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Bailey v. Norfolk & Western Railway Co.: Creating a Collateral Victim Doctrine under the West Virginia Human Rights Act

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BAILEY v. NORFOLK & WESTERN RAILWAY CO.: CREATING A COLLATERAL VICTIM DOCTRINE UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

I. INTRODUCTION

In 2002, the Ninth Circuit Court of Appeals ruled that the words "under God" in the Pledge of Allegiance violated the Establishment Clause of the First Amendment.[1] This decision reinforced the Ninth Circuit's reputation as an activist court. However, the Ninth Circuit is not the only court to engage in judicial activism. This Comment examines the recent West Virginia Supreme Court of Appeals decision in *Bailey v. Norfolk & Western Railway Co.*[2] In *Bailey*, the court held that five employees under the age of forty could be included as plaintiffs in an age discrimination claim brought by employees over the age of forty,

[1] *See* Newdow v. United States Cong., 328 F.3d 466, 490 (9th Cir. 2002) ("[W]e hold that the school district's policy and practice of teacher-led recitation of the Pledge, with the inclusion of the added words 'under God,' violates the Establishment Clause."), *cert. granted sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 384 (2003).

[2] 527 S.E.2d 516 (W. Va. 1999).

despite specific statutory language that requires individuals to be forty years of age or older to sue for age discrimination.[3] To get around this age requirement, the court established a collateral victim doctrine, which holds that collateral victims of discrimination – those under the age of forty – are entitled to relief when an employer has engaged in an unlawful discriminatory practice, such as activities designed to cause economic loss.[4] The court erroneously reasoned that West Virginia Code section 5-11-9(7)(A) supports the creation of a collateral victim doctrine.[5]

This Comment argues that the West Virginia Supreme Court of Appeals should not have created the collateral victim doctrine. Part II of this Comment provides a historical overview of age discrimination laws and discusses the requirements for bringing an age discrimination claim. Part III describes the facts in *Bailey*. This part also explains the collateral victim doctrine and the court's rationale in creating it. Part IV discusses why the collateral victim doctrine should not have been created. Specifically, the collateral victim doctrine subverts the requirement of establishing a prima facie case and contradicts the purpose of age discrimination laws. Moreover, the court erroneously relied on section 5-11-9(7)(A) in creating a collateral victim doctrine. Finally, Part V discusses the possible ramifications of the collateral victim doctrine.

II. BACKGROUND

Congress enacted Title VII of the Civil Rights Act of 1964 ("Act")[6] "to protect minorities from discrimination in the workplace."[7] The Act did not include a prohibition against age discrimination.[8] However, it "did direct the Sec-

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[3] *Id.* at 532; *see* W. VA. CODE § 5-11-3(k) (2002); *see also* Age Discrimination in Employment Act of 1967 ("ADEA") § 12, 29 U.S.C. § 631(a) (2000).

[4] *See Bailey*, 527 S.E.2d at 533, 538 n.2 ("The majority has invoked W. Va. Code § 5-11-9(7)(A) and attached a spurious and totally undefined doctrine to it called 'collateral victim.'") (Davis, J., concurring in part, dissenting in part).

[5] *See id.* at 532.

[6] Pub. L. No. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)).

[7] Beth M. Weber, Note, *The Effect of* O'Connor v. Consolidated Coin Caterers Corp. *on the Requirements for Establishing a Prima Facie Case Under the Age Discrimination in Employment Act*, 29 RUTGERS L.J. 647, 648 (1998).

[8] Bryan B. Woodruff, Note, *Unprotected Until Forty: The Limited Scope of the Age Discrimination in Employment Act of 1967*, 73 IND. L.J. 1295, 1297 (1998). Not only is age discrimination not included in Title VII, but age discrimination can be distinguished from other types of employment discrimination. *See* Sophie E. Zdatny, Comment, West Virginia University v. Decker*: The Future of Age Discrimination in West Virginia*, 98 W. VA. L. REV. 719, 724 (1996). For instance, "[t]he Supreme Court has held that age-based classifications do not constitute a suspect class for equal protection purposes." *Id.* Furthermore, "ADEA claims are typically brought by white males, with relatively high status and high paying jobs." *Id.* "Moreover, age is not an immutable characteristic . . . ." *Id.* at 725.

retary of Labor to study the problem of age discrimination."[9] In response, the Secretary of Labor issued a report[10] which stated that "many establishments had declined to hire any workers who had reached the age of forty-five."[11] "[T]he Secretary emphasized the difficulties that older workers faced when attempting to find new employment following termination."[12] Generally, older workers remained unemployed for longer periods of time than younger workers.[13] Based on the report, the Secretary of Labor recommended that Congress protect individuals aged forty-five to sixty-five from discrimination on account of age.[14]

In 1967, Congress moved to outlaw discrimination on the basis of age.[15] Congress enacted the Age Discrimination in Employment Act ("ADEA") to "promote employment of older persons."[16] The ADEA states that "[i]t is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in em-

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9 Woodruff, *supra* note 8, at 1297.

10 *Id.* (citing U.S. DEP'T OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965)).

11 Chad A. Stewart, Comment, *Young, Talented, and Fired: The New Jersey Law Against Discrimination and the Right Decision in* Bergen Commercial Bank v. Sisler, 84 MINN. L. REV. 1689, 1691 (2000). The report "indicated that age was not a factor in calculating ability, that it had little to do with job performance, that older workers were often a benefit in the workplace rather than a liability, and that contrary to conventional beliefs, older workers had quite healthy attitudes about their jobs." *Id.* at 1691-92. The Secretary also determined that discrimination against older workers had a detrimental impact on the economy due to unemployment insurance payments and lost productivity. *See* Woodruff, *supra* note 8, at 1297.

12 Stewart, *supra* note 11, at 1692.

13 *See id.* "Finding a different job is likely to be more difficult for the old worker than for the young worker." Woodruff, *supra* note 8, at 1301.

14 *See* Woodruff, *supra* note 8, at 1297. Despite the recommendation, Congress set the lower age limit at forty years of age. *See id.*

15 *See* Zdatny, *supra* note 8, at 720.

16 *Id.*; *see* Stewart, *supra* note 11, at 1691.

> Congress expressed the purpose of the ADEA explicitly and concisely in § 621: (a) The Congress hereby finds and declares that – (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

Woodruff, *supra* note 8, at 1298 (citing 29 U.S.C. § 621(a) (2002)).

ployment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[17] However, Congress limited the scope of the ADEA to individuals who were forty years of age and older[18] because it "believed that forty was the age at which discrimination became evident."[19]

The ADEA did not preclude the states from enacting their own legislation against age discrimination.[20] Consequently, the West Virginia Legislature incorporated age as a protected class under the West Virginia Human Rights Act ("WVHRA").[21] The WVHRA states:

> It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment . . . .
>
> The denial of these rights to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, *age*, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.[22]

The WVHRA, like the ADEA, limits the protected class in an age discrimination claim to individuals forty years of age and older.[23] Accordingly, a

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17 ADEA § 2, 29 U.S.C. § 621(b) (2002).

18 Section 3 of the Age Discrimination in Employment Act Amendments of 1978 amended the ADEA to read, "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." *See* Pub. L. No. 95-256, § 3, 92 Stat. 189, 189 (codified at 29 U.S.C. § 631(a) (2000)). Originally, the ADEA only protected individuals between the ages of forty and sixty-five. *See* Weber, *supra* note 7, at 650. However, the ADEA as amended now covers all individuals over the age of forty. *See id.*; Woodruff, *supra* note 8, at 1300.

19 Woodruff, *supra* note 8, at 1297. Congress relied on the Secretary's report in setting the age limit at forty. *See* Stewart, *supra* note 11, at 1691 ("Based primarily on a report by the Secretary of Labor, Congress defined the protected class to include individuals between the ages of forty and sixty-five."). The Secretary recommended that the age limit be forty-five to sixty-five. *See* Woodruff, *supra* note 8, at 1297. However, "Congress supported its decision to limit the lower age range to forty by stating that such age 'is also the lower age limit found in most state statutes bearing on this subject.'" Stewart, *supra* note 11, at 1720; *see also* Woodruff, *supra* note 8, at 1297.

