

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SOON O. KIM, an individual,

Plaintiff,

Case No. 3:12-cv-00430-MMD-WGC

## ORDER

(Defs.' Motion for Summary Judgment  
– dkt. no. 36)

HUMBOLDT COUNTY HOSPITAL DISTRICT, dba HUMBOLDT GENERAL HOSPITAL; MOE HANZLIK, MARY ORR, MEL HUMMEL, JIM FRENCH, and JIM PARRISH, individuals,

## Defendants.

## I. SUMMARY

On March 25, 2015, the Court denied in part a Motion for Summary Judgment (“Motion”) filed by Defendants Humboldt County Hospital District, dba Humboldt General Hospital (“HGH”), Moe Hanzlik, Mary Orr, Mel Hummel, Jim French, and Jim Parrish. (Dkt. no. 49.) The Court found that a genuine dispute of material fact existed with regard to Plaintiff Soon Kim’s claim that Defendants had violated her First Amendment rights by terminating her employment in retaliation for her speech on matters of public concern. (*Id.* at 22.) The Court sought supplemental briefing on the remaining issue in Defendants’ Motion — whether Defendants are entitled to summary judgment on Plaintiff’s claim that Defendants retaliated against her decision to seek reelection to HGH’s Board of Trustees (“Board”). (*Id.* at 22-23.) The Court has reviewed the parties’ supplemental briefs (dkt. nos. 50, 51), and now addresses this remaining issue. Because

1 this Order addresses Plaintiff's separate theory of First Amendment retaliation for  
2 seeking reelection to the Board, it has no effect on the Court's previous partial denial of  
3 Defendants' Motion (dkt. no. 49).

4 **II. BACKGROUND**

5 A detailed description of the undisputed facts appears in the Court's March 25,  
6 2015, Order. (Dkt. no. 49 at 1-4.) The Court will summarize only those facts that are  
7 relevant to the remaining issue.

8 Plaintiff worked as HGH's general surgeon between November 2003 and August  
9 2012. (Dkt. no. 36 at 3; dkt. no. 36-2, Exh. 2, at 18.) In November 2008, Plaintiff was  
10 elected to serve as a member of HGH's Board for a four-year term, which began in  
11 January 2009. (Dkt. no. 36-2, Exh. 2, at 34.) Plaintiff continued to work as HGH's general  
12 surgeon throughout that period. (See *id.*, Exh. 1 at 2 (Plaintiff's September 2010  
13 Agreement for Physician Employment, which extended Plaintiff's employment with HGH  
14 through December 31, 2013).)

15 In January 2012, while Plaintiff was serving her first term as a Board member, the  
16 Board adopted a new corporate compliance policy ("Policy") to address conflicts of  
17 interest arising from staff members' service on the Board. (Dkt. no. 3 ¶¶ 3, 7; see dkt. no.  
18 36-4, Exh. 7 at 11.) The Policy states, in part: "a Hospital employee shall not engage in  
19 any employment, activity or enterprise, including service on the Hospital Board, which is  
20 inconsistent, incompatible or in conflict with their duties as an employee." (Dkt. no. 36-4,  
21 Exh. 7 at 11.) The Policy further provides that if a conflict of interest arises, the employee  
22 may resign from his or her position "prior to taking and executing the oath of office and  
23 beginning the term of office," or take paid or unpaid leave. (*Id.*) Plaintiff abstained from  
24 voting on this provision during the Board's January 2012 meeting. (Dkt. no. 36 at 6; see  
25 dkt. no. 36-2, Exh. 2, at 20.)

26 Plaintiff filed for reelection to the Board two months later, in March 2012. (Dkt. no.  
27 36-2, Exh. 2, at 27-28.) Several weeks later, on April 24, 2012, the Board unanimously  
28 voted to terminate Plaintiff's contract with HGH. (Dkt. no. 36-4, Exh. 8, at 22.)

1 Defendants Hanzlik, Orr, Hummel, and French participated in the vote; Plaintiff  
2 abstained. (*Id.*) The vote occurred after a presentation by Parrish, HGH’s Administrator,  
3 and a Board discussion on the drawbacks of having a single surgeon at HGH, the need  
4 for additional surgeons at the hospital, and the potential benefits of hiring a surgical  
5 service for HGH. (*Id.*) Parrish had been researching surgical services for approximately  
6 one year before the presentation. (Dkt. no. 36-2, Exh. 2 at 26.) The Board voted to select  
7 a surgical service for HGH in May 2012. (*Id.*)

8 Plaintiff initiated this action on August 15, 2012. (Dkt. no. 1.) She filed a First  
9 Amended Complaint (“FAC”) the next month, alleging violations of her First and  
10 Fourteenth Amendment rights. (Dkt. no. 3.) Although the parties participated in an Early  
11 Neutral Evaluation conference in February 2014, they could not resolve Plaintiff’s First  
12 Amendment claim.<sup>1</sup> (Dkt. no. 33.) Defendants sought summary judgment on the First  
13 Amendment claim in April 2014. (Dkt. no. 36.) The Court denied the Motion in part in  
14 March 2015, and, for the reasons discussed below, the Court will deny the Motion with  
15 regard to the single remaining issue of whether Defendants retaliated against Plaintiff for  
16 seeking reelection to the Board.

