IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

FRANKLIN SAVAGE et al., Plaintiffs, v. POCOMOKE CITY, et al., Defendants.	Case No. 1:16-cv-00201-JFM

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT OGLESBY'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION[1]

The filings in this case paint two very different portraits of Worcester County State's Attorney Beau Oglesby ("Oglesby") and offer two very different factual versions of his actions in this case. Plaintiffs' First Amended Complaint ("FAC") pleads, in a specific and detailed manner, Oglesby's gratuitous and repeated use of a racial slur during a meeting in an all-white room with the exception of Officer Savage and Assistant State's Attorney Ajene Turnbull ("Turnbull"). The FAC alleges that Turnbull was present during the reading of the letters and hurriedly left when Oglesby asked if his repeated use of the "n-word" had offended anyone. FAC ¶ 107. The FAC alleges that use of the offensive word was unnecessary to the case and that it would not have been used in court, *id.* ¶ 110. Tellingly, Oglesby does not deny that he used the word multiple times, nor does he deny the allegations in ¶ 100 of the FAC that the use of the word itself was unnecessary to the case or that the word never would have been read in court.

After learning about Officer Savage's complaint to the appropriate authorities, the FAC also makes clear that Oglesby then embarked on his own private mission to discredit Officer Savage. In fact, because he and one of his assistants were directly implicated in the matter being investigated, under the Maryland Rules of Professional Conduct rules, Oglesby never should have conducted any investigation at all. *See* MD Rule 16-812, Rules of Prof. Conduct 1.7, MRPC 1.7 ("[A] lawyer shall not represent a client if the representation involves a conflict of interest. A conflict of interest exists if . . . there is a significant risk that the representation of one

[1] Officer Savage filed charges and amended charges against the Worcester County State's Attorney's Office alleging race discrimination and retaliation. After, *inter alia*, reviewing position statements from both sides and documentary evidence, and conducting interviews with Officer Savage, the EEOC found probable cause that the Worcester County State's Attorney's Office had engaged in third party interference in retaliation for Officer Savage's letter to the Attorney Grievance Commission. As indicated in their FAC, Plaintiff will amend their complaint to add Savage's Title VII claims as soon as the EEOC's and Department of Justice's administrative process concludes. FAC ¶ 11.

or more clients will be materially limited by . . . a personal interest of the lawyer."). He should have recused himself and his staff and had the investigation conducted by a neutral entity, such as the Maryland State Prosecutor's Office. Oglesby then communicated the results of his private investigation, not to the Chief of Police (who was African American), but to the Mayor, the entire City Council and the City Manager—an odd way, indeed, to report alleged concerns about one police officer's veracity. The FAC also makes clear that Oglesby took numerous actions designed to cause Officer Savage's reassignment and eventual termination from the Pocomoke City Police Department. The FAC alleges and Oglesby does not dispute, that actions such as these are entirely outside of his duties and any form of immunity he might otherwise claim. *Id.* at 127-130.

As carefully laid out by the FAC, Oglesby was part of a concerted effort with other Pocomoke City and Worcester County officials to destroy Officer Savage's credibility and drum him out of law enforcement. FAC ¶¶ 125, 128-130, 145-147. The FAC makes clear that these actions were taken in retaliation for Officer Savage's complaints against Oglesby to the Maryland Attorney Grievance Commission and the EEOC. To highlight that point, the FAC includes allegations that Oglesby gave then-Detective Savage glowing reports and strong letters of recommendation *before* any complaints of racial discrimination were made. But, *after* learning of Officer Savage's complaints to the Attorney Grievance Commission and the EEOC, Oglesby "circled the wagons," so to speak, and created an alternate story to defend himself. This included blackballing Officer Savage in any way he could and interfering with his employment as a police officer.

Oglesby tells an entirely different story, and he would have this Court simply adopt his story without any discovery or any chance to test the story in deposition or at trial. Oglesby

maintains that he was acting as the reasonable prosecutor doing his ethical duty throughout the entire incident. He claims the reading of the letters verbatim was critical to case preparation (although he never goes so far as to say the n-word bore any prosecutorial significance). Oglesby says that Turnbull was not in the room when the letters were read and therefore never left the room because he was offended. Oglesby does not address at all the allegations in the FAC regarding his contact with City Manager Crofoot and as his repeated attempts to have Officer Savage fired.

Several points bear on why this Court should deny both of Oglesby's motions. As to the motion to dismiss, there could hardly be a clearer case of a defendant failing to honor the rule that the allegations of the complaint must be taken as true and all inferences must be drawn in favor of the pleading being challenged. Thus, to grant the motion to dismiss, this Court needs to assume that Oglesby used the "n-word" not because it was necessary to the case, that Turnbull was in the room and was offended, that Officer Savage was also shocked and offended, and that once Officer Savage complained of Oglesby's conduct, that Oglesby did conduct his own Javert-like investigation which was nothing more than an ultra vires vendetta to discredit Officer Savage and (successfully) have him fired. Yet, this version of the facts is ignored by Oglesby's motions.

One need merely state these two different scenarios to conclude that Oglesby's motion must be denied in its entirety. In fact, if anything, the FAC tells a more plausible and more coherent story than does Oglesby. Any fact-finder could easily conclude that the story in the FAC is true and that Oglesby's story is nothing but desperate backfilling. Similarly, summary judgment is obviously both disfavored and inappropriate at this stage. The dispute over Turnbull's presence in the room, and on and how and why he left the room, standing alone,

precludes summary judgment. Calendars and emails must be produced and everyone in the room should be subject to deposition before this Court even considers the resolution of such an issue. Even this early in the case, the disputes surrounding Turnbull's presence and Oglesby's conduct after he learned of Officer Savage's complaints stand out as the kind of disputes central to the case that should be resolved by a jury. To grant any part of Oglesby's motions at this time would be a gross miscarriage of justice.

Similarly, Oglesby's claim of absolute immunity should be rejected. As noted above, his entire "investigation" into Officer Savage's credibility was ultra vires. He ignored the Maryland Rules of Professional Conduct's recusal requirements and made himself a judge in his own case. He then published the results to the political establishment of Pocomoke City without allowing Officer Savage any right to be heard on the issue at all. He should receive no immunity at all for acting to protect himself and his own political standing. Oglesby's duties as a prosecutor and under *Brady* and *Giglio* are to inform *defense counsel* about any credibility issues of police officers and government witnesses in a criminal prosecution. But Oglesby made clear he would not ever call Officer Savage in any case, so that doctrine did not apply. Moreover, nothing in that duty requires blast communication to the City Council and the Mayor of credibility concerns.

Nor should he receive absolute immunity for the reading of the letters themselves. While Oglesby shows (by records the Plaintiffs did not have access to) that the two defendants were under indictment, no trial date was set, and the defendants were evidently fugitives. Oglesby argues that it was necessary to read the letters seized to tie the defendant to the gun in his apartment to make out a felon in possession charge. But this is nonsense. The letter had no address on it, and the envelope, the apartment's lease, or neighbors could establish the

defendant's dominion over the apartment and, hence, the unlawful firearm. The claim that verbatim readings of the letters, including reading the n-word over and over, had anything to do with case preparation is absurd.

Nor does qualified immunity apply in this case. The prohibitions against racial discrimination, a hostile work environment, and retaliation for complaints of violation of federal civil rights are as clear and well-established as any law can be. Either Oglesby did or did not act with racial animus as discussed above, but if he did, no form of immunity can save him.

STATEMENT OF FACTS

The Worcester County State's Attorney's Office prosecutes cases investigated by the Worcester County Criminal Enforcement Team ("CET"), on which Officer Savage was assigned as a detective. FAC ¶ 4, 105. Oglesby, as the State's Attorney, leads the office. FAC ¶ 27.

On April 7, 2014, during a case meeting with Officer Savage,[2] Defendant Nathaniel Passwaters, and Assistant State's Attorneys Kelly Hurley and Turnbull, Oglesby read a series of letters written by Davonte Purnell placing particular emphasis on and repeatedly saying the word "nigga." FAC ¶ 106. Turnbull left the room after Oglesby asked whether anyone in the room was offended. During this incident, Oglesby read the word "nigga" more than ten times. FAC ¶ 109.

Following this incident, on June 12, 2014, Officer Savage resigned from the CET. FAC ¶ 113. In his resignation letter, he stated that the repeated use of the word "nigger" and other acts of racial discrimination had created an "uncomfortable, demeaning, and unbearable work

[2] Oglesby's Motion to Dismiss characterizes this meeting as a "trial preparation meeting." Oglesby MTD at 2. Even though the Complaint's factual allegations are couched on information and belief, Plaintiff concedes that the Davonte Purnell case was indicted at the time of the April 7, 2014 incident. When the Complaint was filed, Plaintiff did not have access to the Davonte Purnell case file and other key information, as that information is not a matter of public record. On further investigation, and after discussion among counsel and with Plaintiff, however, we believe that the two defendants were fugitives and there was no trial date set.

environment," and that he hoped his resignation might ensure that such acts of racial discrimination never occurred again on the CET. *Id.* ¶ 113.

