UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

ALBERT J. TURK, M.D. and SHELLEY TURK, R.N.	§	
Plaintiffs,	§	
	§	**C.A. No. 6:15-cv-231-RP**
v.	§	
	§	
SOMERVELL COUNTY HOSPITAL DISTRICT and RAY REYNOLDS, INDIVIDUALLY, AND IN HIS CAPACITY AS CHIEF EXECUTIVE OFFICER OF GLEN ROSE MEDICAL CENTER-SOMERVELL COUNTY HOSPITAL DISTRICT	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(c) and Rules 1(d) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. This court has jurisdiction to review the Plaintiff's claims pursuant to 23 U.S.C. § 1331.

Pending before the Court is Somervell County Hospital District's and Ray Reynold's ("Defendants") Motion for Summary Judgment as to Plaintiff Shelley Turk's claims. ECF No. 88. As explained in detail below, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment (ECF No. 88) be **DENIED** with respect to Shelley Turk's claims.

I. FACTUAL BACKGROUND

The instant action is a civil rights suit filed pursuant to 42 U.S.C. § 1983. Dr. Albert Turk and Shelly Turk allege that the defendants violated their First Amendment right to free speech and to petition the government for redress of grievances, as well as violations of the Texas Constitution. Albert Turk also alleges that the defendants violated his Fourteenth Amendment right to due process. Defendants have filed separate motions for summary judgment as to Albert Turk's and Shelly Turk's claims. As such, the Court will address Shelly Turk's claims in the instant Report and Recommendation, and Albert Turk's in another.

Plaintiff Shelley Turk was employed by Somervell County Hospital District ("SCHD") at Glen Rose Medical Center until June 26, 2015, when her employment was terminated. Pl.'s Compl. ¶¶ 2, 9. During her employment at Glen Rose Medical Center, she received seven pay raises over the course of her employment, and was promoted to Interim Director of the Emergency Department before becoming the Director of the Emergency Department on September 8, 2013. Def.'s Mot. Summ. J. at Ex. B; Pl.'s Resp. ¶ 1. During their employment, Dr. Albert Turk and his wife, nurse Shelley Turk, publically and privately spoke out about management and patient-care problems they perceived at Glen Rose Medical Center. Pl.'s Compl. ¶ 10. Plaintiffs submitted written and oral complaints to: the Board of Trustees of the Somervell County Hospital District, the Glen Rose Medical Center Hospital Staff Committee, the Texas Department of State Health Services, and a local personal blog. *Id.* at ¶ 10.

Plaintiff also had a disciplinary history. Def.'s Mot. Summ. J. at Ex. C. On June 13, 2014, Plaintiff was formally disciplined for what Glen Rose Medical Center deemed unprofessional behavior. *Id.*; Def.'s Mot. Summ. J. at 2; Pl.'s Resp. ¶ 7. She received a "Disciplinary Communication," which detailed an incident that occurred on May 24, 2014. On May 24, 2014,

the emergency room of Glen Rose Medical Center was "packed" and "no nurses showed up to help" because they were "having lunch . . . and training." S. Turk Dep. at 67:7-68:24. Aggravated that she did not receive adequate help from the nursing staff, Plaintiff told Michael Honea, who was CFO and is now COO, that she was "done with [Michael Honea] and Ray [Reynolds]" and stated that she "went to [Honea and Reynolds] verbally for months, [and you] didn't respond . . . and then I started documenting it and still came to you, and you did nothing. So now I'm going to the hospital board." *Id.* at 68:24-69:10.

Plaintiff asserted in her deposition testimony that her numerous written and oral petitions were denied or not acted upon, and that she felt compelled to reach out directly to members of the board. *Id.* The day after the incident, Plaintiff claims that she met with Chip Harrison, President of the Somervell County Hospital District, and brought copies of complaints that she had sent to hospital administration. *Id.* at 74:17-22. During the conversation, Plaintiff alleges that Harrison asked her that if he put in an open records request for the emailed complaints, if she would be able to turn them over to him, to which Plaintiff agreed. *Id.* at 74:16-23. Plaintiff claims that this open records request, which potentially led to Plaintiff's professional correspondence with other Glen Rose administrators being printed in a local blog called *Salon,* was the true reason for the May 28, 2014 meeting with Ray Reynolds and Tadonna Green, Human Resources Director for Glen Rose Medical Center, where she was informed about the emails being published. *Id.* at 79:25-82:5.[1] Plaintiff states that the published e-mails, which detailed the inner workings of the hospital, continued to be a point of contention with Ray Reynolds and Ladonna Green. Plaintiff states that hospital administrators asked her to stop

[1] *Salon* refers to "salon.glenrose.net", a personal blog run by a Somervell resident that "believe[s] in representative democracy and calling out those who are supposed to represent us when we think they're not." The blog is marketed towards residents of Somervell County, and actively solicits tips for potential stories. A sample of headlines includes "Why Does Jack Graham of Prestonwood Baptist Church Support Sexual Predator Donald Trump?" and "Remember How Gov Greg Abbott (TX) Ordered a Winter Solstice Nativity Removed from the Capitol?"

sending e-mails to other employees because they could be published via an open records request. *Id.* at 84:1-25.

Plaintiff argues that the publishing of her e-mails from May 24 to May 28, 2014 was the actual basis for the June 13, 2014 "Disciplinary Communication." However, Defendants argue that they were forced to discipline Plaintiff after this incident because Plaintiff publicly criticized another manager's skills in front of her subordinates, attempting to direct employees in other departments, not fostering cooperation with other departments, and not properly focusing on the needs of her own department. Def.'s Mot. Summ. J. at 2. After being disciplined by Defendants, Plaintiff signed a "Confidentiality Statement," agreeing to keep "'professional' confidentiality in all of [her] statements outside the facility." *Id.* at Ex. D.

Defendants argue that this disciplinary history became the impetus for the decision to terminate Plaintiff. *Id.* Further, Defendants state that Plaintiff's termination was based on the fact that she called another supervisor, Kelly Van Zandt, a "camel toe" "idiot" two days earlier in front of her subordinates, which violated Somervell County's Zero Tolerance Policy on harassment. *Id.* at Ex. E; Ex. I – Miller Depo. at 54:1-59:13, 60:14-63:1, 63:15-19, 64:7-8, 64:19-65:11, 65:23-66:13, 67:9-68:6, 72:9-73:7, 74:6-77:19. However, the actual cause of Plaintiff's termination is hotly disputed by the parties. Plaintiff argues that she was terminated because she had her attorney release information about "the hospital's adverse patient outcomes, unsafe medical practices of some of the nursing staff" to the *Salon* blog, not because she referred to Van Zandt as a "camel toe idiot".

The Van Zandt incident, as described in Ex. H, occurred June 24, 2016. Somervell County policy strictly prohibits "such conduct that has the purpose, in effect . . . of creating an intimidating, hostile, or offensive work environment. This includes deliberate, repeated, or

unsolicited verbal comments, sexual jokes, ridicule, physical gestures or actions of a sexual nature." Ex. E. Defendants' official complaint cited that Plaintiff failed to meet work standards, violated hospital policy, was insubordinate, committed willful misconduct, was discourteous, and harassed Van Zandt. Ex. H. Because of Plaintiff's prior disciplinary history, Chief Nursing Officer Donna Miller responded to the "camel toe" incident by terminating Plaintiff. *Id.* Miller stated that "calling someone a camel toe idiot is harassing, intimidating, unprofessional, and intolerable" and violated Glen Rose Healthcare's zero tolerance policy for harassment. Ex. I at 56:11-16, 62:23-25, 64:4-11, 77:14-19.

Shelley Turk brings claims pursuant to the U.S. Constitution and Article I, Section 19 and 27 of the Texas Constitution. Her Third Amended Complaint ("Pl.'s Compl.") argues that (1) Defendants violated her First Amendment free speech rights by suppressing her complaints about the hospital's management by terminating her employment, and (2) that Defendants systematically denied her First Amendment right to petition the government for redress of grievances by denying or refusing to address her complaints. Pl.'s Compl. ¶¶ 25, 28.

Plaintiffs filed their original complaint August 6, 2015. ECF No. 1. They filed their First Amended Complaint on November 13, 2015. ECF No. 18. Plaintiffs filed a Second Amended Complaint on January 20, 2016. ECF No. 34. On May 4, 2016, the Court partially granted Defendants' Motion to Dismiss.[2] ECF Nos. 21, 47. Plaintiffs filed their Third Amended Complaint ("Pl.'s Compl.") on September 2, 2016. ECF No. 61. Defendants filed separate Motions for Summary Judgment for both Plaintiffs' claims on August 31, 2017. ECF Nos. 87,

[2] The Court dismissed Plaintiff's claim that the defendants violated the Texas Open Meetings Act. Plaintiff's § 1983 claims survived because in determining whether Plaintiff's complaints satisfied *Twombly* and *Iqbal* pleading standards, the Court had to "accept as true the factual allegations contained in the complaint." ECF No. 47 at 11. However, in evaluating Defendants' Motion for Summary Judgment, this Court must look beyond procedural pleading standards and to the substance of non-movant's "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact." *Celotex,* 477 U.S. 317.

