

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, CHARLESTON

THERESA D. MESSER,

Appellant/Plaintiff,

v.

Case No.: 33663; 07-1909

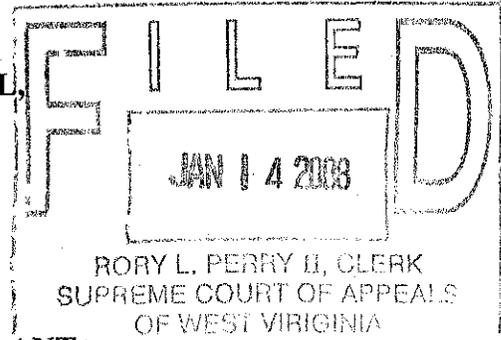
From the Circuit Court of Cabell County

Civil Action No. 02-C-0635

COPY

HUNTINGTON ANESTHESIA GROUP,
INC., DR. FAROUK ABADIR, DR. HOSNY S. GABRIEL,
DR. MARK NEWFELD, DR. RICARDO RAMOS,
DR. ALFREDO RIVAS, DR. D. GRANT SHY,
DR. STANISLAV STRIZ, and DR. MICHAEL VEGA.

Appellee/Defendants.



REPLY BRIEF OF APPELLANT

INTRODUCTION

Through her reply brief Plaintiff responds to the briefs submitted by Defendants.¹ As Appellees submitted two (2) briefs, Appellant will respond to arguments raised in both the "Brief of Appellees Huntington Anesthesia Group, Inc., and Doctors Abadir, Gabriel, Rivas, Ramos, and Vega" (hereinafter HAGI Defendants) and "Brief of Appellees Dr. Mark Newfeld, Dr. D. Grant Shy, and Dr. Stanislav Striz" (hereinafter Newfeld Defendants). Although the positions of the Appellees vary in minor ways, the thrust of their position is the same, with the exception of the settlement issues as discussed herein below. Appellant's responses to Appellees, therefore, shall overlap as do the arguments of Appellees.

In their introductions the Appellees mischaracterize this Court's decision in Messer v. Huntington Anesthesia Group, 218 W. Va. 4, 620 S.E. 2nd 144 (2005) (hereinafter Messer I). As

¹ The terms "Plaintiff" and "Appellant" shall be used interchangeably throughout, as will "Defendants" and "Appellees".

discussed in the petition for appeal and in Appellant's initial brief, this Court reviewed in detail the factual allegations made by the parties in Messer I and concluded that the agreed upon facts stated a cause of action under the West Virginia Human Rights Act. Defendants ignore the thrust of this Court's ruling in Messer I directing that, on these agreed facts, the Plaintiff had stated a cause of action. Instead Defendants "cherry pick" language to suggest that the Court actually determined that the Plaintiff had no such cause of action. A fair reading of Messer I does not support the Defendants' position as discussed in detail in Plaintiff's initial brief.

Further, the Defendants agree upon and accept as true sufficient facts to establish the Plaintiff's claim of failure to accommodate under the WVHRA. The facts established in both the extensive portions of the depositions appended to "Consolidated Memorandum in Support of Motions of Defendant Huntington Anesthesia Group, Inc., and Defendants Abadir, Gabriel, Rivas, Ramos, and Vega to Dismiss and/or for Summary Judgment" (hereinafter "HAGI Summary Judgment") and "Motion for Summary Judgment on Behalf of Mark Newfeld, Dr. D. Grant Shy, and Dr. Stanislav Striz" (hereinafter "Newfeld Summary Judgment"), together with the Defendants' "Responses to Plaintiff's Second Notice of Videotaped 30(b)(7) Deposition on Behalf of Huntington Anesthesia Group, Inc." attached as Exhibit A to "Plaintiff's Initial Response to Defendants' Motion for Summary Judgment" establish an ample factual record of the Defendants' individual and corporate failure to accommodate a mandatory medical limitation on the Plaintiff's hours of work. Thus the Defendants' overall position that the Plaintiff failed to provide the Circuit Court with sufficient factual basis upon which to found her WVHRA claim for failure to accommodate is incorrect.

