

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

AMANDA SHREWSBURY,

Plaintiff,

v.

Civil Case Action No.: 19-C-108

**THE MERCER COUNTY BOARD OF EDUCATION,
ALMA BELCHER, STEVE HAYES, AND DEBORAH
AKERS,**

Defendants.

**ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

On the 20th day of July 2022, the above-captioned matter came before the Court for hearing on Defendants,' The Mercer County Board of Education, Alma Belcher, Steve Hayes, and Deborah Akers, *Motions for Summary Judgment*. There appearing were the Plaintiff, by Counsel, James Akers, Esq.; Defendants Mercer County Board of Education and Deborah Akers, by Counsel, Jared Underwood, Esq.; Defendant, Steve Hayes, by Counsel Jan Fox, Esq.; and Defendant, Alma Belcher, by Counsel, Kermit Moore, Esq.

WHEREUPON, the Court took the matter under advisement for purposes of issuing an Order following deliberations involving the arguments of the parties. The Court having considered the pleadings, the Court file, the exhibits, the arguments of counsel, and pertinent legal authorities, and, as a result thereof, does hereby conclude that Defendants' *Motions to Dismiss* are **DENIED IN PART** and **GRANTED IN PART**.

I. BACKGROUND

Plaintiff was employed by Mercer County Public Schools as a teacher's aide from 2015-2019. During the 2018-2019 school year, Plaintiff worked in this capacity in a special-needs/pre-k classroom under the direction of Defendant, Alma Belcher, at Cumberland Heights Elementary School. During this time period, Plaintiff allegedly informed the Principal, Defendant, Steve Hayes, of alleged abuse against the students in her classroom by Defendant Belcher. Reportedly, Plaintiff first told Defendant Hayes about the alleged abuse no later than December 6, 2018. Prior to reporting the alleged abuse, Plaintiff alleges she had no documented negative performance reviews. Eventually, in January of 2019, Plaintiff reported the alleged abuse to the West Virginia Department of Health and Human Resources Child Protective Services and to the Bluefield, West Virginia Police Department. At issue in this matter is an alleged incident that occurred in the lunchroom between Plaintiff and Defendant Belcher on January 4, 2019. Plaintiff alleges she was comforting student victims of Defendant Belcher when Defendant Belcher grabbed Plaintiff twice and screamed at her. Defendants, and other witnesses, contend Plaintiff was the aggressor and instigator of the confrontation and that Defendant Belcher remained calm as she attempted to explain to Plaintiff that she was attempting to separate children whose parents did not want to sit together. Further at issue is whether Plaintiff was terminated in January 2019. Allegedly, on January 11, 2019, Defendant, Superintendent of the Mercer County School Board at that time, Deborah Akers, instructed Defendant Hayes to inform Plaintiff she should no longer accept employment opportunities in Mercer County, even if contacted to do so, however, Defendants contend Plaintiff was never terminated and was in fact called out for employment opportunities after January 11, 2019. Defendants further contend that Plaintiff accepted employment opportunities after January 11,

2019 and was contacted on five hundred and ninety three (593) occasions where she was not available or did not answer. Finally, Plaintiff contends she was removed from her full-time position at Cumberland Heights after reporting the alleged abuse, whereas Defendants argue Plaintiff's position at Cumberland Heights was as a temporary substitute teacher's aide, a full-time, permanent teacher's aide position was advertised for, Plaintiff applied for said position, and plaintiff was denied the position.

II. MOTIONS FOR SUMMARY JUDGMENT

On May 6, 2022, Defendants, the Mercer County Board of Education and Deborah Akers, by Counsel, filed their Motions for Summary Judgment. The basis of their Motions were that Defendants were entitled to qualified immunity as to all claims asserted against them, that employment retention and termination were discretionary decisions further immune to suit, that Plaintiff failed to establish Defendants' acts or omissions violated any clearly established constitutional right or law which a reasonable person would have known, that Plaintiff failed to meet her *prima facie* burden of establishing a violation of public policy in effectuating Plaintiff's termination, that Plaintiff was never, in fact, terminated, that plaintiff failed to meet her *prima facie* burden in alleging negligent infliction of emotional distress, that Defendants' conduct was not so "outrageous" to constitute intentional infliction of emotional distress, that Count V of Plaintiff's Complaint, negligent permission/failure to remediate a civil assault and battery is not a cognizable cause of action, that Count VI of Plaintiff's Complaint, willful misconduct/ punitive damages, is not a stand-alone cause of action, and finally that Plaintiff failed to meet her *prima facie* burden in alleging Count VII, negligent supervision/retention, as Plaintiff failed to identify any actual acts that resulted in negligent supervision by Defendants.

