IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

SCA EFiled: Dec 05 2022
06:08PM EST
Transaction ID 68510247

Docket No. 22-609

JAY LONGERBEAM,
Petitioner, Plaintiff Below

v.

Appeal from the Orders of the Circuit Court for Jefferson County
20-C--52

SHEPHERD UNIVERSITY,
Respondent, Defendant Below.

BRIEF OF RESPONDENT SHEPHERD UNIVERSITY

Shepherd University
By Counsel

Tracey B. Eberling, Esquire
WV Bar # 6303
Steptoe & Johnson PLLC
1250 Edwin Miller Blvd., Suite 300
Martinsburg, WV 25404
(304) 262-3532
Tracey.eberling@steptoe-johnson.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

I. STATEMENT OF THE CASE

A. Background

Petitioner Jay Longerbeam was employed by the Shepherd University Police Department along with Petitioner Donald Buracker. When inconsistencies in a criminal investigation report and their handling of student interactions were identified and investigated, Shepherd University terminated both men's employment for misconduct and unprofessional behavior. In the resulting lawsuit, the Petitioners sought recovery under many of the same theories, but the underlying factual predicate was largely distinct.

This Court granted the Petitioners' motion to file a Consolidated Brief over the Respondent's opposition. The Petitioners have persisted in filing consolidated documents in the case below and in their appeals although the legal issues and relevant facts are unique to each of their claims. To maintain the integrity and clarity of arguments, the Respondent therefore elects to file separate briefs in response to the two appeals.

B. Factual Background

The Respondent sets forth the following facts from the record below that were properly supported by deposition testimony and verified affidavits. In contrast, the Petitioner's citation to the Appendix Record are, in most part, to the summary allegations contained in the Amended Complaint and his uncorroborated, self-serving argumentative responses to the Respondent's Request for Admissions and his Answers to Interrogatories. While his discovery responses are verified, it does not follow that the content contained therein constitute "facts" sufficient to establish the existence of genuine issues of material disputed fact necessary to defeat a motion for summary judgment as discussed below.

1. Undisputed Facts

Jay Longerbeam was hired on March 4, 2017 as a Campus Police Investigator 1. (Appendix Records at 347). He was then 43 years of age when hired and is now 48. (A.R. at 345-46). At all times relevant to the Petitioner's employment and notably at the time he was hired, the Shepherd University Police Department was headed by then Chief John McAvoy. (A.R. at 348). Chief McAvoy reported to the Director of Community Relations, Holly Frye, at the time of the termination of the Petitioner's employment. (A.R. at 384). 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. (A.R. at 385-86, 404-05).

In the fall of 2018 and January of 2019, Petitioner 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. (A.R. 393-94). The report of the officers' investigation was significantly different than their actions as apparent from the body camera footage. (A.R. at 387-88, 395, 407-415). 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. (A.R. at 387-88). On January 6, 2019, Petitioner participated in the arrest of two of the same athletes involved in the October 7, 2018 incident along with Donald Buracker. (A.R. at 389-92, 396). The

University received reports of concerns from the parents of the athletes. (A.R. at 398, 407-415). 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. (A.R. at 397-400, 407-415).

On April 11, 2019, Chief McAvoy, Ms. Frye and Shepherd's General Counsel, Alan Perdue, conducted a meeting with the Petitioner at which Petitioner was represented by counsel. (A.R. at 348). The handling of the subject incidents was discussed with Petitioner. At the conclusion of the meeting, Petitioner was placed upon an administrative leave of absence, pending further review. On April 23, 2019, President Mary Hendrix directed a letter to Petitioner 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. (A.R. at 416-17). Petitioner 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. (A.R. at 348, 419-20). 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 Petitioner a letter advising him of her decision to terminate his employment effective May 2, 2019. (A.R. 421).

2. Whistleblower Contentions

When asked to explain why he contends that he was a whistleblower, Petitioner cited that he had questioned the use of an alternative disposition practice that Jefferson County Magistrate Gail Boober used when Shepherd students were charged with certain

offenses, including underage consumption of alcohol and possession of controlled substances. Petitioner 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 students were able to present their case. (A.R. 361-66). In his Amended Complaint and in his discovery responses, Petitioner reported that he met with Ms. Frye and Chief McAvoy about the process on April 6, 2018. (A.R. at 348). While the Petitioner 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 in 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.

Secondly, Petitioner contended that he provided a list of information "about what was wrong with the Department" in the morale meeting on or about February 6, 2019. (A.R. at 368; 808). 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 his 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). (A.R. 367-68). A document purporting to be this list was attached to the Petitioner's response in opposition to the Respondent's Motion for Summary Judgment. (A.R. 770-73). It is not signed or dated.

3. Refusal to Not Enforce the Law

Petitioner 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. (A.R. at 366). 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. (A.R. 369-70). Petitioner acknowledged that the Chief indicated his preference that the officers work on campus. (A.R. 369-70, 379-83). He also claimed that he was told to look the other way as to students' smoking and drinking. Once, he overheard a sergeant commenting that the Petitioner should have cited the occupants and towed a student's car at the outset of a traffic stop rather doing so after calling in a DUI recognition expert who was determined to be unavailable. (A.R. 369-70).

4. Petitioner's "Evidence"

Petitioners attached thirty-three exhibits to their "Consolidated Responses" to the Respondent's Motion for Summary Judgment. Many of the Exhibits had no application to the claims of Petitioner Longerbeam: Exhibits 3, 4, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 31, and 33 and as such, were not properly before the trial court for consideration in evaluating the Respondent's motion for summary judgment. As to the remainder, many of them were not properly offered in the opposition to a motion for summary judgment. First, allegations contained in a party's own unverified Complaint (or Amended Complaint) do not serve to establish the truth of matters contained therein. Petitioners also attached and relied on five statements, of which only three appear to have

any relationship to the claims of Petitioner Longerbeam. See Exhibits 27, 28 and 29 (A.R. at 838-40, 841-42, 843-44). None of these three are complete documents, Exhibits 28 and 29 are unsigned, and none is in the form of a legally compliant affidavit. These documents cannot be acknowledged as a basis for opposition to the pending motion. Exhibit 10 was not produced in discovery and is not signed or otherwise authenticated. (A.R. 770-73). Exhibit 32 is purported to be Petitioner Longerbeam's "written statement" but it is plainly incomplete, unsigned and undated and no information is offered as to whom it was submitted or when. (A.R. 853-54). This Exhibit should also be disregarded. 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).

A. Procedural History

Petitioners Longerbeam and Buracker filed a civil action against the Respondent in the Circuit Court for Jefferson County, West Virginia on March 19, 2020. The Complaint as to this Petitioner contained four counts: Violation of the West Virginia Human Rights Act (for the Petitioner - age discrimination and retaliation); Violation of the West Virginia

Whistleblower Protection Act and Wrongful Discharge. Respondent filed its Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) on May 22, 2020. Petitioners filed a motion for Leave to Amend. The court by its letter of May 26, 2020 advised that the cases were being re-docketed as separate cases per Rule 3(a) of the West Virginia Rules of Civil Procedure. That motion was granted on July 2, 2020 after briefing. Petitioner filed a Rule 59(e) and Rule 60(b)(6) Motion to Alter or Amend. On September 16, 2020, the trial court converted the Respondent's Motion to dismiss to a motion for summary judgment and ordered that after a period of discovery, it would consider the Respondent's motion as a motion for summary judgment. The parties engaged in extensive written and deposition discovery. Respondent moved for summary judgment on the claims of both Petitioners. After full briefing, the court conducted oral argument on the Respondent's Motions for Summary Judgment on June 8, 2022. Thereafter, the trial court granted both motions on June 21, 2022. The Petitioner appealed the June 21, 2022 orders to this court.

II. SUMMARY OF ARGUMENT

The Circuit Court committed no error. Its decision granting summary judgment to Shepherd University was based on evidence that was not in dispute, and therefore should be affirmed. Ultimately, Petitioner offers nothing more than unsupported allegations and no legal support for his claims against Shepherd University, and that is insufficient to survive summary judgment.

First, the Circuit Court committed no error in ruling that the Petitioner was not entitled to Whistleblower protections because his complaints were not legally-sufficient

reports of wrongdoing and lacked temporal proximity to the termination of his employment.

The Circuit Court's entry of summary judgment on the Petitioner's common law claim for wrongful discharge was also proper as he had an adequate statutory remedy to seek redress for his claims of age discrimination and reprisal under the West Virginia Human Rights Act and for retaliation under the Whistleblower Act. Although not specifically addressed in the court's June 21, 2022 order, the general public policy consideration assertion that his employment was terminated in violation of the public policy that law enforcement officers should be allowed to enforce the law and the Shepherd University was required to follow the law, cited by the Petitioner cannot support a claim for wrongful discharge under the well-established law of this State.

Finally, the Circuit Court properly applied the burden-shifting as an alternative basis for relief for the Petitioner's claims and did not impose a burden on the claimant that was inconsistent with the law.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

In accordance with West Virginia Rule of Appellate Procedure 18(a), oral argument is not necessary on this appeal. The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. If the Court chooses to hear oral argument, then argument under Rule 19 is appropriate because this case involves assignments of error in the application of settled law. This appeal is appropriate for disposition by memorandum decision under the criteria

of West Virginia Rule of Appellate Procedure 21(c) because there was no prejudicial error committed below.

IV. ARGUMENT

A. Standard of Review

The appellate standard of review on a grant of summary judgment is *de novo*. *See, e.g.*, Syl., *Thompson v. Hatfield*, 225 W. Va. 405, 405, 693 S.E.2d 479, 479 (2010). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c). "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." Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). To survive summary judgment, "the nonmovant must identify specific facts in the record and articulate the precise manner in which that evidence supports its claims." *Harbaugh v. Coffinbarger*, 209 W. Va. 57, 62, 543 S.E.2d 338, 343 (2000).

Recently, in *Butner v. Highlawn Memorial Park Co*., 2022 WL 17038205, *11 (W.Va. November 17, 2022), this Court revisited the nature of the evidence that may be considered in determining the merit of a summary judgment motion:

> The formality required by the rule is consistent with the fact that the stakes are high when a party makes a motion for summary judgment. Put simply, it's "put up or shut up" time for both the proponent and the opponent, who must show that the

> evidence – not the allegations, but the actual evidence – is either conclusive, meaning there's nothing left for a jury to decide, or disputed, meaning that only a jury can resolve the facts. Pursuant to the rule, this evidence may take the form of affidavits, depositions, or answers to interrogatories, all of which have one critical thing in common: they contain information given on personal knowledge and under oath.

(Citing WVRCP 56). In that case, the transcript of a telephone conversation that was not dated, signed or verified and the court declared that it, as well as the proffer of another witness's testimony in the plaintiff's unverified discovery responses should not have been considered in opposition to the summary judgment motion as they did not meet the standard for authenticity under WVRCP 56(e). Id. at *14. The *Butner* court also adopted a new Syllabus Point, Syllabus Point 6:

> 6. Unsworn and unverified documents are not of sufficient evidentiary quality to be given weight in a circuit court's determination of whether to grant a motion for summary judgment. However, in its discretion the court may consider an unsworn and unverified document if it is self-authenticating under West Virginia Rule of Evidence 902 or otherwise carries significant indicia of reliability; if it has been signed or otherwise acknowledged as authentic by a person with first-hand knowledge of its contents; or if there has been no objection made to its authenticity.

Self-serving declarations, even when contained in a party's affidavit are not proper evidence to defeat a motion for summary judgment. In *Merrill v. WVDHHR*, 219 W. Va. 151, 632 S.E.2d 307 (2006), the two plaintiffs submitted affidavits declaring that they did not discover that the DHHR had failed to protect them from harm until after they underwent therapy and reviewed DHHR records. In evaluating the evidence supporting the defendant's motion for summary judgment, the court noted that the record did not contain affidavits corroborating the plaintiffs' assertions. The court declared that "'self-serving

assertions without factual support in the record will not defeat a motion for summary judgment." (Citations omitted) Id. at 160-61, 316-17. The court concluded that:

> In this case, [plaintiffs] have utterly failed to provide any supporting affidavits to corroborate their self-serving statements, and have further failed to "identify specific facts in the record and articulate the precise manner in which that evidence supports [their] claims" of delay in discovering the causal connection between their injuries and DHHR's actions. Id. Accordingly, they have not established the existence of a genuine issue of material fact with respect to their knowledge of a causal connection between their injury and DHHR's actions.

Id. *See also Gibson v. Little General Stores*, 221 W. Va. 360, 362, 655 S.E.2d 106, 108 (2007)(plaintiff's "self-serving statements and conclusory affidavit based upon unsupported speculation" was insufficient evidence to rebut defendant's motion for summary judgment); *Hooshyar v. Sovastion*, 2013 WL 3242788 (W. Va,. 2013)(lack of corroborating evidence supporting plaintiff's self-serving affidavit warranted summary judgment for defendant).

B. Introduction

As to each of his points of error, Petitioner Longerbeam claims that the trial court "placed itself in the position of the jury by weighing evidence", "ignored key facts", and "straw-manned him." Petitioner's brief fails to identify how the trial court committed these alleged errors. Nothing offered by this Petitioner warrants reversal of the grant of summary judgment to the Respondent.

C. The Circuit Court Committed No Error in Granting Summary Judgment on Petitioner's Whistleblower Claim

The Petitioner contended below 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." In discovery, the Petitioner testified that he believes that he is a whistleblower based on three facts, one of which theories was abandoned in his response to the Respondent's Motion for Summary Judgment. Summary judgment was properly granted on his remaining two theories.

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).

The anti-retaliations provision of the Act declares: [n]o employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, 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).

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).

1. Petitioner's questioning the propriety of a Magistrate Court process for handling minor criminal offenses of students is not a "report" of wrongdoing nor was it causally related based on timing.

Petitioner is not entitled to Whistle-blower Act protection for expressing his concerns about the manner in which certain criminal charges against Shepherd University students were addressed by Magistrate Boober for several reasons.

First, as noted by the Court at argument, the duly elected Magistrate Gail Boober is "a constitutional officer and conducts her court in the way she sees fit." (A.R. at 1035) Petitioner's counsel acknowledged that no statement under oath had been provided from a student or parent concerning the asserted denial of the right for his or her day in court. (A.R. at 1034). It was conceded that the complaint about the process had been made only to Chief McAvoy. The trial court observed that while complaints may have been made to the Jefferson County Prosecuting Attorney and a Circuit Court Judge, neither would have had the authority to take corrective action against a magistrate who exceeded her authority. (A.R. at 1039-40). Petitioner cited no statute or regulation that was violated by Shepherd University that in working with an elected Magistrate to establish a process that allows students to perform community service and having certain types of charges dismissed. 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. Petitioner 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.

2. Petitioner's Assertions in Climate Survey Meeting Is Also Not A Report

In addition to the propriety of the alternative disposition process for student criminal charges, the Petitioner claims that his "disclosures at the interdepartmental police meeting" was improperly discounted by the Circuit Court. Petitioner simply argues that there is a causal connection between his report and his termination because he made complaints of wrongdoing. This is not a logically supported conclusion. Moreover, Petitioner conflates the deposition testimony that is part of the record to a disclosure of "waste in terms of the mismanagement of the state funded Shepherd University Police Department." The memo does not aid his assertions as the document is unsigned and undated and there is no evidence that it was "circulated."

The Respondent demonstrated through uncontested sworn testimony that the none of the complaints offered by the officers in the climate survey meetings and ultimately contained in the report was not attributed to any of the officers who made them. Petitioner instead simply argued that the trial court erred in concluding that a causal connection between his statement and his termination could not be made.

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. Sgt. 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 all shredded when the final report was prepared. Since the Petitioner's comments, even if deemed to have risen to the level to be considered a report of waste or wrongdoing, no connection can be made when the critical personnel were unaware that the Petitioner had even made such a report.

3. Adverse Action

Petitioner asserts that the termination of his employment was not the only adverse action taken against him in order to skirt the conclusion of the trial court concerning the lack temporal proximity of his questioning the propriety of community service process for students and his statement in the climate survey process. He now asserts that he was subject to ongoing and continuous acts of retaliation after making disclosures, which ultimately culminated in t[hi] eventual firing." The allegedly "disparate and retaliatory treatment" purportedly consisted of enforcing the law when other younger officers did not; being questioned why he turned off his body camera when younger officers did not; vehicle maintenance disparity; tardiness; community policing responsibilities; and placement of a "graphic" on his shared mailbox with Petitioner Buracker.

West Virginia Code 6C-1-3(a) provides protection for whistleblowers declaring that no employer may "discharge, threaten or otherwise discriminate or retaliate against an employee by change in employee's compensation, terms, conditions, location or privileges of employment." The Petitioner identified no threat, change in compensation, terms,

conditions, location or privileges of employment. The Petitioner appears to have held himself to a higher standard than his former fellow officers did as to patrolling, issuing citations, getting to work on time, completing vehicle maintenance forms, gassing up the patrol cars that he used and engaging in community policing assignments. Absent from his brief and the case below is any evidence that he was subject to any form of discipline that can be considered retaliation under the law.

Certainly, this alleged pattern of "adverse actions" does not rise to the level necessary to support his claim as a matter of law. This court has observed that the retaliation provisions of the WVHRA and Whistleblower Protection Act follow similar patterns of proof and in interpreting the WVHRA, federal precedent is often considered. The U.S. Supreme Court ruled that the retaliation provision of Title VII was broader than that for substantive discrimination in *Burlington Northern & Santa Fe Railway Co v. White*, 548 U.S. 53 (2006). Although the nature of the adverse employment consequences need not rise to the level to establish substantive discrimination the Court declared that "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, "which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.' Id. at 68. "Material adversity does not encompass "trivial harms. The 37 days suspension without pay and reassignment to substantially less desirable job duties was held to meet the standard. The pertinent language of the case has employed in a federal court in West Virginia in considering the anti-retaliation provision of West Virginia Code Section 61-5-27(c). *See Carr-Lambert v. Grant County Bd. Of Education*, 2011 WL 3555839 (N.D. W. Va. 2011).

The provision of Title VII parallel the WVHRA in this regard, as the anti-retaliation provisions declare it unlawful for an employer to: "[e]ngage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." W. Va. Code §5-11-9(7)(C).

In this case, the recitation of alleged retaliatory actions do not rise to the level of being materially adverse. Subjectively the actions did not prevent him from continuing to make reports of what he perceived to be improper actions on the part of the University. The actions cited by the Petitioner closely resemble those before the court in *Petrovsky v. U.S. Attorney General*, 2018 WL 1937070 (N.D. W. Va. 2018) and are also legally insufficient. In *Petrovsky*, summary judgment was entered for the employer as the plaintiff employee failed to offer sufficient evidence of a material adverse action to make a prima facie case of retaliation under Title VII where his proof was of a verbal confrontation, the lowering of his rating in an annual performance evaluation and a change in shift.

4. Temporal Proximity

In his response to the Respondent's motion for summary judgment, Petitioner made no effort to rebut Shepherd's assertion that the lack of temporal proximity to his raising concerns about the community service process defeated his claim because the Petitioner'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. On appeal, he claims not only, as argued above, that there was an ongoing course of retaliation following this disclosure, but also that while "the temporal proximity of an act of retaliation is something which can

be considered by a jury but is not a dispositive issue in either direction." This statement is belied by the language from the sole case cited by the Petitioner on this point, *Conrad v. ARA Szabo,* 198 W. Va. 362, 480 S.E.2d 810 (1996). The *Conrad* court listed the four required elements of a retaliation claim, the last of which is "that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation." Id. at 813, 480 S.E.2d 815.

The Circuit Court properly considered the issue of the passage of time between the conduct and the termination. The law about timing of retaliatory actions has been considered by the Court and by federal courts on whose law this Court frequently and properly relies: *Pascual v. Lowe's Home Improvement Center,* 193 Fed.Appx. 229, 233 (4th Cir. 2006)(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; *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 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. *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 Industrtil 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."

Because this Petitioner's claim is not a legally-sufficient report of wrongdoing and as his complaint of alleged misconduct on April 6, 2018 is the "protected activity" of which he claims, his termination came over a year later, which is insufficient to temporally demonstrate the requisite causation, he cannot establish the prima facie elements of a claim of retaliation or reprisal under the WVHRA. Shepherd University is entitled to summary judgment in its favor on this claim as a matter of law.

D. The Circuit Court Correctly Granted Summary Judgment on Petitioner's Claim for Wrongful Discharge

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). "To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our 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). At *Syllabus Point 3,* the *Birthisel* court declared*:* "[i]nherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person."

The substantial public policy principles alleged in the common law wrongful discharge court of the Petitioner's Amended Complaint were: the governments [sic] interest in preventing discrimination in the workplace; the government's interest in preventing retaliation for disclosures of discrimination; the government's interest in preventing retaliation against whistleblowers; the government's interest in ensuring that its agencies follow relevant state laws; and the government's ineptest in ensuring that its police officers enforce state law. (A.R at 25-26).

1. Statutory Cause of Actions Exist for Claims of Discrimination and Whistleblower Retaliation

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 the Petitioner is 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.*

As such, the Circuit Court correctly held that the Petitioner's *Harless* claim was duplicative of his discrimination and retaliation claims under the West Virginia Human Rights Act and his claim under the Whistleblower Protection Act. Petitioner claims error in that the trial court improperly applied the cases of *Williamson v. Greene*, 200 W. Va. 421, 490 S.E.2d 23 (1997) and of *Brown v. City of Montgomery*, 233 W. Va. 119, 755 S.E.2d 653 (2014). Oddly, he references "exclusivity" language in the WVHRA, which is legally incorrect and contrary to his arguments. In fact, West Virginia Code section 5-11-13(a) is referencing the administrative process open to complainants and it specifically declares that such complainants may institute a civil cause of action for alleged violations of the WVHRA.

The holding of *Williamson* case does not support the Petitioner's argument and he misstates the procedural posture in that the plaintiff was not attempting to raise a statutory and common law cause of action. In fact, the court was faced with four certified questions, two of which are germane. The *Williamson* court ruled that the plaintiff could not maintain a statutory WVHRA claim against her employer because it was not subject to its coverage as it had fewer than twelve employees during the applicable time period. It also declared

that the WVHRA represented a specific and substantial public policy that could form the basis for a retaliatory discharge claim for the plaintiff therein. There can be no argument that Shepherd University employs more than twelve employees, thus the Petitioner was entitled to the protections of the WVHRA. A common law claim is therefore, duplicative and redundant.

The Petitioner's reliance on *Brown* is also 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.

While no state or federal court appears to have addressed whether a plaintiff may maintain a Whistleblower Act claim in addition to a common law retaliatory discharge claim, guidance exists. The Circuit Court and this Court may certainly avail itself of the logic employed by the federal courts in this state where they apply West Virginia law and address legal concepts that may 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 titled "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 Protection Act provide a statutory means for plaintiffs to seek redress for violations, the Circuit Court correctly held that the Petitioner was precluded from pursuing a common law claim for termination in alleged violation of the WVHRA and the Whistleblower Protection Act. .

2. Petitioner's Remaining Claims are not Based on a Specific Substantial Public Policy

The *Birthsiel* court conducted a thoughtful and through analysis in considering what sources of public policy may legitimately form the basis for a claim of retaliatory discharge. The plaintiff in that case cited regulations of the West Virginia Social Work Board and the general policy language in the social workers licensing statute. In rejecting them, the court declared:

> Their general admonitions as to the requirement of good care for patients by social workers do not constitute the type of substantial and clear public policy on which a

> retaliatory discharge claim can be based. If such a general standard could constitute a substantial public policy, it would enable a social worker to make a challenge to any type of procedure that the worker felt violated his or her sense of good service.

Id. at 613, 424 S.E.2d 606.

It is correct that the Circuit Court's order did not address the Petitioner's assertion in his Amended Complaint as to the government's interest in ensuring that its agencies follow relevant state laws; and the government's interests in ensuring that its police officers enforce state law. His argument that "it should go without saying that the legislature's creation of a criminal law implies that it [sic] the state, as a matter of public policy, has an interest in preventing prohibited activity and stopping individuals who violate the same." This is patently incorrect.

The general precepts offered by the Petitioner are not specific enough to support a claim for retaliatory discharge. In fact, the Petitioner does not even make an attempt to declare what statute, rule or regulation was violated. The general declaration that law enforcement officers must stop criminal activity is abundantly more broad and general than those offered and rejected by the *Birthisel* court.

Finally, as he did in his response to the Respondent's motion for summary judgment, he concludes with a circular argument: if summary judgment is proper on his WVHRA and Whistleblower Protection Act claims, then his Harless claim "can stand in under the public policy rationale of whichever other claim was dismissed by this Court." Logically, if the Petitioner cannot establish the prima facie elements of his claims under either or both the WVHRA and the Whistleblower Protection Act, he also can't establish a prima facie common law claim based on those laws. As demonstrated above, the Circuit Court

properly granted summary judgment on the Petitioner's claims under the specific statutes. As such, even if those claims are not deemed duplicative of the Harless claim, Petitioner's common law claim would fail for the substantive reasons explained in Shepherd's prior arguments. As to his more sweeping claims, it is within the purview of this court to rule that summary judgment is proper based on the lack of proof of the violation of any specific substantial policy.

3. The Circuit Court Properly Applied the Burden Shifting Analysis as to All Claims of the Petitioner

As an alternative basis for its ruling on summary judgment, the Circuit Court declared that even if the Petitioner was able to establish a prima facie case under any of his legal theories, and the burden shifted to the Respondent, that the respondent had stated a legitimate basis for the termination of the petitioner's employment, which the petitioner could not prove was pretextual. The Petitioner cities no case law on this point other than a reference to the role of the court in considering summary judgment motions. He asserts that he need meet only a minimum threshold to withstand summary judgment and get his case to a jury. He again refers to the mountain of evidence that supports his claim that Shepherd University's basis for the termination were "arbitrary, nonsensical, illogical, contradictor, and unusually draconian compared to the disciplining of other officers." Notably, nothing in this list declares that the termination was in violation of any law. This

fits with the concept that the petitioners disagree with the bases for the termination of their employment from a factual rather than legal standpoint.

The Petitioner was an employee at will, meaning that his employment could be terminated for any reason that is not contrary to law. The facts that he does not agree with the reasons listed in the termination letter and has his own perspective as to each. The ten page recitation and argument as to why the termination decision is wrong contains not a single reference to case law. The conclusion that other officers received lesser discipline that the Petitioner for their wrongful conduct is irrelevant.

The Circuit Court properly considered the inability of the Petitioner to prove that his termination was on a pretextual basis as an alternative grounds for the grant of summary judgment and it should be affirmed.

V. CONCLUSION

For all of the foregoing reasons, and based on the undisputed facts, the Circuit Court's order granting summary judgment to Shepherd University should be affirmed.

Respectfully submitted this 5th day of December, 2022.

/s/ Tracey B. Eberling

Tracey B. Eberling (WV Bar # 6303)
STEPTOE & JOHNSON PLLC
1250 Edwin Miller Blvd., Suite 300
Martinsburg, WV 25404
Telephone: (304) 262-3532
Facsimile: (304) 262-3541
Counsel for Shepherd University

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2022, I filed the foregoing **"Brief of Respondent Shepherd University"** with the Court by E-File ServeXpress which will deliver a copy to Petitioners' counsel of record:

Christian Riddell, Esq.
Riddell Law Group
329 S Queen Street
Martinsburg, WV 25401
Counsel for Petitioners

/s/ Tracey B. Eberling

Tracey B. Eberling (WV Bar #6306)
STEPTOE & JOHNSON PLLC
1250 Edwin Miller Blvd., Suite 300
Martinsburg, WV 25404
Telephone: (304) 263-6991
tracey.eberling@steptoe-johnson.com
Counsel for Respondent
Shepherd University