IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 23-ICA-540

JEREMIAH L. JONES,
***Petitioner*,**

vs.

TOWN OF LUMBERPORT, WEST VIRGINIA, a political subdivision of West Virginia,
***Respondent*.**

REPLY BRIEF OF PETITIONER JEREMIAH L. JONES

Appeal from a Dismissal Order of the
Circuit Court of Harrison County, West Virginia
in Civil Action No. 2023-C-75
(The Honorable Christopher J. McCarthy, Judge)

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I. STANDARD OF REVIEW

The standard of review is *de novo*. A Circuit Court's order dismissing claims under Rule 12(b)(6) for failure "to state a claim upon which relief can be granted is a ruling of law" and is reviewed *de novo*. *See Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Va.*, 244 W. Va. 508, 519, 854 S.E.2d 870, 881 (2020) (citing Syl. Pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995) ("Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*.")). Further, "[i]n determining . . . the existence of clear error as a matter of law . . ." a "*de novo* standard of review" is employed "as in matters in which purely legal issues are at issue." *State ex rel. W. Va. Mut. Ins. Co. v. Salango*, 246 W. Va. 9, 13, 866 S.E.2d 74, 78 (2021) (citing *State ex rel. Gessler v. Mazzone*, 212 W. Va. 368, 372, 572 S.E.2d 891, 895 (2002)).

II. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter pursuant to the criteria contained in Rule 18(a) of the *West Virginia Rules of Appellate Procedure*. Because this matter involves an issue of first impression and fundamental public importance under Rule 20 of the *West Virginia Rules of Appellate Procedure*, Petitioner requests oral argument be set by the Court.

III. ARGUMENT

A. Respondent continues to incorrectly frame the issue before this Court. The central issue here is whether discrimination based upon sexual orientation constitutes illegal sex discrimination in violation of the WVHRA.

The issue before this Court has been incorrectly framed by both the Respondent and the Circuit Court. The issue is not whether "sexual orientation" is a protected class under the WVHRA. Rather, the central issue before this Court is whether discrimination based on sexual orientation constitutes illegal discrimination based on sex (an already recognized protected class) in violation

of the WVHRA. The plain meaning of the WVHRA, precedent of the Supreme Court of Appeals of West Virginia, federal application of Title VII, and the legislative purpose of the WVHRA all dictate an answer in the affirmative.

Respondent spends a great deal of its argument explaining to this Court why "sexual orientation" and "sex" are distinct and separate terms, and thus, "sexual orientation" is not a protected class under the WVHRA[1]. *Respondent's Brief*, at 9-13. This is not at issue. Undoubtedly, "sex" and "sexual orientation" are distinct and separate concepts. In making this argument, Respondent again illustrates for this Court the fallacy in the Circuit Court's framing of the issue. The issue here is **not** whether sexual orientation is a protected class under the WVHRA, but rather, whether discrimination because of sexual orientation constitutes illegal sex discrimination in violation of the WVHRA. As illustrated by the United States Supreme Court in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020), this Court should answer in the affirmative. For example:

> [c]onsider . . . an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge.

Bostock, 140 S. Ct. 1731, at 1741 (2020). As such, when an employer discriminates against an employee for being homosexual, the protected class of "sex" plays an unmistakable role in the discrimination. Therefore, as discussed more fully below, when looking to long-established

[1] On February 8, 2024, the West Virginia Legislature recodified the West Virginia Human Rights Act ("WVHRA") at W. Va. Code § 16B-17-1, *et seq*. No substantive changes were made to the statute. For clarity and consistency, all references to the WVHRA herein will be to W. Va. Code § 5-11-1, *et seq*., as the same was in effect at the time Petitioner's causes of action accrued.

precedent of the Supreme Court of Appeals of West Virginia, this Court should find sexual orientation discrimination is an illegal form of sex discrimination under the WVHRA.

In making its argument to this Court, Respondent further emphasizes that the statutory language of the WVHRA prohibiting discrimination "because of sex" is clear and unambiguous. W. Va. Code § 5-11-9(1); W. Va. Code § 5-11-3(h); *Respondent's Brief*, at 7-8. However, Respondent utilizes this position to incorrectly argue to this Court that, where the statute is clear and unambiguous, it is unnecessary for this Court to resort to federal case law interpreting Title VII for guidance in the application of the WVHRA. *See Respondent's Brief*, at 16. Respondent appears to mistakenly conflate *interpretation* with *application*. Indeed, the Supreme Court of Appeals of West Virginia has stated,

> [w]e have repeatedly held that we will construe the Human Rights Act to coincide with the prevailing federal application of Title VII ***unless there are variations in the statutory language*** that call for divergent applications or there are some other compelling reasons justifying a different result.

