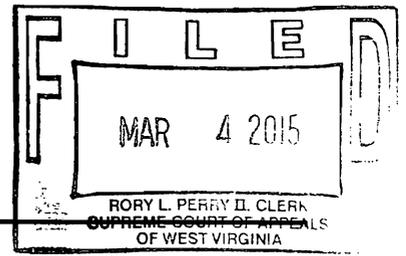


No. 14-1264



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WEST VIRGINIA BOARD OF EDUCATION
and L. WADE LINGER, JR.,**

Defendants Below, Petitioners,

v.

JOREA M. MARPLE,

Plaintiff Below, Respondent.

**From the Circuit Court of Kanawha County, West Virginia
The Honorable James C. Stucky
Civil Action No. 14-C-731**

**PETITIONERS', WEST VIRGINIA BOARD OF EDUCATION AND L. WADE LINGER,
JR., BRIEF**

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ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The Circuit Court erred in finding that the liability insurance exception to sovereign immunity provided pursuant to Article VI, Section 35, of the Constitution of the State of West Virginia is also an exception to the defense of qualified immunity that the State and its officials are entitled to assert against certain claims.

Whether the Circuit Court erred in finding that the defense of qualified immunity, as established by *Clark v. Dunn*, 195 W. Va. 272, 465 S.E.2d 374 (1994) and its progeny, is unavailable to Petitioners based upon the Circuit Court's finding that Petitioners are not entitled to the defense of absolute sovereign or constitutional immunity pursuant to Article VI, Section 35, of the West Virginia Constitution where Respondent alleges in her Complaint that she seeks recovery under and up to the limits of the State's liability insurance coverage.

ASSIGNMENT OF ERROR 2: The Circuit Court erred by denying Petitioner Board's Motion to Dismiss because the Board is entitled to qualified immunity as a State agency for the discretionary actions it undertook relating to the decision to terminate Respondent's at-will employment as all of Respondent's allegations against the Board arise from its exercise of its duties, government function, and authority to retain a Superintendent at its will and pleasure.

Whether the Circuit Court erred by denying the Board's Motion to Dismiss, depriving the Board of qualified immunity, where all of Respondent's allegations against the Board arise from its exercise of its duties, government function, and authority in making employment decisions for an at-will Superintendent where the Board is expressly authorized to "select the state superintendent of free schools who shall serve at its will and pleasure," pursuant to Article XII, Section 2, of the West Virginia Constitution, and "appoint[] . . . a State Superintendent of

Schools who serves *at the will and pleasure* of the state board,” pursuant to West Virginia Code Section 18-3-1.

ASSIGNMENT OF ERROR 3: The Circuit Court erred by denying Petitioner Linger’s Motion to Dismiss premised upon qualified immunity because Respondent’s claims arise from Linger’s discretionary acts, none of which was in clear violation of established law, undertaken in his official capacity as former Board President in and relating to the decision to terminate Respondent’s employment.

Whether the Circuit Court erred by denying Linger’s Motion to Dismiss, depriving him of qualified immunity, where all of Respondent’s allegations against Linger arise from and relate to discretionary actions he undertook in his capacity as former Board President, none of which was in clear violation of established law, and where Respondent fails to allege that any of Linger’s actions were non-discretionary and/or outside the scope of his position as former Board President to defeat Linger’s entitlement to qualified immunity.

STATEMENT OF THE CASE

On or about April 14, 2014, Plaintiff Below, Respondent herein, Jorea M. Marple, filed her civil action asserting claims arising out of the termination of her at-will appointment as Superintendent of Schools for the State of West Virginia (“Superintendent”). (A.R. 1-22, Compl.) Respondent asserts that Defendants Below, Petitioners herein, West Virginia Board of Education (“Board”) and L. Wade Linger, Jr. (“Linger”), violated her substantive and procedural due process rights guaranteed by the West Virginia Constitution, Article III, Section 10, by depriving her of her property interest in continued government employment as Superintendent and depriving her of a liberty interest in potential future employment. (A.R. 7-8, Compl. Count 1, ¶¶ 29-35; A.R. 8, Count 2, ¶¶ 36-37; A.R. 9, Count 5, ¶¶ 42-43; A.R. 9, Count 6, ¶¶ 44-46.)

Plaintiff also asserts common law claims for defamation, false light, and seeks punitive damages. (A.R. 8, Compl. Count 3, ¶¶ 38-39; A.R. 9, Count 4, ¶¶ 40-41; A.R. 10 *ad damnum*, ¶¶ 47-48.)

I. STATEMENT OF THE FACTS

Respondent commenced her admittedly at-will employment as the Superintendent in January 2011 and served in that capacity until the Board terminated her employment on November 15, 2012, upon public majority vote during a properly noticed Board meeting on that date. (A.R. 3-5, Compl. ¶¶ 6, 15, 17-18; A.R. 59-81, “Meeting Notice Detail,” approved 10/11/2012, and “Agenda” for November 14, 2012, and “Minutes” for November 14 and 15, 2012, Defs.’ Mot. to Dismiss, Exs. 2, 3, and 1.)

The Board later affirmed its decision to terminate Respondent’s employment on November 29, 2012, at a second properly noticed meeting and again upon a public majority vote. (A.R. 5-6, Compl. ¶¶ 21-22, 24, Ex. 1; A.R. 82-88, “Meeting Notice Detail,” approved 11/19/2012, and “Minutes” for November 29, 2012, Defs.’ Mot. to Dismiss, Exs. 4 and 5.) After permitting public comment and returning from executive session, Linger announced that the Board had not made any decisions during executive session but that he recommended that the Board terminate and replace Respondent as Superintendent. (*Id.*) Linger cited both the West Virginia Constitution and West Virginia Code as authority for the Board’s actions regarding its decision to terminate Respondent’s at-will employment. (A.R. 5, Compl. ¶ 22, Ex. 1.) The Board then, by public majority vote, again terminated Respondent’s employment in conformity with the West Virginia Constitution, Article XII, Section 2, and West Virginia Code Section 18-3-1. (A.R. 6, Compl. ¶ 24, Ex. 1.)

After the Board’s vote and in the public meeting, Linger provided a recitation of the State’s education statistics and advised that the Board wished to change its direction (hereinafter

referred to as “Linger’s Statement” or “Statement”). (A.R. 16-17, Compl. ¶ 25, Ex. 1.) Linger further stated that the Board did not hold Respondent more responsible than governors, legislatures, educators, or Board Members. (*Id.*)

II. PROCEDURAL HISTORY

On or about May 9, 2014, Petitioners moved to dismiss Respondent’s Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure for Respondent’s failure to state a claim upon which relief can be granted in her Complaint. (A.R. 23-89, Defs.’ Mot. to Dismiss and Mem., Exs. 1 to 6.) Thereafter, on August 5, 2014, Petitioners supplemented their Motion to Dismiss with the Circuit Court’s “Order Granting Defendants’ Combined Motion for Summary Judgment” in *Jennifer N. Taylor v. West Virginia Department of Health and Human Resources, et al.*, Civil Action No. 12-C-2029, which granted summary judgment to the employer on the at-will employee’s claims that are factually analogous to Respondent’s claims in the instant matter. (A.R. 90-171, Defs.’ Supplemental Mem. in Supp. of Mot. to Dismiss, Ex. 1.) Respondent filed her Response to Petitioners’ Motion to Dismiss on August 29, 2014, and Supplemental Response on September 2, 2014, opposing Petitioners’ Motion. (A.R. 172-204, Pl.’s Resp. to Defs.’ Mot. to Dismiss; A.R. 205-207, Pl.’s Supplemental Resp. to Defs.’ Mot. to Dismiss.)

