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

Docket No. 22-609 & 22-610

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DONALD BURACKER,
JAY LONGERBEAM,
Plaintiff, Below, Respondent

Vs.) **20-C-37 & 20-C-52**
(Jefferson County)

SHEPHERD UNIVERSITY
Defendant, Below, Petitioner.

CONSOLIDATED PETITIONER'S BRIEF

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IV. STATEMENT OF THE CASE

This case revolves around concerted efforts by Shepherd University personnel to retaliate and discriminate against two Shepherd University Police Officers for various protected activities, including filing previous grievances alleging wrongdoing and age discrimination, making disclosures of waste and wrongdoing, and attempting to enforce state laws against the wishes of Shepherd leadership, (such as DUI's, underage consumption, drug use, etc), as required by their oaths of office as police officers. The retaliation against Petitioners began immediately after Petitioner Buracker prevailed in before the West Virginia Public Employee Grievance Board in a decision issued on April 30, 2018, wherein he had alleged violations of W.Va. Code § 18B-7-3(e) and age discrimination, and culminated in Respondent engineering a number of disciplinary

[1] Petitioners' Assignments of Error in this case relate to the improper dismissal of specific causes of action by the Circuit Court. However, for organizations sake, Petitioner has, in the body of its Argument, included an additional point of argument specifically related to the Court's erroneous findings as to pretext, which relates to all other assignments of error enumerated above. Petitioners believe this organization structure will best guide the Court in reviewing this matter, but does not intend to allege a separate assignment of error related to pretext, as the pretext issues cannot rationally be separated from the other assignments of error alleged herein.

pseudo-hearings where multiple pretextual reasons were given for the termination of Petitioner Buracker and his partner, Petitioner Longerbeam, none of which held up to scrutiny during depositions. Petitioner's were formally terminated in May of 2019.

More specifically, the above described grievance filed by Petitioner Buracker alleged that Respondent Shepherd University had created false and arbitrary "minimum requirements" for a full time Campus Police Investigator Position in order circumvent the hiring requirements of § 18B-7-3(e), which, at the time, required that current part time police officers at an institution of higher education be given priority in full-time job selection. *See Defendant's Motion for Summary Judgment* against Donald Buracker ("Buracker Motion"), Exhibit C (Appendix Record "AR" p. 541) Petitioner Buracker alleged during his hearing that this maneuver was used to allow Respondent to engage in age discrimination in the hiring of officers, and specifically pointed to a newspaper article which had come out on the individual hired over Petitioner, Zachary Ray, of whom Chief McAvoy had specifically remarked was chosen in part because of his age. *See* Buracker Motion, Exhibit K (Appendix Record "AR" p 606.) The Grievance board ultimately agreed that Shepherd had violated the provisions of 18B-7-3(e) and that "Grievant demonstrated that Respondent acted in an arbitrary and capricious [manner] in its refusal to substitute his experience for the educational requirement, and that as the only remaining internal applicant, he should have been offered the position at issue." *Buracker Motion*, Exhibit C (AR pg. 541), at Conclusions of Law ¶ 4.

Thereafter, Petitioners alleged that they were then subject to an ongoing and continuous pattern of adverse, discriminatory, and retaliatory treatment by the Shepherd University administration and the police department. Buracker alleged that these retaliations included: (a) Being told by his superior, Chief McAvoy, that he was now McAvoy's nemesis; (b) Being kept

at the lowest level of seniority despite his many years of experience; (c) Receiving disparate treatment compared to other officers in terms of responsibilities; and (d) Receiving disparate treatment in terms of discipline. *See Amended Complaint*, Appendix Record (AR pg. 17), ¶¶ 18 & 19 p.).

Following their terminations, a Complaint and Amended Complaint was filed jointly by the Petitioners before the Jefferson County Circuit Court, wherein Buracker claimed to have been "treated in a disparate manner from younger officers by being held to different, more stringent standards of discipline and different, more stringent responsibilities." *Id*. at ¶ 20. Buracker further alleged that, during this time, he made "numerous disclosures of inappropriate activity," including:

> *a. That Shepherd University had police officers who were making arrests and issuing citations who had never taken their oath of office as required by law;*
> *b. That Shepherd University had arranged for an extrajudicial process with a local magistrate whereby Shepherd University students who had been charged with misdemeanors would be placed on an alternate, extrajudicial disciplinary procedure;*
> *c. That the Mayor of Shepherdstown would regularly intercede in criminal prosecutions on behalf of Shepherd University students, particularly athletes.*
> *d. That Shepherd university employees were violating state ethics laws by misappropriating state resources.*
> *e. That Shepherd University instructs its officers not to enforce state law as to certain infractions, particularly in regards to athletes and athletic events;*
> *f. That Shepherd University directly interfered with service of state issued warrants, particularly on behalf of athletes.*

Id. at ¶ 23.

Plaintiff Longerbeam, for his part, alleged in the Amended Complaint that he had also made disclosures of wrongdoing in the form complaining about the extra judicial process between Magistrate Boober and Shepherd known as the "shepherd deal" to the administrative head of Shepherd University Police, Holly Frye (*Id*. at ¶¶ 33, 34), as well as making disclosures of wrongdoing and waste at his February 6, 2019 meeting related to the mismanagement of the Shepherd University Police Department. *Id*. at ¶ 36. He further stated that he had been

"repeatedly reprimanded for attempting to enforce state law, and his unwillingness to allow Shepherd University students to break the law with impunity directly contributed to Shepherd's decision to terminate him." *Id*. at ¶38. He further claimed that he "was fired under pretextual reasons along with Plaintiff Buracker, in part to provide cover for Defendant's pretextual termination of Plaintiff Buracker, and also in retaliation for Plaintiff Longerbeam's disclosures against Defendant and his refusal to isolate and shun Plaintiff Buracker." *Id*. at 39.

The official reason that Shepherd gave for terminating the employment of Petitioners was that they acted improperly in shutting down an under-age drinking party on campus on October 7, 2018. It was alleged that the Petitioners had entered the dorm room without probable cause and had falsified there reports, and it was further alleged that, in a separate incident, Petitioners had improperly targeted these same students in January 6, 2019 traffic stop. There were also a few additional petty complaints inserted into Petitioner's termination letters. However, as will be described in detail below (See Argument Point IV), none of the reasons given held up upon the scrutiny of close examination.

Upon filing the instant Complaint, Defendant moved to dismiss under W.Va. R. Civ. Pro. 12(b)(6), and the Court initially granted said motion. However, following Plaintiffs' responsive Motion to Alter or Amend under Rule 59(e) and Rule 60, the Court amended its ruling as follows:

> *Upon consideration of the Plaintiffs' Rule 59(e) and Rule 60(b)(6) Motion to Alter or Amend, the Court finds it proper to convert the Defendant's May 22, 2020 to dismiss to a motion for summary judgment. Accordingly, the Court hereby ORDERS that the Defendant's May 22, 2020 motion to dismiss be converted into a motion for summary judgment. It is further ORDERED that the parties shall have 90 days of discovery from the entry of this order. Within 30 days after the close of discovery, the Defendant may supplement its May 22, 2020 motion, now converted into a motion for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure.*

See Order Converting Defendant's Motion to Dismiss into a Motion for Summary Judgment (AR pg. 320).

Thereafter, discovery commenced, with each party propounding written discovery and taking depositions. Because of COVID-related and other scheduling difficulties from both parties, the timeframe for conducting said depositions (though not written discovery) was extended by agreement multiple times. Thereafter, a hearing was held on June 8, 2022 for oral argument on Respondent's Motion for Summary Judgment. *See Transcript from June 8, 2022 Proceedings*. Thereafter, the Court issued two Orders - one in each case - Granting Defendant's motions for summary judgment. *See Order Granting Defendant Shepherd University's Motion to for Summary Judgment* against Donald Buracker ("Buracker Order") (AR pg. 922) and *Order Granting Defendant Shepherd University's Motion to for Summary Judgment* against Jay Longerbeam ("Longerbeam Order") (AR pg. 957). Petitioners then appealed both decisions to the West Virginia Supreme Court of Appeals and moved to consolidate the two appeals into a single action, which was granted by this Court on August 12, 2022. This consolidated perfected appeal brief follows.

V. SUMMARY OF ARGUMENT

The Circuit Court erred in dismissing Petitioner Buracker's claims under the West Virginia Human Rights Act because it improperly placed itself in the shoes of the jury by weighing the evidence as a fact-finder, ignored key facts submitted by Petitioners, "straw-manned" Petitioners arguments as set forth in their Response Brief on Motion for Summary Judgment, and misconstrued the burden shifting analysis of Plaintiff's evidence of pretext at the summary judgment phase.

The Circuit Court further erred in dismissing both Petitioner Buracker's and Petitioner Longerbeam's claims under the West Virginia Whistleblower Act by improperly placing itself in the shoes of the jury by weighing the evidence as a fact-finder, ignoring key facts submitted by Petitioners, "straw-manning" Petitioners arguments as set forth in their Response Brief on Motion for Summary Judgment, and misconstruing the burden shifting analysis of Plaintiff's evidence of pretext at the summary judgment phase.

The Circuit Court erred in dismissing both Petitioner Buracker's and Petitioner Longerbeam's wrongful discharge claims because it misconstrued the relevant law regarding "duplicative" causes of action and, further, just as in the previously stated assignments of error, erred by improperly placing itself in the shoes of the jury by weighing the evidence as a fact-finder, ignoring key facts submitted by Petitioners, "straw-manning" Petitioners arguments as set forth in their Response Brief on Motion for Summary Judgment, and misconstruing the burden shifting analysis of Plaintiff's evidence of pretext at the summary judgment phase.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner's believe this case is ripe for oral argument under Rule of Appellate Procedure 20 because it relates to a matter of public importance and an issue of first impression insomuch as it relates to the question of whether law enforcement agencies violate the public policy of the state of West Virginia by overtly refusing to enforce state laws and punishing officers who attempt to enforce state laws. Although these issues relate to only one assignment of error, the remaining issues of the case are complex and factually voluminous, and so will further be aided by a longer oral argument.

Notwithstanding this issue, should the Court decide that oral argument under Rule 20 is improper, the case would also qualify for oral argument under Rule 19 because it involves assignments of error in the application of settled law and involves a result against the clear weight of the evidence.

VII. ARGUMENT

A. STANDARD OF REVIEW

This Court's review of "[a] 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).

West Virginia Rule of Civil Procedure 56 governs the requirements for summary judgment motions. Rule 56(c) states, in relevant part, that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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."

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York,* 148 W.Va. 160, 133 S.E.2d 770 (1963). A "genuine issue" is "simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trial worthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law. Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). "The party that

moves for summary judgment, has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment". *Smith v. Sears, Roebuck & Co.*, 205 W. Va. 64, 66, 516 S.E.2d 275, 277, (1999). Under *Smith v. Sears, Roebuck & Co*., 205 W. Va. 64, 66, 516 S.E.2d 275, 277, (1999), "summary judgment is denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom."

"A Circuit Court's function at the summary judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (W. Va., 1995) (quoting *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505 2511, 91 L.Ed.2d 202, 212 (1986)." As such, "we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion." *Id*. at 336 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587, 106 S.Ct. 1348 1356, 89 L.Ed.2d 538, 553 (1986); Masinter v. WEBCO Co., 164 W.Va. 241, 262 S.E.2d 433 (1980); Andrick, 187 W.Va. at 708, 421 S.E.2d at 249. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (W. Va., 1995)).

Discrimination and Reprisal under the West Virginia Human Rights Act

The West Va. Human Rights Act ("WVHRA"), W.Va. Code § 5-11-1 et seq., makes it unlawful "For any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is blind or disabled," §5-11-9(1). "Discriminate" is defined in §5-11-3 as "to exclude from, or fail or refuse to extend to, a person equal opportunities because of race, religion, color, national origin, ancestry, sex, age,

blindness, disability or familial status and includes to separate or segregate." See also *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 171, 786 S.E.2d 188, 190 (W. Va. April 14, 2016) In the instant case, HRA discrimination based upon age and disability are at issue.

> *In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act, W.Va. Code § 5-11-1 et seq., the plaintiff must offer proof of the following:*
>
> *(1) That the plaintiff is a member of a protected class.*[2]
>
> *(2) That the employer made an adverse decision concerning the plaintiff.*
>
> *(3) But for the plaintiff's protected status, the adverse decision would not have been made.*

Id. at 175-176.

Additionally,

> *Because discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of the protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of . . . a case of unequal or disparate treatment between members of the protected class and others[.]*

Id. at 176, 195.

In order to make a case for disparate treatment discrimination under the West Virginia Human Rights Act, a Plaintiff must meet its initial prima facie burden by proving by preponderance of the evidence that (1) he is a member of a group protected by the Act, such as older or disabled persons; (2) that he was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not discipline or was disciplined less severely, than the complainant, though both engaged in similar conduct. *See Young v. Bellofram Corp.*, 227 W.Va.

[2] Defendant has not disputed plaintiff's status as disabled or the adverse action of firing plaintiff. Thus prongs 1 and 2 are satisfied.

53, 60-61, 705 S.E.2d 560, 567-68 (2010); *Mayflower Vehicle Systems, Inc. v. Cheeks*, 218 W.Va. 703, 715-16, 629 S.E.2d 762, 774-75 (2006).

The WVHRA further prohibits, at §5-11-9(7), any employer from engaging "in any form of threats or reprisal… the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss," and further prohibits employers from engaging "in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practice of acts forbidden under this article…"

Reprisal under the WVHRA does not require a finding that the Defendant was guilty of the discriminatory conduct first complained of, as a reprisal claim can stand on its own even where a Plaintiff cannot prove that they were the subject of the underlying harassment first complained of. *See Kalany v. Campbell*, 640 S.E.2d 113, 119, 220 W. Va. 50 (W. Va. 2006) ("in those cases where a plaintiff cannot prove that he/she was the subject of sexual harassment, the law nonetheless permits that individual to prove that his/her employer took improper employment-related action against him/her based solely on the reporting of the alleged sexual harassment.").

Retaliation under the West Virginia Whistleblower Law

West Virginia Code § 6C-1-1 et seq., is referred to as the "Whistleblower law," and, at §6C-1-3(a), it provides that "No 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 or her 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."

"Wrongdoing" is defined under §6C-1-2 as "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." "Waste" is defined under the same section as "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."

W.Va. Code § 6C-1-4(a) provides for a civil remedy in state court "a court of competent jurisdiction," for both injunctive relief and damages within two years after occurrence of the violation. §6C-1-4(b) requires that "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."

Discrimination/Retaliation Burden Shifting under the WVHRA and the Whistleblower Law

In an action to redress unlawful discriminatory practices in employment and access to 'place[s] of public accommodations' under The West Virginia Human Rights Act, as amended, W.Va.Code §§ 5-11-1 et seq., the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination.... If the complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejection. Should the respondent succeed

in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination." Syl. pt. 4, Conaway v. Eastern Associated Coal Corp., 178 W.Va. 164, 358 S.E.2d 423 (W. Va. 1986) (quoting Syl. pt. 3, in part, *Shepherdstown VFD v. W.Va. Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983)).

This burden shifting framework applies to both discrimination or retaliation under the WVHRA as well as retaliation under the Whistleblower law. *See Taylor v. W.Va. Dep't of Health & Human Res.*, 237 W.Va. 549, 788 S.E.2d 295 (W.Va. 2016) ("employment claims-whether under the Human Rights Act, Whistle–Blower Law, or Harless —all employ effectively the same burden-shifting mechanism first articulated in Syllabus Point three, in part, of *Shepherdstown VFD v. W. Va. Human Rights Comm'n*, 172 W.Va. 627, 309 S.E.2d 342 (1983) :...")

B. ASSIGNMENTS OF ERROR

I. THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER BURACKER'S CLAIMS UNDER THE WEST VIRGINIA HUMAN RIGHTS ACT

Petitioner Buracker argues that the Courts erroneously dismissed both his claims for reprisal under the WVHRA as well as his claims for disability discrimination.[3]

Reprisal/Retaliation under the WVHRA

Petitioner Buracker has claimed that he initially made a report of age discrimination in his 2018 grievance hearing, and that this disclosure was a motivating factor in the retaliatory/discriminatory treatment that he suffered thereafter. The Circuit Court dismissed this

[3] Petitioner concedes that he failed to produce sufficient evidence during discovery that the comparator officers identified by him were substantially younger – a required element of age discrimination - and so does not challenge the Court's ruling on his age discrimination claim. However, the same adverse actions complained of as to age discrimination would also apply equally as reprisal to all other protected activities discussed herein.

claim because "The termination of his employment did not occur until nearly a year later. Even if making the assertion of age discrimination in his grievance is considered 'protected activity,' it fell outside the period of time from which it could be inferred that it was retaliatory." Buracker Order (AR pg. 922), p. 21. In support of this assertion, the Court cites to four federal district court cases which, notwithstanding their limited precedential value, do not support the Court's holding. While, naturally, the temporal proximity of a protected activity to the adverse action complained of is a relevant consideration in determining the viability of a reprisal claim, there is no bright line rule which states that the temporal distance of an adverse action by a certain number of weeks, months, or years precludes, as a matter of law, a jury from finding a causal connection between the adverse action and the protected disclosures. The closest the Court gets to citing such a precedent is *Pascual v. Lowe's Home Improvement*, 193 Fed. App'x. 229, 233 (4th Cir. 2006), which says a distance of three or four months is too long is too long to establish a connection by temporal proximity *in the absence of other evidence*. In fact, West Virginia law is similarly clear that temporal proximity is just one factor to be considered in attributing causality for a discharge (or other adverse action) to a protected activity. *See Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801, 815 (W.Va. 1996) ("as frequently occurs in such cases, the main issue is whether there was sufficient evidence from which to infer some linkage between the protected activities and the discharge. Typically, ***though not necessarily***, the inference arises from a temporal proximity between the two...") (emphasis added). Of course, Petitioner is not, and has never, attempted to prove retaliation merely by asserting the temporal proximity of his termination to his grievance, but has instead provided a mountain of evidence in support of an ongoing and continuous pattern of adverse actions taken against him since his 2018 grievance victory.

Most importantly, Petitioner has also never once claimed that the only adverse action taken against him in response to his grievance was his termination. To the contrary, Plaintiff provided to the Court an enormity of evidence on the ways he was targeted, discriminated against, retaliated against, and treated disparately compared to his fellow officers. Such evidence produced in the record is voluminous, and includes the following:

Evidence of Adverse Action[4]

Throughout the case, Plaintiff Buracker maintained that the retaliation against him was ongoing and continuous from, at a minimum, the day of his being hired on full-time at the command of the West Virginia Public Employees Grievance Board until the date of his termination, and manifested itself in a variety of ways. Specifically, Petitioner Buracker produced sworn interrogatories in discovery which stated that he was discriminated against in terms of:

- *overtime access,*
- *vehicle maintenance requirements,*
- *tardiness (was required to be on time while other officers were allowed to be late).*
- *Assigned Fire Duties- When others less senior (Harper) refused.*
- *Daily Assigned Requirements verses young officers*
- *The requirement of a postdated employment (letter) not required by any other full time employee*
- *Circulation of information and solicit complaints against through the mayor and the Shepherdstown Police department within days of my hiring "Looking for ways to get Buracker"*
- *Requirement of Police Reports for every contact. This was not required of younger officers. (Changed effective Jan 2019)-*
- *Required to use a Body Camera per Policy on every contact and knowingly permitting other officer including younger officers a different level of treatment.*

[4] Petitioner Buracker is submitting this evidence in this particular section of his brief because it is germane to the assignment of error being discussed and comes first in the Court's Order. However, this evidence of adverse action against Buracker applies equally to the adverse action taken against him in response to his whistleblower disclosures (indeed, Plaintiff made disclosures which constitute reports of wrongdoing under the Whistleblower law and reports that constitute an opposition to unlawful discrimination per the WVHRA during the same grievance process). As such, Petitioner would formally request that all such information included in this section of Petitioner's brief be incorporated by reference into Petitioner's arguments regarding Whistleblower retaliation.

