

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION**

JAMEKA K. EVANS)
)
 Plaintiff,)
)

v.)
)

Civil Action No.:
4:15-CV-00103-JRH-GRS

GEORGIA REGIONAL HOSPITAL)
 AT SAVANNAH, and LISA CLARK)
 in her official capacity, and)
 CHARLES MOSS in his individual)
 Capacity,)
)
 Defendants.)
)

_____)

**DEFENDANTS’ MOTION TO DISMISS PLAINTIFF’S
AMENDED COMPLAINT IN LIEU OF ANSWER**

COMES NOW the Georgia Regional Hospital at Savannah (“GHRH”), Lisa Clark, and Charles Moss, Defendants in the above-styled action, by and through counsel of record, the Attorney General of the State of Georgia, and files this Brief in Support of Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint in Lieu of Answer pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendants’ arguments and citations of authority in support of dismissal are contained in its Brief in Support of Defendant’s Motion to Dismiss Plaintiff’s Complaint in Lieu of Answer filed herewith.

Respectfully submitted, this 29th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29th, 2018, I electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT IN LIEU OF ANSWER** with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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GEORGIA REGIONAL)	
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Civil Action No:
4:15-CV-00103-JRH-GRS

**BRIEF IN SUPPORT OF DEFENDANTS’ MOTION TO DISMISS
THE AMENDED COMPLAINT IN LIEU OF ANSWER**

COME NOW, Georgia Regional Hospital at Savannah (“GRHS”), Lisa Clark, and Charles Moss, Defendants in the above-styled action, by and through counsel, the Attorney General of the State of Georgia, and submit this Brief in Support of Defendants’ Motion to Dismiss the Amended Complaint In Lieu of Answer. Plaintiff’s Complaint should be dismissed pursuant to FRCP 12(b)(1) and/or 12(b)(6) for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In support of their Motion, Defendants show this Court as follows:

I. INTRODUCTION

Plaintiff Jameka Evans's Amended Complaint was filed following a two-year procedural history involving her initial Complaint, culminating in the U.S. Supreme Court's denial of Plaintiff's petition for certiorari to review the scope of Title VII of the Civil Rights Act of 1964 ("Title VII"). Defendants now move to dismiss Plaintiff's Amended Complaint because it is also fatally flawed; the Amended Complaint fails to state a claim upon which relief can be granted and deprives the court of subject matter jurisdiction.

Evans first initiated suit on April 23, 2015. Proceeding *pro se* at the time, Evans filed a Complaint which named GRHS, Charles Moss, Jamekia Powers, and Lisa Clark as Defendants. (*See* Dkt. No. 1.) Evans's initial Complaint purported to assert Title VII claims for sex discrimination against all named Defendants. *Id.* After screening her *pro se* Complaint pursuant to 28 U.S.C. § 1915, the Magistrate Judge issued a Report and Recommendation ("R&R") on September 9, 2015, recommending dismissal of all claims with prejudice. (Dkt. No. 4.) Evans filed objections to the R&R, supported by an amicus brief from Lambda Legal Defense and Education Fund. (Dkt. Nos. 9 and 11.) On October 29, 2015, the District Court adopted the R&R, dismissed the case with prejudice, and appointed counsel from Lambda to represent Evans on appeal. (Dkt. No. 12.)

With benefit of counsel, Evans appealed the dismissal of her Complaint to the Eleventh Circuit Court of Appeals. (Dkt. No. 14.) On March 10, 2017, the Court of Appeals issued a decision affirming in part, vacating in part, and remanding for further proceedings. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017). First, the court held that a claim for “discrimination based on gender nonconformity is actionable,” but that Evans’s *pro se* complaint failed to plead sufficient facts to create a plausible inference that she suffered discrimination. *Id.* at 1254-55. The Court of Appeals vacated the portion of the District Court’s order dismissing Evans’s gender nonconformity claim with prejudice and remanded “with instructions to grant Evans leave to amend such claim.” *Id.* at 1255. Second, the Court of Appeals affirmed the portion of the District Court’s order dismissing Evans’s sexual orientation claim. *Id.* at 1255-57. Evans filed a petition for a writ of certiorari to the United States Supreme Court on the dismissal of her sexual orientation claim, which the Supreme Court denied on December 11, 2017. *Evans v. Georgia Regional Hospital*, Case No. 17-370, 2017 U.S. Lexis 7377 (U.S., Dec 11, 2017).

On July 24, 2017, this Court granted Evans leave to amend her complaint “as to her gender nonconformity claim.” (Dkt. No. 23.) Evans filed an Amended Complaint on September 11, 2017, asserting claims of sex discrimination under Title VII and constitutional violations via 42 U.S.C. § 1983 (“Section 1983”). (*See*

Dkt. Nos. 27, 28.) Prior to receiving requests to waive service in November 2017, none of the named Defendants had been served with a summons and complaint in this matter.

Defendants move to dismiss Plaintiff's Amended Complaint in its entirety on the following grounds: (A) Plaintiff's Section 1983 claim is time-barred under the two-year statute of limitations; (B) Plaintiff's Section 1983 claim is further barred by the Court of Appeals' mandate, limiting her right to amend the existing Title VII claim; (C) Defendants are entitled to qualified immunity from her Section 1983 claim; (D) the court lacks subject matter jurisdiction over Plaintiff's Title VII claim because GRHS is not a legal entity capable of being sued; and (E) Plaintiff fails to state a claim for relief for unlawful sex discrimination.

II. STATEMENT OF FACTS FROM AMENDED COMPLAINT¹

Evans became a full-time employee at GRHS in August 2012, as a Facility Safety Officer. (Amended Complaint ("Am. Compl."), ¶ 9.) Evans experienced no harassment or "attempted sabotage" while Lieutenant Alexander Fields, Jr. was Facility Safety Chief, a position which he left in the first half of 2013. (*Id.*, ¶ 10.)

¹ Because the Court is required to accept all alleged facts as true for purposes of ruling on a Rule 12(b)(6) motion to dismiss, the facts recited herein are taken from Evans's Amended Complaint. *See Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000). In filing this motion, Defendants make no admissions as to any of Plaintiff's allegations and hereby expressly reserves any and all defenses available to them.

During this time, Evans had “very limited interaction with Defendant Moss.” (*Id.*) On one occasion, Moss asked Evans whether she was dating a female nurse on staff at the hospital. (*Id.*)

Immediately upon becoming the Facility Safety Chief in mid-2013, Moss began a systematic campaign of harassment and sabotage to force Evans to quit. (*Id.* ¶ 11.), Moss announced a new job title, “Star Corporal,” and placed Shenika Johnson to the position on the night shift. (*Id.*, ¶ 12.) Evans was also reassigned to the night shift and was to be supervised by Johnson, whom Evans alleges was a “less senior” GRHS employee. (*Id.*) Prior to Moss becoming the Facility Safety Chief, work hours were divided into three eight hour shifts. (*Id.*, ¶ 13.) Moss changed the work hours to consist of two twelve hour shifts, from 7 a.m. to 7 p.m. and from 7 p.m. to 7 a.m. (*Id.*) Evans was the only employee reassigned from an eight hour daylight shift to a twelve hour overnight shift. (*Id.*)

On or about July 3, 2013, Moss walked into an office where Evans was in the door’s threshold and inquired whether Evans had an assignment. (*Id.*, ¶ 14.) Evans informed Moss that she had pulled some contraband from a GRHS unit and, following this exchange, Moss “stated in substance that [Evans] ‘can’t hang out here,’ after which Moss repeatedly and intentionally physically slammed the office’s door into [Evans].” (*Id.*)

Evans attempted to address her alleged mistreatment by Moss with management at GRHS. (*Id.*, ¶ 15.) Evans spoke to Defendant Clark in mid-August 2013. (*Id.*) Clark initially indicated a possibility of a shift change, but ultimately told Evans to work the night shift and “did nothing” concerning Evans’s concerns about the Star Corporal position or the alleged “physical assault” by Moss. (*Id.*) In early September 2013, Evans made a written complaint to human resources. (*Id.*, ¶ 16.) GRHS’s response to Evans was that any reported incident that could not be corroborated by a fellow GRHS employee would be deemed unsubstantiated, notwithstanding corroboration by non-GRHS employees that supported Evans’s claim that Moss was seeking to end Evans’s employment at GRHS. (*Id.*) GRHS made it clear to Evans that it would not take steps to address her concerns. (*Id.*, ¶ 17.) Jamekia Powers and Cheryl Saunders, HR personnel responsible for conducting the investigation, did not address Evans’s concerns about the Star Corporal position or whether any change would be made to Evans’s status as the only employee who was re-assigned by Moss to the less favorable twelve-hour night shift. (*Id.*) Instead, Powers asked Evans if she was a homosexual. (*Id.*) Evans’s response was to state that she did not necessarily broadcast that fact to everyone and that it was apparent from Evans’s masculine appearance and presentation. (*Id.*)

After several attempts to seek help from GRHS HR professionals, Plaintiff resigned from employment on October 11, 2013, having concluded that GRHS would not “act on the personnel actions adverse to her, meaningfully redress past incidents of physical and verbal harassment, nor protect her in any way from future incidents of harassment.” (*Id.*, ¶ 19.)

III. STANDARD OF REVIEW

Under Rule 12(b)(6), a complaint is subject to dismissal if it does not “state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The standard for the Court’s consideration of a Rule 12(b)(6) motion to dismiss, therefore, is comprised of two main principles: “First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to the legal conclusion.” *Id.* Similarly, unwarranted deductions of fact in a complaint are not admitted as true. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1268 (11th Cir. 2009) (citing *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005)). “Second, only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Iqbal*, 556 U.S. at 556.

Yet, “[r]egardless of the alleged facts, a court may dismiss a complaint on a dispositive issue of law.” *Bernard v. Calejo*, 17 F. Supp. 2d 1311, 1314 (S.D. Fla.1998) (citing *Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993) (“[T]he court may dismiss a complaint . . . when, on the basis of a dispositive issue of law, no construction of the factual allegations will support the cause of action.”); see also *Glover v. Liggett Group, Inc.*, 459 F.3d 1304,1308 (11th Cir. 2006). Here, even accepting Plaintiff’s allegations as true, Plaintiff’s claims against Defendants fail to state a claim upon which relief can be granted and should be dismissed.

IV. ARGUMENT AND CITATION OF AUTHORITY

Evans’s Amended Complaint is the first notice to the individual Defendants that they could be subject to personal liability. In her first Complaint, Evans filed claims pursuant to Title VII alleging gender nonconformity and sexual orientation discrimination. While she named Defendants Moss and Clark in the original pleading, a Title VII claim may only be brought against an employer. Individual co-workers are not liable to a complaining party for unlawful employment practices under Title VII. *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991). Even if she prevailed on the claims in her her original Complaint, the two individual Defendants would never have been subject to any personal liability. This Court dismissed the initial Complaint with prejudice, without Plaintiff having

served any Defendant. Regardless of whether the individual Defendants had some knowledge that the lawsuit was filed, they had no notice of personal liability or that their personal assets were in the cross-hairs. Now, through her Amended Complaint, filed nearly four years after her resignation, Plaintiff attempts to impose such personal liability. The arguments that follow explain why she should be prohibited from doing so.

A. Plaintiff's Section 1983 Claims Are Time-Barred.

Plaintiff's Section 1983 claims are time-barred because she failed to assert the claim within two years of her resignation. Where a federal statute does not provide a statute of limitations, the Court is to look to state law for the most analogous state law statute of limitations. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). In *Wilson*, the United States Supreme Court held that Section 1983 claims are best characterized as personal injury claims. 471 U.S. at 280. The corresponding statute of limitations in Georgia is two years. *See* O.C.G.A. § 9-3-33. Therefore, Evans had from October 13, 2013, when she left her employment, until October 15, 2015, in which to file her claims pursuant to Section 1983. Because she failed to do so, those claims are due to be dismissed.

