IN THE SUPREME COURT OF APPEALS
STATE OF WEST VIRGINIA

SHIRLEY STEWART BURNS,
Appellant,

V.

WEST VIRGINIA DEPARTMENT OF
EDUCATION AND THE ARTS,
Appellee

APPELLANT'S BRIEF

On Appeal from the March 6, 2018
Order in Civil Action 16-C-319
Hon. Joanna I. Tabit, Circuit Judge
Kanawha County Circuit Court

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ASSIGNMENT OF ERRORS

1. The Circuit Court erred in granting Appellees' motion for summary judgment, and denying Shirley Burn's cross motion for partial summary judgment, by holding that Appellant's request for an accommodation of her disability was not "*reasonable*," for purposes of the West Virginia Human Rights Act, where:

a. Appellee West Virginia Department of Education and the Arts, and the State Historic Preservation Office (SHPO), the component of that agency which employed Shirley Burns, never disclosed to Ms. Burns, or her consulted medical providers, that Appellee regarded presence on SHPO's premises, forty hours per week, to be an essential part of Burn's job.

b. Medically required physical therapy for Ms. Burns' acute asthma was only available off SHPO premises, at CAMC, on Tuesdays and Thursdays afternoons during SHPO's regular business hours;

c. Shirley Burns proposed to work at home in order to make up the nearly 7.5 hours she would miss, if she was allowed to depart the premises of SHPO for physical therapy, while continuing to work on premises at SHPO's offices for the remaining 32.5 hours of her normal 40-hour work week;

d. Shirley Burns' job as a structural historian consisted almost entirely of intellectual activity – including editing and proofing the writing of others – which her immediate supervisor, the Deputy Director of SHPO, testified that Appellant could perform at home without imposing any burden on SHPO;

e. Shirley Burns' treating physician, Nasim Sheikh, M.D., affirmed that Shirley Burns's acute asthma disability would not affect her job performance "as her work is mostly limited to mental utilization" and affirmed her need for an accommodation.

f. Appellee failed to explore alternative accommodations, as required by law, including the alternative of allowing Shirley Burns to work extended hours, early or late, on SHPO's premises, to make up

the hours required to be off-premises for medically required physical therapy;

g. Appellee never advised Shirley Burns of the concealed decision, made by the Director of SHPO immediately upon the filing of her request for a reasonable accommodation, based upon a unpublished "on premises" attendance policy that contradicted applicable WVHR Commission regulations;

h. The State Historic Preservation Officer, Randall Reid-Smith, testified under oath – repeatedly and falsely – that it was against "state policy" to permit employees to work off premises;

i. The Human Resources officer of Appellee Defendant Department of Education and the Arts testified, under oath, that no Department policy barred working at home; and

j. The State Disability Coordinator testified, under oath, that no state personnel policy barred work at home;

k. The Appellee-Defendant Department of Education and the Arts routinely allowed employees to perform services at regional locations from home, and routinely permitted – indeed compelled – employees to work outside the office at public concerts, fairs and festivals.

2. By failing to determine whether SHPO's "on premises" attendance policy was, in fact, an "essential" component of Shirley Burns' job, and by failing to reconcile that policy with requirements of WVHR Commission regulations implementing the West Virginia Human Rights Act, the Circuit Court's March 6, 2018 order failed to satisfy the requirement of *Fayette County Nat. Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (W. Va., 1997), overruled on other grounds by *Sostaric v. Marshall*, 234 W. Va. 449, 766 S.E.2d 396 (2014), that the order set out factual findings sufficient to permit meaningful appellate review.

3. The unannounced decision of Commissioner Randall Reid-Smith to compel Appellant's compliance with his privately concocted "on premises only" attendance policy – while permitting and in some cases requiring that other SHPO employees to work off-premises when it served SHPO's purposes – is a textbook example of illegal arbitrary and capricious action by a government official, and a constructive discharge, as a matter of law.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On August 16, 2013, Appellant Shirley Stewart Burns, disabled in March 2013 by the adult onset of an acute asthmatic condition, requested a reasonable accommodation in the form of authorization to work at home, in order to permit her to obtain physical therapy, only available on two afternoons per week, during the regular work hours of her employer, the State Historic Preservation Office (SHPO). Appellant provided all requested medical records in support of her request for accommodation, and her medical provider affirmed her need for an accommodation and her ability, with that accommodation, to perform all essential job functions.

Appellee West Virginia Department of Education and the Arts never advised Shirley Burns of any decision. Deeming Appellee's failure to decide her request as a constructive discharge, on March 11, 2014, Appellant resigned her position with SHPO, a component of Appellee, West Virginia Department of Education and the Arts.

Appellant filed a complaint with the Kanawha County Circuit Court on March 3, 2016. At the end of discovery, Appellee moved for summary judgment; Appellant filed her cross motion for partial summary judgment.

The parties argued their respective motions on January 6, 2018, and on March 6, 2018, the Circuit Court of Kanawha County granted Appellee's motion for summary judgment and directed Appellee's counsel to prepare an order. Appellant objected to the proposed order submitted by Appellee but the Circuit Court entered it without any change. Appellant filed a timely Notice of Appeal on April 2, 2018.

STATEMENT OF FACTS

A. Shirley Burns was a disabled person, capable of performing all of the essential functions of her job, and requested a reasonable accommodation to allow her to perform routine editing tasks at home – temporarily and on a part-time basis – in order for her to complete a course of physical therapy, critical to her health, which was only available during her employer's regular work hours.

In March 2013, Shirley Burns, aged 42, was an experienced architectural historian employed at the West Virginia Department of Education and the Arts for many years. Her direct supervisor, Susan Pierce stated: "She was a good employee in terms of the work that she produced…. She was a valued employee. She did her work." **App. at 471-472**.[1]

However, Shirley Burns suffered in March 2013 from the adult onset of a serious respiratory illness, which required her absence from work for approximately 30 days. Returning to work in April 2013, Ms. Burns began to use her accumulated leave to pursue a course of physical therapy on Tuesday and Thursday afternoons for a total of approximately seven and one-half hours per week. Kelli Smith, a Registered Nurse at CAMC who supervised Ms. Burns' physical therapy, stated that:

> During this year I have witnessed Shirley's strong determination to build her strength and endurance. … In the beginning her FeV1 was 22% (0.59L) and through much dedication and motivation in attending rehab class regularly twice weekly, she was able to increase her FeV1 to 38% (0.92L) by her September Pulmonary Function Test.

App. at 114 (emphasis added).

However, Plaintiff's physical therapy was only available at the Charleston Area Medical Center (CAMC) during business hours that overlapped with time

[1] References "(App. at __)" are to the Joint Appendix filed herewith.

Plaintiff would normally have been at work at the office of the State Historic Preservation Office (SHPO), a component of Appellee, the Department of Education and the Arts. Because Ms. Burns' accumulated leave was about to be exhausted over the summer of 2013, on August 16, 2013, she requested a "reasonable accommodation" based upon her respiratory disability.

