

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

JAMEKA K. EVANS,

Plaintiff,

v.

GEORGIA DEPARTMENT OF
BEHAVIORAL HEALTH AND
DEVELOPMENTAL DISABILITIES, and
LISA CLARK, in her official capacity, and
CHARLES MOSS in his individual
capacity,

Defendants.

Civil Action No.

4:15-CV-00103-JRH-GRS

**PLAINTIFF’S OPPOSITION TO
DEFENDANTS’ MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

INTRODUCTION

Plaintiff Jameka K. Evans (“Plaintiff”) brings claims against her former employer, Georgia Department of Behavioral Health and Developmental Disabilities (“GDBHDD”); Lisa Clark, the Director of Risk Management at Georgia Regional Hospital in Savannah (“Hospital”)¹, and Charles Moss, Plaintiff’s former supervisor and Facility Security Chief, for violations of her right

¹ The Hospital is a state-funded hospital operated by Defendant GDBHDD and the location at which Plaintiff worked. Dkt. 52, ¶ 6.

to a workplace free from unlawful sex-based discrimination. Clark is sued in her official capacity, and Moss is sued in his individual capacity. Under the legal authorities cited herein, Plaintiff has sufficiently plead claims against GDBHDD for discrimination and hostile work environment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5 (“Title VII”) and against Clark and Moss pursuant to 42 U.S.C. § 1983 (“Section 1983”) for unlawful discrimination that denied her equal protection of the law. This Court should deny Defendants’ Motion to Dismiss in its entirety and permit Evans to proceed with her claims.

PROCEDURAL BACKGROUND

On April 23, 2015, Evans filed, in *pro per*, her Complaint under Title VII, alleging that, during her employment at the Hospital as a security officer, she experienced discrimination against her based on her sex, including harassment and assault. Dkt. 1, p. 3. Plaintiff utilized a form, which provided options for three legal claims for employment discrimination; Evans selected and alleged a violation of Title VII against all Defendants. *Id.*, p. 2. The form did not provide the option to select a claim pursuant to 42 U.S.C. § 1983 alleging violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.*

On September 10, 2015, the magistrate judge “*sua sponte* screened [Evans’s] complaint, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii)” and “issued a

report and recommendation (‘R&R’).” *See Evans v. Georgia Reg’l Hosp.*, 850 F.3d 1248, 1252 (11th Cir.), cert. denied, 138 S. Ct. 557 (2017); Dkt. 4. The R&R concluded that Plaintiff’s case should be dismissed with prejudice. Dkt. 4, p. 12.

On October, 23 2015, Evans timely objected to the R&R. Dkt. 9. “In particular, Evans argued that her gender non-conformity and sexual orientation discrimination claims were actionable under Title VII as sex-based discrimination.” *See Id.; Evans*, 850 F.3d at 1252. “She also argued that, as a pro se litigant, she should have been permitted to amend her complaint, . . . noting that she had reserved her right to amend in her complaint.” *See Id.* Simultaneously, Lambda Legal, appearing as *amicus curiae* in support of Plaintiff, filed a brief detailing problems with the R&R, including arguing “that Evans was entitled to leave to amend, because any necessary amendment would not be futile given Evans’s colorable claims.” *See Id.* at 1253; Dkt. 10, 11.

On October 29, 2015, the Court issued an Order concurring with the R&R, dismissing the case with prejudice, and appointing Lambda Legal as counsel for Plaintiff on appeal. *See* Dkt. 12.

On March 10, 2017, the Eleventh Circuit issued its ruling in Plaintiff’s appeal. *Evans*, 850 F.3d at 1248-58. Therein, the circuit court specifically acknowledged that Plaintiff raised four issues on appeal, one issue which she lost

by waiver (retaliation), one issue which she lost on the merits (sexual orientation discrimination). *Id.* at 1253, 1255-58. And two issues which she won on the merits, necessitating vacatur and remand, specifically “that the district court erred in dismissing her claim that she was discriminated against for failing to conform to gender stereotypes” and “that the district court erred in failing to allow her leave to amend her complaint, because pro se litigants should be allowed to amend their complaints when they have a viable argument.” *Id.* at 1253. On the latter issue, the Eleventh Circuit explained its rationale: “Evans, a *pro se* litigant, has not previously amended her complaint, and it cannot be said that any attempt to amend would be futile with respect to her gender non-conformity claim **and possibly others.**” *Id.* at 1254 (emphasis supplied).

