

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MARTHA KNOTTS,

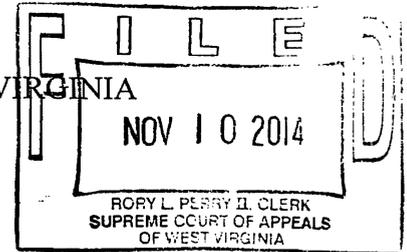
Plaintiff below, Petitioner,

v.

Docket No. 14-0752
(Taylor County Circuit Court
Civil Action No. 12-C-66)

GRAFTON CITY HOSPITAL,

Defendant below, Respondent.



PETITIONER'S APPEAL BRIEF

Submitted by:

Allan N. Karlin, WV Bar No. 1953
Sarah W. Montoro, WV Bar No. 10239
Allan N. Karlin & Associates
174 Chancery Row
Morgantown, WV 26505
304-296-8266
ank@wvjustice.com
swm@wvjustice.com

Counsel for Petitioner

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR	1
II.	STATEMENT OF THE CASE	1
	A. Procedural History	1
	B. Statement of the Facts	2
III.	SUMMARY OF ARGUMENT	11
IV.	STATEMENT REGARDING ORAL ARGUMENT AND DECISION	13
V.	ARGUMENT	13
	A. Standard of Review	13
	B. The Circuit Court Erred in Concluding That Mrs. Knotts Did Not Establish a <i>Prima Facie</i> Case of Age Discrimination	14
	1. <u>The circuit court erred in concluding that evidence that Mrs. Knotts was replaced by an employee who is substantially younger than she is but who is over the age of 40 was insufficient, as a matter of law, to demonstrate Mrs. Knotts’ <i>prima facie</i> case of age discrimination against GCH for its termination of her employment.</u>	15
	a. The USSC’s unanimous decision in <i>O’Connor v. Consolidation Coin Operators</i> authored by Justice Scalia adopted the substantially younger test and rejected the over 40/under 40 test applied by the circuit court in the proceedings below.	16
	b. A significant number of state courts since <i>O’Connor</i> have either adopted the substantially younger test and/or cited it favorably.	18
	c. The Supreme Court of Appeals of West Virginia has affirmed two circuit court orders which appear to apply the substantially younger test to replacement evidence.	19
	d. The circuit court erroneously relied on the holding in <i>Young v. Bellofram</i> and applied the over 40/under 40 test to the replacement evidence.	21
	e. This Court should hold that Justice Scalia’s substantially younger test applies to replacement evidence in age discrimination cases arising under the WVHRA.	23
	f. Mrs. Knotts has raised sufficient replacement evidence to support a <i>prima facie</i> case of age discrimination.	23
	2. <u>The circuit court erred in concluding that evidence that Mrs. Knotts was treated less favorably than other employees of GCH who are substantially younger than she is but who are over the age of 40 was insufficient, as a matter of law, to demonstrate Mrs. Knotts’</u>	

	<u>prima facie case of age discrimination against GCH for its termination of her employment.</u>	24
a.	There is no logical reason to treat comparator evidence differently than replacement evidence in age discrimination cases arising under the WVHRA.	25
b.	Other courts have applied Justice Scalia’s substantially younger test to comparator evidence.	25
c.	This Court should articulate the correct test and apply Justice Scalia’s substantially younger test to comparator evidence in age discrimination cases arising under the WVHRA.	26
d.	Mrs. Knotts has raised sufficient comparator evidence to support a <i>prima facie</i> case of age discrimination.	27
C.	The Circuit Court Erred in Finding That Mrs. Knotts Had Not Presented Sufficient Evidence That GCH’s Purported Legitimate Nondiscriminatory Reason for Terminating Her Was Pretextual by Construing Certain Evidence of Pretext in Favor of GCH and by Ignoring Other Evidence of Pretext	28
1.	<u>The circuit court erroneously construed certain evidence of pretext in favor of GCH.</u>	30
2.	<u>The circuit court ignored other substantial evidence of pretext in its 07/08/14 MSJ Order.</u>	32
VI.	CONCLUSION	38

TABLE OF AUTHORITIES

State Cases

<i>Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York</i> , 148 W. Va. 160, 133 S.E.2d 770 (1963)	14
<i>Barefoot v. Sundale Nursing Home</i> , 193 W. Va. 475, 457 S.E.2d 152 (1995)	22, 23, 26
<i>Conaway v. Eastern Associated Coal Corp.</i> , 178 W. Va. 164, 358 S.E.2d 423 (1986)	15
<i>Hanlon v. Chambers</i> , 195 W. Va. 99, 464 S.E.2d 741 (1995)	29
<i>Kanawha Valley Regional Traps. Auth. v. W. Va. Human Rights Comm'n</i> , 181 W. Va. 675, 677, 383 S.E.2d 857 (1989)	17
<i>Mayflower Vehicle Sys. v. Cheeks</i> , 218 W. Va. 703, 629 S.E.2d 762 (2006)	28
<i>Nestor v. Bruce Hardwood Floors, L.P.</i> , 210 W. Va. 692, 558 S.E.2d 691 (2001)	29
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994)	13
<i>Skaggs v. Elk Run Coal Co.</i> , 198 W. Va. 51, 479 S.E.2d 561 (1996)	13, 14
<i>State v. McKinley</i> , 2014 W. Va. LEXIS 977, __ W. Va. ____, __ S.E.2d __ (Sep. 29, 2014)	23
<i>The Burke-Parsons-Bowlby Corp. v. Rice</i> , 230 W. Va. 105, 736 S.E.2d 338 (2012) ...	19, 20, 23
<i>Vetter v. Town of Moorefield</i> , 2012 W. Va. LEXIS 551 (W. Va. June 22, 2012)	20
<i>W. Va. Am. Water Co. v. Nagy</i> , 2011 W. Va. LEXIS 183 (W. Va. June 15, 2011) (memorandum decision)	19, 20, 23
<i>W. Va. Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc.</i> , 174 W. Va. 711, 721 329 S.E.2d 77 (1985)	30
<i>W. Va. Human Rights Comm'n v. Wilson Estates</i> , 202 W. Va. 152, 503 S.E.2d 6, 12 (1998)	16
<i>W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n</i> , 181 W. Va. 525, 383 S.E.2d 490 (1989)	28
<i>Walker v. Doe</i> , 210 W. Va. 490, 558 S.E.2d 290 (2001)	23
<i>Williams v. Precision Coil, Inc.</i> , 194 W. Va. 52, 459 S.E.2d 329 (1995)	14

<i>WVHRA Vehicle Systems, Inc. v. Cheeks</i> , 218 W. Va. 703, 629 S.E.2d 762 (2006)	27
---	----

<i>Young v. Bellofram</i> , 227 W. Va. 53, 705 S.E.2d 560 (2010)	12, 15, 18, 21-24, 26, 30
--	---------------------------

State Rules

Rule 18(a) of the Revised Rules of Appellate Procedure	13
Rule 20(a)(2) of the Revised Rules of Appellate Procedure	13
Rule 404(b) of the West Virginia Rules of Evidence	19
Rule 56(c) of the West Virginia Rules of Civil Procedure	13
W. Va. Code § 5-11-1 <i>et seq.</i>	1

Federal Cases

<i>Breen v. Mineta</i> , 2005 U.S. Dist. LEXIS 35416 (D.C. 2005)	25
<i>Gallo v. John Powell Chevrolet Inc.</i> , 765 F. Supp. 198 (M.D. Pa. 1991)	33
<i>Grosjean v. First Energy Corp.</i> , 349 F.3d 332 (6th Cir. 2003)	24, 27
<i>Hagedorn v. Veritas Software Corp.</i> , 129 Fed. Appx. 1000 (6th Cir. 2005)	25
<i>Loudermilk v. Best Pallet Co., LLC</i> , 636 F.3d 312 (7th Cir. 2011)	31
<i>O'Connor v. Consol. Coin Caterers Corp.</i> , 517 U.S. 308 (1996)	16-26
<i>O'Connor v. Consol. Coin Caterers Corp.</i> , 56 F.3d 542, 546 (4th Cir. 1995)	17
<i>Smith v. American Service Co.</i> , 611 F.Supp. 321 (N.D. Ga. 1984)	33
<i>Stalter v. Wal-Mart Stores, Inc.</i> , 195 F.3d 285 (7th Cir. 1999)	31
<i>Wallace v. DTG Operations, Inc.</i> , 442 F.3d 1112 (8th Cir. 2006)	34
<i>Warch v. Ohio Cas. Ins. Co.</i> , 435 F.3d 510 (4th Cir. 2006)	25

Other Authorities

Bd. of Educ. of Norwalk v. Comm’n on Human Rights & Opportunities, 832 A.2d 660 (Conn.2003) 18

Bergen Commer. Bank v. Sisler, 723 A.2d 944 (N.J. 1999) 18

Cates v. Regents of the N.M. Inst. of Mining & Tech., 954 P.2d 65 (N. M.1998) 18

City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. Dist. Ct. App. 2008) 18

Coryell v. Bank One Trust Co., N.A., 803 N.E.2d 781 (Ohio 2004) 18

George v. Ute Water Conservancy Dist., 950 P.2d 1195 (Colo. Ct. App.1997) 18

Guz v. Bechtel National, Inc., 8 P.3d 1089 (Cal. 2000) 18

Hardy v. GE, 270 A.D.2d 700 (N.Y. App. Div. 2000) 18

Hartis v. Mason & Hanger Corp., 7 S.W.3d 700 (Tex. App. 1999) 18

Hill v. BCTI Income Fund-I, 23 P.3d 440 (Wash. 2001) 18

Ind. Dep’t of Envtl. Mgmt. v. West, 838 N.E.2d 408 (Ind. 2005) 18

Kalush v. Department of Human Rights Chief Legal Counsel,
700 N.E.2d 132, 141 (Ill. App. Ct. 1998) 19

Knight v. Avon Prods, 780 NE.2d 1255 (Mass. 2003) 18

Kroptavich v. Pa. Power & Light Co., 795 A.2d 1048 (Pa. Super. Ct. 2002) 18

Lytle v. Malady, 566 N.W.2d 582 (Mich. 1997) 18

McCain v. City of Lafayette, 741 So. 2d 720 (La. App. 1999) 18

N.C. Dep’t of Crime Control & Pub. Safety v. Greene,
616 S.E.2d 594 (N.C. Ct. App. 2005) 18

Ritz v. Wapello County Bd. of Supervisors, 2002 Iowa App. LEXIS
867 (Iowa Ct. App. 2002) 18

Wilkins v. Dayton’s Commer. Interiors, 1998 Minn. App. LEXIS 61,
1998 WL 15900 (Minn. Ct. App. 1998) 19

Williams v. Greater Chattanooga Pub. TV Corp., 349 S.W.3d 501
(Tenn. Ct. App. 2011) 18

Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492 (Ky. 2005) 18

I. ASSIGNMENTS OF ERROR

- A. The circuit court erred in concluding that evidence that Martha “Jeannie” Knotts was replaced by Grafton City Hospital (“GCH”) with an employee who is substantially younger than she is but who is over the age of 40 was insufficient, as a matter of law, to demonstrate a *prima facie* case of age discrimination against GCH for its termination of her employment.
- B. The circuit court erred in concluding that evidence that Mrs. Knotts was treated less favorably than other GCH employees who are substantially younger than she is but who are over the age of 40 was insufficient, as a matter of law, to demonstrate a *prima facie* case of age discrimination against GCH for her termination.
- C. The circuit court erred in finding that Mrs. Knotts had not presented sufficient evidence that GCH’s purported legitimate nondiscriminatory reason for terminating her was pretextual.

