IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
File No. 1:15-cv-159-TDS-JLW

JEFFREY H. RANDLEMAN, Plaintiff, v. ALAMANCE COUNTY SHERIFF TERRY S. JOHNSON, in his individual and official capacities, and JOHN DOE CORPORATION, in its capacity as Surety on the Official Bond of the Sheriff of Alamance County, Defendants.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

INTRODUCTION

Plaintiff Jeffrey Randleman served as a law enforcement officer in the Alamance County Sheriffôs Office for 22 years. He had an exemplary record. In August 2014, he was subpoenaed to testify in a federal lawsuit alleging that defendant Alamance County Sheriff Terry Johnson engaged in unlawful racial profiling. Resisting pressure to do otherwise, Randleman testified truthfully about possible racial discrimination within the sheriffôs office. In retaliation for his testimony, Sheriff Johnson fired Randleman.

Under well-established law, Randlemanôs constitutional rights were flagrantly violated. Regardless of whether Randlemanôs separation is deemed a termination or a failure to rehire, it was unconstitutional under the First Amendment. Randleman has stated valid claims under 42 U.S.C § 1983, North Carolina common law, and the North

Carolina Constitution, and defendant is not entitled to qualified immunity. Defendantôs motion to dismiss should be denied.

FACTS

I. Randleman's Career with the Sheriff's Department.

Plaintiff Jeffrey Randleman served as a law enforcement officer in the Alamance County Sheriffôs Office (ñACSOò) for 22 years. (Compl. ¶ 1.) In 2003, and again from 2005 to 2014, he served under defendant Sheriff Terry Johnson. (Id. ¶¶ 12-15, 23.) Randleman was an exemplary employee ï he always received positive performance evaluations and had never been disciplined. (Id. ¶¶ 53, 54.)

In 2007, the United States Immigration and Customs Enforcement (ñICEò) entered into an agreement with Johnson, granting ACSO limited authority to investigate and enforce immigration violations pursuant to Section 287(g) of the Immigration and Nationality Act, 8 U.S.C. § 1357(g) (ñthe 287(g) programò). (Id. ¶ 16.) In 2008, Randleman was one of several officers who became 287(g)-certified, permitting him to investigate immigration offenses for individuals within ACSOôs custody. (Id. ¶18.)

In or about June 2008, Johnson appointed Randleman an immigration task force officer. (Id. ¶ 19.) In this position, Randleman conducted immigration investigations on individuals who had not been arrested or booked. (Id.) He left that position in or around December 2008, after an audit concluded that defendant Johnson had not been authorized to name an immigration task force officer. (Id. ¶ 20.)

In June 2010, the Department of Justice (ñDOJò) began investigating defendant Johnson regarding allegations of discriminatory policing and unconstitutional searches and seizures. (Id. ¶ 22.) On September 18, 2012, DOJ issued an 11-page summary of its investigation into ACSO and detailed charges of discrimination. (Id. ¶ 24.) It then terminated Alamance Countyôs participation in the 287(g) program. (Id.)

II. The United States Department of Justice Files Civil Rights Claims Against Sheriff Johnson for Racial Profiling.

On December 20, 2012, DOJ filed suit in this Court against defendant Johnson in his official capacity as Alamance County Sheriff (the ñDOJ Suitò). (Compl. ¶ 25.) DOJ alleged that ACSO, at defendant Johnsonôs direction, intentionally discriminated against Latino persons in Alamance County ñby targeting Latinos for investigation, detention, and arrest, and conducting unreasonable seizures and other unlawful law enforcement actions in violation of the United States Constitution and federal law.ò (Id.) Some of defendant Johnsonôs alleged discriminatory conduct involved investigations conducted through the 287(g) program. (Id. ¶ 26.)