The filing of Evans's Title VII claims did not toll the running of the statute of limitations as to her Section 1983 claims. The United States Supreme Court has held that parallel avenues of relief were not tolled by a Title VII administrative

remedy, even if those claims were based on the same facts and directed toward the same ends. *See Johnson v. Railway Express Agency*, 421 U.S. 454, 467 (1975). In *Johnson*, the plaintiff sought the tolling of the two-year statute of limitations period for a Section 1983 claim due to having filed an administrative charge required by Title VII and waiting for the end of the EEOC's administrative process. The *Johnson* Court found that the plaintiff's Section 1983 claim was not tolled because those claims were separate, distinct, and independent from the claims brought pursuant to Title VII. Evans should likewise be barred from pursuing her Section 1983 claim (a separate, distinct and independent claim from her Title VII claim) nearly two years beyond the running of the statute of limitations.

Further, Evans cannot explain why her claims could not have been brought within the statute of limitations. Her Amended Complaint reveals that all of the alleged facts that would make up her Section 1983 claim either were known, or should have been known, to her at the time she quit her job in October 2013. Also, the Magistrate Judge recommended dismissal of her Title VII claims in September 2015, a full month prior to the running of the statute of limitations on her Section 1983 claims. She could have amended her Complaint at that time to add the Section 1983 claim within the statute of limitations period, but failed to do so.²

² Evans also failed to object to the R&R's dismissal of the individual defendants with prejudice, or to ask for leave to amend her Complaint to properly state claims

Instead, Evans has waited nearly two years after the expiration of the limitations period to bring new, separate, and distinct claims against Moss and Clark. Having waited until after the appeal of her Title VII sexual orientation claim ran its course, Evans only now seeks to add a claim that could have, and should have, been brought against the individual defendants in 2015. Evans, having been dilatory in asserting her Section 1983 claim, will cause undue prejudice particularly to Moss who, until having been served with Evans's Amended Complaint, had no reason to believe that Evans' claims existed or were directed at him individually or that his personal assets may be in peril upon finding of liability. Section 1983's two year statute of limitations serves to prevent such undue prejudice and should bar Evans' claims for that reason.

B. Plaintiff's Section 1983 Claim Is Further Barred By The Court Of Appeals' Mandate, Limiting Her Right To Amend The Existing Title VII Claim.

against those individuals. Where a party fails to object to the findings in a magistrate's R&R, they have waived their right to revive the issue going forward. *See Mitchell v. United States*, 612 Fed. App'x 542, 545 (11th Cir. 2015) (observing that the Circuit had adopted "a rule for civil cases that attaches consequences to the failure to object to either the factual findings or legal conclusions in a magistrate judge's report and recommendation"). In the same vein, Evans did not raise the dismissal of the individual defendants without leave to amend on appeal, at which point she was represented by counsel. Such a failure to address arguments on appeal is considered a waiver of those issues. *See Evans*, 850 F.3d 1248, 1254 n.3 (2017) (failure to argue an issue on appeal is construed as abandonment).

Evans did not have the right to amend her Complaint to assert a Section 1983 claim because the Mandate of the Court of Appeals specifically permitted an amendment to her existing Title VII claim only.

The Eleventh Circuit Court of Appeals remanded Evans' gender nonconformity claim finding that she should be permitted an opportunity to amend her complaint to provide sufficient factual details to support her Title VII claim. *Evans*, 850 F.3d at 1254-1255. The Court of Appeals held that an opportunity to amend should be granted "because a gender non-conformity claim is not 'just another way to claim discrimination based on sexual orientation,' but instead, *constitutes a separate, distinct avenue for relief under Title VII.*" *Id.* (emphasis supplied). The Court of Appeals vacated "the portion of [this Court's] order dismissing Evans' gender non-conformity claim with prejudice and remand[ed] with instructions to grant Evans *leave to amend such claim.*" *Id.* (emphasis supplied). Notably, the Court of Appeals did not say that Evans would have the right to amend her Complaint to add any new, separate, and distinct claims. The Court of Appeals merely granted Evans leave to amend the claim she had filed: a Title VII claim alleging discrimination on the basis of gender nonconformity. On remand, Evans does not have license to add new claims, expand potential liability upon unserved individual defendants, or save a claim long ago lost by virtue of the limitations period.