On remand, this Court extended the time to file an amended complaint to September 11, 2017, pursuant to Plaintiff’s request; and Plaintiff timely filed an Amended Complaint. Dkt. 26, 27, 28. After service of the complaint and consent motion regarding time to respond thereto, Defendants filed a Motion to Dismiss Plaintiff’s Amended Complaint in Lieu of Answer, on January 29, 2018. Dkt. 41.

On February 20, 2018, Plaintiff filed a Second Amended Complaint, correcting the identification of the legal entity that had employed Plaintiff. Dkt. 52. On March 2, 2018, Defendants filed the instant Motion to Dismiss the Second

Amended Complaint in Lieu of Answer. Dkt. 53. On March 8, 2018, Plaintiff served Defendant GDBHDD with the Summons and Second Amended Complaint. Dkt. 57.

LEGAL STANDARD

“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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. The court gives the plaintiff the benefit of all reasonable factual inferences. *See Hazewood v. Foundation Financial Group, LLC*, 551 F.3d 1223, 1224 (11th Cir.2008) (per curiam). A plaintiff need not include “detailed factual allegations” in order to satisfy Rule 8(a)(2). *Twombly*, 550 U.S. at 555. Federal pleading rules “do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.” *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346 (2014) (per curiam).

ARGUMENT

In this brief, Plaintiff attempts to cut through a confusing jumble of assertions in Defendants' motion, wherein they ignore the specificity of the allegations regarding the discrimination Plaintiff endured; misrepresent the appellate opinion in this case, misapprehend some of the most basic legal concepts of relation back of claims and qualified immunity (to name a few), and fail to take "yes" for an answer with respect to their long-running crusade that Plaintiff name the proper employing defendant. The motion should be denied in full.

I. DEFENDANT GDBHDD IS PROPERLY A DEFENDANT BEFORE THIS COURT.

Plaintiff is at a loss to understand Defendants' arguments about GDBHDD, considering that it was Defendants who argued to this Court and the Supreme Court that the Hospital was not the proper employer defendant. Dkt 41-1 at 19; *Evans v. Georgia Regional Hosp.*, U.S. S.Ct. No. 17-370, Response to Petition for Writ of Certiorari, Nov. 9, 2017, at 6. Plaintiff acceded to this legal formality, and apparently Defendants will not take "yes" for an answer.² Plaintiff has now named and served the entity that Defendants have pointed to as the correct employer.

² In its March 2 motion, Defendants argued that Plaintiff's claims against GDBHDD should be dismissed because she has not served GDBHDD with process of the complaint naming GDBHDD that had been filed 11 days earlier. Dkt. 53. What was then an obviously unripe argument (see Fed. R. Civ. P. 4) became a

And GDBHDD is before this Court properly. In addition to amended complaints filed pursuant to leave of court, like the Amended Complaint that Plaintiff filed September 11, 2017, every plaintiff enjoys the right to amend once as a matter of right within 21 days of a motion to dismiss, as Plaintiff did in filing the Second Amended Complaint on February 20, 2018. *See* Fed. R. Civ. P. Rule 15(a)(1); *Barrientos Arita v. Victor's Café, LLC*, No. 15-CV-81269, 2015 WL 12672721, at *1 (S.D. Fla. Nov. 17, 2015) (citing *Swanigan v. City of Chicago*, 775 F.3d 953, 963 (7th Cir. 2015) (“Because no responsive pleading or motion to dismiss had been filed, the 21-day clock under Rule 15(a)(1)(B) never started and [Plaintiff] retained the right to amend his complaint.”)). Plaintiff filed her Second Amended Complaint – her one amendment as a matter of right – 21 days after Defendants’ Motion to Dismiss, consistent with Rule 15(a)(1)(B).³

moot argument when service on GDBHDD was effected the following week. *See* Dkt. 57.

