UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No. 10-CIV-61813-GRAHAM/O'SULLIVAN

MICHAEL P. BRANNON, Psy.D., individually, MICHAEL P. BRANNON, Psy.D., P.A., a Florida professional services corporation, and INSTITUTE FOR BEHAVIORAL SCIENCES AND THE LAW, LLC, a Florida limited liability company,

Plaintiff,

vs.

HOWARD FINKELSTEIN, in his official capacity as Broward County Public Defender,

Defendant.
_____/

ORDER

THIS MATTER having come before the Court for non-jury trial, and the Court having duly considered the evidence, arguments presented and being duly advised, finds for the reasons that follow that judgment is entered in favor of Defendant Howard Finkelstein, and against Plaintiffs, on all claims.

I. NATURE OF PROCEEDINGS

Plaintiffs Michael P. Brannon ("Brannon"), Michael Brannon, Psy.D., P.A., and the Institute for Behavioral Sciences and the Law,

LLC (collectively, the "plaintiffs") brought this cause of action against Defendant Howard Finkelstein ("Finkelstein"), in his individual capacity and official capacity as Broward County Public Defender, under 42 U.S.C. § 1983, for violation of the First Amendment to the United States Constitution. [D.E. 6]. Plaintiffs allege that Finkelstein reduced and ultimately terminated Brannon's consulting work as a forensic psychologist for the Broward County Public Defender's office in retaliation for Brannon's constitutionally protected testimony about a Florida state court judge.

Finkelstein previously filed a motion for summary judgment on the basis of qualified immunity. This Court granted summary judgment in favor of Finkelstein on all claims. Plaintiffs thereafter appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit Court of Appeals affirmed this Court's judgment granting qualified immunity to Finkelstein in his individual capacity, but vacated judgment and remanded Plaintiffs' claim against Finkelstein in his official capacity. Brannon v. Finkelstein, 754.F.3d 1269, 1278-1279 (11th Cir. June 18, 2014). The Court of Appeals reasoned that a reasonable fact-finder could find that Finkelstein was subjectively motivated to reduce and did reduce Brannon's work because of his protected speech. Id. On the other hand, a reasonable fact-finder could find that Finkelstein would have reduced Brannon's work in any

event because of the Office's budget reductions. Id. As with Brannon's reduced referrals, the Court of Appeals reasoned that a reasonable fact-finder could come to different conclusions as to why Brannon was removed from the Public Defender's referral wheel. Id. With two permissible views of this evidence, The Court of Appeals held that summary judgment was improperly granted to the defendant. Id.

Although Plaintiffs initially joined legal and equitable claims by seeking monetary damages against Finkelstein in his individual capacity, the posture of the case changed when the 11th Circuit affirmed summary judgment granting Finkelstein qualified immunity individually. As such, the only remaining claim seeks declaratory and injunctive relief against Finkelstein in his official capacity.

This matter proceeded on the remaining claim as a non-jury trial from June 17, 2015 through June 24, 2015. The Court now issues its findings of facts and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

II. FINDINGS OF FACT

Michael Brannon is a forensic psychologist and the sole owner of Michael P. Brannon, Psy.D., P.A., which owns fifty percent of the Institute for Behavioral Sciences and the Law, LLC (collectively, the "plaintiffs"). The other fifty percent is owned by Brannon's

business partner, Dr. Sherrie Bourg Carter. Until July 2009, plaintiffs performed forensic psychology work for the office of the Broward County Public Defender, Howard Finkelstein. Finkelstein has been the Public Defender for the 17th Judicial Circuit in and for Broward County Florida since 2005.

a. Funding of Broward County Public Defender's Office

On July 1, 2004, prior to Finkelstein taking office, Article V to the Florida Constitution became law. Article V drastically changed the way the Broward County Public Defender's Office received its budget. As a result of a statewide focus on judicial branch costs, the enactment of Article V, the subsequent economic downturn and resulting cuts to agency budgets, the Broward County Public Defender began reviewing its expenditures and researching options for managing and controlling expenses.

Julianne M. Holt, the Public Defender of Hillsborough County 13th Judicial Circuit and current President of the Florida Public Defender's Association, Inc., explained that there are twenty judicial circuits in Florida. Funding from the State Legislature is shared among the twenty judicial circuits. If one judicial Circuit's spending outpaces its allotted amount, it was agreed amongst the circuits that one circuit may seek funding from another circuit. In essence, although each judicial circuit is allotted a certain amount,

one circuit's overspending causes another circuit's shortfall. In 2004, around the same time the amendment to Article V was enacted, the Florida Public Defender's Association advised the public defenders' office in all judicial circuits to cut back on spending because of the uncertainty of the amount of due process funding that would actually be available. Due process costs are any case related costs including but not limited to the cost of depositions, copying records, translators, court reporters and expert witnesses.

Assistant Chief Robert Wills ("Wills") is the Broward County Public Defender's office representative with the Florida Public Defender's Association and the state legislator in Tallahassee, Florida. Wills has been Broward County's representative since before Finkelstein took office. Wills attends most of the association's meetings and all of the conference calls regarding the state budget. Wills also keeps abreast of what is going on with the association and with the state legislators in Tallahassee. Wills consults with Finkelstein and the two executive assistants regarding the budget.

Like Ms. Holt, Wills also explained that in 2007 the state legislator allocated an amount certain for due process costs to be distributed among the 20 judicial circuits. Each judicial circuit was allocated a certain amount from the overall pool of funding. Due process invoices were paid as they came due in each circuit until

their allotted funding was depleted. If costs continued beyond the allocated amount, each circuit could use funds allocated to another circuit to pay their due process costs. In essence due process funding was first come, first serve. Because Broward County historically operated at a tremendous deficit in due process costs, and the overall due process funding was at a deficit, it was highly likely that the Broward County Public Defender's allotted due process funding would be insufficient to meet its obligations.

In 2006, Wills recommended that the Broward County Public Defender's office eliminate or drastically reduce the money spent for requesting criminal downward departures at sentencing hearings. Reluctant to eliminate the use of expert witnesses for downward departures, Finkelstein adopted new procedures requiring supervisor approval of contracts and capping the amount of money paid to expert witnesses.

In 2007, the state legislator called a special session to address the state's deficit caused by the recession. In addition to facing potential new budgetary cuts with the special session, there was a proposed million dollar penalty to be assessed against the Broward County Public Defender's office because of its financial shortfall the previous year. Although, in 2007, the proposed penalty was not assessed, the Broward County Public Defender lost

approximately $743,000 in funding during the special session and $800,000 the following year.

The fiscal year 2007-2008 budget cuts began immediately after the October special session. These budget cuts, occurring in the middle of the 2007-2008 fiscal year, affected the future release of funding received by the Broward County Public Defender's office. Because funding for due process costs, which included payment to expert witnesses, was already at a deficit, the amount for salaries and operations was reduced for the remainder of the fiscal year to account for the additional $743,000 in cuts.

Also in 2007, as a result of working and meeting with the Florida Public Defender's Association, it was determined that Broward County was one of the few public defender's offices statewide that used expert testimony as a routine practice for all downward departures. Expert testimony is not a legal requirement for a downward departure and the Broward County Public Defender's office began reviewing the fiscal impact of its policy. In the fall of 2007, the Broward County Public Defender's office began changing its policy relating to the way experts were used in downward departures. Specifically, the Public Defender began training their attorneys on how to achieve a downward departure without having to hire a psychologist.

Fearful that his office would be subject to additional budget

cuts or financial sanctions for its continuous over spending, in February 2009, Howard Finkelstein wrote a letter to State Senator Crist explaining the changes which had been made due to the financial cutbacks. Mr. Finkelstein pleaded with Senator Crist not to make further cuts to the budget.

b. Reduction in Referrals to Dr. Brannon

In March 2006, the first of many procedures was implemented by the Broward County Public Defender's office aimed at managing and controlling expenses. Specifically, procedures were implemented requiring supervisor approval for retention of any expert by an Assistant Public Defender ("APD").

During the period of July 2005 until November 2007, Brannon was referred more than half of the Public Defender's forensic psychology evaluations. Brannon's work with the Public Defender's office preceded Finkelstein's administration and he achieved a level of preeminence by developing a reputation for responsiveness, good quality work, timeliness and credibility with both the criminal bench and the State Attorney's Office. In fiscal year July 2005- June 2006, Brannon was paid $524,706.25 by the Broward County Public Defender's office. Brannon was paid three times as much as the next highest paid expert for the Public Defender's office in 2005-2006. In fiscal year July 2006- June 2007, Brannon was paid $608,758.00, twice as much

as the next highest paid expert for the Public Defender's office.

