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SC Court of Appeals

RECORD ON APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of
Appeals

APPEAL FROM CHARLESTON
COUNTY
Court of Common Pleas

HONORABLE JESSICA ANN SALVINI,

Circuit Court Judge

Case No. 2018-CP-1002580
Appellate Case No. 2025-001433

Elise Cromwell, Appellant,

v.

Medical University of South
Carolina Hospital Authority
and the Medical University of South Carolina, Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-10-02580

Elise A Cromwell

Medical University of South Carolina
Hospital Authority

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Viewing the facts and evidence in light most favorable to the nonmoving party, Defendant's Motion to Dismiss is DENIED on both grounds.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

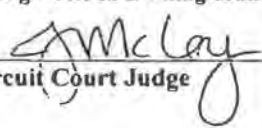
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2764
Judge Code

12/19/18
Date

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-10-02580

Cromwell

The Medical University of South Carolina, et
al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Defendant's Motion to Alter or Amend is DENIED without a hearing.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

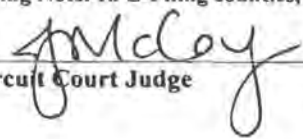
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
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N/A

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2764
Judge Code

2/7/18
Date

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018- CP-10-2580

Elise A Cromwell

2019 SEP -9 AM 10:29

Medical University of South Carolina Hospital
Authority

PLAINTIFF(S)

JULIE J. ARMSTRONG
CLERK OF COURT

DEFENDANT(S)

Submitted by: COURT

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☒ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: The Motion filed April 8, 2019 as Defnt Motion/Judgment on the Pleadings & Crt/Srv case is Ordered Dismissed for Lack of Prosecution. The defendant shall have 10 days from the date of this Order to show just cause why this motion should be restored.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

2166

Judge Code

Date

8/20/19

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Elise A. Cromwell,)
Plaintiff,)
v.)
Medical University of South)
Carolina Hospital Authority and the)
Medical University of South)
Carolina,)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-10-02580

**CONSENT ORDER TO STRIKE CASE
PURSUANT TO RULE 40(j), SCRCP**

Upon motion and consent of the parties and counsel, under the provisions of South Carolina Rule of Civil Procedure 40(j), Plaintiff's claims against Defendants are stricken by consent of the parties, which agree that if the claims are restored upon motion made within one year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored.

IT IS SO ORDERED.

Charleston, South Carolina

_____, 2022

Chief Administrative Judge
Ninth Judicial Circuit

WE SO MOVE AND CONSENT:

s/Donald Gist

Donald Gist

GIST LAW FIRM, P.A.

4400 North Main Street

Columbia, SC 29203

Telephone: (803) 771-8007

dtommygist@yahoo.com

ATTORNEYS FOR PLAINTIFF

s/Bob J. Conley

Caroline Wrenn Cleveland

Bob J. Conley

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Telephone: (843) 577-9626

ccleveland@clevelandlaborlaw.com

bconley@clevelandlaborlaw.com

ATTORNEYS FOR DEFENDANTS



Charleston Common Pleas

Case Caption: Elise A Cromwell VS Medical University of South Carolina Hospital Authority , defendant, et al
Case Number: 2018CP1002580
Type: Order/Dismissal Rule 40J

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2022-03-10 12:52:49 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2018-CP-10-02580
	)	
Elise A. Cromwell,	)	
	)	
Plaintiff,	)	
v.	)	
	)	CONSENT ORDER TO CONTINUE
Medical University of South	)	MOTION HEARING
Carolina Hospital Authority and the	)	
Medical University of South	)	
Carolina,	)	
	)	
Defendants.	)	
_____	)	

Upon motion and consent of the parties and counsel, under the provisions of the South Carolina Rules of Civil Procedure, Plaintiff's Motion to Restore scheduled for hearing at 9:30 a.m., Tuesday, September 24, 2024, is continued so the parties can engage in further discussions about resolving the case.

IT IS SO ORDERED.

Charleston, South Carolina
_____, 2024

Chief Administrative Judge
Ninth Judicial Circuit

WE SO MOVE AND CONSENT:

s/Donald Gist

Donald Gist

GIST LAW FIRM, P.A.

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Columbia, SC 29203

Telephone: (803) 771-8007

dtommygist@yahoo.com

ATTORNEYS FOR PLAINTIFF

s/Bob J. Conley

Bob J. Conley

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ATTORNEYS FOR DEFENDANTS



Charleston Common Pleas

Case Caption: Elise A Cromwell VS Medical University of South Carolina Hospital Authority , defendant, et al
Case Number: 2018CP1002580
Type: Order/Consent Order

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2024-09-19 10:15:17 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2018-CP-10-02580
	)	
Elise A. Cromwell,	)	
	)	
Plaintiff,	)	
v.	)	
	)	CONSENT ORDER TO CONTINUE
Medical University of South	)	MOTION HEARING
Carolina Hospital Authority and the	)	
Medical University of South	)	
Carolina,	)	
	)	
Defendants.	)	
_____	)	

Upon motion and consent of the parties and counsel, under the provisions of the South Carolina Rules of Civil Procedure, Plaintiff's Motion to Restore scheduled for hearing on Friday, December 6, 2024, is continued so the parties can engage in further, ongoing discussions about resolving the case and so Plaintiff's counsel can attend a scheduled out-of-state event on Friday, December 6, 2024.

IT IS SO ORDERED.

Charleston, South Carolina
_____, 2024

Chief Administrative Judge
Ninth Judicial Circuit

WE SO MOVE AND CONSENT:

s/Donald Gist

Donald Gist

GIST LAW FIRM, P.A.

4400 North Main Street

Columbia, SC 29203

Telephone: (803) 771-8007

dtommygist@yahoo.com

ATTORNEYS FOR PLAINTIFF

s/Bob J. Conley

Bob J. Conley

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Charleston, South Carolina 29401

Telephone: (843) 577-9626

bconley@clevelandlaborlaw.com

ATTORNEYS FOR DEFENDANTS



Charleston Common Pleas

Case Caption: Elise A Cromwell VS Medical University of South Carolina Hospital Authority , defendant, et al
Case Number: 2018CP1002580
Type: Order/Consent Order

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2024-12-03 13:35:04 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP1002580

Elise A Cromwell
PLAINTIFF(S)

Medical University of South Carolina Hospital Authority et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Statement of Judgment on the following page.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☒ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/01/2025 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

This matter was before the Court on March 31, 2025. Donald Gist appeared on behalf of Plaintiff and Bob Conley appeared on behalf of Defendant. Plaintiff's Motion to Reinstate Pursuant to 40(j) is denied as Plaintiff's claims are barred by the statute of limitations.

Defendant opposes reinstatement of the case based upon the expiration of the statute of limitations, relying on *Personal Care, Inc. v. Theos*, 426 S.C. 78, 86-87, 825 S.E.2d 281, 285 (Ct. App. 2019). The Court finds this is a breach of contract case. The statute of limitations for breach of contract is three years. S.C. Code Ann. Section 15-3-530(1). Similarly, the statute of limitations for breach of contract with fraudulent intent is three years. S.C. Code Ann. Section 15-3-530(1). However, as to government entities such as Defendants, the statute of limitations for breach of contract with fraudulent intent is two years. S.C. Code Ann. Section 15-78-110.

The Court finds the Order entered on March 22, 2022, resulted in a dismissal of Plaintiff's lawsuit. Plaintiff did not move to restore her lawsuit within one-year of the Order and, therefore, the unexpired portion of the statute of limitations began to run again on March 22, 2023. Because there was no unexpired portion of the statute of limitations remaining when the Order was entered on March 22, 2022, the statute of limitations immediately expired on March 22, 2023, because Plaintiff had not moved to restore her Complaint within one (1) year of the Order.

The Court finds that the applicable statute of limitations now bars Plaintiff's complaint. Therefore, Plaintiff's Motion is denied. Defendant's counsel shall prepare a more formal order within twenty (20) days.

IT IS SO ORDERED.



Charleston Common Pleas

Case Caption: Elise A Cromwell VS Medical University of South Carolina Hospital
Authority , defendant, et al
Case Number: 2018CP1002580
Type: Order/Electronic Form 4

So Ordered

Jessica A. Salvini

Electronically signed on 2025-04-01 14:36:16 page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2018-CP-10-2580
	)	
Elise A. Cromwell,	)	
	)	
Plaintiff,	)	
	)	ORDER
v.	)	
	)	
Medical University of South Carolina	)	
Hospital Authority and the Medical	)	
University of South Carolina,	)	
	)	
Defendants.	)	
	)	

This case came before the Court for hearing on March 31, 2025, regarding Plaintiff Elise A. Cromwell's ("Cromwell") Motion to Restore (the "Motion"). Bob J. Conley appeared on behalf of Defendants Medical University Hospital Authority ("MUHA") and Medical University of South Carolina ("MUSC") (collectively, "Defendants"). Donald Gist appeared on behalf of Cromwell. Based upon the record, submissions of the parties, and the arguments made by the parties at the hearing, the Court denies the Motion.

RELEVANT CASE BACKGROUND

Cromwell filed her Complaint against Defendants on May 21, 2018. Cromwell asserts two causes of action in her Complaint against Defendants: 1) breach of employment contract; and 2) breach of employment contract with fraudulent intent.

On March 22, 2022, the Court entered a "Consent Order to Strike Case Pursuant to Rule 40(j), SCRCF" (the "Order"). Subsequently, almost two years later, on March 20, 2024, Cromwell filed her "Motion to Reinstate Case Pursuant to 40(j)" (the "Motion").

Defendants opposed the Motion, and asserted Cromwell's claims and causes of action in the Complaint are barred by the statute of limitations. For the reasons discussed, the Court denies the Motion.

LEGAL STANDARD

Rule 40(j), SCRCP, provides:

[a] party may strike its complaint, counterclaim, cross-claim, or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim, or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

Defendants opposed Cromwell's Motion based upon the expiration of the statute of limitations. Personal Care, Inc. v. Theos, 426 S.C. 78, 86-87, 825 S.E.2d 281, 285 (Ct. App. 2019) (citing Maxwell v. Gencz, 356 S.C. 617, 622 n.2, 591 S.E.2d 26, 28 n.2 (2003) ("We note the Maxwells assert that, since Genez and Doe agreed to the Rule 40(j) dismissal after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations. We disagree. Parties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year.")). "Furthermore, the purpose of the Rule 40(j) tolling provision is to extend the deadline for filing a claim within the statute of limitations, which naturally requires an inquiry into the date a cause of action accrued and when it will expire." Id. (citing Goodwin v. Landquest Dev., LLC, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015) ("The effect of [Rule 40(j)] is not to set a new

deadline, but to extend the statute of limitation[s] deadline by applying the rule's tolling provision when the motion to restore is made within a year.”)).

“Notably, the procedure under Rule 40(j) for restoring a case is not automatic; the rule contemplates the filing of a motion and a hearing before the case can be reinstated.” *Id.* If a plaintiff files a motion to restore beyond the one-year time limit, a defendant is “no longer bound by the agreement not to challenge the timeliness” of a plaintiff’s claims. *See Maxwell*, 356 S.C. at 622 n.2, 591 S.E.2d at 28 n.2 (“Parties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year.”).

FACTS ALLEGED IN THE COMPLAINT

The claims alleged in Cromwell’s Complaint involve her employment with MUHA.¹ Cromwell is currently employed by MUHA as a registered nurse. (Compl. ¶ 7.) In her Complaint, Cromwell alleges the written policies provided to her by MUHA created an employment contract. (Compl. ¶ 6.)

Cromwell alleges she was subject to “a campaign of contractually impermissible race discrimination and retaliation” beginning in June 2016. (Comp. ¶ 8.) Further, Cromwell claims she “made numerous additional documented complaints . . . of race discrimination and retaliation in breach of her employment contract with [MUHA].” (Compl. ¶ 15.) Cromwell also claims she was subject to various instances of discriminatory and retaliatory behavior in violation of an alleged employment contract. (Compl. ¶ 15.)

Additionally, Cromwell alleges she was not considered for a “charge nurse” position and was assigned additional duties in retaliation for her making complaints about discrimination.

¹ Cromwell is employed by MUHA, not MUSC. In her Complaint, Cromwell expressly alleges she is employed by MUHA. (Compl. ¶ 7.) However, throughout the Complaint Cromwell claims she entered into an employment contract with MUHA *and* MUSC.

(Compl. ¶ 15 and 16.) Moreover, Cromwell claims Defendants “violat[ed] their handbook policies on fair treatment and anti-harassment and retaliation.” (Compl. ¶ 17.)

In the Complaint, Cromwell further claims she was “given a barrage of unjustified and untrue write-ups” in an attempt by Defendants to discriminate against her based on her race. (Compl. ¶ 17.) Cromwell then alleges Defendants “publish and maintain a contractually binding Employee Handbook, which... contains an anti-retaliation clause.” (Compl. ¶ 35.) The Complaint claims Cromwell and Defendants “entered into a binding and valid contract whereby ... pursuant to the handbook and the above stated policies and procedures, Defendants would protect [Cromwell] on the basis of her rights under [Defendants’] anti-harassment and anti-retaliation policies.” (Compl. ¶ 38.)

Cromwell further alleges she relied on Defendants’ “reassurance they must follow their handbook policies when disciplining their employees.” (Compl. ¶ 38.) Furthermore, the Complaint alleges Defendants breached the terms of the alleged contract “by reason of an intentional design on their part to defraud [Cromwell].” (Compl. ¶ 44.)

FINDINGS

Cromwell's claims are barred by the statute of limitations and her Motion is denied. The statute of limitations for breach of contract is three years. S. C. Ann. § 15-3-530(1). Similarly, the statute of limitations for breach of contract with fraudulent intent is three years. S. C. Ann. § 15-3-530(1). However, as to government entities such as Defendants, the statute of limitation for breach of contract with fraudulent intent is two years. S. C. Ann. § 15-78-110.

Cromwell's Complaint contains no allegations of wrongdoing by Defendants after the filing of her Complaint on May 21, 2018. Consequently, at the latest, the applicable statute of

limitations as to Cromwell's claims expired no later than May 20, 2021 – three years after Cromwell filed her Complaint.

The Order entered on March 22, 2022, resulted in a dismissal of Cromwell's lawsuit. Cromwell did not move to restore her lawsuit within one year of the Order and, therefore, the unexpired portion of the statute of limitations began to run again on March 22, 2023. Because there was no unexpired portion of the statute of limitations remaining when the Order was entered on March 22, 2022, the statute of limitations immediately expired on March 22, 2023, because Cromwell had not moved to restore her Complaint within one-year of the Order.

Cromwell does not dispute that she did not to file her Motion within one year of the Order. Moreover, Cromwell does not dispute that the statute of limitations as to the causes of action in her Complaint expired no later than May 20, 2021 – three years after she filed the Complaint. Instead, Cromwell asserted that “good cause,” as recognized in Rule 6(b), SCRCP, existed for her failure to file her Motion within one year of the Order. In particular, Cromwell claimed “good cause” existed for two reasons: 1) Defendants' actions caused Cromwell's counsel to be uncertain about moving to restore under Rule 40(j); and 2) Cromwell's counsel faced extenuating medical emergencies. Cromwell provided no affidavit(s) or other materials in support of the various assertions made in support of the Motion.

However, Cromwell's reliance on the “good cause” standard contained in Rule 6(b), SCRCP, is misplaced. As held in Maxwell, the “good cause” standard contained in Rule 6(b), SCRCP, is inapplicable to Rule 40(j), SCRCP: “Rule 6(b) is not applicable to Rule 40(j). The language of Rule 6(b) specifies it applies when there is a deadline. As explained above, Rule 40(j) does not have a deadline during which a motion to restore must be filed.” Maxwell, 356 S.C. at 621-22; 591 S.E.2d at 28.

For the reasons discussed, the applicable statute of limitations now bars Cromwell's Complaint and Cromwell cannot rely upon the "good cause" standard in Rule 6(b), SCRCP, to save her causes of action.

CONCLUSION

For the reasons discussed, the Motion is denied.

IT IS SO ORDERED.

Charleston, South Carolina
May 8, 2025

Hon. Jessica A. Salvini
Circuit Court Judge



Charleston Common Pleas

Case Caption: Elise A Cromwell VS Medical University of South Carolina Hospital
Authority , defendant, et al
Case Number: 2018CP1002580
Type: Order/Other

So Ordered

Jessica A. Salvini

Electronically signed on 2025-05-08 15:20:53 page 7 of 7

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
Elise Cromwell,	)	
	)	
Plaintiff,	)	INITAL ORDER REGARDING
	)	MOTION TO RECONSIDER
vs.	)	
	)	
Medical University of South Carolina	)	
Hospital Authority and the Medical	)	
University of South Carolina,	)	
	)	
Defendants.	)	Case No.: 2018-CP-10-02580

A Rule 59 (e) SCRCP motion to reconsider and to alter or amend has been filed with the Court on May 16, 2025, and was provided to the Court on May 16, 2025 by the Clerk's Office. Pursuant to Rule 59(f), SCRCP, the Court, in its discretion, may decide this motion based on briefs without oral argument. The Court will decide this motion on written submissions. Written submissions are not required by the non-moving party, but will be considered. The moving party may rely upon what has been filed or may supplement.

No additional briefs are required and Counsel may rely the current record, however the deadline to file written submissions **from the movant regarding this motion is 4:00 PM on Wednesday, May 28, 2025.** Any submissions in **reply must be filed by 4:00 p.m. on Wednesday, June 4, 2025.** A copy of any documents filed must be forwarded immediately to the undersigned judge and to opposing counsel. The copies to the judge shall be sent via US Postal Service to 305 E. North Street, Greenville, SC 29601, and/or by electronic mail to jsalvinisc@sccourts.org and jsalvinilc@sccourts.org.

AND IT IS SO ORDERED.

Presiding Judge's Signature Page to Follow.



Charleston Common Pleas

Case Caption: Elise A Cromwell VS Medical University of South Carolina Hospital
Authority , defendant, et al
Case Number: 2018CP1002580
Type: Order/Other

So Ordered

Jessica A. Salvini

Electronically signed on 2025-05-21 11:19:41 page 2 of 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	NINTH JUDICIAL CIRCUIT
	)	
Elise Cromwell,	)	
	)	
Plaintiff,	)	FINAL ORDER REGARDING
	)	MOTION TO RECONSIDER
vs.	)	
	)	
Medical University of South Carolina	)	
Hospital Authority and the Medical	)	
University of South Carolina,	)	
	)	
Defendants.	)	Case No.: 2018-CP-10-02580

A Rule 59(e), SCRCP motion to reconsider and to alter or amend has been received, filed with the Court on May 16, 2025, and provided to the Court by the Clerk's Office on May 16, 2025. As previously explained to Counsel, pursuant to Rule 59(f), SCRCP, the Court, in its discretion, may decide the motion based on briefs without oral argument. The Court indicated to the parties by prior order in the Initial Order Regarding Motion for Reconsideration that it would decide the issues on written submissions. Further, the Court informed the parties that written submissions were not required by the non-moving party, and that the moving party could rely upon its filings or supplement. The deadlines to file written submissions regarding these motions has now passed.

After careful consideration of the able arguments and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered.

Accordingly, the Motion for Reconsideration made pursuant to Rule 59, SCRCP,¹ is respectfully DENIED.

AND IT IS SO ORDERED.

Presiding Judge's Signature Page to Follow.

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.



Charleston Common Pleas

Case Caption: Elise A Cromwell VS Medical University of South Carolina Hospital
Authority , defendant, et al
Case Number: 2018CP1002580
Type: Order/Other

So Ordered

Jessica A. Salvini

Electronically signed on 2025-06-18 15:55:33 page 2 of 2

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Ms. Elise Cromwell

Plaintiff(s)

vs.

Medical University of South Carolina and Medical
University of South Carolina Hospital Authority

Defendant(s)

Submitted By: Donald Gist / Aaron Wallace

Address: Gist Law Firm

4400 N. Main Street

Columbia, SC 29203

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2018-CP-10-2580

SC Bar #: 13098 / 100255

Telephone #: (803) 771-8007

Fax #: (803) 771-0063

Other:

E-mail: aaronwallace.gistlawfirm@gmail

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
☐ Constructions (100)
☐ Debt Collection (110)
☒ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)

- Torts - Professional Malpractice**
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20-CP-
☐ Notice/ File Med Mal (230)
☐ Other (299)

- Torts - Personal Injury**
☐ Assault/Slander/Label (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☐ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)

- Real Property**
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)

- Inmate Petitions**
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)

- Administrative Law/Relief**
☐ Reinstate Drv. License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)

- Judgments/Settlements**
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment Rights Application (760)

- Appeals**
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Comm (990)
☐ Employment Security Comm (991)

- Special/Complex /Other**
☐ Environmental (600)
☐ Automobile Arb. (610)
☐ Medical (620)
☐ Other (699)
☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in an Out-of-County Action (660)
☐ Sexual Predator (510)

- ☐ Confession of Judgment (770)
☐ Petition for Workers Compensation Settlement Approval (780)
☐ Other (799)

Submitting Party Signature:

Date: 5/13/18

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR.**
 Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

Elise A. Cromwell

Plaintiff,

vs.

Medical University of South Carolina
Hospital Authority and the Medical
University of South Carolina

Defendant.

2018-CP-10-2580
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

SUMMONS

JURY TRIAL REQUESTED

FILED
2018 MAY 21 PM 3:19
JULIE J. SHERROD
CLERK OF COURT

TO: ABOVE NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the Complaint upon the subscriber Gist Law Firm, PA, 4400 North Main Street, Columbia, SC 29203, within thirty (30) days after the service thereof, exclusive of the day of such service. If you fail to answer the Complaint within that time, the Plaintiff shall apply to the Court for a judgment by default against you for the relief demanded in the Complaint.

Respectfully Submitted,

By:



Donald Gist
Aaron Wallace
GIST LAW FIRM, P.A.
4400 North Main Street
Columbia, South Carolina 29203
Telephone: (803) 771-8007
Fax: (803) 771-0063

5/13, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Elise A. Cromwell)
Plaintiff,)

vs.)

Medical University of South Carolina)
Hospital Authority and the Medical)
University of South Carolina)
Defendants.)

2018-CP-W-2580
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

COMPLAINT

JURY TRIAL REQUESTED

2018 MAY 21 PM 3:20
JULIE A. HARRIS
CLERK OF COURT
BY

INTRODUCTION

1. Plaintiff, Elise Cromwell (hereinafter referred to as Plaintiff), brings this action for damages to redress Defendants Medical University Hospital Authority and the Medical University of South Carolina hereby referred to as (Defendants'), actions in breaching Plaintiff's employment contract and for breach of Plaintiff's employment contract with fraudulent intent.

JURISDICTION AND VENUE

2. The substantial part of the actions herein complained of took place at Defendants' principal place of business is located at 169 Ashley Avenue, Charleston, SC 29425 and 171 Ashley Avenue, Charleston, SC 29425.
3. This Court has personal jurisdiction over the parties and subject matter jurisdiction over the claims raised in this Complaint.

PARTIES

4. Plaintiff Elise Cromwell is a citizen and resident of Charleston, South Carolina.

5. The Defendants, located in Charleston, South Carolina, are organizations located within the State of South Carolina and legally exist under the Code of Laws of the State of South Carolina.

FACTS

6. Ms. Cromwell, Plaintiff, at all times, during the course of her employment with Defendants, has been subjected to an increasingly hostile work environment on account of her having exercised her contractual right to make complaints of race discrimination, harassment, and bullying in accordance with the policies and procedures of the Defendants. These contractual guarantees are the basis of this suit as opposed to any federally granted legal protections or protections guaranteed pursuant to the South Carolina Human Affairs Law as the Defendants has violated its own policies and procedures related to race discrimination, harassment, bullying, and retaliation in such a manner as to defeat any allegation of “at will” employment status by Defendants. Specifically Plaintiff avers as follows.
7. Plaintiff has worked for Defendants MUHA at the Ambulatory Procedure Center (hereinafter referred to as “APC”) since 2008. During this time, Ms. Cromwell has worked in the same department in only two (2) titled positions – Interim Charge Nurse and Staff Nurse (RN). Her clinical performance was at all times admirable and she maintains a positive relationship with patients and staff.
8. On or about June 2016 Plaintiff’s leadership changed. Plaintiff’s new leadership team immediately began a campaign of contractually impermissible race discrimination and retaliation against Plaintiff. The Defendants’ Management has no regard for the policies and procedures in place despite Plaintiff’s complaints regarding her unlawful behavior. As a result, Plaintiff has felt the retaliatory wrath of the Defendants all in breach of her employment contract with Defendants.

9. Ms. Cromwell has had the burden of being the most experienced nurse to lead the department with many additional duties without any corresponding pay increase during the majority of the time Ms. Cromwell has worked at APC. This is in stark contrast to her similarly situated Caucasian colleagues who were paid in accordance with their work load during the course of June 2016 through to the present. Such behavior breaches Ms. Cromwell's employment contract with Defendants.
10. In addition throughout June 2016 through to the present, Plaintiff has been subjected to a continual reduction in job hours and other unwarranted restrictions in her ability to earn income and on her working environment to the direct exclusion of her similarly situated Caucasian Colleagues. Pursuant to Defendants' applicable contractual policies and procedures, Plaintiff complained through the employment ranks and to Human Resources that Defendants' actions in doing such clearly amount to policy violations and were also retaliation for Plaintiff's numerous documented complaints through the employment ranks and to Defendants' human resources personnel all in compliance with the contractual guarantees breached by Defendants.
11. Likewise Defendants' treatment of Plaintiff as stated above clearly violates the contractual promises and guarantees provided to Plaintiff by Defendants in both their handbook and other stated policies and procedures.
12. As it relates to the specific actions which spurned the racially discriminatory and retaliatory animus of the Defendants from June 2016 through 2018, Plaintiff recounts as follows.
13. During the course of 2016, Plaintiff was terminated based on false and pretextual allegations. Plaintiff timely filed a grievance based on this clearly improper termination which violated Plaintiff's employment contract, and as a result, was restored to work with supposed full vindication of her employment rights. Nevertheless, she was permanently emotionally scarred

and her legal success was short lived as of June 2016 due to the Defendants' increased harassment acting as a catalysis for further retaliation as she was immediately beset with new instances of contractually breaching retaliation to include a reduction in her hours and an increase in her job duties to the exclusion of her similarly situated Caucasian colleagues.

14. In fact, despite making numerous contractually protected complaints. Nevertheless, these complaints only intensified the unlawful harassment and retaliation which Defendants meted out to her on a daily basis all in violation of her employment contract.
15. During the course of June 2016 through to the present, Plaintiff has made numerous additional documented complaints to Defendants' Human Resources Department and to Management timely and specifically complaining of race discrimination and retaliation in breach of her employment contract with Defendants. As a result of doing such, Plaintiff was beset with new instances of contractually breaching efforts of retaliation to include a further reduction in her work hours and a greater increase in her job duties. This onset of this retaliation occurred continually during the course of June 2016, 2017, and 2018 first with her termination but afterwards intensified in June 2016 causing Plaintiff great stress in addition to causing her monetary harm due to the reduced work hours and medical treatments as a result of the stress and anxiety Defendants' unlawful treatment caused her. These damages are the natural and probable result of Defendants' breach of contract.
16. Due to Plaintiff's contractually protected complaints as stated above, Plaintiff was blocked from being considered for the position of Charge Nurse despite the fact that she had performed admirably in an interim charge nurse role in the same department and was the most qualified applicant for the position. Such actions violate Plaintiff's contractual relationship with Defendants.

17. As a result of Plaintiff's complaints of Defendants' contractually violating their handbook policies on fair treatment and anti harassment and retaliation policies throughout the course of June 2016 through 2018, Plaintiff was given a barrage of unjustified and untrue write-ups and disciplinary actions designed to justify Plaintiff being disciplined despite the fact that such disciplinary actions were false and untrue. The Defendants' actions in doing such was a further attempt to racially discriminate against Plaintiff as her Caucasian Colleagues were never subjected to such a barrage of false write-ups and unlawful retaliation. This adverse treatment towards Plaintiff was proximately due to her contractually protected complaints of race discrimination and retaliation. Plaintiff maintains that she was, at all times, a good and experienced employee who performed her job well and behaved professionally in the performance of her job.
18. Plaintiff is currently still employed by Defendants and, is still the subject of contractual breaches on account of the fair treatment and retaliatory practices stated above all in breach of her employment contract with Defendants.
19. During the course of June 2016 through to the present and as a result of her contractually protected complaints, Plaintiff was subjected to harassing and retaliatory treatment by her superiors and administrators to include Karen Weaver (WF), Michael Denham (WM), Nursing Administrator, Sharon Turner, and others. These individuals have continually worked in concert to derail Plaintiff's employment by unjustly questioning and undermining her work performance and interactions with doctors, staff, and patients. Defendants's actions are violative of Plaintiff's employment contract which provides that Plaintiff would be treated fairly and not retaliated against.

20. During the course of June 2016 through to the present, Plaintiff has been denied every promotional opportunity which she sought and was qualified to receive to include Charge Nurse positions and, in fact, her job has been threatened by systematic inequities related to Plaintiff's treatment and discipline as compared to that of her similarly situated Caucasian Counterparts. In fact, Plaintiff has not taken any actions which can be construed as worthy of discipline, but yet she has been subjected to repeated false and pretextual disciplinary actions to the exclusion of her similarly situated Caucasian colleagues. Defendants' actions violate Plaintiff's contractual rights.
21. As a result of the Defendants' violations of Plaintiff's contractual rights as indicated above, Plaintiff has suffered both financially, emotionally, physically, and mentally and has been irreparably harmed.

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

35. Each and every allegation set forth hereinabove is hereby repeated as fully incorporated herein.
36. Defendants publish and maintain a contractually binding Employee Handbook, which definitely assures employees of their right to report harassment and bullying and also contains an anti-retaliation clause.
37. Defendants state, in their Employee Handbook, that they are Equal Opportunity Employers. Defendants further state, in their handbook, that they will comply with the requirements of the law in implementing equal employment decisions and anti harassment protections for their employees.
38. Plaintiff and Defendants entered into a binding and valid contract whereby Plaintiff relied on Defendants, through their agents' reassurance that, pursuant to the handbook and the above policies and procedures, Defendants would protect Plaintiff on the basis of her rights under their

anti-harassment and anti-retaliation policies. Plaintiff also relied on the Defendants' reassurance that they must follow their handbook policies when disciplining their employees.

39. Plaintiff agreed to fulfill the duties of her position in exchange for valuable consideration and salary with the promise of being protected from discrimination, retaliation, and harassment.
40. Plaintiff performed her job duties with due diligence. However, Defendants, through their agents, unjustifiably failed to perform their duties by failing to protect Plaintiff in accordance with their own policies and procedures as stated above. Further, Defendants failed to follow their handbook policies when they retaliated against Plaintiff for availing herself of the Grievance Process and when Defendants failed to apply the same consequence for filing complaints to Plaintiff's Caucasian counterparts as they did to the Plaintiff all in violation of Defendants' promised contractual protections.
41. Defendants, and their agents, had a contractual responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendants, through its agents, instead chose to fail to protect Plaintiff from being retaliated against in June 2016 to the present when Plaintiff made complaints in compliance with the anti-harassment policy. Defendants attacked Plaintiff for participating in grievances, and engaging in other lawful on the job behaviors with the Defendants all in violation of Defendants' contractual relationship with Plaintiff.
42. Defendants' conduct, by and through its agents, was done in bad faith and breached the implied covenant of good faith and fair dealings that is implied in the employment contract.
43. Accordingly, Plaintiff is entitled to compensatory damages in the nature of the value of her lost wages and benefits, front pay, together with interest thereon, as well as liquidated damages, and her respective attorney's fees for the bringing of this action.

SECOND CAUSE OF ACTION: BREACH OF CONTRACT WITH FRAUDULENT INTENT

43. Each and every allegation set forth above is hereby repeated and fully incorporated herein.
44. Defendants, by and through their agents, have failed to fulfill their obligation under their own written policies and has breached the terms thereof by reason of an intentional design on their part to defraud Plaintiff.
45. In furtherance of such intentional design, Defendants, through their agents, terminated Plaintiff's employment for false and pretextual reasons and when she grieved Defendants' actions, Defendants consistently authored false and pretextual write ups from June 2016 to present which Plaintiff clearly denied,, subjected her to pretextual job assignments, unlawfully raised illegitimate claims regarding Plaintiff's alleged behavior (which Plaintiff denies), retaliated against her for participating and prevailing in the grievance process, and harassed her in violation of and under the guise of following Defendants' own policies and procedures all in violation of Plaintiff's contractual rights with Defendants.
46. Defendants' conduct, by and through their agents, was done in bad faith and breached the implied covenant of good faith and fair dealings that is implied in the employment contract and handbook.
47. Accordingly, Plaintiff is entitled to compensatory and punitive damages in the nature of the value of her lost wages and benefits, front pay, together with interest thereon, as well as liquidated damages, and her respective attorney's fees for the bringing of this action.