DOJ subpoenaed Randlemanôs testimony, and he was deposed on June 17, 2013. (Id. ¶ 27.) In his deposition, Randleman testified about incidents in which Johnson instructed him to conduct immigration investigations on arrestees Johnson assumed to be Latino, and also on Alamance County employees and other citizens Johnson assumed to be Latino. (Id.) Both ACSO and DOJ moved for summary judgment in the DOJ Suit. (Id. ¶ 28.) DOJ cited Randlemanôs deposition testimony in its briefs as evidence of defendant Johnsonôs discriminatory animus. (Id.) On June 20, 2014, this Court denied DOJôs motion for summary judgment and denied defendant Johnsonôs motion for summary judgment as it related to racial discrimination claims. (Id. ¶ 29.)

III. Randleman Testifies in the DOJ Trial Against Sheriff Johnson.

A bench trial in the DOJ Suit was held from August 12 to August 22, 2014 (the ñDOJ Trialò). (Compl. ¶ 30.) An important component of DOJôs case was testimony from current and former ACSO employees to demonstrate defendant Johnsonôs discriminatory intent. (Id. ¶ 31.) Former employees testified that Johnson made a

number of statements explicitly demonstrating his discriminatory intent. (Id. ¶ 32.) For example, a former employee testified that Johnson instructed subordinates to ñgo get them Mexicans.ò (Id.) ACSO aggressively challenged the credibility of these witnesses, presenting them as disgruntled former employees who harbored a grudge against Johnson. (Id. ¶ 33.)

The majority of ACSOôs current employees were hostile witnesses to DOJ. (Id. ¶ 34.) As a current employee of ACSO, Randlemanôs testimony was a critical component of DOJôs response to ACSOôs credibility arguments. (Id. ¶ 35.)

Before trial, Randleman heard conversations around ACSO disparaging any ñmolesò in the department. (Id. ¶ 36.) These conversations made him uncomfortable and made him fear that he would be retaliated against if he testified truthfully. (Id.)

Notwithstanding these concerns, on August 14, 2014, Randleman testified truthfully about his experiences at ACSO. (Id. ¶ 37.) He testified that he was asked to check the immigration status of people who were not yet in custody of ACSO, almost all of whom appeared to be Hispanic. (Id.) He testified about a number of specific interactions with defendant Johnson that supported DOJôs case. (Id.) He testified that other officers discussed hearing defendant Johnson on ACSO radio saying, ñif heôs Hispanic, take him to jail.ò (Id. ¶ 38.)

Johnson was displeased with Randleman because of his testimony. (Id. ¶ 39.) The court took a recess in the middle of Randlemanôs testimony. (Id. ¶ 40.) During this recess, Johnson approached Randleman and commented about what a ñgood memoryò he had. (Id.) After Randleman resumed his testimony, he observed Johnsonôs visible displeasure with his testimony. (Id.) Randleman continued to testify truthfully despite defendantôs behavior. (Id. ¶ 41.) At the conclusion of his direct examination, Randleman testified that he was worried that he would be fired because of his testimony. (Id. ¶ 42.)

In his closing arguments, DOJ's attorney highlighted Randleman's testimony many times and argued that his credibility was "unassailable." (Id. ¶ 43.) On October 17, 2014, DOJ and ACSO each filed proposed findings of fact and conclusions of law. (Id. ¶ 44.) DOJ's filing relied heavily on Randleman's testimony, while ACSO's filing spent many pages challenging its relevance. (Id.)

IV. Johnson Terminates Randleman Following His Testimony.

Johnson ran unopposed in November 2014, and was reelected to a new term as Sheriff. (Compl. ¶ 45.) Following his 2014 reelection, Johnson decided not to re-swear Randleman in as a deputy, and instead terminate his employment. (Id. ¶ 46.) Captain Kim Wilson informed Randleman that he was going to be let go shortly before Thanksgiving. (Id. ¶ 47.) She apologized, and told him she did not know why he was being terminated. (Id.)