- *Requirement of me to be sworn and certified as a law enforcement officer. Younger officers were working and making arrests and were never properly sworn or administered an oath of office.*
- *The hiring process was changed multiple times to allow Shepherd to discriminate against older officers. (SEE NEWSPAPER ARTICLE) Chief MCAvoy States we like hiring younger officers.*
- *Defendant conducted a covert investigation against Buracker that started in January 2019. Yet ignore officers that are committing not only criminal violations of laws but known violations of The West Virginia Ethics Act. (Officers Dumping Trash) (Illegal Use of State owned vehicles and resources). (Officer James using a tazer on a mental subject When it is against the policy of Shepherd to even use a tazer let alone have one. (Chief locked everyone including officer Longerbeam out of the viewing of the video) Officer James also made Unprofessional comments to students on the same traffic stop I was accused of making unprofessional statements.*

See Plaintiff's Consolidated Responses to Defendant's Motion for Summary Judgment, Exhibit 3 (AR pg. 680), at Interrogatory 15.

Regarding the overtime access, Petitioner Buracker testified in his deposition that he was much more restricted in his ability to work overtime hours than far less experienced officers, specifically noting that Adam Letts was permitted to work 14 hour days while he was sent home early even when he was afforded an overtime assignment, and that other officers would be permitted to stay on for extra hours of overtime even when he was short of hours and available for duty. Buracker Motion, Exhibit A (AR pg. 463), ll. 51:16-54:24; 56:14-24.

Buracker further swore, in his interrogatories, that he was disparately treated in terms of discipline insomuch as he was "Terminated on pretextual grounds, while other officers were regularly permitted to engage in misconduct, gross misconduct, and criminal/ethical misconduct without any repercussions." *Id*. at Interrogatory 16.

In his Responses to Defendant's Requests for Admission, Buracker noted that:

> *I have been discriminated repeatedly since I first applied for the original position. There was public statements made about me from within minutes of my application being filed. Chief McAvoy was asked about hiring 'Buracker" at the local chiefs meeting and assured parties that would not happen. My personal information was discussed within and outside the department by supervisors. The Chief in his newspaper article admits to*

> *hiring younger officers. This is in his words not mine. (Article Officer Ray). I been held to a different standard from day one. (Pre Employment Letter) (Public Comments about Watching Buracker Shepherd is looking for a way to get rid of him) (Assigned Special Duties) that others refused) (Denied Longevity Pay that younger officers were award) (Investigated on multiple incidents with no progressive discipline) Singled out for violations of departmental policy when young officers direct violations are overlooked completely. (Use Human Resources to further their investigations of allegations to bypass "Garrity rights' of the Officer.*

Id. at RFA 12.

When asked to "Admit that Chief McAvoy offered you your choice of shift after you began working in a full time position with Shepherd University," stated that "Chief did offer my choice of shift but then gave me the opposite that I had requested. I requested the busier shift and was given the least busy shifts." *Id*. at RFA 3. When asked to admit that he was not subject to discipline after beginning work as a full time employee until the time of termination, Buracker denied the allegation and stated that:

> *I was required to sign a pre-employment post dated letter that other employees were not required upon employment. I was assigned 'fire alarm testing' that Officer Harper clearly advised he was not doing. I was denied system wide 'longevity pay' in July 2018 after Shepherd had awarded me 14 ½ years of Full-Time Service for the 28 years served. I was required/ordered to video tape and complete reports for EVERY contact that other officers were not and on many occasions other officers including those directly under the eye of a supervisor (Sergeant's Chief) were never held to the same standard.*

Id. at RFA 4.

Plaintiff Buracker further produced in discovery emails concerning his complaints about having his shifts changed without warning. He stated in a 1/30/19 email to Chief McAvoy that:

> *I noticed for the third straight month my schedule compared to other officers has changed without notice or explanation. I inquired of Sgt. Kelvington on during Sundays shift about this change… he responded that is a good question and did not have any explanation… I have witnessed in past practices that most changes at our department are discussed with the employee prior to being rolled out. My family and I find ourselves continuously making changes to keep up with the ever changing schedule… I am open to changes but would like to have some consistency as all other employees are afforded and enjoy on a normal basis.*

See Response Brief, Exhibit 12 (AR pg. 776).

In response, Chief McAvoy neither denied the allegation of disparate treatment nor apologized, and instead simply said that "your complaint is noted. Schedules are designed to meet the needs of the university." *Ibid*. Buracker responded that the problem for has been "continuous" and that "It's also very apparent that I was the only officer at SUPD affected in such a manner." *Ibid*.

Plaintiffs have further produced statements and texts from other individuals which show that, long before Plaintiffs were terminated, Defendant was plotting to find a reason to do so. On March 25, 2021, Shepherdstown Police Department ("SPD") Chief Michael King drafted a statement which that "a month or two prior to Don Buracker's termination from Shepherd University, Chief Mcavoy asked me to meet him for lunch," at which time he then told Chief King to keep his Officer Jeffries away from Buracker because he was "not wanting to see off Jeffries caught up in something." King then states that McAvoy told them that "the Buracker situation would resolve itself in the near future." *Id*. at Exhibit 13 (AR pg. 778). Another SPD Officer, Michael Moates, also drafted a statement wherein he stated that:

> *Approximately a month after Donny Buracker was hired full-time, I was transporting mayor Jim Auxer to the Wellness Center. While driving over, the Mayor brought up Donny. He said to me you know to you need to keep an eye on Buracker. Of course you do. I said what? the Mayor said I needed to keep an eye on Buracker and let the University know if he does anything… several weeks later I was transporting the Mayor to the Wellness Center and he again stated to me that I needed to keep an eye on Buracker for the University. I believe that the mayor was asked by University personnel, asked to report any indiscretions that I observed by Buracker and report back to them. I worked with Donny when he was part-time and full-time and found him to be professional and courteous at all times.*

Id. at Exhibit 14 (AR pg. 779); *See also Deposition of Jim Auxer, Id. at* Exhibit 15 (AR pg. 780), ll. 82:4-24.

When asked about these conversations, Mayor Auxer claimed that he lacked memory of the statements, but that he "may have said something in the context to that," *Id*. at 83:13-18. Plaintiffs have further produced texts between Buracker and his supervisor, Dave Kelvington,

which showed that, as early as June of 2018, *less than one month after Buracker's hiring full-time* (*See* Exhibit 16, May 29, 2018 Acceptance of Position), Kelvington stated to Buracker that "JD [Brown] and Lori [Marauga] have wash their hands of both of us! But I know things are going to be ok! No worries mate." He then followed this text with another which said, "They are looking for ammo and I refuse to give them any!" *Id*. at Exhibit 17 (AR pg. 787). When asked during his deposition whether this comment indicated "that you were refusing to participate in what you perceived to be hostility against Donnie," he stated that, "Well, it may partially be." *Id*. at Exhibit 18 (AR pg. 788), *Deposition of Dave Kelvington*, ll. 32:3. These texts create the obvious inference that Respondent was looking for ways to retaliate against or even terminate Petitioner from the moment he accepted his full-time position.

Buracker further produced evidence of retaliation/discrimination in the form applications to the Fairmont Police Department which were placed his mailbox in 2018 and designed to send him a message to leave the department. *See Id*. at Exhibit 19 (AR pg. 790).

Buracker further provided evidence of being denied treatment in accordance with his seniority. In his deposition, when asked about the allegations at paragraph 19(b) of the Amended Complaint that he was kept at the lowest level of seniority, he stated:

> *Ma'am, what I mean by that, it is the history of the Department, and just like upon my termination, within days there was a change of unit numbers, and units are based off of seniority and ranking, actually the dispatchers had questioned me about it, why are you the senior guy and the highest number, and I was like I don't know. And I even asked Chief about this, I said Chief, it's not big thing but why do you keep me at the lowest number or the 710, which is a part-time numbers when I should be 704, and he said just don't have a chance to turn -- change it around. And that was just quite spite answer, but the bottom line is when it comes down to Jefferson or a dispatch center, they -- they are classifying us by, just like they do in the whole county, 300 is more senior than 302, and it's based like that in the whole county with exception of Shepherd and me because I was the only that was secluded like that. Every other officer, like I said, when Jimmy Dunn*

> *left, within two or three days Lori moved up. When I left, a couple days R.J. James is on the radio, 704. So I -- it -- it's -- it's automatic -- automatic with the exception of me.*

See Defendant's Motion for Summary Judgment (Buracker), Exhibit A (AR pg. 463), ll 41:11-42:7.

Buracker further produces evidence of retaliation/discrimination in the form of a complaint about his longevity pay, which was the subject of some cross examination by opposing counsel during Buracker's deposition when Petitioner Buracker stated:

> *The other thing that I was denied of my seniority that I felt that I was -- or had to do with my seniority is when I was advised by one of the Sergeants that I was due longevity pay is what I call it, they have another name for it, and this was after HR had told me that they had credited me for 14 years of full-time service. However, I don't get seniority pay because I haven't been there for three full time years. So that -- that's the conflict, that's where I felt that I was wronged.*

See Defendant's Motion for Summary Judgment (Buracker), Exhibit A (AR pg. 463) at ll. 42:8-16).

Petitioner provided an affidavit, included in his summary judgment response, which more fully discusses this issue. *See Petitioner Motion Response* at Exhibit 20 (AR pg. 792).

Disability Discrimination

The Court first found that Petitioner Buracker's diabetes was inadequate for establishing a prima facie case of disability discrimination because "that condition did not substantially limit one or more of his major life activities." This is false, as Petitioner very clearly articulated, in his deposition, how this issue affects a major life activity. When asked how his diabetes interfered with the essential functions of his job, he advised that it caused him to have to urinate frequently. *See Defendant's Motion for Summary Judgment* (Buracker), Exhibit A (AR pg. 463), ll. 26:5-6. When asked how, specifically, it affected one or more major life activities, Petitioner Buracker

stated, “Ma’am, when you take this medication, the urgency [to urinate] is like unbearable. So if you’re dealing with an incident and all of – it just hits you you have to go. And – and I’ve had that. You drink a lot of water.” *Id*. at ll. 26:10-13. The phrase “major life activity” is defined in the WVHRA as including “**functions such as caring for one’s self**, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and **working**.” Although this list is not intended to be exclusive, one can immediately see that Petitioner Buracker’s explanation of how his diabetes affects his life already falls within at least two of the enumerated categories in the definition of disability.

