

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

<p>PATRICK GARRITY, Plaintiff, vs DANIEL KLIMISCH, individually and in his official capacity, JOSEPH HEALY, individually and in his official capacity and YANKTON COUNTY, SOUTH DAKOTA, Defendants.</p>	<p>CIV 20-4027 COMPLAINT AND REQUEST FOR TRIAL BY JURY</p>
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COMES NOW Plaintiff Patrick Garrity and brings this action for damages and other relief, stating his claims against Defendants Daniel Klimisch, Joseph Healy and Yankton County, South Dakota, as follows:

THE PARTIES, JURISDICTION AND VENUE

1) Plaintiff Patrick Garrity (“Garrity”) asserts claims of interference, discrimination and retaliation arising under the Family and Medical Leave Act at 29 U.S.C. §§ 2601-2654 (“the FMLA”).

2) Garrity further asserts claims of civil rights violations arising under the First Amendment to the United States Constitution and Civil Rights Act of 1871 at 42 U.S.C. § 1983 *et seq.* (“Section 1983”).

3) Garrity is an adult resident of Yankton County, South Dakota and at all times material to this Complaint, Garrity was an employee of Yankton County, South Dakota.

4) Defendant Yankton County is political subdivision of the state of South Dakota. Its decision-making body is an elected, 5-person County Commission, and it is required to

act in compliance with County ordinances, regulations and policies as well as state and federal laws.

5) Yankton County is an employer within the meaning of the FMLA.

6) Defendant Daniel Klimisch (“Klimisch”) is an adult resident of Yankton County, South Dakota.

7) At all times material to this Complaint, Klimisch was serving as an elected member and chairperson of the Yankton County Commission. In that role, Klimisch possessed authority over employment decisions related to Yankton County employees, including Garrity.

8) Defendant Joseph Healy (“Healy”) is an adult resident of Yankton County, South Dakota.

9) At all times material to this Complaint, Healy was serving as an elected member of the Yankton County Commission. In that role, Healy possessed authority over employment decisions related to Yankton County employees, including Garrity.

10) At all times material to this Complaint, Yankton County, Klimisch and Healy were “employers” within the meaning of the FMLA.

11) At all times material to this Complaint, Klimisch and Healy were acting under the color of law.

12) Jurisdiction over this matter is pursuant to 28 U.S.C. § 1331 and § 1343(a)(3) because the Plaintiff’s actions are civil rights claims arising under the Constitution and the law of the United States.

13) Venue over this matter is pursuant to 28 U.S.C. § 1391(b)(1)-(2) because a substantial part of the events or omissions giving rise to the Plaintiff's claims occurred in Yankton County, which is in the Southern Division of the District of South Dakota.

FACTUAL ALLEGATIONS

14) Garrity is a graduate of South Dakota State University. After his college graduation, Garrity worked as a self-employed farmer and consultant until 2009 when he was hired by Yankton County as its Zoning Administrator.

15) Garrity worked as a salaried employee in the position of the Yankton County Zoning Administrator from 2009 until Yankton County terminated him on August 23, 2019.

16) As the Yankton County Zoning Administrator, Garrity supervised one employee and operated the County's Planning Department. His job duties included but were not limited to development and enforcement of the County's planning and zoning ordinances and policies and "assist[ing] the public with application procedures, including building permits, variances and conditional uses."

17) In 2016, Garrity pursued further education in his field in order to be professionally certified by the American Institute of Certified Planners, an elite qualification designed for professionals in the field of urban and governmental planning. AICP certification requires planners to pass examinations on standards of ethics and the standards of planning practice, and certified members pledge to adhere to a detailed code of ethics and rules of professional conduct. AICP certification is valuable to employers because it assures that the planner has been able to demonstrate advanced academic qualifications, relevant work experience, ethical integrity, professional expertise and leadership skills. Garrity voluntarily completed the arduous program in order to better serve Yankton County in its

planning development need, including in the legal aspects of its zoning and planning concerns.

18) Garrity's annual performance evaluations demonstrate that Garrity's performance met or exceeded Yankton County's expectations and was consistently rated as "outstanding" and "very good" throughout his employment.