On December 1, 2014, Randleman met with Chief Deputy Tim Britt and Richard Longamore, ACSO's Director of Personnel. (Id. ¶ 48.) Britt told Randleman that defendant Johnson had decided not to swear Randleman back in to his office, and that Randleman would instead be terminated. (Id.) Britt apologized and said that he did not know why Randleman was being terminated. (Id.) He admitted that there were no problems with Randleman's job performance. (Id.) Johnson did not terminate any other of the approximately 120 ACSO law enforcement officers through the "swearing in" process. (Id. ¶ 50.)

Johnson terminated Randleman because of his truthful testimony in the DOJ Trial. (Id. ¶ 56.) There was no legitimate reason to terminate Randleman's employment. (Id. ¶ 55.) Johnson waited three months after Randleman's testimony to terminate him because he thought it would appear less incriminating if Randleman were terminated as a part of

the process of swearing officers back in to their offices. (Id. ¶ 51.) Johnson would not have terminated Randleman if he had committed perjury and given testimony more favorable to Johnson. (Id. ¶ 57.)

STANDARD OF REVIEW

A complaint should be dismissed pursuant to Rule 12(b)(6) only where a plaintiffôs claims fail as a matter of law. When ruling on a motion to dismiss, the Court must accept as true all well-pled factual allegations and should consider whether ñthey plausibly give rise to an entitlement to relief.ò Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950 (2009). Dismissal is not appropriate where the complaint contains ñenough facts to state a claim to relief that is plausible on its face.ò Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007). In assessing the legal sufficiency of a complaint, the factual allegations must be construed in the light most favorable to the plaintiff. Smith v. Smith, 589 F.3d 736, 738 (4th Cir. 2009) (reversing dismissal of § 1983 claim).

ARGUMENT

I. Randleman Has Stated a Valid First Amendment Claim Under 42 U.S.C. § 1983.

A. Randleman has a valid First Amendment retaliation claim.

Randleman alleges he was terminated in retaliation for exercising his rights under the First Amendment. In order to prove such a claim, an employee must satisfy a three-pronged test, showing:

> (1) that the employee ñwas speaking as a citizen upon a matter of public concernò rather than ñas an employee about a matter of personal interestò; (2) that his ñinterest in speaking upon the matter of public concern outweighed the governmentôs interest in providing effective and efficient

> services to the publicò; and (3) that his ñspeech was a substantial factorò in the employerôs decision to take action against him.

Smith v. Gilchrist, 749 F.3d 302, 308 (4th Cir. 2014) (quoting McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998)). Randlemanôs allegations state a claim for retaliatory discharge in violation of the First Amendment.

First, sworn testimony about systemic racial discrimination within a law enforcement agency is clearly citizen speech on a matter of public concern. ñTruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes.ò Lane v. Franks, 134 S. Ct. 2369, 2378, 189 L. Ed. 2d 312 (2014). And ñallegations é about racial discrimination within a law enforcement agencyò is speech on a matter of public concern. Cromer v. Brown, 88 F.3d 1315, 1326 (4th Cir. 1996). Moreover, testimony regarding ñcorruption in a public programò is ñobviouslyò speech on a matter of public concern. Lane, 134 S. Ct. at 2380. Randlemanôs sworn testimony about possible racial discrimination within ASCO was therefore plainly citizen speech on a matter of public concern.

Second, Randlemanôs interest in speaking outweighed the governmentôs interest in providing effective services to the public. When a law enforcement officer speaks about possible wide-spread discrimination within his agency, the employeeôs individual interests in speech ñmerge in a real sense with those of the community at large.ò Cromer, 88 F.3d at 1327. ñThose merged interests are substantial.ò Id. No allegations suggest that Randlemanôs termination was justified by any legitimate government interest. The employerôs side of the scale is therefore empty. When the public employerôs side of the scale is ñentirely empty,ò there is nothing to ñtip[] the balance in their favor.ò Lane, 134 S. Ct. at 2381. Randlemanôs substantial interest in speaking thus outweighs any government interest in providing effective and efficient services.

