IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

COLUMBIA DIVISION

James Morris, Plaintiff, vs. City of Columbia, Defendant.	Civil Action No. 3:17-3051-TLW-KFM **REPORT OF MAGISTRATE JUDGE**

This matter is before the court on the defendant's motion for summary judgment (doc. 27). In his complaint, which was removed from state court, the plaintiff alleges causes of action for violation of his First Amendment right to free speech, brought pursuant to 42 U.S.C. § 1983, and race discrimination, in violation of Title VII of the Civil Rights Act of 1964, as amended. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Civil Rule 73.02(B)(2)(g) (D.S.C.), all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

FACTS PRESENTED

Plaintiff's Employment

The plaintiff, who is white, was hired by the defendant on November 8, 1999, as a firefighter (doc. 1-1, comp. ¶¶ 8, 35; doc. 4, answer ¶ 6). At the time of his termination from employment on July 11, 2018, the plaintiff held the rank of Captain (doc. 28-3). The defendant City's Fire Chief Aubrey Jenkins testified that the plaintiff "did a great job" and met the legitimate expectations of his job (doc. 28-1, Jenkins dep. 13).

On July 10, 2016, approximately 800 Black Lives Matter protesters assembled in downtown Columbia in response to a secessionist protest opposing the removal of the Confederate flag at the South Carolina State House and controversy over shootings involving law enforcement officials in various cities around the country (doc. 28-4).

"Interstate 126 was closed on the stretch between Greystone Boulevard and the Huger and Elmwood street exits[]" as a result of that the Black Lives Matter protest (*id*.). Chief Jenkins confirmed that the protestors traveled from Elmwood Street onto Interstate 126 causing the road closure (*id*.).

At approximately 10:00 p.m. on July 10th, while he was on duty at Station 13, which is located at 4112 North Main Street in the City of Columbia, the plaintiff made two Facebook posts, which stated:

> Idiots shutting down I-126. Better not be there when I get off work or there is gonna be some run over dumb asses.
>
> Public Service Announcement:
> If you attempt to shut down an interstate, highway, etc on my way home, you best hope I'm not one of the first vehicles in line in line because your ass WILL get run over! Period! That is all….

(Doc. 28-5). The plaintiff admits making the posts (doc. 27-2, pl. dep. 56).

City Manager Teresa Wilson testified that Chief Jenkins told her that people were expressing concern regarding the posts, which included "concern by the other firefighters" and "calls that had come into the station bordering on threatening-type calls, people saying that they had a fear that their public servants were not going to be able to serve them if that's the type of mentality or commentary they were making about running somebody over in the street" (doc. 27-4, Wilson dep. 25-28). The plaintiff was sent home from the station around midnight (doc. 27-2, pl. dep. 68). Chief Jenkins determined it was appropriate to close Station 13 "based on the fear of those firefighters out there" (doc. 28-1, Jenkins dep. 24-25).

The plaintiff was terminated from employment the next day, July 11, 2016 (doc. 28-3). The separation from employment form read:

> On July 11, 2016, I've been advised that Capt. James Morris made statements on social media threatening the lives of citizens that we are to protect. Based on page 6 of the City of Columbia Employee Handbook which states, Be courteous at all times in your contacts with others in person, on the telephone and in correspondence. As a public employee your

> personal conduct, even in your private affairs, must be such that it will not reflect discredit on the City or your fellow employees.
>
> SOG 100.18 a. states . . . Employees will not ignore or violate official guidelines and procedures or supervisory instructions, or knowingly fail to properly execute the duties and responsibilities of their assigned positions that endanger persons or property.

(*Id.*). Chief Jenkins signed the plaintiff's separation of employment form (doc. 28-3), and he testified that he was the "final decisionmaker" with respect to the plaintiff's termination from employment (doc. 28-1, Jenkins dep. 13).

