IN THE CIRCUIT COURT FOR JEFFERSON COUNTY, WEST VIRGINIA

DONALD BURACKER and
JAY LONGERBEAM,

Plaintiff,

v.

Civil Action No. 19-2020-C-37
Judge Michael D. Lorensen

SHEPHERD UNIVERSITY,

Defendant.

ORDER GRANTING DEFENDANT SHEPHERD UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT

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

FINDINGS OF FACT

Donald Buracker worked as a part-time officer with the Shepherd University Police Department starting in 1989.[1] He was 55 years old at the time the subject motion was filed.[2]

[1] All references herein are to the Exhibits offered by the movant in support of its Motion Exhibit A, Excerpt from the Deposition of Donald Buracker, at 21.

[2] *Id.* at 9.

A. 2016 Grievance

In 2016, when posting a position for a full-time officer, Shepherd included a requirement that applicants for a full-time position have at least an Associate's degree from an accredited institution. Plaintiff did not have such a degree. He applied for the position and was not selected. He filed a grievance with the West Virginia Public Employee Grievance Board and asserted that Shepherd had violated West Virginia Code Section 18B-7-3e, which at the time required a hiring preference for current employees over new employees.[3] A second full-time position came open, and the Plaintiff was offered that position both before and during the Level 1 hearing.[4] He rejected the offer both times, stating that he believed that he should be entitled to negotiate his rate of pay instead of working at the same hourly rate he earned as a part-time officer.[5] Near the end of the Level 1 hearing, the Plaintiff, through his counsel, alluded to the theory that the non-selection was the result of discrimination based on an unidentified protected class.[6] After an unsuccessful Level 2 mediation, a Level 3 hearing was held, and the claimant raised the issue of age discrimination. In her written decision, the Administrative Law Judge concluded that the Plaintiff was qualified for the position in that he held the same position on a part-time basis and should have been considered for and offered the position. She ordered that he be instated with limited back pay. The decision contained the following footnote[7]:

> Grievant argued at the level three hearing that Grievant was discriminated against because of his age. The undersigned pointed out that the Grievance Board has ruled that age discrimination is not considered by the Grievance Board, except under the

[3] *Id.* at 22-23.

[4] *Id.* at 23; Exhibit B, Excerpts from Transcript of Level 1 Grievance Hearing, at 9-11.

[5] Exhibit B, at 11.

[6] *Id.* at 41-42.

[7] Exhibit C, Grievance Decision.

definition of discrimination in the grievance procedure. Grievant did not pursue this argument in his post-hearing written argument, and it is deemed abandoned.

Plaintiff was provided with a letter outlining the offer of employment that referenced the order of the Grievance Board.[8] He contended in his Amended Complaint and in discovery that this offer letter was evidence of discrimination in that no other officer had received similar letters nor was a signature required to accept the offer but agreed that none of those officers received their letters following an order of a Grievance Board.[9] The Plaintiff ascribed ill motive to Shepherd concerning the offer letter as he claims that Chief McAvoy told him that an earlier draft of the letter prepared by Shepherd's general counsel contained terms to which he believed the Plaintiff would not agree.[10] He also felt that the letter was "post-dated" in that it likely was not signed by the sender on the date of the letter because the date fell on a Sunday.[11] Plaintiff acknowledged that he never received any version other than that which he signed and accepted.[12]

B. Termination

In the fall of 2018 and January of 2019, Plaintiff was involved in two matters that ultimately raised concerns with Shepherd University's administration. In the first, he coordinated and participated in the entry of a college dorm room without a warrant and without the consent of the residents, and assisted another officer in initiating charges against several Shepherd athletes and the issuance of citations to a number of other students for underage consumption of alcohol.[13] The

[8] Exhibit D, May 20, 2018 Offer letter

[9] Exhibit A, at 61-62.

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

[11] *Id.*

[12] *Id.* at 33.

[13] Exhibit E, Excerpts from Deposition of John Mc Avoy, at 54-55.

report of the investigation that he prepared was significantly different than the actions of the officers as apparent from the body camera footage.[14] While it was claimed that probable cause for the entry was based on the breathalyzer results of several underage students, those tests were actually not administered until later in the evening.[15] On January 6, 2019, Plaintiff participated in the arrest of two of the same athletes involved in the October 7, 2018 incident along with Jay Longerbeam.[16] The University received reports of concerns from the parents of the athletes.[17] Chief McAvoy and Ms. Frye performed an extensive investigation of the two matters, including the review of reports and body camera footage, a comparison of the manner in which Plaintiff Buracker handled another incident in which a vehicle was stopped, the consumption of marijuana was suspected and confirmed, and those students were permitted to leave the scene without legal consequence and other contributing information.[18]

