IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

CHRISTOPHER KEFFER,
Plaintiff,

v.

CIVIL ACTION NO.: 20-C-70
Paul M. Blake, Jr., Judge

FAYETTE COUNTY BOARD OF EDUCATION,
Defendant.

ORDER GRANTING DEFENDANT FAYETTE COUNTY BOARD OF EDUCATION'S MOTION FOR SUMMARY JUDGMENT

On April 1, 2022, came Plaintiff David Keffer, by counsel Anthony M. Salvatore and Tammy Bowles Raines and came Defendant Fayette County Board of Education ("FCBE"), by counsel Chip E. Williams and Jared C. Underwood, before this Honorable Court for a hearing on *Defendant Fayette County Board of Education's Motion for Summary Judgment* (*Motion*) pursuant to Rule 56 of the *West Virginia Rules of Civil Procedure*.

Following the hearing, each party was directed to tender a proposed order with findings of fact and conclusions of law ruling upon the *Motion* and, shortly thereafter, any objections to the proposed orders. The Court has since received and reviewed the respective proposed orders and objections.

The Court has fully considered the proposed orders and related objections, all briefs filed, and the oral arguments presented by the interested parties; the depositions of the witnesses contained within the file; Rule 56 of the *West Virginia Rules of Civil Procedure*; all applicable laws, rules, and regulations; and the appropriate factors in determining whether a motion for summary judgment should be granted pursuant to Rule 56.

Based upon such consideration and upon the following findings of fact and conclusions of law, this Court is of the opinion the Defendant is entitled to judgment as a matter of law and, as such, Defendant's *Motion* should be granted.

STANDARD OF REVIEW

Rule 56 of the *West Virginia Rules of Civil Procedure* provides, "[a] party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." W. Va. R. Civ. P. 56(b). The purpose of summary judgment is to dispose promptly of controversies on their merits if no facts are disputed or only a question of law is at issue. *Crum v. Equity Inns, Inc.*, 224 W. Va. 246, 258, 685 S.E.2d 219, 231 (2009); *Larew v. Monongahela Power Co.*, 199 W. Va. 690, 693, 487 S.E.2d 348, 351 (1997); *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994); *Williams*, 194 W. Va. 52, 459 S.E.2d 329; *see generally* W. Va. R. Civ. P. 56(c). At the summary judgment stage, the circuit court's function is to determine whether a genuine issue exists for trial, not to determine the truth of the matter. *See* Syl. Pt. 4, *Gooch v. West Virginia Dep't of Pub. Safety*, 195 W. Va. 357, 465 S.E.2d 628 (1995); Syl. Pt. 3, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). "[I]f, 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[,]" then summary judgment should be granted to the moving party. Syl. Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995).

If a party moves for summary judgment and presents "affirmative evidence that there is no genuine issue of 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 of the *West Virginia Rules of Civil Procedure*. Syl. Pt. 3, *Williams*, 194 W. Va. at 56, 459 S.E.2d at 333.

What constitutes 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 trialworthy 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, 708, 461 S.E.2d 451, 454 (1995); *Marcus v. Holley*, 217 W. Va. 508, 516, 618 S.E.2d 517, 525 (2005) (quoting Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

The non-movant for summary judgment "is entitled to the most favorable inferences that may reasonably be drawn from the evidence" but the non-movant "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Marcus*, 217 W. Va. at 516, 618 S.E.2d at 525 (quoting *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985); *see also Dellinger v. Pediatrix Med. Grp., P.C.*, 232 W. Va. 115, 122, 750 S.E.2d 668, 675 (2013). Summary judgement cannot be defeated by tenuous, unsupported speculation. *Chafin v. Gibson*, 213 W. Va. 167, 174, 578 S.E.2d 361, 368 (2003). "[T]he nonmoving party must, at a minimum,

offer more than a "scintilla of evidence" to support his claim." *Jividen*, 194 W. Va. at 713, 461 S.E.2d at 459; *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337. Immaterial facts are irrelevant, and summary judgment is required if the non-movant cannot establish an essential element of the case. *See* Syl. Pt. 1, Mumaw v. U.S. Silica Co., 204 W. Va. 6, 7, 511 S.E.2d 117, 118 (1998); Syl. Pt. 4, *Painter*, 192 W. Va. at 190, 451 S.E.2d at 756; Syl. Pt. 2, *Williams*, 194 W. Va. at 56, 459 S.E.2d at 333.

