IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
NO. 5:07-CV-231

PAMELA L. HENSLEY, Plaintiff, v. JOHNSTON COUNTY BOARD OF EDUCATION, and, ANTHONY L. PARKER, in his capacity as superintendent of Johnston County Schools and in his individual capacity, Defendants.	)	PLAINTIFF'S MEMORANDUM OF LAW OPPOSING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiff filed the instant action in Johnston County Superior Court, seeking relief for deprivation of rights under the First and Fourteenth Amendments of the United States Constitution, pursuant to 42 U.S.C. §1983, and under Article I §§1, 13, and 14 of the North Carolina Constitution, to enforce the equal protection clause of Article I, §19 of the North Carolina Constitution, for deprivation of rights under Title VII of the Civil Rights Act of 1964, as amended, and for deprivation of rights under the Americans With Disabilities Act. Defendants removed to the U.S. District Court for the Eastern District of North Carolina and have answered with a Rule 12(b)(6) Motion and also allege a Rule 12(b)(1) basis for dismissal of Plaintiff's Title VII Claim for religious discrimination. Defendants' motions should be denied because they are premature, seeking to resolve questions more appropriately resolved after extensive discovery and because plaintiff has plead sufficient facts and should be permitted, on the basis of her pleading, to develop facts to support her contentions.

STATEMENT OF FACTS

Plaintiff Pamela Hensley began teaching in 1983; became employed with the Johnston County, North Carolina school system in 1994, began teaching at North Johnston Middle School in 1998, and,

taught eighth grade science at North Johnston Middle School between August 2000 and December 2005. (Plaintiff's Complaint (hereinafter "Compl."), ¶6). Plaintiff has enjoyed success as a teacher, receiving measures of satisfactory performance from both supervisors and peers. (Compl ¶7). Plaintiff has a congenital hearing impairment, the nature of which has been discussed with her employer. (Compl. ¶¶8, 40).

In December 2003, Ms. Hensley attended a curriculum seminar, focused on teaching the topic of evolution in science classes, sponsored and presented by the North Carolina Center for the Advancement of Teachers ("NCCAT"), a constituent element of the University of North Carolina, established by the North Carolina legislature in 1986. Her selection was approved by her principal at North Johnston Middle School. (Compl. ¶9). Upon her return from the seminar, she shared the seminar materials with colleagues and successfully used the materials in teaching her eighth grade science class during the spring semester of 2004. (Compl. ¶¶ 9, 10). During November 2004, Ms. Hensley again used the materials for classroom instruction. Neither Ms. Hensley, nor anyone else in the school system, received or responded to any concerns regarding the teaching material, until January 11, 2005, some seven to eight weeks after the classroom instruction, on the day after grade reports were sent to parents. One child's parents (hereinafter "the Does") complained that their child's grade had been arbitrarily lowered because the child had allegedly voiced religious opposition to the material presented during the November 2004 lecture. (Compl. ¶¶ 11-13). The school system investigated the Does' complaints and found no evidence to support their allegation. (Compl. ¶¶ 14, 15, 17).

Despite there being absolutely no credible evidence to support their position, the Does persisted in their complaints to the school system, with vitriolic, malevolent communications, both public and private, including communication in which the plaintiff was plainly targeted because of her "antagonism" toward a Christian belief system, her "alternative [life] views," and, her perceived "shortcomings" associated with her disability. (Compl. ¶ 15). Even after an extensive investigation found no evidence

that the plaintiff had displayed any antagonism toward any religious views[1], the Does continued to express their discontent and expanded their expressions to a public debate that included other parents and mass media sources. (Compl. ¶¶ 19, 20). They accused Ms. Hensley of demonstrating "unconstitutional hostility" toward Christians in her classroom and of giving theological lessons. The Does continued to insist that Ms. Hensley be terminated or, in the alternative, moved from the "North Johnston [school] district."[2] (Compl. ¶ 21). Though the Does continued their communication, there was never any evidence that the school district directly received any other expressions of discontent, complaint, criticism, or, disruptions of any sort from anyone else. (Compl. ¶ 35). The Does also demanded that the school district make significant changes in its curriculum to include a religious view of the teaching of science. (Compl. ¶22). The school district eventually decided to acquiesce to many of the Does' demands, including a demand for curricular revisions and a demand that Ms. Hensley send a letter of apology and explanation to all of the parents of students in her eighth grade science class.[3] The letter was not actually authored by Ms. Hensley. (Compl. ¶ 24). A draft was shown to Ms. Hensley. She initially acquiesced to signing the letter because she felt pressured to do so and because she was led to believe that no agreement with the Does could actually be reached. Then she changed her mind, seeking modifications in the wording of the letter as well as modifications in the plan to disseminate the letter to all of the parents. (Compl. ¶¶ 24-28). No one discussed modifications with Ms. Hensley and she declined to sign the letter as originally written. Apparently, further negotiations with the Does ceased. (Compl. ¶ 29). Approximately two months later, John Doe indicated his interest in further communication on this matter with the Board of Education members. One week after that, Defendant Parker, the superintendent of the school system, decided to transfer Ms. Hensley from the teaching position she had held for five years and from the school where she had taught for seven years to a non-existent teaching position at a school geographically far removed the subset of the Johnston County school district which John Doe identified with his sectarian interests.

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[1] In fact, the plaintiff alleges in her complaint that she made ***no religious statements at all***. Compl. ¶ 18.

[2] The Johnston County Schools are not actually divided into a "north" and "south" district, or any other formal demarcation of subsets of the district. John Doe's reference is presumably to a set of neighborhoods which he felt most closely reflected the sectarian interests he advocated.

[3] The proposed letter is attached to the complaint as Exhibit A.

Much later, Ms. Hensley, who has been hearing-impaired since birth, learned that defendant Parker intended for her to teach a remedial education course in language arts (Compl. ¶¶ 31, 32, 34, 41, 42).

Ms. Hensley did not learn of the transfer until December 1, 2005. Although defendant Parker waited for weeks after he had made the decision to communicate with Ms. Hensley, he insisted that she immediately pack her classroom belongings and report to her new, yet unidentified and undescribed, teaching position and do so despite the fact that she was in the middle of an academic semester that was not to end for several more weeks. (Compl. ¶ 34, 35).

