No. 15-_____

In The Supreme Court of the United States

MELISSA A. ALVES, *et al.*,

Petitioners,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Pickering v. Board of Education of Township High School District held that a government employee may be protected by the First Amendment when he or she speaks as a citizen about a matter of public importance. *Garcetti v. Ceballos* explained that a government worker does not speak as a citizen if his or her speech is pursuant to his or her duties.

The interrelated questions presented are:

(1) Is a worker's speech pursuant to his or her duties, and thus outside the protection of the First Amendment:

(a) whenever the speech has the purpose or effect of furthering those responsibilities (the rule in the Sixth, Tenth, Eleventh and District of Columbia Circuits), or

(b) only when the speech was something the employer expected the worker to engage in (the rule in the Second, Seventh, Eighth, and Ninth Circuits)?

(2) When an employee's speech involves several topics, only some of which are matters of public concern, does *Pickering* apply:

(a) only when the "main thrust" or primary purpose of the speech as a whole was a matter of public concern (the rule in the Fifth, Eighth, Tenth and Eleventh Circuits), or

QUESTIONS PRESENTED – Continued

(b) when any portion of the speech was a matter of public concern (the rule in the First, Second, Third, Fourth and Sixth Circuits)?

(3) Does the question of whether an employee's speech was about a matter of public concern generally turn on:

(a) whether the employee spoke with the purpose of addressing a matter of public concern, rather than furthering his or her own interests (the rule in the Seventh, Eighth and Eleventh Circuits), or

(b) whether the content of the speech was a matter of public concern (the rule in the First, Second, Third, Sixth and Ninth Circuits)?

PARTIES

The petitioners are Melissa A. Alves, Corey M. Arranz, Sandrine M. Bosshardt, Kensa K. Gunter, and Alaycia D. Reid.

The respondents are the Board of Regents of the University System of Georgia, Jill Lee-Barber in her individual capacity, and Douglas F. Covey, in his individual capacity.

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Petitioners Melissa A. Alves, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on October 29, 2015.

OPINIONS BELOW

The October 29, 2015, opinion of the court of appeals, which is reported at 804 F.3d 149 (11th Cir. 2015), is set out at pp. 1a-51a of the Appendix. The August 22, 2014, opinion of the district court, which is not reported, is set out at pp. 52a-66a of the Appendix. The January 6, 2014, magistrate report, which is not reported, is set out at pp. 67a-112a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on October 29, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law ... abridging the freedom of speech...."

STATEMENT

Pickering v. Board of Education of Township High School, 391 U.S. 563 (1968), recognized that government employees enjoy many of the protections of the First Amendment. The touchstone of constitutional protection under *Pickering* and its progeny is whether a public employee is speaking as a citizen on matters of public concern. A worker who does so is protected unless his or her First Amendment interests are outweighed by the legitimate interest of the government employer. *Pickering* prescribes a balancing analysis for evaluating such situations.

This Court elaborated on the meaning of a "matter of public concern" in *Connick v. Myers*, 461 U.S. 138 (1983), and *City of San Diego v. Roe*, 543 U.S. 77 (2004). *Garcetti v. Ceballos*, 547 U.S. 410 (2006), explained that an employee is not speaking as a citizen, and thus enjoys no First Amendment protection, when he or she is merely carrying out the duties for which he or she is employed. But these decisions did not address and could not anticipate the wealth of complex issues that the lower courts have grappled with in applying *Pickering* to countless public employees in a wide range of circumstances. *Garcetti* disavowed any attempt "to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." 547 U.S. at 424.

Over the years since the decisions in *Pickering, Connick*, and *Garcetti*, three fundamental and interrelated issues have divided the lower courts regarding when a public employee can be said to be speaking as a citizen on matters of public concern. In this case the Eleventh Circuit applied well-established circuit precedents on all three issues. Those questions arise in a significant portion of all *Pickering* cases. These recurring issues of First Amendment law affect the rights of millions of state, local, and federal government workers. Review by this Court is essential to clarify when the constitution protects from reprisals speech by the nation's public employees.

Factual Background

This case concerns the Counseling and Testing Center ("Center") at Georgia State University. The Center serves a number of vital functions for the University and its 32,000 students.

First, the Center plays a key role in protecting students.

> The Center [is] ... tasked with conducting mandatory psychological assessment of students who were identified by the Office of the Dean of Students as individuals who had the potential to cause harm to themselves or others.... Students identified as "safety concerns" might be excluded from on-campus housing or continued enrollment at the University.

App. 4a. Second, "the ... Center provided psychological counseling, testing, and assessment services to the Georgia State University population." App. 56a. Third, "[t]he Center.... operated a training program for doctoral students, which included pre-doctoral internships, a practicum training program for doctoral students, and post-doctoral fellowships." App. 3a. The core professional staff at the Center was a group of about ten clinical or counseling psychologists.

In 2009 Dr. Jill Lee-Barber was hired as the Director of Psychological and Health Services; in that role she served as the director of the Center. Over the following two years the psychologists at the Center became increasingly concerned about Lee-Barber's competence and management. Finally, in October of 2011, seven of the psychologists sent a memorandum expressing their concerns to several of the highest ranking university officials. The six-page singled-spaced Memorandum, entitled "Counseling and Testing Center Mismanagement," was addressed to three Vice-Presidents and the University Attorney. App. 113a-14a.

The Memorandum addressed a number of different topics. First, it expressed concern that Lee-Barber's failings had undermined "[o]ur ability to provide a safe environment to our students, including managing risk and crisis...." App. 114a. The Memorandum warned that Lee-Barber's "lack of knowledge in the area[ ] of complex psychopathology" and "[h]er lack of assessment skill continues to pose problems in recognizing risks...." and "compromises [the Center's]

ability to effectively manage risk and crisis." App. 116a. Second, the Memorandum explained that Lee-Barber's actions "had and continues to have an adverse impact on client care." App. 114a. Her asserted mismanagement, it stated, "directly impacts the development of policies and procedures necessary to create an effective system by which to meet the service demands of the students and the University community." App. 119a. Third, the Memorandum contended that Lee-Barber's "failings ... contribute to and cause waste of resources and capital." App. 123a. Fourth, another section described what the authors contended were instances of racial discrimination by Lee-Barber. App. 122a. Finally, the Memorandum described the harm that it asserted Lee-Barber had caused to the Center's training program and its ability to recruit and retain trainees. App. 117a.

Although the authors of the Memorandum were Center employees – indeed, a majority of its psychologists – they emphasized that they were writing because of their concern about the harm Lee-Barber was causing to the level of care and services that the Center provided to the University.

> These are observations that we, as staff members, feel compelled to offer as professionals but also as members of the larger community that seeks the highest quality of services from the [Center].... We would like to see these matters investigated and resolved for the betterment of ... our ability to deliver the highest quality of programs and

> services to the students and University community....

App. 123a.

The University undertook an investigation into the charge in the Memorandum, but decided to take no action against Lee-Barber. "Within a week of the delivery of the final investigative report, Dr. Lee-Barber made a decision to cancel the [Center's] ... training program." App. 84a. A few weeks after that, the defendants "made the decision to implement a reduction in force ... that eliminated the entire staff of full-time psychologists, all but one of whom were authors of the [Memorandum], and replace them with contract psychologists." App. 84a.

Proceedings Below

This action was commenced in state court by five of the original authors of the Memorandum.[1] The complaint alleged that the plaintiffs had been laid off in retaliation for the Memorandum, and contended that this retaliation violated their First Amendment rights. The defendants removed the action to federal court. After a period of discovery, the defendants moved for summary judgment.

(1) The district court, adopting a Report by a Magistrate Judge, dismissed the First Amendment

[1] The other two signatories had left the Center before the reduction in force.

claims. First, the court reasoned that under this Court's decision in *Garcetti*, the action of the plaintiffs in writing and circulating the Memorandum was not constitutionally protected because it was connected to their jobs. There was no claim that any of the plaintiffs had been assigned the task of writing an evaluation of Dr. Lee-Barber. But the district court believed that under Eleventh Circuit precedent "reports by government employees concerning alleged wrongdoing by their supervisors [is] related to their jobs, and therefore the employees are not speaking as private citizens...." App. 93a.

Second, the court concluded that under Eleventh Circuit precedent the Memorandum was not sufficiently about a matter of public concern to be constitutionally protected deals. The district court noted that in the Eleventh Circuit speech that deals with both matters of public concern and other topics is protected only if "the 'main thrust' of the speech is on a matter of public concern." App. 94a. The court acknowledged that the effectiveness of the safety-evaluation program was a matter of public concern, but held that matters of public concern were not "the 'main thrust' of the entirety of Plaintiff's complaints." App. 64a n.2.

Third, in determining whether the Memorandum was about a matter of public concern, the district court relied on what it believed was the subjective purpose of the authors in sending the document to University officials. It concluded that "[t]he primary purpose of Plaintiffs' speech was to further Plaintiff's

own interest in having the [Center] managed and operated in a different manner, not to raise issues of public concern." App. 96a.

(2) The court of appeals did not dispute that at least some parts of the Memorandum dealt with matters of public concern. "We recognize that the question of what constitutes proper care in the treatment of mental health issues is a matter worthy of a public forum." App. 34a. "The University recognized at oral argument that the Memorandum contained 'some matters of [public] concern.'" App. 47a. The Eleventh Circuit nonetheless affirmed.

The court of appeals held that a public employee speaks as an employee, not as a citizen, whenever his speech has the purpose or effect of facilitating his work, regardless of whether the speech in question was an assigned duty. Under Eleventh Circuit precedents, employees are unprotected even if they were not ordered or expected by the employer to engage in the speech in question. "When speech-related activities are required by one's position **or** undertaken in the course of performing one's job, they are within the scope of the employee's duties." App. 30a (quoting *Paske v. Fitzgerald*, 785 F.3d 977, 984 (5th Cir. 2015) (emphasis added). A worker's speech is outside the scope of the First Amendment, it held, when the worker's speech in some way facilitates the carrying out of a responsibility.

> [Plaintiffs] raised concerns about Dr. Lee-Barber in the course of performing – or, more

> accurately, in the course of *trying* to perform – their ordinary roles as coordinators, psychologists, committee members and supervisors. Each complaint in the Memorandum was made in furtherance of their ability to fulfill their duties with the goal of correcting Dr. Lee-Barber's alleged mismanagement, which interfered with [plaintiffs'] ability to perform.

App. 29a (emphasis in original). Since Dr. Lee-Barber's asserted incompetence was making it harder for the plaintiffs to do their jobs, the court of appeals reasoned, their objections to Lee-Barber's mismanagement could not be protected activity. The court of appeals fashioned this general approach into a per se rule, that "speech regarding conduct that interferes with an employee's job responsibilities is ... ordinarily within the scope of the employee's duties." App. 30a. "Implicit in [a worker's] duty to perform [his or her roles] ... is the duty to inform" higher officials of any obstacles to that performance, including a duty to report mismanagement by his or her own supervisor. App. 30a. The court of appeals did not suggest that the University understood in that manner the duties of the plaintiffs; this was a judicially fashioned duty not limited to these particular workers or this specific employer.

The Eleventh Circuit also concluded that the Memorandum was not speech about a matter of public concern. It acknowledged that at least some parts of the Memorandum were matters of public

concern, but under Eleventh Circuit precedent, that was insufficient.

First, the court of appeals noted that under prior decisions in that circuit, if speech involved several topics, only some of which are matters of public concern, the speech cannot be protected unless the "main thrust" of the speech as a whole was a matter of public concern. "[W]e have recognized that 'an employee's speech will rarely be entirely private or entirely public.' *E.g.*, *Akins v. Fulton Cty.*, 420 F.3d 1293, 1304 (11th Cir. 2005).... Therefore ... '[w]e ask whether the main thrust of the speech in question is essentially public in nature or private.' *Vila* [*v. Padron*], 484 F.3d [1334,] 1340 [(11th Cir. 2007)]." App. 23a. It concluded that the "main thrust" of the Memorandum was about the plaintiffs' own jobs, not about the quality of the services being provided to the university community. App. 32a.

Second, the court of appeals held that in determining whether speech – on one topic or on several – is a matter of public concern, the key issue is the subjective motive of the speaker. The court explained:

> We have said before that "the relevant inquiry is not whether the public would be *interested* in the topic of the speech at issue," it is "whether the *purpose* of [the employee's] speech was to raise issues of public concern." *Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (emphases added).

App. 35a. The Eleventh Circuit concluded that the purpose of the Memorandum was only to seek redress for the authors' personal grievances, not to express any concern about or improve the quality of the mental health services being provided by the Center. "It was only incident to voicing their personal concerns that [plaintiff's] remarks touched upon matters that might potentially affect the student body.... The 'main thrust' of the Memorandum's content 'took the form of a private employee grievance.'" App. 36a (quoting *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993)).

(3) One member of the panel dissented. With regard to whether the plaintiffs had spoken as citizens or as employees, the dissenting judge reasoned that a worker does not speak as an employee merely because his speech relates to or facilitates his job. App. 42a. The critical fact, the dissent insisted, was that the "psychologists' jobs include no duty, express or implied, to critique higher management on the broader issues they raised." App. 43a. The dissenting judge also insisted that the First Amendment applied to the portions of the Memorandum expressing concern about "the declining quality of health services at the Center," "even though the[ ] Memorandum included some complaints of a more private nature." App. 50a.

REASONS FOR GRANTING THE WRIT

The court of appeals decision, and the Eleventh Circuit precedents which it applies, severely and

improperly limit the constitutional protection recognized by this Court's decisions from *Pickering* to *Lane v. Franks*, 134 S.Ct. 2369 (2014).

First, the Eleventh Circuit holds that any speech "in furtherance" of an employee's responsibilities is speech as an employee and not as a citizen, and thus lies outside the protections of the First Amendment. This is far more sweeping than the holding of *Garcetti* itself, which concerned a memorandum that the employee in question was routinely expected to prepare as part of his job duties. The court of appeals fashioned a general implied duty of government workers to complain about the failings of their own supervisors, a type of reporting that in the real world is virtually never expected of subordinates.

Second, the Eleventh Circuit holds that speech that is in and of itself about a matter of public concern, and for that reason might be constitutionally protected, loses any protection if it is included in a larger document or oral statement that also includes enough merely personal concerns that the "main thrust" of the speech viewed as a whole is not a matter of public concern.

Third, the Eleventh Circuit holds that in determining whether speech is a matter of public concern, controlling importance can be given to the subjective motive of the speaker. Even though the content of the speech is a matter of public concern, that speech falls outside the protections of the First Amendment if the speaker was not attempting to address a public issue,

but spoke only for the purpose of advancing some personal interest.

Each of these legal standards, unsurprisingly, conflicts with standards in other circuits.

I. THERE IS A CLEAR CIRCUIT CONFLICT REGARDING WHEN SPEECH IS SUFFICIENTLY CONNECTED TO AN EMPLOYEE'S JOB TO PRECLUDE CONSTITUTIONAL PROTECTION

This Court's decision in *Garcetti* held that an employee's speech could be so connected to his or her job that the speech would necessarily be speech as an employee, not as a citizen, and thus fall outside the protections of the First Amendment. But *Garcetti* eschewed adoption of a comprehensive definition of what was thus excluded from constitutional protection, and the varying language of the opinion has led to divisions among the lower courts.

The speech at issue in *Garcetti*, a memorandum to the plaintiff's supervisor about the handling of a case, was the very type of document the plaintiff was routinely expected to prepare as a calendar deputy employed by the District Attorney. Some passages in *Garcetti* appear to refer to documents or oral presentations that the employer contemplated that a worker in the position would prepare; it refers to what an employee is "expected" to do (547 U.S. at 424), and to "what the employer itself has commissioned." 547 U.S. at 422. Other passages refer to statements made

by workers "pursuant to their official duties." *Id.* at 421. "Pursuant to" could mean something the employee and employer understood *was* an official duty, or it could refer far more broadly to almost any statement that was somehow connected to those duties. The apparently broadest phrase mentions speech "that owes its existence to a public employee's professional responsibilities." *Id.* It was that language which led the Eleventh Circuit to mistakenly conclude in *Lane v. Franks* that an employee's trial testimony was unprotected, even when the employee clearly had no duty as an employee to testify.

This ambiguity has led to a clear and perhaps predictable circuit split. Some circuits hold that virtually any statements that are related to an employee's job responsibilities are within the scope of *Garcetti*. Others read *Garcetti* more narrowly, limiting its holding to types of statements – like the memorandum in *Garcetti* itself – that the employer expects the employee to prepare.

(1) Four circuits hold that *Garcetti* applies to speech that the employer neither commanded nor expected a worker to make as part of his or her job, but which the worker engaged in on his or her own initiative.

In the instant case the Eleventh Circuit read *Garcetti* particularly broadly. It held that "speech regarding conduct that interferes with an employee's job responsibilities is ... ordinarily within the scope of the employee's duties." App. 30a. That could include

any number of things that are not what an employer or employee ordinarily understand to be among the duties a worker is obligated to perform. If insufficient funding for a state agency could interfere with an employee's job responsibilities, a letter to the governor urging a greater allocation in next year's budget could be covered. If there was too little money to buy paper for the copier because some official was embezzling the funds, a worker at the agency copy center who might contact the police about the problem would be covered. It is not unheard of for government officials, like supervisors in private industry, to be so inept, lazy or malevolent as to make the work of their subordinates more difficult; in the Eleventh Circuit's view, all of those subordinates would lack constitutional protection if they complained about the problem, even though none of them – virtually by definition – had a duty to supervise his or her own supervisor. Similarly, the Sixth Circuit holds that *Garcetti* extends to "complaints about obstacles interfering with [an employee's] ability to produce records." *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 541 (6th Cir. 2012).

In the District of Columbia Circuit, speech is unprotected if it is "an attempt to ensure proper implementation of [the plaintiff's duties] and was therefore offered pursuant to his job duties." *Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009). This is potentially even broader than the Eleventh Circuit rule. The Eleventh Circuit rule is limited to situations in which something is "interfer[ing]" with the

employee's job responsibilities; the D.C. Circuit standard applies to cases in which the employee merely seeks to improve his ability to do his job, such as by urging better qualified applicants to apply to work in his or her office.

The Tenth Circuit rule is similar to the standard of the District of Columbia Circuit, extending to any speech that "reasonably contributes to or facilitates the employee's performance of [an] official duty." *Brammer Holter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007).

(2) Four circuits, on the other hand, limit *Garcetti* to statements that an employer actually expects an employee to make, situations in which the employee could anticipate being disciplined if he did not engage in the speech. These circuits look to a worker's routine job duties, things that he or she knows are required because they occur regularly, and to specifically imposed duties.

In *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006), female guards at a state prison complained about sexual harassment by inmates. They testified that the "hostile work environment at [the prison] made it very difficult for them to perform their duties, and ... that, in such circumstances, the prison's authority over its inmates is significantly eroded." 468 F.3d at 545. The Ninth Circuit held that the First Amendment did not apply to routine reports the guards filed about the actions of particular inmates. But it distinguished those reports from a letter that

the guards had written to the state Director of the prison system. "We are unsure whether prison guards are *expected* to air complaints regarding the conditions in their prisons all the way up to the Director ... at the state capitol in Sacramento. We are not aware, for example, what the union contract provides with respect to persons to whom such grievances may or *must* be presented." *Id.* at 546 (emphasis added); see *Anthoine v. North Central Counties Consortium*, 605 F.3d 740, 749-50 (9th Cir. 2010) (controlling issue is whether employee is "expected to" make statement). In *Dahlia v. Rodriguez*, 735 F.3d 1060, 1075 (9th Cir. 2013) (en banc), the Ninth Circuit emphasized that reporting broad concerns about systemic problems at an agency is "unlikely ... [to] be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct, e.g., when the employee works for Internal Affairs or another watchdog unit." 735 F.3d at 1063. Thus when the police officer at issue in that case made a statement to representatives from the department's internal affairs office, the key question was whether he was required to make a statement to them. *Id.* at 1077.

In the Seventh Circuit as well, the controlling standard is whether an employee was expected to make the type of statement at issue. *Chaklos v. Stevens*, 560 F.3d 705, 712 (7th Cir. 2009) ("defendants do not demonstrate that they *expected* [the plaintiffs] to write this letter...."') (emphasis in original); *Houskins v. Sheahan*, 549 F.3d 480, 491 (7th Cir. 2008)

("Houskins was clearly expected to [make the] report ... and therefore she was speaking as part of her job...."); *Davis v. Cook County*, 534 F.3d 650, 653 (7th Cir. 2007) (no First Amendment protection because, in making statement, plaintiff "was merely doing what was expected of him"). In *Gonzalez v. City of Chicago*, 239 F.3d 939, 942 (7th Cir. 2001), the Seventh Circuit held that the speech at issue was not protected because "[a] failure to carry out this particular speech – writing accurate reports of assigned investigations – would be a dereliction of Gonzalez's employment duties." In *Miller v. Jones*, 444 F.3d 929, 931 (7th Cir. 2006), on the other hand, the Seventh Circuit concluded that the First Amendment did apply because "[t]his [case] stands in marked contrast to our finding in *Gonzalez* where the plaintiff could have been punished for not making the statements at issue there.... Nothing before us indicates that Miller may have been punished for not [making the disputed statement]." 444 F.3d at 938.

Similarly, the Second Circuit limits *Garcetti* to statements (like that in *Garcetti* itself) that are part of an employee's regular responsibilities, or are specifically required of him. In *Matthews v. City of New York*, 779 F.3d 167 (2d Cir. 2015), the plaintiff patrol officer had complained to higher officials about a quota system for summonses, objecting that it interfered with the normal work and discretion of officers. The Second Circuit explained:

> Matthews's speech to the Precinct's leadership ... was not what he was "employed to do,"

> unlike the prosecutor's speech in *Garcetti*, nor was it "part-and-parcel" of his regular job.... Matthews's speech addressed a precinct-wide policy. Such policy-oriented speech was neither part of his job description nor part of the practical reality of his everyday work.... [The witnesses] all testified that a police officer has no duty to monitor the conduct of his supervisors.

779 F.3d at 174.

In *Davenport v. University of Arkansas Board of Trustees*, 553 F.3d 1110, 1113 (8th Cir. 2009), the plaintiff, a university public safety officer and supervisor, "complained to University Officials about the ... Chief's misuse of resources, and the lack of ... equipment, uniforms, and parking." Those problems clearly were obstacles that interfered with the plaintiff's ability to do his job. But the Sixth Circuit held that his speech was nonetheless protected because "Davenport's duties did not include reporting wrongdoing by a superior officer or a lack of resources." 553 F.3d at 113.

II. THERE IS A CLEAR CIRCUIT CONFLICT REGARDING THE CONSTITUTIONAL STANDARD APPLICABLE TO SPEECH ONLY PARTS OF WHICH INVOLVE MATTERS OF PUBLIC CONCERN

Speech by government workers often involves several topics, some of which are matters of public concern and some of which are not. App. 23a. Five

circuits – the First, Second, Third, Fourth and Sixth – hold that a *Pickering* balancing analysis is required if even a single topic of public concern is included. On the other hand, the Eleventh Circuit, like the Fifth, Eighth and Tenth Circuits, evaluates such speech "as a whole," and will hold that a multi-topic speech is wholly unprotected unless its "main thrust" is to address a matter of public concern. On this view, speech that by itself would be within the scope of the First Amendment will lose that constitutional protection if it is included in a document or oral statement that addresses too many other, non-public concern topics.

In the First Circuit,

> [e]ven if the content of the employee's speech on its face relates largely to the internal affairs of the government agency, *Connick* requires a more searching contextual analysis to determine if the speech implicates matters of public concern as well.... [In *Connick*] most questions [in the plaintiff's questionnaire] related to internal matters that were not of public concern, but one [question] passed this initial inquiry and the court went to the second test [determining whether the employee's interests were outweighed by the interests of the government employer].

Torres-Rosado v. Rotger-Sabat, 335 F.3d 1, 12 (1st Cir. 2003).

