INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

LISA R. DANIELS,

Plaintiff Below, Petitioner

v.

No. 23-ICA-212
(Civil Action #21-C-650)

DAL Global Services, LLC,

Defendant Below, Respondent

BRIEF OF RESPONDENT DAL GLOBAL SERVICES, LLC

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STATEMENT OF THE CASE

Pursuant to W. Va. R. App. P. 10(d), Respondent DAL Global Services, LLC's Statement of the Case will be limited to what is necessary to correct any inaccuracy or omission contained in Petitioner's Brief.

I. Procedural History

Petitioner Lisa R. Daniels's raised seven claims against Respondent in her Complaint[1]: 1) failure to accommodate under the West Virginia Human Rights Act ("WVHRA"), 2) retaliation under the WVHRA, 3) discrimination under the West Virginia Medical Cannabis Act ("WVMCA"), 4) wrongful discharge in violation of public policy as recognized by the WVMCA, 5) violation of the West Virginia Safer Workplace Act, 6) invasion of privacy, and 7) violation of the West Virginia Wage Payment and Collection Act. App. 00001-00017. Petitioner has abandoned her claims except for those under the WVHRA and WVMCA and for invasion of privacy.

II. Statement of Facts

Petitioner worked at Yeager Airport in Charleston. (App. at p. 00254). Upon entering her position, Petitioner needed to pass a fingerprint screening process in accordance with federal regulation to fully perform her duties. (*Id.* at pp. 00269-70, 00303). In February 2019, Petitioner signed a "Safety Commitment Letter" promising to adhere to fundamental safety and security values as part of her job. (*Id.* at pp. 00274-75, 00304). While working at the airport, Petitioner needed to be ready to identify possible safety risks and alert appropriate authorities. (*Id.* at pp. 000276-77). Petitioner's supervisor Jennifer Kuhn, the Station Manager, believed that all members of her team, including Petitioner, had safety job functions. (*Id*. at pp. 00244-45).

[1] Petitioner had originally named Jennifer Kuhn as a defendant, but the parties filed a stipulation to dismiss her from the case. (App. at p. 000038).

In her position as a Customer Service Agent, Petitioner worked at the front ticketing counter at the airport supporting Delta and United Airlines flights. (*Id*. at pp. 00255-57). Petitioner would check passengers' bags, verify the identity of passengers with checked bags, interact with Transportation Security Administration agents when a passenger was flying with an animal, ensure that any checked bags were appropriately weighed for the plane to be properly balanced, and ask passengers safety screening questions. (*Id.* at pp. 00257-64).

As a Customer Service Agent, Petitioner would also work at the departure gate where her duties would include scanning boarding passes and rebooking passengers. (*Id*. at p. 00265). Petitioner would also have access to the airplane cockpit to provide the pilots paperwork, including the passenger manifest. (*Id.* at pp. 00266-67). When working at the gate, Petitioner was responsible, as required by federal safety regulations, for ensuring that passengers with bags on the plane boarded, and if they did not, confirming that their bags were removed from the plane before takeoff. (*Id.* at pp. 00271-72). Petitioner was also responsible for alerting the captain or security if a passenger appeared unfit to fly because they were intoxicated or for some other reason. (*Id.* at p. 00273). Additionally, for United flights, Petitioner was responsible for moving equipment up to the plane door so passengers could deplane. (*Id.* at p. 00268).

During Petitioner's employment, Respondent had a policy that required an employee who was out on leave for longer than 30 days to be drug tested before he or she returned to work. (*Id.* at pp. 00251-52, 00306). Petitioner was fully aware of this policy. (*Id.* at pp. 00252-53, 00284). In addition, Respondent's policy prohibits the use of all illegal drugs, both on and off duty, and makes it clear that drug use "will result in termination." (*Id.* at pp. 00306-07).

a. Petitioner was not certified under West Virginia Law to use Marijuana.

In June 2019, Petitioner received certification to use medical marijuana under Ohio law from her Ohio-based doctor. (*Id.* at pp. 00278-79, 00305). Petitioner was prescribed medical

marijuana for the purpose of pain management. (*Id.* at p. 00279). No West Virginia-based doctors have ever prescribed Petitioner medical marijuana. (*Id.* at pp. 00280-81). Petitioner has no certification to use medical marijuana under West Virginia law. (*Id.* at p. 00282). Petitioner acknowledged that her use of marijuana is not legal under West Virginia laws. (*Id.* at p. 00283). And Petitioner also admitted there were not marijuana dispensaries in West Virginia in 2020. (*Id.* at p. 00289).

In August 2020, Petitioner took leave from work because of a nerve issue with her hand and arm. (*Id.* at p. 00288). Petitioner's leave began on or about August 6, 2020. (*Id.* at p. 00355). In October, Petitioner submitted a form completed by her doctor that conveyed she could return to work on or about October 19, 2020, *with no restrictions*. (*Id.* at pp. 00289, 00310-11). Petitioner knew that after being out of work for over two months, she would be drug tested before she could come back. (*Id.* at p. 00290). Petitioner informed Kuhn on October 2, 2020, that she would be cleared to return to work October 19, 2020. (*Id.* at p. 00295). Yet Petitioner used marijuana after October 2, 2020, despite knowing that she would be drug tested before returning to work. (*Id.*).

b. Petitioner's drug test was positive for a drug illegal under West Virginia law.

Petitioner needed to report to MedExpress for her drug test. (*Id.* at p. 00290). Petitioner chose when to get the drug test papers from Kuhn and did so on October 16, 2020. (*Id.* at p. 00296-97). Petitioner also chose when to go in for testing and first attempted to test on Friday, October 16th, but left because it was too crowded, and then returned the next day. (*Id.* at p. 00290). When Petitioner arrived for the test on Saturday, she began to panic because she realized that she might fail the test from the marijuana she consumed a week or two earlier. (*Id.* at pp. 00291-92). Petitioner called Kuhn while at MedExpress, informed Kuhn that she had recently consumed marijuana, and asked if the test could be delayed. (*Id.* at p. 00291). Kuhn advised that, in accordance with company policy, a refusal to test would be considered a failed test. (*Id.* at pp.

00241-42). Petitioner could not tell Kuhn how long she needed the test delayed before the marijuana would be out of her system. (*Id.* at pp. 00293-94). Petitioner gave a urine sample and exchanged a series of text messages with Kuhn later. (*Id.* at pp, 00322-23). Petitioner asked Kuhn if rehab was an option if she failed, and Kuhn said she would ask human resources on Monday what Petitioner's options would be if she failed. (*Id.*).

Days later, the medical review officer informed Petitioner that she had tested positive for THC, the drug in marijuana. (*Id*. at p. 00294). On October 25, 2020, Petitioner informed Kuhn by text message that she had tested positive for THC. (*Id*. at pp. 00299, 00328). Kuhn allowed Petitioner to write a statement for human resources, giving her side of the story before Respondent decided whether to terminate. (*Id.* At p. 00300). In the October 27, 2020 statement, Petitioner said she took gummies with THC about two weeks before her test, and provided her Ohio medical marijuana card. (*Id*. at p. 00348). Kuhn forwarded the statement to the Human Resources Business Partner who was assisting her with the situation, Michael James. (*Id.* at p. 00243). Kuhn consulted James and was advised that it was appropriate to terminate Petitioner because of the positive drug test. (*Id.* at pp. 00240, 00247-48). This decision aligned with Respondent's policy, which provided that anyone who tests positive for drugs and violates the drug and alcohol policy be terminated. (*Id.* at p. 00352). Kuhn informed Petitioner that Respondent was terminating her employment because of the failed drug test. (*Id.* at p. 00301).

SUMMARY OF ARGUMENT

At its core, Petitioner seeks to shield her use of marijuana by using claims under West Virginia law. But as the Circuit Court correctly determined, West Virginia law did not cover Petitioner's marijuana use and did not protect her from a drug test or employment consequences because of a positive drug test revealing use of a controlled substance illegal under West Virginia

law. The Circuit Court reaffirmed this determination after Petitioner moved to Alter or Amend the Judgment under Rule 59(e).

Rather than accept that she does not have legally valid claims, Petitioner continues to try to fit a square peg into a round hole by bringing this Appeal. Once again, as exposed by the Circuit Court, Petitioner is misguided in her arguments.

Petition has no claims under the WVHRA. West Virginia law is clear that it does not protect an employee from drug tests for illegal drugs and employers do not have to accommodate positive drug tests. In the alternative, having to exempt Petitioner from a uniformly applied drug test would be an undue hardship on Respondent. Petitioner also does not have a retaliation claim under the WVHRA because she did not engage in the required opposition activity required to form such a claim. Any retaliation claim would also fail because Petitioner has no evidence that her termination was retaliatory.

Petitioner also claims that she has a viable cause of action under the WVMCA, but this claim falls apart with just the slightest examination of the statute's terms. The WVMCA does not provide for a private right of action. But even if it did, the WVMCA by its own terms does not apply to Petitioner's Ohio medical marijuana certification. Without a West Virginia certification pursuant to the WVMCA, the provisions of the WVMCA do not apply to Petitioner. In addition, Petitioner cannot sustain a West Virginia common law claim for violating public policy because the public policy created by the WVMCA does not cover her out-of-state medical marijuana certification.

Lastly, Petitioner claims that the drug test administered by Respondent improperly invaded her privacy. Once again, Petitioner is incorrect. Petitioner, like any returning employee, had a lowered expectation of privacy resulting from her knowledge that the drug test was needed to allow her to return to work. Moreover, the invasion of privacy claim fails because some of Petitioner's

duties related to public safety, which the West Virginia Supreme Court has recognized is an exception to privacy protections from drug tests.

As explained in more detail below, the Court should affirm the Circuit Court's decision to grant summary judgment to Respondent on all of Petitioner's claims.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner has requested oral argument pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure. Respondent does not oppose Petitioner's request for oral argument.

ARGUMENT

The Circuit Court correctly determined that Respondent was entitled to summary judgment on all of Petitioner's claims. As explained in detail below, each of Petitioner's claims is missing at least one fundamental element, and Respondent was entitled to judgment as a matter of law on each claim, often on multiple bases. Furthermore, the Circuit Court correctly denied Petitioner's Rule 59(e) Motion to Alter or Amend the Judgment. This Court should uphold the Circuit Court's legally sound decisions and affirm the Circuit Court's previous rulings.[2]

I. Standard of Review

The Circuit Court's entry of summary judgment is reviewed de novo. Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). "Summary judgment is appropriate where the record taken as a whole 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." *Id.* at Syl. Pt. 4.

If the nonmovant fails to make an adequate showing on even one element of her case, the failure of proof "necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S.

[2] Pursuant to W. Va. R. App. P. 10(d), Respondent addresses all of Petitioner's assignments of error in the sections below and disagrees with all of Petitioner's assignments of error.

317, 323 (1986). To defeat a summary judgment motion, the nonmoving party must present evidence with substance that shows there are genuine issues of material fact. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60, 459 S.E.2d 329 (1995). "For example, 'unsupported speculation is not sufficient to defeat a summary judgment motion.'" *Id.* (quoting *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987)).

The Circuit Court's denial of a Rule 59(e) Motion to Alter and Amend Judgment is reviewed under "the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal … is filed." Syl. Pt. 1, *Wickland v. American Travellers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998). Therefore, because the Rule 59(e) Motion sought to alter or amend the granting of summary judgment, the Circuit Court's denial of the Rule 59(e) Motion is reviewed de novo on appeal.

II. The Circuit Court Correctly Determined that Petitioner's WVHRA Claims Failed as a Matter of Law.

Petitioner takes issues with the Circuit Court's determination that her WVHRA claims of failure to accommodate and retaliation failed as a matter of law. As was the case throughout this litigation, Petitioner's Brief shows that she fundamentally misunderstands what is required in such claims and fails to grasp the Circuit Court's bases for granting summary judgment. The WVHRA simply did not protect Petitioner's marijuana use or allow her to avoid a drug test.

a. Petitioner's Failure to Accommodate Claim cannot be put to a jury.

As held by the Circuit Court, there was no reason to present Petitioner's fundamentally deficient failure to accommodate claim to a jury. The WVHRA explicitly articulates that Respondent had no duty to accommodate Petitioner's marijuana use, which was illegal in West Virginia at the time, and that Respondent did not have to exempt her from a drug test.

"[T]o establish a prima facie case of disability discrimination, the plaintiff must show that [s]he is a disabled person within the meaning of the law, that [s]he is qualified to perform the essential functions of the job (either with or without reasonable accommodation), and that [s]he has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises." *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 71 n. 22, 479 S.E.2d 561 (1996). "To comply with our Human Rights Act, an employer must make reasonable accommodations for known impairments to permit an employee to perform the essential functions of the job." *Id.* at 65. Employers do not have to provide accommodations that would be an undue hardship. *Id.* at 66.

As correctly found by the Circuit Court, Petitioner failed to meet the first element of a disability discrimination claim, because her marijuana use cannot render her "disabled." Under the WVHRA, "disability" is defined as "[a] mental or physical impairment which substantially limits one or more of such person's major life activities." W. Va. Code § 5-11-3(m)(1). Petitioner provided Respondent a doctor's note that stated she could return to work and did not need any more time off. (App. at pp. 00310-11). Petitioner did not request any changes to her job duties to allow her to come back to work or suggest she needed more time for her injuries to heal, instead, she based her failure to accommodate claim on a request to delay a drug test so that she did not test positive for marijuana.

The WVHRA explicitly excludes the use of drugs from the "disability" protections of the statute. "For the purposes of this article, this term [disability] does not include persons whose current use of or addiction to alcohol or drugs prevents such persons from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others." W. Va. Code § 5-11-3(m). Similarly, the federal Americans with Disabilities Act ("ADA") excludes an individual "who is

currently engaging in the illegal use of drugs" from its protections.[3] *See* 42 U.S.C. § 12114(a). "[T]he standards governing the ADA, the Rehabilitation Act, and the WVHRA are coextensive." *Shafer v. Preston Mem. Hosp. Corp.*, 107 F.3d 274, 281 (4th Cir. 1997). Someone who is not disabled under the ADA would also not be disabled under the WVHRA. *Id.* In addition, the West Virginia Human Rights Commission's ("WVHRC") Legislative Rule makes it clear that nothing in the WVHRA is meant to "prohibit . . . the conducting of testing for the illegal use of drugs by job applicants or employees or making employment decisions based on such test results." W. Va. Code R. § 77-1-5.6. Legislative rules, like the one issued by the WVHRC on drug tests, have the force of law under West Virginia law. *See* W. Va. Code § 29A-1-2(d).

At the time of her test, marijuana was an illegal drug in the state of West Virginia, no one had a medical marijuana certification to use marijuana in the state, and no West Virginia law authorized Petitioner to have marijuana in her system. Petitioner's drug use, which she admits was not legal in West Virginia, is not a disability under the WVHRA and was not a valid basis for her to request an accommodation. Petitioner could not save her job by admitting to drug use just before the test given her inevitable failure. *See Shafer*, 107 F.3d at 280 ("[A]n employee who admits to recent drug use only after being caught and confronted—like an employee who fails a drug test—cannot avoid being fired by immediately entering drug rehabilitation."). "Terminating an employee for 'current illegal drug use' does not constitute discrimination based on disability under anti-discrimination laws." *Foster v. Nash*, 2020 U.S. Dist. LEXIS 106988, *9 (S.D. W. Va. June 18, 2020). In turn, Respondent had no legal obligation to delay the test or exempt Petitioner from the drug testing policy because of her use of marijuana and her failure to accommodate claim fails on this basis.

[3] Marijuana is also illegal under to federal law.

Petitioner attempts to gloss over the fact the fact that her marijuana use was not protected by the WVHRA by claiming the Circuit Court erred in characterizing the marijuana in Petitioner's system as "not legal in the state of West Virginia" and a test for marijuana in West Virginia at the time was a test "for an illegal drug in the state." Petitioner's Brief at p. 19. Rather than being an error, the Circuit Court's language explains the status of marijuana in West Virginia at the time of the test. Petitioner can protest this reality, but she cannot escape the fact that marijuana was an illegal drug in West Virginia at the time and no West Virginia law authorized her to have marijuana in her system.

Petitioner seeks to distract from the fact that the WVHRA did not protect her marijuana use or allow her to be exempted from a drug testing requirement by citing a number of criminal cases from West Virginia and other states regarding the prosecution of marijuana offenses. *Id*. at pp. 20-24. This line of argument badly misses the point and is irrelevant to the issues in Petitioner's case. The Circuit Court did not use the language in Paragraph 50 of its Order to call for Petitioner's prosecution, instead, the Circuit Court included this language to explain how marijuana—Petitioner's specific test for it—fell within the "illegal drug" language used in the WVHRC Legislative Rule and the ADA. Petitioner does not have to meet the requirements for prosecution for the test she was being administered to be a test for an "illegal drug." The test was a test for illegal drugs based on marijuana's status at the time in West Virginia. Petitioner cannot escape that the WVHRA did not protect her marijuana use and did not obligate Respondent to exempt Petitioner from a drug testing requirement. The lack of legal protection of her marijuana use under the WVHRA makes her failure to accommodate claim fail as a matter of law and the Circuit Court correct to find that summary judgment was appropriate.

Petitioner also argues that the Circuit Court erred when it determined that Petitioner's failure to accommodate claim failed because any accommodation from the drug testing requirement

would have been an undue hardship. Petitioner's Brief at p. 25. As the Circuit Court explained, undue hardship was a "separate and independent reason" why Respondent was entitled to judgment as a matter of law on Petitioner's failure to accommodate claim. App. at p. 00481. So, this Court only needs to address this conclusion by the Circuit Court if it finds that the other reason the Circuit Court gave was wrong.

Respondent raised undue hardship in response to Petitioner's Motion for Summary Judgment, putting the issue in front of the Circuit Court to consider for summary judgment. *See* App. at p. 00443. Petitioner claims that Respondent waived the undue hardship argument by not pleading the defense in its Answer. Petitioner's Brief at p. 25. Respondent's Answer did plead as a defense that it had "complied in all respects with their obligations under West Virginia law." App. 34. This defense would encompass the need to accommodate Petitioner unless an undue hardship exists. Petitioner never alleged that Respondent had failed to plead an affirmative defense of undue hardship with the Circuit Court, even in her Rule 59(e) Motion. *See* App. 496-504. But if this Court finds that Petitioner did not plead undue hardship in its Answer, the admission of a defense not properly pled is "left to the sound discretion of the circuit court." *Hanshaw v. City of Huntington*, 193 W. Va. 364, 367, 456 S.E.2d 445 (1995). The Circuit Court correctly determined that exempting Petitioner from a drug test or ignoring her positive test would have been an undue hardship on Respondent.

In any event, assuming arguendo that this Court determines that the Circuit Court should not have made the undue hardship determination on summary judgment, the decision on the failure to accommodate claim should be upheld based on Petitioner not being disabled and there being no obligation to accommodate her from a test for illegal drugs.

b. Petitioner's WVHRA Retaliation Claim is meritless.

Petitioner also claims the Circuit Court erred by granting summary judgment on her WVHRA retaliation claim. Once again, Petitioner fails to understand the bases for the Circuit Court's determination, and she fails to articulate a clear reason why the Circuit Court was wrong.

As the Circuit Court determined, Petitioner's retaliation claim failed as a matter of law because she never engaged in any protected activity that can support a retaliation claim. Without such protected activity, she cannot meet her prima facie case of a retaliation claim and her claim fails.