Defendant Parker was adamant and inflexible that Ms. Hensley was to be transferred immediately. (Compl. ¶¶ 36-37). His explanation for his decision was: (1) that Ms. Hensley had taught the topic of evolution in a "manner that deviated from the curriculum;" a criticism which blatantly contradicted the findings of the school district's investigation with which Ms. Hensley had been presented in April 2005; (2) there was unspecified "tension and distraction" associated with her refusal to sign the letter; (3) that her refusal to sign the letter had sparked "additional complaints;" (4) and that the school system had expended resources toward the completion of the entire package of religious curricular changes demanded by the Does, which presumably would not come to fruition. (Compl. ¶ 35). Ms. Hensley has since learned that there were no "additional complaints" other than from the Doe family and has so alleged in her Complaint. (Compl. ¶ 35). In his letter of December 1, 2005, defendant Parker acknowledged that Ms. Hensley's communication was voluntary, not a part of her official duties. (Defendant's Memorandum of Law in Support of Motion to Dismiss (hereinafter "Defs' Mem."), Exhibit 2, ¶ 3). When Ms. Hensley chose to discuss the transfer publicly, she was threatened with additional discipline. (Compl. ¶¶ 37-38).

Plaintiff Pamela Hensley asked that defendant Parker reconsider his choice of teaching assignment for her due to the increased difficulty teaching language posed for a person with a congenital hearing impairment. She noted that there were eight available positions in Johnston County, which were advertised, any one of which she was qualified to teach without accommodation. Defendant Parker indicated that accommodation would only be provided if Ms. Hensley would agree to withdraw her

grievance and sign a complete release of all legal claims. (Compl. ¶ 41). Hensley learned that the transfer position was a "make-work"[4] position. (Compl. ¶ 42). She has applied for other advertised positions in the district but has never been considered for another position, despite the fact that the district has publicly decried its inability to fill legitimate teaching positions. (Compl. ¶ 43). In addition, the teacher hired to replace Ms. Hensley in her eighth grade science class at North Johnston Middle School was not qualified for the position. (Compl. ¶ 44).

Pamela Hensley filed a grievance pursuant to school board policy, alleging violations of her free speech rights and filed an administrative Charge of Discrimination with the U.S. Equal Employment Opportunity Commission, based on discrimination in religion and due to disability. After receiving a Notice of Right to Sue, Plaintiff timely filed a civil Complaint in Johnston County Superior Court.

STANDARD FOR REVIEW ON DEFENDANTS' RULE 12(b)(6) MOTIONS

Motions to dismiss under Rule 12(b)(6) test the legal sufficiency of pleadings, but do not seek to resolve disputes surrounding the facts, the merits of claims, or the applicability of any defenses. *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). The issue is not whether the plaintiff will ultimately prevail on her claim, but whether she is entitled to offer evidence to support the claim. *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989). A court should dismiss a case for failure to state a claim upon which relief can be ranted "only in very limited circumstances." *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324, 325 (4th Cir. 1989). When considering a motion to dismiss, the court must evaluate the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded factual allegations. *Randall v. United States*, 30 F.3d 518, 522 (4th Cir. 1994). Dismissal should not be granted "unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitled it to relief." *Mylan Labs. Inc. v. Markari*, 7 F.3d 130, 1134 (4th Cir. 1993).

[4] "Make-work" is a term frequently used in the workers compensation context to denote those times when an employer creates a position not ordinarily available in the market place, primarily to shield itself from indemnity payments. *See*, *e.g.*, *Jenkins v. EASCO Aluminum*, 165 N.C. App., 86, 91, 598 S.E.2d 252, 256 (2004).

In addition, complaints should not be dismissed for failure to particularize factual allegations. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957).

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plaint statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. . . . Such simplified notice pleading is made possible by the liberal opportunity for discovery an other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

Id., at 47-48, 103. Because justice prefers that disputes be resolved on the merits of the issues between the parties, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id.*, at 48, 103 Complaints need not plead law or match facts to every element of a legal theory. *Krieger v. Fadely*, 211 F.3d 134, 137 (D.C. Cir. 2000), cited with approval in *Peters v. Jenny*, 327 F.3d 307, 322 (4th Cir. 2003).

ARGUMENT

I. PLAINTIFF HAS STATED A CLAIM FOR RELIEF UNDER THE FIRST AMENDMENT TO THE U.S. CONSTITUTION, PURSUANT TO 42 U.S.C. §1983.

A. Defendants' Motion Should be Denied Because it is not Appropriate for a Rule 12(b)(6) Defense.

Defendants' motion specifically asks the Court to conclude that Plaintiff's speech is not protected by the First Amendment because it is not a matter of public concern. *Defs' Mem.*, pp 6-10. Speech is a matter of public concern when "it involves an issue of social, political, or other interest to a community." *Urofsky v. Gilmore*, 216 F.3d 401, 406-07 (4th cir. 2000). A court must decide whether the public or community is likely to be truly concerned with or interested in the particular expression, or whether it is more properly viewed as essentially a private matter between employer and employee. *Sheaffer v. County of Chatham*, 337 F. Supp. 2d 709, 718 (M.D.N.C. 2004), citing *Berger v. Battaglia*, 779 F.2d 992, 999 (4th Cir. 1985), cert denied, 476 U.S. 1159 (1986). In analyzing whether speech involves a matter of public concern, courts consider "the content, form, and context" of the statements, as revealed ***by the***

whole record. *Connick*, 461 U.S. at 147-48. Emphasis added.

Whether speech involves a matter of public concern is normally a question of law for the court to determine, however it is "nonetheless a fact-specific inquiry." *Sheaffer v. County of Chatham*, 337 F. Supp. 2d 709, 719 (M.D.N.C. 2004), citing *Holland v. Rimmer*, 25 F.3d 1251, 1255 (4th Cir. 1994). To the extent that there are factual issues that must be addressed by a jury first, the Court will be unable to make a conclusive determination. *Kodrea v. City of Kokomo*, 458 F. Supp.2d 857, 867 (S.D. Ind. June 26, 2006).

