# STATE OF WEST VIRGINIA
# SUPREME COURT OF APPEALS

**Charles D. Thomas,**
**Plaintiff Below, Petitioner**

**vs) No. 11-0253** (Kanawha County 10-C-30)

**Boyd's Family Home Medical, Inc.**
**and Jeffrey A. Boyd,**
**Defendants Below, Respondents**

**FILED**
**November 28, 2011**
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

## MEMORANDUM DECISION

Plaintiff below, Charles D. Thomas, appeals an adverse summary judgment order in an age discrimination suit. Defendants below, Boyd's Family Home Medical, Inc. and Jeffrey A. Boyd, have filed a response brief.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

### I.

Mr. Thomas asserts that his employment with Boyd's Family Home Medical, Inc. was terminated on July 27, 2009, because of his age, fifty-six years, in violation of the West Virginia Human Rights Act ("Act"), West Virginia Code §§ 5-11-1 to -20. Defendant Jeffrey A. Boyd is a shareholder of the corporate defendant who has a managerial role. The defendants deny the allegations.

The circuit court granted summary judgment in favor of the defendants upon concluding that they are not subject to the Act. The Act deems it an unlawful discriminatory practice for an "employer" to discriminate against an employee on the basis of, *inter alia*, age. W.Va. Code § 5-11-9. Under the statutory definition, an "employer" subject to the Act must employ twelve or more people for a twenty week period:

> The term "employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state for twenty or more calendar weeks in the calendar year in which the act of discrimination allegedly took place or the preceding calendar year: Provided, That such terms shall not be taken, understood or construed to include a private club[.]

W.Va. Code § 5-11-3(d) [1998]. The circuit court found that during the time period of May 15 to October 1, 2009, Boyd's Family Home Medical, Inc. employed ten employees. The circuit court found that in other time periods, the corporate defendant employed between seven and ten people. Accordingly, the circuit court concluded that the corporate defendant is not an "employer" for purposes of the Act. The circuit court also found that the individual defendant, Jeffrey A. Boyd, cannot be liable as a person involved in an unlawful discriminatory practice pursuant to West Virginia Code § 5-11-9(7) because he did not employ plaintiff and because neither he nor the corporate defendant employed enough people to be a "employer" subject to the Act.

Plaintiff argues that the statutory minimum number of employees was met because the corporate defendant employed a total of thirteen different people during the period May 15 to October 1, 2009. Plaintiff argues that the circuit court erroneously counted only persons who were employed at the same time. The circuit court found that plaintiff's argument misinterprets the statutory language. Citing *Kalany v. Campbell*, the circuit court noted policy reasons behind the legislative scheme of exempting employers with fewer than twelve employees. 220 W.Va. 50, 57 and 57 n.14, 640 S.E.2d 113, 120 and 120 n.14 (2006).

This Court reviews a circuit court's entry of summary judgment under a de novo standard of review. Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Upon a careful review of the record and arguments, this Court finds no error. The Act provides that twelve or more employees must be employed "for twenty or more calendar weeks" in the calendar year of the alleged discrimination or in the preceding calendar year. W.Va. Code § 5-11-3(d) [1998]. This clearly indicates that the minimum must be met for at least twenty weeks. Plaintiff's argument is not contemplated by the statutory language.

**II.**

Separate from his statutory claim, plaintiff alleges in his petition for appeal that terminating his employment because of his age is actionable at common law because it breaches a substantial public policy of West Virginia. Plaintiff argues that this public policy is derived from the Human Rights Act. The circuit court also rejected this argument in the summary judgment order, but for a reason different than our basis for affirmance herein. "'This Court may, on appeal, affirm the judgment of the lower court when it appears that

such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.' Syl. pt. 3, *Barnett v. Wolfolk*, 149 W.Va. 246, 140 S.E.2d 466 (1965)." Syl. Pt. 1, *State ex rel. Gordon v. McBride*, 218 W.Va. 745, 630 S.E.2d 55 (2006) (per curiam). As set forth above, we apply a de novo standard of review to appeals of summary judgment orders.

In the context of a sex discrimination allegation, we have permitted a common law retaliatory discharge claim against an employer with fewer than twelve employees. Specifically, in *Williamson v. Greene* we held as follows:

> Even though a discharged at-will employee has no statutory claim for retaliatory discharge under *W.Va.Code*, 5-11-9(7)(C) [1992] of the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed, as required by *W.Va.Code*, 5-11-3(d) [1994], the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, *W.Va.Code*, 5-11-1, et seq.

Syl. Pt. 8, *Williamson v. Greene*, 200 W.Va. 421, 490 S.E.2d 23 (1997). However, plaintiff's Complaint did not assert a cause of action for common law retaliatory discharge. The Complaint makes factual assertions about a public policy against discharge from employment because of age, but those assertions are made in the context of his statutory claim.

For the foregoing reasons, we affirm.

Affirmed.

**ISSUED:** November 28, 2011

**CONCURRED IN BY:**

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh