

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley H. Price, Circuit Court Judge
Charleston County

Case No. 2018-CP-10-04377
Appellate Case No. 2020-001160

RECEIVED

Sep 28 2020

SC Court of Appeals

Christine Nelson.....Respondent,

v.

Medical University Hospital Authority Appellant.

APPELLANT'S PETITION FOR REHEARING, EN BANC

Caroline W. Cleveland
Bob J. Conley
Emmanuel J. Ferguson
CLEVELAND & CONLEY, LLC
171 Church Street, Suite 310
Charleston, SC 29401
(843) 577-9626 (o)
(843) 577-6672 (f)

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

Table of Authorities	iii
Introduction.....	1
Background	1
I. Respondent’s Federal Lawsuit.....	1
II. Respondent’s State Lawsuit	4
III. Appellant’s Motion to Dismiss	5
Argument	6
I. The Underlying Order Makes Specific Rulings “Involving the Merits” of the Underlying Lawsuit and is Immediately Appealable Pursuant to S.C. Code Ann. § 14-3-330(1)	7
II. The Underlying Order Affects a Substantial Right and is Immediately Appealable Under S.C. Code Ann. § 14-3-330(2)(c).....	9
A. The Underlying Order Strikes Defenses Available to Appellant.....	9
1. The Underlying Order Establishes the Law of the Case.....	10
B. Protection from Suit by Res Judicata is a Substantial Right.....	12
C. Res Judicata Affects the “Mode of Trial” Appellant is Entitled to as a Matter of Right.....	17
Conclusion	19
Appendix.....	A-001
State Lawsuit Summons and Complaint.....	A-001
Order Denying Motion to Alter or Amend.....	A-009
Motion to Alter, or Amend Order.....	A-013
Plaintiff’s Memorandum in Opposition to Defendant’s Motion To Amend/Alter.....	A-034
i. Order Denying Motion to Dismiss of Defendant.....	A-039

Motion to Dismiss.....	A-050
Defendant’s Memorandum in Support of Motion to Dismiss the Complaint and Exhibits Attached to Memorandum.....	A-056
Exhibit 1 – Federal Complaint – January 20, 2017.....	A-068
Exhibit 2 – Report of Magistrate Judge – April 18, 2018.....	A-076
Exhibit 3 – Objections to the Report and Recommendation of the Magistrate Judge – May 7, 2018.....	A-099
Exhibit 4 – District Court Order – August 7, 2018.....	A-110
Exhibit 5 – District Court Judgment – August 7, 2018.....	A-113
Exhibit 6 – Notice of Appeal – September 5, 2018.....	A-115
Exhibit 7 – Appellate Brief – October 31, 2018.....	A-117
Exhibit 8 – Fourth Circuit Opinion – April 11, 2019.....	A-161
Exhibit 9 - Plaintiff’s Amended Responses to Local Rule 26.03 Interrogatories – March 24, 2017.....	A-164
Exhibit 10 – Plaintiff Deposition Transcript Excerpts – August 29, 2017.....	A-169
Exhibit 11 – <u>Yon v. Regional Medical Center</u>	A-174
Exhibit 12 – <u>Boulware v. South Carolina Department of Health and Human Services</u>	A-188
Plaintiff’s Memorandum in Opposition to Defendant’s Motion To Dismiss.....	A-195
Transcript of Hearing re Motion to Dismiss.....	A-209

TABLE OF AUTHORITIES

Cases

<u>Adickes v. Allison & Bratton</u> , 21 S.C. 245 (1884).....	9
<u>Ballenger v. Bowen</u> , 313 S.C. 476, 443 S.E.2d 379 (1994)	11
<u>Brown v. Pechman</u> , 55 S.C. 555, ___, 33 S.E. 732, 737 (1899).....	12
<u>Cayer v. Komertz</u> , 91 Conn. App. 202, 881 A.2d 368 (2005).....	13
<u>Ex parte Ocean Reef Developers II, LLC</u> , 84 So. 3d 900, (Ala. Civ. App. 2011).....	13
<u>Ex parte Wilson</u> , 367 S.C. 7, 625 S.E.2d 205 (2005)	8
<u>F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.</u> , 350 S.C. 454, 567 S.E.2d 842 (2002).....	14
<u>Flagstar Corp. v. Royal Surplus Lines</u> , 341 S.C. 68, 533 S.E.2d 331 (2000).....	17
<u>FOC Lawshe Ltd. P'ship v. Int'l Paper Co.</u> , 352 S.C. 408, 574 S.E.2d 228 (Ct. App. 2002)	6
<u>Foggie v. CSX Transp.</u> , 313 S.C. 17, 431 S.E.2d 587 (1993)	17
<u>Good v. Hartford Accident and Indemnity Co.</u> , 201 S.C. 32, 21 S.E.2d 209 (1942)	9
<u>Hagood v. Sommerville</u> , 362 S.C. 191, 607 S.E.2d 707 (2005).....	18
<u>Heritage Operating, L.P. v. N.C. Propane Exch., LLC</u> , 219 N.C. App. 623, 727 S.E.2d 311(2012)	13
<u>In re Doran</u> , 129 S.C. 26, 123 S.E. 501 (1924).....	11
<u>Judy v. Judy</u> , 393 S.C. 160, 712 S.E.2d 408 (2011)	17
<u>Lenz v. Walsh</u> , 362 S.C. 603, 608 S.E.2d 471 (Ct. App. 2005)	14
<u>Levi v. N. Anderson Cty. EMS</u> , 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014).....	7
<u>Max Adler, M.D., P.A. v. Lindsey</u> , No. 05-20-00148-CV, 2020 WL 4880166, at *1 (Tex. App. Aug. 20, 2020)	13
<u>McCallum v. N. Carolina Co-op. Extension Serv. of N.C. State Univ.</u> , 142 N.C. App. 48, 542 S.E.2d 227 (2001).....	14

<u>McLendon v. S.C. Dep't of Highways and Pub. Transp.</u> , 313 S.C. 525, 443 S.E.2d 539 (1994)	11
<u>Mid-State Distributors, Inc. v. Century Importers, Inc.</u> , 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)	8, 9
<u>Mooney v. Warren</u> , 87 Mass. App. Ct. 137, 26 N.E.3d 206 (2015)	13
<u>Morrow v. Fundamental Long-Term Care Holdings, LLC</u> , 412 S.C. 534, 773 S.E.2d 144 (2015)	6
<u>N. Carolina Dep't of Transp. v. Page</u> , 119 N.C. App. 730, 460 S.E.2d 332 (1995)	18
<u>Pierre v. Seaside Farms, Inc.</u> , 386 S.C. 534, 689 S.E.2d 615 (2010)	14
<u>Robert Harmon & Bore, Inc. v. Jenkins</u> , 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984).....	11
<u>S.C. Pub. Interest Found. v. Greenville Cty.</u> , 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013).....	17, 18
<u>Shaver v. State</u> , 2018 Ark. App. 242, 548 S.W.3d 222 (2018).....	13
<u>Shields v. Martin Marietta Corp.</u> , 303 S.C. 469, 402 S.E.2d 482 (1991)	17
<u>Spencer v. Nat'l Union Bank of Rock Hill</u> , 189 S.C. 197, 200 S.E. 721 (1939)	11
<u>State Sav. & Loan Ass'n v. Rendon</u> , 103 N.M. 698, 712 P.2d 1360 (1986).....	13
<u>Thornton v. S.C. Elec. & Gas Corp.</u> , 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011)	10
<u>Wells Fargo Bank, N.A. v. Corneal</u> , 238 N.C. App. 192, 767 S.E.2d 374 (2014)	14
<u>Whitaker v. Day</u> , 32 Va. App. 737, 530 S.E.2d 924 (2000)	13
Statutes	
S.C. Code Ann. § 14-3-330.....	9, 12
S.C. Code Ann. § 14-3-330(1)	1
S.C. Code Ann. § 14-3-330(2)(c).....	1, 10, 17
Rules	
Rule 219, SCACR.....	1

Rule 240, SCACR.....	1
Rule 52, FRCP	3
Rule 59(e), FRCP	3

INTRODUCTION

Pursuant to Rule 240, SCACR, Appellant Medical University Hospital Authority (“Appellant”) submits this Petition for Rehearing as to this Court’s Order filed August 27, 2020, dismissing Appellant’s Appeal (“Order of Dismissal”). The Court, in its Order of Dismissal, held the underlying circuit court Order (the “Underlying Order”) denying Appellant’s Motion to Dismiss is not immediately appealable. (Appendix p. A-024 – A-031.)

Appellant petitions this Court to rehear and reconsider its Order of Dismissal for the following reasons:

1. The Underlying Order is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(1) because it made a specific ruling “involving the merits” of the lawsuit Respondent filed in circuit court (“Underlying Lawsuit”); and,
2. The Underlying Order is immediately appealable pursuant to S.C. Code Ann. § 14-3-330(2)(c) because it affects a “substantial right.”

Pursuant to Rule 219, SCACR, Appellant requests its Petition for Rehearing be heard en banc because the proceeding involves an apparent matter of first impression and presents a question of exceptional importance.

BACKGROUND

I. Respondent’s Federal Lawsuit.

Prior to filing the Underlying Lawsuit in the circuit court, Respondent filed a lawsuit in federal district court (“District Court”) against Appellant on January 20, 2017 (“Federal Lawsuit”). (Appendix, p. A-068 – A075.) Respondent’s Federal Lawsuit alleged, among other

claims, a state law cause of action alleging breach of an employment contract.¹ The claims Respondent alleged in the Federal Lawsuit arose from her employment with Appellant. The Federal Lawsuit, among other allegations, asserted the alleged employment contract between the parties was based on Appellant's anti-discrimination and anti-retaliation policies.

At the conclusion of discovery in the Federal Lawsuit, Appellant moved for summary judgment. On April 18, 2018, the federal magistrate judge issued a Report and Recommendation ("R&R") to the Honorable David Norton, the District Court judge assigned to the Federal Lawsuit. (Appendix, p. A-076 – A-098.) The R&R recommended the District Court grant Appellant's motion for summary judgment as to all Respondent's causes of action, including her state law breach of employment contract cause of action.

Subsequently, on May 7, 2018, Respondent filed Plaintiff's Objections to the Report and Recommendation of the Magistrate Judge ("Objections to the R&R"). (Appendix, p. A-099 – A-109.) In her Objections to the R&R, Appellant states, "the [magistrate judge] issued a Report and Recommendation recommending that [the District Court] grant [Appellant's] Motion for Summary Judgment with regard to [Respondent's] claims." (Appendix, p. A-100.) In her Objections to the R&R, Respondent did not assert the federal magistrate's R&R did not recommend summary judgment as to all Respondent's causes of action, including her cause of action alleging the breach of an employment contract. (Appendix, p. A-099 – A-109.)

On August 7, 2018, the District Court adopted the R&R and granted summary judgment to Appellant (the "District Court Order"). (Appendix, p. A-110 – A-112.) The District Court Order adopted the magistrate's R&R and held:

¹ The Federal Lawsuit also alleged Appellant engaged in discrimination and retaliation based on Respondent's race and disability in violation of federal law.

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

The District Court Order does not state the District Court is making an exception in regard to Respondent's breach of employment cause of action and, therefore, not granting summary judgment as to that cause of action. Further, the District Court Order does not state the District Court is declining to exercise supplemental jurisdiction over Respondent's state law cause of action for breach of an employment contract. Subsequently, the District Court entered a judgment granting Appellant summary judgment. (Appendix, p. A-113 – A-114.)

Respondent did not seek clarification, modification, or an amendment of the District Court Order under the Federal Rules of Civil Procedure ("FRCP"). *See* Rule 52, FRCP ("upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly..."); Rule 59(e), FRCP ("[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."). Instead, on September 5, 2018, Respondent notified the District Court of her intent to appeal the District Court Order. (Appendix, p. A-115 – A-116.)

Thereafter, Respondent filed her appeal and, subsequently, her appellate brief with the Fourth Circuit Court of Appeals on October 31, 2018 ("Appellate Brief"). (Appendix, p. A-117 – A-160.) In her Appellate Brief, Respondent expressly requested the Fourth Circuit Court of Appeals reverse the District Court Order in its entirety, including the District Court's grant of summary judgment as to Respondent's breach of employment contract claim. In the "Conclusion" section of the Appellate Brief, Respondent argued:

[b]ased on the foregoing, this Court should reverse the district court's grant of summary judgment on [Respondent's] race discrimination and contract causes of action because the district court erred in failing to determine that there are no genuine issues of material fact to be tried by a fact finder. (emphasis added.) (Appendix, p. A-159.)

On April 11, 2019, the Fourth Circuit Court of Appeals filed an unpublished opinion affirming summary judgment and the decision of the District Court ("Fourth Circuit Opinion"). Like the District Court Order, the Fourth Circuit Opinion does not state it is making an exception in regard to Respondent's breach of employment cause of action and, therefore, not affirming summary judgment as to that cause of action. Further, like the District Court Order, the Fourth Circuit Opinion does not state the Fourth Circuit Court of Appeals is declining to exercise supplemental jurisdiction over Respondent's state law cause of action for breach of an employment contract. (Appendix, p. A-161 – A-163.)

Respondent did not request reconsideration of the Fourth Circuit Opinion by the Fourth Circuit Court of Appeals or petition the U. S. Supreme Court for certiorari. Therefore, Respondent's Federal Lawsuit reached its conclusion. Accordingly, the District Court Order granting of summary judgment as to Respondent's Federal Lawsuit, including her state law breach of employment contract claim, became final.

II. Respondent's State Lawsuit.

On September 6, 2018, the day after Respondent filed her Notice of Appeal with the Fourth Circuit Court of Appeals, Respondent filed the Underlying Lawsuit. The Underlying Lawsuit asserts a single cause of action alleging breach of an employment contract by Appellant based on factual allegations that are identical to the breach of employment contract claim previously dismissed by way of summary judgment by the District Court on August 7, 2018, and subsequently

affirmed by the Fourth Circuit Court of Appeals. For example, the Federal Lawsuit, previously dismissed by way of summary judgment, alleged:

[Appellant], and its agents, had a responsibility to ensure that [Respondent] would not be subjected to discrimination. [Appellant], through its agents, instead chose to fail to protect [Respondent] on the basis of her race, retaliated against [Respondent] when she informed a colleague of the anti-harassment policy, and failed to administer the same punishment to [Respondent] as it did the Caucasian counterparts when it came to filing complaints with the [Appellant]. (Appendix, p. A-074.)

Likewise, the Underlying Lawsuit alleges:

[Appellant], and its agents, had a responsibility to ensure that [Respondent] would not be subjected to discrimination. [Appellant], through its agents, instead chose to fail to accommodate [Respondent] for her disability, retaliated against [Respondent] when she informed a colleague of the antiharassment policy, and failed to administer the same punishment to [Respondent] as it did the Caucasian counterparts when it came to filing complaints with the [Appellant]. These actions were done in violation of [Respondent's] employment contract with [Appellant]. (Appendix, p. A-005 – A-006.)

Respondent, at a hearing regarding Appellant's Motion to Dismiss the Underlying Lawsuit, acknowledged the breach of employment contract claim in the Underlying Lawsuit is the same claim asserted in the Federal Lawsuit. (Appendix, p. A-209 – A-231.)

III. Appellant's Motion to Dismiss.

On October 4, 2018, Appellant moved to dismiss the Underlying Lawsuit based on res judicata and/or judicial estoppel. (Appendix, p. A-050 – A-055.) As it relates to res judicata, the sole issue before the circuit court was whether the District Court's grant of summary judgment in Respondent's prior lawsuit was an adjudication "on the merits."

The parties briefed the issues and the circuit court held a hearing on Appellant's Motion to Dismiss on May 27, 2020. (Appendix, p. A-056 – A-188; A-189 – A-195; and A-196 – A-231.)

On June 16, 2020, the circuit court issued the Underlying Order and held res judicata does not apply because “there has been no final adjudication on the merits [as to the breach of breach of employment contract claim in the Federal Lawsuit] in this case.” Further, the circuit court held judicial estoppel does not serve as a bar to the Underlying Lawsuit.

Appellant filed a Motion to Alter or Amend on June 24, 2020, and Respondent filed a response. (Appendix, p. A-013 – A-033; and A-034 – A-038.) On July 30, 2020, the circuit court denied Appellant’s Motion to Alter or Amend. (Appendix, p. A-009 – A-012.)

On August 18, 2020, Appellant filed its Notice of Appeal requesting this Court review the Underlying Order. On August 27, 2020, this Court dismissed Appellant’s appeal, finding the issue is not immediately appealable.

ARGUMENT

In South Carolina “[t]he determination of whether a trial court’s order is immediately appealable is governed by statute.” Morrow v. Fundamental Long-Term Care Holdings, LLC, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015) (citing S.C. Code Ann. § 14-3-330). Generally, the denial of a motion to dismiss is not immediately appealable. *See* FOC Lawshe Ltd. P’ship v. Int’l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 231 (Ct. App. 2002) (“We note the denial of a motion to dismiss pursuant to Rule 12(b)(6) is generally not immediately appealable.”). But, as recognized in Morrow, “[b]y its nature, the question of whether an order is immediately appealable is determined on a case-by-case basis.” Morrow at 538, 773 S.E.2d at 146. This Court’s order dismissing Appellant’s appeal is wrong and Appellant’s appeal should be considered for several reasons.

First, the Underlying Order denying Appellant’s motion to dismiss the Underlying Lawsuit ruled on issues involving the merits of the case. Second, the Underlying Order resulted in striking

the Appellant's affirmative defenses of res judicata and judicial estoppel and, thereby, materially affected issues closely related to the mode of trial. These circumstances require this Court exercise jurisdiction as to Appellant's interlocutory appeal.

Additionally, this Court's reliance upon *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014) in the Order of Dismissal is misplaced for several reasons. First, Levi did not involve the assertion of res judicata or judicial estoppel, and the Levi court discussed neither doctrine in the context of the opinion. Second, a plain reading of Levi shows the court recognized there were underlying factual disputes that impacted the salient, central defense raised by the defendant and that served as the central basis of the defendant's motion to dismiss. Unlike Levi, there is no factual dispute as to Appellant's assertion of res judicata and judicial estoppel.

I. The Underlying Order Makes Specific Rulings "Involving the Merits" of the Underlying Lawsuit and is Immediately Appealable Pursuant to S.C. Code Ann. § 14-3-330(1).

The Underlying Order finds the Underlying Lawsuit is not barred by res judicata because the Federal Lawsuit did not result in a judgment on the merits as to Respondent's breach of employment contract claim. Additionally, the Underlying Order finds Respondent's breach of employment contract claim is not barred by judicial estoppel. In so holding, the Underlying Order has the effect of finally determining whether Appellant may assert the doctrines of res judicata and judicial estoppel as affirmative defenses. For these reasons, this Court should exercise jurisdiction in regard to Appellant's appeal.

"The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final

judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.” S.C. Code Ann. § 14-3-330(1). “An order which involves the merits is one that ‘must finally determine some substantial matter forming the whole or a part of some cause of action or defense.’” Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (emphasis added) (quoting Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). The Underlying Order finally determines a “substantial matter forming the whole or a part of” Appellant asserting the defenses of res judicata and judicial estoppel.

First, the Underlying Order finds the District Court’s grant of summary judgment in the Federal Lawsuit was not an adjudication “on the merits” as to Respondent’s breach of employment contract claim. Second, the Underlying Order finds Respondent’s breach of employment contract claim is not barred by judicial estoppel. Even though Appellant appealed the District Court Order in respect to the employment contract claim to the Fourth Circuit Court of Appeals.

Because the Underlying Order is based on the circuit court’s *legal* interpretation of the District Court Order granting summary judgment in the Federal Lawsuit – in particular as to the breach of employment contract claim - the Underlying Order issued by the circuit court involves the *merits* of the case. For example, in denying Appellant’s Motion to Dismiss, the Underlying Order states:

[Appellant] also alleges that Plaintiff’s Complaint should be dismissed based on the legal theories of *res judicata*, claim preclusion and issue preclusion. All of these claims require an adjudication on the merits. This [c]ourt holds that *there has been no final adjudication* [in the Federal Lawsuit] *on the merits* in this case [as to the breach of employment contract claim]. (emphasis added.) (Appendix, p. A-044.)

Because the circuit court held the District Court Order was not, *as a matter of law*, an adjudication “on the merits” as to Respondent’s breach of employment contract claim, S.C. Code Ann. 14-3-330(1) applies and the Underlying Order is immediately appealable.

II. The Underlying Order Affects a Substantial Right and is Immediately Appealable Pursuant to S.C. Code Ann. § 14-3-330(2)(c).

This Court “shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal [...] (2) An order affecting a substantial right made in an action when such order [...] (c) strikes out an answer or any part thereof or any pleading in any action [...]” S.C. Code Ann. § 14-3-330. “South Carolina case law has established what constitutes an interlocutory appeal.” Mid-State Distributors, Inc. at 335, 426 S.E.2d at 780.

“If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory.” *Id.* (citing Adickes v. Allison & Bratton, 21 S.C. 245 (1884)). However, “[i]f a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.” *Id.* (citing Good v. Hartford Accident and Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (emphasis added)). The Underlying Order determines the applicable law as to res judicata and judicial estoppel and leaves open no question of fact as to either. Consequently, the Underlying Order, as to res judicata and judicial estoppel, is a final judgment as to those two issues and results in both doctrines being struck as affirmative defenses available to Appellant.

A. The Underlying Order Strikes Defenses Available to Appellant.

The Underlying Order has the direct effect of striking the defenses of res judicata and judicial estoppel without any need for further determination by the court or the trier of fact as to *questions of fact*. See Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) (“an appellate court should look to the effect of an interlocutory order to determine

its appealability under section 14–3–330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial.”). The Underlying Order definitively rules both res judicata and judicial estoppel do not apply to the Underlying Lawsuit and, consequently, strikes both as affirmative defenses available to Appellant.

Because the circuit court made these express rulings in the Underlying Order, there is no “further act which must be done by the court [circuit court]” as it relates to the determination of the availability of res judicata and judicial estoppel as affirmative defenses. Further, the Underlying Order does not “leave open any question of fact” to be determined by the circuit court as to whether either res judicata or judicial estoppel apply. The clear, real impact of the Underlying Order is it directly and effectively bars Appellant from asserting or otherwise pursuing the affirmative defenses of res judicata and judicial estoppel. Therefore, the Underlying Order is immediately appealable.

1. The Underlying Order Establishes the Law of the Case.

The Underlying Order effectively establishes the law of the case by making a specific finding the District Court Order was not an adjudication “on the merits” as to Respondent’s breach of employment contract claim. Moreover, the Underlying Order effectively establishes the law of the case by concluding Appellant’s appeal of the District Court Order, including as to the breach of employment contract claim, to the Fourth Circuit Court of Appeals does not judicially estop Respondent from now asserting there was no adjudication on the merits as to that claim in the Federal Lawsuit.

Applicable South Carolina law indicates the Underlying Order, unless reviewed by way of interlocutory appeal to this Court, cannot be reconsidered at any later stage by the circuit court because, in general, one circuit court judge cannot rescind or modify the order of another. *See Spencer v. Nat'l Union Bank of Rock Hill*, 189 S.C. 197, ___, 200 S.E. 721, 723 (1939) (generally recognizing a circuit judge cannot rescind or modify another such circuit court judge's orders and proper method to challenge ruling is to appeal); *In re Doran*, 129 S.C. 26, ___, 123 S.E. 501, 504 (1924) ("obviously, one circuit judge has no power to review, reverse, or modify the action of another circuit judge as to matters which are res judicata"); *Robert Harmon & Bore, Inc. v. Jenkins*, 282 S.C. 189, 195, 318 S.E.2d 371, 375 (Ct. App. 1984) (a party is bound by ruling that becomes the law of the case when party chooses not to appeal ruling).

Granted, generally the denial of a motion to dismiss does not establish the law of the case and all issues can be raised again at a later stage of the proceedings. *See Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict."); *McLendon v. S.C. Dep't of Highways and Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) ("[L]ike the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue can be raised again at a later stage of the proceedings."). However, the Underlying Order does not merely deny of the motion to dismiss. To the contrary, the Underlying Order establishes the law of the case by specifically ruling the District Court Order was not an adjudication "on the merits" as to Respondent's breach of employment contract claim. *See Underlying Order* ("This [c]ourt holds that there has been no final adjudication on the merits in this case.") (Appendix, p. A-044.) Additionally, the Underlying Order

establishes the law of the case by specifically ruling judicial estoppel is not a defense available to Appellant, despite Respondent expressly appealing the District Court Order to the Fourth Circuit Court of Appeals, including the breach of employment contract claim.

Therefore, if the Underlying Order is not immediately appealable and the Underlying Order is treated as the law of the case, Appellant cannot raise or otherwise assert the issues of res judicata or judicial estoppel at any stage because the circuit court has already ruled, as a matter of law, that neither defense applies. In summary, the Underlying Order strikes affirmative defenses otherwise available to Appellant and is subject to immediate appeal.

B. Protection from Suit by of Res Judicata is a Substantial Right.

It does not appear South Carolina courts have squarely addressed whether denial of a motion to dismiss based on res judicata affects a “substantial right.” However, in Brown v. Pechman, 55 S.C. 555, ___, 33 S.E. 732, 737 (1899) the South Carolina Supreme Court held that where the parties to an action have entered into a stipulation of facts in a prior proceeding, a ruling of the trial court that the stipulation is not binding as res judicata and requiring a trial by jury is an interlocutory order affecting the merits and immediately appealable. Granted, Brown was decided in 1899, prior to the codification of S.C. Code § Ann. 14-3-330. Nonetheless, in Brown, the South Carolina Supreme Court determined the lower court’s order granting a trial based on a previously decided issue [i.e. there was no issue of fact in dispute] affected the merits of the case.

Other jurisdictions, however, have specifically held that denial of motions to dismiss where res judicata is asserted are immediately appealable. For example, Alabama, Arkansas, Connecticut, New Mexico, and North Carolina have each concluded the denial of a motion to dismiss where res judicata is asserted is immediately appealable. See Ex parte Ocean Reef Developers II, LLC, 84 So. 3d 900, 905 (Ala. Civ. App. 2011) (“One benefit of the doctrine of res judicata is that it prevents

a defendant from being subject to repeated litigation over the same subject matter. That benefit would, in large part, be lost if the defendant could seek review of an order denying a motion to dismiss based on the doctrine only by way of an appeal after the entry of a final judgment. If such a motion has been erroneously denied, an appeal would not be an adequate remedy because, by the time the defendant could appeal, the defendant would have already incurred the time and expense of litigation, which are specifically intended to be avoided by application of the doctrine.”); Shaver v. State, 2018 Ark. App. 242, ___, 548 S.W.3d 222, 225 (2018) (recognizing existence of right to an immediate appeal from a trial court denying a motion to dismiss where res judicata is raised); Cayer v. Komertz, 91 Conn. App. 202, 203, 881 A.2d 368, 370 (2005) (“We note that although the denial of a motion for summary judgment ordinarily is not appealable because it is not a final judgment, the denial of a motion for summary judgment on the basis of a claim of res judicata is a final judgment for purposes of appeal because it invokes the right not to go to trial on the merits.”); State Sav. & Loan Ass'n v. Rendon, 103 N.M. 698, 699, 712 P.2d 1360, 1361 (1986) (“The court denied [appellant’s] motion for summary judgment; we granted an interlocutory appeal to decide whether res judicata applied.”); Heritage Operating, L.P. v. N.C. Propane Exch., LLC, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012) (the denial of a motion for summary judgment, where one basis raised is the defense of res judicata, a substantial right may be impacted causing the order to be immediately appealable).

However, Massachusetts, Texas, and Virginia courts have held orders denying motions where res judicata is asserted are not subject to an interlocutory appeal. *See* Mooney v. Warren, 87 Mass. App. Ct. 137, 138-39, 26 N.E.3d 206, 207-08 (2015); Max Adler, M.D., P.A. v. Lindsey, No. 05-20-00148-CV, 2020 WL 4880166, at *1 (Tex. App. Aug. 20, 2020); Whitaker v. Day, 32 Va. App. 737, 742, 530 S.E.2d 924, 926 (2000).

Notably, in prior matters, South Carolina has looked to the state of North Carolina on matters of first impression. *See Lenz v. Walsh*, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005) (looking to North Carolina caselaw regarding a specific contractual matter); *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 543, 689 S.E.2d 615, 619 (2010) (South Carolina courts frequently look to North Carolina rulings with regard to workers' compensation laws due to the statutes' similarities); *F & D Elec. Contractors, Inc. v. Powder Coaters, Inc.*, 350 S.C. 454, 462, 567 S.E.2d 842, 845 (2002) (finding the reasoning of North Carolina, Connecticut, and Georgia is persuasive caselaw persuasive when interpreting mechanics lien statute). Notably, North Carolina has extensively considered whether a denial of a motion to dismiss where a defendant raises *res judicata* is immediately appealable. For purposes determining whether an interlocutory order in such a circumstance is immediately appealable, North Carolina courts determined the principle of *res judicata* may affect a "substantial right":

The denial of summary judgment based on collateral estoppel, like *res judicata*, may expose a successful defendant to repetitious and unnecessary lawsuits. Accordingly, we hold that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and that defendants' appeal, although interlocutory, is properly before us [...] Denial of a summary judgment motion based on *res judicata* raises the possibility that a successful defendant will twice have to defend against the same claim by the same plaintiff, in frustration of the underlying principles of claim preclusion.

McCallum v. N. Carolina Co-op. Extension Serv. of N.C. State Univ., 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001). Like South Carolina, North Carolina courts determine whether an order is immediately appealable on a case-by-case basis. *See Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014) (adopting a "restrictive" view of the substantial right exception and adopting a case-by-case approach).

North Carolina courts have not concluded all denials of motions to dismiss where res judicata is raised are immediately appealable. Instead, North Carolina courts established a two-prong test to determine whether denial of a motion where res judicata is asserted will affect a “substantial right” and is, therefore, subject to immediate, interlocutory appeal.

First, the party moving for immediate appeal must show “the same factual issues would be present” in both the previous proceeding and the lawsuit at issue. Heritage at 627, 727 S.E.2d at 315. Second, the moving party must show the existence of “the possibility of inconsistent verdicts on those [factual] issues.” *Id.*

Here, Appellant’s appeal of the Underlying Order meets North Carolina’s two-pronged test for immediate review, if South Carolina adopted the North Carolina test. First, in the Underlying Lawsuit, the sole issue in controversy before the circuit court as to the application of res judicata was a *question of law not fact*: whether the District Court Order granting summary judgment was a judgment “on the merits” as to Respondent’s breach of employment contract claim. Indeed, there was no dispute before the circuit court, and there is none now, as to whether the factual allegations Respondent made in her Federal Lawsuit as to her breach of employment contract claim are identical to the factual allegations she makes in the Underlying Lawsuit about the same claim.²

Moreover, there was no dispute before the circuit court whether Respondent’s breach of employment contract claim in both the Federal Lawsuit and the Underlying Lawsuit are the same

² Compare Appendix, p. A-068 – A-075, at Paragraphs 8-21, with Appendix, p. A-001 – A-008 at Paragraphs 8-20. Paragraph 12 of the Underlying Lawsuit does not exist. However, the factual allegations in both lawsuits are identical.

in all material respects. Finally, there was no dispute before the circuit court whether the parties in both lawsuits are the same.³

Consequently, the *factual* elements of res judicata are not in dispute and the only element at issue is the legal determination whether the District Court's grant of summary judgment is binding as to Respondent's breach of employment contract claim. No additional facts are required to make this determination and delaying an appeal to "final judgment" will deprive Appellant of the protections of res judicata.

Second, the possibility of inconsistent verdicts on the factual issues is present in the Underlying Lawsuit. In her Federal Lawsuit, Respondent alleged Appellant's employee handbook contains anti-discrimination and antiretaliation policies that constitute an employment contract. Respondent makes the identical factual allegations in the Underlying Lawsuit.

Further, the District Court ruled Respondent's breach of employment contract claim was not supported by the evidence in the Federal Lawsuit. In adopting the Magistrate's R & R, the District Court held Respondent "failed to raise an issue of material fact as to the existence of a policy or custom that is fairly attributable to the defendant that proximately caused the alleged underlying race discrimination and/or retaliation." (Appendix, p. A-088.) Further the District Court held Respondent failed "to create an issue of fact that the conduct the [Respondent] complains of was based on racial or retaliatory animus" and "[t]here is no genuine issue of material fact as to whether the [Respondent] was aware that she was expected to attend the meeting and that she could not tape record the meeting or bring a witness." (Appendix, p. A-094.)

³ See Appendix, p. A-222 – A-223. ("The only real issue that I think is before the court as it relates to the res judicata claim and the issue preclusion arguments and the claim preclusion arguments is whether or not there has been an adjudication on the merits.").

Both the Underlying Lawsuit and the Federal Lawsuit are based on Respondent's allegation that Appellant's employment policies created an employment contract. Further, both lawsuits allege Appellant breached the alleged employment contract by discriminating and retaliating against Respondent.

The District Court specifically ruled Respondent did not present an issue of fact as to these issues. A finding inconsistent with the District Court Order is necessary if the Underlying Lawsuit is to be tried in the circuit court. If Respondent's claim is allowed to continue beyond the motion to dismiss stage, inconsistent decisions as to the factual issues addressed in the Federal Lawsuit and the Underlying Lawsuit may occur. Therefore, for this reason as well, the Underlying Order is immediately appealable.

C. Res Judicata Affects the "Mode of Trial" Appellant is Entitled to as a Matter of Right.

"Pursuant to § 14-3-330(2), [the South Carolina Supreme Court] has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable." Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). "Failure to immediately appeal such an order forever bars appellate review." *Id.* See also Foggie v. CSX Transp., 313 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."). Notably, "[r]es judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (citing Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)).

Granted, the South Carolina Supreme Court has held the "avoidance of a trial is not a 'substantial right' entitling a party to immediate appeal." Shields v. Martin Marietta Corp., 303

1

S.C. 469, 470, 402 S.E.2d 482, 483 (1991). In Shields, the issue was whether a party can immediately appeal a decision to restore a case to the active docket for trial.

North Carolina has also addressed this issue. Like South Carolina, the North Carolina supreme court held “the right to avoid a trial is generally not a substantial right.” N. Carolina Dep’t of Transp. v. Page, 119 N.C. App. 730, 735, 460 S.E.2d 332, 335 (1995) (emphasis added). However, the court in Page further noted the that “the right to avoid two trials on the same issue” may be a “substantial right.” Id.

Here, the protection of res judicata is Appellant’s right to avoid two trials on the same issue, including all duplicative aspects of litigation such as deciding the mode of trial, filing responsive pleadings, and conducting discovery. In Hagood v. Sommerville, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005), the South Carolina Supreme Court held an order granting a motion to disqualify a party’s attorney is “closely related to the right to a particular mode of trial, a well-established substantial right.” Id. In making its determination, the South Carolina Supreme Court held, “an appeal after final judgment and a new trial, if granted, would not adequately protect a party’s interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.” Hagood 362 S.C. at 198.

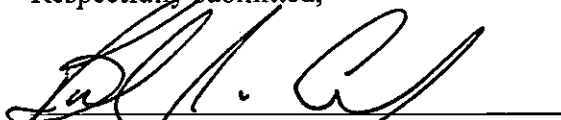
Similar to Hagood, Appellant’s interest will not be adequately protected if it was required to appeal the Underlying Order beyond the motion to dismiss stage because it would “be twice sued for the same cause of action,” thereby defeating the purpose and fundamental protections of res judicata. By holding res judicata, *as a matter of law not fact*, does not apply to the Underlying Lawsuit, the Underlying Order affects the mode of trial because the *same Appellant* is subject to a lawsuit brought by the *same Respondent* on the *same claim* for the second time.

Because the circuit court made this specific, *legal* ruling on a motion to dismiss, the circuit court will seemingly be bound by the Underlying Order at each stage of litigation, including motions for judgment on the pleadings, summary judgment, directed verdict, and post-trial motions. In this instance, the protections afforded by the doctrine res judicata can only be preserved by immediate, interlocutory review of the Underlying Order.

CONCLUSION

The Underlying Order affects substantial rights of Appellant because it involves the merits of the case, strikes defenses, and involves an issue closely related to the mode of trial. Therefore, the Underlying Order is immediately appealable. For the reasons stated, this Court should reconsider its Order dismissing Appellant's interlocutory appeal and allow the parties to fully brief the issues for appellate review.

Respectfully submitted,

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

Caroline W. Cleveland
Bob J. Conley
Emmanuel J. Ferguson
CLEVELAND & CONLEY, LLC
171 Church Street, Suite 310
Charleston, SC 29401
(843) 577-9626 (o)
(843) 577-6672 (f)

ATTORNEYS FOR APPELLANT

Charleston, South Carolina
September 28, 2020

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-4377

Christine Nelson,

Plaintiff,

vs.

Medical University Hospital Authority

Defendant.

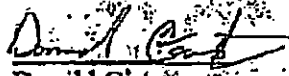
SUMMONS

2018 SEP -6 AM 8:45
JULIE J. ALEXANDER
CLERK OF COURT

TO: ABOVE NAMED DEFENDANT

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

GIST LAW FIRM, P.A.


Donald Gist
Aaron V. Wallace
4400 North Main Street
Columbia, South Carolina 29203
(803) 771-8007 Telephone
(803) 771-0063 Facsimile
Attorneys for Plaintiff

September 5, 2018

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-4377

Christine Nelson,

Plaintiff,

COMPLAINT

vs.

Medical University Hospital Authority

Defendant.

2018 SEP -6 AM 8:45
CLERK OF COURT
BY

INTRODUCTION

1. Plaintiff Christine G. Nelson (hereinafter referred to as "Plaintiff") brings this action to redress Defendant Medical University of South Carolina's (hereinafter referred to as "Defendant"), actions of breaching Plaintiff's employment contract.

JURISDICTION

2. During the time period when the actions herein complained of took place Plaintiff was working out of Defendant's location in Charleston, South Carolina.

Venue

3. Pursuant to the South Carolina Code Annotated § 15-7-30 (1976 & Supp. 2007), venue is proper in this Court because the substantial part of the alleged acts or omissions giving rise to the causes of action occurred in this county.

PARTIES

4. Plaintiff is a female citizen of the United States of America and resides in Dorchester, South Carolina. Plaintiff began her employment with Defendant as a Registered Nurse on February 15, 1995. Plaintiff continued in the position of a Registered Nurse with Defendant until Plaintiff was terminated on February 27, 2014.
5. The Defendant, located in Charleston, South Carolina, is an organization with the State of South Carolina and is legally organized and existing under the Code of Laws of the State of South Carolina.

CONDITIONS PRECEDENT

6. This action was originally filed in Federal District Court for the District of South Carolina Charleston Division, but the Federal Court declined to exercise supplemental jurisdiction over Plaintiff's State Law Claims. Plaintiff therefore timely files this action in South Carolina State Court to be prosecuted accordingly.

STATEMENT OF CLAIM

7. Plaintiff alleges that she is the victim of the Defendant's breach of its employment contract with Plaintiff after being wrongfully terminated on February 27, 2014, despite performing her job duties with due diligence and to the best of her abilities.
8. Plaintiff, on February 15, 1995, began working in the position of a Registered Nurse. Plaintiff contends that she performed her job duties, as a Registered Nurse without incident, however, Defendant wrongfully terminated Plaintiff when she (Plaintiff) informed a colleague about the Defendant's Anti-Harassment Policy which is part of Plaintiff's employment contract.
9. Plaintiff informed her colleague, Valerie Sutton, Nurse Practitioner, about the Defendant's Anti-Harassment policy when Plaintiff observed Sutton being harassed and bullied by their supervisor, Tabitha Nolen (WF), Charge Nurse. Plaintiff states that after Sutton filed her complaint, Nolen began to harass and intimidate Plaintiff. This was done in clear violation of Defendant's policies and procedures and breached Plaintiff's employment contract with Defendant.
10. Plaintiff, following the Defendant's policies and procedures and the Defendant's handbook, filed a complaint in response to Nolen's constant retaliatory behavior towards her, but the Defendant failed to conduct a proper investigation into Plaintiff's concern about Nolen's behavior. This was a further breach of Plaintiff's employment contract with Defendant.
11. On September 9, 2013, Plaintiff was written up, specifically by Defendant's agent Nolen for allegedly being disrespectful, an allegation the Plaintiff denied in her rebuttal statement, on or about, September 12, 2013. This was pretextual and designed to breach Plaintiff's employment contract as Nolen issued disciplinary action against Plaintiff as a result of Plaintiff filing a complaint against her (Nolen).
13. Plaintiff, after Defendant failed to respond to her September 12, 2013 rebuttal statement, sent an email, on October 9, 2013, to Defendant's agent, Sharon Turner (WF), addressing her (Plaintiff's) concerns and further requesting a meeting to resolve the issues in the workplace. This was to no avail, as the Defendant, again, failed to address Plaintiff's concerns about Nolen's retaliatory and abusive behavior all in breach of Plaintiff's employment contract with Defendant.

14. Plaintiff, following Defendant's policies and procedures, contacted Defendant's Employee Assistance and spoke with Tammy Powell, who attempted to initiate an investigation into Nolen's actions against Plaintiff. Upon information and belief, Powell was told that she (Powell) should mind her own business, thus halting Powell's attempt to investigate Plaintiff's concerns in violation of Plaintiff's employment contract with Defendant.
15. Plaintiff contends that the Defendant and its agents, specifically Nolen, failed to accommodate Plaintiff after an ergonomic assessment, in August 2013, indicated that Plaintiff would need a specific office (to include a cushion, new chair, and a new computer keyboard). The Defendant, despite the ergonomic assessment, refused to accommodate Plaintiff and Nolen moved Plaintiff's office to a less accommodating location, which resulted in Plaintiff's inability to complete her job deadlines. Plaintiff addressed her concerns with Turner, to no avail, as the Defendant failed to follow its own policies and procedures by not accommodating Plaintiff's disability all in violation of Plaintiff's employment contract with Defendant.
16. The Defendant, and its agent, continued to retaliate against Plaintiff (despite their knowledge of her disability) by failing to accommodate Plaintiff and, in fact, Defendant's agents inflicted disciplinary action against Plaintiff, claiming she (Plaintiff) was not meeting her work deadlines. Plaintiff states that the Defendant's lack of accommodation heavily contributed to her inability to meet the required deadlines, a fact that Defendant was aware of due to the ergonomic assessment.
17. Plaintiff continued to perform her job duties with excellence and due diligence, despite Defendant's failure to properly accommodate Plaintiff's disability in violation of Plaintiff's employment contract. Despite Plaintiff's hard work, Nolen continued to intimidate Plaintiff by blatantly yelling at Plaintiff about moving charts and leveling false allegations against Plaintiff.
18. Plaintiff states that Nolen alleged false allegations against her, on or about December 30, 2013, when Nolen accused Plaintiff of looking her "up and down," something that Plaintiff strongly denies. Plaintiff, after being informed by another colleague that Nolen had called security on her, attempted to contact Turner three (3) times to no avail, as Turner failed to respond to Plaintiff and address Plaintiff's concerns. This was pretextual, as Defendant, and its agents, had already determined that Plaintiff would be wrongfully terminated from her position, and therefore failed to investigate any allegations made by (and against) Plaintiff thoroughly in violation of Plaintiff's employment contract with Defendant.
19. On or about February 18, 2014, Nolen placed Plaintiff on special notification to announce when she (Plaintiff) was taking a lunch break, a practice that Nolen does not require of Plaintiff's Caucasian counterparts. Plaintiff, despite evidence that this was clear harassment under Defendant's own policies and procedures, complied with Nolen's request, however Plaintiff was still subjected to retaliatory behavior in violation of Plaintiff's employment contract with Defendant.
20. Plaintiff, on February 27, 2014, was wrongfully terminated for allegedly being insubordinate. Plaintiff, in response to the termination followed Defendant's policies and guidelines by filing

a timely grievance on March 3, 2014, however the termination was upheld, on or about May 2014. This was pretextual because Defendant failed to conduct a full and proper investigation into the allegations against its agent, specifically Nolen in violation of Plaintiff's employment contract with Defendant.

21. Upon information and belief, Plaintiff performed her job, with due diligence and without incident, despite being subjected to Defendant's numerous breaches of its own policies and procedures and Plaintiff's employment contract with Defendant.

FOR A FIRST CAUSE OF ACTION: BREACH OF CONTRACT

22. Each and every allegation set forth hereinabove is hereby repeated as fully incorporated herein.

23. Defendant publishes and maintains an Employee Handbook, which definitely assures employees of their right to report harassment and bullying, an anti-retaliation clause, and accommodations for employees with disabilities.

24. Defendant further states, in its Employee Handbook, that it is an Equal Opportunity employer, when it declares that there will be no discrimination as to race, color, gender, age, religion, disability, national origin, or veteran's status. Defendant further states, in its handbook, that it will comply with the requirements of the law in implementing equal employment decisions.

25. Plaintiff and Defendant entered into a binding and valid contract whereby Plaintiff relied on Defendant's, through its agents, reassurance that, pursuant to the handbook and the above policies, and procedures, Defendant would accommodate Plaintiff for her disability and protect her rights under the anti-harassment and anti-retaliation policies. Plaintiff also relied on the Defendant's reassurance that it must follow its Equal Employment Opportunity policy when disciplining its employees.

26. Plaintiff agreed to fulfill the duties of her position in exchange for valuable consideration and salary with the promise of being protected from discrimination, retaliation, harassment, and to be properly accommodated for her disability. These were all covenants in Defendant's employment contract with Defendant which Plaintiff breached.

27. Plaintiff performed her job duties with due diligence, however Defendant, through its agents, unjustifiably failed to perform its duties by failing to accommodate Plaintiff for her disability and failing to protect Plaintiff from the retaliatory actions of its agent, Nolen. Further, Defendant failed to follow its Equal Employment policy when it failed to apply the same consequence, for filing complaints, to Plaintiff's Caucasian counterparts as it did to the Plaintiff all in violation of Plaintiff's employment contract with Defendant.

28. Defendant, and its agents, had a responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendant, through its agents, instead chose to fail to accommodate Plaintiff for her disability, retaliated against Plaintiff when she informed a colleague of the anti-harassment policy, and failed to administer the same punishment to Plaintiff as it did the Caucasian

counterparts when it came to filing complaints with the Defendant. These actions were done in violation of Plaintiff's employment contract with Defendant.

29. Defendant's conduct, by and through its agents, was done in bad faith and breached the implied covenant of good faith and fair dealings that is implied in the employment contract along with the other provisions stated above. Plaintiff has suffered damages to include actual and compensatory damages as a result of Defendant's breach of contract.

JURY TRIAL DEMANDED

30. Plaintiff requests a trial by jury.

PRAYER FOR RELIEF

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

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

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

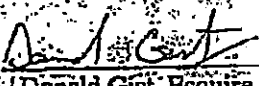
(3) Awarding Plaintiff compensatory damages for each cause of action contained herein, which the jury should find appropriate as a result of the Defendant's, and its agents, breach of contract against Plaintiff resulting in a loss of economic opportunities, any back pay, front pay, and future earnings with cost of living adjustments, prejudgment interest, fringe benefits, and retirement benefits.

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

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

[Signature on Following Page]

Respectfully submitted,

By 

Donald Gist, Esquire
Aaron Wallace, Esquire
Gist Law Firm, PA
4400 N. Main Street
Columbia, SC 29203
Attorneys for Plaintiff

September 5, 2018

596 (1994). But a “ ‘court should intervene to resolve the handbook issue as a matter of law ... if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.’ ” Id. (quoting Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *Indus. Rel. L.J.* 326, 375-76 (1991-92)); cf. *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) (holding, as a matter of law, that a handbook containing conspicuous disclaimers and a non-mandatory discipline procedure did not alter at-will status).

To be enforceable in contract, general policy statements must be definitive in nature, promising specific treatment in specific situations. See, e.g., *Ex parte Amoco Fabrics & Fiber Co.*, 729 So.2d 336, 339 (Ala.1998) (“[to] become a binding promise, the language used in the handbook ... must be specific enough to constitute an actual offer rather than a mere general statement of policy”) (internal quotations omitted); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 665 A.2d 580, 584 (1995) (“[o]nly those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced”); cf. *Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 21 Ct.App.1994). *Hessenthaler v. Tri-County Sister Help, Inc.* 365 S.C. 101, 616 S.E.2d 694 S.C.,2005.

The Defendant argues that the Plaintiff cannot state a cause of action for breach of contract because the handbook does not create a unilateral contract of employment. This presents a question of law to be determined by the Court. At this juncture, the Court looks to the pleadings to determine whether Plaintiff has pled a valid cause of action for breach of contract.

In sum, the Court finds as a matter of law that the Plaintiff has pled a valid claim for breach of contract. It is apparent from the language in the Complaint that Plaintiff has fully pled

her breach of contract claims. Specifically, the Complaint indicates the specific contractual provisions, discusses her reliance upon them, and discusses how the provisions were breached. The contract alleged by Plaintiff is in writing, thus satisfying the statute of frauds. Defendant's Motion to Dismiss should therefore be denied based upon these grounds.

In addition to arguing that Plaintiff has failed to allege a valid breach of contract claim, the Defendant also alleges that Plaintiff's Complaint should be dismissed based on the legal theories of *res judicata*, claim preclusion and issue preclusion. All of these claims require an adjudication on the merits. This Court holds that there has been no final adjudication on the merits in this case.

Although Plaintiff's Federal Claims were dismissed in this case, it is clear that the District Court Judge, in his Order, contemplated Judge McDonald's opinion that the Court decline to exercise jurisdiction over Plaintiff's state law claims for breach of contract. Defendant attempts to rely on Plaintiff's appeal of the ruling of the Federal District Judge as a basis for its allegation that Plaintiff's state court pleadings are *res judicata*, judicially estoppel, or violative of SCRCP 12(B)(1). This is not the case.

The Defendant's attempt to dismiss Plaintiff's claims based on Plaintiff having appealed the ruling of the District Court's dismissal of her claims is, likewise, misplaced. The Magistrate's Report and Recommendation is ambiguous as to which alternative the District Court should take. These ambiguities were incorporated into the District Court Order by Judge Norton. This is not a case where Plaintiff has taken two different views of the facts (even so, doing such would go more to the weight of the evidence and impeachment), rather it is a case where there is an ambiguous order which provides the potential for two venues available to Plaintiff to resolve her case. This is purely a jurisdictional matter.

The Federal Court Order presented two alternative outcomes without either being chosen definitively by the Court. Plaintiff's appeal was dismissed, but this dismissal also takes into account the fact that the District Court declined jurisdiction over the contract-based claims. The dismissal was procedural in nature. Plaintiff should, therefore, is not barred from proceeding with her state court claims. This Court therefore rules that the Defendant's motion to dismiss be denied.

IT IS, THEREFORE, ORDERED that the Defendant's motion to dismiss is denied.

AND IT IS SO ORDERED.

May 28, 2020

s/ Bentley Price
Circuit Court Judge,
Ninth Judicial Circuit



Charleston Common Pleas

Case Caption: Christine Nelson VS Medical University Hospital Authority
Case Number: 2018CP1004377
Type: Order/Dismissal

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-06-15 11:55:27 page 8 of 8

Certificate of Electronic Notification

Recipients

Emmanuel Ferguson - Notification transmitted on 06-24-2020 03:40:31 PM.

Bob Conley - Notification transmitted on 06-24-2020 03:40:31 PM.

Aaron Wallace - Notification transmitted on 06-24-2020 03:40:31 PM.

Donald Gist - Notification transmitted on 06-24-2020 03:40:31 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP1004377

Official File Stamp: 06-24-2020 03:38:37 PM

Court: CIRCUIT COURT

Common Pleas

Charleston

Case Caption: Christine Nelson VS Medical University Hospital
Authority

Document(s) Submitted: Motion/Alter and/or Amend

- Exhibit/Filing of Exhibits

Filed by or on behalf of: Emmanuel Joseph Ferguson, Sr.

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Bob J. Conley for Medical University Hospital
Authority

Donald Gist for Christine Nelson

Aaron Vernon Wallace for Christine Nelson

Emmanuel Joseph Ferguson, Sr. for Medical
University Hospital Authority

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

CHRISTINE NELSON,

Plaintiff,

vs.

MEDICAL UNIVERSITY OF SOUTH
CAROLINA HOSPITAL AUTHORITY

Defendant.

IN THE COURT OF COMMON PLEAS
THE NINTH JUDICIAL CIRCUIT

Case No.: 2018-CP-10-04377

Plaintiff's Memorandum in Opposition to
Defendant's Motion to Amend / Alter

I. Introduction

Plaintiff hereby responds to Defendant's Motion to Amend / Alter the Court's sound decision to Deny their Motion to Dismiss in its Order dated June 15, 2020. For the reasons set forth below, Defendant's Motion should be denied.

II. Procedural History

This action was filed originally in Federal District Court on January 20, 2017 wherein Plaintiff asserted claims against the Defendant for race discrimination and retaliation and for contractual breaches. After completion of extensive discovery, Defendant filed a motion for summary judgment on October 10, 2017. The Magistrate Judge in this case, Honorable Kevin McDonald, issued an ambiguous Report and Recommendation on April 18, 2018 which asserted that Plaintiff's Race and Retaliation claims should be dismissed, but which provided two alternatives for the District Court to consider with respect to Plaintiff's contract based causes of action, specifically 1.) that the District Court exercise its supplemental jurisdiction and dismiss Plaintiff's contract claims or 2.) that the District Court decline to exercise jurisdiction over

Plaintiff's contract claims (thus dictating that such claims be sent back to state court). After responses and objections from the parties, Federal District Court Judge David Norton, on August 7, 2018, adopted the Report and Recommendation of Judge McDonald to include its ambiguities.

Given the inherent ambiguities in the Order of Judge Norton, Plaintiff timely filed a notice of appeal to the Fourth Circuit Court of Appeals on September 5, 2018 and subsequently timely instituted the instant action in accordance with the two contingencies provided for in both the Report and Recommendation of Judge McDonald and the Order of Federal District Court Judge David Norton.

Ultimately the case was remanded back to South Carolina State Court and the Defendant filed a Motion to Dismiss which was heard and denied by this Court on June 15, 2020. The Defendant, thereafter, on June 24, 2020 filed the instant motion to alter / amend the decision of the Court. For the reasons stated below, this motion must be denied.

III. Legal Argument

1. The Defendant's Motion to Amend or Alter its decision to deny Defendant's Motion to Dismiss must be denied.

It is apparent based upon the documents filed in this case that the Federal District Court Judge's Order was ambiguous and declined jurisdiction in the instant case. As a result, Plaintiff was left free to litigate her claims in State Court. The Defendant's obstinate focus on the doctrine of res judicata completely defies the ruling of this Court that such Order was ambiguous and that there was, therefore, no binding decision on the merits, which is an essential element of the doctrine of res judicata.

Although Defense counsel attempts to confuse the issue, this is not a complex matter. This Court had an ample opportunity to review the order and made a sound decision based upon its own interpretation of the Federal District Court Order. The Federal Court Order presented two alternative outcomes without either being chosen definitively by the Court. Plaintiff's appeal was dismissed, but this dismissal also takes into account the fact that the District Court declined jurisdiction over the contract based claims. This clearly amounts to a procedural dismissal. Plaintiff is, therefore, not barred from proceeding with her state court claims. The Court, therefore, rightfully denied Defendant's Motion to Dismiss.

The Defendant's Motion to Alter/Amend does not address the sufficiency of the contract based claims based upon their merits or sufficiency in the pleadings, therefore, Plaintiff declines to address this issue as the decision of the Court should stand on this issue.

IV. Conclusion

Based upon the foregoing, the meticulously briefed and orally argued statements of counsel, and the well-developed record in this case. The decision of this Court to deny Defendant's Motion to Dismiss should stand and Defendant's Motion to Alter / Amend should be denied.

Respectfully submitted,

GIST LAW FIRM, P.A.

/s/ Donald Gist
Donald Gist, Esquire
Aaron Wallace, Esquire
4400 North Main Street (29203)
Post Office Box 30007
Columbia, South Carolina 29230
Tel. (803) 771-8007
Fax: (803) 771-0063
Email: aaronwallace.gistlawfirm@gmail.com;
dtommygist@yahoo.com

June 29, 2020

Certificate of Electronic Notification

Recipients

Emmanuel Ferguson - Notification transmitted on 06-29-2020 11:03:07 AM.

Bob Conley - Notification transmitted on 06-29-2020 11:03:07 AM.

Aaron Wallace - Notification transmitted on 06-29-2020 11:03:07 AM.

Donald Gist - Notification transmitted on 06-29-2020 11:03:07 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2018CP1004377

Official File Stamp: 06-29-2020 11:02:53 AM

Court: CIRCUIT COURT

Common Pleas

Charleston

Case Caption: Christine Nelson VS Medical University Hospital
Authority

Document(s) Submitted: Memo/Memo in Opposition

Filed by or on behalf of: Aaron Vernon Wallace

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

Bob J. Conley for Medical University Hospital
Authority

Donald Gist for Christine Nelson

Aaron Vernon Wallace for Christine Nelson

Emmanuel Joseph Ferguson, Sr. for Medical
University Hospital Authority

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Christine Nelson,	)	
	)	
Plaintiff,	)	CASE NO.: 2018-CP-10-4377
	)	
v.	)	ORDER DENYING THE MOTION TO DISMISS
	)	OF THE DEFENDANT
Medical University Hospital Authority)	)	
Defendant	)	
_____	)	
_____	)	

This matter is before this Court on the motion to dismiss filed by the Defendant. A hearing was held by video conference with all counsel of record present on May 27, 2020. After a review of the written submissions of the parties, the record presented, and the oral arguments of counsel, this Court denies the motion to dismiss in favor of Plaintiff on the bases discussed below.

INTRODUCTION

This litigation arises out of the termination of the employment of the Plaintiff by the Defendant. The Plaintiff was hired as a registered nurse effective February 15, 1995. *See*, Complaint, ¶ 8. She was terminated on or about February 27, 2014. *See*, Complaint, ¶ 20. In her Complaint, the Plaintiff alleges a single cause of action for breach of contract. The Defendant Medical University Hospital Authority moved to dismiss this cause of action.

BACKGROUND

This action was originally filed in federal district court against the Defendant on January 2017 alleging various claims to include her state law claim for breach of contract based upon Defendant's unlawful termination of her employment.

On April 28, 2018, the federal magistrate judge issued a Report and Recommendation which recommended dismissal on all of Plaintiff's claims except for Plaintiff's state based contract claim. The magistrate declined federal jurisdiction over the state law claims. This recommendation was adopted by the Judge Norton who was the assigned Federal District Court judge. The order was, in itself, somewhat ambiguous as to whether Plaintiff's claims had been dismissed. Plaintiff filed an appeal to the Fourth Circuit Court of Appeals. This appeal was ultimately dismissed incorporating the reasoning of the District Court and declining jurisdiction over Plaintiff's state based contract claim.

As a result of the District Court declining jurisdiction over Plaintiff's state law claims, Plaintiff filed the instant case on September 6, 2018 to which Defendant filed a Motion to Dismiss. The Court rules on this Motion as follows.

I. Breach of Contract Claim

As her only remaining cause of action, the Plaintiff alleges a breach of contract action based upon provisions of the Medical University Hospital Authority Handbook. The Plaintiff alleges that "during the course of her employment, Plaintiff relied on the specific promises contained in Defendants' Employee Handbook along with other policies and procedures of the Defendant. *See*, Complaint, ¶ 25.

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

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

In order to prove the existence of a definite contract of employment, the employee must establish all of the elements of a contract. Most employment agreements are unilateral. *Small v. Springs Industries, Inc.*, *supra*. A unilateral contract has the following three elements: 1) a specific offer, 2) communication of the offer to the employee, and 3) performance of job duties in reliance on the offer. 82 Am.Jur.2d Wrongful Discharge § 84 (1992). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 24 (1981). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co., Inc. v.*

Connecticut Nat. Life Ins. Co., supra, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 29 (1981).

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

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

The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract's existence is questioned, and the evidence is either conflicting or is capable of more than one inference. *Small*, 292 S.C. at 483, 357 S.E.2d at 454; *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct.App.2000). In most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. *Fleming v. Borden*, 316 S.C. 452, 464, 450 S.E.2d 589,

596 (1994). But a “ ‘court should intervene to resolve the handbook issue as a matter of law ... if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.’ ” Id. (quoting Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 Indus. Rel. L.J. 326, 375-76 (1991-92)); cf. *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) (holding, as a matter of law, that a handbook containing conspicuous disclaimers and a non-mandatory discipline procedure did not alter at-will status).

To be enforceable in contract, general policy statements must be definitive in nature, promising specific treatment in specific situations. See, e.g., *Ex parte Amoco Fabrics & Fiber Co.*, 729 So.2d 336, 339 (Ala.1998) (“[to] become a binding promise, the language used in the handbook ... must be specific enough to constitute an actual offer rather than a mere general statement of policy”) (internal quotations omitted); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 665 A.2d 580, 584 (1995) (“[o]nly those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced”); cf. *Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 21 Ct.App.1994). *Hessenthaler v. Tri-County Sister Help, Inc.* 365 S.C. 101, 616 S.E.2d 694 S.C.,2005.

The Defendant argues that the Plaintiff cannot state a cause of action for breach of contract because the handbook does not create a unilateral contract of employment. This presents a question of law to be determined by the Court. At this juncture, the Court looks to the pleadings to determine whether Plaintiff has pled a valid cause of action for breach of contract.

In sum, the Court finds as a matter of law that the Plaintiff has pled a valid claim for breach of contract. It is apparent from the language in the Complaint that Plaintiff has fully pled

her breach of contract claims. Specifically, the Complaint indicates the specific contractual provisions, discusses her reliance upon them, and discusses how the provisions were breached. The contract alleged by Plaintiff is in writing, thus satisfying the statute of frauds. Defendant's Motion to Dismiss should therefore be denied based upon these grounds.

In addition to arguing that Plaintiff has failed to allege a valid breach of contract claim, the Defendant also alleges that Plaintiff's Complaint should be dismissed based on the legal theories of *res judicata*, claim preclusion and issue preclusion. All of these claims require an adjudication on the merits. This Court holds that there has been no final adjudication on the merits in this case.

Although Plaintiff's Federal Claims were dismissed in this case, it is clear that the District Court Judge, in his Order, contemplated Judge McDonald's opinion that the Court decline to exercise jurisdiction over Plaintiff's state law claims for breach of contract. Defendant attempts to rely on Plaintiff's appeal of the ruling of the Federal District Judge as a basis for its allegation that Plaintiff's state court pleadings are *res judicata*, judicially estoppel, or violative of SCRCP 12(B)(1). This is not the case.

The Defendant's attempt to dismiss Plaintiff's claims based on Plaintiff having appealed the ruling of the District Court's dismissal of her claims is, likewise, misplaced. The Magistrate's Report and Recommendation is ambiguous as to which alternative the District Court should take. These ambiguities were incorporated into the District Court Order by Judge Norton. This is not a case where Plaintiff has taken two different views of the facts (even so, doing such would go more to the weight of the evidence and impeachment), rather it is a case where there is an ambiguous order which provides the potential for two venues available to Plaintiff to resolve her case. This is purely a jurisdictional matter.

The Federal Court Order presented two alternative outcomes without either being chosen definitively by the Court. Plaintiff's appeal was dismissed, but this dismissal also takes into account the fact that the District Court declined jurisdiction over the contract-based claims. The dismissal was procedural in nature. Plaintiff should, therefore, is not barred from proceeding with her state court claims. This Court therefore rules that the Defendant's motion to dismiss be denied.

IT IS, THEREFORE, ORDERED that the Defendant's motion to dismiss is denied.

AND IT IS SO ORDERED.

May 28, 2020

s/ Bentley Price
Circuit Court Judge,
Ninth Judicial Circuit



Charleston Common Pleas

Case Caption: Christine Nelson VS Medical University Hospital Authority
Case Number: 2018CP1004377
Type: Order/Dismissal

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-06-15 11:55:27 page 8 of 8

Certificate of Electronic Notification

Recipients

Emmanuel Ferguson - Notification transmitted on 06-16-2020 09:38:51 AM.

Bob Conley - Notification transmitted on 06-16-2020 09:38:51 AM.

Aaron Wallace - Notification transmitted on 06-16-2020 09:38:51 AM.

Donald Gist - Notification transmitted on 06-16-2020 09:38:51 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP1004377

Official File Stamp: 06-16-2020 09:38:44 AM

Court: CIRCUIT COURT

Common Pleas

Charleston

Case Caption: Christine Nelson VS Medical University Hospital
Authority

Document(s) Submitted: Order Denying Defnts Motion to Dismiss
Order/Dismissal

Filed by or on behalf of: Bentley D. Price

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Bob J. Conley for Medical University Hospital
Authority

Donald Gist for Christine Nelson

Aaron Vernon Wallace for Christine Nelson

Emmanuel Joseph Ferguson, Sr. for Medical
University Hospital Authority

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

46



EMMANUEL JOSEPH FERGUSON SR.
171 CHURCH ST STE 310
CHARLESTON SC 29401-3140

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

Order Denying Defnts Motion to Dismiss

CASE NO: 2018CP1004377

Christine Nelson VS Medical University Hospital Authority

This judgment was entered on the 16th day of June, 2020, and notice mailed first class on Tuesday, June 16, 2020, to all counsel of record and/or all parties entitled to receive notice.

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

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO.: 2018-CP-10-4377

Christine Nelson

Plaintiff,

vs.

Medical University Hospital Authority

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney:
Donald Gist, Bar No. 13098
Address:
4400 North Main Street
Phone: 803 771-8007 Fax 803 771-0063
E-mail: _____ Other: _____

Defendant's Attorney:
Bob J. Conley, Bar No. 12243
Address:
171 Church St.,
Phone: 843 577-9626 Fax 843 577-6672
E-mail: bconley@clevelandlaborlaw.com
Other: _____

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

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss

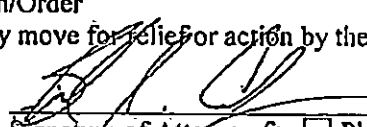
Estimated Time Needed: 1 hour

Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached.
☐ Form Motion/Order

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


Signature of Attorney for ☐ Plaintiff/☒ Defendant

10-1-2018
Date submitted

SECTION III: Motion Fee

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

JUDGE'S SECTION

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

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-4377

) CASE NO.: 2018-CP-10-4377

(

)

)

)

)

i

1

5

1

)

1

2

3. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action as to Defendant and, therefore, Plaintiff's Complaint fails as a matter of law pursuant to Rule 12(b)(6), SCRCF;

4. Plaintiff's Complaint fails to identify or otherwise allege the existence of any legally viable employment contract between Defendant and Plaintiff;

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

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

7. Plaintiff's Complaint is barred by the doctrine of res judicata. In general, Plaintiff's claim was previously adjudicated by the federal district court for the District of South Carolina and is on appeal to the Fourth Circuit Court of Appeals;

8. Plaintiff's Complaint is barred by the doctrine of judicial estoppel. In general, Plaintiff's claim was previously adjudicated by the federal district court for the District of South Carolina and is on appeal to the Fourth Circuit Court of Appeals;

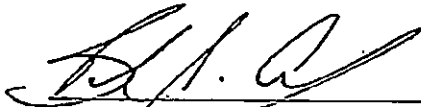
9. Plaintiff's Complaint is barred by the applicable, three-year statute of limitations.

10. Plaintiff's Complaint is barred by 28 U.S.C. § 1367.

11. Plaintiff's Complaint fails because another action is pending between the same parties for the same claim and, therefore, Plaintiff's Complaint fails as a matter of law pursuant to Rule 12(b)(8), SCRCF. In general, Plaintiff's claim was previously adjudicated by the federal district court for the District of South Carolina and is on appeal to the Fourth Circuit Court of Appeals;

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

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



Caroline Wrenn Cleveland (SC Bar #64253)

Bob J. Conley (SC Bar #12243)

Emmanuel J. Ferguson (SC Bar #81431)

CLEVELAND & CONLEY, L.L.C.

One Seventy-One Church Street, Suite 310

Charleston, South Carolina 29401

Telephone: (843) 577-9626

Facsimile: (843) 577-6672

ccleveland@clevelandlaborlaw.com

bconley@clevelandlaborlaw.com

eferguson@clevelandlaborlaw.com

Charleston, South Carolina
October 1, 2018

ATTORNEYS FOR DEFENDANT

2018 CF 10 4377

CERTIFICATE OF SERVICE

This is to certify that I have this 1st day of October 2018, caused to be served a copy of Defendant's Motion to Dismiss on counsel for Plaintiff by depositing same in the United States Mail, First Class postage prepaid, and addressed to:

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

Loretta M. Plitnick
Loretta M. Plitnick
Paralegal

FILED
2018 OCT -4 PM 1:35
JULIE J. ARMSTRONG
CLERK OF COURT

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

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

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

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

October 1, 2018

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

Re: Nelson v. Medical University Hospital Authority,
Civil Action No.: 2018-CP-10-4377

Dear Ms. Armstrong:

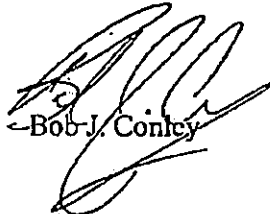
Enclosed is one original and one copy of Defendant's Notice of Motion and Motion to Dismiss, and a check to cover the filing fee, pertaining to the above-referenced matter.

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

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

Sincerely,

CLEVELAND & CONLEY, LLC



Bob J. Conley

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
	)	CASE NO.: 2018-CP-10-4377
Christine Nelson,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT'S MEMORANDUM
v.	)	IN SUPPORT OF
	)	MOTION TO DISMISS THE
Medical University of South Carolina	)	COMPLAINT
Hospital Authority,	)	
	)	
Defendant.	)	

BACKGROUND

I. Plaintiff's Federal Lawsuit.

Prior to filing the Summons and Complaint at issue in this Motion, Plaintiff Christine Nelson ("Nelson") filed a complaint in federal district court (the "District Court") against the Medical University Hospital Authority ("MUHA") on January 20, 2017 (the "Federal Complaint").¹ Nelson's Federal Complaint alleged, among other claims, a state law claim for breach of contract.² The claims Nelson alleged in the Federal Complaint arose from her employment with MUHA. The basis of Nelson's state law claim alleged the existence of a contract between her and MUHA based on MUHA's anti-discrimination and anti-retaliation policies.³

On April 18, 2018, the federal magistrate judge issued a Report and Recommendation (the "R&R") to the Honorable David Norton, the District Court judge assigned to the federal lawsuit. The R&R recommended MUHA be granted summary judgment as to all Nelson's claims

¹ Exhibit 1 (January 20, 2017, Federal Complaint).

² Nelson's federal lawsuit also alleged MUHA engaged in discrimination and retaliation based on her race and disability in violation of 42 U.S.C. § 1981.

³ Exhibit 1, Paragraph 41 (January 20, 2017, Federal Complaint).

and causes of action, including her state law breach of contract claim.⁴ In his R&R, the magistrate judge held, “[...] none of the [anti-retaliation and anti-discrimination] provisions cited by the plaintiff ‘impose a limitation on the employer’s right to terminate an employee at any time, for any reason.’” Moreover, the R&R states, in part:

Based on the foregoing, the defendant is entitled to summary judgment on the plaintiff’s state law causes of action for breach of contract and breach of contract with fraudulent intent. *Alternatively*, should the district court dismiss the plaintiff’s federal claims, the district court should decline to exercise supplemental jurisdiction over the plaintiff’s state law claims. (emphasis added).

