

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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NOV 17 2014

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

SC Court of Appeals

J. Michael Baxley, Circuit Court Judge

Appellate Case No. 2014-000453

Antonio Hough

Appellant,

v.

Town of Pageland

Respondent,

RECORD ON APPEAL

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William Dennis Curtis, Jr.

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STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

Antonio Hough,

Plaintiff,

v.

Town of Pageland,

Defendant.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

C/A No.: 2011-CP-13-667

ORDER GRANTING DEFENDANT'S
SUMMARY JUDGMENT MOTION
(Ending case)

This matter comes before the Court pursuant to Defendant's Motion for Summary Judgment as to all of Plaintiff's claims. A hearing was held on this motion on November 5, 2013, at which time the Court took arguments and reviewed exhibits and affidavits submitted by the parties.¹ Present and participating at the hearing were Sarah C. Campbell, Esq., representing the Plaintiff; and Charles F. Thompson, Jr., Esq., on behalf of the Defendant.

Plaintiff has alleged two causes of action: (1) retaliation for filing a workers' compensation claim; and (2) breach of employment contract based on provisions within the Town of Pageland's employee handbook. At the hearing, the Plaintiff abandoned his claim for breach of contract. Thus, the only remaining claim for determination is for wrongful discharge in retaliation for filing a workers' compensation claim. For the reasons set forth below, the Court grants Defendant's Motion for Summary Judgment and dismisses this matter.

The uncontested facts are as follows. Antonio Hough ("Hough") was an entry level public works employee for the Town of Pageland ("Town"). His job duties required manual labor including heavy work, the necessity of pulling 100 to 150 pounds, as well as prolonged sitting, standing, and walking. In August 2009, Hough alleged that he injured his knee while on

¹ A hearing on this motion was previously held in September 2013 before the Honorable Paul M. Burch, however, before issuing a decision, Judge Burch, a resident of Pageland, recused himself from this matter.

the job by stepping in a hole. He was out of work for several weeks and eventually put on light duty. His light duty work was not a regular job position, it was temporarily created for him by the Town. Hough was absent for substantial periods of time throughout 2010 and, when he was working, he performed the light duty work. According to Hough, his knee never allowed him to resume his regular job. During the first week of January 2011, Hough had surgery on his knee. He never returned to work. On or about August 18, 2011, Hough's orthopedist initially wrote that Hough could return to work. Hough informed the Town of this but, at the same time, reported that he actually could not return to work at that time because a different doctor put him out of work due to diabetes.

9-15
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Shortly after issuing the August 18, 2011 return-to-work authorization, Hough's orthopedist rescinded it. The week following the rescission, the orthopedist opined that Hough had a permanent disability to the knee, gave him an impairment rating, and rated him as permanently unable to lift more than 25 pounds or do any climbing. Hough received workers compensation benefits for his injury.

The Town's leave of absence policy provides that employees may have up to six months of leave for medical reasons. If unable to return to work after exceeding this leave, the employee terminated. Because Hough had exceeded this leave by August 18, 2011 and still was unable to return to work, the Town terminated his employment. The Town has uniformly applied this policy, and at least two other employees have been terminated under the policy in the past.

Hough testified in his deposition in this case, on February 26, 2013, that he never was able to resume his regular duties and was still unable to return to work because he continued to suffer pain in his knee.

WORKERS' COMPENSATION RETALIATION

S.C. Code Ann. § 41-1-80 prohibits an employer from discharging or demoting an employee because of a workers' compensation claim. However, section 41-1-80 does not prohibit an employer from terminating an employee medically unable to perform his job, even if the disability was caused by an injury compensable under South Carolina's workers' compensation law. Such a termination can occur at any time. The only thing an employer may not do is treat the employee differently from other injured employees because the injury is compensable under South Carolina workers' compensation laws.

It is uncontested that Hough was out of work due to his injury from January 2011 through August 2011 and has never been able to return to his regular job. It is also uncontested that the Town has a policy of allowing only six months of leave for any medical leave of absence. Finally, it is uncontested that Hough was unable to return to work at the end of his allowed leave, and, in fact, is permanently unable to resume his job.

Section 41-1-80 does not require an employer to give any particular amount of time for an employee to recover from an on-the-job injury. So long as workers' compensation injuries are not treated differently from other injuries, the employee is not entitled to any particular amount of time off. *See, e.g., Horn v. Davis Elec.*, 416 S.E.2d 634, 636 (S.C. 1992) ("41-1-80 [has] no provision for according an employee a reasonable period of time within which to demonstrate that he can meet established work standards."); *Johnson v. J.P. Stevens*, 417 S.E.2d 527 (S.C. 1992) (termination of employee absent for nine days after job-related injury did not violate section 41-1-80 where employer's policy was uniformly applied); *Hinton v. Designer Ensembles*, 540 S.E. 2d 94 (S.C. 2000) ("It was inappropriate for the Court of Appeals to second

guess the imposition of Designer's absentee policy."); *White v. Malphus*, 2008 WL 4221723 (D. S.C. 2008) (no violation of section 41-1-80 when plaintiff was not able to resume his duties. Availability and prior provision of temporary light duty does not make termination retaliatory.); *Morgan v. Mattress Gallery, LLC*, No. 2:05-CV-2035-DCN, 2006 WL 1878983, at *3 (D.S.C. July 6, 2006) ("Under *Hines*, even if plaintiff has been fired as a result of his workers compensation claim, his cause of action would be fatally deficient because it is undisputed that plaintiff was unable to perform his duties as a delivery helper at the time his employment terminated.").

Therefore, because section 41-1-80 does not provide an employee guaranteed leave beyond what the employer normally allows, it was not retaliatory to terminate Hough when he exceeded his allowed leave and was still unable to come back to work.

9/6/14
Plaintiff contends that his inability to return to work is an affirmative defense which the Defendant failed to plead. A review of the Defendant's Amended Answer filed on January 26, 2012 shows that it includes, as an affirmative defense, that "Defendants actions were based on legitimate non-discriminatory reasons, specifically plaintiff exceeding allowable leave for a non-work related injury." This is the grounds on which the Defendant requests summary judgment and the Court finds that the defense was adequately pled.²

Hough presented an affidavit from one of Hough's co-workers in which the co-worker stated that he heard Hough's supervisor use racial slurs³ when referring to Hough and that the supervisor openly opined that Hough had faked his injury and would be fired if he filed a claim. According to the affidavit, the statements were made over two years before Hough's termination.

² After the November 5 hearing in this matter, Defendant moved to amend its pleadings to more specifically assert an affirmative defense on this issue. No hearing on this motion was ever scheduled and no decision made, it is now moot as a result of this Order.

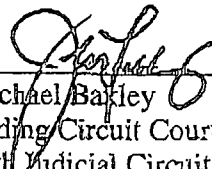
³ The Court notes that the alleged slurs in reference to Hough are not relevant to the matter, are highly inflammatory, and likely inadmissible pursuant to Rule 403. They are not repeated here.

9-6
9-5

The Court finds that the affidavit does not raise a material issue of fact. First, the statement is likely inadmissible for several reasons. Plaintiff argues that the statement may be considered as an admission by a party opponent. It is true that admissions by an agent might be considered if they were authorized by the principle or were within the scope of the speaker's agency or employment with the party-opponent. See SCRE 801(d)(2). The affidavit, however, does not indicate the scope of the supervisor's employment or his authority nor was any evidence of such authority brought to the Court's attention. See, e.g., *Todd v. S. Carolina Farm Bureau Mut. Ins. Co.*, 321 S.E.2d 602, 614 (S.C. Ct. App. 1984) *decision quashed on other grounds*, 336 S.E.2d 472 (S.C. 1985) (witness "neither heard the admission nor could identify whether an authorized agent of the Farm Bureau companies made the admission."); *Clark v. Flow Measurement, Inc.*, 948 F. Supp. 519, 524 (D.S.C. 1996) (statement may not be considered without showing of "a matter within the scope of the agency or employment, made during the existence of the relationship."). Second, and as an independent reason, there is no evidence that the supervisor was involved in the decision to terminate Hough's employment. The parties have had ample time to engage in discovery on this issue and no evidence was presented to the Court that the supervisor had any role in Hough's termination two years after the alleged statements. Finally, even if the Court were to consider the affidavit as evidence of some animus toward Hough's workers' compensation claim, that evidence has no bearing on the question of whether Hough was able to resume his regular duties or whether he had exceeded his leave. By Hough's own admission, and as confirmed by his physicians, Hough has never been able to resume his regular work. An employer is not required to grant any leave beyond what is normally provided to employees disabled by an injury compensable under South Carolina's workers' compensation

laws. Therefore, Hough's termination did not violate the anti-retaliation provision of section 41-1-80.

THEREFORE, IT IS HEREBY ORDERED the Defendant's Motion for Summary Judgment is **GRANTED**, and this case is dismissed in its entirety, with prejudice.



J. Michael Bakley
Presiding Circuit Court Judge
Fourth Judicial Circuit

December 13, 2013

Hartsville, South Carolina

COUNTY OF Chesterfield
Antonio Hough

Plaintiff(s)

vs.

Town of Pageland

Defendant(s)

(Please Print)

Submitted By: M.W. Cockrell III
Address: 159 Main Street
Chesterfield, SC 29709

SC Bar #: 69417
Telephone #: (843) (223-5911)
Fax #: (223-5700)
Other:
E-mail: cockrell@shtc.net

NOTE: The cover sheet 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 cover sheet 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/Libel (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) | 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)
☐ Other (799) | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899) | 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 Commission (990)
☐ Employment Security Comm (991)
☐ Other (999) |
| 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 Out-of-County Action (660)
☐ Sexual Predator (510) | | |

Submitting Party Signature: _____

Date: _____

12-22-11

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.

RECORD ON APPEAL 8

Allendale, Anderson, Beaumont, 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.

RECORD ON APPEAL 9

THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHESTERFIELD) FOURTH JUDICIAL CIRCUIT

Antonia Hough,
Plaintiffs,

versus

Town of Pageland
Defendants.

2011-CP-13-

CLERK OF COURT C.P. & G.S.
CHESTERFIELD COUNTY, SC

True Copy Attest
Steph J. Miller

SUMMONS

FAVELL J. JELLS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

2011 DEC 22 PM 1 06

TO: The Defendant herein

YOU ARE HEREBY SUMMONED and required to answer the Amended Complaint in this action of which a copy is herewith served upon you, and to serve a copy of your Answer to the said Amended Complaint on the subscriber at his offices at the **BARRISTER BUILDING** OLDE TOWNE CENTRE 159 Main Street, Chesterfield, South Carolina, within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

COCKRELL LAW FIRM, PC

BY:

M. W. COCKRELL III

SC BAR# 69417

ATTORNEY FOR PLAINTIFF

Olde Towne Centre

Barrister Building

159 Main Street

CHESTERFIELD, SC 29709

(843) 623-5911

Chesterfield, South Carolina
December 22, 2011

RECORD ON APPEAL 10

THE STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT
2011-CP-13-*667*

Antonio Hough,
Plaintiff,

versus

Town of Pageland,
Defendant.

COMPLAINT
(JURY TRIAL DEMANDED)

A True Copy Attest
Jane S. Jackson
CLERK OF COURT (C.P.)
CHESTERFIELD COUNTY, SC

2011 DEC 22 PM 1 06
FAYE L. JELLS
CLERK OF COURT
CHESTERFIELD COUNTY, S.C.

Plaintiff, complaining of Defendant, would respectfully show the Court as follows:

NATURE OF ACTION

1. Plaintiff asserts a claim for wrongful termination in violation of South Carolina's workers' compensation anti-retaliation statute. Plaintiff seeks to recover lost wages and reinstatement as well as an Order of the Court restraining Linda Long and Wesley Miles referring to him as "Nigger."

JURISDICTION AND VENUE

2. This Court has statutory and general jurisdiction over the subject matter of Plaintiff's cause of action. This Court has personal jurisdiction over Defendant.

3. Venue is proper as Defendant employed Plaintiff in Chesterfield County, South Carolina, which is the situs of the conduct of which Plaintiff complains.

PARTIES

4. Plaintiff is a citizen and resident of the County of Chesterfield, State of South Carolina.

JWC
#1

RECORD ON APPEAL 11

Defendant is a Municipality with its principal place of business in the County of Chesterfield, State of South Carolina. Wesley Miles and Linda Long are citizens and residents of Chesterfield County, State of South Carolina and hold supervisory roles over Mr. Antonio Hough.

BACKGROUND FACTS

5. Defendant is engaged in the daily operations of maintaining and operating the duties of a of municipality.
6. Plaintiff was an employee in Defendant's Public Works Division.
7. Plaintiff suffered a work-related back injury on August 17, 2009 and was re-injured on the job on February 2, 2011.
8. Plaintiff received medical attention and treatment for this work-related injury at the Pageland Family Medicine, Midlands Orthopaedics, Spring Physical Therapy, Dove Internal Medicine, Plaintiff was advised by the treating doctor that he could return to work after September 1, 2011.
9. Plaintiff received a letter dated August 18, 2011 terminating his employment and denying him a continuation of his medically ordered leave of absence, and other employees of the town of Pageland told that the defendant, Mr. Antonio Hough, was not injured on the job and he was "lying like a Nigger."

FOR A FIRST CAUSE OF ACTION

10. The above allegations are incorporated as if fully set forth herein.
11. It is a violation of § 41-1-80, S.C. Code, to discharge an employee because the employee initiates a workers' compensation claim.

12. Defendant's proffered reason for Plaintiff's termination is pretextual, and but for Plaintiff's workers' compensation claim, Defendant would not have terminated Plaintiff's employment.

FOR A SECOND CAUSE OF ACTION

13. That the Plaintiff realleges and incorporates all of the allegations contained above as if set forth verbatim hereinafter.

14. That the Defendant has an employee handbook which was provided to the Plaintiff as part of his employment.

15. That the employee handbook provides policies and procedures for the proper and progressive discipline and/or termination of an employee.

16. That the Plaintiff accepted and relied upon the policies and procedures set forth of the employee handbook as part of his employment contract between the Plaintiff and the Defendant.

17. That the Defendant failed to follow and violate the policies and procedure as set forth in the employee handbook in laying off the Plaintiff and thus violated and/or breached the employment contract with the Plaintiff.

18. That as a direct and proximate result of the Defendant's actions, the Plaintiff has been damaged. The actions of the Defendant have caused the Plaintiff past, present and future monetary loss, emotional upset and distress, humiliation, embarrassment and caused him to incur attorney's fees.


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RECORD ON APPEAL 13

19. That the Plaintiff believes he is entitled to an award of actual and punitive damages against the Defendant, and, in addition to an Order reinstating him to employment pursuant to the statute.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff prays that he be granted an award of actual and punitive damages, reinstatement, and such and further relief as the Court may deem just and proper.

Respectfully submitted,

COCKRELL LAW FIRM, PC

BY: 

M. W. COCKRELL III

SC BAR# 69417

ATTORNEY FOR PLAINTIFF

OLDE TOWNE CENTRE

BARRISTER BUILDING

159 MAIN STREET

CHESTERFIELD, SOUTH CAROLINA 29709

(843) 623-5911

Chesterfield, South Carolina

December 22, 2011

#4

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD

ANTONIO HOUGH,

Plaintiff,

vs.

TOWN OF PAGELAND

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
)

)
)
) Civil Action No.: 2011-CP-13-667
)

) AMENDED ANSWER
) (FIRST CAUSE OF ACTION NON-JURY)
) (SECOND CAUSE OF ACTION JURY)
)
)
)
)

By way of answer to plaintiff's Complaint, addressing each allegation as numbered by the Plaintiff, Defendant states the following:

FOR A FIRST DEFENSE

1. Paragraph 1 of the complaint is denied.
2. Paragraph 2 of the complaint is admitted.
3. Paragraph 3 of the complaint is admitted.
4. Paragraph 4 of the complaint is admitted.
5. Paragraph 5 of the complaint is admitted.
6. Paragraph 6 of the complaint is admitted.
7. Regarding Paragraph 7 of the complaint, Defendant admits Plaintiff submitted claims for injuries as described but denies the remaining allegations.
8. Regarding Paragraph 8 of the complaint, Defendant admits Plaintiff had a return to work authorization for September 2, however, denies the remaining allegations.
9. Regarding Paragraph 9 of the complaint, Defendant admits Plaintiff was terminated August 18, 2011. The remaining allegations are denied.

10. Defendant responds to Paragraph 10 of the complaint by reasserting the foregoing.
11. Paragraph 11 of the complaint is admitted.
12. Paragraph 12 of the complaint is denied.
13. Defendant responds to Paragraph 13 of the complaint by reasserting the foregoing.
14. Paragraph 14 of the complaint is admitted.
15. Regarding Paragraph 15 of the complaint, Defendant admits that guidance concerning discipline is included within the handbook, however, the guidance is not a contractual promise to employees and the Town is free to impose any discipline it wishes in its discretion.
16. Paragraph 16 of the complaint is denied.
17. Paragraph 17 of the complaint is denied.
18. Paragraph 18 of the complaint is denied.
19. Paragraph 20 of the complaint is denied.
20. Plaintiff's prayer for relief is denied.

FOR A SECOND DEFENSE

21. All allegations of the Complaint not specifically admitted are denied.

FOR A THIRD DEFENSE

22. Defendant restates and incorporates by reference the contents of the paragraphs above as if fully repeated herein.

23. Plaintiff has failed to state a claim upon which relief can be granted.

FOR A FOURTH DEFENSE

24. Defendant restates and incorporates by reference the contents of paragraphs above as if fully repeated herein.

25. Defendant actions regarding plaintiff's employment were based on legitimate non-discriminatory reasons, specifically plaintiff exceeding allowable leave for a non-work related injury.

FOR A FIFTH DEFENSE

26. Plaintiff has failed to mitigate his damages and his claims are thus precluded

FOR A SIXTH DEFENSE

27. Defendant City plead that their alleged actions, without admitting them to be true, constitute the exercise of discretion or judgment and qualified privilege for which the Defendants, and those acting through them or on their behalf, are not liable.

FOR A SEVENTH DEFENSE

28. Defendant City pleads the provisions of South Carolina Tort Claims Act, S.C. Code §15-78-10, et seq., including all of the immunities, limitations, and defenses granted or preserved in the Act. Defendant City, a municipal corporation of the State of South Carolina and a governmental entity, is immune from liability under the South Carolina Tort Claims Act, S.C. Code §§15-78-10, et seq. (South Carolina Code Sections 15-78-10 through 190).

FOR AN EIGHTH DEFENSE

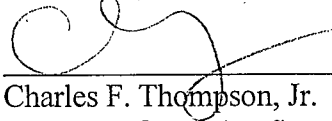
29. Plaintiff cannot meet the required element of reliance to prove a unilateral contract and is barred from asserting a contract by S.C. Code § 41-1-110.

WHEREFORE, having fully answered the Complaint of the Plaintiff, the Defendant prays that the Plaintiff's Complaint be dismissed and that the Defendant be granted costs, expenses, and

such other and further relief as this Court may deem just and proper.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT



Charles F. Thompson, Jr.
thompson@mtsolaawfirm.com
Attorneys for Defendant

339 Heyward St.
Columbia, South Carolina 29201
(803) 254-3300

Dated this 20th day of January 2012

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

Hough

☒ Plaintiff

v.

Town Of Pageland

☒ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2011-CP-13-667

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:

M.W. Cockrell, Bar No. 69417

Address:

Old Towne Centre Barrister Building 159 Main St.

phone: 843-623-5911 fax:

e-mail: cockrell@justice.com other:

Defendant's Attorney:

Charles Thompson, Bar No. 64219

Address:

339 Heyward St Columbia SC 29201

phone: 8032543300 fax:

e-mail: thompson@mtoslawfirm.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 continue

Estimated Time Needed: 5 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

6/5/2013

Date submitted

SECTION III: Motion Fee☒ PAID - AMOUNT: 25☐ 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

Date Filed:

Collected by: _____

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

) IN THE COURT OF COMMON PLEAS
) FOURTH JUDICIAL CIRCUIT
)

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The first week of January 2011, Hough had surgery on his knee. He never returned to work. On or about August 18, 2011, Hough's Orthopedist initially wrote that Hough could return to work. (Ex. 2, pp. 17-18) (Ex. 3, Dr. Kirol Note). Hough informed the Town of this but also informed the Town that he could not return to work at that time because his regular doctor put him out of work due to Hough's diabetes. (Ex. 1) (Ex. 2 pp. 17-20) (Ex. 3. Carolina Physicians' Note).

The Town's leave of absence policy provides that employees may have up to six months of leave for medical reasons. If they are unable to return to work after exceeding this leave, they are administratively terminated. (Id.). Because Hough had exceeded this six months of leave by August 18, and still was unable to return to work, the Town administratively terminated his employment. The Town has uniformly applied this policy and at least two other employees have been terminated under the policy in the past several years. (Ex. 1).

Hough, in fact, was never able to return to work. Despite the Orthopedist's August 18 determination, Hough testified that he was unable to return to work because his knee was still painful. (Ex. 2, pp. 22-23). Shortly after issuing the August 18 return-to-work authorization, Hough's orthopedist rescinded it (Ex. 3 8/24/11 Note of Dr. Kirol) and gave Hough a permanent disability due to the knee, gave him an impairment rating, and rated him as permanently unable to lift more than 25 pounds or do any climbing. (Ex. 3 9/1/2011 Note of Dr. Kirol). Hough agreed in his testimony that he never was able to resume his regular duties and still cannot do so at this time. (Ex. 2 pp. 10-11, 22-23).

WORKERS' COMPENSATION RETALIATION

S.C. Code 41-1-80 prohibits an employer from discharging or demoting an employee because of a workers compensation claim. Hough, however, thinks that this means he cannot be

terminated if the reason he cannot return to work is because he had a compensable injury. This is incorrect. Under 41-1-80, an employer may terminate an employee unable to perform his job. Such a termination can occur at any time. The only thing an employer may not do is treat the employee differently because the injury falls under South Carolina workers' compensation laws.

It is uncontested that Hough was out of work due to his injury from January 2011 through August 2011 and has never been able to return to his regular job. It is also uncontested that the Town has a policy of allowing only six months of leave for any medical leave of absence. Finally, it is uncontested that Hough was unable to return to work at the end of his allowed leave, and, in fact, is permanently unable to resume his job.

It is clear that 41-1-80 does not require an employer to give any particular amount of time for an employee to recover from an on-the-job injury. So long as workers' compensation injuries are not treated differently from other injuries, the employee is not entitled to any particular amount of time off. *See, e.g., Horn v. Davis Elec.*, 416 S.E.2d 634, 636 (S.C. 1992) ("41-1-80 [has] no provision for according an employee a reasonable period of time within which to demonstrate that he can meet established work standards."); *Johnson v. J.P. Stevens*, 417 S.E.2d 527 (S.C. 1992) (termination of employee absent for nine days after job-related injury did not violate 41-1-80 where employer's policy was uniformly applied); *Hinton v. Designer Ensembles*, 540 S.E. 2d 94 (S.C. 2000) ("It was inappropriate for the Court of Appeals to second guess the imposition of Designer's absentee policy."); *White v. Malphus*, 2008 Westlaw 4221723 (D. S.C. 2008) (no violation of 41-1-80 when plaintiff was not able to resume his duties. Availability and prior provision of temporary light duty does not make termination retaliatory.); *Morgan v. Mattress Gallery, LLC*, No. 2:05-CV-2035-DCN, 2006 WL 1878983, at *3 (D.S.C. July 6, 2006) ("Under *Hines*, even if plaintiff has been fired as a result of his workers

compensation claim, his cause of action would be fatally deficient because it is undisputed that plaintiff was unable to perform his duties as a delivery helper at the time his employment terminated.”).

Of course, in this case, the Town provided six months of leave. In the end, Hough was not even out of work because of his knee. He was out because of a non-work injury: his diabetes.

Therefore, because 41-1-80 does not provide an employee guaranteed leave beyond what the employer normally allows, it was not retaliatory to terminate Hough when he exceeded his allowed leave and was still unable to come back to work.

HANDBOOK-CONTRACT CLAIM

Hough claims that the Town’s employee handbook created a contract of employment which the Town breached by not following the discipline policy within the handbook.

Hough’s Handbook Claim is Barred by 41-1-110: This claim is barred by S.C. Code 41-1-110. This law was enacted in 2004 to largely eliminate breach of contract claims based on employee handbooks. It provides:

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. In accordance with this statute, the Town issued a new handbook in 2005 which contained a disclaimer (as required by the statute). (Ex. 4, First Pages of Handbook)

Hough testified that he indeed received the 2005 handbook and signed the disclaimer. (Ex. 2, Dep. Hough pp. 25-28) (Ex. 4, Signed Disclaimers).

Therefore, 41-1-110 clearly precludes Hough from bringing a contract claim based on the Town of Pageland employee handbook.

Claim is Barred Because Hough Admitted there was no Reliance: Breach of employment contract based on an employee handbook is an exception to the at-will employment rule. This is because the handbook exception (when it applies) is a form of unilateral contract. See, e.g., *Small v. Springs Industries*, 357 S.E.2d 452 (S.C. 1987). A unilateral contract offer requires that the promissory language in a handbook be manifestly and intentionally communicated to the employee. Only then can an employee accept the offer, and provide consideration, by relying on it and continuing to work. *Small*, 357 S.E.2d at 454. ("Small's action in forbearance in reliance on Spring's promise was sufficient consideration to make the promise legally binding.") (emphasis added); *Taylor v. Cummins Atlantic*, 852 F. Supp. 1279 (D. S.C. 1994), *aff'd*, 48 F.3d 1217 (4th Cir.), *cert. denied*, 116 S. Ct. 176 (1995)) (the employee must be aware of the alleged promise and rely on it.¹) . Therefore, reliance is a necessary element of the claim. Even if Hough could avoid

¹ There are many cases from other states that specifically hold an employee must have been aware of, and relied upon, the promissory language in the handbook. *Decker v. City of Wyandotte*, 2002 WL 31956958 (Mich.App. 2002); *Eerdmans v. Maki*, 573 N.W.2d 329 (Mich. 1997); *Birmingham Parking Authority v. Wiggins*, 797 So.2d 446 (Ala. 2001); *Frick v. Univ. Hosp. of Cleveland*, 727 N.E.2d 600 (Ohio 1999); *Irvin v. Community Bank*, 717 So.2d 369 (Ala. 1997); *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995); *Rahrs v. Nebraska Public Power Dist.*, 1995 WL 91557 (Neb. App. 1995); *Crisco v. Board of Educ. of Indian River School Dist.*, 1988 WL 90821 (Del. 1988); *Duldulao v. Saint Mary of Nazareth Hosp. Center*, 505 N.E.2d 314 (Ill. 1987). I could not find any case law contrary to the above cases. Although a South Carolina court has not specifically held awareness is required, separate South Carolina courts have held the employee must continue employment in reliance of the handbook language and, in other contexts, that one cannot rely on something one is unaware of. *Towles v. United Health Care*, 524 S.E.2d 839 (S.C. App. 1999) (must be reliance); *Prescott v. Farmers Telephone Cooperative, Inc.*, 516 S.E.2d 923, 925 (S.C. 1999) (must be reliance); and *Williams v. Texas Co.*, 24 S.E.2d 873, 878 (S.C. 1943) (must have knowledge of the facts for there to be reliance).

the prohibition of 41-1-110, he testified that he did not really look at the handbook and did not even keep his copy. (Ex. 2, pp. 24-26). He could not say how it was violated nor does his complaint describe the alleged violation. (Ex. 2, p. 42). If Hough never looked at the handbook and never even retained his copy, it is impossible for him to have relied on anything in the handbook. *See, e.g., Graves v. Serbin Farms, Inc.*, 409 S.E.2d 769, 771 (S.C. 1991) (“[Plaintiff] was not aware of any relationship [and therefore] could not have relied . . .”). Therefore, because Hough was not aware of what the handbook contained, he could not have relied on anything within it and no unilateral contract could be formed. Because he cannot prove reliance, Hough’s handbook contract claim should be dismissed.

There is No Discipline Procedure Policy: Hough’s handbook contract claim is that the Town’s discipline policy was not followed in terminating him. The Town Handbook statement regarding discipline, however, does not contain any promise of a discipline procedure, or progressive steps prior to discharge. It merely states that discipline is determined in the discretion of the Town. (Ex. 5, Handbook Provision on Discipline). To constitute a unilateral contract, a handbook must contain a promise which is breached. The Town’s handbook contained no promise of warnings or other procedures prior to discharge.

In *Prescott v. Farmers Telephone Co-op., Inc.*, 491 S.E.2d 698, 702 (S.C. App. 1997) (rev’d on other grounds 516 S.E.2d 923 (S.C. 1999)) the Court of Appeals held that a handbook that lists the types of discipline that might be applied, without more, is not a contractual promise. In *Prescott*, the company handbook listed types of conduct that could, or might, result in discipline. It did not communicate that there was any particular pre-termination procedure or requirements. The Town of Pageland handbook does even less than the Farmers’ Telephone handbook. The Town’s handbook does not even describe the types of discipline that might be

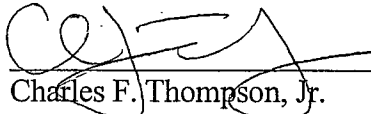
applied. There simply was no promise upon which Hough could rely. *See, also, Epps v. Clarendon County*, 405 S.E.2d 386 (S.C. 1991) (a handbook that did not address pre-termination procedures did not create a contract). Of course, in any event, Hough was terminated under the leave policy. The discipline statement in the Pageland handbook is not even relevant to his discharge. For this reason as well, summary judgment on Hough's handbook claim is required.

CONCLUSION

For all of the above reasons, it is clear that there is not even a scintilla of a factual dispute that warrants allowing these claims to go to trial. The Town is therefore entitled to summary judgment as to all of Hough's claims.

Respectfully submitted,

MALONE, THOMPSON, SUMMERS
& OTT LLC


Charles F. Thompson, Jr.
Attorney for Defendant
Town of Pageland

3/15/13

339 Heyward Street
Columbia, South Carolina 29201
(803) 254-3300

EXHIBIT 1

STATE OF SOUTH CAROLINA
COUNTY OF CHESTERFIELD

ANTONIO HOUGH

Plaintiff

TOWN OF PAGELAND
Defendant

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

Civil Action No. 2011-CP-13467

AFFIDAVIT

1. My name is Linda R. Long and I am currently the Town Clerk for the Town of Pageland, South Carolina.
2. Mr. Hough was an employee of the Town until August 18, 2011. The decision was made by myself and the Public Works Director in consultation with legal counsel to terminate Mr. Hough's employment because on August 18, 2011, he had exceeded the maximum leave time allowed by the Town (6 months) and was still unable to return to his job.
3. The Town's leave policy is stated in the employee handbook (relevant page attached).
4. Mr. Hough worked as a laborer in the Town's public works department. This job requires the employee to perform a number of manual labor tasks, including, for example, garbage collection and debris removal, operating heavy equipment, cleaning out sewer and drain lines, construction, etc. (his job description is attached). The job requires the ability to lift/pull 100 to 150 pounds of heavy work and prolonged sitting, standing, and walking.

5 Mr. Hough reported to have stepped in a hole while on duty and injured himself. This
6 occurred in August 2009. The injury (to his knee) was covered by the Town's workers
7 compensation insurance.

8 From August 18 through December 31, 2009, Mr. Hough was absent for approximately 45
9 out of 95 workdays.

10 On the days Hough did work in 2010, he did not perform any regular job available with the
11 Town but instead the Town found or created some light duty for him to do.

12 Mr. Hough continued to assert that his knee was painful and he was unable to work at his
13 regular job.

14 The first week of January 2011, Mr. Hough had surgery on his knee. He did not return to
15 work after this leave.

16 The Town provides a maximum of six months of leave due to a disability.

17 In August 2011, Mr. Hough's orthopedic doctor released him to come to work. However,
18 Mr. Hough's regular doctor restricted him from working due to his diabetes until no earlier
19 than September 1, 2011.

20 Mr. Hough had already exhausted his six months of leave and, because he was still unable to
21 return to work, his employment was administratively terminated. He remains eligible for
22 re-hiring, however, on September 1, 2011. Mr. Hough's orthopedic doctor determined that
23 Mr. Hough had a permanent disability due to his knee and was no longer capable of lifting
24 greater than 25 pounds or climbing (attached).

25 The Town has consistently applied the six month limit on medical leave and at least two
26 other employees have been administratively terminated for the same reason.

14. Mr. Hough's termination would have occurred whether he was absent for a workers compensation compensable injury or not. The policy applies to all leave regardless of the reason.

15. Having been sworn, I verify that the above affidavit is truthful and accurate.

Linda R. Long
Linda R. Long

Dan M. Duck
Notary Public 03-06-2017

PUBLIC WORKS ASSISTANT 1

NATURE OF WORK

Performs a wide range of activities including sanitation pickup, maintenance, construction, and operation of a wide range of equipment and vehicles.

EXAMPLE OF ESSENTIAL JOB FUNCTION

This list of essential functions is not exhaustive.

Loads garbage, limbs, leaves, etc., into collection vehicles. Picks up dead animals and transports them to the designated place for disposal. Sweeps streets, shovels waste, cleans gutters and sidewalk maintenance. Cleans and maintains vehicles, equipment, buildings and other town facilities. Operates equipment and vehicles after receiving proper training. Removes Litter. Cuts and edges grass and trims shrubbery. Cleans manholes and sewers. Unstops sewers by using tools and equipment. Installs and maintains water and sewer lines and related appurtenances. Performs a wide range of construction activities such as carpentry, painting, masonry, etc. Constructs and maintains recreation facilities. Reads and re-reads meters, establishes and discontinues water service. Performs all other duties as may be assigned to meet organizational needs.

REQUIRED KNOWLEDGE, ABILITIES, AND SKILLS.

Ability to maintain customer-focused relationships with co-workers, supervisors, agencies, the general public, and all other internal and external customers.

Ability to understand and follow oral and written instructions.

Ability to efficiently and safely operate all designated equipment and machinery.

REQUIRED TRAINING AND EXPERIENCE

May be required to obtain a valid S. C. Drivers License.

MINIMUM QUALIFICATIONS REQUIRED TO PERFORM ESSENTIAL JOB FUNCTIONS.

Ability to perform heavy work and to constantly exert sufficient force to lift, carry, push, pull or otherwise move object weighing 100 to 150 pounds. May involve sitting, walking or standing for extended periods of time.

DATA CONCEPTION

Ability to complete maintenance and other designated forms and job requirements with little or no supervision.

scheduled workdays because of any physical disability are automatically terminated but are eligible for rehire.