88. Plaintiffs responded to the Motions on October 9, 2017. ECF Nos. 94, 95. Defendants replied November 2, 2017. ECF Nos. 100, 101. This Motion has been fully briefed. Because Albert Turk's claims are similar, but not identical to Shelley Turk's, Defendants' Motion for Summary Judgment in regards to Plaintiff Albert Turk's claims will be discussed in a separate Report and Recommendation.

II. RELEVANT LAW

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The party seeking summary judgment bears an exacting burden of demonstrating that there is no actual dispute as to any material fact in the case. *Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc.*, 669 F.2d 1026, 1031 (5th Cir. 1982).

In determining whether the movant has met his burden, the court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment. *See id.* at 1031. All reasonable doubts as to the existence of a genuine issue of material fact must be resolved against the movant. *Id.; Jones v. Western Geophysical Co.*, 669 F.2d 280, 283 (5th Cir. 1982). When determining whether to grant summary judgment, the court is merely determining whether a factual dispute exists and is not required to resolve those disputes. *See id.* at 283. The fact that it appears to the court that the non-movant party is unlikely to prevail at trial or that the movants statement of facts appears more plausible is not a reason to grant summary judgment. *See id.*

Once the movant has shown the absence of material fact issues, the opposing party has a duty to respond with any factual assertion that would preclude summary judgment. *See Cleckner*

v. Republic Van & Storage Co., 556 F.2d 766, 771 (5th Cir. 1977). Rule 56(e) of the Federal Rules of Civil Procedure provides that if a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

> (1) give an opportunity to properly support or address the fact;
> (2) consider the fact undisputed for purposes of the motion;
> (3) grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show that the movant is entitled to it; or
> (4) issue any other appropriate order.

FED. R. CIV. P. 56(e).

In this respect, the burden on the non-moving party is not especially heavy; however, he must show specific facts that present a genuine dispute as to any material fact worthy of trial rather than showing mere general allegations. *See Gossett v. Du-Ra-Kel Corp.*, 569 F.2d 869, 872 (5th Cir. 1978). Rule 56 does not impose upon the district court a duty to sift through the extensive record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998); *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs").

At the summary judgment stage, the judge's function is not to weigh the evidence and determine what the truth is, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Stated simply, it is not the function of the trial judge, in ruling on a summary judgment, to assess credibility or to determine the most reasonable inference from conflicting facts. That is the role of the jury. *Id.*; *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987); *Leonard v. Dixie Well Service & Supply, Inc.*, 828 F.2d 291, 294 (5th Cir. 1987) ("The Supreme Court has not, however, approved summary judgments that rest on

credibility determinations . . . [and] the Court reminds district judges not to invade the role of the jury.").

B. 42 U.S.C. §1983

Title 42 U.S.C. § 1983 creates a cause of action against any person who, under color of law, causes another to be deprived of a federally protected constitutional right. 42 U.S.C. § 1983 (2012). Section 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress . . . .

Id.

Section 1983 was promulgated to prevent a government official's "[m]isuse of power, possessed by virtue of state law and made possible only because the [official] is clothed with the authority of state law." *Johnston v. Lucas*, 786 F.2d 1254, 1257 (5th Cir. 1986); *Whitley v. Albers*, 475 U.S. 312 (1986) (Eighth Amendment); *Davidson v. Cannon*, 474 U.S. 344 (1986) (Fourteenth Amendment); *Daniels v. Williams*, 474 U.S. 327 (1986) (Fourteenth Amendment). However, § 1983 does not grant a cause of action for every action taken by a state official. *Whitley*, 475 U.S. at 319.

Two allegations are required in order to state a cause of action under 42 U.S.C. § 1983. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980); *Manax v. McNamara*, 842 F.2d 808, 812 (5th Cir. 1988).

III. DISCUSSION

A. Right to petition

As discussed above, Plaintiffs claim that they publically and privately aired a number of complaints about the hospital and its management. The First Amendment guarantees "the right of the people . . . to petition the Government for a redress of grievances." U. S. Const. amend. I. The right to petition is cut from the same cloth as the other guarantees of that Amendment, and is an assurance of a particular freedom of expression. In *United States v. Cruikshank*, 2 Otto 542, 92 U.S. 542 (1876), the Court declared that this right is implicit in "[t]he very idea of government, republican in form." *Id.* at 552.

