[PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-12886

[December 2, 2021]

ARTUR DAVIS,

Plaintiff-Appellant
Cross Appellee,

versus

LEGAL SERVICES ALABAMA, INC.,
LAVEEDA MORGAN BATTLE,
ALEX SMITH,

Defendants-Appellees
Cross Appellants.

Appeals from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 2:18-cv-00026-RAH-JTA

Before ROSENBAUM and TJOFLAT, Circuit Judges, and STEELE,* District Judge.

* Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

Artur Davis appeals the district court's order granting summary judgment in favor of Defendants, Legal Services Alabama, Inc. ("LSA"), and two members of its Board of Directors, LaVeeda Morgan Battle and Alex Smith. Specifically, Davis contends that the district court erred in holding that, as a matter of law, the paid suspension to which LSA subjected Davis could not constitute an adverse employment action for purposes of his race-discrimination claim and that Davis had not raised a genuine dispute of material fact on whether he was constructively discharged. Davis also argues that the district court erred in holding that LSA's sharing of information with a consultant it hired could not constitute publication for purposes of a state-law defamation claim. For their part, Defendants cross-appeal the district court's failure to award them costs. For the reasons that follow, we affirm the district court's judgment and dismiss the cross-appeal as premature.

I.[1]

Plaintiff-Appellant-Cross-Appellee Davis is a former Congressman, candidate for mayor of Montgomery, Alabama, candidate for governor of

[1] Since we are reviewing an order granting summary judgment, we view the evidence and draw all reasonable inferences from it in the light most favorable to the nonmoving party—here, Davis. *Lewis v. City of Union City*, 934 F.3d 1169, 1179 (11th Cir. 2019). For that reason, the actual facts may or may not be as described in this opinion.

Alabama, and federal prosecutor. He is Black. In 2016, he applied for and obtained the position of Executive Director of LSA, a non-profit law firm providing civil legal services for low-income Alabamians.

During the course of his work with LSA, Davis began experiencing problems with some of his subordinates and colleagues. Some of these employees complained about Davis to LSA's Executive Committee.

On August 18, 2017, as Davis left work, Battle and LSA Board Vice Chair Smith approached him. They informed Davis that the Executive Committee of the Board had voted to suspend him with pay pending an investigation of the complaints against him. Along with this news, they delivered to Davis a copy of the Committee's resolution suspending him (the "Resolution") and a letter outlining the reasons for the suspension (the "Suspension Letter"): (1) spending decisions outside the approved budget; (2) failure to follow LSA policies and procedures when hiring new staff; (3) creating new initiatives without Board approval; and (4) creating a hostile work environment for some LSA employees.

After that, Davis learned that LSA had taken other steps related to his suspension, including posting a security guard in front of its building and hiring David Mowery, an Alabama political consultant, to handle public relations related to Davis's suspension. Davis and Mowery did not have a good relationship because Mowery had handled one of Davis's failed political campaigns until their

relationship soured. After that, Mowery had worked for the campaign of Davis's opponent in another race. According to Battle, LSA was unaware of the history between the two men when it hired Mowery. LSA gave copies of the Resolution and the Suspension Letter to Mowery.

Four days after he was advised that he was being placed on paid suspension, on August 22, 2017, Davis sent word to the Board that he intended to resign from his position as Executive Director, effective September 23, 2017.

Davis filed suit against LSA, Battle, and Smith. The amended complaint stated eight causes of action. As relevant here, they included race discrimination under § 1981 against all defendants; race discrimination under Title VII against LSA; and defamation counts against Battle, Smith, and LSA.

Among other bases for his claims of race discrimination, Davis asserted that LSA's prior Operations Director and its prior Executive Director, both white, had been treated more favorably than he had, and that they had participated in worse alleged misconduct. The former Operations Director allegedly had engaged in abusive behavior towards subordinates, but LSA took no action against her before she left. And the prior Executive Director allegedly had made sexually harassing remarks to female employees and had abused mileage expenses before he resigned. Neither was placed on suspension before leaving.

Following discovery, Defendants moved for summary judgment on all Davis's claims.

The district court granted the motion. As relevant on appeal, it held that, as a matter of law, Davis was not subjected to an adverse employment action, and that circumstance was fatal to his discrimination claims. More specifically, the court held both that being placed on paid leave was not an adverse employment action and that Davis had not raised a fact issue on his claim that he had been constructively discharged.

The district court also granted summary judgment as to Davis's defamation claims, holding that, under Alabama law, the complained-of disclosure (LSA's provision to Mowery of the Resolution and Suspension Letter) could not constitute "publication"—an essential element of defamation.

The district court entered a final judgment on July 16, 2020. Davis timely filed a notice of appeal. Davis appeals the district court's summary-judgment rulings with respect to his discrimination and defamation claims.

After Davis filed his notice of appeal, Defendants filed a Bill of Costs in the district court. The day after filing their Bill of Costs, Defendants filed their own notice of appeal, complaining of the district court's failure to award them costs.

II.

We review *de novo* a district court's grant of summary judgment, using the same legal standards the district court must apply. *Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1263 (11th Cir. 2010). Summary judgment is appropriate when the movant shows no genuine dispute exists as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In determining whether the movant has met this burden, courts must view the evidence in the light most favorable to the non-movant. *Alvarez*, 610 F.3d at 1263–64.

When a movant shows that no genuine dispute of material fact exists, the burden shifts to the non-movant to demonstrate a genuine issue of material fact that precludes summary judgment. *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). The non-movant must go beyond the pleadings and present competent evidence of specific facts to show that a genuine issue exists. *Young v. City of Palm Bay*, 358 F.3d 859, 860 (11th Cir. 2004).

III.

A. LSA did not subject Davis to an adverse employment action

Title VII of the Civil Rights Act prohibits employers from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment" because of that individual's race. 42 U.S.C. § 2000e-2(a)(1).

Section 1981 similarly prohibits race discrimination in employment. 42 U.S.C. § 1981. Claims of race discrimination under both Title VII and § 1981 require a showing that the employer subjected the employee to an "adverse employment action."[2] *Quigg*, 814 F.3d at 1235 (recognizing that a Title VII claim requires an adverse employment action); *Smelter v. S. Home Care Servs. Inc.*, 904 F.3d 1276, 1283 n.3 (11th Cir. 2018) (recognizing that Title VII claims and § 1981 claims "have the same requirements of proof and utilize the same analytical framework") (citation omitted).

When, as here, we are not talking about a hostile-work-environment claim, adverse employment actions include "tangible employment actions," which

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[2] Davis complains that the district court improperly applied the *McDonnell Douglas* framework when evaluating his race-discrimination claim because his claim was a "mixed-motive" claim. *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). We need not decide whether, in fact, his claim was a mixed-motive one because it makes no difference to the outcome here. To be sure, the *McDonnell Douglas* framework does not apply in a mixed-motive case. *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1239 (11th Cir. 2016). But a mixed- motive plaintiff—that is, a plaintiff who claims that another factor and unlawful discrimination contributed to the employer's decision to take adverse employment action—must show "(1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was a motivating factor for the defendant's adverse employment action." *Id.* (alteration in original). Because the correct framework for a mixed-motive claim also requires the employee to establish he was subjected to an adverse employment action and because the district court granted summary judgment on solely the basis that Davis failed to show an adverse employment action, any error by the district court in applying *McDonnell Douglas* was harmless.

are those actions "that affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone." *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 860 (11th Cir. 2020).