19) Garrity's final performance evaluation prior to his termination was issued on December 14, 2018. In this performance evaluation by Yankton County Commissioner Don Kettering, Yankton County rated Garrity as "outstanding" or "very good" in every category of job skill performance, including Garrity's knowledge of work, his planning and organization, his quality of work, his quantity of work, his teamwork, his ability to meet deadlines, his problem-solving, his leadership, his communication, his dependability, his judgment, his attitude, ability to manage people and his cost-consciousness.

20) For years before 2019 and to date, Yankton County's zoning and permitting process regarding confined animal feeding operations ("CAFOs") has been a matter of public concern that is frequently addressed at Yankton County Commission meetings.

21) At all times material to the Complaint, applications and permits for CAFOs and related conditional use permits ("CUPs") were administered through the Planning Administrator's office. Per Yankton County's written policies and procedures, Garrity and his assistant were responsible to provide technical assistance to members of the public applying for such permits. As a part of his job duties, Garrity assisted applicants in presenting applications to the County's Planning and Zoning Commission and then to the County Commissioners.

22) In November 2018, Klimisch, Healy and Cheri Loest (“Loest”) each ran for and were elected as Yankton County Commissioner. None of them had served as County Commissioners before, and all three had publicly stated that they generally opposed to CAFOs.

23) Garrity had never had a disciplinary action or corrective action of any sort during his employment until after Klimisch, Healy and Loest were installed as Yankton County Commissioners on January 8, 2019.

24) After the election, Klimisch, Healy and Loest made visits to Garrity at his office in Yankton County’s Planning Department. During these visits, Klimisch, Healy or Loest would sometimes spend hours complaining about CAFO permits that their predecessors on the Yankton County Commissioners had approved. Contrary to Garrity’s written job description, Klimisch and Healy instructed Garrity to be less helpful to members of the public who requested information about how to comply with the County’s planning and zoning regulations, particularly CUPs for CAFO operations.

25) The County’s written policies as found in the Yankton County Personnel Handbook, Section 203, “Public Relations” explicitly required Garrity “to be service oriented and to ...treat the public in a courteous and respectful manner at all times.” Yankton County policy also required Garrity to “make the public feel as comfortable as possible in dealing with County government,” and “to educate the public in using County services and should seek ways to improve service.”

26) Garrity tried to explain to Loest and Healey that because of this policy, he was required to assist the public with questions about Yankton County policies and CUPs and CAFO permits.

27) The newly elected commissioners were either unaware of or chose to ignore the requirements of Section 203 of the County's policy handbook.

28) Because Yankton County does not have a human resources representative, Garrity unsuccessfully tried to direct the new commissioners to the States Attorney for answers to their policy and procedure-related concerns. Healy and Klimisch were angry about Garrity's attempt to have the States Attorney answer their policy and procedure-related questions.

29) On January 7, 2019, Healy came to the Planning Department office for a scheduled appointment and spent 4.5 hours of County time complaining to Garrity about the prior County Commission's actions and his perception about Garrity's role in the permitting process, particularly County-issued CUPs for pork barns. He stated that he had a "mandate" to fire Garrity because he had been elected to the County Commission and intimated that Garrity needed to gain the trust of the new Commissioners by speaking positively of their ideas. Garrity listened politely and tried to diplomatically refer to County policy in response.

30) On January 28, 2019, Healy and Klimisch came to the Planning Department for a meeting with Garrity. They announced that they would be getting directly involved with three specific, pending zoning matters.

31) Specifically, Klimisch and Healy described that the County Commissioners would be meeting privately with certain permit applicants to "gather the facts" before any public hearing. Garrity objected and tried to explain why the proposed changes could be problematic from an ethical standpoint and could trigger litigation against Yankton County.

32) During this meeting, Klimisch and Healy instructed Garrity that he was not to appear on the County Commissioner's agenda to assist zoning applicants or to have public discussions regarding zoning issues.

