No. __________

In the
Supreme Court of the United States

RACHEL MOSBY,
Petitioner,
v.

CITY OF BYRON, GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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[FILED APRIL 18, 2022]

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-10377

Non-Argument Calendar

RACHEL MOSBY,

Plaintiff-Appellant,

versus

CITY OF BYRON, GEORGIA,

Defendant-Appellee.

Appeal from the United States District Court

for the Middle District of Georgia

D.C. Docket No. 5:20-cv-00163-TES

Before WILSON, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Rachel Mosby, a former fire chief for the City of Byron, Georgia, appeals the district court's grant of summary judgment to the City on several Title VII and ADA claims. Mosby also challenges the district court's dismissal of her procedural due process claims under the United States and Georgia Constitutions

and her state law defamation claim. Upon careful consideration, we affirm.

I. BACKGROUND

Mosby was the City of Byron's fire chief for eleven years before being terminated in 2019. Afterwards, she retained counsel and filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that the City had violated Title VII and the ADA. The City filed a position statement with the Commission that responded to the merits of Mosby's charge. Neither party disputes that the charge was never properly verified, or that there was any attempt to cure verification until after Mosby had already requested and the Department of Justice had already issued a right to sue letter.

Upon being authorized to do so, Mosby brought a lawsuit against the City in the Middle District of Georgia. In addition to her Title VII and ADA claims (Counts I–IV), Mosby alleged procedural due process violations under the United States and Georgia Constitutions and defamation under Georgia state law. Counts V and VI of the complaint alleged that Mosby had a property interest in continued employment as the City's fire chief based on a "long-standing personnel policy" allowing department heads to appeal adverse employment actions. The City notified her on November 13, 2018, that it would be changing this policy to disallow appeals by department heads effective January 14, 2019. Mosby was terminated more than four months after the change went into effect. Count VII further alleged that the City "made and published false [verbal and written] statements to the media and other third

parties" regarding Mosby that "were calculated to injure [Mosby's] reputation," "imputed . . . a want of integrity and misfeasance in her office," and caused damages "including but not limited to a complete inability to secure similar employment in her field."

The City moved to dismiss Mosby's Title VII and ADA claims on the grounds that failure to verify a charge of discrimination required dismissal as a matter of law. It also argued that Counts V–VII failed to state valid claims for relief. To consider matters outside the pleadings, the district court converted the City's motion to dismiss to one for summary judgment. The court then granted summary judgment to the City on Mosby's Title VII and ADA claims and dismissed her due process and defamation claims. Mosby timely appealed.

II. STANDARDS OF REVIEW

We review a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008) (internal quotation marks omitted). We also review grants of summary judgment *de novo*, "apply[ing] the same legal standards as the district court." *Custom Mfg. and Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 646 (11th Cir. 2007). Finally, "[w]e may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court be- low." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

III. DISCUSSION

a. Mosby's Title VII and ADA Claims

Mosby first argues that the district court erred by granting summary judgment to the City on her various Title VII and ADA claims based on the failure to submit a verified charge of discrimination. Because the City raised the issue of verification in a pre-answer motion to dismiss and the parties agree that Mosby's charge was never verified or properly amended, we disagree.

Employees alleging violations of Title VII or the ADA must, before bringing suit in federal court, submit a charge of discrimination to the Commission. 42 U.S.C. § 2000e-5(f). Such charges "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." *Id.* § 2000e-5(b). The Commission's regulations mandate that a charge "shall be verified," meaning that it must be "sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements, or supported by an unsworn declaration in writing under penalty of perjury." 29 C.F.R. §§ 1601.3(a), 1601.9.

An employee who files an unverified charge may cure the lack of verification through an amendment, which will then "relate back" to the initial filing of the charge. 29 C.F.R. § 1601.12(b); *see Edelman v. Lynchburg College*, 535 U.S. 106 (2002). The employee's window to amend ceases when the time for the employer to respond to the charge elapses. *Edelman*, 535 U.S. at 113. Thus, a charge neither filed under oath or affirmation nor subsequently cured by

amendment fails to satisfy the statutory requirement that an employee submit his or her charge to the Commission. *Vason v. City of Montgomery*, 240 F.3d 905, 907 (11th Cir. 2001). Accordingly, we have affirmed summary judgment in favor of Title VII defendants when an employee files a lawsuit based on an unverified charge. *Id.*

The Supreme Court has held that an employer may forfeit the issue of an employee's failure to properly submit his or her charge to the Commission by failing to timely raise the issue in follow-on litigation. In *Fort Bend County v. Davis*, the Court held that a plaintiff's failure to comply with Title VII's charge-filing requirement does not strip the federal courts of jurisdiction to con- sider a follow-on federal lawsuit. *Fort Bend Cnty. v. Davis*, 587 U.S.___, 139 S. Ct. 1843, 1852 (2019). Unlike a jurisdictional issue, the Court reasoned that the failure to comply could be forfeited by the parties. Accordingly, the Court affirmed the Fifth Circuit's decision, which held that an employer forfeited the issue by failing to raise it until approximately four years into the litigation after "an entire round of appeals all the way to the Supreme Court." *See id.* at 1847–48, 1852.

Mosby argues that her failure to file a verified charge should be excused under *Fort Bend County*, but we disagree. In *Fort Bend County*, the Supreme Court affirmed a decision holding that the charge-filing requirement was forfeited when the employee at- tempted to supplement the allegations in her charge by handwrit- ing additional information on a state agency's intake questionnaire and the employer waited four years and "an entire round of appeals all the way to the Supreme Court" to first raise the issue in the liti- gation. *Davis v. Fort Bend Cnty.*, 893 F.3d

300, 208 (5th Cir. 2018), *aff'd*, 139 S. Ct. at 1847–48, 1852. Mosby, by contrast made no such attempts to make handwritten supplements to her charge, which she filed through counsel. And the City raised the verification issue in a pre-answer motion to dismiss rather than after an exhaustive series of appeals. None of our precedents nor the Supreme Court's holding in *Fort Bend County* suggest that the City forfeited Mosby's failure to verify her charge or properly comply with Title VII's administrative exhaustion requirement. Because Mosby did not properly submit her charge of discrimination to the Commission, the district court correctly granted summary judgment on her Title VII and ADA claims.

b. Mosby's Due Process Claim

Mosby's next argument—that the district court erred by dis- missing her procedural due process claims under the United States and Georgia constitutions—fares no better.

The district court dismissed Mosby's complaint because she failed to allege that she had a protected property interest in her employment. A complaint fails to state a claim when it does not include "enough factual matter" to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Although a com- plaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." *Id.* at 555 (cleaned up). "Naked assertions devoid of further factual enhancement" will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The complaint must contain enough facts to make a claim for

relief plausible on its face, that is, it must "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (cleaned up). Notably, when a more carefully drafted complaint might have resolved a pleading deficiency, "[a] district court is not required to grant a plaintiff leave to amend [her] complaint *sua sponte* when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002).

To sufficiently allege a procedural due process claim, Mosby must allege that she had a property interest and that the City de- prived her of that interest. *See Ross v. Clayton Cnty.*, 173 F.3d 1305, 1307 (11th Cir. 1999). Whether an employee has a property interest in continued employment is a question of substantive state law. *Adams v. Bainbridge-Decatur Cnty. Hosp. Auth.*, 888 F.2d 1356, 1363 (11th Cir. 1989) (quoting *Nicholson v. Gant,* 816 F.2d 591, 597 (11th Cir. 1987). We have held that "in Georgia, an at-will employee typically does not have a reasonable expectation of continued employment sufficient to form a protectable property inter- est." *Wofford v. Glynn Brunswick Mem'l Hosp.*, 864 F.2d 117, 119 (11th Cir. 1989); O.C.G.A. § 34-7-1 ("An indefinite hiring may be terminated at will by either party."); *see also Wilson v. City of Sar- dis*, 590 S.E.2d 383, 385 (Ga. Ct. App. 2003) (holding that "'at will' employees have no legitimate claim of entitlement to continued employment and, thus, no property interest protected by the due process clause"). Public employees, however, have a property interest in continued employment under a civil service system if they are terminable only for cause based on "[a]n

explicit contractual provision, rules, or common understandings." *DeClue v. City of Clayton,* 540 S.E.2d 675, 677 (Ga. Ct. App. 2000); *see also Brett v. Jefferson Cnty.*, 123 F.3d 1429, 1433–34 (11th Cir. 1997).

As an initial matter, Mosby has abandoned any challenge to the district court's dismissal based on one issue. Mosby's reply brief raises, for the first time in this appeal, an argument that the district court improperly considered matters outside the pleadings in de- ciding the City's motion to dismiss. In reviewing a district court's dismissal under Rule 12(b)(6), issues not raised in a party's initial brief are considered abandoned. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–83 (11th Cir. 2014). Thus, by not raising the issue in her initial briefing, Mosby has abandoned it.

