

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

EUGENE ANDERSON,	:	
	:	
Plaintiff,	:	Civil Action File No.:
	:	2004 CV 91493
vs.	:	
	:	<u>Jury Trial Demanded</u>
THE BOARD OF REGENTS of the	:	
STATE OF GEORGIA	:	
(Georgia Southern University), in their individual	:	
and official capacities; BRUCE GRUBE,	:	
President of Georgia Southern University, in his	:	
individual and official capacity; RONALD CORE,	:	
former Vice-President of Georgia Southern	:	
University, in his individual capacity and former	:	
official capacity; and KEN BROWN, Director of	:	
Public Safety at Georgia Southern University, in his	:	
individual and official capacity,	:	
	:	
Defendants.	:	

**PLAINTIFF EUGENE ANDERSON’S RESPONSE IN OPPOSITION
TO DEFENDANTS’ MOTION FOR SUMMARY JUDGEMENT**

COMES NOW Plaintiff Eugene Anderson, by and through counsel, to oppose Defendants’ Motion for Summary Judgment. In support of Plaintiff’s response, Plaintiff shows this Court as follows:

INTRODUCTION

Plaintiff, Eugene Anderson, filed a civil action against Defendants alleging that Defendants wrongfully terminated him from his position as a Safety Engineering Manager at Georgia Southern University (GSU). In particular, Plaintiff contends that Defendants repeatedly reprimanded him, rescinded his merit pay increase, and ultimately terminated his employment in retaliation for disclosing information to GSU employees, administrators, and the Board of

Regents concerning the presence of hazardous chemicals on GSU's campus and GSU's failure to comply with environmental laws, rules and regulations.

Defendants have filed a Motion for Summary Judgment, arguing that: (1) Plaintiff has failed to state a claim upon which relief can be granted pursuant to the Free Speech or Equal Protection Clauses of the Georgia Constitution; (2) Plaintiff has failed to state a claim under the Employee Right-to-Know Act because Defendants are entitled to sovereign immunity, has failed to exhaust administrative remedies under the statute, and cannot establish that any of his communications are entitled to protections under the statutory provisions that Plaintiff cited to in his Amended Complaint; and (3) Defendants have articulated legitimate, non-retaliatory reasons for reprimanding Plaintiff, rescinding his merit pay increase, and terminating his employment. Defendants also contend that Plaintiff is unable to show that Defendants' articulated reasons for the complained of employment actions are a pretext.

A review of the record clearly demonstrates that: (1) Plaintiff has stated a claim under the Due Process and Free Speech clauses of the Georgia Constitution; (2) Defendants are not entitled to sovereign immunity as to Plaintiff's claims under the Employee Right-to-Know Act, the Act did not require Plaintiff to exhaust any administrative remedies prior to filing the instant lawsuit, and Plaintiff engaged in activities protected under the statute; and (3) Defendants' purported reasons for reprimanding him, rescinding his merit pay increase, and terminating him were a pretext to cover up their retaliatory motives. Therefore, this Court should deny Defendants' Motion for Summary Judgment.

STATEMENT OF THE FACTS

Plaintiff Eugene Anderson was the Safety Engineering Manager in GSU's Environmental Health and Safety Department which is part of GSU's Division of Public Safety. GSU is located in Statesboro, Georgia, and Plaintiff testified that he was born and raised in Statesboro and that he has children who live in the area. Plaintiff was employed at GSU from September 1995 to September 2002. (Plaintiff Dep., pg. 19, 40-42; Defendant Brown Dep., Pl. Ex. 23; Defendant Core dep, Pl. Ex. 51). As Safety Engineering Manager, Plaintiff's responsibilities included: (1) addressing safety concerns related to all hazardous materials and related programs; (2) reviewing inspection reports, complaints, and recommendations; (3) labeling, sealing, and transporting hazardous materials; (4) developing, maintaining, and reviewing compliance with Employee Right-to-Know laws concerning exposure of employees to hazardous materials, training department heads in their obligations under the law, and providing them with materials to facilitate employee training; and (6) directing inspections of all buildings and other campus properties. (*Id.*). Plaintiff was also a member at-large of the Georgia Environmental Safety Advisory Committee. (Plaintiff Dep., pg. 35-36).

Defendant Kenneth Brown, the Director of Public Safety for GSU, was Plaintiff's supervisor. From 1995 until 2001, Defendant Brown's written evaluations of Plaintiff's job performance showed that Plaintiff was either proficient or excelled in fulfilling his job responsibilities. Defendant Brown acknowledged that he did not have any academic training in environmental health and safety, had not obtained any environmental certifications, had never inspected any building for environmental problems, and did not supervise Plaintiff's handling of hazardous wastes. (Defendant Brown Dep. At 8, 34). Defendant Brown reported to Defendant Ronald Core who was the Vice President for Business and Finance at GSU from 1997 to 2004.

(Defendant Core Dep. At 5). Defendant Core reported directly to Defendant Bruce Grube, President of GSU. (Defendant Core Dep. at __; Defendant Grube Dep. at 8) Mark Demyanek, the Director of Compliance and Administration for the Board of Regents, served as a liaison between the Board of Regents and the schools that comprise the University of System of Georgia, including GSU. (Demyanek Dep. At 15; Demyanek Dep., pg. 13; Plaintiff Dep., pg. 106).

Because Plaintiff's position required him to purchase materials, he often had to submit funding requests to Defendant Brown. It was Plaintiff's responsibility to identify which areas of GSU's environmental program needed funding, but it was the Defendants' responsibility to secure the funding. (Anderson Dep. at __; Brown Dep. at __). Defendant Brown would present Plaintiff's funding requests to Defendant Core, and then Defendants Brown and Core would allocate the necessary funds if Plaintiff's funding requests were granted. (Brown Dep. at __; Anderson Dep. at __; Core Dep. at __).

On numerous occasions, the Environmental Protection Division (EPD) issued "Notices of Violation (NOV)" against GSU for failure to comply with environmental laws, rules and regulations. (Defendant Brown Dep., Pl. Ex. 4). On April 26, 2001, the EPD conducted a surprise inspection on GSU's campus and found several violations. (Pl. Ex. 34). On May 14, 2001, the EPD issued an NOV against GSU. (Pl. Ex. 34). The NOV stated that the violations "represent, in aggregate, enough severity to designate GSU as a Significant Violator of the Georgia Hazardous Waste Management Act . . . and the Rules for Hazardous Waste Management . . ." (Pl. Ex. 34). In an effort to address the problems mentioned in the May 14, 2001 NOV, Plaintiff informed Defendant Brown of how much additional funding was needed in order to remedy the violations. (Plaintiff Dep., pg. 138; Pl. Ex. 34).

On June 8, 2001, Plaintiff sent a memorandum to all of the heads and directors of GSU departments about the violations that the EPD identified in the May 14, 2001 NOV, and he sent a copy of the memorandum to Defendant Core. (Plaintiff Dep., pg. 148, Def. Ex. 5). Plaintiff also conducted one-on-one training with the head of the chemistry department given that many of the violations were in that department. (Plaintiff Dep., pg. 148-49). On August 2, 2001, the EPD acknowledged that it had received GSU's response to the May 14, 2001 NOV and that GSU had "satisfactorily addressed all of the violations listed in the NOV." (Plaintiff Dep., pg. 142-43; Defendant Brown Dep., Pl. Ex. 1).

Although the violations listed in the May 14, 2001 NOV were resolved, Plaintiff also wanted GSU to address the problems found during the EPD's April 26, 2001 surprise inspection. (Anderson Dep. at ___). To that end, Plaintiff sent Defendant Brown a memorandum on September 4, 2001 requesting that Defendant Brown seek Defendant Core's approval to establish a contingency plan and emergency operation procedures for handling hazardous waste. (Plaintiff Dep. 152; Defendant Brown Dep., Pl. Ex. 2). Plaintiff had several conversations with Demyanek regarding the need for GSU to implement a corrective action plan for addressing the violations listed in the EPD's April 26 NOV. On September 11, 2001, Demyanek emailed Bill Chatham, the Vice Chancellor of Facilities for the University System of Georgia, and stated, "In my opinion, the magnitude of these problems is indicative of environmental safety management system deficiencies at GSOU." (Demyanek Dep. 47-50, Pl. Ex. 36). Demyanek also sent Plaintiff a follow-up email making the following recommendations: (1) that a new Director of Environmental Safety position be created which reports directly to the Vice President for Business and Finance and (2) that a new Environmental Health and Safety staff of at least several professionals be created to build and maintain the environmental program at GSU. (Pl. Ex. 37).

Although Plaintiff's department hired student workers, the students were not certified or trained to handle hazardous materials and, thus, could not perform several functions that were necessary to keep GSU in compliance with environmental laws.

On October 12, 2001, GSU and the EPD entered into a consent order related to the violations that the EPD discovered during its April 26 inspection. (Pl. Ex. 4). The consent order required GSU to pay a \$10,000 fine and create a plan to remedy the violations and allow for physical site inspections. (Plaintiff Dep., pg. 145-46; Defendant Brown Dep., Pl. Ex. 4). GSU paid \$10,000 in fines for the violations on October 23, 2001, (Defendant Brown Dep., Pl. Ex. 3), but Plaintiff estimated it would take \$600,000 to fix the problems that the EPD had identified. (Plaintiff Dep., pg. 129, 141). GSU never notified the Board of Regents of the consent order and Demyanek found out about the consent order only after GSU had already entered into an agreement with the EPD. (Demyanek Dep. at __; Pl. Ex. __).

In November 2001, the EPD conducted another inspection at GSU and again found several violations. (Plaintiff Dep., pg. 130). On February 7, 2002, Plaintiff sent Defendant Brown a memorandum regarding GSU's Interim Spill Prevention, Control, and Countermeasures (SPCC) Plan and the need to fund the plan. (Plaintiff Dep., Def. Ex. 8). On March 7, 2002, Plaintiff sent a memorandum to GSU's Physical Plant and Warehouse Personnel to notify them of the interim SPCC plan and that, upon approval of the final plan and allocation of funding to purchase materials and equipment, Plaintiff would schedule trainings. (Pl. Ex. __). Because implementation of the plan would require the need to approve large financial expenditures, Defendants Core and Grube were listed as the Spill Coordinators. (Defendant Brown, Dep., pg. 84-85; Defendant Core Dep., Pl. Ex. 50; Defendant Grube Dep. pg. 20). Plaintiff needed funding in order to properly train GSU employees regarding their obligations under the SPCC plan and to

purchase necessary equipment. In total, Plaintiff requested \$23, 136.60. (Pl. Ex. 5). Although the SPCC plan was integral to GSU's compliance with environmental laws, rules and regulations, Defendant Core only approved the allocation of \$1590.65 towards implementing the plan. (Defendant Brown Dep., pg. 141, Pl. Ex. 10).