The Circuit Court heard argument on Petitioners’ Motions to Dismiss and instructed the parties to submit proposed orders by September 17, 2014. (A.R. 211-259 and 261-265, Hr’g Tr. 4-52, 54-58, Sept. 3, 2014.) By Order, entered on November 3, 2014, the Circuit Court denied Petitioners’ Motions to Dismiss predicated on qualified immunity. (A.R. 393-398, Order.) On or about December 3, 2014, Petitioners timely filed their Notice of Appeal of the Circuit Court’s Order. (A.R. 411-428, Notice of Appeal.)

SUMMARY OF ARGUMENT

The Circuit Court erred by denying the Board's Motion to Dismiss because, as a State agency, the Board is entitled to qualified immunity from suit arising from its discretionary actions relating to terminating Respondent's employment which is constitutionally and statutorily prescribed to be at-will. The Board did not violate any clearly established rights of Respondent, nor were its actions in terminating Respondent's at-will employment after public comment and majority vote fraudulent, malicious, or oppressive. Because all of Respondent's allegations against the Board arise from its discretionary acts in the performance of its duties, government function, and authority to retain a Superintendent at its will and pleasure, the Board is entitled to qualified immunity from Respondent's Complaint.

The Circuit Court similarly denied Linger's Motion to Dismiss, applying the same erroneous analysis as in its denial of the Board's Motion. Linger, too, is entitled to qualified immunity from suit arising from his discretionary actions undertaken as Board President in terminating Respondent's at-will employment. Just as Respondent's allegations against the Board arise from its discretionary acts relating to terminating her employment, her allegations against Linger arise from his exercise and performance of his discretionary duties and function as Board President. Just as the Board's actions did not violate any clearly established rights of Respondent, neither did Linger's. Further, the factual allegations in the Complaint do not support that Linger's actions in terminating Respondent's at-will employment were fraudulent, malicious, or oppressive.

By depriving Petitioners of qualified immunity, the Circuit Court improperly subjects Petitioners to the burden of further litigating Respondent's meritless claims, resulting in unnecessary expenditure of vexatious costs and resources and needless delays, while dishonoring

the public policy embodied in the clear constitutional and statutory prescription that the position of Superintendent is an at-will position.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, oral argument is necessary in this appeal as the decisional process of this Court would be significantly aided by oral argument.

Accordingly, Petitioners request oral argument pursuant to Rule 19 as the instant appeal involves assignments of error in the Circuit Court's application of settled law on the issue of Petitioners' entitlement to qualified immunity from suit. W. VA. R. APP. P. 19(a). Further, this appeal involves a narrow issue of law. *Id.* In the event that the Court determines that a Rule 19 oral argument is appropriate, Petitioners believe that the ten-minute maximum time for argument is sufficient. W. VA. R. APP. P. 19(e).

Alternatively, to the extent that this appeal involves issues of fundamental public importance, Petitioners request oral argument pursuant to Rule 20. The public has an interest in this matter because if Respondent is allowed to proceed, the State and its taxpayers will incur further prohibitive and unnecessary expenditures of costs and resources as it is evident that Respondent's claims do not entitle her to relief. This matter is especially of public importance because allowing Respondent to proceed on her meritless claims, for which Petitioners enjoy qualified immunity, precludes the Board, here, and possibly any other State agency having similar constitutionally and statutorily prescribed authority, from discharging an at-will employee at its will and pleasure, essentially creating an unintended life-long position. Consequently, denying Petitioners qualified immunity could potentially open the Court's floodgates to similar meritless lawsuits by similarly situated employees who are disgruntled by

being discharged from their at-will position. In the event that the Court determines that a Rule 20 oral argument is appropriate, Petitioners believe that the twenty-minute maximum time for argument is sufficient. W. VA. R. APP. P. 20(e).

Petitioners assert that a memorandum decision is not appropriate in this matter, pursuant to Rule 21, and, instead, the issuance of an opinion is warranted pursuant to Rule 22.

ARGUMENT

I. STANDARD OF REVIEW

This is an interlocutory appeal from the Circuit Court’s Order, entered on November 3, 2014, denying Petitioners’ Motion to Dismiss on the issue of Petitioners’ entitlement to qualified immunity. “Ordinarily the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to West Virginia Rules of Civil Procedure 12(b)(6) is interlocutory and is, therefore, not immediately appealable.” Syl. pt. 2, *State ex rel. Arrow Concrete Co. v. Hill*, 194 W. Va. 239, 460 S.E.2d 54 (1995). However, the Supreme Court of Appeals of West Virginia has held that an order denying a motion to dismiss predicated in part on qualified immunity is an interlocutory ruling subject to immediate appeal. *Jarvis v. W. Va. State Police*, 227 W. Va. 472, 475-76, 711 S.E.2d 542, 545-46 (2010) (finding that “[b]ecause the instant order denying a motion to dismiss is an interlocutory order that is predicated in part on qualified immunity, we find that the order is subject to immediate appeal under our holding in [*Robinson v. Pack*, 223 W. Va. 828, 679 S.E.2d 660 (2009)]”).

Appellate review of a circuit court’s order denying a motion to dismiss a complaint is *de novo*. See Syl. pt. 4, *Ewing v. Bd. of Educ. of Cnty. of Summers*, 202 W. Va. 228, 503 S.E.2d 541 (1998) (holding that “[w]hen a party, as part of an appeal from a final judgment, assigns as error a circuit court’s denial of a motion to dismiss, the circuit court’s disposition of the motion

to dismiss will be reviewed *de novo*). *Accord* Syl. pt. 2, *State ex rel. McGraw v. Scott Runyon Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995). However, “[b]eing subject to interlocutory appeal, a trial court’s pretrial ruling involving the existence of qualified immunity must clearly set out factual findings sufficient to permit meaningful appellate review of the issues herein identified.” *City of St. Albans v. Botkins*, 228 W. Va. 393, 400-01, 719 S.E.2d 863, 870-71 (2011).

Pursuant to Rule 12(b)(6), a party may move to dismiss a complaint for “failure to state a claim upon which relief can be granted.” W. VA. R. CIV. P. 12(b)(6). Dismissal for failure to state a claim is proper where it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations in the complaint. *E.g.*, Syl. pt. 3, *Chapman v. Kane Transfer Co. Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977). “For purposes of the motion to dismiss, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true.” *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978). However, to survive a motion to dismiss, a plaintiff’s complaint must “at a minimum [] set forth sufficient information to outline the elements of his claim.” *Price v. Halstead*, 177 W. Va. 592, 594, 355 S.E.2d 380, 383 (1987). Here, as Petitioners invoke qualified immunity, Respondent’s Complaint must meet a heightened pleading requirement: “in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff.” *Hutchison v. City of Huntington*, 198 W. Va. 139, 149, 479 S.E.2d 649, 659 (1996).

Significantly, as the Supreme Court of Appeals has consistently observed, “allowing interlocutory appeal of a qualified immunity ruling is the only way to preserve the intended goal of an immunity ruling: to afford public officers more than a defense to liability by providing

them with ‘the right not to be subject to the burden of trial.’” *Botkins*, 228 W. Va. at 397, 719 S.E.2d at 867 (quoting *Robinson*, 223 W. Va. at 833, 679 S.E.2d at 665) (citations omitted).

This Court views immunity as an “immunity from suit rather than a mere defense to liability” that is “effectively lost if a case is erroneously permitted to go to trial.” *Botkins*, 228 W. Va. at 398, 719 S.E.2d at 868 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Accordingly, the Supreme Court of Appeals has emphasized the need for the court to determine claims of immunity, a pure question of law, where ripe for disposition. “Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.” Syl. pt. 1, *Hutchison*, 198 W.Va. at 144, 479 S.E.2d at 656.

Moreover, the Supreme Court of the United States has emphasized the importance of determining issues of qualified immunity at the earliest possible stage of litigation to avoid expending unnecessary costs and resources:

In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The privilege is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if the case is erroneously permitted to go to trial. *Ibid.* As a result, we repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *Hunter v. Bryan*, 502 U.S. 224, 227 (1991) (per curiam).

