

**West Virginia
Human Rights Commission**

**Annual Report
Fiscal Year 2018**



SERVING ALL OF WEST VIRGINIA



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

HUMAN RIGHTS COMMISSION

Room 108A, 1321 Plaza East

Charleston, WV 25301-1400

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Toll-free: 1-888-676-5546 Web: hrc.wv.gov

Bill J. Crouch
Cabinet Secretary

Cameron McKinney
Acting Executive Director

December 11, 2018

The Honorable Jim Justice
Governor of the State of West Virginia
State Capitol Building
1900 Kanawha Blvd., East
Charleston, WV 25305

Members of the West Virginia Legislature
State Capitol Building
1900 Kanawha Blvd., East
Charleston, WV 25305

Dear Governor Justice and Members of the West Virginia Legislature:

It is with pleasure that I present the Human Rights Commission's Annual Report. The Commission steadfastly continues its mission to eradicate discrimination and to improve its services to the citizens of West Virginia, pursuant to the West Virginia Human Rights Act, the West Virginia Fair Housing Act, and the West Virginia Pregnant Workers Fairness Act.

During Fiscal Year July 1, 2017 through June 30, 2018, the Commission accomplished many of its goals in addition to investigating and litigating cases of discrimination. The Commission staff receive ongoing training from the U. S. Equal Opportunity Commission (EEOC) and the U.S. Department of Housing and Urban Development (HUD).

The Commission continues to conduct outreach to community advocacy groups and businesses regarding discrimination laws in housing, public accommodation, and employment. In addition, the Commission strongly supports alternative dispute resolution programs because of their cost effectiveness.

Additional information is available on our website, www.hrc.wv.gov. Thank you for the opportunity to be of service to the people West Virginia..

Respectfully submitted,

Cameron McKinney

Cameron McKinney
Acting Executive Director

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West Virginia Human Rights Commission

Room 108 ~A

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Charleston, WV 25301-1400

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www.hrc.wv.gov

The staff of the West Virginia Human Rights Commission is dedicated to promoting public awareness of the goals and objectives of the Commission, enforcing the laws set forth by the West Virginia Human Rights Act, as amended and the West Virginia Fair Housing Act, and eliminating all forms of discrimination. If you feel you have been a victim of illegal discrimination as described in the West Virginia Human Rights Act and the West Virginia Fair Housing Act, please contact us for information on filing a complaint.

Related links available on our website:

[WV Human Rights Act](#)

[WV Fair Housing Act](#)

[Rules and Regulations](#)

[Investigative Process and Procedure](#)

[Annual Reports](#)

[Complaint Forms](#)

[Pre-Determination Conciliation](#)

[Poster for Workplaces and Places of Public Accommodation](#)

[Fair Housing Poster Contest](#)

The Acting Executive Director's Vision



The goal of the West Virginia Human Rights Commission is to provide quality, efficient, and effective services to the citizens of the State of West Virginia. Despite budgetary constraints, we have managed to maintain a professional and diligent staff of investigators.

We take seriously our duty to identify incidents of unlawful discrimination in employment, housing, and public places, and to provide an effective forum for the victims of discrimination to be heard and helped.

Our investigators, supervisors, administrative law judge, and general counsel receive training from nationally-recognized experts, including career civil servants at the federal EEOC and HUD. In turn, our staff provide training on discrimination issues to business leaders, government agencies, housing providers, and the general public.

April 2018 marked the 50th anniversary of the passage of the national Fair Housing Act, and our agency hosted, participated in, and attended events reflecting upon this important milestone. The Fair Housing Act was the most substantial part of the Civil Rights Act of 1968, which was signed into law by President Lyndon Johnson on April 11, 1968, just seven days after the assassination of Dr. Martin Luther King, Jr. Dr. King called the groundbreaking successes of the American Civil Rights Movement of the 1960s “the first step in a thousand-mile journey.”

At the Human Rights Commission, we are honored and dedicated to continue that journey. Now, in these times of turmoil, it is imperative that the West Virginia Human Rights Commission redouble its efforts to “encourage and endeavor to bring about mutual understanding and respect among all racial, religious, and ethnic groups within the state,” and, “strive to eliminate all discrimination” in employment, housing, and public accommodations. *W.Va. Code* § 5-11-4.

Respectfully submitted,

Cameron McKinney

Cameron McKinney
Acting Executive Director

Mission Statement

The West Virginia Human Rights Commission enforces the West Virginia Human Rights Act, the West Virginia Fair Housing Act, and the Pregnant Workers Fairness Act. Those laws prohibit discrimination in employment, housing, and places of public accommodation for all citizens of West Virginia regardless of race, religion, color, national origin, ancestry, sex, blindness, disability, age, and familial status. Our mission is to provide quality investigations, fair decisions and remedies, and valuable education about discrimination laws to all West Virginia communities.

Declaration of Policy

It is the public policy of the State of West Virginia to provide all citizens equal opportunity for employment, equal access to places of public accommodation and equal opportunity in the sale, purchase, lease, rental and financing of housing accommodations or real property. Equal opportunity in the areas of employment and public accommodation is a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age (40 and above), blindness, disability or pregnancy. Equal opportunity in housing accommodation or real property is a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, blindness, disability, or familial status.

The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability, pregnancy, or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society. Unlawful discrimination damages both the individual and society in a myriad of ways, not the least of which is shame and humiliation experienced by the victim and feelings that diminish the person's ability to function in every area of life. Society is damaged by the unwarranted refusal to accept an individual's talents and efforts merely because of race, sex, religion, age (40 and above), color, national origin, ancestry, blindness, disability, pregnancy, or familial status. With regard to housing, discrimination strikes at the dignity of the individual.

Specifically, the West Virginia Human Rights Act prohibits discrimination by any employer with 12 or more employed persons within the state for 20 or more calendar weeks in a calendar year in which the act of discrimination allegedly took place or the preceding calendar year (provided that such terms shall not be taken, understood, or construed to include a private club) based on race, color, religion, national origin, ancestry, sex, age (40 and above), blindness, disability, and pregnancy in the selection, discharge, discipline or other terms and conditions of employment. The Act also prohibits any advertisement of employment that indicates any preference, limitation, specification or discrimination based on race, religion, color, national origin, ancestry, sex, age (40 and above), blindness, disability, or pregnancy.

Lastly, it is unlawful under the Act to retaliate or discriminate in any manner against a person because the person has opposed a practice declared unlawful by the Act or because the person has made or filed a complaint, testified, assisted, or participated in any manner in any investigation, proceeding or hearing concerning an unlawful practice under the Act.

The West Virginia Fair Housing Act protects each person's right to personal dignity and freedom from humiliation, as well as the individual's freedom to take up residence wherever the individual chooses. This prohibits discrimination in housing based on race, religion, color, sex, national origin, ancestry, blindness, disability, familial status (the presence of children under the age of 18 years of age in the household) and persons with disabilities who utilize assistance animals. Wide ranges of discriminatory practices are prohibited, affecting a variety of persons and businesses. Realtors, brokers, banks, mortgage lenders, insurance companies, developers, real estate buyers and sellers, landlords and tenants are all affected by the West Virginia Fair Housing Act. It is important that all those covered by the West Virginia Fair Housing Act know their rights and duties.

