THE DIMINISHING DOCTRINE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES

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I. INTRODUCTION

During the September 2013 term, the Supreme Court of Appeals of West Virginia issued a decision regarding the effect of a plaintiff filing a claim asserting “discrimination”, “harassment” and “retaliation” without first completing the administrative processes announced in West Virginia Code § 6C-2-1, et seq., the West Virginia Public Employees Grievance Procedure Act (“Grievance Statute”). In Weimer v. Sanders, et al and Hughes v. West Virginia University, a consolidated decision (hereinafter “Weimer/Hughes”), the Supreme Court of Appeals held that a filing with the West Virginia Public Employees Grievance Board (“Grievance Board”) is permissive and not mandatory. See Syl. Pt. 6, Weimer v. Sanders, et al., 752 S.E.2d 398 (W.Va. 2013). Further, the Supreme Court of Appeals held that, if a grievant initiates a grievance, that grievant is not required to complete the grievance process prior to pursuing an action in Circuit Court (or before the Human Rights Commission). Id. at Syl. Pt. 12. Finally, the Supreme Court held, in a Syllabus Point, that “[a] plaintiff may, as an alternative to filing a grievance with the [Grievance Board], initiate an action in circuit court to enforce rights granted by the West Virginia Human Rights Act, W.Va. Code § 5-11-1 et seq.” Id. at Syl. Pt. 9. As will be explained below, the Supreme Court parted from the recognized exceptions to the doctrine of exhaustion of administrative remedies to make the aforementioned findings. Prior to analyzing this decision, however, it is necessary to review the facts of the cases that were consolidated for appeal before the Supreme Court.

II. BACKGROUND

A. Theresa L. Weimer’s case

In 2006, Ms. Weimer began teaching at Pocahontas County High School (“PCHS”), a public school. During her teaching career at PCHS, it is alleged that she suffered from insulin-
dependent diabetes, lumbar degenerative disk disease, depression, degenerative joint disease, fibromyalgia, plantar fasciitis, acute renal failure, hypertension, and sleep apnea. After numerous issues related to Ms. Weimer’s teaching deficiencies, including a previous suspension due to her teaching deficiencies and being placed on a school improvement plan, Ms. Weimer was recommended for termination from her employment. A pre-termination hearing was conducted, which included evidence that Ms. Weimer had teaching deficiencies, including falling asleep while teaching and leaving students unattended. Based upon the recommendations of the school principal and the school superintendent, Ms. Weimer’s position as a public school teacher was terminated by the Pocahontas County Board of Education on October 27, 2011. Instead of filing a grievance with the West Virginia Public Employee Grievance Board, she filed a civil action in the Circuit Court of Pocahontas County. The Circuit Court of Pocahontas County ruled that she failed to exhaust her administrative remedies and dismissed the action.

B. Vicky Lou Hughes’s case

Ms. Hughes began employment in December 2007 as a coordinator/clinical associate for the Center for Excellence in Disabilities (“CED”), a branch of West Virginia University (“WVU”). Her position provided Traumatic Brain Injury (“TBI”) services throughout the state. During the interview process, Ms. Hughes advised the CED that she has a disability known as multiple chemical sensitivity, which requires reasonable accommodation. Initially, the CED accommodated Ms. Hughes’s requests, permitting her to use her personal vehicle for work travel and allowing her to work from a different office location while her regular office location was undergoing renovation.

On April 6, 2010, a meeting was held wherein Ms. Hughes was informed that there had been consumer complaints regarding her job performance. After an investigation, a warning
letter was issued June 11, 2010, stating that Ms. Hughes’s work quality was unsatisfactory. After the April 6, 2010, meeting, it was alleged that Ms. Hughes had engaged in additional inappropriate and potentially unethical clinical procedures and client interactions. Ms. Hughes argued that these allegations were false and were made with the purpose and intent of harassing her in retribution for her requests for accommodation.

Ms. Hughes, in June 2010, suffered an orthopedic injury that resulted in a medical leave of absence of approximately one year. When she attempted to return to work, she was advised that several of her requests for accommodation had been rejected. On October 31, 2011, her employment was terminated. Ms. Hughes initiated the Grievance Procedure, asserting that her employer had refused to provide needed reasonable accommodations. Reportedly, several grievance hearings had occurred, with another grievance hearing scheduled to take place in late 2012. However, prior to the holding of the latest grievance hearing, Ms. Hughes filed an action in circuit court, which was dismissed pursuant to a Motion to Dismiss for failing to exhaust her administrative remedies.