17 **III. LEGAL STANDARD**

18 “The purpose of summary judgment is to avoid unnecessary trials when there is  
19 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
20 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when “the movant  
21 shows that there is no genuine dispute as to any material fact and the movant is entitled  
22 to a judgment as a matter of law.” Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*,  
23 477 U.S. 317, 322 (1986). An issue is “genuine” if there is a sufficient evidentiary basis  
24 on which a reasonable fact-finder could find for the nonmoving party and a dispute is  
25 “material” if it could affect the outcome of the suit under the governing law. *Anderson v.*  
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<sup>1</sup>The parties stipulated to dismiss the Fourteenth Amendment claim with  
prejudice. (Dkt. nos. 34, 35.)

1        *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Where reasonable minds could differ on  
2 the material facts at issue, however, summary judgment is not appropriate. See *id.* at  
3 250–51. “The amount of evidence necessary to raise a genuine issue of material fact is  
4 enough ‘to require a jury or judge to resolve the parties’ differing versions of the truth at  
5 trial.” *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (quoting *First Nat'l*  
6 *Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1968)). In evaluating a summary  
7 judgment motion, a court views all facts and draws all inferences in the light most  
8 favorable to the nonmoving party. *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793  
9 F.2d 1100, 1103 (9th Cir. 1986).

10        The moving party bears the burden of showing that there are no genuine issues  
11 of material fact. *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). “In  
12 order to carry its burden of production, the moving party must either produce evidence  
13 negating an essential element of the nonmoving party’s claim or defense or show that  
14 the nonmoving party does not have enough evidence of an essential element to carry its  
15 ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210  
16 F.3d 1099, 1102 (9th Cir. 2000). Once the moving party satisfies Rule 56’s requirements,  
17 the burden shifts to the party resisting the motion to “set forth specific facts showing that  
18 there is a genuine issue for trial.” *Anderson*, 477 U.S. at 256. The nonmoving party “may  
19 not rely on denials in the pleadings but must produce specific evidence, through  
20 affidavits or admissible discovery material, to show that the dispute exists,” *Bhan v. NME*  
21 *Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir. 1991), and “must do more than simply show  
22 that there is some metaphysical doubt as to the material facts.” *Orr v. Bank of Am. NT &*  
23 *SA*, 285 F.3d 764, 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith*  
24 *Radio Corp.*, 475 U.S. 574, 586 (1986)). “The mere existence of a scintilla of evidence in  
25 support of the plaintiff’s position will be insufficient.” *Anderson*, 477 U.S. at 252.

26 **IV. ANALYSIS**

27        In the FAC, Plaintiff asserts two theories to support her claim that Defendants  
28 violated her First Amendment rights by terminating her employment. According to

1 Plaintiff, Defendants retaliated against comments of public concern that Plaintiff had  
2 made in her capacity as a private citizen, and they retaliated against Plaintiff's attempt to  
3 seek reelection to the Board. (See dkt. no. 3 at 1-3.) Defendants sought summary  
4 judgment on both theories (dkt. no. 36 at 8-19), but the Court found that genuine issues  
5 of material fact foreclosed their Motion with regard to the first. (Dkt. no. 49 at 22.)

6 In the Motion, Defendants construed the second theory as challenging the  
7 constitutionality of HGH's Policy, which, as Defendants construe it, required employees  
8 to resign or take leave from their positions in order to serve as a member of the Board.  
9 (See dkt. no. 36 at 9-11.) Plaintiff countered that the Policy unconstitutionally infringed  
10 on her First Amendment interests in seeking public office. (Dkt. no. 42 at 3-8.) Based on  
11 those arguments, the Court sought supplemental briefing on two issues: (1) whether the  
12 Policy's constitutionality is dispositive of Plaintiff's claim that she was retaliated against  
13 for seeking reelection to the Board, and (2) if so, whether the Policy was a constitutional  
14 restriction on Plaintiff's First Amendment rights. (Dkt. no. 49 at 22-23.)

15 **A. The Policy's Constitutionality**

16 After reviewing the parties' supplemental briefs, the Court finds that the Policy's  
17 constitutionality is neither relevant to, nor dispositive of, the remaining issue in  
18 Defendants' Motion. In the FAC, Plaintiff asserts that "Defendants . . . caused to be  
19 promulgated the [Policy] infringing upon Plaintiff's right to run for elected office, pursuant  
20 to which her contract was terminated." (Dkt. no. 3 ¶ 3.) She further claims that after  
21 announcing her intent to seek reelection to the Board, another Board member stated that  
22 she had "challenge[d]" the Policy, which "placed [the] Board in a really uncomfortable  
23 position of . . . having to possibly enforce this [P]olicy if she is elected." (*Id.* ¶ 8.) The  
24 Policy itself forecloses HGH employees from "engag[ing] in any employment, activity or  
25 enterprise, including service on the Hospital Board," if those activities would create  
26 conflicts of interest. (Dkt. no. 36-4, Exh. 7 at 11.)