Saucier v. Katz, 533 U.S. 193, 200-01 (2001) (emphasis added). Further, “[u]ntil this threshold immunity question is resolved, discovery should not be allowed.” *Siebert v. Gilley*, 500 U.S. 226, 231 (1991) (emphasis added) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

As an initial matter, Petitioners note that although the Circuit Court was required to clearly set out factual findings involving the existence of qualified immunity sufficient to permit meaningful appellate review, not only does the Order fail to indicate that Respondent sufficiently alleged a clearly established right that Petitioners violated, the Order fails to even reference qualified immunity. *See Botkins*, 228 W. Va. at 400-01, 719 S.E.2d at 870-71. Instead, the Circuit Court merely states for each of Respondent's Counts that "[a] full factual basis for the claim is found in the Complaint read in its entirety," without stating whether Respondent sufficiently pled a legal basis for defeating Petitioners' qualified immunity based on a violation of Respondent's clearly established rights. (A.R. 395-396, Order 3-4.)

II. ASSIGNMENT OF ERROR 1: The Circuit Court erred in finding that the liability-insurance exception to the sovereign immunity afforded the State by Article VI, Section 35, of the West Virginia Constitution creates an exception to the defense of qualified immunity.

The Circuit Court erred in finding that Petitioners are not entitled to qualified immunity from Respondent's claims solely because the defense of sovereign immunity is unavailable where the recovery is sought from the State's policy of liability insurance.

The State's sovereign immunity is created by Article VI, Section 35, of the West Virginia Constitution and states that "[t]he State of West Virginia shall never be made defendant in any court of law or equity" W. Va. Const. art VI, § 35. *Accord* Syl. pt. 1, *Stewart v. State Rd. Comm'n of W. Va.*, 117 W. Va. 352, 185 S.E. 567 (1936) (holding that "Section 35, Article 6, of the Constitution of West Virginia (declaring the state immune from suit), is absolute").

An exception to sovereign immunity exists where the State has procured a policy of liability insurance. West Virginia Code Section 29-12-5(a)(4) requires all insurance policies insuring the State to contain a provision that the insurer "shall be barred and estopped from relying upon the *constitutional* immunity of the State" against claims or suits. *Id.* (emphasis

added). This language has been interpreted as constituting a waiver of the State's sovereign immunity as long as recovery is sought under and up to the limits of the State's liability insurance coverage. *Id.* See Syl. pt. 2, *Pittsburgh Elevator Co. v. W. Va. Bd. of Regents*, 172 W. Va. 743, 310 S.E.2d 675 (1983) (holding that "[s]uits which seek no recovery from state funds, but allege that recovery is sought under and up to the limits of the State's liability insurance coverage, fall outside the traditional constitutional bar to suits against the State"). *Accord Parkulo v. W. Va. Bd. of Prob. and Parole*, 199 W. Va. 161, 169-70, 483 S.E.2d 507, 515-16 (1996).

Although Respondent's allegation that she seeks compensation for her alleged damages from the coverage and limits of the liability insurance policy (A.R. 10, Compl. ¶ 49) may preclude sovereign immunity, Petitioners are still entitled to assert qualified immunity pursuant to *Clark v. Dunn* and its progeny. In *Clark*, the Supreme Court of Appeals held that

In the absence of an insurance contract waiving the defense, the doctrine of qualified or official immunity bars a claim of mere negligence against a State agency . . . and against an officer of that department acting within the scope of his or her employment, with respect to the discretionary judgments, decisions, and actions of the officer.

Id. at Syl. pt. 6.

In its holding in *Clark*, the Supreme Court of Appeals specifically acknowledged that the issue of qualified or official immunity is not resolved solely by the application of the exception to sovereign immunity created by liability insurance. *Id.* at 277, 379. The Supreme Court of Appeals noted that there exists a further source of immunity available for discretionary acts committed within the scope of employment not addressed by *Pittsburgh Elevator*. *Id.* Accordingly, although *Pittsburgh Elevator* bars the State's absolute constitutional immunity where the plaintiff seeks recovery within the State's liability insurance coverage, its holding does

not preclude the application of qualified immunity under *Clark*. Thus, qualified immunity is available to Petitioners as a defense to Respondent's claims.

Therefore, the Circuit Court erred to the extent that its ruling is based on the Circuit Court's finding that the liability-insurance exception to sovereign immunity applies to preclude qualified immunity. (A.R. 396-397, Order 4-5.) Respondent does not plead in her Complaint and did not raise in her various briefs the existence of an insurance contract waiving the defense of qualified immunity. Thus, to the extent that the Circuit Court's Order denied Petitioners' Motion to Dismiss solely on its finding that the availability of liability insurance precludes Petitioners from asserting qualified immunity, the Circuit Court erred as such is clearly unsupported by the law.

III. ASSIGNMENT OF ERROR 2: The Circuit Court erred by denying the Board's Motion to Dismiss because the Board is entitled to qualified immunity as a State agency for its discretionary actions relating to terminating Respondent's at-will employment.

The Board is entitled to qualified immunity from Respondent's claims as all of Respondent's allegations against the Board arise from its discretionary acts in the performance of its duties, government function, and authority relating to terminating Respondent's constitutionally and statutorily prescribed at-will employment, which did not violate any of Respondent's clearly established rights and were not fraudulent, malicious, or oppressive.

In the absence of an insurance contract waiving the defense of qualified immunity, the doctrine of qualified immunity applies to shield the State and its agencies from liability for claims arising out of the agency's discretionary duties and government functions. Syl. pt. 6, *Clark*, 195 W. Va. at 273, 465 S.E.2d at 375.

As recently clarified and elaborated upon by the Supreme Court of Appeals in *West Virginia Regional Jail and Correctional Authority v. A.B.*, No. 13-0037, 2014 WL 5507522, 766 S.E.2d 751 (2014),

To determine whether the State, its agencies, officials, and/or employees are entitled to immunity, a reviewing court must first identify the nature of the governmental acts or omissions which give rise to the suit for purposes of determining whether such acts or omissions constitute legislative, judicial, executive or administrative policy-making acts or involve otherwise discretionary governmental functions. . . .

Id. at Syl. pt. 10 (emphasis added).

To the extent that governmental acts or omissions which give rise to a cause of action fall within the category of discretionary functions, a reviewing court must determine whether the plaintiff has demonstrated that such acts or omissions are in violation of clearly established statutory or constitutional rights or laws of which a reasonable person would have known or are otherwise fraudulent, malicious, or oppressive in accordance with *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (1992). In absence of such a showing, both the State and its officials or employees charged with such acts or omissions are immune from liability.

A.B. at Syl. pt. 11.

As already discussed, because Respondent does not allege in her Complaint that there is a contract of insurance waiving qualified immunity, qualified immunity is available to bar Respondent's claims relating to the discretionary actions and decisions of the Board and its Board Members including, but not limited to, Linger in terminating Respondent's employment.

A. All of Respondent's allegations against the Board involve its discretionary actions and decisions in terminating Respondent's at-will employment.

The Board's acts relating to its decision to terminate Respondent's at-will employment clearly fall within the Board's discretionary functions for which it may enjoy qualified immunity and are both constitutionally and statutorily prescribed. Pursuant to the West Virginia Constitution, "[t]he general supervision of the free schools of the State shall be vested in the

West Virginia board of education which shall perform such duties as may be prescribed by law.” W. Va. Const. art. XII, § 2. Specifically, the West Virginia Constitution provides that “[t]he West Virginia board of education shall in the manner prescribed by law, select the state superintendent of free schools who shall serve at its will and pleasure.” *Id.* (emphasis added). Likewise, the West Virginia Code provides, “[t]here shall be appointed by the state board a State Superintendent of Schools who shall serve at the will and pleasure of the state board.” W. Va. Code § 18-3-1 (emphasis added). It is unequivocal that the authority to select, appoint and retain a Superintendent at its will and pleasure is a discretionary government function of the Board. *See A.B* at 773. Further, the Supreme Court of Appeals has specifically held that “the broad categories of training, supervision, and employee retention, as characterized by respondent, easily fall within the category of ‘discretionary’ governmental functions.” *Id.* (emphasis added) (citing and relying upon *Stiebitz v. Mahoney*, 134 A.2d 71, 73 (Conn. 1957) (the duties of hiring and suspending individuals require “the use of a sound discretion”); *Dovalina v. Nuno*, 48 S.W.3d 279, 282 (Tex. App. 2001) (hiring, training, and supervision are discretionary acts); *Uinta Cnty. v. Pennington*, 286 P.3d 138, 145 (Wyo. 2012) (“hiring, training, and supervision of employees involve the policy judgments protected by the discretionary requirement”)).