33) Immediately after this meeting, Garrity reported his ethical concerns about their directives and that he was worried about violation of the Yankton County zoning policy to the States Attorney. The States Attorney did not respond to Garrity's report.

34) Garrity's objections and his reports to the States Attorney were regarding matters of public concern because of the risk of litigation against the County if its permitting policies and procedures are not followed.

35) On February 5, 2019, Garrity attended a County Commission meeting and made a scheduled report in his role as the Zoning Administrator. Garrity made a professional report and abided by Klimisch and Healy's directive while at the podium.

36) Garrity was permitted to leave after his report, but he remained at the meeting because the States Attorney indicated that Garrity might be summoned to attend an executive session set for later in the meeting. Garrity went to the back of the chamber meeting room and sat with other citizens.

37) Several other members of the public were at the meeting to observe how the Commissioners were processing and handling CUPs and CAFO permits because of the public concern about this issue.

38) When the County Commissioner left the meeting room for an executive session, Garrity and other citizens sitting near him discussed how the County Commissioners were processing CUPs and CAFO permits. Garrity expressed that he did not agree with County

Commissioners' interpretation of the County's ordinance regarding CUPs and that he did not approve of how the County Commissioner's agenda had been amended on short notice.

39) Garrity's comments were made in private conversations with other citizens and were made in Garrity's role as a concerned citizen.

40) Garrity's comments were regarding matters of public concern because of the risk of litigation against the County if its permitting policies and open meeting procedures were not followed.

41) The County Commission later emerged from the executive session meeting and adjourned, so Garrity's input had not been required by the Commission after all and he left without any further interaction with the Commissioners.

42) On February 12, 2019, Garrity was present in his professional role at a public meeting of the Yankton County Planning and Zoning Commission ("P&ZC"). The meeting became contentious when members of the P&ZC received contradictory information from the States Attorney about the status of a specific septic system zoning matter. When pressed to describe why he had advised a P&ZC member that the septic system matter had been resolved, the States Attorney claimed that he did not know there was a septic system issue and then admitted that the matter was not resolved because he had a meeting with the individual involved set for the following day to decide how to proceed. When asked to identify "who all will be at the meeting tomorrow?", the States Attorney responded: "It's.. it's...it's the people who are going to be at the meeting to address how to proceed." He refused to identify when the meeting would take place but admitted that the County Commissioners were invited to this meeting. When P&ZC members questioned whether the meeting had been properly noticed, Garrity accurately advised the P&ZC that he was

unaware of the meeting and had not been invited. The States Attorney represented to the P&ZC that proper notice of the meeting with the County Commissioners had been given.

43) No public notice of a special meeting of the County Commission meeting set for February 13, 2019 had been posted.

44) On February 14, 2019, Garrity received a call from a local newspaper, The Yankton Press and Dakotan, requesting information about the February 13, 2019 meeting with the County Commissioners that the States Attorney had alluded to at the February 12, 2019 P&ZC meeting. Garrity declined to make a comment and immediately called the States Attorney to advise the States Attorney of the press inquiry. The States Attorney did not respond.

45) Approximately thirty minutes after Garrity's call to the States Attorney about the press contact, Klimisch and Healy arrived at the Planning Department office and instructed Garrity that he had to meet with them.

46) Klimisch and Healy took Garrity into a conference room and Klimisch produced an already completed and signed "Incident Report" form. He requested that Garrity sign the form.

47) Klimisch's hand-written written disciplinary action stated that Garrity was being disciplined for making "[d]isturbing comments and actions, during county commission executive session. Inappropriate conduct. Class "F" discussions lack of transparency. Quorem [sic] of Planning Commissioners. This was alleged by three citizens via email."

48) The disciplinary action stated that Garrity would be required to "[r]efrain from making inappropriate comments during public meetings. Support the County Commissioner decesions [sic] & directives."

49) The disciplinary document further stated: “Pat [Garrity], Denise [Wubben], Dan [Klimisch] and Joe [Healy] had a discussion about appropriate comments /behaviors & agreed to be open and hold discussion to better the department.” This language was included in the form signed by Dan Klimisch and presented to Garrity even though no such meeting had taken place at that time.

