IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CYNTHIA ZURCHIN, Ed.D. Plaintiff, v. AMBRIDGE AREA SCHOOL DISTRICT, ET AL. Defendants.	)	Civil Action No. 2:17-cv-00836-NBF JURY TRIAL DEMANDED

BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO RULE 12(b)(6)

AND NOW comes Defendant MEGAN MEALIE, by and through counsel, DICKIE, McCAMEY & CHILCOTE, P.C., and files this Brief in Support of her Motion to Dismiss Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

I. STATEMENT OF THE CASE

Plaintiff initiated this case by filing suit in the United States District Court for the Western District of Pennsylvania, against Ambridge Area School District ("Ambridge SD"), and current and former members of Ambridge SD school board (i) Robert Keber, (ii) Roger Kowal, (iii) Kimberly Locher, and (iv) Brian Padgett.[1] Also included is former Assistant to the Superintendent Megan Mealie (collectively the "Defendants"). Plaintiff brings a total of nine counts against the Defendants, individually and collectively, arising from and connected to her employment as Superintendent of Ambridge SD.

[1] The Complaint states that Plaintiff filed a Charge of Employment Discrimination with the Equal Employment Opportunity Commission and Pennsylvania Human Relations Commission prior to bringing suit. Megan Mealie was not a named party to either action.

Plaintiff raises a total of three counts against Defendant Megan Mealie: two counts pertaining to alleged deprivations of constitutionally-protected rights, 42 U.SC. § 1983 and 42 U.S.C. § 1985(3); and a state claim for tortious interference with contractual relations.

Plaintiff's constitutional claims allege that as Superintendent, Plaintiff was subject to intentional employment discrimination because of her gender, specifically a hostile working environment unlawfully created by the Defendants that culminated in her constructive discharge. *See ECF#1 generally.* She has pled acts that took place during her employment as Superintendent from June 2013 until October 2015 that she alleges evidence a pattern of behavior constituting a hostile working environment. *Id.* Separately, Plaintiff alleges that the individual Defendants, including Megan Mealie, conspired to violate her constitutional rights. Plaintiff seeks compensatory damages for alleged physical harm as well as lost and future income and punitive damages.

The Complaint is facially inadequate because it does not allege facts against Megan Mealie that support the claims raised against her. Moreover, as to the Section 1983 claim, because Plaintiff admits she was Megan Mealie's supervisor, Megan Mealie did not act under color of law. In addition, because the named Defendants were all agents of Ambridge SD, they were not capable of forming a conspiracy. For the same reason, Plaintiff's state claim alleging tortious interference also fails. For the reasons set forth herein, Megan Mealie seeks dismissal of all of the counts against her.

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits courts to dismiss cases in which "a complaint states a claim based upon a wrong for which there is clearly no remedy, or a

claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted." *Port Authority v. Arcadian Corp*., 189 F.3d 305, 312 (3d Cir. 1999). A Complaint must be dismissed for failure to state a claim if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The statement of the claim must include plausible factual allegations concerning all material elements of the claim. *See Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009).

By contrast, "[b]are-bones" allegations cannot survive a motion to dismiss; and "threadbare recitals" of a cause of action's elements, supported by mere conclusory statements do not suffice. *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). A plaintiff may also not rely on mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). The Court need not accept inferences drawn by the Plaintiff, nor draw inferences themselves, if they are unsupported by the facts as set forth in the complaint. *See California Public Employees Retirement System v. The Chubb Corporation*, 394 F.3d 126, 143 (3d Cir. 2004).

III. STATEMENT OF THE ISSUES

1. WHETHER THE COMPLAINT FAILS TO ALLEGE FACTS SUFFICIENT TO STATE CLAIMS FOR RELIEF AGAINST MEGAN MEALIE THAT ARE FACIALLY PLAUSIBLE.

   Suggested Answer: Yes

2. WHETHER THE COMPLAINT AT COUNT IV: 42 U.S.C. § 1983 FAILS TO STATE A CLAIM AGAINST MEGAN MEALIE BECAUSE SHE ACTED AS PLAINTIFF'S SUBORDINATE, AND AS PLED COULD NOT SATISFY SECTION 1983'S COLOR OF LAW REQUIREMENT.

   Suggested Answer: Yes

3. WHETHER THE COMPLAINT AT COUNT VI: 42 U.S.C. § 1985(3) FAILS TO STATE A CLAIM FOR CONSPIRACY WHERE MEGAN MEALIE AND THE OTHER NAMED INDIVIDUAL DEFENDANTS WERE AGENTS OF THE AMBRIDGE SD.