City Manager Wilson released a statement on July 11, 2016, that stated:

> I support the actions taken today by Columbia Fire Chief Aubrey D. Jenkins regarding the inappropriate actions of a former Columbia firefighter. As public servants, using the best judgment is paramount at all times. After conferring with Chief Jenkins and members of my management team, a unilateral decision was made earlier today to take swift and appropriate action. It was important for me to receive all necessary information regarding the incident in order to make the best decision on behalf of the City of Columbia.
>
> As the City Manager, there are specific types of behavior and actions that I will not tolerate. Any actions taken to communicate or demonstrate a lack of respect for the lives and safety of others falls into the category of "zero tolerance". Every man and woman who is employed by the City of Columbia is officially an ambassador for the City. Our Employees represent the City of Columbia not only while they are in the workplace, but also while they are engaging with others in the community.
>
> There are various references in the City of Columbia's employee handbook regarding behavior, conduct and an employee's role and responsibility when communicating and working with citizens/the public. It is the responsibility of each employee to adhere to these guidelines as outlined. At any time, when these policies are not followed, appropriate actions will be taken. As your civil servants, it is our duty to put the community first at all times. As City of Columbia employees, the personal conduct of staff, even in their own private lives, must be such that it will not reflect negatively on the City or discredit the City or fellow employees.

> It is within this context, that I assure each citizen that I will do everything within my level of authority to ensure that these guidelines and policies are followed. I am committed to maintaining a high level of professionalism among our City work force. As we continue to monitor the climate and conditions of current events, I want to commend the many City employees who are maintaining a high level of service delivery. Our public safety staff is on the front lines and they are working diligently.
>
> However through it all, Columbia has been a community that focuses on unity and working together to ensure that our citizens can live in a city that is focused on civility. Civility, respect and professionalism are characteristics that are not only expected, but required of everyone who represents the City of Columbia.
>
> As a whole, our City employees are focused on doing the best job possible for our citizens and this will continue to be our major priority in the days, weeks and months to come. We thank all of our citizens for their love of our City and their commitment to our community.

(Doc. 27-4, Wilson dep., ex. 5). City Manager Wilson testified that the defendant's handbook provisions and Standard Operating Guidelines are official policies of the defendant and that she felt the plaintiff's termination from employment "was an appropriate exercise of those official policies of the City of Columbia" (doc. 28-8, Wilson dep. 47-48).

The plaintiff states that he timely grieved his termination two days later, and his request for a grievance clarified that, while in retrospect the language of his Facebook posts "was improper and ill advised," the motivation for his Facebook posts was that the protestors' use of Interstate 126 "not only obstructed the traffic for hundreds of vehicles going about their daily tasks, but also created a serious impediment to emergency vehicles and law enforcement vehicles who needed to use the roadways to access crime [sites], fires, or other emergency conditions" (doc. 28 at 5).[1]

[1] The request for grievance cited by the plaintiff is not included in the exhibits to the response in opposition to the motion for summary judgment.

Conduct of Other Employees

Ed Augustyn, a white firefighter who was employed by the defendant, made the following comment on a Facebook post that quoted the plaintiff's post regarding the protests: "Ya think they [referring to the protestors] would be going to bed to get ready for work tomorrow" (doc. 28-10 at 1). He was terminated from employment by the defendant on July 11, 2016 (doc. 28-11). Mr. Augustyn stated in an email that Chief Jenkins told him that he had asked the City Manager if Mr. Augustyn could only be suspended for his comment, but the City Manager stated that "everyone involved in the Facebook comment must be fired whether [Chief Jenkins] agreed with it or not" (*id.*).

Dave Proctor, a white firefighter who was employed by the defendant, was terminated from employment by the defendant because he made the following comments on a Facebook post regarding the protests: "start running people over" and "somebody said they are throwing rocks again" (doc. 28-10 at 3; doc. 28-12).

Marcus Bostick, a black fire engineer employed by the defendant, was given an eight-hour suspension for his comment on the plaintiff's Facebook post (doc. 28-13).[2] The disciplinary action Mr. Bostick received differed from the plaintiff's disciplinary action in two ways: (1) Mr. Bostick received a suspension whereas the plaintiff was terminated, and (2) the Bostick disciplinary action noted that Mr. Bostick "made statements on social media that was part of a threatening statement to the lives and citizens we protect" whereas the plaintiff's disciplinary action stated that he "made statements on social media threatening the lives of citizens that we are to protect" (*compare id. with* doc. 28-3).

