Appendix (A)

United States Court of Appeals
for the Fourth Circuit
Judgement

FILED: June 22, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1275
(3:18-cv-00834-MGL)

CYNTHIA B. WOODS

Plaintiff - Appellant

v.

S.C. DEPARTMENT OF HEALTH & HUMAN SERVICES; MONA SECHREST; MARSHA BROWN; KIM BACKMAN; DR. PETE LIGGETT; CHRISTIAN L. SOURA

Defendants - Appellees

and

HOLLIE HOADWONIC

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.

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

"Appendix A"

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1275

CYNTHIA B. WOODS,

Plaintiff - Appellant,

v.

S.C. DEPARTMENT OF HEALTH & HUMAN SERVICES; MONA SECHREST; MARSHA BROWN; KIM BACKMAN; DR. PETE LIGGETT; CHRISTIAN L. SOURA,

Defendants - Appellees,

and

HOLLIE HOADWONIC,

Defendant.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Mary G. Lewis, District Judge. (3:18-cv-00834-MGL)

Submitted: June 18, 2020 Decided: June 22, 2020

Before FLOYD, THACKER, and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

"Appendix A"

Cynthia B. Woods, Appellant Pro Se. Fred Adam Williams, GIGNILLIAT, SAVITZ & BETTIS, Columbia, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

"Appendix A"

PER CURIAM:

Cynthia B. Woods appeals the district court's order accepting the magistrate judge's recommendation to grant Defendants' motion to dismiss Woods' several employment-related claims. On appeal, we confine our review to the issues raised in the Appellant's brief. *See* 4th Cir. R. 34(b). Because the informal brief does not challenge the bases for the district court's dispositive holdings, Woods has forfeited appellate review of the court's disposition. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). Accordingly, we affirm the district court's judgment. 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

"Appendix A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CYNTHIA B. WOODS, Plaintiff,	§	
vs.	§	CIVIL ACTION NO. 3:18-834-MGL
S.C. DEPARTMENT OF HEALTH & HUMAN SERVICES, MONA SECHREST, MARSHA BROWN, KIM BACKMAN, DR. PETE LIGGETT, and CHRISTIAN L. SOURA, Defendants.	§	

ORDER ADOPTING THE REPORT AND RECOMMENDATION AND GRANTING DEFENDANTS' MOTION TO DISMISS

Plaintiff Cynthia B. Woods (Woods) filed this employment action against her former employer, Defendant South Carolina Department of Health and Human Services (SCDHHS), as well as SCDHHS employees Defendants Mona Sechrest, Marsha Brown, Kim Backman, Dr. Pete Liggett, and former SCDHHS Director Christian L. Soura (Soura) (collectively, Defendants). Woods is self represented.

The matter is before the Court for review of the Fourth Report and Recommendation (Fourth Report) of the United States Magistrate Judge suggesting Defendants' motion to dismiss Woods's second amended complaint be granted and no further amended complaints be permitted. The Fourth Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Fourth Report on December 19, 2019, Woods filed her objections on January 6, 2020, and Defendants filed their reply to Woods's objections on January 21, 2020. The Court has carefully reviewed Woods's objections, but holds them to be without merit. It will therefore enter judgment accordingly.

In recommending the Court grant Defendants' motion to dismiss Woods's second amended complaint, the Magistrate Judge makes the following specific suggestions: Woods's claims raised and dismissed in the Court's earlier orders need not be reconsidered, her Rehabilitation Act claims are time barred, and her 42 U.S.C. § 1983 claims and her claim for injunctive relief as to Soura should be dismissed for failure to state a claim. The Magistrate Judge also advises the Court not to allow Woods to make any further amendments to her complaint.

In Woods's submission, which is composed of seventy-five-handwritten pages of objections and nine pages of exhibits, she careens from one meritless argument to another. She repeatedly quotes other documents, often with neither quotation marks nor attribution, and makes conclusory statements void of any legal or factual support. Nevertheless, the Court has teased out what it thinks to be her eleven primary arguments, which it will address here.

First, Woods begins by generally laying out her version of the procedural history of this case. Objections at 1-17. But, this is of no consequence to the Court's consideration of the Fourth Report. Therefore, to the extent these are meant to be objections, the Court will overrule them.

Second, Woods then launches into her understanding of the standard of review for a Fed. R. Civ. P. 12(b)(6) motion, Objections at 18-23, and takes issue with the plausibility requirement discussed in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007) ("Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of" the right to relief.). Of course, it is outside the province of this Court to ignore Supreme Court precedent. Instead, it must follow it. Consequently, the Court will overrule these objections, too.

Third, Woods contends the Court should not have adopted the Third Report and Recommendation (Third Report) and granted Defendants' motion to dismiss her first amended complaint inasmuch as she submitted a second amended complaint in lieu of filing objections to that report. Objections at 24-27. But, she did so at her own peril.

A bit of procedural history is warranted. After the Magistrate Judge filed the Second Report and Recommendation (the Second Report) in this case suggesting the Court grant Defendants' motion to dismiss Woods's original complaint, instead of filing any objections, Woods submitted what the Court liberally construed to be a motion to file a first amended complaint. And, as the Court noted in its February 4, 2019, text order, "[i]n an abundance of caution," it granted the motion to amend, dismissed Defendants' motion to dismiss Woods's original complaint without prejudice, and deemed the Second Report as moot.

When the Court filed its order adopting the Third Report and granting Defendants' motion to dismiss Woods's first amended complaint, it noted Woods had failed to file any objections. Although Woods had submitted her second amended complaint on that same day before the Court filed its order, the Court was unaware of it as the Clerk had not yet filed it in the docket.

According to Woods, she "believes that Judge Lewis may not have [adopted the Third Report] had she known of the second amended complaint's existence." *Id.* at 25 (some capital letters omitted). As the argument goes, because "the second amended complaint was formatted the same as the first amended complaint, Judge Lewis may have rendered the [Third Report] moot as she had done on [the Second Report]." *Id.* (some capital letters omitted). Woods is mistaken.

The "abundance of caution" the Court exercised in its February 4, 2019, text order was unwarranted when it adopted the Third Report. Simply put, the relevant law alongside Woods's allegations in her second amended complaint lead to just one unmistakable conclusion: dismissal was proper. Thus, given Woods's failure to file objections, and because there was no error–clear error, *Diamond v. Colonial Life &Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005), or otherwise–it was entirely appropriate for the Court to adopt the Third Report. That the Court was unaware of Woods's second amended complaint when it adopted the Third Report and granted Defendants' motion to dismiss Woods's first amended complaint is inconsequential. Hence, the Court will also overrule this objection.