Highlights of the West Virginia Human Rights Act

The West Virginia Human Rights Act (W.Va. Code §5-11-1 et seq.) was enacted in 1961 and is administered and enforced by the West Virginia Human Rights Commission.

Employment Discrimination and Harassment

W.Va. Code §5-11-9(1)

It shall be an unlawful discriminatory practice...for any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment.

Public Accommodations Discrimination

W.Va. Code §5-11-9(6)(A)

It shall be an unlawful discriminatory practice...for any person being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodations to: (A) Refuse, withhold from or deny to any individual because of his race, religion, color, national origin, ancestry, sex, age, blindness or disability either directly or indirectly, any of the accommodations, advantages, facilities, privileges or services of such place of public accommodations;

Reprisal Related to Employment or Public Accommodation

W.Va. Code §5-11-9(7)(A)(C)

It shall be an unlawful discriminatory practice for any person to (A) Engage in any form of threats or reprisal,...or otherwise discriminate against any person because he has filed a complaint, testified or assisted in any proceeding under this article.

Housing Related Reprisal and Intimidation

W.Va. Code §5-11A-16

It shall be unlawful to coerce, intimidate, threaten or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by sections four, five, six or seven of this article.

The West Virginia Code is available in public libraries and online: <http://code.wvlegislature.gov>

Community Partnerships, Relations and Outreach List

The following section represents sample of training and outreach efforts by the West Virginia Human Rights Commission with community groups, agencies and businesses. This is part of the Commission's effort to educate and serve the community while administering the West Virginia Human Rights Act, the West Virginia Fair Housing Act, and the Pregnant Workers' Fairness Act, which prohibit discrimination in employment, housing and places of public accommodations.

It is the responsibility of the Human Rights Commission to bring about mutual understanding, respect, tolerance, and equal protection of the laws. While not all-inclusive, the following list represents selected outreach events.

Equal Employment Opportunity Commission &
WV Human Rights Commission

Employer Workshop

Governor's Annual Civil Rights Day

Herbert Henderson Office of Minority Affairs Advisory Board

West Virginia Housing Development Fund Annual Housing Conference

International Association of Official Human Rights Agencies Annual Conference

Charleston Black Ministerial Alliance

Kanawha Charleston Housing Authority

Herbert Henderson Office Minority Affairs Business Expo

Beckley Human Rights Commission Fair Housing Conference

WVHRC Fair Housing Day at WV State University

WV Women's Commission

Juneteenth Celebration

Mercer County Board of Education

West Virginia State Bar Government Lawyers Committee CLE

Northern West Virginia Center for Independent Living

Ohio Civil Rights Commission, Columbus, Ohio

SHRM—Society For Human Resource Management

The Minority Health Advocacy Group of Charleston, WV

Wheeling Human Rights Commission

WV Advocates, Inc.

WV Money Follows the Person Initiative

WV Attorney General's Office, Civil Rights Division

WV Americans with Disabilities Act Coalition

WV Association of Realtors (WRA)

WV Bureau of Senior Services

WV Division of Culture and History

WV Equal Employment Opportunity Office

WV Fairness, Inc.

WV Housing Development Fund

WV Martin Luther King, Jr. Holiday Commission

WV Office of the Governor

WV Governor's Office of Economic Opportunity

WV Herbert Henderson Office of Minority Affairs

WV State Association of Public Housing

WV State Bar Association

WV State University

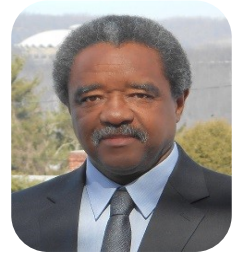
WV Women's Commission

YWCA

The Commissioners and their Roles



Dr. Darrell Cummings
Chair



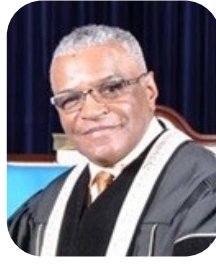
Timothy Hairston
Vice Chair



Karl Gattlieb
Kanawha County



Lisa Younis
Jefferson County



Wesley Dobbs
Marion County



John McFerrin
Monongalia County



Marie Redd
Cabell County



Randall Morgan
Kanawha County

- ◆ Set policy for the Commission.
- ◆ Act as an appellate body for cases appealed from a final order of an administrative law judge. All deliberations about cases on appeal are confidential and Commissioners should not inform anyone about what is discussed during the deliberation of these cases.
- ◆ Approve modifications and/or amendments to procedural, legislative and interpretive rules and regulations.
- ◆ Have an awareness of civil rights issues at the local and state level. Develop appropriate strategies to address these issues with the advice of the Executive Director and the community.
- ◆ Be visible in their communities and throughout the state.
- ◆ Provide assistance and information to individuals needing the agency's services.
- ◆ Form advisory committees and hold public hearings, as appropriate.
- ◆ Attend monthly meetings. Commission meetings are held on the fourth Thursday of every month, unless otherwise agreed. All meeting times, location and agenda are posted on the Secretary of State's website. Commission meetings, except for executive session, are open to the public.
- ◆ Receive ongoing training from the staff of the Human Rights Commission, the Attorney General's Civil Rights Division and other invited members of the community and the West Virginia State Bar.

Please see W. Va. Code § 5-11-8 for complete listing of the Commissioners' powers and functions,

<http://legis.state.wv.us/>.

Selected Outreach & Training Highlights

(Not all inclusive)

CHARLESTON JOB CORPS - July 21, 2017

The Charleston Job Corps held their Annual Community Relations Council and Workforce Council luncheon at the Charleston WV Marriott Town Center. Charleston Job Corps. honored three of their students for their achievements. Attendees included Tiffany Caldwell, Marshall Moss and Leola Bateman of the WV Human Rights Commission; Dr. William M. White, Executive Director of the Herbert Henderson Office of Minority Affairs; Brooks Gilliam, Area Commander of the Salvation Army - Charleston; and many other guests.



ANNUAL MULTI-FEST - August 5-6, 2017

This event is held the first weekend of August each year at Haddad Riverfront Park in Charleston, West Virginia.

2017 WEST VIRGINIA WONDER WOMEN LUNCHEON - October 23, 2017

WV Living Magazine honored 50 women who have made West Virginia a better place at the Holiday Inn & Suites Hotel in South Charleston, West Virginia. Honorees included Joan Browning past Commissioner for the WV Human Rights Commission and one of the original Freedom Riders during the Civil Rights movement.

WEST VIRGINIA MARTIN LUTHER KING, JR.

Each year the West Virginia Human Rights Commission, in partnership with the West Virginia Martin Luther King, Jr. Holiday Commission, participates in the observance of the accomplishments, life, and legacy of the late Rev. Dr. Martin Luther King, Jr. These ceremonies are held in remembrance of Dr. King's efforts towards the advancement of Civil Rights. The ongoing partnership with the Holiday Commission serves to underscore the goals and objectives of the West Virginia Human Rights Commission in promoting equality and awareness of the rights of all citizens of West Virginia.