JURY TRIAL DEMANDED

48. Plaintiff requests a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court declare that Defendants, and their agents, actions complained of herein violated the rights guaranteed to Plaintiff and issue this judgment,

(1) Declaring the actions complained herein illegal; in favor of Plaintiff against Defendants, and its agents, for all causes of actions in an amount which is fair, just and reasonable, and for compensatory damages, actual damages, and punitive damages;

(2) Issuing an injunction enjoining Defendants, their agents, employees, successors, attorneys, and those acting in concert or participation with the Defendants, and their agents, and at its direction from engaging in the unlawful practice shown to be in violation of Plaintiff's contractual rights.

(3) Awarding Plaintiff compensatory and punitive damages for each cause of action contained herein, which the jury should find appropriate as a result of Defendants, and their agents, contractually violative discriminatory action taken as the result of Plaintiff's economic opportunities, any back pay, front pay, and future earnings with cost of living adjustments, prejudgment interest, fringe benefits, and retirement benefits.

(4) Awarding Plaintiff her costs and expenses in this action, including reasonable attorney fees, and other litigation expenses, and

(5) Granting such other and further relief to the Plaintiff as this Court may deem just and proper.

[Signature on Following Page]

Submitted by:

s/ 

Donald Gist

Aaron V. Wallace

GIST LAW FIRM, P.A.

4400 North Main Street,

Columbia, South Carolina 29203

Tel: (803)771-8007

Fax: (803) 771-0063

donaIdgist.gistlawfirm@gmail.com

aaronwallace.gistlawfirm@gmail.com

ATTORNEYS FOR PLAINTIFF

5/13, 2018
Columbia, South Carolina

GIST LAW FIRM, P.A.
4400 North Main Street
Columbia, South Carolina 29203
Telephone (803) 771-8007
Facsimile (803) 771-0063

ATTORNEYS-AT-LAW
Donald Gist
Aaron V. Wallace

MAILING ADDRESS
Post Office Box 30007
Columbia, South Carolina 29203

May 17, 2018

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
Charleston County Judicial Center
100 Broad Street, Suite 106
Charleston, SC 29401

Re: Elise Cromwell vs. Medical University of South Carolina and Medical University of
South Carolina Hospital Authority

Dear Ms. Armstrong:

Enclosed find an original and three (3) copies of Plaintiff's Summons and
Complaint in the above-mentioned civil matter. Please clock these documents and return
the copies in the self-addressed stamped envelope that I have provided for your
convenience.

Additionally, I have enclosed a check in the amount of one hundred and fifty
dollars (\$150.00) for the initial filing of the above-mentioned matter.

Should you have any questions or concerns, please feel free to contact our office
at 803.771.8007.

Sincerely,



Shana Evans,
Paralegal

Cc: Attorney Gist
Attorney Wallace

Filed
Enclosed

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

Elise A. Cromwell)

Plaintiff,)

vs.)

The Medical University of South Carolina,)
et.al,)

Defendant.)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-2580

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Donald Gist, Bar No. 13098

Address:

Gist Law Firm, P.A.

P.O. Box 30007

Columbia, SC 29203

Phone: 803-771-8007 Fax 803 771-0063

E-mail: .com Other: _____

Defendant's Attorney:

Bob J. Conley, Bar No. 12243

Address:

171 Church Street, Suite 310

Charleston, SC 29401

Phone: 843-577-9626 Fax 843-577-6672

E-mail: bconley@clevelandlaborlaw.com Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

Estimated Time Needed: 1 hour

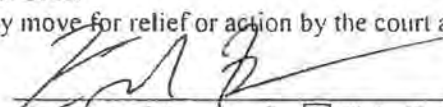
Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

07/13/2018

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$** _____

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED - AMOUNT DUE: \$** _____

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-2580

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4. Plaintiff's Complaint does not allege any violation of public policy by Defendants that would support her claim for breach of an employment contract;

5. Plaintiff's Complaint does not allege the existence of a written employment contract that would satisfy the statute of frauds;

6. Plaintiff's claim for breach of contract with fraudulent intent is barred because Defendants are immune from punitive damages; and,

7. Plaintiff's Complaint fails due to insufficiency of service of process and, therefore, Plaintiff's Complaint fails as a matter of law pursuant to Rule 12(b)(5), SCRCF. In general, Plaintiff served the Summons and Complaint by mail. However, pursuant to Rule 4(d)(4) and (8), SCRCF, neither Defendant can be served with the Summons and Complaint by mail.

WHEREFORE, Defendants respectfully move this Court for an order dismissing Plaintiff's Complaint and awarding Defendants such other and further relief as this Court may deem just and proper.

Counsel for Defendants will submit a memorandum in support of this Motion prior to a hearing.

[signatures on following page]



Caroline Wrenn Cleveland (SC Bar #64253)

Bob J. Conley (SC Bar #12243)

Emmanuel J. Ferguson (SC Bar #81431)

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Charleston, South Carolina

July 9, 2018

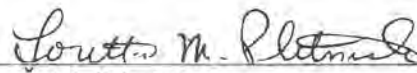
ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

2018-CP-10-2580

This is to certify that I have this 9th day of July 2018, caused to be served a copy of Defendants' Motion to Dismiss on counsel for Plaintiff by depositing same in the United States Mail, First Class postage prepaid, and addressed to:

Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203


Loretta M. Plitnick
Paralegal

FILED
2018 JUL 11 PM 3:01
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

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LABOR AND EMPLOYMENT DEFENSE

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CAROLINE WORM CLEVELAND †
BOB J. CONLEY
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PORTFOLIO SPECIALIST
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July 9, 2018

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed is one original and one copy of Defendants' Notice of Motion and Motion to Dismiss, and a check to cover the filing fee, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our attention using the enclosed envelope provided.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

EIF/imp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

LEGAL STANDARD

A. Rule 12(b)(5)

Rule 12(b)(5), SCRCP, requires the dismissal of a complaint when service of the summons and complaint are not properly served on a defendant. Correspondingly, Rule 4(d)(5) and (j), SCRCP, allow for service on agencies of the State of South Carolina in only two manners: **personal service** “by delivering a copy of the summons and complaint to such officer or agency **and** by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia” or, in the alternative, valid acceptance of service. (emphasis added.) A state agency *cannot* be served by certified mail. *See* Rule 4(d)(1), (2) and (3), SCRCP, and Rule 4(d)(8), SCRCP.

B. Rule 12(b)(6)

“Under Rule 12(b)(6), a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action.” *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). In considering such a motion, the court must look to the allegations contained in the complaint and any inferences drawn from the facts as alleged. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). However, the court should neither consider a plaintiff’s unsupported conclusions nor should it consider a plaintiff’s conclusions of law. *Charleston County School Dist. v. Laidlaw Transit*, 348 S.C. 420, 426, 559 S.E.2d 362, 365 (Ct. App. 2002).

“If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.” *Spence*, 368 S.C. at 116, 628 S.E.2d at 876. “Furthermore, the complaint should not be dismissed merely because the court

doubts the plaintiff will prevail in the action.” *Id.* Nonetheless, “[t]he motion must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case.” *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct. App. 1997).

FACTS ALLEGED IN THE COMPLAINT

The claims alleged in Cromwell’s Complaint involve her employment with MUHA.² Cromwell is currently *employed by MUHA* as a registered nurse (Compl. ¶ 7). In her Complaint, Cromwell alleges the written policies provided to her by *MUHA* created an employment contract (Compl. ¶ 6).

Cromwell alleges she was subject to “a campaign of contractually impermissible race discrimination and retaliation” beginning in June 2016 (Comp. ¶ 8). Further, Cromwell claims she “made numerous additional documented complaints...of race discrimination and retaliation in breach of her employment contract with [MUHA]” (Compl. ¶ 15). Cromwell also claims she was subject to various instances of discriminatory and retaliatory behavior in violation of an alleged employment contract (Compl. ¶ 15).

Additionally, Cromwell alleges she was not considered for a “charge nurse” position and was assigned additional duties in retaliation for her making complaints about discrimination (Compl. ¶ 15 and 16). Moreover, Cromwell claims MUHA and MUSC “violat[ed] their handbook policies on fair treatment and anti-harassment and retaliation” (Compl. ¶ 17).

² Cromwell is employed by MUHA, not MUSC. In her Complaint, Cromwell expressly alleges she is employed by MUHA (Compl. ¶ 7). However, throughout the Complaint Cromwell claims she entered into an employment contract with MUHA *and* MUSC. Nonetheless, based upon the response to this Motion Cromwell filed on November 21, 2018, it appears she is voluntarily dismissing her claims as to MUSC.

In the Complaint, Cromwell further claims she was “given a barrage of unjustified and untrue write-ups” in an attempt by MUSC/MUHA to discriminate against her based on her race (Compl. ¶ 17). Cromwell then alleges MUSC/MUHA “publish and maintain a contractually binding Employee Handbook, which... contains an anti-retaliation clause” (Compl. ¶ 35). The Complaint claims Cromwell and MUSC/MUHA “entered into a binding and valid contract whereby ... pursuant to the handbook and the above stated policies and procedures, Defendants would protect [Cromwell] on the basis of her rights under [Defendants'] anti-harassment and anti-retaliation policies.” (Compl. ¶ 38).

Cromwell further alleges she relied on MUSC/MUHA’s “reassurance they must follow their handbook policies when disciplining their employees” (Compl. ¶ 38). Furthermore, the Complaint alleges MUSC/MUHA breached the terms of the alleged contract “by reason of an intentional design on their part to defraud [Cromwell]” (Compl. ¶ 44).

LEGAL ARGUMENT

A. Rule 12(b)(5) – Insufficiency of Service of Process

Cromwell served MUHA and MUSC by certified mail only.³ For this reason, Cromwell’s service of the Summons and Complaint is insufficient.

South Carolina Rule of Civil Procedure 4 does not allow Cromwell to serve Defendants, both agencies of the State of South Carolina, by certified mail. While Rule 4(d)(8), SCRCF, does allow service upon specific classes of parties by certified mail, the Rule does not allow for such service on Defendants. To the contrary, Rule 4(d)(5), SCRCF, allows only one form of service on MUHA: “by delivering a copy of the summons and complaint to such officer or agency **and**

³ Cromwell filed no proof of service with the Court, including proof she served the Summons and Complaint in any manner other than by certified mail. Moreover, Cromwell filed no proof of service upon the South Carolina Attorney General.

by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.” (emphasis added.)

In summary, Cromwell did not properly affect service upon Defendants and, therefore, Plaintiff’s Complaint should be dismissed pursuant to Rule 12(b)(5) for insufficiency of service of process.

B. MUSC is Not a Proper Defendant⁴

On July 1, 2000, the South Carolina General Assembly established MUHA as an entity separate from MUSC.⁵ Cromwell expressly alleges she has been employed by MUHA since 2008. (Compl. ¶ 7). Cromwell does not allege she is, or ever has been, employed by MUSC.⁶ Because MUSC did not employ Cromwell, MUSC is not a proper party in this lawsuit and the causes of action against MUSC should be dismissed.

1. Cromwell’s Breach of Contract Claim is Barred Because MUHA’s Written Policies Do Not Create a Contract

“The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract’s existence is questioned and the evidence is either conflicting or is capable of more than one inference.” *Bishop v. City of Columbia*, 401 S.C. 651, 658–59, 738 S.E.2d 255, 258–59 (Ct. App. 2013) (citing *Watkins v. Disabilities Bd. of Charleston Cnty.*, 444 F.Supp.2d 510, 514 (D.S.C.2006)). “However, a court should resolve whether the employee handbook constitutes a contract as a matter of law when the employee handbook’s policies and disclaimers, taken together, establish that an enforceable promise does or does not exist. *Id.* “An employee handbook forms a contract when: (1) the handbook

⁴ See footnote 1.

⁵ S.C. Code Ann. § 59-123-60.

⁶ Throughout the Complaint, Cromwell alleges “Defendants” engaged in conduct related to her employment. However, she only alleges MUHA is her employer, and it appears, by way of her response to this Motion, she concedes she is an employee of MUHA.

provisions and procedures in question apply to the employee; (2) the handbook sets out procedures binding on the employer; and (3) the handbook does not contain a conspicuous and appropriate disclaimer.” *Bishop*, 401 S.C. at 659, 738 S.E.2d. at 259 (citing *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 146, 634 S.E.2d 15, 20 (Ct.App.2006)).⁷

Cromwell alleges she entered into an employment contract with MUHA and/or MUSC and claims MUHA/MUSC “policies and procedures related to discrimination, harassment, bullying and retaliation” as the genesis of such a contract. (Compl. ¶ 6.) However, South Carolina law expressly provides that employer issued handbooks and policies do not create express or implied employment contracts if there is a conspicuous disclaimer:

⁷ Cromwell’s counsel has, on multiple occasions, attempted to pursue a cause of action for breach of contract (and fraudulent breach of contract), without success, on same grounds advanced and alleged in Cromwell’s Complaint. See *Brailsford v. Fresenius Med. Ctr. CNA Kidney Centers LLC*, No. 2:15-CV-00239-DCN, 2015 WL 4459032, at *4 (D.S.C. July 21, 2015) (“...to the extent [plaintiff’s] amended complaint relies on anti-retaliation policies, courts have found such language to be insufficient to form a contract of employment.”); *Odom v. City of Columbia Police Dep’t*, No. CV 3:15-4313-MGL-SVH, 2017 WL 9275138, at *7 (D.S.C. Feb. 16, 2017), *report and recommendation adopted*, No. CV 3:15-4313-MGL-SVH, 2017 WL 2952969 (D.S.C. July 11, 2017) (“plaintiffs quote the majority of the anti-discrimination and harassment policies, but do not identify mandatory language, definitive in nature, that promises specific treatment.”); *Yon v. Reg’l Med. Ctr.*, No. 5:14-CV-02098-JMC, 2016 WL 1178202, at *14 (D.S.C. Mar. 28, 2016) (“Upon review of the Four Step Communication and Reporting Process the Non-Retaliation Policy, the court does not find any language therein that is sufficient to establish a genuine issue of fact that [plaintiff] had a “contract” of employment by virtue of these policies.”); *Nelson v. Medical University Hospital Authority*, No. 17-cv-0187-DCN, 2018 WL 4204243 (D.S.C. August 7, 2018) (adopting Magistrate’s recommendation and rejecting contention MUHA anti-harassment policy creates a contract) (Exhibit B).

“It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document. Whether or not a disclaimer is conspicuous is a question of law.”

S.C. Code Ann. § 41-1-110 (2005).

Here, MUHA’s anti-harassment policy follows the requirements of § 41-1-110. The first page of the policy statement, contains a written disclaimer.⁸ The language is written in bold typeface, with capital letters, and underlined as follows:

THE LANGUAGE USED IN THIS DOCUMENT DOES NOT CREATE AN EMPLOYMENT CONTRACT BETWEEN THE EMPLOYEE AND THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY. THIS DOCUMENT DOES NOT CREATE ANY CONTRACTUAL RIGHTS OR ENTITLEMENTS. THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY RESERVES THE RIGHT TO REVISE THE CONTENT OF THIS DOCUMENT, IN WHOLE OR IN PART. NO PROMISES OR ASSURANCES, WHETHER WRITTEN OR ORAL, WHICH ARE CONTRARY TO OR INCONSISTENT WITH THE TERMS OF THIS PARAGRAPH CREATE ANY CONTRACT OF EMPLOYMENT.⁹

Because MUHA’s policy conforms to the requirements of S.C. Code Ann. § 41-1-110, they do not, as a matter of law, create an express or implied employment contract. In her

⁸ The trial court may consider documents referenced in Cromwell’s Complaint without converting a motion to dismiss under 12(b)(6) into a Rule 56 motion for summary judgment. *See Brazell v. Windsor*, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (“In our view, allowing a trial court to consider documents that are incorporated by reference in the complaint but not actually attached thereto prevents a plaintiff from benefiting from his own oversight or from surviving a motion to dismiss by intentionally omitting documents upon which their claims are based.”); *Foshee v. Ginn-LA W. End, Ltd.-Corp.*, No. 2011-UP-568, 2011 WL 11736337, at *1 (S.C. Ct. App. Dec. 20, 2011) (“As to whether the circuit court erred by converting Respondents’ motion to dismiss to a motion for summary judgment by reviewing the parties’ purchase contract, we find no error in the court’s review of the document that Appellants had referenced throughout their complaint and upon which their claims were based.”).

⁹ Exhibit A (MUHA Anti-Harassment Policy).

Complaint, Cromwell *solely* relies on MUHA/MUSC's "policies and procedures" as the basis for her breach of contract claim (Compl. ¶ 6). Therefore, as a matter of law, Cromwell's claim of breach of contract fails.¹⁰

2. The South Carolina Tort Claims Act (the "SCTCA") Bars Governmental Entities from Liability for Failure to Enforce Written Policies

In her Complaint, Cromwell alleges her breach of contract claim is based on MUHA's alleged failure to follow its written policies. (Compl. ¶ 8). However, the SCTCA specifically bars government entities from liability for failure to adopt or enforce written policies. "Section 15-78-60(4) provides that a governmental entity is not liable for loss resulting from: [a]doption, enforcement or compliance with any law or **failure to adopt or enforce** any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, **or written policies**...." *Adkins v. Varn*, 312 S.C. 188, 190, 439 S.E.2d 822, 824 (1993) (emphasis in original).

"In Section 15-78-20, the General Assembly gave the courts guidance on the construction of the comprehensive act: [t]he provisions of this chapter establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." *Id.* "A basic rule of statutory construction is that the words must be given their plain and ordinary meaning without resort to a subtle or forced construction which limits or expands the statute's operation." *Id.* (citing *Berkebile v. Outen*, 311 S.C. 50, 426 S.E.2d 760

¹⁰ Accordingly, Cromwell's second cause of action for fraudulent breach of contract fails, as there can be no independent cause of action for fraudulent breach of contract. *See Minter v. GOCT, Inc.*, 322 S.C. 525, 529-30, 473 S.E.2d 67, 70 (Ct. App. 1996) ("In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) **a breach of contract**; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act.") (emphasis added).

(1993); *First Baptist Church v. City of Mauldin*, 308 S.C. 226, 417 S.E.2d 592 (1992)). “Where a statute contains terms which are clear and unambiguous, a court must apply those terms according to their literal meaning.” *Adkins*, at 191 (citing *Citizens for Lee County, Inc. v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992)). “The provisions of Section 15–78–60(4) are clear and unambiguous on their face, and are not subject to judicial interpretation.” *Adkins v. Varn*, 312 S.C. 188, 192, 439 S.E.2d 822, 824 (1993).

In *Adkins*, plaintiff’s child was struck by a vehicle and fatally injured while riding her bicycle around her home. Plaintiff claimed her child was being chased by several dogs just before she was struck by the vehicle. Prior to this occurrence, several residents complained about these dogs to county animal control personnel.

The South Carolina Supreme Court affirmed the trial court’s decision to dismiss the lawsuit and stated:

“[i]t is undisputed [defendant] is a governmental entity within the meaning of the South Carolina Tort Claim Act, and therefore, is subject to the provisions of S.C.Code Ann. § 15–78–60(4). The provisions of Section 15–78–60(4) are clear and unambiguous on their face, and are not subject to judicial interpretation. The statute clearly exempts from liability any loss resulting from the failure to enforce an ordinance; therefore, the [defendant] is immune from suit for any loss as a result of their non-enforcement of the animal control ordinance.” *Adkins*, 312 S.C. at 191–92, 439 S.E.2d at 824.

Here, Section 15-78-4 of the SCTCA clearly exempts from liability any loss resulting from the failure to enforce written policies. Therefore, Cromwell’ Complaint, even if true, fails to state a claim against MUHA for breach of contract based on her allegation MUHA or MUSC failed to follow written policies. Accordingly, Cromwell’s breach of contract claim, to the extent she relies on MUHA written policies, should be dismissed.

C. Fraudulent Breach of Contract¹¹

1. Cromwell Cannot Recover Punitive Damages from MUSC or MUHA

In her Complaint, Cromwell asserts MUHA and/or MUSC breached a contract with her by “reason of an intentional design on their part to defraud [Cromwell].” (Compl. ¶44.) In *Smith v. Canal Insurance Co.*, 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980), the Supreme Court of South Carolina confirmed there is no separate cause of action for breach of contract accompanied by a fraudulent act, but only a potential for punitive damages where fraudulent acts are involved:

[t]here is no cause of action distinct from breach of contract for breach of contract accompanied by a fraudulent act. *Plowden v. Atlantic States Const. Co.*, 264 S.C. 139, 213 S.E.2d 100 (1975). Rather, “(i)n order to recover punitive damages for breach of contract, the plaintiff must show the breach was accomplished with a fraudulent intention and was accompanied by a fraudulent act.” *Thompson v. Home Security Life Ins.*, 271 S.C. 54, 55, 244 S.E.2d 533, 534 (1978). This fraudulent act, although separate and distinct from the act(s) constituting the breach, must accompany the breach and not be too remote in either time or character. *Branham v. Wilson Motor Co.*, 188 S.C. 1, 198 S.E. 417 (1938); *Lillienthal v. S.C. Public Serv. Co.* 174 S.C. 177, 177 S.E. 98 (1934); 10 S.C. L.Q. 444, 459 (1958).

Because there is no separate cause of action for breach of contract accompanied by a fraudulent act, but merely a potential opportunity for punitive damages, the initial (and, in this case, dispositive) issue for the Court is whether, as a matter of law, punitive damages can be awarded against either MUSC or MUHA. According to the Supreme Court of South Carolina and the United States Supreme Court, the answer is unequivocally “no.”

“In the absence of statutory authority, there is no right to recover exemplary or punitive damages against a . . . state . . .” *MaeMurphy v. South Carolina Dept. of Trans.*, 295 S.C. 49, 51, 367 S.E.2d 150, 151 (1988), *referencing generally* 57 Am.Jur.2d, *Municipal, Etc., Tort*

¹¹ In her response to this Motion, Cromwell indicates she is voluntarily dismissing this cause of action. However, Defendants address it nonetheless.

Liability, § 318 and *Clarke v. City of Greer*, 231 S.C. 327, 98 S.E.2d 751 (1957) (punitive damages against municipality are not recoverable). “Presently, there is no statute authorizing the recovery of punitive damages from the State of South Carolina or its agencies.” *Id.*

Further, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), “the United States Supreme Court recognized that recovery of punitive damages against governmental entities are contrary to sound public policy because such awards would burden the taxpayers and citizens for whose benefit the wrongdoer is assessed punitive damages.” *Id.* “The principal of punitive damages is to ‘punish’ the tortfeasor and to ‘deter’ him from such conduct in the future. “It is not clear that punitive damages will deter future misconduct or punish governmental tortfeasors since they are not personally liable for damages; therefore, such awards in all likelihood would have a nugatory effect.” *Id.*

Here, MUSC and MUHA are government entities.¹² Therefore, MUSC and MUHA are not subject to punitive damages and Cromwell’s claim for fraudulent breach of contract should be dismissed.

2. The SCTCA Bars Cromwell’s Fraudulent Breach of Contract Claim

Pursuant to the SCTCA, particularly S.C. Code Ann. § 15-78-60(17), neither MUHA nor MUSC can be held liable for acts of their agents and/or employees constituting “actual fraud.” In her Complaint, Cromwell alleges, “Defendants, by and through their agents, ... breached terms [of written policies] by reason of an intentional design on their part to defraud [Cromwell]”

¹² See *Peltier v. Metts*, No. 2007-UP-317, 2007 WL 8327723, at *1 (S.C. Ct. App. June 14, 2007) (“[defendant] worked for MUSC, a government entity...”); *Tatum v. Med. Univ. of S.C.*, 346 S.C. 194, 199, 552 S.E.2d 18, 21 (2001), *abrogated by Mendenall v. Anderson Hardwood Floors, LLC*, 401 S.C. 558, 738 S.E.2d 251 (2013) (“MUSC is a governmental agency subject to the provisions of the Tort Claims Act.”).

(Compl. ¶ 44). Further, Cromwell alleges, “Defendants’ conduct, by and through their agents, was done in bad faith...” (Compl. ¶ 46). Because Cromwell claims in her Complaint the alleged actions of agents or employees of MUSC and/or MUHA consisted of fraudulent acts, neither MUHA nor MUSC can be liable, even if such alleged, fraudulent acts occurred.

For these reasons, Cromwell’s cause of action for fraudulent breach of contract should be dismissed pursuant to Rule 12(b)(6), SCRCP.

CONCLUSION

For the reasons discussed, Defendants request the Court grant its Motion to Dismiss as to all Cromwell’s claims and causes of action.



Caroline Wreghitt Cleveland (SC Bar #64253)
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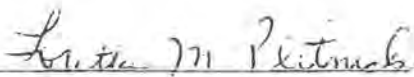
Charleston, South Carolina
November 26, 2018

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that I have this 26th day of November 2018, caused to be served a copy of Defendants' Memorandum in Support of Motion to Dismiss on counsel for Plaintiff by depositing same in the United States Mail, First Class postage prepaid, and addressed to:

Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203



Loretta M. Plitnick
Paralegal

FILED
2018 NOV 29 AM 11:58
JULIE J. ARMSTRONG
CLERK OF COURT
BY  _____

EXHIBIT A



HUMAN RESOURCES POLICY MANUAL

Number & Title: 46 – Anti-Harassment (Including Sexual Harassment)

Owner: Human Resources, H. Bastian

Location / File name:

U:\Authority HR Admins\policy46

Policy 46 Anti-Harassment 9.30.14

Dates:

Originated: 7/1/2000

Reviewed: 7/1/2002

7/1/2004, 9/18/09; 3/23/11;
9/29/2014

Legal Review:

Revised: 8/18/2003; 4/14/11;
3/10/14

Note: THIS POLICY, LIKE ALL OTHER POLICIES WITHIN THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY HUMAN RESOURCES POLICY MANUAL, IS NOT A CONTRACT OF EMPLOYMENT AND SHOULD NOT BE RELIED UPON AS SUCH. THIS POLICY MAY BE CHANGED AT ANY TIME BY THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY.

Policy:

A. It is the policy of the Medical University Hospital Authority (hereinafter "Authority") to prohibit any form of harassment based on race, color, religion, sex, age, national origin, disability, veteran status, genetic information or any other factor and to conduct a thorough investigation of any such reported behavior.

B. Employees and/or agents of the Authority should conduct themselves in a manner that ensures respect and dignity. The offender shall be subject to disciplinary action up to and including dismissal.
This policy prohibits sexual harassment by a supervisor, peer or any agent of the Authority and applies when persons are on Authority property or participating in an activity sponsored off-campus. It is also the policy of the Authority that willful false accusations of sexual harassment will not be condoned and offenders will be subject to disciplinary action up to and including dismissal.

C. Definitions of Sexual Harassment:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when,

1. Submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment,
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual, or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

D. Other Forms of Harassment:

1. The Authority also does not tolerate any form of harassment or intimidation based upon race, color, religion, age, national origin, disability, veteran status, genetic information or any other factor.
2. Generally, harassment is defined as verbal or physical conduct which denigrates or shows hostility to an individual because of his or her sex, race, color, age, religion, national origin, disability, veteran status, genetic information or any other factor, including those of his or her relatives, friends, or associates. Harassing or intimidating behavior includes, but is not limited to, discriminatory intimidation, derogatory statements, insults, ridicule, offensive comments, jokes, pranks, slurs, innuendoes, objects, pictures, graphic and electronic material (e-mails, faxes and social media) unwelcome touching, assault, physical interference with one's work, posters, and/or drawings. This behavior may be exhibited by electronic means, including employment actions against an employee who refuses to submit to or participate in offensive conduct.
3. The prohibited behaviors are those that have the purpose or effect of creating an intimidating, hostile or offensive work environment; unreasonably interferes with an individual's work performance; or otherwise adversely affects a person's employment opportunities.
4. Harassment or intimidation may originate with supervisors/managers, co-workers, faculty, students, visitors, or contractual employees. Regardless of the form or source, such behavior is deemed as unacceptable. Managers and supervisors are responsible for preventing harassment in their work areas. Their responsibilities include dissemination of this Policy, providing anti-harassment training for their employees, attending such training themselves, monitoring their work areas and appropriately addressing complaints.

5. No supervisor or manager is permitted to retaliate or take any adverse employment action against an employee who is the victim, reporter or witness of harassment. Supervisors or managers who are found to have engaged in retaliatory activity will be disciplined appropriately, up to and including termination.
6. Other forms of intimidation not specifically addressed by this Policy are also prohibited. Refer to MUSC Medical Center-Wide Security Policy A052, for additional information.

Procedure

- A. Any employee who believes he or she has been the victim of harassment to include sexual harassment is to present the complaint as promptly as possible after the alleged harassment occurs. The complaint is to be discussed with the Medical University Hospital Authority Office of Human Resources (hereinafter "Human Resources") or supervisor/manager, or director who will ensure the complaint is heard by the appropriate officials.
- B. If the complainant, after an initial meeting with Human Resources or appropriate official, decides to proceed, he or she should submit a written statement to the Human Resources Director, or his or her designee, within seven (7) days of the initial meeting. Following the receipt of the written statement, Human Resources will notify the appropriate Administrator.
- C. The Administrator, or designee, shall take appropriate action which may include the appointment of an investigative committee. Human Resources will assist in the investigative process.

The alleged offender will be notified of the complaint and required to respond in writing to the allegation. The complainant and alleged offender will be informed of the procedures that will be employed to investigate the allegations.

- D. If an investigative committee is appointed, it will conduct its own informal inquiry, call witnesses, and gather whatever information necessary to reach a determination as to the merits of the allegations. The investigative committee shall recommend an appropriate course of action to the Administrator. Human Resources shall inform the complainant and alleged offender of the decision.
- E. Any complaint by an employee which is initiated through an outside agency or organization will be addressed using the procedures above to the extent possible.

- F. As appropriate, discrimination complaints will be referred to the MUSC Office of Equal Employment Opportunity and Affirmation Action Compliance.
- G. If the decision requires that an employee be demoted, suspended or terminated, the employee who was disciplined may grieve such action as outlined in the Authority Human Resources Policy No. 44, Grievance Procedure.

Important: Any individual who believes that he or she has been a victim or witness of sexual harassment involving a faculty member, student, resident or fellow shall report the incident(s) to MUSC's Office of Gender Equity. Academic procedures apply for complaints of sexual harassment involving faculty, students, residents and fellows. Therefore, please refer to the Office of Gender Equity's web site (<http://www.musc.edu/genderequity>) for additional information or contact the Office by telephone (792-8066). Supervisors or department heads who have questions about the issues of sexual harassment involving faculty, students, residents, and fellows and one of their employees may contact the Office of Gender Equity for assistance.

EXHIBIT B

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

Christine G. Nelson,	)	C/A No. 2:17-cv-0187 DCN
	)	
Plaintiff,	)	<u>ORDER</u>
	)	
vs.	)	
	)	
Medical University Hospital Authority,	)	
	)	
Defendant.	)	

The above referenced case is before this court upon the magistrate judge's recommendation that defendant's motion for summary judgment be granted.

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend for the district court to review the factual and legal conclusions of the magistrate judge. Thomas v. Arn, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).¹ Objections to the Magistrate Judge's Report and

¹In Wright v. Collins, 766 F.2d 841 (4th Cir. 1985), the court held "that a pro se litigant must receive fair notification of the consequences of failure to object to a magistrate judge's report before such a procedural default will result in waiver of the right to appeal. The notice must be 'sufficiently understandable to one in appellant's circumstances fairly to appraise him of what is required.'" Id. at 846. Plaintiff was advised in a clear manner that his objections had to be filed within ten (10) days, and he received notice of the consequences at the appellate level of his failure to object to the magistrate judge's report.

Recommendation were timely filed on May 7, 2018 by plaintiff. On May 18, 2018, defendant filed its reply to plaintiff's objections.

A de novo review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report and recommendation is incorporated into this Order. For the reasons articulated by the magistrate judge, defendant's motion for summary judgment is **GRANTED**.

AND IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'David C. Norton', is written over a horizontal line.

David C. Norton
United States District Judge

August 7, 2018
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure

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

Christine G. Nelson,	)	
	)	Civil Action No. 2:17-187-DCN-KFM
Plaintiff,	)	
	)	<u>REPORT OF MAGISTRATE JUDGE</u>
vs.	)	
	)	
Medical University Hospital Authority,	)	
	)	
Defendant.	)	

This matter is before the court on the defendant's motion for summary judgment (doc. 27). Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

On January 20, 2017, the plaintiff filed a complaint against her former employer alleging race discrimination and retaliation in violation of Title 42, United States Code, Section 1981, and state law claims for breach of contract and breach of contract with fraudulent intent (doc. 1, comp.). On October 10, 2017, the defendant filed a motion for summary judgment (doc. 27). On December 28, 2017, the plaintiff filed a response in opposition (doc. 36), and on January 29, 2018, the defendant filed a reply (doc. 43).

I. FACTS PRESENTED

The plaintiff is an African-American female, who was first employed by the defendant for a short time in 1988 as a nurse. Between 1989 and 1994, the plaintiff left the defendant to work for various healthcare providers before she was rehired in 1995 (doc. 27-2). The plaintiff continued to work for the defendant for over 19 years until her employment was terminated on February 27, 2014 (doc. 36-2, pl. dep. 7, 67).