50) Attached to the disciplinary action was a portion of an undated statement from an unidentified person who mentioned that while the Commissioners were in executive session, this person and two other people had allegedly overheard Garrity say that “the new Commissioners were wrong in their actions” and “that the agenda for that nights [sic] meeting had been changed at the last minute.” The anonymous author added: “I know he said a lot more but that was all I could hear.”

51) Klimisch and Healy spent approximately 3 hours expressing their displeasure with Garrity’s comments and his assistance to members of the public. They instructed Garrity that they were altering his job duties so that he was to have limited contact with the P&ZC members, that he was to have limited comments in his role with the PZ&C, and that he was not to appear on the Yankton County Commission’s agenda on zoning issues. Klimisch and Healy repeated that they had a mandate to fire Garrity.

52) During the meeting, Klimisch described the disciplinary action as a process to help Garrity improve his “behavior and comments.”

53) When required to sign the disciplinary action, Garrity added this written response: “I feel trapped between two extremely strong groups. My position is difficult to please or maintain relationships but I will focus on improving trust with the commissioners.”

54) During the meeting, the Assistant Zoning Director Denise Wubben [“Wubben”] entered the room and when she discovered that Garrity was being disciplined, she became distressed and advised the Commissioners that they were not following Yankton County’s disciplinary policy. Klimisch became visibly angry, stated that Wubben had “crossed the line” and stormed out of the meeting.

55) Healy remained in the meeting with Garrity and Wubben in order to reiterate that Garrity and Wubben that their job duties were going to be more limited in that they were to spend less time helping members of the public who came to the Planning Department to ask for help with CAFO permit applications.

56) Garrity remained professional and restrained throughout this meeting, however he was extremely distraught by the repeated threats about his termination if he spoke or acted in a way that the Commissioners did not approve. Garrity immediately began to have serious physical symptoms of stress.

57) Garrity became worried that he could have a stroke because of his high blood pressure and stress level. Garrity went to his doctor, who determined that Garrity was unable to return to work because of depression and needed a leave until March 15, 2019. On February 19, Garrity’s medical leave request was completed on the FMLA leave request form from the Yankton County Auditor.

58) On February 19, the topic of Healy’s directive about “less time” for CAFO applicants was addressed at the County Commissioner meeting. Wubben was present as a private citizen and sought to explain her perspective. Klimisch threatened to call the sheriff if she persisted in speaking publicly about the matter. Garrity became even more anxious when

he heard about Klimisch's threat to call law enforcement because of Wubben's participation at a County Commission meeting.

59) On February 21, Garrity's physician recommended a medical leave because of a serious medical condition and completed the physician part of the County's FMLA form as an "extended absence" until March 15, 2019. Garrity returned the completed form to the Auditor's office on February 21.

60) Though the FMLA requires timely written notice from the employer to the employee or acceptance or rejection of the FMLA request, Garrity never received this notice.

61) When Garrity requested the medical leave, he had accrued 300 hours of sick leave and 200 hours of vacation leave that expired on August 12, 2019. Garrity's leave request was never formally approved, but he was able to use his accrued sick and vacation leave before his unpaid FMLA leave.

62) On February 22, 2019, Wubben submitted her FMLA leave request.

63) Wubben's FMLA request was denied because the Yankton County claimed that it had terminated her employment on February 22.

64) Yankton County and Klimisch have subsequently acknowledged that Wubben's termination was illegal because Yankton County had voted to terminate Wubben while in executive session on February 22. Yankton County subsequently acted to terminate Wubben on February 25, 2019 "effective the afternoon of February 22, 2019."

65) Wubben's abrupt termination further elevated Garrity's distress and depression.

66) In an undated letter, the States Attorney advised Garrity that there was an allegation that Garrity had removed information from his computer after his leave had been granted. The States Attorney further advised that at its March 5, 2019 meeting, the Yankton

County Commissioners were going to determine whether Garrity was considered a “key employee” under its Family and Medical Leave policy.

67) On March 5, 2019, Garrity submitted the completed a FMLA leave form that his physician had completed which states that Garrity required medical leave until April 2, 2019.