As to the merits of the district court's decision, we conclude that it properly held that Mosby had not pleaded sufficient facts to establish a property interest in her continued employment with the City as fire chief. Mosby cites the City's "long-standing personnel policy" as the root of her property interest in continued employment. But the personnel policies cited in Mosby's pleadings placed her under the authority of the City Administrator and made her position terminable at will. Specifically, Section 8.1(K) of the City's personnel policy, as effective on the date of Mosby's firing and pursuant to the City's 2018 amended Charter, expressly provided that "all appointive officers and director shall be employees at-will and subject to removal or suspension at any time by the appointing authority unless otherwise provided by law or ordinance." Similarly, other

sections of the Charter, as amended in 2018, provided that "[a]ll appointive officers and directors shall be employees at-will and subject to removal or suspension at any time by the city administrator unless otherwise provided by law or ordinance." Because she was an at-will employee, Mosby had no property interest in continued employment under Georgia law. *DeClue*, 540 S.E.2d at 677.

Mosby argues that, despite the express language of the personnel policies, other allegations support her position that she had a property interest in continued employment. We disagree. Although Mosby was designated as a non-probationary employee, the rules specifically provided that her position was at-will. No more successful is Mosby's reliance on the City's disciplinary policy, which expressly declined to deprive a supervisor of the ability to "immediately terminate an employee for any one of the reasons listed in this policy." Mosby's reliance on outdated policies and regulations that she admits were changed months before she was fired is also unavailing. Because Mosby did not adequately plead a property interest in her continued employment with the City and failed to seek leave to amend her deficient pleadings, the district court did not err by dismissing her due process claims. *Wagner*, 314 F.3d at 542.

c. Mosby's Defamation Claim

Mosby's final argument—that the district court improperly dismissed her defamation claim under Georgia law—also fails. In Georgia, a defamation plaintiff must allege facts showing: "(1) a false and defamatory statement about [oneself]; (2) an unprivileged communication to a third party; (3) fault

by the defendant amounting to at least negligence; and (4) special damages or defamatory words that are injurious on their face." *Lewis v. Meredith Corp.*, 667 S.E.2d 716, 718 (Ga. Ct. App. 2008) (internal quotation marks omitted). When the plaintiff in a defamation action is a pub- lic figure, he or she must also prove actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Williams v. Tr. Co.*, 230 S.E.2d 45, 52 (Ga. Ct. App. 1976).

Mosby argues that she adequately pleaded actual malice, a required element of her claim. We conclude that she did not. Count VII of Mosby's complaint merely recited the bare elements of libel and slander under Georgia law, mimicking the statutory language in exactly the type of "the-defendant-unlawfully-harmed- me accusation" that the Supreme Court disapproved of in *Iqbal*. 556 U.S. at 678. Nothing on the face of Count VII plausibly alleged that the City made any false statements with actual malice. And although Count VII incorporates the complaint's factual allegations, those allegations mention statements only in the context of the City's nondiscriminatory explanations for terminating Mosby and, likewise, do not allege actual malice. The complaint even ad- mitted that one alleged false statement might have been "based on inaccurate information," instead of knowingly false. Mosby has not alleged sufficient facts to allow a reasonable inference that the City is liable for defamation. *Id.* at 678.

Finally, Mosby never filed a motion or requested leave to amend after being alerted to her pleading deficiencies by the City's motion to dismiss. The district court was not required to cure Mosby's deficient pleadings where Mosby herself chose not to.

See Wagner, 314 F.3d at 542. Thus, the district court did not err by dis- missing Mosby's state law defamation claim.

IV. Conclusion

For the foregoing reasons, the district court's summary judgment on Mosby's Title VII and ADA claims and its dismissal of her due process and defamation claims are **AFFIRMED.**

[FILED JANUARY 28, 2021]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

RACHEL MOSBY,

***Plaintiff*,**

v.

CITY OF BYRON, GEORGIA,

***Defendant*.**

CIVIL ACTION NO. 5:20-cv-00163-TES

ORDER OF DISMISSAL

This case asserts, among others, claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, 2000e-1, 2000e-2(a), and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111, 12112(a), 12112(b)(5)(A).

Because many of the substantive facts aren't important to the particular issues before the Court, a lengthy factual narrative is unnecessary. However, what is important, is that Plaintiff Rachel Mosby served as the City of Byron's Fire Chief for 11 years until she was terminated. Now, she makes the following claims against the City: Counts I and II include her sex-based discrimination claims for harassment, hostile work environment, and wrongful termination under Title VII; Counts III and IV are claims for wrongful termination and failure to provide a reasonable accommodation under the ADA; Counts V and VI each contain a deprivation of due process claim—one alleging a violation of the Fifth and

Fourteenth Amendments to the United States Constitution and the other alleging a violation of the Georgia Constitution; and Count VII is a defamation claim under Georgia law pursuant to O.C.G.A. §§ 51-5-1 and 51-5-4.

In response to Mosby's Complaint, the City filed a motion to dismiss asserting, *inter alia*, that her Title VII and ADA claims are time-barred because "neither [she] nor her [attorney] filed a *verified* charge with the [Commission]." [Doc. 5-1, p. 5]. After an initial review of the parties' briefs, it became clear to the Court that resolution of the verification issue would likely "require the Court to consider matters outside" Mosby's pleading. *See generally* [Doc. 12]. So, with respect to the verification requirement, the Court converted the City's motion to dismiss into one for summary judgment and permitted a short period within which the parties could procure supporting evidence and file supplemental briefs. With both parties having filed one additional brief in support of their positions, the City's motion is now ripe for consideration.

A. <u>The City of Byron's Motion for Summary Judgment</u>

1. Legal Standard

A court must grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute is not genuine unless, based on the evidence presented, "'a reasonable jury could return a verdict for the nonmoving party.'" *Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002) (quoting *United States v. Four*

Parcels of Real Prop., 941 F.2d 1428, 1437 (11th Cir. 1991)); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Importantly, the movant "has the burden of demonstrating that there are no genuine issues of material fact, [and] once that burden is met[,] the burden shifts to the nonmoving party to bring the court's attention to evidence demonstrating a genuine issue for trial." *Perry v. Pediatrix Med. Grp. of Ga.*, 2021 WL 194145, --- F. App'x ----, at *3 (11th Cir. 2021) (quoting *Alvarez v. Royal Alt. Dev., Inc.*, 610 F.3d 1253, 1263 (11th Cir. 2010)).

In executing its burden, the movant may cite to particular parts of materials in the record, including, "'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." *Four Parcels*, 941 F.2d at 1437 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); Fed. R. Civ. P. 56(c)(1)(A). "When the nonmoving party has the burden of proof at trial, the moving party is not required to 'support its motion with affidavits or other similar material negating the opponent's claim[]' in order to discharge this 'initial [burden].'" *Four Parcels*, 941 F.2d at 1437–38 (quoting *Celotex*, 477 U.S. at 323). Rather, "the moving party simply may show—that is, point out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex*, 477 U.S. at 324) (cleaned up). Alternatively, the movant may provide "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.*

If this initial burden is satisfied, the burden then shifts to *the nonmoving party*, who must rebut the movant's showing "by producing . . . relevant and admissible evidence beyond the pleadings." *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1315 (11th Cir. 2011) (citing *Celotex Corp.*, 477 U.S. at 324) (emphasis added). The nonmoving party does not satisfy her burden "if the rebuttal evidence 'is merely colorable or[] is not significantly probative' of a disputed fact." *Josendis*, 662 F.3d at 1315 (quoting *Anderson*, 477 U.S. at 249–50). "A mere scintilla of evidence supporting the [nonmoving] party's position will not suffice." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997).

2. Mosby's Charge of Discrimination

Before filing a lawsuit that concerns violations of Title VII or the ADA, Congress explicitly and unmistakably mandated that a plaintiff submit a Charge of Discrimination to the Equal Employment Opportunity Commission which "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). In addition to Congress' charge-filing requirement, the Commission's regulations mandate that "[a] charge . . . *shall be verified*." 29 C.F.R. § 1601.9 (emphasis added). That is, a charge must be "sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements, or supported by an unsworn declaration in writing under penalty of perjury." *Id.* at § 1601.3(a). Defendant's summary judgment motion case calls upon the Court to answer one main

question: just how mandatory is the Commission's verification requirement?

On June 28, 2019, Mosby submitted her charge which consisted of a detailed, five-page letter drafted and signed by her attorney laying out her grievances, a notice signed by Mosby identifying that an attorney was submitting the charge on her behalf, and 11 pages of exhibits.[1] *See generally* [Doc. 1-4]. What she didn't file was any sort of verification to her charge. Thus, despite submission of her charge, the City argues that Mosby's (and/or her attorney's) failure to verify it bars her Title VII and ADA claims as a matter of law. [Doc. 5-1, pp. 3, 5]; 42 U.S.C. § 2000e-5(e)(1).

