No. _____

In The Supreme Court of the United States

THOMAS A. WILLIAMS,

Petitioner,

v.

COUNTY OF NASSAU, THOMAS R. SUOZZI, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, NASSAU COUNTY CIVIL SERVICE COMMISSION, JOHN J. SENKO, JR., IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, JAMES F. DEMOS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DAVID J. GUERTY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, ANTHONY M. CANCELLIERI, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, JOHN DONNELLY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, CAROL KRAMER, IN HER INDIVIDUAL AND OFFICIAL CAPACITY, PETER SYLVER, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, BRUCE NYMAN, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, PATRICIA BOURNE, IN HER INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Thomas A. Williams was fired from his position as Executive Director of the Nassau County Civil Service Commission after giving truthful testimony at the meeting of the Nassau County Legislature at the request of its chair. This case thus poses the question:

Whether in light of this Court's decision in *Lane v. Franks*, 134 S. Ct. 2369 (2014), and conflicting decisions in other circuits, the Second Circuit erred in finding that truthful speech given in a legislative hearing at the request of the legislative body is unprotected by the First Amendment.

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

RULE 29.6 STATEMENT

The petitioner is not a corporation. The petitioner does not have a parent corporation or shares held by a publicly traded company.

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CASES

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Thomas A. Williams ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 581 F. App'x 56 (2d Cir. 2014), and is found at Appendix (App.) 1. The Court of Appeals' order denying Petitioner's timely petition for rehearing and rehearing en banc was entered December 30, 2014, and is found at App. 99. The order of the United States District Court for the Eastern District of New York is reported at 779 F. Supp. 2d 276 (E.D.N.Y. 2011), and is found at App. 7.

JURISDICTION

Petitioner seeks review of the final decision of the Court of Appeals entered on October 21, 2014. Timely petitions for rehearing and rehearing en banc were denied on December 30, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting

the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

Thomas A. Williams was the Executive Director of the Nassau County Civil Service Commission ("CSC"). App. 44. The CSC is an autonomous agency – created by the New York Constitution and New York civil service law – that acts independently from the Nassau County Government. The CSC ensures that Nassau County's municipal agencies follow state civil service law. As the CSC's Executive Director, Williams' job was to report to the commissioners regarding civil service issues in Nassau County, and to carry out the commissioners' decisions in addressing those issues.

On June 30, 2003, Williams went to the Nassau County government offices to visit a few friends. One of those friends informed him that the county legislature was conducting public hearings on a civil service matter of interest to Williams. He decided to attend the public hearing. The chair of the committee saw him there and asked Williams to address the Nassau County Legislature at the beginning of the hearing time allotted for "public comment." App. 27.

Williams' comments at the public hearing contradicted previous statements made by the Nassau

County government administration, to which Williams had no affiliation. After the meeting, in internal correspondence, administration officials agreed that Williams had embarrassed the administration in an election year and needed to be "released" from his position as Executive Director of the CSC. App. 47-48. Williams' employment was terminated on November 10, 2003.

In response to his termination, Williams brought a civil action against the County of Nassau, the Nassau County Civil Service Commission, the Office of Housing and Intergovernmental Affairs, and several individuals affiliated with these entities (together, "Respondents") in the United States District Court for the Eastern District of New York. App. 8. Among other claims, Williams alleged that Respondents violated his First Amendment right to freedom of speech by firing him for the comments he made at the June 2003 public hearing. The district court rejected Williams' First Amendment retaliation claim, determining that the First Amendment did not protect his comments at the public hearing. App. 33.

Petitioner appealed this judgment to the United States Court of Appeals for the Second Circuit. In a short summary order, the Second Circuit affirmed the district court's judgment. It stated that "Williams spoke before the Nassau County Legislature not 'as a citizen on a matter of public concern,' but rather 'pursuant to his official duties'. . . ." App. 4 (*quoting Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006);

Weintraub v. Board of Education, 593 F.3d 196, 203 (2d Cir. 2010)).

Petitioner sought – and was subsequently denied – a rehearing and a rehearing en banc in the Second Circuit. App. 99. He now petitions for a writ of certiorari to review the Second Circuit's summary order.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE AN ISSUE OF NATIONAL IMPORTANCE, AND ABOUT WHICH THE UNITED STATES COURTS OF APPEALS ARE SPLIT, AS TO WHETHER THE FIRST AMENDMENT PROTECTS THE TRUTHFUL SPEECH OF A GOVERNMENT EMPLOYEE BEFORE A LEGISLATIVE BODY AND HOW TO DETERMINE WHETHER A GOVERNMENT EMPLOYEE'S SPEECH IS AS A "CITIZEN" AND THUS PROTECTED BY THE FIRST AMENDMENT.

A. This Court Should Grant Review To Resolve The Conflict Between The Court Of Appeals' Decision And This Court's Decision In *Lane v. Franks*, And Decisions In Other Circuits, Concerning The First Amendment's Protection For The Truthful Testimony Of A Government Official.

In *Lane v. Franks*, 134 S. Ct. 2369 (2014), this Court held that the First Amendment protects the speech of government employees who testify truthfully in court

after being subpoenaed. This Court unanimously explained the importance of protecting the speech of government employees about matters of public concern:

> Speech by citizens on matters of public concern lies at the heart of the First Amendment, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." This remains true when speech concerns information related to or learned through public employment. After all, public employees do not renounce their citizenship when they accept employment, and this Court has cautioned time and again that public employers may not condition employment on the relinquishment of constitutional rights. There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For "[g]overnment employees are often in the best position to know what ails the agencies for which they work."

Id. at 2377.

The Court explained that under *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), a two-step approach is used to determine whether a government employee's speech is constitutionally protected:

> The first [step] requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of

> action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.

In *Lane v. Franks*, this Court concluded that Edward Lane was speaking as a "citizen" when he testified in court after being subpoenaed. This Court held that "[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes. *That is so even when the testimony relates to his public employment or concerns information learned during that employment*." 134 S. Ct. at 2378 (emphasis added).

This case is very similar to *Lane v. Franks* because it involves a government employee fired for giving truthful testimony about a matter of public concern. There is no dispute that Williams' employment was terminated because of the testimony he gave before the Nassau County Legislature, that he testified truthfully, and that his testimony about the operation of the civil service system in Nassau County involved a matter of public concern.

Only two facts distinguish this case from *Lane v. Franks*. First, Williams' testimony was given to a legislative body and not to a court. Second, Williams was requested to testify by the chair of the Nassau

County Legislature, but not subpoenaed to do so. As the district court explained: "The Chairwoman, however, explained to the audience that the Legislature would first hear testimony from Williams: 'I know most people are here for one particular issue but I would first like to call on Tom Williams, is he in the audience? Tom, who is just gonna clarify something for the Legislature that came up on both Finance and Rules, Tom?'" App. 27.

However, nothing in this Court's reasoning in *Lane v. Franks* provides a basis for treating a legislative hearing different from a court hearing or for making the First Amendment's protection depend on whether the testimony is given after a request from the chair of a legislative body as opposed to after a subpoena. Quite the contrary, in *Lane v. Franks*, this Court stressed the importance of government officers speaking exactly in situations like this case: "It bears emphasis that our precedents dating back to *Pickering* have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." 134 S. Ct. at 2379 (citing *Pickering v. Board of Education*, 391 U.S. 563 (1968)). That, of course, is exactly this case: Williams testimony had "special value precisely" because of the knowledge he had about civil service matters due to his position as the Executive Director of CSC. Thus, this Court should grant review to resolve the conflict between the Second Circuit and this Court's ruling that the

First Amendment protects a government employee's truthful testimony about a matter of public concern.

Furthermore, the Circuits are split as to the central issue presented by this case as to whether the First Amendment protects the testimony of a government employee before a legislative body. Unlike the Second Circuit in this case, other Circuits have expressly ruled that the First Amendment protects such speech.

For example, in *Westmoreland v. Sutherland*, 662 F.3d 714 (6th Cir. 2011), the court found that the First Amendment protected the testimony of a firefighter at a city council meeting. The firefighter was suspended from employment after testifying at a city council meeting and complaining of the city's decision to cut funding for a dive and rescue team in the fire department. The Court of Appeals concluded that the First Amendment protected the testimony even though it concerned the job duties of the firefighter. The Court of Appeals explained:

> Although plaintiff's comments were highly critical of the Mayor and City Council, the "focus," "point," or "communicative purpose" of plaintiff's speech was to express his opinion, as an expert in public safety diving, that the cuts to the Fire Department, especially the elimination of the dive team, had jeopardized public safety and hamstrung the rescue effort on September 1. Nor can plaintiff's speech be said to have addressed "matters only of personal interest." That the comments

> were made publicly to the City Council, rather than in a memo sent solely to his superior, supports this conclusion.

Id. at 719-20.

There is a striking similarity between *Westmoreland v. Sutherland* and this case, though the results were completely different. In both cases, a government employee testified before a legislative hearing in the public comment part of the meeting. In both cases, the government employee was speaking about a matter of public concern, not a matter of private interest. In both cases, the testimony was related to the employee's job. In this case there is even more reason for First Amendment protection because Williams spoke after being asked to do so by the chair of the legislative body. It is therefore highly likely that Williams would have prevailed if his case had been litigated in the Sixth Circuit rather than the Second Circuit.

Similarly, in *Lindsey v. City of Orrick, Missouri*, 491 F.3d 892 (8th Cir. 2007), the Court of Appeals found that firing a government employee for testimony given before the city council violated the First Amendment. The plaintiff was the public works director for the City of Orrick. In training for his job as public works director, he learned about the "sunshine" law that requires the city council to hold public meetings. The plaintiff was convinced that the sunshine law prohibited the city council's non-public executive sessions, and raised the issue at several city council meetings. Even though the plaintiff was

required by his job to attend city council meetings and the testimony about the "sunshine law" obviously was related to his job, the Eighth Circuit found that the testimony before the legislative body was as a "citizen" and thus protected by the First Amendment.

The decision of the Second Circuit in denying First Amendment protection to Williams' testimony before the Nassau County Legislature is in direct conflict with rulings from other Circuits such as the Sixth and Eighth which provided First Amendment protection for testimony given to legislative bodies. The Second Circuit, unlike these other Circuits, failed to recognize the strong public interest in government employees testifying before legislative bodies about the workings of the government, including exposing corruption and wrong doing.

The Second Circuit's ruling in this case therefore undercuts this Court's reasoning in *McGrain v. Daugherty*, 273 U.S. 135 (1927), which stated that "the power of inquiry – with the process to enforce it – is an essential and appropriate auxiliary to the legislative function." *Id*. at 174. This Court added, "A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it." *Id*. at 175. In order to govern properly, a legislative body needs input from informed citizens. If public employees fear retaliation for speaking

freely before government bodies, the legislative process will collapse.

This Court's reasoning in *Lane v. Franks* is consistent with the principle that speech before a public body carries special significance: "Unlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others." 134 S. Ct. at 2380. *See also*, *Reilly v. City of Atl. City*, 532 F.3d 216, 231 (3d Cir. 2008) ("'[t]he duty to testify has long been recognized as a basic obligation that every citizen owes his Government.'").

This Court should grant review to resolve the conflict between the Second Circuit's decision and the ruling of this Court in *Lane v. Franks* and the decisions of other Circuits. The issue of whether the First Amendment protects the testimony of government employees before a legislative body arises frequently and courts would benefit greatly from clarification by this Court.

B. This Court Should Grant Review To Resolve The Conflict Between The Court Of Appeals' Decision And Decisions From This Court And Other Circuits As To How To Determine Whether Speech Is As A "Citizen" Or As A "Government Employee."

The underlying issue in this case, and countless others being litigated across the country, is how to determine whether the speech of a government employee is as a "citizen" and thus protected by the First Amendment. Under *Garcetti v. Ceballos* and *Lane v. Franks*, the First Amendment protects speech by a government employee if it is in his or her capacity as a "citizen" as opposed to as a "government employee." Courts across the country are struggling with how to draw this distinction and would benefit greatly by this Court granting review in this case and clarifying this crucial distinction. Indeed, there is a conflict between the approach of the Second Circuit and that taken by this Court and other Circuits on this issue.

The Second Circuit in this and other cases has said that the speech is as an "employee" as opposed to as a "citizen" if it *relates* to the government employee's duties on the job. The Court of Appeals in ruling against Williams declared: "Because Williams spoke before the Nassau County Legislature not 'as a citizen on a matter of public concern,' but rather 'pursuant to his official duties' as defined by this Court in *Weintraub v. Board of Education*, 593 F.3d 196, 203 (2d Cir. 2010), we hold that Williams's speech is not

protected by the First Amendment and affirm the district court's grant of summary judgment." App. 4.

In *Weintraub v. Board of Education*, a teacher was fired after he complained to his union about the assistant principal's failure to discipline a student who threw books at the teacher. 593 F.3d at 199. The Court of Appeals concluded that "Weintraub, by filing a grievance with his union to complain about his supervisor's failure to discipline a child in his classroom, was speaking pursuant to his official duties and thus not as a citizen." *Id.* at 201. The Second Circuit found the speech was pursuant to the employee's official duties because it was related to his work as a public school teacher. As the Second Circuit pointed out, other Circuits have taken this very broad approach to defining what is speech as an employee as opposed to as a citizen. *See Renken v. Gregory,* 541 F.3d 769, 773 (7th Cir. 2008); *Mills v. City of Evansville,* 452 F.3d 646, 648 (7th Cir. 2006); *Phillips v. City of Dawsonville,* 499 F.3d 1239, 1242 (11th Cir. 2007); *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 492 F.3d 1192, 1204 (10th Cir. 2007); *Battle v. Bd. of Regents,* 468 F.3d 755, 761 (11th Cir. 2006). By contrast, Judge Calabresi in dissent in *Weintraub v. Board of Education*, urged a much narrower approach and said "An employee's speech is 'pursuant to official duties' when the employee is required to make such speech in the course of fulfilling his job duties." 593 F.3d at 208 (Calabresi, J., dissenting).

The Second Circuit's broad definition of what constitutes speech as a government employee directly

conflicts with this Court's decision in *Lane v. Franks* and the rulings of other Circuits. In *Lane v. Franks*, this Court was explicit that Edward Lane's testimony in court was speech as a citizen even though it was obviously "related" to his job. The Court explained that: "*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." 134 S. Ct. at 2379. Yet here the Second Circuit found that Williams' speech was not protected by the First Amendment simply because it related to his public employment and concerned information learned in the course of that employment. The Second Circuit failed to acknowledge that Mr. Williams' speech was, by its nature and circumstances, addressing a matter of public concern.

The Second Circuit's approach for determining whether the speech was as an employee, rather than as a citizen, conflicts with the approach taken in other Circuits. For example, in *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009), a commander in the Baltimore Police Department was fired after releasing an internal memorandum to a local newspaper. The district court granted summary judgment based on *Garcetti v. Ceballos*, but the Court of Appeals reversed. It explained that: "Andrew was not under a duty to write the memorandum as part of his official responsibilities. He had not previously written similar memoranda after other officer-involved shootings. Andrew would not have been derelict in his duties as a BPD commander, nor would he have suffered

any employment consequences, had he not written the memorandum." *Id.* at 264. The Fourth Circuit thus adopted a much narrower test than the Second Circuit in this case for determining when speech is as a government employee as opposed to as a citizen.

Similarly, in *Miller v. City of Canton*, 319 F. App'x 411, 417 (6th Cir. 2009), the Court of Appeals adopted a narrower test than the Second Circuit for determining what is speech as an "employee." The plaintiff was a police officer who was suspended after writing a press release saying that the police department treated black officers different than white officers. The Sixth Circuit determined that the First Amendment protected such speech because the officer "was not doing what he was employed to do when he issued the press release." *Id.* at 417. Where the Second Circuit finds that speech is as a government employee when it is related to an individual's job, the Sixth Circuit focuses on whether it is what the person was "employed to do."

Likewise, in *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006), the Court of Appeals explained that the plaintiff did "not lose her right to speak as a citizen because she initiated the communications while at work or because they concerned the subject matter of her employment." By contrast, it was for exactly these reasons that the district court and the Court of Appeals in this case found that Williams' speech was unprotected by the First Amendment.

There is thus great confusion, and a split among the Circuits, in terms of how to decide whether a government employee is speaking as a "citizen" and protected by the First Amendment, or speaking as an "employee" and not constitutionally protected. Courts have recognized this uncertainty and the conflict among the lower courts. *See, e.g., Mercado-Berrios v. Cancel-Alegria*, 611 F.3d 18, 27 (1st Cir. 2010). This case presents an ideal opportunity for this Court to offer much needed clarification on this issue that constantly arises in litigation throughout the country.

CONCLUSION

For all these reasons, this Court should grant the petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of October, two thousand fourteen.

PRESENT: CHESTER J. STRAUB,
RICHARD C. WESLEY,
DEBRA ANN LIVINGSTON,
Circuit Judges.

THOMAS A. WILLIAMS,

Plaintiff-Appellant,

-v.- No. 11-2033

COUNTY OF NASSAU, THOMAS R. SUOZZI, in his individual and official capacity, NASSAU COUNTY CIVIL SERVICE COMMISSION, JOHN J. SENKO,

JR., in his individual and official capacity, JAMES F. DEMOS, in his individual and official capacity, DAVID J. GUGERTY, in his individual and official capacity, ANTHONY M. CANCELLIERI, in his individual and official capacity, JOHN DONNELLY, in his individual and official capacity, CAROL KRAMER, in her individual and official capacity, PETER SYLVER, in his individual and official capacity, BRUCE NYMAN, in his individual and official capacity, PATRICIA BOURNE, in her individual and official capacity,

Defendants-Appellees,

CHARLES W. FOWLER, in his individual and official capacity, ROBERT L. SCHOELLE, JR., in his individual and official capacity, MARGUERITE COSTELLO, in her individual and official capacity, NASSAU COUNTY OFFICE OF HOUSING AND INTERGOVERNMENTAL AFFAIRS,

Defendants,

ROBIN E. PELLEGRINI,

*Plaintiff.**

For Appellant: STEPHEN BERGSTEIN, Bergstein & Ullrich, LLP, Chester, NY (Law Office of Frederick K. Brewington, Hempstead, NY, *on the brief*).