A non-movant contending that the issues are in dispute is insufficient to deter the trial court from granting summary judgment. *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 421, 460 S.E.2d 663, 667 (1995); *Miller v. Hatton*, 184 W. Va. 765, 769, 403 S.E.2d 782, 786 (1991); *see also* W. Va. R. Civ. P. 56(e). Moreover, factual assertions contained in the brief of the non-movant and self-serving assertions without factual support in the record, are insufficient to shield a non-movant from the award of summary judgment. Syl. Pt. 3, *Guthrie v. Nw. Mut. Life Ins. Co.*, 158 W. Va. 1, 1, 208 S.E.2d 60, 61 (1974); *Folio v. Harrison-Clarksburg Health Dep't*, 222 W. Va. 319, 324, 664 S.E.2d 541, 546 (2008); Syl. Pt. 6, *McCullough Oil, Inc. v. Rezek*, 176 W. Va. 638, 640, 346 S.E.2d 788, 791 (1986); *Williams*, 194 W.Va. at 61 fn. 14, 459 S.E.2d at 338 fn. 14. Upon the burden shifting, summary judgment must be granted if the non-movant is unable to demonstrate "that, indeed, there is a trialworthy issue."

With this standard in mind, the Court now proceeds to make the following findings of fact and conclusions of law regarding the matter before the Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff, David Keffer, was hired as the Director of Operations at the Fayette County Board of Education in Fayetteville, West Virginia, in 2014, and was employed as such at the time of his termination.

2. The instant civil action arises from Plaintiff's discharge from employment from the FCBE as the result of the Plaintiff's unauthorized removal of copper/brass from the Collins Middle School complex ("CMS") and scrapping the same.

3. FCBE technology employees, Chris Marty and Moses Shrewsbury, initially became aware of a disturbance in the ceiling tiles and disturbed pipe wrapping at CMS.

4. Mr. Marty and Mr. Shrewsbury reported the disturbance to Jack Herron, Maintenance Supervisor, and asbestos contact for Fayette County Schools.

5. Mr. Marty and Mr. Shrewsbury observed the disturbance to the ceiling tiles and pipes, one or two weeks prior to June 1, 2018.

6. In June of 2018, Mr. Herron was alerted to some asbestos related issues at CMS by the IT department.

7. Mr. Herron then reviewed video of CMS, which showed the Plaintiff with a ladder and sawzall removing copper piping wrapped in insulation containing some asbestos material.

8. Mr. Herron testified that, at the point he initially reviewed the video footage, he was unaware if the Plaintiff was supposed to be removing any piping and his sole focus was on asbestos related disturbance.

9. The removal, handling and disturbance of asbestos material can have serious health consequences.

10. There is an asbestos management plan and protocol in place for the county for removing any asbestos containing materials.

11. The Plaintiff was aware of the asbestos management plan for the county and the protocol for removing any asbestos containing materials.

12. Mr. Herron reported the issue to Mr. Hough on Monday or Tuesday of the week of

June 1, 2018.

13. Mr. Hough offered testimony confirming that Mr. Herron alerted him to an asbestos related issue and a concern about missing pipe at CMS around the end of May.

14. Mr. Herron also informed Mr. Hough that there was video of the event(s).

15. Mr. Hough received a copy of the video the next morning and reviewed the same with the Director of Personnel, Margaret Pennington.

16. After reviewing the video, Mr. Hough and Ms. Pennington then contacted Terry George, Superintendent for Fayette County Schools at the time.

17. At the time he was notified, Terry George was at home recovering from a medical issue.

18. The following day, June 1, 2018, Mr. Hough and Ms. Pennington took the video to Mr. George's home for him to review.

19. After meeting with Mr. George, Mr. Hough and Ms. Pennington were then instructed to contact the Sheriff's Department to see if the copper/brass had been sold.

20. The records in this case show that the Plaintiff sold the copper and brass at RJ's Recycling, identified himself as the owner of the scrap metal, and the Plaintiff received cash in return for scrapping the subject copper/brass.