Ms. Burns' requested accommodation was that she be permitted to work at home on weekends to make up for up to seven and one-half hours per week she would need to out of SHPO's offices on Tuesday and Thursday afternoons to complete the course of physical therapy which, in her view and that of her physical therapist, could lead to a complete recovery and return to work full time at SHPO's offices.

As stated in Ms. Burns' August 13, 2013 request for accommodation:

> I have been participating in this treatment measure since April 2013. **These sessions are not available on any other days that Tuesdays and Thursdays**. I will be attending Pulmonary Rehabilitation twice weekly through at least January 2014 or later. This places me out of the office 7.5 hours during an average week.
>
> On July 9, 2013, **several accommodation suggestions** from my family physician, Dr. Ashish Sheth, M.D., were submitted to the agency as part of FMLA documentation. Among these **included a modified/flexible schedule and working from home** during times of illness. I am requesting to perform some of my duties from home; specifically, at this time, proofreading and editing duties. I have been a professional editor and proofreader for nearly two decades for various academic and trade books, including the Encyclopedia of Appalachia. As reference in the U.S. Department of Labor's Equal Opportunity Commission guidance, reviewing documents is a job task that can easily be performed from home. **My past editing and proofreading tasks were all performed from home with no supervision. In the current situation, I could forward all of my weekend work to my direct supervisor**.

> In order to successfully complete these tasks in a timely fashion for the agency and since my time at work is spent reviewing Section 106 projects, participating in meetings and answering emails and telephone calls, **I am requesting that I be allowed to work on the proofreading and editing tasks from home for a few hours (3 to 6 hours) each weekend**. This will allow my current required work load to be completed with efficiency while still taking into consideration my physical limitations and medical needs. This would not cause an undue hardship for the agency as it would not have to provide any additional resources. As are the standard operating procedures of the agency, **I would request that any hours worked on the weekend be applied towards time that I will be out of the office the next week.** I am requesting this accommodation under Title I of the Americans with Disabilities Act. **Should you have other suggestions for accommodation recommendations, I would be happy to discuss those with you,** Susan (Pierce) or Heather (Jenkins) at your earliest convenience.
>
> When I returned to work in April 2013, you asked that I let you, Susan (Pierce) or Heather (Jenkins) know if there was anything that the agency could do to help me. Allowing me to work a few hours at home on the weekend would greatly assist me and the agency by allowing me to accomplish tasks for the agency while not having to exert myself. **I do not foresee this as a permanent situation, but a temporary one** as my goal is to work towards complete recuperation. **My physicians, respiratory therapist and rehabilitation team believe that I will make a complete recovery if provided enough time for my treatment.** At this time, neither the physicians nor I know when that complete recovery will occur.

App. at 77-78 (emphasis added).

Susan Pierce, Ms. Burns' supervisor, understood the Burns' accommodation request to be one for "flex time":

> She would have been flexing. **If she had been granted the opportunity to work at home, she would have been flexing**. If she had worked on a Saturday, she would have flexed it within that workweek. **She wasn't accruing leave.**

App. at 484-485 (emphasis added).

B. Shirley Burns promptly complied with all Department of Education and the Arts' requests for medical information pertaining to her disability.

On September 9, 2013, Randall Reid-Smith, the Director of SHPO a component of the Department of Education and the Arts, and an agency subject to WVHRA, W. Va. Code § 5-11-1 et seq., wrote a letter (**App. at 80**) to Ms. Burns' request that Ms. Burn's execute included medical releases to allow Mr. Reid-Smith to evaluate her medical condition.

Ms. Burns' responded on September 11, 2013, by returning to Mr. Reid-Smith executed copies of all requested medical releases. (**App. at 81-84)** On September 18, 2013, at her employer's request, Ms. Burns also filled out a request for accommodation under the ADA on a standard form provided by the Division of Culture and History (**App. at 85**).

In response to Randall Reid-Smith's September 19, 2017 request (**App. at 89**) for "clarification and elaboration" from Mr. Reid Smith, Plaintiff's treating physician, Dr. Nasim Sheikh, sent Mr. Reid-Smith on October 30, 2013 letter outlining Ms. Burns' medical condition.

Dr. Sheikh responded to the questions posed by Mr. Reid-Smith in seriatim:

> Q. "What are the limitations for Ms. Burns at this time?"
> A. **"The patient has severe bronchial asthma**. She is allergic to house dust mites DP and DF. Long term exposure can exacerbate her bronchial asthma."
>
> Q. "How will these limitations affect her job performance?"
> A. **"I do not think that her ailment would affect her job performance as her work is mostly limited to mental utilization**."
>
> Q. "What specific job tasks are problematic as a result of these limitations?"

A. "Those jobs will only be problematic if she has to undergo strenuous physical activity or exposure to chemicals, allergens or irritants."

Q. "How long will she require accommodations?"
A. "<u>She will need accommodations until she improves her bronchial asthma.</u>"

Q. "Are there any alternatives for therapy that will accommodate the employee's work schedule?"
A. "She is on immunotherapy once a week at this time along with anti-inflammatory topical medicine. Topical anti-inflammatory medications are the standard treatment."

Q. "Is Mrs. Burns permanently unable to perform these functions?"
A. "It cannot be determined at this time as **<u>she is slowly improving</u>.**"

(**App. at 90**)(emphasis added).

D. All Appellee witnesses testified, under oath, that Appellant could perform all essential job functions at home without placing any burden on SHPO or placing in jeopardy the accomplishment of its mission.

Susan Pierce, Ms. Burns' direct supervisor at SHPO, was forthcoming and testified in her deposition that Shirley could perform all essential functions of her job – editing and proofing at a computer – by working at home on weekends, and that no significant issue of supervision of her work would be presented by that accommodation:

Q. <u>As you sit here today,</u> **<u>can you think of any reason why Shirley Burns' request for accommodation should not have been granted</u>?**

***

A. <u>Is there any reason why</u>?

Q. Her request for accommodation should not have been granted?
A. **I can't think of anything that would preclude her from doing that except being able to supervise that work**.

Q. **And that work was proofreading and editing**?
A. It was working on an assignment associated with Historic West Virginia, a book about our National Register listings.

***

Q. -- however they generate words on the black dots on white paper, somebody has to do that. **A supervisor, obviously, doesn't look over their shoulder, they get a finished product to look at or a draft, some version. I mean, they don't watch them type, they look at the product; correct?**
A. Yes.

Q. **And do you transmit documents internally at your office by e-mail from time to time?**
A. Yes.

***

Q. So **is there any difference in the ability of Ms. Riebe to supervise an e-mail that she received that was sent from Shirley's house versus Shirley's desk?**
A. No.

***
A. **I think how you've explained it, it could have been possible to supervise that work that was done at home**.

App. at 486-489 (emphasis added).