During her employment with the defendant, the plaintiff most recently worked in the defendant's Ambulatory Surgical Services Unit ("ASU"), where she was directly supervised by Charge Nurse Tabitha Nolen, a white female. Nolen's supervisor was

Sharon Turner, an African-American female, who was the Interim Nurse Manager. Turner's supervisor was the Director of Surgical Services, Karen Weaver, a white female. Weaver reported to the Chief Nursing Officer and Administrator of Clinical Services, Marilyn Schaffner, a white female.

The plaintiff testified that shortly after Nolen was made the Charge Nurse, the plaintiff complained to Turner about Nolen writing her up because the plaintiff complained that Nolen was "not helping out with the patient care." The plaintiff asked Turner to investigate, but she did not do so. According to the plaintiff, Turner did not discriminate against her; she just did not investigate the plaintiff's complaints. When asked how Nolen discriminated against her, the plaintiff testified that Nolen "wrote [her] up unfairly" and "still was . . . harassing [her]." When asked how Nolen harassed her, the plaintiff testified that, in 2013, as a result of an ergonomic study requested by Nolen, the plaintiff was required to sit at a desk to accommodate a back injury rather than in a cubicle like the other nurses. The plaintiff testified that the Nolen made the plaintiff's office an overflow patient room, so that if they had an overflow of patients, the plaintiff would have to take her belongings and move somewhere else (doc. 36-2, pl. dep. 48-57). The plaintiff also testified that Nolen discriminated against her in requiring her to tell Nolen when she was leaving for lunch, which no other nurse had to do (doc. 25-3, pl. dep. 78-79). When asked to identify any statements, jokes, or comments about the plaintiff's race that Nolen or Turner made during the plaintiff's employment with the defendant, the plaintiff stated that they made none (doc. 25-2, pl. dep. 64).

On February 25, 2014, the plaintiff and Nolen were working in the ASU when they had a disagreement. The plaintiff testified that Nolen assumed that the plaintiff was stopping work prior to the end of the day because she saw the plaintiff putting some charts away for the next day. However, the plaintiff still had a chart on her desk. The plaintiff testified that Nolen yelled at her, which other people witnessed. The plaintiff tried to contact Turner to tell her what happened, but Turner was unavailable. The plaintiff testified that she

did not remember if Nolen made any statements about her race during this incident (doc. 25-2, pl. dep. 64-68).

Later that evening, Nolen called Turner to inform her of the incident between the plaintiff and herself, including telling Turner that the plaintiff's behavior "was very bizarre" and that Nolen had contacted security to escort her to the bus stop after the incident because she was uncomfortable. The next day, Turner received an email from Risk Management informing her that a call had been received from Nolen the previous day and asking what was going to be done because "you shouldn't have employees afraid in the unit." Turner then informed Director of Surgical Services Weaver about the incident, and Weaver told her that she would be informing Chief Nursing Officer and Administrator of Clinical Services Schaffner (doc. 27-5, Turner grievance hrg. testimony 67-71).

Turner testified that she wanted "to do a disciplinary" on the plaintiff for what occurred between the plaintiff and Nolen on February 25th. On February 27, 2014, she sought guidance from Weaver and Schaffner as to "how far [she] could go in the disciplinary process." Weaver and Schaffner instructed Turner that they wanted to be present as witnesses when Turner met with the plaintiff (doc. 27-5, Turner grievance hrg. testimony 71-73). Turner prepared a disciplinary letter that she intended to give the plaintiff at the meeting. In the letter, Turner noted that the plaintiff had "been counseled on several occasions regarding [her] productivity in completing charts and patient assessments," and Turner had been made aware that on February 25, 2014, the plaintiff "again did not complete [her] assigned charts . . ." (doc. 27-3, disc. letter). Turner called Nolen and told her that when she was ready to see the plaintiff, Turner would call Nolen and tell her to send the plaintiff to Turner's office at which time Turner would explain to the plaintiff that they were going to Schaffner's office (doc. 27-5, Turner grievance hrg. testimony 71-73).

The plaintiff testified that on February 27, 2014, Turner told her that she wanted to meet with her, but it was the same time that the plaintiff was going to lunch, so the plaintiff called Schaffner, who was also supposed to be at the meeting. The plaintiff told Schaffner that she was on her way to lunch. She also told Schaffner that she would come

if the meeting was about what happened between her and Nolen on the 25th and that, if she was going to be written up, she wanted a witness present and to tape record the conversation because she was "tired of being harassed." Schaffner told the plaintiff that she "better be here in 10 minutes." The plaintiff then asked if she could bring a witness or tape record the conversation. Schaffner repeated that the plaintiff had better be at the meeting in ten minutes and then hung up the phone. The plaintiff further testified: "I didn't meet with her because she didn't say I can bring a witness or tape record the conversation. I went to lunch." When the plaintiff returned from lunch, Turner called the plaintiff and asked if she was going to meet with them, and the plaintiff replied that she would if she could have a witness present or tape record the conversation. Turner replied, "No," and hung up the phone. The plaintiff testified that approximately five minutes later, Turner came to the door of her office with a letter. She gave the letter to the plaintiff and called security to escort the plaintiff out of the building (doc. 25-2, pl. dep. 68-71).

Turner testified that when the plaintiff told her that she refused to meet with Turner, Weaver, and Schaffner and that she was instead going to lunch, Turner told her that her refusal was insubordination. The plaintiff stated that she would call Schaffner herself, and she proceeded to lunch. Turner then went to Schaffner's office and was told that Schaffner had spoken to the plaintiff and told her to be in the office in 15 minutes. Turner, Weaver, and Schaffner waited for the plaintiff for 30 to 35 minutes, and when she did not appear, Turner went back to her office. Later that day, Schaffner called Turner and told her that the plaintiff would be terminated for insubordination. The termination letter was drafted without Turner's involvement, but she agreed with the decision and signed the letter. The letter stated that the plaintiff was terminated from employment for insubordination for refusing to meet with Schaffner, Weaver, and Turner to discuss a disciplinary action. Turner called the plaintiff and asked the plaintiff to come up to her office. When the plaintiff refused, Turner called Weaver and security and asked them to escort her to deliver the termination letter to the plaintiff. They proceeded to the plaintiff's office, and Turner gave

the plaintiff the termination letter, and the plaintiff was escorted out of the building (doc. 27-5, Turner grievance hrg. testimony 73-82; doc. 22-2, termination letter).

In support of her response to the motion for summary judgment, the plaintiff submitted the affidavits of two former co-workers: Elise Cromwell and Valerie Bailey (doc. 36-5, Cromwell aff.; doc. 36-6, Bailey aff.).¹ Cromwell, an African-American female who is currently employed by the defendant as a nurse, worked with the plaintiff during 2010-2011, and, in 2013-2014, when she worked in a different unit, she stated that she would talk with the plaintiff during her breaks. Cromwell stated in her affidavit that she was "keenly aware of the Caucasian management's racially hostile and retaliatory animus towards African-American nurses under their supervision and African-Americans in general" and that she herself "was a previous and current victim of the racial hostility and retaliatory animus." She stated that Human Resources did nothing in response to numerous complaints of racial discrimination and harassment by herself and the plaintiff. She stated that, during her visits with the plaintiff, "Nolen would routinely glare at [her] with racial hostility in her eyes and was noticeably discourteous." She also stated that the plaintiff's working environment and desk appeared to be below standards (doc. 36-5, Cromwell aff.).

Bailey, an African-American female who was employed by the defendant for 42 years, stated that she worked in the same department with the plaintiff during 2013-2014 when Bailey was the Ward Secretary/Clerk. She testified that when Nolen became Charge Nurse, Nolen dealt with the plaintiff in a "hostile manner." Bailey further stated that she witnessed the plaintiff make complaints to management "regarding the continuous

¹ The plaintiff also submitted affidavits from community leaders Leonard Riley, Dorothy Scott, and Thomas Dixon, none of whom were ever employed by the defendant (docs. 36-3, 36-4, 36-7). As argued by the defendant (doc. 43 at 3-4), these affidavits largely contain inadmissible hearsay and conclusory statements (see, e.g. 36-7, Dixon aff. ¶ 6) ("She readily recounted to me that her termination from employment was a result of racially discriminatory and retaliatory animus against her on account of her numerous complaints of racial harassment and retaliation on the job."). Accordingly, these affidavits provide no support for the plaintiff's claims. See Fed. R. Civ. P. 56(c)(4) ("An affidavit . . . used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant . . . is competent to testify on the matters stated.").

mistreatment" by Nolen. Nolen instructed Bailey to "keep tabs" on the plaintiff's "comings and going" following the plaintiff's complaints to management. She stated that she witnessed Nolen harass the plaintiff in 2013 by moving her work station. Prior to the plaintiff's termination from employment, the plaintiff asked Bailey to go to a meeting with her and several hospital officials. Bailey stated that the plaintiff appeared fearful of the meeting, which Bailey believed was a result of the continued retaliation against the plaintiff (doc. 36-6, Bailey aff.).

II. APPLICABLE LAW AND ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient

to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Section 1981 Claims

In her first and second causes of action, the plaintiff alleges race discrimination and retaliation under Title 42, United States Code, Section 1981 (doc. 1, comp. ¶¶ 21-34).

1. Section 1983 is Exclusive Remedy

The defendant first argues that the plaintiff's Section 1981 claims should be dismissed because Section 1983 provides the exclusive remedy for such claims made against state actors (doc. 27-1 at 5-6). The plaintiff states in her complaint that the defendant "is an organization with the State of South Carolina" (doc. 1, comp. ¶ 5), but states in her response to the motion for summary judgment that she has not conceded that the defendant "is, in fact, a State Agency" (doc. 36 at 19). Nonetheless, it is clear that the defendant Medical University Hospital Authority ("MUHA") is an agency of the State of South Carolina. See S.C. Code Ann. § 59-123-60 (establishing MUHA as a separate State entity). See also *Chambers v. Med. Univ. Hosp. Authority*, C.A. No. 2:11-261-RMG, 2012 WL 2888802, at *4 (D.S.C. July 13, 2012) (stating defendant MUHA is a state agency); *Stopka v. Med. Univ. of S.C.*, C.A. No. 2:05-1728-CWH, 2007 WL 2022188, at *10 n.18 (D.S.C. July 11, 2007) (stating defendant MUHA is an agency of the State of South Carolina).

The United States Supreme Court has held that "the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units. . . ." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989). Further, the Fourth Circuit Court of Appeals has held, "We do not believe that this aspect of *Jett* was affected by the Civil Rights Act of 1991, which

added subsection (c) to § 1981." *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 156 n. 1 (4th Cir.1995) (citing 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.")).

The plaintiff's argument that *Jett* "simply changes the analysis with respect to the doctrine of *respondeat superior* as it relates to 1981 claims against public Defendants by requiring an analysis similar to that espoused by 42 U.S.C. 1983" is unsupported and meritless (doc. 36 at 11-12). As the Fourth Circuit and this court have held on numerous occasions, "when suit is brought against a state actor, § 1983 is the 'exclusive federal remedy for violation of the rights guaranteed in § 1981.'" *Dennis*, 55 F.3d at 156 (quoting *Jett*, 491 U.S. at 733). See also *Lewis v. Robeson Cty.*, 63 F. App'x 134, 138 (4th Cir. 2003) ("In a suit brought against a state actor, § 1983 is the exclusive federal remedy for a violation of the rights guaranteed in § 1981."); *Farmer v. Ramsay*, 43 F. App'x 547, 553 n. 8 (4th Cir. 2002) (citing *Dennis* and stating that § 1983 is the exclusive remedy for violations of § 1981 by state actors); *Alsharif v. Med. Univ. of S.C.*, C.A. No. 2:14-4438-SB, 2016 WL 270913, at *2 (D.S.C. Jan. 22, 2016) (dismissing § 1981 race discrimination claims against state actor because, under *Jett*, § 1983 was exclusive remedy); *Robinson v. Greenwood Cty.*, C.A. No. 8:10-2192-TMC-KFM, 2011 WL 6257125, at *2 (D.S.C. Nov. 22, 2011), *R&R adopted by* 2011 WL 6217601 (D.S.C. Dec. 14, 2011) (dismissing race and age claims because, under *Jett*, "there is no implied right of action under [§ 1981] against a governmental entity and . . . the express cause of action for damages created by . . . § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units . . .") (internal citations and quotations omitted); *Stokes v. Charleston Cty. Sch. Dist.*, C.A. No. 2:05-2970-DCN, 2007 WL 858864, at *3 (D.S.C. Mar. 16, 2007) (granting summary judgment on § 1981 cause of action because "[w]hen a plaintiff asserts claims against a state actor of violation of federal law, § 1983 provides the

exclusive remedy—even when the plaintiff alleges violation of rights guaranteed by § 1981") (citations omitted). Accordingly, the plaintiff's Section 1981 claims are not cognizable.

In her response to the motion for summary judgment, the plaintiff asks that the court allow her to proceed on her race discrimination and retaliation causes of action "in accordance with *Jett* under the framework of Section 1983" (doc. 36 at 15). However, even recharacterizing the plaintiff's causes of action as arising under Section 1983, such claims fail as a matter of law as discussed below.

2. Eleventh Amendment Immunity

The defendant argues that the Eleventh Amendment bars the plaintiff's claims against it (doc. 27-1 at 6-7). The undersigned agrees to the extent the plaintiff seeks monetary damages against the defendant under Sections 1981 and/or 1983.

Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity, . . . or unless Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity.

Will v. Michigan Dept. of State Police, 491 U.S. 58, 66 (1989) (citation omitted). Eleventh Amendment immunity protects state agencies and state actors sued in their official capacities against claims seeking monetary damages under Section 1983. *Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996). See *Alsharif*, 2016 WL 270913, at *2 (noting that in order for the plaintiff to pursue her § 1981 claims against Medical University of South Carolina ("MUSC") as § 1983 claims, the plaintiff would need to amend her complaint, and MUSC was "not subject to suit for damages" under § 1983). Here, the plaintiff seeks monetary damages, declaratory relief ("declaring the actions complained herein illegal"), and injunctive relief ("issuing an injunction enjoining Defendant . . . from engaging in the unlawful practice shown to be in violation of . . . Section 1981") (doc. 1 at 6-7). "Congress has not overridden the States' immunity with respect to the plaintiff's claims under 42 U.S.C. §§ 1981, 1983 . . . , nor has South Carolina consented to suit in federal court on these . . .

claims." *Martin v. Clemson Univ.*, 654 F. Supp. 2d 410, 428 (D.S.C. 2009). Based upon the foregoing, to the extent the plaintiff seeks monetary damages under Sections 1981 and/or 1983, the claims are barred by the Eleventh Amendment. See, e.g., *Cromer*, 88 F.3d at 1332 (citing *Will*, 491 U.S. at 71 n.10) ("Eleventh Amendment immunity does not protect state officials in their official capacities from § 1983 claims for injunctive relief.").

3. *McDonnell Douglas Analysis*

As discussed above, in a suit against a state actor, Section 1983 is the exclusive federal remedy for a violation of the rights guaranteed under Section 1981. "Thus, a § 1981 claim in effect merges with § 1983, and courts treat the claims as a single claim." *Davis v. Durham Mental Health Dev. Disabilities Substance Abuse Area Auth.*, 320 F. Supp. 2d 378, 403 (M.D.N.C. 2004). "A § 1983 plaintiff alleging § 1981 race discrimination must therefore adequately plead and ultimately prove three elements: (1) the existence of an official policy or custom (2) that is fairly attributable to the [state actor] (3) that proximately caused the underlying § 1981 race discrimination." *Id.* (citation omitted). Alternatively, liability may exist absent a direct "policy or custom" where liability can "be inferred from continued inaction in the face of a known history of widespread constitutional deprivations on the part of . . . employees." *Milligan v. City of Newport News*, 743 F.2d 227, 229–30 (4th Cir.1984). See also *Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir.1987) (noting that a "condoned custom" theory may be offered as an alternative basis for § 1983 liability).

Here, the plaintiff argues that "it is apparent based upon review of the facts in this case" that the defendant "had a practice and *de facto* policy of allowing Caucasian employees to bring witnesses to disciplinary meetings . . ." (doc. 36 at 18). The defendant cites to the affidavit of Elise Cromwell in support of this argument (*id.*). However, Cromwell's affidavit provides no support for the claim that Caucasian employees were allowed to bring witnesses to disciplinary meetings, as this issue is not addressed in the affidavit (see doc. 36-5, Cromwell aff.). Dorothy Scott, who was never employed by the defendant, states in her affidavit that the plaintiff contacted her for assistance in her capacity

as President of the Charleston Branch of the NAACP, and, during her involvement with the plaintiff's employment matter, "it was revealed that a Caucasian female was authorized to bring a witness to a meeting with a supervisor whereas, Ms. Nelson, who is African-America[n] was not authorized to do so under similar circumstances" (doc. 36-4, Scott aff. ¶ 6). As argued by the defendant, this statement is hearsay and does not contain any specific facts in support of the claim. Moreover, during her deposition, the plaintiff testified she knew of no other employee of the defendant who was authorized to record or bring a representative to a meeting with Schaffner:

Q. Do you have any examples where Marilyn, Sharon and Karen had a meeting with a white employee and allowed a witness?

A. Not in that instance, no.

Q. Do you have an example where Marilyn, Sharon and Karen had a meeting with a white employee and allowed that white employee to tape-record the conversation?

A. Not that I know of.

(Doc. 25-3, pl. dep. 89; see also *id.* 87-88; doc. 25-3, pl. dep. 112-13; doc. 26-1, pl. dep. 114).

The plaintiff further argues that the defendant "had a practice and *de facto* policy of . . . retaliating against Blacks who complained" and cites to Cromwell's affidavit in support (doc. 36 at 18). Cromwell states in her affidavit that the plaintiff "worked in an environment where any complaints of race discrimination were dealt with hostility and retaliatorily by Management to include . . . Weaver, . . . , Schaffner . . . , and Helena Bastian (WF), HR Manager" (doc. 36-5, Cromwell aff. ¶ 6). However, Cromwell provides no specific facts to support this conclusory claim; rather, she states, "I know this because that is how my complaints of race discrimination and retaliation were dealt with during my tenure at the Preoperative Clinic/Procedure Center and during the time periods when I personally worked with [the plaintiff]" (*id.*). As argued by the defendant (doc. 43 at 5), Cromwell did not work

in the same location as the plaintiff during the relevant time period, and her affidavit contains no pertinent facts related to the termination of the plaintiff's employment, nor does it dispute that the plaintiff refused to attend the required meeting with her supervisors.

Based upon the foregoing, the plaintiff has failed to raise an issue of material fact as to the existence of a policy or custom that is fairly attributable to the defendant that proximately caused the alleged underlying race discrimination and/or retaliation. Furthermore, as discussed below, the plaintiff cannot show that the reason given for her termination from employment² was pretext for race discrimination and/or retaliation.

The standards for liability under Section 1981 and Title VII are identical. *Bryant v. Aiken Regional Med. Ctrs., Inc.*, 333 F.3d 536, 545, n.3 (4th Cir. 2002). "A plaintiff asserting a claim of unlawful employment discrimination may proceed through two avenues of proof." *Addison v. CMH Homes, Inc.*, 47 F. Supp. 3d 404, 416 (D.S.C. 2014). First, a plaintiff may establish his/her claims through direct evidence of the alleged discrimination. *Id.* (citation omitted). "Such proof includes 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'" *Id.* at 416-17 (quoting *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir.1995)). "Absent direct evidence of intentional discrimination, Title VII and Section 1981 claims are analyzed under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973)." *Shun-Lung Chao v. Int'l Bus. Machs. Corp.*, 424 F. App'x 259, 260 (4th Cir. 2011) (citation omitted). In their briefs, both parties analyze the

² In her complaint, the plaintiff alleges that the defendant discriminated and retaliated against her by disciplining her for false reasons and terminating her employment (doc. 1, comp.). However, in her response to the motion for summary judgment, the plaintiff does not discuss any particular write-ups or other discipline that were allegedly discriminatory or retaliatory. Rather, the plaintiff focuses on her termination from employment (see generally doc. 36). As the plaintiff notes, she "was allegedly terminated not for any job performance issues, but rather under the auspices of alleged insubordination" (*id.* at 20). Accordingly, as the parties have done, the undersigned has analyzed the plaintiff's claims as discharge claims.

plaintiff's race discrimination and retaliation claims under the *McDonnell Douglas* framework (doc. 27-1 at 8-21; doc. 36 at 19-27).³

To establish a *prima facie* case of disparate treatment, a plaintiff must show: (1) she is a member of a protected class; (2) she was performing her job satisfactorily; (3) she suffered an adverse employment action; and (4) similarly situated employees outside the protected class received more favorable treatment, she was replaced (in the case of a discharge claim) by someone from outside of her protected class, or there is some other evidence giving rise to an inference of unlawful discrimination. *Chambers v. Med. Univ. Hosp. Auth.*, C.A. No. 2:11-cv-261-RMG, 2012 WL 2888802, at *4 (D.S.C. July 13, 2012). Here, the defendant only disputes the second element, that the plaintiff was performing her job satisfactorily (doc. 27-1 at 9-11).

To establish a *prima facie* case of retaliation, a plaintiff must show: (1) engagement in a protected activity; (2) adverse employment action; and (3) a causal link between the protected activity and the employment action. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015) (citation omitted). The defendant argues that the plaintiff cannot meet the first and third elements of a *prima facie* case of retaliation.

If the plaintiff can establish a *prima facie* case, the burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions against the plaintiff. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981) (this is a burden of production, not persuasion). If the defendant meets this burden, the plaintiff must show by a preponderance of the evidence that the proffered reason was a pretext for discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). "[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Id.* at 148. However, "if the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only

³ The plaintiff has not presented direct evidence of race discrimination or retaliation.

a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred," summary judgment is appropriate. *Id.* Accordingly, the court must evaluate "the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id.* at 148-49. "Notwithstanding the intricacies of proof schemes, the core of every [discrimination] case remains the same, necessitating resolution of the ultimate question of . . . whether the plaintiff was the victim of intentional discrimination." *Merritt v. Old Dominion Freight*, 601 F.3d 289, 294-95 (4th Cir. 2010) (citations omitted).

The undersigned will assume for purposes of this motion that the plaintiff can show that she was performing her job satisfactorily and thus can meet a *prima facie* case of disparate treatment. Likewise, the undersigned will assume for purposes of this motion that the plaintiff can establish a *prima facie* case of retaliation. The defendant has produced a legitimate, nondiscriminatory reason for terminating the plaintiff's employment: insubordination for her failure to attend the meeting with her supervisors as she was instructed to do. Accordingly, the plaintiff must show by a preponderance of the evidence that the proffered reason was a pretext for racial discrimination and/or retaliation. As the undersigned finds that the plaintiff has not provided sufficient evidence to meet this burden, summary judgment is appropriate on both causes of action.

The plaintiff argues as follows:

Specifically with respect to the at issue meeting with Schaffner, there is no testimony that Ms. Nelson explicitly refused to attend the meeting. Ms. Nelson simply requested that she receive the same treatment as her Caucasian colleagues in connection with the option to bring a witness to the meeting in light of the continued unlawful treatment that she had received at the direction of these very same Managers. Ms. Nelson was not disrespectful or out of line, rather it was Schaffner who demonstrated her racial hostility and retaliatory animus towards Ms. Nelson by hanging the telephone up in her face after Ms. Nelson's request. Ms. Nelson, having not received authorization

to participate in the meeting on equal terms as her similarly situated coworkers, had every justification to question the motivations and hostile intent behind this meeting. (Ex.4: Affidavit of Elise Cromwell, Ex.3: Affidavit of Dorothy Scott, Ex. 1: Nelson Deposition Excerpts at pg.70).

(Doc. 36 at 21). The problem with the plaintiff's argument is that she has presented nothing more than her own subjective belief and conclusory statements in support of her allegation that she was treated differently because of her race or in retaliation for her complaints of mistreatment by Nolen. While the plaintiff repeatedly states in her response to the motion for summary judgment that Caucasians were allowed to bring a witness or to tape record meetings with a supervisor, she has failed to identify any such employee or former employee of the defendant (see doc. 25-3, pl. dep. 88-89; doc. 25-3, pl. dep. 112-13; doc. 26-1, pl. dep. 114). Further, she has failed to identify any Caucasian employee or former employee of the defendant who refused to meet with a supervisor when instructed to do so and was treated more favorably than she was (doc. 25-3, pl. dep. 89-94). Such general allegations do not suffice to establish an actionable claim of disparate treatment based upon race. *Carter v. Ball*, 33 F.3d 450, 461 (4th Cir. 1994) (citation omitted) ("Roberts' testimony that Lt. Campbell generally reprimanded Carter publicly but spoke with Carter's white co-workers in private is not substantiated by accounts of specific dates, times or circumstances. Such general allegations do not suffice to establish an actionable claim of harassment."). As noted above, the affidavits of Cromwell and Scott, which are cited by the plaintiff in support of her claims, are likewise insufficient; Cromwell does not address this issue in her affidavit (see doc. 36-5, Cromwell aff.), and, while Scott states in her affidavit that "it was revealed that a Caucasian female was authorized to bring a witness to a meeting with a supervisor whereas, Ms. Nelson, who is African-America[n] was not authorized to do so under similar circumstances" (doc. 36-4, Scott aff. ¶ 6), this statement is hearsay and does not contain any specific facts supportive of the plaintiff's claim.

The plaintiff further argues (doc. 36 at 24-25) that the defendant's "true motivations . . . purely based on unlawful racially discriminatory and retaliatory motives" is

evidenced by the affidavit of Cromwell, who testified that Nolen "would routinely glare at [her] with racial hostility in her eyes and was noticeably discourteous" (doc. 36-5, Nolen aff. ¶ 8). The plaintiff also cites the affidavit of Bailey, who testified that "Nolen dealt with [the plaintiff] in a hostile manner" and "[f]rom [her] direct observations and interactions with Nolen, it was clear that this [instruction to keep tabs on the plaintiff] was motivated by retaliatory animus towards [the plaintiff]" (doc. 36-6, Bailey aff. ¶¶ 5, 8). These conclusory statements, without specific evidentiary support, do not support a claim for discrimination or retaliation. *See Causey v. Balog*, 162 F.3d 795, 801-802 (4th Cir. 1998) (citation omitted) ("Causey made conclusory statements that Montgomery treated him less favorably than younger black and white employees of similar rank. Causey's conclusory statements, without specific evidentiary support, cannot support an actionable claim for harassment.").

Even assuming that these conclusory, subjective statements are evidence of Nolen's racial or retaliatory animus, Nolen did not terminate the plaintiff's employment nor did she even decide to discipline the plaintiff. The undisputed testimony of Turner, who is African-American, is that *she* decided "to do a disciplinary on [the plaintiff]," and Weaver and Schaffner told her that they both wanted to be in the meeting when Turner was to give the plaintiff the disciplinary letter Turner had drafted (doc. 27-5, Turner dep. 72-73). *See Ferguson v. Waffle House, Inc.*, 18 F. Supp. 3d 705, 711 (D.S.C. 2014) (stating that "fact that some of the individuals who allegedly discriminated against the plaintiff are the same race as the plaintiff . . . is a relevant consideration in light of all of the evidence, and when, as here, the record contains no evidence of intentional discrimination other than the plaintiff's conclusory statements").

Further, the decision to terminate the plaintiff's employment for failure to attend the meeting was made by Schaffner (doc. 27-5, Turner dep. 78-79). The plaintiff cites Cromwell's affidavit in support of her argument that "Schaffner is a racist . . . who exhibited retaliatory and racist animus towards . . . Cromwell and [the plaintiff] in the past" (doc. 36 at 25). In her affidavit, however, Cromwell mentions Schaffner by name only once,

stating, "[The plaintiff] worked in an environment where any complaints of race discrimination were dealt with hostilely and retaliatorily by Management to include . . . Schaffner" (doc. 36-5, Cromwell aff. ¶ 6). Again, such a conclusory statement with no specific evidentiary support is insufficient to create an issue of fact that the conduct the plaintiff complains of was based on racial or retaliatory animus. See *Causey*, 162 F.3d at 802.

The plaintiff cites her own deposition testimony in support of her argument that she suffered "hostility . . . at the hands of Nolen and Schaffner due to her race and on account of [the defendant's] retaliatory animus towards her" (doc. 36 at 25) (citing doc. 36-2, pl. dep. 48, 68-69, 76). However, in the cited testimony, the plaintiff's only reference to Schaffner is to recount their conversation on February 27, 2014, when Schaffner instructed the plaintiff to be at the meeting in ten minutes and, when the plaintiff repeated her request for a witness or to tape record the meeting, Schaffner again told her to be at the meeting in ten minutes and then hung up the telephone (doc. 36-2, pl. dep. 68-69). The plaintiff attempts to argue that her failure to attend the meeting with her supervisors was justified by "the confusion which Ms. Schaffner caused by hanging up the phone in [the plaintiff's] face in violation of Defendant's own policies"⁴ (doc. 36 at 21; see also *id.* at 23, "[The plaintiff's] confusion regarding the meeting and what she was or was not allowed to do was never clarified by Schaffner due to Schaffner's direct and open racial and retaliatory animus towards [the plaintiff]."). This argument is unavailing. The plaintiff has provided absolutely no evidence that she was "confused" about whether or not she was required to attend the meeting with her supervisors. The plaintiff testified that Turner specifically told her that she "had to go to the meeting," and she asked Bailey to be her witness at the meeting. After her

⁴ The plaintiff references her Exhibit 7 in support of the allegation that Schaffner violated the defendant's own policies in hanging up the telephone (doc. 36 at 21-22). The plaintiff does not state which policy Schaffner allegedly violated. Assuming that the plaintiff is referring to the Standards for Professional Behavior (see doc. 36-8 at 12-15), she has failed to show that any alleged lack of professionalism demonstrated by Schaffner in hanging up the telephone was motivated by discriminatory or retaliatory animus or that such alleged conduct creates any issue of material fact as to her race or retaliation claims.

conversation with Schaffner, she went to lunch with Bailey, and she told Bailey that they "weren't going" (doc. 26-4, pl. dep. 245-47). Moreover, she testified that after she returned from lunch on February 27th, Turner called her and asked her if she was going to meet with them (doc. 36-2 at 69). The plaintiff replied that she would if she could tape record the conversation or bring a witness, and Turner "said no" and hung up the telephone (*id.* at 70). There is no genuine issue of material fact as to whether the plaintiff was aware that she was expected to attend the meeting and that she could not tape record the meeting or bring a witness. As discussed above, the plaintiff has provided no evidence that a Caucasian employee was treated more favorably in such a situation or that the decision to terminate her employment was based upon anything other than her failure to attend the meeting as she was specifically instructed to do.

In a similar case in this district, the court stated:

Plaintiff does not dispute that . . . he refused to accept the assignment as Unit Manager at the Garden City restaurant; . . . and it goes without saying that refusing to follow your boss's instructions is a way for an employee to get themselves fired. While Plaintiff contends that he was justified in refusing this assignment, and that his resulting termination was an act of discrimination and/or retaliation; . . . even if the Court were to assume for purposes of summary judgment that the evidence is sufficient to create an issue of fact as to whether Plaintiff was adequately performing his job at the time he was discharged, he has provided no evidence to show that he was subjected to any disciplinary action or was discharged because of his race.

Ferguson, 18 F. Supp. 3d at 720–21. Similarly, here, the plaintiff has failed to present evidence tending to show that the defendant's decision to terminate her employment was in any way related to her race or in retaliation for previous complaints. Accordingly, summary judgment should be granted on the plaintiff's race discrimination and retaliation causes of action.

C. Breach of Contract Claims

In her third and fourth causes of action, the plaintiff alleges state law claims for breach of contract and breach of contract with fraudulent intent (doc. 1, comp. ¶¶ 35-46).

She alleges that the defendant's employee handbook contains anti-discrimination and anti-retaliation policies that constitute an employment contract that the defendant breached (*id.* ¶¶ 37-42).

South Carolina has long recognized the doctrine of employment at-will. See, e.g., *Mathis v. Brown & Brown of S.C., Inc.*, 698 S.E.2d 773, 778 (S.C. 2010). Generally, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. *Stiles v. Am. Gen. Life Ins. Co.*, 516 S.E.2d 449, 450 (S.C. 1999) (citation omitted). "Of course, an employer and employee may choose to contractually alter the general rule of employment at-will and restrict their freedom to discharge without cause or to resign with impunity." *Prescott v. Farmers Tel. Co-op., Inc.*, 516 S.E.2d 923, 925 (S.C. 1999) (citation omitted). "An employee handbook *may* create a contract altering an at-will arrangement." *Brailsford v. Fresenius Med. Ctr. CNA Kidney Ctrs. LLC*, C.A. No. 2:15-cv-4012-DCN, 2017 WL 1214337, at *6 (D.S.C. Apr. 3, 2017) (emphasis added in *Brailsford*) (quoting *Nelson v. Charleston Cnty. Parks & Recreation Comm'n*, 605 S.E.2d 744, 747 (S.C. Ct. App. 2004)). "A handbook forms an employment contract when: '(1) the handbook provision(s) and procedure(s) in question apply to the employee, (2) the handbook sets out procedures binding on the employer, and (3) the handbook does not contain a conspicuous and appropriate disclaimer.'" *Id.* (quoting *Grant v. Mount Vernon Mills, Inc.*, 634 S.E.2d 15, 20 (S.C. Ct. App. 2006)). "In order for a handbook to alter an employee's at-will status and create an employment contract, the employer must 'phrase the document's language in mandatory terms giving rise to a promise, an expectation and a benefit to an employee.'" *Id.* (quoting *Nelson*, 605 S.E.2d at 747). "Such language must be 'definitive in nature, promising specific treatment in specific situations.'" *Id.* (quoting *Hessenthaler v. Tri-Cnty. Sister Help, Inc.*, 616 S.E.2d 694, 698 (S.C. 2005)). "'When definite and mandatory, [such] procedures impose a limitation on the employer's right to terminate an employee at any time, for any reason.'" *Id.* (quoting *Grant*, 634 S.E.2d at 20).

The defendant states that it does not have a physical handbook but that instead the policies applicable to its employees are provided on an intranet site (doc. 27-1 at 21 n. 43). The plaintiff does not appear to dispute this statement. The defendant argues that its policies do not create an express or implied employment contract because each policy contains a conspicuous disclaimer (doc. 27-1 at 21-23). The South Carolina Code provides as follows:

It is the public policy of this State that a handbook, personnel manual, policy, procedure, or other document issued by an employer or its agent after June 30, 2004, shall not create an express or implied contract of employment if it is conspicuously disclaimed. For purposes of this section, a disclaimer in a handbook or personnel manual must be in underlined capital letters on the first page of the document and signed by the employee. *For all other documents referenced in this section, the disclaimer must be in underlined capital letters on the first page of the document.* Whether or not a disclaimer is conspicuous is a question of law.

S.C. Code Ann. § 41-1-110 (emphasis added).

In response to the motion for summary judgment, the plaintiff generally refers to the documents contained in her Exhibit 7 and states that "some of these documents have disclaimers on them, while others do not" (doc. 36 at 33). The plaintiff's Exhibit 7 contains three of the defendant's policies: Standards of Behavior, Disciplinary Actions, and Standards of Professional Behavior (doc. 36-8 at 5-15). Each of those policies has a disclaimer on the first page that conforms with the requirements of Section 41-1-110 "for all other documents":

THIS POLICY, LIKE ALL OTHER POLICIES WITHIN THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY HUMAN RESOURCES POLICY MANUAL, IS NOT A CONTRACT OF EMPLOYMENT AND SHOULD NOT BE RELIED UPON AS SUCH. THIS POLICY MAY BE CHANGED AT ANY TIME BY THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY.

(*Id.* at 5, 9, 12). Accordingly, the disclaimers in these policies are conspicuous as a matter of law. Moreover, none of the provisions cited by the plaintiff "impose a limitation on the

employer's right to terminate an employee at any time, for any reason." *Brailsford*, 2015 WL 4459032, at *4 (citing *Grant*, 634 S.E.2d at 20).

The other three documents in the exhibit are identified by the plaintiff as "training documents [that] the Defendant has provided to [the plaintiff]" (doc. 36 at 33). The plaintiff argues that these documents are "devoid of any such disclaimers and such documentation provides integral insight into the training environment and how these contractual documents were viewed by both the Defendant and its employees" (*id.*). The defendant states that the three documents are PowerPoint slides, which are not part of its policies, and further notes that the plaintiff provided the documents to the defendant during discovery (doc. 43 at 7). The documents consist of the following: "Lesson Objectives" for understanding harassment, a "Zero Tolerance" statement that the defendant does not tolerate any form of harassment or intimidation based upon protected categories or protected activity in the workplace, and a definition of harassment (doc. 36-8 at 2-4).

Assuming that the three PowerPoint slides are policies of the defendant, courts have found that typical anti-discrimination and anti-retaliation policies are insufficient to form a contract of employment. See *Brailsford*, 2017 WL 1214337, at *8 (dismissing claim for breach of anti-retaliation policy) (citing *Frasier v. Verizon Wireless*, C.A. No. 8:08-cv-356-HMH, 2008 WL 724037, at *2 (D.S.C. Mar.17, 2008) ("The Defendant's promises that 'everyone should feel comfortable to speak his or her mind' and that '[defendant] prohibits retaliation against employees who, in good faith, submit or participate in the investigation of any complaints' 'do[] not create an expectation that employment is guaranteed or that a particular process must be complied with before an employee is terminated.' "); *King v. Marriott Int'l, Inc.*, 520 F. Supp. 2d 748, 756 (D.S.C. 2007) (finding that employer's promise "that 'there will be no discrimination or recrimination' against an employee who asserts a complaint against the Company" was insufficient to alter the employee's at-will employment status)). See also *Hessenthaler*, 616 S.E.2d at 698 ("Unlike

a mandatory, progressive discipline procedure, a general policy statement of nondiscrimination does not create an expectation that employment is guaranteed for any specific duration or that a particular process must be followed before an employee may be fired.").

Based upon the foregoing, the defendant is entitled to summary judgment on the plaintiff's state law causes of action for breach of contract and breach of contract with fraudulent intent. Alternatively, should the district court dismiss the plaintiff's federal claims, the district court should decline to exercise supplemental jurisdiction over the plaintiff's state law claims. 28 U.S.C. § 1367(c)(3) ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction . . ."). See *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

III. CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the defendant's motion for summary judgment (doc. 27) should be granted.⁵

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

April 18, 2018
Greenville, South Carolina

⁵ The defendant also argues the following alternative grounds for summary judgment: the plaintiff's claims of retaliation and discrimination prior to January 20, 2014, are time-barred, the plaintiff's claims are barred by the doctrine of *res judicata*, the plaintiff should be judicially estopped from pursuing this action because she failed to disclose her claims to the bankruptcy court in her Chapter 13 bankruptcy action, and the plaintiff's claims for punitive and/or exemplary damages are barred (doc. 27-1 at 7-8, 28-33). As the undersigned has recommended that summary judgment be granted on all causes of action as set forth above, these alternative grounds are not addressed herein.

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LABOR AND EMPLOYMENT DEFENSE

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FACSIMILE: (843) 577-6672

November 26, 2018

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed is one original and one copy of Memorandum in Support of Defendants' Motion to Dismiss, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our attention using the enclosed envelope provided.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

EJF/lmp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON)

CASE NO.: 2018-CP-10-2580

Elise Cromwell)

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff,)

vs.)

Medical University of South Carolina, et al.)

Defendant.)

Plaintiff's Attorney:

Bob J. Conley, Bar No. 12243

Address:

Cleveland & Conley, LLC

171 Church St., Ste. 310, Charleston, SC
29401

Phone: 843-577-9616 Fax 843 577-6672

E-mail: bconley@clevelandlaborlaw.com

Other: _____

Defendant's Attorney:

Donald Gist, Bar No. 13098

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Gist Law Firm, P.A., P.O. Box 30007, Columbia,
SC 29203

Phone: 803-771-8007 Fax 803-771-0063

E-mail: donaldgist.gistlawfirm@gmail.com

Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Order

Estimated Time Needed: 1 hour

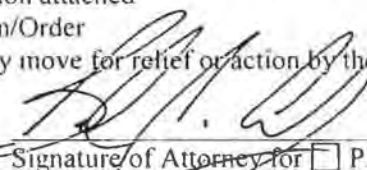
Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff/☒ Defendant

1-8-19

Date submitted

SECTION III: Motion Fee

☒ PAID - AMOUNT: \$ _____

☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elise Cromwell

Plaintiff,

vs.

Medical University of South Carolina, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-2580

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

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Defendant's Attorney:

Donald Gist, Bar No. 13098

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SC 29203

Phone: 803-771-8007 Fax 803-771-0063

E-mail: donaldgist.gistlawfirm@gmail.com

Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)**SECTION I: Hearing Information**

Nature of Motion: Motion to Alter or Amend Order

Estimated Time Needed: 1 hour

Court Reporter Needed: ☒ YES / ☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

1-8-19

Date submitted

SECTION III: Motion Fee☒ **PAID – AMOUNT: \$** _____☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☐ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached
order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____☐ **CONTESTED – AMOUNT DUE: \$** _____

) IN THE COURT OF COMMON PLEAS

) FOR THE NINTH JUDICIAL CIRCUIT

) CASE NO.: 2018-CP-10-2580

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**MOTION TO ALTER OR
AMEND ORDER**

2009 JAN -8 PM 2:14
CLERK COUNTY

Defendants Medical University of South Carolina (“MUSC”) and Medical University Hospital Authority (“MUHA”), pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, move for an order amending and/or altering the Court’s Order dated December 19, 2018, and entered by the Clerk of Court on December 28, 2018 (the “Order”).¹ Defendants received written notice of entry of the Order on Monday, December 31, 2018.

STATEMENT OF THE CASE

Plaintiff Elise Cromwell (“Cromwell”) filed a Complaint against MUHA and MUSC (collectively “Defendants”) on May 21, 2018. Cromwell asserts two causes of action against MUHA and MUSC: 1) breach of contract; and, 2) breach of contract with fraudulent intent. On July 11, 2018, Defendants filed their Motion to Dismiss (the “Motion”) on the following grounds: 1) Cromwell failed to properly serve either Defendant with the Summons and Complaint, subjecting her Complaint to dismissal pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure (“SCRCP”); and, 2) Cromwell’s claims, as alleged in her Complaint, fail to state

¹ Exhibit A.

a claim on which relief can be granted pursuant to Rule 12(b)(6), SCRCPP. On November 20, 2018, Cromwell provided her Memorandum in Opposition to Defendants' Motion to the Court.² Thereafter, on November 29, 2018, Defendants filed their memorandum of law in support of the Motion.

On November 29, 2018, the Court held a hearing regarding the Motion. Thereafter, the Court issued the Order on December 19, 2018.

LEGAL STANDARD

South Carolina Rule of Civil Procedure 52(b) allows a party "not later than 10 days after receipt of written notice of entry of judgment" to request that the court "amend its findings or make additional findings and may amend the judgment accordingly" Rule 52(b), SCRCPP, further requires "[a] party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after filing the motion." Correspondingly, and similarly, South Carolina Rule of Civil Procedure 59(e) allows a party to request a court alter or amend a judgment within ten days of receiving the written notice of entry of an order.

LEGAL ARGUMENTS

A. The Order Fails to Dismiss All Causes of Action as to MUSC

Cromwell, in her Memorandum in Opposition, states (i.e. concedes) the following: "As Defendant has represented that Plaintiff was never an employee of Defendant Medical University of South Carolina, **Plaintiff voluntarily withdraws her causes of action against the Medical**

² Exhibit B. Although Cromwell provided her Memorandum in Opposition to the Court, she never filed it, including at the time of this Motion. Additionally, Cromwell never filed the exhibits referenced in her Memorandum, and Cromwell never filed, or otherwise submitted, any proof she provided the Summons and Complaint to the South Carolina Attorney General.

University [of South Carolina]”³³ (emphasis added.) Correspondingly, at the hearing on November 29, 2018, Cromwell’s counsel confirmed the withdrawal (i.e. dismissal) of Cromwell’s claims and causes of action as to MUSC.

Despite Cromwell conceding her claims as to MUSC are not viable and, therefore, subject to dismissal, the Order *denies* dismissal of Cromwell’s claims and causes of action as to MUSC. In this respect, the Order is in error and is in direct contradiction to Cromwell’s concessions. Consequently, the Court should alter and/or amend the Order to reflect **all** Cromwell’s claims and causes of action as to **MUSC** are dismissed, without prejudice.

B. The Order Fails to Dismiss the Cause of Action for Breach of Contract with Fraudulent Intent as to All Defendants

Cromwell, in her Memorandum in Opposition, states (i.e. concedes) the following: “As Defendant has represented its status as a governmental entity, **Plaintiff voluntarily withdraws her claims for breach of contract with fraudulent intent.**”³⁴ (emphasis added.) Correspondingly, at the hearing on November 29, 2018, Cromwell’s counsel confirmed the withdrawal (i.e. dismissal) of Cromwell’s cause of action alleging breach of contract with fraudulent intent as to **both** Defendants.

Despite Cromwell conceding her claim as to both Defendants is not viable, and therefore subject to dismissal, the Order *denies* dismissal of Cromwell’s cause of action alleging breach of contract with fraudulent intent as to **both** Defendants. In this respect, the Order is in error and is in direct contradiction to Cromwell’s concessions. Consequently, the Court should alter and/or amend the Order to reflect Cromwell’s cause of action for breach of contract with fraudulent intent is dismissed as to **both** Defendants, without prejudice.

³³ Exhibit B, P. 2.

³⁴ Exhibit B, P. 2.

C. **Cromwell Failed to Properly Serve the Summons and Complaint and, Therefore, the Court Lacks Personal Jurisdiction Over MUHA**

Rule 12(b)(5), SCRCP, requires the dismissal of a complaint when service of the summons and complaint are not properly served on a defendant. Correspondingly, Rule 4(d)(5) and (j), SCRCP, allow for service on agencies of the State of South Carolina, including both Defendants in this matter, in only two manners: **personal service** “by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia” or, in the alternative, valid acceptance of service. (emphasis added.) A state agency, such as MUHA, *cannot* be served by certified mail. See Rule 4(d)(1), (2) and (3), SCRCP, and Rule 4(d)(8), SCRCP. Cromwell served MUHA by certified mail only.⁵ For this reason, Cromwell’s service of the Summons and Complaint on MUHA is patently insufficient and, therefore, the Court lacks personal jurisdiction over MUHA.

Rule 4, SCRCP, does not allow Cromwell to serve MUHA, an agency of the State of South Carolina, by certified mail. While Rule 4(d)(8), SCRCP, does allow service upon specific classes of parties by certified mail, the Rule does not allow for such service on MUHA. To the contrary, other than acceptance of service, Rule 4(d)(5), SCRCP, allows only one form of service on MUHA: “by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.” (emphasis added.)⁶

⁵ Cromwell neither filed nor otherwise provided proof of service to the Court, including proof she served the Summons and Complaint in any manner other than by certified mail. Moreover, Cromwell filed no proof of service upon the South Carolina Attorney General.

⁶ Cromwell does not contend MUHA accepted service of the Summons and Complaint.

Even if Rule 4 did allow Cromwell to serve MUHA by certified mail, Cromwell's attempted service fails because she did not send "a copy of the summon and complaint by registered or certified mail to the Attorney General at Columbia." Rule 4 expressly, by use of the word "and," requires Cromwell provide this Court with proof of proper service on MUHA and proof she sent "a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia." The use and inclusion of "and" in Rule 4(d)(5), not "or" or "may" by way of example, shows the Rule requires Cromwell meet both requirements to affect proper service on MUHA. In denying MUHA's Motion to Dismiss, the Court, essentially, rewrites the Rule and/or ignores the use of the word "and" in the Rule.⁷ The Court's Order in respect to this issue constitutes error.

"The primary purpose in interpreting statutes [court rules] is to ascertain and effectuate the intent of the legislature." *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E. 2d 465, 468 (2010) (citing *Cain v. Nationwide Prop. and Cas. Ins. Co.*, 378 S.C. 25, 29, 661 S.E.2d 349, 351 (2008)). "Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute [or court rule]." *Id.* (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Applying the well-recognized rules of construction, Rule 4(d)(5) requires

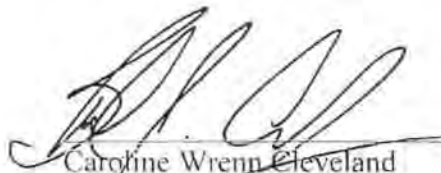
⁷ Although the requirements for Rule 4(d)(5), SCRCp, have not been reviewed or examined by South Carolina appellate courts, courts in other jurisdictions reviewed similar rules and conclude "and" requires service on both the state entity and the state attorney general. *See e.g., State, Dep't of Corr. v. Kila, Inc.*, 884 P.2d 661, 661 (Alaska 1994) (voiding default judgment based on insufficient service of process); *Haney v. Cribbs*, 2006 WY 158, 148 P.3d 1118 (Wyo. 2006) (statute required that service of the complaint upon the Attorney General be made by registered mail, statute also provided that such service was a jurisdictional requirement in order to maintain the suit, and jurisdictional standards could not be surmounted by logic or reason.)

Cromwell, in addition to serving MUHA, send "a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia."

Cromwell has not complied with Rule 4(d)(5). Moreover, Cromwell did not supply the Court with proof she fully complied with Rule 4(d)(5). In summary, Cromwell did not properly affect service upon MUHA and, therefore, Cromwell's Complaint should be dismissed pursuant to Rule 12(b)(5) for insufficiency of service of process and resulting lack of personal jurisdiction.

CONCLUSION

For the reasons discussed above, Defendants respectfully request the Court alter and/or amend the Order.



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ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
January 8, 2019

2018-CP-10-2580

CERTIFICATE OF SERVICE

This is to certify that I have this 8th day of January 2019, caused to be served a copy of Defendants' Motion to Alter or Amend on all counsel by depositing in the mail and addressed to:

Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203

Loretta M. Plitnick
Loretta M. Plitnick
Paralegal

January 8, 2019

2019 JAN -8 PM 2:15
CLERK OF COURT

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-10-02580

Elise A Cromwell

Medical University of South Carolina
Hospital Authority

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Viewing the facts and evidence in light most favorable to the nonmoving party, Defendant's Motion to Dismiss is DENIED on both grounds.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

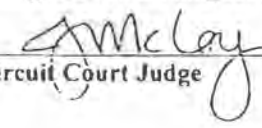
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Circuit Court Judge

2764
Judge Code

12/19/18
Date

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE TENTH JUDICIAL CIRCUIT
	)	
Elise Cromwell	)	
	)	
Plaintiff,	)	
	)	CASE NO.: 2018-CP-10-2580
	)	
vs.	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANTS'
	)	MOTION TO DISMISS
	)	
The Medical University of South Carolina	)	
and Medical University Hospital Authority	)	
	)	
Defendant,	)	
	)	

Plaintiff, Elise Cromwell, by and through his undersigned attorneys respectfully submits this Memorandum of Law in Opposition to Defendants' Motion to Dismiss Plaintiff's causes of action in this lawsuit arising out of Plaintiff's employment with Defendants. Plaintiff asserts two causes of action against Defendants: 1.) breach of contract and 2.) breach of contract with fraudulent intent. The issues raised in Plaintiff's Complaint are properly pled giving rise to jurisdiction in this Court and fully stating a claim upon which relief may be granted. As a result, Defendants' Motion to Dismiss must be denied.

I. STANDARD FOR MOTIONS TO DISMISS

"A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir.1992) (citing 5A C. Wright & A. Miller, Fed. Practice and Procedure § 1356 (1990)). "A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be

proved in support of [the subject] claim.” *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 328 (4th Cir.1996) (en banc) (citing *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir.1989)). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must assume all of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiff, and must view the allegations in a light most favorable to the plaintiff. See *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir.1999). Finally, in rendering its decision, the Court should consider only the allegations contained in the complaint, the exhibits to the complaint, matters of public record, and other similar materials that are subject to judicial notice. See *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir.1995).

II. FACTS

Plaintiff relies solely upon the facts in her Complaint as this is a Motion to Dismiss as oppose to an evidentiary Motion.

III. LEGAL ARGUMENT

1. Plaintiff voluntarily withdraws her claim for Breach of Contract with Fraudulent Intent.

As Defendant has represented its status as a governmental entity, Plaintiff voluntarily withdraws her claims for breach of contract with fraudulent intent.

2. Plaintiff voluntarily dismisses Defendant Medical University of South Carolina based upon Defendant’s representation that Defendant Medical University of South Carolina was, at no time, Plaintiff’s employer.

As Defendant has represented that Plaintiff was never an employee of Defendant Medical University of South Carolina, Plaintiff voluntarily withdraws her causes of action against the Medical University but not against Defendant Medical University Hospital Authority.

3. **Plaintiff's Complaint states facts sufficient to state a breach of contract claim against Defendant Medical University Hospital Authority and Plaintiff has alleged the existence of a legally viable contract which satisfies the statute of frauds.**

General contract law provides that a "contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct.App.1993), quoting *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984). A contract may arise from oral or written words or by conduct. *Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 245 S.E.2d 598 (1978).

In the employment context, South Carolina Courts have already recognized that a contract altering the at-will arrangement may arise, in part, from the oral or written statement of the employer. A contract may arise from actual agreement of the parties manifested by words, oral or written, or by conduct. *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 335, 516 S.E.2d 923, 926 (1999) (emphasis added); *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct.App.2003).

In order to prove the existence of a definite contract of employment, the employee must establish all of the elements of a contract. Most employment agreements are unilateral. *Small v. Springs Industries, Inc.*, supra. A unilateral contract has the following three elements: 1) a specific offer, 2) communication of the offer to the employee, and 3) performance of job duties in reliance on the offer. 82 Am.Jur.2d Wrongful Discharge § 84 (1992). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his

assent to that bargain is invited and will conclude it." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 24 (1981). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 29 (1981). "Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act ... amounts to an offer." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting *Broadway v. Jeffers*, 185 S.C. 523, 530-31, 194 S.E. 642, 645 (1938). To be binding, an offer must be definite. In addition, it must "be one which is intended of itself to create legal relations on acceptance." *McLaurin v. Hamer*, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932).

In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. *108 *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 224, 516 S.E.2d 449, 450 (1999). But when an employee's at-will status has been altered by the terms of an employee handbook, an employee, when fired, may bring a cause of action for wrongful discharge based on breach of contract. *Conner v. City of Forest Acres*, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002). If an employer wishes to issue an employee handbook or manual without being bound by it and with a desire to maintain the at-will employment relationship, the employer must insert a conspicuous disclaimer into the handbook. *Small v. Springs Indus., Inc.*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987). The issue of whether an employee handbook constitutes a contract should

be submitted to the jury when the issue of the contract's existence is questioned and the evidence is either conflicting or is capable of more than one inference. *Small*, 292 S.C. at 483, 357 S.E.2d at 454; *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct.App.2000). In most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. *Fleming v. Borden*, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994). But a “ ‘court should intervene to resolve the handbook issue as a matter of law ... if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.’ ” *Id.* (quoting Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *Indus. Rel. L.J.* 326, 375-76 (1991-92)); cf. *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) (holding, as a matter of law, that a handbook containing conspicuous disclaimers and a non-mandatory discipline procedure did not alter at-will status). To be enforceable in contract, general policy statements must be definitive in nature, promising specific treatment in specific situations. See, e.g., *Ex parte Amoco Fabrics & Fiber Co.*, 729 So.2d 336, 339 (Ala.1998) (“[to] become a binding promise, the language used in the handbook ... must be specific enough to constitute an actual offer rather than a mere general statement of policy”) (internal quotations omitted); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 665 A.2d 580, 584 (1995) (“[o]nly those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer’s intent to bind itself will be enforced”); cf. *Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 21

(Cr.App.1994). *Hessenthaler v. Tri-County Sister Help, Inc.* 365 S.C. 101, 616 S.E.2d 694 S.C.,2005.

In support of Plaintiff's claims for breach of contract, Plaintiff points out the below bolded excerpts from Plaintiff's well pled Complaint.

6. Ms. Cromwell, Plaintiff, at all times, during the course of her employment with Defendants, has been subjected to an increasingly hostile work environment on account of her having **exercised her contractual right to make complaints of race discrimination, harassment, and bullying in accordance with the policies and procedures of the Defendants. These contractual guarantees are the basis of this suit as opposed to any federally granted legal protections or protections guaranteed pursuant to the South Carolina Human Affairs Law as the Defendants has violated its own policies and procedures related to race discrimination, harassment, bullying, and retaliation in such a manner as to defeat any allegation of "at will" employment status by Defendants. Specifically, Plaintiff avers as follows.**
7. Plaintiff has worked for Defendants MUHA at the Ambulatory Procedure Center (hereinafter referred to as "APC") since 2008. During this time, Ms. Cromwell has worked in the same department in only two (2) titled positions – Interim Charge Nurse and Staff Nurse (RN). Her clinical performance was at all times admirable and she maintains a positive relationship with patients and staff.
8. On or about June 2016 Plaintiff's leadership changed. Plaintiff's new leadership team immediately began a campaign of **contractually impermissible race discrimination and retaliation against Plaintiff. The Defendants' Management has no regard for the policies and procedures in place despite Plaintiff's complaints regarding her unlawful behavior. As a result, Plaintiff has felt the retaliatory wrath of the Defendants all in breach of her employment contract with Defendants.**
9. Ms. Cromwell has had the burden of being the most experienced nurse to lead the department with **many additional duties without any corresponding pay increase** during the majority of the time Ms. Cromwell has worked at APC. This is in stark contrast to her similarly situated Caucasian colleagues who were paid in accordance with their work load during the course of June 2016 through to the present. **Such behavior breaches Ms. Cromwell's employment contract with Defendants.**
10. In addition, throughout June 2016 through to the present, Plaintiff has been subjected to a continual reduction in job hours and other unwarranted restrictions in her ability to earn income and on her working environment to the direct exclusion of her similarly situated Caucasian Colleagues. **Pursuant to Defendants' applicable contractual policies and procedures, Plaintiff complained through the employment ranks and to Human Resources that Defendants' actions in doing such clearly amount to policy violations and were also retaliation for Plaintiff's numerous documented complaints through the employment ranks and to Defendants' human resources personnel all in compliance with the contractual guarantees breached by Defendants.**
11. Likewise, **Defendants' treatment of Plaintiff as stated above clearly violates the contractual promises and guarantees provided to Plaintiff by Defendants in both their handbook and other stated policies and procedures.**
12. As it relates to the specific actions which spurned the racially discriminatory and retaliatory animus of the Defendants from June 2016 through 2018, Plaintiff recounts as follows.
13. During the course of 2016, Plaintiff was terminated based on false and pretextual allegations. Plaintiff **timely filed a grievance based on this clearly improper termination which violated Plaintiff's employment contract**, and as a result, was restored to work with supposed full vindication of her employment rights. Nevertheless, she was permanently emotionally scarred and her legal success was short lived as of June 2016 due to the Defendants' increased harassment acting as a catalyst for further retaliation as she was immediately beset with new instances of contractually breaching retaliation to include a reduction in her hours and an increase in her job duties to the exclusion of her similarly situated Caucasian colleagues.
14. In fact, despite **making numerous contractually protected complaints**, Nevertheless, these complaints only intensified the unlawful harassment and retaliation which Defendants meted out to her on a daily basis all in violation of her employment contract.

15. During the course of June 2016 through to the present, Plaintiff has made numerous additional documented complaints to Defendants' Human Resources Department and to Management timely and specifically complaining of race discrimination and retaliation in breach of her employment contract with Defendants. As a result of doing such, Plaintiff was beset with new instances of contractually breaching efforts of retaliation to include a further reduction in her work hours and a greater increase in her job duties. This onset of this retaliation occurred continually during the course of June 2016, 2017, and 2018 first with her termination but afterwards intensified in June 2016 causing Plaintiff great stress in addition to causing her monetary harm due to the reduced work hours and medical treatments as a result of the stress and anxiety Defendants' unlawful treatment caused her. These damages are the natural and probable result of Defendants' breach of contract.
16. Due to Plaintiff's contractually protected complaints as stated above, Plaintiff was blocked from being considered for the position of Charge Nurse despite the fact that she had performed admirably in an interim charge nurse role in the same department and was the most qualified applicant for the position. Such actions violate Plaintiff's contractual relationship with Defendants.
17. As a result of Plaintiff's complaints of Defendants' contractually violating their handbook policies on fair treatment and anti-harassment and retaliation policies throughout the course of June 2016 through 2018, Plaintiff was given a barrage of unjustified and untrue write-ups and disciplinary actions designed to justify Plaintiff being disciplined despite the fact that such disciplinary actions were false and untrue. The Defendants' actions in doing such was a further attempt to racially discriminate against Plaintiff as her Caucasian Colleagues were never subjected to such a barrage of false write-ups and unlawful retaliation. This adverse treatment towards Plaintiff was proximately due to her contractually protected complaints of race discrimination and retaliation. Plaintiff maintains that she was, at all times, a good and experienced employee who performed her job well and behaved professionally in the performance of her job.
18. Plaintiff is currently still employed by Defendants and, is still the subject of contractual breaches on account of the fair treatment and retaliatory practices stated above all in breach of her employment contract with Defendants.
19. During the course of June 2016 through to the present and as a result of her contractually protected complaints, Plaintiff was subjected to harassing and retaliatory treatment by her superiors and administrators to include Karen Weaver (WF), Michael Denham (WM), Nursing Administrator, Sharon Turner, and others. These individuals have continually worked in concert to derail Plaintiff's employment by unjustly questioning and undermining her work performance and interactions with doctors, staff, and patients. Defendant's actions are violative of Plaintiff's employment contract which provides that Plaintiff would be treated fairly and not retaliated against.
20. During the course of June 2016 through to the present, Plaintiff has been denied every promotional opportunity which she sought and was qualified to receive to include Charge Nurse positions and, in fact, her job has been threatened by systematic inequities related to Plaintiff's treatment and discipline as compared to that of her similarly situated Caucasian Counterparts. In fact, Plaintiff has not taken any actions which can be construed as worthy of discipline, but yet she has been subjected to repeated false and pretextual disciplinary actions to the exclusion of her similarly situated Caucasian colleagues. Defendants' actions violate Plaintiff's contractual rights.
21. As a result of the Defendants' violations of Plaintiff's contractual rights as indicated above, Plaintiff has suffered both financially, emotionally, physically, and mentally and has been irreparably harmed.

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

35. Each and every allegation set forth hereinabove is hereby repeated as fully incorporated herein
36. Defendants publish and maintain a contractually binding Employee Handbook, which definitely assures employees of their right to report harassment and bullying and also contains an anti-retaliation clause.
37. Defendants state, in their Employee Handbook, that they are Equal Opportunity Employers. Defendants further state, in their handbook, that they will comply with the requirements of the law in implementing equal employment decisions and anti-harassment protections for their employees.
38. Plaintiff and Defendants entered into a binding and valid contract whereby Plaintiff relied on Defendants, through their agents' reassurance that, pursuant to the handbook and the above policies and procedures, Defendants would protect Plaintiff on the basis of her rights under their anti-harassment and anti-retaliation policies. Plaintiff also relied on the Defendants' reassurance that they must follow their handbook policies when disciplining their employees.
39. Plaintiff agreed to fulfill the duties of her position in exchange for valuable consideration and salary with the promise of being protected from discrimination, retaliation, and harassment.

40. Plaintiff performed her job duties with due diligence. However, Defendants, through their agents, **unjustifiably failed to perform their duties by failing to protect Plaintiff in accordance with their own policies and procedures as stated above. Further, Defendants failed to follow their handbook policies when they retaliated against Plaintiff for availing herself of the Grievance Process and when Defendants failed to apply the same consequence for filing complaints to Plaintiff's Caucasian counterparts as they did to the Plaintiff all in violation of Defendants' promised contractual protections.**
41. Defendants, and their agents, had a contractual responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendants, through its agents, instead chose to fail to protect Plaintiff from being retaliated against in June 2016 to the present when Plaintiff made complaints in compliance with the anti-harassment policy. Defendants attacked Plaintiff for participating in grievances, and engaging in other lawful on the job behaviors with the Defendants **all in violation of Defendants' contractual relationship with Plaintiff.**
42. Defendants' conduct, by and through its agents, was done in bad faith and **breached the implied covenant of good faith and fair dealings that is implied in the employment contract.**
43. Accordingly, Plaintiff is entitled to compensatory damages in the nature of the value of her lost wages and benefits, front pay, together with interest thereon, as well as liquidated damages, and her respective attorney's fees for the bringing of this action.

It is apparent, readily, that Plaintiff has, in painstaking detail, pled the contractual nature of her employment with Defendant. Plaintiff has pointed out documents and policies which satisfy the statute of frauds to include, Defendant's anti-harassment, anti-retaliation, EEOC, Grievance, and other policies and procedures which, upon being violated by Defendant, gave rise to Plaintiff's contractually based cause of action. "Under the doctrine of at-will employment, an 'at-will employee may be terminated at any time for any reason or for no reason, with or without cause.'" *Weaver*, 2013 WL 5587854, at *4 (quoting *Legette v. Nucor Corp.*, 2:12-cv-1020-PMD, 2012 WL 3029650, at *3 (D.S.C. July 25, 2012)) (citing *King v. Marriott Int'l, Inc.*, 520 F. Supp. 2d 748, 755 (D.S.C. 2007); *Barron v. Labor Finders of S.C.*, 713 S.E.2d 634, 636 (S.C. 2011)). "Of course, an employer and employee may choose to contractually alter the general rule of employment at-will and restrict their freedom to discharge without cause or to resign with impunity.'" *Brailsford*, 2015 WL 4459032, at *3 (quoting *Prescott v. Farmers Tel. Co-op., Inc.*, 516 S.E.2d 923, 925 (S.C. 1999)). "Because employment is presumed to be at-will, in order to survive a motion to dismiss on a claim for breach of contract of employment, a plaintiff must plead sufficient factual allegations to establish the existence of an employment contract beyond the at-will relationship." *Id.* (citing *Weaver*, 2013 WL 5587854, at *4). Thus, to assess a claim for breach

of contract, “it is first necessary to determine whether a contract was formed,” as “[i]t is axiomatic that to recover under a theory of breach of contract, a valid contract must have existed between the parties.” *Weaver*, 2013 WL 5587854, at *5 (citing, inter alia, *Fung Lin Wah Enters. Ltd. v. E. Bay Imp. Co.*, 465 F. Supp. 2d 536, 542-43 (D.S.C. 2006); *Tidewater Supply Co. v. Indus. Elec. Co.*, 171 S.E.2d 607, 608 (S.C. 1969)); accord *Brailsford*, 2015 WL 4459032.