Davis appeals the district court's conclusion that suspension with pay pending an investigation categorically does not constitute an adverse employment action and its holding that Davis was not subjected to a constructive discharge.

i. Davis's paid suspension here was not an adverse employment action

Whether suspension with pay can rise to the level of an adverse employment action in discrimination cases appears to be an issue of first impression in this Circuit.[3] Many of our sister circuits,

[3] We have previously acknowledged that paid suspension may constitute an adverse employment action in the *retaliation* context. *See Hairston v. Gainesville Sun Pub. Co.*, 9 F.3d 913, 920 (11th Cir. 1993) ("In August of 1990, plaintiff was the subject of an adverse employment action; he was suspended with pay for thirty days."). The standard to show an adverse employment decision in a retaliation case is more relaxed, with the employee having to show only that the mistreatment "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). But we have held that a five-day suspension with pay pending an investigation, without more, is not an adverse action for purposes of a First Amendment retaliation claim. *Bell v. Sheriff of Broward Cnty.*, 6 F.4th 1374, 1379 (11th Cir. 2021).

however, have already addressed the issue.

No Circuit has held that a simple paid suspension, in and of itself, constitutes an adverse employment action. *See Joseph v. Leavitt*, 465 F.3d 87 (2d Cir. 2006) (holding that paid leave there did not constitute an adverse employment action but leaving open the possibility that a paid suspension or accompanying investigation carried out in an exceptionally unreasonable or dilatory way may constitute an adverse employment action); *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323 (3d Cir. 2015) (same); *Von Gunten v. Maryland*, 243 F.3d 858 (4th Cir. 2001) *abrogated on other grounds by Burlington N.*, 548 U.S. at 68 (holding that, categorically, paid suspension or leave is not an adverse employment action); *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000) (same); *Peltier v. United States*, 388 F.3d 984 (6th Cir. 2004) (same); *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772 (7th Cir. 2007) (same); *Pulczinski v. Trinity Structural Towers, Inc.*, 691 F.3d 996 (8th Cir. 2012) (same); *Haddon v. Exec. Residence at White House,* 313 F.3d 1352 (Fed. Cir. 2002) (same).

We agree with our sister Circuits that a simple paid suspension is not an adverse employment action. A paid suspension can be a useful tool for an employer to hit "pause" and investigate when an employee has been accused of wrongdoing. And that is particularly so in a case like this one—where the employee under investigation is in charge of all the employees who are the witnesses. As a practical matter, employers cannot expect employees to speak freely to investigators when the person under investigation is looking over their

shoulders. Employers should be able to utilize the paid-suspension tool in good faith, when necessary, without fear of Title VII liability.

Davis does not disagree that a simple paid suspension does not rise to the level of an adverse employment action. Rather, he asserts that the manner in which his suspension was handled, and the circumstances that accompanied it, combined to amount to an adverse employment action. We therefore must consider whether the circumstances here escalated Davis's paid suspension to an adverse employment action. We conclude they did not.

Davis maintains that the following circumstances made his paid suspension atypical and caused it to constitute an adverse employment action: (1) LSA disclosed the suspension to Mowery; (2) the suspension occurred days before a high-profile LSA reception with the state bar; (3) LSA compiled a narrative of reasons for the suspension in the Suspension Letter; and (4) LSA placed a guard in the building in the aftermath of the suspension. Davis also argues that because he was the Executive Director, he served as the public face of LSA. And as a result, Davis asserts, the paid suspension was more adverse to him than it would be to a low-level employee.

We disagree. Davis has offered no evidence that LSA purposely hired Mowery because of the bad blood between Mowery and Davis or intentionally timed the suspension with the state bar event to embarrass Davis. And as we explain in Section III.B, on this record, we cannot conclude that LSA's disclosure of the

suspension to Mowery was improper or otherwise punitive. The record likewise contains no evidence that placing a guard at the building after a suspension was out of the ordinary for LSA. And it is perfectly reasonable that LSA would compile its reasons for the suspension in a document to give to Davis to avoid any accusations of arbitrariness. Last, Davis has offered no authority, and we have found none, to support the notion that whether an action constitutes an adverse employment action should depend on whether the employee is high-ranking in the organization. Put simply, the circumstances of Davis's paid suspension do not rise to the level of an adverse employment action.

ii. Davis was not constructively discharged

Davis next argues that, even if his paid suspension does not amount to an adverse employment action, his alleged constructive discharge does. Under Title VII, a constructive discharge is tantamount to an actual discharge, so it constitutes an adverse employment action. *Green v. Brennan*, 578 U.S. 547, 555 (2016); *see also id.* at 560 ("The whole point of allowing an employee to claim 'constructive' discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee's resignation as though the employer actually fired him."); *Akins v. Fulton Cnty.*, 420 F.3d 1293, 1300–01 (11th Cir. 2005) ("Constructive discharge negatively affects an employee's job status, and therefore constitutes an adverse employment action."). 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).

The district court held that Davis abandoned his constructive-discharge claim when he failed to address the Defendants' argument that Davis's voluntary resignation meant there could be no constructive discharge as a matter of law. Nevertheless, the district court went on to hold that, even if Davis had not abandoned the claim, LSA was still entitled to summary judgment on Davis's theory of constructive discharge. We do not address the district court's holding on abandonment because its ultimate conclusion that Davis was not constructively discharged was correct, in any case.

The district court held that "a Title VII constructive dis- charge claim generally cannot be based upon an employee's resignation under the subjective belief that an investigation would be unfair or unjust." To support this conclusion, the district court relied on *Hargray v. City of Hallandale*, 57 F.3d 1560 (11th Cir. 1995).

We do not agree that *Hargray* is instructive in this regard. Rather, *Hargray* is about whether a resignation from public employment that had been requested by the employer was sufficiently involuntary to trigger the protections of the Due Process Clause. *Id.* at 1567–68.

Davis correctly points out in his brief that "whether a government entity's conduct violates a

litigant's constitutional rights . . . is a more demanding standard than whether a litigant advances to the post prima facie stage, or its equivalent, in an employment lawsuit." Appellant's Brief at 20–21. The district court did apply too exacting a standard to determine whether Davis had raised an issue of fact on whether he was constructively discharged. Instead, the correct standard is the one articulated in *Green*: whether the employee can demonstrate that he was discriminated against by his employer to the point where a reasonable person in his position would have felt compelled to resign. 578 U.S. at 555.

Nevertheless, the district court arrived at the correct ultimate conclusion. And we may affirm on any basis in the record, even if the district court did not actually rely on that basis. *Henley v. Payne*, 945 F.3d 1320, 1333 (11th Cir. 2019).

Even under the proper, more relaxed standard, no reasonable factfinder would conclude that a reasonable person would have felt compelled to resign under Davis's circumstances. Instead, Davis offered evidence of unpleasant disputes and disagreements with coworkers who then filed complaints against Davis. The evidence does not paint a picture of intense, intolerable harassment usually seen in cases of constructive discharge. And because paid suspension alone is not an adverse employment action, an employee's resignation in response to it cannot be an adverse employment action, either. Nor did Davis give LSA the chance to remedy any allegedly intolerable working conditions because he notified LSA of his intention to resign so soon after the

suspension—within four days. *See Kilgore v. Thompson & Brock Mgmt.*, Inc., 93 F.3d 752, 754 (11th Cir. 1996) ("A constructive discharge will generally not be found if the employer is not given sufficient time to remedy the situation.").