20 *See* Stewart, *supra* note 11, at 1692-93 (citing 29 U.S.C. § 633(a) (2000)).

21 *See* Zdatny, *supra* note 8, at 721. "Age" was included along with other protected classes from the initial passage of the WVHRA in 1967. *Id.* "In contrast, the ADEA is part of the Fair Labor Standards Act, and not part of Title VII of the Civil Rights Act." *Id.*; *see* Ann K. Wooster, *Actions Brought Under Age Discrimination in Employment Act,* 180 A.L.R. FED. 325 (2002). The WVHRA is codified at W. VA. CODE §§ 5-11-1 to -19 (2002).

22 W. VA. CODE § 5-11-2 (2002) (emphasis added).

23 The WVHRA states that "[t]he term 'age' means the age of forty or above." *Id.* § 5-11-3(k).

plaintiff may bring an age discrimination claim under the ADEA or the WVHRA. In either instance, however, a plaintiff must establish a prima facie case of age discrimination by showing "some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference [of discrimination]."[24] If a plaintiff meets the burden of establishing a prima facie case, then the burden "shift[s] to the employer to show some nondiscriminatory reason for the decision."[25] If the employer produces a nondiscriminatory reason, "the employee will have the chance to rebut the employer's evidence with a showing that the stated reason was merely a pretext for [a] discriminatory motive."[26]

III. *BAILEY v. NORFOLK & WESTERN RAILWAY CO.*

A. *Facts*

The plaintiffs in *Bailey* worked as brakemen for the Norfolk & Western Railway Company ("Railroad").[27] Under a prior collective bargaining agreement, brakemen hired before November 1, 1985 had the right to refuse promotion to the position of conductor.[28] As a result, the plaintiffs were initially able to retain their seniority rights and expensive benefit packages that they accumulated as brakemen.[29] Under a collective bargaining agreement dated October 1, 1985, the Railroad could force-promote all employees hired after November 1, 1985.[30] In addition, under a 1988 labor agreement, employees hired after November 1, 1985 could transfer their brakemen seniority to the conductor roster.[31]

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[24] Conaway v. E. Associated Coal Corp., 358 S.E.2d 423, 429 (W. Va. 1986) (citing Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977)); *see, e.g.*, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Skaggs v. Elk Run Coal Co., 479 S.E.2d 561 (W. Va. 1996); Barefoot v. Sundale Nursing Home, 457 S.E.2d 152 (W. Va. 1995). An employee does not have to establish a prima facie case if the employee can show direct evidence of discrimination. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The plaintiff has the burden of production.

[25] *Conaway*, 358 S.E.2d at 430. The employer's burden of producing a legitimate nondiscriminatory reason is not difficult.

[26] *Id.* This is a burden of persuasion.

[27] Bailey v. Norfolk & W. Ry. Co., 527 S.E.2d 516, 522 (W. Va. 1999). Norfolk & Western Railway Company no longer exists as a separate corporate entity, as it merged into Norfolk Southern Railway Company in 1998. *Id.* at 522 n.1.

[28] *Id.* at 523.

[29] *Id.* at 522-23. "The benefit packages apparently included significant monetary benefits, higher salaries, and job security rights based upon years of service and seniority within the brakeman category." *Id.* at 523 n.2.

[30] *Id.* at 523.

[31] *Id.*

These labor agreements did not address employees hired before November 1, 1985, who had the right to refuse promotion.[32]

However, a 1991 agreement gave the Railroad the right to force-promote employees hired before November 1, 1985.[33] Thereafter, the Railroad force-promoted the plaintiffs from brakemen to conductors.[34] Unlike the employees hired after November 1, 1985, who could transfer their brakemen seniority, the employees hired before November 1, 1985 could not transfer their brakemen seniority. Therefore, the plaintiffs were stripped of their brakemen seniority and were placed on the bottom of the conductors' seniority roster.[35] Furthermore, the employees hired before November 1, 1985 were predominately older employees, whereas the employees hired after November 1, 1985 were younger employees.[36]

Subsequently, the plaintiffs filed an age discrimination claim against the Railroad. The plaintiffs claimed that they were discriminated against when they were promoted to the position of conductor and placed at the bottom of the conductors' seniority roster.[37] More specifically, the plaintiffs claimed that they were discriminated against based on their age because, unlike the predominantly younger workers, they could not transfer their seniority. The plaintiffs further alleged that the Railroad engaged in a plan to eliminate workers who maintained expensive benefit packages in favor of a class of employees predominately younger and whose benefit packages were less expensive.[38] However, five of the sixty-seven plaintiffs in the age discrimination claim were under forty years of age when the alleged discrimination took place.[39]

At trial, the plaintiffs presented evidence that the Railroad targeted them because they were primarily older and had expensive benefit packages.[40] A jury verdict in the Circuit Court of McDowell County found that the Railroad discriminated against the plaintiffs on the basis of age when the Railroad promoted the plaintiffs and stripped them of their seniority.[41] The Railroad appealed this decision to the West Virginia Supreme Court of Appeals.[42] On appeal, the Rail-

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32 *Id.* Therefore, at that time, the plaintiffs were still able to refuse promotion.

33 *Id.*

34 *Id.* at 524.

35 *Id.*

36 *Id.* at 522-23.

37 *Id.* at 523.

38 *Id.* at 522-23. The class of employees predominately younger than the plaintiffs were the brakemen hired after November 1, 1985.

39 *Id.* at 522.

40 *Id.* at 523.

41 *Id.* at 522.

42 *Id.*

road maintained that there was insufficient evidence to prove age discrimination.[43] The Railroad specifically challenged the lower court's ruling as it applied to the five plaintiffs under forty years of age.[44]

The major issue before the West Virginia Supreme Court of Appeals was whether the five employees under the age of forty could be included as plaintiffs in the age discrimination claim.[45] In the circuit court, the jury was instructed that an individual may be discriminated against even though he is not in an age-protected group as long as he associates with members of the protected group.[46] The jury was also instructed that a person younger than forty years old who is in the same grouping as older workers may recover for discrimination.[47] On appeal, the Railroad argued that these "jury instructions erroneously stated the law" regarding the inclusion of the five plaintiffs under forty years of age.[48]

B. The Collateral Victim Doctrine

The West Virginia Supreme Court of Appeals held that the lower court's jury instructions were not a misstatement of the law.[49] The court held that "the five Plaintiffs under the age of forty at the time of the alleged discriminatory action may recover under the West Virginia Human Rights Act and were properly included by the lower court as Plaintiffs."[50] The court stated:

> In the case sub judice, the five individuals have asserted that they were victims of an unlawful discriminatory practice perpetrated through the Railroad's engagement in discriminatory activities, and we find that relief through section 5-11-9(7) is appropriate. Thus, despite the fact that they had not attained the age of forty at the time of the alleged discriminatory action, they are appropriately considered *collateral victims* of the discrimination against the members within the protected age group and can be viewed as suffering the same consequences as those within the protected age group.[51]

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43 *Id.*

44 *Id.* at 532.

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.* at 533.

51 *Id.* (emphasis added).

At first glance, it appears that the *Bailey* court simply allowed the five plaintiffs to recover under the independent cause of action of section 5-11-9(7)(A).[52] However, the court relied on section 5-11-9(7)(A) to create an entirely new doctrine.[53] In this regard, Justice Davis stated in her dissenting opinion[54] that "[t]he majority has invoked W. Va. Code § 5-11-9-7(A) and attached a spurious and totally undefined[55] doctrine to it called 'collateral victim.'"[56] The collateral victim doctrine holds that

> collateral victims of discrimination are entitled to relief under Section 5-11-9(7)(A) upon establishing that the employer has engaged in an unlawful discriminatory practice, such as activities designed to cause economic loss. Such collateral victims are properly included as Plaintiffs in a cause of action initiated by other victims of discrimination under the West Virginia Human Rights Act.[57]

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[52] *See infra* note 62 and accompanying text.