On May 6, 2022, Defendant, Steve Hayes, by Counsel, filed his Motion for Summary Judgment. The basis of his Motion was that Defendant did not have the power to terminate or employ teachers in his school as those decisions rested with the Mercer County Board of Education, that school boards' decisions to terminate or employ individuals are discretionary decisions for said school boards to make, that the facts contained in Plaintiff's complaint fail to form a basis for a claim of negligent infliction of emotional distress, that Defendant's conduct was not so "outrageous" to establish a claim of intentional infliction of emotional distress, that Defendant is entitled to statutory immunity as to Count V of Plaintiff's complaint alleging Defendant negligent permission/failure to remediate a civil assault and battery, that Count VI of Plaintiff's Complaint, willful misconduct/punitive damages, is not a stand-alone cause of action, and that Plaintiff failed allege any negligent conduct to establish Count VII of her Complaint, negligent supervision/retention.

On May 13, 2022, Defendant, Alma Belcher, by Counsel, filed her Motion for Summary Judgement incorporating and reasserting the arguments contained in Defendants,' the Mercer County Board of Education and Deborah Akers, Motions for Summary Judgement.

On June 3, 2022, Plaintiff, by Counsel, filed her Combined Responses to Defendants' Motions for Summary Judgement. Plaintiff contends that Defendants are not entitled to qualified immunity, that Plaintiff established a clearly established right, the statutory, regulatory, and common law prohibitions against abuse and neglect combined with a right to report, that was violated by her termination, that Defendants' insurance policy waives the defense of qualified immunity as it provides coverage for indemnity, that Plaintiff raised a recognized claim of negligent infliction of emotional distress and the seriousness of her emotional distress is a question of fact for the jury to determine, that the issue of intentional infliction of emotional distress is a question of fact for the

jury to determine, that Plaintiff suffered adverse employment action due to her reporting the alleged abuse by Defendant Belcher as she was removed from her full time position at Cumberland Heights, that Count VI of her Complaint alleges willful misconduct which is a stand-alone claim, and finally, that Defendants' alleged negligent supervision and conduct is a question of fact for the jury to determine.

On July 7, 2022, Defendant, Steve Hayes, by Counsel, filed his Reply to Plaintiff's Combined Responses to Defendants' Motions for Summary Judgment. Defendant argues Plaintiff was never terminated and Defendant did not have the authority to terminate her, Plaintiff failed to sufficiently allege claims establishing wrongful acts or omissions that caused "severe" emotional distress, Defendant is statutorily immune from suit alleging negligence/civil assault battery and Plaintiff stated in her Response she is not seeking damages from Defendant regarding that claim, that willful misconduct is not a stand-alone claim as it is so connected to a claim of negligence, it is instead a level of intent that negates certain defenses in a negligence action, that Plaintiff does not have standing to assert a claim of negligent retention/supervision of certain other Defendants as she cannot pursue the claims of a third party, there is no implied, private cause of action for a violation of the Child Welfare Act, only criminal penalties, the facts of the complaint do not establish a claim for negligent infliction of emotional distress, and, finally, that in addressing a claim for intentional infliction of emotional distress, the question of whether said alleged conduct was so "outrageous" is a question of law rather than a question of fact.

On July 8, 2022, Defendants, the Mercer County Board of Education and Deborah Akers, by Counsel, filed their Reply to Plaintiff's Combined Responses to Defendants' Motion for Summary Judgment. Defendants contend they are entitled to qualified immunity in employment claims, as well as in claims involving discretionary judgements that do not violate a clearly established