For these reasons, Davis failed to establish that he had suffered any adverse employment action. As a result, his substantive discrimination claims necessarily failed, and the district court's grant of summary judgment on them was appropriate.[4]

B. The LSA's disclosure of the Resolution and Suspension Letter to Mowery did not amount to publication under Alabama law

Next, Davis appeals the district court's conclusion that he failed, as a matter of law, to meet the publication element of his defamation claim. Davis contends that Defendants defamed him when they gave the Resolution and Suspension Letter to Mowery. For its part, LSA asserts that it provided Mowery with the documents so Mowery could provide public-relations guidance concerning Davis's suspension.

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[4] Davis also complains that the district court ruled that race was not a motivating factor in any adverse employment action taken against Davis. But while the district court did acknowledge that Davis's response to the motion for summary judgment "maintain[ed] that there [was] ample evidence that race was a motivating factor in [Davis's] suspension," it nonetheless decided to "confine its inquiry . . . strictly to whether there was an actionable adverse employment action." ECF No. 49 at 19–20. For that reason, no holding on motivation is before this Court, and we offer no opinion on it.

Under Alabama law, a defamation plaintiff must establish all the following to set forth a defamation claim: (1) the defendant was at least negligent (2) in publishing (3) a false and defamatory statement to another; (4) that statement concerned the plaintiff; and (5) the claim is actionable either without having to prove special harm or upon allegations and proof of special harm. *Gary v. Crouch*, 867 So. 2d 310, 315 (Ala. 2003).

The district court held that LSA's provision of the documents to Mowery did not constitute publication because Mowery was acting as LSA's agent at the time of the disclosure. In so holding, the court relied on *Brackin v. Trimmier L. Firm*, 897 So. 2d 207 (Ala. 2004). There, the Family Security Credit Union ("FSCU") identified various improprieties related to a former employee. *Brackin*, 897 So. 2d at 209. In response, the Alabama Credit Union Administration ordered FSCU to conduct an investigation of the improprieties. *Id.* FSCU retained a law firm to conduct the investigation, which in turn retained Jo Lynn Rutledge, a certified public accountant. *Id.* As part of the investigation, various employees told Rutledge that Karen Brackin, an FSCU employee at the time, had instructed employees to change due dates on loans and make other changes to loan documents. *Id.* at 210. Eventually, Brackin sued FSCU on various theories, one of them being defamation based on FSCU employees' disclosures of information about Brackin to Rutledge. *Id.* at 215.

The Supreme Court of Alabama held that no publication of the statements occurred when the

employees gave the information to Rutledge. *Id.* at 221. This was so, the court reasoned, because Rutledge was retained by FSCU and the law firm to conduct the investigation. So the information that the employees gave Rutledge fell within the scope of the agency relationship between FSCU and Rutledge. "[T]he employees' communications to Rutledge did not amount to 'publications' to a third party for purposes of establishing a defamation claim." *Id.* at 222.

In his brief, Davis attempts to distinguish *Brackin* by pointing out that the investigation there was ordered by the state regulatory agency. True, but that is legally irrelevant to the fact that an agency relationship between Rutledge and FSCU existed. And that relationship, as we have explained, served as the basis for the Court's decision.

Davis also argues that the district court erred by conflating a "consultant" relationship with an agency relationship, and he contends that the district court should have applied traditional agency principles to determine whether Mowery was truly acting as LSA's agent or rather, as an independent contractor. In Davis's view, LSA can claim that giving Mowery the documents was not publication only if Mowery was LSA's employee.

We are not persuaded. Being an "agent" and being an "independent contractor" are not necessarily mutually exclusive. One can be in an agency relationship with another without being that person's employee. *See Brown By & Through Brown v. Com. Dispatch Publ'g Co.*, 504 So. 2d 245, 246 (Ala. 1987)

(emphasizing that "test of agency is the right of control," not simply employer-employee relationship); *see also 1-800 Contacts, Inc. v. Lens.com*, *Inc.*, 722 F.3d 1229, 1251 (10th Cir. 2013) ("[A]n independent contractor can be an agent. An agent need not be an employee."). Indeed, the Alabama Supreme Court held that Rutledge was an "agent" of FSCU for publication purposes, even though Rutledge was not FSCU's employee. *See Brackin*, 897 So. 2d at 222. If Davis were correct, employers could not hire consultants and experts to assist them in human-resources matters. Otherwise, they would risk defamation liability every time they hired outside consultants, investigators, and advisors and provided them with the information they needed to do their jobs.

For these reasons, the district court correctly held that LSA's provision of the Resolution and Suspension Letter to Mowery did not constitute publication for purposes of a defamation claim un- der Alabama law.

C. We lack jurisdiction over Defendants' cross-appeal

In their cross-appeal, Defendants point out that the district court was silent as to the award of costs under Federal Rule of Civil Procedure 54(d). Based on this circumstance, Defendants argue that the district court erred by denying them costs without stating a basis for doing so. In Defendants' view, they are entitled under Rule 54(d)(1) to their costs because the district court made no findings of misconduct by Defendants that would justify any sanction. But

Defendants do not mention in their brief the bill of costs they filed after the district court entered the final judgment and Davis filed his notice of appeal.

In the absence of circumstances not present here, an appellate court's jurisdiction is limited to appeals of final decisions. 28 U.S.C. § 1291; *Fort v. Roadway Exp., Inc.*, 746 F.2d 744, 747 (11th Cir. 1984). But a district court's decision regarding costs is not final until the amount is fixed. *See Mekdeci v. Merrell Nat'l Lab'ys*, 711 F.2d 1510, 1523 (11th Cir. 1983) (finding lack of jurisdiction to review a district court's order that it intended to award costs but had yet to fix the amount).

Federal Rule of Civil Procedure 54(d)(1) states that unless a federal statute, the Federal Rules, or a court order provides otherwise, costs should be allowed to the prevailing party, and the court clerk "may tax costs on 14 days' notice." The Middle District of Alabama's Local Rule 54.1 directs that requests for taxation of costs under Rule 54(d) shall be filed with the clerk within 35 days of entry of final judgment.

Here, Defendants' cross-appeal is premature because the judgment, while final as a general matter, was not a final decision on costs, and the district court has not acted on the bill of costs Defendants filed after judgment. A district court is not required to address costs in its judgment, and silence is not somehow an implicit denial of costs. To the contrary, Local Rule 54.1 contemplates that the prevailing party will not even seek costs until after the district court enters final judgment. Because the judgment from which the

Defendants cross appeal is not final as to the costs issue—the sole subject of their appeal—we lack jurisdiction over the cross-appeal and therefore dismiss it.

IV.

For the foregoing reasons, the judgment of the district court is affirmed, and the cross-appeal is dismissed.

AFFIRMED; CROSS-APPEAL DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

ARTUR DAVIS,	)
	)
Plaintiff,	)
	)
v.	) Case No: 2:18-cv-26-RAH-
	) JTA (WO)
	)
LEGAL SERVICES	)
ALABAMA, INC.,	)
et al.,	)
	)
Defendants.	)

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Artur Davis ("Davis" or "Plaintiff") is a former U.S. Congressman, mayoral candidate for the City of Montgomery, Alabama, gubernatorial candidate for the State of Alabama, federal prosecutor, and litigator. In December 2016, he became the Executive Director for Legal Services Alabama, Inc. ("LSA"), a non-profit, public interest organization that provides civil legal services to low income clients in Alabama. That marriage, however, did not last long, as Davis resigned from the position approximately nine months later in August 2017 after complaints were lodged against him by two African American employees. Following his exit, Davis sued LSA, LaVeeda Battle

("Battle"), and Alex Smith ("Smith") (collectively, "Defendants") for race discrimination, retaliation, defamation, and conspiracy.

