APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-41521

[Filed March 14, 2018]

DAWN POLK,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
MICHAEL SINEGAL,	)
	)
Defendant - Appellant	)
	)

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:15-CV-153

Before HIGGINBOTHAM, JONES, and GRAVES, Circuit Judges.

PER CURIAM:[*]

This case occasions review of the district court's denial of a motion for summary judgment predicated on

[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

qualified immunity. Finding no error in the district court's analysis, we AFFIRM.

BACKGROUND

In 2009, Michael Sinegal, a county commissioner in Jefferson County, Texas, hired Dawn Polk as an administrative assistant.

Three years later, in 2012, Polk informed Sinegal that she planned to run in the Democratic Primary for Justice of the Peace. One of Polk's opponents was the incumbent, Tom Gillam III. Sinegal initially told Polk he thought her campaign was a good idea. During a subsequent meeting in September 2013, however, Sinegal acted as though Polk had failed to inform him of her candidacy, complaining, "you don't know what type of position you're putting me in because this man Gillam is going around telling everybody that I set you up to run against him."

Polk campaigned on the basis of her own integrity and Gillam's lack thereof. She ultimately lost the primary and returned to work for Sinegal. Upon her return, Sinegal called Polk into his office, informing her that he had spoken with Human Resources and that Polk's employment was "not working out." Sinegal said that he had informed Human Resources that Polk was not typing memoranda or giving messages. In fact, Sinegal alleged that Polk was "not doing anything." Polk asked Sinegal why he would lie to Human Resources and whether he was firing her for campaigning against Gillam. Sinegal immediately called another employee into the room to witness the meeting and told Polk she had two days to find another job.

In March 2015, Polk sued Sinegal and Jefferson County under 42 U.S.C. § 1983 in state court. The defendants subsequently removed the case to federal court. Polk's amended complaint asserts that Sinegal and Jefferson County violated the First Amendment by retaliating against her for speaking out against Gillam. The defendants moved for summary judgment, arguing that the County was not liable under *Monell* and that Sinegal was entitled to qualified immunity. The district court granted summary judgment as to the County, but found that Polk had raised a genuine issue of material fact as to Sinegal's qualified immunity. Sinegal timely appealed that decision.

STANDARD OF REVIEW

"While not a final decision, 'the denial of a motion for summary judgment based upon qualified immunity is a collateral order capable of immediate review.'" *Heaney v. Roberts*, 846 F.3d 795, 800 (5th Cir. 2017) (quoting *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004) (en banc)). However, in doing so, we have limited appellate jurisdiction.

A district court denying an official's motion for summary judgment predicated on qualified immunity "can be thought of as making two distinct determinations." *Kinney*, 367 F.3d at 346. First, the district court determines whether "a certain course of conduct would, as a matter of law, be objectively unreasonable in light of clearly established law." *Id*. Second, the district court determines whether "a genuine issue of fact exists regarding whether the defendant(s) did, in fact, engage in such conduct." *Id*. This court only has jurisdiction to review the first type of determination. *Id*. at 346-47.

Because we have no jurisdiction to consider the correctness of the plaintiff's version of the facts, the appealing defendant must "be prepared to concede the best view of the facts to the plaintiff and discuss only the legal issues raised by the appeal." *Winfrey v. Pikett*, 872 F.3d 640, 644 (5th Cir. 2017) (citations omitted). So limited, this court reviews the district court's analysis *de novo*. *Id.*

DISCUSSION

Sinegal argues that Polk's allegations are, as a matter of law, insufficient. In addition, Sinegal asserts that the district court defined "clearly established law" at too high a level of generality. Neither argument has merit.

To establish a claim of First Amendment retaliation, Polk must show that: (1) she "suffered an adverse employment decision;" (2) her "speech involved a matter of public concern;" (3) her interest in speaking "outweighed the defendant's interest in promoting efficiency;" and (4) her speech was a "substantial or motivating factor" behind the adverse employment decision. *See James v. Texas Collin Cnty.*, 535 F.3d 365, 375-76 (5th Cir. 2008).

Only the fourth element is in dispute.[1] As the district court noted, "Polk alleges that her decision to run for office caused altercations between Sinegal and Gillam, which ultimately resulted in Sinegal's decision to terminate Polk's employment." The court found that Polk had raised a genuine issue of fact for those allegations by proffering evidence that Sinegal used the allegations of poor work performance "as excuses to mask" his true motive in firing Polk. The only question for our consideration is whether such conduct, if proven, would be objectively unreasonable in light of clearly established law. *See Kinney*, 367 F.3d at 346. We agree with the district court that it would.

"This court has been unequivocal in its recognition of a First Amendment interest in candidacy." *Phillips v. City of Dallas*, 781 F.3d 772, 778 (5th Cir. 2015). We have recognized that right in the public employment context since at least 1992. *See Click v. Copeland*, 970 F.2d 106, 112 (5th Cir. 1992). Applying that clearly established precedent to this case, we agree with the district court that "if Polk's version [of the facts] is accurate, and Sinegal is using [poor work evaluations] as excuses to mask his unconstitutional conduct, then qualified immunity is unavailable."

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[1] Sinegal disputes the district court's conclusion that he was not contesting the third element of Polk's retaliation claim. As evidence that he disputed this element, Sinegal states that his summary judgment motion explained that he fired Polk because she was "inefficient." This argument misunderstands the third element, which involves interest balancing under *Pickering v. Board of Education*, 391 U.S. 563 (1968). Sinegal never argues that an interest in governmental efficiency outweighed Polk's interest in engaging in political speech; indeed, he argues that Polk's termination was *unrelated* to her political speech.

CONCLUSION

There is no question that Sinegal disputes that Polk's candidacy was the motivating factor in terminating her employment. However, we are limited to determining only whether the conduct identified by the district court would, as a matter of law, be objectively unreasonable in light of clearly established law, if true. Finding that it would, we AFFIRM on that limited ground.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

CIVIL ACTION NO. 1:15-CV-153

[Filed October 11, 2016]

DAWN POLK,)
)
Plaintiff,)
versus)
)
JEFFERSON COUNTY, TEXAS, and)
MICHAEL SINEGAL,)
)
Defendants.)
)

MEMORANDUM AND ORDER

Pending before the court is Defendants Jefferson County, Texas ("the County"), and Michael Sinegal's ("Sinegal") (collectively, "Defendants") Motion for Summary Judgment (#51) in which Defendants seek summary judgment on all claims asserted by Plaintiff Dawn Polk ("Polk").[1] Having considered the pending

[1] The County joined in the motion under protest that it should no longer be a party to the case based on Polk's omission of the County's name from the style of the case in her First Amended Complaint (#15) as well as the court's order (#31) in which the claims against Sinegal in his official capacity were dismissed.

motion, the submissions of the parties, the pleadings, and the applicable law, the court is of the opinion that summary judgment is warranted with respect to the claim against the County. Summary judgment is inappropriate, however, with respect to the claims against Sinegal.

