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

JAMEKA K. EVANS	*	
	*	
Plaintiff,	*	
	*	
v.	*	Civil Action No:
	*	4:15-CV-00103-JRH-GRS
GEORGIA DEPARTMENT OF BEHAVIORAL HEALTH AND DEVELOPMENTAL DISABILITIES, and LISA CLARK, In her official capacity, and CHARLES MOSS in his individual Capacity,	*	
	*	
Defendants.	*	

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT IN LIEU OF ANSWER

COME NOW the Georgia Department of Behavioral Health and Developmental Disabilities ("GDBHDD"), 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 Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint in Lieu of Answer pursuant to Rules 12(b)(1), (2), (4), (5) and/or (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 Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint in Lieu of Answer filed herewith.

Respectfully submitted, this 2nd day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, I electronically filed the foregoing **DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND 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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	*	
Defendants.	*	

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT IN LIEU OF ANSWER

COME NOW, Georgia Department of Behavioral Health and Developmental Disabilities ("GDBHDD"),[1] 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 Second Amended Complaint In Lieu of Answer. Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(1), (2), (4), (5) and/or (6) of

[1] GDBHDD makes this motion by special appearance, specifically reserving its defenses to service, service of process and personal jurisdiction.

the Federal Rules of Civil Procedure ("FRCP"). In support of their Motion, Defendants show this Court as follows:

I. INTRODUCTION

Plaintiff Jameka Evans filed her Amended and Second Amended Complaints following a two-year procedural history which stemmed from her initial Complaint and culminated in the United States 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"). On September 11, 2017, Plaintiff filed an Amended Complaint adding new claims and a new individual defendant. (Dkt. No. 28) On January 29, 2018, Defendants moved to dismiss Plaintiff's Amended Complaint in Lieu of Answer. (Dkt. No. 41). In response, without Defendants' consent and without leave of Court, Plaintiff filed a Second Amended Complaint, changing only the name of the agency/Defendant from Georgia Regional Hospital Savannah ("GRHS") to GDBHDD.[2]

Defendants now move to dismiss Plaintiff's Second Amended Complaint because this second amendment fails to cure the defects previously raised by Defendants in their Motion to Dismiss the Amended Complaint in Lieu of Answer.

[2] GRHS, as a unit of GDBHDD, is not a separate legal entity subject to suit. *See Williamson v. Ga. Dep't of Human Res.*, 150 F. Supp. 2d 1375, 1377 (S.D. Ga. 2001) ("Georgia Regional Hospital is not a legal entity capable of being sued….").

Further, Plaintiff's substitution of GDBHDD for GRHS as Defendant is insufficient to grant the court personal jurisdiction over GDBHDD without formal service.

Evans first initiated suit on April 23, 2015. Proceeding *pro se* at the time, she 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.[3]

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 Second Amended Complaint in its entirety on the following grounds: (A) the court lacks personal jurisdiction over Plaintiff's Title VII claim against GDBHDD because Plaintiff has not served

[3] Evans filed a petition for a writ of certiorari to the United States Supreme Court on the dismissal of her sexual orientation claim; the petition was denied on December 11, 2017. *Evans v. Georgia Regional Hospital,* Case No. 17-370, 2017 U.S. Lexis 7377 (U.S., Dec 11, 2017).

GDBHDD with process; (B) Plaintiff's Section 1983 claim is time-barred under the two-year statute of limitations; (C) Plaintiff's Section 1983 claim is further barred by the Court of Appeals' mandate, limiting her right to amend the existing Title VII claim; (D) Plaintiff fails to state a claim for relief for unlawful sex discrimination; and (E) Defendants are entitled to qualified immunity from her Section 1983 claim.

II. STATEMENT OF FACTS FROM SECOND AMENDED COMPLAINT[4]

Evans became a full-time employee at GDBHDD in August 2012, as a Facility Safety Officer under Lieutenant Alexander Fields, Jr. (Second Amended Complaint ("Sec. Am. Compl."), ¶ 9 and 10.) 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

[4] 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 Second 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 reserve any and all defenses available to them.

Johnson to the position on the night shift. (*Id.*, ¶ 12.) Moss also reassigned Evans to the night shift, to be supervised by Johnson, whom Evans alleges was a "less senior" GDBHDD 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.*)

In mid-August 2013, Evans attempted to address her alleged mistreatment by Moss with Defendant Clark. (*Id.*, ¶ 15.) 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.) GDBHDD's response to Evans was that

any reported incident that could not be corroborated by a fellow GDBHDD employee would be deemed unsubstantiated, notwithstanding corroboration by non-GDBHDD employees that supported Evans's claim that Moss was seeking to end Evans's employment at GDBHDD. (*Id.*) GDBHDD 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 GDBHDD HR professionals, Plaintiff resigned from employment on October 11, 2013, having concluded that GDBHDD 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)). Here, even accepting Plaintiff's allegations as true, her 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 was 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 original Complaint, the two individual Defendants would not have personally been subject to liability. This Court dismissed the initial Complaint with prejudice, without Plaintiff having served any Defendant. Regardless of whether the individual Defendants had some

knowledge of the lawsuit, they had no notice of personal liability or that their personal assets were in the cross-hairs. Now, through her Amended Complaint and her Second 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. The Court Lacks Personal Jurisdiction over GDBHDD Because Plaintiff Failed to Serve GDBHDD With Process.