Pending before the Court is the Defendants' motion for summary judgment ("Motion").[1] (Doc. 39.) The Court has carefully reviewed the Motion, the briefs filed in support of and in opposition to the Motion, and the supporting and opposing evidentiary materials. In accordance with the governing standard, the Court concludes that the Motion is due to be granted.

II. JURISDICTION

This Court has subject matter jurisdiction pursuant to 42 U.S.C. § 1331 and § 1343 and the jurisdictional grant in 42 U.S.C. § 2000e-5. The Plaintiff and Defendants (collectively, "Parties") do not challenge venue, and the Court concludes that venue properly lies in the Middle District of Alabama. *See* 28 U.S.C. § 1391.

III. FACTS AND PROCEDURAL HISTORY

Montgomery-based, LSA is a non-profit, public interest organization that provides civil legal services to low-income clients throughout Alabama. (Doc. 41- 1

[1] Following the close of briefing on the Motion, Davis filed a motion, (Doc. 48), to supplement his summary judgment opposition with a new case recently issued by the Eleventh Circuit. For purposes of the Court's consideration of all legal issues associated with the Motion, this Court grants Davis' request.

at 2; Doc. 43-22 at 1.) Among the many services it provides, LSA helps qualified clients with legal issues involving domestic violence, garnishments, housing subsidies, mortgage modifications, public assistance, and other cases. *See* Brad Harper*, Artur Davis Named Leader of State Legal Aid Group*, MONTGOMERY ADVERTISER, Dec. 8, 2016.[2] In addition, LSA supports local volunteer attorney programs so as to encourage lawyers throughout Alabama to take pro bono cases in their communities. *See* Bob Lowry, *Lawyers Must Join Legal Aid Program*, HUNTSVILLE TIMES, Oct. 19, 2007.

LSA is run by a Board of Directors ("Board"), which includes a four-member executive committee and twenty-two members from across the State. *Board of Directors*, LEGAL SERVICES ALABAMA, INC., https://legalservicesalabama.org/ ourstory-2/ (last visited July 10, 2020).

In December 2016, Davis was hired by LSA to serve as its new Executive Director, following the retirement of James H. Fry ("Fry"), after a purported national search. (Doc. 41-1 at 3; Doc. 43-22 at 1.) "The input we received from our partners, collaborators and

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[2] District courts may take judicial notice of matters that are accessible to the general public and "are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Bryan v. Avado Brands, Inc.*, 187 F.3d 1271, 1278 (11th Cir. 1999). *See also U.S. ex rel Osheroff v. Humana, Inc.*, 776 F.3d 805, 811 n.4 (11th Cir. 2015) (courts may take judicial notice of statements contained within—but not the veracity of—newspaper articles).

staff on the skills needed for our next executive director strongly influenced our committee," Phil Mitchell ("Mitchell"), the Search Committee's Chair, said in a statement at the time. Harper, *supra*. "Mr. Davis has all the qualities needed to serve as LSA's executive director at the highest level and re-establish the organization as the leader in serving the civil legal needs of low income Alabamians." (*Id.*)

This excitement soon waned. Naturally, as Executive Director, Davis had his own ideas as to how LSA should be run. (Doc. 43-22 at 2-5.) These ideas were met with resistance from members of the Board, including Battle,[3] as well as sundry staff members. (*Id.* at 5-7.) According to Davis, beginning in July and August, he was subjected to numerous instances of insubordination and poor employee attitude from several employees, including Jaffee Pickett ("Pickett"), an African American employee who served as the Assistant Executive Director at LSA. (*Id.* at 5-6.)

Eventually, sometime in August 2017, Pickett relayed to the Board several complaints made by staff members about the hostile work environment allegedly created by Davis. (Docs. 41-1 at 3; Doc. 41-2 at 77-80; Doc. 43-22 at 8.) On August 17, 2017, as these grievances developed, Davis emailed LSA board

[3] Battle was a member of the Executive Director Search Committee ("Search Committee") that made this decision and is an African-American attorney who maintains a private solo practice and has served as an administrative law judge for the Equal Employment Opportunity Commission ("EEOC"). (Doc. 41-1 at 2-3.)

member, Mitchell, to inform him that he was considering departing LSA. (Doc. 41-4 at 45.)

The next day, the Board met. At the end of its discussion, the Board placed Davis on paid leave (suspension) pending an investigation into the staff complaints about Davis. (Doc. 41-2 at 83-86.) The nature of the suspension and the investigation were detailed in a lengthy letter signed by Battle in her capacity as President of the Board, and promptly sent to Davis. (*Id.*) As this missive lays out, concerns had been expressed by staff and Board members about hiring, spending outside of budget, the creation of new initiatives without Board input, harassment and creation of a hostile work environment by Davis, and even statements by Davis critical of the Board. (*Id.*) The letter concluded that Davis should refrain from making any public announcement that might reflect adversely upon LSA. (*Id.* at 85.)

Davis initially responded in two ways. That very evening, he emailed the Board to announce his intent to file an EEOC charge of discrimination. (Doc. 43-21 at 1; Doc. 43-22 at 8.) Next, before the Board even launched its investigation, Davis submitted his notice of resignation from LSA on August 22, 2017, effective September 23, 2017. (Doc. 41-1 at 4; Doc. 41-4 at 58; Doc. 43-22 at 8.) According to Davis, he resigned because he did not believe he would receive a fair shake and justice from any investigative process. (Doc. 43-1 at 24-25.) Nevertheless, Davis was paid through the end of September of 2017. (*Id.* at 21, 23.)

To conduct the investigation, the Board

retained Delores R. Boyd ("Judge Boyd"), a retired United States Magistrate Judge. (Doc. 41-1 at 3.) After speaking with employees and reviewing a parade of documents, among other things, Judge Boyd issued her final report in September 2017. (Doc. 45-8 at 47-118.)

During the pendency of this investigation, on August 25, 2017, Davis published an article on AL.com providing his explanation as to why he resigned from LSA. (Doc. 41-4 at 59-62.) In the article, Davis did not allege discrimination and retaliation by LSA and its board members or employees. (*Id.*) Instead, he described his resignation as representing the culmination of "a turbulent several weeks where . . . [he] was expending more time clashing with a board president and a few dissident employees than . . . [he] was spending on devising strategies to serve Alabama's low income families." (*Id.*) The clashes had turned "very petty," and though he purportedly "asked the national Legal Services Corporation to take a hard look at the integrity and future of the Alabama program, which desperately needs an intervention," he "*chose* resignation rather than a protracted fight to regain authority." (*Id.* (emphasis added).) He did so, it would seem, because he had "other plans for . . . [his] life, including a return to the public arena sooner or later," and had "maybe . . . hit the wall on what . . . [he] could do at Legal Services." (*Id.*) He would instead "put" his energy into Montgomery's future, and into being another constructive voice in Alabama." (*Id.*) Fittingly for such a long-time public servant, he signed off: "I'm still the grown version of a child who rose out of the poorest side of Montgomery, Alabama on the

force of dreams." (*Id.*)

IV. LEGAL STANDARD

Pursuant to Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 323 (construing and quoting Rule 56(c)(1)). This burden is not a light one. *Harris v. Ostrout*, 65 F.3d 912, 917 (11th Cir. 1995).