statutory or constitutional right of which a reasonable person would have known, the Child Welfare Act does not create a private cause of action for a violation of said Act, the Plaintiff failed to allege any acts or omissions which were in violation of a clearly established statutory or constitutional right of which a reasonable person would have known, Defendant's liability insurance contract does not waive a claim of immunity as it explicitly states so in said contract, the Defendants incorporated the arguments contained in Sections III A and B of Defendant Steve Hayes Reply to Plaintiff's Combined Responses to Defendants' Motions for Summary Judgment, that the Defendants are entitled to qualified immunity in regard to negligence claims, that Plaintiff was never terminated and failed to specifically identify a public policy that Defendants' violated in her Complaint, that Plaintiff failed to meet her *prima facie* burden in asserting a claim for negligent infliction of emotional distress, that Plaintiff did not establish conduct so "outrageous" to bring a claim of intentional infliction of emotional distress, and, finally, that there is no viable cause of action for negligent permission/failure to remedy a civil assault and battery.

III. HEARING HELD JULY 20, 2022

The Court held a hearing regarding the Defendants' Motions for Summary Judgment on July 20, 2022. Counsel for Defendants, the Mercer County Board of Education and Deborah Akers, argued that Plaintiff was never terminated and her employment status with Mercer County Schools remains the same today as in January 2019, any sort of adverse employment action Plaintiff allegedly suffered was the result of her verbal altercation with Defendant Belcher, Defendants are entitled to qualified immunity in claims involving employment decisions and negligence, no constitutional or statutory right is alleged to have been infringed upon, and the School Board's insurance policy did not waive the defense of immunity. At the close of their arguments, Defendants moved the Court to grant their Motions for Summary Judgment.

Defendant, Steve Hayes, by Counsel argued that Defendant did not have the power to hire or fire employees and that Plaintiff was never, in fact, terminated. Defendant moved the Court to grant his Motion for Summary Judgment.

Defendant, Alma Belcher, by Counsel, argued Defendant Belcher was the victim of Plaintiff and was also entitled to qualified immunity. Defendant moved the Court to grant her Motion for Summary Judgment.

Plaintiff, by Counsel, responded to Defendants' arguments stating material facts were disputed in this matter, Defendants are not entitled to qualified immunity and qualified immunity is not a blanket defense, and that Plaintiff lost her full-time position at Cumberland Heights within days of reporting Defendant Belcher's alleged abuse of children in her classroom to the West Virginia Department of Health and Human Resources and the Bluefield, West Virginia Police Department.

Defendants, the Mercer County Board of Education and Deborah Akers, by Counsel, replied to Plaintiff's arguments contending that qualified immunity is routinely granted to school boards when applicable, that this employment claim does not involve an infringement of a constitutional or statutory right, and finally that there has been no change to Plaintiff's employment status.

Defendant, Steve Hayes, by Counsel, replied to Plaintiff's arguments and stated Plaintiff's position was temporary, Plaintiff was aware her position was temporary, and Plaintiff was never, in fact, discharged.

Plaintiff, by Counsel, argued finally, and stated that Plaintiff did suffer adverse employment action as a result of making her reports of alleged abuse by Defendant Belcher.

IV. STANDARD OF REVIEW

Summary judgment when sought “shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” W. VA. R. CIV. P. 56(c). “If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.” W. VA. R. CIV. P. 56(d).

“Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syl. Pts. 4 and 5. *Swears v. R.M. Roach and Sons, Inc.*, 225 W. Va. 699, 696 S.E.2d 1 (2010).

V. DISCUSSION

A. *Defendant, Steve Hayes, Motion for Summary Judgment*

1. *COUNTS I and II of Plaintiff's Complaint*

It is clear after reviewing the complaint, the exhibits filed in this matter, the arguments advanced by Counsel in writing and orally, and the relevant case law that Defendant Hayes did not have the authority to terminate or retain employees at Cumberland Heights Elementary School.

Furthermore, the Court finds that the Child Welfare Act does not create a private cause of action against Defendant Hayes. "The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government." Syl. Pt. 2. *Arbaugh v. Board of Educ., County of Pendleton*, 214 W. Va. 677, 591 S.E.2d 235 (2003). The Plaintiff is not a member of the class for whose benefit the statute was enacted, as she was not an abused child rather a reporter of alleged abuse. The legislature expressly provided for criminal punishment for failure to report alleged abuse but declined to expressly create a private cause of action.

Therefore, Defendant Hayes' Motions for Summary Judgment as to Counts I and II of the Plaintiff's Complaint are **GRANTED**.