Fourth, Woods objects to the Magistrate Judge's list of what claims are at issue in the Fourth Report, Objections at 28-34. According to her, she is seeking a "claim for injunctive relief brought pursuant to the ADA [and the Family and Medical Leave Act (FMLA)]" against SCDHHS; "monetary relief brought pursuant to the FMLA [and] the Rehabilitation Act to the following individual defendants in their individual capacities[:] Mona Sechrest[,] Marsha Brown[,] Kim Backman[, and] Pete Liggett[;] . . . [and] a new claim for injunctive relief brought pursuant to the

FMLA, the Rehabilitation Act, and the Americans with Disabilities Act" against Christian Soura in her official capacity. *Id.* at 28-29. (some capital letters omitted). Given the nature of this argument, and the fact she adds another claim later in her objections, the Court will neither sustain nor overrule this objection.

Fifth, Woods contends the Magistrate Judge erred is advising the Court to dismiss her Rehabilitation Act claims on the basis they are time barred. *Id.* at 36-44.

"When a federal statute, like the Rehabilitation Act, does not set forth a statute of limitations, federal courts borrow the state statute of limitations that applies to the most analogous state-law claim. Federal district courts should borrow the limitations period from the state in which the district court sits, as long as doing so is not inconsistent with federal law or policy." *Ott v. Maryland Dep't of Pub. Safety and Corr. Serv.*, 909 F.3d 655, 659 (4th Cir. 2018).

Other courts in this district have found the South Carolina Human Affairs Law (SCHAL), S.C. Code Ann. § 1–13–10, et. seq., to be the most analogous state law claim and have applied the one-year statute of limitations found in that statute to Rehabilitation Act claims. *See, e.g.*, *Finch v. McCormick Correctional Inst.*, C.A. No. 4:11–0858, 2012 WL 2871665, at *2 (D.S.C. June 15, 2012); *Cockrell v. Lexington County School District One*, C.A. No. 3:11–2042, 2011 WL 5554811, at *11 (D.S.C. Nov.15, 2011); *Vandeusen v. Adams*, No. 3:06–1092, 2007 WL 2891502, at *5 (D.S.C. July 31, 2007). The Court agrees with those Courts and will apply a one-year statute of limitations here.

Inasmuch as Woods was terminated on December 1, 2016, but waited until March 27, 2018, to file this action, the one-year statute of limitation bars her complaint. According to Woods, however, the continuing violation doctrine applies to these claims, Objections at 39, she "has evidence that she sought reinstatement from [2016-2018] 'in light of changed circumstances[,]" and

the "failure to reinstate her despite . . . changed circumstances amount[s] to fresh acts of disability discrimination and are not time barred[.]" *Id.* at 44.

Unfortunately for Woods, "[a]n employer's refusal to undo a discriminatory decision is not a fresh act of discrimination." *Martin v. Southwestern Virginia Gas Co.*, 135 F.3d 307, 310 (4th Cir. 1998) (citation omitted) (internal quotation marks omitted). If it were, it "would as a practical matter eliminate the statute of limitations in [employment discrimination] cases." *Kennedy v. Chemical Waste Management, Inc.*, 79 F.3d 49, 51 (7th Cir.1996). Put a different way, allowing a plaintiff such as Woods "to restart the statute of limitations by sending a letter requesting reasonable accommodations after she has been unequivocally fired would destroy the statute of limitations." *Conner v. Reckitt & Colman, Inc.*, 84 F.3d 1100, 1102 (8th Cir. 1996). Thus, the Court will overrule this objection as well.

Sixth, although Woods agrees with the Magistrate Judge "42 U.S.C. § 1983 can not be used to enforce rights created by the FMLA[,]" she maintains "29 U.S.C. § 2617 can be used to enforce rights created by the FMLA[.]" Objections at 45 (some capital letters omitted). As such, she requests to amend her complaint to add a Section 2617 claim. *Id.* at 46.

Section 2617 is the enforcement provision of the FMLA. As the Court has previously held, sovereign immunity bars Woods's FMLA claim against the SCDHHS. *See Coleman v. Md. Court of Appeals*, 566 U.S. 30, 33 (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").

Woods's FMLA claims against the individual defendants are also disallowed by sovereign immunity. *See Lizzi v. Alexander*, 255 F.3d 128 (4th Cir. 2001) *(overruled in part on other grounds by Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)) (holding state employee supervisors sued for violating an employee's FMLA rights enjoy the same immunity

from suit that the state itself enjoys because the state is the real party in interest.). Therefore, the Court will deny Woods's request to amend her complaint to add a Section 2617 claim because such amendment would be futile. *See Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) ("[L]eave to amend a pleading should be denied . . . when . . . the amendment would have been futile.").

The Court notes, when Woods listed the claims she is pursuing in her Second Amended Complaint, she neglected to list she was pursuing any Section 1983 claims. *See* Objections at 28-29. Nevertheless, in her seventh objection, she takes issue with the Magistrate Judge's recommendation as to her Section 1983 claims, *Id.* at 47-53, and "ask[s] that this case be allowed to go forward so that if need be Congress can use it to make a ruling on the intent of the Rehabilitation Act [and] § 1983 claims." *Id.* at 48. In other words, she seeks to employ Section 1983 as an enforcement mechanism for rights found in the Rehabilitation Act.

Although the Fourth Circuit has failed to address this issue directly, it has stated that, when a statute such as the Rehabilitation Act provides individuals with a private right of action for the enforcement of their rights under that statute, "the availability of such a remedy strongly suggests a Congressional intent to preclude resort to § 1983." *Kendall v. City of Chesapeake, Va.*, 174 F.3d 437, 443 (4th Cir. 1999). Further, the Circuit courts that have dealt with the issue has rejected the notion a plaintiff can use Section 1983 in seeking rights under the Rehabilitation Act. *See, e.g.*, See *Vinson v. Thomas*, 288 F.3d 1145, 1156 (9th Cir. 2002); *Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1011–12 (8th Cir. 1999); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1530–31 (11th Cir.1997). The Court agrees with these circuit courts' decisions, and thinks the Fourth Circuit, if faced with this precise question, would too. Accordingly, it will also overrule this objection.

Eighth, Woods sets forth a mish mash of statements and conclusory allegations concerning her claim for monetary relief. Objections at 54-55. But, inasmuch as the objections are both non-specific and without merit, the Court will overrule them.

Ninth, Woods makes a long series of objections as to why she is entitled to the injunctive relief of having her employment restored. *Id.* at 56-69. Like her objections concerning her claim for monetary relief, however, her objections regarding her request for injunctive relief are also non-specific and without merit. Consequently, the Court will overrule them, too.

Tenth, Woods next offers miscellaneous general arguments as to why the Court should not grant Defendants' motion to dismiss. *Id.* at 70-71 The Court, however, is unpersuaded and will therefore overrule these objections, too.