Not surprisingly, most cases deciding, as a matter of law, whether speech is a matter of public concern, are decided pursuant to summary judgment or after other development of an extensive evidentiary record. *See*, *e.g.*, *Garcetti, et. al. v. Ceballos*, 547 U.S. ---, *10, U.S. LEXIS 4341 (May 30, 2006) (District Court ruled on petitioner's motion for summary judgment); *Hinton v. Conner*, 366 F. Supp. 2d 297, 306 (M.D.N.C. 2005) (denying summary judgment and concluding that plaintiff's engaged in protected speech when she raised concerns about small business loan administration); *Love-Lane v. Martin*, 355 F.3d. 766 (4th Cir. 2004), *cert. denied* U.S. LEXIS 5577 (October 2004) (Plaintiff's expressions of racial inequality in school discipline determined to be matters of public concern "after extensive discovery [when] the defendants filed a motion for summary judgment"); *Peters v. Jenny*, 327 F.3d 307 (2003) (denying summary judgment and finding that plaintiff's advocacy for equity in the program was a matter of public concern); *Brown v. Scotland County*, 1:01CV 936, *2 (MDNC May 21, 2003), U.S. Dist. LEXIS 10303 (summary judgment denied as to first amendment claims; deputy sheriff's statements about race discrimination was protected speech). *Williams v. City of Fayetteville*, No. 5:99-CV-449, No. 5:99-CV-450, *2 (2002), U.S. LEXIS 26221 (E.D.N.C. May 13, 2002), reversed, in part, on other grounds by *Williams v. Hansen*, 326 F.3d 569 (2003), *cert. denied* 540 U.S. 1089 (2003) (summary judgment denied as to first amendment claims; plaintiffs' expressions concerning racism in their department addressed matters of public concern); *Goldstein v. The Chestnut Ridge Volunteer Fire Company*, 218 F.3d 337, 339 (2000) (Court decided, pursuant to defendant's motion for summary judgment that plaintiff's expressions of concern over safety issues in his department were protected

speech; defendant's motion granted on other grounds); *Berger v. Battaglia*, 779 F.2d 992, 996 (4th Cir. 1985), *cert denied*, 476 U.S. 1159 (1986) (reversing district court's finding at bench trial and holding that artistic expressions outside his employment were protected speech). On the other hand, where a court can only consider the parties' pleadings, a decision may only reflect whether the speech cannot, under any circumstance, be characterized as speech on a matter of public concern. *See*, *e.g.*, *Sheaffer*, 337 F. Supp. 2d at 719-720 (M.D.N.C. 2004) (denying defendants' motion to dismiss and stating "[t]he court cannot conclude as a matter of law that there exists no set of facts upon which Plaintiff could show that some of her speech involved a matter of public concern" on the basis of the pleadings alone).

B. Plaintiff's Refusal to Sign the Letter of Apology and Explanation and Disseminate it to Parents of her Eighth Grade Science Students was Protected Speech.

It is well settled that "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983). The first amendment limits the ability of a public employer to leverage the employment relationship, to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. *Perry v. Sniderman*, 408 U.S. 593, 597 (1972). Public employee's retain the same rights as ordinary citizens to address matters of public concern. *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

The freedom of educators to speak on matters of public concern is an especially significant context of first amendment freedoms. *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 305 U.S. 589, 603 (1967) (where the court noted that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom"). *See*, *also*, *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools"); *Pickering*, 391 U.S. at 573 (holding that school administrators may not "limit teachers'

opportunities to contribute to public debate," their contributions being necessary to an informed, vital dialog on matters of public concern).

Pickering and the cases which follow its teachings identify two inquiries which must be made: first to determine whether the employee spoke as a citizen on a matter of public concern. If the first inquiry is satisfied, then the government must show an adequate justification for treating the employee differently from any other member of the general public. *See*, *Pickering*, 391 U.S. at 568.

Considering the content of the speech, it is important to remember that the First Amendment protects the right not to speak as fiercely as it protects articulated expressions. The right not to speak is as important as the right to speak. *The International Dairy Foods Association v. Amestoy*, 92 F.3d 67, 72 (2d Cir. 1996) ("The wrong done by the labeling law to the dairy manufacturers' constitutional right not to speak is a serious one . . . ."). *See also*, *Wooley v. Maynard*, 430 U.S. 705, 714, (1977) ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all"); *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 559 (1985) (recognizing, along with freedom to express one's views publicly, "'concomitant freedom not to speak publicly'") (quoting *Estate of Hemingway v. Random House, Inc.*, 23 N.Y.2d 341, 348, 244 N.E.2d 250, 255, (1968)). Defendants' attempt to distinguish the superintendent's actions as focused solely on Ms. Hensley's "reversal" or "reneging." Those acts, however, are speech acts which should be protected if they relate to matters of public concern.

Furthermore, and contrary to defendants' position, there is a long and detailed jurisprudence that stands for the proposition that speech related to a plaintiff's employment is frequently speech reflecting matters of public concern. School teachers have been afforded protections on a wide variety of topics having to do with curriculum, school policy, and school administration decisions. *Perry v. Sindermann*, 408 U.S. 593, 598, (1972) (testimony regarding change from two year to four year college raised public concerns); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 284 (1977) (teacher relayed to a radio station the substance of a memorandum relating to teacher dress and appearance engaged in speech involving public concern); *Pickering v. Board of Educ.*, 391 U.S. 563, 564 (1968) (school teacher's letter

to local newspaper criticizing a school board's funding policy was protected speech); *Peters v. Jenny*, 327 F.3d 307 (4th Cir. 2003) (plaintiff's advocacy for equity in program academically gifted was a matter of public concern); *Pivar v. Pender County Board of Education*, 835 F.2d 1076 (4th Cir. 1987) (a high school teacher who spoke out in support of tenure for his principal engaged in protected speech); *Lewis v. Harrison School District No. 1*, 805 F.2d 310 (8th Cir. 1986), *cert. denied*, 482 U.S. 905 (1987) (school principal's speech to school board involving proposed transfer of his wife, an English teacher, involved issues of public concern); *Belyeu v. Coosa County Board of Education*, 998 F.2d 925, 928 (11th Cir. 1993) (teaching assistant who expressed concern over school's failure to have program for Black History Month, although discussing a curriculum matter, was engaged in protected speech about a matter of public concern); *Locklear v. Person County Board of Education*, 1:05CV255 (M.D.N.C. 26 June 2006), LEXIS 42203 (teacher discussing policies regarding test scores and grading was discussing matters of public concern).