It is clear that Plaintiff has sufficiently and adequately pled a unilateral employment contract. Contracts will be either bilateral or unilateral in nature, and, in the employment context where no formal written agreement between the employer and employee appears to exist, the contract, if any, is likely unilateral, meaning that, in response to the employer’s offered promises, the employer accepts, not by making a reciprocal promise, but by commencing performance. See *Weaver*, 2013 WL 5587854, at *5 (citing *Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 165-66 (S.C. 2003), *Prescott*, 516 S.E.2d at 926; *Small v. Springs Indus., Inc.*, 357 S.E.2d 452, 454 (S.C. 1987); *Int’l Shoe Co. v. Herndon*, 133 S.E. 202, 203 (S.C. 1926)).

Under South Carolina law, a unilateral employment contract exists when the employer makes a specific offer, the offer is communicated to the employee, and the employee commences performance of employment-related duties in reliance on the offer. *Id.* at *5-6 (citing *Sauner*, 581 S.E.2d at 165-66; *Prescott*, 516 S.E.2d at 926; 82 Am. Jur. 2d Wrongful Discharge § 84 (1992)). In addition, “[t]o alter an employee’s at-will status under South Carolina law, a contract . . . must limit either the duration of the employment or the employer’s right to terminate the employee.” *Id.* at *6 (citing *Wadford v. Hartford Fire Ins. Co.*, No. 3:87-2872-15, 1988 WL 492127, at *4 (D.S.C. Aug. 11, 1988); *Lord v. Kimberly-Clark Corp.*, 827 F. Supp. 2d 598, 602-05 (D.S.C. 2011)). “In sum, to survive [a motion to dismiss] with respect to [a] breach of contract claim, [a plaintiff-employee] needs to have set forth sufficient factual allegations in [her c]omplaint to state a facially

plausible claim that the [p]arties entered into a contract with terms of employment that limited the duration of the relationship or the right of termination or both.” *Id.* (citing *Battle v. Nikanth, LLC*, No. 2:13-543- PMD, 2013 WL 4874976, at *5 (D.S.C. Sept. 11, 2013)); accord *Brailsford*, 2015 WL 4459032, at *4.

The allegations presented by Plaintiff in her complaint discuss the limitations placed upon the Defendant by the own language in their employment handbook and other pled policies and procedures which limit the right of Defendant to terminate her employment. **They cannot retaliate against her, violate their EEOC policy or their grievance policy, all of which was alleged as being violated by Plaintiff in this case. Likewise, Plaintiff has alleged that she relied on this language as it is couched in mandatory terms.** “In order for a handbook to alter an employee’s at-will status and create an employment contract, the employer must ‘phrase the document’s language in mandatory terms giving rise to a promise, an expectation and a benefit to an employee,’” *id.* at *4 (brackets omitted) (quoting *Nelson*, 605 S.E.2d at 747) (citing *Hessenthaler v. Tri-Cnty. Sister Help, Inc.*, 616 S.E.2d 694, 698 (S.C. 2005); *Grant*, 634 S.E.2d at 20), because “[w]hen definite and mandatory, such [language] impose[s] a limitation on the employer’s right to terminate an employee at any time, for any reason.” *id.* (citing *Grant*, 634 S.E.2d at 20). Regardless the language in the handbook gives rise to a jury issue as genuine issues of material fact exist to justify submission of the alleged employment contract to a jury. “When the evidence conflicts or is capable of more than one inference, the issue of whether an employee handbook constitutes a contract should be submitted to the jury; however, a court should intervene to resolve the handbook issue as a matter of law if the handbook statements and the disclaimer, taken together, establish beyond any doubt that an enforceable promise either does or does not exist.” *Id.* (brackets and ellipsis omitted) (quoting *Grant*, 634 S.E.2d at 20).

Likewise, in accordance with Plaintiff's allegations, the statute of frauds has also been satisfied. "[T]he Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties." *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005) (citing S.C.Code Ann. § 32-3-10 (1991)). If there is a possibility that a contract might be performed within one year, the statute of frauds is not a bar to enforcement of the contract. *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Ct.App.1997). *Springob v. Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (S.C., 2014). The clear unilateral contract and extensive writings alleged by Plaintiff to make up her contract claim clearly satisfies any alleged failure to satisfy the statute of frauds. In addition, such an argument is properly made at Summary Judgment as opposed to a Motion to Dismiss as it requires documents and writings extraneous to the Complaint. Defendant's statute of frauds argument should, therefore, be disregarded.

In accordance with the arguments stated above, Defendant's Motion to Dismiss should be denied.

4. Defendant's allegation that Plaintiff has not alleged violations of public policy against Defendant fails.

Despite Plaintiff's claims being contractual in nature, Defendant alleges that Plaintiff has failed to allege violations of public policy against the Defendant. Plaintiff disagrees with this assessment as Defendant's failure to abide by their Grievance Policy, which is established in accordance with the statutory and regulatory framework of the South Carolina Department of Administration, mandates that such Grievances be established. Defendant's alleged retaliatory conduct is prejudicial to the maintenance of such policies and, thus, violates the public policy of the State of South Carolina which has established such. Regardless, as Plaintiff has not set forth

a claim for violation of public policy as a cause of action, Plaintiff requests that Defendant's argument in this regard be discarded. In accordance with the arguments stated above, Defendant's Motion to Dismiss should, therefore, be denied.

5. Plaintiff has served Defendant in accordance with the Rules of Civil Procedure.

The Defendant has cited South Carolina Rule of Civil Procedure 4(d)(4) and (8) in support of the proposition that Plaintiff has failed to properly effectuate service on the Medical University Hospital Authority. Based on Defendant's status as an incorporated entity of the State of South Carolina, Defendant's argument fails. (Ex. 1: MUHA Incorporation Status)

Specifically, the language cited by the Defendant is as follows:

SCRCP 4(d)(4) State of South Carolina:

(A) When State a Party. Upon the State of South Carolina by delivering a copy of the summons and complaint to the Attorney General, or when another official is designated to be served by the statute permitting such action by delivering a copy of the summons and complaint to that official and sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.

(B) When Unconstitutionality of Statute is Asserted. In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General.

and

SCRCP 4(d)(8) State of South Carolina:

(8) Service by Certified Mail. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4 (c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55 (c) or Rule 60 (b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Plaintiff served Defendant by timely delivering a copy of the Summons and Complaint to its CEO via Certified and US Mail on June 12, 2018 (Timely served on June 5, 2018). (Ex. 2: Service Proofs). Defendant is attempting to argue that the Defendant is essentially the State of South Carolina such that service upon the Attorney General is necessary pursuant to SCRCP 4.

Defendant argument, however, fails due to SCRPC 4(d)(3) and (5) which are stated below:

(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(5) State Officer or Agency. Upon an officer or agency of State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

SCRPC 4(d)(3) and (5).

As Defendant MUHA is an Agency-Corporation of the State of South Carolina, SCRPC (4)(d)(5), proscribes that service is proper via SCRPC (4)(d)(3) which provides that a copy can be delivered to an officer, managing, or general agent (i.e. the CEO). SCRPC (4)(d)(8) therefore establishes that Service is proper via Certified Mail.

Based upon the foregoing, Defendant's Motion for Summary Judgment should be denied.

IV. CONCLUSION

Based on the foregoing reasons, Plaintiff hereby requests that the Court enter an Order denying the Defendant's Motion to Dismiss her Complaint.

Respectfully Submitted:

By: s/ Donald Gist
Donald Gist, Esquire (7178)
Aaron Wallace, Esquire (11469)
GIST LAW FIRM, P.A.
4400 North Main Street
Columbia, South Carolina 29203
Telephone: (803) 771-8007
Fax: (803) 771-0063
Attorneys for Plaintiff

November 15, 2018
Columbia, South Carolina

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LABOR AND EMPLOYMENT DEFENSE

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CHARLESTON, SOUTH CAROLINA 29401
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CAROLINE WREN CLEVELAND †
BOB J. CONLEY
EMMANUEL J. FERGUSON
OF COUNSEL
LABOR & EMPLOYMENT LAW

TELEPHONE: (843) 577-9626
FAX: (843) 577-6672

January 8, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed, is one original and one copy of Notice of Motion/Order, Motion to Alter or Amend Order and a check for the \$25.00 filing fee, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our office.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

EJF/lmp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-2580

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of written notice of the entry of the Order. Cromwell's contention the Motion is untimely is without support and contrary to the clear requirements of Rules 52(b) and 59(e), SCRPC.

Additionally, and notably, in her Response in Opposition to the Motion, Cromwell does not contest Defendants' assertion the Order is in error and the mandates of the Order are in direct contradiction to her concessions, both in brief and at hearing, as to the following: (1) she consented to the dismissal of all claims and causes of action as to Defendant Medical University of South Carolina ("MUSC"); and, (2) she consented to the dismissal of the cause of action alleging breach of contract with fraudulent intent as to Defendant Medical University Hospital Authority ("MUHA").

Finally, despite Cromwell's contention and the Order, Rule 4(d)(5) and (j), SCRPC, allow for service on agencies of the State of South Carolina, including both Defendants in this matter, in only two manners: **personal service** "by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia" or, in the alternative, valid acceptance of service. (emphasis added.) A state agency, such as MUHA, *cannot* be served by certified mail. See Rule 4(d)(1), (2) and (3), SCRPC, and Rule 4(d)(8), SCRPC.

Cromwell does not contend, and effectively concedes, she served MUHA by certified mail only.¹ For this reason, Cromwell's service of the Summons and Complaint on MUHA is insufficient as a matter of law and, therefore, the Court lacks personal jurisdiction over MUHA.

¹ Cromwell neither filed nor otherwise provided proof of service to the Court, including proof she served the Summons and Complaint in any manner other than by certified mail. Moreover, Cromwell filed no proof of service upon the South Carolina Attorney General.

In summary, Cromwell did not properly affect service upon MUHA and, therefore, Cromwell's Complaint should be dismissed pursuant to Rule 12(b)(5) for insufficiency of service of process and resulting lack of personal jurisdiction.

CONCLUSION

For the reasons discussed above, Defendants respectfully request the Court alter and/or amend the Order.



Caroline Wrenn Cleveland

Bob J. Conley

Emmanuel J. Ferguson

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eferguson@clevelandlaborlaw.com

ATTORNEYS FOR DEFENDANTS

1

Charleston, South Carolina
January 16, 2019

CERTIFICATE OF SERVICE

This is to certify that I have this 16th day of January 2019, caused to be served a copy of Defendants' Reply to Plaintiff's Response in Opposition to Defendants' Motion to Alter or Amend on all counsel by depositing in the mail and addressed to:

Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203

Loretta M. Plitnick
Loretta M. Plitnick
Paralegal

January 16, 2019

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CLERK OF COURT
BY SP

EXHIBIT A

Bob Conley

From: My Cases Notification <Notifications@Courtplus.org>
Sent: Monday, December 31, 2018 10:20 AM
To: Bob Conley
Subject: My Cases Notification

List of notifications for User Account: [REDACTED]

[2018CP1002580](#)

Elise A Cromwell VS Medical University of South Carolina Hospital Authority

ORDER FILED ON 12/28/2018



if you do not wish to continuing receiving notifications for a case, remove it from your My Cases list.

Note: This is an auto-generated e-mail sent from an unmonitored account. Therefore, please do not reply to this e-mail.

EXHIBIT B

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

29



BOB J. CONLEY
171 CHURCH ST STE 310
CHARLESTON SC 29401-3140

NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

Order-Motion to Dismiss Denied

CASE NO: 2018CP1002580

Elise A Cromwell VS Medical University of South Carolina Hospital Authority

This judgment was entered on the 28th day of December, 2018, and notice mailed first class on Monday, December 31, 2018, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

RECEIVED
1-7-19

EXHIBIT C

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-2580

) CASE NO.: 2018-CP-10-2580

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Defendants Medical University of South Carolina (“MUSC”) and Medical University Hospital Authority (“MUHA”), pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, move for an order amending and/or altering the Court’s Order dated December 19, 2018, and entered by the Clerk of Court on December 28, 2018 (the “Order”).¹ Defendants received written notice of entry of the Order on Monday, December 31, 2018.

STATEMENT OF THE CASE

Plaintiff Elise Cromwell (“Cromwell”) filed a Complaint against MUHA and MUSC (collectively “Defendants”) on May 21, 2018. Cromwell asserts two causes of action against MUHA and MUSC: 1) breach of contract; and, 2) breach of contract with fraudulent intent. On July 11, 2018, Defendants filed their Motion to Dismiss (the “Motion”) on the following grounds: 1) Cromwell failed to properly serve either Defendant with the Summons and Complaint, subjecting her Complaint to dismissal pursuant to Rule 12(b)(5) of the South Carolina Rules of Civil Procedure (“SCRPC”); and, 2) Cromwell’s claims, as alleged in her Complaint, fail to state

¹ Exhibit A.

a claim on which relief can be granted pursuant to Rule 12(b)(6), SCRPC. On November 20, 2018, Cromwell provided her Memorandum in Opposition to Defendants' Motion to the Court.² Thereafter, on November 29, 2018, Defendants filed their memorandum of law in support of the Motion.

On November 29, 2018, the Court held a hearing regarding the Motion. Thereafter, the Court issued the Order on December 19, 2018.

LEGAL STANDARD

South Carolina Rule of Civil Procedure 52(b) allows a party "not later than 10 days after receipt of written notice of entry of judgment" to request that the court "amend its findings or make additional findings and may amend the judgment accordingly" Rule 52(b), SCRPC, further requires "[a] party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after filing the motion." Correspondingly, and similarly, South Carolina Rule of Civil Procedure 59(e) allows a party to request a court alter or amend a judgment within ten days of receiving the written notice of entry of an order.

LEGAL ARGUMENTS

A. The Order Fails to Dismiss All Causes of Action as to MUSC

Cromwell, in her Memorandum in Opposition, states (i.e. concedes) the following: "As Defendant has represented that Plaintiff was never an employee of Defendant Medical University of South Carolina, **Plaintiff voluntarily withdraws her causes of action against the Medical**

² Exhibit B. Although Cromwell provided her Memorandum in Opposition to the Court, she never filed it, including at the time of this Motion. Additionally, Cromwell never filed the exhibits referenced in her Memorandum, and Cromwell never filed, or otherwise submitted, any proof she provided the Summons and Complaint to the South Carolina Attorney General.

University [of South Carolina]”³ (emphasis added.) Correspondingly, at the hearing on November 29, 2018, Cromwell’s counsel confirmed the withdrawal (i.e. dismissal) of Cromwell’s claims and causes of action as to MUSC.

Despite Cromwell conceding her claims as to MUSC are not viable and, therefore, subject to dismissal, the Order *denies* dismissal of Cromwell’s claims and causes of action as to MUSC. In this respect, the Order is in error and is in direct contradiction to Cromwell’s concessions. Consequently, the Court should alter and/or amend the Order to reflect **all** Cromwell’s claims and causes of action as to **MUSC** are dismissed, without prejudice.

B. The Order Fails to Dismiss the Cause of Action for Breach of Contract with Fraudulent Intent as to All Defendants

Cromwell, in her Memorandum in Opposition, states (i.e. concedes) the following: “As Defendant has represented its status as a governmental entity, **Plaintiff voluntarily withdraws her claims for breach of contract with fraudulent intent.**”⁴ (emphasis added.) Correspondingly, at the hearing on November 29, 2018, Cromwell’s counsel confirmed the withdrawal (i.e. dismissal) of Cromwell’s cause of action alleging breach of contract with fraudulent intent as to **both** Defendants.

Despite Cromwell conceding her claim as to both Defendants is not viable, and therefore subject to dismissal, the Order *denies* dismissal of Cromwell’s cause of action alleging breach of contract with fraudulent intent as to **both** Defendants. In this respect, the Order is in error and is in direct contradiction to Cromwell’s concessions. Consequently, the Court should alter and/or amend the Order to reflect Cromwell’s cause of action for breach of contract with fraudulent intent is dismissed as to **both** Defendants, without prejudice.

³ Exhibit B, P. 2.

⁴ Exhibit B, P. 2.

C. **Cromwell Failed to Properly Serve the Summons and Complaint and, Therefore, the Court Lacks Personal Jurisdiction Over MUHA**

Rule 12(b)(5), SCRPC, requires the dismissal of a complaint when service of the summons and complaint are not properly served on a defendant. Correspondingly, Rule 4(d)(5) and (j), SCRPC, allow for service on agencies of the State of South Carolina, including both Defendants in this matter, in only two manners: **personal service** “by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia” or, in the alternative, valid acceptance of service. (emphasis added.) A state agency, such as MUHA, *cannot* be served by certified mail. *See* Rule 4(d)(1), (2) and (3), SCRPC, and Rule 4(d)(8), SCRPC. Cromwell served MUHA by certified mail only.⁵ For this reason, Cromwell’s service of the Summons and Complaint on MUHA is patently insufficient and, therefore, the Court lacks personal jurisdiction over MUHA.

Rule 4, SCRPC, does not allow Cromwell to serve MUHA, an agency of the State of South Carolina, by certified mail. While Rule 4(d)(8), SCRPC, does allow service upon specific classes of parties by certified mail, the Rule does not allow for such service on MUHA. To the contrary, other than acceptance of service, Rule 4(d)(5), SCRPC, allows only one form of service on MUHA: “by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.” (emphasis added.)⁶

⁵ Cromwell neither filed nor otherwise provided proof of service to the Court, including proof she served the Summons and Complaint in any manner other than by certified mail. Moreover, Cromwell filed no proof of service upon the South Carolina Attorney General.

⁶ Cromwell does not contend MUHA accepted service of the Summons and Complaint.

Even if Rule 4 did allow Cromwell to serve MUHA by certified mail, Cromwell's attempted service fails because she did not send "a copy of the summon and complaint by registered or certified mail to the Attorney General at Columbia." Rule 4 expressly, by use of the word "and," requires Cromwell provide this Court with proof of proper service on MUHA and proof she sent "a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia." The use and inclusion of "and" in Rule 4(d)(5), not "or" or "may" by way of example, shows the Rule requires Cromwell meet both requirements to affect proper service on MUHA. In denying MUHA's Motion to Dismiss, the Court, essentially, rewrites the Rule and/or ignores the use of the word "and" in the Rule.⁷ The Court's Order in respect to this issue constitutes error.

"The primary purpose in interpreting statutes [court rules] is to ascertain and effectuate the intent of the legislature." *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E. 2d 465, 468 (2010) (citing *Cain v. Nationwide Prop. and Cas. Ins. Co.*, 378 S.C. 25, 29, 661 S.E.2d 349, 351 (2008)). "Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute [or court rule]." *Id.* (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). Applying the well-recognized rules of construction, Rule 4(d)(5) requires

⁷ Although the requirements for Rule 4(d)(5), SCRCP, have not been reviewed or examined by South Carolina appellate courts, courts in other jurisdictions reviewed similar rules and conclude "and" requires service on both the state entity and the state attorney general. *See e.g., State, Dep't of Corr. v. Kila, Inc.*, 884 P.2d 661, 661 (Alaska 1994) (voiding default judgment based on insufficient service of process); *Haney v. Cribbs*, 2006 WY 158, 148 P.3d 1118 (Wyo. 2006) (statute required that service of the complaint upon the Attorney General be made by registered mail, statute also provided that such service was a jurisdictional requirement in order to maintain the suit, and jurisdictional standards could not be surmounted by logic or reason.)

Cromwell, in addition to serving MUHA, send "a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia."

Cromwell has not complied with Rule 4(d)(5). Moreover, Cromwell did not supply the Court with proof she fully complied with Rule 4(d)(5). In summary, Cromwell did not properly affect service upon MUHA and, therefore, Cromwell's Complaint should be dismissed pursuant to Rule 12(b)(5) for insufficiency of service of process and resulting lack of personal jurisdiction.

CONCLUSION

For the reasons discussed above, Defendants respectfully request the Court alter and/or amend the Order.



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eferguson@clevelandlaborlaw.com

ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
January 8, 2019

CERTIFICATE OF SERVICE

This is to certify that I have this 8th day of January 2019, caused to be served a copy of Defendants' Motion to Alter or Amend on all counsel by depositing in the mail and addressed to:

Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203

Loretta M. Plitnick

Loretta M. Plitnick
Paralegal

January 8, 2019

FILED
2019 JAN -8 PM 2:15
CLERK OF COURT

EXHIBIT A

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-10-02580

Elise A Cromwell

Medical University of South Carolina
Hospital Authority

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Viewing the facts and evidence in light most favorable to the nonmoving party, Defendant's Motion to Dismiss is DENIED on both grounds.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A		

If applicable, describe the property, including tax map information and address, referenced in the order:
N/A

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

A McLay
Circuit Court Judge

2764
Judge Code

12/19/18
Date

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE TENTH JUDICIAL CIRCUIT
	)	
Elise Cromwell	)	
	)	
Plaintiff,	)	
	)	CASE NO.: 2018-CP-10-2580
	)	
vs.	)	PLAINTIFF'S MEMORANDUM IN
	)	OPPOSITION TO DEFENDANTS'
	)	MOTION TO DISMISS
	)	
The Medical University of South Carolina	)	
and Medical University Hospital Authority	)	
	)	
Defendant,	)	
	)	

Plaintiff, Elise Cromwell, by and through his undersigned attorneys respectfully submits this Memorandum of Law in Opposition to Defendants' Motion to Dismiss Plaintiff's causes of action in this lawsuit arising out of Plaintiff's employment with Defendants. Plaintiff asserts two causes of action against Defendants: 1.) breach of contract and 2.) breach of contract with fraudulent intent. The issues raised in Plaintiff's Complaint are properly pled giving rise to jurisdiction in this Court and fully stating a claim upon which relief may be granted. As a result, Defendants' Motion to Dismiss must be denied.

I. STANDARD FOR MOTIONS TO DISMISS

"A motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir.1992) (citing 5A C. Wright & A. Miller, Fed. Practice and Procedure § 1356 (1990)). "A motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be

proved in support of [the subject] claim.” *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 328 (4th Cir.1996) (en banc) (citing *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir.1989)). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must assume all of the allegations to be true, must resolve all doubts and inferences in favor of the plaintiff, and must view the allegations in a light most favorable to the plaintiff. See *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4th Cir.1999). Finally, in rendering its decision, the Court should consider only the allegations contained in the complaint, the exhibits to the complaint, matters of public record, and other similar materials that are subject to judicial notice. See *Anheuser-Busch, Inc. v. Schnoke*, 63 F.3d 1305, 1312 (4th Cir.1995).

II. FACTS

Plaintiff relies solely upon the facts in her Complaint as this is a Motion to Dismiss as oppose to an evidentiary Motion.

III. LEGAL ARGUMENT

1. Plaintiff voluntarily withdraws her claim for Breach of Contract with Fraudulent Intent.

As Defendant has represented its status as a governmental entity, Plaintiff voluntarily withdraws her claims for breach of contract with fraudulent intent.

2. Plaintiff voluntarily dismisses Defendant Medical University of South Carolina based upon Defendant’s representation that Defendant Medical University of South Carolina was, at no time, Plaintiff’s employer.

As Defendant has represented that Plaintiff was never an employee of Defendant Medical University of South Carolina, Plaintiff voluntarily withdraws her causes of action against the Medical University but not against Defendant Medical University Hospital Authority.

3. Plaintiff's Complaint states facts sufficient to state a breach of contract claim against Defendant Medical University Hospital Authority and Plaintiff has alleged the existence of a legally viable contract which satisfies the statute of frauds.

General contract law provides that a "contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct.App.1993), quoting *Benya v. Gamble*, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct.App.1984). A contract may arise from oral or written words or by conduct. *Gaskins v. Blue Cross-Blue Shield of South Carolina*, 271 S.C. 101, 245 S.E.2d 598 (1978).

In the employment context, South Carolina Courts have already recognized that a contract altering the at-will arrangement may arise, in part, from the oral or written statement of the employer. A contract may arise from actual agreement of the parties manifested by words, oral or written, or by conduct. *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 335, 516 S.E.2d 923, 926 (1999) (emphasis added); *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432, 439 (Ct.App.2003).

In order to prove the existence of a definite contract of employment, the employee must establish all of the elements of a contract. Most employment agreements are unilateral. *Small v. Springs Industries, Inc.*, supra. A unilateral contract has the following three elements: 1) a specific offer, 2) communication of the offer to the employee, and 3) performance of job duties in reliance on the offer. 82 Am.Jur.2d Wrongful Discharge § 84 (1992). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his

assent to that bargain is invited and will conclude it." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 24 (1981). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 29 (1981). "Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act ... amounts to an offer." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting *Broadway v. Jeffers*, 185 S.C. 523, 530-31, 194 S.E. 642, 645 (1938). To be binding, an offer must be definite. In addition, it must "be one which is intended of itself to create legal relations on acceptance." *McLaurin v. Hamer*, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932).

In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. *108 *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 224, 516 S.E.2d 449, 450 (1999). But when an employee's at-will status has been altered by the terms of an employee handbook, an employee, when fired, may bring a cause of action for wrongful discharge based on breach of contract. *Conner v. City of Forest Acres*, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002). If an employer wishes to issue an employee handbook or manual without being bound by it and with a desire to maintain the at-will employment relationship, the employer must insert a conspicuous disclaimer into the handbook. *Small v. Springs Indus., Inc.*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987). The issue of whether an employee handbook constitutes a contract should

be submitted to the jury when the issue of the contract's existence is questioned and the evidence is either conflicting or is capable of more than one inference. *Small*, 292 S.C. at 483, 357 S.E.2d at 454; *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct.App.2000). In most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. *Fleming v. Borden*, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994). But a “court should intervene to resolve the handbook issue as a matter of law ... if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.” ¹³ *Id.* (quoting Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *Indus. Rel. L.J.* 326, 375-76 (1991-92)); cf. *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) (holding, as a matter of law, that a handbook containing conspicuous disclaimers and a non-mandatory discipline procedure did not alter at-will status). To be enforceable in contract, general policy statements must be definitive in nature, promising specific treatment in specific situations. See, e.g., *Ex parte Amoco Fabrics & Fiber Co.*, 729 So.2d 336, 339 (Ala.1998) (“[to] become a binding promise, the language used in the handbook ... must be specific enough to constitute an actual offer rather than a mere general statement of policy”) (internal quotations omitted); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 665 A.2d 580, 584 (1995) (“[o]nly those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced”); cf. *Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 21

(Ct.App.1994). *Hessenthaler v. Tri-County Sister Help, Inc.* 365 S.C. 101, 616 S.E.2d 694 S.C.,2005.

In support of Plaintiff's claims for breach of contract, Plaintiff points out the below bolded excerpts from Plaintiff's well pled Complaint.

6. Ms. Cromwell, Plaintiff, at all times, during the course of her employment with Defendants, has been subjected to an increasingly hostile work environment on account of her having exercised her contractual right to make complaints of race discrimination, harassment, and bullying in accordance with the policies and procedures of the Defendants. **These contractual guarantees are the basis of this suit as opposed to any federally granted legal protections or protections guaranteed pursuant to the South Carolina Human Affairs Law as the Defendants has violated its own policies and procedures related to race discrimination, harassment, bullying, and retaliation in such a manner as to defeat any allegation of "at will" employment status by Defendants.** Specifically, Plaintiff avers as follows.
7. Plaintiff has worked for Defendants MUHA at the Ambulatory Procedure Center (hereinafter referred to as "APC") since 2008. During this time, Ms. Cromwell has worked in the same department in only two (2) titled positions – Interim Charge Nurse and Staff Nurse (RN). Her clinical performance was at all times admirable and she maintains a positive relationship with patients and staff.
8. On or about June 2016 Plaintiff's leadership changed. Plaintiff's new leadership team immediately began a campaign of contractually impermissible race discrimination and retaliation against Plaintiff. **The Defendants' Management has no regard for the policies and procedures in place despite Plaintiff's complaints regarding her unlawful behavior. As a result, Plaintiff has felt the retaliatory wrath of the Defendants all in breach of her employment contract with Defendants.**
9. Ms. Cromwell has had the burden of being the most experienced nurse to lead the department with many additional duties without any corresponding pay increase during the majority of the time Ms. Cromwell has worked at APC. This is in stark contrast to her similarly situated Caucasian colleagues who were paid in accordance with their work load during the course of June 2016 through to the present. **Such behavior breaches Ms. Cromwell's employment contract with Defendants.**
10. In addition, throughout June 2016 through to the present, Plaintiff has been subjected to a continual reduction in job hours and other unwarranted restrictions in her ability to earn income and on her working environment to the direct exclusion of her similarly situated Caucasian Colleagues. **Pursuant to Defendants' applicable contractual policies and procedures, Plaintiff complained through the employment ranks and to Human Resources that Defendants' actions in doing such clearly amount to policy violations and were also retaliation for Plaintiff's numerous documented complaints through the employment ranks and to Defendants' human resources personnel all in compliance with the contractual guarantees breached by Defendants.**
11. Likewise, **Defendants' treatment of Plaintiff as stated above clearly violates the contractual promises and guarantees provided to Plaintiff by Defendants in both their handbook and other stated policies and procedures.**
12. As it relates to the specific actions which spurned the racially discriminatory and retaliatory animus of the Defendants from June 2016 through 2018, Plaintiff recounts as follows.
13. During the course of 2016, Plaintiff was terminated based on false and pretextual allegations. Plaintiff timely filed a grievance based on this clearly improper termination which violated Plaintiff's employment contract, and as a result, was restored to work with supposed full vindication of her employment rights. Nevertheless, she was permanently emotionally scarred and her legal success was short lived as of June 2016 due to the Defendants' increased harassment acting as a catalysis for further retaliation as she was immediately beset with new instances of contractually breaching retaliation to include a reduction in her hours and an increase in her job duties to the exclusion of her similarly situated Caucasian colleagues.
14. In fact, despite making numerous contractually protected complaints. Nevertheless, these complaints only intensified the unlawful harassment and retaliation which Defendants meted out to her on a daily basis all in violation of her employment contract.

15. During the course of June 2016 through to the present, Plaintiff has made numerous additional documented complaints to Defendants' Human Resources Department and to Management timely and specifically complaining of race discrimination and retaliation in breach of her employment contract with Defendants. As a result of doing such, Plaintiff was beset with new instances of contractually breaching efforts of retaliation to include a further reduction in her work hours and a greater increase in her job duties. This onset of this retaliation occurred continually during the course of June 2016, 2017, and 2018 first with her termination but afterwards intensified in June 2016 causing Plaintiff great stress in addition to causing her monetary harm due to the reduced work hours and medical treatments as a result of the stress and anxiety Defendants' unlawful treatment caused her. These damages are the natural and probable result of Defendants' breach of contract.
16. Due to Plaintiff's contractually protected complaints as stated above, Plaintiff was blocked from being considered for the position of Charge Nurse despite the fact that she had performed admirably in an interim charge nurse role in the same department and was the most qualified applicant for the position. Such actions violate Plaintiff's contractual relationship with Defendants.
17. As a result of Plaintiff's complaints of Defendants' contractually violating their handbook policies on fair treatment and anti-harassment and retaliation policies throughout the course of June 2016 through 2018, Plaintiff was given a barrage of unjustified and untrue write-ups and disciplinary actions designed to justify Plaintiff being disciplined despite the fact that such disciplinary actions were false and untrue. The Defendants' actions in doing such was a further attempt to racially discriminate against Plaintiff as her Caucasian Colleagues were never subjected to such a barrage of false write-ups and unlawful retaliation. This adverse treatment towards Plaintiff was proximately due to her contractually protected complaints of race discrimination and retaliation. Plaintiff maintains that she was, at all times, a good and experienced employee who performed her job well and behaved professionally in the performance of her job.
18. Plaintiff is currently still employed by Defendants and, is still the subject of contractual breaches on account of the fair treatment and retaliatory practices stated above all in breach of her employment contract with Defendants.
19. During the course of June 2016 through to the present and as a result of her contractually protected complaints, Plaintiff was subjected to harassing and retaliatory treatment by her superiors and administrators to include Karen Weaver (WF), Michael Denham (WM), Nursing Administrator, Sharon Turner, and others. These individuals have continually worked in concert to derail Plaintiff's employment by unjustly questioning and undermining her work performance and interactions with doctors, staff, and patients. Defendant's actions are violative of Plaintiff's employment contract which provides that Plaintiff would be treated fairly and not retaliated against.
20. During the course of June 2016 through to the present, Plaintiff has been denied every promotional opportunity which she sought and was qualified to receive to include Charge Nurse positions and, in fact, her job has been threatened by systematic inequities related to Plaintiff's treatment and discipline as compared to that of her similarly situated Caucasian Counterparts. In fact, Plaintiff has not taken any actions which can be construed as worthy of discipline, but yet she has been subjected to repeated false and pretextual disciplinary actions to the exclusion of her similarly situated Caucasian colleagues. Defendants' actions violate Plaintiff's contractual rights.
21. As a result of the Defendants' violations of Plaintiff's contractual rights as indicated above, Plaintiff has suffered both financially, emotionally, physically, and mentally and has been irreparably harmed.