To establish the prima facie case for a retaliation claim, Petitioner must show: "(1) that [she] engaged in protected activity, (2) that [her] employer was aware of the protected activities, (3) that [she] was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that [her] discharge followed … her protected activities within such period of time that the court can infer retaliatory motivation." *Brammer v. W. Va. Hum. Rts. Comm'n*, 183 W. Va. 108, 110-11, 394 S.E.2d 340 (1990). The WVHRA prohibits employers from engaging "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(C). The West Virginia Supreme Court has explained that for an individual to show that she has engaged in protected activity she "must show that . . . her opposition concerned practices that he or she believed were violations of the statute." *Hanlon v. Chambers*, 195 W. Va. 99, 112, 464 S.E.2d 741 (1995).

Petitioner's Brief, as was the case before the Circuit Court, does not point to any opposition to any alleged prohibited acts. Petitioner's accommodation request, even if a valid one, is not protected activity that can support a retaliation claim. Requesting an accommodation does not

show opposition to practices that an employee believes violate the WVHRA. *See Hanlon*, 195 W. Va. at 112. Courts have made it clear that requesting an accommodation, even if denied, cannot support a retaliation claim. *See Floyd v. Lee*, 968 F. Supp. 2d 308, 334 (D.D.C. 2013) ("[I]f the denial of a request for accommodation could itself support a claim of retaliation based on the request, then every failure-to-accommodate claim would be doubled."). The denial of Petitioner's accommodation request to be exempted from drug testing cannot sustain a separate retaliation claim.

Petitioner objects to the Circuit Court's reference to the fact that use of illegal drugs is not protected by the WVHRA. *See* App. at 00482 ¶ 61. But this portion of the order explained how requesting exemption from a test for illegal drugs was not protected activity under the WVHRA. *Id.* ¶ 62. The order adds that simply requesting an accommodation is not the type of opposition activity protected by the WVHRA. *Id.* ¶ 63. Since Petitioner never engaged in the opposition activity protected by the WVHRA, she cannot meet her prima facie burden and the Circuit Court correctly determined that Respondent was entitled to judgment as a matter of law on the retaliation claim.

Petitioner also claims that the Circuit Court erred by finding, as an alternative basis for awarding summary judgment, that even if Petitioner could prove a prima facie case, her retaliation claim fails because she cannot ultimately prove that but for any protected activity she would not have been terminated. Petitioner Brief at p. 26. Petitioner simply has no evidence that demonstrates that she was terminated in retaliation for protected activity. As the West Virginia Supreme Court has further explained, even if a prima facie case has been established, which in this case it has not, the question of whether someone suffered discrimination becomes a question of law when "only one conclusion could be drawn from the record in the case." *Conrad v. ARA Szabo*, 198 W. Va. 362, 370, 480 S.E.2d 801 (1996). Here, based on the evidence, only one

conclusion can be drawn, and it is that Petitioner did not suffer unlawful retaliation. Petitioner has presented no evidence that even suggests retaliation drove the decision to terminate her. Therefore, the Circuit Court correctly determined this was an alternate basis for awarding summary judgment.

Lastly, the Circuit Court, in yet another alternate basis for awarding summary judgment on the retaliation claim, noted that Petitioner failed to respond to Respondent's arguments about this claim, effectively waiving it. The Circuit Court was correct that by failing to address Respondent's arguments, Petitioner waived the claim. *See W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 Fed. Appx. 214, 226 (4th Cir. 2019) (quoting *Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016)) (Ignoring arguments the moving party made is "'an outright failure to join in the adversarial process would ordinarily result in waiver.'"); *see also Wojtas v. Capital Guardian Tr. Co.*, 477 F.3d 924, 926 (7th Cir. 2007) (the plaintiff failing to respond to arguments in a motion means that she accepted the argument and operates as a waiver). While the Circuit Court still decided the claim on the merits, it was correct in noting that Petitioner's failure to respond to Respondent's argument was another reason Respondent was entitled to summary judgment on this claim. Petitioner's contention that she addressed the retaliation claim by addressing the failure to accommodate claim (*see* Petitioner's Brief at p. 25) rings hollow. These are two separate claims and Petitioner completely failed to advocate her retaliation claim in response to Respondent's arguments. Failing to do so effectively waived the claim.

The Circuit Court's finding that Petitioner's retaliation claim failed as a matter of law was correct and should be upheld by this Court.

III. Petitioner's WVMCA Claim Failed as a Matter of Law.

a. There is no private cause of action under the WVMCA.

The Circuit Court correctly determined that the WVMCA provided Petitioner no cause of action. Petitioner lacks any coherent reason why the Circuit Court was incorrect. There is no

private right of action under the WVMCA, and even if there were, Petitioner does not qualify. By the statute's plain terms, it does not apply to Petitioner. Accordingly, this Court should uphold the Circuit Court's determination that Petitioner's WVMCA claim fails as a matter of law.