³To the extent that this Court disagrees, Plaintiff respectfully requests that this Court grant leave *nunc pro tunc* to permit the filing of the Second Amended Complaint. *See* Fed. R. Civ. P. 15(a) (leave to amend “shall be freely given when justice so requires”; *see also* *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir.2001); *see also* *Foman v. Davis*, 371 U.S. 178, 182, (1962) (“If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject for relief, he ought to be afforded an opportunity to test his claim on the merits.”)).

II. PLAINTIFF’S SECTION 1983 CLAIM IS TIMELY AND PROPER.

Defendants advance the frivolous argument that Plaintiff’s Section 1983 claim should be dismissed. This argument is based on Plaintiff’s misleading, selective citation of the Court of Appeals’ opinion in this case, and Defendants’ complete ignoring of the relation back doctrine and controlling authority authorizing the relation back of employment-related claims under the same facts brought under different civil rights statutes.

A. The Section 1983 Claim Relates Back to the Initial Complaint, and Thus Is Timely.

Defendants’ claim that Plaintiff’s Section 1983 claim is time barred is without merit because the Section 1983 claim – based upon the same facts at the Title VII claim – relates back to the filing of the Complaint under controlling legal authorities. *See Sessions v. Rusk State Hosp.*, 648 F.2d 1066, 1070 (5th Cir. 1981) (citing Fed. R. Civ. P. 15(c)) (pre-split case) (“[i]f the claim asserted in the amendment arises out of the conduct or occurrence set forth in the original complaint, the amendment is given retroactive effect to the date the original complaint was filed”); *see also Williams v. United States*, 405 F.2d 234, 236 (5th

Cir. 1968) (the relation back doctrine under Rule 15(c) is “liberally applied” by the courts).⁴

In cases like this, where a newly added claim is “based on the discrimination originally charged in the complaint, allowing it to relate back to the date of filing” for the previously asserted claim “works no hardship on the defendant for the original complaint furnished adequate notice of the nature of the suit.” *Sessions*, 648 F.2d at 1070. In *Sessions*, the court ruled that the plaintiff’s Title VII and Section 1981 claims “were based on identical facts and identical allegations of discrimination,” and thus, the latter-filed Title VII claim “was timely filed.” *Id.*; *see also Kapral v. GEICO Indem. Co.*, No. 8:13-CV-2967-T-36EAJ, 2015 WL 12839265, at *5 (M.D. Fla. Sept. 9, 2015).⁵ Indeed, rather than provide a reason

⁴ Defendants also assert, in a footnote, that Evans waived her right to name Moss and Clark under Section 1983 because she did not object to the “R&R’s dismissal of the individual defendants” under Title VII. Dkt. 53-1, fn. 2. This argument is not only meritless but is another attempt to punish Plaintiff for doing exactly the right thing. Plaintiff initially brought one claim, under Title VII. The R&R ruled correctly that no individual liability lies under that statute. There was simply nothing to object to; all that could be done was ask for leave to amend so that a valid claim could be brought against individual defendants, and that is exactly what Evans did, a request that the Eleventh Circuit specifically held should have been granted. *See Evans*, 850 F.3d at 1257.

⁵ Plaintiff’s Section 1983 claim also relates back under the applicable Georgia statute, O.C.G.A. § 9-11-15(c). That statute “is very similar to” Rule 15(c)(1), and provides that where a claim “arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates

for ruling against plaintiff, Defendants' acknowledgement that her Section 1983 claim is based on "the same set of facts"⁶ as her Title VII claim, establishes definitively under controlling law that the Section 1983 claim relates back to the initial complaint and thus is timely.⁷

B. The Amendment Properly Added a Section 1983 Claim.

Defendants argue that Evans "did not have the right" to amend her Complaint to add a Section 1983 claim. Dkt. 53-1, p. 12. But Defendants selectively cite from the Eleventh Circuit opinion. The Court of Appeals clearly treated the issue of Plaintiff's right to amend as a separate issue from the validity and sufficiency of the gender stereotyping claim. *See Evans*, 850 F.3d at 1252 (in

back to the date of the original pleading." *Presnell v. Paulding Cty., Ga.*, 454 F. App'x 763, 767 (11th Cir. 2011) (citation omitted); *see also Jensen v. Yong Ha Engler*, 317 Ga. App. 879, 883 (2012) (the relation back doctrine applies to claims involving "the same general fact situation" as the initial complaint) (citation omitted) (italics in original). Like Rule 15(c), O.C.G.A. § 9-11-15(c) is also "liberally construed." *See Cartwright v. Fuji Photo Film U.S.A., Inc.*, 312 Ga. App. 890, 894 (2011).