I. Background

Polk began working for the County in 1996, when she was hired as a part-time clerk in the Juvenile Justice Center. In 2002, she transferred to the Jefferson County Justice of the Peace Court for Precinct 2, where she served as Court Clerk. Thereafter, in 2009, she moved to County Road and Bridges Precinct 3 ("Precinct 3"), where she served as an administrative secretary to Sinegal, the County Commissioner of Precinct 3. Sinegal, as County Commissioner, is an elected official and a member of the County Commissioners Court.

Polk's First Amended Complaint, however, clearly states that the claims against Sinegal are being asserted against him individually and "as Jefferson County." As discussed in the court's previous Memorandum and Order (#31), "a suit against a public servant 'in his official capacity' imposes liability on the entity that he represents . . . ." *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). Thus, the court dismissed the claims against Sinegal in his official capacity because they were duplicative of the claims against the County, the entity for which he serves as a commissioner. Further, this issue was already resolved by the court's order (#40) granting Sinegal's Motion for Clarification (#35) in which the court clarified that Polk's claims under 42 U.S.C. § 1983 remained pending against Sinegal, in his individual capacity, and against the County. Accordingly, the County is a proper party to this case.

In 2013, Polk decided to run for Justice of the Peace for Jefferson County Precinct 8 ("Precinct 8") in the November 2014 election. Polk had four opponents in the Democratic Primary, one of whom was Tom Gillam III ("Gillam"), the incumbent. Polk conferred with Sinegal about her plans to run for office in January 2013, and, according to Polk, he told her that it was a good idea. In September 2013, however, Sinegal called Polk into his office to question why she had not told him that she was running. When Polk reminded him of their conversation in January, Sinegal denied his alleged comments and told Polk that Gillam was "going around telling people that [Sinegal had] put [Polk] up to running . . . ." Sinegal also advised Polk that she would have to follow the rules regarding a county employee running for office and set up a meeting with the County's Human Resources Director, Carey Erickson ("Erickson"), to review the County's rules. Polk attended a meeting with Sinegal and Erickson on October 17, 2013, during which Erickson explained the rules to her.

On October 24, 2013, Polk announced her plans to run in the Democratic Primary.[2] She campaigned on the basis of her integrity and Gillam's lack thereof.[3] Thus, Polk's campaign involved negative speech about

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[2] There were no Republican candidates running for Justice of the Peace for Precinct 8. Therefore, the victor of the Democratic Primary election would run unopposed in the November general election.

[3] According to Polk, Gillam was "considered to be particularly vulnerable because of his rumored, numerous sexual encounters, even with a purported juvenile, while Justice of the Peace."

an elected official. The Democratic Primary election was held on March 4, 2014. Ultimately, Polk lost the election to Gillam. Polk returned to work on March 10, 2014, resuming her duties as Sinegal's administrative secretary. During her first week back, Sinegal was out of the office on vacation. Two days after his return, on the morning of March 19, Sinegal called Polk into his office to inform her that he had spoken with Human Resources and that "things were not working out between them because she was 'missing calls, not typing memorandums, and not giving him his calls.'" Polk questioned Sinegal "as to why he would tell Human Resources falsehoods" and inquired if she was being terminated because she ran against Gillam in the election. In response, Sinegal called in another employee to be a witness to the meeting and informed Polk that she "had two days to find a job in Jefferson County, but as of Friday, March 21, 2014, Polk would no longer be employed at Precinct 3." Polk asserts that she was never written up for unprofessionalism or inadequate job performance during her five-year tenure with Precinct 3 and that she never received notice from Sinegal that her job performance was poor, inadequate, or unsatisfactory. After her termination, however, Sinegal went back through his calendar and added entries showing the days in which Polk had allegedly behaved in an unprofessional manner and did not perform her duties.[4]

Polk filed suit against Sinegal and the County on March 4, 2015, in the 60th Judicial District of Jefferson County, Texas. Defendants removed the action to this

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[4] Previously, managing Sinegal's calendar had been part of Polk's duties.

court on April 14, 2015, and Polk amended her complaint on August 27, 2015. In her amended complaint (#15), Polk asserts that Sinegal and the County infringed upon Polk's rights under the First Amendment to the United States Constitution by terminating her for engaging in protected speech.[5] Specifically, Polk alleges that she was terminated for speaking out against Gillam and opposing him in the election for Justice of the Peace. Defendants filed the instant motion on June 14, 2016, asserting that Polk failed to raise a genuine issue of material fact regarding: (1) an official county policy; (2) Sinegal's status as a policymaker; and (3) a violation of a constitutional right. Thus, Defendants argue, the County cannot be held liable. Additionally, Defendants contend that Sinegal is entitled to qualified immunity.

II. Analysis

A. Summary Judgment Standard

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *accord Hefren v. McDermott, Inc.*, 820 F.3d 767, 771 (5th Cir. 2016). The parties seeking summary judgment bear the initial burden of informing the court of the basis for their motion and identifying those portions of

[5] Additionally, Polk asserted a claim under the Fourteenth Amendment for deprivation of a protected interest without due process of law. The court dismissed that claim on January 4, 2016 (#31).

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which they believe demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Davis v. Fort Bend Cty.*, 765 F.3d 480, 484 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2804 (2015); *Tech. Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399, 407 (5th Cir. 2012).

"A fact issue is material if its resolution could affect the outcome of the action." *Hemphill v. State Farm Mut. Auto. Ins. Co.*, 805 F.3d 535, 538 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1715 (2016); *Tiblier v. Dlabal*, 743 F.3d 1004, 1007 (5th Cir. 2014); *accord Poole v. City of Shreveport*, 691 F.3d 624, 627 (5th Cir. 2012); *Cooper Tire & Rubber Co. v. Farese*, 423 F.3d 446, 454 (5th Cir. 2005). "Factual disputes that are irrelevant or unnecessary will not be counted." *Tiblier*,743 F.3d at 1007 (quoting *Anderson v. Liberty Lobby, Inc.*,477 U.S. 242, 248 (1986)). "An issue is '*genuine*' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Hudspeth v. City of Shreveport*, 270 F. App'x 332, 334 (5th Cir. 2008) (quoting *Bazan ex rel. Bazan v. Hidalgo Cty.*, 246 F.3d 481, 489 (5th Cir. 2001)). Thus, a genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Hefren*, 820 F.3d at 771 (quoting *Anderson*, 477 U.S. at 248); *Tiblier*, 743 F.3d at 1007; *accord Haverda v. Hays Cty.*, 723 F.3d 586, 591 (5th Cir. 2013).