On April 11, 2019, Chief McAvoy, Ms. Frye and Shepherd's General Counsel, Alan Perdue, conducted a meeting with the Plaintiff at which Plaintiff was represented by counsel.[19] The handling of the subject incidents was discussed with Plaintiff. The Plaintiff was also asked why he left his body camera on when he was using the bathroom.[20] He indicated that it was accidental and that he needed to urinate frequently because of medication that he took to manage his diabetes.[21] At the conclusion of the meeting, Plaintiff was placed upon an administrative leave

---

[14] *Id.* at 55-56, 121; Exhibit F, Excerpts from Deposition of Holly Frye, at 35-38, 50-51, 60-62

[15] Exhibit E at 55-56.

[16] *Id.* at 86-89, 134.

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

[18] Exhibit E at 86-89, 93-94, 142-43, 145-46; Exhibit F at 35-38, 50-51, 60-61.

[19] Exhibit A at 23.

[20] Exhibit A, at 28, Exhibit E, at 182.

[21] Exhibit A at 28.

of absence, pending further review. On April 23, 2019, President Mary Hendrix directed a letter to Plaintiff advising him that Ms. Frye had recommended the termination of his employment and provided detailed reasons, which included misconduct in the October 7, 2018 matter and unprofessionalism in the January 6, 2019 traffic stop.[22] Plaintiff and his counsel met with Shepherd's Director of Human Resources, Dr. Marie DeWalt, on April 30, 2019, pursuant to Shepherd's policy providing for a pre-termination hearing.[23] After being advised by Dr. DeWalt that no compelling reason was demonstrated at the April 30, 2019 hearing to change the recommendation, Dr. Hendrix sent the Plaintiff a letter advising him of her decision to terminate his employment effective May 2, 2019.[24]

Plaintiff filed a grievance with the West Virginia Public Employee Grievance Board on May 10, 2019 challenging the termination of his employment.[25] In his grievance, he contended that he had been subjected to wrongful termination "under pretextual reasons in retaliation for Grievant disclosing wrongdoing and waste and successfully prosecuting previous acts of wrongdoing," "violation of 29-6-10 regarding manner and circumstance of termination" and "appeal of dismissal." No mention was made of alleged age or disability discrimination.[26] His grievance remains pending, at his request, awaiting the outcome of this civil litigation.

C. Age Discrimination

As the part of the basis of his claim for age discrimination, Plaintiff cites an article in which Chief McAvoy was allegedly quoted that Zachary Ray was hired because of his youthful age. He

---

[22] Exhibit G, April 23, 2019 Letter.

[23] Exhibit A, at 23. Exhibit H, Excerpts from deposition of Dr. Marie DeWalt at 75-76.

[24] Exhibit I, May 2, 2019 Letter.

[25] *Id.* at 34; Exhibit J: Plaintiff's Level 1 Grievance

[26] Exhibit J.

contends that this demonstrates that he was not selected for the full-time position because of his age. The Court takes judicial notice, pursuant to W.V.R.E. 201, of the contents of the article and of the fact that the article was published more than two and one-half years before the termination of the Plaintiff's employment.[27]

In his response to Shepherd's written discovery requests seeking support for his contention that he was "continuously treated disparately compared to younger officers at Shepherd University, and explain in detail your claim that this took the form of you 'being held to a different, more stringent standards in terms of responsibilities,'" Plaintiff indicated that he was required by Chief McAvoy to do reports and that other officers were not, although this was discontinued by the Chief in an email in December of 2018.[28] He testified that he had to assume fire watch duty more frequently than other officers and that a younger employee expressed that he did not want to do the duty.[29] He also contends the younger officers did not routinely utilize their body camera, did not maintain department vehicles or fill them with gas, while another was routinely late.[30] This was also his sworn deposition testimony.[31]

The Plaintiff further testified in his discovery deposition that he felt he should have received a verbal reprimand for the conduct that led to termination, like was given to Officer James, for his handling of the January 6, 2019 traffic stop.[32] He was never subject to discipline until the time of the suspension and termination of his employment but that he had been instructed at various

---

[27] Exhibit L, Excerpt from Plaintiff's responses to Shepherd University's discovery requests

[28] Exhibit A, at 46-47.

[29] Exhibit A, at 47

[30] *Id.* at 57-59, 65

[31] *Id.* at 28-31.

