

[D.E. 196–97, 200–1, 204, 209–13, 229], affidavits in support [D.E.199], and several declarations in support [D.E. 217–24, 230–32].¹ On March 6, 2026, Smithfield replied with a response statement of material facts [D.E. 246], an appendix to the response statement of material facts [D.E. 247], sealed exhibits [D.E. 248], and a response brief [D.E. 251].

On October 27, 2025, Marshburn moved for summary judgment on the defamation claim [D.E. 155]. Marshburn also submitted a statement of material facts [D.E. 157], an appendix to the statement of material facts [D.E. 158], and a memorandum in support [D.E. 156]. Johnson

¹ Johnson’s response to Smithfield’s statement of material facts has several deficiencies. For many of Smithfield’s factual claims, Johnson either makes vague, blanket objections (including questioning the relevance of the facts) or makes arguments without citing the record. See, e.g., [D.E. 195] ¶¶ 2, 4–7, 13, 22, 37, 39. Under Local Civil Rule 56.1, a party opposing a motion for summary judgment must submit “a separate statement that includes a response to each numbered paragraph in the movant’s statement [of material facts].” Local Civ. R. 56.1(a)(2). “Each numbered paragraph in the movant’s statement of material facts will be deemed admitted for purposes of the motion unless it is specifically controverted by a correspondingly numbered paragraph in the opposing statement.” Id. “Each statement by the movant or opponent . . . must be followed by citation to evidence that would be admissible, as required by Federal Rule of Civil Procedure 56(c).” Local Civ. R. 56.1(a)(4). Under Federal Rule of Civil Procedure 56(c), a party disputing a material fact must support its position by “citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials” or by “showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” Fed. R. Civ. P. 56(c)(1)(A)–(B). Merely responding that a party disputes a material fact does not suffice under Rule 56 or Local Civil Rule 56.1. See, e.g., Howard v. Coll. of the Albemarle, 262 F. Supp. 3d 322, 329 n.1 (E.D.N.C. 2017), aff’d, 697 F. App’x 257 (4th Cir. 2017) (per curiam) (unpublished).

When the party opposing the motion fails to follow Local Civil Rule 56.1(a)(2) the movant’s statement of material facts are deemed admitted. See, e.g., Local Civ. R. 56.1(a)(2); Ali v. WorldWide Language Res., LLC, 686 F. Supp. 3d 430, 438 n.1 (E.D.N.C. 2023); Ferrante v. Westin St. John Hotel Co., 559 F. Supp. 3d 492, 498 n.2 (E.D.N.C. 2020), aff’d, No. 20-1322, 2022 WL 396022 (4th Cir. Feb. 9, 2022) (per curiam) (unpublished); Horton v. Methodist Univ., Inc., No. 5:16-CV-945, 2019 WL 320572, at *1 n.1 (E.D.N.C. Jan. 23, 2019) (unpublished), aff’d, 788 F. App’x 209 (4th Cir. 2019) (per curiam) (unpublished); Felton v. Moneysworth Linen Serv., Inc., 295 F. Supp. 3d 595, 597 n.1 (E.D.N.C. 2018); Howard, 262 F. Supp. 3d at 329 n.1. Where Johnson’s response to Smithfield’s statement of material facts does not comply with Local Civil Rule 56.1(a)(2), each numbered paragraph in Smithfield’s Statement of Material Facts is “deemed admitted.” Local Civ. R. 56.1(a)(2).

responded in opposition [D.E. 233] and filed a statement of material facts [D.E. 228], multiple appendices to the statement of material facts [D.E. 200–1, 204, 209–13, 229], affidavits in support [D.E. 199], and several declarations in support [D.E. 230–32]. As explained below, the court grants defendants’ motions for summary judgment.

I.

On June 13, 2005, Johnson joined the Smithfield Police Department as a police officer. See Smithfield’s Stmt. Material Facts (“SSMF”) [D.E. 160] ¶ 28. In 2012, the Smithfield Police Department promoted Johnson to detective. See id. at ¶ 29. In 2016, with the knowledge and permission of his supervisors and Smithfield, Johnson ran for the Johnston County School Board (“Board”). See Compl. [D.E. 1] 18. In 2016, voters elected Johnson to the Board. See id. at 4, 18. In 2020, voters reelected Johnson to the Board. See id. at 23.

On June 24, 2022, Marshburn and his co-host Joseph Preston (“Preston”) taped a Facebook Live event alleging that Johnson misused Town equipment to have an extramarital affair and for his own political gain. See SSMF ¶ 34. On June 24, 2022, at 8:00 p.m., Marshburn, a candidate for Johnston County Sheriff, and Preston streamed their first of 23 Facebook Live webcasts and public posts. See Compl. 5, 40–42, 50–51, 56, 59, 62. In these webcasts, Marshburn and Preston alleged that Johnson had “engaged in misconduct as a police detective, violated the law, and that [Johnson] had engaged in misconduct as a member of the School Board.” Id. at 5.

On June 27, 2022, after learning of Marshburn’s allegations about Johnson, the Smithfield Police Department began an internal affairs investigation of Johnson. See SSMF ¶ 36. Lieutenant Terry West (“Lt. West”) headed the investigation. See id. at ¶ 38. The Town initially believed the allegations were unfounded and that Johnson would be exonerated. See id. Smithfield began the investigation while Johnson was on vacation and issued Johnson a memorandum on June 29, 2022,

notifying him of the investigation and asking him to appear for an interview. See id. at ¶¶ 39–41; [D.E. 2-6]. Smithfield intended to determine if Johnson “used department equipment to investigate people for the furtherance of [his] political career and in the commission of an extra-marital affair in violation of departmental policy.” [D.E. 2-6]. The memorandum advised Johnson that Smithfield General Order Section 201 required officers to “avoid actions that tend to bring the Department into disrepute or tends to impair the operations of the Department or the efficiency of any officer or employee.” Id. It also advised Johnson that Smithfield General Order Section 202 prohibited officers from engaging in “any activity or personal business which would cause them to neglect or be inattentive to their responsibilities.” Id. Moreover, it advised Johnson that Smithfield General Order Section 204 stated that no “department member or employee shall use any supplies or equipment of [Smithfield] for political or partisan purposes.” Id. Furthermore, it advised Johnson that Smithfield Personnel Regulation Section 42 provided that “[Smithfield] employees are not to use [Smithfield] equipment or vehicles for private purposes.” Id.

On June 29, 2022, Lt. West interviewed Johnson at the police station, and Johnson admitted to having sex with Angela McLeod-Barbour (“McLeod-Barbour”) in 2020 or 2021. See SSMF ¶¶ 41, 43–44. Johnson previously told the police department that McLeod-Barbour had “harassed” him, “threatened” him, and been “infatuated” with him. See id. at ¶¶ 44–46. Lt. West recommended that Johnson get a protective order against McLeod-Barbour. See id. at ¶ 47.

After the interview with Lt. West, Johnson sought a protective order under N.C. Gen. Stat. § 50C in the Johnston County District Court and did not mention having a sexual relationship with McLeod-Barbour or mention nonconsensual sexual conduct. Id. at ¶ 49. A paragraph at the top of the form for the protective order stated that a person should not use the form if the plaintiff and defendant were “persons of the opposite sex who are in a dating relationship or have been in a

dating relationship.” Id. Johnson always contended that his relationship with McLeod-Barbour was not consensual. See id. at ¶ 50.

On July 5, 2022, Lt. West interviewed McLeod-Barbour as a part of the internal affairs investigation. See id. at ¶ 51. McLeod-Barbour stated that her relationship with Johnson was consensual and included dining out, taking vacations, and having sex several times between November 2020 and February 2022. See id. at ¶ 52. McLeod-Barbour also stated that Johnson asked her to wear recording devices and record conversations with third parties. See id. at ¶ 53. After this meeting, Lt. West believed that Johnson’s claims about the affair were untrue, and the Town placed Johnson on paid administrative leave. See id. at ¶¶ 54–55.

On July 6, 2022, Johnson requested FMLA leave and provided Smithfield with a physician’s note stating that he should not work until at least July 29, 2022. See id. at ¶ 57; [D.E. 165] 7. Smithfield told Lt. West not to interview Johnson while on leave but asked Lt. West to check in with Johnson daily to determine when he could participate in the internal affairs investigation. See SSMF at ¶¶ 61–62, 66. Initially, Lt. West contacted Johnson briefly each day about the investigation, including asking for his phone records, but never asked him to work. See id. at ¶¶ 67–68, 71. On July 13, 2022, the Town changed Johnson’s leave to unpaid leave under Town policy and approved an extension through August 12, 2022. See id. at ¶¶ 63–64, 70.