⁶ See Dkt. 53-1, n.7.

⁷ For their contrary position, Defendants rely exclusively on *Johnson v. Ry. Exp. Agency, Inc.*, 421 U.S. 454, 465 (1975), reflecting their complete misunderstanding of the relation back doctrine. *Johnson* is inapposite because the issue was whether or not the limitations period on the plaintiff's Section 1981 claim was tolled based on the pendency of administrative proceedings; the Court never mentions the relation back doctrine of Federal Rule of Civil Procedure 15.

her objections to the Magistrate’s R&R, “She also argued that, as a *pro se* litigant, she should have been permitted to amend her complaint . . .”); *id.* at 1253

(“Finally, Evans argues that the district court erred in failing to allow her leave to amend her complaint, because *pro se* litigants should be allowed to amend their complaints when they have a viable argument.”). In ordering that Plaintiff have the leave to amend that she should have been given initially, the Court of Appeals expressly decreed that the permitted amendment could address claims “other[]” than the gender non-conformity claim under Title VII: “Here, Evans, a *pro se* litigant, has not previously amended her complaint, and it cannot be said that any attempt to amend would be futile with respect to her gender non-conformity claim *and possibly others.*” *Evans*, 850 F.3d at 1254 (emphasis added). This ruling was not by happenstance; Plaintiff specifically argued on appeal that “While it is true that no Title VII claims lies against [the individual defendants], the unlawfulness of discrimination based on gender non-conforming appearance and demeanor is so well-established that Evans could allege Section 1983 claims against them in their individual capacities, and she should be allowed to do so.” *Evans v. Georgia Regional Hosp.*, 11th Cir NO. 15-15234, Opening Brief of Appellant, Jan. 7, 2016

at 67.⁸ In sum, the leave to amend granted by the Court of Appeals encompassed the adding of the Section 1983 claim.⁹

III. PLAINTIFF HAS ALLEGED DISCRIMINATION WITH SUFFICIENT SPECIFICITY.

Defendants attempt to sweep under the rug the irrefutable point that the complaint alleges with great specificity not just a *plausible* adverse employment action based on sex, but indeed a not-required *prima facie* case. Plaintiff similarly alleges with specificity the actions taken by Moss to sabotage her job, after his discriminatory promotion of a less-qualified candidate did not initially succeed in driving Plaintiff to quit.

A. Plaintiff's Adverse Employment Action Claim is Properly Pleaded.

To allege a plausible sex discrimination claim, Plaintiff is not required to “allege facts sufficient to make out a classic *prima facie* case, but must simply

⁸ It is puzzling why Defendants cite to *Italiano v. Jones Chemicals, Inc.*, No. 95-1161-CIV-T-17A, 1997 WL 118426, at *3 (M.D. Fla. Feb. 21, 1997), which concerns whether leave to amend allows a party “to substantially revise non-related portions of the original Complaint.” *Id.* Plaintiff is not engaging in a substantial revision of non-related portions of the complaint; instead, Defendants acknowledge that Section 1983 claim and Title VII claim are “based on the same set of facts” and analyzed under the “same framework.” *See* Dkt. 53-1, n.7.

⁹ Of course, this Court’s order of July 24, 2017 is not contrary to the Court of Appeals ruling; indeed, this Court specifically “ordered that the Mandate of the Eleventh Circuit is made the Order of this Court.” Dkt. 23.

provide enough factual matter to plausibly suggest intentional discrimination.”