[53] *Bailey* does not hold that the five plaintiffs under the age of forty have an independent cause of action under section 5-11-9(7)(A) and can therefore recover under that statute. Rather, *Bailey* holds that the plaintiffs under the age of forty can be included in an age discrimination claim because section 5-11-9(7)(A) extends protection to individuals who suffer collateral harm. *Bailey*, 527 S.E.2d at 532-33. Furthermore, if the court wanted to rely solely on section 5-11-9(7)(A), there would have been no reason for the court to describe the five plaintiffs as collateral victims.

[54] Justice Davis' opinion was, in fact, concurring in part and dissenting in part. However, the opinion will be referred to as a dissenting opinion in the context of this Comment because all that is addressed herein are the dissenting comments.

[55] In creating this collateral victim doctrine, the court failed to adequately explain it. For example, the court never specifically defined the term "collateral victim." However, the court did refer to the fact that the five plaintiffs under forty "suffer[ed] the same consequences as those within the protected age group." *Bailey*, 527 S.E.2d at 533. Secondly, the court did not *clearly* explain the parameters of the doctrine. For example, can an employee have an *independent* claim of age discrimination based on the collateral victim doctrine even if the employee is under forty years of age? On the other hand, is an employee's age discrimination claim under the collateral victim doctrine contingent on other employees initiating a claim for age discrimination? Most likely, the collateral victim doctrine will only be invoked when a group of employees file a discrimination claim against an employer. Regardless, it appears that an employee invoking the collateral victim doctrine will be basing his claim on discrimination perpetrated against others. Accordingly, the collateral victim doctrine is, in effect, a roundabout way of creating an *association doctrine* under the WVHRA, despite the court's specific rejection of an *association doctrine* under the WVHRA. *See id.* at 532 & n.15 (rejecting that the association principles set forth in W. Va. Human Rights Comm'n v. Wilson Estates, Inc. 503 S.E.2d 6 (W. Va. 1998) supported the five plaintiffs' claim that they were properly included as plaintiffs by their "association with the protected group.").

[56] *Id.* at 538 n.2 (Davis, J., concurring in part, dissenting in part).

[57] *Id.* at 533. Accordingly, the two elements of the collateral victim doctrine are: (1) plaintiff is a collateral victim; and (2) plaintiff shows that the employer violated section 5-11-9(7)(A). Obviously, if a plaintiff can show that the employer violated section 5-11-9(7)(A), then that plain-

C. *The Court's Rationale*

The court acknowledged that West Virginia Code section 5-11-3(k) requires age discrimination claimants to be forty years of age or older.[58] However, the court believed it was necessary "for the protection of the Human Rights Act to be extended to individuals who suffer collateral harm from discriminatory practices."[59] The court was obviously concerned with the harsh result of denying recovery to those plaintiffs under the age of forty because they suffered "the same consequences as those within the protected age group."[60] However, the court still needed to specify where in the WVHRA collateral victims of discrimination are protected. The court reasoned that section 5-11-9(7)(A) would provide relief for the five plaintiffs.[61] Section 5-11-9(7)(A) states:

> It shall be an unlawful discriminatory practice . . . :
>
> . . . .
>
> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesmen or financial institution to:
>
> (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or *economic loss* or to aid, abet, incite, compel, or coerce any person to en-

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tiff would have a cause of action under section 5-11-9(7)(A) independent of any collateral victim claim.

58 *See id.* at 532.

59 *Id.*

60 *Id.* at 533.

61 Specifically, the court stated:

> In resolving the matter of inclusion of the five Plaintiffs under age forty, we recognize the necessity for the protection of the Human Rights Act to be extended to individuals who suffer collateral harm from discriminatory practices committed in violation of the Act. In examining the potential relief available to the five Plaintiffs who were under the age of forty at the time the discrimination was initiated in this case, the remedy available through West Virginia Code § 5-11-9(7) (1999) is of particular intrigue.

Bailey, 527 S.E.2d at 532.

> gage in any of the unlawful discriminatory practices defined in this section.[62]

The court interpreted the economic loss prohibition in section 5-11-9(7)(A) as a means of providing relief to those who are collateral victims of discrimination. The court stated:

> Pursuant to this section, where the employer engages in activities of any nature, the purpose of which is to cause economic loss, the employer has committed an unlawful discriminatory practice under the Act. Thus, whether entertained as a derivative or an independent claim, individuals who may not otherwise be covered under the specific requirements of the Act can seek relief through the more general provisions of West Virginia Code § 5-11-9(7).[63]

The court also relied on West Virginia Code section 5-11-15, which states that the WVHRA "'shall be liberally construed to accomplish its objectives and purposes.'"[64] The court noted that "'[a] statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part.'"[65] The court argued that the objective and purpose of the WVHRA is to ensure that all citizens receive equal opportunity for employment, and therefore collateral victims of discrimination should be protected under the WVHRA.[66]

Interestingly, the court specifically rejected the creation of an *association doctrine*, which would have protected the five plaintiffs based on their association with the employees over the age of forty.[67] The five plaintiffs under forty argued that they should have been included in the age discrimination complaint based on their association with the older employees.[68] The court acknowledged an association doctrine under the Fair Housing Act but stated that "[i]nclusion as Plaintiffs in a cause of action available only to individuals over the age of forty through the [WVHRA] is not a corresponding right."[69]

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62 W. VA. CODE § 5-11-9(7)(A) (2002) (emphasis added).

63 *Bailey*, 527 S.E.2d at 532-33.

64 *Id.* at 533 (quoting W. VA. CODE § 5-11-15 (1999)).

65 *Id.* (quoting Shell v. Bechtold, 338 S.E.2d 393 (W. Va. 1985)).

66 *Id.* at 533 (citing W. VA. CODE § 5-11-2 (1989)).

67 *Id.* at 532 n.15.

68 *Id.* at 532. The five plaintiffs relied upon *West Virginia Human Rights Commission v. Wilson Estates, Inc.*, 503 S.E.2d 6 (W. Va. 1998), which established an association doctrine under the Fair Housing Act.

69 *Bailey*, 527 S.E.2d at 532 n.15.

IV. WHY THE COLLATERAL VICTIM DOCTRINE SHOULD NOT HAVE BEEN CREATED

The collateral victim doctrine should not have been created for several reasons. The issue was not raised in the lower court and thus should not have been adjudicated for the first time on appeal. Secondly, section 5-11-3(k) of the WVHRA specifically requires that a plaintiff be forty years of age or older to bring a claim of age discrimination.[70] Thirdly, the collateral victim doctrine subverts the requirement of establishing a prima facie case of discrimination because a plaintiff does not have to be a member of a protected class. The collateral victim doctrine also subverts this requirement because a plaintiff does not have to show a link between the employer's decision and the plaintiff's protected status. Furthermore, by enacting the collateral victim doctrine, the court failed to adhere to the purpose of age discrimination laws. Lastly, section 5-11-9(7)(A) does not support the creation of a collateral victim doctrine.

A. *Due Process*

The dissenting opinions in *Bailey* focused on procedural grounds. Justice Davis correctly argued that including the five plaintiffs under forty years of age in the age discrimination claim violated due process.[71] Justice Davis' dissent, which was extremely critical of the majority opinion, stated that "the majority has determined that in West Virginia a plaintiff no longer has to present a claim at the trial court level in order to prevail."[72] She continued, "[T]he majority decision has stated unequivocally that in West Virginia a defendant no longer has a right to know the basis of a cause of action and no longer has a right to present evidence on a cause of action."[73] Justice Maynard, also critical of the majority opinion, wrote that "this Court cannot and should not *sua sponte* create a new cause of action and simultaneously decide the merits of the new cause of action against the defendant."[74]

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70 *See supra* note 23 and accompanying text.