II. STATEMENT OF THE CASE

A. Procedural History

This is an appeal from the “Findings of Fact, Conclusions of Law, and Order on Defendant’s Motion for Summary Judgment” of the Circuit Court of Taylor County dated July 8, 2014 (“07/08/14 MSJ Order”), granting GCH’s summary judgment and dismissing Mrs. Knotts’ claim for wrongful termination on the basis of her age in violation of the West Virginia Human Rights Act (“WVHRA”), W. Va. Code § 5-11-1 *et seq.* (App. I, 0001-0011).

Jeannie Knotts, then age 65, was fired from her position as a housekeeper at GCH on April 3, 2012, for conduct that she contends was not a violation of GCH policies and, in any case, was far less serious than the conduct of substantially younger employees who were not fired for

actually violating the same policies. After her discharge, GCH replaced her with a substantially younger employee. Mrs. Knotts filed her age discrimination claim for wrongful discharge in violation of the WVHRA and, after the close of discovery, GCH filed a Motion for Summary Judgment. (App. I, 0027-0050). A hearing was held on GCH's Motion for Summary Judgment, after which the parties submitted supplemental briefing. (App. I, 0117-0148, 0149-0157). The circuit court ruled, by order dated May 7, 2014, that it would grant GCH's Motion for Summary Judgment and instructed GCH to submit an order to that effect. (App. I, 0024). GCH submitted a proposed order including proposed findings of fact and conclusions of law, which the circuit court adopted verbatim. (App. I, 0012-0023, 0001-0011).

On or about May 12, 2014, Mrs. Knotts became aware of additional evidence: a video (the "GCH Is Happy Video") posted by agents or employees of GCH to a public internet site depicting residents of GCH's long-term care facility in a manner inconsistent with GCH's alleged concern for the privacy interests of its patients. (App. I, 0299). Mrs. Knotts submitted the GCH Is Happy Video with a Motion to Alter or Amend the May 7, 2014 Order ("Motion to Alter or Amend"), contending that the video provided additional evidence that GCH's alleged concern for the privacy of its patients is not so genuine as to justify Mrs. Knotts' termination. The circuit court, by order dated July 8, 2014 ("07/08/14 MTA Order"), denied Mrs. Knotts' Motion to Alter or Amend, finding that the GCH Is Happy Video was not relevant to the plaintiff's claim. (App. I, 0100-0101). Mrs. Knotts appeals from the 07/08/14 MSJ Order (App. I, 0001-0011).

B. Statement of the Facts

Mrs. Knotts worked for GCH from 2005 until she was fired on April 3, 2012. (App. II, 0324, 0459). She was replaced by a substantially younger employee: Mary Spring, who is 12½ years younger than Mrs. Knotts, or Sherry Lepka, who is 24 years younger than Mrs. Knotts. (App. II,

0473, 0666).¹

During her employment, Mrs. Knotts' evaluations were consistently positive, earning her yearly merit increases (App. I, 0270-0287, 0288-0294) and praise from her housekeeping supervisor, Angela Rinck, who described her as "an exceptional worker" who was "truly . . . dedicated" to GCH. (App. II, 0462-0464). In each evaluation, including the last evaluation completed less than two months before her termination, Mrs. Knotts received a "strong" rating, the second highest rating possible. (App. I, 0270-0287; App. II, 0462-0464). Other than a few minor infractions over her seven years of employment at GCH, Mrs. Knotts had never received any significant discipline and had always been considered a good employee. (App. II, 0460-0461, 0474).

Nonetheless, Mrs. Knotts was summarily terminated for three alleged violations of HIPAA and GCH's Confidentiality Policy which took place in quick succession on April 2, 2012. (App. I, 0242). First, according to Tammy Barcus, GCH's Director of Quality and Patient Safety, Mrs. Knotts allegedly violated both HIPAA and GCH's Confidentiality Policy when she saw a long time close friend, Rebecca Green, being admitted to the emergency department ("ED"). (App. I, 0242). Mrs. Green was no stranger to Mrs. Knotts; she was best friends with Mrs. Knotts' daughter Kim and was also related to Mrs. Knotts by marriage. (App. I, 0177, 0187; App. II, 0375). Mrs. Green testified that she went from elementary through high school with Kim and even lived with her and Mrs. Knotts for a year after she was kicked out of her own home as a young adult. (App. II, 00375). She explained her close relationship with Mrs. Knotts: "[She] was like mom [*sic*] to me. She took me in, was a person I could talk to when I couldn't talk to my own parents. She was always there when I needed her. So like I said, she was just like a mother to me, and she always has

¹ GCH was not sure specifically who was hired to replace Mrs. Knotts but believed it was either Ms. Spring or Ms. Lepka. (App. II, 0473). One other individual who was hired in the housekeeping department within the month following Mrs. Knotts' termination was Janet Cox, who is 20 years younger than Mrs. Knotts. (App. II, 0666).

been.” (App. II, 0375).

When Mrs. Knotts saw Mrs. Green in the ED, she did what most people would do when they encounter a friend in the hospital: she asked Mrs. Green what was wrong. (App. I, 0187).² According to GCH, asking Mrs. Green what was wrong with her violated both HIPAA and the Confidentiality Policy and therefore presented a compelling reason to fire Mrs. Knotts. (App. I, 0242).³

The second alleged violation of HIPAA and the Confidentiality Policy occurred shortly thereafter, when Mrs. Knotts saw Mrs. Green’s 15-year old son, Cordale, standing in the hall crying. (App. I, 0181-0182; App. II, 0373, 0378). Mrs. Knotts hugged him, asked what was the matter with his mother and was “everything okay?” and told him to let her know if he needed anything. (App. I, 0181-0182, 0186). According to GCH, this was a violation of HIPAA and the Confidentiality Policy and presented a second reason to fire Mrs. Knotts. (App. I, 0242).

² Nurse Brooke Davis claims she told Mrs. Knotts not to ask Mrs. Green what was wrong, but Mrs. Knotts, who is hard of hearing, did not hear the warning. (App. I, 0181). GCH attempted in the proceedings below to cast doubt on the existence of Mrs. Knotts’ hearing impairment and GCH’s knowledge of her hearing impairment, but both are highly contested issues of fact. (App. II, 0465-0466) (Rinck testifying Mrs. Knotts’ obvious hearing impairment “wasn’t a secret”); (App. II, 0346) (Davis admitting she had to repeat herself on occasion because Mrs. Knotts had not heard her); (App. II, 0376) (Green testifying that Knotts had trouble hearing on telephone and in face-to-face conversations); (App. I, 0161-0164) (Knotts testifying about hearing impairment); (App. I, 0263-0265) (medical records documenting hearing impairment).

³ GCH contends that aide Debbie Hickman asked Mrs. Green if she wanted Mrs. Knotts in the room with her and Mrs. Green said, “F no. When my house burnt down, she called to see what happened but she wasn’t interested in seeing what we needed.” (App. II, 0316). *These allegations are disputed facts.* Mrs. Green testified that Ms. Hickman did not ask her if she wanted Mrs. Knotts to come back with her and that she did not say she didn’t want Mrs. Knotts with her. (App. II, 0378). In fact, Mrs. Green testified that if Ms. Hickman had asked her, she would have told her that she *did* want Mrs. Knotts to stay with her. (App. II, 0378). Mrs. Green also testified that she did not tell Ms. Hickman that her relationship with Mrs. Knotts was strained after the fire and that Mrs. Green’s relationship with Mrs. Knotts was, in fact, not strained because of the fire. (App. II, 0378-0379). As both Mrs. Knotts and Mrs. Green testified, Mrs. Knotts came to Mrs. Green’s home the night of the fire and supplied coffee and comfort to Mrs. Green and her family in the hours after the fire. (App. I, 0179; App. II, 0379). Moreover, Mrs. Green stayed in Mrs. Knotts’ daughter-in-law’s home after the house fire until she and her family could find a new home. (App. II, 0379).

The third purported violation of HIPAA and the Confidentiality Policy occurred in a separate and unrelated incident on the same day, when Mrs. Knotts asked EMS personnel what floor a patient they were transporting was from so that she could clean the patient's room in connection with her job as a housekeeper. (App. I, 0183, 0242). GCH management all agree that Mrs. Knotts did not ask for the patient's name or for any other protected patient information. (App. II, 0314, 0354, 0430, 0496). According to GCH, this was a third violation of HIPAA and the Confidentiality Policy presenting a third reason to fire Mrs. Knotts. (App. I, 0242).

Mrs. Knotts presented credible evidence that these three reasons were pretextual and were inconsistent with both the policies themselves and with GCH's treatment of younger employees. For instance, Mrs. Knotts put forward evidence that demonstrated that she had not violated GCH policies. During the course of her investigation, Ms. Barcus reviewed the Confidentiality Policy, which provides, in pertinent part, as follows:

As an employee, your job may allow you access to medical records or other pertinent patient information considered to be confidential. **You must not discuss patients or their visitors with anyone outside or inside the Hospital, other than in the course of the patient's care and treatment.** Every patient contact, service, communication or other event taking place within the Hospital and the Nursing Care Facility is confidential and must not be disclosed except as provided below. A violation of this confidentiality policy, be it verbal, by action, or written, may result in termination.

(App. I, 0237) (emphasis added). Employees must sign a confidentiality statement and by doing so, "agree [they] will not disclose, by any means, whether verbal, written, or electronic, any information obtained by [them] regarding patients, co-workers, or hospital operations, unless and as required during the proper course of [their] employment or upon receipt of a HIPAA-compliant authorization." (App. I, 0237). According to GCH, Mrs. Knotts violated these provisions when she briefly spoke with Mrs. Green and Cordale Green and when she asked what floor another patient had been on. (App. I, 0242). However, the policy is about disclosing information learned in the hospital,

not about asking a friend or her son what is wrong or asking the son if she can help. (App. I, 0237).