A little over a month later, on July 22, 2014, Officer Savage filed a complaint against Oglesby with the Maryland Attorney Grievance Commission regarding the April 7, 2014 incident. FAC ¶ 124. Officer Savage's complaint explained that he was "very offended" by Oglesby's repeated and gratuitous use of "the word Nigga so freely and without care in front of ASA Turnbull and [himself]." *Id.* The complaint also stated that Oglesby began treating Officer Savage differently after the incident. When Oglesby and the other members of the State's Attorney Office learned about the Officer Savage's complaint they "no longer zealously prosecuted cases on which Officer Savage was the lead officer." FAC ¶ 128.

For example, on September 4, 2014, Oglesby refused to acknowledge Officer Savage in court and stated that Officer Savage was not needed in court. FAC ¶ 145. Within the next week, Oglesby sent correspondence to both the Pocomoke City Mayor and the Pocomoke City Council stating that Officer Savage would no longer be able to testify in court, an integral component of his job as a narcotics officer, because Oglesby "question[ed] his veracity." FAC ¶ 147; *see also* FAC Exhibit E (Oglesby stating that Officer Savage "has always been a man of considerable integrity.").

On August 17, 2015, Officer Savage learned that he was being investigated by the Harford County Sheriff's Office for his July 22, 2014 Complaint to the Attorney Grievance Commission. FAC ¶ 180-81. He was required to attend an interrogation regarding the investigation on October 6, 2015. FAC ¶ 183.

Ten days after the interrogation, on October 16, 2015, Oglesby told Pocomoke City Manager Ernie Crofoot that Officer Savage would not be able to testify in court because Oglesby questioned his veracity. FAC ¶ 184.

After four and a half years of employment as a police officer with the Pocomoke City Police Department, Officer Savage was terminated on October 26, 2015. FAC ¶¶ 186.

Oglesby augments this timeline with a newly revealed reason for his having refused to allow Officer Savage to testify in criminal matters. Oglesby alleges that in July 2014, just weeks before the grievance letters, Officer Savage drafted a warrant application misrepresenting himself as a CET member even though he had resigned from the CET in June 2014. Oglesby MTD at 5. Oglesby asserts that this misrepresentation undermined Officer Savage's veracity in concert with the grievance letters. *Id.* at 26.

To explain this new allegation, Oglesby attaches what he represents is the draft warrant application, marked with his own contemporaneous notes. *Id.* Ex. B-5 at 5. In a section summarizing the "Affiant's Law Enforcement Training and Expertise," Officer Savage wrote "By: Detective Franklin L. Savage," followed by "Pocomoke City Police Department / Worcester County Criminal Enforcement Team." *Id.* Ex. B-5 at 5. "Worcester County Criminal Enforcement Team" is highlighted and a star is marked above the word "Worcester." *Id.* On the next page, Officer Savage started a paragraph with "[i]n March 2012, Your Affiant was assigned to the Worcester County Criminal Enforcement Team," text that is highlighted and above which is a notation "Put an end date." *Id.* at 6. As Oglesby's motion notes, in multiple places Officer Savage used the present perfect tense to describe his experience with the CET. *E.g., id.* ("[D]uring this time [with the CET] Your Affiant has assisted in several search and seizure warrants . . . ."); *see* Oglesby MTD at 5 (citing examples). Oglesby asserts that he directed Chief

Sewell not to allow Officer Savage to execute the warrant, though Sewell's response is not provided, and that Officer Savage executed the warrant anyways. *See id.* at 6.

STANDARD OF REVIEW

A. Motion to Dismiss

A party seeking dismissal under Fed. R. Civ. P. 12(b)(6) must show that, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). All complaints must meet the "simplified pleading standard" of Rule 8(a)(2), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

To determine whether a complaint meets this standard, a court first must divide genuine factual allegations, which are entitled to deference, from "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements..." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), quoted in, *e.g.*, *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013). Next, the court must "assume [the] veracity [of the genuine factual allegations] and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. A complaint will survive when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. A court must "draw on its judicial experience and common sense" to determine whether a reasonable inference can be made, and thus whether the pleader has stated a plausible claim for relief. *Id.* at 679.

In applying its experience and common sense, however, a court must accept all genuine factual allegations as true and construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *See Tobey*, 706 F.3d at 390. A court may not "consider

extrinsic evidence" supplementing those allegations, unless that evidence consists of documents that are attached to or incorporated into the complaint, "integral to the complaint," and "authentic." *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (citing *Blankenship v. Manchin*, 471 F.3d 523, 526 n. 1 (4th Cir. 2006)). Declarations, affidavits, and other statements are among the evidence excluded from consideration if not attached or incorporated to the complaint or not integral to the complaint. *See, e.g., United States v. $2,200,000 in U.S. Currency*, Civil Action No. ELH-12-3501, 2014 WL 1248663, at *9 (D. Md. Mar. 26, 2014) (declining to consider statements of scientists in motion to dismiss) (also citing cases); *Trotter v. Kennedy Krieger Inst., Inc*., Civil No. 11-cv-3422-JKB, 2012 WL 3638778, at *5 (D. Md. Aug. 22, 2012) (declining to consider a declaration in deciding a motion to dismiss).

Finally, if "the motion to dismiss involves 'a civil rights complaint, [a court] must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.'" *Hall v. Burney*, 454 F. App'x 149, 150 (4th Cir. 2011) (quoting *Edwards*, 178 F.3d at 244); *accord Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 248 (4th Cir. 2005) (same); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (same). That context is highly salient in this case.

B. Motion for Summary Judgment

When a party moves for dismissal but relies on evidence outside the pleadings, as Oglesby does here, Fed. R. Civ. P. 12(d) directs courts to treat the motion as one for summary judgment. A motion for summary judgment should not be granted unless the movant can prove, "from the totality of the evidence, including pleadings, depositions, answers to interrogatories, and affidavits, the court believes no genuine issue of material fact exists for trial and the moving

party is entitled to judgment as a matter of law." *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 385 (4th Cir. 2013). In evaluating the evidence, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Raynor v. Pugh*, 817 F.3d 123, 128 (4th Cir. 2016) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)).

A district court therefore "must refuse summary judgment 'where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition.'" *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Baltimore*, 721 F.3d 264, 280 (4th Cir. 2013) (quoting *Nader v. Blair*, 549 F.3d 953, 961 (4th Cir. 2008)). It is "especially important" to allow "sufficient time for discovery . . . when the relevant facts are exclusively in the control of the opposing party." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246-47 (4th Cir. 2002) (quoting 10B Charles A. Wright et al., Federal Practice & Procedure § 2741, at 419 (3d ed. 1998)); *see also E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 448 (4th Cir. 2011) (Summary judgment "is not appropriate where the parties have not had an opportunity for reasonable discovery."). The same is true when the "case involves complex factual questions about intent and motive." *Greater Baltimore Ctr.*, 721 F.3d at 285.

A non-moving party may file an affidavit explaining that "it cannot present facts essential to justify its opposition" to a summary judgment motion. Fed. R. Civ. P. 56(d). Filed with this opposition brief is the Declaration of Andrew McBride, explaining why certain facts essential to oppose the motions cannot be set forth. The Plaintiff requests that Defendant's motions be denied in its entirety and that they be given the opportunity to engage in all discovery to which they are entitled under this Court's rules.

ARGUMENT

I. OGLESBY IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR HIS CREATION OF A RACIALLY HOSTILE WORK ENVIORMENT NOR FOR RETALIATORY EMPLOYMENT ACTIONS ENTIRELY OUTSIDE HIS DUTIES.

In his Motion to Dismiss, Oglesby contends that all of the claims asserted against him in Complaint must be dismissed as a matter of law because the doctrine of absolute immunity shields him from liability. Oglesby MTD at 11. This is not so. As demonstrated below, Oglesby has failed to show that he is entitled to absolute immunity because the conduct giving rise to Officer Savage's claims is ultra vires in that it clearly falls outside of the scope of Oglesby's prosecutorial duties.

A prosecutor is entitled to absolute immunity only "for acts committed within the scope of [his or her] official duties where the challenged activities are . . . 'intimately associated with the judicial phase of the criminal process. . . .[,]'" as opposed to investigative or administrative in nature. *Fishback v. Maryland*, Case No. 12-927, 2012 WL 1145034, at *4 (D. Md. Apr. 4, 2012) (Motz, J.) (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)), *aff'd*, 486 F. App'x 387 (4th Cir. 2012). Courts employ a "functional approach" in determining whether the doctrine of absolute immunity applies. *Safar v. Tingle*, No. 15-CV-467, 2016 WL 1367165, at *10 (E.D. Va. Apr. 4, 2016) (citing *Burns v. Reed*, 500 U.S. 478 (1991)). That is, "when asked to determine whether a prosecutor is entitled to absolute immunity, a court examines 'the nature of the function performed, not the identity of the actor who performed it.'" *Veney v. Fine*, No. 15-3965, 2016 WL 97838, at *3 (D. Md. Jan. 8, 2016), *aff'd*, No. 16-6070, 2016 WL 1273299 (4th Cir. Apr. 1, 2016) (citing *Forrester v. White*, 484 U.S. 219, 229 (1988)). "[T]he official seeking

absolute immunity bears the burden of showing that the nature of [his] conduct is prosecutorial in nature, and therefore entitled to absolute immunity . . . ." *Safar*, 2016 WL 1367165, at *10.