The movant may meet this burden by presenting evidence showing there is no dispute of material fact, or by showing that the nonmoving party has failed to present evidence in support of some element of its case on which it bears the ultimate burden of proof. *Celotex Corp.*, 477 U.S. at 322-24. A dispute of material fact "is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). What is material is determined by the substantive law applicable to the case. *Id.* If the movant succeeds in demonstrating the

absence of a material issue of fact, the burden shifts to the non-movant to establish, with evidence beyond the pleadings, that a genuine issue material to the non-movant's case exists. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-17 (11th Cir. 1993); *see also id.* at 1116, n.3 (discussing Rule 56(e)) ("When a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of [his] pleading, but [his] response ... must set forth specific facts showing that there is a genuine issue for trial."). Crucially, the non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, the non-movant must present "affirmative evidence" of material factual conflicts to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 257. While, if the non-movant's response consists of nothing more than conclusory allegations, a district court must enter summary judgment for the movant. *See Holifield v. Reno*, 115 F.3d 1555, 1565, n. 6 (11th Cir. 1997); *Harris*, 65 F.3d at 917, "[T]he [plaintiff's] evidence is to be believed and all justifiable inferences are to be drawn in his favor" if there is a conflict in the evidence. *Anderson*, 477 U.S. at 255; *Molina v. Merritt & Furman Ins. Agency*, 207 F.3d 1351, 1356 (11th Cir. 2000). Indeed, "[e]ven if the district court believes that all the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of such credibility choices." *Harris*, 65 F.3d at 917.

Once the nonmoving party has responded, the court must grant summary judgment if there remains no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

V. DISCUSSION

A. Davis' Race Discrimination Claims

Two of Davis' claims merit concurrent consideration. In Counts I and III, Davis contends that he was wrongfully suspended on August 18, 2017, based on his race, in violation of 42 U.S.C. § 1981 and 42 U.S.C. § 2000e. (*See* Doc. 14.) The Defendants move for summary judgment on these two claims, arguing that Davis has not and cannot meet his burden of proof of showing an actionable adverse employment action under the facts of this case. (Doc. 40 at 11-12.) The Defendants bolster this argument with another: since Davis voluntarily resigned, there was no constructive discharge[4] for purposes of meeting his prima facie case of discrimination. (*Id.* at 8-12.)

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[4] Davis does not appear to argue in his summary judgment response that he was constructively discharged, although his Complaint vaguely raises the allegation. In their Motion, the Defendants do not specifically address the extent to which, if any, Davis' suspension qualifies as an *adverse employment action*. Presumably, the Defendants are lumping the suspension under the general umbrella of one of the many actions of LSA that could constitute a constructive discharge. Given the disconnect between the parties as to exactly what is the adverse employment action at issue, the Court will address both the suspension and Davis' constructive discharge.

Title VII and § 1981 operate similarly. Both prohibit race-based discrimination. *See* 42 U.S.C. § 2000e-2(a)(1); *Chapter 7 Tr. v. Gate Gourmet, Inc.*, 683 F.3d 1249, 1256 (11th Cir. 2012). Moreover, the elements of race-based employment discrimination claims brought under either statute are the same. *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998). For these reasons, the Eleventh Circuit "has routinely and systematically grouped Title VII and § 1981 claims for analytic purposes." *Jimenez v. Wellstar Health Sys.*, 596 F.3d 1304, 1312 (11th Cir. 2010). The Court will do the same as it concerns Counts I and III.

To defeat the Motion, Davis first must establish a prima facie case of discrimination by one of three generally accepted methods: (1) presenting direct evidence of discriminatory intent; (2) presenting evidence to satisfy the four-part circumstantial evidence test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); or (3) presenting statistical proof. *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). Where, as here, Davis admittedly relies on circumstantial evidence to establish discriminatory intent, the Court typically uses the *McDonnell Douglas* analytical framework to evaluate the sufficiency of the complainant's evidence. *Flowers v. Troup Cty., Ga. School Dist.*, 803 F.3d 1327, 1335-36 (11th Cir. 2015).[5]

[5] Davis, however, contests this application of the *McDonnell Douglas* framework and instead defends a mixed-motive theory. Whether Davis advances a single-motive or mixed-motive theory affects his burden at the summary judgment stage and the

Regardless of whether this (or Davis' proposed) framework is applied, Davis' burden remains the same: he still must prove that he suffered an actionable adverse employment action. *See Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1239 (11th Cir. 2016) (holding that a plaintiff must offer "evidence sufficient to convince a jury that . . . the defendant took an adverse employment action against the plaintiff"); *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008) ("To make out a *prima facie* case of racial discrimination a plaintiff must show . . . she was subjected to adverse employment action.").

As it concerns Davis' race discrimination and retaliation claims, the only two potentially relevant adverse employment actions are Davis' suspension and his resignation five days later. Davis depicts his suspension with pay as an actionable employment action; the Defendants disagree, citing a host of cases that stand for the proposition that a suspension with pay during an investigation does not rise to a sufficient level. In an attempt to distinguish this litany of case decisions, Davis describes his suspension with pay as inherently different because he was a high profile, executive level employee of a statewide organization and therefore was saddled with an added stigma not otherwise attached to a suspension leveled against a lesser employee.

Yet, for all the forcefulness and subtlety of this critique, neither tentativeness nor ambiguity define the relevant jurisprudence. As accurately noted by the

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Court's evaluation thereof.

Defendants, "[c]ourts have consistently held that being placed on administrative leave pending an internal investigation is not an adverse employment action that would dissuade a reasonable employee from making or supporting a discrimination charge." *Carrio v. Apollo Grp.*, No. CIVA 1:07-CV-1814BBM, 2009 WL 2460983, at *15 (N.D. Ga. Aug. 7, 2009); *see, e.g.*, *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 787 (7th Cir. 2007) (paid administrative leave pending investigation does not constitute materially adverse action); *Singletary v. Mo. Dep't of Corrs.*, 423 F.3d 886, 891–92 (8th Cir. 2005) (finding that corrections officer did not suffer a materially adverse action when his employer placed him on administrative leave pending a departmental investigation); *Peltier v. United States*, 388 F.3d 984, 988 (6th Cir. 2004) ("[A] suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action."); *Breaux v. City of Garland*, 205 F.3d 150, 158 (5th Cir. 2000) (holding that a police officer suffered no adverse employment action where he was temporarily placed on paid administrative leave during an internal investigation); *Jackson v. Blue Bird Corp.*, No. 5:17-CV-00101-TES, 2018 WL 4169074, at *3, n.4 (M.D. Ga. Aug. 30, 2018), *aff'd*, 792 F. App'x 706 (11th Cir. 2019) ("Placing Plaintiff on a brief, paid leave during the investigation is not adverse employment activity."); *Stephen v. H. Lee Moffitt Cancer Ctr. & Research Inst. Lifetime Cancer Screening Ctr., Inc.*, 259 F. Supp. 3d 1323, 1337-38 (M.D. Fla. 2017) (holding that a paid suspension pending investigation was not an adverse employment action); *Brown v. Bd. of Regents of Univ. Sys. of Ga.*, No. 1:14-CV-0365-

