



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

**HUMAN RIGHTS COMMISSION**

1321 Plaza East, Room 108A

Charleston, WV 25301-1400

Ph: (304) 558-2616 Fax: (304) 558-0085

Toll-free: 1-888-676-5546 Web: [www.hrc.wv.gov](http://www.hrc.wv.gov)

Tia L. Welch, Executive Director

December 15, 2021

**VIA CERTIFIED MAIL- RETURN RECEIPT REQUESTED**

Robb Livingood  
220 Cherry Street, Apt. 2  
Morgantown, WV 26501  
*Complainant*

Public Defender Corporation  
Fifth Judicial District  
214 Main Street  
Ripley, WV 25271  
*Respondent*

Laura Davidson, Esq.  
Mountain State Justice, Inc.  
325 Willey Street  
Morgantown, WV 26505  
*Co-Counsel for the Complainant*

Kirk Auvil, Esq.  
The Employment Law Center  
1208 Market Street  
Parkersburg, WV 26101  
*Counsel for the Respondent*

Aubrey Sparks, Esq.  
Our Future West Virginia  
1636 Kanawha Blvd. E  
Charleston, WV 25311  
*Co-Counsel for the Complainant*

Office of The Attorney General  
Civil Rights Division  
P. O. Box 1789  
Charleston, WV 25326  
*Counsel for the Commission on  
behalf of the Complainant*

**Via Hand Delivery**  
Tia L. Welch, Executive Director  
West Virginia Human Rights Commission  
1321 Plaza East, Room 108-A  
Charleston, WV 25301

Re: *Livingood v Public Defender Corp., Fifth Judicial Circuit*  
Docket No.: ES-192-18

Dear Parties:

Enclosed please find the final decision of the undersigned administrative law judge in the above-captioned matter. Rule 77-2-10, of the Rules of Practice and Procedure

Practice and Procedure Before the West Virginia Human Rights Commission, effective January 1, 1999, sets forth the appeal procedure governing a final decision as follows: "§77-2-10. Appeal to the commission.

10.1. Within thirty (30) days of receipt of the administrative law judge's final decision, any party aggrieved shall file with the executive director of the commission, and serve upon all parties or their counsel, a notice of appeal, and in its discretion, a petition setting forth such facts showing the appellant to be aggrieved, all matters alleged to have been erroneously decided by the administrative law judge, the relief to which the appellant believes she/he is entitled, and any argument in support of the appeal.

10.2. The filing of an appeal to the commission from the administrative law judge shall not operate as a stay of the decision of the administrative law judge unless a stay is specifically requested by the appellant in a separate application for the same and approved by the commission or its executive director.

10.3. The notice and petition of appeal shall be confined to the record.

10.4. The appellant shall submit the original and nine (9) copies of the notice of appeal and the accompanying petition, if any.

10.5. Within twenty (20) days after receipt of appellant's petition, all other parties to the matter may file such response as is warranted, including pointing out any alleged omissions or inaccuracies of the appellant's statement of the case or errors of law in the appellant's argument. The original and nine (9) copies of the response shall be served upon the executive director.

10.6. Within sixty (60) days after the date on which the notice of appeal was filed, the commission shall render a final order affirming the decision of the administrative law judge, or an order remanding the matter for further proceedings before an administrative law judge, or a final order modifying or setting aside the decision. Absent unusual circumstances duly noted by the commission, neither the parties nor their counsel may appear before the commission in support of their position regarding the appeal.

10.7. When remanding a matter for further proceedings before an administrative law judge, the commission shall specify the reason(s) for the remand and the specific issue(s) to be developed and decided by the administrative law judge on remand.

10.8. In considering a notice of appeal, the commission shall limit its review to whether the administrative law judge's decision is:

10.8.a. In conformity with the Constitution and laws of the state and the United States;

10.8.b. Within the commission's statutory jurisdiction or authority;

10.8.c. Made in accordance with procedures required by law or established by appropriate rules or regulations of the commission;

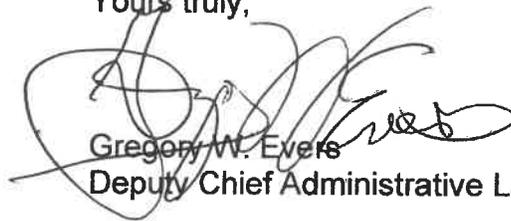
10.8.d. Supported by substantial evidence on the whole record; or

10.8.e. Not arbitrary, capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

10.9. In the event that a notice of appeal from an administrative law judge's final decision is not filed within thirty (30) days of receipt of the same, the commission shall issue a final order affirming the judge's final decision; provided, that the commission, on its own, may modify or set aside the decision insofar as it clearly exceeds the statutory authority or jurisdiction of the commission. The final order of the commission shall be served in accordance with Rule 9.5."

If you have any questions, you are advised to contact Tia L. Welch, Executive Director of the Commission at the above address.

Yours truly,

A handwritten signature in black ink, appearing to read 'Gregory W. Evers', is written over a printed name and title.

Gregory W. Evers

Deputy Chief Administrative Law Judge

GWE/rl

Enclosure

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**ROBB LIVINGOOD,  
Complainant,**

**v**

**Docket No. ES-192-18**

**PUBLIC DEFENDER CORPORATION  
FIFTH JUDICIAL CIRCUIT,  
Respondent.**

**ADMINISTRATIVE LAW JUDGE'S FINAL DECISION**

A Public Hearing in the above captioned matter was held March 10, 2021, by Zoom, before Deputy Chief Administrative Law Judge Gregory W. Evers, of the West Virginia Human Rights Commission.

The Complainant, Robb Livingood<sup>1</sup>, appeared in person and was represented by counsel, Aubrey Sparks, Esq. and Laura Davidson, Esq. of "Mountain State Justice", 1029 University Avenue, Suite 1029, University Avenue, Morgantown, WV, 26505. The Respondent, Public Defender Corporation, Fifth Judicial District, (hereafter referred to as Respondent), appeared by its agent/representative, Kevin B. Postalwait, Esq., Respondent's Chief Public Defender for the Fifth Judicial Circuit, and legally represented by counsel, Kirk Auvil Esq., of "The Employment Law Center PLLC", 1208 Market St., Parkersburg, WV, 26101. The parties, their respective counsel, and witnesses, all appeared for this public hearing by Zoom, as the undersigned Administrative Law Judge found that a Public Hearing, by Zoom, to be necessitated by the ongoing Covid-19 pandemic, and due to continuing hazardous conditions due to airborne contagion with potential for illness for attendees from Covid-19, by close public contact.

Following the hearing, the parties submitted their respective "*Proposed Findings and Conclusions of Law*" together with supporting argument. To the extent that the parties "*Proposed Findings of Fact and Conclusions of Law*" are herein found to be in accordance with the findings, conclusions, and legal analysis of the undersigned administrative law judge, in issuing this Final Decision, such Proposed Findings and Conclusions have been

---

<sup>1</sup> This case involves the complaint of a transgender individual, who at the time of the alleged incident was a masculine appearing female transitioning to male. Consequently, the Complainant, who completed transitioning after the alleged incident, was a transgender male at the time of filing of the subject complaint, and will be referred to, at times, as female, masculine female or male depending upon the time referenced.

adopted and incorporated in this *Final Decision*, in their entirety. To the extent that the proposed *Findings of Fact and Conclusions of Law* are found by the undersigned to be inconsistent therewith or found not to be supported by a preponderance of the evidence herein, they have been rejected. Additionally, certain proposed findings and conclusions have been omitted from discussion herein as not relevant or necessary for a proper decision in accordance with applicable law, or restated/revised, by the undersigned administrative law judge, to remain consistent with the undersigned's *Findings of Fact and Conclusions of Law* and legal analysis of the issues presented.

I.

**STATEMENT OF THE CASE**

On June 18, 2018, Complainant, Robb Livingood, filed a complaint with the West Virginia Human Rights Commission (hereafter Commission), under the provisions of the West Virginia Human Rights Act (hereafter Act or WVHRA), W.Va. Code §5-11-1 *et. seq.*, against the Respondent, Public Defender Corporation, Fifth Judicial Circuit, alleging disparate treatment, employment discrimination, under the provisions of the WVHRA, for the Respondent's unlawful rejection of the Complainant's application for employment, per Respondent's advertisement, for an open and advertised position of Assistant Public Defender, because of sex, female, and specifically discrimination on the basis of Complainant's gender identity, as transgender in transition to male, and due to gender stereotyping by the Respondent.

By its *Verified Answer*, and its attachments, the Respondent, Public Defender Corporation, Fifth Judicial Circuit, admitted that it was a "person" and "employer" under the West Virginia Human Rights Act, and that it had rejected the Complainant's employment application for the position of Assistant Public Defender, but denied liability under the West Virginia Human Rights Act, for employment discrimination based on sex. Respondent also alleged that the Commission lacked jurisdiction to adjudicate the Complainant's complaint due to Complainant's lacking protected status under the Act and not being qualified for the position of Assistant Public Defender.

II.

**PARTIES CONTENTIONS**

**COMPLAINT:**

The Complainant, a female, undergoing transition to male at the time of her application and rejected for employment by the Respondent as an Assistant Public

Defender, alleges that the Respondent violated provisions of the WVHRA by discriminating against her, a masculine appearing female, when she was rejected for employment, due to discrimination on the basis of her gender identity, being transgender, and due to gender stereotyping for her masculine appearance. Complainant also alleges being fully qualified and, in fact, more qualified than the only other applicant for the position, a cisgender male, who was offered the position over her, but who declined the position. The Complainant alleges that but for the Complainant's protected status, as transgender and her appearance as male, she would have been offered and hired for such position. Complainant contends that after being wrongfully rejected for the subject position, the Respondent continued to seek another applicant for the position with her same qualifications, re-advertising for the same position and later hiring a cisgender male. The Complainant contends that she was subjected to disparate treatment in Respondent's processing of her application for employment, wrongly being made the subject of a search of her gender status and appearance, subjected to different and stricter standards for employment with the Respondent as compared with the cisgender male applicant, and that she was not meaningfully interviewed by the Respondent's hiring representatives and agents, Mr. Kevin Postalwait, Respondent's Chief Public Defender and Mr. Andrew Vodden, Respondent's Deputy Chief Public Defender. Complainant contends that she is entitled to relief as proscribed under the Act, and applicable regulation, due to Respondent's unlawful discrimination, and rejection of her employment application, including lost back pay wages, with prejudgment interest, plus incidental damages, attorneys' fees, and costs and entry of a cease and desist order including requiring implementation of "diversity" sensitivity training to stop the Respondent's discrimination practices.

**RESPONDENT'S VERIFIED ANSWER WITH ATTACHMENTS/AFFIRMATIVE DEFENSES:**

By its Verified Answer, filed February 14, 2020, the Respondent admits that the Complainant is a "person" within the meaning of the WVHRA, W.Va. Code § 5-11-3(a) and that Respondent is both a "person" and "employer" within the meaning of the WVHRA, W.Va. Code § 5-11-3(a) and (d), that the Complainant had initiated his complaint for discrimination, based upon sex, female, due to rejection of Complainant's application for employment, but alleges that the Complainant was unqualified for the position of Assistant Public Defender. Respondent admits that after it rejected

Complainant's application for employment, that it re-advertised the subject position for hire, after the only other applicant for the position turned down the Respondent's offer of employment. Respondent denies that Complainant had been discriminated against in violation of the West Virginia Human Rights Act "because of her sex". Joint Ex. Notebook, pp. 46-56.

Attachments made part of the Respondent's *Verified Answer* included additional statements made by its agents on its behalf and also exhibits, all treated herein as affirmative defenses, consisting of the following:

- (1) Respondent's "Narrative" represents that the Complainant was not offered the subject advertised position because of "poor references, lack of experience, poor presentation, and an interview that made it clear that Complainant was not qualified for the open Assistant Public Defender position".
- (2) Respondent's "Narrative" specifically represents that "[t]he Public Defender Corporation for the Fifth Judicial Circuit of West Virginia makes its employment decisions based "entirely" on the qualifications of the candidate for open positions and that it does not discriminate on any basis."
- (3) Respondent's "Narrative" further states that **following the invitation to interview and prior to the interview date**, employees of the Respondent began preparing for the Complainant's interview, which included a search for the Complainant's social media accounts, **contacted other attorneys who had worked with the Complainant in a professional capacity** and inquired about the Complainant with another employee of the Respondent who had been a classmate of the Complainant.
- (4) The Respondent's "Narrative" notes that by Respondent's review of the Complainant's social media account, the Complainant "clearly presents publicly to be male".
- (5) The Respondent noted further in its "Narrative", that a secretary for a Circuit Judge, was unwilling to make a positive employment recommendation for the Complainant, and that the secretary refused to put Respondent's representative, Mr. Postalwait, through to speak with the Circuit Judge.
- (6) The Narrative notes further that the Complainant's resume did not indicate appearances by Complainant in court, "an essential requirement of the advertised position".
- (7) Included with the exhibits attached to its *Verified Answer*, are undated social media postings of the Complainant, represented by the

Respondent including copies of pictures of the Complainant in which Complainant “clearly presents publicly to be male”.

- (8) The Respondent attached to its *Verified Answer*, a document, represented by Respondent to be a “news article”, dated October 11, 2019, a date following the Complainant’s application and rejection for employment, and following the filing of the Complainant’s complaint herein, referencing an incident at a Planet Fitness Gym, involving an alleged “transgender man”, Robb Livingood.
- (9) Also included with the Respondent’s *Verified Answer* are screenshots of a Facebook posting allegedly made by Complainant, appearing to be dated January 14, 2020, represented by Respondent as intimating the Complainant’s complaint to be a complaint of transgender discrimination, noting that the Complainant was looking for an attorney “to champion the cause of gender minorities in West Virginia”, Respondent, asserting that such post provides “strong evidence” that the Complainant’s complaint alleges transsexual discrimination, under the “guise” of gender discrimination, and
- (10) Respondent contends further that “...transsexual individuals are not a protected class under the West Virginia Human Rights Act”.

### III.

#### **SUMMARY OF ADMINISTRATIVE LAW JUDGE’S FINAL DECISION**

The following is a summary of the undersigned’s *Final Decision* regarding the Complainant’s complaint against the Respondent for disparate treatment employment discrimination based upon sex. A further in-depth discussion of the undersigned’s analysis of the issues and criteria applied in arriving at the undersigned’s decision on each of the following issues and criteria applicable to this decision will follow the undersigned’s Findings of Fact.

#### **JURISDICTION AND PROTECTED STATUS:**

In the proceedings held in this matter, the Respondent initially challenged the Human Rights Commission’s jurisdiction to adjudicate the Complainant’s Complaint and the Complainant’s protected status under the provision of the West Virginia Human Rights Act.

In a previous Order entered herein, on December 10, 2020, hereby reaffirmed and made part of this *Final Decision* by reference, this Tribunal denied the Respondent’s Initial and *Amended Motions to Dismiss the Complainant’s Complaint*, in which the Respondent asserted lack of the Commission’s jurisdiction due to an alleged absence

of Complainant's protected status under the West Virginia Human Rights Act (WVHRA), on the basis of "sex" arising from the Complainant's gender identity, as transgender.

In the aforementioned Tribunal's decision of December 10, 2020, the undersigned held the Commission to have jurisdiction of this matter and the Complainant to have the required protective status under the Act, "because of sex", on the basis of her transgender status, and for gender stereotyping by the Respondent for her non-conforming or non-stereotypical appearance as male, when being female. The undersigned's holding was based upon decisions of the United States Supreme Court of Appeals in the cases of *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020), a decision of the United States District Court for the Southern District of West Virginia *Jarrell v. Hardy Cellular Tel. Co.*, No. 2:20-cv-00289, 2020 U.S. Dist. LEXIS 129436, (S.D. W.Va. July 22, 2020) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

In the decision of United States Supreme Court of Appeals, in *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020), involving the issue of protective status and clarification of the definition of discrimination "based upon sex", under the provisions of Title VII, Civil Rights Act of 1964, as amended, the Court made clear that the protected class of "sex" included discrimination based upon gender identity and/or sexual orientation.

Specifically, the *Bostock* Court held, as follows:

"[Title VII's] message for our cases is equally simple and momentous: **an individual's homosexuality or transgender status is not relevant to employment decisions.** That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." (Emphasis added).

*Bostock*, at 1741.

In *Bostock*, the Court also held that under its earlier decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), an employee can also prevail on an action for discrimination under Title VII, for discrimination based on sex, by showing that a challenged employment decision was based on a sex stereotype and consequently based on sex. *Price Waterhouse* at 251.

In *Price Waterhouse*, the United States Supreme Court noted that while sex stereotypes do not inevitably prove that gender plays a part in a particular employment

decision, it “can certainly be evidence that gender played a part”. *Id.* at 251, 109 S.Ct. 1775. The *Price Waterhouse* Court acknowledged further that there may be cases in which a gay, lesbian, or **transgender** individual can make a claim based on sexual stereotyping. *Id.* at 294, 109 S.Ct. 1775.

The undersigned’s previous holding regarding the Commission’s jurisdiction and Complainant’s protected status in the decision of December 10, 2020, was also based upon a decision of the United States District Court for the Southern District of West Virginia, entered in *Jarrell v. Hardy Cellular Tel. Co.*, No. 2:20-cv-00289, 2020 U.S. Dist. LEXIS 129436, (S.D. W.Va. July 22, 2020). In *Jarrell*, a case transferred to the District Court from the Circuit Court of Kanawha County, West Virginia, involving a claim for discrimination in employment by a same sex couple, under the West Virginia Human Rights Act, the Honorable Irene Berger, Judge, held that the aforementioned *Bostock* decision applies to cases of employment discrimination, based on sex, under the West Virginia Human Rights Act, providing both jurisdiction and protected class status for discrimination in employment claims based upon gender identity and sexual/gender orientation.

Because of the foregoing decisions of the United States Supreme Court in *Bostock* and *Price Waterhouse* and of the United States District Court for the Southern District of West Virginia in *Jarrell*, and due further to the consistent following of Title VII federal case law, by the West Virginia Supreme Court of Appeals, when determining violations of the West Virginia Human Rights Act, the undersigned concluded and hereby reaffirms his Order of December 10, 2020, finding that the Commission has jurisdiction to adjudicate Mr. Livingood’s claim of unlawful discrimination based upon sex, under the West Virginia Human Rights Act.

**DISPARATE TREATMENT EMPLOYMENT DISCRIMINATION THREE STEP INFERENCEAL PROOF FORMULA:**

In its landmark decision in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 668 (1973), the United States Supreme Court of Appeals explained that an action for disparate treatment employment discrimination, as brought here, may be proven under a three-step inferential proof formula. This formula consists first, in the Plaintiff/Complainant establishing a *prima facie* case of unlawful, intentional employment discrimination, followed at the second step, by the Respondent’s articulation of one or more legitimate nondiscriminatory reasons for its decision

adversely affecting the Complainant, and, upon Respondent so doing, and at the third step, the Complainant is provided the opportunity to establish, by a preponderance of the evidence, that the Respondent's articulated reasons were not the true reason(s) for the decision, but were pretext or coverup for intentional discriminatory motive. *Id.* at 802.

The West Virginia Supreme Court of Appeals has adopted the above *McDonnell Douglas* formula for purposes of determining violation of the West Virginia Human Rights Act for a disparate treatment discriminatory employment decision through circumstantial evidence. *Conaway v, Eastern Associated Coal Corporation*, 178 W.Va. 164, 358 S.E.2d 423 (1986); *Syl. Pt.3, Shepherdstown VFD v. W.Va. Human Rights Comm'n* 172 W.Va. 627, 309 S.E.2d 342 (1983).

#### **CRITERIA FOR ESTABLISHMENT OF A PRIMA FACIE CASE OF DISPARATE TREATMENT EMPLOYMENT DISCRIMINATION BASED UPON SEX:**

##### **A. *McDONNELL DOUGLAS* CRITERIA AND WEST VIRGINIA HUMAN RIGHTS ACT PRIMA FACIE CASE CRITERIA IN FAILURE TO HIRE CASES**

Although the aforementioned *McDonnell Douglas* case is often cited for the general rule for proving a *prima facie* case of unlawful employment discrimination as requiring the Complainant to establish by a preponderance of the evidence (1) that he or she is a member of a protected class, (2) that the Respondent made an adverse employment decision concerning such individual's employment, and (3) "but for" the Complainant's protective status the Respondent's adverse decision would not have been made, the United States Supreme Court and the West Virginia Supreme Court of Appeals, have made clear that this general rule is not inflexible and that the elements necessary to make a *prima facie* case of disparate treatment employment discrimination will vary according to the circumstances of each case, specifically in "failure to hire cases", as is involved here. *McDonnell Douglas Corporation v. Green*, 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13. (1973)

In *McDonnell Douglas*, the U.S. Supreme Court held that one way to make a *prima facie* case in a racial failure to hire employment case is for the plaintiff to show (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants, (3) that, despite his qualifications, he was rejected, and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of Complainant's qualifications. *Id.* at 1824. Likewise, the West Virginia Supreme Court of Appeals has adopted the above stated

*McDonnell Douglas* criteria for establishing a *prima facie* case in failure to hire cases. *Syl. Pt. 1, City of Ripley v. West Virginia Human Rights Commission*, 179 W.Va. 375, 369 S.E.2d 226 (1988), *Conaway v. Eastern Associated Coal Corporation*, 178 W.Va. 164, 358 S.E.2d 423 (1986).

Mr. Livingood filed his employment discrimination complaint against the Respondent, under the West Virginia Human Rights Act, W.Va. Code §5-11-1 *et seq.*, upon a disparate treatment theory, for its failure to hire him because of sex, a protected class, and specifically due to his transgender status as a transgender male, as compared with an applicant outside that protected class, a less qualified “cisgender” male who was offered the position sought by the Complainant. As noted hereinabove, the protected classes set forth in the provisions of the West Virginia Human Rights Act (Act), West Virginia Code, §§ 5-11-2 and 5-11-9(1), include employment discrimination based upon race, religion, color, national origin, ancestry, sex, blindness, disability or familial status. *Conaway v. Eastern Associated Coal Corporation*, 178 W.Va. 164, 358 S.E.2d 423 (1986); *Syl. Pt. 3, Shepherdstown Volunteer Fire Dept. v. West Virginia Human Rights Commission*, 172 W.Va. 627, 629, 309 S.E.2d 342, 344 (1983).

**B. COMPLAINANT LIVINGOOD’S PRIMA FACIE CASE OF DISPARATE TREATMENT EMPLOYMENT DISCRIMINATION UNDER PROVISIONS OF THE WEST VIRGINIA HUMAN RIGHTS ACT**

The undersigned hereby holds that Complainant Livingood has established, by a preponderance of the evidence, a *prima facie* case of disparate treatment employment discrimination, based upon sex, against the Respondent, under the provisions of the West Virginia Human Rights Act (Act), following the *McDonnell Douglas* criteria, resulting in the Complainant’s entitlement to a rebuttable presumption of Respondent’s violation of the West Virginia Human Rights Act. The criteria met by the Complainant here, in this “failure to hire” case, under applicable West Virginia Human Rights statutory and case law are that (a) Complainant has protected status under the Act on the basis of “sex” due to gender identity, in this case being transgender, and for gender stereotyping on the basis of Complainant’s appearance as male when being female, (b) that the Complainant applied for and was fully qualified for the position, of employment as Assistant Public Defender, as advertised by the Respondent, (c) that in spite of the Complainant being fully qualified for the position for which Complainant applied, and, in fact, the most qualified of the two applicants for such position, the Respondent offered the position to

the second, lesser qualified applicant, a cisgender male, who declined the position, leaving the Complainant as the only qualified applicant, and (d) that following the Respondent's denial of the Complainant's application for employment, although Complainant being fully qualified, and the Complainant being the only remaining qualified applicant, Respondent re-advertised for the same position seeking an applicant with the Complainant's qualifications, and that it subsequently hired for such position a cisgender male.

### **PROTECTED STATUS**

As noted above in the undersigned's holding herein regarding Jurisdiction and Protected Status and is found in the undersigned's aforesaid Order of December 10, 2020, denying the Respondent's *Motions to Dismiss* for Complainant's failure to establish being a member of a protected class, Complainant has protected status on the basis of sex, for both gender identity discrimination and gender stereotyping.

### **COMPLAINANT'S APPLICATION AND QUALIFICATIONS**

The Respondent advertised for the subject open position of Assistant Public Defender, posting an advertisement for the same on January 11, 2018. The advertisement read as follows:

"The Public Defender Corporation for the 5<sup>th</sup> Judicial Circuit seeks applications for the position of Assistant Public Defender. The available position will work primarily out of Roane County, West Virginia and will be responsible for misdemeanors, juvenile abuse and neglect and juvenile delinquencies. Must be licensed to practice in the State of West Virginia. Please submit resume and cover letter to Kevin Postalwait, P.O. Box 797, Ripley WV 25271".

Comp. Ex. G; Hrg. Tr. p. 164: 15-19 (Vodden).

No other qualifications were noted in the Respondent's posted advertisement.

After the Complainant filed his complaint in this matter, the Respondent in its *Verified Answer to the Complainant's Complaint* included a "Narrative" setting forth an additional requirement for qualification, stating that courtroom experience was also considered an "essential requirement" for the advertised position.

On January 13, 2018, the Complainant forwarded an application to the Respondent for its advertised position. The Complainant provided with her application, a cover letter, a resume of her background and qualifications, together with legally

related professional references, with contact information, those references including former West Virginia Supreme Court Justice, the Honorable Larry V. Starcher, Ms. Cathy McConnell, Esq., Executive Director West Virginia Senior Legal Aid, LLC, and Complainant's prior legal supervisor, and Ms. Mildred Biggs, co-worker staff attorney, for West Virginia Senior Legal Aid, LLC. The Respondent's representatives, Mr. Postalwait, its Chief Public Defender, and Mr. Vodden its Deputy Chief Public Defender, admitted that these references, were intentionally not contacted by the Respondent. As shown by the evidence, the Complainant's references were obvious sources of proof of the Complainant's qualifications. One of them, Ms. Mildred Biggs, Esq., a co-employee of the Complainant testified in the public hearing establishing the Complainant's required experience and qualifications.

The Complainant's resume and undisputed testimony establishes that she was a May 2012, graduate of the West Virginia University College of Law, that she had self-employment legal experience, post-graduation, as a licensed attorney in West Virginia, then known under the name Rachel Livingood, and that she performed criminal defense work, primarily in juvenile criminal cases, child support cases, divorce and domestic violence cases, from November 2012 to May 2014, specifically including courtroom experience in both Magistrate and Circuit Court. After taking a job to teach in Japan for a year, the Complainant accepted employment as a staff attorney with West Virginia Senior Legal Aid LLC, from August 2015 to December 2017. Comp. Ex. D; Hrg. Tr. pp 43: 10-12 & 20-24, 44:1-24, 45:1-25 & 46:1-24.

Mr. Postalwait, the Respondent's Chief Public Defender, admitted in his testimony that he read Robb Livingood's resume and, based upon the same, offered him a job interview, as Mr. Postalwait thought that "he certainly met the minimum qualifications for an interview". Hrg. Tr. p. 225:5-17. The Complainant was scheduled for interview by the Respondent on January 24, 2018. There were only two applicants for the position to the Respondent's above noted advertisement, the Complainant and a cisgender male, Mr. Alan Nichols. Although Mr. Postalwait testified that he and Respondent knew of the Complainant's transgender status before she was offered an interview, the evidence, including the Respondent's Verified Answer, demonstrates that they did not.

A preponderance of the evidence, as further noted herein, establishes that the Complainant was fully qualified for the open position of Assistant Public Defender, and

had the experience sought by the Respondent per the requirements of its advertisement for the position, including the later added qualification of courtroom experience.

The only other applicant at the time of the Respondent's initial hiring process for the position of Assistant Public Defender was Mr. Alan Nichols. The parties jointly stipulated that Mr. Nichols was a cisgender male. Mr. Nichols was interviewed by the Respondent on the same day as the Complainant, January 24, 2018. The evidence of Mr. Nichols qualifications, or lack thereof, for the subject position is based upon his resume and admission by the Respondent's representative, Mr. Vodden, that Mr. Nichols did not have any courtroom or other legal experience since his graduation from the University of Toledo, Ohio law school. Mr. Nichols' resume does not reflect admission to the Ohio state bar after his graduation nor any legal experience either in the state of Ohio or in the state of West Virginia since his graduation from law school. While Mr. Nichols' resume does reflect that he was admitted to practice law in the state of West Virginia in 2017, he lists no history of employment, or practical experience or courtroom experience, as an attorney in West Virginia, at the time of his applying for the Respondent's advertised position of Assistant Public Defender. Mr. Nichols was clearly the less qualified of the two applicants per the Respondent's requirements.

#### **RESPONDENT'S REJECTION OF THE COMPLAINANT'S APPLICATION AND REPOSTING THE POSITION**

A preponderance of the evidence further establishes that in spite of the Complainant being fully qualified for the open position of Assistant Public Defender and being the only remaining applicant after Mr. Nichols' declined the Respondent's offer of employment as Assistant Public Defender, the Respondent rejected the Complainant and continued to seek an applicant with the qualifications already met by the Complainant and subsequently hired a cisgender male.

#### **PRIMA FACIE CASE ESTABLISHED**

On the basis of the record in its entirety and upon a preponderance of the evidence, it is concluded that the Complainant met the criteria for establishing a prima facie case of disparate employment discrimination based upon sex, specifically her gender identity as transgender and upon Respondent's impermissible gender stereotyping of the Complainant based upon her appearance.

#### **RESPONDENT'S ARTICULATED REASONS FOR REJECTING THE COMPLAINANT'S APPLICATION FOR EMPLOYMENT**

Under the second step of the Complainant establishing, by a preponderance of the evidence, a *prima facie* case of employment discrimination, under the West Virginia Human Rights Act, the employer may rebut the resulting inference/presumption of the employer's violation of the Act, by articulating its legitimate non-discriminatory reason(s) for its adverse employment decision. At this step, the Respondent employer's burden of proof is only one of production, or articulation of its reasons, and not one of persuasion, but it is required to set forth, clearly, through admissible evidence, its legitimate non-discriminatory reasons for its decision, *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1093-1095, 450 U.S. 248, 67 L.Ed.2d 207. The employer's articulated reasons should "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext". Cases analyzed under the aforementioned *McDonnell Douglas* test often turn on the credibility of the explanation given by the employer. *Burdine. Id.* Courts are also skeptical of alleged reasons which are not asserted until the latter stages of a discrimination dispute. *Gallo v. John Powell Chevrolet, Inc.* 61 Fair Empl. Prac. Case 1121, 1129, (MD. PA. 1991).

#### **RESPONDENT'S FIRST ARTICULATED REASONS FOR REJECTION OF THE COMPLAINANT'S APPLICATION FOR EMPLOYMENT**

The reasons first articulated by the Respondent in its "Narrative" made part of its Verified Answer, as constituting its legitimate, non-discriminatory reasons for rejection of the Complainant's application for employment as an Assistant Public Defender, were that the Complainant had "poor references", "lack of experience", "poor presentation", and "an interview that made it clear Complainant was not qualified" for the Assistant Public Defender position.

With regard to the Respondent's assertion that the Complainant was rejected because of "poor references", Mr. Postalwait testified that they intentionally did not contact the Complainant's professional legal references noted in the Complainant's resume but that he, Mr. Postalwait, "had reached out to folks and they did not give a positive recommendation" so, in his mind that seemed like a "poor reference" Hrg. Tr. 241: 13-15.

The evidence taken in the public hearing reflects that the first of the three individuals Mr. Postalwait contacted who he took as providing a "poor reference" was a female attorney employee in the Respondent's office who remembered a Rachel Livingood, but not a Robb Livingood, who had graduated with her from law school. Hrg. Tr. p. 207: 8-19. No other information was noted as having been provided by such

employee, and specifically nothing regarding the Complainant's qualifications for the position advertised.

The second individual said to have provided Mr. Postalwait a negative reference of the Complainant was an employee of the Lewis County Magistrate's office who, without giving any opinion regarding the Complainant, simply transferred Mr. Postalwait's call to the Circuit Judge's office. Mr. Postalwait stated he did not know if it was taken as a negative reference but that he was "shocked" by the lack of comment from the Magistrate's office and that this was taken, by him, as a "red flag" regarding the Complainant. Hrg. Tr. 248: 18– 24 & 249:1-3.

The third and last of the individuals Mr. Postalwait testified that he contacted, who he stated provided him negative references of the Complainant, was said by him to be a secretary to a Circuit Judge, who would not put through Mr. Postalwait's call to the Circuit Judge and said only that she believed Rachel and Robb Livingood were the same. Mr. Postalwait stated that he took his contact with the secretary as indicating that "they probably didn't view Mr. Livingood favorably, for whatever reason". Hrg. Tr. 210: 14-15.

Mr. Vodden testified that after Mr. Postalwait's phone conversation with the Circuit Judge's secretary, Mr. Postalwait told him that "the secretary had declined to offer a recommendation or really anything at all about how Mr. Livingood had performed". Hrg. Tr. p. 181: 19–24.

As to the alleged "lack of experience" nothing needs to be noted further here as the Complainant's qualifications for the position referenced above clearly demonstrate the opposite.

The Respondent's assertion that the Complainant's presentation and interview demonstrated her lack of qualification for the position is rejected as lacking sufficient clarity and credibility to arrive at an inference regarding the legitimacy, or non-discriminatory nature, of such reason. Both parties have offered differing testimony regarding the Complainant's interview, with the Complainant testifying that she was treated and interviewed poorly and that Mr. Postalwait and Mr. Vodden lost interest in hiring her upon viewing her masculine appearance, that there was little conversation and that they didn't ask her any follow-up questions. Both Mr. Postalwait and Mr. Vodden indicated their opinion that the interview was unsatisfactory, Mr. Vodden stating, in fact, that he considered it the worst interview in which he had been involved for the

Respondent but when asked, at the hearing, if he asked follow-up questions to the Complainant; he testified that he didn't specifically remember the interview. Hrg. Tr. pp. 177: 1-16 & 192: 10-22. There is no manner in which the undersigned can reasonably reach or make an inference as to the quality of the interview, absent notes or a recording of the interview, which were not apparently taken by the Respondent's representatives, or nor any way to determine that the Complainant made a poor presentation given the Respondent's misrepresentations as to the Complainant's qualification, experience or poor references.

#### **ADDITIONAL REASONS ARTICULATED FOR RESPONDENT'S ADVERSE DECISION**

Among other multiple reasons, coming in late to the proceedings, provided by the Respondent for rejecting the Complainant's application for employment, the Respondent proffered that the Complainant wore wrinkled clothes, that she did not dress professionally, and that she met with the disfavor of the Respondent's legal secretary.

These additional reasons will be discussed later in this decision as being rejected on the basis of lack of clarity, relevancy, their lateness, their believability and their pretextual nature when considering the Respondent's pre-interview research into the Complainant's gender identity and masculine appearance, when being female.

#### **COMPLAINANT'S REBUTTAL**

Upon articulation by the Respondent, at the second step of the *McDonnell Douglas* criteria for establishing, by circumstantial evidence, violation of the West Virginia Human Rights Act for disparate employment discrimination, the Complainant, at the third step of such criteria, may rebut the employer's proffer of legitimate non-discriminatory reasons for its adverse action toward the Complainant by establishing by a preponderance of the evidence, that the reasons proffered by the Respondent are pretext and not the true reasons for the Respondent's action.

Pretext, as it relates to unlawful discriminatory practices under the West Virginia Human Rights Act is defined as meaning "an ostensible reason or motive assigned as a color or cover for the real reason or motive, or false appearance or pretense." *Davis v. Leonard Aluminum Utility Buildings, LLC*, United States District Court, S.D. West Virginia, 2021, WL4898070, (Oct. 2021) (citing *Morris Memorial Convalescent Nursing Home, Inc. v. W.Va. Hum. Rts. Comm'n*, 431 S.E.2d 353 (W.Va. 1994)); *Mayflower Vehicle Sys., Inc. v. Cheeks*, 629 S.E.2d 762, 773 (W.Va. 2006), *West Virginia Institute*

*of Technology v. West Virginia Human Rights Commission*, 1814 W.Va. 525, 383 S.E.2d 490 (1989).

The record here establishes that after both receiving the Complainant's application for its advertised position of Assistant Public Defender and scheduling the Complainant for an interview, and rather than checking the Complainant's qualifications by contacting attorneys with whom the Complainant had worked, as the Respondent asserted that it did by its "Narrative" attached to its Verified Answer, individuals in the Respondent's office including its Chief and Deputy Chief Public Defender, became involved in an irrelevant and impermissible inquiry into the Complainant's gender focused on her transgender status and non-conforming masculine appearance rather than her legal experience and qualifications. *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 1742, 207 L.Ed.2d 218 (2020).

Mr. Vodden, the Respondent's Deputy Chief Public Defender testified that as a result of his inquiry with another employee in the Respondent's office who remembered a Rachel Livingood and not a Robb Livingood in law school, began conducting research of the Complainant's social media, which focused on her gender identity, including his obtaining copies of photographs of the Complainant's appearance as male rather than female, which he then provided to the Respondent's Chief Public Defender, Kevin Postalwait, and which information thereafter became known to other employees in the Respondent's office, including the Respondent's receptionist and legal secretary, Ms. Sandra Fisher, whose negative opinion of the Complainant was relied upon in the Respondent's hiring decision.

Ms. Fisher, according to her testimony, spoke with other employees of the Respondent regarding the Complainant's gender identity and gender transitioning, testifying that they were aware of some "transitioning" and who after a brief meeting with the Complainant taking place immediately before the Complainant's interview, advised, Mr. Postalwait and Mr. Vodden, of her negative opinion of the Complainant's fitness for the position which she admitted was based solely upon the Complainant's appearance. Hrg. Tr. p. 154: 1-24, 155:2-12, 175: 19-24.

The research and consideration by the Respondent of the Complainant's transgender status and non-conforming male appearance when making its hiring decision, are found, in accordance with the aforementioned United States Supreme Court decisions in *Bostock* and *Price Waterhouse*, and United States District Court for the

Southern District of West Virginia, in *Jarrell*, involving the West Virginia Human Rights Act, to be impermissible and irrelevant to employment hiring decisions in employment discrimination cases. It is further found that such focus compromised and corrupted a proper, equal, and fair evaluation of the Complainant's fitness for the advertised position, and causes too much doubt to accept the Respondent's multiple reasons for its adverse decision to constitute legitimate or non-discriminatory reasons for the same.

Based upon the record in its entirety, to be more fully set forth in the undersigned's Findings of Fact, below, and the following Discussion section, the undersigned concludes that the reasons articulated by the Respondent were not clearly stated, were pretextual and not found to be credible legitimate non-discriminatory reasons for the Respondent's decision not to hire the Complainant for the position of Assistant Public Defender. It is therefore concluded that the Complainant's prima facie case of Respondent's intentional and unlawful discriminatory decision not to hire the Complainant was not successfully rebutted by the Respondent's articulation of its reasons for failing to hire the Complainant and that the Complainant has established her entitlement to relief under the West Virginia Human Rights Act for unlawful discrimination based upon sex.

#### **ALTERNATIVE LIABILITY FINDING: MIXED MOTIVE CASE AND MOTIVIATING FACTORS PLAYING A ROLE IN THE RESPONDENT'S ADVERSE DECISION**

The U.S. Supreme Court and West Virginia Supreme Court of Appeals have both held that in mixed motive cases, where both legitimate and unlawful discriminatory factors are established by the evidence for the Respondent's adverse decision, the plaintiff is not required, in proving unlawful discrimination, to show that employer's proffer of legitimate non-discriminatory reasons for its adverse action were false or played no role in the employment decision but is only required to show that a prohibited reason was a **motivating factor** in the Respondent's making of the adverse decision affecting the Complainant and that such prohibited factor had determinative influence on the outcome. *Diamond v. Colonial Life & Accident Insurance Company*, 416 F.3d 310 (4th Circuit, 2005); *Hill v. Lockheed Martin Logistics Management, Incorporated*, 354 F.3d 277, U.S. Court of Appeals, Fourth Circuit, (2004); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996); *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 465 S.E. 2d 399 (1995); *Hanlon v. Chambers*, 195 W.Va. 99, n. 3, 464 S.E.2d

741 (1995); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 249, 109 S.Ct. 1775; 1790, 104 L.Ed.2d 268 (1989).

In Complainant Livingood's case, although the undersigned has concluded that the Complainant has proven a *prima facie* case of disparate treatment employment discrimination against the Respondent, and that the Respondent's articulated reasons for its adverse decision were pretextual and/or lacking in sufficient clarity and credibility and that it had failed to rebut the presumption of Respondent's violation of the West Virginia Human Rights Act on the basis of sex, in the alternative, the undersigned hereby finds that the Complainant has established, by a preponderance of the evidence, Respondent's violation of the Act under a mixed motive liability theory. The Complainant's gender identity, as transgender, and her non-conforming, non-stereotypical appearance as male, when being female, under a mixed motive theory of liability, are found to have been motivating factors that played a part and were determinative factors of the Respondent's adverse decision not to hire her for the position of Assistant Public Defender. Consequently, the Respondent is therefore found liable for violation of the West Virginia Human Rights Act for disparate discrimination against the Complainant based upon sex.

Additionally, the undersigned finds that had it not been for the Respondent's improper research and focus by its employees and agents, upon the Complainant's gender identity and non-conforming, non-stereotypical appearance, as male, and its unequal and discriminatory treatment of the Complainant with regard to assessment of her qualifications and fitness for employment, as compared to a less qualified cisgender male, in rendering its decision not to hire the complainant, she would have been hired or at least offered the advertised position of Assistant Public Defender.

