province of the circuit court itself to decide what inferences should be drawn." *Hanlon*, 194 W. Va. at 99, 464 S.E.2d at 741.

This Court "must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Williams*, 194 W. Va. at 59, 459 S.E.2d at 336. "[I]f there is *any evidence* in the record from *any* source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper." *Longerbeam*, 2024 WL 1571403 at *8 (citing *Hanlon*, 195 W. Va. at 105, 464 S.E.2d at 747) (emphasis in original). Further, in employment and discrimination cases, "[c]ourts must take special care when considering summary judgment . . . because state of mind, intent, and motives may be crucial elements." *Williams*, 194 W. Va. at 61, 459 S.E.2d at 338. Based on this standard, summary judgment is improper here for several reasons, none of which the BOE has effectively addressed.

A. Discretion does not permit discrimination.

Policy 5000 is the standard for county boards of education to make "decisions affecting the filling of vacancies for classroom teachers on the basis of the applicant with the highest qualifications." W. Va. CSR § 126-126-6.1. Although faculty senates and principals may recommend the candidate that they agree should be hired, that candidate should not be recommended unless they are the "highest qualified for the position." *Id.* at § 126-126-6.5. The principals and faculty senates "**shall** consider each criterion" set forth in Policy 5000 when selecting candidates. *Id.* (emphasis added). "The word 'shall," in absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation." Syl. Pt. 2, *Terry v. Sencindiver*, 153 W. Va. 651, 171 S.E.2d 480 (1969).

By the BOE's reading, qualifications do not matter, and faculty senates and principals may simply choose their favored candidate for a full-time classroom teacher position. This is contrary to Policy 5000 and educational policy in West Virginia. County boards of education must hire

teachers with the highest qualifications. W. Va. Code § 18A-4-7a(a)-(b). Hiring the best qualified teachers matters. "Public education is a fundamental constitutional right in this State, and a prime function of the State government is to develop a high quality educational system, an integral part of which is qualified instructional personnel. '[T]he State has a legitimate interest in the quality, integrity and efficiency of its public schools in furtherance of which it is not only the responsibility but also the duty of school administrators to screen those [in] . . . the teaching profession to see that they meet this standard." *Dillon v. Bd of Educ. of Wyoming Cty.*, 177 W. Va. 145, 351 S.E.2d 58 (1986) (superseded by statute, on other grounds); *see also* Syl. Pt. 3, *Pauley v. Kelley*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

In attempting to hand-wave away the record replete with issues of material fact, the BOE essentially argues that it is ultimately acceptable that Mrs. Bradley was not selected for any one of the sixteen positions for which she applied because the faculty senates and principals were not really required to evaluate her credentials in any meaningful way. Instead, the faculty senates and principals could choose their favorite candidate, no matter if that candidate was objectively less qualified than Mrs. Bradley. Not only is this proposition incorrect based on the plain language of the policy and, specifically, the phrase "shall consider each criterion," it opens the door to the discriminatory conduct that occurred here.

The Supreme Court of Appeals of West Virginia has also overturned a lower court's finding that a female plaintiff did not state a prima facie case of discrimination when she was passed over twice for positions with a Board of Education in favor of less-qualified male candidates. *Perilli v. Board of Educ. Monongalia County*, 182 W. Va. 261, 265, 387 S.E.2d 315, 319 (1989). In *Perilli*, the court held that the female plaintiff offered enough proof of discrimination to bring her claim before a jury. Critical to that court's analysis was the fact that Ms. Perilli was the most senior

person applying for each position. Likewise, Mrs. Bradley had seniority and more teaching experience than the majority of the other candidates for the positions she applied for. She was the best-qualified applicant but was instead passed over in favor of younger, less-qualified candidates. And she was passed over *sixteen times*, far more than the two times the Supreme Court determined was sufficient to establish prima facie discrimination in *Perilli*.