Once a proper motion has been made, the nonmoving party may not rest upon mere allegations or denials in the pleadings but must present affirmative evidence, setting forth specific facts, to demonstrate the

existence of a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 322 n.3; *see Beard v. Banks*, 548 U.S. 521, 529 (2006) (quoting FED. R. CIV. P. 56(e)); *Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime, Inc.*, 738 F.3d 703, 706 (5th Cir. 2013). The court must "review the record 'taken as a whole.'" *Black v. Pan Am. Labs., LLC*, 646 F.3d 254, 273 (5th Cir. 2011) (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986))); *see City of Alexandria v. Brown*, 740 F.3d 339, 350 (5th Cir. 2014). The evidence is construed "in favor of the nonmoving party, but only where there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Spring St. Partners-IV, L.P. v. Lam*, 730 F.3d 427, 435 (5th Cir. 2013) (quoting *Boudreaux v. Swift Transp. Co.*, 402 F.3d 563, 540 (5th Cir. 2005)). Furthermore, "only reasonable inferences in favor of the nonmoving party can be drawn from the evidence." *Mills v. Warner-Lambert Co.*, 581 F. Supp. 2d 772, 779 (E.D. Tex. 2008) (citing *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469 n.14 (1992), *cert. denied*, 523 U.S. 1094 (1998)); *accord Cannata v. Catholic Diocese of Austin*,700 F.3d 169, 172 (5th Cir. 2012).

"Summary judgment may not be thwarted by conclusional allegations, unsupported assertions, or presentation of only a scintilla of evidence." *Hemphill*, 805 F.3d at 538 (citing *McFaul v. Valenzuela*, 684 F.3d 564, 571 (5th Cir. 2012)); *see Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *accord Stauffer v. Gearhart*, 741 F.3d 574, 581 (5th Cir. 2014); *Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012). Thus, summary judgment is mandated if the

nonmovant fails to make a showing sufficient to establish the existence of an element essential to her case on which she bears the burden of proof at trial. *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *Celotex Corp.*, 477 U.S. at 322; *Tiblier*, 743 F.3d at 1007; *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013). "[W]here the nonmoving party fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, no genuine issue of material fact can exist." *Apache Corp. v. W&T Offshore, Inc.*, 626 F.3d 789, 793 (5th Cir. 2010).

B. Section 1983 Claims

The Civil Rights Act of 1871, 42 U.S.C. § 1983, creates a private right of action for redressing the violation of federal law by those acting under color of state law. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 65 (2009); *Inyo Cty. v. Paiute-Shoshone Indians of the Bishop Cmty.*, 538 U.S. 701, 708 (2003); *Goodman v. Harris Cty.*, 571 F.3d 388, 394 (5th Cir. 2009), *cert. denied*, 558 U.S. 1148 (2010). It provides:

> Every person who, under color 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 person 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 in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983; *accord Connick v. Thompson*, 563 U.S. 51, 60 (2011). "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)); *accord Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *Sepulvado v. Jindal*, 729 F.3d 413, 420 n.17 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 1789 (2014). Further, a § 1983 complainant must support her claim with specific facts and may not simply rely on conclusory allegations. *Bryant v. Military Dep't of Miss.*, 597 F.3d 678, 686 (5th Cir.), *cert. denied*, 562 U.S. 893 (2010); *Priester v. Lowndes Cty.*, 354 F.3d 414, 420 (5th Cir.), *cert. denied*, 543 U.S. 829 (2004).

Thus, for Polk to recover, she must show that Defendants deprived her of a right guaranteed by the Constitution or the laws of the United States. *Daniels v. Williams*, 474 U.S. 327, 329-31 (1986); *Baker*, 443 U.S. at 139. "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Victoria W. v. Larpenter*, 369 F.3d 475, 482 (5th Cir. 2004) (quoting *Baker*, 443 U.S. at 146); *accord Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 n.15 (2005). Polk must also prove that the alleged constitutional or statutory deprivation was intentional or due to deliberate indifference—not the result of mere negligence. *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *Davidson v. Cannon*, 474 U.S. 344, 348 (1986); *Daniels*, 474 U.S. at 328.

C. Local Government Liability

The Supreme Court of the United States has expressly held that local governmental entities may be sued directly under § 1983 where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see Collins v. City of Harker Heights*, 503 U.S. 115, 120-21 (1992); *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 166 (5th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011); *Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002). For § 1983 liability to attach, a plaintiff must demonstrate three elements: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Culbertson v. Lykos,* 790 F.3d 608, 628 (5th Cir. 2015) (quoting *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir.), *cert. denied*, 524 U.S. 820 (2001)); *Cox v. City of Dallas*, 430 F.3d 734, 748 (5th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006); *accord Zarnow*, 614 F.3d at 166. "[T]he unconstitutional conduct must be directly attributable to the municipality through some sort of official action or imprimatur." *Culbertson,* 790 F.3d at 628 (quoting *Piotrowski*, 237 F.3d at 578); *accord James v. Harris Cty.*, 577 F.3d 612, 617 (5th Cir. 2009), *cert. denied*, 558 U.S. 1114 (2010); *Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 247 (5th Cir. 2003). Moreover, when proceeding under § 1983, "each and any policy which allegedly caused constitutional violations must be specifically identified by [the] plaintiff . . . ." *Piotrowski*, 237 F.3d at 579. Therefore, to prevail under § 1983, Polk must point to more than the isolated

unconstitutional actions of a county employee; instead, she "must identify a policymaker with final policymaking authority and a policy that is the 'moving force' behind the alleged constitutional violation." *Rivera*, 349 F.3d at 247 (quoting *Piotrowski*, 237 F.3d at 578).