Melinda Pauley an HR employee expressed the same opinion:

Q. **Did letting her off on those Tuesdays and Thursdays in any way impair her performance of her job?**
A. No, not that I know of.

App. at 536 (emphasis added).

Sue Chapman, another human resource director at the Department of Education and the Arts, conceded that in the absence of policy restrictions, the work could be performed at home.

> Q. …, **is there any reason why a person willing to run the risk of violating those great rules couldn't effectively get work done at home, editing, proofing, drafting?**
> **A. I'm sure that they could absolutely do that.**

App. at 709 (emphasis added).

Randall Reid-Smith testified that he had no evidence to support a contention that Ms. Burns' request for accommodation would cause any burden – financial or otherwise – on the Department of Education and the Arts:

> [BY Ms. Poe]
> But hypothetically, if it wasn't the policy, are there some of these job -- are there some aspects of the job that she could have done from home**? Had you allowed anybody to work from home, are there some aspects of the job that could be done there?**
> **THE WITNESS: Maybe. I don't know**.
>
> ***
> BY MR. DePAULO:
> **Q. Well, do you have any evidence that she couldn't have done those at home?**
> **A. I don't know**.

App. at 642 (emphasis added).

E. The Department of Education and the Arts never informed Shirley Burns that her request for accommodation had been denied.

Susan Pierce, Ms. Burns' immediate supervisor, testified that she did not participate in the Defendant agencies decision-making process:

> Q. **Did anyone from that organization contact you to get your input as to whether or not a proposed accommodation was workable from the point of view of the division or your office?**
> **A. I don't believe those discussions took place**.

***

Q. **Wouldn't you have expected that, though?**
A. Yes.

***

Q. …. I mean, **logically, you would be the person they would talk to if they were trying to decide is it reasonable**. You know, in other words, I guess among the factors to consider and whether an accommodation request is reasonable is can the job get done. And **if I understand your testimony, no one ever made that inquiry of you,** or at least you can't recall it.
A. **I can't remember any**.

Q**. Do you think you'd recall that?**
A. Yeah.

App. at 478-479 (emphasis added).

And Mr. Reid-Smith acknowledged that no formal decision denying her request for accommodation had been communicated to Shirley Burns

Q. Okay. **Why didn't you tell her at that point that her request had been denied?**
A. It was my understanding, she gave us the letter, and so then she understood that she was not going to get to work from home.

***

See, when she gave us **the letter**, it -- you know, **where it said that -- the thing about, you know, mental utilization** and all that --

***

A. -- that she understood that there was no reason why she had to work from home.

Q. Okay. I'll let you explain that answer later. **Why didn't you tell her, Dear Ms. Burns, we've considered your request for accommodation, and that accommodation is denied as being inconsistent with our policy which prohibits work at home?**
A. They gave me the letter. I assumed that she understood. And then I gave it to my HR --

Q. "She" who? Assumed --
A. I'm sorry**. I assumed that Shirley understood**.

***

Q. ...., **you never made a verbal statement to her, We deny your request, did you?**
A. I personally didn't.

***

Q. ... **do you have any evidence, any document, which anybody on behalf of SHPO or the division or the department conveyed to Shirley Burns the fact that her request for accommodation had been denied?**
A. We don't have a document, no, sir.

App. at 665-668 (emphasis added).

F. Reid-Smith Intentionally Distorted and Knowingly Misrepresented Appellant's Medical Records As A Means of Masking His Unlawful Private Policy Against Work At Home.

Reid-Smith's statement, that Shirley Burns understood her request for accommodation was going to be denied, was explained as a reference to a response in Dr. Nasim Sheikh's October 29, 2018 letter, to Reid-Smith's question, as follows:

Q. "How will these limitations affect her job performance?"
A. **"I do not think that her ailment would affect her job performance as her work is mostly limited to mental utilization**."

App. at 90.

As explained by Reid-Smith, Dr. Sheikh's statement to the effect that Shirley Burn's work consisted of intellectual work, meant that she didn't need an accommodation:

Q. ... Are you stating that because she gave you that letter, that indicates she knew it was being denied? I mean, I understood your letter --
A. No. See, when she gave us **the letter**, it -- you know, where it said that -- **the thing about, you know, mental utilization and all that –**

Q. Yeah. Yeah.

> A. -- that **she understood that there was no reason why she had to work from home**.

App. at 666.

In short, Reid-Smith – who had already decided, privately, to deny Burns' request for accommodation based upon Reid-Smith's personally concocted "work on premises only" attendance policy – attempted to lay off responsibility for the denial of Burns' request on an imagined limitation in Burns' doctor's response.

This was a willful misrepresentation of the doctor's letter, and intentionally false statement of the reason for Reid-Smith's denial of Burns' accommodation request. The reality is that Dr. Sheikh was, like everyone else, completely unaware that Reid-Smith considered Shirley Burns' 40-hour per week presence on SHPO's premises to be an "essential" part of her job, and plainly intended his reference to "mental utilization" to mean the obvious: it could be done anywhere, including at home as proposed in the request for accommodation.

Moreover, Dr. Sheikh's statement regarding mental utilization must be read, not in isolation, but in the context of the rest of his responses regarding the duration of an accommodation: **"A. She will need accommodations until she improves her bronchial asthma." App. at 90**. If no accommodation was needed at all – as Reid-Smith would willfully misread the doctor's responses – why was its duration even a topic.

G. After exhausting all personal leave, and without any decision on her request for accommodation, Appellant resigned, stating the effective denial of her request was a constructive discharge.

Melinda Pauley testified that, by January 9, 2014, Shirley Burns had

exhausted sick or annual leave might otherwise have been available to her, as reflected on a log of days of leave taken by Ms. Burns.

> Q. And that as Shirley Burns approached the date of January 14th, basically she had exhausted all available annual leave, all available sick leave; is that correct?
> A. Yes.

App. at 522.

Melinda Pauley testified that Shirley Burns' options at January 14, 2014 were to take leave without pay, or come to work without an accommodation:

> Q. …[I]is it your position that the only one, the only way, assuming they don't have any annual or sick leave available --
> A. Right, is to grant a leave of absence.
>
> Q. -- is the only way they can take off that Tuesday and Thursday to go do rehab is to take a leave of absence?
> A. If they have no leave, yes.
>
> Q. And presumably, they would be -- I gather when you take a leave of absence, that's a leave of absence without pay?
> A. Right.

App. at 545-546.

SUMMARY OF ARGUMENT

This case involves a disabled state employee's August, 2013 request for a reasonable accommodation to permit her to work at home for 7½ hours per week, as a means of allowing her to complete a course of physical therapy only offered during the employee's regular work hours. The request to work at home was temporary (only until the physical therapy course was completed) and part-time (appellant proposed to continue working at SHPO's offices the remaining 32 ½ hours of her normal 40-hour week).