[32] Exhibit A, at 103.

times to do something differently or refrain from certain conduct.[33] As far as his assertion that younger officers were held to less stringent standards of discipline, he cited that other officers were not required to follow department procedures as to cleaning and maintaining department vehicles or wearing their body cameras and keeping their GPS units with them, and came to work late.[34] He also noted that he reported to one of the supervisors that a younger officer failed to patrol the campus and sat in the office doing personal work, but admitted that he did not know if the officer was counseled or disciplined.[35] Additionally, he asserts that younger officers had not taken their oath of office but he was required to be sworn and certified as a law enforcement officer.[36]

Plaintiff also contends that he was not given the same access to overtime as younger officers.[37] He cited two examples in which another officer was allowed to work overtime related to court appearances and two occasions on which he expected to work overtime and was instructed to leave early.[38] The Affidavit of Marie DeWalt sets forth the number of over-time hours worked by all members of the department and shows that the Plaintiff worked far more than any other officer, regardless of age.[39] This was not refuted by the Plaintiff.

Plaintiff further claims that "the hiring process at Shepherd was changed multiple times to allow Shepherd to discriminate against older officers."[40] He conceded that this claim was related

---

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

[34] *Id.* at 57-59.

[35] *Id.* at 38.

[36] *Id.* at 66-71.

[37] *Id.* at 51-55, 56-57.

[38] *Id.*

[39] See Exhibit M.

[40] Exhibit A, at 71.

to the inclusion of the requirement of a college degree in the posting in 2016.[41] Plaintiff also bases this on what he feels was the practice since 2017 to hire younger versus older officers and a comment attributed to Chief McAvoy in which the Chief was making fun of an older officer and stated that "those are the guys we need to replace."[42] The Plaintiff acknowledged he had no information about the age of applicants for recent positions relative to others.[43]

D. Disability Discrimination

Plaintiff is a diabetic.[44] He requires medication to manage his condition, a side effect of which is the need to urinate frequently.[45] Per his deposition testimony, his condition did not affect his ability to perform any of the essential functions of his job, but he noted that he would need to take bathroom breaks with some urgency.[46] He was never disciplined or counseled about the number of times he needed to use the bathroom.[47] When one of his sergeants questioned him about having left his body camera on when using the bathroom, Plaintiff advised him that that was accidental and that he had a need to use the bathroom with urgency. Plaintiff asked Chief McAvoy for permission to install a grill at the police department so that he could prepare meals he felt were healthier than those offered on campus.[48] This request was granted[49], and the grill was installed and used by the Plaintiff. Shepherd University's Staff Handbook provides a mechanism for

---

[41] *Id.*

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

[43] *Id.* at 72.

[44] *Id.* at 24.

[45] *Id.*

[46] *Id.* at 26.

[47] *Id.* at 29.

[48] Exhibit A, at 26-27.

[49] *Id.* at 27.

employees who need an accommodation of a disability. Plaintiff testified that he was unaware of that process but that he had signed an acknowledgement that he had read and understood the handbook.[50]

Shepherd police officers are issued body cameras. They are encouraged to use them in interactions with the public.[51] On more than one occasion, Plaintiff failed to turn off his body camera while he was urinating in a university restroom. The video does not capture the Plaintiff's anatomy, but the sound of his urination was plain. During the course of the Garrity-hearing on April 11, 2019, Plaintiff was asked why he neglected to turn off his body camera in a private moment and he replied that he forgot to do so. The issue was not addressed further. Plaintiff testified that he believes that he was discriminated based on his disability because of the timing of being questioned by a sergeant as to why he had left his camera on in the bathroom, and it being raised shortly thereafter in the Garrity hearing.

E. WVHRA Retaliation

Plaintiff claims that Shepherd retaliated against him for filing his non-selection grievance and by failing to accord him the privilege of his seniority. This is largely centered on the fact that Chief McAvoy did not re-assign the unit numbers in the department by seniority after Plaintiff started his full-time position.[52] Historically, unit numbers were assigned with lower numbers given to those with more seniority. Plaintiff testified that the numbers are re-assigned "within days" when there is a change in the department's make up.[53] When asked how having a higher number affected him professionally, he noted that a dispatcher casually asked him once why he did not

[50] *Id.* at 25.

[51] Exhibit E, at 180-81.

[52] Exhibit A, at 41-42, 43-44.