Defendants' Motion for Summary Judgment asserts that the plaintiffs freely aired their complaints and that the defendants did nothing to infringe on Shelly Turk's constitutional right to petition. ECF No. 11-14. "The First Amendment right to associate and to advocate "provides no guarantee that a speech will persuade or that advocacy will be effective." *Smith v. Ark. Highway Emp. Local 1315*, 441 U.S. 463, 465 (1979) citing *Hanover Federation of Teachers v. Hanover Community School*, 457 F.2d 456 (1972). The First Amendment guarantees citizens the right to petition, but it does not create any "affirmative obligation" upon the government to acknowledge or respond to those petitions. *Smith v. Ark. Highway Emp. Local 1315*, 441 U.S. at 465.

When the government creates procedural requirements for processing grievances, however, it creates a procedural due process right that the government must obey. *Prof'l Assoc. of Coll. Educators v. El Paso Cmty. Coll. Dist.*, 730 F.2d 258, 263 (5th Cir. 1984). Where a government employer is required to process grievances, the refusal to process a grievance violates the First Amendment when the refusal is motivated by an intention to quash the speech. *Id.*

In the instant case, Plaintiff's Response to Defendants' Motion for Summary Judgment offers summary judgment evidence to support the following assertions: (1) The SCHD board of trustees required all grievances were to be handled on a quarterly basis by the board; (2) Plaintiff submitted grievances; (3) Defendant Reynolds repeatedly told board president Harrison "There were never any grievances filed at Glen Rose Medical Center."; (4) during the 24 months Harrison served as president, no grievances were presented to the board; (5) board member Paul Harper also testified that the board did not consider any grievances while he served and attended meetings; (6) Paul Harper requested that Defendant Reynolds to produce "complaints by the Turks." On August 21, 2015, Reynolds responded and produced nothing. Chip Harrison Dep. p. 86:11-87:3; p. 88:21-89:3; Paul Harper Dep. p. 106:10-17; ; Paul Harper Dep. at Exh. 22.

Again, Rule 56 requires a non-movant to respond with any factual assertion that would preclude summary judgment. *See Cleckner v. Republic Van & Storage Co.*, 556 F.2d 766, 771 (5th Cir. 1977). Plaintiff's response identifies material questions of fact as to the defendants' conduct and motivation with regard to the processing of Plaintiff's grievances at the hospital. As such, summary judgment is inappropriate.

B. Employment retaliation

Plaintiff Shelley Turk alleges that Defendants Somervell County Hospital District (SCHD) and Ray Reynolds terminated her contract in retaliation for speaking out about her concerns at the hospital, and for sharing information with various outside organizations. Pl.'s Compl. ¶¶ 25, 28. Plaintiff can only establish a retaliatory termination claim under the First Amendment by proving (1) she suffered an adverse employment action, (2) her speech involved a matter of public concern, (3) her interest in commenting on the matter of public concern outweighed the defendant's interest in promoting efficiency (balancing under *Pickering v. Board of Education,* 391 U.S. 563 (1968)), and (4) her speech was a substantial or motivating factor

behind the defendant's actions. *James v. Texas Collin County*, 535 F.3d 365, 375 (5th Cir. 2008); *see also Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999).

With regard to the first factor, the parties do not contest that Shelly Turk suffered an adverse employment action. As to the second factor, Defendants argue that Shelly Turk did not speak out as a *citizen*, but as an *employee*. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). In *Garcetti*, a deputy district attorney sued his employers, alleging that they retaliated against him for pointing out inaccuracies in a search warrant affidavit, and later writing a memo to his supervisors about the validity of the case. The Court held that the plaintiff:

> did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

Id. at 422.

The Supreme Court later held in *Lane v. Franks*:

> But *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of [the prosecutor's] employment," because "[t]he First Amendment protects some expressions related to the speaker's job." In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. *The critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.*

Lane v. Franks, 134 S.Ct. 2369, 2379 (2014) (internal citations omitted) (emphasis added).

Plaintiff concedes that her internal reporting and complaints to management were made as an employee. However, her complaints to the SCHD board of trustees, board president Chip Harrison, the State of Texas Department of State Health Services were well outside her job duties. Shelly Turk's passing of information to the Somervell County Salon—an internet blog, is inarguably outside the scope of her duties, and as such, Plaintiff spoke out as a "citizen".