The Court next claimed that Plaintiff “cannot prove” that his employment was terminated based on his disability. This is erroneous for multiple reasons. First, as discussed above and below, Petitioner Buracker has never claimed that the only adverse action taken against him by Respondent was his termination. In fact, Buracker enumerated a laundry list of adverse actions taken against him from the date of his grievance victory in April of 2018. Specifically as to his diabetes, Buracker testified in his deposition that, when he asked to install a grill on campus for his use in order to avoid eating the greasy, carb-loaded fast foods served on campus, that, although the police sergeants had already approved the grill, his immediate supervisor, Sgt J.D. Brown, told him he needed to speak with Chief McAvoy about it first, and Chief McAvoy placed additional and arbitrary barriers on his installation of a grill, to wit, he required that Buracker, at his own expense, provide the school concrete pavers, which Buracker did but which, even after being notified, Chief McAvoy then refused to install. See *See Defendant’s Motion for Summary Judgment(Buracker) (*AR pg 463 *),* Exhibit A, ll. 26:22-28:2. This issue is also referenced in Buracker Responses to Request for Admission, at RFA 5. *See Plaintiff’s Response on Motion for Summary Judgment*, at Exhibit 3(AR pg 680), RFA 5. The Court dismisses RFA 5 - and all of

Burackers RFA responses – by claiming that they "are not evidence." However, such a finding is directly contradicted by the explicit language of Rule of Civil Procedure 56, which, as noted above, requires the Court to evaluate that "pleadings, depositions, answers to interrogatories, and ***admissions on file***, together with any affidavits…". This language amounts to unequivocal black letter law that all discovery responses, including responses to requests for admissions are competent evidence to be considered in evaluating a motion for summary judgment.

Second, it is entirely untrue that that Buracker's diabetes related frequent urination was not factored into his termination. Both Petitioners Discovery Responses (Id. at RFA 10) and his deposition testimony (*See Defendant's Motion for Summary Judgment* (Buracker), Exhibit A (AR pg. 463), ll. 29:1- 30:5 explicitly state that a video of his urination from his body cam (accidentally left on in the haste of his emergency need) was used not only to chastise him by his supervisor Sgt. Kelvington ("he was like, excuse me. Why are you pissing on duty,") but then, despite his having explained the reason was also used against him at his pre-termination hearing - referred to throughout as a "Garrity" Hearing. ("And I said, I'm a diabetic, you know that. I said there's – I can't help that. And he said, oh okay, and that was it. And then, you know, just a few days, or a few weeks later, I'm in a Garrity hearing being questioned about that video"). West Virginia law is clear that an improper motive for an adverse action against an employee need not be the sole reason for the adverse action, but rather need only be a "motivating factor." See *Skaggs v. Elk Run Coal Co*., 198 W. Va. 51, Syl. Pt. 6, 59, 479 S.E.2d 561, 569, (1996).

Finally, the Court's framing of this issue is entirely improper, as it is not up to a Plaintiff to "prove," his case in response to a Defendant's motion for summary judgment. The burden of proof is on the moving party (here, Respondent) to show that there is no genuine issue of material fact for trial. A plaintiff responding to a motion for summary judgment simply needs to

show that there is some evidence from which a jury could create a trial worthy issue, and it is not for the adjudicating Court to weigh the evidence and determine the truth. See Syl. pt. 5, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995), *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (W. Va., 1995). Put simply, we are looking for a bare minimum threshold of evidence, and it is erroneous for a reviewing Court to attempt to resolve or interpret key evidentiary questions or interpretations as if it were the fact-finder.

II. THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER BURACKER'S AND PETITIONER LONGERBEAM'S WHISTLEBLOWER CLAIMS

The Jefferson County Circuit Court committed further reversible error in finding that Petitioner Buracker's Whistleblower claims could not support a genuine issue of material fact for trial because "Plaintiff cannot demonstrate the prima facie elements of this claim." See Buracker Order (AR pg. 922) at p. 23; Longerbeam Order (AR pg. 957), at p. 15. Petitioner's will address each in turn.

A. The Courts Dismissal of Petitioner Buracker's Whistleblower Claim

The Circuit Court begins its analysis in Buracker by enumerating, in both its Findings of Fact and Conclusion of Law, the "good faith reports" of wrongdoing and waste (See Buracker Order) (AR pg. 922), pp. 11-12; 25-27, and immediately makes a critical error in overlooking the first and most significant of Petitioner Burackers reports, to wit, his 2018 grievance victory against Respondent (initiated in 2016 and resolved in his favor in 2018) for violation of both W.Va. Code §18B-7-3 and the age discrimination provisions of the WVHRA, wherein Petitioner Buracker prevailed and was made a full time employee against Respondent's will. This is an odd mistake, given that the Court begins its Findings of Fact by discussing this very grievance for nearly two pages. *See Id*. at pp. 2-3. This basis was also clearly identified in Petitioner's

Response in Opposition to Defendant's Motion for Summary Judgment, as the first good faith report of wrongdoing made by Petitioner Buracker. Petitioner's responsive brief states:

> *Regarding his whistleblower retaliation disclosures, Plaintiff Buracker's 2018 grievance filing [as discussed in previously in the motion response] further amounts to a disclosure ofwrongdoing triggering the protections of the Whistleblower law insomuch as it alleges violation of two statutes, (a) the WVHRA, and (b) violation of the provisions of W.Va. Code § 18b-7-3(e).*

See Plaintiffs' Consolidated Brief in Opposition to Defendant's Motion for Summary Judgment ("Response Brief") (AR pg. 621), p. 13.

As such, it is obvious reversible error for the Court to have dismissed Petitioner Buracker's whistleblower claim without even reckoning with the triggering disclosure of wrongdoing that first started the ball rolling.

The Court next errs by discounting Buracker's triggering disclosure regarding the filing of an ethics complaint against his supervising officer, SUPD Officer J.D. Brown on the basis that "The Complaint was filed in October 2018, more than six months before the termination, thus it is too remote to be related to the termination." *See* Buracker Order (AR 922)at p. 25-26. This finding is in error for multiple reasons. First, outside of inapposite federal cases discussed in the preceding Argument, the Circuit Court provides no authority whatsoever for the proposition that a six-month time gap between the date of a triggering disclosure and the adverse action complained of is too remote, as a matter of law, to form the basis of a whistleblower retaliation claim, and, indeed, there is no such precedent of which undersigned has discovered. Although, as discussed above, the temporal proximity of an act of retaliation is something which can be considered by the jury, it is not a dispositive issue in either direction. *See Conrad v. ARA Szabo*, 198 W.Va. 362, 480 S.E.2d 801, 815 (W.Va. 1996) ("as frequently occurs in such cases, the main issue is whether there was sufficient evidence from which to infer some linkage between

the protected activities and the discharge. Typically, ***though not necessarily***, the inference arises from a temporal proximity between the two...") (emphasis added).

Perhaps even more importantly, however, the Court's conclusions of law on this point appears to again presume that there was no adverse actions taken against Plaintiff Buracker between the time of the ethics complaint and the time of his termination. This is patently false. As discussed in greater detail in Argument I, above, Petitioner Buracker has produced myriad evidence showing that the retaliation against him was ongoing and continuous from the day of his being hired on full-time (and against Shepherd's will) until the date of his termination. He produced sworn interrogatories and testified in deposition on the many ways he was retaliated against, he produced two different statements from Shepherdstown Police Department Officers – who regularly work with Shepherd University officers –showing that Shepherd University and those affiliated with it were targeting Petitioner Buracker for retaliation and potential termination. See *Id*. at p. 22 (quoting Statements of Michael Motes and Chief , attached as Exhibit 14 of Petitioner's motion response). During his deposition, Mayor Auxer even admitted that he "may have said something in the context to" Moates' claim. See *Ibid. (quoting Deposition of Jim Auxer* at ll. 82:4-24). Mayor Auxer also specifically referenced the Brown Ethics Complaint in a derogatory fashion when discussing Buracker. *See* Response Brief at Exhibit 14("AR pg. 779"), ll. 84:11-24. He further produced evidence of retaliatory graphic posted to his mailbox (which he shared with Longerbeam) during the relevant time period which stated "Ask yourself one question before throwing someone under the bus; Why?" See Response Brief, Exhibit 22 (AR pg. 820). As such, any suggestion that Petitioner Buracker failed to allege or produce evidence of ongoing and continuous retaliation against him following his ethics complaint against J.D. Brown is clearly belied by the record, and, given that all of this evidence

was put before the Circuit Court in deciding Defendants Motions for Summary Judgment, Petitioner is simply at a loss as to how this information could have been disregarded by the Circuit Court in finding that the only adverse action taken against Petitioner Buracker was his termination.

The Court's Order next errs in discounting Petitioner's disclosures of the extra-judicial procedure utilized by a Jefferson County magistrate – referred to as the "Shepherd Deal"- by claiming that "Plaintiffs cites no statute or regulation that was violated by Magistrate Boober or Shepherd University by allowing students to perform community service and having charges dismissed." Buracker Order (AR pg. 922), at p. 26. Notwithstanding the straw-man depiction of Petitioner's complaint on this issue ("it was far more than simply "allowing students to perform community service and having charges dismissed"), it is flatly untrue that Petitioners' Response Brief failed to identify the ways in which this procedure violates the law, and Petitioners are again baffled at the Circuit Court's studious disregard for the evidence and argument submitted in Petitioners Response on Motion for Summary Judgment.