A. Oglesby's Entire Investigation Into Officer Savage's Veracity Was Ultra Vires.

Oglesby's MTD fails to address the Worcester County State's Attorney's Office investigation that ultimately resulted in Officer Savage's termination, specifically the fact that it was improper for Oglesby to conduct his own investigation into Officer Savage's veracity as a detective. First, Section 3-104 of the Maryland Law Enforcement Officers Bill of Rights ("LEOBR") requires that investigations of officers take place according to its procedures, many of which the State's Attorney's Office investigation did not follow and none of which were waived by Officer Savage. For example, Officer Savage did not know that he was under investigation. There may have been additional procedures that were not followed, but that information is not available at this stage of the litigation. As such, Oglesby cannot be protected by absolute immunity because this investigation was ultra vires to his role as the Worcester County State's Attorney. *See People v. Williams*, 465 N.W.2d 376, 379 (Mich. Ct. App. 1990) (explaining that prosecutors abuse their discretion when their actions are "unconstitutional, illegal, or ultra vires.").

B. Oglesby's Citation To His Obligations Under Brady Is A Red Herring.

In yet another argument that misses the mark, Oglesby contends that he is entitled to absolute immunity because he was merely "establishing and implementing a system to ensure that his *Brady* obligations [were] fulfilled." Oglesby MTD at 13 (emphasis deleted). This, like the rest of Oglesby's absolute immunity argument, is nothing more than a red herring. First, obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny are obligations that are owed to *defendants* in the context of criminal prosecutions; there is no corresponding duty

for a prosecutor to set out on a crusade to procure the termination of a police officer who has been placed on a "*Brady*" list. The lack of such a duty makes eminent sense in light of the fact that, as discussed in *Botello v. Gammick*, 413 F.3d 971, 978 (9th Cir. 2005), there are numerous other staffing choices short of termination that may be made in a situation where an officer has been placed on a *Brady* list. More importantly, Oglesby's invocation of *Brady* further highlights the false premise underlying his entire absolute immunity argument, *i.e.* that Officer Savage's claims are nothing more than a challenge to Oglesby's decision regarding whether Officer Savage should be called as a witness at trial.

As is evident from the face of the FAC, the decision not to use Savage as a witness at criminal trials is not the *basis upon which Officer Savage's claims rest*. Officer Savage is not suing Oglesby based on Oglesby's decision not to have Officer Savage testify in any case. Nor do the Plaintiffs disagree with the proposition that Oglesby has the right to choose who testifies in a particular case based on his exercise of prosecutorial strategy and even instinct. The decision not to call Officer Savage in any case is not being challenged.[3] To the contrary, Officer Savage's claims arise out of actions that Oglesby took *above and beyond* the decision not to use him as a witness at trial—conduct which was clearly more akin to an employment decision, which is indisputably administrative and thus not covered by absolute immunity. *See, e.g.*, *Osborne v. King*, Civil Action No. 02-CV-1250, 2006 WL 2371186, at *5 (S.D.W. Va. Aug. 15,

[3] Contrast this case with a hypothetical case in which Oglesby clearly *would* be entitled to absolute immunity. Say, for instance, that Oglesby's decision not to use Officer Savage as a witness in a criminal trial led to the dismissal of charges against a guilty defendant who had robbed a victim at gunpoint. If the victim wanted to sue Oglesby for damages because of his failure to call Officer Savage as a witness, Oglesby would clearly be shielded from liability by the doctrine of absolute immunity. This, however, is not the case here. Another hypothetical further underscores the point. Imagine that instead of filing a civil action against Oglesby for money damages, the victim files an ethics complaint against Oglesby with the Maryland Attorney Grievance Commission. If Oglesby later spreads false rumors about the victim through the news media, could he seriously argue that he is entitled to absolute immunity in a defamation lawsuit because the decision not to call Officer Savage as a witness at the trial was a prosecutorial act? The answer is clearly no. *See* Exhibit A. And yet this is precisely the same result that Oglesby seeks in this case.

2006) ("[A] judge who hires or fires a probation officer cannot meaningfully be distinguished from a district attorney who hires and fires assistant district attorneys, or indeed from any other Executive Branch official who is responsible for making such employment decisions. Such decisions, like personnel decisions made by judges, are often crucial to the efficient operation of public institutions (some of which are at least as important as the courts), yet no one suggests that they give rise to absolute immunity from liability in damages under § 1983.") (citing *Forrester v. White*, 484 U.S. 219 (1988)). Just as Oglesby would not be entitled to absolute immunity if he had, for instance, unlawfully caused ASA Turnbull's employment to be terminated, he is not entitled to absolute immunity for doing the same to Savage. *See Osborne*, 2006 WL 2371186, at *5; *see also Runnels v. Newell*, 407 Md. 578 (2009).

In any event, the cases cited by Oglesby in support of his argument that Officer Savage's claims should be dismissed because courts have applied absolute immunity "in cases involving a prosecutor's decision not to call a police witness" are inapposite.[4] Oglesby MTD at 17. None of those cases involved the same set of facts alleged here: the undertaking of a concerted effort to procure the unlawful termination of a police officer because of his race and in retaliation for exercising his First Amendment rights. Even more telling is the Ninth Circuit case that Oglesby *did not cite* in his motion papers, which severely undercuts his claim for blanket absolute immunity in this case.

In *Botello v. Gammick*, 413 F.3d at 973, a police officer filed suit against two county prosecutors alleging, *inter alia*, that they unlawfully retaliated against him after he revealed abuses in the district attorney's sexual assault response program. The officer alleged that the

[4] *Barnett v. Marquis*, 16 F. Supp. 3d 1218, 1222-24 (D. Or. 2014); *Neri v. Cty. of Stanislaus Dist. Attorney's Office*, No. 10-CV-823 AWI GSA, 2010 WL 3582575, at *4 (E.D. Cal. Sept. 9, 2010); *Walters v. Cty. of Maricopa*, , No. 04-1920-PHX-NVW, 2006 WL 2456173, at *16 (D. Ariz. Aug. 22, 2006); *Roe v. City & Cty. of San Francisco*, 109 F.3d 578, 584 (9th Cir. 1997).

defendant prosecutors retaliated against him in three ways: (1) by reaching out to the officer's new employer in an effort to dissuade it from hiring the officer; (2) by deciding not to prosecute any of the officer's cases; and (3) by demanding that the police department bar the officer from participating in any aspect of any criminal investigation. *Id.* at 977-78. The prosecutors argued successfully in the District Court that all three of these actions were protected by absolute immunity because they could be traced back to the core prosecutorial function of determining whether to prosecute. The Ninth Circuit reversed. It held that only the second course of conduct, the decision not to prosecute any of the officer's cases, was protected by absolute immunity. *Id.* In doing so, the Ninth Circuit explicitly rejected the same gambit deployed by Oglesby here: invoking blanket absolute immunity for non-prosecutorial actions by mere reference to an earlier prosecutorial act. *See Botello,* 413 F.3d at 978 ("By simply characterizing all of their conduct as a decision not to prosecute, [the defendant prosecutors] have not met their burden of showing that absolute immunity is justified either for their attempted interference with the [new employer's] hiring of [the plaintiff officer] or for their administrative demands that [the plaintiff officer] be barred from participating in all stages of the investigative process."). This Court should similarly reject Oglesby's attempt to rewrite the law of absolute immunity.

With respect to the attempt to dissuade the officer's new employer from offering him a job, the Ninth Circuit rejected absolute immunity because "[w]hen [the prosecutors] involved themselves in the [new employer's] decision whether to hire [the officer], they were at best performing an administrative function . . . ." *Id.* at 977. Because the prosecutors' "defamatory comments about [the officer] were simply an attempt to disrupt an employment decision," those actions were not protected by absolute immunity. *Id.* Likewise, the Ninth Circuit rejected absolute immunity in connection with the officer's allegation that the prosecutors demanded that

he be barred from participating in all phases of criminal cases. The Ninth Circuit reasoned that "in insisting that [the officer] be barred from any aspect of the investigative process, even from the earliest stages of preliminary investigations, [the prosecutors] were in essence dictating to local law enforcement authorities how future criminal investigations should be conducted and staffed – an administrative function." *Id.*

The *Botello* decision dooms Oglesby's invocation of the doctrine of absolute immunity in this case, which is perhaps why he declined to acknowledge it in his motion papers. Just like the defendant prosecutors in *Botello*, Oglesby "sought to usurp the staffing decisions" that the Pocomoke City Police Department might have made "to use [Officer Savage] in ways that would not compromise a criminal prosecution and would comport with [Oglesby's] nonprosecution policy." *Id.* at 978 (noting that such "staffing choices" include transferring the officer or ensuring that there is always another officer who could testify and corroborate the first officer's testimony). Oglesby is not entitled to absolute immunity for such actions.