On April 15, 2002, Plaintiff sent Defendant Core a memorandum informing him that GSU was not in compliance with federal and state environmental regulations and requested funding to achieve compliance. (Plaintiff Dep., pg. 200-01; Demyanek Dep., Pl. Ex. 39). Plaintiff wrote this memorandum because GSU was not providing him with sufficient funding to implement the environmental program and Plaintiff also felt that he was being blamed for the NOV's that the EPD was issuing against GSU even though he had no control over the allocation of funds. (Plaintiff Dep., pg. 123-24). Plaintiff sent a copy of this memorandum to Demyanek and Demyanek's assistance, Jeff Owens.

On April 16, 2002, Plaintiff informed Defendant Core, in a memorandum, that GSU was not in compliance with the SPCC plan with regard to the EPD inspection of the 90-day storage area. See Ex. A. Plaintiff wrote the memorandum to bring Defendant Core's attention, for the third time, to the need for a fence and, in general, the need to remedy the problems that the EPD repeatedly identified in the NOV's. (Plaintiff Dep., pg. 161). Plaintiff sent the memorandum regarding the fence to Demyanek and Owens so that the Board of Regents could understand how the fence problem could lead to another EPD violation and that delays in funding would lead to more violations. (Plaintiff Dep., pg. 167-68); (Plaintiff Dep., pg. 160-61, Def. Ex. 7).

In April 2002, Plaintiff conducted an investigation regarding the use of pesticides, fungicides, and herbicides on the GSU campus and interviewed employees. (Plaintiff Dep. at 109-16; Pl. Ex. __). During his investigation, several employees complained to Plaintiff that

they were being asked to work with hazardous substances without proper equipment or adequate training. (Plaintiff Dep., pg. 113-14; Defendant Brown Dep. Pl. Ex. 6; Plaintiff Dep. at 87). The employees specifically asked to be relieved of such responsibilities. (Plaintiff Dep. at 88).

Plaintiff advised the employees of their rights under the Right-to-Know Act and suggested that they contact the Human Resources department to file complaints. (Plaintiff Dep. at 88). Plaintiff was aware of at least one individual who contacted the Department of Labor to file a complaint alleging violations of the Right-to-Know Act. (Plaintiff Dep. at 90).

On April 17, 2002, Plaintiff sent a memorandum to Richard Mellett, the head of GSU's Physical Plant, and Joe Franklin, the head of GSU's Auxiliary Services and Housing. (Plaintiff Dep., pg. 108-09; Pl. Ex. __). In the memorandum, Plaintiff provided the results of his investigation on the use of pesticides, fungicides, and herbicides on campus. (Plaintiff Dep., pg. 109-16; Defendant Brown Dep., Pl. Ex. 6). Plaintiff listed a number of problems that he found during his inspection, including the fact that pesticides were stored and mixed in a washroom that was next to a student dormitory and that there was inadequate ventilation within the enclosed areas where pesticides were prepared and stored. (Pl. Ex. 6). Plaintiff made several specific recommendations on ways to address the problems, including the creation of a pesticide facility "designed for the specific purpose of storing, mixing, and preparing toxic or acutely hazardous chemicals for pesticide management" and that employees should receive better equipment. (Pl. Ex. 6; Plaintiff Dep., pg. 115-16); (Pl. Ex. 6); (Plaintiff Dep., pg. 113-14; Defendant Brown Dep. Pl. Ex. 6).

Plaintiff sent a copy of the April 17 memorandum to Defendants Core and Brown to keep them informed of how employees were handling hazardous chemicals and to show that he was actively communicating with other departments in order to identify and correct environmental

violations. (Plaintiff Dep., pg. 112). Plaintiff also sent Demyanek a copy of the memorandum because Demyanek had mentioned that other university campuses were having problems with the use of pesticides. (Plaintiff Dep., pg. 110; 112-13). Plaintiff also spoke with Defendant Brown about hiring a consultant to help address the problems that he discovered during the pest management inspection, and Defendant Brown responded that he would discuss the matter with Defendant Core. (Plaintiff Dep., pg. 114-15). Because Defendants never authorized Plaintiff to retain a consultant, Plaintiff provided employees with as much training as possible given his limited budget and resources. In the end, the lack of funding and additional staff persons made it impossible for Plaintiff to make any major improvements to GSU's pest control management program. (Plaintiff Dep., pg. 114-15; 119).

In addition to sending Demyanek copies of the memorandum that he sent to Defendant Core, Defendant Brown and other GSU administrators, Plaintiff spoke with Demyanek over the phone and expressed his frustration at the administration for not adequately funding the environmental program in a manner that would eliminate the repeated NOV's that the EPD was issuing against GSU. (Demyanek Dep. At 96, 106). Based on Demyanek's verbal and written communications with Plaintiff, Demyanek concluded that GSU had not done much to address the need for GSU to comply with the SPCC plan. (Demyanek Dep., pg. 92-93). Demyanek testified that he spoke with Defendant Core about some of the issues that Plaintiff raised during their written and verbal communications. (Demyanek Dep. at __). Demyanek further testified that many of the environmental health and safety issues that Plaintiff had raised were legitimate issues that needed to be addressed. (Demyanek Dep. at 128).

Defendant Brown testified during his deposition that he began having concerns about Plaintiff's work performance when Plaintiff "started going outside of the community," to discuss

his frustrations with people such as Demyanek. (Defendant Brown Dep. At 116-117).

Defendant Brown testified that he was aware of Demyanek calling Defendant Core about Plaintiff's complaints regarding the environmental program, and Defendant Brown stated that he considered Demyanek and the Board of Regents to be "outside of the community." (Defendant Brown Dep. At 116-117).

On April 23, 2002, Defendant Core met with Plaintiff and handed Plaintiff a memorandum. (Plaintiff Dep., pg. 224). In the memorandum, Defendant Core wrote, "I will begin immediately to examine our current environmental safety program. Perhaps, reorganizing or even outsourcing this function is the solution." During his deposition, Plaintiff testified that, during the meeting, Defendant Core expressed his "displeasure with the fact that I had gone to his boss and notified him that he was not fulfilling his accountabilities and that he was very upset, that he was not pleased and that he was going to terminate me and that he was going to contract out my services." (Plaintiff Dep. At 224). (Pl. Ex. 42). Defendant Core testified during this deposition that "outsourcing" might have included removing Plaintiff from his position. (Defendant Core Dep. At 45-46).

On May 2, 2002, GSU received another NOV from the EPD for failing to properly handle hazardous waste materials. (Pl. Ex. 46). Also in May, Plaintiff received requests from Susan Cassidy, an employee in GSU's Human Resources Department, Dr. Kate Conway-Turner, Dean of the Communications Art Department, and Dr. Lynn Tabor, Director of GSU's Health Services, that he examine several buildings on campus for mold and fungi growth. (Plaintiff Dep., pg. 225; 226-27, 229-30). Cassidy stated that employees were filing worker's compensation claims related to exposure to mold and that she needed Plaintiff to investigate the complaints so that she could put additional information in her files. (Plaintiff Dep. at 238).

During his examination of the buildings, Plaintiff spoke with GSU employees, such as Dr. Haskell Fulmer, Director of GSU's Communication Arts Department, regarding respiratory problems that several staff members and students were experiencing. (Plaintiff Dep. At 229-232). In addition, Plaintiff spoke with Dr. Panther Yates, a GSU professor, about Yates' own respiratory problems which had caused Yates to see a doctor. (Plaintiff Dep. At 247-48). Professor Yates' doctor, Saraju C. Dalsania, sent Anderson a letter stating that Yates was suffering from respiratory difficulty and that, "[i]n my medical opinion, I attribute this to his environmental and occupational conditions." (Pl. Ex. __). Plaintiff informed Susan Cassedy of his conversations with GSU employees regarding environmental and occupational health and safety concerns at GSU, took samples from the buildings, and had Air Quality Sciences, Inc. test the samples that he collected.

Air Quality Services returned the results from the mold tests on May 15, 2002 and, on May 30, 2002, Plaintiff circulated a memorandum which described the findings from the tests. (Plaintiff Dep., pg. 228). Plaintiff sent the May 30, 2002 to Dr. Conway-Turner, Dr. Linda Bleicken, the Vice President of Academic Affairs, Joe Franklin and Susan Cassedy, and sent a copy to Defendants Core and Brown. (Plaintiff Dep., pg. 232-33, Def. Ex. 1). In the memorandum, Plaintiff discussed the problems of mold and fungi growth, the abundant presence of insect fragments and flea infestation at GSU. (Plaintiff Dep., Def. Ex. 1). Plaintiff enclosed a copy of the report that Air Quality Services prepared and included information regarding studies that showed a link between exposure to mold and fungus and health problems such as respiratory ailments. (Def. Ex. 1). Plaintiff also made specific recommendations, such as repairing defects that lead to water accumulation, remediating building materials that support fungal growth, and effective communication with building occupants. (Def. Ex. 1).

On June 3, 2002, Defendant Brown sent Plaintiff a memorandum entitled “Inappropriate Action Toward Implementation of SPCC Plan.” (Defendant Brown Dep., pg. 136, Pl. Ex. 10). Defendant Brown asserted that Plaintiff had failed to properly ensure that all of the departments that were going to be affected by the SPCC plan were apprised of the plan and that they were “on board” with the plan. (Pl. Ex. 10). Even though the \$1590 that Defendant Core originally allotted was no where close to the amount of money needed to train employees on the SPCC plan, Plaintiff nevertheless sent a memorandum on June 5, 2002 to all of the directors and heads of departments who were affected by the SPCC plan to schedule trainings. (Plaintiff Dep., pg. 210-12, Def. Ex. 9).