At pages 13 and 14 the Response Brief, Petitioners identified a 12/18/18 email sent from Buracker to Sgt. Kelvington, one of his direct supervisors, wherein he notes that Shepherd:

> *[D]irectly involves itself and interferes directly and indirectly with Criminal Prosecution of its students, including encouraging its officers not to make arrests at all or enforce[ing] certain laws. These students don't have their individual Due Process Rights afforded when they go to Magistrate Court and one Magistrate is on duty and asks a simply question "are you a Shepherd Student," If the answer is yes, at that point they are given community service automatically without a right to trial, right to call witnesses, right to plead not guilty, right to pled guilty and pay fines and costs, right to have an attorney present, and without any consideration of prior criminal offenses. They get a promise as a student of Shepherd University Student (sic) that a non student that committed the exact crime at the same location just simply does not get. "A magistrate promising to dismiss all criminal charges after "the community service plan' through a partnership with Shepherd University is completed. I would ask one question if this is correct why would the other two sitting magistrates do not practice this and will only give community service after a prosecutor's review and presentation?*

See Response Brief, Exhibit 4 (AR pg. 708).

Petitioners then go on to further discuss the ways in which this procedure violates the law, noting that:

> *The conduct of the Magistrate Court described above violates numerous Constitutional and statutory provisions, including a Defendant's right to counsel per the U.S. Constitution's 6th Amendment and Sec. 3-14 of the West Virginia Constitution, and W.Va. Code § 50-4-3. It further amounts to a violation of the equal protection clause of the 14th Amendment insomuch as it creates a different justice system for Shepherd students vs. non-Shepherd students who get arrested in Jefferson County, West Virginia. It further amounts to a violation of Rule 7 of the West Virginia Rule of Criminal Procedure for Magistrate Court insomuch as SU students are not allowed to plead guilty and pay a fine, should they so choose (Rule 7(b)), or to plead not guilty and contests the allegations against them (Rule 7(c)).*

Response Brief, p. 14.

Petitioners' Response Brief further identifies an instance where Chief McAvoy, in his 30(b)(7) deposition, discussed a meeting Magistrate Boober once held with Shepherd administrators, wherein she herself expressed concern that the "administrative fine" levied upon students by Shepherd after being assigned community service by Magistrate Boober could amount to double jeopardy in violation of the 5th Amendment. *Id*. at p. 14. See also *Id*. at Exhibit 9 (AR pg. 721) *ll.* 39:19-40:5.

As if all this wasn't enough, Petitioner Buracker also discussed these issues at length in his deposition, which was included in Respondent's own summary judgment motion. When asked about these disclosures, Petitioner Buracker replied:

> *Ma'am, I believe it was in December of 2018. Actually, it was before that. There -- there was four young ladies that came forth right after the Yost incident that we had, Officer Longerbeam and I had cited, and they had questions about their citation, and they had questions about their treatment by a specific Magistrate, namely Magistrate Boober. And in discussion with them it became a repeated pattern that had been spoken the past where they were never given a right to seek counsel, they were never given a right to call witnesses, they were never given a right to plead not guilty or ask for a trial, that she merely says are you a Shepherd University student. Yes. Please see Holly Morgan Frye for your community service, have 40 hours completed, I'll set it up for a pre-trial, and*

> *when you come back in if your 40 hours is done, I'll dismiss it. There was no prosecutor, there -- there had been no prosecutorial intervention in this. I made this known, first of all, to Matt Harvey… Matt Harvey called me back and said this, I'm not permitting this to occur, I didn't know anything about it. And then right after that he said did you tell your -- have you advised your Chief. So when I made it known to the Chief that this was occurring, he was more on the grounds of Title IX, having us read a Title IX Rules and Regulations, and I explained to him then, Chief, these young ladies rights are being violated, and as much and important as it is about Title IX, we need to also stand up for these young ladies rights and make sure that they are being fairly treated. It was on -- on or about the day before Christmas, or two days before Christmas, all these students were in Magistrate Count with yet like the fourth or fifth prosecutor assigned to us, and a lot of the parents were very disgruntled because other players had been cited that already plead guilty and -- and was done with just a minor fine and was --was done with. And then what some of the parents relayed to us as well as the students that not only they had to do community service for Shepherd -- or for Magistrate Court per their requirement, they also had to do an additional community service for their coach, their female coach, but yet the guys didn't get anything, they didn't even get a writeup… I'm saying in the State of West Virginia, under the rules of our courts, under proper arraigns - arraignments, even on a citation, when a student goes in, they have a right to have a trial, they have a right to have counsel, they have a right to call a jury, they have a right to call witnesses. That's what I'm saying that's been denied in Boober's court.*

See Defendants Motion for Summary Judgment (Buracker), Exhibit A (AR pg. 463), ll. 85:18-88:13.

Additionally, the implication behind the Circuit Court's reasoning – that an activity must constitute a violation of law to amount to a disclosure of wrongdoing under the Whistleblower law – is also in error. "Wrongdoing" is defined under § 6C-1-2 as "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." (emphasis added). The entire point of the criminal justice system – and every single rule related thereto - is designed to protect the interests the public in prosecuting crimes and in being protected from false allegations. A violation of any law, rule, protocol, or code of conduct relevant thereto amounts to failure to protect these public interests. An accused's criminal conduct being diverted from prosecution by the county's duly elected prosecutorial authority in favor of system where a single magistrate acts as judge, jury, and

attorney amounts to an obvious breach of the public's interest in prosecuting those who commit crimes. An accused submitting to community service without an attorney or any real ability to contest the allegations or produce exculpatory evidence to the prosecutor violates the public's interest in ensuring that criminal defendants are treated fairly and equally. Shepherd University students being treated differently than other individuals who commit crimes in Jefferson County West Virginia violates the public interest regardless of whether it amounts to a formal violation of equal protection clause (which it also does).

Regarding Buracker's disclosures Concerning Oaths of Office, the Circuit Court invalidated these as predicate discosures under the Whistleblower law because it "occurred nearly two years before the termination of Plaintiff's employment," and "Shepherd had a legitimate reasons for the termination of the Plaintiff's employment that was not merely a pretext as considered above." For organization's sake, Petitioner's will be addressing the Pretext issues in a separate point of argument, but notes here that the Court seems to simultaneously be attempting to find that Petitioner Buracker has failed to set forth a prima facie case of whistleblower retaliation by using the lack of pretext as a basis for finding no prima facie case. This is not the way the burden shifting paradigm works. As explained above, a Plaintiffs duty to set forth a prima facie case, after which time the burden then shifts to the Defendant to demonstrate some legitimate, nondiscriminatory bases for the adverse action complained of. After Defendant has successfully identified the same, the burden shifts back to Plaintiff to show that the alleged nondiscriminatory bases for the adverse action is pretextual. *See* Syl. pt. 4, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (W. Va. 1986) As such, the legitimacy or pretextual nature of an employers adverse actions is part of a secondary analysis, and does not factor into whether a plaintiff has set forth a prima facie case of retaliation

or discrimination. Nevertheless, as to the Court's temporal proximity argument, Petitioner Buracker would again note the Court's disregard of the many other instances of adverse action taken against Buracker prior to his termination as articulated through the evidence produced on the record. It has never been suggested by anyone that Petitioner Buracker made the disclosure regarding the oaths of office and then suffered no retaliatory consequences until his termination in May of 2019.

As to Buracker's disclosures regarding the Shepherdstown Mayor's attempts to interfere, the Circuit Court dispensed with this disclosure in two sentences, saying "The video of Plaintiff's conversation with Mayor Auxer is not a disclosure of wrongdoing or waste. The Plaintiffs belief that the mayor should not have attempted to intervene in the criminal prosecution of a student does not demonstrate whistleblower activity." Buracker Order (AR), p. 27. However, Petitioner's concern is not merely a personal belief, it is a plain violation of the most basic code of conduct for criminal prosecutions, which requires that laws be enforced, that police make arrests for violations of law, and that prosecutorial decisions be decided by duly authorized law enforcement authorities (police and prosecutors). This is disclosure is related to another disclosure of wrongdoing made by Buracker and Longerbeam, to wit, Shepherd's refusal to allow their officers to enforce state law. Mayor Auxer, in the videotaped discussion with Buracker, is attempting to use his position of authority to coerce Buracker into not prosecuting a particular student athlete for offenses against the law. Additionally, 18 USC 1512(c) makes it a crime for any individual to "obstruct, influence, or impede any official proceeding." Similarly, W.Va. Code § 61-5-27(b) makes it a crime for "a person to use… harassment… with the intent to…(1) impede or obstruct a public official or employee from performing his or her official

duties." As such, there is a serious likelihood that Mayor Auxer's conduct could be deemed a violation of the law in and of itself.

B. The Courts Dismissal of Petitioner Longerbeam's Whistleblower Claim

Regarding the extrajudicial "Shepherd Deal," the Circuit Court that this could not form the predicate disclosure of a Whistleblower claim for two reasons. "First, Plaintiff cites no statute or regulation that was violated by Magistrate Boober or Shepherd University by allowing students to perform community service and having charges dismissed." Longerbeam Order (AR pg. 957), p. 18. This is the exact same faulty assertion as made by the Court in the Buracker Order, and it should be reversed for all the same reasons (both Petitioners shared a brief via their Consolidated Response In Opposition to Defendants Motion for Summary Judgment). Petitioner Longerbeam would request, in the interests of avoiding repetition, that the arguments made in the above argument II(a) regarding the supposed failures of Petitioners to identify a statute or regulation violated to be incorporated by reference herein.

Interestingly, the Court also, at p. 18 of its Longerbeam Order, makes two additional findings regarding Longerbeam's Interrogatory Response wherein he details his disclosure of the "Shepherd Deal" to then-head of the SU Police Department, Holly Frye (see Response Brief, Exhibit 21 (AR pg. 794)), that merit a response. The Court appears to suggest, at the beginning of its page 18, that Plaintiff's interrogatories are not "sworn testimony," implying that it is not evidence that it can consider, before then considering it anyway. As a matter of law, all interrogatories are, in fact, sworn statements of the responding party, per Rule of Civil Procedure 33(b)(1) ("each interrogatory shall be answered separately and fully *in writing under oath*, unless it is objected to…"). Not only was this procedure complied with in the case of Petitioner Longerbeam (and also Petitioner Buracker), but both parties actually applied their verification to

the entirety of their discovery responses, not just their interrogatories (See *Id*. at Exhibits 20, 21 (final page of each Exhibit), making all responsive statements in either their interrogatories or requests for admission sworn statements just as if they had been produced via an independent affidavit, a deposition, or any other mechanism which requires they swear, under penalty of perjury, to the truth of their averments.