In addition to the pleadings, each element of the Plaintiff's prima facie WVHRA case was detailed point by point before the Circuit Court in oral argument. Thus, it is inaccurate to argue (as do the Defendants in their pleadings) that the Plaintiff did not oppose the Defendants' summary judgment motions on either a corporate or individual basis. Defendants' summary judgment motions were vigorously opposed, both in pleadings and oral argument.

FACTS

HAGI employed approximately twenty (20) CRNAs, including Plaintiff. Messer TR 25, Id. In the deposition transcripts, the pleadings submitted by the Defendants, in briefing and in oral argument, the factual basis for the Plaintiff's WVHRA claim of failure to accommodate was not only well established but was, in all pertinent regards, not disputed by Defendants. Defendants did not dispute and do not dispute that the Plaintiff had a handicapping condition which significantly limited one or more of her major life activities, thus rendering her a handicapped person afforded protections under the West Virginia Human Rights Act. Defendants do not dispute that the Plaintiff was qualified to perform her position as a CRNA, and, in fact, employed her in performing that position until she was removed from her CRNA work by her treating physician. January 11, 2007, Order, ¶ 15, p. 5. Defendants do not dispute that Plaintiff could have continued to perform the essential functions of her CRNA position had they afforded her the accommodation of limiting her workday to eight (8) hours per day as required by her treating physician. Defendants do not dispute that they repeatedly failed to afford this accommodation despite being on notice that this accommodation was medically

necessary.² These are facts which establish a violation of the West Virginia Human Rights Act of failure of accommodate. Defendants now request that this Court ignore the legal significance of these undisputed facts as did the Circuit Court.

Plaintiff notes that the entire statement of “facts” in the HAGI Defendants’ brief contains only the general reference that “unless otherwise referenced, the factual material in this section is contained in the affidavits which were submitted by the Appellants in support of their motions for summary judgment.” *Id.* at footnote 8. However, it is not acceptable to base the grant of summary judgment upon self-serving affidavits by Defendants when, as in this case, the Defendants’ own submissions to the Circuit Court form a prima facie case for the Plaintiff. *Id.* at page 9-10.

For instance, when, in addition to the written restrictions she had given in terms of work hours, the Plaintiff made individual requests of Defendants for accommodation, rather than address the accommodation HAGI took the position that the Plaintiff would “basically have to find my own person or relief.” Messer TR 99 (attached as an exhibit to “Consolidated Memorandum in Support of Motions of Defendant Huntington Anesthesia Group, Inc., and Defendants Abadir, Gabriel, Rivas, Ramos, and Vega to Dismiss and/or for Summary Judgment”). Plaintiff noted Defendants failed to accommodate her medical restriction that she not be forced to work overtime. Messer TR 22, *Id.* Plaintiff had not only given written requests

² Plaintiff prepared a chronological list of the violations of the Plaintiff’s eight (8) hour restriction which Defendants, from Defendants’ “Responses to Plaintiff’s Second Notice of Videotaped 30(b)(7) Deposition on Behalf of Huntington Anesthesia Group, Inc.” attached as Exhibit A to “Plaintiff’s Initial Response to Defendants’ Motion for Summary Judgment”, admitted before the Circuit Court.. The list is attached as an appendix hereto. As reflected therein, Defendants admit that over 25% of Plaintiff’s work schedule (after Defendants were aware of her need for accommodation) violated that accommodation.

for accommodation to the Defendants, but verbally requested that she be given relief coverage after eight (8) hours. Messer TR 105, Id. Plaintiff specifically alleged that Defendants repeatedly failed to accommodate her restrictions. Messer TR 89, Id.