Mr. Bostick was not disciplined when he made the following Facebook post opposing the Black Lives Matter movement: "Here's a thought, I wear a blue uniform, I'm black, but because I wear the uniform gangs are going to try and take me out? Hmmmm guess black lives don't matter now do they? See it's all bullshit…. But can't tell idiots that now can you?" (doc. 28-14). Chief Jenkins testified that Mr. Bostick's post was different

[2] Neither party presented evidence of the content of Mr. Bostick's comment.

than the plaintiff's because he did not "see a threat in here" (doc. 28-1, Jenkins dep. 32). He further testified that Mr. Bostick, like all firefighters, was subject to the same code of conduct, policies, and ultimate supervisors as the plaintiff (*id.* 35-38).

Courtney Ramsaroop, a black firefighter employed by the defendant, made the following Facebook post: "Protesting is your right and you are free to do so, but when you protest in the street, that is impeding traffic. In that case, you're just pretending to be a speed bump" (doc. 28-15). The plaintiff states that Mr. Ramsaroop was not terminated from employment based on this post (doc. 28 at 11).[3] Mr. Ramsaroop also posted: "So, because of the Black Lives Matter 'movement' Burger Kings around South Carolina have refused to service Firefighters. I have heard this from different Firefighters at different Burger Kings. I hope you bitches have insurance" (doc. 28-16). The plaintiff states that Mr. Ramsaroop did not receive discipline based on this post (doc. 28 at 11). In his deposition, Chief Jenkins was "not 100 percent sure" that he knew about Mr. Ramsaroop's posts prior to his deposition (doc. 28-1, Jenkins dep. 32-33). Chief Jenkins testified that, while he viewed the plaintiff's posts as threatening, he "did not see a threat" in Mr. Ramsaroop's "you're pretending to be a speed bump" post (*id.*). Chief Jenkins testified that Mr. Ramsaroop's Burger King/Black Lives Matter post stating, "I hope you bitches have insurance," "could possibly . . be" viewed as a threat (*id.* 35).

City Government

The defendant operates pursuant to a council-manager form of government as prescribed in the South Carolina Code (doc. 28-7, § 2-1). *See* S.C. Code Ann. § 5-5-10. "All legislative powers of the city and the determination of all matters of policy are vested in the city council . . . . " (doc. 28-7, § 2-5). *See* S.C. Code Ann. § 5-13-30 ("All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote. . . . "). Per

[3] No testimonial evidence regarding Mr. Ramsaroop's lack of discipline for the Facebook posts has been presented. However, the defendant does not appear to dispute that he was not disciplined for these posts (*see* doc. 27-1 at 17).

ordinance, the city manager is "the chief executive officer of the city and head of the administrative branch of city government" (doc. 28-7, § 2-32). In that role, the city manager "perform[s] and exercise[s] the duties and responsibilities prescribed by law for [her] office and such other duties and responsibilities as prescribed by the city council" (*id.*). The defendant's ordinances provide:

> Except for the purpose of inquires and investigations, neither council nor its members shall deal with municipal officers and employees who are subject to the direction and supervision of the manager except through the manager, and neither the council nor its members shall give orders to any such officer or employee, either publically or privately.

(*Id*. § 2-36). The only city employees subject to supervision by city council are the city manager and the city attorney (*id.* §§ 2-32, 2-34). State law provides that the city manager shall "[a]ppoint and . . . remove any appointive officer or employee of the municipality." S.C. Code Ann. § 5-13-90(1).

APPLICABLE LAW AND ANALYSIS

Standard of Review

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

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex*

Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Municipal Liability

The plaintiff alleges a First Amendment retaliatory discharge cause of action pursuant to 42 U.S.C. § 1983 (doc. 1-1 at 9-10). The defendant first argues that it is entitled to summary judgment on this cause of action because the plaintiff has failed to show that any policy of the defendant is the cause of the alleged constitutional violation (doc. 27-1 at 4-5).[4] The undersigned agrees.