Next, the Court found that "even if the Plaintiff's raising concerns about the process is in fact whistleblowing, the Plaintiff's employment was terminated more than a year after his concerns were addressed in the April 6, 2018 meeting with Chief McAvoy and Holly Frye. As such, even if considered the sort of report to which would entitle him to protection of the Whistle-blower Act, it was too removed in time to be retaliatory conduct related to Plaintiff's concerns." Once again, the Court makes the same error it did in discounting this same disclosure by Buracker, to wit, failing to acknowledge that the Petitioners are not alleging that their termination was the only adverse action complained of following their disclosures, but are, in both instances, making the claim that they were subject to ongoing and continuous acts of retaliation after making disclosures, which ultimately culminated in their eventual firing. Petitioner Longerbeam, in his sworn and verified interrogatories stating that he suffered disparate and retaliatory treatment as follows:

> *I actually enforced the laws which I was sworn, about seven to eight months after I should have been, to uphold the laws of the state of WV and to protect the campus, in doing so the younger officers who did not patrol, did not write citations continued to work for the department while myself and Donald Buracker were terminated for enforcing the laws.*
>
> *Per policy every officer was to carry & use his/her body camera at all time, younger officers routinely did not do this – on two occasions when I turned my camera off the chief questioned me about this, each time was due to an attempted stop being terminated or the end of a uniform traffic stop.*

> *Per policy every officer was to inspect/maintain, fill up with gas his/her assigned vehicle and complete and inspection log, younger officers did not do this.*
>
> *Per policy officers are supposed to call if he/she is going to be late/out, a younger officer was routinely and rarely called. I would routinely show up 30 minutes or more prior to each shift and when I showed up 10-15 minutes prior to a shift a supervisor joked with about being late.*
>
> *Per the "Community Policing Policy" officers are to patrol their location, have monthly meetings with the assigned personnel and document this in the CAD. I had done this, as well as recorded each shift patrol with my body camera. I was told by email by Chief McAvoy that I championed the community policing initiative. Sergeant Kelvington advised that he had to get after on of the younger officers, as he had not been completing his assignments and even though he was leaving the department he needed to fulfill his obligation.*

See Response Brief, Exhibit 21 (AR pg. 794), at Interrogatory 14.

Longerbeam also identified a graphic posted to his campus mailbox (which he shared with his partner, Buracker), which read: "Ask yourself one question before throwing someone under the bus; Why?" *Id*. at Exhibit 22 (AR pg. 820).

The Court discounts Petitioner Longerbeam's disclosures at the inter-departmental police meeting (referred to in the Court's Order as a "Climate Survey Complaint") because "Plaintiff has offered no evidence to demonstrate that the comments he made in the meeting were in any way related to the termination of his employment. Again, summary judgment is proper because he cannot establish a causal connection between his reports and the termination of his employment." This, too, is in error, as the disclosures made by Longerbeam in this meeting constitute disclosures not only wrongdoing in terms of violations of protocols and codes of conduct, as well disclosures of waste in terms of the mismanagement of the state funded Shepherd University Police Department. *See Deposition of Jay Longerbeam,* Longerbeam Motion, Exhibit A (AR pg. 345), ll:62:12-63:24. The memo he circulated, included in Petitioner's Response Brief at Exhibit 10 (AR pg. 770), included criticisms like "Too many

people have their hands in the pot [i.e. overstaffing, too many supervisors (with high salaries) not enough subordinates, etc.], the chief/department should report to one person and one person only and that is the president of the University," and "You have some officers that show up 10, 15, 20, 25, 30 minutes late on a shift and don't contact anyone," and "too much done by email leaves too many question marks," and "I think anyone that communicates by email and email alone has a visible problem with talking to his/her people," and "policies talk about answer the radio and duty phone but just a week… ago an officer was called several times on the radio, and phone but never responded!"

III. THE CIRCUIT COURT ERRED IN DISMISSING PETITIONER BURACKER AND PETITIONER LONGERBEAM'S CLAIMS FOR WRONGFUL DISCHARGE

Finally, the Circuit Court dismissed both Petitioners' wrongful discharge/*Harless* claims on the basis that they were "duplicative" of the other causes of action for which Petitioners could not proceed simultaneously with a wrongful discharge claim, and, further, that, "even if those claims are not deemed duplicative of the *Harless* claim, Plaintiff's common law claim would fail for the substantive reasons explained in the Court's prior conclusions." Neither of these findings are supported by the law or the facts in the record.

First, although the language of the WVHRA and corresponding case precedent does suggest that Petitioners would not be permitted to proceed simultaneously at trial on both a WVHRA and a *Harless* claim, the Circuit Court has cited no controlling West Virginia law for the proposition that a *Harless* claim must fail simply because it is "duplicative" of a possible WVHRA claim – even where the WVHRA are dismissed or not raised in a Complaint. The Circuit Court instead references a handful of non-controlling federal district court cases, only one of which – *Guevara v. K-Mart Corp.,* 629 F. Supp. 1189 (S.D.W.Va. 1986) – appears to have

ever even been published. In *Guevara,* the Plaintiff brought a *Harless* action in Kanawha County Circuit Court after having filed charges of discrimination with the W.Va. Human Rights Commission alleging discrimination based on national origin. Defendant K-Mart moved for summary judgment, asserting that the remedial scheme of the WVHRA is exclusive and precludes the initiation of common law tort claims like wrongful/abusive discharge. *Id*. at 1190. The District Court agreed, stating that "a victim of discrimination prohibited by the West Virginia Human Rights Act is limited to a suit under that statute and may not prosecute a so-called *Harless*-type action." *Id*. at 1192. This holding, however, appears to be directly contradicted by two West Virginia Supreme Court decision of vastly superior precedential value – *Williamson v. Greene,* 200 W.Va. 421, 490 S.E.2d 23 (1997) and *Brown v. City of Montgomery,* 233 W.Va. 119, 755 S.E.2d 653 (W.Va. 2014). In *Greene,* the Plaintiff attempted to proceed under dual causes of action for violation of the WVHRA and for wrongful discharge, and the West Virginia Supreme Court was asked to decide a number of certified questions, one of which was "can an 'at-will' employee maintain a tort action at common law for retaliatory discharge based on the allegations of nonphysical sexual discrimination and/or harassment." *Greene,* supra, 200 W.Va. at 423. In answering that question in the affirmative, the Supreme Court explicitly utilized the policy provisions of the West Virginia Human Rights Act to uphold the Plaintiff's right to proceed under a theory of wrongful discharge where a similar claim under the WVHRA would fail. Said the Court:

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

> *harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, W.Va.Code, 5-11-1, et seq.*

Id. at Syl. Pt. 8.

This same holding was echoed recently in another decision before this Supreme Court of Appeals, *Brown v. City of Montgomery,* 233 W.Va. 119, 755 S.E.2d 653 (W.Va. 2014) who included it in their own opinion as Syllabus Point 5, citing Syllabus Point 8 of the *Greene* decision ("[A] discharged employee may ... maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, W. Va.Code, 5–11–1 et seq.").

The Circuit Court, in dismissing Petitioner's Wrongful Discharge Claims, attempts to distinguish the *Brown* holding from the case at bar by pointing out that the *Brown* Court was not presented with a simultaneous WVHRA and Harless claim because the Plaintiff in Brown had only alleged a *Harless* violation and failure to provide him with a pre-termination hearing. *See Order Granting Defendant's Motion for Summary Judgment* (Buracker), p. 32-33. While that is true, it is precisely this scenario that was presented with the *Greene* decision, where the Plaintiff had filed both a wrongful discharge claim and an HRA retaliation claim and the Court had allowed the Harless claim to proceed after dismissal of the WVHRA claim. *See Greene,* 200 W.Va. at 424, 431 – which Petitioners also cited in their responsive brief and which the Circuit Court avoided responding to entirely. Petitioners respectfully submit that the Circuit Court's silence as to the applicability of *Greene* speaks loudly on this point.

Additionally, and perhaps most critically, although Petitioners would be precluded from simultaneous trying both a WVHRA claim and a *Harless* claim in the same action based on the

exclusivity language of the WVHRA and corresponding case law,[5] there is no equivalent language within the Whistleblower law, to the best of undersigned's knowledge, which would work the same exclusion upon a *Harless* claim being persued concomitantly with a Whistleblower law claim. As the Circuit Court noted, both Plaintiff's alleged, as a violation of West Virginia public policy, not only violations of the WVHRA, but also violations of the "government's interest in preventing retaliation against whistleblowers," "the government's interest in ensuring that its agencies follow relevant state law," and "the government's interest in ensuring that its police officers follow state law*." See Order Granting Motion for Summary Judgment* (Buracker) (AR pg. 922), p. 30 (Quoting Petitioners Amended Complaint). None of these public policy violations are derived in any way from the WVHRA. The Circuit Court, at p. 31 of its Buracker decision and p. 25 of its Longerbeam decision, simply concludes that the Whistleblower law mirrors the WVHRA in its exclusivity provisions when, in actuality, the Whistleblower law does not include any such language. The Court further completely fails to reckon, in either its Buracker or Longerbeam Decision, with the public policies violations alleged by Petitioners of the state of West Virginia's interest in ensuring that its laws are being enforced by law enforcement.

Additionally, the Court completely fails to address the other substantive public policy violations alleged by Petitioners regarding the refusal of Shepherd University and the SUPD to enforce state law. These are separate and legitimate basis upon which to divine West Virginia public policy, as it should go without saying that the legislature's creation of a criminal law

[5] W.Va. Code § 5-11-13(a) reads: "[A]s to acts declared unlawful by section nine [§ 5-11-9] 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."

implies that it the state, as a matter of policy, has an interest in preventing the prohibited activity and stopping individuals who violate the same.

Finally, the Circuit Court further bases its dismissal of Petitioners' *Harless* claims by stating that "even if those claims are not deemed duplicative of the *Harless* claim, Plaintiff's common law claim would fail for the substantive reasons explained in the Court's prior conclusion," is erroneous for all the reasons articulated in the assignments of error above and below, and amounts to an inappropriate exercise of judicial fact-finding on issues which are squarely within the province of the jury.