2. Employees are requested to apply for leaves of absence as far in advance of need as is possible, but an employee may be placed on leave status without application when the circumstances warrant such action.
3. Physical disability leave begins on the first day of absence.
4. After the employee has exhausted his annual and/or sick leave, as a general rule, an employee on leave of absence is not entitled to wages or fringe benefits and does not accrue fringe benefits. Certain exceptions may be established by law.
5. Employees on leave of absence may not engage in other employment.
6. Employees desiring to return to work from an unpaid leave of absence should notify the Administrator in writing at least ten (10) days prior to their desired return date. If the Town finds that the employee is fit to resume his duties, the employee may be recalled to his former job if a vacancy exists which is to be filled. If no such vacancy exists, the employee may be recalled to any job in which there is a vacancy which is to be filled and for which he is qualified. If no such vacancy exists at the time the employee desires to return to work, the employee's leave of absence may be continued. Any employee who has not been reinstated within six (6) months following the commencement of a leave of absence is terminated. This action does not affect the employee's eligibility to be considered for hire as a new employee at some future time.

EXHIBIT 2

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHESTERFIELD) CASE NO.: 2011-CP-13-667
3

4 Antonio Hough,)
5 Plaintiff,) DEPOSITION OF
6 vs.) ANTONIO HOUGH
7 Town of Pageland,) FEBRUARY 26, 2013
8 Defendant.)
9 _____)

10
11 Deposition on oral examination of Antonio Hough,
12 reported by Jaime D. Newton, Court Reporter and Notary
13 Public in and for the State of South Carolina; pursuant to
14 Rule 30 of the South Carolina Rules of Civil Procedure;
15 said deposition taken at the law offices of Cockrell Law
16 Firm, P.C., 159 Main Street, Chesterfield, South Carolina,
17 on Tuesday, the 26th day of February, 2013, scheduled for
18 1:00 p.m. and commencing at the hour of 12:56 p.m.
19
20
21
22
23
24
25

GARBER REPORTING SERVICE, INC.
POST OFFICE BOX 12348
COLUMBIA, SOUTH CAROLINA 29211
(803) 256-4500

RECORD ON APPEAL 35

1 A: I had a surgery before the accident -- I mean,
2 not before the accident. I had a surgery after
3 the accident when Dr. -- I forgot his name. His
4 in Rock Hill, York County, York, and he had went
5 in and did my leg, and at the same time --

6 Q: That was in January of 2011?

7 A: Yes. And he did my leg and it didn't work out
8 too well. And it end up we set everything up
9 with Dr. Kirol. I went to Linda and told Linda
10 I'm still having pain in my knee. So we went to
11 Dr. Kirol, and Dr. Kirol did the surgery on my
12 leg.

13 Q: Okay. Did a Dr. Schwartz do a procedure back in
14 2009?

15 A: Yes.

16 Q: And was that before or after the August
17 accident?

18 A: That was right after the accident.

19 Q: Okay, got you. All right. Now I'm with you.

20 A: And he told me my knee was messed up, so I went
21 to -- after Dr. Kirol did all this x-rays and
22 MRIs and stuff, we have copies on a disk here,
23 stated he had to do surgery kind of immediately
24 of my knee.

25 Q: All right. So immediately after the accident

1 you were out of work for a while?

2 A: Yes, I had surgery. I had therapy. And then
3 after that going back and forth to Columbia, and
4 they told me to be off my knee. I was on light
5 duty with the town, then -- modified duties, or
6 whatever they call it. And Dr. Kirol pulled me
7 completely out of work.

8 Q: Okay. Hang on a second.

9 MR. THOMPSON: Let me mark this as Exhibit Two.

10 (Defendant's Exhibit Number Two was marked for
11 identification purposes.)

12 Q: At least at one point, let me show you Exhibit
13 Two, they had you coming back to work on the
14 28th of September?

15 A: Yes.

16 Q: And is that when you did the light duty?

17 A: I'm not sure. I think so.

18 Q: But shortly after that you were out of work.

19 Let's look at Exhibit Three.

20 (Defendant's Exhibit Number Three was marked for
21 identification purposes.)

22 Q: All right. Looking at Exhibit Three, the doctor
23 had you on some restrictions --

24 A: Yes.

25 Q: -- about that time.

1 A: That's when I was going through therapy.

2 Q: Okay. And what kind of work were you doing?

3 A: Public works consisted of garbage, sewer, fixing
4 roads, cutting grass. Anything maintaining the
5 town.

6 Q: But in October '09 when you were on these
7 restrictions --

8 A: On the restrictions, Wesley had me sitting out
9 there guarding a dumpster. I mean, literally
10 guarding a dumpster.

11 Q: So it was kind of make work?

12 A: No. It was kind of like go out there and guard
13 that dumpster.

14 Q: No. I mean, that was not a normal job, right?

15 A: No. I mean, people don't do that.

16 Q: Let me show you what we'll mark as Exhibit
17 Three.

18 COURT REPORTER: Four.

19 MR. THOMPSON: Four. Thank you.

20 (Defendant's Exhibit Number Four was marked for
21 identification purposes.)

22 Q: And it looks to me like Dr. Schwartz had you out
23 of work in October through November 9. He had
24 you coming back on November 9. Do you recall
25 that?

1 A: Yes. I came back to work.

2 Q: All right. And when you came back were you
3 still doing light duty?

4 A: When I came back to work --

5 Q: November of '09?

6 A: No. I was doing regular duties, picking up
7 limbs, leaves. If someone was out on the trash
8 truck, helping them out on the trash truck.
9 Anything maintaining the town. And that was it.

10 Q: Okay. And it looked like in 2010, beginning in
11 January, you were back at work; is that right?

12 A: Yes.

13 Q: And in 2010, during that time, were you ever on
14 light duty?

15 A: I was on -- actually it was in December, I
16 think, if you look on my schedule. I think I
17 was leaving back and forth in December going to
18 therapy.

19 Q: Right. December of 2009 or 2010?

20 A: 2009, I think. I was leaving back and forth to
21 go to therapy until I got an appointment with
22 Dr. Kirol.

23 Q: And that went into --

24 A: I was working at the community city, running the
25 public community center. I had to open up,

1 stuff for Andrea, and help Andrea out with the
2 floors and stuff at the community center.

3 Q: When was that?

4 A: I'm not recollecting when that was, but --

5 Q: You recollect that in December of --

6 A: I think it was December. I'm not sure.

7 Q: December 2009? Or do you remember some light
8 duty in December 2010?

9 A: 2010.

10 Q: Okay. December 2009, I'm looking at your
11 attendance schedule, it looks like you were not
12 at work.

13 A: Okay.

14 Q: Right?

15 A: Okay. Right there.

16 Q: That's January. I'm sorry.

17 **MS. LONG:** That's '09.

18 A: That's '09.

19 Q: You were at work. So 2010, it looks like you
20 worked. I mean, you were out here and there,
21 but you pretty much worked in 2010?

22 A: Yeah, because I was going to therapy, back and
23 forth.

24 Q: Okay. And then in January 2011 is when you had
25 your surgery, right?

1 A: Yes.. Because they recommended that I have to
2 have surgery. They said the therapy was making
3 it worse. So, therefore, Dr. Kirol did x-rays
4 and stuff on me at Columbia MRIs and --

5 Q: And from your surgery up until the termination
6 of your employment you were pretty much out.
7 You didn't come back to work, or were you here -

8 -
9 A: I was out after my surgery.

10 Q: Okay. So you didn't come back to work after
11 your surgery?

12 A: No.

13 Q: And at some point you applied for short term
14 disability?

15 A: No. I had went through Aflac --

16 Q: Right.

17 A: -- because Aflac has a plan to help you out with
18 your bills or whatever. Since I was paying for
19 it, I might as well use it.

20 Q: And did you get anything out of that?

21 A: And it was like 100 and something dollars, or
22 something a week, or something like that through
23 Aflac, if I'm not mistaken.

24 Q: I'm going to show you what I'm going to mark as
25 Exhibit Five.

1 A: And I was getting that through Aflac, and that's
2 about it.

3 (Defendant's Exhibit Number Five was marked for
4 identification purposes.)

5 Q: Exhibit Five is your attendance chart for 2011.
6 If I'm looking at it right, and I think you
7 already agree with me, it looks like you
8 received in January and February some sick pay
9 and a holiday pay. Do you recall that?

10 A: Yes.

11 Q: But you weren't working then, correct?

12 A: No, I wasn't.

13 Q: So during 2011, what kind of problems were you
14 having? Was it just the knee?

15 A: It was my sugar, too. My sugar was acting up.
16 And that was from Dr. Kelley Rosebrock in Indian
17 Trail.

18 Q: And did Dr. Kirol, your orthopaedic doctor, did
19 he also have you out of work?

20 A: Yes.

21 Q: In 2011?

22 A: Yes.

23 Q: And eventually he did give you, and I'll show
24 you Exhibit Six, a return to work note.

25 (Defendant's Exhibit Number Six was marked for

1 identification purposes.)

2 Q: And he was going to put you back, it looks like,
3 on August 15th, back to work.

4 A: Yes.

5 Q: All right. But that didn't work out, right?

6 A: No. Because I left and went back up there
7 because my knee started giving me problems and
8 Dr. Kirol said he was going to put me out
9 longer. So, therefore, he put me out longer.

10 Q: And what problem were you having then?

11 A: It was popping and swelling.

12 Q: Okay. Was there ever a time period in 2011
13 after your surgery where your knee felt good or
14 it never quite got better?

15 A: He said this about the best it's going to get
16 other than me probably having a total knee
17 replacement.

18 Q: And have you thought about a total knee
19 replacement?

20 A: Yes. I thought of it, but after the crap and
21 stuff I went through with this knee -- I mean,
22 it is insane.

23 Q: What do you mean, pain and --

24 A: Pain. Like extensive pain.

25 Q: So Dr. Kirol put you back out and you never came

1 back on August 15. Dr. Kirol put you --

2 A: He put me back out. I believe Jason and them
3 have that letter. I don't know if you have it
4 or not. I don't see it over here nowhere. The
5 one Dr. Kirol wrote and put me back out.

6 Q: And about that time, I think also Dr. Kelley --

7 A: Kelley Rosebrock. She put me out. That was my
8 private physician. She put me out until I could
9 get my sugar under control because she said I
10 was a walking heart attack.

11 Q: And do you know why you were having a problem
12 with the diabetes?

13 A: No. It's just hereditary. My dad has bad
14 diabetes problems. I mean, it's just a gene.
15 I've lost plenty of weight and did everything
16 they wanted me to do, take the medicine. And
17 right now it still is messed up.

18 Q: And are you on regular medication, insulin at
19 all?

20 A: I'm on two different types of insulin. Four
21 different types of sugar medicines, plus two
22 blood thinners and a cholesterol medicine.

23 Q: Okay. Were you on all that back in September of
24 2011?

25 A: No. I was on two types of insulin and two

1 pills.

2 Q: And so, has it --

3 A: Four pills actually. It was two of -- 1,000
4 milligrams of -- I can't even think now. But
5 anyway, it's two of those, and I was on Prandin
6 and Actos.

7 Q: Okay. So has your diabetes gotten a little
8 worse since 2011?

9 A: Right now it's doing a lot better. It's a lot
10 better.

11 Q: Is it because the medication is helping out?

12 A: Because the medication and -- helping out a lot.
13 And I got rushed to the hospital two weeks ago.

14 Q: For a blood sugar problem?

15 A: Yeah.

16 Q: And so, I think right about that time did you
17 come in and talk to Ms. Long?

18 A: Yes. I came in and talked to Ms. Long. She
19 called me and I came up to town hall and --

20 Q: Because they were expecting you to come back to
21 work; is that right?

22 A: I came to town hall and Linda told me, she said,
23 Tony, you've been out. This letter states that
24 you've been out longer than six months. The
25 handbook says that you're terminated. I mean,

1 we're going to have to terminate you. I hate to
2 do this, but we have to terminate you. That's
3 exactly what she said. And I said, good
4 gracious, I'm on workers' comp. I don't
5 understand it. And she said, it don't matter.
6 I mean, the handbook says that. If the handbook
7 says it, that's what she got to go by, because
8 she would have got in trouble.

9 Q: Okay. But based on Dr. Kirol's note returning
10 you to work August 15, did you call into the
11 town and tell somebody you weren't going to be
12 there on the 15th?

13 A: Yes.

14 Q: Who did you speak to about that?

15 A: No, I didn't call in. I gave Linda a note from
16 Dr. Kelley Rosenbrock.

17 Q: Okay. And do you know when that was?

18 A: That was the same day I gave her the note from
19 Dr. Kirol.

20 Q: And was that -- let me just go ahead and show
21 you Exhibit Seven.

22 (Defendant's Exhibit Number Seven was marked for
23 identification purposes.)

24 A: All that was the same day. Same date that she
25 told me I was terminated.

1 Q: Okay. Did she give you this letter, Exhibit
2 Seven, or did you get that in the mail later?

3 A: I believe she gave me this letter.

4 Q: Did she give that to you in person?

5 A: I don't know, to tell you the truth.

6 Q: Okay. Well, let me roll back because I want to
7 make sure I understand the sequence of events.
8 And if you don't remember, that's fine. But do
9 you know if the town was thinking that you were
10 going to come back to work on the 15th or the
11 16th of August, based on Dr. Kirol's note?

12 A: Based on Dr. Kirol's note that I have gave Linda
13 -- I gave her two notes at the same time. Gave
14 her Dr. Kirol's and Dr. Kelley Rosenbrock's.

15 Q: Okay. And do you know when that was?

16 A: I have copies of the letters. I gave her two of
17 the letters at the same time and she -- and Trey
18 and them have copies. My lawyer have copies of
19 the letters. I gave her copies of the letters
20 at the same time. She told me by the letters
21 stating that the handbook states that I no
22 longer has a job, because they have to refill my
23 position.

24 Q: And you didn't --

25 A: And after that I told her I was going back to

1 see my doctor. I believe that's what I said.
2 So I had seen Dr. Kirol and called him and set
3 up an appointment, because I didn't really want
4 to get up because my knee was killing me. So I
5 went and seen Dr. Kirol. He did another exam on
6 it, shot me up with a cortisone shot. About
7 made me come out of the chair. And he said this
8 is all I can do right now. I'm sending the town
9 a letter stating that, and they sent what's her
10 name from workers' comp a letter, too. And she
11 said, Tony, you're still on workers' comp, and I
12 said okay. I forgot her name, it's been so long
13 ago, from workers' comp. She called me and I
14 talked to her. And the rest is history. I was
15 terminated and I'm up here.

16 Q: Let me show what we'll mark as Exhibit Eight.

17 **(Defendant's Exhibit Number Eight was marked for**
18 **identification purposes.)**

19 Q: And would this be right that around -- let's
20 see. He signed it September 1. I thought I saw
21 an August date on here. But around September 1
22 Dr. Kirol gave you a permanent partial
23 impairment of 15 percent for your knee; is that
24 right?

25 A: Yeah, 15 percent disability on my knee.

1 Q: And he gave you permanent restriction, no
2 climbing, no --

3 A: No climbing, no lifting, and no carrying or
4 pulling 25 pounds, which is -- I mean, if I was
5 back at work at the time, we still had stuff at
6 work to do, but --

7 Q: But not your regular job, right?

8 A: It's not my regular job. But you're messing
9 with the town, so, I mean, you've got a lot of
10 stuff around town to do. But according to the
11 supervisor I was acting and faking.

12 Q: Hang on. We'll get to that. In your workers'
13 comp deposition -- you're welcome to look at
14 page 35, if you want to. You testified that you
15 were not going to be able to do manual labor
16 like you used to.

17 A: No. I mean, I ain't going to be able to do
18 manual labor like I used to. I mean, I just ran
19 through all the surgery and all this other
20 stuff.

21 Q: And in terms of doing the job, the regular job
22 that you were doing for the town before your
23 injury, you can't do that now, correct?

24 A: I can do some of it.

25 Q: But not all of it?

1 A: Not all of it.

2 Q: And you mentioned that Ms. Long mentioned the
3 handbook to you. Were you aware of that policy
4 in the handbook about --

5 A: No, I was not aware of it. I always thought if
6 you --

7 Q: Hang on a second. Let me finish. I know we're
8 doing sort of a normal conversation, but let me
9 get my full question out so she has my full
10 question right. My full question is, were you
11 aware of the policy limiting leave to six
12 months?

13 A: No, sir, I wasn't. I always thought that if you
14 was hurt on the job and whenever you come back
15 you always have a job, or like that. I mean,
16 that's how it was at my last jobs I had. I've
17 seen employees and other people get hurt. They
18 come back and everything's fine. They back out
19 there working.

20 Q: Did you look at your handbook to see --

21 A: No. At that time when I was hired, man, I was
22 just trying to get a job, get in the door so I
23 could pay my bills. I mean, I wasn't --

24 Q: My question is, after she mentioned the six
25 months limit did you look at your handbook to

1 see if she was right or not?

2 A: Tell you the truth, no. Because to me this is
3 the second handbook we had, I think. I believe
4 it's the second one we had. We had one first,
5 when I first come there, and I believe this is
6 the second one. I'm not sure.

7 Q: Okay. So you never looked at the leave policy?

8 A: I never looked at it. Me and my lawyers looked
9 at it.

10 Q: Did you have a copy of the policy when you got
11 terminated?

12 A: Yes.

13 Q: You had a copy of the handbook?

14 A: I got one from the town.

15 Q: Okay. So when did you get one from the town,
16 after your termination or before?

17 A: After my termination.

18 Q: So had the town issued you a copy of the
19 handbook? Do you remember if the town issued
20 you a copy of the handbook during your
21 employment?

22 A: I'm pretty sure they probably did, because you
23 have to sign off on it. If not, the new one
24 they gave out, you had to sign off on it, too.

25 Q: And that's the one I'm talking about, the 2005

1 handbook?