On July 27, 2022, Johnson sent Smithfield a letter asserting that the Town’s internal administrative investigation was motivated by sex discrimination. See Compl. 57. Before that letter, Johnson had never complained to the Town about sex discrimination. See SSMF ¶ 74. After receiving the letter, the Town converted Johnson’s leave to paid leave. See id. at ¶ 77. Johnson remained on paid leave for six additional weeks after his request for medical leave ended. See id. at ¶ 78. Johnson never submitted any completed FMLA paperwork to the Town. See id. at ¶ 85.

On August 24, 2022, the Board censured Johnson for recording a closed session Board meeting and attempting to tamper with the assignment of students in the district. See id. at ¶¶ 94–96.

On September 8, 2022, Lt. West completed the internal affairs investigation and recommended terminating Johnson’s employment. See id. at ¶¶ 101–02. On October 5, 2022, Smithfield Police Department Chief Keith Powell (“Powell”) advised Johnson that he was recommending employment termination because Johnson’s conduct on the Board negatively affected Johnson’s “perceived integrity, neutrality, or reputation related to the performance of the employee’s town duties” in violation of the Smithfield handbook. Id. at ¶¶ 108–11. Powell also found that Johnson’s private and professional life was unbecoming of a police officer and brought the department in disrepute. See id. at ¶ 112.

On October 6, 2022, the Board censured Johnson for sending inappropriate texts of a sexual nature about a female employee. See id. at ¶ 114. This censure included Johnson’s signed affidavit admitting to the misconduct. See id.

On October 14, 2022, the Smithfield town manager, Michael Scott (“Scott”), terminated Johnson’s employment. See id. at ¶¶ 128–30. Scott’s stated reasons for termination included: (1) grave concerns about the public trust, (2) dishonesty about the protective order application, and (3) Johnson’s sexual comments about a female employee which made it impossible for Johnson to work on sex-abuse crimes. See id. at ¶ 128. On December 19, 2022, the Town grievance board upheld Johnson’s employment termination. See id. at ¶ 140.

On January 25, 2023, Richard Hoffman (“Hoffman”), an investigator with the Johnston County District Attorney’s office, obtained a search warrant from a North Carolina Superior Court Judge to search Johnson’s office and car and to seize evidence of “[l]arceny of property” and

“[w]illfully failing to discharge duties and [o]bstruction of [j]ustice.” Compl. 75–76; see N.C. Gen. Stat. §§ 14-72, 14-230. Hoffman’s probable cause affidavit in support of the search warrant cited the Board’s outside counsel Tharrington Smith LLP’s findings that Johnson “secretly recorded a closed session” of the Board. [D.E. 2-11] 6. The affidavit also stated that after Smithfield terminated Johnson’s employment, the Smithfield Police Department asked Johnson to return two iPhones that the department issued to him. See id. Johnson had not returned the two iPhones despite department requests, and the affidavit noted that a person could use the iPhones as recording devices even without active cellular service. See id. The affidavit also noted Johnson’s history of making and sharing recordings of other individuals without their knowledge. See id. The affidavit also noted reports from witnesses that Johnson had used an iPhone to discuss Board information and information about Board election campaigns. See id. at 7. The affidavit stated that Hoffman personally and recently viewed an iPhone and other electronic items used for video and photography at Johnson’s office. See id. The iPhone matched the model and description of the device that the Smithfield Police Department provided to Johnson. See id. at 8.

On January 25, 2023, the Clayton Police Department assisted Hoffman when he applied to a North Carolina Superior Court Judge for a search warrant to obtain the iPhones. See id. While Hoffman was applying for the search warrant, Johnson visited his office and left minutes later with a large box. See id.

On March 29, 2023, Hoffman obtained another search warrant from a North Carolina Superior Court Judge to search Johnson’s residence and car and to seize evidence of “[l]arceny of property,” “[w]illfully failing to discharge duties, [f]elony obstruction of justice[,] and [c]onspiracy to [c]ommit extortion.” Id. at 12. Hoffman’s probable cause affidavit in support of the search warrant recounted Johnson’s secret recordings about Board matters. See id. at 16–17. The

affidavit also recounted statements from McLeod-Barbour about Johnson's request for McLeod-Barbour to "help record other persons," so that Johnson could "obtain recordings he could use at a later time for leverage or to give him an advantage." Id. at 18. According to McLeod-Barbour, Johnson "asked her to help him get De[V]an Barbour by recording him or by having sex with him." Id. A search warrant for the records connected with a phone Johnson gave to McLeod-Barbour revealed that the email address used to activate the phone was "rljohnson@smithfieldpd.org." Id. at 19–20. The affidavit also stated that a search of Johnson's police department computer revealed "recordings of several past school superintendents and [B]oard members." Id. at 20.

The affidavit in support of the search warrant also included details of Hoffman's interview of DeVan Barbour ("Barbour") on November 1, 2022. See id. at 21. During that interview, Barbour recounted to Hoffman a meeting between Barbour and Johnson in April 2022, where Johnson told Barbour that he had a damaging recording of an incident between Barbour and McLeod-Barbour. See id. When the April 2022 meeting occurred, Barbour was a candidate for Congress in a contested primary with the primary election scheduled for May 17, 2022. See id. Johnson told Barbour that in exchange for not releasing the damaging recording and thereby damaging Barbour's campaign, Johnson wanted Barbour to secure a "written statement from [McLeod-Barbour] stating that she lied about the affair" with Johnson. Id. at 22. Hoffman obtained text messages from Barbour supporting Barbour's allegations about Johnson. The text messages were between Barbour and Johnson and corroborated the timing of Barbour's April 2022 meeting with Johnson. See id. at 22–24. The affidavit also stated that on May 12, 2022, Barbour received a text message from a phone number with an out-of-state area code again threatening to release the damaging recording of an incident between Barbour and McLeod-Barbour. See id. at

24. Hoffman also obtained and executed a search warrant to determine the registered phone number behind the disguised “Pinger” phone number, and the search revealed Johnson’s T-Mobile phone number as the registered user of the disguised “Pinger” number. See id. at 25.

Hoffman’s affidavit in support of the search warrant stated that Johnson removed items from his office before a North Carolina Superior Court Judge issued the January 25, 2023 search warrant, and immediately after someone told Johnson that the district attorney’s office asked about security footage at the location of Johnson’s office. See id. at 28. Hoffman noted that this conduct “appear[ed] to be in an effort to remove and/or destroy evidence this investigator was attempting to seize with a search warrant.” Id.

On April 3, 2023, a Johnston County grand jury indicted Johnson and charged him with (1) felony extortion on April 25, 2022, in violation of North Carolina General Statute § 14-118.4 by threatening a candidate for political office, DeVan Barbour IV, with the intent to wrongly obtain an advantage (“count one”), (2) willfully failing to discharge duties on May 31, 2022, in violation of North Carolina General Statute § 14-230 by recording a closed session of the Board’s meeting (“count two”), (3) willfully failing to discharge duties on November 10, 2022, in violation of the same statute by failing to comply with public records requests, (4) willfully failing to discharge duties on July 1, 2022, in violation of the same statute by attempting to transfer students to another school as an act of personal retaliation (“count four”), and (5) felony common law obstruction of justice on January 25, 2023, by removing evidence related to Johnson’s criminal activity when he was aware that law enforcement intended to search his belongings (“count five”). See [D.E. 2-12]; Compl. 78–79.

During Johnson’s criminal trial, Johnson admitted to secretly recording a closed Board session on school system property. See [D.E. 158-8] 78–80. He also admitted to having an affair

with McLeod-Barbour, secretly recording a conversation where she detailed inappropriate conversations with Barbour, and retaining 76 secret recordings on his personal iCloud, including recordings of police investigations. See [D.E. 157] ¶¶ 9–11. On January 17, 2025, a Johnston County jury convicted Johnson of counts one, two, four, and five. See [D.E. 158-8] 147–61. The court sentenced Johnson to six to seventeen months’ imprisonment. See id. at 175.

II.

Summary judgment is appropriate when, after reviewing the record as a whole, the court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a); Scott v. Harris, 550 U.S. 372, 378, 380 (2007); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). The party seeking summary judgment initially must demonstrate the absence of a genuine issue of material fact or the absence of evidence to support the nonmoving party’s case. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has met its burden, the nonmoving party may not rest on the allegations or denials in its pleading, see Anderson, 477 U.S. at 248–49, but “must come forward with specific facts showing that there is a genuine issue for trial.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (cleaned up). A trial court reviewing a motion for summary judgment should determine whether a genuine issue of material fact exists for trial. See Anderson, 477 U.S. at 249. In making this determination, the court must view the evidence and the inferences drawn therefrom in the light most favorable to the nonmoving party. See Harris, 550 U.S. at 378.