LMM-LTW, 2016 WL 4925792, at *9 (N.D. Ga. Feb. 12, 2016) ("Typically, courts within this circuit have concluded that a paid suspension or placement on administrative leave for less than a month is not an adverse employment action."); *Moore v. Miami-Dade Cty.*, No. 03-22421-CIVGOLD, 2005 WL 3273722, at *11 (S.D. Fla. Sept. 30, 2005) (collecting cases as to this issue and ultimately holding that suspension for one month pending investigation was not adverse employment action). Davis may have been offended, and he may indeed think that the mere act of being suspended amounted to a grave misdeed, but an employee's subjective view of the significance and adversity of the employer's action does not control. *Doe v. DeKalb Cty. Sch. Dist.*, 145 F.3d 1441, 1445 (11th Cir. 1998). To rule otherwise is to make every inquiry by any employer as to any conduct by a suspended employee, regardless of the cause or circumstances, into an adverse action sufficient to trigger application of federal anti-discrimination law. *See, e.g., Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (observing that the "terms, conditions, or benefits of a person's employment do not typically, if ever, include general immunity from the application of basic employment policies or exemption from [an employer's] disciplinary procedures"); *cf. Hulsey v. Pride Rest.*, LLC, 367 F.3d 1238, 1245 (11th Cir. 2004) ("[A] tangible employment action is a significant hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."), *cited in Hyde v. K. B. Home, Inc.*, 355 F. App'x 266, 271 (11th Cir. 2009). In some cases, a temporary suspension with pay may indeed be an adverse employment

action, *McCollough v. Buffalo Elec. Co. of Ala.*, No. 2:16-cv-00438-AKK, 2017 WL 4222613 (N.D. Ala. Sept. 22, 2017), but not when the employee opted to resign within a week of the investigation's commencement and no other discomfort was actively imposed by the employer, as here, whatever embarrassment Davis may have otherwise felt. *Cf. Joseph v. Leavitt*, 465 F.3d 87, 91 (2d Cir. 2006) ("[A]dministrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action.").

The only decision to the contrary cited by Davis comes from the United States District Court for the District of Rhode Island in *Mosunic v. Nestle Prepared Foods Co.*, 272 F. Supp. 3d 22 (D.R.I. 2017). In that case, the court rejected other courts' holdings and concluded that the plaintiff had met her prima facie burden because "[s]uspension, regardless of whether it is paid, is adverse to the employee in and of itself. It is punitive in nature and at a minimum becomes part of one's permanent employment record, affecting one's ability for advancement, or to find other future employment, or gaining valuable job experience." *Mosunic*, 272 F. Supp. 3d at *27, n.3 (citing *Dahlia v. Rodriquez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (holding that the loss of experience while on administrative leave, *inter alia*, could constitute an adverse employment action)).

For several different reasons, this Court is not persuaded by *Mosunic's* reasoning that a suspension with pay is an actionable adverse employment action simply because it is inherently "adverse to an

employee in and of itself." First, if that was the burden by which an actionable adverse employment action is measured, then virtually any disciplinary action would constitute an actionable adverse employment action. Second, the case upon which *Mosunic* based this construction – *Dahlia* – narrowly held that plaintiff's "assertions—that administrative leave prevented him from taking the sergeant's exam, required him to forfeit on-call and holiday pay, and prevented him from furthering his investigative experience—if proved, would constitute an adverse employment action." *Dahlia*, 735 F.3d at 1079. The court in *Dahlia* did not hold, as *Mosunic* arguably contended and as Davis would read it, that (1) a suspension that ultimately lasted less than a fortnight and (2) some imagined stigma, the only things that Davis has brought to this Court's attention, were enough. In fact, despite its undeniably unambiguous statement as to the adverse nature of a suspension, not even *Mosunic* went as far as Davis believes: suspension, plus the loss of experience and a coterie of other repercussions that it engendered, none of which Davis has either evidenced or alleged, was seen as "adverse." *Mosunic*, 274 F. Supp. 3d at 27, n.3. Lastly, this Court is persuaded by the numerous decisions in the Eleventh Circuit where courts have held that suspensions with pay during an investigation do not constitute an adverse employment action because they do not constitute a *serious and material change* in the terms, conditions or privileges of employment. This Court further finds that no distinction should be drawn simply because an affected employee is a higher-level employee, such as an executive director, rather than a lower level employee. *See Brown*, 2016

WL 4925792 at *9 (dean of college); *Stephen*, 259 F. Supp. 3d at 1337-38 (physician). To draw such a distinction would require this Court to engage in rank speculation and conjecture as to the mindset of future unknown employers at unspecified future points in time regarding unknown future employment positions, and traffics in possibilities rather than in probabilities and verities.

In sum, Davis has not demonstrated that his suspension, considering the attendant circumstances that neither party denies, was materially adverse to meet his burden to establish a prima facie case.

While Davis also vaguely alleges that he was constructively discharged, Davis' failure to address the Defendants' argument that there can be no constructive discharge as a matter of law because of Davis' admission that he voluntarily resigned, (Doc. 40 at 10), is an abandonment of the claim. *See, e.g., Wilkerson v. Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) (affirming that a claim is abandoned where presented in the complaint but not raised in a party's response to a motion for summary judgment or in the party's own motion for summary judgment); *Adams v. Bank of Am.*, N.A., 237 F. Supp. 3d 1189, 1203 (N.D. Ala. 2017) ("A party that fails to defend a claim that is targeted by a summary judgment motion is deemed to have abandoned that claim."). As such, the Court concludes that Davis has abandoned this claim to the extent he pleaded it in his Complaint.

But even if Davis has not abandoned this claim, the Defendants nevertheless would be entitled to

summary judgment. The reason is as clear as Davis' abandonment: a Title VII constructive discharge claim generally cannot be based upon an employee's resignation under the subjective belief that an investigation would be unfair or unjust. *See Soloski v. Adams*, 600 F. Supp. 2d 1276, 1347 (N.D. Ga. 2009) ("[T]he mere fact that the choice is between comparably unpleasant alternatives . . . does not of itself establish that a resignation was induced by duress or coercion, hence was involuntary.") (citing *Hargray v. City of Hallandale*, 57 F.3d 1560, 1568 (11th Cir. 1995)). Resignations made in situations where an employee is faced with unpleasant alternatives, certainly if not exacerbated or facilitated by the employer, are nevertheless voluntary, and therefore do not constitute constructive discharge, because the employee has a choice. *Id.* As the Eleventh Circuit wrote, "[a] resignation will be considered voluntary even where the only alternative to resignation is possible termination for cause, criminal charges, or other unpleasant alternatives." *Hargray*, 57 F.3d at 1568. By his own account, rather than choosing "[to] stand pat and fight," *id.*, Davis expressly "chose resignation rather than a protracted fight to regain authority." (Doc. 41-4 at 59-62.) By his own admission, where the law requires a fight, he declined to do so.

While there is no bright line rule, Davis certainly has provided no evidence or legal argument supporting any inference that a reasonable person in Davis' position would have felt compelled to resign under the circumstances. *Cf. Joseph*, 465 F.3d at 91 ("[A]n employee does not suffer a materially adverse

change in the terms and conditions of employment where the employer merely enforces its preexisting disciplinary policies in a reasonable manner."). All that Davis has offered is his own subjective belief that the investigation by Judge Boyd, an African American and former federal judge, would have been unfair. That proposition, as speculative and subjective as it is, simply comes nowhere close to supporting a constructive discharge claim. *See Doe*, 145 F.3d at 1448-50 (adopting an objective standard). Rather, within this Circuit, a court must presume that a resignation is voluntary unless the employee "comes forward with sufficient evidence to establish that the resignation was involuntarily extracted." *Hargray*, 57 F.3d at 1568.