C. Oglesby Should Not Be Granted Absolute Immunity For Reading The N-Word More Than Ten Times In A Meeting With Two African Americans Present.

In this case, Oglesby has not, and cannot, sustain his burden of showing that his conduct in mockingly reading the Purnell letters and subsequently advocating for Officer Savage's unlawful termination from the Pocomoke City Police Department was "so intimately and inexorably tied to the prosecutorial phase of the criminal process as to warrant the blanket protection that absolute immunity affords." *Pachaly v. City of Lynchburg*, 897 F.2d 723, 727 (4th Cir. 1990). Rather, when the facts are considered in the light most favorable to Officer Savage, as required on a motion to dismiss, it is clear that Oglesby's conduct falls well outside of the scope of his prosecutorial duties.

The reading and rereading of this offensive word, more than ten times, was simply not necessary to any legitimate prosecutorial goal and was not the kind of conduct for which absolute immunity should be extended. Although the two defendants had evidently been indicted, no trial date was set and Plaintiffs believe that the two defendants were not even in custody at the time of the meeting. As noted above, Oglesby's story—that the reading of the letters was necessary to search for or establish Purnell's dominion and control over a firearm in the apartment—does not bear scrutiny. There are no addresses on either letter. That could have easily been ascertained without a verbatim reading of the letters. Other proofs of dominion and control were readily available—a lease, a postal envelope, or neighbors' eye witness accounts. It is a fair inference from the facts pled that Oglesby was taking an opportunity to use the word to taunt the two African Americans in the room and entertain the white police officers in the room. Again, if that was his motive, he is entitled to no immunity at all.

In *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993), the Supreme Court enunciated several principles that are relevant here. First, the Court affirmed its prior rulings that absolute immunity is an affirmative defense which the defendant bears the burden of establishing. *Id*. at 269 ("' [T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question.'") (quoting *Burns v. Reed*, 500 U.S. 478, 486 (1991) (further citations omitted). Second, the Court noted that the line between an administrative or investigatory action by a prosecutor (which is entitled only to qualified immunity) and the core function of advocacy in a judicial proceeding (where absolute immunity applies). *Buckley*, 509 U.S. at 275 & n.7. Third, the Court rejected the position seemingly taken by Oglesby that everything a prosecutor does after indictment is protected by absolute immunity.

Id. at 274 n.5 ("Of course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards.").

On these facts, Oglesby has not carried his burden to establish absolute immunity. He does not contend that a trial was imminent or that he was actually marking exhibits for trial. It appears that he was sifting through the fruits of a search warrant with the agents for the very first time. He appears to have been engaged in a preliminary analysis of the potential usefulness of evidence in an as yet unscheduled judicial proceeding. The Court has made clear that "obtaining, reviewing and evaluating" evidence are functions that are *not* automatically entitled to absolute immunity. Rather, "some of these actions may fall on the administrative, rather than the judicial, end of the prosecutor's activities, and therefore be entitled only to qualified immunity." *Id.* at 276 n.7. Case agents review the fruits of search warrants and write memos summarize evidence to the prosecutor that are protected by only qualified immunity. With no trial date set and outside the specific task of selecting and marking actual trial exhibits, Oglesby has not made out a case for absolute immunity and a final decision on that issue should abide further discovery into the nature of the meeting and testimony from witnesses other than Oglesby as to the functions performed.

Nor can absolute immunity cover the acts of retaliation in this case. They look much more political and administrative than, in any sense, legal or prosecutorial. As alleged in detail in the FAC, after learning of Officer Savage's complaint against him regarding the April 7, 2014 incident, Oglesby embarked upon a concerted, and ultimately successful, crusade to get Savage fired from his job. Oglesby's retaliatory and discriminatory actions included the following: "treat[ing] Officer Savage in a markedly different and less respectful manner both in and out of court"; "no longer zealously prosecut[ing] cases on which Officer Savage was the lead officer";

"continu[ing] to block Officer Savage from testifying"; "refus[ing] to acknowledge Officer Savage's presence in court and talk[ing] past him"; "sen[ding] the Pocomoke City mayor and city council [but not Chief of Police Sewell] a letter implying that he would not allow Officer Savage to testify in court because he 'question[ed] his veracity'"; and taking part in "a telephone conversation with Crofoot [just ten days prior to Savage's termination] in which Oglesby was adamant that Officer Savage would never be able to testify again . . . [and] reiterated that Officer Savage should be terminated." FAC ¶¶ 125, 128, 144, 145, 147, 184.

Oglesby cannot seriously argue that all of these actions were prosecutorial in nature, which explains why he focused his entire absolute immunity argument on a false premise, *i.e.* that he is entitled to absolute immunity because the "decision regarding whether and under what conditions he would call Officer Savage as a witness in criminal trials" is a "core prosecutorial function," Oglesby MTD at 11, 18, while at the same time completely ignoring the other key factual allegations from the FAC which actually form the basis for Officer Savage's claims—most notably, the telephone call with Pocomoke City Manager Crofoot just ten days before Officer Savage's termination in which Oglesby adamantly advocated for Officer Savage's termination. *See* FAC ¶ 184. Oglesby's letter to the Pocomoke City Mayor and City Council, based on his own biased and improper investigation, cannot be considered trial preparation under any circumstance or set of facts. This is not the case of a prosecutor making a decision about one case, and this case cannot properly be analogized to *Imbler* and *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009). Oglesby went beyond *any* prosecutorial role and blackballed Officer Savage out of Worcester County law enforcement without affording Officer Savage any due process. The false premise relied upon by Oglesby is the foundation of his invocation of absolute immunity and, without it, his argument crumbles.

In short, it is well-established that the doctrine of absolute immunity does not provide a prosecutor with a blank check to violate employment or other laws with impunity so long as he or she can link those actions back in some fashion to a prosecutorial act. *See Botello,* 413 F.3d at 978. ("Just as a prosecutor may not assert that his actions are absolutely immune merely because they are performed by a prosecutor, . . . a prosecutor may not assert blanket absolute immunity by labeling all his actions as within a particular prosecutorial function.") (citation omitted). The conduct in question must, itself, have been prosecutorial in nature. *See Pachaly*, 897 F.2d at 727; *Veney*, 2016 WL 97838, at *3. That is simply not the case where, as here, the conduct in question—*e.g.*, writing a letter to the mayor and city council (based on his own biased investigation) and adamantly advocating for Savage's termination during a telephone call with Crofoot just ten days before the termination decision (FAC ¶¶ 147, 184)—clearly fall outside of the scope of prosecutorial duties. Oglesby is attempting to stretch prosecutorial immunity yards and yards beyond *Imbler*. Clearly Oglesby is not covered by absolute immunity when he takes a political position or makes a political statement about a police officer. *See* Exhibit A.

Thus, Oglesby's Motion to Dismiss on the basis of absolute immunity should be denied.

II. OGLESBY IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR DISCRIMINATORY AND RETALIATORY ACTIONS.

When determining whether a state officer is entitled to qualified immunity courts engage in a two-step inquiry. *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir. 2003). First, courts "identify the specific right that the plaintiff asserts was infringed by the challenged conduct at a high level of particularity." *Edwards v. City of Goldsboro,* 178 F.3d 231, 251 (4th Cir. 1999). Courts then "consider whether at the time of the claimed violation that right was clearly established," *id.*, "such that it would be clear to an objectively reasonable officer that his conduct violated that right." *Bailey*, 349 F.3d at 739 (emphasis added) (internal quotations omitted).

This second "inquiry is an objective one, dependent not on the subjective beliefs of the particular officer …, but instead on what an objectively reasonable officer would have understood in those circumstances." *Id.* at 741. "Notably, however, the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity." *Edwards*, 178 F.3d at 251.

At the motion to dismiss stage, courts regularly deny qualified immunity based solely on a complaint's factual allegations, which must be read in the light most favorable to the plaintiff. *See, e.g.*, *Gholson v. Benham*, No. 3:14-cv-622, 2015 WL 2403594, at *7 (E.D. Va. May 19, 2015) (denying qualified immunity at the motion to dismiss stage where plaintiff alleged facts to establish that she received harsher treatment and ultimately was terminated due to her race, color, and gender); *Adams v. Univ. of Md. at Coll. Park*, No. Civ.AW-00-3177, 2001 WL 333095, at *3 (D. Md. Mar. 6, 2001) ("assuming the truth of Plaintiff's allegations . . . [Defendant's] actions would not be protected by qualified immunity.").