On December 6, 2007, Brannon testified before the Judicial Qualifications Committee (JQC) that was convened to investigate charges that a Florida state court judge, the Hon. Cheryl Aleman, had mistreated a criminal defendant appearing before her. Brannon testified in Judge Aleman's favor stating that she was never hostile to him during his appearances before her as a witness. The parties do not dispute that Brannon's testimony is protected speech under the First Amendment.

The Aleman JQC hearing was closely monitored by the Broward County Public Defender's office. Two APDs were involved in the proceedings. Catherine A. Keuthan, Mr. Finkelstein's executive chief APD, as well as other APDs attended the hearing and observed Brannon's testimony. Although Finkelstein was aware of the allegations involving APDs he did not personally attend the JQC hearing and did not know the substance of Brannon's testimony at the JQC.

Shortly after the JQC hearing, Finkelstein encountered Michael Gottlieb, Esq., a former APD and the only private-practice lawyer to testify against Judge Aleman. After congratulating Mr. Gottlieb for his courage in testifying against a sitting judge, Finkelstein expressed "dissatisfaction" with Brannon's JQC testimony on behalf of Judge Aleman. Finkelstein was surprised Brannon testified for

Judge Aleman because of previous unflattering statements he made concerning Judge Aleman. Although Mr. Gottlieb has no specific recollection of what Finkelstein said about Brannon's JQC testimony, he "felt" that based on Finkelstein's statements there was going to be some repercussion. Mr. Gottlieb immediately contacted Brannon to relay the substance of the conversation with Finkelstein and his concern.

Approximately two weeks after the JQC hearing, on December 21, 2007, Finkelstein sent correspondence to Broward County's criminal division administrative judge, each of the criminal judges in Broward County, and the state attorney, advising them of the change in policy of the Public Defender as it related to the retention of experts for downward departure motions. [See Defendant's Exhibit 3]. In his letter, Finkelstein referenced the recent budget cuts, the shared common due process "pool" with all state public defender offices, and the need to limit expert contracts for downward departure motions. Id.

In fiscal year July 2007- June 2008, the year of his JQC testimony, Brannon was paid $390,212.00 by the Public Defenders' office. Again, even with the overall reduction in spending for due process costs and mental health experts, Brannon was paid three times as much as the next highest paid expert.

The Broward County Public Defender's budgetary issues were communicated to Brannon. Assistant Chief Robert Wills met with Brannon and informed him that, because of the budgetary changes, his fee for downward departure evaluations would be cut from $750 to $400. Brannon continued to receive referrals and conducted downward departure evaluations at the $400 reduced rate.

As of March 1, 2009, the Public Defender's office began utilizing an internal wheel rotation for the retention of mental health experts. The wheel rotation for the retention of mental health experts was implemented in an effort to control and reduce expenses as well as to diversify the pool of experts available for retention by APDs on behalf of their clients. Brannon was included on the internal wheel rotation for the retention of experts through July 28, 2009. However, Brannon and his partner, Dr. Sherrie Bourg Carter, vehemently objected to the use of a wheel rotation system.

In fiscal year July 2008 through June 2009, the year in which the rotation system was implemented, Brannon was paid $170,613.00 by the Broward County Public Defender's office. Again, Brannon was paid twice as much as any other expert hired by the Public Defender.

The decision to reduce the hiring of expert witnesses for downward departure motions was not motivated by Brannon's JQC testimony. As well, the decision to create and implement the Public

Defender's wheel for the retention of mental health experts was not motivated by Brannon's JQC testimony. Moreover, the reduction of referrals to Brannon was not related to his JQC testimony.

c. Removal of Dr. Brannon from Referral Rotation System

Dr. Brannon expressed his displeasure with regard to each of the steps taken by the Broward County Public Defender's office aimed at cost-containment, reducing expenses and broadening the pool of expert witnesses. It is Brannon's opinion that a wheel rotation system is an "improper system" that treated every expert as if they had the same level of "quality." [Trial Tr. 6-19-15]. Dr. Brannon expressed his opinions regarding the wheel rotation system to everyone who would listen. He thought "it was an unfair system."