A genuine issue of material fact exists if there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. See Anderson, 477 U.S. at 249. “The mere existence of a scintilla of evidence in support of the [nonmoving party’s] position [is]

insufficient” Id. at 252; see Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985) (“The nonmoving party, however, cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.”). Only factual disputes that affect the outcome under substantive law properly preclude summary judgment. See Anderson, 477 U.S. at 248.

III.

Smithfield seeks summary judgment on Johnson’s remaining Title VII, ADA, and FMLA retaliation claims. Johnson never filed a brief in opposition to Smithfield’s motion for summary judgment. Rule 56 “require[s] parties to cite all evidence in support of their positions at summary judgment, thus permitting a district court to limit its review to such cited materials.” Carlson v. Bos. Sci. Corp., 856 F.3d 320, 324 (4th Cir. 2017); see Fed. R. Civ. P. 56. “The responsibility to comb through the record in search of facts relevant to summary judgment falls on the parties—not the court.” Carlson, 856 F.3d at 325. Under Rule 56, a court “need consider only the cited materials in a summary judgment brief.” Arvon v. Liberty Mut. Fire Ins. Co., No. 20-1249, 2021 WL 3401258, at *3 (4th Cir. Aug. 4, 2021) (unpublished) (quotations omitted). Thus, Smithfield argues that Johnson “conceded [Smithfield’s] arguments by failing to address them in any way” when he failed to file a brief responding to Smithfield’s dispositive motion. McLean v. Leonard, No. 5:14-CV-718, 2015 WL 5725773, at *6 (E.D.N.C. Aug. 19, 2015) (unpublished), mem. and recommendation adopted, 2015 WL 5725818 (E.D.N.C. Sept. 30, 2015) (unpublished).

Where a party fails to respond to a motion for summary judgment, the court must still engage in a summary-judgment analysis but may consider uncontroverted facts as conclusively established. See, e.g., Custer v. Pan Am. Life Ins. Co., 12 F.3d 410, 416 (4th Cir. 1993); Wetherington v. Keil, No. 2:24-CV-703, 2025 WL 3035172, at *4 (E.D. Va. Oct. 30, 2025)

(unpublished). Thus, the court must determine whether Smithfield has demonstrated that there is no genuine issue of material fact.

A.

Smithfield seeks summary judgment on Johnson's Title VII retaliation claim, arguing that Johnson (1) cannot establish a causal connection between his protected activity and his termination, and (2) cannot establish that his termination was pretext for unlawful retaliation. See [D.E. 165] 4–15. Title VII prohibits an employer from retaliating against an employee for engaging in protected activity under Title VII. See 42 U.S.C. § 2000e–3(a).

Initially, Johnson responds with five statements of alleged direct evidence of retaliation. See [D.E. 225-2] 10. Direct evidence requires that evidence includes “conduct or statements that both (1) reflect directly the alleged [retaliatory] attitude, and (2) bear directly on the contested employment decision.” Laing v. Fed. Exp. Corp., 703 F.3d 713, 717 (4th Cir. 2013) (cleaned up).

Accepting Smithfield's uncontroverted facts as true, only two of those statements concern the Town. See Local Civ. R. 56(a)(2); [D.E. 251] 4–5. They are that things would not “end well” for Johnson based on information that then-Board attorney Jimmy Lawrence provided to the Town on July 6, 2022, and that the Town investigated Johnson after Johnson pointed to Jimmy Lawrence's office on July 6, 2022. See [D.E. 211-3] 2–3; [D.E. 251] 5.

This alleged statement and conduct are stray remarks. See, e.g., Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289, 300 (4th Cir. 2010). No clear nexus exists between these stray remarks and Smithfield's termination of Johnson's employment on October 14, 2022. Thus, Johnson only offers circumstantial evidence, and the court analyzes Johnson's Title VII retaliation claim against Smithfield under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973).

The McDonnell Douglas framework consists of three steps: “(1) the plaintiff must first establish a prima facie case of employment discrimination or retaliation; (2) the burden of production then shifts to the employer to articulate a non-discriminatory or non-retaliatory reason for the adverse action; (3) the burden then shifts back to the plaintiff to prove by a preponderance of the evidence that the stated reason for the adverse employment action is a pretext and that the true reason is discriminatory or retaliatory.” McPherson v. Emp. Source, Inc., 827 F. Supp. 3d 668, 691 (E.D.N.C. 2026); see Guessous v. Fairview Prop. Invs., LLC, 828 F.3d 208, 216 (4th Cir. 2016).

To establish a prima facie case of retaliation, Johnson must prove that (1) he engaged in protected activity under Title VII, (2) Smithfield took some action against him that a reasonable employee would find materially adverse, and (3) Smithfield took the adverse action because of the protected activity. See Massaro v. Fairfax Cnty., 95 F.4th 895, 902–03 (4th Cir. 2024); McIver v. Bridgestone Ams., Inc., 42 F.4th 398, 411 (4th Cir. 2022); Walton v. Harker, 33 F.4th 165, 177 (4th Cir. 2022); Roberts v. Glenn Indus. Grp., Inc., 998 F.3d 111, 122 (4th Cir. 2021); Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643, 653 (4th Cir. 2021); Kitlinski v. U.S. Dep’t of Just., 994 F.3d 224, 232 (4th Cir. 2021); Wilcox v. Lyons, 970 F.3d 452, 460 (4th Cir. 2020); Evans v. Int’l Paper Co., 936 F.3d 183, 195 (4th Cir. 2019); Perkins v. Int’l Paper Co., 936 F.3d 196, 213 (4th Cir. 2019); Savage v. Maryland, 896 F.3d 260, 276 (4th Cir. 2018); Strothers v. City of Laurel, 895 F.3d 317, 327 (4th Cir. 2018); Abilt v. CIA, 848 F.3d 305, 315 n.9 (4th Cir. 2017); Guessous, 828 F.3d at 217; Foster v. Univ. of Md.-E. Shore, 787 F.3d 243, 253 (4th Cir. 2015); Adams v. Anne Arundel Cnty. Pub. Schs., 789 F.3d 422, 429 (4th Cir. 2015), abrogated in part on other grounds by Muldrow v. City of St. Louis, 601 U.S. 346 (2024); DeMasters v. Carilion Clinic, 796 F.3d 409, 416 (4th Cir. 2015); Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 281 (4th Cir. 2015) (en banc);

Balas v. Huntington Ingalls Indus., Inc., 711 F.3d 401, 410 (4th Cir. 2013); see Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 67–70 (2006); Bonds v. Leavitt, 629 F.3d 369, 384 (4th Cir. 2011).

Title VII protects two kinds of activities: opposition and participation. See Netter v. Barnes, 908 F.3d 932, 937–38 (4th Cir. 2018); Laughlin v. Metro. Wash. Airports Auth., 149 F.3d 253, 259 (4th Cir. 1998). “[O]ppositional activity must be directed to ‘an unlawful employment practice’ under Title VII” DeMasters, 796 F.3d at 417; see Netter, 908 F.3d at 937–38; Boyer-Liberto, 786 F.3d at 282; Laughlin, 149 F.3d at 259. The opposition clause applies when an employee “opposes not only employment actions actually unlawful under Title VII but also employment actions [he] reasonably believes to be unlawful [under Title VII].” DeMasters, 796 F.3d at 417 (cleaned up); see Netter, 908 F.3d at 937–38; Boyer-Liberto, 786 F.3d at 282. The participation clause protects employees making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII. See 42 U.S.C. § 2000e-3(a); Laughlin, 149 F.3d at 259.

Under Title VII, material adversity “means [that an employer’s actions] well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” White, 548 U.S. at 68 (quotation omitted). Title VII does not redress “trivial harms” or provide a “general civility code for the American workplace.” Id. (quotation omitted); see Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998). Rather, Title VII’s anti-retaliation provision prohibits an employer’s actions that “are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers.” White, 548 U.S. at 68 (quotation omitted); see Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997). The court analyzes material adversity from the perspective of an objective, reasonable employee and ignores “a plaintiff’s unusual subjective

feelings.” White, 548 U.S. at 68–69; see also Bryant v. Bell Atl. Md., Inc., 288 F.3d 124, 134–35 (4th Cir. 2002). Additionally, the court must account for the “particular circumstances” surrounding the alleged retaliation. White, 548 U.S. at 69.