The City makes a simple argument: "[T]here is no evidence that . . . Mosby or her [attorney] ever submitted a *verified* charge to the [Commission] and [without a verified charge], [Mosby's] Title VII and ADA claims must be dismissed." [Doc. 5-1, p. 6]. While the United States Supreme Court allows a later-verified charge to "relate back" to an original charge, the window of opportunity to do so shuts when the Commission closes its file. *See generally Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002); *see also Butler v. Grief, Inc.*, 325 F. App'x 748 (11th Cir. 2008). "Where a right to sue letter has issued, the plaintiff has brought suit, and the [Commission] has closed its file, there is no longer a charge pending before the [Commission] that is capable of being verified."

[1] "While an attorney may file a[] . . . charge on behalf of a client, the attorney's signature alone will not constitute verification if the attorney does not personally swear to the truth of the facts stated in the charge and does not have personal knowledge of those facts." *Butler v. Grief*, 325 F. App'x 748, 749 (11th Cir. 2009).

Butler, 325 F. App'x at 749. In other words, a charging party can amend her charge and—in that amendment—include a verification "only so long as the [original] charge is a viable one in the [Commission's] files[.]" *Id.* (citing *Balazs v. Liebenthal*, 32 F.3d 151, 156–58 (4th Cir. 1994)).

After realizing that neither he nor his client ever verified the charge, Mosby's attorney tried to amend the charge to add the requisite verification. In a letter to the Commission dated July 17, 2020 (well after she filed suit on April 28, 2020), Mosby's attorney wrote: "Based upon our review of the [Commission's] investigative file that we received on May 11, 2020, the [Commission] has not issued a Dismissal and Notice of Rights or taken any other action to close this matter." [Doc. 10-9, p. 1]; *see also* [Doc. 1, p. 31]. To that letter, Mosby attached an amendment to her original charge to include a verification. [Doc. 10-9, p. 2]. Thus, the Court must first decide whether Mosby could have amended her original charge in the first place. The short answer is that she could not.

On December 19, 2019, following an exchange of several emails between Mosby's attorney and various representatives from the Atlanta District Office of the Commission regarding the status of Mosby's charge, Mosby's attorney requested the Commission "to issue a Notice of Right to Sue and close this file." *See generally* [Doc. 10-6]; *see also* [Doc. 10-2]; [Doc. 10-3]; [Doc. 10-4]; [Doc. 10-5]. That same day, the Commission informed Mosby, that her request for a Notice of Right to Sue had "been forwarded to the U.S. Department of Justice (DOJ) for action[]" and that the Department of Justice ("DOJ") would "act on [her] request and issue the Notice directly to [her.]" [Doc. 10-7, p. 2].

On January 3, 2020, even though Mosby's attorney "underst[ood] that the request" for a Notice of Right to Sue "had to be forwarded to the DOJ[,]" he still (ostensibly because of the time that had passed since Mosby filed her original charge) asked whether the Commission was "able to issue a Right to Sue Letter[.]" [Doc. 10-8, p. 1]; *see also Fort Bend Cnty. v. Davis*, 139 S.Ct. 1843, 1847 (2019) ("Whether . . . the [Commission] acts on the charge, a complainant is entitled to a 'right-to-sue' notice 180 days after the charge is filed."). In response, the Commission stated that it was not and that "[t]he DOJ is solely responsible for issuing Notices upon request by the parties against state and local government entities." [Doc. 10-8, p. 1].

Then, on February 12, 2020, the DOJ "notified" Mosby that she had "the right to institute a civil action . . . against [the City]." [Doc. 1-5, p. 1]. Mosby filed her lawsuit on April 28, 2020, and 18 days after the City (in its original dismissal motion) pointed out that she failed to file a verified charge, she attached (to her attorney's July 17, 2020 letter to the Commission) the amendment to her charge that included a verification. *See* [Doc. 5, p. 1] *in connection with* [Doc. 10-9, p. 2]; *see also* [Doc. 1, p. 31].

Mosby's attempt, however, to amend her original charge on July 17, 2020, fails because the DOJ issued its "right-to-sue" letter on February 12, 2020, nearly six months earlier. Candidly, the City is correct; Mosby's "charge was inexplicably not verified," and following the precedent set by the Eleventh Circuit, it is clear that there wasn't an active charge within the DOJ that could be amended. *Butler*, 325 F. App'x at 749; [Doc. 11, p. 2].

In briefing, Mosby even admits that "[o]n July 24, 2020, a[] [Commission] Enforcement Supervisor contacted [her attorney] to say that the [amendment to her charge] could not be accepted because the [file] was closed." [Doc. 10, p. 12]; *see also* [Doc. 14, p. 9]. Through a summary-judgment lens, the evidence shows that Mosby failed to verify her charge. And, based on Mosby's waiver-related arguments that attempt to save her Title VII and ADA claims, she effectively admits she didn't file a verified charge. Thus, based on the fact that "[t]he verification requirement is mandatory[,]" and Mosby failed to adhere to it, her Title VII and ADA claims must be dismissed. *Butler*, 325 F. App'x at 749; *see also Vason v. City of Montgomery*, 240 F.3d 905, 907 (11th Cir. 2001); *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 261 (3d Cir. 2006) (noting that "courts have reasoned that amendment serves no purpose once the right to sue letter has issued[]").

However, in an attempt to keep her Title VII and ADA claims alive, Mosby contends that the City waived her failure to verify when it submitted a Position Statement to the Commission and failed to mention the verification requirement. [Doc. 10, pp. 3–13]. In short, Mosby argues that everyone involved—herself, the City, and the Commission—all treated the charge as valid. [Doc. 10, p. 3].

While the Eleventh Circuit has acknowledged waiver-related arguments, it has yet to definitively hold that equitable waiver applies to missing verifications, much less issue any opinion that stakes out the scope or contours of such a waiver

rule or the circumstances[2] when it might apply.[3] *Vason*, 240 F.3d at 907.

Nevertheless, the only binding precedent available to the Court at the time of this decision clearly and distinctly holds that "the verification requirement for . . . charges is mandatory." *Id.*; *accord Balazs*, 32 F.3d at 156 (holding that failure to comply with the verification requirement "is fatal to an action seeking relief under Title VII"). In *Vason*, a three-judge panel on the Eleventh Circuit explicitly held that "the statute mandates that charges be made under oath or affirmation" and affirmed a district court's grant of summary judgment to an employer because the employee's "charge was not under oath or affirmation." 240 F.3d at 907.

Mosby implores the Court to recognize *Buck v. Hampton Township School District* and *Gad v. Kansas State University*[4] where the Third and

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[2] Even if the Eleventh Circuit ultimately decides that the verification requirement may be waived, it could decide that waiver does not apply in cases, like this one, where (1) both the plaintiff and her experienced attorney simply forgot to include the requisite verification and (2) the defendant responded to the charge of discrimination but could not have definitively known of the lack of verification because it only had the charge itself as opposed to the entire file from the Commission that could have included a separate verification. *See* [Doc. 11, p. 3].

[3] Another district court has also recognized that the Eleventh Circuit has yet to decide when a finding of equitable modification or waiver is appropriate. *Dees v. Florida*, No. 4:10cv305/MCR/WCS, 2012 WL 662295, at *4 (N.D. Fla. Feb. 28, 2012).

[4] *Gad* specifically discusses *Vason*'s ruling that affirmed summary judgment on the grounds that "verification is mandatory." *Gad*, 787 F.3d 1032, 1041 (10th Cir. 2015) (citing *Vason*, 240 F.3d at 907). In *Gad*, the Tenth Circuit noted that

Tenth circuits, respectively, crafted an opposite waiver rule. *Buck*, 452 F.3d 256; *Gad*, 787 F.3d 1032 (10th Cir. 2015). However, it must be remembered that this Court is bound by this circuit's *current* precedent—the precedent set by the Eleventh Circuit. In other words, *Vason* controls until the en banc Eleventh Circuit or the United States Supreme Court directly overrules it. *See Bostock v. Clayton Cnty. Bd. of Comm'rs*, 723 F. App'x 964, 965 (11th Cir. 2018) (mem.) (citing *United States v. Kaley*, 579 F.3d 1246, 1255–56 (11th Cir. 2009)). It simply is not the place of a district court to decide when a circuit precedent is overruled or abrogated to the point that it is no longer binding on lower courts; that remains the exclusive domain for the circuit court.

Additionally, Mosby also urges the Court to consider a 2019 case from the United States Supreme Court, *Fort Bend County, Texas v. Davis*, 139 S.Ct. 1843 (2019). However, *Fort Bend*'s procedural history is drastically different than the procedural posture presented in this case and, upon careful inspection, its holding may not directly

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the Eleventh Circuit, in *Vason*, "never explicitly dubbed the [verification] requirement *jurisdictional*." *Gad*, 787 F.3d at 1041. However, the Tenth Circuit clearly stated that the holding from *Vason* "strongly suggests an implicit conclusion that the requirement was jurisdictional." *Id.* Just to clarify, the Court does *not* find that Mosby's failure to verify robs the Court of jurisdiction to hear her case. Quite the opposite. As explained in the latter portion of this section, the Court finds that it absolutely has jurisdiction to decide these motions and only follows Eleventh Circuit precedent holding that a lack of a verification is mandatory so that a failure to comply means that a plaintiff failed to satisfy a condition precedent to filing suit for Title VII and ADA claims.

overrule the precedent set by the Eleventh Circuit in *Vason* concerning the mandatory requirement that a charge be verified. "For the Supreme Court to overrule a case, its decision must have 'actually overruled or conflicted with [the Eleventh Circuit's] prior precedent.'" *United States v. Vega-Castillo*, 540 F.3d 1235, 1237 (11th Cir. 2008) (citation omitted). Importantly, the Eleventh Circuit has emphasized that

> [t]here is a difference between the holding in a case and the reasoning that supports that holding. Even if the reasoning of an intervening high court decision is at odds with a prior appellate court decision, that does not provide the appellate court with a basis for departing from its prior decision.