Accordingly, as all of Respondent’s allegations concern the Board’s discretionary acts and government function, so long as those discretionary actions did not violate Respondent’s clearly established rights or laws or were otherwise fraudulent, malicious, or oppressive, the Board is entitled to qualified immunity from liability.

B. Respondent fails to sufficiently plead facts to support her contention that the Board violated a clearly established right.

Respondent’s factual allegations do not support her contention that the Board violated a clearly established right or law in terminating her at-will employment such as to defeat the

Board's qualified immunity. "[T]he question of whether the constitutional or statutory right was clearly established is one of law for the court." *A.B.* at 776 (citing *Hutchison*, 198 W. Va. at 149, 479 S.E.2d at 659). The Supreme Court of Appeals has held that "in civil actions where immunities are implicated, the trial court must insist on heightened pleading by the plaintiff." *Id.*

Here, Respondent alleges Petitioners violated her right to substantive due process afforded by the West Virginia Constitution, Article III, Section 10, by terminating her employment without "due process of law." (A.R. 7-9, Compl. ¶¶ 29-35, 42-43.) Respondent also claims a property interest in continued government employment as Superintendent under terms she specifies as her performing the requisites of the office and acting in obedience to the legitimate directives of the Board. (*Id.*) Respondent claims this purported property interest entitles her to due process and that Petitioners' terminating her employment without due process denied her "right to continued government employment." (*Id.*) Moreover, Respondent claims Petitioners' action "reflects upon her good name, reputation and potential for future employment," and that as a result of the "summary, unjustified action" of Petitioners in terminating her employment without due process, caused her "irreparable damage to her name, her reputation and her ability for future employment" in which she had a liberty interest. (A.R. 7-8, Compl. ¶¶ 29-31, 33-34, 42-43). Relatedly, Respondent alleges that Linger's Statement was defamatory (A.R. 8, Compl. ¶¶ 38-39) and cast her in a false light. (A.R. 9, Compl. ¶ 40-41.)

Respondent asserts that she was "vested with a right to the application of due process of law to assure her rights to liberty and property" and that such procedural due process rights include: "(a) a formal written notice of charges (b) sufficient opportunity to prepare to rebut the charges (c) opportunity to have retained counsel at any hearing on the charges (d) to confront her

accusers (e) to present evidence on her own behalf (f) an unbiased hearing tribunal and (g) an adequate record of proceedings.” (A.R. 7-8, Compl. ¶¶ 35, 44-46.)

1. Respondent was not entitled due process upon the Board’s terminating her at-will position as Superintendent.

The West Virginia Constitution provides that “[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers.” W. Va. Const. art. III, § 10. Syl. pt. 1 *Waite v. Civil Serv. Comm’n*, 161 W. Va. 154, 241 S.E.2d 164 (1977). However, Respondent was not entitled to due process because she had no liberty interest or property interest in continued employment as Superintendent where the position of Superintendent is, by both the Constitution and statute, an at-will position.

a. Respondent had no clearly established liberty interest in continued employment as Superintendent.

Respondent failed to plead facts sufficient to show that Petitioners’ actions “reflect[] upon her good name, reputation and potential for future employment” as required to support her assertion that she had a liberty interest implicated by Petitioners’ actions. (A.R. 7, Compl. ¶ 31.) Absent a liberty interest, Petitioners’ terminating Respondent’s at-will employment without due process does not violate a clearly established right sufficient to defeat the Board’s qualified immunity.

West Virginia law defines a constitutional liberty interest in employment as:

includ[ing] an individual’s right to freely move about, live and work at his chosen vocation, without the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities.

Syl. pt. 2, *Waite*, 161 W. Va. at 154, 241 S.E.2d at 165; Syl. pt. 4, *Freeman v. Poling*, 175 W. Va. 814, 338 S.E.2d 415 (1985). Accordingly, “[t]his liberty interest in continued public

employment encompasses two of the employee's most basic interests, her good name and her prospects for future employment." *Major v. DeFrench*, 169 W. Va. 241, 256, 286 S.E.2d 688, 697 (1982). *Accord Boggess v. Housing Auth. of City of Charleston*, 273 F. Supp.2d 729, 747 (S.D.W. Va. 2003) (mem. op. and order) (stating that "[a] liberty interest is implicated and the right to procedural due process required when government action threatens an employee's good name, reputation, honor or integrity or his or her freedom to take advantage of other employment opportunities") (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972)). However, recognition of a "due process interest in continued public employment and freedom from an arbitrary non-retention devoid of protective procedures" does not equate with holding "that all public employees have a protected liberty interest in continued employment." *Freeman*, 175 W. Va. at 821, 338 S.E.2d at 422.

An employee is only entitled to a "name-clearing hearing" to clear her name if the government "dismiss[es] an employee on charges that call into question her good name, or that impose a stigma upon an employee which could foreclose her freedom to pursue other employment opportunities, without providing the employee notice of the charges against her and a hearing in which the factual basis of the charges can be contested." *Major*, 169 W. Va. at 256, 286 S.E.2d at 697 (citing *Roth*, 408 U.S. at 564); *Freeman*, 175 W. Va. at 821, 338 S.E.2d at 421. Accordingly, the employer must make a "public disclosure of the reasons for the discharge" during the course of the termination of employment. *Boggess*, 273 F. Supp. 2d at 747 (citing *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Paul v. Davis*, 424 U.S. 693, 710 (1976)). *Accord Ridpath*, 447 F.3d 292, 209-12 (4th Cir. 2006) (citing *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 167, 172 n. 5 (4th Cir. 1988)). Further, the reasons for the discharge must be

false. *Id.* (citing *Codd v. Velger*, 429 U.S. 624, 627 (1977) (per curiam)); *Ridpath*, 447 F.3d at 312.

This Court has further held that “an accusation or label given the individual by his employer which belittles his worth and dignity as an individual and, as a consequence, is likely to have severe repercussions outside his work world, infringes one’s liberty interest” and that “an individual has an interest in avoiding ‘a stigma or other disability’ that forecloses future employment opportunities.” *Waite*, 161 W. Va. at 160, 241 S.E.2d at 168. However, “[c]ourts are rather uniform in holding that an unexplained termination or discharge from employment does not create a sufficient stigma to invoke a liberty interest protection.” Syl. pt. 5, *Freeman*, 175 W. Va. at 822, 338 S.E.2d at 423. More specifically, this Court has noted that while “a person who has been fired may be somewhat less attractive to other potential employers, . . . it would be stretching the concept too far to conclude that a person’s liberty interest is impaired merely because he has been discharged.” *Id.* (holding that an un-communicated or unpublished charge did not stigmatize the employee to rise to a liberty interest) (citing *Roth*, 408 U.S. at 575; *Bd. of Curators v. Horowitz*, 435 U.S. 78, 83–84 (1978)). *Accord Boggess*, 273 F. Supp.2d at 748-49 (finding that Plaintiff failed to establish a liberty interest as the court found no false statements made to the public in the course of terminating Plaintiff’s employment that threatened Plaintiff’s name, reputation, honor, or integrity or freedom to take advantage of other employment opportunities, noting “[i]n large part, the Board was publicly silent as to its reasons for terminating Plaintiff”).