A "policy" can be shown three different ways. The first type of "policy" is characterized by formal rules and understandings which constitute fixed plans of action to be followed under similar circumstances consistently and over time. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986); *accord Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 754 (5th Cir. 1993). The second type of "policy" arises from custom, *i.e.*, "conduct that has become a traditional way of carrying out policy and has acquired the force of law." *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984), *cert. denied*, 472 U.S. 1016 (1985). The third type of "policy" stems from a policymaker's "adoption of a course of action 'tailored to a particular situation and not intended to control decisions in later situations.'" *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 406 (1997) (quoting *Pembaur*, 475 U.S. at 481); *accord In re Faust*, 310 F.3d 849, 862 (5th Cir. 2002).

Polk has not identified a specific set of rules constituting a "policy" of Jefferson County that was applied in this situation. Further, she does not argue that she was fired pursuant to a "custom" that has become the force of law in Jefferson County. Rather, Polk appears to rely on the third type of "policy"—a single action by a policymaker. Certainly, "a single decision by a policy maker may, under certain

circumstances, constitute a policy for which the county may be liable." *Brown v. Bryan Cty.*, 219 F.3d 450, 457 (5th Cir. 2000), *cert. denied*, 532 U.S. 1007 (2001); *accord Gelin v. Hous. Auth. of New Orleans*, 456 F.3d 525, 527 (5th Cir. 2006); *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005). Under this type of "policy," however, a local government can be liable only if the decision to adopt that particular course of action was properly made by that government's authorized policymakers. *See Brown*, 219 F.3d at 462; *accord Woodard*, 419 F.3d at 352. Thus, this "policy" exists "only under the 'extremely narrow' circumstance that the decision maker was also a 'final policymaker.'" *Turay v. Harris Cty.*, No. H-09-0193, 2011 WL 841510, at *8 (S.D. Tex. Feb. 17, 2011) (citations omitted).

Furthermore, a governmental entity may not be held liable for the acts of its employees under a theory of *respondeat superior*. *Monell*, 436 U.S. at 694; *Goudeau v. E. Baton Rouge Paris Sch. Bd.*, 540 F. App'x 429, 437-38 (5th Cir. 2013); *Okon v. Harris Cty. Hosp. Dist.*, 426 F. App'x 312, 216 (5th Cir. 2011). Municipalities "are not vicariously liable under § 1983 for their employees' actions." *Connick*, 563 U.S. at 60. Thus, proof of a responsible policymaker is a necessary element for the imposition of municipal liability under § 1983. *Id.* at 60-61; *Piotrowski*, 237 F.3d at 579 (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)); *see Johnson v. Deep E. Tex. Reg'l Narcotics Trafficking Task Force*, 379 F.3d 293, 309 (5th Cir. 2004). State law determines whether a particular individual is a final policymaker of a governmental entity with respect to a certain sphere of activity. *McMillian v. Monroe Cty.*, 520 U.S. 781, 786 (1997); *Culbertson*, 790 F.3d at 624.

"Where liability is based upon a single decision by an official, '[a] court's task is to identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional . . . violation at issue.'" *Gelin*, 456 F.3d at 527 (quoting *McMillian*, 520 U.S. at 784-85); *accord Brady v. Fort Bend Cty.*, 145 F.3d 691, 698 (5th Cir. 1998) (quoting *Pembaur*, 475 U.S. at 484), *cert. denied*, 525 U.S. 1105 (1999). Only officials "responsible under state law for making policy in *that area*" of the county's business can subject the municipality to § 1983 liability. *Harris Cty. v. Nagel*, 349 S.W.3d 769, 790 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (emphasis in original) (citations omitted), *cert. denied*, 134 S. Ct. 117 (2013). Policymaking, however, "is more than discretion, and it is far more than the final say-so . . . ." *Rhode v. Denson*, 776 F.2d 107, 110 (5th Cir. 1985) (quoting *Bennett*, 728 F.2d at 769), *cert. denied*, 476 U.S. 1170 (1986). Thus, "[t]he fact that a particular official—even a policymaking official—has discretion in the exercise of a particular function does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable." *Brady*, 145 F.3d at 699; *accord Pembaur*, 475 U.S. at 481; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 126 (1987) ("If the mere exercise of discretion by an employee could give rise to a constitutional violation, the result would be indistinguishable from *respondeat superior* liability.").

Indeed, the United States Court of Appeals for the Fifth Circuit has recognized as fundamental the distinction between "final decisionmaking authority" and "final policymaking authority." *Bolton v. City of Dallas*, 541 F.3d 545, 548-49 (5th Cir. 2008) (per curiam) (citing *Jett*, 7 F.3d at 1247), *cert. denied*, 556 U.S. 1152 (2009). A final policymaker is one "whose acts or edicts may fairly be said to represent official policy . . . ." *Pembaur*, 475 U.S. at 480 (quoting *Monell*, 436 U.S. at 694). A final policymaker has "the responsibility for making law or setting policy in any given area of a local government's business." *Turay*, 2011 WL 841510, at *9 (citations omitted); *see Nagel*, 349 S.W.3d at 792. "[County] policymakers not only govern conduct; they decide the goals for a particular [county] function and devise the means of achieving those goals." *Rhode*, 776 F.2d at 110 (quoting *Bennett*, 728 F.2d at 769). On the other hand, an official whose discretionary decisions are constrained by policies not of his own making is instead a decisionmaker. *Praprotnik*, 485 U.S. at 127; *Gelin*, 456 F.3d at 528; *Jett*, 7 F.3d at 1247.

In *Pembaur*, the Supreme Court of the United States illustrated this significant distinction in the following manner:

> [F]or example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the

> Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner . . . .

475 U.S. at 483 n.12 (emphasis in original); *accord Brady*, 145 F.3d at 699; *Jett*, 7 F.3d at 1247; *Turay*, 2011 WL 841510, at *9 ("The finality of an official's action does not therefore automatically lend it the character of a policy."). Thus, a county official does not become a policymaker simply because he has the authority to hire and fire employees. *See Praprotnik*, 485 U.S. at 129-30 (stating that the case before the court resembled the hypothetical example in *Pembaur* because the Commission left appointing authorities discretion to hire and fire employees). Significantly, "[t]hat a particular agent is the apex of a bureaucracy makes the decision 'final' but does not forge a link between 'finality' and 'policy.'" *Gelin*, 456 F.3d at 530 (quoting *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992)).