Id. (citing *Atl. Sounding Co. v. Townsend*, 496 F.3d 1282, 1284 (11th Cir. 2007)).

Because the Supreme Court's holding in *Fort Bend* is not "clearly on point," it may not have overruled the Eleventh Circuit's prior precedent in *Vason*. *Cole v. United States*, --- F. App'x ----, 2021 WL 118849, at *2 (11th Cir. Jan. 13, 2021). Whether *Fort Bend* overrules or abrogates *Vason* can only be decided by the Eleventh Circuit, not this Court. Thus, there is only one ruling the Court can properly make in this case.

This record, as it stands today, does not contain a verified charge, and "the statute mandates that charges be made under oath or affirmation." *Vason*, 240 F.3d at 907. Since "verification is an absolute condition precedent to suit" under Title VII (and the ADA) in this circuit, Mosby's lack of verification

demands one simple ruling—she did not satisfy an absolute condition precedent before filing her lawsuit. *See Vason v. City of Montgomery*, 86 F. Supp. 2d 1130, 1133 (M.D. Ala. 2000), *aff'd*, 240 F.3d 905 (alteration adopted). Consequently, Mosby's Title VII and ADA claims are barred as a matter of law. Notwithstanding Mosby's reasonable arguments as to why there should possibly be an exception to the *Vason* rule (such as equitable waiver), until the Eleventh Circuit overrules *Vason*, the Court must apply it. And, while the Court certainly empathizes with both Mosby and her attorney regarding the results of their omission, it nonetheless **GRANTS** summary judgment to the City on Counts I–IV of her Complaint.

B. <u>The City of Byron's Motion to Dismiss</u>

1. Legal Standard

When ruling on a motion under Federal Rule of Civil Procedure 12(b)(6), it is a cardinal rule that district courts must accept the factual allegations set forth in a complaint as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007). Under this Rule, a defendant may test the legal sufficiency of a complaint by way of a motion to dismiss. *Barreth v. Reyes 1, Inc.*, No. 5:19-cv-00320-TES, 2020 WL 4370137, at *2 (M.D. Ga. July 29, 2020) (citation omitted). Such motion is an "assertion by a defendant that, even if the facts alleged by a plaintiff are true, the complaint still fails as a matter of law to state a claim upon which relief may be granted." *Id.*

Whether a complaint states a claim for relief is measured by reference to the pleading standard of Rule 8—a "short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*; Fed. R. Civ. P. 8(a)(2). Although Rule 8 does not require

detailed factual allegations, it does require "more than unadorned, the-defendant- unlawfully-harmed-me accusations." *McCullough v. Finley*, 907 F.3d 1324, 1333 (11th Cir. 2018) (citation omitted) (alterations adopted). The purpose of Rule 8 is to provide a defendant "with 'fair notice' of the claims and the 'grounds' for entitlement to relief."[5] *Barreth*, 2020 WL 4370137, at *2 (citation omitted); *see also Twombly*, 550 U.S. 555–56.

When drafting her complaint, "[a] plaintiff must plead more than labels and conclusions or a formulaic recitation of the elements of a cause of action." *McCullough*, 907 F.3d at 1333 (quoting *Twombly*, 550 U.S. at 555). "To be sure, a plaintiff may use legal conclusions to structure [her] complaint, but legal conclusions 'must be supported by factual allegations.'" *McCullough*, 907 F.3d at 1333 (quoting *Iqbal*, 556 U.S. at 679).

While courts, in ruling on a motion to dismiss, must take all of the factual allegations in a complaint

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[5] To decide whether a complaint survives a motion to dismiss, district courts use a two-step framework. *McCullough v. Finley*, 907 F.3d 1324, 1333 (11th Cir. 2018) (citation omitted). The first step is to identify the allegations that are "no more than conclusions." *Id.* (quoting *Iqbal*, 556 U.S. at 679). "Conclusory allegations are not entitled to the assumption of truth." *Id.* After disregarding the conclusory allegations, the second step is to "assume any remaining factual allegations are true and determine whether those factual allegations 'plausibly give rise to an entitlement to relief.'" *Id.* "A court decides whether [Rule 8's pleading standard] is met by separating the legal conclusions from the factual allegations, assuming the truth of only the factual allegations, and then determining whether those allegations allow the court to reasonably infer that the plaintiff is entitled to the legal remedy sought." *Barreth*, 2020 WL 4370137, at *2 (citation omitted).

as true; they are not bound to accept a legal conclusion couched as a factual allegation. *Iqbal*, 556 U.S. at 678. Courts must "identify conclusory allegations and then discard them—not 'on the ground that they are unrealistic or nonsensical' but because their conclusory nature 'disentitles them to the presumption of truth.'" *McCullough*, 907 F.3d at 1333 (quoting *Iqbal*, 556 U.S. at 681).

The factual allegations in a complaint "must be enough to raise a right to relief above the speculative level" and cannot "merely create[] a suspicion of a legally cognizable right of action." *Twombly*, 550 U.S. at 555. Finally, and in this case, critically, a complaint that tenders "'naked assertions' devoid of 'further factual enhancement'" will not survive against a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557) (cleaned up). To survive, a complaint must allege enough facts "to raise a reasonable expectation that discovery will reveal evidence" supporting a claim. *Twombly*, 550 U.S. at 556.

2. Mosby's Due Process Claims

In Counts V and VI of her Complaint, Mosby alleges that the City violated her due process rights afforded to her under the United States and Georgia constitutions, respectively. [Doc. 1, ¶¶ 153–72]. Public employees, like Mosby, "may have a protectable interest in their jobs such that they may not be terminated from those jobs without the protections of procedural and substantive due process." *Peterson v. Atlanta Housing Auth.*, 998 F.2d 904, 913–14 (11th Cir. 1993) (citing *Perry v. Sindermann*, 408 U.S. 593, 601 (1972)); *see also Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). Mosby describes this

protected interest as "a property interest in continued employment." [Doc. 1, ¶ 157].

To establish a procedural due process claim, Mosby must first show that she had a property interest of which she was deprived. *Womack v. Carroll Cnty.*, --- F. App'x ----, 2020 WL 7365795, at *2 (11th Cir. Dec. 15, 2020) (citation omitted). "State law determines whether a public employee has a property interest in his or her job. Under Georgia law, a public employee generally has no protected property interest unless he or she is employed under a civil service system, which allows termination only for cause."[6] *Id.* (quoting *Brett v. Jefferson Cnty.*, 123 F.3d 1429, 1433–34 (11th Cir. 1997)). "Generally speaking," however, "'a public employee has a property interest in continued employment if state law or local ordinance in any way limits the power of the appointing body to dismiss an employee.'" *Gonzalez v. City of Hialeah*, 744 F. App'x 611, 614 (11th Cir. 2018) (quoting *Ross v. Clayton Cnty.*, 173 F.3d 1305, 1307 (11th Cir. 1999)). Still though, without an agreement between the employee and the employer, "Georgia follows an 'at-will' employment doctrine, which permits the employer to discharge the employee for any reason whatsoever . . . ." *H&R Block E. Enters., Inc. v. Morris*, 606 F.3d 1285, 1284 (11th Cir. 2010).

Previously, the Court noted that the specific facts underlying Mosby's Title VII and ADA claims were not important in order to analyze the procedural aspects concerning verification. However, in light of

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[6] Mosby neither alleged nor argued that she is subject to the protections afforded by a civil service system. *See generally* [Doc. 1]; [Doc. 10]; [Doc. 14].

the City's arguments regarding Mosby's due process claims, some factual detail is necessary, and the Court—as it must—pulls these factual allegations from Mosby's Complaint and assumes them to be true when considering the City's arguments. The City summarizes Mosby's due process claims as this: Mosby "asserts that she had a property interest in continued employment based on the [C]ity's former personnel policy which provided an appeal process for department heads to appeal adverse employment actions."[7] [Doc. 5-1, p. 2].