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* The Clerk of the Court is directed to amend the caption as above.

For Appellees: ROBERT VANDERWAAG, Deputy County Attorney (Dennis J. Saffran, *on the brief*), *for* John Ciampoli, County Attorney of Nassau County, Mineola, NY.

Appeal from the United States District Court for the Eastern District of New York (Roslynn R. Mauskopf, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment is **AFFIRMED**.

Thomas A. Williams ("Williams") is the former Executive Director of the Civil Service Commission of Nassau County who alleges that he was fired in retaliation for his public comments before the Nassau County Legislature. Pursuant to 42 U.S.C. § 1983, Williams brought suit alleging Defendants terminated his employment in violation of the First Amendment. Williams appeals from a Memorandum & Order dated March 30, 2011, granting Defendants-Appellees' motion for reconsideration and thereby granting summary judgment for Defendants-Appellees and dismissing Williams's Complaint in its entirety. *See Williams v. County of Nassau*, 779 F. Supp. 2d 276 (E.D.N.Y. 2011). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

This court reviews de novo a district court's grant of summary judgment, "construing the evidence in the light most favorable to the nonmoving party and

drawing all reasonable inferences in that party's favor." *Kuebel v. Black & Decker Inc.*, 643 F.3d 352, 358 (2d Cir. 2011).

Because Williams spoke before the Nassau County Legislature not "as a citizen on a matter of public concern," *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006), but rather "pursuant to his official duties" as defined by this Court in *Weintraub v. Board of Education*, 593 F.3d 196, 203 (2d Cir. 2010), we hold that Williams's speech is not protected by the First Amendment and affirm the district court's grant of summary judgment.

We have considered Williams's remaining arguments and find them to be without merit. For the reasons stated above, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

[SEAL]
/s/ Catherine O'Hagan Wolfe

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THOMAS A. WILLIAMS and ROBIN E. PELLEGRINI,

Plaintiffs,

-against-

COUNTY OF NASSAU, NASSAU COUNTY CIVIL SERVICE COMMISSION, THOMAS R. SIOUZZI, *in his official and individual capacities*, JOHN J. SENKO, JR., *in his official and individual capacities*, JAMES F. DEMOS, *in his official and individual capacities*, DAVID J. GUGERTY, *in his official and individual capacities*, ANTHONY M. CANCELLIERI, *in his official and individual capacities*, JOHN DONNELLY, *in his official and individual capacities*, PETER SYLVER, *in his official and individual capacities*, BRUCE NYMAN, *in his official and individual capacities*, and PATRICIA BOURNE, *in her official and individual capacities*,

Defendants.

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JUDGMENT
03-CV-6337 (RRM)

(Filed Apr. 18, 2011)

A Memorandum and Order of Honorable Roslynn R. Mauskopf, United States District Judge, having been filed on March 30, 2011, granting defendants' motion for reconsideration as to plaintiff Thomas A. Williams' First Amendment retaliation claims; denying as to plaintiff Robin E. Pellegrini's First Amendment retaliation claims; and directing that as these First Amendment claims constitute plaintiff Thomas A. Williams' only remaining claims, Thomas A. Williams complaint is now dismissed in its entirety; it is

ORDERED and ADJUDGED that defendants' motion for reconsideration is granted as to plaintiff Thomas A. Williams' First Amendment retaliation claims; that is denied as to plaintiff Robin E. Pellegrini's First Amendment retaliation claims; and that as these First Amendment claims constitute plaintiff Thomas A. Williams' only remaining claims, Thomas A. Williams complaint is now dismissed in its entirety.

Dated: Brooklyn, New York
April 15, 2011

s/Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- X

THOMAS A. WILLIAMS and ROBIN E. PELLEGRINI,

Plaintiffs,

-against-

COUNTY OF NASSAU, NASSAU COUNTY CIVIL SERVICE COMMISSION, THOMAS R. SIOUZZI, *in his official and individual capacities*, JOHN J. SENKO, JR., *in his official and individual capacities*, JAMES F. DEMOS, *in his official and individual capacities*, DAVID J. GUGERTY, *in his official and individual capacities*, ANTHONY M. CANCELLIERI, *in his official and individual capacities*, JOHN DONNELLY, *in his official and individual capacities*, PETER SYLVER, *in his official and individual capacities*, BRUCE NYMAN, *in his official and individual capacities*, and PATRICIA BOURNE, *in her official and individual capacities*,

Defendants.

---------- X

MEMORANDUM & ORDER

03-CV-6337 (RRM)(ETB)

(Filed Mar. 30, 2011)

MAUSKOPF, United States District Judge.

Defendants, the County of Nassau, the Nassau County Civil Service Commission, Thomas R. Suozzi, John J. Senko, Jr., James F. Demos, David J. Gugerty, Anthony M. Cancellieri, John Donnelly, Peter Sylver, Bruce Nyman, and Patricia Bourne (together, "Defendants"), move for reconsideration pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) and Local Rule 6.3 of this Court's January 22, 2010 Memorandum and Order denying their motion for summary judgment as to Plaintiffs Thomas Williams and Robin Pellegrini's (together, "Plaintiffs") First Amendment retaliation claims. For the reasons set forth below, Defendants' motion is DENIED as to Pellegrini and GRANTED as to Williams. Accordingly, Williams' claims of First Amendment retaliation are DISMISSED.

BACKGROUND[1]

Plaintiffs commenced this civil rights action on December 18, 2003. (Doc. No. 1.) They asserted numerous causes of action against the County of Nassau, the Nassau County Civil Service Commission ("CSC"), and the Office of Housing and Intergovernmental

[1] The underlying facts and procedural history of this case are set forth in greater detail in Judge Boyle's February 2, 2009 Report and Recommendation. (Doc. No. 143.) This Court discusses only those facts relevant to the instant motion for reconsideration.

Affairs ("OHIA"), as well as various individuals in both their official and individual capacities. Plaintiffs amended their Complaint on February 18, 2004. (Doc. No. 19.)

On March 31, 2005, Judge Feuerstein dismissed a number of Plaintiffs' claims. (Doc. No. 61.) On December 26, 2007, Defendants moved for summary judgment on the remaining six causes of action, (Doc. No. 126), and this Court referred that motion to Magistrate Judge E. Thomas Boyle on November 12, 2008. On February 2, 2009, Judge Boyle issued a Report and Recommendation (the "R&R") that summary judgment should be granted in favor of Defendants as to all claims, except Plaintiffs' First Amendment retaliation claims. (Doc. No. 143.) On January 22, 2010, this Court adopted the R&R in its entirety. (Doc. No. 151.) Accordingly, the following claims were dismissed: (1) Williams' conspiracy claim brought pursuant to 42 U.S.C. § 1983 (second cause of action); (2) Pellegrini's claim of race and color discrimination brought pursuant to Title VII, 42 U.S.C. §§ 2000e *et seq.* (first cause of action); (3) Pellegrini's age discrimination claim brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 623 (fourth cause of action); and (4) Plaintiffs' whistleblower claims brought pursuant to the New York State Civil Service Law § 75-b (sixth cause of action). Additionally, the Court dismissed Defendant OHIA from the case.

The Court denied Defendants' motion for summary judgment as to Williams' and Pellegrini's claims

of First Amendment retaliation (the second and third causes of action). Defendants now move for reconsideration of that portion of the decision pursuant to Federal Rules of Civil Procedure 59(e) and 60(b) and Local Rule 6.3. Defendants argue that Pellegrini's First Amendment retaliation claims should be dismissed because the R&R overlooked the causal element of a prima facie case for retaliation. Further, Defendants argue that the Second Circuit's opinion in *Weintraub v. Bd. of Educ.,* 593 F.3d 196 (2d Cir. 2010), which was decided after this Court adopted the R&R, changes the analysis of whether Williams spoke as a citizen or in his official capacity as Executive Director of the CSC.

STANDARD OF REVIEW

The standard for making a successful motion for reconsideration is stringent, "and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked – matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *See Shrader v. CSX Transp., Inc.,* 70 F.3d 255, 257 (2d Cir. 1995) (citations omitted); *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.,* 956 F.2d 1245, 1255 (2d Cir. 1992) ("The major grounds justifying reconsideration are an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." (citations and internal quotation marks omitted)). A motion for reconsideration is not an opportunity to

relitigate claims that have already been adjudicated. *See Sequa Corp. v. GBJ Corp.,* 156 F.3d 136, 144 (2d Cir. 1998) (stating that a motion for reconsideration "is not a vehicle for relitigating old issues, presenting the case under new theories, securing a rehearing on the merits, or otherwise taking a second bite at the apple" (citation and internal quotation marks omitted)); *Davidson v. Scully,* 172 F. Supp. 2d 458, 461-62 (S.D.N.Y. 2001) (explaining that motions for reconsideration brought pursuant to Local Rule 6.3 must be "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court," and may not be used to advance new facts, issues, or arguments not previously presented to the court (citation and internal quotation marks omitted)).

DISCUSSION

1. Timeliness

Plaintiffs first argue that Defendants' motion for reconsideration must be denied as untimely. (Pls.' Mem. of Law in Opp. to Mot. for Recons. ("Pls.' Br.") at 2.) It is true that Defendants filed their motion for reconsideration beyond the time-limits prescribed by Federal Rules of Civil Procedure 60(b) and 59(e), and Local Rule 6.3. Plaintiffs' argument, however, ignores a fundamental principle. A district court retains absolute authority to reconsider or otherwise affect its interlocutory orders any time prior to appeal. *See* Fed. R. Civ. P. 54(b); *see also Catskill Dev., L.L.C. v.*

Park Place Entm't Corp., 217 F. Supp. 2d 423, 428 (S.D.N.Y.2002). Moreover, this Court, fully aware of the Second Circuit's decision in *Weintraub,* invited reconsideration and additional briefing, thereby extending the time-limit imposed by Local Rule 6.3, which establishes the only ground available for Defendants to move for reconsideration of this Court's interlocutory Order.[2] *See Lichtenberg v. Besicorp Grp. Inc.,* 204 F.3d 397, 403-04 (2d Cir. 2000) (courts may extend time-limit imposed by Local Rule 6.3); (Doc.

[2] Neither Rule 60(b) nor Rule 59(e) applies to this motion for reconsideration, and it is properly brought pursuant to Local Rule 6.3. Rule 60(b) exclusively governs final judgments, meaning those that are sufficiently final that they may be appealed, and it is therefore inapplicable to this Court's Order denying in part and granting in part Defendants' motion for summary judgment, which is non-final, interlocutory, and non-appealable. *See Transaero, Inc. v. La Fuerza Aerea Boliviana,* 99 F.3d 538, 541 (2d Cir. 1996) ("By its own terms, Rule 60(b) applies only to judgments that are final."); *United States v. 228 Acres of Land & Dwelling,* 916 F.2d 808, 811 (2d Cir. 1990) (citation omitted) ("An order that denies summary judgment or grants partial summary judgment cannot by itself be the basis for an appeal, since it is nonfinal."). The motion for reconsideration is also not governed by Rule 59(e) because that rule is used to alter or amend a "judgment." Rule 54 of the Federal Rules of Civil defines "judgment" as "a decree and any order from which an appeal lies." *See also Kittay v. Korff (In re Palermo),* No. 08-CV-7421 (RPP), 2011 U.S. Dist. LEXIS 11681, at *12 (S.D.N.Y. Feb. 4, 2011) ("Because a denial of a motion to dismiss is an interlocutory order from which no appeal lies . . . a motion pursuant to 59(e) to modify this order is procedurally improper . . . [and] the only ground available for [defendant] to move for reconsideration is under Local Civil Rule 6.3."). Accordingly, this motion for reconsideration is considered as brought pursuant to Local Rule 6.3.

No. 167). Accordingly, Plaintiffs' argument that the motion for reconsideration is untimely fails entirely.

2. Pellegrini

Defendants argue that the R&R overlooked whether Pellegrini's termination was caused by her protected speech. To establish a First Amendment retaliation claim, a public employee must demonstrate the following: (1) the employee spoke "as a citizen upon matters of public concern"; (2) he suffered an adverse employment action; and (3) "the speech at issue was a substantial or motivating factor in the adverse employment action." *Benvenisti v. City of N.Y.,* No. 04-CV-3166 (JGK), 2006 U.S. Dist. LEXIS 73373, at *21-22 (S.D.N.Y. Sept. 23, 2006) (citations and internal quotation marks omitted); *see also Healy v. City of N.Y.,* No. 04 Civ. 7344 (DC), 2006 U.S. Dist. LEXIS 86344, at *11-12 (S.D.N.Y. Nov. 22, 2006). Defendants argue that summary judgment is warranted because Pellegrini, the former Acting Director of OHIA, failed to provide evidence sufficient to show that County officials knew of her protected speech with co-workers, outside counsel for OHIA, and her friends, including a former police chief, his wife, and his daughter. (Defs.' Mem. in Supp. of Mot. for Recons. ("Defs.' Br.") at 10-11.) Defendants, however, fail to acknowledge that they made precisely the same argument in their original motion for summary judgment. (*See* Defs.' Mem. in Further Supp. of Mot. for Summ. J. at 2.) Indeed, such an admission would undermine the very basis for their motion for

reconsideration, which shall "not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader,* 70 F.3d at 257.

Rather, in what appears to be a weak end-run around a previously litigated issue, Defendants couch their argument using the familiar buzz-words on reconsideration, that is, that the R&R "overlooked" the issue of causation. (Defs.' Br. at 11.) Specifically, Defendants contend that the R&R does not include "any finding that Defendants were aware of [Pellegrini's] communications [with co-workers, outside counsel, and friends] and that her termination resulted therefrom." (*Id.* at 10.) This Court finds itself somewhat puzzled by this argument. The R&R, after engaging in significant analysis of the record and relevant case law, clearly states that "*based on the evidence submitted,* sufficient questions of fact exist with respect to whether or not Pellegrini's termination was motivated by her speech, particularly since Pellegrini's speech and termination all occurred within a period of six months." (R&R at 29-30 (emphasis added).) Defendants' argument in support of reconsideration as to Pellegrini reflects either a misreading of the R&R, which clearly and adequately addressed the issue of causation, or an attempt to take "a second bite at the apple." *Sequa Corp.,* 156 F.3d at 144. Either way, Defendants' motion for reconsideration is DENIED as to Pellegrini.

3. Williams

Defendants argue that the Second Circuit's decision in *Weintraub v. Bd. of Educ.,* 593 F.3d 196 (2d Cir. 2010), which interpreted *Garcetti v. Ceballos,* 547 U.S. 410 (2006), invalidates the analysis in the R&R as to whether Williams' speech was protected by the First Amendment. Only two examples of Williams' speech are arguably protected by the First Amendment:[3] first, he reported his belief to Defendant Cancellieri that various Nassau County employees were working out of title in violation of the Civil Service Laws, and second, he testified before the Nassau County Legislature about Civil Service procedures. The R&R considered only the first instance and did not discuss the second. For the reasons set forth below, under *Garcetti, Weintraub,* and their progeny, none of Williams' speech is protected by the First Amendment, and Defendants' motion for reconsideration is granted as to Williams.

a. First Amendment Retaliation – Garcetti, Weintraub, and Progeny

The standard for determining whether the speech of a public employee is protected by the First Amendment "entails two inquiries: (1) whether the employee

[3] The R&R found that Williams' remaining statements, which were made to the Civil Service Commissioners, to whom he unquestionably owed a reporting duty, "were made pursuant to his official duties as Executive Director and undeserving of First Amendment protection." (R&R at 24.) This Court agrees.

spoke as a citizen on a matter of public concern and, if so, (2) whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Anemone v. Metro. Transp. Auth.,* 629 F.3d 97, 114 (2d Cir. 2011) (citations and internal quotation marks omitted). Here, Defendants ask this Court to reconsider the question of whether, in the instances relevant to this case, Williams spoke as a citizen or a public employee. (Defs.' Br. at 8.) "[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,* 547 U.S. at 421. "The objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties is 'a practical one.'" *Weintraub,* 593 F.3d at 202 (quoting *Garcetti,* 547 U.S. at 424). The Second Circuit in *Weintraub* noted that "[t]he *Garcetti* Court cautioned courts against construing a government employee's official duties too narrowly." *Id.* (explaining that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes" (quoting *Garcetti,* 547 U.S. at 424-25)).

In determining whether a plaintiff spoke as an employee or a citizen, courts must consider factors such as whether the speech was made "in furtherance of" the plaintiff's "core [employment] duties" and whether the form of the speech had a "relevant citizen analogue." *Id.* at 203. Neither factor is dispositive. *Id.* at 204; *see also Castro v. Cnty. of Nassau,* 739 F. Supp. 2d 153, 179 (E.D.N.Y. 2010). Rather, these factors serve as proxies for the controlling question of what "role the speaker occupied when he spoke." *Jackler v. Byrne,* 708 F. Supp. 2d 319, 324 (S.D.N.Y. 2010) (citing *Weintraub,* 593 F.3d at 204). Accordingly, "under the First Amendment, speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." *Weintraub,* 593 F.3d at 203.