As such, in the event Petitioner Buracker's WVHRA claims fail, for any reason, he should be entitled to proceed on a *Harless* Claim, and Petitioner Longerbeam, who is not appealing the denial of his WVHRA age discrimination claim, should be entitled to proceed simultaneously and without qualification or contingency on both his Whistleblower and *Harless* claims.

IV. IN ALL OF PETITIONERS' CLAIMS, THE CIRCUIT COURT HAS MISCONSTRUED BOTH THE EVIDENCE OF PRETEXT AS WELL AS THE COURT'S ROLE IN ADJUDICATING THE SAME.

In both its Buracker and Longerbeam Orders, the Circuit Court erroneously found that, even if Plaintiff had been able to prove a prima facie case against Respondent, "The Plaintiff cannot prove pretext." Buracker Order (AR pg. 922) at 27; Longerbeam Order (AR pg. 957) at 21. This phrasing immediately confuses and erroneously heightens the burden on Petitioners in responding to a motion for summary judgment. It is not for the Court to decide whether the non-moving party in an employment discrimination suit has "proven" pretext – that is a matter for the jury, and it is explicitly not for the Court "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Williams v. Precision Coil,*

Inc., 194 W.Va. 52, 459 S.E.2d 329 (W. Va., 1995). As such, all that is required of Petitioners is the presentation of some minimum threshold of evidence which might establish "one half of a trial worthy issue," and the basic truth here is that Petitioner have produced much evidence that the claimed bases for their termination were arbitrary, nonsensical, illogical, contradictory, and unusually draconian compared to the disciplining of other officers. These demonstrations plainly allow for the reasonable inference, when making all such inferences in Petitioners favor as required on motion for summary judgment, that Respondent's reasons for terminating Petitioners were pretextual.

The formal reasons for Plaintiffs' termination were outlined in Plaintiffs' termination letters, both issued on April 23, 2019 and signed by Shepherd University President Marie Hendrix (Exhibit 24). Both letters identified the following reasons for Plaintiffs' termination:

- *Misconduct as a police officer in overseeing and making a warrantless, nonconsensual entry of a student residence hall room on October 7, 2018;*
- *Failure to apply sound policing practices, and failure to apply the norms of campus community policing – as articulated as an expectation by the Chief, in your conduct in the pre-dawn hours of October 7, 2018;*
- *Unprofessional conduct as a police officer in the course of your work on October 7, 2018;*
- *Inappropriate efforts to influence other employees of the University by providing false and misleading information to them and in some cases soliciting them to write statements as to the evening's events which you knew, or reasonably should have known, would be false;*
- *Submission of reports which were willfully and materially false and misleading as to the events of October 7, 2018;*
- *Unprofessionalism in the handling of a traffic stop on January 6, 2019;*
- *Unprofessionalism in your general conduct and interactions with other officers of the SUPD, other University Employees, and University Students.*
- *Insubordination in your refusal to adopt a commitment to the University Community Policing philosophy of the Department and Shepherd University;*
- *An inability on your part to conform your conduct and demeanor, as a University Police Officer, to our University Community Policing philosophy and expectations.*

The SUPD's Official Policy and Procedure Manual makes explicit that "The basic mission for which the police exist is to prevent crime and disorder." Response Brief, Exhibit 25 (AR pg. 829).

Regarding the October 7, 2018 incident, wherein Petitioners cited myriad students for underage drinking and furnishing alcohol to minors, President Marie Hendrix, who had ultimate policymaking and decision-making authority as to SUPD policies and personnel decisions, was asked to articulate both Plaintiff's transgressions from the evening, she stated, "So not, you know, knocking on the door, announcing themselves, declaring who they are, but just kind of pushing their way in. *See Deposition of Marie Hendrix,* Response Brief, Exhibit 26 (AR pg. 831), ll. 99:7-10. She clarified further that, when asked if her objections "all just comes back to the fact that they… made a nonconsensual entry… it's about that you don't really want police officers entering a dorm room where there's a party without knocking and announcing themselves?" She responded in the affirmative, saying "that's my opinion." *Id*. at 101:16-24. She did not, at any point, suggest that Plaintiff's had made an illegal entry into the room (i.e. in violation of the 4th Amendment), but only that they had offended school policy by doing so. However, when the discussion progressed into how, exactly, SUPD Officers were expected to enforce the law and school's policies against dangerous activity (like underage drinking) under such policy restrictions, the expectations quickly became farcical to the point of belying the legitimacy of the supposed policy. For example, President Hendrix testified that it was the policy of Shepherd University to discourage underage drinking, that underage drinking was an unsafe activity, and that there was a connection between underage drinking and sexual assault. *Id*. at 102:1-23. However, she then testified as follows:

Q. Okay. In order to deter underage drinking, would you agree that the police officers have to be able to actually catch people underage drinking and punish them for it in the same manner?

...

A. Well, how else would they recognize it was happening?
Q. Precisely. So was that a yes?
A. It is a yes.
Q. Yes. So to take this all to the October 7th incident at Yost Hall, if Officers Buracker and Longerbeam have concern of -- of underage -- are concerned that there is underage drinking going on in this dorm room, that was something you -- you would want them to identify, catch, and deter, correct?

...

A. I would want that to be accomplished by any officer in a manner that is consistent with our policies, yes.
Q. Do you understand, or would you agree that if Officers Buracker and Longerbeam instead of relying on probable cause to make nonconsensual entry, if they were to stop and knock on the door and say this is the police and wait however long it took for someone to answer the door, and then discuss with them to get their consent to enter, that they might not get that consent at all, and therefore, not be able to make entry, or it might take so long for that to happen that the evidence of underage drinking could be destroyed or hidden, would you agree with that?

...

A. Again, hypothetically, Mr. Riddell, my level of comfort would be to see police officers follow our policies and get to the point where they can establish a rapport with the students, and I believe that students would have answered the door, right, when you knock on the door someone's gonna answer, and then a discussion could have ensued.
Q. But ultimately what you're saying is if -- you want it set up so that if a student who's having a party where there may be underage people drinking tells an officer that they can't come in that that officer shouldn't come in, that's what you're saying, right?
A. No, that's -- that's not what I'm saying.
Q. Okay. Well, what are they supposed to do if a student who was holding a party where underage student - other underage students may be drinking will not consent to them entering and inspecting the party, what are they supposed to do at that point?
A. Yeah. It is my expectation, again hypothetically, that once a rapport is established with the person who answers the door that indeed the person answering the door would allow the police officers to come in. Hypothetically, that is my expectation.

...

Q. All right, here -- here's what I'm getting at, here's what I'm getting at, what… what is it that's supposed to happen when these police officers charms are not as effective as we had hoped?

...

A. Yeah. I don't have an answer to that.

Id. at 104:3-106:20.

This exchange amounts to a direct admission by President Hendrix that she does not wish for her officers to enforce state law, unless they have the permission and consent of those

who are suspected of breaking it, and does not have any contingency plan for when the suspected law breaker doesn't wish to be caught. It is confirmation of everything that Petitioner's have claimed about their desire to enforce state law – and their disclosures as to the same – being a motivating factor in their termination. While Respondent and the Circuit Court may disagree on this point, it is not for them, but for a jury, to decide who is right, as "summary judgment is denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Smith v. Sears, Roebuck & Co*., 205 W. Va. 64, 66, 516 S.E.2d 275, 277, (1999)

Chief McAvoy, when asked about the October 7th incident and what Buracker and Longerbeam did wrong, stated that "Officer Buracker made a false report misstating the sequence of events on his report. Officer Longerbeam forced his way into an apartment after threatening to strike a student with a flashlight. Moments later officer Buracker followed him into that apartment." *Id*. at 54:2-7. He later testified that he believed the entry to be unlawful (*Id*. at 56:22), although he also appeared to concede the various facts which gave Plaintiffs probable cause to believe underage drinking was occurring in the room. *Id*. at 55:24-59:5. The fact that the school President and chief of police cannot even agree as to whether the terminated officers acted unlawfully or not is probative of the lack of legitimacy of the claims or, at the very least, allows for the inference, when all such inferences are interpreted in Petitioners' favor as required, that the supposed unlawfulness or impropriety of the dorm room entry is a pretextual basis for termination.

As to his allegations that Buracker lied on the report, McAvoy specifically articulated that the basis for that was that, when discussing how a PBT had been administered while Plaintiffs' made entry into the room, Buracker had stated that they

had administered the PBT *and then* made entry, giving the potentially false impression that the PBT had been the basis for the probable cause. *Id*. at 55:24-56:8. McAvoy admits, however, that Buracker's report did not actually state that he based his probable cause to make entry on the PBT. *Id*. at 56:11. As such, we can boil down the entire claim that Buracker "lied" in his report to a single word typo, hardly the smoking gun that should be needed to accuse a decorated veteran police officer of dishonesty in the performance of duty.

Buracker, of course, contests the facts as stated by McAvoy, creating yet another issue of material fact. When asked to admit that he entered the student residence hall without a warrant or consent, Buracker stated that "I did enter a resident's room without a warrant and without the consent of the resident. However, this entry was lawful as prescribed by the West Virginia State Code and this officers training consistent with the laws of arrest, search, and seizure." *Response Brief*, Exhibit 3 (AR pg. pg. 680) at RFA 15. Buracker has supported this assertion by producing in discovery the statement of Constance Amoa, who states that "there was alcohol in plain view. When you walked up the steps there was a pack of Mike's hard lemonade and in the residence there were alcohol bottles on the floor of the suite." *Id*. at Exhibit 27 (AR pg. 838). The other RA on duty at the time, Aaron Robinson, who stated that two of the individuals who had just walked out of the party stated that they were 18 years old and that they had been drinking. *Id*. at Exhibit 28 (AR pg.841).