A plaintiff must prove that “the desire to retaliate was the but-for cause of the challenged employment action.” Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 352 (2013); see Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900 (4th Cir. 2017); Guessous, 828 F.3d at 216–17; Huckelba v. Deering, No. 5:16-CV-247, 2016 WL 6082032, at *3 (E.D.N.C. Oct. 17, 2016) (unpublished). “This but-for causation requirement is stricter than the lessened causation standard for discrimination claims, under which a plaintiff need only show that race, color, religion, sex, or national origin was a motivating factor for an adverse action by an employer.” Netter, 908 F.3d at 938 (quotations omitted); see Foster, 787 F.3d at 249. This but-for causation standard “requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” Nassar, 570 U.S. at 360; see Guessous, 828 F.3d at 217. As such, “[n]aked allegations of a causal connection between plaintiff’s protected activity and the alleged retaliation do not state a plausible Title VII claim.” Huckelba, 2016 WL 6082032, at *3. “To establish a causal relationship between the protected activity and the termination, a plaintiff must show that the decision maker was aware of the protected activity at the time the alleged retaliation occurred.” Roberts, 998 F.3d at 124.

An employee cannot plausibly allege a but-for causal connection between a protected activity and the employer’s adverse action without alleging that the decisionmaker who took the adverse action knew that the employee had engaged in protected activity. See Holland, 487 F.3d at 218; Hooven-Lewis v. Caldera, 249 F.3d 259, 278 (4th Cir. 2001); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 657 (4th Cir. 1998), abrogated on other grounds by

White, 548 U.S. 53; see also Conrad v. CSX Transp., Inc., 824 F.3d 103, 108 (4th Cir. 2016); Gestamp S.C., L.L.C. v. NLRB, 769 F.3d 254, 261–62 (4th Cir. 2014). Courts also consider temporal proximity between an employer’s knowledge of protected activity and an adverse employment action. See, e.g., Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 273–74 (2001) (per curiam); Price v. Thompson, 380 F.3d 209, 213 (4th Cir. 2004), abrogated on other grounds by Nassar, 570 U.S. 338. An adverse action taken shortly after an employer learned of protected activity typically permits a reasonable inference of causation. See Dowe, 145 F.3d at 657. But “[a] lengthy time lapse between the employer becoming aware of the protected activity and the alleged adverse employment action, [however,] . . . negates any inference that a causal connection exists between the two.” Id. (finding three years too long to infer causation); see Breeden, 532 U.S. at 274 (same for 20 months); Massaro, 95 F.4th at 902, 904 (same for 18 months); Roberts, 998 F.3d at 126 (same for three months); Penley v. McDowell Cnty. Bd. of Ed., 876 F.3d 646, 656 (4th Cir. 2017) (same for eight and nine months); Causey v. Balog, 162 F.3d 795, 803 (4th Cir. 1998) (same for 13 months). A plaintiff can rebut this conclusion by plausibly alleging that his employer’s actions taken during the intervening period demonstrate retaliatory animus. See Lettieri v. Equant Inc., 478 F.3d 640, 650 (4th Cir. 2007); King v. Rumsfeld, 328 F.3d 145, 151 n.5 (4th Cir. 2003).

An adverse employment action includes “one that constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011) (quotation omitted); see Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998); Wilson v. City of Chesapeake, 290 F. Supp. 3d 444, 457 (E.D. Va. 2018).

Johnson contends that he engaged in protected “opposition” activity on July 27, 2022, when he wrote a letter to Smithfield (“July Letter”) and opined that he believed that the Town’s internal administrative investigation was based on his sex. See [D.E. 112] 30–31; [D.E. 165] 5; Compl. 87–88. Johnson concedes, however, that he had not made any sex discrimination complaints to the town manager before July 27, 2022. See [D.E. 161-1] 69–70. Moreover, in the July Letter detailing his complaints, Johnson alleged that the Town’s internal administrative investigation was “motivated at least in part by Chief Powell’s personal relationship with [the] school board attorney [Jimmy Lawrence] . . . result[ing] in a vendetta against Mr. Johnson.” [D.E. 165] 6; [D.E. 161-1] 65.

Smithfield responds that Johnson cannot establish but-for causation because Johnson sent the July Letter to Smithfield one month after the Town’s investigation began, meaning Smithfield had no knowledge of any protected opposition activity when the alleged retaliatory action began. [D.E. 165] 6–7.

“Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.” Francis v. Booz, Allen & Hamilton, Inc., 452 F.3d 299, 309 (4th Cir. 2006) (citation omitted). Moreover, before Johnson’s July Letter, the Smithfield Police Department had evidence that Johnson misrepresented his affair with McLeod-Barbour. See [D.E. 160] ¶¶ 51, 54. That misrepresentation provided part of the rationale for Johnson’s employment termination on October 14, 2022. Viewing the record in the light most favorable to Johnson, no inference of retaliation arises due to the absence of evidence to show but-for causation. See, e.g., Francis, 452 F.3d at 309. Thus, Johnson fails to state a prima facie case.

Alternatively, even if Johnson established a prima facie case, Smithfield offered admissible evidence sufficient to meet its burden of production. Specifically, Smithfield asserts that it terminated Johnson's employment on October 14, 2022, for several non-retaliatory reasons. First, Johnson's conduct on the Board negatively affected Johnson's perceived integrity, neutrality, and reputation related to his performance as a police officer. See SSMF ¶ 111. Second, Johnson engaged in "detrimental personal conduct" by sending sexual texts about a female employee. See id. at ¶¶ 114–18. Third, as a police officer, Johnson would have to testify in court, but the Town believed that Johnson lied to a magistrate in requesting a 50C protective order instead of a 50B protective order. See id. at ¶ 128. Johnson's misconduct gave the town manager "grave concerns regarding the public trust." Id. Lastly, Smithfield did not think "it was appropriate to have an officer who had been publicly accused of inappropriate sexual conduct in charge of these types of sensitive [sex-abuse] cases." Id.

Because Smithfield met its burden of production, Johnson must "produce evidence sufficient to create a material issue of fact as to whether [Smithfield's] alleged reason for firing [him] was not its true reason, but rather a pretext for [retaliation]." Parker v. Childs. Nat'l Med. Ctr., Inc., No. 24-1207, 2025 WL 1540954, at *4 (4th Cir. May 30, 2025) (per curiam) (unpublished); see, e.g., Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142–43 (2000); Wannamaker-Amos v. Purem Novi, Inc., 126 F.4th 244, 257 (4th Cir. 2025). Johnson can do so by showing that Smithfield's "explanation is unworthy of credence or by offering other forms of circumstantial evidence sufficiently probative of" retaliation. Mereish v. Walker, 359 F.3d 330, 336 (4th Cir. 2004) (quotation omitted), abrogated in part on other grounds by Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–80 (2009); see Reeves, 530 U.S. at 147. Johnson "must produce sufficient evidence to create a genuine dispute of material fact such that a reasonable factfinder

could conclude the adverse employment action was taken for an impermissible reason, i.e., retaliation.” Sharif v. United Airlines, Inc., 841 F.3d 199, 203 (4th Cir. 2016); see Reeves, 530 U.S. at 143, 148–49.

“An employer is entitled to summary judgment on the issue of pretext if the employee creates only a weak issue of fact as to whether the employer’s reason is untrue and there is abundant and uncontroverted independent evidence that no [retaliation] ha[s] occurred.” Kennedy v. Abbott Lab’ys, Inc., 654 F. Supp. 3d 512, 521 (E.D.N.C. 2023) (cleaned up); Reeves 530 U.S. at 148. Moreover, “a plaintiff’s own assertions of [retaliation] in and of themselves are insufficient to counter substantial evidence of legitimate non[retaliatory] reasons for a discharge.” Dockins v. Benchmark Commc’ns, 176 F.3d 745, 749 (4th Cir. 1999) (citation omitted).

Even viewing the evidence in the light most favorable to Johnson, no genuine issue of material fact exists about pretext. No rational jury could find that Smithfield terminated Johnson’s employment on October 14, 2022, because of his July Letter, as opposed to the misconduct and other concerns reflected in Smithfield’s employment termination decision. Thus, the court grants Smithfield’s motion for summary judgment on Johnson’s Title VII retaliation claim.

B.

Smithfield seeks summary judgment on Johnson’s ADA retaliation claim. See [D.E. 159]. The ADA makes it “unlawful to . . . interfere with any individual . . . on account of his or her having exercised or enjoyed . . . any right granted or protected by this chapter.” 42 U.S.C. § 12203(b); see Reynolds v. Am. Nat’l Red Cross, 701 F.3d 143, 154 (4th Cir. 2012). Seeking a reasonable accommodation under the ADA, including medical leave, constitutes protected activity. See Works v. Colvin, 519 F. App’x 176, 186 (4th Cir. 2013) (per curiam) (unpublished); Rhoads v. F.D.I.C., 257 F.3d 373, 381 (4th Cir. 2001). The McDonnell Douglas framework applies to ADA

retaliation claims. See Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 58 (4th Cir. 1995).

To state a prima facie retaliation case under the ADA, a plaintiff must plausibly allege that “(1) he engaged in protected conduct, (2) he suffered an adverse action, and (3) a causal link exists between the protected conduct and the adverse action.” Reynolds, 701 F.3d at 154; see White, 548 U.S. at 67–70; A Soc’y Without a Name v. Virginia, 655 F.3d 342, 350 (4th Cir. 2011); Ollis v. Hawkins, No. 5:18-CT-3276, 2020 WL 618835, at *2 (E.D.N.C. Feb. 10, 2020) (unpublished).

Johnson did not properly respond to Smithfield’s statement of material facts. Thus, the court accepts Smithfield’s uncontroverted facts as true. See Local Civ. R. 56.1(a)(2); Custer, 12 F.3d at 416; Keil, 2025 WL 3035172 at *4.

As with Johnson’s Title VII claim, Johnson asserts that he engaged in protected activity in sending his July Letter. See Compl. 87–88, 90; [D.E. 112] 30–31; [D.E. 165] 7–8. As with Johnson’s Title VII claim, Smithfield argues that Johnson has failed to show a causal connection between his October 14, 2022 employment termination and his July 27, 2022 protected activity. See [D.E. 165] 6–8. Specifically, Smithfield argues that Johnson cannot establish but-for causation because Johnson’s alleged protected activity on July 27, 2022, occurred after the investigation began. See id.

The court agrees with this argument for the same reasons as Johnson’s Title VII retaliation claim. Thus, Johnson has failed to establish a prima facie case of retaliation under the ADA, and his ADA retaliation claim fails.

Alternatively, even if Johnson established a prima facie case of retaliation, Smithfield provided ample non-retaliatory reasons for Johnson’s employment termination on October 14, 2022. Viewing the evidence in the light most favorable to Johnson, Johnson has failed to establish

that a genuine issue of material fact exists about whether his employment termination was a pretext for retaliating against him for exercising his rights under the ADA. Thus, the court grants Smithfield's motion for summary judgment on Johnson's ADA retaliation claim.

C.

Smithfield seeks summary judgment on Johnson's FMLA interference claim. See [D.E. 159]. The FMLA entitles employees to take "reasonable leave for medical reasons." 29 U.S.C. § 2601(b)(2). The FMLA allows eligible employees to take a total of 12 workweeks of unpaid leave during any 12-month period due to "a serious health condition that makes the employee unable to perform the functions of the position of such employee." Id. § 2612(a)(1)(D). Generally, after taking FMLA leave, employees may return to their pre-leave job or an equivalent position. See id. § 2614(a)(1)(A)–(B); see Fry v. Rand Constr. Corp., 964 F.3d 239, 244 (4th Cir. 2020).

The FMLA makes it unlawful for any employer to "interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under [the FMLA]." 29 U.S.C. § 2615(a)(1) (emphasis added). "To prove FMLA interference, an employee must demonstrate that (1) [he is] entitled to an FMLA benefit; (2) [his] employer interfered with the provision of that benefit; and (3) that interference caused harm." Roberts v. Gestamp W. Va., LLC, 45 F.4th 726, 732 (4th Cir. 2022) (cleaned up); see Adams, 789 F.3d at 427. "The FMLA provides no relief unless the employee has been prejudiced by the violation." Vannoy v. Fed. Rsrv. Bank of Richmond, 827 F.3d 296, 302 (4th Cir. 2016) (cleaned up); see Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 89 (2002). Thus, "an employer may avoid liability if it shows it would have taken the contested adverse employment action regardless of the employee's FMLA leave." Roberts, 45 F.4th at 732–33; see Hannah P. v. Haines, 80 F.4th 236, 244 (4th Cir. 2023).

On July 6, 2022, Johnson gave Smithfield a physician's note stating that Johnson needed medical leave until at least July 29, 2022. See Compl. 55. Johnson had worked over 1,250 hours for Smithfield in the last 12 months and qualified for unpaid leave under the FMLA. See id. at 91–92. After receiving the note, Smithfield granted Johnson FMLA leave. See id. at 55.

Johnson contends that Smithfield's requirement for him to maintain daily contact with Lt. West to cooperate with the investigation violates the FMLA's interference provision. See [D.E. 112] 36–38. Smithfield responds that its contacts with Johnson during his FMLA leave were de minimis. See Antekeier v. Lab'y Corp. of Am., 295 F. Supp. 3d 679, 685 (E.D. Va. 2018); [D.E. 165] 18.

In Antekeier, the plaintiff's employer contacted the employee on FMLA leave multiple times concerning client contact information, a new client account, her return-to-work date, and whether to hold a holiday party. See Antekeier, 295 F. Supp. 3d at 685. In resolving cross motions for summary judgment, the district court held that because the employer requested only basic information and did not require the employee to respond to emails or telephone calls during her FMLA leave, the contacts were de minimis and did not violate the FMLA. See id. at 685–87.

Taking Smithfield's uncontroverted facts as true, Johnson initially had daily contact with Lt. West, which eventually changed to weekly contacts. See [D.E. 165] 18; Local Civ R. 56.1(a)(2). “[T]hese contacts were brief, and were done in an effort to determine when [Johnson] could participate in the ongoing investigation.” [D.E. 165] 18. On July 7, 2022, Lt. West called Johnson and learned about his doctor's note. See [D.E. 150-10] 7. On July 13, 2022, Lt. West visited Johnson's home to notify him that he had been placed on unpaid leave. See id. at 10. Lt. West also advised Johnson that he would need to “contact [Lt. West] daily updating [him] of [Johnson's] status so an interview [could] be scheduled.” Id. at 7. Johnson's daily updates

continued for around a month, limited to requests for information about the investigation. See id. at 11, 14. Johnson also initiated contact to provide updates about his return to work and compliance with the investigation. See id. at 17–18. On July 27, 2022, Smithfield changed Johnson’s leave to paid leave. See SSMF ¶ 77.

Smithfield limited its contacts with Johnson to the investigation, which Johnson has not plausibly alleged that Smithfield started in retaliation for Johnson’s FMLA leave. See Adams, 789 F.3d at 428. Rather, the “record here points to a standard procedure during which due process was accorded to [Johnson] every step of the way.” Id. Moreover, seeking Johnson’s participation in the investigation “did not constitute an impermissible interference with [Johnson’s] FMLA leave.” Id. Viewing the record in the light most favorable to Johnson, Lt. West’s contacts were de minimis. See Antekeier, 295 F. Supp. 3d at 685–87. Thus, the court grants summary judgment to Smithfield on Johnson’s FMLA interference claim. See, e.g., Adams, 789 F.3d at 428–30; Antekeier, 295 F. Supp. 3d at 685–87.

Alternatively, Smithfield argues that Johnson provides no evidence that the alleged interference caused Johnson harm or prejudiced him. See [D.E. 165] 18–20. A plaintiff must identify lost compensation or benefits due to defendant’s FMLA interference. See Burton v. Maximus Fed., No. 3:20-CV-955, 2021 WL 1234588, at *6 (E.D. Va. Apr. 1, 2021) (unpublished); West v. J. O. Stevenson, Inc., 164 F. Supp. 3d 751, 768 (E.D.N.C. 2016); Downs v. Winchester Med. Ctr., 21 F. Supp. 3d 615, 620 (W.D. Va. 2014). There is no harm or prejudice when a plaintiff receives his unpaid leave under the FMLA. See, e.g., Adkins v. CSX Transp., Inc., 70 F.4th 785, 797 (4th Cir. 2023); Boone v. Bd. of Governors of Univ. of N.C., 858 F. App’x 622, 624 (4th Cir. 2021) (per curiam) (unpublished); Downs, 21 F. Supp. 3d at 619.

On July 5, 2022, Johnson was placed on paid leave pending the investigation. See [D.E. 165] 19; SSMF ¶¶ 51, 55. On July 6, 2022, Johnson requested and received FMLA leave. See [D.E. 165] 19; SSMF ¶¶ 60–61. Johnson remained on paid leave (other than between July 7 and July 27, 2022, when he was on unpaid leave) despite never submitting any FMLA paperwork to the Town. See SSMF ¶¶ 82, 85. Moreover, Johnson only requested leave through September 1, 2022, and remained on paid leave from July 27, 2022, until the conclusion of the investigation in October 2022. See id. at ¶¶ 82–83, 100. Furthermore, Johnson never provided evidence that any harm or prejudice occurred due to any of Lt. West’s contacts. See [D.E. 165] 19; Adkins, 70 F.4th at 797. Thus, the court grants Smithfield’s motion for summary judgment on Johnson’s FMLA interference claim.

D.

Smithfield seeks summary judgment on Johnson’s FMLA retaliation claim. See [D.E. 159]. The FMLA protects employees who exercise their rights under the FMLA from retaliation. See 29 U.S.C. § 2615(a)(2) (“It shall be unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter.”). Section 2615(a)(2) encompasses retaliation claims. See Fry, 964 F.3d at 244. “In both contexts, a plaintiff can either (1) produce direct and indirect evidence of retaliatory animus or (2) demonstrate intent by circumstantial evidence, which we evaluate under the framework established for Title VII cases in McDonnell Douglas.” Fry, 964 F.3d at 244 (quotations omitted); see Vannoy, 827 F.3d at 304; Laing, 703 F.3d at 717.

The court accepts Smithfield’s uncontroverted facts as true. See Local Civ. R. 56.1(a)(2); Custer, 12 F.3d at 416; Keil, 2025 WL 3035172 at *4. Smithfield still must show that no genuine issue of material fact exists.

Johnson alleges that he engaged in protected activity under the FMLA when he requested FMLA leave on July 6, 2022, and provided Smithfield with a physician's note stating that he should not work until at least July 29, 2022. See Compl. 92–94; [D.E. 112] 38; [D.E. 165] 7. The Town does not dispute this fact. See SSMF ¶¶ 60–75. Smithfield also does not dispute that Johnson suffered adverse employment action when Smithfield terminated his employment on October 14, 2022. See id. at ¶ 129. As with Johnson's Title VII claim, Smithfield argues that Johnson cannot establish causation because Johnson's alleged protected activity occurred after the investigation began. See [D.E. 165] 6–8.

The court agrees with Smithfield. Alternatively, even viewing the evidence in the light most favorable to Johnson, no rational jury could find that Johnson's October 14, 2022 employment termination was a pretext for retaliation for engaging in protected activity under the FMLA. Thus, Johnson has failed to establish a prima facie case of retaliation under the FMLA, and the court grants summary judgment to Smithfield on Johnson's FMLA retaliation claim.

IV.

Marshburn seeks summary judgment on Johnson's defamation claim. [D.E. 155]. North Carolina law applies to this claim, which means this court must predict how the Supreme Court of North Carolina would rule on any disputed state-law issue. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co., 433 F.3d 365, 369 (4th Cir. 2005). First, the court looks to opinions of the Supreme Court of North Carolina. See Plyler v. Cox, 145 F.4th 501, 511 (4th Cir. 2025); Stahle v. CTS Corp., 817 F.3d 96, 100 (4th Cir. 2016). If there are no governing opinions from that court, this court may consider the opinions of the North Carolina Court of Appeals, treatises, and "the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369 (citation omitted). In predicting how the highest court of a state would address an issue, this court must "follow the

decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently.” Town of Nags Head v. Toloczko, 728 F.3d 391, 398 (4th Cir. 2013) (quotation omitted); see Hicks ex. rel. Feiock v. Feiock, 485 U.S. 624, 630 n.3 (1988). Moreover, in predicting how the highest court of a state would address an issue, this court “should not create or expand a [s]tate’s public policy.” Time Warner Ent.-Advance/Newhouse P’ship v. Carteret-Craven Elec. Membership Corp., 506 F.3d 304, 314 (4th Cir. 2007) (citation omitted); see Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam); Wade v. Danek Med., Inc., 182 F.3d 281, 286 (4th Cir. 1999).

To establish a defamation claim under North Carolina law, a “plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff’s reputation.” Cannon v. Peck, 36 F.4th 547, 559 (4th Cir. 2022) (citation omitted); see Griffin v. Holden, 180 N.C. App. 129, 133, 636 S.E.2d 298, 302 (2006); Desmond v. News & Observer Publ’g Co., 375 N.C. 21, 41–44, 846 S.E.2d 647, 661–62 (2020); Hendrix v. Town of W. Jefferson, 273 N.C. App. 27, 32, 847 S.E.2d 903, 907 (2020); Boyce & Isley, PLLC v. Cooper, 211 N.C. App. 469, 478, 710 S.E.2d 309, 317 (2011); Craven v. Cope, 188 N.C. App. 814, 816, 656 S.E.2d 729, 732 (2008); Smith-Price v. Charter Behav. Health Sys., 164 N.C. App. 349, 356, 595 S.E.2d 778, 783 (2004); see also Syngenta Crop Prot., LLC v. Atticus, LLC, No. 5:19-CV-509, 2022 WL 842938, at *6 (E.D.N.C. Mar. 21, 2022) (unpublished). A statement is defamatory if it, either directly or by implication, ascribes dishonesty, fraud, lack of integrity, or reprehensible conduct to the subject of the statement. See Flake v. Greensboro News Co., 212 N.C. 780, 785–86, 195 S.E. 55, 60 (1938); Donovan v. Fiumara, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994); Beane v. Weiman Co., 5 N.C. App. 276, 277, 168 S.E.2d 236, 237 (1969). A defamatory statement “tend[s] to prejudice

another in his reputation, office, trade, business, or means of livelihood.” Donovan, 114 N.C. App. at 526, 442 S.E.2d at 574 (quotation omitted); see Flake, 212 N.C. at 786, 195 S.E. at 60.

In North Carolina, defamation can be either libel or slander. See, e.g., Craven, 188 N.C. App. at 816, 656 S.E.2d at 732; Tallent v. Blake, 57 N.C. App. 249, 251, 291 S.E.2d 336, 339 (1982); cf. Renwick v. News & Observer Publ’g Co., 310 N.C. 312, 323–24, 312 S.E.2d 405, 412–13 (1984). “Generally, libel is written and slander is oral.” Aycock v. Padgett, 134 N.C. App. 164, 165, 516 S.E.2d 907, 909 (1999) (quotation omitted); see Tallent, 57 N.C. at 251, 291 S.E.2d at 338; cf. Bell v. Simmons, 247 N.C. 488, 494, 101 S.E.2d 383, 388 (1958). Marshburn’s statements were oral. See [D.E. 157] ¶ 4. Thus, Johnson alleges slander.

Whether a statement is defamatory per se is a question of law. See, e.g., Ellis v. N. Star Co., 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990). When a plaintiff alleges that statements are defamatory per se, the statements “must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.” Skinner v. Reynolds, 237 N.C. App. 150, 152–153, 764 S.E.2d 652, 655 (2014) (emphasis removed). In making this determination, the court considers the statement alone without any explanatory circumstances, insinuations, innuendo, or colloquium. See, e.g., Nucor Corp. v. Prudential Equity Grp., LLC, 189 N.C. App. 731, 736, 659 S.E.2d 483, 487 (2008).

A “pure expression of opinion” is not actionable under North Carolina law. Id., 659 S.E.2d at 486; see Desmond, 375 N.C. at 38, 846 S.E.2d at 659; Daniels v. Metro Mag. Holding Co., LLC, 179 N.C. App. 533, 539–40, 634 S.E.2d 586, 590 (2006). Nevertheless, “someone cannot preface an otherwise defamatory statement with ‘in my opinion’ and claim immunity from liability . . .” Nucor Corp., 189 N.C. App. at 736, 659 S.E.2d at 486 (quotation omitted); see Milkovich v. Lorain

Journal Co., 497 U.S. 1, 19–20 (1990); Design Res., Inc. v. Leather Indus. of Am., 789 F.3d 495, 504–05 (4th Cir. 2015); Desmond, 375 N.C. at 38, 846 S.E.2d at 659.

Johnson alleges that the following statements are defamatory:

- On June 24, 2022, Marshburn stated that Johnson had used “government property” to “go out as a person and expose people . . . [using equipment from] the Smithfield Police Department.” Compl. 40–41.
- On June 30, 2022, Marshburn stated: “What Ronald Johnson did, when he got into the school board, did all these recordings, paid people, paid people to do that, used government property to get that done . . .” Id. at 50–51.
- On July 7, 2022, Marshburn stated:
 - “It is a fact that he used government property paid for by the taxpayers for personal gain. He could actually from what I know, things I have talked to people about, he could be arrested for conspiracy of extortion. Do you remember when and I am not trying to beat a dead horse, Joe mentioned the CAAG.” Id. at 53.
 - “Ronald Johnson was involved deeply with this voter guide and that he pushed the agenda and extorted certain people he could because, to better understand it. Ronald Johnson causes problems.” Id.
 - “[Johnson] goes in and creates a problem. He comes in and goes back and forth and acts like he is a savior.” Id.
 - “Ronald Johnson was the top dog when it came to the CAAG, Conservative card and the people on it. He was the one to put the ADT on the card. He bribed, kind of extorted, I need these people on this board. I will get you where you need to be, higher up in the system, I will get you a raise, I will get you this, but I need support. He actually got these people and had them so afraid because if they didn’t do what he said, they felt like their job was in jeopardy, they were out there at polls working because they were afraid Ronald Johnson was going to retaliate against them. That’s how sorry that individual is.” Id.
 - “They were being intimidated at the polls, some were under the direction of Ronald Johnson.” Id.
 - “He has gone to the point where he has taken the mistress, and pretty much sell her out, rent her out so he can have dirt on other people, like DeVan Barbour. Go flirt, see if you can have sex with him, and get pictures and video. No what kind of sick, sadistic son of a bitch is that? That’s him. That come out of his mouth.” Id.

Marshburn’s statements “tend to disgrace and degrade [Johnson] or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided.” Skinner, 237 N.C. App. at 152–153, 764 S.E.2d at 655. Furthermore, Marshburn published his statements of June 24, June

30, and July 7, 2022, to third parties via Facebook Live. See Compl. 40–41, 50–51, 53. Thus, Marshburn’s statements, if false and made with actual malice, constitute slander per se.

Marshburn seeks summary judgment and argues that (1) Marshburn’s statements are true or substantially true as proven by Johnson’s criminal conviction; and (2) Marshburn’s statements addressed a public figure and matters of public concern, and Johnson cannot prove actual malice by clear and convincing evidence. See [D.E. 156] 2–3.

Johnson agrees that he must prove actual malice by clear and convincing evidence. See [D.E. 233] 2–4. Johnson argues that (1) his criminal conviction does not establish the substantial truth of Marshburn’s statements; and (2) the evidence, viewed in the light most favorable to Johnson, provides sufficient circumstantial evidence to prove actual malice by clear and convincing evidence. See id. at 5–22.

A.

“Truth of the matter or substantial truth is a complete defense to a claim for defamation.” A Fisherman’s Best, Inc. v. Recreational Fishing All., 310 F.3d 183, 196 (4th Cir. 2002). Under North Carolina law, defamation “overlooks minor inaccuracies and focuses on substantial truth.” Desmond, 375 N.C. at 67, 846 S.E.2d at 675 (citation omitted); Masson v. New Yorker Mag., Inc., 501 U.S. 496, 516 (1991). “Minor inaccuracies do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified.” Desmond, 375 N.C. at 67, 846 S.E.2d at 675 (cleaned up). “Thus, a plaintiff must establish that ‘the sting,’ the aspect causing injury to the plaintiff’s reputation, is materially false.” Robinson v. Williams, 59 F.4th 113, 118 (4th Cir. 2023) (citation omitted); Desmond, 375 N.C. at 67, 846 S.E.2d at 675. “Stated differently, the issue of falsity relates to the defamatory facts implied by a statement.” Desmond, 375 N.C. at 67, 846 S.E.2d at 675 (quotation and emphasis omitted); Milkovich, 497 U.S. at 20 n.7. Moreover, in

assessing falsity, a court must consider statements within their “full context.” Robinson, 59 F.4th at 118; Desmond, 375 N.C. at 66, 846 S.E.2d at 675.

In a criminal trial, a jury is “empaneled to ascertain the truth, which is the meaning of ‘verdict.’” United States v. Sawyers, 423 F.2d 1335, 1341 (4th Cir. 1970). A jury must consider the credibility of witnesses and find the truth. See Tools USA & Equip. Co. v. Champ Frame Straightening Equip. Inc., 87 F.3d 654, 662 (4th Cir. 1996); Rodoussakis v. Hosey, 8 F.3d 820 (table), 1993 WL 421617, at *1 (4th Cir. 1993) (per curiam) (unpublished); State v. Summers, 105 N.C. App. 420, 423, 413 S.E.2d 299, 301 (1992).

Marshburn asks the court to take judicial notice of the public records in Johnson’s criminal file. See [D.E. 156] 4 n.3. In reviewing a summary judgment motion, a court may take judicial notice of public records. See, e.g., Fed. R. Evid. 201; Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 322 (2007); Philips v. Pitt Cnty. Mem’l Hosp., 572 F.3d 176, 180 (4th Cir. 2009). A criminal file is a public record, including all documents in evidence and trial transcripts. See Benedict v. Hankook Tire Co. Ltd., 323 F. Supp. 3d 747, 755 (E.D. Va. 2018). Thus, the court takes judicial notice of the public records in Johnson’s criminal file to ascertain the truth or substantial truth of Marshburn’s statements.

i.

Johnson alleges that Marshburn falsely stated that Johnson used government property to record conversations for non-governmental purposes and for personal gain. See [D.E. 156] 2; [D.E. 233] 6. Johnson admitted, however, to making 76 secret recordings, some of which were on his government phone, for personal and not official police purposes. See [D.E. 158-8] 39–41. These recordings included one where McLeod-Barbour spoke about an inappropriate phone conversation with congressional candidate Barbour and other recordings of Johnson’s police work.

See [D.E. 158-8] 45; [D.E. 158-2] 46. Moreover, Johnson admitted to recording individuals for personal purposes on law enforcement equipment. See [D.E. 158-8] 45; [D.E. 158-2] 45. Johnson then retained these recordings on a personal iCloud after Smithfield terminated his employment. See [D.E. 158-8] 40. Johnson also admitted to secretly recording a Board meeting and taking a phone from the Smithfield Police Department. See [D.E. 158-8] 78–80. Johnson’s conduct violated Board policy and had no official policy purpose. See [D.E. 158-5] 90–91. The jury instructions in Johnson’s criminal case identified this conduct as violating his official duties. See [D.E. 158-8] 151. The jury convicted Johnson for this violation of his official duties. See id. at 161.

The “sting” of Marshburn’s statements concern Johnson improperly using government property for personal gain. The jury convicted Johnson of this misconduct. Thus, Marshburn’s statements that Johnson used government property to record conversations for non-governmental purposes and for personal gain are substantially true.

ii.

The court considers Marshburn’s statement that Johnson extorted people, could be arrested for extortion, and that Johnston bribed people by promising things in exchange for their support. The jury instructions about extortion in Johnson’s criminal case required the jury to find that Johnson (1) communicated a threat, (2) intended to obtain an advantage, and (3) intended to obtain a statement from McLeod-Barbour recanting the affair. See [D.E. 158-8] 150. Barbour testified that Johnson told him “if I can have Ms. [McLeod-]Barbour write a letter denying [her] affair [with Johnson], [Johnson] could make the recording disappear.” [D.E. 158-2] 48–49. Barbour asserted Johnson had a political goal with this action and told a police officer it was blackmail. See id. at

53, 124. Johnson engaged in this conduct mere weeks before Barbour's congressional primary. See id. at 37.

The jury considered this evidence and convicted Johnson of extortion. See [D.E. 158-8] 160–61. The “sting” of Marshburn's statements concern Johnson using extortion to get preferred outcomes. Thus, Marshburn's statements are substantially true.

iii.

The court considers Marshburn's final two statements together: (1) that Johnson intimidated people into working the polls for him; and (2) that Johnson attempted to have his mistress dig up dirt on people like Barbour by having sex with him and securing incriminating photos and videos. See Compl. 50–51.

McLeod-Barbour worked the polls for Johnson. See [D.E. 158-2] 140. Johnson told McLeod-Barbour that he knew “bad people” and “didn't just get his money from regular jobs.” [D.E. 158-3] 90. Johnson's statement intimidated McLeod-Barbour. See id. McLeod-Barbour also testified that Johnson asked her to have sex with Barbour and record it on video. See id. at 28–29. To do so, Johnson supplied McLeod-Barbour with a burner phone and claimed that he wanted “to have leverage over people.” Id. at 29–30, 42.

The “sting” of both statements is the same—that Johnson used coercive tactics to exploit relationships for political leverage. See [D.E. 156] 10. The “aspect causing injury to the plaintiff's reputation” is the same as the extortion claim. Robinson, 59 F.4th at 118. The jury found Johnson guilty of extortion. See [D.E. 158-8] 160–61.