   Suggested Answer: Yes.

4. WHETHER MEGAN MEALIE IS ENTITLED TO QUALIFIED IMMUNITY BECAUSE BY HER ACTIONS AS PLED SHE DID NOT VIOLATE CLEARLY ESTABLISHED LAW.

   Suggested Answer: Yes.

5. WHETHER THE COMPLAINT AT COUNT VIII FAILS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE IN A CONTRACTUAL RELATIONSHIP WHERE MEGAN MEALIE AND THE OTHER NAMED INDIVIDUAL DEFENDANTS WERE AGENTS OF AMBRIDGE SD.

   Suggested Answer: Yes.

IV. ARGUMENT

1. THE COMPLAINT IS FACIALLY DEFICIENT.

The Complaint is defective because it fails to provide Ms. Mealie with "fair notice" required of the rules and therefore must be dismissed. "Fair notice" requires that Plaintiff set forth the basis for her claims against each Defendant. A federal plaintiff must "give the defendant fair notice of what the … claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In civil rights cases brought against multiple defendants, the Third Circuit has reaffirmed repeatedly the principle that plaintiffs must show each individual defendant violated constitutional rights. *See, e.g., Estate of Smith v. Marasco*, 430 F.3d 140, 151 (3d Cir. 2005) ("In order to prevail on a § 1983 claim against multiple defendants, a plaintiff must show that each individual defendant violated his constitutional rights."). "Without separately alleging the conduct of each Defendant, Defendants are not on notice of their conduct." *Krebs v. New Kensington-Arnold Sch. Dist.*, 2016 U.S. Dist. LEXIS 159059, at *21-22 (W.D. Pa. Nov. 16, 2016).

Though Plaintiff names multiple defendants to each of the three counts against Megan Mealie, she makes no effort to identify the proscribed conduct engaged in specifically by Megan Mealie. *See e.g.* ECF#1 ¶27 at 5. ("The actions of **Defendants** as set forth herein …") (emphasis added). Megan Mealie's name appears only sparingly within the 236-paragraph Complaint and not at all in Count IV, for example. By drafting the Complaint in this fashion, Megan Mealie is left to guess at what is being alleged against her.

Even in the few instances in which her name does appear, the Complaint does not allege facts against Megan Mealie that if proven would establish Plaintiff's entitlement to relief. A complaint must be dismissed for failure to state a claim if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). For example, as to the alleged civil rights violations, Plaintiff does not identify any intentionally discriminatory conduct that Megan Mealie engaged in, let alone intentional discrimination that was so "severe or pervasive" such that it would support the creation of a hostile work environment as Plaintiff alleges. *Graham v.*

Avella Area Sch. Dist., 2008 U.S. Dist. LEXIS 5119, *16-17 (W.D. Pa. Jan. 24, 2008) (establishing elements of Section 1983 hostile work environment claim).

The lack of individualized information places a prejudicial burden on Megan Mealie that prevents her from fairly responding to the Complaint. The prejudicial effect is particularly offensive as it relates to certain text messages that Plaintiff suggests are connected to Megan Mealie. *See* ECF#1 ¶96: at 13-15. Plaintiff recites the text messages over 15 paragraphs of the Complaint, but does not provide even basic information connecting the texts to the allegations in the Complaint. For instance, Plaintiff does not identify the sender or recipient of any of the texts, when they were sent, why they were sent, or to what they relate. As pled they accomplish nothing other than to arouse emotion.

In addition to its inadequacy, as set forth above, there are substantive defects with the Complaint that support its dismissal with prejudice.

2. COUNT IV: 42 U.S.C. § 1983. MEGAN MEALIE WAS PLAINTIFF'S SUBORDINATE AND DID NOT ACT UNDER COLOR OF STATE LAW.

In Count IV, Plaintiff asserts she was discriminated against by Megan Mealie on the basis of her sex. Section 1983 offers private citizens, in this case the Plaintiff, a means to redress violations of federal law by state officials, here Ambridge SD and its agents and employees. The statute provides, in pertinent part, as follows:

> Every person who, under power of any statute, ordinance, regulation, custom, or usage, of any State … subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit at equity, or other proper proceeding for redress….

42 U.S.C. § 1983.

Section 1983 is not a source of substantive rights, but merely a method to vindicate violations of Federal law committed by State actors. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

A *prima facie* case under § 1983 requires a plaintiff to demonstrate: (i) that the alleged wrongful conduct was committed by a person acting under color of state law; and (ii) that the conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States. *See Nicini v. Morra,* 212 F.3d 798, 806 (3d Cir. 2000).

