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

Savanah Nabors, Plaintiff, v. Sheriff Will Lewis, Greenville County Sheriff's Office, Fidelity and Deposit Company of Maryland, and John Does, Defendants.	**MOTION TO DISMISS OF DEFENDANTS SHERIFF WILL LEWIS AND THE GREENVILLE COUNTY SHERIFF'S OFFICE** C.A. No.: 6:18-CV-01338-DCC-KFM

To: Savanah Nabors, Plaintiff and Druanne D. White, Kyle J. White, and Lauren Taylor, her attorneys.

Defendant Sheriff Will Lewis and the Greenville County Sheriff's Office will move the Court pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for an order dismissing certain claims contained in Plaintiff's Amended Complaint. This motion is made on the following grounds:

1. Plaintiff has not exhausted her administrative remedies with respect to any claim for quid pro quo sexual harassment or gender discrimination;
2. Plaintiff has not properly pled the required elements of a claim for gender discrimination;
3. Plaintiff's claim for overtime pay under the FLSA is legally deficient;
4. Plaintiff has not asserted a valid claim under the Computer Fraud and Abuse Act;
5. To the extent that Plaintiff asserts claims against Will Lewis in his official capacity as Sheriff of Greenville County, such claims are barred by the Eleventh Amendment;
6. Plaintiff has not properly pled a claim for violation of her first amendment rights under 42 U.S.C. §1983;
7. Plaintiff's Class-of-One Equal Protection Claim is legally flawed;

8. Plaintiff's state law claim for overtime pay is preempted by the FLSA;

9. Plaintiff has not pled a viable claim against the Greenville County Sheriff's Office for pay during the transition team;

10. The South Carolina Tort Claims Act bars Plaintiff's claim for intentional infliction of emotional distress;

11. Plaintiff's Amended Complaint fails to state a claim for negligent hiring or retention against the Greenville County Sheriff's Office;

12. Plaintiff has failed to state a viable claim for negligent supervisions against the Greenville County Sheriff's Office;

13. Plaintiff's negligence claim against the Sheriff is legally defective;

14. Plaintiff's claim for assault and battery is deficient as she cannot assert such a claim against both Sheriff Lewis and the Greenville County Sheriff's Office;

15. Plaintiff's defamation claim fails to state a claim;

16. Plaintiff does not state a legally cognizable claim for wrongful discharge; and

17. Defendants are entitled to an order dismissing these claims of Plaintiff as a matter of law.

This motion is based upon the pleadings filed in this Action, the accompanying memorandum of authorities, and applicable law.

s/Stephanie H. Burton
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October 22, 2018
Spartanburg, South Carolina

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FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Savanah Nabors, Plaintiff, v. Sheriff Will Lewis, Greenville County Sheriff's Office, Fidelity and Deposit Company of Maryland, and John Does, Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS** C.A. No.: 6:18-CV-01338-DCC-KFM

I. NATURE OF THE CASE

Plaintiff initiated this action against Defendants asserting federal claims under 42 U.S.C. § 1983 and Title VII and various pendent state law claims.

II. BACKGROUND

Plaintiff filed an Amended Complaint on October 11, 2018. (Doc. 34). This matter is now before this Court on the motion to dismiss of Defendants Sheriff Will Lewis and that Greenville County Sheriff's Office. This motion is made upon the following grounds:

1. Plaintiff has not exhausted her administrative remedies with respect to any claim for quid pro quo sexual harassment or gender discrimination;
2. Plaintiff has not properly pled the required elements of a claim for gender discrimination;
3. Plaintiff's claim for overtime pay under the FLSA is legally deficient;
4. Plaintiff has not asserted a valid claim under the Computer Fraud and Abuse Act;
5. To the extent that Plaintiff asserts claims against Will Lewis in his official capacity as Sheriff of Greenville County, such claims are barred by the Eleventh Amendment;
6. Plaintiff has not properly pled a claim for violation of her first amendment rights under 42 U.S.C. §1983;

7. Plaintiff's Class-of-One Equal Protection Claim is legally flawed;

8. Plaintiff's state law claim for overtime pay is preempted by the FLSA;

9. Plaintiff has not pled a viable claim against the Greenville County Sheriff's Office for pay during the transition team;

10. The South Carolina Tort Claims Act bars Plaintiff's claim for intentional infliction of emotional distress;

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15. Plaintiff's defamation claim fails to state a claim;

16. Plaintiff does not state a legally cognizable claim for wrongful discharge; and

17. Defendants are entitled to an order dismissing these claims of Plaintiff as a matter of law.

III. ARGUMENT

A. Plaintiff's Federal Claims Fail to State a Proper Claim

Plaintiff Has Not Exhausted Her Administrative Remedies under Title VII

Prior to pursuing a Title VII claim in federal court, a plaintiff must exhaust her administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Jones v. Calvert Grp., Ltd., 551 F.3d 297, 300 (4th Cir. 2009) ("[A] failure by the plaintiff to exhaust administrative remedies concerning a Title VII claim deprives the federal courts of subject matter jurisdiction over the claim."). The allegations contained in the administrative charge of discrimination limits the scope of any subsequent judicial complaint. King v. Seaboard Coast Line R.R., 538 F.2d 581, 583 (4th Cir. 1976) (stating that a subsequent civil suit "may encompass only the 'discrimination stated in the [EEOC] charge itself

or developed in the course of a reasonable investigation of that charge'") (quoting Equal Employment Opportunity Comm'n v. Gen. Elec., 532 F.2d 359, 365 (4th Cir. 1976)).