First, there can be no immunity, qualified or otherwise, for actions that are entirely outside a government employee's work description and assigned duties. Much of Oglesby's conduct as alleged in the FAC falls into this category. Oglesby's "investigation" into Officer Savage's credibility was *ultra vires* in its entirety. He should have recused himself from a matter where his self-interest so obviously made his judgment biased and unreliable. His rush to judgment against Officer Savage also violated the Law Enforcement Officers' Bill of Rights and gave Officer Savage no opportunity to be heard at all in the matter. Oglesby literally tried to make himself both judge and jury in his own case. There is no immunity of any kind for such self-serving misuse of official powers.

Also, Oglesby's letter regarding his opinion of Officer Savage's credibility, which was sent to the entire City Council, the Mayor and the City Manager (and pointedly *not* to the Chief of Police) was a political act, outside his assigned duties. Nor does Oglesby even argue that he has any form of immunity for his communications to Crofoot and others regarding the unlawful termination of Officer Savage.

Even if qualified immunity could apply to these actions, it would not apply here. There can be no question that a reasonable government attorney in Oglesby's position would know that racial discrimination in employment is unconstitutional. "If any 'right' under federal law is 'clearly established,' it is the constitutional right to be free from racial discrimination.'" *Frasier v. McGinley*, No. 2:13-cv-02986, 2014 WL 5163056, at *6 (D.S.C. Oct. 14, 2014) (internal citations omitted). "There is no ambiguity surrounding the constitutional right to be free from discrimination on the basis of gender or race, or the laws preventing an employer from terminating an employee on these grounds. If [Defendant] did so, as the Complaint alleges, [he is] not entitled to qualified immunity." *Greenan v. Bd. of Educ. of Worcester Cty*., 783 F. Supp. 2d 782, 791 (D. Md. 2011); *see also Shank v. Baltimore City Bd. of Sch. Comm'rs*, Civil Action No. WMN-11-1067, 2014 WL 198343, at *2 (D. Md. Jan. 14, 2014) ("Certainly, the unlawfulness of discriminating against an employee because of his race was clearly established and any reasonable person would have known that the alleged conduct was unlawful."); *Herring v. Cent. State Hosp.*, No. 3:14-cv-738, 2015 WL 4624563, at *4 (E.D. Va. July 29, 2015) ("No one in their right mind could possibly think that the government can discriminate based on race. Qualified immunity does not protect the defendants. . . .").

Similarly, the constitutional right to be free from a hostile work environment under the Fourteenth Amendment Equal Protection Clause is "clearly established." *See Riley v. Buckner*, 1

F. App'x 130, 134 (4th Cir. 2001) (citing *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994)); *see also Huri v. Office of the Chief Judge of the Cir. Ct. of Cook Cty.*, 804 F.3d 826, 835 (7th Cir. 2015); *Williams v. Herron*, 687 F.3d 971, 978 (8th Cir. 2012); *Jemmott v. Coughlin*, 85 F.3d 61, 67 (2d Cir. 1996).

Numerous federal courts have found that a defendant is not entitled to qualified immunity when claims of hostile work environment involve specific racial slurs or similar derogatory comments. *Ugorji v. New Jersey Envtl. Infrastructure Trust*, Civil Action No. 12-5426, 2014 WL 2777076, at *1 (D.N.J. June 19, 2014) (denying qualified immunity where supervisor described employee of African descent as "'uppity,' which Plaintiff interpreted as a derogatory race-based comment"); *Cantu v. Mich. Dep't of Corrs.*, 653 F. Supp. 2d 726, 746 (E.D. Mich. 2009) (denying qualified immunity where Caucasian plaintiff was target of racial slurs); *Brosmore v. City of Covington*, 1993 WL 762881, at *7 (E.D. Ky. Oct. 14, 1993) (denying qualified immunity where defendants used numerous racial slurs to describe Caucasian plaintiff and his African-American wife), *aff'd*, 43 F.3d 1471 (6th Cir. 1994); *Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1186 (D.N.M. 1999) (denying qualified immunity to defendant physician who made numerous racially offensive comments and "freely distributed ethnic slurs").

It is equally well-settled and obvious that retaliation for the exercise of federal civil rights, such as a petition to the EEOC is unlawful. *See, e.g.*, *King v. Rumsfeld*, 328 F.3d 145, 151 (4th Cir. 2003) (filing of a formal complaint constitutes protected activity for which an employee may not be punished).

III. OFFICER SAVAGE HAS ADEQUATELY PLED THAT DEFENDANT OGLESBY UNLAWFULLY RETALIATED AGAINST HIM FOR EXERCISING HIS FIRST AMENDMENT RIGHTS.

A public employee who reports racially discriminatory behavior and governmental corruption outside of his typical duties to an outside entity and is subsequently retaliated against

for that speech is entitled to First Amendment protection. Officer Savage's complaint to the Maryland Attorney Grievance Commission about Oglesby's conduct during the April 7, 2014 incident was private speech on a matter of public concern. Police officers who experience retaliation in their employment for expressing their free expression are, indeed, protected by the First Amendment. *Durham v. Jones*, 737 F.3d 291 (4th Cir. 2013) (holding that a police officer maintained a§ 1983 First Amendment retaliation claim for publicizing commands to alter an incident report); *see also Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009). Like other public employees, they do not relinquish First Amendment protection by virtue of their employment position. *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014) ("Almost 50 years ago, [the Supreme Court] declared that citizens do not surrender their First Amendment rights by accepting public employment. ").

To determine whether a public employee has stated a First Amendment claim for retaliatory discharge, a court must analyze:

> (1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and; (3) whether the employee's speech was a substantial factor in the employee's termination decision.

McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998). [5]

As discussed below, Officer Savage has plausibly alleged that his report to the Attorney Grievance Commission about Oglesby's racially discriminatory and corrupt conduct implicates constitutional protection.

[5] In addition to meeting the four prongs of the *McVey* test, Officer's Savage's exercise of his First Amendment right is protected by Section 3-103(d) LEOBR, which states that "[a] law enforcement officer may not be discharged, disciplined, demoted, or denied promotion, transfer, or reassignment, or otherwise discriminated against in regard to the law enforcement officer's employment or be threatened with that treatment because the law enforcement officer . . . has lawfully exercised constitutional rights." *Md. Code Ann.* § 3-103(d).

A. Officer Savage Made His Complaint To The Attorney Grievance Not As A Police Officer But As A Private Citizen.

Officer Savage spoke as a private citizen in filing his complaint to the Attorney Grievance Commission. First, Officer Savage made the Attorney Grievance Commission complaint outside of his role as a police officer with the Pocomoke City Police Department and CET. Oglesby's argument relies on *Brooks v. Arthur*, 685 F.3d 367 (4th Cir. 2012), but that case involved only personalized grievances and not a matter of public concern.[6]

The integral fact here is that the Attorney Grievance Commission is an outside reporting agency. Thus, Officer Savage's complaint to the Attorney Grievance Commission is considered ad hoc reporting. *See Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir, 2008) ("[When] however a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen."); *see Spalding v. City of Chicago*, 4 F. Supp. 3d 765, 776 (N.D. Ill. 2014) ("If the employee reports misconduct in the manner directed by official policy, to a supervisor, or to an external body with formal oversight responsibility, then the employee speaks pursuant to her official duties and her speech is unprotected. By contrast, if the employee testifies regarding misconduct to a jury or grand jury or reports misconduct outside established channels or in violation of official policy, she speaks as a private citizen and her speech is constitutionally protected.") (internal citations omitted).

Further, in determining whether the employee is speaking as a private citizen, *Garcetti* instructs the court to conduct a practical inquiry into the employee's "daily professional

[6] Oglesby cannot properly rely on *Brook*s here because that case is procedurally distinct. *Brooks* was on appeal to the Fourth Circuit from a grant of summary judgment, meaning that "at that post-discovery stage of the proceedings, there was a more detailed record with which the content, form, and context of the employees' statements could be examined." *Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597, 610 n, 8 (E.D. Va 2015*)* (citing *Brooks* at 370).

activities." *Garcetti*, 547 U.S. at 4222. There is no question that reporting to the Attorney Grievance Commission was not an exercise within Officer Savage's daily activities as a narcotics detective with the CET or as an officer with the Pocomoke City Police Department. Officer Savage's complaint was centered on Oglesby and his office's ability to effectively prosecute cases. *Cromer v. Brown*, 88 F.3d 1315, 1325-26 (4th Cir. 1996) (finding that employee complaints were made as private citizens because they "prompted an expression of concern about the inability of the sheriff's office to carry out its vital public mission effectively").

For purposes of Rule 12(b)(6), Officer Savage has plausibly alleged that he spoke as a private citizen.

B. Oglesby's Conduct Was A Matter Of Public Concern.

A public employee's speech "involves a matter of public concern if it affects the social, political, or general well-being of a community." *Edwards v. City of Goldsboro*, 178 F.3d 231, 246 (4th Cir. 1999). In resolving this "highly fact-intensive inquiry," *Stickley v. Sutherly*, 416 F. App'x. 268, 272 (4th Cir. 2011), courts must consider the "content, form, and context of a statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48. Importantly, the Fourth Circuit eschews an all-or-nothing approach and has held that even if only part of the communication touched on a matter of public concern, the first element of the above-defined standard is still satisfied. *See Connick*, 461 U.S. at 149 ("Because *one of the questions* in Myers' survey touched upon a matter of public concern, and contributed to her discharge[,] we must determine whether Connick was justified in discharging Myers.") (emphasis added); *see also Stroman v. Colleton Cty. Sch. Dist.*, 981 F.2d 152, 158 (4th Cir. 1992) (treating as a matter of public concern a letter that was in large part a discussion of personal grievances but also

mentioned potential mismanagement of a school budget, a matter that could have been of public concern).