Eleventh, Woods maintains the Magistrate Judge erred in advising the Court to disallow any further amended complaints. *Id.* at 72-75. As per the relevant law, "a district court may not deny [a motion to amend] simply because it has entered judgment against the plaintiff." *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006). "Instead, a post-judgment motion to amend is evaluated under the same legal standard as a similar motion filed before judgment was entered—for prejudice, bad faith, or futility." *Id.* However, "[t]here is one difference between a pre- and a post-judgment motion to amend: the district court may not grant the post-judgment motion unless the judgment is vacated pursuant to Rule 59(e) or Fed. R. Civ. P. 60(b)." *Id.*

Further, although "the grant or denial of an opportunity to amend is within the discretion of the District Court, . . . outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Pittston Co. v. United States*, 199 F.3d 694, 705 (4th Cir. 1999). It follows that, for the Court to say it is going to forbid any further amendments before it has

reviewed the motion to amend would be an abuse of the Court's discretion. That is so because the Court would be unable to fully consider whether the motion is justified before it has reviewed it.

Thus, although Woods's motion to amend may be denied, the Court is unwilling to say any such motion will be denied before it has had an opportunity to review it. As such, because the Court is unable to determine whether it will allow any further amendment, it will neither sustain nor overrule this objection.

Any and all other objections not discussed here are so lacking in merit as not to require discussion. Thus, the Court will overrule those objections, too.

After a thorough review of the Report and the record in this case pursuant to the standards set forth above, the Court overrules Woods's objections, except as noted above, adopts the Report to the extent it does not contradict this order, and incorporates it herein. Therefore, it is the judgment of this Court Wood's request to amend her complaint to add a Section 2617 claim is **DENIED**, Defendants' motion to dismiss is **GRANTED**, and Woods's complaint is **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

Signed this 10th day of February, 2020, in Columbia, South Carolina.

s/ Mary G. Lewis
MARY G. LEWIS
UNITED STATES DISTRICT JUDGE

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NOTICE OF RIGHT TO APPEAL

Woods is hereby notified of the right to appeal this Order within thirty days from the date hereof, pursuant to the Federal Rules of Appellate Procedure.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Cynthia B. Woods, Plaintiff, vs. S. C. Department of Health & Human Services, Mona Sechrest, Marsha Brown, Kim Backman, Dr. Pete Liggett, and Christian L. Soura, Defendants.	)	C/A No. 3:18-cv-00834-MGL-KDW REPORT AND RECOMMENDATION

Plaintiff, proceeding pro se and *in forma pauperis*, brings this employment action against her former employer, South Carolina Department of Health and Human Services ("SCDHHS"), as well as SCDHHS employees—Defendants Mona Sechrest, Marsha Brown, Kim Backman, and Dr. Pete Liggett (collectively, "Individual Defendants"), who were Plaintiff's supervisors (Sechrest and Liggett) and Defendant's Human Resources managers (Brown and Backman). Most recently, Plaintiff has filed an amended pleading (Second Amended Complaint, ECF No. 84) that adds another Defendant—former SCDHHS Director Christian L. Soura ("Defendant Soura"). Because Defendant Soura was recently added as a Defendant, he is referred to separately herein and not included in reference to "Individual Defendants." Any reference to the "natural defendants" includes all individual Defendants—Sechrest, Brown, Backman, Liggett, and Soura. This matter is before the undersigned pursuant to 28 U.S.C. § 636(b)(1), and Local Civil Rule 73.02(B)(2)(e) (D.S.C.) for a Report and Recommendation ("R&R") on Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint. ECF No. 85. Plaintiff responded to the Motion, ECF No. 96, and Defendants submitted a Reply, ECF No. 97. Having reviewed the pleadings and

filings in the case and applicable law, the undersigned recommends Defendants' Motion to Dismiss, ECF No. 85, be *granted and no further amendment be permitted.*

I. Background

This procedural history of this matter is somewhat convoluted, and this is the fourth time an iteration of Plaintiff's complaint has been before the undersigned for review.

A. Initial Complaint and First (May 31, 2018) R&R

First, the undersigned reviewed Plaintiff's initial proper-form Complaint, ECF No. 1-6, and recommended service of some, but not all, of the claims in that Complaint. First (May 31, 2018) R&R, ECF No. 25 (initial review of pro se Complaint conducted pursuant to procedural provisions of 28 U.S.C. § 1915); Partial Serve Order, ECF No. 24. Plaintiff was advised of her right to file specific objections to the First R&R, which she did on June 15, 2018. ECF No. 30. District Judge Mary G. Lewis considered the R&R and Plaintiff's objections thereto, found the objections to be without merit, and adopted the undersigned's May 31, 2018 R&R. ECF No. 34. As explained by Judge Lewis, Plaintiff's claims for injunctive relief brought pursuant to the Americans with Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA") were served on SCDHHS; Plaintiff's FMLA claim was served as to the Individual Defendants in their individual capacities. Other claims brought by Plaintiff in her Proper Form Complaint, ECF No. 1-6, were dismissed without prejudice and without service of process. June 21, 2018 Order, ECF No. 34.

B. Motion to Dismiss Original Complaint and Second (October 2018) R&R

Defendants responded to Plaintiff's original Complaint by filing a Motion to Dismiss all claims. ECF No. 51. After considering the parties' arguments and applicable law, the undersigned

issued an R&R recommending that Defendants' Motion to Dismiss be granted and that Plaintiff's Complaint be dismissed in its entirety. ECF No. 60 ("October 2018 R&R"). Plaintiff was advised of her right to submit objections to the R&R. Instead of submitting specific objections to the October 2018 R&R, Plaintiff filed what she called an "Amended Complaint." ECF No. 64. Judge Lewis liberally construed Plaintiff's filing as a Motion to Amend the Complaint and gave Defendants time to respond to that motion, ECF No. 65, which they did, ECF No. 67. "In an abundance of caution," Judge Lewis granted Plaintiff's Motion to Amend, mooted then then-pending Second R&R and the motion to dismiss the earlier Complaint, and returned the matter to the undersigned for further proceedings. ECF No. 68.

C. Motion to Dismiss Amended Complaint and Third (April 18, 2019) R&R

1. Third R&R recommending Motion to Dismiss Amended Complaint be granted

Defendants responded to the Amended Complaint by filing another Motion to Dismiss. ECF No. 71. After considering Plaintiff's response, ECF No. 74, and Defendants' Reply, ECF No. 75, the undersigned issued a Third R&R recommending Defendants' Motion to Dismiss be granted and the case be ended, ECF No. 77. Again, Plaintiff was advised of her right to file objections to that R&R. The Notice on the last page of the Third R&R advised Plaintiff that she had 14 days to submit any objections. Third (April 18, 2019) R&R 17. Service by mail afforded Plaintiff three additional mailing days. *See* ECF No. 77.

2. May 6, 2019 filings

Plaintiff never filed objections to the Third R&R. Judge Lewis adopted the R&R in an Order dated May 6, 2019. A judgment dismissing the action without prejudice followed. ECF Nos. 81, 82. The Clerk of Court closed this matter.