71 Justice Davis concurred with the majority's opinion in respect to the sixty-two plaintiffs aged forty or above. *See Bailey*, 527 S.E.2d at 536 (Davis, J., concurring in part, dissenting in part).

72 *Id.* at 538.

73 *Id.*

74 *Id.* at 540 (Maynard, J., concurring in part, dissenting in part). Justice Maynard emphasized that the West Virginia Supreme Court of Appeals can constitutionally recognize a new cause of action in two ways:

> (1) a party may advocate a new theory at the trial level and prevail; on appeal, this Court may recognize the new cause of action, or (2) a party may advocate a new cause of action at the trial level but be prevented from litigating the matter; on appeal, this Court may recognize the unlitigated new cause of action and remand for trial.

On numerous occasions, the West Virginia Supreme Court of Appeals has held that it "is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below."[75] The court has further stated that "issues which do not relate to jurisdictional matters and which have not been raised before the circuit court will not be considered for the first time on appeal to this court."[76]

> The rationale behind this rule is that when an issue has not been raised below, the facts underlying that issue will not have been developed in such a way so that a disposition can be made on appeal. Moreover, we consider the element of fairness. When a case has proceeded to its ultimate resolution below, it is manifestly unfair for a party to raise new issues on appeal. Finally, there is also a need to have the issue refined, developed, and adjudicated by the trial court, so that we have the benefit of its wisdom.[77]

In *Bailey*, section 5-11-9(7)(A) and the collateral victim doctrine were never raised in the lower court.[78] Therefore, it was clearly unfair to the Railroad for the court to consider the collateral victim doctrine on appeal because the Railroad could not fully address the issue. Also, the issue was never refined and developed by the trial court. Accordingly, the West Virginia Supreme Court of Appeals should not have addressed section 5-11-9(7)(A) or the collateral victim doctrine on appeal.

Id. (Maynard, J., concurring in part, dissenting in part).

75 Kronjaeger v. Buckeye Union Ins. Co., 490 S.E.2d 657, 672 (W. Va. 1997); *see also, e.g.*, Trent v. Cook, 482 S.E.2d 218, 224 (W. Va. 1996); Whitlow v. Bd. of Educ. of Kanawha County, 438 S.E.2d 15, 18 (W. Va. 1993); Mich. Nat'l Bank v. Mattingly, 212 S.E.2d 754, 757-58 (W. Va. 1975); Wheeling Downs Racing Ass'n v. W. Va. Sportservice, Inc., 199 S.E. 2d 308, 310 (W. Va. 1973).

76 *Kronjaeger*, 490 S.E.2d at 672.

77 Barney v. Auvil, 466 S.E.2d 801, 810 (W. Va. 1995).

78 *Bailey*, 527 S.E.2d at 538 (Davis, J., concurring in part, dissenting in part).

> This result obtained in the majority opinion, though, is just plain wrong. The plaintiffs did not even assert W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Nor did the plaintiffs present any evidence regarding W. Va. Code § 5-11-9(7)(A) at the trial level or on appeal. Presumably, such evidence is lacking because none of the parties envisioned the resolution of their controversy on this ground.

Id.

B. *Prima Facie Case*

Even if the parties had raised the issue in lower court, the West Virginia Supreme Court still should not have created the collateral victim doctrine because section 5-11-3(k) specifically states that an age discrimination claim is limited to individuals forty years of age and older.[79] In *Bailey*, the court acknowledged that section 5-11-3(k) set the age limit at forty or above;[80] however, it ignored this clear statutory language and decided that the WVHRA should be extended to protect collateral victims of discrimination.[81]

Furthermore, the collateral victim doctrine should not have been created because it subverts the requirement of establishing a prima facie case of discrimination. In *McDonnell Douglas Corp. v. Green*,[82] the United States Supreme Court established the framework for proving a case of disparate treatment.[83] Under *McDonnell Douglas*, a plaintiff has the initial burden of presenting sufficient evidence to establish a prima facie case of discrimination.[84] In order to establish a prima facie case, a plaintiff must show

> (i) that he belongs to a racial minority [protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications.[85]

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79 *See supra* note 23 and accompanying text.

80 The court stated, "In discussing age discrimination, West Virginia Code 5-11-3(k) (1999) defines age to mean 'the age of forty or above.'" *Bailey*, 527 S.E.2d at 532.

81 After acknowledging the requirement of section 5-11-3(k), the court did not discuss its impact or relevance to the case except to note: "Despite the fact that they had not attained the age of forty at the time of the alleged discriminatory action, they are appropriately considered collateral victims of the discrimination against the members within the protected age group." *Id.* at 533. The court further stated, "In resolving the matter of inclusion of the five Plaintiffs under age forty, we recognize the necessity for the protection of the Human Rights Act to be extended to individuals who suffer collateral harm from discriminatory practices committed in violation of the act." *Id.* at 532. Section 5-11-3(k), however, does not provide an exception for collateral victims. Section 5-11-3(k) states that a plaintiff can not bring a claim for age discrimination unless he is forty years of age or older.

82 411 U.S. 792 (1973).

83 *See* Zdatny, *supra* note 8, at 727.

84 *See* Hanlon v. Chambers, 464 S.E.2d 741, 748 (W. Va. 1995). A "plaintiff must establish a prima facie case of discrimination." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142 (2000).

85 *McDonnell Douglas*, 411 U.S. at 802.

The United States Supreme Court has not squarely addressed whether the *McDonnell Douglas* framework applies to the ADEA.[86] However, the Court has generally applied *McDonnell Douglas* to the ADEA.[87] In addition, the West Virginia Supreme Court of Appeals "has consistently looked to federal discrimination law dealing with Title VII of the Civil Rights Act of 1964 . . . when interpreting provisions of our state's human rights statutes."[88] Accordingly, in *Conaway v. Eastern Associated Coal Corp.*,[89] the West Virginia court created a general test for determining if the plaintiff has established a prima facie case of employment discrimination.[90]

> In order to make a prima facie case of employment discrimination, the plaintiff must offer proof of the following: (1) *That the plaintiff is a member of a protected class.* (2) That the employer made an adverse decision concerning the plaintiff. (3) *But for the plaintiff's protected status, the adverse decision would not have been made.*[91]

Therefore, whether under the ADEA or the WVHRA, a plaintiff must establish a prima facie case of discrimination in order to prevail.[92]

1. Member of a Protected Class

To establish a prima facie case of discrimination, a plaintiff must be a member of the class protected by the WVHRA.[93] The age limit established in

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[86] *See Reeves*, 530 U.S. at 142; *see also* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311 (1996). "Under the ADEA, it is 'unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.'" *Reeves*, 530 U.S. at 141 (quoting 29 U.S.C. § 623(a)(1) (2000)).

[87] *See Reeves*, 530 U.S. at 142.

[88] W. Va. Human Rights Comm'n v. Wilson Estates, Inc., 503 S.E.2d 6, 12 (W. Va. 1998) (citing Barefoot v. Sundale Nursing Home, 457 S.E.2d 259, 265-66 (W. Va. 1994)).

[89] 358 S.E.2d 423, 425 (W. Va. 1987).

[90] *See id.* at 425, Syl. Pt. 3.

[91] *Id.* (emphasis added); *see also, e.g.*, Dobson v. E. Associated Coal Corp., 422 S.E.2d 494, 497 (W. Va. 1993); Raber v. E. Associated Coal Corp., 423 S.E.2d 897, 898 (W. Va. 1992); Guyan Valley Hosp. v. W. Va. Human Rights Comm'n, 382 S.E.2d 88, 89 (W. Va. 1989).

[92] Of course, if there is direct evidence of discrimination then a prima facie case is not needed. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 230 (1989).