While Plaintiff filed a charge of discrimination with the EEOC, she did not assert all of her newly created claims in her charge of discrimination, she merely cut and pasted the allegations from her then-existing Complaint into her Charge. (Attachment A). Plaintiff did not file a charge of discrimination for gender discrimination or for quid pro quo sexual harassment and her time to do so has long since passed. Accordingly, this Court should dismiss Plaintiff's claims for gender discrimination and quid pro quo sexual harassment.

Plaintiff Fails to Adequately Plead a Title VII Claim for Sex Discrimination

In the Eighth Cause of Action in the Amended Complaint, Plaintiff attempts to assert a claim for violation of Title VII of the Civil Rights Act of 1964 for gender discrimination. (Doc. 49-2, ¶ 124-32). To prevail on a Title VII claim for gender discrimination, Plaintiff must present sufficient facts to state a plausible claim for intentional discrimination based upon her gender. Jackson v. S.C. State Ports Auth., No. 2:12-cv-1283-DCN-BM, 2014 WL 43270, at *7 (D.S.C. March 4, 2014). To meet this this standard, Plaintiff must plead that: (1) she is a member of a protected class; (2) she was performing her job satisfactorily; (3) she was subjected to an adverse employment action; and (4) similarly situated male employees received more favorable treatment. Coleman v. Maryland Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010). Conclusory allegations, lacking any factual support, cannot establish a claim for gender discrimination. Jackson, 2014 WL 43270, at *7 (holding that the defendant was entitled to dismissal of Plaintiff's claim for gender discrimination because Plaintiff only alleged that her rights were violated because of her gender and was subjected to gender discrimination and these conclusory allegations lacked factual support).

Here, Amended Complaint clearly does not provide sufficient facts to state a plausible claim. Plaintiff alleges she is a member of a protected class (female) and she was subjected to an adverse employment action, constructive termination. Plaintiff conclusively states she was discriminated against in terms, conditions, and privileges of employment in various ways because of her sex. Plaintiff alleges no facts supporting this allegation. Further, she fails to include any factual allegations to show that similarly situated male employees received more favorable treatment. For these reasons, Plaintiff's amendment is legally flawed and her Title VII claim for sex discrimination should be dismissed.

Fair Labor Standards Act Overtime

In the Second Cause of Action in the Amended Complaint, Plaintiff purports to assert a claim under the Fair Labor Standards Act ("FLSA") against all Defendants for alleged overtime compensation owed to Plaintiff. (Doc. 49-2, ¶ 87-92). Under the FLSA, non-exempt employees must receive overtime pay, not less than time-and-a-half at the regular rate of pay, for hours worked in excess of forty hours in a given work week. 29 U.S.C. § 207(a)(1). However, to make a plausible overtime claim, Plaintiff must allege sufficient facts to support a reasonable inference that she worked in excess of forty hours in at least one work week. Hall v. DirecTV, LLC, 846, F.3d 757, 777 (4th Cir. 2017); Ra' Palo and Galeana v. Lucas Designs Inc., No. 9:17-cv-00710-DCN, 2017 WL 311810, at *2 (D.S.C. July 21, 2017) (stating Plaintiff is required to plead sufficient facts to state a claim to relief that is plausible on its face and the facts pled are not sufficient if they are merely consistent with liability). To support a reasonable inference, Plaintiff must provide sufficient detail about the length and frequency of her unpaid work. Hall, 846 F.3d at 777.

Plaintiff does not adequately plead necessary facts to support her FLSA claim. Plaintiff's blanket allegations do not provide sufficient facts to support a reasonable inference that she has

worked in excess of forty hours in one workweek because she fails to mention the length or frequency of her unpaid work. Plaintiff merely attempts to skirt the pleading requirement without providing any details that could provide a reasonable inference of any violation of the Fair Labor Standards overtime regulations. Plaintiff's proposed amendment is futile, specious, lacking in legal foundation and her FLSA overtime claim should be dismissed accordingly.

Computer Fraud and Abuse Act

Plaintiff asserts a claim under the Federal Computer Fraud and Abuse Act that was adopted primarily to criminally prosecute computer hackers. 18 U.S.C. § 1030. Not only does Plaintiff fail to identify which Defendant this claim is asserted against, her proposed pleading does not state a proper legal claim.