III. ANALYSIS

A. The doctrine of exhaustion of administrative remedies

In West Virginia, “[t]he general rule is that where an administrative remedy is provided by statute or by rule and regulation having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.” Syl. Pt. 1, Kinell v. Superintendent of Marion County Schools, 499 S.E.2d 862 (W.Va. 1997) (per curiam); Daurelle v. Traders Fed. Savings & Loan Assoc., 104 S.E.2d 320, 326 (W.Va. 1958). The policy behind requiring exhaustion of administrative remedies has been explained.
Specifically, in \textit{Sturm v. Board of Education}, the Supreme Court succinctly described the principles behind this doctrine as:

(1) permitting the exercise of agency discretion and expertise on issues requiring these characteristics; (2) allowing the full development of technical issues and a factual record prior to court review; (3) preventing deliberate disregard and circumvention of agency procedures established by Congress [or the Legislature]; and (4) avoiding unnecessary judicial decision by giving the agency the first opportunity to correct any error.


\textbf{B. Recognized exceptions to the doctrine of exhaustion of administrative remedies}

Like most rules, the doctrine of exhaustion of administrative remedies is subject to certain exceptions. The first exception is whether the statute provides for a choice of forum. The Supreme Court recognized that the alternative administrative and judicial avenues run “counter to the general rule of statutory construction that where a new right is created by statute, the remedy provided for its violation is exclusive.” \textit{Price v. Boone Cnty. Ambulance Auth.}, 337 S.E.2d 913, 916-17 (W.Va. 1985). For example, the Supreme Court has recognized that the doctrine of exhaustion of administrative remedies does not apply to the Wage Payment and Collection Act. \textit{Beichler v. West Virginia University at Parkersburg}, 700 S.E.2d 532, 537 (W.Va. 2010). While the Wage Payment and Collection Act provides for an administrative remedy, the statutory language of the Act allows for a plaintiff to remedy a violation of that Act by “any legal action necessary.” \textit{Id.} Because “any legal action” would include a civil filing, the Supreme Court found this language sufficient to create a forum selection clause in the statute, thereby falling within the first exception to the doctrine of exhaustion of administrative remedies. \textit{Id.}

The second recognized exception to the doctrine of exhaustion of administrative remedies is whether the remedies provided for by the administrative agency are inadequate. Syl. pt. 2,
Wiggins v. Eastern Assoc. Coal Corp., 357 S.E.2d 745 (W.Va. 1987). However, the mere fact that a specific monetary damage is not available through the administrative agency is not sufficient to fall within the inadequate remedy exception. Wheeling v. Morris Plan Bank & Trust Co., 183 S.E.2d 692, 695 (W.Va. 1971). Finally, “[t]he doctrine of exhaustion of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility.” Syl. pt. 1, State ex rel. Board of Educ. v. Casey, 349 S.E.2d 436 (1986). Again, because a certain type of damage is not available does not equate to futility for purposes of the doctrine of exhaustion of administrative remedies. Wheeling, 183 S.E.2d at 695.

With this basic understanding of the doctrine of the exhaustion of administrative remedies and its exceptions, a review of the Court’s analysis regarding the application of this doctrine can be undertaken.

C. A review and analysis of the Court’s reasoning for its decision

Before discussing the Supreme Court’s decision regarding whether a public employee must exhaust administrative remedies provided for in the Grievance Statute, it is important to note that the Supreme Court had previously ruled that the Grievance Board’s authority to remedy claims of “discrimination”, “harassment” and “favoritism”, includes jurisdiction to remedy discrimination that also would violate the West Virginia Human Rights Act (“WVHRA”). Syl. Pt. 1, Vest v. Board of Education, 455 S.E.2d 781 (W.Va. 1995). As a result, the sole issue before the Supreme Court was whether a public employee must exhaust this administrative remedy prior to pursuing a claim in circuit court. While this was the sole issue, the Supreme Court did not analyze this matter under the previously announced legal principals and exceptions to this doctrine. Instead, the Supreme Court, after finding that a public employee does not have a mandatory obligation to pursue a grievance through the Grievance Board, found that the
exhaustion of administrative remedies was not necessary. The Court based this decision on two reasons: first, the Human Rights Act doesn’t require an exhaustion of administrative remedies, *Weimer*, 752 S.E.2d at 406, and second, there is no reason to treat public employees differently than other citizens, *id.* at 407.