Evans v. Georgia Reg’l Hosp., 850 F.3d 1248, 1253 (11th Cir.), cert. denied (2017) (citation omitted).¹⁰

But contrary to Defendants’ assertion that her adverse employment action claim is “supported only by a conclusory statement of bias against her,” Plaintiff in fact alleges a prima facie case, despite not being required to. See Dkt. 53-1 at 16. Plaintiff specifies the exact position “star corporal,” and the exact illicit motivation: her being a gender-nonconforming lesbian, as contrasted with who got the job: Shenika Johnson, a feminine, gender-conforming woman romantically interested in men. Plaintiff also specified why she was more qualified than Johnson, given that she had been working at the Hospital for a year prior to Johnson’s tenure there. Dkt. 52, ¶¶ 11-12; 23.

Thus, Plaintiff has provided more than “enough factual matter to plausibly suggest” that her gender non-conformity led to the alleged adverse employment actions, “nudg[ing]” her claim from conceivable to plausible. *Evans*, 850 F.3d at 1254; *Twombly*, 550 U.S. at 570. See *Burke–Fowler v. Orange Cty.*, 447 F.3d

¹⁰ As Defendants concede, Plaintiff’s Title VII and Section 1983 claims, based upon the same set of facts, are subject to the same legal analysis. See Dkt 53-1 at 14-15 n.7; see also *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016).

1319, 1323 (11th Cir. 2006) (a *prima facie* case consists of the plaintiff's membership in a protected class, the specific adverse employment action, the similarly-situated person outside her protected class who got the job, and the plaintiff's superior qualifications).¹¹

By setting forth facts establishing the elements of a *prima facie* discrimination claim, Plaintiff has certainly met the burden of sufficiently pleading her claim. Indeed, courts routinely hold that allegations much like Evans's meet the pleading requirements. *See Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004) (“[h]aving alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.”); *see also Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (“As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes, Plaintiff has met his [pleading] burden”); *see also Lucas v. Vee Pak, Inc.*, 68 F. Supp. 3d 870, 878 (N.D. Ill. 2014) (plaintiffs need only allege

¹¹ The “precise requirements of a *prima facie* case can vary depending on the context,” and through progression of discovery. *See Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002).

they “tried to get work” and “were not hired,” where equally or less qualified applicants outside their protected category were); *cf. Uppal v. Hosp. Corp. of Am.*, 482 F. App’x 394, 396 (11th Cir. 2012) (discrimination claim not stated by only a “repeated allegation that ‘[o]ther similarly situated employees outside Plaintiff’s protected classes’ engaged in similar misconduct, but were not disciplined” where there was “not even a brief description of how the alleged comparator employees were outside of her protected class.”).

B. Plaintiff’s Hostile Work Environment Claim is Properly Pleaded

At the pleading stage, Plaintiff need only plausibly plead that she was subjected to a hostile work environment because of her sex. *See Short v. Immokalee Water & Sewer Dist.*, 165 F. Supp. 3d 1129, 1142 (M.D. Fla. 2016); *see also Sisco v. DLA Piper LLP*, 833 F. Supp. 2d 133, 140-41 (D. Mass. 2011) (citing *Twombly*, 550 U.S. at 547) (“it is not necessary for a plaintiff to plead facts supporting each element of a claim, provided that whatever facts are pled allow the Court to plausibly infer liability”). Evans easily satisfied this threshold. Evans alleges that, because of her failure to conform to gender norms, Defendants took adverse actions against her – namely, failure to promote, harassment, physical assault, sabotage, and life-altering schedule changes intended to make her quit, all

of which culminated in her constructive discharge. Dkt. 52, ¶¶ 11-40. Plaintiff alleges that Moss asked her whether she was dating a female nurse, a question unrelated to any legitimate employment purpose. *Id.* at ¶ 10. Immediately upon becoming her supervisor, Plaintiff alleges that Moss began a campaign of harassment and sabotage against her, based on her failure to live up to Moss's notions of how a woman should conduct herself. *Id.* at ¶ 11. Plaintiff has sufficiently alleged that Defendants' view of her led to the adverse actions, specifically that they perceived Plaintiff as a masculine, gender-nonconforming lesbian who failed to live up to expectations of appropriate female behavior and appearance. *See Davis v. Vermont, Dep't of Corr.*, 868 F. Supp. 2d 313, 324 (D. Vt. 2012) (the allegations "allow the Court to reasonably infer that abuse directed at Plaintiff reflected the harassers' belief that [s]he did not act in conformity with [Defendants'] gender norms" and support "the reasonable inference that the abuse was motivated by a perception that [Plaintiff] was not conforming to gender stereotypes"). Defendants' inquiries into Plaintiff's sexual orientation, connected to her gender non-conformity, were serious and not "simple teasing" – they

demonstrate the basis of Defendants' actions against her due to her failure to conform to gender norms.¹²