The state regulations governing disabled persons requests for reasonable accommodation explicitly make accommodations mandatory, and specifically identify changes in work schedules as an appropriate form of accommodation:

> 4.5. An employer shall make reasonable accommodation to the known physical or mental impairments of qualified individuals with disabilities where necessary to enable a qualified individual with a disability to perform the essential functions of the job.
>
> **Reasonable accommodations include**, but are not limited to:
>
> ***
>
> 4.5.2. Job restructuring, **part-time or modified work schedules…**

W. Va. Code of State Regulations, § 77-1-4 (emphasis added).

Moreover, a broad consensus of state cases (including West Virginia) and federal case law construing the WVHRA and the ADA, expressly approve temporary, part-time work at home as appropriate means of accommodating disabled individuals. See *Haynes v. Rhone-Poulenc, Inc.,* 521 S.E.2d 331, 206 W.Va. 18 (1999).

Notwithstanding the clear state regulatory mandate and the broad judicial consensus, the accommodation request of Shirley Burns, an experienced and valued employee of the State Historic Preservation Office (SHPO), was never formally or informally acted on and was, thereby, effectively denied.

The request – to perform basic writing tasks such as editing and proofing at home – was deemed reasonable by Ms. Burns' direct supervisor at SHPO, Susan Pierce, who testified that Ms. Burns could accomplish the essential tasks of her professional position at home, without jeopardizing SHPO's mission, or presenting any supervisory or other burden on the agency.

Randall Reid-Smith – the Commissioner of the Division of Culture and History at the Department of Education and the Arts, of which SHPO is a part, and the official charged with decision making authority on Ms. Burns' ADA request – testified repeatedly and falsely that the request to work at home violated state policies. Reid-Smith's false assertion that state personnel policies barred work at home, was directly contradicted by the human resources director for the Division of Culture and History, and the State ADA Coordinator, both of whom denied the existence of any state policy prohibiting use of temporary work at home as a reasonable accommodation or otherwise.

Lacking any decision on her ADA request in the seven months following August 2013, and having become totally disabled in the interim, Ms. Burns submitted her resignation in March 2014, treating the failure to grant her ADA request as an unlawful constructive firing.

The net result of the Defendant's unlawful denial of a reasonable

accommodation is that a valued state employee, who faithfully performed her job professionally for many years, has become totally disabled, faces very dramatically reduced life expectancy, and is now living on a bare bones disability income.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under the criteria of Rule 20 (a)(1), Rules of Appellate Procedure, because the case involves an issue of first impression: the reasonableness of flexible work schedule adjustment as an accommodation for a person with a disability. This Court has not specifically addressed the propriety of "work-at-home" (or other alternatives, such as increased hours of work at the office, before or after regular work hours) as a means of accommodating disabled persons.

The jurisprudence across the country has varied, over time; early in the development of responses to the requirements of the ADA, courts displayed a patent hostility to the idea of "work-at-home." Increasingly, however, courts have recognized that much work can be, and in fact is, done at home, and have endorsed flexible work schedules, including "work-at-home" components, as appropriate accommodations of disabled persons. This Court should use the opportunity of this case to move this state's jurisprudence forward.

Additionally, under Rule 20 (a)(2), this question involves an issue of fundamental public importance. Our society has evolved from a largely agricultural and manufacturing society to a service economy, with a principal source of growth in the "knowledge" economy, i.e., work performed in front of a computer screen.

The simultaneous growth of broadband communications frequently means that work in front of a computer screen does not require persons to get in a car and drive to a remote location to perform their jobs; the work product (frequently a digital file) may be created at home and sent, via email or any number of other means, to the remote location for review and use by an employer and other employees.

The move of the modern economy from factories and farms to computer cubicles, has been matched by a very significant increase in the number of women in the work force generally. However, because the burden of child rearing, and care for aged parents, has remained primarily a chore left to women in our society, the need for flexibility in work schedules and locations is increasingly important to in excess of one half of our population.

In short, the circumstances of the evolving workforce strongly suggest that access to flexible work schedules will become increasingly important and have a broader impact than in prior eras, matters which warrant this Court's involvement.

ARGUMENT

I. THE WEST VIRGINIA HUMAN RIGHTS ACT AND CONTROLLING DECISIONS OF THIS COURT REQUIRE AN EMPLOYER TO GRANT QUALIFIED DISABLED PERSONS REASONABLE ACCOMMODATIONS TO PERFORM THE ESSENTIAL FUNCTIONS OF THEIR JOB, ABSENT UNREASONABLE BURDEN.

A. Granting a reasonable accommodation to a disabled person is mandatory absent unreasonable burden.

Both the West Virginia Human Rights Act (WVHRA) and the Americans with Disabilities Act (ADA) require employers to grant disabled employees reasonable accommodations to the requirements of the work place unless those accommodations represent an unreasonable burden for the agency.

The West Virginia Human Rights Act provides that:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification, or except where based upon applicable security regulations established by the United States or the state of West Virginia or its agencies or political subdivisions:
>
> (1) For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled.

W.Va.Code, 5-11-9(1)(emphasis added).

In order to be protected by the Act, a person must first prove he or she is a person with a "disability," and the Act defines "disability" as:

> (1) A mental or physical impairment which substantially limits one or more of such person's major life activities. The term "major life activities" includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working;

(2) A record of such impairment; or

(3) Being regarded as having such an impairment.

W. Va. Code § 5-11-3(m)(emphasis added).

The WVHRA at W. Va. Code § 5-11-3(d) defines the term "employer" to include "the state, or any political subdivision thereof," thereby clearly covering requests for reasonable accommodation by disabled employees of the Department of Education and the Arts, and its subsidiary agency, the Division of Culture and History, and the State Historic Preservation Office (where Plaintiff worked) within the Division of Culture and History.

In *Skaggs v. Elk Run Coal Co., Inc.,* 479 S.E.2d 561, 198 W.Va. 51, (1996), the late Justice Clecklely held that, absent an unreasonable burden, an employer's duty to accommodate disabled persons required an employer to engage in an interactive process that includes consideration alternatives to the requested accommodation and, in an appropriate case, the creation of alternative job placement.

In *Skaggs* Justice Cleckley wrote:

> **When a course of action meets the needs of both an employer and employee, then that alternative must be put on the table.** As to Coffman 's application of the duty of reasonable accommodation to its facts, we fully agree with Justice Miller's dissent in the case, which made clear that the employer simply had shuffled job assignments between two employees and that the plan was working without any loss or hardship to the employer. (At least, none was mentioned by either the majority or the dissent.) Under those facts, the employer had no plausible basis for resisting the accommodation.
>
> We, thus, specifically disavow the following conclusion in the Coffman majority opinion:
>
> > "While assigning Coffman to the unit position doing only the 'high' work provided her with work that she could perform, it

> was a position unique to Coffman's circumstances and outside the normally assigned duties of any job classification at the University. Because an employer is not required to create a special job for an employee who cannot do the one for which she was hired, we hold that the appellants were not obligated to retain Coffman in the unit position where she did only the 'high' work." 182 W.Va. at 78, 386 S.E.2d at 6. (Footnote omitted).