In this case, Polk claims that Sinegal, as an elected official of Jefferson County, is a policymaker with regard to the terms and conditions of employment in his respective precinct. Conversely, Defendants assert that the Jefferson County Commissioners Court is the policymaker for all Jefferson County policy, including employment policy in each commissioner's precinct. Defendants maintain that while Sinegal is able to hire,

fire, and discipline persons within his precinct office, he is nonetheless bound by the policies set forth by the Commissioners Court. Importantly, Texas courts have not addressed the issue of whether a county commissioner is a policymaker in the area of employment.[6]

"Under Texas law, the principal organ of county government is the commissioners court."[7] *Nagel*, 349 S.W.3d at 794; *accord Comm'rs Ct. of Titus Cty. v. Agan*, 940 S.W.2d 77, 79 (Tex. 1997). Article V, section 18, of the Texas Constitution grants commissioners courts the power "over all county business . . . ." TEX. CONST. art. V, § 18. With regard to employment, commissioners courts establish elected officers' budgets and determine the number of appointments they can make. TEX. LOC. GOV'T CODE §§ 151.001(a), 151.002, 151.901. A commissioners court cannot, however, "attempt to influence the appointment of any person to an employee position . . . ." TEX. LOC. GOV'T CODE § 151.004. Rather, "[a]n elected county officer, despite the commissioners court's control over the officer's budget, is free to select assistants of his or her 'own

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[6] In fact, the court was unable to find any case regarding a commissioner's status as a policymaker in any area of county business. Rather, Texas law makes clear that, generally, a commissioner cannot bind the county by his conduct. *Hill Farm, Inc. v. Hill Cty.*, 436 S.W.2d 320, 324 (Tex. 1969); *Canales v. Laughlin*, 214 S.W.2d 451, 455 (Tex. 1948) ("[T]he individual commissioners have no authority to bind the county by their separate action.").

[7] The Jefferson County Commissioners Court consists of four commissioners, one from each precinct within the County, and the county judge. TEX. LOC. GOV'T CODE § 81.001.

choice.'" Tex. Att'y Gen. Op. No. GA-0037 (2003) (citing *Abbott v. Pollock*, 946 S.W.2d 513, 517 (Tex. App.—Austin 1997, writ denied)). In other words, a commissioner has the authority to make decisions regarding whom he hires. When it comes to enacting policies, however, Attorney General Opinions indicate that commissioners courts retain the power to make employment policy with respect to the employees of county commissioners.[8] Tex. Att'y Gen. Op. No. GA-0656 (2008) (citing *Garcia v. Reeves Cty.*, 32 F.3d 200, 203 (5th Cir. 1994)); Tex. Att'y Gen. Op. No. JM-521. Polk has not cited any authority to the contrary.

In an attempt to demonstrate that Sinegal is a policymaker, Polk relies almost exclusively on two

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[8] This is consistent with the manner in which county policymaking authority exists in other states. *See LaVerdure v. Cty. of Montgomery*, 324 F.3d 123, 125-26 (3d Cir. 2003) ("It is undisputed that only a majority of the three-member Board [of Commissioners] is authorized to establish policy on behalf of the county."); *Blue v. Miami-Dade Cty.*, No. 10-23599-CV, 2011 WL 1099263, at *3-4 (S.D. Fla. Mar. 22, 2011) (holding that "final policymaking authority for Miami-Dade County resides in the Board of County Commissioners or the County Manager."); *Reuss v. Henry Cty.*, No. 1:02-CV-2000-JEC, 2008 WL 4426127, at *10 (N.D. Ga. Sept. 30, 2008) (citing *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1313 (11th Cir.), *cert. denied*, 549 U.S. 1020 (2006); *Mason v. Village of El Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001)); *Stewart v. Bd. of Comm'rs for Shawnee Cty.*, 320 F. Supp. 2d 1143, 1152 (D. Kan. 2004) ("Kansas law places final authority over county personnel decisions in the elected board of county commissioners.").

stipulations from unrelated cases.[9] First, Polk points the court to *Ha Penny Nguyen v. Jefferson County*, a Texas state court case in which a clerk who worked for Justice of the Peace Gillam sued the County for terminating her employment in retaliation for her exercise of free speech. No. B-177,132 (60th Dist. Ct., Jefferson Cty., Tex. Jan. 22, 2013). In that case, the parties entered into a stipulation that Gillam was the policymaker for the County in the matters of personnel decisions in his precinct.[10] *Id.* Second, Polk points to

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[9] Polk also cites deposition testimony from two other unrelated cases. In *Bowden v. Jefferson County*, a case previously before this court, Nick Saleme, Jr. ("Saleme"), a county constable, testified that, as an elected official, he was the final authority for hiring decisions in his office. No. 1:14-CV-287 (E.D. Tex. Nov. 6, 2015). Erickson, the Human Resources Director, corroborated this testimony. *Id.* Nevertheless, the court held that Saleme was not a policymaker in the area of employment. *Id.* Thus, Polk completely mischaracterizes the significance of this testimony. Polk also points to *Harris v. Jefferson County*, a state court case involving another justice of the peace who acknowledged, at deposition, that he had the authority to hire and fire within his department. No. A196,540 (58th Dist. Ct., Jefferson Cty., Tex. Nov. 27, 2013). Both of these cases involve testimonial admissions that the relevant county official was a *decisionmaker*, not a policymaker. As discussed above, an individual with decisionmaking authority is not necessarily a policymaker. *Bolton*, 541 F.3d at 548-49; *Jett*, 7 F.3d at 1247. In any event, even if the county officials had admitted to being "policymakers," such admissions would not be controlling on the court's determination on whether, as a matter of law, they were in fact policymakers. *Frank v. Harris Cty.*, 118 F. App'x 799, 802 (5th Cir. 2005).

[10] The stipulation provided as follows: "At all times material hereto Tom Gillam, serving as Justice of the Peace Precinct 8 for Jefferson County is and has been respectively the final authority and or 'policymaker' for Jefferson County in the matters of

Davis v. Jefferson County, another Texas state court case in which the County stipulated that a purchasing agent "was at all times during his tenure as the purchasing agent for Jefferson County a policymaker and final authority for personnel decisions that were made by him with regard to his office." No. B-182,252 (60th Dist. Ct., Jefferson Cty., Tex. June 19, 2013). These stipulations, however, are not binding in this case because, *inter alia*, they concerned a justice of the peace and a purchasing agent, not a county commissioner, and did not pertain to the individuals involved in the case at bar.[11] In both instances, the

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personnel decisions in the Justice of the Peace Precinct 8, including the decisions to employ persons to serve in budgeted positions, terminate the employment of persons employed by the Justice of the Peace Precinct 8 office, promotion and demotion of persons employed by the Justice of the Peace Precinct 8; *specifically as applied to Penny Nguyen*." (emphasis added).

[11] Stipulations can become binding through the court's application of the doctrine of judicial estoppel, which prevents a party from assuming inconsistent positions in litigation. *GlobeRanger Corp. v. Software AG*, 27 F. Supp. 3d 723, 743 (N.D. Tex. 2014) (quoting *In re Superior Crewboats, Inc.*, 374 F.3d 330, 334 (5th Cir. 2004)). Judicial estoppel, however, is an equitable doctrine, and the decision whether to invoke it is within the court's discretion. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *In re Knight-Celotex, LLC*, 695 F.3d 714, 722 (7th Cir. 2012); *GlobeRanger Corp.*, 27 F. Supp. 3d at 743 (quoting *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999)). Further, the doctrine is limited in that "it may be applied only where the position of the party to be estopped is clearly inconsistent with its previous one . . . ." *GlobeRanger Corp.*, 27 F. Supp. 3d at 743 (citing *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir. 2000)); *accord Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). Alternatively, stipulations can become binding

County expressly limited the stipulations to the specific case being litigated. The court cannot conclude that by entering into these limited stipulations in unrelated cases, the County admitted that all elected officials, much less county commissioners specifically, are policymakers in the area of employment.

Polk also offers excerpts from Sinegal's deposition, in which he stated that he "had the responsibility for determining what [Polk's] duties were" within his office. At deposition, Sinegal also testified that he has authority to make disciplinary decisions. Defendants argue that while Sinegal "is able to hire, fire and discipline persons within his precinct office, he is still bound by the Jefferson County policies set forth by the Commissioners' Court." In other words, Defendants assert that Polk "confuses a policymaker with a decisionmaker." During his deposition, Sinegal specifically denied being a policymaker. He also stated that he could make certain decisions "[a]s long as it

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under the doctrine of judicial admissions, which also requires the purported admission to be "inconsistent with or contrary to" its current statement. *GlobeRanger Corp.*, 27 F. Supp. 3d at 743 (quoting *Giddens v. Cmty. Educ. Ctrs., Inc.*, 540 F. App'x 381, 390-91 (5th Cir. 2013) (citing *Davis v. A. G. Edwards & Sons, Inc.*, 823 F.2d 105, 107-08 (5th Cir. 1987))). The court finds that the doctrines of judicial estoppel and judicial admissions are not applicable in this case because Defendants have not asserted a position that is "plainly inconsistent" with a previously asserted position.

didn't violate any county policies or anything in the county policies . . . ."[12] Further, Sinegal testified that he frequently called Human Resources regarding applicable county policies to ensure that his decisions complied with them.

The evidence is simply insufficient to raise a genuine issue of material fact regarding Sinegal's status as a policymaker. At best, the evidence shows that Sinegal possessed final *decisionmaking* authority, but there is no evidence to support the conclusion that he possessed *policymaking* authority. Accordingly, summary judgment is warranted with respect to Polk's § 1983 claim against the County, as she has not demonstrated that her termination stemmed from the enforcement of a county policy or custom or that she was discharged by an authorized policymaker of Jefferson County.

D. Qualified Immunity

Qualified immunity is available to defendant officials in suits arising under § 1983 and is an immunity from suit, extending beyond a defense to liability to include all aspects of civil litigation, including discovery. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Hinojosa v. Livingston,* 807 F.3d 657, 663 (5th Cir. 2015); *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002), *cert. denied*, 537 U.S. 1232 (2003). For summary judgment purposes, "a defendant asserting immunity is not required to

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[12] One example of a county policy that limits Sinegal's hiring authority is the County's nepotism policy, which prohibits him from hiring family members to work in his office.

establish the defense beyond peradventure, as he would have to do for other affirmative defenses." *Cousin v. Small*, 325 F.3d 627, 632 (5th Cir.) (quoting *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 633 (5th Cir.), *cert. denied*, 531 U.S. 871 (2000)), *cert. denied*, 540 U.S. 826 (2003). "It is sufficient that the movant in good faith pleads that [he] is entitled to absolute or qualified immunity." *Id.*; *accord Hathaway v. Bazany*, 507 F.3d 312, 320 (5th Cir. 2007). Where a defendant pleads qualified immunity and shows he is a governmental official whose position involves the exercise of discretion, the plaintiff then has the burden to rebut this defense by establishing that the official's allegedly wrongful conduct violated clearly established law." *Kovacic v. Villarreal*, 628 F.3d 209, 211-12 (5th Cir. 2010) (quoting *Thompson v. Upshur Cty.*, 245 F.3d 447, 456 (5th Cir. 2001)), *cert. denied*, 564 U.S. 1004 (2011); *Hampton v. Oktibbeha Cty. Sheriff Dep't*, 480 F.3d 358, 363 (5th Cir. 2007); *accord Michalik v. Hermann*, 422 F.3d 252, 258 (5th Cir. 2005). As the Fifth Circuit has explained, "[w]e do not require that an official demonstrate that he did not violate clearly established federal rights; *our precedent places that burden upon plaintiffs*." *Zarnow v. City of Wichita Falls*, 500 F.3d 401, 407 (5th Cir. 2007) (emphasis added) (quoting *Pierce v. Smith*, 117 F.3d 866, 871-72 (5th Cir. 1997)), *cert. denied*, 564 U.S. 1038 (2011).

"Whether a government official is entitled to qualified immunity 'generally turns on the "objective reasonableness of the action" assessed in light of the legal rules that were "clearly established" at the time it was taken.'" *Johnston v. City of Houston*, 14 F.3d 1056, 1059 (5th Cir. 1994) (quoting *Tex. Faculty Ass'n v. Univ. of Tex. at Dallas*, 946 F.2d 379, 389 (5th Cir.

1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987))); *see Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Stotter v. Univ. of Tex. at San Antonio*, 508 F.3d 812, 823 (5th Cir. 2007), *cert. denied*, 562 U.S. 897 (2010). In considering a claim of qualified immunity, the court must utilize a bifurcated approach, asking first "whether the facts taken in the light most favorable to the party asserting the injury show the [defendant's] conduct violated a federal right;" and second, "whether the defendant's behavior was objectively reasonable under clearly established law at the time the conduct occurred." *Tolan v. Cotton*, ___ U.S. ___, 134 S. Ct. 1861, 1865 (2014) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *Hampton*, 480 F.3d at 363; *accord Machete Prods., L.L.C. v. Page*, 809 F.3d 281, 289 (5th Cir. 2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)); *Doe v. Robertson*, 751 F.3d 383, 387 (5th Cir. 2014).

"The first prong requires the plaintiff to allege 'the deprivation of an *actual* constitutional [or statutory] right.'" *Hampton*, 480 F.3d at 363 (quoting *Felton v. Polles*, 315 F.3d 470, 477 (5th Cir. 2002)). The court must evaluate "whether, taking the facts in the light most favorable to the plaintiff, the official's conduct violated a constitutional right." *Haverda*, 723 F.3d at 598 (citing *Lytle v. Bexar Cty.*, 560 F.3d 404, 409-10 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010)). Under the second prong, "a clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)); *see Brosseau*, 543 U.S. at 198-99; *Wilkerson v. Goodwin*, 774 F.3d 845, 851 (5th

Cir. 2014). "The salient question is whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged conduct was unconstitutional." *Tolan*, 134 S. Ct. at 1866 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). At the summary judgment stage, qualified immunity is appropriate where the defendant "shows that there is no genuine issue as to any material fact and the [defendant] is entitled to judgment as a matter of law." *Id.*; *Hillyer v. TDC*, 55 F. App'x 716, 716 (5th Cir. 2002); *Blackwell v. Barton*, 34 F.3d 298, 301 (5th Cir. 1994). Thus, if resolution of qualified immunity at this stage turns on what the defendant actually did, rather than on whether he is immunized from liability, "and if there are conflicting versions of his conduct, one of which would establish and the other defeat liability, the case is inappropriate for summary judgment." *Haverda*, 723 F.3d at 599 (citing *Barker v. Norman*, 651 F.2d 1107, 1123-24 (5th Cir. 1981)); *accord Keenan*, 290 F.3d at 262; *Thomas v. Jackson*, No. 3:14-CV-4530-B-BN, 2016 WL 749558, at *3 (N.D. Tex. Feb. 5, 2016); *Kostic v. Tex. A&M Univ. at Commerce*, 11 F. Supp. 3d 699, 715 (N.D. Tex. 2014).

1. Violation of a Constitutional Right

Polk alleges that Sinegal's actions violated her right to free speech guaranteed under the First Amendment to the United States Constitution. *See* U.S. CONST. amend. I. To prove a claim of First Amendment retaliation, a public employee must establish four elements:

(1) an adverse employment action;

(2) speech involving a matter of public concern;

(3) the employee's interest in speaking outweighs the employer's interest in efficiency; and

(4) the speech motivated the adverse employment action.

Culbertson, 790 F.3d at 617; *Wilson v. Tregre*, 787 F.3d 322, 325 (5th Cir. 2015); *Burnside v. Kaelin*, 773 F.3d 624, 626 (5th Cir. 2014); *Juarez v. Aguilar*,666 F.3d 325, 332 (5th Cir. 2011). While the first three of these elements present questions of law for the court to decide, the fourth one is a factual issue typically decided by a jury. *Kostic*, 11 F. Supp. at 714.

The parties do not dispute the first three elements. Rather, Defendants argue that Polk "has failed to show that her running for the office of justice of the peace was a motivating factor in Sinegal['s] decision to terminate her." In other words, the dispute revolves around whether Polk's exercise of her right to free speech was a motivating factor in her termination. This issue turns on what Sinegal actually did, rather than on whether he is immunized from liability. *See Haverda*, 723 F.3d at 599; *Keenan*, 290 F.3d at 262; *Kostic*, 11 F. Supp. 3d at 715. In this instance, there are conflicting versions of his conduct, one of which would establish and the other defeat liability. On the one hand, Polk claims that she was fired for campaigning against Gillam. Polk alleges that her decision to run for office caused altercations between Sinegal and Gillam, which ultimately resulted in Sinegal's decision to terminate Polk's employment. In

response, Sinegal argues that his decision to terminate Polk was the result of her poor work performance and lack of professionalism, not her decision to run for public office. As proof, Sinegal offers calendar entries showing numerous occasions on which Polk allegedly failed to perform her job duties, or did so poorly. Notably, however, Polk proffers evidence that these entries were not made until after she was terminated and after she had filed a complaint against Sinegal. Clearly, if Sinegal's version of events is accurate and he terminated Polk for poor work performance rather than in retaliation for her exercise of free speech, he would be entitled to qualified immunity because there would be no violation of a constitutional right. Conversely, if Polk's version is accurate, and Sinegal is using these events as excuses to mask his unconstitutional conduct, then qualified immunity is unavailable. Accordingly, resolution of this prong turns on what Sinegal actually did, which the court cannot resolve at the summary judgment stage.

2. Objectively Reasonable Conduct and Clearly Established Law

Even assuming Sinegal's conduct violated a constitutional right, he is still entitled to qualified immunity if his conduct was "objectively reasonable in light of 'clearly established' law at the time of the violation." *Kostic*, 11 F. Supp. 3d at 723 (quoting *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 614 (5th Cir. 2004), *cert. denied*, 544 U.S. 1062 (2005)). The question of whether an officer's conduct was objectively reasonable in light of clearly established law is a matter of law for the court to determine. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir.

2000); *accord Swindle v. Livingston Parish Sch. Bd.*, 655 F.3d 386, 400-01 (5th Cir. 2011); *Kostic*, 11 F. Supp. 3d at 723. "The touchstone of this inquiry is whether a reasonable person would have believed that his conduct conformed to the constitutional standard in light of the information available to him and the clearly established law." *Goodson,* 202 F.3d at 736; *accord Ramirez v. Martinez*, 716 F.3d 369, 375 (5th Cir. 2013). Here, although Polk was an at-will employee and could be discharged for any legitimate reason or for no reason at all, "it [is] clearly established that the First Amendment generally prohibits a public employer from retaliating against an employee because she exercised her right to engage in protected speech." *Blackwell v. Laque*, 275 F. App'x 363, 370 (5th Cir. 2008). Indeed, "[t]he government may not constitutionally compel persons to relinquish their First Amendment rights as a condition of public employment." *Beaulieu v. Lavigne*, 539 F. App'x 421, 424 (5th Cir. 2014) (quoting *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir.), *cert. denied*, 528 U.S. 1022 (1999)); *Jordan v. Ector Cty.*, 516 F.3d 290, 294-95 (5th Cir. 2008) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006)) ("It is now a rote principle of constitutional law that 'public employees do not surrender all their First Amendment rights by reason of their employment.'"). Thus, Polk has sufficiently demonstrated a constitutional right that was clearly established at the time of her termination.