2 A: Yes. That's the one you had to sign off on.

3 Q: Okay. But you didn't have a copy of that at the
4 time of your termination?

5 A: No. Who keeps them? I mean, that's just being
6 honest. Who keeps the handbooks?

7 Q: I understand. Did you ever look through it?

8 A: Not really, because I'm doing my job correctly
9 and I haven't been wrote up but probably about
10 one thing since I've been with the town, and
11 that was over the supervisor's stupidity and it
12 wasn't mine.

13 Q: Let me show you what we'll mark as Exhibit Nine
14 and Ten.

15 **(Defendant's Exhibits Numbers Nine and Ten were marked for**
16 **identification purposes.)**

17 Q: Let me ask you if that's your signature on both
18 of these documents? It's actually the same
19 document.

20 A: I was going to say they're the same. They look
21 like the same. Yeah.

22 Q: And did you read this important notice at the
23 time you signed it?

24 A: No, I didn't. I just signed it and just kept on
25 going.

1 MR. THOMPSON: Can we make a copy of this? Let's go off
2 the record for a minute.

3 (Off the Record)

4 Q: We fixed our exhibits. And just so the record
5 is clear, this is your signature on Exhibit Ten
6 as well?

7 A: Yes. I remember this one.

8 Q: Okay. And would you have signed these at the
9 time you received the 2005 handbook?

10 A: Yes.

11 Q: Okay. And was there a meeting to discuss the
12 new handbook, or did somebody explain why a new
13 handbook was coming out?

14 A: Was this handbook issued in 2005?

15 Q: No, that's your workers' comp.

16 A: Where's when the handbook was issued?

17 Q: We want to look at the handbook.

18 MR. THOMPSON: I'll mark this as Exhibit Eleven.

19 (Defendant's Exhibit Number Eleven was marked for
20 identification purposes.)

21 A: Was it issued in 2005?

22 Q: Hang on a second.

23 A: Because we had two of them.

24 Q: Let's talk about this one first. All right. So
25 my question was, do you think that you would

- 1 have signed Exhibit Ten and Exhibit Nine about
2 the same time you received the 2005 handbook, or
3 do you recall?
- 4 A: Yes. I recall signing this one.
- 5 Q: You mentioned a prior handbook. Did you have a
6 copy of the prior handbook?
- 7 A: No, I don't.
- 8 Q: Okay. And do you remember if you ever looked at
9 the leave policy in the prior handbook?
- 10 A: No, I haven't.
- 11 Q: Okay. Did you ever look at the discipline
12 policy in either handbook?
- 13 A: No, I haven't.
- 14 Q: You just never had any cause to look at it?
- 15 A: No. Because, I mean, I go to work, do what I'm
16 supposed to do and do it pretty good.
- 17 Q: All right. Looking at Exhibit Nine, that's this
18 one. You should have it in front of you.
- 19 A: Right there.
- 20 Q: All right. Did you understand, as it says on
21 there, that the handbook was not a contract of
22 employment?
- 23 A: Yes.
- 24 Q: All right. Let me ask you, who do you think the
25 witnesses are for your case? The witnesses that

1 Q: Are you aware of any policy in the handbook that
2 you allege the town violated in terminating your
3 employment?

4 A: No. I haven't even looked in the handbook
5 personally.

6 MR. THOMPSON: Let's take a quick break.

7 (Off the Record)

8 (Defendant's Exhibit Numbers Twelve and Thirteen were
9 marked for identification purposes.)

10 Q: All right. Mr. Hough, I've just handed you what
11 we've marked as Exhibits Twelve and Thirteen.
12 Let's start with Exhibit Twelve. Is this the
13 note from Dr. Kelley that you mentioned earlier
14 in your testimony putting you out of work from
15 July 18 to September 1?

16 A: Yes.

17 Q: Okay. And you gave this note to the town?

18 A: Yes.

19 Q: And then let's look at Exhibit Thirteen. And
20 would this basically be the document that you
21 were talking about earlier where -- at the end of
22 your employment where Dr. Kirol put you out of
23 work through August 30th?

24 A: Yes. But he gave me another one.

25 Q: Gave you one after that or --

EXHIBIT 3

MIDLANDS

orthopaedics, p.a.

Robert M. Peele, Jr, MD*Robert M. DaSilva, MD* James A. O Leary, MD
Michael R. Ugino, MD*Michael S. Green, MD * M. David Redmond, MD*
William C. James, MD * Robert D. Santrock, MD* Frederick C. Piehl, MD * Thomas P. Gross, MD
Coleman D. Fowble, MD*Thomas D. Armsey, MD*Ivan LaMotta, MD*Bernard G. Kirol, MD

1910 Blanding Street * Columbia, SC 29201 * 1013 Lake Murray Boulevard * Irmo, SC 29063

2989 Sunset Boulevard, West Columbia, SC 29169

(803) 256.4107 * www.midlandsortho.com

Work Status Information

NAME: Hough, Antonio

EMPLOYER: TOWN OF PAGELAND

PHYSICIAN: Bernard G. Kirol, M.D.

DATE OF ACCIDENT: 08/17/2009

WORKERS' COMP CLAIM NUMBER#

630000076419-0001

ACCOUNT: 2049748

CARRIER: COMPANION PROPERTY
AND CAUSALTY GROUP

DATE OF SERVICE: 08/09/2011

DIAGNOSIS CODE (S): 71836;71996

DIAGNOSIS DESCRIPTION:

RECURRENT DISLOCATION OF JOINT;
LOWER LEG; UNSPECIFIED DISORDER
OF JOINT; LOWER LEG

WORK STATUS:

(X) Regular duty as of [08/15/2011] with no restrictions

() Light duty as of [] with restrictions

(availability of light duty is determined by the employer, not the physician)

() Remain out of work until []

() Part time (whether regular duty or light duty)

() Full time (whether regular duty or light duty).

PHYSICAL LIMITATIONS:

() None

() No walking

() No climbing

() No standing

() No prolonged standing

() No sitting

() No bending or stooping

() No twisting or stretching

Other:

() No kneeling, squatting, crawling

() Pushing or Pulling Limit () lbs

() Lifting and carrying limit () lbs

() Sedentary duties only

() No overhead work

() No work involving () L () R () (extremity)

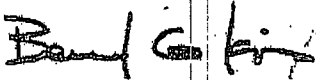
() No overhead work

() No work at heights

These restrictions are recommended to promote healing of the body part which is injured or which has had surgery. Unrestricted use is recommended when it will not adversely affect the healing process. This is not a statement as to the capacity to undertake a given task or participate in a given sport, nor is it a warranty against subsequent injury. All restrictions or the lack of such restrictions may be subject to revision or modification if conditions change. It is your responsibility to contact us for any clarification, questions or concerns.

Follow-up plan: Return in 1 month

Follow-up appointment date: 09/06/2011



Bernard G. Kirol, M.D.

RECORD ON APPEAL 57

Pageland/Hough 0015



Carolina's Physicians Network
Carolina's HealthCare System

CERTIFICATE TO RETURN TO SCHOOL OR WORK

Date:

8/15/11

ORG:

MRN:

To Whom It May Concern:

Antonio Hough
(name)

is under my care. He/She

check all that apply.

☒ was seen in my office today 7/18/2011 (date)

☒ is able to return to school/work on (S/M/T/W/Th/F/S) 7/11/2011 (date)

☐ is able to resume sporting activities on (S/M/T/W/Th/F/S) (date)

☐ was accompanied by (name)

Limitations/Remarks:

MD/Provider's Signature:

Kelleya [signature]

CHS-008 (3/07)

12
RECORD ON APPEAL 58

Patient Name: Antonio Hough

Date of Service: 08/24/11

Patient ID: 2049748

Provider: Bernard G. Kirol, M.D.

To Whom It May Concern:

Our patient, Antonio Hough, was seen in the office on 08/24/11.

If you have any questions, please feel free to contact our office at 803.256.4107.

(X) Patient will be out of school or work until his follow up of 8/30/2011.

() Patient may return to school or work with no restrictions.

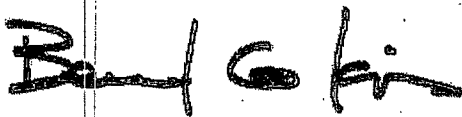
() Patient may return to school or work on with the following restrictions:

- () No lifting/carrying over lbs.
- () No sitting over hours/day.
- () No standing over hours/day
- () No prolonged walking
- () No climbing
- () No kneeling
- () No repetitive twisting
- () No pushing or pulling

- () No repetitive bending
- () No repetitive stooping
- () No reaching above shoulder level
- () No work involving use of upper extremity
- () No work involving use of lower extremity
- () No repetitive squatting
- () No repetitive crawling

Other:

Return Appointment Date/Time: 8/30/2011



Bernard G. Kirol, M.D.

Fax Created: Dated: 8/24/2011 5:00:23 PM
faxed to 1-843-623-5700

RECORD ON APPEAL 59

Patient: Hough, Antonio DOS:

ALLERGIES: No Known Allergies

MEDICATION(s): No data for Medication

REVIEW OF SYSTEMS:

General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine are normal except for what is noted:

Systems Reviewed

PHYSICAL EXAM:

Vital Signs: HEIGHT: 6'2"
WEIGHT: 283 lbs 0 oz
BMI: 36.3

on exam the patient's left knee shows no visible swelling. There is full range of motion. There is no patellofemoral instability. The patient reports tenderness to palpation anteriorly at the patellofemoral joint and laterally. Quadriceps and VMO tone is good. The calf is nontender. There is no distal swelling. Foot is neurovascularly intact.

RADIOGRAPHS:PROCEDURE:

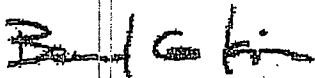
ASSESSMENT: -impairment rating: 15% permanent partial impairment left lower extremity based on fifth edition AMA guidelines.

PLAN: we did not feel that additional treatment or testing would provide reliable pain relief and the patient agrees. Permanent restrictions of no climbing and no lifting greater than 25 pounds are assigned. We feel that the patient has reached maximum medical improvement. The patient is rated and released. We reviewed maintaining strengthening exercises. We anticipate symptom improvement over time. The patient's Impairment rating is based partly on revision surgery and grade 4 chondral injury to the medial femoral condyle. The patient is appreciative of this care. We wished him well in the future.

PRESCRIPTIONS: No data for Prescription

PRE-EXAMINATION:WORK STATUS:

() Full Time () Part Time (X) Restrictions () Out of Work () Non-Applicable



Bernard G. Kirol, M.D.

Electronically Signed
September 01, 2011 10:40 AM

RECORD ON APPEAL 60

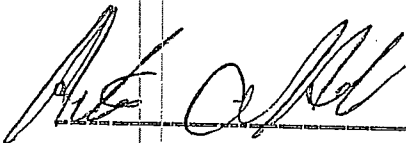
Pageland/Hough 00171

EXHIBIT 4

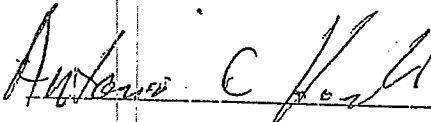
DISCLAIMER

ALL EMPLOYEES OF THE TOWN OF PAGELAND ARE EMPLOYED AT-WILL AND MAY QUIT OR BE TERMINATED AT ANY TIME AND FOR ANY REASON. NOTHING IN ANY OF THE TOWN OF PAGELAND'S RULES, POLICIES, HANDBOOKS, PROCEDURES OR OTHER DOCUMENTS RELATING TO EMPLOYMENT CREATES ANY EXPRESS OR IMPLIED CONTRACT OF EMPLOYMENT. NO PAST PRACTICES OR PROCEDURES, WHETHER ORAL OR WRITTEN, FORM ANY EXPRESS OR IMPLIED AGREEMENT TO CONTINUE SUCH PRACTICES OR PROCEDURES. NO PROMISES OR ASSURANCES, WHETHER WRITTEN OR ORAL, WHICH ARE CONTRARY TO OR INCONSISTENT WITH THE LIMITATIONS SET FORTH IN THIS PARAGRAPH CREATE ANY CONTRACT OF EMPLOYMENT UNLESS: 1) THE TERMS ARE PUT IN WRITING, 2) THE DOCUMENT IS LABELED "CONTRACT," 3) THE DOCUMENT STATES THE DURATION OF EMPLOYMENT, AND 4) THE DOCUMENT IS SIGNED BY THE TOWN ADMINISTRATOR OR APPROVED BY TOWN COUNCIL.

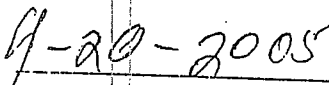
I acknowledge receipt of the employee handbook AND UNDERSTAND THAT IT IS NOT A CONTRACT OF EMPLOYMENT.



Signature



Printed Name



Date

50

RECORD ON APPEAL 62

Pageland/Hough 0021

PAGELAND
IMPORTANT NOTICE

As you know, our employee handbook and written personnel policies contain various provisions relating to your employment. This handbook and these policies are not a contract of employment The provisions of this handbook and our personnel policies are subject to change at any time by the Town of Pageland, with or without notice. Not with-standing any of the provisions of this handbook or any personnel policy all Town of Pageland "employees are "employees at-will" who may quit at any time for any or no reason and who may be terminated at any time for any and no reason.

No person except the Administrator has the authority to enter into a contract of employment which is not terminable at-will. Neither the Town's policies, nor its practices, nor the oral assurances of its representatives create a contract of employment. The Town's regular work hours are established by each department. However, due to the Town's operations, certain employees may be required to work different schedules. The fact that an employee may be tentatively scheduled for particular hours in a day or days in a week does not preclude the Town from requiring employees to work additional hours or fewer hours than scheduled.

THIS IS NOT A CONTRACT.

The rate of pay upon employment shall be 8.00 per hour.

*temporary - no benefits except
and workman's comp
4-20-2005*

Carol Kenna

PAGELAND
IMPORTANT NOTICE

As you know, our employee handbook and written personnel policies contain various provisions relating to your employment. This handbook and these policies are not a contract of employment The provisions of this handbook and our personnel policies are subject to change at any time by the Town of Pageland, with or without notice. Not with-standing any of the provisions of this handbook or any personnel policy all Town of Pageland "employees are "employees at-will" who may quit at any time for any or no reason and who may be terminated at any time for any and no reason. No person except the Administrator has the authority to enter into a contract of employment which is not terminable at-will. Neither the Town's policies, nor its practices, nor the oral assurances of its representatives create a contract of employment. The Town's regular work hours are established by each department. However, due to the Town's operations, certain employees may be required to work different schedules. The fact that an employee may be tentatively scheduled for particular hours in a day or days in a week does not preclude the Town from requiring employees to work additional hours or fewer hours than scheduled.

THIS IS NOT A CONTRACT.

The rate of pay upon employment shall be

8.00 per hour.

*temporary - no benefits except
retirement and workman's comp
C.C. 4-20-2005*

Carol Kenna

EXHIBIT 5

Town of Pageland
Employee Handbook

2005

NOT A CONTRACT

Benefits

The Town currently offers a competitive benefits package. The terms of the Town's benefits plans are subject to change, and the Town is not responsible for any changes in or elimination of benefits or benefit plans. Please see the Administrator's office for specific information on the Town's benefits plans.

Health Insurance

The Town currently offers group health coverage to eligible employees and their dependents. Please see the Administrator's office for a copy of the summary plan description.

Retirement

The Town participates in the South Carolina State Retirement System and Police Officers Retirement System. Some employees are required by law to become members and participate in the system. Benefits and their terms are set by the State Retirement System and not the Town. Please see the Administrator's office or contact the State Retirement System for more information.

Workers' Compensation

Town employees are covered by workers' compensation for on-the-job injuries. Benefits are governed by state law and not set by the Town. Employees must report immediately any on-the-job injury, regardless of severity, to their supervisor.

Discipline

Employees are subject to disciplinary action up to and including discharge when the Administrator determines that such action is necessary for the good of the Town.

Employees must sign disciplinary notices, counseling memoranda, performance appraisals and similar documents. The employee's signature indicates only that the employee is aware of the action taken and does not indicate that the employee agrees with such action.

An employee who refuses to sign such a document will be relieved of all duty until the document is signed. If the document has not been signed and returned by the end of the employee's next scheduled work day, the Town will consider the employee to have resigned.

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF CHESTERFIELD) CASE NO.: 2011-CP-13-667
3

4 Antonio Hough,)
5 Plaintiff,) DEPOSITION OF
6 vs.) ANTONIO HOUGH
7 Town of Pageland,) FEBRUARY 26, 2013
8 Defendant.)
9 _____)

10
11 Deposition on oral examination of Antonio Hough,
12 reported by Jaime D. Newton, Court Reporter and Notary
13 Public in and for the State of South Carolina; pursuant to
14 Rule 30 of the South Carolina Rules of Civil Procedure;
15 said deposition taken at the law offices of Cockrell Law
16 Firm, P.C., 159 Main Street, Chesterfield, South Carolina,
17 on Tuesday, the 26th day of February, 2013, scheduled for
18 1:00 p.m. and commencing at the hour of 12:56 p.m.
19
20
21
22
23
24
25

GARBER REPORTING SERVICE, INC.

POST OFFICE BOX 12348

COLUMBIA, SOUTH CAROLINA 29204

(803) 256-4500

RECORD ON APPEAL 68

APPEARANCES:

Representing the Plaintiff:

JASON B. TURNBLAD, ESQUIRE

Cockrell Law Firm, P.C.