[53] *Id.*

have a lower number, that it was mentioned by other officers, and that he himself felt that it made him look like a less senior person.[54] Chief McAvoy testified that the department did not have a policy on when numbers would be re-assigned and that he did not handle that administrative task.[55]

Plaintiff claims he was denied longevity pay. "Longevity pay," also known as an Annual Increment, is provided to state employees pursuant to W. Va. Code § 5-5-2, *et seq.* The Court agrees that the application of the statute is not simple for a lay reader. However, Plaintiff did not qualify to receive longevity pay because while he was a part-time employee, he worked less than half-time, 0.5 full-time equivalent, and he did not have three full years of service as a full-time employee. He was credited with 14 years of full-time service in calculating his rate of pay under a pay step system that the State of West Virginia had in place, but this does not translate to determination for state longevity pay.[56] The eligibility for this longevity pay is controlled by State law; it is not discretionary for the agency. Plaintiff admitted that he was unaware of how longevity pay was calculated under the state's policy but that he knew that employees who are younger than him with less seniority received the pay.[57] The Plaintiff's Affidavit as to his understanding of longevity pay does create a dispute of material fact as his entitlement to the benefit.

When asked about what he contends were his disclosures of discrimination that resulted in retaliation, he cited his filing of an EEOC complaint – which came after the termination of his employment.[58]

---

[54] *Id.* at 43-44., 45.

[55] Exhibit E, at 15-17.

[56] Exhibit H, at 63-64.

[57] Exhibit A, at 42.

[58] Exhibit A, at 104

F. Whistleblower

Plaintiff's claimed whistleblower status is based on three contentions. First, he notified Dr. Hendrix in an email in 2017 that he discovered from a review of court records that the University had not submitted proof that all of its officers had been given the required oath of office.[59] This was promptly corrected, and Dr. Hendrix thanked the Plaintiff for his report.

His next basis is the complaint Plaintiff filed against Sgt. Brown with the West Virginia Ethics Commission.[60] In October 2018, Plaintiff took photos and video of Sgt. J.D. Brown that showed him using a department vehicle to pick up a child from school. Plaintiff submitted this evidence in support of the complaint. Plaintiff did not provide a copy of the complaint to any member of Shepherd's administration but mentioned it to a sergeant.[61] Chief McAvoy was aware of Sgt. Brown's use of the vehicle and permitted it.[62]

Plaintiff contends that his filing the ethics complaint was related to the termination of his employment under a strained theory. Sgt. Lori Maraugha was covering for Chief McAvoy while he was on vacation in January of 2019. Sgt. Maraugha received a number of written concerns about the manner in which Plaintiff was treating his fellow officers. She provided this information to Ms. Frye. Ms. Frye communicated with Dr. DeWalt, who arranged for a series of meetings with each officer in the department by the HR Director and the University Ombudsperson, Professor Karen Green. A report was generated by Dr. DeWalt and Professor Green: the comments contained therein were not attributed to any officer. In fact, Dr. DeWalt testified that all notes from the interviews of the members of the police department were shredded when the final report

---

[59] Id. at 65-67.

[60] Id. at 75.

[61] Id.

[62] Exhibit N, Excerpt from Deposition of J.D. Brown, at 96.

was prepared. Plaintiff's theory is that Sgt. Maraugha made the report because she had allegedly had an affair with Sgt. Brown when she was Sgt. Brown's subordinate.[63] Note that Sgt. Maraugha was promoted to Sergeant in 2009 or 2010.[64] Plaintiff places great weight on his own statement: "if it wasn't for my ethics complaint, I'd probably be still sitting here today, because in my heart cops don't turn on cops. But I did what was right."

Plaintiff also claims that he was a whistleblower because he questioned the alternative community service assigned to Shepherd students charged with certain offenses. He addressed this with one of the prosecuting attorneys, who Plaintiff claims intervened to stop this process.[65]

G. Refusal to Not Enforce the Law

Plaintiff further contends that his employment was terminated because he refused not to enforce the law. His explanation of this is that he was told by Chef McAvoy not to run traffic stops on the road adjacent to Shepherd even though the department officers had the legal jurisdiction to do so, not to patrol certain parking lots during football games and not to tow vehicles parked in fire lanes.[66] The email concerning the fire lanes was sent in 2014.[67] Plaintiff acknowledges that the Chief indicated his preference that the officers work on campus. He also notes that he was told to look the other way with students smoking and drinking. Plaintiff further claims that the department requirement that warrants be time-stamped before service interfered with his ability to do his job. He is apparently not contending this requirement was imposed on him and not others because he believes he and Jay Longerbeam were the only officers that used

---

[63] Exhibit A, at 107-110.

[64] Exhibit O, Excerpt from Deposition of Lori Maraugha, at 58-59.