#### **DAMAGES AND OTHER RELIEF**

The Respondent is found to be liable for damages and expenses sustained by the Complainant by reason of its violation of the West Virginia Human Rights Act, including lost wages, prejudgment interest, incidental damages, attorneys' fees and costs, and subject to a cease-and-desist order also requiring anti-discrimination training, all as set forth below and in this Decision's "Relief and Order".

**IV**  
**FINDINGS OF FACT**

Upon review of the record in its entirety, including but not limited to the Complainant's and Respondent's pleadings, the exhibits attached thereto, the undersigned's previous Order issued December 10, 2021, denying the *Respondent's Motions to Dismiss*, for lack of jurisdiction and lack of protected status for the Complainant, the parties joint stipulations of fact, the transcript of the March 10, 2021, Public Hearing in this matter, and the parties proposed findings of fact, the undersigned enters the following Findings of Fact:

1. The Complainant is and was, at all times pertinent to this action, a "person" within the meaning of the West Virginia Human Rights Act, W.Va. Code §5-11-3(a).
2. The Respondent is and was, at all times pertinent hereto, a "person" and an "employer" within the meaning of the Act. W.Va. code §5-11-3(a) and 3(d).
3. The West Virginia Human Rights Commission has personal and subject matter jurisdiction to adjudicate Mr. Livingood's complaint of disparate treatment employment discrimination based upon sex, under the provisions of the West Virginia Human Rights Act (WVHRA), specifically including discrimination for failing to hire the Complainant because of the Complainant's gender identity as transgender, and/or non-conforming, non-stereotypical appearance as male, when born female.
4. Complainant, at birth, was assigned the gender identity, female, and given the name Rachel Livingood. Hrg. Tr. p. 31:18-20.
5. The Complainant, as female, under her given name of Rachel Livingood, attended and graduated from the West Virginia University College of Law, in May 2012, with a Juris Doctorate degree.
6. Following her graduation from law school and upon formal admission to practice law in the state of West Virginia, the Complainant engaged in the solo practice of law, appearing professionally and publicly as female.
7. The Complainant began transitioning from female to male in 2015, although retaining her name Rachel Livingood, both publicly and professionally as a practicing attorney.
8. In 2017, the Complainant, legally obtained a change in her name from Rachel Livingood to Robb Livingood, by Order of the Circuit Court of Monongalia County, West Virginia, entered November 29, 2017. Joint Ex. Notebook, p. 74; Comp. Exh. B.

9. Although legally changing her name to Robb Livingood in November 2017, the Complainant continued to identify herself as female, both personally and professionally, until on or about June 13, 2018, when announcing by social media post that she was “coming out” as transgender male professionally. Hrg. Tr. pp. 37: 16-24 & 38: 1-9; Comp. Ex. C.

10. The Complainant after filing an application for employment as an Assistant Public Defender with the Respondent on January 13, 2018 and being granted an interview on the basis of her listed qualifications, was interviewed by the Respondent on January 24, 2018, and rejected for employment.

11. On June 18, 2018, Complainant Robb Livingood, filed a complaint with the West Virginia Human Rights Commission, alleging a claim of disparate employment discrimination against the Respondent, Public Defender Corporation, Fifth Judicial Circuit, for failure to hire her for its advertised position of Assistant Public Defender, Complainant Livingood alleging discrimination on the basis of sex, due to her gender identity as transgender, and due to her non-stereotypical appearance as a masculine appearing female.

12. At all times pertinent to the incident alleged in the Complainant’s complaint, the Complainant physically presented, dressed, and identified as masculine female. Hrg. Tr. p. 32: 1-2.

13. The parties have stipulated, for purposes of this action, that the word “transgender” is taken to be an umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. Hrg. Tr. p.134: 9-19.

14. Also, by joint stipulation, the parties agreed to a definition of the word “cisgender”, for the purposes of this matter, to be “a term for people whose gender identity and/or gender expression aligns with their sex assigned at birth”. Hrg. Tr. p. 134:9-19,

15. On January 11, 2018, the Respondent posted an advertisement seeking applicants for a vacant position of Assistant Public Defender for the Fifth Judicial Circuit of West Virginia. Hrg Tr. pp. 163: 23 -24, 164: 2–3, 206:11–16. Comp. Exh. G.

16. The Respondent’s subject job advertisement for the position of Assistant Public Defender stated as follows: “The available position will work primarily out of Roane County, West Virginia, and will be responsible for misdemeanors, juvenile abuse and

neglect, and juvenile delinquencies. Must be licensed to practice in the State of West Virginia". Comp. Exh. G.

17. No other qualifications were made part of the Respondent's job advertisement.

18. On January 13, 2018, the Complainant filed her job application for the above referenced attorney staff position with the Respondent, together with a cover letter, and resume, specifying her qualifications for the position and including therewith her professional legal references from three individuals, all being practicing lawyers in the state of West Virginia, with their contact information, supportive of her qualifications for the position advertised.

19. The Respondent received a total of two applications from its posting of January 11, 2018, the Complainant, Robb Livingood, gender identity masculine female, and Mr. Alan Nichols, a cisgender male. Hrg. Tr. pp. 164:22-24, 165: 1-4, 207: 2-4.

20. Mr. Postalwait, the Respondent's Chief Public Defender, being one of the two individuals on behalf of the Respondent who interviewed the two applicants for the above referenced position, testified in the Public Hearing, acknowledging that he read Complainant "Robb Livingood's" resume and based upon the same offered "him" a job interview, as he thought that "he certainly met the minimum qualifications for an interview". Hrg. Tr. p. 225:5-17.

21. Mr. Vodden, the Respondent's Deputy Chief Public Defender, and the second of the two of Respondent's representatives who formally interviewed the applicants, testified that an interview was offered to the Complainant on basis of the Complainant's resume which indicated that the Complainant "could be qualified" for the position. Hrg. Tr. p. 185:14-22.

22. Although Mr. Postalwait testified that the Complainant was not offered an interview until after Respondent had conducted a background search, including a social media search, of the Complainant by Mr. Vodden, the Respondent's Deputy Chief Public Defender, and consequently contends that the Respondent knew and was aware of the Complainant's transgender status at the time of offering her an interview, this testimony is proven by the record to be incorrect.

23. Respondent's "Narrative", attached to its Verified Answer, stated the Respondent received the Complainant's resume and cover letter on January 18, 2018, and that on January 19, 2018, Respondent e-mailed the Complainant inviting her to interview for the position on January 24, 2018. Joint Ex. Notebook, p.51

24. Respondent's "Narrative" states further that after receiving the Complainant's application and "[f]ollowing the invitation to interview and prior to the interview date, employees of the Respondent began preparing for the interview and that this preparation included a search for social media accounts, contacting other attorneys who had known and worked with the Complainant in a professional capacity, and inquiring about the Complainant with another employee of Respondent, who had been a classmate of the Complainant". Joint Ex. Notebook p. 51.

25. Mr. Postalwait testified that he first learned that the Complainant was transgender only after Mr. Vodden conducted a search of Mr. Livingood's social media, in which Mr. Vodden found different photos of the Complainant, which photos were provided to Mr. Postalwait and which Mr. Postalwait testified established the Complainant to be a transgender male. Hrg. Tr. p. 207: 8-19.

26. The above findings regarding when the Respondent first knew of the Complainant's transgender status are significant here, as the Respondent argues that it is entitled to an inference that its decision was not based on discrimination due to sex, because it knew the Complainant was transgender before it offered the Complainant an interview, an argument shown by the evidence to be incorrect, having no merit and consequently, no such inference is made.

27. Both applicants, the Complainant and Mr. Nichols, were interviewed by Respondent on January 24, 2018, in the Respondent's Ripley, West Virginia office.

28. The Complainant first appeared for interview on January 24, 2018, at the Respondent's Spencer, Roane County, West Virginia office, as directed in writing, by e-mail, from the Respondent, but upon Complainant's arrival at the Spencer office, Complainant Livingood was redirected to go to its Ripley, West Virginia office, for her interview. Hrg. Tr. p. 175:10-16; Comp. Exh. J.

29. There is no explanation in the record as to why the Complainant was directed in writing, first to travel to its Spencer, West Virginia office, when the second applicant was directed to the Ripley, West Virginia office for interview.

30. Mr. Nichols was interviewed on behalf of the Respondent by Mr. Postalwait and Mr. Vodden, first, followed by the Complainant. Hrg. Tr. p. 174:19-21.

31. The position of Assistant Public Defender was offered to Mr. Nichols by Mr. Postalwait and Mr. Vodden, Mr. Nichols declining the offer, leaving only the Complainant as the lone qualified applicant for consideration.

32. Rather than then offering the position to the Complainant, the only remaining applicant, the Respondent kept the position open and re-advertised the same position on February 12, 2018, Respondent continuing to seek an individual with qualifications met by the Complainant, for the position of Assistant Public Defender and subsequently hiring a cisgender male.

33. The Respondent's second posting for the position of Assistant Public Defender, states: "Assistant Public Defender (3276) Fifth Judicial Circuit Court Public Defender Corporation (Ripley, WV). The Public Defender Corporation for the Fifth Judicial Circuit seeks applicants for the position of Assistant Public Defender. The available position will work primarily out of Roane County, West Virginia and . . . view details". No details were provided for the record. Comp. Exh. K.

34. As there is no evidence in the record, either documentary or in testimony, indicating a change in the qualifications for the position made in the Respondent's second posting for the position of Assistant Public Defender, it is inferred that there were no changes to the qualifications for the position from first advertised.

35. Although the Respondent, in its "Narrative", stated that as part of its pre-interview process that its employees began preparing for the interview, such preparation including a search for social media accounts, contacting other attorneys who had known and worked with the Complainant in a professional capacity, the record clearly demonstrates that other than searching for information regarding the Complainant's gender identity, Respondent made no contacts with individuals Respondent knew, by receipt of the Complainant's resume, had such professional information, having either taught, worked with or supervised the Complainant with regard to her legal work.

36. Respondent intentionally chose not to contact the three professional references from the West Virginia legal community, provided in the Complainant's resume, including former West Virginia Supreme Court Justice, the Honorable Larry V. Starcher, who had personal knowledge of the Complainant from interactions with her in law school during courses that he taught, and contact with the Complainant's immediately preceding legal supervisor, Ms. Cathy McConnell, Esq., of West Virginia Senior Legal Aid, and Ms. Mildred Biggs, a co-worker at West Virginia Senior Legal Aid who were the latest attorneys to have professional contact and work with the Complainant on a daily basis, in a legal work atmosphere.

37. Instead of seeking out such professional references the Respondent contacted other individuals and relied upon the same as providing negative opinions of the Complainant, who failed to provide relevant information regarding her qualifications or any evidence of her legal performance.

38. Mr. Postalwait and Mr. Vodden testified that they both participated in the pre-interview investigation of the Complainant, which the evidence establishes as having focused on the Complainant's gender identity and appearance as male. Hrg. Tr. pp. 170: 8-17 & 171: 13-17.

39. Mr. Vodden testified that he first reached out to an employee in the Respondent's office whose time in law school at the WVU College of Law coincided with the Complainant's, and that while she did not remember a Robb Livingood, she reached out to another attorney, not of Respondent's office, who said she remembered a Rachel Livingood. Hrg. Tr. p. 170:8-17.

40. Mr. Vodden testified that with this information he started a social media search of the Complainant and that based on certain Instagram posts, as well as a "LinkedIn page", he believed that Rachel and Robb Livingood were the same person and that she was transitioning from female to male. Hrg. Tr. p. 171: 1-4 & 18-24.

41. Mr. Postalwait admitted in his testimony that a copy of social media pages provided him by Mr. Vodden gave him no insight to the Complainant's qualifications for the advertised position. Hrg. Tr. p. 226: 23-24 & 227: 1.

42. The Respondent's reasons given for not hiring the Complainant were set forth in Respondent's aforementioned "Narrative", that the Complainant had "poor references", "lack of experience", "poor presentation", and "an interview that made it clear Complainant was not qualified for the Assistant Public Defender position". Joint Ex. Notebook, p 52.

43. Mr. Postalwait, testified that by his comment contained in the Respondent's aforementioned "Narrative", that the Complainant had "poor references", he did not mean "poor references" referring to the references listed in the Complainant's resume itself, but that he "had reached out to folks and they did not give a positive recommendation" so, in his mind that seemed like a "poor reference" Hrg. Tr. p. 241: 13-15.

44. The record establishes that the individuals referenced by Mr. Postalwait consisted of (1) an employee in Respondent's office, (2) an unnamed employee of the Magistrate

Office in Lewis County, West Virginia, and (3) an unnamed Circuit Judge's secretary in Lewis County, West Virginia, none of whom expressed personal knowledge of the Complainant's legal performance or offered an opinion of the Complainant's legal skills, performance, or qualifications.

45. The employee of the Respondent, referenced by Mr. Postalwait in these Findings of Fact 43 and 44, as not having provided a positive reference for the Complainant, and taken by him as a "poor reference", was said by Mr. Postalwait to have advised Mr. Vodden only that she remembered a Rachel Livingood but not a Robb Livingood from law school. Hrg. Tr. p. 207: 8-20.

46. Review of the record in its entirety does not indicate anything reportedly said by such Respondent's employee to Mr. Vodden, regarding the Complainant's qualifications for the advertised position, or even of her performance in law school, but only of the identity of a Rachel Livingood in law school, and not a Robb Livingood.

47. Review of the record regarding Mr. Postalwait's telephone contact with the unidentified employee of Magistrate's Office, in Lewis County, West Virginia, reflects no comment made by the employee regarding the Complainant's qualifications but only that the Magistrate employee transferred Mr. Postalwait's call to a Circuit Judge's office, without comment, whereupon, Mr. Postalwait then spoke with an unidentified Circuit Judge's secretary.

48. Mr. Postalwait testified that the fact that the Magistrate's employee with whom he spoke, transferred his call without comment, which seemed unusual to him, by not providing an opinion with regard to the Complainant's performance. Hrg. Tr. p. 210:2-4.

49. Although Mr. Postalwait testified that he was "shocked" by the Magistrate's office transferring him to the Circuit Judge's office, without comment, and that it "raised a red flag" with regard to the Complainant, Mr. Postalwait stated that he didn't know if he would call it a negative reference and that there may have been another reason for the lack of comment. Hrg. Tr. pp. 248: 18-24 & 249: 1-3.

50. Upon review, the record reflects no information regarding the Complainant's qualifications for the position sought from Mr. Postalwait's contact with the Magistrate's Office in Lewis County, West Virginia, and no negative reference of the Complainant to have thereby been made or to be inferred.

51. Upon his telephone call being transferred by the Magistrate's Office to the Circuit Judge's Office, and in speaking with an unidentified secretary of an unidentified Circuit

Judge, the secretary declined to give Mr. Postalwait a reference for the Complainant, but indicated that she didn't know of a Robb Livingood and she didn't have a Rachel Livingood but thought it was the same person and declined to give a positive reference. Hrg. Tr. p. 210:5-12.

52. Mr. Postalwait testified that the lack of a positive reference from the Judge's secretary, meant to him that "they probably didn't view Mr. Livingood favorably, for whatever reason". Hrg. Tr. p. 210: 9-15.

53. Mr. Postalwait admitted that he didn't remember if the secretary said, specifically, that she wasn't willing to make a positive reference regarding the Complainant or whether she was choosing to make none at all and that "they basically didn't have much of a comment on him". Hrg. Tr. p. 230: 1 – 16.

54. Mr. Vodden testified that after Mr. Postalwait's phone conversation with the Circuit Judge's secretary, Mr. Postalwait told him that "the secretary had declined to offer a recommendation or really anything at all about how Mr. Livingood had performed". Hrg. Tr. p. 181: 19–24.

55. The undersigned finds no relevant or pertinent information regarding the Complainant's qualifications for the position sought from Mr. Postalwait's contact with the Circuit Judge's secretary and no negative reference of the Complainant to have thereby been made or to be inferred.

56. Mr. Postalwait testified further that the Circuit Judge's secretary also refused to put him through to the Circuit Judge, that he didn't know why, but could only speculate. Hrg. Tr. pp. 210: 24 & 211: 1-13.

57. Speculation is insufficient upon which the undersigned can infer a negative reference as to the Complainant's qualifications, consequently the undersigned finds no relevant information regarding the Complainant's qualifications for the position sought, to have been made or to be inferred from the secretary's refusal to put Mr. Postalwait's call through to the Circuit Judge.

58. As to the Complainant's qualifications for the position of Assistant Public Defender, the record reflects that prior to her graduation from law school in May 2012, the Complainant had served as president of OUTlaw (an LGBT Legal Society), was a member of Public Interest Advocates, a member of ADR Society , also Black Law Student Association, the Women's Law Caucus, the Alliance for Social Justice and Environmental

Law Society, and received a Pro Bono Service honor and a Shaffer and Shaffer Law Firm Scholarship. Comp. Exh. D

59. With regard to the Complainant's post law school graduation qualifications at the time of her application, the Complainant's resume establishes that the Complainant was a May 2012, graduate of the West Virginia University College of Law; that she had self-employment legal experience, post-graduation, as a licensed attorney in West Virginia, performing criminal defense work, primarily in juvenile criminal cases, child support cases, divorce and domestic violence cases, from November 2012 to May 2014, and employment with West Virginia Senior Legal Aid LLC, from August 2015 to December 2017. Tr. pp. 42 & 43. Comp. Exh. D; Hrg. Tr. pp. 43: 20-24, 44:1-24, 45:1-25 & 46:1-24.

60. The Complainant's testimony regarding her applying and being qualified for the Respondent's advertised position as Assistant Public Defender included the following:

- A. Prior to graduation from WVU College of Law in 2012, the Complainant worked as a legal intern for West Virginia Senior Legal Aid and was involved as an intern in family law cases, exoneration cases, and landlord tenant matters, including meeting with clients. Hrg. Tr. 41: 13 – 24.
- B. While attending law school, the Complainant was engaged in clinical legal work, mostly involving family law, interaction with clients and experience gained from participation in divorce hearings. Hrg. Tr. 42: 20-24.
- C. Also prior to graduation from law school, the Complainant gained experience in legal research and writing, editing a 200-page manual regarding frequently asked legal questions and authored a brochure on LGBTQ domestic violence while involved in internships with West Virginia Senior Legal Aid. Hrg. Tr. 42: 1-19.
- D. Immediately following graduation from law school in 2012, the Complainant, under the name Rachel Livingood, opened a solo legal practice often appearing in Magistrate Court proceedings in misdemeanors, as well as in Circuit Court in several felony cases, abuse and neglect cases, juvenile delinquency cases and mental hygiene cases. Hrg. Tr. 43: 10–12 & 23-24, Tr. 44: 1-9.
- E. Complainant believed that his civil and criminal legal work in Circuit Court, as well as in Magistrate Court, would relate to work performed in a Public Defender Office as it involved interviewing clients, identifying the problem and answering the client's questions. Hrg. Tr. 44:10-24.
- F. Immediately prior to Complainant's applying for the position of Assistant Public Defender with the Respondent, the Complainant worked for two years four months as a staff attorney at West Virginia Senior Legal Aid in West Virginia, from August 2015 to December 2017, where she worked the "hot line" answering senior legal

questions, interviewing clients, performing legal research, and being involved with managing a large load of cases. Hrg. Tr. 45: 1-24 & 46:1-14.

- G. That the Respondent's posting for the position looked to the Complainant to be a job in his field of interest for which she was qualified and familiar. Hrg. Tr. 56: 13-15.
- H. The Respondent's advertisement for the position indicated that the Respondent sought an attorney for misdemeanors, juvenile abuse and neglect and juvenile delinquencies, all areas in which the Complainant was familiar and had experience.
- I. That the Complainant did not find the Respondent's job posting to list any requirements in which he did not have experience.
- J. That he believed that he exceeded the requirements listed in the Respondent's advertisement as he had a lot of court room experience, including experience in felony cases as well, which was above the requirements listed and were areas of law in which he had practiced. Hrg. Tr. 57: 2-10.
- K. That following being rejected for employment with the Respondent, the Complainant returned to solo private practice of law and began applying for legal positions with legal aid offices across the state. Hrg. Tr. 46: 19 -24.

61. Mr. Livingood's above referenced testimony regarding his education, qualifications and experience is uncontested by the Respondent's evidence, found to be credible, supported by the record and supportive of a finding, hereby made, that Complainant was fully qualified for the position, as advertised, by the Respondent.

62. The Respondent, at the time of processing the Complainant's application for employment, was aware of the Complainant's above legal experience and qualification for the advertised position through receipt of the Complainant's cover letter and resume, and also made aware of the Complainant's professional legal references regarding the Complainant's legal acumen, qualifications and applicable legal skills.

63. Both Respondent's Chief Public Defender, Mr. Postalwait, and its Deputy Chief Public Defender, Mr. Vodden, testified that they did not contact the Complainant's professional references. Hrg. Tr. pp. 188: 1-6, 209: 2-16 & 229: 15-21.