159 Main Street

Chesterfield, South Carolina 29709

jbt@cockrelllawfirm.com

Representing the Defendant:

CHARLES F. THOMPSON, JR., ESQUIRE

Malone, Thompson, Summers & Ott, LLC

339 Heyward Street

Columbia, South Carolina 29201

thompson@mtsolaawfirm.com

Also present:

Linda Long

CONTENTS

(Deposition of Antonio Hough)

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* * * * *

EXHIBIT INDEX

Exhibits: Marked at Page

(Copy of exhibits attached to
each copy of transcript.)

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11	Town of Pageland Employee Handbook	28
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* * * * *

Court Reporter's note:

-- indicates interruption; incomplete phrases; unfinished sentences

1 This deposition is taken in accordance with the
2 South Carolina Rules of Civil Procedure.

3 It is agreed and stipulated by the deponent and
4 respective counsel that the reading and signing of the
5 deposition by the deponent is expressly waived.

6 WHEREUPON:

7 ANTONIO HOUGH, being duly sworn and cautioned to
8 speak the truth, the whole truth and nothing but the
9 truth, testifies as follows:

10 EXAMINATION BY MR. THOMPSON:

11 Q: Can we get your full name for the record?

12 A: Antonio Christopher Hough.

13 Q: And how do you pronounce your last name?

14 A: Hough.

15 Q: Hough, okay.

16 A: A lot of people pronounce it Hough, H-O-U-G-H.

17 Q: My name is Charles Thompson and I'm here on
18 behalf of the town through the Municipal
19 Association which provides insurance to the town
20 on claims of this type. First I'm going to ask
21 you some questions, and it's not to be nosey,
22 but one day we may be picking a jury in this
23 case so I want to know, you know, what
24 organizations you may be in, church you go to,
25 who your families are in the area. So let's

1 start with family. 1 Do you have any family
2 members that go by a different last name than
3 Hough?

4 A: No.

5 Q: Like a married sister or --

6 A: No.

7 Q: -- aunt, nothing like that?

8 A: No.

9 Q: Okay. And are you a regular member of any
10 church?

11 A: No.

12 Q: Regular member of any organization?

13 A: No.

14 Q: Okay. Have you had any employment since leaving
15 the Town of Pageland?

16 A: No, I haven't.

17 Q: And did you apply for unemployment benefits?

18 A: Yes. I got denied the first time and the second
19 round they gave me my unemployment.

20 Q: Okay. And have you exhausted those benefits --

21 A: Yes.

22 Q: -- or are you still receiving them?

23 A: Exhausted them.

24 Q: Okay. And somewhere I think I saw that you
25 applied for social security disabilities and

1 that was denied; is that right?

2 A: Yes.

3 Q: And is that on appeal or --

4 A: Yes.

5 Q: Okay. And when do you expect your next step in
6 the social security process?

7 A: Well, I don't --

8 Q: If you don't know --

9 A: I really don't know.

10 Q: Don't know. Okay. And who is your attorney for
11 the social security application?

12 A: Trey Cockrell.

13 Q: Okay. And since leaving your employment with
14 the Town of Pageland have you been arrested or
15 charged with any crime other than a traffic
16 violation?

17 A: No. I don't have no charges, and I also have
18 never had.

19 Q: And your workers' comp claim is all over with;
20 is that correct?

21 A: Yes.

22 Q: And do you recall giving a deposition in your
23 workers' compensation case on September 30th,
24 2011?

25 A: Yes.

1 Q: I'll show you a copy of the transcript. We may
2 refer to it and we may not.

3 MR. THOMPSON: That'll be Exhibit One.

4 (Defendant's Exhibit Number One was marked for
5 identification purposes.)

6 Q: And let's see. The attorney that took your
7 deposition was Mr. Nicolas Haigler. Do you
8 remember giving a deposition where Mr. Haigler
9 asked you some questions?

10 A: Yes.

11 Q: And did you ever get a chance to review the
12 deposition transcript that is Exhibit One before
13 you?

14 A: No.

15 Q: Okay. Well, let me ask you this. And what I'm
16 really trying to do is perhaps cut short some of
17 the deposition today, because he covered a lot
18 of things that I normally would ask you. Did
19 you give truthful testimony to Mr. Haigler?

20 A: Yes, I have.

21 Q: Okay. And are you aware of anything in your
22 deposition from September 30th, 2011 where you
23 might have made a mistake, or any testimony you
24 might need to correct?

25 A: No.

1 Q: Okay. As far as you know, this is an accurate
2 transcript of your truthful testimony on that
3 day?

4 A: Yes.

5 Q: That is going to cut this deposition much
6 shorter, so I appreciate that. But I do have a
7 few things we need to go through, and some of it
8 will involve some repetition. And by the way, I
9 don't expect this to take too long, but if you
10 need a break, you just let me know and we'll
11 take a break.

12 A: All right.

13 Q: You recall you were injured on the job in August
14 2009; is that right?

15 A: Yes.

16 Q: Okay. And that's when you stepped in a hole?

17 A: I stepped in a hole, and the supervisor went out
18 there and checked to see if the hole was there.

19 Q: And who was your supervisor then?

20 A: At that time it was Wesley Miles.

21 Q: Okay. He was your supervisor through the end of
22 your employment, correct?

23 A: Yes.

24 Q: And is it true you had had a surgery before the
25 accident?

1 A: I had a surgery before the accident -- I mean,
2 not before the accident. I had a surgery after
3 the accident when Dr. -- I forgot his name. His
4 in Rock Hill, York County, York, and he had went
5 in and did my leg, and at the same time --

6 Q: That was in January of 2011?

7 A: Yes. And he did my leg and it didn't work out
8 too well. And it end up we set everything up
9 with Dr. Kirol. I went to Linda and told Linda
10 I'm still having pain in my knee. So we went to
11 Dr. Kirol, and Dr. Kirol did the surgery on my
12 leg.

13 Q: Okay. Did a Dr. Schwartz do a procedure back in
14 2009?

15 A: Yes.

16 Q: And was that before or after the August
17 accident?

18 A: That was right after the accident.

19 Q: Okay, got you. All right. Now I'm with you.

20 A: And he told me my knee was messed up, so I went
21 to -- after Dr. Kirol did all this x-rays and
22 MRIs and stuff, we have copies on a disk here,
23 stated he had to do surgery kind of immediately
24 of my knee.

25 Q: All right. So immediately after the accident

1 you were out of work for a while?

2 A: Yes, I had surgery. I had therapy. And then
3 after that going back and forth to Columbia, and
4 they told me to be off my knee. I was on light
5 duty with the town, then -- modified duties, or
6 whatever they call it. And Dr. Kirol pulled me
7 completely out of work.

8 Q: Okay. Hang on a second.

9 **MR. THOMPSON:** Let me mark this as Exhibit Two.

10 **(Defendant's Exhibit Number Two was marked for**
11 **identification purposes.)**

12 Q: At least at one point, let me show you Exhibit
13 Two, they had you coming back to work on the
14 28th of September?

15 A: Yes.

16 Q: And is that when you did the light duty?

17 A: I'm not sure. I think so.

18 Q: But shortly after that you were out of work.

19 Let's look at Exhibit Three.

20 **(Defendant's Exhibit Number Three was marked for**
21 **identification purposes.)**

22 Q: All right. Looking at Exhibit Three, the doctor
23 had you on some restrictions --

24 A: Yes.

25 Q: -- about that time.

1 A: That's when I was going through therapy.

2 Q: Okay. And what kind of work were you doing?

3 A: Public works consisted of garbage, sewer, fixing
4 roads, cutting grass. Anything maintaining the
5 town.

6 Q: But in October '09 when you were on these
7 restrictions --

8 A: On the restrictions, Wesley had me sitting out
9 there guarding a dumpster. I mean, literally
10 guarding a dumpster.

11 Q: So it was kind of make work?

12 A: No. It was kind of like go out there and guard
13 that dumpster.

14 Q: No. I mean, that was not a normal job, right?

15 A: No. I mean, people don't do that.

16 Q: Let me show you what we'll mark as Exhibit
17 Three.

18 COURT REPORTER: Four.

19 MR. THOMPSON: Four. Thank you.

20 (Defendant's Exhibit Number Four was marked for
21 identification purposes.)

22 Q: And it looks to me like Dr. Schwartz had you out
23 of work in October through November 9. He had
24 you coming back on November 9. Do you recall
25 that?

1 A: Yes. I came back to work.

2 Q: All right. And when you came back were you
3 still doing light duty?

4 A: When I came back to work --

5 Q: November of '09?

6 A: No. I was doing regular duties, picking up
7 limbs, leaves. If someone was out on the trash
8 truck, helping them out on the trash truck.
9 Anything maintaining the town. And that was it.

10 Q: Okay. And it looked like in 2010, beginning in
11 January, you were back at work; is that right?

12 A: Yes.

13 Q: And in 2010, during that time, were you ever on
14 light duty?

15 A: I was on -- actually it was in December, I
16 think, if you look on my schedule. I think I
17 was leaving back and forth in December going to
18 therapy.

19 Q: Right. December of 2009 or 2010?

20 A: 2009, I think. I was leaving back and forth to
21 go to therapy until I got an appointment with
22 Dr. Kirol.

23 Q: And that went into --

24 A: I was working at the community city, running the
25 public community center. I had to open up,

1 stuff for Andrea, and help Andrea out with the
2 floors and stuff at the community center.

3 Q: When was that?

4 A: I'm not recollecting when that was, but --

5 Q: You recollect that in December of --

6 A: I think it was December. I'm not sure.

7 Q: December 2009? Or do you remember some light
8 duty in December 2010?

9 A: 2010.

10 Q: Okay. December 2009, I'm looking at your
11 attendance schedule, it looks like you were not
12 at work.

13 A: Okay.

14 Q: Right?

15 A: Okay. Right there.

16 Q: That's January. I'm sorry.

17 **MS. LONG:** That's '09.

18 A: That's '09.

19 Q: You were at work. So 2010, it looks like you
20 worked. I mean, you were out here and there,
21 but you pretty much worked in 2010?

22 A: Yeah, because I was going to therapy, back and
23 forth.

24 Q: Okay. And then in January 2011 is when you had
25 your surgery, right?

1 A: Yes. Because they recommended that I have to
2 have surgery. They said the therapy was making
3 it worse. So, therefore, Dr. Kirol did x-rays
4 and stuff on me at Columbia MRIs and --

5 Q: And from your surgery up until the termination
6 of your employment you were pretty much out.
7 You didn't come back to work, or were you here -
8 -

9 A: I was out after my surgery.

10 Q: Okay. So you didn't come back to work after
11 your surgery?

12 A: No.

13 Q: And at some point you applied for short term
14 disability?

15 A: No. I had went through Aflac --

16 Q: Right.

17 A: -- because Aflac has a plan to help you out with
18 your bills or whatever. Since I was paying for
19 it, I might as well use it.

20 Q: And did you get anything out of that?

21 A: And it was like 100 and something dollars, or
22 something a week, or something like that through
23 Aflac, if I'm not mistaken.

24 Q: I'm going to show you what I'm going to mark as
25 Exhibit Five.

1 A: And I was getting that through Aflac, and that's
2 about it.

3 **(Defendant's Exhibit Number Five was marked for**
4 **identification purposes.)**

5 Q: Exhibit Five is your attendance chart for 2011.
6 If I'm looking at it right, and I think you
7 already agree with me, it looks like you
8 received in January and February some sick pay
9 and a holiday pay. Do you recall that?

10 A: Yes.

11 Q: But you weren't working then, correct?

12 A: No, I wasn't.

13 Q: So during 2011, what kind of problems were you
14 having? Was it just the knee?

15 A: It was my sugar, too. My sugar was acting up.
16 And that was from Dr. Kelley Rosebrock in Indian
17 Trail.

18 Q: And did Dr. Kirol, your orthopaedic doctor, did
19 he also have you out of work?

20 A: Yes.

21 Q: In 2011?

22 A: Yes.

23 Q: And eventually he did give you, and I'll show
24 you Exhibit Six, a return to work note.

25 **(Defendant's Exhibit Number Six was marked for**

1 identification purposes.)

2 Q: And he was going to put you back, it looks like,
3 on August 15th, back to work.

4 A: Yes.

5 Q: All right. But that didn't work out, right?

6 A: No. Because I left and went back up there
7 because my knee started giving me problems and
8 Dr. Kirol said he was going to put me out
9 longer. So, therefore, he put me out longer.

10 Q: And what problem were you having then?

11 A: It was popping and swelling.

12 Q: Okay. Was there ever a time period in 2011
13 after your surgery where your knee felt good or
14 it never quite got better?

15 A: He said this about the best it's going to get
16 other than me probably having a total knee
17 replacement.

18 Q: And have you thought about a total knee
19 replacement?

20 A: Yes. I thought of it, but after the crap and
21 stuff I went through with this knee -- I mean,
22 it is insane.

23 Q: What do you mean, pain and --

24 A: Pain. Like extensive pain.

25 Q: So Dr. Kirol put you back out and you never came

1 back on August 15. Dr. Kirol put you --

2 A: He put me back out. I believe Jason and them
3 have that letter. I don't know if you have it
4 or not. I don't see it over here nowhere. The
5 one Dr. Kirol wrote and put me back out.

6 Q: And about that time, I think also Dr. Kelley --

7 A: Kelley Rosebrock. She put me out. That was my
8 private physician. She put me out until I could
9 get my sugar under control because she said I
10 was a walking heart attack.

11 Q: And do you know why you were having a problem
12 with the diabetes?

13 A: No. It's just hereditary. My dad has bad
14 diabetes problems. I mean, it's just a gene.
15 I've lost plenty of weight and did everything
16 they wanted me to do, take the medicine. And
17 right now it still is messed up.

18 Q: And are you on regular medication, insulin at
19 all?

20 A: I'm on two different types of insulin. Four
21 different types of sugar medicines, plus two
22 blood thinners and a cholesterol medicine.

23 Q: Okay. Were you on all that back in September of
24 2011?

25 A: No. I was on two types of insulin and two

1 pills.

2 Q: And so, has it --

3 A: Four pills actually. It was two of -- 1,000
4 milligrams of -- I can't even think now. But
5 anyway, it's two of those, and I was on Prandin
6 and Actos.

7 Q: Okay. So has your diabetes gotten a little
8 worse since 2011?

9 A: Right now it's doing a lot better. It's a lot
10 better.

11 Q: Is it because the medication is helping out?

12 A: Because the medication and -- helping out a lot.
13 And I got rushed to the hospital two weeks ago.

14 Q: For a blood sugar problem?

15 A: Yeah.

16 Q: And so, I think right about that time did you
17 come in and talk to Ms. Long?

18 A: Yes. I came in and talked to Ms. Long. She
19 called me and I came up to town hall and --

20 Q: Because they were expecting you to come back to
21 work; is that right?

22 A: I came to town hall and Linda told me, she said,
23 Tony, you've been out. This letter states that
24 you've been out longer than six months. The
25 handbook says that you're terminated. I mean,

1 we're going to have to terminate you. I hate to
2 do this, but we have to terminate you. That's
3 exactly what she said. And I said, good
4 gracious, I'm on workers' comp. I don't
5 understand it. And she said, it don't matter.
6 I mean, the handbook says that. If the handbook
7 says it, that's what she got to go by, because
8 she would have got in trouble.

9 Q: Okay. But based on Dr. Kirol's note returning
10 you to work August 15, did you call into the
11 town and tell somebody you weren't going to be
12 there on the 15th?

13 A: Yes.

14 Q: Who did you speak to about that?

15 A: No, I didn't call in. I gave Linda a note from
16 Dr. Kelley Rosenbrock.

17 Q: Okay. And do you know when that was?

18 A: That was the same day I gave her the note from
19 Dr. Kirol.

20 Q: And was that -- let me just go ahead and show
21 you Exhibit Seven.

22 **(Defendant's Exhibit Number Seven was marked for**
23 **identification purposes.)**

24 A: All that was the same day. Same date that she
25 told me I was terminated.

1 Q: Okay. Did she give you this letter, Exhibit
2 Seven, or did you get that in the mail later?

3 A: I believe she gave me this letter.

4 Q: Did she give that to you in person?

5 A: I don't know, to tell you the truth.

6 Q: Okay. Well, let me roll back because I want to
7 make sure I understand the sequence of events.
8 And if you don't remember, that's fine. But do
9 you know if the town was thinking that you were
10 going to come back to work on the 15th or the
11 16th of August, based on Dr. Kirol's note?

12 A: Based on Dr. Kirol's note that I have gave Linda
13 -- I gave her two notes at the same time. Gave
14 her Dr. Kirol's and Dr. Kelley Rosenbrock's.

15 Q: Okay. And do you know when that was?

16 A: I have copies of the letters. I gave her two of
17 the letters at the same time and she -- and Trey
18 and them have copies. My lawyer have copies of
19 the letters. I gave her copies of the letters
20 at the same time. She told me by the letters
21 stating that the handbook states that I no
22 longer has a job, because they have to refill my
23 position.

24 Q: And you didn't --

25 A: And after that I told her I was going back to

1 see my doctor. I believe that's what I said.

2 So I had seen Dr. Kirol and called him and set
3 up an appointment, because I didn't really want
4 to get up because my knee was killing me. So I
5 went and seen Dr. Kirol. He did another exam on
6 it, shot me up with a cortisone shot. About
7 made me come out of the chair. And he said this
8 is all I can do right now. I'm sending the town
9 a letter stating that, and they sent what's her
10 name from workers' comp a letter, too. And she
11 said, Tony, you're still on workers' comp, and I
12 said okay. I forgot her name, it's been so long
13 ago, from workers' comp. She called me and I
14 talked to her. And the rest is history. I was
15 terminated and I'm up here.

