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[ENTERED: March 10, 2020]

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1457

BEATTIE I. BUTLER,

Plaintiff - Appellee,

v.

D. ASHLEY PENNINGTON, in his individual and official capacities,

Defendant - Appellant,

and

CHARLESTON COUNTY,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Bruce H. Hendricks, District Judge. (2:15-cv-04455-BHH)

Submitted: February 27, 2020
Decided: March 10, 2020
Amended: March 10, 2020

Before KING, THACKER, and HARRIS, Circuit Judges.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

Nancy B. Bloodgood, Lucy Clark Sanders, BLOODGOOD & SANDERS, LLC, Mount Pleasant, South Carolina; Caroline Wrenn Cleveland, Bob J. Conley, Emmanuel Joseph Ferguson, CLEVELAND & CONLEY, LLC, Charleston, South Carolina, for Appellant. Shon Hopwood, Ann Marie Hopwood, LAW OFFICE OF SHON HOPWOOD, PLLC, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Beattie I. Butler, a former assistant public defender with the Charleston County ("the County") Public Defenders Office, brought this action against the County and D. Ashley Pennington, the Public Defender for the Ninth Circuit, individually and in his official capacity, raising several claims stemming from the termination of Butler's employment in 2014. Defendants moved for summary judgment on Butler's claims, which the district court granted in part and denied in part. Most relevant to this appeal, Pennington asserted that he was entitled to qualified immunity on Butler's claim that Pennington violated Butler's First Amendment rights, in violation of 42 U.S.C. § 1981 (2018), when Pennington restricted

Butler's speech regarding possible prosecutorial misconduct and later terminated Butler's employment in retaliation for his protected speech. We affirm in part and dismiss in part.

Pennington purports to raise several issues on appeal, but we may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2018), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2018); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949). Although an order rejecting a claim of qualified immunity is an appealable order at the summary judgment stage, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), immediate appealability of an order rejecting a government official's qualified immunity defense is appropriate only if the rejection rests on a purely legal determination that the facts do not establish a violation of a clearly established right, *Iko v. Shreve*, 535 F.3d 225, 234-36 (4th Cir. 2008). Thus, "if the appeal seeks to argue the insufficiency of the evidence to raise a genuine issue of material fact, [we] do[] not possess jurisdiction under § 1291 to consider the claim." *Valladares v. Cordero*, 552 F.3d 384, 388 (4th Cir. 2009).

Limiting our review to whether the district court correctly determined it was clearly established during the relevant time period that Butler maintained a First Amendment right to report alleged prosecutorial misconduct, we agree with the district court that it was. *See Durham v. Jones*, 737 F.3d 291, 303-04 (4th Cir. 2013); *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009). We thus affirm the district court's order, in part. *See Butler v. Pennington*, No. 2:15-cv-04455-BHH (D.S.C. Apr. 16,

2019). We lack jurisdiction over the remainder of Pennington's appeal, which seeks to challenge the district court's determinations that genuine issues of material of fact existed as to whether Pennington was entitled to qualified immunity, and which the court determined were issues appropriate for resolution by a trier of fact.

Based on the foregoing, we affirm in part and dismiss in part. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART,
DISMISSED IN PART

[ENTERED: March 10, 2020]

FILED: March 10, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT\

No. 19-1457
(2:15-cv-04455-BHH)

BEATTIE I. BUTLER

Plaintiff - Appellee

v.

D. ASHLEY PENNINGTON, in his individual and official capacities

Defendant - Appellant

and

CHARLESTON COUNTY

Defendant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part. The appeal is dismissed in part.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED: April 16, 2019]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Beattie I. Butler, Plaintiff, vs. D. Ashley Pennington, in his individual and official capacities, and Charleston County, Defendants.	)	Civil Action No. 2:15-4455-BHH **OPINION AND ORDER**

This matter is before the Court for review of the Report and Recommendation entered by United States Magistrate Judge Bristow Marchant on November 15, 2018 ("Report"). (ECF No. 151.) In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02 for the District of South Carolina, this case was referred to Magistrate Judge Marchant for pretrial handling. In his Report, the Magistrate Judge recommends that Defendant D. Ashley Pennington's ("Defendant" or "Pennington") motion for summary judgment on his counterclaim for defamation (ECF No. 110), made in his individual capacity, be denied, and that Defendants Pennington, in his official capacity, and Charleston County's (collectively "Defendants") motion for summary judgment on Plaintiff's claims (ECF No. 111) be granted in part and denied in part. (*See* ECF No. 151 at 51.) The Report sets forth in detail the relevant facts and

standards of law, and the Court incorporates them here, *summarizing* below only in relevant part.[1]

BACKGROUND

This case arises out of a series of disputes, over a span of years, between Plaintiff Beattie Butler ("Plaintiff" or "Butler"), who served as an Assistant Public Defender ("APD") for Charleston County, and Defendant Pennington, who was at all times relevant to the amended complaint the Public Defender for the Ninth Circuit and Plaintiff's boss. Plaintiff joined the Public Defender's Office ("PD's Office") in 2003 and over time became the most experienced litigator, eventually being designated "director of litigation" and later "chief litigator." In essence, Plaintiff alleges that, beginning in 2007, he possessed knowledge of what he considered to be serious prosecutorial misconduct perpetrated by attorneys from the Ninth Circuit Solicitor's Office, but that Pennington prevented him from reporting the misconduct to the Office of Disciplinary Counsel ("ODC"). Plaintiff alleges that Defendant, at various times and in various ways, ordered him not to speak or convey in any manner to others comments that were critical of the Solicitor (Scarlett Wilson) or her office, especially regarding their ethics or honesty, without first obtaining Defendant's permission.

Nevertheless, Plaintiff consulted with members of the Board of Directors of the South Carolina Association of Criminal Defense Lawyers

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[1] As always, the Court says only what is necessary to address the parties' objections against the already meaningful backdrop of a thorough Report and Recommendation by the Magistrate Judge; exhaustive recitation of law and fact exists there.

("SCACDL") and assisted them in drafting a grievance against Solicitor Wilson, which action was contrary to Defendant's wishes and advice to the Board. Plaintiff subsequently began to question the ethical propriety of his own compliance with Defendant's previous orders not to disclose the alleged prosecutorial misconduct, and sought legal counsel. Ultimately, Plaintiff's ethics counsel sent a letter to Defendant challenging Defendant's directives about reporting/non-reporting ethical misconduct, and informing Defendant of Plaintiff's intent to "self-report" to the ODC his failure to disclose knowledge of misconduct as a result of those directives. Plaintiff later met with ODC staff to satisfy what he believed to be his reporting obligation.

In April 2014, Plaintiff was diagnosed with cancer and immediately began an intensive treatment regimen including chemotherapy and radiation. Plaintiff alleges that although he requested FMLA leave due to his treatment and condition, he never received official notification from Charleston County's Human Resource Office or any other county office relating to this request. During the period that Plaintiff was undergoing this cancer treatment, his dispute with Defendant about reporting ethical breaches by the Solicitor's Office continued. Plaintiff alleges that, while he was compromised by his disease and treatment, Defendant sent him a list of detailed questions seeking information related to the Solicitor's Office's past alleged ethics violations and regarding the Defendant's prior orders to not file grievances about said violations. Plaintiff met with Defendant on September 29, 2014 to discuss these matters, at which time Defendant requested further written documentation of Plaintiff's medical condition

and prognosis. On October 14, 2014, Defendant terminated Plaintiff's employment with the PD's Office.

Plaintiff asserts the following claims in his amended complaint: First Amendment retaliation, prior restraint, and protected speech under 42 U.S.C. § 1983 (First Cause of Action); employment discrimination in violation of the Americans with Disabilities Act ("ADA") (Second Cause of Action); Family and Medical Leave Act ("FMLA")—interference with statutory rights (Third Cause of Action); defamation—libel and slander *per se* (Fourth Cause of Action); breach of implied contract (Fifth Cause of Action); denial of due process under § 1983 (Sixth Cause of Action); and breach of contract—intended third-party beneficiary (Seventh Cause of Action).[2] (ECF No. 20 ¶¶ 41–174.)

Defendant Pennington, in his individual capacity, asserts a counterclaim for defamation and slander *per se*. (Second Am. Answer, ECF No. 41 at 23–28.) In the counterclaim, Defendant alleges that Plaintiff, after having been specifically instructed not to speak on behalf of the PD's Office without first receiving clearance from Defendant, responded to press inquiries from the Post and Courier regarding alleged misconduct by the Solicitor's Office in direct violation of Defendant's instructions. Defendant further alleges that Plaintiff's constant criticism of the Solicitor's Office reflected poorly on the PD's Office, fostered division within that office, and was generally counterproductive. According to Defendant,

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[2] Plaintiff has abandoned both his Sixth and Seventh Causes of Action. (*See* ECF No. 151 at 15 n.12.) Accordingly, those claims will not be addressed in this order.

Plaintiff held continuing personal animosity against Solicitor Wilson for having filed a professional grievance against Plaintiff several years earlier.

Defendant avers that Plaintiff told numerous attorneys the falsehood that Defendant ordered Plaintiff not to file a grievance against the Solicitor, thereby inferring that Defendant was unethically "covering for" or protecting the Solicitor at the expense of the best interests of the PD's clients and the community. Defendant identifies nine individuals to whom Plaintiff made this allegedly false statement.

Moreover, Defendant asserts that Plaintiff repeated this false statement to South Carolina Lawyer's Weekly reporter Phillip Bantz ("Bantz") in April 2014, and that the false statement was published statewide by the Lawyer's Weekly to members of the South Carolina Bar and the broader community. Defendant contends that the statement that he had ordered Plaintiff not to file a grievance against the Solicitor, and the repetition of the statement, was both false and published by Plaintiff with the intent of showing Defendant was unethical and unfit for his profession. Defendant alleges that when he asked Plaintiff in September 2014 to provide the date, time, and location of any such alleged orders, Plaintiff was unable to provide the information.

Finally, Defendant alleges that he terminated Plaintiff's employment due to Plaintiff's false accusations against Defendant, Plaintiff's insubordinate and divisive statements and conduct as a senior staff member directed to subordinate staff and third parties, and Plaintiff's inability to control his animosity toward other lawyers and act

constructively for the welfare of his clients in coordination with his employer, the PD's Office.

On April 13, 2018, Defendants filed a motion for summary judgment on Plaintiff's claims, and Pennington, in his individual capacity, filed a motion for summary judgment on his counterclaim. (ECF Nos. 110 & 111.) The motions were fully briefed. (ECF Nos. 115, 116, 121, 122, 124, 127.) The Magistrate Judge held a hearing on, *inter alia*, the motions for summary judgment. (ECF Nos. 131 & 132.) The case was reassigned to the undersigned on September 10, 2018. (ECF No. 137.) On November 15, 2018, the Magistrate Judge issued his Report. (ECF No. 151.) The parties filed timely objections and replies. (ECF No. 154, 155, 156, 157.) The matter is ripe for consideration and the Court now makes the following ruling.

STANDARD OF REVIEW

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *See Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a *de novo* determination of any portion of the Report of the Magistrate Judge to which a specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the Magistrate Judge or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b). In the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must "only satisfy itself that there is no clear error on the face of

the record in order to accept the recommendation." *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005).

DISCUSSION

A. Defendant Pennington's Defamation Counterclaim

The Magistrate Judge concluded that Defendant Pennington's motion for summary judgment on his defamation counterclaim should be denied. The Report notes that Defendant offered evidence of comments made by Plaintiff which are arguably actionable under a defamation theory, including that Defendant was unable to perform his job, that no one would want him representing them, that his legal skills were lacking, that he was incompetent and a poor administrator, that he was unable to perform his job, that he was unwilling as the Public Defender "to really fight with the Solicitor's office," and that he would not permit Plaintiff to file grievances. (ECF No. 151 at 12 (citing deposition excerpts).) However, the Magistrate Judge found that there is a clear factual dispute between Plaintiff and Defendant about whether Defendant ordered Plaintiff not to file a grievance, which is a question of fact for the jury. (*Id.* at 13.) Moreover, the Magistrate Judge concluded that genuine issues of material fact remain with respect to whether the statements at issue were mere opinion and did not convey defamatory meaning, or were indeed defamatory in nature, and/or were made with malice and truly damaged Defendant's reputation. (*Id.* at 14.) Accordingly, the Magistrate Judge reasoned that the facts and evidence presented do not establish defamation as a

matter of law, and Defendant is not entitled to summary judgment on his counterclaim. (*Id.*)

Though he agrees with the Magistrate Judge's conclusion that Defendant is not entitled to summary judgment on the defamation counterclaim, Plaintiff objects "on the basis of lack of federal subject matter jurisdiction" to consideration of "certain statements referenced in the [Report's] discussion of Defendant's counterclaim." (ECF No. 155 at 7.) The Court finds that the factual questions surrounding the statements relevant to Defendant's counterclaim fall within the Court's supplemental jurisdiction. The objection is without merit and is overruled.

The Court agrees with the sound reasoning and conclusions of the Magistrate Judge pertaining to the defamation counterclaim, and finds no error therein. Accordingly, the motion for summary judgment on the counterclaim is denied.

B. Plaintiff's First Amendment Section 1983 Claim

With respect to Plaintiff's § 1983 claim alleging violation of his rights under the First Amendment to the U.S. Constitution (First Cause of Action), the Magistrate Judge first concluded that Defendant Pennington, in his official capacity, is entitled to dismissal as a party defendant to Plaintiff's First Amendment claim because he enjoys Eleventh Amendment immunity from any suit for damages under § 1983. (ECF No. 151 at 15–17.) Plaintiff objects to this conclusion in part, arguing that, to the extent his First Amendment claim seeks injunctive relief—namely, reinstatement for a retaliatory firing—Eleventh Amendment immunity does not

apply, and Defendant Pennington, in his official capacity, should not be fully dismissed as a party defendant to the First Cause of Action. (ECF No. 155 at 3–4.) Plaintiff is correct and the objection is sustained. The U.S. Supreme Court has stated, "[A] state official *in his or her official capacity, when sued for injunctive relief*, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989) (emphasis added) (citations and quotation marks omitted). Accordingly, Defendants' motion for summary judgment is granted insofar as it seeks dismissal of Defendant Pennington, in his official capacity, from the First Cause of Action for damages, but denied insofar as it seeks dismissal of Defendant Pennington, in his official capacity, from the First Cause of Action for injunctive relief. (*See* ECF No. 20 ¶ 57 (seeking reinstatement and other injunctive relief as remedfies for alleged First Amendment violations).)

The Magistrate Judge next found that Plaintiff has presented no evidence of any unconstitutional policy adopted and promulgated by Defendant Charleston County or its officers—in this case Pennington—so as to subject Charleston County to liability on the First Amendment claim. (ECF No. 151 at 17–18.) The Magistrate Judge stated, "Plaintiff has failed to point to any ordinance or policy of Charleston County that Pennington would have been following by engaging in the improper conduct alleged, and the county may only be liable for damages if the execution of a policy or custom *of the county itself* is what resulted in the alleged injury." (*Id.* at 18 (emphasis added) (citing *Monell v. Dep't of Social Servs.*, 436

U.S. 658, 694 (1978); *Milligan v. City of Newport News*, 743 F.2d 227, 229 (4th Cir. 1984); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination*, 507 U.S. 163, 166 (1993)).) The Report further notes that, as the Ninth Circuit Public Defender, Pennington is considered to be an employee of the State of South Carolina, not Charleston County. (*Id.*) Thus, the Magistrate Judge concluded that Defendant Charleston County is entitled to dismissal as a party defendant to Plaintiff's First Cause of Action. (*Id.* at 19.)

Plaintiff objects to this conclusion, arguing that Defendant Pennington is the "final policy maker" with respect to hiring, firing, and directing the duties of PD's Office employees, who are all employees of Charleston County. (ECF No. 155 at 5.) He further asserts that, irrespective of Pennington being "labelled a 'state employee,'" Pennington is acting for, and on behalf of, Charleston County when making hiring and firing decisions regarding PD's Office personnel. (*Id.* at 6.) However, this objection misconstrues both what it means to be a "final policy maker" and the nature of the "policy" being challenged in the First Amendment claim. "'[P]olicymaking authority' implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government." *Spell v. McDaniel*, 824 F.2d 1380, 1386 (4th Cir. 1987) (citations omitted). Pennington's decision to terminate Plaintiff was operational and discretionary in nature, and Plaintiff has not shown that Pennington was a "final policy maker" in this regard. Moreover, the "policy" being challenged in the First Amendment claim is Pennington's alleged order

to Plaintiff and other PD's Office personnel not to report ethical misconduct without first receiving his approval. Plaintiff's firing is incidental to this "policy," though in Plaintiff's view, causally related. Plaintiff has not offered any evidence to show that Pennington was acting on behalf of Charleston County when he allegedly imposed such a policy. Accordingly, the objection is overruled and Defendants' motion for summary judgment is granted to the extent it seeks dismissal of Charleston County as a party defendant to the First Cause of Action.

Regarding Plaintiff's § 1983 claims against Defendant Pennington in his individual capacity, the Magistrate Judge determined that, when considered in the light most favorable to Plaintiff, the record evidence reflects that Plaintiff sought to engage in speech designed to bring public attention to what he believed to be serious prosecutorial misconduct by the Ninth Circuit Solicitor, and that Defendant attempted to prevent him from engaging in that speech by way of his role as Plaintff's boss. (ECF No. 151 at 19–23.) Thus, the Magistrate Judge found that Pennington is not entitled to summary judgment on Plaintiff's prior restraint claim. (*Id.* at 23.)

Defendants object to these findings, arguing that Pennington did not restrain Plaintiff's speech in violation of the First Amendment. (ECF No. 154 at 3.) Defendants broadly argue that: (1) Plaintiff has not presented evidence that his speech was "citizen speech" related to "matters of concern to the public"; (2) Plaintiff has not presented adequate evidence that Pennington restrained his speech in an unlawful manner; and (3) Pennington's interest in managing and operating his office outweighed Plaintiff's

interest in engaging in the allegedly protected speech. (*Id.* at 3–6.) The Court disagrees, and finds that: (1) there is sufficient evidence in the record to conclude that the speech at issue was not purely personal, but related to a matter of significant public concern—namely, alleged ethical misconduct by the local prosecutor's office in a serious criminal case(s); (2) there is adequate evidence to create a jury issue as to whether Pennington restrained Plaintiff's speech unlawfully—by ordering Plaintiff not to disclose alleged ethical misconduct of which he had knowledge and regarding which he maintained a perceived duty to report; and (3) the question whether Pennington's legitimate managerial interest outweighed Plaintiff's First Amendment interests presents a genuine dispute of material fact for resolution by a jury. Defendants have not shown any error in the Magistrate Judge's sound reasoning and conclusions on these matters, and the objection is overruled.