[93] Cunningham v. Owens-Illinois, Inc., 669 F. Supp. 757, 762 (S.D. W. Va. 1987). The first element in a prima facie case under *McDonnell Douglas* is that a plaintiff belongs to a racial minority. This is different from the requirement of membership in a protected class. However, "[t]he *McDonnell Douglas* test was never intended by the Supreme Court to be a panacea to correct all discrimination wrongs." *Conaway*, 358 S.E.2d at 429.

section 5-11-3(k) corresponds to the first element in establishing a prima facie case. In an age discrimination case under the WVHRA, the protected class includes individuals forty years of age or older.[94] "[T]he showing the plaintiff must make as to the elements of the *prima facie* case in order to defeat a motion for summary judgment is *de minimis*."[95] In other words, "[t]he first two parts of the test are easy."[96] However, a plaintiff still must satisfy the first element of the prima facie case in order to make a claim of age discrimination.[97]

Courts have consistently held that persons under the age of forty do not satisfy the first element of a prima facie case and thus do not have a claim for age discrimination.[98] For instance, in *Brown v. Oscar Mayer Foods Corp.*,[99] a federal district court addressed an issue similar to the issue addressed in *Bailey*. In *Brown*, the employer closed a plant, thus terminating employees over the age of forty and employees under the age of forty.[100] Employees over the age of forty and employees under the age of forty sued the employer for age discrimination.[101] The court held that the employees over the age of forty were members

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94 *See* W. VA. CODE § 5-11-3(k) (2002).

95 Hanlon v. Chambers, 464 S.E.2d 741, 748 (W. Va. 1995) (emphasis added).

96 *Conaway*, 358 S.E.2d at 429.

97 "Protection against age discrimination is granted, however, only to employees and applicants between the ages of forty and seventy." Mack A. Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme*, 17 GA. L. REV. 621, 621 (1983). "[A]ll courts agree that the plaintiff must establish that her age at the time of the employment decision was between forty and seventy." *Id.* at 644.

98 *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) ("The discrimination prohibited by the ADEA . . . is 'limited to individuals who are at least 40 years of age.' This language does not ban discrimination against employees because they are aged 40 or older; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older."); Spain v. Ball, 928 F.2d 61, 62-63 (2d Cir. 1991) (holding that claimant could not bring a claim under the ADEA because he was thirty-five years old); Mixer v. M.K. Ferguson Co., 17 F. Supp. 2d 569, 576 (S.D. W. Va. 1998) ("To prove his claim, the plaintiff must establish that . . . he is over 40 years of age."); Philippeaux v. N. Cent. Bronx Hosp., 871 F. Supp. 640, 647 (S.D.N.Y. 1994) (holding that a plaintiff who was thirty-nine years old cannot claim age discrimination); Anderson v. Meyer Broad. Co., 630 N.W.2d 46, 51-52 (N.D. 2001) (holding that plaintiff was not forty years or older and thus was not a member of the protected class in order to bring a claim for age discrimination); Outzen v. Cont'l Gen. Tire, Inc., No. 19604, 2000 WL 141069, at *4 (Ohio Ct. App. Feb. 2, 2000) (holding that an Ohio statute limits the protected class to persons at least forty years of age); Gross v. City of Lynnwood, 583 P.2d 1197, 1199 (Wash. 1978) (holding that when two statutes conflict, the statute that limits age discrimination to persons between forty and sixty-five governs); Kanawha Valley Reg'l Transp. Auth. v. W. Va. Human Rights Comm'n, 383 S.E.2d 857, 861 (W. Va. 1989) ("It is undisputed that Ms. Hatcher is a member of a protected class, i.e., over the age of forty, and that the employer made an adverse decision concerning her employment.").

99 No. 94C3759, 1996 WL 99412 (N.D. Ill. Mar. 5, 1996).

100 *See id.* at *1.

101 *See id.*

of the protected class but could not recover for age discrimination because they failed to raise an inference of age discrimination.[102] The court further held that the employees under the age of forty could not recover under the ADEA because "the ADEA does not provide a cause of action for age discrimination claims asserted by those under age 40."[103]

Similarly, in *Hahn v. City of Buffalo,*[104] a federal district court ruled that persons under forty could not recover under the ADEA. In *Hahn*, the court had to determine the legality of a New York civil service law.[105] The civil service law restricted the appointment of police officers so that only persons aged twenty to twenty-nine could be appointed.[106] Several plaintiffs brought an age discrimination claim against the city of Buffalo based on the civil service law.[107] Some of the plaintiffs were over the age of forty, while some of the plaintiffs were over the age of twenty-nine, but under the age of forty.[108] The court held that the civil service law "violates the rights of the plaintiffs . . . who are 40 years old."[109] However, the court held that the persons over the age of twenty-nine but under the age of forty did not have standing to assert claims under the ADEA because they had not reached the age of forty.[110]

These cases illustrate that all plaintiffs must satisfy the first element in a prima facie case where an employer discriminates against a group.[111] A plaintiff

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[102] *See id.* at *3.

[103] *Id.* at *4. "The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age." ADEA § 12, 29 U.S.C. § 631(a) (2000).

[104] 596 F. Supp. 939 (W.D.N.Y. 1984).

[105] *Id.* at 941-42.

[106] *Id.* at 924 n.1. "Section 58(1)(a) generally prohibits the appointment of any person as a police officer of a county, city, town, or village who is less than 20 or 'more than twenty-nine years of age.'" Doyle v. Suffolk County, 786 F.2d 523, 525 (2d Cir. 1986).

[107] *Hahn*, 596 F. Supp at 942.

[108] *Id.*

[109] *Id.* at 954.

[110] *Id.* at 942, 954. "The result of *Hahn* is that section 58(1)(a) may not be used to prevent any person between the ages of 40 and 70 from being hired as a police officer in New York State because of age." *Doyle*, 786 F.2d at 525. In *Doyle*, the court addressed the question of whether the legislature would have intended to bar persons between the ages of twenty-nine to forty, since part of the statute was invalidated as to those over forty years of age. The court held that the statute still applied to bar those between the ages of twenty-nine to forty. "Having prohibited the appointment of anyone 29 or older, the legislators would most likely have wished that prohibition to remain effective to the greatest extent possible." *Id.* at 528.

[111] The West Virginia Supreme Court of Appeals has relied on federal law when interpreting the WVHRA. *See* W. Va. Human Rights Comm'n v. Wilson Estates, Inc., 503 S.E.2d 6, 12 (W. Va. 1998) (citing Barefoot v. Sundale Nursing Home, 457 S.E.2d 259, 265-66 (W. Va. 1994) ("This court has consistently looked to federal discrimination law dealing with Title VII of the Civil Rights Act of 1964 . . . when interpreting provisions of our state's human rights statutes.")); Slack v. Kanawha County Hous. and Redev. Auth., 423 S.E.2d 547 (W. Va. 1992) (relying on the

is not a member of the protected class if a plaintiff is under forty years of age. Thus, a plaintiff cannot establish a prima facie case and should not prevail on a claim of age discrimination. The five plaintiffs under forty years of age in *Bailey* did not satisfy the first element of a prima facie case because they were not members of the protected class. Accordingly, they should not have been included in a claim for age discrimination. One commentator noted that it would be very "unlikely that a court will ignore express statutory language limiting protection to individuals forty or older." [112] However, in *Bailey*, the West Virginia Supreme Court of Appeals ignored express statutory language. The collateral victim doctrine does not distinguish between individuals who are members of the protected class and those who are not. By eliminating this distinction, the collateral victim doctrine contradicts the requirement of establishing a prima facie case.

2. But for the Plaintiff's Protected Status

In addition, the collateral victim doctrine subverts the causation element in an age discrimination claim. The third element in a prima facie case requires a plaintiff to show that his age was a factor in the employer's decision.[113] The third element states that "[*b*]*ut for* his or her protected status, the adverse decision would not have been made."[114] This third element is more difficult to satisfy than the first two elements.[115] The plaintiff must show in some manner that his protected status was a *cause* of the discriminatory act.[116] "Disparate treatment requires a showing that the plaintiff was treated differently because of his membership *in a class protected by the statute*."[117]

ADEA in defining elements of constructive discharge).

[112] Woodruff, *supra* note 8, at 1302.