Also on May 6, 2019 Plaintiff submitted a Second Amended Complaint, which was docketed by the Clerk of Court. ECF No. 84. Plaintiff filed the amended pleading without providing written consent of the opposing party and without seeking leave of court as contemplated by Federal Rule of Civil Procedure 15(a)(2). Further, for future reference, the undersigned points out to Plaintiff that her Second Amended Complaint was not appropriately considered an "objection" or otherwise a response to the R&R, Plaintiff's suggestion to the contrary notwithstanding. Pl. Mem. 3 (indicating she filed a Second Amended Complaint "in response to" the R&R). The R&R plainly contemplated Plaintiff's filing "[s]pecific written objections" that "specifically identif[ied] the portions of the [R&R] to which objections are made and the basis for such objections." Third R&R 17 (citing statutory and case law, including, *e.g.*, Fed. R. Civ. P. 72(b)). The District Court was not required to conduct specific de novo review of recommendations in the R&R absent such specific written objections. The submission of an amended pleading is not the same as submitting written objections.

The undersigned acknowledges Plaintiff's argument that the Second Amended Complaint was "in response" to the R&R and that it was "received" by the court at 8:31 a.m., several hours before Judge Lewis's Order adopting the Third R&R was docketed (at 11:34 a.m.), although the Second Amended Complaint was not docketed until after the Order (at 11:55 a.m.). *See* Pl. Mem. 2 and ECF No. 96-1 at 1-3. At bottom, however, this precise sequence of events becomes unimportant. Absent specific objection to the recommendations in the Third R&R, Judge Lewis appropriately adopted the Third R&R regardless of the timing of the docket entries on May 6, 2019. In any event, because Plaintiff's Second Amended Complaint was docketed (and, de facto, permitted), Defendants filed the Motion to Dismiss now before the court. ECF No. 85. At bottom,

then, regardless of the status of the Third R&R, the ultimate issue—whether any of Plaintiff's claims in her Second Amended Complaint should survive Defendants' Rule 12(b) challenge—is discussed within.

D. Plaintiff's June 4, 2019 Appeal to the Fourth Circuit

Plaintiff did not respond to Defendant's Motion to Dismiss the Second Amended Complaint within the 14 days permitted by Local Rule. Rather, Plaintiff submitted a Notice of Appeal to the Fourth Circuit, appealing Judge Lewis' Order adopting the Third R&R and the Judgment following same. ECF No. 86. The docket reflects several events that took place in June 2019 regarding that appeal, USCA Case Number 19-1606. ECF Nos. 86-90. While the matter was on appeal, no action took place in this court. On September 30, 2019, the Fourth Circuit issued an unpublished per curium opinion dismissing the appeal as interlocutory and remanding for further proceedings, including the motion to dismiss the second amended complaint "still pending in the district court." ECF No. 91 at 2. The Fourth Circuit mandate issued on October 22, 2019, and the case was reopened in this court and again was referred to the undersigned for pretrial proceedings, including the consideration of Defendants' Motion to Dismiss the Second Amended Complaint.

E. Motion to Dismiss Second Amended Complaint, ECF No. 85

On October 24, 2019, the undersigned issued an order to Plaintiff pursuant to *Roseboro v. Garrison*, 524 F.2d 309, (4th Cir. 1975), advising Plaintiff that she was required to submit a response to Defendants' Motion to Dismiss by November 25, 2019. ECF No. 94. Plaintiff submitted such a response, ECF No. 96, and Defendants replied on December 2, 2019, ECF No. 97.

II. Standard of review

Defendants seek dismissal of Plaintiff's Second Amended Complaint, arguing Plaintiff has failed to state a claim. "A motion filed under Rule 12(b)(6) challenges the legal sufficiency of a complaint." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). A motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts that would support his claim and would entitle him to relief. Fed. R. Civ. P. 12(b)(6). Pro se complaints are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007); *Kerr v. Marshall Univ. Bd. of Governors*, 824 F.3d 62, 72 (4th Cir. 2016). When a federal court is evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. *De'Lonta v. Angelone*, 330 F.3d 630, 630 n.1 (4th Cir. 2003). Nevertheless, the requirement of liberal construction does not mean that this court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

The Supreme Court considered the issue of well-pleaded allegations, explaining the interplay between Rule 8(a) and Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . .

550 U.S. 544, 555 (2007) (internal citations omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (citing *Twombly*, 550 U.S. at 556)); *see also Tobey v. Jones*, No. 11-2230, 2013 WL 286226, at *3 (4th Cir. Jan. 25, 2013) (affirming district court's denial of Rule 12(b)(6) motion, noting that *Twombly* reiterated that a plaintiff "was not required to state [] precise magical words" to plausibly plead claim). When ruling on a motion to dismiss, the court "must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The court is also to "'draw all reasonable inferences in favor of the plaintiff.'" *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011) (quoting *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009)). Although a court must accept all *facts* alleged in the complaint as true, this is inapplicable to legal conclusions, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal,* 556 U.S. at 678 (citation omitted). While legal conclusions can provide the framework of a complaint, factual allegations must support the complaint for it to survive a motion to dismiss. *Id.* at 679. Therefore, a pleading that provides only "labels and conclusions" or "naked assertion[s]" lacking "some further factual enhancement" will not satisfy the requisite pleading standard. *Twombly,* 550 U.S. at 555, 557. Further, the court need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *E. Shore Mkts., Inc. v. J.D. Assocs., Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). At bottom, the court is mindful that a complaint "need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Coleman v. Md. Ct. of Apps.*, 626 F.3d 187, 190 (4th Cir. 2010) (internal quotation marks omitted).

III. Discussion

A. Plaintiff's Original and Amended Complaints

As Plaintiff is proceeding pro se, her precise legal theories are not always readily apparent. Review of her earlier pleadings and the rulings associated with them is instructive. Construed liberally in Plaintiff's favor, and as noted in previous R&Rs, Plaintiff's original Complaint as served included a claim for injunctive relief brought pursuant to the Americans with Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA") as to Defendant SCDHHS and an FMLA cause of action against the Individual Defendants in their individual capacities. *See* ECF Nos. 1-6, 25, 34. Plaintiff's purported claims brought pursuant to Title VII of the Civil Rights Act of 1964, her claims for monetary relief against SCDHHS under the ADA and FMLA, her ADA claims against the Individual Defendants, and her claim against another defendant were summarily dismissed without being served. *See* ECF No. 34; 28 U.S.C. § 1915(e)(2)(B) (noting claims by indigent parties may be dismissed sua sponte and without service of process if they are based on meritless legal theories).