27 Reading Plaintiff's claim as a challenge to the Policy's constitutionality,  
28 Defendants insist that the Policy was a proper limitation on Plaintiff's First Amendment

1 interests in seeking elected office. (See dkt. no. 36 at 9-11, dkt. no. 50 at 3-7, 10-11.)  
2 Such a limitation, they contend, is constitutional because the Supreme Court “ha[s] held  
3 that the existence of barriers to a candidate’s access to the ballot ‘does not itself compel  
4 close scrutiny.’” *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (quoting *Bullock v.*  
5 *Carter*, 405 U.S. 134, 143 (1972)). But as Defendants remind the Court in their  
6 supplemental brief, Defendants have never asserted — except for hypothetical  
7 arguments — that Plaintiff was terminated because of the Policy. (Dkt. no. 50 at 2.)  
8 Instead, they contend that Plaintiff was terminated because the Board decided to  
9 contract with outside providers of surgical services. (*Id.*) Effectively, Defendants are  
10 arguing that it was constitutionally permissible to use the Policy to limit Plaintiff’s ability to  
11 serve on the Board, even though they never applied the Policy to Plaintiff. The Court  
12 rejects this argument. Defendants cannot logically assert (1) that Plaintiff cannot make  
13 out a First Amendment claim because the Policy properly limited her ability to serve on  
14 the Board, and (2) that no such limitation ever occurred because Plaintiff was not fired  
15 pursuant to the Policy. As the Court understands it, Plaintiff’s First Amendment claim is  
16 based not on the Board’s use of the Policy to thwart her reelection bid, but rather on the  
17 Board’s alleged retaliation against her decision to seek reelection. The Policy’s  
18 constitutionality is not relevant to this determination.

19 Moreover, as Defendants point out (dkt. no. 36 at 12), Plaintiff has failed to  
20 produce any evidence indicating that she was fired pursuant to the Policy. The evidence  
21 instead indicates that the Board voted to terminate Plaintiff’s employment contract at  
22 around the same time that it decided to seek outside surgical services. (See dkt. no.  
23 36-4, Exh. 8 at 22 (minutes from the April 24, 2012, Board meeting, during which the  
24 Board voted to “pursue recruitment of additional surgical coverage” and “formally notify  
25 [Plaintiff] that . . . it is the intent of the board to terminate her contract following the  
26 required 180 days notice”.) The Court has already found that genuine issues of material  
27 fact exist as to whether Plaintiff was terminated because of the Board’s decision to  
28 pursue those outside surgical services, or whether the decision to seek surgical services

1 was pretextual. (Dkt. no. 49 at 22.) Because neither party has offered evidence  
2 suggesting that the Policy was ever applied to Plaintiff, the Court need not determine  
3 whether the Policy constitutionally limited Plaintiff's ability to seek reelection to the  
4 Board.

5 **B. Plaintiff's Retaliation Claim**

6 The remaining issue, then, is whether Defendants are entitled to summary  
7 judgment on Plaintiff's claim that her firing was carried out in retaliation after Plaintiff filed  
8 for reelection to the Board. (See dkt. no. 36 at 11-13; dkt. no. 3 ¶ 11 (alleging that  
9 Plaintiff's candidacy for reelection "was a substantial motivating factor in the decision to  
10 terminate" her employment contract).) Defendants argue that Plaintiff's retaliation claim  
11 is legally deficient because Plaintiff "did not have a constitutionally protected right to  
12 remain employed by HGH." (Dkt. no. 36 at 11.) This argument misconstrues Plaintiff's  
13 allegations. Plaintiff does not allege that her termination alone was a constitutional  
14 deprivation; instead, she avers that her termination was the result of retaliation against  
15 her decision to run for the Board. (See dkt. no. 3 at 2-3.) As the Court held in its previous  
16 Order, genuine issues of material fact exist as to the cause of Plaintiff's termination. (Dkt.  
17 no. 49 at 22.) In light of that holding, the Court finds that Defendants have not  
18 demonstrated that they are entitled to summary judgment on the claim that Plaintiff's  
19 termination violated her First Amendment rights in seeking reelection to the Board.<sup>2</sup>

20 **V. CONCLUSION**

21 The Court notes that the parties made several arguments and cited to several  
22 cases not discussed above. The Court has reviewed these arguments and cases and  
23 determines that they do not warrant discussion as they do not affect the outcome of the  
24 single remaining issue in the Motion.

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27 <sup>2</sup>As noted above, this Order has no effect on the Court's previous Order (dkt. no.  
28 49).

It is ordered that Defendants' Motion for Summary Judgment (dkt. no. 36) is denied with regard to the only remaining issue of whether Plaintiff was terminated because she sought reelection to the Board of Trustees.

DATED THIS 12<sup>th</sup> day of November 2015.



MIRANDA M. DU  
UNITED STATES DISTRICT JUDGE