According to Brannon, in 2009, prior to implantation of the wheel, he received 40-60 referrals monthly from the Public Defender's office. After the wheel was instituted, Brannon's referrals dropped dramatically. In the first month the wheel was implemented, Brannon received approximately 24 referrals. Thereafter, Brannon's referrals were in the single digits. [Trial Tr. 6-19-15].

On July 7, 2009, Brannon wrote Finkelstein an email expressing concern about the number of referrals he was receiving and inquiring whether he was still a part of the wheel rotation system. [See Plaintiffs' Trial Exhibit 4]. Finkelstein replied reassuring Brannon

that he was a part of the rotation and acknowledging that "the last couple of weeks have been very light on requests combined with some unique case anomalies." Id. Finkelstein continued that if the "pattern does not get back on track please let me know." Id. Finkelstein took the email to be another opportunity for Brannon to voice his displeasure with the rotation system. Although Brannon's email was sent to his personal email account, Finkelstein followed his normal practice of forwarding his response to Executive Chief Assistant Catherine Keuthan, his chief of staff, and repository of information. Keuthan asked "[a]re you trying to make me ill?" Finkelstein replied to Keuthan:

> No him. Death by a 1000 invisible cuts. Withering on the vine, pinned and wriggling on the wall with no target or issue or martyrdom for him to seek sanctuary.
>
> [Plaintiffs' Trial Exhibit 4].

Finkelstein understood that Keuthan was frustrated with Brannon's constant complaining about the rotation system, the number of referrals he was receiving, and the amount of money he was being paid. Through an inartfully worded and inaccurate attempt to quote the poet T.S. Elliott, Finkelstein assured Keuthan that there was no need for her frustration because Brannon's continual complaining would be his undoing. According to Finkelstein, his reference to "death by a 100 invisible cuts" was a reference to Brannon's

persistent complaints and vocal displeasure with the rotation system and not a reference to a reduction in his referrals. With the rotation system, Brannon had gone from being the primary psychologist receiving the majority of referrals, and almost $600,000 a year in fees, from the Broward County Public Defender to being one of 30 psychologist receiving appointments. Finkelstein understood that Brannon wanted the rotation system stopped and felt he would be relentless in his opposition.

On July 14, 2009, a week after sending the email expressing his frustration to Finkelstein, Brannon expressed his clear displeasure and disagreement with the changes in policies and procedures implemented by the Public Defender during his cross examination by APD George Reres in the case of State of Florida v. Bernard Joseph. In Joseph, APD Reres asked Brannon about the issues he was having with the Public Defender's office. In particular APD Reres inquired whether Brannon's concerns were because of the implementation of the wheel rotation system and his resulting reduction in referrals. [See Defendant's Trial Exhibit 1, p. 131]. Brannon confirmed that the reduction was one of a number of his concerns with the Public Defender's Office. Brannon continued that another concern was "that you were demoted from your position as the head of homicide." Id. Brannon continued to expound, in the presence of the jury, upon his

concern with APD Reres' demotion, his "disagreements" with the Public Defender's office, and whether he contemplated filing a lawsuit.

On or about July 27, 2009, Chief Assistant Public Defender Robert Wills received the official transcript in State of Florida v. Joseph. Finkelstein along with Executive Public Defenders Dianne Cuddihy and Catherine Keuthan, reviewed the Joseph transcript. Immediately upon reviewing Brannon's testimony in Joseph, Finkelstein determined that, because Brannon had expressed increased hostility and animosity towards the Public Defender as a witness during a trial by personally and inappropriately referring to Reres' demotion in the presence of the juror, they could no longer in good faith continue to retain Brannon to evaluate Public Defender clients.

In July 2009, Public Defender supervisors, Gordon H. Weekes and Frank de la Torre, informed APDs, that because of his expressions of hostility toward the Public Defender during Joseph, Brannon was not to be retained as an expert to evaluate Public Defender clients. The decision not to hire Brannon was again expressed to APDs by supervisor Frank de la Torre after Brannon filed his lawsuit against the Public Defender's office and Finkelstein.