[65] Exhibit A, at 85-92

[66] *Id.* at 81-82

[67] *Id.* at 82.

warrants.[68] Finally, he believes that Shepherd, through the actions of Chief McAvoy and Holly Frye, terminated his employment and acted improperly because "they made judgmental decisions on lawful actions conducted by officers at Shepherd University."[69]

Plaintiff also contends that Shepherd University ignored officers that were committing criminal violations and violations of the ethics act. The "criminal violations" were noted to be the use of university dumpsters for the disposal of private trash by several officers and that officers did not use a hang tag on the mirror of their personal vehicles because they had expired inspections. As to the ethics violations, he testified that he investigated and filed a complaint with the West Virginia Ethics Commission concerning Sgt. J.D. Brown's personal use of a department vehicle. He did not address his concern with anyone at the University.[70] He also notes that an officer wrote speeding citations without using a radar gun which would have comprised proof at a criminal trial.[71] Plaintiff also asserts that another officer threatened to shoot the dog in the care of a person pulled over in a traffic stop. He claims this conduct was "unprofessional" and decried that the officer not disciplined.[72] Chief McAvoy indicated that he was unaware of the incident.[73]

H. Plaintiff's Other Contentions

Plaintiff claims that he was entitled to the protections of the Police Officers Bill of Rights that was enacted in 2015 because he was told by the President of the Fraternal Order of Police that

[68] Exhibit A, at 79-81

[69] Id. at 84.

[70] Id. at 75.

[71] Id. at 73-75.

[72] Exhibit A, at 77-78.

[73] Exhibit E, at 47.

it applied to all non-civil service department.[74] He believes that he was entitled to due process, the right to receive exculpatory evidence and to present and examine witnesses.[75]

Plaintiff also alleges a conspiracy between Shepherdstown's Mayor, James Auxer, and Shepherd University to terminate his employment. The "evidence" offered is not appropriate to oppose a summary judgment motion per Rule 56. The statement prepared by Officer Moats of the Shepherdstown Police Department in which he reports that Mayor Auxer told him that Officer Moats should let the Mayor know of any issues with Buracker because Shepherd was looking for a reason to "get Buracker" and the similar statement allegedly made by another officer were not in the form of an affidavit. The Plaintiff also admits that he has no information as to who at Shepherd University supposedly told the Mayor to look for ways to get rid of the Plaintiff, and there is no evidence that anyone at Shepherd ever initiated such conversations or objectives.[76] Plaintiff maintains his belief that this plan was in effect because of his assessment of Officer Moats' credibility and the fact that the Mayor serves on multiple boards at Shepherd, is a "big sports booster" and is "best friends with the President..." [77] His assessment of the relationship between President Hendrix and Mayor Auxer was based on the President's referral to the Mayor as "her buddy", despite the fact that President Hendrix testified that she did not socialize with the Mayor at each other's homes, only saw him at university events and considered him more to be a friend of the university than her personally.[78]

---

[74] Exhibit A, at 34-35.

[75] *Id.* at 35-36.

[76] *Id.* at 63-64.

[77] *Id.* at 64.

[78] Exhibit K, Excerpts from the Deposition of Dr. Mary J.C. Hendrix, at 89.

He also contends that the Mayor "would regularly intercede with the criminal prosecution of students, particularly athletes."[79] Plaintiff used his body camera to record a conversation he had with the Mayor in the offices of the Shepherdstown Police Department in which the Mayor asked Buracker to go easy with one of the students being prosecuted for the October 6, 2018 incident. He testified that he recorded their conversation because he doesn't trust the Mayor.[80] Plaintiff further claims that the Mayor interfered with the arrest of an athlete for public urination by Shepherdstown Police Department by telling the student to come to his office and he would take care of the situation.

Finally, the Plaintiff arguedthat the fact that he filed a complaint with the Officer of Disciplinary Counsel against Shepherd's General Counsel is somehow related to his termination. The matter was dismissed on June 18, 2018 with the conclusion that the complaint was not warranted.

CONCLUSIONS OF LAW

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

[79] Exhibit A, at 92-93

[80] *Id.* at 93.

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

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

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

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

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

Syllabus point 3 of *Williams* provides that:

> If the moving party makes a properly supported motion for summary judgment and can show by affirmative evidence that there is no genuine issue of a material fact, the burden

> of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f) of the West Virginia Rules of Civil Procedure.

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

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

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

> (a) The governing boards may appoint bona fide residents of this state to serve as campus police officers upon any premises owned or leased by the State of West Virginia and under the jurisdiction of the governing boards, subject to the conditions and restrictions established in this section....

> (e) A governing board may at its pleasure revoke the authority of any campus police officer and such officers serve at the will and pleasure of the governing board. The president of the state institution shall report the termination of employment of a campus police officer by filing a notice to that effect in the office of the clerk of each county in which the campus police officer's oath of office was filed.