FIRST CAUSE OF ACTION: BREACH OF CONTRACT

35. Each and every allegation set forth hereinabove is hereby repeated as fully incorporated herein.
36. Defendants publish and maintain a contractually binding Employee Handbook, which definitely assures employees of their right to report harassment and bullying and also contains an anti-retaliation clause.
37. Defendants state, in their Employee Handbook, that they are Equal Opportunity Employers. Defendants further state, in their handbook, that they will comply with the requirements of the law in implementing equal employment decisions and anti-harassment protections for their employees.
38. Plaintiff and Defendants entered into a binding and valid contract whereby Plaintiff relied on Defendants, through their agents' reassurance that, pursuant to the handbook and the above policies and procedures, Defendants would protect Plaintiff on the basis of her rights under their anti-harassment and anti-retaliation policies. Plaintiff also relied on the Defendants' reassurance that they must follow their handbook policies when disciplining their employees.
39. Plaintiff agreed to fulfill the duties of her position in exchange for valuable consideration and salary with the promise of being protected from discrimination, retaliation, and harassment.

40. Plaintiff performed her job duties with due diligence. However, Defendants, through their agents, unjustifiably failed to perform their duties by failing to protect Plaintiff in accordance with their own policies and procedures as stated above. Further, Defendants failed to follow their handbook policies when they retaliated against Plaintiff for availing herself of the Grievance Process and when Defendants failed to apply the same consequence for filing complaints to Plaintiff's Caucasian counterparts as they did to the Plaintiff all in violation of Defendants' promised contractual protections.
41. Defendants, and their agents, had a contractual responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendants, through its agents, instead chose to fail to protect Plaintiff from being retaliated against in June 2016 to the present when Plaintiff made complaints in compliance with the anti-harassment policy. Defendants attacked Plaintiff for participating in grievances, and engaging in other lawful on the job behaviors with the Defendants all in violation of Defendants' contractual relationship with Plaintiff.
42. Defendants' conduct, by and through its agents, was done in bad faith and breached the implied covenant of good faith and fair dealings that is implied in the employment contract.
43. Accordingly, Plaintiff is entitled to compensatory damages in the nature of the value of her lost wages and benefits, front pay, together with interest thereon, as well as liquidated damages, and her respective attorney's fees for the bringing of this action.

It is apparent, readily, that Plaintiff has, in painstaking detail, pled the contractual nature of her employment with Defendant. Plaintiff has pointed out documents and policies which satisfy the statute of frauds to include, Defendant's anti-harassment, anti-retaliation, EEOC, Grievance, and other policies and procedures which, upon being violated by Defendant, gave rise to Plaintiff's contractually based cause of action. "Under the doctrine of at-will employment, an 'at-will employee may be terminated at any time for any reason or for no reason, with or without cause,'" *Weaver*, 2013 WL 5587854, at *4 (quoting *Legette v. Nucor Corp.*, 2:12-cv-1020-PMD, 2012 WL 3029650, at *3 (D.S.C. July 25, 2012)) (citing *King v. Marriott Int'l, Inc.*, 520 F. Supp. 2d 748, 755 (D.S.C. 2007); *Barron v. Labor Finders of S.C.*, 713 S.E.2d 634, 636 (S.C. 2011)). "Of course, an employer and employee may choose to contractually alter the general rule of employment at-will and restrict their freedom to discharge without cause or to resign with impunity.'" *Brailsford*, 2015 WL 4459032, at *3 (quoting *Prescott v. Farmers Tel. Co-op. Inc.*, 516 S.E.2d 923, 925 (S.C. 1999)). "Because employment is presumed to be at-will, in order to survive a motion to dismiss on a claim for breach of contract of employment, a plaintiff must plead sufficient factual allegations to establish the existence of an employment contract beyond the at-will relationship." *Id.* (citing *Weaver*, 2013 WL 5587854, at *4). Thus, to assess a claim for breach

of contract, “it is first necessary to determine whether a contract was formed,” as “[i]t is axiomatic that to recover under a theory of breach of contract, a valid contract must have existed between the parties.” *Weaver*, 2013 WL 5587854, at *5 (citing, inter alia, *Fung Lin Wah Enters. Ltd. v. E. Bay Imp. Co.*, 465 F. Supp. 2d 536, 542-43 (D.S.C. 2006); *Tidewater Supply Co. v. Indus. Elec. Co.*, 171 S.E.2d 607, 608 (S.C. 1969)); accord *Brailsford*, 2015 WL 4459032.

It is clear that Plaintiff has sufficiently and adequately pled a unilateral employment contract. Contracts will be either bilateral or unilateral in nature, and, in the employment context where no formal written agreement between the employer and employee appears to exist, the contract, if any, is likely unilateral, meaning that, in response to the employer’s offered promises, the employer accepts, not by making a reciprocal promise, but by commencing performance. See *Weaver*, 2013 WL 5587854, at *5 (citing *Sauner v. Pub. Serv. Auth. of S.C.*, 581 S.E.2d 161, 165-66 (S.C. 2003)). *Prescott*, 516 S.E.2d at 926; *Small v. Springs Indus., Inc.*, 357 S.E.2d 452, 454 (S.C. 1987); *Int’l Shoe Co. v. Herndon*, 133 S.E. 202, 203 (S.C. 1926)).

Under South Carolina law, a unilateral employment contract exists when the employer makes a specific offer, the offer is communicated to the employee, and the employee commences performance of employment-related duties in reliance on the offer. *Id.* at *5-6 (citing *Sauner*, 581 S.E.2d at 165-66; *Prescott*, 516 S.E.2d at 926; 82 Am. Jur. 2d Wrongful Discharge § 84 (1992)). In addition, “[t]o alter an employee’s at-will status under South Carolina law, a contract . . . must limit either the duration of the employment or the employer’s right to terminate the employee.” *Id.* at *6 (citing *Wadford v. Hartford Fire Ins. Co.*, No. 3:87-2872-15, 1988 WL 492127, at *4 (D.S.C. Aug. 11, 1988); *Lord v. Kimberly-Clark Corp.*, 827 F. Supp. 2d 598, 602-05 (D.S.C. 2011)). “In sum, to survive [a motion to dismiss] with respect to [a] breach of contract claim, [a plaintiff-employee] needs to have set forth sufficient factual allegations in [her c]omplaint to state a facially

plausible claim that the [p]arties entered into a contract with terms of employment that limited the duration of the relationship or the right of termination or both.” *Id.* (citing *Battle v. Nikanth, LLC*, No. 2:13-543- PMD, 2013 WL 4874976, at *5 (D.S.C. Sept. 11, 2013)); accord *Brailsford*, 2015 WL 4459032, at *4.

The allegations presented by Plaintiff in her complaint discuss the limitations placed upon the Defendant by the own language in their employment handbook and other pled policies and procedures which limit the right of Defendant to terminate her employment. **They cannot retaliate against her, violate their EEOC policy or their grievance policy, all of which was alleged as being violated by Plaintiff in this case. Likewise, Plaintiff has alleged that she relied on this language as it is couched in mandatory terms.** “In order for a handbook to alter an employee’s at-will status and create an employment contract, the employer must ‘phrase the document’s language in mandatory terms giving rise to a promise, an expectation and a benefit to an employee,’” *id.* at *4 (brackets omitted) (quoting *Nelson*, 605 S.E.2d at 747) (citing *Hessenthaler v. Tri-Cnty. Sister Help, Inc.*, 616 S.E.2d 694, 698 (S.C. 2005); *Grant*, 634 S.E.2d at 20), because “[w]hen definite and mandatory, such [language] impose[s] a limitation on the employer’s right to terminate an employee at any time, for any reason.”” *id.* (citing *Grant*, 634 S.E.2d at 20). Regardless the language in the handbook gives rise to a jury issue as genuine issues of material fact exist to justify submission of the alleged employment contract to a jury. “When the evidence conflicts or is capable of more than one inference, the issue of whether an employee handbook constitutes a contract should be submitted to the jury; however, a court should intervene to resolve the handbook issue as a matter of law if the handbook statements and the disclaimer, taken together, establish beyond any doubt that an enforceable promise either does or does not exist.”” *Id.* (brackets and ellipsis omitted) (quoting *Grant*, 634 S.E.2d at 20).

Likewise, in accordance with Plaintiff's allegations, the statute of frauds has also been satisfied. "[T]he Statute of Frauds requires that a contract that cannot be performed within one year be in writing and signed by the parties." *Davis v. Greenwood Sch. Dist.* 50, 365 S.C. 629, 634, 620 S.E.2d 65, 67 (2005) (citing S.C.Code Ann. § 32-3-10 (1991)). If there is a possibility that a contract might be performed within one year, the statute of frauds is not a bar to enforcement of the contract. *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 774 (Cl.App.1997). *Springob v. Univ. of S.C.*, 407 S.C. 490, 757 S.E.2d 384 (S.C., 2014). The clear unilateral contract and extensive writings alleged by Plaintiff to make up her contract claim clearly satisfies any alleged failure to satisfy the statute of frauds. In addition, such an argument is properly made at Summary Judgment as opposed to a Motion to Dismiss as it requires documents and writings extraneous to the Complaint. Defendant's statute of frauds argument should, therefore, be disregarded.

In accordance with the arguments stated above, Defendant's Motion to Dismiss should be denied.

4. Defendant's allegation that Plaintiff has not alleged violations of public policy against Defendant fails.

Despite Plaintiff's claims being contractual in nature, Defendant alleges that Plaintiff has failed to allege violations of public policy against the Defendant. Plaintiff disagrees with this assessment as Defendant's failure to abide by their Grievance Policy, which is established in accordance with the statutory and regulatory framework of the South Carolina Department of Administration, mandates that such Grievances be established. Defendant's alleged retaliatory conduct is prejudicial to the maintenance of such policies and, thus, violates the public policy of the State of South Carolina which has established such. Regardless, as Plaintiff has not set forth

a claim for violation of public policy as a cause of action, Plaintiff requests that Defendant's argument in this regard be discarded. In accordance with the arguments stated above, Defendant's Motion to Dismiss should, therefore, be denied.

5. Plaintiff has served Defendant in accordance with the Rules of Civil Procedure.

The Defendant has cited South Carolina Rule of Civil Procedure 4(d)(4) and (8) in support of the proposition that Plaintiff has failed to properly effectuate service on the Medical University Hospital Authority. Based on Defendant's status as an incorporated entity of the State of South Carolina, Defendant's argument fails. (Ex. 1: MUHA Incorporation Status)

Specifically, the language cited by the Defendant is as follows:

SCRCP 4(d)(4) State of South Carolina:

(A) When State a Party. Upon the State of South Carolina by delivering a copy of the summons and complaint to the Attorney General, or when another official is designated to be served by the statute permitting such action by delivering a copy of the summons and complaint to that official and sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.

(B) When Unconstitutionality of Statute is Asserted. In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General.

and

SCRCP 4(d)(8) State of South Carolina:

(8) Service by Certified Mail. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4 (c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55 (c) or Rule 60 (b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Plaintiff served Defendant by timely delivering a copy of the Summons and Complaint to its CEO via Certified and US Mail on June 12, 2018 (Timely served on June 5, 2018). (Ex. 2: Service Proofs). Defendant is attempting to argue that the Defendant is essentially the State of South Carolina such that service upon the Attorney General is necessary pursuant to SCRCP 4.

Defendant argument, however, fails due to SCRPC 4(d)(3) and (5) which are stated below:

(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(5) State Officer or Agency. Upon an officer or agency of State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

SCRPC 4(d)(3) and (5).

As Defendant MUHA is an Agency-Corporation of the State of South Carolina, SCRPC 4(d)(5), proscribes that service is proper via SCRPC 4(d)(3) which provides that a copy can be delivered to an officer, managing, or general agent (i.e. the CEO). SCRPC 4(d)(8) therefore establishes that Service is proper via Certified Mail.

Based upon the foregoing, Defendant's Motion for Summary Judgment should be denied.

IV. CONCLUSION

Based on the foregoing reasons, Plaintiff hereby requests that the Court enter an Order denying the Defendant's Motion to Dismiss her Complaint.

Respectfully Submitted:

By: s/ Donald Gist
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November 15, 2018
Columbia, South Carolina

EXHIBIT D

CLEVELAND & CONLEY, L.L.C.
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January 8, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed, is one original and one copy of Notice of Motion/Order, Motion to Alter or Amend Order and a check for the \$25.00 filing fee, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our office.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

EJF/lmp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

EXHIBIT E

CLEVELAND & CONLEY, L.L.C.
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January 9, 2019

The Honorable Jennifer B. McCoy
Circuit Court Judge for the Ninth Judicial Circuit
100 Broad St., Suite 106
Charleston, South Carolina 29401

Re: Elise Cromwell v. Medical University Hospital Authority et al.
Civil Action No.: 2018-CP-10-2580

Dear Judge McCoy:

Enclosed please find Defendants' Motion to Alter or Amend. The Motion was filed and served on January 8, 2019, and a copy is being provided directly to you pursuant to Rules 52(d) and 59(g) of the South Carolina Rules of Civil Procedure.

If you have any questions about the enclosed Motion, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

BJC/lmp
Enclosures as stated
cc: Donald Gist, Esquire

CLEVELAND & CONLEY, L.L.C.
LABOR AND EMPLOYMENT DEFENSE

ONE SEVENTY ONE CHURCH STREET, SUITE 310
CHARLESTON, SOUTH CAROLINA 29401
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CAROLINE WIGGS CLEVELAND †
BOB J. CONLEY
EMMANUEL J. FERGUSON
OF COUNSEL
LABOR & EMPLOYMENT LAW

TELEPHONE: (843) 577-9626
FACSIMILE: (843) 577-6672

January 16, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed, is one original and one copy of Defendants' Reply to Plaintiff's Response in Opposition to Defendants' Motion to Alter or Amend Order, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our office.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

EJF/lmp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

behalf of the Plaintiff and Emmanuel Ferguson, Esquire of Cleveland and Conley, LLC who appeared on behalf of the Defendants.

At the hearing and via Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, Plaintiff's counsel stipulated to the Dismissal of Plaintiff's claims against Defendant MUSC and to the dismissal of Plaintiff's claims for breach of contract with fraudulent intent against Defendant MUHA. Thus, these issues were no longer opposed issues before the Court at the November 29, 2018 hearing.

The sole contested issue before the Court at the November 29, 2018 hearing was whether Plaintiff properly served Defendant MUHA via certified mail in accordance with the applicable rules of civil procedure.

The Court issued an order dated December 19, 2018 denying Defendant's Motion to Dismiss. Defendant thereafter filed a Motion to Alter / Amend on January 8, 2019. For the following reasons Defendant's Motion to Alter / Amend should be denied.

LEGAL STANDARD

South Carolina Rule of Civil Procedure 52(b) allows a party "not later than 10 days after receipt of written notice of entry of judgment" to request that the court "amend its findings or make additional findings and may amend the judgment accordingly..." Rule 52(b), SCRPC, further requires "[a] party filing a written motion under this rule shall provide a copy of the motion to the judge within ten (10) days after filing the motion." Correspondingly, and similarly, South Carolina Rule of Civil Procedure 59 (e) allows a party to request a court alter or amend a judgment within ten days of receiving the written notice of entry of an order.

LEGAL ARGUMENT

1. Defendant's Motion to Amend / Alter Judgment is untimely

There is no disagreement among the parties regarding the legal standard applicable in the instant case. The law requires that any Motion to Amend / Alter brought pursuant to the South Carolina Rules of Civil Procedure be made within ten days after receipt of written notice of the entry of an order.

Although Defendant alleges that it received written notice of the entry of the order on December 31, 2018, it is apparent that written notice was entered online on December 28, 2018, (see attached Exhibit 1). This information is readily available online and the Defendant certainly was on notice of such. As Defendant's motion was filed on January 8, 2018, Defendant missed the motion deadline which expired on January 7, 2018. As such, the Court is devoid of jurisdiction to hear Defendant's Motion such that it must be denied.

2. Plaintiff's service of process of Defendant MUHA was proper

The Defendant has cited South Carolina Rule of Civil Procedure 4(d)(4) and (8) in support of the proposition that Plaintiff has failed to properly effectuate service on the Medical University Hospital Authority. As demonstrated by Plaintiff's counsel at the November 29, 2018 hearing, based on Defendant's status as an incorporated entity of the State of South Carolina, Defendant's argument fails.

Specifically, the language cited by the Defendant is as follows:

SCRCP 4(d)(4) State of South Carolina:

(A) When State a Party. Upon the State of South Carolina by delivering a copy of the summons and complaint to the Attorney General, or when another official is designated to be served by the statute permitting such action by delivering a copy of the summons and complaint to that official and sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.

(B) When Unconstitutionality of Statute is Asserted. In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint shall be sent by registered or certified mail to the Attorney General.

and

SCRCP 4(d)(8) State of South Carolina:

(8) Service by Certified Mail. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4 (c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55 (c) or Rule 60 (b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

Plaintiff served Defendant by timely delivering a copy of the Summons and Complaint to its CEO via Certified and US Mail on June 12, 2018 (Timely served on June 5, 2018). Defendant is attempting to argue that the Defendant is essentially the State of South Carolina such that service upon the Attorney General is necessary pursuant to SCRCP 4.

Defendant argument, however, fails due to SCRCP 4(d)(3) and (5) which are stated below:

(3) Corporations and Partnerships. Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

(5) State Officer or Agency. Upon an officer or agency of State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

SCRCP 4(d)(3) and (5).

As Defendant MUHA is an Agency-Corporation of the State of South Carolina, SCRCP (4)(d)(5), proscribes that service is proper via SCRCP (4)(d)(3) which provides that a copy can be delivered to an officer, managing, or general agent (i.e. the CEO). SCRCP (4)(d)(8) therefore establishes that Service is proper via Certified Mail.

At the hearing, when questioned by the Court on the Corporate status of the Defendant, Defendant's counsel was unable to refute such status. Therefore, Plaintiff's service of the Defendant was proper. Defendant's Motion to Alter merely rehashes the same arguments which

Defendant's counsel made at the November 29, 2018 hearing, all of which have been properly refuted by the Court in its December 28, 2018 ruling.

Based upon the foregoing, Defendant's Motion to Alter/Amend must be denied.

Respectfully Submitted:



Donald Gist
Aaron Wallace
Gist Law Firm, PA
Post Office Box 30007
Columbia, South Carolina 29230
Tel.: (803) 771-8007
Fax: (803) 771-0063
Attorneys for Plaintiffs

January 15, 2019
Columbia, South Carolina

EXHIBIT 1



Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

[Charleston County Home Page](#) [Clerk of Court Home Page](#) [Magistrates Court](#) [SC Judicial Home Page](#) [Search Tips](#)

Switch View

Elise A Cromwell VS Medical University of South Carolina Hospital Authority

Case Number:	2018CP1002580	Court Agency:	Common Pleas	Filed Date:	05/21/2018
Case Type:	Common Pleas	Case Sub Type:	Use Empl 180	File Type:	Mediator - Jury
Status:	Pending/ADR Sanctions	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:		Disposition Date:		Disposition Judge:	
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

[Case Parties](#) [Judgments](#) [Tax Map Information](#) [Associated Cases](#) [Actions](#) [Financials](#)

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Cromwell, Elise A	ADR/Notice of ADR	Action		03/17/2019-09:07		
Medical University of South Carolina	Motion/Motion Filing Fee	Filing		01/08/2019-14:14		
Conley, Bob J.	Defnt Motion/Alter and/or Amend Order & Crt/Srv	Motion		01/08/2019-09:19		
	Order-Motion to Dismiss Denied	Order		12/28/2018-10:14		
Cromwell, Elise A	ADR/Alternative Dispute Resolution (Workflow)	Action		12/17/2018-15:19	03/17/2019-15:19	
Cromwell, Elise A	Archived Document	Filing		12/17/2018-00:00		
Gist, Donald	Archived Document	Filing		12/17/2018-00:00		
Daniel, E. Bart	Archived Document	Filing		12/17/2018-00:00		
Barnes, A. Parker Jr.	Archived Document	Filing		12/17/2018-00:00		
Conley, Bob J.	Archived Document	Filing		12/17/2018-00:00		
	Memo in Support of Defendants' Motion to Dismiss, crt/srv	Filing		11/29/2018-15:26		
Gist, Donald	11/26/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action		11/01/2018-10:41		
Conley, Bob J.	11/26/2018_MOTION_Roster/Notice of Motions Roster Publicatio	Action		11/01/2018-10:41		
Medical University of South Carolina	Motion/Motion Filing Fee	Filing		07/11/2018-15:00		
Conley, Bob J.	Motion to Dismiss & cert/srv	Motion		07/11/2018-12:06	11/29/2018-12:06	
Cromwell, Elise A	Summons & Complaint	Filing		05/21/2018-15:10		

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GIST LAW FIRM, P.A.

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**ATTORNEYS-AT-LAW
Donald Gist
Aaron V. Wallace**

**MAILING ADDRESS
Post Office Box 30007
Columbia, South Carolina 29230**

January 16, 2019

Honorable Julie Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401-2258

**RE: Elise Cromwell v. Medical University Hospital Authority
Case No.: 2018-CP-10-2580**

Dear Ms. Armstrong:

Enclosed for filing please find an original and one copy of Plaintiff's Memorandum in Opposition to Defendant's Motion to Amend/Alter in the above case.

Please file the original and return the clocked copy to us in the postage prepaid envelope which I have provided for your convenience.

Please do not hesitate to contact me if you have any questions or concern regarding this matter.

Sincerely,



Aaron Wallace
Attorney at Law

c: Ms. Elise Cromwell
Emmanuel Ferguson, Esquire
Bob Conley, Esquire
Donald Gist, Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Elise A. Cromwell,)
)
Plaintiff,)
)
v.)
)
Medical University of South)
Carolina Hospital Authority and the)
Medical University of South)
Carolina)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-10-02580

ANSWER

FILED
2019 FEB 20 PM 1:49
JULIE J. ARHSTROM
CLERK OF COURT

Defendants Medical University of South Carolina Hospital Authority ("MUHA") and Medical University of South Carolina ("MUSC") (collectively, the "Defendants"), by and through their undersigned attorneys, hereby answer the Complaint of the Plaintiff as follows:

FOR A FIRST AND SECOND DEFENSE

- I Defendants move to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(5), SCRPC, because Plaintiff failed to properly serve Defendants.
- II Defendants move to dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6), SCRPC, because Plaintiff's Complaint fails to state facts sufficient to constitute causes of action.

FOR A THIRD DEFENSE AND BY WAY OF ANSWER

- III A. Each allegation in Plaintiff's Complaint not hereinafter expressly admitted is denied.
- B. Defendants respond to the allegations in Plaintiff's Complaint by paragraph as follows:

INTRODUCTION

1. Denied.

JURISDICTION AND VENUE

2. Denied.

3. Denied.

PARTIES

4. Defendants lack sufficient information to admit or deny the allegations in Paragraph 4 of Plaintiff's Complaint and, therefore deny, the allegations in Paragraph 4 of Plaintiff's Complaint.

5. Admitted.

FACTS

6. Denied.

7. Denied.

8. Denied.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

20. Denied.

21. Denied.

FIRST CAUSE OF ACTION
(Breach of Contract)

35 [sic]. Defendants hereby incorporate their responses to Paragraphs 1 through 21 as fully and completely as if repeated verbatim herein.

36 [sic]. Denied.

37 [sic]. Denied.

38 [sic]. Denied.

39 [sic]. Denied.

40 [sic]. Denied.

41 [sic]. Denied.

42 [sic]. Denied.

43 [sic]. Denied.

SECOND CAUSE OF ACTION
(Breach of Contract with Fraudulent Intent)

43 [sic]. Defendants hereby incorporate their responses to Paragraphs 1 through 21 and 35 through 43 as fully and completely as if repeated verbatim herein.

44 [sic]. Denied.

45 [sic]. Denied.

46 [sic]. Denied.

47 [sic]. Denied.

48 [sic]. Paragraph 48 of Plaintiff's Complaint contains conclusions of law that Defendants are not required to admit or deny. However, to the extent a response is required, Defendants deny the allegations in Paragraph 48 of Plaintiff's Complaint.

JURY TRIAL REQUESTED AND PRAYER FOR RELIEF

Defendants deny all allegations in Plaintiff's Complaint and expressly deny Plaintiff is entitled to any or all the relief requested in her prayer for relief.

FOR A THIRD DEFENSE

III Plaintiff's breach of contract claim(s) is barred by the parol evidence rule.

FOR A FOURTH DEFENSE

IV Plaintiff has failed to mitigate her damages, and some or all her claims are thus precluded or limited under the doctrine of avoidable consequences.

FOR A FIFTH DEFENSE

V The actions taken by Defendants were made for legitimate business reasons, in good faith, and without malice, and are thus subject to qualified privilege.

FOR AN SIXTH DEFENSE

VI Defendants acted in good faith, on reasonable grounds, and without malice or intent to harm.

FOR A SEVENTH DEFENSE

VII Plaintiff is barred from recovery from Defendants by the doctrine of waiver.

FOR A EIGHTH DEFENSE

VIII Plaintiff is barred from recovery from Defendants by the doctrine of laches.

FOR A NINTH DEFENSE

- IX Plaintiff is barred from recovery from Defendants by the doctrine of estoppel.

FOR A TENTH DEFENSE

- X Plaintiff is barred from any recovery from Defendants due to the doctrine of unclean hands.

FOR AN ELEVENTH DEFENSE

- XI Plaintiff's claims are barred under the doctrine of misrepresentation.

FOR A TWELFTH DEFENSE

- XII Any and all alleged claims as to Defendants are barred under the doctrine of mistake.

FOR A THIRTEENTH DEFENSE

- XIII Plaintiff's claims are barred by the doctrines of accord and satisfaction and settlement and release.

FOR A FOURTEENTH DEFENSE

- XIV Plaintiff's claims are barred by the Statute of Frauds.

FOR A FIFTEENTH DEFENSE

- XV Plaintiff's claims are barred in whole or in part by the statute of limitations.

FOR A SIXTEENTH DEFENSE

- XVI Defendants are governmental entities and, therefore, Plaintiff cannot recover punitive or exemplary damages.

FOR A SEVENTEENTH DEFENSE

- XVII Defendants plead the provisions of the South Carolina Tort Claims Act, S.C. Code §§ 15-78-10, *et seq.*, including all the immunities, limitations, and defenses granted or reserved in the Act.

FOR AN EIGHTEENTH DEFENSE

XVIII Plaintiff received full payment for her services during her employment with Defendants.

FOR A NINETEENTH DEFENSE

XIX Plaintiff's claims are barred by the doctrine of consent.

FOR A TWENTIETH DEFENSE

XX Defendant MUSC never employed Plaintiff.

FOR A TWENTY-FIRST DEFENSE

XXI Plaintiff failed to properly serve Defendants with the Summons and Complaint and, therefore, the Complaint is barred for insufficiency of service of process pursuant to Rule 12(b)(5), SCRPC. Additionally, and consequently, the Court has no personal jurisdiction over Defendants.

FOR A TWENTY-SECOND DEFENSE

XXII Plaintiff failed to exhaust her administrative remedies.

FOR A TWENTY-THIRD DEFENSE

XXIII Tort remedies are barred as to Plaintiff's claim any covenant of good faith and fair dealing was breached by Defendants.

FOR A TWENTY-FOURTH DEFENSE

XXIV Defendants deny they breached any contract or any implied covenant of good faith and fair dealing. However, to the extent Defendants are found to have breached same, which is asserted solely for the purposes of this defense, Plaintiff may not recover damages for both causes of action.

WHEREFORE, having fully answered Plaintiff's Complaint and asserted defenses thereto, Defendants pray that this Honorable Court grant the following relief:

- (a) The dismissal of the claims against Defendants;
- (b) Award Defendants the costs of this action; and,
- (c) Such additional relief as this Honorable Court deems just and proper.



Caroline Wrenn Cleveland

Bob J. Conley

Emmanuel J. Ferguson

CLEVELAND & CONLEY, LLC

One Seventy-One Church Street, Suite 310

Charleston, South Carolina 29401

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ccleveland@clevelandlaborlaw.com

bconley@clevelandlaborlaw.com

eferguson@clevelandlaborlaw.com

ATTORNEYS FOR DEFENDANTS

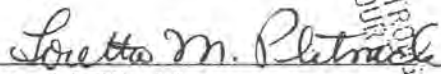
Charleston, South Carolina
February 19, 2019

2018 CP-10-2580

CERTIFICATE OF SERVICE

This is to certify that I have this 19th day of February 2019, caused to be served a copy of Defendants' Answer on counsel for Plaintiff by depositing same in the United States Mail, First Class postage prepaid, and addressed to:

Donald Gist
Gist Law Firm, P.A.
4400 North Main Street
Columbia, SC 29203


Loretta M. Plitnick
Paralegal

FILED
2019 FEB 20 PM 1:49
JULIE J. ARMSTRONG
CLERK OF COURT

CLEVELAND & CONLEY, L.L.C.
LABOR AND EMPLOYMENT DEFENSE

ONE SEVENTY ONE CHURCH STREET, SUITE 310
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CAROLINE WRESS CLEVELAND f
BOB J. CONLEY
EMMANUEL J. FERGUSON
SERVICED SPECIALIST
LABOR & EMPLOYMENT LAW

TELEPHONE: (843) 577-9626
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February 19, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

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Civil Action No.: 2018-CP-10-2580

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Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our attention using the enclosed envelope provided.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC


Bob J. Conley

BJC/lmp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
Elise A. Cromwell,)
Plaintiff,)
v.)
Medical University of South)
Carolina Hospital Authority and the)
Medical University of South)
Carolina,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-10-02580

AMENDED ANSWER

BY _____

JULIE J. ARMSTRONG
CLERK OF COURT

2019 MAR 21 PM 12:46

FILED

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FACTS

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7. Denied.

8. Denied.

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13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Denied.

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(Breach of Contract)

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¹ See Exhibit A.

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FOR A TENTH DEFENSE

- X Plaintiff is barred from recovery from Defendants by the doctrine of estoppel.

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FOR A TWELFTH DEFENSE

- XII Plaintiff's claims are barred under the doctrine of misrepresentation

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FOR A TWENTIETH DEFENSE

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XXII Plaintiff failed to properly serve Defendants with the Summons and Complaint and, therefore, the Complaint is barred for insufficiency of service of process pursuant to Rule 12(b)(5), SCRPC. Additionally, and consequently, the Court has no personal jurisdiction over Defendants.

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XXV Defendants deny they breached any contract or any implied covenant of good faith and fair dealing. However, to the extent Defendants are found to have breached same, which is

asserted solely for the purposes of this defense, Plaintiff may not recover damages for both causes of action.

WHEREFORE, having fully answered Plaintiff's Complaint and asserted defenses thereto,

Defendants pray that this Honorable Court grant the following relief:

- (a) The dismissal of the claims against Defendants;
- (b) Award Defendants the costs of this action; and,
- (c) Such additional relief as this Honorable Court deems just and proper.



Caroline Wrenn Cleveland
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ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
eferguson@clevelandlaborlaw.com

ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
March 19, 2019

CERTIFICATE OF SERVICE

This is to certify that I have this 19th day of March 2019, caused to be served a copy of Defendants' Amended Answer on counsel for Plaintiff by depositing same in the United States Mail, First Class postage prepaid, and addressed to:

Donald Gist
Gist Law Firm, P.A.
4400 North Main Street
Columbia, SC 29203

Loretta M. Plitnick
Loretta M. Plitnick
Paralegal

FILED

2019 MAR 21 PM 12:46

JULIE J. ARMSTRONG
CLERK OF COURTBY LB

EXHIBIT A



HUMAN RESOURCES POLICY MANUAL

Number & Title: 46 – Anti-Harassment (Including Sexual Harassment)

Owner: Human Resources, H. Bastian

Location / File name:

U:\Authority HR Admins\policy46

Policy 46 Anti-Harassment 9.30.14

Dates:

Originated: 7/1/2000

Reviewed: 7/1/2002

7/1/2004, 9/18/09; 3/23/11;
9/29/2014

Legal Review:

Revised: 8/18/2003; 4/14/11;
3/10/14

Note: THIS POLICY, LIKE ALL OTHER POLICIES WITHIN THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY HUMAN RESOURCES POLICY MANUAL, IS NOT A CONTRACT OF EMPLOYMENT AND SHOULD NOT BE RELIED UPON AS SUCH. THIS POLICY MAY BE CHANGED AT ANY TIME BY THE MEDICAL UNIVERSITY HOSPITAL AUTHORITY.