Plaintiff's Amended Complaint, submitted with the court's leave, included the same Defendants served with the original Complaint—SCDHHS and Individual Defendants Sechrest, Brown, Backman, and Liggett—and included causes of action under the ADA and the FMLA. Am. Compl., ECF No. 64. Essentially, Plaintiff alleged that Defendants violated the ADA and FMLA by failing to accommodate her medical condition related to fragrance sensitivity. Plaintiff had been accommodated by being placed in a closed office; however, during renovation of her workspace she was moved to an open cubicle. Plaintiff sought accommodations of being moved to a closed office or being permitted to telecommute. *See* EEOC Charge, ECF No. 1-6 at 40

(attached to Compl. but not Am. Compl.). Based on the "denial of an effective accommodation," Plaintiff "was forced to go on medical leave related to [her] condition." *Id.* She alleged her employment was terminated as of December 1, 2016 (not November 4, 2015, as mistakenly indicated in the Third R&R), because she was unable to return to work. *Id.* Plaintiff's list of damages sought in her Amended Complaint was slightly different from those sought in her original Complaint but included requests for both injunctive and monetary relief. Am. Compl. 18. In the Amended Complaint, Plaintiff sought to be reinstated to her position with SCDHHS; to have her personnel file "clear of all negative documentation" regarding attendance since October 2015; to be reimbursed for out-of-pocket expenses since October 2015; to be awarded "maximum damages allowed for exemplary & compensatory for mental & emotional pain & suffering" since that time; and to recover interest, expenses, and other damages allowed by law. *Id.*; *cf.* ECF No. 1-6 at 48 (in which Plaintiff sought back pay, seniority that allowed her to receive retiree benefits, an indication in her personnel record that she retired with full benefits, out-of-pocket medical expenses, and "maximum damages allowed for exemplary, compensatory for mental/emotional pain and suffering"). The Amended Complaint, comprised of 21 handwritten pages and several attachments, did not clearly delineate what claims were brought against what defendant(s). Instead, much of the Amended Complaint focused on reasons Plaintiff believed each Individual Defendant ought to be held responsible for her termination. *See* Am. Compl. 6-18. Many of the documents attached to the Complaint were also attached to the Amended Complaint.

B. The Court's Ruling on the Amended Complaint

As Plaintiff's Second Amended Complaint builds on her Amended Complaint, brief review of the claims in the Amended Complaint is appropriate. Following is a synopsis[1] of the undersigned's Third R&R, in which it was recommended that Plaintiff's Amended Complaint be dismissed in its entirety. Except when the Amended Complaint clearly stated otherwise, the undersigned interpreted Plaintiff's causes of action in the Amended Complaint to be the same as those permitted to be served in her earlier Complaint. As noted above, the undersigned is of the opinion that Judge Lewis appropriately adopted the Third R&R in its entirety, making the recommendations in the Third R&R the court's order. *To the extent further substantive review of the claims in Plaintiff's Amended Complaint is to be undertaken, the undersigned reaffirms the recommendations in its Third R&R and recommends that all claims in the Amended Complaint be dismissed for failure to state a claim against any Defendant.* The Amended Complaint was dismissed, as follows:

- Plaintiff may not pursue monetary damages against SCDHHS as to ADA or FMLA claims. Third R&R 5-6.
- Plaintiff may not pursue ADA claims against the Individual Defendants. *Id.* at 7.
- Plaintiff may not pursue FMLA claims against the Individual Defendants. *Id.* at 8-11.
- Plaintiff may not pursue injunctive relief against SCDHHS under the ADA or FMLA; any cognizable injunctive relief would be pursued under the *Ex Parte Young* exception (*Ex Parte Young*, 209 U.S. 123 (1908)), for prospective injunctive relief against individuals. *Id.* at 11-12.

[1] The reasoning and analysis of the Third R&R is not repeated in detail herein except when necessary for clarity. Please see the Third R&R for additional detail of the Amended Complaint and the recommended dismissal of same.

- While Plaintiff's request to be reinstated to her position at SCDHHS is the type of prospective injunctive relief potentially cognizable as to appropriate individuals pursuant to the *Ex Parte Young* exception, none of the named Individual Defendants had the requisite responsibility and authority to afford the relief sought. Third R&R 13-14.
- Other requested injunctive relief (such as the "cleaning up" of her personnel file and the issuance of a "permanent injunction" against future violations) are outside the scope of cognizable injunctive relief contemplated by the *Ex Parte Young* exception. *Id.* at 15.

C. Second Amended Complaint

Plaintiff submitted her Second Amended Complaint on May 6, 2019, ECF No. 84, and Defendants' Motion to Dismiss it is the subject of this R&R.

As with her earlier pleadings, Plaintiff's 58-page Second Amended Complaint does not always plainly delineate what causes of action she seeks to bring against what Defendant(s). Construed in the light most favorable to Plaintiff, the Second Amended Complaint appears to include the following claims, some of which have already been considered as noted above:

- ADA, FMLA claim for injunctive relief against SCDHHS, Second Am. Compl. 8.
- FMLA, Rehabilitation Act claim for monetary damages against SCDHHS and Individual Defendants Sechrest, Brown, Backman, Leggett, *id.* at 8-9, 37.
    - The Rehabilitation Act claims are new to the Second Amended Complaint.
- ADA, FMLA, Rehabilitation Act claim for injunctive relief against newly named defendant Christian L. Soura, Director of SCDHHS (2014-2017), *id.* at 11.
- 42 U.S.C. § 1983 claim under FMLA and Rehabilitation Act, seeking damages against the Individual Defendants, possibly including Soura,[2] *id.* at 13-23.

[2] It is not clear whether Plaintiff intends to bring a 42 U.S.C. § 1983 claim against newly named Defendant Soura. As the analysis is similar regarding Plaintiff's § 1983 claims as to all natural

- The *substance* of the claims against the original Individual Defendants are similar to those raised in the Amended Complaint; however, the Amended Complaint did not contain any claims under § 1983. Compare Am. Compl. 8-14 with Second Am. Compl. 24-33.
- Plaintiff alleges newly added Defendant Soura violated her rights under the "ADA, FMLA, the Rehabilitation Act, and possibly other Federal laws that may be uncovered during trial." Second Am. Compl. 33. Soura allegedly "upheld the termination" of Plaintiff and "concurred/allowed" other Defendants to violate Plaintiff's rights. *Id.*

- Plaintiff's amended Prayer for Relief seeks the following:

> (1) My job back
> (2) Reimbursed for any and all out-of-pocket expenses that I and my family incurred as a result of said actions beginning in October 2015 until now according to proof at trial and may be allowable by law
> (3) For general, special, and punitive damages according to proof at trial and may be allowable by law
> (4) For interest as allowed by law
> (5) Award maximum damages allowed for exemplary and compensatory for mental and emotional pain and suffering that I and my family suffered as a result of said actions beginning in October 2015 until now according to proof at trial and may be allowable by law
> (6) That the expenses which the Plaintiff necessarily incurred in bringing the action be awarded
> (7) That the court grant permanent injunctive relief to prevent any future violations of these laws alleged herein
> (8) That the court grant any other relief as may be just and proper.

Second Am. Compl. 56-57.

Defendants, including Soura, the undersigned considers Soura to be included as a defendant to that claim.

D. Defendants' Motion to Dismiss Second Amended Complaint

Defendants' Motion to Dismiss focuses on the differences between the Amended Complaint and Second Amended Complaint, arguing the Second Amended Complaint is also subject to Rule 12(b)(6) dismissal. As noted by Defendants (and not disputed by Plaintiff) the Second Amended Complaint asserts some of the same claims that were alleged in the Amended Complaint, as well as several new claims. These new claims that are the subject of Defendants' Motion to Dismiss are:

- a Rehabilitation Act claim against SCDHHS and the original Individual Defendants (Sechrest, Brown, Backman, and Liggett);
- claims against Sechrest, Brown, Backman, Liggett, and Soura in their individual capacities under 42 U.S.C. § 1983 for violation of Plaintiff's rights under the Rehabilitation Act and the FMLA; and
- a claim for injunctive relief against former SCDHHS Director Soura in his official capacity.