The Second Circuit applies the same rule. *Munroe v. Westchester Community College*, 178 Fed.Appx.

37, 38-39 (2d Cir. 2006) ("Although ... much of the speech did not touch on a matter of public concern, the presence of even some speech that touches on a matter of public concern necessitates the *Pickering* balance....").

In the Third Circuit,

> [i]f ... the employee's speech is largely composed of matters of only personal concern, that becomes relevant when the balancing is done, not in the determination whether the speech touches upon matters of public concern. The court, then, cannot make a superficial characterization of the speech or activity taken *as a whole*; to do so would undermine the entire purpose of the *Pickering* test. Instead, it must conduct a particularized examination of each activity....

T.M. Johnson v. Lincoln University of the Commonwealth Syst. of Higher Ed., 776 F.3d 443, 452 (3d Cir. 1985) (emphasis added).

In *Campbell v. Galloway*, 483 F.3d 258 (4th Cir. 2007), the Fourth Circuit refused to deny protection to speech on a matter of public concern solely because it was contained in a letter raising many other issues.

> [We have no] license to ignore the portions of the letter raising issues of [public importance] simply because most of the letter is devoted to personal grievances.... Campbell's letter cannot be deemed to be a matter of private concern simply because the bulk of

> the letter addresses what can only be viewed as personal grievances.

483 F.3d at 267-68.

In *Banks v. Wolfe County Bd. of Ed.*, 330 F.3d 888, 894 (6th Cir. 2003), the Sixth Circuit explained that "[s]ince 1983, this court has followed the Supreme Court's holding that the entirety of the employee's speech does not have to address matters of public concern, so long as some portion of the speech touches on a matter of public concern."

In the instant case the court of appeals applied the contrary Eleventh Circuit rule; the inclusion of a matter of public concern in speech is not protected unless the "main thrust" of the speech as a whole involves a matter of public concern. App. 36a. *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993), explained that "[a]n employee's speech will rarely be entirely private or entirely public**.** Rather than categorize each phrase the employee uttered, we consider whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee." In *Morgan*, although the speech in question did include a matter of public concern, the Eleventh Circuit held it was unprotected because "the main thrust of her speech took the form of a private employee grievance." *Id.* The court below, quoting the standard in *Morgan*, rejected the plaintiffs' claim because it believed the "main thrust" and "focus" of the Memorandum were matters of only private interest, even though some portions of the Memorandum

were a matter of public concern. App. 36a. The "main thrust" of the Memorandum was of controlling importance, the court explained, because it revealed "whether the purpose of the employee's speech was to raise issues of public concern or further her own private interest." App. 23a; see *infra*, pp. 25-26.

Similarly, the Fifth Circuit refers to speech involving matters of public concern as well as other topics as "mixed speech." E.g., *Stotter v. University of Texas at San Antonio*, 508 F.3d 812, 825-26 (5th Cir. 2007). That Circuit holds that the issue in such cases is whether the "speech as a whole relates to [a] public concern." *Modica v. Taylor*, 465 F.3d 174, 180 (5th Cir. 2006); see *Salge v. Edna Ind. School Dist.*, 411 F.3d 178, 186 (5th Cir. 2005) (question is whether "employee's speech as a whole addresses a matter of public concern"). That is precisely the opposite of the rule in the Third Circuit, which has rejected analyzing such speech "as a whole." *T.M. Johnson*, 776 F.3d at 452. The Fifth Circuit has admitted to great difficulty in fashioning a standard for deciding whether speech "as a whole" relates to a matter of public concern. *Kennedy v. Tangipahoa Parish Library Bd. of Control*, 224 F.3d 359, 367 (5th Cir. 2000).

In the Tenth Circuit, "a pattern of speech may be considered as a unitary whole for determining whether it addresses matters of public concern.... We have indicated that it is appropriate to conduct such a unitary analysis when 'the speech involves one instance but multiple distinct subjects....'" *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d

1192, 1205 (10th Cir. 2007) (quoting *Johnsen v. Indep. Sch. Dist. No. 3*, 891 F.3d 1485, 1491 (10th Cir. 1989)).

In the Eighth Circuit, speech involving both matters of public concern and other topics is evaluated as a whole; the controlling standard is the subjective motive of the speaker. Speech involving some matters of public concern is unprotected if the speaker's "primary" purpose in speaking was to advance a personal interest. Thus speech involving a matter of public concern and motivated in part by a desire to address such a problem and even bring it to the attention of the public will be unprotected if the speaker's main purpose was personal. In *McCullough v. University of Arkansas for Medical Sciences*, 559 F.3d 855, 866 (8th Cir. 2009), the Eighth Circuit held that complaints about sexual harassment were not constitutionally protected because the victim's primary purpose in speaking was to protect his personal interests. The Eighth Circuit explained:

> McCullough does raise important public issues of sexual harassment and organizational disruption, but "the mere fact that the topic of [an] employee's speech [is] one in which the public might or would have had a great interest is of little moment." ... Our focus remains on McCullough's purpose in speaking, and we agree with the district court that the better view is that these complaints are primarily oriented toward McCullough's self-interest, rather than the public interest.

559 F.3d at 866 (quoting *Morgan v. Ford*, 6 F.3d at 754); see *Altonen v. City of Minneapolis*, 487 F.3d 554, 559 (8th Cir. 2007) ("When speech relates both to an employee's private interest as well as matters of public concern, the speech is protected if it is primarily motivated by public concern.... Altonen's ... primary motivation was her personal interest.").

III. THERE IS A CLEAR CIRCUIT CONFLICT REGARDING WHETHER SPEECH ON A MATTER OF PUBLIC CONCERN LOSES CONSTITUTIONAL PROTECTION IF MADE FOR A PERSONAL PURPOSE

The court of appeals reiterated and applied established Eleventh Circuit precedent under which speech on a matter of public concern loses constitutional protection if the speaker was motivated by a desire to advance some personal interest. Other circuits have emphatically rejected that rule.

(1) The panel emphasized that "[w]e have said before that 'the relevant inquiry is not whether the public would be *interested* in the topic of the speech at issue,' it is 'whether the *purpose* of [the employee's] speech was to raise issues of public concern.' *Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (emphases added)." App. 35a. "A court must ... discern the purpose of the employee's speech – that is, whether she spoke on behalf of the public as a citizen, or whether the employee spoke for herself as an employee." *Morgan*, 6 F.3d at 755. As applied in the Eleventh

Circuit, even though the content of an employee's speech was a matter of public concern, a court will still reject the claim if the speaker spoke with the wrong motive. For example, in *Morgan* the plaintiff had complained about being sexually harassed. In holding her complaint outside the protections of the First Amendment, the court commented:

> [w]hile we heartily agree with Morgan that sexual harassment in the workplace is a matter of important social interest, "the mere fact that the topic of the employee's speech was one in which the public might or would have a great interest is of little moment." ... Rather, we must determine whether the purpose of Morgan's speech was to raise issues of public concern, on the one hand, or to further her own private interest, on the other.... Morgan's speech was driven by her own entirely rational self-interest in improving the conditions of her employment.

6 F.3d at 755 (quoting *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988)). The Eleventh Circuit has repeatedly applied this rule to reject claims without regard to whether the subject matter of the speech was a matter of public concern.[2] *Myles v. Richmond County Bd. of Education*, 267 Fed.Appx. 898, 900

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[2] E.g., *Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007) (danger to safety of children being assisted by agency); *Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir. 1997) (racist remarks by supervisor); *Deremo v. Watkins*, 939 F.3d 908, 912 (11th Cir. 1991) (sexual harassment).

(11th Cir. 2008) ("Though her speech did touch on a matter of public interest, the true purpose behind [plaintiff's various complaints was not to raise an issue of public concern, but rather to further her own private interest in improving her employment position."). It is not sufficient that an employee speak with some purpose to raise a matter of public concern; that must be his or her "primary" purpose. *Maggio*, 211 F.3d at 1353.

The Eighth Circuit also holds that speech on a matter of public concern is unprotected if engaged in without a concern for the public. "It is not enough that the topic of an employee's speech is one in which the public might have an interest.... We must determine whether the purpose of the speech was to raise issues of public concern or to further the employee's private interests." *Sparr v. Ward*, 306 F.3d 589, 594 (8th Cir. 2002); see *Schlicher v. University of Arkansas*, 387 F.3d 959, 963 (8th Cir. 2004) ("it is not enough to say that a particular topic or subject is ... a matter of public concern. If the speech was mostly intended to further the employee's private interests rather than to raise issues of public concern, her speech is not protected, even if the public might have an interest in the topic of her speech.")

The Seventh Circuit has adopted an intermediate rule. An employee who speaks *solely* for private reasons enjoys no constitutional protections. "[E]ven speech on a subject that would otherwise be of interest to the public will not be protected if ... the only point of the speech was 'to further some purely

private interest.'" *Gustafson v. Jones*, 290 F.3d 895, 908 (7th Cir. 2002) (quoting *Kokkinis v. Ivkovich*, 185 F.3d 840, 844 (7th Cir. 1999)). Applying this rule, the Seventh Circuit makes fact-intensive determinations of the motives of each speaker, albeit without any trial or live testimony. In *Bivens v. Trent*, 591 F.3d 555, 561-62 (7th Cir. 2010), the Seventh Circuit held that a complaint about lead contamination in a public building was unprotected because it was "filed for the sole purposes of securing [the plaintiff's] own medical treatment and ensuring he had a safe working environment." In *Smith v. Fruin*, 28 F.3d 646 (7th Cir. 1994), the court held that a complaint about second-hand smoke in a police station was unprotected because the officer had only complained because he was worried about his own health.

(2) The Second Circuit, on the other hand, has repeatedly reversed district court decisions that rejected First Amendment claims because the speaker had a personal motive. In *Garcia v. Hartford Police Dept.*, 706 F.3d 120, 130 (2d Cir. 2013), the court of appeals explained that

> [t]he district court erred in concluding that because Garcia spoke ... to protect his reputation, his speech was not protected by the First Amendment. Whether or not Garcia [spoke] solely out of a desire to protect his reputation, he spoke about a matter of public concern, namely, whether the police department was discriminating against Hispanics.

In *Sousa v. Roque*, 578 F.3d 164 (2d Cir. 2009), the district court had dismissed the free speech claim on the ground that "[t]here is no First Amendment protection for speech calculated to redress personal grievances in the employment content." 578 F.3d at 169. The Second Circuit reversed. "[A] speaker's motive is not dispositive in determining whether his or her speech addresses a matter of public concern.... [T]he District Court erred in concluding that Sousa's speech did not address a matter of public concern because he was motivated by employment grievances." *Id.* at 173-74. In *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006) (opinion joined by Sotomayor, J.), the Second Circuit held that a First Amendment claim is not barred by a finding that the speaker had not acted for the purpose of addressing a public problem. "[The defendant] contends that because the jury found Reuland was not motivated by a desire to address a matter of public concern, his speech cannot have been a matter of public concern. We disagree." 460 F.3d at 415. "[T]he jury's finding that Reuland was not motivated by a desire to address a matter of public concern does not resolve the issue.... Reuland's statement addressed the crime rate in Brooklyn. We have previously held that crime rates are inherently a matter of public concern." *Id.* at 418.

In *Fryer v. Noecker*, 34 Fed.Appx. 852 (3d Cir. 2002) (opinion joined by Alito, J.), the Third Circuit held that

> regardless of the motive or the personal interest of the speaker, a matter will be

> deemed a matter of public concern if it is the type of issue that is important ... for public employees to be free to express themselves about.... [I]n *Baldassare v. New Jersey*, 250 F.3d 188 (3d Cir. 2001), ... we noted that, although Mr. Baldassare had a personal motivation for expressing his views, that motivation was immaterial, because Baldassare was trying to bring to light ... a matter of public concern.

34 Fed.Appx. at 853-54. In *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997) (en banc) (opinion joined by Alito, J.), the court upheld the plaintiff's First Amendment claim despite the fact that in speaking "her interest in each instance was in saving her job and that of her husband." 110 F.3d at 979. *Azzaro* disapproved of the contrary Eleventh Circuit rule in *Morgan v. Ford*, the precedent applied by the court of appeals in the instant case. 110 F.3d at 979. In contrast to decisions in the Seventh Circuit denying protection to complaints about lead contamination and second hand smoke because the speaker was only concerned about his own health, the Third Circuit in *Brennan v. Norton*, 350 F.3d 399 (3d Cir. 2003), upheld a claim about asbestos contamination regardless of the motive involved.

In the Sixth Circuit, "the pertinent question is not *why* the employee spoke, but *what* he said...." *Farhat v. Jopke*, 370 F.3d 580, 591 (6th Cir. 2004) (emphasis in original). "The fundamental distinction recognized in *Connick* is the distinction between *matters* of public concern and *matters* of personal

interest, not civic-minded motives and self-serving motives." *Chapel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 575 (6th Cir. 1997) (emphasis in original). Similarly, the First Circuit will only look at the motive of a speaker when "public-employee speech [is] on a topic which would not necessarily qualify, *on the basis of its content alone*, as a matter of inherent public concern." *O'Connor v. Steeves*, 994 F.2d 905, 913-14 (1st Cir. 1993) (emphasis in original). The Ninth Circuit holds that the speaker's motive is irrelevant except when "the subject matter of a statement is only marginally related to issues of public concern." *Johnson v. Multnomah County, Oregon*, 48 F.3d 420, 425 (9th Cir. 1995).

> This conflict is well recognized.
>
> The courts of appeals have adopted various approaches for determining whether a topic of employee speech is of "public concern"....
> [S]ome courts have adopted a content-based analysis, focusing exclusively on "which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government." *McKinley v. City of Eloy*, 705 F.2d 1110, 1113-14 (9th Cir. 1983).... Other courts have adopted an analysis which turns either entirely or in part on the employee's subjective intent....

O'Connor v. Steeves, 994 F.2d at 913. The existence of the conflict was also noted in *Sousa*, 578 F.2d at 172,

Reuland, 460 F.3d at 417-18, and *Harris v. City of Virginia Beach*, 1995 WL 634593 at *7 (4th Cir. Oct. 30, 1995) (Heaney, J., dissenting). See Comment, Beyond "Public Concern": New Free Speech Standards for Public Employees, 57 U.Chi.L.Rev. 249, 258-60 (1990).

IV. THE DECISION BELOW IS CLEARLY INCORRECT

(1) Although the broadly phrased language of *Garcetti* leaves some doubt as to the scope of that decision, other opinions of this Court make clear that the Eleventh Circuit interpretation of *Garcetti* is far too broad.

This Court has explained that speech by government employees is important because "Government employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion). But practices and problems that "ail" government agencies are precisely the sort of thing that would interfere with the work of its employees. Employees are most likely to know about the particular problems that affect their own work, not the activities of other employees in different offices. It would be a strange interpretation indeed if the First Amendment were construed to protect only employees who want to talk about how swimmingly things are going in their offices, and to muzzle employees who want to complain that things are not going well at all.

In fact, the plaintiff in *Pickering* was complaining about problems at his high school that interfered with the proper performance of his job as a teacher. His letter to the editor objected that "[the] Board of Administration ... ha[s] been spending on varsity sports while neglecting the wants of teachers." 391 U.S. at 577. "[L]ook at East High [School]. No doors on many of the class rooms, a plant room without any sunlight, no water in a first aid treatment room, ... [a] part of the sidewalk in front of the building has already collapsed.... [W]e need blinds on the windows...." *Id.* These are precisely the kinds of complaints that under the Eleventh Circuit standard would not be protected.

In *Garcetti* Justice Souter expressed concern that under the majority opinion an employer might be able to "limit the ... teacher's [speech] options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school." 547 U.S. at 432 n.2 (dissenting opinion). The majority, in response, "reject[ed] ... the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." 547 U.S. at 424. If Georgia State University were to adopt a rule stating that "all employees have an obligation to report anything that interferes with the performance of their duties," this Court would surely hold that the University could not by that artifice eviscerate the First Amendment rights of its workers. But what the court of appeals has done in this case is far worse; it

has imposed that very obligation, and concomitant limitation on First Amendment rights, on all of the hundreds of thousands of public employees that work at any of the state, local, and federal government agencies anywhere in the Eleventh Circuit.

(2) This Court's decision in *Connick v. Myers* makes clear that a multi-topic speech involves a matter of public concern, and thus must be evaluated under *Pickering*, if any part of the speech addresses a matter of public concern.

The speech in *Connick* consisted of a questionnaire. Thirteen of the fourteen questions were limited to minor employment gripes. 461 U.S. at 148. One question in Myers' questionnaire, however, d[id] touch upon a matter of public concern." *Id.* at 149. "Because one of the questions in Myers' survey touched upon a matter of public concern, and contributed to her discharge," *Connick* explained, "we must determine whether Connick was justified in discharging Myers." *Id.* The Court did consider the fact that most of the questionnaire was not a matter of public concern, but only in weighing the First Amendment and employer interests at stake, not in deciding whether that balancing analysis was required at all. *Id.* at 152, 154.

Just as the inclusion of non-public concern matters in the questionnaire in *Connick* did not obviate the need to engage in *Pickering* balancing, so here the inclusion of any non-public concern matters in the Memorandum did not eliminate the need for that

First Amendment evaluation. Constitutionally protected speech on a matter of public concern cannot lose constitutional protection merely because it is contained in a written or oral statement that also addresses other issues.

(3) The Eleventh Circuit's insistence that the determination of whether speech is about a "matter of public concern" turns on the motive of the speaker is palpably inconsistent with the decisions of this Court, and with ordinary English.

"Matter" of public concern, the phrase consistently used by this Court, refers to the subject matter of the speech. Matters of public concern are "*subjects* that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which ... an ... official charged with managing a vital governmental agency, discharges his responsibilities." *City of San Diego v. Roe*, 543 U.S. 77, 84 (2004) (quoting *Connick*, 461 U.S. at 163 (opinion of Brennan, J.)) (emphasis added). Of course, the broader context in which a statement was made could throw light on the meaning of the words. But the subjective purpose of the speaker, a circumstance of which the public would almost always be unaware, could not, except in the most unusual circumstances, affect whether the speech was of concern to the public. It is simply impossible to understand how, as one opinion asserted "speech of public importance is ... *transformed* into a matter of private concern when it is motivated solely by the speaker's personal interests." *Gazarkiewicz v. Town of Kingsford Heights,*

Indiana, 359 F.3d 933, 942 (7th Cir. 2004) (emphasis added).

As several courts have noted, attributing significance to whether a speaker acted with a personal motive is inconsistent with the decision in *Connick*. The plaintiff in that case clearly was acting with a personal motive, seeking to "stir up other people" to avoid an unwanted transfer. 461 U.S. at 151 n.11. Yet this Court held that a single question in her questionnaire was about a matter of public concern, and required a weighing of the competing interests under *Pickering*. See *Reuland*, 460 F.3d at 416 (opinion joined by Sotomayor, J.); *Azzaro v. County of Allegheny*, 110 F.3d at 979 (opinion joined by Alito, J.).

The notion that speech is only a matter of public concern when motivated by a desire to address a public issue is also inconsistent with the decision in *Lane v. Franks*. *Lane* held that testimony under oath is ordinarily outside of the limitation in *Garcetti*, and that the "content of Lane's testimony – corruption in a public program and misuse of state funds – obviously involves a matter of significant public concern." 134 S.Ct. at 2380. *Lane* overturned the Eleventh Circuit decision in *Morris v. Crow*, 142 F.3d 1379, 1382-83 (11th Cir. 1998), denying First Amendment protection to testimonial statements. But the lower court decision in *Morris* was based on the same reasoning utilized by the Eleventh Circuit in the instant case, that speech is only a matter of public concern if the motive of the speaker is to address such a concern. "Morris ... reasoned – in declining to afford

First Amendment protection – that the plaintiff's decision to testify was motivated solely by his desire to comply with a subpoena. The same could be said of Lane's decision to testify." *Lane v. Franks*, 134 S.Ct. at 2381-82. If the speaker's motive was not relevant to whether Lane's speech was a matter of public concern, then that motive cannot be relevant to whether the speech of the plaintiffs in the instant case was entitled to constitutional protection.

V. THIS CASE PRESENTS AN EXCELLENT VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED

All of the inter-related questions presented were squarely addressed by the courts (and dissent) below, and were the basis of the Eleventh Circuit decision rejecting plaintiffs' claims.

Whether plaintiffs' claims are barred by *Garcetti* turns on the answer to the first question. The Eleventh Circuit held the speech was unprotected solely because it believed that the Memorandum had the effect of furthering the plaintiffs' ability to do their jobs, and was engaged in for that purpose. There is no suggestion in this case that university officials had ever directed any of the plaintiffs to monitor and report on the competence of their boss, or that the Memorandum was a routine occurrence.

The Eleventh Circuit did not deny that at least part of the Memorandum dealt with matters of public concern, but only insisted that the "main thrust" and

purpose of the Memorandum removed it from constitutional protection. In at least five circuits, on the other hand, the inclusion of any matter of public concern would compel application of the *Pickering* balancing test.

The court below based its rejection of the First Amendment claims on its conclusions about the purposes which motivated the plaintiffs to write and submit the Memorandum, discrediting their claims that they had spoken out of concern for the safety and quality of services provided to the university community. If, as other circuits hold and *Connick* indicates, their motive was irrelevant, the decision below would clearly be incorrect.

Review by this Court is necessary to resolve these intertwined important questions, and to bring clarity and stability to this vital area of First Amendment law.

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CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-14149

D.C. Docket No. 1:12-cv-01899-WCO

MELISSA A. ALVES,
COREY M. ARRANZ,
SANDRINE M. BOSSHARDT,
KENSA K. GUNTER, and
ALAYCIA D. REID,

Plaintiffs-Appellants,

versus

BOARD OF REGENTS OF THE
UNIVERSITY SYSTEM OF GEORGIA,
JILL LEE-BARBER, in her individual capacity, and
DOUGLAS F. COVEY, in his individual capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(October 29, 2015)

Before WILSON and MARTIN, Circuit Judges, and HODGES,* District Judge.

WILSON, Circuit Judge:

On this appeal, we consider whether a written grievance by five university employees alleging mismanagement by their supervisor which preceded their termination is entitled to First Amendment protection. Appellants Melissa A. Alves, Corey M. Arranz, Sandrine M. Bosshardt, Kensa K. Gunter, and Alaycia D. Reid (collectively, Appellants) are clinical psychologists and former full-time staff employees at the Georgia State University (the University) Counseling and Testing Center (the Center). In 2012, they were terminated through a purported reduction-in-force by Dr. Jill Lee-Barber, the Director of the Center, and Dr. Douglass F. Covey, the Vice President of Student Affairs. According to Appellants, the reduction in force was mere pretext. They were terminated, they say, in retaliation for submitting a Memorandum to University officials complaining about what they perceived to be poor leadership and mismanagement by Dr. Lee-Barber. Appellants say their Memorandum amounts to citizen speech on a matter of public concern, which would be protected by the First Amendment, and that their retaliatory termination thus violated the Constitution. The district court found, however, that the

* Honorable Wm. Terrell Hodges, United States District Judge for the Middle District of Florida, sitting by designation.

Appellants' Memorandum constituted employee speech on an issue related to their professional duties, which would not be subject to First Amendment protection, and granted summary judgment to Appellees on that ground. We affirm the judgment.

I.

In August 2009, the University hired Dr. Lee-Barber as its Director of Psychological and Health Services. Dr. Lee-Barber was tasked with administrative and supervisory responsibility over three departments: the student health clinic, student health promotion, and the Center.

A. The Center

The Center provided clinical services to the student body, including psychological counseling, testing, and assessment, and operated a training program for doctoral students, which included pre-doctoral internships, a practicum training program for doctoral students, and post-doctoral fellowships.

The mental health services provided by staff at the Center included, among other things, initial consultations, individual and couples counseling, group counseling, nutrition consultations, mental health outreach, and faculty and staff consultations. As of 2011, upward of fifty percent of the Center's clinical services were provided by trainees in the Center's training program. Candidates for the Center's

training program were recruited through national "feeder programs" managed by the Center's staff.