[113] *See, e.g.*, King v. Herbert J. Thomas Mem'l Hosp., 159 F.3d 192, 198 (4th Cir. 1998) (stating a plaintiff "must establish that 'but for' her age, she would not have been fired"); Hahn, 596 F. Supp. at 954.

[114] Hurst v. St. Mary's Hosp., 867 F. Supp. 435, 439 (S.D. W. Va. 1994) (emphasis added); *see* Dobson v. E. Associated Coal Corp., 422 S.E.2d 494, 497 (W. Va. 1993); Raber v. E. Associated Coal Corp., 423 S.E.2d 897, 898 (W. Va. 1992); Guyan Valley Hosp. v. W. Va. Human Rights Comm'n, 382 S.E.2d 88, 89 (W. Va. 1989); *see also* Mixer v. M.K. Ferguson Co., 17 F. Supp. 2d 569, 576 (S.D. W. Va. 1998) ("To prove his claim, the plaintiff must establish that . . . but for his age, the defendants would not have taken the adverse employment action against him."); Kanawha Valley Reg'l Transp. Auth. v. W. Va. Human Rights Comm'n, 383 S.E.2d 857, 861 (W. Va. 1989) ("It is undisputed that Ms. Hatcher is a member of a protected class, i.e., over the age of forty, and that the employer made an adverse decision concerning her employment.").

[115] *See* Conaway v. E. Associated Coal Corp., 358 S.E.2d 423, 429 (W. Va. 1987).

[116] *See id.* at 425, Syl. Pt. 3 ("But for the plaintiff's protected status, the adverse decision would not have been made.").

[117] Player, *supra* note 97, at 625-26 (emphasis added).

In *Conaway v. Eastern Associated Coal Corp.*,[118] the West Virginia Supreme Court of Appeals further described this third element. The court stated, "What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion."[119] "This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others . . . or statistics . . . ."[120] In *Conaway*, the plaintiff was a member of the protected class but failed to show a link between his protected status and the employer's decision.[121] A link did not exist in *Conaway* because "the older employees were treated slightly better than the younger ones."[122]

Showing that a plaintiff's protected status was a cause of the discriminatory act is contingent on the plaintiff being a member of the protected class. In other words, if an employer discriminates against a twenty-five-year-old employee, the reason for the discrimination cannot be the employee's protected status because the employee does not have protected status. In *Bailey*, the five plaintiffs under the age of forty were not members of the protected class, and therefore they could not establish an inference that their protected status was a cause of the employer's discriminatory conduct. Also, the plaintiffs could not show unequal treatment between themselves and persons outside the protected class because the plaintiffs themselves were outside the protected class. In other words, the plaintiffs could not compare themselves to a class to which they belong.[123]

Furthermore, the five plaintiffs could not argue that the employer's discriminatory actions were correlated with age. In *Hazen Paper Co. v. Biggins*,[124] "[t]he Supreme Court held that a plaintiff could not succeed in proving a disparate treatment charge if the employer's adverse employment decision was motivated by factors other than age, *even if the motivating factors happened to be correlated with age, such as pension status.*"[125] The Court further stated that "an employee cannot prove age discrimination under the ADEA, based on salary considerations alone, even if such employee was discharged purely to save sal-

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118 358 S.E.2d 423.

119 *Id.* at 429; *Dobson*, 422 S.E.2d at 498.

120 *Conaway*, 358 S.E.2d at 430.

121 *Id.* at 431.

122 *Id.*

123 *See* Cunningham v. Owens-Illinois, Inc., 669 F. Supp. 757, 762 (S.D. W. Va. 1987).

124 507 U.S. 604 (1993).

125 *Id.* at 607 (emphasis added).

ary costs."[126] In *Bailey*, the employer's motivating factors may have been correlated with their age. For instance, the fact that the employees had been employed for a long period of time, and thus had accumulated seniority benefits, may be have been correlated to the plaintiffs' ages. However, a plaintiff must show that the employer discriminated based on the plaintiff's age and not on a correlating factor.[127]

Liability ultimately depends on whether the plaintiff's age "actually played a role in the [employer's decisionmaking] process and had a determinative influence on the outcome."[128] Accordingly, the five plaintiffs under forty years of age could not show that their age was the reason behind the employer's discriminatory actions. The collateral victim doctrine allows a plaintiff to sue for age discrimination even when that plaintiff cannot show that "[b]ut for the plaintiff's protected status, the adverse decision would not have been made."[129] In this respect, the collateral victim doctrine also subverts the requirement of establishing a prima facie case.

C. *Purpose of Age Discrimination Laws*

The court in *Bailey* also failed to focus on the purpose of age discrimination laws, the basic purpose of which are to protect older workers from discrimination, not to protect younger workers.[130] The ADEA and the great majority of states limit age discrimination to individuals forty years of age and older. The ADEA does not prohibit the states from changing the age limits in their age discrimination laws. "[N]othing within the text of the ADEA restricts the ability of the states to enact more expansive anti-age discrimination laws."[131] However, only a few states have age discrimination laws that allow plaintiffs under forty years of age to sue for age discrimination.[132] West Virginia has specifically limited age discrimination to those who are forty years of age and older.[133] In addition, the West Virginia Supreme Court of Appeals has relied on federal

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126 *Id.*

127 *See id.* at 607.

128 Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141 (2000) (quoting *Hazen Paper*, 507 U.S. at 610) (alteration in original).

129 Conaway v. E. Associated Coal Corp., 358 S.E.2d 423, 429 (W. Va. 1987).

130 *See* Stewart, *supra* note 11, at 1696.

131 *Id.* at 1719.

132 *See id.* at 1693 n.26 (noting Colorado, Iowa, Kansas, Michigan, and New Hampshire as states that allow plaintiffs under forty years of age to sue for age discrimination); *see also* Bergen Commercial Bank v. Sisler, 704 A.2d 1017, 1022 (N.J. Super. Ct. App. Div. 1998) (holding that the New Jersey age discrimination statute is not limited to persons over the age of forty).

133 W. VA. CODE § 5-11-3(k) (2002).

law when interpreting the WVHRA.[134] Federal law clearly illustrates the purpose of protecting older workers. Accordingly, federal law provides persuasive evidence that the purpose of the WVHRA is to protect older workers.

For example, age discrimination does not apply across the board under the ADEA. A plaintiff under forty years of age cannot claim he was discriminated against because of his "old" age. However, a plaintiff under forty years of age cannot claim reverse discrimination and argue that he was discriminated against because he is too young. This conclusion was reinforced by the Seventh Circuit's decision in *Hamilton v. Caterpillar Inc.*,[135] which addressed a reverse discrimination claim under the ADEA. The court stated, "This is the first time a reverse age discrimination case has reached this court. Nonetheless, we have opined that the ADEA 'does not protect the young as well as the old, or even, we think, the younger against the older.'"[136] The court held that "[t]here is nothing to suggest that Congress believed age to be the equal of youth in the sense that the races and sexes are deemed to be equal."[137] The court stated that "[t]he ADEA allows individuals only 40 years and older to sue."[138] The court further stated, "There is no evidence in the legislative history that Congress had any concern for the plight of workers arbitrarily denied opportunities and benefits because they are too *young*."[139]

The purpose of protecting older workers from age discrimination was also illustrated in *O'Connor v. Consolidated Coin Caterers Corp.*,[140] in which the United States Supreme Court held that a plaintiff does not have to be replaced by someone outside the protected class.[141] The Court stated,

> Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is *substantially younger* than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.[142]

The Court's use of the term "substantially younger" suggests that a plaintiff who is forty-five years of age is less likely to have a claim if his re-

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134 *See supra* note 111 and accompanying text.

135 966 F.2d 1226 (7th Cir. 1992).

136 *Id.* at 1227 (quoting Karlen v. City Coll. of Chi., 837 F.2d 314, 318 (7th Cir. 1988)).

137 *Id.*

138 *Id.*

139 *Id.* at 1228.