Defendant Brown testified during his deposition that he wanted Plaintiff to develop an “implementation plan” separate from the SPCC plan. (Defendant Brown Dep. At 87-88, 261). However, Defendant Brown acknowledged that Dr. Francois Song, the person who replaced Plaintiff as Safety Engineering Manager, was never reprimanded for not creating an implementation plan. (Brown Dep. at 260). Furthermore, Defendant Brown never offered Plaintiff any suggestions on what the implementation plan should include and did not provide Plaintiff any guidance on how to prepare the plan. (Defendant Brown Dep. At 88). Defendant Brown also never provided Plaintiff with any guidance on how to fulfill his responsibility for handling hazardous wastes and did not supervise Plaintiff’s handling of hazardous wastes. In addition, he acknowledged that the NOVs were not “all Gene’s fault because, you know, there were some things that was [sic] beyond his control.” (Defendant Brown Dep. At 75). Defendant Brown also testified that he was never reprimanded for the NOVs that the EPD repeatedly issued against GSU. (Defendant Brown Dep. at ____).

On June 7, Defendant Core sent Plaintiff a reprimand letter in response to Plaintiff's May 30, 2002 memorandum concerning the presence of mold on GSU's campus. (Pl. Ex. 11). Defendant Core wrote, "your actions consist of nothing more than citing the problem areas, and in this case, doing so in a vague, inflammatory manner." (Pl. Ex. 11). Plaintiff also testified that Defendant Core was upset that Plaintiff had circulated the memorandum to others on GSU's campus. (Plaintiff Dep., pg. 250-51). Yet, in Defendant Core's June 7, 2002 response to the EPD's May 2, 2002 NOV, Defendant Core wrote that "Mr. Anderson has met with those responsible for appropriate use of hazardous materials to ensure their understanding of proper techniques and procedures," "instituted an inspection program to ensure compliance," and that "Georgia Southern University works diligently to ensure a safe environment for our faculty, staff and students." (Pl. Ex. 46). Defendant Core also attached a report that Plaintiff allegedly prepared. (Pl. Ex. 46). However, Plaintiff never prepared the report and, on June 13, 2002, he sent the EPD a letter stating that he had never seen any reports regarding GSU's remediation of environmental violations. (Plaintiff Dep., pg. 274-76, Def. Ex. 14).

On June 11, 2002, Defendant Brown sent Plaintiff another reprimand letter complaining about the "distribution, tone, and content" of Plaintiff's May 30, 2002 memorandum concerning the presence of mold on campus. (Pl. Ex. 12). The reprimand letter stated: "Distributing such materials without any notice to your supervisors and the administration is unacceptable and will not be tolerated." (Defendant Brown Dep., Pl. Ex. 12). However, all of the recipients of the letter were part of GSU's administration. (Def. Ex. 1). In addition, Defendant Grube testified that, at any one time, GSU has 1800-2000 employees and that he "absolutely" believed that GSU employees and the Board of Regents were entitled to information regarding the status of GSU's environmental program. (Defendant Grube Dep. at 7, 23).

Defendant Brown instructed Plaintiff to review his job description and submit “a written report detailing precisely every step you have taken to perform each of the five responsibilities assigned to you” within two weeks. (Pl. Ex. 12). Defendant Brown testified during his deposition that he issued the June 11 reprimand letter because he felt that Plaintiff should have sought permission before distributing the May 30 memorandum to other people on campus. (Defendant Brown Dep., pg. 262-63). Plaintiff testified that he felt that Defendant Brown reprimanded him for the May 30 memorandum because he had broken the “code of silence” by distributing information that could be “embarrassing or potentially liable to the university.” (Plaintiff Dep. At 255). Plaintiff further stated that Defendant Brown told him that communicating with employees and students in a manner like the May 30 memorandum “was unacceptable” and that Defendant Brown considered him to be a traitor for, in Defendant Brown’s words, “blowing the whistle on the university.” (Plaintiff Dep. At 255-56).

On June 12, 2002, Plaintiff informed Defendant Brown that, per Defendant Brown’s request, Plaintiff had met with administrators and other employees in the Communication Arts Building to discuss the May 30 memorandum and to conduct additional testing for mold and fungi. (Plaintiff Dep., pg. 256-58, Def. Ex. 11). On June 17, 2002, Plaintiff sent a memorandum to Defendant Brown to provide information about additional steps that GSU should take to remove the surface fungi and to address the health and safety issues in the Communication Arts Building. (Plaintiff Dep., pg. 260-61, Def. Ex. 12). Plaintiff also sent Defendant Brown two memorandum detailing the actions that he had taken to perform his job duties, as Defendant Brown requested in the June 11 reprimand letter. (Plaintiff Dep., pg. 265-66; Defendant Brown Dep., Pl. Ex. 15; Plaintiff Dep., 266-67, Def. Ex. 3).

GSU originally submitted a request for Plaintiff to receive a merit pay increase for the 2003 fiscal year. However, on June 18, 2002, Kim Thompson, from GSU's Office of the Comptroller, submitted a request to rescind Plaintiff's merit pay increase. See Ex. F. Defendant Core signed the Personal Action form rescinding Plaintiff's merit pay increase, but never informed Plaintiff of the rescission. (Anderson Dep. at ____). Defendant Brown testified that he supported the rescission because Anderson should not have received a pay increase after having been reprimanded. (Defendant Brown dep, pg. 186; (Defendant Brown Dep., pg. 185-86); (Defendant Brown Dep. 191, Pl. Ex. 14); (Defendant Core Dep., Pl. Ex. 48).

Although there was virtually no trained staff to assist Plaintiff in the handling of hazardous waste and insufficient funds to properly handle hazardous materials, Defendants Brown and Core continued to pressure Plaintiff to remedy environmental violations through verbal and written reprimands. On June 27, Plaintiff broke his back on the job when he tried to move a 55-gallon drum of formaldehyde. (Plaintiff Dep., pg. 282-83, Def. Ex. 15). Thus, Plaintiff had to go on leave from work in order to recover from his injury. Plaintiff testified that, for several days prior to his leave of absence, Defendant Brown "would not speak with me if he saw me coming. He would look the other way, he would not look me in the eye, he wouldn't speak to me." (Plaintiff Dep. At 254).

Plaintiff's doctor, Kenneth Johnson, could not provide Plaintiff with an exact date as to when Plaintiff could return to work, but stated that it usually took ninety days for someone to recover from such an injury. (Plaintiff Dep., pg. 289). On July 1, 2002, Defendant Brown sent Plaintiff a letter stating that GSU was placing Plaintiff on leave under the Family Medical Leave Act (FMLA), that Plaintiff should contact GSU's Human Resources office for anything related to workers' compensation or other benefits, and that Plaintiff should "contact this office as soon as

possible so that we may determine when you might be eligible to return to work” (Plaintiff Dep., pg. 288; Defendant Brown Dep., Pl. Ex. 16). On July 8, 2002, Plaintiff sent a letter to Susan Lovett, an employee in GSU’s Human Resources department, requesting that he be placed on sick leave without pay instead of using the FMLA. (Heidler Dep., pg. 60, Pl. Ex. 27). Plaintiff sent a copy of the July 8 letter to Defendant Brown.

On July 9, 2002, Plaintiff sent Defendant Brown a letter asking that he be allowed to exhaust his sick leave with pay and then be placed on sick leave without pay instead of being placed under the FMLA. (Defendant Brown Dep., pg. 219, Pl. Ex. 17). Defendant Brown did not reply to Plaintiff’s letter. Instead, Lovett responded and told him that GSU had placed him on leave pursuant to the FMLA, and that GSU “will use your accumulated sick leave during this time until it is exhausted per your request.” (Heidler Dep., pg. 66, Pl. Ex. 28).

On July 16, 2002, Plaintiff sent Defendant Brown a letter expressing his understanding that: (1) GSU would not use his accumulated annual leave; (2) GSU would allow him to exhaust his sick leave with pay and (3) after such time, he would begin receiving worker’s compensation benefits. (Pl. Ex. 18). Plaintiff further stated that if Defendant Brown had any questions regarding work-related issues, Defendant Brown could call Plaintiff at home. (Pl. Ex. 18; Defendant Brown Dep., pg. 220, Pl. Ex. 18). Defendant Brown did not reply to Plaintiff’s July 16 letter.

On July 25, 2002, two separate articles in The Statesboro Herald reported mold on GSU’s campus. (Plaintiff Dep., pg. 261; Defendant Brown Dep., Pl. Ex. 7). The articles cited to Plaintiff’s May 30th mold memorandum, but Plaintiff did not contribute to the newspaper articles in any way. (Plaintiff Dep., pg. 261-62). Demyanek testified that the issue of mold “generally is of interest to the public.” (Demyanek Dep. at 115).

On September 5, 2002, Jack Heidler, the new director of Human Resources, sent Plaintiff a letter stating that Plaintiff would exhaust his sick and annual leave on September 18th and that his twelve weeks of FMLA would expire on September 24th. (Plaintiff Dep., pg. 289-90; Defendant Brown Dep., pg. 222-23, Pl. Ex. 19). Heidler instructed Plaintiff to contact Defendant Brown prior to September 24 “**to advise him of your ability and intention to either return to employment on or before September 25, 2002, or at least provide to him a prognosis/diagnosis from your physician relative to your present medical status.**” (Pl. Ex. 19) (emphasis added). Heidler further stated that, under Worker’s Compensation, Plaintiff could receive 67% of his salary for 400 weeks from the date of his injury, and that those benefits would cease when either Plaintiff’s physician returned him to work or the 400 weeks expired. (Pl. Ex. 19). At no time, either in written correspondence or verbal communication, did anyone at GSU ever inform Plaintiff that he would be terminated if he did not return to work by September 25, 2002.

On September 16, 2002, Plaintiff sent Heidler a letter confirming receipt of the September 5 letter and sent a copy to Defendant Brown. (Plaintiff Dep., pg. 292; Heidler Dep., Pl. Ex. 30). Plaintiff also attached a “Return to Work/School Form” that Dr. Johnson completed which indicated that Plaintiff was still unable to return to work and that his health would be reevaluated on September 24, 2002. (Plaintiff Dep., pg. 292; Heidler Dep., Pl. Ex. 30). Dr. Johnson also advised Plaintiff that Plaintiff could return to work sooner if GSU allowed him to perform light duty tasks and suggested that Plaintiff obtain a letter from GSU to that effect. (Plaintiff Dep. at 297). Plaintiff sent Defendant Brown a copy of his September 16 letter and the Return to Work form. (Pl. Ex. 30). Because Plaintiff’s September 16 letter and the Return to Work form advised Defendant Brown and the Human Resources department of Plaintiff’s

inability to return to work on or before September 25, 2002 and provided a prognosis of Plaintiff's medical status, Plaintiff considered the September 16 letter to comply with Heilder's September 5, 2002 request that Plaintiff provide Defendant Brown with such information.