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

A. Plaintiff's age discrimination claim

To establish a *prima facie* case of employment discrimination under the WVHRA, the plaintiff must offer proof that (1) he is a member of a protected class, (2) his employer made an adverse decision concerning him, and (3) but for his protected status, the adverse decision would not have been made. *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986). The Supreme Court of Appeals of West Virginia has adopted the "substantially younger" rule in age discrimination employment cases brought under the WVHRA. *Knotts v. Grafton City Hosp.*, 237 W.Va. 169, 786 S.E.2d 188 (2016). The focus of a court's inquiry should be on whether

a "substantially younger" comparison employee engaged in the same or similar conduct for which the plaintiff faced an adverse employment decision, received more favorable treatment. *Id.* at Syllabus Pt. 5.

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

Plaintiff's age discrimination claim fails because he cannot establish an essential element of his claim – that "but for his protected status, the adverse decision would not have been made." *Young v. Bellofram*, 227 W. Va. 53, 59, 705 S.E.2d 560, 566 (2020) (overruled on other grounds by *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 786 S.E.2d 188 (2016). The Court finds that the Plaintiff has produced no evidence whatsoever that suggests he was discriminated against on account of his age. Plaintiff argued late in his non-selection grievance that he was not selected for the full-time position based on his age. While the Plaintiff was successful in the prosecution of the grievance, it was based on the grievance board's interpretation of the code section in effect at the time. The article cited by the Plaintiff does not demonstrate that the Plaintiff was not selected for a full-time position because of his age. The Plaintiff was offered equivalent employment just weeks later and conceded that the salary amount was the reason he declined that offer, so that

article is not relevant. The fact that a former officer was successful in a grievance in 2001 in which age discrimination was raised is too remote from the present circumstance to have any relevance.

The Plaintiff also contends that he was held to a different standard than younger employees because they didn't have to follow department policies on vehicle maintenance. This is also not germane. What is critical to the analysis is whether a substantially younger officer who engaged in the same or similar conduct received more favorable treatment. By the Plaintiff's own admission, he had no knowledge of any other officer in the department who included materially false information in a report or treated student athletes differently than other students.[81] While the Plaintiff may have been more diligent in taking care of department vehicles and wearing his body camera, he received no discipline related to these tasks. Simply having been asked why he did not have his camera activated on during a single incident does not demonstrate he was held to a different standard in any way of legal significance. The level of conduct for which the Plaintiff's employment was terminated – misconduct and unprofessionalism - is not by any means comparable to not washing a vehicle, seeing that it is full of gas at shift's end or reporting for work late.

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

B. WVHRA Retaliation

Plaintiff also claims that Shepherd University violated the WVHRA "by engaging in

[81] Exhibit A, at 113.

reprisals" for his "disclosures" of discrimination on the basis of age and disability. To establish a claim of retaliatory discharge under the WVHRA, the plaintiff must prove (1) that the plaintiff engaged in protected activity, (2) that plaintiff's employer was aware of the protected activities, (3) that plaintiff was subsequently discharged, and (absent other evidence tending to establish a retaliatory motivation) (4) that plaintiff's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. Syl. pt. 6, *Freeman v. Fayette County Bd. of Educ.*, 215 W.Va. 272, 599 S.E.2d 695 (2004). If the plaintiff makes a *prima facie* showing of retaliation, then the employer will still prevail if it shows that it took the adverse action for a legitimate, non-discriminatory reason. Syl. pt. 2, *Kanawha Valley Reg'l Transp. Auth. v. West Virginia Human Rights Comm'n*, 181 W. Va. 675, 383 S.E.2d 857 (1989). If the employer makes this showing, then the plaintiff is required to show that the legitimate, non-retaliatory reason for his termination was pretextual. Syl. pt. 4, *Conaway*, 178 W. Va. 164, 358 S.E.2d 423.

Plaintiff's "disclosure " in his grievance that he was not hired for the full-time position because of his age. The Plaintiff was instated to the position effective June 4, 2018. 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 of the period of time from which it could be inferred that it was retaliatory. *See Pascual v. Lowe's Home Improvement Center,* 193 Fed. App'x. 229, 233 (4th Cir. 2006) (three to four months' time between the protected activity and an adverse employment action is too long to establish a connection by temporal proximity in the absence of other evidence); *Bailey v. Mayflower Vehicle Systems, Inc.*, 218 W. Va. 273, 624 S.E.2d 710 (2005); *Dowe v. Total Action Against Poverty in Roanoke Valley,* 145 F.3d 653, 657 (4th Cir.1998) (determining that a lengthy period of time between the employer becoming aware of the protected activity and the alleged adverse employment action negated any

inference that a causal connection existed); *Iyoha v. Architect of the Capitol*, 927 F.2d 561, 574 (D.C. Cir. 2021).

In the absence of necessary evidence that establishes that the termination of his employment was motivated by retaliation and because Shepherd terminated the Plaintiff's employment for a legitimate business reason, his claim for retaliation fails as a matter of law and should be dismissed.

C. Disability Discrimination

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

In order to establish discrimination based on a disability, it must be demonstrated that the Plaintiff's disability substantially limited one or more of his major life activities and that the adverse employment action was based on the disability. Plaintiff has been diagnosed with

diabetes but cannot establish a *prima facie* case of disability discrimination because that condition did not substantially limit one or more of his major life activities. Plaintiff also cannot prove that his employment was terminated based on his disability. Plaintiff's denials of requests for admission pertaining to his disability claim are not "evidence."

Here, the only evidence that the Plaintiff offers is that he was asked by a sergeant and during the April 11, 2019 meeting, why he allowed his body camera to run while he was urinating. He was not criticized for the fact of his taking time to relieve himself, but rather the lack of professionalism demonstrated by his failure to turn off his camera knowing that the supervisory staff of the police department reviewed all footage. The fact that he was questioned why he left his body camera on while urinating does not demonstrate the requisite but for causation.

Because Plaintiff cannot establish two of the requisite elements of a disability discrimination claim, Shepherd University is entitled to summary judgment in its favor as a matter of law.

D. Whistleblower

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

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

> An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee, or a person acting on behalf of or under the direction of the employee, had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.

W.Va. Code § 6C-1-4(b).

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

ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer." *Id.* at (h).

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

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

1. Ethics Commission Complaint

Plaintiff asserts whistleblower status because he filed a complaint with the West Virginia Ethics Commission which challenged Sergeant J.D. Brown's personal use of a department vehicle. Chief McAvoy testified that he was aware of and gave permission for Sgt. Brown to use the vehicle to pick up his child from school, thus there was no "disclosure." 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. The Court further finds that the alleged complaints against the Plaintiff by his fellow officers is not actionable reprisal, even it if gave credence to Plaintiff's theory that Sgt. Maraugha instigated the complaints about the Plaintiff because of her alleged affair with Sgt. Brown more than a decade prior. Additionally, Shepherd University demonstrated separate legitimate reasons for the termination. Shepherd conducted an investigation and concluded that the Plaintiff engaged in misconduct and acted unprofessionally. As a result, it elected to terminate the at-will employment of the Plaintiff. There is no genuine of issue of material fact in dispute on this point. The Plaintiff is not entitled to whistleblower protection as a matter of law.

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

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

3. Plaintiff's Report Concerning Oaths of Office

In 2017, Plaintiff advised President Hendrix that some of the police department's officers had not been given the required oath of office. The Court finds that the Plaintiff cannot establish the *prima facie* element of this theory as this "disclosure" cannot be considered a motivating factor as it occurred nearly two years before the termination of the Plaintiff's employment. Moreover, the oversight was corrected and the Plaintiff thanked for his diligence in reporting this.

Again, Shepherd had a legitimate reason for the termination of the Plaintiff's employment that was not merely pretext as considered above. As a result, it elected to terminate the at-will employment of the Plaintiff. Regardless, as a matter of law, there was no "wrongdoing" reported within a timeframe from which an inference of ill motive can legitimately be drawn; therefore, the Plaintiff cannot establish a whistleblower claim. Summary judgment is therefore warranted.

4. Mayor Auxer

The video of Plaintiff's conversation with Mayor Auxer is not a disclosure of wrongdoing or waste. The Plaintiff's belief that the mayor should not have attempted to intervene in the criminal prosecution of a student does not demonstrate whistleblower activity.

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

Because the Court has concluded that as Plaintiff cannot demonstrate a *prima facie* basis for any of his substantive claims, the burden does not shift to Shepherd University to prove that the reasons offered for the termination of the Plaintiff's employment were not pretextual. Even if the Court allowed the burden to shift, the Plaintiff cannot prove pretext.

Labeling Shepherd's reasons for termination set forth in the pre-termination letter of April 23, 2019 as "nonsensical" does not make them "pre-textual." The Plaintiff's characterization of the deposition testimony of Dr. Hendrix, Shepherd's President, also does not establish pretext.