68) At its March 5, 2019 Commissioner’s meeting, Yankton County discussed whether Garrity was a “key employee” within the meaning of the FMLA.

69) On March 5, Yankton County, through the States Attorney, sent Garrity a letter in which it represented:

“The Yankton County Commission determined at their last meeting that Yankton County’s Zoning Administrator meets the definition of a key employee as defined by the Yankton County Handbook and the Family and Medical Leave Act. The restoration of Mr. Garrity who is on indefinite leave to this position when and/or if he is able to return will cause substantial and grievous economic injury to the operations of Yankton County. Not only is the cost to temporarily operate the office until a permanent solution can be determined significant, but also the citizens of Yankton County rely on the office for information, guidance, permits, conditional uses and variances. In addition, significant revenue is generated by this position for Yankton County.”

70) Yankton County knew or should have known that its determination that Garrity’s absence would cause substantial and grievous economic injury to the operations of the employer is not compliant with the FMLA, which requires that the employer must determine that the restoration of the employee to his job would cause substantial grievous economic injury to the employer, not whether the absence of the employee will cause substantial grievous economic injury.

71) Yankton County did not hire a replacement for Garrity until November 15, 2019.

72) Yankton County knew or should have known that its representation about its determination as stated in the March 5 letter was materially inaccurate because the Yankton County Commissioner's minutes state, as verified by a video of the meeting that is posted on YouTube, that:

A motion was made by Kettering and seconded by Loest to hire a Yankton County Zoning Administrator as the current administrator who is on indefinite leave and *either* his position is a "key employee" as defined by the Yankton County Employee Manual and The Family and Medical Leave Act *or* he would have an equivalent position available if he returns with the same benefits and work conditions and further move that the position be immediately posted and remain posted until filled. Roll call vote was taken with Kettering, Loest, Swensen, Healy and Klimisch voting Aye; Motion carried 5-0.

(Yankton County 3/5/19 Minutes, emphasis added.)

(71) On April 2, 2019, Garrity was continuing treatment for his depression and submitted a FMLA leave form that his physician had completed that indicated that Garrity would require a medical leave until April 23, 2019.

(73) On April 16, 2019, Garrity attended an executive session meeting with Yankton County Commission at the States Attorney's request in order to discuss an option of returning to work in the role of the open position of Zoning Code Enforcer. Garrity was qualified for this position and Garrity's physician confirmed that Garrity could perform the job as it was less stressful.

(74) As Garrity entered the executive session, Swenson walked out of the meeting and refused to participate in the meeting. During the meeting, Garrity advised the remaining Commissioners that he would be willing and able to return to work in the Zoning Enforcer position but Healy abruptly announced: "That job no longer exists." The executive session

then concluded. Garrity left the meeting in a professional manner, however the stress of the meeting exacerbated his depression and stress symptoms.

(75) The position of Zoning Enforcer remained open and unfilled throughout 2019 though it was not posted after this meeting.

(76) On April 23, 2019, Garrity was continuing treatment for his depression and submitted a FMLA leave form that his physician had completed that indicated that Garrity would require medical leave until May 15, 2019.

(77) On May 15, 2019 Garrity was continuing treatment for his depression and submitted the FMLA leave form that his physician had completed that indicated that Garrity would require leave until June 3, 2019.

(78) On June 3, 2019, Garrity was continuing treatment for his depression and submitted the FMLA leave form that his physician had completed that indicated that Garrity would require leave until July 15, 2019.

(79) On July 15, 2019, Garrity was continuing treatment for his depression and submitted the FMLA leave form that his physician had completed that indicated that Garrity would require leave until September 1, 2019.

(80) On July 30, 2019, Yankton County informed Garrity that he would exhaust his remaining paid sick leave and vacation on August 12, and that he would be considered for 12-weeks of unpaid FMLA leave at that time.

(81) Garrity advised Yankton County that he had already submitted the requested FMLA leave form on July 15.

(82) On August 5, 2019, the States Attorney called Garrity and represented that Yankton County would pay Garrity the sum of \$20,000.00 if Garrity would resign. Garrity asked for some time to evaluate his options. The States Attorney responded that it was fine.

(83) On August 12, 2019, Garrity's FMLA leave began.

(84) On August 21, 2019, Garrity contacted the States Attorney through an attorney to discuss his employment options. The States Attorney stated that Yankton County was willing to pay Garrity \$10,000.00 as a severance payment, but Garrity had to action the offer by August 22, 2019.

(85) The States Attorney represented that the Yankton County Commission had not wanted to frighten or fire Garrity and that it respected his performance.

(85) On August 22, 2019, Garrity's attorney made arrangements with the States Attorney to discuss Garrity's employment options with the Yankton County Commissioners.

(86) At August 23, 2019 at 8:00 a.m., Garrity's attorney, Healy and the States Attorney met by phone to discuss that Garrity wanted to return to work for the County and wanted to do so in less stressful position if possible, namely the open Code Enforcer position. The States Attorney asked what would happen if Garrity was not hired and Garrity's lawyer stated that he only wanted to talk about what would happen if Garrity was hired. Healy asked if Garrity would expect the same salary. The attorney responded that Garrity would likely request the same salary as he did not believe there were grounds to terminate him, but added that Garrity would consider a different position at a different pay rate.

(87) Later that morning, Yankton County delivered a termination letter by email to Garrity's attorney that stated: "On Friday, August 23, 2019, the Yankton County

Commission terminated Patrick Garrity's employment with Yankton County effective immediately."

(88) Garrity was not terminated for cause.

(89) On October 8, 2019, for an unknown reason, the States Attorney sent Garrity a letter that stated only: "Patrick Garrity is no longer employed with Yankton County."

CAUSES OF ACTION

COUNT I: FMLA ENTITLEMENT

29 U.S.C. § 2615(a)(1)

90) Plaintiff re-alleges the facts asserted in paragraphs 1-89 of this Complaint.

91) On February 21, 2019 and on August 12, 2019, Garrity was eligible and qualified for leave under the FMLA.

92) To comply with Yankton County policy, Garrity had to exhaust his sick and vacation leave first. As a result of his sick and vacation leave, Garrity was not eligible to start his unpaid FMLA leave until August 12, 2019.

93) Garrity was eligible and qualified for FMLA leave.

94) Garrity had a serious health condition as defined by the FMLA.

95) Garrity gave the Defendants timely notice of his need to be absent from work because of his serious health condition.

96) Garrity acted in compliance with the FMLA and Yankton County's leave policy when he requested leave because of his serious health conditions.

97) Garrity took leave and was absent from work because of his serious health condition.

98) The Defendants considered Garrity to be absent from work because of FMLA leave.

99) The Defendants inaccurately represented to Garrity that they had determined that he was a “key employee” in order to deny his right to restoration to his job or an equivalent position when he returned from FMLA leave.

100) The Defendants considered Garrity’s use of FMLA leave as a negative factor in his performance.

101) Garrity had advised the Defendants that he had received treatment and was able to return to work and perform the functions of his job at the expiration of the FMLA leave period.

102) The Defendants terminated Garrity within hours after Garrity had indicated that he was able to return to the same or an equivalent position at the end of his FMLA leave.

103) The Defendants did not provide Garrity with any reason for his termination.

104) The Defendants’ decision to terminate his employment interfered with Garrity’s ability to take the FMLA leave he was entitled to.

105) The Defendants’ decision to terminate his employment interfered with Garrity’s ability to be reinstated to the same or an equivalent position at the end of his FMLA leave.

106) Garrity was not able to take all of his FMLA leave or to be reinstated because of the Defendants’ interference with his FMLA leave.

107) Garrity has acted to minimize his damages through re-employment.

108) As a direct and proximate require of the Defendants’ violations of the FMLA, Garrity has suffered vocational harm, lost wages, lost benefits, medical expenses and other consequential financial losses.

109) As a result of the Defendants' unlawful interference with his FMLA rights, Garrity is entitled to all damages and relief available at law and in equity, including liquidated damages.

COUNT II: FMLA RETALIATION
29 U.S.C. § 2615(a)(2)

110) Plaintiff re-alleges the facts asserted in paragraphs 1-109 of this Complaint.

111) On February 21, 2019 and on August 12, 2019, Garrity was eligible and qualified for leave under the FMLA.

112) To comply with Yankton County policy, Garrity had to exhaust his sick and vacation leave first. As a result of his sick and vacation leave, Garrity was not eligible to start his unpaid FMLA leave until August 12, 2019.

113) Garrity had a serious health condition as defined by the FMLA.

114) Garrity gave the Defendants timely notice of his need to be absent from work because of his serious health condition.

115) Garrity acted in compliance with the FMLA and Yankton County's leave policy when he requested leave because of his serious health conditions.

116) Garrity took leave and was absent from work because of his serious health condition.

117) The Defendants considered Garrity to be absent from work because of FMLA leave.

118) The Defendants inaccurately represented to Garrity that they had determined that he was a "key employee" in order to deny his right to restoration to his job or an equivalent position when he returned from FMLA leave.

119) The Defendants terminated Garrity within hours after Garrity had indicated that he was able to return to the same or an equivalent position at the end of his FMLA leave.

120) Garrity's absence from work was a motivating factor in the Defendants' decision to terminate his employment.

121) Garrity's intent to exercise his right to reinstatement to the same or an equivalent position at the end of his FMLA leave was a motivating factor in the Defendants' decision to terminate his employment.

122) Garrity has acted to minimize his damages through re-employment.

123) As a direct and proximate require of the Defendants' violations of the FMLA, Garrity has suffered vocational harm, lost wages, lost benefits, medical expenses and other consequential financial losses.

124) The Defendants' employment actions against Garrity were willful and not in good faith, entitling Garrity to all damages and relief available at law and in equity, including liquidated damages.

COUNT III FIRST AMENDMENT RETALIATION
42 U.S.C. § 1983

125) Plaintiff re-alleges the facts asserted in paragraphs 1-124 of this Complaint.

126) At all times relevant and to date and as documented by articles, cartoons and Commissioners' social media posts, the Yankton County electorate had a high degree of interest in how the Yankton County Commission was processing of CAFO applications and related permits and other alleged failures to follow policy, state law or to efficiently administer County business.

127) Garrity suffered an adverse employment action when he was subject to disciplinary action, his job duties were arbitrarily reduced in terms of his ability to speech to members of County government and citizen, and he was threatened with termination if future speech or actions did not meet the approve of Klimisch or Healy.

128) At all times material to this Complaint, Garrity spoke as a citizen on matters of public concern, including but not limited to:

- a. Garrity's comments to Klimisch, Healy and the States Attorney in December 2018 and January 2019 to the effect that the States Attorney was the appropriate person to address Klimisch's and Healy's complaints about prior Yankton County Commission actions, and Garrity's comments to Klimisch, Healy and the States Attorney about his concerns that Klimisch's and Healy's directives not to help members of the public were contrary to Garrity's written job duties and County policy;
- b. Garrity's comments to private citizens in the back of a meeting room at a February 5, 2019 County Commission where he stated that he did not agree with how the new Commissioners were interpreting zoning permit ordinances and that he did not agree with how they amended the agenda shortly before a meeting;
- c. Garrity's accurate response to a question posed to him at a public P&ZC meeting on February 12, 2019 about whether he knew about or had been invited to an unposted County Commissioner meeting with a private individual about a permitting issue.

129) Garrity's speech to Klimisch, Healy and the States Attorney about use of his office time to explore their policy and procedure questions was protected activity that did not in any way infringe upon the efficiency of the public services that the County performs.

130) Garrity's speech at the February 5, 2019 meeting was protected activity that did not in any way infringe upon the efficiency of the public services that the County performs.

131) Garrity's speech at the February 12, 2019 meeting was protected activity that did not in any way infringe upon the efficiency of the public services that the County performs.

132) For each incident identified in this Complaint, Garrity's speech was delivered in a professional manner that was not designed to incite arguments or disdain.

133) For each incident identified in this Complaint, Garrity's speech did not impair his ability to perform his duties.

134) Klimisch and Healy unilaterally reduced Garrity's job duties, including his ability to communicate with members of the public who came to his office, and threatened Garrity's economic security, reputation and health by threatening to terminate him if he did not publicly express support for the County Commissioners' "decesions [sic]."

135) The Defendants failed to follow Yankton County's written disciplinary policy and ignored written job duties and performance requirements in issuing the disciplinary action to Garrity and in reducing his job duties.

136) Klimisch and Healy adopted a policy that stifled and punished speech about matters concerning County departments and policy, and the remaining Defendants ratified their policy.

128) Yankton County, Klimisch and Healy acted individually, separately or jointly, in response to and in retaliation for Garrity's exercise of his constitutional and lawful right to speak about matters of public concern.

129) Yankton County, Klimisch and Healy acted individually, separately or jointly, to chill Garrity's exercise of his constitutional and lawful right to speak about matters of public concern.

130) Yankton County, Klimisch and Healy were acting under the color of state law at all times relative to the above-described retaliatory actions taken against Garrity.

131) Garrity's speech as identified Complaint was a motivating factor in the Defendants' actions to discipline him, reduce his job duties and to threaten him with termination.

132) Yankton County, Klimisch and Healy engaged in the above-described retaliatory actions in violation of Garrity's constitutionally protected right to free speech and 42 U.S.C 1983.

133) Yankton County, Klimisch and Healy acted to cause Garrity humiliation, stress, anxiety, harm to reputation, vocational harm, wage and benefit loss, emotional and mental injuries, physical injuries, pain and suffering and financial distress.

134) Yankton County, Klimisch and Healy were willfully engaged in retaliatory actions directed Garrity because of his exercise of free speech.

135) As a result of the unlawful conduct of Yankton County, Klimisch and Healy, Garrity is entitled to the all damages and relief available at law and in equity, including punitive damages.

RELIEF REQUESTED

WHEREFORE, Plaintiff Patrick Garrity requests the following judgment against the Defendants as follows:

- 1) That the practices complained of in this Complaint be determined to violate the rights secured to the Plaintiff under the FMLA;
- 2) That the practices complained of in this Complaint be determined to violate the rights secured to the Plaintiff under the 42 USC § 1983 and the United States Constitution;
- 3) For all relief available to the Plaintiff under his claims, including compensatory damages consisting of losses for future employment income and benefits, mental anguish, physical harm, distress, embarrassment, loss of reputation and other damages, including liquidated and punitive damages where allowed;
- 4) For attorney fees and reasonable costs and disbursements as approved by the Court;
- 5) For such other just and further relief as the Court deems fair and equitable under the circumstances: and
- 6) For a trial by jury upon the issues in this matter.

Dated this 11th day of February, 2020.

JOHNSON POCHOP & BARTLING



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Attorney for Plaintiff Patrick Garrity

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS
 PATRITCK GARRITY

(b) County of Residence of First Listed Plaintiff YANKTON
 (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
 Stephanie E. Pochop Johnson Pochop & Bartling
 405 Main Street | PO Box 149 Gregory, SD 57533 (605) 269-0665

DEFENDANTS
 DANIEL KLIMISCH, individually and in his official capacity, JOSEPH HEALY, individually and in his official capacity and YANKTON COUNTY, SOUTH DAKOTA

County of Residence of First Listed Defendant YANKTON
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	<input checked="" type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input checked="" type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Acts <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	FEDERAL TAX SUITS
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input checked="" type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609
			IMMIGRATION	
			<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding 2 Removed from State Court 3 Remanded from Appellate Court 4 Reinstated or Reopened 5 Transferred from Another District (specify) 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
29 U.S.C. 2601; 42 U.S.C. Sec. 1983.

Brief description of cause:
FMLA discrimination and retaliation for exercising federal rights. (1st Amendment)

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 75,000.00+ CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 02/11/2020
 SIGNATURE OF ATTORNEY OF RECORD
Stephanie E. Pochop

FOR OFFICE USE ONLY RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.