NO. 22-631

IN THE SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

David Christopher Keffer	**Civil Action No.**
v.	**20-C-70**
Fayette County Board of Education	

Circuit Court of Fayette County
Honorable Paul M. Blake, Jr.

PETITION FOR APPEAL

Counsel for Petitioner:

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ASSIGNMENTS OF ERROR

1. **The lower court erred by granting Defendant's motion for summary judgment on all Plaintiff's claims when material issues of fact existed.**

STATEMENT OF THE CASE

David C. Keffer was hired as the Director of Operations at Fayette County Board of Education (herein "FCBOE") in Fayetteville, West Virginia in 2014, after being employed with the FCBOE since August 21, 2000. The Plaintiff's job duties were, in part:

- To work with the superintendent, associate superintendent, and Fayette County Board of Education to prioritize facility needs;
- Develop and administer schedules and work assignments of staff, including training and safety programs;
- Determine appropriate staffing needs for the maintenance department, interview and recommend maintenance personnel needed to fill vacancies or new positions;
- Communicate with other administrators, personnel and outside organizations to coordinate work, construction, supply, equipment and personnel requirements;
- Provide recommendations concerning equipment, materials, personnel, policies, and procedures to assure an economical, safe, and efficient work environment;
- Monitor HVAC systems;
- Assign work orders for general maintenance on the buildings and prioritizing maintenance work;
- Maintain a budget and keep records of expenditures;
- Provide reports to the Fayette County Board of Education as requested;
- Other duties as assigned by the superintendent or associate superintendent.

While working for the FCBOE, Mr. Keffer performed his job duties in a satisfactory manner and met the reasonable expectations of the Defendant. According to documents produced by the Fayette County Board of Education, Plaintiff received job performance evaluations in 2016 and 2017 wherein it was noted he completed tasks on time; was very knowledgeable and had a great understanding of facility needs; worked well with contractors, architects, and others; had a great work ethic; did a great job on large projects; and was doing a tremendous job for the students of Fayette County Schools. His overall work performance was noted as "exemplary" or "exceeds

standards." It was noted that Mr. Keffer had done an "outstanding job and has great knowledge of the work he is completing." These were written by the Assistant Superintendent Gary Hough.

Plaintiff's Amended Complaint Plaintiff's Complaint contains the following causes of action: (1) alleged retaliation against Plaintiff for reporting unlawful activities under the well-known doctrine of *Harless v. First National Bank*, 246 S.E.2d 270 (W.Va. 1978) (2) violations of the West Virginia Human Rights Act ("WVHRA") for harassment and hostile work environment, and (3) malicious prosecution. ***(See Def. Motion for Summary Judgment Ex. L***). Defendant's Motion seeks dismissal of Plaintiff's claims, which are in essence, based upon the report of county property being taken by the husband of the Defendant's Director of Personnel and resulting false allegations that led to his criminal prosecution and termination. Defendant's motion asserts that there are no genuine issues of material fact surrounding Plaintiff's claims, as Plaintiff was terminated for the perceived theft of county property. Defendant cites to multiple depositions, documents and statements consisting of over one hundred and twenty pages (including videos and pictures) exchanged and taken in this matter for the proposition that there are **no** disputed material facts which would entitle his case to have a jury weigh the evidence. To the contrary, the testimony in this case clearly establishes that Plaintiff's termination was not justified, as there are no facts in evidence that management ever previously disciplined Plaintiff, offered an improvement plan or even discussed concerns regarding his job performance prior to termination. As set forth herein, the time frame of Plaintiff's complaints about the bumper being taken and the hostile environment he experienced prior to termination give rise to genuine issues of material fact regarding the motivation for her termination which make summary judgment improper.

SUMMARY OF ARGUMENT

"A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Rule 56 of the W.V. R. Civ. P; *Syl. Pt. 3, Cobb v. E.I. DuPont,* 549 S.E.2d 657 (W.Va. 1999). In *Cobb*, the Court discussed the heavy burden a movant for summary judgment must show under Rule 56:

> All reasonable doubts regarding the evidence must be resolved in favor of the non- moving party. "A party who moves for summary judgment has the burden of showing that there is no genuine issue of material fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." *Syl. pt. 6, Aetna Cas*., 133 S.E.2d 770. In order for summary judgment to be proper, the movant must demonstrate that there is no evidence to support the non-movant's case and "that the evidence is so one-sided that the movant must prevail as a matter of law." *Tolliver v. The Kroger Co*., 498 S.E.2d 702, 706 (1997*). Id*. at 660.

In employment discrimination and retaliation cases, this Court has noted that "[p]articularly in 'complex cases where issues involving motive and intent are present,' summary judgment should not be utilized as a method of resolution." *Kelley v. City of Williamson*, 655 S.E.2d 528, 532 (W.Va. 2007). On a motion for summary judgment, the court cannot try issues of fact; a determination must be made only as to whether there are issues to be tried. *Hanlon v. Chambers*, 464 S.E.2d 471 (W.Va. 1995). "[I]f there is *any evidence* in the record from *any source* from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper." *Id*. (*emphasis* added). Generally, unless the employer can provide evidence of a dispositive nondiscriminatory reason, the conflict between plaintiff's *prima facie* case and the employer's evidence reflect a question of fact to be resolved by the jury. *Id*. Finally, it is well settled that with respect to employment and discrimination cases, "[c]ourts take special care ... because state of mind, intent, and motives may be crucial elements." *Williams v. Precision Coil,*

Inc., 459 S.E.2d 329, 338 (W.Va.1995). The Court has explained that "[s]ummary judgment is often imprudent in discrimination cases that present issues of motive or intent because ... `credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge[.]'" *West Virginia Human Rights Com'n v. Wilson Estates, Inc.*, 503 S.E.2d 6, 14 (W.Va.1998). As Defendant's motion and memorandum reflect, there are numerous disputed facts regarding the proffered reasons for Plaintiff's termination, rendering summary judgment improper.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for Petitioner asserts, pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, that the facts and legal arguments are adequately presented by brief and such that the decisional process would not be significantly aided by oral argument.

ARGUMENT

A. Plaintiff offered proof of the factors necessary to establish retaliatory discharge under the WVHRA and/or public policy pursuant to *Harless v. First National Bank* and its progeny, based upon a good faith report of misappropriating county property sufficient to withstand Defendant's motion.

West Virginia has long held: "[W]here the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge." *Harless v. First National Bank of Fairmont,* 246 S.E.2d 270, 275 (W.Va. 1978). One of the "fundamental rights" of an employee is the "right not to be a victim of a 'retaliatory discharge', that is, a discharge from employment where the employer's motivation for the discharge is in contravention of a substantial public policy." The employee must show that his complaints about or refusal to participate in the improper conduct of

the employer "was a substantial or a motivating factor for the discharge." *Tiernan v. Charleston Area Medical Center*, 506 S.E.2d 578, 587 (W.Va. 1998). The employee need not show that the protected conduct was the "only precipitating factor for the discharge" in order to recover. *Id.* *Harless* wrongful discharge cases involve violations of statutes that are deemed by the Court to "articulate a substantial public policy." *Birthisel v. Tri-Cities Health Services Corp.*, 424 S.E.2d 606 (W.Va. 1992). More generally:

> "…to identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislatively approved regulations, and judicial opinions. Inherent in the term 'substantial public policy' is the concept that the policy will provide specific guidance to a reasonable person." *Id.* at 612 …The legislative enactments must impose "specific" requirements which the employer violated, as opposed to "general standards" which a statute might create. *Id.* at 612-614. There must be a "specific statement of public policy." *Id.*

To prevail on a *Harless* retaliatory discharge claim, Plaintiff must offer proof of the following:

> 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).; 4. The employer lacked overriding legitimate business justification for the dismissal (the overriding justification element).

Burke v. Wetzel Cty. Comm'n, 815 S.E.2d 520, 525 (W.Va. 2018)

To that end, and contrary to Defendant's argument in the lower court, Plaintiff's report of misusing county property and government waste involving the bumper is protected activity and is in fact, the exact same conduct Defendant wrongfully accused him of which terminated his employment. This Court has held that: "The employers of this state … have long been on notice that they cannot terminate an employee for his or her efforts to uphold this state's laws." *Frohnapfel v. ArcelorMittal*, 772 S.E.2d 350, 358 (W.Va. 2015) (citing *Harless*, 246 S.E.2d at

271; *see also Kanagy v. Fiesta Salons, Inc.*, 541 S.E.2d 616, 623 (W.Va. 2000) ("There is a substantial public interest in discouraging illegal behavior."). In fact, Plaintiff's complaint to Board employees who had supervisory authority over Mr. Pennington of the suspected illegal and improper conduct is protected activity under the State's Whistle-blower Law. *See* W.Va. Code §6C-1-1, which provides in part:

> W.Va. Code§ 6C-1-3 "Discriminatory and retaliatory actions against whistle-blowers prohibited; promotion, increased compensation protected."
>
> (a) No employer may discharge, threaten, or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location, or privileges of employment because the employee, acting on his or her own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report, or is about to report, verbally or in writing, to the employer or appropriate authority, an instance of wrongdoing or waste.

Plaintiff is a covered employee under the Act and the Defendant FCBOE is an 'employer' as those terms are defined. *See* "Definitions", W.Va. Code §6C-1-2 (e) (1-2). Plaintiff's report that Mr. Pennington had taken a county owned bumper for personal use to Mr. Pennington's direct supervisor is protected activity that falls squarely under this Act, as waste is defined as "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" and "wrongdoing" is defined as a violation of a regulation or code designed to protect the interest of the public or the employer. W.Va. Code § 6C-1-2(f) and (h). Additionally, the Whistle-blower Law is a clear and specific statement of public policy that supports a *Harless* claim. *See Blanda v. Martin Seibert LC,* 836 S.E.2d 519 (W.Va. 2019) (Evaluating a Plaintiff's *Harless* claim predicated upon reporting legal billing fraud and misconduct under the criminal statutes and finding the criminal code insufficient public policy to support a *Harless* claim). In addressing whether the Plaintiff's

report of malfeasance in *Blanda* as a private employee in the private sector could fall under the public policy of the State's Whistle-blower law for a *Harless* claim, the Court stated:

> So, as an alternate means of recourse, Ms. Blanda essentially seeks to avail herself of the same whistleblower protections statutorily afforded to public employees who report wrongdoing to the appropriate authority under West Virginia Whistle-Blower Law. In light of the statute's clear language limiting whistleblower protections to the public sector, and the other specific statutory expressions of public policy extending whistleblower protections to non-public employees outlined in footnote 56, we will not extend these same protections to a non-public employee under West Virginia Code § 61-3-24. If whistleblower protections are to be extended outside the contexts outlined above, that expression of public policy should be made by the legislature—not the Court. *Id.* 528-529.

Other cases have found a substantial public policy violation to exist when the claimant was terminated for refusing to engage in illegal activity. *See, e.g., Lilly v. Overnight Transp. Co*., 425 S.E.2d 214 (W.Va. 1992) (acknowledging wrongful discharge cause of action existed where employee terminated for refusing to operate a motor vehicle with unsafe brakes in light of the legislature's established public policy that the public should be protected against substantial danger created by operation of vehicle in unsafe condition); *Taylor v. W.Va. Dept. Health and Human Resources,* 788 S.E.2d 295 (W. Va. 2016)(Reversing summary judgment as to Plaintiff's statutory whistle-blower claims).

In addition to the public policy that prohibits a public employer from retaliating against an employee who reports waste or wrongdoing under the Whistle-blower Law, Plaintiff's employment was governed W.Va. Code §18A-1-1 through §18A-1-7 as a school personnel employee. (***See Plaintiff's Brief in Opposition to Motion for Summary Judgment Ex. 1,*** Job Duties, and Contract of Employment, attached as ***Exhibit 9 to Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment.)*** Accordingly, Plaintiff was required to execute an oath required by teachers pursuant to W.Va. Code §18A-5-7 which states: "Every teacher shall, at

the time of signing his contract to teach, take an oath to support the Constitution of the United States and the Constitution of the State of West Virginia, and to honestly demean himself in the teaching profession and to the best of his ability execute his position of teacher. Such oath shall be printed on the contract form prescribed by the state superintendent." ***See Plaintiff's Brief in Opposition to Motion for Summary Judgment Ex. 9***. Mr. Keffer testified in this case that he did nothing wrong despite the accusations of theft leveled against him by Defendant (***See Plaintiff's Brief in Opposition to Motion for Summary Judgment Ex. 5,*** pg. 82) and that in accordance with his responsibilities as sworn by his oath, he made a good faith report to the supervising principal of the suspected bumper theft. *(Id.* pg. 98-104). Clearly, this provision is a specific statement of public policy that supports a *Harless* claim under West Virginia law, as the State has expressed a clear intention to require its school personnel to honestly demean themselves and uphold the laws as it pertains to the public's interests.

Here, Plaintiff has alleged that his termination was motivated in whole or in part by retaliation and in contravention of a substantial public policy, including but not limited to the public policy against retaliation or discharge from employment based upon Plaintiff's reporting of misuse of county property and government waste involving the bumper. These allegations are sufficient to state a cause of action under *Harless* in addition to or in the alternative to retaliation under the WVHRA, W.Va. Code §5-11-9 (7). Plaintiff's Complaint alleged that "Plaintiff engaged in protected activity in complaining about the unlawful activities that were occurring and in complaining about the hostile work environment these activities created. Through repeated and continuing unlawful conduct, Defendant has retaliated against Plaintiff in violation of the West Virginia Human Rights Act, W.Va. Code §5-11-9(7) and in violation of West Virginia common

law prohibiting such retaliation." *See* Complaint, ¶ 18. While Defendant contends that Plaintiff cannot maintain an action under the WVHRA for retaliation based upon the set of facts set forth herein, alleging that Plaintiff cannot establish discriminatory conduct based upon a protected class (*Def.* Memo, pg. 8-9), this argument misconstrues Plaintiff's cause of action. The WVHRA has been held to provide a public policy statement sufficient to support a *Harless* common law wrongful termination action. *See Burke v. Wetzel County Commission*, 815 S.E.2d 520, 538-539 (W. Va. 2018) (Reversing lower court's dismissal of Plaintiff's complaint and analyzing Plaintiff's *Harless* retaliatory discharge claims, where the sources of the public policy were found in the West Virginia Constitution, the Human Rights Act, the FMLA, the Whistle-blower Law). *See also Roth v. DeFeliceCare, Inc*., 700 S.E.2d 183 (W.Va. 2010) (holding that plaintiff had both a viable Human Rights Act hostile workplace claim, and a viable common law retaliatory discharge claim, both arising from the same set of facts).

Defendant states that Plaintiff cannot prevail on a *Harless* discharge claim based upon the report of the missing bumper, asserting there is no evidence in the record that such report was made to anyone in the central Board office or that anyone with any supervisory authority over the Plaintiff was aware of any such issue prior to his termination. (*Def.* Memo, pg. 10, citing testimony from Hough, Pennington and George). However, this is the very definition of a material fact in dispute which renders summary judgment improper. Plaintiff's testimony contradicts the Defendant's denial of knowledge concerning the report. (***See Plaintiff's Brief in Opposition to Motion for Summary Judgment Keffer depo. Ex. 5,*** pg. 103-104). Also, Margaret Pennington did not deny any knowledge of the event but testified that she was aware of the bumper incident after Plaintiff's termination (***See Plaintiff's Brief in Opposition to Motion for Summary Judgment Ex.***

8, pg. 47-48). This evidence is subject to a jury's determination regarding credibility. Finally, while Defendant's purported reason for terminating Plaintiff's employment arises from the sale of scrap copper resulting in a criminal prosecution, this would merely create a factual issue for resolution by the trier of fact. As stated in *Taylor:*

> Petitioners' employment claims-whether under the Human Rights Act, Whistle–Blower Law, or Harless —all employ effectively the same burden-shifting mechanism first articulated in Syllabus Point three, in part, of Shepherdstown VFD v. W. Va. Human Rights Comm'n, 172 W.Va. 627, 309 S.E.2d 342 (1983) : If the complainant is successful in creating [a] rebuttable presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejection. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination. …("[I]n a retaliatory discharge case, the employer may defend the discharge by showing a legitimate, nonpretextual, and nonretaliatory reason for its action."). As plainly evidenced above, the mere fact that respondents posit an arguably legitimate, non-pretextual, and non-retaliatory or discriminatory reason for petitioner Taylor's discharge, does not entitle them to summary judgment. There is little question that whether petitioners were discharged for retaliatory or discriminatory reasons is replete with disputed issues of material fact which must be resolved by the fact-finder.

Taylor, 788 S.E.2d at 307. The issue of motive for a discharge in employment cases presents a question of fact. *Burke*, 815 S.E.2d at 531-532 n. 25:

> In *Hanlon v. Chambers* , … we cautioned circuit courts to be particularly careful in granting summary judgment in employment discrimination cases. Although we refuse to hold that simply because motive is involved that summary judgment is unavailable, the issue of discriminatory animus is generally a question of fact for the trier of fact, especially where a prima facie case exists. The issue does not become a question of law unless only one conclusion could be drawn from the record in the case. In an employment discrimination context, the employer must persuade the court that even if all of the inferences that could reasonably be drawn from the evidentiary materials of the record were viewed in the light most favorable to the employee, no reasonable jury could find for the plaintiff.

A jury could easily find that Plaintiff was an employee with an exemplary work history with no prior disciplinary action prior to the Spring of 2018; that he had moved up into the position of Director of Operations in 2014 and enjoyed a successful eighteen (18) year career with the

FCBOE; that upon making a report of waste and misconduct involving the spouse of the Director of Personnel for the FCBOE he becomes a target for retaliation; that no employee with authority to dispose of abandoned property with access to all buildings and video surveillance would perpetrate a theft in broad daylight knowing it was captured on camera; and that no employee in Plaintiff's position, having saved the County and State thousands of dollars during his course of employment, would jeopardize a career and his personal freedom by selling copper pipes for a few hundred dollars and placing the money in an envelope in his work desk drawer. Further, a jury can infer that most employers would discuss an allegation of misconduct with a long-standing employee prior to contacting law enforcement and that the criminal report and investigation served only to intimidate and harass Plaintiff, which ultimately forced his wrongful termination. Accordingly, these claims should be submitted to the jury for factual determinations regarding motive and pretext.

B. Plaintiff's claims supported by evidence addressed in the lower court for hostile work environment should have survived summary judgment under the same analysis as the *Harless* retaliatory discharge claims.

In *Roth v. DeFeliceCare, Inc*., 700 S.E.2d 183 (W.Va. 2010), the Court held that the Plaintiff had both a viable Human Rights Act hostile workplace claim, and a viable common law retaliatory discharge claim, both arising from the same set of facts. For a hostile work environment claim to be actionable, the offensive environment must be sufficiently severe or pervasive so as to alter the conditions of the victim's employment and create an abusive working environment. *Burke*, 815 S.E.2d at 534. Here, Plaintiff's Complaint alleged that after reporting the misconduct involving the bumper, "through repeated and continuing unlawful conduct, Defendant created and/or condoned a hostile work environment, subjecting Plaintiff to unwelcome, harassment that

was severe and pervasive, in violation of the West Virginia Human Rights Act and in violation of West Virginia common law." Complaint, ¶ 23. In addition to Plaintiff's testimony as cited above, Plaintiff's allegation of hostile environment was supplemented by his Interrogatory Response as follows:

> 21. Please list each and every unwelcome harassing conduct that this Defendant engaged in toward the Plaintiff as alleged in Paragraph 23 of the Complaint.
>
> ANSWER: Plaintiff's basis for asserting he was the subject of harassing conduct by Defendant is based in part upon the fact that having worked for the FCBOE in various positions for many years, he was not even questioned about the alleged inappropriate behavior prior to the issue being turned over to law enforcement. Plaintiff believes the use of law enforcement to come to his home for retrieving the company vehicle was done for intimidation and harassment. The entire action of prosecuting him for this conduct was an unwelcome effort to harass and intimidate him. Plaintiff feels he was discriminated against in part due to reporting the missing bumper potentially involving Mr. Pennington who was the husband of Margaret Pennington, the personnel director and was harassed due to this report. Plaintiff reserves the right to supplement this response after further investigation and discovery.

(See Plaintiff's Brief in Opposition to Motion for Summary Judgment Exhibit 10, pg. 10). This claim should be subject to the same analysis as the *Harless* discharge claim and is supported by the public policy in this state which prohibits retaliation and termination from whistle-blowing activities for public employees; the state board of education code requiring compliance with law and honesty of character; and the BOE policies cited by Defendant which they contend Plaintiff violated, i.e. Cash Management Policy 8100 and 8200 Section 31 disposition of surplus real and personal property. *See e.g Roth v. Defelicecare,* 226 W. Va. 214, 223 (Discussing Plaintiff's claims of hostile work environment and retaliatory discharge based upon the public policy contained in the WVHRA and public policy that prohibits discharge based upon giving truthful testimony). Thus, a hostile work environment claim can be proven by Plaintiff even if he is unable to prove he falls under the WVHRA. *See e.g., Williamson v. Greene,* 490 S.E.2d 23 (W.Va. 1997)

(Holding that the WVHRA could serve as the public policy basis for a *Harless* claim because while defendant employer's conduct violated WVHRA, the employer was not an "employer" under the act and so was not subject to liability under the WVHRA's statutory remedial scheme).

Once an employee makes a *prima facie* case of discrimination, the burden shifts to the employer to proffer a legitimate, nondiscriminatory reason for the challenged employment action. *Barefoot*, 457 S.E.2d 152, 160 (W.Va. 1995). "The conflict between the plaintiff's evidence establishing a *prima facie* case and employer's evidence of a nondiscriminatory reason reflects a question of fact to be resolved by factfinder at trial." *Hanlon*, 464 S.E.2d at 747-748. Further, "the plaintiff *is not* required to show that the employer's proffered reasons were false or played no role in the employment decision. The plaintiff is only required to show that the reasons were not the only factors and that the prohibited factor was at least one of the motivating factors." *Id*., n. 3. Following an employer's proffer of a legitimate, nondiscriminatory reason for termination, an employee is then afforded an opportunity to demonstrate that discrimination was a determinative factor in the employer's decision or that the employer's articulated rationale was merely pretext for discrimination. *Barefoot,* 457 S.E.2d at 160. The latter may be established through either direct or circumstantial evidence of falsity or discrimination …and plaintiff need not show more than that the defendant's articulated reasons were implausible and, thus, pretextual. *Id*. at 160, 164.

Defendant's stated reason for termination continues to be conversion of abandoned copper pipe. However, Defendant has brought forth no evidence to contradict Plaintiff's testimony that he was authorized to sell the materials or that of his supervisor- the Superintendent, who expected him to do his job without asking for permission for each act performed. (***George, Ex. 4***, pg. 21; 27). It is significant that video evidence existed of another FCBOE employee taking computer

monitors that belonged to the County but was not disciplined, terminated or prosecuted like the Plaintiff. This set of facts, combined with Plaintiff's testimony regarding his report of misconduct by Pennington, gives rise to a jury question regarding retaliation and hostile work environment.

C. Plaintiff Proved His Malicious Prosecution Claim.

In West Virginia, malicious prosecution has four elements. See *Syl. pts. 1-2, Norfolk S. Ry. Co. v. Higginbotham, 721 S.E.2d 541 (W.Va. 2011*). To succeed on such a claim, a plaintiff must show that the prosecution was: 1) malicious, 2) unsupported by reasonable or probable cause, 3) terminated in favor of the plaintiff, and 4) procured by the defendant. Defendant argues that it did not 'procure' the prosecution against the Plaintiff, but rather that it presented what evidence it had to the Fayette County Sheriff's Department and the Fayette County Prosecuting Attorney and was thereafter removed from the matter. This argument ignores the testimony of Hough, Pennington, and George where they were asked by the prosecutor and sheriff's department what they wanted to occur after watching the video at the Sheriff's department. (***See Plaintiff's Brief in Opposition to Motion for Summary Judgment Ex. 3,*** pg. 17;19; ***Ex. 8,*** pg. 37-39; ***Ex. 4***, pg. 41-42). Moreover, the prosecuting attorney is the statutory lawyer for the FCBOE and Defendant's Superintendent admitted he was aware of this fact. (***See Plaintiff's Brief in Opposition to Motion for Summary Judgment Ex. 4,*** pg. 40). In light of the same, it cannot be maintained that the Defendant simply handed the matter over for criminal proceedings and then "stepped out."

In *Higginbotham,* the Supreme Court of Appeals explained 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 a defendant assert control over the pursuit of the prosecution." *Id. at 541, citing Vinal v. Core,* 18 W.Va. 1 (1881). The Court explained that to prove procurement a

plaintiff must show that the defendant engaged in consult[ation]... regarding the prosecution, ... participated in the prosecution, and that the prosecution was carried out under the defendants' countenance and approval." *Id.* at 541. The Court also acknowledged the level of control necessary was not clearly defined under the law. Nonetheless, the facts in this case weigh squarely in Plaintiff's favor that Defendant FCBOE set the entire criminal prosecution afoot without ever speaking with Plaintiff regarding the allegations; and sought out prosecution, presumably to support of a terminable offense for Plaintiff's employment. Reliance upon legal advice is not a defense to malicious prosecution. Whether the actions of Defendant to prosecute Plaintiff for conduct he was authorized to perform was malicious or unsupported by probable cause is a jury question. As discussed in *Weigle v. Pifer,* 139 F. Supp. 3d 760 (S.D.W. Va. 2015), West Virginia recognizes the 'false information' exception which is that a defendant can be regarded as an instigator of a proceeding if he ... communicates material information falsely or inaccurately and the prosecutor relies on his statement. *Id.* at 782. The *Weigle* Court denied the Defendant's motion for summary judgment by addressing Plaintiff's malicious prosecution claim against an officer. In discussing the 'false information' and probable cause element, the Court stated:

> As described in detail above, Pifer's position is that he himself saw Weigle committing a criminal act. If so, Pifer plainly had probable cause to believe that a crime had been committed. Weigle contends that the officers, including Pifer, are lying about what happened, and he insists that no criminal act was committed. When there are inconsistent accounts of the same factual occurrence, the jury, exercising its role as the arbiter of credibility, must determine which account to believe.

Id. at 783. Further, malice may be inferred if the jury finds there was no probable cause. *Id*. 784. The operative facts in *Weigle* are nearly identical to the case at bar, insofar as Defendant's employees claim they 'saw' Plaintiff committing what they deemed criminal acts and Plaintiff denies the acts were criminal. Therefore, these claims should be submitted to the jury.

CONCLUSION

In sum, Defendant failed to establish at the motion for summary judgment stage that no reasonable jury could conclude that Plaintiff Keffer was discriminatorily discharged. Plaintiff could have reasonably argued from the record that Defendant's representatives are not believable; that Plaintiff was an 'exemplary' employee; that an employee with Plaintiff's work history would normally be given the benefit of a doubt; that Defendant failed to meaningfully investigate the allegations against Plaintiff regarding the removal of the pipes and materials and merely seized the opportunity to terminate Plaintiff for his good faith report; and Defendant's failure to discipline others for similar performance evidenced pretext. *See Barefoot*, 457 S.E.2d at 163. Accordingly, a jury could reasonably find that Defendant terminated Plaintiff not because of the alleged theft from converting abandoned materials, but rather in direct retaliation for his whistle-blowing activities and set afoot a chain of events to maliciously prosecute him. There exists here a "classical and paradigmatic case in which each party has produced testimony and evidence that conflicts on the ultimate issue- whether [Plaintiff] was discharged for his [work performance] or for other factors violative" of the public policies. *Barefoot*, 457 S.E.2d at 165.

The Plaintiff prays the Court will reverse the lower court and remand this case for trial upon the evidence submitted by Plaintiff in opposition to the Defendant's Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I, Anthony M. Salvatore, Counsel for Petitioner, hereby certify that I have served a true and accurate copy of the foregoing Petition for Appeal on counsel of record listed below, this 24th day of October 2022, via electronically through File and Serve Express notification:

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