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

The Court finds that Plaintiff's argument concerning the alleged existence of probable cause to conduct a warrantless non-consensual entry of a dorm room on October 7, 2018 and to pull over a vehicle and investigate its occupants for driving under the influence of a controlled substance on January 6, 2019 does not create a genuine issue of material fact as to the basis for the termination. The legality of the Plaintiff's actions is not evidence of pretext. The fact that the Plaintiff's law enforcement certification was reinstated after review by the Law Enforcement Professional Standards Subcommittee per the process outlined in W. Va. Code § 30-29-11(b) and he received a letter of support from the Fraternal Order of Police is not evidence that warrants denial of summary judgment. This case is not about whether the conduct of the two offers could withstand a legal challenge in criminal court. The Court must consider whether Shepherd terminated the Plaintiff's employment for a legally proper reason. It is not unexpected that the Plaintiff does not agree with the reasons for termination, but even if he met the *prima facie* elements of his various legal theories, pretext has not been shown and thus, summary judgment is not precluded.

F. Denial of Due Process

While not stated as a legal theory in the case, Plaintiff appears to argue that he was denied due process in the pre-termination meeting based on the Police Officer Bill of Rights. The Court finds no basis for relief exists. As found above, the Plaintiff was an at will employee as a campus police officer. Moreover, what is commonly referred to as the Bill of Rights is codified at W. Va. Code §8-14A-1, *et seq.*, pertains only to municipal police officers. A separate statutory process for hiring and discipline of county law enforcement officers is outlined in W. Va. Code § 7-14-1, *et seq.* Neither of these statutory schemes applies to the Plaintiff's employment with an institution of higher education.

G. Plaintiff's common law claim for wrongful discharge in contravention of public policy is duplicative of his statutory claims for age discrimination under the WVHRA and violation of the Whistleblower Protection Act. Consequently, Plaintiff's common law claim for wrongful discharge in contravention of public policy fails as a matter of law.

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

A *Harless* claim is superseded by a discrimination or retaliation claim when the conduct underlying both claims is the same. *Collins v. Lowe's Home Centers, LLC*, No. CV 3:17-1902,

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

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

a. The governments [sic] interest in preventing discrimination in the workplace;
b. The governments [sic] interest in preventing retaliation for disclosures of discrimination;
c. The government's interest in preventing retaliation against whistleblowers;
d. The government's interest in ensuring that its agencies follow relevant state law;
e. The government's interest in ensuring that its police officers follow state law.

Amended Complaint at paragraph 49. The Plaintiff's attempt to recover under the WVHRA precludes his ability to maintain simultaneous common law public policy claims under *Harless*. The alleged improper conduct cited in paragraph 49, subparts a and b of the Complaint falls squarely within the WVHRA. Courts applying West Virginia law have consistently held that a plaintiff may not bring a *Harless* claim to gain redress for violations of the WVHRA.[82] Because

[82] See *Taylor v. City Nat'l Bank*, 642 F. Supp. 989, 998 (S.D.W. Va. 1986), aff'd, 836 F.2d 547 (4th Cir. Dec. 16, 1987) (mem.); *Guevara v. K-Mart Corp.*, 629 F. Supp. 1189, 1189 (S.D. W.Va. 1986) ("a victim

the WVHRA is the exclusive remedy for Plaintiff, Plaintiff cannot seek remedies under both the WVHRA and *Harless*.

The claims in paragraph 49, subparts c, d and e fall squarely within the coverage of the West Virginia Whistle-Blower Law, thus precluding Plaintiff from pursuing a claim for common law retaliatory discharge in violation of public policy. The West Virginia legislature adopted the "Whistle-Blower Law" in 1988 and established a civil remedy for employees of public bodies who have been subject to adverse employment action as a result of making a good faith report of wrongdoing or waste, and those who are about to make such a report. The code specifically authorizes said employees to file suit seeking injunctive relief or damages, or both, and defines the available remedy of back wages, full reinstatement of fringe benefits and seniority rights, as well as attorneys fees' if deemed appropriate by the court. *See* W.Va. Code §§6C-1-4(a) and 6C-1-5. This State's Whistle-Blower Law applies to the facts of the case at bar as Shepherd is a public body as defined under law, at West Virginia Code § 6C-1-1(e)(3). As the Plaintiff was an employee of a public body as defined in the Whistle-Blower Law, he is bound to pursue any claim for violation of the law under that law.

Plaintiff cannot pursue his common law claim of termination in violation of public policy contained in Counts 5 and 6 of the Complaint as each of the theories are covered by specific applicable statutory remedies available for him to address the alleged harm. Accordingly, summary judgment must be granted on this theory as a matter of law.

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

---

of discrimination prohibited by the West Virginia Human Rights Act is limited to a suit under that statute and may not prosecute a so-called Harless-type action.").

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

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

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

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

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

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

CONCLUSION

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

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

Enter this 21 day of June, 2022

Honorable Michael D. Lorensen