The discretion afforded faculty senates and principals in Policy 5000 is not a get-out-of-jail-free card for discriminatory actions. The faculty senates and principals were still required, by the plain language of Policy 5000, to evaluate all candidates and select the most qualified individual to recommend to the county board. As demonstrated by the sixteen positions all filled by younger, less-qualified candidates, this evaluation was not actually completed, and a rational finder of fact could find that the BOE discriminated against Mrs. Bradley on the basis of her age. Accordingly, the lower court erred in granting summary judgment in the BOE's favor.

B. The lower court erred in conclusively accepting the BOE's alleged legitimate, non-discriminatory reason for failing to transfer Mrs. Bradley.

The BOE presented only conclusory arguments to the lower court and this Court about its legitimate, non-discriminatory reason for failing to transfer Mrs. Bradley. Most telling is the BOE's refusal to engage with Mrs. Bradley's evidence. Instead of rebutting the facts that undermine the BOE's pretext argument, including the fact that the three interview teams that assigned *any* points to any applicants for past evaluations of an application's performance actually credited Mrs. Bradley for good past performance,[1] the interviewers did not speak with Mrs. Bradley's supervisor about her performance,[2] and the testimony from the BOE's 30(b)(6) representative that the BOE did not make teachers' past evaluations available or interview or review purposes conflicts with

[1] J.A.000616; J.A.000630; J.A.000639.
[2] J.A.000587 at 95:18-J.A.000588 at 96:3.

the BOE's proffered reason,[3] the BOE just ignores them. All of these facts, when viewed in the light most favorable to Mrs. Bradley, raise serious issues of material fact regarding the BOE's pretext defense.

Further, the BOE itself acknowledges the speculative nature of its own supposed legitimate, non-discriminatory reason for its failure to transfer Mrs. Bradley. In its brief, the BOE states "Respondents identified, and the Court accepted, the fact that the interviewers **may not have** chosen Mrs. Bradley because they reviewed her personnel files, or because she had a reputation for poor performance." BOE Br., p. 26. The lower court's acceptance of these entirely speculative, contradictory facts underscores its error here. Rather, this proffer of a legitimate, nondiscriminatory reason for its failure to transfer Mrs. Bradley would implicate the issue of pretext and create disputed issues of motive which must be resolved by a finder of fact. *Longerbeam v. Shepherd University*, 2024 WL 1571403 at *14; *Hanlon*, 195 W. Va. at 113, 464 S.E.2d at 755 ("The defendant's response that her discharge was the result of the recommendation of an expert management consultant simply put the matter of motive at issue."). *See also Moore v. Consolidation Coal Co.*, 211 W. Va. 651, 657, 567 S.E.2d 661, 667 (2002) ("When pretext is at issue in a discrimination case, it is a plaintiff's duty to produce specific facts which, reasonably viewed, tend logically to undercut the defendant's position.") (cleaned up).

Finally, the lower court should have disregarded the BOE's "Employee Age File" because it is totally irrelevant to Mrs. Bradley's claims. The BOE's argument in its response brief is also unpersuasive – Mrs. Bradley did not seek a list of all the BOE's employees in discovery because the BOE likely would have resisted producing any documents in response. The age of all of the BOE's employees is not relevant to Mrs. Bradley's contention that she was discriminated against

[3] J.A.000713 at 31:12-15.

on the basis of her age during the hiring process governed by Policy 5000. Service personnel and full-time classroom teachers, like Mrs. Bradley, are subject to different hiring standards. Service personnel positions, for example, are filled solely through seniority. J.A.000781 at 99:16-23. As explained above, pursuant to Policy 5000, full-time classroom teachers are hired on a number of discrete criteria, including seniority. Here, Mrs. Bradley was discriminated against when the BOE misapplied Policy 5000.

Mrs. Bradley has developed numerous facts that call the BOE's supposed reason for her non-transfer into question. Therefore, the lower court should not have granted the BOE's motion for summary judgment.