In the summer of 2018, Mosby alleges that one of her reserve firefighters subjected her to discriminatory harassment on the basis of her sex. [Doc. 1, ¶ 63]. After receiving prior approval from the City's attorney, Mosby terminated that reserve firefighter, and her decision was initially upheld by Derick Hayes, the City Administrator. [*Id.* at ¶¶ 47, 65–66]. However, on November 13, 2018, Hayes emailed Mosby and informed her of an appeal sought by the reserve firefighter. [*Id.* at ¶ 69]. In that email, Hayes told Mosby that the City "would follow the appeal procedures in" a "personnel policy that had been proposed, but not yet approved, by City Council." [*Id.*]. Hayes heard the appeal, reversed Mosby's decision to terminate and reinstated the reserve firefighter. [*Id.* at ¶ 68]. This email was the first time Mosby "had ever seen the proposed revisions that removed *only* a department head's right to appeal any disciplinary actions taken against them or any employees under their supervision." [*Id.* at ¶¶ 69–70]. The proposed revisions discussed in Hayes' email to

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[7] In other words, the City, through a revised personnel policy, removed Mosby's right to appeal an adverse employment action taken against her as a department head—the Fire Chief.

Mosby were "enacted through an ordinance passed and made effective on January 14, 2019." [*Id.* at ¶ 73].

The City casts Mosby's due process claims as an issue related to a lack of notice of the proposed changes. [Doc. 5-1, pp. 14–15]. Relying on Mosby's allegations in her Complaint, the City argues that "Mosby had been notified of the proposed policy change" and that she "was clearly in communication with . . . Hayes regarding [the proposed changes] and had numerous opportunities to voice her displeasure prior to the new policy being enacted." [*Id.* at p. 14]. On this, the City is correct. Mosby had two months to review the proposed changes before they became effective. *See* [Doc. 1, ¶ 69] *in connection with* [Doc. 1, ¶ 73]. Thus, to the extent Mosby argues that the City didn't give her an opportunity to dispute the proposed changes, her argument fails. *See DeClue v. City of Clayton*, 540 S.E.2d 675, 677–80 (Ga. Ct. App. 2000).

However, an issue relating to a lack of notice of the proposed changes isn't, according to Mosby's arguments, the crux of her due process claims. Instead, Mosby alleges that the City "arbitrar[ily]" terminated her "without any prior notice" and as such "failed to follow its own procedures." [Doc. 1, ¶¶ 159–60]; [Doc. 10, p. 13]. Although Mosby argues that the City deprived her of her due process rights when it immediately terminated her instead of adhering to the "increasingly progressive property interest.[8] [Doc. 1-2, p. 2].

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[8] As to the "progressive nature" of the City's disciplinary scheme, the Personnel Policies state that "an employee" can be "immediately terminate[d] . . . for any one of the reasons listed in this policy." [Doc. 1- 2, p. 2]. Because "[d]iscipline should correspond to the offense," the policy clearly allows the City to

"To obtain a protected property interest in employment, a person must have more than a mere unilateral expectation of continued employment; one must have a legitimate claim of entitlement to continued employment." *Warren v. Crawford*, 927 F.2d 559, 562 (11th Cir. 1991). And importantly, "[u]nder Georgia law, in the absence of a controlling contract between the parties, employment for an indefinite period is terminable at will by either party." *Id.* (citing *Land v. Delta Airlines*, 203 S.E.2d 316, 317 (Ga. Ct. App. 1973)); *see also Stidwell v. City of Atlanta*, No. 1:16-CV-3375-MHC, 2018 WL 4999971, at *3 (N.D. Ga. Feb. 8, 2018) (citing *DeClue*, 540 S.E.2d at 677).

Since the City's Personnel Polices clearly say that Mosby is an at-will employee and they are silent as to any for-cause requirement, the City is correct that Mosby did not have a property interest in her employment when the City terminated her, and the Court **GRANTS** the City's dismissal motion as to Mosby's due process claims.[9] *DeClue*, 540 S.E.2d at 678 (when an employee no longer has any property interest in her employment after new policies become effective, the employer does not violate due process

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terminate an employee without the use of progressive discipline. [*Id.*].

[9] Even if Mosby could show a deprivation of some right protected by the due process clause, there is nothing in her Complaint alleging that she took advantage of available state procedures, like mandamus, to correct any potential due process deficiency. "If adequate state remedies were available but the plaintiff failed to take advantage of them, the plaintiff cannot rely on that failure to claim that the state deprived [her] of procedural due process." *Nurse v. City of Alpharetta*, 775 F. App'x 603, 607 (11th Cir. 2019) (quoting *Cotton v. Jackson*, 216 F.3d 1328, 1331 (11th Cir. 2000) (per curiam)).

rights by terminating employment without notice and a hearing); *see, e.g.*, [Doc. 1-2, p. 6].

3. Mosby's Defamation Claim

Finally, the City contends that Mosby has failed to state a defamation claim under Georgia law because she has not alleged actual malice in light of her public figure status as the Fire Chief. [Doc. 5-1, p. 16].

When the plaintiff is a public figure, like Mosby, she must ultimately prove "actual malice" in order to prevail on a claim for defamation. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). Under Georgia law, "libel" is "a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." O.C.G.A. § 51-5-1(a). Essential to recovery on any libel claim is publication. *Id.* at § 51-5-1(b). Slander, on the other hand, is oral defamation and consists of "[m]aking charges against another in reference to [her] trade, office, or profession, calculated to injure." *Id.* at § 51-5-4(a)(3).

In her Complaint, Mosby alleges that the City made and published false written and verbal "statements to the media and other third parties that consisted of false charges against [Mosby] in reference to her trade, office, and profession." [Doc. 1, ¶¶ 174–75]. To further lay out her claim, Mosby merely recites the elements of a cause of her. [*Id.* at ¶ 176]; *see also McCullough*, 907 F.3d at 1333, *supra.*

Pleading issues aside, a public official, like Mosby, cannot recover for defamation unless she can prove that "the statement was made with 'actual malice'—that is with knowledge that it was false or with

reckless disregard of whether it was false or not." [Doc. 10, p. 19 (quoting *Sullivan*, 376 U.S. at 279–80)]. Importantly, she never points out which statements were false. *See, e.g.*, [Doc. 1, ¶¶ 173–79]. Instead, Mosby points to microaggressions and intentional harassment from subordinates, fellow department heads, and members of the City Council—the same things she uses to support her sex- based discrimination claims. [Doc. 10, p. 20 n.10 (citing [Doc. 1, ¶¶ 37–38, 44–46, 63)].

At this juncture, the Court will not comb through Mosby's 179-paragraph Complaint and cherry-pick which statements or "microaggressions" she intends to use to support some notion of harassment or her defamation claim. Detailing the grounds for her entitlement to relief is her responsibility. *Barreth*, 2020 WL 4370137, at *2. Although Mosby is correct that "the person's intent in making the statement" is "central to the consideration of . . . defamatory comments," so is falsity. [Doc. 10, p. 19]; *see also Sullivan*, 376 U.S. at 279–80. Although Mosby does not have to prove her case via her Complaint, Eleventh Circuit pleading standards require that she allege more than she did. Recitation pleading of the kind Mosby has used to structure her defamation claim is not permitted. Accordingly, the Court **GRANTS** the City's dismissal motion as to Mosby's defamation claim.[10]

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[10] The City (and thus, Mosby) never argued whether sovereign immunity protects the City from liability with respect to Mosby's defamation claim. *See Doss v. City of Savannah*, 660 S.E.2d 457, 426 (Ga. Ct. App. 2008) (citing *City of Atlanta v. Heard*, 555 S.E.2d 849, 852 (Ga Ct. App. 2001)) ("The City [of Savannah] is entitled to the protections of sovereign immunity on the claim of defamation, as [the plaintiff] has failed to establish any waiver

C. Conclusion

In summation, the Court **GRANTS** the City's Motion for Summary Judgment [Doc. 5] as it relates to the verification requirement for filing a charge of discrimination and **GRANTS** the City's Motion to Dismiss [Doc. 5] with respect to Mosby's due process and defamation claims. The Clerk is **DIRECTED** to **ENTER** Judgment in favor of the City of Byron on all counts.

SO ORDERED, this 28th day of January, 2021.

S/ Tilman E. Self, III
TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

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of this immunity."). The Georgia Constitution permits the Georgia General Assembly to waive the sovereign immunity of municipalities. *Heard*, 555 S.E.2d at 852 (citing GA. CONST. of 1983, art. IX, § II, para. IX). However, "it is clear that such waiver must be by express legislative act." *Heard*, 555 S.E.2d at 852. "In speaking to this authority, the legislature has declared, with limited exception, that 'it is the public policy of the State of Georgia that there is no waiver of the sovereign immunity of municipal corporations of the state and such municipal corporations shall be immune from liability for damages.'" *Id.*; *see also* O.C.G.A. § 50-21-24(7) ("The state shall have no liability for losses resulting from . . . libel [or] slander[.]").

[FILED AUGUST 27, 2020]

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

RACHEL MOSBY,

***Plaintiff*,**

v.

CITY OF BYRON, GEORGIA,

***Defendant*.**

CIVIL ACTION NO. 5:20-cv-00163-TES

ORDER CONVERTING DEFENDANT'S MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT

In order for the Court to rule on the issues presented in Defendant City of Bryon's Motion to Dismiss [Doc. 5], it will be necessary to determine whether Defendant raised the verification defense at the earliest time possible. This determination will likely require the Court to consider matters outside the pleadings. Therefore, Defendant's Motion to Dismiss will be treated as one for summary judgment under Federal Rule of Civil Procedure 56. Fed. R. Civ. P. 12(d).