16 Q: Let me show what we'll mark as Exhibit Eight.

17 **(Defendant's Exhibit Number Eight was marked for**
18 **identification purposes.)**

19 Q: And would this be right that around -- let's
20 see. He signed it September 1. I thought I saw
21 an August date on here. But around September 1
22 Dr. Kirol gave you a permanent partial
23 impairment of 15 percent for your knee; is that
24 right?

25 A: Yeah, 15 percent disability on my knee.

1 Q: And he gave you permanent restriction, no
2 climbing, no --

3 A: No climbing, no lifting, and no carrying or
4 pulling 25 pounds, which is -- I mean, if I was
5 back at work at the time, we still had stuff at
6 work to do, but --

7 Q: But not your regular job, right?

8 A: It's not my regular job. But you're messing
9 with the town, so, I mean, you've got a lot of
10 stuff around town to do. But according to the
11 supervisor I was acting and faking.

12 Q: Hang on. We'll get to that. In your workers'
13 comp deposition -- you're welcome to look at
14 page 35, if you want to. You testified that you
15 were not going to be able to do manual labor
16 like you used to.

17 A: No. I mean, I ain't going to be able to do
18 manual labor like I used to. I mean, I just ran
19 through all the surgery and all this other
20 stuff.

21 Q: And in terms of doing the job, the regular job
22 that you were doing for the town before your
23 injury, you can't do that now, correct?

24 A: I can do some of it.

25 Q: But not all of it?

1 A: Not all of it.

2 Q: And you mentioned that Ms. Long mentioned the
3 handbook to you. Were you aware of that policy
4 in the handbook about --

5 A: No, I was not aware of it. I always thought if
6 you --

7 Q: Hang on a second. Let me finish. I know we're
8 doing sort of a normal conversation, but let me
9 get my full question out so she has my full
10 question right. My full question is, were you
11 aware of the policy limiting leave to six
12 months?

13 A: No, sir, I wasn't. I always thought that if you
14 was hurt on the job and whenever you come back
15 you always have a job, or like that. I mean,
16 that's how it was at my last jobs I had. I've
17 seen employees and other people get hurt. They
18 come back and everything's fine. They back out
19 there working.

20 Q: Did you look at your handbook to see --

21 A: No. At that time when I was hired, man, I was
22 just trying to get a job, get in the door so I
23 could pay my bills. I mean, I wasn't --

24 Q: My question is, after she mentioned the six
25 months limit did you look at your handbook to

1 see if she was right or not?

2 A: Tell you the truth, no. Because to me this is
3 the second handbook we had, I think. I believe
4 it's the second one we had. We had one first,
5 when I first come there, and I believe this is
6 the second one. I'm not sure.

7 Q: Okay. So you never looked at the leave policy?

8 A: I never looked at it. Me and my lawyers looked
9 at it.

10 Q: Did you have a copy of the policy when you got
11 terminated?

12 A: Yes.

13 Q: You had a copy of the handbook?

14 A: I got one from the town.

15 Q: Okay. So when did you get one from the town,
16 after your termination or before?

17 A: After my termination.

18 Q: So had the town issued you a copy of the
19 handbook? Do you remember if the town issued
20 you a copy of the handbook during your
21 employment?

22 A: I'm pretty sure they probably did, because you
23 have to sign off on it. If not, the new one
24 they gave out, you had to sign off on it, too.

25 Q: And that's the one I'm talking about, the 2005

1 handbook?

2 A: Yes. That's the one you had to sign off on.

3 Q: Okay. But you didn't have a copy of that at the
4 time of your termination?

5 A: No. Who keeps them? I mean, that's just being
6 honest. Who keeps the handbooks?

7 Q: I understand. Did you ever look through it?

8 A: Not really, because I'm doing my job correctly
9 and I haven't been wrote up but probably about
10 one thing since I've been with the town, and
11 that was over the supervisor's stupidity and it
12 wasn't mine.

13 Q: Let me show you what we'll mark as Exhibit Nine
14 and Ten.

15 **(Defendant's Exhibits Numbers Nine and Ten were marked for**
16 **identification purposes.)**

17 Q: Let me ask you if that's your signature on both
18 of these documents? It's actually the same
19 document.

20 A: I was going to say they're the same. They look
21 like the same. Yeah.

22 Q: And did you read this important notice at the
23 time you signed it?

24 A: No, I didn't. I just signed it and just kept on
25 going.

1 **MR. THOMPSON:** Can we make a copy of this? Let's go off
2 the record for a minute.

3 **(Off the Record)**

4 Q: We fixed our exhibits. And just so the record
5 is clear, this is your signature on Exhibit Ten
6 as well?

7 A: Yes. I remember this one.

8 Q: Okay. And would you have signed these at the
9 time you received the 2005 handbook?

10 A: Yes.

11 Q: Okay. And was there a meeting to discuss the
12 new handbook, or did somebody explain why a new
13 handbook was coming out?

14 A: Was this handbook issued in 2005?

15 Q: No, that's your workers' comp.

16 A: Where's when the handbook was issued?

17 Q: We want to look at the handbook.

18 **MR. THOMPSON:** I'll mark this as Exhibit Eleven.

19 **(Defendant's Exhibit Number Eleven was marked for**
20 **identification purposes.)**

21 A: Was it issued in 2005?

22 Q: Hang on a second.

23 A: Because we had two of them.

24 Q: Let's talk about this one first. All right. So
25 my question was, do you think that you would

1 have signed Exhibit Ten and Exhibit Nine about
2 the same time you received the 2005 handbook, or
3 do you recall?

4 A: Yes. I recall signing this one.

5 Q: You mentioned a prior handbook. Did you have a
6 copy of the prior handbook?

7 A: No, I don't.

8 Q: Okay. And do you remember if you ever looked at
9 the leave policy in the prior handbook?

10 A: No, I haven't.

11 Q: Okay. Did you ever look at the discipline
12 policy in either handbook?

13 A: No, I haven't.

14 Q: You just never had any cause to look at it?

15 A: No. Because, I mean, I go to work, do what I'm
16 supposed to do and do it pretty good.

17 Q: All right. Looking at Exhibit Nine, that's this
18 one. You should have it in front of you.

19 A: Right there.

20 Q: All right. Did you understand, as it says on
21 there, that the handbook was not a contract of
22 employment?

23 A: Yes.

24 Q: All right. Let me ask you, who do you think the
25 witnesses are for your case? The witnesses that

1 will support your case? In other words, to put
2 it another way, who would you expect maybe to be
3 called, if this matter goes to trial, as a
4 witness that would help you establish your case?
5 Other than yourself, if you know of any.

6 A: Well, we're only dealing with the town. So the
7 only person I know was there was Mr. Chambers,
8 Bobby Rollins. That's about it.

9 Q: So Mr. Chambers, what testimony do you think he
10 might give that would help you establish your
11 case?

12 A: Only thing he could do is tell the truth of what
13 happened, you know.

14 Q: What would he say?

15 A: I did step in a hole, and I got in the truck and
16 told him to take me to the shop.

17 Q: Okay. Did he know anything about your
18 termination?

19 A: Everybody in the whole town knew about my
20 termination.

21 Q: Okay. But I mean like why you were terminated,
22 or how the town made that decision or --

23 A: I think a lot of decision, personally, I think
24 has got to do with Wesley Miles, because I don't
25 think if it was left up to Linda Long or other

1 people, that I probably wouldn't have got
2 terminated.

3 Q: Okay. We'll come back --

4 A: I mean, because --

5 Q: Let me come back to that. Right now I want to
6 focus on -- because I'm entitled to know who you
7 think your witnesses are and why, and that's
8 what I'm getting at right now. So you named Mr.
9 Chambers and Mr. Rollins. And my question was,
10 would Mr. Chambers know anything, as far as you
11 know, about why you were terminated or how you
12 were terminated?

13 A: I'm pretty sure they probably do know how I got
14 terminated and why I was terminated.

15 Q: All right. And have you had a conversation with
16 Mr. Chambers about it?

17 A: I hadn't, no. I've had no conversation with
18 Mitchell other than saying hello and how you
19 doing. And with Charles -- I talked to Charles
20 and Jim a couple of times, too. And only thing
21 they can say was Wesley said I'm terminated.

22 Q: Okay. And did they say they had discussed it
23 with Wesley or Ms. Long?

24 A: No. They just overheard Wesley telling that I'm
25 terminated. I'm no longer there.

1 Q: And Mr. Rollins, same thing?

2 A: As of Bobby, he heard the same thing. And he
3 heard a bunch of other negative stuff.

4 Q: Okay. And who told you that Wesley made the
5 comment about the -- the N word comment?

6 A: Bobby said it.

7 Q: That's Mr. Rollins?

8 A: Yes.

9 Q: And what did he say that Wesley said?

10 A: He said Wesley said that nigger never doggone
11 date his doggone daughter. We was putting that
12 sod down at Conbraco Park.

13 Q: What was Wesley talking about?

14 A: He was talking about this black guy and this
15 white girl over there at Conbraco Park up under
16 the gazebo, up under the little picnic area.

17 Q: Okay. So Wesley saw him and Bobby heard him say
18 that?

19 A: Well, everybody heard him say that, even John.
20 A lot of people heard him say that, other than
21 me.

22 Q: All right. Have you ever heard him say that?

23 A: No. If I heard him say that, I would have
24 probably got into some trouble. But I could
25 tell on his reaction how he is with black

1 people. He don't dig them too well.

2 Q: But he didn't call you that? He wasn't talking
3 about you?

4 A: No. I think we'd be somewhere else.

5 Q: All right. And has Mr. Chambers or Mr. Rollins
6 said that he used the N word on any other
7 occasion?

8 A: No. Just whenever -- they haven't said it. But
9 whenever guys come down and do community service
10 and stuff like that, if they're black, he's
11 going to send them to the south plant down there
12 to shovel out stuff. Just so they can keep them
13 around. It's not to the point of getting the
14 job done or whatever. They going to make sure
15 you're out of the office. They're going to try
16 to degrade you so that he don't have to use that
17 word, but at the same time it's going to degrade
18 you. I done been up there in the office a
19 couple of times complaining about the man. Me
20 and him, we've had a spit argument.

21 Q: A what kind of argument?

22 A: Spit argument. I mean, just me and him fussing
23 at each other. And it was a matter of time where
24 he was trying to get rid of me. He tried to
25 write me up a couple of times for stupid stuff..

1 Saying that I didn't put stuff on the calendar,
2 which I told him, and I put it on the calendar.
3 Everybody else put it on the calendar. He sent
4 them a letter to bring up there, then he got to
5 say that the letter is all right. Then I took
6 off, went to the beach like I do every year, and
7 came back, he wrote me up. I refused to sign it.
8 We took it to Linda, Carroll Faile. He was the
9 mayor then. A good mayor. And I told him I
10 wasn't going to sign it. He said it was automatic
11 termination if I don't sign it. He was trying
12 everything out if his way to get me terminated.

13 Q: And did Ms. Long ever say anything to you
14 indicating that she thought you were faking your
15 workers' comp?

16 A: No. But Wesley told the employees down there,
17 and he got Bobby to take him down there to the
18 accident where it happened and fill the hole in,
19 what I stepped in.

20 Q: But Wesley didn't say -- he didn't say anything
21 to indicate that he thought that you were faking?

22 A: No. He didn't say nothing. He didn't say
23 nothing to me, but he said it to Bobby.

24 Q: Okay. What did he say to Bobby?

25 A: He told Bobby that I was faking. You know damned

1 well he's fucking faking. That's exactly what he
2 told Bobby. Words for words.

3 Q: When did Bobby tell you that?

4 A: Bobby told me that just the next day, as a matter
5 of fact. Bobby said Wesley said that you're
6 faking.

7 Q: Okay. About when was that?

8 A: After I went to the hospital.

9 Q: When was that?

10 A: Went to the physical therapy -- I mean, the place
11 up the road from the shop, the medical center,
12 and after I went to the hospital, because their
13 x-ray machine down there sucks or something. I
14 don't know.

15 Q: Do you know when that was?

16 A: That was the same day of the accident.

17 Q: Okay.

18 A: And me and my wife went to Monroe and Monroe did
19 an x-ray on me and they found out what was wrong.
20 I brought the paperwork back to Linda. But
21 Wesley went back to the shop and told everybody
22 in the shop, which I doubt anybody in that shop
23 down there gonna doggone recommend that Wesley
24 said anything -- or say that he said anything. He
25 went back to the shop down there talking about I

1 lied and I'm not hurt, none whatsoever. And
2 about two, three weeks later, as old people
3 always say, that what you always think that
4 didn't happen, happens, and it'll happen to you.
5 Two weeks later he stepped in a hole getting off
6 a tractor and messed his leg up.

7 Q: And other than Mr. Rollins, is there anybody else
8 that's a witness to Wesley saying that?

9 A: Well, everybody was in the shop at that time.

10 Q: Who's everybody?

11 A: Ray Thunderburk, which he ain't going to say
12 nothing. He's a good guy, but he ain't going to
13 say nothing against Wesley. Ryan Steagall. He
14 ain't going to say nothing. He's a good kid. I
15 like him.

16 Q: So you don't know --

17 A: Because they know how evil -- I mean, how he can
18 get back at them. These people have families.

19 Q: All right. Anybody else?

20 A: Jim Mullis, Mitchell Chambers. And I forgot the
21 other new guys name that was there. He was just
22 filling in at the time. I mean, he wasn't new.
23 He just was filling in. Charlie Owens. He don't
24 get into nothing. So if you go to his house, he
25 might run you away.

1 Q: You mentioned one time Wesley tried to write you
2 up for not putting something on the calendar.
3 What happened to that writeup?

4 A: I got so mad. I went to town hall. I clocked
5 out and went to town hall, because me and him got
6 into an argument and he tell me if I didn't sign
7 it, I'm fired. And I had clocked in at 8:00.
8 And he was sitting there waiting till I clocked
9 in, which everybody in the shop knew that he
10 wrote me up. Because I was at the beach and got
11 a phone call that he wrote me up. He went and
12 told everybody in the shop, yeah, I wrote him up.
13 He don't sign this, I'm firing him. So I had
14 left there and went straight to town hall. Got
15 in my personal vehicle and went to town hall.
16 Went and talked to Linda. Gave Linda the letter.
17 I said Wesley trying to write me up for stupid
18 stuff. And God bless her sole, I told Martha
19 Hamilton first. I did tell Martha first. The I
20 went to town hall. She told me to go see you,
21 and I went to see you. And I went and seen
22 Linda. Linda called Mr. Faile in there. We sat
23 in Mr. Faile's office. Wesley came up there. I
24 said I'm not signing this, and I said he's wrong.
25 He's lying. I said you all can go down there and

1 look on that calendar. People's names is on that
2 calendar. What don't even have date -- what
3 didn't have no notes -- what they signed. That's
4 the way we been doing it since I been here for
5 three years. It was three years at that time. I
6 said it been people just signing the calendar and
7 tell him. And probably to this day they still
8 signing that calendar down there. And I said
9 they sign the calendar and just tell him.
10 Everything's fine. I said he know I was taking
11 this off. I told him a whole month in advance.
12 And I told him two weeks prior to this. I said
13 I'm not signing the letter. So Linda gets on the
14 phone and calls Unemployment Commission.
15 Unemployment Commission told her that it's a work
16 will state. If I don't sign it, it's their rules
17 or whatever, I could get terminated or whatever.
18 I signed the letter. And Linda told me if I want
19 to I can make a comment on the bottom of the
20 letter. I made a comment. I brushed it off.
21 She say in a couple of months or something it'll
22 be off. You don't have to worry about that.

23 Q: All right. So was it Linda or Wesley at that time
24 that had authority to terminate somebody's
25 employment?

1 A: I don't know, to tell you the truth.

2 Q: Linda communicated your termination to you,

3 correct?

4 A: Yeah, she gave me the letter.

5 Q: Okay. To your knowledge, has Wesley ever fired

6 anybody --

7 A: No.

8 Q: -- on his own authority?

9 A: But he threatens people down there like he's

10 going to fire to them.

11 Q: I understand.

12 A: And he's going to try to go after people. So he

13 can fire them if they don't do like he want them

14 to do.

15 Q: But does he have the authority to hire -- fire

16 somebody?

17 A: He probably has the authority to hire, because

18 when I got hired she said --

19 Q: No. I meant fired. As far as you know, can he

20 fire somebody on his own?

21 A: I don't know that for a fact, but I know he can

22 hire. They usually say if you can hire, you can

23 fire.

24 Q: Okay. To your knowledge, has he fired anybody on

25 his own?

1 A: No, not to my knowledge.

2 Q: And he didn't fire you, Linda did, right?

3 A: Linda handed me the papers. I ain't say she
4 fired me, but she handed me the papers. That was
5 her job.

6 Q: Well, is there somebody other than Linda that
7 would have made that decision that you know of?

8 A: I think Wesley was a little to -- he wasn't going
9 to come down there and do that.

10 Q: At the time, Linda is Wesley's superior, correct?

11 A: At the time, yes.

12 Q: And does Wesley report to Linda, or does he
13 report to somebody else who reports to Linda?

14 A: He report to Linda or the mayor.

15 Q: And you understand Linda is the town
16 administrator, right?

17 A: Yes. At that time, she was. She's not no more.

18 Q: She was acting town administrator at that time?

19 A: Yeah.

20 Q: Do you have any other evidence that you're aware
21 of and we haven't already discussed that your
22 termination was because of your workers' comp
23 claims?

24 A: I think it was more of a workers' comp including
25 racist. That Wesley Miles is a racist. And, I

1 mean, I see him --

2 Q: That happened prior to workers' comp?

3 A: -- go in neighborhoods and fix other people sewer
4 lines in their yard and won't go in other people
5 yard and claim that he can't go on private
6 property. But he run a whole sewer line for
7 somebody else.