The Center was also tasked with conducting mandatory psychological assessments of students who were identified by the Office of the Dean of Students as individuals who had the potential to cause harm to themselves or to others. The assessments were performed through the University's Mandated Safety Assessment Program, which was administered by certain staff at the Center. A student deemed a "safety concern" by the Office of the Dean of Students was referred by the Office of the Dean of Students to the Center for evaluation through the Program. Students identified as "safety concerns" might be excluded from on-campus housing or continued enrollment at the University. The Director of the Center was tasked with coordinating assessment efforts with the Office of the Dean of Students.

B. The Staff

Dr. Lee-Barber assumed her role as Director of the Center in 2009. In that capacity, Dr. Lee-Barber oversaw the Center's programs, managed the Center's operations, and served as the liaison between the Center and the Office of the Dean of Students with regard to the Mandated Safety Assessment Program. Dr. Lee-Barber reported to Dr. Rebecca Stout, Associate Vice President for Student Affairs and Dean of Students, who, in turn, reported to Dr. Douglass Covey, Vice President of Student Affairs.

When Dr. Lee-Barber assumed her role as Director, Appellants were employed as full-time staff and clinical psychologists at the Center. Appellants' responsibilities at the Center were expansive and varied, and, given the nature of Appellants' retaliation claim, a brief summary of each of Appellants' roles is in order.

Dr. Arranz was the Crisis Response Coordinator for and a clinical psychologist at the Center. He helped develop the University's Mandated Safety Assessment Program and formulate the procedures used in assessing a student's risk of violence through the Program. Among other things, Dr. Arranz oversaw the Center's crisis services, provided training on crisis procedures to staff and trainees, supervised interns, students, and trainees, and conducted mandated assessments.

Dr. Reid was the Assistant Director of Training and a clinical psychologist at the Center. Her duties included, among other things, providing clinical services, assisting in the coordination of clinical services, supervising senior staff psychologists and trainees, serving as the Associate Director on Duty when the Director of the Center was unavailable, serving as a consultant to the Office of the Dean of Students, assisting in the development of policies and procedures for the Center, and conducting mandated assessments. Dr. Reid also served as an adjunct professor at the University.

Dr. Bosshardt was the Coordinator of Mind-Body Programs and a clinical psychologist at the Center. She was the Center's liaison to the International Student Services and the University Health Clinic. Dr. Bosshardt also performed the general duties of a staff psychologist, which included individual and group therapy, outreach services, individual supervision for trainees, and weekly crisis walk-in hours. She also served as a member of the Center's Clinical Task Force and Executive Training Committee.

Dr. Alves served as the Center's Internship Training Director and was a clinical psychologist at the Center. In addition to providing general clinical services to the University community, Dr. Alves also provided "educational instruction" to trainees, supervised interns, post-doctoral students, and practicum students, and served on numerous committees, including the Center's Executive Committee (an "upper administrative level" committee).

Dr. Gunter, the fifth and final Appellant, joined the Center as the Outreach Coordinator before transitioning to Coordinator of Practicum Training. In the latter role, Dr. Gunter served as the primary point of contact for practicum students. She was also the Center's liaison to the University's Athletic Department, the primary provider of sports psychology and counseling services, and, as of 2010, Chair of the Center's Diversity Committee and Co-Chair of the Cultural Competency Conference Planning Committee.

The Center's staff also included several professionals and trainees who are not parties to this appeal, including clinical psychologist Dr. Rachel Kieran, the Center's sexual and gender diversity coordinator; Dr. Pegah Moghaddam, a senior staff psychologist and the Center's group therapy coordinator; and clinical psychologist Dr. Yared Alemu, who served as the interim Assistant Director of Clinical Services and on the Center's mandatory assessment team with Drs. Reid and Arranz.

C. The Speech

On or about October 18, 2011, Dr. Gunter met with the University's Office of Opportunity Development and Diversity Education Planning (ODDEP). The ODDEP deals with issues of discrimination within the University community. In the meeting, Dr. Gunter expressed concerns regarding Dr. Lee-Barber's management of the Center and an interest in filing a complaint against Dr. Lee-Barber. An intake form completed by Dr. Gunter listed the bases for her complaint as race and age unfairness, "potential hostile work environment," and "retaliation for stating that [Dr. Lee-Barber's] behavior was hypocritical." Other "not discrimination based" issues included personnel issues, increasing office conflict, and unfair treatment. Dr. Gunter ultimately did not file a complaint.

On October 25, 2011, Appellants and two other full-time psychologists, Drs. Moghaddam and Alemu,

submitted a formal, written memorandum of concern to University officials regarding Dr. Lee-Barber's management of the Center (the Memorandum).[1] The Memorandum was addressed to Drs. Covey and Stout – Dr. Lee-Barber's immediate supervisors – and was copied to the Senior Vice President for Academic Affairs and Provost, the University Attorney in the Office of Legal Affairs, and Dr. Lee-Barber.

In the Memorandum, Appellants alleged that Dr. Lee-Barber's leadership and management of the Center adversely impacted client care and jeopardized the reputation of the Center. They complained that Dr. Lee-Barber had created an unstable work environment that prevented staff from "effectively carry[ing] out all aspects of their work" and from "optimally perform[ing] daily required tasks[,] including the ability to collaboratively manage risk." Appellants expressly stated that the Memorandum was "not an employee grievance," but rather "a documentation of identifiable behaviors . . . that jeopardize[d]

[1] The Memorandum was jointly drafted, signed, and submitted by seven signatories using one voice. Drs. Moghaddam and Alemu, however, resigned from their positions at the Center prior to the reduction in force that was the impetus for the instant action. Appellants are the five remaining signatories and the only signatories asserting a claim for retaliation. Therefore, in the interests of clarity and continuity, we will refer to statements and assertions made in the Memorandum as being made by "Appellants" rather than "the signatories."

the programs" offered by the Center. The Memorandum then set forth five areas of general concern:

1. *Deficiencies in Managing Center Operations*: Appellants alleged that Dr. Lee-Barber demonstrated "a fundamental misunderstanding" of the Center's client population and "deficiencies in her ideological approach to" the services provided by the Center. They further contended that Dr. Lee-Barber lacked "knowledge in the areas of complex psychopathology," was ineffective "in dealing with campus collaborators," and had an "inability to advocate for the appropriate use of psychologists' skills in conducting [the mandated safety risk] assessments," which "significantly compromise[d] the [Center's] ability to effectively manage risk and crisis." Appellants claimed that Dr. Lee-Barber's "lack of assessment skills" posed "problems in recognizing risk" and that her "lack of understanding about the nuances of the mandated program . . . contributed to her misinforming staff about when and how to use the mandated process."

2. *Failure to Maintain Positive Trainee Relationships*: Appellants alleged that the Center's "quality relationships" with feeder programs and its overall reputation were critical to its "ability to attract, recruit, and retain trainees." They claimed that Dr. Lee-Barber's "management style" had created "rifts" in the Center's relationships with its feeder programs and that the Associate Director of Training [Dr. Reid] had to "step in and manage the damage." They also relayed "concerns" voiced by trainees regarding Dr.

Lee-Barber's "communication style," "lack of authenticity," and "apparent confusion" about "some policies and procedure," her "inappropriate comments" about the physical attractiveness of one trainee, and other "negative nonverbal" behavior such as "eye-rolling."

3. *Questionable Competence in Management of Center Resources*: Appellants alleged that "Dr. Lee-Barber's management of personnel, which is the primary clinical resource of the Center, [had] been a significant problem." They questioned "Dr. Lee-Barber's emotional and professional stability" given her "pervasive pattern" of "significant" emotional outbursts. Dr. Lee-Barber allegedly failed to adhere "to the boundaries of the professional relationship" in one-on-one meetings with staff members wherein she would "discuss her feelings" about other employees. Appellants catalogued Dr. Lee-Barber's difficulty in considering feedback from others and staunch maintenance of a "singular vision" for the Center. They also complained that Dr. Lee-Barber had a "preoccupation" with staff members taking notes during staff meetings and that Dr. Lee-Barber's management style "undermine[d] open communication."

4. *Witness Tampering and Influence*: Appellants alleged that Dr. Lee-Barber sought to influence the testimony of at least three staff members who were witnesses in a tenure revocation proceeding involving the former Associate Clinical Director of the Center by "encouraging" the three staff members to only provide information that "could support the University's position." She allegedly told one staff member,

"We need to support the President [of the University]," and she "exhibited frustration" in discussing the proceedings with another. Appellants postulated that Dr. Lee-Barber was "misusing" her "authority and power in encouraging a certain level of participation" in the revocation proceedings.

5. *Differential Treatment of Staff of Color*: Appellants also alleged that Dr. Lee-Barber responded differently to "staff of color" than to "white-identified staff." They stated that Dr. Lee-Barber would complain when "staff of color" used portable electronic devices to take notes in staff meetings, but she did not complain when "white-identified staff" did the same. They further alleged that Dr. Lee-Barber "routinely commented" on the tone of voice and body language of "staff of color," but she did not make the same comments to "white-identified staff."

Appellants asserted that, in addition to raising awareness about their concerns, the Memorandum served "as a request for an investigation of [Appellants'] concerns in order to remedy the . . . crisis in leadership and management" at the Center. To this end, Appellants directed the Memorandum "to those that would appear to have the most need to know and best opportunity to investigate and correct the problems [they had] observed."

D. The University's Response

Dr. Covey appointed two senior staff members, Carol Clark, Assistant Vice President for Student

Affairs, and William Walker, Director of Student Affairs, to investigate Appellants' concerns. Between November and December 2011, Clark and Walker interviewed each of the Appellants. Clark and Walker also asked each Appellant to submit an individual statement detailing the specific complaints in the Memorandum of which he or she had personal knowledge.[2]

In January 2012, Dr. Covey met with Appellants to inform them that Clark and Walker had found insufficient evidence to substantiate their concerns. Copies of a final investigative report prepared by Clark and Walker were forwarded to Appellants on February 3, 2012. The report stated that Appellants' "negative attitudes and dissatisfaction seem[ed] to be due to the desire of some of the staff to run the Center in the collaborative clinical services model that

[2] On December 15, 2011, Drs. Alves, Arranz, Gunter, Moghaddam, and Reid submitted a complaint to the ODDEP. They complained that Clark and Walker "were biased, made inappropriate and/or insensitive comments, and [they] felt that due process was not offered to [either side]" during the investigation. They also alleged Dr. Lee-Barber had "creat[ed] a hostile work environment, unfairly enforce[ed] departmental policy, retaliated against some of the [staff] for taking their concerns to the Division leadership . . . , discriminated against some of the employees due to their race and/or sexual identity, bullied, mobbed, and participated in favoritism." Linda Nelson, Assistant Vice President for the ODDEP, investigated the psychologists' complaint. She found no evidence of racial discrimination and concluded that Clark and Walker's investigation was not conducted improperly.

was used by the former director." Clark and Walker also reported a "strong resistance" to change and a "reluctance to follow directions" among the Center's staff. In the end, Dr. Covey determined that no action would be taken against Dr. Lee-Barber.

Within a week after the final report was issued to Appellants, Dr. Lee-Barber made the unilateral decision to cancel the Center's practicum training program and the Center's participation in the national matching program for interns. Dr. Lee-Barber asserted that the changes were due to an accreditation standard that recommended that no more than forty percent of the Center's clientele be seen by trainees. The cancellations eliminated many of the job duties of Drs. Reid, Gunter, and Alves.

In the days between February 10 and March 2, Drs. Lee-Barber and Covey, with assistance from other University officials, also made the decision to implement a reduction in force that would eliminate the entire staff of full-time psychologists – all but one of whom were signatories to the Memorandum. University officials intended to outsource the clinical services provided at the Center to contract psychologists to allegedly lower the costs associated with running the Center. On March 2, 2012, Appellants (along with a full-time psychologist who was not a signatory to the Memorandum) were terminated.

E. The District Court Proceedings

On April 20, 2012, Appellants filed a complaint in state court against Dr. Lee-Barber, Dr. Covey, and the Board of Regents of the University System of Georgia (collectively, Appellees). The action was removed to federal court. Appellants' complaint asserted four counts, including a claim under 42 U.S.C. § 1983 for retaliation in violation of the First Amendment of the United States Constitution and a claim for the same under the Georgia State Constitution. After discovery, Appellees moved for summary judgment on all claims. The district court granted Appellees' motion as to Appellants' free speech claims and denied it with leave to renew as to Appellants' other claims.

The district court held that Appellants' speech was not protected speech because Appellants spoke as employees on private matters rather than as citizens on matters of public concern. The court rejected Appellants' characterization of the Memorandum as limited in scope to the Center's management of risk and crisis, reasoning that "[t]he fact that one issue raised in the [Memorandum] – mandatory risk assessments – might reflect on public safety or public policy is not sufficient to bring the entire [Memorandum] within the ambit of 'public concern,' particularly given the fact that the remainder of the Memorandum addressed employment issues." It found that Appellants' complaints addressed the manner in which Dr. Lee-Barber's management style affected Appellants as employees, not how her management of the Center impacted public health and safety. In the

absence of constitutional protection, the district court granted summary judgment to Appellees on Appellants' free speech claims.

Appellants timely filed this instant appeal.[3]

II.

We review an order granting summary judgment de novo, applying the same legal standards that bound the district court. *Hegel v. First Liberty Ins. Corp.*, 778 F.3d 1214, 1219 (11th Cir. 2015). As such, we will not affirm a grant of summary judgment unless the movant has shown that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). In our review, "[a]ll evidence must be viewed in the light most favorable to the party opposing the motion for summary judgment." *Ave. CLO Fund, Ltd. v. Bank of Am., N.A.*, 723 F.3d 1287, 1294 (11th Cir. 2013) (internal quotations marks omitted). We do not weigh conflicting evidence or make credibility determinations, and we draw "[a]ll reasonable inferences arising from the

[3] After the district court entered its order and prior to filing this appeal, Appellants filed a consent order to amend their complaint to withdraw their remaining claims, terminating the case below. Appellants filed their notice of appeal in this court following entry of judgment on Appellants' freedom of speech claims below. *See* 28 U.S.C. § 1291; *see also Barfield v. Brierton*, 883 F.2d 923, 930 (11th Cir. 1989).

undisputed facts . . . in favor of the nonmovant." *Id.* (internal quotation marks omitted).

III.

A government employer may not demote or discharge a public employee in retaliation for speech protected by the First Amendment. *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). While a citizen who enters public service "must accept certain limitations on [her] freedom[s]," *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 1958 (2006), she does not "relinquish the First Amendment rights [she] would otherwise enjoy as [a citizen] to comment on matters of public interest," *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968). Thus, the aim is to strike "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." *Id.* at 568, 88 S. Ct. at 1734-35.

A.

The Supreme Court sets forth a two-step inquiry into whether the speech of a public employee is constitutionally protected:

> The first 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 . . . 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 [based on the government's interests as an employer].

Garcetti, 547 U.S. at 418, 126 S. Ct. at 1958 (citations omitted) (identifying, from *Pickering* and its progeny, "two inquiries to guide interpretation of the constitutional protections accorded to public employee speech"). Both steps are questions of law for the court to resolve. *See, e.g.*, *Moss v. City of Pembroke Pines*, 782 F.3d 613, 618 (11th Cir. 2015); *Battle v. Bd. of Regents*, 468 F.3d 755, 760 (11th Cir. 2006) (per curiam). This appeal turns on the first step: "whether the employee[s] spoke as . . . citizen[s] on a matter of public concern."[4] *Garcetti*, 547 U.S. at 418, 126 S. Ct. at 1958.

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[4] Following *Pickering*, our analysis of a public employee's claim that her employer's disciplinary action was in retaliation for constitutionally protected speech has had four parts, requiring an employee to show that "(1) the speech involved a matter of public concern; (2) the employee's free speech interests outweighed the employer's interest in effective and efficient fulfillment of its responsibilities [i.e., the *Pickering* balance]; and (3) the speech played a substantial part in the adverse employment action." *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1318 (11th Cir. 2005). If the employee satisfies her burden on

(Continued on following page)

This threshold inquiry is comprised of two requirements. For her speech to be constitutionally protected, an employee must have spoken (1) as a citizen and (2) on a matter of public concern. *See, e.g.*, *Boyce*, 510 F.3d at 1342. *Garcetti*'s "threshold layer" looks at both the "role the speaker occupied" and "the content of the speech" to determine whether the government retaliation at issue warrants the *Pickering* analysis. *See Davis v. McKinney*, 518 F.3d 304, 312 (5th Cir. 2008) (internal quotation marks omitted); *see also Garcetti*, 547 U.S. at 417, 126 S. Ct. at 1957 ("[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.").

Under *Garcetti* and its progeny, a court must consider the balance of public and private interests articulated in *Pickering* only when the employee speaks "as a citizen." *See Boyce*, 510 F.3d at 1342-43;

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these first three parts, (4) the burden shifts to the employer to show that it would have made the same employment decision even in the absence of the protected speech. *Id.* The first two parts are questions of law to determine whether the employee's speech is protected; the last two parts are questions of fact that address the causal link between the speech and the adverse employment action. *See id.*; *see also Battle*, 468 F.3d at 760. After *Garcetti*, we modified the first step in our four-part analysis to account for *Garcetti*'s two-step inquiry. *See, e.g.*, *Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007) (per curiam). Thus, the first part of this circuit's *Pickering* analysis now asks whether the employee spoke as a citizen *and* whether the speech involved a matter of public concern. *See id.*; *see also Vila v. Padrón*, 484 F.3d 1334, 1339 (11th Cir. 2007).

Vila, 484 F.3d at 1339; *see also Garcetti*, 547 U.S. at 423, 126 S. Ct. at 1961. If the employee spoke as a citizen and on a matter of public concern, "the possibility of a First Amendment claim arises," and the inquiry becomes one of balance, *see Garcetti*, 547 U.S. at 418, 126 S. Ct. at 1958; on the other hand, if the employee spoke as an employee and on matters of personal interest, the First Amendment is not implicated, and "the constitutional inquiry ends with no consideration of the *Pickering* test," *see Boyce*, 510 F.3d at 1343. The First Amendment will step in to safeguard a public employee's right, *as a citizen*, to participate in discussions involving public affairs, but "it [will] not empower [her] to 'constitutionalize the employee grievance.'" *Garcetti*, 547 U.S. at 420, 126 S. Ct. at 1959 (quoting *Connick v. Myers*, 461 U.S. 138, 154, 103 S. Ct. 1684, 1694 (1983)).

B.

As to the "citizen" requirement, the Supreme Court has held that "when 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." *Id.* at 421, 126 S. Ct. at 1960. In *Garcetti*, the Court found that an internal memorandum written by a deputy district attorney "pursuant to his duties" did not constitute speech as a citizen and was thus unprotected. *Id.*

Because the attorney in *Garcetti* conceded that his written statements were made "pursuant to his employment duties," the Court "ha[d] no occasion to articulate a comprehensive framework" for determining just what the Court meant by the phrase "pursuant to his employment duties." *See id.* at 424, 126 S. Ct. at 1961. Given the circumstances, the Court observed:

> The proper inquiry is a practical one. Formal 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.

Id. at 424-25, 126 S. Ct. at 1961-62.

Under *Garcetti*, "[t]he central inquiry is whether the speech at issue 'owes its existence' to the employee's professional responsibilities." *Moss*, 782 F.3d at 618 (quoting *Garcetti*, 547 U.S. at 421, 126 S. Ct. at 1960); *see Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009); *Boyce*, 510 F.3d at 1342. Practical factors that may be relevant to, but are *not* dispositive of, the inquiry include the employee's job description, whether the speech occurred at the workplace, and whether the speech concerned the subject matter of the employee's job. *See Moss*, 782 F.3d at 618. As *Garcetti* instructed, the "controlling factor" is whether the employee's statements or

expressions were made "pursuant to [her] official duties." *Garcetti*, 547 U.S. at 421, 126 S. Ct. at 1959-60.

The Supreme Court recently revisited *Garcetti* in *Lane v. Franks*, 573 U.S. ___, 134 S. Ct. 2369 (2014). In *Lane*, the Court found 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." *Lane*, 134 S. Ct. at 2378. The Court noted that the subpoenaed testimony at issue in *Lane* was "far removed from the speech at issue in *Garcetti*." *Id.* at 2379. The communication in *Lane* was separate and apart from the employee's obligations to his employer, *see id.*, while the memorandum in *Garcetti* was commissioned by the employer, *Garcetti*, 547 U.S. at 422, 126 S. Ct. at 1960. The fact that Lane "learned of the subject matter of his testimony in the course of his employment" could not *alone* transform his "sworn testimony speech as a citizen" into employee speech on par with *Garcetti*'s employer-commissioned speech. *See Lane*, 134 S. Ct. at 2379 ("[T]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee . . . speech.").

The Court noted that, in finding that the employee's memorandum was "made pursuant to [his] official responsibilities" in *Garcetti*, the Court "said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." *Lane*, 134 S. Ct. at

2379 (internal quotation marks omitted). Indeed, in *Garcetti*, the Court "made explicit that its holding did not turn on the fact that the memo at issue concerned the subject matter of the prosecutor's employment, because the First Amendment protects some expressions related to the speaker's job." *Id.* (internal quotation marks omitted). Thus, in *Lane*, the Court reiterated that "[t]he critical question under *Garcetti* is whether the speech at issue is *itself* ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* (emphasis added); *see Garcetti*, 547 U.S. at 421-22, 126 S. Ct. at 1960 (defining speech made pursuant to an employee's job duties as "speech that owes its existence to a public employee's professional responsibilities" and speech the "employer itself has commissioned or created").

After *Lane*, the exception to First Amendment protection in *Garcetti* for "speech that owes its existence to a public employee's professional responsibilities," *Garcetti*, 547 U.S. at 421-22, 126 S. Ct. at 1960, must be read narrowly to encompass speech that an employee made in accordance with or in furtherance of the ordinary responsibilities of her employment, not merely speech that concerns the ordinary responsibilities of her employment.

C.

The second requirement – that the speech address a matter of public concern – concerns the context of

the speech and asks whether the employee spoke on a matter of public concern or on matters of only personal interest. *See, e.g.*, *Boyce*, 510 F.3d at 1342-43. To fall within the realm of "public concern," an employee's speech must relate to "any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146, 103 S. Ct. at 1690; *see Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216 (2011) (including within the ambit of "public concern" speech that "is a subject of legitimate news interest . . . [or] a subject of general interest and of value and concern to the public" (internal quotation marks omitted)). The inquiry turns on "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S. Ct. at 1690.

In determining whether the purpose of the employee's speech was to raise issues of public concern or to further her own private interest, we have recognized that "an employee's speech will rarely be entirely private or entirely public." *E.g.*, *Akins v. Fulton Cty.*, 420 F.3d 1293, 1304 (11th Cir. 2005) (internal quotation marks omitted). Therefore, in reviewing the whole record, "[w]e ask whether the main thrust of the speech in question is essentially public in nature or private." *Vila*, 484 F.3d at 1340 (internal quotation marks omitted); *see Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993) (per curiam) ("Rather than categorize each phrase the employee uttered, we consider whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role

of employee." (internal quotation marks omitted)). If the "main thrust" of a public employee's speech is on a matter of public concern, the speech is protected. *See Morgan*, 6 F.3d at 754-55.

A court may also consider the employee's attempt to make her concerns public along with the employee's motivation in speaking. *See id.* at 754; *Vila*, 484 F.3d at 1339. However, "a court cannot determine that an utterance is not a matter of public concern *solely* because the employee does not air the concerns to the public." *See Morgan*, 6 F.3d at 754 n. 5; *see also Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988) ("[F]ocusing solely on [an employee's efforts to communicate her concerns to the public], or on the employee's motivation, does not fully reflect the Supreme Court's directive that the content, form, and context of the speech must all be considered."). Thus, whether the speech at issue was communicated to the public or privately to an individual is relevant – but not dispositive.