"When a district court converts a motion to dismiss into a motion for summary judgment, it must comply with the requirements of Rule 56 by notifying the parties of the conversion and provid[e] *at least* 10 days for the parties to supplement the record accordingly." *German v. Nationstar Mortg., LLC*, No. CV 2:20-033, 2020 WL 4905066, at *1 (S.D. Ga. Aug. 20, 2020)

(citing *Trustmark Ins. v. ESLU, Inc.*, 299 F.3d 1265, 1267 (11th Cir. 2002)). Accordingly, Defendant shall have 14 days from the date of this Order to file any supplemental evidence as listed in Rule 56(c) along with a short brief in support of its positions on the issues raised in its dismissal motion. Plaintiff Rachel Mosby shall have 14 days from the supplemental filings to respond. Mosby's failure to respond could result in the dismissal of her claims against Defendant.

The Court notes that both parties have already provided the Court with materials outside the pleadings, many of which are documents Mosby filed with the Equal Employment Opportunity Commission ("EEOC") or are central to her claim under 42 U.S.C. § 2000e *et seq.*, and would not be categorized as materials requiring conversion. *See Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005); *Scott v. Ride Aid of Ga., Inc.*, No. 7:11–CV–180 (HL), 2012 WL 1409326, at *1 (M.D. Ga. Apr. 23, 2012). However, some materials provided arguably do not fall within this category, and the Court, in its discretion, **CONVERTS** Defendant's Motion to Dismiss [Doc. 5] into one for summary judgment. *German*, 2020 WL 4905066, at *1. The parties need not submit any information already provided to the Court, nor are the parties *required* to submit any information in response to this Order.

SO ORDERED, this 27th day of August, 2020.

S/ Tilman E. Self, III

TILMAN E. SELF, III, JUDGE
UNITED STATES DISTRICT COURT

[FILED JUNE 24, 2022]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10377-DD

RACHEL MOSBY,

Plaintiff - Appellant,

versus

CITY OF BYRON, GEORGIA,

Defendant - Appellee.

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

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

BEFORE: WILSON, LAGOA, and BRASHER, Circuit Judges.

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 Panel Rehearing is also denied. (FRAP 40)

[FILED APRIL 18, 2022]

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-10377

Non-Argument Calendar

RACHEL MOSBY,

Plaintiff-Appellant,

versus

CITY OF BYRON, GEORGIA,

Defendant-Appellee.

Appeal from the United States District Court

for the Middle District of Georgia

D.C. Docket No. 5:20-cv-00163-TES

Before WILSON, LAGOA, and BRASHER, Circuit Judges. PER CURIAM:

Rachel Mosby, a former fire chief for the City of Byron, Georgia, appeals the district court's grant of summary judgment to the City on several Title VII and ADA claims. Mosby also challenges the district court's dismissal of her procedural due process claims under the United States and Georgia Constitutions and her

state law defamation claim. Upon careful consideration, we affirm.

I. BACKGROUND

Mosby was the City of Byron's fire chief for eleven years before being terminated in 2019. Afterwards, she retained counsel and filed a charge of discrimination with the Equal Employment Opportunity Commission alleging that the City had violated Title VII and the ADA. The City filed a position statement with the Commission that responded to the merits of Mosby's charge. Neither party disputes that the charge was never properly verified, or that there was any attempt to cure verification until after Mosby had already requested and the Department of Justice had already issued a right to sue letter.

Upon being authorized to do so, Mosby brought a lawsuit against the City in the Middle District of Georgia. In addition to her Title VII and ADA claims (Counts I–IV), Mosby alleged procedural due process violations under the United States and Georgia Constitutions and defamation under Georgia state law. Counts V and VI of the complaint alleged that Mosby had a property interest in continued employment as the City's fire chief based on a "long-standing personnel policy" allowing department heads to appeal adverse employment actions. The City notified her on November 13, 2018, that it would be changing this policy to disallow appeals by department heads effective January 14, 2019. Mosby was terminated more than four months after the change went into effect. Count VII further alleged that the City "made and published false [verbal and written] statements to the media and other third parties" regarding Mosby that "were calculated to

injure [Mosby's] reputation," "imputed . . . a want of integrity and misfeasance in her office," and caused damages "including but not limited to a complete inability to secure similar employment in her field."

The City moved to dismiss Mosby's Title VII and ADA claims on the grounds that failure to verify a charge of discrimination required dismissal as a matter of law. It also argued that Counts V–VII failed to state valid claims for relief. To consider matters outside the pleadings, the district court converted the City's motion to dismiss to one for summary judgment. The court then granted summary judgment to the City on Mosby's Title VII and ADA claims and dismissed her due process and defamation claims. Mosby timely appealed.

II. STANDARDS OF REVIEW

We review a district court's dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) *de novo*, "accepting the allegations in the complaint as true and construing them in the light most favorable to the plaintiff." *Mills v. Fore- most Ins. Co.*, 511 F.3d 1300, 1303 (11th Cir. 2008) (internal quotation marks omitted). We also review grants of summary judgment *de novo*, "apply[ing] the same legal standards as the district court." *Custom Mfg. and Eng'g, Inc. v. Midway Servs., Inc.*, 508 F.3d 641, 646 (11th Cir. 2007). Finally, "[w]e may affirm the district court's judgment on any ground that appears in the record, whether or not that ground was relied upon or even considered by the court below." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir. 2007).

III. DISCUSSION

A. Mosby's Title VII and ADA Claims

Mosby first argues that the district court erred by granting summary judgment to the City on her various Title VII and ADA claims based on the failure to submit a verified charge of discrimination. Because the City raised the issue of verification in a pre- answer motion to dismiss and the parties agree that Mosby's charge was never verified or properly amended, we disagree.

Employees alleging violations of Title VII or the ADA must, before bringing suit in federal court, submit a charge of dis crimination to the Commission. 42 U.S.C. § 2000e-5(f). Such charges "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." *Id.* § 2000e-5(b). The Commission's regulations man- date that a charge "shall be verified," meaning that it must be "sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements, or support- ed by an unsworn declaration in writing under penalty of per- jury." 29 C.F.R. §§ 1601.3(a), 1601.9.

An employee who files an unverified charge may cure the lack of verification through an amendment, which will then "re- late back" to the initial filing of the charge. 29 C.F.R. § 1601.12(b); *see Edelman v. Lynchburg College*, 535 U.S. 106 (2002). The employee's window to amend ceases when the time for the employer to respond to the charge elapses. *Edelman*, 535 U.S. at 113. Thus, a charge neither filed under oath or affirmation nor subsequently cured by amendment

fails to satisfy the statutory requirement that an employee submit his or her charge to the Commission. *Vason v. City of Montgomery*, 240 F.3d 905, 907 (11th Cir. 2001). Accordingly, we have affirmed summary judgment in favor of Title VII defendants when an employee files a lawsuit based on an unverified charge. *Id.*

The Supreme Court has held that an employer may forfeit the issue of an employee's failure to properly submit his or her charge to the Commission by failing to timely raise the issue in follow-on litigation. In *Fort Bend County v. Davis*, the Court held that a charge's lack of verification does not strip the federal courts of jurisdiction to consider a follow-on federal lawsuit. *Fort Bend Cnty. v. Davis*, 587 U.S. , 139 S. Ct. 1843, 1852 (2019). Unlike a jurisdictional issue, the Court reasoned that the lack of verification can be waived or forfeited by the parties. Accordingly, the Court held that an employer forfeited the issue of verification when the employer failed to raise it until approximately four years into the litigation after "an entire round of appeals all the way to the Supreme Court." *See id.* at 1847–48, 1852.

Mosby argues that her failure to file a verified charge should be excused under *Fort Bend County*, but we disagree. In *Fort Bend County*, the Supreme Court held that the issue was waived when the employee filed a charge without counsel and the employer waited four years and "an entire round of appeals all the way to the Supreme Court" to first raise the issue of verification in the litigation. *Fort Bend Cnty.*, 139 S. Ct. at 1847–48, 1852. Mosby, by contrast, was represented by counsel when she filed her charge. And the City raised the verification issue in a pre- answer motion to dismiss rather than after an exhaustive series of

appeals. None of our precedents nor the Supreme Court's holding in *Fort Bend County* suggest that the City waived Mosby's failure to verify her charge. Because Mosby did not properly submit her charge of discrimination to the Commission, the district court correctly granted summary judgment on her Title VII and ADA claims.

B. *Mosby's Due Process Claim*

Mosby's next argument—that the district court erred by dismissing her procedural due process claims under the United States and Georgia constitutions—fares no better.