Section 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)). A party bringing an action under Section 1983 is able to seek relief if he or she has been deprived of a federal right under the color of state law. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 707 (1999). Municipalities and other local governing bodies are considered "persons" and may be sued under Section 1983. *Monell v. Dept. of Social Servs.*, 436 U.S. 658, 690-91 (1978). However, a county or city cannot be held liable pursuant to respondeat superior principles. "[N]ot every deprivation of a constitutional right

[4] Because the undersigned finds that summary judgment should be granted on this basis, the defendant's additional arguments for dismissal of this cause of action will not be addressed (*see* doc. 27-1 at 5-14).

will lead to municipal liability. Only in cases where the municipality causes the deprivation 'through an official policy or custom' will liability attach." *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003) (quoting *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999)). As the Court of Appeals for the Fourth Circuit has stated:

> A policy or custom for which a municipality may be held liable can arise in four ways: (1) through an express policy, such as a written ordinance or regulation; (2) through the decisions of a person with final policymaking authority; (3) through an omission, such as a failure to properly train officers, that "manifest [s] deliberate indifference to the rights of citizens"; or (4) through a practice that is so "persistent and widespread" as to constitute a "custom or usage with the force of law."

Id. (quoting *Carter*, 164 F.3d at 217).

Here, the plaintiff contends that the policy or custom for which the defendant is allegedly liable arose through the decision to terminate his employment by the City Manager, whom he contends is a person with final policymaking authority (doc. 28 at 5-7, 13-16). *See Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) ("While municipal 'policy' is found most obviously in municipal ordinances, regulations and the like which directly command or authorize constitutional violations, ... it may also be found in formal or informal *ad hoc* 'policy' choices or decisions of municipal officials authorized to make and implement municipal policy."). "[W]hether an official had final policymaking authority is a question of state law." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986).

Here, viewing the evidence in a light most favorable to the plaintiff and assuming for purposes of this motion that City Manager Wilson was the final decisionmaker with regard to the plaintiff's termination of employment, the plaintiff has failed to show that City Manager Wilson had final policymaking authority such that the defendant may be held liable for her decision. The plaintiff cites *Edwards v. City of Goldsboro*, 178 f3d 231, 245 (4th Cir. 1999) in support of his argument that the "Fourth Circuit has explicitly recognized that a municipality can be liable for § 1983 claim in the City Manager context" (doc. 28 at 15). However, in *Edwards*, which was considered in the context of a Rule 12(b)(6) motion

to dismiss rather than a motion for summary judgment, the court found that the plaintiff had sufficiently alleged that "the City delegated authority to its agents and employees, including [the police chief and city manager], to formulate, develop and administer employment and personnel policies and practices for the City, including those policies and practices that caused [the plaintiff] the damages he has alleged." 178 F.3d at 245. Here, the plaintiff has not alleged, much less shown proof, of any such delegation of authority to City Manager Wilson.

Further in *Lytle*, which is also cited by the plaintiff (doc. 28 at 16), the Fourth Circuit found that the City Manager for the City of Norfolk was "clearly the final policymaker for purposes of § 1983 liability" with regard to the police department because "[t]he Norfolk City Charter provides that the City Manager, acting as the director of public safety, is in charge of the police department. All orders, rules, and regulations applicable to the entire police department must be approved by the City Manager." 326 F.3d at 472. Here, however, there is no indication that City Manager Wilson was vested with policymaking authority as in *Lytle* and *Edwards*.

As set out above, the defendant's ordinances provide that "[a]ll legislative powers of the city and the determination of all matters of policy are vested in the city council . . . . " (doc. 28-7, § 2-5). *See* S.C. Code Ann. § 5-13-30 ("All legislative powers of the municipality and the determination of all matters of policy shall be vested in the municipal council, each member, including the mayor, to have one vote. . . . "). Per ordinance, the city manager is "the chief executive officer of the city and head of the administrative branch of city government" (*id.* § 2-32). In that role, the city manager "perform[s] and exercise[s] the duties and responsibilities prescribed by law for [her] office and such other duties and responsibilities as prescribed by the city council" (*id.*), which include the direction and supervision of employees (*id*. § 2-36) and appointing and removing employees. S.C. Code Ann. § 5-13-90(1). Thus, while the City Manager Wilson had discretion to hire, fire, and discipline employees, there is no indication that she was authorized to establish

employment policy for the defendant. As stated by the Supreme Court of the United States in *Pembaur*:

> Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

Pembaur, 475 U.S. at 481–83. The Supreme Court gave the following hypothetical, which is similar to the situation presented here:

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff *is* the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board. However, if the Board delegated its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability.