* * *

Given Appellants' heavy reliance on *Lane*, we think a quick word on that case's impact on our precedent is in order. *Lane* focuses on the "citizen" aspect of the *Garcetti* analysis. In *Lane*, the Court held that the First Amendment "protects a public employee who provide[s] truthful sworn testimony, compelled by subpoena," where testifying in court proceedings is outside the scope of the employee's "ordinary job responsibilities." *Lane*, 134 S. Ct. at

2374-75. In so holding, the Court relied specifically on the nature of compelled testimony. *Id.* at 2379-80. It found that any obligations an employee may have, as an employee, to her government employer are "distinct and independent from the obligation, as a citizen, to speak the truth" when offering sworn testimony in judicial proceedings. *Id.* at 2378-79 (noting "the obligation borne by all witnesses testifying under oath"). This "independent obligation" rendered the employee's sworn testimony "speech as a citizen and set[ ] it apart from speech made purely in the capacity of an employee." *Id.* at 2379.

The Court's holding in *Lane* is a narrow one. Because it was "undisputed that [the employee's] ordinary job responsibilities did not include testifying in court proceedings," the Court "decide[d] only whether truthful sworn testimony that is not a part of an employee's ordinary job responsibilities is citizen speech on a matter of public concern." *Id.* at 2378 n.4. *Lane* reinforces *Garcetti*'s holding that a public employee may speak as a citizen even if his speech involves the subject matter of his employment and clarifies the critical inquiry for retaliation claims. *See Lane*, 134 S. Ct. at 2379. The Court's repeated use of the term "ordinary" in reference to the phrase "job duties," *see, e.g.*, *id.* at 2375, 2377-78, and its confirmation that speech that merely concerns information acquired in the course of employment is not "employee speech" narrowed the field of employee speech left unprotected by *Garcetti* – but this is not a

substantial shift in the law. It is, if anything, a slight modification and a useful clarification.

IV.

Here, Appellants challenge the district court's determination that they spoke as employees on matters related to the mission of their public employer – and not as citizens on matters of public concern. They offer three main reasons why their Memorandum constitutes protected speech: (1) Appellants took action that was not required by any job duty; (2) the Memorandum's protests impacted matters of public concern, including "the safety and well-being of students" and "client care"; and (3) Appellants directed their concerns to persons "well outside [their] chain of command." Appellees counter that Appellants' speech owed its existence to Appellants' ordinary job duties and that the Memorandum was nothing more than an internal complaint submitted to Dr. Lee-Barber's supervisors complaining about Dr. Lee-Barber's managerial style. We find that Appellants spoke as employees about matters of only personal interest, and their speech is therefore beyond the protection of the First Amendment.

A.

We first look to whether Appellants spoke as citizens or as employees. *See Garcetti*, 547 U.S. at 418, 126 S. Ct. at 1958; *Boyce*, 510 F.3d at 1342. According to Appellants, their speech owed its

existence to their job responsibilities only to the extent that they would not otherwise have been in a position to know of the matters about which they complained. They argue that their ordinary job duties did not include raising ethical issues, protesting their supervisor's professional incompetence "in the area of mandated assessments," or critiquing the Center's operations. Appellants contend that individual counseling was their "primary job," and, while certain Appellants had "limited administrative/supervisory duties," Appellants were not charged with "ultimate responsibility of the Center's programs" and were not "ultimately responsible for its operations." In short, Appellants argue that because they were not paid to offer a referendum on Dr. Lee-Barber's management or the Center's operations, their Memorandum does not amount to employee speech. *Cf. Garcetti*, 547 U.S. at 421-22, 126 S. Ct. at 1959-60.

As the Supreme Court observed in *Garcetti*, formal job descriptions "often bear little resemblance to the duties an employee actually is expected to perform." *Id.* at 424-25, 126 S. Ct. at 1962. Instead, *Garcetti* and its progeny require a "functional review" of an employee's speech in relation to her duties or responsibilities. *See Abdur-Rahman*, 567 F.3d at 1285. Here, Appellants claim that their only employment duties related to individual counseling and *some* administration and supervision. These duties, as described by Appellants, can be read narrowly so as not to mandate the act of speaking, but such a reading would disregard the actual activities engaged

in by Appellants at the Center as well as the purpose served by the Memorandum.

As a group, Appellants supervised employees, trainees, and other staff; trained interns, candidates, and practicum students; assessed at-risk students; and counseled individuals, couples, and groups. Dr. Arranz was the Crisis Response Coordinator for the Center; he helped develop both the Mandated Safety Assessment Program and the procedures used in assessing a student through the Program. Dr. Reid was the Associate Director on Duty when Dr. Lee-Barber was unavailable; she also supervised staff and trainees, assisted in the coordination of clinical services, and was a consultant to the Office of the Dean of Students. Dr. Alves was the Internship Training Director and served on the Center's Executive Committee. Dr. Gunter was the Coordinator of Practicum Training, and Dr. Bosshardt coordinated the Center's Mind-Body programs – both provided general clinical services. More than a few of Appellants, then, served in supervisory roles at and managed programs administered by the Center.

The Memorandum details how Dr. Lee-Barber's conduct affected Appellants' ability to fulfill these roles. Drs. Arranz and Reid performed mandated assessments; Appellants stated that Dr. Lee-Barber's lack of necessary knowledge compromised their ability to perform these mandated assessments and to manage risk and crisis. Dr. Reid assisted in the development of policies and procedures for the Center; Appellants complained that Dr. Lee-Barber

lacked understanding about "some" of the Center's policies and procedures. Drs. Reid, Alves, Gunter, and, to some extent, Arranz supervised, trained, and recruited candidates into the Center's training programs; Appellants complained that Dr. Lee-Barber's mismanagement impacted the Center's ability to recruit and retain qualified candidates. Appellants provided clinical services to the student body, faculty, and staff at the University; Appellants complained that Dr. Lee-Barber was an incompetent manager of personnel, "the primary clinical resource of the Center." In short, each complaint or concern relates back to Appellants' ordinary duties.

Activities undertaken in the course of performing one's job are activities undertaken "pursuant to employment responsibilities." *See Garcetti*, 547 U.S. at 422-24, 126 S. Ct. at 1960-61. Appellants raised concerns about Dr. Lee-Barber in the course of performing – or, more accurately, in the course of *trying* to perform – their ordinary roles as coordinators, psychologists, committee members, and supervisors. Each complaint in the Memorandum was made in furtherance of their ability to fulfill their duties with the goal of correcting Dr. Lee-Barber's alleged mismanagement, which interfered with Appellants' ability to perform. *See D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1210-12 (11th Cir. 2007) (finding high-ranking employee's broad administrative responsibilities rendered speech "to fulfill his professional duties" unprotected); *see also Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009) ("[Employee's speech] was an

attempt to ensure proper implementation of [his duties] and was therefore offered pursuant to his job duties."). While the Memorandum does not bear the hallmarks of daily activity, it was drafted and submitted by Appellants in the course of carrying out their daily activities. *See, e.g.*, *Paske v. Fitzgerald*, 785 F.3d 977, 984 (5th Cir. 2015) ("When speech-related activities are required by one's position or undertaken in the course of performing one's job, they are within the scope of the employee's duties." (internal quotation marks omitted)), *petition for cert. docketed*, No. 15-162 (Aug. 5, 2015). Thus, it is evident that Appellants' speech "owes its existence" to their professional responsibilities, *Garcetti*, 547 U.S. at 421, 126 S. Ct. at 1960, and it "cannot reasonably be divorced from those responsibilities," *Abdur-Rahman*, 567 F.3d at 1283.

Further, we do not agree that speech regarding conduct that interferes with an employee's job responsibilities is not itself ordinarily within the scope of the employee's duties. Implicit in Appellants' duty to perform their roles as psychologists, committee members, supervisors, and coordinators is the duty to inform, as Appellants put it, "those that would appear to have the most need to know and best opportunity to investigate and correct" the barriers to Appellants' performance. For example, in *Boyce*, two employees at the Department of Family and Children Services complained to their supervisors about the size of their caseloads, which they viewed to be the result of mismanagement of internal administrative affairs.

510 F.3d at 1344-45. The plaintiffs were case workers; they were responsible for investigating the cases of children allegedly at risk and making recommendations to their supervisors. *Id.* at 1336, 1343. Still, we found that the plaintiffs spoke "pursuant to [their] employment responsibilities" in reporting conduct that affected the plaintiffs' ability to manage their cases, close cases, and meet deadlines. *Id.* at 1345-46 (internal quotation marks omitted). In other words, in reporting conduct that interfered with their ordinary job duties, the plaintiffs in *Boyce* spoke pursuant to those duties. And the same is true of Appellants here.

Because Appellants spoke as employees, not as citizens, their Memorandum does not implicate the First Amendment. *See id.* at 1343.

B.

Our inquiry could – but does not – end here.[5] Under *Garcetti*'s second threshold prong, we next ask whether Appellants' speech "addressed an issue

[5] Having determined that Appellants spoke as employees, we need not ask whether the subject matter of Appellants' speech was a topic of public concern. *See Boyce*, 510 F.3d at 1343. However, the "citizen" inquiry and the "public concern" inquiry are closely intertwined. *See Lane*, 134 S. Ct. at 2379-80 (emphasizing special value of employee speech in determining citizen-employee inquiry); *see also Abdur-Rahman*, 567 F.3d at 1283-86; *Boyce*, 510 F.3d at 1343-47. Thus, we think it would better serve the parties if we address both prongs of the *Garcetti* analysis.

relating to the mission of [the Center] or a matter of public concern." *See id.* at 1342. Appellants acknowledge that some of their protests "were directed to personal employment situations," but they argue that the "main thrust" of their Memorandum was the treatment of student mental health issues by the Center and the impact of that treatment on student health. The district court correctly concluded, however, that the form, content, and context of the Memorandum, as construed in the light most favorable to Appellants, indicate that Appellants were speaking as employees on conduct that interfered with their job responsibilities, rather than as citizens on matters of social, political, or other civic concern.[6] *See Connick*, 461 U.S. at 146, 103 S. Ct. at 1690.

After *Connick*, "courts have found speech that concerns internal administration of the educational system and personal grievances will not receive constitutional protection." *Maples v. Martin*, 858 F.2d

[6] Appellants request "credit" for statements within the Memorandum that the Memorandum "[was] not an employee grievance" and "not merely [a compilation of] employee grievances." While we are required to view the facts in the light most favorable to Appellants as the nonmoving parties, *Ave. CLO Fund, Ltd.*, 723 F.3d at 1294, such statements are not "facts." Rather, such statements are conclusions designed to have legally operative effects. *See, e.g.*, *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). While we appreciate Appellants' characterization of their speech, it is the province of the court to determine whether the Memorandum is an employee grievance. *See, e.g.*, *Moss*, 782 F.3d at 618 (stating that both prongs of *Garcetti* are questions of law).

1546, 1552 (11th Cir. 1988); *see Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986) (finding teacher's complaints about manner of course registration and course assignments unprotected). "However, [an employee] whose speech directly affects the public's perception of the quality of education in a given academic system find[s her] speech protected." *Maples*, 858 F.2d at 1553. Further, while speech that "touch[es] upon a matter of public concern" may be considered protected speech, *see Connick*, 461 U.S. at 149, 103 S. Ct. at 1691, our determination must be based on the record as a whole, *see id.* at 147-48, 103 S. Ct. at 1690; *see also Abdur-Rahman*, 567 F.3d at 1284 (cannot consider facts in isolation).

In this case, we find that Appellants' speech did not constitute speech on a matter of public concern. Their Memorandum is focused on their view that Dr. Lee-Barber is a poor leader and a deficient manager, and how Dr. Lee-Barber's conduct adversely affected them and other employees of the Center. *See, e.g.*, *Watkins v. Bowden*, 105 F.3d 1344, 1353 (11th Cir. 1997) (per curiam) (finding employee's complaints about how colleagues behaved toward her and how that behavior affected her work were not protected). The Memorandum sets forth a litany of complaints, including that Dr. Lee-Barber interfered with Appellants' "ability to optimally perform daily required tasks," mismanaged personnel, failed to maintain positive relationships with trainees, was hostile to feedback, encouraged certain testimony in pending

tenure revocation proceedings, and treated "staff of color" differently from "white-identified staff."[7]

Appellants contend that, even if many of their complaints are private in nature, the Memorandum as a whole is grounded in the public interest. They contend that the sufficiency of mental health services provided by public institutions to students, faculty, and staff is a matter of extreme public importance. These public concerns, they argue, are reflected in their complaints about Dr. Lee-Barber's deficient management of Center operations and failure to maintain positive trainee relationships, both of which Appellants contend affect the quality of services provided by the Center and jeopardize the Center's reputation. We recognize that the question of what constitutes proper care in the treatment of mental health issues is a matter worthy of a public forum. But, we find that, while the Memorandum may touch up against matters of public concern, it is not directed to such concerns. *See, e.g.*, *Boyce*, 510 F.3d at 1344-45.

In its introductory remarks, the Memorandum makes vague and sweeping references to "an adverse

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[7] If the speech at issue was Appellants' truthful testimony at the subject tenure revocation proceeding, *Lane* might require a conclusion different from the one that we reach today. However, Appellants' stated concern was Dr. Lee-Barber's alleged "misuse of her authority and power in encouraging a certain level of participation" in the revocation proceedings. Neither Appellants' testimony nor the proceedings themselves are discussed in the Memorandum.

impact on client care," "the safety and well-being of students," and the Center's "ability to provide a safe environment to . . . students," without reference to specific instances in which the Center failed to effectively manage risk or to provide quality care. On the other hand, the Memorandum goes into great detail and offers specific examples when addressing Appellants' personal grievances and frustrations with Dr. Lee-Barber's management of the Center. It refers to Dr. Lee-Barber's deficient ideological approach to clinical work, refusal to address staff concerns, poor communication style, "singular way of examining issues," and displays of "significant emotional distress." *See, e.g.*, *Mpoy v. Rhee*, 758 F.3d 285, 291 (D.C. Cir. 2014) ("[Unprotected speech] list[ed] a litany of complaints indicating that the school, and particularly its principal, had been interfering with [the employee's] 'primary duty.'"). Appellants sought a "stable work environment" to enable them to "carry out all aspects of their work" and "to optimally perform daily required tasks." Upon a careful reading, the public simply does not factor into Appellants' concerns.

We have said before that "the relevant inquiry is not whether the public would be *interested* in the topic of the speech at issue," it is "whether the *purpose* of [the employee's] speech was to raise issues of public concern." *Maggio v. Sipple*, 211 F.3d 1346, 1353 (11th Cir. 2000) (emphases added) (internal quotation marks omitted); *see also Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (*Connick* "requires us to look at the *point* of the speech in question: was it

the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?"). Appellants' speech, while ostensibly intertwined with the services provided by the Center, was not intended to address a matter of public concern from the perspective of a citizen. *See Boyce*, 510 F.3d at 1344-45. It was only incident to voicing their personal concerns that Appellants' remarks touched upon matters that might potentially affect the student body. *See Pearson v. Macon-Bibb Cty. Hosp. Auth.*, 952 F.2d 1274, 1278 (11th Cir. 1992); *see also Gomez v. Tex. Dep't of Mental Health & Mental Retardation*, 794 F.2d 1018, 1022 (5th Cir. 1986) ("Whatever the significance of [the] speech . . . , he was not seeking to alert the public to any actual or potential wrongdoing or breach of the public trust. . . ."). The "main thrust" of the Memorandum's content "took the form of a private employee grievance." *Morgan*, 6 F.3d at 755.

Given its form and context, Appellants' Memorandum did not relate to a matter of public concern. As to form, Appellants used the Memorandum as an internal channel through which they could, in their capacities as employees at the Center, relay to Dr. Lee-Barber's supervisors and other University officials what they believed to be Dr. Lee-Barber's deficient management and poor leadership.

Also, although not dispositive to our inquiry, Appellants made no attempt to make their concerns public. *See id.* at 754; *Kurtz*, 855 F.2d at 727. The

issues outlined in the Memorandum were raised, discussed, investigated, and resolved privately, *see Connick*, 461 U.S. at 148 n.8, 103 S. Ct. at 1691 n.8, and without any intervention from or communication with outside persons or agencies, *cf. Pickering*, 391 U.S. at 564, 88 S. Ct. at 1732-33 (employee sent letter to local newspaper); *Akins*, 420 F.3d at 1304 (employee requested special meeting with public official); *Maples*, 858 F.2d at 1549 (employee's criticisms published in public report). Accordingly, the means by which Appellants communicated their concerns further supports that this was a private employee grievance.

V.

We find that the district court correctly concluded that the speech for which the Appellants seek First Amendment protection was made by them as employees and not as citizens, and on matters related to their employment and not public concern. Therefore, the district court's grant of summary judgment to Appellees is **AFFIRMED**.

MARTIN, Circuit Judge, dissenting:

The Majority concludes that several psychologists who work in Georgia State University's Counseling and Testing Center ("Center") were speaking as employees, rather than citizens, when they criticized the practices of that Center's Director. The Majority also holds that these criticisms are not a matter of

public concern. I believe the First Amendment affords more protection to public employees than the Majority opinion allows, and I would reverse the District Court's grant of summary judgment to the University. It is for that reason I respectfully dissent.

The Supreme Court regularly reminds us that "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957 (2006). For example in *Lane v. Franks*, ___ U.S. ___, 134 S. Ct. 2369 (2014), the Supreme Court reaffirmed 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." *Id.* at 2379. Given this "special value," *Lane* indicates that we should exercise care in applying *Garcetti*'s exception to First Amendment protection.

In exercising this care, we ask two questions: first, whether the psychologists spoke as citizens; and second, whether their speech implicated a matter of public concern. *Moss v. City of Pembroke Pines*, 782 F.3d 613, 617 (11th Cir. 2015). And as we always do in reviewing the grant of summary judgment, we "construe the facts and draw all inferences in the light most favorable to the nonmoving party." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1252 (11th Cir. 2013) (quotation omitted). The District Court and the

Majority answer "no" to both questions. My answer is "yes" to both, so I write to explain how I part ways with my colleagues.

I.

As I said, in order to receive First Amendment protection, the psychologists must first have spoken as citizens rather than employees. The Supreme Court recently gave us guidance about how to answer this question. In *Lane v. Franks*, our Circuit held that Mr. Lane's sworn testimony was employee speech because he "learned of the subject matter of his testimony in the course of his employment." 134 S. Ct. at 2379. We were wrong.[1] In reversing the judgment of this Court, the Supreme Court told us that "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech." *Id.* Rather, "[t]he critical question under *Garcetti* is whether the speech at issue is itself *ordinarily* within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* (emphasis added).[2]

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[1] Since I was on the panel of this court that decided *Lane*, I suppose another way to say it is I was wrong.

[2] The District Court did not mention *Lane* in its order denying First Amendment protection to the psychologists, and therefore seems not to have benefited from the guidance the Supreme Court gave. Perhaps the parties' briefs did not refer to *Lane* because it had not been decided by the time the briefs were

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The Majority is, of course, correct when it says that after *Lane, Garcetti*'s exception to First Amendment protection must be construed narrowly to encompass only "speech that an employee made in accordance with or in furtherance of the ordinary responsibilities of her employment, not merely speech that concerns the ordinary responsibilities of her employment." But I do not see that the Majority applies its own enunciation of the rule. Instead, the Majority broadly reasons that an employee is unprotected when she speaks about conduct that in some way interferes with her ordinary job responsibilities. But this does not give sufficient weight to *Lane*'s clarification of our First Amendment precedent.

It is clear to me that the psychologists' speech was not "ordinarily within the scope of [their] duties." *Id.* As set forth in the Magistrate Judge's Report and Recommendation, their duties included "providing counseling services to the GSU population, conducting mandatory risk assessments of students of concern, and supervising and training the individuals within the [Center's] training and practicum programs." According to their sworn declarations, the psychologists were not responsible for critiquing or assessing the Center Director's performance and its impact on student mental health or the functioning of the Center. For instance, while Corey M. Arranz was the Center's Crisis Response Coordinator overseeing

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filed. However, *Lane* issued over two months before the District Court ruled and now gives us guidance for deciding this case.

crisis services, he "was not charged with ultimate oversight of the [Center's] programs, . . . operations of the [Center] . . . [or] supervision, evaluation, critique, appraisal or reporting as to the performance of the director." Likewise, Melissa A. Alves noted that while she was responsible for therapy and consultations, as well as educational instruction and service on committees, she was not "ultimately responsible for operations at the [Center]," nor was she "responsible for supervision, evaluation, critique, appraisal or reporting as to the performance of the director." So too with the remaining Appellants – Sandrine M. Bosshardt, Kensa Gunter, and Alaycia Reid.[3]

No one really disputes that the psychologists had only limited supervisory duties. Nevertheless, the Majority suggests that even this limited supervisory role brings the psychologists' criticism of the Director's performance within their ordinary job responsibilities. But as nonmoving parties, the psychologists are entitled to have "[a]ll reasonable inferences arising from the undisputed facts" drawn in their favor. *Ave. CLO Fund, Ltd. v. Bank of Am., N.A.*, 723 F.3d 1287, 1294 (11th Cir. 2013) (quotation omitted). The Majority's emphasis on its own view of the Appellants' supervisory roles is not therefore proper at the summary judgment stage.

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[3] At oral argument, counsel for the University agreed that these declarations were the primary evidence in the record concerning the psychologists' job duties.

I certainly recognize that parts of the Memorandum touched on the psychologists' job duties. The Memorandum asserts, for example, that "Dr. Lee-Barber's lack of knowledge in the areas of complex psychopathology and ineffectiveness in dealing with campus collaborators, and her inability to advocate for the appropriate use of psychologists' skills in conducting [mandatory student risk] assessments significantly compromises the [Center's] ability to effectively manage risk and crisis." The Memorandum also notes the Director's detrimental effect on the "[Center's] ability to attract, recruit, and retain trainees . . . [which] directly impacts the quantity and quality of service provision at the [Center]." The psychologists do not contest that counseling, risk assessment, and trainee recruitment were part of their ordinary responsibilities.

However, *Lane* tells us that the First Amendment protects the speech an employee makes outside of her ordinary obligations, even if it touches on those obligations. Public employees "are uniquely qualified to comment" on issues of public concern because of the knowledge they gain through their ordinary work responsibilities. *Lane*, 134 S. Ct. at 2380 (quotation omitted). Here, the psychologists spoke of their own duties only in the context of raising broader concerns about the effects of the Director's mismanagement. Specifically, the psychologists said that the Director's practices impeded their ability to identify students who might be a risk to themselves or others and to provide effective counseling services. I do not view

these health and safety concerns as merely personal gripes or employment-related grievances. *See Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1319 (11th Cir. 2005) (holding that a bus driver's concerns about "the safety of children due to bus overcrowding and the lack of time allotted for pre-trip bus inspections" were not merely "internal bus driver employment issues"); *see also Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 917 n.25 (11th Cir. 1993) ("Some issues may be obviously of public concern from their subject matter, for instance, an alleged health or safety risk."). In contrast, the Majority concludes that the Appellants' ordinary duties included the obligation to make these criticisms.

In support of its conclusion, the Majority cites cases I see as easily distinguishable from this one. *D'Angelo v. School Board of Polk County, Florida*, 497 F.3d 1203 (11th Cir. 2007), for example, is a quintessential "enumerated duty" case. In *D'Angelo*, the school principal who was denied First Amendment protection admitted that he pursued charter conversion to improve the quality of education at his school. This was one of his listed job responsibilities and indeed what he described as his "number one duty." *Id.* at 1210 (quotation omitted). In contrast, our psychologists' jobs include no duty, either express or implied, to critique higher management on the broader issues they raised.