Content about employment matters is generally not the dispositive basis for eliminating an employee's speech from the category of protected speech. *Mansoor v. Trank*, 319 F.3d 133, 138 (4th Cir. 2003) (communication relating to employment can encompass matters of public concern). In *Garcetti, et. al. v. Ceballos*, 547 U.S. ---, 2006 U.S. LEXIS 4341 (May 30, 2006), (cited by defendants), Ceballos was a calendar deputy who exercised supervisory responsibilities over other lawyers. It was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases. In the case before the court, the uncontroverted evidence was that Ceballos had been asked to investigate a pending case and after having done so, prepared a case disposition memorandum for his. It was this memorandum which he contended sparked retaliation against him in violation of his first amendment rights. In *Garcetti*, Ceballos did not dispute that he prepared the memorandum pursuant to his duties as a prosecutor the Court found that "the controlling factor" was that "Ceballos' expressions were made pursuant to his duties as a calendar deputy." *Id.* at *21."

Because the parties did not dispute that Ceballos' memo was done pursuant to his duties, the Supreme Court observed that it did not have occasion to articulate a framework for defining the scope of

an employee's duties in cases where there is room for serious debate. *See, Id*. at *10. It did, however, reject the suggestion that an employer can restrict an employee's rights simply by creating broad job descriptions. *Id.* In addition, the Court was not persuaded that Ceballos' speech was unprotected merely because he had expressed his views in the office and concerned the subject matter of his employment, explicitly noting that in some cases employees may still receive First Amendment protection for expressions made at work or related to the employee's job. *Id.* at *7.

In the instant case, defendant's own admission is that the letter plaintiff did not want to sign was not an act pursuant to her job duties. See, Defs' Mem., Exh. 2, ¶ 3. Here, the plaintiff, like any ordinary citizen, was considering whether to enter into an individualized, binding agreement, not with her employer, but, with a third-party. Indeed, the Does, private citizens who were also considering the same agreement which was put before the plaintiff, were given an opportunity to change their mind after being shown the same "draft," which plaintiff was shown. Attorneys for both sides specifically contemplated that the Does might change ***their*** minds. Compl. ¶¶ 24-27. Unlike the plaintiff in *Garcetti*, whether or not plaintiff signed the letter was not part of defendants' evaluation of her teaching performance.

Nor should the speech be rejected as an expression of public concern because plaintiff's motive was partly to correct false or inaccurate statements in the proposed. *See*, *e.g.*, *Brown v. Scotland County*, 1:01CV 936, *15 (M.D.N.C. May 21, 2003), U.S. Dist. LEXIS 10303, approved by, summary judgment granted, in part, summary judgment denied, in part, by 2003 U.S. Dist. LEXIS 10294 (M.D.N.C., June 17, 2003) (desire to correct a misimpression created by statements of public officials also serves a public purpose). As with the plaintiff in *Brown*, the *context* of the communication, namely as part of an already public dialog, affects whether the speech should be deemed a matter of public concern. *Id.* The fact that the Does had made public statements in the community and to the media, and, that the Does and school officials insisted that the letter be disseminated to a group of parents, made the focus on accuracy of the information in the letter an important issue of public concern.

The fact that an employee has a personal stake in the subject matter of the speech does not necessarily remove it from the scope of public concern. *Cliff v. Sch. Comm'rs of City of Indianapolis*, 42

F.3d 403, 410 (7th Cir. 1994). *Accord*. *Brown v. Scotland County*, 1:01CV 936 at *2, citing *Gonzalez v. Benavides*, 774 F.2d 1295, 1300-1301 (5th Cir. 1985) cert. denied, 475 U.S. 1140 (1986). A case cited extensively by defendants, *Goldstein v. The Chestnut Ridge Volunteer Fire Company*, 218 F.3d 337, 354 (4th Cir. 2000), also stands for the proposition that, where speech may suggest two motives, one personal and one reflecting public concern, and the standard for review requires that evidence be viewed in the light most favorable to the nonmoving plaintiff, the court should not reject plaintiff's claim that the speech was protected speech.

Nor is the reliance on private, rather than public, channels of communication fatal to a plaintiff's claim of protected speech. *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-416 (1979) ("Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment"). *Accord*. *Garcetti, et. al. v. Ceballos*, 547 U.S. ---, 2006 U.S. LEXIS 4341 (May 30, 2006), at *7. Rather, "[a]n employee who attempts to follow internal mechanisms to resolve important issues should not be automatically treated less favorably than the individual who immediately turns to the press or public forum." *Spiegla v. Hull,* 371 F.3d 928, 937-38 (7th Cir. 2004). Because the plaintiff continued to use the communication mechanisms which the school wanted her to use, namely the NCAE representative who spoke to the school's attorney, she should not be treated less favorably, and her speech should not be accorded less protection than if she had chosen the same kind of public forum that the Does chose.

Defendants attempt to equate Pamela Hensley's speech with that of the plaintiffs in *Boring* and *Lee*, but, these can be easily distinguished. *Boring v. Buncombe Board of Education*, 136 F.3d 364 (4th Cir. 1998) (en banc). *Lee v. York County School Division*, 484 F.3d 687 (4th Cir. 2007). Each of the earlier decisions reflected speech in a ***compulsory classroom setting***. *Id.*, at 695-697 (discussing both decisions). Boring was a high school teacher who was disciplined for her selection of a play, that was part of the drama class curriculum. The court concluded that the school administration had a legitimate pedagogical interest in the curriculum of the advanced drama class. *Boring*, 136 F.3d at 369-370. Lee

posted material on the school bulletin board in his classroom that were of a religious nature. Dispositive in that case was the school's interest in scrutinizing expressions that "the public might reasonably perceive to bear its imprimatur." *Lee*, 484 F.3d at 695.[5]

C. Plaintiff has plead sufficient facts to show that her protected speech was a substantial factor resulting in retaliation against her.

First, defendants' assertion of this issue at this stage of the litigation is improper. Courts applying this analytical framework to employee speech uniformly agree that the issue posed by defendants is a fact-based inquiry and can only be decided by the Court where there is no genuine issue of material fact from which a reasonable fact-finder could conclude that the speech in question was a substantial factor in retaliation. *See*, *for instance*, *Hinton v. Conner*, 366 F. Supp. 2d 297, 306 (M.D.N.C. 2005) (establishing that the protected speech was a 'substantial factor' in the decision to take the allegedly retaliatory act is a question of fact and will only serve as a basis for summary judgment when there are no facts that could support a finding for the plaintiff). *Accord*. *Goldstein v. The Chestnut Ridge Fire Co.*, 218 F.3d 337, 352, (4th Cir. 2000), *cert. denied*, 531 U.S. 1152 (2001).

Defendants rely heavily on *Goldstein* to support their position. Their reliance in this regard is misplaced. Goldstein's speech was analyzed pursuant to a motion for summary judgment. *Id.* at 339. The court concluded, as a matter of law, that Goldstein's speech was a matter of public concern, but, denied his claim because he had not produced any record evidence that his speech was a substantial factor in the decision to suspend him or terminate him or that defendant's stated reasons were pretextual. *Id.* at 356-357.

Goldstein was suspended due to the violation of an agreement he had made with his immediate supervisor. After a long letter-writing campaign directing safety concerns to the Executive Committee of

[5] Defendants cite another case where a plaintiff's speech was judged to be pursuant to job duties rather than an expression of public concern. Defendants cite *Berard v. Town of Millville*, 113 F. Supp. 2d 197, 203 (D. Mass. 2000) a case decided by a district court outside of the Fourth Circuit of Appeals. Berard was asked to make statements at his supervisor's behest in order to cover up the mismanagement of the agency's response to a bus accident. Berard complied. The Court decided that Berard did not have an actionable First Amendment claim because he did not identify any way in which he was retaliated against. In addition, the Court noted that Berard had failed to include in the record any facts from which the Court could conclude that Berard's speech (the statements covering up the mismanagement) was made as an expression of public concern.

the department, Goldstein entered into a bargained-for exchange with his supervisor, wherein the supervisor agreed to address some of the concerns and take certain actions with respect to some of Goldstein's complaints. Expressly in exchange, Goldstein agreed that, with respect to future complaints, he would give his supervisor the opportunity to investigate before bringing complaints to the executive committee. Goldstein violated that agreement when he voiced a complaint to his supervisor on one day and then immediately brought the same complaint to the executive committee. *Id*. Furthermore, when asked to rebut the reasons for his suspension articulated by his employer, Goldstein offered no reason or evidence which cast doubt on the credibility of the explanations individually articulated by those who made the decision to suspend him. *Id.*, at 358.

Defendants attempt to equate Goldstein's bargained-for agreement with Ms. Hensley's request for modifications in the proposed draft letter. Regardless of whether Ms. Hensley initially indicated assent to the proposed wording of the letter, the attempt to analogize Goldsten's situation to Hensley's is seriously undermined by vast differences between the two circumstances. First, Goldstein received specific consideration as a result of his bargained-for exchange with his supervisor. Ms. Hensley was a reluctant participant in a negotiation with a third party and received no consideration for her promise. Second, Goldstein agreed not to perform a particular act and then immediately did what he had agreed not to do. Ms. Hensley made a promise to sign the letter, then asked for an opportunity to modify the contents of what she was signing. Third, Goldstein was not being denied the opportunity to freely express his ideas; he was simply instructed as to the proper channel for the completely free expression of those ideas. Ms. Hensley was denied the opportunity to freely express her own thoughts regarding the concerns that the Does had raised.

Finally, where Goldstein presented no facts to suggest that his employers' stated reasons for their action were a pretext aimed at chilling his free speech, the plaintiff in the instant case has alleged considerable facts and circumstances from which a reasonable person could infer that her employer's stated reasons were, in fact, to punish her for her exercise of her rights under the First Amendment. Among the facts alleged by plaintiff is that defendant's claims of "tension," "additional complaints," and

loss of "credibility" resulting from her refusal to sign the letter were nonexistent and that the only complaints were those from John Doe and his family. Compl. ¶ 35. Plaintiff has also alleged that defendant chose not to communicate his decision to transfer her at the time he made the decision, but, instead, waited approximately six weeks; did not give her an opportunity to apply for other available positions, and, in an unusual move in the field of education, removed her from the class room in the midst of a semester with no reason given for his timing and no reason for his unyielding insistence that the move be accomplished prior to the end of the semester. Compl. ¶ ¶ 34, 41. Defendant Parker misstated the actual findings of the school district's own investigation into the Does' allegations against the school, stating that plaintiff had deviated from the school's science curriculum. In fact, she had not and her principal had stated eight months earlier that the district had no guidelines for teaching evolution from which Ms. Hensley could have deviated. Compl. ¶ 34. Although there were many advertised positions in the district for which plaintiff was qualified, defendant created a "make-work" position far away from where she had been based for seven years and, significantly, in the section of the school district where John Doe had insisted that plaintiff be placed if she was not terminated. Compl. ¶ 21, 41, 42. It was also a position that severely limited plaintiff's contact with students and opportunities for teaching. Compl. ¶ 42. Plaintiff has applied for other positions for which she is qualified; the school district has publicly lamented its inability to fill its existing vacancies, yet plaintiff was not offered an existing vacancy and was to return to the same make-work position. Compl. ¶ 43. When plaintiff did speak out publicly about the matters over which the Does had complained, defendant Parker threatened further discipline. Compl. ¶ 38.[6] On the basis of the pleadings, plaintiff has made a showing that forecasts a substantial causal connection between her protected speech and defendants' retaliatory act.

Defendants, on the other hand, seek the dismissal of plaintiff's claims by asserting, through conclusory allegations, that they had an interest in, or, rational basis for, transferring plaintiff from North Johnston Middle School to South Campus Community School. However, The government employer

[6] Parker alleged that plaintiff had provided sufficient information in her public message that would reveal the identity and grade of the student who's parents had complained; the student's father had previously publicized that information. Compl. ¶ 19.

must make a stronger showing of the potential for inefficiency or disruption when the employee's speech involves a 'more substantial' matter of public concern." *Love-Lane v. Martin*, 355 F.3d at 779, citations omitted. There must be a ***factual*** resolution of whether the speech in question did indeed disrupt or sufficiently threaten to disrupt. *Scallett v. Rosenblum*, 911 F. Supp. 999, 1016 (WD Va 1996). Emphasis added. "[G]eneralized and unsubstantiated allegations of "disruptions," and predictions thereof, must yield to the specific allegations made" by the plaintiff. *Goldstein*, 218 F.3d at 355. Where the court could not find in the record "any direct disruption caused by the plaintiff," or even a reason to believe that his conduct was likely to cause a disruption prospectively, it could not conclude, as a matter of law, that the government's interests outweighed the plaintiff's protected speech interests. *Mansoor v. Trank*, 319 F.3d 133, 138-39 (4th Cir. 2003). Finally, where the court cannot determine from the pleadings that defendant's interests in a properly functioning operation outweigh the plaintiff's interest in the contested expression, defendant's motion to dismiss the plaintiff's First Amendment claim, defendant's motion to dismiss must be denied. *Sheaffer*, 337 F. Supp. 2d at 720.