Defendant also argues that Shelly Turk's speech (whether "citizen" speech or "employee" speech) was not a matter of public concern. They argue that Plaintiff's true motive was to complain about other employees' performance. ECF No. 88 at 16. A public employee's speech may relate to a public concern for purposes of First Amendment analysis if it does not involve solely personal matters or strictly a discussion of management policies that is only interesting to the public by virtue of a manager's status as an arm of government. *Connick v. Myers*, 461 U.S. 138 at 147 (1983); *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 372 (5th Cir. 2000) (citing *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1269 (5th Cir. 1992); *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 n. 5 (5th Cir.1986)). "If releasing the speech to the public would inform the populace of more than the fact of an employee's employment grievance, the content of the speech may be public in nature." *Kennedy*, 224 F.3d at 372 (citing *Thompson*, 901 F.2d at 463 n. 5).

Plaintiff responds that the Defendants mischaracterize her complaints. The parties have offered a large body of summary judgment evidence, and that record is replete with discussions of Plaintiff's complaints about patient safety, patient care, and medical errors by nursing staff at a public hospital. *See e.g.*, ECF 95-2 at 1-6. Those issues are a matter of public concern.

Moreover, Plaintiff's public complaints are not interesting to the public simply because of her status as a government employee, but because the speech indicates that persistent mismanagement at the local hospital places the health of patients at peril. As such, Plaintiff satisfies the second factor.

Again, the third factor requires that Plaintiff show that her interest in commenting on the matter of public concern outweighed the defendant's interest in promoting efficiency. *James v. Texas Collin Cnty.*, 535 F.3d 365, 375 (5th Cir. 2008). The court must balance the employee's interest as a citizen in commenting upon matters of public concern against "the interest of the State, as an employer, in promoting the efficiency of the public service[s] it performs through its employees." *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

"The Supreme Court has recognized as pertinent considerations 'whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.'" *Victor v. McElveen*, 150 F.3d 451, 457 (5th Cir. 1998) (quoting *Pickering*, 391 U.S. at 570–73). "[R]eal, not imagined, disruption is required, and the 'close working relationship' exception cannot serve as a pretext for stifling legitimate speech . . . ." *Branton v. Dallas*, 272 F.3d 730 (5th Cir. 2001), citing *McKinley v. Eloy*, 705 F.2d 1110, 1115 (5th Cir.1983).

Defendants assert, without citation to the record, that Shelly Turk's complaints were disruptive and were made in violation of hospital policy. ECF No. 88 at 14-15. Defendants liken Plaintiff's conduct to those occurring in *Price v. Brittain*, 874 F.2d 252 (5th Cir. 1989). In *Price*, the plaintiff worked at a hospital for involuntarily-committed mental patients. He made

unsubstantiated allegations to staff, patients, and law enforcement about sex-for-drugs exchanges between staff and patients, drug dealing by staff and patients, beatings of patients by staff, theft of patients' money and the cover-up of a murder in the facility. *Id.* at 254-255. The court found that in the context of a facility housing individuals who are violent and insane, some of whom were incarcerated for heinous crimes, making such allegations was disruptive. As such, the court found plaintiff's speech so dangerously disruptive that the state's interest in keeping order at the mental hospital outweighed the plaintiff's interest in making unsubstantiated allegations. *Id.* at 257-258.

Defendants' Motion cites no uncontroverted facts that show that the hospital was even remotely as volatile a workplace as that cited in *Price*. The Motion fails to provide uncontroverted evidence that Plaintiff's complaints disrupted the ability of staff to cooperate, or disrupted the hospital's ability to operate. Moreover, Defendants' Motion explicitly asserts that they did not fire Plaintiff for her complaints about the hospital, but that she was fired for name-calling a co-worker. This provides further indication that Plaintiff's complaints were not significantly disruptive. On the other hand, Plaintiff's interest in publically discussing patient safety issues was significant. Considering the content, form, and context of Plaintiff's statements, in the context of the whole record, Plaintiff adequately alleges that she slowly escalated her concerns through the administration. *Rankin*, 107 S.Ct. at 2897 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). When dissatisfied with the response, she took her complaints to the SCHD board of trustees and ultimately to a local political blog. *Id.* Viewed in the light most favorable to Shelly Turk, she establishes that her interest in speaking out about the hospital outweighs SCHD's interest in promoting workplace efficiency. *Pickering*, 391 U.S. at 568.