Other than generically citing to the statute in her proposed pleading, Plaintiff does not identify under which section she asserts a claim. To set forth a proper civil claims under subsection (a)(2) of the CFAA, Plaintiff is required to allege that **each Defendant**: (1) intentionally accessed a computer; (2) without authorization or exceeding authorized access; (3) such Defendant thereby obtained information; (4) from a protected computer; and (5) there was a loss aggregating at least $5,000 in value. See LVRC Holdings, LLC v. Brekka, 581 F.3d 1127, 1132 (9th Cir. 2009). To assert a claim under subsection (a)(4), Plaintiff must allege that each Defendant (1) accessed a 'protected computer"; (2) without authorization or exceeding authorization that was granted; (3) knowingly and with intent to defraud and thereby (4) furthered the intend fraud and obtained something of value; (5) causing a loss of at least $5,000.00.

Plaintiff's proposed pleading does not allege the required elements. First, Plaintiff does not make specific allegations against each Defendant. Plaintiff proposes to allege only that the "Defendants" accessed her Google Drive account without her authorization. Plaintiff does not

identify which Defendant allegedly obtained such access, when access was obtained, identify any device (i.e. did this person use a GCSO computer or iPad used by Plaintiff during her employment and which is owned by a Defendant), nor does Plaintiff identify how such unknown person magically obtained her password. Plaintiff does not allege that any information was used for any purpose, was corrupted or damaged in any way, or that she has even been unable to access her Google Drive account.

Second, Plaintiff's proposed Complaint does not include sufficient allegations of damages. Section 1030(g) of the CFAA authorizes a private cause of action for any person "who suffers damage or loss by reason of a violation" but "only if the conduct involves [one] of the factors set forth in" subsection 1030(c)(4)(A)(i). 18 U.S.C. § 1030(g). Here, Plaintiff alleges only that she has "incurred at least $5,000.00 in damages" without pleading a single factual detail to support such a claim. Section 1030(c)(4)(A)(i)(I) which provides that the loss be to "one or more persons during any one year period . . . aggregating at least $5,000 in value." 18 U.S.C. § 1030(c)(4)(A)(i)(I).

"Loss" under the CFAA is defined as "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C. § 1030(e)(11). The 'alleged "loss" must be related to the impairment or damage to a computer or computer system." Brooks v. AM Resorts, *LLC*, 954 F.Supp.2d 331, 338 (E.D. Pa. 2013) (quoting Sealord Holdings, Inc. v. Radler, No. 11-6125, 2012 WL 707075, at *4 (E.D. Pa. Mar. 6, 2012). Loss under the CFAA is compensable if "the cost of remedial measures taken to investigate or repair the damage to the computer, or loss is the amount of lost revenue resulting

from a plaintiff's inability to utilize the computer while it was inoperable because of a defendant's misfeasance." Clinton Plumbing & Heating of Trenton, Inc. v. Ciaccio, No. 09-2751, 2011 WL 6088611, at *5 (E.D. Pa. Dec. 7, 2011) (emphasis added).

Plaintiff has not properly asserted damage under the CFAA because the only damages recoverable are: (1) the cost of remedial measures taken to investigate and repair damage to the computer system; and (2) lost revenue when the damage computer was inoperable. Plaintiff does not allege that Defendants deleted any data or otherwise caused harm to the computer system, nor assert that system has ever been inoperable. Plaintiff does not allege that she has undertaken any action or incurred a penny as a result of her discovery that "Defendants" have possession of documents she created or saved on Google Drive. Plaintiff's bare bones allegation that she sustained a loss of $5,000, without more, does not meet the threshold pleading requirements and such claim should be dismissed.

Section 1983 Claims

Sheriff Lewis is Entitled to Eleventh Amendment Immunity

In paragraph 103 of her Amended Complaint, Plaintiff states: "the above-referenced acts and/or omissions by the Sheriff occurred within the scope of his employment as the Sheriff of Greenville County" implying that she asserts claims against him in his official capacity as Sheriff. To the extent that Sheriff Will Lewis is sued by Plaintiff in his official capacity, he is entitled to immunity pursuant to the Eleventh Amendment. The Eleventh Amendment bars federal courts from hearing claims against a state or its agents, unless the state has consented to the suit. Gulledge v. Smart, 691 F. Supp. 947, 954 (D.S.C. 1998). A suit against a state employee in his or her official capacity "is not a suit against the official but rather is a suit against the official's office." Will v. Mich. Dep't State Police, 491 U.S. 58, 71 (1989).