Finally, Randlemanôs allegations support the conclusion that his speech was a substantial factor in defendantôs decision to terminate him. Randleman was an exemplary employee for 22 years and always received positive employment evaluations. (Compl. ¶¶ 12-15, 23, 53.) He then provided testimony that was damaging to defendant Johnson. (Compl. ¶¶ 37-38.) Johnson was unhappy with that testimony, and terminated Randlemanôs employment because of that testimony. (Id. ¶¶ 39, 56.) There was no legitimate reason for Randlemanôs termination, and if he had instead perjured himself and given testimony favorable to Johnson, he would not have been terminated. (Id. ¶¶ 55, 57.) These allegations clearly support the conclusion that Randlemanôs speech was a substantial factor in defendant Johnsonôs decision to take action against him.

ñ[P]ublic employers may not condition employment on the relinquishment of constitutional rights.ò Lane, 134 S. Ct. at 2377. The allegations support the conclusion that defendant Johnson conditioned Randlemanôs employment on the relinquishment of his First Amendment rights, and thus state a valid claim under 42 U.S.C. § 1983.

B. First Amendment retaliation claims do not require a "protected property interest."

Defendant argues that Randlemanôs First Amendment claim fails because he ñwholly fails to allege that he had a protected property interest in his employment under the Fifth or Fourteenth Amendments to the United States Constitution.ò (Def. Mem. pp. 10-11.) But it has long been recognized that ña public employee need not have a protected property interest in his employment to state a retaliation claim.ò Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 304 n.25 (4th Cir. 2006); see also Huang v. Bd. of Governors of Univ. of N. Carolina, 902 F.2d 1134, 1140 (4th Cir. 1990) (ñ[P]ossession of a property right is immaterial to a plaintiffôs claim that he was deprived

of some valuable benefit as a result of exercising his First Amendment rights.ò). Instead, even when a public employee ñcould have been discharged for no reason whatever . . . he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedoms.ò Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 283-84, 97 S. Ct. 568, 574, 50 L.Ed.2d 471 (1977); see also Perry v. Sindermann, 408 U.S. 593, 597-98, 92 S. Ct. 2694, 2697-98, 33 L. Ed. 2d 570 (1972) (finding that a plaintiffôs ñlack of a contractual or tenure órightô to re-employment é is immaterial to his free speech claimò).

Defendantôs argument to the contrary relies exclusively on language discussing procedural due process ï a context in which a protected property interest is often necessary to state a claim for relief. See, e.g., Bd. of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972) (discussing claim based on procedural due process without any connection to First Amendment); Holland v. Rimmer, 25 F.3d 1251, 1257 (4th Cir. 1994) (same). But Randleman does not claim that his procedural due process rights were violated. The cases cited by defendant are irrelevant to Randlemanôs actual claims.

Defendant fails to acknowledge that he exclusively relies on decisions addressing jurisprudence unrelated to Randlemanôs claims. He offers no justification for ignoring First Amendment law. His arguments must be rejected under controlling Fourth Circuit and Supreme Court authority.

An employee need not have a ñprotected property interestò under the Fifth Amendment to state a claim for retaliation under the First Amendment. See Ridpath, 447 F.3d at 304 n.25; Mount Healthy, 429 U.S. at 283-84, 97 S. Ct. at 574. Randlemanôs First Amendment claim is thus valid regardless of whether he has a ñprotected property interest.ò

C. Any difference between a "termination" and a "failure to rehire" is irrelevant to Randleman's First Amendment claim.

Defendant contends that Randleman mischaracterizes the employment action at issue as a ñtermination.ò He insists that Randlemanôs term of employment ended on November 30, 2014, and that ñ[i]nstead, [Randleman] was not rehired on December 1, 2014.ò (Def. Mem. p. 7.) He then argues that ñthere is no constitutional requirement that a person be reappointed to a position, once their employment has ended.ò (Id.) Defendantôs argument again rests on procedural due process jurisprudence, which is irrelevant to Randlemanôs claims. (See Def. Mem. p. 6 (citing Bd. Of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701 (1972).) Under long-established First Amendment law, defendantôs argument has no merit.

Defendant asserts that there is a meaningful distinction between ñterminatingò an employee and ñnot rehiringò an employee, and that only the former is constitutionally protected. In the First Amendment context, however, this argument has been unequivocally rejected. The Fourth Circuit recognizes that ña public employer contravenes a public employeeôs First Amendment rights when it discharges or refuses to rehire the employee, or when it makes decisions relating to promotion, transfer, recall, and hiring based on the exercise of that employeeôs free speech rights.ò Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006) (internal quotation marks omitted, emphasis added); see also Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 686 (4th Cir. 2000) (ñ[A] public employer adversely affects an employeeôs First Amendment rights when it refuses to rehire an employee because of the exercise of those rights[.]ò); Daulton v. Affeldt, 678 F.2d 487, 490 (4th Cir. 1982) (finding that a public employee could ñestablish a claim if the decision not to rehire her was based on her exercise of constitutionally protected first amendment freedomsò); Shumate v. Bd. of Educ. of

Jackson Cnty., 478 F.2d 233, 234 (4th Cir. 1973) (finding that ñfailure to renew a contractò was ñdeliberate inactionò sufficient to provide a basis for First Amendment retaliation claims despite ñ[t]he absence of any contractual or tenure rightò to reemployment); cf. McConnell v. Adams, 829 F.2d 1319, 1324 (4th Cir. 1987) (holding that under the First Amendment, ñthere is no constitutional difference between a patronage refusal to rehire and a patronage dismissal[.]ò). The Supreme Court has also recognized First Amendment violations based on a public employerôs refusal to rehire an employee. See, e.g., Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 283-84, 97 S. Ct. 568, 574, 50 L.Ed.2d 471 (1977) (finding that a teacher with no contractual right to continued employment may ñestablish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected First Amendment freedomsò); Perry v. Sindermann, 408 U.S. 593, 598, 92 S. Ct. 2694, 2698, 33 L. Ed. 2d 570 (1972) (finding that ñnonrenewal of a é one-year contract may not be predicated on [a public employeeôs] exercise of First and Fourteenth Amendment rights.ò)

Randleman has alleged that he was terminated by defendant. (Compl. ¶¶ 1, 5, 46, 48, 50, 56.) These allegations must be accepted as true on a motion to dismiss. See Coleman v. Maryland Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010). But even if the court finds the employment action is better characterized as a failure to ñrehireò or ñreappoint,ò that conclusion has no impact on Randlemanôs claims. Just as the First Amendment proscribes retaliatory terminations, it also proscribes retaliatory decisions not to rehire or reappoint. See Ridpath, 447 F.3d at 316; Mount Healthy, 429 U.S. at 283-84, 97 S. Ct. at 574.

D. North Carolina statutes do not defeat Randleman's claim.

In Section II of his brief, defendant recites a series of state statutes and regulations, most of which speak to the discretion sheriffs possess in selecting deputy sheriffs. (Def. Mem. pp. 8-10.) This section could be read as making three different arguments, each of which is plainly meritless.

First, defendant may be arguing that North Carolina law permits sheriffs to exercise discretion in ways that violate the First Amendment. (See Def. Mem. p. 5 (ñThere can also be no question that a County Sheriff in North Carolina has the exclusive right to select his deputies, subject only to limits on nepotism.ò).) This is not the case. Even though North Carolina law grants sheriffs wide latitude in employment decisions, that discretion is limited by federal laws and the United States Constitution. See U.S. Const. Art. VI, cl. 2 (ñThe Constitution, and the Laws of the United States which shall be made in Pursuance thereof é [are] the supreme Law of the Land[.]ò). As such, ñ[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 é cannot be immunized by state law.ò Martinez v. State of Cal., 444 U.S. 277, 284, 100 S. Ct. 553, 558, 62 L. Ed. 2d 481 (1980). Regardless of what statutes North Carolina enacts, the stateôs sheriffs may not make employment decisions that violate employeesô First Amendment rights.