When analyzing Attorney Grievance Commission complaint's content, context, and form, Oglesby's MTD ignores the fact that the crux of the complaint was about Oglesby's repetitive and offensive use of the n-word and the later retaliation he instigated with city and county officials. Thus, Oglesby's argument that Officer Savage's complaint is not a matter of public concern is contrary to precedent in this Circuit and elsewhere. Federal courts have recognized that speech alleging racial discrimination and retaliation is inherently a matter of public concern. *See Victor v. McElveen*, 150 F.3d 451, 456 (5th Cir. 1998) ("Consequently, the context of Victor's remarks, as well as their inherent characteristic as a protest against racial discrimination, demonstrate that he spoke on a matter of public interest and concern."); *Rode v. Dellarciprete*, 845 F.2d 1195, 1201 (3d Cir. 1988) ("Rode's complaints, while expressed because of her personal employment problems with the [Pennsylvania State Police], were a matter of serious public import. Rode may have been the disgruntled employee. . . . But Rode did not merely claim that she was being mistreated—she claimed that she was a victim of retaliation arising out of racial animus within the PSP. This was a matter of grave public concern."); *Leonard v. City of Columbus*, 705 F.2d 1299, 1305 (11th Cir. 1983) ("Appellants sought to emphasize a widely-held perception of racially discriminatory practices in the City of Columbus Police force. These practices concerned not only internal police matters, but matters of interest to the community-at-large as well.").

Moreover, the Fourth Circuit has recognized that speech exposing workplace corruption is inherently a matter of public concern. *See Hunter v. Town of Mocksville, N. C.*, 789 F. 3d 389 (4th Cir. 2015) ("[S]peech about serious governmental misconduct, and certainly not least of all

serious misconduct in a law enforcement agency, was protected under the First Amendment;" (quotation marks and citation omitted) *Durham*, 737 F.3d at 300 (finding that plaintiff spoke on a matter of public concern by "bring[ing] to light actual or potential wrongdoing on the part of his superv[isors]."⟩).

The content, context, and form of Officer Savage's complaint to the Attorney Grievance Commission further shows that while it was focused solely on Oglesby's conduct, the complaint demonstrates how Oglesby's conduct could negatively impact how the Worcester County State's Attorney's Office prosecutes cases in its jurisdiction. *Willis v. City of Virginia Beach*, 90 F. Supp. 3d 597, 610 (E.D. Va 2015) ("[i]f favoritism crosses a line to the point that it imperils public welfare . . . then the public would rightly be concerned about the matter.") (citing *Brooks v. Arthur*, 685 F.3d at 375). For example, in his July 22, 2014 complaint, Officer Savage describes how after reading the letters, Oglesby asked Assistant State's Attorney Kelly Hurley "to make copies of the letters so that he could use them for trial." FAC Exhibit E. No reasoned prosecutor would ever read the n-word and its variants to a jury during trial. Officer Savage stated that he "could not believe that the State's Attorney for Worcester County would use the word Nigga so freely and without care . . . knowing how highly powerful and hurtful" the word is. FAC Exhibit E. Also, in his September 4, 2014 follow-up correspondence, Officer Savage states that "[p]rior to his filing the Grievance we were attempting to get these individuals off the street now States Attorney Beau Oglesby is putting them right back into the community." MTD Exhibit B-3. Clearly, Oglesby's conduct could be detrimental to the Worcester County community at large.

Finally, Oglesby is an elected official, whose conduct, in and of itself, is obviously a matter of public concern. In addition, his own actions belie his claim. Oglesby himself appeared

on a local television station's primetime news broadcast to discuss the matter and to defend his actions. *See* Exhibit A. How can Oglesby argue there is no matter of public concern to this Court while making his arguments in his defense on local television?

For purposes of Rule 12(b)(6), Officer Savage has plausibly alleged that his speech touches on a matter of public concern.

C. Officer Savage's First Amendment Interests Outweigh Any Potential Governmental Interests.

Under the third prong of the test, this Court must balance "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public service it performs through its employees." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). In balancing these two competing interests, courts "must take into account the context of the employee's speech, including the employee's role in the government agency, and the extent to which it disrupts the operation and mission of the agency." *McVey*, 157 F.3d at 278 . Relevant factors that courts consider includes, for example, whether the speech "impedes the performance of the public employee's duties;" "interferes with the operation of the agency;" and "conflicts with the 'responsibilities of the employee within the agency.'" *Id*.

Here, there were no disruptions in government performance caused by Officer Savage's speech. Rather, the disruptions were caused by Oglesby's retaliation in response to Officer Savage's speech. First, after Officer Savage filed his complaint, he was blocked from testifying in court. FAC ¶ 144-45. It was also Oglesby's retaliation, not Officer Savage's speech, which interfered with the Pocomoke City Police Department's ability to effectively and efficiently prosecute cases. There is no question that Officer Savage's interest in exercising his constitutionally protected right outweighs any governmental interest cited by Oglesby, and

Oglesby's personal interest in not being sanctioned for misconduct does not constitute a governmental interest.

Oglesby argues that his decision to not allow Officer Savage to testify was justified under his *Brady* obligations. Oglesby MTD at 25-26. However, as stated above, Oglesby's discussion of his *Brady* obligations is merely a red herring.

D. Officer Savage's Speech Was The Primary Cause of His Termination.

Officer Savage has sufficiently pled and demonstrated a close temporal relationship between his protected activity, Oglesby's adverse actions, and the concerted effort of Pocomoke City officials to terminate Officer Savage's employment. For purposes of Rule 12(b)(6), Officer Savage has plausibly alleged that his speech was the primary cause of his termination from the Pocomoke City Police Department.

Under the correct standard for a motion to dismiss, Plaintiffs' Complaint more than adequately pleads a situation of racial discrimination and racial retaliation for his complaint to the Attorney Grievance Commission.

IV. OFFICER SAVAGE ADEQUATELY PLED THAT DEFENDANT OGLESBY ENGAGED IN A CIVIL CONSPIRACY WITH DEFENDANTS BLAKE, PASSWATERS, AND SMACK UNDER § 1985(3).

Officer Savage adequately pled a civil conspiracy charge, and Oglesby's arguments for dismissal of Count VI should be denied because he misreads both the law and Officer Savage's Amended Complaint. Section 2 of Civil Rights Act of 1871 ("§ 1985"), also known as the Ku Klux Klan Act, prohibits two or more people from conspiring to deprive a person or class equal protection of the law. 42 U.S.C. § 1985(3). In order to successfully make out a civil conspiracy claim, a plaintiff must show:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury

> to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (citing *Buchi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985)). Officer Savage has alleged an injurious hostile work environment and termination caused by Oglesby, and Oglesby has not attacked the pleading of elements four and five. Instead, he argues that employment discrimination is not an actionable source of an equal protection violation under § 1985 (elements two and three) and that Officer Savage has not adequately pled a conspiracy (element one).

The Reconstruction-era Congress that created § 1985 did not intend for it to act as a "general federal tort law" but instead as mechanism to fight discrimination. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971) (holding that allegations of a conspiracy to prevent interstate travel of African Americans was actionable under § 1985 because it implicated both a fundamental constitutional right and racial discrimination). The Supreme Court has not clarified what these rights entail or whether they are limited to constitutional rights or can include federal statutory rights as well. Yet the Court has held that § 1985 cannot be used as a remedy for violations of Title VII of the 1964 Civil Rights Act because Title VII provides an extensive remedial scheme of administrative exhaustion that suits under § 1985 would be able to bypass, thus undermining the purpose of Title VII. *Great Am. Fed. Savs. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377-78 (1979). *Novotny* should not be read too broadly, however, because its holding was a narrow one, applicable to a case against a private company for retaliation about speaking out against gender discrimination: "The Court's specific holding is that 42 U.S.C. § 1985(3) may not be invoked to redress violations of Title VII." *Id*. at 379 (Powell, J., concurring). What the *Novotny* Court did not do is what Oglesby claims: close the door for the use of § 1985 as a remedy for victims of discrimination by public employers.