2. COUNT III of Plaintiff's Complaint

“The Court's analysis of Defendants' argument is straightforward. Under West Virginia law, a “defendant may be held liable for negligently causing a plaintiff to experience serious emotional distress, after the plaintiff witnesses a person closely related to the plaintiff suffer critical injury or death as a result of the defendant's negligent conduct, even though such distress did not result in physical injury.” *Heldreth v. Marrs*, 425 S.E.2d 481, 482, Syl. Pt. 1 (W. Va. 1992). Though these doctrinal strictures have since been somewhat loosened, *see, e.g., Ricotilli v. Summersville Hosp.*, 425 S.E.2d 629, 630, Syl. Pt. 2 (W. Va. 1992) (creating exception, “often referred to as the ‘dead body exception,’ permitt[ing] recovery for emotional damages upon proof of the negligent mishandling of a corpse”), a plaintiff cannot succeed on a NIED theory where the challenged actions are directed solely at herself, *Ali v. Raleigh Cnty.*, No. 5:17-cv-03386, 2018 WL 1582721, at *12 (S.D.W. Va. Mar. 29, 2018). Here, Plaintiff points only to her own alleged injuries as the factual basis for her NIED claim. Her claim is deficient as a matter of law, and summary judgment in Defendants' favor is therefore warranted.” *Jones v. Martin Transport, Inc.*, 2020 WL 1802934.

Plaintiff cites to *Rodriguez v. Consolidated Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999) to argue that Plaintiff can succeed on a NIED theory where the challenged actions are directed solely at herself. This Court finds no merit to this assertion and finds that the *Rodriguez* decision is distinguishable from the facts at bar as that case dealt with a Plaintiff who was discharged after causing an accident wherein one of his subordinates was killed. The Court does not find that Plaintiff's alleged threats of termination as to Defendant Hayes meets a *prima facie* threshold to establish her NIED claim. Therefore, Defendant Hayes' Motion for Summary Judgment as to Count III of Plaintiff's Complaint is **GRANTED**.

3. COUNT IV of Plaintiff's Complaint

“In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress; and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.” *Herbert J. Thomas Memorial Hospital Association v. Nutter*, 238 W. Va. 375, 389, 795 S.E.2d 530, 544 (2016). “A defendant cannot be held liable for a singular act that is merely “inconsiderate and unkind.” *Id.* at 390, 54. “With respect to the first of these factors, “whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.” *Id.* at 421

“Although ‘there is no bright line separating conduct that may reasonably considered outrageous from conduct that may not, *see Lambert v. Hall*, No. 5:17-cv-01189, 2017 WL 2873050, at *4 (S.D.W. Va. July 5, 2017), conduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent does not constitute outrageous conduct.” *Courtney v. Courtney*, 413 S.E.2d 418, 423–24 (W. Va. 1991). “Indeed, ‘[i]t is not enough that an actor act with tortious or even criminal intent’ to meet this threshold. ‘The extreme and outrageous requirement is a notoriously high burden to meet,’ and the loutish statements at issue here are insufficient to do so. Defendants' Motion is therefore granted with respect to Plaintiff's IIED claim.” *Jones v. Martin Transport, Inc.*, 2020 WL 1802934.

The Court does not find that Plaintiff's alleged threats of termination as to Defendant Hayes meets a *prima facie* threshold to establish her IIED claim. Therefore, Defendant Hayes' Motion for Summary Judgment as to Count III of Plaintiff's Complaint is **GRANTED**.

4. *COUNTS V, VI, and VII of Plaintiff's Complaint*

"Governmental Tort Claims and Insurance Reform Act provides that employees of political subdivisions are immune from personal tort liability unless (1) his or her acts or omissions were manifestly outside scope of employment or official responsibilities, (2) his or her acts or omissions were with malicious purpose, in bad faith, or in wanton or reckless manner, or (3) liability is expressly imposed upon employee by statute. W. Va. Code § 29-12A-5(b)." Syl. Pt. 3. *Moore By and Through Knight v. Wood County Bd. of Edu.*, 200 W. Va. 247, 489 S.E.2d 1 (1997)

"A negligent supervision claim prevails when the party shows that the employer failed to supervise its employee, and as a result, the employee committed a negligent act and caused injury." *Taylor v. Cabell Huntington Hosp., Inc.*, 208 W. Va. 128, 134, 538 S.E.2d 719, 725 (2000).