In general, the allowance of an amendment to a complaint is within the discretion of the district court, unless an appellate court has issued a mandate calling for amendment or its mandate has precluded amendment. *Moore's Federal Practice para.* 15.11, p. 971. ““If an amendment that cannot be made as of right is served without obtaining the court’s leave or the opposing party’s consent, it is without legal effect and any new matter it contains will not be considered unless the amendment is resubmitted for the court’s approval.”” *Vallina v. Mansiana Ocean Residences LLC*, No. 10-CV-21506, 2011 U.S. Dist. LEXIS 157707, at *13-15 (S.D. Fla. June 16, 2011) (quoting 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1484 (3d ed. 2010)); *see also Italiano v. Jones Chem., Inc.*, 1997 U.S. Dist. LEXIS 2899, 1997 WL 118426, at *3 (M.D. Fla. Feb. 21, 1997) (recognizing that dismissal of a claim with leave to amend does not grant a plaintiff the right to ‘substantially revise non-related portions’ of the original complaint).

Evans did not seek leave of court to add the Section 1983 claim and did not have permission to do so through the Court of Appeals mandate. Defendants, therefore, move for dismissal of Evans’ Section 1983 claim against Moss and Clark as improper. Defendants further submit that Evans should not be permitted leave to amend because Evans’ claim is beyond the two-year statute of limitations and would substantially prejudice the individual Defendants.

C. Defendants Are Entitled To Qualified Immunity From the Section 1983 Claim.

1. Plaintiff fails to plead any actions taken by Defendants that were taken outside their discretionary authority.

Qualified immunity should be applied “in all but exceptional cases” to protect “government officials performing discretionary functions from the burdens of civil trials and from liability.” *McMillan v. Johnson*, 88 F.3d 1554, 1562 (11th Cir. 1996) (citing *Lassiter v. Alabama A&M Univ.*, 28 F. 3d 1146, 1149 (11th Cir. 1994)); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law”). The Eleventh Circuit Court of Appeals has stated that it is “only the rarest of cases [that] reasonable governmental officials truly know that the termination or discipline of a public employee violated ‘clearly established rights.’” *Anderson v. Burke Cnty*, 239 F.3d 1216, 1222 (11th Cir. 2001). Qualified immunity should be assessed at the motion to dismiss stage because it is “an immunity from suit rather than a mere defense to liability” and should be resolved “at the earliest possible stage in litigation.” *Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009).

The process for analyzing the qualified immunity defense has been set out as follows:

To be eligible for qualified immunity, the official must first establish that he was performing a “discretionary function” at the time the alleged violation of federal law

occurred. Once the official has established that he was engaged in a discretionary function, the plaintiff bears the burden of demonstrating that the official is not entitled to qualified immunity. In order to demonstrate that the official is not entitled to qualified immunity, the plaintiff must show two things: (1) that the defendant has committed a constitutional violation and (2) that the constitutional right the defendant violated was “clearly established” at the time he did it.

Crosby v. Monroe County, 394 F.3d 1328, 1332 (11th Cir. 2004). An official performs a discretionary function when his acts “but for the constitutional infirmity, would have fallen within his legitimate job description,” and the acts were done “through means that were within his power to utilize.” *Holloman v. Harlan*, 370 F.3d 1252, 1265-1266 (11th Cir. 2004).