8 Q: Putting any allegations of racism aside, because
9 that's not in your complaint, is there any other
10 evidence that you're aware of and we haven't
11 already discussed that your termination was
12 related to your workers' comp claim?

13 A: I say yes and no.

14 Q: What's the yes part of that?

15 A: The yes is that workers' comp claim -- it's true
16 about the workers' comp that I was wrongful
17 terminated. But also whenever you got a bigot
18 working for you, that's how it is.

19 Q: All right. I understand you're on workers' comp.
20 You were paid for a workers' comp injury. Your
21 injury was admitted to be work related. Besides
22 that is there evidence that your termination was
23 because you filed a workers' compensation claim?

24 A: Yes. I really do think so.

25 Q: Okay. So if we've already discussed it, that's

1 fine. If there's something else you need to add
2 to that, go ahead and add to that.

3 A: I think that's the nicest way they can get rid of
4 me instead of saying they got rid of me because
5 me and the supervisor been butt heads. We always
6 butting heads about crazy stuff. And that's the
7 way they can get rid of me, because every time I
8 go out there and do a job correctly and do it
9 more -- 150 percent or more.

10 Q: All right. Are you aware of any other employee
11 who exceeded six months of leave and was not
12 terminated?

13 A: No. I mean, I don't know that definitely,
14 because -- I mean, I seen employees leave for a
15 minute. I'm not going to say they six months.
16 I'm not saying they're a year. I'm not saying
17 they three days. But I done seen them left for a
18 while and come back and leave for a while and
19 come back. I mean, I don't know how long Ralph
20 been out. I seen him do it, come back. I seen
21 people do it.

22 Q: But any of those people you mentioned, do you
23 know how long they actually were out?

24 A: No. I don't keep records or nothing. I don't
25 know that, to tell you the truth.

1 Q: Are you aware of any policy in the handbook that
2 you allege the town violated in terminating your
3 employment?

4 A: No. I haven't even looked in the handbook
5 personally.

6 MR. THOMPSON: Let's take a quick break.

7 (Off the Record)

8 (Defendant's Exhibit Numbers Twelve and Thirteen were
9 marked for identification purposes.)

10 Q: All right. Mr. Hough, I've just handed you what
11 we've marked as Exhibits Twelve and Thirteen.
12 Let's start with Exhibit Twelve. Is this the
13 note from Dr. Kelley that you mentioned earlier
14 in your testimony putting you out of work from
15 July 18 to September 1?

16 A: Yes.

17 Q: Okay. And you gave this note to the town?

18 A: Yes.

19 Q: And then let's look at Exhibit Thirteen. And
20 would this basically be the document that you
21 were talking about earlier where -- at the end of
22 your employment where Dr. Kirol put you out of
23 work through August 30th?

24 A: Yes. But he gave me another one.

25 Q: Gave you one after that or --

1 A: Yes.

2 Q: -- before that?

3 A: Yes, after this.

4 Q: Okay. So he continued you out of work --

5 A: He continued me out of work.

6 Q: Actually he gave you your permanent restriction
7 on August 30th, correct?

8 A: Yes. And he gave me another note on August 30th.

9 Q: We might already have that in the record. Here's
10 one, Exhibit Eight, which we've already put that
11 in the record, dated September 1 down at the
12 bottom.

13 A: Yeah, but it don't say back to work, or a work
14 note.

15 Q: He gave you a permanent restriction at that
16 point?

17 A: He gave me a permanent restriction, but he gave
18 me another work note, too.

19 Q: Okay. It says down at the bottom work status
20 restrictions, right?

21 A: Uh-huh (affirmative response.)

22 Q: But you think there's another one?

23 A: He gave me one for out of work.

24 Q: That looks like Exhibit Thirteen?

25 A: Looks just like Exhibit Thirteen.

1 Q: And how long did he put you out of work?

2 A: He put me out of work for, I believe, two more
3 weeks, I think.

4 Q: Into September, at least?

5 A: Into September.

6 Q: But once again, you've never really been able to
7 go back to your regular duties as they were
8 originally, right?

9 A: No. But I was doing modified duties.

10 Q: I understand.

11 A: I was doing modified duties as cleaning up the
12 floor at the community center, doing stuff at the
13 community center. Even being Wesley's secretary
14 sometime.

15 Q: But for them to continue you on work they would
16 have had to put something together like that to
17 give you a modified job?

18 A: Actually had something, I mean.

19 Q: Well, I understand. Your light duty, right?

20 A: Yeah.

21 Q: Okay. So for you to work for the town, they
22 would have had to do something like that, a
23 modified duty job?

24 A: It wasn't really modified. I mean, they had
25 stuff to do like that.

1 Q: Right.

2 A: It wasn't modified as of -- modified, you're
3 saying, as make up stuff. No. You had stuff you
4 had to do on a regular days basis.

5 Q: There were things certainly before your injury
6 that you cannot do now, right, that were part of
7 your job?

8 A: As my job description as public works. Public
9 works description has to do stuff for the town.
10 Whatever the town needs.

11 Q: Right. And there's certainly some things in
12 there that you can't do anymore?

13 A: Well, of course. I can't jump off the back of a
14 garbage truck, and hold on to garbage bins, or
15 jump down a hole to fix pipes. I mean, but
16 there's a lot more stuff I could do.

17 Q: Got you.

18 MR. THOMPSON: I don't have other questions, Jason.

19 MR. TURNBLAD: All right. Just briefly.

20 EXAMINATION BY MR. TURNBLAD:

21 Q: Tony, how far did you go in school?

22 A: Eleven grade.

23 Q: Okay. You never got a GED or --

24 A: No. I never got a GED. Kids to worry about and
25 pay bills.

1 Q: And when you received this handbook, I mean, with
2 your little education did you understand
3 everything that was in it?

4 A: Not really.

5 Q: Did you ever feel like Wesley was trying to
6 retaliate against you for filing a workers' comp
7 claim?

8 A: One hundred thousand percent.

9 Q: Okay. And why did you feel that way?

10 A: The whole time I was there he was on me. On me
11 as of constantly having me do crazy stuff.
12 People be sitting around the shop and he'll say,
13 Tony, go out there and measure the oil tank, or
14 Tony, go out there and go to the south plant and
15 cut the grass and it's completely raining
16 outside.

17 Q: Did you ever hear from anybody else that Wesley
18 was upset because you filed a workers' comp
19 claim?

20 A: Yes.

21 Q: So you believe he was trying to get back at you
22 for filing a workers' comp claim?

23 A: Yes, 100 percent.

24 Q: And have you applied for jobs since then?

25 A: Yes, I've applied for jobs.

1 Q: And you haven't been able to find any employment?

2 A: I haven't been able to find no employment at all.

3 **MR. TURNBLAD:** No further questions.

4 **MR. THOMPSON:** One followup.

5 RE-EXAMINATION BY MR. THOMPSON:

6 Q: Who told you Wesley was upset that you filed a
7 workers' comp claim?

8 A: Bobby Rollins seen Wesley right after the
9 incident at Family Dollar in Jefferson and he
10 said he don't understand why in the hell I filed
11 a damned workers' comp claim against Pageland,
12 because I wasn't fucking hurt. That's exactly
13 what he said. And Bobby was unemployed at this
14 time with the town.

15 Q: Got you. And when was that, roughly?

16 A: I don't know roughly. I'm just saying --

17 Q: Was it this year, last year?

18 A: It was last year.

19 Q: More than six months ago?

20 A: I don't know. Then he went down there and tried
21 to get another job or something and they told him
22 to come back and talk to Linda or the mayor, or
23 something like that.

24 Q: You talking about Mr. Rollins?

25 A: Yeah.

1 Q: Do you know if he's working now?

2 A: No, he isn't working now. I seen him not too
3 long ago. He's not working now. Not that I know
4 of. It's been about two and a half, three weeks
5 ago when I seen him.

6 Q: Okay. Anybody else tell you Wesley was upset you
7 filed a comp claim?

8 A: No.

9 **MR. THOMPSON:** No other questions.

10 A: Nobody else ain't told me.

11 **MR. TURNBLAD:** Nothing further.

12

13 Further deponent sayeth not.

14 (There being no further questions, the
15 deposition concluded at 2:00 p.m.

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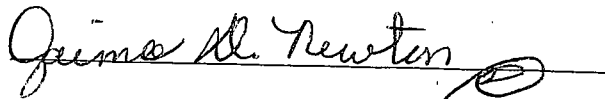
CERTIFICATE OF REPORTER

I, JAIME D. NEWTON, COURT REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF SOUTH CAROLINA AT LARGE, HEREBY CERTIFY THAT I REPORTED THE DEPOSITION OF ANTONIO HOUGH, ON TUESDAY, THE 26TH DAY OF FEBRUARY, 2013, THAT THE WITNESS WAS FIRST DULY SWORN BY ME AND THAT THE FOREGOING 48 PAGES CONSTITUTE A TRUE AND CORRECT TRANSCRIPTION OF MY STENOMASK REPORT OF SAID DEPOSITION.

I FURTHER CERTIFY THAT I AM NEITHER ATTORNEY NOR COUNSEL FOR, NOR RELATED TO OR EMPLOYED BY ANY OF THE PARTIES CONNECTED WITH THIS ACTION, NOR AM I FINANCIALLY INTERESTED IN SAID CAUSE.

I FURTHER CERTIFY THAT THE ORIGINAL OF SAID TRANSCRIPT WAS THEREAFTER SEALED BY ME AND DELIVERED TO CHARLES F. THOMPSON, JR., ESQUIRE, MALONE, THOMPSON, SUMMERS & OTT, LLC, 339 HEYWARD STREET, COLUMBIA, SOUTH CAROLINA, WHO WILL RETAIN THIS SEALED ORIGINAL TRANSCRIPT AND SHALL BE RESPONSIBLE FOR FILING SAME WITH THE COURT PRIOR TO TRIAL OR ANY HEARING WHICH MIGHT RESULT IN A FINAL ORDER ON ANY ISSUE.

IN WITNESS WHEREOF, I HAVE SET MY HAND AND SEAL THIS 6TH DAY OF MARCH, 2013.


JAIME D. NEWTON, COURT REPORTER

MY COMMISSION EXPIRES MAY 14, 2017

State of South Carolina) In the Court of Common Pleas
County of Chesterfield) Fourth Judicial Circuit
2011-CP-13-00667

Antonio Hough,

Plaintiff,

Vs.

Town of Pageland,

Defendant.

Transcript of Record

November 5, 2013
Chesterfield, South Carolina

B e f o r e:

The Honorable J. Michael Baxley, Judge

A p p e a r a n c e s:

Will Curtis , Esquire
Sarah Campbell, Esquire
Attorneys for the Plaintiff

Charles Thompson, Esquire
Attorney for the Defendant

Bonnie H. Kelly, CVR
Circuit Court Reporter

RECORD ON APPEAL 117

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>
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-- NO EXHIBITS ENTERED --

1 THE COURT: Counsel, let's do this. Let's come across
2 let everyone introduce themselves, and tell us whom they
3 represent. And let's begin with our newest member of the
4 Bar, Mr. Curtis, for the plaintiff.

5 Please introduce yourself and we'll come across.

6 MR. CURTIS: I'm Will Curtis. I'm a law clerk for
7 Cothran Law Firm.

8 THE COURT: Thank you.

9 MS. CAMPBELL: All right. Sarah Campbell with the
10 Cothran Law Firm, appearing on behalf of Trey Cockrell,
11 who represents the plaintiff in this matter.

12 THE COURT: All right. Thank you, ma'am.

13 MR. THOMPSON: And I'm Charles Thompson with Malone,
14 Thompson, Summers & Ott in Columbia, representing the Town
15 of Pageland through the Municipal Association.

16 THE COURT: All right. Thank you. Then please be
17 seated everyone. And let's let the record reflect we've
18 set this matter especially today because Judge Burch has
19 recused in this matter.

20 This is a civil claim arising against the Town of
21 Pageland. Judge Burch, a resident of the Town of
22 Pageland, and for other reasons as well, disqualified; and
23 thus, the matter has set for some time awaiting this day
24 and this day and this Court's resolution.

25 And you're the moving party for summary judgement, Mr.

1 Thompson. I'll be glad to hear from you.

2 MR. THOMPSON: Briefly, Your Honor, originally there
3 were two claims: A breach of contract through the
4 employee handbook claim, which before Judge Burch, the
5 plaintiffs represented that they were dropping that claim.
6 So we're only here now about worker's comp retaliation
7 claim. And --

8 THE COURT: And let me make sure: Do we agree with
9 that, Ms. Caldwell [sic]?

10 MS. CAMPBELL: Yes, Your Honor. That's correct.

11 THE COURT: All right. Very good. So we're done to
12 the one issue of whether or not this is a retaliatory
13 discharge for the filing of a worker's comp claim.

14 MR. THOMPSON: And the legal issue, Your Honor, is
15 very straightforward. And that is -- well, just to give
16 you the facts real quick: Mr. Hough was allegedly injured
17 back in August, 2009. In 2010, he was at work, but only
18 light duty on and off. Sometimes he was there; sometimes
19 he was not. When he was there, he was doing light duty.

20 In January, 2011, he had surgery -- which was the same
21 knee he injured back in '09 -- surgery on the knee. He
22 never returned to work after the surgery, even on light
23 duty.

24 In August, 2011, first his orthopaedist said he can
25 return to work, but he did not return to work. He came to

1 the Town and gave them a note from his family doctor -- he
2 also suffers from diabetes -- and the family doctor put
3 him out of work.

4 Shortly thereafter, I think it was the next week, Your
5 Honor, the orthopaedist put him -- rescinded the return to
6 work that he did, put him out to work -- put him out of
7 work and gave him a permanent impairment: no climbing, I
8 think it was -- it was. No climbing, and no more lifting
9 than 25 pounds. Mr. Hough -- his job was -- he was a -- a
10 -- a general worker for the Town who did stuff like
11 removing trash, garbage, those kinds of things. Heavy
12 work.

13 And at that time, in August, 2011, he had exceeded six
14 months of leave that the Town allows for employees. So he
15 was administrative -- his employment was administratively
16 terminated.

17 He testified that he could not work. Even at the time
18 of his deposition, he could not go back to his regular
19 job.

20 His orthopaedist, according to his -- the last
21 permanent impairment rating, he could not go back to his
22 regular job.

23 The law, Your Honor, is clear. I've cited a number of
24 cases, including *Horn vs. Davis*, *Johnson vs. JP Stevens*.
25 The employer doesn't have to give an employee on worker's

1 comp leave any leave. Now, they have to apply their leave
2 policies if they've got one, which the Town did. It's not
3 contested that he -- he exceeded his six months of leave.

4 An employee out on worker's comp leave due to an
5 injury is not entitled to any extra leave. And we don't -
6 - we don't have to wait for them to recover.

7 But even if we had waited for him to recover, even as
8 of the time of the deposition, he testified he could not
9 go back to work, and there was no doctor's note indicating
10 he could go back to work.

11 Their only evidence that there was some sort of animus
12 toward his worker's comp injury was a statement by his
13 supervisor back in -- at the time of the injury, August of
14 2009, over two years before he was terminated, that the
15 supervisor did not think -- he thought the guy was faking
16 it, and a co-worker -- actually, this is what the co-
17 worker says. The supervisor denies it. But the co-worker
18 says the supervisor said something like that, and also
19 said that -- something to the effect that Hough would lose
20 his job because -- because of the claim.

21 THE COURT: And -- and Counsel, just to confirm, are
22 you getting that information you just made from an
23 affidavit that Bobby Jo Rollins filed or this -- is this
24 from deposition testimony?

25 MR. THOMPSON: It's an affidavit that I believe the

1 plaintiff's counsel obtained and provided to me during
2 discovery.

3 THE COURT: All right. That's dated December 22,
4 2011?

5 (Brief pause.)

6 MR. THOMPSON: Dated December 22, 2011. Yes, Your
7 Honor.

8 THE COURT: All right. I -- I have that and I've
9 reviewed it. What -- what do you say in response to that?

10 MR. THOMPSON: It -- that it doesn't -- it doesn't
11 matter whether the supervisor had any kind of animus or
12 not two years before the termination, because he's
13 conceded he can't go back to work. The doctor has agreed
14 he can't go back to work at his regular job.

15 We certainly don't have to create a new job for him,
16 which I -- I think is what he wants, if you read his
17 deposition testimony. He wants his light-duty job.

18 We don't -- don't have to create a permanent light-
19 duty position for him.

20 Uncontested, he exceeded his leave. Uncontested that
21 he cannot go back to his regular job. And I think the
22 law, Your Honor, is very clear if they can't resume their
23 duties and their leave is expired, the employer is
24 entitled to apply its policies. And the Courts are not
25 supposed to second guess the application of those

1 employment policies. It's as simple as that.

2 THE COURT: And Counsel, tell me, what -- how has --
3 what has the discovery process shown about the decision to
4 hire and fire? Who -- who makes it in the Town of
5 Pageland? Is it the supervisor who is quoted in the -- in
6 this affidavit or is it the Council? Is it the
7 administrator? What -- what -- what does the record show
8 on that?

9 MR. THOMPSON: I believe Ms. Long's affidavit says
10 anything about it. She says in her affidavit (as read):
11 "The decision was made by myself." Ms. Long, I'm sorry,
12 was the -- I believe she was an interim administrator at
13 the time. She made the decision herself and the public
14 works director, which may be -- it may be that same
15 fellow. I don't recall.