The Majority also cites *Boyce v. Andrew*, 510 F.3d 1333 (11th Cir. 2007) (per curiam), in which this Court held that internal complaints by social services

case managers about the size of their caseloads were unprotected employee speech. *Id.* at 1343. In so holding, we noted that the case managers' complaints focused on "their respective views that their caseloads were too high, which caused each not to meet expected deadlines, and their consequent need for assistance." *Id.* at 1343-44. Thus, "[t]he purpose of their grievances clearly was not to raise public awareness about children within the care of [their office]." *Id.* at 1346. Here, in contrast, the psychologists complained not about a routine aspect of their daily work, but about broader mismanagement and dysfunction at the Center. In doing so, they spoke directly to the quality of services the Center offered to the University and its students.

The Majority also says that the psychologists spoke as employees because they reported conduct that related to their ability to fulfill their respective responsibilities. This argument treads too closely to that affirmatively rejected by *Lane*. The Supreme Court repeats the modifier "ordinary" nine times in the *Lane* opinion, emphasizing that an employee loses First Amendment protection only as to speech he undertakes in "perform[ing] the tasks he was paid to perform." 134 S. Ct. at 2379 (quoting *Garcetti*, 547 U.S. at 422, 126 S. Ct. at 1960).[4] *Lane*'s holding

[4] At least two of our sister Circuits have interpreted this emphasis on "ordinary" job duties as potentially limiting the exception to First Amendment protection for employee speech even beyond what *Garcetti* envisions. *See Dougherty v. Sch. Dist.*

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strengthens *Garcetti*'s "significant point" that First Amendment protection should only be withheld from speech "commissioned or created" by the employer. *Garcetti*, 547 U.S. at 421-422, 126 S. Ct. at 1960. To say, as the Majority does, that the psychologists spoke as employees because "each complaint or concern relates back to Appellants' ordinary duties," seems to me to deny protection based on "the mere fact that [the psychologists'] speech concerns information acquired by virtue of [their] public employment." *Lane*, 134 S. Ct. at 2379.[5] Binding Supreme Court precedent forbids this.

Although the Majority acknowledges *Lane*'s import to some degree, it does not apply its rule. I read the Memorandum to address matters beyond the scope of the ordinary job duties of its writers, so I

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of Phil., 772 F.3d 979, 990 (3d Cir. 2014) ("If anything, *Lane* may broaden *Garcetti*'s holding by including 'ordinary' as a modifier to the scope of an employee's job duties."); *Mpoy v. Rhee*, 758 F.3d 285, 295 (D.C. Cir. 2014) (noting that the repeated use of "ordinary" may limit "the realm of employee speech left unprotected by *Garcetti*").

[5] The only case the Majority cites that directly holds that an employee is unprotected when he reports conduct that "interferes with his job responsibilities" is *Winder v. Erste*, 566 F.3d 209, 215 (D.C. Cir. 2009). However, the D.C. Circuit has since called *Winder* into doubt, noting that "it is possible that *Winder's* broad language, interpreting *Garcetti* as leaving an employee unprotected when he reports conduct that 'interferes with his job responsibilities,' . . . could be in tension with *Lane's* holding." *Mpoy*, 758 F.3d at 294. In the wake of *Lane* and the D.C. Circuit's own questioning of *Winder*'s continued viability, I give this out-of-circuit precedent little weight.

would hold that the psychologists spoke as citizens rather than employees.

II.

The Majority also holds that the Memorandum does not implicate a matter of public concern. Speech involves matters of public concern when it can be "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983). To decide whether speech is a matter of public concern, we look at "the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48, 103 S. Ct. at 1690.

In *Peterson*, we found guidance in "a critical word in the Supreme Court's articulation of the standard, that is the word 'fairly.'" 998 F.2d at 916 (quoting *Connick*, 461 U.S. at 146, 103 S. Ct. at 1690). We explained that:

> the Supreme Court did not say that an employee's speech must be "definitively" or "clearly" or "indisputably" characterized as a matter of public concern. . . . If it *is* capable of being *fairly* so characterized, then dismissal on summary judgment without examination of the evidence supporting the claim is inappropriate.

Id. The Majority acknowledges that "the question of what constitutes proper care in the treatment of mental health issues is a matter worthy of a public

forum." Nevertheless, the Majority holds that the "main thrust" of the psychologists' speech was voicing private grievances against the Director. But given that they also advanced health and safety issues that can be "fairly" considered matters of public concern, summary judgment was not properly entered against them.

No doubt some of the problems set out in the Memorandum relate to the impact the Director's conduct had on how the psychologists carried out their job duties. However, we have held that if employee speech "contained *some* matters of public interest in addition to . . . personal attacks, the personal nature of the speech would not, standing alone, be sufficient to render the speech private." *Mitchell v. Hillsborough Cty.*, 468 F.3d 1276, 1285 n.22 (11th Cir. 2006) (emphasis added). On this record, I believe there is a "sufficient quantum of content touching a matter of public concern" to support the Appellants' First Amendment claim. *Id.*

The University recognized at oral argument that the Memorandum contained "some matters of concern." For example, early in the Memorandum, the psychologists emphasize that the Director's conduct has caused "an adverse impact on client care and has jeopardized the reputation of the Center both in the GSU community and with community collaborators." The Memorandum also mentions that these failings "jeopardize the programs, contribute to and cause waste of resources and capital, risk the safety and well-being of students served by the programs and

threaten the integrity of the administrative and extra-judicial processes inherent in our governance."

The enumerated grievances also connect the Director's conduct to the quality of services the Center provides. In the section on trainee relationships, the psychologists express concern that "any rifts in our relationships or reputation [as a training center] directly impacts the quantity and quality of service provision at the [Center]." In the section on management of Center resources, they raise the concern that the Director's lack of knowledge "directly impacts the development of policies and procedures necessary to create an effective system by which to meet the service demands of the students and the University community." Even though the psychologists do reference their own grievances, they return throughout the Memorandum to the Director's impact on the quality of mental health services delivered by the Center. Clearly, in my view, the Memorandum contains both matters of public and private concern.

In *Connick*, the Supreme Court confronted comparable facts. *Connick* presented the question of whether an Assistant District Attorney's questionnaire to other attorneys in the office involved matters of public concern. *Id.* at 140-42, 103 S. Ct. at 1686-87. Although the Supreme Court found that most of the employee's questions were "mere extensions of [her] dispute over her transfer to another section of the criminal court," it ruled that one question, asking whether Assistant District Attorneys felt pressure to work on political campaigns, touched upon a matter

of public concern. *Id.* at 148, 103 S. Ct. at 1690. Despite the primarily personal nature of the questionnaire, the Supreme Court proceeded to the next part of the *Pickering* analysis based on that one question. *Id.* at 149, 103 S. Ct. at 1691.

This Court's decision in *Maples v. Martin*, 858 F.2d 1546 (11th Cir. 1988), is also instructive. There, we considered whether a report that included results of a survey of professors in the Mechanical Engineering Department at Auburn University involved matters of public concern. *Id.* at 1549. A "main concern" of the report was decidedly private in nature: "the lack of faculty involvement in administrative decisionmaking and the 'morale problem' in the Department." *Id.* Indeed, "[t]he tone of the [report] was extremely critical of the Department Head." *Id.* Still, this Court held that "while critical of the way the . . . Department ha[d] been managed by the Department Head," the report also touched on issues of public concern like the curriculum, facilities, and performance of graduates. *Id.* at 1553. In other words, it was enough that "[a]t least part of the motivation for . . . publishing the [report] was to alert both the administration and other interested parties of the problems the Department was facing in providing . . . students with an adequate engineering education." *Id.* Our Court concluded that "the appellants were sincere in their efforts to alert the public to the conditions of [the] Department, even if that concern was co-mingled with criticism of the Department Head's management style." *Id.* I would extend the

reasoning from *Maples* to this case and credit the psychologists with sincerely attempting to inform the public about the declining quality of health services at the Center. I would so hold, even though their Memorandum included some complaints of a more private nature.

My conclusion is not altered by the fact that the Appellants' Memorandum was distributed internally. As the Supreme Court tells us, the fact that an employee "expressed his views inside his office, rather than publicly, is not dispositive." *Garcetti*, 547 U.S. at 420, 126 S. Ct. at 1959; *see also Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16, 99 S. Ct. 693, 696-97 (1979) ("The First Amendment forbids abridgment of the 'freedom of speech.' Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."). Beyond that, the psychologists addressed the Memorandum to those at the highest levels of the University's administration – including the Provost, the Dean of Students, and the Vice President for Student Affairs. Their concerns were not directed to the human resources department. This manner of publication also weighs in favor of treating their speech as relating to matters of public concern. After all, "[t]here is considerable value . . . in encouraging, rather than inhibiting speech by public employees." *Lane*, 134 S. Ct. at 2377. First Amendment principles do not require us to penalize an employee for choosing to first alert

those within the University's administration to alleged mismanagement before seeking to publicly embarrass the University.

III.

I believe these psychologists were speaking as citizens on a matter of public concern. Were my view to prevail, we would reverse and remand for the District Court to consider whether the University "had an adequate justification for treating the [psychologists] differently from any other member[s] of the public based on the [its] needs as an employer." *Id.* at 2380 (quotation omitted). If the District Court held that the psychologists' First Amendment interests outweighed the University's needs, the psychologists would then be entitled to have a jury consider their case that their speech was a "substantial motivating factor" in their termination. *Moss*, 782 F.3d at 618. Likewise, the University would have an opportunity to prove that it would have terminated the psychologists even absent their speech. *Id.* Maybe the psychologists would succeed before a jury – maybe not. But, at this stage in the analysis, I understand Supreme Court precedent to characterize their Memorandum as citizen speech on a matter of public concern. Therefore I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

Melissa A. Alves, et al.,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO.
Board of Regents of the University System of Georgia, et al.,	:	1:12-cv-01899-WCO-GGB
Defendants.	:	

ORDER

This matter is before the court on Defendants' motion for summary judgment [46]; the Report and Recommendation of Magistrate Judge Gerrilyn G. Brill [62]; and Plaintiffs' objections thereto [64].

In 2011, a group of employees at Georgia State University's Counseling and Testing Center complained about mismanagement at the Center and improper conduct by the Center's Director, Dr. Jill Lee-Barber. In this lawsuit, Plaintiffs contend that after they complained, they were terminated in an alleged reduction-in-force. Plaintiffs raise claims under the First Amendment of the United States Constitution; Article I, Section I, Paragraph V, of the Georgia Constitution; 42 U.S.C. §§ 1981 and 1983 (retaliation); and the Georgia Whistleblower Act, O.C.G.A. § 45-1-4.

In a Report and Recommendation, Magistrate Judge Gerrilyn G. Brill determined that under *Garcetti v. Ceballos*, 547 U.S. 418 (2006), Plaintiffs' complaints (1) were spoken as employees and not citizens and (2) addressed a matter of the mission of the government employer and not a matter of public concern. *See* Report and Recommendation, at 20-36. Because of this, the speech could not be considered protected under the First Amendment and Magistrate Judge Brill recommended granting summary judgment on both the United States and Georgia constitutional claims.

Magistrate Judge Brill then determined that because the parties had focused on the First Amendment issue, they had not fully briefed the § 1981 race retaliation claim. Even more significantly, the Magistrate Judge noted that ***after*** the parties had briefed summary judgment, the Supreme Court issued its opinion in *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517 (2013), which held that the "but for" causation standard applied to a plaintiff's Title VII – and by relation, § 1981 – retaliation claims. Because the Magistrate Judge had concerns about whether Plaintiffs could meet that standard in this case and there had been no briefing under the "but for" causation standard, she recommended that this court direct re-briefing on the § 1981 retaliation claim only. *See* Report and Recommendation, at 30-45.

Finally, given that the facts relating to Plaintiffs' whistleblower claims were separate from the facts of

their § 1981 race retaliation claims and because there are questions of law as to whether Georgia's whistleblower protections extended to the circumstances of this case, Magistrate Judge Brill recommended that the court decline to exercise supplemental jurisdiction over the whistleblower claim and remand it to state court. *See* Report and Recommendation, at 46-49.

In their objections to the Report and Recommendation of the Magistrate Judge, Plaintiffs chiefly argue that the Magistrate Judge erred in her legal determination that Plaintiffs' speech was not protected by the First Amendment.

The Eleventh Circuit has held that

> [f]or a public employee to sustain a claim of retaliation for protected speech under the First Amendment, the employee must show by a preponderance of the evidence these things:
>
> > (1) the employee's speech is on a matter of public concern; (2) the employee's First Amendment interest in engaging in the speech outweighs the employer's interest in prohibiting the speech to promote the efficiency of the public services it performs through its employees; and (3) the employee's speech played a "substantial part" in the employer's decision to demote or discharge the employee. Once the employee succeeds in showing the preceding factors, the burden then shifts to the employer to show, by a

> preponderance of the evidence, that "it would have reached the same decision . . . even in the absence of the protected conduct."

See, e.g., *Battle v. Board of Regents for Georgia*, 468 F.3d 755, 759-60 (11th Cir. 2006) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)); *Abdur-Rahman v. Walker*, 567 F.3d 1278 (11th Cir. 2009).

However, the court must "first ask '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.'" *Id.* at 760 (quoting *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006)). *See also Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007) (after *Garcetti*, first step of the analysis now requires that the court decide at the outset "(1) if the government employee spoke as an employee or citizen and (2) if the speech addressed an issue relating to the mission of the government employer or a matter of public concern"). Whether Plaintiff's "speech" is a matter of "public concern" is a question of law to be determined by analyzing the speech's "content, form, and context . . . as revealed by the whole record" to evaluate whether the purpose of the speech was to raise matters of public concern. *See, e.g.*, *Gonzalez v. Lee County Housing Auth.*, 161 F.3d 1290, 1296-97 (11th Cir. 1998).

To give context to Plaintiffs' objections to the Magistrate Judge's conclusion that their complaints were made as employees and did not address matters of public concern, the court describes in greater detail the complaints raised by Plaintiffs. The Report and Recommendation of the Magistrate Judge carefully examines these complaints in full. *See* Report and Recommendation, at 4-20. The court summarizes.

The Counseling and Testing Center provided psychological counseling, testing, and assessment services to the Georgia State University population and operated a training program for psychologists, including pre-doctoral internships, post-doctoral fellowships, and a practicum program for doctoral students. *See* Report and Recommendation, at 4. The Center was also tasked with conducting psychological assessments of students who had been identified by the Office of Dean of Students as individuals who could potentially harm themselves or others. *Id.* At the relevant time, Dr. Lee-Barber was the Director of the Center and reported to Dr. Rebecca Stout, Associate Vice President for Student Affairs and Dean of Students. Dr. Stout reported to Dr. Douglass Covey, Vice President of Student Affairs. *Id.* at 5.

In October 2011, Dr. Kensa Gunter, one of the Plaintiffs in the instant case, spoke with an individual in Georgia State's Office of Opportunity Development and Diversity Education Planning concerning workplace complaints Dr. Gunter had against Dr. Lee-Barber. Those complaints related to race and age unfairness, hostile work environment, and retaliation.

Dr. Gunter subsequently decided not to file a complaint. A week later, seven employees of the Center, including Dr. Gunter, sent a written Memorandum of Concern to Dr. Covey and Dr. Stout. Plaintiffs set out five areas of general concern:

1. *Deficiencies in Managing Center Operations:* Plaintiffs alleged Dr. Lee-Barber had a "fundamental misunderstanding" of the Center's client population and "deficiencies in her ideological approach to clinical work and the nature of the work" conducted by the Center. Plaintiffs further contended that Dr. Lee-Barber lacked "knowledge in the areas of complex psychopathology and ineffectiveness in dealing with campus collaborators." She had an "inability to advocate for the appropriate use of psychologists' skills in conducting [the mandatory student risk] assessments" which "significantly compromises [the Center's] ability to effectively manage risk and crisis." Plaintiffs "believed that the requirement that they predict whether a student could potentially be at risk to himself or others (if the student were allowed to remain in student housing) violated confidentiality laws and the authors' ethical and professional obligations."

2. *Failure to Maintain Positive Trainee Relationships:* Plaintiffs contended that "quality relationships with the trainee feeder programs were critical to [the

Center's] ability to attract, recruit, and retain trainees and maintain [the Center's] reputation" but that Dr. Lee-Barber's management style had created "rifts" in the relationship between the Center and its feeder programs. Plaintiffs complained about Dr. Lee-Barber's "communication style," her "apparent confusion" about policies and procedures, commenting on the physical attractiveness of one trainee, and "non-verbal" behavior such as "eye-rolling."

3. *Questionable Competence in Management of [Center] Resources:* Plaintiffs complained that Dr. Lee-Barber's "management of personnel" has "been a significant problem." She exhibited significant emotional outbursts in front of staff, which implied she had "potential [emotional] impairment." Dr. Lee-Barber would seek out specific staff (junior or recently hired or staff of color) for one-on-one meetings to discuss her feelings on staff relations. She could not adhere to professional boundaries. Plaintiffs complained Dr. Lee-Barber had a "preoccupation" with staff's taking notes during official staff meetings. She "undermines open communication – something that is necessary in a collaborative work environment."

4. *Witness Tampering and Influence:* Three of the authors of the Memorandum of Concern complained that Dr. Lee-Barber

was attempting to influence their testimony in a tenure revocation proceeding involving the former associate clinical director at the Center. They complained that she improperly communicated with staff concerning the pending case. Plaintiffs were concerned that Dr. Lee-Barber was "misusing her authority and power by encouraging a greater level of participation" in the revocation process.

5. *Differential Treatment of Staff of Color:* Plaintiffs complain that Dr. Lee-Barber responded differently to "staff of color" than to "white-identified staff." She would complain when "staff of color" used portable electronic devices to take notes but would not complain about "white-identified stafft['s] doing the same. Plaintiffs alleged that Dr. Lee-Barber would admonish "staff of color" on their tone of voice and use critical non-verbal body language during their presentations, but she would not do the same to "white-identified" staff.[1]

[1] Dr. Covey assigned two senior staff members to investigate Plaintiffs' Memorandum of Concern. These investigators interviewed each signator of the Memorandum of Concern. During their investigation, a subset of signators filed a complaint with Georgia State's Office of Opportunity Development and Diversity Education Planning contending the investigators were "insensitive" and had not afforded them "due process." They also complained that Dr. Lee-Barber created a hostile work environment, mismanaged the Center, retaliated against the signators,

(Continued on following page)

Plaintiffs attempt to characterize the myriad of issues raised in the Memorandum of Concern as limited to "the management of risk and crisis" and "focused on the handling of [the Center's] mandatory assessment program." *See* Objections, Docket Entry [64], at 3, 5. The court finds that the Report and Recommendation (as summarized above) amply demonstrates that such a characterization is inaccurate and the vast majority of complaints in the Memorandum of Concern related to Dr. Lee-Barber's performance as a supervisor. The list of complaints addressed the manner in which Dr. Lee-Barber was running the Center and how that impacted Plaintiffs as employees, not how it impacted public health and safety. The

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and discriminated on the basis of race and sex. The Assistant Vice President overseeing the Office of Opportunity Development and Diversity Education Planning investigated these complaints and prepared a report for Dr. Covey. Although she believed the original investigators could have asked their questions in a "more open-ended fashion," she did not believe any discrimination had taken place.

Dr. Covey then met with the authors of the Memorandum of Concern and the original investigators and informed them that he did not believe there was sufficient evidence to substantiate Plaintiffs' claims. Dr. Covey did not take any action against Dr. Lee-Barber. A week after the final investigation report was delivered, Dr. Lee-Barber made the decision to cancel the Center's practicum training program and the Center's participation in a national matching program for interns. These cancellations eliminated many of the job duties of the staff of the Center. As a result, Drs. Covey and Lee-Barber, with input from others, decided to implement a reduction-in force that eliminated the staff of full-time psychologists and replaced them with contract psychologists.

clear bottom line is that Plaintiffs did not like Dr. Lee-Barber, her policies, or her management style. The court fully agrees with the determination of the Magistrate Judge that none of these is a matter of public concern and that Plaintiffs raised their complaints as employees and not as citizens.[2]

Although there is not a requirement that Plaintiffs attempt to bring their complaints to the public generally through radio, television, or newspapers, the manner in which Plaintiffs do raise their concerns is an element to consider in whether the concerns are entitled to First Amendment protection. *See, e.g.*, *Morgan v. Ford*, 6 F.3d 750, 754 n.5 (11th Cir. 1993) (per curiam) (holding that while public dissemination is not dispositive on the issue of public concern, an "employee's attempt at public disclosure nonetheless

[2] The court separately notes that on two occasions, Plaintiffs contend that the Magistrate Judge determined the "main thrust" of the complaints concerned the mandatory assessment program. The court disagrees. The Magistrate Judge wrote that Plaintiffs believed this was the main thrust of one of the five areas of concern addressed by the Memorandum of Concern. It was not the "main thrust" of the entirety of Plaintiffs' complaints. The court looks at the totality of the complaints and the manner in which they were raised to determine whether they are of public concern. The fact that one issue raised in the Memorandum of Concern – mandatory risk assessments – might reflect on public safety or public policy is not sufficient to bring the entire Memorandum of Concern within the ambit of "public concern," particularly given the fact that the remainder of the Memorandum addressed employment issues.

remains a relevant factor in determining whether the speech was a matter of public concern").

Plaintiffs, here, raised their complaints internally through Dr. Lee-Barber's chain of command. Plaintiffs object that if they were going up their chain of command, they would have taken their grievances to human resources. *See* Objections, Docket Entry [64], at 14-15. However, Dr. Covey, the Vice President of Student Affairs, and Dr. Rebecca Stout, the Associate Vice President and Dean of Students, are above Dr. Lee-Barber in her "chain of command." There is nothing in the record to suggest that Plaintiffs addressed their concerns to Dr. Covey and Dr. Stout in some attempt to make the matter "public" as opposed to bringing the matter directly to the attention of Dr. Lee-Barber's supervisors. Dr. Covey and Dr. Stout certainly treated their investigation as one to determine the functioning of the department as opposed to any public safety concern. Plaintiffs' attempt to distinguish *Boyce v. Andrew*, 510 F.3d 1333, 1337, 1343 (11th Cir. 2007) (rejecting First Amendment claim of two DFACS caseworkers who complained that their caseload was too high to manage properly and endangered children), on this point is unpersuasive. *See* Objections, Docket Entry [64], at 18.

The court agrees with the determination of the Magistrate Judge that Plaintiffs' complaints were spoken as employees and not citizens and that the complaints did not relate to matters of public concern. Under *Garcetti*, this finding defeats Plaintiffs' First Amendment claims. The court GRANTS Defendants'

motion for summary judgment as to Plaintiffs' federal and state free speech claims.

The court further agrees (and Plaintiffs do not object to this recommendation) that the parties should re-brief the § 1981 retaliation claim under the guidance provided by *Nassar* and the instructions of the Magistrate Judge. *See* Report and Recommendation, at 43-45. Defendants may file a motion for summary judgment on the § 1981 retaliation claim within thirty (30) days from the date of entry of this order. Briefing of that motion should proceed in the manner directed by the Federal Rules of Civil Procedure and this court's local rules.

Finally, Magistrate Judge Brill recommended that the court decline to exercise supplemental jurisdiction over Plaintiffs' Georgia Whistleblower Act claim. *See* Report and Recommendation, at 46-49. In this case, the court has original jurisdiction over Plaintiffs' claims under the First Amendment of the United States Constitution as well as 42 U.S.C. § 1981. *See* 28 U.S.C. § 1331. The court's jurisdiction over Plaintiffs' state law Georgia Whistleblower Act claim arises under the doctrine of supplemental or pendant jurisdiction. *See, e.g.*, *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), codified at 28 U.S.C. § 1367. The Eleventh Circuit has described § 1367 as reflecting "a dichotomy between a district court's power to exercise supplemental jurisdiction, § 1367(a), and its discretion not to exercise such jurisdiction, § 1367(c)." *Parker v. Scrap Metal Processors, Inc.* 468 F.3d 733, 742-43 (11th Cir. 2006).

The district court has discretion ***not*** to exercise supplemental jurisdiction in four situations: "(1) the claim raises a novel or complex issue of state law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction." *See* 28 U.S.C. § 1367(c). Any one of these factors is sufficient to give the court discretion to dismiss supplemental state law claims. *See Palmer v. Hosp. Auth. of Randolph County*, 22 F.3d 1559, 1563 (11th Cir. 1994). In determining whether the court should exercise supplemental jurisdiction, "the court should take into account concerns of comity, judicial economy, convenience, fairness, and the like" before remanding the state law claims. *Id.* at 1569.

Magistrate Judge Brill determined:

> Plaintiffs' allegations that they were asked to violate laws, rules, or regulations in connection with the mandatory assessment program do not share a "common nucleus of operative fact" with their claim of race-related retaliation. Resolution of the Plaintiffs' Georgia Whistleblower Act claim will require a thorough analysis of the scope of the protection provided by the Act for public employees in the State of Georgia who disclose alleged violations by their supervisors. A district court may decline to exercise supplemental jurisdiction where, like here, the

> claim raises complex issues of state law. 28 U.S.C. § 1367(c)(1).
>
> A decision on the state law claim asserted in Count Four is unnecessary to a resolution of Plaintiffs' § 1981 race-related claim. As Plaintiffs have stated, the main thrust of their protests concerned the University's mandatory assessment program. Issues surrounding this program and Plaintiffs' allegations of witness tampering would be better handled by a state court with "a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726.

See Report and Recommendation, at 48-49.

The court agrees. As the Magistrate Judge noted, Plaintiffs' whistleblower claim will involve a detailed determination of the scope of protection under the Act for public employees. "State courts, not federal courts, should be the final arbiters of state law." *Baggett v. First Nat'l Bank*, 117 F.3d 1342, 1353 (11th Cir. 1997). Furthermore, there would not be any loss in judicial economy to have these two claims adjudicated in different forums because Plaintiffs' race-retaliation claim is focused on the actions and mannerisms of Dr. Lee-Barber, while their whistleblower claims focus on issues surrounding the mandatory assessment program and Plaintiffs' contention that such a program would require them to violate confidentiality laws, as well as their ethical and professional obligations. These two claims do not share a common nucleus of facts. For these reasons, the court agrees with the

recommendation of the Magistrate Judge that the court should exercise its discretion not to take supplemental jurisdiction over Plaintiffs' Georgia state law claim.

Conclusion

The court ADOPTS the Report and Recommendation of the Magistrate Judge [62] as the ORDER of this court. The court GRANTS IN PART AND DENIES WITH LEAVE TO RENEW IN PART Defendants' motion for summary judgment [46].

Defendants may file a motion for summary judgment on the § 1981 retaliation claim within thirty (30) days from the date of entry of this order. Briefing of that motion should proceed in the manner directed by the Federal Rules of Civil Procedure and this court's local rules.

The court REMANDS Plaintiffs' Georgia Whistleblower Act claim to the Superior Court of Fulton County.

IT IS SO ORDERED this 22nd day of August, 2014.

s/ William C. O'Kelley
WILLIAM C. O'KELLEY
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MELISSA A. ALVES, COREY M. ARRANZ, SANDRINE M. BOSSHARDT, KENSA K. GUNTER, and ALAYCIA D. REID, Plaintiffs, v. BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA; JILL LEE-BARBER, *in her individual capacity*; and DOUGLASS F. COVEY, *in his individual capacity*, Defendants.	CIVIL ACTION FILE NO. 1:12-CV-01899-JOF-GGB

NON-FINAL REPORT AND RECOMMENDATION

This case is before the Court on the Defendants' Motion for Summary Judgment [Doc. 46].

I. BACKGROUND

The plaintiffs in this action are clinical psychologists and former full-time staff employees at the Georgia State University ("GSU" or "the University") Counseling & Testing Center ("CTC"). GSU is a Board

of Regents for the University System of Georgia academic institution in Atlanta, Georgia. Plaintiffs allege that after they complained about what they perceived to be mismanagement of the CTC, witness tampering, and disparate treatment based on race by the center's director, Dr. Jill Lee-Barber, that Defendants retaliated against them by terminating their employment in an alleged reduction in force ("RIF"), in violation of the First Amendment to the United States Constitution and protections of 42 U.S.C. § 1983 (Count One); Article I, Section I, Paragraph V of the Georgia Constitution (Count Two); 42 U.S.C. § 1981 and 42 U.S.C. § 1983 which protect complainants of race discrimination from retaliation (Count Three); and O.C.G.A. § 45-1-4 (the Georgia Whistleblower Act) (Count Four).

Plaintiffs initially filed their complaint against the Defendants on April 20, 2012 in the Superior Court of Fulton County, Georgia, Civil Action No. 2012-cv-214113. [Doc. 1-1 at 2 ("Complaint")]. Defendants removed the case to federal court on June 1, 2012 on the basis of federal question jurisdiction. After the close of discovery, Defendants filed the instant motion for summary judgment on May 13, 2013. [Doc. 46]. The motion has been briefed and is before the Court for consideration.

For the reasons set forth below, I **RECOMMEND** that Defendants' Motion for Summary Judgment [Doc. 46] be **GRANTED** as to Plaintiffs' constitutional claims in Counts One and Two, **DENIED WITHOUT PREJUDICE TO REFILE** as to

Plaintiffs' retaliation claim under §§ 1981 and 1983 in Count Three, that the District Court decline to exercise supplemental jurisdiction as to Plaintiffs' remaining state law claim under the Georgia Whistleblower Act in Count Four, and that the state law claim be **REMANDED** to the Superior Court of Fulton County where this case was originally filed.

II. LEGAL STANDARD

Summary judgment is proper when no genuine issues of material fact are present and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The movant carries its burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex v. Catrett*, 477 U.S. 317, 325 (1986).

"Only when that burden has been met does the burden shift to the nonmoving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and to present competent evidence in the form of affidavits, answers to interrogatories, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324; Fed. R. Civ. P. 56(c). "Mere conclusions and unsupported factual allegations are

legally insufficient to create a dispute to defeat summary judgment." *Bald Mountain Park, Ltd. v. Oliver*, 863 F.2d 1560, 1563 (11th Cir. 1989). Resolving all doubts in favor of the nonmoving party, the Court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

III. FACTS

In light of the foregoing summary judgment standard, the Court finds the following facts for the purpose of resolving Defendants' motion for summary judgment only.

In August 2009, GSU hired Dr. Jill Lee-Barber as its Director of Psychological and Health Services with administrative and supervisory responsibility over the following three departments: GSU's student health clinic, student health promotion, and the CTC. Plaintiffs worked as full-time staff psychologists in the CTC. The CTC provided psychological counseling, testing and assessment services to the GSU population, and operated a training program for psychologists, including pre-doctoral internships, post-doctoral fellowships, and a practicum program for doctoral students.

At all relevant times, the CTC was also tasked with conducting psychological assessments of students who had been identified by the Office of the Dean of Students ("ODOS") as individuals who could

potentially harm themselves or others. These assessments were done through a mandatory assessment program that was instituted to address safety concerns at the University. [Doc. 51-2 ("Arranz Decl.") at ¶ 5].

As director over the CTC, Dr. Lee-Barber had the authority to hire and fire the persons working for her. [Doc. 53 ("Lee-Barber Dep.") at 44; Doc. 56 ("Covey Dep.") at 25-26]. During the time period in question, Dr. Lee-Barber reported to Dr. Rebecca Stout, Associate Vice President for Student Affairs and Dean of Students, and Dr. Stout in turn reported to defendant Dr. Douglass Covey, Vice President of Student Affairs. [Covey Dep. at 20; Doc. 58 ("Stout Dep.") at 14].

When Dr. Lee-Barber took over as director, the CTC also had an associate director of clinical services, Dr. Cathy Brack, and two assistant directors, plaintiff Dr. Alaycia Reid and Dr. Yared Alemu. The staff included plaintiff Dr. Melissa Alves, who was the internship training director and a clinical psychologist for the CTC. [Doc. 1-1, Compl. ¶ 4]. Plaintiff Dr. Corey Arranz was the crisis response coordinator and a clinical psychologist on the staff. Plaintiff Dr. Sandrine Bosshardt was coordinator of mind-body programs and a counseling psychologist for the CTC. [*Id*. ¶¶ 5-6; Lee-Barber Dep. at 34]. Plaintiff Dr. Kensa Gunter served as a clinical psychologist and the CTC's coordinator of practicum training. [Compl. ¶ 7; Lee-Barber Dep. at 78-79]. The staff also included several additional professionals who are not plaintiffs in the current action, including clinical psychologist

Dr. Rachel Kieran, CTC's gender and diversity coordinator, and Carol Simpson, CTC's coordinator of client advocacy. [Lee-Barber Dep. at 79, 83, 141].

In the fall of 2010, Dr. Brack was removed from her position as associate director of clinical services, Dr. Alemu became interim assistant director of clinical services, and plaintiff Dr. Reid was promoted to associate director of training. [*Id*. at 80-81, 85, 125; Doc. 46-30]. For the bulk of the period of time at issue in this lawsuit, Drs. Alemu, Reid, Arranz, and Lee-Barber served on the CTC's mandatory assessment team and performed the mandatory assessments. [Lee-Barber Dep. at 106-07]. As director of the CTC, Dr. Lee-Barber served as the liaison between the CTC and the ODOS.

On October 18, 2011, Plaintiff Kensa Gunter spoke with an individual in GSU's Office of Opportunity Development and Diversity Education Planning ("ODDEP") concerning workplace complaints that Gunter was considering filing against Dr. Lee-Barber. [Doc. 46-19, Defs.' Ex. 16 (ODDEP intake form)]. ODDEP is the office of GSU that deals with discrimination issues. [Doc. 57 ("Nelson Dep.") at 15]. On the intake form, under "Basis for Complaint, Discrimination," Gunter indicated "Alleged Race & Age Unfairness, Potential Hostile Work Environment, and retaliation for stating that Director's behavior was hypocritical." [Doc. 46-19]. Under "Employment Related – Not Discrimination Based," Gunter indicated "Personnel Issues, Increasing Office Conflict, and Unfair Treatment (Tone, mannerism, non-verbal)."

[*Id*.]. Dr. Gunter subsequently decided not to file a formal complaint.

Memorandum of Concern

On October 25, 2011, Plaintiffs (Drs. Alves, Arranz, Bosshardt, Gunter, and Reid) and two other full-time psychologists in the CTC (Dr. Alemu and Dr. Pegah Moghaddam, CTC's group therapy coordinator) (hereinafter collectively "authors" or "signators") drafted, signed, and sent a written memorandum of concern ("MOC") to Defendant Covey and Dr. Stout. [Doc. 46-8, Defs.' Ex. 5, MOC]. The MOC identified a number of concerns that the authors had regarding what they considered to be deficiencies in Dr. Lee-Barber's management of the CTC, including, but not limited to, her alleged failure to maintain positive relationships with the trainees and feeder programs, incompetence and a lack of leadership in the management of CTC's personnel, lack of professional expertise with regard to the mandatory assessment program, emotional and professional instability, attempts to influence three of the authors who were witnesses in Dr. Brack's pending tenure revocation matter, and disparate treatment of "staff of color." [Compl. at 16-17; Doc. 46-8].

The MOC set out five specific areas of concern: (1) Deficiencies in Managing CTC Operations; (2) Failure to Maintain Positive Trainee Relationships; (3) Questionable Competence in Management of CTC Resources; (4) Witness Tampering and Influence; and

(5) Differential Treatment of Staff of Color. [Doc. 46-8 at 2]. Under "Deficiencies in Managing CTC Operations," the authors stated that "Dr. Lee-Barber has exhibited a fundamental misunderstanding of the nature of our client population and deficiencies in her ideological approach to clinical work and the nature of the work conducted at the CTC." [*Id*.]. The authors asserted that "Dr. Lee-Barber's lack of knowledge in the areas of complex psychopathology and ineffectiveness in dealing with campus collaborators, and her inability to advocate for the appropriate use of psychologists' skills in conducting [the mandatory student risk] assessments significantly compromises the CTC's ability to effectively manage risk and crisis." [*Id*.]. They specifically complained about Dr. Lee-Barber's lack of assessment skills and understanding about the mandatory assessment process and her defensiveness about those subjects during conversations with the other mandatory assessment team members. The MOC described occasions where those deficiencies "contributed to [Dr. Lee-Barber's] misinforming staff about when and how to use the mandated process." [*Id*. at 3]. The "main thrust" of the authors' protests concerned Dr. Lee-Barber's handling of the mandatory assessment program. [Doc. 50, Pls.' Br., at 19]. The authors believed that the requirement that they predict whether a student could potentially be at risk to himself or others (if the student were allowed to remain in student housing) violated confidentiality laws and the authors' ethical and professional obligations. [*Id*. at 41].

Under the heading "Failure to Maintain Positive Trainee Relationships," the MOC authors asserted that quality relationships with the trainee feeder programs were critical to the CTC's ability to attract, recruit, and retain trainees and maintain the CTC's reputation, especially because the trainees provided up to half of the CTC's clinical services. [Doc. 46-8 at 3]. According to the authors, Dr. Lee-Barber's management style had created "rifts" in the relationship between the CTC and some of the feeder programs that provided trainees to the CTC's training program. In addition, the authors stated that there had been some complaints from trainees about Dr. Lee-Barber's communication style, her apparent confusion regarding policies and procedures, and negative non-verbal behavior (such as eye rolling) to such an extent that one trainee asked not to be supervised by Dr. Lee-Barber. [*Id*.]. The MOC authors also accused the director of inappropriately commenting about the physical attractiveness of one of the trainees. [*Id*. at 4].

Under "Questionable Competence in Management of CTC Resources," the authors stated that, "Dr. Lee-Barber's management of personnel, which is the primary clinical resource of the center, has been a significant problem." [*Id*.]. The authors expressed concerns about Dr. Lee-Barber's emotional and professional stability after observing "episodes in which she exhibited significant emotional distress (e.g., crying spells) in front of the staff who report to her," and other emotional outbursts. The MOC stated that,

"It is unclear whether these episodes occur as a lack of judgment in the moment and/or are evidence of Dr. Lee-Barber's inability to contain her internal distress, implying potential impairment. In addition, Dr. Lee-Barber has demonstrated a persistent pattern of seeking out specific staff members (e.g., junior staff, recently hired, staff of color) for one-on-one meetings in order to discuss her feelings with them regarding staff relations. Her difficulties in not adhering to the boundaries of the professional relationship during these meetings has been noted." [*Id*.].

The authors further complained that Dr. Lee-Barber had difficulties listening to and considering feedback from her staff, which they stated "directly impacts the development of policies and procedures necessary . . . to meet the service demands of the students and the University community." [*Id*.]. In particular, the authors raised concerns about Dr. Lee-Barber's apparent preoccupation with, and objections to, staff taking notes during official staff meetings. The authors attributed this "to the fact that [Dr. Lee-Barber] does not want to be quoted." [*Id*.]. According to the authors, "The recording of staff proceedings is essential to the integrity and continuity of CTC operations. Dr. Lee-Barber's request characterizes her management style, which is one of avoiding responsibility for her statements and behaviors in these meetings and silencing the staff. This combination undermines open communication – something that is necessary in a collaborative work environment." [*Id*.].

Under the heading "Witness Tampering and Influence," three of the authors raised the concern that Dr. Lee-Barber was attempting to influence their testimony in a tenure revocation proceeding involving Dr. Brack, the former associate clinical director of the CTC. [*Id*. at 5]. They accused Dr. Lee-Barber of improperly communicating with staff members about the pending case and telling one staff member that "[w]e need to support the President" of the university in response to the staff's questions about the process. [*Id*.]. The authors asserted that in a separate conversation with Plaintiff Reid, Dr. Lee-Barber "exhibited frustration and stated explicitly, 'I don't know whose side you're on.'" [*Id*.]. That comment suggested to the authors that the director "needed to know the testimony that would be offered and what perspective the testimony would take. [Dr. Lee-Barber] clearly appeared to want to influence the staff testimony." [*Id*.]. The authors also took issue with Dr. Lee-Barber asking another staff member to respond to the Legal Affairs office and answer a GSU's attorney's questions because, in Dr. Lee-Barber's words, the staff member had "a professional obligation" or "professional responsibility" to participate in the process. Such requests and comments increased the authors' concerns that Dr. Lee-Barber was misusing her authority and power by encouraging a greater level of participation. [*Id*.].

The fifth and final topic heading is "Differential treatment of staff of color." [*Id*.]. In this section, the authors complained that Dr. Lee-Barber responded

differently in staff meetings to "staff of color" as compared to "white-identified staff." [*Id*. at 6]. The authors recounted that during one staff meeting, two "staff of color" (Drs. Reid and Alves) were using electronic devices to take notes, and Dr. Lee-Barber interrupted the meeting to complain that their behavior was "distracting," whereas in previous meetings, when a white-identified staff member took notes on her phone or laptop, Dr. Lee-Barber made no such comments. [*Id*. at 5-6; Doc. 46-9 at 9]. The authors also complained that in one-on-one meetings with staff of color, Dr. Lee-Barber routinely criticized their tone of voice and/or non-verbal body language during their presentations, but she did not make similar comments when white-identified staff members used similar tones of voice and body language during meetings. [Doc. 46-8 at 6]. The authors concluded their MOC by asking for an investigation of their concerns, and to be protected from retaliation "for collectively voicing our concerns and the concerns of the staff and community." [*Id*. at 7].

Copies of the MOC were sent to Dr. Risa Palm, Senior Vice President for Academic Affairs and Provost; Dr. Jill Lee-Barber, Director of Psychological and Health Services; and Kerry L. Heyward, J.D., University Attorney, Office of Legal Affairs. [*Id*.].

Internal Investigations

Dr. Covey assigned his Assistant Vice President for Student Affairs, Carol Clark, to investigate the

matters raised by the MOC. Clark selected Jeff Walker, Director of Business Affairs, Student Operations, to assist her in the investigation.

In November and early December 2011, as part of the investigation, Clark and Walker interviewed each signator to the MOC. They asked each signator to submit an individual statement detailing the specific allegations for which he or she had personal knowledge. [Covey Dep. at 57-58]. As requested, each of the signators submitted an individual statement describing in greater detail the specific concerns contained in the MOC about which he or she had personal knowledge. [Docs. 46-9 through 46-15, Defs.' Exs. 6-12].

In mid-December 2011, a subset of the MOC signators, Drs. Alves, Arranz, Gunter, Moghaddam, and Reid (hereinafter "complainants"), complained to GSU's Office of Opportunity Development and Diversity Education Planning (ODDEP) that Clark and Walker were biased, that Clark and Walker had allegedly made inappropriate and/or insensitive comments during their questioning, and the complainants felt they had not been afforded due process by the investigators. [Doc. 57-2]. The complainants also claimed that Dr. Lee-Barber had created a hostile work environment, that she mismanaged the CTC, retaliated against some of the individuals that signed the October 25th MOC, and engaged in discrimination based on race and sex. [*Id*.; Doc. 51-5, Reid Decl., at 16; Doc. 46-17, Defs.' Ex. 14].

In support of their complaints to ODDEP, the complainants cited, among others, the following examples. Under the heading "Retaliation," the complainants alleged that Dr. Arranz changed a policy and distributed the policy change on November 8, 2011. On November 28, 2011, Dr. Arranz received a disciplinary write-up initiated by Dr. Lee-Barber for changing the policy without proper authorization. The complainants believed that the disciplinary action was in retaliation for the allegations that their group had made against Dr. Lee-Barber in their MOC. [Doc. 57-2 at 3; Doc. 46-18 at 1-2]. Under "Sexual Discrimination/Hostile Work Environment," the complainants alleged that Dr. Lee-Barber had inappropriately commented to Dr. Reid that a student was physically attractive. Dr. Lee-Barber also allegedly commented, in a group setting, that neither she nor Dr. Reid would know anything about condoms, which Dr. Reid interpreted as an inappropriate reference to the fact that both Dr. Lee-Barber and Dr. Reid were in same-sex relationships. [Doc. 46-18 at 2].

Under "Race Discrimination," the complainants alleged that Dr. Lee-Barber showed favoritism to a Caucasian coworker (Dr. Rachel Kieran) by spending time in the coworker's office, by allowing the coworker to be disruptive during staff meetings, and by allowing her to take notes and text on her cell phone, whereas minority employees were chastised for taking notes electronically during staff meetings, and criticized for using unacceptable vocal tones and

nonverbal body language. [*Id*.]. The complainants also claimed that Clark could not be objective because she had been appointed by Dr. Covey to serve as co-chair of the search committee that had a role in selecting Dr. Lee-Barber as director of the CTC.

Linda Nelson is the Assistant Vice President who oversees the functions of ODDEP. [Nelson Dep. at 15]. In response to the concerns raised by the complainants, Nelson conducted a review of Clark's and Walker's investigation, focusing particularly on the group's complaints of race and gender discrimination, whether Clark's and Walker's investigation was or was not racially charged, and whether the investigation was carried out appropriately. [*Id*. at 82-83]. Nelson testified that in her opinion, the investigators' questions should have been asked in a more open-ended fashion rather than in a manner that suggested the opinion of the questioner. [*Id*. at 83-88]. As part of her review, Nelson went back and posed the questions again to the staff. [*Id*. at 86]. Nelson ultimately concluded that no racial discrimination had taken place, that Clark's and Walker's investigation was not racially charged, and the investigation was not conducted inappropriately. [*Id*. at 83-84].

January 3rd Memo

On January 3, 2012, the MOC authors submitted another memo to Dr. Covey concerning the investigation process. Although the memo was primarily a list of questions, the authors intended it as an outline of

their complaints and criticisms of the investigation conducted by Clark and Walker. [Reid Decl. ¶ 24; Reid Decl. Ex. D, Doc. 51-5 at 50-52, Memo dated January 3, 2012]. The authors' criticisms included the following: bias on the part of the investigators; lack of substantive knowledge of psychological services; lack of diversity (both investigators were white); failure to inquire as to certain substantive areas of the authors' original complaint; an argumentative and biased interview style; and retaliation following the original complaint. The authors also questioned whether they had a right to have an impartial third party present during the investigative process. [Doc. 51-5 at 50-52].

The Investigators' Findings and Conclusions

On January 5, 2012, Dr. Covey met with the MOC authors, along with Clark and Walker, and informed them that the investigators had found insufficient evidence to substantiate the claims of the MOC authors. [Covey Dep. at 65]. Clark's and Walker's written findings are dated January 9, 2012. The final written report was submitted to Dr. Covey on January 27, 2012. [Doc. 46-16, Defs.' Ex. 13; Doc. 53-16]. On February 3, 2012, Dr. Covey forwarded to Plaintiffs copies of the written report from Clark and Walker. [Doc. 53-16].

In the final paragraph of the investigators' written report, the investigators concluded that the MOC authors' "negative attitudes and dissatisfaction seem to be due to the desire of some of the staff to run the

Center in the collaborative clinical services model that was used by the former director. Several of the staff expressed to us (and to Dr. Lee-Barber) strong resistance to change. This resistance, coupled with a reluctance to follow directions, impedes the functioning of the Center and prohibits and diminishes the staff from fulfilling the mission of providing critical services to GSU students." [*Id*. at 6; Compl. ¶ 67]. This statement reflected Clark's and Walker's opinions that Plaintiffs' resistance to the manner in which Dr. Lee-Barber was running the CTC was impeding the functioning of the CTC. [Doc. 54, Clark Dep., Vol. I, at 198-99]. Clark also believed that Plaintiffs did not have an appropriate understanding of Lee-Barber's position as director. [*Id*. at 201-03].

Post-Investigative Report

After the investigative report was issued, Dr. Covey determined that no action would be taken against Dr. Lee-Barber and that she would remain in her position as director. [Doc. 46-33 at 2].

In January 2012, after twice failing to pass her licensure exam, Carol Simpson (the CTC's coordinator of client advocacy) was discharged from her employment due to licensing issues. [Lee-Barber Dep. at 142]. Simpson was not a signator to the MOC. [*Id*. at 141].

Sometime in January or February 2012, Drs. Alemu and Moghaddam, two of the authors of the

MOC, resigned their positions, citing Dr. Lee-Barber's alleged mismanagement of the CTC. [*Id*. at 142-43].

Within a week of the delivery of the final investigative report, Dr. Lee-Barber made the decision to cancel the CTC's practicum training program and the CTC's participation in a national matching program for interns. [Doc. 51, Pls.' Stmt. of Mat. Facts ("PSMF") ¶ 59]. These programs had required significant time and expertise of several of the Plaintiffs. Dr. Lee-Barber asserted that the changes were due to an accreditation standard that recommended that no more than forty percent of the center's clientele be seen by trainees. [*Id*.; Lee-Barber Dep. at 204-09]. The loss of these programs eliminated many of the job duties of plaintiffs Reid, Gunter, and Alves. [PSMF ¶¶ 59, 62].

Between February 10 and March 2, 2012, after the training and matching programs were cancelled, defendants Covey and Lee-Barber, with assistance from Ms. Clark, Ms. Nelson, and Dr. Stout, made the decision to implement a reduction in force ("RIF") that eliminated the entire staff of full-time psychologists, all but one of whom were authors of the MOC, and replace them with contract psychologists. [PSMF ¶ 63; Doc. 60, Defs.' Resp. to PSMF ("DRPSMF") ¶ 63].

On March 2, 2012, the RIF eliminating all full-time psychologist positions at the CTC was announced, and the full-time psychologists still employed with the CTC were informed of the decision to outsource

the clinical services in the CTC to contractors. [Doc. 46-4 at 1]. The employees being RIF'd included the Plaintiffs and non-plaintiff Dr. Rachel Kieran. Dr. Kieran had not signed the MOC. [Lee-Barber Dep. at 141]. The vacant positions that had been held by Carol Simpson and Drs. Moghaddam and Alemu were also eliminated in the RIF. [*Id*. at 218].

On April 20, 2012, Plaintiffs filed the instant lawsuit in state court against the Defendants, alleging retaliatory termination. [Doc. 1-1, Compl.]. Defendants removed the case to federal court on June 1, 2012. [Doc. 1, Notice of Removal].

IV. DISCUSSION

A. First Amendment Retaliation Claim (Count One)

In Count One of their complaint, Plaintiffs allege that the individual defendants, Dr. Douglass Covey and Dr. Jill Lee-Barber, violated Plaintiffs' First Amendment rights under the United States Constitution by terminating their employment in retaliation for complaining about Dr. Lee-Barber's mismanagement of the CTC and the other concerns raised in the MOC. Plaintiffs assert their claim pursuant to 42 U.S.C. § 1983. [Compl. at 30-32].

Defendants argue that Plaintiffs' speech cannot give rise to a cognizable First Amendment retaliation claim because Plaintiffs spoke as government employees, rather than as private citizens, and the main

thrust of their speech did not address a matter of public concern. [Doc. 46-2, Defs.' Br., at 11-24].

"[T]he law is well established that the state may not demote or discharge a public employee in retaliation for speech protected under the [F]irst [A]mendment." *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989). However, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.'" *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1281 (11th Cir. 2009) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 1958 (2006)). Acting as an employer, the government is afforded broad discretion in its employment decisions. *Boyce v. Andrew*, 510 F.3d 1333, 1341 (11th Cir. 2007) (citation omitted). There is no dispute that as employees of a state university, Plaintiffs were public employees.

For a public employee to establish a claim of retaliation for protected speech under the First Amendment, the employee must show by a preponderance of the evidence: "(1) that the speech can be fairly characterized as relating to a matter of public concern, (2) that [the plaintiff's] interests as a citizen outweigh the interests of the State as an employer, and (3) that the speech played a substantial or motivating role in the government's decision to take an adverse employment action." *Akins v Fulton County*, 420 F.3d 1293, 1303 (11th Cir. 2005) (citing *Bryson*, 888 F.2d at 1565). If the employee establishes these three elements, there is a fourth factor to be considered: the burden shifts to the employer to show, by a

preponderance of the evidence, that it would have reached the same decision even if the speech at issue had never taken place. *Anderson v. Burke County, Ga.*, 239 F.3d 1216, 1219-20 (11th Cir. 2001) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568 (1977)). The first two factors are questions of law designed to determine whether the First Amendment protects the employee's speech. *Id*. (citation omitted). The second two factors are questions of fact designed to determine whether the alleged adverse employment action was in retaliation for the protected speech. *Id*. This four-factor analysis is referred to as the "*Pickering* test" after *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734 (1968). *See Boyce*, 510 F.3d at 1342.

There is no need for a jury to balance interests or decide whether the employee's speech played a part in any adverse employment actions under the second through fourth steps of the *Pickering* test, however, if the court first determines that the employee's speech is not protected under the First Amendment. There are two steps to determine whether an employee's speech is constitutionally protected under the First Amendment. *See id*. (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 1960 (2006)). The court must determine at the outset: (1) if the plaintiff spoke as an employee or as a citizen; and (2) if the speech addressed an issue relating to the mission of the government employer or a matter of public concern. *Id*. (citing *D'Angelo v. School Bd. of Polk County,*

Fla., 497 F.3d 1203, 1209 (11th Cir. 2007)). If the plaintiffs were speaking as employees, "there can be no First Amendment issue, and the constitutional inquiry ends. . . . " *Id*. at 1343 (stating that the *Pickering* balance "is not triggered unless it is first determined that the employee's speech is constitutionally protected.").

Did Plaintiffs Speak as Employees or as Citizens?

To determine whether Plaintiffs were speaking as public employees or as citizens, the relevant inquiry is whether the speech "owes its existence to [Plaintiffs'] professional responsibilities." *Garcetti*, 547 U.S. at 421-22 (holding that "when 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.").

Here, as set forth above, each of the Plaintiffs worked as a licensed clinical psychologist in GSU's CTC. Their duties included (but were not limited to) providing counseling services to the GSU population, conducting mandatory risk assessments of students of concern, and supervising and training the individuals within the CTC's training and practicum programs. After growing increasingly concerned about what they believed to be deficiencies of their supervisor, Dr. Lee-Barber, Plaintiffs went up the chain of

command and addressed their concerns and complaints in writing to the individual directly above Dr. Lee-Barber, Dr. Stout, and the administrator that Dr. Stout reported to, Dr. Covey, the Vice President of Student Affairs. In response, Dr. Covey assigned his Assistant Vice President, Carol Clark, to investigate Plaintiffs' (and the other MOC authors') complaints, and the matter was also subsequently reviewed and investigated by ODDEP's Linda Nelson.

Defendants argue that Plaintiffs' statements are nothing more than workplace grievances focused on Plaintiffs' dissatisfaction with their work environment. In support of their argument, Defendants point specifically to Plaintiffs' statement in their October 25th MOC noting that Plaintiffs' "ability to provide a safe environment to our students, including managing risk and crisis, as well as to provide high quality services directly depends on creating a stable work environment in which competent professionals are able to effectively carry out all aspects of their work. In the absence of this environment, the ability to optimally perform daily required tasks including the ability to collaboratively manage risk is compromised." [Doc. 46-8, MOC, at 2].

The MOC also complained that Dr. Lee-Barber's deficiencies in leadership, management, and professional and communication skills directly (and negatively) impacted Plaintiffs' role and effectiveness in the mandatory assessment process and in meeting the service demands of the students, created confusion and uncertainty among the staff and trainees,

caused such problems with the training program that Plaintiff Alves had to step in, undermined open communication between the director and the professional staff, and created a hostile work atmosphere where Plaintiffs were reluctant to offer feedback or discuss issues of concern. Several of the Plaintiffs also complained that as CTC employees, they were being improperly pressured by Dr. Lee-Barber to support the position of the University in Brack's tenure revocation matter, and that Dr. Lee-Barber treated staff of color differently during staff meetings. Defendants argue that each of these complaints pertain directly to the performance of Plaintiffs' job duties, Plaintiffs' perception that they were not being adequately utilized and/or fairly treated, their general disagreement with how Dr. Lee-Barber was managing the CTC, and/or that Dr. Lee-Barber's management was hindering Plaintiffs in performing their duties. [Doc. 46-2 at 17]. In sum, Defendants argue that Plaintiffs' "speech" pertained directly to their own work environment and circumstances, with their goal being the removal of Dr. Lee-Barber as director. [Doc. 46-18 at 3].

In response, Plaintiffs insist that they were speaking as citizens, rather than as public employees, because their official duties and job responsibilities did not include evaluating their supervisor. [Doc. 50 at 12-14]. Plaintiffs argue that from the outset, they stated that their MOC was not an employee grievance, and therefore it should not be viewed as such. In support of their argument that they were speaking

as citizens, Plaintiffs repeatedly assert that they did not simply communicate their concerns within the workplace, but instead took their protests outside their chain of command to Dr. Covey, the Vice President of Student Affairs. [*Id*. at 7, 14, 15, 19, 25]. However, the "outside the chain of command" assertion is contrary to the evidence, which establishes that Dr. Stout and Dr. Covey were the administrators directly above Dr. Lee-Barber in the chain of command. Plaintiffs do not assert – nor does the evidence show – that Plaintiffs ever sought to expose the alleged misconduct to the public generally, such as through radio, television, or the newspapers.

With regard to the first preliminary determination that must be made, I find that Plaintiffs spoke as employees, not as private citizens. Plaintiffs' complaints and speech pertained directly to Plaintiffs' work environment, the operation and management of the CTC, and Plaintiffs' ability to effectively and ethically perform their job responsibilities.

The manner in which Plaintiffs communicated their concerns is also consistent with speech by employees – not citizens. Plaintiffs directed their complaints to Dr. Lee-Barber and her immediate supervisors, "with a copy to those [at GSU] that would appear to have the most need to know and best opportunity to investigate and correct the problems we have observed," i.e., Dr. Risa Palm, Senior Vice President for Academic Affairs and Provost, and Kerry Heyward, GSU's internal attorney, in the Office of Legal Affairs. [Doc. 46-8].

It matters not that Plaintiffs' formal job descriptions did not include critiquing or assessing Lee-Barber's job performance. Plaintiffs' speech clearly owed its existence to Plaintiffs' professional responsibilities. An employee's formal job description is not determinative on the issue of whether the employee spoke as an employee or private citizen. *Murphy v. Gilmer County, Ga.*, No. 2:11-CV-114-RWS, 2013 WL 1213310, at *4 (N.D. Ga. Mar. 25, 2013) (citing *Garcetti*, 547 U.S. at 42425); *see also Abdur-Rahman*, 567 F.3d at 1283-84 (concluding that even though plaintiffs' job responsibilities did not include notifying their supervisors about how sewer overflows were being reported and remediated, the plaintiffs' speech owed its existence to the plaintiffs' job duties); *D'Angelo*, 497 F.3d at 1210-11 (rejecting high school principal's attempt to narrow the scope of his job duties to exclude working, on his own initiative, to convert his high school to charter status); *Battle v. Board of Regents for State of Ga.*, 468 F.3d 755, 761 & n.6 (11th Cir. 2006) (per curiam) (rejecting plaintiff's attempt to narrow the scope of her employment duties so as to exclude discovering fraud by her supervisor).

In a recent Eleventh Circuit case, Jack Ramsey, an employee of the Georgia Institute of Technology ("Tech"), was terminated from his job as a Senior Facilities Manager at Tech's College of Computing. *Ramsey v. Board of Regents of Univ. Sys. of Ga.*, ___ F. App'x ___, 2013 WL 5932000, at *1 (11th Cir. Nov. 6, 2013). Before he was fired, Ramsey had met with

Tech officials to report that his supervisor, Larry Beckwith, had violated Tech policies by: (1) ordering Ramsey and another employee to use their Tech Procurement Cards ("PCard") to make improper purchases; (2) ordering Ramsey to improperly dispose of desks that belonged to Tech by giving them to students; and (3) hiring a vendor that Beckwith had worked for. *Id*. Ramsey brought an action alleging, in part, that Tech violated the First Amendment by terminating him in retaliation for reporting his supervisor's policy violations. The Eleventh Circuit found that Ramsey's report of improper uses of his PCard and improper disposal of property all implicated Tech policies that he was obligated to abide by as an employee. As a result, the Court held that Ramsey was speaking as a government employee, and his speech was not protected by the First Amendment. *Id*. at *2.

Other Eleventh Circuit cases have similarly found that reports by government employees concerning alleged wrongdoing by their supervisors were related to their jobs, and therefore the employees were not speaking as private citizens for purposes of a First Amendment retaliation claim. *See, e.g.*, *Phillips v. City of Dawsonville*, 499 F.3d 1239, 1242 (11th Cir. 2007) (per curiam) (concluding that the city clerk was acting within the scope of her duties when she reported that the mayor was improperly charging the city for his personal expenses, and thus she spoke out as a government employee and not a citizen, although her enumerated duties did not specifically include

monitoring the mayor's activities); *Vila v. Padron*, 484 F.3d 1334, 1336-38, 1340 (11th Cir. 2007) (after examining content, form and context of reports by the vice president of a community college of illegal and unethical behavior of the president and other employees of the college, the court concluded that the vice president made her reports, save one, pursuant to her job duties).

Did Plaintiffs' Speech Relate to Matters of Public Concern?

The second preliminary determination pertains to whether Plaintiffs' speech addressed issues relating to the mission of their employer or a matter of public concern. "For speech to be protected as speech on a matter of public concern," the speech "must relate to a matter of political, social, or other concern to the community." *Akins*, 420 F.3d at 1304 (internal quotation marks and citation omitted). If the speech at issue is personal in nature, and "cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983). Because an employee's speech "will rarely be entirely private or entirely public," it is protected so long as the "main thrust" of the speech is on a matter of public concern. *Akins*, 420 F.3d at 1304 (quoting *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir.

1993)). Whether a government employee's speech relates to his or her job as opposed to an issue of public concern "must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S. Ct. at 1690; *Boyce*, 510 F.3d at 1343.

Defendants argue that Plaintiffs' statements in their memos of concern to Drs. Stout and Covey and their complaints to ODDEP in December 2011 addressed Plaintiffs' personal employment conditions and work environment, not a matter of public concern. Defendants argue that Plaintiffs were particularly concerned about how Dr. Lee-Barber's decisions and lack of leadership were negatively impacting Plaintiffs' ability to perform their work and potentially compromising Plaintiffs' ability to comply fully with their professional and ethical requirements and responsibilities. Defendants argue that these concerns indicate that Plaintiffs were speaking about personal employment issues, not matters of public concern.

Plaintiffs counter that their speech was on a matter of public concern because the matters they complained about addressed the mental health care and treatment of students in the university community as well as whether the CTC was operating legally and ethically with regard to internal operations and client services. [Doc. 50, Pls.' Resp. Br., at 18]. Plaintiffs assert that their speech concerning Dr. Lee-Barber's apparent efforts to influence their testimony in the Brack tenure revocation matter and their

complaints about potential race discrimination were also on matters of public concern.

As to the second preliminary determination, I find that Plaintiffs' speech was related to their particular employment situation and not a matter of public concern. Plaintiffs sought to alert the CTC's administrators to what Plaintiffs perceived to be a "crisis in leadership and management." [Doc. 46-8 at 2]. The primary purpose of Plaintiffs' speech was to further Plaintiffs' own interests in having the CTC managed and operated in a different manner, not to raise issues of public concern. *See Maggio v. Sipple*, 211 F.3d 1346, 1352 (11th Cir. 2000) (the "relevant inquiry" is not whether the speech was on a topic that may interest the public, but whether the purpose of the plaintiff's speech was to raise issues of public concern or to further his own interests). The main thrust of Plaintiffs' speech was concern for their own work environment and job responsibilities, and the well-being and integrity of the CTC. Plaintiffs did not attempt to involve the public or take the matter outside GSU. Plaintiffs' passing references to "the larger community" of those potentially seeking services from the CTC do not turn Plaintiffs' employment-related concerns into a matter of public concern. *See Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986) (holding that "a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run.").

Where, like here, the form and context of a plaintiff's complaints to his or her management address matters connected with the plaintiff's job, the Eleventh Circuit has held that the speech was not intended to address matters of public concern from the perspective of a citizen. *See, e.g.*, *Boyce*, 510 F.3d at 1344-45 (citing *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2d Cir. 1993) (recognizing that "[e]ven as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue solely in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little weight")). The facts of *Boyce* illustrate this point.

In *Boyce*, two caseworkers employed by the DeKalb County Department of Family and Children Services ("DFCS") brought First Amendment claims of retaliation after they were terminated and transferred, respectively. *Id*. at 1336. The caseworkers alleged that they were retaliated against for speaking out to their supervisors about the size of their caseloads. *Id*. at 1337. The caseworkers complained by emailing their supervisors and union representatives, stating that they were overworked and unable to handle all the cases assigned to them. *Id*. at 1343. The complaints also raised significant issues of child safety, DeKalb DFCS mismanagement, and inconsistent management styles. *Id*. at 1339.

In analyzing whether the caseworkers were speaking as employees or as private citizens, the Eleventh Circuit determined that the complaints

were intended to address personal grievances connected to the caseworkers' jobs, not matters of public concern from the perspective of a citizen. *Id*. at 1344-45. Crucial to this finding was that the complaints were not addressed to any outside entities, nor did they concern any matters beyond the caseworkers' personal working conditions. *Id*. at 1344.

While the Eleventh Circuit has stated that "a court cannot determine that an utterance is not a matter of public concern *solely* because the employee does not air the concerns to the public [internal citations omitted], [t]he employee's attempt at public disclosure nonetheless remains a relevant factor in determining whether the speech was a matter of public concern." *Morgan v. Ford*, 6 F.3d 750, 754 n.5 (11th Cir. 1993) (citing *Deremo v. Watkins*, 939 F.2d 908, 911 n.3 (11th Cir. 1991); *see Kurtz v. Vickrey*, 855 F.2d 723, 729 (11th Cir. 1988) ("Kurtz's profession of public concern loses force when it is considered that he took no affirmative steps . . . to inform the public at large about, the problems with which he was so gravely concerned."); *Terrell v. Univ. of Tex. Sys. Police*, 792 F.2d 1360, 1362-63 (5th Cir. 1986) (holding that the contents of a notebook were not protected speech based in part on the fact that appellant "made no effort to communicate the contents of the notebook to the public"). Like the caseworkers in *Boyce*, the Plaintiffs in this case did not address their complaints to outside entities, nor did their speech concern matters beyond the Plaintiffs' personal working conditions at the CTC.

Plaintiffs' speech is clearly distinguishable in content, form, and context from cases where courts have found that a public employee spoke as a citizen on a matter of public concern. *See, e.g.*, *Pickering*, 391 U.S. at 565, 88 S. Ct. 1731 (speech protected where public school teacher submitted a letter to the editor of a local newspaper criticizing the school board and its funding decisions); *Gresham v. City of Atlanta*, No. 1:10-CV-1301-RWS, 2011 WL 4601020, at *2 (N.D. Ga. Sept. 30, 2011) (speech protected where the plaintiff posted on Facebook "newsfeed" allegations of unethical conduct within the police force); *Barthlow v. Jett*, No. 3:06-cv-1056-J-33MCR, 2008 WL 1985405, at *6-7 (M.D. Fla. May 2, 2008) (speech protected where county recording clerk filed allegations of election law violations by the Clerk of Courts with the Florida Elections Commission and the Office of the State Attorney); *Rodin v. City of Coral Springs, Fla.*, 229 F. App'x 849, 852-54 (11th Cir. 2007) (volunteer firefighter's speech was protected where he complained to city officials about the safety risk of closing a fire station, vandalism of fire trucks and air hoses, insufficient training of volunteer firefighters, and mismanagement of the fire department's finances).

In sum, based on the cited authority and the reasons stated, the Court finds that Plaintiffs were not speaking as citizens on a matter of public concern. The main thrust and purpose of their speech was not to raise public awareness about the alleged mismanagement of the CTC and the quality of services being provided to GSU's students and others.

Plaintiffs' expressions "in no way dr[ew] the public at large or its concerns into the picture." *Morgan*, 6 F.3d at 755 (citation omitted) (finding that the plaintiff's speech largely focused on how her supervisor behaved towards her and how that conduct affected her work). Instead, the record shows that this was an internal GSU employment matter focused mainly on how Dr. Lee-Barber's conduct towards Plaintiffs and her decisions in managing the CTC affected Plaintiffs' work. Plaintiffs' speech, therefore, is not protected under the First Amendment, and the Court need not engage in further constitutional analysis or analysis regarding qualified immunity.

For all the reasons stated, I **RECOMMEND** that Defendants' motion for summary judgment be **GRANTED** with regard to Plaintiffs' First Amendment retaliation claim (Count One).

B. Violation of the Georgia Constitution (Count Two)

In addition to their First Amendment claim, Plaintiffs allege (in Count Two) that their termination also violated the free speech clause of the Georgia Constitution, Article I, Section I, Paragraph V ("No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty."). [Doc. 1-1, Compl., at 32-34]. Neither Plaintiffs nor Defendants addressed this claim separate and apart

from Plaintiffs' claim under the First Amendment of the United States Constitution. Instead, the parties appear to be assuming that the analysis of a retaliation claim under the Georgia Constitution is the same as under the First Amendment. [*See* Doc. 46-2 at 11; Doc. 50 at 5].

At the most, Plaintiffs have asserted in a footnote that the Georgia Constitution affords broader protection for a public employee's speech than does the United States Constitution [Doc. 50 at 5 n.3]. However, that statement has been called into question by the Georgia Supreme Court. *See Grady v. Unified Gov't of Athens-Clarke County*, 289 Ga. 726, 715 S.E.2d 148 (2011) (raising doubts in a different context about the proposition that Georgia's free speech guarantee is broader than its federal counterpart in the First Amendment). Plaintiffs have not provided any alternative analysis (to their First Amendment analysis) for their retaliation claim under the Georgia Constitution. Plaintiffs have also failed to point the Court to any Georgia authority applying the Georgia Constitution in the context of an action challenging retaliation by a public employer for an employee's speech.

In cases similar to this one where the plaintiffs have asserted retaliation claims under both the First Amendment and the Georgia Constitution, federal district courts in Georgia have applied the same First Amendment analysis to both constitutional claims. *See, e.g.*, *Smith v. Atlanta Indep. Sch. Dist.*, 633 F. Supp. 2d 1364, 1375 n.1 (N.D. Ga. 2009) ("The court

may apply the same analysis to Plaintiff's free speech . . . claim[ ] under the United States and Georgia Constitutions"); *A.A.A. Always Open Bail Bonds, Inc. v. DeKalb County, Ga.*, No. 1:02-CV-2905-ODE, 2006 WL 5440395, at *11 n.11 (N.D. Ga. Aug. 4, 2006) (same); *Palmer v. Stewart County Sch. Dist.*, No. 4:04-cv-21 (CDL), 2005 WL 1676701, at *12 n.11 (M.D. Ga. June 17, 2005) ("[T]he analysis of Plaintiff's state constitutional claims is the same as the analysis of the related federal claims, and therefore subject to the same disposition as Plaintiff's federal claims."). I see no reason why the same should not apply here.

Based on the cited authority, I find that the analysis of Plaintiffs' state constitutional claim is the same as the analysis of their related federal claim, and therefore recommend that the state law claim be subject to the same disposition as Plaintiffs' First Amendment claim. For the reasons stated above with respect to Plaintiffs' Count One retaliation claim under the First Amendment, I **RECOMMEND** that Defendants' motion for summary judgment be **GRANTED** as well on Plaintiffs' Count Two retaliation claim under Article I, Section 1, Paragraph V of the Georgia Constitution.

C. Section 1981 Retaliation Claim (Count Three)

In Count Three of Plaintiffs' complaint, Plaintiffs allege that Defendants violated 42 U.S.C. § 1981, through § 1983, by unlawfully terminating their

employment in retaliation for complaining about disparate treatment on the basis of race.[1] Section 1981 gives "[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981(a). Even though the plain text of Section 1981 does not expressly refer to retaliation based on race, the United States Supreme Court has held that Section 1981 encompasses retaliation claims. *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 452,128 S. Ct. 1951, 1958-59 (2008).