Essentially, courts distinguish the types of statements and communications that give rise to a protected liberty interest, which imply “the existence of serious character defects such as dishonesty or immorality,” from statements that simply assert incompetence and similar traits.

Ridpath, 447 F.3d at 308-309 (quoting *Robertson v. Rogers*, 679 F.2d 1090, 1092 (4th Cir. 1982) (citing *Roth*, 408 U.S. at 573)). *Accord Waite*, 161 W. Va. at 159-160, 241 S.E.2d at 167 (citing *Roth*, 408 U.S. at 573). For example, statements and communications that imply the existence of serious character defects such as dishonesty, immorality, and criminality may give rise to a protected liberty interest. *See Ridpath*, 447 F.3d at 309 (finding that the administrators' use of "corrective action" label laid blame on the plaintiff for the university's NCAA rules violations, including academic fraud and impermissible employment of props at the Machine Shop, and, thus, insinuating "the existence of serious character defects such as dishonesty or immorality"); *Boston v. Webb*, 783 F.2d 1163, 1165-66 (4th Cir. 1986) (recognizing that the plaintiff's liberty interest "was surely implicated" by public announcement that he was discharged after failing to disprove an allegation of receiving a bribe); *Cox v. N. Va. Transp. Comm'n*, 551 F.2d 555, 557-58 (4th Cir.1976) (finding that a liberty interest was infringed when the employer publicly linked the plaintiff's discharge to investigation of financial irregularities, thus, "insinuating dishonesty"); *McNeill v. Butz*, 480 F.2d 314, 319-20 (4th Cir.1973) (concluding that the federal employees' liberty interests were implicated by the government-employer's charges of Agriculture Department regulation violations that "smack of deliberate fraud" and "in effect allege dishonesty").

Conversely, statements and communications that merely suggest incompetence, unsatisfactory job performance, interpersonal issues, and similar traits do not give rise to a protected liberty interest. *See Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 95-96, 479 S.E.2d 602, 605-06 (1996) (per curiam) (holding that the liberty interest of the deputy director, who statutorily "serve[d] at the will and pleasure of the director," was not implicated as the lottery director's statement that "the reason for [termination] is my loss of confidence in your ability to

effectively [*sic*] discharge the duties and responsibilities of your position” did not “reach the level of stigmatization which would foreclose future employment opportunities or seriously damage . . . [the individual’s] standing and associations in the community”). *See also Zepp v. Rehrmann*, 79 F.3d 381, 388 (4th Cir.1996) (rejecting deprivation of liberty interest claim where the employer announced that the plaintiff was being forced to retire “due to management problems,” an accusation, at most, “of incompetence or unsatisfactory job performance”); *Robertson*, 679 F.2d at 1091-92 (citing *Roth*, 408 U.S. at 573) (concluding that a liberty interest was not implicated by nonrenewal of an employment contract for “incompetence and outside activities” because such allegations did not involve an attack on the plaintiff’s integrity or honor); *Bunting v. City of Columbia*, 639 F.2d 1090, 1094 (4th Cir. 1981) (holding that no liberty interest was implicated where the public reason for the employees’ dismissal was that their services “did not meet the expectations” of the public employer); *Bragg v. Trupo*, 638 F. Supp. 311, 312 (N.D. W. Va. 1986) (finding that the new sheriff’s comment that he assembled a staff of qualified people to work with him could not be viewed as a comment of such damaging effect as to impair the plaintiffs’ standing in the community, noting it “would be stretching the concept too far to conclude that a person’s liberty interest is impaired merely because he has been discharged”); *McBride v. City of Roanoke Redevelopment and Housing Auth.*, 871 F. Supp. 885, 891 (W.D. Va. 1994) (holding that the public statement, issued upon termination, that the housing authority board’s decision was based on “lack of compatibility between [the executive director] and the manner in which the Board desires the Authority to be operated” did not deprive the executive director of a protected liberty interest); *Wilcox v. Conley*, No. 11-0678, 2011 WL 8192211 (W. Va. Nov. 28, 2011) (finding that the circuit court did not err in finding that the nature of the prosecutor’s secretary’s employment termination was “not sufficient to

reach the level of stigmatization such that future employment opportunities were foreclosed or seriously damaged” where the “evidence indicate[d] that no stigma was created as the prosecutor discharged the secretary for admittedly showing counsel a juvenile’s file).

Here, Respondent relies upon the following “four specific charges” contained in Linger’s Statement, attached as Exhibit 1 to the Complaint, which do not give rise to the level of a protected liberty interest:

1. Many members found no sense of urgency in the department to address some of the issue that have been outlined.
2. When discussing concerns, we often were met with excuses and not actions.
3. Too often we were told how things can’t change instead of being offered solutions.
4. When current practices were challenged, we often found people being defensive.

(A.R. 6, Compl. ¶¶ 25-26, Ex. 1; A.R. 256-257, Hr’g Tr. at 49-50.) First, one cannot discern from the entirety of Linger’s Statement to whom Linger was referring: Linger specifically prefaced his Statement by clarifying that the Board was not affixing blame and only referenced the “department” when describing the “issues” that Respondent claims are charges against her made by Linger and adopted by the Board. (A.R. 6, Compl. ¶¶ 25-26, Ex. 1.) Second, regardless of to whom Linger referred and to which the foregoing four “issues” referred, his Statement cannot be understood or construed in any way to insinuate that Respondent had a serious character flaw such as dishonesty, immorality, or criminality sufficient to implicate Respondent’s liberty interest.

Additionally, Linger’s recitation does not implicate a protected liberty interest as he merely recited five statistics regarding West Virginia student achievement and West Virginia’s national education rankings. (A.R. 6, Compl. ¶¶ 25-26, Ex. 1.) These mere statistics cannot be construed as implying that Respondent has serious character defects of dishonesty, immorality,

or criminality. Further, immediately following Linger's recitation of these education statistics, he expressly stated that he was not affixing blame on Respondent and explained that the Board did not hold Respondent more responsible than governors, legislators, educators, or Board Members for the education statistics. (A.R. 16-17, Compl., Ex. 1.) Moreover, Respondent does not contend that the statistics are false or fabricated by Linger to impugn her character.

Linger's Statement that the Board adopted is not only incapable of being construed as defamatory or disclosing any private facts about Respondent, but it was also privileged as the public had a legitimate interest in knowing the information concerning Respondent's employment termination. Accordingly, Respondent's claim that Linger's Statement defamed her and cast her in a false light cannot form the basis of a liberty interest creating a clearly established right that Respondent may claim Petitioners violated that is sufficient to defeat the Board's qualified immunity.

i. *Linger's Statement adopted by the Board did not create a liberty interest because it was not defamatory of Respondent.*

Linger's Statement adopted by the Board was not defamatory of Respondent as the Statement merely set forth educational statistics, after which Linger specified that the Board did not affix blame on the Respondent. In order for a public official, such as Respondent, to establish a claim for defamation she must show that:

(1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false.

Syl. pt. 1, *Hinerman v. Daily Gazette Co., Inc.*, 188 W. Va. 157, 423 S.E.2d 560 (1992), cert. denied, 507 U.S. 960 (1993). A statement may be described as defamatory "if it tends so to harm

the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 706, 320 S.E.2d 70, 77 (1984) (citation omitted). Statements are defamatory if they tend to “reflect shame, contumely, and disgrace upon [the plaintiff].” Syl. pt. 1, *Sprouse v. Clay Commc’n, Inc.*, 158 W. Va. 427, 211 S.E.2d 674 (1975). The first step is to “decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning.” Syl. pt. 6, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986). “Under West Virginia law[,] . . . Plaintiffs who are public officials or public figures must prove by clear and convincing evidence that the defendants made their defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not.” Syl. pt. 2, *Suriano v. Gaughan*, 198 W. Va. 339, 480 S.E.2d 548 (1996).