Neither the complaint nor the supporting materials contain any indication that Defendant Hayes acted outside the scope of his employment or that he acted with a malicious purpose, in bad faith, or in a reckless manner in allegedly failing to supervise Plaintiff or Defendant Belcher. Plaintiff argues this failure to supervise resulted in a battery to her person however the Court finds upon reviewing the record that Plaintiff never insinuated she was fearful of Defendant Belcher or reported threats of battery or prior acts of battery that would warrant Defendant Hayes to heighten his level of supervision. Similarly, there is no other statutory provision imposing liability on the principal. Further, for reasons discussed above, the Court does not find Defendant

Hayes' failure to report the alleged abuse of students in her classroom to be a cognizable cause of action against Defendant Hayes. Therefore, Defendant Hayes' Motion for Summary Judgement as to Count V, VI, and VII of Plaintiff's Complaint is **GRANTED**.

B. Defendant, Alma Belcher's, Motion for Summary Judgement

1. For the reasons discussed in the Court's discussion of Defendant Hayes' Motion for Summary Judgement, the Court **GRANTS** Defendant, Alma Belcher's, Motion for Summary Judgement as to Counts I, II, III, IV, V, VI, and VII of the Complaint.

C. Defendants, Mercer County Board of Education's and Deborah Akers', Motions for Summary Judgement

1. COUNTS I and II of Plaintiff's Complaint

"County boards of education have substantial discretion in matters relating to the hiring, assignment, transfer, and promotion of school personnel. Nevertheless, this discretion must be exercised reasonably, in the best interests of the schools, and in a manner which is not arbitrary and capricious." *McCann v. Lincoln County Board of Education*, 244 W. Va. 66, 72, 851 S.E.2d 512, 518 (2020). *Doe v. Jefferson Area Local Sch. Dist.*, 97 Ohio App.3d 11, 646 N.E.2d 187 (1994) (school board is immune from negligent hiring and supervision claims).

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.* 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. *West Virginia Regional*

Jail and Correctional Facility v. A.B., 234 W. Va. 492, 499, 503 S.E.2d 751, 762 (2014). 503, 762. (quoting *State v. Chase Securities*, 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. If the plaintiff identifies a clearly established right or law which has been violated by the acts or omissions of the State, its agencies, officials, or employees, or can otherwise identify fraudulent, malicious, or oppressive acts committed by such official or employee, the court must then determine whether such acts or omissions were within the scope of the public official or employee's duties, authority, and/or employment.” *Id.* at 507-508, 766-767.

In addressing a claim for wrongful discharge, the Court is to consider four factors in order determine “whether an employee has successfully presented a claim of relief for wrongful discharge in contravention of substantial public policy[.]” *Herbert J. Thomas Memorial Hospital Association v. Nutter*, 238 W. Va. 375, 385, 795 S.E.2d 530, 540 (2016). The four factors to consider are as follows:

1. That a clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the *clarity* element).
2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the *jeopardy* element).
3. The plaintiff's dismissal was motivated by conduct related to the public policy (the *causation* element).
4. The employer lacked overriding legitimate business justification for the dismissal (the *overriding justification* element). *Id.*

“Under this test, a plaintiff cannot simply cite a source of public policy and then make a bald allegation that the policy might somehow have been violated. There must be some elaboration upon the employer's act jeopardizing public policy and its nexus to the plaintiff's discharge. ‘The mere citation of a statutory provision is not sufficient to state a cause of action for retaliatory discharge without a showing that the discharge violated the public policy that the cited provision clearly mandates.’” *Id.*

Defendants argue that Plaintiff has not met her burden of establishing that its actions violated a public policy. The Court disagrees. Under the Child Welfare Act, Plaintiff was a mandatory reporter of child abuse. The Court takes guidance from the Supreme Court Nebraska when it held the discharge of a nursing home employee after she reported alleged incidents of elderly abuse was a violation of public policy. “The APSA makes a clear public policy statement by utilizing the threat of criminal sanction to ensure the implementation of the reporting provisions set forth to protect the vulnerable adults with which the APSA is concerned. Thus, we determine that a public policy exception to the employment-at-will doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for making a report of abuse as mandated by the APSA. *Wendeln v. The Beatrice Manor, Inc.*, 271 Neb. 373, 387-388, 712 N.W.2d 226, 239-240, (Sup. Ct. Neb. 2006).