In fact, Ms. Knott's supervisor, Ms. Rinck testified that she did not believe that Mrs. Knotts had violated HIPAA or the Confidentiality Policy because she had not **disclosed** any information to anyone. (App. II, 0466). As Ms. Rinck explained, the policy only states that information learned at GCH could not be disclosed to others:

*I have always told my staff that if you have learned something by virtue of the fact that you are employed here, **you are not to share it.** That is my impression of violating. **You don't go out and share it.** She wasn't sharing anything, and my assumption was she wasn't violating it.*

(App. II, 0467) (emphasis added). Ms. Rinck testified that she regularly told the employees she supervised, which included Mrs. Knotts, that HIPAA and the Confidentiality Policy required only that employees refrain from disclosing private medical information. (App. II, 0467).

Just several weeks before Mrs. Knotts was terminated, Ms. Rinck issued a memorandum to the housekeeping staff, including Mrs. Knotts, reminding them of the Confidentiality Policy. Ms. Rinck's memorandum read, in pertinent part, as follows:

This memo is to remind EVERYONE that when you were hired here each of you signed a Confidentiality of Patient Information document, explaining the HIPPA [*sic*] laws and that you understood not to violate them. I am posting this document along with this memo. I just want to take a moment to reiterate what this means. If anyone who is employed at Grafton City Hospital **discusses any information about a patient or resident that they would not have known had they not been employed here is a violation of the HIPPA [*sic*] law. . . . So to put it simply...if you would not have known it if you were working at McDonalds and you only know it because you work here, **then don't say it.****

(App. I, 0269) (emphasis added). Even Cate Heindel, GCH's HIPAA expert, had difficulty articulating how the training provided by GCH would actually inform Mrs. Knotts that her conduct was contrary to hospital policy. (App. II, 0537-0539).

The decision to fire Mrs. Knotts was made at a meeting on April 3, 2012. During that meeting, Ms. Rinck told Ms. Barcus, CEO Pat Shaw, and Human Resources Director Missy

Kimbrew that she did not believe Mrs. Knotts had violated HIPAA and/or the Confidentiality Policy and that the recent training Mrs. Knotts had did not instruct employees not to ask patients why they were at the hospital. (App. II, 0466). Nonetheless, despite the difference between the language of the policies and the alleged conduct of Mrs. Knotts, despite the fact that even Ms. Rinck, Mrs. Knotts supervisor, did not believe Mrs. Knotts' conduct violated the GCH policies, and despite Ms. Rinck's disagreement with the decision, GCH management decided to fire Mrs. Knotts. (App. II, 0324). Ms. Rinck was crying when she left the meeting. (App. II, 0467).

Although Ms. Barcus claimed that Ms. Rinck eventually agreed in the termination decision, (App. II, 324), Ms. Rinck testified that she never agreed that Mrs. Knotts should have been terminated – not at the time the decision was made and not at the time of her deposition. (App. II, 0467). Rather, Ms. Rinck believed Mrs. Knotts should have been given a written warning and retraining on HIPAA and the Confidentiality Policy, a training which she acknowledged she and the staff she supervised would likewise need to undergo. (App. II, 0467).

Ms. Barcus informed Mrs. Knotts of her termination for violations of the Confidentiality Policy (App. I, 0237) and GCH's Corrective Discipline Policy (App. I, 0238) when Mrs. Knotts arrived for her shift on April 3, 2012, a mere eight hours after Ms. Barcus began her investigation and without ever interviewing Mrs. Knotts. (App. II, 0325). Mrs. Knotts filed a grievance to challenge her termination in which she explained her relationship with Mrs. Green and denied that she had violated GCH policies. (App. I, 0245). Ms. Rinck, as Mrs. Knotts' supervisor, was responsible for responding to Mrs. Knotts' grievance. (App. II, 0471). Ms. Rinck began drafting GCH's official denial. However, because she did not agree with the termination decision, she wrote only the first paragraph stating the purpose of the letter and the last sentence informing Mrs. Knotts of her appeal rights. (App. I, 0250). Ms. Rinck asked Ms. Kimbrew to complete the letter because

she did not agree with the decision. (App. II, 0469). Ms. Rinck gave Mrs. Knotts the completed letter as directed, but disagreed with the denial. (App. II, 0471).

Mrs. Knotts appealed to CEO Shaw, explaining that Mrs. Green was a close family friend and relative who had lived with Mrs. Knotts at one point and that, because of her hearing impairment, she had not heard Ms. Davis's warning. (App. I, 0251). Mr. Shaw interviewed Ms. Davis and Ms. Hickman, spoke with Mrs. Green, and reviewed a letter that Mrs. Green had written on Mrs. Knotts' behalf. (App. I, 0254-0256, 0258-0260). In that letter, Mrs. Green explained her close relationship with Mrs. Knotts, explained that she did not think Mrs. Knotts had violated her privacy and pleaded with GCH to give Mrs. Knotts her job back. (App. I, 0258-0260). Although Mr. Shaw knew that Mrs. Green's statements supported Mrs. Knotts' appeal, he nonetheless denied the grievance and upheld the decision to fire her. (App. I, 0257).

GCH's Disparate Treatment of Substantially Younger Employees

GCH's application of its Confidentiality Policy and Corrective Discipline Policy to Mrs. Knotts is in marked contrast to the way GCH applied those policies to other substantially younger employees who engaged in far more egregious behavior. For instance, David Bender, a physician employed by GCH who is 15 years younger than Mrs. Knotts, accessed his ex-wife's medical records without her permission. (App. I, 0298; App. II, 0599-0663). According to Ms. Heindel, GCH's own expert, this conduct is one of the most serious HIPAA violations. (App. II, 0530). Dr. Bender nonetheless remains employed by GCH. (App. II, 0599-0663).

Another GCH employee, Diane Painter, who is approximately 17 years younger than Mrs. Knotts, (App. I, 0297), posted a death announcement of a patient in GCH's long-term care facility on her public Facebook page on June 1, 2012:

A very special, kind and gentle man passed away this evening. Roy Hartley, you will always and forever be my buddy.

(App. I, 0295). Ms. Kimbrew, GCH's senior human resources manager and one of the individuals involved in the decision to fire Mrs. Knotts, clicked the "like" button on that post, indicating not only that had she seen it, but also that she approved of it. (App. II, 0446-0447). When asked whether she believed that the Facebook post was a violation of HIPAA or the Confidentiality Policy, Ms. Kimbrew first tried to justify Ms. Painter's conduct as an exception to the policies based on the fact that Ms. Painter had formed a relationship with the patient. (App. II, 0449). When asked why Mrs. Knotts' conduct could not be justified on the same grounds given her relationship with Mrs. Green, Ms. Kimbrew claimed that Mrs. Knott's conduct differed from Ms. Painter's because Mrs. Knotts was at the hospital at the time she approached Mrs. Green. (App. II, 0452). Ms. Kimbrew then testified that "it would be each individual's opinion" as to whether they should post such information on Facebook. (App. II, 0453). Ms. Heindel conceded that the Facebook post was a violation of HIPAA. (App. II, 0555-0556).

Ms. Painter was never disciplined for the conduct and remains employed at GCH. (App. I, 0296-0297). In fact, GCH apparently made no investigation into Ms. Painter's Facebook post until the eve of its Motion for Summary Judgment.⁴ GCH provided no notes of Ms. Barcus' purported investigation and no evidence that she did anything to corroborate Ms. Painter's claim that she

⁴ GCH contends, in disclosures produced after the close of discovery, that Ms. Barcus investigated Ms. Painter's Facebook post after learning about it at her May 13, 2013 deposition. GCH, however, did not disclose the alleged investigation until February 27, 2014, long after Mrs. Knotts' June 13, 2013 request for the records. (App. II, 0734-0737, 0744-0747). When GCH filed its initial response to those discovery requests, Ms. Barcus' verified response stated that GCH had no documents relating to any investigation into Ms. Painter's Facebook post. (App. II, 0739). GCH also responded to another request in the same document that no GCH employees other than Mrs. Knotts and Dr. Bender were investigated for violations of HIPAA and/or the Confidentiality Policy. *See id.* The discrepancy between GCH's initial response, which reasonably implies that no investigation was made into Ms. Painter conduct, and Ms. Barcus' Affidavit, (App. I, 0296-0297), filed as an exhibit to GCH's Motion for Summary Judgment stating she did investigate, draws Ms. Barcus' credibility into question.

learned of Mr. Hartley's death from a "family member or friend." (App. II, 0744-0747).⁵

In another incident, Sherry Lepka, who is 24 years younger than Mrs. Knotts, (App. II, 0667) and who, like Mrs. Knotts, was employed by GCH as a housekeeper, was overheard discussing the death of a patient at a gas station. (App. I, 0297-0298; App. II, 0477-0478). When her supervisor, Ms. Rinck, heard about the incident, she verbally instructed Ms. Lepka not to disclose medical information that she had learned by virtue of her employment. (App. II, 0478). Ms. Lepka, like Dr. Bender and Ms. Painter, was not disciplined and remains employed by GCH. (App. II, 0478).

In addition to the discrepancy in the way it applied HIPAA and the Confidentiality Policy to Mrs. Knotts on the one hand and substantially younger employees on the other, GCH has also favored younger employees in applying its Corrective Discipline Policy. For instance, Timothy Setler, a GCH admissions clerk who is 30 years younger than Mrs. Knotts, was accused of using and/or possessing drugs with the intent to distribute. (App. II, 0330). He was arrested while working as the only individual responsible for admitting patients to the hospital. (App. II, 0330). Mr. Setler had to call a supervisor to have someone relieve him so that he could be escorted from GCH in police custody. (App. II, 0330). Mr. Setler later plead guilty to charges related to the accusations. (App. II, 0330). GCH did not drug test Mr. Setler and, in fact, took no disciplinary action against him whatsoever, notwithstanding the fact that his conduct called for immediate termination under at least three separate provisions of the Corrective Discipline Policy. (App. II, 0331).

Employee Training and Understanding of HIPAA and Privacy Laws

Although GCH claimed that Mrs. Knotts should have known her conduct violated HIPAA and the Confidentiality Policy because she had been trained on those policies, as explained *supra*,

⁵ Mrs. Knotts sought additional information about Mr. Hartley in order to evaluate the credibility of the evidence, but GCH maintained that Mrs. Knotts was not entitled to additional evidence because discovery had closed. Mrs. Knotts filed a Motion to Strike and/or Motion to Reopen Discovery to address this issue (App. II, 0668-0714), but the circuit court did not rule on it.

Mrs. Knotts' most recent training only discussed employees' obligation not to *disclose* confidential information and did not address prohibitions on asking one's friends or loved ones about their medical condition. (App. I, 0269). Ms. Rinck's March 19, 2012 memorandum, upon which GCH relies in its claim that Mrs. Knotts had received relevant training just weeks before her termination, was consistent with Ms. Rinck's testimony that she understood, and regularly trained her employees, that the Confidentiality Policy prohibited only the *disclosure* of protected medical information. (App. I, 0269, App. II, 0460).