Defendants and the Circuit Court attribute great significance a note by the WV Division of Rehabilitation Services which reports that Plaintiff indicated that she initially believed that her return to work would be accommodated by the Defendants. January 11, 2007, Order, ¶¶ 8-10, p. 4. However, Plaintiff testified in her deposition that, although she hoped that would be true when she spoke to the WV Division of Rehabilitation, that proved not to be the case because the Defendants refused to fulfill their promise to accommodate her. As Plaintiff put it “at first I thought it came out good. They [HAGI] told me what I wanted to hear, but in essence it didn’t seem to help.” Messer TR 9-10, Id. Plaintiff noted that, although she initially felt good after meeting with the Division of Rehabilitation and the corporate representatives of HAGI “after thinking about it, I thought, well, they really haven’t helped me. You know, Dave Easter [HAGI Office Manager] has put it back on me again.” Messer TR 14, attached as an exhibit to “Motion for Summary Judgment on Behalf of Mark Newfeld, Dr. D. Grant Shy, and Dr. Stanislav Striz”. The Defendants ask this Court to follow the Circuit Court in adopting the Defendants’ interpretation of this note, which interpretation Plaintiff credibly disputes as misleading. This is a factual issue which cannot be properly resolved on summary judgment, especially in light of the fact that the Circuit Court gave no reason for rejecting Plaintiff’s version of the significance of this note.

Plaintiff explicitly testified that she had communicated to the HAGI office manager upon her return to work in September, 1999, that she was to continue on eight (8) hour restrictions and

ask the HAGI office manager to remind each of the supervising anesthesiologists of the restrictions. Messer TR 71, "Consolidated Memorandum in Support of Motions of Defendant Huntington Anesthesia Group, Inc., and Defendants Abadir, Gabriel, Rivas, Ramos, and Vega to Dismiss and/or for Summary Judgment".

As set forth in the portions of Plaintiff's deposition attached to "Motion for Summary Judgment on Behalf of Mark Newfeld, Dr. D. Grant Shy, and Dr. Stanislav Striz", Plaintiff noted that she provided a February 10, 1999, medical slip from her treating neurologist (Dr. Deer) and specifically discussed the restrictions set forth therein with Defendant Gabriel. Messer TR 67-68, Id. Plaintiff testified, "I remember giving it to Dr. Gabriel and discussing with him that I was having some major problems and that, you know, the one major problem that I was having was trying to work over eight hours a day. I handed it to him. He handed it back to me." Plaintiff explicitly discussed the need to structure her schedule so that she did would not be forced to work past eight (8) hours a day with the Defendants. Messer TR 99, Id. Defendants do not dispute that they regularly violated this known limitation.

ARGUMENT

A. Summary Judgment Facts Support Finding of Failure to Accommodate Inappropriate

Defendants admitted in pleadings filed with the Circuit Court that they had decided that "absolute, strict adherence to an eight hour restriction is impossible in light of the nature of Plaintiff's profession." "Responses to Plaintiff's Second Notice of Videotaped 30(b)(7) Deposition on Behalf of Huntington Anesthesia Group, Inc." attached as Exhibit A to "Plaintiff's Initial Response to Defendants' Motion for Summary Judgment", Response No. 19. Thus, the

Defendants never intended to consistently accommodate the Plaintiff's known medical restrictions, claiming that it was "impossible" to do so. Defendants blame the Plaintiff for choosing to return to work with condition which required accommodations. *Id.* But Plaintiff's effort to return to employment is exactly what the WVHRA protects and encourages.

Defendants did not attempt to establish that accommodating the Plaintiff would impose an "undue hardship" as defined by W. Va. CSR § 77-1-4.6. In fact, the Circuit Court, at paragraph 12 of its summary judgment order, ignored the question of whether accommodation of the eight (8) hour restriction would impose an undue hardship. Instead, the Circuit Court addressed as dispositive the very different question of whether or not the Defendants denied the Plaintiff's request for replacement at the end of her eight (8) hour shift if "if a replacement anesthetist was available." This ignores the legal obligation of the Defendants to assure a replacement anesthetist was available to accommodate the Plaintiff's restriction unless Defendants demonstrated that doing so would pose an "undue hardship." In a twenty (20) CRNA operation, Defendants' consistent failure to schedule Plaintiff to adhere to Plaintiff's restriction at least poses a jury question as to whether Defendants met the legal standard of "reasonable accommodation." Given the frequency with which Defendants worked Plaintiff past her eight (8) hour restriction (over 25% of the time) it is certainly something that could reasonably be anticipated and for which a jury could reasonably hold Defendants responsible.