Evans alleges that Moss targeted her as the only employee he reassigned from an 8-hour daylight shift to a less favorable 12-hour nighttime shift, and that Moss and Johnson intended and believed that the shift change would force Plaintiff to quit. *Id.* at ¶13. Plaintiff alleges that Moss repeatedly and intentionally slammed his door into Plaintiff, and that this assault was so severe as to alter the terms of Plaintiff's employment. *Id.* at ¶¶ 14; 28. Courts have held that allegations regarding sabotage, punitive scheduling, and constructive discharge – which Plaintiff has alleged – are sufficient to meet the pleading requirements. *See, e.g., Hicks v. Baines*, 593 F.3d 159, 170 (2d Cir. 2010) (reversing dismissal of plaintiffs' claims, finding that allegations of “workplace sabotage and punitive scheduling” sufficiently alleged adverse actions in Section 1983 case); *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (a broad range of actions can

¹² To the extent that Defendants *also* harbored discriminatory animus because of Evans's sexual orientation, that does not detract from the fact that Evans was likewise harassed for her “failure to conform to gender stereotypes.” *See Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 292 (3d Cir. 2009) (“There is no basis in the statutory or case law to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim while an effeminate homosexual man may not.”).

“contribute to a hostile work environment,” including “work sabotage,” less desirable shifts or assignments intended to “force [the employee] to quit,”); *Raniola v. Bratton*, 243 F.3d 610, 619-20 (2d Cir. 2001); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092, 1108 (S.D. Ga. 1995) (allegations including that supervisor physically hit the plaintiff and scheduled him “for the most undesirable shifts” and “wanted to force him to quit” could be construed as “hostile, intimidating or threatening”).

Plaintiff also alleges facts that affix responsibility on GDBHDD and Lisa Clark in her official capacity. Plaintiff alleges that she attempted to address this mistreatment by Moss with GDBHDD personnel in charge at the Hospital, including Defendant Clark, but Clark failed to take any action to address the failure to promote, shift change, or physical assault. *Id.* at ¶¶ 15-16. Evans alleges that she submitted a written complaint to Defendant’s Human Resources (“HR”) department and cooperated in the resulting investigation, detailing the discriminatory personnel actions and physical and verbal harassment levelled against her, both by Moss and at his behest, including the assault. *Id.* at ¶¶ 15-16. Plaintiff alleges that GDBHDD made clear in writing that it would not take any remedial steps and ratified and condoned Moss’s behavior and mistreatment. *Id.* at ¶15-17. Evans alleges that GDBHDD personnel responsible for the investigation

failed to address the mistreatment and, instead of addressing her serious concerns, asked Plaintiff if she was a “homosexual,” prompting Plaintiff to confirm that it was apparent from her masculine appearance and presentation that she is (a lesbian). *Id.* at ¶18. Plaintiff alleges that, after several attempts to seek help and meaningfully redress these actions with Clark and GDBHDD, and seek protection from further incidents, she reasonably concluded that GDBHDD would not act regarding the adverse actions, redress past incidents of physical or verbal harassment, or protect her from future incidents. *Id.* at ¶19. As alleged, Plaintiff saw no other option but to leave her employment on October 11, 2013, as she could not remain in such a position any longer despite her best efforts to rectify the situation. *Id.*