1. Claims raised and dismissed in the court's earlier orders need not be reconsidered.

Defendants first argue that, to the extent Plaintiff again raises claims as to SCDHHS and the Individual Defendants (except Soura) that were dismissed in the prior Orders (as recommended by prior R&Rs), those claims should be dismissed from the Second Amended Complaint without the need for additional consideration. Defs. Mem. 2-3. In response, Plaintiff argues this should not take place as the district court did not discuss the *Second* Amended Complaint in its May 6, 2019

Order adopting the Third R&R. Pl. Mem. 5-6. Plaintiff's response indicates a misunderstanding of Defendants' first argument.

What Defendants argue regarding the "law of the case" theory would not require a prior court ruling on the *Second* Amended Complaint. Rather, this legal theory provides that a court need not reanalyze claims that are raised again when those claims are materially the same as claims already dismissed by the court in the same litigation. As explained by the Fourth Circuit, "[t]he law-of-the-case doctrine provides that in the interest of finality, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Carlson v. Boston Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009)).

Here, the undersigned agrees with Defendants that the claims already considered and dismissed in the court's rulings on the original and Amended Complaint ought not be revisited now. That the Second Amended Complaint had not already been considered and ruled on is of no moment. Rather, the undersigned has now reviewed Plaintiff's Second Amended Complaint in detail and is not inclined to revisit the court's prior rulings in light of information in the Second Amended Complaint. *See, e.g., City of Charleston, S.C. v. Hotels.com, LP,* 520 F. Supp. 2d 757, 774-75 (D.S.C. 2007) (finding it appropriate to invoke the law-of-the-case doctrine as to a motion to dismiss that raised same the issues that had been presented and ruled on in connection with a futility-challenge to a prior motion when the new motion did not raise new, material facts that would change the court's prior analysis). In *City of Charleston*, Senior United States District Judge Patrick M. Duffy noted the law-of-the-case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same

case. Law of the case directs a court's discretion. It does not limit the tribunal's power." *Id.* at 774 (citing *Arizona v. California,* 460 U.S. 605, 618–19 (1983)).

In other words, those claims previously dismissed need not be discussed in this R&R as the prior rulings are the law of the case. The court's prior rulings in earlier orders and R&Rs are incorporated herein by reference and stand now. Only the new claims and the new Defendant need be considered in detail in ruling on the viability of the Second Amended Complaint. The newly pleading claims include:

- a claim for monetary damages against SCDHHS and original Individual Defendants in their individual capacity under the Rehabilitation Act;
- claims against the Individual Defendants individually, including newly named Defendant Soura, under § 1983 for violating Plaintiff's rights under the Rehabilitation Act and the FMLA;
- a claim for injunctive relief against Soura under the ADA/Rehabilitation Act/FMLA.

Defendants seek Rule 12(b)(6) dismissal of each of Plaintiff's newly added claims. The court considers them, *seriatim.*

2. Plaintiff's Rehabilitation Act claims

Defendants argue that Plaintiff's newly brought claims for violation of the Rehabilitation Act should be dismissed as untimely. Defs. Mem. 4-5. Rule 12(b)(6) dismissal on timeliness grounds may be appropriate "if the time bar is apparent on the face of the complaint." *Dean v. Pilgrim's Pride Corp.*, 395 F.3d 471, 474 (4th Cir. 2005).

The Rehabilitation Act does not contain its own specific statute of limitations. *See McCullough v. Branch Banking & Trust Co.,* 35 F.3d 127, 129 (4th Cir. 1994). In the absence of

an applicable federal standard, Plaintiff's claims are governed by "the state statute of limitations that applies to the most analogous state-law claim." *Society Without A Name v. Virginia,* 655 F.3d 342, 347 (4th Cir. 2011); *see also Wolsky v. Med. Coll. of Hampton Roads,* 1 F.3d 222, 223 (4th Cir.1993) (applying most-analogous-state-law standard to Rehabilitation Act). To determine which state-law claim is most analogous, courts look to the rights and remedies provided, *Wolsky,* 1 F.3d at 224, and the persons the law intends to protect. *McCullough,* 35 F.3d at 132. Federal law determines when both claims began to accrue. *See Society Without A Name,* 655 F.3d at 348 (citing *Cox v. Stanton,* 529 F.2d 47, 50 (4th Cir. 1975)). Under federal law, "[a] civil rights claim accrues when the plaintiff 'knows or has reason to know of the injury which is the basis of the action.'" *Society Without A Name,* 655 F.3d at 348 (quoting *Cox,* 529 F.2d at 50).

In the employment-discrimination context, courts have concluded that the South Carolina Human Affairs Law (SCHAL)'s one-year statute of limitations is appropriately applied to Rehabilitation Act claims. SCHAL, codified at S.C. Code Ann. §1-13-10 *et seq.*, prohibits discrimination in employment on the basis of disability as well as other protected characteristics. SCHAL provides that a claimant may file a lawsuit within one year from the date of the violation alleged. *See* S.C. Code Ann. §§ 1-13-90(d)(7) and (8), (e) and (f). *See, e.g., Moore v Greenwood Sch. Dist. No. 52,* 195 F. App'x 140, 142-43 (4th Cir. 2006) (concluding SCHAL is most analogous to a Title IX claim of employment discrimination); *Jackson v. S.C. Dep't of Disabilities and Special Needs*, No. CV 4:15-5033-BHH-KDW, 2016 WL 3647981, at *3-4 (D.S.C. June 15, 2016), report and recommendation adopted, 2016 WL 3633660 (D.S.C. July 7, 2016) (applying SCHAL's one-year statute of limitations to state employee's Rehabilitation Act-based claim of disability discrimination).

Defendants submit Plaintiff's Rehabilitation Act claims were not timely brought based on the face of her pleadings. Plaintiff indicates her employment with SCDHHS was terminated on December 1, 2016. Second Am. Compl. 21. Plaintiff began this case by filing her original Complaint on March 27, 2018, *see* ECF No. 1, well more than one year after she was terminated. Accordingly, Defendants argue that all Rehabilitation Act claims are untimely and should be dismissed from the Second Amended Complaint. Defs. Mem. 4-5.