Policy:

- A. It is the policy of the Medical University Hospital Authority (hereinafter “Authority”) to prohibit any form of harassment based on race, color, religion, sex, age, national origin, disability, veteran status, genetic information or any other factor and to conduct a thorough investigation of any such reported behavior.
- B. Employees and/or agents of the Authority should conduct themselves in a manner that ensures respect and dignity. The offender shall be subject to disciplinary action up to and including dismissal.
This policy prohibits sexual harassment by a supervisor, peer or any agent of the Authority and applies when persons are on Authority property or participating in an activity sponsored off-campus. It is also the policy of the Authority that willful false accusations of sexual harassment will not be condoned and offenders will be subject to disciplinary action up to and including dismissal.
- C. **Definitions of Sexual Harassment:**

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when,

Policy 46 – Anti-Harassment

Page: 1 of 4

1. Submission to such conduct is made explicitly or implicitly a term or condition of an individual's employment,
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting that individual, or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

D. Other Forms of Harassment:

1. The Authority also does not tolerate any form of harassment or intimidation based upon race, color, religion, age, national origin, disability, veteran status, genetic information or any other factor.
2. Generally, harassment is defined as verbal or physical conduct which denigrates or shows hostility to an individual because of his or her sex, race, color, age, religion, national origin, disability, veteran status, genetic information or any other factor, including those of his or her relatives, friends, or associates. Harassing or intimidating behavior includes, but is not limited to, discriminatory intimidation, derogatory statements, insults, ridicule, offensive comments, jokes, pranks, slurs, innuendoes, objects, pictures, graphic and electronic material (e-mails, faxes and social media) unwelcome touching, assault, physical interference with one's work, posters, and/or drawings. This behavior may be exhibited by electronic means, including employment actions against an employee who refuses to submit to or participate in offensive conduct.
3. The prohibited behaviors are those that have the purpose or effect of creating an intimidating, hostile or offensive work environment; unreasonably interferes with an individual's work performance; or otherwise adversely affects a person's employment opportunities.
4. Harassment or intimidation may originate with supervisors/managers, co-workers, faculty, students, visitors, or contractual employees. Regardless of the form or source, such behavior is deemed as unacceptable. Managers and supervisors are responsible for preventing harassment in their work areas. Their responsibilities include dissemination of this Policy, providing anti-harassment training for their employees, attending such training themselves, monitoring their work areas and appropriately addressing complaints.

5. No supervisor or manager is permitted to retaliate or take any adverse employment action against an employee who is the victim, reporter or witness of harassment. Supervisors or managers who are found to have engaged in retaliatory activity will be disciplined appropriately, up to and including termination.
6. Other forms of intimidation not specifically addressed by this Policy are also prohibited. Refer to MUSC Medical Center-Wide Security Policy A052, for additional information.

Procedure

- A. Any employee who believes he or she has been the victim of harassment to include sexual harassment is to present the complaint as promptly as possible after the alleged harassment occurs. The complaint is to be discussed with the Medical University Hospital Authority Office of Human Resources (hereinafter "Human Resources") or supervisor/manager, or director who will ensure the complaint is heard by the appropriate officials.
- B. If the complainant, after an initial meeting with Human Resources or appropriate official, decides to proceed, he or she should submit a written statement to the Human Resources Director, or his or her designee, within seven (7) days of the initial meeting. Following the receipt of the written statement, Human Resources will notify the appropriate Administrator.
- C. The Administrator, or designee, shall take appropriate action which may include the appointment of an investigative committee. Human Resources will assist in the investigative process.

The alleged offender will be notified of the complaint and required to respond in writing to the allegation. The complainant and alleged offender will be informed of the procedures that will be employed to investigate the allegations.
- D. If an investigative committee is appointed, it will conduct its own informal inquiry, call witnesses, and gather whatever information necessary to reach a determination as to the merits of the allegations. The investigative committee shall recommend an appropriate course of action to the Administrator. Human Resources shall inform the complainant and alleged offender of the decision.
- E. Any complaint by an employee which is initiated through an outside agency or organization will be addressed using the procedures above to the extent possible.

- F. As appropriate, discrimination complaints will be referred to the MUSC Office of Equal Employment Opportunity and Affirmation Action Compliance.
- G. If the decision requires that an employee be demoted, suspended or terminated, the employee who was disciplined may grieve such action as outlined in the Authority Human Resources Policy No. 44, Grievance Procedure.

Important: Any individual who believes that he or she has been a victim or witness of sexual harassment involving a faculty member, student, resident or fellow shall report the incident(s) to MUSC's Office of Gender Equity. Academic procedures apply for complaints of sexual harassment involving faculty, students, residents and fellows. Therefore, please refer to the Office of Gender Equity's web site (<http://www.musc.edu/genderequity>) for additional information or contact the Office by telephone (792-8066). Supervisors or department heads who have questions about the issues of sexual harassment involving faculty, students, residents, and fellows and one of their employees may contact the Office of Gender Equity for assistance.

CLEVELAND & CONLEY, L.L.C.
LABOR AND EMPLOYMENT DEFENSE

ONE SEVENTY ONE CHURCH STREET, SUITE 310
CHARLESTON, SOUTH CAROLINA 29401
WWW.CLEVELANDANDCONLEY.COM

CAROLINE WRESS CLEVELAND †
BOB J. CONLEY
EMMANUEL J. FERGUSON
COURT REPORT SPECIALIST
LABOR & EMPLOYMENT LAW

Telephone: (843) 577-9626
Facsimile: (843) 577-6672

March 19, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed is one original and one copy of Defendants' Amended Answer, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our attention using the enclosed envelope provided.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

BJC/lmp
Enc: as stated
cc: Donald Gist (w/enclosure)

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elise Cromwell

Plaintiff,

vs.

Medical University of South Carolina, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-2580

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Bob J. Conley, Bar No. 12243

Address:

Cleveland & Conley, LLC

171 Church St., Ste. 310, Charleston, SC
29401

Phone: 843-577-9616 Fax 843 577-6672

E-mail: bconley@clevelandlaborlaw.com

Other:

Defendant's Attorney:

Donald Gist, Bar No. 13098

Address:

Gist Law Firm, P.A., P.O. Box 30007, Columbia,
SC 29203

Phone: 803-771-8007 Fax 803-771-0063

E-mail: donaldgist.gistlawfirm@gmail.com

Other:

☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)

☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)

☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Judgment on the Pleadings

Estimated Time Needed: 1 hour

Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached

☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant

4-4-19

Date submitted

SECTION III: Motion Fee

☒ **PAID - AMOUNT: \$**

☐ **EXEMPT:**

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☐ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached
order.

☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ **MOTION FEE COLLECTED: \$** _____

☐ **CONTESTED - AMOUNT DUE: \$** _____

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-2580

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4. The pleadings do not allege any violation of public policy by Defendants that would support her claim for breach of an employment contract;

5. The Pleadings do not allege the existence of a written employment contract that would satisfy the statute of frauds;

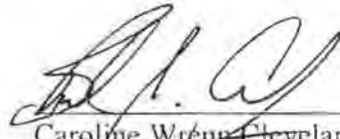
6. Plaintiff's claim for breach of contract with fraudulent intent is barred because Defendants are immune from punitive damages; and,

7. Plaintiff's Complaint fails due to insufficiency of service of process and, therefore, Plaintiff's Complaint fails as a matter of law pursuant to Rule 12(b)(5), SCRCF. In general, Plaintiff served the Summons and Complaint by mail. However, pursuant to Rule 4(d)(4) and (8), SCRCF, neither Defendant can be served with the Summons and Complaint by mail. Consequently, based upon the pleadings, the Court lacks subject personal jurisdiction as to either Defendant.

WHEREFORE, Defendants respectfully move this Court for an order dismissing Plaintiff's Complaint and awarding Defendants such other and further relief as this Court may deem just and proper.

Counsel for Defendants will submit a memorandum in support of this Motion prior to a hearing.

[signatures on following page]



Caroline Wienn Cleveland (SC Bar #64253)

Bob J. Conley (SC Bar #12243)

Emmanuel J. Ferguson (SC Bar #81431)

CLEVELAND & CONLEY, L.L.C.

One Seventy-One Church Street, Suite 310

Charleston, South Carolina 29401

Telephone: (843) 577-9626

Facsimile: (843) 577-6672

ccleveland@clevelandlaborlaw.com

bconley@clevelandlaborlaw.com

eferguson@clevelandlaborlaw.com

Charleston, South Carolina

April 3, 2019

ATTORNEYS FOR DEFENDANTS

2018-CP-10-2580

CERTIFICATE OF SERVICE

This is to certify that I have this 4th day of April 2019, caused to be served a copy of Defendants' Motion for Judgment on the Pleadings on counsel for Plaintiff by depositing same in the United States Mail, First Class postage prepaid, and addressed to:

Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203

Loretta M. Plitnick

Loretta M. Plitnick
Paralegal

FILED
2019 APR -8 PM 2:13
CLERK OF COURT

CLEVELAND & CONLEY, L.L.C.
LABOR AND EMPLOYMENT DEFENSE

ONE SEVENTY ONE CHURCH STREET, SUITE 310
CHARLESTON, SOUTH CAROLINA 29401
WWW.CLEVELANDANDCONLEY.COM

CAROLINA WHELAN CLEVELAND †
BOB J. CONLEY
EMMANUEL J. FERGUSON
CERTIFIED SPECIALIST
LABOR & EMPLOYMENT LAW

TELEPHONE: (843) 577-9626
FACSIMILE: (843) 577-6672

April 4, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina*, et al.,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed is one original and one copy of Defendants' Notice of Motion, Motion for Judgment on the Pleadings, and a check to cover the filing fee, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our attention using the enclosed envelope provided.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

BJC/lmp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-2580

Elise Cromwell

Plaintiff,

vs.

Medical University of South Carolina, et al.

Defendant

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:
Bob J. Conley, Bar No. 12243
Address:
Cleveland & Conley, LLC
171 Church St., Ste. 310, Charleston, SC
29401
Phone: 843-577-9616 Fax 843 577-6672
E-mail: bconley@clevelandlaborlaw.com
Other: _____

Defendant's Attorney:
Donald Gist, Bar No. 13098
Address:
Gist Law Firm, P.A., P.O. Box 30007, Columbia,
SC 29203
Phone: 803-771-8007 Fax 803-771-0063
E-mail: donaldgist.gistlawfirm@gmail.com
Other: _____

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion to Restore Motion for Judgment on the Pleadings

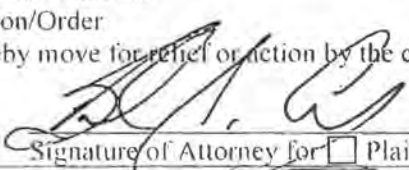
Estimated Time Needed: 1 hour

Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

9-19-19

Date submitted

SECTION III: Motion Fee

- ☒ **PAID - AMOUNT:** \$ _____
☐ **EXEMPT:** (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

- ☐ **MOTION FEE COLLECTED:** \$ _____
☐ **CONTESTED - AMOUNT DUE:** \$ _____

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-2580

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**DEFENDANT'S MOTION TO
RESTORE MOTION FOR
JUDGMENT ON THE
PLEADINGS**

2019 SEP 30 PM 1:13
U.S. DISTRICT COURT
the Pleadings
email the hearing

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On September 9, 2019, the Court filed a Form 4 Order dismissing the Motion for lack of prosecution. In the Order, the Court allowed Defendants ten days to show “just cause” why the Motion should be restored.

LEGAL STANDARD¹

“Whether an action [or motion] should be dismissed for failure to prosecute is left to the discretion of the trial court judge, and his decision will not be disturbed, except upon a clear showing of an abuse of discretion.” *McComas v. Ross*, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006). In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of *repeated* warnings to the offending party or *multiple* opportunities to proceed with trial, and only then upon a finding of unreasonable neglect. *Id.*

The Fourth Circuit has said the trial court must consider four factors before dismissing a case, or in this instance a motion, for failure to prosecute: (1) the party’s degree of personal responsibility; (2) the amount of prejudice caused the opposing party; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and, (4) the effectiveness of sanctions less drastic than dismissal. *McComas*, 368 S.C. at 63 (citing *Hillig v. Comm’r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir.1990)).

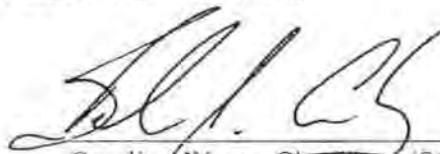
ARGUMENT

Counsel for Defendants respectfully requests its Motion for Judgment on the Pleadings be restored. Although counsel for Defendants acknowledge and accept personal responsibility in failing to ensure the hearing was properly calendared, Plaintiff will not be prejudiced by the rescheduling of the hearing. Further, counsel for Defendants do not have a history of deliberately proceeding in a dilatory fashion.

¹ The following legal standard applies specifically to instances where the Court considers dismissal of an *entire* lawsuit due to *plaintiff’s* failure to prosecute. However, the same, general standard should apply to this situation as well.

CONCLUSION

For the reasons stated above, Defendants request the court restore Defendants' Motion for Judgment on the Pleadings and set a date for the Motion to be heard.



Caroline Wrenn Cleveland (SC Bar #64253)

Bob J. Conley (SC Bar #12243)

Emmanuel J. Ferguson (SC Bar #81431)

CLEVELAND & CONLEY, L.L.C.

One Seventy-One Church Street, Suite 310

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Telephone: (843) 577-9626

Facsimile: (843) 577-6672

ccleveland@clevelandlaborlaw.com

bconley@clevelandlaborlaw.com

eferguson@clevelandlaborlaw.com

Charleston, South Carolina
September 19, 2019

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

This is to certify that I have this 19th day of September 2019, caused to be served a copy of Defendants' Motion to Restore Motion for Judgment on the Pleadings on all counsel by depositing in the mail and addressed to:

Donald Gist, Esquire
Gist Law Firm, PA
P.O. Box 30007
Columbia, SC 29203

Loretta M. Plitnick

Loretta M. Plitnick
Paralegal

2019 SEP 30 PM 1:39
CLERK OF COURT

September 19, 2019

CLEVELAND & CONLEY, L.L.C.
LABOR AND EMPLOYMENT DEFENSE

ONE SEVENTY ONE CHURCH STREET, SUITE 310
CHARLESTON, SOUTH CAROLINA 29401
WWW.CLEVELANDANDCONLEY.COM

CAROLINE WIRENN CLEVELAND †
BOB J. CONLEY
EMMANUEL J. FERGUSON

†CERTIFIED SPECIALIST,
LABOR & EMPLOYMENT LAW

TELEPHONE: (843) 577-9626
FACSIMILE: (843) 577-6672

September 19, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed, is one original and one copy of Notice of Motion/Order, Motion to Restore Motion for Judgment on the Pleadings and a check for the \$25.00 filing fee, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our office.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

BJC/Imp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elise Cromwell

Plaintiff,

vs.

Medical University of South Carolina, et al.

Defendant.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-2580

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:

Bob J. Conley, Bar No. 12243

Address:

Cleveland & Conley, LLC
171 Church St., Ste. 310, Charleston, SC
29401

Phone: 843-577-9616 Fax 843 577-6672

E-mail: bconley@clevelandlaborlaw.com

Other: _____

Defendant's Attorney:

Donald Gist, Bar No. 13098

Address:

Gist Law Firm, P.A., P.O. Box 30007, Columbia,
SC 29203

Phone: 803-771-8007 Fax 803-771-0063

E-mail: donaldgist.gistlawfirm@gmail.com

Other: _____

- ☒ **MOTION HEARING REQUESTED** (attach written motion and complete SECTIONS I and III)
☐ **FORM MOTION, NO HEARING REQUESTED** (complete SECTIONS II and III)
☐ **PROPOSED ORDER/CONSENT ORDER** (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Motion for Summary Judgment

Estimated Time Needed: 1 hour

Court Reporter Needed: ☒ YES/☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff/☒ Defendant

10-1-19

Date submitted

SECTION III: Motion Fee☒ PAID - AMOUNT: \$ _____☐ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☐ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached
order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-2580

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2019 OCT -1 PM 2:31
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3. Plaintiff cannot show any violation of public policy by Defendants that would support her claim for breach of an employment contract;

4. Plaintiff cannot show the existence of a written employment contract that would satisfy the statute of frauds;

5. Plaintiff's claim for breach of contract with fraudulent intent is barred because Defendants are immune from punitive damages;

6. Plaintiff is an at-will employee of the Medical University Hospital Authority ("MUHA");

7. Plaintiff's claim is barred by S.C. Code Ann. § 41-1-110 (1986 & Supp. 2006);

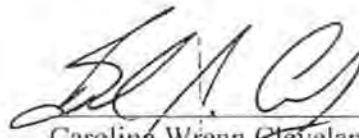
8. Plaintiff cannot present sufficient material evidence to support every element necessary to pursue her breach of contract claim; and,

9. Plaintiff's Complaint fails due to insufficiency of service of process and, therefore, Plaintiff's Complaint fails as a matter of law. In general, Plaintiff served the Summons and Complaint by mail. However, pursuant to Rule 4(d)(4) and (8), SCRCP, neither Defendant can be served with the Summons and Complaint by mail. Consequently, based upon the pleadings, the Court lacks subject personal jurisdiction as to either Defendant.

WHEREFORE, Defendants respectfully move this Court for an order granting each of them summary judgment and awarding Defendants such other and further relief as this Court may deem just and proper.

Counsel for Defendants will submit a memorandum in support of this Motion prior to a hearing.

[signatures on following page]



Caroline Wrenn Cleveland

Bob J. Conley

Emmanuel J. Ferguson

CLEVELAND & CONLEY, L.L.C.

One Seventy-One Church Street, Suite 310

Charleston, South Carolina 29401

Telephone: (843) 577-9626

Facsimile: (843) 577-6672

ccleveland@clevelandlaborlaw.com

bconley@clevelandlaborlaw.com

eferguson@clevelandlaborlaw.com

Charleston, South Carolina
September 30, 2019

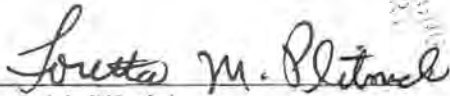
ATTORNEYS FOR DEFENDANTS

2018 CR 10-2580

CERTIFICATE OF SERVICE

This is to certify that I have this 1st day of October 2019, caused to be served a copy of Defendants' Motion for Summary Judgment on counsel for Plaintiff by depositing same in the United States Mail, First Class postage prepaid, and addressed to:

Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203



Loretta M. Plitnick
Paralegal

2019 OCT -4 PM 2:31
U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

CLEVELAND & CONLEY, L.L.C.
LABOR AND EMPLOYMENT DEFENSE

ONE SEVENTY ONE CHURCH STREET, SUITE 310
CHARLESTON, SOUTH CAROLINA 29401
WWW.CLEVELANDANDCONLEY.COM

CAROLINE WRENN CLEVELAND †
BOB J. CONLEY
EMMANUEL J. FERGUSON
REGISTERED SPECIALIST
LABOR & EMPLOYMENT LAW

TELEPHONE: (843) 577-9626
FACSIMILE: (843) 577-6672

October 1, 2019

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street, Suite 106
Charleston, South Carolina 29401

Re: *Cromwell v. The Medical University of South Carolina, et al.*,
Civil Action No.: 2018-CP-10-2580

Dear Ms. Armstrong:

Enclosed is one original and one copy of Defendants' Notice of Motion, Motion for Summary Judgment, and a check to cover the filing fee, pertaining to the above-referenced matter.

Upon review and approval, we are requesting the original be filed with the court and a file-stamped copy be returned to our attention using the enclosed envelope provided.

We thank you for your assistance with this matter and if you have any questions, please contact me.

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

BJC/lmp
Enc: as stated
cc: Donald Gist, Counsel for Plaintiff

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2018-CP-10-2580
	)	
Elise A. Cromwell,	)	
	)	
Plaintiff,	)	
	)	MOTION FOR SUMMARY
v.	)	JUDGMENT
	)	
Medical University of South Carolina	)	
Hospital Authority and the Medical	)	
University of South Carolina	)	
	)	
Defendants.	)	
	)	

TO: DONALD GIST, ATTORNEY FOR PLAINTIFF

PLEASE TAKE NOTICE, the undersigned attorneys for Defendants, under Rule 56, SCRCP, will move before the presiding judge of the Ninth Judicial Circuit at the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina 29401, or at such other place as the Court may direct, after ten (10) days from the date of service hereof or at such time and place as the Court may direct, for summary judgment as to Plaintiff's claims and causes of action. Defendants move for summary judgment based upon the following, general grounds:

1. Plaintiff, as a matter of law, was never employed by Defendant Medical University of South Carolina.
2. Plaintiff cannot present evidence of or otherwise show the existence of any legally viable employment contract between Defendants and Plaintiff.
3. Plaintiff cannot present evidence of or otherwise show any violation of public policy by Defendants that would support her claim for breach of an employment contract.
4. Plaintiff cannot present evidence of or otherwise show the existence of a written employment contract that would satisfy the statute of frauds.

5. Plaintiff's claim for breach of contract with fraudulent intent is barred because the claim is not legally viable as to public entities, such as Defendants, and Defendants are immune from punitive damages.

6. The Court lacks personal jurisdiction. In general, Plaintiff served the Summons and Complaint by mail. However, pursuant to Rule 4(d)(5) and (8), SCRCP, neither Defendant can be served with the Summons and Complaint by mail. Additionally, Plaintiff cannot present evidence she served the South Carolina Attorney General with the Summons and Complaint, as required by Rule 4(d)(5), SCRCP.

WHEREFORE, Defendants respectfully move this Court for summary judgment and an award to Defendants of such other and further relief as this Court may deem just and proper.

Counsel for Defendants will submit a memorandum in support of this motion prior to a hearing.

s/ Bob J. Conley
 Caroline Wrenn Cleveland
 Bob J. Conley
 CLEVELAND & CONLEY, L.L.C.
 One Seventy-One Church Street, Suite 310
 Charleston, South Carolina 29401
 Telephone: (843) 577-9626
 Facsimile: (843) 577-6672
ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com

Charleston, South Carolina
 February 10, 2022

ATTORNEYS FOR DEFENDANTS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2018-CP-10-02580
	)	
Elise A. Cromwell,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CONSENT ORDER TO STRIKE CASE
	)	PURSUANT TO RULE 40(j), SCRCF
Medical University of South	)	
Carolina Hospital Authority and the	)	
Medical University of South	)	
Carolina,	)	
	)	
Defendants.	)	
	)	

Upon motion and consent of the parties and counsel, under the provisions of South Carolina Rule of Civil Procedure 40(j), Plaintiff's claims against Defendants are stricken by consent of the parties, which agree that if the claims are restored upon motion made within one year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored.

IT IS SO ORDERED.

Charleston, South Carolina

_____, 2022

Chief Administrative Judge
Ninth Judicial Circuit

WE SO MOVE AND CONSENT:

s/Donald Gist

Donald Gist

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ATTORNEYS FOR DEFENDANTS

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elise A. Cromwell,

Plaintiff,

v.

Medical University of South Carolina Hospital
Authority,

Defendant.

IN THE COURT OF COMMON PLEAS

FOR THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-02580

MOTION TO REINSTATE CASE
PURSUANT TO 40(j)

COMES NOW Plaintiff Elise A. Cromwell, by and through her undersigned counsel, who along with defense counsel agreed on March 10, 2022 to mutually file under SCRCP 40(j) to stay the case under the statute due to the case not being ready for trial and due to additional discovery not yet taken on damages. Plaintiff now having consulted with Defendant, respectfully moves for this Court to reinstate her case, which was dismissed pursuant to SCRCP Rule 40(j) on March 10, 2022.

Respectfully Submitted,

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ATTORNEYS FOR PLAINTIFF

March 20, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2018-CP-10-2580
	)	
Elise A. Cromwell,	)	
	)	
Plaintiff,	)	
	)	DEFENDANTS' MEMORANDUM
v.	)	IN OPPOSITION TO
	)	PLAINTIFF'S MOTION TO
Medical University of South Carolina	)	RESTORE
Hospital Authority and the Medical	)	
University of South Carolina,	)	
	)	
Defendants.	)	
	)	

STATEMENT OF THE CASE

Plaintiff Elise Cromwell ("Cromwell") filed her Complaint against the Medical University Hospital Authority ("MUHA") and the Medical University of South Carolina ("MUSC") (collectively "Defendants") on May 21, 2018. Cromwell asserts two causes of action in her Complaint against Defendants: 1) breach of employment contract; and 2) breach of contract with fraudulent intent.

On March 22, 2022, the Court entered a "Consent Order to Strike Case Pursuant to Rule 40(j), SCRCF" (the "Order"). Subsequently, almost two years later, on March 20, 2024, Cromwell filed her "Motion to Reinstate Case Pursuant to 40(j)" (the "Motion").

The Motion is now before the Court for hearing. Defendants oppose the Motion and contend Cromwell's claims and causes of action in the Complaint are barred by the statute of limitations. This memorandum of law is offered in opposition to the Motion.

LEGAL STANDARD

A. Rule 40(j), SCRCP.

Rule 40(j) provides:

[a] party may strike its complaint, counterclaim, cross-claim, or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim, or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard. Upon being restored, the case shall be placed on the General Docket and proceed from that date as provided in this rule.

Defendants may oppose Cromwell's Motion based upon the expiration of the statute of limitations. *Personal Care, Inc. v. Theos*, 426 S.C. 78, 86-87, 825 S.E.2d 281, 285 (Ct. App. 2019) (citing *Maxwell v. Genez*, 356 S.C. 617, 622 n.2, 591 S.E.2d 26, 28 n.2 (2003) ("We note the Maxwells assert that, since Genez and Doe agreed to the Rule 40(j) dismissal after the statute of limitations had expired, they waived their right to oppose the motion to restore on grounds of the expiration of the statute of limitations. We disagree. Parties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year.")). "Furthermore, the purpose of the Rule 40(j) tolling provision is to extend the deadline for filing a claim within the statute of limitations, which naturally requires an inquiry into the date a cause of action accrued and when it will expire." *Id.* (citing *Goodwin v. Landquest Dev., LLC*, 414 S.C. 623, 630, 779 S.E.2d 826, 830 (Ct. App. 2015) ("The effect of [Rule 40(j)] is not to set a new deadline, but to extend the statute of limitation[s] deadline by applying the rule's tolling provision when the motion to restore is made within a year.")).

“Notably, the procedure under Rule 40(j) for restoring a case is not automatic; the rule contemplates the filing of a motion and a hearing before the case can be reinstated.” *Id.* If a plaintiff files a motion to restore beyond the one-year time limit, a defendant is “no longer bound by the agreement not to challenge the timeliness” of a plaintiff’s claims. See *Maxwell*, 356 S.C. at 622 n.2, 591 S.E.2d at 28 n.2 (“Parties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year.”).

FACTS ALLEGED IN THE COMPLAINT

The claims alleged in Cromwell’s Complaint involve her employment with MUHA.¹ Cromwell is currently employed by MUHA as a registered nurse. (Compl. ¶ 7.) In her Complaint, Cromwell alleges the written policies provided to her by MUHA created an employment contract. (Compl. ¶ 6.)

Cromwell alleges she was subject to “a campaign of contractually impermissible race discrimination and retaliation” beginning in June 2016. (Comp. ¶ 8.) Further, Cromwell claims she “made numerous additional documented complaints . . . of race discrimination and retaliation in breach of her employment contract with [MUHA].” (Compl. ¶ 15.) Cromwell also claims she was subject to various instances of discriminatory and retaliatory behavior in violation of an alleged employment contract. (Compl. ¶ 15.)

Additionally, Cromwell alleges she was not considered for a “charge nurse” position and was assigned additional duties in retaliation for her making complaints about discrimination. (Compl. ¶ 15 and 16.) Moreover, Cromwell claims MUHA and MUSC “violat[ed] their handbook policies on fair treatment and anti-harassment and retaliation.” (Compl. ¶ 17.)

¹ Cromwell is employed by MUHA, not MUSC. In her Complaint, Cromwell expressly alleges she is employed by MUHA. (Compl. ¶ 7.) However, throughout the Complaint Cromwell claims she entered into an employment contract with MUHA *and* MUSC.

In the Complaint, Cromwell further claims she was “given a barrage of unjustified and untrue write-ups” in an attempt by MUSC/MUHA to discriminate against her based on her race. (Compl. ¶ 17.) Cromwell then alleges MUSC/MUHA “publish and maintain a contractually binding Employee Handbook, which... contains an anti-retaliation clause.” (Compl. ¶ 35.) The Complaint claims Cromwell and MUSC/MUHA “entered into a binding and valid contract whereby ... pursuant to the handbook and the above stated policies and procedures, Defendants would protect [Cromwell] on the basis of her rights under [Defendants’] anti-harassment and anti-retaliation policies.” (Compl. ¶ 38.)

Cromwell further alleges she relied on MUSC/MUHA’s “reassurance they must follow their handbook policies when disciplining their employees.” (Compl. ¶ 38.) Furthermore, the Complaint alleges MUSC/MUHA breached the terms of the alleged contract “by reason of an intentional design on their part to defraud [Cromwell].” (Compl. ¶ 44.)

LEGAL ARGUMENT

Cromwell’s claims are barred by the statute of limitations and her Motion should be denied. The statute of limitations for breach of contract is three years. S. C. Ann. § 15-3-530(1). Similarly, the statute of limitations for breach of contract with fraudulent intent is three years. S. C. Ann. § 15-3-530(1). However, as to government entities such as Defendants, the statute of limitation for breach of contract with fraudulent intent is two years. S. C. Ann. § 15-78-110.

Cromwell’s Complaint contains no allegations of wrongdoing by Defendants after the filing of her Complaint on May 21, 2018. Consequently, at the latest, the applicable statute of limitations as to Cromwell’s claims expired no later than May 20, 2021 – three years after Cromwell filed her Complaint.

The Order entered on March 22, 2022, resulted in a *dismissal* of Cromwell's lawsuit. Cromwell did not move to restore her lawsuit within one-year of the Order and, therefore, the unexpired portion of the statute of limitations began to run again on March 22, 2023. Because there was no *unexpired* portion of the statute of limitations remaining when the Order was entered on March 22, 2022, the statute of limitations immediately expired on March 22, 2023, because Cromwell had not moved to restore her Complaint within one-year of the Order.

The applicable statute of limitations now bars Cromwell's Complaint. Consequently, the Court should deny Cromwell's Motion.

CONCLUSION

For the reasons discussed, Defendants request the Court deny Cromwell's Motion.

s/ Bob J. Conley

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ATTORNEY FOR DEFENDANTS

Charleston, South Carolina
September 17, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	CASE NO.: 2018-CP-10-02580
	)	
Elise Cromwell,	)	
Plaintiff,	)	Joint Consent Motion
	)	
	)	
v.	)	
	)	
Medical University of South Carolina	)	
Hospital Authority and the Medical	)	
University of South Carolina,	)	
	)	
Defendants.	)	
	)	

Now comes Counsel for Plaintiff upon consultation with Counsel for Defendant Medical University of South Carolina Hospital Authority and the Medical University of South Carolina who mutually move for a continuance of Motion Hearing on Plaintiff's Motion to Reinstate the above captioned case to the Court docket scheduled for a virtual hearing on January 27, 2025, at 9:30 a.m.

Counsel for both parties engaged in good faith continuous negotiations to settle this matter before the Court over the last few months. Plaintiff's Counsel, with the consent of Defense Counsel, wishes to continue negotiations and is waiting on a final settlement decision by Plaintiff. Both parties therefore request that this matter be continued until the next term of Court so that negotiations may conclude on a possible settlement. Neither party is prejudiced and are making all efforts to resolve this case.

I so move,

Respectfully submitted,
s/Donald Gist
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Attorney for Plaintiff

January 24, 2025

I consent,

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Attorney for Defendants

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO.: 2018-CP-10-02580

Elise Cromwell,
Plaintiff,

**Plaintiff's Reply to Defendants'
Motion in Opposition to Restore Case**

v.

Medical University of South Carolina
Hospital Authority and the Medical
University of South Carolina,

Defendants.

Now comes Plaintiff, Elise Cromwell, by and through her undersigned Counsel, hereby moves that Defendants' Motion in Opposition to Restore Plaintiff's case be denied on the grounds that Plaintiff can demonstrate "good cause" as to why her case was not restored within one-year time limitation. The grounds for this motion are fully set forth in Plaintiff's Memorandum of Law in Support of this reply, which is filed contemporaneously herewith and incorporated herein by reference.