WEST VIRGINIA HUMAN RIGHTS COMMISSION CELEBRATES BLACK HISTORY MONTH

During February's commemoration of Black History Month, the West Virginia Human Rights Commission, area faith-based initiatives, Charleston's Black Ministerial Alliance, and other surrounding community groups celebrate the birthday, life, and legacy of the late Rev. Dr. Martin Luther King, Jr. Throughout the year, the West Virginia Human Rights Commission continues to have a presence in various community celebrations, commemorations, and events which emphasize the importance of human rights.

JUNEETEENTH CELEBRATION - June 19, 2017

This event was held at the Haddad Riverfront to commemorate the June 19, 1865 emancipation of slaves in Texas following the Civil War. President Lincoln issued the Emancipation Proclamation almost three years earlier, on September 22, 1862, but because Texas was not a battleground state, the law had little effect until the end of the war in May 1865. It wasn't until June 19, 1865 that the slaves in Texas were informed they had been emancipated. Juneteenth marks the late delivery of a very important message and became an annual celebration for the freed slaves and their descendants.

2017 MINORITY BUSINESS EXPO - CHARLESTON CIVIC ENTER- October 25, 2017

This event was a business educational and networking expo for minority businesses hosted by the Herbert Henderson Office of Minority Affairs under the direction of Dr. White. The keynote speaker was West Virginia native Morris Morrison, President/CEO of Morrison Global Brands.



2018 DISABILITY ADVOCACY DAY AT THE STATE CAPITOL - January 17, 2018

This event was held at the State Capitol during the legislative session to bring awareness to The Fair Shake Network, an association of West Virginians dedicated to a "fair shake" for people with disabilities. The Fair Shake Network monitors all legislation introduced that may affect the disability community and urges the legislative and executive branches of government to invest in people with disabilities.

WOMEN'S AND GIRLS DAY AT THE LEGISLATURE - January 22, 2018

This event is sponsored by the WV Women's Commission. Guest speakers included First Lady Cathy Justice, former First Lady Gayle Manchin, 2017 Miss West Virginia Tamia Hardy and 2017 Miss Teen West Virginia Sabrina Harrison.

US POSTAL SERVICE AND CONSUMER PROTECTION - March 5, 2018

The USPS celebrated National Consumer Protection Week with this year's theme "Veterans Speak Out Against Vet-related Scams." The USPS and the AARP Fraud Watch Network have joined in launching Operation Project Veterans.

2018 WV ELDER ABUSE AWARENESS DAY SEMINAR - June 7, 2018

World Elder Abuse Awareness Day was launched on June 15, 2006, by the International Network for Prevention of Elder Abuse and the World Health Organization at the United Nations to provide an opportunity for communities around the world to promote a better understanding of abuse of elder persons, neglect and financial exploitation. West Virginia's 2018 event was held at the University of Charleston.



2018 Fair Housing Poster Contest Winners

Elementary School Winners

1st: Danielle Jones



2nd: Haley Link



3rd: Alex Casteel



Middle School Winners

1st: Phenix Wormack



2nd: Kaylene Jordan



3rd: Morgan Graham



Honorable Mention

Caleb Hetzer



Joel Foreman



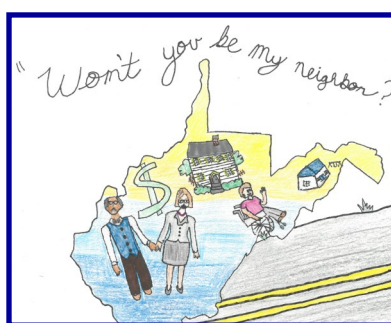
Ziona Sanders



Nataniah Lewis



Emma Luikart



Dakota Browning



The Complaint Process

The following is an overview of the complaint and investigative process, pursuant to the Rules of Practice and Procedure before the West Virginia Human Rights Commission, 6 W. Va. C.S.R. § 77-2-4.15

I. Intake — Persons wishing to file a complaint or to obtain information regarding their rights may contact the Commission by telephone, US mail, online, or by visiting the Commission’s office. Those wishing to file a complaint are provided a Background Information Form which will provide the Commission with all the necessary information to begin an investigation into the complaint.

The complaint is evaluated to ensure it meets the minimal jurisdictional requirements: in that, the harm complained of has occurred within the last 365 days; the complainant (person making the complaint) is a member of a protected class; and the complaint is with regard to employment, public accommodation, or a housing issue. In employment and public accommodation complaints, protected classes include: race, sex, age (40 and above), disability, blindness, religion, ancestry, national origin, pregnancy and/or reprisal, as set forth in the West Virginia Human Rights Act and the West Virginia Pregnant Workers’ Fairness Act. In housing complaints, in addition to the aforementioned list of protected classes, familial status and persons with disabilities who utilize assistance animals are added, as set forth in the West Virginia Fair Housing Act. When a complaint meets the minimal jurisdictional requirements, it is docketed as an actual case. A docketed complaint is typed into a formal, legal complaint which is signed by the complainant and notarized by a notary public before being served upon the company/agency/person the complainant alleged caused the harm.

The company/agency/person is referred to as the respondent. The respondent is given an opportunity to respond to the allegations set forth in the formal complaint before the case is assigned to an investigator.

II. Investigation — Investigators analyze the information provided by the complainant and respondent and can request more information, as needed, to determine whether there is probable cause to believe that the respondent has engaged in unlawful discrimination under either the West Virginia Human Rights Act, the West Virginia Fair Housing Act or the Pregnant Workers’ Fairness Act. Throughout the investigative process, the parties may request a pre-determination conciliation to attempt to settle the dispute before a determination is made in the case. After a Notice of Proposed Dismissal is issued to the complainant by the investigative team, the complainant may request a review meeting of their case, in writing, to the Acting Executive Director. When a determination of no probable cause is made, the complaint is dismissed and the case is closed. The complainant receives a Right to Sue letter and may file the action directly in circuit court. When a determination of probable cause is made, the case must be set for a public hearing before the Commission’s Administrative Law Judge.

III. Administrative Hearing — Prior to the hearing date, an Administrative Law Judge orders the parties to participate in the Commission’s mediation process. If a settlement is not reached, the Administrative Law Judge conducts a Public Hearing and determines whether there is a violation of the West Virginia Human Rights Act, the West Virginia Fair Housing Act or the Pregnant Workers’ Fairness Act. The administrative law judge’s final decision can be appealed to the Commission, the circuit court, and the West Virginia Supreme Court of Appeals.

Freedom of Information Act

Pursuant to W.Va. Code §29B-1-1, the West Virginia Human Rights Commission is subject to Freedom of Information Act (FOIA) requests. The Commission processes FOIA requests through its FOIA Coordinator.

These requests are generated by attorneys, other state and government agencies, the media and the general public. The documentation requested is for copies of investigatory and public hearing files and other public information or data regarding the West Virginia Human Rights Commission's procedures.

In regard to investigatory files, The Human Rights Act provides as follows: "The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors." *W.Va. Code* §5-11-10. The Commission's Rules of Practice and Procedure further designate materials which "shall not constitute public information" at 77 C.S.R. 2, §15.2, which include those materials listed in §7.14.b and 7.14.c of the same rule.

As such, the investigatory file is generally exempt from Freedom of Information Act disclosure pursuant to *West Virginia Code* §29B-1-4(a)(5) ("Information specifically exempted from disclosure by statute"). Nevertheless, the investigatory file does contain some materials that are deemed to be public information pursuant to 77 C.S.R. 2, §15.1. Specifically, the investigatory file typically contains a copy of the Complaint (§15.1.a), and the Determination (§15.1.d). However, when the Commission discloses facts about a case that has been dismissed, or could be dismissed without a determination of probable cause, it must do so "without disclosing the identity of the parties involved," pursuant to West Virginia Code §5-11-10.

Generally, the public hearing file is not exempt from FOIA disclosure as its contents are mostly deemed to be public information under 77 C.S.R. 2, §15. The public hearing file begins with a copy of the Complaint and the Notice of Public Hearing, and contains any and all of the public materials listed in 77 C.S.R. 2, §15.1.

The Commission charges \$1.00 per page copied for closed files; \$.50 cents per page copied for open files; and \$10.00 per electronic disk.

Case Activity for FY 2017-2018

The Commission received a total of **1124** inquiries from West Virginia citizens about their Civil Rights.
Of that total:

- 796 were telephone inquiries
- 219 were walk-in inquiries
- 109 were website inquiries

The Commission mailed a total of **414** Background Information Forms to West Virginia citizens.
Of that total:

- 345 were telephone inquiries
- 65 were walk-in inquiries
- 4 were letter inquiries

Of those Background Information Forms

- 325 were employment
- 50 were public accommodation
- 39 were housing

The Commission docketed a total of **195** new cases which were added to the current case load.
Of that total:

- 165 were employment
- 13 were public accommodation
- 17 were housing

The Commission closed a total of **149** cases.
Of that total:

- 114 were employment
- 6 were public accommodation
- 29 were housing

Alternate Dispute Resolution Programs

Pursuant to the Rules of Practice and Procedure before the West Virginia Human Rights Commission, 6 W. Va. C.S.R. § 77-2-4-15, the following information provides details on the two main Alternate Dispute Resolution Programs. These programs provide a valuable outlet for the complainant and respondent to attempt to reach a settlement and avoid costly and time-consuming litigation. The Commission is proud to be a leader in utilizing this tool, which allows both parties an opportunity to resolve differences effectively and efficiently. The results of conciliations and mediations may be monetary in nature or may also include non-payment conditions, i.e., a neutral work reference, a pay raise, the promise of a future job, an accommodation for a disability, anti-discrimination training, development of an anti-harassment/anti-discrimination policy in the work place, a change in work shift, or simply an apology from the respondent.

PREDETERMINATION CONCILIATION 2017-2018	
Successful Conciliation Settlements	8
TOTAL Monetary Benefits	\$22,700

The Pre-Determination Conciliation Program offered by the West Virginia Human Rights Commission serves as an efficient and time saving method of resolving complaints earlier in the process and before the agency issues a

determination based on a completed investigation.

The program involves a trained facilitator to help the participants arrive at a negotiated settlement in a fair and confidential setting. This program is a free service offered by the Commission. After a complaint is filed, either party may request conciliation at any time prior to the Commission's issuance of determination.

The Commission, after reviewing the complaint and information received during the initial stages of the investigation, may invite the other party to participate in the Pre-Determination Conciliation Program. With the consent from all interested parties, the agency's conciliator of record then assists the parties in reaching mutually-agreeable terms of settlement, which becomes a binding Agreement, signed by the parties and the Commission. Investigation does not necessarily stop because conciliation efforts are undertaken but if a settlement is reached, the case may then be closed. If settlement efforts fail, the case returns to investigations for completion and the Commission's determination of No Probable Cause or Probable Cause. Requests to enter the Pre-Determination Conciliation Program should be directed to the agency's Director of Operations.

MEDIATION 2017-2018	
Cases Withdrawn to Circuit Court	7
Cases Mediated and Settled	7
TOTAL Monetary Benefits	\$32, 100

The Mediation Program offered by the West Virginia Human Rights Commission serves as an efficient and time-saving method to resolve complaints that are in litigation. This program uses a trained mediator, who

is an attorney to help the participants arrive at a negotiated settlement in a fair and confidential setting. The parties may request mediation or the administrative law judge may order it. If the matter is not settled at mediation, the parties proceed to the previously set public hearing before an administrative law judge at the WV Human Rights Commission. If the parties reach a settlement and execute a written agreement, this agreement may be enforced in the same manner as any other written contract in a court of law. Request for information concerning the Mediation Program may be directed to the Office of Administrative Law Judges at (304) 558-2616 or toll-free at 1-888-676-5546.

***Total represents amount awarded to Complainants. This money is not collected by the West Virginia Human Rights Commission and therefore is not represented as part of its budget. Conciliations and settlements may also include non-payment conditions as stated above.**

Office of Judges Selected Case Summary

REPORT OF OFFICE OF JUDGES: SIGNIFICANT DECISION/RULING 2018

The following contains summaries of a *Final Decision* from the Office of Judges, West Virginia Human Rights Commission, Administrative Law Judge, Gregory W. Evers, in the Disability Discrimination claim of Jerry Handy v. Nitro Electric Company, Inc. issued April 25, 2018, and an *Order Granting Respondent's Motion to Dismiss*, in the Fair Housing complaint, styled Northern West Virginia Center For Independent Living v. Robert J. Connor et als., issued February 20, 2018, which are believed to be of particular importance in the development and hearing of disability discrimination claims and Fair Housing Act claims.

JERRY HANDY, Complainant,

v.

NITRO ELECTRIC COMPANY, INC., Respondent

Docket No. ED-139-14

SUMMARY OF FINAL DECISION OF ADMINISTRATIVE LAW

JUDGE, GREGORY W. EVERS

FINAL DECISION ENTERED APRIL 25, 2018

A Public Hearing was in held the above referenced matter on July 28, 29, and 30, 2015, at the Offices of the West Virginia Human Rights Commission, Charleston, Kanawha County, West Virginia, before the Honorable Gregory W. Evers, Administrative Law Judge.

Mr. Jerry Handy (hereafter Mr. Handy or Complainant) filed his complaint with the West Virginia Human Rights Commission (hereafter Commission) alleging unlawful discrimination against Nitro Electric Company, Inc. (hereafter Nitro Electric or Respondent) based upon mental disability, i.e. Borderline I.Q, a learning and other mental limitations, actual or, alternatively, perceived by the Respondent, resulting in his wrongful termination of employment by the Respondent, as a Heating, Ventilation, Air-Conditioning, and Refrigeration (HVAC/R) technician, the position he claimed to be able and competent to perform. The Respondent denied the Complainant's allegations, including, among others, his allegation of disability, actual or perceived.

SUMMARY OF ALJ FINAL DECISION APRIL 25, 2018

The issues in this case included (1) whether Mr. Handy's complaint before the Commission was pre-empted by the provisions of two Collective Bargaining Agreements to which the Complainant and Respondent were parties, allegedly requiring as a sole remedy, mandatory arbitration of Mr. Handy's discrimination complaint; and (2) whether the Respondent had violated the West Virginia Human Rights Act on the basis of an actual mental disability or perceived mental disability.

I.
**MR. HANDY WAS NOT REQUIRED TO ARBITRATE
HIS WEST VIRGINIA HUMAN RIGHTS COMPLAINT
UNDER HIS UNION REPRESENTATIVES COLLECTIVE
BARGAINING AGREEMENTS WITH THE RESPONDENT**

Nitro Electric Company argued that Mr. Handy was required by applicable law to arbitrate, rather than pursue through this administrative proceeding, his employment disability discrimination complaint, under the grievance procedures set forth in the provisions of two Collective Bargaining Agreements between the parties.

In support of its preemption and mandatory arbitration argument, the Respondent references the decision of the United States Supreme Court of Appeals in the case of *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 275 (2009), (hereafter *14 Penn Plaza*), holding that provisions in a collective bargaining agreement that “clearly and unmistakably” require union members to arbitrate employment discrimination claims is enforceable as a matter of law. The Respondent contends that two collective bargaining agreements between the Complainant’s union representatives and the Respondent in this matter created a “clear and unmistakable” waiver of Mr. Handy's right to pursue his disability discrimination complaint in any forum other than arbitration. In response, the Complainant argues that he was entitled to pursue his complaint before the Commission as neither of the collective bargaining agreements established “clear and unmistakable” agreement to arbitrate his discrimination claim rather than pursue his statutory remedy under the WV Human Rights Act and consequently that under *14 Penn Plaza*, as well as the Court's earlier holding in *Alexander v. Gardner-Denver*, 415 U.S. 36,94 S.Ct. 1011,39 L.Ed.2d 147 (1974), a case in which the Court held that a collective bargaining agreement identical to that in Mr. Handy’s claim, did not require arbitration, Mr. Handy's discrimination complaint is not required to be arbitrated nor has Mr. Handy waived his right to pursue his statutory employment discrimination claim administratively before this Commission.

Upon consideration of the parties above arguments and review of the above referenced case law, Administrative Law Judge Evers found that the U.S. Supreme Court's holding in *Gardner-Denver* applies to Mr. Handy's case, unaffected by the Court's later ruling in *14 Penn Plaza*, as neither of the two CBAs introduced into the evidence in Mr. Handy's claim provided a “clear and unmistakable statement or manifestation of intent” to arbitrate Mr. Handy's employment disability discrimination complaint rather than to pursue his complaint before the West Virginia Human Rights Commission.

In addition to the above, ALJ Evers noted that no mention was made by the parties in their post hearing arguments of the Commission's Legislative Rules at 6 W.Va. C.S.R. §77-6-1 *et. seq.* WAIVER OF RIGHTS, effective August 12, 2002, setting forth the mandatory criteria for regulating the voluntary release or waiver of an individual's right to pursue a claim under the West Virginia Human Rights Act. These Rules, effective prior to execution and the effective dates of both of the two above referenced collective bargaining agreements, specifically regulate and address the enforceability of “arbitration agreements” said to preempt or otherwise affect processing of complaints filed with the West Virginia Human Rights Commission for prosecution of acts of unlawful discrimination under the West Virginia Human Rights Act.

Without specifically setting forth herein the specific provisions of the above referenced regulations, (see Regulations), ALJ Evers found that neither of the two collective bargaining agreements submitted into the evidence in this matter were executed by Mr. Handy, nor do they include an explicitly stated waiver by Mr. Handy of his right to file and pursue an employment disability discrimination complaint as filed here with the West Virginia Human Rights Commission, as required therein, to establish a knowing and voluntary release or waiver of his right to pursue his discrimination complaint before the Human Rights Commission. ALJ Evers found that neither did such Collective Bargaining Agreements provide Mr. Handy to be entitled to notification of his right to counsel or to the proscribed time noted in such regulations to revoke waiver of his right to pursue a discrimination complaint before the West Virginia Human Rights Commission complying with the waiver requirements contained in such legislative rules. The Commission's legislative rules have the force and effect of law. *Koerner v. West Virginia Department of Military Affairs and Public Safety*, 217 W.Va. 231, 617 S.E.2d 778 (2005), (citing Syl. Pt. 5, *Smith v. West Virginia Human Rights Com'n.*, 216 W. Va. 2. 602 S.E. 2d 445 (2004)). Consequently, upon applying the criteria of these Legislative rules, ALJ Evers, upon review of the collective bargaining agreements in this matter, found that such agreements were not in compliance with such regulations and therefore that neither of such collective bargaining agreements precluded the filing and pursuit of Mr. Handy's employment discrimination complaint or constituted a lawful waiver of such right to pursue remedy under the WVHRA.

Although there was additional reasoning stated by ALJ Evers in his decision finding the above referenced CBAs not to have had the effect of preempting the consideration and hearing of his disability discrimination complaint before the Commission or requiring mandatory arbitration in this matter rather than Mr. Handy's pursuit of his disability discrimination complaint before the Commission, the foregoing reasons were, in themselves, dispositive of the issue regarding preemption by provisions of the Collective Bargaining Agreements noted in the ALJ's *Final Decision* and in this Summary. For a full discussion of this issue, reference is made to the *Final Decision* of the Administrative Law Judge, contained on the West Virginia Human Rights Commission's website.

II.

MR. HANDY FAILED TO ESTABLISH A *PRIMA FACIE* CASE OF DISABILITY DISCRIMINATION UNDER HIS COMPLAINT FILED WITH THE COMMISSION

With regard to Mr. Handy's disability discrimination complaint before the Commission, Mr. Handy, having submitted no direct evidence of such discrimination, ALJ Evers found, for the following reasons, as more fully explained in the discussion section of the ALJ's *Final Decision*, to have failed to establish a *prima facie* case of disparate treatment employment discrimination, as pled by the Complainant, under the provisions of the West Virginia Human Rights Act against the Respondent, on the basis of mental disability as defined in the West Virginia Human Rights Act, W.Va. Code §5-11-1 *et seq.*

First, it was found by ALJ Evers, that Mr. Handy failed to establish that he is a member of a protected class under the provisions of the WVHRA, on the basis of an alleged actual mental disability. W.Va. Code §5-11-3(m) (1-3), 6 W.Va. C.S.R. §§77-1-2.1, 2.3, 2.5. The Complainant offered no medical opinions or medical/psychological records pre-dating the Respondent's decision to terminate his employment on January 23, 2013, establishing existence of learning impairments or other mental impairments as alleged, substantially limiting his ability to perform one or more of his major life activities under the Act. and its implementing regulations. The only "medical opinion or record" made part of the record regarding Mr. Handy's alleged actual mental disability was a Psychological Evaluation Report conducted by Clinical Psychologist, Douglas Fischer, M.A., on August 21, 2013, seven (7) months **following** Mr. Handy's termination from employment by Nitro Electric, as well as Mr. Fischer's testimony at the Public Hearing. Mr. Fischer's Report of Psychological Evaluation, while diagnosing borderline I.Q. and certain developmental and learning disabilities, offered no opinion as to substantial limitation of one or more of Mr. Handy's major life activities, as defined in the West Virginia Human Rights Act, or its implementing Legislative Rules, due to such alleged mental impairments. W.Va. Code §5-11-3(m), 6 W.Va. C.S.R. §§77-1-2.5–2.8 and noted no prior psychological or psychiatric assessment of Mr. Handy's mental condition at the time of Nitro Electric's decision to terminate his employment.