The Court finds that Brannon's JQC testimony was not a factor considered, and did not motivate, Finkelstein's decision to remove Brannon from the Broward County Public Defender's wheel rotation

system. Prior to July 28, 2009, and Brannon's testimony in Joseph, no decision was made to stop using Brannon as an expert. Rather, after testifying in the 2007 JQC hearing, Brannon continued to receive more than half of the referrals given to any other expert up until his Joseph testimony and subsequent permanent removal.

III. CONCLUSIONS OF LAW

The Court of Appeals remanded this action for trial as to Plaintiffs' claims against the defendant in his official capacity. As a result, this Court need only decide two remaining issues. First, whether or not Brannon's decreased referrals and income from the Broward County Public Defender's office were related to the protected speech. Second, whether or not Brannon's removal from the referral wheel was based on his JQC testimony, 19 months earlier, or his testimony in the Joseph matter, approximately a week prior.

To establish a First Amendment retaliation claim, Brannon must show that: (1) his speech was constitutionally protected; (2) he suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech. Brannon v. Finkelstein, 754 F.3d 1269, 1274 (11th Cir. 2014).

a. Protected Speech

The parties do not dispute that Brannon's testimony at the JQC

hearing was constitutionally protected. Thus, the Court must determine whether Plaintiffs have shown by a preponderance of the evidence that Brannon suffered adverse conduct and that there was a causal relationship between the adverse conduct and Brannon's JQC testimony.

b. Adverse Conduct

In order to qualify as an adverse action, Brannon must show that the Finkelstein's conduct resulted in something more than a "*de minimis* inconvenience" to the exercise of his First Amendment rights. Bennett v. Hendrix, 423 F.3d 1247, 1252 (11th Cir. 2005). Moreover, Brannon's subjective view of the significance and adversity of Finkelstein's action is not controlling. Rather, Finkelstein's actions must be viewed objectively. Specifically, he must establish that the allegedly retaliatory acts would likely deter a person of ordinary firmness from exercising his or her First Amendment rights. Bennett v. Hendrix, 423 F.3d 1247, 1252 (11th Cir. 2005).

The acts complained of here include Brannon's reduction in referrals and income from the Public Defender's office and his eventual removal from its referral wheel system. The parties agree, that Brannon's ultimate removal from the wheel rotation system in 2009 amounted to adverse conduct. However, it is disputed whether Brannon's reduction in referrals and income was an adverse act.

With regards to Brannon's reduction in referrals and income, the Court must decide whether "such a drastic decrease in business, if it resulted from retaliation, would likely deter a person of ordinary firmness from the exercise of First Amendment rights." Brannon v. Finkelstein, 754 F.3d 1269, 1275 (11th Cir. 2014) (internal citation omitted). Brannon's work from the Public Defender's office decreased approximately 72% over the course of two fiscal years after his JQC testimony. Brannon's referrals from the Public Defender dropped from approximately 40-60 prior to the implementation of the wheel system in 2009, to single digits thereafter. Although Brannon continued to receive a consistent share of the Public Defender's total spending on due process mental health experts, and was paid two to three times as much as the next expert, such a reduction in income is not trivial or *de minimis*. If such a reduction in income resulted from Brannon's JQC testimony, it would likely deter a person of ordinary firmness from participating in the same protected activity. Therefore, the Court finds that Brannon's reductions in referrals and income is also an adverse act.

Having found that both Brannon's reduction in referrals and removal from the Public Defender's rotation wheel are adverse acts, the Court must now determine whether there is a causal link between the adverse action and Brannon's protected speech.

c. Causal Connection

To show causation, Brannon must prove by a preponderance of the evidence that Finkelstein, "was subjectively motivated either to reduce Brannon's work beginning in 2007 or to remove Brannon from the wheel rotation system in July 2009 because Brannon engaged in constitutionally protected speech by testifying at the Aleman hearing." Brannon v. Finkelstein, 754 F.3d 1269, 1275 (11th Cir. 2014); Castle v. Appalachian Technical Coll., 631 F.3d 1194, 1197 (11th Cir. 2011).

1. Reduction in Referrals

The evidence shows that shortly after Brannon's JQC testimony, Finkelstein expressed his disappointment. Although neither Finkelstein nor Mr. Gottieb recall the specifics of their conversation, Mr. Gottieb recalls immediately notifying Brannon of Finkelstein's displeasure and what he thought to be impending consequences. The evidence also shows that shortly after his testimony in December 2007, Brannon received significantly fewer referrals from the Public Defender's office, and continued to do so until his removal in 2009.