Subsequently, on May 7, 2018, Nelson filed Plaintiff’s Objections to the Report and Recommendation of the Magistrate Judge (Nelson’s “Objections to the R&R”).⁵

In *her* Objections to the R&R, Nelson acknowledges, “the [magistrate judge] issued a Report and Recommendation recommending that this Court [the District Court] *grant Defendant’s Motion for Summary Judgment with regard to Plaintiff’s claims.*” (emphasis added).⁶ On August 7, 2018, the District Court adopted the magistrate’s R&R and granted MUHA’s Motion for Summary Judgment (the “District Court Order”).⁷ The District Court Order adopted the magistrate’s R&R and held:

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

Subsequently, the District Court entered judgment granting MUHA summary judgment as to *all* Nelson’s claims.⁸

⁴ Exhibit 2 (April 18, 2018, Magistrate R&R).

⁵ Exhibit 3 (May 7, 2018, Objections to R&R).

⁶ Exhibit 3 (May 7, 2018, Objections to R&R), Page 1 of 10.

⁷ Exhibit 4 (August 7, 2018, District Court Order).

⁸ Exhibit 5 (August 7, 2018, Judgment).

Nelson did not seek clarification, modification, or an amendment of the District Court Order under the Federal Rules of Civil Procedure ("FRCP").⁹ Instead, on September 5, 2018, Nelson notified the District Court of her intention to appeal the District Court Order.¹⁰ Thereafter, Nelson filed her appeal and, subsequently, her appellate brief with the Fourth Circuit Court of Appeals on October 31, 2018 (Nelson's Appellate Brief).¹¹ In her Appellate Brief, Nelson expressly requested the Fourth Circuit Court of Appeals reverse the District Court Order in its entirety, *including the District Court's grant of summary judgment as to Nelson's breach of contract claim*. In the "Conclusion" section of Nelson's Appellate Brief, she argued:

Based on the foregoing, this Court should reverse the district court's *grant of summary judgment* on Appellant's race discrimination *and contract causes of action* because the district court erred in failing to determine that there are no genuine issues of material fact to be tried by a fact finder.¹²

On April 11, 2019, the Fourth Circuit Court of Appeals filed an unpublished opinion affirming summary judgment and the decision of the District Court (the "Fourth Circuit Opinion").¹³

Nelson did not appeal the Fourth Circuit Opinion and Nelson's Federal Lawsuit reached its conclusion. Accordingly, the District Court's grant of summary judgment as to Nelson's Federal Lawsuit became a final judgment on the merits. *See, Justini v. Berkeley Hall Club, Inc.*, No. 2013-UP-108, 2013 WL 8507806, at *1 (S.C. Ct. App. Mar. 13, 2013) ("Summary judgment is an adjudication on the merits."); *Nelson v. QHG of S.C., Inc.*, 362 S.C. 421, 425, 608 S.E.2d 855, 858 (2005) (holding plaintiff's claims against the defendants were collaterally estopped

⁹ See Rule 52, FRCP ("upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly..."); Rule 59(e), FRCP ("[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.").

¹⁰ Exhibit 6 (September 5, 2018, Notice of Appeal).

¹¹ Exhibit 7 (Nelson's October 31, 2018, Appellate Brief).

¹² Exhibit 7 (Nelson's October 31, 2018, Appellate Brief), Page 42 of 43 (emphasis added).

¹³ Exhibit 8 (April 11, 2019, Fourth Circuit Opinion).

because there was a fair and full opportunity to litigate those claims in an earlier suit in which summary judgment had been granted.); *Brandt v. Gooding*, 368 S.C. 618, 625, 630 S.E.2d 259, 262 (2006), *disapproved in later proceedings*; 636 F.3d 124 (4th Cir. 2011) (“a summary judgment motion, when granted, constitutes the final determination of all the issues that exist between the parties”).

II. Plaintiff's State Court Lawsuit.

On September 6, 2018, the day after Nelson filed her Notice of Appeal with the Fourth Circuit, Nelson filed a Summons and Complaint in the South Carolina Court of Common Pleas for the Ninth Judicial Circuit (the “Ninth Circuit Complaint”). The Ninth Circuit Complaint alleges a single breach of contract claim against MUHA based on reasoning that is *identical* to the breach of contract claim previously dismissed by way of summary judgment by the District Court on August 7, 2018, and subsequently affirmed by the Fourth Circuit Court of Appeals. For example, Paragraph 41 of the Federal Complaint, *previously dismissed by way of summary judgment*, alleged:

Defendant, and its agents, had a responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendant, through its agents, instead chose to fail to protect Plaintiff on the basis of her race, retaliated against Plaintiff when she informed a colleague of the anti-harassment policy, and failed to administer the same punishment to Plaintiff as it did the Caucasian counterparts when it came to filing complaints with the Defendant.

Further, and by way of further example, Paragraph 28 of the *currently pending* Ninth Circuit Complaint alleges:

Defendant, and its agents, had a responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendant, through its agents, instead chose to fail to accommodate Plaintiff for her disability, retaliated against Plaintiff when she informed a colleague of the antiharassment policy, and failed to administer the same punishment to Plaintiff as it did the Caucasian counterparts when it came to filing complaints with the Defendant. These actions were done in violation of Plaintiff's employment contract with Defendant.

LEGAL STANDARD

I. Rule 12(b)(6), SCRPC.

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

“If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper.” *Spence*, 368 S.C. at 116, 628 S.E.2d at 876. “Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action.” *Id.* Nonetheless, “[t]he motion must be granted if the facts and the inferences reasonably deducible from them show that the plaintiff could not prevail on any theory of the case.” *Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 651, 491 S.E.2d 272, 275 (Ct. App. 1997).

ARGUMENT

I. Nelson’s Ninth Circuit Complaint is Barred by the Doctrine of *Res Judicata*.

“The term *res judicata* encompasses two types of preclusion: claim preclusion and issue preclusion.” *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 216, 493 S.E.2d 826, 834–35 (1997) (citing *Pedrina v. Chun*, 906 F.Supp. 1377 (D.Hawaii 1995)). “Issue preclusion and

claim preclusion have historically been called collateral estoppel and bar or merger respectively.” *Id.* “Issue preclusion only bars relitigation of particular issues actually litigated and decided in the prior suit.” *Id.* “Claim preclusion ... bars plaintiffs from pursuing successive suits where the claim was litigated or could have been litigated.” *Id.*

“Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” *S.C. Pub. Interest Found. v. Greenville Cty.*, 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (citing *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)). “Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” *Id.* “Res judicata’s fundamental purpose is to ensure that no one should be twice sued for the same cause of action.” *Id.*

In Nelson’s Appellate Brief filed with the Fourth Circuit Court of Appeals, Nelson argues, “[t]he District Court erred in its determination that [MUHA’s] policies and procedures are insufficient to give rise to a claim for breach of contract” (emphasis added).¹⁴ Nelson’s Appellate Brief further states, “[a]t the District Court level, the court found...that there are no genuine issues of fact for trial regarding [Nelson’s] contract claims” (emphasis added).¹⁵ However, in contradiction to her filings with the Fourth Circuit Court of Appeals, Nelson’s Ninth Circuit Complaint alleges “the Federal District Court...declined to exercise supplemental jurisdiction over [Nelson’s] State Law Claims” (Compl. ¶ 6) (emphasis added).

The Ninth Circuit Complaint alleges the District Court declined to exercise jurisdiction over her state law claims. However, Nelson clearly acknowledged and appealed the District Court Order dismissing her breach of contract claim based on the theory MUHA’s policies

¹⁴ Exhibit 7 (Nelson’s October 31, 2018, Appellate Brief).

¹⁵ Exhibit 7 (Nelson’s October 31, 2018, Appellate Brief).

created a contract. This theory and related facts are identical to the theory and related facts Nelson attempts to advance in her Ninth Circuit Complaint. Therefore, Nelson's Ninth Circuit Complaint is barred by the doctrine of res judicata.

A. Issue Preclusion.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (internal citations omitted). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189-90 n. 1 (Ct.App.1984)).

Nelson's claim MUHA's anti-discrimination and anti-retaliation policies created a contract were directly litigated in federal court. By way of example, Nelson identified her breach of contract claim was at issue in response to her Interrogatories to the District Court,¹⁶ Nelson testified about her breach of contract claim during her deposition,¹⁷ and the federal court analyzed and discussed Nelson's breach of contract claim in the magistrate's R&R.

Further, Nelson's breach of contract claim and, specifically, the issue of whether MUHA's policies created an employment contract, was directly determined by the District Court in its adoption of the magistrate's R&R, and thereafter affirmed by the Fourth Circuit Court of Appeals. Moreover, Nelson did not argue, raise or otherwise notify the magistrate judge, the District Court judge, or the Fourth Circuit Court of Appeals that she believed the District Court's

¹⁶ Exhibit 9 (Plaintiff's Amended Responses to Local Rule 26.03 Interrogatories).

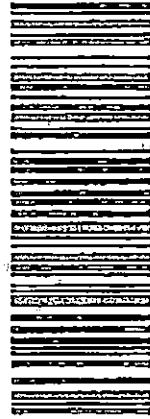
¹⁷ Exhibit 10 (Nelson's Deposition Transcript Excerpt, Pages 180-183).

eat

8/11/18
MSC
Office

ed Delivery
based on rep

7006 1370 0000 8557 9202



1000



29425

U.S. POSTAGE PAID
FOM LETTER
COLUMBIA, SC
SEP 18, 18
AMOUNT

\$12.22
R2305K142674-12

VIA CERTIFIED MAIL & RESTRICTED DELIVERY
Mr. David J. Cole, MD, FAGS, President of
Medical University of South Carolina Hospital
Authority
171 Ashely Avenue
Charleston, SC 29425

Restricted Delivery

Order was ambiguous.¹⁸ Therefore, both the District Court and the Fourth Circuit Court of Appeals determined MUHA was entitled to summary judgment as to Nelson's breach of contract claim.

Moreover, Nelson is fully aware the District Court Order granted MUHA summary judgment as to her state law breach of contract claims because Nelson's Appellate Brief specifically and expressly argues the District Court's ruling should be overturned. For instance, in Nelson's Appellate Brief, Nelson argues "[t]he *District Court erred in its determination that Appellant's policies and procedures are insufficient to give rise to a claim for breach of contract.*" (emphasis added)¹⁹

The issue of whether MUHA's policies created a contract is present in Nelson's Ninth Circuit Complaint and was previously determined by the federal court's grant of summary judgment as to Nelson's breach of contract claim. In other words, if this Court determines MUHA's policies *could* create a contract, then it would be in direct conflict with the previous federal court ruling. Therefore, issue preclusion bars Nelson from relitigating the issues related to MUHA's anti-discrimination and anti-retaliation policies.

B. Claim Preclusion.

"[Claim preclusion] is shown if (1) the identities of the parties [are] the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior

¹⁸ Notably, in instances when the District Court intends to decline its authority to exercise supplemental jurisdiction, it makes a *specific* determination. Otherwise, the order is all encompassing. Compare Exhibit 11 (*Boulware v. S.C. Dep't of Health & Human Servs.*, No. CV 3:17-01110-MGL, 2017 WL 4401673 (D.S.C. Oct. 4, 2017) with Exhibit 12 (*Yon v. Reg'l Med. Ctr.*, No. 5:14-CV-02098-JMC, 2016 WL 1178202 (D.S.C. Mar. 28, 2016)).

¹⁹ Exhibit 7, Page 35 of 43, (Nelson's October 31, 2018, Appellate Brief) (emphasis added); See also, Page 42 of 43 ("...this Court should reverse the district court's grant of summary judgement on Appellant's race discrimination *and contract causes of action*...") (emphasis added).

adjudication of the issue by a court of competent jurisdiction.” *Efland v. Mills*, No. 2017-001130, 2019 WL 2880950, at *1 (S.C. Ct. App. July 3, 2019) (quoting *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994)). “[T]he doctrine of res judicata has been held to bar an action in state court where the precise point was adjudicated in a federal court action terminated by a directed verdict.” *Jones v. City of Folly Beach*, 326 S.C. 360, 366, 483 S.E.2d 770, 773 (Ct. App. 1997) (citing *McConnell v. Davis*, 128 S.C. 111, 122 S.E. 399 (1924)).

Here, the parties in Nelson’s Federal Lawsuit are identical to the parties named in Nelson’s Ninth Circuit Complaint. Further, the breach of contract cause of action alleged in Nelson’s Federal Lawsuit also involves MUHA’s anti-discrimination and anti-harassment policies as the basis for her cause of action for breach of contract. Moreover, Nelson’s state law cause of action was adjudicated in the federal courts.

When analyzing whether to apply the doctrine of res judicata, South Carolina state courts recognize a decision entered by the federal court as an “adjudication of the issue by a court of competent jurisdiction.” *See, Jones*, 326 S.C. at 366, 483 S.E.2d at 773 (citing *Smith v. Volunteer State Life Ins. Co.*, 201 S.C. 291, 22 S.E.2d 885 (1942)) (“The judgment of the federal court is entitled to the same conclusiveness as is accorded the judgment of a state tribunal.”). Therefore, the doctrine of res judicata bars Nelson from relitigating her breach of contract claim; a claim the District Court and the Fourth Circuit Court of Appeals already ruled upon in granting MUHA summary judgment.

II. Nelson’s Ninth Circuit Complaint Fails to Allege a Cause of Action for Breach of Contract.

Even if Nelson’s Ninth Circuit Complaint were not barred as discussed above, her claim would still find no support and should be dismissed. In her Ninth Circuit Complaint, Nelson goes no further than allege MUHA violated its own, internal, antidiscrimination and anti-retaliation

policies. Even taking the allegations in her Ninth Circuit Complaint as true, an alleged violation of these policies cannot establish a cause of action for breach of contract.

The policies Nelson relies upon in her Ninth Circuit Complaint, in particular, MUHA's anti-discrimination and anti-harassment policies, are insufficient to support Nelson's contract claims because these policies have been routinely held not to, by themselves, constitute a contract. *Grant v. Mount Vernon Mills, Inc.*, 370 S.C. 138, 148, 634 S.E.2d 15, 21 (Ct. App. 2006) (general policy statements do not create or otherwise alter the at-will employment relationship). *Hessenthaler v. Tri-County Sister Help, Inc.*, 365 S.C. 101, 109-11, 616 S.E.2d 694, 698-99 (S.C. 2005) (employer's non-discrimination policies could not serve as basis for breach of contract claim); *Brailsford v. Fresenius Med. Ctr. CNA Kidney Centers LLC*, No. 2:15-CV-00239-DCN, 2015 WL 4459032, at *4 (D.S.C. July 21, 2015) (emphasis add) (citing *Frasier v. Verizon Wireless*, No. 8:08-cv-356, 2008 WL 724037, at *2 (D.S.C. Mar.17, 2008) ("The [d]efendant's promises that 'everyone should feel comfortable to speak his or her mind' and that '[defendant] prohibits retaliation against employees who, in good faith, submit or participate in the investigation of any complaints' 'do[] not create an expectation that employment is guaranteed or that a particular process must be complied with before an employee is terminated.'"); *King v. Marriott Int'l, Inc.*, 520 F.Supp.2d 748, 756 (D.S.C.2007) (finding that the defendant's promise 'that 'there will be no discrimination or recrimination' against an employee who asserts a complaint against the Company' was insufficient to alter the employee's at-will employment status)).

Additionally, and notably, counsel for Nelson has, on multiple occasions, attempted to pursue a cause of action for breach of contract, **without success**, on the same grounds advanced and alleged in Nelson's Complaint. *See Brailsford*, 2015 WL 4459032, at *4 ("...to the extent

[plaintiff's] amended complaint relies on anti-retaliation policies, courts have found such language to be insufficient to form a contract of employment.”); *Odom v. City of Columbia Police Dep't*, No. CV 3:15-4313-MGL-SVH, 2017 WL 9275138, at *7 (D.S.C. Feb. 16, 2017), *report and recommendation adopted*, No. CV 3:15-4313-MGL-SVH, 2017 WL 2952969 (D.S.C. July 11, 2017) (“plaintiffs quote the majority of the anti-discrimination and harassment policies, but do not identify mandatory language, definitive in nature, that promises specific treatment.”); *Yon v. Reg'l Med. Ctr.*, No. 5:14-CV-02098-JMC, 2016 WL 1178202, at *14 (D.S.C. Mar. 28, 2016) (“Upon review of the Four Step Communication and Reporting Process the Non-Retaliation Policy, the court does not find any language therein that is sufficient to establish a genuine issue of fact that [plaintiff] had a “contract” of employment by virtue of these policies.”); *Smith v. Palmetto Denture Care, P.A.*, No. 7:17-cv-1043-AMQ-KFM, 2018 WL 3611368, *3-4 (D.S.C. July 27, 2018)(general references to anti-discrimination policies are not sufficient basis to establish a breach of contract claim).

In summary, there is no legal support, as a matter of law, for Nelson’s assertion MUHA’s policies either did, or lawfully could, serve as the basis for a breach of contract claim.

CONCLUSION

For the reasons discussed, MUHA requests the Court grant its Motion and dismiss Nelson’s Complaint.

s/Emanuel J. Ferguson, Sr.
 Caroline Wrenn Cleveland (SC Bar #64253)
 Bob J. Conley (SC Bar #12243)
 Emmanuel J. Ferguson, Sr. (SC Bar #81431)
 CLEVELAND & CONLEY, L.L.C.
 One Seventy-One Church Street, Suite 310
 Charleston, South Carolina 29401
 Telephone: (843) 577-9626
 Facsimile: (843) 577-6672

ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
eferguson@clevelandlaborlaw.com

Charleston, South Carolina
May 22, 2020

ATTORNEYS FOR DEFENDANT

Exhibit 1

Federal Complaint – January 20, 2017

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Christine G. Nelson,	)	
	)	
Plaintiff,	)	Case No.: 2:17-cv-00187-DCN-KFM
	)	
vs.	)	
	)	COMPLAINT
Medical University	)	
Hospital Authority,	)	
	)	
Defendant.	)	

INTRODUCTION

1. Plaintiff Christine G. Nelson (hereinafter referred to as "Plaintiff") bring damages to redress Defendant Medical University Hospital Authority (hereinafter referred to as "Defendant"), actions in discriminating against Plaintiff on the basis of race, retaliation, breach of contract and breach of contract with fraudulent intent.

JURISDICTION AND VENUE

2. The Court has jurisdiction over this action pursuant to 28 U.S.C. Sections 1331 and 1343 and 42 U.S.C. Section 1981. This Court also has pendant and supplementary jurisdiction over so much of this action as is based on state law.

3. Venue is proper in the Charleston Division, because the causes of action arose therein, the acts and practices complained of occurred there and it is where the Defendant does business and may be found.

PARTIES

4. Plaintiff is a female citizen of the United States of America and resides in Dorchester, South Carolina. Plaintiff began her employment with Defendant as a Registered Nurse on February 15, 1995. Plaintiff continued in the position of a Registered Nurse with Defendant until Plaintiff was terminated on February 27, 2014.

5. The Defendant, located in Charleston, South Carolina, is an organization with the State of South Carolina and is legally organized and existing under the Code of Laws of the State of South Carolina.

6. Upon information and belief, Defendant is an employer within the State of South Carolina and is legally organized and existing under the Code of Laws of the State of South Carolina.

STATEMENT OF CLAIM

7. Plaintiff alleges that she is the victim of the Defendant's discriminatory practices after being wrongfully terminated on February 27, 2014 despite performing her job duties with due diligence and to the best of her abilities.

8. Plaintiff, on February 15, 1995, began working in the position of a Registered Nurse. Plaintiff contends that she performed her job duties as a Registered Nurse without incident; however, Defendant wrongfully terminated Plaintiff when she (Plaintiff) informed a colleague about the Defendant's Anti-Harassment Policy.

9. Plaintiff informed her colleague, Valerie Sutton, Nurse Practitioner, about the Defendant's Anti-Harassment Policy when Plaintiff observed Sutton being harassed and bullied by their supervisor, Tabitha Nolen (WF), Charge Nurse. Plaintiff states that after Sutton filed her complaint, Nolen began to harass and intimidate Plaintiff.

10. Plaintiff, following Defendant's policies and procedures and Defendant's handbook, filed a complaint in response to Nolen's constant retaliatory behavior towards her, but Defendant failed to conduct a proper investigation into Plaintiff's concern about Nolen's behavior.

11. On September 9, 2013, Plaintiff was written up, specifically by Defendant's agent Nolen for allegedly being disrespectful, an allegation Plaintiff denied in her rebuttal statement on or about September 12, 2013. This was pretextual as Nolen issued disciplinary action against Plaintiff as a result of Plaintiff filing a complaint against her (Nolen).

12. Plaintiff, after Defendant failed to respond to her September 12, 2013 rebuttal statement, sent an email on October 9, 2013 to Defendant's agent, Sharon Turner (WF), addressing her (Plaintiff's) concerns and further requesting a meeting to resolve the issues in the workplace. This was to no avail, as Defendant, again, failed to address Plaintiff's concerns about Nolen's retaliatory and abusive behavior.

13. Plaintiff, following Defendant's policies and procedures, contacted Defendant's Employee Assistance and spoke with Tammy Powell who attempted to initiate an investigation into Nolen's actions against Plaintiff. Upon information and belief, Powell was told that she (Powell) should mind her own business, thus halting Powell's attempt to investigate Plaintiff's concerns.

14. Plaintiff contends that Defendant and its agents, specifically Nolen, failed to accommodate Plaintiff after an ergonomic assessment in August 2013 indicated that Plaintiff would need a specific office (to include a cushion, new chair, and a new computer keyboard). Defendant, despite the ergonomic assessment, refused to accommodate Plaintiff and Nolen moved Plaintiff's office to a less accommodating location, which resulted in Plaintiff's inability

to complete her job deadlines. Plaintiff addressed her concerns with Turner, to no avail, as Defendant failed to follow its own policies and procedures by not accommodating Plaintiff's disability.

15. Defendant, and its agent continued to retaliate against Plaintiff (despite their knowledge of her disability) by failing to accommodate Plaintiff and, in fact, Defendant's agents inflicted disciplinary action against Plaintiff claiming she (Plaintiff) was not meeting her work deadlines. Plaintiff states that Defendant's lack of accommodation heavily contributed to her inability to meet the required deadlines, a fact that Defendant was aware of due to the ergonomic assessment.

16. Plaintiff continued to perform her job duties with excellence and due diligence despite Defendant's failure to properly accommodate Plaintiff's disability. Despite Plaintiff's hard work, Nolen continued to intimidate Plaintiff by blatantly yelling at Plaintiff about moving charts and leveling false allegations against Plaintiff.

17. Plaintiff states that Nolen alleged false allegations against her, on or about December 30, 2013, when Nolen accused Plaintiff of looking her "up and down," something that Plaintiff strongly denies. Plaintiff, after being informed by another colleague that Nolen had called security on her, attempted to contact Turner three (3) times to no avail as Turner failed to respond to Plaintiff and address Plaintiff's concerns. This was pretextual as Defendant, and its agents had already determined that Plaintiff would be wrongfully terminated from her position, and therefore failed to investigate any allegations made by (and against) Plaintiff thoroughly.

18. On or about February 18, 2014, Nolen placed Plaintiff on special notification to announce when she (Plaintiff) was taking a lunch break, a practice that Nolen does not require of Plaintiff's Caucasian counterparts. Plaintiff, despite evidence that this was clear harassment under Defendant's own policies and procedures, complied with Nolen's request, however Plaintiff was still subjected to retaliatory behavior.

19. Plaintiff, on February 27, 2014, was wrongfully terminated for allegedly being insubordinate. Plaintiff, in response to the termination followed Defendant's policies and guidelines by filing a timely grievance on March 3, 2014. However, the termination was upheld, on or about May 2014. This was pretextual because Defendant failed to conduct a full and proper investigation into the allegations against its agent, specifically Nolen.

20. Upon information and belief, Plaintiff performed her job with due diligence and without incident despite being subjected to race and disability discrimination.

FIRST CAUSE OF ACTION:
RACE DISCRIMINATION

21. Each and every allegation set forth hereinabove is hereby repeated as fully incorporated herein.

22. Plaintiff is a member of a protected group on the basis of her race. Plaintiff was retaliated against and written up based on her race in violation of 42 U.S.C. Section 1981, retaliation, breach of contract, and breach of contract with fraudulent intent.

23. Defendant, by and through its agents, began a pattern and practice of targeting Plaintiff by continuously writing Plaintiff up after she informed another colleague, Sutton, of her (Sutton's) right to file a complaint about Tabitha Nolen's (WF) abusive and bullying behavior towards her. Plaintiff steadfastly denied the allegations made against her, and states that her Caucasian counterparts, in similar situations as Plaintiff, were not terminated for enforcing the anti-harassment policies provided by Defendant.

24. Plaintiff alleges that Defendant's on the job treatment, retaliation, and wrongful termination were pretextual. Plaintiff alleges that Defendant, through its Agents, initiated discriminatory practices against Plaintiff based on her race when Defendant disciplined Plaintiff and failed to discipline Plaintiff's Caucasian counterparts for the same actions.

25. Defendant, and its agents, were reckless, wanton, and intentional in the discrimination of Plaintiff in the following particulars, to wit:

- a. Knowingly disciplining Plaintiff for false reasons; and
- b. In retaliating against Plaintiff for complaining of the discrimination and inappropriate behavior of the Defendant and its agents.

26. In failing to protect Plaintiff from racial discrimination, preferential treatment, or retaliation, Defendant, and its agents, acted with malice or reckless indifference to the federally protected rights set out under 42 U.S.C. Section 1981.

27. That the aforesaid conduct of Defendant, and its agents and servants, violates South Carolina and the United States of America laws against retaliatory conduct and was, in fact, retaliatory in nature, and in violation of racial discrimination under 42 U.S.C. Section 1981.

28. Defendant's, and its agents, racial discrimination of Plaintiff has caused Plaintiff to suffer substantial damages for pecuniary losses, embarrassment, humiliation, pain and suffering, mental anguish, loss of enjoyment of life, and other pecuniary losses.

29. Due to the racial discrimination by Defendant, its agents, and employees, Plaintiff is entitle to injunctive relief and/or civil damages, back wages, plus interests, payment for lost wages, and punitive damages.

SECOND CAUSE OF ACTION: **RETALIATION**

30. Each and every allegation set forth hereinabove is hereby repeated as fully incorporated herein.

31. Plaintiff was repeatedly subjected to and protested the violations of her federally protected rights within the Defendant's administrative structure.

32. After Plaintiff informed Sutton of her (Sutton's) right to enforce the anti-harassment policy concerning Nolen's abusive attitudes, Defendant retaliated against Plaintiff by practicing a continuing pattern of animus, harassment, and continuous write ups.

33. Due to the retaliatory acts of the Defendant, its agents and employees, Plaintiff is entitled to injunctive relief and/or civil damages, back wages, plus interest, payment for lost wages, and punitive damages.

34. Accordingly, Plaintiff is entitled to compensatory and punitive damages in the nature of the value of her lost wages and benefits, front pay, together with interest thereon, as well as liquidated damages, and her respective attorney's fees for the bringing of this action.

THIRD CAUSE OF ACTION:
BREACH OF CONTRACT

35. Each and every allegation set forth hereinabove is hereby repeated as fully incorporated herein.

36. Defendant publishes and maintains an Employee Handbook, which definitely assures employees of their right to report harassment and bullying and also contains an anti-retaliation clause.

37. Defendant further states, in its Employee Handbook, that it is an Equal Opportunity Employer, when it declares that there will be no discrimination as to race, color, gender, age, religion, disability, national origin, or veterans status. Defendant further states, in its handbook, that it will comply with the requirements of the law in implementing equal employment decisions.

38. Plaintiff and Defendant entered into a binding and valid contract whereby Plaintiff relied on Defendant's, through its agents, reassurance that, pursuant to the handbook and the above policies and procedures, Defendant would protect Plaintiff on the basis of her race and protect her rights under the anti-harassment and anti-retaliation policies. Plaintiff also relied on the Defendant's reassurance that it must follow its Equal Employment Opportunity policy when disciplining its employees.

39. Plaintiff agreed to fulfill the duties of her position in exchange for valuable consideration and salary with the promise of being protected from discrimination, retaliation, and harassment.

40. Plaintiff performed her job duties with due diligence. However, Defendant, through its agents, unjustifiably failed to perform its duties by failing to protect Plaintiff on the basis of her race and failing to protect Plaintiff from the retaliatory actions of its agent, Nolen. Further, Defendant failed to follow its Equal Employment policy when it failed to apply the same consequence for filing complaints to Plaintiff's Caucasian counterparts as it did to the Plaintiff.

41. Defendant, and its agents, had a responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendant, through its agents, instead chose to fail to protect Plaintiff on the basis of her race, retaliated against Plaintiff when she informed a colleague of the anti-harassment policy, and failed to administer the same punishment to Plaintiff as it did the Caucasian counterparts when it came to filing complaints with the Defendant.

42. Defendant's conduct, by and through its agents, was done in bad faith and breached the implied covenant of good faith and fair dealings that is implied in the employment contract.

FOURTH CAUSE OF ACTION:
BREACH OF CONTRACT WITH FRAUDULENT INTENT

43. Each and every allegation set forth above is hereby repeated as if fully incorporated herein.

44. Defendant, by and through its agents, has failed to fulfill its obligation under its own written policy and has breached the terms thereof by reason of an intentional design on its part to defraud Plaintiff.

45. In furtherance of such intentional design, Defendant, through its agents, to include Nolen, wrote Plaintiff up for insubordination, which Plaintiff clearly denied, and terminated her based off of such reason when the actual reason for her termination stemmed from Plaintiff filing a complaint against Nolen and for Plaintiff encouraging her colleague to do the same. Plaintiff states that this fact is proven because Plaintiff was written up and terminated only after she (Plaintiff) and her colleague filed complaints against Nolen (Defendant's agent) due to race discrimination and animus.

46. Defendant's conduct, by and through its agents, was done in bad faith and breached the implied covenant of good faith and fair dealings that is implied in the employment contract and handbook.

JURY TRIAL DEMANDED

47. Plaintiff requests a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Honorable Court declare that Defendant's, and its agents, actions complained of herein violated the rights guaranteed to Plaintiff and issue this judgment,

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

(2) Issuing an injunction enjoining Defendant, its agents, employees, successors, attorneys, and those acting in concert or participation with the Defendant, and its agents, and at its direction from engaging in the unlawful practice shown to be in violation of 42 U.S.C. Section 1981 and any other violations.

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

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

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

Respectfully Submitted:

By: /s/ Donald Gist
Donald Gist
Gist Law Firm, PA
Post Office Box 30007
Columbia, South Carolina 29230
Tel.: (803) 771-8007
Fax: (803) 771-0063
Attorney for Plaintiff

January 18, 2017

Exhibit 2

Report of Magistrate Judge – April 18, 2018

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

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

Christine G. Nelson,

Plaintiff,

vs.

Medical University Hospital Authority,

Defendant.

Civil Action No. 2:17-187-DCN-KFM

REPORT OF MAGISTRATE JUDGE

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

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

I. FACTS PRESENTED

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

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

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. APPLICABLE LAW AND ANALYSIS

A. Summary Judgment Standard

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

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

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

B. Section 1981 Claims

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

1. Section 1983 is Exclusive Remedy

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

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

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

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

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

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

2. Eleventh Amendment Immunity

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

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

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

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

3. *McDonnell Douglas* Analysis

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

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

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

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

A. Not in that instance, no.

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

A. Not that I know of.

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

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

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

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

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

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

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

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

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

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

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

Page 14 of 22

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

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

The plaintiff argues as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Breach of Contract Claims

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

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

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

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

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

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

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

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

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

employer's right to terminate an employee at any time, for any reason." *Brailsford*, 2015 WL j4459032, at *4 (citing *Grant*, 634 S.E.2d at 20).

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

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

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

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

III. CONCLUSION AND RECOMMENDATION

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

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

April 18, 2018
Greenville, South Carolina

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

Exhibit 3

**Objections to the Report and Recommendation of the Magistrate Judge -
May 7, 2018**

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Christine Nelson,	)	CASE NO.: 2:17-cv-00187-DCN-KFM
	)	
Plaintiff,	)	
	)	
vs.	)	PLAINTIFF'S OBJECTIONS TO THE
	)	REPORT AND RECOMMENDATION
	)	OF THE MAGISTRATE JUDGE
Medical University Hospital Authority,	)	
	)	
Defendant.	)	

I. INTRODUCTION

The Plaintiff, Christine Nelson, hereby submits this memorandum objecting to the Magistrate's Report and Recommendation. Plaintiff filed her Complaint on January 20, 2018, alleging the following causes of action pursuant to 42 U.S.C. Section 1981 (Entry #1). Defendant's filed an Answer to Plaintiff's Complaint on February 13, 2017 (Entry #5). The parties thereafter diligently participated in the discovery process.

The Defendant filed a Summary Judgment motion on October 10, 2017 (Entry #27). Plaintiff subsequently filed a Memorandum in Opposition to Defendant's Motion on December 28, 2017 (Entry #36). Defendant then filed a Reply to the Opposition on January 29, 2018 (Entry #43).

After reviewing the motions and responses, the Honorable Kevin McDonald issued a Report and Recommendation recommending that this Court grant the Defendant's Motion for Summary Judgment with regard to Plaintiff's claims. The Magistrate filed her Report and Recommendation on April 18, 2018 (Entry # 44). Plaintiff files this timely memorandum objecting to the Magistrates Report & Recommendation.

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

II. STANDARD OF REVIEW

The Report and Recommendation of a United States magistrate judge is made in accordance with 28 U.S.C. § 636 and the local rules of this district concerning reference to a magistrate judge. See United States Magistrates, Local Rule 73.02, D.S.C.; *Bowman v. Bordenkircher*, 522 F.2d 209 (4th Cir. 1975).

Under 28 U.S.C. § 636(b), [a] judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” 28 U.S.C. § 636(b)(1). This Court may also “receive further evidence or recommit the matter to the magistrate with instructions.” *Id.* Furthermore, it is noted that the magistrate makes only a recommendation to the Court. The recommendation has no presumptive weight, and responsibility for making a final determination remains with this Court. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976).

III. SUMMARY JUDGMENT STANDARD

Summary judgment is an extreme and treacherous device, which should not be granted unless the moving party has established a right to judgment with such clarity as to leave no room for controversy and unless the moving party could not be entitled to recover under any discernible circumstance. *Moore v. Ernest-Jackson*, 123 F.3d 1082 (8th Cir. 1997). The movant for summary judgment must demonstrate entitlement beyond a reasonable doubt. *Mustang Fuel Corp. v. Youngstown Sheet and Tube Co.*, 516 F.2d 33 (10th Cir. 1975). A Plaintiff can defeat an employer’s summary judgment motion with the testimony of a single witness, which may be himself. *Jackson v. University of Pittsburgh*, 826 F.2d 230 (3rd Cir. 1987), cert denied 108 S.Ct.

732, 484 U.S. 1020. 98 L.Ed.2d 680. Summary judgment is inappropriate where reasonable minds could differ. *EEOC v. Clay Printing*, 955 F.2d 936, 946 (4th Cir. 1991).

The Supreme Court has stated “[under Rule 56(c)], summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law” in our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). The moving party bears the burden of showing that there is no genuine issue and that he is entitled to judgment. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). Judgment as a matter of law is proper only if “there can be but one reasonable conclusion as to the verdict.” *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250, 106 S.Ct. 2505 (1986).

IV. FACTS

Plaintiff fully relies on and incorporates by reference the facts as alleged in her Memorandum of Law in Opposition to Defendant’s Motion for Summary Judgment as set forth at _____, Entry # ____.

V. OBJECTIONS

In the instant case, the Magistrate gravely errs with respect to the legal conclusions drawn by the court supporting the Magistrate’s recommendation that Plaintiff’s claims be dismissed on Summary Judgment.

Specifically, the Magistrate, in support of its recommendation that Plaintiff's claims be dismissed, erroneously draws the following legal conclusions: 1.) That Plaintiff's 1981 claims, construed as Section 1983 claims, fail to give rise to a genuine issue of material fact regarding a.) demonstrating a *de facto* policy and practice of defendant allowing Caucasian workers to bring witnesses to disciplinary meetings and b) that Plaintiff has failed to rebut Defendant's asserted non discriminatory excuse for terminating Plaintiff (i.e. that Defendant terminated Plaintiff for being insubordinate), 2.) that although Plaintiff has demonstrated a *prima facie* case of race discrimination and retaliation, Plaintiff has failed to show that the Defendant's asserted excuse for unlawfully terminating Plaintiff is pretextual, and 3.) that Defendant's policies are insufficient to give rise to Plaintiff's contract based claims and that Defendant's purported disclaimers are sufficient under the law to block Plaintiff's breach of contract claims. Defendant's arguments are erroneous for the reasons and specific objections stated below.

1. Plaintiff has demonstrated a genuine issue of material fact in support of her claims that Defendant has a *de facto* policy of allowing Caucasian workers to bring witnesses to disciplinary meetings whereas Plaintiff was not allowed to do such.

The magistrate wholly discounts as hearsay the eye witness testimony of Ms. Dorothy Scott, President of the Charleston Chapter of the NAACP, who stated during Ms. Nelson's grievance hearing that it was revealed that the Defendant has a *de facto* policy of allowing Caucasian workers to bring witnesses to disciplinary meetings and that Defendant has done such on numerous previous occasions.

Although the magistrate asserts that Ms. Scott's witnessing of Defendant's policies are hearsay, it is clear that Ms. Scott's affidavit is based on what Ms. Scott actually witnessed and opposed during the grievance hearing as compared to information which she heard from a second hand source. As Ms. Scott actually witnessed the application of this policy, it is inappropriate

for the magistrate to wholly discount Ms. Scott's observations of Defendant's *de facto* policies and procedures. Although the Defendant asserts that Ms. Scott's statements regarding the Defendant's practice of allowing Caucasian workers to bring witnesses to disciplinary meetings are asserted to establish their "truth", it is clear that her testimony is provided to establish the Defendant's *de facto* policies regarding the same. Ms. Scott is therefore competent to testify regarding her knowledge of such policies as she was intimately involved in opposing such policies by nature of her role as President of the Charleston Chapter of the NAACP and because she was an active participant in Defendants' grievance hearings such that her observations regarding Defendants' policies clearly possess sufficient indicia of truth so as to be considered by the Court.

"The true nature of the Hearsay rule is nowhere better illustrated and emphasized than in those cases which fall without the scope of its prohibition. The essence of the Hearsay rule is the distinction between the testimonial (or assertive) use of human utterances and their non-testimonial use. The theory of the Hearsay rule (ante, Sect. 1361) is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertor becomes the basis of our inference, and therefore the assertion can be received only when made upon the stand and subject to the test of cross-examination. If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply." (Italics supplied.) *Terry v. United States*, 51 F.2d 49 (4th Cir., 1931)

"The prohibition of the Hearsay rule, then, does not apply to all words or utterances merely as such. If this fundamental principle is clearly realized, its application is a comparatively simple matter. The Hearsay rule excludes extrajudicial utterances only when offered for a special

purpose, namely, as assertions to evidence the truth of the matter asserted." In 22 C. J. page 199, hearsay evidence is defined as follows: "Evidence is called hearsay when its probative force depends, in whole or in part, on the competency and credibility of some person other than the witness by whom it is sought to produce it." See, also, 10 R. C. L. 958; 6 Encyclopedia of Evidence 443." *Id.*

Ms. Scott's observations are consistent with Ms. Nelson's observations during the course of Ms. Nelson's tenure and are based on Ms. Scott's own independent and first-hand observations, it would, therefore, be improper for Plaintiff's case to be dismissed at this early juncture.

In addition to the testimony of Ms. Scott regarding her having witnessed the disparity in how Ms. Nelson was treated as opposed to her Caucasian counterparts, Ms. Nelson's other witnesses, similarly, all have observed in painstaking detail numerous instances where the Defendant treated African Americans disparately as compared to their similarly situated Caucasian colleagues, to include Ms. Nelson. It is improper for the Magistrate to completely disregard the testimony of Ms. Nelson's numerous witnesses regarding their accounts of Defendant's *de facto* policies of racial discrimination and harassment.

As all facts are construed in favor of Plaintiff at this procedural stage, the Magistrate improperly failed to consider the testimony of Plaintiff and her witnesses regarding the continual pattern of race discrimination and Defendant's *de facto* policy of disparate treatment and disregard of Plaintiff's complaints of race discrimination.

Plaintiff therefore requests that this Honorable Court reject the Report and Recommendation of the Magistrate and allow Plaintiff's Section 1983 claims to proceed to trial

so that a jury may consider the veracity of Plaintiff's claims and that of her witnesses as compared to the claims of the Defendant.

2. Defendant's asserted excuse for terminating Plaintiff's employment is blatantly pretextual.

Although the Magistrate has stated that Plaintiff has shown a *prima facie* case of race discrimination and retaliation, the Magistrate has, nevertheless, recommended that Plaintiff's claims for race discrimination and retaliation be dismissed as the Magistrate apparently believes that the Defendant was justified in terminating Ms. Nelson for purported insubordination in connection with Ms. Nelson not appearing at the disciplinary meeting and harassment session called by the Defendant immediately prior to Ms. Nelson's termination.

It is readily apparent that the Magistrate's Report and Recommendation completely misses the mark by failing to consider Ms. Nelson's sworn testimony that she was not insubordinate, and that she was confused regarding the procedure given Defendant's *de facto* policies and the mixed and confusing messages given by Schaffner in hanging the telephone up in Plaintiff's face prior to Plaintiff being given a full understanding of the appropriate procedure. This is clearly referenced at length in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment which explains, consistent with the evidence in this case, that with respect to the at issue meeting with Schaffner, there is no testimony that Ms. Nelson explicitly refused to attend the meeting. Ms. Nelson simply requested that she receive the same treatment as her Caucasian colleagues in connection with the option to bring a witness to the meeting in light of the continued unlawful treatment that she had received at the direction of these very same Managers. Ms. Nelson was not disrespectful or out of line, rather it was Schaffner who demonstrated her racial hostility and retaliatory animus towards Ms. Nelson by hanging the telephone up in her face after Ms. Nelson's request. Ms. Nelson, having not received

authorization to participate in the meeting on equal terms as her similarly situated coworkers, had every justification to question the motivations and hostile intent behind this meeting. (Ex.4: Affidavit of Elise Cromwell, Ex.3: Affidavit of Dorothy Scott, Ex. 1: Nelson Deposition Excerpts at pg.70) – Pl. Memo in Opposition (Entry #36).

Plaintiff should not be penalized on account of the Defendant's clear failure to clarify the procedure articulated by Shaffner in connection with the "at issue" meeting. Nevertheless, the Magistrate has requested that this Court allow the confusion created by Defendant and its management to inure to Defendant's benefit as opposed to Plaintiff's benefit.

As Ms. Nelson has presented genuine issues of material fact which support her claim that the Defendant did not terminate her for legitimate reasons, but rather that Defendant sought to confuse the issues and terminate Plaintiff in a pretextual manner, Plaintiff should be afforded an opportunity to present her case to a jury for a just determination of the facts in the instant case in accordance with her interpretation and perspective regarding her termination. It should be left up to the jury as opposed to the Court to make a determination regarding who is telling the truth. The Magistrate has elected to usurp the role of the jury in this regard. Plaintiff respectfully requests that this Court does not do the same.

3. Plaintiff has raised genuine issues of material fact sufficient to allow her contract based claims to go to a jury.

The Defendant, in its Motion, has erroneously attempted to hide behind its disclaimers in support of its argument that Plaintiff's contract based claims should not go to a jury. Although the Magistrate elected to base its recommendation upon this erroneous interpretation, it is clear that this interpretation belies the facts in this case.

Specifically, Plaintiff has demonstrated that her contract based claims are not based merely upon the documents specifically disclaimed by the Defendant but, rather, that Defendant

created an environment where numerous policy documents, disclaimed and non disclaimed alike, are distributed and relied upon by employees in a hodge podge manner which must be construed against the Defendant as opposed to Plaintiff.

As Plaintiff discussed at length in her Memorandum in Opposition to Defendant's Motion for Summary Judgment, the facts in this case demonstrate that Plaintiff fully relied upon the contractual documents provided by Defendant which deal directly with her being promised protection from race based discrimination and retaliation. It is the Defendant who has failed to keep its end of the bargain in this regard as is evidenced by the testimony of both the Plaintiff and her numerous witness affidavits. In addition, Defendant has not tendered a signed disclaimer in support of their claim that Ms. Nelson agreed not to be bound by this documentation. Further, the training documents which the Defendant has provided to Ms. Nelson is devoid of any such disclaimers and such documentation provides integral insight into the training environment and how these contractual documents were viewed by both the Defendant and its employees.

Thus the record, to include the passages provided from Ms. Nelson's deposition, as well as the witness affidavits support Plaintiff's position that the Defendant completely disregarded the contractual terms of these clearly promissory documents. As a result, the Plaintiff has presented genuine issues of material fact to be determined by the fact finder as it relates to her breach of contract claims.

Defendant should not be allowed to hide behind its own errors in an effort to oppose Plaintiff's contract based claims. As Plaintiff has demonstrated that genuine issues of material fact exist in regard to her contract based claims, such claims must be allowed to proceed to a jury for a just determination of their veracity.

VI. CONCLUSION

Based on the foregoing reasons, Defendants' Motion for Summary Judgment must be denied and Plaintiff's claims should be allowed to proceed through the discovery process.

Respectfully submitted,

GIST LAW FIRM, P.A.

/s/ Donald Gist

Donald Gist, Esquire Federal ID# 7178
Aaron Wallace, Esquire Federal ID# 11469
4400 North Main Street (29203)
Post Office Box 30007
Columbia, South Carolina 29230
Tel. (803) 771-8007
Fax: (803) 771-0063
Email:
aaronwallace.gistlawfirm@gmail.com
dtommygist@yahoo.com

May 6, 2018

Exhibit 4

District Court Order – August 7, 2018

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

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

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

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

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

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

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

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

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

August 7, 2018
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

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

Exhibit 5

Judgment – August 7, 2018

UNITED STATES DISTRICT COURT

for the
District of South CarolinaChristine G. Nelson*Plaintiff*

v.

Medical University Hospital Authority*Defendant*

Civil Action No. 2:17-cv-00187-DCN

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one)*:☐ the plaintiff☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____
recover costs from the plaintiff *(name)* _____.☒ other: The Report and Recommendation of Magistrate Judge McDonald is affirmed and defendant's motion for summary judgment is **GRANTED**.This action was *(check one)*:☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.☒ decided by the Honorable David C. Norton, United States District Judge on a motion for summary judgment.

Date: August 7, 2018

CLERK OF COURT

s/John P. Bryan, Jr.

Signature of Clerk or Deputy Clerk

Exhibit 6

Notice of Appeal – September 5, 2018

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Christine G. Nelson,	)	
	)	C.A. No.: 2:17-CV-0187-DCN
Plaintiff,	)	
	)	
v.	)	
	)	NOTICE OF APPEAL
	)	
Medical University of South Carolina,	)	
	)	
Defendant.	)	

Notice is hereby given that Plaintiff Christine Nelson in the above-named case, hereby appeals to the United States Court of Appeals for the Fourth Judicial Circuit from the order granting Defendant Medical University Hospital Authority's Motion for Summary Judgment (ECF#27) filed on October 10, 2017 and which was granted in this action on the 7th Day of August, 2018 and the Judgment entered against Plaintiff on the 7th Day of August 2018 (ECF#50).

Respectfully Submitted,

/s/ Donald Gist
Gist Law Firm, P.A.
Donald Gist Fed I.D. 7178
Aaron Wallace Fed I.D. 11469
4400 N. Main Street
Columbia, South Carolina 29203
Telephone: (803) 771-8007
Attorneys for Plaintiff

August 31, 2018

Exhibit 7

Appellate Brief – October 31, 2018

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

18-2038

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHRISTINE NELSON

Plaintiff-Appellant

v.

MEDICAL UNIVERSITY HOSPITAL AUTHORITY

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE PLAINTIFF-APPELLANT URGING REVERSAL

DONALD GIST, ESQ
AARON WALLACE, ESQ
Gist Law Firm, PA
4400 North Main Street
Columbia, SC 292093
T: 803-771-8007

AATTORNEYS FOR APPELLANT

BOB CONLEY, ESQUIRE, ESQ
EMMANUEL FURGESON, ESQ
Cleveland & Conley, LLC
171 Church St #310
Charleston, SC 29401
T: 843-577-9626

ATTORNEYS FOR APPELLEE

I. TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF AUTHORITIES.....	2
JURISIDICTIONAL STATEMENT.....	6
STATEMENT OF THE ISSUES.....	7
STATEMENT OF THE CASE.....	7
STATEMENT OF THE FACTS.....	8
SUMMARY OF THE ARGUMENTS.....	16
STANDARD OF REVIEW	17
ARGUMENTS	
I. The District Court erred in its determination that Appellant's claims pursuant to 42 USC Section 1981 cannot be analyzed under the framework of 42 USC Section 1983.	
II. The District Court erred in its determination that Appellant offers no substantive evidence that Appellee pretextually terminated her employment as an act of race discrimination and retaliation for protected activity in violation of 42 USC Section 1981 and 1983.	
III. The District Court erred in its determination that Appellant's policies and procedures are insufficient to give rise to a claim for breach of contract.	
CONCLUSION.....	42
STATEMENT WITH RESPECT TO ORAL ARGUMENT.....	42
CERTIFICATE OF COMPLIANCE.....	42
CERTIFICATE OF SERVICE.....	43

II. TABLE OF AUTHORITIES

CASESPAGE

See Smith v. Virginia Commonwealth University, United States Court of Appeals, Fourth Circuit, May 10, 1996, 84 F.3d 672 (1996). 17

Jett v. Dallas Independent School District Dallas Independent School District v. Jett, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).....18

Monell v. Department of Social Services, Id. at 690–91, 98 S.Ct. at 2035–36. 2:17-cv-00187-DCN-----19

Lynch v. Household Fin. Corp., 405 U.S. 538(1972). -----20

NCAA v. Tarkanian, 488 U.S.179, 192 (1988) -----20

Edmonson v. Leesville Concrete Co., 500 U.S. 614, 610 (1991) -----20

Hurtado v. California, 110 U.S. 516, 527, 4 S.Ct. 111, 116–117, 28 L.Ed. 232 -----24

Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662 -----24

Collins v. Harker Heights, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071, 117 L.Ed.2d 261 -----24

Rochin v. California, 342 U.S. 165, 172–173, 72 S.Ct. 205, 209–210, 96 L.Ed. 183.2:17-cv-00187-DCN -----24

Lenard v. Argento, 699 F.2d 874, 886 (7th Cir.1983), *cert. denied*, 464 U.S. 815, 104 S.Ct. 69, 78 L.Ed.2d 84 (1983). -----26

Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir.1981). -----26

Davis v. Durham Mental Health Dev. Disabilities Substance Abuse Area Auth., 320 F. Supp.2d 378, 403 (M.D.N.C. 2004). -----28

Milligan v. City of Newport News, 743 F.2d 227, 229–30 (4th Cir.1984) -----29

Spell v. McDaniel, 824 F.2d 1380, 1391 (4th Cir.1987) -----29

Bryant v. Aiken Regional Med. Ctrs., Inc., 333 F.3d 536, 545, n.3 (4th Cir. 2002). --
-----29

Addison v. CMH Homes, Inc., 47 F. Supp. 3d 404, 416 (D.S.C. 2014). -----
29

Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir.1995)). -----29

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793 (1973). -----29

Shun-Lung Chao v. Int'l Bus. Machs. Corp., 424 F. App'x 259, 260 (4th Cir. 2011)
-----29

Chambers v. Med. Univ.Hosp. Auth., C.A. No. 2:11-cv-261-RMG, 2012 WL
2888802, at *4 (D.S.C. July 13, 2012). -----30

Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 281 (4th Cir. 2015) (citation
omitted). -----30

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-55 (1981) -----30

Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000). -----
31

Dennis v. Columbia Colleton Med. Ctr., 290 F.3d 639 (4th Cir.2002) -----32

EEOC v. Sears, 243 F.3d 846 (4th Cir.2001) (citing *Reeves*). -----33

Gaskins v. Blue Cross-Blue Shield of South Carolina, 271 S.C. 101, 245 S.E.2d
598 (1978). -----35

Prescott v. Farmers Tel. Co-op., Inc., 335 S.C. 330, 335, 516 S.E.2d 923, 926
(1999) (emphasis added) -----35

Regions Bank v. Schmauch, 354 S.C. 648, 660, 582 S.E.2d 432, 439
(Ct.App.2003). -----35

Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co., supra, at 220, 437
S.E.2d 122, S.E.2d at 125 -----36

Broadway v. Jeffers, 185 S.C. 523, 530-31, 194 S.E. 642, 645 (1938). -----36

McLaurin v. Hamer, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932). -----36

Stiles v. Am. Gen. Life Ins. Co., 335 S.C. 222, 224, 516 S.E.2d 449, 450 (1999). ---
-----36

Conner v. City of Forest Acres, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002). ----
-----37

Small v. Springs Indus., Inc., 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987). -----
---37

Williams v. Riedman, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct.App.2000). -----
---37

Fleming v. Borden, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994). -----37

Horton v. Darby Elec. Co., 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) -----
37

Ex parte Amoco Fabrics & Fiber Co., 729 So.2d 336, 339 (Ala.1998) -----38

Ross v. Times Mirror, Inc., 164 Vt. 13, 665 A.2d 580, 584 (1995) -----38

Bookman v. Shakespeare Co., 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 21
(Ct.App.1994). -----38

Hessenthaler v. Tri-County Sister Help, Inc. 365 S.C. 101, 616 S.E.2d 694
S.C.,2005. -----38

III. STATUTES

42 USC §1981

42 USC §1983.

IV. OTHER AUTHORITIES

Section 1 Fourteenth Amendment to the United States Constitution.

Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13
Indus. Rel. L.J. 326, 375-76 (1991-92)); cf.

Restatement (Second) of Contracts § 24 (1981).

82 Am.Jur.2d Wrongful Discharge § 84 (1992).

V. JURISDICTIONAL STATEMENT

This is an appeal from Summary Judgment which was entered in a civil case in Federal District Court. This Court has jurisdiction as this was a case filed pursuant to 42 USC Section 1981 / 1983 with the Court exercising supplemental jurisdiction over Appellant's State Law Claims.

VI. STATEMENT OF THE ISSUES

Question I

Did the District Court err in its determination that Appellant's claims pursuant to 42 USC Section 1981 cannot be analyzed under the framework of 42 USC Section 1983?

Question 2

Did the District Court err in its determination that Appellant offers no substantive evidence that Appellee pretextually terminated her employment as an act of race discrimination and retaliation for her participation in protected activity in violation of 42 USC Section 1981 and 1983?

Question 3

Did the District Court err in its determination that Appellant's policies and procedures are insufficient to give rise to a claim for breach of contract?

VII. STATEMENT OF THE CASE

Appellant Christine Nelson filed this action against her former employer, Appellee Medical University Hospital Authority, seeking damages for her unlawful termination from employment in violation of 42 USC Section 1981 and 42 USC Section 1983 and for breach of contract arising from her termination from employment.

After the completion of discovery, on October 10, 2017, the Appellee moved for Summary Judgment pursuant to Federal Rule of Civil Procedure 56 asserting that no unlawful race discrimination or retaliation had occurred regarding Appellant's termination from employment and that no contractual breaches took place.

In an order dated August 7, 2018, the court ruled in favor of Appellee and granted Summary Judgment against Appellant. This appeal followed.

VIII. STATEMENT OF THE FACTS

The facts in this case are established and Appellant has shown by ample witness testimony, and personal testimony, that the Appellee Medical University Hospital Authority is an environment with *de facto* policies and procedures that treat African Americans disparately under similar circumstances as Caucasians in a manner which has directly impacted the Appellant as it resulted in her being unlawfully harassed due to her race and terminated from employment.

Despite falsely making numerous employment promises embodied in the language of their contractual documents to include employment handbooks, those promises which include non-retaliation, and equal treatment based on race, were utterly disregarded by Appellee's Management staff with respect to the African Americans who work for the Appellee and with respect to the Appellee's treatment of Appellant.

Appellant's employment was terminated on February 27, 2014 despite her many years of service since the 1980s and her excellent track record of job performance. After her service in the eighties concluded she was rehired in 1995 by the Appellee on account of her excellent track record of service.;

During the interim period between 1989 and 1995, Appellant continued to practice as a nurse gaining both experience and knowledge as a nurse until returning to service at the Medical University Hospital Authority in 1995. (J/A 000209)

During the course of her many years of service laboring for the Appellee, Appellant witnessed and was a victim of many instances of unlawful race discrimination. As Appellant was both a victim and a witness to a constant barrage of unlawful race discrimination levied against African Americans, she spoke out against it and protested this unlawful treatment at the highest levels within the organization to include the Appellee's Board of Directors. (J/A 000209).

As a result of Appellant's vigorous and unwavering advocacy on behalf of herself and other African American workers, the Appellee set out to destroy Appellant's distinguished career.

Specifically, during the course of 2013-2014, a Caucasian female named Tabitha Nolen became Appellant's supervisor. Nolen made it a mission to destroy Appellant in all possible ways. Nolen was both racially hostile and retaliatory in

the manner in which she treated Appellant, to include unjustified writeups, yelling and screaming at Appellant for no apparent reason, and pervasive harassment due to Appellant's status as an African American. Nolen placed Appellant at desks with adverse seating positions just to harass her. (J/A 000210).

Despite Appellant making numerous complaints, the Appellee did nothing to address Appellant's concerns. (J/A 000210). Appellant's complaints to her management do nothing but highlight the callous disregard and retaliatory animus that she was met with on account of complaining of the racial harassment and retaliation that Nolen meted out to her on a daily basis. (J/A 000210).

On February 25, 2014, Appellant was inputting patient data into the computer at the end of her shift when she was approached by Nolen who aggressively came to her and started berating her for allegedly "not working" despite the fact that Appellant was performing her assigned job tasks and the necessary procedure of charting information regarding patients. Nolen yelled and berated Appellant in front of her fellow employees at that time. Appellant made numerous attempts to complain to Sharon Turner, Nurse Manager regarding how she was treated by Nolen, but was met with nothing but callous disregard. (J/A 000210).

On February 27, 2014, Appellant was contacted by Turner who indicated to her that she (Appellant) was required to meet with Turner, the Department

Director, Marilyn Schaffner (WF), and Nolen. (J/A 000210). Appellant, shortly thereafter, contacted Schaffner and indicated that she would like to either have a witness present or tape record the meeting. This was a procedure, a *de facto* policy, which the Hospital allows for Caucasian employees, but which was not available to Appellant as an African American. (J/A 000211). This *de facto* policy existed as it allowed the Appellee unfettered ability to harass and racially discriminate at will against African Americans.

Appellant, understandably fearful given Nolen and Management's pattern of hostile treatment towards her, sought to avail herself of this procedure. Rather than afford Appellant the opportunity to do such, Schaffer got hostile with Appellant upon making this request and in a very disrespectful and racially hostile manner, hung the telephone up in Appellant's face. (J/A 000211).

On February 27, 2014, Appellant was terminated from her employment with the Medical University Hospital Authority.

Now although Appellant was subsequently terminated with the pretextual allegation that she was insubordinate by failing to attend the meeting, it is clear that she was fearful and traumatized by Schaffer's hostility and Nolen's clear retaliatory and racial animus towards her and racially disparate administration of the policy and practice of allowing a witness to attend such meetings.

The testimony in this case which has been provided both by Appellant and her witnesses shows that the Appellee had a policy and practice of allowing Caucasians to bring witnesses to such meetings whereas the Appellee did not authorize Appellant to do such under similar circumstances. In addition, Appellant was terminated with improper procedure as no Human Resources personnel were present during her termination, which contributes to the contractual violations shown by the evidence in this case. (J/A 000212).

Eye Witness Accounts

During the course of 2013-2014 when the events leading up to the instant action took place, Appellant had the unfortunate experience of working in the Appellee's Preoperative Clinic in the midst of a very racist environment with individuals who exhibited very harsh racial and retaliatory animus towards both Appellant and African American workers in general.

Even currently employed nurse, Elise Cromwell (BF), testified in her affidavit regarding the hostile and retaliatory manner that Appellee's Highest Level Managers such as Marilyn Shaffner (WF), CEO of Nursing, Helena Bastian (WF), HR Manager, and Karen Weaver (WF), Director of Surgical Services treated African American employees. (J/A 000212). Ms. Cromwell's undisputed and uncontested affidavit even recounts her interactions with Appellant's direct supervisor during 2014, Tabitha Nolen (WF), as being beset with racial hostility

and glaring, discourteous mistreatment during even the most casual of brief interactions. (J/A 000212).

In addition to the testimony which Ms. Cromwell provided at great risk to herself, Ms. Valerie Bailey (BF), who worked as an employee of the Appellee for forty-two years, and who was the Ward Secretary / Clerk for the Perioperative Clinic where Appellant worked during 2013-2014, provided a detailed and uncontested affidavit which recounts Appellant's interactions with Nolen as being driven by hostility. Ms. Bailey indicates that Ms. Nolen, who became Appellant's Charge Nurse during mid-2013, interacted with Appellant with hostility despite Appellant being a courteous and respectful employee even in her dealings with Ms. Nolen. Significantly in 2014 and leading up to Appellant's termination, Ms. Bailey indicates that she personally witnessed Appellant make direct complaints to Management regarding Ms. Nolen's clearly racially disparate treatment of her, and that Appellant was only met with increased hostility as a result of such complaints all in violation of the policies and procedures of the Appellee as it relates to their complaint procedure and policies against retaliation. Ms. Bailey's uncontested affidavit even indicates that Bailey was asked by Appellee to spy on Appellant. Although Bailey refused this racist assignment (which was not given regarding any whites) it is clear that Nolen was motivated by racial hostility against Appellant in her treatment of Appellant. Given Ms. Bailey's

unique position as the Ward Secretary she was in a position to observe many of the interactions which took place daily on Appellant's ward and based on her eye witness testimony she testified that the hospital took no steps to address Appellant's numerous complaints regarding Ms. Nolen as it relates to the racist and retaliatory treatment which Nolen meted out to Appellant daily. (J/A 000213). Indeed, the Hospital's defacto policy of allowing such behavior to go unchecked is testified to by Appellant and fully corroborated by her witnesses' testimony (J/A 000213).

Separate and apart from the harrowing eyewitness accounts of the on the job racial harassment and retaliation which Appellant received, there are several community leaders who advocated on Appellant's behalf during her grievance hearing and both prior and subsequent to her termination. These witnesses, who were completely disregarded by the District Court, had both an opportunity to learn the honest and trustworthy nature of Appellant's character as well as the callous, racially discriminatory, and retaliatory nature of her oppressors within the Appellee's organization as well as the Appellee's racially oppressive and unlawfully retaliatory tactics.

One of the community leaders who advocated fully on Appellant's behalf was the President of the Charleston Chapter of the NAACP, Ms. Dorothy Scott. In her affidavit Ms. Scott testified that Appellant came to her for assistance in 2014 as

a result of the adverse on the job treatment she had received at the hands of the Appellee. Ms. Scott found Appellant to be honest and trustworthy as a person. As a result of Ms. Scott's involvement advocating on Appellant's behalf, she became aware of the racially disparate treatment which was perverse throughout Appellee's organization. In fact, Ms. Scott recounts specifically, that a Caucasian female, under similar circumstances to that of Appellant was allowed to bring a witness to a supervisory meeting similar to the one which Appellant was not authorized to bring a witness to. This *de facto* policy of Appellee which treats African Americans in a disparate manner as compared to Caucasians certainly continually created cause for alarm with Appellant and other similarly situated African American workers. The Appellee as a purported State Agency certainly had an obligation to ensure that both Caucasians and African Americans had equal treatment under the law pursuant to the Fourteenth Amendment. Despite not being an employee of the Appellee, Ms. Scott's many years of experience as a community activist and former manager allowed her, after a review of Appellee's policies and procedures, to determine that Appellant's termination was procedurally improper and she notes in her testimony the difference in how Appellant was treated as compared to a similarly situated Caucasian employee. (J/A 000215).

In addition, the affidavits of Thomas A. Dixon and Leonard Riley, Jr., who are other community leaders, specifically recount how Appellant attended Medical University Hospital Authority Board Meetings and advocated for African American workers and herself at the highest level within the organization and even note that Appellant was procedurally deprived of due process during the course of her grievance hearing. In fact, Appellant was met with a barrage of unlawful retaliation as a result of these continual lawful protests at the highest administrative level, and was ultimately terminated from her job as a result of these protests. (J/A 000215).

IX. Summary of the Arguments

- I. The District Court erred in its determination that Appellant's claims pursuant to 42 USC Section 1981 cannot be analyzed under the framework of 42 USC Section 1983.

At the District Court level the court found that Appellant's claims cannot be characterized pursuant to 42 USC Section 1983 after being filed as claims pursuant to 42 USC Section 1981. Appellant, as stated fully below, will show that this finding is in error based upon the applicable case law and rules of this Court from both a procedural and substantive framework.

- II. The District Court erred in its determination that Appellant offered no substantive evidence that Appellee pretextually terminated her employment as an act of race discrimination and retaliation for her

participation in protected activity in violation of 42 USC Section 1981 and 1983?

At the District Court level the court found that, despite Appellant having shown a *prima facie* case of race discrimination and retaliation, that Appellant failed to show that Appellee's adverse actions against Appellant were pretextual. Appellant, as stated fully below, will show that this finding is in error based upon the applicable case law and rules of this Court from both a procedural and substantive framework.

III. The District Court erred in its determination that Appellant's policies and procedures are insufficient to give rise to a claim for breach of contract.

At the District Court level, the court found that, despite Appellant having shown that genuine issues of material fact exist regarding her contractual claims for breach of contract, that there are no genuine issues of fact for trial regarding her contract claims. Appellant, as stated fully below, will show that this finding is in error based upon the applicable case law and rules of this Court from both a procedural and substantive framework.

X. Standard of Review

This Court reviews the district court's grant of the Appellee's motion for summary judgment *de novo*. See *Smith v. Virginia Commonwealth University, United States Court of Appeals, Fourth Circuit, May 10, 1996, 84 F.3d 672 (1996)*. Summary judgment is appropriate only "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed.R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In reviewing the propriety of a district court's grant of summary judgment, we view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences from the affidavits, depositions, and attached exhibits submitted below in his or her favor. *See Diebold, Inc.*, 369 U.S. at 655, 82 S.Ct. 993; *Smith*, 84 F.3d at 675.

XI. Legal Argument

I. The District Court erred in its determination that Appellant's claims pursuant to 42 USC Section 1981 cannot be analyzed under the framework of 42 USC Section 1983.

The District Court in this case erred in its supposition that in claims for damages brought against state actors pursuant to 42 USC Section 1981, the framework of 42 USC Section 1983 cannot apply. The court did precisely that in *Jett v. Dallas Independent School District* *Dallas Independent School District v. Jett*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), wherein the Court stated in no uncertain terms that

[T]he text and legislative history of both the Civil Rights Act of 1866 and the Civil Rights Act of 1871, the precursors of §§ 1981 and 1983 respectively, demonstrate that § 1981 does not provide an independent federal damages remedy for racial discrimination by local governmental entities; rather, Congress intended that the explicit remedial provisions of § 1983 control in the context of § 1981 damages actions against state actors. Pp. 711-731. *Id.*

In applying this framework, it is apparent that Plaintiff's 42 USC Section 1981 claims against the Appellee Medical University Hospital Authority are properly characterized pursuant to the framework articulated in the statutory and case law analysis of claims brought pursuant to 42 USC Section 1983. The Appellant's claims in this case, while pled originally as an action for damages against a state actor under the purview of 42 USC Section 1981, are controlled by the damages provision in 42 USC Section 1983.

42 USC § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The United States Supreme Court in *Monell* held that a municipality may be sued, "like every other 1983 'person'," for constitutional deprivations resulting from custom, policy statement, ordinance, regulation, or decision officially adopted and promulgated by the body's officers. *Monell v. Department of Social Services*, Id. at 690–91, 98 S.Ct. at 2035–36. 2:17-cv-00187-DCN

Under § 1983, plaintiffs have a remedy for the violation of any rights, privileges or immunities secured by the United States Constitution. See *Lynch v. Household Fin. Corp.*, 405 U.S. 538(1972). This generally includes constitutional rights, federal statutes and treaties. Section 1983 remedies are only available for actions taken by persons acting under color of state law. Courts ask “whether the state was sufficiently involved to treat that decisive conduct as a state action. Thus, in the usual case we ask whether the state provided a mantle of authority that enhanced the power of the harm-causing individual actor.” *NCAA v. Tarkanian*, 488 U.S.179, 192 (1988) (holding that a state university’s enforcement of the rules of a private association did not transform the private association into a state actor).

The Supreme Court has recognized that “although the conduct of private parties lies beyond the Constitution’s scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional restraints.” *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 610 (1991).

In essence, despite the Appellee’s contention that the court correctly held that Appellant’s claims pursuant to 42 USC Section 1981 could not be characterized as

claims brought pursuant to 42 USC Section 1983, it is apparent that the Appellee is in error.

In fact, the District Court completely dismissed both the spirit and text of the Federal Rules of Civil Procedure and the jurisprudence espoused in *Jett*. The opinion as delivered by Justice O'Conner very specifically states that:

A municipality may not be held liability for its employees' violations of § 1981 under a respondeat superior theory. The express "action at law" provided by § 1983 for the "deprivation of . . . rights secured by the Constitution and laws" provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor. Cf., e.g., *Brown v. GSA*, 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402, where the Court, in holding that § 717 of Title VII of the Civil Rights Act of 1964 constitutes the exclusive remedy for racial discrimination in federal employment despite the possibility of an implied damages remedy under § 1981, invoked the general principle that a precisely drawn, detailed statute pre-empts more general remedies. *Monell*, supra, specifically held that a municipality cannot be liable under § 1983 on a respondeat superior theory, while the Courts of Appeals in post-*Monell* decisions have unanimously rejected the contention, analogous to petitioner's argument here, that that theory is available against municipalities under a Bivens-type action implied directly from the Fourteenth Amendment. Given this Court's repeated recognition that the Fourteenth Amendment was largely intended to embody and expand the protections of § 1981's statutory predecessor as against state actors, this Court declines petitioner's invitation to imply a damages remedy broader than § 1983 from § 1981's declaration of rights. Creation of such a remedy would allow § 1983's carefully crafted remedial scheme to be circumvented by artful pleading. Nor can a respondeat superior standard be implied from 42 U.S.C. § 1988, since, although that statute does authorize district courts in civil rights actions to look to the common law if federal remedies are deficient, the statute specifically withdraws that authority where, as here, the common law remedy is inconsistent with federal law; i.e., with § 1983. See *Moor v. County of Alameda*, 411 U.S. 693, 706, 710, n. 27, 93 S.Ct. 1785, 1794, 1796, n. 27, 36 L.Ed.2d 596. Thus, to prevail against the DISD, petitioner must show that the violation of his § 1981 "right to make contracts" was caused by a custom or policy within the meaning of *Monell* and subsequent cases. Pp. 731-736.

Jett v. Dallas Independent School District Dallas Independent School District v. Jett, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).

Although the District Court, in adopting the Magistrate's Report and Recommendation, assumed *arguendo* that the *Jett* framework apply, it is apparent from the text of the court's ruling that the court gave no credence to its obligation to properly analyze the case accordingly and based its opinion on this failed and flawed reasoning. In the Report and Recommendation, the District Court by and through the Magistrate states:

The plaintiff's argument that *Jett* "simply changes the analysis with respect to the doctrine of *respondeat superior* as it relates to 1981 claims against public Appellees by requiring an analysis similar to that espoused by 42 U.S.C. 1983" is unsupported and meritless (doc. 36 at 11-12). As the Fourth Circuit and this court have held on numerous occasions, "when suit is brought against a state actor, § 1983 is the 'exclusive federal remedy for violation of the rights guaranteed in § 1981.'"

In coming to this conclusion, the District Court completely disregards all of Appellant's legal arguments. The Appellant has not attempted to make the argument that 42 USC Section 1981 should apply to her claims rather she has presented evidence that this case should be analyzed pursuant to 42 USC 1983 despite the pleadings in accordance with the evidence and legal arguments of counsel.

Appellant's claims do not rely upon a respondeat superior theory in this case. The claims espoused by Appellant which were originally characterized as

claims pursuant to Section 1981 actually, as shown by the evidence in this case, involve the de facto customs and policies of the Appellee which show genuine issues of material fact exist which establish that Appellant was systematically deprived of her due process rights and discriminated against as an African American employee. This evidence is sufficient to change the analysis in favor of Appellant.

As is stated in Appellant's Memorandum in Opposition to Summary Judgment Motion, Appellant stated that:

Jett does not serve to bar claims against public Appellees pursuant to 42 USC Section 1981, but rather it simply changes the analysis with respect to the doctrine of *respondeat superior* as it relates to 1981 claims against public Appellees by requiring an analysis similar to that espoused by 42 USC Section 1983. Appellee can point to no precedent binding upon this Court which establishes that such claims are barred and, indeed, to do such without an express stipulation by Plaintiff would be a clear violation of Plaintiff's right to bring her cause of action pursuant to a lawful statute. While it is up to the Court to interpret the law, Appellee's assertions that Plaintiff's claims are barred by nature of their being brought pursuant to 42 USC Section 1981 is simply erroneous.

A review of the evidence stated below and listed clearly establishes that Appellant's §1981 claim and judicially acknowledged §1983 claim against the Appellant is shown by Appellee's deliberate adoption of blatantly inadequate customs, procedures, and practices in violation of Appellant's substantive due process rights under color of the authority and law of the State of South Carolina due to the Appellee's admitted status as a Government Agency. In doing such Appellee

disregards the clear language of the Constitution of the United States as “...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” *Section 1 Fourteenth Amendment to the United States Constitution*. The Appellee cannot legally deprive Appellant of equal protection under the law as “[p]rotection against governmental arbitrariness is the core of due process, e.g., *Hurtado v. California*, 110 U.S. 516, 527, 4 S.Ct. 111, 116–117, 28 L.Ed. 232, including substantive due process, see, e.g., *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, but only the most egregious executive action can be said to be “arbitrary” in the constitutional sense, e.g., *Collins v. Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1071, 117 L.Ed.2d 261; the cognizable level of executive abuse of power is that which shocks the conscience, e.g., *id.*, at 128, 112 S.Ct., at 1070; *Rochin v. California*, 342 U.S. 165, 172–173, 72 S.Ct. 205, 209–210, 96 L.Ed. 183.2:17-cv-00187-DCN

It is clear that the District Court has confused Appellant’s argument by coming to the clearly erroneous conclusion that Appellant was attempting to argue that Section 1981 applies verbatim as opposed to applying an analysis pursuant to Section 1983 claims under the circumstances presented by Appellant that the evidence supports such a standard be applied.

The evidence presented and disregarded by the court is both relevant and admissible and should not have been dismissed.

Specifically, with respect to Appellant's claims that there is sufficient evidence to support Appellant's argument that Appellant has proven there are genuine issues of material fact to support her Section 1983 claim being submitted to the jury, the District Court completely misses the mark.

The clear evidence which was proffered by the Appellant and dismissed by the District Court is clear and demonstrated regarding Appellee's practice and *de facto* policy of allowing Caucasian employees to bring witnesses to disciplinary meetings and of retaliating against Blacks who complained. This is clearly evident by the attached affidavit of Elise Cromwell who has personal knowledge of the facts and circumstances and who averred to as much in her affidavit. (Ex. Affidavit of Elise Cromwell). This *de facto* policy which Appellant was not allowed to avail herself of would have prevented the meeting from being an active session of harassment and racial discrimination. As Appellant had been forced to endure many other sessions of such treatment in the past, the Appellee's policies and procedures were *de facto* racially discriminatory and retaliatory in light of Appellant's previous protected complaints at the Board Meetings and internally, and caused Appellee severe distress to the exclusion of her Caucasian colleagues at a severity which triggers Constitutional concerns. Significantly all that is required is that the appellant

demonstrate that genuine issues of material fact exist with respect to her claims. Had the District Court correctly applied this well settled legal standard, Appellant's claims would not have been dismissed at Summary Judgment.

The policy need not be one officially adopted and promulgated by the municipality's officials. It may be one that is "visited pursuant to governmental 'custom' even though such custom has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 691, 98 S.Ct. at 2036. In other words, a municipality (or State Agency) may be subjected to liability on the basis of its de facto policies as well as its de jure policies. *Lenard v. Argento*, 699 F.2d 874, 886 (7th Cir.1983), *cert. denied*, 464 U.S. 815, 104 S.Ct. 69, 78 L.Ed.2d 84 (1983).

The de facto policies of an [agency] may be established in several ways. They may be established by the omissions of a municipality or supervisory officials where their unreasonable failure to make rules causes the unconstitutional conduct practiced by their employees. *Avery v. County of Burke*, 660 F.2d 111, 114 (4th Cir.1981). Such omissions are actionable, however, only if they constitute "tacit authorization" of or "deliberate indifference" to constitutional violations. *Avery*, 660 F.2d at 114.

To prevail at the Summary Judgment stage Appellant must show there to be a genuine issue of material fact in favor of her claims. The court's beliefs about

whether or not Appellant will prevail are not a consideration. Appellant has asserted and proven her claims regarding Appellant's *de facto* policies and procedures being both racially discriminatory and retaliatory. The testimony in this case is admissible and comes from several of her witnesses regarding both the racial injustice and her protests to the MUHA Board of Directors as well as the Appellee's *de facto* policies regarding allowing Caucasian employees to bring witnesses to disciplinary meetings. Appellee's counsel failed to depose these witnesses. Their testimony withstands scrutiny and is revealing of Appellee's true motives of sowing racial disparities and retaliating, at the highest administrative levels. Appellant was terminated from her job and her due process rights violated pursuant to the Fourteenth Amendment embodied in 42 USC §1981 and secured under 42 USC §1983.

In addition to the jurisprudence articulated in *Jett* and the above precedent which is certainly binding precedent, the Federal Rules of Civil Procedure also support Appellant's contention that the proper framework of analysis, despite Appellant's characterized claims pursuant to 42 USC Section 1981, can be brought pursuant to 42 USC Section 1983.

Specifically, this case was erroneously dismissed on Summary Judgment, the Court can allow the amendment of pleadings even at trial as articulated in Federal Rule of Civil Procedure 15(b), which states:

(b) AMENDMENTS DURING AND AFTER TRIAL.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

The court's failure to exercise its discretion to conform the pleadings to the evidence clearly is erroneous and has placed Appellant in the position of an unwarranted dismissal. Appellant respectfully request that this decision be reversed and that this case be set for trial.

II. The District Court erred in its determination that Appellant offers no substantive evidence that Appellee pretextually terminated her employment as an act of race discrimination and retaliation for protected activity in violation of 42 USC Section 1981 and 1983.

In a suit against a state actor, Section 1983 is the exclusive federal remedy for a violation of the rights guaranteed under Section 1981. "Thus, a § 1981 claim in effect merges with § 1983, and courts treat the claims as a single claim." *Davis v. Durham Mental Health Dev. Disabilities Substance Abuse Area Auth.*, 320 F. Supp.2d 378, 403 (M.D.N.C. 2004). "A § 1983 plaintiff alleging § 1981 race discrimination must therefore adequately plead and ultimately prove three elements: (1) the existence of an official policy or custom (2) that is fairly attributable to the [state actor] (3) that proximately caused the underlying § 1981 race discrimination." *Id.* (citation omitted). Alternatively, liability may exist absent a direct "policy or custom" where liability can "be inferred from continued inaction in the face of a

known history of widespread constitutional deprivations on the part of . . . employees.” *Milligan v. City of Newport News*, 743 F.2d 227, 229–30 (4th Cir.1984). *See also Spell v. McDaniel*, 824 F.2d 1380, 1391 (4th Cir.1987) (noting that a

“condoned custom” theory may be offered as an alternative basis for § 1983 liability).

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

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

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

If the plaintiff can establish a *prima facie* case, the burden then shifts to the Appellee to produce a legitimate, nondiscriminatory reason for its actions against the plaintiff. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-55 (1981) (this is a burden of production, not persuasion). If the Appellee meets this burden, the

plaintiff must show by a preponderance of the evidence that the proffered reason was a pretext for discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). “[A] plaintiff’s *prima facie* case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” *Id.* at 148.

In the District Court’s Order dismissing Appellant’s case, the District Court correctly concluded that Appellant met the *prima facie* case for race discrimination and retaliation, but simultaneously held that Appellant could not show genuine issues of material fact related to pretext.

This ruling is patently in error. The premise of the District Court’s decision is weak at best as the Appellant has shown very clearly that the Appellee’s treatment of her in connection with her claims is wholly pretextual.

Even excluding the testimony of the Appellant in support of her claims, a review of the relevant affidavits which were submitted in this case fully supports her claims.

The affidavit of Ms. Dorothy Scott recounts the policies and practices of the Appellee in allowing Caucasian employees to bring witnesses to meetings to the exclusion of African Americans. (J/A 000215). This testimony is direct and is based on her observations and direct knowledge and participation in the grievance process. Although the District Court centers its misplaced belief that this affidavit

is insufficient based solely on the failure of Ms. Scott to actually name an individual, this is a matter which goes to the weight of the evidence and whether Appellee can attempt to impeach her at trial. The court's sole reliance on this failure is not a matter which should prevent this case from going to a jury so that the evidence presented by Appellant can be tested by her peers.

The District Court's allegations are essentially that Appellant has created a "weak" issue of fact that the Appellee's supposed basis for terminating Appellant is untrue. The evidence of pretext is, nevertheless uncontroverted.

The Fourth Circuit has noted, in *Dennis v. Columbia Colleton Med. Ctr.*, 290 F.3d 639 (4th Cir.2002), as follows: [u]nder the McDonnell Douglas framework, once an employer has met its burden of producing a legitimate nondiscriminatory explanation for its decision, the plaintiff is afforded the "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the Appellee were not its true reasons, but were pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). That is, [the plaintiff] could attempt to establish that [she] was the victim of intentional discrimination by "showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256. *Dennis*, 290 F.3d at 646.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the United States Supreme Court clarified the

Plaintiff's burden at the pretext stage. The Reeves Court made plain that a "plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 2109.

Where a plaintiff makes this showing, Reeves held that plaintiff is not required to additionally show evidence that the real reason was discrimination--as is required under the pretext-plus" standard--in order to survive summary judgment. The Fourth Circuit reiterated that, under the Reeves standard: " 'if no rational fact-finder could conclude that the [employer's job] action was discriminatory,' then the case should not proceed beyond summary judgment ... [b]ut in the absence of evidence requiring such a conclusion, a prima facie case and evidence of pretext raises a sufficient inference of discrimination to entitle a plaintiff to survive a motion for summary judgment." *EEOC v. Sears*, 243 F.3d 846 (4th Cir.2001) (citing *Reeves*).

In the instant case, Appellant has shown that the Appellee's true motivations are purely based on unlawful racially discriminatory and retaliatory motives. As evidenced by the affidavit of Elise Cromwell, Nolen is a racist who made no effort to hide her disdain for African Americans. (Ex.: Cromwell Affidavit). In addition, Ms. Cromwell testified that Shaffner is a racist as well who exhibited retaliatory and racist animus towards her (Cromwell) and Appellant in the past. Although the

Appellee attempts to assert that there were no racial motivations underlying their actions towards Appellant, nothing could be further from the truth.

In addition, there is the affidavit of Ms. Valerie M. Bailey. As Ms. Bailey was a secretary in the ward during the time period when Appellee's severe, pervasive, and heinous acts of race discrimination were occurring, she testified to witnessing firsthand how Nolen daily treated Appellant with racial animus and hostility and how Appellant was fearful of meeting with her. She also testified to the respectful manner which Appellant dealt with Ms. Nolen despite the animus exhibited by Nolen. (J/A 000210).

Despite Appellee's assertions to the contrary, Appellant testified repeatedly during her deposition regarding the hostility which she endured at the hands of Nolen and Shaffner due to her race and on account of Appellee's retaliatory animus towards her. (J/A 000210).

Although it is apparent that the District Court evidenced a belief in Appellee's version of events, this belief is not sufficient under the law to overcome the fact that Appellant raised genuine issue of material fact to the contrary.

For the aforementioned reasons, Plaintiff's race discrimination case should be allowed to proceed against the Appellee as there are genuine issues of material fact to be tried by the fact

III. The District Court erred in its determination that Appellant's policies and procedures are insufficient to give rise to a claim for breach of contract.

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

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

In order to prove the existence of a definite contract of employment, the employee must establish all of the elements of a contract. Most employment agreements are unilateral. *Small v. Springs Industries, Inc.*, *supra*. A unilateral contract has the following three elements: 1) a specific offer, 2) communication of

the offer to the employee, and 3) performance of job duties in reliance on the offer. 82 Am.Jur.2d Wrongful Discharge § 84 (1992). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, supra, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 24 (1981). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, supra, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 29 (1981). "Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act ... amounts to an offer." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, supra, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting *Broadway v. Jeffers*, 185 S.C. 523, 530-31, 194 S.E. 642, 645 (1938). To be binding, an offer must be definite. In addition, it must "be one which is intended of itself to create legal relations on acceptance." *McLaurin v. Hamer*, 165 S.C. 411, 420, 164 S.E. 2, 5 (1932).

In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. *108 *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 224, 516 S.E.2d 449, 450 (1999). But when an employee's at-will status

has been altered by the terms of an employee handbook, an employee, when fired, may bring a cause of action for wrongful discharge based on breach of contract. *Conner v. City of Forest Acres*, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002). If an employer wishes to issue an employee handbook or manual without being bound by it and with a desire to maintain the at-will employment relationship, the employer must insert a conspicuous disclaimer into the handbook. *Small v. Springs Indus., Inc.*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987). The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract's existence is questioned and the evidence is either conflicting or is capable of more than one inference. *Small*, 292 S.C. at 483, 357 S.E.2d at 454; *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct.App.2000).

In most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. *Fleming v. Borden*, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994). But a “ ‘court should intervene to resolve the handbook issue as a matter of law ... if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.’ ” *Id.* (quoting Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *Indus. Rel. L.J.* 326, 375-76 (1991-92)); cf. *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456,

461 (2004) (holding, as a matter of law, that a handbook containing conspicuous disclaimers and a non-mandatory discipline procedure did not alter at-will status). To be enforceable in contract, general policy statements must be definitive in nature, promising specific treatment in specific situations. See, e.g., *Ex parte Amoco Fabrics & Fiber Co.*, 729 So.2d 336, 339 (Ala.1998) (“[to] become a binding promise, the language used in the handbook ... must be specific enough to constitute an actual offer rather than a mere general statement of policy”) (internal quotations omitted); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 665 A.2d 580, 584 (1995) (“[o]nly those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced”); cf. *Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 21 (Ct.App.1994). *Hessenthaler v. Tri-County Sister Help, Inc.* 365 S.C. 101, 616 S.E.2d 694 S.C.,2005.

The Appellee has erroneously attempted to hide behind its disclaimers on some of its contractual documents in support of its argument that Appellee's contract based claims should not go to a jury. The District Court, in its order, relied on this clearly erroneous interpretation.

Specifically, Plaintiff has demonstrated that her contract based claims are not based merely upon the documents properly disclaimed by the Appellee but, rather, that Appellee created an environment where numerous policy documents,

disclaimed and non disclaimed alike, are distributed and relied upon by employees in a hodge podge manner which must be construed against Appellee as opposed to Appellant.

Appellant relied upon the contractual documents provided by Appellee which deal directly with her being promised protection from race based discrimination and retaliation, whereas Appellee failed to keep its end of the bargain in this regard as is evidenced by the testimony of both the Appellee and her numerous witness affidavits.

In addition, the District Court failed to require Appellee to tender a signed disclaimer in support of their claim that Appellant agreed not to be bound by this documentation as many of the documents proffered to include the powerpoint provisions are devoid of a conspicuous disclaimer. Further, the training documents which the Appellee provided to Appellant and utterly devoid of any such disclaimers and such documentation provides integral insight into the training environment and how these contractual documents were viewed by both the Appellee and its employees.

Thus the record, to include the passages provided from Appellant's deposition, as well as the witness affidavits support Appellant's position that the Appellee completely disregarded the contractual terms of these clearly promissory

documents. As a result, the Plaintiff has presented genuine issues of material fact to be determined by the fact finder as it relates to her breach of contract claims.

At the District Court level Appellee argued and the District Court held that anti-retaliation policies embodied in their employment power point, policies, and intranet handbook are insufficient to form an employment contract that displaces at-will status.

The cases cited by Appellee and referenced by the District Court are distinguishable because, in each of them, the handbook language presented only a generalized policy statement that could not create the expectation of guaranteed employment if the policy was not followed because it did not promise specific treatment in specific situations. That is not the circumstance in the instant case.

In fact, the language of an anti-retaliation policy can create an enforceable employment contract if it is not generalized but, instead, promises specific treatment in specific situations, such as expressly stating that the employee will not be terminated for filing internal complaints. See *Lord*, 827 F. Supp. 2d at 604.

Here, the Court should properly accept the testimony presented by Appellant and her witnesses that the applicable handbook, policies, and powerpoint slides prohibited Appellee from terminating her employment in retaliation for reporting Appellee's noncompliance with the anti discrimination and anti retaliation provisions. Thus, the intranet handbook, policies, and powerpoint slides contains a

non-generalized policy, promising that Plaintiff would not have her employment terminated in retaliation for the specific actions she took.

Appellee seems to attempt to argue that, when an employee alleges a breach of an employment contract by pointing to an employer's failure to abide by a handbook's provision, the court, in determining whether the handbook limits the employer's right to terminate the employee and thereby constitutes an enforceable contract, may look only to the provision that the employee claims the employer breached. Thus, Appellee seemed to argue that the court may only consider whether the handbook's anti-retaliation provision limited Appellee's right to terminate Appellant. The District Court should have properly found that this was an issue which is properly decided by a jury.

In any event, the District Court cites no authority for the proposition that a court assessing the existence of an employment contract alleged to arise from an employee handbook may only look to the provision of the handbook alleged to have been breached in determining whether the handbook contains mandatory, promissory language that limits the employer's right to terminate the employee. Accordingly, the District Court should have rejected Appellee's argument in this regard and allow Appellant's contract-based claims to proceed to a jury.

XII. CONCLUSION

Based on the foregoing, this Court should reverse the district court's grant of summary judgment on Appellant's race discrimination and contract causes of action because the district court erred in failing to determine that there are no genuine issues of material fact to be tried by a fact finder.

Respectfully Submitted,

BY: s/ DONALD GIST. ESQ

Donald Gist, Esquire
Aaron Wallace, Esquire
Gist Law Firm, PA
4400 North Main Street
Columbia, SC 292093
T: 803-771-8007

October 31, 2018

XIII. STATEMENT WITH RESPECT TO ORAL ARGUMENT

Counsel believes that oral argument would be helpful in elucidating the complexity and novelty of these issues.

XVI. CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(C) because this brief contains 8531 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this

brief has been prepared in a proportionally spaced type face using Microsoft Word in Times New Roman 14 point.

XV. CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of October, 2018, a copy of the foregoing Appellant's Brief was served on counsel of record by this Court's ECF System to:

BOB CONLEY, ESQUIRE, ESQ
EMMANUEL FURGESON, ESQ
Cleveland & Conley, LLC
171 Church St #310
Charleston, SC 29401
T: 843-577-9626

ATTORNEYS FOR APPELLEE

s/Donald Gist
Donald Gist, Esq
AARON WALLACE, ESQ
Gist Law Firm, PA
4400 North Main Street
Columbia, SC 292093
T: 803-771-8007

October 31, 2018

Exhibit 8

Fourth Circuit Opinion – April 11, 2019

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-2038

CHRISTINE G. NELSON,

Plaintiff - Appellant,

v.

MEDICAL UNIVERSITY HOSPITAL AUTHORITY,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at
Charleston. David C. Norton, District Judge. (2:17-cv-00187-DCN)

Submitted: March 29, 2019

Decided: April 11, 2019

Before GREGORY, Chief Judge, WILKINSON, Circuit Judge, and TRAXLER, Senior
Circuit Judge.

Affirmed by unpublished per curiam opinion.

Donald Gist, Aaron Wallace, GIST LAW FIRM, PA, Columbia, South Carolina, for
Appellant. Caroline W. Cleveland, Bob J. Conley, Emmanuel J. Ferguson,
CLEVELAND & CONLEY, LLC, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Christine G. Nelson appeals the district court's order accepting the recommendation of the magistrate judge and granting the Medical University Hospital Authority's motion for summary judgement. We have reviewed the parties' briefs and the joint appendix and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Nelson v. Med. Univ. Hosp. Auth.*, No. 2:17-cv-00187-DCN (D.S.C. Aug. 7, 2018). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Exhibit 9

**Plaintiff's Amended Responses to Local Rule 26.03 Interrogatories –
March 24, 2017**

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Christine G. Nelson,	)	
	)	
Plaintiff,	)	Case No.: 2:17-cv-00187-DCN-KFM
	)	
vs.	)	
	)	Plaintiff's Amended Responses Local Rule 26.03
Medical University Hospital	)	Interrogatories
Authority,	)	
	)	
Defendant.	)	

Pursuant to Federal Rule of Civil Procedure 26(f) and Local Civil Rule 26.03, Plaintiff respectfully submits the following:

LOCAL CIVIL RULE 26.03

1. A short statement of the facts of the case

Plaintiff, Christine Nelson, is a citizen of the United States and resides in the state of South Carolina.

Plaintiff began her employment with Defendant in February 1995 and was wrongfully terminated on or about February 27, 2014.

Plaintiff brings damages to redress Defendant's actions regarding the terms, conditions, and privileges of Plaintiff's employment. Specifically, Plaintiff was subjected to race discrimination after she informed Valerie Sutton (WF), Nurse Practitioner, about her right to file a complaint against, Tabitha Nolen (WF). Caucasian counterparts, in similar situations as Plaintiff, were not terminated for voicing harassment provided by Defendant's human resource policies and procedure. Second, Plaintiff was subjected to retaliation when Nolen (after Plaintiff informed Ms. Sutton of her rights to file a complaint) began a pattern and practice of animus, harassment, and continuous pretextual write ups. Third, Plaintiff's breach of contract claim arises as Defendant failed to protect Plaintiff from discrimination, retaliation and harassment as mandatorily promised in Defendant's internal policies and producers. Fourth, as to Plaintiff's breach of contract with fraudulent intent, Defendant participated in an intentional design to pretextually write Plaintiff up for insubordination, and terminated her based on that reason.

The actual reason for termination was race discrimination by Defendant, retaliation, breach of contract and breach of contract with fraudulent intent, all in violation of Plaintiff's protective rights.

2. The names of fact witnesses likely to be called by the party and a brief summary of their expected testimony.

- Plaintiff Christine Nelson is expected to testify regarding the claims set forth in her initial pleadings and any additional facts revealed during the discovery of this matter.
- Defendant Medical University Hospital Authority can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter.
- Valerie Sutton can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter.
- Tabitha Nolen can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter.
- Joann D. Cromwell can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter.
- Sharon Turner can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter.
- Tammy Powell can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter.
- Barbara Johnson-Williams can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter.

Plaintiff also reserves the right to amend and/or supplement this list of witnesses up until the discovery of this case.

3. The names and subject matter of expert witnesses (if not witnesses have been identified) the subject matter and field expertise should be given as to experts likely to be offered.

- D. Victoria DeShong, M.Ed., LMFT, LPC
845 Lowcountry Blvd., Suite K
Mt. Pleasant, SC 29464
Tel. Phone No.: 843-856-0054

DeShong can testify to the claims set forth in the initial pleadings and any additional facts revealed during the discovery of this matter. Specially, DeShong has treated Plaintiff for emotional job related stress.

Plaintiff reserves the right to amend and/or supplement this list of expert witness up until discovery of this case.

4. A summary of the claims or defenses with statutory and/or citations supporting same.

(a) Race Discrimination Under 42 U.S.C. § 1981 - *Hazel v. Med. Action Indus., Inc.*, 216 F. Supp. 2d 541 (W.D.N.C. 2002) (elements of a prima facie claim that discipline of an employee violated § 1981); *Sherman v. Marriott Hotel Servs., Inc.*, 317 F. Supp. 2d 609, 614 (D. Md. 2004) ("In general, the elements of a claim under section 1981 largely track the elements of a claim for race discrimination in employment under Title VII of the Civil Rights Act of 1964").

(b) Breach of Contract - *Adv. Pain Therapies, LLC v. Hartford Fin. Services Group, Inc.*, 3:14-CV-00050-MGL, 2014 WL 4402800 (D.S.C. Sept. 3, 2014) (elements of breach of contract).

(c) Breach of Contract with Fraudulent Intent - *Conner v. City of Forest Acres*, 560 S.E.2d 606 (S.C. 2002) (elements of breach of contract).

(d) Retaliation- (Title VII of Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e et seq.; *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (1986))

5. Proposed Dates for Disclosure of Expert Witness Information and Discovery:

As set forth in the Joint Rule 26(f) Report, the parties agree that the dates in the Conference and Scheduling Order Filed February 14, 2017, are appropriate for this case.

6. The parties shall inform the Court whether there are any special circumstances which would affect the time frames applied in preparing the scheduling order.

See Plaintiff's response to number 5.

7. The parties shall provide any additional information requested in the Pre-Scheduling Order (Local Civil Rule 16.01) or otherwise requested by the assigned judge.

None applicable at this time.

SIGNATURE ON FOLLOWING

Respectfully Submitted:

/s/ Donald Gist

Donald Gist
Gist Law Firm, PA
PO Box 30007
Columbia, South Carolina 29230
Tel.: (803) 771-8007
Fax: (803) 771-0063

ATTORNEY FOR PLAINTIFF

Columbia, South Carolina
March 24, 2017

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

Exhibit 10

Nelson's Deposition Transcript Excerpt – Pages 180 – 183 - August 29, 2017

1 answer, okay? 180

2 MR. FERGUSON: Let's get her back in.

3 (Witness entered did deposition room.)

4 BY MR. FERGUSON: .

5 Q. Ms. Nelson, Defendant's Exhibit 18, did
6 that -- do you believe that policy applied to you
7 while you were working with MUHA?

8 A. I have to say no because this says MUHA
9 Health and you got down here the notes or they have
10 the notes and it says MUH Medical Authority.

11 Q. All right. Thank you.

12 A. That's two different things.

13 Q. Thank you. So it's your testimony
14 Exhibit 18 did not apply to you.

15 A. It has two different things.

16 Q. Okay. Was that a yes or a no? Did
17 Defendant's Exhibit 18 apply to you when you were
18 working with MUHA?

19 A. That particular policy has two
20 different things on it so I am not sure.

21 Q. Okay. All right. You also bring a
22 breach of contract and breach of contract with
23 fraudulent intent claim in your lawsuit. Do you
24 realize that?

25 A. Uh-huh.

1 Q. What contract are you referring to? 181

2 A. The handbook.

3 Q. Which handbook?

4 A. MUSC handbook.

5 Q. Is this part of MUSC's handbook,
6 Defendant's Exhibit 18?

7 A. I don't know if that particular one is,
8 it has two different things on it.

9 Q. Have you seen any other handbook that
10 you are basing your allegation on?

11 A. Yeah. I seen some other things. But
12 this one just has two different things. It's MUSC
13 Health --

14 Q. Well, what contract are you referring
15 to?

16 A. The handbook that they give us when we
17 first started and that was a long time ago. That
18 was the first time we were given a handbook. Then
19 they put everything on line.

20 Q. So do you have a copy of that handbook?

21 A. I don't have it with me.

22 Q. Where is it?

23 A. I don't know.

24 Q. Because in discovery we asked you to
25 provide all the documents that were relevant to

A W R

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 181

1 this lawsuit so we should have been provided it. 182

2 We should have had it provided to us.

3 MR. GIST: I'm sorry.

4 THE WITNESS: He said something about
5 all the discovery documents.

6 MR. GIST: We provided all the
7 discovery that we have that relates to anything in
8 any handbook relating to MUSC.

9 MR. FERGUSON: Okay. So I will
10 represent to you that nothing has been provided us
11 through discovery that has MUSC or MUHA on it. Let
12 me rephrase that.

13 Let me rephrase that. Based on
14 discovery we have received from you, we don't know
15 what contract you are referring to. Can you tell
16 us what contract you are referring to and what
17 provision of that contract.

18 THE WITNESS: Well, we don't have a
19 contract.

20 BY MR. FERGUSON:

21 Q. So you don't have a contract?

22 A. We don't have a contract, not with
23 MUSC, no.

24 Q. What about with MUHA?

25 MR. GIST: Object to the form.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

183

THE WITNESS: They always -- there's no contract. There are rules and regulations, but there is no contracts.

BY MR. FERGUSON:

Q. So there's no contract, how could there be a breach of contract?

MR. GIST: Object to the form.

THE WITNESS: Handbook.

BY MR. FERGUSON:

Q. The handbook is the contract?

A. The handbook is the only thing we have to go by because we don't have a contract they said.

Q. You don't have an employment contract with MUHA?

A. That's what they say, we don't.

Q. Okay. Also in discovery we sent over something called Plaintiff's -- excuse me, we didn't send plaintiff's. We sent something called Defendant's First Set of Requests For Admissions. You through your attorney provided some responses to those requests for admission. I don't think I have to mark this because it's already part of discovery, but I want to ask you some questions about it.

A W R

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

Page 183

Exhibit 11

Yon v. Regional Medical Center

2016 WL 1178202

Only the Westlaw citation is currently available.
United States District Court,
D. South Carolina, Orangeburg Division.

Adeline Yon, Plaintiff,

v.

The Regional Medical Center, Defendant.

Civil Action No. 5:14-cv-02098-JMC

Signed 03/28/2016

Attorneys and Law Firms

Aaron Vernon Wallace, Donald Gist, Gist Law Firm,
Columbia, SC, for Plaintiff.

Jonathan Pharr Pearson, Fisher and Phillips, Columbia, SC,
for Defendant.

ORDER AND OPINION

J. Michelle Childs, United States District Judge

*1 Plaintiff Adeline Yon ("Yon" or "Plaintiff") filed this action against her former employer, Defendant The Regional Medical Center ("TRMC" or "Defendant"), alleging that she was subjected to race discrimination, retaliation, and a racially hostile work environment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e-2000e-17. (ECF No. 1.) Yon also asserts state law claims for breach of contract and breach of contract accompanied by a fraudulent act. (*Id.*)

This matter is before the court on TRMC's Motion for Summary Judgment pursuant to Fed. R. Civ. P. 56. (ECF No. 36.) In accordance with 28 U.S.C. § 636(b) and Local Civ. Rule 73.02(B)(2)(g) (D.S.C.), the matter was referred to United States Magistrate Judge Kaymani D. West for pretrial handling. On February 10, 2016, the Magistrate Judge issued a Report and Recommendation in which she recommended that the court grant TRMC's Motion for Summary Judgment as to all of Yon's claims. (ECF No. 52.) Yon filed Objections to the Magistrate Judge's Report and Recommendation, which are presently before the court. (ECF No. 53.) For the reasons set forth below, the court **ACCEPTS** the Magistrate

Judge's recommendation and **GRANTS** TRMC's Motion for Summary Judgment.

**I. RELEVANT BACKGROUND
TO PENDING MOTION**

The facts as viewed in the light most favorable to Yon are discussed in the Report and Recommendation. (ECF No. 52.) The court concludes, upon its own careful review of the record, that the Magistrate Judge's factual summation is comprehensive and accurate and incorporates it by reference. The court will only reference herein facts pertinent to the analysis of Yon's claims.

TRMC is a full service hospital in Orangeburg, South Carolina. (ECF No. 36-2 at 1 ¶ 2.) Home Care ("HC") is one of the services TRMC provides. (*Id.*) HC provides in-home healthcare services for certain patients for the purpose of increasing the convenience and reducing "the cost of health care by delivering certain types of health care in the patient's home." (*Id.*) HC is located near TRMC in a small retail office complex. (*Id.*)

HC's primary workforce is made up of "clinical" staff, which includes registered nurses, therapists, and a social worker." (*Id.* at ¶ 4.) Clinical staff members go into the field to treat patients in their homes. (*Id.*) Clinical staff members "perform a wide variety of services, including giving injections and other medications, administering blood pressure and other tests, treating wounds, and providing other medical, therapeutic, and social work services which may be needed by patients recovering from illness or injury." (*Id.*) The clinical care staff is supervised by a patient care coordinator, who is responsible for scheduling appointments and making sure treatment plans are being adequately staffed and followed. (*Id.* at ¶ 3.) Wendy Dantzler ("Dantzler") was the patient care coordinator from 2006 until July 2012. (*Id.*) Jill Hopkins began working as the patient care coordinator on October 1, 2012. (*Id.*)

*2 Yon began her employment with HC on May 3, 1999 as a salaried social worker. (ECF No. 38-8 at 37:1-6 & 113:13-15.) As a social worker, Yon's job responsibilities included, but were not limited to, providing "Home Health/Hospice social work services to include family assessments and psychosocial interventions to assist with development of a multidisciplinary care plan ... [and providing] support

for patients and families through coordination of community resources.” (ECF No. 36-4 at 5.)

In November 2012, David Hill (“Hill”) began work as the director of HC at TRMC. (ECF No. 36-2 at 1 ¶ 1.) Hill reports to the vice president of patient services for TRMC, Julia Yawn (“Yawn”). (*Id.* at ¶ 3.) In December 2012, Yawn and the chief financial officer of TRMC, Cheryl Mason, asked Hill to look for ways to reduce expenses. (*Id.* at 3 ¶ 9.) In considering how to reduce expenses, Hill focused on staff mileage reimbursement because in a former position he had managed to reduce expenses through auditing the mileage of clinical staff by comparing the reported mileage to the mileage total as calculated by MapQuest.¹ (*Id.*)

In mid-January 2013, Hill began the process of checking employee mileage using MapQuest as a tool to gauge the accuracy of the mileage reported. An administrative assistant, Eryn Radewitz, assisted Hill with this project and Radewitz was tasked with selecting one clinical staff member from each discipline at random for the initial review. (*Id.* at 4 ¶ 10.) Hill personally reviewed all of Radewitz’s work, including routes and calculations. (*Id.*) According to Hill, “[t]he results of the review revealed a pattern of falsification by Yon.” (*Id.* at ¶ 11.) More specifically, Yon’s mileage requests were consistently over the MapQuest figures by significant amounts.² (*Id.* at ¶¶ 11–12.)

On or about January 24, 2013, Hill conducted a meeting with the HC staff. (*Id.* at 3 ¶ 8.) During the meeting, Hill discussed a \$400,000.00 “write-off” from the HC budget. (*Id.*) He explained that the amount was written off by the hospital “because it represented uncollected bad debts or charges disallowed by providers.” (*Id.*) “These charges had been accumulating for several years and the hospital felt that they needed to be written off.” (*Id.*)

On January 29, 2013, Hill asked Yon about her mileage discrepancies. (*Id.* at 5 ¶ 13.) Yon refused to specifically discuss the mileage, but generally observed that she was a social worker and had to drive long distances. (*Id.*) Thereafter, Hill met with the director of staffing and retention, Kim Westbury (“Westbury”), and recommended terminating Yon’s employment for falsifying mileage “unless she was able to explain the discrepancies.” (*Id.* at ¶ 14.)

On the afternoon of January 29, 2013, Hill and Westbury met with Yon. (*Id.* at ¶ 15.) Hill explained to Yon the differences between her reported mileage and the mileage

as calculated by MapQuest. (*Id.*) Hill showed Yon that her mileage calculations “were consistently higher for every entry and that the difference was significant.” (ECF No. 36-5 at 2 ¶ 6.) Without addressing the substance of the allegations, Yon said that she was being singled out. (*Id.* at ¶ 7.) Hill and Westbury responded that “the mileage of other employees had been audited also” and “other employees had been terminated in the past for misrepresenting Hospital documents.” (*Id.*) Eventually, Yon proceeded to depart the meeting by standing up, holding her hands over her head, saying “Thank the Lord, I am free,” and hugging Hill and Westbury. (*Id.* at 15–16; ECF No. 38-8 at 77:24–78:10.) On January 29, 2013, Yon was terminated “due to falsifying mileage reports.” (ECF No. 38-30 at 2.)

*3 On January 30, 2013, Yon filed a grievance (ECF No. 36-14) with TRMC pursuant to its grievance and administrative review procedures. (ECF No. 36-4 at 85–93.) In her grievance, Yon alleged the following particulars:

I was unfairly terminated by the interim director, David Hill without a valid reason. On January 29, 2013, I was contacted by phone and asked to meet with him and Kim Westbury at the Human Resource office. At this time, I was told by David that when he compared my mileage to the nurses I did not add up. Prior to this meeting, I have never been asked about my mileage and this has never been addressed as a problem in my fourteen years of dedicated services to TRMC.

I am the only social worker in the home care office and I cover a very broad and rural territory. I’ve never relied on Google maps or GPS systems in finding my patients. I have always relied upon the directions provided by staff and/or the patient and they are sometimes subject to corrections or changes. It would be unfair to say that my mileage doesn’t add up to the nurses because we don’t see the same patients in the same order and oftentimes not from the same starting point.

Further, I not only make home visits to patients homes I also coordinate community resources and that entails me going to various community based sites to obtain information and resources for patients that I serve largely because they are unable to do so on their own. I have a very high rate of success with the patients that I serve largely due to this fact. I don’t simply make home visits for assessment purposes only, there is a great deal of follow up and case management that is a required component to medical social services and home health. We have to serve our home and

the communities in which they live and that is the nature of my work especially within rural and impoverished towns within our service areas.

Additionally, I am concerned that this termination came as an immediate and improper personnel action since the issue was never addressed with me as a concern. However, during our January 24, 2013 staff meeting was the first time mileage was addressed to the team emphasizing that we need to watch our mileage, (see staff meeting attached). He never held a meeting with me on a one-on-one basis concerning my mileage. I do recall David coming to me and stated on the morning of January 29, 2013 in an unprofessional manner that he was talking about me in the meeting. Then, around 4:15 p.m. he had me to meet with him and Kim Westbury. I didn't have a clue I was being terminated. They also demanded that I turn in all items that belonged to TRMC. I couldn't because I didn't have everything with me at the time. They had security to call me and asked for the belongings. I spoke with a gentleman by the name of Ira with security and informed him that I would bring all the items the next day, and he agreed that this would be just fine. I was not asked about my mileage logs and there were never any visits identified at any point that were being questioned prior to this meeting. This was overwhelming and surprising to me in which the situation was handled. I didn't know what to do. I just hugged both of them and thanked God for releasing me from this unfair treatment.

*4 (ECF No. 36-14 at 2-3.) Yon's grievance was first heard by Yawn. (ECF No. 36-2 at 5 ¶ 17.) In investigating Yon's grievance, Yawn requested further audits of Yon's mileage. (*Id.*) Hill discovered additional discrepancies. (*Id.* at 6 ¶ 18.) Yon met with Yawn regarding her grievance on February 7, 2013. (ECF No. 38-8 at 81:14-82:16.) Following her meeting with Yon, Yawn confirmed Yon's termination on February 12, 2013.

Yon then followed the next step of TRMC's grievance procedure and met with the chief executive officer of TRMC, Thomas Dandridge, on March 19, 2013. (ECF No. 38-18 at 12:7-10.) Dandridge upheld Yon's termination. (*Id.* at 26:20-22.)

After Yon was terminated, TRMC replaced her position with Loretta Green a part-time social worker who was called in on an as-needed basis. (ECF No. 36-1 at 14 (citing ECF No. 36-8 at 3:13-17).) Loretta Green is an African-American female. (*Id.*) Green held the position for several months. (*Id.*) Upon

Green's departure, Cathy Thompson, who is also an African-American female, took over the vacant position. (ECF No. 38-17 at 63:4-7.)

During her employment at HC, Yon alleged that she suffered through many instances of discriminatory and/or retaliatory conduct. Yon summarized these incidents as follows:

Ms. Yon's supervisor, from 2006 until 2012, was Wendy Dantzler (WF), the Personal Care Coordinator. On or about October 2012, Ms. Yon was informed, by former employee Charlotte Shuler, that Ms. Dantzler instructed Ms. Shuler to find issues with Ms. Yon's job performance, despite the fact that Ms. Yon performed her job duties (as shown in her 2011 job evaluation) without incident. (Ex. 2: Plaintiff's Complaint) (Ex. 3: Plaintiff's 2011 Job Evaluation).

(ECF No. 38 at 2-3.)...

Ms. Dantzler continued to promote a racially hostile work environment when she gave Ms. Yon's office space to Tracy Stillinger (WF) and placed Ms. Yon in a small workspace among the other nurses. Ms. Dantzler's reasoning for removing Ms. Yon from her office was that, "she [Tracy Stillinger] worked in the office on the computer all day and had to have access to other documents while she was working. Adeline did not need an office. If she was doing her job properly, she was on the road most of the day." (Ex. 6 Excerpt of Wendy Dantzler's Affidavit). However, Ms. Dantzler, in her Affidavit, stated that Ms. Yon seldom talked to patients in her office, she does not state that Ms. Yon never talked to patients in her office. Ms. Dantzler also admitted that Ms. Yon would use her office space for conferences.

(*Id.* at 5.)...

Ms. Yon's job description, from The Regional Medical Center, did not include express supervisory authority,

however, she had implied supervisory authority. Further, Social Workers, with Home Care, are given the authority to supervise, as shown in the Medical Social Services document. Ms. Dantzler's actions toward Ms. Yon were crafted in order to take away the implied supervisory authority, of Ms. Yon, though Ms. Yon had continuously performed her job duties without incident.

(Id. at 9.)...

Ms. Yon was the only Social Worker employed at The Regional Medical Center, however this did not exclude the possibility that the Defendant could have referred patients to social workers outside of Home Care. The nurses, before Ms. Dantzler changed the protocol, directly referred patients to Ms. Yon. This was the normal protocol throughout Ms. Yon's employment until Ms. Dantzler decided (without good cause) to have the nurses refer the patients to her (Ms. Dantzler) instead of Ms. Yon.

*5 (Id.)...

"Plaintiff, on or about June 2012, overheard her Caucasian counterpart, Donna McAlhany (McAlhany), who worked in Medicaid and Medicare Billing, tell another Caucasian counterpart, that she was going to, 'get rid of these black trouble makers in the office.' Plaintiff, to her disbelief, also hears McAlhany state to a Caucasian counterpart that, 'blacks get too many free things, such as cell phones and food stamps.'" (Ex. 2 Plaintiff's Complaint ¶ 12).

(Id. at 12.)...

Ms. Yon, and several of her colleagues, took their concerns, over the racially

hostile work environment to the Chief Nursing Officer, Julia Yawn (WF).

(Id. at 13.)...

The meeting Ms. Yon, and the nurses, had with Ms. Yawn addressed the concerns of working in a Racially Hostile Environment at The Regional Medical Center, placing her (and The Regional Medical Center) on notice of the issues, alleged by Ms. Yon, of the racial hostility. In fact several of the nurses brought their concerns about the Racially Hostile Environment to Ms. Yon, hoping to ease the racial tension, however, Ms. Yon, herself, soon became the target of inappropriate behavior and comments.

(Id. at 14.)...

Despite Ms. Yon's attempt to resolve the issues, concerning a Racially Hostile Environment, at The Regional Medical Center, the issues at the hospital continued to get worse. Management began to target Ms. Yon because she spoke up for other people. (Ex. 13 McMillan Affidavit). Unfair treatment occurred when management began to promote less qualified Caucasians over more qualified African Americans, and Caucasians were given a slap on the wrist for serious incidents while African Americans were terminated for less serious violations. (Ex. 14 Davis Affidavit). The treatment of African Americans at The Regional Medical Center was so intense that some of the African American employees resigned, because they

were the victim of race discrimination.
(Ex. 15 Peeples Affidavit).

(*Id.* at 14–15.)...

On January 24, 2013, a staff meeting was held concerning the hospital budget. During the staff meeting Ms. Yon brought up legitimate concerns, about four hundred thousand dollars (\$400,000.00) being missing from the hospital budget to David Hill (WM), Interim Director. Ms. Yon's concerns were justified because, during the meeting, it appeared as though the hospital was still unsure about the money issues, and Ms. Yon, herself, suggested an audit.

(*Id.* at 16.)...

Approximately five (5) days after Ms. Yon questioned Mr. Hill about the missing monies she was terminated from her job.

(*Id.*)

On March 27, 2013, Yon alleges that she filed a Charge of Discrimination (the "Charge") with the United States Equal Employment Opportunity Commission ("EEOC"). (ECF No. 1 at 2 ¶ 7(a).) After receiving notice of the right to sue from the EEOC as to the Charge, Yon filed an action in this court on May 30, 2014, alleging claims for (1) Title VII race discrimination (Count 1), Title VII retaliation (Count 2), Title VII racially hostile work environment (Count 3), breach of contract (Count 4), and breach of contract accompanied by a fraudulent act (Count 5). (*Id.* at 4–7.) TRMC answered the Complaint on June 13, 2014, denying its allegations. (ECF No. 5.) On April 16, 2015, TRMC moved for summary judgment. (ECF No. 36.) Yon filed a Memorandum in Opposition to Defendant's Motion for Summary Judgment on May 4, 2015, to which TRMC filed a Reply to Plaintiff's

Memorandum in Opposition on May 22, 2015. (ECF Nos. 38, 42.)

*6 The Magistrate Judge issued her Report and Recommendation on February 10, 2016, recommending that TRMC's Motion for Summary Judgment be granted as to all Yon's claims. (ECF No. 52.) On February 29, 2016, Yon filed Objections to the Report and Recommendation. (ECF No. 53.) TRMC responded to Yon's Objections on March 16, 2016. (ECF No. 55.)

II. JURISDICTION

This court has jurisdiction over Yon's Title VII claims via 28 U.S.C. § 1331, as the claims arise under a law of the United States, and also via 42 U.S.C. § 2000e–5(f)(3), which empowers district courts to hear claims "brought under" Title VII. Additionally, the court has supplemental jurisdiction over Yon's state law claims for breach of contract and breach of contract accompanied by a fraudulent act pursuant to 28 U.S.C. § 1367(a), because these claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *Id.*

III. LEGAL STANDARD

A. The Magistrate Judge's Report and Recommendation
The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with this court. *See Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The court reviews de novo only those portions of a magistrate judge's report and recommendation to which specific objections are filed, and reviews those portions which are not objected to – including those portions to which only "general and conclusory" objections have been made – for clear error. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005); *Camby v. Davis*, 718 F.2d 198, 200 (4th Cir. 1983); *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). The court may accept, reject, or modify, in whole or in part, the recommendation of the magistrate judge or recommit the matter with instructions. *See* 28 U.S.C. § 636(b) (1).

B. Summary Judgment Generally

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if proof of its existence or non-existence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248-49 (1986). A genuine question of material fact exists where, after reviewing the record as a whole, the court finds that a reasonable jury could return a verdict for the nonmoving party. Newport News Holdings Corp. v. Virtual City Vision, 650 F.3d 423, 434 (4th Cir. 2011).

In ruling on a motion for summary judgment, a court must view the evidence in the light most favorable to the non-moving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). The non-moving party may not oppose a motion for summary judgment with mere allegations or denial of the movant's pleading, but instead must "set forth specific facts" demonstrating a genuine issue for trial. Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Shealy v. Winston, 929 F.2d 1009, 1012 (4th Cir. 1991). All that is required is that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." Anderson, 477 U.S. at 249. "Mere unsupported speculation...is not enough to defeat a summary judgment motion." Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 62 (4th Cir. 1995).

IV. ANALYSIS

A. The Report and Recommendation

*7 Upon her review, and after considering Yon's Title VII race discrimination claim under the McDonnell Douglas burden-shifting framework, the Magistrate Judge determined that a prima facie case was lacking because (1) Yon's falsification of records prevented her from demonstrating that she was meeting TRMC's legitimate expectations and (2) Yon was replaced by another African-American woman and therefore cannot show that she was treated differently than others outside of her protected class. (ECF No. 52 at 13-17.) The Magistrate Judge also determined that TRMC's stated reason for terminating Yon – her falsification of mileage reimbursement records – was legitimate and non-discriminatory and she could not demonstrate that the reason was pretextual. (*Id.* at 18-19.)

In her analysis of Yon's retaliation claim, the Magistrate Judge first specified that the only viable protected activity occurred in March and April 2012 when Yon complained about racial issues. (*Id.* at 27-28.) The Magistrate Judge next separated the employment action that qualified as adverse for purposes of a prima facie case (*i.e.*, Yon's January 2013 termination) from the actions that she did not consider adverse: (1) the reduction in referrals from 15-to-20 visits per week to 4-to-5 visits per week,³ (2) her relocation in 2012 from an office to a "small workspace among the other nurses,"⁴ and (3) a change in her job description to remove supervisory authority from her.⁵ (*Id.* at 29-40.) As to the termination, the Magistrate Judge then concluded that there was no causal connection between the 2013 termination and the 2012 complaints based on a lack of temporal proximity and even if there was, TRMC had presented a legitimate, non-discriminatory reason for Yon's termination: "that she falsified mileage-reimbursement claims." (*Id.* at 29-30.)

In addressing Yon's hostile work environment claim, the Magistrate Judge isolated the following statements by Yon as to her evidence demonstrating the second and third elements of a prima facie case:

1. "[D]ue to her race, the Plaintiff was forced out of her much needed office space, was stripped of her implied authority, and her patient referrals were cut down"; and
2. "the hostile environment created an abusive work environment for Plaintiff because she was: (1) forced to work in a space that failed to provide her adequate space to perform her job duties, (2) subjected to Ms. Dantzler's constant abusive attitudes when she (Ms. Dantzler) told Ms. Shuler to find issues with Plaintiff's job performance, (3) subjected to Ms. Dantzler's constant (and continuous) insults, (4) and Nurses were told (by Ms. Dantzler) to cut back on patient referrals."

*8 (ECF No. 52 at 41-42 (referencing ECF No. 38 at 31).) Finding these statements to be conclusory without evidentiary support, the Magistrate Judge recommended granting summary judgment on Yon's hostile work environment claim on the basis that her evidence did not demonstrate that any allegedly unwelcome conduct was based on Yon's race or that it was sufficiently severe or pervasive to alter Yon's conditions of employment to create an abusive work environment. (*Id.* at 42.)

Finally, as to Yon's state law claims, the Magistrate Judge observed that both the breach of contract and breach of contract accompanied by fraudulent act claims are based on TRMC's alleged failure to follow the "Four Step Communication and Reporting Process" and "Non-Retaliation Policy" contained in its Code of Conduct. (*Id.* at 46-47.) Upon her review of these policies, the Magistrate Judge determined that neither included "language sufficiently 'mandatory' to create a potential contract of employment that could be considered breached if not precisely followed." (*Id.* at 49.) The Magistrate Judge then found that "[t]he portions of the Code of Conduct upon which Plaintiff relies do not alter her at-will employment relationship with Defendant; therefore, there is no contract of employment that could be breached." (*Id.* at 51.) Accordingly, the Magistrate Judge recommended granting summary judgment to TRMC on both of Yon's breach of contract claims. (*Id.* at 51-52.)

Based on the reasons set forth in her Report and Recommendation, the Magistrate Judge recommended granting TRMC's Motion for Summary Judgment in its entirety. (*Id.* at 52.)

B. Yon's Objections to the Magistrate Judge's Recommendation

First, Yon objects to the finding in the Report and Recommendation that her evidence did not satisfy the McDonnell-Douglas framework for a prima facie case of Title VII race discrimination. (ECF No. 53 at 5.) Specifically, Yon asserts that (1) she "engaged in a protected activity, when she spoke out against the race discrimination occurring in the office and when she spoke out about the missing monies in a January 24, 2013 meeting[]"; (2) TRMC "took adverse action by wrongfully terminating her from her position as a Social Worker[]"; (3) there was a causal connection between her protected activity and her termination because she was terminated 5 days after voicing concerns over missing monies; (4) she was performing her job duties diligently and excellently based on feedback from both her patients and her colleagues⁶; and (5) she as a member of a protected class was treated differently because TRMC only wrongfully terminated protected class members. (ECF No. 53 at 4-5.) Yon asserts that the Magistrate Judge erred in finding that TRMC "met its burden of proving a legitimate non-discriminatory reason for terminating Plaintiff[]" while she failed to demonstrate pretext. (*Id.* at 7.) Yon argues that her claims should be presented to a jury based on the fact she as an African-American "was terminated from her position

due to alleged miscalculated mileage, while her Caucasian counterparts remained employed with the Defendant, despite their [own] mileage miscalculation." (*Id.* at 7-8.)

*9 Yon next objects to the finding in the Report and Recommendation that she was not forced to work in a racially hostile work environment. Yon asserts that (1) the conduct in question was unwelcome "because she continuously reported her concerns to upper management[]"; (2) she was subjected to the conduct in question because of her race; and (3) the conduct was sufficiently severe as a result of her being (a) "forced to work in a space that failed to provide her adequate space to perform her job duties," (b) "subjected to... constant abusive attitudes...to find issues with Plaintiff's job performance," (c) "subjected to...constant (and continuous) insults," (4) "and Nurses were told...to cut back on patient referrals." (*Id.* at 8-9.) Yon argues that a jury should determine whether she was forced to work in a racially hostile work environment. (*Id.* at 9.)

Yon also objects to the finding that her prima facie case of retaliation fails. As with her discrimination claim, Yon asserts two instances of protected activity: first, when she spoke out against the race discrimination occurring in the office; and, second, when she spoke out about the missing monies in a January 24, 2013 meeting. As to the latter, Yon asserts that she suffered an adverse employment action when TRMC terminated her employment and, as to the former, when TRMC cut down on her patient referrals, forced her out of her office into a small workspace that was not reasonable for her to conduct her job duties, and took away her implied authority. (*Id.* at 11.) To demonstrate the requisite causal connection, Yon asserts that her termination occurred 5 days after voicing concerns over missing monies and the other adverse actions occurred over a period of time because she "was constantly speaking up about her concerns of race discrimination to the Defendant,...." (*Id.* at 11-12.) In consideration of the aforementioned, Yon argues that a jury could easily determine that TRMC retaliated against her "by slowly removing... [her] job responsibilities from her in an attempt to terminate her,...." (*Id.* at 12.)

As to her state law claims, Yon disagrees with the Magistrate Judge and argues that her evidence establishes a breach of contract based on the fact that TRMC's Code of Conduct contains mandatory language that the company failed to follow. (*Id.* at 14-15.) Moreover, she argues that TRMC committed fraud when it stated in the Code of Conduct that it would investigate complaints of race discrimination, but

failed to do so as it relates to Yon. (*Id.* at 15–16.) As a result, Yon asserts that “there was a breach of contract and it was with a fraudulent intent.” (*Id.* at 16.)

C. The Court's Review

In light of the foregoing authorities and the parties' respective positions, the court considers each of the claims relevant to TRMC's Motion for Summary Judgment in turn below.

1. Race Discrimination

In her Objections, Yon admits that she is seeking to establish race discrimination through circumstantial evidence. (ECF No. 53 at 4.) As a result, she argues that she has satisfied the McDonnell-Douglas framework for establishing a prima facie case of Title VII race discrimination. (*Id.*)

Title VII makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;...” 42 U.S.C. § 2000e-2(a) (1). Absent direct evidence, the elements of a prima facie case of discrimination under Title VII are: (1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) different treatment from similarly situated employees outside the protected class, or there is some other evidence giving rise to an inference of unlawful discrimination. Coleman v. Md. Ct. App., 626 F.3d 187, 190 (4th Cir. 2010); Cason v. S.C. State Ports Auth., C/A No. 2:11-2241-RMG-BM, 2014 WL 588031, at *4 (D.S.C. Jan. 7, 2014) (citations omitted). “The employer may then rebut the prima facie case by showing that there was a legitimate non-discriminatory reason for the adverse action, after which the burden shifts back to the plaintiff to show that those reasons are pretextual.” Hammett v. S.C. Dep't of Health & Envtl. Control, C/A No. 3:10-932-MBS-SVH, 2013 WL 1316440, at *5 (D.S.C. Jan. 25, 2013) (citing Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 318 (4th Cir. 2005)).

*10 Upon review, the court agrees with the Magistrate Judge that Yon cannot satisfy the second and fourth elements of a prima facie case of race discrimination. First, even though Yon disputes that her job performance was unsatisfactory, the court observes that an employee's submission of a falsified mileage report for reimbursement is presumably the type of act that warrants a finding of unsatisfactory job performance. Cf. S.C. Code Ann. §§ 40-63-110(B)

(11) (2015) (“Misconduct, which constitutes grounds for revocation, suspension, or restriction of practice or limitation on, reprimand, or other discipline of a [social work] licensee is a satisfactory showing to the board that:...(11) the licensee is guilty of the use of any intentionally false or fraudulent statement in any document connected with the practice of social work;...”); Andree v. Siemens Energy & Automation, Inc., F. App'x 145, 151 (7th Cir. 2003) (“The fact that Andree was discharged for falsifying his call reports and not because of the unsatisfactory execution of his duties simply establishes that the filing of false and fraudulent reports in the business world is a very proper and accepted cause for termination, and obviously more serious than inadequate or poor job performance.”).

Second, Yon failed to identify similarly situated employees outside the protected class that were not terminated for falsifying mileage. She only generally alleges that white employees remained employed even though they also had miscalculated mileage. (ECF No. 53 at 7–8.) Moreover, because her replacement was an African-American female, Yon cannot show that she was discharged under circumstances giving rise to an inference of discrimination. E.g., Spiegler v. Isr. Disc. Bank of N.Y., No. 01 Civ. 6364(WK), 2003 WL 21488040, at *11 (S.D.N.Y. June 25, 2003) (“Where no evidence giving rise to an inference of discrimination has been presented, the fact that a plaintiff is replaced with an individual within his protected class undermines his attempt to establish a prima facie case of discrimination.”).

However, even assuming Yon could establish a prima facie case of race discrimination regarding her termination, in order for Yon to survive TRMC's Motion for Summary Judgment, she would have to come forward with sufficient evidence to demonstrate that the legitimate reason offered by TRMC was not its true reason, but was a pretext for discrimination. Specifically, TRMC has stated that Yon was terminated for “falsifying mileage reports.” (ECF No. 38-30 at 2.)

In her response to TRMC's proffered reason for her termination, Yon asserts the following:

The Defendant appears to base the fact that Plaintiff was not performing her job duties on the fact that she allegedly falsified documentation concerning her mileage, a statement

that Plaintiff clearly denies and states is pretextual. As a result, Plaintiff has provided factual, not opinionated, evidence that shows that the Defendant based its argument off of unreliable information. For example, Plaintiff submitted into evidence MapQuest Copyright Information which clearly indicated that MapQuest should not be used for the purpose of accuracy and further states the reason why the system is not accurate. (Entry # 38 Ex. 23). Further, it is not of the Plaintiff's opinion that the Defendant failed to provide a policy on how to calculate mileage (in its handbook or in any other written or oral statement), as it is factually proven that the Defendant failed to indicate to its employees the proper procedure to calculating the mileage when traveling to visit patients. There is also further testimony submitted by Plaintiff through fellow colleagues Barbara Grant and Arnita Frazier by depositions (Entry #38 Ex. 4, 7) concerning the fact that there was no set policy given by the Defendant on how to properly calculate mileage. Specifically, none of the Defendant's agents testified to, or stated, that there was a policy enforced by the Defendant on how to calculate the mileage.

(ECF No. 53 at 6.)

"The focus of a pretext inquiry is whether the employer's stated reason was honest, not whether it was accurate, wise, or well-considered." Anderson v. Ziehm Imaging, Inc., C/A No. 7:09-02574-JMC, 2011 WL 1374794, at *5 (D.S.C. Apr. 12, 2011) (citing Stewart v. Henderson, 207 F.3d 374, 376 (7th Cir. 2000)). "The ultimate question is whether the employer intentionally discriminated and proof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that [plaintiffs] proffered reason...is correct...[i]t is not enough to disbelieve the [employer]." Love-Lane v. Martin, 355

F.3d 766, 788 (4th Cir. 2004) (quoting Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-47 (2000)) (internal citations omitted). Rather, Yon must demonstrate that a reasonable jury could "believe [her] explanation of intentional race discrimination." Id.

*11 Upon the court's review, there is insufficient evidence to support a finding that TRMC's decision to terminate Yon on January 29, 2013, was motivated by her race. Jiminez v. Mary Washington Coll., 57 F.3d 369, 378 (4th Cir. 1995) ("[T]o establish that a proffered reason for the challenged action was pretext for discrimination, the plaintiff must prove 'both that the reason was false, and that discrimination was the real reason' for the challenged conduct.") (citation omitted). The court finds that Yon's evidence as highlighted in her Objections to the Magistrate Judge's Report and Recommendation and her Memorandum in Opposition to Defendant's Motion for Summary Judgment does not rise to the level necessary to establish that her race actually played a role in the decision-making process and had a determinative influence on the outcome. In employment discrimination actions, it is not the role of the court to "sit as a super-personnel department weighing the prudence of employment decisions." Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 272 (4th Cir. 2005) (internal quotation marks omitted). Based on the foregoing, the Magistrate Judge correctly found that Yon has not produced sufficient evidence to meet her burden of proving that TRMC's asserted reason for terminating her on January 29, 2013, was a pretext for race discrimination. Accordingly, Yon's Title VII race discrimination claim fails as a matter of law and TRMC is entitled to summary judgment.

2. Retaliation in Violation of Title VII

Title VII protects individuals from retaliation. 42 U.S.C. § 2000e-3(a).⁷ As a result of her speaking out against race discrimination occurring in the office and missing monies in a January 24, 2013 meeting,⁸ Yon asserts that she was retaliated against when she was terminated, given a lower number of patient referrals, moved from her office to a smaller workspace, and stripped of her implied supervisory authority. (ECF Nos. 38 at 23-24 & 53 at 10-11.) Yon further asserts that "the audit was a pretext for...[her] termination" because TRMC "made it their goal to try and terminate... [Yon] from her job because she continued to speak up against race discrimination." (ECF No. 53 at 13.)

In order to prevail on a claim of retaliation, a plaintiff must either offer sufficient direct and indirect evidence of retaliation, or proceed under the aforementioned burden-shifting method. Under the burden-shifting method, to demonstrate a prima facie case of retaliation under Title VII, a plaintiff must show (1) that he engaged in protected activity; (2) that his employer took an adverse employment action against him; and (3) that a causal connection existed between the protected activity and the asserted adverse action. Rhoads v. F.D.I.C., 257 F.3d 373, 392 (4th Cir. 2001); Munday v. Waste Mgmt. of N. Am., Inc., 126 F.3d 239, 242 (4th Cir. 1997). Once the plaintiff establishes a prima facie case of retaliation, the defendant can rebut the presumption of retaliation by articulating a non-discriminatory reason for its action. Matvia v. Bald Head Island Mgmt., Inc., 259 F.3d 261, 271 (4th Cir. 2001) (citation omitted). At that point, the plaintiff has the opportunity to prove that the employer's legitimate, non-discriminatory reason is pretextual. Id.

Upon review, the court observes that TRMC offered the following non-discriminatory reasons for each of the alleged adverse employment actions alleged by Yon:

1. Termination—Yon was terminated for falsifying mileage reports. (ECF No. 38-30 at 2.)
2. Lower Patient Referral Numbers — Yon was the only social worker. (ECF No. 38-6 at 2 ¶ 16.) “The Patient Care Coordinator did not generate social work referrals.” (ECF No. 36-1 at 6.) “Social work referrals were generated by the Admissions Nurse with approval from a physician.” (Id.) “If a doctor or the Admissions Nurse gave...[Dantzler] a referral, there was no way...[she] could have kept...[Yon] from seeing the patient.” (ECF No. 38-6 at 2 ¶ 16.)

*12 3. Relocation to Smaller Workspace — “Yon was asked to move from the small office and into the office space with the other clinical staff, because her office was needed for a Data Entry Clerk.” (ECF No. 36-1 at 4.) “Yon's new workspace included a personal work station, telephone, and a computer connection.” (Id.) “Her work station was identical to the work stations occupied by every other clinical staff member of HC.” (Id.) “The Data Entry Clerk, Tracy Stillinger, had no other place to work and needed the office because she worked on a full-size desktop computer.” (ECF No. 36-1 at 4 (citing ECF No. 38-6 at 2 ¶ 18).) “She also needed room to store other documents while she was processing bills.” (ECF No. 36-1 at 4 (citing ECF No. 38-6 at 2 ¶ 18).) “Unlike

Plaintiff, Stillinger worked in the office all day long while Yon was only at the office in the morning and late afternoon.” (Id.) “There were no other offices available in which to locate Stillinger.” (ECF No. 36-1 at 4 (citing ECF No. 38-6 at 2 ¶ 18).)

4. Loss of Implied Supervisory Authority — “RMC conducted a diligent search of its policies, records, and job descriptions and has not found any job description for a Social Worker which included supervisory duties.” (Id. (citing ECF No. 36-4 at 1 ¶ 4).) Moreover, Yon “never had any supervisory authority...because she was the only social worker and there was no one for her to supervise.” (ECF No. 38-6 at 2 ¶ 18.)

Therefore, after consideration of the foregoing, the court finds that Yon's Title VII retaliation claim fails for the same reason her Title VII race discrimination claim failed: the absence of sufficient evidence indicating that TRMC's stated non-retaliatory reason for the adverse employment actions that Yon suffered were pretextual. Therefore, the court overrules Yon's Objection and finds that TRMC is entitled to summary judgment on her Title VII retaliation claim.

3. Hostile Work Environment

In the following summary, Yon provides the basis for her Objection to the Magistrate Judge's recommendation regarding the claim for hostile work environment:

First, Plaintiff clearly states that the racially hostile environment that she was subjected to was unwelcome because she continuously reported her concerns to upper management. Second, the Plaintiff was subjected to this environment because of her race. As stated above, due to her race, the Plaintiff was forced out of her much needed office space, was stripped of her implied authority, and her patient referrals were cut down. The above facts, and witness testimony, also show that the Defendant's Agents had a propensity for favoring Caucasian employees over African Americans. Third, the hostile environment created an abusive work environment for Plaintiff because she was: (1) forced

to work in a space that failed to provide her adequate space to perform her job duties, (2) subjected to Ms. Dantzler's constant abusive attitudes when she (Ms. Dantzler) told Ms. Shuler to find issues with Plaintiff's job performance, (3) subjected to Ms. Dantzler's constant (and continuous) insults, (4) and Nurses were told (by Ms. Dantzler) to cut back on patient referrals. Fourth, Plaintiff voiced her concerns about the racially hostile work environment with the Defendant, as stated in the facts, frequently. Plaintiff reached out to Ms. Yawn by meeting with her face to face, via e-mail, and by phone, however, this was to no avail as Ms. Yawn (Defendant's Agent) failed to do an investigation into Plaintiff's allegations of being subjected to a racially hostile work environment.

(ECF No. 53 at 8-9.) In addition to her own assertions, Yon submitted affidavits from former co-workers (Latonya Peeples,⁹ Adrienne McMillan,¹⁰ and Shirley Davis¹¹) who confirmed an environment at TRMC that did not provide the most rewarding experience for African-Americans. Based on the foregoing, Yon argues that a jury should be allowed to decide whether she was "forced to work in a racially hostile work environment." (*Id.* at 9.)

*13 "To demonstrate...a racially hostile work environment, a plaintiff must show that there is '(1) unwelcome conduct; (2) that is based on the plaintiff's...[race]; (3) which is sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) which is imputable to the employer.'" ¹² *Okoli v. City of Balt.*, 648 F.3d 216, 220 (4th Cir. 2011) (quoting *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 334 (4th Cir. 2010).) A work environment is hostile when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult...that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (internal citations omitted). The Magistrate Judge determined that Yon failed to present

evidence sufficient to establish the second and third elements of the prima facie case of hostile work environment.

After careful review of the record, the court finds that even assuming the other elements of the prima facie case are satisfied, Yon has failed to set forth specific evidence that she was subjected to unwelcome harassment as a result of her race that was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere. As thoroughly summarized by the Magistrate Judge (ECF No. 52 at 42-46), the conclusory statements of Yon and her former co-workers about TRMC's general treatment of them personally and African-Americans in general, because they lack specific evidentiary support, cannot support an actionable claim for race-based hostile work environment. *Causey v. Balog*, 162 F.3d 795, 801-02 (4th Cir. 1998). Therefore, after reviewing the totality of the harassing conduct alleged by Yon, the court agrees with the Magistrate Judge that TRMC is entitled to summary judgment on Yon's hostile work environment claim on the basis of race.

4. Breach of Contract

With respect to employment, there is a presumption in South Carolina that employees are at-will. *Prescott v. Farmer's Tel. Co-Op., Inc.*, 516 S.E.2d 923, 927 n.8 (S.C. 1999) (In South Carolina, "there is a presumption of at-will employment"). In order to prevail on a breach of contract claim under South Carolina law, a plaintiff bears the burden of establishing the existence and terms of the contract, defendant's breach of one or more of the contractual terms, and damages resulting from the breach. *Taylor v. Cummins Atl., Inc.*, 852 F. Supp. 1279, 1286 (D.S.C. 1994) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 124 S.E.2d 602, 610 (S.C. 1962)). In an action asserting breach of contract based on a handbook or other statement of company policy, once an employer voluntarily publishes the handbook or policy to its employees, the employer may be held liable for breach of contract if the employee can establish that the handbook, policy, or other similar material applies to the employee, sets out procedures binding on the employer, and does not contain a conspicuous and appropriate disclaimer. *Grant v. Mount Vernon Mills, Inc.*, 634 S.E.2d 15, 20 (S.C. Ct. App. 2006). Therefore, for Yon to survive TRMC's Motion for Summary Judgment, the evidence before the court must be sufficient to create a genuine issue of fact that a contract for employment was created in this case.

As the basis for her breach of contract claim, Yon asserts that TRMC's Code of Conduct contains 2 policies – the Four Step Communication and Reporting Process and the Non-

Retaliation Policy – that both contain mandatory language which TRMC breached when it “wrongfully terminated Plaintiff approximately five days after the Plaintiff voiced her concerns about missing money, and after they lowered Plaintiff’s patients referrals, removed Plaintiff from her office, and by taking away Plaintiff’s implied authority after she continuously voiced her concerns over working in a racially hostile work environment.” (ECF No. 38 at 27–28.) The Four Step Communication and Reporting Process provides:

*14 If you have a question or concern about an activity being unethical, illegal or wrong, use the following process to answer questions and reporting concerns. Throughout this process your identity will be kept confidential as much as possible.

1. Talk to your supervisor or department chair for medical staff. He or she is most familiar with the laws, regulations and policies that relate to your work.
2. If you are uncomfortable contacting your supervisor or if you do not receive an adequate response, talk to the next person in the chain of command. You may also choose to speak with the director of Human Resources.
3. If you have followed either #1 or #2 and still have questions, contact our Corporate Integrity Officer at....
4. If for any reason you feel you cannot follow the above steps, or do not want to give your name, call the Regional Medical Center Compliance Hotline at....The Regional Medical Center Corporate Integrity Officer will review and address all reports to the Hotline.

(ECF No. 38-29 at 9.) The Non-Retaliation Policy provides:

No disciplinary action or retaliation is taken against any individual who reports a perceived issue, problem, concern or violation to management, Human Resources, Corporate Integrity or the Compliance Hotline “in good faith.” The “in good faith” requirement means an employee actually believes or perceives the information reported to be true.

(Id. at 10.)

Upon review of the Four Step Communication and Reporting Process the Non-Retaliation Policy, the court does not find any language therein that is sufficient to establish a genuine issue of fact that Yon had a “contract” of employment by virtue of these policies. For language in these policies to create binding contractual obligations, the provisions cited by Yon must contain sufficiently mandatory terms that give rise to a reasonable expectation on their part of continued employment. *Small v. Springs Indus., Inc.*, 357 S.E.2d 452, 455 (S.C. 1987). In this regard, the policies cited by Yon do not in any way limit TRMC’s right to terminate Yon’s employment and, therefore, her at-will status has not been altered by the policies. *Wadford v. Hartford Fire Ins. Co.*, C/ A No. 3:87–2872-15, 1988 WL 492127, at *5 (D.S.C. 1988) (“A review of the relevant authorities...reveals that a policy or representation must limit the duration of employment or the employer’s right to terminate employment in order to alter at-will status. Other terms and conditions of employment, including pay, benefits, job duties, or location of performance may be changed prospectively by either party without violating an employment contract with an indefinite term.”). Based on the foregoing, the court finds that Yon’s Objection to the Magistrate Judge’s recommendation is without merit and TRMC is entitled to summary judgment on Yon’s claim for breach of contract.

5. Breach of Contract Accompanied by Fraudulent Act
As to her claim for breach of contract accompanied by a fraudulent act, Yon asserts that in addition to her demonstration of a breached contract, she can show the commission of a fraudulent act accompanying the breach when TRMC “stated that they would investigate Plaintiff’s allegations into race discrimination, yet there is no evidence that any investigation was conducted, thus violating their own Code of Conduct policy.” (ECF No. 38 at 28.)

*15 Upon review, the court finds that the breach of contract accompanied by a fraudulent act claim fails because, as discussed above, Yon can neither overcome the presumption of at-will employment nor provide sufficient factual support to sustain a breach of contract claim. Accordingly, the court overrules Yon’s Objection to the Magistrate Judge’s recommendation to grant TRMC summary judgment on the claim for breach of contract accompanied by a fraudulent act.

V. CONCLUSION

Upon careful consideration of the entire record, the court hereby GRANTS the Motion for Summary Judgment of Defendant The Regional Medical Center. (ECF No. 36.) The court ACCEPTS the Magistrate Judge's Report and Recommendation (ECF No. 52) and incorporates it herein by reference.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 1178202, 2016 IER Cases 94,877

Footnotes

- 1 MapQuest is a map publisher and a free online Web mapping service owned by AOL. Mapquest, <http://wiki.gis.com/wiki/index.php/MapQuest> (last visited Mar. 25, 2016).
- 2 As Hill explained, the mileage "did not always match up perfectly." (ECF No. 36-2 at 4 ¶ 10.) Minor variations were not a problem. (*Id.*)
- 3 The Magistrate Judge decided that the reduction in referrals was not an adverse action because Yon was a salaried employee and "a reasonable person would not consider Plaintiff's reduced case load with no change to her salary to be materially adverse." (ECF No. 52 at 34.) Additionally, the Magistrate Judge noted that TRMC stated a legitimate, non-retaliatory reason for the decrease in referrals since it was not responsible for the number of referrals to Yon, physicians making the referrals controlled that number. (*Id.* at 35-36.)
- 4 In assessing the adverse nature of a move from an office to a cubicle, the Magistrate Judge observed that "[a]sking an employee to perform their job in a different work station, without other changes, particularly when her new work station is in the same area as other members of the clinical staff, was not a materially adverse action." (ECF No. 52 at 37-38 (citing *Mack v. S. C. Dep't of Transp.*, C/A No. 3:12-2960-MGLKDW, 2015 WL 1297836, at *19 & n.22 (D.S.C. Jan. 28, 2015) report and recommendation adopted, No. 3:12-CV-2960-MGL, 2015 WL 1297876 (D.S.C. Mar. 23, 2015) (move to cubicle not "materially adverse" event to satisfy prima facie retaliation claim)).)
- 5 The Magistrate Judge concluded that the alleged job description revision to remove supervisory authority was not an adverse employment action because Yon admitted that none of TRMC's job descriptions for social worker included supervisory authority. (ECF No. 52 at 39.)
- 6 As to the issue of her job performance, Yon also disagreed with the Magistrate Judge's conclusion that Yon's MapQuest evidence did not have any bearing on her overall job performance. (ECF No. 53 at 6.) Yon asserts that she "submitted into evidence MapQuest Copyright Information which clearly indicated that MapQuest should not be used for the purpose of accuracy and further states the reason why the system is not accurate." (*Id.* (referencing ECF No. 38-23).)
- 7 "It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).
- 8 The Magistrate Judge concluded that the only "protected activities" occurred in March and April 2012. (ECF No. 52 at 28.) Moreover, the Magistrate Judge observed that Yon's complaints at the January 24, 2013 staff meeting were not protected because they were about missing money and "questions and complaints about corporate fiscal issues do not relate to potential civil rights violations,...." (*Id.*)
- 9 Yon "has been the target of racial and social discrimination at TRMC for years." (ECF No. 38-15 at 2.) "I have personally witnessed the retaliation." (*Id.*) "Mrs. Yon has been a target because she stands up for the voiceless employees in the office." (*Id.*)
- 10 Yon "had started speaking up for coworkers, when they found it hard to speak up for themselves." (ECF No. 38-13 at 2.) "This of course, did not please the management in the office, and they seemed to create more rules, and hoops she needed to jump through,...." (*Id.*)
- 11 "I believe Mrs. Adeline Yon and others with allegations against the Regional Medical Center." (ECF No. 38-14 at 2.)
- 12 A plaintiff can establish a hostile work environment claim by direct evidence, or, as is more common, by relying on the indirect, burden-shifting method set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Kaszinski v. Thompson*, 83 F. App'x 526, 527-28 (4th Cir. 2003).

Exhibit 12

Boulware v. South Carolina Department of Health and Human Services

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

2017 WL 4401673
United States District Court, D.
South Carolina, Columbia Division.

Adriane E.T. BOULWARE, Plaintiff,
v.

SOUTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES, Defendant.

Civil Action No. 3:17-01110-MGL

Signed 10/04/2017

Attorneys and Law Firms

Aaron Vernon Wallace, Donald Gist, Gist Law Firm,
Columbia, SC, for Plaintiff.

Vance J. Bettis, Gignilliat Savitz and Bettis LLP, Columbia,
SC, for Defendant.

**ORDER ADOPTING THE REPORT AND
RECOMMENDATION AND GRANTING
DEFENDANT'S MOTION TO DISMISS**

MARY GEIGER LEWIS, UNITED STATES DISTRICT
JUDGE

*1 Plaintiff Adriane E.T. Boulware (Plaintiff) brought this lawsuit against her employer, Defendant South Carolina Department of Health and Human Services (Defendant). In her Complaint, Plaintiff alleges claims for violations of the Family Medical Leave Act (FMLA), breach of contract, and breach of contract with fraudulent intent. The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge recommending Defendant's motion to dismiss be granted as to all claims. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

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

or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Court need not conduct a de novo review, however, "when a party makes general and conclusory objections that do not direct the [C]ourt to a specific error in the [Magistrate Judge's] proposed findings and recommendations." *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982); see Fed. R. Civ. P. 72(b). Thus, the Court will address each specific objection to the Report in turn. As provided above, however, the Court need not—and will not—address any arguments that fail to point the Court to alleged specific errors the Magistrate Judge made in the Report.

The Magistrate Judge filed the Report on August 23, 2017. ECF No. 19. Plaintiff filed objections on September 20, 2017. ECF No. 24. Defendant replied on September 28, 2017. ECF No. 25. The Court has reviewed Plaintiff's objections, but holds them to be without merit. Therefore, it will enter judgment accordingly.

Plaintiff first argues the Magistrate Judge erred by recommending Plaintiff's claim under the FMLA self-care provision is barred by the Eleventh Amendment. The Magistrate Judge suggests *Coleman v. Court of Appeals of Md.*, 566 U.S. 30 (2012), is the controlling law on Eleventh Amendment immunity and FMLA self-care claims. Under *Coleman*, the Eleventh Amendment bars FMLA self-care lawsuits against the States. 566 U.S. at 33. Plaintiff avers the Eleventh Amendment does not bar her FMLA self-care claim. Defendant agrees with the Magistrate Judge.

Plaintiff first argues her self-care claim should be controlled by *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), rather than by *Coleman* because her self-care and family-care FMLA claims are inextricably intertwined. As noted above, the *Coleman* Court held the Eleventh Amendment bars suits against the States under the FMLA self-care provision. 566 U.S. at 33. In contrast, the *Hibbs* Court held the Eleventh Amendment does not bar lawsuits against the States under the FMLA's family-care provision. 538 U.S. at 725. Plaintiff alleges her FMLA self-care and FMLA family-care claims are inextricably interwoven, and should thus be analyzed under *Hibbs*. She provides no support for this claim, however. The Court thus holds this contention to be without merit.

*2 Even if *Hibbs* does not control, Plaintiff argues her situation is novel because her FMLA self-care and family-care claims are intertwined, so the Court should not grant

Defendant's motion to dismiss. Plaintiff contends her facts are different from other cases, but the issue she raises is one of application of law. The law here is clear—*Coleman* controls FMLA self-care claims, and *Hibbs* controls FMLA family-care claims. For the foregoing reasons, the Court will overrule Plaintiff's objections as to the Magistrate Judge's recommendation regarding Plaintiff's FMLA self-care claim.

Plaintiff next objects the Magistrate Judge erred in recommending Defendant's motion to dismiss be granted as to Plaintiff's FMLA family-care claim. The Magistrate Judge determined Plaintiff failed to show she suffered prejudice from Defendant's alleged interference with her FMLA family-care leave. The Magistrate Judge also noted the actions Plaintiff alleged she suffered are not violations of the FMLA. The Magistrate Judge thus concluded Plaintiff's Complaint failed to state a factual and legal claim under the FMLA family-care provision, and recommended granting Defendant's motion to dismiss as to that claim. Plaintiff contends she sufficiently alleged she was prejudiced by Defendant's interference, and she suffered legal damages as a result of Defendant's purported violation of her FMLA family-care rights. Defendant again agrees with the Magistrate Judge's analysis.

Plaintiff's claim fails for two reasons. First, Plaintiff alleges Defendant violated her FMLA family-care rights by scheduling a meeting during a protected doctor's appointment, informing Plaintiff others could do her job/were a better fit, and extending her probationary period. Under FMLA, however, an employer is liable to the employee for only the employee's lost compensation and benefits, other monetary losses the employee suffered as a result of the FMLA violation, or for equitable remedies including employment, reinstatement or promotion. See 29 U.S.C. § 2617(a)(1). Equitable remedies are unavailable, however, where there is no legal loss under FMLA. See *Montgomery v. Md.*, 72 Fed.Appx. 17, 19-20 (4th Cir. 2003). None of the actions Plaintiff alleges Defendant engaged in here are remediable under the FMLA.

Even if the actions were remediable under FMLA, to state a claim for FMLA interference, Plaintiff must show Defendant interfered with her FMLA rights and she was prejudiced by such interference. *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002). An employee is prejudiced, however, only if she loses compensation and benefits, suffers other monetary losses as a result of the FMLA interference, or if she is denied employment, reinstatement, or promotion.

See 29 U.S.C. § 2617(a)(1). Although Plaintiff requested "compensatory damages in the nature of the value of her lost wages and benefits, front pay, together with interest thereon, as well as liquidated damages, and.... reasonable attorney's fee," ECF No. 1 ¶ 51, the Complaint does not contain any allegations Plaintiff suffered lost compensation or benefits, or incurred costs as a result of Defendant's purported interference with her FMLA family-care rights. For those reasons, the Court overrules Plaintiff's objection to the Magistrate Judge's suggestion as to Plaintiff's FMLA family-care claim.

Plaintiff also argues the Magistrate Judge erred in suggesting the Eleventh Amendment bars Plaintiff's state law claims for breach of contract and breach of contract with fraudulent intent. Though Plaintiff alleged the Court had supplemental jurisdiction over her state law claims, the Magistrate Judge stated supplemental jurisdiction cannot override the Eleventh Amendment. On that basis, the Magistrate Judge recommended Defendant's motion to dismiss be granted on Plaintiff's state law claims. Plaintiff argues her FMLA claim is not barred by the Eleventh Amendment because she presents a novel issue which should not be controlled by *Coleman*, and when Defendant entered into an employment contract with her, it waived any sovereign immunity it may have had from Plaintiff's contractual claims. Finally, Plaintiff requests her state law claims be remanded to state court if this Court cannot hear these claims. Defendant replies that the Magistrate Judge's recommendation was correct, Plaintiff's reliance on state law cases regarding sovereign immunity was misplaced, and Plaintiff's case cannot be remanded to state court because it did not originate there.

*3 As a preliminary matter, Plaintiff originally filed her claims in this Court, not in state court. Thus, this Court cannot remand Plaintiff's state law claims to state court. See 28 U.S.C. § 1447(d) (indicating the District Court can issue an Order remanding a case to the state court where the case was originally filed).

Further, as analyzed above, the Eleventh Amendment bars the District Court from hearing Plaintiff's FMLA self-care claim, and Plaintiff has failed to state a claim upon which relief may be granted under the FMLA's family-care provision. Accordingly, Defendant's motion to dismiss is due to be granted as to all of Plaintiff's FMLA claims. Where a District Court has dismissed all claims over which it had original jurisdiction, the Court may decline to exercise supplemental jurisdiction over related claims. 28 U.S.C. §

1367(c)(3). Because it will dismiss Plaintiff's FMLA claims over which it had original jurisdiction, the Court declines to exercise supplemental jurisdiction over her state law claims for breach of contract and breach of contract with fraudulent intent. Plaintiff's claim about the State waiving sovereign immunity in relation to those claims is without merit. For those reasons, the Court will overrule Plaintiff's objection to the Magistrate Judge's recommendation regarding Plaintiff's state law claims.

After a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court overrules Plaintiff's objections, adopts the

Report, and incorporates it herein. Therefore, it is the judgment of this Court Defendant's motion to dismiss is **GRANTED**. Plaintiff's FMLA claims are **DISMISSED WITH PREJUDICE**. Plaintiff's state law claims for breach of contract and breach of contract with fraudulent intent are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4401673, 2017 Wage & Hour Cas.2d (BNA) 358,459

End of Document

© 2020 Thomson Reuters. No claim to original U.S. Government Works.

ELECTRONICALLY FILED - 2020 May 22 1:01 PM - CHARLESTON - COMMON PLEAS - CASE#2018CP1004377

Certificate of Electronic Notification

Recipients

Emmanuel Ferguson - Notification transmitted on 05-22-2020 01:02:17 PM.

Bob Conley - Notification transmitted on 05-22-2020 01:02:16 PM.

Donald Gist - Notification transmitted on 05-22-2020 01:02:17 PM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

-

A filing has been submitted to the court RE: 2018CP1004377

Official File Stamp: 05-22-2020 01:01:59 PM

Court: CIRCUIT COURT

Common Pleas

Charleston

Case Caption: Christine Nelson VS Medical University Hospital
Authority

Document(s) Submitted: Memo/Memo in Support

- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits

Filed by or on behalf of: Emmanuel Joseph Ferguson, Sr.

This notice was automatically generated by the Court's auto-notification system.

-

The following people were served electronically:

Bob J. Conley for Medical University Hospital
Authority

Donald Gist for Christine Nelson

Emmanuel Joseph Ferguson, Sr. for Medical
University Hospital Authority

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Christine Nelson,	)	
	)	
	)	CASE NO.: 2018-CP-10-4377
Plaintiff,	)	
	)	
v.	)	PLAINTIFF'S MEMORANDUM IN OPPOSITION
	)	TO DEFENDANT'S MOTION TO DISMISS
Medical University Hospital Authority)	)	
	)	
Defendant	)	
_____	)	

INTRODUCTION

Comes now Plaintiff, Christine Nelson, who files this Memorandum in Opposition to Defendant's Motion to Dismiss. Based upon the arguments stated below, Defendant's Motion to Dismiss should be denied.

FACTS

Plaintiff relies fully on the facts set out in her well-pled complaint.

PROCEDURAL HISTORY

This action was originally filed in federal district court against the Defendant on January 2017 alleging various claims to include her state law claim for breach of contract based upon Defendant's unlawful termination of her employment.

On April 28, 2018, the federal magistrate judge issued a Report and Recommendation dismissing all of Plaintiff's claims except for Plaintiff's state based contract claim. The magistrate declined federal jurisdiction over the state law claims. This recommendation was adopted by the Judge Norton who was the assigned Federal District Court judge. The order was, in itself,

somewhat ambiguous as to whether Plaintiff's claims had been dismissed. In an abundance of caution, Plaintiff filed an appeal to the Fourth Circuit Court of Appeals. This appeal was ultimately dismissed.

As a result of the District Court declining jurisdiction over Plaintiff's state law claims, Plaintiff filed the instant case on September 6, 2018 to which Defendant filed a Motion to Dismiss. Plaintiff hereby responds to this motion as follows.

STANDARD OF REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. *Id.*; *Clearwater Trust v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). In deciding to grant the motion to dismiss, the court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Spence*, at 116, 628 S.E.2d at 874 (2006). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.*; *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence*, at 116-17, 628 S.E.2d at 874. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d

245, 247 (2007). Rule 8, SCRCF

This requires a litigant to plead the ultimate facts which will be proven at trial, not evidence which will be used to prove those facts. *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328 (1987) (emphasis added).

Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993). The Ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Moreover, a 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question to be considered is whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail. *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (Ct. App. 2004) (emphasis added).

LEGAL ARGUMENT

1. With regard to paragraph 1, paragraph 7 and paragraph 8 of Defendant's Motion to Dismiss, Plaintiff states that Defendant's argument that Plaintiff's case should be dismissed due to a lack of subject matter jurisdiction pursuant to SCRCF 12(B)(1), judicial estoppel, and res judicata must be denied. In addition, in response to paragraphs 10 and 11 of Defendant's Motion, there is no argument that 28 USC Section 1367 bars Plaintiff's case because the Court has declined supplemental jurisdiction over Plaintiff's case. In addition, Plaintiff's Appeal has been dismissed so the argument that Plaintiff's Complaint fails because another action is pending must, likewise, be denied.

The language from the applicable Orders of the Federal Judges which Plaintiff proffers substantiates her claims are outlined below. The first excerpts is the excerpt from the Order of

United States Magistrate Judge Kevin F. McDonald whereas the second excerpt is taken from the District Court Order of United States District Court Judge David Norton.

The applicable excerpts are taken directly from the Orders issued by the Federal Court. For the convenience of the Court and counsel, Plaintiff's counsel has highlighted the ambiguous language clearly present in the operative sections of both respective orders.

Excerpt 1

ireu.).

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

III. CONCLUSION AND RECOMMENDATION

Excerpt 2

filed its reply to plaintiff's objections.

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

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

August 7 2019

Although Plaintiff's Federal Claims were dismissed, it is clear that the District Court Judge, in his Order, contemplated Judge McDonald's opinion that the Court decline to exercise jurisdiction over Plaintiff's state law claims for breach of contract. Defendant attempts to rely on Plaintiff's appeal of the ruling of the Federal District Judge as a basis for its allegation that Plaintiff's state court pleadings are res judicata, judicially estoppel, or violative of SCRCP 12(B)(1). This is, therefore, clearly not the case.

The Defendant's attempt to dismiss Plaintiff's claims based on Plaintiff having appealed the ruling of the District Court's dismissal of her claims is ludicrous. By any reading the Magistrate's Report and Recommendation is clearly ambiguous as to which alternative the District Court should take. It is this ambiguous Report and Recommendation which was incorporated into the District Court Order by Judge Norton. Defendant's Motion is, with all due respect to the Defendant's counsel, quite nonsensical given the ambiguity in the Federal Orders. This is not a case where Plaintiff has taken two different views of the facts (even so, doing such would go more to the weight of the evidence and impeachment), rather it is a case where there is an ambiguous

order which provides the potential for two venues available to Plaintiff to resolve her case. This is not even a case where alternative theories of relief are being pled. This is a case of an ambiguous order dealing with jurisdiction. Plaintiff's counsel has every right to ensure that Plaintiff is protected from the ambiguities in the orders of the Court.

The Federal Court Order presented two alternative outcomes without either being chosen definitively by the Court. Plaintiff's counsel not only has a right, but rather has an obligation to respond to both contingencies. Plaintiff's appeal was dismissed, but Plaintiff should not be punished for attempting to decipher ambiguous court orders. The dismissal was procedural in nature. Plaintiff should, therefore, not be barred from proceeding with her State Court claims.

In either case, the Federal Court's ruling and Plaintiff's counsel's actions constitute a mirrored reflection of the same approach addressing two alternative courses of action of a procedural rather than substantive nature.

Plaintiff's counsel requests that this Motion therefore be denied.

2. In response to paragraph 2 of the Defendant's Motion, Plaintiff's service of process on Defendant MUHA was proper.

The Defendant has cited SCRCP 4(d)(4) and (8) in support of the failed proposition that Plaintiff has failed to properly effectuate service on the Medical University Hospital Authority. Defendant's argument fails based upon Defendant's status as an incorporated entity of the state of South Carolina.

The language cited by the Defendant states as follows:

(d)(4) State of South Carolina.

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

and sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia.

(B) When Unconstitutionality of Statute Is Asserted. In any action attacking the Constitutionality of a State statute when the State, officer or agency is not made a party, a copy of the summons and complaint.

(d)(8) Service by Certified Mail.

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

Plaintiff served the Defendant by timely delivering a copy of the Summons and Complaint to its CEO via certified and US Mail. Defendant is attempting to argue that the Defendant is essentially the State of South Carolina such that service upon the Attorney General is necessary pursuant to SCRPC 4. Defendant's argument fails however due to SCRPC (4)(d)(3) and (5) which are stated below:

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

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

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

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

Plaintiff's service of Defendant was proper under the rules. This same argument was made and lost by this same Defendant in *Elise Cromwell v. MUHA*. The Defendant is attempting to make the same argument which was previously ruled on by the Court and which they lost.

In addition, Defendant has attempted to argue that Plaintiff's Complaint must be denied on account of the pending Fourth Circuit Appeal. This argument fails because the appeal has been dismissed.

Likewise Defendant's argument that 28 USC Section 1367 applies and bars Plaintiff's claims must also be denied as the Federal Court has declined jurisdiction over Plaintiff's case.

Plaintiff, therefore, respectfully requests that Defendant's motion be denied.

3. In response to Paragraphs 3, 4, and 6 of Defendant's Motion, Plaintiff has stated a sufficient cause of action against the Defendant pursuant to SCRPC 12(b)(6), and Plaintiff's complaint alleges the existence of a legally viable employment contract between Plaintiff and Defendant which satisfies the statute of frauds. Likewise, in response to paragraph 9 of Defendant's Motion, as Plaintiff's claims were originally filed in Federal Court within the statute of limitations, Defendant's Motion to Dismiss on statute of limitations grounds must be denied.

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

In the employment context, South Carolina Courts have already recognized that a contract altering the at-will arrangement may arise, in part, from the oral or written statement of the employer. A contract may arise from actual agreement of the parties manifested by words, oral or written, or by conduct. *Prescott v. Farmers Tel. Co-op., Inc.*, 335 S.C. 330, 335, 516 S.E.2d

923,926 (1999) (emphasis added); *Regions Bank v. Schmauch*, 354 S.C. 648, 660, 582 S.E.2d 432,439 (Ct.App.2003).

In order to prove the existence of a definite contract of employment, the employee must establish all of the elements of a contract. Most employment agreements are unilateral. *Small v. Springs Industries, Inc.*, *supra*. A unilateral contract has the following three elements: 1) a specific offer, 2) communication of the offer to the employee, and 3) performance of job duties in reliance on the offer. 82 Am.Jur.2d Wrongful Discharge § 84 (1992). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 24 (1981). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 29 (1981).

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

In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause. *108 *Stiles v. Am. Gen. Life Ins. Co.*, 335 S.C. 222, 224, 516 S.E.2d 449, 450 (1999). But when an employee's at-will status has been altered by the terms of an

employee handbook, an employee, when fired, may bring a cause of action for wrongful discharge based on breach of contract. *Conner v. City of Forest Acres*, 348 S.C. 454, 463, 560 S.E.2d 606, 610 (2002). If an employer wishes to issue an employee handbook or manual without being bound by it and with a desire to maintain the at-will employment relationship, the employer must insert a conspicuous disclaimer into the handbook. *Small v. Springs Indus., Inc.*, 292 S.C. 481, 485, 357 S.E.2d 452, 455 (1987).

The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract's existence is questioned and the evidence is either conflicting or is capable of more than one inference. *Small*, 292 S.C. at 483, 357 S.E.2d at 454; *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct.App.2000). In most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. *Fleming v. Borden*, 316 S.C. 452, 464, 450 S.E.2d 589, 596 (1994). But a “ ‘court should intervene to resolve the handbook issue as a matter of law ... if the handbook statements and the disclaimer, taken together, establish beyond any doubt tha[t] an enforceable promise either does or does not exist.’ ” *Id.* (quoting Stephen F. Befort, *Employee Handbooks and the Legal Effect of Disclaimers*, 13 *Indus. Rel. L.J.* 326, 375-76 (1991-92)); cf. *Horton v. Darby Elec. Co.*, 360 S.C. 58, 67-68, 599 S.E.2d 456, 461 (2004) (holding, as a matter of law, that a handbook containing conspicuous disclaimers and a non-mandatory discipline procedure did not alter at-will status).

To be enforceable in contract, general policy statements must be definitive in nature, promising specific treatment in specific situations. See, e.g., *Ex parte Amoco Fabrics & Fiber Co.*, 729 So.2d 336, 339 (Ala.1998) (“[to] become a binding promise, the language used in the handbook ... must be specific enough to constitute an actual offer rather than a mere general

statement of policy") (internal quotations omitted); *Ross v. Times Mirror, Inc.*, 164 Vt. 13, 665 A.2d 580, 584 (1995) ("[o]nly those policies which are definitive in form, communicated to the employees, and demonstrate an objective manifestation of the employer's intent to bind itself will be enforced"); cf. *Bookman v. Shakespeare Co.*, 314 S.C. 146, 148-49, 442 S.E.2d 183, 184 21 Ct.App.1994). *Hessenthaler v. Tri-County Sister Help, Inc.* 365 S.C. 101, 616 S.E.2d 694 S.C.,2005.

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

23. Defendant publishes and maintains an Employee Handbook, which definitely assures employees of their right to report harassment and bullying, an anti-retaliation clause, and accommodations for employees with disabilities.

25. Plaintiff and Defendant entered into a binding and valid contract whereby Plaintiff relied on Defendants, through its agents reassurance that, pursuant to the handbook and the above policies and procedures, Defendant would accommodate Plaintiff for her disability and protect her rights under the anti-harassment and anti-retaliation policies. Plaintiff also relied on the Defendant's reassurance that it must follow its Equal Employment Opportunity Policy when disciplining its employees.

26. Plaintiff agreed to fulfill the duties of her position in exchange for valuable consideration and salary with the promise of being protected from discrimination, retaliation, harassment, and to be properly accommodated for her disability. These were all covenants in Defendant's employment contract with Defendant which Plaintiff breached.

28. Defendant and its agents had a responsibility to ensure that Plaintiff would not be subjected to discrimination. Defendant, through its agents, instead chose to fail to accommodate Plaintiff for her disability, retaliated against Plaintiff when she informed a colleague of the antiharassment policy, and failed to administer the same punishment to Plaintiff as it did the Caucasian counterparts when it came to filing complaints with the Defendant. These actions were done in violation of Plaintiff's employment contract with Defendant.

It is apparent from the language in the Complaint that Plaintiff has fully pled her breach of contract claims. Specifically, the Complaint indicates the specific contractual provisions, discusses her reliance upon them, and discusses how the provisions were breached. The contract

alleged by Plaintiff is in writing, thus satisfying the statute of frauds. Defendant's Motion to Dismiss should therefore be denied based upon these grounds.

4. In response to paragraph 5 of Defendant's Motion, Defendant's allegation that Plaintiff has not alleged violations of public policy against Defendant fails.

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

Respectfully Submitted,

By: s/Donald Gist

Donald Gist (13098)

Aaron Wallace (100255)

GIST LAW FIRM, P.A.

4400 North Main Street

Columbia, South Carolina 29203

Telephone: (803) 771-8007

Fax: (803) 771-0063

Aaronwallace.gistlawfirm@gmail.com

Attorneys for Plaintiff

May 27, 2020

Certificate of Electronic Notification

Recipients

Emmanuel Ferguson - Notification transmitted on 05-27-2020 09:19:05 AM.

Bob Conley - Notification transmitted on 05-27-2020 09:19:05 AM.

Aaron Wallace - Notification transmitted on 05-27-2020 09:19:05 AM.

Donald Gist - Notification transmitted on 05-27-2020 09:19:05 AM.

***** IMPORTANT NOTICE - READ THIS INFORMATION *****
NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2018CP1004377

Official File Stamp: 05-27-2020 09:18:56 AM

Court: CIRCUIT COURT
Common Pleas
Charleston

Case Caption: Christine Nelson VS Medical University Hospital
Authority

Document(s) Submitted: Memo/Memo in Opposition

Filed by or on behalf of: Aaron Vernon Wallace

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Bob J. Conley for Medical University Hospital
Authority

Donald Gist for Christine Nelson

Aaron Vernon Wallace for Christine Nelson

Emmanuel Joseph Ferguson, Sr. for Medical
University Hospital Authority

The following people have not been served electronically by the Court. Therefore, they must
be served by traditional means:

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Christine Nelson,	)	CASE NO. 2018-CP-10-04377
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
vs.	)	ORIGINAL
	)	
Medical University of South	)	
Carolina Hospital Authority,	)	
	)	
DEFENDANT.	)	
	)	

May 27, 2020

Charleston, South Carolina, via Zoom

B E F O R E:

The Honorable Bentley Price

A P P E A R A N C E S:

Aaron V. Wallace, Esquire
For the Plaintiff

Emmanuel J. Ferguson, Sr., Esquire
For the Defense

Certified Transcript Provided For: Emmanuel J. Ferguson

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
636 Long Point Road, Unit G, #74, Mt. Pleasant, South Carolina 29464
PNorton@sccourts.org

I N D E XHEARING

-- 03

EXHIBITS - None ProfferedCERTIFICATION OF TRANSCRIPT

-- 23

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: If you will just tell us your name and who
2 you represent and whose motions they are.

3 MR. FERGUSON: Emmanuel Ferguson representing the Medical
4 University Hospital Authority. It is our motion to dismiss.
5 Thank you.

6 MR. WALLACE: Aaron Wallace. I am the plaintiff's lawyer
7 for Ms. Christine Nelson. And we are here in opposition of
8 defendant's motion to dismiss.

9 THE COURT: All right. Mr. Ferguson, be happy to hear
10 from you.

11 MR. FERGUSON: All right, Your Honor. In order to
12 streamline everything I have made another PowerPoint
13 presentation. I hope we -- I hope you are all right with me
14 doing those. If not ---

15 THE COURT: Sure. That is not a problem.

16 MR. FERGUSON: Wonderful.
17 I hope I can do this right.

18 THE LAW CLERK: I just made it so that you could share
19 it, so it should work.

20 MR. FERGUSON: Awesome. Thanks. All right.
21 (WHEREUPON, PowerPoint displayed during Zoom hearing)

22 MR. FERGUSON: So there we have it.

23 This is our motion to dismiss, Your Honor. And what is
24 before the court is just a simple motion to dismiss based on
25 12(b)(6).

1 A little bit of history of the case. It actually starts
2 back in January of 2017. Plaintiff, Ms. Nelson, she filed a
3 lawsuit in federal court; and in that federal court lawsuit in
4 2017 she alleged among other claims a state law breach of
5 contract claim. It was in federal court because she also
6 alleged claims under federal law, specifically 28 U.S.C 1981
7 discrimination and retaliation claim.

8 Now specifically as to her state law claims in federal
9 court she claimed that MUHA's antidiscrimination and
10 anti-retaliation policies created the contract. Almost a year
11 and four months of litigation, including depositions, exchange
12 of paper discovery, and filing motions, specifically a motion
13 for summary judgment, and the forwarding and opposing memos,
14 the federal magistrate issued a report of recommendation in
15 April of 2018 and the R&R recommended that the federal
16 district court dismiss all of Ms. Nelson's claim.

17 What you see on your screen right now is Exhibit 2. The
18 April 18th magistrate's R&R, the last page it just -- it
19 states that wherefore based on the foregoing the defendant's
20 motion for summary judgment should be granted. And the
21 magistrate judge, Kevin McDonald, issued that R&R.

22 Before that conclusion the magistrate stated that
23 specifically as to Ms. Nelson's breach of contract claim those
24 should be dismissed.

25 Now the court does go on to propose an alternative saying

1 that should the court dismiss the federal claims it wouldn't
2 have supplemental jurisdiction over the contract claims and
3 those contract claims the court should decline to exercise
4 supplemental jurisdiction over the contract claims if that is
5 what it wanted to do.

6 In the alternative, on August 7th, 2018, the district
7 court entered an order and adopted the magistrate's R&R in
8 whole. If you look on Exhibit 4 of our memo that is the
9 district court order. And the district court said a de novo
10 review of the record indicates that the magistrate's R&R
11 accurately summarizes the applicable law. And the District
12 Court granted in total MUHA's motion for summary judgment and
13 adopted the magistrate judge's recommendation in whole.

14 Now on September 5th, 2019, the plaintiff filed a notice
15 of appeal. What I would note for the court what plaintiff did
16 not do was file a motion to alter or amend or a motion to
17 clarify the judge's order under Rule 52 or Rule 59(e) of the
18 Federal Rules of Civil Procedure. Instead plaintiff filed a
19 notice of appeal. And on October 31st, 2018, the plaintiff
20 filed her appellate brief with the Circuit Court of Appeals
21 and specifically argued that the district -- that the Court of
22 Appeals should reverse the District Court's order granting
23 summary judgment as to the plaintiff's breach of contract
24 claim.

25 If you look on Exhibit 7 of our memo the conclusion

1 section of plaintiff's appellate brief states just that.
2 Plaintiff's brief makes arguments about why the District Court
3 was in error and then concludes and says that the Appellate
4 Court -- or the Court of Appeals should reverse the decision
5 of the District Court granting summary judgment as to the
6 contract causes of action.

7 On April 11th, 2019, the Federal Court of Appeals made
8 its decision, published an un- -- excuse me, issued an
9 unpublished opinion and affirmed the District Court's granting
10 of summary judgment as to Ms. Nelson's entire lawsuit.

11 At this point I will just note that grant of summary
12 judgment is an adjudication of the merits, and that is going
13 to be relevant to my argument as it relates to res judicata.

14 Fast forward to September 6th, 2018. This is when the
15 plaintiff, Ms. Nelson, filed her state court complaint. That
16 is the complaint that is before us -- before you today, Your
17 Honor. In her state court complaint she alleges a single
18 cause of action for breach of contract.

19 And again in this complaint, much like the federal
20 complaint she filed in 2017, she again claims that MUHA's
21 antidiscrimination and anti-retaliation policy created a
22 contract.

23 Now what you see on your screen now, Your Honor -- I
24 don't want to put all of these words up, because nobody likes
25 that in a PowerPoint; right? But if you look on the left that

1 is Paragraph 41 of the federal complaint. And if you compare
2 it to the complaint before you today in state court, Paragraph
3 28 of the current pending complaint, they are nearly the
4 mirror image of each other.

5 I won't go on to read everything, but you can just see it
6 starts out: Defendant and his agents had a responsibility to
7 insure that plaintiff would not be subjected to
8 discrimination. That is an identical sentence in Paragraph
9 22. And it goes down with very similar language except that
10 in the current complaint the last sentence adds that those
11 things that were alleged in the federal complaint were a
12 violation of the employment contract, the alleged employment
13 contract with MUHA.

14 Your Honor, plaintiff's complaint that is before us in
15 state court is absolutely barred by the doctrine of res
16 judicata. You know, I will cite -- I will state it here for
17 the record. But under South Carolina Public Interest
18 Foundation versus Greenville County at 401 S.C. 377 res
19 judicata serves two purposes. One, it bars subsequent actions
20 by the same parties when the claims arise out of the same
21 transaction or occurrence. And under the doctrine of res
22 judicata a litigant is barred from raising any issues that
23 were adjudicated in the former suit and any issues that might
24 have been raised in the former suit as well.

25 Now under the umbrella of res judicata you have got claim

1 preclusion and issue preclusions. And MUHA -- or actually
2 plaintiff is barred from bringing her state court claim under
3 both claims for preclusion and issue preclusion.

4 In a nutshell, claims for preclusion will bar the
5 plaintiff from pursuing a lawsuit based on the claim that was
6 already litigated. Issue preclusion, you know, bars the
7 plaintiff from relitigating particular issues that were
8 actually litigated and decided. So claim preclusion, the
9 claim, i.e. breach of contract, cannot be relitigated. Issue
10 preclusion, i.e. the issue of whether anti-retaliation policy
11 could create a contract, cannot be relitigated.

12 So claim preclusion is shown with three fairly simple
13 elements. The parties have to be the same, the subject matter
14 has to be the same, and there has to be a prior adjudication.
15 And that is what we have got here.

16 If you look on your screen you will see on the left is
17 Exhibit 1 to our memo which is the January 20th, 2017,
18 complaint. And obviously the identity of the parties are the
19 same. I don't think there is much dispute about that.
20 Christine Nelson is -- or was the plaintiff in the federal
21 complaint, and she is now the plaintiff before you today. The
22 same with MUHA.

23 The subject matter is also the same. Here is a
24 excerpt -- an excerpt of Exhibit 1 which was the 2017 federal
25 complaint. And plaintiff's third cause of action is a breach

1 of contract. Before you today, plaintiff's first cause of
2 action is a breach of contract. Those claims are the same.

3 And more important -- or next I guess, these issues and
4 claims were adjudicated back in 2017 in the Federal District
5 Court. Exhibit 2, the magistrate's R&R, as I stated earlier,
6 clearly states that the magistrate is suggesting or
7 recommending to the District Court that all of the claim be
8 dismissed and the plaintiff -- or and defendant be granted
9 summary judgment.

10 The court does provide an alternate if the court so
11 desires. But in total the magistrate recommended that all of
12 the defendants -- or excuse me, all of plaintiff's claims be
13 dismissed and the defendant's motion for summary judgment be
14 granted in its entirety.

15 As you can see here in Exhibit 2 which is the
16 magistrate's R&R, the conclusion says just that; it does not
17 parse out which claims should be dismissed and which claims
18 they are not going to exercise jurisdiction over. The
19 magistrate recommended all of the claims be dismissed.

20 And the District Court's order on Exhibit 4 did just
21 that; the District Court did a de novo review of not only the
22 magistrate's R&R but all of the filings and all of the records
23 that were made in the 2017 litigation. And after reviewing
24 all of that the District Court granted defendant's motion for
25 summary judgment.

1 To further emphasize this point, the plaintiff in her
2 appellate brief on multiple places identified an argument
3 about why the District Court erred in its determination that
4 MUHA's policies and procedures are insufficient to give rise
5 to a plan for breach of contract.

6 On Page 35 of I believe of Exhibit 7 the appellate brief
7 makes mention of the District Court's decision to grant
8 summary judgment as to the breach of contract claim. It does
9 the same thing on Page 42 of Exhibit 7 where she states that
10 this court shouldn't reverse a district court's grant of
11 summary judgment on the appellant's race discrimination and
12 contract causes of area. So there was a prior adjudication.

13 And what I want to also emphasize to the court is that in
14 the federal court it is not unusual for the courts to
15 specifically mention whenever they are going to adopt part of
16 the magistrate's R&R and not another part.

17 For example, Exhibit 11 of our memo is Boulware versus
18 South Carolina Department of Health and Human Services. Now I
19 bring this to the court -- notably, the plaintiff in this case
20 was represented by the plaintiff counsel in the Boulware case
21 as well. But as you can see, in Boulware the district court
22 judge granted defendant's motion to dismiss and dismissed with
23 prejudice the federal claim. And then as to the plaintiff's
24 state law claims for breach of contract the district court
25 Judge specifically mentioned that those would be dismissed

1 without prejudice so that plaintiff can refile those claims in
2 state court.

3 Compare that to Yon versus Regional Medical Center at
4 Exhibit 12 of our memo where if you look towards the
5 conclusion of that case the district court judge granted
6 defendant's motion to dismiss and accepted the magistrate's
7 report and recommendation in whole and did not go any further.

8 But as you can see - I failed to highlight it - in Yon
9 they were both federal claims and a state law claim for breach
10 of contract.

11 If you look in the middle column you will see that this
12 opinion -- this order states that finally as to that
13 plaintiff's state law claims the magistrate judge observed in
14 both the breach of contract and breach of contract accompanied
15 by a fraudulent act claim are based on the defendant's failure
16 to follow the four-step communication policies and the
17 non-retaliation policy.

18 So the court referenced the magistrate judge's order,
19 adopted it, and then granted it in whole. The latter is
20 similar to what we have here. In Exhibit 2 in the
21 magistrate's R&R, again Judge Norton adopted the entire R&R
22 from the magistrate court and left it like that. Similar to
23 in Yon the District Court adopted and accepted in whole the
24 entire R&R.

25 So, Your Honor, that is my argument as it relates to

1 claim preclusion. And briefly I am going to go over issue
2 preclusion. Because not only does claim preclusion apply here
3 but issue preclusion still would bar plaintiff's state court
4 lawsuit; because in both cases, the federal and state court
5 case, the issue was whether MUHA's nondiscrimination and
6 anti-retaliation policies created a contract. That issue was
7 also previously litigated in 2017.

8 Now like claim preclusion there are three things that
9 must be shown: That the issue, the issue, was actually
10 litigated in the prior action; directly determined in the
11 prior action, and was necessary to support the prior judgment.

12 Very quickly, I don't think there's any dispute that this
13 breach of contract claim was actually litigated; and
14 specifically the question about whether MUHA's employee
15 handbook created a contract was specifically litigated. And
16 the magistrate's R&R on Exhibit 2 at Page 19 you can see on
17 the screen in the blue highlight the magistrate begins to
18 discuss MUHA's employee handbook containing antidiscrimination
19 and anti-retaliation policies, and that was supposed to
20 constitute the employment contract. So it was absolutely
21 litigated. And it was directly determined.

22 As you can see in the magistrate's R&R in Exhibit 2 the
23 court, the magistrate court, paid a great deal of attention to
24 addressing that point. And I just highlight it for the
25 court's quick review that blue -- blue box that the courts

1 have found that typical antidiscrimination and
2 anti-retaliation policies are insufficient to form a contract.
3 So the magistrate did directly determine that particular
4 issue.

5 And, finally, that issue of whether the
6 antidiscrimination and anti-retaliation policy were a contract
7 of or obviously necessary to support the prior judgment, the
8 court needed to address that because otherwise it would not
9 have been able to make a determination that MUHA did not have
10 an employment contract with the plaintiff.

11 So in conclusion, MUHA's request that the court grant its
12 motion to dismiss, for three reasons: One for claim --
13 because of claim preclusion it bars plaintiff from bringing
14 her breach of contract claim. Issue preclusion does the same
15 thing, but more particularly it bars plaintiff from
16 relitigating the nondiscrimination, non retaliation policy
17 language creating a contract. And the third reason, Your
18 Honor, I am just going to rely on my brief; because MUHA's
19 anti-retaliation policies and antidiscrimination policies just
20 are not sufficient to form a contract even if res judicata
21 doesn't apply.

22 And for that -- it is in my memo, but I will just recite
23 it for the record: Grant versus Mount Vernon at 370 S.C. 138,
24 agent states that general policy statements do not create or
25 otherwise alter the at-will employment relationship.

1 And Hessenthaler versus Tri-County - with one y, not
2 two - Sister Help, Incorporated at 365 S.C. 101 it states an
3 employer's non discrimination policy could not serve as a
4 basis for breach of contract claims.

5 And based on those reasons, Your Honor, we would ask that
6 the court at this time just grant our motion to dismiss.
7 Because there are no other facts that could be developed that
8 would change what happened in 2017 and what was re- -- what
9 was litigated in 2017. And MUHA's requests that we not have
10 to relitigate these issues again.

11 So I will stop sharing my screen there. And I appreciate
12 you allowing me to present that.

13 THE COURT: All right.

14 Mr. Wallace.

15 MR. WALLACE: Thank you, Your Honor. And I don't have a
16 fancy PowerPoint, but I do have a memorandum which I provided
17 to the court which we filed yesterday. We had -- I apologize
18 for the late filing. We had previously asked for a
19 continuance. We went ahead and got the memo together and sent
20 it out; filed it, provided the court with a copy of it.

21 And our position here is that the defendant's motion to
22 dismiss fails. And I think we can kind of look at it by just
23 cutting to the chase here. The only real issue that I think
24 is before the court as it relates to the res judicata claim
25 and the issue preclusion arguments and the claim preclusion

1 arguments is whether or not there has been an adjudication on
2 the merits.

3 Quite frankly, it is our position that there has not
4 been. And at the very least with respect to the argument that
5 there is an adjudication on the merits, the judge's order at
6 the federal case was extremely ambiguous; it left open the
7 possibility that there was no supplemental jurisdiction
8 maintained by the District Court.

9 With that being in the case I think we do go back and
10 look at the orders themselves and provide a copy of that
11 information in our memorandum.

12 Alternatively, should the court dismiss the plaintiff's
13 federal claims the District Court should decline to exercise
14 supplemental jurisdiction over the plaintiff's state law
15 claims.

16 Your Honor, if -- if the jurisdiction was declined, which
17 we believe that it was and we believe that it was expressly
18 stated in the order that the jurisdiction was declined, then
19 the grant of summary judgment is going to be on the claims
20 that the court maintained jurisdiction over, meaning the race
21 claim, the retaliation claim.

22 Who are having declined jurisdiction over the state law
23 claims simply means that any grant of summary judgment would
24 not be with respect to those particular claims.

25 And that is our position that this ambiguity in the order

1 shouldn't be construed against the plaintiff in this case.
2 Because the court clearly indicated this opinion was adopted
3 in total what the District Court says was that the magistrate
4 judge's report accurately summarized the case and applicable
5 law and that the magistrate judge and recommend- -- report of
6 recommendation is incorporated into the order.

7 So that means that this language here regarding the
8 District Court declining to exercise supplemental jurisdiction
9 over plaintiff's state law claims was incorporated into the
10 District Court order as it relates to this case. And with
11 that declining of the jurisdiction any grant of summary
12 judgment just simply does not include those claims.

13 And I set that out very specifically in our memorandum.
14 So the only issue here with respect to the argument that was
15 put forth by defendant's counsel is whether or not there is an
16 adjudication on the merits. And our position is that without
17 jurisdiction being maintained you can't have adjudication on
18 the merits with respect to those particular claims.

19 Now as it relates to the -- to our appeal and our
20 arguments and our appellate brief we were merely dealing with
21 the issue of ambiguity. I believe we had an obligation to do
22 that, to address that issue with regard to whether or not
23 there was any claim -- if the appellate court were to hold
24 that the court maintain jurisdiction I think we needed to
25 address those claims.

1 But it is our position and based on our having filed this
2 state court suit that the court did not maintain jurisdiction
3 and we don't believe that ambiguity should be held against us.

4 As it relates to the other argument espoused by
5 defense counsel regarding the breach of contract claims,
6 specifically the argument that general policy language in --
7 and anti-retaliation policies are insufficient, I want to say
8 that there are actually a couple claims that our claim went
9 beyond that.

10 We actually looked at the complaint. We indicate that
11 the employee handbook includes and ensures employees of their
12 right to report harassment and bullying, an anti-retaliation
13 clause, and accommodations for employees with disabilities.
14 And then we also say that defendant would accommodate
15 plaintiff for her disability and protect her rights from the
16 anti-retaliation and anti-harassment policy and that our
17 client relied on the reassurance of the defendant that it
18 would follow the Equal Employment Opportunity policy.

19 But I just want to -- I just want to put out there
20 that our claims are a little more broad than just the
21 anti-retaliation and antidiscrimination policies. But
22 nevertheless even if we look just at those particular
23 arguments there I don't think you can get into the issue of
24 saying whether or not they are general. I understand defense
25 counsel's position on the argument that general policy

1 language is insufficient in and of itself to create a
2 contract, but this being a motion to dismiss without even
3 attaching the handbook to the complaint I don't think all of
4 these other exhibits are even rightfully considered because it
5 is a motion to dismiss. You would have to look just at the
6 four corners of the complaint.

7 When we look at the four corners of the complaint I think
8 it is very clear that you can't get into the issue of whether
9 or not the policy language itself is even general without an
10 examination of the policy language. That is something that
11 should be taken up on summary judgment, not on a motion to
12 dismiss.

13 So the issue of whether or not, you know, general policy
14 language creates a contract or can't create a contract, that
15 is fine; but it is our position that the language itself
16 wasn't general language, and you can't get to that issue
17 without an examination of the language.

18 This is a motion to dismiss. I think you putting -- in
19 essence you're putting the cart before the horse to try to
20 determine whether or not something is contractual in nature,
21 whether or not a policy is contractual in nature, without
22 actually examining that policy. And that hasn't been done
23 today.

24 I don't think that is -- there is a requirement that it's
25 done on a motion to dismiss. All that is required is that we

1 actually plead the contract. And I think that we've actually
2 pled the contract, if you look at Paragraph 22 through 28 of
3 our well-pled complaint.

4 So, Your Honor, we have indicated that our client relied
5 on those policies and that they weren't just general policy
6 language.

7 And for these reasons we believe that the motion to
8 dismiss should be denied, Your Honor. We respectfully ask
9 that the court do so.

10 THE COURT: All right. Anything in response, Mr.
11 Ferguson?

12 MR. FERGUSON: Just briefly, Your Honor.

13 So it is clear that the only issue that the plaintiff
14 raises is whether the District Court's order is ambiguous. My
15 argument to that is that is not even the court's concern and I
16 don't think the court can really make a determination about
17 that for the sole reason that the Fourth Circuit Court of
18 Appeals had already affirmed the grant of summary judgment as
19 to everything.

20 So even assuming that plaintiff's argument has merit as
21 to the ambiguity of the District Court's order the United
22 States Court of Appeals did not find it -- affirm the entire
23 grant of summary judgment and the plaintiff is not appealing;
24 so, therefore, it is actually over.

25 As it relates to further discovery I think that argument

1 is incorrect for this reason: Res judicata is a bar from
2 suit. That is different from a bar from liability. That
3 means at the onset a defendant is not subjected to and does
4 not have to go through the litigation process to see if they
5 have any liability as it relates to defending the claim. It
6 is something that the court must consider at this stage
7 because it is a complete bar from suit. Therefore the
8 documents that we submitted the court can consider because it
9 doesn't go to the facts of the lawsuit but of the legal
10 defense that the defendant has at this time.

11 Finally, Your Honor, there was absolutely no mention of
12 ambiguity prior to filing of plaintiff's memo this morning.
13 There is no mention of ambiguity in her appellate brief.
14 There is no 59 motion to alter or amend. And, therefore, it
15 is clearly not an issue of ambiguity but a question of res
16 judicata. So that is all I have got. Thank you, Your Honor.

17 MR. WALLACE: Thank you, Your Honor. Very briefly if I
18 may respond. What I want to state is that if you look at what
19 the Fourth Circuit said, they said we affirm for the reasons
20 stated by the District Court.

21 The District Court adopted the recommendation of the
22 magistrate judge that there be no jurisdiction. That no
23 jurisdiction be maintained, then the Fourth Circuit's opinion
24 affirming for the reason stated by the District Court
25 essentially is also saying that there is no jurisdiction over

1 the claims. Not jurisdiction over the claims, summary
2 judgment can be granted but just not with respect to the
3 contract claims.

4 And with respect to the argument regarding the additional
5 documents, Your Honor, I mean this could have been brought as
6 a summary judgment motion; but it wasn't. And, quite frankly,
7 I think Rule 12(b)(6) is pretty clear that you are dealing
8 with pleadings. This was brought as some sort of Rule 56
9 motion and they were saying that you can look at all of these
10 other documents and try to parse out whether or not -- I guess
11 we will have a right to go forward, that is one thing; but
12 being a 12(b)(6) motion I don't think we get into these other
13 documents.

14 But, regardless, I think that the Fourth Circuit
15 essentially by adopting the District Court's recommendation
16 which adopted an order which adopted the magistrate judge's
17 recommendation, all of that language is incorporated into that
18 and so that there is no jurisdiction being exercised.

19 Summary judgment granting is with respect to the claims
20 other than the claims regarding the contract because the judge
21 said he wasn't adopting jurisdiction, should not adopt
22 jurisdiction, over those claims.

23 So, Your Honor, we respectfully request that the motion
24 be denied.

25 THE COURT: All right. I will take it under advisement,

1 and you will have my ruling by the end of the day. Okay.

2 MR. WALLACE: Thank you, Your Honor.

3 THE COURT: All right. Thank you.

4 MR. FERGUSON: Thank you.

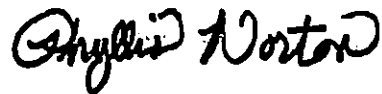
5 (WHEREUPON, the hearing concluded.)

(NOTE: Please contact the court reporter for additional copies or certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth 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 proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on May 27, 2020.

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



Date: June 9, 2020

Certified Transcript Provided For: Emmanuel J. Ferguson
Certification Reference #2020-0609 Original

Christine Nelson
PLAINTIFF(S)

Medical University Hospital Authority
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

The Motion to Reconsider is DENIED. A hearing is not necessary.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on: 07/29/2020 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Charleston Common Pleas

Case Caption: Christine Nelson VS Medical University Hospital Authority

Case Number: 2018CP1004377

Type: Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-07-29 13:46:29 page 3 of 3

JULIE J. ARMSTRONG

CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2258

RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org

23



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

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

Order/Motion to Reconsider is Denied

CASE NO: 2018CP1004377

Christine Nelson VS Medical University Hospital Authority

This judgment was entered on the 30th day of July, 2020, and notice mailed first class on Thursday, July 30, 2020, to all counsel of record and/or all parties entitled to receive notice.

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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Christine Nelson,

Plaintiff,

V.

Medical University of South Carolina
Hospital Authority,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FOR THE NINTH JUDICIAL CIRCUIT
) CASE NO.: 2018-CP-10-4377

**MOTION TO ALTER OR
AMEND ORDER**

Defendant Medical University Hospital Authority (“MUHA”), pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure, moves for an order amending and/or altering the Court’s Order dated June 15, 2020, and entered by the Clerk of Court on June 16, 2020 (the “Order”).¹ Defendant received written notice of entry of the Order on June 16, 2020.

INTRODUCTION

In its Order, the Court, without reference to legal authority, effectively holds a party may do the following: 1) litigate a claim in a federal district court through summary judgment – a final judgment on the merits – appeal the same claim to a federal court of appeals, where summary judgment is affirmed, and then pursue the identical claim against the same party in South Carolina state court; and, 2) assert a federal appellate court has jurisdiction to review a state law claim but then contend the federal appellate court both lacked and refused to exercise jurisdiction. In these

¹ Exhibit A.

respects, the Order finds no support in either federal or state law, is without precedent and is contrary to the well-established doctrines of res judicata and judicial estoppel.

Notably, in regard to this matter in particular and in respect to the issues of res judicata and judicial estoppel, the Order references no legal authority to support the Court's holding that Plaintiff may *again* litigate her breach of contract claim against MUHA in this Court after the federal courts, both the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit Court of Appeals"), granted MUHA summary judgment – a judgment on the merits.² Likewise, the Court references no legal authority to support the Court's conclusion that it is acceptable, and not in contravention of the well-established doctrine of judicial estoppel, for Plaintiff to expressly state, represent and contend the Fourth Circuit Court of Appeals had jurisdiction – jurisdiction the Fourth Circuit Court of Appeals then exercised - but subsequently assert the Fourth Circuit Court of Appeals did not have jurisdiction. Instead, the Order contains statements and findings that either find no support in the record before the Court or, more notably and concerning, are in contradiction to well-established state and federal law in regard to the doctrines of res judicata and judicial estoppel.

Because the Order recognizes and "carves" seemingly novel exceptions to the well-established legal doctrines of res judicata and judicial estoppel, that before now find no known support in existing legal precedent either in federal law or South Carolina law, the Court must alter and amend the Order. Additionally, the Court must alter and amend the Order to correct those findings and conclusions that are inconsistent with the record.

² In regard to res judicata and judicial estoppel, the Order does not reference any federal or South Carolina case, statute, or regulation.

Left uncorrected, the Order re-writes the history of this case and re-writes the express, written opinions of the federal district court and the Fourth Circuit Court of Appeals. Moreover, left uncorrected, the Order results in judicially created exceptions to the doctrines of res judicata and judicial estoppel that do not appear to enjoy previous recognition in either federal or South Carolina jurisprudence.

LEGAL STANDARD

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

LEGAL ARGUMENTS

A. The Order Is Contrary to the Record.

In several respects, the Order is contrary to the record, including the prior orders issued by the United States District Court for the District of South Carolina and the Fourth Circuit Court of Appeals. Moreover, and more concerning, the Order effectively supplants the written order issued by the federal district court judge and the written order of the Fourth Circuit Court of Appeals.

Unless corrected, this Court, without reference to legal authority, substitutes its own judgment in place of the federal district court and the Fourth Circuit Court of Appeals.

1. The Order Issued by the Federal District Court Judge.

The Order makes the following findings: 1) the order issued by the federal district court judge is "in itself, somewhat ambiguous as to whether Plaintiff's claims had been dismissed;" 2) the federal district court judge declined "jurisdiction over Plaintiff's state based contract claims;" and, 3) "[t]he Federal Court Order presented two alternative outcomes without either being chosen definitively by the Court."

The Order, by concluding the federal district court order is ambiguous, adopts Plaintiff's assertions that such ambiguity exists. In doing so, the Court ignores and neither addresses, considers nor mentions several, notable issues. First, the record is clear Plaintiff never claimed or alleged such ambiguity with the federal district court or the Fourth Circuit Court of Appeals. Plaintiff never claimed such ambiguity *until doing so before this Court*. Even the most strained reading of Plaintiff's "Appellant's Brief" filed with the Fourth Circuit Court of Appeals indicates Plaintiff, including Plaintiff's counsel, read and understood the federal district court judge granted summary judgment as to all Plaintiff's claims, including her state law breach of contract claims.

Second, the statement in the Order that the district court declined "jurisdiction over Plaintiff's state based contract claims" is contrary to the record. For instance, the district court made no such statement in his written order. Indeed, it is beyond debate that the district court does not state in its order that it is declining to exercise jurisdiction over Plaintiff's state law breach of contract claim. Consequently, this finding in the Order is incorrect. Neither Plaintiff nor this Court can summarily re-write the express, written order of the district court.

Third, in the Order, the Court states the “[t]he Federal Court Order [presumably the federal district court order] presented two alternative outcomes without either being chosen definitively by the Court.” Similar to other instances already noted in this Motion, the Court attributes statements and findings to the federal district court that do not appear in the record. Like other instances noted previously, it is beyond debate that the federal district court makes no such statements in its order.

In summary, the district court order makes a singular, unambiguous statement granting summary judgment to MUHA. No where in the district court order does it state the district court is dismissing Plaintiff’s state law breach of contract claim pursuant to 28 U.S.C. § 1367(c)(3), the federal statute allowing the dismissal and refiling of state law claims if a federal court declines to exercise continuing, supplemental jurisdiction of state law claims. Moreover, the district court order does not use the word “dismiss” anywhere in its order; an order the district court issued after conducting a *de novo* review of MUHA’s motion for summary judgment. It is without precedent – and none is referenced in the Order - that this Court now reads findings and conclusions into the district court order that do not exist; findings this Court uses to create the “ambiguity” the Court relies upon to allow Plaintiff’s action to proceed.

2. The Order Issued by the United States Court of Appeals for the Fourth Circuit.

The Order makes the following finding: the Fourth Circuit Court of Appeals “ultimately dismissed [Plaintiff’s appeal] incorporating the reasoning of the District Court and declining jurisdiction over Plaintiff’s state based contract claim;” 2) “Plaintiff’s appeal was dismissed, but this dismissal also takes into account the fact that the District Court declined jurisdiction over the contract-based claims;” and, 3) “[t]he dismissal was procedural in nature.” (emphasis added.) The

findings are contrary to the plain, express reading of the order issued by the Fourth Circuit Court of Appeals in several respects. More notably, left uncorrected, the Order substitutes the judgment of this Court in place of the express findings of the Fourth Circuit Court of Appeals.

First, Plaintiff did not assert the Fourth Circuit Court of Appeals either lacked jurisdiction or should decline to exercise jurisdiction over her state law breach of contract claim. To the contrary, Plaintiff expressly asserted the Fourth Circuit Court of Appeals did have jurisdiction in regard to her state law breach of contract claim. The Court concluding otherwise in the Order is in direct contradiction to the record before the Court, including, in particular, *Plaintiff's filings* with the Fourth Circuit Court of Appeals.

For instance, at the Fourth Circuit Court of Appeals in Plaintiff's "Brief of Appellant," in the required jurisdictional statement, Plaintiff made the following express representation: 1) "[t]his is an appeal from *Summary Judgment* which was entered in a civil case in Federal District Court. **This Court has jurisdiction as this was a case filed pursuant to 42 USC Section 1981 / 1983 with the Court exercising supplemental jurisdiction over Appellant's State Law Claims.**" There is no instance in the record - and the Court does not make reference to such instance in the Order - where Plaintiff raised, mentioned or contented the Fourth Circuit Court of Appeals lacked jurisdiction to consider her state law breach of contract claim. To the contrary, Plaintiff stated the Fourth Circuit Court of Appeals had jurisdiction and, moreover, requested the Fourth Circuit exercise jurisdiction in respect to Plaintiff's state law breach of contract claim.

Second, the Fourth Circuit Court of Appeals did not dismiss Plaintiff's appeal as stated in the Order. To the contrary, the Fourth Circuit Court of Appeals "affirm[ed] [*summary judgment*] for the reasons stated by the district court." Contrary to the express and implied findings in the Order, the Fourth Circuit Court of Appeals did not "dismiss" Plaintiff's claims. Indeed, neither the

word "dismiss" nor any derivative of it appears in the order issued by the Fourth Circuit Court of Appeals. In summary, it is indisputable the Fourth Circuit Court of Appeals affirmed *summary judgment* and statements in the Order to the contrary are inaccurate, wrong and require correction.

Third, the Court's statement in the Order that the order issued by the Fourth Circuit Court of Appeals was "procedural in nature" is contrary to the record. As an initial item, even the most strained reading of the Fourth Circuit Court of Appeals' order cannot result in such a conclusion by this Court. Notably, there is no mention of procedural issues or jurisdictional issues in the Fourth Circuit Court of Appeals' order. The Court's Order in this regard, unless corrected, at best misstates and at worst re-writes the express, written order issued by the Fourth Circuit Court of Appeals. In short, this statement in the Order is inaccurate, wrong and requires correction.

Left uncorrected, the Order includes incorrect findings, statements and conclusions; findings, statements and conclusions that are contrary to the record, inaccurately reflect the order issued by the Fourth Circuit Court of Appeals and, perhaps most concerning, insert this Court's judgment in the place of the express, written order of the Fourth Circuit Court of Appeals.

In summary, unless altered and/or amended, the Order contains findings by the Court that modify the federal district court's order and the order issued by the Fourth Circuit Court of Appeals. There is no support for such findings and actions by this Court and, notably, no legal authority is referenced in the Order that would support this Court substituting its judgment for that expressed in writing by the federal district court and the Fourth Circuit Court of Appeals. The Order, in this respect, is without precedent, wrong and requires correction.

B. The Order Contains No Legal Authority to Support the Court's Findings as To Either Res Judicata or Judicial Estoppel.

In the Order, the Court makes the following, seminal findings without referencing legal support: 1) "[t]his is not a case where Plaintiff has taken two different views of the facts (even so, doing such would go more to the weight of the evidence and impeachment), rather it is a case where there is an ambiguous order which provides the potential for two venues available to Plaintiff to resolve her case. This is purely a jurisdictional matter;" and 2) "Defendant's attempt to dismiss Plaintiff's claims based on Plaintiff having appealed the ruling of the District Court's dismissal of her claims is, likewise, misplaced."

First, the Court makes a *legal* finding that Plaintiff, and consequently other parties who have two "venues" available to pursue claims, may pursue claims in one venue after a judgment on the merits is issued in the other, available venue where Plaintiff chose to first pursue her claims. The Court's finding in this regard finds no support in the law of res judicata, and the Court references no supporting legal authority in the Order. Indeed, the Court's finding in this regard is contrary to the well-established doctrine of res judicata.

Second, the Order states this is "purely a jurisdictional matter." However, the Order makes no reference to whether it finds this is a matter of personal jurisdiction or subject matter jurisdiction. Moreover, the Order confuses the issue more by, in the same finding, stating this is a "venue" issue. Subject matter jurisdiction, personal jurisdiction and venue are distinct legal issues. The failure of the Court to state whether the Court finds this is a matter of subject matter jurisdiction, personal jurisdiction or venue requires the Court alter and amend the Order to make its finding clear.

Third, the Order, without referencing legal support, concludes it is allowable for this Plaintiff, and thereby any other plaintiff, to affirmatively state and assert a federal court of appeals has jurisdiction but then, being dissatisfied with the outcome, represent to a South Carolina state court, in particular this Court, that the federal court of appeals neither had nor exercised jurisdiction. The Court's finding in this regard finds no support in the law of judicial estoppel and the Court references no supporting authority in the Order. Moreover, the Court's finding in this regard is contrary to the well-established doctrine of judicial estoppel and, left uncorrected, condones this Plaintiff, and other plaintiffs, making differing representations about the same issue to different courts. *See Cothran v. Brown*, 357 S.C. 210, 215 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary.") (internal citations omitted).

CONCLUSION

For the reasons discussed above, MUHA respectfully requests the Court alter and/or amend the Order, and dismiss Plaintiff's Complaint.³

³ MUHA requests a hearing.

s/ Emmanuel J. Ferguson
Caroline Wrenn Cleveland
Bob J. Conley
Emmanuel J. Ferguson
CLEVELAND & CONLEY, L.L.C.
One Seventy-One Church Street, Suite 310
Charleston, South Carolina 29401
Telephone: (843) 577-9626
Facsimile: (843) 577-6672
ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
cferguson@clevelandlaborlaw.com

ATTORNEYS FOR DEFENDANT

Charleston, South Carolina
June 24, 2020

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	FOR THE NINTH JUDICIAL CIRCUIT
Christine Nelson,	)	
	)	
	)	CASE NO.: 2018-CP-10-4377
Plaintiff,	)	
	)	
v.	)	ORDER DENYING THE MOTION TO DISMISS
	)	OF THE DEFENDANT
Medical University Hospital Authority)	)	
	)	
Defendant	)	
	)	
	)	
	)	

This matter is before this Court on the motion to dismiss filed by the Defendant. A hearing was held by video conference with all counsel of record present on May 27, 2020. After a review of the written submissions of the parties, the record presented, and the oral arguments of counsel, this Court denies the motion to dismiss in favor of Plaintiff on the bases discussed below.

INTRODUCTION

This litigation arises out of the termination of the employment of the Plaintiff by the Defendant. The Plaintiff was hired as a registered nurse effective February 15, 1995. *See*, Complaint, ¶ 8. She was terminated on or about February 27, 2014. *See*, Complaint, ¶ 20. In her Complaint, the Plaintiff alleges a single cause of action for breach of contract. The Defendant Medical University Hospital Authority moved to dismiss this cause of action.

BACKGROUND

This action was originally filed in federal district court against the Defendant on January 2017 alleging various claims to include her state law claim for breach of contract based upon Defendant's unlawful termination of her employment.

On April 28, 2018, the federal magistrate judge issued a Report and Recommendation which recommended dismissal on all of Plaintiff's claims except for Plaintiff's state based contract claim. The magistrate declined federal jurisdiction over the state law claims. This recommendation was adopted by the Judge Norton who was the assigned Federal District Court judge. The order was, in itself, somewhat ambiguous as to whether Plaintiff's claims had been dismissed. Plaintiff filed an appeal to the Fourth Circuit Court of Appeals. This appeal was ultimately dismissed incorporating the reasoning of the District Court and declining jurisdiction over Plaintiff's state based contract claim.

As a result of the District Court declining jurisdiction over Plaintiff's state law claims, Plaintiff filed the instant case on September 6, 2018 to which Defendant filed a Motion to Dismiss. The Court rules on this Motion as follows.

I. Breach of Contract Claim

As her only remaining cause of action, the Plaintiff alleges a breach of contract action based upon provisions of the Medical University Hospital Authority Handbook. The Plaintiff alleges that "during the course of her employment, Plaintiff relied on the specific promises contained in Defendants' Employee Handbook along with other policies and procedures of the Defendant. *See*, Complaint, ¶ 25.

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

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

In order to prove the existence of a definite contract of employment, the employee must establish all of the elements of a contract. Most employment agreements are unilateral. *Small v. Springs Industries, Inc.*, *supra*. A unilateral contract has the following three elements: 1) a specific offer, 2) communication of the offer to the employee, and 3) performance of job duties in reliance on the offer. 82 Am.Jur.2d Wrongful Discharge § 84 (1992). "An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." *Carolina Amusement Co., Inc. v. Connecticut Nat. Life Ins. Co.*, *supra*, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 24 (1981). "The offer identifies the bargained for exchange and creates a power of acceptance in the offeree." *Carolina Amusement Co., Inc. v.*

Connecticut Nat. Life Ins. Co., supra, at 220, 437 S.E.2d 122, S.E.2d at 125, quoting Restatement (Second) of Contracts § 29 (1981).

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

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

The issue of whether an employee handbook constitutes a contract should be submitted to the jury when the issue of the contract's existence is questioned, and the evidence is either conflicting or is capable of more than one inference. *Small*, 292 S.C. at 483, 357 S.E.2d at 454; *Williams v. Riedman*, 339 S.C. 251, 259, 529 S.E.2d 28, 32 (Ct.App.2000). In most instances, judgment as a matter of law is inappropriate when a handbook contains both a disclaimer and promises. *Fleming v. Borden*, 316 S.C. 452, 464, 450 S.E.2d 589,

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley H. Price, Circuit Court Judge
Charleston County

Case No. 2018-CP-10-04377
Appellate Case No. 2020-001160

RECEIVED

Sep 28 2020

SC Court of Appeals

Christine Nelson Respondent,

v.

Medical University Hospital Authority Appellant.

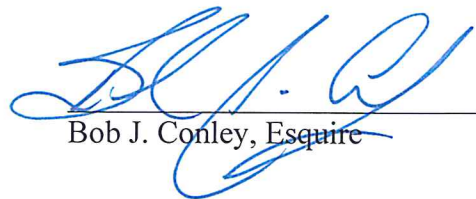
PROOF OF SERVICE OF PETITION FOR REHEARING, EN BANC

Caroline Cleveland
Bob J. Conley
Emmanuel J. Ferguson
CLEVELAND & CONLEY, LLC
171 Church Street, Suite 310
Charleston, SC 29401
Telephone: (843)577-9626
ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
eferguson@clevelandlaborlaw.com

ATTORNEYS FOR APPELLANT

I hereby certify that on this date, I served a copy of the Petition for Rehearing, En Banc, upon counsel for Respondent by placing a copy in the United States mail with sufficient postage thereon on to the following address:

Donald Gist
Aaron Wallace
GIST LAW FIRM, P.A.
P.O. Box 30007
Columbia, SC 29203



Bob J. Conley, Esquire

Charleston, South Carolina

Date: September 28, 2020