64. In explaining why "they" chose not to contact the Complainant's references, although having stated in the Respondent's aforementioned "Narrative" attached to Respondent's Verified Answer, that in preparation for an applicant's interview, Respondent contacted other attorneys who had known and worked with the Complainant

in a professional capacity, Mr. Postalwait testified that “they” do not contact an applicant’s personal references “as it’s going to be a **positive indication in favor of the applicant...**” and that he “can’t say that I’ve ever contacted a reference in the past.” Hrg. Tr. p. 209: 2-15.

65. As to why the Respondent did not contact former Supreme Court Justice, the Honorable Larry V. Starcher, Mr. Postalwait testified that “almost everybody coming out of law school uses Justice Starcher as a reference and it’s common for him to be referenced all the time” Hrg. Tr. p. 242: 2-9.

66. In his letter dated April 12, 2012, to Senior Legal Aid, LLC, written just before Rachel Livingood’s graduation from law school, former Supreme Court Justice Larry Starcher wrote the following letter of employment recommendation in a legal staff position:

This is a letter of recommendation for Rachel Livingood, currently a third year student at the West Virginia University College of Law. Ms. Livingood has advised me that she is applying for a position with Senior Legal Aid.

I know Rachel quite well having her as a student in one of the two classes I now teach at the College of Law, and from seeing her frequently around the Law School. I have been teaching at the WVU College of Law since retiring from the West Virginia Supreme Court of Appeals in 2008 – and I served as an Adjunct on a part-time basis at the College for many years prior to retiring.

As a jurist for 32 years – twenty as a state trial judge and twelve as a state supreme court justice – I have worked with law students and law clerks most of my life. And, in my opinion, Rachel one of the more unique students I have encountered. She is mature, hardworking, very inquisitive and generally a pleasure to have around. She is openly committed to equal justice for all persons. She possesses a quiet leadership style, is a very hard worker for whatever she commits to and is always willing to assume responsibilities assigned to her individually, or on behalf of a class.

Ms. Livingood’s resume speaks for itself. It acknowledges a well-rounded student who has complemented her academic classroom work with interesting activities and employment with the diversity that might be expected of a bright, inquisitive mind. She, obviously, has an interest in legal services for the disadvantaged – particularly seniors. I confess that I have a personal bias for a person who chooses to work in this area of the law, having been the Director of a six-county legal services program for seven [years] prior to becoming a circuit judge in 1976.

At the College of Law Rachel is not in the top five percent of her class, but her intelligence is not reflected by that measure only. A twenty minute conversation with Rachel suggest that her mind is expansive, she

possesses high intelligence, and she is one of the more committed persons that one will ever encounter. She tends to think “outside of the box”, is very friendly, and generally highly thought of by her peers and the faculty here at our College of Law.

To summarize, my overall impression of Rachel Livingood is that she is a hard-working young woman who presents herself as bright, talented, personable, and appropriately aggressive. She is an individual who accepts a task, explores options for accomplishing it, and gets to work on it. She is outwardly friendly; it has been a pleasure for me to have had her in class and knowing her at the College of Law. Rachel is destined to succeed.

Sincerely,

Larry V. Starcher  
Senior Status Justice and  
Lecturer in Law WVU  
College of Law.

Comp. Exh. I.

67. It is hereby found, by inference, that had former West Virginia Supreme Court Justice Starcher been contacted by Mr. Postalwait or Mr. Vodden, Justice Starcher’s opinion and recommendation of the Complainant for a legal position with her immediate past employer, West Virginia Senior Legal Aid, LLC, would have been helpful in determining and confirming the Complainant’s qualifications for employment with the Respondent, or, at the very least, his opinion and recommendation would provide a better indication of the Complainant’s legal acumen, capabilities and qualifications than the unidentified Magistrate’s employee and unidentified Circuit Judge’s secretary and others with whom Mr. Postalwait testified that he spoke, who provided no opinion or comment regarding the Complainant’s qualifications, but were nevertheless treated by Mr. Postalwait as being negative references upon which he based, at least in part, the Respondent’s decision that the Complainant had “poor references”.

68. Ms. Cathy McConnell, Esq., the second of the Complainant’s references, was the Executive Director of West Virginia Senior Legal Aid LLC, and the Complainant’s immediate supervisor during the Complainant’s nearly two and one-half year employment there, is one of the two most current of the Complainant’s legal work related references to have personal knowledge regarding the Complainant’s legal performance, work ethic

and qualifications. As noted above, both Mr. Postalwait and Mr. Vodden acknowledged that they intentionally did not contact Ms. McConnell. Hrg. Tr. 63: 9-23, 143: 15-19,

69. Ms. Mildred Biggs, Esq., the third of the Complainant's professional references, and a co-employee of the Complainant at West Virginia Senior Legal Aid, LLC, testified that she was still working as a staff attorney for West Virginia Senior Legal Aid, LLC, where she began working in October of 2016, as a legal aid, and where she first came to know the Complainant Robb Livingood. Hrg. Tr. p. 137: 1-24.

70. Ms. Biggs testified that when she began working at West Virginia Senior Legal Aid, LLC, in 2016, Complainant, Robb Livingood, was already a staff attorney. Hrg. Tr. 138: 3-8.

71. Ms. Biggs testified that she worked with the Complainant 15% to 20% of the time, helping him with legal research. Hrg. Tr. p. 138: 22-24.

72. Ms. Biggs testified that her impression of Robb Livingood's work was very favorable, that he seemed to work well with the clients, was hard-working, did a thorough job, did a lot of follow up, was careful in his research and that she would want to work with him again. Hrg. Tr. pp. 139:10-24 & 140: 1-9.

73. Ms. Biggs testified that she was not contacted by the Respondent, but if contacted she would have given a very favorable reference as she believed him to be a wonderful co-worker, pleasant to be around, hardworking, and conscientious. Hrg. Tr. p. 142: 14-24.

74. Ms. Biggs identified Ms. Cathy McConnell as the Executive Director and immediate supervisor to both she and Robb Livingood. Hrg. Tr. p 143:13-17.

75. Ms. Biggs' testimony is uncontested, found to be both credible and reliable with regard to the Complainant's legal work and legal ability during a period of time immediately preceding the Complainant's application for the position of Assistant Public Defender with the Respondent.

76. By intentionally ignoring and not contacting Complainant's professional references within the legal community with personal knowledge of the Complainant and her qualifications, under the Respondent's policy as expressed in its "Narrative" the Respondent, unreasonably eliminated the above relevant information from consideration in making its hiring decision regarding the Complainant.

77. Although the second applicant, Mr. Alan Nichols, a cisgender male, who was offered the position of Assistant Public Defender over the Complainant, but ultimately

declined the offer of employment, was much less qualified and experienced than the Complainant and, in fact, did not meet a requirement for the position which Mr. Postalwait said was essential, i.e., courtroom experience. Respondent's "Narrative", Joint Exh. Notebook, p.51.

78. Mr. Nichols qualifications, as demonstrated by his resume, made part of the record, demonstrated that he had graduated from The University of Toledo College of Law, Toledo, Ohio, in 2017, five years after the Complainant's graduation from law school. Joint Exh. Notebook, p. 281.

79. Mr. Nichols' resume noted only being admitted to practice law in West Virginia and not in Ohio, where he attended and graduated from law school. Joint Exh. Notebook, p.

80. Mr. Nichols resume noted that he had passed the West Virginia State Bar Examination in 2017, was admitted to practice law in the state of West Virginia, in 2017, but had no practical experience in legal proceedings in West Virginia, nor in representing clients in the courts of this state, at the time of his applying for the position of Assistant Public Defender for the Respondent. Joint Exh. Notebook, p. 281.

81. Mr. Nichols also listed no personal or professional references in his resume and neither does the record reflect any. Joint Exh. Notebook, p. 281.

82. Mr. Vodden testified, that of the two candidates, that he and Mr. Postalwait preferred Mr. Nichols, although recognizing that Mr. Nichols was a 2017 law school graduate with no legal experience since graduating from law school. Hrg. Tr. pp. 178: 16-24 & 179: 1-21.

83. Mr. Postalwait testified, as being one of the reasons for his favoring Mr. Nichols over the Complainant, was that he thought that Mr. Nichols' "star was rising" and that the Complainant's "was not" and that Mr. Nichols "had a courtroom trajectory". Hrg. Tr. p. 247: 15-18.

84. Mr. Postalwait's "star was rising" and "courtroom trajectory" comments for not hiring the Complainant are non-sensical, given the fact that Mr. Nichols had no legal experience and not found to be in line with the stated policy of the Respondent to hire solely on the basis of qualifications.

85. Given the Complainant's legal background and experience, including representing clients before the courts of this state in her solo legal practice, severely undercuts, if not totally eliminates, any credibility given by the undersigned to the Respondent's above

referenced multiple reasons for its decision as being credible, legitimate, non-discriminatory and non-pretextual.

86. In addition to the above stated reasons set forth by the Respondent in its Verified Answer for its rejection of the Complainant's application for employment, the Respondent has, in the Public Hearing, proffered additional reasons for its adverse decision including that the complainant wore "wrinkled clothes to the interview and appeared disheveled", that she did not dress professionally, that she met with the disfavor of the Respondent's legal secretary as being non-communicative or acting "oddly", and that she gave a poor interview, all of which are found to lack clarity, credibility or relevancy, and to be pretextual for the true reason for the Respondent's adverse decision, the Complainant's gender identity and non-stereotypical appearance.

87. Mr. Vodden, when asked whether the Complainant's appearance influenced his decision on whether or not to make him an offer of employment, testified that it was a **factor**, and that in a courtroom or an interview setting, a professional appearance was important including a well-pressed suit, ironed shirt, tie, professional attire and jacket. Hrg. Tr. p. 191: 15-21.

88. When asked how he expected an interviewee to appear for interview, Mr. Vodden testified that **in a courtroom or an interview setting**, a well-pressed suit, ironed shirt, tie, professional attire, including a jacket.

89. The Complainant, Mr. Livingood, testified that he drove for the interview from Morgantown, W.Va., a trip of about two and one-half hours, and appeared for the interview wearing a button up shirt, a tie and jacket, also wearing short hair, no makeup, no jewelry, describing his appearance as that of a masculine woman. Hrg. Tr. pp.67: 3-6, 8-24 & 68:1-7.

90. When Mr. Vodden was asked in the hearing what action he would take if an employee of Respondent's office came to the office appearing in what he believed to be an inappropriate fashion, as he apparently thought of the Complainant, Mr. Vodden stated that they would be sent home to change but, Mr. Vodden didn't answer, when asked, by the undersigned, what disciplinary action if any would be taken, stating that he didn't understand the question. Hrg. Tr. pp. 197: 18-24 & 198: 1-7.

91. Mr. Vodden also testified that the interview with the Complainant was the worst of five out of ten interviews that he had been involved with for the Respondent; that the

Complainant's answers were short, that the Complainant didn't invite much in the way of follow-up and that there was no rapport established. Hrg. Tr. p. 177:1-16.

92. Besides being totally subjective and when asked only a short time later, in the Public Hearing, whether he had asked any follow up questions of the Complainant in the interview, Mr. Vodden said that he didn't remember the interview, specifically, but he imagined that he did. Hrg. Tr. p. 192:19-22.

93. Little, if any, credibility is given Mr. Vodden's subjective statement as to the nature or quality of the interview of the Complainant. If he didn't remember the interview, "specifically", the undersigned cannot accept his earlier statement that it was the worst interview in which he had been involved for the Respondent.

94. The Complainant testified that he was likewise dissatisfied with the interview as the Respondent seemed to be interested in hiring her until the moment that they saw his physical appearance as a masculine female, and felt that she wasn't listened to, that they had no interest in what she had to say and that there was no interaction back and felt that she had been invalidated as a professional for all the years she had been gaining experience for the position, that she felt invalidated as a basic human being and that her gender expression somehow made it okay not to look at her qualifications. Hrg. Tr. pp. 73:20-23 & 74:2-7.

95. Although both parties expressed dissatisfaction with the interview, there is insufficient evidence in the record on which the undersigned can make a determination, even by inference, that the quality of the Complainant's interview constitutes, in light of the totality of evidence, a clear, legitimate non-discriminatory reason for the Respondent's adverse decision.

96. The Respondent's "Narrative", made part of its Verified Answer, also specifically states that "[i]t was the opinion of Respondent's employees that they did not feel comfortable accepting responsibility for the work product of the Complainant". Joint Exh. Notebook, p. 52.

97. Neither does the Respondent's "Narrative", nor does the record as a whole, indicate what employees, other than the Respondent's secretary, Ms. Fisher, were consulted or gave an opinion of the fitness of the Complainant or why they felt uncomfortable accepting responsibility for the Complainant's work product, when they were not involved in interviewing the Complainant, nor is it shown by the Respondent that its employees were made aware of the Complainant's qualifications.

98. Given no explanation for the immediately preceding statement, and lack of Respondent's proper and fair consideration of the Complainant's legal experience and other qualifications noted above, the alleged lack of comfort Respondent's employees in accepting responsibility for the Complainant's work product is found lacking any clarity but to be indicative of an underlying motive for such opinion, specifically given that the Respondent's staff had been advised and discussed the Complainant's transgender status.

99. Given the pretextual, erroneous and unsupported nature of the Respondent's multiple articulated reasons, noted above, for finding the Complainant being unqualified, "poor reference", "lacking experience" for the position of Assistant Public Defender, and "poor interview", when Mr. Vodden could not specifically remember it, no significant weight is given the "wrinkled clothes and disheveled appearance" or "poor interview", as being legitimate non-discretionary reasons for the Respondent's decision.

100. The Complainant's interview for the Respondent's advertised position of Assistant Public Defender is found to have been compromised, adversely affected and corrupted by Respondent's improper pre-interview social media search of the Complainant's gender identity and non-conforming non-stereotypical male appearance, unlawful factors for consideration under the West Virginia Human Rights Act and applicable Title VII case law.

101. Likewise, the Respondent's adverse decision was fatally compromised and adversely affected by the Respondent's intentional avoidance of contacting the Complainant's professional references establishing Complainant's qualifications for the position, as noted above, and further the Respondent's reliance on clearly unreliable contacts with others having no personal knowledge of the Complainant's fitness or qualifications for the position.

102. Review of Mr. Nichols' application for the position of Assistant Public Defender and the reasons for Respondent initially selecting him over the Complainant, establishes that his application and employment consideration was treated in a completely different manner than the Complainant's; that Respondent's pre-interview process regarding Mr. Nichols was less intrusive than the Complainant and with less regard to determining the Respondent's advertised qualifications for the advertised position, which is unexplained, but for the Complainant's gender identity and non-stereotypical appearance as being a motivating factor in the Respondent's pre-interview research and inquiries.

103. Mr. Postalwait's statement that neither he nor anyone else in the Respondent's office set out to somehow expose or determine that the Complainant was "trans" is not found to be true, as a preponderance of the evidence specifically establishes that he, Mr. Vodden, and others were involved in research or discussions regarding the Complainant's gender identity and non-conforming, non-stereotypical appearance, as establishing her transgender status. Hrg. Tr. p. 208:11-14

104. The Complainant's transgender status was discussed by the Respondent's legal secretary, Ms. Sandra Fisher, with at least one other of the Respondent's staff members, prior to the Complainant's interview. Hrg. Tr. pp. 154: 12-20 & 158: 1-7.

105. Ms. Fisher testified she had known, "ahead of time", that the Complainant was a female and that one of Respondent's staff attorneys, Ms. Lauren Estep, who went to law school at the same time as the Complainant, said that she had known a Rachel Livingood but not a Robb Livingood, while in law school, and that it was at this point when "they looked on social media and found out that it was one in the same". Hrg. Tr. pp. 154:1-24 & 158: 1-7.

106. Ms. Fisher testified that it had become known "among the Public Defender's Office that Robb and Rachel were the same person and that that there had been "some sort of transition that had taken place", which was known before the Complainant's interview. Hrg. Tr. p. 155: 2-12.

107. On January 24, 2018, immediately before conducting the Complainant's interview, Mr. Postalwait and Mr. Vodden had the Complainant wait in the Respondent's outer office with the Respondent's legal secretary and receptionist, Ms. Sandra Fisher, for five to ten minutes, to allow for Ms. Fisher to interact with her. Hrg. Tr. p. 175:19-24.

108. Mr. Vodden testified that Ms. Fisher, in providing he and Mr. Postalwait with her negative opinion of the Complainant, told them that she thought that Mr. Livingood behaved "oddly", that Mr. Livingood wasn't very responsive to her, that he had been pacing and that he did not appear appropriately dressed for his interview. Hrg. Tr. p. 180: 1-6.

109. Ms. Fisher testified that she met with both applicants in this matter, Mr. Livingood and Mr. Nichols, but stated that didn't remember much about Mr. Nichols, saying that nothing stood out, but as to Mr. Livingood, that he was uneasy, paced the floor, that he did not take a seat when offered, seemed distracted, that his clothes were very wrinkled

and did not fit well, and that she felt that he made a poor impression for a job interview. Hrg. Tr. pp. 152: 6-14, Hrg. Tr. 153: 9-15.

110. Ms. Fisher testified that she discussed these impressions of the Complainant with Mr. Postalwait and Mr. Vodden. Hrg. Tr. pp. 152: 6-24 & 153:1-6.

111. Ms Fisher testified that she was not involved in the Complainant's interview and that her opinion provided to Mr. Postalwait and Mr. Vodden of the Complainant's non-fitness for the position was based solely upon Complainant's appearance. Hrg. Tr. pp. 159: 14-16 & 160: 2-15.

112. Mr. Postalwait, when asked the reasons for his not hiring the Complainant, testified that it was the Complainant's interview, the way he acted with his secretary and the phone call to the Circuit Judge's office. Hrg. Tr. p. 217: 11-23.

113. Copies of photos obtained by Mr. Vodden, provided to Mr. Postalwait showing the Complainant dressed appearing as male, were later attached to the Respondent's Verified Answer and Motions to Dismiss asserting that they demonstrated lack of Complainant's protected status under the West Virginia Human Rights Act due to Complainant being transgender. Resp. Verified Answer Joint Exh. Notebook, pp. 46- 56 Comp. Exh. A & Resp. Exh. A.

114. The Respondent's *Motions to Dismiss the Complainant's complaint* were based upon the Respondent's pre-interview social media research of the Complainant's gender identity and pictures of the Complainant dressed as male, obtained by Mr. Vodden, which Respondent referenced as having established the Complainant's transgender status. Commission's Order December 10, 2020.

115. Gender identity and sexual orientation have been determined by the United States Supreme Court, in Title VII discrimination matters and by the United States District Court for the Southern District of West Virginia, in its interpretation of the application of the provisions of the West Virginia Human Rights Act, with regard to discrimination based on sex, not legally relevant to hiring decisions and therefore that such factors do not constitute, factually or legally, legitimate non-discriminatory factors on which to base, even in part, an adverse employment decision under the West Virginia Human Rights Act. *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020); *Jarrell v. Hardy Cellular Tel. Co.*, No. 2:20-cv-00289, 2020 U.S. Dist. LEXIS 129436, (S.D. W.Va. July 22, 2020).

116. On the basis of all of the foregoing factual findings, the undersigned finds that the Respondent's multiple findings proffered as legitimate, non-discriminatory reasons for its adverse decision are not shown to be fact based, but rather based upon faulty assumptions of the Complainant's qualifications, inquiries and conversations with third parties expressing no personal knowledge of the Complainant's qualifications or legal performance and upon irrelevant issues of Complainant's gender identity and non-forming, non-stereotypical appearance, producing no relevant evidence regarding the Complainant's non-eligibility and non-fitness for the job of Assistant Public Defender, and contrary to the policy expressed in its aforementioned "Narrative" of making employment decisions entirely based upon an applicant's qualifications.

117. The U.S. Supreme Court and West Virginia Supreme Court of Appeals have also held that in mixed motive cases, where both legitimate and unlawful discriminatory factors are established by the evidence for the Respondent's adverse decision, the plaintiff is not required to show that employer's proffer of legitimate non-discriminatory reason or reasons for its adverse action were false or played no role in the employment decision but is only required to show that a prohibited reason was a motivating factor in the Respondent's making of the adverse decision affecting the Complainant and that such prohibited factor had determinative influence on the outcome. *Diamond v. Colonial Life & Accident Insurance Company*, 416 F.3d 310 Fourth Circuit, 2005); *Hill v. Lockheed Martin Logistics Management, Incorporated*, 354 F.3d 277, U.S. Court of Appeals, Fourth Circuit, (2004); *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 465 S.E. 2d 399 (1995); *Hanlon v. Chambers*, 195 W.Va. 99, n. 3, 464 S.E.2d 741 (1995); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 249, 109 S.Ct. 1775; 1790, 104 L.Ed.2d 268 (1989)

118. Based upon a preponderance of the evidence, the Complainant's gender identity as transgender and non-stereotypical male appearance when being female are hereby found to have been motivating factors for the Respondent's decision not to hire Complainant, which factors which played a prominent and determinative role in the Respondent's decision and adversely affected and compromised the Respondent's decision not to hire her.