Neither did Psychologist Fischer opine, in his report or testimony, that the Respondent, Nitro Electric Company, Inc., knew or should have known of Mr. Handy's alleged mental impairments. Mr. Fischer testified that he was offering no opinion of Mr. Handy's employability and testified that he had misunderstood that Mr. Handy was unemployed at the time of his psychological evaluation when Mr. Handy was, in fact, employed, on a full-time basis, and which employment was continuing at the time of hearing. Mr. Fischer did not find that Mr. Handy had a disability which would meet the definition of a disability as defined in the WVHRA. He further testified that it "would not be unreasonable" to find that the Respondent was unable to observe any of Mr. Handy's developmental limitations. Mr. Fischer testified further that he was unable to state an opinion as to Mr. Handy's need for accommodation for such limitations as this was outside his field of expertise.

Second, ALJ Evers found that a preponderance of the evidence failed to establish that the Respondent regarded or perceived Mr. Handy as being mentally disabled in deciding to terminate his employment. 6 W.Va. C.S.R. §77-1-2.8. Nitro Electric was found by ALJ Evers, by a preponderance of the evidence, to have had no knowledge of or reason to know of Mr. Handy having or alleging a learning impairment or mental disability before or during his employment with Nitro Electric. The Respondent's reason for terminating Mr. Handy's employment, i.e. that poor results on Mr. Handy's required, independently conducted, 2013 Regulatory Training Center (RTC) safety testing, conducted immediately prior to his termination, demonstrated that he did not understand or comprehend safety requirements of the job to safely perform the essential functions of employment for Nitro Electric in the Bayer or Dow facilities, in Institute, WV, where it performed services, or elsewhere for Nitro Electric, was found by ALJ Evers to be established by a preponderance of the evidence and to constitute a legitimate non-discriminatory reason for Mr. Handy's termination and not invoking an inference that Mr. Handy was mentally disabled or perceived by Nitro Electric as being mentally disabled, as Mr. Handy alleges.

Third, aside from the issue of disability, actual or perceived, Mr. Handy failed to establish a *prima facie* case of disability discrimination upon the basis of being a "qualified individual with a disability", able and competent to perform the essential functions of his employment with Nitro Electric at the time of his discharge from employment, as required under the Human Rights Act, the Commission's Legislative Rules and applicable case law. W.Va. Code §5-11-9(1), 6 W.Va. C.S.R. §§77-1-4.2 and 77-1-4.3. Although the evidence established that Mr. Handy had previously worked for 22 years, prior to his work for Nitro Electric, including seven or eight years as a Certified Industrial Heating, Ventilation, Air Conditioning and Refrigeration (HVAC/R) technician, the record also established that Mr. Handy failed to establish by a preponderance of the evidence that he was capable of performing the essential functions of the job for which he was hired by Nitro Electric, which specifically required him to be "able and competent" to safely work for it in the Bayer Material Science and Dow Chemical Industrial facilities in Institute, WV, and which facilities were both major clients of Nitro Electric and where most of Nitro Electric's work was located in January 2013, when Mr. Handy's employment was terminated. In a recent decision of the West Virginia Supreme Court of Appeals, in *West Virginia Division of Motor Vehicles v. Renee L. Richardson-Powers and West Virginia Human Rights Commission*, 239 W.Va. 78, 799 S.E.2d 341, at 347, (2017), the Court, citing Syl. Pt. 1, in part, *Coffman v. W.Va. Bd. Of Regents*, 182 W.Va. 73, 386 S.E. 2d 1 (1988), noted that "[u]nder our case law and our regulations, 'a qualified person with a disability' is an individual 'who is able and competent to perform the essential functions of the job' and '[b]y statute only an individual who is 'able and competent to perform the services required' of a **particular employment position** is entitled to seek relief on the grounds of unlawful discrimination under the West Virginia Human Rights Act".

The record in *Handy* demonstrated no prior work experience for Mr. Handy in the Bayer Material Science or Dow Chemical facilities where Mr. Handy was expected to work, and significantly reflects that, in 2011, while Mr. Handy was employed as a HVAC/R technician for his immediate prior employer, Johnson Controls, he failed site specific safety testing prepared by the same Bayer and Dow companies to obtain a site permit to work in those facilities for Johnson Controls and that he did not thereafter work in those facilities for Johnson Controls during his employment with that company prior to his hire by Nitro Electric in September 2012.

Furthermore, upon being assigned by Nitro Electric, in January 2013, to work in the Bayer and Dow facilities for Nitro Electric in January 2013, Mr. Handy again took the same or similar RTC safety testing as taken in 2011, as prepared by the Bayer and Dow facilities to work in their facilities, whereupon review of the results of such testing by Nitro Electric's Corporate Safety Director in performance of her duties, and by Nitro Electric's President and CEO, Mr. Lane Ferguson, believed that Mr. Handy did not understand or comprehend the safety requirements to safely perform the essential functions of his job, whereupon Mr. Ferguson, as sole decision maker for Nitro Electric, terminated Mr. Handy's employment on the basis of his not being able or competent to safely perform his job for Nitro Electric in the Bayer or Dow facilities, or elsewhere for Nitro Electric. Mr. Handy offered no evidence establishing his ability to perform the essential functions of employment for Nitro Electric for which he was hired only four months earlier.

Fourth, ALJ Evers found, upon a preponderance of the evidence, including all of the foregoing, that Mr. Handy failed to establish a *prima facie* case of disability discrimination under the Act, as the preponderance of the evidence failed to support a finding of circumstances under which it may reasonably be inferred that Nitro Electric terminated Mr. Handy's employment with discriminatory intent or motive. Moreover, when given the opportunity after terminating his employment to provide verification of the nature of his alleged mental disability and adequate knowledge of safety to perform his essential duties of employment, he failed to do so.

Fifth, ALJ Evers concluded that Mr. Handy had failed, given all of the foregoing, to establish by a preponderance of the evidence that "but for" his alleged protected class that Mr. Handy would not have been terminated from *his* employment.