The quoted statement merely recharacterized the adjustment of duties as the creation of a new position, thus, presumably relieving the employer of its duty to accommodate. We see no cause for that recharacterization. More importantly, **whether an accommodation is labeled as an adjustment to job duties or as the creation of a new position (unique to the plaintiff) is completely irrelevant to determining whether an employer met its duty of accommodation**. We cannot begin to draw a meaningful line between what is a simple restructuring of duties and what is the creation of a new job.

In some senses, any modification of duties would create a new position unique to the person with a disability. In addition, and most importantly, **even if an accommodation could be and is characterized as creating a new position, we do not categorically rule that out as within the possible accommodations that the Human Rights Act might require an employer to make in an appropriate case.**

Indeed, categorically excluding any strategy from the list of accommodations that can be required of an employer must be highly disfavored. The Human Rights Act dictates that decisions must be made on a case-by-case basis and focus on identifying means that would permit qualified persons with a disability to continue their employment and that would meet an employer's needs without imposing upon it an undue hardship.

To the extent that Coffman is inconsistent with any of the foregoing, it is expressly overruled.

479 S.E.2d 579, 198 W.Va. 69 (emphasis added).

B. WVHRC Regulations expressly define "part-time or modified work schedules" as "reasonable accommodations" for disabled employees.

As noted, regulations adopted by the West Virginia Human Rights Commission (WVHRC) to implement the prohibition on discrimination against disabled persons provide that:

> 4.5. An employer shall make reasonable accommodation to the known physical or mental impairments of qualified individuals with disabilities where necessary to enable a qualified individual with a disability to perform the essential functions of the job. **Reasonable accommodations include**, but are not limited to:
>
> ***
>
> 4.5.2. **Job restructuring, part-time or modified work schedules**, reassignment to a vacant position for which the person is able and competent (as defined in Section 4.3) to perform, acquisition or modification of equipment or devices, the provision of readers or interpreters, and similar actions;
>
> 4.6. An employer shall not be required to make such accommodation if she/he can establish that the accommodation would be unreasonable because it imposes undue hardship on the conduct of his/her business. The term **undue hardship means an action requiring significant difficulty or expense,** when considered in light of the factors set forth in the following subparagraphs (4.6.1 - 4.6.5).

WV Code of State Regulations § 77-1-4 (underscoring and bold added).

C. The West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), requires employers to assess requests for "reasonable accommodation" on a case-by-case basis, with the objective of enabling a disabled individual to remain in the position for which they were hired.

In *Skaggs* this Court ruled that the WVHRA requires an employer to provide a disabled employee with reasonable accommodations, and those accommodations to the employee's work arrangements would be assessed on a case-by-case basis, and

need not be the precise accommodations requested by the employee. See Syllabus Point 1, *Skaggs*.

Here, SHPO concedes that it never discussed the requested accommodation with Shirley Burns, did not approach it on the basis of facts unique to Ms. Burns' needs or the employer's needs, and never explored any alternatives that might accommodate both her needs and the needs of the employer.

Specifically, SHPO Director Randall Reid-Smith conceded he never engaged in any discussions with Ms. Burns or considered any alternative to her request to work at home.

> [BY MR.DEPAULO]
> **Q. Okay. Did you ever talk to Shirley Burns regarding the request for accommodation?**
> **A. I don't think so**.
>
> Q. Okay. **Did you ever propose an alternative** to her working at home that would allow her to take off Tuesday and Thursday afternoons to get therapy?
> A. What we allowed her to do was to take the emergency family leave, and then she did ask for donated time.
>
> Q. Okay. **Did you consider any other alternatives?**
> **A. No, sir.**
>
> Q. Well, **for instance, did it ever occur to you to have her come in early on the Monday, Wednesday -- or even on the -- any one of the five days, to do additional time in the office to make up those 7 1/2 hours**, or --
> A. During the --
>
> Q. During the time --
> A. **That would be fine. I honestly don't know if we discussed that or not.** We may have. I could find out for you.
>
> Q. Well, you don't have any recollection of it though, correct?
> A. **I don't recall.**
>
> Q. Okay. Well, and --

MS. POE: I'm just trying to understand if your question was, allowing her to come in early in order to make up the time that she was going to be gone, is that what you said?

MR. DePAULO**: Or to stay late on the Monday, Wednesday, and Friday when she was there.**

MS. POE: And accrue the hours that she was requesting?

MR. DePAULO: Correct. Correct.

BY MR. DePAULO:
Q. Did you ever consider that?
A. I don't think so, because to do something like the therapy, you take sick leave or annual leave, or family sick leave.

Q. Okay. But you didn't consider it is the answer, correct?
A. **I don't remember.**

Q. Okay. Would you agree that there was -- basically, **there was no give and take between you and Shirley Burns on this? Your position was clear, correct?**
A. When it came to working from home? **Yes, sir. We just don't allow that.**

Q. And that applied to her request for accommodation? **There were no alternatives to consider? You made no counter offer?** You didn't negotiate or in any way discuss it with her at all, did you?

A. We allowed her to take emergency family sick leave, and then if she -- then **her next choice was she could have gone off payroll. Leave without pay.**

Q. Yeah. **Of course, if she went off payroll, she wouldn't be making a living, would she?**
A. Those were her choices.

App. at 658-661 (emphasis added).

And Mr. Reid-Smith never considered whether there were other jobs that would accommodate Ms. Burns' disability:

[BY MR. DePAULO]:
Q. Okay. **Did you consider whether there were any other jobs at**

> **SHPO, History -- or the division at home, and possibly transferring her into that kind of a job?**
> A. Nobody works from home. I'm -- that's --
>
> Q. So the answer is no, correct?
> A. **No.**
>
> Q. **Did you make any effort to determine if such jobs existed either in SHPO or the division or the department?**
> A. **No.**

App. at 662-663(emphasis added).

D. After an employee states a prima fascia case of disability and requests accommodation, the employer bears the burden of proving a request is "unreasonable."

In Syllabus Point 2 of *Skaggs v. Elk Run Coal Co.*, 198 W.Va. 51, 479 S.E.2d 561 (1996) the elements that a plaintiff must prove in a claim of disability discrimination:

> To state a claim for breach of the duty of reasonable accommodation under the West Virginia Human Rights Act, W.Va.Code, 5-11-9 (1992), a plaintiff must allege the following elements:
>
> (1) The plaintiff is a qualified person with a disability;
>
> (2) the employer was aware of the plaintiff's disability;
>
> (3) the plaintiff required an accommodation in order to perform the essential functions of a job;
>
> (4) a reasonable accommodation existed that met the plaintiff's needs;
>
> (5) the employer knew or should have known of the plaintiff's need and of the accommodation; and
>
> (6) the employer failed to provide the accommodation.