To state a cause of action for a violation of Section 1983, Plaintiff must allege a violation of a federal right by a person acting under color of state law. *See Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 23 (3d Cir. 1997)(concluding that color of law is a "threshold issue in any section 1983 case."). Where a Section 1983 action is brought by one public employee against another person employed by the same entity, "the alleged wrongdoer must occupy a supervisory position over the plaintiff in order to act under color of state law." *Houlihan v. Sussex Technical Sch. Dist. Bd. of Educ.,* 461 F.Supp.2d 252, 261 (D.Del. 2006).

The hallmarks of the required supervisory position necessary to satisfy the color of law requirement are the power to hire and fire. *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 23 (3d Cir. 1997). In *Bonenberger*, the Third Circuit held that the threshold color of law question is also satisfied in a supervisor's dealings with "**a subordinate** whose work he regularly supervises, even if he does not hire, fire, or issue regular evaluations of her work." *Id. (*emphasis added). Thus, the Third Circuit held that, "[i]f a state entity places an official

in the position of supervising a lesser-ranking employee and empowers him or her to give orders which the subordinate may not disobey without fear of formal reprisal, that official wields sufficient authority to satisfy the color of law requirement of 42 U.S.C. § 1983." *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 24-25 (3d Cir. 1997).

The Complaint states that Dr. Zurchin was hired by Ambridge SD in March 2013 to serve in the role of Superintendent. *See* ECF#1, ¶3 at 2. It further states that "Defendant Megan Mealie is the former Assistant to the Superintendent of Ambridge SD, a board-appointed position, who was acting under the color of state law in that capacity."[2] ECF#1, ¶8 at 2. Though the Complaint alleges that Megan Mealie acted under color of law in her capacity as Assistant to the Superintendent, the Complaint does not and cannot allege any facts supporting that Defendant Megan Mealie was in fact Plaintiff's supervisor.[3] As Plaintiff admits in the Complaint, the opposite was true. The Plaintiff was empowered by her position and did in fact discipline Megan Mealie. *See* ECF#1, ¶92 at 13. ("Dr. Zurchin ... suspended Defendant Mealie ...."). Thus, the face of the pleadings definitively establish that Megan Mealie was Plaintiff's subordinate. *Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) ("required to accept as true all factual allegations in the complaint"). For this reason, Plaintiff's charge that Megan Mealie acted under color of law in her position as Assistant to the Superintendent must be dismissed.

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[2] Megan Mealie was not hired as an Assistant Superintendent but instead as an Assistant to the Superintendent.

[3] "Color of law" determination is a question of law for the Court. *See Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 344 n.7 (4th Cir. 2000)(noting that district court correctly determined that determination of whether party was state actor was a question of law). *See also Blum v. Yaretsky*, 457 U.S. 991, 997 (1982) (describing "whether there is state action" as one of "several issues of law").

3. COUNT VI: 42 U.S.C. § 1985(3). THE CONSPIRACY COUNT IS INADEQUATELY PLED AND IS SUBSTANTIVELY DEFICIENT.

A. The Complaint Fails to Adequately Specify Megan Mealie's Alleged Role in Any Conspiracy.

Plaintiff also alleges that she was the victim of an unlawful civil conspiracy that discriminated against her in her employment because of her gender. ECF#1 ¶¶179-191 at 33-35. Plaintiff claims that the individual school board members and Megan Mealie were parties to the conspiracy. *Id.* Plaintiff's claim of conspiracy against Megan Mealie must be dismissed because it fails to adequately plead Ms. Mealie's role in the conspiracy, as she is required to do.

In pleading a conspiracy, "[t]he plaintiff must expressly allege an agreement or make averments of communication, consultation, cooperation, or command from which such an agreement can be inferred." *Flanagan v. Shively*, 783 F.Supp. 922, 928 (M.D. Pa. 1992). A plaintiff cannot rely on subjective suspicions and unsupported speculation. *See Young v. Kann*, 926 F.2d 1396, 1405 n.16 (3d Cir. 1991).