Plaintiff does not dispute the applicability of the one-year SCHAL limitations period. Rather, she argues that the "continuing violation doctrine" makes her claims timely. Pl. Mem. 9-10. Plaintiff's argument is brief, citing generally to a case from the Ninth Circuit Court of Appeals (cited by Plaintiff as Douglas v. California Department of Youth Authority (No. 99-17140, Nov. 14, 2001).[3] Plaintiff's argument appears to be that her claim can be pursued as timely because SCDHHS "continues to violate federal laws with their procedures identified in the Complaint," which "continues to expose its employees to its discriminatory practices[.]" Pl. Mem. 9-10. SCDHHS's allegedly continued practice of discrimination as to its current employees "renders [Plaintiff's] claims timely by extending the claims past the deadline for filing" them, Plaintiff argues. *Id.*

On Reply, Defendants argue that the continuing-violation doctrine is inapplicable here because Plaintiff's claimed wrongs of discrimination and failure-to-accommodate are considered "discrete acts" for purposes of determining statute of limitations issues. Reply 4-5 (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)). Defendant also argues that any failure to

[3] As Ninth Circuit law is not binding on this court and as Plaintiff has provided no legal analysis or even a proper case citation to the *Douglas* case, the court will not endeavor to discern how Plaintiff intends the case to bolster her argument.

"undo" or change a discrete act of discrimination does not begin the limitations period anew. *Id.* at 5-6 n.2 (citing *Martin v. Clemson Univ.*, 654 F. Supp. 2d 410, 421-22 (D.S.C. 2009)).

The undersigned agrees with Defendants that Plaintiff's Rehabilitation Act claims should be dismissed as untimely. The continuing-violation doctrine does not operate as Plaintiff would have it apply. Rather, as explained in *Morgan* and later cases, acts that allegedly happened to Plaintiff—termination and failure to accommodate—are discrete acts, not "continuing violations." With discrete acts, the statute of limitations begins to run when the act, such as the termination and/or the denial of accommodation, occurs. *See Morgan*, 536 U.S. at 114 ("Discrete acts such as termination, failure to promote, denial of transfer or refusal to hire are easy to identify."); *Hill v. Hampstead Lester Morton Court Partners, L.P.*, 581 F. App'x 178, 181 (4th Cir. 2014) ("[A] defendant's failure to accommodate constitutes a discrete act rather than an ongoing omission. Accordingly, the continuing violation doctrine is inapplicable[.]").

Here, Plaintiff was terminated in December 2016 and her alleged failure-to-accommodate claim took place prior to her termination. These discrete acts took place well more than one year prior to Plaintiff's filing suit, and the continuing-violation doctrine does not make them timely. Further, the timeliness of Plaintiff's claims is considered as to the alleged wrongs impacting *her*. Plaintiff has alleged no wrongs that happened to her that took place within one year of the date she began this litigation. That Plaintiff believes SCDHHS continues to cause harm to others simply does not relate to her own Rehabilitation Act claims. *Burgess v. Costco Wholesale Corp.*, No. 4:10-CV-1678-RBH, 2013 WL 645982, at *3 (D.S.C. Feb. 21, 2013), *aff'd,* 533 F. App'x 271 (4th Cir. 2013) (finding continuing-violation doctrine inapplicable to make plaintiff's claims timely because the later claims were directed at others, not plaintiff). Further, that she may continue to

feel impacted by SCDHHS's actions that happened on or before December 1, 2016 is of no moment in considering the timeliness of her claims. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 628 (2007), superseded by statute on unrelated grounds, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 11-2, 123 Stat. 5.

Plaintiff's Rehabilitation Act claims should be dismissed as untimely. As this ruling encompasses all of Plaintiff's Rehabilitation Act claims the court does not separately consider Defendants' alternative argument that the natural Defendants are not subject to Rehabilitation Act claims in their individual capacities.

3. Plaintiff's claims under 42 U.S.C § 1983 for violating Plaintiff's rights under the Rehabilitation Act and the FMLA.

In her Second Amended Complaint Plaintiff includes claims against the natural Defendants in their individual capacities under 42 U.S.C § 1983 for violating Plaintiff's rights under the Rehabilitation Act and the FMLA. *See* Second Am. Compl. 13. Defendants argue the § 1983 claims should be dismissed as a matter of law because rights created by the Rehabilitation Act and the FMLA are not remediable under § 1983. Defs. Mem. 7-10.

Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). To state a claim under § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). Identifying a federal constitutional or statutory right is a necessary first step to maintaining a § 1983 claim against a state actor, but it is not sufficient in and of itself because a plaintiff can maintain a § 1983 claim for a violation of federal

statutory or constitutional rights "only if Congress has not foreclosed recourse to [§ 1983]." *Kendall v City of Chesapeake, Va.*, 174 F.3d 437, 440 (4th Cir. 1999). As the Fourth Circuit explained in *Kendall*:

> Because § 1983 is a statutory remedy . . . Congress retains the authority to repeal it or replace it with an alternative remedy. The crucial consideration is what Congress intended. Congress can manifest its intent to preclude use of § 1983 either expressly or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.

Id., 174 F.3d at 440 (internal quotation and citations omitted; ellipsis in *Kendall*). In *Kendall*, for example, the *Kendall* court looked to the details of the Fair Labor Standards Act ("FLSA"), including the FLSA's provision of a private right of action for enforcement of FLSA rights, and determined that Congress "evinced a clear intent to preclude the use of § 1983 for the protection of overtime compensation rights secured by the FLSA." *Id.* at 443.

Defendants note that the Rehabilitation Act itself is silent as to whether Congress intended that the Act foreclose a § 1983 claim. Rather, based on *Kendall* and other cases, Defendants submit that the Rehabilitation Act's provision of a private right of action for individuals alleging employment discrimination based on a disability, *see* 29 U.S.C. 794a, "strongly suggests a Congressional intent to preclude resort to § 1983." *Kendall*, 174 F.3d at 443 (end citations omitted); Def. Mem. 8-9. Defendants acknowledge that the Fourth Circuit has never ruled on this precise issue but several circuit courts of appeals have considered the issue and found that § 1983 cannot be used to enforce rights created by the Rehabilitation Act. Def. Mem. 9-10 (citing *A.W v. Jersey City Pub. Schls.*, 486 F.3d 791, 804-06 (3d Cir. 2002); *Lollar v. Baker*, 196 F.3d 603, 608-10 (5th Cir. 1999); *Tri-Cnty. Housing Inc. v. Bauman*, 826 F.3d 446, 448-49 (7th Cir. 2016);

Vinson v. Thomas, 288 F.3d 1145, 1155-56 (9th Cir. 2002); *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1530-31 (11th Cir. 1999)).

Similarly, Defendants argue, Plaintiff's attempt to include a claim against the natural defendants under 42 U.S.C. § 1983 for violating her rights under the FMLA[4] cannot survive Rule 12(b)(6). Congress modeled the FMLA on the FLSA, 29 U.S.C. § 201 *et seq.*, and expressed its intent that the FMLA was to be enforced in accordance with the enforcement scheme of the FLSA. *See Taylor v. Progress Energy, Inc.*, 415 F.3d 364, 373-74 (4th Cir. 2005) (noting Congress indicated the FMLA was to be implemented in the same way as the FLSA), *reh'g granted, judgment vacated* (June 14, 2006), *opinion reinstated on reh'g,* 493 F.3d 454 (4th Cir. 2007). As noted above, in *Kendall*, the Fourth Circuit held that the enforcement scheme of the FLSA "evinced a clear intent to preclude the use of § 1983 for the protection of . . . rights secured by the FLSA." *Kendall* 174 F.3d at 443. Accordingly, Defendants argue, § 1983 cannot be used to enforce rights created by the FMLA and Plaintiff's purported § 1983 claims against the natural defendants for violating her rights under the FMLA should be dismissed.