In South Carolina, sheriff's offices and departments are state agencies. S.C. Code Ann. § 23-13-550 (2017). This Court has held that under South Carolina law, sheriffs and deputy sheriffs are agents of the state and not of the counties: "[i]t is well-established in this state that a sheriff's office is an agency of, and a sheriff 'dominated by,' the state, such that a suit against the sheriff in his official capacity is a suit against the State." Carroll v. Greenville Cty. Sheriff's Dept., 871 F. Supp. 844, 846 (D.S.C. 1994) (quoting Gulledge, 691 F. Supp. at 955). Section 15-78-20(e) of the South Carolina Code states that the State of South Carolina does not waive Eleventh Amendment immunity, consents to suit only in a court of the State of South Carolina, and does not consent to suit in a federal court or in a court of another state. To the extent Plaintiff seeks to assert her claims against Sheriff Lewis in his official capacity, her claim should be dismissed.

42 U.S.C. § 1983 First Amendment Claim

In the Fifth Cause of Action in the Amended Complaint, Plaintiff asserts a very vague claim for violation of her rights under the First Amendment. (Doc. 49-2, ¶ 104). To recover Plaintiff must allege that: (1) she engaged in a protected First Amendment activity; (2) Sheriff Lewis took some action that adversely affected her First Amendment rights; and (3) there was a causal relationship between her protected activity and his conduct. Martin v. Duffy, 858 F.3d 239, 249 (4th Cir. 2017) (holding Plaintiff, a *pro se* inmate, had stated a plausible First Amendment retaliation claim because Plaintiff alleged in his complaint that: (1) Plaintiff had filed a grievance against a Sergeant for battery which the court determined was a protected activity because the First Amendment protects the right to petition the government for a redress of grievances; (2) he was placed in segregation which adversely affected his First Amendment rights; and (3) the Plaintiff sufficiently alleged the Defendant's retaliatory act of placing him in segregation was taken in response to the exercise of his First Amendment right because Defendant took the adverse action

of placing Plaintiff in segregation the day after he filed a grievance and after she had questioned him relentlessly about an informal resolution attempt of the grievance.)

Plaintiff has not adequately pled any facts to support violation of her First Amendment rights. Plaintiff merely states "the above-described acts and/or omissions violated her First Amendment rights" but fails to identify which allegations are alleged to be an exercise of her rights under the First Amendment. Further, Plaintiff does not allege that Lewis took any action that adversely affected her First Amendment rights nor does she allege a causal relationship between the any protected First Amendment activity and any adverse action. For these reasons, Plaintiff's First Amendment Retaliation claim lacks any legal basis, and therefore, it should be dismissed.

Class-of-One Equal Protection

In the thirteenth cause of action in the Amended Complaint, Plaintiff asserts a violation of the Equal Protection Clause pursuant to 42 U.S.C. § 1983 as a member class-of-one. Her premise is that the Sheriff publicly challenged her credibility during two press conferences, knowing that she was a victim of sexual misconduct. To succeed on an Equal Protection claim brought by a class-of-one, Plaintiff must allege that she was intentionally treated differently from others who are similarly situated and that there is no rational basis for such treatment. Village of Willowbrook v. Grach Olech, 528 U.S. 562, 564 (2000); see King v. Rubenstein, 825 F.3d 206, 220 (4th Cir. 2016) (A plaintiff must demonstrate he has been treated differently from others with whom he is similarly situated and the unequal treatment was the result of purposeful discrimination).

In Plaintiff's Amended Complaint, Plaintiff alleges that the alleged sexual assault occurred at the Hyatt Place House Hotel located in Charlotte, North Carolina, plainly not within the jurisdiction of the GCSO. Plaintiff does not allege that she reported that crime to any law

enforcement agency to investigate. She does not allege that the GCSO ever investigated any crime of which she is the victim or had jurisdiction to do so.

Plaintiff must allege that there is an extremely high degree of similarity between her and the comparative class – presumably victims of crimes in Greenville County that are investigated by the GCSO. Sono Irish, Inc. v. Town of Surfside Beach, No. 4:13-cv-00249-RBH, 2015 WL 2412156, at *7 (D.S.C. May 21, 2015) (holding that the plaintiff was not similarly situated to Pier Outfitters, Inc. because the plaintiff had exercised an option to extend in its lease and its lease had expired, whereas Pier Outfitters, Inc.'s contract still had a number of years left). Further, the Equal Protection Clause does not require things that are different in fact or opinion to be treated in law as if they were the same. Moss v. Clark, 886 F.2d 686, 691(4th Cir. 1989) (holding that prisoners in the District of Columbia are not similarly situated to prisoners in federal facilities with regard to parole eligibility simply because both were sentenced in the District of Columbia Superior Court under the District of Columbia Code). Here, Plaintiff has not alleged, nor can she, that there is a high degree of similarity between herself (an alleged victim of sexual harassment in the workplace who never reported a crime to any law enforcement agency) and victims of crimes within the jurisdiction of the GCSO.

