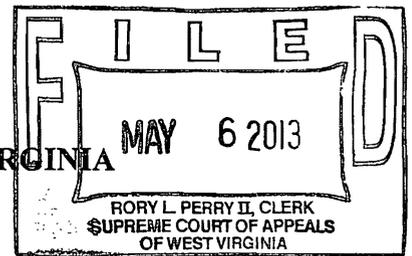


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 12-1534



JACKIE L. BROWN, II,

Plaintiff/Petitioner,

v.

THE CITY OF MONTGOMERY, a Municipal Corporation, and JAMES F. HIGGINS, JR., individually and in his capacity as Mayor of the City of Montgomery,

Defendants/Respondents.

RESPONDENTS' SUMMARY RESPONSE

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ISSUES PRESENTED

- I. The circuit court correctly found that, as a matter of law, the Petitioner was not entitled to a pre-termination hearing because he was an at-will chief of police of a class III city.
- II. The circuit court correctly found that the Complaint, taken in the light most favorable to the Petitioner's allegations that he was terminated for failing to follow illegal orders from the mayor failed because he failed to identify any illegal orders which he refused to obey.
- III. The circuit court correctly found that the Respondents were entitled to qualified immunity because the Petitioner's Complaint failed to allege that the Defendants violated a specific law, or maliciously, fraudulently, or oppressively.

STATEMENT OF THE CASE

Petitioner was hired as a municipal police officer with the City of Montgomery in approximately 2007. See Complaint at ¶ 1. What Petitioner failed to allege, but cannot deny, is that he accepted the position of chief of police of the City of Montgomery. See id. Petitioner did not allege Mayor Higgins knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. Petitioner alleges he refused to obey what he believed to be an unlawful order—to affix a GPS device to a city owned police cruiser. See id. at ¶ 5. However, this order was not illegal and the allegations of his refusal show the respondent violated a direct, legal order of his employer. He cannot now allege that his mistaken belief in the illegality of the order serves as a defense to prevent him from being terminated from his at will employment.

SUMMARY OF ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT

The Respondent believes that oral argument is unnecessary under W.Va. R.A.P. 18(a)(3) because the issues raised in the Petition have been authoritatively decided. However, should this Court accept this Petition, then oral argument would assist this Court in determining whether the facts presented in this Case fall within the authoritatively decided precedent.

ARGUMENT

The Respondent is filing this Summary Response because each of the Petitioner's arguments relate to the same determination by the Court—that the Respondents were entitled to qualified immunity. The Petitioner's Complaint alleges that Mayor Higgins "often ordered the Petitioner to do things that were not consistent with the laws of the State of West Virginia. When Petitioner refused and pointed out the illegality of such orders, Defendant would become enraged and verbally abusive." Complaint at ¶ 6. The only specific request Plaintiff identifies is that he "asked plaintiff to place a GPS device in Ivy's cruiser to track his whereabouts. Petitioner refused to obey the Orders of the Police Department in regards to James Ivy." See id. at ¶ 5. However, placing a GPS device on a police cruiser is not illegal. Therefore, Petitioner has failed to identify a specific law the Respondents violated.

Qualified immunity is designed to protect public officials from the threat of litigation resulting from difficult decisions which must be made in the course of their employment. See e.g., Clark v. Dunn, 195 W.Va. 272, 465 S.E.2d 374 (1995). To sustain a viable claim against a political subdivision or its employees or officials acting within the scope of their authority sufficient to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively.

Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996); Clark, 465 S.E.2d 394 (citing State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1991)); Syl. Pt. 4, City of St. Albans v. Botkins, 228 W. Va. 393, 719 S.E.2d 863 (2011). In other words, the City of Montgomery, its agencies, officials and employees are immune for acts or omissions arising out of the exercise of discretion in carrying out their duties, so long as they are not violating any known law or acting with malice or bad faith. Syl. pt. 8, Parkulo.

In outlining qualified immunity, this Court relied on previous discussions from federal courts to outline its purpose. This Court outlined that qualified immunity is designed to “insulate the decision making process from the harassment of prospective litigation.” Chase at 361, 424 S.E.2d at 596. “The provision of immunity rests on the view that the threat of liability will make federal officials timid in carrying out their official duties, and that effective government will be promoted if officials are freed the costs of vexations and often frivolous damages suits.” Id. (quoting Westfall v. Erwin, 484 U.S. 292, 295 (1988)).

In Chase, this Court adopted the test used by the United States Supreme Court in Harlow v. Fitzgerald, holding that “government officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Chase at 362, 424 S.E.2d at 597 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982)). This Court explained further that the term “reasonable person” is defined as “a reasonable public official occupying the same position as the defendant public official.” Id. at n. 16, (citing Anderson v. Creighton, 483 U.S. 635 (1987)).