"The causal link element is construed broadly so that a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." Grier v.

Snow, 206 F. App'x 866, 868 (11th Cir. 2006) (internal quotation omitted). To establish a causal connection, a plaintiff must show that the decision-makers were aware of the protected conduct and that the protected activity and the adverse act were at least somewhat related and in close temporal proximity. Gupta v. Fl. Bd. of Regents, 212 F.3d 571, 590 (11th Cir.2000); Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir.2004), Grier v. Snow, 206 F. App'x 866, 868 (11th Cir. 2006). Although Finkelstein did not personally attend the JQC hearing, and was unware of the substance of the testimony, he was aware that Brannon testified on behalf of Judge Aleman. Plaintiffs have shown, by the preponderance of the evidence, that Finkelstein was aware of and expressed surprise and disappointment with Brannon's protected speech.

Causation may be inferred by close temporal proximity between the protected conduct and the materially adverse action taken by the employer. Walker v. Sec'y, U.S. Dep't of Air Force, 518 F. App'x 626, 628 (11th Cir. 2013). It is undisputed that within a month of his testimony, Brannon began, and continued, receiving significantly fewer referrals from the Public Defender's office. While his fax machine did not fall silent immediately after his testimony, as asserted by Brannon, a causal link between his protected speech and his reduction in referrals can be inferred by the close proximity.

Brannon having demonstrated a causal connection, the burden shifts to Finkelstein to show, by a preponderance of the evidence, that he would have taken the same action in the absence of the protected conduct, in which case he cannot be held liable. Brannon v. Finkelstein, 754 F.3d 1269, 1275.

Here, Brannon testified before the JQC on December 6, 2007. On December 21, 2007, Finkelstein sent correspondence to Broward County judges and the State Attorney advising them of the change in policy of the Public Defender as it related to the retention of experts for downward departures. The preponderance of the evidence shows that this change in policy began prior to Brannon's JQC testimony.

In March 2006, the Broward County Public Defender's office began implementing procedures to manage and control expenses, including those for expert witnesses. In 2007, the state legislator called a special session to address the state's deficit caused by the recession. In addition to potential new budgetary cuts with the special session, the Public Defender's office faced a proposed million dollar penalty because of its shortfall the previous year. Although, in 2007, the proposed penalty was not assessed, the Broward County Public Defender immediately lost approximately $743,000 in funding after the October 2007 special session and $800,000 the following fiscal year.

These budget cuts, occurring in the middle of the 2007-2008 fiscal year, affected the future release of funding received by the Broward County Public Defender's office. Both the impact of the budget cuts and Brannon's testimony occurred in the middle of the 2006-2007 fiscal year.

Also in 2007, it was determined that Broward County was one of the few public defender's offices statewide that used expert testimony as a routine practice for all downward departures. In an effort to reduce spending, the Broward County Public Defender's office began reviewing the fiscal impact of its policy at that time. In the fall of 2007, the Broward County Public Defender's office began changing its policy relating to the way experts were used in downward departures. Specifically, the Public Defender began training their attorneys on how to achieve a downward departure without having to hire an expert. The Public Defender's office also reduced the amount of money they paid to experts for downward departures from $750 to $400.

Despite the implementation of the Public Defender's cost saving measures, Brannon was paid $390,212.00 during the 2007-2008 fiscal year. It is undisputed that Brannon received three times as much as the next highest paid Public Defender expert in 2007-2008. It is also undisputed that in 2007-2008 Brannon's received approximately 50%

of the Public Defender's total spending for mental health expert fees. Although the impact of the Public Defender's policy change may have significantly impacted Brannon's pocket, causing him more than a "de minimis inconvenience, the preponderance of the evidence shows that Finkelstein would have reduced Brannon's referrals, along with that of all experts, even in the absence of his JQC testimony. It is unfortunate that the timing of both Brannon's testimony and the implementation of the policy change occurred within three weeks of each other. However, the preponderance of the evidence is that Finkelstein began the process of reducing referrals to experts for downward departures well before becoming aware of Brannon's protected activity.