The Court finds that whether Plaintiff suffered adverse employment action is a question of fact for the jury. The Court further finds that whether the Defendants had an overriding legitimate business justification for the dismissal is also a question of fact for the jury. The Complaint, the Motions for Summary Judgement, the responses and replies, and the depositions all indicate there is a genuine issue of material fact as to whether the Plaintiff suffered an adverse

employment action motivated by her reports of abuse and neglect as well as whether any adverse employment action was the result of Plaintiff's confrontation with Defendant Belcher. Who was the victim and who was the aggressor are questions of fact for the jury. The Court finds that any alleged adverse employment action which was the result of Plaintiff reporting alleged abuse in her classroom would be in direct violation of the public policy enacted to guard a protected class of individuals: children who are abused and/or neglected. Employees who report such abuse or neglect, as mandated, cannot do so if they fear negative employment retaliation for doing so and this constitutes a violation of public policy. Furthermore, the Court finds that alleged negative employment action would violate clearly established laws of which a reasonable official would have known, as all parties in this case knew of the duty to report alleged abuse and neglect and it is reasonable to assume that Plaintiff had a right not to face adverse employment actions because of her reports. Therefore, Defendants' arguments as to qualified immunity and discretionary employment decisions do not apply to the facts of this case, and their Motions for Summary Judgment as to Counts I and II of Plaintiff's Complaint are **DENIED**.

2. COUNT III of Plaintiff's Complaint

"The Court's analysis of Defendants' argument is straightforward. Under West Virginia law, a "defendant may be held liable for negligently causing a plaintiff to experience serious emotional distress, after the plaintiff witnesses a person closely related to the plaintiff suffer critical injury or death as a result of the defendant's negligent conduct, even though such distress did not result in physical injury." *Heldreth v. Marrs*, 425 S.E.2d 481, 482, Syl. Pt. 1 (W. Va. 1992). Though these doctrinal strictures have since been somewhat loosened, *see, e.g., Ricotilli v. Summersville Hosp.*, 425 S.E.2d 629, 630, Syl. Pt. 2 (W. Va. 1992) (creating exception, "often

referred to as the 'dead body exception,' permitt[ing] recovery for emotional damages upon proof of the negligent mishandling of a corpse”), a plaintiff cannot succeed on an NIED theory where the challenged actions are directed solely at herself, *Ali v. Raleigh Cnty.*, No. 5:17-cv-03386, 2018 WL 1582721, at *12 (S.D.W. Va. Mar. 29, 2018). Here, Plaintiff points only to her own alleged injuries as the factual basis for her NIED claim. Her claim is deficient as a matter of law, and summary judgment in Defendants' favor is therefore warranted.” *Jones v. Martin Transport, Inc.*, 2020 WL 1802934.

Plaintiff cites to *Rodriguez v. Consolidated Coal Co.*, 206 W. Va. 317, 524 S.E.2d 672 (1999) to argue that Plaintiff can succeed on a NIED theory where the challenged actions are directed solely at herself. This Court finds no merit to this assertion and finds that the *Rodriguez* decision is distinguishable from the facts at bar as that case dealt with a Plaintiff who was discharged after causing an accident wherein one of his subordinates was killed. The Court does not find that Defendants' alleged threats of termination or even an actual termination by Defendants meets a *prima facie* threshold to establish her NIED claim. Therefore, Defendants Mercer County Board of Education's and Deborah Akers' Motions for Summary Judgment as to Count III of Plaintiff's Complaint are **GRANTED**.