I. PROCEDURAL HISTORY

This case comes before the Court on May 21, 2018, when Plaintiff filed her Complaint. Defendants later filed their Motion to Dismiss on July 11, 2018, in lieu of an Answer. Defendants additionally filed their Memorandum of Law in support of their Motion to Dismiss on November 29, 2018. Subsequently, an Order was rendered on 12/28/2018 denying the Defendants' Motion to Dismiss. Defendants later filed a Motion to Alter/Amend on January 8, 2019. Plaintiff later files a Memorandum in Opposition to such Motion on January 22, 2018. Subsequently, Defendants' Motion to Alter/Amend is denied as well. Defendants then filed their

Answer on February 20, 2019, upon which they amended on March 21, 2019. Defendants subsequently filed their Motion/Judgment on the Pleadings on April 8, 2019, which an Order was rendered on September 9, 2019, for lack of prosecution. Defendants then filed a Motion to Restore such Motion/ Judgment on the Pleadings along with their Motion for Summary Judgment on September 30, 2019, and October 4, 2019. Defendants then filed their initial Proposed Scheduling Order on October 23, 2019, which was granted the same day. Defendants later filed is second Proposed Scheduling Order on March 4, 2020, which was granted on March 5, 2020. Defendants later filed their third Proposed Scheduling Order on May 12, 2021, which was granted the same day. The Plaintiff subsequently requested an Order of Protection from the Court on August 4, 2020, which was granted on August 11, 2021. A third Amended Consent Scheduling Order was filed by Defendants on November 9, 2021. Defendants subsequently filed is second Motion for Summary Judgment on February 10, 2022. A final scheduling order was submitted by the Defendants and was granted on February 24, 2022. Pursuant to such an order, Defendants filed an Order to Strike according to 40j, which was granted on March 22, 2022. Plaintiff subsequently filed a Motion to Reinstate such case according to 40j on March 20, 2024. Defendants subsequently filed a Memorandum in Opposition to Plaintiff's Motion to Restore on September 17, 2024. On December 3, 2024, a Consent Order to Continue a Motion to Restore Hearing was filed by Defendants on September 19, 2024. An additional Consent Order to Continue a Motion to Restore Hearing was filed by Defendants on December 3, 2024. Subsequently, a Joint Motion to Continue was filed by Plaintiff on January 24, 2025.

II. Facts

Plaintiffs rely solely upon the facts as stated in their well-pled Complaint.

III. LEGAL STANDARD

“Rule 40j does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period.” *Maxwell v. Genez*, 356, S.C. 617, 621, (S.C. 2023). “Rule 40j now requires all adverse parties to consent to the dismissal in writing, but the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party.” language in *Graham v. Dorchester County Sch. Distr.*, 399 S.C. 121, 125, 528 S.E.2d 80, 82 (Ct. App. 2000). “A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one-year tolling period provided by the rule. *Maxwell*, 356, S.C. 617, at 621. “When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefore is made before the expiration of the period as originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. . . “ *Id.*. Furthermore, as stated in *Maxwell*, Rule 40j does not have a deadline as to when a motion to restore must be filed. *Maxwell*, 356, S.C. 617, at 622.

II. Plaintiff can demonstrate “good cause” as to why her Motion to Restore was not filed within a one-year timeframe.

1. *Defendants' actions during the timeframe of March 22, 2022, until March 20, 2024, were contradictory to restoring Plaintiff's case.*

During the timeframe in which Plaintiff's case was stricken from the docket on March 22, 2022, until March 20, 2024, when Plaintiff filed its Motion to Restore its case, Plaintiff and Defense Counsel had consented to mediation of this case. In addition, Defense Counsel before that time never opposed Plaintiff's Motion to Restore. As a direct result of Defense Counsel's actions, this caused Plaintiff's Counsel to rely on continued negotiations between Defense Counsel and the ultimate decision that the case would be restored to the docket around March of 2024. Furthermore, during this timeframe of March 22, 2022, and March 20, 2024, when Plaintiff's Counsel and Defense Counsel were negotiating this case and were attempting to mediate this case, Defense Counsel faced difficulty locating witnesses for Defendant MUSC, who had moved out of state. This alone prolonged negotiations for this case for months while Defense Counsel attempted to locate such witnesses. Based on Rule 40j "good cause" exception, Plaintiff asserts that Defense Counsel's actions during this timeframe excessively prolonged Plaintiff's case to where Plaintiff's Counsel was not certain of restoring such case until March 20, 2024, based on Defense Counsel's actions. Finally, Plaintiff asserts that she would be severely prejudiced by the acts of Defense Counsel if Plaintiff's Motion to Reinstate is denied.

2. Plaintiff's Counsel faced extenuating medical circumstances during the period that Plaintiff's case should have been restored.

During the timeframe that Plaintiff's case should have been restored, Plaintiff's Counsel on record incurred extenuating medical emergencies during the year 2022, including COVID during the time Plaintiff's case should have been restored. COVID also affected all staff members of the firm during 2022, leaving the firm understaffed for some time. Plaintiff believes under the *Maxwell v. Genez* "good cause" findings a Rule 40j case to not be restored in one year, Plaintiff has demonstrated with extenuating medical circumstances a "good cause" as to why Plaintiff's

Counsel did not file a Motion to Restore until March 20, 2024 for the reasons stated above. Plaintiff asserts that Plaintiff would be severely prejudiced by the unplanned medical issues of Plaintiff's Counsel and staff if Plaintiff's Motion to Restore is denied. In addition, the willingness of Defense Counsel to continue to negotiate with Plaintiff's Counsel on this matter shows specifically that Defendant would not be prejudiced by the restoration of this case to the docket with a specific scheduling order issued by the Court allowing both parties to seek Discovery which was never done in this case by Defendants continuous Motions to Dismiss which each time was denied by the Court and subsequent negotiations by the Defense and Plaintiff.

III. CONCLUSION

Based on the foregoing reasons of Defense Counsel's actions of prolonging Plaintiff's case and extenuating medical circumstances affecting Plaintiff's Counsel in 2022, Plaintiff believes she has demonstrated a "good cause" finding under the conclusions of *Maxwell v. Genez* that allows Plaintiff to file its Motion to Restore after the one-year timeframe. Therefore, the Defendants' Memorandum in Opposition to Plaintiff's Motion to Restore should be denied, and Plaintiff's case should be restored to allow negotiations and settlement of such case.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully Submitted,

s/Donald Gist

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Attorney for Plaintiff

March 28, 2025

Answer on February 20, 2019, upon which they amended on March 21, 2019. Defendants subsequently filed their Motion/Judgment on the Pleadings on April 8, 2019, which an Order was rendered on September 9, 2019, for lack of prosecution. Defendants then filed a Motion to Restore such Motion/ Judgment on the Pleadings along with their Motion for Summary Judgment on September 30, 2019, and October 4, 2019. Defendants then filed their initial Proposed Scheduling Order on October 23, 2019, which was granted the same day. Defendants later filed is second Proposed Scheduling Order on March 4, 2020, which was granted on March 5, 2020. Defendants later filed their third Proposed Scheduling Order on May 12, 2021, which was granted the same day. The Plaintiff subsequently requested an Order of Protection from the Court on August 4, 2020, which was granted on August 11, 2021. A third Amended Consent Scheduling Order was filed by Defendants on November 9, 2021. Defendants subsequently filed is second Motion for Summary Judgment on February 10, 2022. A final scheduling order was submitted by the Defendants and was granted on February 24, 2022. Pursuant to such an order, Defendants filed an Order to Strike according to 40j, which was granted on March 22, 2022. Plaintiff subsequently filed a Motion to Reinstate such case according to 40j on March 20, 2024. Defendants subsequently filed a Memorandum in Opposition to Plaintiff's Motion to Restore on September 17, 2024. On December 3, 2024, a Consent Order to Continue a Motion to Restore Hearing was filed by Defendants on September 19, 2024. An additional Consent Order to Continue a Motion to Restore Hearing was filed by Defendants on December 3, 2024. Subsequently, a Joint Motion to Continue was filed by Plaintiff on January 24, 2025. Plaintiff pursuant to a Motions Roster Publication on March 24, 2025, subsequently filed a Reply to Defendants' Motion in Opposition to Reinstate Case on March 28, 2025. Subsequently, Defendants filed their reply to Plaintiff's Motion in Opposition to Reinstate Case as well on

March 28, 2025. Thereafter, an Order on Plaintiff's Motion to Reinstate Case pursuant to Rule 40j was given by the Honorable Judge Salvini, denying such restoration of Plaintiff's case on May 8, 2025. Plaintiff hereby files this Motion for Reconsideration of the May 8, 2025, Order denying Plaintiff's Motion to Reinstate.

II. Facts

Plaintiffs rely solely upon the facts as stated in their well-pled Complaint.

III. LEGAL STANDARD

"Rule 40j does not require that a party move to restore the case to the docket within one year after it was stricken. Instead, the unambiguous language provides that if the claim is restored within one year after it is stricken, the statute of limitations is tolled for that period." *Maxwell v. Genez*, 356, S.C. 617, 621, (S.C. 2023). "Rule 40j now requires all adverse parties to consent to the dismissal in writing, but the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party." language in *Graham v. Dorchester County Sch. Distr.*, 399 S.C. 121, 125, 528 S.E.2d 80, 82 (Ct. App. 2000). "A party can move to restore a case to the docket more than one year after the claim was stricken without running afoul of Rule 40(j); the party simply cannot take advantage of the one-year tolling period provided by the rule. *Maxwell*, 356, S.C. 617, at 621. "When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the time may be extended by written agreement of counsel for an additional period not exceeding the original time provided in these rules, or the court for cause shown may at any time in its discretion (1) with or without written motion or notice order the period enlarged if request therefore is made before the expiration of the period as originally prescribed or extended or (2)

upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done. . . “ *Id.* Furthermore, as stated in *Maxwell*, Rule 40j does not have a deadline as to when a motion to restore must be filed. *Maxwell*, 356, S.C. 617, at 622.

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During the timeframe in which Plaintiff’s case was stricken from the docket on March 22, 2022, until March 20, 2024, when Plaintiff filed is Motion to Restore its case, Plaintiff and Defense Counsel had consented to mediation of this case. In addition, Defense Counsel before that time never opposed Plaintiff’s Motion to Restore. As a direct result of Defense Counsel’s actions, this caused Plaintiff’s Counsel to rely on continued negotiations between Defense Counsel and the ultimate decision that the case would be restored to the docket around March of 2024. Furthermore, during this timeframe of March 22, 2022, and March 20, 2024, when Plaintiff’s Counsel and Defense Counsel were negotiating this case and were attempting to mediate this case, Defense Counsel faced difficulty locating witnesses for Defendant MUSC, who had moved out of state. This alone prolonged negotiations for this case for months while Defense Counsel attempted to locate such witnesses. Based on Rule 40j “good cause” exception, Plaintiff asserts that Defense Counsel’s actions during this timeframe excessively prolonged Plaintiff’s case to where Plaintiff’s Counsel was not certain of restoring such case until March 20, 2024, based on Defense Counsel’s actions. Finally, Plaintiff asserts that she would be severely prejudiced by the acts of Defense Counsel if Plaintiff’s Motion to Reinstate is denied.

2. *Plaintiff's Counsel faced extenuating medical circumstances during the period that Plaintiff's case should have been restored.*

During the timeframe that Plaintiff's case should have been restored, Plaintiff's Counsel on record incurred extenuating medical emergencies during the year 2022, including COVID during the time Plaintiff's case should have been restored. COVID also affected all staff members of the firm during 2022, leaving the firm understaffed for some time. Plaintiff believes under the *Maxwell v. Genez* "good cause" findings a Rule 40j case to not be restored in one year, Plaintiff has demonstrated with extenuating medical circumstances a "good cause" as to why Plaintiff's Counsel did not file a Motion to Restore until March 20, 2024 for the reasons stated above. Plaintiff asserts that Plaintiff would be severely prejudiced by the unplanned medical issues of Plaintiff's Counsel and staff if Plaintiff's Motion to Restore is denied. In addition, the willingness of Defense Counsel to continue to negotiate with Plaintiff's Counsel on this matter shows specifically that Defendant would not be prejudiced by the restoration of this case to the docket with a specific scheduling order issued by the Court allowing both parties to seek Discovery which was never done in this case by Defendants continuous Motions to Dismiss which each time was denied by the Court and subsequent negotiations by the Defense and Plaintiff.

III. CONCLUSION

Based on the foregoing reasons of Defense Counsel's actions of prolonging Plaintiff's case and extenuating medical circumstances affecting Plaintiff's Counsel in 2022, Plaintiff believes she has demonstrated a "good cause" finding under the conclusions of *Maxwell v. Genez* that allows Plaintiff to file its Motion to Restore after the one-year timeframe. Therefore, the

Court should reconsider the Order of May 8, 2025, and Plaintiff's case should be restored to allow negotiations and settlement of such case.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully Submitted,

s/Donald Gist

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Attorney for Plaintiff

May 16, 2025

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Elise A. Cromwell,

Plaintiff,

v.

Medical University of South Carolina
Hospital Authority and the Medical
University of South Carolina,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-02580

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFF'S
MOTION FOR
RECONSIDERATION TO
RESTORE CASE**

RESPONSE

Plaintiff's Motion for Reconsideration to Restore Case (the "Motion") is no different, and is almost identical in every respect, to Plaintiff's Motion to Restore – a motion the Court denied. Moreover, Plaintiff does not contend in her Motion that the Court failed to rule on any argument or issue raised in her Motion to Restore, and Plaintiff does not otherwise challenge the findings or conclusions in the Court's Order denying Plaintiff's Motion to Restore.

Consequently, in response to the Motion, Defendants defer to and rely upon this Court's Order denying Plaintiff's Motion to Restore and defer to and reply upon Defendants' Memorandum in Opposition to Plaintiff's Motion to Restore.

CONCLUSION

For the reasons discussed, Defendants request the Court deny the Motion.

s/ Bob J. Conley

Bob J. Conley (SC Bar #12243)

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ATTORNEY FOR DEFENDANTS

Charleston, South Carolina
May 29, 2025

STATE OF SOUTH CAROLINA) IN THE GENERAL SESSIONS COURT
)
 COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

Elise Cromwell,)
)
 Plaintiff,) Case No. 2018-CP-10-02580
)
 vs)
)
 Medical University of South)
 Carolina Hospital Authority)
 and Medical University of)
 South Carolina)
)
 Defendant.

H E A R I N G

BEFORE THE HONORABLE JESSICA SALVINI

DATE: March 31, 2025
 LOCATION: South Carolina Circuit Court 9
 TRANSCRIBER: Jessica Antonucci

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On behalf of the Defendant

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EXHIBITS

(No Exhibits Were Marked)

(THIS TRANSCRIPT MAY CONTAIN QUOTE MATERIAL. SUCH
MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 THE COURT: Good morning, everybody. We are getting
2 ready to start out 11:30 block. And so, I'm just going
3 to start at the top of the docket and kind of work my way
4 through the cases that are scheduled at 11:30. The first
5 matter that's on the Court's docket is Elise A. Cromwell
6 versus Medical University of South Carolina Hospital
7 Authority. This is 2018CP1002580. This is Plaintiff's
8 motion to reinstate the case. And so, it looks like I've
9 got Mr. Gist on on behalf of the Plaintiff, looks like
10 I've got Defense counsel and so, I'm happy to hear from
11 counsel. What's our status? And if it still remains
12 contested I'm happy to hear from you.

13 MR. GIST: Good morning, Judge Salvini.

14 THE COURT: Good morning.

15 MR. GIST: I'm Donald Gist for the Plaintiff. We
16 originally filed this motion back on March the 20th of
17 2024 to reinstate this case. I'd asked the Court
18 primarily to take judicial notice of the fact that this
19 case was actually a 2018 case. It had a number of moving
20 parts to it with respect to the original summons and
21 complaint that was filed. After the summons and
22 complaint was filed, in tracking through the Court's
23 chronological docket would show that there were several
24 motions filed, motions to dismiss under summary judgment
25 motions. Those motions were denied. There was also a

1 motion to amend the pleadings. Those motions were denied
2 as it relates to the motions filed by Defense counsel.

3 Defense counsel moved to strike this case on March
4 the 22nd of 2022. We all know that during the time of
5 2020 to 2022, pursuant to an order of Chief Justice
6 Donald Beatty, the court system itself was in fact
7 somewhat in a altered hybrid (inaudible) in terms of
8 moving cases forward.

9 Also during this time period, as we have said, and
10 I've -- we filed our motion with the Clerk of Court, and
11 my apologies, we did not see until this morning where you
12 had asked that we have our motion actually emailed to you
13 and your chambers. We did such. We wanted to make sure
14 that one of the Clerk's office had made you aware of our
15 motion and our position, we call it a reply in opposition
16 to the memorandum to oppose the reinstatement.

17 We believe also that based upon the circumstance of
18 this case, there's three different issues in this case.
19 We know that the Court will take notice of it and
20 hopefully will understand the issues of how my client has
21 been prejudiced, and will be prejudiced, if Defendant's
22 motion in fact is granted to deny restoration to the
23 docket.

24 First of all, this is a breach of contract claim.

25 THE COURT: Okay.

1 MR. GIST: Since that time period, with the breach
2 of contract claim, the South Carolina Court of Appeals on
3 a case that we did it's called Pearson versus Richland
4 County Government. In that case, which was heard last
5 year, latter part of last year, and the Court made a
6 ruling this year that all breach of contract claims --
7 and this case is strictly a breach of contract claim.

8 When it was initially filed by one of my associate
9 attorneys, she had filed it under the base of breach of
10 contract, breach of contract with fraudulent intent.
11 Well you can't get fraudulent intent on a breach of
12 contract claim against a governmental entity. We
13 conceded that.

14 THE COURT: Okay.

15 MR. GIST: The breach of contract claim is still
16 viable. It now is a claim that rather than being jury --
17 we requested a jury trial back in 2018. Now, under the
18 rulings of the Court of Appeals, any breach of contract
19 claim against the governmental entity has to be heard by
20 the bench as opposed to a jury. And I'll talk about that
21 a little bit later at the end of my presentation to the
22 Court.

23 THE COURT: Okay.

24 MR. GIST: First of all, the action to stricken the
25 case under 40(j) was not filed by us. We consented to

1 it, as my memorandum of law shows; and my law clerks went
2 through that process. We consented to the -- the 40(j)
3 motion, and obviously under Rule 40(j) we don't have an
4 obligation to restore it. It's the party that moved to
5 restore it. Or it could go both ways, either party could
6 restore it. But our position here is that we didn't
7 restore it, as I outlined in our memorandum of law. We
8 didn't restore it, because we were ongoing with
9 negotiations, trying to get this case settled.

10 If you'll notice, this case has actually been
11 continued several times, from the original date with
12 respect to motion to continue. And our position is very
13 clear, that one, we had no obligation to restore it, but
14 when I did restore it, back in 2024, it was restored at
15 that time by Ms. Erica McCrea who was one of my counsel's
16 who originally was the lead lawyer on this case. Ms.
17 McCrea underwent serious medical issues, with respect to
18 her healthcare, and as a result we were faced with COVID,
19 implications of COVID. My office was stricken with
20 pretty much the entire staff being shutdown and the
21 office operation being shut down with COVID.

22 In addition to that, Ms. McCrea had some serious
23 medical issues that ultimately resulted in her not being
24 able to work in the law firm on a -- in a in-person
25 status, and resulted in her resignation from the law

1 firm, because of the fact that we could not afford to
2 continue to work hybrid.

3 Our position is that we believe under the case that
4 we have cited, under the Genez case, the Maxwell vs.
5 Genez case, that their -- that that is in and of itself
6 is one of the basis for our action that this motion
7 should be restored -- the case should be restored to the
8 Court.

9 One, we didn't have an obligation to restore it, but
10 we did restore it on March the 22nd of 2024. Two, we had
11 medical circumstances that altered the restoration of
12 this case. And then number three, we asked the Court to
13 take notice of the fact of continuous motions. And Mr.
14 Conley and I have known each other for a long time, we
15 have great respect for each other, and we were diligently
16 trying to work to get this case settled. It has been an
17 ongoing process. We're not saying necessarily that they
18 caused us to detrimentally rely upon the negotiations,
19 but the truth is the truth.

20 Also, if we look at Rule 40(j) it says that either
21 party can restore it, or either party does not have an --
22 the party that was the moving party had the obligation to
23 restore it. Regardless of that, we believe in the
24 interest judicial economy, this case should be restored
25 to the docket. It's not a high figure case. Basically

1 it's a case that deals with a promotional issue, and it
2 deals with matters that primarily looks at some of the
3 aspects of the difference between this nurse's pay versus
4 the pay of her similarly situated colleagues and that's
5 the whole basis for this case.

6 We do not believe that the defense has been
7 prejudiced in any way. We certainly don't believe that
8 because they're the ones who move with our consent to
9 strike it from the -- from the docket and put it into the
10 40(j) status. The basis for that was because, and Mr.
11 Conley's going to speak to that I'm sure, but the basis
12 for that is there was some issues finding witnesses in
13 this case.

14 In addition to that we'll accept some
15 responsibility. We were trying to make sure our client
16 was able to come within reason as far as trying to get
17 this matter negotiated and settled. We still believe
18 that a restoration of this case to the Court will and
19 should, and probably will, result in a potential
20 settlement of this case before it's even heard by the
21 bench. So, that's our presentation, Your Honor, at this
22 point.

23 THE COURT: All right. Mr. Conley?

24 MR. CONLEY: Good morning, Judge. This case was
25 stricken by way of a consent order to strike under Rule

1 40(j) in March of 2022, two days after the case was
2 mediated. The mediation occurred on March 8th of 2022.
3 The consent order striking the case was filed on March
4 10th of 2022.

5 Judge, the records I've briefly been able to review
6 before the hearing today, and after receiving Mr. Gist's
7 memorandum late Friday, I don't see any record of
8 communication between my office and his between March of
9 2022 when the case is stricken, and March of 2024 when
10 there was a request made of my client to consent to
11 restoration of the case under Rule 40(j).

12 Now, I'm not saying those communications didn't
13 occur. I'm saying because that's one of the basis for
14 Mr. Gist's argument in this case, as I understand it,
15 that somehow some alleged ongoing discussions during that
16 time to settle the case somehow caused his client not to
17 promptly move to restore it within the one year required,
18 somehow ought to play into the Court's decision.

19 What I would say in that regard, is if that is going
20 to be a consideration for the Court in this matter as to
21 what occurred in that two year period of time between
22 counsel in regard to this case, then I would -- I would
23 ask that the Court allow me 14 days to submit an
24 affidavit detailing what my records show did or did not
25 occur.

1 But the fundamental matter, Your Honor, is this.
2 This case was stricken under Rule 40(j) pursuant to a
3 consent order to do so. Rule 40(j) unequivocally says
4 that if you restore the case within one year then the
5 statute of limitations during that time is tolled. In
6 fact, Rule 40(j) says the unexpired statute of
7 limitations time is tolled.

8 In this case, if you look at the complaint, the last
9 alleged time of any breach of contract by my clients was
10 in May of 2018. And what that would indicate is that the
11 statute of limitations on any breach of contract claims
12 that Ms. Cromwell asserts in this case would've expired
13 in May of 2021, while the case was still pending.

14 In other words, Your Honor, at the time this case is
15 stricken from the roster, pursuant to the consent of all,
16 in March of 2022 there was no unexpired portion of the
17 statute of limitations. We were way -- we were a year
18 past, three years at that point.

19 So, what does that do under Rule 40(j)? Well,
20 taking Rule 40(j) and applying it to that situation, Your
21 Honor, that meant that this case had to be restored, had
22 to be restored within one year of being stricken in March
23 of 2022. Because it was not, the statute of limitations
24 effectively expired on March 23rd of 2023, one year and
25 one day after the case had been stricken, because at that

1 point in time the case had not been restored. So, that
2 meant that if you look at the case law, we had the right
3 at that point to contest restoration of the case based on
4 the statute of limitations, which is exactly what we're
5 doing in this instance.

6 This case was not restored. There's no dispute the
7 case wasn't moved -- there was no motion to restore the
8 case in 2023 and the motion to restore was not filed
9 until March of 2024.

10 The case law is clear about a couple of things, Your
11 Honor. Number one, this is an appropriate time to
12 challenge the application and assert the application of
13 Plaintiff's claims being barred by the statute of
14 limitations. There is a 2019 case out of the Court of
15 Appeals, it's the Theos case, and that case really stands
16 for the clear proposition that a party can in fact
17 challenge restoration of a case under Rule 40(j), based
18 upon the expiration of the statute of limitations. That
19 case is Personal Care, Inc. versus Theos, it's actually
20 referenced in the memorandum we filed.

21 And in that case the Court of Appeals expressly said
22 yes, a party can challenge restoration based on the
23 statute of limitations at this junction of the case. And
24 in fact, the Court of Appeals said it's appropriate to do
25 so, and a defendant should do so as we're doing in this

1 instance.

2 The second case of consequence here to Plaintiff's
3 motion is, as I understand their position in the case, or
4 the Plaintiff's position, is that good cause exists for
5 the Court to look beyond the fact that they failed to
6 move to restore it within a year. The problem with that
7 argument, Judge, is the Plaintiff misreads or
8 misinterprets or mis-implies, whatever word we want to
9 put on it, for the Maxwell versus Genez case that Mr.
10 Gist cites.

11 In fact, Maxwell versus Genez cuts directly against
12 the Plaintiff's argument in this case that this Court
13 should apply good cause standard, or that the good cause
14 standard can apply. In fact, the Court of Appeals in the
15 Genez case expressly said, and expressly held, as a
16 matter of fact, that there is no good cause standard that
17 applies under Rule 40(j). The reason for that is, as the
18 Court of Appeals explained in Genez, is that 40(j)
19 doesn't have a deadline to extend.

20 In other words, there's no deadline to restore a
21 case under Rule 40(j). You can restore a case -- you can
22 move to restore a case at any time under Rule 40(j),
23 however, the consequence of it doesn't mean you've
24 avoided the application of the running of the statute of
25 limitations by failing to restore it within a year. The

1 reason being, if you don't restore it within a year it's
2 no longer pulled during the proceeding period.

3 So, the notion as is expressly argued by the
4 Plaintiff, and very expressly in the brief they filed,
5 that there is good cause to allow them to restore this
6 case even though the statute of limitations has expired,
7 that cuts directly against the holding in the Genez case,
8 and its holding that there is no good cause standard
9 under Rule 40(j).

10 Judge, you know, no lawyer has ever enjoyed being in
11 this position, but this is what I see in this position.
12 March of 2023 came and went and no motion was filed to
13 restore this case. The consequence of that was as of
14 March 23rd of 2023, the statute of limitations -- the
15 unexpired statute of limitations from March of 2022
16 continued to run at that moment. And it's at that moment
17 that the statute expired and it had to expire, Judge,
18 because it -- there was no unexpired time left when the
19 case was stricken.

20 And so as of March 23rd of 2023, the statute of
21 limitations had expired as to Ms. Cromwell's claims in
22 this case, which as Mr. Gist has explained is a breach of
23 contract claim. There is no motion until March of 2024
24 to restore the case and that's the motion we're here for
25 today. And clearly by that time any statute of

1 limitations has expired.

2 The simple matter of fact, Your Honor, is there is
3 no good cause argument that can be applied here. To the
4 extent the Plaintiff's position is that the good cause
5 standard ought to allow her or ask this -- or require the
6 Court look beyond the express requirements of Rule 40(j)
7 for good cause because of COVID, because of somebody in
8 the law firm being ill, because of even if there were
9 ongoing negotiations about settling the case while it was
10 stricken, good cause simply cannot be used as a
11 methodology or a legal doctrine to avoid the
12 ramifications of not restoring a case within a year under
13 Rule 40(j).

14 For the reasons, the reasons that really mirror that
15 that are laid out in our brief, we believe the Court
16 should deny the Plaintiff the ability to restore this
17 case. Why? Because the statute of limitations has
18 expired as to her breach of contract claim, Your Honor.
19 There is nothing left to restore.

20 THE COURT: All right, thank you. And I haven't had
21 an opportunity to read the reply that was filed on
22 Friday. So, I am going to take this under advisement so
23 I can read it, 'cause if y'all take the time to prepare
24 something and file it and send it to me, I'm going to
25 read it. But, Mr. Gist, you want to be heard in

1 response?

2 MR. GIST: Yes, with the Court's permission.

3 THE COURT: Yes, sir.

4 MR. GIST: Your Honor, I want to make sure we
5 clarify. Mr. Conley said he had not had an opportunity
6 look at the chronological history of this case as
7 enunciated by the Court's filing. In fact, his earlier
8 statement that there was a 2019 expiration of the statute
9 of limitations, that is not correct. In fact, defense
10 counsel filed a motion for summary judgment on February
11 10th of 2022. That motion for summary judgment, it
12 enunciated and clearly what advocated the Defendant's
13 position that they believed that the statute of
14 limitations, even at that time had expired, was denied by
15 this very Court. It was denied.

16 As a result of the denial of their motion for
17 summary judgment, which primarily said that the statute
18 of limitations had expired in this case, basically they
19 then asked for a scheduling order after their summary
20 judgment motion was denied.

21 Shortly within days of asking of a scheduling order,
22 the defense in this case primarily moved to strike this
23 case from the docket. That's clear. It's unequivocally
24 clear without me even having to -- the facts of the
25 document in the Court's record speak for themselves.

1 They filed the motion to strike this case and I consented
2 to it. The basis for the reason for them filing the
3 motion to stricken the case was because of the
4 unavailability of a witness named Sharon Turner. Sharon
5 Turner was one of the moving parties for the defense that
6 my client claims was harassing her and violating the
7 handbook policy at the Medical University. As a result,
8 Ms. Turner, for what we have on our records, had moved
9 somewhere to Tennessee and they were having difficulty
10 reaching her. He moved at that point to consent to that
11 motion to strike.

12 Now, I want to go back. Now, the Court at this
13 stage in this juncture to say okay, we're going to hold
14 Ms. Cromwell responsible. Ms. Cromwell never filed a
15 motion to take this matter off the docket on 40(j). The
16 record also in Genez, in our Supreme Court he cites a
17 2019 case. We believe that Maxwell versus Genez totally,
18 totally contradicts the argument made by defense counsel
19 this morning.

20 Essentially, in Maxwell versus Genez it says that
21 there could be compelling reasons, but it also says that
22 the defense cannot use a tolling of the statute, let the
23 statute then expire, and never try to move -- 'cause this
24 is a two-way system in the judicial process. They had an
25 obligation to restore this case to the docket. They were

1 the moving party to take it off -- and move for 40(j).
2 They gave us assurances that it was good cause,
3 unavailability of a witness. Now to use this process to
4 saying we now oppose this, they never opposed the motion
5 to restore, never filed a motion denying the motion to
6 restore until we moved essentially to have the matter
7 brought back up to restore the case.

8 So, how do you let a case stay out there if you move
9 -- you were the moving party, you asked for it to be
10 taken off the 40(j) docket, we consent it, and then you
11 allowed us -- or you allowed the case to just sit there,
12 when we moved to get it restored, all of a sudden you
13 throw up this roadblock saying oh, we don't consent to
14 that. And even when they do that, they don't actually
15 come back and file a motion in opposition until September
16 of 2024, some three to four months after we filed our
17 motion to restore.

18 We believe that the facts clearly in this case, as
19 enunciated in our motion (inaudible) clearly in the favor
20 of the Plaintiff, Ms. Cromwell. To do such allows any
21 defendant to actually stricken the matter from 40(j), get
22 the consent of the Plaintiff's attorney, and then just
23 let it sit there and never bring it back out.

24 Now, I'm not saying that that was not a
25 responsibility on our part, but again, what we're trying

1 to say is these negotiations that were going on also gave
2 us reliance on the fact that at some point they had an
3 obligation, move 40(j), say it's a party -- a party
4 consenting to a case stricken from the docket, okay, that
5 we don't have a legal obligation to restore it. They
6 have the obligation to restore it.

7 Now, we believe this is one of these cases that will
8 set precedent, and I'm sure you've been on the winning
9 side of said precedents in South Carolina, and a lot of
10 cases before our Supreme Court and our Court of Appeals,
11 but essentially we're trying to avoid that issue by
12 simply asking that the Court reinstate this case, there's
13 no prejudice to them.

14 At any point when we were doing these negotiations
15 they could've filed a motion primarily to have the matter
16 to restore denied. While they could've -- and more
17 importantly, they could have filed a motion to restore it
18 to the docket. We cannot be hit by surprise and utilize
19 and then have the Court punish my client because of that.

20 So, that's our position. We believe that our brief
21 is well stated. We believe that Maxwell begets overrules
22 any prior 2019 ruling. We also believe that even though
23 it's not applicable that Rule 6(b) in this case also
24 allows my client the right to have this case restored to
25 the docket. It's clearly --

1 THE COURT: All right.

2 MR. CONLEY: -- (inaudible) Court's ruling.

3 THE COURT: All right. Let me take a look at your
4 reply and I want to go back and read Maxwell and take it
5 under advisement and I'll let y'all know.

6

7

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9 (THERE BEING NOTHING FURTHER, THIS HEARING CONCLUDED)

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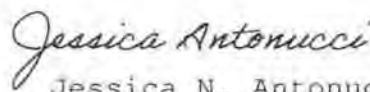
CERTIFICATE OF TRANSCRIBER

State of South Carolina

County of Charleston

I, JESSICA ANTONUCCI, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had, and evidence introduced in the hearing of the captioned case, relative to appeal, in South Carolina Circuit Court 9, on the 31st day of March, 2025.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.


Jessica N. Antonucci

Transcriber

December 23, 2025

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

July 14, 2026

/s/ Donald Gist

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