Without consent or leave of court, Plaintiff filed her Second Amended Complaint substituting GDBHDD for GRHS as the agency/defendant.[5] Because Plaintiff took no further action to bring GDBHDD into this action, her Second Amended Complaint should be dismissed for insufficient process and insufficient service of process and lack of personal jurisdiction, under Rule 12(b)(2), (4), and (5) of the FRCP. Rule 4 of the FRCP provides that "[t]he plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m)." Fed. R. Civ. P. 4(c) (1). Plaintiff must serve a "State or Local Government" by "delivering a copy of the summons and of the complaint to its chief executive officer; or serving a copy of each in the manner prescribed by that state's law for

[5] A party may only amend a pleading once without the opposing party's written consent or the court's leave. Fed. R. Civ. P. 15 (a) (1). Evans did not request Defendants' consent or move the Court for leave to amend before filing her Second Amended Complaint.

serving a summons or like process on such a defendant." Fed. R. Civ. P. 4(j) (2). Georgia law requires that service on GDBHDD, a "public body," shall be, ". . . to the chief executive officer or clerk thereof." O.C.G.A. § 9-11-4 (e) (5). Thus, a state agency such as GDBHDD must be served with process by delivering a copy of the summons and the complaint to its chief executive officer. Plaintiff has not done so, rendering the Complaint against GDBHDD subject to dismissal for insufficient process, insufficient service of process, and lack of personal jurisdiction.

B. 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 should 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. *Id.* 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 should 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. Parallel avenues of relief are 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) (holding that Plaintiff's Section 1983 claim was not tolled by the filing of a Title VII administrative charge with the EEOC because those claims were separate, distinct, and independent from the claims brought pursuant to Title VII). Evans is therefore barred from pursuing her separate and distinct Section 1983 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. 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. 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, but failed to do so.[6]

[6] 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 against those individuals. Where a party fails to object to the findings in a

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, claims which should have been brought against them 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' Amended Complaint, had no reason to believe that Evans's 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.

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

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

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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).

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.

D. Plaintiff Fails To Plead Sufficient Facts To Support Her Claims of Unlawful Sex Discrimination.[7]

[7] 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's 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

The crux of all of Plaintiff's claims is that she was unlawfully discriminated against on the basis of her sex. Whether under Title VII or Section 1983, Evans must plead sufficient facts in her Second Amended Complaint which would "state a claim to relief that is plausible on its face." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 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.

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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)).

Viewed through the *Iqbal/Twombly* lens, the majority of Evans's facts are simply conclusory accusations. (*See* Sec. 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. (*Id*., ¶ 10.) Then, without any supporting facts, Evans asserts in a conclusory fashion that Moss "began a systematic campaign of harassment and sabotage to force [her] to quit." (*Id.* ¶ 11). 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. Clark allegedly failed to substantiate or otherwise act on Evans's 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. Absent are any allegations that Clark's inaction was motivated by her bias against Plaintiff for gender nonconformity. 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 Second Amended Complaint are insufficient to state a claim for a hostile work environment. (*See* Sec. 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's 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 Second Amended 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. 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). Under the *Iqbal/Twombly* standard, Evans's hostile work environment claim should be dismissed for failure to state a claim upon which relief can be granted.

2. Evans fails to assert 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's Second Amended Complaint is that Moss' 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)). Plaintiff must meet a high bar to establish a constructive discharge claim, a more onerous task than to establish a hostile work environment claim. *Id.* (citing *Landgraf. v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992)).

Through her facts as pled, Evans cannot meet the high bar of establishing a constructive discharge. Approximately three and a half months passed between the

last alleged act of Moss on July 3, 2013, and Evans's decision to resign on October 11, 2013. (Sec. 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 Second 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.

E. 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"). In "only the rarest of cases [will] 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 resolved "at the earliest possible stage in litigation" because it is "an immunity from suit." *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 Seconded Amended Complaint fails to allege any actions taken by Moss or Clark 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." (Sec. 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. (*Id.*, ¶¶ 12-14.) Evans's 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. (*Id.*, ¶ 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 is on Evans to show that their actions violated her constitutional rights under clearly established law. *See Crosby* 394 F.3d 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.

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 exits, 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 *supra* in subpart D, Evans's Seconded 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 because 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. (Sec. 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.[8]

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 Second 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,

[8] To the extent Evans attempts to impose liability on Clark by way of *respondeat superior*, "[i]t is well established in [the Eleventh Circuit] that supervisory officials are not liable under § 1983 for the unconstitutional acts of their subordinates on the basis of *respondeat superior* or vicarious liability." *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999) (citations omitted).

Evans is unable to establish that Moss and Clark should be stripped of their qualified immunity from her Section 1983 claim.

V. CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion to Dismiss Plaintiff's Second Amended 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 2nd day of March, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2018, I electronically filed the foregoing **BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT IN LIEU OF ANSWER** 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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