119. A preponderance of the evidence establishes that the Respondent treated the Complainant unequally when compared to its other applicant, Mr. Nichols, by researching the Complainant's gender identity prior to conducting its interview of the Complainant,

sharing or allowing such information to be discussed by members of the Respondent's staff, allowing for a non-attorney staff person's opinion of the Complainant's fitness for the job to influence Respondent's hiring decision and, by applying different and more restrictive qualification standards to the Complainant as compared with Mr. Nichols, the only other applicant who was offered the position.

120. Mr. Vodden testified that he and Mr. Postalwait discussed the Complainant's gender identity with regard to the existence of general bias, stating that he, Mr. Vodden, was aware that the state of West Virginia is a very conservative state, that there was some concern that that may have "weakened" somebody's assessment of Mr. Livingood in the 26<sup>th</sup> Circuit (Lewis County) where Postalwait had called for an opinion of the Complainant. Hrg. Tr. p. 190:1-7.

121. Mr. Vodden testified that he was not aware of any anti-discrimination training having been implemented by the Respondent for its staff. Hrg. Tr. p. 195: 22-24.

122. Also, a preponderance of the evidence establishes that although the Respondent articulated what it contends to be multiple legitimate non-discriminatory reasons for its decision not to hire the Complainant for the advertised position of Assistant Public Defender, including, but not limited to, poor references, lack of experience, lack of qualifications, poor presentation, having wrinkled clothes at the interview and not having met with the Respondent's legal secretary's, Ms. Fisher's, approval, having a poor or disqualifying interview, the undersigned finds, upon a totality of the evidence, that such reasons are not legitimate, non-discriminatory reasons for its adverse employment decision, but pretextual, lacking the necessary clarity and credibility, not "entirely based upon the applicant's qualifications" as per the Respondent's "Narrative", and not to be the true and motivating reasons for Respondent's failure to hire the Complainant, which were the Complainant's gender identity and non-stereotypical appearance as male when born female.

123. Even if any of the Respondent's articulated reasons were found to be reasonably supported, legitimate and non-discriminatory, it is found that the Respondent's singular focus, in its pre-interview research, regarding Complainant's gender identity, transgender status and non-stereotypical male appearance, when female, were motivating factors playing a significant part in the Complainant's rejection for employment by the Respondent, thereby rendering, in a mixed motive case, the Respondent's decision not

to hire to have been discriminatory on the basis of sex and a violation of the West Virginia Human Rights Act.

124. Based upon a preponderance of the evidence it is found that the Respondent failed to rebut the presumption afforded the Complainant of Respondent's violation of the Act upon establishing a prima facie case of disparate treatment, employment discrimination, based upon sex.

125. It is further found that absent Respondent's transgender status and non-stereotypical male appearance when being female, Respondent would have offered the advertised position to the Complainant, based upon qualifications.

126. Respondent's resulting violation of the West Virginia Human Rights Act, W.Va. Code §5-11-1 *et. seq.* for its discrimination of the Complainant on the basis of sex, has resulted in the Complainant sustaining damages for wages lost for 2018, 2019 and 2020.

127. The Complainant submitted no income information or work-related expense information for calendar year 2021, nor has Complainant sought front pay or to be awarded the next available position with the Respondent of Assistant Public Defender.

128. Based upon Mr. Postalwait's testimony that the initial salary for the position of Assistant Public Defender was between forty-eight (\$48,000.00) dollars and fifty-two thousand (\$52,000.00) dollars. There being no additional evidence offered regarding the Complainant's wage entitlement should she have been hired, the undersigned finds that the Complainant has sustained a wage loss per year since being rejected for employment, of forty-eight thousand (\$48,000.00) dollars, prior to calculation of the reduction of such loss by mitigation due to wages subsequently earned by the Complainant in calendar years 2018, 2019, and 2020. Hrg. Tr. p. 224: 11- 15.

129. The Complainant submitted into the evidence, as a joint exhibit, the Complainant's 2018 Federal Income Tax Return, listing the Complainant's gross income for 2018 to be \$8,660.00. Comp. Exh. E.

130. The Complainant submitted a 1099 for miscellaneous income for calendar year 2019 in the amount of \$45,268.50. Comp. Exh. F.

131. The Complainant submitted evidence that his business expenses for 2018 were \$6,410 and for 2019 were \$9,490.00.

132. The Complainant's gross income for 2020 was \$47,327.00.

133. After mitigation for wages earned in 2018, 2019, and 2020, Complainant's back pay damages, with prejudgment interest, at 10% annum, for 2018, 2019, and 2020 were \$89,418.53.

134. Complainant is further found to have suffered humiliation, embarrassment, and emotional and mental distress and loss of dignity from the Respondent's violations of the West Virginia Human Rights Act, and to be entitled to an award against the Respondent for incidental damages in the amount of \$5,000.00 dollars.

135. The Complainant is further found entitled to reasonable attorneys' fees in the amount of \$24,391.00 plus costs, in the amount of \$606.82, based upon Affidavit's of Complainant's counsel and proper documentation being provided and made part of the record.

136. It is further found that the Commission and the Complainant are entitled to issuance by this Tribunal of a cease and desist order requiring the Respondent to implement anti-discrimination training for its management and other employees in its Fifth Judicial Circuit which will assist it to eliminate bias in its daily operations, specifically affecting its hiring process.

## V

### DISCUSSION

#### **JURISDICTION AND PROTECTED CLASS UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT**

In the proceedings held in this matter the Respondent initially challenged the Human Rights Commission's jurisdiction to adjudicate the Complainant's complaint and the Complainant's protected status under the provision of the West Virginia Human Rights Act.

As noted herein, in this Tribunal's previous Order entered December 10, 2020, made part of the undersigned Administrative Law Judge's Final Decision by reference, it was held that, under the provisions of the West Virginia Human Rights Act (Act), and in accordance with applicable case law, specifically, the decisions of the United States Supreme Court in *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020), and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and the decision of the United States District Court for the Southern District of West Virginia in *Jarrell v. Hardy Cellular Tel. Co., No. 2:20-cv-00289*, 2020 U.S. Dist. LEXIS 129436, (S.D. W.Va. July 22, 2020), establish that the West Virginia

Human Rights Commission has jurisdiction to adjudicate the merits of Complainant Livingood's complaint against the Respondent, for disparate treatment employment discrimination due to gender identity and/or gender/sexual stereotyping, under the protected class of sex.

As noted in the undersigned's previous Order of December 10, 2020, the United States Supreme Court of Appeals held in *Bostock v. Clayton County Georgia*, Id. at 1737, that gender identity and sexual orientation are subsets of "sex" under Title VII and consequently employment discrimination based on gender identity and/or sexual orientation are legitimate basis for complaints based on sexual discrimination under Title VII.

The *Bostock* Court held:

"[Title VII's] message for our cases is equally simple and momentous: **an individual's homosexuality or transgender status is not relevant to employment decisions.** That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." (Emphasis added).

*Bostock*, at 1741.

Although the Respondent argues that by a previous decision of the West Virginia Supreme Court of Appeals in *State v. Butler*, 239 W.Va. 168, 799 S.E.2d 718 (2018), involving interpretation of the State's hate crimes statute, W.Va. Code §61-6-21, that the term "sex" does not include, for purposes of protected status under the West Virginia Human Rights Act, discrimination based upon gender identity and sexual orientation, Judge Irene Berger for the United States District Court for the Southern District of West Virginia, in *Jarrell v. Hardy Cellular Tel. Co.*, No. 2:20-cv-00289, 2020 U.S. Dist. LEXIS 129436, (S.D. W.Va. July 22, 2020), an employment discrimination claim under the W.Va. Human Rights Act, held that the United States Supreme Court decision in *Bostock*, has direct application to claims for discrimination based upon sexual orientation and gender identity brought under the provisions of the West Virginia Human Rights Act. Judge Berger specifically noted that although the West Virginia Supreme Court, in *Butler*, found that this state's hate crimes statute which specifically included "sex" as a category, did not reach crimes based on sexual orientation, that the W.Va. Supreme Court had found in its decision in *Butler*, at footnotes 8 and 11, that the analysis under *Butler* is inapplicable to a case brought under the West Virginia Human

Rights Act. Judge Berger held applicable to interpretation of the provisions of the West Virginia Human Rights Act regarding protected status for discrimination based on “sex”, the U.S. Supreme Court held in its *Bostock* decision, that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex” *Bostock* at 1741. Upon further review of applicable West Virginia Human Rights case law involving interpretation of provisions of the West Virginia Human Rights Act, Judge Berger held that “[b]ecause interpretation of the WVHRA parallels interpretation of Title VII, the Court finds that the plaintiffs allegations of discrimination [in *Jarrell*] based on a same sex relationship states a claim for sex discrimination under the WVHRA”, and that long established precedent in the West Virginia Supreme Court of Appeals stating that West Virginia courts consider federal Title VII precedent in interpreting the West Virginia Human Rights Act, governs in *Jarrell*, providing protected status for an individual complaining of discrimination in employment on the basis of gender identity and sexual orientation, applied.

Review by the undersigned of applicable case law of the West Virginia Supreme Court of Appeals regarding its application of federal Title VII case law when ruling upon issues of discrimination under the West Virginia Human Rights Act, supports Judge Berger’s holding in *Jarrell* with regard to this state’s following of federal case law laid down in *Bostock*. The West Virginia Supreme Court of Appeals has repeatedly and consistently held, as noted by Judge Berger, that it will construe the West Virginia Human Rights Act to coincide with the prevailing federal application of Title VII law unless there are variations in the statutory language that call for divergent applications. *Barefoot v. Sundale Nursing Home*, 193 W.Va. at 482, 457 S.E.2d at 159 (1996); *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (Oct. 1995); *West Virginia Univ. v. Decker*, 191 W.Va. 567, 447 S.E.2d 259 (1994); *Westmoreland Coal Co. v. West Virginia Human Rights Comm’n*, 181 W.Va. 368. 382 S.E.2d 562 (1989); *State ex rel. State Human Rights Comm’n v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W.Va. 711, 329 S.E.2d 77 (1985); *Shepherdstown V.F.D. v. West Virginia Human Rights Comm’n*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

With regard to the Complainant Livingood’s having protected status for an action for employment discrimination brought under the West Virginia Human Rights Act based upon gender stereotyping, W.Va. Code §5-11-1 *et. seq.*, the United States Supreme Court of Appeals, again in *Bostock*, citing the Court’s earlier decision *Price Waterhouse*

*v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), stated that an employee can also prevail on an action for discrimination under Title VII, for discrimination based on sex, by showing that a challenged employment decision was based on a sex stereotype and consequently based on sex. *Price Waterhouse* at 251.

Significantly, in *Price Waterhouse*, *supra*, the United States Supreme Court noted that while sex stereotypes do not inevitably prove that gender plays a part in a particular employment decision, it “can certainly be evidence that gender played a part”. *Id.* at 251. The *Price Waterhouse* Court acknowledged further that there may be cases in which a gay, lesbian, or **transgender** individual can make a claim based on sexual stereotyping. *Id.* at 294, 109 S.Ct. 1775.

In Mr. Livingood’s claim here, he also alleged discrimination based upon gender stereotyping, his appearing physically dressed male as opposed to female, the gender assigned him at birth. Mr. Livingood’s complaint and the Respondent’s Verified Answer, and its initial and amended Motions to Dismiss, with their attached exhibits, by themselves, establish a legally supportable claim for gender stereotyping. The Respondent’s Verified Answer and Motions to Dismiss with attachments, including photos of the Complainant dressed as a male, showing her to have short cropped hair, no apparent makeup and having a stereotypical male appearance, together with the Respondent’s assertion that such “evidence” demonstrates the Complainant to be transgender, make clear that Complainant Livingood’s complaint is properly pled for adjudication by this Tribunal of a discrimination claim based upon sex on both gender identity and gender/sexual stereotyping issues.

It is further noted that under the provisions of the West Virginia Human Rights Act, specifically the provisions of W.Va. Code § 5-11-8(c), West Virginia legislatively mandated that “[t]he commission is authorized and empowered: [t]o receive, investigate and pass upon complaints alleging discrimination in employment or places of public accommodations, because of . . . **sex**, . . .” (Emphasis added).

On the basis of the foregoing applicable case law and W.Va. legislative mandate, also set forth in the undersigned’s previous Order of December 10, 2020, the undersigned holds that the West Virginia Human Rights Commission has jurisdiction, to adjudicate Complainant Livingood’s complaint on the basis of sex, arising from discrimination by the Respondent’s failure to hire, based upon the Complainant’s gender identity, as transgender, and for discriminatory gender stereotyping.

## DISPARATE TREATMENT, INFERENTIAL PROOF FORMULA IN ESTABLISHING A PRIMA FACIE CASE; MIXED MOTIVE CASES

### DISPARATE TREATMENT

Mr. Livingood brought his employment discrimination complaint against the Respondent, under the West Virginia Human Rights Act, W.Va. Code §5-11-1 *et seq.*, upon a disparate treatment theory. Disparate treatment is the practice, especially in employment, of an employer's intentionally treating an individual unequally, because of his/her membership in a protected class, as compared with those outside that protected class. Under the provisions of the West Virginia Human Rights Act (Act), West Virginia Code, §§ 5-11-2 and 5-11-9, a claim for unlawful employment discrimination may be established under a disparate treatment theory, based upon an adverse decision against an individual by an employer, **intentionally and unequally discriminating** against a qualified employee, or employee applicant, based upon such individual's protected status by reason of, race, race, religion, color, national origin, ancestry, **sex**, blindness, disability or familial status. *Bibbs v. New River Community and Technical College*, 985 F.Supp.2d 760, U.S. Dist. Ct. S.D. W.Va. (2013); *Syl. Pt. 1, City of Ripley v. West Virginia Human Rights Commission*, 179 W.Va. 375, 369 S.E.2d 226 (1988); *Conaway v. Eastern Associated Coal Corporation*, 178 W.Va. 164, 358 S.E.2d 423 (1986); *Syl. Pt. 3, Shepherdstown Volunteer Fire Dept. v. State ex. Rel. State of West Virginia v. West Virginia Human Rights Commission*, 172 W.Va. 627, 629, 309 S.E.2d 342, 344 (1983).

Disparate treatment may be proven through either direct or circumstantial evidence. *Moore v. Consolidation Coal Company*, 211 W.Va. 651, 567 S.E.2d 661 (2002); *West Virginia University/West Virginia Board of Regents v. Decker*, 191 W.Va. 567, 447 S.E.2d 259 (1994). Direct evidence is "evidence which, if believed, would prove the existence of a fact in issue without inference or presumption.

Here, Mr. Livingood has established his claim of disparate treatment employment discrimination against the Respondent by a preponderance of the circumstantial evidence of record establishing intentional discrimination by the Respondent, Public Defender Corporation, Fifth Judicial Circuit. *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 279 (4<sup>th</sup> Cir. 2000); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996); *Bhd. of Teamsters v. United States*, 431 U.S. 324, 325 n. 15, 97 S.Ct. 1843, 52 L.Ed 2d 396 (1977).

A preponderance of the evidence is defined as the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force. *Black's Law Dictionary*, 10<sup>th</sup> Edition (2009).

The question to be resolved in all disparate treatment cases is not whether the evidence of discrimination was direct or circumstantial, but whether the evidence, in its entirety, is strong enough to meet the plaintiff's burden of proof. *Syl. Pt. 2, Moore v. Consolidation Coal Company*, 211 W.Va. 651, 567 S.E.2d S.E.2d 66 (2002); *Syl. Pt. 7, Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996).

### **CIRCUMSTANTIAL EVIDENCE/INFERENCE PROOF METHOD FOR ESTABLISHING UNLAWFUL DISCRIMINATION**

As direct evidence of disparate treatment employment discrimination is very infrequently the basis of disparate treatment employment discrimination cases, the common method in proving a disparate treatment employment discrimination claim is through the use and presentation of circumstantial evidence, as involved here, giving rise to an inference of intentional discrimination. In its landmark decision in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 668 (1973), the United States Supreme Court explained that an action for disparate treatment employment discrimination may be proven under a three-step circumstantial evidence/inference proof formula. This formula consists first, in the plaintiff/complainant establishing a *prima facie* case of unlawful, intentional employment discrimination, followed at the second step, by the Respondent's articulation of one or more legitimate nondiscriminatory reasons for its decision adversely affecting the Complainant, and upon Respondent so doing, and at the third step, the Complainant is provided the opportunity to establish, by a preponderance of the evidence, that the Respondent's articulated reasons by the Respondent as being the non-discriminatory reason or reasons for its decision, was or were not the true reason(s) for the decision, but were pretext or coverup for intentional discriminatory motive. *Id.* at 802. The State of West Virginia has adopted the *McDonnell Douglas* formula in determining violation of the West Virginia Human Rights Act for disparate treatment employment discrimination. *Conaway v. Eastern Associated Coal Corporation*, 178 W.Va. 164, 358 S.E.2d 423

(1986). *Syl. Pt. 3, Shepherdstown V.F.D. v. W.Va. Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

Both the U.S. Supreme Court of Appeals and West Virginia Supreme Court of Appeals have also held that in mixed motive cases, where both legitimate and unlawful discriminatory factors appear in the evidence for the Respondent's adverse decision, the plaintiff is not required to show that employer's proffer of legitimate non-discriminatory reason or reasons for its adverse action were false or played no role in the employment decision but is only required to show that a prohibited reason was a motivating factor in the Respondent's making of the adverse decision affecting the Complainant and that such prohibited factor had determinative influence on the outcome. *Diamond v. Colonial Life & Accident Insurance Company*, 416 F.3d 310 (Fourth Circuit, 2005); *Hill v. Lockheed Martin Logistics Management, Incorporated*, 354 F.3d 277, U.S. Court of Appeals, Fourth Circuit, (2004); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996); *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 465 S.E. 2d 399 (1995); *Hanlon v. Chambers*, 195 W.Va. 99, n. 3, 464 S.E.2d 741 (1995); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 249, 109 S.Ct. 1775; 1790, 104 L.Ed.2d 268 (1989).

Although the aforementioned *McDonnell Douglas* case is often cited for the general rule for proving a prima facie case of unlawful employment discrimination as requiring the Complainant to establish by a preponderance of the evidence (1) that he or she is a member of a protected class, (2) that the Respondent made an adverse employment decision concerning such individual's employment, and (3) "but for" the Complainant's protective status the Respondent's adverse decision would not have been made, the Courts, including the United States Supreme Court of Appeals and the West Virginia Supreme Court of Appeals, have made clear that this general rule is not inflexible and that the elements necessary to make a prima facie case will vary according to the circumstances of each case, including in failure to hire cases, as involved here. *McDonnell Douglas Corporation v. Green* 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13. In *McDonnell Douglas*, the U.S. Supreme Court held that one way to make a prima facie case in a racial failure to hire employment case is for the plaintiff to show (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants, (3) that, despite his qualifications, he was rejected, and (4) that, after his rejection, the position remained open and the employer continued

to seek applicants from persons of Complainant's qualifications. *Id.* at 1824. Likewise, the West Virginia Supreme Court of Appeals has held in discriminatory, disparate treatment, failure to hire cases, following the *McDonnell Douglas* formula, that the burden is on the Complainant to prove, by a preponderance of the evidence, a prima facie case of discrimination, which may be carried by showing (1) that the Complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for an employment position or opening; (3) that he or she was rejected despite being qualified and (4) that after Complainant's rejection the Respondent continued to seek and accept applications of similarly qualified persons for such position. *Syl. Pt. 1, City of Ripley v. West Virginia Human Rights Commission*, 179 W.Va. 375, 369 S.E.2d 226 (1988); *Syl. Pt. 1, City of Ripley v. West Virginia Human Rights Commission*, 179 W.Va. 375, 369 S.E.2d 226 (1988); *Conaway v. Eastern Associated Coal Corporation*, 178 W.Va. 164, 358 S.E.2d 423 (1986); *Syl. Pt. 3, Shepherdstown Volunteer Fire Dept. v. State ex. Rel. State of West Virginia v. West Virginia Human Rights Commission*, 172 W.Va. 627, 629, 309 S.E.2d 342, 344 (1983).

With the above federal and West Virginia Supreme Court law in mind, Complainant Robb Livingood, a transgender male, is herein found to have established a prima facie case of disparate treatment, unlawful employment discrimination, against the Respondent based upon sex, under the provisions of the West Virginia Human Rights Act, the Complainant having proven, by a preponderance of the evidence, that at the time of the alleged incident she was (1) a member of a protected class on the basis of sex, due to her transgender status and due to impermissible gender stereotyping by the Respondent. (2) that she applied for and was fully qualified for Respondent's advertised position of Assistant Public Defender based upon her years of authorized solo legal practice in the state of West Virginia and her prior work as a staff attorney for West Virginia Legal Aid, LLC; (3) that she was rejected for the aforementioned position of employment with the Respondent despite being fully qualified, and 4) that after being rejected by the Respondent for the applied for position, the Respondent kept the position open for hire, re-posting its initial advertisement for the position, and that it subsequently hired a cisgender male.