140 517 U.S. 308 (1996).

141 *Id.* at 312.

142 *Id.* at 313 (emphasis added).

placement is forty-three years of age. Similarly, a plaintiff who is sixty years of age is more likely to have a claim if his replacement is forty years of age. This substantially younger requirement not only prevents a plaintiff under forty from having a claim, but probably prevents a plaintiff who is younger than his replacement from having a claim. Accordingly, this requirement reinforces the purpose of protecting older workers as opposed to younger workers.

Furthermore, the legislative history of the ADEA shows that its purpose was directed at individuals forty years of age or above.[143] The Secretary of Labor emphasized that older workers faced difficulties "when attempting to find new employment following termination."[144] Because older workers faced such difficulties, the Secretary of Labor recommended that Congress protect individuals from forty-five years of age to sixty-five years of age.[145] Congress then set forty as the age limit because it "believed that forty was the age at which discrimination became evident."[146] Congress "consider[ed] an even lower age limit [than forty] based on widespread discrimination by airlines against stewardesses" but ultimately chose not to lower the age limit.[147] "Although the committees recognized this discrimination, they 'felt a further lowering of the age limit . . . would lessen the primary objective; that is, the promotion of employment opportunities for older workers.'"[148]

The discrimination against airline stewardesses, which Congress referred to when it was determining the appropriate age limit, occurred in *American Airlines, Inc. v. State Commission for Human Rights*.[149] In *American Airlines*, the court was faced with the issue of whether an airline can terminate stewardesses upon their thirty-second birthdays.[150] The federal district court held that the stewardesses did not have a claim for age discrimination because age discrimination is limited to those between the ages of forty and sixty-five.[151] By not changing the age limit after the decision in *American Airlines*, Congress illustrated the purpose of protecting older workers as opposed to younger workers. Like Congress, the West Virginia Legislature enacted West Virginia Code section 5-11-3(k) for the purpose of protecting older workers. Federal case law

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143 *See* Stewart, *supra* note 11, at 1692.

144 *Id.*

145 *See* Woodruff, *supra* note 8, at 1297. Despite the recommendation, Congress set the lower age limit at forty years of age. *Id.*

146 *Id.*

147 *Id.* at 1297-98.

148 *Id.* at 1298 (citation omitted).

149 286 N.Y.S.2d 493 (N.Y. App. Div. 1968).

150 *Id.* at 494.

151 *Id.* at 497 ("We are constrained to hold that the provisions of the statute, in the light of its legislative history, are limited in their application to persons between the ages of 40 and 65.").

and the legislative history of the ADEA reinforce this purpose. Consequently, the collateral victim doctrine contradicts the purpose of protecting older workers because it does not distinguish between older workers and younger workers.

D. Statutory Interpretation

In addition to ignoring the specific statutory language of section 5-11-3(k), the West Virginia Supreme Court of Appeals misinterpreted section 5-11-9(7)(A) of the WVHRA. The court predetermined that it was going to extend the protection of the WVHRA to cover collateral victims of discrimination. The court stated, "In resolving the matter of inclusion of the five Plaintiffs under age of forty, we recognize the necessity for the protection of the Human Rights Act to be extended to individuals who suffer collateral harm from discriminatory practices committed in violation of the Act."[152] Since the court had decided that the WVHRA needed to be extended, the majority's next step was to figure out how they could do it. The court found section 5-11-9(7) "*of particular intrigue.*"[153] However, nothing in the language of section 5-11-9(7)(A) mentions, relates, or even refers to collateral victims of discrimination.[154] Accordingly, it can be argued that the collateral victim doctrine was created out of whole cloth. In her dissenting opinion, Justice Davis hinted at this:

> The majority *sua sponte* decided in this opinion that it would create a new theory of liability to benefit these five plaintiffs. Embarking on this course, the majority determined that the independent cause of action for economic loss found in W. Va. Code § 5-11-9(7)(A) would partly save the plaintiffs' judgment. However, in order to completely save the judgment, the majority created a unique creature in discrimination law and titled it "collateral victim." In doing so, the majority proclaimed that, while the five plaintiffs did not meet the age discrimination requirement, they were nevertheless collateral victims of age discrimination who suffered economic loss. The majority then concluded that under W. Va. Code § 5-11-9(7)(A) and the collateral victim doctrine, the plaintiffs' judgment should be sustained.[155]

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[152] Bailey v. Norfolk & W. Ry. Co., 527 S.E.2d 516, 532 (W. Va. 1999). The court stated its desired result (extending the WVHRA to cover collateral victims) and then looked for a means to accomplish its desired result. *See id.* ("In examining the potential relief available to the five Plaintiffs who were under the age of forty at the time the discrimination was initiated in this case, the remedy available through West Virginia Code § 5-11-9(7) (1999) is of particular intrigue.").

[153] *Id.* (emphasis added).

[154] *Id.*; *see supra* note 62 and accompanying text.

[155] *Id.* at 538 (Davis, J., concurring in part, dissenting in part).

Moreover, section 5-11-9(7) has been interpreted and applied as a retaliation provision.[156] Most retaliation claims under the WVHRA have been brought under section 5-11-9(7)(C). Section 5-11-9(7)(A) has been, for the most part, an unlitigated provision of the WVHRA. However, in *Conrad v. ARA Szabo,*[157] the plaintiff raised section 5-11-9(7)(A) and "alleged that the defendants engaged in acts of reprisal and conspired to harass, degrade, embarrass, and cause her economic loss."[158] Furthermore, besides *Bailey*, no case law exists regarding the interpretation of the economic loss provision in section 5-11-9(7)(A).

The *Bailey* court also reasoned that a collateral victim doctrine exists because the WVHRA "'shall be liberally construed to accomplish its objectives and purposes.'"[159] The court reasoned that section 5-11-9(7)(A)

> "should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith."[160]

Relying on these liberal interpretation requirements, the court basically interpreted the economic loss provision of section 5-11-9(7)(A) as a catch-all provision which prohibits discriminatory conduct.[161] This interpretation is erroneous because the WVHRA is not a general bad acts statute.[162] "Rather, the conduct it prohibits is specifically set forth."[163] Furthermore, the liberal inter-

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156 It could be argued that section 5-11-9(7)(A) was intended as a retaliation provision because its language speaks of "threats," "reprisals," and "conspiring with others." *See* W. VA. CODE § 5-11-9(7)(A) (2002).

157 480 S.E.2d 801 (W. Va. 1996).

158 *Id.* at 813.

159 *Bailey,* 527 S.E.2d at 533 (quoting W. VA. CODE § 5-11-15 (1999)).

160 *Id.* at 533 (quoting Shell v. Bechtold, 338 S.E.2d 393, 394 (W. Va. 1985)).

161 The court's reliance on the economic loss provision in order to create a collateral victim doctrine is unfounded. "Economic loss" is one of many prohibitions found in section 5-11-9(7)(A). For example, it is also unlawful for an employer to engage in any form of reprisal, the purpose of which is to harass, degrade, embarrass, or cause physical harm. *See* W. VA. CODE § 5-11-9(7)(A) (2002).

162 *See* Crowley v. Prince George's County, 890 F.2d 683, 687 (4th Cir. 1989) (referring to Title VII and citing Holder v. City of Raleigh, 867 F.2d 823, 828 (4th Cir. 1989)).

163 *Id.* (referring to Title VII). Like Title VII, the prohibitions under the ADEA and the

pretation requirements are not a mandate for judicial activism. In fact, the court cannot legislate or create when the law is clear and unambiguous. A long-standing rule of statutory interpretation is that "'[w]hen a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.'"[164] The West Virginia Supreme Court of Appeals has recognized the "importance of giving deference to the plain and simple meaning of words when interpreting statutes."[165] The court has further stated that "'[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use.'"[166] Accordingly, although the provisions of the WVHRA shall be liberally construed, nothing in the Act authorizes that provisions be liberally created.