Second, defendant appears to argue that, in order to state a claim, Randleman was required to allege that he possessed ñthe special trust and confidence of the Sheriff.ò (Def. Mem. p. 10.) This argument approaches the bizarre. Randleman alleged that ñthere was no legitimate reasonò to terminate his employment, and that he would not have been terminated if he ñhad committed perjury and given testimony more favorable to defendant Johnson.ò (Compl. ¶¶ 55, 57.) These allegations are entirely consistent with other detailed factual allegations. On a motion to dismiss, the court must infer that if

Randleman lacked ñthe special trust and confidence of the sheriff,ò it was a result of Randlemanôs testimony. The peculiar question of whether defendant somehow had ñspecial trust and confidenceò in Randleman notwithstanding his retaliatory animus is irrelevant to Randlemanôs claim.

Finally, defendant again argues that Randleman lacked a protected property interest in his continued employment. (Def. Mem. p. 10.) As discussed above, employees need not have a protected property interest in employment to bring a claim for First Amendment retaliation. See Section I.B, supra. Even if the cited statutes imply that Randleman lacked such a property interest, they are irrelevant.

II. Defendant Is Not Entitled to Qualified Immunity.

Courts are permitted to award damages against a government official in his personal capacity if ñthe official violated a statutory or constitutional rightò that was ñclearly established at the time of the challenged conduct.ò Ashcroft v. al-Kidd, __ U.S. __, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011). ñA Government officialôs conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.ò Id. at 2083. Courts ñdo not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.ò Id.

Randleman alleges he was terminated for giving truthful sworn testimony about possible racial discrimination within the ACSO. His right not to be retaliated against for such conduct has been clearly established for decades. For example, in Cromer v. Brown, 88 F.3d 1315, 1318 (4th Cir. 1996), a deputy sheriff alleged he was terminated because he spoke about perceived racism in the sheriffôs office. On summary judgment,

the Fourth Circuit held that the defendant sheriff was not entitled to qualified immunity, finding that the deputy sheriffôs ñright to speak about perceived racial discrimination was clearly established in 1991.ò Id. at 1327; see also Robinson v. Balog, 160 F.3d 183, 188 (4th Cir. 1998) (holding that public employees had a clearly established right not to be retaliated against for ñbring[ing] to light actual or potential wrongdoing or breach of public trustò); Cutts v. Peed, 17 Fed. Appôx 132, 135-36 (4th Cir. 2001) (unpublished; attached) (holding that deputy sheriffs had a clearly established right not to be retaliated against for speaking about ñfraud and racial discrimination in a law enforcement agencyò).

Any possible ambiguity was resolved in Lane v. Franks, __ U.S. __, 134 S. Ct. 2369, 2381 (June 19, 2014). In Lane, a public employee was terminated for testifying truthfully under oath about public corruption. The defendant argued that because the testimony related to information learned in the scope of the plaintiffôs public employment, the plaintiff was speaking as an employee instead of as a citizen, precluding a claim under the First Amendment. Id. at 2376. The Supreme Court rejected the defendantôs argument. It held that ñ[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. That is so even when the testimony relates to his public employment or concerns information learned during that employment.ò Id. at 2378. It also confirmed that testimony about ñcorruption in a public program and misuse of state funds é obviously involves a matter of significant public concern.ò Id. Lane settled any question about Randlemanôs right to testify truthfully without fear of retaliation.