Plaintiff also spoke with Susan Cassedy, Vicky Hodges, and Susan Lovett, all in the Human Resources department, about returning to work sooner if he were allowed to perform light duty tasks. (Plaintiff Dep. at 296-97). Plaintiff discussed the possibility of returning to work earlier with Cassedy, Hodges, and Lovett in compliance with Defendant Brown's instruction that Plaintiff discuss all issues related to his worker's compensation injury with the Human Resources department. (Plaintiff Dep. at 297; Pl. Ex. 16). Although Defendant Brown testified that he would have been amenable to allowing Plaintiff to return to work under a modified work program, GSU never issued such a letter to Plaintiff. (Defendant Brown Dep. at 245; Plaintiff Dep. at 297).

On September 27, 2002, Defendant Brown sent Plaintiff a letter terminating Plaintiff's employment at GSU and sent a copy of the letter to Defendant Core and Heidler. Defendant Brown wrote that Plaintiff's leave under the FMLA had expired on September 24 and that:

The expectation was that you would return to work on September 25th or, at a minimum, given me a timely notice of any reasons preventing you from reporting to work. Based on the above, and Georgia Southern policy that absence 'from work for three consecutive days without notice will be considered as having resigned employment,' it is my decision to release you from your employment position effective immediately. (Pl. Ex. 23).

Prior to sending Plaintiff the termination letter, Defendant Brown never notified Plaintiff that he would be subject to termination for not coming to work on September 25, 2002. (Plaintiff Dep., pg. 295). Plaintiff was completely surprised when he received the termination letter because, based on his conversations and correspondence with the Human Resources department and Defendant Brown, Plaintiff understood that he still had annual leave available and that GSU

would place him on sick leave without pay for at least one year starting in August 2002 while he received worker's compensation benefits. (Plaintiff Dep., pg. 295).

The fact that GSU sent Plaintiff a check for the amount of \$313.47 in November 2002 for his unused annual leave further substantiates Plaintiff's understanding of his leave status. (Pl. Ex. __). In addition, Plaintiff began receiving Worker's Compensation benefits on August 1, 2002, which meant that GSU could not pay Plaintiff his regular wages - through either sick leave with pay or annual leave - while Plaintiff received worker's compensation benefits. (Plaintiff Dep. at Pl. Ex. __). Plaintiff concluded that there must have been an error on the part of Human Resources with respect the type and amount of leave still available to him. (Plaintiff Dep. at 295).

On September 30, 2002, Plaintiff sent Heidler a letter stating that, based on his correspondence with Lovett, he still had annual leave available and that his worker's compensation benefits had already started. Thus, there were several leave options that would have allowed Plaintiff to remain employed at GSU beyond September 24, 2002 while he recovered from his work-related injury. (Plaintiff Dep., pg. 293-95; Defendant Brown Dep., Pl. Ex. 21). In addition, Plaintiff attached a copy of the Return to Work form that Dr. Johnson completed which stated that Plaintiff was still temporarily disabled and that the doctor would reevaluate him on October 15, 2002. (Plaintiff Dep., pg. 293; Pl. Ex. 22).

During his deposition, Defendant Brown testified that, even though Plaintiff's doctor would reevaluate Plaintiff's condition on October 15, 2002, Defendant Brown would not have allowed Plaintiff to maintain his employment at GSU because he "needed somebody full-time in [the department] and it was going to take a period of time for me to hire somebody." (Defendant Brown Dep. at 236-39). Yet, immediately after Plaintiff's injury, Defendant Brown hired Julie

Byrd, from the consulting firm of Brown and Caldwell, to work full-time on a temporary basis to assume Plaintiff's responsibilities. (Defendant Brown Dep., pg. 107-08; Demyanek Dep., pg. 123).

On October 25, 2002, Plaintiff submitted a GSU employee grievance form against Defendant Brown and Defendant Core, asserting that his termination was wrongful, and that he was fired in retaliation for informing GSU administrators, employees and the Board of Regents about hazardous working conditions at GSU. (Pl. Ex. 32). There were three members of the grievance panel and Defendant Grube made the ultimate decision as to whether to reverse or affirm Plaintiff's termination. (Defendant Grube Dep. at 16). Defendant Grube admitted during his deposition that, for the years 2001 and 2002, he was not aware that (1) GSU was experiencing serious mold problems on campus; (2) GSU had received numerous NOV's from the EPD, (3) employees and students were complaining of respiratory illnesses that might be related to the exposure to hazardous and toxic substances; and (4) the department of Environmental Health and Safety was underfunded and understaffed. (Defendant Grube Dep. at 9-12). Defendant Grube also stated that he never reprimanded anyone with respect to GSU's repeated failures to comply with environmental regulations. (Defendant Grube Dep. at 12). While reviewing the merits of Plaintiff's grievance form, Defendant Grube did not take into consideration any of the reprimand letters that Defendants Brown and Core issued against Plaintiff or the rescission of Plaintiff's merit pay increase. (Defendant Grube Dep. at 9, 27-30).

On December 12, 2002, Defendant Grube informed Plaintiff that, based on the grievance panel's recommendation, he would not overturn Plaintiff's termination. (Pl. Ex. ; Defendant Grube Dep., pg. 33). In January of 2003, Plaintiff filed an appeal of his termination with the Human Resources Department for the Board of Regents. In February of 2003, the Board of

Regents affirmed Plaintiff's termination. On September 23, 2004, Plaintiff filed the instant lawsuit against Defendants, suing them in their individual and official capacities. (Orig. Compl.).

ARGUMENTS AND CITATION OF AUTHORITY

I. Standard of Review

“Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” Clive v. Gregory, 2006 WL 1914319, *3 (Ga. Ct. App. July 13, 2006) (finding that defendants were not entitled to summary judgment). See also O.C.G.A. § 9-11-56(c). “On a motion for summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party.” Ham v. Ham, 230 Ga. 43, 45, 195 S.E.2d 429 (1973)(affirming denial of defendants’ motion for summary judgment). When the movant is the defendant, the movant ““has the additional burden of piercing the plaintiff’s pleadings and affirmatively negating one or more essential elements of the complaint.”” Moore v. Goldome Credit Corp., 187 Ga. App. 594, 596, 370 S.E.2d 845 (Ga. Ct. App. 1988) (citations omitted). “In ruling on a motion for summary judgment, the opposing party should be given the benefit of all reasonable doubt, and the court should construe the evidence and all inferences and conclusions arising therefrom most favorably toward the party opposing the motion.” Id.

“Circumstantial evidence may be sufficient to create a jury issue in the face of direct evidence to the contrary.” Jones v. Board of Regents of the University System of Georgia, et al., 262 Ga. App. 75, 81, 585 S.E.2d 138, 144 (Ga. Ct. App. 2003) (reversing grant of summary judgment in favor of defendants, finding that a genuine issue of material fact as to whether the employee was terminated in reprisal for disclosing information of fraud). “Where direct and

positive testimony is presented on an issue, the opposing party must show some other fact which contradicts the testimony.” Id. If this other fact is direct evidence, that is sufficient to allow the case to go to the jury; if the other fact is circumstantial evidence, it must be inconsistent with the defendant's evidence, or if consistent, it must demand a finding of fact on the issue in favor of the plaintiff.” Id.

This Court must review the record in a light most favorable to Plaintiff. Defendants have not met their burden of negating any of the essential elements of Plaintiff’s claims against Defendants. As shown below, the defenses of sovereign immunity and failure to exhaust administrative remedies are not available to Defendants; and there is direct and circumstantial evidence to support a jury finding that Defendants’ alleged reasons for reprimanding Plaintiff, rescinding his merit pay increase and terminating him were a pretext to cover up the Defendants’ retaliatory motives. Thus, Defendants are not entitled to summary judgment as a matter of law and this Court should deny Defendants’ motion.

II. THIS COURT SHOULD DENY DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT THAT A JURY SHOULD DECIDE.

A. Defendants are not entitled to sovereign immunity or official immunity as to Plaintiff’s claims under the State Constitution or the Employee Right-to-Know Act.

Defendants argue that they are entitled to sovereign immunity against claims under the Georgia Constitution for monetary damages.¹ (Defs.’ Mot. Summary Judgment at 5).

¹ On September 14, 2005, this Court bifurcated this case so that the parties could first determine whether Defendants terminated Plaintiff in retaliation for disclosing information related to GSU’s environmental compliance problems. (cite Court Order). This Court also ordered that, if Plaintiff is successful in the first stage of the proceedings, the parties will then litigate the issue of damages. (cite Court Order). Thus, Defendants’ attempt to raise the issue of damages at this point in the litigation is improper.

Defendants also contend that Plaintiff cannot sue Defendants in their individual capacity for violations of the constitution or Right-to-Know Act. (Defs.' Mot. Summary Judgment at 6, 8). They maintain that the Right-to-Know Act only entitles Plaintiff to equitable relief against Defendants in their official capacity. (Defs.' Mot. Summary Judgment at 8).

Neither the Georgia Tort Claims Act nor the doctrine of sovereign immunity govern state constitutional claims for equitable relief. O.C.G.A. § 51-1-1. "The [Supreme Court of Georgia] has long recognized an exception to sovereign immunity where a party seeks injunctive relief against the state or public official acting outside the scope of lawful authority."

International Business Machines Corp. v. Evans, 265 Ga. 215, 216, 453 S.E.2d 706 (1995).

"Sovereign immunity is not a bar to an action alleging a violation of a *constitutional* right."

Kilgo v. Department of Corrections, 202 Ga. App. 50, 413 S.E.2d 507 (1991) (emphasis added).

See also C. F. I. Const. Co. v. Board of Regents of University System of Georgia, 145 Ga. App. 471, 476 (1978) (holding that sovereign immunity is not a legitimate defense to plaintiff's state constitutional claims); Fonda Corp. v. Department of Human Resources, 147 Ga.App. 226, 227, 248 S.E.2d 528 (1978) (same).