Arguably, it seems that Davis may be attempting to allege the "involuntary extracted" element through his contention that LSA would have made a finding that there was validation to the subordinates' allegations. To the extent Davis contends the decision not to account for the high-profile nature of his position shows that LSA involuntarily extracted his resignation, (Doc. 44 at 14), the Court rejects the contention because it is the employee's obligation in such instances "not to assume the worst, and not to jump to conclusions too fast." *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987). Generally speaking, "constructive discharge will . . . not be found if the employer is not given sufficient time to remedy the situation." *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996).

Such is precisely the case presented here. After discovery, the record shows the following: within five days of being notified of the investigation into the staff complaints, Davis resigned. Davis did not allow the investigation to run its course, and he did not stay and offer a defense, as courts have long expected. Instead, he resorted to giving press statements and publishing op-ed articles. "Neither life nor the law favor quitters—particularly quitters who do not give their employer a chance to remedy the perceived wrong." *Russell v. Sealing Equip. Prods. Co.*, No. 2:11-CV-04330-RDP, 2013 WL 6145333 (N.D. Ala. Nov. 20, 2013). Accordingly, Davis' resignation before Judge Boyd could finish her investigation defeats any claim by Davis that he was constructively discharged.

B. Motivating Factor and Pretext

Aside from arguing that his suspension constitutes an adverse employment action, Davis also maintains that there is ample evidence that race was a motivating factor in his suspension. (Doc. 44 at 17.) As Davis puts it, "LSA's sudden decision to remove Davis as ED was at least partially influenced by the fact that two key members of the Executive Committee, Board Chair Battle and Personnel Chair Saxon, both African Americans, put an unfair weight on weak or unsubstantiated complaints from three black employees. . . and that the heart of the grievance was that Davis somehow favored whites that he had brought into the program over the interests of these three black employees." (*Id.* at 12.) This claim is actionable, Davis insists, because, while he was suspended with pay due to false accusations of a

hostile work environment by African American co-workers, former Operations Director Eileen Harris, who is white, was never suspended with pay even though she had been accused of creating a hostile work environment by bullying, insults and intimidation. (*Id.* at 18.)

As to this contention, what is good for the goose is good for the gander. Since the Defendants did not raise this factor in their summary judgment motion, nor in reply to Davis' brief in opposition, the Court need not address this issue for purposes of determining whether summary judgment should be granted. Instead, the Court will confine its inquiry, outlined above, strictly to whether there was an actionable adverse employment action.

C. The Retaliation Claim

In response to the Defendants' attack on Davis' retaliation claims (Counts II and IV), itself based on the simple argument of lack of an actionable adverse employment action, Davis proffers that under the *McDonnell Douglas* framework there is sufficient evidence of retaliation. In Davis' telling, he engaged in protected activity when he notified the Board of LSA by email that he was filing an EEOC charge; therefore, the Defendants retaliated against him when they (1) hired a political operative with a history of animosity toward Davis, (2) conducted a flawed and one-sided investigation, and (3) refused to allow Davis to collect payment for his unused leave. (Doc. 44 at 29.) Understandably enough, the Defendants aver that these actions do not constitute actionable adverse

employment actions under a claim of retaliation.

With the Defendants, the Court agrees. A *prima facie* case of retaliation under Title VII requires a plaintiff to show that: (1) he engaged in an activity protected under Title VII; (2) he suffered an adverse employment action; and (3) there was a causal connection between the protected activity and the adverse employment action. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008). An adverse employment action under Title VII's anti-retaliation provision is an action "that a reasonable employee would have found . . . materially adverse." *Burgos v. Napolitano*, 330 F. App'x 187, 189 (11th Cir. 2009) (quoting *Burlington N. & Sante Fe Ry. v. White*, 548 U.S. 53, 68 (2006)).[6] For a retaliatory act to qualify as an adverse employment action, it must be materially adverse such that it might well have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).[7] Actions that reasonably lead to consequences such as reduced pay, a smaller raise

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[6] The same standard governs retaliation claims based on race under Title VII and § 1981 in this Circuit. *See Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008).

[7] As previously noted, *see supra* note 1, Davis filed a supplemental brief, (Doc. 48), in light of the Eleventh Circuit's recent decision in *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020), which held that the governing Title VII retaliation standard in this Circuit is that discussed in *Burlington N. and Santa Fe Ry. Co* and *Crawford*, and not the standard used in *Gowski v. Peake*, 682 F.3d 1299 (11th Cir. 2012). While relevant, the *Monaghan* decision changes nothing in the Court's analysis.

than the employee would otherwise receive, or suspension of incentives are generally considered materially adverse. *Edwards v. Nat'l Vision, Inc.*, 568 F. App'x 854, 862 (11th Cir. 2014).

Here, the Defendants make a quick reply. They do not dispute that Davis' email constituted protected activity. Instead, they challenge Davis' general assertion that he was retaliated against in the three ways outlined above. For its purposes, the Court can easily narrow this field further to one item and that is the unpaid leave allegation, for there can be no real dispute that, standing alone, hiring an operative or conducting an investigation does not constitute a materially adverse employment action. *See Brush v. Sears Holdings Corp.*, 466 F. App'x 781, 786 (11th Cir. 2012) (internal investigations alone do not constitute discriminatory practices); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir. 2007) (detailing type of investigative procedures acceptable under Title VII); *Entrekin v. City of Panama City, Fla.*, 376 F. App'x 987, 994 (11th Cir. 2010) (per curiam) ("Title VII does not … establish requirements for an employer's internal procedures for receiving … complaints, or even require that employers must have an internal procedure for receiving such complaints."). Unfortunately, as to this unpaid leave issue, Davis does little more than briefly mention it. He does not explain or provide any basis for a right to payment for unpaid leave other than that other employees on other occasions were compensated for unused leave. For example, he does not state whether there was a legitimate basis for his claim such as through a provision in his employment contract or an LSA

employment manual, or whether payment for unpaid leave was promised to him upon his initial hiring. Nor does he assert or set forth the amount of pay he was entitled to receive or whether he even asked for it. In fact, in his deposition, Davis acknowledged that he did not know if he even asked for payment for his unused leave when he left his employment at LSA. (Doc. 43-1 at 22.)

The failure to develop this claim is problematic for Davis for a rather obvious cause: the basis for not receiving compensation for unpaid leave can derive from any number of legitimate reasons. For example, some employer policies provide that terminated employees are entitled to be paid for unused leave, while voluntarily departing employees are not. Other employer policies may turn on whether the employee is exempt or nonexempt. Yet other employers may require that an employee work at least twelve months before qualifying for an unused leave payout.

The only evidence in the record here is that, even though Davis resigned on August 22, 2017, he was paid out through September 23, 2017, but received no payment for unused leave. Davis makes no effort to present evidence that he was treated any less favorably from any white employees who departed from LSA; he simply states that he "knew from [his] tenure as ED that it was LSA's regular practice to issue a check upon departure for any unused personal leave time." (Doc. 43-22 at 9.) While the Court acknowledges that the failure to pay for unused leave could, under the appropriate circumstances, constitute an adverse employment action under a

retaliation claim, Davis' failure to present evidence of this claim requires the Court to dismiss it.