Evans’s Amended Complaint fails to allege any actions taken by Moss or Clark that were taken outside the scope of their employment and, thus, their discretionary authority. Rather, Evans alleges that Moss and Clark “acted under pretense and color of state law and within the scope of their employment as GRHS officers and employees.” (Am. Compl., ¶ 34.) Evans’s only references to actions taken by Moss include him passing over her for the position of Star Corporal, his placement of her on the night shift and his inquiring about her assignments. (Am. Compl., ¶¶ 12-14.) Evans’ only references to actions taken by Clark include her meeting with Evans to discuss her complaints about the shift changes and her

personnel dispute with Moss. (Am. Compl., ¶ 15.) All of the actions attributable to Moss and Clark were taken pursuant to their job descriptions as managers.

Because Moss and Clark were acting within their discretionary authority, the burden shifts to Evans to show that their actions violated her constitutional rights under clearly established law. *See Crosby* at 1332. Otherwise, the individual Defendants are entitled to qualified immunity.

2. Plaintiff cannot show that Defendants' actions violated a constitutional right that was clearly established.

Evans claims that Defendants Moss and Clark violated her constitutionally protected rights through their alleged activity against her designed, ultimately, with the intent that she would quit her job. Because Evans's allegations are insufficient to establish that her constitutional rights were violated, or that such rights were clearly established at the time of the alleged violation, Moss and Clark are entitled to qualified immunity.

When considering questions of qualified immunity, a court must determine whether the alleged facts make out a violation of a constitutional right and whether that right was "clearly established" at the time of the defendant's alleged misconduct. *Saucier v. Katz*, 533 U.S. 194 (2001). Courts are permitted to determine whether a constitutional right is clearly established before reaching the question of whether the right even exists, because there will be "cases in which it is

plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right. *Pearson v. Callahan*, 555 U.S. 223, 235-237 (2009). Additionally, “[t]he inquiry whether a constitutional violation is clearly established ‘is undertaken in light of the specific context of the case, not as a broad general proposition.’” *Leslie v. Hancock Cty. Bd. Of Educ.*, 720 F.3d 1338, 1345 (11th Cir 2013) (citations omitted); *see also Griffin Indus.v. Irvin*, 496 F.3d 1189, 1209 (11th Cir. 2007) (rejecting a broad level of generality when applying the test of “clearly established law”).

As discussed *infra* in subpart E, Evans’s Amended Complaint is devoid of sufficient facts to establish that a violation of her constitutional rights has occurred because of sex discrimination, gender-nonconformity, or any other basis. Ultimately, Evans must show that Moss was on notice that his actions, in the context of this case, and with these facts, were clearly established as violating Evans’s rights. Evans cannot rely on mere generalities, but must show with some specificity that Moss would be on notice that his unspecified acts of harassment and sabotage, his placement of another in a new position, changing Evans’s shift, and forcing her out of a location in which he did not want her constitutes a violation of Evans’s constitutional rights to be free from gender nonconformity bias. Evans cannot do so and her claim against Moss must be dismissed.

Clark is likewise entitled to qualified immunity as Evans's allegations against her consist only of the allegation that Clark did nothing to assist her after Evans complained. With no factual underpinning, Evans alleges that Clark was ultimately responsible for the alleged violation of her rights. (Am. Compl., ¶ 37.) However, Evans provides no factual basis which would establish that Clark took any adverse employment action against her or was otherwise responsible for any action taken against her.

Evans has failed to plead sufficient facts to move her allegations that Defendants Moss and Clark violated her constitutional rights beyond a mere possibility. The Amended Complaint sets forth no facts which would constitute an alleged violation of her constitutional rights. Evans merely hurls unsubstantiated allegations of bias and sabotage against her and complains that she was on the short end of two employment decisions. With no facts to support her claims of discrimination, she jumps to the conclusion that Moss acted with bias against her due to gender nonconformity. It is even less clear what facts would indicate Clark took any action on the basis of discriminatory intent. Without more, Evans is unable to establish that Moss and Clark should be stripped of their qualified immunity from her Section 1983 claim.

D. Evans’s Title VII Claim Against GRHS Should Be Dismissed Because It Is Not A Legal Entity Capable Of Being Sued.

“Georgia Regional Hospital is not a legal entity capable of being sued.”