Courts have held that a complaint must clearly define the role of each alleged conspirator in the conspiracy. *See Payne v. Duncan*, 2017 U.S. Dist. LEXIS 18718, at *26-27 (M.D. Pa. Feb. 9, 2017) (citing *Flanagan v. Shively*, 783 F.Supp. 922, 928 (M.D. Pa. 1992)). The court in Flanagan states that to survive dismissal, Plaintiff's allegations of a conspiracy "must be supported by facts bearing out the existence of the conspiracy and indicating its broad objectives and the role each Defendant allegedly played in carrying out those objectives." *Id.* The Complaint in this instance does not include any of the requisite support articulated by the *Flanagan* court.

Here, Plaintiff alleges that Megan Mealie somehow colluded with the school board in creating a hostile work environment by fomenting opposition against Plaintiff but fails to specify the role played by Ms. Mealie in carrying out those objectives.[4] There are no references to Ms. Mealie's role or any acts committed by Ms. Mealie in furtherance of the alleged conspiracy. Rather, Plaintiff makes reference to action engaged in by "the Defendants" generally, but as set forth above those allegations fail to provide the notice required by the rules. *See e.g.* ECF#1, ¶185 at 33.

Where Megan Mealie's name does appear, it is in reference to text messages. *See e.g.* ECF#1, ¶¶90-97 at 13-16. As set forth above, the Complaint fails to allege Megan Mealie's connection to the text messages, the context in which they were sent, or even whether she is alleged to be an author or recipient of the texts. Moreover, the text messages provide no evidence and support no inference of the existence of an unlawful conspiracy and fail to properly allege what action or role Megan Mealie carried out in furtherance of the alleged conspiracy. *See Flanagan v. Shively*, 783 F.Supp. 922, 928 (M.D. Pa. 1992).

B. As an Agent of Ambridge SD Megan Mealie Could Not Conspire with Individual Board Members.

Plaintiff alleges a conspiracy among Defendant Megan Mealie, as Assistant to the Superintendent, and the four individually named defendants, all current and former school board members. *See* ECF#1 ¶8 at 2.

[4] The Complaint is untenable to the extent it alleges that lobbying or other opposition to Plaintiff's policies and initiatives was unlawful. Political speech and the ability to petition the government are protected by the First Amendment. *See* U.S. Const. amend. I.

42 U.S.C. § 1985(3) imposes liability on two or more persons who "conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws." *Id.* To properly plead a claim of conspiracy, "a plaintiff must show that two or more conspirators reached an agreement to deprive him or her of a constitutional right 'under color of law.'" *Parkway Garage, Inc. v. City of Philadelphia*, 5 F.3d 685, 700 (3d Cir. 1993).

As this Court recently held in granting defendants' motion to dismiss a civil rights conspiracy claim in *Hart v. West Mifflin Area Sch.,* a school district's officials cannot conspire with one another because they are not legally distinct parties. *See Hart v. W. Mifflin Area Sch. Dist.*, 2016 U.S. Dist. LEXIS 169473, at *13-14 (W.D. Pa. Dec. 8, 2016). Noting agreement among several courts on this issue, called the intracorporate conspiracy theory, this Court explained that, "a governmental entity and its agents cannot, as a matter of law, conspire because they are considered one and, therefore, the 'two or more persons' requirement cannot be met." *Id.* (citing *Burden v. Wilkes-Barre Area Sch. Dist.*, 16 F. Supp. 2d 569, 573 (M.D. Pa. 1998)). Agreeing that the theory applied, this Court dismissed the claims "[b]ecause the individual Defendants named in the Complaint acted as agents of the Defendant School District ... [and] cannot conspire with each other as a matter of law." *Id.* Thus, even where otherwise properly pled, a conspiracy claim fails where it alleges a conspiracy among agents of the same governmental entity, such as among school district personnel.

In *Hart*, the plaintiff, the school district's former director of security and safety, alleged that the defendant district superintendent and the defendant assistant

superintendent conspired to deny him due process.[5] *See Id.* at *1. The facts in *Hart* dovetail those here. In *Hart*, the plaintiff was employed for just over two years and his time was marked by "multiple confrontations" with the supervisor defendants whom he alleged conspired against him, including by posting on a social media site, and ultimately discharging him. *See Id.* at *1-2. Just as in *Hart* in which the alleged conspirators were both agents of the school district, the Complaint alleges that Megan Mealie and the other individual defendant school board members are named in their capacity as employees and agents of Ambridge SD. *See e.g.* ECF#1 ¶8 at 2 ("Defendant MEGAN MEALIE is the former Assistant to the Superintendent of Ambridge SD, a board-appointed position, who was acting under color of law in that capacity."). Because, as an agent of Ambridge SD, she was incapable of forming a conspiracy with the individual defendant school board members, the conspiracy claim against Defendant Megan Mealie must be dismissed.

4. QUALIFIED IMMUNITY APPLIES.

Qualified immunity protects a public official performing a discretionary function from civil liability "as long as the conduct does not violate clearly established constitutional or statutory rights." Black's Law Dictionary 600 (7th ed. abr'd 2001). It is appropriate to resolve questions of the applicability of qualified immunity "at the earliest possible stage of a litigation." *Anderson v. Creighton*, 483 U. S. 635, 646 n.6 (1987).

[5] The claim in *Hart v. W. Mifflin Area Sch. Dist.* was a Section 1983 conspiracy. The "intracorporate conspiracy theory" is equally applicable to Section 1983 conspiracy and Section 1985(3) conspiracy. *See Ziglar v. Abbasi*, 582 U.S. ____ , 137 S. Ct. 1843 (2017), (considering theory in context of Section 1985(3)). Thus, in addition to preventing Plaintiff from stating a claim under Section 1985(3) claim, the theory also prevents Plaintiff from stating a claim for a Section 1983 conspiracy.

In its decision in *Saucier v. Katz*, the U.S. Supreme Court established a two-part test to determine the applicability of qualified immunity: (i) "first ... whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right"; and (ii) "second … the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (citing *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)). A court may address the two elements in any order, but if Plaintiff fails to satisfy either element, qualified immunity applies and judgment is to be entered as a matter of law. *Id.* Whether or not qualified immunity applies turns on the "objective legal reasonableness" of the official's acts. *Harlow v. Fitzgerald*, 457 U. S. 800, 819 (1982). If a reasonable officer might not have known that the conduct was unlawful, then the officer is entitled to qualified immunity. Thus, an "official loses qualified immunity only for violating clearly established law." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The U.S. Supreme Court has held that where a constitutional question is not "beyond debate," the law is not clearly established. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (*per curiam*) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).[6]

In the case here, an objectively reasonable officer in Megan Mealie's position would not have known that by her conduct as pled she engaged in an unlawful conspiracy under Section 1985(3). Court rulings have varied on the issue of whether employees of the same

[6] Similarly, in determining whether law is clearly established for purposes of qualified immunity, the Third Circuit looks to Supreme Court precedent "[w]e look first for applicable Supreme Court precedent. Even if none exists, it may be possible that a 'robust consensus of cases of persuasive authority' in the Court of Appeals could clearly establish a right for purposes of qualified immunity." *Mammaro v. N.J. Div. of Child Protection & Permanency*, 814 F.3d 164, 169 (3d Cir. 2016)

entity can conspire. Plaintiff is alleging that Ms. Mealie conspired with the individual Ambridge SD board members, but her role in the conspiracy is unclear and appears to relate to sending or receiving text messages that were critical of Plaintiff in an effort to foment public opposition against her. *See* e.g. ECF#1, ¶94 at 13. The question of whether officials of the same governmental entity can form a conspiracy is not clearly established and Megan Mealie would not have known that her conduct violated Section 1985(3).[7] *See Hart v. W. Mifflin Area Sch. Dist.*, 2016 U.S. Dist. LEXIS 169473 (W.D. Pa. Dec. 8, 2016).

Earlier this year, the U.S. Supreme Court addressed this very issue, relying on the intracorporate conspiracy theory to conclude in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017) that qualified immunity applied to bar civil rights conspiracy claims brought against government officials from the same agency.

There, the U.S. Supreme Court held that qualified immunity applied to bar the Section 1985(3) claim of plaintiffs/respondents, individuals suspected of terrorism and detained post-9/11, who alleged "that petitioners conspired with one another to hold respondents in harsh conditions because of their actual or apparent race, religion or

[7] There is also no Supreme Court precedent or "robust consensus" among the circuit courts of appeal as to any potentially applicable exception to the intra-corporate conspiracy theory. Plaintiff does not allege a criminal conspiracy and that is the only exception that appears broadly adopted by the respective courts of appeal. Some courts also recognize a pattern exception to the theory, involving multiple acts of discrimination, but there is a clear circuit split on that issue. For example, in *Travis v. Gary Community Mental Health Ctr., Inc.*, the Seventh Circuit explicitly renounced the existence of any "multiple acts" exception to the intra-corporate conspiracy doctrine on the ground that it "responds neither to the text nor to the objectives of § 1985." *Travis v. Gary Community Mental Health Ctr., Inc.*, 921 F.2d 108, 111 (7th Cir. 1990). A number of other courts have also rejected the pattern theory. *See e.g. Dilworth v. Goldberg*, 914 F. Supp. 2d 433, 467 (S.D. N.Y. 2012) (same). Because the courts are divided, Megan Mealie would not have known that her conduct violated any clearly established law.

national origin." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1854 (2017). Concluding that reasonable officials in petitioners' positions as federal executive department officials and prison wardens would not have known with sufficient certainty that 42 U.S.C. § 1985(3) prohibited their "joint consultations and the resulting policies," the U.S. Supreme Court reaffirmed that when courts are divided as to whether particular conduct is lawful, qualified immunity applies. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017).

The Court noted a longstanding division among the courts of appeal as to whether the intracorporate conspiracy theory precludes "agents of the same entity" from conspiring with one another in relation to civil rights claims. *Id*.[8] The same questions exist as to the theory's application among state actors. The Court concluded that "[w]hen the courts are divided on an issue so central to the cause of action alleged, a reasonable official lacks the notice required before imposing liability." *Id. at* 168 (*quoting Wilson v. Layne*, 526 U. S. 603, 618 (1999)(concluding that it would be "unfair" to subject officers to damages liability when even "judges . . . disagree")). Noting the absence of "clearly established law on the issue whether agents of the same executive department are distinct enough to 'conspire' with one another within the meaning of 42 U.S. C. §1985(3)," the Court concluded that qualified immunity applied. *Id.* at 1850. As such, qualified immunity applies.

[8] Conclusively noting the absence of clearly established law, the Court noted that it "might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees, as distinct from a conspiracy in the antitrust context." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1868 (2017).

5. COUNT VIII: TORTIOUS INTERFERENCE. AS AN AGENT OF AMBRIDGE SD, MEGAN MEALIE COULD NOT INTERFERE WITH PLAINTIFF'S EMPLOYMENT.

Plaintiff also alleges that Megan Mealie and the individual school board Defendants tortiously interfered with her employment by Ambridge SD. To establish tortious interference with business relationship, Plaintiff must show that: "one, without a privilege to do so, induces or otherwise purposely causes a third person not to

(a) perform a contract with another; or

(b) enter into or continue a business relation with another

[and] is liable to the other for the harm caused thereby. *See Capecci v. Liberty Corp*., 406 Pa. 197, 176 A.2d 664 (1962) (adopting the Restatement of Torts Section 766).

An employee of a company, as the company's agent, is not a third party capable of interfering with plaintiff's employment with the company. *See Maier v. Maretti*, 671 A.2d 701, 707 (Pa. Super. 1995). In *Roseman v. Hassler*, 382 F. Supp. 1328, 1340 (W.D. Pa. 1974), this Court noted that tortious interference "only applies to attempts to induce *third persons* not to deal" and does not address a situation involving an employee and his employer or its agents. *Id.*(emphasis in original). In *Johnson v. Univ. of Pittsburgh*, 1974 U.S. Dist. LEXIS 13205, *15 (W.D. Pa. 1974), this Court considered a tortious interference claim brought by a professor denied tenure by the university who alleged that "the individual defendants attempted to cause, induce, persuade and influence the University of Pittsburgh to refuse to offer plaintiff tenure or continue its business relationship with her… ." *Id.* The Court granted the motion to dismiss filed by the defendants – administrators and other agents of the University -- concluding that the plaintiff failed to state a claim "where it is alleged that employees of … the University of Pittsburgh interfered with contractual relationships

present or proposed between [the University] and the plaintiff." *Id. at *16.* The Court further noted that an agent of a party is privileged to act for the party it represents and that the burden of proving lack of privilege is on plaintiff. *See Id.*

For the same reason here, Plaintiff fails to state a claim for tortious interference where she alleges that Megan Mealie tortiously interfered with Plaintiff's employment with Ambridge SD and the Complaint admits that like all of the named individual defendants, Megan Mealie was Ambridge SD's agent. *See* ECF#1 ¶¶4-9 at 2-3. As an agent of Ambridge SD, Ms. Mealie could not tortiously interfere with Plaintiff's employment by Ambridge SD.

V. CONCLUSION

Based on the assertions above, Megan Mealie asserts that the Complaint against her should be dismissed.

Respectfully submitted,

DICKIE, MCCAMEY & CHILCOTE, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing BRIEF IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED PURSUANT TO RULE 12(b)(6) has been served on this 10th day of October, 2017, by electronic service through the U.S. District Court for the Western District of Pennsylvania ECF to the following counsel of record:

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