Hanlon v. Chambers, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995) (emphasis added). Here, no such variations in the statutory language exist nor any compelling reasons justifying a different result. To be sure, the Supreme Court of Appeals of West Virginia has, throughout the history of the WVHRA, expanded its protections through application stemming from federal guidance. *See*, *e.g.*, *Frank's Shoe Store v. Human Rights Commission*, 179 W. Va. 53, 59-60, 365 S.E.2d 251, 256-57 (1986) (citing Pregnancy Discrimination Act amendment to Title VII and United States Supreme Court decision interpreting that amendment as basis for holding that discrimination upon pregnancy constitutes illegal sex discrimination under the WVHRA); *Westmoreland Coal Co. v. W. Va. Human Rights Comm'n*, 181 W. Va. 368, 372-73, 382 S.E.2d 562, 566-67 (1989) (adopting the United States Supreme Court's recognition of sexual harassment as an invidious form of discrimination and adopting the federal definition of "quid pro quo" sexual harassment for the

WVHRA). This is particularly true for the provision squarely at issue here, discrimination "because of sex."

The Respondent essentially argues the absence of the words "sexual orientation" within the text of the WVHRA dictates a finding that discrimination because of the same must be permitted. *See, e.g.*, *Respondent's Brief*, at 7, 10-11, and 14. Such an argument is without merit or logic. For example, looking to the cases cited above, the Supreme Court of Appeals of West Virginia utilized guidance from the federal courts on the application of Title VII's prohibition against discrimination "because of sex" to find the WVHRA prohibits sexual harassment and pregnancy discrimination as illegal forms of sex discrimination. *Frank's Shoe* Store, 179 W. Va. at 59-60, 365 S.E.2d 251, 256-57 (1986); *Westmoreland Coal Co.*, 181 W. Va. 368, 372-73, 382 S.E.2d 562, 566-67 (1989).

Indeed, in *Frank's Shoe Store*, the Supreme Court of Appeals of West Virginia specifically acknowledged the WVHRA "does not enumerate pregnancy among the specifications subject to its protective provisions." *Frank's Shoe Store*, 179 W. Va. 53, 59-60, 365 S.E.2d 251, 256-57 (1986). Nonetheless, the Supreme Court of Appeals turned to the WVHRA's legislative mandate found in W. Va. Code § 5-11-15, stating "[t]he provisions of this article shall be liberally construed to accomplish its objectives and purposes" and held, "discrimination based upon pregnancy constitutes illegal sex discrimination under the West Virginia Human Rights Act, W. Va. Code § 5-11-9(a)." *Id*.

Similarly, the words "sexual harassment" do not specifically appear within the plain statutory text of the WVHRA. Yet, the Supreme Court of Appeals followed federal guidance from Title VII to find sexual harassment is an invidious form of sex discrimination prohibited by the WVHRA. *See Westmoreland Coal Co.*, 181 W. Va. 368, 372-73, 382 S.E.2d 562, 566-67 (1989).

Would the Respondent have this Court overrule these decisions on the basis that the West Virginia Legislature did not specifically identify sexual harassment and pregnancy among the prohibited forms of discrimination under the WVHRA? Of course not. The same reasoning and analysis as applied by the Supreme Court of Appeals of West Virginia in *Frank's Shoe Store* and *Westmoreland Coal Co.* applies here and supports a finding that discrimination because of sexual orientation constitutes illegal sex discrimination under the WVHRA.

1. Respondent fails to acknowledge or distinguish *Willis v. Wal-Mart Stores Inc.*, 202 W. Va. 413, 504 S.E.2d 648 (1998), which is directly on point in the instant case.

Conspicuously absent from Respondent's brief is any mention of the Supreme Court of Appeals of West Virginia's holding in *Willis v. Wal-Mart Stores Inc.*, 202 W. Va. 413, 504 S.E.2d 648 (1998). As noted previously herein, the Supreme Court of Appeals of West Virginia has stated,

> [w]e have repeatedly held that we will construe the Human Rights Act to coincide with the prevailing federal application of Title VII ***unless there are variations in the statutory language*** that call for divergent applications or there are some other compelling reasons justifying a different result.