#### **COMPLAINANT A MEMBER OF A PROTECTED CLASS**

Noted earlier, applicable case laws clearly establishes the Complainant to be a member of a protected class of "sex" under the West Virginia Human Rights Act on the

basis of gender identity, his being a transgender male, and upon gender stereotyping on his appearance as masculine to male, upon proper application of the holdings of the United States Supreme Court in the aforementioned decisions in *Bostock* and *Price Waterhouse*, and under the decision of the United States District Court for the Southern District of West Virginia in the aforementioned *Jarrell* case, which held that gender identity and sexual orientation are entitled to protected status under the provisions of the West Virginia Human Rights Act.

The relationship of the Complainant's gender identity and masculine appearance when being female to the Respondent's adverse action is clear by its focus on her gender identity and appearance, its research of her and personal background and identity, beginning shortly after it granted her an interview.

Although the Respondent's Chief Public Defender, Mr. Postalwait, testified that Respondent first became aware of the Complainant being transgender prior to granting her an interview, the evidence specifically establishes that her transgender status was not known by the Respondent until after her interview was offered and scheduled but before it was held. The Respondent's "Narrative" attached to and made part of its Verified Answer stated that "[f]ollowing the invitation to interview and prior to the interview date, employees of the Respondent began preparing for the interview and that this preparation included a search for social media accounts, ... inquiring about the Complainant with another employee of Respondent, who had been a classmate of the Complainant". Joint Exh. Notebook, p.51-52.

The record establishes that after granting and scheduling the Complainant for an interview, rather than checking the Complainant's qualifications by contacting attorneys with whom the Complainant had worked, in preparation for the Complainant's interview, as the Respondent asserted that it did by its "Narrative" attached to its Verified Answer, the Respondent began an inquiry into the Complainant's personal background, impermissibly focusing on her transgender status and non-conforming masculine appearance. *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 1742, 207 L.Ed.2d 218 (2020).

Mr. Vodden, the Respondent's Deputy Chief Public Defender testified that as a result of his inquiry with another employee in the Respondent's office as to the Complainant's identity, he conducted research of the Complainant's social media, and that based on certain Instagram posts as well as a "LinkedIn page" he believed that

Rachel and Robb Livingood were the same person and that she was transitioning from female to male. Hrg. Tr. p 171:4 & 18-24.

Mr. Postalwait testified that he first learned that Robb Livingood was transgender only after Mr. Vodden conducted a search of Mr. Livingood's social media in which Mr. Vodden found different photos, which were provided to Mr. Postalwait, and which Mr. Postalwait testified established the Complainant to be a transgender male. Hrg. Tr. p. 207:8-19.

Mr. Postalwait testified that the social media pages provided him by Mr. Vodden from his pre-interview research of the Complainant's gender identity and physical appearance, although establishing the Complainant to be transgender, provided no insight to the Complainant's qualifications for the advertised position. Hrg. Tr. p. 226: 23-24 & 227:227.

Ms. Sandra Fisher, a legal secretary for the Respondent, in its Ripley office, testified that it had become known among the Public Defender's office that Robb and Rachel [Livingood] were the same person and that there had been "some sort of transition that had taken place" which was known before the Complainant's interview. Hrg. Tr. p. 155:2-12. Based upon applicable law, and the heretofore stated Findings of Fact, the Complainant is held to be a member of a protected class under the provisions of the West Virginia Human Rights Act, for purposes of his complaint of disparate employment discrimination, based upon sex, and specifically upon the Complainant's gender identity and non-stereotypical male appearance, when being female, subsets of the protective class of "sex" under provisions of the West Virginia Human Rights Act.

**COMPLAINANT'S APPLICATION AND QUALIFICATION  
FOR RESPONDENT'S ADVERTISED POSITION  
OF ASSISTANT PUBLIC DEFENDER**

The Respondent advertised for the subject open position of Assistant Public Defender, posting an advertisement for the same on January 11, 2018. The advertisement read as follows:

"The Public Defender Corporation for the 5<sup>th</sup> Judicial Circuit seeks applications for the position of Assistant Public Defender. The available position will work primarily out of Roane County, West Virginia and will be responsible for misdemeanors, juvenile abuse and neglect and juvenile delinquencies. Must be licensed to practice in the State of West Virginia. Please submit resume and cover letter to Kevin Postalwait, P.O. Box 797, Ripley WV 25271".

Comp. Exh. G; Hrg. Tr. p. 164: 15-19 (Vodden).

No other qualifications were noted in the Respondent's advertisement.

On January 13, 2018, the Complainant forwarded her application to the Respondent for its advertised position, Complainant providing with her application, a cover letter, a resume of her background and qualifications, together with legally related professional references, with contact information, those references including former West Virginia Supreme Court Justice, the Honorable Larry V. Starcher, Ms. Cathy McConnell, Esq., Executive Director West Virginia Senior Legal Aid, LLC, and Complainant's prior legal supervisor, and Ms. Mildred Biggs, co-worker staff attorney, for West Virginia Senior Legal Aid, LLC.

The evidence establishes that prior to her graduation from law school, as noted in the Complainant's resume, she was active in numerous legally related organizations, including having served as president of OUTlaw (an LGBT Legal Society), being a member of Public Interest Advocates, a member of ADR Society, also Black Law Student Association, the Women's Law Caucus, the Alliance for Social Justice and Environmental Law Society, and having received a *pro bono* service honor and a Shaffer and Shaffer Law Firm Scholarship. Comp. Exh. D.

Prior to graduation from law school the Complainant worked as a legal intern for West Virginia Senior Legal Aid, LLC, and was involved in working with family law cases, exoneration cases, and landlord tenant matters. Hrg. Tr. 41: 13 – 24.

The Complainant testified that after graduation from law school in May 2012, she was self-employed in a solo legal practice under her given name, Rachel Livingood, during which time she performed criminal defense work, misdemeanor and some felony case work, abuse and neglect cases, and juvenile delinquency cases. She also made frequent court appearances in bench trials before Magistrates and some appearances in felony cases. Comp. Exh. D; Hrg. Tr. pp 43: 10-12 & 20-24, 44:1-24.

The Complainant testified that she was employed from August 2015 to December 2017 with West Virginia Senior Legal Aid where she had multiple duties including half hour sessions answering "hotline" civil law questions from seniors, performing legal research interacting with clients and managing a case load. 45:1-25 & 46:1-11.

The Complainant testified that she then applied for the Assistant Public Defender position with the Respondent in January 2018, believing that her civil and criminal courtroom work in Circuit and Magistrate Courts, would relate to work performed in a

Public Defender Office, as it involved handling a large case load, interviewing clients, and delivering services efficiently. Hrg. Tr. 45: 22-24 & 46:1-8.

The Complainant's testimony is uncontested and found to be credible.

Mr. Postalwait testified that from reading Complainant's resume he certainly believed he met the minimum qualifications. Hrg. Tr. p. 225: 5-17.

Complainant is found to have been fully qualified for the position of Assistant Public Defender as advertised by the Respondent.

**QUALIFICATIONS OF ONLY OTHER APPLICANT,  
MR. ALAN NICHOLS, A CISGENDER MALE**

It is important to first note that Mr. Alan Nichols, a cisgender male and the second of the two applicants for the position of Assistant Public Defender, although never having engaged in the practice of law in the state of Ohio, where he attended law school, or in the state of West Virginia where he was admitted to practice law in 2017, was offered the Respondent's advertised position of Assistant Public Defender over the Complainant, but declined the offer, leaving the Complainant as the only qualified applicant.

As established by Mr. Nichols' resume admitted into the evidence without objection, Mr. Nichols graduated from The University of Toledo College of Law, Toledo, Ohio, in 2017, five years after the Complainant's graduation from law school during which years the Complainant gained practical legal experience including courtroom experience. Mr. Nichols' resume noted only his admission to practice law in the state of West Virginia but noted no admission to practice in the state of Ohio, where he attended and graduated from law school. He listed no legal work or courtroom experience since his law school graduation in 2017. Mr. Nichols listed no personal or professional references in his resume.

In Respondent's "Narrative" which was attached to its Verified Answer, Respondent stated, although not having noted the same in its advertisement for the position, that courtroom experience was an essential requirement for the advertised position. Joint Exhibit Notebook, p. 51.

Mr. Postalwait acknowledged that the Complainant had courtroom experience, but felt that she performed lesser work, "answering telephones" for West Virginia Senior Legal Aid following her courtroom experience, and that while Mr. Nichols' "star was rising" that the Complainant's was not. Hrg. Tr. pp. 15 -17. This unexplained and belittling comment is unjustified in light of the actual work performed in the Complainant's staff

attorney position with West Virginia Senior Legal Aid, in addition to her prior solo legal practice involving courtroom appearance, and is not found to diminish the Complainant's being herein found, fully qualified, and the most qualified for the advertised position.

**DESPITE COMPLAINANT BEING QUALIFIED THE RESPONDENT REJECTED THE COMPLAINANT'S APPLICATION AND CONTINUED TO SEEK AND HIRED ANOTHER APPLICANT FOR THE SUBJECT POSITION**

Mr. Vodden testified that of the two candidates that he and Mr. Postalwait preferred Mr. Nichols, although admitting that Mr. Nichols was a 2017 law school graduate with no legal experience since graduating from law school and less experience than the Complainant. Hrg. Tr. p. 178: 16-24; 179: 1-21; 239: 1-9.

The Complainant's application and resume and witness testimony from both parties establish that the Complainant not only to have met the qualifications of the Respondent's advertisement but, when compared to the evidence of the other applicant's qualifications, Mr. Nichols, the Complainant was clearly the most qualified of the two applicants under the Respondent's advertisement and its "Narrative" stating that employment decisions were entirely based entirely on qualifications. As earlier noted, the Respondent rejected the Complainant's application for the position of Assistant Public Defender, offered the position to Mr. Nichols, who declined Respondent's offer, and thereafter reposted the position seeking a different applicant of the same qualifications as originally advertised and subsequently hired a cisgender male.

**PRIMA FACIE CASE ESTABLISHED**

Based on all of the foregoing, the Complainant is found to have established the first step of the applicable *McDonnell Douglas* criteria by establishing, by a preponderance of the evidence, a prima facie case of disparate treatment employment discrimination based upon sex under the provisions of the West Virginia Human Rights Act, for failure to hire the Complainant for the advertised position of Assistant Public Defender.

**RESPONDENT'S ASSERTED LEGITIMATE, NON-DISCRIMINATORY REASONS FOR FAILURE TO HIRE COMPLAINANT; COMPLAINANT'S REBUTTAL; PRETEXT, MIXED MOTIVES, UNLAWFUL MOTIVATING FACTORS**

Following the Complainant establishing, by a preponderance of the evidence, a prima facie case of discrimination under the WVHRA as here, the employer may rebut the rebuttable inference/presumption of the employer's violation of the West Virginia

Human Rights Act by articulating a legitimate non-discriminatory reason(s) for its adverse employment decision. At this step, the Respondent employer's burden of proof is only one of production and not one of persuasion. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, such legitimate, non-discriminatory reasons for the Respondent's adverse employment decision and the plaintiff's/complainant's rejection. *Texas Department of Community Affairs v. Burdine*, 101 S.Ct. 1089, 1093-1095, 450 U.S. 248, 67 L.Ed.2d 207. The employer's articulated reasons should frame the factual issue with such sufficient clarity so that the plaintiff/Complainant will have a full and fair opportunity to demonstrate pretext.

Additionally, both the West Virginia Supreme Court of Appeals and United States Fourth Circuit Court of Appeals have held that in mixed motive cases, those shown by the evidence to involve both legitimate and illegitimate reasons for the employer's adverse decision, the plaintiff is not required to show that each of the employer's proffered reason(s) for its adverse action were false or played no role in the employment decision but the plaintiff is only required to show that a prohibited factor was at least one of the motivating factors for the employer's adverse decision. *Diamond v. Colonial Life & Accident Insurance Company*, 416 F.3d 310 (Fourth Circuit, 2005); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996); *Hanlon v. Chambers*, 195 W.Va. 99, n. 3, 464 S.E.2d 741 (1995); *Martin v. Randolph County Board of Education*, 195 W.Va. 297, 465 S.E. 2d 399 (1995); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247, 249, 109 S.Ct. 1775; 1790, 104 L.Ed.2d 268 (1989)

In *Martin v. Randolph County Board of Education*, 195 W.Va. 297 Syl. Pt. 4, 465 S.E. 2d 399 (1995), a case involving a complaint of alleged disparate employment sexual discrimination, the West Virginia Supreme Court of Appeals held that a finding by the factfinder of non-sensical and arbitrary justification by the employer for disparate treatment, seriously undercuts the employer's claim that it did not rely on a forbidden motive and tends to show that the purported justification was pretextual. Our court has further held that if the plaintiff has been found by the factfinder to be entitled to an inference of discrimination through his or her prima facie case and the factfinder further finds that the defendant's explanation for the adverse action taken against the plaintiff, the factfinder justifiably may conclude that the logical explanation for the adverse action was the unlawful discrimination. *Moore v. Consolidation Coal Co.*, 211 W.Va. 651,

Syl.Pt.,2, 567 S.E.2d 661 (2002); *Skaggs v. Elk Run Coal Co., Inc.* 198 W.Va. 51, Syl. Pt. 5, 479 S.E.2d 561 (1996).

Pretext, as it relates to unlawful discriminatory practices under the West Virginia Human Rights Act “means an ostensible reason or motive assigned as a color or cover for the real reason or motive, or false appearance or pretense.” *Davis v. Leonard Aluminum Utility Buildings, LLC*, United States District Court, S.D. West Virginia, 2021, WL4898070, (Oct. 2021) (citing *Morris Memorial Convalescent Nursing Home, Inc. v. W.Va. Hum. Rts. Comm’n*, 431 S.E.2d 353 (W.Va. 1994; *Mayflower Vehicle Sys., Inc. v. Cheeks*, 629 S.E.2d 762, 773 (W.Va. 2006).

In the Respondent’s aforementioned “Narrative”, attached to and made part of its *Verified Answer*, the Respondent asserted that it had rejected Complainant Livingood’s application for the advertised position of Assistant Public Defender due to “poor references”, “lack of experience”, “poor presentation”, and “an interview that made it clear Complainant was not qualified for the Assistant Public Defender position”. The “Narrative” also asserts that Respondent makes employment decisions **entirely** on the qualifications of the candidate. Joint Exhibit Notebook p. 52.

In addition to the above stated reasons set forth by the Respondent in its *Verified Answer* for its rejection of the Complainant’s application for employment, the Respondent has, in the Public Hearing, proffered at a late stage in the proceedings additional reasons for its adverse decision including that the Complainant wore wrinkled clothes to the interview and appeared disheveled, that she was non-communicative or acted “oddly” with the office’s secretary/receptionist, and that she gave a poor interview.

**ALLEGED “POOR REFERENCES”, LACK OF EXPERIENCE AND QUALIFICATIONS:**

With regard to the Respondent’s assertion that the Complainant’s application for employment was rejected due to “poor references”, “lack of experience” and “lack of qualifications” the Complainant provided, in addition to evidence of her roughly four years of legal practice in various areas of law, three professional references with her application and resume, these including former West Virginia Supreme Court Justice, the Honorable Larry V. Starcher, the Executive Director of West Virginia Senior Legal Aid, LLC, Ms. Cathy McConnell, Esq., also the Complainant’s supervisor during the Complainant’s employment, and also Ms. Mildred Biggs, Esq. a staff attorney and co-worker of the Complainant’s during the Complainant’s employment with West Virginia Senior Legal Aid.

Mr. Postalwait and Mr. Vodden testified that they intentionally did not contact the Complainant's references.

**Former W.Va. Supreme Court Justice, the Honorable Larry V. Starcher:**

In his personal letter of recommendation for employment with West Virginia Senior Legal Aid, dated April 11, 2012, filed with the evidence in this matter, former West Virginia Supreme Court Justice, Larry V. Starcher, recommended that it hire Rachel Livingood for an attorney staff position, Justice Starcher stating as follows:

"This is a letter of recommendation for Rachel Livingood, currently a third year student at the West Virginia University College of Law. Ms. Livingood has advised me that she is applying for a position with Senior Legal Aid.

I know Rachel quite well having her as a student in one of the two classes I now teach at the College of Law, and from seeing her frequently around the Law School. I have been teaching at the WVU College of Law since retiring from the West Virginia Supreme Court of Appeals in 2008 – and I served as an Adjunct on a part-time basis at the College for many years prior to retiring.

As a jurist for 32 years – twenty as a state trial judge and twelve as a state supreme court justice – I have worked with law students and law clerks most of my life. And, in my opinion, Rachel one of the more unique students I have encountered. She is mature, hardworking, very inquisitive and generally a pleasure to have around. She is openly committed to equal justice for all persons. She possesses a quiet leadership style, is a very hard worker for whatever she commits to and is always willing to assume responsibilities assigned to her individually, or on behalf of a class.

Ms. Livingood's resume speaks for itself. It acknowledges a well-rounded student who has complemented her academic classroom work with interesting activities and employment with the diversity that might be expected of a bright, inquisitive mind. She, obviously, has an interest in legal services for the disadvantaged – particularly seniors. I confess that I have a personal bias for a person who chooses to work in this area of the law, having been the Director of a six-county legal services program for seven [years] prior to becoming a circuit judge in 1976.

At the College of Law Rachel is not in the top five percent of her class, but her intelligence is not reflected by that measure only. A twenty minutes conversation with Rachel suggest that her mind is expansive, she possesses high intelligence, and she is one of the more committed persons that one will ever encounter. She tends to think "outside of the box", is very friendly, and generally highly thought of by her peers and the faculty here at our College of Law.

To summarize, my overall impression of Rachel Livingood is that she is a hard-working young woman who presents herself as bright, talented,

personable, and appropriately aggressive. She is an individual who accepts a task, explores options for accomplishing it, and gets to work on it. She is outwardly friendly; it has been a pleasure for me to have had her in class and knowing her at the College of Law. Rachel is destined to succeed.”

Sincerely,

Larry V. Starcher  
Senior Status Justice and  
Lecturer in Law WVU  
College of Law.

Comp. Exh. I.

It is hereby found, by inference, that had former Justice Starcher been contacted by Mr. Postalwait or Mr. Vodden, or other Respondent representative in preparing for the Complainant’s interview, Justice Starcher’s opinion and recommendation of the Complainant for a legal position with her immediate past employer, West Virginia Senior Legal Aid, LLC, would have been helpful in determining and confirming the Complainant’s, reputation, work ethic, and qualifications for employment as an Assistant Public Defender, or, at the very least, his opinion and recommendation would provide a better indication of the Complainant’s legal acumen, capabilities and qualifications than others, contacted by the Respondents representatives, Mr. Postalwait and Mr. Vodden, who offered no relevant information with regard to the Complainant’s legal mindset or abilities, but only comment regarding her gender identity.

**MS. MILDRED BIGGS, ESQ., STAFF ATTORNEY, WEST VIRGINIA SENIOR LEGAL AID, LLC:**

In the testimony of Ms. Mildred Biggs, Esq., at the Public Hearing, Mildred Biggs, Esq., a staff member of West Virginia Senior Legal Aid, LLC, and testified that when she began working at West Virginia Senior Legal Aid, in 2016, Robb Livingood was a staff attorney there, but went by the name Rachel Livingood, his legal name at that time. Hrg. Tr. 138: 3-8. Ms. Biggs stated that her impression was very favorable, that he worked well with the clients, was hardworking and did a thorough job, that he did a lot of follow up, was careful in his research and that she would want to work with him again. Hrg. Tr. pp. 139:10-24 & 140: 1-9. Ms. Biggs testified that she was not contacted by the Respondent as a reference for Robb Livingood but if contacted she would have given a very favorable reference as she believed him to be a wonderful coworker, pleasant to be around hardworking and conscientious. Hrg. Tr. p. 142: 14-24. Ms. Biggs also

identified Ms. Cathy McConnell as the Executive Director and immediate supervisor to both she and Robb Livingood. Hrg. Tr. p 143: 13-17.

Had Ms. Biggs been contacted by the Respondent, she would have been the only attorney contacted by the Respondent, who had both known and worked with the Complainant, and whose opinion would have provided information that the Respondent claims it had verified by contacting attorneys who had worked with the Complainant in a professional capacity. (Respondent's Narrative, pp. 51).

**MS. CATHY MCCONNELL, EXECUTIVE DIRECTOR, W.Va. SENIOR LEGAL AID, LLC:**

Although Ms. McConnell did not testify at the Public Hearing, her position as Executive Director of West Virginia Senior Legal Aid and the Complainant's legal supervisor for the period of the Complainant's employment with West Virginia Senior Legal Aid, made her a logical and reasonable contact person regarding her frequent, if not daily, interaction with the Complainant and her qualifications for the position of Assistant Public Defender, particularly when the Respondent asserted in its aforementioned "Narrative" attached to its Verified Answer, that in preparing for the Complainant's interview the Respondent's employees contacted other attorneys who had known and worked with the Complainant.

**RESPONDENT'S EXPLANATION OF "POOR REFERENCES" UNSUPPORTED BY THE EVIDENCE**

Mr. Postalwait, testified in the public hearing in this matter that by Respondent's comment in the "Narrative" made part of its Verified Answer, that the Complainant had "poor references", as contained in the Respondent's "Narrative", he did not mean "poor references" referring to those listed in the Complainant's resume, but that he "had reached out to folks and they did not give a positive recommendation" so, in his mind that seemed like a "poor reference". Hrg. Tr. 241: 13-15.

The record establishes that the only individuals referenced by Mr. Postalwait consisted of (1) a female employee in Respondent's office who had been said to have attended law school at the same time as the Complainant, (2) an unnamed employee of the Magistrate Court, in Lewis County, West Virginia, called by Mr. Postalwait, prior to the Complainant's interview and (3) an unnamed Circuit Judge's secretary in Lewis County, West Virginia, also called by Mr. Postalwait before the Complainant's interview, none of whom offered an opinion of the Complainant's legal skills, work performance or qualifications.

The Respondent's employee referenced by Mr. Postalwait, as not having provided a positive reference for the Complainant, and taken by him as a "poor reference", was said by Mr. Postalwait to have advised Mr. Vodden only that she remembered a Rachel Livingood but not a Robb Livingood from law school. The record does not indicate anything reportedly said by such employee regarding the Complainant's qualifications for the advertised position, or even of her performance in law school, but only of the identity of a Rachel Livingood in law school and not a Robb Livingood. Hrg. Tr. p. 207:8-20. Since the only topic of discussion relates to the Complainant's gender identity, it can only be hereby inferred that this is the basis for Mr. Postalwait's finding such comment to be a negative reference and that such information is insufficient and lacks clarity supporting it to be a legitimate non-discriminating reasons for Respondent's decision not to hire the Complainant.

Review of the record regarding Mr. Postalwait's contact with the unidentified employee of the Magistrate's office, in Lewis County, West Virginia, fails to disclose any information regarding the Complainant's qualifications or legal performance but only that the Magistrate employee transferred Mr. Postalwait's call to a Circuit Judge's office, without comment, whereupon Mr. Postalwait then spoke with an unidentified Circuit Judge's secretary. Hrg. Tr. pp. 209:17-24 & 210: 1-4.

Although Mr. Postalwait testified that he was "shocked" by the Magistrate's office transferring him to the Circuit Judge's office, without comment, and that it "raised a red flag" with regard to the Complainant, Mr. Postalwait also testified that there could have been another reason why the Magistrate's office transferred his call without comment. The record reflects no comment and certainly no information provided by the Magistrate's employee regarding the Complainant's qualifications for the position, and consequently no negative reference of the Complainant is hereby made or inferred. Hrg. Tr. pp. 248: 18-24 & 249: 1-3.

With regard to Mr. Postalwait's conversation with the unidentified Circuit Judge's secretary, Mr. Postalwait testified that the secretary declined to give Mr. Postalwait a reference for the Complainant but indicated that she thought that Robb Livingood and a Rachel Livingood were the same. Hrg. Tr. pp. 210:5-12. Mr. Postalwait testified that the lack of a positive reference from the Judge's secretary, meant to him that "they probably didn't view Mr. Livingood favorably, for whatever reason". Hrg. Tr. 210: 14-15. Mr. Postalwait admitted that he didn't remember if the secretary specifically said that she

wasn't willing to make a positive reference regarding the Complainant or whether she was choosing to make none at all. Hrg. Tr. 210: 14-15; 230: 1-16.

Mr. Vodden testified that after Mr. Postalwait's phone conversation with the Circuit Judge's secretary, Mr. Postalwait told him that "the secretary had declined to offer a recommendation or really anything at all about how Mr. Livingood had performed". Hrg. Tr. p. 181: 19-24.

Mr. Postalwait testified further that the Circuit Judge's secretary also refused to put his call through to the Circuit Judge, that he didn't know why, but could only speculate. Hrg. Tr. p. 210: 24 & 211: 1-13. Speculation is insufficient upon which the undersigned can infer a negative reference as to the Complainant's qualifications.

The undersigned concludes that there was no relevant information regarding the Complainant's qualifications for the position sought from Mr. Postalwait's contact with the above referenced individuals and no negative reference of the Complainant to have thereby been made or to be inferred and consequently such contact with a Circuit Judge's secretary does not substantiate a clear or credible non-discriminatory reason for not hiring the Complainant but rather, establishes the same to be misrepresentations of Complainant's having poor references, lack of experience or lack of qualifications for the position sought.

On the basis of the foregoing, it is concluded that the Respondent's proffer of the above asserted legitimate, non-discriminatory reasons for its rejection of the Complainant's application for employment being based upon "poor references", and "lack of experience" and "lack of qualifications", fails to meet the legal requirements of clarity and credibility to establish reasonable non-discriminatory reasons for the Respondent's failure to hire Complainant.

#### **RESPONDENT'S ADDITIONAL REASONS FOR NOT HIRING THE COMPLAINANT LACKING CLARITY AND CREDIBILITY**

As noted above, the Respondent, in the Public Hearing, offered numerous additional reasons for its adverse decision regarding the Complainant, including that the Complainant wore wrinkled clothes to the interview and appeared disheveled, that she was non-communicative with the Office's secretary/receptionist, Ms. Fisher, in the five to ten minutes while the Complainant awaited her interview, and that she gave a poor interview, all of which, as discussed below, are found to lack sufficient clarity, credibility, objective or otherwise, and not representative of the true or motivating reason for the

Respondent's adverse decision, her transgender status and non-conforming appearance as a masculine female. It is also concluded that the Respondent's adverse decision was fatally compromised and adversely affected by the Respondent's irrelevant and improper pre-interview, research and focused inquiry into the Complainant's gender identity and non-stereotypical male appearance, which was made a topic of general discussion in the Respondent's office, including by the Respondent's legal secretary, Ms. Fisher and others. The Respondent, by its focus upon the Complainant's gender identity, transgender status, and male appearance, when female, treated the Complainant differently and unequally as compared to Mr. Nichols, the only other applicant for the subject position, a cisgender male, and subjected the Complainant to a different and more restrictive standard for determining her qualifications for the position of Assistant Public Defender, than Mr. Nichols who was offered the position.

#### **WRINKLED CLOTHES AND DISHEVELED APPEARANCE**

Both Mr. Postalwait and Mr. Vodden testified that a reason or factor for not hiring the Complainant was because of her wrinkled clothes and that she had a disheveled appearance at her interview. The Complainant, however, testified that she was dressed professionally at the time of the interview, wearing a tie and jacket, a button up shirt, the jacket having been purchased from a men's clothing store, that she wore short hair, no makeup, no jewelry, and appeared as a masculine female. Hrg. Tr. pp. 67:3-6, 8-24, 68: 1-7.

When asked what action he would take if an employee of Respondent's office came to the office appearing in an inappropriate fashion, Mr. Vodden stated that they would be sent home to change, but Mr. Vodden didn't answer, when asked, what disciplinary action, if any, would be taken, stating that he didn't understand the question. Hrg. Tr. p. 197: 18-24 & 198: 1-7.

Given the lack of objective evidence or way of proving the accurateness of either party's recollections of the interview or of the Complainant's alleged inappropriate appearance, and the lack of credibility of the Respondent's reasons for not hiring the Complainant due to poor references, lack of experience or qualifications, those reasons being proven wrong, the undersigned does not accept "wrinkled clothes" or "disheveled appearance" as a legitimate, non-discriminatory reasons for not hiring the Complainant.

#### **RESPONDENT'S LEGAL SECRETARY'S SUBJECTIVE EVALUATION OF THE COMPLAINANT'S FITNESS FOR EMPLOYMENT AND RESPONDENT'S STAFF'S**

The Respondent's reference in its Verified Answer and Motions to Dismiss to Instagram photos of the Complainant, presenting as male, and a copy of the Complainant's West Virginia driver's license, obtained by Mr. Vodden also attached to the Respondent's *Verified Answer and Motions to Dismiss*, clearly indicate the mindset of the Respondent at the time of its processing of the Complainant's application and in making its employment decision regarding the Complainant, that it believed that discrimination against a transgender individual, and specifically this Complainant, was not unlawful discrimination under the West Virginia Human Rights Act. This mindset clearly affected the Respondent's interview and selection process. The Respondent's entire office learned of the Complainant's transgender status and appearance, which issue took front and center on the Complainant's hiring consideration, even to the point of seeking out the Respondent's legal secretary's opinion of the Complainant's fitness, when she had admittedly spoken with others in the office regarding the Complainant's transgender status and appearance. It is impossible for this factfinder to believe that given the record as a whole, and the Respondent's research into the Complainant's gender identity and non-conforming appearance and discussion of the same in the Respondent's offices, did not adversely impact the Complainant's treatment with regard to her application for employment with the Respondent, its interview process and the Respondent's ultimate decision regarding her employment. Respondent's treatment of the Complainant clearly constitutes disparate and unequal treatment based upon sex.

#### **MIXED MOTIVE AND MOTIVATING FACTORS**

Even if any of the many reasons offered by the Respondent for its determination not to hire the Complainant were to be found to be legitimate, non-discriminatory reasons for Respondent's decision not to hire the Complainant for the open position of Assistant Public Defender, which argument is rejected here, the Respondent's discrimination of the Complainant "on the basis of sex", if not the sole reason for the Respondent's decision not to hire the Complainant, was clearly a motivating factor for the Respondent's rejection of Complainant's application for employment, playing a role in the Respondent's adverse decision, without which factor it is believed the Complainant would have been hired. Consequently, the Complainant is found to have established, by a preponderance of the evidence, the Respondent's violation of the West Virginia Human Rights Act, in its failure to hire the plaintiff on the basis of sex, both on

## **DISCUSSION AND KNOWLEDGE OF THE COMPLAINANT'S GENDER IDENTITY PRIOR TO COMPLAINANT'S INTERVIEW.**

Mr. Postalwait, when asked the reasons for his not hiring the Complainant, testified that it was the Complainant's interview, the way the Complainant acted with his secretary and the aforementioned phone with the Circuit Judge's secretary. Hrg. Tr. p. 217: 11-23.

On January 24, 2018, immediately before conducting the Complainant's interview, Mr. Postalwait and Mr. Vodden had the Complainant wait in the outer office with the Respondent's legal secretary and receptionist, Ms. Sandra Fisher, for five to ten minutes, to allow for Ms. Fisher to interact with her. Hrg. Tr. p. 175: 19-24.

Mr. Vodden testified that Ms. Fisher advised them that she thought that Mr. Livingood behaved "oddly", that Mr. Livingood wasn't very responsive to her, that he had been pacing and that he did not appear appropriately dressed for his interview. Hrg. Tr. p. 180: 1-6.

Ms. Fisher did not participate in the Complainant's interview and admitted that her opinion of the Complainant's non-fitness for the position, given to Mr. Postalwait and Mr. Vodden, was based solely upon her subjective opinion of the Complainant's appearance and lack of conversation. Hrg. Tr. pp. 159: 14-24 & 160: 1-17.

The evidence establishes that **prior to the Complainant's interview**, the Complainant's transgender status was made known to the Respondent's staff, including Ms. Fisher, and discussed by Ms. Sandra Fisher, with other of the Respondent's staff members, that they had looked on social media and found that there had been "some sort of transition that had taken place" and that it had become known among the Public Defender's Office that Robb and Rachel apparently were the same person. Hrg. Tr. pp. 154: 12-20, 155: 2-12.

Interestingly, the Respondent's "Narrative" attached to its *Verified Answer* stated that it was the opinion of the Respondent's staff that they were not willing to accept responsibility for the work product of the Complainant. Since the record reflects that little, if anything, was known by the Respondent's staff of the Complainant's qualifications and past legal experience, it is only reasonable to assume that the opinion of the Respondent's staff was based on something other than qualifications. Based upon Ms. Fisher's testimony, it is clear that knowledge of the Complainant's transgender status became known generally in the Respondent's office following Mr. Vodden's research into

the Complainant's social media disclosing her transiting gender status and photos of her appearing as male, which he then passed to Mr. Postalwait.

All of the additional reasons for rejecting the Complainant's application for employment are found overwhelmingly subjective, arbitrary, unsupported in the record, lacking clarity and credibility and believed by the undersigned to be pretextual as cover for the true reason for rejecting the Complainant's application for employment, her gender identity and male appearance. Courts are skeptical of alleged reasons which are not asserted until the later stages of a discrimination dispute. *Gallo v John Powell Chevrolet, Inc.* 61 Fair Emp. Prac. Cases 1121, 1129 (M.D.PA. 1991)

### **RESPONDENT'S IMPERMISSIBLE FOCUS ON THE COMPLAINANT'S GENDER IDENTITY AND MALE APPEARANCE**

According to the record, immediately following the Respondent's receipt and scheduling of the Complainant for an interview the Respondent began engaging in a search of personal information regarding the Complainant in preparation for her interview, and rather than focusing on the Complainant's qualifications for the position advertised and seeking out attorneys who had worked with her as Respondent represented it had done (See Respondent's "Narrative" attached to its Verified Answer), the Respondent's representatives, including its Deputy Chief Public Defender, Mr. Vodden, and its Chief Public Defender, Mr. Postalwait, focused on the Complainant's gender identity, and non-stereotypical appearance as male, even to the point of obtaining copies of photos of the Complainant which Mr. Vodden described as Complainant clearly appearing as a male and then making inquiries both in and outside its offices regarding the Complainant's gender identity. Unfortunately, this inquiry became the Respondent's only focus, later known and discussed, as noted above, by the Respondent's staff and thereby adversely affecting a non-discriminatory evaluation of the Complainant's legal ability and qualifications, which consequently corrupted a fair and equal evaluation of the Complainant's fitness for the position advertised. This is deemed to be a logical conclusion resulting from the Respondent's application of stricter standards of qualification for the position advertised for the Complainant as compared with the standards applied to the other applicant, Mr. Nichols, a cisgender male, and Respondent's misrepresentation of the Complainant's qualifications and experience which demonstrated the Complainant to be far more qualified than Mr. Nichols who Respondent offered the position over the Complainant.

the basis of her gender identity as being transgender and Respondent's impermissible gender stereotyping, on the basis of her appearance as a masculine female.

### **RESPONDENT'S FAILURE TO REBUT THE COMPLAINANT'S PRIMA FACIE CASE**

On the basis of all of the foregoing regarding the Respondent's proffer of its alleged legitimate, non-discriminatory reasons for rejecting the Complainant's application for the advertised position of Assistant Public Defender, it is concluded that a preponderance of the evidence the Complainant has established the Respondent's reasons for rejecting her application for such position not to constitute legitimate non-discriminatory reasons for rejecting her application for employment to be lacking in clarity, and credibility and to be pretext for the true reasons for her rejection, her transgender status and non-conforming appearance as male when being female.

Further, the undersigned concludes that the Respondent has failed to establish by a preponderance of the evidence, that absent discrimination on the basis of sex, specifically the Complainant's gender identity, i.e. transgender status, and non-stereotypical appearance as male when being female, that it would have, for clear, non-discriminatory reasons, rejected the Complainant's application for employment as an Assistant Public Defender.

### **DAMAGES AND FURTHER RELIEF**

Complainant contends that he has suffered damages in the form of lost back pay wages, that he is entitled to incidental damages, his attorneys fees and costs and other equitable relief pursuant to applicable regulations of the West Virginia Human Rights Commission at W.Va. C.S.R. §77-2-9.2 and 9.3 and the previous holding of the West Virginia Supreme Court regarding such relief. *State Human Rights Commission v. Pearlman Realty Agency*, 161 W.Va. 1, 239S.E.2d 145, 146 (1977). Mr. Livingood asserts specifically that he is entitled to actual damages in the amount of "at least" \$70,114.50, plus interest of \$1,280.86, for a total of \$71,425.36; that he is entitled to incidental damages of \$4,370.91, pursuant to applicable case law established under the aforementioned decision in *Pearlman* and that he is entitled to attorney's fees of \$24,391.00, and costs in the amount of \$606.82. Complainant contends that the total damages to which he is therefore entitled is \$100,763.23. In and for further relief, the Complainant urges the Commission to order Respondent to implement diversity sensitivity training "to stop their unlawful discriminatory practices".

Under applicable statute, regulation, and case law, Mr. Livingood is found entitled to such relief as will effectuate the purposes of the West Virginia Human Rights Act and make him whole for injuries suffered on account of the Respondent's unlawful employment discrimination in this matter. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed. 2d 280 (1975). Mr. Livingood is entitled to be placed, as near as possible, in the position he would have been had he not been subject of the Respondent's discriminatory action.

Under the "make whole rule" Mr. Livingood is therefore found entitled to receive mitigated back pay with prejudgment interest at a per annum interest rate of 10% simple interest, incidental damages, reasonable attorney fees, and costs for his claim against the Respondent. As no request was made by the Complainant to be awarded the position denied, or for front pay, those issues are not considered or made part of this decision or relief hereby granted.

### **BACK PAY**

By testimony of the Respondent's representative, Mr. Postalwait, the evidence reflects that the annual salary paid in the position of Assistant Public Defender is between \$48,000.00 and \$52,000.00 per year. Having no other information, and Respondent's Chief Public Defender being found to be the witness most able to verify the appropriate salary, it is therefore concluded that the \$48,000.00, figure will be adopted as the Complainant's expected yearly salary upon assuming such role. The period of back pay to which Mr. Livingood is found to be entitled is found to begin as of January 24, 2018, the day of Complainant's interview and rejection by the Respondent to December 31, 2020, the last day of the period of time for which the Complainant has sought back pay, and the last period of time for which the record provides information for mitigation purposes. In computing back pay the Commission is required to take into account the Complainant's duty to mitigate his damages by accepting equivalent employment. *Paxton v. Crabtree*, 184 W.Va. 237, 400 S.E.2d 245 (1990).

In this case the Complainant, Mr. Livingood, mitigated his damages by engaging in a solo practice of law. In that practice, for the year of 2018, the Complainant earned gross wages of \$8,660.00, in his practice of law and incurred business expenses of \$6,410.00, directly related to such legal practice, leaving him a net income for 2018 of \$2,250.00. Consequently, Mr. Livingood is entitled to mitigated back pay damages in the

amount of \$42,593.84 for 2018, using the aforementioned base expected annual salary of \$48,000.00.

For the year of 2019, Mr. Livingood earned gross wages of \$45,268.50 in his legal practice, incurring business expenses of \$9,490.50 directly related to such legal practice, leaving him a net income, for the year 2019, of \$35,778.50. Consequently, Mr. Livingood is entitled to mitigated back pay damages in the amount of \$12,221.50 for 2019.

For the year of 2020, Mr. Livingood earned gross wages of \$47,327.00 from his solo legal practice incurring business expenses of \$11,470.00, directly related to such legal practice, leaving him a net income, for the year 2020, of \$38,877.00. Consequently, Mr. Livingood is entitled to mitigated back pay damages in the amount of \$12,143.02 for the year 2020.

On the basis of the foregoing, the Complainant is entitled to a mitigated back pay award totaling \$66,958.34 for the period of January 24, 2018, through December 31, 2020, the last period of time for which back pay was sought, and mitigation information provided.

#### **PREJUDGMENT INTEREST ON MITIGATED BACK PAY**

Mr. Livingood is entitled to prejudgment interest on his mitigated back pay for the years of 2018, 2019, and 2020, at the rate of 10%, per annum, simple interest. The West Virginia Human Rights Commission does not compound interest. *Rodriguez v. Consolidation Coal Co.*, 206 W.Va. 317, 524 S.E.2d 672 (1999); *Hensley v. West Virginia Dep't of Health and Human Resources*, 203 W.Va. 456, 508 S.E.2d 616 (1998); *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W.Va. 53, 365 S.E. 2d 251 (1986); *Bell v. Inland Mutual Ins. Co.*, 175 W.Va. 165, 332 S.E.2d 127 (1985); W.Va. Code §56-6-31. Prejudgment interest is to be calculated from the date on which the cause of action arose to the date of entry of the judgment order.

It has been the policy of the Commission, in keeping with the "make whole" objective of the Act, to calculate interest on accrued back pay. On this basis the Complainant is found entitled to prejudgment interest on his mitigated back pay for 2018 in the amount of \$16,478.62, in the additional amount of \$3,609.53 for 2019 and in an additional amount of \$2,372.04 for 2020. No additional back pay was found for 2021 as the Complainant provided no request for the same nor did Complainant provide any mitigation information for 2021.

## INCIDENTAL DAMAGES

The Complainant is further entitled to incidental damages with respect to his claim against the Respondent. *Pearlman Realty Agency v. West Virginia Human Rights Commission*, 161 W.Va. 1, 239 S.E.2d 145 (1977); *Bishop Coal Co. v. Salyers*, 181 W.Va. 71, 380 S.E.2d 238 (1989). Under the provisions of the West Virginia Human Rights Act, incidental damages are awardable for emotional distress damages *Bishop Coal* provides that the \$2,500 cap on incidental damages may be adjusted from time to time to conform to the Consumer Price Index. *Bishop Coal* at 247. In keeping with this language, the Commission has periodically raised the cap on incidental damages which may be awarded by the Commission for violation of the Act. Currently the cap for emotional distress is \$5,000.00 for each claim. The Complainant is found entitled to such damages from the Respondent in no less than this amount. The Commission takes the position that in virtually all cases where discrimination is held to have occurred, the Complainant will have suffered at least the maximum worth of damages. The Complainant here has obviously suffered from emotional distress injury, due to the Respondent's violation of the Act, in excess of the \$5,000.00 available under the aforesaid cap. Accordingly, the Respondent is held liable for \$5,000.00 to be paid the Complainant for incidental damages arising in this matter.

## LITIGATION COSTS

The general rule provides that each party bears his own attorney's fees unless there is an express statutory authorization to the contrary. Where there is such provision to the contrary, that provision shall be followed.

Here, the West Virginia Human Rights Act modifies the above general rule by providing that for actions brought under the Act, where it is held that the Respondent violated the Act or finds it is engaged in discrimination practice as charged in the complaint, the court in its discretion can award reasonable attorneys' fees and costs to the Complainant. *Rules of Practice and Procedure Before the West Virginia Human Rights Commission*, W.Va. C.S.R. §77-2-9.3.c. The Court may shift the costs to the prevailing party, provided that such requested fees and costs are found to be reasonable. *Hensley v Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933 (1983).

In this case, the Complainant has requested that he be awarded his reasonable attorneys' fees of \$24,391.00, inclusive of time expended by Complainant's counsel, paralegal staff, and costs of \$606.82. Review of the extensive documentation provided

with regard to the Complainant's requested attorneys' fees and paralegal fees demonstrates that the Complainant was represented by Mountain State Justice which provided three (3) attorneys, all of whom provided legal representation at various times in the course of these proceedings with the assistance of multiple paralegals all also employed by Mountain State Justice. Also provided by Mountain State Justice, in its documentary evidence, is a thorough accounting of the specified time, in hours and minutes, and nature of services expended by such staff. The records reflect charged time for its attorneys, of a total of 184.1 hours, covering the period of September 17, 2020, through April 28, 2021, and paralegal time of 14.2 hours. Upon review by the undersigned of the hours and minutes charged, in attorneys' fees, it is noted that they are considerably less than the total time actually expended. Given the nature of the specific services provided, noted experience and regular hourly fees of Mountain State Justice for each of the attorneys involved as set forth in their affidavits, the reasonableness of paralegal charges, and the complexity of the issue involved, the total attorneys' fees, of \$24,391.00, including both attorney fees and paralegal fees, and litigation costs of \$606.82, totaling \$24,997.82 are found to be reasonable.

It is noted that the Respondent's objections to the above award of damages, i.e., that the Respondent lacks assets or insurance coverage to offer any monetary relief to the Complainant, are rejected as not presenting reasonable or credible argument or proper legal basis against awarding such fees and costs against the Respondent under the Act. As to Respondent's statements that it does not have any positions into which it could place the Complainant, nor did such relief seem to it to be practicable, these issues were not addressed in the public hearing, nor addressed here or made part of the relief awarded to the Complainant, only because such further relief was not sought or requested by the Complainant, even in its closing argument or post hearing brief.

#### **CEASE AND DESIST ORDER**

The Commission and Complainant, in this matter, are both entitled to a cease and desist order against the Respondent. The Commission, in its cease and desist order, may make provisions which will aid in eliminating the Respondent's future acts of discrimination and may require an affirmative action program and a sworn affirmation from a responsible officer of the Respondent that the Commission's cease and desist order has been implemented and will continue to be implemented. *Whittington v. Monsanto Corp.*, Human Rights Commission Docket No. ES-2-77; *Pittinger, et al. v.*

*Shepherdstown Volunteer Fire Dep't.*, Human Rights Commission Docket Number PAS-48-77; *Shepherdstown Volunteer Fire Dep't v. West Virginia Human Rights Commission*, 172 W.Va. 627,309 S.E. 2d 342 (1983). The Complainant is likewise entitled to issuance of a cease and desist order against the Respondent as it is always consistent with a "make whole" remedy, because the charging party or complainant is never made whole when the real possibility of future discrimination remains following resolution of the individual charge or complaint.

A cease and desist order is particularly warranted in this case because of the involvement of the Respondent's management employees, who made the hiring decision regarding the Complainant, in researching and inquiring into the Complainant's gender identity, and non-stereotypical appearance as male when being female, which action is clearly against such individual's civil and human rights, and constitutes, an impermissible invasion of issues, gender identity and non-stereotypical appearance, irrelevant to the Respondent's hiring decisions. The Respondent's Chief Public Defender, its Deputy Chief Public Defender, and at least one other Respondent employee, and a legal secretary, by her own testimony, were involved in exploring and discussing with others in the Respondent's office the Complainant's gender identity and transitioning status. Such action must be discontinued. It is also troubling that the Respondent's Deputy Chief Public Defender, Mr. Vodden, has testified that that he was not aware of any anti-discrimination training having been implemented by the Respondent for its staff. Hrg. Tr. p. 195: 22-24.

As established by the United States Supreme Court in its recent decision in *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020), and in its previous decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 104 L.Ed.2d, 268 (1989), an adverse employment decision made by an employer on the basis of an individual's gender identity or sexual orientation, including transgender status, and/or on the basis of gender stereotyping, when making hiring decisions, is unlawfully discriminatory. The United States District Court for the Southern District of West Virginia, in a more recent decision in *Jarrell v. Hardy Cellular Tel. Co.*, no: 2:20-cv-00289, 2020, U.S. Dist. Court, Lexis 129436, (S.D. W.Va., July 22, 2020), adopting the *Bostock* decision, held that under the West Virginia Human Rights Act, an adverse employment decision resulting in an employee's denial of employment, of a qualified

applicant, on the basis of that individual's gender identity or sexual orientation, constitutes unlawful discrimination under the West Virginia Human Rights Act on the basis of sex. An "employer" as defined in the West Virginia Human Rights Act is required, when making hiring decisions, to look at an individual when determining his or her qualifications for an employment position, on that individual's ability or inability to perform essential functions of the job, without reference to sex. It is particularly troubling and discriminatory in this matter, under the West Virginia Human Rights Act, to allow such bias to become a motivating factor of an adverse hiring decision when considering a transgender individual for employment, who has demonstrated by her efforts in successfully obtaining the necessary education, training and licensing, and actual practical work, the ability to perform the position in question. There are many legitimate reasons for denying an employment opportunity to an individual, including non-discriminatory subjective reasons believed to interfere with the essential functions of a job, resulting in her or his not being able to provide the services required, however, choosing to reject an individual on the basis of gender identity, transgender status and non-stereotypical dress and treating that individual differently who does not fit the gender or stereotypical model that the employer envisions for its employees cannot be allowed or tolerated in a civil society which seeks to provide equal employment opportunities. If it is, what comes next? Here, in this case, a transgender lawyer simply has an equal right to employment, as does a non-transgender or "cisgender" lawyer, especially when it is apparent that the person being considered for employment is the most qualified, as was Mr. Livingood under the Respondent's original posting. Such right must be protected.

### **CONCLUSIONS OF LAW**

- 1 Complainant, Robb Livingood, is and was, at all times pertinent to this action, a "person" within the meaning of the West Virginia Human Rights Act. W.Va. Code §5-11-3(a).
- 2 Respondent, Public Defender Corporation, Fifth Judicial Circuit, is and was, at all times pertinent hereto, a "person" and an "employer" within the meaning of the Act. W.Va. Code §5-11-3(a) and 3(d).
- 3 Mr. Livingood's complaint filed in this matter was timely filed in accordance with the provisions of W.Va. Code § 5-11-10.

- 4 The West Virginia Human Rights Commission has personal and subject matter jurisdiction to adjudicate Mr. Livingood's complaint of discrimination, based upon sex, due to Complainant's gender identity/transgender, and due to her non-stereotypical appearance as male when being female, during the period of time involved in this incident.
- 5 The WVHRA provides, in pertinent part, that "[i]t is the public policy of the State of West Virginia to provide **all** of its citizens equal opportunity for employment . . . ." (Emphasis added). Further, and as set forth therein, "Equal opportunity in the areas of employment . . . is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, **sex**, age, blindness or disability..." (Emphasis added). W.Va. Code §5-11-2.
- 6 The provisions of the Act, also provide that the denial of the above rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, **sex**, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society. W.Va. Code §5-11-2.
- 7 The WVHRA, establishes it to be unlawful for any employer to discriminate against an individual with respect to ... **hire**, tenure, terms, conditions or privileges of employment if that 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).
- 8 The Act, in part, defines the term "discriminate" or "discrimination" as meaning "to exclude from, or fail or refuse to extend to a person equal opportunities because of ... **sex**..." (Emphasis added). W.Va. Code §5-11-3(h).
- 9 It is unlawfully discriminatory, under the provisions of the West Virginia Human Rights Act, to discriminate against a "person", by failing to hire such individual, if qualified, on the basis of his or her gender identity, sexual orientation, and/or due to gender stereotyping.
- 10 The Respondent's hiring procedures in this matter, including its pre-interview research, impermissibly focused on the Complainant's gender identity, transgender status and non-conforming, non-stereotypical appearance as male when being female, causing its assessment of the Complainant's qualifications for the position sought to be adversely affected and corrupted by the Respondent's discriminatory treatment of the Complainant on the basis of gender identity and Respondent's

gender stereotyping of the Complainant, a violation of the West Virginia Human Rights Act.

- 11 That the Complainant's transgender status and non-stereotypical male appearance reflected in the Instagram photos of the Complainant discovered, copied, and provided to the Respondent's Chief Public Defender, Mr. Postalwait, by Deputy Chief Public Defender, Mr. Vodden, during his pre-interview social media search for personal information regarding the Complainant, concentrating on the Complainant's gender identity, transgender status and male appearance when female, adversely affected and corrupted a fair and non-discriminatory hiring process, and were motivating factors determinative in the Respondent's rejection of the Complainant's application for employment.
- 12 A preponderance of the evidence establishes the Complainant to have made a *prima facie* case of unlawful disparate employment discrimination under the West Virginia Human Rights Act, Complainant having established (a) that she belongs to a protected class under the West Virginia Human Rights Act, on the basis of sex, (b) that she both applied for and was fully qualified for the employment position for which the Respondent/employer was seeking applicants, (c) that despite her being fully and the best qualified of its two applicants, for the advertised open position of Assistant Public Defender, the Respondent rejected the Complainant, a transgender and male appearing female, choosing instead to offer the position to considerably less qualified individual, a cisgender male, and (d) that after her rejection, although Complainant remaining the only qualified applicant, the position was re-advertised and remained open, the Respondent continuing to seek applicants for a position for which the Complainant was qualified and subsequently hired a cisgender male.
- 13 By establishing a *prima facie* case of disparate employment discrimination for failure to hire, under the provisions of the West Virginia Human Rights Act, the Complainant is entitled to the rebuttable presumption that the Respondent has violated the West Virginia Human Rights Act for unlawful employment discrimination.
- 14 The Respondent, as the charged employer, may successfully rebut the rebuttable presumption created by plaintiff establishing a *prima facie* case of employment discrimination under the WVHRA, by clearly and credibly articulating legitimate non-discriminatory reason(s) for its adverse employment decision not to hire.

- 15 The Respondent, Public Defender Corporation, Fifth Judicial Circuit's articulation of legitimate non-discriminatory reasons for its denial of the Complainant's application for employment were rebutted by the Complainant and by a preponderance of the evidence, as lacking clarity and credibility and shown to be pretextual and not the true motivating reason for its adverse action.
- 16 Alternatively, upon the Complainant having established, by a preponderance of the evidence, that an unlawful discriminatory reason(s), i.e., gender identity and/or gender stereotyping, was a motivating factor in the Respondent's adverse decision not to hire the Complainant, it is concluded that the Respondent has violated the West Virginia Human Rights Act, for unlawful disparate treatment/employment discrimination under a mixed motive theory of liability. *Diamond v. Colonial Life & Accident Insurance Company*, 416 F.3d 310 (4th Circuit, 2005); *Skaggs v. Elk Run Coal Company, Inc.*, 198 W.Va. 51, 479 S.E.2d 561 (1996).
- 17 There was no legally relevant or permissible reason under the West Virginia Human Rights Act for the Respondent's focus on the Complainant's gender identity or manner of dress or non-stereotypical appearance at any time during its hiring process, including the Respondent's informational search conducted regarding her transgender status and non-stereotypical appearance as male when being female. *Bostock v. Clayton Cty. Georgia*, 140 S.Ct. 1731, 207 L.Ed.2d 718 (2020); *Jarrell v Hardy Cellular Tel. Co.*, No 2:20 CV-00289, 2020 U.S. Dist. LEXIS 129, 436 (S.D.W.Va. July 22, 2020) and *Price Waterhouse v Hopkins* 228, 251, 109 S.Ct. 1775, 104 L.Ed 268 (1989).
- 18 The West Virginia Supreme Court of Appeals has consistently held that it will construe the West Virginia Human Rights Act to coincide with the prevailing federal application of Title VII law unless there are variations in the statutory language that call for divergent applications. *Hanlon v. Chambers*, 195 W.Va. 99, 464 S.E.2d 741 (Oct. 1995); *Barefoot v. Sundale Nursing Home*, 193 W.Va. at 482, 457 S.E.2d at 159 (1995); *West Virginia Univ. v. Decker*, 191 W.Va. 567, 447 S.E.2d 259 (1994); *Westmoreland Coal Co. v. West Virginia Human Rights Comm'n*, 181 W.Va. 368. 382 S.E.2d 562 (1989); *State ex rel. State Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W.Va. 711, 329 S.E.2d 77 (1985); *Shepherdstown V.F.D. v. West Virginia Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983).

- 19 The Respondent has failed to establish, by a preponderance of the evidence, that absent its discriminatory action herein, it would not have hired the Complainant.
- 20 As a result of the Complainant's violation of the West Virginia Human Rights Act, the Respondent is liable to the Complainant for mitigated back pay for the years 2018, 2019, and 2020, accrued prejudgment interest from the date of the cause of action to the date of this Judgment Order.
- 21 Based upon a yearly salary \$48,000.00 for the position of Assistant Public Defender, and for the year of 2018, the Complainant is entitled to mitigated back pay damages in the amount of \$42,593.84 plus accrued prejudgment interest on such lost back pay, at the rate of 10% per annum, to the date of this Judgment Order in the amount of \$16,478.62.
- 22 Based upon a yearly salary of \$48,000.00 for the year of 2019, the Complainant is entitled to mitigated back pay damages in the amount of \$12,221.50 plus accrued prejudgment interest on such lost back pay at the rate of 10% per annum, to the date of this Judgment Order in the amount of \$3,609.53.
- 23 Based upon a yearly salary of \$48,000.00 for the year of 2020, Complainant is entitled to mitigated back pay in the amount of \$12,143.02, plus accrued prejudgment interest on such lost back pay at the rate of 10% per annum, to the date of this Judgment Order in the amount of \$2,372.04.
- 24 In and for incidental damages, Mr. Livingood is further awarded, and Respondent is found liable for the sum of \$5,000.00 for humiliation, embarrassment and emotional and mental distress and loss of personal dignity suffered as a result of the discriminatory action of the Respondent, Public Defender Corporation, Fifth Judicial Circuit. W.Va. Code §5-11-10.
- 25 The Complainant is further entitled to payment by the Respondent of his reasonable attorneys' fees and litigation in the amount of \$24,391.00 and reasonable litigation costs of \$606.82 for a total amount of \$24,997.82. W.Va. Code §5-11-10.
- 26 The Commission and the Complainant are entitled to a cease and desist order against Respondent, requiring Respondent to immediately cease and desist from engaging in unlawful discriminatory practices related to its violation of the West Virginia Human Rights Act for discrimination in its hiring practices based upon sex as found in this decision. Such Order is issued for the express purpose of preventing Respondent from committing further illegal discriminatory practices evidenced in this

action, inclusive of discrimination related to its hiring practices of individuals regarding their gender identity and related to gender stereotyping.

27 As part of the cease and desist order the Respondent's managerial employees with responsibilities related to the Respondent's hiring practices, and the Respondent's employees in the Fifth Judicial Circuit, shall undergo training related to discrimination in employment practices beginning within 60 days of the issuance of this decision, such training to include but not limited to training related to discrimination upon gender identity and gender stereotyping under the provisions of the West Virginia Human Rights Act.

### **RELIEF AND ORDER**

Pursuant to the above finding of act and conclusions of law, it is hereby **ORDERED:**

1. The above-named Respondent shall cease and desist from engaging in unlawful discriminatory practices, including, but not limited to, discriminating in hiring decisions because of sex, based upon gender identity, and because of gender stereotyping.

2. Within 31 days of the receipt of the undersigned's **ORDER**, the Respondent shall pay the Complainant back pay damages of \$66,958.34 for lost back pay, plus prejudgment interest thereon, at the statutory rate of 10% per annum, simple interest, in the amount of \$22,460.19 for a total of \$89,418.53.

3. Within 31 days of receipt of the undersigned's **ORDER**, the Respondent shall also pay the Complainant an additional sum for incidental damages in the amount of \$5,000.00 for humiliation, embarrassment, emotional distress and loss of person dignity suffered as a result of Respondent's unlawful discrimination.

4. Within 31 days of the receipt of the undersigned's **ORDER**, the Respondent shall pay to the Complainant reasonable attorney fees and costs and Complainant's totaling \$24,997.82, incurred in the prosecution of this matter.

5. It is **ORDERED** that the Respondent, Public Defender Corporation, Fifth Judicial Circuit, shall engage in an anti-discrimination training program for its management and all present employees, to be conducted by an instructor approved by the West Virginia Human Rights Commission, in accordance with the anti-discrimination requirements of the West Virginia Human Rights Act. Such training shall be conducted at the expense of the Respondent, Public Defender Corporation, Fifth Judicial Circuit,

and shall consist of no fewer than three (3) hours of instruction. Upon completion of such training, the Respondent is further **ORDERED** to provide, to the Commission, an Affidavit from its Chief Public Defender certifying completion of such training.

6. The Respondent, Public Defender Corporation, Fifth Judicial Circuit, is **ORDERED** to post information about anti-discrimination requirements of the West Virginia Human Rights Act, including the address and toll-free telephone number for the West Virginia Human Rights Commission in an area or areas visible to all employees of the Respondent and to the visitors to its office.

In the event of failure of the Respondent to perform any of the obligations hereinbefore set forth, Complainant is directed to immediately so advise the West Virginia Human Rights Commission, Compliance Director, 1321 Plaza East, Room 108-A, Charleston, WV 25301, Phone: 304-558-2616.

It is so **ORDERED**.

**Entered this 15th day of December 2021.**

**WV HUMAN RIGHTS COMMISSION**



**GREGORY W. EVERS  
DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE  
1321 PLAZA EAST, ROOM 108A  
CHARLESTON, WV 25301-1400  
PH: 304-558-2616 / FAX: 558-0085**

**BEFORE THE WEST VIRGINIA HUMAN RIGHTS COMMISSION**

**ROBB LIVINGOOD,**

**Complainant,**

**v**

**Docket No: ES-192-18**

**PUBLIC DEFENDER CORPORATION  
FIFTH JUDICIAL DISTRICT,**

**Respondent.**

**CERTIFICATE OF SERVICE**

I, **Gregory W. Evers, Deputy Chief Administrative Law Judge** for the West Virginia Human Rights Commission, do hereby certify that I have served the foregoing *Administrative Law Judge's Final Decision* on the following individuals, by depositing a true copy thereof in the U.S. Mail, postage prepaid, this 15th day of December 2021, addressed as follows:

Robb Livingood  
220 Cherry Street, Apt. 2  
Morgantown, WV 26501  
*Complainant*

Public Defender Corporation  
Fifth Judicial District  
214 Main Street  
Ripley, WV 25271  
*Respondent*

Laura Davidson, Esq.  
Mountain State Justice, Inc.  
325 Willey Street  
Morgantown, WV 26505  
*Co-Counsel for the Complainant*

Kirk Auvil, Esq.  
The Employment Law Center  
1208 Market Street  
Parkersburg, WV 26101  
*Counsel for the Respondent*

Aubrey Sparks, Esq.  
Our Future West Virginia  
1636 Kanawha Blvd. E  
Charleston, WV 25311  
*Co-Counsel for the Complainant*

Office of The Attorney General  
Civil Rights Division  
P. O. Box 1789  
Charleston, WV 25326  
*Counsel for the Commission on  
behalf of the Complainant*

**Via Hand Delivery**  
Tia L. Welch, Executive Director  
West Virginia Human Rights Commission  
1321 Plaza East, Room 108-A  
Charleston, WV 25301

  
**GREGORY W. EVERS**

**DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE**