Case No.: 24-ICA-40

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

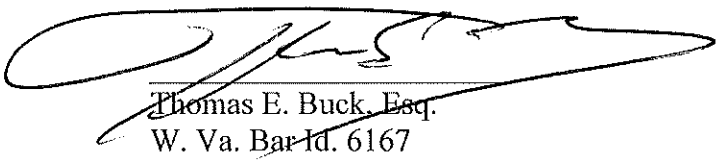
HELEN BRADLEY,
Plaintiff Below, Petitioner

vs.

THE OHIO COUNTY BOARD OF EDUCATION
and KATRINA LEWIS,
Defendants Below, Respondents

RESPONDENTS' BRIEF

Submitted by:



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I. Assignments of Error

Respondents do not claim any assignments of error.

II. Statement of the Case

The Ohio County Circuit Court correctly granted Respondents summary judgment on all counts because Petitioner does not have any evidence that she was discriminated against at all, let alone because of her membership in a protected class.

Petitioner, a retired Middle Creek Elementary School teacher, felt "overly micromanaged and stressed" because Katrina Lewis, Middle Creek Elementary School principal, required her to, *inter alia*, follow the county's curriculum, enter her grades on time, and keep her classroom organized. Instead of attempting to improve in those areas, Petitioner tried to flee her responsibilities, and applied for *sixteen* (16) lateral transfers in just over a year, attempting to take a similar position at another school. However, county policy had changed since Petitioner last transferred schools, and seniority no longer guaranteed her the ability to take a job no one wanted her to take. Instead, Petitioner had to interview for those positions with the faculty senate of each school, *i.e.*, with dozens of her peers. Her peers did not select her for any of those positions. Instead of reflecting upon these rejections as perhaps indicative of her county-wide reputation, Petitioner chose to retire. She is now suing the Ohio County Board of Education claiming, apparently, that dozens of her peers *all* discriminated against her because of her age.[1] This theory is, of course, meritless.

Petitioner has no evidence to support that claim, or any of her other ancillary claims. Her appeal is composed of a panoply of attempts to obfuscate the actual facts and legal requirements

[1] As Petitioner has not alleged any *conspiracy* claims, apparently she believes each faculty senate member at each school independently discriminated against her.

of her case, and to misapply the summary judgment standard. This case is a textbook case of an aggrieved former employee attempting to prosecute employee grievances by placing those grievances in the context of a discrimination claim. Plaintiff has not raised a serious claim, and it should not be treated as such. Accordingly, this Court should uphold the Circuit Court's grant of summary judgment in this matter.

A. Facts of the Case

1. Background Information

Petitioner worked in various capacities, including, but not limited to, substitute teaching, for the Ohio County Board of Education ("OCBE") since 2004. Bradley Depo. 20:22 – 20:25, J.A. 000249. Ultimately, she was hired by OCBE as an Integration/Library/Media teacher for Warwood Middle School ("Warwood") for the 2010 – 2011 school year. Bradley Depo. 26:5 – 26:14, J.A. 000251. She was 51 years old when she was hired for that position. Bradley Depo. 27:9 – 27:13, J.A. 000251. Three years later, when she was 54, Petitioner leveraged her seniority to transfer to Middle Creek Elementary School for the 2013 – 2014 school year.[2] Bradley Depo. 28:2 – 28:4, J.A. 000251. She was, under the transfer rules at the time, able to take the position without interviewing or submitting a resume for the job. Bradley Depo. 29:6 – 29:14, J.A. 000252.

Katrina Lewis ("Ms. Lewis") became Middle Creek principal for the 2017 – 2018 school year. Lewis Depo. 13:18 – 13:21, J.A. 000585. Ms. Lewis was inundated with complaints about Petitioner almost immediately. For instance, the school was focusing on reading and math proficiency, and had a Title 1 reading teacher teaching students in small groups. When the Title 1 teacher went to teach reading to Petitioner's class, the students were doing science projects instead. Lewis Depo. 27:12 – 27:22, J.A. 000382. Ms. Crow, the other fourth-grade teacher, was concerned

[2] This, like all the transfers for which Petitioner applied, was a lateral transfer that did not change any meaningful part of Plaintiff's employment.

because Petitioner was skipping GoMath chapters. Lewis Depo. 27:23 – 28:15, J.A. 000382. The guidance counselor was concerned because Petitioner was not completing the rewards charts for the children. Lewis Depo. 28:16 – 29:6, J.A. 000382. The special education teacher was concerned because Petitioner was not assigning one-on-one work for a special education student in her class. Lewis Depo. 29:7 – 29:17, J.A. 000382. The art teacher found it concerning that Petitioner was crying because her students were "disruptive and [were] not listening." Lewis Depo. 32:9 – 32:23, J.A. 000383. A parent complained because their child was supposed to be staying over for "tutoring" with Petitioner, but instead was assigned to clean and organize the classroom. Lewis Depo. 40:5 – 40:8, J.A. 000385.

Petitioner fundamentally was not doing her job. Significantly, parents called the school because grades and assignments were not being posted to Schoology and they had no idea how their children were doing or what the next assignment was. Lewis Depo. 34:2 – 34:14, J.A. 000384. Even a West Virginia Education Association ("WVEA") representative asked to quit working with Petitioner after discovering that Petitioner had lied about using GOMath and was actually not using the mandatory curriculum at all.[3] Lewis Depo. 31:12 – 31:20, 33:11 – 33:16, J.A. 000384.

Ms. Lewis, along with the WVEA school representative, spoke with Petitioner numerous times about these, and other, issues and tried to work with her to improve. *See, e.g.*, Lewis Depo. 32:17 – 37:10, J.A. 000383 – 000384. Lewis observed Petitioner's class and identified numerous problems with work not being completed and lesson plans not being followed. Specifically, students were working on math when they were supposed to be reading, some were coloring instead, some were struggling to design their own division problems, and so forth. Lewis Depo.

[3] Petitioner, at one point, asked for a West Virginia Education Association ("WVEA") representative to sit in with her and Ms. Lewis, to which Lewis was more than happy to agree. Lewis Depo. 31:3 – 31:8, J.A. 000383.

43:24 – 45:1, J.A. 000385. Plaintiff agreed that she was not actually disciplined for any of these issues whatsoever, instead claiming that she just felt "overly micromanaged and stressed." Bradley Depo. 91:7 – 91:9, 92:3 – 92:6, J.A. 000267.

Petitioner, for her part, did not believe she was doing anything wrong, explaining numerous times that she did not believe she did anything wrong, and that she didn't need to improve anything at all. Bradley Depo. 92:12 – 93:24. Rather, Petitioner was offended that Ms. Lewis would deign to speak to her about her teaching methods and viewed these attempts to correct her teaching as some sort of offense. She ultimately did not respond to Ms. Lewis' attempts to get her a mentor and was offended by the suggestion that she needed help. Lewis Depo. 56:5 – 57:8, J.A. 000262.

Specifically, she felt slighted by a number of minor workplace quibbles and disagreements, including, *inter alia*, Ms. Lewis phasing out fourth grade participation in the fifth grade science fair, Ms. Lewis prohibiting Petitioner from having students stay after school to organize her classroom, Ms. Lewis not picking Petitioner to be on a textbook adoption committee, Ms. Lewis requiring Petitioner to put grades in a recording program in a timely fashion, Ms. Lewis speaking to Petitioner about giving inappropriate assignments to children on special learning plans, and Ms. Lewis speaking to Petitioner about not reporting an incident where a child was stabbed with a spork. *See, e.g.*, Bradley Depo., 47:21 – 48: 5, 48:7 – 48:15, 51:16 – 51:19, 65:25 – 66:4, 70:6 – 70:20, 80:4 – 80:12, 81:7 – 81:14, J.A. 000256 - 000257, 000261 – 000262, 000264, respectively.[4]

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[4] Petitioner's medical records show she made all of the same complaints about school to her therapist as she now makes in her Complaint as far back as the 2016 school year, a full year before Ms. Lewis started to work there.
For instance, Petitioner was "overwhelmed" with school and had not even set up her classroom. J.A. 000403. She has "issues with her co-workers," "feels she's not good enough in the principal's eyes," and "she doesn't want to stay at the school but needs the job." J.A. 000407. She claims, *inter alia*, that "she doesn't fit in" and "feels ignored" at school, that "the principal isn't impressed with her," and that she wanted to teach somewhere else. J.A. 000405. She complained about "not bonding with other teachers," that she "was not treated the same as other teachers," and that "[s]he

Ultimately, Petitioner received an evaluation of "Emerging" at the end of the year, in large part because of all of these different problems. Lewis Depo. 46:24 – 47:4, J.A. 000387.

2. Transfer-Related Facts

Around this time, Petitioner began applying to open positions with the Ohio County Board of Education, in the hope of going somewhere else where she would not be bothered by principals asking her to engage in such trivial tasks as *putting grades in on time*, *timely assigning homework*, and *drafting lesson plans*, or, as Petitioner calls it, "micromanaging." Bradley Depo. 101:7 – 101:10. Petitioner assumed, because of her seniority, that she would be able to slide into whatever job she felt like taking. Bradley Depo. 100:8 – 100:18, J.A. 000269; *see also* Bradley Depo. 109:18 – 110:8 ("I feel like that's something that anyone has the right to do in their job, is to transfer to another location. I just feel like I was not allowed to transfer after making this many applications.")

However, the transfer process she used in 2013 was modified by "Policy 5000," as promulgated by the West Virginia Department of Education, which requires teachers to apply for open positions instead of unilaterally moving themselves into those positions regardless of the feelings of the rest of that school's faculty. *See* J.A. 439 – 449. "Policy 5000," *i.e.*, 126 W. Va. C.S.R. § 126, is designed to provide generalized hiring procedures for classroom teachers, to "establish processes that a faculty senate may adopt when making hiring recommendations for

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doesn't feel appreciated at the school." J.A. 000406. She "feels that the teachers at Middle Creek are cliqueish and she's not in it." J.A. 000408. She "is still checking for positions in different schools," and believes "her principal [prior to Ms. Lewis] is unprofessional." J.A. 000411. Once Ms. Lewis started, her complaints largely remained the same. *See, e.g.*, J.A. 000418, 000424, 000431 – 000432, 000434. *See* Pl.'s Depo. 166:19 – 173:23, J.A. 000335 - 000337.

Petitioner clearly suffers from significant stress outside work due to her difficult relationship with her now-husband and with her adult children. *See, e.g.*, J.A. 000403, 000404, 000413– 000419, 000422, 000427, 000428, 000429, 000434, 000435, 438. Unsurprisingly, she accused her husband of "micromanaging" her as well. J.A. 000404. He, in turn, told her that "she has no friends, can't control her classroom, and isn't a good teacher." J.A. 000429.

classroom teachers, clarify certain transfer procedures, and outline the roles of the principal, county superintendent, and county board of education in the limited hiring and transfer procedures set forth herein." § 126-1.1, J.A. 439.

Policy 5000 works in a simple fashion. If the principal and faculty senate agree on a candidate, and the superintendent concurs, that candidate is to be hired. 126 W. Va. C.S.R. § 126.6.4. If the principal and faculty senate do not agree, the provisions of 126 W. Va. C.S.R. § 6.2 and § 6.3 kick in and apply criteria with defined weights and balances to the process. *Id.* at 6.4. Critically, the weights only apply in cases of disagreement; § 6.5 states clearly that the principal and faculty senate "shall *consider* each criterion from § 6.2.a through 6.2.i," but they are not *required* to assign *any amount of weight* to any factor." *Id.* at § 6.5.

Finally, principals and faculty senate chairs are required to "complete the applicable hiring recommendation forms ... and shall submit a completed form as documentation of the recommendation. *Other than the recommendation form, no other matrix or documentation of the selection shall be required.*" *Id.* (emphasis added).

In other words, so long as the principal and faculty senate agree on a candidate and have considered the required criterion and filled out the recommendation form, they may choose to hire anyone they like, so long as the superintendent agrees, *nothwithstanding any other provision of Policy 5000. Id.* at 6.4. Here, Respondents submitted properly-completed recommendation forms for the jobs at issue here, certifying that the factors from 6.2.a to 6.2.i were considered, and were submitted to the trial court in this matter. J.A. 459 – 488. Petitioner did not challenge the veracity of those documents.

Petitioner applied for three (3) jobs at each of Bridge Street Middle School, Woodsdale Grade School, and Warwood Grade School, two (2) jobs at each of Ritchie Grade School and West

Liberty Grade School, and one (1) job at each of Steenrod and Madison Grade Schools, as well as Triadelphia Middle School. *See, e.g.*, Pet'r's Br., pp. 5-6.[5] The principals and faculty senates of *eight* (8) different schools all chose to go in a different direction rather than accept Petitioner's transfer, which Petitioner believes is "evidence" of age discrimination. Petitioner does not have an automatic right to be transferred, no matter her seniority. Petitioner did not produce any evidence which would indicate that these decisions were procedurally improper, let alone any evidence that eight (8) different schools with different reviewing personnel engaged in discriminatory practices by not accepting Petitioner's transfer.

3. Past Litigation History

After her failure to procure any of the sixteen (16) jobs she applied for, Petitioner filed a WVHRC complaint on Sept. 30, 2019, alleging age discrimination in twelve (12) discrete instances where she applied to a position and was not transferred into it. J.A. 000048 – 000049. There are no other claims in Petitioner's WVHRC complaint, nor is Katrina Lewis named as a defendant. Petitioner then retired on October 15, 2019. *See, e.g.*, Bradley Depo. 30:15 – 30:17, Pet'r's Br., p. 7, ¶ 4. On August 27, 2021, the WVHRC issued a Letter of Determination for those claims. J.A. 000050 – 000052. As her case before the WVHRC was heading to a hearing, Petitioner asked for, and received, a "Right to Sue" letter from the WVHRC, and voluntarily dismissed her claim before the agency accordingly. J.A 000053 – 000054.

4. Procedural History

Petitioner filed the actual complaint at issue in this matter on Feb. 4, 2022 and served that complaint on Respondents on Feb. 25, 2022. J.A. 000009 – 000022. Respondents filed a Motion

[5] Apparently, she applied for "4 – 5" jobs in Marshall County, West Virginia which she also did not get. J.A. 000434. Plaintiff does not state whether the various faculty senates and principals in Marshall County were also a part of the alleged age-related conspiracy.

for Partial Dismissal on March 17, 2022. J.A. 000031 – 000045. There, Respondents alleged, *inter alia*, that Jobs 2349, 1973, 2394, 2485, and 2431, as well as Petitioner's Counts II and III, for both procedural statute of limitations issues and a substantive failure to state claims. *Id.* Petitioner timely responded to which Respondents timely replied. *See* J.A. 000077 – 000137 and J.A. 000139 – 000154, respectively.

The Circuit Court correctly determined that Petitioner's age discrimination claims for jobs 1973, 2431, and 2485, as well as Petitioner's age discrimination claims against Katrina Lewis and wrongful constructive discharge complaint against all parties, were outside the two-year statute of limitations for WVHRA claims because they were not tolled by the original WVHRA filing, and were therefore untimely. J.A. 000167. The Court also found that, were those claims not barred by the statute of limitations, that they would fail for failure to state a claim upon which relief could be granted. J.A. 163 – 167.

Discovery proceeded without much difficulty, except for a hiccup over whether Petitioner would have to produce her psychiatric records since she claims "substantial emotional and mental distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance, and inconvenience." J.A. 000218. The lower court ultimately required her to turn them over because they were "sufficiently relevant" to Petitioner's claims. J.A. 000226.

At the conclusion of discovery, Respondents moved for summary judgment on Petitioner's twelve (12) remaining age discrimination claims because, *inter alia*, Petitioner did not allege any actual adverse employment actions, and even if she did, she did not come close to meeting her evidentiary burden under the *McDonnell Douglas* framework necessary to proceed with a WVHRA claim. *See* J.A. 000228 – 000241. Respondents also moved for summary judgment on

her damages claims because she failed to identify any compensatory damages during discovery. J.A. 000240. The parties timely completed briefing on the same. J.A. 505 – 663, J.A. 664 – 802.

The Court ultimately agreed with Respondents, finding that Plaintiff did not allege an adverse employment action, and even if she did, she did not produce "evidence adequate to create an inference that an employment decision was based on an illegal discriminatory criterion." *See* J.A. 855 – 856. Critically, the Court found that, "[a]s Plaintiff's theory of discrimination in this case is that Defendant's procedurally incorrect evaluations under W. Va. C.S.R. § 126-126-6.2 are evidence adequate to create that inference of discrimination, and *Defendant did not actually make any procedurally incorrect evaluations*, Plaintiff cannot meet the evidentiary standard adequate to create that inference." J.A. 000858 (emphasis added).

The Court *further* found that even if Petitioner had alleged an adverse employment action, *and* that Petitioner met her *prima facie* burden, Petitioner *still* could not produce evidence which would "defeat Defendant's legitimate, non-discriminatory reasons for failing to transfer her," explaining, *inter alia*, that "Defendant's list of employees is uncontroverted evidence that OCBE does not have a policy of discrimination." J.A. 000859. Finally, the Circuit Court found that Petitioner did not have evidence to show that she suffered any meaningful compensatory damages, or that she was entitled to punitive damages. J.A. 000861.

The Circuit Court, in its Order granting summary judgment, gave three separate and distinct reasons why it was granting summary judgment to Respondents. J.A. 000862.

III. Summary of Argument

None of Petitioner's assignments of error are meritorious. Petitioner alleges nothing more than classic workplace grievances, masquerading in the closest applicable legal costuming she believes has the best chance of allowing her to vent those grievances to a jury.

Petitioner appears to believe that the United States Supreme Court's decision in *Muldrow v. City of St. Louis, Missouri*, 144 S. Ct. 967 (2024) saves her case since the lower court granted summary judgment, in part, due to her inability to show "significant harm." However, Petitioner's claim does not meet the *Muldrow* standard either. Petitioner cannot show any sort of actionable harm occurred when she was not accepted for any of the lateral transfers for which she applied.

Even if she could do so, Petitioner's theory of damages is based largely on an incorrect attempt to backdoor a wrongful constructive termination claim as an age discrimination claim. She also has not produced any evidence that she suffered "extreme emotional distress" other than her own *ipse dixit*.

Petitioner's further assignments of error meet the same fate. The lower court correctly identified her "evidence" as nonexistent because she could not show that any of the teachers and principals who interviewed her did anything procedurally inapposite in hiring or transferring other people into the positions for which she applied, and even if she could have done so, she has absolutely no evidence of a causal nexus between those decisions and her age.

The remainder of Petitioner's arguments are primarily attempts to inflate and rehabilitate Petitioner's scant evidence under different theories, as well as to render the summary judgment standard pointless. Petitioner's claimed "evidence" consists entirely of nitpicking the weights individual evaluators assigned to interviewees at her job interviews. She believes she has the right to appear in front of a jury and claim that, for example, "John Proctor gave me two (2) points for "seniority," but gave two (2) points to Abigail Williams under "other measures or indicators upon which the relative qualifications of the applicant may fairly be judged," and *that*, alone, is evidence of *age discrimination*. Of course, it is not.

Finally, Petitioner's attempts to resurrect her constructive discharge claims at the end of her brief appear to be mostly *pro forma* kitchen sink claims, first attempting to misapply some case law about equitable tolling before offering a pedantic "interpretation" of the lower court's order dismissing the claim. None of these arguments justify a finding that the lower court did anything wrong, and the lower court's dismissal or judgment in Respondents' favor remains appropriate.

IV. Statement Regarding Oral Argument

Respondents agree with Petitioner that this appeal is appropriate for oral argument pursuant to W. Va. R. App. P. 19(a)(1) because this appeal involves assignments of error in the application of settled law, *i.e.*, Petitioner's inability to set out a *prima facie* case or to rebut Respondents' non-discriminatory reasons for not transferring her to another job. To the extent that this Court would like to hear arguments related to *Muldrow v. City of St. Louis, Missouri*, 144 S. Ct. 967 (2024), this case would be more appropriately argued under W. Va. R. App. P. 20(a)(1) as a "case[] involving issues of first impression."

V. Argument

As the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court") has explained, "[i]n order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act [] the plaintiff must offer proof of the following: (1) That the plaintiff is a member of a protected class. (2) That the employer made an adverse decision concerning the plaintiff. (3) But for the plaintiff's protected status, the adverse decision would not have been made." *Knotts v. Grafton City Hosp.*, 237 W. Va. 169, 175-176, 786 S.E.2d 188, 194 – 195 (2016); *see also* Syl. Pt. 3, *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 358 S.E.2d 423 (1986) (internal citations omitted).

Here, Petitioner is over the age of 40, and is therefore a member of a protected class. However, Petitioner is incapable of meeting the requirements of the statute.

A. The lower court did not err in granting Respondents summary judgment because Petitioner still cannot identify a change in employment conditions.

Petitioner focuses her appeal primarily on the United States Supreme Court's decision in *Muldrow v. City of St. Louis, Missouri*, 144 S. Ct. 967 (2024), which held that "[a]n employee challenging a job transfer under Title VII must show that the transfer brought about some harm with respect to an identifiable term or condition of employment, but that harm need not be significant." *Muldrow* at 969.

Of course, here the Court found, in part, that Petitioner could not show any significant harm from not being transferred, and therefore could not show that she suffered an "adverse employment action." *See* J.A. 000810 – 000814. Specifically, at the time of the opinion, the Fourth Circuit, as well as most federal circuits, flatly did not recognize denial of a lateral transfer as capable of being discriminatory. *See* J.A. 000812 – 000813.

This new standard is unhelpful to the adjudication of discrimination cases, but it appears to function in the same fashion as the old standard:

> I have no idea what this means, and I can just imagine how this guidance will be greeted by lower court judges. The primary definition of "harm" is "physical or mental damage," and an "injury" is defined as "an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm." *Webster's Third International Dictionary* 1034, 1164 (1976). These definitions incorporate at least some degree of significance or substantiality. We do not typically say that we were harmed or injured by every unwanted experience. What would we think if a friend said, "I was harmed because the supermarket had run out of my favorite brand of peanut butter," or, "I was injured because I ran into three rather than the usual two red lights on the way home from work"?
>
> I see little if any substantive difference between the terminology the Court approves and the terminology it doesn't like. The predictable result of today's decision is that

> careful lower court judges will mind the words they use but will continue to do pretty much just what they have done for years.

Muldrow v. City of St. Louis, Missouri, 144 S. Ct. 967, 979 (2024) (Alito, J., concurring). In other words, while the acceptable verbiage may have changed, the results have not. *Muldrow* is not a free pass for plaintiffs to file endless discrimination lawsuits without meaningful harm or identifiable remedies that Petitioner believes it to be.

Whether *Muldrow* even *applies* to a failure to transfer is unclear. The Western District of Pennsylvania, to Respondents' knowledge the only court who has directly dealt with this issue post-*Muldrow*, found it specifically inapplicable:

> Nonetheless, *Muldrow* involved an employee's involuntary job transfer, while the present case involves an employee's request for a voluntary job transfer. As such this new authority is not applicable to the present case and does not make the denial of Plaintiff's request an adverse employment action.

Cavanaugh v. Wal-Mart Stores E., LP., No. 3:22-CV-1908, 2024 WL 2094010, at *4 (M.D. Pa. May 9, 2024); *see also Kauffman v. New York Presbyterian Hosp.*, No. 23-CV-4964 (AT) (RWL), 2024 WL 2279318, at *4 (S.D.N.Y. May 16, 2024) ("Neither the Supreme Court nor the Second Circuit has addressed whether *Muldrow* applies to all Title VII cases or just those alleging claims of forced job transfer.")

Even if *Muldrow* is applicable, Petitioner must still show that a "transfer brought about some 'disadvantageous' change in an employment term or condition." *Muldrow* at 977. That is not a *fait accompli* under any circumstance, and is certainly not one here.

For instance, the Seventh Circuit Court of Appeals has found:

> Third, no other action by the defendants counts as an "adverse employment action" supporting a discrimination claim. Phillips's reassignment from the processing hub to the local office was not an adverse action because there is no evidence that it left him "worse off" with respect to the terms and conditions of his employment.

> *Muldrow v. City of St. Louis*, 601 U.S. ——, 144 S.Ct. 967, —— L.Ed.2d ——, 2024 WL 1642826, at *5, *7 (2024). Indeed, the reassignment did not change his position, job duties, salary, or benefits, and the new office was even in the same building.

Phillips v. Baxter, No. 23-1740, 2024 WL 1795859, at *3 (7th Cir. Apr. 25, 2024).

Those are not the facts of this case. Plaintiff, here, is claiming that she:

(1) is over the age of 40;

(1) did not get along with her boss; and

(2) tried to laterally transfer to other substantially similar positions to avoid her boss; but

(3) dozens of her peers filled those positions with other people after undertaking a lawful interview process; and

(4) she is therefore entitled to a remedy approaching or exceeding a million dollars.

Nothing about this set of facts implicates *Muldrow* or renders the lower court's decision incorrect. Ignoring, for the moment, the fact that Petitioner has absolutely no evidence linking any decision made by anyone to her membership in a protected class, Petitioner must still show that a "transfer brought about some 'disadvantageous' change in an employment term or condition." *Muldrow* at 977. Here, Petitioner was not denied an opportunity to interview for the transfers she sought. When she did not get a position, the terms and conditions of her employment remained the same – she went back to the same job she had possessed since the 2013 – 2014 school year. She was not docked pay, her benefits were not cut, her hours of employment did not change. Rather, by virtue of *keeping the exact job she held,* the terms and conditions of her employment did not change.

At worst, she was stuck with a boss and coworkers whom she did not like. The idea that any member of a protected class could maintain a discrimination action simply because they were not transferred away from a boss they did not like is, of course, ridiculous.

Moreover, Ms. Lewis' requiring Petitioner to, *inter alia*, actually fill out her grade book, organize her class, and teach the material the school board requires her to teach could never constitute any sort of harassment. However, even if there were a *chance* her actions could be considered discriminatory, the few post-*Muldrow* cases dealing with workplace harassment find that *Muldrow* was inapposite to the issue. For instance, the United States District Court for New Mexico found that:

> *Muldrow* clearly states that an employment action not only must cause "some harm," but also must affect "an identifiable term or condition of employment." *Id.* at 974 (emphasis added). And the Supreme Court has previously held that "discriminatory intimidation, ridicule, and insult" violates federal anti-discrimination statutes only when it is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (emphasis added) (quotation marks and citations omitted). The Court recognizes that *Harris* addressed whether discriminatory intimidation, ridicule, and insult create a hostile work environment, rather than whether such conduct amounts to an adverse employment action for purposes of a disparate treatment claim. *See generally* 510 U.S. at 17. But under *Muldrow*, the pertinent question in both contexts is whether such conduct affects a term or condition of the plaintiff's employment, and under *Harris*, such conduct must be "sufficiently severe or pervasive" in order to do so.

ROBERT SMITH, Plaintiff, v. DENIS MCDONOUGH, Sec'y of U.S. Dep't of Veterans Affs., Defendant, No. CV 20-1321 KK/JFR, 2024 WL 2804428, at *8 (D.N.M. May 31, 2024) (dismissing an age discrimination claim tied to 'offensive utterances,' 'run-of-the-mill … annoying behavior,' and '[n]ormal job stress' arising out of a '[p]ersonality conflict[]'.)

Even Petitioner's identification of "harms" skirts the outer limits of *Muldrow*. For example, Petitioner claims that "[t]he BOE made discriminatory, adverse decisions when it failed to offer Mrs. Bradley employment for any one of the sixteen positions for which she applied and for which

she was more qualified." Pet'r's Br., p. 15. Ignoring the truth, or lack thereof, in that statement, the *harms* identified by Petitioner are nearly nonexistent. She states only that the other positions were at other schools, and she would have had different supervisors and co-workers, and that because she did not get them, she suffered cognizable legal harm. No court has yet accepted such a flimsy claim as a legally cognizable "harm." The right of a member of a protected class "to transfer jobs until you find coworkers and supervisors of whom you approve" has not yet been discovered in the Constitution or elsewhere, and certainly the alleged denial of that right does not "affect[] an identifiable term or condition of employment." *Muldrow* at 977.

In short, the lower court found that OCBOE's alleged "failure" to transfer Petitioner to other lateral jobs did not constitute an "adverse employment action" under the law. J.A. 000813 – 000814. While *Muldrow* eliminated the *per se* bar on discrimination claims based on forced unwanted lateral transfers, it did not render the Court's decision incorrect as a matter of course. Petitioner could not meet the pre-*Muldrow* "substantial change" standard, and cannot meet the post-*Muldrow* "some harm that affects an identifiable term or condition of employment" standard either. The Court was correct to grant summary judgment in the first place, and its decision should be upheld.

B. The lower court did not err in finding that Petitioner did not have any damages.

1. Petitioner does not have "lost wages," nor does she provide an argument as to why the Court's decision on lost wages is incorrect.

Petitioner next takes issue with the lower court's finding that she did not actually claim any damages. The Court specifically found that Petitioner retired from her job, and that it already dismissed her claim for wrongful constructive discharge, so she could not allege "lost wages," "without limitation front and back pay," or "out of pocket losses" as alleged in the Complaint. J.A.

000819.[6] Petitioner's only argument in this section as to how she could actually allege lost wages is limited to the sentence fragment "which she can," which does not constitute any sort of argument Respondents must address. Pet'r's Br., p. 18, ¶ 1. Petitioner claims later, without support, that "the BOE's failure to transfer Mrs. Bradley ... caused Mrs. Bradley to prematurely retire," which in turn "caused Ms. Bradley to lose wages and past and future benefits." *Id.* at p. 19, ¶ 1. This is just an attempt to backdoor a wrongful constructive discharge claim as a part of her failure to transfer claims, which was correctly disregarded by the lower court and should be disregarded here.

The Court's analysis is clear – Petitioner was not terminated, constructively or otherwise, and therefore did not "lose" any wages. J.A. 000860. As Petitioner does not meaningfully refute this argument, the Court's judgment should be upheld.

2. Petitioner does not have emotional distress damages.

Petitioner next disagrees that she should be allowed to claim "significant emotional distress" damages because she was not transferred. Pet'r's Br., p. 18, ¶ 2. Her primary disagreement with the Court's decision is that despite the text of her Complaint, she was *actually* alleging "significant emotional distress" independent of her wrongful constructive discharge claim. *Id.*

Petitioner's Complaint identifies specific damages in three places: ¶ 81, ¶ 95, and ¶ 107. Those paragraphs state as follows:

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[6] Petitioner footnotes that she produced an expert who "showed that she suffered $847,170 in pecuniary damages based on the BOE's discriminatory actions." Pet'r's Br., p. 18, fn. 3. Ignoring, for a moment, the ludicrous amount in "damages" for a public school teacher who was 61 years old at the time of her retirement, Petitioner's description is a "creative" way of describing what the expert report stated – the expert calculated her "earnings absent *separation*," which the Court found that Petitioner chose to do herself.

81. As a direct result of Defendant's discriminatory conduct, Mrs. Bradley has suffered damages, including lost wages, including without limitation front and back pay, out of pocket losses, substantial emotional and mental distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance and inconvenience, and those additional damages detailed herein.

J. A. 000020.

95. As a direct result of Defendant Lewis's discriminatory conduct, Mrs. Bradley has suffered damages, including lost wages, including without limitation front and back pay, out of pocket losses, substantial emotional and mental distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance and inconvenience, and those additional damages detailed herein.

J.A. 000022.

107. As a direct result of Defendants' willful, wanton, and reckless discriminatory conduct, Mrs. Bradley has suffered damages, including lost wages, including without limitation front and back pay, out of pocket losses, substantial emotional and mental distress, humiliation, anxiety, embarrassment, depression, aggravation, annoyance and inconvenience, and those additional damages detailed herein.

J.A. 000024.

In Petitioner's Response to Respondent's Motion for Summary Judgment, Petitioner characterized her damages as follows:

> Moreover, Mrs. Bradley suffered significant emotional distress as a result of the BOE's failure to transfer her to another school. Rather than endure daily micromanagement and discriminatory treatment at the hands of Mrs. Lewis, and feeling she had no other choice given the BOE's refusal to offer her any of the twelve positions at other schools for which she applied, Mrs. Bradley chose to prematurely retire. The amount of emotional distress damages to award is a jury issue. *See Dobson*, 188 W. Va. at 24, 422 S.E.2d at 501 (1992). Finally, Mrs. Bradley is also entitled to an award of attorney's fees and costs. W. Va. Code § 5-11-13(c). Thus, Mrs. Bradley has significant damages claims that should be considered by the jury and, in the case of an award of attorney's fees and costs, by the Court after trial.

J.A. 000525. Petitioner is claiming that she suffered *emotional distress which caused her to prematurely retire*, and that she is owed damages for that distress. The Court correctly identified these damages as tied to her claim that she was forced to prematurely retire, *i.e.*, that she was constructively discharged, and granted summary judgment for Respondents. J.A. 000820. Now, for the first time, Petitioner is attempting a *post hoc* decoupling of her damages claim after the lower court's ruling, which should not be permitted.

However, even if Petitioner actually *was* intending to allege emotional distress separate from her claim that she was forced to retire, she has not provided evidence of any cognizable "emotional distress" outside her own testimony. Petitioner wrongly chides the Circuit Court for not accepting Petitioner's own testimony as sufficient to bypass summary judgment, claiming that "Mrs. Bradley testified that she suffered emotional distress due to the BOE's failure to transfer her – and the Court was required to construe that *evidence* in her favor at the summary judgment stage instead of summarily disregarding it." Pet'r's Br., p. 18, ¶ 2.

Of course, that is not a correct statement of law, or of the court's responsibilities at the summary judgment stage. As the Supreme Court has identified numerous times, "self-serving

assertions without factual support in the record will not defeat a motion for summary judgment." *See, e.g., McCullough Oil, Inc. v. Rezek*, 176 W.Va. 638, 346 S.E.2d 788 (1986), *Williams v. Precision Coil*, 194 W.Va. 52, 61 n.14, 459 S.E.2d 329, 338 n.14 (1995), *Campion v. W. Virginia Dep't of Educ.*, No. 15-0689, 2016 WL 3141580, at *4 (W. Va. June 3, 2016). "The essence of the inquiry the court must make is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Williams* at 61, S.E.2d 338 (1995). Here, Petitioner did not present any evidence to the lower court outside her own self-serving testimony that she suffered any emotional distress at all, and Petitioner's Brief does not identify any in the record. The Court is not required to rubber stamp plaintiffs' claims at the summary judgment stage and pass them on to a jury. As Petitioner did not actually present any evidence of emotional distress independent of her wrongful termination allegations in responding to the summary judgment motion, the Court correctly dismissed that claim for damages.

C. The lower court did not err in its determination that the BOE did not hire her based on her age.

1. The lower court was not required to place any sort of evidentiary weight on the WVHRC's "finding of probable cause."

Petitioner first places undue weight on the WVHRC's "finding of probable cause." Petitioner appears to believe that the WVHRC's Letter of Determination, finding that there was probable cause to continue the matter over to a hearing, is "strong evidence" that Petitioner "stated a *prima facie* case for age discrimination." The Letter of Determination contains no findings of fact and no conclusions of law. J.A. 590 – 591. It is a black box. The Court is not required to accept it as evidence of anything at all, because it *is not evidence*. It does not make anything in Petitioner's Complaint more or less true.

Petitioner claims that "[a]lthough there are no cases in West Virginia on point, similar determinations" issued by the EEOC are considered "highly probative of the ultimate issue involved." Pet'r's Br., p. 20, ¶ 1. This statement is extremely misleading. *Smith v. Universal Serices, Inc.*, 454 F.2d 154 (5th Cir. 1972), the lone case Petitioner relies upon for this belief, had a much different "report" than the one Petitioner is trying to masquerade as evidence here:

> The Commission's decision contains findings of fact made from accounts by different witnesses, subjective comment on the credibility of these witnesses, and reaches the conclusion that there is reasonable cause to believe that a violation of the Civil Rights Act has occurred. Certainly these are determinations that are to be made by the district court in a de novo proceeding. We think, however, that to ignore the manpower and resources expended on the EEOC investigation and the expertise acquired by its field investigators in the area of discriminatory employment practices would be wasteful and unnecessary.
>
> The fact that an investigator, trained and experienced in the area of discriminatory practices and the various methods by which they can be secreted, has found that it is likely that such an unlawful practice has occurred, is highly probative of the ultimate issue involved in such cases.

Smith v. Universal Servs., Inc., 454 F.2d 154, 157 (5th Cir. 1972). Here, there are no findings of fact, no "accounts of different witnesses," no "subjective comment on the credibility of ... witnesses." The report contains only a bald statement that the WVHRC "found probable cause." J.A. 590 – 591.

Moreover, the WVHRC, unlike the EEOC in *Smith*, did not get a chance to make findings of fact and conclusions of law because Petitioner removed the case to the Circuit Court. Petitioner cannot now force the Circuit Court to accept a cursory probable cause finding of an unspecified "violation of the West Virginia Human Rights Act" as corroborating evidence. Had Petitioner taken her WVHRC claim to its conclusion, any such findings by an ALJ would receive the deference Petitioner demands here:

> On appeal of an administrative order from a circuit court, this Court is bound by the statutory standards contained in W.Va.Code § 29A–5–4(a) and reviews questions of law presented *de novo;* findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.

W. Virginia Univ./Ruby Mem'l Hosp. v. W. Virginia Hum. Rts. Comm'n, 217 W. Va. 174, 178, 617 S.E.2d 524, 528 (2005) (quoting Syl. Pt. 1, *Muscatell v. Cline,* 196 W.Va. 588, 474 S.E.2d 518 (1996). Here, no findings of fact exist to be granted deference. If Petitioner actually *had* corroborating evidence, she had plenty of opportunity to present it to the Circuit Court. It presented nothing at all. The Circuit Court was correct to ignore Petitioner's attempt to use a summary WVHRC document as substantive evidence of anything at all.

2. The lower court did not ignore "issues of material fact," nor did it fail to "construe them in the light most favorable" to Petitioner.

The Circuit Court found that "Plaintiff has not actually adduced any evidence that she was not transferred because of her age," and that even if lateral transfers were otherwise adverse employment actions, she could not succeed on her claim. J.A. 000815 – 000816.

In her appeal, Petitioner claims that she showed, and only *needs* to show, "some evidence" sufficiently linking "the employer's" decision and her membership in a protected class "so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion." Pet'r's Br., pp. 20 – 21. She has absolutely not met her evidentiary requirements here.

As this Court is aware, "the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence,' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Painter v. Peavy*, 192 W. Va. 189, 192-93, 451 S.E.2d 755, 758-59 (1994), *Daniels v. DAL Glob. Servs., LLC*, No. 23-ICA-212, 2024 WL 2844385, at *9 (W. Va. Ct. App. June 5, 2024).

Petitioner, of course, realizes that she does not have "evidence sufficient for a reasonable jury to find" in her favor, and is attempting to focus this Court on her belief that she needs to provide very little evidence to proceed. However, no matter how low Petitioner moves that bar, she has still not provided even the slightest evidence that she was discriminated against in hiring, because of her age or otherwise.

a. Petitioner misrepresents the applicable law on "subjective hiring criteria" in this matter.

Petitioner claims that the Court wrongly "considered subjective hiring criteria" in resolving Petitioner's claim, and that it ignored the "operative portion" of Policy 5000. Pet'r's Br., pp. 21, 24.[7] This argument is unequivocally wrong and misrepresents both the Court's opinion and Policy 5000. It is also ultimately immaterial to her claim. The Court did not "consider subjective hiring criteria" in the context of the federal cases cited in Petitioner's brief. Rather, the Court considered *whether Respondents actually violated the policy at issue*, and found that Respondents did not. Ironically, Petitioner is instead claiming that the Court should have *considered the subjective informal worksheets* more than it did. *See* Pet'r's Br., pp. 21 – 23. The Court's rationale was not error, in any sense.

First, nearly every part of Petitioner's explanation of Policy 5000 at pages 21 – 25 is demonstrably wrong. Petitioner made this mistake with the lower court as well. J.A. 000857 – 000858. Essentially, Petitioner is attempting to claim that the criteria at W. Va. C.S.R. § 126-126-6.2 is *mandatory*, and that the criteria was applied *subjectively*.[8] Pet'r's Br., pp. 21 – 22. Policy

[7] For clarity's sake, Respondents intend this section to operate as a response to Petitioner's Brief parts c(2)(a) and c(2)(b).

[8] Petitioner never does get around to explaining how allegedly incorrect application of weights serves as evidence of "age discrimination."

5000 does not work that way, and it is incredibly difficult to believe that after numerous explanations, Petitioner remains unwilling to understand the policy.

§ 126-6.2 and 6.5 require principals and faculty senate to *give consideration* to the factors at 6.2.a – 6.2.k. The rule states clearly that principals and faculty may assign *any amount of weight* to any number of those factors. § 6.5. After doing so, "if the recommendations resulting from the operations of sections 6.2.j and 6.2.k, *i.e.*, the recommendation of the principal and the recommendation of the faculty senate, are for the same applicant, and the superintendent concurs with the recommendation, the county board *shall* appoint that applicant *notwithstanding any other provision of this policy to the contrary.* § 6.4. To appoint that applicant, "[p]rincipals and faculty senate chairs or single designees shall complete the applicable hiring recommendation forms … and shall submit a completed form as documentation of the recommendation. Other than the recommendation form, no other matrix or documentation of the selection shall be required." § 6.5. Those forms, certifying that Respondents considered Policy 5000 in making their determinations, have all been provided, and went unchallenged by Petitioner. J.A. 459 – 488. Respondents did not violate any Policy 5000 requirement, nor did Petitioner provide evidence that they did.

Rather, Petitioner claims the Court's finding that Respondents did not violate Policy 5000 constitutes "wrongly considering subjective hiring criteria." Pet'r's Br., p. 21, ¶ 1. Instead, Petitioner claims that the Court should have essentially converted the "subjective" hiring criteria into "objective" hiring criteria, and then penalized Respondents for treating subjective hiring criteria subjectively, and for assigning *any amount of weight* to any number of those factors, as specifically permitted by § 6.5. *See* Pet'r's Br., p. 22, ¶ 2.

This position is unsupported by any law or by good sense. The entire purpose of Policy 5000 was to give faculty senate a say in who their colleagues would be. *See, e.g.*, W. Va. Code §

18-5A-5(b)(2).[9] In fact, § 6.3 specifically double-weights the recommendations of the principal and faculty senate to break ties and disagreements. It worked as intended here.

The Court did not "tak[e] subjective criteria into account" in a manner which constituted error. The Court found that Policy 5000 was followed and certified as such by each faculty senate, and that Respondents did not actually do anything outside the policy. J.A. 000858. In doing so, ironically, the Court disregarded Petitioner's attempts to have it make a subjective judgment on subjective informal matrices which are not required to be filled out at all.

Finally, Petitioner claims that the lower court erred because it found that § 6.4, stating that an agreed-upon candidate may be hired despite any other provision to the contrary, does not actually mean what it says. Pet'r's Br., pp. 24 – 25. She claims, instead, that § 6.5 requires a determination of which applicant is the highest qualified based on the criterion. *Id.* at 25. Respondent agrees. Despite Petitioner's attempts to use scratch worksheets as evidence that someone didn't weight something in a way that Petitioner found acceptable, each faculty senate and principal properly certified their choices as required by statute, and in doing so confirmed that all Policy 5000 factors were considered. J.A. 459 – 488. The lower court accepted that evidence as well. J.A. 000858.

Finally, and most importantly, *none of this matters.* If Petitioner somehow proves that some of the informal interview worksheets were not filled out to her liking, that means *nothing at all.* At best, it is proof that some interviewers did not fill out worksheets completely. Nothing at all ties improperly-completed worksheets to Petitioner's age. Petitioner has not adduced any evidence making that critical causal connection. Instead, Petitioner claims that (1) she is a member of a

[9] Numerous news articles have also been written on the subject; *see, e.g.,* "Full WV Board of Ed passes teacher hiring policy," *https://www.wvnews.com/statejournal/news/full-wv-board-of-ed-passes-teacher-hiring-policy/article_fb858404-bb0d-53ef-b061-ed246ad9e34c.html.*

protected class, (2) she disagrees with the weights used by some of the interviewers, who are nonetheless *expressly allowed* to use whatever weights they want per Policy 5000, and (3) that disagreement, combined with the fact that she did not get transferred, constitutes enough evidence to go to a jury with an age discrimination claim.

b. The lower court did not err in accepting the BOE's reasons for her lack of transfers.

While the existence or non-existence of a pretext should be unnecessary based on the fact that Petitioner has not alleged the causal connection between her "failure to be transferred" and her age, the lower court was not wrong to accept the BOE's argument that the reasons her peers did not choose her was not pretextual.

First, Petitioner takes issue with the fact that the lower court rejected her position that "any reason the BOE asserts for failing to transfer her was pretextual." Pet'r's Resp., p. 26, ¶ 1. That is, yet again, not an actual legal position. Petitioner must *prove* that the specific positions actually *are* pretextual, not only that she *believes* they are. She did not do so here, apparently believing that producing a boilerplate argument that all Respondents' arguments are pretextual should be good enough for the Court.

Respondents identified, and the Court accepted, the fact that the interviewers may have not chosen Ms. Bradley because they reviewed her personnel files, or because she had a reputation for poor performance. J.A. 000859. Respondents raised this reason in their Motion for Summary Judgment. Petitioner was welcome to counter with any evidence she had to the contrary. For instance, Petitioner could have provided deposition transcripts of the interviewers. She could have provided affidavits from individuals who would swear to her sterling reputation, had she actually found any. Rather, Petitioner again did *nothing* to counter the assertions in Respondents' summary

judgment motion, apparently mistakenly relying on her belief that anything a plaintiff says at the summary judgment stage should be accepted and evidence is not necessary to go to trial.

Lastly, Petitioner objects, somehow, to the fact that Respondent produced a list of 152 BOE employees older than Petitioner because the list included non-teachers, which the Court accepted as evidence. Pet'r's Resp., p. 26, ¶ 2. Specifically, the Court found that the list was "uncontroverted" evidence that OCBE does not have a policy of discrimination, because Petitioner did not meaningfully rebut the claim. That list is, in fact, uncontroverted. Had Petitioner actually asked for the list, or a similar document, in discovery, and then asked followup questions about the list, or reviewed it with, for instance, Ms. Fox-Nolte during her deposition, perhaps Petitioner would have a meaningful rebuttal argument.

Moreover, any argument over this document is perplexing. The Circuit Court identified that Petitioner "did not expressly allege that [a discriminatory policy] existed." J.A. 000859. Petitioner's position is that she "does not assert a disparate impact case, which would challenge the existence of a discriminatory policy." Pet'r's Br., p. 26, ¶ 2. If the Court and Petitioner agree that Petitioner is not alleging the existence of a discriminatory policy, it is unclear what error Petitioner wants reversed.

D. The Court did not err in dismissing Petitioner's constructive discharge claim.

Finally, Petitioner claims that the Court erred in dismissing Petitioner's constructive discharge claim because (1) it was time-barred, and (2) because the lower Court did not perform a series of mental gymnastics to create a claim for Petitioner. Neither reason shows error on the part of the lower court.[10]

[10] For clarity's sake, Respondents intend this section to operate as a response to Petitioner's Brief parts c(2)(d) and c(2)(d)(1) and (2), to the extent Respondents are correctly identifying those portions of the brief.