Where there is only a perceived threat of disruption, it may not serve as justification for public employer disciplinary action directed at that speech. *Berger v. Battaglia*, 779 F.2d 992, 1000 (4th Cir. 1985), cert denied, 476 U.S. 1159 (1986). The point made by the Berger court is apposite to the defendants' conduct:

> Historically, one of the most persistent and insidious threats to first amendment rights has been that posed by the 'heckler's veto,' imposed by the successful importuning of government to curtail 'offensive' speech at peril of suffering disruptions of public order. Government's instinctive and understandable impulse to buy its peace -- to avoid all risks of public disorder by chilling speech assertedly or demonstrably offensive to some elements of the public -- is a recurring theme in first amendment litigation. Though this 'veto' has probably most frequently exercised through legislation responsive to majority sensibilities, the same assault on first amendment values of course occurs when, as here, it is exercised by executive action responsive to the sensibilities of a minority.

Id., at, 1001. Internal citations omitted.

II. PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SUPPORT HER EQUAL PROTECTION CLAIM.

The Fourteenth Amendment's Equal Protection Clause provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const. amend. XIV § 1*. The "Equal Protection Clause gives rise to a cause of action on behalf of a 'class of one.'" Plaintiff need only that the discriminatory treatment is "intentional and arbitrary." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

A number of federal courts have found the following allegations of improper motive which constituted claims for class of one equal protection claims. *Willis v. Town of Marshall*, 426 F.3d 251 (4th Cir. 2005), *dismissed on other grounds* by *Willis V. Town of Marshall*, US Dist. LEXIS 27121 (W.D.N.C. April 12, 2007) (Equal protection claim allowed based on dissimilar treatment compared to others at dance establishment). *Cobb v. Pozzi*, 363 F.3d 89 (2d Cir. 2003) (irrational treatment of plaintiff were defendants' subjective belief that plaintiffs engaged in an unlawful activity "was unwarranted and that such an unwarranted belief resulted in the irrational treatment of the plaintiffs"). *DeMuria v. Hawkes*, 328 F.2d 704 (2d. Cir. 2003) (plaintiffs received a lower level of police protection than other similarly situated residents). *Giordano v. City of New York*, 274 F.3d 740, 751 (2d Cir. 2001) (public employee was "intentionally treated differently from others similarly situated" without a rational basis for the difference in treatment). *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995) (denial of liquor license because of mayor's "deep-seated animosity" toward plaintiff is "wholly unrelated to any legitimate state objective"). *Yates v. Beck*, 1:03cv10-T (W.D.N.C. August 22, 2003), U.S. Dist. LEXIS 16969 (denying summary judgment to employer in "class-of-one" lawsuit by disabled corrections officer who claimed the employer unreasonably denied his request for accommodations). Millar v. Ojima, 354 F.Supp.2d 220 (E.D.N.Y. 2005) (married university professors treated in an arbitrary manner based on department chair's ill will). Vanderhurst v. Colorado Mountain College Dist., 16 F. Supp. 2d 1297 (D. Colo. 1998), *aff'd on other grounds*, 208 F.3d 908 (10th Cir. 2000) (campaign to secure plaintiff's discharge carried out in intentional and vindictive campaign).

Defendants contend that they had a rational basis for the decision to transfer the plaintiff, and other conduct alleged in the complaint, and that Plaintiff's complaint should, therefore, be dismissed at the pleading stage. First, Plaintiff's complaint alleges that she was dissimilarly treated and that defendants' had an impermissible motive. From the start of the Does' campaign against her, plaintiff was targeted because the Does believed her to be homosexual and "antagonistic" toward Christian beliefs. Compl. ¶ 15. Defendants specifically targeted plaintiff for criticism of grading and class room management practices that were practiced by others and were, in fact, more exacting than the practices of other similarly situated teachers. Compls. ¶ 16. Defendant made false statements that plaintiff had deviated from curriculum guidelines, that her refusal to sign the draft apology letter had caused tension, sparked complaints which defendant Parker implied were from families other than the Does. Compl. ¶ 35. Defendant Parker made the decision to transfer plaintiff to another school but kept the decision from her for six weeks. Compl. ¶ 32. Plaintiff's principal singled her out by reviewing her grades during the and her syllabus during the fall 2004 semester and then questioning her about her sexual orientation. Compl. ¶ 33.[7] Defendant Parker chose to transfer plaintiff in the midst of a semester, a highly unusual decision in education. Compl. ¶ 34. Plaintiff was assigned, not to an available, existing alternative position, but, to a "make-work" position. Compl. ¶41-42. When plaintiff asked for a reasonable accommodation for her disability, in the form of an alternative, open, advertised position, she was told that an accommodation of that nature would only be allowed if plaintiff agreed to the forbearance of any and all legal claims she might have against defendants. Compl. ¶41. With regard to all of the above, plaintiff was treated intentionally arbitrary and differently than similarly-situated employees. In reviewing the facts set out above, in a light most favorable to the plaintiff, a jury could reasonably infer that the Defendants singled Plaintiffs out for an impermissible reason, or arbitrarily--for no reason at all--

[7] Defendants contend that the principal's query about sexual orientation could not have been the basis for an equal protection violation since it came after Parker's decision to transfer plaintiff. However, it is clear from allegations in the complaint that discussion of plaintiff's sexual orientation, initiated by the Does, had been part of the context of discussions between the Does and school officials from the start. The allegations in the light most favorable to plaintiff suggests that plaintiff should be afforded the opportunity to pursue discovery in this regard.

and intentionally subjected plaintiffs' teaching to a standard of review far beyond that which ordinarily governs Johnston County school teachers.

At this stage of the litigation, the facts set out by plaintiff are sufficient to withstand defendants motion to dismiss. An "allegation of an impermissible motive and of animus is sufficient to establish an equal protection issue." *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir. 2003). *See*, *also Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 500 (2d Cir.2001) In addition, an allegation that defendants deviated from their ordinary policies and procedures supports an inference of discriminatory motive. *See*, *e.g.*, *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977).