Hanlon v. Chambers, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995) (emphasis added). In *Willis*, the Supreme Court of Appeals of West Virginia held, "[o]ur ***longstanding practice*** of applying the same analytical framework used by federal courts when deciding cases arising under the [WVHRA] is particularly fitting, when, as in this case, ***the critical language of our Act – 'because of sex' – parallels the federal legislation***." *Willis*, 202 W. Va. 413, 417, 504 S.E.2d 648, 652 (1998) (internal citations omitted) (emphasis added). In doing so, the Court in *Willis* found same-sex sexual harassment to be a prohibited form of sex discrimination under the WVHRA.

As stated previously, the same provision is directly at issue in this case. Namely, whether discrimination "because of sex" prohibits discrimination based on sexual orientation. The critical language of the WVHRA parallels Title VII. The holdings in *Willis*, *Frank's Shoe Store*, and

Westmoreland Coal Co. clearly demonstrate the error in Respondent's argument that this Court should not look to the federal counterpart because discrimination "because of sex" as contained in the WVHRA is clear and unambiguous. To the contrary, the Court has looked to Title VII for guidance time and time again when applying the phrase, "because of sex," in the WVHRA. As such, *stare decisis* dictates the same analysis here.

When turning to Title VII in this case, the result is determined in construing the WVHRA to "coincide with the prevailing federal application of Title VII" as the same statutory language is at issue here. The United States Supreme Court held in *Bostock* that discrimination based on sexual orientation constitutes illegal sex discrimination. *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020). In applying the long-established precedents of the Supreme Court of Appeals of West Virginia, this Court must reach the same conclusion.

2. The legislative purpose and mandates of the WVHRA support reversal of the Circuit Court.

In incorrectly arguing that the "history of the WVHRA supports the circuit court's conclusion that discrimination because of 'sex' does not include discrimination based on 'sexual orientation,'" the Respondent relies solely upon the failure of Senate Bill 156 (S.B. 156), introduced on January 12, 2022. *Respondent's Brief*, at 14-15. As noted by Respondent, S. B. 156 would have amended the definition of "discriminate" or "discrimination" to specifically include sexual orientation as a protected class under the WVHRA. Respondent compares this to the Supreme Court of Appeals of West Virginia's reasoning in *State v. Butler*, 239 W. Va. 168, 799 S.E.2d 718 (2017). However, this one introduction of S.B. 156 is entirely dissimilar from the Court's analysis of legislative intent in *Butler*, as the Court noted the Legislature had attempted to amend the hate crimes statute found in W. Va. Code § 61-6-21(b) to include "sexual orientation" at least **twenty-six (26)** times. The amendment failed all twenty-six times. *Butler*, 239 W. Va. at

176, 799 S.E.2d at 726 (2017). The Court in *Butler* relied upon this "repeated rejection of legislation" to find an expression of intent. *Id*.

Here, far from the twenty-six (26) failed attempts to amend W. Va. Code § 61-6-21(b), Respondent points to *only one* (1) failed attempt to amend the WVHRA. Furthermore, Respondent's reliance on subsequent legislative history is contradictory to Respondent's argument that the term "sex" as contained in the WVHRA is *unambiguous*. The use of legislative history is used as a means of interpretation when statutory language is *ambiguous*. *Bostock*, 140 S. Ct. 1731, 1749 (2020). Petitioner agrees the same language, "because of sex" used in the WVHRA, is unambiguous as the United States Supreme Court found for the same phrase used under Title VII in *Bostock*.

Nonetheless, Respondent argues the failure of S.B. 156 is indicative of the Legislature's intent to exclude sexual orientation from protection under the WVHRA. Yet, there is no authoritative evidence explaining why the Legislature declined to adopt S. B. 156. Perhaps the Legislature "understood the impact" the "[WVHRA's] broad language already promised" and "didn't think a revision needed." *Bostock*, 140 S. Ct. at 1747. Further, perhaps the Legislature understood the Supreme Court of Appeals of West Virginia's long-standing precedent in looking to Title VII when applying the WVHRA and found the *Bostock* decision rendered any amendment moot. However, any reliance upon the failure of S.B. 156 as evidence of legislative intent is highly speculative.

All we can know for certain is the Legislature's pronouncement and intent in enacting the WVHRA, stating:

> It is the public policy of the state of West Virginia to provide ***all*** of its citizens equal opportunity for employment . . . Equal opportunity in the area of employment . . . is hereby declared to be a human right or civil right of all persons without regard to . . . sex . . .