1. Equitable tolling is inapplicable to Petitioner's constructive discharge claim.

Petitioner claims, in many more words, that she was proceeding *pro se* through the WVHRC portion of her claim, and therefore did not *know* that she should have alleged wrongful constructive discharge, so the lower court should have equitably tolled the claim. That is, of course, nonsense. Petitioner misleadingly supports her position by claiming that "the Supreme Court of Appeals of West Virginia has applied equitable tolling in employment discrimination cases." In reality, the only citation she provides is *Indep. Fire Co. No. 1 v. W. Virginia Hum. Rts. Comm'n*, 180 W. Va. 406, 410, 376 S.E.2d 612, 616 (1988), a case which applied equitable tolling to *the time period for filing a complaint with the HRC*, not in circuit court.

Equitable tolling applies until "facts that would support a charge of discrimination ... [are] apparent or should [be] apparent to a person with a reasonably prudent regard to his rights similarly situated to the plaintiff." *Indep. Fire Co. No. 1 v. W. Virginia Hum. Rts. Comm'n*, 180 W. Va. 406, 408–09, 376 S.E.2d 612, 614–15 (1988). Petitioner was aware of her rights when she filed her WVHRC claim and spoke with WVHRC investigators on and around September 30, 2019. *See* J.A. 000095. Contrary to Petitioner's current claims, her initial complaint does not allege anything about wrongful constructive termination, nor was OCBE "on notice" of such a claim. J.A. 000094 – 000095. In fact, at the time she filed it, she had not yet retired. *See, e.g.*, Bradley Depo. 30:15 – 30:17, Pet'r's Br., p. 7, ¶ 4. Petitioner further claims that equitable tolling should be applied here because "the involvement of a government agency in a case can lead plaintiffs to believe that their claims are being pursued," the implication being that Petitioner's claims here were not. Pet'r's Br., p. 28.

Petitioner incorrectly relies upon *Taylor v. Commtec/Pomeroy Computer Res., Inc.*, No. CIV.A. 2:05-CV-00445, 2006 WL 362463, at *4 (S.D.W. Va. Feb. 15, 2006) for this principle,

despite lacking anything resembling the same set of facts. Specifically, in *Taylor*, the Division of Labor ("DOL") improperly involved itself in Taylor's litigation and believed it was legally representing Taylor, when in fact it had no right or authority to do so. *See Taylor* at *3. After the Court cleaned up that mess, it permitted Taylor to file the appropriate claim since he believed he was being represented by the DOL.

In contrast, Petitioner's claims *were* being pursued by the government agency of her choice. Her failure, or the failure of her WVHRC helpers, to allege a wrongful constructive discharge claim does not constitute the type of confusion or misunderstanding which would trigger the application of any sort of equitable tolling. The lower court was therefore correct to not apply equitable tolling to allow Plaintiff to allege new claims not alleged in two (2) years of WVHRC proceedings.

2. The lower court did not err in dismissing Petitioner's constructive discharge claim on the merits.

Finally, even if equitable tolling would apply, the lower court dismissed Petitioner's constructive discharge claim on the merits as well. J.A. 000164 – 000167. Petitioner's argument here appears limited to claiming that the lower court somehow "did not address Ms. Bradley's claims against the BOE as to her constructive discharge claim, which all relate to the BOE's failure to hire her for sixteen positions." Pet'r's Br., p. 30.

Unsurprisingly, this claim is also demonstrably incorrect. The Court's Order clearly addresses these claims in its Order, as follows:

> Plaintiff claims at Count III that she was wrongfully and constructively terminated from her position when she retired on October 15, 2019. Pl,'s Cplt., ¶¶ 97 – 108. In short, she claims that her not being hired for positions at other schools as described in Count I, combined with Defendant Lewis' actions described in Count II, constituted a hostile work environment from which she felt she had to resign.

J.A. 000164. Moreover, the cases cited by the Court deal specifically with "poor evaluations," "*denial of a management position*," "being ignored by co-workers and top management," "dissatisfaction with work assignments," and "perceived unfair criticism." J.A. 000165 – 000166. The idea that the Court did not consider those claims in dismissing this case is not supported by the record in this matter. Moreover, the Court repeatedly references, in its Summary Judgment Order, Petitioner's lack of a wrongful constructive termination claim. *See, e.g.*, J.A. 000819.

Finally, to the extent that Petitioner is again claiming that the lower court did not give her arguments the amount of weight they deserved at the motion to dismiss stage, the Court accepted Petitioner's facts as true, compared them with the facts in a series of other cases, and found that they were "far less severe" than those cases. It then found that Petitioner's wrongful constructive termination claim does not, therefore, state a claim upon which relief could be granted. J.A. 000166 – 000167. Petitioner does not refute the Court's reasoning *at all*, instead just retreating to her usual position of "the Court should care more about my feelings on the matter." In that regard, her legal claims reflect her personal beliefs quite well but fail to establish any question proper for a jury.

VI. Conclusion

Ultimately, Petitioner cannot identify any change in her employment conditions which would qualify as a "harm" or "adverse employment action." Likewise, she has not produced evidence that she was discriminated against at all, let alone that she was discriminated against because of her age. She cannot make out a *prima facie* case of discrimination, let alone counter

Respondents' non-discriminatory reasons for not selecting her during any of the interview processes. Petitioner's evidentiary deficiencies render the application of *Muldrow* here as a quasi-advisory opinion as to what *would* happen, if a Petitioner with actual facts which show a failure to transfer that *could be* construed to identify *a* harm, but perhaps not a *significant* harm. That is not the question here; Petitioner has no meaningful evidence to prove her case, nor has she produced a causal connection between her failure to be selected for transfer and her age.

Similarly, Petitioner offers this Court no meaningful reason why her wrongful constructive discharge claim should be reinstated, either in law or in equity. She does not have evidence of lost wages, because the only wages she "lost" were those "lost" by her own accord when she retired. She has not identified any "emotional distress" damages." Petitioner must know and understand that she does not actually have an "age discrimination" claim – there is no actual evidence to support that claim. Her appeal is almost entirely built upon the premise that the law does not *require* her to produce meaningful evidence to appear before a jury and claim that dozens of teachers and administrators across the county all discriminated against her because of her age. Trying to lower the summary judgment standard into nonexistence does not change that the evidence does not show that she was, in any sense, "discriminated against."

The lower court was correct to grant summary judgment or, in some cases, dismiss, Petitioner's claims. Petitioner has not provided any legal or factual reason to overturn that grant. Accordingly, Respondents move this Court to DENY Petitioner's appeal for the reasons set forth herein.

CERTIFICATE OF SERVICE

I, undersigned counsel for the Respondents do hereby certify that I have served a true copy of the foregoing Respondents' Brief upon the following, this 13th day of June 2024:

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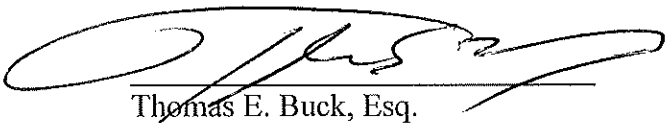

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