Plaintiff does not respond specifically to Defendants' legal argument that Congress did not intend that a § 1983 remedy be available for violations of the Rehabilitation Act or the FMLA. Rather, Plaintiff references § 1983 as being a "means to enforce civil rights that already exist" and notes that "Section 504 of the Rehabilitation Act is a civil rights law," Pl. Mem. 16, 18, as is the FMLA, *id.* at 18. Elsewhere in her response, Plaintiff generally notes Defendants' statement that Congress did not give "'clear and unambiguous notice to states that acceptance of federal financial assistance is conditioned on the state's subjecting their employees and officials to individual

[4] Prior court rulings have dismissed Plaintiff's FMLA claims brought under the FMLA itself.

liability" under the Rehabilitation Act.'" Pl. Mem. 7-8. This lack of unambiguous notice, Plaintiff urges, is the "very reason" why the § 1983 claim for alleged violation of her rights under the Rehabilitation Act and FMLA should be permitted to proceed. *Id.* at 8.

Having considered the statutory and case law presented, the undersigned agrees with Defendants that no separate § 1983 cause of action should lie for Plaintiff to pursue claims against the natural defendants for alleged violation of the Rehabilitation Act or the FMLA. Plaintiff's § 1983 claims should be dismissed for failure to state a claim as to any Defendant.

4. Plaintiff's claims for injunctive relief as to Defendant Christian Soura, former Director of SCDHHS.

Finally, Defendants seek dismissal of the only remaining new claims—those for injunctive relief against Defendant Christian Soura, whom Plaintiff identifies as the Director of SCDHHS from 2014-2017. Second Am. Compl. 11 (indicating Plaintiff seeks a "new claim for injunctive relief" against Soura in his "individual capacity" pursuant to the ADA, FMLA, and Rehabilitation Act); *id.* at 33 (alleging Soura violated Plaintiff's rights by upholding her termination and concurring in others' violating her rights); *see* Def. Mem. 11.

As an initial matter, the undersigned agrees with Defendants that Plaintiff's claim against Soura lacks any real basis in fact regarding Soura's purported actions. Any claim against him could be dismissed on that ground alone. Further, to the extent Plaintiff's Second Amended Complaint is construed to contain any claims against Soura other than the discussed claim for injunctive relief, such claims should be dismissed for failure to state a claim for the reasons set out above and the reasons set out in prior R&Rs.

As do Defendants, the undersigned reads Plaintiff's latest pleading to include a claim against Soura for the injunctive relief of getting her "job back[.]" *See* Second Am. Compl. 56. As

discussed in some detail in prior R&Rs, the Eleventh Amendment protects SCDHHS from claims for injunctive relief pursuant to the ADA and the FMLA. In limited circumstances, certain types of claims for injunctive relief against certain individuals acting in their official capacities (such as Soura) might be permissible based on the doctrine introduced by *Ex parte Young*, 209 U.S. 123 (1908). *See* Third R&R 12; Second R&R 9-10. As to a request for prospective injunctive relief such as being reinstated in a job, *Ex parte Young*-type relief may be available against individual defendants when a plaintiff has demonstrated a special relationship between the state official or employee sued and the actions sought to be prospectively enjoined. *Kobe v. Haley*, 666 F. App'x 281, 299 (4th Cir. 2016). Practically speaking, a plaintiff must name as a defendant one or more state officials or employees who has both the *responsibility* for the alleged ongoing violations of federal law and the authority to provide prospective redress for those alleged ongoing violations, i.e., the *authority* to end the alleged ongoing violations. *See id.* at 299-300; *see also* Third R&R 13. As discussed in the Third R&R, the previously named Individual Defendants lacked the "relationship" and "authority" to reinstate Plaintiff, requiring dismissal of claims for injunctive relief as to them. As previously explained, South Carolina law gives only the Director of SCDHHS the authority to hire agency employees. *See* Third R&R 13-14; *see* S.C. Code Ann. § 44-6-100. ("The director shall have *sole* authority to employ and discharge employees [of SCDHHS] . . . .") (emphasis added).

Here, potentially based on this prior ruling, Plaintiff now seeks injunctive relief against Soura, a former Director of SCDHHS. For argument's sake, the undersigned considers the claim against Soura to be one for an injunction seeking to have him reinstate Plaintiff into her prior position with SCDHHS. Defendants argue this claim for injunctive relief must be dismissed for

the simple reason that Soura is no longer Director of SCDHHS, nor was he director when Plaintiff initially filed suit in 2018. Defs. Mem. 11 (citing *Kobe v. Haley*, 666 F. App'x at 298-99). In *Kobe*, former members of the Budget and Control Board were dismissed because, as former board members, they could not provide the prospective injunctive relief sought.

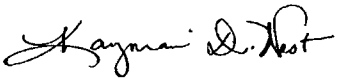
Plaintiff offers little response to this argument other than to indicate that Soura was the SCDHHS Director "at the time of Plaintiff's rights being violated." Pl. Mem. 19. Plaintiff does not address the fact that Soura was not Director when she filed suit and, therefore, was never in a position to grant her the injunctive relief sought before this court. Dismissal is appropriate.

IV. Recommendation

For the reasons discussed in the court's prior R&Rs and Orders concerning those R&Rs, as well as the reasons set out above, Plaintiff's Second Amended Complaint should be dismissed in its entirety. It is recommended that the district court grant Defendants' Motion to Dismiss, ECF No. 85, and end this case. As set out more fully in the Notice below, Plaintiff has an opportunity to submit any objections to this R&R. However, Plaintiff is admonished that any objections should be so titled and should be submitted within 14 days. Any attempt to challenge the proposed rulings in this R&R by submitting yet another amended pleading should not be permitted. Further, in the interest of judicial economy and given Plaintiff's numerous opportunities to amend her pleadings, it is recommended that Plaintiff's Second Amended Complaint be considered a final and appealable order. *See, e.g., Martin v. Duffy*, 858 F.3d 239, 248 (4th Cir. 2017) (noting "repeated, ineffective attempts at amendment suggest that further amendment of the complaint would be futile"; finding district court's third dismissal for failure to state a claim indicated plaintiff's

pleading deficiency could not be cured by amendment and made the complaint's dismissal a final, appealable order).

IT IS SO RECOMMENDED.



December 19, 2019
Florence, South Carolina

Kaymani D. West
United States Magistrate Judge

The parties are directed to note the important information in the attached "Notice of Right to File Objections to Report and Recommendation."

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 2317
Florence, South Carolina 29503

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).

Additional material from this filing is available in the Clerk's Office.