One of the rights that can satisfy elements three and four of a § 1985 claim are the substantive rights created by the 42. U.S.C. § 1981 ("§ 1981"). Section 1981, Section 1 of the Civil Rights Act of 1866, was an earlier precursor to the 1877 Act. *Jett v. Dallas Independent School Dis.*, 491 U.S. 701, 713-14 (1989). Section 1981 prohibits racial discrimination in the making and enforcement of contracts, includes employment contracts, and retaliation for complaining about violations of § 1981. *CBOCS W., Inc. v. Humphries,* 553 U.S. 442, 457 (2008). Courts are divided as to whether § 1981 is a right that can be enforced through § 1985, *compare Johnson v. Greater Se. Cmty Hosp. Corp.*, 903 F. Supp. 140, (D.D.C. 1995) ("a violation of federal rights secured by § 1981 may serve as the basis of § 1985 claim" (citing *Alder v. Columbia Historical Soc'y,* 690 F. Supp. 9 (D.D.C. 1988)) *with Brown v. Philip Morris, Inc.*, 250 F. 3d 789, 806 (3d Cir. 2001) (recognizing that many courts had a limited view of the rights enforced by § 1985 but not ultimately reaching a conclusion of whether § 1981 was one of those rights). But, importantly, the Fourth Circuit has not yet addressed the issue.

Nearly two decades ago, Judge James Miller of this Court wrote a thorough analysis finding that *Novotny* did not preclude § 1985 as a remedial vehicle for § 1981 claims. *Witten v. A.H. Smith & Co.*, 567 F. Supp. 1063 (D. Md. 1983). The *Witten* opinion first explains that the *Novotny* Court based its ruling on the remedial scheme of Title VII, not on the substantive rights embodied in Title VII. *Id.* at 1067. Next, it expounded that *Notovny*'s holding was limited to only the statute of Title VII itself and not all federal statutes broadly because the majority opinion did not join Justice Stevens' concurrence, which stated that § 1985 could not be used to enforce statutory rights. *Id.* (citing *Novotny*, 442 U.S. at 365 (Stevens, J., concurring)). The opinion provided a lengthy legislative history of § 1985, which was passed as a way to combat the rise of the Ku Klux Klan in the Reconstruction Era South. *Id.* at 1068-69. The court

concluded that the 42nd Congress intentionally did not limit the rights that § 1985(3) could protect, but the overall purpose was like its older sibling of a statute, § 1981: the eradication of racism and the promotion of equal citizenship in the wake of the ratification of the Thirteenth and Fourteenth Amendments. *Id.* at 1071-72. The opinion ultimately concludes that § 1981 was a bedrock part of the statutory scheme created along with and under the constitutional authority of Reconstruction Amendments and thus it is a "proper substantive basis for a claim of redress under § 1985(3)." *Id.* at 1072. *C.f. Hodgin v. Jefferson*, 447 F. Supp. 804, 808 (D. Md. 1978) (equal pay act a substantive basis for a § 1985 claim).

The *Witten* opinion is persuasive because it focuses on the clear legislative history that Congress intended § 1985 to be a tool for the enforcement for the rights that were created and declared in § 1981. It is also similar to a legislative analysis used by the Supreme Court in *Jett*, 491 U.S. 701, discussed in Part V, *infra*, which held that Section 1 of the same 1877 Civil Rights Act was a remedial tool for public employees for the rights created by § 1981. Therefore, this Court should find that because Congress enacted § 1985 to remediate the discrimination that § 1981 prohibits, § 1981 creates a substantive right that is actionable in a conspiracy alleged under § 1985.

An additional source of rights unambiguously enforceable under § 1985 is the Constitution itself, specifically the Fourteenth Amendment. "No state . . . shall deny any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1. One such denial of equal protection is when a public employer denies equal terms and conditions to an employee on the basis of his race. The Fourth Circuit has made very clear that, the *Notovny* decision notwithstanding, Title VII does not pre-empt state and municipal employees from bringing employment discrimination claims under the Fourteenth Amendment and the statutory

vehicle of 42 U.S.C. 1983 ("§ 1983"). *Keller v. Prince George's Cty.*, 827 F.3d 952, 963 (4th Cir. 1987) (holding that the legislative history of the 1972 amendments to Title VII that expanded its coverage to public employees showed that Congress considered and then rejected a proposal to preempt § 1983 suits for public employee discrimination claims); *Booth v. Maryland*, 327 F.3d 377 (4th Cir. 2003) (reinstating religious discrimination claims brought under § 1983 even though plaintiff chose not also sue under Title VII); *Beardsley*, 30 F.3d at 527 (finding that the 1991 Civil Rights Act did not limit the scope or pre-empt public employee § 1983 claims).

As described above, § 1983 is a part of the same 1871 Civil Rights Act that created § 1985. Like § 1985, § 1983 is a statutory vehicle through which victims of discrimination can seek redress for violations for the Constitution. Therefore, a conspiracy to violate the Fourteenth Amendment is actionable under § 1985. Here, Officer Savage has made out claims for both violations of § 1981 and the Fourteenth Amendment and thus he has alleged elements three and four of a § 1985 claim.

Oglesby's arguments that Officer Savage has not adequately alleged a conspiracy are equally erroneous. In order to make out the first element of a § 1985 claim, a plaintiff must allege a "meeting of the minds" among defendants to violate the plaintiff's rights. *Poe*, 47 F.3d 1370 at 1377 (citing *Caldeira v. County of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989)).

There is no heightened pleading standard for § 1985 claims beyond that proscribed in Fed. R. Civ. P. 8, even though *Poe* cautions that § 1985 suits are rarely successful in proving a meeting of the minds at the summary judgment stage. 47 F.3d at 1376. Additionally, a plaintiff can survive summary judgment on a § 1985 conspiracy claim with either direct or circumstantial evidence as long as the evidence "reasonably lead[s] to the inference that [Defendants] positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan."

Hinkle v. City of Clarksburg, 81 F.3d 416, 421 (4th Cir. 1996) (citing *Hafner v. Brown*, 983 F.2d, 570, 576-77 (4th Cir. 1990)). If such circumstantial evidence can be used to prove a claim, a plaintiff should not be required to plead with absolute certainty the nature of every detail of the conspiracy. Officer Savage has pled sufficient, non-conclusory, allegations that Oglesby plausibly had a meeting of the minds with other defendants to deprive Officer Savage of equal employment, in alleging that "Oglesby spoke with Pocomoke City Manager Defendant Crofoot by phone, urging him to terminate Officer Savage." FAC ¶ 187.

Although Officer Savage cannot know the exact details of the conversations between Defendants without discovery, he has alleged specific times in which they worked in together to violate his rights to equal employment. Further, Officer Savage's Amended Complaint is replete with allegation of racial animus, *Facey v. Dae Sung Corp.*, 992 F. Supp. 2d 536, 541-42 (D. Md. 2014), including actions by Oglesby. *E.g.* ¶¶ 106-112.[7]

Accordingly Officer Savage respectfully requests that this Court deny Oglesby's motions to dismiss Count VI of his Amended Complaint. In the alternative, if this Court finds that Officer Savage has not adequately pled enough facts to make out a claim under 42 U.S.C. § 1985(3), he respectfully requests that this Court allows him leave to amend just as this Court did for the § 1985 count in *Hejrika v. Md. Div. of Corrs.*, 264 F. Supp. 2d 341, 343 (D. Md. 2003).

V. SECTION 1981 PROVIDES A BASIS FOR RELIEF FROM RACIAL DISCRIMINATION BY STATE ACTORS THAT IS INDEPENDENT OF THAT FOUND IN SECTION 1983.

Oglesby misread the law related to Officer Savage's 42 U.S.C. § 1981 and accordingly this Court should not dismiss Count VII of his Amended Complaint.

[7] Oglesby's assertion that Oglesby's racial sensitivity, Oglesby MTD at 32, is "undisputed" is belied by the very evidence that Oglesby's cites to support that claim.

Section 1 of the Civil Rights Act of 1866 prohibits, *inter alia*, racial discrimination in contracting. 42 U.S.C. § 1981(a). Passed in the wake of the ratification of the Thirteenth Amendment to the United States Constitution, it was intended as declaration of equal rights for newly freed slaves. *Jett*, 491 U.S. at 713-14. The rights declared in § 1981 were shortly "constitutionalized" through the passage and ratification of the Fourteenth Amendment. *Id.* at 721 (citing Cong. Globe, 39th Cong., 1st Sess., 2465 (1866) (Rep. Thayer)). Section 1981 was amended through the 1991 Civil Rights Act to expand the definition of the enforcement of contracts and to clarify that the rights embodied in § 1981 were "protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(b)-(c).

A few short years after § 1981 came into existence, Congress passed the Civil Rights Act of 1871 in order to combat the rising violence that the Klu Klux Klan posed in the Reconstruction South and provide an enforcement mechanism for the newly ratified Fourteenth Amendment. *Jett*, 491 U.S. at 722. Section 1 of that Act provided a civil damages remedy in Federal Court against state actors who had violated a person's federal, constitutional or statutory rights. 42 U.S.C. § 1983.