21. The Plaintiff did not give the proceeds from the scrapping of the copper/brass to the FCBE.

22. Mr. George reached out to general counsel for the FCBE, Denise Spatafore, Esq. Ms. Spatafore advised that the Plaintiff should be placed on administrative leave pending the results of the investigation.

23. Ms. Pennington and Mr. Hough needed to meet with the Plaintiff on June 4, 2018,

at the main FCBE office. During the meeting, Plaintiff was notified of the allegation of potential illegal activity and was informed that he was being placed on paid administrative leave while the allegation was being investigated.

24. The Plaintiff was required to surrender his keys to FCBE property; advised he was not to be on any board of education property while on leave and required to surrender his county owned vehicle.

25. During the meeting, the Plaintiff never provided any explanation as to what he did with the pipe he removed from CMS. Following the meeting, the Plaintiff contacted Jack Herron and informed Mr. Herron that there was some money in his desk drawer and asked that he get the money and hold on to it for him.

26. A second meeting was conducted with the Plaintiff and his counsel on June 11, 2018, whereat the charges against the Plaintiff were further elaborated upon and the Plaintiff was advised of the investigation. Upon the advice of counsel, the Plaintiff invoked his 5th Amendment Right against self-incrimination and chose not to provide an explanation for his conduct.

27. The Plaintiff's conduct was investigated by Captain Shawn Campbell of the Fayette County Sheriff's Department who found:

- The Fayette County BOE representatives advise that Mr. Keffer is not authorized to cut and/or remove piping and related materials from the Collins school property.
- Security footage provided by the BOE depicts Mr. Keffer in the Collins annex on May 10th, 21st and 25th, 2018, cutting down, stripping insulation off of, and removing copper piping from the building.
- Receipts from JR's Recycling Company indicate copper and brass transactions with Mr. Keffer on May 10th, 21st and 25th, 2018. These receipts indicate that Mr. Keffer received $853.85 for these sales.
- Video from JR's Recycling Company indicate that Mr. Keffer arrived at their facility on May 25th, 2018, while operating his assigned county vehicle, and, per the BOE, was on an approved vacation day.
- $768.00 in U.S. currency was recovered from Mr. Keffer's desk.

28. While the majority of the proceeds received by the Plaintiff for the sale of the copper and brass as scrap metal was recovered during the investigation of this matter, to date roughly eighty-five dollars of such proceeds has never been recovered.

29. After receiving the findings of the Fayette County Sheriff's Department, a third meeting was held on June 26, 2018, with the Plaintiff and his counsel, where the Plaintiff was advised that the FCBE would be recommending his termination during the Board meeting on July 17, 2018.

30. During the July 17, 2018, Board meeting, Ms. Spatafore made her case on behalf of the Board and the Plaintiff made the decision not to be present for the meeting.

31. By letter dated July 18, 2018, the Plaintiff was notified that the Board terminated his employment with the FCBE effective July 17, 2018.

32. Following a criminal investigation into Plaintiff's conduct, Plaintiff's employment with the FCBE was terminated for failure to comply with the financial/budgetary process that applies to school/county property.

33. An independent Magistrate found probable cause existed and an arrest warrant was issued for the Plaintiff for the felony offenses of Grand Larceny, Destruction of Property, and three (3) counts of Entry of a building other than a dwelling, as a result of Plaintiff's conduct.

34. Subsequently, an independent Magistrate conducted a contested preliminary hearing and found probable cause to believe that Mr. Keffer committed the offenses as charged and the matter was bound over for presentment to a grand jury.

35. As a result of Plaintiff's conduct, a Fayette County Grand Jury subsequently returned an indictment against the Plaintiff, Indictment 19-F-18, charging the Defendant with three

(3) counts of entry of a building other than a dwelling in violation of W. Va. Code § 61-3-12, one count of grand larceny in violation of W. Va. Code § 61-3-13, and one count of destruction of property in violation of W. Va. Code § 61-3-30.

36. Plaintiff's criminal case initially came on for a jury trial on August 22, 2019, and ultimately ended in a mistrial.

37. On November 6, 2019, the Plaintiff, as Defendant in Criminal Action No. 19-F-18, filed a *Motion To Disqualify Prosecuting Attorney's Office* and the same was subsequently granted following a hearing held on November 14, 2019.

38. On December 3, 2019, Michael Cochrane, Prosecuting Attorney of Wyoming County, West Virginia, was appointed to act as Special Prosecutor in the matter.

39. Following a status hearing held in the Fayette County Circuit Court on February 10, 2020, 19-F-18, was dismissed, *without prejudice*, pursuant to the Plaintiff, Plaintiff's criminal counsel, and the Special Prosecuting Attorney arriving at an agreement for the Plaintiff to enter into a pretrial diversion agreement through the Magistrate Court of Fayette County, West Virginia, in exchange for the dismissal of the felony charges named in the indictment.

40. The Plaintiff testified during his deposition that the basis of all of his claims which he has asserted in this matter stem from the investigation into his removal of the copper/brass from CMS and no other incidents.

41. The Plaintiff's *Complaint* puts forth the following causes of action: (1) alleged retaliation against Plaintiff, Christopher Keffer, for reporting unlawful activities, (2) violations of the West Virginia Human Rights Act ("WVHRA") for harassment and hostile work environment, and (3) malicious prosecution.

VIOLATIONS OF THE WEST VIRGINIA HUMAN RIGHTS ACT W. VA. CODE § 5-11-1 ET SEQ. FOR HARASSMENT, HOSTILE WORK ENVIRONMENT, AND WRONGFUL TERMINATION/RETALIATION

42. This Court finds that, in order to make a prima facie case of discrimination under the West Virginia Human Rights Act, the plaintiff must offer proof that: (1) the plaintiff is a member of a protected class; (2) the employer made an adverse decision concerning the plaintiff; and (3) but for the plaintiff's protected status, the adverse decision would not have been made. W. Va. Code § 5–11–1 *et seq.*; *see also Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 786 S.E.2d 188 (2016). "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Id.*

43. This Court finds in the instant matter, the Plaintiff has failed to assert any alleged discriminatory conduct as a result of the Plaintiff being a member of any protected class and certainly has not produced any evidence that but for Plaintiff's protected status he would not have been terminated.

44. Thus, this Court finds that any claim being asserted pursuant to the West Virginia Human Rights Act should be dismissed as a matter of law as the Plaintiff has failed to meet his prima facie burden.

45. This Court finds that the Plaintiff has failed to identify any valid, viable manner in which he sustained a hostile work environment, prior to be charged with a crime.

46. The Plaintiff was initially charged thru Magistrate Court and then indicted for his alleged criminal conduct and subsequently entered into a pre-trial diversion as a result of said indictment.

47. There is simply no genuine issue of material fact that the Plaintiff was terminated

for scrapping copper for which he did not have permission and for failure to comply with the financial/budgetary process that applies to school/county property.

COMMON LAW CLAIM OF UNLAWFUL RETALIATION AND TERMINATION IN VIOLATION OF SUBSTANTIAL PUBLIC POLICY

48. The Plaintiff has asserted that his termination was in retaliation for reporting an allegedly missing bumper from the Fayette Institute of Technology to Principal Barry Crist.

49. This Court finds that causes of action for wrongful discharge exist when an aggrieved employee can demonstrate that his/her employer acted contrary to substantial public policy in effectuating the termination. *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 795 S.E.2d 530 (2016). There are four factors courts should weigh to determine whether an employee has successfully presented a claim for relief for wrongful discharge in contravention of substantial public policy. The test requires the plaintiff to plead and prove the following elements: 1) That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element); 2) That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element); 3) The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element); and 4) The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element). *Burke v. Wetzel Cty. Comm'n*, 240 W. Va. 709, 714, 815 S.E.2d 520, 525 (2018).

50. This Court finds that under the test to determine whether an employee has successfully presented a claim for relief for wrongful discharge in contravention of substantial public policy, a plaintiff cannot simply cite a source of public policy and then make a bald allegation that the policy might somehow have been violated; there must be some elaboration upon

the employer's act jeopardizing public policy and its nexus to the plaintiff's discharge. *Id.* To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, courts look to established precepts in the West Virginia Constitution, legislative enactments, legislatively approved regulations, and judicial opinions. A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact for a jury. *Herbert J. Thomas Mem'l Hosp. Ass'n* , 238 W. Va. at 380.