> The denial of these rights to properly qualified persons by reason of . . . sex . . . is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

See Pajak v. Under Armour, Inc., 246 W. Va. 387, 391, 873 S.E.2d 918, 923 (2022) (quoting W. Va. Code § 5-11-2 (eff. 1998) (emphasis added)). The Legislature further explicitly included a mandate within the WVHRA, requiring it be liberally construed to accomplish its objectives and purposes. W. Va. Code § 5-11-15; Syl. Pt. 1, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990). Accordingly, the Supreme Court of Appeals of West Virginia has "consistently interpreted the [WVHRA] broadly." *Shepherdstown Volunteer Fire Dep't v. State*, 172 W. Va. 627, 633, 309 S.E.2d 342, 348 (1983). In speaking to the purposes of the WVHRA, the Supreme Court of Appeals of West Virginia has stated:

> If our society and government seriously desire to stamp out the evil of unlawful discrimination which is symptomatic of unbridled bigotry, and we believe they do, then it is imperative that the duty of enforcement be accompanied by an effective and meaningful means of enforcement. The forceful language used by the Legislature mandates the eradication of unlawful discrimination.

State Human Rights Comm'n v. Pauley, 158 W. Va. 495, 499-500, 212 S.E.2d 77, 79 (1975). Further, the Supreme Court of Appeals of West Virginia has declared "equal employment is a fundamental right." *Frank's Shoe Store v. West Va. Human Rights Comm'n*, 179 W. Va. 53, 59, 365 S.E.2d 251, 257 (1986) ("Recently, we have held that equal employment is a fundamental right.") (citing *Allen v. State Human Rights Commission*, 174 W. Va. 139, 324 S.E.2d 99 (1984)).

As such, any application of the WVHRA which permits direct discrimination in employment, as the Respondent would urge this Court to adopt here, is an affront to the explicit purposes and objectives of the WVHRA as announced by the Legislature in its enactment. Accordingly, the history of the WVHRA supports finding discrimination because of sexual orientation constitutes illegal sex discrimination under the WVHRA.

B. Respondent's argument that the Circuit Court's decision is supported by precedent of the Supreme Court of Appeals of West Virginia is without merit.

Respondent continues to rely upon *State v. Butler* in incorrectly arguing that the Circuit Court's decision is supported by precedent of the Supreme Court of Appeals of West Virginia. Respondent's heavy reliance upon *Butler* is misplaced. *State v. Butler* was decided in 2017, three years prior to the United States Supreme Court's decision in *Bostock*. Thus, the Supreme Court of Appeals of West Virginia did not have the benefit of the *Bostock* Court's analysis when deciding *Butler*. Further, *Butler* deals only with hate crimes and the criminal statute found at W. Va. Code § 61-6-21(b), not with the application of the WVHRA.

Differentiating *Butler* from the instant case, this case deals with application of the WVHRA which comes with the Supreme Court of Appeals of West Virginia's long-established precedent in construing the WVHRA to coincide with Title VII. *See Hanlon v. Chambers*, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995); *see also* Section III.A. and III.A.1, *supra*. No such precedent is applicable to the hate crimes statute found at W. Va. Code § 61-6-21(b). Accordingly, precedent involving application of the WVHRA controls in this case and this Court should decline to rely upon *Butler*. Further, the WVHRA mandates broad construction to achieve its stated goals and purposes of eradicating all unlawful discrimination in employment. *See* Section III.A.2., *supra*. When applying the applicable precedent of the Supreme Court of Appeals of West Virginia regarding application of the WVHRA and adhering to the Legislature's mandate in enacting the WVHRA, this Court must find in favor of the Petitioner.

IV. CONCLUSION

WHEREFORE, based upon the foregoing analysis, Petitioner respectfully requests this Court follow long-standing West Virginia precedent in looking to Title VII for interpretation of the WVHRA and adopt the United States Supreme Court's holding in *Bostock* to find sexual

orientation discrimination constitutes illegal sex discrimination under the WVHRA. Petitioner further requests this matter be reversed and remanded to the Circuit Court of Harrison County for further proceedings.

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CERTIFICATE OF SERVICE

Appeal from a Dismissal Order of the
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(The Honorable Christopher J. McCarthy, Judge)

I, Cory B. Lowe, counsel for the Petitioner, Jeremiah L. Jones, do hereby certify that, on May 6, 2024, the foregoing ***Reply Brief of Petitioner Jeremiah L. Jones*** was filed through the applicable E-Filing system, which will send electronic notification for service of such filing to the following counsel of record for the Respondent, Town of Lumberport, West Virginia, a political subdivision of West Virginia:

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