"[U]nder Georgia law, public officials are entitled to a qualified immunity in their individual capacities for discretionary actions within the scope of their official authority performed *without actual malice or actual intent to cause injury*." Rodriguez v. Kraus, 275 Ga. App. 118, 119, 619 S.E.2d 800, 802 (Ga. Ct. App. 2005) (emphasis added). See also Cooper v. Paulding County School Dist., 265 Ga. App. 844, 845, 595 S.E.2d 671, 672 (Ga. Ct. App. 2004) (holding that public officials are entitled to immunity when engaging in discretionary actions provided that such actions are done within the scope of their employment and without willfulness, malice, or corruption).

Plaintiff alleges that the Defendants violated his state constitutional rights to due process and freedom of speech. Anytime the government violates a citizen's constitutional rights, a cause of action directly based upon that constitutional provision arises. The case law clearly shows that Defendants are not entitled to sovereign immunity against constitutional claims. Thus, Defendants cannot raise the defense of sovereign immunity with respect to violations of Plaintiff's free speech and due process rights, and this Court has jurisdiction over both claims.

Plaintiff's suit against the Defendants in their individual capacities is proper because the Defendants' actions of issuing reprimand letters against Plaintiff, rescinding Plaintiff's merit pay increase and terminating Plaintiff were all discretionary actions taken within the scope of the Defendants' official authority undertaken with actual malice and intent to cause Plaintiff injury. Plaintiff informed GSU employees, administrators and the Board of Regents that GSU's failure to adequately fund and staff the environmental program was leading to repeated NOV's from the EPD. Plaintiff also provided employees with information regarding their rights under the Right-to-Know Act, which resulted in employees requesting that they not be required to handle certain hazardous materials, filing complaints to the Human Resources and Worker's Compensation departments, and seeking medical treatment.

The record shows that Defendants Brown and Core were displeased with Plaintiff's written and verbal communications exposing the inadequacies of GSU's environmental program and that the Defendants' retaliatory actions were directly related to Plaintiff's legally protected activities. Defendant Brown testified during his deposition that he began finding fault with Plaintiff's work performance when Plaintiff "started going outside of the community," to discuss his frustrations with people such as Demyanek. (Defendant Brown Dep. At 116-117). Defendant Brown considered Demyanek and the Board of Regents to be "outside of the [GSU]

community” and, thus, felt that the Board of Regents did not need to know the problems with GSU’s environmental program. This sentiment is best illustrated by the fact that GSU failed to inform the Board of Regents about the consent order it had entered into with the EPD concerning several environmental violations. (Plaintiff Dep., pg. 145-46; Defendant Brown Dep., Pl. Ex. 4).

In an April 23, 2002 memorandum, Defendant Core wrote, “I will begin immediately to examine our current environmental safety program. Perhaps, reorganizing or even outsourcing this function is the solution.” Plaintiff testified during his deposition that Defendant Core verbally expressed his “displeasure with the fact that I had gone to his boss and notified him that he was not fulfilling his accountabilities and that he was very upset . . . and that he was going to terminate me” (Plaintiff Dep. at 224). Defendant Core also testified that “outsourcing” might have included removing Plaintiff from his position. (Defendant Core Dep. At 45-46). Thus, there is sufficient evidence to show that the Defendants reprimanded Plaintiff, rescinded his merit pay increase, and terminated him in retaliation for Plaintiff exposing GSU’s failure to comply with environmental laws and regulations. Consequently, Plaintiff has properly sued the Defendants in their individual and official capacities.

B. Plaintiff did not fail to exhaust administrative remedies under the Right-to-Know Act.

Defendants argue that, because Plaintiff did not file a grievance with the Commissioner of Labor with respect to his claim under the Right-to-Know Act, Plaintiff has failed to exhaust his administrative remedies. (Defs.’ Mot. Summary Judgment at 9). Therefore, they assert, this Court lacks jurisdiction over Plaintiff’s Employee Right-to-Know claim. (Defs.’ Mot. Summary Judgment at 8-9). Thus, Defendants ask this Court to dismiss that claim. (Defs.’ Mot. Summary Judgment at 10).

The Georgia Employee Right-to-Know Act provides, in pertinent part, as follows:

In order to enforce the provisions of this chapter, any employee adversely affected by a violation of this chapter by that employee's employer may file a grievance in accordance with the employer's established grievance procedures. Appointing authorities shall pursue all complaints concerning occupational exposure to hazardous chemicals. Employees dissatisfied with a final decision of an appointing authority may file a grievance with the Commissioner." O.C.G.A. § 45-22-11(a) (emphasis added).

Any employee adversely affected by a final decision of the Commissioner to a grievance filed pursuant to subsection (a) of this Code section shall be entitled to judicial review in the same manner as provided for judicial review of contested cases in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." O.C.G.A. § 45-22-11-(d).

"'May' ordinarily denotes permission and not command. However, where the word as used concerns the public interest or affects the rights of third persons, it shall be construed to mean 'must' or 'shall.' O.C.G.A. § 1-3-3(10).

[WE ARGUE THAT FREE SPEECH APPLIES IN PART BECAUSE ISSUE OF PUBLIC CONCERN. THERE IS SUFFICIENT EVIDENCE THAT PLAINTIFF ENGAGED IN PROTECTED ACTIVITY UNDER THE ACT, BUT "NO NEED TO EXHAUST" ARGUMENT WEAK AND CONTRADICTIONARY WITH FREE SPEECH CLAIM]

C. There is sufficient evidence in the record to support a jury finding that Defendants' reasons for reprimanding Plaintiff, rescinding his merit pay increase, and terminating his employment were a pretext to disguise the Defendants' retaliatory motives.

Defendants argue that they reprimanded Plaintiff and rescinded his merit pay increase "based on several serious performance issues with Plaintiff." (Defs.' Mot. Summary Judgment at 37). Defendants also maintain that, at the time of his termination, "Plaintiff had exhausted all of his approved leave, including annual, sick, and family leave." (Defs.' Mot. Summary Judgment at 33). Defendants contradict themselves by arguing that Plaintiff never contacted Defendants prior to the alleged expiration of his leave to inform them of his ability to return to work, and yet they acknowledge receipt of all of the written correspondence that Plaintiff sent to Defendants while he was on leave. (Defs.' Mot. Summary Judgment at 33-36). In addition,

Defendants admit that they never afforded Plaintiff a pre-termination hearing. (See Defendants' Statement of Material Facts at ___). However, they argue that Plaintiff's ability to file a grievance constituted "an adequate post-deprivation remedy" and that, therefore, Plaintiff's due process claim fails. (Defs.' Mot. Summary Judgment at 6).

1. Reprimand Letters and Rescission of Merit Pay Increase

After working at GSU for almost seven years, Plaintiff received his first verbal and written reprimand from Defendant Core on April 23, 2002. In the memorandum, Defendant Core wrote, "I will begin immediately to examine our current environmental safety program. Perhaps, reorganizing or even outsourcing this function is the solution." During his deposition, Plaintiff testified that, during the meeting, Defendant Core expressed his "displeasure with the fact that I had gone to his boss and notified him that he was not fulfilling his accountabilities and that he was very upset, that he was not pleased and that he was going to terminate me and that he was going to contract out my services." (Plaintiff Dep. At 224). (Pl. Ex. 42). Defendant Core testified during this deposition that "outsourcing" might have included removing Plaintiff from his position. (Defendant Core Dep. At 45-46). Thus, it was clear as early as April 2002 that the Defendants had set a process in motion that would result in Plaintiff's termination.

On June 3, 2002, Defendant Brown sent Plaintiff a memorandum entitled "Inappropriate Action Toward Implementation of SPCC Plan." (Defendant Brown Dep., pg. 136, Pl. Ex. 10). Defendant Brown asserted that Plaintiff had failed to properly ensure that all of the departments that were going to be affected by the SPCC plan were apprised of the plan and that they were "on board" with the plan. (Pl. Ex. 10). However, on March 7, 2002, Plaintiff sent a memorandum to GSU's Physical Plant and Warehouse Personnel to notify them of the interim SPCC plan and stated that he would schedule trainings upon approval of the final plan and allocation of funding

to purchase materials and equipment. (Pl. Ex. __). Thus, Plaintiff had already notified employees of the plan.

Defendant Brown testified during his deposition that he wanted Plaintiff to develop an “implementation plan” separate from the SPCC plan. (Defendant Brown Dep. At 87-88, 261). Defendant Brown never offered Plaintiff any suggestions on what the implementation plan should include and did not provide any guidance on how to prepare the plan. (Defendant Brown Dep. At 88). Furthermore, Plaintiff discussed the implementation process with Defendant Brown in February 2002 and had prepared a list of equipment and other materials that were needed in order to move forward on the plan. The \$1590 that Defendant Core allocated for purposes of implementing the SPCC plan was no where near the \$23,136.60 that Plaintiff needed in order to adequately train employees. (Plaintiff Dep., pg. 210-12). Thus, Plaintiff had already provided documentation as to what was needed in order to implement the SPCC plan, but neither Defendants Brown nor Core took the steps necessary for the implementation process. In addition, Defendant Brown admitted that Dr. Song, the person who replaced Plaintiff as Safety Engineering Manager, was never reprimanded for not creating a separate SPCC implementation plan. (Brown Dep. at 260). Therefore, Defendant Brown demanded that Plaintiff create a plan that not even Plaintiff’s successor was required to do. In sum, the basis for the June 3 reprimand was totally baseless and serves as further evidence of the Defendants’ retaliatory motives.

On June 7, Defendant Core sent Plaintiff a reprimand letter in response to Plaintiff’s May 30, 2002 memorandum concerning the presence of mold on GSU’s campus. (Pl. Ex. 11). Defendant Core wrote, “your actions consist of nothing more than citing the problem areas, and in this case, doing so in a vague, inflammatory manner.” (Pl. Ex. 11). Yet, in Defendant Core’s June 7, 2002 response to the EPD’s May 2, 2002 NOV, Defendant Core wrote that “Mr.

Anderson has met with those responsible for appropriate use of hazardous materials to ensure their understanding of proper techniques and procedures,” “instituted an inspection program to ensure compliance,” and that “ Georgia Southern University works diligently to ensure a safe environment for our faculty, staff and students.” (Pl. Ex. 46). Thus, Defendant Core’s description of Plaintiff’s job performance is completely inconsistent with his representation to the EPD. Defendant Core also attached a report that Plaintiff allegedly prepared to the letter he sent to the EPD. (Pl. Ex. 46). Because Plaintiff never prepared the report, he sent the EPD a letter on June 13, 2002 to that effect, thus exposing the fact that Defendant Core made a false statement to the EPD. (Plaintiff Dep., pg. 274-76, Def. Ex. 14).