" 'The inquiry into the protected status of speech is one of law, not fact.' " *Benvenisti,* 2006 U.S. Dist. LEXIS 73373, at *24 (quoting *Connick v. Myers,* 461 U.S. 138, 148 n.7 (1983)); *see also Sousa v. Roque,* 578 F.3d 164, 170 (2d Cir. 2009) ("To determine whether or not a plaintiff's speech is protected, a court must begin by asking 'whether the employee spoke as a citizen on a matter of public concern.' If the court determines that the plaintiff either did not speak as a citizen or did not speak on a matter of public concern, 'the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.' " (quoting *Garcetti,* 547 U.S. at 418)).

b. Williams' Conversations With Defendant Cancellieri

As the Executive Director of the Nassau County CSC, Williams' official role was to advise the Civil Service Commission on civil service matters, to implement the policies made by the three commissioners, to assure that those policies were enforced and put into operation, and to handle day-to-day operations of the commission staff. (R&R at 3; Defs.' R. 56.1 Stmt. ¶ 4; Pls.' Reply to Defs.' 56.1 Stmt. ¶ 4.)[4] Moreover, "[i]t is undisputed that Williams' responsibilities as Executive Director of the CSC included enforcing the rules and regulations governing civil service employees and investigating any suspected wrongdoing." (R&R at 24); (*see also* Doc. No. 134-1 at 4 (Williams testified that "the [Civil Service] commissioners are sort of like the board of directors of a corporation. The executive director is like the president. The executive director handles the day-to-day operations of the commission. . . ."); (Williams Dep. at 65.).) Indeed, Plaintiffs admit that, "as the Executive Director of the Civil Service Commission," Williams was "bound to ensure" that all Nassau County government agencies and departments complied with the Civil Service Law. (Pls.' R. 56.1 Cntrstmt. ¶ 21.) Thus, Plaintiff was

[4] "While the Commission is the final decision maker with respect to civil service transactions for all municipal agencies under its jurisdiction, the Commission relies upon the guidance, advice and information reporting of its Executive Director." (Pls.' Reply to Defs.' 56.1 Stmt. ¶ 5.)

responsible for correcting situations in which employees at various Nassau County government agencies were working out of title, as in the Treasurer's Office, or out of compliance with Civil Service Law, as in the Planning Department. (*Id.* ¶¶ 21, 36-44, 62-72.) The CSC requires cooperation from the various Nassau County agencies and officers subject to Civil Service Law so that it can address the personnel transactions governed by Civil Service Laws, Rules, and Regulations. (Pls.' Reply to Defs.' 56.1 Stmt. ¶ 6.)

While he served as Executive Director of the CSC, Williams told Defendant Cancellieri, the Deputy County Executive of Nassau County, he was concerned that employees in the Planning Department, the OHIA, and the Treasury Department were working out of title in violation of the Civil Service Laws. (R&R at 10, 12; Defs.' R. 56.1 Stmt. ¶¶ 43-44; Pls.' Reply to Defs.' 56.1 Stmt. ¶¶ 43-44.) Williams further advised Cancellieri that this arrangement could potentially constitute a misuse of federal funds. (R&R at 12.) The County Executive is an elected official who serves as the head of Nassau County government. Nassau County Charter § 201. According to the Nassau County Charter, "the Civil Service Commission [has] . . . the powers and duties of a municipal civil service commission," and it is "the duty of the County Executive to supervise, direct, and control, subject to the provisions of the act, the administration of all departments, offices and functions of the county government. . . ." *Id.* §§ 203-1, 1303. The County Executive has "the powers and duties, with reference

to the County Civil Service Commission, of the mayor of a city." *Id.* § 1303. The Deputy County Executive is appointed by the County Executive, and is responsible for performing the administrative duties of the County Executive, as well as other duties determined by the County Executive. *Id.* §§ 203, 205.

Williams was required to report only to the three Civil Service Commissioners, and owed no reporting responsibility to Cancellieri. (R&R at 24.) The R&R took this to be a controlling fact, citing the district court opinion in *Weintraub* for the proposition that when an when [sic] a public employee "goes outside of the established institutional channels in order to express a complaint or concern, the employee is speaking as a citizen, and the speech is protected by the First Amendment." (R&R at 25) (citing *Weintraub v. Bd. of Educ.,* 489 F. Supp. 2d 209, 219 (E.D.N.Y. 2007), *aff'd,* 593 F.3d 196 (2d Cir. 2010).) The R&R applied this principle to hold that because "Williams had no duty to report any concerns he may have had to Cancellieri, his actions in doing so were taken as a private citizen and not as a public employee." (*Id.*) The Second Circuit's decision in *Weintraub* puts a finer point on this reasoning.

Weintraub and its progeny make clear that merely reporting information outside the chain of command is not necessarily sufficient, in and of itself, to establish that a public employee was speaking as a citizen. *See, e.g., Carter v. Inc. Vill. of Ocean Beach,* No. 10-CV-0740, 2011 U.S. App. LEXIS 5464, at *5 (2d Cir. Mar. 18, 2011) (finding that plaintiffs were speaking

pursuant to their official duties where their "allegations establish no more than that they reported what they believed to be misconduct by a supervisor up the chain of command – misconduct they knew of only by virtue of their jobs as police officers and which they reported as 'part-and-parcel of [their] concerns about [their] ability to properly execute [their] duties.'" (citing *Weintraub,* 593 F.3d at 203)); *Anemone,* 629 F.3d at 115-16 (rejecting argument that speech was made as a private citizen, rather than pursuant to official duties, where plaintiff "went outside the chain of command"); *Castro,* 739 F. Supp. 2d at 180 (holding that a security guard was speaking as a public employee when he "directed his complaints up the operational chain of command"); *accord Winder v. Erste,* 566 F.3d 209, 215 (D.C. Cir. 2009) ("[W]e have consistently held that a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command.").

Garcetti and *Weintraub* require courts to take a practical approach to determining whether public employees have spoken pursuant to their official duties. For example, in Castro, the plaintiff's duties as a private security guard included enforcing school parking regulations, and the court found that his complaints to the school principal, as opposed to his employer, a private contractor, about laxity in the enforcement of parking regulations were made pursuant to his official duties. 739 F. Supp. 2d at 179 & n.20. Likewise, in *Morey v. Somers Cent. Sch. Dist.,* the plaintiff

was head custodian of a high school who reported the possible existence of asbestos in the school gymnasium. No. 06-CV-1877 (PGG), 2010 U.S. Dist. LEXIS 26262, at *19-23 (S.D.N.Y. Mar. 19, 2010), *aff'd,* 2011 U.S. App. LEXIS 2554 (2d Cir. Feb. 9, 2011). Although the custodian's official duties did not include identifying or abating asbestos, the court held that his warnings about asbestos were sufficiently related to school maintenance and cleaning that he was speaking as a public employee and not as a regular citizen. (*Id.*)

Here, too, Williams' discussions with Cancellieri were in furtherance of his core official duties. Williams contacted Cancellieri, the Deputy County Executive, in order to solicit Cancellieri's help in ensuring that various Nassau County agencies and departments were in compliance with Civil Service Laws, one of Williams' core job duties as Executive Director of the CSC. (Pls.' R. 56.1 Cntrstmt. ¶¶ 7, 38.) Even Plaintiffs admit that for the Nassau County government to run and for Williams to carry out his responsibilities, Williams necessarily had to, and did, interact regularly with other Nassau County government officials. (Pls.' Reply to Defs.' R. 56.1 Stmt. ¶ 6.) In addition to meeting with Cancellieri at regularly scheduled senior staff meetings, Williams met with Cancellieri and others "probably ten or twelve" times in eleventh months, and provided them with advice concerning Civil Service regulations. (Pls.' Reply to Defs.' R. 56.1 Stmt. ¶ 22; Doc. No. 130 ¶¶ 77-79.) Plaintiff also testified that he had "probably" at least twenty phone

conversations with Cancellieri about various Civil Service issues. (Williams Dep. at 247.) This undisputed evidence demonstrates that it was not unusual for Williams to discuss Civil Service issues with Cancellieri on an official basis. Moreover, pursuant to the Nassau County Charter, the County Executive, as head of Nassau County government, and his deputies, including Cancellieri, have a direct relationship with the CSC, *see* Nassau County Charter § 1303 (the County Executive has "the powers and duties, with reference to the County Civil Service Commission, of the mayor of a city"), and it is the "duty of the Civil Service Commission to . . . do everything in its power to secure observance of the spirit and letter of the civil service law." *Id.* § 1309. For both the County Executive and the CSC to carry out their mandated duties under the Nassau County Charter, the two necessarily rely on and regularly interact with one another. Not only was this symbiotic relationship mandated, but it was carried out in the day-to-day operations of Nassau County Government as evidenced by the undisputed facts in the record.

Although he had no duty to report information to Cancellieri, in his role as Executive Director of the CSC, Williams relayed to Cancellieri his "concerns about the County's unlawful actions, including compliance by various departments (*i.e.,* the Treasurer) with Civil Service Laws, Rules and Regulations," issues at the core of his job duties. (Pls.' R. 56.1 Cntrstmt. ¶¶ 21, 38 ("as the Executive Director of the Civil Service Commission" Williams was "bound to

ensure" that Nassau County agencies and departments complied with the Civil Service Laws)). As the County Executive supervises, directs, and controls all Nassau County departments and agencies, it is entirely unremarkable that Williams would contact him on an official basis to discuss Civil Service violations in various agencies and departments. Indeed, by reporting the lack of compliance with Civil Service requirements to the Deputy County Executive, Williams was "was fulfilling his undisputed duty to see that those" requirements were satisfied. *See Winder v. Erste,* 566 F.3d 209, 215 (D.C. Cir. 2009).[5]

Moreover, the way in which Williams reported his concerns to Cancellieri has no citizen analogue, or "channel of discourse available to non-employee citizens." *Weintraub,* 593 F.3d at 204. While citizens may write letters to, or request meetings with, the Deputy County Executive, none would have the kind of access to Cancellieri that Williams had as Executive Director of the CSC. *See D'Olimpio v. Crisafi,* 718

[5] Although Williams also told Cancellieri that the arrangement involving these Civil Service violations might constitute a misuse of federal funds, such statements are equally related to his core job duties that he conveyed them as Executive Director of the CSC. *See, e.g., Morey,* 2010 U.S. Dist. LEXIS 26262, at *19-23 (janitor, whose duties did not include identifying asbestos, was speaking as a public employee when he reported asbestos to school principal because asbestos identification was sufficiently related to maintenance of school grounds). Moreover, it is clear that Williams learned of this potential "misconduct . . . only by virtue of [his] job[ ]" as Executive Director of the CSC. *Carter,* 2011 U.S. App. LEXIS 5464, at *5.

F. Supp. 2d 340, 354 (S.D.N.Y. 2010) (noting that plaintiffs' statements were "made *in a manner* that would not be available to a non-public employee citizen") (emphasis added); *see also Medina v. Dep't of Educ. of N.Y.,* No. 10-CV1180 (BSJ), 2011 U.S. Dist. LEXIS 5194, at *8-9 (S.D.N.Y. Jan. 14, 2011) (plaintiff guidance counselor who complained to principal, union representative, and students' parents "was only in a position to raise these concerns to these specific people as a direct result of his position as a guidance counselor"); *Heffernan v. Straub,* 612 F. Supp. 2d 313, 326 (S.D.N.Y. 2009) (holding plaintiff made speech pursuant to his official duties when "an ordinary citizen not employed by the Fire Bureau would not . . . have the opportunity to convey [his opinion] through the channels that he utilized.") (citing *Garcetti,* 547 U.S. at 422 ("Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.")). Williams and Cancellieri met in person ten-to-twelve times, and spoke on the phone on least twenty occasions, to discuss civil service issues, and nothing in the record suggests that Williams ever spoke to Cancellieri on an unofficial basis. In sum, on the basis of the uncontroverted facts in the record, this Court concludes as a matter of law that Williams' conversations with Cancellieri are not protected by the First Amendment because Williams was speaking "pursuant to [his] official responsibilities." *Garcetti,* 547 U.S. at 424.

Tellingly, in their opposition to the motion for reconsideration, Plaintiffs do not dispute Defendants' contention that, under *Garcetti* and *Weintraub,* Williams spoke with Cancellieri in his official capacity, choosing instead to focus instead on Williams' statements to the Nassau County Legislature. The Court turns next to this issue.

c. Williams' Testimony Before the Nassau County Legislature

Williams' testimony before the Nassau County Legislature ("Legislature") is also not protected by the First Amendment because Williams was speaking there in his official capacity as Executive Director of the CSC. Although Williams offered his testimony to the Legislature on the rules of a government agency – likely a matter of public concern – "[t]he fact that the plaintiff's speech addresses a matter of public concern is not dispositive." *Morey,* 2010 U.S. Dist. LEXIS 26262, at *19 n.7. To receive First Amendment protection, a public employee must both "speak as a citizen, and . . . speak on a matter of public concern." *Castro,* 739 F. Supp. 2d at 179. Williams' testimony before the Nassau County Legislature fails to meet the first requirement, and is therefore not protected by the First Amendment.

The circumstances and content of Williams' testimony at the hearing indicate that he was speaking

in his official capacity as Executive Director of the CSC.[6] The hearing occurred on a Monday at 3:20 p.m., in the middle of a workday. (Defs.' Reply in Supp. of Mot. for Recons. Ex. A, at 1.) Williams addressed the Legislature on a technical question of Civil Service law before a public comment portion of the hearing commenced. The Chairwoman opened the hearing by announcing that there would be "a half hour of public comment . . . [with] each speaker having three minutes." (*Id.* at 7.) The Chairwoman, however, explained to the audience that the Legislature would first hear testimony from Williams: "I know most people are here for one particular issue but I would first like to call on Tom Williams, is he in the audience? Tom, who is just gonna clarify something for the Legislature that came up on both

[6] Plaintiffs object to Defendants use of the legislative hearing transcript on the grounds that it was "not before the Court during the Summary Judgment Motion . . . and was never presented until now." (Doc. No. 177.) Plaintiffs are simply wrong. Defendants attached the legislative hearing transcript to an affidavit in support of their motion for summary judgment on December 12, 2007. (Doc. No. 134-3.) Indeed, the R&R includes a citation to the very document that Plaintiffs now seek to preclude on the basis of surprise and prejudice. (R&R at 6 n.4.) Moreover, it stretches the imagination to believe that Plaintiffs could be prejudiced or surprised by a public document that recorded verbatim the *very statements* upon which they claim First Amendment protection. The Court is also troubled that Plaintiffs would suggest that Defendants be sanctioned for citing this document when they are at fault for misunderstanding the record in this case. For these reasons, Plaintiffs' motion to strike reference to the legislative hearing transcript is DENIED.

Finance and Rules, Tom?" (*Id.*) When this statement is considered with other undisputed facts in the record, it is clear that the Legislature offered Williams an opportunity to answer a civil service question that had been posed in a prior session by a legislator in response to official testimony provided by members of the Nassau County administration. (Pls.' Mem. of Law in Opp. to Defs.' Mot. for Recons. Ex A, at 1 ("Williams proceeds to declare prior testimony from members of the administration – testimony that he did not hear – 'wrong,' among other descriptors.").)[7] In other words, Williams, who was on the clock working as a public official, was permitted to speak on an official matter before the start of the public comment phase of the hearing.[8]

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[7] Plaintiffs make much of that fact that Defendant Gianelli, a Deputy County Executive, was angered that Williams spoke in front of the Legislature. (Pls. Opp. to Mot. for Recons. at 8-9.) However, " '[i]t would be incongruous to interpret *Garcetti,* a case concerned with allowing the government to control its employees within their jobs, as giving broader protections to disobedient employees who decide they know better than their bosses how to perform their duties.' " *Anemone,* 629 F.3d 97, 116 (quoting *Thompson v. Dist. of Columbia,* 530 F.3d 914, 918 (D.C. Cir. 2008)).