Defendant also alleges that Plaintiff cannot establish the fourth element of her employment retaliation claim. Plaintiff must adequately allege that her speech was a substantial or motivating factor behind the defendant's actions. *James v. Texas Collin County*, 535 F.3d 365, 375 (5th Cir. 2008); *see also Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999). Defendants argue that Plaintiff was fired for name-calling a co-worker, not her complaints about hospital management.

Defendant, who has the burden of producing evidence that shows there is no genuine issue of material fact, simply does not offer uncontroverted evidence to dispose of Plaintiff's claims against the defendants. Defendants' Motion relies almost solely on competing depositions in the record to rebut Plaintiff's retaliation claims. Defendant states that Reynolds recommended Plaintiff's firing because she referred to another nurse as a "camel toe idiot," but Plaintiff asserts that she did not even make the remark and was speaking about another individual entirely. Def.'s Mot. Summ. J. Ex. H, Ex. I Miller Dep. at 54:1-59:13, 60:14-63:1, 63:15-19, 64:7-8, 64:19-65:11, 65:23-66:13, 67:9-68:6, 72:9-73:7, 74:6-77:19; Appx. 0044-0045, S. Turk Dep. 180:20 - 181:19; 183:11-20. Critically, Plaintiff alleges that the defendants fired her moments after she refused to ask the publisher of the Somervell County Salon to take down a blog post that was critical of the hospital. Appx. 0005, S. Turk Decl., Para. 21.

In this motion for summary judgment, it is incumbent on defendants SCHD and Reynolds to resolve this wholly factual dispute, and show the Court that no genuine issue of material fact exists. It is also not the function of this Court to make credibility assessments or to determine the most reasonable inference from conflicting facts. *Honore,* 833 F.2d 565. In this case, the Defendants are essentially asking this court to make a credibility assessment on several conflicting statements and depositions in order to decide an issue that is most assuredly in

dispute: whether Shelley Turk was terminated for calling another employee a "camel toe idiot", or for speaking out about mismanagement at the hospital. Again, it is not the function of the trial judge, in ruling on a summary judgment, to assess credibility or to determine the most reasonable inference from conflicting facts. That is the role of the jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Plaintiff has adequately alleged that her speech was a motivating factor in her termination, and summary judgment is inappropriate.

C. Ray Reynolds

Defendant argues that Plaintiff's First Amendment retaliation claim should be dismissed against Ray Reynolds because Plaintiff makes no specific allegation that Defendant Reynolds retaliated against her. ECF No. 88 at 20. Plaintiff's argument focuses on two events directly tying Ray Reynolds to her termination: (1) her meeting with Chief Nursing Officer Donna Miller and Ray Reynolds in which they asked her to stop sending e-mails to other employees so that the e-mails would not be subject to an open records request, and to try and get the e-mails published on *Salon* removed, and (2) the phone call Reynolds had with Board President Chip Harrison, in which Reynolds told Harrison about the June 24, 2015 "camel toe idiot" incident, an allegation of misconduct that Plaintiff contends was utterly false. S. Turk Dep. at 84:1-25; Appx. 0064, Harrison Dep. p.82:21- 83:14.

While there is stark disagreement as to the motivations for terminating Plaintiff, the burden to prove that there is no genuine issue of material fact rests on the movants, SCHD and Ray Reynolds. FED. R. CIV. P. 56(a); *Impossible Electronics Techniques, Inc.,* 669 F.2d 1026. In this instance, Defendants fail to demonstrate that there is no genuine issue of material fact regarding Ray Reynolds' personal involvement and motivation in the alleged infringement on Plaintiff's First Amendment rights. Accordingly, this Court **RECOMMENDS** that Defendants'

Motion for Summary Judgment be **DENIED** in regard to Plaintiff Shelley Turk's claims against Ray Reynolds.

IV. CONCLUSION AND RECOMMENDATIONS

For the foregoing reasons, the undersigned **RECOMMENDS** that Defendants' Motion for Summary Judgment (ECF No. 88) be **DENIED.**

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987). A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn,* 474 U.S. 140, 150-53 (1985); *Douglas v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc). To the extent that a party has not been electronically served by the Clerk with this Report and Recommendation pursuant to the CM/ECF procedures of this district, the Clerk is directed to send such a party a copy of this Report and Recommendation by a national overnight delivery service having confirmation of pickup and delivery.

SIGNED this 8th day of January, 2018.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE