

**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.

*

**REPLY 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 Reply in Support of Defendants’
Motion to Dismiss the Second Amended Complaint In Lieu of Answer (hereinafter

¹ Plaintiff properly served GDBHDD with process on March 8, 2018. (Dkt. No. 57). Defendants incorporate by reference their Motion to Dismiss the Second Amended Complaint in Lieu of Answer as Defendant GDBHDD’s response to the complaint. (See Dkt. No. 53).

“Def. MTD Brief”). In their initial motion to dismiss brief, Defendants moved for dismissal of Plaintiff’s Complaint pursuant to Rule 12(b) (1), (2), (4), (5) and/or (6) of the Federal Rules of Civil Procedure (“FRCP”). (Dkt. No. 53). With Plaintiff perfecting service of her Second Amended Complaint on GDBHDD, Defendants withdraw their previous arguments for dismissal based upon lack of service of process and personal jurisdiction under FRCP Rule 12 (b) (2), (4) and (5). Further, Defendants withdraw their argument requesting dismissal on the basis of qualified immunity, expressly reserving the right to re-assert the argument after the record has been developed through discovery.

The Court should still dismiss Plaintiff’s Second Amended Complaint in full on the other grounds raised in Def. MTD Brief under FRCP Rule 12 (b) (1) and (6). Defendants’ position is set forth fully in Def. MTD Brief, which is hereby incorporated by reference. Any failure to repeat or reiterate those arguments should not be construed as abandonment or waiver of any defenses previously asserted by Defendants. In support of their Motion, Defendants show this Court as follows:

I. ARGUMENT AND CITATION OF AUTHORITY

A. Plaintiff Failed To Overcome Defendants’ Argument That Her Section 1983 Claim Is Time-Barred.

Defendants moved for dismissal of Plaintiff’s Section 1983 claim because she failed to assert the claim within two years of her resignation and, therefore, the

claim is time-barred under the applicable two year statute of limitations. (Def. MTD Brief, pp. 10-12). Plaintiff responds that the addition of the Section 1983 claims against Moss and Clark is timely because of the “relation back” doctrine. (Plaintiff’s Opposition to Defendants’ Motion to Dismiss Second Amended Complaint (hereinafter “Pl. Resp.”), pp. 8-9). Plaintiff asserts that, in applying the relation back doctrine, the Court is to analyze only whether the new claim was based on the same set of facts. If so, allowing the claim to relate back to the original date of filing “works no hardship on the defendant for the original complaint furnished adequate notice of the nature of the suit.” *Id.*

Plaintiff’s relation back argument fails for precisely this point. Plaintiff Evans’s new claim is directed at a defendant that was not furnished adequate notice of the nature of the suit, and upon whom will work significant hardship. The relation back analysis does not stop at a simple comparing of the facts upon which it is based. “Because Georgia law provides the applicable statute of limitations in this case, if a proposed amendment relates back under Georgia law, then ‘that amendment relates back under [FRCP 15(C)(1)(A)] even if the amendment would not relate back under the federal law rules.’” *Presnell v. Paulding County*, 454 Fed. Appx. 763, 767 (11th Cir. 2011), citing *Saxon v. ACF Indus., Inc.*, 254 F.3d 959, 963 (11th Cir. 2001). Therefore, “we look to the law of Georgia to determine

whether Plaintiff's amendment should relate back to the time of filing the original complaint." (Id.)

The Georgia relation back statute provides in pertinent part:

Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. ***An amendment changing the party against whom a claim is asserted*** relates back to the date of the original pleadings if the foregoing provisions are satisfied, ***and if within the period provided by law for commencing the action against him*** the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

O.C.G.A. § 9-11-15(c) (emphasis supplied).

Plaintiff Evans placed the name of Charles Moss on the form Title VII complaint filed, but never served it upon any of the alleged "defendants." The parties do not dispute that Plaintiff brought only a Title VII claim in her original complaint. Title VII claims are only proper against an "employer" and liability against a co-employee is not proper. *See Dearth v. Collins*, 441 F.3d 931, 933 (11th Cir. 2006). Plaintiff's Title VII claim could only operate, as a matter of law, against the entity defendant, GDBHDD. By adding the Section 1983 claim, Plaintiff is "changing the party against whom [the] claim is asserted." *See*

O.C.G.A. § 9-11-15 (c).² Plaintiff's Section 1983 claim is only operative against Moss in his individual capacity and Clark in her official capacity; not the entity defendant. *See Stevens v. Gay*, 864 F.2d 113, 114-115 (11th Cir. 1989); citing *Will v. Mich. Dep't of St. Police*, 491 U.S. 58, 65, 71 (1989).

Moss has not worked for Defendant GDBHDD since January of 2014. (Affidavit of Charles Moss (hereinafter "Moss Aff."), ¶ 2, attached hereto as Exhibit A). Plaintiff's original complaint, filed on October 23, 2015, was not served on any of the purported defendants. (Dkt. No. 9). Further, Moss was unaware of the existence of the lawsuit until November of 2017, after having been contacted by counsel for Defendants seeking permission to execute a waiver of service of summons directed to him. (Moss Aff., ¶ 4). Plaintiff has no evidence that would support a contention that Moss had "received such notice of the institution of the action." O.C.G.A. § 9-11-15(c). Likewise, Plaintiff has no evidence that Moss "knew or "should have known" that the action would have been brought against him. *Id.*

² Plaintiff admits in her own brief that the Section 1983 claim is shifting the focus to a new party, quoting her appellant brief. (Pl. Resp., p. 11) ("While it is true that no Title VII claims lie against [the individual defendants], the unlawfulness of discrimination...is so well-established that Evans could allege Section 1983 claims against them in their individual capacities.")

Plaintiff's supplemental authority, submitted to the Court on March 28, 2018, does not change this analysis. In *Woldeab v. DeKalb County Board of Education*, the Plaintiff sought to substitute a misnamed party as the defendant in his previously filed Title VII claim. No. 16-16018, ___ F.3d ___ 2018 WL 1404083 (11th Cir. March 21, 2018). In contrast, Plaintiff Evans seeks to add a new and completely different claim not asserted in the original complaint, and directed at another party. The *Woldeab* case would be relevant here if the disputed issue was that Plaintiff was attempting to substitute GDBHDD for Georgia Regional Hospital in her Title VII claim, as GDBHDD is the legal entity capable of being sued in lieu of the hospital. Defendants did not dispute that amendment. Rather, Plaintiff's amendment at issue is the inclusion of the Section 1983 claim against the individual defendants, a new claim. For that reason, the *Woldeab* case is distinguishable.

Applying the Georgia relation back statute, Plaintiff's Section 1983 claim does not relate back to the filing of Plaintiff's original Complaint and, therefore, the claim should be dismissed as time-barred.³

³ Even under the Federal rule regarding relation back of amendments, the claim would still be barred. The Federal rule allows an amendment that "changes the party or the naming of the party against whom a claim is asserted" if "within the period provided by rule 4(m)" for service, the party received such notice that he or she won't be prejudiced and "knew or should have known" that the action would

B. Plaintiff Evans Failed To Show How Her Section 1983 Amendment is Allowed By The Court Of Appeals Mandate.

In their initial brief, Defendants argued that the Court of Appeals Mandate, which specifically permitted an amendment to her existing Title VII gender non-conformity claim only, barred Evans from amending her Complaint to assert a Section 1983 claim. (Def. MTD Brief, pp. 12-14). With respect to the remand, the Court of Appeals unambiguously stated, “[w]e vacate the portion of the district court’s order dismissing Evans’s gender non-conformity claim with prejudice and remand with instructions to grant Evans leave to amend *such claim*.” *Evans v. Ga. Reg’l Hosp.*, 850 F.3d 1248, 1255 (11th Cir., 2017) (emphasis added).

Plaintiff moves the Court to expand the Mandate beyond the claim that was before it on appeal. Plaintiff counters Defendants’ arguments with nothing more than dicta from the *Evans* opinion and quotes from Lambda Legal’s appellate brief. (Pl. Resp., pp. 10-12). Plaintiff’s attempts fail because she glosses over her failure to preserve the issue of the individuals’ dismissal on appeal and because the

have been brought against it. FRCP 15(c) (1) (C). *See Bloom v. Alverez*, 498 F.3d Appx. 867, 873 (11th Cir. 2012) (holding that Rule 15 “does not support relation back where the newly added defendants were known to the plaintiff before the running of the statute of limitations and where the potential defendants should not necessarily have known that, absent a mistake by the plaintiff, they would have been sued”).

Court's Mandate is clearly limited to remand of the Title VII gender non-conformity claim that Plaintiff had properly preserved on appeal.

Noticeably absent from Plaintiff's argument is any reference to where she preserved this issue—dismissal of the individual defendants—for appeal. Plaintiff did not preserve the issue by properly objecting to the dismissal of the individual defendants in her Objections to the Magistrate Judge's Report and Recommendation. (Dkt. No. 9). Instead, she merely objected to the Court's decision not to allow her to amend her Complaint, specifically referring to her right to amend the Title VII Claim stating,

I should be allowed at least one opportunity to be granted leave to amend my complaint as new supplemental evidence has arisen that affirm the consistency of the claims alleged in my complaint [a Title VII complaint] with the claims investigated in the EEOC Charge.

Id. If the party fails to raise an issue in his or her objections to the Magistrate Judge's Report and Recommendation, the Court of Appeals will "generally not review" those findings and the party "waives the right to challenge on appeal." *Evans*, 850 F.3d at 1257. Therefore, like her retaliation claim which the Court of Appeals deemed waived because Evans failed to object to the District Court's dismissal, Evans also waived her right to appeal the dismissal of the individual defendants. *Id.*

Consistent with the issues before it on appeal, the Court’s Mandate is limited to remand of the Title VII gender non-conformity claim that Plaintiff had properly preserved. In a strongly worded opinion, the Court of Appeals recently reiterated the importance of compliance with the mandate rule. *See Winn-Dixie Stores, Inc., v. Dolgencorp., LLC*, 881 F.3d 835 (11th Cir., 2018). In *Winn-Dixie Stores*, the Court defined that “[t]he mandate rule is a specific application of the ‘law of the case’ doctrine which provides that subsequent courts are bound by any findings of fact or conclusions of law made by the court of appeals in a prior appeal of the same case.” *Winn-Dixie Stores, Inc.* 881 F.3d at 843 (internal citations omitted). “The law of the case doctrine and the mandate rule ban courts from revisiting matters decided expressly or by necessary application in an earlier appeal of the same case” and “has the greatest force when a case is on remand to the district court.” *Id.* Under this rule, the “district court when acting under an appellate court’s mandate, cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.” *Id.*

The Court of Appeals was not in a position to issue a mandate on Plaintiff Evans’s right to bring new claims against the individual defendants because Evans

did not preserve the issue for appeal. As such, the mandate was limited to Evans's gender non-conformity claim under Title VII against the entity defendant. Any attempt to expand the mandate to allow Evans to bring the Section 1983 claim against Moss and Clark is improper, subjecting those claims to dismissal.

C. Plaintiff Fails To Adequately Respond To Defendants' Argument Regarding The Factual Sufficiency Of Her Claims Of Unlawful Sex Discrimination.

Defendants moved for dismissal of Plaintiff's claims under Title VII and Section 1983 for failure to state a claim for relief under the *Iqbal/Twombly* analysis. (Def. MTD Brief, pp. 14-20). Plaintiff argues in response that she is only required to provide enough factual matter to "plausibly suggest intentional discrimination," contending that she has done so. (Pl. Brief, pp. 12-20). Yet, as Defendants pointed out in their initial brief, Plaintiff's Second Amended Complaint is short on facts and long on conclusory statements, which fails to meet the threshold of "plausibly suggesting intentional discrimination."