This Court explicitly extended the qualified immunity to which the official was entitled to the State, stating: “we endorse the principle, expressed in the Restatement, that the immunity

of the State is ordinarily coterminous with the qualified immunity of the public executive official whose acts or omissions give rise to an action [.]” Parkulo v. West Virginia Bd. of Probation, 199 W.Va. 161, 177-8, 483 S.E.2d 507, 523-4 (1996); Hess v. W. Va. Div. of Corr., 227 W. Va. 15, 19, 705 S.E.2d 125, 129 (2010). Accordingly, Mayor Higgins and the City of Montgomery are shielded from liability because qualified immunity is coterminous.

Dispositive motions filed on behalf of governmental defendants that implicate immunities require unique consideration. “Immunities under West Virginia law *are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.*” Hutchinson v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996) (emphasis added). Indeed “[t]he very heart of the immunity defense is that *it spares the defendant from having to go forward with an inquiry* into the merits of the case.” Id. (emphasis added) (Citing Swint v. Chambers County Commission, 514 U.S. 35 (parallel citations omitted) (1995)). As Justice Cleckley in Hutchinson wrote:

As assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune – a trial – will absent a pretrial ruling occur and cannot be remedied by a later appeal. On the other hand, the trial judge must understand that a grant of summary judgment based upon immunity does not lead to a loss of right that cannot be corrected on appeal.

Id. at note 13.

Similarly, the United States Supreme Court used almost identical reasoning to that of Justice Cleckley in Hutchinson to guide the federal judiciary as to the importance of a government official’s right to be summarily dismissed from litigation when qualified immunity is applicable. Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001)(overruled on other grounds, Pearson v. Callahan, 555 U.S. 223, 233, 129 S. Ct. 808, 816, 172 L. Ed. 2d 565, 574 (2009)). “The privilege of immunity from suit is an immunity rather than a mere defense to

liability, and like absolute immunity *it is effectively lost if a case is erroneously permitted to go to trial.*” Id. (emphasis added). Further, Saucier holds that immunities spare governmental defendants from the other burdens of litigation. Id. Other burdens of litigation have been held to include discovery. See, Yoak v. Marshall University, 223 W. Va. 55, 672 S.E.2d 191 (2008). Therefore, the circuit court correctly found that the Respondents should not be subjected to the burdens of litigation and this Court must uphold their dismissal from this suit.

The Petitioner’s Complaint does not include an allegation of a violation of a specific law which Mayor Higgins would have known he was violating. The Petitioner avers one action that he believes is a violation of law, the order to attach a GPS device to a city owned police cruiser. The Petitioner notes in a footnote that he had legitimate grounds to believe the Petitioner’s order was illegal because the United States Supreme Court ruled that warrantless placement of a GPS on a suspect’s vehicle violated his Fourth Amendment rights. See United States v. Jones, ___ U.S. ___, 132 S.Ct. 945; 181 L.Ed.2d 911 (2012). However, this alleged belief was misplaced. Jones was a criminal case where the defendant was suspected of participating in the trafficking of narcotics. The federal government installed a GPS tracking device on his personal vehicle and tracked his vehicle’s movement over a 28 day period. The Court unanimously determined that the placement of the tracking device constituted a “search” within the meaning of the Fourth Amendment. However, significant element to the Jones decision is that the vehicle in question was the personal vehicle of the defendant. He had a right under the Fourth Amendment to be free from unreasonable searches of his person, house, papers, and effects. The cruiser in question belonged to the City of Montgomery, not the individual officer. The officer, while on duty, had no reasonable expectation of privacy in the movement of the City’s police cruiser. In

fact, the City has the absolute right to control its own property and to control the movement of its officers.

While Petitioner argues that the issue of placement of a GPS device on a city owned vehicle is unclear, the Fourth Circuit's decision in U.S. v. Gerson Guzman Martinez-Turcio, 2012 U.S. App. Lexis 19619 (Sept. 17, 2012 4th Cir. Lexis) supports the circuit court's decision in this case. In this unpublished opinion, the court determined that co-conspirators convicted of conspiracy could not allege their Fourth Amendment rights had been violated by the placement of a GPS tracking device to monitor the movement of a van because the van did not belong to the defendants.

More importantly to the issue at hand, for the Petitioner to overcome the Respondents' entitlement to qualified immunity, he must allege that Mayor Higgins violated a specific law which a similarly situated public official would have known was a violation of the law. See Chase at 362, 424 S.E.2d at 597 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) and (citing Anderson v. Creighton, 483 U.S. 635 (1987))). The alleged violation of law by the Petitioner is far from clearly established violation of a specific law. As this Court noted, qualified immunity shields the Respondents from liability unless Mayor Higgins "transgress[ed] bright lines." City of St. Albans v. Botkins, 228 W. Va. 393, 402, 719 S.E.2d 863872 (W. Va. 2011)(quoting Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992)).