IV. The Lower Court Erred in Dismissing Mrs. Bradley's Constructive Discharge Claim.

1. The lower court should have equitably tolled Mrs. Bradley's constructive discharge claim.

This case involves Mrs. Bradley's claims for age discrimination and mistreatment at the BOE by both her supervisor and the BOE, which ultimately culminated in Mrs. Bradley prematurely retiring. At the time of Mrs. Bradley's untimely, forced retirement, her claims against the BOE were already pending before the HRC. Indeed, the BOE was aware of Mrs. Bradley's retirement during the pendency of her HRC complaint—although her retirement is not pleaded in her complaint (because it had not happened yet)—the BOE acknowledged her retirement in its answering statement. J.A.000097. It simply does not make sense that Mrs. Bradley would be foreclosed from pursuing a claim for damages for constructive discharge because of the same age discrimination allegations that were being investigated by the HRC. Further, the WVHRA is a remedial statute that should be liberally construed. *See Skaggs v. Elk Run Coal Co., Inc.*, 198 W. Va. 51, 479 S.E.2d 561 (1996).

The lower court also relied on distinguishable precedent, *Conaway v. E. Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986), in its order dismissing Mrs. Bradley's constructive discharge claim. In *Conaway*, the Supreme Court of Appeals of West Virginia held that the statute of limitations for an age discrimination claim filed before the West Virginia Human Rights Commission was tolled until the HRC issued a right to sue. *Conaway* 178 W. Va. at 168, 358 S.E.2d at 427. That court further held that "all other causes of action accrued . . when [plaintiff's] discharge was confirmed by the management at Eastern." *Id.* Critical to this Court's analysis is those causes of action asserted by Conaway: "(1) that he was discharged so as to prevent him from becoming eligible for benefits under Eastern's long-term disability benefits program; (2) that he was discharged in order to prevent his pension rights from vesting; (3) that his discharge was in violation of his employment contract with Eastern; and (4) that he was discriminated against because of his age." *Id.* The Court dismissed all plaintiff's claims, save for age discrimination, as untimely, holding:

> With respect to the age discrimination claim alone, that cause of action did not accrue until March 31, 1983, when the West Virginia Human Rights Commission issued Mr. Conaway a notice of right to sue. All other causes of action accrued October 31, 1980, when Mr. Conaway's discharge was confirmed by the management at Eastern. The fact that Mr. Conaway's age discrimination claim was tolled during the period [in] which he was proceeding before the Human Rights Commission does not act to toll the statute of limitations from running on his other causes of action.

Id., 178 W. Va. at 168, 358 S.E.2d at 427.

Conaway is immediately distinguishable from the matter at hand. Mr. Conaway's other causes of action, retaliatory discharge and breach of contract, were based on his actual discharge, not age-discrimination conduct. Here, Mrs. Bradley's constructive discharge occurred because of the BOE's discriminatory actions. Indeed, her constructive discharge had not even occurred when she filed her complaint before the HRC. The BOE's position, and the lower court's decision, do

not make sense as a practical matter for two reasons. First, Mrs. Bradley's constructive discharge claim was not ripe at the time she filed her HRC complaint. Courts do not have subject matter jurisdiction over a claim if it "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *In re N.W.*, 249 W. Va. 201, 895 S.E.2d 56, 64 (2023) (quoting *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 345, 801 S.E.2d 216, 223 (2017) (cleaned up)).

Second, even if Mrs. Bradley been aware that her constructive discharge claim was not part of her HRC complaint, and she sued within the two year statute of limitations for constructive discharge in circuit court, her civil action could be barred by the prohibition against claim splitting. Like res judicata, claim splitting "prohibits a plaintiff from prosecuting its case piecemeal, and requires that all claims arising out of a single wrong be presented in one action." *Sensormatic Sec. Corp. v. Sensormatic Electronics Corp.*, 452 F.Supp.2d 621, 626 (D. Md. 2006). In claim splitting cases, subsequent suits are barred if the claim involves the same parties and "arises out of the same transaction or series of transactions" as the first claim. *Id.* (citing *Trustmark Insur. Co. v. ESLU, Inc.*, 299 F.3d 1265, 1269-70 (11th Cir. 2002)).