Employment claims brought under sections 1981 and 1983 involve the same analysis as Title VII claims. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008). There are two forms of statutorily protected

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[1] In Footnote 1 of Plaintiffs' response in opposition to Defendants' motion for summary judgment, Plaintiffs assert that Defendants "have not specifically moved for summary judgment on Plaintiffs' § 1981 claims, which are premised on retaliation for Plaintiffs[‘] complaints of race discrimination – also a matter of public concern. Accordingly, that issue is not addressed. . . ." [Doc. 50 at 3 n.1]. The Court disagrees. Defendants' brief in support of their motion for summary judgment specifically asks for summary judgment "on all of Plaintiffs' claims," and expressly references Plaintiffs' § 1981 claim. [Doc. 46-2 at 2, 4, 11, 34]. In addition, the entire first section of Defendants' "Argument and Citation of Authority" addresses "each of Plaintiffs' [retaliation] claims" using the burden-shifting *McDonnell-Douglas* analysis traditionally employed for Title VII and § 1981 claims of retaliation and retaliatory termination. [Doc. 46-2 at 9-11]. From the Court's reading, Defendants' brief adequately indicates that Defendants are moving for summary judgment on Plaintiffs' Count Three claim of retaliation under § 1981 (through § 1983).

conduct under Title VII. An employee is protected from discrimination if (1) "he has opposed any practice made an unlawful employment practice by this subchapter" (the opposition clause) or (2) "he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the participation clause). 42 U.S.C. § 2000e-3(a); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1350 (11th Cir. 1999). Here, because the assertions of race-related conduct were made prior to or in connection with an internal investigation, and not in connection with a formal EEOC charge, the claim would fall under the opposition clause, not the participation clause. *E.E.O.C. v. Total Sys. Servs., Inc.* 221 F.3d 1171, 1174 (11th Cir. 2000) (stating that the participation clause "does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC.").

After careful review of the parties' pleadings, briefs and memoranda of law, and the documentary evidence in the record, only a very small portion of Plaintiffs' complaints about Dr. Lee-Barber are race-related. In the portion of the MOC entitled "Differential treatment of staff of color," Plaintiffs complained that Dr. Lee-Barber responded differently in staff meetings to "staff of color" as compared to "white-identified staff." [Doc. 46-8 at 5-6]. Plaintiffs recounted that during one staff meeting, two staff of color (Drs. Reid and Alves) were using electronic devices to take notes, and Dr. Lee-Barber interrupted the

meeting to complain that their behavior was "distracting," whereas in previous meetings, when a white-identified staff member took notes on her phone or laptop, Dr. Lee-Barber made no such comments. [*Id.*; Doc. 46-9 at 9]. Plaintiffs also complained that in one-on-one meetings with staff of color, Dr. Lee-Barber routinely criticized their tone of voice and/or non-verbal body language during their presentations, but she did not make similar comments when white-identified staff members used similar tones of voice and body language during meetings. [Doc. 46-8 at 6].

The only allegations of race-related conduct by Dr. Lee-Barber in Plaintiffs' 44-page Statement of Material Facts are the following: (1) "Dr. Lee-Barber has often commented on the 'tone of voice' and the 'body language' of persons of color, while not 'calling out' white staff members on behavioral matters" [Doc. 51, PSMF ¶ 43, p. 22]; (2) "Dr. Lee-Barber treated white identified staff better in regards to note taking in meetings than women of color" [*id*. ¶ 45, p. 24]; and (3) Dr. Lee-Barber indicated to Dr. Alves that her nonverbal expression and tone of voice comes across strong and that she was unable to read her [*id*. ¶ 46, p. 25]. According to Dr. Alves, "this feedback has been directed to women of color." [*Id*.]. Thus, it is abundantly clear that race-related conduct was only a small part of Plaintiffs' complaints against Dr. Lee-Barber. As Plaintiffs repeatedly emphasize in their response brief, the main thrust of their protests concerned issues surrounding the mandatory assessment

program. [Doc. 50 at 3, 9-12, 18-20]. Plaintiffs believed that the requirement that they predict whether a student could potentially be at risk to himself or others, if the student were allowed to remain in student housing, violated confidentiality laws and the Plaintiffs' ethical and professional obligations. [*Id*. at 41].

If this Report and Recommendation is accepted and adopted by the district court, the vast majority of Plaintiffs' complaints about Dr. Lee-Barber will be deemed unprotected activity. This ruling would constitute a finding that under federal law, Defendants did not act unlawfully even if they did terminate Plaintiffs for the central thrust of their complaints. Plaintiffs' only arguably protected activity, then, would be their opposition to disparate treatment on the basis of race.

However, the parties have not adequately briefed the issue of race-related retaliation, in part because their primary focus was on the First Amendment issue, and in part because an important U.S. Supreme Court decision was issued after the briefing in this case. The case before the Supreme Court, *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 186 L.Ed.2d 503 (2013), was decided on June 24, 2013, after the parties briefed the motion for summary judgment in this case. *Nassar* held that Title VII retaliation claims must be proven according to traditional "but-for" causation principles. *Id.* at 2534. *Nassar's* holding applies to retaliation claims under § 1981, like Plaintiffs'. *See Shumate v.*

Selma City Bd. of Educ., No. 11-00078-CG-M, 2013 WL 5758699, at *2 (S.D. Ala. 2013). Under *Nassar*, in contrast to prior precedent, Plaintiffs' § 1981 retaliation claim cannot succeed without evidence that Plaintiffs' termination would not have occurred but for their complaint(s) of race discrimination. *See id*.

Because of the minor role and lack of emphasis that Plaintiffs have placed on their complaints about Dr. Lee-Barber's race-related conduct (as compared to Plaintiffs' other complaints against Dr. Lee-Barber), this Court questions whether a reasonable jury could find that but for Plaintiffs' complaints about Dr. Lee-Barber's race-related conduct, they would not have been terminated. However, because *Nassar* was decided after the briefing of the motion for summary judgment, and because the parties mainly addressed the First Amendment issue (which may no longer be a part of this case), this Court did not have the benefit of a thorough and up-to-date discussion of whether there are questions of material fact for a jury on Plaintiffs' claim that they were terminated in retaliation for their complaints about race discrimination.

Also, the parties have not addressed whether a reasonable jury could find that the Plaintiffs had a "good faith, reasonable belief" that Dr. Lee-Barber had engaged in unlawful race discrimination. In order for a complaint about discrimination to form the basis of a retaliation action under the opposition clause, the complaining employees need not prove that the conduct they opposed was actually unlawful, but they must have a "good faith, reasonable belief"

that their employer has engaged in unlawful discrimination. *Clover*, 176 F.3d at 1351; *Little v. United Techs., Carrier Transicold* Div., 103 F.3d 956, 960 (11th Cir. 1997).

Dr. Lee-Barber's alleged race discrimination consisted of isolated instances of commenting about note-taking and commenting about the tone of voice and/or nonverbal body language of some of her non-white subordinates. "The objective reasonableness of an employee's belief that [his] employer has engaged in an unlawful employment practice must be measured against existing substantive law." *Clover*, 176 F.3d at 1351. Plaintiffs have failed to cite any legal authority or point to any evidence that would support an objectively reasonable belief that the conduct alleged constitutes unlawful discrimination. In addition, the substantive law requires a showing that the employees who were subjected to the alleged race discrimination suffered an adverse employment action. *See, e.g.*, *Howard v. Walgreen Co.* 605 F.3d 1239, 1245 (11th Cir. 2010). Under these standards, Plaintiffs' complaints of racially motivated comments may not rise to the level at which a jury could find that Plaintiffs had a good faith, reasonable belief that Dr. Lee-Barber had engaged in unlawful race discrimination.

For the above reasons, I **RECOMMEND**, as to Count Three, that Defendants' motion for summary judgment be **DENIED WITHOUT PREJUDICE**, and that Defendants be allowed to re-file another motion for summary judgment that specifically

addresses the Plaintiffs' claim of retaliation under § 1981 (through § 1983). If such a motion for summary judgment is filed, the motion should specifically address *Nassar* and whether a reasonable jury could find that Plaintiffs had a "good faith, reasonable belief" that Dr. Lee-Barber had engaged in unlawful race discrimination.

D. Plaintiffs' Georgia Whistleblower Claim (Count Four)

In addition to Plaintiffs' constitutional claims and federal claim under §§ 1981 and 1983, Plaintiffs have brought a state law claim under Georgia's Whistleblower Act, O.C.G.A. § 45-1-4 (Count Four). [Compl. at 36]. Under this law, "No public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency. . . ." O.C.G.A. § 45-1-4(d)(2). Similarly, "No public employer shall retaliate against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation." O.C.G.A. § 45-1-4(d)(3).

Plaintiffs assert that their protests were efforts to disclose violations and objections to what they reasonably believed to be violations of Georgia laws, rules, and regulations. Specifically, Plaintiffs believed that the Dean of Students' demands that they predict

(under the mandatory assessment program) whether a student could potentially be at risk to himself or others were violations of confidentiality laws as well as their ethical and professional obligations. Plaintiffs argue that the American Psychological Association's ("APA") ethical standards (with which they were most concerned) are codified as Georgia law. [Doc. 50 at 42-44 (citing Ga. Comp. R. & Regs. § 510-4-.02 (adopting APA Ethical Standards effective 2003))]. Plaintiffs assert that they were also concerned over potential breaches in psychologist/patient confidentiality, a relationship that they argue is codified at O.C.G.A. § 43-39-16 ("confidential relations and communications between a licensed psychologist and client are placed upon the same basis as those provided by law between attorney and client"). [*Id*. at 43]. Plaintiffs also argue that their claim of witness tampering implicates Georgia law, specifically, O.C.G.A. § 16-10-93, which makes it illegal for a person to "deter a witness from testifying freely, fully, and truthfully to any matter pending in any court, in any administrative proceeding, or before a grand jury." [*Id*. at 43-44].

In order to exercise pendent or supplemental jurisdiction over a state law claim, this Court must have jurisdiction over a substantial federal claim, and the federal and state claims must derive from a "common nucleus of operative fact." *Ray v. Edwards,* 557 F. Supp. 664, 672-73 (N.D. Ga. 1982) (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138 (1966)). Even when these

two criteria are satisfied, thus establishing the power to exercise supplemental jurisdiction, the decision whether to exercise such jurisdiction is within the discretion of the Court. *Id*.

If this Report and Recommendation is adopted, the only possible remaining federal claim will be Plaintiffs' narrow claim of race-related retaliation. Plaintiffs' allegations that they were asked to violate laws, rules, or regulations in connection with the mandatory assessment program do not share a "common nucleus of operative fact" with their claim of race-related retaliation. Resolution of the Plaintiffs' Georgia Whistleblower Act claim will require a thorough analysis of the scope of the protection provided by the Act for public employees in the State of Georgia who disclose alleged violations by their supervisors. A district court may decline to exercise supplemental jurisdiction where, like here, the claim raises complex issues of state law. 28 U.S.C. § 1367(c)(1).

A decision on the state law claim asserted in Count Four is unnecessary to a resolution of Plaintiffs' § 1981 race-related claim. As Plaintiffs have stated, the main thrust of their protests concerned the University's mandatory assessment program. Issues surrounding this program and Plaintiffs' allegations of witness tampering would be better handled by a state court with "a surer-footed reading of applicable law." *Gibbs*, 383 U.S. at 726.

Accordingly, for the reasons stated, I **RECOMMEND** that the Court decline to exercise supplemental jurisdiction over Plaintiffs' Count Four claim brought under the Georgia Whistleblower Act, and that the claim be **REMANDED** to the Superior Court of Fulton County.

V. CONCLUSION

For the foregoing reasons, I **RECOMMEND** that Defendants' Motion for Summary Judgment [Doc. 46] be **GRANTED** as to Counts One and Two, **DENIED WITHOUT PREJUDICE TO REFILE** as to Count Three, that the District Court decline to exercise supplemental jurisdiction as to Plaintiffs' remaining state law claim in Count Four, and that the state law claim (Count Four) under the Georgia Whistleblower Act be **REMANDED** to the Superior Court of Fulton County.

IT IS SO RECOMMENDED, this 6th day of January, 2014.

/s/ Gerrilyn G. Brill
GERRILYN G. BRILL
UNITED STATES
MAGISTRATE JUDGE

Exhibit

Exhibit No.
10
Name:
Lee-Barber
Date:
10-19-12 MB

[LOGO] ESQUIRE

October 25, 2011

To: Dr. Douglass F. Covey, Vice President for Student Affairs
Dr. Rebecca Stout, Associate Vice President for Student Affairs and Dean of Students

From: Dr. Yared Alemu, Interim Director of Clinical Services; Assistant Director, Programming; Coordinator, Integrated Alcohol & Other Drug Program

Dr. Melissa A. Alves, Training Director, Internship/Clinical Psychologist

Dr. Corey M. Arranz, Crisis Response Coordinator/Clinical Psychologist

Dr. Sandrine M. Bosshardt, Coordinator of Mind-Body Programs/Clinical Psychologist

Dr. Kensa K. Gunter, Coordinator of Practicum Training/Clinical Psychologist

Dr. Pegah Moghaddam, Coordinator of Group Therapy Program/Clinical Psychologist

Dr. Alaycia D. Reid, Associate Director, Training; Clinical Psychologist and Adjunct Professor

Subject: Counseling and Testing Center Mismanagement

The GSU Counseling & Testing Center (CTC) continues to be a vital and valued part of the university community. As partners with other university offices and departments, the Center endeavors to support the goal of student retention by offering services to those students in need of support, guidance and encouragement throughout their academic careers. As employees involved in the Center but also as dedicated professionals and community members, we collectively find ourselves in the unusual and difficult position of needing to communicate a growing concern that potentially may impact the integrity of the Center and the services it offers. Because this is not an employee grievance, we are directing our concerns to you with a copy to those that would appear to have the most need to know and best opportunity to investigate and correct the problems we have observed.

Specifically, it is our observation that Dr. Jill Lee-Barber's leadership and management of the Counseling & Testing Center during the past two years has had and continues to have an adverse impact on client care and has jeopardized the reputation of the Center both in the GSU community and with community collaborators. Our ability to provide a safe environment to our students, including managing risk and crisis, as well as to provide high quality services directly depends on creating a stable work environment in which competent professionals are able to effectively carry out all aspects of their work. In the

absence of this environment, the ability to optimally perform daily required tasks including the ability to collaboratively manage risk is compromised.

In addition to raising awareness about the concerns outlined below and to highlight how these concerns are impacting service delivery at the CTC, this letter also serves as a request for an investigation of these concerns in order to remedy the current crisis in leadership and management in the area of Psychological and Health Services. To be clear, this report is not a compilation of subjective experiences but rather is documentation of identifiable behaviors that have been observed and experienced by multiple staff members over an extended period of time. As mentioned, these are not merely employee grievances but rather observations of failings that jeopardize the programs, contribute to and cause waste of resources and capital, risk the safety and well-being of students served by the programs and threaten the integrity of the administrative and extra-judicial processes inherent in our governance.

This document is organized into different topic areas with the primary focus being on how various behaviors and decisions have impacted client care and the central mission of the Counseling & Testing Center.

I. <u>Deficiencies in Managing CTC Operations</u>

Dr. Lee-Barber has exhibited a fundamental misunderstanding of the nature of our client population and deficiencies in her ideological approach

to clinical work and the nature of the work conducted at the CTC.

In addition to providing traditional counseling services, in recent years, the role of counseling centers in the context of University campuses has increasingly centered on helping institutions in the management of risk. This requires a complex and specific set of clinical and administrative skills as well as the ability & commitment to effectively collaborate with campus constituents in navigating the complicated terrain of threat and risk assessment as well as liability management. Dr. Lee-Barber's lack of knowledge in the areas of complex psychopathology and ineffectiveness in dealing with campus collaborators, and her inability to advocate for the appropriate use of psychologists' skills in conducting these assessments significantly compromises the CTC's ability to effectively manage risk and crisis. Dr. Lee-Barber's stewardship of the mandated safety screening program continues to be problematic in multiple areas as outlined below:

A. Her lack of assessment skills continues to pose problems in recognizing risk; there are two recent incidents in which she was involved that demonstrate this difficulty. It took having a number of difficult conversations with Dr. Lee-Barber in which she was defensive and accused the other mandated team members of not respecting her "chief psychologist" role before she implemented specific steps to address the primary clinical concerns.

B. Dr. Lee-Barber's lack of understanding of the nuances of the mandated program has contributed to her misinforming staff about when and how to use the mandated process. Because of her deficits in knowledge in this area she had to call multiple meetings to clarify previously shared information, including how the mandate reports are included in the students' record and when and how the Counseling & Testing Center is involved in the overall mandated process.

II. Failure to Maintain Positive Trainee Relationships

One of the three primary identified service areas of the CTC is to provide quality training experiences to doctoral students in Counseling, Counseling Psychology, and Clinical Psychology. The CTC's ability to attract, recruit, and retain trainees is dependent upon continued quality relationships with identified feeder programs as well as the CTC's reputation both locally and nationally. In addition, up to 50% of the CTC's clinical services are provided by trainees; therefore, any rifts in our relationships or reputation, directly impacts the quantity and quality of service provision at the CTC.

A. As a consequence of Dr. Lee-Barber's management style, there have been rifts in the relationship between the Counseling and Testing Center and some of our identified feeder programs. These rifts have placed a strain on the training program and on several occasions

have resulted in a need for the Associate Director of Training to step in and manage the "damage" in order to salvage the relationships and help maintain the CTC's integrity as a quality training site.

B. There have been several reports from trainees who have expressed concern regarding Dr. Lee-Barber's communication style. Feedback offered included concerns about lack of authenticity, shaming others in staff meetings, confusion regarding some policies and procedures, and observed negative nonverbal communication (e.g., eye rolling). As an example of the impact of these behaviors, one trainee asked not to be supervised by Dr. Lee-Barber after expressing these concerns.

C. Dr. Lee-Barber has made inappropriate comments regarding the physical attractiveness of a trainee which was completely irrelevant and inappropriate to the context of the discussion which was in regard to specific clinical and training related concerns.

III. <u>Questionable Competence in Management of CTC Resources</u>

Dr. Lee-Barber's management of personnel, which is the primary clinical resource of the center, has been a significant problem:

A. Of great concern is Dr. Lee-Barber's emotional and professional stability. She has been observed to have episodes in which she exhibited significant emotional distress (e.g.,

crying spells) in front of staff who report to her. While support is always offered, this pervasive pattern of displaying emotional outbursts has been a source of concern for the majority of staff who witnessed these episodes. It is unclear whether these episodes occur as a lack of judgment in the moment and/or are evidence of Dr. Lee-Barber's inability to contain her internal distress, implying potential impairment. In addition, Dr. Lee-Barber has demonstrated a persistent pattern of seeking out specific staff members (e.g., junior staff, recently hired, staff of color) for one-on-one meetings in order to discuss her feelings with them regarding staff relations. Her difficulty in not adhering to the boundaries of the professional relationship during these meetings has been noted.

B. There have been multiple staff meetings in the past in which Dr. Lee-Barber's singular way of examining an issue results in her difficulties hearing and considering feedback from others. Part of this singular vision is precipitated by her lack of full understanding of the issue in order to identify the best solution for the problem presented. This directly impacts the development of policies and procedures necessary to create an effective system by which to meet the service demands of the students and the University community.

C. Dr. Lee-Barber has been pre-occupied with staff members taking notes during official staff meetings. Per a statement made by Dr.

Lee-Barber during one of these staff meetings, her concerns around note-taking were directly related to the fact that she does not want to be quoted. The recording of staff proceedings is essential to the integrity and continuity of CTC operations. Dr. Lee-Barber's request characterizes her management style, which is one of avoiding responsibility for her statements and behaviors in these meetings and silencing the staff. This combination undermines open communication – something that is necessary in a collaborative work environment.

IV. Witness Tampering and Influence

At least three staff members of the CTC staff are currently witnesses in a tenure revocation proceeding involving the previous Associate Clinical Director of the CTC. Our concern is that Dr. Lee-Barber, in her position as the Director of the CTC, and thus in a power position over her clinical staff, is actively urging the Associate Clinical Director's tenure revocation and termination. Despite her repeated assertions that she cannot talk about any aspect of these proceedings with the staff, Dr. Lee-Barber directly approached the three staff members involved in the University's case and then solicited and encouraged only that information which could support the University's position. It is our understanding that it is illegal and unethical for Dr. Lee-Barber to solicit information or engage in coercion as it relates to the potential testimony of the staff member witnesses.

A. To be clear, Dr. Lee-Barber has directly communicated with each of these staff members regarding this pending case and in one instance, told a staff member "*We need to support the President*" in response to questions about the process. This conduct has created increased concern over conforming testimony to what Dr. Lee-Barber represents as the University's position and the prospect of retaliation should accurate and thorough testimony differ from that position.

B. In a separate conversation, Dr. Lee-Barber exhibited frustration and stated explicitly, "I don't know whose side you're on." The clear indication was that Dr. Lee-Barber needed to know the testimony that would be offered and what perspective the testimony would take. She clearly appeared to want to influence the staff testimony.

C. In another instance, Dr. Lee-Barber initiated a conversation in which she encouraged a staff member to respond to the Legal Affairs office to answer the University attorney's questions stating that they had a "professional obligation" or "professional responsibility" to participate in the process. This conduct resulted in increased concern regarding Dr. Lee-Barber's expectations around the staff members' involvement in this case and exemplified a misuse of her authority and power in encouraging a certain level of participation.

V. Differential treatment of staff of color

A. Dr. Lee-Barber has responded differently to staff of color versus White-identified staff in regard to similar actions displayed in staff meetings. For example, a White-identified staff member has consistently used electronic devices (e.g., phone, laptop) to take notes in staff meetings and Dr. Lee-Barber has never commented on this behavior in any capacity in any meetings. However, in a recent meeting in which two staff of color were using electronic devices for note-taking purposes, Dr. Lee-Barber interrupted the meeting and openly commented on their behavior as being “distracting".

B. In one-on-one meetings with the staff of color (4 of the current 5 staff of color), Dr. Lee-Barber has routinely commented on their “tone of voice” or their non-verbal body language as a part of her concern regarding their presentation in larger staff meetings. However, it has been noted that although White-identified staff members have displayed similar tone of voice and body language in meetings, she has not made these same comments about these aspects of their behavior in her individual meetings with them.

As referenced above, these are observations that we, as staff members, feel compelled to offer as professionals but also as members of the larger community that seeks the highest quality of services from the CTC. As previously stated, our observations are of

failings that jeopardize the programs CTC offers, that contribute to and cause waste of resources and capital, risk the safety and well-being of students served by the programs and threaten the integrity of our processes both internal and University-wide. We would like to see these matters investigated and resolved for the betterment of CTC relationships with other offices and departments, as well as our ability to deliver the highest quality of programs and services to the students and University community who we support and serve.

In signing our names below we are indicating our mutual agreement with the goals of this memo and willingness to offer our personal experiences, many of which are outlined here. In addition, we are asking that we be protected from retaliation for collectively voicing our concerns and the concerns of the staff and community.

/s/ Yared Alemu
Yared Alemu, Ph.D.

Melissa A. Alves, Psy.D.

/s/ Corey M. Arranz
Corey M. Arranz, Psy.D.

/s/ Sandrine M. Bosshardt
Sandrine M. Bosshardt, Ph.D.

/s/ Kensa K. Gunter
Kensa K. Gunter, Psy.D.

/s/ Pegah Moghaddam
Pegah Moghaddam, Psy.D.

/s/ Alaycia D. Reid
Alaycia D. Reid, Ph.D.

cc: Dr. Risa Palm, Senior Vice President for Academic Affairs and Provost

Dr. Jill Lee-Barber, Director of Psychological and Health Services

Kerry L. Heyward, J.D., University Attorney, Office of Legal Affairs