Marshburn's statements are substantially true, and substantial truth is a complete defense to a defamation claim. See, e.g., Masson, 501 U.S. 516; Fisherman's Best, Inc. 320 F.3d at 196;

Desmond, 375 N.C. at 67, 846 S.E.2d at 675. Thus, the court grants Marshburn's motion for summary judgment.

B.

Alternatively, even viewing the record in the light most favorable to Johnson, no rational jury could find actual malice by clear and convincing evidence. For a public figure to recover damages in a defamation case, the First Amendment requires that the allegedly defamatory statements be made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Foretich v. Cap. Cities/ABC, Inc., 37 F.3d 1541, 1551–52 (4th Cir. 1994); Blue Ridge Bank v. Veribanc, Inc., 866 F.2d 681, 686 (4th Cir. 1989). Public figures must prove that the defendant acted with actual malice because a public figure's access to the media permits a public figure to resort to the self-help remedy of rebuttal and because a public figure's involvement in a matter of public concern invites public comment and attention. See Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974); Blue Ridge Bank, 866 F.2d at 686.

Johnson admits that he is a public figure. See [D.E. 233] 4; [D.E. 156] 13. Thus, the evidence must permit a jury to find by clear and convincing evidence that Marshburn published the statements at issue with actual malice. See, e.g., Cannon, 36 F.4th at 559.

Where the factual dispute concerns actual malice, "the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." Phifer v. City of Rocky Mount, No. 5:08-CV-292, 2010 WL 3834565, at *10 (E.D.N.C. Aug. 12, 2010) (unpublished), mem. and recommendation adopted, 2010 WL 3860411 (E.D.N.C. Sept. 28, 2010) (unpublished). Whether the evidence presented in a defamation case suffices to support

a finding of actual malice is a question of law. See, e.g., Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685 (1989) (citation omitted).

A defendant acts with actual malice when the defendant makes a statement with “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” Sullivan, 376 U.S. at 279–80. Recklessness requires the defendant to have made the statement with a “high degree of awareness of [its] probable falsity.” Garrison v. Louisiana, 379 U.S. 64, 74 (1964); see Connaughton, 491 U.S. at 667. This standard requires “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubt as to the truth of his publication”—a culpable state of mind. Hugger v. Rutherford Inst., 94 F. App'x 162, 166 (4th Cir. 2004) (per curiam) (unpublished); see St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

A court may consider extrinsic and circumstantial evidence in deciding whether a person made allegedly defamatory statements with actual malice. See Connaughton, 491 U.S. at 668; Herbert v. Lando, 441 U.S. 153, 160 (1979); Celle v. Filipino Rep. Enters., Inc., 209 F.3d 163, 183 (2d Cir. 2000). In determining actual malice, a court focuses on the defendant's attitude towards the truth, not the defendant's attitude towards the plaintiff. See Masson, 501 U.S. at 510–11; Konikoff v. Prudential Ins. Co. of Am., 234 F.3d 92, 99 (2d Cir. 2000).

The court must determine if sufficient evidence exists for a rational jury to find by clear and convincing evidence that Marshburn had serious doubt about the truth of his statements. Johnson cites Connaughton and argues that Marshburn engaged in “purposeful avoidance of the truth.” Connaughton, 491 U.S. at 692.

In Connaughton, the Court found actual malice due to the purposeful failure to evaluate evidence provided to news reporters. See id. Unlike in Connaughton, Marshburn (at best) failed to investigate as fully as he could have the validity of some of his statements. See id. at 682–92.

Notably, “[a]ctual malice cannot be proven simply because a source of information might also have provided” the information “to further the source’s self-interest.” Reuber v. Food Chem. News, Inc., 925 F.2d 703, 715 (4th Cir. 1991) (en banc). “Self-interest (and the related desire to place opposing views and persons in an unfavorable light) motivates many news sources; if dealing with such persons were to constitute evidence of actual malice on the part of a reporter, much newsgathering would be severely chilled.” Id. Here, Johnson merely asserts that (1) Marshburn lacked personal knowledge of the validity of the statements, (2) McLeod-Barbour was an unreliable “woman scorned,” and (3) Marshburn did not seek other sources concerning the validity of the statements. See [D.E. 233] 12–22; see also [D.E. 156] 14–17.

Johnson ignores the standard for determining actual malice. To prove actual malice, Marshburn must have made the assertions with a “high degree of awareness” that Johnson did not engage in these actions. Fairfax v. CBS Corp., 2 F.4th 286, 293 (4th Cir. 2021); Garrison 379 U.S. at 74; Reuber, 925 F.2d at 717–18. Here, Marshburn declared that he witnessed Johnson’s computer being used for non-government purposes—namely hosting video recordings and sending “good luck for getting elected” messages. See [D.E. 156] 15; [D.E. 158-9] 131. Marshburn also learned from a witness that Johnson used his work phone to “record[] other people to get an advantage in his political stance.” [D.E. 156] 14; see [D.E. 158-9] 130. This evidence defeats Johnson’s claim that Marshburn had a “high degree of awareness” that Johnson did not use government property for personal purposes. Fairfax, 2 F.4th at 293; Reuber, 925 F.2d at 717–18.

Before publication, Marshburn also listened to recordings of Johnson allegedly extorting Bennett Jones. See [D.E. 156] 16; [D.E. 159-10], 10. Furthermore, Marshburn learned that Johnson used his allegiance with both the Cleveland High School football coach and Bennett Jones for political gain via recordings provided by Bennett Jones. See [D.E. 156] 16;

[D.E. 159-10] 69–71. These recordings led Marshburn to state that Johnson “bribed” people in exchange for support of his candidacy or extorted people to get support. See [D.E. 156] 16; [D.E. 159-10] 71.

Bribe means a “favor given or promised with a view to . . . influence the action of a person in a position of trust.” Bribe, Black’s Law Dictionary (12th ed. 2024). Perhaps, Marshburn used slightly stronger language than the evidence suggests. But this evidence does not suffice to prove actual malice. See, e.g., Reuber, 925 F.2d at 717–18; Ryan v. Brooks, 634 F.2d 726, 733 (4th Cir. 1980). Similarly, Johnson’s assertion that Marshburn lacked personal knowledge of Johnson’s intimidation tactics or affair does not suffice to prove a “high degree of awareness” of its untruth. Fairfax, 2 F.4th at 293; Reuber, 925 F.2d at 717–18.

Viewing the record in the light most favorable to Johnson, the record lacks clear and convincing evidence to dispute Marshburn’s claim that he believed “everyone [including Jimmy Lawrence] was afraid of Ronald Johnson” leading Lawrence to support Johnson’s campaign. [D.E. 156] 16–17; [D.E. 158-11] 1–2. The record also lacks clear and convincing evidence that Marshburn had reason to doubt the assertion that Johnson attempted to have his mistress dig up dirt for extortion.

In opposition, Johnson makes broad circumstantial assertions without directly attacking Marshburn’s statements. See [D.E. 233] 12–22. At most, Johnson merely asserts that Marshburn should have more thoroughly investigated each statement without showing that Marshburn did not believe the statements. Johnson’s assertions do not suffice. See, e.g., Garrison, 379 U.S. at 74; Fairfax, 2 F.4th at 293; Reuber, 925 F.3d at 717–18.

Johnson also argues that “Marshburn’s reliance on statements made by Angie [McLeod-]Barbour, whom Marshburn knew was biased and had animus against Johnson and who

had provided exaggerated and variously inconsistent accounts of their ‘relationship’ is evidence that Marshburn entertained reasonable doubts as to [McLeod-]Barbour’s credibility.” [D.E. 156] 16. But Johnson does not cite to the record or any exhibit for this argument. See Local Civ. R. 56(a)(2); Fed. R. Civ. P. 56; see Carlson, 856 at 325. Thus, the court rejects the argument.

“Judges . . . must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice.” Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984) (quotation omitted). Even viewing the record in the light most favorable to Johnson, no rational jury could find actual malice by clear and convincing evidence. Thus, the court grants Marshburn’s motion for summary judgment.

V.

In sum, the court GRANTS defendant Smithfield’s motion for summary judgment [D.E. 159], and GRANTS defendant Marshburn’s motion for summary judgment [D.E. 155]. The clerk SHALL close this case. Defendants may file a motion for costs under the Federal Rules of Civil Procedure and this court’s local rules.

SO ORDERED. This 21 day of September, 2026.



JAMES C. DEVER III
United States District Judge