[8] Indeed, the legislator who "was asking the questions" during the prior session with Nassau County officials asked whether Williams would consider meeting in private after the hearing because members of the public had "been waiting here all day to speak." (Defs.' Reply in Supp. of Mot. for Recons. Ex. A, at 8.) Williams responded that he "wanted to let the entire Legislature know the answers." (*Id.*) The legislator then asked the Chairwoman if they should "do this now" and she responded

(Continued on following page)

Plaintiffs rely heavily on the fact that Williams himself approached the Legislature. Williams explained his presence at the hearing as follows: "I was coming by here [sic] today to visit with some of my friends when I was informed there had been some questions concerning Civil Service regulations and the Office of Emergency Management. I was also informed of some of the answers which I do not believe were entirely accurate and I wanted to make myself available. I stayed there about an hour or so to make myself available to answer the questions that were being asked earlier so that you can have the correct and full information." (Defs.' Reply in Supp. of Mot. for Recons. Ex. A, at 8.) Williams was informed about the Legislature's Civil Service questions by an unnamed "friend and colleague." (Pls.' R. 56.1 Cntrstmt. ¶ 91.) Notwithstanding the circumstances in which Williams found himself in the legislative chamber, it is evident that the reason the Legislature permitted him to correct prior testimony of Nassau County

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that Williams should try to be as "quick[ ]" as possible. (*Id.*) Were Williams speaking as a public citizen, it seems likely that he unquestionably would have received the three minutes allotted to all other members of the public, and the legislators would not have debated whether he should provide the information *in private* or at another time. Moreover, this conclusion is further supported by the fact that, after Williams finished speaking, the Chairwoman immediately addressed "the people I'm looking out at in the audience," or her constituents, and started giving a political speech. (*Id.* at 11.) It is reasonable to conclude that the public comment phase of the Legislative Hearing began at this moment.

officials regarding the Civil Service Laws, which had been provided on an official basis, was that he was a high-level, Nassau County Civil Service official with specialized knowledge of the Civil Service Laws. In this context, Williams' clarification of official testimony has no citizen analogue, or "channel of discourse available to non-employee citizens." *Weintraub,* 593 F.3d at 204; *see also Almontaser v. N.Y. City Dep't of Educ.,* No. 07-CV-10444 (SHS), 2009 U.S. Dist. LEXIS 84696, at *8-9 (S.D.N.Y. Sept. 1, 2009) (interim school principal spoke pursuant to official duties during interview with the press). Williams' speech is indisputably related to overseeing the operations of the Civil Service Commission, one of his central duties. (R&R at 3; Defs.' R. 56.1 Stmt. ¶ 4; Pls.' Reply to Defs.' R. 56.1 Stmt. ¶ 4.) Such an opportunity to provide technical advice to the Nassau County Legislature on Civil Service rules and procedures does not exist for citizens generally. Moreover, it would be unreasonable to infer that the Legislature asked Williams to provide guidance on the Civil Service regulations in his personal capacity, as opposed to his official capacity, when his core official duty is to interpret and enforce those very regulations. *See* Nassau County Charter § 1309 (it is "the duty of the County Civil Service Commission to make investigations concerning the enforcement and effect of this article, and to do everything in its power to secure observance of the spirit and letter of the civil service law"); (*see also* Pls.' R. 56.1 Cntrstmt. ¶ 21). In short, the undisputed evidence in the record clearly shows that Williams testified before the Legislature in his

role as Executive Director of the CSC, and that there is no citizen analogue for the provision of such testimony. *See Weintraub,* 593 F.3d at 203 ("'When a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees.'" (quoting *Garcetti,* 547 U.S. at 424)).

Williams testimony was also "in furtherance" of his "core duties" as Executive Director of the CSC. *Weintraub,* 593 F.3d at 203. In explaining to the Legislature how title and appointment procedures work, Plaintiff addressed "questions concerning Civil Service regulations and the Office of Emergency Management." (Defs.' Reply in Supp. of Mot. for Recons. Ex. A, at 8-10.) As Plaintiffs acknowledge, the CSC "assist[s] Nassau County government and its municipal agencies by providing guidance, information, and assistance on how to comply with Civil Service Law." (Pls.' R. 56.1 Cntrstmt. ¶ 9.) Moreover, "as the Executive Director of the Civil Service Commission," Williams was "bound to ensure" that all Nassau County government agencies and departments complied with the Civil Service Law. (Pls.' R. 56.1 Cntrstmt. ¶ 21.) It is apparent from the hearing transcript that Williams believed that the Legislature had received an inaccurate account of the rules, and he felt it incumbent upon himself to put forth his 'expert' perspective, which is indeed "'part-and-parcel' of his concerns" about "properly execut[ing] his duties." *Weintraub,* 593 F.3d at 203 (citation and internal quotation marks omitted); *see Castro,* 739

F. Supp. 2d at 179 (noting that in deciding whether speech was made pursuant to official duties courts may consider "whether the speech resulted from special knowledge gained through the plaintiff's employment" (citation omitted)). The fact that Williams was not required to speak to the Legislature is not dispositive. *Weintraub* 593 F.3d at 203 (speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer).

Williams did not provide his personal opinion on any matter at the hearing, and was clearly addressing technical matters under the CSC rules and regulations as he attempted to answer the legislator's question. Indeed, when the legislator's question concerned funding for the Office of Emergency Management, and not Civil Service titles and appointments, he responded, "[T]hat's not a Civil Service question, I apologize. I was told it was a Civil Service question." (Defs.' Reply in Supp. of Mot. for Recons. Ex. A, at 10-11.)[9] As *Garcetti* and *Weintraub* require courts to

[9] Although Williams was unable to provide the necessary information – the issue was not about the Civil Service rules, as he had believed – the legislator thanked him and said he planned to write a letter to the County Attorney, the Comptroller or the Treasurer to get the necessary information. (Defs.' Reply in Supp. of Mot. for Recons. Ex. A, at 11.) Williams' responded, "Good. We just wanted to clarify the fact that you're correct." (*Id.*) The "we" to whom William is referring is clearly the CSC, his employer. Indeed, earlier in his testimony, when Williams explained the process by which civil service titles are approved,

(Continued on following page)

consider the question of employment duty holistically, this Court finds that Williams testified before the Nassau County Legislature in furtherance of his official duties. *See Weintraub,* 593 F.3d at 202 ("The *Garcetti* Court cautioned courts against construing a government employee's official duties too narrowly.").

In sum, given the uncontroverted facts in the record, and drawing all inferences in favor of Plaintiffs, this Court finds as a matter of law that Williams' speech to the Legislature "owes its existence to [his] professional responsibilities" as Executive Director of the CSC. *Garcetti,* 547 U.S. at 424-25. No reasonable juror could find that Williams was speaking as a citizen in any of the instances detailed in the record. Accordingly, the First Amendment does not protect his speech, and Defendants motion for reconsideration as to Williams' First Amendment retaliation claims is GRANTED.

CONCLUSION

For the reasons set forth above, Defendants' motion for reconsideration (Doc. No. 170) is GRANTED as to Plaintiff Williams' First Amendment retaliation

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he also referred to the Civil Service Commission as "we." (*Id.* at 9) ("*We* pass them as noncompetitive titles but that is subject to Albany's review and Albany may, if they choose, make it a competitive title." (emphasis added).) This lends further support to the notion that Williams was speaking as a public official and not as a regular citizen.

claims, and DENIED as to Plaintiff Pellegrini's First Amendment retaliation claims. As these First Amendment claims constitute Plaintiff Williams' only remaining claims, Williams Complaint is now dismissed in its entirety. The parties are ordered to file a Joint Status Report by April 15, 2011 as to Plaintiff Pellegrini's remaining claims.

SO ORDERED.

Dated: Brooklyn, New York
March 30, 2011

/S/
ROSLYNN R. MAUSKOPF
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X
THOMAS A. WILLIAMS and ROBIN E. PELLEGRINI,

Plaintiffs,

-against-

COUNTY OF NASSAU, THOMAS R. SIOUZZI, *in his official and individual capacities*, NASSAU COUNTY CIVIL SERVICE COMMISSION, JOHN H. SENKO, JR., *in his official and individual capacities*, JAMES F. DEMOS, *in his official and individual capacities*, DAVID J. GUGERTY, *in his official and individual capacities*, ANTHONY M. CANCELLIERI, *in his official and individual capacities*, JOHN DONNELLY, *in his official and individual capacities*, NASSAU COUNTY OFFICE OF HOUSING AND INTER-GOVERNMENTAL AFFAIRS, PETER SYLVER, *in his official and individual capacities*, BRUCE NYMAN, *in his official and individual capacities*, and PATRICIA BOURNE, *in her official and individual capacities*,

Defendants.
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MEMORANDUM & ORDER
03-CV-6337
(RRM)(ETB)

(Filed Jan. 22, 2010)

MAUSKOPF, United States District Judge.

Plaintiffs, Thomas A. Williams and Robin E. Pellegrini, commenced the instant civil rights action asserting various causes of action against the County of Nassau, the Nassau County Civil Service Commission ("CSC"), the Nassau County Office of Housing and Intergovernmental Affairs ("OHIA"), and the following individuals, all county employees, both in their individual and official capacities: Thomas R. Suozzi, John H. Senko, James F. Demos, David J. Gugerty, Anthony M. Cancellieri, John Donnelly, Peter Sylver, Bruce Nyman, and Patricia Bourne (collectively, the "County Defendants").[1] Defendants moved for summary judgment (Docket Nos. 126-138), which motion was respectfully referred to United States Magistrate Judge E. Thomas Boyle. Now before this Court is Judge Boyle's Report and Recommendation (Docket No. 143), recommending that Defendants' motion be granted in part and denied in part, Defendants' timely objections to certain portions of the Report (Docket Nos. 145, 147), and Plaintiffs' opposition to those objections (Docket No. 146).

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[1] By Order dated March 31, 2005 (Docket No. 61), Judge Sandra Feuerstein dismissed several claims against these, and other defendants named in the Amended Complaint (Docket No. 17). By stipulated Order entered October 19, 2007, Plaintiffs voluntarily dismissed claims against defendants Robert Schoelle, Jr., Carol Kramer, Marguerite Costello, and Charles Fowler. As such, the defendants named here are those that remain. This case was transferred to the undersigned on December 26, 2007.

A. Standard of Review

Rule 72 of the Federal Rules of Civil Procedure permits magistrate judges to conduct proceedings on dispositive pretrial matters without the consent of the parties. Fed. R. Civ. P. 72(b). If any party timely serves and files written objections to a magistrate judge's report and recommendation on a dispositive motion, the district court must "make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Civ. P. 72(b)(3). The district court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* The district court is not required to review the factual or legal conclusions of the magistrate judge as to those portions of a report and recommendation to which no objections are addressed, see *Thomas v. Arn*, 474 U.S. 140, 150 (1985), and instead reviews those portions for clear error, see *Covey v. Simonton*, 481 F. Supp. 2d 224, 226 (E.D.N.Y. 2007).

B. Dismissal of Claims

First, no party has objected to those portions of the Magistrate Judge's Report recommending the grant of summary judgment with respect to the following claims alleged in the Amended Complaint: 1) Williams' conspiracy claim pursuant to 42 U.S.C. § 1983 (second cause of action); 2) Pellegrini's claim for race and color discrimination pursuant to Title VII, 42 U.S.C.

§ 2000e *et seq.* (first cause of action); 3) Pellegrini's age discrimination claim pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 623 (fourth cause of action); and 4) Plaintiffs' whistleblower claims pursuant to the New York State Civil Service Law § 75-b (sixth cause of action.) Having reviewed the Report for clear error, and finding none, summary judgment is GRANTED as to these claims. Moreover, the Magistrate Judge recommended that OHIA be dismissed from this action on the grounds that it is an administrative agency of the County of Nassau with no legal identity separate and apart from that of the County. As no party objects, and this Court finding no clear error in the Magistrate Judge's Report, OHIA is DISMISSED as a party to this action.

C. Defendants' Objections

Defendants allege that the Magistrate Judge erred by 1) concluding that Plaintiffs' speech was made in their capacity as private citizens upon a matter of public concern; 2) failing to dismiss all claims against the County Defendants as a result of the recommendation to dismiss the conspiracy claim brought pursuant to 42 U.S.C. § 1983; and 3) by denying the County Defendants qualified immunity.

Upon *de novo* review of the Report and the record upon which it is based, and upon careful consideration of the Defendants' objections, the Court overrules

the objections, and accepts and adopts Magistrate Judge Boyle's Report and Recommendations in its entirety.

CONCLUSION

Summary judgment is GRANTED as to 1) Williams' conspiracy claim pursuant to 42 U.S.C. § 1983 (second cause of action); 2) Pellegrini's claim of race and color discrimination pursuant to Title VII, 42 U.S.C. § 2000e *et seq*. (first cause of action); 3) Pellegrini's age discrimination claim pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 623 (fourth cause of action); and 4) plaintiffs' whistleblower claims pursuant to the New York State Civil Service Law § 75-b (sixth cause of action.) Summary judgment is DENIED as to Williams' and Pellegrini's claims of First Amendment retaliation pursuant to 42 U.S.C. § 1983 (second and third causes of action). Defendant Nassau County Office of Housing and Intergovernmental Affairs is DISMISSED from this action, and all defendants not previously dismissed remain parties. Qualified immunity is DENIED.

The Court hereby recommits this matter to Magistrate Judge Boyle for further pretrial proceedings, including settlement discussions if appropriate. By February 12, 2010, the parties are ORDERED to file a Joint Pretrial Order, under the supervision of the Magistrate Judge, consistent with this Order and in

compliance with this Court's Individual Motion Practices and Rules.

SO ORDERED.

Dated: Brooklyn, New York
January 22, 2010

ROSLYNN R. MAUSKOPF
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---------- X

THOMAS A. WILLIAMS and ROBIN E. PELLEGRINI,

Plaintiffs,

-against-

COUNTY OF NASSAU, THOMAS R. SUOZZI, in his individual and official capacity, NASSAU COUNTY CIVIL SERVICE COMMISSION, JOHN H. SENKO, JR., in his individual and official capacity, JAMES F. DEMOS, in his individual and official capacity, DAVID J. GUGERTY, in his individual and official capacity, ANTHONY M. CANCELLIERI, in his individual and official capacity, JOHN DONNELLY, in his individual and official capacity, CHARLES W. FOWLER, in his individual and official capacity, ROBERT L. SCHOELLE, JR., in his individual and official capacity, CAROL A. KRAMER, in her individual and official capacity,

REPORT AND RECOMMENDATION

CV 03-6337 (RRM) (ETB)

(Filed Feb. 2, 2009)

MARGUERITE COSTELLO, in her individual and official capacity, NASSAU COUNTY OFFICE OF HOUSING AND INTERGOVERNMENTAL AFFAIRS, PETER SYLVER, in his individual and official capacity, BRUCE NYMAN, in his individual and official capacity, and PATRICIA BOURNE, in her individual and official capacity,

Defendants

---------- X

TO THE HONORABLE ROSLYNN R. MAUSKOPF, UNITED STATES DISTRICT JUDGE:

Before the Court is the motion of the defendants, the County of Nassau (the "County"), Thomas Suozzi ("Suozzi"), the Nassau County Civil Service Commission (the "CSC"), John Senko ("Senko"), James Demos ("Demos"), David Gugerty ("Gugerty"), Anthony Cancellieri ("Cancellieri"), John Donnelly ("Donnelly"), the Nassau County Office of Housing and Intergovernmental Affairs ("OHIA"), Peter Sylver ("Sylver"), Bruce Nyman ("Nyman") and Patricia Bourne ("Bourne") (collectively referred to as "defendants"), for summary judgment, pursuant to Federal Rule of Civil Procedure 56. For the following reasons, I recommend that the defendants' motion be granted in part and denied in part.

FACTS

I. Procedural History

Plaintiffs, Thomas Williams ("Williams") and Robin Pellegrini ("Pellegrini") (collectively referred to as "plaintiffs"), commenced the instant civil rights action on December 18, 2003, asserting numerous causes of action against the County of Nassau, the CSC and OHIA, as well as certain individual defendants in both their official and individual capacities.[1] Plaintiffs amended their Complaint on February 15, 2004.

By Report and Recommendation dated March 15, 2005, the undersigned recommended that several causes of action be dismissed. Those recommendations were adopted by Judge Feuerstein on March 31, 2005.[2] Accordingly, the remaining causes of action are as follows: (1) plaintiffs' causes of action alleging First and Fourteenth Amendment violations pursuant to 42 U.S.C. § 1983 ("Section 1983") (second and third causes of action); (2) Williams' conspiracy claim pursuant to 42 U.S.C. § 1983 (second cause of action); (3) Pellegrini's cause of action alleging race and color discrimination pursuant to Title VII of the Civil

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[1] By stipulation and voluntary dismissal, plaintiffs agreed to discontinue the within action against defendants Robert Schoelle, Jr., Carol Kramer, Marguerite Costello and Charles Fowler. (Def. R. 56.1 Statement ¶ 66; Pl. R. 56.1 Statement ¶ 66.)

[2] This action was subsequently reassigned to Judge Mauskopf on December 26, 2007.

Rights Act of 1964, as amended, 42 U.S.C. § 2000e et *seq*. ("Title VII") (first cause of action); (4) Pellegrini's cause of action alleging age discrimination pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 623 ("ADEA") (fourth cause of action); and (5) plaintiffs' claims under New York State Civil Service Law § 75-b (sixth cause of action).[3]

II. Plaintiff Williams

Plaintiff Williams is the former Executive Director of the Nassau County Civil Service Commission. (Def. R. 56.1 Statement ("Def. R. 56.1") ¶ 3; Pl. R. 56.1 Statement ("Pl. R. 56.1") ¶ 3.) Williams was appointed to that position by defendants Senko, Demos and Gugerty who, at the time, served as the Commissioners of the CSC. (*Id*.) Williams began his appointment on or about December 17, 2002. (*Id*.)

Williams' role as Executive Director was to advise the CSC regarding civil service requirements, implement "the policies made by the three commissioners . . . assure that those policies were enforced and put into operation, and to handle [the] day-to-day operations of the commission staff" (Def R. 56.1 ¶ 4; Pl. R. 56.1 ¶ 4; Williams Dep. 65.) In this position, Williams

[3] The parties appear to dispute which claims actually remain in this action. After reviewing the Amended Complaint and the decision previously rendered with respect to the defendants' motion to dismiss, the undersigned finds the foregoing causes of action to be remaining in this action.

reported to the Commissioners, Senko, Demos and Gugerty. (Williams Dep. 66.) Although the CSC is the final decision maker with respect to civil service transactions for all of the municipal agencies within its jurisdiction, it relies on the guidance, advice and information reporting provided by its Executive Director. (Def. R. 56.1 ¶ 5; Pl. R. 56.1 ¶ 5.)

A. Complaints Concerning Williams' Conduct as Executive Director of the CSC

During mid-late 2003, in his capacity as Deputy County Executive ("DCE"), defendant Cancellieri began receiving complaints about Williams and the CSC generally from various County agencies and departments. (Def. R. 56.1 ¶ 10; Pl. R. 56.1 ¶ 10.) Defendant Suozzi, as County Executive, also received complaints concerning Williams' directorship of the CSC. (Def. R. 56.1 ¶¶ 27-29; Pl. R. 56.1 ¶¶ 27-29.)

1. The Assessment Review Commission

On January 31, 2003, Glen Borin ("Borin"), then Chair of the Nassau County Assessment Review Commission ("ARC"), emailed Cancellieri, stating that "[m]ovement on Civil Service Commission actions have come to a stop . . . We have been doing well on recruitment . . . But we will have to stop recruiting and risk losing candidates who have accepted offers or expressed interest." (Def R. 56.1 ¶ 7; Pl. R. 56.1 ¶ 7; Def Ex. G.) On August 13, 2003, Borin again emailed Cancellieri, as well as Arthur Gianelli

("Gianelli"), the DCE for the Management, Budget and Finance Department, stating that the ARC was losing qualified candidates because employee applications were not being processed timely. (Def. R. 56.1 ¶ 11; Pl. R. 56.1 ¶ 11; Def. Ex. L.) Borin further stated that the ARC "needs decisions on these issues or [it] will lose more of the candidates and develop a poor reputation in the appraisal community, which will frustrate future recruiting." (Def. Ex. L.) By email to Cancellieri dated August 25, 2003, and in response to an email from Williams attributing the loss of a particular candidate to the negligence of the ARC, (Pl. Ex. K), Bolin directly blamed Williams for the delay in processing employee applications for the ARC, stating that "ARC did not drop the ball . . . Tom Williams punctured it." (Def. Ex. M.) Borin further stated that "Williams [was] the cause of the delays which [made] it hard to recruit competitively for the best talent. (*Id*.)

2. The Information Technology Department

Similarly, by email dated May 20, 2003, Craig Love ("Love"), Director of the County Information Technology Department ("IT"), requested that Williams "expedite the approval process of the pending applications for Clerk I Seasonal positions in [Williams'] office since May 3rd." (Def. R. 56.1 ¶ 8; Pl. R. 56.1 ¶ 8; Def. Ex. H.) Love stated that "[t]here appear[ed] to be a misunderstanding by certain staff that the applications are on hold until the outcome of [the] seasonal duration appeal [was] determined,"

which he stated was incorrect. (Def. R. 56.1 ¶ 8; Pl. R. 56.1 ¶ 8; Def. Ex. H.) Love further stated that the Clerk I Seasonal positions were "critical to the overall success of our strategic initiatives." (Def. Ex. H.) Two days later, on May 22, 2003, Love emailed defendant Suozzi, requesting that he telephone Williams regarding the Clerk I Seasonal positions and stating that he had already called Williams and written him twice. (Def. R. 56.1 ¶ 9; Pl. R. 56.1 ¶ 9; Def Ex. I.) Love informed Suozzi that the delay in approving the Clerk I Seasonal applications was "causing operational issues" as well as "affecting real people who are waiting to start and in some cases are out of a job." (Def. Ex. I.)

3. The Management, Budget and Finance Department

By email dated June 30, 2003, Gianelli, the DCE for the Nassau County Management, Budget and Finance Department, emailed Cancellieri and Suozzi, advising them that Williams had spoken out at a Legislative hearing held that day concerning issues relating to the Office of Emergency Management ("OEM"). (Pl. Ex. CC.) Williams had not been present for certain earlier testimony provided at the Legislative hearing by defendant Donnelly, the Director of Human Resources for the County, and Liz Botwin of the County Attorney's Office concerning the approval of titles in the OEM. (Pl. Ex. CC; Def. Reply Ex. C.) Gianelli informed Cancellieri and Suozzi that "Williams proceed[ed] to declare the prior testimony from

members of the administration – testimony that he did not hear – 'wrong,' among other descriptors" and "attempted to put his [own] version forward."[4] (Pl. Ex. CC.)

Gianelli went on to state that the County "cannot have someone with no loyalty whatsoever to this administration in a position with this much authority." (Pl. Ex. CC.) Gianelli stated that he felt that Williams "undermined [the] administration . . . in the way he conducted himself, and he did so over a topic of importance – the Office of Emergency Management." (Pl. Ex. CC.) Gianelli further stated that even if Williams was correct in what he stated to the

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[4] Specifically, the transcript from the Legislative hearing reflects that Williams stated:

> I was coming by her [sic] today to visit with some of my friends when I was informed there had been some questions concerning Civil Service regulations and the Office of Emergency Management. I was also informed of some of the answers which I do not believe were entirely accurate and I wanted to make myself available.
>
> * * *
>
> What I was told was that the titles for the various individuals in the Office of Emergency Management have to await approval of Albany and there were questions as to whether they could be appointed before Albany approved. That's not accurate.
>
> The titles have been approved by the Nassau County Civil Service Commission. The titles are approved and they can be filled immediately upon that.

(Def. Reply Ex. C.)

Legislature, which Gianelli did not know if he was, "there were any number of ways to have helped put together the 'right' response without a public effort to embarrass members of [the] administration." (Pl. Ex. CC.) Gianelli concluded his email by stating that "Tom Williams is not just on a different team . . . he's playing a different game." (Pl. Ex. CC.)

In response to Gianelli's email, Cancellieri advised Suozzi via email on July 2, 2003 that he would speak to Williams but that Williams "really doesn't get it and will cause us more trouble down the road." (Cancellieri Dep. 105-06; Pl. Ex. CC.) By email dated July 2, 2003, Suozzi inquired of Cancellieri as to the "process to release" Williams and asked whether the County needed the Commissioners to do so. (Cancellieri Dep. 117; Suozzi Dep. 110-11; Pl. Ex. CC.) Cancellieri responded by email dated July 7, 2003, advising Suozzi that he "asked Liz [Botwin] to do some quiet research."[5] (Pl. Ex. CC.)

4. The Village of Garden City

During the Summer of 2003, the Village Administrator for Garden City, Robert Schoelle, Jr. ("Schoelle"), informed Cancellieri that the Village was having difficulties filling a position for Director of Recreation,

[5] Cancellieri testified at his deposition that the email should have stated that he asked Liz Botwin to do some "quick" research, not "quiet" and that the use of the word "quiet" was a typographical error. (Cancellieri Dep. 117-18.)

which is a civil service position. (Def. R. 56.1 ¶ 14; Pl. R. 56.1 ¶ 14.) Thereafter, by letter dated November 7, 2003, Schoelle sought Cancellieri's assistance "in helping the Village of Garden City improve relations with the Nassau County Civil Service Commission," stating that he had recently "detected" that the relationship between the two entities was "showing signs of deterioration." (Def. R. 56.1 ¶ 15; Pl. R. 56.1 ¶ 15; Def. Ex. T.) Schoelle requested any suggestions Cancellieri might have "to effect improvements." (Def. Ex. T.)

5. The Council of School Superintendents and BOCES

By letter dated October 2, 2003, Charles Fowler ("Fowler"), then President of the Nassau County Council of School Superintendents, notified defendant Suozzi that his organization was experiencing difficulties with the CSC under Williams' directorship. (Def. R. 56.1 ¶ 27; P1. R. 56.1 ¶ 27; Def Ex. S.) In his letter, Fowler identified an "apparent conflict between the State and the County regarding Nassau County school districts' authority to employ persons from Civil Service lists who are awaiting fingerprint clearance." (Def. Ex. S.) Fowler stated that New York State law permits such individuals to begin employment while awaiting the results of their fingerprint submission but that due to a ruling instituted by

Williams,[6] that opportunity was not available to school districts in Nassau County. (*Id*.) Fowler advised Suozzi that "the working relationship with the [CSC], which was very positive under former Executive Director Karl Kampe, has been negatively impacted by the events associated with this issue." (*Id*.) Fowler further advised Suozzi that "[t]he school personnel administrators of the County, who work directly on a daily basis with the Civil Service office, feel that they should discontinue their long-standing practice of meeting regularly with the Executive Director, as Mr. Williams has shown little or no interest in developing a positive working relationship." (*Id*.)

Similarly, by letter dated November 5, 2003, then Executive Director of Human Resources of Nassau County BOCES, Marguerite Costello ("Costello"), notified Suozzi of her "concerns" regarding Williams. (Def. R. 56.1 ¶ 28; Pl. R. 56.1 ¶ 28; Def. Ex. R.) Specifically, Costello stated that Williams had "obstructed the hiring process for Civil Service employees, and . . . [had] been rude and condescending to top leaders of [her] agency," which resulted in BOCES' ability to provide services to the County's children having been "compromised." (Def. Ex. R; Costello Dep. 41-44.)

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[6] Williams testified at his deposition that the ruling at issue was instituted by the Commissioners, not himself. (Williams Dep. 130-32.) Commissioner Senko testified similarly at his deposition. (Senko Dep. 194, 199.)

6. The Planning Department

On October 8, 2003, Patricia Bourne, the Director of Planning, sent a "confidential memo" to defendants Sylver, Cancellieri and Donnelly, stating that she was subjected to "abusive and threatening remarks" by Williams during a telephone conversation that occurred that day. (Def. Ex. P.) Bourne further described Williams' behavior as "erratic" and stated that Williams "was abusive, crude and so completely unprofessional on the telephone that I was left speechless." (*Id*.) In addition, Bourne stated that this was not the first time that Williams had "behaved erratically" toward the Planning Department. (*Id*.)

7. The Treasury Department

On October 21, 2003, former Nassau County Treasurer Henry Dachowitz ("Dachowitz") sent an email to Cancellieri, Gianelli and Donnelly entitled "Harassment by Civil Service/Tom Williams." (Def. Ex. Q.) In his email Dachowitz complained that Williams was "dictating" how Dachowitz was to use his staff (Def. R. 56.1 ¶ 13; Pl. R. 56.1 ¶ 13; Def. Ex. Q.) Dachowitz further complained that Williams was engaging in "personal attacks and vendettas" against him. (Def. Ex. Q.)

8. The Village of Rockville Centre

By letter dated November 10, 2003, Carol Kramer ("Kramer"), Deputy Clerk Treasurer for the Village of Rockville Centre, expressed concerns to

Suozzi regarding how Civil Service matters were being handled by Williams.[7] (Def. R. 56.1 ¶ 29; Pl. R. 56.1 ¶ 29.) Kramer testified at her deposition that Rockville Centre was concerned about its communications with Williams and felt that the CSC was not "working with the Village." (Kramer Dep. 58, 68.) Specifically, Kramer testified that during her one interaction with Williams, which took place in August 2003, she felt that "he was attacking [her] for something that [she] had no control over." (Kramer Dep. 59, 62.) Kramer described Williams as "very brusque in his conversation" and stated that he was not understanding. (Kramer Dep. 59.) Kramer further testified that she felt that the way Williams addressed her was "not the way you speak to a village or a person in the village." (Kramer Dep. 59.)

B. Williams' Reports of Misconduct by County Agencies and Employees

During his tenure as Executive Director, Williams reported to the CSC, as well as to defendant Cancellieri, that County employees in Planning, OHIA and the Treasury Department were working out of title. (Def. R. 56.1 ¶ 43-44; Pl. R. 56.1 ¶ 43-44;

[7] Kramer testified at her deposition that the Village Administrator, Ronald Wasson, actually prepared this letter on Kramer's letterhead and then asked her to sign it. (Kramer Dep. 24-25, 49-54.) Kramer did not object to signing the letter or to the contents of it. (Kramer Dep. 25.)

Williams Dep. 215-17.) The CSC thereafter decertified the payroll for a number of County employees. (*Id.*)

1. Planning

In April 2003, an issue arose with respect to the status of several provisional employees[8] in Planning. (Williams Dep. 164-65.) The issue concerned the placement order of individuals on the Planner I and Planner III exams that were certified on April 16, 2003. (Williams Dep. 185.) Specifically, five provisional employees had either failed the placement exam or were "too far down on the list to be able to be reached and be appointed." (Williams Dep. 188.) Shortly thereafter, Williams met with the Director of Planning, defendant Bourne, concerning this issue. (Def. R. 56.1 ¶ 19; Pl. R. 56.1 ¶ 19.) During this meeting, Williams and his staff provided instructions to Bourne regarding the necessary paperwork to resolve the provisional employee problems. (*Id.*) Williams and his staff continued to interact with Planning subsequent to this meeting in an effort to assist it with its employee problems before the 60-day period for

[8] "A provisional employee is one who is hired in a competitive position for which there is no existing list of individuals who have taken and passed a [Civil Service] test." (Decl. of Thomas A Williams, dated Nov. 27, 2007 ("Williams Decl."), ¶ 8.)

resolving its personnel issues expired.[9] (Williams Dep. 196-97, 200-01, 206-08.)

In May 2003, Williams brought the problems Planning was experiencing to the attention of the Commissioners. (Williams Dep. 202-03.) The Commissioners did not direct Williams to take any specific action other than to work with Planning to resolve the problem. (Williams Dep. 203-04.)

In June 2003, Planning's 60-day placement period expired. (Williams Dep. 209-10.) At that time, one of the provisional employees was appointed to a full-time position. (Williams Dep. 210.) The other four positions were not filled. (Williams Dep. 210.) Williams informed Planning that it needed to resolve the issue immediately and that the provisional employees would not continue to be employed after June 16, 2003. (Williams Dep. 210.) In July 2003, Bourne advised Williams that the remaining provisional employees were being terminated from Planning and appointed to positions in OHIA until she could obtain approval to reinstate them in Planning. (Williams Dep. 212-13.) Williams received paperwork verifying that this was in fact done and considered the issue resolved. (Williams Dep. 213, 217.)

In late August or early September 2003, Williams learned that the provisional employees who Bourne

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[9] At the end of the 60-day period, any provisional employees that were not appointed to full-time positions would be terminated. (Williams Dep. 197.)

had advised would be transferred to OHIA were still working in Planning. (Williams Dep. 214.) On September 18, 2003, Williams met with Cancellieri and informed him that a number of employees who were on OHIA's payroll were actually performing work for Planning in positions to which they were not entitled. (Williams Dep. 215-17.) Williams further advised Cancellieri that the arrangement could possibly constitute a misuse of federal funds if individuals were being paid out of OHIA funds but not actually performing work for OHIA. (Williams Dep. 217-18.) A couple of days later, Cancellieri advised Williams that he assigned defendant Donnelly, the Director of Human Resources, to handle the issue with Planning. (Williams Dep. 220-21.)

As of October 2003, no action was taken by Planning to correct the issues Williams raised with Cancellieri on September 18, 2003. (Williams Dep. 248-49.) Williams again brought the issue to the attention of the Commissioners on October 28, 2003. (Williams Dep. 249.) On October 31, 2003, the CSC withdrew the payroll certification for two former Planners. (Def. R. 56.1 ¶ 21; Pl. R. 56.1 ¶ 21.)

2. OHIA

The CSC also came to learn that approximately five employees in OHIA were working out of title. (Gugerty Dep. 300.) By resolution dated October 28, 2003, the CSC voted and instructed Williams to notify the five employees that payroll certification with

respect to those employees would be withdrawn in the future.[10] (Senko 155-59; Gugerty Dep. 300; Pl. Ex. Q.) Williams thereafter sent an inter-departmental memorandum, dated October 31, 2003, to defendant Sylver, notifying him that the five employees "must be terminated immediately" and that payroll certification for each of them would be withdrawn, effective October 31, 2003. (Pl. Ex. R.)

3. The Treasury Department

With respect to the Treasury Department, there were three employees who were working out of title while Williams was the Executive Director of the CSC. (Williams Dep. 223.) Specifically, two of the employees were being given tasks to perform that were not appropriate to their job titles and the third, Angela DiMascio ("DiMascio"), was a provisional employee who failed the civil service exam for the placement she was seeking. (Williams Dep. 223-28.)

With respect to DiMascio, Williams advised Dachowitz, the Treasurer, that he needed to fill the position DiMascio was provisionally performing but that he could not fill it with DiMascio since she had failed the placement exam. (Williams Dep. 234-35.)

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[10] By that same resolution, the Commissioners also voted to withdraw the payroll certification for another employee, Jason Plaskowitz, who was employed as a Clerk Seasonal in the Office of Management and Budget, but who was actually performing work for the IT Department. (Pl. Ex. Q.)

Williams was thereafter informed that although Dachowitz had interviewed three eligible candidates for the position, Dachowitz had discouraged all three from accepting the position.[11] (Williams Dep. 236-38; Pl. Ex. AA.) Williams presented this information to the Commissioners who passed a resolution stating that Dachowitz would not be permitted to reappoint DiMascio to the provisional position she had previously held. (Williams Dep. 238-39.) Upon learning that Dachowitz was continuing to employ DiMascio out of title, Williams advised Dachowitz on more than one occasion that his actions were "illegal" and a "flagrant violation of Civil Service Law." (Williams Dep. 243; Pl. Ex. L; Pl. Ex. V.) On July 22, 2003, the Commissioners voted to withdraw the payroll certification for DiMascio. (Pl. Ex. V.)

On October 28, 2003, Williams advised the Commissioners that the issues arising in the Treasury Department had still not been corrected. (Williams Dep. 248-49.) The Commissioners thereafter withdrew the payroll certification for the three Treasury employees. (Williams Dep. 249.)

An investigation into Williams' allegations was conducted by the Office of the Nassau County Commissioner of Investigations. (Def. Ex. MM.) In a

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[11] By inter-departmental memorandum dated April 23, 2003, Dachowitz informed Williams that all three eligible candidates had declined the position and further requested that he be permitted to reappoint DiMascio to the position. (Pl. Ex. W.)

report dated January 19, 2004, the Commissioner of Investigations found that "federal grant money was *not* used to fund Planning Department salaries" as Williams had alleged to Cancellieri in September 2003.[12] (Def Ex. MM (emphasis in original).) Nor did the Commissioner of Investigations find any wrongdoing on the part of Planning with respect to the assignment of proper titles to its employees. (Def. Ex. MM.) Rather, the Commissioner of Investigations found that "[w]hile errors occurred in terms of assigning proper titles to Planning Department employees and completing required paperwork, there was no attempt to circumvent the Civil Service Commission or its requirements." (Def Ex. MM.) The Commissioner of Investigations attributed the Planning Department's errors to "a lack of understanding of Civil Service requirements and procedures, and from a lack of assistance from Civil Service." (Def. Ex. MM.)

Prior to his termination, Williams never notified any media outlets regarding his concerns that the County had engaged in improper or illegal employment actions. (Def. R. 56.1 ¶ 46; Pl. R. 56.1 ¶ 46.) Nor did Williams notify the State Civil Service Commissioner or any law enforcement agencies of the illegal employment actions he alleges to have occurred. (Def.

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[12] The Commissioner of Investigations found that the Planning employees' salaries were paid out of County "general funds under the Housing 85 category," which were subsequently "reimbursed by the Office of Planning through journal entries." (Def. Ex. MM.)

R. 56.1 ¶ 47; Pl. R. 56.1 ¶ 47.) Following Williams' termination, the CSC rescinded some, but not all, of the payroll decertifications. (Gugerty Dep. 336-37; Pl. Ex. BB.)

C. Williams' Termination

In late October or early November 2003, Cancellieri met with two of the three Commissioners – Demos and Gugerty[13] – as well as defendant Donnelly to discuss the alleged problems that the various municipal agencies and County departments were having with Williams. (Cancellieri Dep. 188-89, 207, 211; Donnelly Dep. 152-54.) On November 10, 2003, a meeting was held between Williams and the CSC Commissioners. (Def R. 56.1 ¶ 41; Pl. R. 56.1 ¶ 41.) Williams was informed that his employment with the CSC was being terminated and was provided a memo containing the rationale for his termination, as well as four letters from various County agencies containing complaints about Williams, upon which the Commissioners' based their decision to terminate. (Williams Dep. 413-16; Pl. Ex. Z.) The Commissioners advised Williams of the reasons for his termination and passed a resolution terminating his employment.[14] (Williams Dep. 414-15.)

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[13] Commissioner Senko was on vacation at this time. (Senko Dep. 42.)

[14] The Commissioners voted 2 to 1 in favor of terminating Williams, with Senko voting against termination. (Senko Dep. 53-57; Gugerty Dep. 302.)

III. Plaintiff Pellegrini

Plaintiff Pellegrini is the former Acting Director of the Nassau County Office of Housing and Intergovernmental Affairs, which oversees the administration of millions of dollars in federal funding for block grant spending for housing and other initiatives to assist moderate and low income persons. (Def. R. 56.1 ¶ 50-51; Pl. R. 56.1 ¶ 50-51.) Pellegrini was appointed to that position in 2002 when defendant Suozzi took office as County Executive. (Def. R. 56.1 ¶ 51; Pl. R. 56.1 ¶ 51.) Prior to this appointment, Pellegrini had been employed with OHIA since 1993, as both a Community Development Representative and the Community Development Director. (Pellegrini Dep. 13, 23-24.)

In March 2002, defendant Sylver was appointed Deputy County Executive for the County's "Economic Development vertical," which included OHIA and Planning. (Def. R. 56.1 ¶ 52; Pl. R. 56.1 ¶ 52.) At the time of Sylver's appointment, Pellegrini remained in her position of Acting Director of OHIA as a "holdover" from the previous administration. (*Id*.) Pellegrini was the only person in OHIA at that time who possessed certain important institutional knowledge concerning the operation of the agency. (Def. R. 56.1 ¶ 53; Pl. R. 56.1 ¶ 53.)

Shortly after Sylver began his appointment, Pellegrini attended a meeting with Sylver, a land development contractor, Chris Daly ("Daly"), and OHIA's outside counsel, Robert Benrubi ("Benrubi"),

during which Sylver requested that Daly hire his brother in return for financial help that would be provided to Daly's company through the HOME program. (Def. R. 56.1 ¶ 54; Pl. R. 56.1 ¶ 54; Pellegrini Dep. 117-21.) Pellegrini found Sylver's request to be improper and reported it to defendant Nyman. (Def. R. 56.1 ¶ 54; Pl. R. 56.1 ¶ 54.) Pellegrini further reported the incident to the then Chief Deputy County Executive, William Cunningham. (Def. R. 56.1 ¶ 55; Pl. R. 56.1 ¶ 55.)

In April 2002, Pellegrini learned that Michael Levine ("Levine"), a planner from North Hempstead, would begin working at OHIA as a Community Development Representative. (Def. R. 56.1 ¶ 55; Pl. R. 56.1 ¶ 56.) However, shortly after commencing work at OHIA – and being placed on OHIA's payroll – Levine began working in Planning instead.[15] (*Id.*) Pellegrini thereafter approached Sylver to protest Levine's salary being paid out of OHIA's budget when he was not actually working on the community block grant programs, asserting that such a practice was contrary to the regulations of the United States Department of Housing and Urban Development ("HUD"). (Def. R. 56.1 ¶ 57; Pl. R. 56.1 ¶ 57.) Sylver told Pellegrini to "[Mind [her] own business." (*Id.*; Pellegrini Dep. 93-94.) Pellegrini never voiced her complaints concerning Levine's salary arrangement

[15] Levine was also one of the employees that Williams advised Planning was working out of title. (Bourne Dep. 240-41, 246-47.

to defendant Suozzi. (Def. R. 56.1 ¶ 58; Pl. R. 56.1 ¶ 58.)

During this same time, Pellegrini also believed that the salary of the newly appointed Director of Real Estate was being improperly paid out of HUD monies. (Def. R. 56.1 ¶ 59; P1. R. 56.1 ¶ 59.) Pellegrini did not report this to Sylver, but rather advised Benrubi of her suspicions with the expectation that he would report it to Suozzi. (Def. R. 56.1 ¶¶ 59-60; Pl. R. 56.1 ¶¶ 59-60.) In addition, Pellegrini felt that several other persons, including Sylver, his secretary and his Chief of Staff, were being paid improperly out of HUD monies. (Def. R. 56.1 ¶ 61; Pl. R. 56.1 ¶ 61.) Pellegrini reported her allegations to Benrubi and another outside attorney for the County, Dan Deegan ("Deegan"), as well as defendant Nyman, and believed that Benrubi was relaying the information to Suozzi. (*Id*.; Pellegrini Dep. 113-14.) Pellegrini never spoke to Sylver about the source of his salary or the salaries of his secretary and Chief of Staff. (Pellegrini Dep. 114.)

Another issue that concerned Pellegrini was Sylver's alleged issuance of contracts without the benefit of requests for proposals. (Def. R. 56.1 ¶ 62; Pl. R. 56.1 ¶ 62.) Pellegrini reported her concerns to Benrubi and Deegan. (*Id.*)

In May 20002 [sic], Sylver hired a consultant, Don Schatz ("Schatz"), to oversee Pellegrini. (Pellegrini Dep. 131-32.) In his capacity as a consultant, Schatz visited the OHIA offices once per week and observed

Pellegrini performing her job. (*Id*. 132-33.) Schatz also asked Pellegrini questions pertaining to how she performed her job, as well as her daily routine, and took notes with respect to her position. (*Id*.) This arrangement lasted for approximately five months. (*Id*. 132.)

On September 20, 2002, Sylver called Pellegrini to his office and terminated her employment. (Def. R. 56.1 ¶ 65; Pl. R. 56.1 ¶ 65.) Thereafter, Pellegrini met with John Donnelly for the purpose of possibly obtaining another position with the County. (Pellegrini Dep. 191-92, 194; Donnelly Dep. 25-26.) During this meeting, Pellegrini advised Donnelly that she had been terminated from her position at OHIA and that she believed her termination was the result of information that she possessed that reflected negatively on Sylver. (Pellegrini Dep. 194-95; Donnelly Dep. 27-29.) Pellegrini was not ultimately hired for another position with the County. (Pellegrini Dep. 195, 201; Donnelly Dep. 30-31.)

DISCUSSION

I. Legal Standard

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden is on the moving party to establish the lack of any factual issues. *See Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986). The very language of this standard reveals that an otherwise properly supported motion for summary judgment will not be defeated because of the mere existence of some alleged factual dispute between the parties. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247 (1986). Rather, the requirement is that there be no "genuine issue of material fact." *Id*. at 248.

The inferences to be drawn from the underlying facts are to be viewed in the light most favorable to the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588 (1986). When the moving party has carried its burden, the party opposing summary judgment must do more than simply show that "there is some metaphysical doubt as to the material facts." *Id*. at 586. Under Rule 56(e), the party opposing the motion "may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing there is a genuine issue for trial." *Anderson,* 477 U.S. at 248.

When considering a motion for summary judgment, the district court "must also be 'mindful of the underlying standards and burdens of proof' . . . because the evidentiary burdens that the respective parties will bear at trial guide district courts in their determination of summary judgment motions." *SEC v. Meltzer,* 440 F. Supp. 2d 179, 187 (E.D.N.Y. 2006) (quoting *Brady v. Town of Colchester,* 863 F.2d 205, 211 (2d Cir. 1988) (internal citations omitted). "Where the non-moving party would bear the ultimate burden of proof on an issue at trial, the burden on the moving

party is satisfied if he can point to an absence of evidence to support an essential element of the non-movant's claim." *Meltzer,* 440 F. Supp. 2d at 187.

Summary judgment should not be regarded as a procedural shortcut, but rather as an integral part of the Federal Rules of Civil Procedure, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex,* 477 U.S. at 327. Rule 56 must be "construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury," but also for the rights of those persons "opposing such claims and defenses to demonstrate, . . . prior to trial, that the claims and defenses have no factual basis." *Id*. By its terms, Rule 56 does not require that a trial judge make any findings of fact. *See Anderson,* 477 U.S. at 250. The only inquiry to be performed is the determination of whether there is a need for trial. *See id*. The court's principal analysis on a motion for summary judgment is to ascertain whether there are any "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id*

II. Plaintiffs' First Amendment Retaliation Claims

To establish a First Amendment retaliation claim under Section 1983, a public employee must demonstrate the following: (1) the speech at issue was protected; (2) he suffered an adverse employment

action; and (3) "the speech at issue was a substantial or motivating factor in the adverse employment action." *Benvenisti v. City of New York,* No. 04 Civ. 3166, 2006 U.S. Dist. LEXIS 73373, at *21-22 (S.D.N.Y. Sept. 23, 2006) (citing cases); *see also Healy v. City of New York,* No. 04 Civ. 7344, 2006 U.S. Dist. LEXIS 86344, at *11 (S.D.N.Y. Nov. 22, 2006) (citing cases).

In determining whether a public employee's speech is protected, courts must engage in a two-part inquiry. *See Healy,* 2006 U.S. Dist. LEXIS 86344, at * 12 (citing *Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006)). First, a court must determine "whether the employee spoke as a citizen on a matter of public concern." *Garcetti,* 547 U.S. at 418 (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)). Speech is considered protected where it pertains to a "matter of political, social or other concern to the community." *Connick v. Myers,* 461 U.S. 138, 146 (1983)). However, "speech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment falls outside the realm of constitutional protection." *Benvenisti,* 2006 U.S. Dist. LEXIS 73373, at *32 (internal quotation marks and citations omitted). Moreover, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes," *Garcetti,* 547 U.S. at 421, and "the First Amendment does not protect the employee's speech from discipline or retaliation by the employer." *Weintraub v. Bd. of Educ.,* 489 F. Supp. 2d 209, 219

(E.D.N.Y. 2006). "The inquiry into the protected status of speech is one of law, not fact." *Benvenisti,* 2006 U.S. Dist. LEXIS 73373, at *24 (quoting *Connick,* 461 U.S. at 148 n.7); *see also Lewis v. Cowen,* 165 F.3d 154, 163 (2d Cir. 1999) ("Whether an employee's speech addresses a matter of public concern is a question of law for the court to decide. . . .").

If the answer to the first part of the inquiry is no and the employee's speech is found to be of a private matter rather than a public one, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." *Garcetti,* 547 U.S. at 418 (citing *Connick,* 461 U.S. at 147). However, if the answer is yes, the court must "move to the second part of the test, questioning 'whether the relevant government entity has an adequate justification for treating the employee differently from any other member of the general public.'" *Healy,* 2006 U.S. Dist. LEXIS 86344, at *12 (quoting *Garcetti,* 547 U.S. at 418). This requires the court to arrive "at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering,* 391 U.S. at 568 (commonly referred to as the "*Pickering* balancing test"); *see also McEvoy v. Spencer,* 124 F.3d 92, 98 (2d Cir. 1997) (holding that the ultimate question is whether the employee's right to speak is outweighed by the public employer's interest in the effective operation of the workplace). This, too, is an issue of

law for the court to decide. *See Lewis,* 165 F.3d at 164 ("[I]t is the court's task to apply the [balancing test] to the facts.") (alteration in original); *Mataraza v. Newburgh Enlarged City Sch. Dist.,* 294 F. Supp. 2d 483, 487 (S.D.N.Y. 2000) ("It is the Court, not the jury, that performs the *Pickering* balancing test.").

In conducting the *Pickering* balancing test, "a court must consider whether the statement sought to be protected 'impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships . . . or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.'" *Lewis,* 165 F.3d at 162 (quoting *Rankin v. McPherson,* 483 U.S. 378, 388 (1987)); *see also Rookard v. Health and Hosps. Corp.,* 710 F.2d 41, 46 (2d Cir. 1983) ("A] court should consider whether the speech impaired the employee's ability to perform his duties, disrupted working relationships requiring personal loyalty and confidence, or otherwise impeded the regular operation of the employing agency."). Additionally, the "manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." *Rankin,* 483 U.S. at 388; *see also Lewis,* 165 F.3d at 162. The government bears the burden of demonstrating that the challenged speech threatens to interfere with its operations. *See Lewis,* 165 F.3d at 162. However, the government is only required to show a "likely interference with its operations, . . . not an actual disruption." *Id*. at 163 (internal quotation marks and citations omitted); *see also Mataraza,* 294

F. Supp. 2d at 488 (rejecting plaintiff's argument that the defendant must demonstrate that his speech actually disrupted the workplace).

Finally, under the *Pickering* balancing test, speech charging unlawful, fraudulent, or corrupt conduct carries great weight. *See Rookard,* 710 F.2d at 46; *Benvenisti,* 2006 U.S. Dist. LEXIS 73373, at *31 ("Allegations of public corruption or wrongdoing are almost always matters of public concern."). "An employee's charge of unlawful conduct is given far greater weight than is a complaint as to the fairness of internal office operations." *Dangler v. New York City Off Track Betting Corp.,* 193 F.3d 130, 140 (2d Cir. 1999) (citing *Connick,* 461 U.S. at 14849) (additional citations omitted). "A public employer cannot, with impunity, fire an employee who 'blew the whistle' on other employees' violations of law on the ground that those disclosures impaired office morale." *Dangler,* 193 F.3d at 140 (citing *Frank v. Relin,* 1 F.3d 1317, 1331 (2d Cir. 1993)).

A. Williams

Williams alleges a First Amendment retaliation claim against all of the remaining defendants. Defendants assert that they are entitled to summary judgment on this claim because Williams' speech was made pursuant to his professional responsibilities, and therefore is not protected under the First Amendment. Alternatively, defendants argue that even if Williams did engage in protected speech, and

was subsequently terminated as a result of that speech, defendants are entitled to qualified immunity.

It is undisputed that Williams' responsibilities as Executive Director of the CSC included enforcing the rules and regulations governing civil service employees and investigating any suspected wrongdoing. *See* N.Y. Civ. Serv. Law § 6 (incorporated by reference in the Nassau County charter). Accordingly, much of Williams' allegations of out of title work by civil service employees – specifically, those allegations made to the Commissioners concerning Planning, OHIA and the Treasury Department – were made pursuant to his official duties as Executive Director and undeserving of First Amendment protection. *See Garcetti,* 547 U.S. at 421. However, the record in this action also clearly establishes that Williams reported solely to the Commissioners and not to the County Executive or any of his Deputy County Executives. (Williams Dep. 66; Gugerty Dep. 16-17; Cancellieri Dep. 72; Suozzi Dep. 52-53.) The record further establishes that Williams not only informed the Commissioners of his concerns regarding out of title work being performed – which, as stated above, fell within his duties as Executive Director – but that he also reported such information to defendant Cancellieri, to whom he owed no reporting responsibility. (Suozzi Dep. 183 (stating that Cancellieri did not have the authority to terminate Williams))

Specifically, as discussed above, Williams met with Cancellieri in September 2003 and informed him that a number of employees who were on OHIA's

payroll were actually performing out of title work for Planning. (Williams Dep. 215-17.) Williams further advised Cancellieri that the arrangement could constitute a misuse of federal funds if individuals were being paid out of OHIA funds but not actually performing work for OHIA. (Williams Dep. 217-18.)

Where a public employee "goes outside of the established institutional channels in order to express a complaint or concern, the employee is speaking as a citizen, and the speech is protected by the First Amendment." *Weintraub,* 489 F. Supp. 2d at 219. That is precisely what occurred here. In light of the fact that Williams had no duty to report any concerns he may have had to Cancellieri, his actions in doing so were taken as a private citizen and not as a public employee. As such, the rule established in *Garcetti* does not apply. *See id*. at 220 (holding that plaintiff's complaints to coworkers were not within the scope of his employment duties and entitled to First Amendment protection).

Having found that Williams' speech was made in his capacity as a private citizen upon a matter of public concern, the Court must next balance Williams' interest in free speech against defendants' interest in the effective operation of the CSC and the County. In effect, Williams' speech alleged that County agencies and employees were engaging in improper, and potentially corrupt or fraudulent, practices. This is clearly a matter of public concern and therefore protected by the First Amendment. *See Dangler,* 193

F.3d at 140 (holding that where plaintiff alleged high-level officials within defendant's corporation of "improper and corrupt behavior . . . [t]here can be no question that [her] speech therefore implicated particularly strong First Amendment interests"). As stated above, speech of this nature weighs heavily in favor of the employee when balancing the competing interests. *See Rookard,* 710 F.2d at 46.

Moreover, defendants have not met their burden of establishing that Williams' speech was likely to interfere with its operations. Although the record contains evidence of numerous complaints lodged against Williams by various County agencies and departments, most, if not all, of the actions complained of were actually taken by Williams as a result of an order issued by the Commissioners. (Williams Dep. 66 (confirming that "[a]ll of the implementation of policy . . . was to be at the direction of the Civil Service Commissioners"); Suozzi Dep. 98.) The Commissioners themselves testified at their depositions that they were responsible for making the ultimate determinations with respect to civil service policy and that Williams merely carried out their instructions. (Senko Dep. 15; Gugerty Dep. 30-33, 73-74.) Moreover, two of the three Commissioners were unable to specify any actions by Williams that they found to be improper. (Senko Dep. 27-28; Demos Dep. 113-16, 135-36.) In addition, as plaintiffs point out, the concerns that Williams raised to both the Commissioners and Cancellieri, whether ultimately found to be true or not, were aimed at improving the way the County

was run. Accordingly, the defendants' contention that the voicing of such concerns interfered with the effective operation of the County is without merit.

Based on the foregoing, I find that Williams engaged in speech protected by the First Amendment. Moreover, it is undisputed that by being terminated Williams suffered an adverse employment action. *See Morris v. Lindau,* 196 F.3d 102, 110 (2d Cir. 1999) ("Adverse employment actions include discharge. . . ."). I further find that, based on the evidence submitted, sufficient questions of fact exist with respect to whether or not Williams' speech was the motivating factor for his termination, particularly in light of the fact that Williams was terminated less than two months after voicing his concerns to defendant Cancellieri. Such issues of fact preclude a determination of summary judgment. *See id*. ("Summary judgment is precluded where questions regarding an employer's motive predominate in inquiry regarding how important a role the protected speech played in the adverse employment decision.").

Accordingly, I recommend that defendants' motion for summary judgment with respect to Williams' claim of First Amendment retaliation be denied.

B. Pellegrini

As a result of defendants' prior motion to dismiss, Pellegrini's First Amendment retaliation claim remains only against defendants Nassau County and Peter Sylver. As with Williams, defendants assert

that Pellegrini did not engage in protected speech because her statements were made pursuant to her official duties as Acting Director of OHIA and therefore, she does not have a cognizable First Amendment retaliation claim. For reasons similar to those outlined above with respect to Williams, I find defendants' argument lacking.

As Acting Director of OHIA, Pellegrini was responsible for the oversight of millions of dollars in federal funds allocated for community development spending for housing and various other initiatives to assist moderate to low-income persons residing in the County. (Pellegrini Dep. 59-60.) In that capacity, Pellegrini reported directly to Suozzi when she was first appointed in January 2002, and thereafter reported to Sylver when he was appointed DCE for the Economic Development vertical in March 2002. (Pellegrini Dep. 59; Pellegrini Decl. 10; Suozzi Dep. 33-34.)

It is undisputed that Pellegrini voiced her concerns regarding out of title work being performed by an OHIA employee and Sylver's allegedly improper behavior to Sylver directly, as well as to other County executives, such as defendant Nyman. Such speech would likely be precluded from First Amendment protection under the Supreme Court's ruling in *Garcetti*. However, Pellegrini's deposition is rife with examples wherein Pellegrini went outside of the County structure to complain about what she perceived to be corrupt and fraudulent behavior within OHIA, and particularly on Sylvar's [sic] part, on more

than one occasion over a period of several months. For example, Pellegrini testified that she voiced concerns to Barbara Scammacca, an in-house human resources employee, (Pellegrini Dep. 90, 94, 139-40), as well as Joe Machiano, who headed the County's Rehab Program, and Cathy Sevchuck, a Mental Development Representative. (Pellegrini Dep. 86-87.) Although these individuals are or were County employees, it has not been shown that Pellegrini owed any sort of reporting duty to them. Rather, they were Pellegrini's coworkers.

In addition, Pellegrini testified that she also raised numerous concerns with the County's outside economic development counsel, Robert Benrubi and Dan Deegan, neither of whom were County employees. (Pellegrini Dep. 99-101, 111-15, 131, 139.) Finally, Pellegrini also spoke with the former Police Chief of Long Beach, Chief Buscemi, as well as his wife and his daughter, Laura, at their home, informing them of her allegations concerning Sylver and seeking advice as to how she should proceed. (Pellegrini Dep. 120-21, 186, 191.) As with Williams, going "outside of the established institutional channels in order to express a complaint or concern" renders Pellegrini's speech that of a citizen, not a public employee, and such speech is protected by the First Amendment. *Weintraub,* 489 F. Supp. 2d at 219. Moreover, even if the reporting of such concerns could be found to be within Pellegrini's employment responsibilities, as defendants contend, there has been no evidence offered from which the court could conclude that

Pellegrini was obligated to report such information to coworkers or individuals not employed by the County. *See Weintraub,* 489 F. Supp. 2d at 220 (holding that complaints to coworkers constitute protected First Amendment speech).

Furthermore, for the same reasons set forth above, defendants have not met their burden of establishing that Pellegrini's speech was likely to disrupt its operations. As with Williams, Pellegrini was voicing concerns regarding allegedly corrupt and fraudulent practices within OHIA and, more specifically, by her supervisor, Sylver. As stated above, such speech is almost always considered a matter of public concern and is given great weight when balanced against the government's interests. *See Dangler,* 193 F.3d at 140; *Benvenisti,* 2006 U.S. Dist. LEXIS 73373, at *31. In addition, defendants have failed to offer any evidence as to how Pellegrini's speech interfered with the effective operation of the County. Rather, defendants' argument hinges solely on the issue of whether or not Pellegrini's speech is protected. As a result, defendants failed to even advance an argument for the Court to consider. Accordingly, having found that Pellegrini spoke as a citizen on a matter of public concern and that defendants have failed to demonstrate that the balance under *Pickering* should weight in their favor, I find that Pellegrini's speech was indeed protected under the First Amendment.

Based on the foregoing, I find that Pellegrini has satisfied the first element of a First Amendment retaliation claim. In addition, it is undisputed that

Pellegrini suffered an adverse employment action – *i.e.*, her termination – thereby satisfying the second element of her claim. *See Morris*, 196 F.3d at 110. However, as with Williams, I find that, based on the evidence submitted, sufficient questions of fact exist with respect to whether or not Pellegrini's termination was motived by her speech, particularly since Pellegrini's speech and termination all occurred within a period of six months. Such issues of fact accordingly preclude a determination of summary judgment. *See supra* at 26-27; *see also Morris,* 196 F.3d at 110.

Based on the foregoing, I recommend that defendants' motion for summary judgment with respect to Pellegrini's First Amendment retaliation claim be denied.

C. Qualified Immunity

Defendants assert that even if plaintiffs are successful on their First Amendment retaliation claims, the individual defendants are entitled to qualified immunity.[16] Qualified immunity shields government officials from civil liability resulting from the performance of their discretionary functions only where their conduct "did not violate plaintiff's clearly

[16] The defense of qualified immunity is unavailable to the County. *See County of Sacramento v. Lewis,* 523 U.S. 833, 841 n.5 (1998) (noting that qualified immunity is unavailable "in an action against a municipality").

established rights or if it would have been objectively reasonable for the official[s] to believe that [their] conduct did not violate plaintiff's rights." *Mandell v. County of Suffolk,* 316 F.3d 368, 385 (2d Cir. 2003) (citing *Lewis,* 165 F.3d at 166-67). However, "[w]here specific intent of a defendant is an element of plaintiff's claim under clearly established law, and plaintiff has adduced sufficient evidence of that intent to defeat summary judgment, summary judgment on qualified immunity grounds is inappropriate." *Mandell,* 316 F.3d at 385 (citing cases). Here, retaliatory intent is an element of plaintiffs' First Amendment claims and there is a triable issue of fact with respect to that element – i.e., whether plaintiffs' protected speech was the motivating factor for defendants' decisions to terminate them. Accordingly, "[u]ntil that issue is resolved by a factfinder . . . the retaliation claim[s] against [the individual defendants] cannot be dismissed on qualified immunity grounds." *Id*.; *see also Morgenstern v. County of Nassau,* No. 04-CV-0058, 2008 U.S. Dist. LEXIS 91746, at *52 (E.D.N.Y. Sept. 29, 2008) (stating that "granting summary judgment based on qualified immunity is improper if genuine issues of material fact exist"); *Davis v. City of New York,* 373 F. Supp. 2d 322, 338 (S.D.N.Y. 2005) ("As there remains a question of fact as to defendant[s'] . . . states of mind as to plaintiffs' . . . First Amendment claims, the Court cannot grant defendants immunity on these claims as a matter of law."); *Szoke v. Carter,* 974 F. Supp. 360, 369 (S.D.N.Y. 1997) ("Because facts material to this inquiry, namely the factual question behind [defendant's] actions, are in

dispute, the Court cannot make a qualified immunity determination at this time.").

III. Williams' Section 1983 Conspiracy Claim[17]

To establish a claim for conspiracy under 42 U.S.C. § 1983, Williams must demonstrate the following: "(1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir. 1999) (citing cases). This requires the plaintiff to introduce evidence that "the defendants acted in a willful manner, culminating in an agreement, understanding, or meeting of the minds, to violate his rights." *Blount v. Swiderski,* No. 03-CV-0023, 2006 U.S. Dist. LEXIS 82889, at *55 (E.D.N.Y. Nov. 14, 2006) (quotation omitted). A plaintiff alleging a conspiracy may meet this requirement through either direct or circumstantial evidence. *See Pangburn,* 200 F.3d at 72. "This is not to say, however, that a plaintiff may overcome a summary judgment motion based simply on general and conclusory

[17] Although plaintiffs make reference to a conspiracy claim on behalf of Pellegrini in their opposition papers, (Pl. Mem. of Law 19), a review of the Amended Complaint demonstrates that a conspiracy claim is only alleged by Williams. (Am. Compl. ¶ 115.) Moreover, on page one of their opposition papers, plaintiffs list the claims remaining in this action. Such claims do not include a conspiracy claim by Pellegrini. (Pl. Mem. of Law 1.)

allegations." *Blount,* 2006 U.S. Dist. LEXIS 82889, at *55-56.

Here, Williams alleges that defendants Cancellieri and Suozzi "and their designees" conspired with former defendants Fowler, Schoelle, Kramer and Costello's[18] to terminate him in retaliation for "speaking out about the illegal and improper actions being taken by [d]efendants." (Williams Decl. ¶ 39; Am. Compl. ¶ 115.) Williams relies on the complaint letters written by Fowler, Schoelle, Kramer and Costello within weeks prior to his termination[19] as evidence of the purported conspiracy. However, the deposition testimony of Fowler, Schoelle, Kramer and Costello unequivocally establishes that none of these individuals wrote their individual letters of complaint with the intention of having Williams terminated.

For example, Fowler specifically testified at his deposition that he did not write his letter for the purpose of having Williams terminated. (Fowler Dep. 93.) Moreover, at the time he wrote his letter, Fowler did not have any understanding, belief or knowledge that his letter might be used as a basis to terminate Williams. (Fowler Dep. 93-94.) In fact, Fowler testified

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[18] As stated *supra,* plaintiffs have voluntarily dismissed the within action against Fowler, Schoelle, Costello and Kramer. *See supra* n.1.

[19] Fowler's letter is dated October 2, 2003. Schoelle's, Kramer's and Costello's letters are all dated between November 3, 2003 and November 10, 2003. Williams was terminated on November 10, 2003.

that he did not even learn that his letter had been used in part to terminate Williams until he read so in the Complaint in this matter. (Fowler Dep. 95-96.) Similarly, Schoelle testified that he sent his letter of complaint with the intention that it be construed as "an overture to be of assistance . . . in improving [Garden City's] relationship or perceived relationship with the Civil Service Commission" and that he was surprised to learn that it was "utilized for other purposes," namely Williams' termination. (Schoelle Dep. 86-87.) Although Schoelle testified that he submitted his letter in response to a request from Cancellieri to put in writing certain concerns he had previously raised regarding Williams and the CSC's relationship with Garden City, (Schoelle Dep. 57-67), Schoelle further testified that had he known the purpose for which his letter was going to be used, he would not have written it. (Schoelle Dep. 89.) As with Fowler, Schoelle did not learn that his letter was used as a basis for Williams' termination until he read the Complaint in this action. (Schoelle Dep. 79, 85.)

With respect to Costello, she testified at her deposition that the purpose of her letter was to voice her concerns regarding the relationship between BOCES and the CSC in an effort to improve that relationship. (Costello Dep. 88.) Costello further testified that her letter was not a "complaint" but rather a "concern" and that the issue that had arisen between BOCES and the CSC with respect to fingerprinting "was[ ] [not] something that [she] believed could[ ] [not] be resolved." (Costello Dep. 90.) Finally, Kramer

testified that she did not write her letter herself, but rather she simply signed a letter that was drafted by the Village of Rockville Centre's Administrator, Ronald Wasson. (Kramer Dep. 24-25, 32-33, 69.) In fact, Kramer testified that she did not even read the letter that she signed other than the first and last lines of it, nor did she read that it was addressed to defendant Suozzi. (Kramer Dep. 39, 51.) Kramer was not made aware of the letter or its contents any time prior to being asked to sign it. (Kramer Dep. 50.) Kramer further testified that it was not her intent to have anyone terminated, but rather she "just wanted [the CSC] to work better with [Rockville Centre] and give [Rockville Centre] more guidance when [it] did have a problem." (Kramer Dep. 46-47.) Moreover, Kramer characterized her letter as "more [of] a request, not a complaint" and testified that had she known that Williams would be terminated in part due to her letter, she would not have signed it. (Kramer Dep. 72, 77.)

Williams has not produced any evidence, apart from speculation and conjecture, to contradict the testimony provided by Fowler, Schoelle, Kramer and Costello at their depositions. Nor has Williams offered even a scintilla of evidence of any agreement between the County defendants and Fowler, Schoelle, Kramer or Costello to work together to secure Williams' termination. As such, I conclude that Williams has failed to demonstrate a "meeting of the minds," an understanding, or any agreement whatsoever on

the parts of Fowler, Schoelle, Kramer and Costello to conspire to terminate Williams.

Having concluded that former defendants Fowler, Schoelle, Kramer and Costello were not part of any alleged conspiracy to violate Williams' rights, the only remaining defendants who are alleged to have engaged in a conspiracy are defendants Cancellieri, Suozzi "and their designees." (Am. Compl. ¶ 115.) Defendants assert that they are entitled to summary judgment on Williams' conspiracy claim on the basis of the intracorporate conspiracy doctrine.[20] Under this doctrine, "the officers, agents, and employees of a single corporate or municipal entity, each acting within the scope of his or her employment, are legally incapable of conspiring with each other." *Crews v. County of Nassau,* No. 06-CV-2610, 2007 U.S. Dist. LEXIS 94597, at *42 (E.D.N.Y. Dec. 27, 2007) (citing cases); *see also Herrmann v. Moore,* 576 F.2d 453, 459 (2d Cir. 1978) ("[T]here is no conspiracy if the conspiratorial conduct challenged is essentially a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment."). An exception to the doctrine is where defendants are acting outside the scope of their employment when the alleged conspiracy is created. *See Crews,* 2007 U.S. Dist. LEXIS 94957, at *43. To demonstrate this exception, "a plaintiff must show that defendants were 'acting in

[20] Williams appears to have chosen not to address this argument in his opposition papers to the within motion.

their personal interests, wholly and separately from the corporation' or municipal entity." *Id*. at *43 (quoting *Bhatia v. Yale Univ.,* No. 3:06cv1769, 2007 U.S. Dist. LEXIS 73849, at *4-5 (D. Conn. Sept. 30, 2007)).

Here, Cancellieri and Suozzi, as well as their "designees" whom Williams alleges to have entered into a conspiracy, "are all employees of a single municipal entity – Nassau County." *Crews*, 2007 U.S. Dist. LEXIS 94597, at *42-43. Moreover, Williams has not offered any evidence – let alone even alleged – that the defendants were acting outside the scope of their employment when they partook in the alleged conspiracy. Accordingly, any purported conspiratorial agreement among them is barred by the intra-corporate conspiracy doctrine.[21]

Based on the foregoing, I recommend that summary judgment be granted in defendants' favor with respect to Williams' Section 1983 conspiracy claim and that the claim be dismissed.

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[21] Although not specifically pleaded in the Amended Complaint, Williams also appears to allege that defendants Cancellieri, Suozzi and Arthur Gianelli, the DCE for the Nassau County Management, Budget and Finance Department, conspired to terminate Williams in retaliation for his public speech. (Pl. Mem. of Law 18-19.) However, as all three individuals are all employees of Nassau County, any alleged conspiracy would also be barred on intra-corporate conspiracy doctrine grounds.

IV. Pellegrini's Race and Age Discrimination Claims

Claims of racial discrimination in violation of Title VII and age discrimination pursuant to the ADEA are both evaluated according to the three-part burden shifting test enunciated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). *See Sciarrino v. Municipal Credit Union,* 894 F. Supp. 102, 106 (E.D.N.Y. 1995) ("Under the Supreme Court decisions in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *St. Mary's Honor Center v. Hicks,* 509 U.S. 592 (1993), claims of racial discrimination in violation of Title VII . . . are analyzed under a three-part test."); *see also Schnabel v. Abramson,* 232 F.3d 83, 87 (2d. Cir. 2000) ("We have explained that we analyze ADEA claims under the same framework as claims brought pursuant to Title VII."). Under that framework, plaintiff must first establish a prima facie case of discrimination, "for which the burden is 'minimal.'" *Baur v. Rosenberg Mink, Falkoff & Wolff,* No. 07 Civ. 8835, 2008 U.S. Dist. LEXIS 99819, at *8 (S.D.N.Y. Dec. 2, 2008). With respect to racial discrimination, a prima facie case is demonstrated by proof of the following: (1) plaintiff is a member of a protected class; (2) plaintiff was qualified for the position; (3) plaintiff suffered an adverse employment action; and (4) the adverse employment action "occurred under circumstances giving rise to an inference of discrimination." *Baldwin v. North Shore Univ. Hosp.,* 470 F. Supp. 2d 225, 228 (E.D.N.Y. 2007); *see also De La Cruz v. New York City Human Res. Admin.,* 82 F.3d 16, 20 (2d Cir. 1996). Similarly, a prima facie case of

age discrimination requires plaintiff to demonstrate that (1) she was within the protected age group; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) the adverse employment action occurred under "circumstances giving rise to an inference of unlawful discrimination." *Baur*, 2008 U.S. Dist. LEXIS 99819, at *8; *see also Schnabel,* 232 F.3d at 87.

Once the plaintiff establishes a prima facie case of discrimination, the burden of production shifts to the employer to articulate a "legitimate, nondiscriminatory reason for the adverse employment action." *Baldwin,* 470 F. Supp. 2d at 230; *see also Schnabel,* 232 F.3d at 87. If the employer is able to meet its burden, the plaintiff must then "prove that the articulated justification is in fact a pretext for discrimination. . . ." *Baldwin,* 470 F. Supp. 2d at 230; *see also Baur*, 2008 U.S. Dist. LEXIS 99819, at *9. "[A]lthough intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143 (2000) (quoting *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981)).

In the within action, Pellegrini has successfully established a prima facie case of race and age discrimination. Pellegrini was fifty-one years old at the time of her termination and is Caucasian, which are considered protected classes under Title VII and the

ADEA. *See McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 279 (1976) (stating that Title VII prohibits racial discrimination against Caucasians on the same terms as racial discrimination against non-Caucasians); *see also* 29 U.S.C. 631(a) (limiting the prohibitions of the ADEA to persons over the age of 40). Moreover, there is no dispute that Pellegrini was qualified for the position she held in OHIA. It is similarly undisputed that Pellegrini suffered an adverse employment action in that she was terminated. Finally, the fact that Pellegrini was replaced by a younger, Hispanic woman, Michelle Marquez, gives rise to an inference of discrimination for purposes of establishing a prime [sic] facie case. *See Meiri v. Dacon,* 759 F.2d 989, 996 (2d Cir. 1985) (holding that although Title VII does not require proof that a protected class member was replaced by a non-protected class member, evidence of such raises an inference of discrimination).

The burden then shifts to the County, who has also successfully met its burden, and has articulated a legitimate, nondiscriminatory reason for Pellegrini's termination – namely, her difficult working relationship with defendant Sylver. It is undisputed that Pellegrini and Sylver did not work well together. A review of the deposition transcripts provided in connection with the within motion makes that fact clear. Pellegrini herself testified that her relationship with Sylver was "adversarial" and "confrontational." (Pellegrini Dep. 101-03.) Similarly, Sylver testified that he found it difficult to "get a straight answer"

from Pellegrini when he would ask her a question, (Sylver Dep. 45-46), and that on at least two occasions, Pellegrini refused to carry out certain instructions that Sylver had specifically given her with respect to the withdrawal of HUD funds that were not being utilized by the Town of Hempstead. (Sylver Dep. 96-100 Sylver characterized Pellegrini's behavior in this instance as "insubordinate." (Sylver Dep. 100.)

The defendants' assertions constitute valid reasons for terminating Pellegrini. *See Baur*, 2008 U.S. Dist. LEXIS 99819, at *11 ("[I]t is well-settled that an employer may permissibly terminate an employee based on inappropriate comments, perceived insubordination, or disruptive behavior in the workplace.") (citing cases). While Pellegrini may not agree with the reasons for her termination, the "general rule" is that "an employer can suspend or discharge an employee at will for any reason, wise or unwise, fair or unfair, as long as this decision is not based on discrimination." *Baldwin,* 470 F. Supp. 2d at 233. Accordingly, the burden then shifts back to Pellegrini to demonstrate that defendants' reasons are nothing more than a pretext for discrimination.

To demonstrate pretext, Pellegrini must demonstrate through admissible evidence "circumstances that would be sufficient to permit a rational finder of fact to infer that the defendant[s] employment decision was more likely than not based in whole or in part on discrimination." *Baur*, 2008 U.S. Dist. LEXIS 99819, at *10 (quoting *Terry v. Ashcroft,* 336 F.3d 128, 138 (2d Cir. 2003)). "At the very least, [Pellegrini]

must introduce evidence raising an issue of material fact as to whether the [County] has honestly and truthfully set forth [its] reasons for firing her." *Baur*, 2008 U.S. Lexis 99819, at *12 (citing *Weinstock v. Columbia Univ.,* 224 F.3d 33, 42 (2d Cir. 2000)). This, Pellegrini has failed to do.

The only "evidence" that Pellegrini offers in support of her race and age discrimination claims is a conclusory allegation in her declaration in opposition to the defendants' motion that since Michelle Marquez "did not have the experience, qualifications, and demonstrated abilities that [she] had," Pellegrini "therefore had to conclude that [her] age, race and color, along with [her] speech on matters of public concern, were the reasons for [her] termination." (Pellegrini Decl. ¶ 32.) This is simply not enough to raise an issue of fact with respect to Pellegrini's race and age discrimination claims. "[P]urely conclusory allegations of discrimination, standing alone, are insufficient" to defeat a motion for summary judgment." *Sciarrino,* 894 F. Supp. at 108 (citing *Meiri v. Dacon,* 759 F.2d 989, 998 (2d Cir. 1985)).

Pellegrini has not presented any evidence that she was subjected to comments, whether offensive or not, about her race or her age. Nor has she offered any evidence that she was treated any differently from other individuals with whom she worked on the basis of her race or her age.

"In fact, beyond the minimal proof required to state a prima facie case, [Pellegrini] has offered no

evidence that [she] was discriminated against because of her [race or] age." *Schnabel,* 232 F.3d at 88 (emphasis omitted). As such, defendants are entitled to a judgment as a matter of law with respect to Pellegrini's claims of discrimination. "Absent evidence of discrimination, it is not the province of the Court to sit as a super-personnel department that reexamines an entity's business decisions." *Baur*, 2008 U.S. Dist. LEXIS 99819, at *13-14 (quotation omitted).

Accordingly, I recommend that defendants be granted summary judgment with respect to Pellegrini's Title VII claim for race discrimination and ADEA claim for age discrimination and that those claims be dismissed.

V. Plaintiffs' Claims Pursuant to New York Civil Service Law Section 75-b[22]

The Report and Recommendation previously issued by the undersigned recommended dismissal of

[22] New York Civil Service Law Section 75-b is one of the state's "whistleblower" statutes. *See Calabro v. Nassau Univ. Med. Ctr.,* 424 F. Supp. 2d 465, 474 (E.D.N.Y. 2006); *Scheiner v. N.Y. Health & Hosps. Corp.,* 152 F. Supp. 2d 487, 494 (S.D.N.Y. 2001). Under the statute, a public employer is precluded from terminating or taking any "disciplinary or other adverse personnel action" against a public employee "because the employee discloses to a government body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action." N.Y. Civ. Serv. Law § 75-b(2)(a).

plaintiffs' Section 75-b claims against all defendants except the County. That recommendation was subsequently adopted by Judge Feuerstein. Accordingly, the only Section 75-b claims remaining are those against the County.

As a "condition precedent" to commencing an action against New York municipalities, New York General Municipal Law § 50-e requires plaintiffs to file a notice of claim within ninety days after the claim arises. *Chesney v. Valley Stream Union Free Sch. Dist.,* No. 05 Civ. 5106, 2006 U.S. Dist. LEXIS 68137, at *2 (E.D.N.Y. Sept. 22, 2006). Similarly, Section 52 of the New York County Law requires the service of a notice of claim "in accordance with section fifty-e of the general municipal law" for "[a]ny claim . . . against a county for damage, injury or death, or for invasion of personal or property rights, of every name and nature," as well as "any other claim for damages . . . alleged to have been caused or sustained in whole or in part because of any misfeasance, omission of duty, negligent or wrongful act on the part of the county, its officers, agents, servants or employees." N.Y. County Law § 52. "Notice of claim requirements are generally strictly construed, and failure to comply with the requirements typically results in dismissal due to failure to state a cause of action." *Chesney,* 2006 U.S. Dist. LEXIS 68137, at *26 (citing *Hardy v. New York City Health and Hosp. Corp.,* 164 F.3d 789, 793-94 (2d Cir. 1999)). There is no dispute here that plaintiffs failed to file a notice of claim with respect to their Section 75-b claims.

The prior Report and Recommendation, dated March 15, 2005, on defendants' motion to dismiss, informed plaintiffs that pursuant to New York General Municipal Law § 50e-(5), "[u]pon application, the court, in its discretion, may extend the time to serve a notice of claim. . . ." N.Y. Gen. Mun. Law § 50-e(5). "All applications under [that] section shall be made to the supreme court or to the county court" in certain counties. N.Y. Gen. Mun. Law § 50-e(7). It is also undisputed that plaintiffs failed to exercise this option.[23]

Although the New York Court of Appeals has not ruled on the issue, numerous cases in this circuit have interpreted General Municipal Law Section 50-e(7) to mean that the "[f]ederal courts do not have jurisdiction to hear complaints from plaintiffs who have failed to comply with the notice of claim requirement, or to grant permission to file a late notice." *Van Cortlandt v. Westchester County,* No. 07 Civ. 1783, 2007 U.S. Dist. LEXIS 80977, at *23-24 (S.D.N.Y. Oct. 31, 2007) (citing cases); *see also Corcoran v. N.Y. Power Auth.,* 202 F.3d 530, 540 (2d Cir. 1999) (noting that "[t]he appropriate state court may extend the time to file a notice of claim" but declining to decide "whether the federal court has such jurisdiction") (emphasis added); *Costabile v. County of Westchester,* 485 F. Supp. 2d 424, 431 (S.D.N.Y. 2007)

[23] Plaintiffs do not address this issue – or, for that matter, their Section 75-b claims at all – in their opposition to defendants' motion for summary judgment.

(finding that due to Section 50-e(7) of the New York General Municipal Law, the court "lack[s] jurisdiction to decide plaintiffs' application to serve a late notice of claim").

Plaintiffs were previously advised of the procedural defect with respect to their state law claims and were further advised of the options available to them to remedy this defect. Plaintiffs failed to avail themselves of those options. Accordingly, their state law claims pursuant to Section 75-b of the New York Civil Service Law fail as a matter of law.

Based on the foregoing, I recommend that defendants be granted summary judgment with respect to plaintiffs' claims under Civil Service Law Section 75-b and that those claims be dismissed.

VI. Whether the CSC and OHIA are Suable Entities

Defendants assert that the CSC and OHIA are not suable entities because they are merely agencies of the County and lack any separate legal identity. Although plaintiffs challenge defendants assertions with respect to the CSC, their opposition makes no such argument with respect to OHIA. Accordingly, the undersigned assumes that plaintiffs agree that OHIA is not a suable entity. Moreover, it seems clear to the undersigned that OHIA is an office of the County, in the same way as the other various County departments, such as Planning and the Management, Budget and Finance Department, are. As such, it has no legal identity separate and apart from the County

and any claims against it are claims against the County of Nassau. *See Hall v. City of White Plains,* 185 F. Supp. 2d 293, 303 (S.D.N.Y. 2002) ("Under New York law, departments which are merely administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued.") (citing cases). For these reasons, I recommend that plaintiffs' claims against OHIA be dismissed.

With respect to the CSC, defendants assert that it exists by virtue of Article XIII of the Nassau County Charter. Plaintiffs, however, insist that the CSC is a creature of state law, not County law. Although Article XIII of the Nassau County Charter specifies that a department of civil service shall exist within the County and how it shall be administered, it appears that the power to create that entity is derived from the New York State Civil Service Law. *See* N.Y. Civ. Serv. Law § 15 (providing for the creation of "municipal civil service commissions"); *see also Pearse v. Inc. Village of Freeport,* No. CV 81-1217, 1982 U.S. Dist. LEXIS 13456, at *4 (E.D.N.Y. May 3, 1982) ("The New York State Civil Service Law, §§ 15, 17, allows for the establishment of local forms of Civil Service Administration.").

Moreover, as plaintiffs point out, the CSC has been a party to numerous actions in the past, as both plaintiff and defendant. (Pl. Ex. GG.) An independent search by the Court found more than one hundred cases in both the federal and state courts of New York where the CSC was a named party. Unlike the case

law cited by the defendants with respect to those agencies that are clearly municipal entities (*e.g.,* county police departments), the defendants have not offered, nor did the Court's independent research produce, any cases where a court held that a county civil service commission does not have the capacity to sue or be sued.[24] In addition, several of defendants' own witnesses testified at their depositions that although the CSC interacts quite extensively with the County, it is a separate and distinct entity, independent of the Nassau County government. (Cancellieri Dep. 23; Senko Dep. 11; Gugerty Dep. 12-14; Suozzi Dep. 63.)

Accordingly, I recommend that the CSC be considered an independent legal entity rather than an agency or office of the County and, as such, is appropriately subject to suit by plaintiffs.

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[24] The undersigned notes that in one case, *Cullen v. New York State Civil Serv. Comm'n,* 435 F. Supp. 546 (E.D.N.Y. 1977), the court held that "for purposes of § 1983 jurisdiction, the civil service commissions named as defendants are simply departments of state, county and municipal governments and, therefore, can not be 'persons' within the meaning of the statute." *Id.* at 557. However, the Court's research has not produced a single other case within the federal or state courts of New York with a similar holding. Moreover, based on the subsequent history of *Cullen,* it is unclear whether it is still considered "good law."

RECOMMENDATION

For the foregoing reasons, I recommend that defendants' motion for summary judgment be granted in part and denied in part. Specifically, I recommend that defendants be granted summary judgment with respect to the following claims contained in the Amended Complaint: (1) the conspiracy claim pursuant to 42 U.S.C. § 1983; (2) the race discrimination claim pursuant to Title VII; (3) the age discrimination claim pursuant to the ADEA; and (4) the state law whistleblower claim pursuant to New York Civil Service Law § 75-b. I further recommend that the Nassau County Office of Housing and Intergovernmental Affairs be dismissed from this action on the grounds that it is an administrative agency of the County of Nassau and has no legal identity separate and apart from the County. In all other respects, I recommend that defendants' motion be denied.

OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a copy to the undersigned within ten (10) days of the date of this report. Failure to file objections within ten (10) days will preclude further appellate review of the District Court's order. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), and 72(b); *IUE AFL-CIO Pension Fund v. Herrmann,* 9 F.3d 1049, 1054 (2d Cir. 1993), *cert. denied*, 513 U.S. 822 (1994); *Frank v. Johnson,* 968 F.2d 298 (2d Cir. 1992), *cert. denied*, 506 U.S.

1038 (1992); *Small v. Sec'y of Health and Human Servs.,* 892 F.2d 15, 16 (2d Cir. 1989) (per curiam).

SO ORDERED:

Dated: Central Islip, New York
February 2, 2009

/s/ E. Thomas Boyle
HON. E. THOMAS BOYLE
United States Magistrate Judge

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of December, two thousand fourteen,

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Thomas A. Williams,

Plaintiff-Appellant,

v.

County of Nassau, Thomas R. Suozzi, in his individual and official capacity, Nassau County Civil Service Commission, John J. Senko, Jr., in his individual and official capacity, James F. Demos, in his individual and official capacity, David J. Guerty, in his individual and official capacity, Anthony M. Cancellieri, in his individual and official capacity, John Donnelly, in his individual and official capacity, Carol Kramer, in her individual and official capacity, Peter Sylver, in his individual and official capacity, Bruce Nyman, in his individual and official capacity, Patricia

ORDER

Docket No.: 11-2033

(Filed Dec. 30, 2014)

Bourne, in her individual and official capacity,

Defendants-Appellees,

Charles W. Fowler, in his individual and official capacity, Robert L. Schoelle, Jr., in his individual and official capacity, Marguerite Costello, in her individual and official capacity, Nassau County Office of Housing and Intergovernmental Affairs,

Defendants,

Robin E. Pellegrini,

Plaintiff.

Appellant Thomas A. Williams filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

/s/ Catherine O'Hagan Wolfe