The second prong of a class-of-one Equal Protection claim requires the Court to consider whether there is a rational basis for the disparate treatment. Village of Willowbrook v. Grach Olech, 528 U.S. 562, 564 (2000). However, rational basis is so deferential that even if the purpose in creating the classification is not rational, this Court could uphold the regulation if the Court can envision any rational basis for the classification. Cainhoy Athletic Soccer Club v. Town of Mount Pleasant, 225 F.Supp.3d 514, 524-25 (D.S.C. 2016).

Here, Plaintiff is not similar to victims of crimes in Greenville County who actually report a crime to be investigated by the GCSO. To the contrary, Plaintiff is a disgruntled former employee who publically accused a public official of rape, a crime she never alleges that she reported to the GCSO. Her claim is specious and it should be dismissed accordingly.

PLAINTIFF'S STATE LAW CLAIMS

South Carolina Payment of Wages Act

Given the obvious weakness in her prior Complaints, Plaintiff now asserts new theories under the South Carolina Payment of Wages Act. Plaintiff now alleges that she is owed compensation for work performed on a "transition team" prior to the inauguration of Will Lewis as Sheriff or her employment with the GCSO. Plaintiff also for the first time alleges that she is owed overtime compensation.

Plaintiff's Proposed Overtime Claim is Preempted by the FLSA

Plaintiff cannot assert a claim for overtime compensation pursuant to the SCPWA because such a claim is preempted by the provisions of the Fair Labor Standards Act. In Anderson v. Sara Lee Corp., 508 F.3d 181, 194 (4th Cir. 2007), the United States Court of Appeals for the Fourth Circuit noted that the FLSA provides an "unusually elaborate enforcement scheme" and "Congress prescribed exclusive remedies in the FLSA for violations of its mandates." Id. at 192, 194. Two specific FLSA mandates are: (1) "that covered workers be paid a minimum wage, see [29 U.S.C.] § 206," and (2) "that they receive overtime compensation, *see* [29 U.S.C. § 207]." Id. at 192. As this Court has held on many occasions, the FLSA preempts any state law claim for overtime compensation. See *e.g.* Austin v. City of York, No. 0:17-cv-01054-MBS, 2017 WL 3205792, at *2 (D.S.C. July 28, 2017)(" Here, Plaintiff is seeking overtime wages, a right established by an FLSA mandate. *See* 29 U.S.C. § 207. Plaintiff does not assert that the SCWPA provides more

beneficial overtime benefits, nor does Plaintiff assert that the SCWPA even provides for overtime benefits. The court concludes Plaintiff's claim is preempted by the FLSA and removal is proper under federal question jurisdiction."); McMurray v. JRJ Restaurants, Inc., C.A. No. 4:10-cv-01435-JMC, 2011 WL 247906, at *2 (D.S.C. January 26, 2011)("To the extent that Plaintiff seeks compensation under the Wage Act for overtime pay otherwise required by the FSLA or alleges that he received less than the federal minimum wage as a result of Defendants' failure to pay him for all hours worked, Anderson clearly provides that these claims are preempted by the FLSA and must be dismissed."); Degidio v. Crazy Horse Saloon and Rest., Inc, No. 4:13-CV-02136-BHH, 2015 WL 5834280, at *4 (D.S.C. Sept. 30, 2015) ("[T]o the extent that the plaintiff is alleging that the defendant violated her rights under the SCPWA by failing to pay appropriate minimum wages for all hours worked and "denying overtime wages, those claims are preempted by the FLSA."). Plaintiff cannot assert a claim for overtime compensation under the South Carolina Payment of Wages Act because such a claim is plainly preempted. Therefore, her SCPWA overtime claim should be dismissed.

Plaintiff Does not Allege that GCSO was her Employer while she was on the Transition Team

Plaintiff also asserts a claim against all Defendants for compensation allegedly owed for work performed prior to the inauguration of Will Lewis as Greenville County's Sheriff. Plaintiff cannot plead a plausible claim for these wages against Defendant GCSO. Under the SCPWA, an employer is "every person, firm, partnership, association, corporation, receiver, or other officer of a court of this State, the State or any political subdivision thereof, and any agent or officer of the above classes **employing any person in this State**." S.C. Code Ann. § 41-10-30 (2017). Plaintiff does not plead that she was an employee of the GCSO during the "transition" period. To the contrary, Plaintiff specifically pleads that she was employed by Greenville County starting on

December 5, 2016. (Doc 49-2, ¶ 10-11). In fact, Plaintiff pleads that Will Lewis was hired by Greenville County as an "Administrative Coordinator" during this period. Her claim is legally flawed and should be dismissed accordingly.

Intentional Infliction of Emotional Distress is not Actionable Under the South Carolina Tort Claims Act

In her Amended Complaint, Plaintiff asserts a state law tort claim for intentional infliction of emotional distress against all Defendants apparently based upon the premise that Sheriff Lewis sexually assaulted her and sexually harassed her. Section 15-78-30 (f) of the Act defines "Loss" as "bodily injury, disease, death, or damage to tangible property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, **but does not include the intentional infliction of emotional harm**." S.C. Code Ann. §15-78-30(f) (2017). This Court has determined that "the SCTCA specifically excludes claims for intentional infliction of emotional distress against a government entity and its employees and agents." Arora v. James, No. 5:14-cv-00018-JMC, 2015 WL 1011341, at *3 (D.S.C. March 6, 2015); See e.g. Tucker v. Shelton, No. 6:16-cv-313-TMC-KFM, 2017 WL 6033521, at *3 (D.S.C. November 20, 2017) (recommending that summary judgment be granted for the Laurens County Sheriff's Office on Plaintiff's intentional infliction of emotional distress claim pursuant to S.C. Code Ann. § 15-78-30(f) (2017)); ("Claims of intentional infliction of emotional distress against a governmental entity, including an individual government employee in their official capacity, are barred by the South Carolina Tort Claims Act […]"). Accordingly, Defendants cannot be liable for intentional infliction of emotional distress and such claim must be dismissed.

Plaintiff's Negligence Claims Against GCSO

Hiring and Retention

In the Fourth Cause of Action of the Amended Complaint, Plaintiff asserts negligence claims for negligent hiring, retention and supervision of several GCSO officers. To the extent that Plaintiff alleges that Miller, Davenport, or any of the other "above-referenced officers" were negligently hired, she has alleged nothing to support such a legal claim. "Where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring ... the employee." James v. Kelly Trucking Co., 661 S.E.2d 329, 330, 377 S.C. 628, 630 (2008). Negligent hiring "cases 'generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties.'" Kase v. Ebert, 707 S.E.2d, 456, 459, 392 S.C. 57, 64 (Ct. App. 2011) (quoting Doe v. ATC, Inc., 624 S.E.2d 447, 450, 367 S.C. 199, 206 (Ct. App. 2005)); see also Williams v. Preiss–Wal Pat III, *LLC*, 17 F.Supp.3d 528, 538 (D.S.C. 2014) ("The issue of an employer's knowledge concerns the employer's awareness that the employment of a specific individual created a risk of harm to the public."). Plaintiff has not alleged that there was something in Miller or Davenport's background that put the GCSO on notice that they might harm her.

Plaintiff's one limited allegation that she reported "the inappropriate actions of the Sheriff to more than one employee of the Sheriff's Office" at some unknown point in time, is simply insufficient. Plaintiff does not allege that there is something in any such person's background that put the GCSO on notice that such person would not take action given her report or had ever failed to do so in the past. Blair v. Defender Services Inc., 386 F.3d 623, 629-30 (4th Cir. 2004) (citing Southeast Apts. Mgmt., Inc. v. Jackman, 257 Va. 256, 513 S.E.2d 395 (Va.1999)). Plaintiff does

not allege that any GCSO employee had a propensity or a prior history of failing to report sexual harassment. The Amended Complaint is devoid of any allegation that even remotely suggests that the GCSO was aware of any such propensity. In addition, there is nothing in Plaintiff's Amended Complaint that suggests how any alleged failure proximately caused Plaintiff injury. Plaintiff's negligent hiring and retention claim is simply defective. Accordingly, Plaintiff's negligent hiring and retention claim should be dismissed.

Negligent Supervision Claim

Plaintiff's negligent supervision claim is likewise deficient. An employer can be liable for negligent supervision of an employee when an "employee intentionally harms another" on the employer's premises and "[the employer] (i) knows or has reason to know that he has the ability to control his [employee], and (ii) knows or should know of the necessity and opportunity for exercising such control." Degenhart v. Knights of Columbus, 420 S.E.2d 495, 496, 309 S.C. 114, 116–17, (1992) (quoting Restatement (Second) of Torts § 317 (1965)).

To the extent that such claim relates to Miller, Davenport, or any other officer of GCSO, there is no allegation in the Amended Complaint of any the necessary elements to support such a claim. Plaintiff does not allege that some other person intentionally harmed her while on the premises of the GCSO nor that the GCSO knew of any opportunity to exercise control. For these reasons, Plaintiff's amended negligent supervision claim is futile.

Plaintiff's Negligence Claim Against the Sheriff

Although Plaintiff alleges that Sheriff Lewis drugged and raped her, a criminal act that she does not allege she ever reported to any law enforcement officer or agency, in a blatant effort to try to plead some claim which might be covered by an insurance policy, in the Fourteenth Cause of Action, Plaintiff alleges that Sheriff Lewis individually is liable by "negligently and recklessly"

[failing] "to act as a reasonably prudent person would act under the circumstances" (Doc. 49-2 ¶ 167-168). Plaintiff does not identify any specific duty owed by the Sheriff to her. She does not allege that factual basis to support a negligence claim or the legal basis for her claim. Her proposed pleading does not meet the pleading requirements of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Robinson v. American Honda Motor Co., 551 F.3d 218, 222 (4th Cir. 2009). Accordingly, Plaintiff's vague and ambiguous negligence claim against Will Lewis must be dismissed.