198 W.Va. 51, 479 S.E.2d 561(text reformatted).

The Supreme Court also stated in Syllabus Point 3 of Skaggs that :

> Under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), in a disparate treatment discrimination case involving an employee with a disability, an employer may defend against a claim of reasonable accommodation by disputing any of the essential elements of the employee's claim or by proving that making the accommodation imposes an undue hardship on the employer. Undue hardship is an affirmative defense, upon which the employer bears the burden of persuasion.

Id.(emphasis added). See *Haynes v. Rhone-Poulenc, Inc*., 206 W.Va. 18, 521 S.E.2d 331 (W.Va., 1999).

Shirley Burns stated all elements of a cause of action for discrimination in SHPO's denial of her request for a reasonable accommodation, and SHPO failed totally to sustain its burden of any burden, let alone an unreasonable burden.

And Shirley Burns' immediate supervisor testified, without contradiction, that: "**I think how you've explained it, it could have been possible to supervise that work that was done at home**." **App. at 489** (emphasis added).

E. EEOC "Guidance Memoranda" expressly endorsed "Work At Home" as a reasonable accommodation in 2005, eight years before Plaintiff's 2013 request.

West Virginia courts have routinely acknowledged the instructive value of the federal courts and the Equal Employment Opportunity Commission (EEOC) interpretations of the Americans with Disabilities Act (ADA), the federal analog to the WVHRA. In an October 2005 titled **"*Work At Home/Telework as a Reasonable Accommodation*,"** a specific EEOC guidance memorandum was issued on the use of "work-at-home" or "telecommuting" as a means of complying with the requirement to provide a reasonable accommodation. The October, 2005 EEOC guidance, issued

eight years prior to Ms. Burns' August 2013 request for accommodation, stated, *inter alia*, that:

> **2. May permitting an employee to work at home be a reasonable accommodation, even if the employer has no telework program?**
>
> **Yes**. Changing the location where work is performed may fall under the ADA's reasonable accommodation requirement of modifying workplace policies**, even if the employer does not allow other employees to telework**….

App. at 73-74 (emphasis added)(https://www.eeoc.gov/facts/telework.html).

But forcing a disabled person to accept unpaid leave, as SHPO Director Reid-Smith did here, when a reason accommodation is available, is not a lawful alternative for an employer:

> A. We allowed her to take emergency family sick leave, and then if she -- then **her next choice was she could have gone off payroll. Leave without pay.**
>
> Q. Yeah. **Of course, if she went off payroll, she wouldn't be making a living, would she?**
> **A. Those were her choices**.

App. at 658-661 (emphasis added).

F. The SHPO Director denied Shirley Burns' request for accommodation on the basis of his false claim that state law prohibited employees from working at home when, in fact, no state policy prohibited work at.

In her initial response to the question regarding the existence of any reason Shirley Burns' request for accommodation should not have been granted, Susan Pierce stated that there was no formal agency policy against work at home, but that it was Commissioner Randall Reid-Smith's personal policy to require all work to be performed at the office, with the exception of projects that occurred out of the office, i.e., except when he didn't:

> Q. … Is it your testimony that the policies of the department, the division, and/or the office precluded any accommodation which would have allowed somebody to work at home?
> A. The policies of the office, of the agency, to preclude anyone from working at home?
>
> Q. Yes.
> A. **I'm not aware that our policies indicate that**.

App. at 485-486 (emphasis added).

Randall Reid-Smith, the Commissioner of the Division of Culture and History, which included SHPO, testified repeatedly –and falsely – that "**I go by state code" (App. at 641)** which he claimed required all work by Division personnel to be performed at the office, on the premises of the Department of Education and the Arts.

In fact, neither the Department of Education and the Arts nor the State of West Virginia had any policy barring work at home. Kim Nuckles, the State ADA Coordinator, testified that there was no state policy prohibiting work at home.

> **Is there, in fact, a state policy for flex time?**
> A. I do not think so.
>
> Q. What's the nature of your uncertainty about that?
> A. Well, **I guess I should say there is not a state policy regarding flex time**. Let me restate that.
>
> Q. **Is there a policy regarding working at home?**
> **A. There is not.**

App. at 766.

> Q. If somebody uses the term "flex time," what do you understand that to mean?
> A. Well, that's a great question. Possibly modified time, maybe.
>
> **Q. Well, does the state have a policy on the use of modified time?**
> **A. No, the state does not have a policy. There's no state policy.**

***

Q. I want to let you know that Reid-Smith repeatedly in his deposition invoked the existence of state policy as prohibiting working at home. Do you have any idea what he might have been relying upon?
A. I don't. I certainly can't speak for him.

MS. POE: I'm going to object to the form. Go ahead.

Q. That's all right.
A. Yeah, I have no idea. I don't know.

App. at 774-775 (emphasis added).

Sue Chapman, the human resources director for the Department of Education and the Arts, testified that there was no policy addressing use of work at home, one way or the other, as an accommodation for a disabled person,

A. There is no state policy, per se, that allows an employee to work from home.

Q. And is there one that prohibits it?
A. <u>I can't speak to any that would prohibit it, per se</u>.

App. at 701(emphasis added).

G. Applicable WVHR Commission Regulations Expressly Identify Flex-Time As A "Reasonable Accommodation" For Disabled Employees.

As noted, regulations adopted by the West Virginia Human Rights Commission (WVHRC) to implement the prohibition on discrimination against disabled persons provide that:

> 4.5. <u>An employer shall make reasonable accommodation to the known physical or mental impairments of qualified individuals with disabilities where necessary</u> to enable a qualified individual with a disability to perform the essential functions of the job. **<u>Reasonable accommodations include</u>**, but are not limited to:
>
> ***

> 4.5.2. **Job restructuring, part-time or modified work schedules**, reassignment to a vacant position for which the person is able and competent (as defined in Section 4.3) to perform, acquisition or modification of equipment or devices, the provision of readers or interpreters, and similar actions;

WV Code of State Regulations § 77-1-4 (underscoring and bold added).

Without ever addressing the EEOC criteria for assessing "essential" job components, or the WVHR Commission regulations embracing flextime as a reasonable alternative, Reid-Smith engaged in a prolonged and adamant refusal to examine those "policies" until after Burns' counsel threatened to seek Court intervention to compel his answer.

The extended holdout went as follows:

> Q. Okay. And if I understand from your prior statement, you know, you're -- skipping the timing or the formality of it, **you were not going to grant this request for accommodation; is that correct?**
> **A. No one works from home**. We're a small agency. We need everybody there.

App. at 621 (emphasis added).

> **[D]id you understand that Shirley Burns' request to work at home** to make up the 7 1/2 hours she had to take off for the therapy on Tuesdays and Thursdays **was not a permanent idea**? It was the idea that she would do that so for long over a period of recovery, and presumably at the end of the recovery, she would return to a 40-hour week at the office. Did you understand that also?
> THE WITNESS: **Her request was to work from home, and we did not allow that to happen**.