On the basis of the foregoing, the complaint of Mr. Handy was **Denied and Dismissed, with prejudice**. No appeal was filed to this *Final Decision*.

FINAL ORDER OF THE COMMISSION

By its *Final Order* entered July 2, 2018, the Commission affirmed ALJ Evers' *Final Decision* denying and dismissing Mr. Handy's complaint. No appeal followed.

The complete *Final Decision* of Administrative Law Judge Evers and *Final Order* of the Commission can be found on the West Virginia Human Rights Commission's website.

NORTHERN WEST VIRGINIA CENTER FOR INDEPENDENT LIVING

v.

**ROBERT J. CONNOR; CAMPUS VIEW DEVELOPMENT, LLC;
CAMPUS VIEW 38, LLC., AND CAMPUS VIEW 13, LLC.,**

WVHRC DOCKET NO. HD-120-15

HUD CASE NO. 03-15-0178-8

**SUMMARY OF ORDER DISMISSING
COMPLAINT FOR LACK OF STANDING**

The above-styled case originated November 25, 2014, with the filing by the Complainant, Northern West Virginia Center for Independent Living (the Center) of a Housing Discrimination Complaint against the above-named Respondents with the Federal Department of Housing and Urban Development ("HUD"). On December 29, 2014, HUD referred this case to the West Virginia Human Rights Commission for further proceedings before the Commission. On March 6, 2017, the Commission issued a *Notice of Charge* against the Respondents restating the allegations from the Complainant's complaint filed with the Federal Department of Housing and Urban Development ("HUD") regarding the alleged violations and damages sustained by the Complainant arising from the Respondents' actions, said to be in violation of the West Virginia Fair Housing Act. Respondents answered the *Notice of Charge* on April 5, 2017, denying the allegations set forth in the complaint and *Notice of Charge* and asserting numerous affirmative defenses, amongst these being a challenge to the Center's standing to bring its complaint.

The Center is a non-profit fair housing organization, which for the period involved herein, operated under a federal grant from HUD under which it was required to conduct a minimum number of fair housing compliance tests for each grant year, including a minimum number of design and construction tests to become and remain a HUD funded private enforcement agency. In 2012 to 2016/2017, the Center applied for and won HUD grants.

The Center's Housing Discrimination complaint alleged that features of Respondents' subject residential rental properties located in Morgantown, Monongalia County, West Virginia, did not comply with applicable "design and construction" ("D&C") requirements of the federal Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* and the West Virginia Fair Housing Act, West Virginia Code § 5-11A-5. The Center pursued relief for damages sustained, in its own right, as an organization, and not as a membership organization. The Respondents denied liability and damages and the matter was set for Public Hearing before the Office of Judges of the West Virginia Human Rights Commission for January 30, 31, and February 1, 2018.

Following completion of discovery in this matter, including the deposition of the Center's Executive Director, Ms. Jan Derry, the Respondents filed a *Motion to Dismiss* the Center's complaint, July 28, 2017, based upon the Commission's lack of subject matter jurisdiction, specifically upon the Center's lack of standing. By their *Motion to Dismiss*, the Respondents argued that the undisputed facts of this matter, established through the discovery deposition of the Center's Executive Director, Ms. Jan Derry, demonstrate that the Commission lacks subject matter jurisdiction over this case due to Complainant's failure to provide sufficient information to establish an injury-in-fact as alleged in the subject complaint, fairly traceable to the Respondents' alleged violations of the federal and West Virginia Fair Housing Acts sufficient to confer standing.

On August 7, 2017, the Center, by and through the Commission's counsel, the Civil Rights Division of the Office of the Attorney General of the State of West Virginia, in its written response to the Respondents' *Motion to Dismiss* and *Memorandum of Law* attached thereto, asserted that the facts alleged by the Respondents were substantially correct, and were well documented in the deposition of the Center's Executive Director, Ms. Derry, which was made part of the record.

The Commission's counsel further advised that it believed this Office of Judges had before it "an adequate record to determine whether the Complainant alleges sufficient facts to prevail under either a broad or narrow interpretation of applicable law to the issue of standing."

Based upon the record made herein, including representations of the parties' counsel, in writing and as orally presented at a hearing on the Respondents' *Motion to Dismiss*, held before the Commission's Administrative Law Judge on August 28, 2017, the Honorable Gregory W. Evers, ALJ Evers entered an **ORDER GRANTING THE RESPONDENTS' MOTION TO DISMISS, WITHOUT PREJUDICE**, issued February 20, 2018, based upon the parties' pleadings and evidence of record, specifically including the deposition testimony of the Center's executive director.

The West Virginia Fair Housing Act is codified at W.Va. Code § 5-11A-1 *et. seq.* The Federal Fair Housing Act is the precedent federal act that served as the genesis of the state fair housing act and decisions involving the federal act are valid precedent under the state act so long as the statutory language is similar. *West Virginia Human Rights Comm'n v. Wilson*, 202 W.Va. 152, 503 S.E.2d 6 (1998). Standing is a basic jurisdictional question, based upon Article III, of the United States Constitution. Article III requires that all litigated federal matters involve a case or controversy. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

The West Virginia Supreme Court of Appeals has made clear that standing is a requirement of subject matter jurisdiction that cannot be waived and may be raised at any time in a proceeding. *Men & Women Against Discrimination v. Family Prot. Servs. Bd.*, 229 W.Va. 55, 60, 725 S.E.2d 756, 761 (2011). The inquiry before the Office of Judges in this matter is whether the pertinent facts made part of the record, substantially agreed upon by the parties and review of the pleadings, documents and evidence offered on the Respondents' *Motion*, establish that Respondents are entitled, under applicable law, to entry of an *Order* granting the Respondents' *Motion to Dismiss* the subject complaint in this matter on the basis of lack of the Center's first party organizational standing, as alleged.

When pursuing claims, for their own injuries, organizations are subject to the same standing query applicable to individual plaintiffs, i.e. whether the organizational plaintiff has (1) suffered an "injury-in-fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) whether the injury is fairly traceable to the challenged action of the defendant; and (3) whether it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 718-19 (D. Md. 2011) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *see also* Syl. Pt. 2, *Doering v. City of Ronceverte*, 228 W. Va. 147, 148, 718 S.E.2d 497, 498 (2011)).

In the seminal case for first party standing of an organization seeking enforcement of the provisions of the Fair Housing Act (FHA), *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114 (1982), the United States Supreme Court determined that first party standing for organizations, involves the same inquiry as for individual standing, that is, the plaintiff must demonstrate an **injury-in-fact, causation and redressability**. The Court noted further that to establish standing in its own right, the organizational plaintiff must allege that it had suffered a "concrete and demonstrable injury to the organization's activities" and not "simply a setback in the organization's social interests." *Id.* at 379. In *Havens*, the Court further noted that a fair housing organization could not stand on its pleadings and would ultimately "have to demonstrate at trial that it has indeed suffered impairment in its role of facilitating open housing before it [would] be entitled to judicial relief." *Id.* at 379 n.21. In the matter before this Tribunal, unlike in *Havens*, the parties conducted discovery with regard to the standing issue and advised that they were in substantial agreement as to the material facts regarding such issue, jointly advising that they required no further discovery.