The clear terms of the WVMCA show that there is no private cause of action under the statute. The WVMCA is carefully crafted legislation, and the legislature had an opportunity to write in a private cause of action but did not. Ultimately, as the West Virginia Supreme Court has explained, "legislative intent is the polar star in determining the existence of a private cause of action." *Fucillo v. Kerner*, 231 W. Va. 195, 200, 744 S.E.2d 305 (2013). There is no sign that the legislature had any intent of including a private cause of action in the WVMCA, and the best evidence for this is that no provision does so. Accordingly, the WVMCA does not meet the test to determine whether a private cause of action exists, as explained in *Hurley v. Allied Chem. Corp*., 164 W. Va. 268, 262 S.E.2d 757 (1980). Along with the absence of any intent in the statute for a private cause of action, Petitioner does not meet the first factor set out in *Hurley* because she was not part of a "special class" that was supposed to benefit from the WVMCA. 164 W. Va. *Id*. at 274. As explained in more detailed below, Petitioner was never certified to us medical cannabis under the WVMCA, and only those who are certified are the intended beneficiaries of the statute.

At bottom, the WVMCA is a recently enacted statute, and the legislature had the full benefit of West Virginia Supreme Court case law on private causes of action to consider and determined that it would not include a private cause of action provision in the WVMCA. *See Miles v. Apex Marine Corp*., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation."). If Petitioner was supposed to have a private cause of action, the legislature would have said so, and its silence speaks volumes.

Even if Petitioner could, in theory, bring a private cause of action under the WVMCA, she personally cannot bring one because she was never certified under the WVMCA. The WVMCA states:

> No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use *medical cannabis.*

W. Va. Code § 16A-15-4(b)(1) (emphasis added).

The WVMCA defines "certified medical use" as "the acquisition, possession, use, or transportation of medical cannabis by a patient, . . . for use as part of the treatment of the patient's serious medical condition, *as authorized in a certification under this act,* including enabling the patient to tolerate treatment for the serious medical condition." W. Va. Code § 16A-2-1(5) (emphasis added). Medical cannabis is defined as "cannabis for certified medical use *as set forth in this act*." *Id*. at § 16A-2-1(20) (emphasis added). Patient is defined as someone who "(A) [h]as a serious medical condition, (B) [h]as met the requirements for certification under this act, and (C) is a resident of this state." *Id*. at § 16A-2-1(22).

By her own admission, Petitioner has never received certification to use medical marijuana in West Virginia under the WVMCA, and never used cannabis that was certified for use under the WVMCA. Furthermore, Petitioner's Ohio certification is meaningless under the WVMCA because the statute does not recognize the certifications of other states as satisfying the certification requirements of the WVMCA. In fact, the only provision of the WVMCA that discusses reciprocity from other states is limited to "terminally ill cancer patients," which Petitioner is not. *Id.* at § 16A-3-5. Once again, limiting reciprocity to very narrow terms was a deliberate decision by the legislature that courts cannot rewrite.

By its clear terms, the WVMCA's employment protections applied to individuals certified under the WVMCA and using medical cannabis as certified by the WVMCA. Petitioner's Ohio medical marijuana status is irrelevant under West Virginia law, which the Circuit Court correctly recognized in determining that Respondent was entitled to summary judgment on this claim.

b. The Circuit Court correctly determined that Petitioner's termination did not violate West Virginia public policy.

Anticipating the failure of her argument that the WVMCA provided her a cause of action, Petitioner also argues that the Circuit Court committed error by determining Petitioner's termination did not violate public policy under West Virginia common law as discussed in *Harless v. First Nat. Bank in Fairmount*. *See* Petitioner's Brief at p. 31. Once again, Petitioner is incorrect. The Circuit Court correctly found that there was no valid violation of public policy claim because Petitioner fell outside any public policy set out in the WVMCA. *See* App. p. 00489 n. 4.

To state a violation of public policy claim, Petitioner must show: 1) a clear public policy manifested in a state or federal authority, 2) dismissal of the employee under the circumstances would jeopardize the public policy, 3) the dismissal was motivated by conduct related to the public policy, and 4) the employer lacked a legitimate business reason for the dismissal. *Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 726, 815 S.E.2d 520 (2018).

Petitioner has no connection to any public policy set forth in the WVMCA. As explained above, the WVMCA provides protection to those who are certified to use medical cannabis under the provisions of the WVMCA. The WVMCA also explicitly does not recognize certifications from other states, except under very narrow circumstances. It is undisputed that Petitioner was not certified under the WVMCA, and the clear definitions of the terms in the statute limited the employment protections to those certified under the WVMCA. Any public policy that existed did not extend to Petitioner, and she cannot rewrite the statute to serve her own ends.

Grasping at straws, Petitioner claims the not applying the WVMCA protections to her somehow violates "equal protection" and the Constitution's dormant Commerce Clause. Petitioner's Brief at p. 32. Petitioner cites no authority that explains how either concept applies to the WVMCA or Petitioner not being certified under the WVMCA. She fails to cite such authority because none exists. The West Virginia Legislature established the medical cannabis regime that would apply to the state in the WVMCA. The legislature was free to exercise state sovereignty by limiting the provisions to individuals who were certified under the WVMCA and only allowing for reciprocity from other states under extremely narrow circumstances. These decisions meant the WVMCA did not apply to Petitioner and her Ohio medical marijuana certification. Petitioner chose to work in West Virginia despite living in Ohio and was therefore subject to West Virginia law as it relates to her employment. None of these circumstances violate equal protection or the dormant Commerce Clause, and Petitioner has presented no authority that suggests otherwise.