In his sole argument to the contrary, Defendant asserts that there was ambiguity as to what constituted an adverse employment action in retaliation cases. Defendant argues that while the plaintiff in Lane was ñterminated from his current and existing position,ò

Randleman ñwas simply not re-appointedò to his position by defendant. (Def. Mem. p. 14.) Given this purported distinction, defendant argues that he was not ñon noticeò about the fact that the First Amendment limited his ability to retaliate against employees through the reappointment process. (Id.) He therefore asserts he should be entitled to qualified immunity just as the Lane defendant was entitled to qualified immunity.[1] (Id.)

Defendant ignores the fact that Lane v. Franks is not the only opinion discussing First Amendment retaliation claims. A cursory examination of additional cases demonstrates that defendantôs asserted ambiguity does not exist. As discussed above, see Section I.C, supra, the Supreme Court and the Fourth Circuit have long recognized that the First Amendment prohibits retaliatory failures to reappoint employees just as it prohibits retaliatory terminations. See, e.g., Mount Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 283-84, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977); Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006). Defendant fails to cite a single case from any jurisdiction suggesting that a retaliatory failure to rehire is different than any other retaliatory employment action. Because a reasonable official would have known that the First Amendment applied to defendantôs reappointment process, defendant is not entitled to qualified immunity.

Because Randlemanôs right to be free from retaliation for testifying truthfully under oath about possible racism in the ACSO was clearly established before December 2014, defendant is not entitled to qualified immunity.

[1] The Lane defendant was entitled to qualified immunity because of ambiguity within the Eleventh Circuit as to when sworn testimony was citizen speech. See Lane, 134 S. Ct. at 2381-83 (comparing Morris v. Crow, 142 F.3d 1379 (11th Cir. 1998) with Martinez v. Opaï Locka, 971 F.2d 708 (11th Cir. 1992) and Tindal v. Montgomery Cty. Commôn, 32 F.3d 1535 (11th Cir. 1994)). That ambiguity was resolved by Lane.

III. Randleman Has Alleged Valid State Law Claims.

A. Randleman states a valid claim for wrongful discharge in violation of North Carolina public policy.

In his second claim, Randleman alleges that he was terminated in violation of North Carolina public policy. North Carolina recognizes a ñpublic policy exception to the employee-at-will doctrine.ò Coman v. Thomas Mfg. Co., 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989). Under this doctrine, ñwhile there may be a right to terminate a contract at will for no reason, or for an arbitrary or irrational reason, there can be no right to terminate such a contract for an unlawful reason or purpose that contravenes public policy.ò Id. North Carolina courts have recognized wrongful discharge claims ñwhere the employee was discharged (1) for refusing to violate the law at the employerôs request, (2) for engaging in a legally protected activity, or (3) based on activity by the employer contrary to law or public policy.ò Imes v. City of Asheville, 163 N.C. App. 668, 670-71, 594 S.E.2d 397, 399 affôd, 359 N.C. 182, 606 S.E.2d 117 (2004) (internal citations omitted).

Wrongful discharge claims can arise when an employer terminates an employee for refusing to engage in perjury, Sides v. Duke University, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826 (1985) overruled on other grounds by Kurtzman v. Applied Analytical Indus., Inc., 347 N.C. 329, 493 S.E.2d 420 (1997), or for testifying truthfully, Williams v. Hillhaven Corp., 91 N.C. App. 35, 39, 370 S.E.2d 423, 425 (1988). Randleman alleges that he was terminated for declining to perjure himself, and instead testifying truthfully under oath. He has therefore stated a claim for wrongful discharge in violation of North Carolina public policy.