App. at 621 (emphasis added).

> Q. **Did you understand that it was a temporary request**?
> A. The request was, **she wanted to work from home, and we did not allow that to happen.**

App. at 624 (emphasis added).

Q. I understand that. Trust me, I understand that you oppose that. Okay? My question is not what you do or don't allow. My question is what your understanding is of her request.
A. Her request –

Q. Do you under --
A. -- was to work from home, and we do not allow that.

App. at 625 (emphasis added).

MR. DePAULO: Do you want *** to instruct him to give me a yes or no answer on that?

MS. POE [to the witness]: If you can tell him that you understood she only wanted to work two days a week from home, that's fine. Just tell him that that was your understanding.

THE WITNESS: She wanted to work from home on the weekend to accrue time.

[MS. POE] Yes, I understand that.

MR. DePAULO: Okay.
THE WITNESS: But our policy is –

MR. DePAULO: I understand --
THE WITNESS: -- no one works from home.

MR. DePAULO: I understand your policy. I --
THE WITNESS: **Well, you've asked me several times. I just want to make --**

MR. DePAULO: No. I --
THE WITNESS: -- **sure you understand**.

App. at 626 (emphasis added).

MR. DePAULO: Yeah. But the question is, what is his understanding?
THE WITNESS: **My understanding is, when people request to work from home, we do not allow that**.

MR. DePAULO: Okay. **Counsel, do you want to** –

***
MR. DePAULO: -- **instruct him** --

App. at 627(emphasis added).

> MR. DePAULO: I understand that. The question is not what your policy is. I understand your policy. Trust me, I really, really do. My question is, your understanding of her request. Do you understand that it was for a part-time at home, and that it was --
> THE WITNESS: **And once again** –
>
> MR. DePAULO: -- a temporary request?
> THE WITNESS: -- **I answered you. I followed the policies** --
>
> MR. DePAULO: No. No. You --
> THE WITNESS: -- **of my agency**.

App. at 628 (emphasis added).

> MS. POE: **Did you understand that she was asking to do this until she recuperated fully and didn't have to go to rehab anymore?**
>
> THE WITNESS: **What I understand is, she asked to work from home, and that's not what we do. That's what I understand**.
>
> BY MR. DePAULO:
> Q. Okay. **Are you going to refuse to answer the question**?

App. at 628-629(emphasis added).

> BY MR. DePAULO:
> Q. Okay. **Even though she was required to be in the office, can you think of any face-to-face interaction that was required as part of her job?**
> A**. Asked and answered**.
>
> Q. No, it's not.
>
> ***
> Q. You know, if -- look, **if you want** --
>
> MS. POE: Okay. **You've got to answer** --
>
> Q. -- **the judge to intervene here, I'll call her and get her to do it**.
>
> MS. POE: **We've got to answer** –

App. at 635-636 (emphasis added).

THE WITNESS: **If he continues** –

MS. POE: -- it's a legitimate --

THE WITNESS: -- **I'm going to leave**.

MS. POE: No. No. Wait.

MR. DePAULO: Well, you can **leave if you want, and we'll get a default judgment against you.**

MS. POE: **Come talk to me.**

THE WITNESS: Okay.
MS. POE: Let's take a break.
(Break in proceedings.)
(Exhibit 31 was marked.)

App. at 643 (underscoring and bold added).

H. Appellee had no evidence that Shirley Burns could not perform specific essential job functions – editing and proofing tasks – from home or that the requested accommodation would create any burden at all, let alone an unreasonable burden, on it as an employer.

Following the break to consult with counsel, Commissioner Reid-Smith relented on the issue of agency burden:

Q. And if she had to have meetings, she could have them during the 32 1/2 hours she proposed to be there, correct?
A. Yes, sir.

Q. Okay. Assuming she were allowed to go home and work on editing and proofreading of documents, and then sent them in by e-mail, and then later perhaps met to talk about the changes**, would her typing of those documents or editing of those documents at home cause the agency to incur any additional cost?**
A. No, I don't think so.

Q. Okay. Other than financial matters, or, you know, issues, considerations, **was there any nonfinancial burden that those would impose on the agency that you can think of?**
A. No, sir.

App. 648-651.

II. THE CIRCUIT COURT'S MARCH 6, 2018 ORDER DOES NOT COMPLY WITH THE REQUIREMENT RECITED IN *FAYETTE COUNTY NAT. BANK V. LILLY* THAT THE ORDER SET OUT FACTUAL FINDINGS SUFFICIENT TO PERMIT MEANINGFUL APPELLATE REVIEW.

The Circuit Courts of this state have significant dockets that require more person hours than are, in a real world, available to dispose of all cases as thoroughly as the litigants – and the Circuit Judges themselves – would prefer. And it is not, per se, inappropriate for a Circuit Judge to direct the prevailing party in any motion, including a motion for summary judgment, to prepare an order for the Court's signature. But as a case's facts become more complex, and legal issues become more nuanced, the requirement that a Circuit Judge invest the time needed to produce a legally sufficient opinion increases. Appellant respectfully submits that this opinion, in this case, fails to satisfy the requirements for minimal judicial review.

Fayette County Nat. Bank V. Lilly, 199 W. VA. 349, 484 S.E.2D 232 (W. VA., 1997), overruled on other grounds by *Sostaric V. Marshall*, 234 W. VA. 449, 766 S.E.2D 396 (2014), held in syllabus point 3 as follows:

> 3. Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed.

484 S.E.2d 234.

As explained in *Lilly*, "[t]his Court's function, as a reviewing court is to determine whether the stated reasons for the granting of [the] judgment by the

lower court are supported by the record. 199 W.Va. at 353, 484 S.E.2d at 236." See also *Richard H. v. Rachel B.,* Case No. 17-0065 (May 18, 2018).

In the present case, the Circuit Court made no finding that Appellee's "on premises" attendance policy was, in fact, an "essential" part of Shirley Burns' job, and stated no basis for such a finding. Clearly, Shirley Burns' immediate supervisor recognized that performing editing and proof reading tasks off SHPO's premises presented no risk to SHPO accomplishing its mission, and imposed no burden, let alone an unreasonable burden, on Shirley Burns' employer.

Moreover, EEOC guidance on how to determine the "essential" parts of an employee's job was readily available. Specifically, EEOC's October 27, 2005 Guideline titled "Work At Home/Telework as a Reasonable Accommodation" – presented to Commissioner Randall Reid-Smith in his deposition – recites that:

> Not all persons with disabilities need - or want - to work at home . And not all jobs can be performed at home. But, **allowing an employee to work at home may be a reasonable accommodation where the person's disability prevents successfully performing the job on-site and the job , or parts of the job, can be performed at home without causing significant difficulty or expense.**

App. at 72 (emphasis added).