Because she was not certified to use medical cannabis under the WVMCA, Petitioner does not have a claim that she was wrongfully terminated, either under the statute itself or pursuant to West Virginia common law under a *Harless* claim.

IV. Petitioner's Invasion of Privacy Claim Fails as a Matter of Law.

Petitioner argues that the Circuit Court improperly granted summary judgment on her invasion of privacy claim related to the drug test. Once again, Petitioner is mistaken. The Circuit Court correctly articulated two reasons for why Petitioner's invasion of privacy claim failed legally. Either of these reasons justified finding that Petitioner's invasion of privacy claim could not withstand Respondent's Motion for Summary Judgment. Accordingly, this Court should uphold the Circuit Court's determination.

The West Virginia Supreme Court in *Twigg v. Hercules, Corp.* concluded that "it is contrary to public policy in West Virginia for an employer to require an employee to submit to

drug testing, since such testing portends an invasion of an individual's right to privacy." 185 W. Va. 155, 158, 406 S.E.2d 52 (1990). For two separate reasons, Petitioner's situation does not violate this right to privacy.

First, the West Virginia Supreme Court later clarified in *Baughman v. Wal-Mart Stores, Inc*. that the same violation of privacy does not occur when the individual drug tested has a lowered expectation of privacy. 215 W. Va. 45, 592 S.E.2d 824 (2003). In *Baughman*, the plaintiff who took a pre-employment testing had a lowered expectation of privacy and therefore the drug testing did not violate the privacy right outlined in *Twigg. Id.* at 49. In Petitioner's case, she was out on leave for over two months before the drug test. The drug test was conducted as part of a well-established policy that required an employee out more than 30 days to be drug tested before returning to work. Petitioner knew of this policy and fully expected to be drug tested before returning to work. Despite this, she still consumed marijuana after learning of her return date—one that she and her doctors set, not her employer.

As in *Baughman*, Petitioner's circumstances are easily distinguishable from those covered in *Twigg*. As courts have explained, the *Twigg* Court articulated that "in West Virginia, random drug testing by a private employer violates a fundamental principles [sic] of public policy." *Cheesebrew v. Felman Prod., Inc.*, 2009 U.S. Dist. LEXIS 119620, *10-11 (S. D. W. Va. Dec. 23, 2009). There was nothing "random" about Petitioner's drug test. She had ample notice of her return to work and knew she would need to take a drug test to return to work yet used marijuana after her return date was set. As in the pre-employment situation at issue in *Baughman*, Petitioner knew that she needed to submit to a drug test to return to work. As a result, she had no expectation

of privacy, and Respondent did not violate her privacy when it required a well-understood drug test to return.[4]

Even if *Twigg* applies, Petitioner's claim still fails because the West Virginia Supreme Court made it clear in *Twigg* that no invasion of privacy has occurred when tests are "conducted by an employer based upon reasonable, good faith objective suspicion of an employee's drug usage or where an employee's job responsibility involves public safety or the safety of others." *Twigg* 185 W. Va. at 158. Drug testing of Petitioner was not an invasion of privacy because Petitioner's job responsibilities involved "public safety or the safety of others." Petitioner had many responsibilities that related to the safety of the plane, crew, and passengers.

Petitioner was responsible for, among other things, properly weighing bags, alerting appropriate authorities of an issues with passengers, recognizing if a passenger had checked a bag, but was not on the plane, screening for lithium batteries, ensuring that everyone boarding the plane had a valid ticket, and moving equipment so passengers could deplane. Many aspects of Petitioner's job were performed to ensure public safety and the safety of crew and passengers. Commercial airplanes and airports are some of the most safety-focused places on the planet. Petitioner had an important role in preventing harm and security breaches. These duties are enough to meet the *Twigg* exception because they involve "public safety or the safety of others." Given her duties, she readily meets the exemption explained in *Twigg* and Respondent could not have violated her privacy by testing her.

As she did before the Circuit Court, Petitioner attempts to confuse the issue by claiming she did not meet the Federal Aviation Administration's ("FAA") "safety-sensitive" definition.

[4] Furthermore, Petitioner voluntarily disclosed to her supervisor that she had used marijuana before even taking the test, which also undercuts Petitioner's privacy argument.

Petitioner's Brief at p. 35-36. This argument is a red herring because nothing in the *Twigg* decision or later cases indicates that an individual must meet this specific FAA definition for the public safety exception to apply. In the FAA context, "safety-sensitive" positions, by rule, *must be* drug-tested. *See* 14 C.F.R § 120.105. So making the public safety exception to a *Twigg* invasion of privacy claim dependent on meeting the FAA's "safety-sensitive" definition would be completely redundant.