Plaintiff addresses her adverse employment action claim on pages 12-15 of her brief. Setting aside her conclusory statements, Plaintiff's only factual allegations asserted to show intentional discrimination include that Shenika Johnson, a gender-nonconforming woman romantically interested in men, got a Star Corporal position and that Plaintiff worked at the hospital longer. (Pl. Resp.,

p.13). Considering that Plaintiff fails to even allege that she applied for the Star Corporal position in question, she merely points to an independent employment decision about another employee that has nothing to do with her. Plaintiff fails to point to any other facts plausibly shedding light on the decision-makers' intent with respect to the Star Corporal decision. Her allegation that this decision was motivated by her gender nonconformity is "wholly conclusory" and amounts to "an unadorned, the defendant-unlawfully-harmed-me accusation." *See Pouhey v. Bascom Palmer Eye Inst.*, 613 Fed. Appx. 802, 809 (11th Cir., 2015), citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008). Without more, Plaintiff cannot rebut Defendants' arguments for dismissal of her adverse employment action claim for failure to state a claim for relief.

Plaintiff's hostile work environment claim fails to state a claim for the same reasons. Again setting aside her conclusory statements, Plaintiff Evans's only factual allegations supporting a hostile work environment include a single incident of Moss inquiring whether she was dating a female nurse; a single incident of door slamming (months prior to her resignation); a shift reassignment; and a human resources investigation, prompted by Plaintiff's complaint, that did not reach the conclusion she wanted. (Pl. Resp., pp. 16-19). Notably, Plaintiff acknowledges Defendants' argument about lack of temporal proximity between these incidents

and her resignation, but then fails to address the problem other than to say the environment “would lead a reasonable person to have to quit.” *Id.*, p. 19. These bare factual allegations and conclusory statements are not a rebuttal to Defendants’ arguments for dismissal. Plaintiff’s factual allegations fail to plausibly suggest a hostile work environment and this claim should be dismissed for failure to state a claim for relief.

II. CONCLUSION

Accordingly, Defendants respectfully request that Plaintiff’s Second Amended Complaint be dismissed under FRCP 12(b) (1) and (6).

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

| | | |
|---|-----------------------------------|--------|
| Please serve: | CHRISTOPHER M. CARR | 112505 |
| | Attorney General | |
| KATHERINE P. STOFF | ANNETTE M. COWART | 191199 |
| Senior Assistant Attorney General | Deputy Attorney General | |
| Georgia Department of Law | | |
| 40 Capitol Square, S.W. | <i>s/ Bryan K. Webb</i> | |
| Atlanta, Georgia 30334-1300 | _____ | |
| Telephone: (404) 656-3393 | BRYAN K. WEBB | 743580 |
| Facsimile: (404) 657-9932 | Senior Assistant Attorney General | |
| Email: kstoff@law.ga.gov | <i>s/ Katherine P. Stoff</i> | |
| | _____ | |
| | KATHERINE P. STOFF | 536807 |
| | Senior Assistant Attorney General | |
| | <i>s/ Courtney C. Poole</i> | |
| | _____ | |
| | COURTNEY C. POOLE | 560587 |
| | Assistant Attorney General | |

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2018, I electronically filed the foregoing **REPLY 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:

Gregory R. Nevins
Lambda Legal Defense & Education Fund, Inc.
730 Peachtree Street, N.E.
Suite 1070
Atlanta, Georgia 30308
GNevins@lambdalegal.org

Natalie Nardecchia
Lambda Legal Defense and Education Fund, Inc.
4221 Wilshire Boulevard
Suite 280
Los Angeles, CA 90010
nnardecchia@lambdalegal.org

Gerald Weber
Law Offices of Gerry Weber, LLC
P.O. Box 5391
Atlanta, Georgia 31107
wgerryweber@gmail.com

s/ Katherine P. Stoff
KATHERINE P. STOFF 536807
Attorney for Defendants