Williamson v. Ga. Dep’t of Human Res., 150 F. Supp. 2d 1375, 1377 (S.D. Ga. 2001). As such, Plaintiff has failed to name and sue a proper defendant on her Title VII claim and GRHS must be dismissed from the lawsuit, along with all Title VII claims asserted against it.

E. Plaintiff Fails To Plead Sufficient Facts To Support Her Claims of Unlawful Sex Discrimination.³

The crux of all of Plaintiff’s claims is that she was unlawfully discriminated against on the basis of her sex. Whether she asserts Title VII claims against her employer or constitutional claims against the individual Defendants, Evans must plead sufficient facts in her Amended Complaint which would “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550

³ Evans clearly indicates that she is pursuing claims for both a hostile work environment and a discriminatory adverse action under Title VII (Counts I and II), but her claim of sex discrimination under § 1983 (Count III) is less clear. However, because courts use the same framework to analyze claims of sex discrimination under Title VII and § 1983 which are based on the same set of facts, Defendants address Evans’ failure to state a claim for unlawful sex discrimination together. *See Richardson v. Leeds Police Dep’t*, 71 F.3d 801, 805 (11th Cir. 1995) (“In a case such as this alleging disparate treatment, in which § 1983 is employed as a remedy for the same conduct attacked under Title VII, ‘the elements of the two causes of action are the same.’”) (quoting *Cross v. State of Ala.*, 49 F.3d 1490, 1508 (11th Cir. 1995)).

U.S. at 570). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’” *Id.* (quoting *Twombly*, 550 U.S. at 555). This plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at 557). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (internal citations omitted). In her Amended Complaint, Evans fails to state facts sufficient to support her claim that she was subject to a hostile work environment or that she suffered an adverse action on the basis of unlawful sex discrimination.

Viewed through the *Iqbal/Twombly* lens, the majority of Evans’ alleged “facts” are less than “threadbare.” Indeed, many are simply conclusory accusations. (*See* Am. Compl., ¶¶ 11-13, 21, 23, 25, 27, 30.) Evans alleges that, prior to his becoming her supervisor, Moss asked her one time if she were dating a female nurse. (Am. Comp., ¶ 10.) Evans then asserts in a conclusory fashion that Moss “began a systematic campaign of harassment and sabotage to force [her] to quit.” (*Id.* ¶ 11). Evans provides no facts or details to support the allegations of a “systematic campaign” or Moss’s supposed harassment. Evans further alleges that

Moss passed over her for the position of Star Corporal, an allegation supported only by a conclusory statement of bias against her. (*Id.*, ¶ 12.) Evans further complains about being placed on the nightshift and, without any factual support, concludes that this schedule change was to prompt her to quit her job. (*Id.*, ¶ 13.) Finally, Evans alleges that Moss informed her that she could “not hang out” in an office and physically slammed an office door into her, but she does not include any facts which would indicate that this incident was in any way related to her sex, gender, or status as a gender non-conforming female. In fact, Evans fails to allege any facts which would link any of the aforementioned events to any type of unlawful bias.

Evans’s allegations against Clark are even more scant. According to Evans, Clark failed to substantiate or otherwise act on Evans’ complaints about Moss. Evans does not allege that Clark personally subjected her to any type of discrimination or that Clark took any adverse employment action against her. Notably, Evans doesn’t even bother with the pretense of alleging that Clark’s inaction was motivated by her bias against Plaintiff for gender nonconformity. As explained in more detail below, these allegations are insufficient to establish claims for a hostile work environment or unlawful disparate treatment.