Defendants argue that too much time elapsed between the harassment Plaintiff endured and her quitting to support a constructive discharge claim. *See* Dkt. 53-1, p. 20. Plaintiff’s allegations certainly support a finding of a hostile work environment that would lead a reasonable person to have to quit, *i.e.*, a constructive discharge. *See Parker v. D.R. Kincaid Chair Co.*, No. 5:10CV97-V, 2011 WL 3347905, at *8 (W.D.N.C. Aug. 2, 2011) (plaintiff “pleaded sufficient facts to plausibly demonstrate both requisite elements of a Title VII constructive discharge claim,” namely deliberateness of the employer’s actions and intolerability of the

working conditions); *see also* *Bakhit v. Safety Markings, Inc.*, 33 F. Supp. 3d 99, 107 (D. Conn. 2014) (plaintiff sufficiently alleges constructive discharge “especially” where, as here, plaintiff makes multiple complaints and the hostility fails to abate). Defendants’ concerns are misplaced at the pleading stage.¹³ *See, e.g. Hand v. Univ. of Alabama Bd. of Trustees*, No. 7:17-CV-00810-RDP, 2018 WL 372310, at *3 (N.D. Ala. Jan. 11, 2018) (rejecting employer’s similar claim and noting that “[w]hile this incident occurred *a few years* prior to Plaintiff’s demotion, it suggests there is circumstantial evidence” of discrimination”) (emphasis added) (citing *Castillo v. Allegro Resort Marketing*, 603 Fed. App’x 913, 917-19 (11th Cir. 2015) (reversing a district court’s dismissal of a Title VII claim where discovery could yield circumstantial evidence of intentional discrimination)). This is especially so, given that Plaintiff’s hostile work environment claim should survive whether or not there is an eventual finding of constructive discharge. *Winspear v. Community Dev., Inc.*, 574 F.3d 604, 608 (8th Cir. 2009).

¹³ “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 1281, 1298 (11th Cir. 2009). Plaintiff has sufficiently plead that her working conditions were so unbearable that they would compel a reasonable person to resign. *Id.*; *see* Dkt. 52, ¶¶ 11-19.

IV. DEFENDANTS MOSS AND CLARK ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Defendants have no plausible claim for qualified immunity. It is hornbook law that one sued in his or her official capacity, like Lisa Clark, is not entitled to qualified immunity. And the sufficiency of the allegations regarding gender stereotyping discrimination prevent Charles Moss from being granted qualified immunity, given that Plaintiff's right to be free from gender stereotyping discrimination in state employment is a proposition so definitively established years ago that it prompted reversal of the judgment against Evans on that claim.

Defendant Clark is not entitled to qualified immunity because she was sued in her official capacity only. *Kentucky v. Graham*, 473 U.S. 159, 167 (1985) (“The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, qua entity, may possess, such as the Eleventh Amendment.”); *see generally Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir.2002) (qualified immunity only protects government officers sued in their *individual* capacities where their conduct does not violate clearly established rights).

Moss also is not entitled to qualified immunity. In assessing a defendant's entitlement, first, “a court must decide whether the facts that a plaintiff has alleged

show the defendant’s conduct violated a constitutional right”; and second, “the court must decide whether the right was clearly established.” *Randall v. Scott*, 610 F.3d 701, 715 (11th Cir. 2010) (citation omitted); *see also Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011) (citations omitted). Notably, no “heightened pleading standard” is required for Section 1983 claims against individuals. *Randall*, 610 F.3d at 714. To constitute “clearly established law,” the law need be “sufficiently established so as to provide public officials with fair notice that the conduct alleged is prohibited.” *Id.* at 715 (citation omitted).

As explained *supra*, Plaintiff has sufficiently alleged facts to show that Defendants’ conduct violated her constitutional right to be free from sex-based discrimination and harassment. Eleventh Circuit precedent is unambiguous that a state governmental employee has the constitutional right to be free from sex-based discrimination and mistreatment on the basis of gender stereotypes, including because of gender-nonconformity – whether the employee is lesbian, gay, bisexual, or transgender, or not. *Glenn*, 663 F.3d at 1318. The “unlawfulness” of sex-based discrimination was, at all material times, “apparent,” and Defendant Moss was on notice that his conduct, as alleged, was prohibited. *Randall*, 610 F.3d at 715 (citation omitted); *see Smiley v. Alabama Dep’t of Transp.*, 778 F. Supp. 2d 1283, 1301 (M.D. Ala. 2011) (noting “the right to be free from intentional employment

discrimination on the basis of sex” and denying qualified immunity defense); *see also Kelley v. Troy State Univ.*, 923 F. Supp. 1494, 1500 (M.D. Ala. 1996) (the “right to be free from unlawful sex discrimination and sexual harassment in public employment is a well established right”); *see also Braddy v. Fla. Dep’t of Labor & Emp’t Sec.*, 133 F.3d 797, 803 (11th Cir. 1998) (denying the harassing supervisor’s claim for qualified immunity).