Moreover, the preponderance of the evidence does not show that the Public Defender's office implementation of the wheel rotation system in March 2009 was a result of Brannon's JQC testimony. Brannon continued to receive referrals until his ultimate removal. During the months of March through July 2009, Brannon was one of thirty (30) experts receiving referrals from the wheel rotation system. Given the increase in the expert pool from only a few to 30, it is reasonable that Brannon's referrals would have dropped to single digits. Although not at the numbers he received prior to the policy changes implemented in 2007, Brannon continued to receive two to three times

as much in income as any other expert in fees.

Brannon's displeasure with the wheel rotation system is undisputed. It is also undisputed that he continued to complain "to anyone that would listen" about the wheel system and the number of referrals that he was receiving from the Public Defender's office. While the email that Finkelstein sent referencing a "death by [] 1000 invisible cuts," could be interpreted to relate back to reductions in his referral work, it could also reference Brannon's continued complaining. Finkelstein explained that "death by a 1000 cuts" was Brannon's relentless complaining about the wheel system, and that he would continue until he ran out of people to complain to. This, Finkelstein explained, was the reference to Brannon's inability to "seek sanctuary." The Court finds Finkelstein's explanation, interpretation, and references with regards to the email forwarded to Keuthan credible.

Brannon has failed to sufficiently establish the requisite causal connection between his JQC testimony and his reduction in referrals by a preponderance of the evidence. Therefore, the Court finds, as a matter of law, that Brannon's reduction in referrals beginning in 2007 was not related to his protected speech or a violation of his rights under the First Amendment.

2. Removal from Rotation Wheel

Likewise, Brannon argues that his 2007 JQC testimony was a motivating factor in his removal from the wheel rotation system in 2009. It is undisputed that Brannon continued to receive referrals from the Public Defender's office until his removal in July 2009. As discussed above, the significant budget reductions experienced by the Public Defender's office prompted the policy change with regards to the retention of expert witnesses such as Brannon. The preponderance of the evidence is that no decision was made to remove Brannon from the wheel rotation system until after his July 2009 testimony in the Joseph matter.

With regards to removal, in most cases, a close temporal proximity between the protected conduct and the adverse action infers a causal connection between the two. Stanley v. City of Dalton, Ga., 219 F.3d 1280, 1291 (11th Cir. 2000). Nonetheless, "gaps in time," standing alone, do not preclude a plaintiff from producing enough evidence for a reasonable fact finder to conclude that protected speech was a substantial factor in the decision to take adverse action. Id.

In this case, Brannon's removal from the wheel occurred nineteen months after his JQC testimony. While Brannon presented evidence that his reduction of referrals may have been related to his JQC testimony,

he failed to show by a preponderance of the evidence that his removal from the wheel system was related or motivated by his protected activity.

Even if Brannon met his burden, Finkelstein has established, by a preponderance of the evidence, that he would have taken the same action regardless of Brannon's protected testimony. Indeed, the preponderance of the evidence demonstrates that Finkelstein believed in good faith that Brannon's testimony in Joseph warranted his removal from the wheel rotation. During his Joseph testimony, Brannon made disparaging remarks and was palpably hostile towards the Public Defender's office. Brannon was removed from the wheel rotation system immediately after the Public Defender's office received and reviewed a copy of the Joseph trial transcript. Brannon's JQC testimony did not motivate Finkelstein's decision to remove Brannon from the Public Defender's wheel rotation system. Therefore, the Court finds, as a matter of law, that Brannon's removal from the Public Defender's wheel rotation system was not related to or motivated by his protected speech or a violation of his rights under the First Amendment.

V. CONCLUSION

Based on the foregoing findings of fact and conclusions of law following trial in this matter, the Court finds that Plaintiffs have not proven any of their claims by a preponderance of the evidence

and that the Defendant is entitled to judgment in his favor. It is hereby,

ORDERED AND ADJUDGED that judgment is entered in favor of Defendant Howard Finkelstein, and against Plaintiffs, on all claims. It is further

ORDERED AND ADJUDGED that, within fourteen (14) days of the date of this Order, Defendant Howard Finkelstein is directed to file a proposed final judgment to be entered as a separate document pursuant to Rule 58(a) of the Federal Rules of Civil Procedure. It is further

ORDERED AND ADJUDGED that this case is **CLOSED** for administrative purposes and all pending motions are **DENIED** as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 15th day of September, 2015.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: All Counsel of Record