The Magistrate Judge further concluded that Plaintiff's First Amendment retaliation claim is not subject to summary judgment because there is a sufficient question of fact as to whether the speech at issue is protected, as well as a genuine dispute regarding whether Plaintiff's having engaged in protected speech was the motivating cause for his discharge. (*Id.* at 23–24.) Specifically, the Magistrate Judge found that the evidence, considered in the light most favorable to Plaintiff, demonstrates that Pennington's decision to terminate Plaintiff's employment arose from Plaintiff's public comments about the Solicitor's Office, including with the SCACDL Board of Directors and to the press. (*Id.* at 24.) Accordingly, the Magistrate Judge recommended that Defendants' motion for summary judgment on

Plaintiff's § 1983 retaliatory discharge claim be denied. (*Id.*)

Defendants object, arguing that the Report allows Plaintiff to create and rely upon a "sham issue of fact" in order to avoid the entry of summary judgment on the retaliation claim. (ECF No. 154 at 6.) Here Defendants aver that Plaintiff set up, and swore to, contradictory theories, where in one claim of his verified amended complaint he asserts that his *disability* was the "but for" cause of his termination (employment discrimination based on disability in violation of the ADA, Second Cause of Action), and in another claim he contends that "speaking out" against prosecutorial misconduct and violating the unconstitutional restraints Pennington imposed him was the but for cause (First Amendment retaliation theory, First Cause of Action). (*Id.* at 6–8.) Defendants assert that by failing to acknowledge or examine this inconsistency in Plaintiff's sworn statements, including his charge of discrimination to the EEOC, verified complaint, verified amended complaint, and deposition testimony, the Magistrate Judge erroneously allowed Plaintiff to manufacture an issue of fact, which the Magistrate Judge then relied upon in recommending that summary judgment be denied. (*Id.* at 8.) Defendants state that the Report, "in this respect, is wrong, inconsistent with well-established law and in error." (*Id.*)

The Court disagrees that the Magistrate Judge relied upon a "sham issue of fact," and overrules the objection. Paragraph 52 of the verified amended complaint states: "Defendant Pennington ultimately terminated Plaintiff's employment because of his criticism of Solicitor Wilson in violation of Defendant

Pennington's restrictions on Plaintiff's speech as described herein and because of Plaintiff's involvement in grievances filed against Solicitor Wilson and her office." (ECF No. 20 at 16.) This is a clear statement of causation, wherein Plaintiff represents that engaging in speech protected by the First Amendment directly led to his firing. (*See also* Opp'n to Mot. Summ. J., ECF No. 115 at 22–25 (arguing that Plaintiff was fired for exercising and attempting to exercise protected speech).) With respect to Plaintiff's ADA claim, paragraph 79 of the verified amended complaint states: "Defendant Pennington had knowledge of Plaintiff's disability and intentionally and willfully discriminated against Plaintiff based on that disability in direct violation of the ADA by terminating Plaintiff's employment on October 14, 2014, in the midst of his on-going course of chemotherapy treatments." (*Id.* at 22.) Paragraph 80 states:

> Upon information and belief, Defendant Pennington deliberately attempted to take advantage of Plaintiff's weakened physical condition from the cancer treatments to inflict greater harm on Plaintiff than would have been possible if Plaintiff were healthy. Upon information and belief, Defendant Pennington also used the timing of termination in the midst of Plaintiff's health crisis in an attempt to force Plaintiff to accept a severance payment of approximately two weeks' pay, plus three months of continuation of health benefits under COBRA in exchange for Plaintiff's waiving any legal claims

> arising out of his employment or termination. Plaintiff refused to accept the severance proposal.

(*Id.*) Plaintiff's charge of discrimination to the EEOC alleges: "My termination of October 14, 2014 was strategically timed during a specific course of my treatment that was especially debilitating and physically demanding. But for my illness, I would not have been terminated at that time. But for my condition I would not have been let go when and [sic] the manner I was treated, due to my illness." (ECF No. 111-15 at 2.) Plaintiff argues that these averments, taken together, represent a "novel claim under ADA law" that Pennington used the *timing* of a particularly difficult stage of his illness and treatment to take advantage of his cancer disability when effecting his termination. (*See* Pl.'s Reply to Defs.' Objections, ECF No. 157 at 10–14 & n.12.) Plaintiff states, "[I]t is not now, nor has it ever been Plaintiff's position that Pennington fired him 'because he was disabled by cancer.'" (*Id.* at 12.) Without expressing any opinion on the viability of Plaintiff's "novel" disability discrimination theory, the undersigned finds that it is not fundamentally at odds with Plaintiff's core assertion that he was fired for making ethical allegations against personnel from the Solicitor's Office. Finding no error in the Magistrate Judge's conclusions and recommendation regarding the First Amendment retaliation claim, the Court denies summary judgment as to that claim within the First Cause of Action.

As to qualified immunity, the Magistrate Judge noted that he had already determined that a genuine issue of material fact remains regarding

whether Pennington violated Plaintiff's First Amendment rights by preventing Plaintiff from discussing or commenting on a matter of public concern. (*Id.* at 24–25.) The Magistrate Judge next concluded that it was clearly established during the relevant time period that even a public employee's First Amendment rights could be violated where the countervailing government interest motivating the restraint was insufficient to outweigh the employee's right to address an issue of public concern. (*See id.* at 25–26.) Therefore, the Magistrate Judge reasoned that Defendant Pennington is not entitled to dismissal of Plaintiff's First Amendment claims based on qualified immunity because there is a genuine issue of fact as to whether Pennington's conduct violated a clearly established constitutional right of which a reasonable person would have known. (*Id.* at 26 (citing *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994) (holding that qualified immunity shields a government official from liability only if the official's conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known)).)

Defendants object to these conclusions, arguing that even if Pennington did restrain Plaintiff's speech in violation of the First Amendment, Pennington, in his individual capacity, is entitled to qualified immunity because an unlawful restraint was not established "beyond debate." (ECF No. 154 at 3.) Defendants assert that the right at issue was not clearly established, and that the Magistrate Judge relied upon inapplicable precedent, precedent post-dating the events at issue, and precedent from jurisdictions other than the U.S. Supreme Court or the Fourth Circuit in finding that summary judgment

was not appropriate. (*Id.* at 8–11.) Defendants further contend that when considering the right that Butler alleges Pennington violated, the Court must not define the right as a broad general proposition, but in light of the specific context of the case. (*Id.* at 11 (citing *Mullinex v. Luna,* 136 S. Ct. 305, 308 (2015); *McKinney v. Richland Cty. Sheriff's Dep't*, 431 F.3d 415, 417 (4th Cir. 2005); *Wiley v. Doory*, 14 F.3d 993, 995 (4th Cir. 1994)).)

The Fourth Circuit has explained the legal principles governing the First Amendment rights of public employees in the following manner:

> It is well settled that citizens do not relinquish all of their First Amendment rights by virtue of accepting public employment. *See United States v. National Treasury Employees Union*, 513 U.S. 454, 465, 115 S. Ct. 1003, 130 L.Ed.2d 964 (1995) [hereinafter *NTEU*]; *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L.Ed.2d 811 (1968). Nevertheless, the state, as an employer, undoubtedly possesses greater authority to restrict the speech of its employees than it has as sovereign to restrict the speech of the citizenry as a whole. *See Waters v. Churchill*, 511 U.S. 661, 671, 114 S. Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) (recognizing that "the government as employer . . . has far broader powers than does the government as

sovereign"); *Pickering*, 391 U.S. at 568, 88 S. Ct. 1731 (explaining that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general"). A determination of whether a restriction imposed on a public employee's speech violates the First Amendment requires "'a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick*, 461 U.S. at 142, 103 S. Ct. 1684 (alteration in original) (quoting *Pickering*, 391 U.S. at 568, 88 S. Ct. 1731). This balancing involves an inquiry first into whether the speech at issue was that of a private citizen speaking on a matter of public concern. If so, the court must next consider whether the employee's interest in First Amendment expression outweighs the public employer's interest in what the employer has determined to be the appropriate operation of the workplace. *See Pickering*, 391 U.S. at 568, 88 S. Ct. 1731.

The threshold inquiry thus is whether the Act regulates speech by state employees in their capacity as citizens

> upon matters of public concern. If a public employee's speech made in his capacity as a private citizen does not touch upon a matter of public concern, the state, as employer, may regulate it without infringing any First Amendment protection. *See Connick*, 461 U.S. at 146, 103 S. Ct. 1684 (explaining that if a plaintiff's speech "cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary . . . to scrutinize the reasons for [the] discharge"); *Holland v. Rimmer*, 25 F.3d 1251, 1254–55 & n. 11 (4th Cir. 1994). Whether speech is that of a private citizen addressing a matter of public concern is a question of law for the court and, accordingly, we review the matter de novo. *See Connick*, 461 U.S. at 148 n. 7, 103 S. Ct. 1684; *Hall v. Marion Sch. Dist. Number 2*, 31 F.3d 183, 192 (4th Cir. 1994); *Holland*, 25 F.3d at 1255.

Urofsky v. Gilmore, 216 F.3d 401, 406 (4th Cir. 2000) (modifications in original). "When applying this Pickering balancing test, the Supreme Court has suggested that 'the Government's burden is greater' in cases like that at hand, involving 'potential speech before it happens' than in cases involving 'an adverse action taken in response to actual speech.'" *Mansoor v. Trank*, 319 F.3d 133, 137 (4th Cir. 2003). Viewing the facts in the light most favorable to Plaintiff, the Court finds that Butler's proposed speech—namely, exposing alleged prosecutorial misconduct—was citizen speech on a matter of public concern, and that

Butler's interest in communicating that speech was not outweighed by Pennington's interest in efficient operation of the PD's Office.

The Fourth Circuit has stated, "'We do not require a case directly on point' in order to conclude that the law was clearly established, 'but existing precedent must have placed the statutory or constitutional question beyond debate.'" *Liverman v. City of Petersburg*, 844 F.3d 400, 411 (4th Cir. 2016) (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011)). "[I]t was clearly established in the law of this Circuit in September 2009 that an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency . . ., is protected." *Durham v. Jones*, 737 F.3d 291, 303–04 (4th Cir. 2013) (citing *Andrew v. Clark*, 561 F.3d 261, 269 (4th Cir. 2009)). The Court finds that, at times relevant to the alleged events, it was clearly established that Butler maintained a First Amendment right to report alleged prosecutorial misconduct by the Ninth Circuit Solicitor's Office. Accordingly, Defendants' objections are overruled, the Magistrate Judge's reasoning and conclusions are adopted, and the Court holds that Defendant Pennington, in his individual capacity, is not entitled to qualified immunity.

C. Americans with Disabilities Act Claim

With regard to Plaintiff's Second Cause of Action, the Magistrate Judge found that: (1) Plaintiff cannot bring an ADA claim against Defendant Pennington in his official capacity under Title I of the ADA—specifically, 42 U.S.C. §§ 12111(8) and 12112(a)—for damages; (2) Pennington in his official

capacity is entitled to dismissal insofar as Plaintiff asserts a claim under Title II of the ADA—specifically, 42 U.S.C. §§ 12102(2) and 12132; (3) Pennington in his official capacity is entitled to dismissal as a party defendant to the Second Cause of Action; and (4) Plaintiff may proceed with his ADA claim against Defendant Charleston County because he was a Charleston County employee, and Charleston County is subject to, and may be found liable for, violations of Title I of the ADA. (ECF No. 151 at 27–28.)

Plaintiff's verified amended complaint alleges that he suffers from rectal cancer, that the condition was a "disability" within the meaning of the ADA during the relevant time period, and that Pennington failed to grant his request for additional time to respond to questions that Pennington required Plaintiff to answer about their ongoing dispute over reporting alleged misconduct by the Solicitor's Office, as well as details regarding Pennington's alleged orders to Plaintiff to not report the alleged misconduct. (*See generally* ECF No. 20 ¶¶ 61–83.) Plaintiff further alleges that Pennington took advantage of his weakened state, during a debilitating round of chemotherapy treatments, to terminate his employment in an attempt to force Plaintiff to accept an unfavorable severance package. (*Id.*) The Magistrate Judge concluded that there is sufficient record evidence to give rise to a genuine issue of fact as to whether Defendants refused to provide a reasonable accommodation that had been requested by Plaintiff, namely an extension of time in which to answer Pennington's detailed questions. (ECF No. 151 at 30–32.) Therefore, the Magistrate Judge found that Charleston County is not entitled to

summary judgment on the Second Cause of Action. (*Id.* at 32.)

Plaintiff objects broadly to the Magistrate Judge's conclusions regarding the viability of the ADA claim against Defendant Pennington. Plaintiff states, "For reasons now lost to memory, Plaintiff erroneously sued Pennington in his 'official capacity.' He should have been sued in his individual capacity, and will suffer no prejudice if Plaintiff is allowed to amend his complaint." (ECF No. 155 at 11.) Plaintiff cannot amend his complaint by way of objections to a Report and Recommendation on a motion for summary judgment. The objection is overruled.

Defendants object by noting the Magistrate Judge's prior conclusion, when addressing Plaintiff's First Amendment claims, that Defendant Pennington is considered to be an employee of the State of South Carolina, not Charleston County. (ECF No. 154 at 12.) They cite *McMillian v. Monroe Cty., Ala.*, 520 U.S. 781, 784–93 (1997), in support of their assertion that the Magistrate Judge, when addressing Plaintiff's ADA claim, erred by considering Pennington to be an agent of Charleston County. However, the question presented in *McMillan* was whether an Alabama sheriff, when executing his law enforcement duties in the course of criminal investigations, was acting as a policy maker for the State of Alabama *or* for the particular county that he served, such that the county could be liable under 42 U.S.C. § 1983 for alleged violations of the plaintiff's constitutional rights by way of the sheriff concealing evidence of the plaintiff's innocence during a murder investigation and trial. *See McMillan*, 520 U.S. at 783–93. The substantive context in *McMillan* is entirely different than the case

at bar. To the extent that *McMillan* has any relevance here, it actually counsels against sustaining Defendants' objection. In *McMillan* the Supreme Court stated, with respect to local government liability, "[T]he question is not whether [the government official in question] acts for [the state] or [the county] in some categorical, 'all or nothing' manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policymakers for the local government *in a particular area, or on a particular issue*." *Id.* at 785 (emphasis added). Moreover, after noting that the inquiry is dependent on an analysis of state law, the *McMillan* court stated:

> This is not to say that state law can answer the question for us by, for example, *simply labeling as a state official an official who clearly makes county policy*. But our understanding of the *actual function of a governmental official, in a particular area*, will necessarily be dependent on the definition of the official's functions under relevant state law.

Id. at 786 (emphasis added). In the instant case, there is no question that Defendant Pennington, who was Plaintiff's boss, was acting on behalf of Plaintiff's employer, Charleston County, when he took actions with respect to the terms of Plaintiff's employment, such as whether or not to grant accommodations for a disability. This is true notwithstanding the fact that Pennington is technically a state employee. Accordingly, this portion of the objection is without merit.

However, Defendant's next objection, arguing that Plaintiff cannot bring a failure to accommodate claim under the ADA because his charge of discrimination did not allege a failure to accommodate, is correct and is therefore sustained. (ECF No. 154 at 13.) Butler's charge of discrimination alleges that Pennington strategically timed his termination during a period when the treatment he was receiving for his illness was most debilitating and physically draining. (*See* ECF No. 111-15 at 2.) The charge of discrimination says nothing of an alleged failure to accommodate by way of an unwillingness to grant an extension of time in which to answer Pennington's interrogatory-style questions. (*See id.*) Plaintiff seeks to avoid the consequence of this fact by arguing that "[t]he accommodation claim was added by letter dated June 12, 2015. Butler's employment lawyer wrote to the EEOC federal investigator, explaining in detail the accommodation Butler requested, and Mr. Pennington's refusal to grant it." (ECF No. 157 at 14; *see* ECF No. 111-12 at 18-19.) But the absence of the failure to accommodate allegation in the charge of discrimination is fatal to the viability of that pleading theory in this Court:

> The EEOC charge "defines the scope of the plaintiff's right to institute a civil suit." *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002). As stated by the Fourth Circuit Court of Appeals: "In any subsequent lawsuit alleging unlawful employment practices under Title VII, a federal court may only consider those allegations included in the EEOC charge." *Balas v. Huntington Ingalls Indus., Inc.*, 711

> F.3d 401, 407 (4th Cir. 2013) (citation omitted). If the plaintiff's claims "'exceed the scope of the EEOC charge and any charges that would naturally have arisen from an investigation thereof, they are procedurally barred.'" *Chacko v. Patuxent Inst.*, 429 F.3d 505, 506 (4th Cir. 2005) (quoting *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995)).

Allen v. Michelin N. Am., Inc. - USA, No. CV 6:18-791-TMC-KFM, 2018 WL 4346226, at *2 (D.S.C. Aug. 16, 2018) (holding ADA claim for failure to accommodate was barred where failure to accommodate was not alleged in the administrative charge of discrimination), *report and recommendation adopted sub nom. Allen v. Michelin N. Am., Inc.*, No. 6:18-CV-00791-TMC, 2018 WL 4334899 (D.S.C. Sept. 11, 2018); *Cox v. Nucor Corp.*, No. 2:16-cv-03073-PMD-MGB, 2017 WL 9250339, *2–*5 (D.S.C. June 14, 2017) (same). Therefore, Defendants' motion for summary judgment is granted to the extent that the Second Cause of Action purports to state a claim for failure to accommodate pursuant to the ADA. The relevant portion of the Magistrate Judge's Report (*see* ECF No. 151 at 26–32) is modified accordingly.

Defendants further object to the Magistrate Judge's conclusion that the ADA claim may proceed against Charleston County even though the County is not specifically named as a respondent in the administrative charge. (ECF No. 154 at 14.) Defendants argue that the Magistrate Judge inappropriately applied the "substantial identity" test because there is no evidence in the record that the

County participated in the conciliation process when Butler's EEOC charge was pending, and there is no evidence that the County was aware of Butler's EEOC charge until he filed and served his verified complaint. (*Id.* at 15.)