Further, the 2005 EEOC Guideline provides in a Q & A format suggestions on how an employer may, in compliance with the ADA, determine the "essential" parts of an employee's job and, from that determination, assess the reasonableness of a request to work at home:

> **4 . How should an employer determine whether a particular job can be performed at home?**
>
> An employer and employee first need to identify and review all of the essential job functions. The essential functions or

> duties are those tasks that are fundamental to performing a specific job.
>
> ***
>
> After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home.
>
> ***
>
> If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs.

App. at 73-74 (emphasis added).

In the present case, SHPO Director Reid-Smith insisted that he, and he alone, made decisions at SHPO, regardless of the legal requirements applicable to disabled persons:

> MR. DePAULO: No. What I'm asking is, does he have any reason to disagree with Susan Pierce's judgment that it could be done at home?
>
> MS. POE: That's a yes or no.
>
> THE WITNESS: **The answer is simple. I am the appointed authority of the agency. The final decision rests with me**.

App. at 632 (emphasis added).

Appellant respectfully submits that the answer may be simple, but Appellee's principal officer misstates it. This Court , not the Appellee, is the final authority on the requirements of the West Virginia Human Rights Act, and this Court should not

hesitate to inject rationality into the decision making process.

And the compelling need in the present case was for the Circuit Court to make specific findings, that examined Appellee's broad assertions of the "essential" character of SHPO's never-published, and arbitrarily enforced, "on premises" work policy.

III. THE DENIAL OF SHIRLEY BURNS REQUEST FOR ACCOMMODATION OF HER DISABILITY WAS UNLAWFUL, ARBITRARY AND CAPRICIOUS CONDUCT, AND CONSTITUTED AN UNLAWFUL CONSTRUCTIVE DISMISSAL AS A MATTER OF LAW.

The Circuit Court below understood fully the arbitrariness of Commissioner Reid-Smith's refusal to grant Shirley Burns requested accommodation or any alternative to it, and did not hesitate, on her own initiative, to express her opinion in plain English:

> THE COURT: **Your argument is really more he's being a jerk.**
>
> MR. DEPAULO: He is being a jerk.
>
> THE COURT: The question is **assuming that what you're saying is true, does that violate the law?**
>
> MR. DEPAULO: **Yes, because he cannot be unreasonable**, Your Honor. And what he was doing was arbitrary. That is why we all sitting here know **he was a jerk because he was being arbitrary and unreasonable**.

App. at 62-663 (emphasis added).

As a matter of law, arbitrary and capricious conduct by a government official is unlawful. Here, the Court understood fully, based on Reid-Smith's repeated false invocation of non-existent state policies purporting to ban work-at-home, that Reid-Smith was - in a pithy legal short cut for arbitrary and capricious - **"being a jerk."**

The law does not tolerate arbitrary and capricious behavior; it is the antithesis of being reasonable, which the ADA and the West Virginia Human Rights Act compel when the topic is accommodating disabled persons employed by the state.

The arbitrariness of Reid-Smith's decision is underscored by the fact that other employees were permitted to work at home on a full time basis. As explained by the Human Resource Director of SHPO's umbrella agency, the Department of Education and the Arts:

> **[W]e do have employees that are regional**, such as office of technology and the regional techs, **their offices, home offices are many times at their home,** but the home office, being the culture center, would not have given any employee a secondary home office.

App. at 701(emphasis added).

And Reid-Smith readily conceded that employees of SHPO and other agencies within the Department of Education and the Arts, routinely worked out of the office, when it suited his purposes. Indeed, some of the functions of Appellant Burns' position actually required the employee to go out of the office:

> A. They went into the field to do research.
> Q. What else?
> A. That's basically it.
> Q. Okay. Can you think of any one of those functions that could not be performed during the 32 1/2 hours that she proposed to be working in the office?
> A. She couldn't go into the field.
> Q. I understand that.
> A. Yeah.

App. at 650 (emphasis added).

But the exceptions to SHPO permitting, indeed compelling, employees to work outside the office were not limited to site visits by architectural historians. Persons involved with conferences or fairs were routinely required to be out of the

office, but were in no way penalized or required to employ leave to work out of the office. Reid-Smith's preposterous defense of the double standard follows:

> Q. Employees of SHPO and the division and department were allowed to attend conferences like Vandalia out of the office, correct?
> A. Yes. Well, that's not a conference, that's an event.
> Q. Okay. But they were allowed to go to that event, correct?
> A. Yes, because it was at our building.
> Q. Yes. And that occurred on weekends, and it was -- but it's outside also, right? It's out there in the middle of the campus?

App. at. 651-656.

Slack v. Kanawha County Housing and Redevelopment Authority, 423 S.E.2d 547 (W.Va. 1992) states that: "A constructive discharge cause of action arises when the employee claims that because of age, race, sexual, **or other unlawful discrimination**, the employer has created a hostile working climate which is so intolerable that the employee was forced to leave his or her employment."

In his deposition, Mr. Reid-Smith callously stated his legally erroneous view of Shirley Burns' legal options at the Department of Education and the Arts. As Randall Reid-Smith put it, Shirley Burns' had very narrow choices:

> Q. Yeah. Of course, if she went off payroll, she wouldn't be making a living, would she?
> A. Those were her choices.

App. at 661.

The EEOC Office of Legal Counsel Letter dated September 27, 2001, based on EEOC Enforcement Guideline on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act makes it clear that forcing an employee to take unpaid leave violated the ADA:

> Both leave and working at home are forms of reasonable accommodation. However, they are not equally effective because only

> one – working at home – allows the employee to perform his job. You state that the job can be performed from home and you do not suggest that this accommodation will cause an undue hardship. In this situation, **requiring an employee to take a leave of absence rather than granting the request to work at home**, and then backfilling the employee's position, **would be a violation of the ADA because the employer would be** forcing the employee to accept a less effective form of accommodation and **depriving a qualified employee of his job**.

App. at 71 (emphasis added).

Clearly, here, Shirley Burns was the victim of "other unlawful discrimination" for purposes of *Slack*. And equally clearly, Randall Reid-Smith's supercilious effort to dictate Shirley Burns' rights, demonstrably incorrect as a matter of law, fully satisfied the requirement of being so intolerable that she was forced to leave.

CONCLUSION

Shirley Burns' request was in all respects a straight forward request for accommodation, i.e., a temporary request for a part-time, flexible schedule to permit Shirley Burns, a valued employee, to complete a course of physical therapy and return to full-time employment at her employer's place of business.

The Defendant's unlawful denial of that request, entitled Shirley Burns to partial summary judgment in the form of an order finding Defendant liable for violation of the WVHRA, and setting the matter down for a trial on the issue of damages. The granting of Defendant's motion for summary judgment, on this record, was error requiring reversal and remand for trial on damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Brief and the parties' Joint Appendix was placed in the US Postal Service, postage pre-paid, this 6th day of July, 2018, addressed to Counsel for the Appellee, at the address indicated below:

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