Critically, the Circuit Court noted that it did not (because it was "not necessary") undertake to "evaluate the efficiency of the accommodation which HAGI made or whether other alternatives were available." But this is exactly what the law requires Defendants to do. W.Va. CSR § 77-1-4. The Court concluded that the Defendants made some effort to accommodate and

interact with the Plaintiff and concluded that, as a matter of law, Defendants had complied with their duty of accommodation. Summary Judgment Order, January 11, 2007, page 6, paragraph 1.

The Circuit Court further concluded that “the only complaint which Plaintiff made to HAGI about these accommodations was in a letter which was written in November, 2000, after she had stopped working.” As set forth in the citations to the Plaintiff’s deposition set forth above, this is clearly inaccurate based on the undisputed evidence before the Circuit Court.³

As set forth in the Circuit Court’s order, all the Court required was that Defendants exhibit “flexibility, courtesy, and cooperation” in order to grant summary judgment on the Plaintiff’s WVHRA claim. However, flexibility, courtesy, and cooperation, while relevant, do not address the specific accommodation which was medically justified and which all of the Defendants knew was required in order for the Plaintiff to continue to be employed. In this particular instance, HAGI and each of the Defendant physicians was aware of the explicit and simple accommodation which was required - an eight (8) hour day. They had the means by which to accomplish this restriction (the scheduling of a backup CRNA to take over in the event that a case the Plaintiff was involved in at the end of the day ran past her eight hours). They repeatedly failed to make the accommodation. It is a simply a factual question for a jury to determine whether such a failure was or was not a failure of reasonable accommodation, and from that determination, what damages Plaintiff suffered, if any. This is particularly true in light

³ The Circuit error may be attributable to its adoption of HAGI’s ex parte communication as its order. In the March, 2007, hearing on its ex parte communications with Defendants’ counsel, the Circuit Court indicated that it had adopted its summary judgment findings from the ex parte communication from HAGI Defendants’ counsel which have never been made a part of the record. However, regardless of its source, it does not comport with the facts before the Circuit Court at the time the order was entered.

of the fact that the legislative regulations implementing the Human Rights Act explicitly define modified work schedules as a reasonable accommodation. W.Va. CSR § 77-1-4.5.2.

The Circuit Court's position was that, even if the failure to accommodate the restriction imposed by the Plaintiff's physician caused the Plaintiff to be driven from her employment, this did not state a cause of action against the Defendants because they had done other things which "exhibited flexibility, courtesy, and cooperation." January 11, 2007, Order, ¶ 15, p.4- 5, p. 7. Although alleged attitude toward Plaintiff may be admissible in determining whether or not the Defendants met their duty of reasonable accommodation, it is not dispositive of that question.

B. Defendants Failure to Cooperate in Discovery Prevented Development of More Extensive Record of Defendants' Non-Accommodation

Plaintiff notes the irony of the Defendants' critique that Plaintiff did not cite deposition testimony in opposition to their motions for summary judgment in light of the fact that Plaintiff's initial pleading to the Circuit Court in response to Defendants' Motion for Summary Judgment requested that the Circuit Court defer ruling on the issue of summary judgment until the long delayed 30(b)(7) deposition of HAGI was taken. The Plaintiff pointed out that, despite the Circuit Court's order in this regard, and partly due to the delays occasioned by the effort to enforce the settlement agreement, the 30(b)(7) deposition which had been ordered had never taken place. Nevertheless, the Circuit Court proceeded to grant summary judgment days before the 30(b)(7) deposition was finally scheduled to occur.⁴ Defendants' now attempt to shoehorn their refusal to provide discovery (even after being ordered to do so by the Circuit Court) into a claim that the Plaintiff failed to produce sufficient evidence to resist summary judgment.

⁴See the time line in Appendix to the Petition for Appeal, "30(b)(7) Time Line."

C. Plaintiff's Compliance with Circuit Court's Direction to Submit Draft Order Denying Summary Judgment.

Defendants, as they did in their responses to their Petition for Appeal, repeat the inaccurate assertion that Plaintiff's counsel "apparently ignored the Circuit Court's direction" to submit a proposed order stemming from the January 4, 2007, hearing conducted on Defendants' motion for summary judgment. The Circuit Court, in the hearing on Defendants' motions for summary judgment, noted that all the Plaintiff need submit was a simple order stating that there were material questions of fact to be resolved that precluded summary judgment. Plaintiff timely submitted such an order as directed by the Circuit Court, serving the same contemporaneously on counsel for the Defendants. Defendants' repeated assertions that Plaintiff's counsel did not submit the appropriate pleading as requested by the Circuit Court are not supported by the record.