The Court agrees and sustains the objection. In finding that Charleston County was not entitled to dismissal on the ground that it was not named in Plaintiff's EEOC filing, the Magistrate Judge relied upon an exception to the general rule that an action under Title VII may generally only be brought against the respondent named in the charge. (*See* ECF No. 151 at 29–30.) The exception may apply where the defendant not named in the charge received fair notice and where the EEOC was able to attempt conciliation with the responsible parties. *See Equal Employment Opportunity Comm'n v. Am. Nat. Bank*, 652 F.2d 1176, 1186 n.5 (4th Cir. 1981) (noting that some courts have developed an exception to this rule "where it is clear that the defendant through some relationship with the named respondent had notice of the charges and participated in the conciliation process"). However, it should be noted that, other than an oblique reference to this exception in a footnote, it does not appear that the Fourth Circuit has directly recognized or adopted this exception. "In applying this exception, some courts have used the 'substantial identity' test, finding that if unnamed defendants are substantially or functionally identical to named ones, then the plaintiff may sue all defendants in a district court action, despite the failure to name some of them in the administrative action." *Scurry v. Lutheran Homes of S.C., Inc.*, No. CA 3:13-2808-JFA-PJG, 2014 WL 4402797, at *3 (D.S.C. Sept. 3, 2014) (citation omitted). Moreover,

> [i]n determining whether the named and unnamed defendants are substantially identical, courts have applied the following factors: (1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC charge; (2) whether, under the circumstances, the interests of a named party are so similar to the unnamed party's that for purposes of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; (3) whether the unnamed party's absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; and (4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Id. The Court finds: (1) that Plaintiff could, through reasonable effort, have ascertained the role of Charleston County at the time the EEOC charge was filed; (2) Plaintiff has not shown that the interests of Defendant Pennington, in his official capacity, and Charleston County are so similar that it would be unnecessary to include the County in the conciliation process; (3) it is impossible to determine whether Charleston County's absence from the EEOC proceedings resulted in actual prejudice because it would be inappropriate to make *ex post* assumptions about how the County would have conducted itself if

it had been included in the conciliation process; and (4) Plaintiff has not shown that Charleston County somehow represented to Plaintiff that its relationship with Plaintiff was to be through Defendant Pennington. Therefore, the Court concludes that Plaintiff has not made an adequate showing that Defendant Pennington and Charleston County were substantially identical for the purposes of Butler's disability discrimination claim. Consequently, Defendants' motion for summary judgment is granted to the extent that it seeks dismissal of Charleston County as a party defendant to the ADA claim. The relevant portion of the Magistrate Judge's Report (*see* ECF No. 151 at 26–32) is modified accordingly.

D. Family and Medical Leave Act Claim

With respect to Plaintiff's Third Cause of Action, the Magistrate Judge determined that: (1) Defendant Pennington, in his official capacity, is an arm of the State and cannot therefore be sued for monetary damages under Plaintiff's FMLA claim by virtue of the Eleventh Amendment; (2) Pennington, in his individual capacity, is entitled to dismissal as a party defendant to the FMLA claim because Plaintiff has not set forth factual allegations in his verified amended complaint to establish that Pennington was ever acting other than in his official capacity when making the decisions or taking the actions at issue in the claim, the evidence does not create an issue of fact as to whether Pennington was acting *ultra vires* for purposes of the claim, and binding authority Fourth Circuit authority precludes FMLA liability for state employees in their individual capacities; and (3) Defendant Charleston County is subject to liability for Plaintiff's FMLA claim under an "interference"

theory, specifically relating to the calculation of Plaintiff's leave time, and is not entitled to summary judgment on the claim. (ECF No. 151 at 33–40.)

Plaintiff objects to the Magistrate Judge's conclusion that Pennington cannot be sued in his individual capacity for violations of the FMLA, specifically taking issue with the Magistrate Judge's determination that the State, and not Pennington, was the real party in interest. (ECF No. 155 at 12–15.) However,

> [c]ontrolling Fourth Circuit authority holds claims against state employees in their individual capacities under the FMLA are barred by Eleventh Amendment immunity when the state is the real party in interest. *Martin v. Wood*, 772 F.3d 192, 196 (4th Cir. 2014). The state is the real party in interest when "the allegedly unlawful actions of the state officials [were] 'tied inextricably to their official duties.'" *Id.*

McKay v. Med. Univ. of S.C., No. CV 2:17-45-RMG, 2017 WL 3477799, at *3 (D.S.C. Aug. 14, 2017) (dismissing all FMLA claims against individual defendants because the plaintiff made no factual allegations establishing that said defendants were acting other than in an official capacity when engaging in the conduct of which the plaintiff complained). The allegedly unlawful actions with which Pennington is charged by Butler were inextricably tied to Pennington's official duties. The objection is without merit and is overruled.

Defendants object to the Magistrate Judge's conclusions that the County failed to provide Butler with adequate individualized notice for Butler to understand his FMLA leave, and that there is evidence Butler did not utilize his FMLA leave as he otherwise would have used it. (ECF No. 154 at 17.) Defendants argue that Butler received all required notice regarding his rights and responsibilities under the FMLA when he personally initialed, and had his physician review, prepare, and sign a FMLA leave certification form, which includes a page entitled, "Your Rights and Responsibilities under the Family Medical Leave Act as a Charleston County Government Employee." (*See id.* at 17–18; ECF No. 111-8.) Moreover, Defendants assert that the Magistrate Judge failed to recognize, or otherwise address, that Butler provided no evidence or specificity about how he would have used his FMLA differently. (ECF No. 154 at 18.)

The Court disagrees, and finds that Defendants' objection is insufficient to displace the sound reasoning and analysis of the Magistrate Judge. The Magistrate Judge found that the evidence, when considered in the light most favorable to Plaintiff, is that Plaintiff was told by an office manager that Charleston County had approved his FMLA leave and that he would be receiving a letter from the County confirming this, but that he never received any such letter confirming his leave, designating it as FMLA leave, or otherwise explaining its operation. (*See* ECF Nos. 151 at 39.) The Report further notes that the County began counting Plaintiff's sick leave hours as FMLA hours without providing the promised confirmation, "and Plaintiff asserts that by the time he was told orally by the office

manager on June 5, 2014 that his FMLA leave had been approved, Plaintiff had already been charged with approximately 252 hours (4 and 1/2 weeks) of FMLA leave." (*Id.*) In his verified amended complaint and at his deposition, Plaintiff stated that the County's failure to adequately inform him of the consequences of exhausting his FMLA leave before the County began charging him with FMLA hours resulted in him not taking necessary measures from the beginning to preserve his leave for the long treatment road ahead. (ECF Nos. 20 ¶¶ 103–06; 111-14 at 55.) The Magistrate Judge concluded, "This assertion is sufficient to state an FMLA interference claim for purposes of summary judgment." (ECF No. 151 at 40 (citing *Vannoy v. Fed. Reserve Bank of Richmond*, 827 F.3d 296, 302–03 (4th Cir. 2016) (reversing district court's grant of summary judgment to employer and recognizing an allegation that FMLA leave would have been structured differently as sufficient prejudice, resulting from an FMLA notice violation, to support an FMLA interference claim)).) "There are two types of individualized notice that the employer must give an employee who may be entitled to FMLA leave: a 'rights and responsibilities notice,' [29 C.F.R.] § 825.300(c); and a 'designation notice,' *id.* § 825.300(d)." *Vannoy*, 827 F.3d at 301. The requirements for FMLA designation notice are laid out in the Code of Federal Regulations:

> The employer is responsible in all circumstances for designating leave as FMLA–qualifying, and for giving notice of the designation to the employee as provided in this section. When the employer has enough information to determine whether the leave is being

> taken for a FMLA–qualifying reason (e.g., after receiving a certification), *the employer must notify the employee whether the leave will be designated and will be counted as FMLA leave within five business days absent extenuating circumstances*.

29 C.F.R. § 825.300(d)(1). Plaintiff's FMLA allegations amount to a claim that Charleston County failed to timely provide him with designation notice, and he has provided sufficient evidence of such failure in the form of his verified amended complaint and deposition testimony to survive summary judgment. Furthermore, the Court finds that Plaintiff has provided sufficient evidence that he would have structured his FMLA leave differently—for instance by using some of his accumulated sick leave and annual leave, or by working from home—to satisfy the prejudice prong of an interference claim premised on a FMLA notice violation. (*See* ECF Nos. 20 ¶¶ 103–06; 111-14 at 55.) Accordingly, Defendants objections are overruled and the motion for summary judgment as to the FMLA claim is denied.

E. Plaintiff's Defamation Claim

After explaining the various factual bases for Plaintiff's defamation claims against Defendant Pennington and considering Pennington's arguments for why Plaintiff's defamation claim should be dismissed, the Magistrate Judge concluded that Pennington is not entitled to dismissal of the defamation claim against him in his individual capacity because Plaintiff has clearly asserted that Pennington's allegedly defamatory conduct was

accompanied by actual malice, and a sufficient question to be decided by the finder of fact has been presented. (*See* ECF No. 151 at 40–43.) The Magistrate Judge further found that, when considered in the light most favorable to the Plaintiff, a genuine issue of material fact remains as to whether Pennington would be entitled to the affirmative defense of conditional or qualified privilege because the comments he made or published about Plaintiff were done in the course and scope of his position as the Ninth Circuit Public Defender. (*See id.* at 43–44.) The Report explains that, when considered under the summary judgment standard, the evidence presents jury questions as to whether the comments made by Pennington were made with malice, and as to whether Pennington exceeded any privilege he may have otherwise had in making the statements concerning Plaintiff. (*Id.*) Finally, the Magistrate Judge concluded that Pennington is not entitled to summary judgment on Plaintiff's defamation claim on account of Plaintiff being a public figure because Plaintiff has adequately alleged that the comments and publications by Pennington were made with actual malice, and this remains a question of fact for the jury. (*Id.* at 44.)

Defendant Pennington makes lengthy written argument objecting to the Magistrate Judge's reasoning and conclusions regarding Plaintiff's defamation claim. (*See* ECF No. 154 at 19–29.) Essentially, Pennington claims that the Magistrate Judge erred by failing to consider the details of four discrete actions by Pennington that Plaintiff contends amount to defamation, and that when the details are properly considered with respect to each action individually, each defamation theory fails either by

lack of sufficient factual basis or by application of the affirmative defenses of absolute privilege and/or conditional/qualified privilege. (*See id.*) These arguments present as potentially effective summation at trial, but not as valid reasons to grant summary judgment on the defamation claim. After *de novo* review, the Court finds no error in the Magistrate Judge's analysis, and agrees that jury questions remain regarding all pertinent aspects of the defamation claim and possible defenses. Accordingly, Defendant Pennington's objections are overruled, and the motion for summary judgment as to Plaintiff's Fourth Cause of Action is denied.

F. Breach of Implied Contract Claim

The Magistrate Judge considered Plaintiff's novel theory that Defendant Pennington, in his official capacity, and/or Charleston County breached an implied contract of Plaintiff's employment that consisted of a fundamental understanding that the employer attorney and employee attorney would both conduct their respective legal practices in accordance with ethical standards of the profession, and determined that there is no basis for such a claim under South Carolina law. (ECF No. 151 at 45–50.) Plaintiff raises what appears to be an objection to this determination (*see* ECF No. 155 at 15); however, the objection is conclusory and does not point to any specific error in the reasoning or conclusions of the Magistrate Judge. Accordingly, the objection is overruled, the motion for summary judgment is granted as to Plaintiff's Fifth Cause of Action, and the breach of implied contract claim is dismissed.

G. After-Acquired Evidence

Defendants argue that the Magistrate Judge's failure to address the matter of after-acquired evidence with respect to the First Amendment retaliation claim constitutes error. (ECF No. 154 at 30.) Defendants contend that based upon information gained in discovery about Butler's negative statements and actions regarding Pennington, Pennington would have terminated Butler's employment as early as February 22, 2014, irrespective of Butler and Pennington's ongoing conflict about reporting alleged ethical misconduct by the Solicitor's Office, and Pennington's decision to do so would have been appropriate and justified. (*Id.* at 30–31.) Defendants assert that their affirmative defense of after-acquired evidence was ripe for disposition at the summary judgment stage and the Magistrate Judge's failure to dispose of the issue was error. (*Id.* at 31–32.) The Court finds that remaining questions of fact with regard to the First Amendment retaliation claim and how Defendant Pennington may or may not have reacted to the discovery of Butler's negative statements and actions about Pennington render Defendants' after-acquired evidence defense, and any associated limitation on liability, more appropriate for disposition at trial. The Magistrate Judge did not err by omitting discussion of this affirmative defense in the Report. Accordingly, the objection is overruled.

H. Failure to Mitigate Damages

Finally, Defendants argue that the lack of any discussion of their failure to mitigate damages defense in the Magistrate Judge's Report constitutes

error. (ECF No. 154 at 32–34.) Defendants assert that Butler's claim for lost wages is barred because he made no effort to search or apply for new employment after being terminated by Pennington. (*Id.* at 32.) Again, the Court finds that the substance of this affirmative defense is more appropriate for disposition at trial. There is a genuine dispute as to whether Plaintiff's limited efforts to seek alternative employment during the relevant time period was reasonable in light of the severity of his medical condition. (*See, e.g.*, Butler Dep. 26:8–31:10, ECF No. 111-14 (describing limitations on Butler's ability to work due to cancer treatment and related surgeries, as well as Butler's intermittent efforts to work as a solo practitioner).) The Magistrate Judge committed no error by omitting discussion of the failure to mitigate damages defense in the Report, and the objection is overruled.

CONCLUSION

After careful consideration of the relevant materials and law, and for the reasons set forth above, the Court adopts the Report (ECF No. 151) of the Magistrate Judge and incorporates it herein, *as modified*, and to the degree not inconsistent with this ruling. Accordingly, Defendant Pennington's motion for summary judgment on his counterclaim (ECF No. 110) is DENIED, and Defendants' motion for summary judgment on Plaintiff's claims (ECF No. 111) is GRANTED in part and DENIED in part.

Specifically, Defendant Pennington, in his official capacity, is dismissed from the First Cause of action insofar as it seeks damages, but not insofar as it seeks injunctive relief. Defendant Charleston

County is dismissed as a party defendant to the First Cause of Action. The motion for summary judgment regarding the First Amendment claim against Pennington in his individual capacity is denied. Defendants' motion for summary judgment is granted to the extent that the Second Cause of Action purports to state a claim for failure to accommodate pursuant to the ADA, and the ADA claim is dismissed with prejudice because both Defendant Pennington, in his official capacity, and Charleston County are entitled to dismissal as party defendants to the claim. Defendant Pennington, in both his official and individual capacities, is dismissed as a party defendant to the Third Cause of Action under the FMLA, but the FMLA claim persists against Charleston County. The motion for summary judgment with respect to Plaintiff's defamation claim is denied. The motion for summary judgment as to Plaintiff's Fifth Cause of Action for breach of implied contract is granted, and that claim is dismissed with prejudice. Plaintiff has withdrawn his Sixth and Seventh Causes of Action, and those claims are accordingly dismissed without prejudice.

IT IS SO ORDERED.

/s/ Bruce Howe Hendricks
United States District Judge

April 16, 2019
Greenville, South Carolina

[ENTERED: November 15, 2018]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Beattie I. Butler,	)	C/A 2:15-4455-BHH-BM
	)	
Plaintiff,	)	
	)	
v.	)	**REPORT AND**
	)	**RECOMMENDATION**
	)	
D. Ashley Pennington, in his individual and official capacities and Charleston County	)	
	)	
Defendants.	)	
	)	

This action has been filed by the Plaintiff, a former employee of the Ninth Circuit Public Defender's Office, asserting various federal and state claims against the named Defendants. The Defendants Charleston County and Pennington (in his official capacity) filed an answer to Plaintiff's Amended Complaint on April 14, 2016. The Defendant Pennington (in his individual capacity) also filed an Answer together with a counterclaim on that same date, and thereafter filed an Amended Answer and Counterclaim on July 8, 2016, and a Second Amended Answer and counterclaim on September 27, 2016. Plaintiff filed an Amended Reply to Defendant's Second Amended Answer and

Counterclaim on December 29, 2016, and Defendant filed an Amended Answer (but did not amend or include his counterclaim) on January 8, 2018.

The Defendants filed a motion for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on April 13, 2018, seeking dismissal of all of Plaintiff's claims against the Defendants. The Defendant Pennington (in his individual capacity) also filed a motion for summary judgment as to his counterclaim that same date.[1] Plaintiff filed memoranda in opposition to the Defendants' motions on May 29, 2018, following which the Defendants filed reply memoranda on July 2, 2018. Plaintiff filed an amended response to Pennington's motion for summary judgment on July 17, 2018. See also, Text Order (Court Docket No. 125). A hearing was held on the pending motions on August 15, 2018, at which all parties were represented by able counsel. The motions were thereafter taken under advisement pending scheduled mediation.

The Court has now been advised that mediation was unsuccessful, and the pending motions are therefore now before the Court for disposition.[2]

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[1] Defendant Pennington's Second Amended Answer and Counterclaim initially included, inter alia, a counterclaim for defamation based on Plaintiff publically claiming Pennington terminated him because he has cancer. By Order filed December 27, 2016, that counterclaim was dismissed. See Order (Court Docket No. 50); see also Court Docket No. 47 [Report and Recommendation]. Defendant Pennington's motion for summary judgment is on his remaining counterclaim.

[2] This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C.

Allegations of the Parties

Plaintiff's allegations from his Amended Complaint were previously set forth by the Court in its Order of September 12, 2016, and in the Report and Recommendation filed November 28, 2016, and are reprinted herein verbatim as follows:

Plaintiff was an Assistant Public Defender (APD) for Charleston County. The Defendant Pennington is the Public Defender for the Ninth Circuit, which includes Charleston County, and was Plaintiff's boss. Plaintiff alleges that at the time of his termination by Pennington (the "Defendant"), he was "the most experienced litigator in the Office and was the lawyer most often sought out by other APDs to be second chair or otherwise to aid in the defense of clients charged with serious felonies. Amended Complaint, at ¶ 9[3]; see also Dunaway Deposition, pp. 8-9; Penn Affidavit, # 5-7. Plaintiff alleges that beginning in late 2007 he became aware of what he considered to be serious misconduct being perpetrated against clients of the Public Defender's

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§ 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(g), D.S.C. The Defendants have filed motions for summary judgment. As these motions are dispositive, this Report and Recommendation is entered for review by the Court.

[3] Plaintiff's pleading is a verified Amended Complaint. In this Circuit, verified complaints are to be considered as affidavits and may, standing alone, defeat a motion for summary judgment when the allegations contained therein are based on personal knowledge. Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991). Therefore, the undersigned has considered the factual allegations set forth in the verified Complaint in issuing a recommendation in this case.