In a later case, *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 720 (D. Md. 2011), the Court held that to establish an injury-in-fact, an organizational plaintiff must show that it has “incur[red]” expenditures in identifying and counteracting a company’s violations of the FHA and those expenditures perceptibly impaired the organization’s ability to advance its mission.

In *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed.2d 635 (as revised May 24, 2016), the United States Supreme Court vacated a decision of the Ninth Circuit Court of Appeals which had reversed a decision of the U.S. District Court for the Central District of California, dismissing for lack of standing upon the insufficiency of the pleadings contained in the complaint. In *Spokeo*, the Ninth Circuit Court of Appeals reversed the District Court and found that the plaintiff below had established standing as he had alleged that *Spokeo* violated his statutory rights and because the plaintiff’s personal interests in the handling of his credit information were individualized rather than collective. *Id.* at 1546. In vacating and remanding the Ninth Circuit’s decision for further review, the U.S. Supreme Court held that the Ninth Circuit Court had failed to conduct a complete analysis of standing, as required, as it had failed to determine whether the website operator’s alleged violations of the FCRA constituted **both** a “particularized” and a “concrete injury”, these two criteria being distinctly different. *Id.* at 1548. The Supreme Court held further that for an injury to be “particularized” it must affect the plaintiff in a personal and individual way and that to be “concrete” an injury must be also be “de facto”, that is actually exist, be “real” and not “abstract”. *Id.* at 1548.

In a recent decision of the West Virginia Supreme Court of Appeals, in *State ex rel Healthport Technologies, LLC, et al v. Stucky*, 239 W.Va. 239, 800 S.E.2d 506, (May 24, 2017), our Court restated and made clear its position with regard to its review of the issue of standing. The Court stated that it has defined “standing” as a party’s right to make a legal claim or seek judicial enforcement of a duty or right and that “standing” refers to one’s ability to bring a lawsuit based upon a **personal stake** in the outcome of the controversy. *Id.* at 509-10. The Court held, first, that the party attempting to establish standing must have suffered an “injury-in-fact” – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical, that second, there must be a causal connection between the injury and the conduct forming the basis of the lawsuit and third, that it must be likely that the injury will be redressed through a favorable decision of the Court. *Id.* at 510. ALJ Evers found that although the Center alleged that it had sustained injury due to the alleged design and construction violations of the Respondents, review of the factual evidence made part of the record, substantially agreed upon by the parties, review of the pleadings, other documents submitted with the Respondents’ *Motion* and complete deposition transcript of the Center’s Executive Director, Ms. Derry, fail to establish a “concrete and particularized injury” having been properly pled and supported by the Center in the testimony of its executive director and fail to support standing in this matter on the basis of its having sustained an injury-in-fact, fairly traceable to the alleged design and construction violations of the federal and West Virginia Fair Housing Acts.

The Center was found, by ALJ Evers, to have presented no evidence of more than *de minimus* expenditure, if that, of its economic or non-economic resources, or evidence that it was required to divert significant resources from any of its programs perceptibly impairing any of the same, in identifying or responding to Respondents alleged discriminatory conduct. ALJ Evers found that Ms. Derry’s testimony confirmed that all of the monies expended by the Center in identifying and counteracting the alleged violations of the Respondents were completely from HUD grant funds, and that since first being awarded a grant through HUD in 2012, the Center had not expended a dollar of its own on fair housing enforcement activities. (Derry Depo., p. 116:14-20). ALJ Evers noted that Ms. Derry stated, in fact, that any monies recovered in this lawsuit would be considered a benefit and deposited with the Center’s unrestricted funds and that the Center would not be required to reimburse HUD any of the grant funds. Therefore, even were it to be assumed that the Center suffered an injury-in-fact, not found here, that injury is not shown by the evidence to be fairly traceable to the Center’s investigation of, and made in response to, Respondents’ alleged D&C violations.

ALJ Evers also concluded that the Center had failed to plead or otherwise sufficiently establish how any of its efforts allegedly made to respond to and/or to counteract the Respondents' alleged design and construction violations extended beyond its normal, "day-to-day work" it regularly undertook under the HUD grant requirements. *Jimenez v. David Y Tsai*, Civil No. 5:16-04434, 2017 WL 2423186, *12 (N.D. Cal. June 5, 2017).

Consequently, based upon all of the foregoing, ALJ Evers found that the Center had failed to identify or to otherwise provide sufficient evidence to find or for him, as decision maker, to make a reasonable inference that significant resources of the Center were expended or caused to be diverted from the its usual activities, including education and outreach, to respond to or counteract the Respondents' alleged unlawful actions. ALJ Evers found that the investigation of Respondents' identified subject properties, were established by a preponderance of the evidence to have been performed for the purpose of complying with the activities that the Center was to perform, as set forth in the statement of works to be made part of its agreements with HUD, which the Center had been performing in accordance with such pre-planned HUD grant terms, which were totally budgeted under the Center's HUD grant. The evidence establishes no major shift in the Center's programs or activities taken to respond to or counteract the alleged violations of the federal and West Virginia Fair Housing Acts by the Respondents.

Accordingly, and as a matter of law, ALJ Evers concluded that the substantially undisputed evidence submitted on the issue of standing herein established that the Center was not caused to sustain an injury-in-fact, concrete and particularized, fairly related to the Respondents' alleged design and construction violations of the federal and West Virginia State Fair Housing Acts. Consequently, ALJ Evers **GRANTED** the Respondent's *Motion to Dismiss the Complaint and Charge for Lack of Standing*.

No appeal was filed to this Order, and consequently it became final.

Conclusion

The West Virginia Human Rights Commission's goals, for Fiscal Year 2019 include:

- ◆ Provide a continued, ongoing variety of training to the Commissioners and all staff
- ◆ In a collaborative effort with the EEOC and the Civil Rights Division of the Attorney General's office, continue to conduct additional training for investigative staff and Commissioners including City Commissions
- ◆ Promote awareness of the Human Rights Act and services provided by the West Virginia Human Rights Commission
- ◆ Provide more extensive and innovative training sessions to educate businesses regarding discrimination law in housing, public accommodation and employment
- ◆ Continue the Commission's mission to eradicate discrimination and continue to improve its services to the citizens of West Virginia by expanding community outreach to include additional advocacy groups
- ◆ Set up a dialogue of understanding between the Commission and all West Virginians to promote awareness of the goals and objectives of the Commission
- ◆ Continue to collaborate with the Governor's Herbert Henderson Office of Minority Affairs to conduct community-based outreach and education seminars
- ◆ Continue to maximize the use of Alternative Dispute Resolution Programs, which include Mediation and Pre-Determination Conciliation
- ◆ Organize and implement the Civil Rights Day
- ◆ Plan and implement the annual Fair Housing Summit/Seminar of 2019
- ◆ Review and update the Commission's rules and regulations