“A qualified privilege exists when a person publishes a statement in good faith about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter.” *Swearingen v. Parkersburg Sentinel Co.*, 125 W.Va. 731, 744, 26 S.E.2d 209, 215 (1943). Qualified privileges are “based upon a public policy that it is essential that true information be given whenever it is reasonably necessary for the protection of one’s own interests, the interests of third persons or certain interests of the public.” *Crump*, 173 W. Va. at 707, 320 S.E.2d at 78 (citation omitted).

Here, Linger’s Statement set forth educational statistics which Respondent has not disputed as false. Further, the public, without question, has a legitimate interest in the efficacy of public education. Thus, not only has Respondent not pled that Linger’s Statement was false, but she has not pled that the public, to whom the Statement was made, had no interest in the information provided by Linger.

ii. *Linger's Statement adopted by the Board did not cast Respondent in a false light and invade her privacy.*

Similarly, Respondent cannot establish a liberty interest in the position of Superintendent based on Linger's Statement because the Statement does not satisfy the elements of a claim for false light. To establish a false light invasion of privacy claim, Respondent must show:

(1) that there was a public disclosure by Petitioners of facts regarding Respondent; (2) that the facts disclosed were private facts; (3) that the disclosure of such facts is highly offensive and objectionable to a reasonable person of reasonable sensibilities; and (4) that the public has no legitimate interest in the facts disclosed.

Benson v. AJR, Inc., 215 W. Va. 324, 329, 599 S.E.2d 747, 752 (2004) (citation omitted). "The 'right of privacy' does not extend to communications which are privileged under the law of defamation; which concern public figures or matters of legitimate public interest; or which have been consented to by the plaintiff." Syl. pt. 9, *Crump*, 173 W. Va. at 703, 320 S.E.2d 70 at 74.

Here, Respondent, a public figure, fails to sufficiently allege in her Complaint any specific defamatory and unprivileged statement made by Linger or any Board Member. The only statement at issue is Linger's Statement that he read into the record at the meeting on November 29, 2012, as reflected in the Minutes, attached as Exhibit 1 to the Complaint. Read in its entirety, Linger's Statement is incapable of defaming Respondent as Linger mentions Respondent's name only once when he specifically denounces blaming Respondent for any shortcomings related to stated education statistics:

We are not saying that Superintendent Marple is any more responsible than governors, legislators, educators or board members for these shortcomings. We are not here to affix blame today. However, we are charged with the general supervision of schools in West Virginia and we think the people of West Virginia deserve to have these problems fixed. The board determined that in order to fix these problems we needed to head in a new direction with new leadership.

(A.R. 17, Compl., Ex. 1.) As a preliminary matter, Linger's Statement was privileged as set forth above. Similarly, Linger's Statement cannot be construed as casting Respondent in a false light as it does not publicly disclose any of Respondent's private facts and cannot be construed as highly offensive or objectionable.

Not only is Linger's Statement incapable of defaming Respondent or casting Respondent in a false light, the Statement, which Respondent alleges was "offered as a foundation for the termination" (A.R. 8-9, Compl. ¶¶ 38, 40), is privileged as the public has a legitimate interest in knowing the information contained in Linger's Statement as it relates to the Board's decision to terminate Respondent's employment and the direction of the State's education system. Thus, Linger's Statement is privileged and not actionable and cannot form the basis of a liberty interest in the at-will position of Superintendent. Because Linger's Statement did not create a liberty interest and concomitant right to due process, Petitioners are entitled to the defense of qualified immunity.

b. Respondent had no clearly established property interest in continued employment as Superintendent.

Despite Respondent's assertion that she had a property interest in the "right to continued government employment as Superintendent" (A.R. 7, Compl. ¶ 32), Respondent failed to plead a sufficient factual and legal basis to support this purported right. As a matter of fact, West Virginia law is clear that Respondent could have no such property interest in continued employment in the at-will Superintendent position. Because Respondent had no property interest in the at-will Superintendent position, her termination at the will of the Board does not support a contention that Petitioners violated her clearly established right to defeat the Board's qualified immunity.

The Supreme Court of Appeals has held that “[a] ‘property’ interest protected by due process must derive from private contract or state law, and must be more than a unilateral expectation of continued employment.” *Major*, 169 W. Va. at 251, 286 S.E.2d at 695 (emphasis added) (citing *Roth*, 408 U.S. at 577 (stating that property interests are not created by the Constitution, “they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law”)); Syl. pt. 3, *Orteza v. Monongalia Cnty. Gen. Hosp.*, 173 W. Va. 461, 318 S.E.2d 40 (1983). *Accord Bishop*, 426 U.S. at 344-45; *State ex rel. McLendon v. Morton*, 162 W. Va. 431, 437, 249 S.E.2d 919, 922 (1978); *Waite*, 161 W. Va. at 160, 241 S.E.2d at 160-61. Accordingly, “[a]lthough a government employee may have a reasonable basis for understanding terms of his employment, those understandings cannot override state law that defines the terms of employment.” Syl. pt. 2, *Freeman*, 175 W. Va. at 815, 338 S.E.2d at 417.

- i. ***No contract could have or did exist between the parties that would create a property interest on behalf of Respondent in her employment as Superintendent.***

Although Respondent pled that Petitioners breached a “contract” (A.R. 8, Compl. ¶¶ 36-37), no written or oral or express or implied contract between the parties existed to create a property interest in Respondent’s continued government employment. Significantly, Respondent alleges that she was employed by the Board, “the specifics of which employment were set out in a contract” and “[t]he terms of [which] included a provision that plaintiff would serve at the ‘will and pleasure’ of defendant Board.” (A.R. 3, Compl. ¶¶ 4-5.) A contract that provides for at-will employment cannot create a property interest. *See Orteza*, 173 W. Va. at 467, 318 S.E.2d at 46 (finding that the plaintiff had no liberty or property interest where the contract provided for termination at will). Thus, even had such a contract existed, Respondent’s reliance on a

purported contract that provided for employment at-will is, in essence, a concession that she had no property interest in continued employment.

However, assuming arguendo that a contract did exist, no contract could create a property interest in Respondent's continued employment as Superintendent. Under West Virginia law, the Board is prohibited from "contracting away" its authority to retain a Superintendent at its will and pleasure in such a way as to bind it:

Where a statute conferring the power to appoint fixes no definite term of office, but provides that the tenure shall be at the pleasure of the appointing body, the implied power to remove such appointee may be exercised at its discretion, and cannot be contracted away so as to bind the appointing body to retain him in such position for a definite, fixed period.

Syl., *Barbor v. Cnty. Court of Mercer Cnty.*, 85 W. Va. 359, 101 S.E. 721 (1920) (emphasis added); Syl. pt. 2, *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993). Further, any such contract that purports to bind an appointing body, such as the Board, to terms of employment is necessarily void. *Bogges*, 273 F. Supp.2d at 743. Accordingly, as any purported contract is void pursuant to State law, State law does not and cannot establish a property interest in continued employment. *Id.* at 744. Therefore, because the Board does not have the authority to contract away the at-will nature of the Superintendent position, any contract purporting to do so would be void.

Similarly, Respondent's claim that she and Petitioners had an implied contract of employment based upon a duty to "deal with one another in good faith and with fairness free of arbitrary, capricious or despotic action" (A.R. 3 and 8, Compl. ¶¶ 5, 36) also fails, because as a matter of law, no duty of good faith and fair dealing in at-will employment exists. Instead, the Supreme Court of Appeals has held that "[i]mposing this duty would be contrary to the general principles contained in *Barbor* and elsewhere that grant the appointing authority an unfettered

right to terminate an appointee.” *Williams*, 190 W. Va. at 208, 437 S.E.2d at 781. In *Williams*, a factually analogous case, the Supreme Court of Appeals specifically held that “W. Va. Code, 5–3–3 (1961), by providing that assistant attorneys general shall serve at the pleasure of the attorney general, defines an at-will employment allowing termination at any time with or without cause.” *Id.* at Syl. pt. 4. The *Williams* Court additionally held that “[t]he Attorney General does not owe a duty of good faith and fair dealing to an assistant attorney general with regard to employment.” *Id.* at Syl. pt. 5.