In light of this legislative history, which is only broadly summarized here, the Supreme Court declared that, unlike against private entities, Congress did not intend for § 1981 to create a private cause of action against state actors. *Jett*, 491 U.S. at 731-32 (holding that a school district could not be held liable for a racially motivated termination under § 1981 using the respondeat superior theory of liability). The Fourth Circuit has also that held the 1991 Civil Rights Act did not create that cause of action or change the result of *Jett*. *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995). The Fourth Circuit has not clarified whether its

Dennis holding precludes § 1981 actions against state actors in their individual capacities, and courts within this District have reached inconsistent conclusions on the issue. *Compare Victors v. Kronmiller*, 553 F. Supp. 2d. 533, 543 (D. Md. 2008) (finding that § 1981 suits could not be brought against state actors regardless of whether they were sued in their individual or official capacities) with *Stout v. Reuschling*, Civil Action No. TDC_14-1555, 2015 U.S. Dist. LEXIS 39997, at *14 (D. Md. Mar. 27, 2015) (finding that *Dennis* only applies to suits against municipal entities and not individuals).

Defendants' argument that *Dennis* requires a dismissal of Officer Savage's § 1981 claims misreads the text and thrust of the law, however. Both *Jett* and *Dennis* limited a Plaintiff's ability to seek vicarious liability against municipal entities under § 1981 to cases in which he can prove that the discriminatory act was a "policy or custom" of the entity as defined in *Monell v. Dept. of Soc. Serv. of New York*, 436 U.S. 658, 694 (1978) and its progeny because that is what is required of § 1983 actions. *Dennis*, 151 F.3d at 156 (citing *Jett*, 491 U.S. at 735-36). What *Jett* and *Dennis* did not do is limit the rights that §1981 created: "We think the history of the 1866 Act and 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981." *Jett*, 491 U.S. at 731. Therefore, *Jett* explicitly states that rights created by § 1981 still exist for public employees; it is only the remedies for violations of those rights that must be enforced through § 1983.

The text of § 1983 also supports this proposition because it creates a cause of action for violations of both the "Constitution and laws" of the United States. 42 U.S.C. § 1983 (emphasis added). Using § 1983 as a remedial vehicle for alleged violation of rights established by § 1981 is consistent with other federal laws that do not provide their own remedial scheme. *E.g. Maine*

v. Thiboutot, 448 U.S. 1 (1980) (allowing suits under § 1983 for a deprivation of welfare benefits under the Social Security Act). Further, this Court should allow Officer Savage's § 1981 claims to survive even though he did not expressly invoke § 1983 as the remedial vehicle because such a technical defect is not a grounds for dismissal of a claim. *Johnson v. City of Shelby*, 135 S. Ct. 346, 346 (2014) (per curiam) (reversing dismissal of a constitutional claim that pled adequate facts but did not expressly cite § 1983). Recently the D.C. Circuit read the *Johnson* decision to mean that it could not dismiss a § 1981 employment discrimination claim against a public university that did not expressly plead that it was being brought under the remedial scheme of § 1983, so instead the Court reviewed the merits of whether the Complaint alleged sufficient facts to make out a claim under § 1981. *Brown v. Sessoms*, 774 F.3d 1016, 1022 (D.C. Cir. 2014) (reversing dismissal of § 1981 claims).

For these reasons, this Court should deny Oglesby's motion to dismiss Count VII of the FAC and read the claims alleged under 42 U.S.C. § 1981 as brought through 42 U.S.C. § 1983. In the alternative, Officer Savage respectfully requests leave to amend to clarify this reading pursuant to *Johnson*, 135 S. Ct. 346.

VI. SUMMARY JUDGMENT IS INAPPROPRIATE SO EARLY IN THIS CASE AND WITH SO MANY DISPUTED FACTS AND OPEN QUESTIONS.

Oglesby fails to show entitlement to absolute immunity and qualified immunity, even with his added factual averments. He attempts to coalesce the added facts into support for this argument in his motion: "Oglesby did not refrain from using Officer Savage as a witness because Officer Savage submitted the Attorney Grievance letter, but because of falsehoods in warrant applications and falsehoods contained in the Attorney Grievance letter that then triggered State's Attorney Oglesby's Brady obligations." Oglesby MTD at 26. In other words, Oglesby asks this Court to believe that his reasons for neutering Officer Savage's police work

were permissible and in the public interest. Aside from failing for the same legal infirmities identified above, this summary-judgment argument fails because it relies on facts in dispute and introduces new facts into which discovery is needed.

First, Oglesby's own motions demonstrate that there are genuine disputes of material facts. Oglesby offers multiple letters and declarations to assert that the April 7 meeting was not as Officer Savage described it. *See* Oglesby MTD at 3-4, 6-7, 13-14 (citing exhibits). Oglesby uses these factual allegations to assert that Officer Savage lied about the meeting in his grievance letters and thus was properly blocked from testifying in criminal matters—rather than improperly retaliated against for complaining of inappropriate conduct. But Oglesby offered these factual disputes *specifically to counter the allegations in Officer Savage's complaint*. *See id.* at 2-4, 6-7. These facts are thus by definition in dispute.

Two examples illustrate the point. First, the parties dispute whether Turnbull, an Assistant State's Attorney and an African American, was present in the April 7 meeting when Oglesby began reading the letters and departed when Oglesby began reading the n-word variants aloud. *Compare* FAC ¶ 107 (Turnbull was present and left mid-reading) *with* Oglesby MTD Ex. B-2 ¶¶ 1, 4 and Ex. D-1 (disagreeing). Second, the parties disagree about the gusto with which Oglesby read the n-word variants. *Compare* FAC ¶ 93 ("particular emphasis") *with* Oglesby MTD Ex. B-2 ¶¶ 10, 13 (disagreeing). Given this dispute, Oglesby's views about the April 7 meeting and the accuracy of Officer Savage's ensuing grievance cannot support summary judgment.

Nor can all the new facts advanced in Oglesby's motion—namely, the theory that Officer Savage lied in a warrant application about still being on the CET after he had resigned. Officer Savage seeks discovery essential to opposing those facts and their support for Oglesby's theories

about Officer Savage's veracity. Exhibit B ¶¶ 5-13. Officer Savage has not yet had an opportunity to mount that opposition because discovery has not yet commenced. *Id.* Indeed, the parties have not even made initial disclosures.

Oglesby's motion is the first Officer Savage has heard of the draft warrant application. Discovery will show that Oglesby has zero credibility in his factual assertions related to the draft. Instead, discovery will show that Oglesby has seized on the draft warrant as a post hoc justification for his retaliation against Officer Savage. Lines of needed inquiry include the following:

- Oglesby's contemporaneous reaction to the draft application has not been tested. *Id.* ¶¶ 6-7. The alleged reaction is hard to square with his stated laudatory views of Officer Savage, the draft application's text, and the notes that Oglesby alleges he made about the draft.
- The record of Oglesby's communications about the draft warrant application is incomplete. *Id.* ¶ 8 (showing no evidence of when Oglesby advised anyone of the alleged misrepresentation). It is implausible that Oglesby could have been so concerned about the draft that he reported no specific concerns about the alleged misrepresentation.
- Oglesby's handling of the draft application lacks context. *Id.* ¶¶ 9-10. Officer Savage seeks to discover whether Oglesby acted consistently with the protocols for reviewing and commenting on draft warrant applications as established by the State's Attorney's office.
- The record includes no evidence that Oglesby made any actual *Brady* disclosures for cases in which Officer Savage would have otherwise provided testimony for the prosecution. *Id.* ¶ 11. That lack of disclosures casts doubt on Oglesby's assertion that he had "establish[ed] and implement[ed] a system to ensure that his *Brady* obligations are fulfilled." Oglesby MTD at 13. Indeed, Oglesby's "system" for *Brady* disclosures is so far wholly a creation of this lawsuit. Exhibit B ¶ 12. That Oglesby had a system, so to speak, for retaliating against Savage has been well supported, in contrast.

These are just a sampling of the unexplored areas of discovery bearing directly on the implausibility of the second factual basis for Oglesby's assertions of absolute and qualified immunity. And of course, discovery is equally needed concerning many facts relating to the

April 7 meeting and the ensuing grievance. *See id.* ¶ 13. All of these facts are within the control of Oglesby or other defendants and thus are available to Officer Savage only through discovery.

At bottom, all the undisputed facts to date point against Oglesby's having any legitimate basis for keeping Officer Savage from the courtroom, even before this Court draws all inferences in Officer Savage's favor. These facts also confirm that Officer Savage's complaint against Oglesby turns on Oglesby's motives and beliefs—the very areas that the Fourth Circuit has found inappropriate for resolution on summary judgment. Couple that baseline with the slew of disputed facts and facts untested by discovery, and the only appropriate outcome is to deny Oglesby's alternative motion for summary judgment.

CONCLUSION

For the reasons set for above, Officer Savage requests that the court deny Defendant's Motion to Dismiss and Motion for Summary Judgment.

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Dated: June 1, 2016

EXHIBIT LIST

Exhibit A: Defendant Oglesby's ABC 47 interview about the April 7, 2014 incident.

Exhibit B: Andrew McBride declaration.

CERTIFCATE OF SERVICE

I hereby certify that on June 1, 2016, I served the foregoing document electronically on the following via the CM/ECF system:

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