The majority in *Bailey* would probably argue that section 5-11-9(7)(A) is unclear and ambiguous, in which case the court would have more leeway in interpreting section 5-11-9(7)(A).[167] The majority may argue that, "'[i]n ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation.'"[168] However, even if section 5-11-9(7)(A) is ambiguous, creating a collateral victim doctrine does not accomplish or enhance the purpose of the WVHRA. On the contrary, the collateral victim doctrine explicitly contradicts the purpose of limiting age discrimination to individuals age forty and above. "The cardinal rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature."[169] By enacting section 5-11-3(k), the legislature intended to limit age discrimination claims to individuals age forty and above.

V. RAMIFICATIONS

Based on *Bailey*, a plaintiff can be included in a claim for age discrimination even though he or she is not forty years of age.[170] In the future, if an employer discriminates on the basis of age against a group of employees, those

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WVHRA are specifically set forth.

164 State v. Merrifield, 446 S.E.2d 695, 701 (W. Va. 1994) (quoting Cummins v. State Workmen's Comp. Comm'r, 166 S.E.2d 562 (W. Va. 1969)).

165 *Id.* at 699.

166 *Id.* at 699-700 (quoting State v. Morgan, 107 S.E.2d 353, 358 (W. Va. 1959)).

167 "Where, however, the language used is ambiguous, the court, in ascertaining the legislative intent, should consider the subject matter of the legislation, its purposes, objects and effects in addition to its express terms." Simpkins v. Harvey, 305 S.E.2d 268, 273 (W. Va. 1983).

168 *Merrifield*, 446 S.E.2d at 701 (quoting State v. White, 425 S.E.2d 210, 213 (W. Va. 1992)).

169 *Simpkins*, 305 S.E.2d at 273.

170 *See* Bailey v. Norfolk & W. Ry. Co., 527 S.E.2d 516, 533 (W. Va. 1999).

employees under the age of forty may invoke the collateral victim doctrine. However, the *Bailey* decision may have a much broader scope. In establishing a collateral victim doctrine, the court did not limit its application to age discrimination claims. The court stated that "collateral victims *of discrimination* are entitled to relief under W. Va. Code § 5-11-9(7) (1999) upon establishing that the employer has engaged in an unlawful discriminatory practice, such as activities designed to cause economic loss."[171] Therefore, the collateral victim doctrine only requires that a plaintiff be a collateral victim of discrimination and that the employer commit an unlawful discriminatory act as described in section 5-11-9(7)(A).[172]

Accordingly, a plaintiff may arguably raise the collateral victim doctrine in a race discrimination claim brought under the WVHRA. For instance, if an employer discriminates on the basis of race against a group of predominately black employees, a caucasian employee within that group could arguably invoke the collateral victim doctrine. The caucasian employee would have to show that he is a collateral victim of the discrimination against the black employees and that the employer committed an unlawful discriminatory act as described in section 5-11-9(7)(A). It would not matter if the caucasian employee was not a member of a protected class. Also, it would not matter if the caucasian employee could not show a nexus between his race and the employer's decision. The collateral victim doctrine applies to plaintiffs who are not "covered under the specific requirements of the Act."[173]

Similarly, the collateral victim doctrine may be applicable in a gender discrimination claim. For example, if an employer discriminated against a group of mostly female employees, a male employee in that group could invoke the collateral victim doctrine. Accordingly, a male employee may have a claim if he is a collateral victim of sex discrimination against his fellow female employees, and the employer committed an unlawful discriminatory act.[174] Under

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171 *Id.* (emphasis added).

172 *Id.* ("We hold that collateral victims of discrimination are entitled to relief under W. Va. Code § 5-11-9(7) (1999) upon establishing that the employer has engaged in an unlawful discriminatory practice, such as activities designed to cause economic loss.").

173 *Id.*

174 These examples illustrate the absurdity of a fundamental application of the collateral victim doctrine. For example, an individual disparate treatment claim under the WVHRA *requires* a plaintiff to show that he or she was discriminated against on the basis of race, gender, age, etc. *See* Conaway v. E. Associated Coal Corp., 358 S.E.2d 423, 429 (W. Va. 1986). The WVHRA does not permit a plaintiff to recover based on his or her *association* with someone who is discriminated against on the basis of race, gender, age, etc. *See Bailey*, 527 S.E.2d at 532 n.15. However, the collateral victim doctrine allows a plaintiff to recover based on the plaintiff's association within a group that is discriminated against. *Id.* at 533. Therefore, under the collateral victim doctrine, a plaintiff can recover for race discrimination even though the plaintiff was not discriminated based on his or her race. Likewise, a plaintiff can recover for sex or age discrimination even though the plaintiff was not discriminated against on the basis of their sex or age.

the collateral victim doctrine, it would not matter if the male employee was not discriminated against on the basis of his sex.

The *Bailey* decision may also be used as precedent for the court to ignore clear statutory language in the future.[175] Principles of statutory interpretation specifically reject judicial activism. "'[I]t is not for courts arbitrarily to read into a statute that which it does not say.'"[176] Furthermore, a statute "may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."[177] The rationale behind these principles is based on the genuine fairness of the legal process. Where the law is clear, it should be applied as written to ensure fairness.[178]

VI. CONCLUSION

The collateral victim doctrine establishes a new cause of action in employment discrimination law in West Virginia. A plaintiff who is not otherwise covered by the specific provisions of the WVHRA may have a claim if: (1) he or she is a collateral victim of discrimination; and (2) the employer committed an unlawful discriminatory practice as described in section 5-11-9(7)(A). *Bailey* illustrates that a plaintiff can be included in an age discrimination claim even though the plaintiff is not forty years of age or older. However, the *Bailey* decision does not limit the collateral victim doctrine to age discrimination. For example, when considering future ramifications, the collateral victim doctrine could arguably apply to race and gender discrimination.

Bailey was wrongly decided on due process grounds. However, the collateral victim doctrine should not have been created regardless of whether the issue was raised in the lower court. The collateral victim doctrine subverts the requirement of establishing a prima facie case because a plaintiff does not have to be a member of the protected class. Additionally, a plaintiff does not have show that the employer discriminated based on the plaintiff's protected status.

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[175] The court's judicial activism in *Bailey* is similar to that in *Williamson v. Greene*, 490 S.E.2d 23 (W. Va. 1997). In *Williamson*, the West Virginia Supreme Court of Appeals refused to follow clear statutory language. *Id.* at 30. The plaintiff brought a claim of retaliatory discharge against her employer. *Id.* at 26. The employer argued that it was not liable because it did not fall within the statutory definition of "employer" under the WVHRA. *Id.* at 28. To be liable under the WVHRA, an employer must employ twelve or more persons within the state when the discrimination is committed. W. VA. CODE § 5-11-3(d) (2002). The employer in *Williamson* employed less than twelve employees at the time of the discrimination. *Williamson*, 490 S.E.2d at 29-30. Despite this statutory language, the court held that the plaintiff had a common law claim based on "substantial public policy." *Id.* at 30.

[176] *Williamson*, 490 S.E.2d at 28 (quoting Banker v. Banker, 474 S.E.2d 465, 476-77 (W. Va. 1996)).

[177] *Id.* (quoting Consumer Advocate Div. v. Pub. Serv. Comm'n, 386 S.E.2d 650, 654 (W. Va. 1989)).

[178] *Id.* at 29.

The collateral victim doctrine also ignores the specific statutory language and purpose behind age discrimination laws.

Furthermore, the collateral victim doctrine should not have been created because the WVHRA does not support its creation. The plain reading of section 5-11-9(7)(A) does not support the creation of a collateral victim doctrine. The West Virginia Supreme Court of Appeals created the collateral victim doctrine out of whole cloth. The five plaintiffs under forty years of age suffered the same harsh consequences as the older employees within their group. Protecting collateral victims of discrimination may be appropriate depending on the circumstances; however, the West Virginia Supreme Court of Appeals should not have ignored clear statutory language in order to reach its desired result. The court should have deferred to the state legislature to protect collateral victims of discrimination.

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