Assault and Battery

In her Amended Complaint, Plaintiff asserts a claim for assault and battery against all Defendants apparently arising from her contention that she was drugged and raped by Sheriff Lewis in Charlotte, North Carolina. It is legally impossible to assert such a claim against both Sheriff Lewis and the GCSO. The South Carolina Tort Claims Act is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. S.C. Code Ann. §15-78-200 (2017). The Act includes exceptions to the State's waiver of sovereign immunity including: "employee conduct […] which constitutes actual fraud, actual malice, **intent to harm, or a crime involving moral turpitude**." S.C. Code Ann. § 15-78-60 (2017). Employees cannot be sued individually under the Act unless "the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (2017). Thus, for a given tort, either the governmental entity or the employee is liable, but not both. Here, Plaintiff claims that Defendant Lewis "unreasonably and **intentionally** assaulted and physically battered the Plaintiff with the intent to harm the Plaintiff." (Doc. 49-2, ¶

140). Such a claim against the GCSO is plainly barred by the Act and her claim against the GCSO should be dismissed.

Defamation

In her Amended Complaint, Plaintiff asserts a claim for defamation based upon two press conferences. First, Plaintiff asserts that Sheriff Will Lewis defamed her by stating that his encounter with Plaintiff was consensual. Second, Plaintiff suggests that a GCSO employee defamed her during a press conference by allegedly implying that her delay in serving the Complaint and "number of chosen counsel" affects her credibility. (Doc. 49-2, ¶ 73).

Plaintiff is a Limited Purpose Public Figure

Plaintiff is a limited purpose public figure required to prove actual malice and cannot therefore state a claim for defamation against GCSO. To prove a defamation claim, a public figure plaintiff must show that the statements were made with "actual malice," meaning "with knowledge that [the statements] were false, or with reckless disregard of whether [the statements] were false or not." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162 (1967); Hatfill v. The New York Times Co., 532 F.3d 312, 317 (4th Cir. 2008). Plaintiff became a limited-purpose public figure by "thrusting [herself] into the forefront of a public debate." Carr v. Forbes, 259 F.3d 273, 280 (4th Cir. 2001). To determine whether a Plaintiff is a limited purpose public figure as to a particular controversy, the Court conducts a two-part inquiry: whether (1) a "public controversy" gave rise to the defamatory statement; and (2) plaintiff's participation in that controversy sufficed to establish him as a public figure. Carr, 259 F.3d at 278. A public controversy is a dispute that "in fact has received public attention because its ramifications will be felt by persons who are not direct participants." Carr, 259 F.3d at 279. To determine whether Plaintiff thrust herself into a public controversy, a five-part test applies: (1) whether Plaintiff has access to channels of effective

communication; (2) whether Plaintiff voluntarily assumed a role of special prominence in the controversy; (3) whether Plaintiff sought to influence the resolution of the controversy; (4) whether the controversy existed prior to the publication of the defamatory statements; and (5) whether Plaintiff retained public figure status at the time of the alleged defamation." Carr, 259 F.3d at 279.

First, the events giving rise to Plaintiff's allegations against Defendants Will Lewis and GCSO are "public controversies". Plaintiff's allegations have triggered intense media scrutiny because she alleged that an elected official engaged in criminal conduct.

Second, Plaintiff is a limited-purpose public figure with respect to her allegations against Defendants Will Lewis and GCSO. Plaintiff admittedly assumed a role of special prominence in the controversy by publishing a public blog post, and has access to channels of effective communication. With respect to the third element, Plaintiff clearly sought to influence the outcome of the controversy; she admittedly published her blog post allegedly to hold Sheriff Lewis accountable for his actions. As to the fourth element, the controversy existed prior to the publication of the allegedly defamatory statements. Plaintiff retained public figure status at the time of the news conferences she identifies. Accordingly, Plaintiff is a limited-purpose public figure and is required to prove "actual malice" to prove her claim for defamation.

Defendant GCSO cannot be liable for Plaintiff's claim because a government entity is not liable for employee conduct constituting "actual malice." The exceptions to the State's waiver of sovereign immunity include: "employee conduct […] which constitutes actual fraud, **actual malice**, intent to harm**,** or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17) (2017). Accordingly, Plaintiff claim against GCSO is flawed and should be dismissed.

The Statements Made at the Second Press Conference are not Defamatory

As to the second press conference, Plaintiff cannot plausibly claim that the statements about her were defamatory. Plaintiff imaginatively suggests that a GCSO employee defamed her by stating that he had first received notice about the lawsuit from a law firm in the "low country," and that he had not yet received the Complaint as he had requested from Plaintiff's counsel. (Doc. 49-2, ¶ 70). Plaintiff further asserts that she was defamed by the GCSO employee's disclosure of "the specifics of conversations" that he had with Plaintiff's previous lawyers. Id. Plaintiff also asserts that she was defamed by the GCSO's employee's comment that "asserting 'baseless' claims that don't give someone the fair opportunity to respond to them would be 'fundamentally unfair.'" (Doc. 49-2, ¶ 72). Plaintiff creatively attempts to manufacture a theory that the GCSO employee's statements "suggest that the Plaintiff's number of chosen counsel and the timing of service had some impact on her credibility." (Doc. 49-2, ¶ 73).