The West Virginia Supreme Court did not use the term "safety-sensitive" in *Twigg* and has never deferred to the FAA's "safety-sensitive" definition in determining whether someone meets the public safety definition.[5] There is no reason to determine whether Petitioner meets the "safety-sensitive" definition of the FAA. Instead, the relevant inquiry is whether Petitioner had duties that involve "public safety or the safety of others." As she testified, Petitioner had several responsibilities specifically focused on public safety and the safety of the airplane passengers.

Despite Petitioner's contentions, the "safety-sensitive" issue was not an issue a jury needed to decide because it was ultimately irrelevant whether she met the FAA's definition. Petitioner admitted to performing the duties related to public safety and there were no material facts in dispute that demanded that a jury be summoned. Accordingly, the Circuit Court could rule that summary judgment was appropriate.

[5] As she did before the Circuit Court, Petitioner points to the definition of "safety-sensitive duty" in the West Virginia Alcohol and Drug-Free Workplace Act ("WVADFWA") to somehow argue that Petitioner did not meet the public safety exception. Petitioner's Brief at p. 36 n. 9. However, as with the FAA definition, this is also irrelevant and only meant to distract the Court. The WVADFWA provides drug testing requirements for "public improvement construction," and it has nothing to do with analyzing the exceptions discussed in *Twigg*. W. Va. Code § 21-1D-4. As with the FAA, how "safety-sensitive" is defined in this specific statute has nothing to do with Petitioner's employment or whether her duties meet the broad public safety exception set forth in *Twigg*.

The Circuit Court correctly determined that there were no genuine issues of fact that a jury needed to decide, and Petitioner's job duties met the public safety exception explained in *Twigg*. Accordingly, Petitioner's invasion of privacy claim fails as a matter of law.

V. Petitioner Cannot Meet the Legal Standard to Have the Circuit Court's Summary Judgment Decision Altered or Amended.

Throughout her Brief, Petitioner argues that the Circuit Court committed legal error by not granting her Rule 59(e) Motion to Alter or Amend the Judgment. It is a high burden to set aside or change a judgment, which the Circuit Court correctly determined that Petitioner did not meet. The Circuit Court appropriately concluded that Respondent was entitled to summary judgment on all of Petitioner's claims, and there was no basis to alter or amend this judgment after Petitioner filed the Rule 59(e) Motion.

A Motion under Rule 59(e) of the West Virginia Rules of Civil Procedure cannot be granted unless: (1) there is an intervening change in controlling law; (2) previously unavailable new evidence is presented; (3) it becomes necessary to remedy a clear error of law; or (4) to prevent obvious injustice. *See Hinerman v. Rodriguez*, 230 W. Va. 118, 123, 736 S.E.2d 351 (2012). The first two bases are inapplicable because there has not been an intervening change in the law nor any new evidence. Instead, Petitioner is left arguing that there was a clear error of law or that changing the judgment would prevent obvious injustice. But neither scenario is present here.

As explained above, the Circuit Court correctly found that all of Petitioner's claims failed as a matter of law. Her marijuana use was simply not protected under West Virginia law. She therefore does not have claims under the WVHRA, WVMCA, or on any other basis for her termination. Similarly, Respondent requiring Petitioner to submit to the drug test was not an improper invasion of privacy under West Virginia law.

Petitioner claims the Circuit Court erred by not directly addressing the WVHRA claims in the order denying the Rule 59(e) Motion, but the Circuit Court did say that Petitioner had simply rehashed her summary judgment arguments, which were addressed in the order granting summary judgment. App. at p. 00513. As the Circuit Court further explained, the references to the legality of marijuana did not mean that Respondent had to prove that Petitioner was subject to criminal penalties to receive summary judgment. *Id.* Petitioner's citations to criminal law cases are irrelevant to the inquiry needed to dispose of the case. *Id.* at p. 00514.

The Circuit Court rightly ruled that no private cause of action existed under the WVMCA. *Id*. The Circuit Court also came to the right conclusion in rejecting Petitioner's dormant Commerce Clause argument and correctly noted that Petitioner cited no case law that suggested a West Virginia medical cannabis law must recognize and protect an Ohio resident certified to use medical marijuana under Ohio law. *Id.* at p. 00515. There was also not legal basis to disturb the Circuit Court's rejection of the invasion of privacy claim, and the Circuit Court explained the multiple reasons that claim failed in the summary judgment order.

There was no clear error of law or obvious injustice in the Circuit Court's granting of summary judgment. There is no basis to overturn this determination under Rule 59(e) and all of Petitioner's assignments of error related to Rule 59(e) Motion should be rejected.

CONCLUSION

For these reasons, the Circuit Court's granting of summary judgment on all claims and its determination that the judgment should not be altered or amended under Rule 59(e) should be affirmed by this Court.

Respectfully submitted,

JACKSON LEWIS P.C.

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By: */s/ Laura C. Bunting*

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CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2023, the foregoing Respondent's Brief was filed with the Intermediate Court of Appeals through the Court's electronic filing system and through this system, Petitioner's counsel of record received notification of the filing and access to the Brief.

/s/ Laura C. Bunting
Laura C. Bunting, Esq.