16 THE COURT: All right. Thank you.

17 MR. THOMPSON: But -- but the bottom line, Your Honor,
18 is he couldn't go back to work. He admits it. His doctor
19 says it, too.

20 THE COURT: All right. Thank you. And now, Ms.
21 Caldwell.

22 MS. CAMPBELL: Thank you, Your Honor. First I would
23 address the defendant's reliance upon Section 41-1-80 of
24 the South Carolina Code of Laws sets forth a list of
25 affirmative defenses that employers may rely on in a claim

1 such as this for retaliation for filing a worker's comp
2 suit. One of those is that the employer [sic] is unable
3 to perform the job duties.

4 However, the defendant did not plead that affirmative
5 defense in his answer nor in his amended answer. And so
6 the plaintiff would contend that under *Madren v. Bradford*,
7 which is a South Carolina Court of Appeals case, that (as
8 read): "Failure to plead an affirmative defense is deemed
9 a waiver of the right to assert it." And the exception to
10 the waiver would be for the party to amend its pleadings
11 to conform to the evidence.

12 The defendant has not filed a motion to amend his
13 pleadings to assert that affirmative defense, and it has
14 not been asserted. And so reliance on that now at summary
15 judgement, plaintiff feels it would be improper under
16 South Carolina Rules of Civil Procedure, Rule 8(c), just
17 to address that.

18 The other affirmative defense that the defendant
19 relies on, under 41-1-80, is that the plaintiff exceeded
20 the written policy that states that the -- after so much
21 time out of work, the -- the Town can discharge him for --
22 for -- for violation of that written policy.

23 The plaintiff would contend that under *Hinton v.*
24 *Designer Ensembles*, which is one of the cases defendant
25 relies on in his motion for summary judgement, sets forth

1 the test for determining a retaliatory discharge, the
2 elements of which would be institution of worker's comp
3 proceedings, a discharge or demotion after that, and a
4 causal connection between those two elements.

5 The case goes on to state that the test for
6 determining that causation would be the determinate factor
7 test, and that the employer may prove that after the
8 assertion of an affirmative defense in one of two ways (as
9 read): "Either by proving that the discharge was
10 significantly motivated by retaliation; or that the
11 employer's proffered explanation is unworthy of credence."

12 And we feel that the affidavit that was provided to
13 defendants through discovery certainly goes to show that
14 there's at least a question of fact for -- to be
15 determined by the trier of fact, that the reason given by
16 the Town is protectural in nature and that it's actually -
17 - you know, their reason is unworthy of credence that --
18 that the discharge is significantly motivated by
19 retaliation.

20 And we think that -- that the affidavit certainly, at
21 least, creates a question of -- of fact here, to at least
22 move past summary judgement.

23 THE COURT: Well, Counsel, let -- let me ask you now:
24 This affidavit is -- clearly is hearsay, because he's
25 saying what he heard, and then he said that, "Wesley Miles

1 asked me to tell workers comp that he didn't get hurt, and
2 that Tony would be filed -- would be fired if he filed a
3 worker's comp claim."

4 What does Wesley Miles say about this, because this --
5 again, this is a gentleman who's saying he overheard
6 something. So you got some admissibility issues. What --
7 what does Mr. Miles say when he was deposed on these
8 points?

9 MS. CAMPBELL: Mr. Miles's deposition has not been
10 taken, and it ---

11 (Loud noise in the courtroom from unidentified
12 source.)

13 THE COURT REPORTER: I'm sorry. You need to repeat
14 that.

15 MS. CAMPBELL: Mr. Miles's deposition has not been
16 taken. Before -- or during the discovery process, in
17 fact, 18 days after the defendant served their discovery
18 requests on plaintiff, they didn't file this motion for
19 summary judgement. So I believe it would be a little
20 premature in the discovery process.

21 But in any event, we -- we would certainly rely on its
22 admissibility because it's a statement against interest by
23 -- offered by a party opponent, which would be the
24 plaintiff, against the -- the Town of an employee of the
25 Town.

1 So I believe it would be, you know, admissible as a
2 hearsay exception at -- at the trial in this matter, just
3 to address the Court's question on that.

4 THE COURT: All right. Now, Mr. Hough, did he -- did
5 he receive a worker's compensation package or payment from
6 the -- from the carrier?

7 MS. CAMPBELL: I do not know the answer to that.

8 THE COURT: Is -- is he still receiving it to your
9 knowledge?

10 MR. THOMPSON: There was a settlement, Your Honor.

11 THE COURT: Okay. Very good. All right. Any --
12 anything else?

13 MS. CAMPBELL: No, Your Honor. Just -- just based on
14 -- on those points, we would just -- we would -- it would
15 just be our opinion that in the light most favorable to
16 the non-moving party, that being the plaintiff, that
17 there's certainly a question of fact here, and we would
18 ask that the Court dismiss the defendant's motion --

19 THE COURT: All right.

20 MS. CAMPBELL: -- or deny the motion for summary
21 judgement rather.

22 THE COURT: Thank you. And now, you want to reply,
23 Mr. Thompson?

24 MR. THOMPSON: Just briefly. In our amended answer we
25 assert as a core defense, defendant's actions regarding

1 plaintiff's -- were based on legitimate non-discriminatory
2 reasons, specifically, plaintiff exceeding allowable leave
3 for a non-work related injury. So I -- I think the
4 defense, as pled, certainly the plaintiff has been aware
5 of that defense for quite some time.

6 I just don't see how we're going to try this case when
7 he's admitted and his doctor's admitted he can't go back.
8 How's the Court going to put him back to work and
9 reinstate him when he says he can't go back to work, and
10 he's admitted that and his doctor says that, too.

11 I just don't see how it's retaliatory by not letting
12 him come back to work when he admits he can't go back to
13 work.

14 THE COURT: All right. Just -- just one moment,
15 please. Of course, suit -- the suit is for monetary
16 damages. It's not -- you've not asked for the equitable
17 relief of place -- placing him back on the job, have you?

18 MS. CAMPBELL: That's correct, Your Honor.

19 THE COURT: Okay.

20 MR. THOMPSON: Your Honor, I think the case is *Wallace*
21 *vs. Milliken*, worker's comp retaliation is an equitable
22 claim; and wages, the *Wallace* case specifically states
23 this: Wages are an element of the reinstatement claim.

24 I believe that reinstatement is the preferred remedy,
25 not that you can't award lost wages, Your Honor.

1 THE COURT: All right.

2 MR. THOMPSON: Relatingly, Your Honor, I know we were
3 on the jury roster, which is where this case was
4 originally because of the handbook claim.

5 Comp retaliation is an equitable remedy. The *Wallace*
6 case says that, 406 SC 2d 358, as well as the *Hinton* case,
7 which is in my brief, in plaintiff's counsel's brief.
8 Both of those make clear it's an equitable claim. I think
9 we should do them before we can be on the non-jury roster.

10 THE COURT: All right. Well, I see that there is a
11 request for (as read): "... actual and punitive damages,
12 reinstatement, and such other and further relief as the
13 Court deems appropriate." So thank you.

14 All right. Just one moment, please.

15 (Brief pause.)

16 THE COURT: I'm prepared to rule. Just -- just one
17 moment, please.

18 (Brief pause.)

19 THE COURT: All right. Mr. Thompson, I'm going to ask
20 you to prepare an order. And I'm going to grant the
21 motion, Ms. Campbell and Mr. Curtis.

22 And I -- I grant the motion for the following reasons:
23 First of all, I -- the Court accepts the fact that we're
24 now down to just simply one claim, which is a retaliatory
25 discharge for filing a worker's comp action. The

1 evidence, as put forward by the plaintiff, is an affidavit
2 of Mr. Rollins, which is dated the 22nd day of December,
3 2011.

4 This Court finds that, first of all, the defendant's
5 argue -- argument or claim of impossibility really is well
6 taken, because first of all, the medical relief -- or the
7 medical permission to return is not in this record.

8 Also the fact that there is not a position to which
9 Mr. Hough could return on light duty. The Court find this
10 also mitigates strongly in favor of the defendant and
11 against the claim for reinstatement.

12 There is no protection of an -- of an injured worker
13 once they have exhausted their various sick leave or time
14 out from work. And if there is no position for them and
15 they are not able to perform work, the Court is aware that
16 South Carolina law allows an employer to release an
17 employee; and that is not per se retaliatory.

18 The only evidence that is put before the Court is this
19 affidavit. And the Court finds that the affidavit does
20 not create a genuine issue of fact for the following
21 reasons: First of all the Court finds that it is clearly
22 a hearsay document. Whether it would ultimately be
23 admissible is highly questionable.

24 Second, it is inflammatory in its wording. It is
25 unnecessarily inflammatory and prejudicial. The Court

1 would exclude it most likely for -- on a Rule 403
2 analysis.

3 But thirdly, and most importantly, it does not
4 establish a proximate link between the firing and the
5 decision to fire because there's no evidence before me
6 that Mr. Wesley Miles, who allegedly made the statement,
7 had the ability to hire or fire, in this case, Mr. Hough;
8 or that he actually did fire Mr. Hough.

9 And I just simply find that this inflammatory
10 statement does not rise to the level of creating a genuine
11 issue of material fact. And the defendant is entitled to
12 a dismissal of this claim as a matter of law.

13 Mr. Thompson, what I'd ask you to do, because this is
14 a dispositive conclusion, to -- would be to prepare an
15 order that would memorialize the reasons the Court just
16 gave. If you would send that to us at
17 jbaxleylc@sccourts.org. That will come to Jamie Scruggs,
18 my law clerk. Please send it in Word format. That's the
19 only format we have at the Judicial Department.

20 But before you do that, please let Ms. Campbell review
21 it for misstatement of her position so that that can be
22 corrected. I'm not asking the plaintiff to agree with it,
23 but just simply to review it for that purpose.

24 And that is the decision of the Court. All right.

25 MR. THOMPSON: Thank you, Your Honor.

1 MS. CAMPBELL: Thank you, Your Honor.

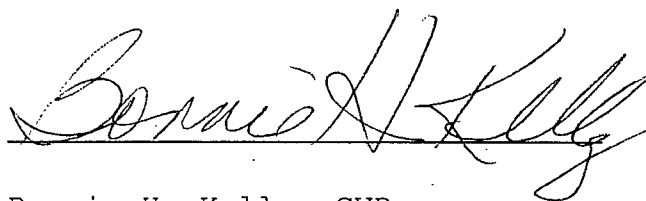
2 THE COURT: Thank you, Counsel. Have a good day.

3
4 -- END OF TRANSCRIPT RECORD --

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court, for Chesterfield County, South Carolina, on the 5th day of November, 2013.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

A handwritten signature in cursive script, reading "Bonnie H. Kelly", written over a horizontal line.

Bonnie H. Kelly, CVR

Official Court Reporter

Columbia, South Carolina

May 11, 2014

IN THE COURT OF COMMON PLEAS

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RECORD ON APPEAL 136

Mr. Miles was Hough's manager and was also aware of the ongoing status of his leave, the policy regarding leave and the reason for the dismissal.

2. Set forth a list of any prepared documents in the possession of the party that relate to the claim or the defense in this case. If you will, supply them without the necessity of a motion. Please attach copies to your answer.

Response: Defendant is producing all documents know to it to be relevant to this matter.

3. List the names and addresses of all insurance companies which have liability insurance coverage relating to the claim. Give the number(s) of the policy or policies involved and the amount(s) of the liability coverage and the policy number.

Response: There is one policy with the South Carolina Municipal Insurance Fund. SF-11-0155.

The Fund is providing a defense under a reservation of rights with liability limited to \$1,000,000.

Lost wages are not covered.

4. List each person known to the parties of counsel who will be a witness concerning the facts of this case and set forth a summary sufficient to inform the other party of the important facts known or observed. Please provide a copy of any written or recorded statements from such witness.

5. List specifically, in detail, each reason the Plaintiff was terminated.

Response: Plaintiff was terminated for being unable to return to work after exceeding the amount of leave provided under the Town's policies.

6. List each and every employee, with address and phone number, who sustained a work-related injury and was thereafter dismissed, demoted, terminated, or discharged from the Defendant for the last three years.

Response: Defendant, after diligent review of its records, finds no other employee so discharged or demoted.

RESPONSE TO PLAINTIFF'S FIRST REQUESTS TO PRODUCE

1. All statements, whether written, recorded or transcribed, taken of any parties or witnesses of the facts of his case.

Response: No statements have been taken except for the deposition of the Plaintiff in his Workers' Compensation case. Plaintiff's counsel should already have a copy of that transcript.

2. Copies of all insurance policies owned by the Defendant that relate to this matter or in alternative, the front page of such policies showing the amount and type of coverage.

Response: Defendant objects to providing this document as it is not relevant nor likely to lead to the discovery of relevant information.

3. Copies of all documents and reports relating in any way to the matters referred to in the Complaint.

Response: Defendant is producing all relevant documents that is has identified.

4. Copy of the Plaintiff's personnel file with the Defendant.

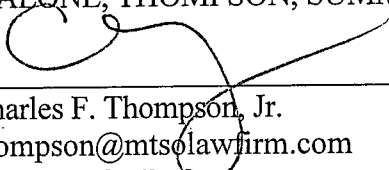
Response: Produced

5. Copy of the Plaintiff's workers' compensation file as a result of the Plaintiff's injury of February 2, 2008.

Response: Produced

Respectfully submitted,

MALONE, THOMPSON, SUMMERS & OTT



Charles F. Thompson, Jr.
thompson@mtsollawfirm.com
Attorneys for Defendant

339 Heyward St.
Columbia, South Carolina 29201
(803) 254-3300

Dated this 30th day of January 2013

STATE OF SOUTH CAROLINA

COUNTY OF CHESTERFIELD

ANTONIO HOUGH,

Plaintiff,

vs.

TOWN OF PAGELAND

Defendant.

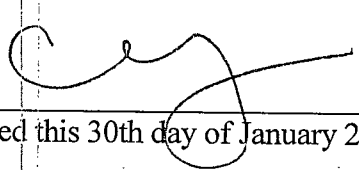
) IN THE COURT OF COMMON PLEAS

) FOURTH JUDICIAL CIRCUIT

) Civil Action No.: 2011-CP-13-667

The undersigned affirms that, on this date, Plaintiff was served a copy of Defendant's Responses to Plaintiff's First Interrogatories and Requests for Production by placing a copy of the same in the United States Mail, postage prepaid and addressed to counsel for the Plaintiff as follows:

M.W. Cockrell
Olde Towne Center
Barrister Building
159 Main St.
Chesterfield, S.C. 29709


Dated this 30th day of January 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHESTERFIELD)
_____)

AFFIDAVIT OF BOBBY JOE ROLLINS

Personally appeared before me and after being duly sworn states:

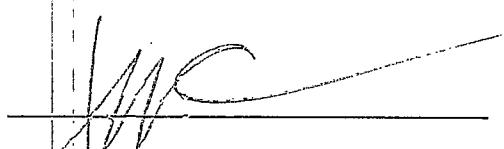
I am Bobby Joe Rollins (Date of Birth 02/08/1971). I know Antonio C. Hough ("Tony") well and have known him since he starting working with the Town of Pageland. Tony always worked hard and was dedicated to his job duties. His boss, Wesley Miles, on numerous occasions has indicated he did not like Tony because his wife is white. Mr. Miles uses the word "Nigger" regularly and I have heard him call and or/use the word "Nigger" on more than 40 occasions. When Tony got hurt and injured his knee, Mr. Miles said it never happened and told me Tony was lying like a Nigger, and that he did not get hurt. Wesley Miles asked me to tell the Workers' Comp that Tony did not get hurt and if Tony files for workers' comp he will be fired.

I have read this affidavit and received a copy of the same.

FURTHER AFFIANT SAYETH NAUGHT!



Bobby Joe Rollins


SWORN AND ACKNOWLEDGED TO BEFORE ME THIS
22 DAY OF DECEMBER 2011
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES 8/5/2020

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2014-000453

RECEIVED

NOV 17 2014

SC Court of Appeals

Antonio Hough

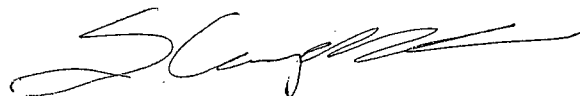
Appellant,

v.

Town of Pageland

Respondent,

Counsel for the Appellant hereby certifies that this Record on Appeal contains all materials proposed to be included by all parties. Counsel for Appellant further certifies that this Record on Appeal does not contain any other material not proposed to be included by the parties.



M.W. Cockrell, III
Sarah C. Campbell
159 Main Street
Chesterfield, South Carolina 29709
(843) 623-5911
ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No: 2011-CP-13-0667

Antonio Hough,

Appellant,

v.

Town of Pageland

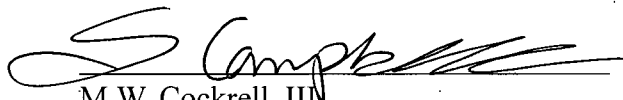
Respondent,

PROOF OF SERVICE

I certify that I have served the Record on Appeal on Town of Pageland by depositing a copy of it in the United States Mail, postage prepaid on October 27, 2014, addressed to its attorney of record, Charles F. Thompson, Jr., Malone, Thompson, Summers, & Ott, LLC, 339 Heyward St, Columbia, SC 29201

October 27, 2014

COCKRELL LAW FIRM, PC



M.W. Cockrell, III

Sarah C. Campbell

Barrister Building

Old Towne Centre

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Chesterfield, SC 29709

Phone: (843) 623-5911

Fax: (843) 623-5700

RECEIVED

OCT 29 2014

SC Court of Appeals