Defendant argues that this claim fails because, ñas set forth above, [Randleman] had no right to continued employment, was not discharged from his employment, and he

has not established a right to continued employment after his term expired.ò (Def. Mem. p. 12.) Defendant, however, misconstrues the nature of North Carolinaôs common-law claim for wrongful discharge. The lack of a right to continued employment does not *defeat* such a claim ï it is a *necessary prerequisite* for such a claim. See Wagoner v. Elkin City Schoolsô Bd. of Educ., 113 N.C. App. 579, 588, 440 S.E.2d 119, 125 (1994) (finding that ñthe tort of wrongful discharge arises only in the context of employees at willò and that ñ[b]reach of contract is the proper claim for a wrongfully discharged employee who is employed for a definite term[.]ò)

And defendant cites no authority supporting his repeated assertion that a termination labeled a ñfailure to reappointò is somehow not an adverse employment action. To the contrary, North Carolina courts have recognized that a failure to rehire an employee does constitute an actionable employment act because ñthe failure to renew an employeeôs contract produces the adverse result of terminating her employment.ò Johnson v. Trustees of Durham Technical Cmty. Coll., 139 N.C. App. 676, 682, 535 S.E.2d 357, 362 (2000) (noting the persuasive authority of Mt. Healthy City Board of Ed. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977) and Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972)).

Regardless of what label applies, permitting a sheriff to end an officerôs 22 years of employment because the officer testified truthfully about racial discrimination would ñencourage and sanction lawlessness, which law by its very nature is designed to discourage and prevent.ò Coman, 325 N.C. at 175, 381 S.E.2d at 447. Defendantôs retaliation is abhorrent to the public policy of North Carolina regardless of how it is characterized.

Randleman alleges that he was terminated for declining to commit perjury, and instead testifying truthfully under oath. He has therefore stated a claim for wrongful discharge in violation of North Carolina public policy.

B. Randleman has a valid claim under the North Carolina Constitution.

Randleman also brings a claim under the North Carolina Constitution. ñ[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under [the North Carolina] Constitution.ò Corum v. Univ. of N. Carolina Through Bd. of Governors, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). A public employee terminated for exercising his free speech rights may therefore have a claim directly under the North Carolina Constitution. Id.

Defendant argues this claim must be dismissed because ñPlaintiff has pled a waiver of sovereign immunity by purchase of the Sheriffôs official bond,ò and because ñupon that waiver, he has pled a common law claim for wrongful discharge in violation of public policy.ò (Def. Mem. p. 12.) But defendant also argues that Randlemanôs allegations are insufficient to support a right to relief for wrongful discharge in violation of North Carolina public policy. To the extent Randlemanôs allegations fail to state a claim for wrongful discharge in violation of public policy, he lacks an adequate remedy under state law for any violation of the North Carolina Constitution, and his state constitutional claim should not be dismissed.

Moreover, Randlemanôs claim under the North Carolina Constitution is raised ñto the extentò his claim for wrongful discharge in violation of public policy ñis barred by governmental immunity.ò (Compl. ¶ 80.) Should discovery reveal that defendant has not waived governmental immunity, or that any waiver is partial and limits recovery, Randleman lacks an adequate remedy at state law and will be permitted to proceed on his

claims under the state Constitution. See Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ., 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009) (finding that a state tort claim ñis not an adequate remedy at state law because the doctrine of governmental immunity prevails against itò). Randlemanôs claims under the North Carolina Constitution therefore cannot be dismissed at this time.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that defendantôs Motion to Dismiss be denied.

This the 21st day of May, 2015.

/s/ Narendra K. Ghosh
Narendra K. Ghosh, NC Bar No. 37649
nghosh@pathlaw.com
Paul E. Smith, NC Bar No. 45014
psmith@pathlaw.com
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, North Carolina 27517
(919) 942-5200

Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Opposition to Defendantôs Motion to Dismiss was filed electronically with the Clerk of Court using the CM/ECF system, which will send notification of such filing to James D. Secor III, Clyde B. Albright, and Benjamin C. Pierce, Counsel for Defendants.

Dated: May 21, 2015.

/s/ Narendra K. Ghosh
Narendra K. Ghosh
NC Bar No. 37649
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
Tel: 919.942.5200
Fax: 866.397.8671
E-mail: nghosh@pathlaw.com