D. Settlement Agreement

The entirety of the discussion of the record on the settlement agreement contained in the "Brief of Appellants Huntington Anesthesia Group, Inc., and Doctors Abadir, Gabriel, Rivas, Ramos and Vega" (Pages 12 - 15) contains not a single citation to the record. The record does not support the characterizations set forth therein. Rather, the record developed at the August 21, 2006, evidentiary hearing on the Plaintiff's motion to enforce the settlement reflected the fact that Defendants' had, in fact, agreed to the settlement and had authorized their trial counsel, (Mr. Dellinger) to represent that they had done so. This record was discussed extensively in Plaintiff's initial brief. Only when a dispute arose regarding the contribution from each individual defendant and HAGI necessary to fund the settlement was the agreement rejected post-facto by the Defendants.

In essence, this is accepted in “Brief of Appellees Dr. Mark Newfeld, Dr. D. Grant Shy, and Dr. Stanislav Striz”, page 27 - 29. (Hereinafter “Newfeld Defendants”) The Newfeld Defendants note that “they took no position on the ultimate issue [of the enforcement of the settlement agreement] because Dr’s. Newfeld, Shy and Striz did not directly, nor through their counsel participate in any of the settlement discussions and negotiations that apparently occurred and have no first had knowledge of what HAGI or any of its physicians agreed to or did not agree to.” Nevertheless, each of the Defendants Newfeld, Shy and Striz did understand that they were represented in this action by trial counsel Dellinger and that he was acting on their behalf in this matter. *Id.* page 28 -29. These defendants took the position that “they had no further financial responsibility and/or obligation concerning the case.” The Newfeld Defendants note that “they had no objection to any settlement reached as long as they were not expected or required to make any financial contribution toward the settlement.” *Id.* page 28.

E. Ex Parte Contacts

The Newfeld Defendants again assert that the Circuit Court directed them to engage in ex parte’ contacts. Without reference to any support in the record, these defendants contend that “[t]his procedure is not uncommon.” There is no evidence to support such an assertion. *Id.*, page 29. The Newfeld Defendants note that they submitted a letter to the Circuit Court ex parte’ “which restated the position taken on their behalf at the evidentiary hearing and set forth certain recommendations/proposed findings.” These Defendants note that “as directed this submission was not served on either Appellant’s counsel or on separate counsel for the other Appellees.” *Id.*, page 29.

The Newfeld Defendants accuse the Plaintiff of "taking great liberties with the facts and unfairly impun[ing] the character of both the Circuit Court and counsel." This representation is inaccurate. Defendants' Counsel admit repeatedly engaging in ex parte' contacts with the Circuit Court. Defendants' Counsel claimed that they did so based upon direction of the Circuit Court. The Circuit Court acknowledged that these ex parte' communications substantially formed the basis for its decision dismissing the Plaintiff's claims. As set forth in the March, 2007, hearing on these issues, the Petition for Appeal and the Plaintiff's initial brief, the Plaintiff makes no accusations of unethical conduct by counsel or the Circuit Court. However, it is in part to protect the adversarial process that substantive ex parte' communication is prohibited. Ex parte' contacts by the Defendants prejudiced the due process rights of the Plaintiff. That the Circuit Court encouraged these actions "off the record" does not cure the problem.

The allegation in the Newfeld Defendants brief that the Appellant "misrepresents the relevant factual circumstances" contains no reference to any fact alleged by the Appellant which does not find support in the record. The Newfeld Defendants' recitation of the transcript of the March 6, 2007, hearing (wherein the Circuit Court acknowledged having requested ex parte' communications) proves the Plaintiff's point. The Circuit Court observes that off the record it requested ex parte' communications "because I didn't want to have to fight over objections to wording on proposals". Problematically, this eliminates the opportunity for a party (in this case Plaintiff) to note that proposed findings of fact and conclusions of law are inaccurate and do not find support in the record. This is one of the evils which prohibition against ex parte' communications is designed to prevent. Brief of Newfeld Defendants, page 33.

The argument by Newfeld Defendants that the ex parte' submissions by the Defendants did not significantly impact the Circuit Court rulings is belied by the fact that, in the March 2007 hearing, the Circuit Court indicated that it adopted the ex parte' submission by HAGI (modified slightly) as the basis for granting summary judgment to the Defendants. This is the very same ex parte' submission which is still not a part of the record in this matter, despite the Plaintiff's efforts to make it a part of the record to present to this Court (and agreement by counsel for the HAGI Defendants to include it in the record).

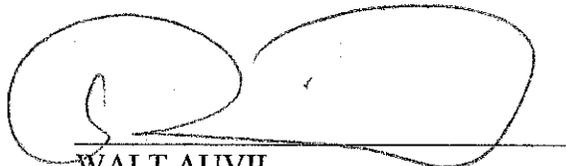
CONCLUSION

For all these reasons Plaintiff respectfully requests that summary judgment for the Defendants be reversed, that the settlement agreement reached in this matter be enforced and that Plaintiff be granted her reasonable costs and attorney fees necessitated by this appeal.

THERESA D. MESSER,

Plaintiff by Counsel,

Respectfully Submitted:



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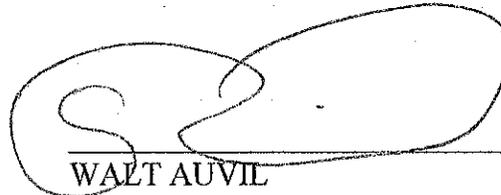
Appellee/Defendants.

CERTIFICATE OF SERVICE

The undersigned counsel for the Plaintiffs hereby certifies that on the 11th day of January, 2008, he served the foregoing and hereto annexed **Reply Brief of Appellant** upon Thomas E. Scarr and William D. Levine, counsel for the Defendants, by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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DR. STANISLAV STRIZ, and DR. MICHAEL VEGA.**

Respondents/Defendants.

APPENDIX TO PETITION FOR APPEAL

1. **HAG'S Schedule of Worked - Over 8 Hours**

HAGI'S SCHEDULE OF WORKED - OVER 8 HOURS

YEAR	MONTH	EXPLANATION
1998	NOVEMBER	WORKED OVER 3 OUT OF 8 OCCASIONS
	DECEMBER	WORKED OVER 3 OUT OF 10 OCCASIONS
1999	JANUARY	WORKED OVER 4 OUT OF 8 OCCASIONS
	FEBRUARY	WORKED OVER 5 OUT OF 8 OCCASIONS
	MARCH	WORKED OVER 2 OUT OF 9 OCCASIONS
	APRIL	WORKED OVER 4 OUT OF 9 OCCASIONS
	MAY	WORKED OVER 6 OUT OF 8 OCCASIONS
	JUNE	WORKED OVER 5 OUT OF 9 OCCASIONS
	JULY	NONE
	AUGUST	WORKED OVER 4 OUT OF 9 OCCASIONS
	SEPT	WORKED OVER 4 OUT OF 9 OCCASIONS
	OCT	WORKED OVER 3 OUT OF 8 OCCASIONS
	NOV	WORKED OVER 1 OUT OF 9 OCCASIONS
	DEC	WORKED OVER 1 OUT OF 9 OCCASIONS
2000	JAN	ON VACATION
	FEB	WORKED OVER 4 OUT OF 9 OCCASIONS
	MARCH	WORKED OVER 1 OUT OF 9 OCCASIONS
	APRIL	WORKED OVER 2 OUT OF 8 OCCASIONS
	MAY	WORKED OVER 3 OUT OF 9 OCCASIONS

JUNE	WORKED OVER 1 OUT OF 9 OCCASIONS
JULY	WORKED OVER 1 OUT OF 8 OCCASIONS
AUGUST	WORKED OVER 6 OUT OF 10 OCCASIONS
SEPTEMBER	WORKED OVER 1 OUT OF 8 OCCASIONS

OUT OF A POSSIBLE 208 WORKDAY SCHEDULE - PLAINTIFF WORKED OVER AN EIGHT HOUR DAY "APPROXIMATELY 64 DAYS."