D. The State Law Claims for Defamation

Counts VI, VII and VIII are state law claims for defamation, which assert in general that Battle and Smith, individually, and the LSA, generally, defamed Davis by publishing allegedly false statements about his leadership, compliance with rules and guidelines, treatment of employees, and financial mismanagement. As to the LSA, Davis argues that LSA published a defamatory suspension notice and resolution to an outside political consultant. (Doc. 14 at 24-25.) Citing the Alabama Supreme Court's decision in *Brackin v. Trimmier Law Firm* ("*Brackin*"), 897 So. 2d 207 (Ala. 2004), the Defendants move for summary judgment on the basis that there has been no publication; that is, there is "no evidence that anyone . . . shared any information about the allegations or the investigation beyond those who were acting on behalf of LSA." (Doc. 40 at 14.)

In response, Davis focuses his attention on, and draws this Court's to, two documents: the "Executive Committee's resolution of suspension and the accompanying letter to Davis outlining the grounds of the suspension." (Doc. 44 at 31.) According to Davis, the intra-corporate doctrine does not apply because these two documents, (Doc. 41-2 at 81-90), contained false allegations that LSA maliciously published to an outside, independent consultant. (Doc. 44 at 32-33.)

Since the parties focus on the issue of

publication, so too will the Court. First and foremost, the only alleged publication is that of the details of Davis' suspension to the outside consultant. There is no evidence that any information or details of Davis' suspension were published or disseminated to anyone else by LSA or by the political consultant to anyone else. While Davis surmises that the information given to the consultant will be used against him by future political opponents, Davis provides no evidence rebutting LSA's stated purpose for hiring the consultant: to give advice and consultation on how best to deal with the publicity associated with Davis' departure. (Docs. 40 at 13-14; 46 at 4.) That it was Davis, himself, who actually "went public" and gave statements to the press and published an article in an on-line media platform about his suspension underscores the wisdom of LSA in recognizing the need for such a consultant. Indeed, no evidence is presented that LSA published any information or statement responsive to that which Davis disseminated himself.

Putting this point aside, the legal issue before the Court concerns whether giving the suspension notice and letter to an outside consultant constitutes publication, a question controlled by Alabama law. While Davis says it cannot, and LSA says it can, *Brackin* says it must. *Brackin*, when distilled to its essentials, held among others that statements made to one's agent, which are both authorized and invited by the principal, are not deemed to have been "published," and without "publication," there can be no defamation. *See Brackin*, 897 So. 2d at 222. *See also McDaniel v. Crescent Motors, Inc.*, 31 So. 2d 343

(1947); *Dixon v. Economy Co.*, 477 So. 2d 353 (Ala. 1985); *Mims v. Metro. Life Ins. Co.*, 200 F. 2d 800 (5th Cir. 1952).[8]

The rationale for this rule is simple – because the requisite element of publication is not met if the allegedly defamatory words (whether written or oral) are made only to the complaining party by the offending party, *such words also are not published when made to one who stands in an agency relationship with the offending party*, if the agent represents the offending (or principal) in the matter discussed and the words are invited by the offender. *See Brackin*, 897 So. 2d at 220 (citing *Prins v. Holland-N. Am. Mortg. Co.*, 181 P. 680, 680–81 (Wash. 1919) ("For a corporation, therefore, acting through one of its agents or representatives, to send a libelous communication to another of its agents or representatives, cannot be a publication of the libel on the part of the corporation. It is but communicating with itself.")). Stated otherwise, statements made to an agent, under these circumstances, are the legal equivalent of statements made directly to oneself. Consequently, as logic commands, no publication has taken place, and without publication no actionable claim for defamation can exist.

Applied to this case, the statements at issue (the resolution and suspension letter authored by the Board and given to the consultant hired by the Board

[8] Decisions of the Fifth Circuit issued prior to October 1, 1981 are binding precedent on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

during the investigation) fall within the "no publication" rule. No evidence that these documents were shared or disseminated with anyone else, or that they were given to the consultant for any purpose other than addressing the current issues at LSA, has been provided by Davis or found by this Court. As elsewhere, Davis' argument that the information *may* be shared with his future political opponents is speculative, conjectural and lacking any evidentiary support.

In short, this Court fails to see how the facts of this case are materially distinct from those other circumstances where courts have concluded that there has been no publication of communications between a corporation and its outside retained consultants, whether that is an investigator, an auditor, an attorney, or a public relations consultant.[9] *See Watters v. Louisiana Pacific Corp.*, 156 F. App'x 177, 179 (11th Cir. 2005) (holding that, under Alabama law, "communications made to employees in the course of investigating the plaintiff's employment behavior do not constitute third-party publication for defamation purposes"); *Redman v. Massey Auto*, 2:13CV313-SRW, 2014 WL 4855023 (M.D. Ala. Sept. 29, 2014) (concluding there had been no publication of communications between an auto dealer and its outside attorney concerning an investigation into

[9] While the Defendants do not raise this issue in their Motion, it appears the allegedly defamatory statements made to the retained consultant are conditionally privileged since the documents shared with the consultant are ones in which the consultant had a corresponding interest if made in good faith and without actual malice.

alleged sexual harassment by the plaintiff); *Harris*, 2008 WL 11380165, at *22 ("[C]ommunications between an attorney and his client clearly are privileged and do not constitute publication[.]").

As one last desperate heave, Davis argues there is an exception when the statement was communicated with malice. However, as the Alabama Supreme Court has noted, "[w]e do not reach the matter of privilege, malice or any other question until there is a publication." *Brackin*, 897 So. 2d at 221 (quoting *McDaniel*, 31 So. 2d at 345). While malice may have relevance when it comes to an assertion of a conditional privilege, the Defendants advance no such notion in their Motion.

E. The State Law Conspiracy Claim

One last claim remains. In their final point, the Defendants ask for the dismissal of Davis' conspiracy claim for two reasons. First, since summary judgment is due on the underlying claims, or "wrongful acts", then Davis' conspiracy claim founded on those claims or acts must fail as a matter of law. *See Thompson Props. 119 AA 370, Ltd. v. Birmingham Hide & Tallow Co.*, 897 So. 2d 248, 267 (Ala. 2004) (In Alabama, if "the underlying cause of action is not viable, the conspiracy claim must also fail."). Second, since the alleged co-conspirators are all co-directors and employees of LSA, the conspiracy claim is affirmatively barred by the intra-corporate conspiracy doctrine. *M&F Bank v. First Am. Title Ins. Co.*, 144 So. 3d 222, 234 (Ala. 2013). The Court concludes that both arguments support dismissal of Davis' conspiracy

claim.

Furthermore, because Davis does not address these arguments in his responsive brief, the Court must assume that Davis concedes these points and has abandoned this claim. *Jones v. Bank of Am., N.A.*, 564 F. App'x 432, 434 (11th Cir. 2014).

VI. CONCLUSION

Accordingly, for the foregoing reasons, it is

ORDERED as follows:

(1) The Plaintiff's Motion to Supplement Memorandum Brief, (Doc. 48), is GRANTED.

(2) The Defendants' Motion for Summary Judgment, (Doc. 39), is GRANTED.

A separate judgment shall issue.

DONE, this 16th day of July, 2020.

/s/ R. Austin Huffaker, Jr.
R. AUSTIN HUFFAKER, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-12886-BB

[April 14, 2022]

ARTUR DAVIS,

Plaintiff - Appellant
Cross Appellee,

versus

LEGAL SERVICES ALABAMA, INC.,
LAVEEDA MORGAN BATTLE,
ALEX SMITH,

Defendants - Appellees
Cross Appellants.

Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: ROSENBAUM and TJOFLAT, Circuit Judges, and STEELE, *District Judge.

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* Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

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