No contract does or can create a property interest in Respondent’s continued employment that would entitle her to an established right of constitutional protection from termination of at-will employment without due process. Thus, Respondent has no property interest in employment as Superintendent based on contract and Respondent’s claim of a breach of such a contract cannot defeat the Board’s qualified immunity.

ii. *State law does not create a property interest on behalf of Respondent in her employment as Superintendent.*

Because no State law exists that creates a property interest in Respondent’s continued employment as Superintendent, Respondent cannot show that Petitioners violated a clearly established right sufficient to defeat the Board’s qualified immunity by terminating her at-will employment. The Supreme Court of Appeals has held that, in addition to a protected property interest deriving from a contract, a protected property interest may also derive from State law. *Major*, 169 W. Va. at 251, 286 S.E.2d at 695. However, a government employee’s basis for her understanding of her employment “cannot override state law that defines the terms of employment.” Syl. pt. 2, *Freeman*, 175 W. Va. at 815, 338 S.E.2d at 417.

In the instant case, the constitutional and statutory provisions that create the position of Superintendent do just the opposite. The West Virginia Constitution specifically mandates that

“[t]he West Virginia board of education shall in the manner prescribed by law, select the state superintendent of free schools who shall serve at its will and pleasure.” W. Va. Const. art. XII, § 2 (emphasis added). Similarly, the West Virginia Code mandates that “[t]here shall be appointed by the state board a State Superintendent of Schools who shall serve at the will and pleasure of the state board.” W. Va. Code § 18-3-1 (emphasis added). It is unequivocal that State law creates no property interest in the position of Superintendent: the position is an at-will position in which Respondent had no expectation of continued employment.

Accordingly, the Board’s constitutionally and statutorily prescribed power to appoint and terminate the employment of the Superintendent at its will and pleasure contradicts any claim that Respondent could have a clearly established and recognized property interest in her continued employment derived from State law. As already discussed, any purported contract that attempts to bind the Board to retain an employee is necessarily void pursuant to State law, and State law does not establish a property interest in Respondent’s continued employment as Superintendent. *See Boggess*, 273 F. Supp.2d at 744.

Therefore, because State law does not create a property interest protected by due process on behalf of Respondent, Respondent does not have a clearly established right to continued employment that she may claim Petitioners violated to defeat qualified immunity.

2. Respondent was not entitled to procedural due process rights.

Because Respondent had no property and liberty interest implicated by the Board’s terminating her at-will employment, Respondent had no right to procedural due process in the form of a pre-termination notice and hearing. Thus, such purported right to these procedural safeguards cannot form the basis of a clearly established right violated by Petitioners sufficient to defeat the Board’s qualified immunity.

In order to determine if procedural safeguards against State action are required, West Virginia courts generally employ a two-step analysis. *Waite*, 161 W. Va. at 159, 241 S.E.2d at 167. Initially, the court is to “determine whether [the individual’s] interest rises to the level of a ‘liberty’ or ‘property’ interest.” *Id.* If an individual’s claims do not implicate the deprivation of a liberty or property interest, the court’s inquiry may end as the individual has no claim warranting constitutional protection. *Id.*; *Accord Freeman*, 175 W. Va. at 820, 338 S.E.2d at 421 (stating that [t]he purpose of the constitutional due process right to a hearing is to provide an opportunity for a person to vindicate his claim of entitlement. . . . No constitutional interest is served by permitting one to vindicate an interest or right to which he has no claim”) (citing *Roth*, 408 U.S. at 577).

Based on the foregoing, Respondent fails to plead a deprivation of property and liberty interests protected by the West Virginia Constitution, and thus, Respondent had no right to procedural due process. Likewise, Respondent is not entitled to the requested equitable and injunctive relief in the form of a full hearing. Accordingly, such a purported procedural due process right cannot form the basis of a clearly established right that Petitioners violated sufficient to defeat the Board’s qualified immunity.

C. Respondent fails to sufficiently plead that the Board’s discretionary acts were fraudulent, malicious, or oppressive.

Respondent fails to allege that the Board’s discretionary acts in terminating her at-will employment were fraudulent, malicious, or oppressive. Thus, Respondent fails to provide any basis to preclude the Board’s entitlement to qualified immunity for its discretionary actions in exercising and performing its duties, government function, and authority with regard to her retention as Superintendent at its will and pleasure: Petitioner’s termination of Respondent did

not violate any of her clearly established rights. Thus, for this reason too, the Board is entitled to qualified immunity.

IV. ASSIGNMENT OF ERROR 3: The Circuit Court erred by denying Linger's Motion to Dismiss because he is entitled to qualified immunity as a State official for his discretionary actions relating to terminating Respondent's at-will employment.

For primarily the same foregoing reasons and following the same analysis, Linger is entitled to qualified immunity from Respondent's suit as all of her allegations against him arise from his discretionary exercise and performance of his duties and government function as Board President in terminating Respondent's at-will employment.

Just as it shields the Board, the doctrine of qualified immunity serves to shield Linger, as a government official, from personal liability for claims arising out of the performance of discretionary functions within the scope of his authority:

A public executive official who is acting within the scope of his authority and is not covered by the provisions of W. Va. Code, 29-12A-1, *et seq.* [the West Virginia Governmental Tort Claims and Insurance Reform Act], is entitled to qualified immunity from personal liability for official acts if the involved conduct did not violate clearly established laws of which a reasonable official would have known. There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive. To the extent that *State ex rel. Boone National Bank of Madison v. Manns*, 126 W.Va. 643, 29 S.E.2d 621 (1944), is contrary, it is overruled." Syllabus, *State v. Chase Securities, Inc.*, 188 W.Va. 356, 424 S.E.2d 591 (1992).

Syl. pt. 3, *Clark*, 195 W. Va. at 273, 465 S.E.2d at 375. *Accord* Syl. pt. 3, *Robinson*, 223 W. Va. at 829, 679 S.E.2d at 661 (quoting Syl., in part, *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465 (1987)); Syl., *Chase Sec., Inc.*, 188 W. Va. at 356, 424 S.E.2d at 591.

Further, a government official's immunity is extended to "discretionary function immunity" from liability for their errors:

If a public officer is either authorized or required, in the exercise of his judgment and discretion, to make a decision and to perform acts in the making of that

decision, and the decision and acts are within the scope of his duty, authority, and jurisdiction, he is not liable for negligence or other error in the making of that decision, at the suit of a private individual claiming to have been damaged thereby.

Syl. pt. 4, *Clark*, 195 W. Va. at 273, 465 S.E.2d at 374. *Accord* Syl. pt. 3, *Robinson*, 223 W. Va. at 829, 679 S.E.2d at 661; Syl., *Chase Sec., Inc.*, 188 W. Va. at 356, 424 S.E.2d at 591; Syl., *Bennett*, 178 W. Va. at 500, 361 S.E.2d at 465.

Linger, as Board President, satisfies the threshold for entitlement to the availability of the qualified immunity defense from suit as he was a public official, who was at all times relevant to Respondent's claims, acting within the scope of his authority as Board President and is not covered by the Governmental Tort Claims and Insurance Reform Act. (A.R. 2, Compl. ¶ 3.) *See* W. Va. Code §§ 18-2-1, 18-2-4, 29-12A-3(e); *Kondos v. W. Va. Bd. of Regents*, 318 F. Supp. 394, 395 (S.D. W. Va. 1970). As already discussed, because Respondent does not allege in her Complaint that an applicable contract of insurance waives qualified immunity, and as no such waiver exists, qualified immunity is available to bar Respondent's claims relating to Linger's discretionary judgment, decisions, and actions in terminating Respondent's employment.

A. All of Respondent's allegations against Linger involve his discretionary actions and decisions in terminating Respondent's at-will employment.