Id. at 483 n.12 (emphasis in original).

Based upon the foregoing, the undersigned recommends that the district court find that the plaintiff has not demonstrated that there is a genuine dispute of material fact regarding whether his alleged injury was caused by a municipal policy or custom. Accordingly, summary judgment should be granted to the defendant on the plaintiff's Section 1983 cause of action for retaliatory discharge in violation of the First Amendment.

Race Discrimination

The plaintiff alleges a cause of action for race discrimination in violation of Title VII (doc. 1-1 at 10-11). "A plaintiff asserting a claim of unlawful employment discrimination may proceed through two avenues of proof." *Addison v. CMH Homes, Inc*., 47 F. Supp. 3d 404, 416 (D.S.C. 2014). First, a plaintiff may establish his/her claims through direct evidence of the alleged discrimination. *Id*. (citation omitted). "Such proof includes 'evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision.'" *Id*. at 416-17 (quoting *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir.1995)). "Absent direct evidence of intentional discrimination, Title VII . . . claims are analyzed under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 793 (1973)." *Shun-Lung Chao v. Int'l Bus. Machs. Corp*., 424 F. App'x 259, 260 (4th Cir. 2011) (citation omitted).

Here, the plaintiff proceeds on his race discrimination claim employing the *McDonnell Douglas* framework (doc. 28 at 22). Accordingly, he must first establish a *prima facie* case of discrimination. *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). To establish a *prima facie* case of disparate treatment based on race, a plaintiff must show: 1) he is a member of a protected class, 2) his job performance was satisfactory, 3) he suffered an adverse employment action, and 4) similarly-situated employees outside his protected class were treated more favorably or there is some other evidence giving rise to an inference of unlawful discrimination. *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010).

The defendant does not dispute that the plaintiff can establish the first three elements of a *prima facie* case, but the defendant argues that the plaintiff cannot show evidence that similarly situated employees outside his protected class were treated more favorably (doc. 27-1 at 14-1). The undersigned disagrees.

The plaintiff has presented evidence that two black firefighters made Facebook posts regarding the Black Lives Matter protests, and they were not terminated

from employment. Specifically, Mr. Bostick posted: "Here's a thought, I wear a blue uniform, I'm black, but because I wear the uniform gangs are going to try and take me out? Hmmmm guess black lives don't matter now do they? See it's all bullshit…. But can't tell idiots that now can you?" (doc. 28-14).[5] Also, Mr. Ramsaroop posted: "Protesting is your right and you are free to do so, but when you protest in the street, that is impeding traffic. In that case, you're just pretending to be a speed bump" (doc. 28-15).

The defendant contends the Facebook posts by Mr. Bostick and Mr. Ramsaroop "while unfortunate, stopped well short of direct threats to do harm to members of the public," while "[t]he posts made by the Plaintiff were clear in their intention" (doc. 27-1 at 17-18).The defendant further argues that "[t]he standard for whether employees are similarly situated requires that their circumstances be nearly identical" (*id.* at 16). The undersigned disagrees that the comparison is so clear, particularly with regard to Mr. Ramsaroop's statement regarding protestors in the street "pretending to be a speed bump." With regard to the fourth element of a *prima facie* case, the Fourth Circuit recently stated:

> [T]his Court has emphasized that a comparison between similar employees "will never involve precisely the same set of work-related offenses occurring over the same period of time and under the same sets of circumstances." *Cook v. CSX Transp. Corp*., 988 F.2d 507, 511 (4th Cir. 1993). Rather, to establish a valid comparator, the plaintiff must produce evidence that the plaintiff and comparator "dealt with the same supervisor, [were] subject to the same standards and ... engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Haywood v. Locke*, 387 F. App'x 355, 359 (4th Cir. 2010) (quoting *Mitchell v. Toledo Hosp*., 964 F.2d 577, 583 (6th Cir. 1992)) (alterations in original).

