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

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Docket No. 22-610

DONALD BURACKER,

Petitioner, Plaintiff Below

v.

Appeal from the Orders of the Circuit Court for Jefferson County
20-C--37

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

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I. STATEMENT OF THE CASE

A. Background

Petitioner Donald Buracker was employed by the Shepherd University Police Department along with Petitioner Jay Longerbeam. 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 for their claims 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.

1. 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, consist of references 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.

2. General Background

Donald Buracker worked as a part-time officer with the Shepherd University Police Department starting in 1989. (Appendix Record at 464). He is now 56 years old. (A.R. at 463).

A. 2016 Grievance

In 2016, when posting a position for a full-time officer, Shepherd included a requirement that applicants for a full-time position have at least an associate degree from an accredited institution. Petitioner did not have such a degree. He applied for the position and was not selected. He filed a grievance with the West Virginia Public Employee Grievance Board and asserted that Shepherd had violated West Virginia Code Section 18B-7-3e which at the time required a hiring preference for current employees over new employees. (A.R. at 465-66) A second full-time position came open and the Petitioner was offered that position both before and during the Level 1 hearing. (A.R. at 466, 536-38). He rejected the offer both times, stating that he believed that he should be entitled to negotiate his rate of pay instead of working at the same hourly rate he earned as a part-time officer. (A.R. at 538). Near the end of the Level 1 hearing, the Petitioner, through his counsel, alluded to the theory that the non-selection was the result of discrimination based on an unidentified protected class. (A.R. at 539-40). After an unsuccessful Level 2 mediation, a Level 3 hearing was held, and the Petitioner raised the issue of age discrimination. In her written decision, the Administrative Law Judge concluded that the

Petitioner was qualified for the position in that he held the same position on a part-time basis and should have been considered for and offered the position per the code provision in effect at that time. She ordered that he be instated with limited back pay. The decision contained the following footnote [1]:

> Grievant argued at the level three hearing that Grievant was discriminated against because of his age. The undersigned pointed out that the Grievance Board has ruled that age discrimination is not considered by the Grievance Board, except under the definition of discrimination in the grievance procedure. Grievant did not pursue this argument in his post-hearing written argument, and it is deemed abandoned.

Following the outcome of the grievance, Petitioner was provided with a letter outlining the offer of employment that referenced the order of the Grievance Board. (A.R. at 554-55). He contended in his Amended Complaint and in discovery that this offer letter was evidence of discrimination in that no other officer had received similar letters nor was a signature required to accept the offer but agreed that none of those officers received their letters following an order of a Grievance Board. (A.R. at 497-98). Petitioner further attributed ill motive to Shepherd concerning the offer letter as he claims that Chief McAvoy told him that an earlier draft of the letter prepared by Shepherd's general counsel contained terms to which he believed the Petitioner would not agree. (A.R. at 474-75). He also felt that the letter was "post-dated" in that it likely was not signed by the sender on the date of the letter because the date fell on a Sunday. (Id.) Petitioner acknowledged that he never received any version other than that which he signed and accepted. (A.R. at 476).

[1] (Appendix record at 549).

B. Termination

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 coordinated and participated in the entry of a college dorm room without a warrant and without the consent of the residents 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. at 564-65). The report of the investigation that he prepared was significantly different than the actions of the officers as apparent from the body camera footage. (A.R. at 565-66, 577, 587-95). 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. 565-66). On January 6, 2019, Petitioner participated in the arrest of two of the same athletes involved in the October 7, 2018 incident along with Jay Longerbeam. (A.R. at 567-70, 578). The University received reports of concerns from the parents of the athletes. (A.R. at 580, 587-95). Chief McAvoy and Ms. Frye performed an extensive investigation of the two matters, including the review of reports and body camera footage, a comparison of the manner in which Petitioner Buracker handled another incident in which a vehicle was stopped, the consumption of marijuana was suspected and confirmed, and those students were permitted to leave the scene without legal consequence and other contributing information. (A.R. at 567-572, 579-80, 587-95).

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. The Petitioner was also asked why he left his body camera on when he was using the bathroom. (A.R. at 471-72). He indicated that it was accidental and that he needed to urinate frequently because of medication that he took to manage his diabetes. (A.R. at 471-73). 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 596-97). 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, 601-02). 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. 603-04).

C. Age Discrimination/Retaliation

As the part of the basis of his claim for age discrimination, Petitioner cites an article in which Chief McAvoy was allegedly quoted that Zachary Ray was hired because of his youthful age. He contends that this demonstrates that he was not selected for the full-time position because of his age. A copy of the article is attached. (A.R. at 609-10).

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'", Petitioner indicated that he was required by Chief McAvoy to do reports and that other officers were not, although this was discontinued by the Chief in an email in December of 2018. (A.R. at 486-87). He testified that he had to assume fire watch duty more frequently than other officers and that a younger employee expressed that he did not want to do the duty. (A.R. at 487). 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. (A.R. at 494-95).

The Petitioner further testified in his discovery deposition that he felt he should have received a verbal reprimand for the conduct that led to termination, like was given to Officer James, for his handling of the January 6, 2019 traffic stop. (A.R. at 526). He was never subject to formal discipline until the time of the suspension and termination of his employment but that he claimed that he had been instructed at various times to do something differently or refrain from certain conduct. (A.R. at 474-76). As far as his assertion that younger officers were held to less stringent standards of discipline, he 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 and others frequently came to work late. (A.R. 494-96). 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. (A.R. at 480). Additionally, he asserts that younger officers

had not taken their oath of office but he was required to be sworn and certified as a law enforcement officer. (A.R. 502-07).

Another claim of disparate treatment is based on the Petitioner's perception that he was not given the same access to overtime as younger officers. (A.R. at 488-94). He cites two examples in which another officer was allowed to work overtime related to court appearances and two occasions on which he expected to work overtime and was instructed to leave early. (Id.) The Affidavit of Marie DeWalt sets forth the number of over-time hours worked by all members of the department and demonstrates that the Petitioner worked far more than any other officer, regardless of age. (A.R. 611-614). Petitioner offered no challenge to the contents of this Affidavit.

Petitioner additionally contended that "the hiring process at Shepherd was changed multiple times to allow Shepherd to discriminate against older officers." (A.R. at 507-08). He conceded that this claim was related to the inclusion of the requirement of a college degree in the posting in 2016. (Id.) Petitioner also bases this on what he felt was the practice since 2017 to hire younger versus older officers and a comment attributed to Chief McAvoy in which the Chief was making fun of an older officer and stated that "those are the guys we need to replace." (Id.). The Petitioner acknowledged he had no information about the age of applicants for recent positions relative to others. (A.R. at 508).

D. Disability Discrimination

Petitioner is a diabetic. (A.R. at 467). He requires medication to manage his condition, a side effect of which is the need to urinate frequently. (Id.). Per his deposition testimony, his condition did not affect his ability to perform any of the essential functions

of his job, but he noted that he would need to take bathroom breaks with some urgency. (A.R. at 469). When one of his sergeants questioned about having left his body camera on when using the bathroom, Petitioner advised him that that was accidental and that he had a need to use the bathroom with urgency. (A.R. at 471). Petitioner asked Chief McAvoy for permission to install a grill at the police department so that he could prepare meals he felt were healthier than those offered on campus. (A.R. 469-70). This request was granted. (A.R. at 470). Shepherd University's Staff Handbook provides a mechanism for employees who need an accommodation of a disability. Petitioner testified that he was unaware of that process but that he had signed an acknowledgement that he had read and understood the handbook. (A.R. 468).

Shepherd police officers are issued body camera. They are encouraged to use them in interactions with the public. (A.R. 584-85). On more than one occasion, Petitioner failed to turn off his body camera while he was urinating in a University restroom. The video does not capture the Petitioner's anatomy, but the sound of his urination was plain. During the course of the Garrity-hearing on April 11, 2019, Petitioner was asked about why he neglected to turn off his body camera in a private moment and he replied that he forgot to do so. (A.R. at 472-73). The issue was not addressed further, and Petitioner testified that he believes that he was discriminated based on his disability because of the timing of being questioned by a sergeant as to why he had left his camera on in the bathroom, and it being raised shortly thereafter in the Garrity hearing. (Id.).

E. Retaliation

Petitioner claims that Shepherd retaliated against him for filing his non-selection grievance by failing to accord him the privilege of his seniority. This is largely centered on the fact that Chief McAvoy did not re-assign the unit numbers in the department by seniority after Petitioner started his full-time position. (A.R. at 481-84). Historically, unit numbers have been assigned with lower numbers given to those with more seniority. Petitioner testified that the numbers are re-assigned "within days" when there is a change in the department's make up. (Id.). When asked how having a higher number affected him professionally, he noted that a dispatcher casually asked him once why he did not have a lower number, that other officers mentioned it, and that he himself felt that it made him look like a less senior person. (A.R. at 483-85). Chief McAvoy testified that the department did not have a policy on when numbers would be re-assigned and that he did not handle that administrative task. (A.R. at 557-58).

The second issue is Petitioner's perception that he was denied longevity pay. "Longevity pay", also known as an Annual Increment, is provided to state employees pursuant to W. Va. Code §5-5-2, et seq. Admittedly, the application of the statute is not simple for a lay reader. However, Petitioner did not qualify to receive longevity pay because while he was a part-time employee, he worked less than half-time, 0.5 full-time equivalent. and did not have three full years of service as a full-time employee. He was credited with 14 years of full-time service in calculating his rate of pay under a pay step system that the State of West Virginia had in place, but this does not translate to determination for state longevity pay. (A.R. at 599-600). The eligibility for this longevity

pay is controlled by State law, it is not discretionary for the agency. He admitted that he was unaware of how longevity pay was calculated under the state's policy but that he knew that employees who are younger than him with less seniority received the pay. (A.R. at 482).

F. Whistleblower

Petitioner's whistleblower status as testified to in his deposition and set forth in his written discovery responses was based on three contentions. First, he notified Dr. Hendrix in an email in 2017 that he discovered from a review of court records that the University had not submitted proof that all of its officers had been given the required oath of office. (A.R. at 501-03). This was promptly corrected, and Dr. Hendrix thanked the Petitioner for his report.

His next basis is the Ethics Commission complaint he filed against Sgt. Brown with the West Virginia Ethics Commission. (A.R. at 511). In October 2018, Petitioner took photos and video of Sgt. J.D. Brown that showed him using a department vehicle to pick up a child from school. Petitioner submitted this evidence in support of the complaint. Petitioner did not provide a copy of the complaint to any member of Shepherd's administration but mentioned it to a sergeant. (A.R. at 511-12). Chief McAvoy was aware of Sergeant Brown's use of the vehicle and permitted it. (A.R. at 616).

Petitioner contended that his filing the ethics complaint was related to the termination of his employment under a convoluted theory. 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 shredded when the final report was prepared. Petitioner's theory is that Sgt. Maraugha made the report because she had allegedly had an affair with Sgt. Brown when she was Sgt. Brown's subordinate. (A.R. at 528-31, 616). Note that Sgt. Maraugha was promoted to Sergeant in 2009 or 2010. (A.R. at 618-19). Petitioner places great weight on this statement: "if it wasn't for my ethics complaint, I'd probably be still sitting here today, because in my heart cops don't turn on cops. But I did what was right." (A.R. at 531).

Petitioner claims that he was a whistleblower because he questioned the alternative community service assigned to Shepherd students charged with certain offenses. He addressed this with one of the prosecuting attorneys, who Petitioner claims intervened to stop this process. (A.R. at 517-24).

G. 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 Chef McAvoy told him not to run traffic stops on the road adjacent to Shepherd even though the department officers had the legal jurisdiction to do so, not to patrol certain parking lots during football games and not to tow vehicles parked in fire lanes. (A.R. 514-15). The email concerning the fire lanes

was sent in 2014. (A.R. at 515). Petitioner acknowledged that the Chief indicated his preference that the officers work on campus. He also noted that he was told to look the other way with smoking and drinking. Petitioner further claimed that the department requirement that warrants be time-stamped before service interfered with his ability to do his job. He is apparently not contending this requirement was imposed on him and not others because he believes he and Jay Longerbeam were the only officers that used warrants. (A.R. at 512-14). Finally, he believes that Shepherd, through the actions of Chief McAvoy and Holly Frye, terminated his employment and acted improperly because "they made judgmental decisions on lawful actions conducted by officers at Shepherd University." (A.R. at 516). As noted before, this demonstrates that the Petitioner would have this Court review his conduct from the perspective of whether it would stand constitutional muster in a criminal proceeding.

Petitioner also contends that Shepherd University ignored officers that were committing criminal violations and violations of the ethics act. The "criminal violations" were noted to be the use of university dumpsters for the disposal of private trash by several officers and that officers did not use a hand tag on the mirror of their personal vehicles because they had expired inspections. (A.R. at 509-11). As to the ethics violations, he testified that he investigated and filed a complaint with the West Virginia Ethic Commission concerning Sgt. J.D. Brown's personal use of a department vehicle. He did not address his concern with anyone at the University. (A.R. at 511). Petitioner also asserted that another officer threatened to shoot the dog in the care of a person pulled over in a traffic stop. He claims this conduct was "unprofessional" and decried that the officer

not disciplined. (A.R. at 512-13). Chief McAvoy indicated that he was unaware of the incident. (A.R. at 562).

H. Petitioner's Other Contentions

Throughout the course of discovery, Petitioner has proffered a lengthy, but irrelevant, laundry list of slights which he claims amount to age and/or disability discrimination and/or retaliation. However, this case boils down to the fact that Mr. Buracker's employment was terminated because of the very real concerns that the Shepherd University had concerning his treatment of students in two situations and his demeanor and treatment of fellow officers and other university staff.

The Petitioner has continued to argue that he and Petitioner Longerbeam had probable cause to conduct a warrantless non-consensual entry of a dorm room on October 7, 2018 and that they had probable cause to pull over a vehicle and investigate its occupants for driving under the influence of a controlled substance on January 6, 2019. This case, however, is not about whether the conduct of the two officers could withstand a legal challenge in criminal court. Instead, the heart of the case is that the record demonstrates that Shepherd terminated the Petitioner's employment for a legally proper reason consistent with its principles and philosophy of campus law enforcement.

Another red herring is Petitioner's attempt to implicate Shepherdstown's Mayor, James Auxer, in what he implies was a conspiracy with Shepherd University to terminate his employment. Included in the Petitioner's discovery responses was a statement prepared by Officer Moats of the Shepherdstown Police Department in which he reports that Mayor Auxer told him that Officer Moats should let the Mayor know of any issues with Buracker

because Shepherd was looking for a reason to "get Buracker." Petitioner claims that he was told the same thing by another Shepherdstown officer, Officer Jeffries. (A.R. at 499-500). However, Petitioner admits that he has no information as to who at Shepherd University supposedly told the Mayor to look for ways to get rid of the Petitioner, and there is no evidence that anyone at Shepherd ever initiated such conversations or objectives. (A.R. at 499-500). Petitioner maintains his belief that this plan was in effect because of his assessment of Officer Moats' credibility and the fact that the Mayor serves on multiple boards at Shepherd, is a "big sports booster" and is "best friends with the President…" (A.R. at 499). His assessment of the relationship between President Hendrix and Mayor Auxer was based on the President's referral to the Mayor as "her buddy", despite the fact that President Hendrix testified that she did not socialize with the Mayor at each other's homes, only saw him at university events and considered more to be a friend of the university than her personally. (A.R. at 608).

He also contends that the Mayor "would regularly intercede with the criminal prosecution of students, particularly athletes." (A.R. at 523-24). Petitioner used his body camera to record a conversation he had with the Mayor in the offices of the Shepherdstown Police Department in which the Mayor asked Buracker to go easy with one of the students being prosecuted for the October 6, 2018 incident. He testified that he recorded their conversation because he doesn't trust the Mayor. (A.R. at 525). Petitioner further claims that the Mayor interfered with the arrest of an athlete for public urination by Shepherdstown Police Department by telling the student to come to his office and he would take care of the situation.

3. 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 could not establish a prima facie case of disability discrimination or retaliation under the West Virginia Human Rights Act.

The Circuit Court also correctly held 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 considerations 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 is 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 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 Buracker 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 Did Not Err in Granting Summary Judgment on Petitioner's Claims Under the West Virginia Human Rights Act

1. Petitioner Cannot Establish a Prima Facie Case of Disability Discrimination

"To establish a prima facie case of disability discrimination under the WVHRA, Plaintiff must show that (1) he meets the definition of 'disabled' within the law's meaning; (2) he is a "qualified disabled person"; and (3) he was discharged from his job." See, e.g., *Hosaflook v. Consolidation Coal Co.*, 497 S.E.2d 174, 178–79. The WVHRA contains a three-prong definition of "disability." A plaintiff must establish either that he suffered from "[a] mental or physical impairment" substantially limiting one or more of his major life activities, including working; that a record of such an impairment exists; or that he was "regarded as having such an impairment" by his employer. See W. Va. Code § 5-11-3(m)(1)–(3). Under the WVHRA, not all physical impairments, even if known by an employer, constitute disabilities under the law. See e.g., *Andrew O v. Racing Corp of W. Va.*, 2013 WL 3184641 (W. Va. 2013)(obesity, thyroid condition and arthritis without medical documentation) *Lindenmuth v. Laboratory Corp. Of America*, 2016 WL 5109159 (S.D. W. Va. 2016)(sequel of kidney tumor surgery that did not substantially limit a major life activity).

Petitioner's stated basis for his disability discrimination claim is that he is a diabetic, that his Sergeant and the Chief of the Department were both aware of his condition and

that his termination was based in part on his disability. The Circuit Court correctly ruled that the Petitioner cannot establish a prima facie case for his claim. In order to establish discrimination based on a disability, it must be demonstrated first that this disability interfered with the performance of the essential functions that the adverse employment action was based on the disability.

On appeal, the Petitioner contends that his diabetes "affects a major life activity", therefore, he has met the first prong of his claim and that Circuit's finding to the contrary is "false." However, that is not the standard under the WVHRA: a disability must "substantially limit" an activity to be actionable. Petitioner incorrectly claims on page 9 of his brief, in footnote 2, that "Defendant has not disputed plaintiff's status as disabled or the adverse action of firing plaintiff. These prongs 1 and 2 are satisfied." Note: the Respondent only acknowledged the undisputed facts that the Petitioner is a diabetic and that he takes medication to manage his condition.

The Petitioner offers no legal support for his contention that his diabetes substantially affects a major life activity. His condition, which requires him to urinate frequently and with some urgency, is wholly unlike the diabetic condition of the plaintiff in *Kemp v. JHM Enterprises*, 2016 WL 859361 (D. S.C. 2016). Although a broader definition of disability applies, under ADAAA, the case is instructive. The plaintiff in *Kemp* qualified as person with a disability where diabetes he provided medical evidence showing that he has Type 1 diabetes that requires him to take multiple daily injections of insulin, eat at regular intervals, and watch his diet. He had also testified that he sometimes had double vision, sweated profusely, became unsteady on his feet and could not put words

together when his blood sugar was low. The court concluded that "a reasonable jury could conclude that Kemp is substantially limited by his diabetes in the major life activities of speaking, communicating, and caring for himself, and thus is disabled under the ADA." The Petitioner's condition bears no resemblance to that of the plaintiff in *Kemp* and is legally insufficient to meet his prima facie burden of proof.

The Petitioner also cites as error, the Circuit Court's determination that he could not prove a prima facie claim of causation. He asserts that he "enumerated a laundry list of adverse actions taken against him from the date of his grievance victory in April of 2018." Specific to his disability discrimination claim, he contends that Chief McAvoy refused to install concrete pavers he had provided to install a grill on which he could use to avoid the food served on campus. The Petitioner erroneously contends that his response to Requests for Admission and Answers to Interrogatories are "evidence" because he verified them. As discussed above, uncorroborated self-serving statements, even if contained in verified documents, are legally insufficient to rebut a motion for summary judgment. He further maintains that the references to him urinating while his body camera demonstrates causation. The Circuit Court considered this evidence and properly found that it did not rise to the level to establish the required element of causation as a matter of law.

Finally, the petitioner argues that the Circuit Court framed the issue improperly and that he does not have to prove his case. In fact, it is the role of trial court to evaluate the evidence provided to determine whether it is sufficient to establish the prima facie elements of a plaintiff's claim. The Circuit Court properly exercised this role and found the evidence

established that the petitioner could not prove a prima facie case as to two of the required elements, disability and causation, and it correctly granted summary judgment.

2. Petitioner Cannot Prove A Prima Facie Case of Reprisal for making a Report of Age Discrimination

In his Amended Complaint, Petitioner claimed 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 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.

Petitioner's disclosure amounts to the fact that he asserted in his grievance that he was not hired for the full-time position because of his age. The Petitioner was instated to

the position effective June 4, 2018. The termination of his employment did not occur until nearly a year later.

The Circuit Court correctly ruled that even if making the assertion of age discrimination in his grievance is considered "protected activity", it fell outside of the period of time from which it could be inferred that it was retaliatory. The Circuit Court also declared that because Shepherd terminated the Petitioner's employment for a legitimate business reason, summary judgment was appropriate as a matter of law.

On appeal, Petitioner only claims that the trial was wrong because it only cited to four federal cases addressing temporal proximity and that temporal proximity is only one of four factors to be considered. In fact, in *Knotts v. Grafton City Hospital,* 237 W. Va. 169, 178, 786 S.E.2d 188, 197 (2016), the court observed that in *Hanlon v. Chambers*, 195 W.Va. 99, 112, 464 S.E.2d 741, 754 (1995), Justice Cleckley stated, "[w]e have repeatedly held that we will construe the Human Rights Act to coincide with the prevailing federal application of Title VII unless there are variations in the statutory language that call for divergent applications or there are some other compelling reasons justifying a different result." In this case, the federal cases provide guidance where this court has not spoken and the Circuit Court properly relied upon these cases for its decision. The Petitioner offers no case law to demonstrate that the Circuit Court was incorrect in its decision.

To the second point, Respondent agrees that temporal proximity is just one of the factors, but it is indeed one of the four required elements necessary to prove a prima facie case. Without proof of a relationship, the claim fails on the causation element.

Petitioner further injects that there were other adverse actions taken against him and claims to have "provided to the [the trial court] a mountain of evidence in support of an ongoing and continuous pattern of adverse actions taken against him since his 2018 grievance victory. In fact, the Petitioner fails on two points. First, the "mountain" he offers is only in the form of uncorroborated, self-serving statements and unsigned, undated and unverified statements which is not proper to defeat a motion for summary judgment. The Petitioner references his sworn interrogatories, which are uncorroborated by any independent affidavit and merely contain summary assertions of disparate treatment. In fact, he ignores the affidavit of Marie DeWalt concerning the overtime issue and merely claims that another officer was permitted work 14 hour days while he was sent home. The statement of Chief Michael King of the Shepherdstown Police Department is undated and unverified and thus not proper evidence at the summary judgment stage. The longevity pay issue was addressed in the sworn deposition of Marie DeWalt. The Petitioner's perception that he should have been afforded such pay and was told by a sergeant that he should receive it is simply not supported by the law and he offers no properly supported evidence to establish that Shepherd University improperly applied the state law and policy in determining that he was not entitled to that pay. His self-serving affidavit is not corroborated by any other sworn affidavit or other proper evidence.

Secondly, this pattern of "adverse actions" does not rise to the level necessary to support his claim. 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 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 were not 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.

The Circuit Court correctly determined that summary judgment was proper on the petitioner's claim for retaliatory discharge under the WVHRA and its decision should be affirmed.

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

The Petitioner contended 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 identified three bases on which he believed was a whistleblower: his report that officers had not taken their oath of office, his ethics complaint against a fellow officer, and in questioning the alternative community service assigned to Shepherd University students charged with certain offenses. On appeal, he claims that the Circuit Court overlooked his 2018 grievance as a basis. In doing so, he misstates the basis for his grievance victory: his claim of age discrimination formed no basis for the decision. (See Appendix Record at 541-52). He also adds his "disclosure" of witness tampering by Shepherdstown's Mayor. Summary judgment was properly granted on the theories raised and for the reasons set forth herein, summary disposition as to the new addition is also proper.

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 Report Concerning Oaths of Office was not temporally related to termination

In 2017, Petitioner advised Shepherd University President Hendrix that some of the police department's officers had not been given the required oath of office. As a matter of law, this "disclosure" cannot be considered a motivating factor as it occurred nearly two years before the termination of the Plaintiff's employment. Moreover, the oversight was corrected and the Plaintiff was thanked for his diligence in reporting this. The Circuit Court correctly found that the lack of the temporal proximity of this complaint to the termination of his employment was fatal to the Petitioner's claim. As set forth above, the other alleged "adverse action did not rise to the level of materiality to constitute actionable retaliation" as set forth above.

2. 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 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.

Moreover, the Petitioner's recitation of his evidence is based solely on his uncorroborated self-serving statements. As such, it cannot be considered as a means to defeat summary judgment.

3. Petitioner's Ethics Commission Complaint Was Not The Legal Cause For The Termination Of His Employment.

Petitioner testified in his discovery deposition that he feels he is a whistleblower because he filed a complaint with the West Virginia Ethics Commission which challenged the conduct of Sergeant J.D. Brown, a Shepherd University Police Department officer for personal use of a department vehicle. Chief McAvoy testified that he was aware of and gave permission for Sgt. Brown to use the vehicle to pick up his child from school, thus there was no "disclosure." As discussed above the convoluted theory that Sgt. Maraugha instigated officers to complain about the Petitioner because of her alleged affair with Sgt. Brown more than a decade prior because of the ethics complaint, has no merit and is pure speculation.

The Petitioner's argument that there was a lack of adverse action against him as a result of the Ethics Complaint also fails for the reasons set forth above: none of the so-called actions were materially adverse as required by law. The Circuit Court properly determined that there was no genuine of issue of material fact in dispute on this point and concluded that the Petitioner was not entitled to whistleblower protection as a matter of law.

4. Petitioner Did Not Make a Disclosure of "Witness Tampering"

In his appeal brief, the Petitioner is critical of the Circuit Court's summary conclusion that the video of his conversation of James Auxer, the City of Shepherdstown's Mayor, was not a disclosure of wrongdoing or waste. Even if it is accepted that the conversation violated West Virginia Code section 61-5-27(b) or 18 U.S.C. 1512(c), there is no properly supported factual or logical basis to assert that this somehow a disclosure of waste or wrongdoing by Shepherd University related to "Shepherd University's refusal to allow their officers to enforce state law." The Circuit Court gave the due amount of credence to this allegation in dismissing it as a basis for a Whistleblower Act violation.

B. 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 at 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 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 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 broader and more 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 refence 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