51. This Court finds that the Plaintiff has been unable to identify any way in which he was retaliated against in violation of any public policy. To the extent the Plaintiff is attempting to causally link his termination to any issue concerning the allegedly missing bumper, Mr. Hough, Mr. George, and Ms. Pennington all confirmed that they had no knowledge of any such event prior to Plaintiff's termination.

52. Further, as noted earlier, it has been established that the report regarding the allegedly missing bumper from the Fayette Institute of Technology was made to Principal Barry Crist, not to any of Plaintiff's supervisors.

53. It is likewise clear that no supervisor of the Plaintiff was aware of any such report prior to the Plaintiff's termination.

54. The tenuous connection drawn by Plaintiff between a report made to a principal regarding an allegedly missing bumper from the Fayette County Institute of Technology and the Plaintiff's termination is simply insufficient to support Plaintiff's causes of action.

55. The Plaintiff substantially relies on W. Va. Code § 6C-1-3 and W. Va. Code § 18A-5-7 to form the basis of the "substantial public policy" allegedly violated as a result of his termination by the Defendant.

56. Plaintiff's reliance is misguided however, as the Court finds neither statute is

applicable under the given circumstances of this case.

57. This Court finds that the Plaintiff did not make any report of wrongdoing or waste to his employer or appropriate authority as defined in W.Va. Code § 6C-1-3.

58. This Court finds that W.Va. Code § 18A-5-7 is inapplicable to the Plaintiff as the Plaintiff is not a teacher as defined in Chapters 18 and 18A.

59. Plaintiff has also failed to articulate any other substantial West Virginia public policy he was terminated in contravention of.

60. This Court finds that the Plaintiff has failed to meet his burden of establishing that the Plaintiff's termination was motivated by conduct related to any alleged public policy.

61. Plaintiff's conduct, however, violated established policies of the West Virginia Board of Education.

62. The dismissal of an employee for the conduct and concurrent violations of the employer's established policies such as was exhibited by the Plaintiff in this matter, does not endanger any public policy known to this Court.

63. Even if the Court assumed, *arguendo*, that the Plaintiff could successfully navigate and establish the first three elements outlined in *Burke*, the Plaintiff simply cannot overcome the final element that the FBOE had an overriding legitimate business justification for the Plaintiff's dismissal.

64. Therefore, this Court finds and concludes the Plaintiff's common law wrongful termination/retaliation claim must fail as a matter of law.

MALICIOUS PROSECUTION

65. This Court finds that there are two separate lines of cases that delineate the elements of malicious prosecution. The first line of cases uses a three-element rule: "to maintain an action

for malicious prosecution it is essential to prove (1) that the prosecution was malicious, (2) that it was without probable cause, and (3) that it terminated favorably to plaintiff." *Norfolk Southern Railway Company v. Higginbotham*, 228 W.Va. 522, 527, 721 S.E.2d 541 (2011). In the second line of cases, the West Virginia Supreme Court of Appeals held that, in an action for malicious prosecution, the plaintiff must show: "(1) that the prosecution was set on foot and conducted to its termination, resulting in plaintiff's discharge; (2) that it was caused or procured by defendant; (3) that it was without probable cause; and (4) that it was malicious. If the plaintiff fails to prove any of these, he [or she] cannot recover." *Id.*

66. Although, the element of procurement of the prosecution is not explicitly stated in the first rule, the West Virginia Supreme Court of Appeals held that the two rules are the same, and procurement is an inherent element in both. *Id.* In *Vinal*, the West Virginia Supreme Court of Appeals stated that the "meaning of procurement is not that the defendants jointly applied to the justice of the peace to issue the warrant against the plaintiff, but that they consulted and advised together, and both participated in the prosecution, which was carried on under their countenance and approval." *Vinal v. Core*, 18 W.Va. 1, 2 (1881); *Norfolk Southern Railway Company*, 228 W.Va. at 527-528. It is apparent that procurement within the meaning of a malicious prosecution suit requires more than just the submission of a case to a prosecutor; it requires that the Defendant assert control over the pursuit of the prosecution. *Id.*

67. This Court finds that the Defendant did not procure Plaintiff's prosecution.

68. The Court finds in the context of this litigation, the Prosecutor was not the attorney, statutorily or otherwise, of the FCBE and that FCBE did not procure Plaintiff's prosecution. *See* W. Va. Code § 7-4-1(a).

69. This Court finds that there was probable cause to prosecute the Plaintiff for his

conduct as evidenced by a finding of probable cause by a neutral third-party Magistrate for the issuance of the arrest warrant; at the Plaintiff's preliminary hearing, a neutral third-party Magistrate finding probable cause to bound the matter over for presentment to a grand jury; and, upon presentment of the matter to a Fayette County Grand Jury, the return of an indictment against the Plaintiff.

70. Furthermore, the Plaintiff entered a pre-trial diversion to get the subject charges dismissed, without prejudice.

71. "Courts that have addressed the issue have overwhelmingly held that entering a pre-trial diversion agreement, as the plaintiff did, does not terminate a criminal action in favor of the defendant for purposes of bringing a malicious prosecution claim, and that such claims are legally barred." *Patterson v. Yeager*, No. 2:12-cv-01964, 2015 U.S. Dist. LEXIS 75657, at *27-28 (S.D. W. Va. Apr. 24, 2015); *See also, e.g., Uboh v. Reno*, 141 F.3d 1000, 1005, 11 Fla. L. Weekly Fed. C 1394, 1998 WL 248372 (11th Cir. 1998); *Taylor v. Gregg*, 36 F.3d 453, 455, 1994 WL 558496 (5th Cir. 1994) (overruled on other grounds); *Hygh v. Jacobs*, 961 F.2d 359, 367, 35 Fed. R. Evid. Serv. 532, 1992 WL 70149 (2d Cir. 1992).

72. Although the dismissal of the charges may be the result of a pretrial diversion agreement, and the charges may not be reinstituted upon the successful completion of such agreement, a pretrial diversion agreement with its inherent terms, conditions, period of supervised or unsupervised probation, and payment of court costs associated therewith is simply not the same as a *nolle prosequi* dismissal or an acquittal of a criminal charge.

73. Further, while entry of a pretrial diversion agreement may be *favorable* to prosecution of felony or misdemeanor criminal charges, termination of a criminal prosecution in one's favor and a favorable outcome by entry of a pretrial diversion agreement are not

synonymous.

74. This Court finds that where a plaintiff has entered into a pretrial diversion agreement, he cannot prove the third element of the malicious prosecution claim, i.e. that the criminal prosecution terminated in his favor. *Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Circ. 1994) (overruled in part on other grounds).

75. Further, Plaintiff has failed to show malice in his prosecution, as prior to the Plaintiff's wrongful conduct, the Plaintiff was well thought of by his superiors and Plaintiff had positive work performance evaluations and a positive work history while employed by the FCBE.

76. This Court finds and concludes that Plaintiff's malicious prosecution claim likewise must fail as a matter of law.

CONCLUSION

77. Viewing the record evidence and argument in a light most favorable to the Plaintiff, this Court finds and concludes no genuine issues of material fact exist as to the claims raised by the Plaintiff against the Defendant, FCBE.

78. From the totality of the record evidence, a rational trier of fact could not find and enter a judgment in favor of the Plaintiff, as the Plaintiff is unable to prove and establish the essential elements of, violations of the West Virginia Human rights Act, common law retaliation/wrongful termination, or malicious prosecution.

79. Accordingly, this Court finds and concludes that the Defendant, FCBE, is entitled to judgement as a matter of law as to the claims raised by the Plaintiff.

NOW, THEREFORE, based upon all of the foregoing, this Court **GRANTS** *Defendant Fayette County Board of Education's Motion for Summary Judgment* and **ORDERS** this suit **DISMISSED with prejudice.**

The objections and exceptions of the parties as to all adverse rulings herein are noted and preserved for purposes of appeal.

It appearing to the Court that nothing further remains to be done in this matter, this is a **FINAL ORDER** and the Clerk of this Court is directed to remove this matter from the Court's active docket.

The Clerk of this Court is further directed to ensure that a copy of the foregoing *Order Granting Defendant Fayette County Board Of Education's Motion For Summary Judgment* is transmitted or sent to all attorneys of record.

ENTERED this 24th day of June 2022.

Paul M. Blake, Jr., Judge