IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, WEST VIRGINIA

DONALD BURACKER and
JAY LONGERBEAM,

Plaintiff,

v.

Civil Action No. 19-2020-C-52
Judge Michael D. Lorensen

SHEPHERD UNIVERSITY,

Defendant.

ORDER GRANTING DEFENDANT SHEPHERD UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT

The Court considered Defendant Shepherd University's Motion for Summary Judgment, the response of Plaintiff Jay Longerbeam, and the movant's reply, as well as oral argument, and based on the foregoing, the Court finds that there is no genuine issue of material fact in dispute in this matter and that Shepherd University is entitled to summary judgment in its favor on each of the Plaintiff's claims. Accordingly, the Court does hereby GRANT the motion based on the following findings of fact and conclusions of law.

FINDINGS OF FACT

Jay Longerbeam was hired on March 4, 2017 as a Campus Police Investigator 1.[1] He was then 43 years of age when hired and was 48 at time that the subject motion was filed.[2] At all times relevant to the Plaintiff's employment and notably at the time he was hired, the Shepherd University Police Department was headed by then Chief John McAvoy.[3] Chief McAvoy reported

[1] All references herein are to the Exhibits offered by the movant in support of its Motion. See Exhibit A, Excerpts from Deposition of Jay Longerbeam, at 22.

[2] *Id.* at 9-10.

[3] See Exhibit B, Excerpts from Deposition of John McAvoy, at 12.

to the Director of Community Relations, Holly Frye, at the time of the termination of the Plaintiff's employment.[4] Ms. Frye was assigned this responsibility by Shepherd's President, Dr. Mary J.C. Hendrix, upon the departure of James Vigil, a former VP of Administration.[5]

In the fall of 2018 and January of 2019, Plaintiff was involved in two matters that ultimately raised concerns with Shepherd University's administration. In the first, he entered a college dorm room without a warrant and without the consent of the residents, threatened to strike a student with his flashlight, and assisted another officer in initiating charges against several Shepherd athletes and the issuance of citations to a number of other students for underage consumption of alcohol.[6] The report of the officers' investigation was significantly different than their actions as apparent from the body camera footage.[7] While it was claimed that probable cause for the entry was based on the breathalyzer results of several underage students, those tests were actually not administered until later in the evening.[8] On January 6, 2019, Plaintiff participated in the arrest of two of the same athletes involved in the October 7, 2018 incident along with Donald Buracker.[9] The University received reports of concerns from the parents of the athletes.[10] Chief McAvoy and Ms. Frye performed an extensive investigation of the two matters, including the review of reports and body camera footage and other contributing information.[11]

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[4] *Id.* at 33.

[5] *Id.* at 35-36; see also Exhibit C, Excerpts from Deposition of Dr. Mary J.C. Hendrix, at 11-12.

[6] Exhibit B, at 114-115.

[7] *Id.* at 55-56, 121, ; Exhibit D, Excerpts from Deposition of Holly Frye, at 35-8, 50-51, 60-62.

[8] Exhibit B at 55-56.

[9] Exhibit B at 86-89, 134.

[10] *Id.* at 143; Exhibit D, at 35-38, 50-51, 60-62.

[11] Exhibit B at 142-43, 145-46; Exhibit D at 35-38, 50-51, 60-61.

On April 11, 2019, Chief McAvoy, Ms. Frye and Shepherd's General Counsel, Alan Perdue, conducted a meeting with the Plaintiff at which Plaintiff was represented by counsel.[12] The handling of the subject incidents was discussed with Plaintiff. At the conclusion of the meeting, Plaintiff was placed upon an administrative leave of absence, pending further review. On April 23, 2019, President Mary Hendrix directed a letter to Plaintiff advising him that Ms. Frye had recommended the termination of his employment and provided detailed reasons, which included misconduct in the October 7, 2018 matter and unprofessionalism in the January 6, 2019 traffic stop.[13] Plaintiff and his counsel met with Shepherd's Director of Human Resources, Dr. Marie DeWalt, on April 30, 2019, pursuant to Shepherd's policy providing for a pre-termination hearing.[14] After being advised by Dr. DeWalt that no compelling reason was demonstrated at the April 30, 2019 hearing to change the recommendation, Dr. Hendrix sent the Plaintiff a letter advising him of her decision to terminate his employment effective May 2, 2019.[15]

Plaintiff filed a grievance with the West Virginia Public Employee Grievance Board on May 10, 2019, challenging the termination of his employment.[16] In his grievance, he cited wrongful termination and violation of civil service rules as the basis for his grievance. No mention was made of alleged age discrimination or retaliation for whistleblower activities.[17] His grievance remains pending, at his request, awaiting the outcome of this civil litigation.

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[12] Exhibit A at 23.

[13] Exhibit E, April 23, 2019 letter.

[14] Exhibit A, at p. 23; Exhibit F, Excerpts from Deposition of Dr. Marie DeWalt at 75-76.

[15] Exhibit G, May 2, 2019 letter.

[16] Exhibit A, at 23-24; Exhibit H: Plaintiff's Level 1 Grievance

[17] Exhibit A, at 24.