On June 11, 2002, Defendant Brown sent Plaintiff another reprimand letter complaining about the “distribution, tone, and content” of Plaintiff’s May 30, 2002 memorandum concerning the presence of mold on campus. (Pl. Ex. 12). The reprimand letter stated: “Distributing such materials without any notice to your supervisors and the administration is unacceptable and will not be tolerated.” (Defendant Brown Dep., Pl. Ex. 12). Defendant Brown testified during his deposition that he issued the June 11 reprimand letter because he felt that Plaintiff should have sought permission before distributing the May 30 memorandum to other people on campus. (Defendant Brown Dep., pg. 262-63). Plaintiff testified that he felt that Defendant Brown reprimanded him for the May 30 memorandum because he had broken the “code of silence” by distributing information that could be “embarrassing or potentially liable to the university.” (Plaintiff Dep. At 255). Plaintiff further stated that Defendant Brown told him that communicating with employees and students in a manner like the May 30 memorandum “was unacceptable” and that Defendant Brown considered him to be a traitor for, in Defendant Brown’s words, “blowing the whistle on the university.” (Plaintiff Dep. At 255-56). However,

all of the recipients of the letter were part of GSU's administration whether they were a vice-president, dean or director of a department. Also, Defendant Grube testified that he "absolutely" believed that GSU employees were entitled to information regarding the status of GSU's environmental program. (Defendant Grube Dep. at 23). Thus, the June 11 reprimand was yet another example of the Defendants retaliating against Plaintiff for "blowing the whistle" on GSU's failure to properly address serious environmental problems on campus.

GSU originally submitted a request for Plaintiff to receive a merit pay increase for the 2003 fiscal year. However, on June 18, 2002, Kim Thompson, from GSU's Office of the Comptroller, submitted a request to rescind Plaintiff's merit pay increase. See Ex. F. Defendant Core signed the Personal Action form rescinding Plaintiff's merit pay increase, but never informed Plaintiff of the rescission. (Anderson Dep. at ____). Defendant Brown testified that he supported the rescission because Plaintiff should not have received a pay increase after having been reprimanded. (Defendant Brown dep, pg. 186; (Defendant Brown Dep., pg. 185-86); (Defendant Brown Dep. 191, Pl. Ex. 14); (Defendant Core Dep., Pl. Ex. 48).

From April 23, 2002 until June 11, 2002, Plaintiff received four written reprimands, several verbal reprimands, and a rescission of his merit pay increase. Defendants Brown and Core issued three of the written reprimands in less than two weeks and did not even notify Plaintiff that he would no longer receive a pay increase for the 2003 Fiscal Year. The Defendants' reasons for reprimanding Plaintiff and rescinding his merit pay increase were a pretext to cover up the retaliatory motives behind their actions. Consequently, Defendants have not presented a legitimate, non-retaliatory reason for reprimanding Plaintiff and rescinding his merit pay increase Plaintiff.

2. Termination

“No person shall be deprived of life, liberty, or property except by due process of law.” Ga. Const. Art. 1, §1, ¶1. Georgia’s due process clause gives the same procedural protection in public employment cases as the federal due process clauses of the Fifth and Fourteenth Amendments. *Camden County v. Haddock*, 271 Ga. 664, 665 (1999) (“We interpret the due process clause under our State Constitution as providing the same procedural rights in public employment cases as the federal due process clause.”).

“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1497, 1493 (1985), (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950)). See also *Davis v. Scherer*, 468 U.S. 183, 192, n. 10, 104 S.Ct. 3012, 3018, n. 10, 82 L.Ed.2d 139 (1984). “We have described ‘the root requirement’ of the Due Process Clause as being ‘that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.’” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1497, 1493 (1985), quoting *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1971) (emphasis in original). “This principle requires ‘some kind of a hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.” *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1497, 1493 (1985), quoting *Board of Regents v. Roth*, 408 U.S., at 569-570, 92 S.Ct., at 2705.

“[T]he state may cure a procedural deprivation by providing for a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural

deprivation does a constitutional violation ... arise.” *Atlanta City Sch. Dist. v. Dowling*, 266 Ga. 217, 218 (Ga. 1996), (quoting McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994)).

“Unlike procedural due process claims which challenge the adequacy of the procedures used by the government in deciding how to treat individuals, substantive due process claims allege that certain government conduct would remain unjustified even if it were accompanied by the most stringent of procedural safeguards.” Jones v. City of East Point, Georgia, 795 F.Supp. 408, 416 (N.D. Ga. 1992). “A public employee’s substantive due process rights are violated when his employment is terminated ‘for an improper motive and by means that were pretextual, arbitrary and capricious, and, because unrelated to the proper reasons for layoff, without any rational basis.’” Jones v. City of East Point, Georgia, 795 F.Supp. 408, 416 (N.D. Ga. 1992).

The Family Medical Leave Act (“FMLA”) allows an employee to take up to twelve (12) weeks of leave during any 12-month period “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D). GSU’s Family Leave policy is identical to that of the FMLA. “An employee unable to return to work after using all accumulated sick leave and accrued vacation may be granted sick leave without pay for no longer than one year.” GSU Leave Policy/Ex. J of Compl. “Sick leave may be granted at the University’s discretion with the Supervisor’s approval for any of the following reasons: Employee’s illness or injury.” GSU Leave Policy/Ex. J of Compl. GSU’s policy also provides that “[e]very reasonable effort will be made to return eligible employees to their previous positions or comparable ones.” GSU Leave Policy/Ex. J of Compl. GSU’s policy does not state that an employee who does not return to work when his leave under the FMLA expires will be terminated. GSU Leave Policy/Ex. J of Compl.

The Rules and Regulation of the State Board of Workers' Compensation provide that “[a]n injured employee who receives regular wages during disability shall not be entitled to weekly benefits for the same period.” (Pl. Ex. __).

Defendant Brown terminated Plaintiff on the basis that Plaintiff was absent from work for three consecutive days without notice. (Pl. Ex. 23). However, the record shows that from the date of his injury on June 27, 2002 until the time of his termination, Plaintiff regularly sent Defendant Brown and the Human Resources department letters regarding his leave status, his medical condition, and his ability to return to work. For example, on July 8, 2002 and July 9, 2002, Plaintiff sent Defendant Brown and Susan Lovett letters requesting that he be allowed to exhaust his sick leave with pay and then be placed on sick leave without pay instead of being placed on leave under the FMLA. Defendant Brown never denied Plaintiff's request to be placed on sick leave without pay and Lovett sent Plaintiff a letter stating that, although GSU would place Plaintiff on leave under the FMLA, GSU would also allow him to use his sick leave as he had requested. Plaintiff memorialized this understanding in a letter that he sent to Brown on July 16, 2002 in which he stated that: (1) GSU would not use his accumulated annual leave; (2) GSU would allow him to exhaust his sick leave with pay and (3) after such time, he would begin receiving worker's compensation benefits. (Pl. Ex. 18). Defendant Brown never sent Plaintiff a response which contradicted Plaintiff's understanding of his leave status.

On September 5, 2002, Heidler informed Plaintiff in writing that Plaintiff would exhaust his sick and annual leave on September 18th and that his twelve weeks of FMLA would expire on September 24th. (Plaintiff Dep., pg. 289-90; Defendant Brown Dep., pg. 222-23, Pl. Ex. 19). Heidler instructed Plaintiff to contact Defendant Brown prior to September 24 “**to advise him of your ability and intention to either return to employment on or before September 25, 2002,**

or at least provide to him a prognosis/diagnosis from your physician relative to your present medical status.” (Pl. Ex. 19) (emphasis added). At no time, either in written correspondence or verbal communication, did anyone at GSU ever inform Plaintiff that he would be terminated if he did not return to work by September 25, 2002.

On September 16, 2002, Plaintiff sent Heidler a letter confirming receipt of the September 5 letter and sent a copy to Defendant Brown. (Plaintiff Dep., pg. 292; Heidler Dep., Pl. Ex. 30). Plaintiff also attached a “Return to Work/School Form” which stated that Plaintiff was unable to return to work and that his health would be reevaluated on September 24, 2002. (Plaintiff Dep., pg. 292; Heidler Dep., Pl. Ex. 30). Plaintiff’s September 16 letter establishes that Plaintiff notified Defendant Brown of his inability to return to work prior to September 25 and that he was still receiving medical treatment for his injury. Thus, Plaintiff complied with the request set forth in Heidler’s September 5, 2002 letter.

Nevertheless, Defendant Brown sent Plaintiff a termination letter on September 27, 2002. In the letter, Brown stated that Plaintiff’s leave under the FMLA had expired and that Plaintiff had allegedly failed to notify Defendant Brown of his inability to return to work. Because of all of the correspondence between GSU and Plaintiff while Plaintiff was on leave, Plaintiff concluded that GSU had just made a clerical error. Again, Plaintiff specifically requested that GSU place him on sick leave without pay and Defendant Brown never denied that request. Also, Plaintiff had annual leave available as evidenced by the fact that GSU sent Plaintiff a check for the amount of \$313.47 in November 2002, after his termination, for his unused annual leave. (Pl. Ex. __). In addition, Plaintiff began receiving Worker’s Compensation benefits on August 1, 2002, which meant that GSU could not pay Plaintiff his regular wages - through either sick leave

with pay or annual leave - while Plaintiff received worker's compensation benefits. (Plaintiff Dep. at Pl. Ex. ___).

On September 30, 2002, Plaintiff sent Heidler a letter stating that he still had annual leave available and that his worker's compensation benefits had already started. Plaintiff also attached a copy of the "Return to Work/School" form that Dr. Johnson completed which stated that Plaintiff was still temporarily disabled and that the doctor would reevaluate his condition on October 15, 2002. (Plaintiff Dep., pg. 293; Pl. Ex. 22). Plaintiff also informed GSU that his doctor would allow him to return to work earlier if he were allowed to perform light duty tasks. Although Defendant Brown testified that he would have been amenable to allowing Plaintiff to return to work under a modified work program, GSU never issued such a letter to Plaintiff. (Defendant Brown Dep. at 245; Plaintiff Dep. at 297). During his deposition, Defendant Brown testified that, even though Plaintiff's doctor would reevaluate Plaintiff's condition on October 15, 2002, Defendant Brown would not have allowed Plaintiff to maintain his employment at GSU because he "needed somebody full-time in [the department] and it was going to take a period of time for me to hire somebody." (Defendant Brown Dep. at 236-39). Yet, immediately after Plaintiff's injury, Defendant Brown hired Julie Byrd, from the consulting firm of Brown and Caldwell, to work full-time on a temporary basis to assume Plaintiff's responsibilities. (Defendant Brown Dep., pg. 107-08; Demyanek Dep., pg. 123). Thus, Defendant Brown had already hired someone, albeit on a temporary basis, to fulfill Plaintiff's job duties while Plaintiff recovered from his work-related injury.