Office by attorneys from the Ninth Circuit Solicitor's Office. Plaintiff alleges, however, that the Defendant prevented him from reporting this misconduct to the Office of Disciplinary Counsel (ODC). Id., ¶ 10; Plaintiff's Deposition, pp. 4, 65-69, 121; Dunaway Deposition, pp. 43-44. Plaintiff then proceeds to set out some of these alleged instances of misconduct, and the Defendant's alleged refusal to allow him to report what he considered to be misconduct. Id., ¶¶ 11-23. See Plaintiff's Deposition, pp. 125, 199.

Plaintiff alleges that in December 2013 he contributed to a discussion regarding continuing misconduct by the Ninth Circuit Solicitor's Office on the South Carolina Association of Criminal Defense Lawyers ("SCACDL") Electronic List Serv.[4] Plaintiff alleges that he "detailed his experience with the history of ethical lapses in that office and indicated that something should have been done about it a long time ago". Id., at ¶ 24; see also Plaintiff's Deposition, pp. 5-6, 127. Plaintiff alleges that in response to this posting, the Defendant instructed him via email that he was not to speak or convey in any manner to others comments that were critical of the Solicitor (Scarlett Wilson) or her office, especially regarding their ethics or honesty, without first obtaining the Defendant's permission.[5] Id., at ¶ 25. See also

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[4] Plaintiff alleges that the SCACDL List Serv facilitates active conversation among criminal defense lawyers regarding issues of criminal law in South Carolina. Plaintiff further alleges that participants on the List Serv generally believe that matters discussed on that forum are not to be shared outside the organization, especially not with prosecutors. Id., at ¶ 14.

[5] Rhett Dunaway, Deputy Public Defender for Charleston County, testified that after the Defendant became

Plaintiff's Deposition, pp. 127-128. Even so, Plaintiff alleges that the SCACDL Board of Directors subsequently voted in January 2014 to file a grievance and send a letter to the South Carolina Attorney General requesting an investigation of the Ninth Circuit Solicitor's Office, and that he both discussed this matter with two members of the SCACDL Board and assisted in drafting the language of the grievance and letter. Id., at ¶ 27; see also Dunaway Deposition, pp. 40-41; Plaintiff's Affidavit, # 70.

Plaintiff alleges that during the SCACDL's February 2014 board meeting, the Defendant argued to the Board that Plaintiff was manipulating the SCACDL for his own personal agenda and was doing so at the expense of his own clients, and that Wilson would punish the public defender clients and the Public Defender's Office in retaliation for such complaints. Id., at ¶ 28; Plaintiff's Deposition, pp. 149-152, 208-209. However, Plaintiff alleges that the SCACDL Board voted to go forward with the grievance and letter despite the Defendant's arguments, following which Plaintiff received an email from the Defendant directing him to turn over all materials he had provided to the SCACDL Board, since Defendant had ordered Plaintiff not to criticize the Ninth Circuit Solicitor's Office. Id., at ¶ ¶ 29-30; see also Court Docket No. 111-13, p. 13. Plaintiff alleges that he thereafter began to question whether he had acted contrary to his own ethical

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upset with Plaintiff for discussing an ethical complaint against Wilson, the policy of the public defender's officer became if a grievance is contemplated that it has to go through the Defendant. See Dunaway Deposition, pp. 5, 36-37.

duties by previously adhering to the Defendant's directives not to report what he believed to be ethical breaches to the appropriate authority, and that on advice of his own counsel he then drafted a letter to the ODC to "self-report" and explain his previous failure to do so. Id., at ¶ 31; Plaintiff's Affidavit, # 21.

Plaintiff alleges that on February 27, 2014, the Defendant sent out an office wide email in the Charleston County Public Defender's Office stating that any perceived ethical breach encountered by an APD should first be reported to him so that he could properly investigate the matter and determine how to respond. Id., at ¶ ¶ 33-34; see also Plaintiff's Exhibit 48. Defendant further stated that the SCACDL List Serv was not to be used for discussing ethical breaches or his handling thereof. Id., at ¶ ¶ 33-34; see also Plaintiff's Deposition, pp. 126-127. Plaintiff alleges that thereafter an attorney representing him sent a letter to the Defendant on March 3, 2014, taking issue with his directive and informing him of Plaintiff's intent to self-report to the ODC his previous failures to report the Solicitor's office's ethical breaches. Plaintiff alleges he thereafter met with the ODC's staff to satisfy his reporting obligation. Id., at ¶ ¶ 33-34.

Plaintiff alleges that on April 7, 2014 he was diagnosed with cancer and immediately began undergoing an intensive treatment regimen which included chemotherapy and radiation. Plaintiff alleges that although he requested FMLA leave due to his treatment and condition, he never received any official notification from Charleston County's Human

Resource Office or any other County office relating to this request. Id., at ¶ ¶ 35-36; Plaintiff's Deposition, pp. 6-7, 49, 52, 90, 207. Plaintiff alleges that then, on September 23, 2014, he received an email from the Defendant containing detailed questions and requests for information related to past ethical breaches by the Solicitor's Office and the Defendant's orders that Plaintiff not file grievances about those breaches, with a response due the following day. Plaintiff alleges that at that time he was suffering the effects of his cancer treatments, and requested additional time to respond, but that the Defendant specifically denied his request, and only agreed to give him "slightly more time" because of an accidental death of an APD the previous night. Id., at ¶ ¶ 37-38; see also Court Docket No. 111-6, p. 2 [Plaintiff's Deposition Exhibit 9]; Plaintiff's Deposition, pp. 202-203. Plaintiff alleges that he then met with the Defendant on September 29, 2014, at which time the Defendant requested further written documentation of his condition and prognosis, and that thereafter the Defendant "abruptly terminated" Plaintiff's employment on October 14, 2014. Id., at ¶ ¶ 39-40; see also Court Docket Nos. 111-7, 111-15, pp. 40-43.

In his verified Amended Complaint, Plaintiff alleges the following claims against the Defendants: First Amendment retaliation, prior restraint, and protected speech under 42 U.S.C. § 1983 (First Cause of Action); Employment Discrimination in violation of the ADA (Second Cause of Action); Family and Medical Leave Act - interference with statutory rights (Third Cause of Action); Defamation - libel and slander per se (Fourth Cause of Action); Breach of

Implied Contract (Fifth Cause of Action); denial of due process under § 1983 (Sixth Cause of Action); and Breach of Contract - Intended Third-party beneficiary (Seventh Cause of Action). See generally, Plaintiff's Verified Amended Complaint.

As part of his Second Amended Answer to Plaintiff's Amended Complaint, the Defendant asserts a Counterclaim against the Plaintiff for defamation and slander per se. In this Counterclaim, Defendant alleges that after he told Plaintiff that he [Plaintiff] was not authorized to speak to the press on behalf of, or as a representative of, the Ninth Circuit Public Defender's Office without seeking clearance first from the Defendant, that Plaintiff nonetheless "responded to press inquiries from the Post and Courier regarding problems or wrongdoing by the Ninth Circuit Solicitor's Office". See Second Amended Answer and Counterclaim, ¶ 1; see also Plaintiff's Deposition, pp. 4-5. Defendant alleges that Plaintiff's constant criticism of the Solicitor's Office reflected badly on the Defender's Office and fostered division within that office, but that when he tried to counsel Plaintiff regarding his counterproductive behavior, Plaintiff was resistant, later becoming hostile. Id., ¶ ¶ 2-3. Defendant alleges that Plaintiff's conduct created an inference "that [Defendant] was unethical for not reporting the Solicitor and/or her staff members to the South Carolina Office of Disciplinary Counsel and incompetent in leading the Public Defender's Office". Id., ¶ 4. Defendant alleges that this was similar to conduct Plaintiff had engaged in toward the Defendant's predecessor as well as the previous Solicitor, that he was also aware that the current Solicitor had previously filed a

grievance against the Plaintiff, and that he came to recognize that Plaintiff held continuing personal animosity against the Solicitor for having filed that grievance against the Plaintiff several years earlier. Id., ¶ ¶ 5-7.

Defendant alleges that when he refused to publically criticize the Solicitor as the Plaintiff wanted him to do, Plaintiff told numerous other attorneys, both inside and outside of the Public Defender's Office, the falsehood that he had ordered Plaintiff not to file a grievance against the Solicitor, thereby inferring that the Defendant was covering for or protecting the Solicitor at the expense of the best interests of the Public Defender's clients and the community. Defendant identifies nine individuals to whom Plaintiff made this allegedly false statement. Id., ¶ ¶ 8-9. Defendant further alleges that Plaintiff's statement that he had ordered Plaintiff not to file a grievance was false and defamatory, as it charged the Defendant with actions that inferred he was disloyal to his own office, that he was unethical by failing to zealously represent Public Defender Office clients, and that he was unfit for his profession. Id., ¶ 10.

Defendant also alleges that Plaintiff or his agents contacted South Carolina Lawyer's Weekly Reporter Phillip Bantz on or around April 2014 and repeated this false statement, and that South Carolina Lawyer's Weekly then ran an article repeating the false statement that Defendant had directly ordered Plaintiff not to file a grievance against the Solicitor. Defendant alleges he first learned of Plaintiff's false statement when reporter

Bantz called his office seeking comment, and that this false statement was published statewide by the news weeklyto South Carolina Bar Members and the broader community both on its website and in its newspaper. Id., ¶ ¶ 11-13; see also Pennington's Deposition, pp. 22-24.

Defendant alleges that Plaintiff's statement that he had ordered Plaintiff not to file a grievance against the Solicitor and the repetition of this statement was both false and published by the Plaintiff with the intent of showing Defendant was unethical and unfit for his profession. Id., ¶¶ 14-15; Plaintiff's Deposition, pp. 150-151. Defendant alleges that Plaintiff knew or should have known that the rules governing the practice of law in South Carolina are self policing, and that if Plaintiff wanted to file a grievance against another lawyer it was his personal responsibility to do so, not any other lawyer's responsibility, and that the Defendant had consistently reminded Plaintiff and all of the other public defender lawyers of their ethical right to file grievances whenever ethics issues arose. Id., ¶ ¶ 16-17. Defendant further alleges that he asked the Plaintiff in 2014 to provide the date, time and location of any alleged order from the Defendant for Plaintiff not to file a grievance, but that Plaintiff was unable to provide this information. Id., ¶ 18.

Defendant alleges that he eventually terminated Plaintiff's employment due to Plaintiff's false accusations that the Defendant had ordered him not to file grievances, his insubordinate and divisive statements and conduct as a senior staff member directed to subordinate staff and to third

parties outside of the office, and because of Plaintiff's inability to control his animosity towards others lawyers and to act constructively for the welfare of his clients in coordination with his employer, the Ninth Circuit Public Defender. Defendant further alleges that although Plaintiff complained publically and in the press that he was terminated by the Defendant because he had cancer, Plaintiff states in his Amended Complaint that he was terminated because he complained about the Ninth Circuit Solicitor's Office. Id., ¶ ¶ 19-20. See generally, Defendant's Second Amended Answer and Counterclaim.

Discussion

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56, Fed.R.Civ.P. The moving party has the burden of proving that judgment on the pleadings is appropriate. Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991). Once the moving party makes this showing, however, the opposing party must respond to the motion with specific facts showing there is a genuine issue for trial. Baber v. Hosp. Corp. of Am., 977 F.2d 872, 874-75 (4th Cir. 1992).

Pennington's Counterclaim

Pennington seeks summary judgment on his counterclaim against the Plaintiff for defamation and slander per se. Defendant alleges that Plaintiff published himself or through his agents verbal and written false and defamatory statements about the Defendant to the press, members of the Defendant's staff, local attorneys, members of the South Carolina Criminal Defense Lawyers Association, and the public; that these false statements exceeded any intra-corporate privilege that may have existed; that they were false and Plaintiff knew they were false and/or had reckless disregard for their falsity; that these false statements inferred that the Defendant was unethical, was not loyal to his clients, did not care if the Solicitor's Office acted in a manner that might harm clients, and that he was hiding or covering for the Solicitor's actions; that these statements inferred wrongdoing and that the Defendant was unfit for his profession and constituted slander per se; that Plaintiff's false statements were made and his actions were taken with actual malice and exceeded any qualified privilege that may have existed; and that the publication and republication of these false statements by the Plaintiff has caused the Defendant to suffer general damages, and damages to his personal and professional reputation. Defendant's Second Amended Answer and Counterclaim, at ¶ ¶ 23-30.

Defamatory communications can take two forms: libel and slander. Slander is a spoken defamation, while libel is a written defamation or one

accomplished by actions or conduct. Swinton Creek Nursery v. Edisto Farm Credit, 514 S.E.2d 126 (S.C. 1999). [6] In South Carolina, the elements for a defamation claim are: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Murray v. Holnam, Inc., 542 S.E.2d 743, 748 (S.C.Ct.App. 2001). Further, a statement may be actionable per se where it is both false and defamatory and suggests 1) the commission of a crime of moral turpitude, 2) contraction of a loathsome disease, 3) adultery, 4) unchastity, or 5) unfitness in one's business or profession. Holtzscheither v. Thomson Newspapers, Inc., 506 S.E.2d 497, 508-509 (S.C. 1998). Finally, as the Defendant is a public figure, he must prove that any alleged defamation of him was done by the Plaintiff with actual malice. See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); cf. Parrish v. Gannett River States pub. Corp., No. 93-238, 1994 WL 159533 at * 3 (S.D.Miss. Feb. 9, 1994) [Discussing public defenders as public figures]; see also S.C.Code 17-3-510 (2007).

After careful review and consideration of the evidence presented on this issue in conjunction with the applicable case law, the undersigned does not find that the Defendant is entitled to summary judgment on his counterclaim. First, the Defendant has

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[6] Defendant's allegations encompass both forms of defamatory communications.

submitted several emails and documents from the Plaintiff wherein Plaintiff criticizes the Defendant and calls him bad names. See Defendant's Deposition Exhibits 3, 5-6, 10. Plaintiff also made disparaging comments about the Defendant (such as that the Defendant was "stupid", an "a**hole", a "piece of sh**", etc.) to other individuals, including employees of the public defender's office. See generally Lewis Deposition, pp. 27, 35-39, 42, 64-65; Penn Deposition, pp. 46-50; Cochran Deposition, p. 75; Schwartz Deposition, pp. 19-20; Blazer Deposition, pp. 45-51, 115, 124; Grose Deposition, pp. 37-39; Plaintiff's Deposition, pp. 110-112; Dunaway Deposition, p. 64; Court Docket No. 111-15, p. 5. However, while there is no wholesale defamation exception for anything that might be labeled "opinion", general expressions of opinion (such as that someone is "stupid" or an "idiot") are not in general by themselves sufficient to support a defamation claim, although they may be under certain limited circumstances. Todd v. South State Bank, No. 15-708, 2015 WL 6408121, at * 3(D.S.C. Oct. 22, 2015); cf. Nigro v. Virginia Commonwealth University/Medical College of Virginia, No. 10-2425, 2012 WL 2354635 at * 7 (4th Cir. June 21, 2012) ["Pure expressions of opinion, not amounting to 'fighting words', cannot form the basis of an action for defamation."] (quote from Chaves v. Johnson, 335 S.E.2d 97, 101 (V. 1985)); Milkovich v. Lorain Journal Co., 491 U.S. 1, 18-20 (1990) [Statements amounting to "imaginative expression" or "rhetorical hyperbole" not actionable against public figures as defamatory].

Defendant does also cite to other comments made by the Plaintiff about him which are arguably more actionable, including that he was unable to perform his job, that no one would want him representing them, that his legal skills were lacking, that he was incompetent and a poor administrator, that he was unable to perform his job, that he was unwilling as the public defender "to really fight with the solicitor's office", and that he would not let Plaintiff file grievances. These comments were made to both employees of the public defender as well as to other individuals outside the office. See generally, Lewis Deposition, pp. 27, 35-39, 44, 46; Penn Deposition, pp. 46-50; Blazer Deposition, pp. 46-51; Grose Deposition, pp. 37-39. Indeed, Plaintiff himself admitted to making disparaging comments about the Defendant. See generally, Plaintiff's Deposition, pp. 110-112, 127, 307-308. Defendant contends that these statements made by the Plaintiff about him were false and defamatory, were made to third parties and were not privileged, and are actionable per se in so far as they accuse the Defendant of being unfit for his business or profession, [7] or (possibly) of having committed a crime of moral turpitude. [8] Defendant further argues that, with

[7] Plaintiff argues in his response in opposition to the Defendant's motion, inter alia, that the Defendant is making a new claim insofar as he alleges Plaintiff said he was "unfit for his profession". However, that is clearly a claim made by the Defendant in his pleading. See Second Amended Answer and Counterclaim, at ¶ ¶ 10, 14, 26, 30; Court Docket No. 41, pp. 24-25, 27.

[8] A question has been presented of whether the Plaintiff made comments to third parties that the Defendant did, or may have, committed a crime. See Court Docket No. 127-1, pp. 301-302. However, it is not clear that the Defendant is pursuing this

respect to the affirmative defense of truth, there is "no evidence in the record to support the truth of Plaintiff's statements about Defendant Pennington being unfit for his profession". See Holtzscheither, 506 S.E.2d at 508-509 [Statement may be actionable per se where it is both false and defamatory and suggests unfitness in one's business or profession]; Johns v. Amtrust Under writers, Inc., 996 F.Supp.2d 413, 418-419 (D.S.C. 2014).

However, the Defendant is not entitled to summary judgment on these claims. While Defendant argues that Plaintiff has no third party witnesses who will testify they ever heard Pennington order Plaintiff not to file a grievance,[9] Plaintiff correctly notes in his response that Plaintiff himself asserts this to be the case as a verified claim. See also Plaintiff's Deposition, pp.65-69, 121; Dunaway Deposition, pp. 43-44. As such, this dispute between Plaintiff and the Defendant about what the Defendant did or did not instruct the Plaintiff to do is a question of fact for the jury.[10] See Anderson v.

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issue as part of his defamation claim, as it is not part of his filed counterclaim. The undersigned has therefore not discussed that issue further as part of this opinion.

[9] Plaintiff acknowledged that he does not have any witnesses who have personal knowledge of Pennington ordering him not to file a grievance against Scarlett Wilson regarding her actions in the Moultrie case. See Plaintiff's Deposition, p. 4.

[10] As a member of the Bar, both Plaintiff and the Defendant had a duty to report ethical violations of which they were aware. Cf. Matter of Foster, 478 S.E.2d 840, 841 (S.C. 1996) [Supreme Court can suspend law license for violations of rules of professional conduct]; Matter of Hawkins, 463 S.E.2d 92 (S.C. 1995) [Same]; see also In Re Sullivan, 679 S.E.2d 525 (S.C. 2009) [same].

Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ["Credibility determinations, the weighing of evidence, and drawing of legitimate inferences from the facts" are functions for the trier of fact]. Plaintiff also argues that many of the comments cited to by the Defendant are mere opinion and therefore do not even constitute defamatory conduct, and the undersigned agrees that whether the statements at issue are subject to a defamatory meaning, or were made with malice or truly damaged Defendant's reputation, are all matters for the finder of fact to determine. Warner v. Rudnick, 313 S.E.2d 359, 360 (S.C. 1984) [Noting that where a non- defamatory inference is possible, whether a statement is defamatory is a question of fact for the jury]; Wardlaw v. Peck, 318 S.E.2d 270, 274 (S.C.Ct.App. 1984) [Defamation protects one's reputation it offers no protection from hurt feelings]; Flemming v. Rose, 567 S.E.2d 857, 860 (S.C. 2002) [Actual malice means the publisher of the statement had knowledge the statement was false or acted with reckless disregard as to whether or not it was false].

In sum, the undersigned does not find that the facts and evidence presented establish Defendant's defamation claim against the Plaintiff as a matter of law. Therefore, the Defendant is not entitled to summary judgment on his defamation counterclaim. Muhammad v. Klotz, 36 F.Supp.2d 240, 243 (E.D.Pa. 1999)["Thus, at the summary judgment stage the only inquiry is the threshold one of determining whether there is the need for a trial, that is, 'whether the evidence presents a sufficient disagreement to require submission to [the trier of

fact] or whether it is so one sided that one party must prevail as a matter of law.'"].

Plaintiff's Section 1983 Claim

In his First Cause of Action, Plaintiff asserts a claim for violation of his First Amendment rights against all of the Defendants pursuant to 42 U.S.C. § 1983.[11] Plaintiff alleges that he sought to bring public attention to the serious prosecutorial misconduct of the Ninth Circuit Solicitor's Office, but that the Defendant Pennington restricted and limited his ability to speak in violation of his First Amendment rights. Plaintiff alleges that this constituted an unlawful restraint on speech. Plaintiff further alleges that he was retaliated against by Pennington when he unlawfully terminated Plaintiff's employment in retaliation for Plaintiff speaking out, as a citizen, on matters of public concern.[12]

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[11] 42 U.S.C. § 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)). A civil action under § 1983 allows "a party who has been deprived of a federal right under the color of state law to seek relief." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707 (1999).

[12] Plaintiff initially also included a claim under § 1983 in his Sixth Cause of Action that the Defendants failed to provide a "name clearing" hearing for him. However, Plaintiff's counsel advised the Court at the motions hearing that that claim was no longer being pursued. See also Plaintiff's Brief, p. 35. Plaintiff is also no longer pursuing his Seventh Cause of Action for Breach of Contract- Intended Third Party beneficiary. Id.

Pennington in his official capacity. As a public official,[13] the Defendant Pennington is subject

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[13] This determination (that Pennington is a public official) is case specific based on the facts and allegations presented herein, due to the hybrid nature of Pennington's employment. The current Public Defender system was established by the Indigent Defense Act of 2007, and under this Act, Circuit Public Defenders have been considered to be employees of the State of South Carolina. See HTTPS://sccid.sc.gov/about-us/circuit-public-defenders (last visited October 30, 2018); see also Stephney v. Baker, No. 08-3290, 2009 WL 2168868, at n. 6 (July 17, 2009). However, whether the Circuit Public Defender is considered a state employee, or even a public official, is dependant on the specific facts and the claims presented. For example, a public defender does *not* act under color of state law for purposes of a § 1983 claim when performing a lawyer's traditional function as counsel to a defendant in a criminal proceeding. Polk County v. Dodson, 102 S.Ct. 445, 453 (1981). However, Pennington's conduct as an attorney representing a defendant is not the issue in this lawsuit. The South Carolina Attorney General has also opined that employees of the defender corporation are neither state or county employees for certain types of claims, even though they may be considered to be public employees for other "certain specific purposes" or claims. See S.C. Atty. Gen. Opinion 2005 WL 1383353 (SCAG May 4, 2005). As for what those other purposes or claims might be, the United States Supreme Court concluded in Branti v. Finkel, 445 U.S. 507 (1980), that a public defender acts under color of state law when making hiring and firing decisions, and further stated in Polk County that the public defender could also be acting under color of state law while performing certain administrative and possibly investigative functions. Polk County, 102 S.Ct. at 453; cf. Imbler v. Pachtman, 424 U.S. 409, 430-431, and n. 33 (1976). Therefore, the fact that, as noted in the previously cited 2005 State Attorney General's opinion, public defenders are essentially employees of an eleemosynary corporation created by state statute, does not in and of itself prevent public defenders from being "public" employees. As another example, private medical care companies that provide medical care to jail and prison inmates through contracts with public bodies (such

to suit for damages in his individual capacity for claims asserted pursuant to § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989); Hafer v. Melo, 112 S.Ct. 358, 365 (1991); Goodmon v. Rockefeller, 947 F.2d 1186 (4th Cir. 1991); Inmates v. Owens, 561 F.2d 560 (4th Cir. 1977). However, in his official capacity, Pennington assumes the status of the office itself. Bellamy v. Borders, 727 F.Supp. 247, 251 (D.S.C. 1989) ["It is well established that 'a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office'"], citing Will v. Michigan Dept. of State Police, 491 U.S. 58, 68-70 (1989). Defendants assert in their motion for summary

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as counties or the State) have been deemed to be "public" entities for purposes of constitutional claims presented through § 1983 lawsuits, even though they are private companies. Cf. West v. Atkins, 487 U.S. 42, 48 (1988)[Holding that private physicians that contracted with the State to provide medical care to prisoners were state actors because they were hired to fulfil an obligation - medical care - which was traditionally filled by the State]; Jones v. Correctional Care Solutions, No. 09-269, 2010 WL 2639788 at * 6 (D.S.C. June 7, 2010)[Declining to recommend dismissing Correctional Care Solutions on the basis that it did not act under color of state law], adopted by, 2010 WL 2926178 (D.S.C. July 23, 2010), aff'd, 397 Fed. Appx. 854 (4th Cir. Oct. 6, 2010). Finally, it is noted that the parties herein do not dispute that Defendant Pennington is a public official for purposes of the claims asserted. As such, for purposes of the claims presented in this lawsuit, the undersigned has concluded that both Plaintiff and the Defendant Pennington were public employees/officials. See also Parrish, 1994 WL 159533 at * 3 [Discussing public defenders as public figures]. However, this conclusion is specifically not a finding by the undersigned that a Circuit Public Defender, or assistant public defenders are, or should be deemed to be, public employees generally, as any such determination necessarily has to be made on a case bycase basis.

judgment that the office of the Ninth Circuit Public Defender is a state office, and therefore enjoys Eleventh Amendment immunity from any suit from damages in this Court. See also S.C.Code Ann. 17-3-510, et seq. But see S.C. Atty. Gen. Opinion 2005 WL 1383353 (S.C.A.G. May 4, 2005). Plaintiff does not contest this argument in his reply brief, nor did he do so at the hearing, and is therefore considered to have abandoned this claim. See Coker v. International Paper Co., No. 08-1865, 2010 WL 1072643, at * 2["[A] plaintiff can abandon claims by failing to address them in response to a summary judgment motion."]; Jones v. Danek Medical, Inc., No. 96-3323, 1999 WL 1133272 at * 3 (D.S.C. Oct. 12, 1999)["The failure of a party to address an issue raised in summary judgment may be considered a waiver or abandonment of the relevant cause of action."].

Therefore, the Defendant Pennington (in his official capacity) is entitled to dismissal as a party Defendant in Plaintiff's First Amendment claim. Bellamy, 727 F.Supp. at 249 ["Neither a State nor its officials acting in their official capacities are 'persons' for purposes of damages actions brought under 1983"]; see also Harbour v. South Carolina Dept. of Corrections, No. 12-3611, 2013 WL 394159, at * 2 (D.S.C. Jan. 16, 2013).

Defendant Charleston County. With respect to the Defendant Charleston County, while the First Amendment provides that *Congress* shall make no law abridging the freedom of speech, the rights guaranteed by the First Amendment also apply to local governmental entities such as Charleston County through their incorporation into the due process clause of the Fourteenth Amendment. See,

e.g., Gitlow v. People of New York, 268 U.S. 652, 666 (1925); Oliver v. United States, 466 U.S. 170, 186 n.3 (1984); Elfbrandt v. Russell, 384 U.S. 11, 18 (1966). Even so, with respect to Plaintiff's First Amendment claims against Charleston County, this Defendant may be liable under § 1983 only if "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 Social Servs., 436 U.S. 658, 690-691 (1978). There is no evidence of any such unconstitutional policy of the County that was implemented by Pennington so as to subject Charleston County to liability on this claim. Plaintiff has failed to point to any ordinance or policy of Charleston County that Pennington would have been following by engaging in the improper conduct alleged, and the county may only be liable for damages if the execution of a policy or custom of the county itself is what resulted in the alleged injury. Monell, 436 U.S. 694; see also Milligan v. City of Newport News, 743 F.2d 227, 229 (4th Cir. 1984) [A municipality may be liable under § 1983 for the violation of a Plaintiff's constitutional rights "only where the constitutionally offensive actions of employees are taken in furtherance of some municipal 'policy or custom'"]; Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 507 U.S. 163, 166 (1993) ["[A] municipality can be sued under § 1983, but it cannot be held liable unless a municipal policy or custom caused the constitutional injury"].

Moreover, as the Circuit Public Defender, Pennington is considered to be an employee of the

State of South Carolina, not Charleston County.[14] As such, the County is not responsible for actions taken by Pennington as the Circuit Public Defender. Cf. Allen v. Fidelityand Deposit Co., 515 F.Supp. 1185, 1189-1191 (D.S.C. 1981)["To allow the County to be held accountable for the actions of the sheriff and his deputies over whom it has no control as to the manner in which they perform their official duties and whom it cannot hire, fire, discipline or train relative to the performance of the duties of their offices, would be to subject the County to unbridled and unlimited liability over which it has no control and over which it is prevented from exercising such control"], affd, 694 F.2d 716 (4th Cir. 1982) [Table]; Riley v. County of Cook, 682 F.Supp. 2d 856, 860 (N.D.Il. 2010)["Because the sheriff is an independently-elected official, he answers directly to the electorate and does not have a master/servant relationship with the county [ ]. Since the County cannot control the actions taken by [the Sheriff's] Office, it cannot be charged with vicarious liability"] (internal citations omitted); [15] see also Plaintiff's Exhibit 89 [Intergovernmental Agreement], ¶ 5 (Noting that assistant public defenders serve at the pleasure of the Circuit Public Defender and have

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[14] As previously noted, the Circuit Public Defender system replaced a system of non-profit defender corporations with the passage of the South Carolina Indigent Act of 2007. See Stephney v. Baker, 2009 WL 2168868, at n. 6. Under this Act, Defendant Pennington is the Ninth Circuit Public Defender, an office which encompasses both Charleston *and* Berkeley counties. See also, n. 13, supra.

[15] Although both of these cases discuss county liability for actions of the Sheriff, the analysis is the same with respect to county liability for actions of a Circuit Public Defender.

responsibilities as the Circuit Public Defender directs). Therefore, the Defendant Charleston County is also entitled to dismissal as a party Defendant under Plaintiff's First Amendment Cause of Action.

Pennington in his individual capacity. With respect to Plaintiff's claim against Pennington in his individual capacity, Defendant argues that Plaintiff's claim is subject to summary judgment because the evidence does not present a genuine issue of fact that Plaintiff's "speech" was "citizen speech [related to] matters of concern to the public", that the Defendant "restrained" Plaintiff's speech in any unlawful manner, or that Plaintiff's right to engage in the allegedly protected speech was not outweighed by the Defendant's interest in managing and operating his office. Cf. Bearss v. Wilton, No. 08-248, 2010 WL 11523749, at * 5 (D.Ver. Aug. 10, 2010) [Noting that where a public employee is involved, in determining whether the constitutional protection of speech applies the Court must first determine whether the employee is there to speak as a citizen on a matter of public concern, and that if the answer is no, then no First Amendment claim arises], citing to Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) and Caraccilo v. Village of Seneca Falls, NY, 582 F.Supp. 2d 390, 405 (W.D.N.Y 2008); Picott v. Chatmon, No. 12-7202, 2017 WL 4159900 at * 5 (S.D.N.Y. Sept. 18, 2017)["The Supreme Court has ruled that a public employee acting pursuant to his official duties does not speak as a citizen for First Amendment purposes."]; DeRitis v. McGarrigle, 861 F.3d 444, 452 (3rd Cir. 2017) ["Public employees' First Amendment rights are limited by the Government's countervailing interest in efficient provision of public

services"]; see also Connick v. Meyers, 461 U.S. 138, 147 (1983) [Noting that a federal court is not the appropriate forum in which to review the wisdom of personnel decisions of a public agency]. However, considered in the light most favorable to the Plaintiff, the evidence reflects that the speech Plaintiff wanted to engage in was not with respect to matters personal to him, but involved (according to the Plaintiff) attempts to bring public attention to what he believed to be serious prosecutorial misconduct by the public office of the Ninth Circuit Solicitor, and that the Defendant attempted to prevent him from engaging in that speech. See Plaintiff's Deposition, pp. 65-69, 121; Plaintiff's Affidavit, ¶¶ 10-12. [16] Bearss, 2010 WL 11523749, at * 5 ["The heart of the matter is whether the employee speech was 'calculated to redress personal grievances or whether it had a broader public purpose'"], quoting Ruotolo v. City of New York, 514 F.3 184, 189 (2nd Cir. 2008); Stroman v. Colleton County School District, 981 F.2d 152, 156 (4th Cir. 1992) ["Speech involves a matter of public concern when it involves an issue of social, political, or other interests to a community"], quoting Kirby v. City of Elizabeth City, 388 F.3d 440, 446 (4th Cir. 2004).[17]

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[16] Although, for purposes of whether the Defendant is entitled to summary judgment, the evidence is viewed in the light most favorable to the Plaintiff, it is noted that the Defendant testified that Plaintiff had told him that he did not want to file a grievance against Wilson, but that he instead wanted others to file it. See Pennington Deposition, pp. 150-151. The Defendant also testified that he did not know until 2014 that Plaintiff was telling other people that he did not allow Plaintiff to file a grievance. See Pennington Deposition, p. 152.

[17] By contrast, to the extent Plaintiff's complaints concerning Pennington involve how he [Plaintiff] was

Plaintiff testified to several instances wherein he believed the Solicitor's Office acted improperly over the years. Although the Defendant properly notes in his motion that the statute of limitations would bar any free speech violation claims occurring prior to November 2, 2012 (three years prior to the commencement of this action on November 2, 2015); see McMorris v. Sherfield, No. 10-670, 2011 WL 13457, at * 2 (D.S.C. Jan. 4, 2011) [Applying South Carolina's three year statute of limitations to Federal Section 1983 claims]; the evidence (again, considered in the light most favorable to the Plaintiff) shows that following a murder trial in December 2012 which Plaintiff contends was replete with questionable conduct by the State, the Defendant prohibited Plaintiff from making comments to the press that could be seen as critical without first consulting with the Defendant. See Plaintiff's Exhibits 37 and 40; see also Plaintiff's Deposition, pp. 65-69, 121, 126. Thereafter, in December 2013,

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personally treated by Pennington in the office (other than to the extent they may involve elements of unlawful retaliation), those complaints would not present a constitutional claim. Picott, 2017 WL 4159900, at * 5 ["[A] public employee's speech on matters of purely personal interest or internal office affairs does not constitute a matter of public concern"]; Bearss, 2010 WL 11523749, at * 5 ["speech that is focused on matters personal to the employee cannot be classified as being only a matter of public concern"]; see also Connick, 461 U.S. at 147 ["When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of person interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personal decision taken by a public agency . . . ."]; DeRitis, 861 F.3d at 455 ["Speech does not involve a matter of public concern when it relates solely to mundane employment grievances"] (internal quotes omitted).

Plaintiff participated in a discussion on the SCACDL listserve wherein he discussed ethical lapses by the Solicitor's Office and indicated that something should be done about it, following which the Defendant instructed him that he was not to speak or convey in any manner to others comments critical of the Solicitor or her office, especially regarding ethics or honesty, without first obtaining the Defendant's permission. See Plaintiff's Exhibits 43 and 44; see also Plaintiff's Deposition, p. 127. Later, in February 2014, the Defendant sent an email to the entire Charleston County Public Defender's Office indicating that any perceived ethical breach by prosecutors should be reported to him so that he could investigate and determine how to respond based on a "cost-benefit analysis". See Plaintiff's Exhibit 48. The evidence also shows that when the SCACDL was considering whether to file a grievance against the Solicitor in early 2014, Plaintiff confirmed some facts to the Board that were included in the Board's complaint. See McLaughlin Deposition, p. 57; Plaintiff's Affidavit, ¶ 20; see also Plaintiff's Deposition, p. 127. After this SCACDL grievance was covered by the press, Plaintiff wanted to report the misconduct to the Bar, and on May 21, 2014 Plaintiff (through counsel) filed a complaint against the Defendant for his refusal to allow Plaintiff to do so. See Plaintiff's Exhibits 31, 61; see also Plaintiff's Amended Complaint, ¶ ¶ 34 and 35; Plaintiff's Deposition, pp. 198-199.

While the Defendant argues that the evidence is not sufficient to show that he restrained Plaintiff's speech in an unlawful manner and that he was within his rights to require his employees to consult

with him on such matters before going public with such serious charges, considered in the light most favorable to the Plaintiff, the evidence is sufficient to give rise to a question of fact as to whether the Defendant improperly restrained Plaintiff from discussing matters of public concern to survive summary judgment. United States v. National Treasury Employees Union, 513 U.S. 454, 468 (1995) [a prior restraint is unconstitutional if it is sufficiently broad as to chill speech, that if spoken, would be protected by the First Amendment]; Livermore v. City of Petersburg, 488 F.3d 400, 407-408 (4th Cir. 2016); Lane v. Franks, 134 S.Ct. 2369, 2381 (2014) ["a stronger showing of [government interests] may be necessary if the employee's speech more substantially involve [s] matters of public concern"]; Garcetti v. Ceballos, 547 U.S. at 425 ["Exposing governmental inefficiency and misconduct is a matter of considerable significance"]; DeRitis, 861 F.3d at 456-458 [Discussing how, in determining whether a First Amendment violation has occurred, the fact finder should weigh the interest of the State, as the employer, in preventing potential disruptions that could be caused by statements that could undermine the effectiveness of the office, against the extent the speech at issue addresses an issue of public concern]; see also Iannillo v. County of Orange, 187 F.Supp.2d 170, 185 (S.D.N.Y. 2002)[At summary judgment, the Court expresses no view as to a plaintiff's chance of success on the merits of his claim at trial, and bases its decision only on whether there is a material issue of fact as to causation that renders summary judgment inappropriate.]. Therefore, the Defendant is not

entitled to summary judgment on Plaintiff's prior restraint claim under the First Amendment.