1. Age Discrimination

In his response to Shepherd's written discovery requests seeking support for his contention that he was "continuously treated disparately compared to younger officers at Shepherd University, and explain in detail your claim that this took the form of you 'being held to a different, more stringent standards in terms of responsibilities,'" Plaintiff indicated that he "actually enforced the law" while "the younger officers who did not patrol, did not write citations continued to work for the department while myself [sic] and Donald Buracker were terminated for enforcing the laws." He also contends the younger officers did not routinely utilize their body camera, did not maintain department vehicles or fill them with gas, while another was routinely late.[18] This was also his sworn deposition testimony.[19]

The Plaintiff further testified in his discovery deposition that he was never subject to discipline until the time of the suspension and termination of his employment but that he had been instructed at various times to do something differently or refrain from certain conduct.[20] As far as his assertion that younger officers were held to less stringent standards of discipline, he merely cited that other officers were not required to follow department procedures as to cleaning and maintaining department vehicles or wearing their body cameras and keeping their GPS units with them.[21] He also noted that he reported to one of the supervisors that a younger officer failed to patrol the campus and sat in the office doing personal work, but admitted that he did not know if the officer was counseled or disciplined.[22]

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[18] Exhibit I, Excerpts from Plaintiff's Response to Defendant Shepherd University's First Set of Combined Discovery Requests to Plaintiff Jay Longerbeam, Answer to Interrogatory No. 14.

[19] Exhibit A at 28-31.

[20] *Id.* at 31-33.

[21] *Id.* at 34-38.

[22] *Id.* at 38.

2. Retaliation for Reports of Age Discrimination

Plaintiff testified that his disclosure consisted of speaking with his supervisors about the fact that younger officers were not required to comply with department policy about vehicle maintenance.[23] Plaintiff acknowledged in his deposition that he made no such reports. He also indicated that he mentioned this in his interview during the morale meetings.[24] Background as to the cause for the meeting bears explanation. Sergeant Lori Maraugha was covering for Chief McAvoy while he was on vacation in January of 2019. Sergeant Maraugha received a number of written concerns about the manner in which Donald Buracker was treating his fellow officers. She provided this information to Ms. Frye. Ms. Frye communicated with Dr. DeWalt, who arranged for a series of meetings with each officer in the department by the HR Director and the University Ombudsperson, Professor Karen Green. A report was generated by Dr. DeWalt and Professor Green: the comments contained therein were not attributed to any officer. In fact, Dr. DeWalt testified that all notes from the interviews of the members of the police department were shredded when the final report was prepared.

3. Whistleblower

When asked to explain why he contends that he was a whistleblower, Plaintiff cited that he had questioned the use of an alternative disposition practice that Magistrate Gail Boober used when Shepherd students were charged with certain offenses, including underage consumption of alcohol and possession of controlled substances. Plaintiff testified that he first became aware of the process when he was in court before Magistrate Boober on December 17, 2017. At that time, he spoke with Chief McAvoy and the prosecuting attorney about the process as he did not feel that the

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[23] *Id.* at 75-76.

[24] *Id.* at 77.

students were able to present their case.[25]. In his Amended Complaint and in his discovery responses, Plaintiff reported that he met with Ms. Frye and Chief McAvoy about the process on April 6, 2018. While the Plaintiff testified in his deposition that he believed that the process denied the students certain rights, he did not recount raising this concern in the April 6, 2018 meeting in his deposition or discovery responses. He did not indicate to Ms. Frye or Chief McAvoy that he thought the process was illegal, nor could he recall whether he told Ms. Frye that he did not agree with the process.[26]

Plaintiff also claims to have been a whistleblower because he believes he was listed as a witness to the conduct of Shepherd Police Department's Sergeant J.D. Brown that was the subject of a complaint filed by Donald Buracker with the West Virginia Ethics Commission.[27] He was not a party to the ethics complaint.

Finally, Plaintiff contends that he provided a list of information "about what was wrong with the Department" in a morale meeting on or about February 6, 2019. (Interrogatory No. 21). Although his discovery responses indicate that a copy of the list was attached to his responses, no such list was contained in the 200 plus pages of documents he produced. In his deposition, he indicated that in this meeting, he criticized Chief McAvoy for his lack of staff meetings and not following department policies (the vehicle inspections and maintenance reports and wearing issued equipment).[28]

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[25] *Id.* at 39-44

[26] *Id.*

[27] *Id.* at 77-78.

[28] *Id.* at 62-63.

4. Refusal to Not Enforce the Law

Plaintiff further contends that his employment was terminated because he refused not to enforce the law. His explanation of this is that he was once told by Chef McAvoy that he did not need to take his citation book to every call.[29] He also disagreed with Chief McAvoy's instruction not to run traffic stops on the road adjacent to Shepherd even though the department officers had the legal jurisdiction to do so.[30] Plaintiff acknowledges that the Chief indicated his preference that the officers work on campus.[31] He also claims that he was told to look the other way with smoking and drinking. Once, he overheard a sergeant commenting that the Plaintiff should have cited the occupants and towed a student's car at the outset rather doing so after calling in a DUI recognition expert who was determined to be unavailable.[32]

CONCLUSIONS OF LAW

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. *Jochum v. Waste Management of West Virginia, Inc.*, 224 W. Va. 44, 680 S.E.2d 59 (2009). In Syllabus point two of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995), the court discussed the necessity of addressing each essential element of a cause of action in a multi-element claim, explaining as follows: "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing

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[29] *Id.* at 44.

[30] *Id.* at 71-72.

[31] *Id.* at 71-72; Exhibit B, at 20-21, 26-28.

[32] Exhibit A, at 50-51, 71-72

on an essential element of the case that it has the burden to prove." 194 W.Va. at 56, 459 S.E.2d at 333. Thus, if one element fails, there is no possibility for recovery, and the argument that there may be genuine issues of material fact regarding other elements will not permit a plaintiff to prevail against a defendant's motion for summary judgment.

In *Chafin v. Gibson*, 213 W. Va. 167, 171, 578 S.E.2d 361, 365 (2003), the court declared:

> The nonmoving party, in order to defeat a motion for summary judgment, must show that there will be sufficient competent evidence available at trial to warrant a finding favorable to the nonmoving party. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 60–61, 459 S.E.2d 329, 337–38 (1995). In *Gooch v. West Virginia Dept. of Public Safety*, 195 W.Va. 357, 465 S.E.2d 628 (1995), this Court explained that "[t]o meet its burden, the nonmoving party must offer 'more than a mere "scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor." *Id.* at 365, 465 S.E.2d at 636, quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202.

In *Jackson v. Putnam County Bd. Of Educ.* 221 W.Va. 170, 176-178, 653 S.E.2d 632, 638-640 (2007), the court discussed the standard as set forth by Justice Franklin D. Cleckley in *Williams v. Precision Coil*, 194 W.Va. 52, 459 S.E.2d 329 (1995):

> Rule 56 of the West Virginia Rules of Civil Procedure plays an important role in litigation in this State. It is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial, if there essentially is no real dispute as to salient facts or if it only involves a question of law. Indeed, it is one of the few safeguards in existence that prevent frivolous lawsuits from being tried which have survived a motion to dismiss. Its principal purpose is to isolate and dispose of meritless litigation.
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> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Syllabus point 3 of *Williams* provides that:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a

genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

Finally, in *Merrill v. WVDHHR*, 219 W. Va. 151, 160-161, 632 S.E.2d 307 (2006), the court declared that "self-serving assertions without factual support in the record will not defeat a motion for summary judgment." (citing *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 61 n. 14, 459 S.E.2d 329, 338 n. 14 (1995).

Even if properly verified, a party's discovery responses are not "sworn testimony." See *Jackson v. Putnam County Bd. Of Educ.* 221 W. Va. 170, 176-178, 653 S.E.2d 632, 638-640 (2007) (documents attached to discovery responses are not part of the court's file for consideration on summary judgment); *Ramey v. Contractor Enterprises, Inc.*, 225 W. Va. 424, 432, fn 15, 693 S.E.2d 789, 797, fn 15 (2010) ("Ordinarily, "[u]nsworn and unverified documents are not of sufficient evidentiary quality to be given weight in determining whether to grant a motion for summary judgment. Therefore, documents that do not state that they are made under oath and do not recite that the facts stated are true are not competent summary judgment evidence." 49 C.J.S. Judgments § 328 (2009)); *Harmon v. Morris*, 2021 WL 5033682 (2021).

In employment cases, the Court must first consider the terms under which an employee was employed. Here, Jay Longerbeam was employed at the will and pleasure by the Shepherd University Police Department pursuant to Chapter 18B, section 4-5 of the West Virginia Code. That law governs the employment of law enforcement officers by institutions of higher education:

> (a) The governing boards may appoint bona fide residents of this state to serve as campus police officers upon any premises owned or leased by the State of West Virginia and under the jurisdiction of the governing boards, subject to the conditions and restrictions established in this section....
>
> (e) A governing board may at its pleasure revoke the authority of any campus police officer and such officers serve at the will and pleasure of the governing board. The president of the state institution shall report the termination of employment of a campus

> police officer by filing a notice to that effect in the office of the clerk of each county in which the campus police officer's oath of office was filed.

The employment of persons employed under the at-will doctrine may be terminated at any time as long as it is not based on an illegal motive. *Harless v. First National Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, Syllabus Point (1978). In this suit, Plaintiff challenges the termination of his employment by Shepherd University and attributes the reasons to have been motivated by discrimination based on his age, his status as a whistleblower, as well as retaliation for raising concerns about discrimination against other employees as well as wrong-doing in the police department. The Court has considered each theory and for the reasons set forth below, concludes that the Plaintiff has not introduced evidence to establish a prima facie claim under any of his theories. Based on this conclusion, the burden does not shift to Shepherd University to demonstrate that the reason for the termination was not pretextual. However, the Court further declares that if he had, Shepherd University had legitimate non-discriminatory reasons for the termination of the Plaintiff's employment.

A. Plaintiff's age discrimination claim

To establish a *prima facie* case of employment discrimination under the WVHRA, the plaintiff must offer proof that (1) he is a member of a protected class, (2) his employer made an adverse decision concerning him, and (3) but for his protected status, the adverse decision would not have been made. *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986). The Supreme Court of Appeals of West Virginia has adopted the "substantially younger" rule in age discrimination employment cases brought under the WVHRA. *Knotts v. Grafton City Hosp.*, 237 W.Va. 169, 786 S.E.2d 188 (2016). Pursuant to the "substantially younger" rule, a plaintiff who is age forty or older satisfies the third prong of the *prima facie* discrimination test by presenting evidence that he was replaced by a "substantially younger" employee. *Id.* at 179. The

focus of a court's inquiry should be on whether the comparison employee was "substantially younger" who engaged in the same or similar conduct for which the plaintiff faced an adverse employment decision, received more favorable treatment. *Id.* at Syllabus Pt. 5.

Furthermore, merely being over the age of 40 is insufficient to establish an age discrimination claim. *Johnson v. Killmer*, 219 W. Va. 320, 324, 633 S.E.2d 265, 269 (2006) (holding that a 52-year-old plaintiff's age discrimination claim failed because she did not provide any evidence linking the termination decision to her protected status). The WVHRA prohibits discrimination against employees because of their age but does not ban any treatment against employees merely because they are over 40 years old. *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 177, 786 S.E.2d 188, 196 (2016); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312, 116 S. Ct. 1307, 1310 (1996). In addition to showing he is over 40 years old, a plaintiff must show he suffered an adverse employment action <u>*because*</u> of his age. *Id.*

Plaintiff's age discrimination claim fails because he cannot establish an essential element of his claim – that "but for his protected status, the adverse decision would not have been made." *Young v. Bellofram*, 227 W. Va. 53, 59, 705 S.E.2d 560, 566 (2020) (overruled on other grounds by *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 786 S.E.2d 188 (2016). Like the plaintiff in *Young*, Plaintiff Longerbeam cannot meet his *prima facie* burden as he has provided no evidence of the existence of a comparator who engaged in similar conduct and was either not disciplined or who was disciplined less severely.

The Court finds that Plaintiff produced no evidence that demonstrates that he was discriminated against on account of his age. Plaintiff's contention that he was held to a different standard than younger employees because they didn't have to follow department policies on vehicle maintenance is irrelevant. What is critical to the analysis is whether a substantially younger

officer who engaged in the same or similar conduct received more favorable treatment. By the Plaintiff's own admission, he had no knowledge of any other officer in the department who included materially false information in a report or treated student athletes differently than other students.[33] While the Plaintiff may have been more diligent in taking care of department vehicles and wearing his body camera, he received no discipline related to these tasks. Simply having been asked why he did not have the camera activated during a single incident does not demonstrate he was held to a different standard in any way of legal significance. The level of conduct for which the Plaintiff's employment was terminated – misconduct and unprofessionalism - is not by any means comparable to not washing a vehicle, seeing that it is full of gas at shift's end or reporting for work late. Notably, when Chief McAvoy was informed that not all officers were following the policy about vehicle inspections, he stopped the requirement, calling it "archaic."[34] Plaintiff himself admits that he not aware of any other officer who included false information in a report or treated athletes differently than other students under the same circumstances.

Consequently, Plaintiff has no comparators, younger or not. The record establishes that Plaintiff has no evidence that the adverse employment action taken against him was because of his age – an essential element of this cause of action. As a result, Plaintiff's age discrimination claim fails as a matter of law and summary judgment is appropriate.

B. WVHRA Retaliation

Plaintiff also claims that Shepherd University violated the WVHRA "by engaging in reprisals" for his "disclosures" of discrimination on the basis of age and disability. To establish a claim of retaliatory discharge under the WVHRA, the plaintiff must prove (1) that the plaintiff

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[33] Exhibit A at pp. 80-81.

[34] Exhibit B at 178-79.

engaged in protected activity, (2) that plaintiff's employer was aware of the protected activities, (3) that plaintiff was subsequently discharged, and (absent other evidence tending to establish a retaliatory motivation) (4) that plaintiff's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Syl. pt. 6, *Freeman v. Fayette County Bd. of Educ.*, 215 W.Va. 272, 599 S.E.2d 695 (2004). If the plaintiff makes a *prima facie* showing of retaliation, then the employer will still prevail if it shows that it took the adverse action for a legitimate, non-discriminatory reason. Syl. pt. 2, *Kanawha Valley Reg'l Transp. Auth. v. West Virginia Human Rights Comm'n*, 181 W. Va. 675, 383 S.E.2d 857 (1989). If the employer makes this showing, then the plaintiff is required to show that the legitimate, non-retaliatory reason for his termination was pretextual. Syl. pt. 4, *Conaway*, 178 W. Va. 164, 358 S.E.2d 423.

Plaintiff testified in his deposition that he questioned his superiors and reported in the climate interviews that other officers did not follow department vehicle maintenance and inspection policies. While the Plaintiff may have felt strongly that all officers should follow policies, this does not amount to a disclosure of alleged age or disability discrimination. Plaintiff argued (based on evidence not properly before the Court pursuant to Rule 56) that he questioned procedures of the department in morale meetings but made no reference to discrimination against himself or any other employee based on membership of any class protected under the WVHRA. The Court finds that it is undisputed that the concerns and criticisms offered to the Human Resources Director and the campus Ombudsman and included in their report were not attributed to the persons who offered them. Plaintiff offered no evidence to rebut the explanation of the process or to demonstrate that Chief McAvoy, Holly Frye or the University President, the persons involved in the decision to terminate his employment, had knowledge of his complaints. No factual connection can be established if the decision-makers had no knowledge of the Plaintiff's particular

complaints, even if they could be considered as a report that subjected him to retaliation under the WVHRA. "[W]here a relevant decisionmaker is unaware of any prior complaints, a plaintiff cannot establish the necessary causal connection between his filing a complaint . . . and his termination." *Roberts v. Glenn Indus. Group., Inc.*, 998 F.3d 111, 124 (4th Cir. 2021) (internal quotation and citation omitted).

The fact that the morale meetings were initiated, in part, because of the complaints of other employees about the conduct of Donald Buracker, does not imbue Plaintiff Longerbeam's criticism of the management of the police department with the status of a "disclosure" or expression of opposition to a practice that violates the provisions of the WVHRA. Plaintiff's concerns about the management of the police department do not form an actionable basis for a WVHRA retaliation claim as a matter of law, and Shepherd is entitled to summary judgment as to this claim.

C. Plaintiff's Whistleblower Claim Fails as a Matter of Law

The Plaintiff claims that Shepherd University violated the West Virginia Whistleblower Protection Act by "discharging, discrimination, and retaliating against him for his good faith reports of wrongdoing and waste." The Court finds that Shepherd University is entitled to summary judgment on this claim as a matter of law because the Plaintiff cannot demonstrate the prima facie elements of this claim.

The West Virginia Whistleblower Act provides that "[n]o employer may discharge . . . . an employee . . . because the employee, acting on his own volition . . . makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste." W.Va. Code § 6C-1-3(a). According to the West Virginia Code:

> An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction of the employee, had reported or was about to report in good faith,

> verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.

W.Va. Code § 6C-1-4(b).

The definition of certain terms is critical here. "'Whistle-blower' means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority." W.Va. Code § 6C-1-2(g). "'Appropriate authority' means a federal, state, county or municipal government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the attorney general, the office of the state auditor, the commission on special investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste." *Id.* at (a) "'Good faith report'" means a report of conduct defined in this article as wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true." *Id.* at (d). "'Waste' means an employer or employee's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision sources." *Id.* at (f). "'Wrongdoing' means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer." *Id.* at (h).

Employers have a safe harbor for employment decisions taken with regard to possible whistleblowers. The West Virginia Code specifies that "[i]t shall be a defense to an action . . . if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." W.Va. Code § 6C-1-4(c).

The Supreme Court of Appeals of West Virginia has declared "[i]t is . . . implicit in our statutory scheme that the purpose of a report of wrongdoing or waste is, in fact, germane to determining whether an employee has engaged in activity protected thereunder." *Taylor v. West Virginia Dept. of Health and Human* Resources, 237 W.Va. 549, 788 S.E.2d 295, 309-310 (2016). In *Bee v. West Virginia Supreme Court of Appeals*, 2013 WL 5967045 (W.Va. Nov. 8, 2013) (unpublished), the West Virginia Supreme Court of Appeals emphasized that "wrongdoing" includes "violations of any statute or rule." Similarly, the United States District Court for the Northern District of West Virginia recognized the statutory definition of wrongdoing, stating, "[t]he Court agrees that Austin has failed to show 'wrongdoing' within the meaning of the statute, as she has failed to point to any law, regulation, or code of ethics the Commission violated." *Austin v. Preston County Com'n*, 2014 WL 5148581 (N.D. W.Va. Oct. 14, 2014) (unpublished).

The Court finds as a matter of law that the Plaintiff's actions do not entitle him to whistleblower protection.

1. **Ethics Commission Complaint Witness Status**

While the Plaintiff asserted whistleblower status on this basis in his deposition, he did not contest Shepherd University's motion on this point. As such, the Court deems this theory as abandoned.

2. Magistrate Court Process for Handling Minor Criminal Offenses of Students

Summary judgment is also proper as to Plaintiff Longerbeam's whistleblower claim based on concerns he raised about the process of Shepherd students being assigned community service by a Magistrate when they were charged with certain infractions. Plaintiff offered his response to Shepherd's Interrogatory No. 16 as evidence of disclosure of waste or wrongdoing under the Whistleblower Laws. In fact, the request was as follows: "Please identify the 'agents/administrators [with] whom you met on April 6, 2018 about "said extra-judicial disciplinary process" and the substance of said discussion.' [See Am. Compl. ¶34]." This is not "sworn testimony" despite Plaintiff's assertion. Nonetheless, Plaintiff admitted that he did not raise concerns about the denial of the rights of students in the discussion on April 6, 2018.

First, Plaintiff cites no statute or regulation that was violated by Magistrate Boober or Shepherd University by allowing students to perform community service and having charges dismissed. He claims that he was concerned that the students were denied the assistance of counsel, were not read their rights or given the right to trial but admits that he had no knowledge of whether the students elected to go to court without counsel. The Court takes judicial notice that Rule 11 of the West Virginia Rules of Criminal Procedure for Magistrate Court requires only that rights be read when a plea is being considered. The informal resolution process did not require the students to enter a plea of guilt or no contest to the offense. Even if there was a legal basis for his belief, the conduct at issue was that of an elected magistrate. Plaintiff has no knowledge of how the Magistrate would make the decision to offer community service and what, if any, role Shepherd played in the process.

Next, even if the Plaintiff's raising concerns about the process is in fact whistleblowing, the Plaintiff's employment was terminated more than a year after his concerns were addressed in

the April 6, 2018 meeting with Chief McAvoy and Holly Frye. As such, even if considered the sort of report to which would entitle him to protection of the Whistle-blower Act, it was too removed in time to be considered to be retaliatory[35] conduct related to Plaintiff's concerns.

Plaintiff did not attempt to rebut Shepherd's assertion that the lack of temporal proximity to his raising concerns about the community service process defeats his claim because the Plaintiff's employment was terminated more than a year after his concerns were addressed in the April 6, 2018 meeting with Chief McAvoy and Holly Frye. As such, even if considered the sort of report to which would entitle him to protection of the Whistleblower Act, it was too removed in time to be considered to be retaliatory conduct related to Plaintiff's concerns.

Generally, the passage of time alone cannot provide proof of causation unless the temporal proximity between an employer's knowledge of protected activity and an adverse employment action is "very close." *Pascual v. Lowe's Home Improvement Center*, 193 Fed. App'x. 229, 233 (4th Cir. 2006). Accordingly, the Fourth Circuit has held that a time period of three to four months between the protected activity and an adverse employment action is too long to establish a connection by temporal proximity in the absence of other evidence. *Id.*

The Supreme Court of Appeals of West Virginia has upheld the terminations of employees, even when such terminations occurred after the employees filed workers' compensation claims, when the terminations were too remote in time to raise an inference of retaliatory motive. *Bailey v. Mayflower Vehicle Systems, Inc.*, 218 W. Va. 273, 624 S.E.2d 710 (2005).

In *Lewis v. Baltimore City Board of School Commissioners*, the United States District Judge for the District of Maryland noted that "[i]n evaluating causation at the prima facie stage of

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[35] The West Virginia Code specifies that "[i]t shall be a defense to an action . . . if the defendant proves by a preponderance of the evidence that the action complained of occurred for separate and legitimate reasons, which are not merely pretexts." W.Va. Code § 6C-1-4(c).

the retaliation analysis, courts often consider: (1) whether the allegedly retaliatory actor was aware that the plaintiff had engaged in the protected activity at the time of the allegedly retaliatory act, and (2) the temporal proximity between the protected activity and the allegedly retaliatory act. *Baqir v. Principi*, 434 F.3d 733, 748 (4th Cir. 2006) (holding that a plaintiff had not established a prima facie case of retaliation where he had not shown that the allegedly retaliatory actors were aware of his protected activity); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 657 (4th Cir. 1998) (determining that a lengthy period of time between the employer becoming aware of the protected activity and the alleged adverse employment action negated any inference that a causal connection existed)." 187 F. Supp. 3d 588, 597 (D. Md. 2016). Moreover, " '[a] six month lag is sufficient to negate any inference of causation.' *Hooven–Lewis v. Caldera*, 249 F.3d 259, 278 (4th Cir. 2001)." Id.

In *Iyoha v. Architect of the Capitol*, 927 F.2d 561, 574 (D.C. Cir. 2021), the court declared "[a] plaintiff can establish the 'causation' element of the prima facie case by showing a tight temporal proximity between protected activity and an adverse employment action. However, 'only where the two events are "very close" in time does temporal proximity support an inference of causation." *Woodruff v. Peters*, 482 F.3d 521, 529 (D.C. Cir. 2007) (quoting *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001))." And recently in *Robert S. Glenn Indus. Group, Inc.*, 998 F.3d 111, 125 (4th Cir. 2021), the court noted that "[a]lthough there is no 'bright-line rule' for temporal proximity, courts within our Circuit have found that shorter lapses of time similar to the three-month period at issue in the case before us are insufficient to infer a causal relationship without other evidence of a causal link."

The Court finds that the Plaintiff's claim fails as his April 6, 2018 complaint was not a legally-sufficient report of wrongdoing and was made more than a year before the termination of

his employment. As a matter of law, it insufficient to temporally demonstrate the requisite causation and therefore, he cannot establish the prima facie elements of a claim of retaliation or reprisal under the WVHRA.

Finally, the Court finds that Shepherd had a legitimate reason for the termination of the Plaintiff's employment that was not merely pretext. Shepherd conducted an investigation and concluded that the Plaintiff engaged in misconduct and acted unprofessionally. As a result, it elected to terminate the at-will employment of the Plaintiff. Regardless, as a matter of law, there was no "wrongdoing" reported; therefore, the Plaintiff cannot establish a whistleblower claim. Summary judgment is therefore warranted.

3. Climate Survey Complaints

As addressed above, the information provided by Plaintiff Longerbeam in his meeting with Dr. DeWalt and the campus ombudsman was integrated into a report that did not attribute comments or criticism to the employees who offered them. Plaintiff has offered no evidence to demonstrate that the comments he made in the meeting were in any way related to the termination of his employment. Again, summary judgment is proper because he cannot establish a causal connection between his reports and the termination of his employment. Also, the Court finds that Shepherd amply demonstrated that it had a legitimate non-discriminatory reason for the termination of Plaintiff's employment. As this has not been rebutted with proper proof, summary judgment is appropriate.

D. The Burden Does Not Shift to Shepherd to Rebut Pretext

Because the Court has concluded that as Plaintiff cannot demonstrate a *prima facie* basis for any of his substantive claims, the burden does not shift to Shepherd University to prove that

the reasons offered for the termination of the Plaintiff's employment were not pretextual. Even if the Court allowed the burden to shift, the Plaintiff cannot prove pretext.

Labeling Shepherd's reasons for termination set forth in the pre-termination letter of April 23, 2019 as "nonsensical" does not make them "pre-textual." The Plaintiff's characterization of the deposition testimony of Dr. Hendrix, Shepherd's President, also does not establish pretext. First, the Plaintiff's conduct did not have to be illegal to justify the termination of his employment. Whether he had probable cause to enter the student's housing unit on October 7, 2018 or to conduct the traffic stop on January 6, 2019 is not the issue. The "slippery slope" argument: underage drinking is bad, underage drinking can be dangerous and underage drinking can lead to sexual assault, so campus officers can take any action they feel is appropriate to stop underage drinking, does not establish illegal pretext. Dr. Hendrix's testimony demonstrates that Shepherd concluded that the conduct of both Plaintiffs, as evidenced by their handling of two student matters, failed to conform with Shepherd's model of campus policing. This was the basis for the termination of the Plaintiff's employment.

The Court finds that Plaintiff's argument concerning the alleged existence of probable cause to conduct a warrantless non-consensual entry of a dorm room on October 7, 2018 and to pull over a vehicle and investigate its occupants for driving under the influence of a controlled substance on January 6, 2019 does not create a genuine issue of material fact as to the basis for the termination. The legality of the Plaintiff's actions is not evidence of pretext. The fact that the Plaintiff's law enforcement certification was reinstated after review by the Law Enforcement Professional Standards Subcommittee per the process outlined in W. Va. Code §30-29-11(b), and he received a letter of support from the Fraternal Order of Police is not evidence that warrants denial of summary judgment. This case is not about whether the conduct of the two officers could

withstand a legal challenge in criminal court. The Court must consider whether Shepherd terminated the Plaintiff's employment for a legally proper reason. It is not unexpected that the Plaintiff does not agree with the reasons for termination, but even if he met the *prima facie* elements of his various legal theories, pretext has not been shown and thus, summary judgment is not precluded.

E. Plaintiff's common law claim for wrongful discharge in contravention of public policy is duplicative of his statutory claim for age discrimination under the WVHRA and violation of the Whistleblower Protection Act.

Plaintiff alleges that Shepherd University terminated his employment because of his age, complaining of age discrimination, making a whistleblower complaint and attempting to ensure that the law was followed and enforced all in the alleged violation of public policy. Where an employer's motivation for an employee's discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge. *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978). In determining what constitutes a clear public policy, the Court looks to "established precepts in [the State's] constitution, legislative enactments, legislatively approved regulations, and judicial opinions." Syl. pt. 2, *Birthisel v. Tri-Cities Health Servs. Corp.*, 188 W. Va. 371, 424 S.E.2d 606, (1992).

A *Harless* claim is superseded by a discrimination or retaliation claim when the conduct underlying both claims is the same. *Collins v. Lowe's Home Centers, LLC*, No. CV 3:17-1902, 2017 WL 6061980, at *3 (S.D.W. Va. Dec. 7, 2017); *Adkins v. Cellco P'ship, Inc.*, No. CV 3:17-2772, 2017 WL 2961377, at *3 (S.D.W. Va. July 11, 2017); *Daniel v. Raleigh General Hospital*, LLC, No. 5:17-cv-03986, 2018 WL 3650248, at *10 (S.D.W. Va. Aug. 1, 2018). West Virginia law provides that plaintiffs are not permitted both a statutory and common law claim based upon the same, underlying facts. *Id.* In that situation, common law claims should be dismissed. *Id.*

Plaintiff cannot maintain his wrongful discharge *Harless* claims against Shepherd because their allegations fall entirely within the scope of either the WVHRA or the WVWA. Plaintiff cites the following "improper conduct" contravenes the substantial public principles of the state of West Virginia:

a. The governments [sic] interest in preventing discrimination in the workplace;

b. The governments [sic] interest in preventing retaliation for disclosures of discrimination;

c. The government's interest in preventing retaliation against whistleblowers;

d. The government's interest in ensuring that its agencies follow relevant state law;

e. The government's interest in ensuring that its police officers follow state law.

See Amended Complaint at paragraph 49. The Plaintiff's attempt to recover under the WVHRA precludes his ability to maintain simultaneous common law public policy claims under *Harless*. The alleged improper conduct cited in paragraph 49, subparts a and b of the Complaint falls squarely within the WVHRA. Courts applying West Virginia law have consistently held that a plaintiff may not bring a *Harless* claim to gain redress for violations of the WVHRA.[36] Because the WVHRA is the exclusive remedy for Plaintiff, Plaintiff cannot seek remedies under both the WVHRA and *Harless*.

The federal courts in this state have addressed this issue and this court may consider logic employed by those courts where they apply West Virginia law and address legal concepts that may

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[36] See *Taylor v. City Nat'l Bank*, 642 F. Supp. 989, 998 (S.D.W. Va. 1986), aff'd, 836 F.2d 547 (4th Cir. Dec. 16, 1987) (mem.); *Guevara v. K-Mart Corp.*, 629 F. Supp. 1189, 1189 (S.D. W.Va. 1986) ("a victim of discrimination prohibited by the West Virginia Human Rights Act is limited to a suit under that statute and may not prosecute a so-called Harless-type action.").

not have been directly addressed by the West Virginia Supreme Court of Appeals. Notably, in *Guevara v. K-Mart Corp.*, 629 F. Supp. 1189, 1189 (S.D. W.Va. 1986), Judge Haden performed a thorough analysis of the concept of exclusivity of remedies and in doing so, he considered the statutory history of the WVHRA. In doing so, he cited West Virginia Code Section 5-11-13 (which incidentally is tilted "Exclusiveness of remedy; exceptions") that contains the following language "...but as to acts declared unlawful by section nine of this article, the procedure herein provided shall, when invoked, be exclusive and the final determination therein shall exclude any other action, civil or criminal, based on the same grievance of the complainant concerned." *See also Councell v. Homer Laughlin China Co.*, 2012 WL 907086 (N.D. W. Va. 2012) (fn 5: citing W. Va. Code § 5-11-13(a) as to the exclusiveness of the remedy under the WVHRA); *Garvin v. World Color Printing (USA) Corp.*, 2011 WL 1485998 (N.D. W. Va. 2011); *Vaughn v. Vaughn Energy Service*, 2015 WL 6394510 (N. D. W. Va. 2015).

Because the WVHRA and the Whistleblower Protect Act provide a statutory means for plaintiffs to seek redress for violations, the Plaintiff herein is precluded from pursuing a common law claim for termination in alleged violation of those laws.

Plaintiff's reliance on *Brown v. City of Montgomery*, 233 W. Va. 119, 755 S.E.2d 653 (2014) is misplaced. In that case, the plaintiff asserted two claims, termination without the hearing required by W. Va. Code § 8-14A-1, *et seq.* and discharge in contravention of public policy under *Harless*. The defendant's motion to dismiss argued that the cited statute did not apply to it, therefore, the plaintiff was not entitled to a pre-termination hearing under the law, and that as an at-will employee, plaintiff was not entitled to that protection. The second basis for the motion was qualified immunity. While the court did note that the WVHRA set forth a substantial public policy of West Virginia, it did not consider whether a plaintiff could maintain both a *Harless* and a

WVHRA claim in the same litigation. As such, the case does not serve to support the Plaintiff's argument herein.

The Court also finds no merit in the Plaintiff's assertion that he can maintain a *Harless* claim if summary judgment is proper on his WVHRA and Whistleblower Protection Act claims, because it "can stand in under the public policy rationale of whichever other claim was dismissed by this Court." As outlined above, the Court concludes that summary judgment is warranted on both the Plaintiff's claims under the specific statutes. As such, even if those claims are not deemed duplicative of the *Harless* claim, Plaintiff's common law claim would fail for the substantive reasons explained in the Court's prior conclusions.

Accordingly, Plaintiff's *Harless* claim is duplicative of his discrimination and retaliation claims under the West Virginia Human Rights Act and his claim under the Whistleblower Protection Act, and Shepherd University is entitled to summary judgment on that claim.

For the aforementioned reasons, the Court declares that Shepherd University is entitled to summary judgment in its favor on each of the Plaintiff's claims and hereby dismisses Plaintiff's Amended Complaint, with prejudice. The exceptions and objections of the parties are hereby noted.

The Clerk is directed to enter this Order and distribute copies to all counsel of record and place this matter among the causes ended.

Enter this 21 day of June, 2022.

Michael D. Lorensen, Circuit Judge