A better solution is to equitably toll the statute of limitations to afford Mrs. Bradley, who proceeded before the HRC *pro se*, the opportunity to pursue a claim that arose out of the same discriminatory conduct by the BOE. Supreme Court of West Virginia recognizes that the legal issues in employment discrimination cases, like the ones presented in this case, are difficult and beyond the grasp of a typical pro se plaintiff.

> The issues in a human rights case—especially unlawful motive and disparate impact—are extremely difficult and often complex. Invariably, they require substantial degrees of fact gathering and familiarity with the concepts of discrimination law. A grievant without a lawyer could not possibly be expected to grasp the

> significance of that law, put together a case of discrimination, and comprehend the full impact of claim and issue preclusion doctrine.

Vest v. Board of Educ. of County of Nicholas, 193 W. Va. 222, 227, 455 S.E.2d 781, 786 (1995).

By dismissing Mrs. Bradley's constructive discharge claim as time-barred, the lower court impermissibly shut the courtroom door, in contravention of the remedial purpose of the West Virginia Human Rights Act. Accordingly, the lower court should have equitably tolled Mrs. Bradley's constructive discharge claim.

2. The lower court did not view the facts in the light most favorable to Mrs. Bradley when it dismissed her constructive discharge claim on the merits.

Like in *Longerbeam v. Shepherd University*, No. 22-609, No. 22-610, 2024 WL 1571403 (Apr. 11, 2024), the lower court's order granting the BOE's partial motion to dismiss went beyond a legal conclusion that ended the analysis and "wade[d] into the remainer of the paradigm" by assessing the merits of an otherwise legally deficient claim. This further, unnecessary analysis further underscores the closeness of the order to the BOE's motion and the lower court's misapplication of the legal standards that require it to have construed the pleadings in the light most favorable to Mrs. Bradley.

The BOE's response does not actually address this issue other than to say that the lower court found that Mrs. Bradley's alleged facts were "far less severe" than those in the inapplicable cases the BOE cited. The lower court clearly erred when it made this determination, because Mrs. Bradley's pleadings were indeed far more severe than those in the cited cases. Mrs. Bradley was subjected to bullying and sixteen rejections from positions for which she was the most qualified and, ultimately, Mrs. Bradley was so distressed that she felt she needed to resign. Therefore, the lower court erred, and this Court should reverse its dismissal of Mrs. Bradley's constructive discharge claim.

CONCLUSION

For the reasons stated above and in her initial brief, this Court should reverse the lower court's decisions on the BOE's Motion for Summary Judgment and Motion to Dismiss and direct the lower court to allow this case to proceed to a jury trial.

Respectfully submitted,

HELEN BRADLEY,

By Counsel.

/s/ Christopher D. Smith
Christopher D. Smith (WVSB #13050)
Mary Pat Statler (WVSB #11456)
Elizabeth L. Stryker (WVSB #13270)
BAILEY & GLASSER LLP
209 Capitol Street
Charleston, WV 25301
(304) 345-6555
(304) 342-1110
mstatler@baileyglasser.com
estryker@baileyglasser.com
csmith@baileyglasser.com

CERTIFICATE OF SERVICE

I hereby certify that on this 3RD day of July, 2024, I electronically filed a true and exact copy of the forgoing *Petitioner's Reply Brief* with the Clerk of this Court using the File & Serve Xpress system, which will send notification of such filing to the following:

Thomas E. Buck
Benjamin P. Visnic
BAILEY & WYANT, PLLC
1219 Chapline Street
Wheeling, WV 26003

/s/ Christopher D. Smith
Christopher D. Smith (WVSB #13050)