Plaintiff also alleges that he was unlawfully retaliated against by Pennington when Pennington terminated his employment in retaliation for Plaintiff speaking out, as a citizen, on matters of public concern. "In order to establish a cause of action by a public employee for an alleged wrongful discharge . . . in violation of the employee's rights, the Plaintiff-employee must demonstrate (1) that the speech complained of qualified as protected speech or activity and (2) that such protected speech or activity was the 'motivating' or 'but for' cause for his discharge . . . . ". Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 877-878 (4th Cir. 1984); see also Mt. Healthy City School Bd. of Ed. v. Doyle, 429 U.S. 274, 287 (1977). Here, the undersigned has already determined that there is a sufficient question of fact as to whether the speech at issue in this case is protected speech under the First Amendment to preclude summary judgment on that issue. With respect to whether there is a genuine issue of fact that Plaintiff having engaged in this conduct was the motivating cause for his discharge, the evidence (again, considered in the light most favorable to the Plaintiff) is that Pennington's decision to terminate Plaintiff's employment was due to Plaintiff's public comments about the operation of the Solicitor's office, including with the SCACDL Board and with the press, regarding ethics charges against the Solicitor or her staff, and because Plaintiff in doing so had violated Pennington's directive not to comment publically about such matters without his permission. See Plaintiff's Exhibits 7 (¶ ¶ 2, 10-13,

20-21, 23-25, 33), 35. While the Defendant argues that the evidence is not sufficient to meet the "but for" standard for showing this was the cause for Plaintiff's discharge, that is a question of fact for the jury. Jerguson, 745 F.2d at 880-881 [Noting that a retaliation cause of action under the First Amendment requires that the protected speech or activity was the "but for" cause of the employee's discharge, and that the resolution of this question depends on a factual determination of what the actual cause was for the employee's discharge]. Therefore, the Defendant Pennington is not entitled to summary judgment on Plaintiff's § 1983 retaliatory discharge claim under the First Amendment.

Qualified Immunity. Finally, Pennington also argues that, with respect to Plaintiff's First Amendment claim against him in his individual capacity, that this claim should be dismissed because he is entitled to qualified immunity. The Supreme Court in Harlow v. Fitzgerald, 457 U.S. 800 (1982), established the standard which the Court is to follow in determining whether a defendant is protected by qualified immunity.

> Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow, 457 U.S. at 818.

Additionally, the Court of Appeals for the Fourth Circuit has stated:

> Qualified immunity shields a government official from liability for civil monetary damages if the officer's "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. "In determining whether the specific right allegedly violated was 'clearly established,' the proper focus is not upon the right at its most general or abstract level but at the level of its application to the specific conduct being challenged." Pritchett v. Alford, 973 F.2d 307, 312 (4th Cir. 1992). Moreover, "the manner in which this [clearly established] right applies to the actions of the official must also be apparent." Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992) . . . As such, if there is a "legitimate question" as to whether an official's conduct constitutes a constitutional violation, the official is entitled to qualified immunity.

Wiley v. Doory, 14 F.3d 993, 995 (4th Cir. 1994)(internal citations omitted), cert. denied, 516 U.S. 824 (1995).

The question thus becomes whether, considering the facts and evidence in the light most favorable to the Plaintiff, there is a genuine issue of fact as to whether

Pennington's conduct violated a clearly establish statutory or constitutional right of which a reasonable person would have known.

As previously noted, the undersigned has determined that a genuine issue of fact exists as to whether Pennington violated Plaintiff's First Amendment rights by preventing Plaintiff from discussing or commenting on a matter of public concern. National Treasury Employees Union, 513 U.S. at 468 [a prior restraint is unconstitutional if it is sufficiently broad as to chill speech, that if spoken, would be protected by the First Amendment]; Lane, 134 S.Ct. at 2381 ["a stronger showing of [government interest] may be necessary if the employee's speech more substantially involve [s] matters of public concern"]; Garcetti, 547 U.S. at 425 ["Exposing governmental inefficiency and misconduct is a matter of considerable significance"]. It is also clear that during the time period relevant to Plaintiff's claims, the law was clearly established that even a public employee's First Amendment Rights could be violated where "the magnitude of this interest rests on the extent to which [Plaintiff's] speech addressed an issue of public concern". DeRitis, 861 F.3d at 457, citing Miller v. Clinton County, 544 F.3d 542, 549-550 (3rd Cir. 2008). Therefore, as there is a genuine issue of fact as to whether Pennington's conduct violated a clearly established statutory or constitutional right of which a reasonable person would have known, he is not entitled to dismissal of Plaintiff's First Amendment claims based on qualified immunity. Wiley, 14 F.3d at 995 [Qualified immunity shields a government official from liability for civil monetary damages only if the official's

conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known].

ADA Claim[18]

In his Second Cause of Action, Plaintiff asserts a claim of discrimination based on a disability in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, et seq. This claim is asserted only against the Defendants Charleston County and Pennington in his official capacity.

In his verified Amended Complaint, Plaintiff cites both to 42 U.S.C. § 12102(2) and 42 U.S.C. § 12111(8) in support of his claim. The first statutory cite is under Title II of the ADA, while the second

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[18] Congress made substantial changes to the ADA through the ADA Amendments Act of 2008 ("ADAAA"), which had an effective date of January 1, 2009. "The ADAAA was intended to clarify congressional intent with respect to the original ADA, as well as to overturn certain United States Supreme Court cases that had narrowed the ADA's scope;" Ryan v. Columbus Regional Healthcare System, Inc., No. 10-234, 2012 WL 1230234 at * 3 (E.D.N.C. Apr. 12, 2012); and under the ADAAA, "[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals . . . , to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). Further, "[t]he primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA." 29 C.F.R. § 1630.1 (2011). Since Plaintiff lost his job in October 2014, these amendments apply to his ADA claim. Therefore, to the extent any cases cited herein relating to general ADA definitions pre-date 2009, the undersigned has nonetheless considered Plaintiff's claim pursuant to the ADAAA's enhanced standard.

statutory cite is under Title I. Plaintiff cannot bring an ADA claim against the Defendant Pennington in his official capacity under Title I for damages.[19] Rivers v. Bannister, No. 11-194, 2012 WL 486178, * 3 (D.S.C. Feb. 13, 2012); see also Bd. of Trustees of the University of Alabama, 531 U.S. 356. Pennington in his official capacity is also entitled to dismissal insofar as Plaintiff asserts a claim under Title II. Id., at * 5.[20] Therefore, Pennington in his official capacity is entitled to dismissal as a party Defendant under Plaintiff's Second Cause of Action.

However, although (for purposes of this lawsuit) the undersigned has considered the Defendant (Pennington) to be a State employee,[21] the Plaintiff is deemed to be an employee of Charleston County. See Plaintiff's Exhibit 89

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[19] Plaintiff could pursue a claim against this Defendant for injunctive relief under Title I of the ADA. See Bd. of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, at * 5 (2001). However, Plaintiff clarifies that his ADA claim is not based on his termination. See Plaintiff's Brief, p. 34.

[20] Plaintiff argues in his brief that Pennington in his official capacity has waived any immunity he may have as a state official (or state office) by virtue of the Intergovernmental Agreement he signed with Charleston County. See Plaintiff's Exhibit 89. However, that Agreement was only for purposes of providing for the administration of Public Defender funds. Additionally, the fact that Pennington, as the Ninth Circuit Public Defender, entered into such an agreement with Charleston County shows that he is a separate office and entity from the County. It was not a waiver of any sovereign immunity Pennington had as a state official. Id., ¶ 5 (Circuit Public Defender retains all hiring authority for his/her employees).

[21] See, n. 13, supra.

[Intergovernmental Agreement], providing that "all employees of the Public Defender shall be employees of [Charleston] County," whose employment is covered by "all applicable Federal, State, and Local laws and ordinances . . . .". The Defendant Charleston County is subject to, and may be found liable for, violations of Title I [22] of the ADA, depending on the claim asserted. See generally Reyazuddin v. Montgomery County, MD, 789 F.3d 407, 418-421 (4th Cir. 2015). Therefore, Plaintiff may proceed with his ADA claim against Charleston County.[23]

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[22] Title I of the ADA prohibits a "covered entity" from discriminating against a qualified individual with a disability. 42 U.S.C. § 12112(a). Charleston County is considered a "covered entity" in this case. Forman v. County of Suffolk, No. 13-2977, 2015 WL 4600755 at * 4 (E.D.N.Y. 2015) ["There is no dispute here that the County of Suffolk is a covered entity" under Title 1 of the ADA]; see also Douris v. Bucks County Office of District Attorney, No. 04-232, 2005 WL 226151 at * * 5-6 (E.D.Pa. Jan. 31, 2005); Clark v. School District Five of Lexington and Richland Counties, 247 F.Supp. 3d 734, 743 n. 7 (D.S.C. 2017) [Allowing Title I ADA claim to proceed against defendant county school districts]. Further, with respect to the conduct at issue in this lawsuit that was taken by Pennington, for purposes of Plaintiff's Title I ADA claim any discriminatory conduct taken by him (as the "employer's agent") may create liability for the employer (Charleston County). Williams v. Grimes Aerospace Co., 988 F.Supp. 925, 936 (D.S.C. 1997).

[23] However, Charleston County is not subject to suit under Title II. Title II of the ADA provides that "no qualified individual with a disability shall . . . be subject to discrimination by a [public] entity". 42 U.S.C. § 12132. The Fourth Circuit has held that discrimination against the disabled cannot be asserted under Title II of the ADA where the claim is set forth in the employment context. Reyazuddin, 789 F.3d at 420-421 ["[W]e agree with the majority of circuits to have considered the question that Title II unambiguously does

In his verified Amended Complaint, Plaintiff alleges that he suffers from rectal cancer, that his condition was a "disability" within the meaning of the ADA during the relevant time period, and that Pennington failed to accommodate his request for additional time to respond to questions and information Pennington had directed Plaintiff to provide pertaining to the conduct of the Solicitor's Office and Pennington's orders about Plaintiff's disseminating those concerns. Plaintiff further complains that Pennington terminated his employment in the midst of his on-going course of chemotherapy treatments, although in his brief opposing the Defendant's motion for summary judgment, Plaintiff clarifies that he "does not claim he was fired for a disability, but rather Pennington did not honor his request for an accommodation". Plaintiff's Brief, p. 34. Instead, to the extent his firing relates to his disability, Plaintiff's claim is only that Pennington terminated him "how" and "when" he did (although his termination may have been for other reasons) so as to take advantage of Plaintiff's "weakened condition" due to his ongoing chemotherapy treatments. Id.

The Defendant County asserts several defenses to Plaintiff's claims, including (initially) that Plaintiff failed to exhaust his administrative remedies with respect to the County since his EEOC charge only named the Charleston County Public Defender as the employer. See Defendants' Exhibit

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not provide a vehicle for public employment discrimination claims".]. Pursuant to this holding, Plaintiff may not pursue a claim under Title II of the ADA.

J. Defendant is correct that an action under Title VII may generally only be brought against the respondent named in the charge. See 42 U.S.C. § 2000e-5(f)(1). The purpose of the naming requirement is to put the charged party on notice of the complaint and allow the EEOC to attempt reconciliation. See Causey v. Balog, 162 F.3d 795, 800 (4th Cir. 1998)(citing Alvarado v. Bd. of Trs. of Montgomery County College, 848 F.2d 457, 460 (4th Cir. 1988)). However, courts have recognized an exception to this general rule when the defendant was not named in the charge but nevertheless received fair notice and the EEOC was able to attempt conciliation with the responsible parties. See Equal Employment Opportunity Comm'n v. Am. Nat. Bank, 652 F.2d 1176, 1186 n. 5 (4th Cir. 1981).

> Courts have developed exceptions to this rule, though, where it is clear that the defendant through some relationship with the named respondent had notice of the charges and participated in the conciliation process. See, e. g., Stith v. Manor Baking Co., 418 F.Supp. at 156, and cases cited therein; Escamilla v. Mosher Steel Co., 386 F.Supp. 101, 105 (S.D.Tex.1975) [jurisdiction proper over parent of wholly-owned subsidiary where parent had or should have had notice of conciliation process]; Chastang v. Flynn & Emrich Co., 365 F.Supp. 957, 964 (D.Md.1973)["where there is substantial, if not complete identity of parties before the EEOC and the court,

> it would require an unnecessarily technical and restrictive reading of (the statute)" to deny jurisdiction], aff'd in relevant part, 541 F.2d 1040 (4th Cir. 1976).

Id.

Under the "substantial identity" test, "if unnamed defendants are substantially or functionally identical to named ones, then the plaintiff may sue all defendants in a district court action, despite the failure to name some of them in the administrative action." Scurry v. Lutheran Homes of S.C., Inc., No. CA 3:13-2808-JFA-PJG, 2014 WL 4402797, at *3–4 (D.S.C. Sept. 3, 2014) (citing Mayes v. Moore, 419 F.Supp.2d 775, 783 (M.D.N.C. 2006)). Here, as previously noted, the Intergovernmental Agreement places Pennington (as the Circuit Public Defender) in the shoes of the County for purposes of Plaintiff's ADA claim. See Plaintiff's Exhibit 89 [Intergovernmental Agreement], ¶ 7 (Noting that "personnel of the Public Defender shall be employees of Charleston County . . . ."); Williams, 988 F.Supp. at 936 ["Discriminatory personnel actions taken by an employer's agent may create liability for the employer"]; Oliver v. Spartanburg Regional Health Care System, Inc., No. 15-4759, 2016 WL 5419459, at * 3 (D.S.C. Sept. 8, 2016) [Report and Recommendation]. Therefore, Charleston County is not entitled to dismissal on the ground that it was not specifically named in Plaintiff's EEOC filing.

As for the merits of Plaintiff's ADA claim, the Defendant does not contest for purposes of summary judgment that Plaintiff had a disability as defined by the ADA, but argues that Plaintiff has failed to present any evidence sufficient to show that his termination was as a result of any disability he had. Defendants' Brief, p. 18. However, Plaintiff is not asserting that he was terminated because he was disabled. Rather, Plaintiff's claim is a failure to accommodate claim, based on Pennington's alleged refusal to allow him additional time to respond to information Pennington was seeking (additional time that Plaintiff alleges he needed due to his weakened condition as a result of his cancer treatments). See Plaintiff's Deposition, p. 90. The ADA makes it unlawful for an employer to fail to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee . . ." 42 U.S.C. § 12112(b)(5)(A).

To establish a prima facie case of failure to accommodate under the ADA, Plaintiff's evidence must show that (1) he is an individual who has a disability within the meaning of the statute; (2) the Defendant had notice of his disability; (3) with reasonable accommodation he could perform the essential functions of his position; and (4) the Defendant refused to make such accommodations. See Reyazuddin, 789 F.3d at 414-416; Wilson v. Dollar General Corp., 717 F.3d 337, 345 (4th Cir. 2013); Donaldson v. Clover School District, No. 15-1768, 2017 WL 4173596 at * 3 (D.S.C. Sept. 21, 2017). Only the third and fourth elements are at issue here. The evidence shows that on September

23, 2014 Pennington sent a list of sixteen (16) questions (including subparts) that Plaintiff was to answer at a meeting the following day. Plaintiff's Exhibit 71. Plaintiff sent Defendant a response in which he noted, inter alia, the problems he was having with his cancer treatment and the effects the treatment was having on him, and requesting a postponement of the meeting. Plaintiff's Exhibit 72. According to the Plaintiff, the Defendant refused his request for an extension and insisted that Plaintiff show up with his answers, in writing, the following day. See Plaintiff's Verified Amended Complaint, ¶ 77; see also Court Docket No. 111-6, p. 2 [Plaintiff's Deposition Exhibit 9].

This evidence is sufficient to give rise to a genuine issue of fact as to whether the Defendant refused to provide a reasonable accommodation that had been requested by the Plaintiff, as it is clear that Plaintiff made a request for an accommodation, a fact finder could determine that this was a reasonable request, and there has been no evidence presented to show that any harm would have resulted from the Defendant not accommodating this request.[24] See generally Barber v. Columbia Coll., No. 05-3405, 2007 WL 2891657 at * 3 (D.S.C. Sept. 28, 2007) [holding that employers have a duty under the ADA to provide reasonable accommodation when so requested]; but see also Godlove v. Martinsburg

[24] Indeed, the evidence shows that the meeting was eventually postponed, but only because an assistant public defender was killed in an automobile accident, not because the Defendant agreed to accommodate Plaintiff's request due to his medical condition. Plaintiff's Verified Amended Complaint, ¶ 78; see also Plaintiff's Deposition, pp. 202-203.

Senior Towers, LP, No. 14-132, 2015 WL 1809325 at * 4 (4th Cir. Apr. 21, 2015) ["A reasonable accommodation claim requires proof of such a specific request."]; Shin v. Univ. of Md. Med. Sys. Corp., 369 Fed.Appx. 472, 481 (4th Cir. 2010) [Plaintiff "bears the burden of identifying an accommodation that would allow a qualified individual to perform the job, as well as the ultimate burden of persuasion with respect to demonstrating such an accommodation is reasonable."]. Therefore, the Defendant Charleston County is not entitled to summary judgment on Plaintiff's Second Cause of Action asserting a claim under the ADA.[25]

FMLA Claim

In his Third Cause of Action, Plaintiff asserts an interference claim under the FMLA against all of the Defendants. However, the Defendant Pennington

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[25] As previously noted, Plaintiff does also allege that Pennington used the fact of Plaintiff's weakened condition to try to extract concessions from him (such as a waiver of any legal claims arising out of his employment) when Pennington terminated him. See Court Docket No. 111-7 [Plaintiff's Termination Letter with Severance Offer]. However, Plaintiff does not contend that his disability was the reason for the termination itself, and in any event Plaintiff did not agree to the conditions Pennington tried to (allegedly) force on him. Therefore, this assertion does not constitute a valid ADA claim for purposes of this lawsuit. Cf. Hurd v. Cardinal Logistics Mgmt. Corp., No. 17- 319, 2018 WL 4604558, at * 4 (W.D.Va. Sept. 25, 2018)[To establish liability, a claim under "the ADA must be based not merely on a technical violation of the statute but on some cognizable injury- in-fact of which the statutory violation is a legal and proximate cause."](quoting Whindleton v. Coach, Inc., No. 3:13-00055, 2015 WL 412021, at *3 (W.D. Va. Jan. 30, 2015)) (internal quotations omitted).

in his official capacity is an arm of the State, and cannot therefore be sued for monetary damages under Plaintiff's FMLA claim by virtue of the Eleventh Amendment. See Coleman v. Maryland Court of Appeals, 132 S.Ct. 1327, 1332, 1338 (2012)["In agreement with every Court of Appeals to have addressed this question, this Court now holds that suits against States under [the FMLA's self-care provision] are barred by the States' immunity as sovereigns in our federal system"];[26] see also Lizzi v. Alexander, 255 F.3d 128, 135-136 (4th Cir. 2001), overruled in part on other grounds by, Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003); Nelson v. University of Texas at Dallas, 535 F.3d 318,

[26] There is some authority that, in appropriate circumstances, suit may be brought in federal court against a state official in their official capacity seeking prospective injunctive relief, including even under the "self-care" provision of the FMLA. See Ex parte Young, 209 U.S. 123 (1908); Lytle v Griffith, 240 F.3d 404, 408 (4th Cir. 2001)[Ex parte Young authorizes "suit against state officers for prospective equitable relief from ongoing violations of federal law"]; Stewart v. Moccasin Bend Mental Hospital, Nos. 07-305, 08-255, 2009 WL 2244621, * * 5-6 (E.D.Tenn. July 24, 2009)["[A] claim for reinstatement brought under the self-care provision of the FMLA falls under the Ex parte Young exception to Eleventh Amendment immunity"]. However, Plaintiff makes clear in his verified Amended Complaint that he seeks monetary damages under this cause of action. See Plaintiff's Verified Amended Complaint, ¶ ¶ 110-111. To the extent Plaintiff is also seeking prospective injunctive relief of reinstatement, that is not relief obtainable under this cause of action (although it may be under others), as there is no evidence to show, nor does Plaintiff even assert, that his termination was the result of a violation of the FMLA. Plaintiff specifically testified that he was not claiming that he was fired for taking FMLA leave. See Plaintiff's Deposition, p. 95. Therefore, Plaintiff cannot pursue his FMLA claim against Pennington in his official capacity.

321 (5th Cir. 2008); Batchelor v. South Florida Water Management District, 242 Fed. Appx. 652 (11th Cir. 2007); Miles v. Belfontaine Habilitation Center, 481 F.3d 1106 (8th Cir. 2007); Toeller v. Wisconsin Dep't of Corrections, 461 F.3d 871 (7th Cir. 2006); Touvell v. Ohio Dep't of Mental Retardation and Developmental Disabilities, 422 F.3d 392, 402 (6th Cir. 2005); Brockman v. Wyoming Dep't of Family Services, 342 F.3d 1159, 1164 (10th Cir. 2003). [27]

With respect to Pennington in his individual capacity, Plaintiff has set forth no factual allegations in the verified Amended Complaint to establish that Pennington was ever at any time acting other than in his official capacity when making the decisions or taking the actions at issue with respect to his FMLA claims. See generally, Verified Amended Complaint, ¶ ¶ 86-88, 92, 108; see also Plaintiff's Deposition, pp. 47-55. While Plaintiff does allege in ¶ 89 of his verified Amended Complaint that Pennington acted in an ultra vires manner, the evidence does not support this assertion. An act is "ultra vires" if it is an act done without legal authority. Plaintiff's Third Cause of Action alleges, and the evidence submitted by the parties shows, that Pennington was acting

[27] Notably, these rulings stand in contrast to court rulings regarding the "family leave" provision of the FMLA; 29 U.S.C. § 2612(a)(1)(C); which allows an employee to obtain leave in order to care for a family member. The United States Supreme Court has held that the abrogation of the States' immunity from suit under the "family leave" provision meets constitutional muster, and that the States therefore have no immunity from suit under that provision. See Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 725-726, 737 (2003). That is not, however, the provision of the FMLA at issue in this lawsuit.

within his legal authority as the Circuit Public Defender when he entered into the Intergovernmental Agreement,[28] that calculation of Plaintiff's FMLA leave time was done by and through the County, and that the Defendant Pennington was acting in his capacity as the Circuit Public Defender and Plaintiff's boss when he terminated Plaintiff's employment. Therefore, the evidence does not create an issue of fact as to whether Pennington was acting untra vires for purposes of Plaintiff's FMLA claim. Luder v. Endicott, 253 F.3d 1020, 1022-1023 (7th Cir. 2000)["[A] suit nominally against state employees in their individual capacities that demonstratively has the identical effect as a suit against the state is, we think, barred. Any other position would be completely unrealistic and would make a mockery of the Supreme Court's heightened sensitivity to state prerogatives"]. [FLSA case]. Moreover, and significantly, even if this Court was to otherwise find that the evidence was sufficient to set forth an individual capacity claim against Pennington, Fourth Circuit precedent clearly holds that claims against state employees in their individual capacities under the FMLA are barred by state sovereign immunity because the State is the real party in interest. See Lizzi, 255 F.3d at 136-138 (citing Kazmier v. Widmann, 225 F.3d.519, 533, n. 65 (5th Cir. 2000)), overruled in part on other grounds by, Nevada v. Dep't of Human Resources v. Hibbs, 538 U.S. 721 (2003). Hence, Pennington cannot be sued in federal court for a violation of the

[28] See Court Docket No. 111-9 [Intergovernmental Agreement].

FMLA in his individual capacity. See Brown v. Lt. Governor's Office of Aging, 697 F.Supp. 2d 632, 639 (D.S.C. 2010); Smith v. City of Marion, No. 11-2039, 2012 WL 694314, at * 5 (D.S.C. Jan. 27, 2012) [Agreeing with courts that hold a public official cannot be held individually liable for violations of the FMLA] (Report and Recommendation).

In reaching this conclusion, the undersigned is aware that some jurisdictions have held that Coleman, while upholding state sovereign immunity under the FMLA, did not bar FMLA claims in federal court against state employees in their individual capacity.[29] However, the undersigned agrees with Judge Currie's decision in Brown that, until the holding by the Fourth Circuit in Lizzi that state employers in their individual capacities cannot be sued under the FMLA is overruled by either the

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[29] Cf. Modica v. Taylor, 465 F.3d 174, 184 (5th Cir. 2006)[Individual liability may exist for public employees under the FMLA]; Darby v. Bratch, 287 F.3d 673, 681 (8th Cir.2002) [holding that a public official may be held liable in his or her individual capacity for retaliation in violation of the FMLA]; Dennard v. Towson Univ., 62 F.Supp.3d 446, 452 (D.Md. 2014)[noting that sovereign immunity cannot be raised as a defense where monetary relief is sought against public employees in their individual capacity under the FMLA]; Sheaffer v. County of Chatham, 337 F.Supp.2d 709, 728–29 (M.D.N.C.2004); Cantley v. Simmons, 179 F.Supp.2d 654, 656 (S.D.W.Va.2002); Morrow v. Putnam, 142 F.Supp.2d 1271, 1273 (D.Nev.2001); Bell v. University of California Davis Medical Center, No. 11-1864, 2013 WL 1896318 at * 10 (E.D.Ca. May 6, 2013), adopted by, 2013 WL2664552 (E.D.Ca. June 11, 2013); Howard v. Pennsylvania Dep't of Public Welfare, No. 11-1938, 2013 WL 102662 at * * 9-10 (E.D.Pa. Jun. 9, 2013); Santiago v. Connecticut Dept of Transportation, No. 12-132, 2012 WL 5398884 at * 4 (D.Conn. Nov. 5, 2012).

Fourth Circuit or the Supreme Court, [30] that decision remains binding on this Court. Brown, 697 F.Supp.2d at 639 ["Until the Supreme Court or the en banc Fourth Circuit articulates a different Rule, Lizzi remains controlling precedent as to the extension of the Eleventh Amendment immunity to supervisory employees of a state who are sued for damages as to claims for which the state, itself, is entitled to Eleventh Amendment immunity"]. See also Williams v. Dorchester Detention Center, 987 F.Supp.2d 690, 692-694 (D.S.C. 2013); Mitchell v. Chapman, 343 F.3d 811, 833 (6th Cir.2003)[public official is not an employer for purposes of the FMLA when sued in his individual capacity], *cert. denied,* 542 U.S. 937 (2004); Wascura v. Carver, 169 F.3d 683, 686 (11th Cir.1999); Keene v. Rinaldi, 127 F.Supp.2d 770, 776 (M.D.N.C.2000) [holding that public officials are not liable in their individual capacities under the FMLA]; Law v. Hunt Cty., Texas, 830 F. Supp. 2d 211, 215–16 (N.D. Tex. 2011)[same]; Svet v. Florida Dep't of Juvenile Justice, No. 11- 394, 2012 WL 5188036 at * 3 (M.D.Fla. Oct. 19, 2012)[Extending protection in FMLA claim to individual Dependant in official capacity]; Smith v. City of Marion, No. 11-2039, 2012 WL 694275, at * 1 (D.S.C. Mar. 2, 2012)[adopting the thorough analysis in the Magistrate Judge's Report and Recommendation and concluding there is "no liability for public agency employees under the FMLA."]. [31] Therefore, Pennington is entitled to

[30] Coleman did not address the question of individual liability under the FMLA.

[31] The undersigned also observes that in at least two of the District Court decisions from this Circuit which found that individual capacity suits under the FMLA *should* be allowed,

dismissal as a party Defendant under Plaintiff's FMLA claim.[32]

As for the remaining Defendant, Charleston County is subject to liability for Plaintiff's FMLA

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they did not discuss the Fourth Circuit's decision in Lizzi, which the undersigned believes (in accord with Brown) is binding precedent on this issue. See Reed v. Maryland, Dep't. of Human Resources, No. 12-472, 2013 WL 489985 (D.Md. Feb. 7, 2013); see also Sheaffer, 337 F.Supp.2d at 728–29.

[32] It is also noted that in a recent Fair Labor Standards Act (FLSA) case, the Fourth Circuit considered whether two public supervisors who were sued in their individual capacities were entitled to dismissal based on sovereign immunity. See Martin v. Wood, 772 F.3d 192 (4th Cir. 2014). While Martin deals with the FLSA, which contains differing language with regard to the definition of an employer, the Fourth Circuit's analysis regarding when the State is the real party in interest is on point with the analysis in this case:

> To identify the real, substantial party in interest, we thus examine the *substance* of the claims stated in the complaint, positing inquiries such as: (1) were the allegedly unlawful actions of the state officials 'tied inextricably to their official duties,' Lizzi, 255 F.3d at 136; (2) if the state officials had authorized the desired relief at the outset, would the burden have been borne by the State, *cf.* Pennhurst, 465 U.S. at 109 n. 7, 104 S.Ct. 900; (3) would a judgment against the state officials be "institutional and official in character," such that it would operate against the State, id. at 108; (4) were the actions of the state officials taken to further personal interests distinct from the State's interests, id.; and (5) were the state officials' actions ultra vires, id. at 111; Lizzi, 255 F.3d at 136.
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> Martin, 772 F.3d at 196.

claim for the same reason it is subject to liability under Plaintiff's ADA claim. See discussion, supra. Plaintiff's FMLA claim against the County is an "interference" claim relating to the calculation of his leave time. [33]

The FMLA provides twelve (12) weeks of unpaid leave per year for eligible employees. An "eligible employee" under the Act is an employee who has been employed for at least twelve (12) months by the employer with respect to whom leave is requested, and for at least one thousand two hundred and fifty (1,250) hours of service with such employer during the previous twelve (12) month period. 29 U.S.C. § 2611(2)(A). "To establish unlawful interference with an entitlement to FMLA benefits, an employee must show that: (1) he was an eligible employee, (2) the employer was covered by the Act, (3) he was entitled to leave under the FMLA, (4) he gave the employer adequate notice of his intention to take leave, and (5) the employer denied him FMLA benefits to which he was entitled." Carr, 2013 WL 1282105 at * 7 (quoting King v. Blanchard Mach. Co., No. 10-3219, 2012 WL

[33] The FMLA creates two types of claims: "(1) interference claims, in which an employee asserts that his employer denied or otherwise interfered with his substantiative rights under the Act; and (2) retaliation claims, in which an employee asserts that his employer discriminated against him because he engaged in activity protected by the Act". Carr v. Mike Reichenbach Ford Lincoln, Inc., No. 11-2240, 2013 WL 1282105 at *6 (D.S.C. Mar. 26, 2013)(quoting Gleaton v. Monumental Life Ins. Co., 719 F.Supp.2d 623, 633, n. 3 (D.S.C. 2010)); Sommer v. The Vanguard Group, 461 F.3d 397, 399 (3rd Cir. 2006). As noted, Plaintiff's claim here is an interference claim.

4586177 at * 5 (D.S.C. Sept. 28, 2012)); Makowski v. Smithamundsen LLC, 662 F.3d 818, 825 (7th Cir. 2011). Furthermore, to succeed on this claim, Plaintiff must show that the interference he alleges caused him prejudice. Downey v. Strain, 510 F.3d 534, 540 (5th Cir. 2007)["[T]he FMLA's remedial scheme . . . requires an employee to prove prejudice as a result of an employer's noncompliance."] (citing Ragsdale v. Wolverwine World Wide, Inc., 535 U.S. 81, 90 (2002)); Anderson v. Discovery Communications, LLC, No. 11-2195, 2013 WL 1364345, at * 6 (4th Cir. Apr. 5, 2013)[In order to establish a FMLA interference claim, Plaintiff has to prove not only interference, but that the violation prejudiced her]; Croy v. Blue Ridge Bread, Inc., No. 12-00034, 2013 WL 3776802, at * 8 (W.D.Va. July 15, 2013)[Plaintiff must demonstrate that he was prejudiced in some way].

The Defendant County has not disputed for purposes of summary judgment the first four elements of Plaintiff's FMLA interference claim. As such, Plaintiff was entitled to take reasonable leave for medical and other reasons in a manner that accommodated the legitimate interests of his employer. 29 U.S.C. § 2612. See Taylor v. Progress Energy, Inc., 493 F.3d 454, 457 (4th Cir. 2007)[Under the FMLA, an employee has a "right to take a certain amount of unpaid medical leave each year and the right to reinstatement following such leave."]. Defendant argues instead that Plaintiff's claim fails because Plaintiff received all of the FMLA leave he requested. Defendants Brief, p. 18. See Ragsdale, 112 S.Ct. at 1161; and 29 U.S.C. 2617(a)(1)(A)(i)[prejudice exists where there is a loss

of compensation or benefits because of the alleged violation]. However, Plaintiff's evidence (considered in the light most favorable to him) is that after he was diagnosed with rectal cancer on April 7, 2014, he was told by the Public Defender office manager that if he expected to be away from work for more than two weeks, he needed to fill out papers for the County which included information to be supplied by his doctor. Plaintiff states that to the best of his recollection the completed forms were thereafter provided to the County. Plaintiff further states that on June 5, 2014 he was told by the office manager that the County had approved his FMLA leave and that he would be receiving a letter from the County confirming this, but that he never did receive a letter from the County confirming his leave, designating it as FMLA leave, or otherwise explaining its operation. See also Plaintiff's Deposition, pp. 6-7, 49, 52, 207. Even so, the Defendant County was counting his sick leave hours as FMLA hours, and Plaintiff asserts that by the time he was told orally by the office manager on June 5, 2014 that his FMLA leave had been approved, Plaintiff had already been charged with approximately 252 hours (4 and ½ weeks) of FMLA leave. Plaintiff states, however, that he does not recall ever having received any information from the County about his options under the FMLA, or about the consequences of when his FMLA leave was deemed to have commenced or about its exhaustion. Plaintiff also states that he "never received notice that he could fired in the middle of cancer treatment if he exhausted his 12 weeks of FMLA leave, even if at the time he had substantial annual leave left." Verified Amended Complaint, ¶ 103; see also Plaintiff's Deposition, pp. 49-50.

Plaintiff contends that the County's failure to inform him of the consequences of exhausting his FMLA leave before the County began charging him with FMLA hours resulted in his not taking necessary measures from the beginning to preserve his leave for the long treatment road ahead. Plaintiff's Deposition, pp. 206-208. This assertion is sufficient to state an FMLA interference claim for purposes of summary judgment. See Vannoy v. The Federal Reserve Bank of Richmond, 827 F.3d 296, 302-303 (4th Cir.2016)[recognizing an allegation that FMLA leave would have been structured differently may be sufficient "prejudice" to support an FMLA interference claim]; Muhammad, 36 F.Supp.2d at 243 ["Thus, at the summary judgment stage the only inquiry is the threshold one of determining whether there is the need for a trial, that is, 'whether the evidence presents a sufficient disagreement to require submission to [the trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'"]. Therefore, the Defendant Charleston County is not entitled to summary judgment on Plaintiff's FMLA claim.

Plaintiff's Claim for Defamation

In his Fourth Cause of Action, Plaintiff asserts a claim for defamation against Pennington in his individual capacity. The standard for a successful defamation claim has previously been set forth in the discussion of Pennington's counterclaim. Supra.

Plaintiff states that Pennington hand delivered his termination letter to him on October 14, 2014, which contained various false statements

about the Plaintiff's honesty and integrity and questioning Plaintiff's performance of his duties as an APD. Verified Amended Complaint, ¶ ¶ 113, 115. See Plaintiff's Exhibits 35, 87. Plaintiff contends that Pennington composed this letter specifically with the knowledge and intent that it would subsequently be published to the media through the Freedom of Information Act, and notes that the contents of the letter did indeed subsequently appear in several highly visible media publications. Id., ¶ 116; see also Plaintiff's Deposition, pp. 43-44. Plaintiff further contends that Pennington told members of the SCACDL Board that Plaintiff was using it [the Board] for his own personal agenda at the expense of Plaintiff's clients, and that Plaintiff was manipulating the SCACDL (an organization composed of Plaintiff's peers and colleagues in the legal profession). Id., p. 118; see also Plaintiff's Deposition, pp. 149-153, 208-209; Plaintiff's Exhibits 49-52. Plaintiff contends that these assertions by Pennington were false, and constitute slander per se because they accuse Plaintiff of unfitness in his business or profession and because the defamatory meaning of the statements was obvious on its face. Verified Amended Complaint, ¶ ¶ 119-120; see also Plaintiff's Exhibits 47, 49 (p. 9-10, 13), 51 (p. 7), 52 (p. 6), 57, 58. Plaintiff further states that on or about August 27, 2014, Pennington issued a press release in which he stated that accusations that he had ordered Plaintiff not to file a grievance against Wilson were "utterly false". See Plaintiff's Exhibit 69; see also Plaintiff's Deposition, p. 53. This statement was subsequently published in the Charleston newspaper. See Plaintiff's Deposition,

pp. 153-154; see also Plaintiff's Exhibit 7. [34] Plaintiff argues that the statements in this press release also constitute libel per se, and that Pennington made these defamatory statements with actual malice and with the intent to injure Plaintiff's reputation. Verified Amended Complaint, ¶ ¶ 124-125.