3. *COUNT IV of Plaintiff's Complaint*

“In order for a plaintiff to prevail on a claim for intentional or reckless infliction of emotional distress, four elements must be established. It must be shown: (1) that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency; (2) that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct; (3) that the actions of the defendant caused the plaintiff to suffer emotional distress;

and, (4) that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.” *Herbert J. Thomas Memorial Hospital Association v. Nutter*, 238 W. Va. 375, 389, 795 S.E.2d 530, 544 (2016). “A defendant cannot be held liable for a singular act that is merely “inconsiderate and unkind.” *Id.* at 390, 54. “With respect to the first of these factors, “whether conduct may reasonably be considered outrageous is a legal question, and whether conduct is in fact outrageous is a question for jury determination.” *Id.* at 421. “Although ‘there is no bright line separating conduct that may reasonably considered outrageous from conduct that may not, *see Lambert v. Hall*, No. 5:17-cv-01189, 2017 WL 2873050, at *4 (S.D.W. Va. July 5, 2017), conduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent does not constitute outrageous conduct.” *Courtney v. Courtney*, 413 S.E.2d 418, 423–24 (W. Va. 1991). “Indeed, ‘[i]t is not enough that an actor act with tortious or even criminal intent’ to meet this threshold. ‘The extreme and outrageous requirement is a notoriously high burden to meet,’ and the loutish statements at issue here are insufficient to do so. Defendants’ Motion is therefore granted with respect to Plaintiff’s IIED claim.” *Jones v. Martin Transport, Inc.*, 2020 WL 1802934.

The Court does not find that Defendants’ alleged threats of termination or even an actual termination by Defendants meets a *prima facie* threshold to establish her IIED claim. Therefore, Defendants Mercer County Board of Education’s and Deborah Akers’ Motions for Summary Judgment as to Count IV of Plaintiff’s Complaint are **GRANTED**.

4. COUNTS V and VI of Plaintiff’s Complaint

“Negligence conveys the idea of heedlessness, inattention, inadvertence; willfulness and wantonness convey the idea of purpose or design, actual or constructive. In some jurisdictions they are used to signify a higher degree of neglect than gross negligence. ‘In order that one may

be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.” *Stone v. Rudolph*, 127 W. Va. 335, 32 S.E.2d 742, 749 (1944). “Negligence and willfulness are mutually exclusive terms which imply radically different mental states. ‘Negligence’ conveys the idea of inadvertence as distinguished from premeditation or formed intention. An act into which knowledge of danger and willfulness enter is not negligence of any degree, but is willful misconduct.” *Id.* at 748.

“Under West Virginia law, the distinction between negligence and willful and wanton conduct rests on the requisite mental state... [u]nder West Virginia law, the elements of a negligence action are: (1) the existence of a duty, (2) the breach of that duty, (3) loss or damage to another caused by the breach, and (4) actual loss or damage to another... [t]o establish willful and wanton conduct under West Virginia law, a plaintiff must show that the defendant was conscious of its conduct, and conscious that injury would likely or probably result from its conduct, and that with reckless indifference to consequences it consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.” *Letart v. Union Carbide Corporation*, 461 F. Supp.3d 391, 395 (2020).

In the case at bar, Plaintiff attempts to allege negligence and willful misconduct, two separate causes of action, based on the same facts and circumstances. Plaintiff alleges, the Defendants failed to appropriately supervise Defendant Belcher and as a direct result of this lack of appropriate supervision, Plaintiff suffered a battery at the hands of Defendant Belcher. Nowhere in the record does Plaintiff establish she had reason to fear Defendant Belcher nor that

she informed any superiors of threats or prior batteries on Plaintiff by Defendant Belcher. Because the Court does not find that Plaintiff alleged facts in her Complaint to establish willful and wanton conduct, Defendants, Mercer County Board of Education's and Deborah Akers', Motions for Summary Judgement as to Count VI of the Indictment are **GRANTED**.

As to Count V of the Complaint, the Court finds that Plaintiff has established a question of material fact as to negligence. The Defendants had a duty to properly supervise Plaintiff and Defendant Belcher and under their supervision, Plaintiff allegedly suffered a battery at the hands of Defendant Belcher. The Court relies on case law wherein the Supreme Court of Appeals of West Virginia upheld a claim of negligence per se when the Assistant Principal verbally assaulted the Plaintiff causing Plaintiff's damages. "As a direct and proximate result of Defendant HCBE's [the Board's] liability through its employee, agent, and representative [the Assistant Principal], [the student] suffered personal injuries and damages, including but not limited to suffering and mental anguish, past and future lost enjoyment of life, past and future humiliation, embarrassment, indignity, and shame, economic damages, diminished earning capacity, and future lost wages. This conduct alleged in support of the Petitioners' negligence per se claim does not involve either the failure to adopt or the adoption of a policy for which immunity is afforded to the Board. *See* W. Va. Code § 29-12A-5(a)(4). Rather, these allegations sound in negligence and complement the allegations that the Board negligently retained the Assistant Principal once it became aware of his conduct set forth in Count 6 of the Petitioners' complaint and discussed *infra*. Because the Act does not afford immunity for negligence claims, the Petitioners' claim for negligence per se alleging the Board's violation of its policy is not automatically precluded by the Board's assertion of immunity." *C.C. v. Harrison County Board of Education*, 245 W. Va. 594, 603, 858-859 S.E.2d 762, 770-771 (2021). Whether the alleged