Moreover, although Mrs. Knotts was told she was fired for not following purportedly clear policies, GCH's management demonstrated ignorance about those very same policies. In addition to Ms. Kimbrew's testimony that it was permissible for employees to disclose information if they form relationships with patients or if they only disclose information when they are not on duty (App. II, 0449, 0452), CEO Shaw did not know whether HIPAA prevents employees from asking someone they know in the hospital what is wrong with them or why they are there. (App. II, 0490).

GCH Is Happy Video

GCH posted the GCH Is Happy Video on the internet on approximately May 12, 2014. (App. I, 0299) (also available at <https://www.youtube.com/watch?v=aPAT9YsDqac>). The video portrays GCH employees, including CEO Shaw, dancing and singing to the popular hit song "Happy." (App. I, 0299). The video also includes, in the most public of forums, residents of GCH's long-term nursing facility, in sometimes unflattering images. Some of the residents do not appear to be aware of what is going on around them or that they are participating in a video production. (App. I, 0299). This video is inconsistent with GCH's alleged concern for patient privacy.

III. SUMMARY OF ARGUMENT

Jeannie Knotts, then aged 65, was fired from her position as a GCH housekeeper for allegedly

violating HIPAA and GCH's Confidentiality Policy. Mrs. Knotts contends that the firing violated the WVHRA's prohibition against age discrimination and has established her *prima facie* case by proffering evidence (a) that her replacement is substantially younger than she is and (b) that substantially younger GCH employees committed serious violations of the same policies without being fired and, in some cases, without even being disciplined.

The circuit court erred in rejecting Mrs. Knotts' *prima facie* case because it relied on a prior decision of this Court, *Young v. Bellofram*, 227 W. Va. 53, 705 S.E.2d 560 (2010), for the proposition that, in order to establish a *prima facie* case using replacement evidence and/or comparator evidence under a disparate treatment theory, Mrs. Knotts was required to prove that her replacement and comparators were under the age of 40. This conclusion is contrary to and inconsistent with a leading decision of the United States Supreme Court ("USSC"), with decisions of appellate courts in other states and, in the case of replacement workers, with decisions of this Court, all of which recognize that the issue in an age discrimination case is whether the replacement worker or comparator is substantially younger than the plaintiff, not whether she is under the age of 40.

The circuit court also erred in concluding that Mrs. Knotts had not presented evidence sufficient to support a finding of pretext because it failed to resolve the facts and inferences in favor of Mrs. Knotts and misconstrued how one evaluates evidence of pretext in a discrimination case. Mrs. Knotts' evidence of pretext included, but was not limited to, evidence that she did not violate GCH policies; evidence that no GCH manager could reasonably have concluded that she violated GCH policies; evidence that GCH did not follow its own discipline policies in firing her and treated her more severely under those policies than a substantially younger co-worker whose misconduct was far more serious than anything she was accused of doing; and, as noted above, evidence

establishing a substantial case of disparate treatment.

This evidence of the *prima facie* case and of pretext are sufficient to support a case of discrimination and to defeat a motion for summary judgment. *See, e.g., Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996) (“In disparate treatment cases under the West Virginia Human Rights Act, W. Va. Code, 5-11-9 (1992), proof of pretext can by itself sustain a conclusion that the defendant engaged in unlawful discrimination.”). For these reasons, the circuit court’s decision should be reversed and the case should be remanded.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this case pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure. This case is appropriate for oral argument under Rule 20(a)(2) because it involves issues of fundamental public importance. First, it raises the question of whether the analysis of evidence of age discrimination in West Virginia should deviate from federal age discrimination law, from other state laws, and from the very logic of laws against age discrimination. Second, the lower court’s analysis of Mrs. Knotts’ evidence misconstrues the role of pretext evidence in discrimination cases, indicating the need for this Court to update and explain the nature and purpose of the pretext analysis and the inferences that can be drawn from evidence of pretext.

V. ARGUMENT

A. Standard of Review

This Court reviews the granting of summary judgment *de novo*. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is appropriate when the record shows that there is “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. Va. R. Civ. Proc. 56(c). Accordingly, “[a] motion for summary judgment should be granted only

when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syl. Pt. 3, *Aetna Casualty & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). In other words, summary judgment should be denied “even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.” *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995).

The party that moves for summary judgment bears “the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment.” Syl. Pt. 6, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

B. The Circuit Court Erred in Concluding That Mrs. Knotts Did Not Establish a *Prima Facie* Case of Age Discrimination

Plaintiffs in discrimination cases generally rely on circumstantial evidence, including proof of a *prima facie* case, to prove their claims. *See, e.g.*, Syl. Pt. 7, *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 59, 479 S.E.2d 561, 569 (1996). In the present case, Mrs. Knotts contends that she established a *prima facie* case by presenting evidence and inferences (1) that GCH replaced her with an employee who is substantially younger than she is and (2) that GCH treated substantially younger employees who, unlike her, were guilty of real and substantive violations of GCH’s HIPAA and Confidentiality Policy, less severely than it treated her.⁶

⁶ Mrs. Knotts presented evidence which establishes her *prima facie* case of age discrimination using not one, but two common methods of proof: (1) replacement evidence and (2) comparator evidence, *i.e.*, evidence of disparate treatment. With respect to the first method, a plaintiff establishes a *prima facie* case and, therefore, an inference of discrimination, by pointing to a substantially younger replacement. *See Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996) (“[I]f the plaintiff raises an *inference of discrimination through his or her prima facie case* and the fact-finder disbelieves the defendant’s explanation for the adverse action taken against the plaintiff, the factfinder justifiably may conclude that the logical explanation for the action was the unlawful discrimination.”). With respect to the second method, a plaintiff establishes a *prima facie* case and therefore, an inference of discrimination, by pointing to other

In rejecting the evidence supporting both methods of proof, the circuit court relied on *Young*, 227 W. Va. 53, 705 S.E.2d 560. As discussed below, *Young* does not apply to evidence of replacement workers. Moreover, because it eviscerates age discrimination law in West Virginia, this Court should reexamine *Young*'s adoption of the "over 40/under 40" rule and adopt instead Justice Scalia's "substantially younger" test for assessing replacement and comparator evidence in age discrimination cases arising under the WVHRA. In doing so, the Court should confirm that West Virginia provides the same protection to older employees as is provided by the Age Discrimination in Employment Act ("ADEA") and by state laws throughout the United States.

1. **The circuit court erred in concluding that evidence that Mrs. Knotts was replaced by an employee who is substantially younger than she is but who is over the age of 40 was insufficient, as a matter of law, to demonstrate Mrs. Knotts' prima facie case of age discrimination against GCH for its termination of her employment.**

The circuit court rejected Mrs. Knotts' evidence of a substantially younger replacement because the replacement is over the age of 40 and, thus, within the class of persons protected from age discrimination by the WVHRA. (App. I, 0009). The circuit court relied on this Court's holding in *Young* that, in order to demonstrate disparate treatment, *i.e.*, a younger individual was treated more favorably than the older plaintiff, the comparator must be under the age of 40. 227 W. Va. at 60, 705 S.E.2d at 567. The circuit court applied *Young*'s holding on comparator evidence to Mrs. Knotts' replacement evidence. Under this reasoning, a plaintiff who is 65 cannot establish *prima facie* age discrimination through evidence that she was replaced with a substantially younger employee unless the younger employee was under the age of 40. In other words, replacing a worker who is 65 with

substantially younger employees who were treated more favorably than she was. *See Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 170-171, 358 S.E.2d 423, 429-430 (1986) ("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. This evidence could, for example, come in the form of . . . a case of unequal or disparate treatment between members of the protected class and others.").

someone who is 50, 45 or even 40 is not age discrimination under the circuit court's decision because the replacement is not under 40.

This result is not only contrary to the traditional understanding of age discrimination law, it is also directly contrary to the numerous state and federal decisions, including a unanimous decision of the USSC directly on point. In *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308 (1996), Justice Scalia, writing for the Court, rejected the over 40/under 40 test in favor of a substantially younger test in an age discrimination case arising under the ADEA. As discussed below, subsequent decisions of this Court have implicitly approved circuit court decisions applying the substantially younger test to replacement evidence. Moreover, almost every other state appellate court that has considered this issue has applied an analysis similar to *O'Connor*.

Given this Court's prior decisions, the logic of the WVHRA's protection against age discrimination, and the many decisions following *O'Connor* in other states, the circuit court erred in rejecting Justice Scalia's substantially younger test in the context of replacement evidence.

- a. **The USSC's unanimous decision in *O'Connor v. Consolidation Coin Operators* authored by Justice Scalia adopted the substantially younger test and rejected the over 40/under 40 test applied by the circuit court in the proceedings below.**

This Court has looked to federal discrimination law when interpreting the WVHRA. *See W. Va. Human Rights Comm'n v. Wilson Estates*, 202 W. Va. 152, 503 S.E.2d 6, 12 (1998)). The seminal federal case analyzing how old a replacement may be for purposes of establishing a *prima facie* case of age discrimination under the ADEA is the USSC's unanimous decision in *O'Connor*, in which the 56-year old plaintiff filed suit under the ADEA after he was fired by his employer and replaced by a 40-year old worker. 517 U.S. 308. The district court's grant of summary judgment against the plaintiff was affirmed by the Fourth Circuit because the plaintiff was replaced by a worker who was not "outside the protected class," *i.e.*, by someone who was not under 40. *See*

O'Connor v. Consol. Coin Caterers Corp., 56 F.3d 542, 546 (4th Cir. 1995).

The USSC reversed the Fourth Circuit's decision. 517 U.S. at 313. Justice Scalia, writing for the Court, addressed the relationship between the age discrimination prohibited by the ADEA and the statutory limitation of that protection to individuals age 40 and over. Justice Scalia explained that the ADEA's limited protections, reaching only to individuals over 40, "does not ban discrimination against employees because they are aged 40 or older." *Id.* at 312. Rather, Justice Scalia explained, the ADEA "bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older." *Id.* Justice Scalia continued:

The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age. Or to put the point more concretely, there can be no greater inference of age discrimination (as opposed to "40 or over" discrimination) when a 40-year old is replaced by a 39-year old than when a 56-year is replaced by a 40-year old. Because it lacks probative value, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the McDonnell Douglas *prima facie* case.

Id. Thus, where a plaintiff in an age discrimination case alleges that an inference of discrimination arises because he was replaced by a younger employee, the issue is not whether that younger employee is over or under the age of 40, but rather whether the difference between their ages is sufficiently substantial to support an inference of discrimination based on age:

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.

Id. at 313. After *O'Connor*, the test in cases arising under the ADEA is not whether the replacement worker is over 40 or under 40, but whether he or she is substantially younger than the plaintiff.

The protection afforded to West Virginians who are 40 or older by the WVHRA is the same as the protection afforded by the ADEA. *See, e.g., Kanawha Valley Regional Traps. Auth. v. W. Va. Human Rights Comm'n*, 181 W. Va. 675, 677 fn.2, 383 S.E.2d 857, 859 fn. 2 (1989) ("Our statute

tracks the wording of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e, but includes protection on the basis of age. Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621-634, to meet this goal.”). Thus, as explained below, to the extent the *Young* decision suggests otherwise, it should be expressly overruled.

b. A significant number of state courts since *O'Connor* have either adopted the substantially younger test and/or cited it favorably.

Since the *O'Connor* decision, a significant number of states, including Florida, Indiana, Kentucky, Ohio, Connecticut, Massachusetts, Iowa, Pennsylvania, Washington, Texas, Louisiana, New Mexico, Colorado and Michigan, have applied Justice Scalia’s analysis to state laws similar to the WVHRA.⁷ A number of other states, including Tennessee, North Carolina, California, New York and New Jersey, have cited *O'Connor* favorably for the proposition that the age difference between a plaintiff and replacement must be significant.⁸

⁷ See, e.g., *City of Hollywood v. Hogan*, 986 So. 2d 634, 641 (Fla. Dist. Ct. App. 2008) (applying *O'Connor*’s substantially younger test in age discrimination claim arising under state law); *Ind. Dep’t of Envtl. Mgmt. v. West*, 838 N.E.2d 408, 414 (Ind. 2005) (same); *Williams v. Wal-Mart Stores, Inc.*, 184 S.W.3d 492, 496 (Ky. 2005) (same); *Coryell v. Bank One Trust Co., N.A.*, 803 N.E.2d 781 (Ohio 2004) (same); *Bd. of Educ. of Norwalk v. Comm’n on Human Rights & Opportunities*, 832 A.2d 660, 669 (Conn. 2003) (same); *Knight v. Avon Prods.*, 780 N.E.2d 1255, 1263-1264 (Mass. 2003) (same); *Ritz v. Wapello County Bd. of Supervisors*, 2002 Iowa App. LEXIS 867 (Iowa Ct. App. 2002) (same); *Kroptavich v. Pa. Power & Light Co.*, 795 A.2d 1048 (Pa. Super. Ct. 2002) (same); *Hill v. BCTI Income Fund-I*, 23 P.3d 440, 450, n.10 (Wash. 2001) (same), *overruled on other grounds by McClarty v. Totem Elec.*, 137 P.3d 844 (2006); *Hartis v. Mason & Hanger Corp.*, 7 S.W.3d 700, 705 (Tex. App. 1999) (same); *McCain v. City of Lafayette*, 741 So. 2d 720, 728-729 (La. App. 1999) (same); *Cates v. Regents of the N.M. Inst. of Mining & Tech.*, 954 P.2d 65, 71 (N.M. 1998) (same); *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1198 (Colo. Ct. App. 1997) (same); *Lytle v. Malady*, 566 N.W.2d 582, 599 (Mich. 1997) (same).

⁸ See *Williams v. Greater Chattanooga Pub. TV Corp.*, 349 S.W.3d 501, 510 (Tenn. Ct. App. 2011) (proof of replacement by substantially younger employee may be used to establish fourth element of *prima facie* case); *N.C. Dep’t of Crime Control & Pub. Safety v. Greene*, 616 S.E.2d 594, 600-601 (N.C. Ct. App. 2005) (deciding case on other grounds but observing that “[a]n inference of unlawful discrimination arises when an employee is replaced by a ‘substantially younger’ worker”); *Guz v. Bechtel National, Inc.*, 8 P.3d 1089, 1121 (Cal. 2000) (“[A] logical inference of age discrimination may arise where replacement is significantly younger, even if not below statutorily protected age.”); *Hardy v. GE*, 270 A.D.2d 700, 704 (N.Y. App. Div. 2000) (citing *O'Connor* in affirming summary judgment and finding “insignificant” two year age difference between plaintiff and replacement); *Bergen Commer. Bank v. Sisler*, 723 A.2d 944, 956 (N.J. 1999) (observing plaintiff may generally show that replacement was “sufficiently younger to permit an

c. The Supreme Court of Appeals of West Virginia has affirmed two circuit court orders which appear to apply the substantially younger test to replacement evidence.

Two recent cases decided by this Court suggest that Justice Scalia's substantially younger test applies to evidence of replacements in West Virginia. *See The Burke-Parsons-Bowlby Corp. v. Rice*, 230 W. Va. 105, 108, 736 S.E.2d 338, 341 (2012); *W. Va. Am. Water Co. v. Nagy*, 2011 W. Va. LEXIS 183 (W. Va. June 15, 2011) (memorandum decision).

In *Rice*, this Court upheld a substantial verdict in an age discrimination case. 203 W. Va. at 108, 736 S.E.2d at 341. The plaintiff there had relied, in part, on another type of evidence often used in discrimination cases: evidence, admitted under Rule 404(b) of the West Virginia Rules of Evidence, that the employer had engaged in age discrimination against another employee, Robert Crane. *Id.* at 113, 736 S.E.2d at 346. Mr. Crane, age 62, had been replaced by an employee who was approximately 40. *Id.* (stating that the replacement was approximately 22 years younger than Mr. Crane, *i.e.*, approximately 40). In order to present this 404(b) evidence, the plaintiff was required to demonstrate that Mr. Crane's replacement by a younger employee violated the WVHRA's prohibition against age discrimination. This Court rejected the employer's challenge to the admission of the Rule 404(b) evidence, implicitly recognizing that Mr. Crane presented facts from which a jury could conclude that he was a victim of age discrimination even though the plaintiff failed to establish that Mr. Crane's younger replacement was under 40.⁹ *Id.* at 111, 113, 736 S.E.2d at 344, 346. Although it did not cite *O'Connor*, this Court's decision implicitly embraces the

inference of age discrimination"). *But see Kalush v. Department of Human Rights Chief Legal Counsel*, 700 N.E.2d 132, 141 (Ill. App. Ct. 1998) (requiring plaintiff to point to replacement who is under 40); *Wilkins v. Dayton's Commer. Interiors*, 1998 Minn. App. LEXIS 61, 1998 WL 15900 (Minn. Ct. App. 1998) (same).

⁹ In affirming the circuit court's order, this Court noted that it was "thorough and supported by the record" and found "no error with regard to the admission of evidence concerning Robert Crane." *Id.* at 113, 736 S.E.2d at 346.

substantially younger test because if it had not, it could not have reasonably concluded that Mr. Crane was the victim of age discrimination because the plaintiff failed to prove that Mr. Crane's replacement was under 40. *Id.* If the Court rejected the substantially younger test, it would have been obligated to reject the Crane evidence and reverse the jury verdict in the plaintiff's favor. Instead, the Court upheld the verdict. *Id.* at 116, 736 S.E.2d at 349.

Similarly, in *W. Va. Am. Water Co. v. Nagy*, 2011 W. Va. LEXIS 183 (W. Va. June 15, 2011) (memorandum decision), this Court affirmed the circuit court's decision in an age discrimination case. In an appendix to the decision, the Court incorporated the circuit court's order denying the defendant's post-trial motions. Notably, in its order, the circuit court cited and discussed *O'Connor* in rejecting the defendant's challenge to an instruction to the jury that "the age of the person or persons who replaced [the plaintiff] is not relevant to the determination as to whether [the plaintiff's] age was a motivating factor for his termination." *Id.* at *60. The circuit court quoted *O'Connor* for the proposition that "there can be no greater inference of age discrimination (as opposed to '40 or over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old." *Id.* at *61 (quoting from *O'Connor*, 517 U.S. at 312). In finding that the jury instruction was proper, the circuit court went on to cite a number of cases for the proposition that a plaintiff in an age discrimination case is not required to prove that his replacement is outside of the protected class. *Id.* at *61-62. This Court's affirmation of the circuit court's order suggests that Justice Scalia's substantially younger test applies to replacement evidence in age discrimination cases arising under the WVHRA.¹⁰

¹⁰ One other case from this Court cites *O'Connor*. See *Vetter v. Town of Moorefield*, 2012 W. Va. LEXIS 551 (W. Va. June 22, 2012) (memorandum decision) (affirming circuit court order granting summary judgment against plaintiff in which circuit court cites *O'Connor*). The circuit court's citation to *O'Connor* in *Vetter* is perplexing because while it seems to acknowledge that an inference of discrimination might arise from a significant age difference, it continuously references that the replacement and other comparators were members of the protected class, making it unclear whether the circuit court rejected the

d. The circuit court erroneously relied on the holding in *Young v. Bellofram* and applied the over 40/under 40 test to the replacement evidence.

The circuit court in the proceedings below relied on language in *Young v. Bellofram* in concluding that Mrs. Knotts' proof that she was replaced by a substantially younger employee was insufficient to make out a *prima facie* case of age discrimination. 227 W. Va. 53, 705 S.E.2d 560 (2010). *Young*, a *per curiam* decision which announced no new syllabus points and which is inconsistent with the decision of the USSC in *O'Connor*, relied on language from discrimination cases that did not involve age discrimination (*i.e.*, race and gender discrimination), and suggests that comparators in age discrimination cases arising under the WVHRA must be outside the protected class, *i.e.*, under the age of 40.

In *Young*, the plaintiff, age 60, alleged that she was terminated on the basis of her age and gender. 227 W. Va. at 57, 705 S.E.2d at 564. The employer maintained that it had fired the plaintiff for failing to properly discipline employees who violated the company's sexual and racial harassment policies. *Id.* As proof of discrimination, the plaintiff pointed to a male supervisor who was demoted, rather than terminated, for failing to ensure his employees were complying with company policies relating to time limits for breaks and lunches. *Id.* at 58, 705 S.E.2d at 565. This Court concluded that because the male supervisor was over the age of 40 and thus not outside of the protected age class, evidence that he was treated more leniently was not evidence of discrimination. *Id.* at 59, 705 S.E.2d at 564. The Court also found that the male supervisor's conduct – failing to enforce time limits for breaks and lunches – was far different from the plaintiff's conduct in ignoring complaints that her subordinates were engaging in racial and sexual harassment, even though she had

replacement because he was just two years younger or because he was a member of the same protected class.

witnessed some of the conduct. *Id.* at 56-57, 61, 705 S.E.2d at 563-564, 568.

In concluding that the male supervisor was not a comparator because he, too, was in the protected age class, the *Young* decision did not address, or even cite, the *O'Connor* case. *See id.* at 59-60, 705 S.E.2d at 566-567. Because Ms. Young was promoted a year earlier when she was 59 and was fired for allowing her subordinates to engage in racially and sexually inappropriate conduct (conduct markedly different from the conduct of her would-be comparator), the facts of *Young* were such that the ultimate outcome was justified. *See id.* However, the Court's omission of any discussion of *O'Connor*, the seminal case on how the *McDonnell Douglas* proof paradigm applies in age discrimination cases arising under federal law, suggests that the parties did not raise and the Court did not consider *O'Connor*, its reasoning or its conclusions before it issued its decision in *Young*.¹¹

As a result, *Young* deviates from *O'Connor* and defies the very logic of laws against age discrimination. The decision resulted from a mistaken application of the traditional test for disparate treatment in race, gender and similar cases to the quite different considerations that exist in age discrimination cases. *Young* relies on Syl. Pt. 4, *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995), for the proposition that “[u]nless a comparison employee and a plaintiff share the same disputed characteristics, the comparison employee cannot be classified as a member of a plaintiff’s class for purposes of rebutting prima facie evidence of disparate treatment.” 227 W. Va. at 60, 705 S.E.2d at 567. In relying on *Barefoot*, the *Young* decision inadvertently adopted an over 40/under 40 test for analyzing evidence of age discrimination in cases arising under the WVHRA without considering the differences between age discrimination on the one hand and other

¹¹ The Court's failure to address *O'Connor* is not surprising given that none of the publicly available briefs filed before the Court's decision in *Young* cited *O'Connor*. *See* Supreme Court of Appeals of West Virginia Argument Docket (Sept. 8, 2010), http://www.courtswv.gov/supreme-court/calendar/2010/dockets/sept8_10ad.htm.

types of discrimination, like race and gender, on the other.

e. This Court should hold that Justice Scalia’s substantially younger test applies to replacement evidence in age discrimination cases arising under the WVHRA.

As explained more fully *infra*, the analysis in *Young* is mistaken because it failed to consider the differences between age discrimination and other types of discrimination. Even so, the circuit court in the proceedings below should not have applied *Young* – which dealt only with comparator evidence – in holding that Mrs. Knotts’ replacement evidence was insufficient as a matter of law to establish a *prima facie* case of discrimination because her replacement was over the age of 40. However subtle or implicit, this Court’s decisions in *Rice* and *Nagy*, which are consistent with the *O’Connor* decision, are the Court’s only statements as to what analysis applies to replacement evidence in age discrimination cases, and the circuit court should not have rejected Mrs. Knotts’ substantially younger replacement on the basis that she also happened to be a member of the protected class. To the extent the *Young* decision has confused the issue, the Court should reexamine *Young*’s adoption of the over 40/under40 test and articulate that the substantially younger test is the proper test to be applied to replacement evidence (and to comparator evidence).¹²

f. Mrs. Knotts has raised sufficient replacement evidence to support a *prima facie* case of age discrimination.

Mrs. Knotts has raised sufficient evidence to support a *prima facie* case of age discrimination

¹² Mrs. Knotts recognizes that where a conflict exists between a published opinion and a memorandum decision, the published opinion controls. *State v. McKinley*, 2014 W. Va. LEXIS 977, __ W. Va. __, __ S.E.2d __ (Sep. 29, 2014). The conflict here, however, is between, on the one hand, *Rice* and *Nagy* – the former a published signed opinion and the latter a memorandum opinion – and on the other hand *Young* – a per curiam opinion which should not have announced new law, but arguably did just that when it applied the *Barefoot* analysis to age discrimination. See *Walker v. Doe*, 210 W. Va. 490, 494, 558 S.E.2d 290, 293 (2001) (“This Court will use signed opinions when new points of law are announced and those points will be articulated through syllabus points as required by our state constitution.”). The *Rice* and *Nagy* opinions, taken together with *Young*, suggest that this Court has not yet fully considered, based on a full briefing by the parties, the issues raised by *O’Connor*, *Young* and the present case.

because her replacement – Ms. Spring or Ms. Lepka – is substantially younger such that a jury could infer a discriminatory motive on GCH’s part. Although there is no hard and fast rule as to what constitutes a substantial age difference for purposes of establishing a *prima facie* case of age discrimination under the ADEA, the overwhelming authority is that “[a]ge differences of ten or more years [are] sufficiently substantial to meet the requirement . . . [and] age differences of less than ten years are not significant enough . . .” *Grosjean v. First Energy Corp.*, 349 F.3d 332, 338-339 (6th Cir. 2003) (digesting cases assessing what constitutes sufficiently substantial age difference under ADEA).

The age difference between Mrs. Knotts and the employee who replaced her is sufficiently substantial such that a jury could infer discriminatory intent. Ms. Spring is more than 12½ years younger than Mrs. Knotts. (App. II, 0666). Ms. Lepka is more than 24 years younger than Mrs. Knotts. (App. II, 0666). Because both individuals are substantially younger than Mrs. Knotts, a jury could reasonably infer a discriminatory motive from GCH’s decision to terminate her and replace her with a substantially younger employee.

2. **The circuit court erred in concluding that evidence that Mrs. Knotts was treated less favorably than other employees of GCH who are substantially younger than she is but who are over the age of 40 was insufficient, as a matter of law, to demonstrate Mrs. Knotts’ prima facie case of age discrimination against GCH for its termination of her employment.**

The conclusion in *Young* that a comparator in an age discrimination case must be below 40 misconstrues the role of the protected class in age discrimination cases, effectively undermines the age discrimination protections of the WVHRA, and is directly contrary to *O’Connor*, in which the USSC held that a replacement in an age discrimination case must be substantially younger in order to provide an inference of discrimination and establish a *prima facie* case of discrimination. This Court should reexamine and overturn *Young* and adopt the substantially younger test articulated in

O'Connor because whether a replacement is inside or outside the protected class in the context of age discrimination is “an utterly irrelevant factor” that “lacks probative value.” 517 U.S. at 312-313.

a. There is no logical reason to treat comparator evidence differently than replacement evidence in age discrimination cases arising under the WVHRA.

Comparator evidence in a disparate treatment age discrimination case under the WVHRA should be analyzed just as replacement evidence is, that is, to determine whether the inferences to be drawn from the hiring of a substantially younger replacement worker are the same as those that can be drawn from treating substantially younger employees more favorably than older ones. The issue in both cases is whether the plaintiff was discriminated against based upon his or her age, not whether the comparator or replacement worker was under 40. As Justice Scalia observed, while age 40 is the cut-off point for those protected by the law, that fact does not require that the plaintiff prove he or she was treated less favorably than someone outside the protected class.

b. Other courts have applied Justice Scalia’s substantially younger test to comparator evidence.

Although *O'Connor* dealt with replacement evidence, rather than comparator evidence, a number of courts have applied the substantially younger test to both comparator evidence and replacement evidence under the ADEA. *See, e.g., Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 513 (4th Cir. 2006) (“To establish a *prima facie* case under the ADEA, a plaintiff must demonstrate . . . she was replaced by or treated less favorably than a substantially younger individual with similar qualifications.”); *Hagedorn v. Veritas Software Corp.*, 129 Fed. Appx. 1000, 1002 (6th Cir. 2005) (“[A]n ADEA plaintiff may establish the fourth element of his *prima facie* case by presenting evidence that he was treated less favorably than a similarly situated substantially younger employee”). *See also Breen v. Mineta*, 2005 U.S. Dist. LEXIS 35416, *10-11 (D.C. 2005) (“To make a *prima facie* showing of age-based discrimination in this case, plaintiffs must show that . . . they are

disadvantaged in favor of substantially younger people.”).

- c. **This Court should articulate the correct test and apply Justice Scalia’s substantially younger test to comparator evidence in age discrimination cases arising under the WVHRA.**

As explained more fully *supra*, *Young* inadvertently adopted the over 40/under 40 test, without citation to or discussion of *O’Connor*, and without the benefit of briefing from the parties that addressed the issue. The analysis in *Young* is mistaken because it failed to consider the differences between a race discrimination case, as in *Barefoot*, and an age discrimination as in *Young*. In a race discrimination case (as in gender, religious or disability discrimination), one compares a person of one category to a person of another category in order to show disparate treatment. Age discrimination, however, is not limited to discrimination favoring those under 40 or to those over 40 because “old” and “young” – unlike black or white, male or female, disabled or not disabled, Christian or Jew – are relative concepts. By incorporating the analysis for cases involving race discrimination where the issue is whether, for example, a person of one race is treated differently than a person from another race, *Young* mistakenly turned age discrimination into a dichotomy of “old” and “young” rather than acknowledging that age is not an easily categorized either/or concept. The lack of discussion in *Young* of the difference between age and other types of discrimination explained by Justice Scalia in *O’Connor* has resulted in a case which, if left to stand, would decimate the protection against age discrimination in West Virginia. Under *Young*, a plaintiff who is 40 could make out a case of age discrimination by comparing himself with a person who is 39 who received more favorable treatment, but a plaintiff who is 65 could not make out a case of age discrimination by comparing his treatment to a person who is 40 who received more favorable treatment. This result is inconsistent with federal and other state law and is inconsistent with the purpose of the WVHRA. As such, this Court should overrule *Young*’s implicit adoption of the over

40/under 40 analysis for comparator evidence.

d. Mrs. Knotts has raised sufficient comparator evidence to support a *prima facie* case of age discrimination.

Mrs. Knotts has raised sufficient evidence to support a *prima facie* case of age discrimination because her comparators – Dr. Bender, Ms. Painter and Ms. Lepka – are substantially younger than she is such that a jury could infer a discriminatory motive from GCH’s disparate treatment of her for her alleged violations of HIPAA and Confidentiality Policy in comparison its treatment of others who clearly violated those policies. As explained *supra*, age differences of ten or more years have generally been held to be sufficiently substantial. *See Grosjean*, 349 F.3d at 338-339. In this case, the age differences between Mrs. Knotts on the one hand and Dr. Bender, Ms. Painter and Ms. Lepka on the other hand are sufficiently substantial such that a jury could infer discriminatory intent. Dr. Bender was 50 at the time of Mrs. Knotts’ termination, and is thus more than 15 years younger than Mrs. Knotts. (App. 0298). Ms. Painter was 48 at the time of Mrs. Knotts’ termination, and is therefore more than 17 years younger than Mrs. Knotts. (App. 297). Ms. Lepka was 41 at the time of Mrs. Knotts’ termination (and barely 40 at the time of her own infraction), making her more than 24 years younger than Mrs. Knotts. (App. 0667). Because each of these individuals are substantially younger than Mrs. Knotts despite the fact that they were over 40 at the time of their violations of HIPAA and/or the Confidentiality Policy, they are not, as a matter of law, excluded as comparators in Mrs. Knotts’ *prima facie* case of discrimination.¹³ Mrs. Knotts has presented sufficient

¹³ The circuit court also found that GCH’s response to the arrest of Mr. Setler “failed to provide an inference of age discrimination” because Mr. Setler’s conduct did not involve violations of the patient privacy and confidentiality policies. (App. I, 0009). The circuit court’s finding in this regard is in error because individuals are not required to be identical in order to be comparators in a disparate treatment case. *See WVHRA Vehicle Systems, Inc. v. Cheeks*, 218 W. Va. 703, 715-716, 629 S.E.2d 762, 774-775 (2006). (“The test is whether a ‘prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.’ Exact correlation between employees’ cases is not necessary; the proponent of the evidence must only show that the cases are ‘fair congeners.’”). In analyzing comparators, it is important to remember why courts engage in such an analysis. The underlying issue is

replacement and comparator evidence to make out a *prima facie* case of age discrimination and the circuit court's 07/08/14 MSJ Order concluding otherwise should be reversed.

C. The Circuit Court Erred in Finding That Mrs. Knotts Had Not Presented Sufficient Evidence That GCH's Purported Legitimate Nondiscriminatory Reason for Terminating Her Was Pretextual by Construing Certain Evidence of Pretext in Favor of GCH and by Ignoring Other Evidence of Pretext

Once an employee establishes a *prima facie* case of discrimination, the employer has the opportunity to articulate a legitimate nondiscriminatory reason for its action. "Pretext' means an ostensible reason or motive assigned as a color or cover for the real reason or motive; false appearance; pretense." *W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n*, 181 W. Va. 525, 531, 383 S.E.2d 490, 496 (1989). "A proffered reason is a pretext if it was not 'the true reason for the decision[.]'" *Mayflower Vehicle Sys. v. Cheeks*, 218 W. Va. 703, 714, 629 S.E.2d 762, 773 (2006). Pretext may be demonstrated "through direct or circumstantial evidence of falsity or discrimination; and where pretext is shown, discrimination may be inferred." *Id.*

Reliance on evidence of pretext is essential in proving discrimination because employers rarely admit to their discriminatory motives and plaintiffs must instead rely on circumstantial evidence, including evidence that the employer's nondiscriminatory reason for the employment action is pretextual. As Justice Cleckley observed:

In assessing the inferences that may be drawn from the circumstances surrounding a termination of employment, the circuit court must be alert to the fact "employers are rarely so cooperative as to include a notation in the personnel file" that their actions were motivated by factors expressly forbidden by law. As a result, a victim of discrimination is seldom able to prove a claim by direct evidence and is usually

whether the employer really fired the employee for the alleged misconduct. To evaluate that issue, one looks around the workplace to determine how the employer treats other employees who engage in similar, analogous or even more serious violations of policies. Where one determines that no one else has ever been disciplined for the conduct at issue (as in the present case) and that substantially younger employees who have engaged in equal or more egregious conduct are given a free pass, one can and, in this case, should infer that Mrs. Knotts was not fired for the alleged misconduct, but rather that age was a motive in the discharge decision.

constrained to rely on circumstantial evidence.

Hanlon v. Chambers, 195 W. Va. 99, 106, 464 S.E.2d 741, 748 (1995) (internal citation omitted).
See also Nestor v. Bruce Hardwood Floors, L.P., 210 W. Va. 692, 694, 558 S.E.2d 691, 694 (2001)
("In employment discrimination cases, there is often very little direct evidence of discriminatory intent. This Court has said that because discrimination is essentially an element of the mind, there will probably be very little direct proof available.").

Pretext is a particularly powerful type of circumstantial evidence to support an inference of discrimination, and its value arises from a common sense understanding of human behavior: when someone lies about the reasons for his action, it is reasonable to infer that he does not want us to know the true reason. Likewise, where an employer's purported reason for firing an employee is not worthy of belief, it is reasonable to infer that the employer offers a false reason for the firing because the true reason involves a discriminatory animus.

GCH contended that Mrs. Knotts was terminated for violating HIPAA and the Confidentiality Policy. Consistent with recognized formulations for proving discrimination, Mrs. Knotts presented compelling evidence that GCH's proffered reason for terminating her was pretextual. The circuit court nonetheless found that Mrs. Knotts had not presented sufficient evidence that GCH's purported reason for terminating her was pretextual. In so doing, the circuit court failed to construe the facts and inference in Mrs. Knotts' favor and, instead, construed the evidence in GCH's favor.

In evaluating Mrs. Knotts' evidence of pretext, it is important to remember that she did not rely on an isolated item of evidence to support a conclusion that the reasons given for her firing were pretextual. Rather, as discussed below, Mrs. Knotts offered a number of different reasons, supported by the record she submitted in opposition to summary judgment, why a jury could infer that the reasons GCH offered for firing her were a pretext for discrimination.

1. **The circuit court erroneously construed certain evidence of pretext in favor of GCH.**

In its 07/08/14 MSJ Order, the circuit court cited only two of Mrs. Knotts' proffered bases for a finding of pretext: that her conduct did not actually violate the policy that she was accused of violating and that members of GCH's management did not understand HIPAA or the Confidentiality Policy. (App. I, 0021).¹⁴ The circuit court concluded that "no reasonable fact-finder could draw . . . an inference" from those two factors that GCH's proffered reason for terminating Mrs. Knotts was pretextual. (App. I, 0022). This conclusion was in error.

The issue is whether there was evidence that the reasons proffered by GCH for firing Mrs. Knotts are unworthy of belief, *i.e.* pretextual. Mrs. Knotts presented substantial evidence that those reasons were not worthy of belief because her conduct did not violate HIPAA or the Confidentiality Policy that GCH accused her of violating, either as those policies were written or were taught to her. This evidence included the undisputed evidence that Mrs. Knotts never disclosed any confidential health information to anyone, and Ms. Rinck's undisputed testimony that the training she gave Mrs. Knotts and her other employees was limited to informing them that they could not disclose information they learned during their employment. (App. II, 0467). In fact, the very reminder memorandum which GCH relies on for claiming that Mrs. Knotts had been trained on HIPAA in the weeks leading up to her termination only warned employees not to disclose information they learned during their employment. (App. I, 0269). And, GCH's own expert, Ms. Heindel, could not articulate how the training provided by GCH to Mrs. Knotts would inform

¹⁴ Of course, the circuit court also discussed, but rejected, Mrs. Knotts' comparator evidence, which is evidence of both her *prima facie* case as well as evidence of pretext, as a matter of law on the basis of *Young*. See *W. Va. Human Rights Comm'n v. Logan-Mingo Area Mental Health Agency, Inc.*, 174 W. Va. 711, 721, 329 S.E.2d 77, 87 (1985) ("Although evidence of disparate treatment is utilized in establishing a *prima facie* case, such evidence is also probative of pretext." (citing *McDonnell Douglas*, 411 U.S. at 804)).

her that what she did – asking Mrs. Green and her son what was wrong – was a violation of HIPAA or the Confidentiality Policy.

A reasonable fact-finder could, in fact, draw an inference of discrimination from evidence that Mrs. Knotts did not actually violate GCH’s policy and/or HIPAA, and/or did not violate the policy as it was taught to her and understood by her supervisor. **Most important, a reasonable factfinder could conclude that, based on this evidence, GCH management could not reasonably have believed that Mrs. Knotts violated either policy when she spoke briefly to Mrs. Green, to Cordale Green or the EMS workers.** As a result, the evidence **does** support an inference of pretext. *See Loudermilk v. Best Pallet Co., LLC*, 636 F.3d 312, 315 (7th Cir. 2011) (“[A]n employer who advances a fishy reason takes the risk that disbelief of the reason will support an inference that it is a pretext for discrimination.”); *see also Stalter v. Wal-Mart Stores, Inc.*, 195 F.3d 285, 290 (7th Cir. 1999) (reversing summary judgment for employer where plaintiff had been purportedly fired for theft after eating corn chips from open bag in break room after concluding the incident did not “fit within a reasonable understanding of the term ‘theft’” and that “jury could certainly infer . . . claim of theft” was pretextual).

GCH’s explanation for terminating Mrs. Knotts is “fishy” and the conduct which she was accused of “did not fit within a reasonable understanding” of HIPAA or the Confidentiality Policy. GCH nonetheless continues to accuse Mrs. Knotts of violating HIPAA and the Confidentiality Policy prohibiting *disclosure* of information she learned through her employment at GCH despite the fact that GCH’s witnesses all agree that Mrs. Knotts did not disclose any protected health information. (App. II, 0315, 0431). None of GCH’s witnesses provided a coherent explanation for how Mrs. Knotts could violate a policy that prohibits disclosure of information to third parties when she did not disclose any information to third parties. (App. II, 0487) (Shaw suggesting that asking patient

how they are doing is “discussing patients or their visitors” with someone in violation of Confidentiality Policy); (App. II, 0313) (Barcus testifying that “asking a patient what is wrong with them when you don’t have any direct contact with their care – as a housekeeper, Jeanne had no need to know about this patient’s condition. And so seeking that information is a violation of confidentiality.”); (App. II, 0431) (Kimbrew testifying that Knotts’ conduct violated the policy “[b]ecause she was accessing information that, based upon her job, she shouldn’t have had access to. She was acting on behalf of the hospital as a housekeeper. She was not giving direct patient care to that individual, so she had no reason to contact that in – individual.”). GCH’s lack of a coherent explanation for how Mrs. Knotts’ conduct violated HIPAA and the Confidentiality Policy is evidence from which a jury conclude that the proffered reason for terminating her is not the true reason, *i.e.* the reason was a pretext for firing an older employee.

Likewise, a reasonable fact-finder could conclude that the reason for terminating Mrs. Knotts was pretextual from evidence that GCH’s own management team did not understand HIPAA or the Confidentiality Policy. The testimony from GCH management demonstrating their own confusion about the requirements of HIPAA and the Confidentiality Policy, and the testimony of Ms. Heindel, including her failure to identify how Mrs. Knotts would have been able to understand from the training materials that her conduct was inappropriate, is additional substantial evidence from which a jury could easily infer that GCH’s proffered reason for terminating Mrs. Knotts was pretextual.

2. The circuit court ignored other substantial evidence of pretext in its 07/08/14 MSJ Order.

The circuit court’s 07/08/14 MSJ Order ignored other, substantial evidence of pretext that was submitted by Mrs. Knotts in her opposition to summary judgment. First and foremost, the evidence of HIPAA and Confidentiality Policy violations by other GCH employees discussed *supra* is strong evidence of pretext as well as evidence supporting a *prima facie* case. Because the circuit

court applied the over 40/under40 test, it likewise failed to consider GCH's disparate treatment of other substantially younger employees who unquestionably had violated HIPAA and the Confidentiality Policy. Applying Justice Scalia's substantially younger test, evidence that Mrs. Knotts was treated more harshly than Dr. Bender, Ms. Painter, and Ms. Lepka, who each engaged in conduct far more egregious than Mrs. Knotts did, is strong evidence that GCH's proffered reason for terminating Mrs. Knotts' employment was pretextual.

Additionally, courts have recognized that changes in the reasons an employer uses to justify an employment decision can lead to an inference that the proffered justification is not credible. *See Gallo v. John Powell Chevrolet Inc.*, 765 F. Supp. 198, 210 (M.D. Pa. 1991) (fact that employer's alleged reasons were not asserted until hearing "casts doubt on their authenticity and suggests that they were fabricated after the fact to justify a decision made on other grounds"). Shifting reasons or defenses between the time of the adverse action and the time of the hearing are also strong evidence of pretext. *See, e.g., Smith v. American Service Co.*, 611 F.Supp. 321, 328 (N.D. Ga. 1984) (concluding that because defendant's initial reason for selecting white person over plaintiff changed, defendant had no legitimate nondiscriminatory reason for decision).

Mrs. Knotts submitted evidence that GCH's alleged reasons for firing Mrs. Knotts did, in fact, change over time. GCH initially alleged that Mrs. Knotts was fired for, among other things, asking EMS workers what floor a patient came from. GCH has all but abandoned its defense of this rationale for the firing during the course of litigation, which is hardly surprising since common sense suggests there is nothing wrong with a housekeeping employee trying to find out where a newly vacated bed is so that she can attend to it. Even GCH's expert, Ms. Heindel, could not find a violation of any policy in Mrs. Knotts' question to the EMS workers. (App. II, 0533-0534). GCH clearly relied upon the EMS incident in its decision to terminate Mrs. Knotts. (App. I, 0240-0241;

App. II, 0313, 0430, 0495). Yet, once it became apparent that GCH could not defend its reasoning, it confined this alleged reason for the firing to a footnote in its briefing in the circuit court. (App. I, 0029).

There is also evidence supporting an inference that, even if GCH believed that Mrs. Knotts actually violated policies, termination from employment was inconsistent with common sense and with GCH's conduct in other cases. Mrs. Knotts has already discussed the manner in which GCH treated other employees whose conduct did, in fact, violate HIPAA or the GCH Confidentiality Policy. None of these individuals were disciplined, let alone fired. Even Ms. Heindel, GCH's expert, did not seem to believe that Mrs. Knotts' conduct merited firing. (App. II, 0531) (refusing to take a position on whether Mrs. Knotts should have been fired).

Although an employer is not necessarily obligated to follow its own employment policies, an employer's selective application of those policies can support an inference of discrimination. *See, e.g., Wallace v. DTG Operations, Inc.*, 442 F.3d 1112, 1123 (8th Cir. 2006) (selective application of a policy could be evidence of pretext). In this case, GCH's selective application of the Corrective Discipline Policy to Mrs. Knotts suggests that its proffered reason for terminating Mrs. Knotts was pretextual. Under the Corrective Discipline Policy, employees are generally subject to progressive discipline. (App. I, 0238-0239). The exception is for critical offenses, which include, *inter alia*, the following types of conduct:

- a) The use, possession or reporting for duty or being on duty under the influence of alcohol, narcotics or a controlled substance, or unprescribed drugs.

- g) Violation of State or Federal Laws.

- j) Any act jeopardizing the well-being of a patient.

- m) Violation of medical patient or personnel confidentiality. Unauthorized disclosure of information including unauthorized possession, use, copying or revealing of confidential information regarding patients, employees or

Hospital activities.

- p) Conduct seriously detrimental to patient care, fellow employees, or Hospital operations.

(App. I, 0238-0239). Although Mrs. Knotts was fired without even the courtesy of asking her what happened, (App. II, 95 Barcus), GCH manager Barcus could not identify a single other employee of GCH other than Mrs. Knotts who had ever been terminated without any progressive steps under the Corrective Discipline Policy during her tenure at GCH. (App. II, 0125).

In stark contrast, GCH failed to discipline in any way at least one other employee who had engaged in conduct which unequivocally fell under no less than three categories of critical offenses warranting immediate termination under the Corrective Discipline Policy. (App. I, 0238-0239) (identifying use or possession of drugs, violations of federal or state law and conduct detrimental to patient care or hospital operations as conduct which warrants immediate termination). Timothy Setler, an admissions clerk at GCH who is 30 years younger than Mrs. Knotts, was arrested while on the job, for possession of drugs outside of work, but suffered no adverse employment action whatsoever. (App. II, 0330). Mr. Setler's conduct involved the possession of drugs, violations of state law, and conduct detrimental to patient care or hospital operations, all critical offenses under the Corrective Discipline Policy. (App. I, 0238-0239). GCH's failure to discipline Mr. Setler or even conduct an investigation into his conduct calls into question GCH's claim that Mrs. Knott's purported misconduct was a "critical offense" severe enough to warrant termination rather than some other, less drastic measure. An employer who truly feels compelled to fire an employee such as Mrs. Knotts for asking a close friend and her son what is wrong when they show up in the ER is not likely to so easily overlook another employee's arrest for illegal drugs on its own premises. GCH was so forgiving of Mr. Setler's drug arrest that it did not investigate his conduct, subject him to a drug test

upon his return to work, or apply the Corrective Discipline Policy to him at all. GCH's casual attitude toward an employee arrested for drugs while on the job calls into question the credibility of its unforgiving attitude toward Mrs. Knotts and supports an inference that the proffered reasons for her firing are not credible.¹⁵

The circuit court also failed to consider other evidence that GCH management has not been truthful in its testimony and allegations. For instance, Ms. Barcus testified at her deposition that, during the course of her investigation, she asked Ms. Davis if she was "standing close" to Mrs. Knotts when she warned her about asking Mrs. Green what was wrong, if Mrs. Knotts "was looking at her" at the time, if Ms. Davis had Mrs. Knotts' attention, and whether there was any disruptiveness or chaos going on at the time. (App. II, 0312). Yet, Ms. Barcus simultaneously claimed she did not know that Mrs. Knotts had a hearing impairment until after Mrs. Knotts was fired. (App. II, 0312).

Similarly, there is evidence from which a jury could infer that senior HR manager Kimbrew's was not credible. In an attempt to justify Ms. Painter's conduct in announcing the death of a patient on Facebook, Ms. Kimbrew testified in her deposition that, despite GCH's clear policies prohibiting the disclosure of patient information, it was nonetheless acceptable for Ms. Painter to post information on Facebook because she had "work[ed] with the same patients day in and day out . . . form[ing] bonds, . . . form[ing] relationships" with them, and becoming "like family members" to them. (App. II, 0449). When questioned how the Painter exception to patient confidentiality was

¹⁵ The circuit court concluded that this evidence "failed to provide an inference of age discrimination" because Mr. Setler's conduct did not involve violations of the patient privacy and confidentiality policies. (App. I, 0009). However, even if one rejects the treatment of Mr. Setler as comparator evidence, as noted above, it is nonetheless relevant to the credibility of GCH's insistence that Mrs. Knotts' alleged transgressions were so serious that it had no choice but to fire her.

different from Mrs. Knotts' asking Mrs. Green, an individual who regarded Mrs. Knotts as a mother, what was wrong, Ms. Kimbrew changed her story and testified that Ms. Painter's conduct was permissible because she was essentially off the clock at the time she made the post and did it from home, rather than at GCH. (App. II, 0452-0453).¹⁶ Perhaps recognizing that this answer made no sense and was inconsistent with GCH's policies, Ms. Kimbrew then changed her rationale yet again and testified that "it would be each individual's opinion as to whether [the Facebook post] was appropriate or not." (App. II, 0453).

The circuit court also failed to acknowledge in the 07/08/14 MSJ Order GCH's posting of the GCH Is Happy Video. (App. I, 0001-0011). Although the circuit court did acknowledge the video in its 07/08/14 MTA Order, it dismissed the video's value as evidence of pretext. It defies credulity, however, to believe that GCH would video and broadcast images of its patients and/or long-term residents on the internet, a medium that the entire world can see, while simultaneously insisting that it was so offended by Mrs. Knotts asking Mrs. Green if she was okay that it had no choice but to summarily fire her. Publishing this video on the internet is a much greater intrusion into patient privacy than anything Ms. Knotts was accused of doing. The video was thus evidence of pretext undermining GCH's proffered reason for terminating Mrs. Knotts. If Mrs. Knotts' conduct was a violation of HIPAA or the Confidentiality Policy at all, it was benign in comparison to the posting of the GCH is Happy Video, showing images of residents, some of whom appear to

¹⁶ Inexplicably, counsel for GCH argued the same distinction in the circuit court proceedings when it contended that two of Mrs. Knotts' proffered comparators, Diane Painter and Sherry Lepka, are not similar to Mrs. Knotts because their disclosures of protected medical information of patients were "off work time." (App. I, 0046-0047). This does not comport with common sense, nor does it comport with the testimony of GCH's own expert that a person would be violating HIPAA and/or the Confidentiality Policy if the person took information learned while at work and disclosed it later, off-the-clock. (App. II, 0556) The very purpose of HIPAA and confidentiality policies is to prevent such disclosures, on or off the clock.

be asleep or entirely unaware of their surroundings. (App. I, 0299). The posting of this video to the internet discloses particular individuals who are patients of GCH and who can easily be identified by anyone who knows them. In light of the compelling evidence of pretext, the circuit court's conclusion in the 07/08/14 MSJ Order that Mrs. Knotts failed to present sufficient evidence of pretext should be reversed.

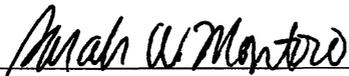
VI. CONCLUSION

Wherefore, for the foregoing reasons, Mrs. Knotts respectfully requests an order from this Court reversing the decision of the circuit court and vacating the July 8, 2014 Findings of Fact, Conclusions of Law, and Order on Defendant's Motion for Summary Judgment and remanding this case to the circuit court for trial.

Respectfully submitted,
PETITIONER,
BY COUNSEL.



ALLAN N. KARLIN (WV BAR # 1953)
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266



SARAH W. MONTORO (WV BAR # 10239)
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266

CERTIFICATE OF SERVICE

I, SARAH W. MONTORO, attorney for the plaintiff, do hereby certify that service of the within and foregoing "Petitioner's Appeal Brief" was made upon the party hereinbelow listed by first class mail, addressed as follows:

Mario R. Bordogna
Julie A. Arbore
Steptoe & Johnson
PO Box 1616
Morgantown, WV 26507

all of which was done on the 7th day of November 2014.



SARAH W. MONTORO
WV BAR # 10239
ALLAN N. KARLIN & ASSOCIATES
174 CHANCERY ROW
MORGANTOWN, WV 26505
304-296-8266