When asked to admit that information in the incident report from October 7, 2018 was materially false, Buracker responded that he admits this only "insofar as the report contained accidental, unintentional errors. Denied to the extent the Request implies

intentional misrepresentations." *Id.* at Exhibit 3 (AR pg.680), at RFA 16. He elaborated on this same distinction at RFA 17, saying "there were accidental human errors or mistakes made that were not reflected on the video. I deny any intentional intent to misrepresent any fact or to knowingly entering any false information." *Id*. at RFA 17. Further corroborating proof of lack of intent to mislead was Longerbeam's own oft-ignored incident report from that evening, which does not even mention the PBT and instead clearly states, as the basis for the entry, that, "When we got upstairs we countered 2 young females, who identified themselves as an 18-year old and a 19-year old, standing on the second floor landing, who smelled of an alcoholic beverage. It was at that point that I went to the doorway of the apartment, where a young male was out the door and tried to pull the door shut on me, to which I advised him not to do." Response Brief at Exhibit 29 (AR pg. 843). If Buracker and Longerbeam had intended to falsify the basis for their entry in the dorm room, it is probable that they would have coordinated these critical details, and the fact that they did not is probative of the lack of any such intent.

Chief McAvoy further took issue with Plaintiff lacking probable cause to make arrests for furnishing alcohol to minors, and suggested that the students had "brought their own alcohol." *McAvoy Deposition,* Response Brief at Exhibit 9 (AR pg. 721) at 67:4-5. However, he could not identify any fact from that evening which would support this belief. *Id*. at 68:12-13. Petitioner's, meanwhile, contested this allegation by producing in discovery emails from Coach Justin Namolik and Chief McAvoy from a number of the student-athletes arrested on October 7, 2018 who actually issued letters of apologies to "the Shepherd police officers who were involved in the incident," essentially admitting their own misconduct and the appropriateness of Petitioner's police response.

Id. at Exhibit 30 (AR pg. 845). Devin Smith wrote that "we did not follow the rules at all that night," and that "In the future whenever there is a party of some sort… I will make sure… all of the rules are being followed and that if there is any alcohol present that there will be no one underage there or consuming any sort of beverage." Derrick McKnight wrote that "I was being naïve in regards to not knowing the bad position I would be putting everybody in, myself included… I take full responsibility for my role in all of this… Again, I apologize for this terrible disturbance." Winston Burgess wrote that I realize that my actions were very irresponsible and not only did they affect me and my team but also many other student athletes from other sports teams that were there." Emmanuel Agharyere wrote that "By drinking underage and attempting to flee the scene I failed to conduct myself in that manner [of a campus leader] and I am deeply sorry for that." Noah Wimbish wrote that "it was wrong of me to be drinking at this event and it was even more wrong of me for being irresponsible and being a bystander when I knew things were getting out of control."

Chief McAvoy also criticized Buracker's handling of the October 7 event insomuch as he "stood helplessly while people were jumping out the window." *Id.* at 69:9-10. McAvoy further stated that Buracker should have called for backup, but when it was pointed out to him that there were no other officers available to respond at the time entry made, McAvoy conceded "that makes sense to me, I don't know if it's a recollection or just, you know it would make sense." *Id*. at 71:3. This represent yet another instance where, as soon as the head of Respondent's police department is pressed about why he found fault with Petitioner's actions on October 7, his reasons fall apart immediately.

Regarding the claim that Buracker had been "insubordinate in your refusal to adopt a commitment to the University Community Policing policy," as stated at bullet point 8 of the April 9 termination letter, Buracker contested this fact by stating that "At no time did Plaintiff refuse to adopt a commitment to University Community Policing. Rather, Plaintiff exceeded all objective standards for community policing as set by Shepherd." *Id*. at RFA 22. At RFA 18, he also noted some of the specific ways that he had exceeded the community policing guidelines, stating:

> *There was an assigned duty to foot patrol certain assigned areas, conduct meeting with staff and work to make changes.*
>
> *1- I completed and exceeded in this area- (Identified 50 plus street lights out and marked then)*
> *2- I conducted meeting with staff when they would respond. (Multiple Ignored Emails Exist) (Chief never told them about this plan in the beginning.*
> *3- Documented my patrols and conducted extra patrols in other buildings when the assigned officer was off duty.*
> *4- Identified several hazards and reported those hazards- (As identified by Chief as "Good find "referring to multiple dead standing trees.*
> *5- Jay and I hosted several cookouts/ bought pizza for staff to improve relationships (All Staff in our assigned areas were invited.- This was at my expense and was a great way to increase communication and cooperation between staff and student.*
> *6- Followed Up on student complaints aired at the meeting- Emails/ Work orders- Some email was completing ignored by maintenance.*
> *7- During these patrols was able to identify staff and public illegally dumping personal trash in dumpsters in violation of The West Virginia State Code*
> *8- Also, on several occasion caught multiple persons (Consuming Illegal Drugs/ Substances) – Chief advised he would much rather them use drugs outside the dorms then inside.*
> *9- Answer multiple complaints of residents using illegal drugs and, on many occasions, disabling the fire systems in the buildings.*
> *10- Also conducted timely fire drills and system tests.*
> *11- Presented Radar Boards to educate the public to the Chief. Nasty Email resulted.*
> *12- I believe I far exceeded any officer on his staff in this area.*

Id. at RFA 18.

Both Plaintiffs were fired based on the events of October 7, 2018 and January 6, 2019 without any kind of progressive or graduated discipline being applied. Stated in discovery, that "Shepherd policy clearly states that they utilize progressive discipline." *Buracker Discovery Responses* (Exhibit 3) (AR pg. 680) at RFA 13. He further noted his

stellar performance records, specifically that "I have been an officer for over 31 years with a spotless record of service. This record is generated while employed by multiple past and present departments. Chief McAvoy yelling during the Garrity hearing 'You falsely swore to a criminal complaint in front of a judge didn't you. This again all being said before testimony of any officers that were directly involved. Including Officer Jefferies, Officer Longerbeam or the female defendant charged and convicted in the court of law that was stopped and charged that night." *Id*. at RFA 14. Official 30(b)(7) designee Chief John Mcavoy, in his deposition, also admitted that Buracker had never had a negative performance evaluation during McAvoy's tenure and that neither Buracker nor Longerbeam had ever had a disciplinary infraction during their time at Shepherd prior to the events which gave rise to their termination. *Rule 30(b)7 Deposition of John McAvoy (Exhibit 9)*, ll. 12:18-13:4; 14:23; 15:6-9. Following his termination, Plaintiffs were both recertified as officers by the State Police Board, and Buracker further received a letter of commendation for his work on a murder investigation in May of 2020 while employed with the Berkeley County Sheriff's Department. Exhibit 31.

McAvoy further testified as 30(b)(7) designee, as to the 4th stated reason for termination ("inappropriate efforts to influence our employees of the university by providing false and misleading information to them and in some cases soliciting them to write statements… that you knew or should have known would be false"), that both Plaintiffs' had committed misconduct by "describing to the RA how the student touched or grabbed Officer Longerbeam…I think they were asking the RA to include something that RA did not see and indicate that the RA did see it." *Id*. at 74:13-75:8. However, Constance Amoa, the RA in question, drafted a statement (Exhibit 27), wherein he denied

that either Officer Buracker or Longerbeam instructed the RA's on what to write in their statements, stating instead "No. we checked in with the Officers to make sure we documented everything correctly." *Ibid*.

As to the 5th State reasons for termination, to wit, Unprofessionalism in handling the traffic stop on January 6, 2019, McAvoy admitted that there was nothing unlawful about the stop or the search, and there was nothing unlawful about the arrests. *Id*. at 92:6-24. He compared it unfavorably, however, with another stop on New Year 's Eve wherein Plaintiff Buracker had shown more leniency. *Id*. at 93:21- 94:9. However, McAvoy admitted that this was just one incident, that he had not reviewed and compared all of Officer Buracker's encounters, and that he "knows that Officer Buracker wrote a lot of citations for people with marijuana in cars." *Id*. at 96:8-9. When asked on written discovery whether he was "inconsistent in your handling of like offenses among students at Shepherd University," Buracker responded "I consistently applied my lawful discretion, regardless of who the individual suspect was, based on a consistent and evenly applied set of criteria, e.g. how cooperative/honest the suspect was, the severity of the crime, my previous dealings/knowledge of the suspects, etc." *Id*. at RFA 20.

Plaintiff Longerbeam, when asked to admit that he was inconsistent in his handling of offenses among students at Shepherd University, denied the allegation "except insofar as Plaintiff exercised his lawful discretion based on facts of the circumstances and the cooperation of the suspect in accordance with the law. *Longerbeam Discovery Responses* (Exhibit 21), at RFA 11. He further denied that he was in any way unprofessional during his handling of the 1/6/19 traffic stop. *Id*. at RFA 12. He further denied that he was insubordinate in refusing to adopt a commitment to Community Policing, and instead

noted that, "Rather, Plaintiff exceeded all objective standards for community policing as set by Shepherd." *Id*. at RFA 13. He further submitted a written statement which directly refuted the allegations being brought against him in the termination letters. *Id*. at Exhibit 32.

The treatment of Petitioners by Shepherd can be contrasted and compared, for disparate treatment purposes, with the treatment of Officer RJ James, who Chief McAvoy stated received no discipline after using a Shepherdstown PD officer's taser on a mentally impaired person. *McAvoy Deposition* at 46:1-47:1. This appears to be a far more serious offense than anything Petitioners have been accused of. Their treatment can further be contrasted against many of the younger officers habitually breaking other rules of the department without incident, such as the policy against distributing pornographic materials while on duty. *See McAvoy Deposition* at 47:20-48:20; *See also* Exhibit 23

VIII. CONCLUSION

For all the reasons stated above, the decision of the Jefferson County Circuit Court should be reversed, and the matter should be remanded for trial.

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

Docket No. 22-609 & 22-610

DONALD BURACKER,
JAY LONGERBEAM,
Plaintiff, Below, Respondent

Vs.) **20-C-37 & 20-C-52**
(Jefferson County)

SHEPHERD UNIVERSITY
Defendant, Below, Petitioner.

CERTIFICATE OF SERVICE

I, Christian J. Riddell, Esq., attorney for the Petitioner's, Donald Buracker and Jay Longerbeam, do swear that a copy of the foregoing Consolidated Brief for Appeal in this matter was served upon counsel, Tracey Eberling, Steptoe & Johnson, PLLC, 1250 Edwin Miller Blvd., Suite 300, Martinsburg, WV 25404 via the WV Supreme Court of Appeals electronic filing this 21st day of October, 2022.

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