Prior to sending Plaintiff the termination letter, Defendant Brown never offered Plaintiff the right to a pre-termination hearing. Such a hearing would have allowed (1) GSU to remedy its faulty application of the leave policies and procedures; (2) Plaintiff and Defendant Brown to

discuss the possibility of Plaintiff returning to work in a light duty capacity; and (3) Plaintiff to address the illegality of the Defendants' retaliatory actions in a less adversarial setting. GSU's grievance process did not cure this procedural defect because Defendant Grube admitted during his deposition that he did not consider any of the reprimand letters that Defendants Brown and Core issued against Plaintiff or the rescission of Plaintiff's merit pay increase. (Defendant Grube Dep. at 9, 27-30). Thus, the record clearly demonstrates that the Defendants intended to fire Plaintiff and the "job abandonment" defense was just a pretext for the Defendants' retaliatory motives. Consequently, Defendants have not presented a legitimate, non-retaliatory reason for terminating Plaintiff.

D. The Defendants retaliated against Plaintiff for engaging in activities protected under Georgia's Whistleblower Act, the Employee Right-to-Know Act, and the Georgia Constitution.

1. The Defendants fired Plaintiff in retaliation for engaging in activities protected under the Georgia Whistleblower Act (O.C.G.A. § 45-1-4).

Defendants contend that Plaintiff's claim under the Whistleblower Act fails because "Plaintiff's communications did not disclose fraud, abuse, or waste when he reported the existence of environmental problems on campus and the need for funding to remedy those problems." (Defs.' Mot. Summary Judgment at 14). Defendants also argue that the Legislature never intended the Whistleblower Act to protect activities that were part of Plaintiff's job responsibilities, such as identifying and reporting incidents of GSU's non-compliance with environmental laws. (Defs.' Mot. Summary Judgment at 15, 18).

Georgia's Whistleblower Statute provides, in pertinent part, as follows:

No public employer shall make, adopt, or enforce any policy or practice preventing a public employee from 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)(1).

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, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity. O.C.G.A. § 45-1-4(d)(2).

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).²

No action against any public employee shall be taken or threatened by any public employer who has authority to take, direct others to take, recommend, or approve any personnel action as a reprisal for making a complaint or disclosing information to the public employer” O.C.G.A. § 45-1-4(d).

While no case law has set out the elements of a *prima facie* case under Georgia’s Whistleblower Act, the Eleventh Circuit Court of Appeals often uses the framework set out for federal civil rights claims in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973). “To establish a *prima facie* case of retaliation, the plaintiff must show that: (1) he engaged in statutorily protected activity; (2) he experienced an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse action.” *Hurlbert v. St. Mary’s Health Care System, Inc.*, 439 F.3d 1286, 1297 (11th Cir.2006) (quoting *McDonnell Douglas*, 411 U.S. at 804).

² Plaintiff filed his original complaint on September 23, 2004. Defendants argue that Plaintiff is not entitled to monetary damages because, when Plaintiff filed his original complaint, Section 45-1-4 only allowed a court to set aside any action which violated the section. (Defs.’ Mot. Summary Judgment, n. 2). However, on July 1, 2004, the General Assembly amended Section 45-1-4 to allow the award of monetary damages. On September 14, 2005, Plaintiff filed a motion to amend his complaint, and reasserted that Defendants violated his rights under O.C.G.A. § 45-1-4(d). Plaintiff sought the same equitable relief and monetary damages that he requested in his original complaint. This Court granted Plaintiff’s motion to amend his complaint on October 4, 2005. (cite court order). Although this Court has instructed the parties not to address the issue of damages until the second stage of this litigation, Plaintiff strongly maintains that the July 1, 2004 amendments to Section 45-1-4 apply to his case and that, therefore, he is entitled to monetary damages.

Georgia's whistleblower statute, first enacted in 1993, has rarely been invoked in the Georgia courts. In *North Georgia Regional Educational Service Agency v. Weaver*, both Supreme Court and lower courts devoted the majority of their analysis to whether the defendant was a public official and, thus, subject to liability under the Act. 272 Ga. 289 (2000) (finding that the defendant was not a "state agency," and thus not a "public employer," under the Act).

Jones v. Board of Regents of the University System of Georgia is one of the few cases in which Georgia courts have examined the Whistleblower Act. 262 Ga. App. 75, 81, 585 S.E.2d 138, 144 (Ga. Ct. App. 2003). In *Jones*, the Georgia Court of Appeals reversed the lower court's grant of summary judgment to the Board of Regents, finding that a genuine issue of material fact existed as to whether the employee was terminated in reprisal for disclosing information of fraud. 262 Ga. App. 75, 81, 585 S.E.2d 138, 144 (Ga. Ct. App. 2003). The court held that circumstantial evidence of a causal link between the protected disclosures and alleged reprisal is enough to create a genuine issue of material fact. 262 Ga. App. 75, 81, 585 S.E.2d 138, 144 (Ga. Ct. App. 2003). In particular, the Court highlighted three pieces of evidence that supported a denial of the defendant's motion for summary judgment: (1) the temporal proximity of the employee's whistle-blowing actions to alleged retaliatory actions; (2) the employee's averment that the employer interfered with duties directly related to the employee's whistleblowing actions; and (3) the employee's expressly averred denial of the reasons given by his employer for termination. *Id.* at 81.

On several occasions, the EPD formally cited GSU for failing to comply with environmental laws, rules and regulations, including in May 2001, October 2001, November 2001, and May 2002. (Defendant Brown Dep., Pl. Ex. 4); (Pl. Ex. 34); (Plaintiff Dep., pg. 130); (Pl. Ex. 46). Most of the violations involved the improper handling of hazardous materials. In

fact, one of the EPD's NOV's designated GSU as a "Significant Violator of the Georgia Hazardous Waste Management Act . . . and the Rules for Hazardous Waste Management."

Plaintiff testified that GSU preferred to pay fines that were much smaller than the amount of money necessary to bring GSU in compliance with environmental laws. (Plaintiff Dep., pg. 129, 141).

Plaintiff's job responsibilities included communicating with GSU administrators and employees regarding GSU's compliance with environmental laws. Plaintiff sent several memoranda to administrators regarding the NOV's that the EPD repeatedly issued against GSU as well as the findings from Plaintiff's environmental inspections on campus. Some of Plaintiff's memoranda revealed that GSU had serious mold and fungi problems, GSU was not in compliance with its own SPCC plan, pesticides were not properly stored or mixed, employees did not have proper equipment to handle hazardous materials and that, in general, GSU would continue to violate environmental laws, as well as, occupational health and safety standards unless GSU adequately staffed and funded the environmental program. In those memoranda, Plaintiff would also offer concrete recommendations on how to solve the particular problems. In addition to sending written communications, Plaintiff also met with employees in order to facilitate open communication amongst the departments and to get feedback on his findings.

In addition, Plaintiff had several conversations with Demyanek regarding the need for GSU to implement a corrective action plan for addressing the violations listed in the EPD's NOV's and the problems with GSU's environmental program. Even Demyanek recognized that the repeated NOV's from the EPD signaled a deeper problem within GSU's environmental program, and that the environmental and safety issues that Plaintiff raised were legitimate issues that GSU's administration needed to address. In fact, Demyanek recommended that GSU hire a

new Director of Environmental Safety who would report directly to the Vice President for Business and Finance, and that a new Environmental Health and Safety staff of at least several professionals be created to build and maintain the environmental program at GSU. GSU totally ignored all of Plaintiff and Demyanek's recommendations, to the detriment of its employees and students. Thus, Plaintiff was left to provide employees with as much training as possible given his limited budget and resources.

As argued in Section C1 above, Defendants' alleged reasons for reprimanding Plaintiff and rescinding his merit pay increase were just a pretext to cover up the retaliatory motives behind their actions. The record shows that GSU flagrantly violated environmental laws and that the Defendants wanted to punish Plaintiff for revealing such fraud and abuse on GSU's part. Thus, there is sufficient evidence to show that the Defendants violated Plaintiff's rights under the Georgia Whistleblower Statute, and the Defendants are not entitled to summary judgment on this issue.

2. The Defendants fired Plaintiff in retaliation for engaging in activities protected under the Employee Right-to-Know Act (O.C.G.A. § 45-22-1, et seq.).

Defendants maintain that this Court should dismiss Plaintiff's claim under the Employee Right-to-Know Act because Plaintiff's verbal and written communications regarding the presence and management of hazardous materials on GSU's campus were not equivalent to invoking his rights under the Act. (Defs.' Mot. Summary Judgment at 20). Under Georgia's Employee Right-to-Know Act employees have the right to: (1) information regarding the presence of hazardous chemicals in their work areas; (2) information about the types of hazardous chemicals to which the employee might be exposed; (3) request information on behalf of the employee's physician regarding hazardous chemicals to which he may have been exposed;

and (4) know their rights under the Act. O.C.G.A. 45-22-8(a). Section 45-22-8(b) requires an employer to provide a training program for all employees who are exposed to hazardous chemicals in the normal course of their employment. Such training must include an explanation of any physical or health hazards associated with the use of the chemical or mixture, and information on how to properly handle such materials. O.C.G.A. 45-22-8(b). The Employee Right-to-Know Act also provides that:

No person shall discharge or cause to be discharged or otherwise discipline or in any manner discriminate against any employee for any of the following reasons: (1) The employee has requested information regarding hazardous chemicals, filed any complaint or action, or has instituted, or caused to be instituted, any proceeding under this chapter; (2) The employee has testified or is about to testify in any proceeding in his own behalf or on behalf of others; or (3) The employee has exercised any other right afforded pursuant to the provisions of this chapter.”
O.C.G.A. § 45-22-10(a).

Section 45-22-10(b) further states that “[n]o pay, position, seniority, or other benefits shall be lost for exercise of any right provided by this chapter.” O.C.G.A. § 45-22-10(b). There are no reported cases in Georgia involving the Employee Right-to-Know Act.

Plaintiff’s job responsibilities included developing, maintaining, and reviewing compliance with Employee Right-to-Know laws concerning the exposure of employees to hazardous materials, training the heads of department in their obligations under the law, and providing them with materials to facilitate employee training. In April 2002, Plaintiff conducted an investigation regarding the use of pesticides, fungicides, and herbicides on the GSU campus and interviewed several employees. (Plaintiff Dep. at 109-16; Pl. Ex. __). During the inspection, employees complained to Plaintiff that they were being asked to work with hazardous substances without proper equipment or adequate training. (Plaintiff Dep., pg. 113-14; Defendant Brown Dep. Pl. Ex. 6; Plaintiff Dep. at 87). The employees asked to be relieved of

such responsibilities. (Plaintiff Dep. at 88). Plaintiff advised the employees of their rights under the Right-to-Know Act and suggested that they contact the Human Resources department to file complaints. (Plaintiff Dep. at 88).

In May, Dr. Conway-Turner, the Dean of the Communication Arts Department, and Dr. Tabor, the Director of GSU's Health Services Department, and Susan Cassedy from the Human Resources department asked Plaintiff to inspect some campus buildings because employees were filing worker's compensation claims related to exposure to mold. During his investigation, Plaintiff spoke with GSU employees who stated that several staff members and students were experiencing respiratory problems. (Plaintiff Dep. At 229-232). Plaintiff also provided information to Professor Yates whose doctor later determined that Yates's respiratory ailments were attributable to the environmental and occupational conditions at GSU. (Plaintiff Dep. At 247-48; Pl. Ex. __).

Plaintiff had Air Quality Sciences, Inc. test mold samples that he collected from campus buildings and the results showed that GSU had a serious problem with mold, an abundant presence of insect fragments, and an infestation of fleas. On May 30, 2002, Plaintiff circulated a memorandum which described the findings from the tests. (Plaintiff Dep., pg. 228); Def. Ex. 1). He also enclosed a copy of the report that Air Quality Services prepared and included information regarding studies that showed a link between exposure to mold and fungus and health problems such as respiratory ailments. (Def. Ex. 1). Plaintiff made specific recommendations, such as repairing defects that lead to water accumulation, remediating building materials that support fungal growth, and effective communication with building occupants. (Def. Ex. 1).

On June 12, 2002, Plaintiff informed Defendant Brown that he had met with administrators and other employees in the Communication Arts Building to discuss the May 30 memorandum and to conduct additional testing for mold and fungi. (Plaintiff Dep., pg. 256-58, Def. Ex. 11). On June 17, 2002, Plaintiff sent a memorandum to Defendant Brown to provide information about additional steps that GSU should take to remove the surface fungi and to address the health and safety issues in the Communication Arts Building. (Plaintiff Dep., pg. 260-61, Def. Ex. 12).

Because Plaintiff investigated complaints regarding exposure to mold, circulated his findings to GSU administrators employees were able to exercise their rights under the Right-to-Know Act. In particular, employees complained to the Human Resources and Workers' Compensation departments, as well as the Department of Labor. Consequently, Plaintiff engaged in activities covered under the Right-to-Know Act. As argued in Section D2 of this memorandum, the Defendants' actions of reprimanding Plaintiff, rescinding his merit pay increase and terminating Plaintiff were all directly related to Plaintiff exercising his responsibilities and rights under the Right-to-Know Act and his assistance to others who invoked those rights. Therefore, there is sufficient evidence in the record for a jury to find that the Defendants violated Plaintiff's rights under the Right-to-Know Act and Defendants are not entitled to summary judgment on this issue.

3. The Defendants fired Plaintiff in retaliation for engaging in activities protected under the free speech clause of the Georgia Constitution.

Defendants contend that Plaintiff's actions and communications related to GSU's non-compliance with environmental laws are not entitled to protection under Georgia's free speech clause because Plaintiff was acting within the scope of his employment when he engaged in such conduct. (Defs.' Mot. Summary Judgment at 23-27). Defendants also suggest that the

environmental health and safety issues that Plaintiff raised were not matters of public concern because Plaintiff directed most of his communications to individuals on campus. (Defs.' Mot. Summary Judgment at 24-26). In addition, Defendants argue that their interest in controlling Plaintiff's speech outweighs Plaintiff's right to inform and educate those most adversely affected by GSU's environmental problems. (Defs.' Mot. Summary Judgment at 24-26).

“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.” Ga. Const. art. 1, §1, ¶ 5. “[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.” *Connick v. Myers*, 461 U.S. 138, 140 (1983) (citing *Pickering v. Bd. of Educ. of the Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968)). “[A] state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.” *Connick v. Myers*, 461 U.S. at 142. When determining whether an employee's speech is entitled to free speech protections, the court should seek “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.” *Connick v. Myers*, 461 U.S. at 142. In order to achieve this balance, a court considers several factors. *See Pickering*, 391 U.S. at 569-74

One factor that a court analyzes is the relationship between the speech and the employment. If the speaker's employment is “only tangentially and insubstantially involved in the subject matter of the public communication” the speech is entitled to protection because the employee is speaking as “a member of the general public.” *Pickering*, 391 U.S. at 574.

A court also analyzes whether the speaker has a special interest in the matter. See Pickering, 391 U.S. at ___. A speaker with a special interest will probably be better informed on the topic than the majority of the public, and his speech should be protected because it is in the public benefit that he “be able to speak out freely...without fear of retaliatory dismissal.” *Pickering*, 391 U.S. at 572. In *Pickering*, the defendant school district fired a teacher for sending a letter to a local newspaper which discussed a proposed tax increase and criticized the school board and district superintendent of schools’ handling of prior proposals to raise funds for the school. 391 U.S. at 564. The US Supreme Court overturned the dismissal and found that a teacher should be able to speak out on how funds are allocated to operate a school because “[t]eachers are, as a class, the members of the community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent.” *Id.* at 572.

Another factor that the court considers is the person to whom the speech is directed. Pickering, 391 U.S. at ___. If the speech is directed to someone with whom the employee has normal business contact so that a close working relationship will be affected negatively, the speech should not be protected because it interferes with the employer’s public service. In *Pickering*, the teacher’s statements were not directed to anyone with whom he worked on a daily basis, so there was no question of maintaining discipline or harmony at the school. *Pickering*, 391 U.S. at 569-70. In *Connick*, the Court decided that “when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.” *Connick*, 461 U.S. at 151-52.

Another factor that the court analyzes is whether the speech involves a matter of public concern. “[S]tatements made by public officials on matters of public concern must be accorded

First Amendment protection despite the fact that the statements are directed at their nominal superiors.” *Pickering*, 391 U.S. at 574 (citing *Garrison v. La.*, 379 U.S. 64 (1964)). In *Connick*, the Court found that “[w]hether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement....” *Connick*, 461 U.S. at 148.

In *Garcetti v. Ceballos*, the U.S. Supreme Court held that “the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities.” 126 S.Ct. 1951, 1961 (2006) (upholding dismissal of deputy district attorney who was terminated for writing a memorandum that recommended the dismissal of a case on the ground of purported governmental misconduct). The Court reasoned that “[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.” 126 S.Ct. 1951, 1960 (2006).

[NEED TO SHOW GREATER PROTECTIONS UNDER STATE CONSTITUTION]

As part of his job duties, Plaintiff disseminated information regarding the presence and handling of hazardous chemicals and other materials on GSU’s campus. Plaintiff was also responsible for labeling, sealing, and transporting hazardous materials and in charge of inspecting campus buildings for environmental problems. Thus, unlike Defendant Brown, Defendant Core and other employees in the Public Safety Division, Plaintiff had regular direct contact with hazardous substances. Although there was virtually no trained staff to assist Plaintiff in the handling of hazardous waste and insufficient funds to properly handle hazardous materials, Defendants Brown and Core continued to pressure Plaintiff to remedy environmental

violations through verbal and written reprimands. On June 27, Plaintiff broke his back on the job when he tried to move a 55-gallon drum of formaldehyde and had to go on leave to recover from his work-related injury. (Plaintiff Dep., pg. 282-83, Def. Ex. 15). Consequently, GSU's failure to adequately fund and staff the environmental program had a personal impact on Plaintiff because he was directly exposed to the hazards related to GSU's poor environmental performance.

Plaintiff also testified that he lived and was born and raised in Statesboro, and that his children also lived in the area. Thus, as a Statesboro resident and parent, Plaintiff's concern regarding GSU's repeated non-compliance with environmental laws affected his private life. Thus, although Plaintiff's communications were disseminated during the course of his business, Plaintiff's concern was also rooted in his role as a private citizen.

Plaintiff's direct supervisor was Defendant Brown, whose supervisor was Defendant Core. Plaintiff not only disseminated information regarding GSU's environmental problems to Defendants Brown and Core, but also to Demyanek (a person Brown considered to be an outsider to the GSU community) and other GSU administrators and employees who had no authority over Plaintiff. Plaintiff's interactions with Demyanek and GSU administrators and employees was limited to situations involving environmental compliance problems on GSU's campus. Thus, Plaintiff did not work with these individuals on a daily basis.

GSU's environmental problems were issues of public concern as illustrated by the two newspaper articles which appeared in the Statesboro Herald on July 25, 2002. Employees also complained to Plaintiff that they were being asked to work with hazardous substances without proper equipment or adequate training, and that they were suffering health problems related to exposure to mold and other hazardous substances. Defendant Grube admitted that GSU has

1800-2000 employees at any one time, and that he “absolutely” believed that GSU employees and the Board of Regents were entitled to information regarding the status of GSU’s environmental program. (Defendant Grube Dep. at 7, 23).

In sum, the record supports a finding that Plaintiff’s communications regarding GSU’s failure to comply with environmental rules, laws and regulations are entitled to free speech protections under the Georgia Constitution. Defendants violated Plaintiff’s right to free speech by issuing unfounded reprimands, rescinding his merit pay increase, and terminating his employment. Thus, this Court should not grant Defendant’s motion for summary judgment with respect to Plaintiff’s free speech claim.

CONCLUSION

Respectfully submitted,

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