With respect to the first reason, the Supreme Court harkened back to its decision in *Price*, which held that a person may pursue a Human Rights Act claim in circuit court or before the Human Rights Commission. *See Price*, 337 S.E.2d at Syl. Pt. 1. In other words, the Human Rights Act has a choice of forum, which is an exception to the exhaustion of administrative remedies requirement. Because of this holding, the Supreme Court noted “It stands to reason that if a claimant is not required to maintain an action before the Human Rights Commission prior to filing a claim in the circuit court, the claimant is, likewise, not required to file a grievance with the Grievance Board before filing a claim pursuant to the WVHRA in the circuit court.” *Weimer*, 752 S.E.2d at 406. The Supreme Court bolstered this decision by finding that the Human Rights Commission has broader power and authority to remedy discrimination claims than does the Grievance Board. *Id.*

This reasoning has several flaws. First, the Grievance Act is statutorily different from the WVHRA because the Grievance Act does not contain a choice of forum. As a result, by simply comparing the two statutes and concluding that because the WVHRA doesn’t require exhaustion, so neither should the claims falling under the Grievance Act, discounts the legislative intent in not creating a choice of forum in the Grievance Statute. In addition, the Supreme Court ignored the analysis under the doctrine of exhaustion of administrative remedies previously discussed and instead decided that this simple comparison was sufficient to overcome the long-standing doctrine of exhaustion of administrative remedies.
Further, by discussing that the Human Rights Commission has greater remedial authority, the Supreme Court diminished its previous holding in *Wheeling*, 183 S.E.2d at 695, which states that the availability of certain remedies does not abrogate the requirement of exhaustion of administrative remedies. On this same point, the Supreme Court would later acknowledge that many of the remedies provided for under the WVHRA and the Grievance Statute are the same. *Weimer*, 752 S.E.2d at fn. 9. The Supreme Court did not state, expressly or impliedly, what remedies the Human Rights Commission could offer that the Grievance Board could not that overcame the doctrine of exhaustion of administrative remedies.

With respect to the reasoning that a public employee should not be treated differently than a private employee, this ignores the additional protections afforded to public employees, who have a property interest in their employment and private employees. In addition, it ignores the express legislative purpose of the Grievance Statute, which is to “[resolve] grievances in a fair, efficient, cost-effective and consistent manner will . . . better serve the citizens of the State of West Virginia.” *West Virginia Code* § 6C-2-1(b). Further, the Supreme Court previously recognized the added benefit of the grievance statute in conjunction with subsequent claims under the WVHRA by stating “a grievance decision may, in many cases, end the controversy and preclude the need for further administrative or judicial proceedings under the Human Rights Act; and it does so by a procedure that is much faster and less expensive.” *Vest*, 455 S.E.2d at 785.

Finally, the Supreme Court, in addressing the issue of whether a grievant must complete the grievance process prior to filing an action in circuit court alleging WVHRA violations, found that completion of this process was not necessary. *Weimer*, 752 S.E.2d at Syl. Pt. 12. The basis for this decision was that a decision by the Grievance Board has no preclusive effect on a subsequent WVHRA claim, so this process has no effect on any action in circuit court. *Id.* at
408-409. Because of such, a grievant can abandon her grievance and instead pursue a civil action. Again, this decision departs from the legal principals related to the doctrine of administrative remedies and instead focuses on principles of *res judicata* and claim preclusion.

**D. Future effects and impact of this decision**

There are a number of obvious implications that can be reached regarding the effect of this decision. However, a far greater issue remains as to how the Supreme Court will interpret and/or otherwise use this decision when faced with future decisions regarding the doctrine of exhaustion of administrative remedies and any statute that may overlap with the WVHRA. First, the obvious takeaways are found in the express holdings of the Court: the filing of a grievance by a public employee is discretionary; a plaintiff may, as an alternative to filing a grievance with the Grievance Board, initiate an action in circuit court to enforce rights granted by the WVHRA; and a grievant must not complete a previously filed grievance prior to initiating a suit under the WVHRA arising out of the same factual basis.

With respect to how the Supreme Court will utilize this decision in the future, there are a number of questions. First, will the Supreme Court continue to diminish the doctrine of exhaustion of administrative remedies by creating a new exception based upon a comparison of a statute that confers joint jurisdiction? Second, will the Supreme Court review the adequacy of available remedies in determining whether a person must exhaust administrative remedies, effectively overturning prior precedent set forth in *Wheeling v. Morris Plan Bank & Trust Co.*? Third, will the Supreme Court continue to diminish the importance of the Grievance Board by allowing a grievant to forego the Grievance Procedure for claims not arising under the WVHRA? For example, the Grievance Board has jurisdiction over employment contract disputes, will the Supreme Court allow a grievant to forego the administrative action and file a contract claim in
circuit court? Finally, will the Supreme Court limit the impact of this decision because it involved claims under the WVHRA, which the Supreme Court imputed its interpretation of the WVHRA upon the Grievance Statute?

Only time will tell how the Supreme Court will address these questions and the numerous others that arise out of this decision. However, it certainly appears that those practicing employment litigation, specifically claims involving public employees, lost the power to utilize a long standing legal theory, the doctrine of exhaustion of administrative remedies.