"The second prong 'focuses not only on the state of the law at the time of the complained of conduct, but also on the particulars of the challenged conduct and/or of the factual setting in which it took place.'" *Felton*, 315 F.3d at 478 (quoting *Pierce*, 117 F.3d at 872);

accord Mullenix, 136 S. Ct. at 308 ("The dispositive question is whether the violative nature of *particular* conduct is clearly established. This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition."). "A 'defendant's acts are . . . objectively reasonable unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff.'" *Felton*, 315 F.3d at 478 (emphasis in original) (quoting *Thompson*, 245 F.3d at 457). Hence, to prevail, Polk must show that Sinegal knew or reasonably should have known that the action he was taking within his sphere of official responsibility would violate Polk's constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Schultea v. Wood*, 47 F.3d 1427, 1431-32 (5th Cir. 1995).

Defendants argue that Sinegal acted objectively reasonably in light of the particular conduct and specific context of the case. Defendants maintain that Sinegal had just cause to discharge Polk even though her termination occurred within days of the election. At deposition, Sinegal claimed that within her first year, Polk had an issue with the maintenance supervisor and his secretary, which caused severe tension within the office. He also testified that Polk violated county policy by instructing a maintenance employee to add county fuel to her personal vehicle. With regard to this incident, Polk asserts that she had county fuel put in her personal vehicle because Sinegal asked her to go to Beaumont for a work function and a county car was not available. Further, she alleges that the maintenance superintendent authorized her actions.

According to Sinegal, there were times when Polk did not forward his calls or give him his messages, and he constantly had to correct her work. For example, Sinegal contends that he asked Polk to prepare a biography of him for a Houston magazine that was writing an article honoring him. While he and his wife were on vacation, someone from the magazine reportedly called to tell him that the magazine could not print the biography because it was full of mistakes. Sinegal asserts that the biography looked as though Polk had not proofread it, and he and his wife had to spend two days of their vacation rewriting it. Sinegal also claims that Polk was disruptive, sarcastic, had a bad attitude, and made off-color comments about members of the public who visited the courthouse. These allegations are supported by the affidavit of Deputy Reginald Boykin, Sr. ("Deputy Boykin"), and a statement from former Sheriff's Deputy Bradford Eugene Lowe, Sr. ("Deputy Lowe"). In his affidavit, Deputy Boykin stated that he witnessed a few occasions where Polk was insubordinate toward Sinegal and rude to patrons. Further, Deputy Boykin stated that when persons whom Polk did not like called the office, Polk would say she did not feel like being bothered and would not answer the phone. Deputy Lowe asserted that he also witnessed Polk being insubordinate to Sinegal. Specifically, Deputy Lowe claimed that he witnessed Polk rolling her eyes at Sinegal and saying negative things about him. According to Deputy Lowe, Polk's behavioral issues began long before she ran for office.

Additionally, Sinegal maintains that he witnessed Polk behave disrespectfully toward a county probation officer, Joe Champ ("Champ"), who purportedly refused

to return to Sinegal's office because of Polk's behavior. Polk claims that Champ was loud and used "ugly words" toward her and that Sinegal urged Champ to continue. She does not, however, deny having behaved disrespectfully toward Champ. Rather, she acknowledges that she and Champ did not get along and admits to arguing with him. The evidence also shows that Sinegal received a complaint from Oscar Dwin ("Dwin"), a constituent, claiming that Polk used county equipment to unearth personal information about Dwin. In an affidavit, Dwin stated that Polk took "a very personal interest" in him, which made him feel uncomfortable.[13] Like Champ, Dwin refused to return to Sinegal's office because of Polk. Polk, however, claims that she always thought she and Dwin had a pleasant relationship. There is also evidence of an altercation between Polk and Deputy Kenneth Gunner ("Deputy Gunner"). At deposition, Polk testified that Deputy Gunner called her cell phone while she was on vacation and she did not answer. When she returned to work, Deputy Gunner "was ugly to [Polk]" about her not answering his call, so she "got back" at him and "was ugly to him."

Sinegal claims that Polk was not doing the job he expected her to do, so he made the decision to terminate her in 2012, before she decided to run for office. Before he had the opportunity to fire her, however, Polk notified him that she was running for Justice of the Peace. According to Sinegal, her performance did not improve after she lost the election,

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[13] Specifically, Dwin elaborated that after his girlfriend passed away, Polk "used her authority and influence" to seek autopsy results before they were given to the decedent's family.

so he terminated her a few days afterward. Sinegal told Polk that she was discharged because she was not giving him his messages and was not doing her work. Polk, however, argues that these reasons are pretextual because she was never written up, reprimanded, or otherwise disciplined prior to her running for office. She maintains that the calendar entries detailing the events on which she allegedly displayed poor work performance were all made *after* she was terminated and only in anticipation of litigation. Polk essentially suggests that Sinegal altered the calendar in bad faith to comport with his asserted reasons for discharging her. Importantly, at deposition, Sinegal confirmed that some entries were indeed made after Polk filed suit. Further, Polk asserts that Sinegal began gathering statements and affidavits corroborating his version of events once he became aware that she had filed a claim with the EEOC. Thus, there is a genuine issue of material fact regarding the validity of Sinegal's calendar entries and the purported reasons for Polk's termination. In order to conclude that Sinegal is entitled to qualified immunity under the second prong, the court would have to engage in impermissible credibility determinations, which, as discussed above, the court may not do. *See Haverda*, 723 F.3d at 599; *Keenan*, 290 F.3d at 262; *Kostic*, 11 F. Supp. 3d at 715. At this juncture, the court cannot conclude as a matter of law that Sinegal's conduct was objectively reasonable in light of clearly established law. Hence, summary judgment on the issue of qualified immunity is not appropriate.

III. Conclusion

Consistent with the foregoing analysis, Polk presents no claim against the County that warrants relief. Nevertheless, Polk has raised a genuine issue of material fact with regard to Sinegal's claim to qualified immunity, which precludes the court from granting summary judgment in favor of Sinegal. Consequently, Defendants' Motion for Summary Judgment is GRANTED in part and DENIED in part. Polk's claims against Sinegal in his individual capacity remain pending.

SIGNED at Beaumont, Texas, this 11th day of October, 2016.

s/_____
MARCIA A. CRONE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-41521

[Filed April 30, 2018]

DAWN POLK,	)
	)
Plaintiff - Appellee	)
	)
v.	)
	)
MICHAEL SINEGAL,	)
	)
Defendant - Appellant	)
	)

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING EN BANC

(Opinion March 14, 2018, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, JONES, and GRAVES, Circuit Judges.

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the

court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/_____
UNITED STATES CIRCUIT JUDGE