Significantly, Defendants do not appear to contest that Plaintiff’s right to be free from unlawful sex discrimination is clearly established. Dkt. 53-1, p. 23. Rather, they quibble that the facts as alleged do not “establish that a violation of her constitutional rights has occurred.” *Id.* But in analyzing Moss’s claim of immunity, the court “need not consider the correctness of [Evans’s] version of the facts, nor even determine whether the [her] allegations actually state a claim.” *Johnson v. Jones*, 515 U.S. 304, 311 (1995) (citation omitted). The Court need only determine “a question of law: whether the legal norms allegedly violated by [Moss] were clearly established at the time of the challenged actions.” *Id.* (citation omitted).

Plaintiff alleges that she was deprived by Moss of a very specific right that is clearly established under *Glenn*: the right to free from gender stereotyping discrimination in state employment. Thus, Defendants’ contrary authority is

inapposite, as it was unclear whether the particular plaintiff enjoyed the right at issue in *Leslie v. Hancock Cty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013) (right of policymaking or confidential employees to be free from retaliation because of speech). And the right to be free from arbitrary, irrational discrimination was deemed too amorphous in *Griffin Indus. v. Irvin*, 496 F.3d 1189 (11th Cir. 2007) to provide fair warning to the defendants of what conduct was prohibited. In sum, under clear Eleventh Circuit precedent, Moss was on notice that his alleged actions violated Evans's right to be free from sex-based discrimination and harassment. *See generally Hope v. Pelzer*, 536 U.S. 730, 731, 739 (2002) (a "materially similar" set of facts is *not* necessary to establish law clearly for qualified immunity purposes and "officials can be on notice that their conduct violates established law even in novel factual situations").

CONCLUSION

For all of the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' Motion in its entirety.

Respectfully submitted,

/s/ Gregory R. Nevins
Gregory R. Nevins, GA Bar No. 539529

Admitted pro hac vice by order of the Court
Lambda Legal Defense and Educ. Fund, Inc.
730 Peachtree Street, NE, Suite 640
Atlanta, GA 30308-1210
Telephone: (404) 897-1880
Fax: (404) 897-1884
gnevins@lambdalegal.org
LEAD COUNSEL

Natalie Nardecchia
Admitted pro hac vice by order of the Court
Lambda Legal Defense and Educ. Fund, Inc.
4221 Wilshire Boulevard, Suite 280
Los Angeles, CA 90010
Telephone: (213) 382-7600
Fax: (213) 351-6050
nnardecchia@lambdalegal.org

W. Gerry Weber, GA State Bar No. 744878
Law Offices of Gerry Weber, LLC
P.O. Box 5391
Atlanta, GA 31107
Telephone: (404) 522-0507
wgerryweber@gmail.com

Attorneys for Plaintiff
Jameka K. Evans

CERTIFICATION OF SERVICE

I hereby certify that on March 16, 2018, I electronically filed the foregoing SECOND AMENDED COMPLAINT with the Clerk of Court using the CM/ECF system, which will automatically send an email notification of this filing to the following attorneys of record:

Katherine Powers Stoff

Dept. of Law
40 Capitol Sq., SW
Atlanta, GA 30334-1300
404-656-6593
Fax: 404-657-9932
Email: kstoff@law.ga.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Courtney Coons Poole

Georgia Department of Law
40 Capitol Square, SW
Atlanta, GA 30334-1300
404-656-3384
Fax: 404-657-9932
Email: cpoole@law.ga.gov
ATTORNEY TO BE NOTICED

So certified this 16th day of March, 2018.

/s/ Gregory R. Nevins
Gregory R. Nevins