The Complaint fails to allege that a public official breached a specific law, or acted maliciously or oppressively. See Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996). Therefore, the Petitioner failed to identify the actions of Mayor Higgins which violated a clearly established law which a mayor in similar circumstances

would have been aware. Therefore, the circuit court correctly found that the Respondents are entitled to qualified immunity from suit. Thus, this Court should refuse this Petition.

The Petitioner also argues that the Court erred in finding that the Petitioner was not entitled to a pre-termination hearing prior to termination. The Petitioner cites to W.Va. Code § 8-14-7 which establishes “Policeman’s Civil Service Commission[s]” for “every Class I and Class II cit[ies].” Pursuant to W.Va. Code § 8-1-3(3), the City of Montgomery is a class III city. Therefore, the officers hired by the City of Montgomery are members of a “noncivil service police department.” W.Va. Code § 8-14A-1(5). Pursuant to W.Va. Code § 8-10-1, the mayor has the right to control the police of the municipality and the right to appoint special officers. See also, Complaint at ¶ 3. The Petitioner was not entitled to the protections of W.Va. Code §§ 8-14-16 and 17 because he was chief of police of a Class III city. Therefore, the Mayor’s right to control the police of the municipality gives him the authority to appoint a chief of police, to serve at his will and pleasure.

Petitioner has cited no authority in his Complaint that would entitle him to a pre-termination hearing other than W.Va. Code § 8-14A-1 *et seq.* However, this section only applies to the termination of an officer accused of wrongdoing. The Petitioner was not an “accused officer” and there were no “issues involved” for a Police Board to determine. See W.Va. § 8-14A-3. He was an at-will employee that was terminated from his position. In Vetter v. Town of Moorefield, 2012 W. Va. LEXIS 551 (June 22, 2012, WV Lexis), this Court examined a similar situation. In Vetter, the Town of Moorefield terminated the employment of Vetter from the position as Chief of Police. He filed suit claiming age discrimination and retaliatory discharge. This Court affirmed the grant of summary judgment and in the Memorandum Opinion, this Court “adopt[ed] and incorporate[d] by reference the well-reasoned final order granting summary

judgment.” The first Finding of Fact adopted by the Court was “The Plaintiff, Frank Vetter, as Chief of Police, **was an at will employee of the Town of Moorefield**, and, as such, he could be terminated for any reason or for no reason, so long as his dismissal did not violate the law. Skaggs v. Elk Run Coal Co., Inc., 479 S.E.2d 561, 198 W.Va. 51 (1996).” Id. at **3-4(emphasis added). The Town of Moorefield, like the City of Montgomery is a class III city. Therefore, the circuit court was correct in dismissing this claim. Thus, the circuit court did not err in granting the Respondent’s Motion to Dismiss. As such, this Court should uphold the circuit court’s Order.

CONCLUSION

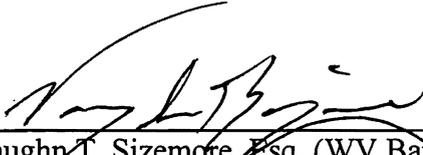
The Petitioner has filed this Petition challenging the Circuit Court of Fayette County’s Order granting the Respondent’s Motion to Dismiss. The circuit court correctly found that the Respondents are entitled to qualified immunity. The Petitioner failed to aver that Mayor Higgins “knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively.” Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996); Clark, 465 S.E.2d 394 (citing State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1991)); Syl. Pt. 4, City of St. Albans v. Botkins, 228 W. Va. 393, 719 S.E.2d 863 (2011). The Petitioner alleged he was terminated after he refused to follow illegal orders from the Mayor, yet the only order he alleges in his Complaint is not an illegal order. Thus, he failed to allege facts sufficient to overcome the Respondent’s entitlement to qualified immunity.

The Petitioner also alleges he was entitled to a pre-termination hearing under W.Va. Code § 8-14A-1 *et seq.* The circuit court correctly found that, as a Class III city, W.Va. Code § 8-14A-1 *et seq.* is not applicable. Further, the circuit court correctly found that the Petitioner gave up any rights to a pre-termination hearing when he accepted the at-will position of chief of

police. This Court ruled on a nearly identical case in Vetter v. Town of Moorefield, 2012 W. Va. LEXIS 551 (June 22, 2012, WV Lexis). This Court upheld the circuit court's dismissal because Chief Vetter was an at will chief of a Class III city. Therefore, the Circuit Court of Fayette County correctly ruled that, as an at-will employee, the Petitioner was not entitled to a pre-termination hearing. Thus, dismissal of the entire suit was appropriate. As such, this Court should uphold the circuit court's Order Granting the Defendants' Motion to Dismiss.

**THE CITY OF MONTGOMERY and
JAMES F. HIGGINS, JR.,**

By Counsel,



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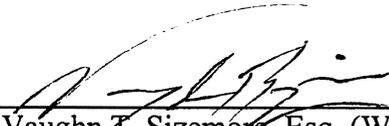
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Defendants/Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing "Respondents' Summary Response" was served upon the following parties by U.S. Mail on this 6th day of May, 2013:

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