Haynes v. Waste Connections, Inc., 922 F.3d 219, 223–24 (4th Cir. 2019). While Mr. Ramsaroop's post may not be "precisely the same" as the plaintiff's, it is not required to be. Further, the defendant does not address Mr. Ramsaroop's post stating: "So, because of the

[5] As set out herein, Mr. Bostick was suspended for commenting on the plaintiff's Facebook post, but he was not disciplined for the post that is quoted here.

Black Lives Matter 'movement' Burger Kings around South Carolina have refused to service Firefighters. I have heard this from different Firefighters at different Burger Kings. I hope you bitches have insurance" (doc. 28-16; *see generally* doc. 27-1 at 17-18 and doc. 30 at 4-5). Chief Jenkins testified that this post "could possibly . . be" viewed as a threat (doc. 28-1, Jenkins dep. 35). A reasonable jury too could find that the Mr. Ramsaroop's post was "the same conduct without such differentiating or mitigating circumstances that would distinguish [his] conduct or the employer's treatment of [him] for it." *Haywood*, 387 F. App'x at 359 (citation and internal quotations omitted). The defendant notes that Chief Jenkins testified that he was "not 100 percent sure" about whether he knew about Mr. Ramsaroop's posts (doc. 28-1, Jenkins dep. 32-33). However, this certainly is not conclusive evidence that he and/or City Manager Wilson did not know about the posts.

Furthermore, Chief Jenkins testified that all firefighters were subject to the same code of conduct, policies, and ultimate supervisors as the plaintiff (*id.*. 35-38). Taken as a whole, the evidence in the record could permit a reasonable factfinder to conclude that the plaintiff and Mr. Ramsaroop are proper comparators. Accordingly, the undersigned recommends that the district court find that the plaintiff can establish a *prima facie* case of race discrimination.

The burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for its actions against the plaintiff. *Texas Dept. of Cmty.* Affairs, 450 U.S. at 253-55 (this is a burden of production, not persuasion). The defendant has met this burden by stating that it terminated the plaintiff's employment because he made a social media post "threatening the lives of citizens," which violated the defendant's handbook provisions and Standard Operating Guidelines (doc. 28-3).

The plaintiff must show by a preponderance of the evidence that the proffered reason was a pretext for discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). The defendant does not specifically argue that the plaintiff cannot show pretext and relies solely on the comparator argument discussed above (*see generally* doc. 27-1 at 14-18 and doc. 30 at 4-5). Nonetheless, considering the evidence in a light

most favorable to the plaintiff, the undersigned recommends that the district court find that the plaintiff can meet his burden.

"[A] plaintiff's *prima facie* case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 530 U.S. at 148. However, "if the record conclusively reveal[s] some other, nondiscriminatory reason for the employer's decision, or if the plaintiff create[s] only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred," summary judgment is appropriate. *Id*. Accordingly, the court must evaluate "the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Id*. at 148-49. Notwithstanding the intricacies of proof schemes, the core of every [discrimination] case remains the same, necessitating resolution of the ultimate question of . . . whether the plaintiff was the victim of intentional discrimination." *Merritt v. Old Dominion Freight*, 601 F.3d 289, 294-95 (4th Cir. 2010) (citations omitted).

Here, the plaintiff has presented evidence that both he and two other white firemen, Mr. Augustyn and Mr. Proctor, were terminated from employment by the defendant for social media posts that were similar to posts made by similarly situated black firemen who were not terminated from employment. The plaintiff's evidence is sufficient to create an issue of fact as to whether the defendant's reason for terminating the plaintiff was pretext for race discrimination. Accordingly, summary judgment should be denied on the plaintiff's Title VII race discrimination cause of action.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the undersigned recommends that the defendant's motion for summary judgment (doc. 27) be granted on the plaintiff's Section 1983 cause of action for First Amendment retaliatory discharge and be denied as to the plaintiff's Title VII cause of action for race discrimination.

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

June 10, 2019
Greenville, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
300 East Washington Street
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).