battery occurred and whether the Defendants breached their duty to supervise are questions of fact for the jury. Therefore, Defendants, Mercer County Board of Education's and Deborah Akers' Motions for Summary Judgment as to Count V of the Complaint are **DENIED**.

5. *COUNT VII of Plaintiff's Complaint*

"The second error assigned by the Petitioners concerns the circuit court's dismissal of Count 6 of the Petitioners' complaint in which they alleged causes of action for negligent retention, hiring, and supervision. Although the Petitioners intimated at oral argument that these three charges constitute a single claim, we find that each component has its own discrete elements such that three separate claims for relief are alleged in this count, and, therefore, we will consider whether the Petitioners' complaint sufficiently states a claim for relief as to each such issue." *C.C. v. Harrison County Board of Education*, 245 W. Va. 594, 604, 859 S.E.2d 762, 773 (2021).

"Although our body of caselaw concerning negligent supervision is sparse, our current definition of this cause of action requires, as a predicate prerequisite of a negligent supervision claim against an employer, underlying conduct of the supervised employee that also is negligent." *Id.* at 606 and 774. Because the West Virginia Supreme Court of Appeals has found the causes of action for negligent supervision and retention to be separate causes of action, the Court will address each cause of action under Count VII of Plaintiff's Complaint individually. Because the alleged battery of Plaintiff by Defendant Belcher is a requisite element of the claim for negligent supervision, and whether the battery in fact occurred is a question of fact for the Jury, Defendants, Mercer County Board of Education's and Deborah Aker's, Motions for Summary Judgment as to the claim of negligent supervision under Count VII of the Indictment is **DENIED**.

With respect to a claim of negligent retention, we have recognized that, to hold an employer liable for negligent retention, the employer must have been able to foresee “the possible risk of harm or injury to co-workers or third parties that could result from the conduct of an unfit employee.” *Id.* at 608 and 776 (citing *McCormick v. W. Va. Dep’t of Pub. Safety*, 202 W. Va. 189, 193, 503 S.E.2d 502, 506 (1998)). Because the record fails to demonstrate Plaintiff informed her supervisors she had reason to fear Defendant Belcher nor that Plaintiff reported threats or prior batteries on Plaintiff by Defendant Belcher, the Court does not find that Plaintiff’s alleged battery by Defendant Belcher was the type of harm or injury Defendants could foresee. Therefore, Defendants, Mercer County Board of Education’s and Deborah Akers’, Motions for Summary Judgment as to the claim of negligent retention under Count VII of the Indictment are **GRANTED**.

WHEREFORE, the Court does hereby **ORDER, ADJUDGE, and DECREE** as follows:

1. Defendant, Steve Hayes’, Motion for Summary Judgment as to Counts I, II, III, IV, V, VI, and VII of Plaintiff’s Complaint is **GRANTED**.
2. Defendant, Alma Belcher’s, Motion for Summary Judgment as to Counts I, II, III, IV, V, VI, and VII of Plaintiff’s Complaint is **GRANTED**.
3. Defendants, Mercer County Board of Education’s and Deborah Akers’, Motions for Summary Judgment as to Counts III, IV, VI, and the claim of negligent retention found in Count VII of Plaintiff’s Complaint are **GRANTED**. Defendants, Mercer County Board of Education’s and Deborah Akers’, Motions for Summary Judgment as to Counts I, II, V, and the claim of negligent supervision found in VII of Plaintiff’s Complaint are **DENIED**.

4. The Clerk is directed to submit copies of this *Order* to all counsel of record.

ENTER: this 1st day of August, 2022.

/s/ Mark Wills, Judge
9th Judicial Circuit