1. Evans fails to state facts sufficient to state a claim for a discriminatory hostile work environment.

The facts in Evans's Amended Complaint are insufficient to state a claim for a hostile work environment. (*See* Am. Compl., ¶¶ 9-21, 27-30.) In order to state a claim for a hostile environment, Evans must allege facts which support that (1) she belongs to a protected group; (2) she has been the subject of unwelcome harassment; (3) that the harassment was based on her gender; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment and create a discriminatory abusive working environment; and (5) that the employer was responsible for such environment under a theory of vicarious or direct liability. *Adams v. Austal, U.S.A., LLC*, 754 F.3d 1240, 1248-49 (11th Cir. 2014). Evans must show that the work environment was both subjectively and objectively hostile. *Id.* at 1249. The objective severity of the harassment is viewed from the perspective of a reasonable person in Evans' position. *Davis v. Auburn Bank*, 2016 U.S. Dist. LEXIS 51425 *31-32 (M.D. Ala. Apr. 18, 2016).

To evaluate whether a work environment is objectively hostile, a court will consider the following (1) frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance.

Id. at *32, citing *Allen v. Tyson Foods*, 121 F.3d 642, 647 (11th Cir. 1997).

Evans's Complaint fails to plead sufficient facts to plausibly meet the fourth element of the hostile environment *prima facie* case—that her work environment was sufficiently severe or pervasive so as to alter the terms and conditions of her employment. Evans's vague allegations of harassment fail to speak to the frequency of the hostile conduct, to the objective severity of the alleged conduct, to whether the conduct was physically threatening, humiliating, or to whether it unreasonably interfered with the daily performance of her job duties. At most, Evans has alleged that Moss once asked her if she were dating a female nurse, that he promoted another employee instead of her, and that he once tried to shut a door when he did not want her in a particular office. The complaint includes no allegations of sexually charged, offensive, or homophobic language or actions – from Moss or anyone else at Georgia Regional Hospital. Even if the Court were to assume that a single instance of Moss closing a door while Evans stood in the threshold was sufficiently severe as to create an actionable hostile work environment, that event is not alleged to be in any way linked to a discriminatory attitude or intent. “Title VII . . . does not prohibit harassment alone, however severe and pervasive’ unless it is based on some other protected status.” *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1301 (11th Cir. 2007).

Because the Amended Complaint does not state a claim for a discriminatory hostile work environment under the *Iqbal/Twombly* standard, Evans's claims to

that effect should be dismissed for failure to state a claim upon which relief can be granted.

2. Evans fails to state facts sufficient to state a claim that she suffered an adverse employment action on the basis sex discrimination.

Similarly, the court should still dismiss Evans's claim of "constructive discharge" because she has failed to plead facts sufficient to establish this type of adverse action. The gravamen of Evans' Amended Complaint is that Moss's actions forced her to quit her job on October 11, 2013, amounting to a constructive discharge. "Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job." *Bryant v. Jones*, 575 F.3d 1298-99 (11th Cir. 2009). "A plaintiff must show 'the work environment and conditions of employment were so unbearable that a reasonable person in that person's position would be compelled to resign.'" *Id.* (citing *Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350, 1363 (11th Cir. 1994)). "Establishing a constructive discharge claim is a more onerous task than establish a hostile work environment claims." *Id.* (citing *Landgraf. v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992) (holding that "[t]o prove constructive discharge, the plaintiff must demonstrate a greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment.")).

Inasmuch as Evans has failed to state a claim for hostile work environment, discussed *supra*, she failed to support her Amended Complaint with facts sufficient to establish constructive discharge. Approximately three and a half months passed between the last alleged act of Moss on July 3, 2013, and Evans' decision to resign on October 11, 2013. (Am. Compl., ¶¶ 14, 19). This passage of time alone is sufficient to establish that the conditions for Evans were not "so intolerable" that a reasonable person in her position would be required to leave her position. Without more factual support, Evans's Amended Complaint fails to plausibly state a Title VII claim for constructive discharge under the *Iqbal/Twombly* standard, subjecting her claim in Count 2 to dismissal for failure to state a claim upon which relief can be granted.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion to Dismiss Plaintiff's Complaint In Lieu of Answer, dismiss Plaintiff's claims in their entirety, tax all costs against Plaintiff, and grant any and all other relief that this Court deems just.

Respectfully submitted, this 29th day of January, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2018, I electronically filed the foregoing **BRIEF IS SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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