Defendants argue for dismissal on the basis of the Fourth Circuit's unpublished opinion in *McWaters v. Crosby*, 54 Fed. Appx. 379 (4th Cir. December 5, 2002). Defendants' argument is a misapplication of the holding in *McWaters*. The *McWaters* complaint was dismissed, not simply because her complaint acknowledged a rational basis for defendants' conduct, as the defendants in the instant case allege. Rather, McWaters' complaint was dismissed because she failed to "negative any reasonably conceivable state of facts that could provide a rational basis for the decision." *Id.*, Citing *Board of Trustees of Alabama v. Garrett*, 531 U.S. 356, 367 (2001). Ms. Hensley's complaint, on the other hand, provides extensive allegations as to the pretextual nature of defendants' alleged rational basis for its conduct toward the plaintiff. In contrast to this unpublished decision, the Fourth Circuit has held in its published jurisprudence that a plaintiff who alleges dissimilar treatment as a basis for equal protection violation should be given the opportunity to develop the evidentiary basis for that allegation through thte discovery process. *Willis*, 426 F.3d. at 263

III. DEFENDANT PARKER SHOULD NOT BE GIVEN QUALIFIED IMMUNITY.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In evaluating whether a government official is entitled

to qualified immunity, a court is required to determine (1) whether the facts alleged show that the official's conduct violated a constitutional right; and (2) whether the right was clearly established such that a reasonable official would have known that his conduct would violate that right. *Id.*, *See*, *also*, *Love-Lane*, 355 F.3d at 783; *Mandsager v. University of North Carolina*, 269 F. Supp. 2d 662, 667 (2003); *Jennings v. University of North Carolina*, 240 F. Supp. 2d 492, 504 (2002).

With respect to the first inquiry, plaintiff has alleged facts sufficient to show that the individual defendant, superintendent Anthony Parker, violated her rights under the first amendment and under the equal protection clause of the fourteenth amendment, based on arguments developed in Sections I and II, above. With respect to the second inquiry, the United States Supreme Court, and the federal courts in North Carolina have consistently held that basic constitutional rights, such as those contained in the First and Fourteenth Amendments are fundamental and "clearly established" rights of which a reasonable official should know and should be expected to conform his conduct. *Hyatt v. Town of Lake Lure*, 225 F. Supp. 2d 647, 664 (W.D.N.C. 2002). In *Hyatt*, the court rejected defendants' qualified immunity defense and denied their motion to dismiss stating that the equal protection class of one basis for liability was not a new legal theory even at the time of the *Olech* decision. *Id.* at 664. In *Love-Lane* the court denied the defendant's qualified immunity defense, stating that Love-Lane's first amendment rights were "clearly established." 355 F.3d at 783.

Although the fourth circuit has noted that the "particularized balancing" that is required by a *Pickering* analysis, is difficult to apply, it has not held that "a public employee's right to speak on matters of public concern could never be clearly established." *Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996); *Accord*. *Love-Lane v. Martin*, 355 F.3d 766, 783; *Mansoor v. Trank*, 319 F.3d 133, 139 (4th Cir. 2003). In the instant case, defendant Anthony Parker was confronted throughout the relevant time period with information establishing plaintiff's right to speak on matters of public concern. Soon after John Doe lodged his first attack, the school district engaged its attorney in the investigation and events which culminated in plaintiff's rejection of the apology letter. Compl. ¶ 16; 23-26. Plaintiff filed a grievance on

the basis for Parker's response to her exercise of her protected speech. Compl. ¶ 39.[8] Finally, defendant Parker offered plaintiff a particular accommodation for her disability in exchange for her willingness to release him and the school district from legal liability associated with his conduct. Compl. ¶ 41. The relevant events, from the start, focused on the constitutionality of conduct; there were attorneys involved for all parties who, presumably, were explaining and interpreting laws and policies grounded in the First and Fourteenth Amendments. Plaintiff's complaint allegations forecast facts which indicate that defendant Parker's awareness of plaintiff's rights were known to him. What a person in defendant Parker's position knows, given the exigent facts and circumstances during the relevant time period, is a fact-based inquiry which the plaintiff should be given the opportunity to develop through discovery. Otherwise, an individual in defendant Parker's position could violate a plaintiff's rights with impunity by simply choosing to ignore information which is inconsistent with what he wants to do. Even after extensive briefing on the legal issues, he could simply claim that he did not fully appreciate the nature of plaintiff's rights under the law.

IV. PLAINTIFF HAS ALLEGED SUFFICIENT FACTS TO SUPPORT A CLAIM FOR VIOLATION UNDERTHE AMERICANS WITH DISABILITIES ACT.

Plaintiff's complaint alleges that she is a qualified person with a disability who asked her employer for a reasonable accommodation of her disability. Plaintiff has been hearing impaired since birth, and, therefore did not learn to speak by hearing others speak. Rather than teach language arts to children who required remedial instruction in verbal expression, as defendant Parker had assigned her to do in December 2005, plaintiff asked that she be placed in one of eight available, advertised openings within the Johnston County Schools for which she was qualified and which did not burden her in the same way. Defendant Parker responded that he would accommodate that request only if plaintiff agreed to withdraw her free speech grievance and release defendant Parker and the school system from any and all legal claims plaintiff might assert as arising from employment. Compl. ¶ 41.

[8] While plaintiff's complaint does not fully explicate the laws which were at issue in her original grievance, plaintiff respectfully contends that she should have the opportunity to develop more fully the factual basis from which a court could conclude that the contours of plaintiff's rights should have been known by a reasonable person in the defendant superintendent's position.

The Code of Federal Regulations established pursuant to the Americans with Disability Act (42 U.S.C. §§12101 et. seq.) make it unlawful for an employer to "coerce, intimidate, threaten, harass or interfere with . . . any individual in the exercise or enjoyment of . . . any right protected or granted" under the Act. 29 C.F.R. Part 1630 App. §1630.12. Plaintiff does not contend that the defendants refused to provide an accommodation, rather, that their choice of accommodation was impermissibly conditioned upon plaintiff's forbearance of other legal rights. Although defendants were permitted to offer an alternative accommodation based upon the employer's business interests, the facts alleged in plaintiff's complaint are that they did not. The facts alleged in plaintiff's complaint suggest that animus toward the plaintiff rather than business necessity dictated the employer's response to plaintiff's request for an accommodation. Furthermore, an employee need not make a request for an accommodation where the employer's selection of job duties was adopted to target an employee's disability. *Gaston v. Bellingrath Gardens & Home, Inc.*, 167 F.3d 1361, 1364 n.3 (11th Cir. 1999), or, where the employee's disability and the need to accommodate it are obvious. *Walstead v. Woodsury County, IA*, 113 F. Supp. 2d 1318, 1336 (N.D. Iowa 2000).