Linger is entitled to qualified immunity as a State official for his discretionary actions and decisions made in his capacity as Board President relating to terminating Respondent's at-will employment as all of her allegations against him arise from his exercise of his duties as Board President. Respondent fails to allege that Linger acted outside the scope of his position as Board President or that any of Linger's actions were non-discretionary.

Respondent's specific allegations against Linger include that he called for the November 29, 2012, meeting; he called for a motion to enter executive session on November 15 and 29,

2012; he announced Respondent's employment was terminated on November 15, 2012; he recommended Respondent's employment be terminated on November 29, 2012; he voted to terminate Respondent's employment; and he read his Statement explaining the Board's decision to terminate Respondent's employment. (A.R. 4-6, Compl. ¶¶ 16, 18, 21-22, 24-25, 28, 38-39, 40-41.) These allegations without question involve Linger's discretionary actions as Board President. *See* W. Va. Code §§ 18-2-3 (providing that the "state board . . . may meet at such other times as may be necessary" and "such meetings to be held upon its own resolution or at the of the president of the state board"); 6-9A-4(a) (requiring the presiding officer during the open portion to identify authorization for executive session and present it to the governing body and general public); 6-9A-4(b)(2)(A) (requiring a majority affirmative vote for an executive session to consider matters arising from employment and discharge).

Linger's acts and/or omissions relating to his recommending that the Board terminate Respondent's employment and voting to terminate Respondent's employment clearly fall within Linger's discretionary functions as Board President. As Board President, he is tasked with the authority to make decisions on whether to retain a person as Superintendent, a position which is both constitutionally and statutorily prescribed to be an at-will position. W. Va. Const. art. XII, § 2; W. Va. Code § 18-3-1. Thus, Linger is entitled to the defense of qualified immunity for these discretionary functions.

Further, Linger and the Board are entitled to qualified immunity from Respondent's claims for false light and defamation as those claims are premised upon Linger's Statement adopted by the Board. The Statement was made and adopted by the Board during the course of terminating Respondent's employment. Thus, these acts are discretionary and subject to the defense of qualified immunity. (A.R. 8-9, Compl. ¶¶ 38-39, 40-41, Ex. 1).

Because Respondent's allegations concern Linger's discretionary government functions and acts, he is entitled to qualified immunity so long as those discretionary actions did not violate Respondent's clearly established rights or laws or were otherwise fraudulent, malicious, or oppressive.

B. Respondent fails to sufficiently plead facts to support her contention that Linger violated a clearly established right.

For the same reasons already discussed as it relates to the Board, Respondent fails to sufficiently plead a clearly established right or law that Linger violated that is sufficient to defeat his qualified immunity.

In short, as Respondent had no clearly established property interest in continued employment as Superintendent, Linger's constitutionally and statutorily prescribed discretionary vote to terminate Respondent's employment did not violate her property rights. Not only is one unable to discern from the entirety of Linger's Statement to whom Linger was referring, his Statement cannot be understood or be construed in any way to insinuate a serious character flaw such as dishonesty, immorality, or criminality sufficient to implicate Respondent's liberty interest. The education statistics Linger recited are merely statistics. He placed no blame for the statistical results on Respondent. His factual statements were made within his discretionary authority and did not implicate Respondent's liberty interests. Because Respondent's termination did not implicate a property and liberty interest, Respondent had no right to procedural due process. Thus, Respondent's purported property, liberty, and procedural due process rights cannot form the basis of a clearly established right that Respondent may claim Linger violated to defeat his qualified immunity.

Also, for the reasons already discussed, as Linger's Statement cannot be construed as defamatory or disclosing any private facts about Respondent or unprivileged statements of public

interest, any such claim that Linger's Statement defamed Respondent and cast her in a false light cannot form the basis of a clearly established right that Respondent may claim Linger violated that is sufficient to defeat his qualified immunity.

C. Respondent fails to sufficiently plead that Linger's discretionary acts were fraudulent, malicious, or oppressive.

As Respondent fails to allege that Linger's discretionary acts in terminating her at-will employment were fraudulent, malicious, or oppressive, Respondent fails to provide any basis to preclude Linger's entitlement to qualified immunity for his discretionary actions in performing his duties and government function as Board President to retain a Superintendent at the Board's will and pleasure, which did not violate any clearly established rights of Respondent. Respondent's claims that Linger's participation in her termination were fraudulent, malicious, or oppressive fail for the same reasons as those claims against the Board fail. Thus, for the same reasons that the Board is entitled to qualified immunity, Linger is entitled to qualified immunity.

V. THE PURPOSE OF QUALIFIED IMMUNITY AND PUBLIC POLICY DICTATE FINDING THAT PETITIONERS ARE IMMUNE FROM LIABILITY

The purpose of qualified immunity and public policy embodied in the constitutional and statutory prescription of the at-will Superintendent position dictate finding that Petitioners are entitled to qualified immunity from Respondent's Complaint at this juncture.

By depriving Petitioners of qualified immunity, the Circuit Court dishonors the goal of qualified immunity and the public policy embodied in the clear constitutional and statutory prescription that the position of Superintendent is an at-will position.

Allowing Respondent to proceed on her meritless claims precludes the Board, or any other State agency having similar constitutional and statutory authority, from discharging an at-will employee, essentially creating an unintended tenured position, and, thus, dishonors the clear

constitutional and statutory prescription that the position of Superintendent is an at-will position. “Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed.” Syl. pt. 1, *State v. Elder*, 152 W. Va. 571, 165 S.E.2d 108 (1968). The Supreme Court of Appeals explains its duty to give effect to legislative intent, applying clear statutory language, as follows:

This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this court to enforce legislation unless it runs afoul of the State or Federal Constitutions.

Boyd v. Merritt, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986). Here, the clear intent of the Legislature in West Virginia Code 18-3-1, consistent with the clear intent of the framers of Article XII, Section 2, of the West Virginia Constitution, was to provide for the Board’s discretionary authority to appoint and retain a Superintendent at its “will and pleasure.” Accordingly, the Court should honor and enforce the public policy embodied in the clear constitutional and statutory prescription that the position of Superintendent is at-will.

Further, allowing Respondent’s claims to proceed would likely open the Court’s floodgates to similar meritless lawsuits by similarly situated employees who are disgruntled by being discharged from their at-will position which they are not entitled to maintain indefinitely.

Especially consistent with public sentiment, Petitioners are entitled to qualified immunity at this juncture to avoid further burdens of litigation and unnecessary expenditure of vexatious costs and resources and needless delays. Petitioners have already unnecessarily expended considerable money and resources in defending Respondent’s lawsuit in both federal court and in West Virginia state court, as well as in the State’s responding to various Freedom of Information

Act requests relating to the same. Petitioners should not be further burdened by allowing Respondent to pursue her meritless claims from which Petitioners enjoy qualified immunity.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners, West Virginia Board of Education and L. Wade Linger, respectfully request that this Court: Reverse the Circuit Court's Order denying Petitioners' Motion to Dismiss, entered on November 3, 2014; remand this Civil Action to the Circuit Court for entry of an Order granting Petitioners' Motion to Dismiss and dismissing Respondent's Complaint against Petitioners with prejudice; and grant Petitioners costs and any and all other such relief allowable by law.

Respectfully submitted,

**WEST VIRGINIA BOARD OF EDUCATION
and L. WADE LINGER, JR.,**

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No. 14-1264

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**WEST VIRGINIA BOARD OF EDUCATION
and L. WADE LINGER, JR.,**

Defendants Below, Petitioners,

v.

JOREA M. MARPLE,

Plaintiff Below, Respondent.

**From the Circuit Court of Kanawha County
The Honorable James C. Stucky
Civil Action No. 14-C-731**

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioners, West Virginia Board of Education and L. Wade Linger, Jr., does hereby certify on this 4th day of **March, 2015**, that a true copy of the foregoing "***Petitioners', West Virginia Board of Education and L. Wade Linger, Jr., Brief***" was served upon counsel of record by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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