To prove defamation, Plaintiff must plead and prove the following elements: "(1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either action ability of the statement irrespective of special harm or the existence of special harm caused by the publication." See Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 (1998). A defamatory statement is a statement that will "harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* at 506. In addition, a public figure plaintiff must prove that the statement was made with "actual malice," meaning "with knowledge that [the statements] were false, or with reckless disregard of whether [the statements] were false or not." Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162 (1967); Hatfill v. The New York Times Co., 532 F.3d 312, 317 (4th Cir. 2008). Plaintiff simply cannot claim that the statements were damaging to

her reputation. To the extent that Plaintiff relies on the statement that her claims were "baseless," such a statement is not harming to her reputation such that it constitutes defamation. A claim can be questioned for a myriad of reasons beyond the substantive merits of the claim. The statements made by the GCSO employee are not defamatory. Accordingly, Plaintiff's claim should be dismissed.

Wrongful Discharge

In her Third Cause of Action, Plaintiff attempts to recast her prior wrongful discharge claim with yet another legal theory – that she resigned because she "refused to participate in the misuse of taxpayer dollars" and "reported" the possible future misuse of public funds, apparently by playing part of a recording to Major Ty Miller. (Doc. 49-2 ¶95). Apparently, Defendant's alleged misuse of public funds does not relate to any actual misuse of funds but to a proposed trip to Reno. Plaintiff fails to allege any cognizable wrongful discharge claim under state law. Contrary to Plaintiff's assertions, these allegations are not grounds for wrongful discharge in South Carolina.

In South Carolina employment is at-will subject to a very limited public policy exception first enunciated in Ludwick v. This Minute of Carolina, Inc. 337 S.E.2d 213, 216, 287 S.C. 219, 224-25 (1985). South Carolina's courts have recognized a cause of action for wrongful termination only when there is a violation of a clear mandate of public policy and there is no other available remedy. Barron v. Labor Finders of South Carolina, 713 S.E.2d 634, 637, 393 S.C. 609, 614 (2011); *Ludwick*, 337 S.E.2d at 216, 287 S.C. at 225,; Keiger v. Citgo, 482 S.E.2d 792, 793, 326 S.C. 369, 372 (Ct. App. 1997). There are no South Carolina cases recognizing a claim for wrongful termination because of a potential (not actual) misuse of public funds. Accordingly, Plaintiff's claim for wrongful discharge should be dismissed.

CONCLUSION

Based upon the foregoing authorities and argument, Defendants Sheriff Will Lewis and the Greenville County Sheriff's Office respectfully submit that many of the proposed claims should be dismissed:

- Her First Cause of Action under the South Carolina Payment of Wages Act for overtime compensation against both Defendants because it is preempted by the FLSA.
- Her First Cause of Action under the South Carolina Payment of Wages Act against the GCSO for work on a "transition team" which existed prior to the inauguration of Will Lewis as Sheriff and her employment by GCSO.
- Her Second Cause of Action for overtime compensation against both Defendants under the Fair Labor Standards Act because her claims do not meet required pleading standards.
- Her Third Cause of Action for wrongful discharge in violation of public policy against both Defendants because she does not state a proper legal claim.
- Her Fourth Cause of Action against GCSO for negligence.
- Her Fifth Cause of Action under Section 1983 against Sheriff Lewis in his official capacity that is barred by the Eleventh Amendment.
- Her Fifth Cause of Action under Section 1983 for violation of her first amendment rights because she does not properly state a claim.
- Her Seventh Cause of Action for quid pro quo discrimination because she did not exhaust her administrative remedies with respect to such a claim.
- Her Eighth Cause of Action for gender discrimination because she failed to exhaust her administrative remedies for such a claim and because it is legally flawed against both Defendants.
- Her Tenth Cause of Action for assault and battery against the GCSO which is barred by the Tort Claims Act.
- Her Eleventh Cause of Action against both defendants for intentional infliction of emotional distress that is barred by the Tort Claims Act.
- Her Twelfth Cause of Action for defamation which is barred by the Tort Claims Act against the GCSO and which does not state a proper legal claims against the GCSO.
- Her Thirteenth Cause of Action as a class-of-one for violation of the equal protection clause.
- Her Fourteenth Cause of Action against Sheriff Lewis for negligence.
- Her Fifteenth Cause of Action under the Computer Fraud and Abuse Act because she does not state a proper legal claim.

Respectfully submitted,

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