V. PLAINTIFF HAS ALLEGED SUFFICENT FACTS, ON BOTH STATUTORY AND CONSTITUTIONAL GROUNDS, SUPPORTING HER CLAIMS THAT ADVERSE EMPLOYMENT ACTIONS WERE TAKEN

Under the federal antidiscrimination statutes, a plaintiff must show that she suffered an adverse employment action. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375 (4th Cir. 1997). Job reassignment can be considered an adverse employment act when the plaintiff suffers a significant detriment. *Id.*, at 376. The Supreme Court has recently defined "tangible employment action" to include not only "hiring, firing, failing to promote, . . . [and] significant change in benefits," but also "reassignment with significantly different responsibilities." *Burlington Industries, Inc., v. Ellerth*, 534 U.S. 742 (1998) (discussing "tangible employment action" as trigger for employer's strict liability under Title VII for supervisor's discriminatory acts); *see also* Reinhold v. Commonwealth of Virginia, 151 F.3d 172, 175 (4th Cir. 1998). While not all job re-assignments are adverse employment actions, it is clear

that a plaintiff can prevail if she shows that she suffered a significant detrimental effect. *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999) (plaintiff's claim dismissed because she failed to show more than "moderate stress"). In some circumstances, reassignment to menial or degrading work may be considered constructive discharge. *Brown v. Bunge Corp.*, 207 F.3d 776, 782 (5th Cir. 2000). A constructive discharge may also be found when an employer makes a calculated effort to pressure an employee into resignation through the imposition of unreasonably harsh conditions in excess of those faced by co-workers. *Carter v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994).

In the instant case, plaintiff was transferred to a position which essentially stripped her of any meaningful opportunities to engage in the learned profession in which she had been engaged for more than twenty years. Based upon the allegations in plaintiff's complaint, plaintiff expects to demonstrate that she was placed in a position which accentuated her physical communication difficulties, making it more difficult to apply and continue to develop in her profession. Plaintiff's re-assignment essentially ended her opportunity to grow in her career. In addition, it was geographically the furthest distance from where she had previously been assigned. Plaintiff has, therefore, made sufficient allegations that the reassignment to South Campus was an adverse employment action under federal statutory schemes.

With respect to her constitutional claims, plaintiff need show only that she has suffered "some impairment of the plaintiff's rights" *Dimeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995). Something less onerous than an "adverse employment action" in the context of Title VII jurisprudence may so chill the exercise of constitutional rights as to constitute a showing of adversity in a First Amendment retaliation case under §1983. The dispositive inquiry is whether the adverse actions complained of, under the particular circumstances of the case, would deter the employee from again exercising his constitutional right to publicly comment on matters of public concern. *Williams v. City of Fayetteville*, No. 5:99-CV-449, No. 5:99-CV-450, *108 (2002), U.S. LEXIS 26221 (E.D.N.C. May 13, 2002), reversed, in part, on other grounds by *Williams v. Hansen*, 326 F.3d 569 (2003), *cert. denied* 540 U.S. 1089 (2003), citations omitted. The action need only deter "a person of ordinary firmness" from the exercise of First Amendment rights. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d

474, 500 (4th Cir. 2005). See, also, *Pivar v. Pender County Board of Education*, 835 F.2d 1076 (4th Cir. 1987) (Retaliation found where a teacher was re-assigned to a school some forty miles from his home); *Hinton v. Conner*, 366 F.Supp. 2d 297 (M.D.N.C. 2005) (Plaintiff was stripped of job duties and given a lesser position with no assignments).

VII. PLAINTIFF HAS STATE A CAUSE OF ACTION UNDER THE NORTH CAROLINA CONSTITUTION.

In *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E. 2d 276 (1992), the North Carolina Supreme Court recognized a direct cause of action for monetary damages under the North Carolina Constitution against the state and its officials for violations of rights guaranteed by its Declaration of Rights as set forth in Article I. In the instant case, plaintiff has alleged violations under Article I, Sections 1, 14, and, 19 of the North Carolina Constitution, alleging deprivation of free speech, due process and equal protection. The factual basis for support of those claims has been discussed in Sections I and II, above. In addition, as defendants concede, plaintiff has a legitimate property interest in her employment which is the basis for her claims under Article I, Section I, "the law of the land." While plaintiff may not have a right to a particular "job," she is a licensed, well-educated professional whose right to practice that profession was been effectively eliminated when defendant relegated plaintiff to a "make work" position that is not ordinarily available in the marketplace.

It is true that most plaintiffs are not permitted to proceed with claims directly under the North Carolina Constitution because "adequate alternative remedies" are found. See, e.g., Swain v. Elfland, 143 N.C. App. 383, 391, 550 S.E.2d 530 (2001). However, plaintiff has alleged facts in her complaint which clearly distinguish her situation. Plaintiff has specifically alleged that the grievance procedure was deficient, as it placed not obligation upon the defendant to create a complete record. In this case, plaintiff alleges, it is clear that defendant has not disclosed all relevant documents. In addition, plaintiff was denied the opportunity to cross-examine the defendant directly responsible for taking the adverse action against her.

Defendants contend that plaintiff could have pursued her grievance to Superior Court for a

judicial review. That review, as defendants point out, would be governed by the principles and provisions of North Carolina's Administrative Procedures Act and would therefore be limited to the inadequate record that resulted from the grievance procedure. Plaintiff, therefore, is like *Pickering*, whose review of his grievance resulted in an affirmation of the school system's decision to dismiss him, but, whose free speech rights were vindicated by a direct constitutional cause of action.

In conclusion, plaintiff respectfully requests that this Court, viewing the factual allegations in the light most favorable to the plaintiff, deny defendants' motion to dismiss and allow plaintiff to proceed on her federal and state constitutional claims, as well as on her claim under the Americans with Disabilities Act.

This the 20th day of August 2007.

By:

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CERTIFICATE OF SERVICE

I, Mary-Ann Leon, hereby certify that on this date I electronically filed the foregoing Memorandum of Law with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: Daniel W. Clark, dclark@tharringtonsmith.com and Christine Scheef, cscheef@tharringtonsmith.com.

This the 20h day of August 2007.

/s/ Mary-Ann Leon

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