Pennington offers several arguments for why Plaintiff's defamation claim should be dismissed. Pennington first contends that as a state official, he is immune from suit for claims asserted under the South Carolina Tort Claims Act (SCTCA). Pennington is correct that in his "official" capacity he cannot be sued in this Court, both by virtue of the Eleventh Amendment; see, discussion, supra; and because (even if he could be sued in this Court) the proper party defendant for Plaintiff's defamation claim is the Office of Public Defender (i.e., Pennington in his official capacity), not Pennington in his individual capacity. Flateau v Harrelson, 584 S.E. 2d 413, 417 (S.C.Ct.App. 2003) [Under the SCTCA, "a government employee acting within the scope of official duty is exempt from personal liability."]; Cornelius v. City of Columbia, No. 06-3215, 2007 WL 2116466 at * 3 (D.S.C. Mar. 6, 2007),

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[34] Although the press release did not refer to Plaintiff by name, using the term "subordinate lawyer", Plaintiff contends that it was clear to everyone who that "subordinate lawyer" was. See Neeley v. Winn-Dixie Greenville, Inc., 178 S.E.2d 662, 665 (S.C. 1971) [Statement may be defamatory if it is "such that persons reading or hearing it will, in the light of surrounding circumstances, be able to understand that it refers to the person complaining, and it must have been so understood by at least one other person".]

adopted in party by, 2011 WL 2116459 (D.S.C. July 19, 2007). However, the SCTCA "does not grant an employee immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude". McCall v. Williams, 52 F.Supp. 2d 611, 615 (D.S.C. 1999), quoting S.C.Code Ann. § 31-78-70(b), as amended. Plaintiff clearly asserts in this action that the Defendant Pennington's allegedly defamatory conduct was accompanied by actual malice. See Plaintiff's Deposition, p. 208; see also Verified Amended Complaint, ¶ ¶ 2, 117, 125, 130. This is a question to be decided by the finder of fact. Therefore, Pennington is not entitled to dismissal of Plaintiff's defamation claim against him individually. McCall, 52 F.Supp. 2d at 615 ["Thus, a governmental employee can be personally liable for intentional torts . . . ."](citing Roberts v. City of Forest Acres, 902 F.Supp. 662, 671 (D.S.C. 1995)); see Quadir v. Cooke, No. 08-498, 2008 WL 5215610 at * 8 n. 9 (D.S.C. Dec. 11, 2008) [Defamation is an intentional tort].

Pennington further argues that any comments he made or published about the Plaintiff were in the course and scope of his position as the Ninth Circuit Public Defender, and that any such statements were therefore privileged. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 514 S.E.2d 126, 134 (S.E. 1999) ["In a defamation action, the defendant may assert the affirmative defense of conditional or qualified privilege"]. However, considered in the light most favorable to the Plaintiff, there is a

question of fact as to whether Pennington would be entitled to this privilege in this case. Under South Carolina law, "[w]hen one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interests is privileged by reason of the occasion". Bell v. Bank of Abbyville, 38 S.E.2d 641, 643 (S.E. 1946). However, the statement at issue "must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed". Id. Here (again, considered in the light most favorable to the Plaintiff), there is a question whether the comments and statements made by Pennington were (as alleged by the Plaintiff) made with malice, and a Plaintiff may recover for a defamatory communication, even one that is otherwise accompanied by a qualified privilege, "if he shows that it was actuated by malice". Richardson, 255 S.E.2d at 342, quoting Bell, 38 S.E.2d at 642. Moreover, it "is generally held that the protection of a qualified privilege may be lost by the manner of its exercise", and the "person making it making it must be careful to go no further than his interest or his duties require". Fulton v. Atlantic Coastline R.R.Co., 67 S.E.2d 425, 429 (S.C. 1951). Considered in the light most favorable to the Plaintiff, there is a question of fact in the evidence as to whether Pennington exceeded any privilege he may have otherwise had in making the statements and comments he did concerning the Plaintiff. See also Mains v. K-Mart, Inc., 375 S.E.2d 311, 315 (S.C.Ct.App. 1988) [Whether a speaker exceeded a privilege is a jury question]; cf. Legette v. Nucor

Corp., No. 12-1020, 2012 WL 3029650 at * 3 (D.S.C. July 29, 2012) ["Even assuming a qualified privilege applies to all of the alleged statements, Plaintiff has alleged that the statements were made with reckless disregard and malice".]

Finally, Defendant argues that he is entitled to summary judgment on Plaintiff's defamation claim because Plaintiff [like the Defendant] is a public figure. As already noted in the discussion herein with respect to the Defendant's counterclaim for defamation, as a public figure (which Plaintiff does not dispute) Plaintiff must plead and prove that any alleged defamation of him was done with actual malice to succeed on this claim. See New York Times Co., 376 U.S. at 270; cf. Parrish, 1994 WL 159533 at * 3 [Discussing public defenders as public figures]; see also S.C.Code 17-3-510 (2007). Plaintiff specifically alleges that the comments and publications by the Defendant were made with malice, and the undersigned finds that this is a question of fact for the jury to determine. Plaintiff's Deposition, p. 208. See Flemming, 567 S.E.2d at 860 [Actual malice means the publisher of the statement had knowledge the statement was false or acted with reckless disregard as to whether or not it was false]; Elder v. Gaffney Ledger, 533 S.E.2d 899, 902 (S.C. 2000) [Actual malice can be found where the publisher in fact entertained serious doubts as to the truth of his publication and/or had a high degree of awareness of probable falsity]; Holtzscheiter, 506 S.E.2d at 508-509 [Statement may be actionable per se where it is both false and defamatory and suggests unfitness in one's business or profession].

Therefore, the Defendant is not entitled to summary judgment on Plaintiff's claim for defamation.

Claim for Breach of Implied Contract

In his Fifth Cause of Action, Plaintiff asserts that he had an "implied contract" of employment with the Defendant Pennington in his official capacity and/or the Defendant Charleston County, because "[i]n the hiring of any lawyer . . . in South Carolina, there is implied a fundamental understanding between the employer attorney and the employee attorney that both will conduct their respective legal practices in accordance with the ethical standards of the profession." Verified Amended Complaint, ¶ 138. Plaintiff then alleges that this "implied contract" was breached by the Defendants, because "[u]nder South Carolina law, there is implied in every contract an implied covenant of good faith and fair dealing", and that the Defendants breached that fundamental understanding. Id., ¶ 138. Although Plaintiff acknowledges in his brief (as did counsel at the motions hearing) that South Carolina is an employment at-will state, Plaintiff cites as support for what he concedes to be this "novel" claim the case of Weider v. Skala, 609 N.E.2d 105 (N.Y. 1992). In that case, the New York Court of Appeals found that the Plaintiff attorney in that case had stated a valid claim for breach of contract, based on an implied-in-law obligation arising out of his relationship with the Defendants (his superiors at the law firm where he worked), after he was fired when he sought to report misconduct by a fellow associate at the firm. The New York court found that

"[i]nsisting that as an associate in their employ plaintiff must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship". Id., at 109-110.

However, Plaintiff fails to point to any other support (other than this one 1992 New York Court of Appeals opinion) for his argument that his termination by Pennington gives rise to a claim for breach of contract under South Carolina law, and counsel also conceded at the hearing that Plaintiff had no other authority for such a novel claim. Even so, counsel argued that since this issue is one of novel first impression in South Carolina, it should not be determined by way of summary judgment, but should instead be determined on a full record after trial, citing to Rhodes v. E.I. duPont deNemours & Co., 636 F.3d 88, 97-98 (4th Cir. 2011) ["A federal court . . . should act conservatively when asked to predict how a state court would proceed on a novel issue of state law"]. However, while Charleston County (but not Pennington in his official capacity) may otherwise be subject to a breach of contract claim in this Court, there is simply no basis for Plaintiff's implied contract claim under state law.

Under South Carolina law, in order to prevail on a breach of contract claim, the Plaintiff bears the burden of establishing the existence and terms of the contract, the Defendant's breach of one or more of the contractual terms, and damages resulting from the breach. Taylor v. Cummins Atlantic, Inc., 852 F.Supp. 1279, 1286 (D.S.C. 1994), citing Fuller v.

Eastern Fire & Cas.Ins.Co., 124 S.E.2d 602, 610 (S.C. 1962). That is assuming, of course, that a contract is even found to exist. Staley Smith & Sons v. Limestone College, 322 S.E.2d 474, 477 (S.C.Ct. App. 1984) [If the agreement is manifested by conduct, it is said to be implied. However, the parties must manifest a mutual intent to be bound].[35] Further, with respect to employment, there is a presumption in South Carolina that employees are at-will, and therefore in order to survive a motion for summary judgment on a claim for breach of a contract of employment, a Plaintiff must also present "sufficient factual allegations to establish the existence of an employment contract beyond the at-will relationship." Perrine, 2011 WL 3563110, at * 2 [Rule 12 motion case] ["[T]here is a presumption in South Carolina that employees are at-will, and in order to survive a Rule 12 motion to dismiss on a claim for breach of a contract of employment, a Plaintiff must 'plead sufficient factual allegations to establish the existence of an employment contract beyond the at-will relationship '"], quoting Amason v. P. K. Management, LLC, No. 10-1752, 2011 WL 1100169, at * 6 (D.S.C. Mar. 23, 2011); see also Prescott v. Farmer's Tel. Co-Op., Inc., 516 S.E.2d 923, 927, n. 8 (S.C. 1999)[In South Carolina, "there is a presumption of at-will employment']. Plaintiff has not presented any evidence to show that he had an "implied" employment contract with Charleston County just because he was a County employee (through operation of the Intergovernmental

[35] Plaintiff acknowledged at his deposition that he did not have a written employment contract. See Plaintiff's Deposition, p. 171.

Agreement between the County and Pennington as the Circuit Public Defender). County employees are not contract employees, and the IGA did not change Plaintiff's at-will status.[36]

Finally, although captioned and argued as an "implied" contract claim, Plaintiff further contends that the at-will nature of his employment was altered under the facts of this case (again, citing to the New York Court of Appeals case) because it would be a violation of "public policy" to not allow him to pursue such a claim. However, that is not a contract claim, and in any event Plaintiff has not shown a "public policy" violation here under state law. For example, in Ludwick v. This Minute of Carolina, Inc., 337 S.E.2d 213 (S.C. 1985), the South Carolina Supreme Court held that a cause of action in tort exists under South Carolina law where a retaliatory discharge of an at- will employee

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[36] Even though the Intergovernmental Agreement references the Charleston County Employee Handbook and general rules governing Charleston County employees, Plaintiff has presented no evidence to show that any such handbook and/or rules or policies altered his at-will employee status. Cf. Ford v. Musashi S.C., Inc., No. 07-3734, 2008 WL 4414385 (D.S.C. Sept. 23, 2008), adopting in part and denying in part, 2008 WL 4414497, at * 3 (D.S.C. July 11, 2008)["[U]nder South Carolina law where an employee handbook provides a general policy statement of nondiscrimination such a provision does not constitute a promise altering the at-will employment relationship'"]; Karges v. Charleston County Sheriff's Office, No. 08-2163, 2010 WL 1303455 at * 10 (D.S.C. Mar. 5, 2010)[Recommending dismissal on summary judgment where Plaintiff asserted that a handbook altered his employment-at-will status, but failed to introduce the handbook or reference any evidence to establish the necessary elements of a handbook claim], adopted by, 2010 WL 1409435 (D.S.C. Mar. 31, 2010);

constitutes a violation of a clear mandate of public policy, such as "when an employer requires an at-will employee, as a condition of retaining employment, to violate the law". Id, at 216. See also Culler v. Blue Ridge Electric Cooperative, Inc., 422 S.E.2d 91 (S.C. 1992). However, "[t]his exception is generally applied in a situation in which an employer requires an employee to violate a law, or when the reason for the termination is itself a violation of criminal law"; Barron v. Labor Finders of South Carolina, 682 S.E.2d 271, 273 (S.C.Ct. App. 2009), aff'd as modified by, 713 S.E.2d 634 (S.C. 2011); although some other limited situations may also apply. See Barron, 713 S.E.2d at 637 [noting that there may be cases where a public policy wrongful termination claim could be pursued even where a discharge did not itself violate a criminal law or the employer did not require the employee to violate the law], citing to Garner v. Morrison Knudsen Corp., 456 S.E.2d 907 (S.C. 1995) and Keiger v. Citgo Coastal Petroleum, Inc., 482 S.E.2d 792 (S.C.Ct.App. 1997).

However, while Plaintiff's evidence could be construed as showing that Pennington was forcing (or attempting to force) him to commit an ethical violation (by not reporting unethical conduct to the Bar), there is no evidence that Pennington was attempting to force Plaintiff to commit a crime, or that Plaintiff's termination was in violation of any criminal law or constituted a crime. Lawson v. South Carolina Dept. of Corrections, 532 S.E.2d 259, 260-261 (S.C. 2000)[Public policy claim arises where "an employer requires an employee to violate the [criminal] law or the reason for the employee's termination was itself a violation of a criminal

law"]; cf. Eady v. Veolia Transp. Services, Inc., 609 F.Supp.2d 540, 559 (D.S.C. 2009)[Plaintiff failed to show violation of public policy where he claimed that he was terminated for refusing to sign a blank affidavit]; King v. Charleston County School District, 664 F.Supp.2d 571, 584-585 (D.S.C. May 21, 2009); Love v. Cherokee County Veteran's Affairs Office, No. 09-194, 2009 WL 2394369, at * 3 (D.S.C. Jul. 31, 2009)[Granting Rule 12 motion to dismiss where no inference could be drawn from the facts alleged that the Plaintiff's termination was in violation of a criminal law]; Barron, 682 S.E.2d at 273-274 [No wrongful discharge action where employee was not asked to violate the law and his termination did not violate the criminal law]; see also Merck v. Advanced Drainage System, Inc., 921 F.2d 549, 554 (4th Cir. 1990)[The "public policy" exception to the at-will doctrine "is to be very narrowly applied."].

Further, even in those limited (and as yet undefined[37]) circumstances where the violation of a criminal statute is not involved, a Ludwick claim still cannot be asserted where there are federal or state statutory remedies available to vindicate the public policies allegedly implicated by a plaintiff's termination, as the South Carolina Supreme Court has explicitly held that "[w]hen a statute creates a substantive right and provides a remedy for infringement of that right, the Plaintiff is limited to that statutory remedy." Palmer v. House of Blues Myrtle Beach Restaurant Corp., No. 05-3301, 2006 WL 2708278 at *3 (D.S.C. Sept. 20, 2006) (citing Lawson, 532 S.E.2d 259). As noted in Stiles v. Am.

[37] See Barron, 713 S.E.2d at 637-638.

Gen. Life Ins. Co., 516 S.E.2d 449, 450 (S.C. 1999), the public policy exception "is not designed to overlap an employee's statutory or contractual rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists". Id. (Toal, J. concurring). Here, Plaintiff has or had other potential remedies for his alleged wrongful termination claim, including under the First Amendment (through 42 U.S.C. § 1983) as well as under the ADA and/or the FMLA. Palmer, 2006 WL 2708278, at * 3 [[t]he public policy exception does not . . . extend to situations where the employee has an existing statutory remedy for wrongful termination"].

In sum, as Plaintiff has potential constitutional and statutory remedies for his termination claim, he may not pursue a separate state law public policy/wrongful termination cause of action. Palmer, 2006 WL 2708278, at * * 3 and 5; Ramsey v. Vanguard Servs, Inc., No. 07-265, 2007 WL 904526 at *1 (D.S.C. Mar. 22, 2007); Dockins v. Ingles Markets, Inc., 413 S.E.2d 18, 19 (S.C. 1992); see Merck, 921 F.2d at 554 [The "public policy" exception to the at-will doctrine "is to be very narrowly applied."]; Zeigler v. Guidant Corp., No. 07-3448, 2008 WL 2001943 at * 2 (D.S.C. May 6, 2008) ["The Ludwick exception to at-will employment is not designed to overlap an employee's statutory rights to challenge a discharge, but rather to provide a remedy for a clear violation of public policy where no other reasonable means of redress exists."] (quoting Stiles, 516 S.E.2d at 452). Therefore, this claim should be dismissed.

Conclusion

Based on the foregoing, it is recommended that the Defendant Pennington's motion for summary judgment on his counterclaim for defamation be **denied**. It is further recommended that the Defendants' motion for summary judgment on Plaintiff's claims be **granted**, in part, and **denied**, in part, as follows:

The Defendants Pennington (in his official capacity) and Charleston County should be **dismissed** as party Defendants in Plaintiff's First Cause of Action asserting a First Amendment claim. That claim should then proceed against Pennington in his individual capacity.

The Defendant Pennington (in his official capacity) should be **dismissed** as a party Defendant in Plaintiff's Second Cause of Action under the ADA. That claim should then proceed against the Defendant Charleston County.

The Defendant Pennington (in both his official and individual capacities) should be **dismissed** as a party Defendant in Plaintiff's Third Cause of Action under the FMLA. That claim should then proceed against the Defendant Charleston County.

The Defendant Pennington's motion for summary judgment on Plaintiff's Fourth Cause of Action for defamation (against him in his individual capacity) should be **denied**.

The Defendants' motion for summary judgment with respect to Plaintiff's Fifth Cause of Action for breach of implied contract should be **granted**, and that claim should be dismissed. The Plaintiff has also withdrawn his Sixth and Seventh Causes of Action. Therefore, those claims should also be **dismissed**. The parties are referred to the Notice Page attached hereto.

Bristow Marchant
United States Magistrate Judge

November 15, 2018
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310

(4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
Post Office Box 835
Charleston, South Carolina 29402

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

[ENTERED: April 14, 2020]

FILED: April 14, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-1457
(2:15-cv-04455-BHH)

BEATTIE I. BUTLER

Plaintiff - Appellee

v.

D. ASHLEY PENNINGTON, in his individual and official capacities

Defendant - Appellant

and

CHARLESTON COUNTY

Defendant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Thacker, and Judge Harris.

For the Court

/s/ Patricia S. Connor, Clerk