The district court dismissed Mosby's complaint because she failed to allege that she had a protected property interest in her employment. A complaint fails to state a claim when it does not include "enough factual matter" to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). Although a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions." *Id.* at 555 (cleaned up). "Naked assertions devoid of further factual enhancement" will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The complaint must contain enough facts to make a claim for relief plausible on its face, that is, it must "allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (cleaned up). Notably, when a more carefully drafted complaint might have resolved a pleading deficiency, "[a] district court is not required to grant a plaintiff leave to amend [her] complaint *sua sponte* when the plaintiff,

who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002).

To sufficiently allege a procedural due process claim, Mos- by must allege that she had a property interest and that the City deprived her of that interest. *See Ross v. Clayton Cnty.*, 173 F.3d 1305, 1307 (11th Cir. 1999). Whether an employee has a property interest in continued employment is a question of substantive state law. *Adams v. Bainbridge-Decatur Cnty. Hosp. Auth.*, 888 F.2d 1356, 1363 (11th Cir. 1989) (quoting *Nicholson v. Gant,* 816 F.2d 591, 597 (11th Cir. 1987). We have held that "in Georgia, an at-will employee typically does not have a reasonable expectation of continued employment sufficient to form a protectable proper- ty interest." *Wofford v. Glynn Brunswick Mem'l Hosp.*, 864 F.2d 117, 119 (11th Cir. 1989); O.C.G.A. § 34-7-1 ("An indefinite hiring may be terminated at will by either party."); *see also Wilson v. City of Sardis*, 590 S.E.2d 383, 385 (Ga. Ct. App. 2003) (holding that "'at will' employees have no legitimate claim of entitlement to continued employment and, thus, no property interest protect- ed by the due process clause"). Public employees, however, have a property interest in continued employment under a civil service system if they are terminable only for cause based on "[a]n explic- it contractual provision, rules, or common understandings." *De- Clue v. City of Clayton,* 540 S.E.2d 675, 677 (Ga. Ct. App. 2000); *see also Brett v. Jefferson Cnty.*, 123 F.3d 1429, 1433–34 (11th Cir. 1997).

As an initial matter, Mosby has abandoned any challenge to the district court's dismissal based on one issue. Mosby's reply brief raises, for the first time in this appeal, an argument that the district court

improperly considered matters outside the pleadings in deciding the City's motion to dismiss. In reviewing a district court's dismissal under Rule 12(b)(6), issues not raised in a party's initial brief are considered abandoned. *Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008); *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–83 (11th Cir. 2014). Thus, by not raising the issue in her initial briefing, Mosby has abandoned it.

As to the merits of the district court's decision, we conclude that it properly held that Mosby had not pleaded sufficient facts to establish a property interest in her continued employment with the City as fire chief. Mosby cites the City's "long-standing personnel policy" as the root of her property interest in continued employment. But the personnel policies cited in Mosby's pleadings placed her under the authority of the City Administrator and made her position terminable at will. Specifically, Section 8.1(K) of the City's personnel policy, as effective on the date of Mosby's firing and pursuant to the City's 2018 amended Charter, expressly provided that "all appointive officers and director shall be employees at-will and subject to removal or suspension at any time by the appointing authority unless otherwise provided by law or ordinance." Similarly, other sections of the Charter, as amended in 2018, provided that "[a]ll appointive officers and directors shall be employees at-will and subject to removal or suspension at any time by the city administrator unless otherwise provided by law or ordinance." Because she was an at-will employee, Mosby had no property interest in continued employment under Georgia law. *DeClue*, 540 S.E.2d at 677.

Mosby argues that, despite the express language of the personnel policies, other allegations support her position that she had a property interest in continued employment. We disagree. Although Mosby was designated as a non-probationary employee, the rules specifically provided that her position was at-will. No more successful is Mosby's reliance on the City's disciplinary poli- cy, which expressly declined to deprive a supervisor of the ability to "immediately terminate an employee for any one of the rea- sons listed in this policy." Mosby's reliance on outdated policies and regulations that she admits were changed months before she was fired is also unavailing. Because Mosby did not adequately plead a property interest in her continued employment with the City and failed to seek leave to amend her deficient pleadings, the district court did not err by dismissing her due process claims. *Wagner*, 314 F.3d at 542.

C. Mosby's Defamation Claim

Mosby's final argument—that the district court improperly dismissed her defamation claim under Georgia law—also fails. In Georgia, a defamation plaintiff must allege facts showing: "(1) a false and defamatory statement about [oneself]; (2) an unprivileged communication to a third party; (3) fault by the defendant amounting to at least negligence; and (4) special damages or defamatory words that are injurious on their face." *Lewis v. Mere- dith Corp.*, 667 S.E.2d 716, 718 (Ga. Ct. App. 2008) (internal quotation marks omitted). When the plaintiff in a defamation action is a public figure, he or she must also prove actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Williams v. Tr. Co.*, 230 S.E.2d 45, 52 (Ga. Ct. App. 1976).

Mosby argues that she adequately pleaded actual malice, a required element of her claim. We conclude that she did not. Count VII of Mosby's complaint merely recited the bare elements of libel and slander under Georgia law, mimicking the statutory language in exactly the type of "the-defendant-unlawfully-harmed-me accusation" that the Supreme Court disapproved of in *Iqbal*. 556 U.S. at 678. Nothing on the face of Count VII plausibly alleged that the City made any false statements with actual mal- ice. And although Count VII incorporates the complaint's factual allegations, those allegations mention statements only in the con- text of the City's nondiscriminatory explanations for terminating Mosby and, likewise, do not allege actual malice. The complaint even admitted that one alleged false statement might have been "based on inaccurate information," instead of knowingly false. Mosby has not alleged sufficient facts to allow a reasonable inference that the City is liable for defamation. *Id.* at 678.

Finally, Mosby never filed a motion or requested leave to amend after being alerted to her pleading deficiencies by the City's motion to dismiss. The district court was not required to cure Mosby's deficient pleadings where Mosby herself chose not to. *See Wagner*, 314 F.3d at 542. Thus, the district court did not err by dismissing Mosby's state law defamation claim.

IV. Conclusion

For the foregoing reasons, the district court's summary judgment on Mosby's Title VII and ADA claims and its dismissal of her due process and defamation claims are **AFFIRMED.**

[DATED JUNE 28, 2019]

KENNETH E. BARTON
KEB@COOPERBARTON.COM

VIA CERTIFIED MAIL &
VIA FACSIMILE: (404) 562-6909
Equal Employment Opportunity Commission
Atlanta District Office
100 Alabama Street, S.W., Suite 4R30
Atlanta, Georgia 30303

Re: Charge of Discrimination
Rachel J. Mosby v. City of Byron, Georgia
Equal Employment Opportunity Commission (Charge No. TBD)
Cooper, Barton & Cooper File No.: 15918.0001

To Whom It May Concern:

Our law firm has been retained to represent Ms. Rachel J. Mosby, and we wish to file a Charge of Discrimination on her behalf. Enclosed, please find a true and correct copy of a Notice in which Chief Mosby has designated me and our law firm as her legal representative. The Equal Employment Opportunity Commission will find that, while Chief Mosby was employed with the City of Byron, Georgia, she was subjected to harassment and hostile work environment, disparate treatment, and termination due to her sex and disabilities, in violation of Title VII of the Civil Rights Act and the Americans with Disabilities Act.

Ms. Mosby (hereinafter, "Chief Mosby") was employed as the Chief of the Fire Department, located at 103 GA Highway 49 South, Byron, Peach County, Georgia 31008. The City of Byron was Chief Mosby's employer, which is located at 401 Main Street, Byron, Peach County, Georgia 31008. The City of Byron has employed in excess of fifteen (15) employees for each working day in 2019 and in previous years.

Chief Mosby identifies as a transgender female, and she was one of the first openly-transgender fire chiefs in the world, if not the very first. As described herein, Chief Mosby also suffers from several conditions, especially in her right ankle and lower back-lumbar, that substantially limit her major life activities and are considered disabilities under the Americans with Disabilities Act. Moreover, Chief Mosby became further disabled in Spring 2019, when she sustained additional injuries to her left hip, left wrist, and mid-back thoracic in an on-the-job motor vehicle accident, in which Chief Mosby was not at fault.

Chief Mosby began her employment with the City of Byron on September 4, 2007, as the City's Fire Marshal. At that time, the City was served by the Byron Volunteer Fire Department. In January 2008, the City established its first professional Fire Department, and, shortly thereafter, Chief Mosby was appointed as its first Chief. Prior to Chief Mosby's tenure, the City had been rated by the Insurance Service Office ("ISO") as Class 7. A fire district receives an ISO rating from 1-10, with Class 10 being the lowest, which indicates that the fire district failed to meet ISO minimum requirements.

These ratings directly impact property owners' and municipalities' insurance rates and premiums, and can, thereby impact growth.

During her eleven years as Chief, Chief Mosby's performance was exemplary. Chief Mosby oversaw the growth of the number of professional employees in the Fire Department, contributed to the drafting of proposed City Ordinances, developed Strategic Plans, and improved the quality of the Department's equipment, among other accomplishments. Moreover, Chief Mosby successfully lead the City through two ISO surveys and lowered the City's ISO rating from Class 7 to Class 4 within only four years. She believes that the City will soon be rated as Class 3 due to her efforts. Prior to the events described herein, Chief Mosby only recalls receiving one written reprimand, although she was not otherwise disciplined, for using a profane word while on the scene of a fire. In the last performance evaluation that she received, Chief Mosby's performance was described as exemplary, with very few areas, if any, identified for improvement.

Unbeknownst to her employer, Chief Mosby had been struggling with gender dysphoria for most of her life. In or around Fall 2016, she began her medical transition in order to allow herself to properly present as female. Initially, Chief Mosby attempted to transition quietly; however, in Summer 2017, Chief Mosby realized that other City employees were circulating rumors about Chief Mosby and her appearance. In September 2017, Chief Mosby felt that it was necessary to "come out" (or, "go public," in her words) to her employees. Soon thereafter, Chief

Mosby also came out to the City Administrator, the Mayor, and her fellow department heads, and Chief Mosby would describe herself as presenting entirely as female in or around January 2018.

While she initially thought that this news had been well-received, Chief Mosby often experienced microaggressions and other intentional harassment from her employees, fellow department heads, and even members of the City Council. Shortly after she came out, one Councilmember told Chief Mosby that he did not have a problem with her transition but that he would if she showed up to work in a dress. Another Councilman told Chief Mosby that the City could still use a performance review to get rid of her.

Subsequently, when Chief Mosby was conducting interviews for an open position, the City enacted a hiring freeze *the day after* Chief Mosby had interviewed a qualified candidate who also happened to be transgender, although the City allowed the Public Works and Police Departments to continue hiring. On a number of instances, the Chief of Police and members of City Council intentionally referred to Chief Mosby with male pronouns in their communications with her and statements to the media. In an October 2018 meeting of department heads, the Police Captain intentionally referred to Chief Mosby as male a number of times, and when Chief Mosby corrected the Captain, he responded "whatever dude." Although the City Administrator (and the City's designated equal employment officer) heard the Captain's remarks, he refused to take any corrective or disciplinary action or accept Chief Mosby's complaint. There were other instances when

Councilmembers either blatantly refused to speak to Chief Mosby, and even one Councilman who left the City's designated table as soon as she sat down at a local Chamber of Commerce dinner.

The EEOC will note that the treatment of Chief Mosby began to change drastically and dramatically around the time she was featured in a story by the local press. On April 29, 2019, local outlet 13WMAZ ran a story, on both its evening news broadcast and online, specifically about Chief Mosby coming out as transgender. A true and correct copy of the story is attached hereto and marked as "Exhibit A." Critically, the news outlet approached Chief Mosby about participating in the interview, and there was nothing in City policy or practice that prevented Chief Mosby from making public statements about this, or other topics on prior occasions.

For almost all of Chief Mosby's tenure, she was not required to wear a uniform. Instead, Chief Mosby was permitted to wear professional attire such as khaki pants, button-up shirts, and suits and ties, and the City Budget generally included a line item for a clothing allowance. In 2018, the City budgeted $1,200 for Chief Mosby to use to purchase said professional attire. In Spring 2018, Chief Mosby sought to purchase professional attire that is considered more-traditionally female. She spent approximately $600 on clothing, which had been approved by the appropriate person. However, shortly after Chief Mosby was seen wearing a skirt to work for the first time, the City issued her a written reprimand for allegedly making an unauthorized purchase. The City also required that Chief Mosby pay back the

money. Unfortunately, a City employee decided to leak this information to the press. Critically, Chief Mosby only started wearing a uniform before she came out because this unisex option helped her manage her dysphoria. Around the same time that Chief Mosby used her clothing allowance, another female employee of the City was also permitted to make similar purchases, but she was not disciplined or otherwise required to pay anything back. Moreover, after Chief Mosby wore the skirt to work, the City changed its policy, making it mandatory that firefighters wear uniforms. The policy change appeared to target Chief Mosby, as the Police Chief and detectives remained exempted from this policy and allowed to wear non-uniform, professional attire.

In Summer 2018, one of Chief Mosby's reserve firefighters called Chief Mosby a "he-she" to her face. Because of this incident, as well as a prior complaint of sexual harassment made by another employee against the same individual, Chief Mosby decided to terminate the reserve firefighter. Chief Mosby received approval from the City Attorney to terminate the employee, and her decision was upheld by the City Administrator. However, the City granted the reserve firefighter's request to appeal in November. Despite initially upholding the termination, the City Administrator, now as the officer hearing the appeal, reversed the termination and reinstated the reserve firefighter.

The City Administrator notified Chief Mosby of the appeal via a November 13, 2018 email, and he initially stated that the City would follow the appeal procedures in an unapproved personnel policy that had been proposed but in no way approved. This was

the first time that Chief Mosby had seen the proposed revisions – revisions that took away *only* department heads' right to appeal any disciplinary actions taken against them or other employees. Not only did the *old* policy not actually allow for reserve firefighters (i.e., volunteers) to appeal a termination, the City Administrator told Chief Mosby that she could not appeal the reinstatement because of the *new* policy not yet in effect. The new policy was enacted through an ordinance passed and made effective on January 14, 2019. A true and correct copy of the newly-enacted personnel policy is attached hereto and marked as "Exhibit B."

On June 4, 2019, the City Administrator sent Chief Mosby an email asking to meet with her that afternoon. When Chief Mosby arrived, the City Administrator provided her with notice of her termination, effective immediately. This was the first indication that the City ever gave her that she was going to be terminated, or that her job was in jeopardy in any way. A true and correct copy of the termination letter is attached hereto and marked as "Exhibit C." Chief Mosby was immediately escorted to her office by the Chief of Police, where she found that the locks had already been changed, and she was forced to pack all of her belongings and leave the premises that afternoon.

While the City stated that the termination was for lack of performance, the examples that it cites are inaccurate and/or not indicators of her lack or performance, or much less, valid reasons for termination. The reasons provided are as follows:

- First, the City states that Chief Mosby failed to "release new/renewal business licenses for approval in a timely manner." In late 2018, the City incorporated new software for the Fire Department to use for its part of the business licenses approval process. Because of the new system, the Fire Department was required to enter all information about existing business licenses into the system by hand. Chief Mosby has long been expressing her concerns about the delays this was causing and made suggestions on how the process could be improved, as the City Administrator had instituted a new workflow process without consulting the department heads and was specifically cumbersome on the Fire Chief. The City failed to take her suggestions, and Chief Mosby and one other employee were forced to enter this information into the system manually when they were not performing their regular duties. Critically, the City was aware that Chief Mosby's Department was understaffed due to a hiring freeze and that her personal schedule was limited due to frequent physical therapy sessions that she was receiving for a work-related accident. This is one example of how the City took efforts to make Chief Mosby's duties difficult or impossible, especially in light of Chief Mosby's disabilities and work-related injuries. Moreover, Chief Mosby was never counseled, coached, warned, nor given a negative evaluation on this issue.

- Second, the City alleges that Chief Mosby only attended five of the classes offered during a Georgia Association of Fire Chiefs conference from March 30 through April 3, 2019. The City alleged that this was a waste of its resources. However, the EEOC will find that Chief Mosby took full-advantage of training

opportunities and conferences that she attended, including at this conference. The evidence will show that this allegation is not true, and the City never even asked Chief Mosby about the accuracy of this information. Moreover, the evidence will reflect that this inaccurate information about her conference attendance was reported by at least two individuals with discriminatory animus against Chief Mosby.

- Third, the City states that Chief Mosby failed to maintain the Arson Investigator certification, as required by her job description. However, Chief Mosby maintained all necessary training and certifications, and in evidence will show that the City never actually required this certification for the position.

  In fact, the inclusion of the requirement for a fire investigator certification in the fire chief job description was a mistake *made by Chief Mosby, herself,* when she wrote the original fire chief job description adopted by the city. It was an error that she attempted to correct over the years; this was recognized by her superiors, as evidenced by her never having been notified that this was an issue during her nearly twelve-year tenure, until her termination. Moreover, the evidence will show that the City officially removed fire investigations from being one of the Fire Chief's duties in 2009 and 2010.

Due to the January 2019 change in the personnel policy, Chief Mosby does not have the right to request any reconsideration, appeal, or review of her termination. She is the first department head who has been discharged by the City over the last several

years, and she is the first and only City employee who has been terminated without the right to request an appeal. In hindsight, the City had taken countless actions in late 2018 through 2019 that made it apparent that the City planned to remove Chief Mosby. Since her termination, the City has taken additional steps to humiliate Chief Mosby and further damage her career. One Councilman has given interviews to the local media in which he has *intentionally* referred to Chief Mosby using both female and male pronouns.

Accordingly, for the above and foregoing reasons, Chief Rachel J. Mosby seeks to file a Charge of Discrimination against the City of Byron, Georgia, as follows:

(1) Beginning in January 2018 and continuing through June 4, 2019, Chief Mosby was subjected to harassment, hostile work environment, and disparate treatment due to her sex and gender identity, in violation of Title VII of the Civil Rights Act;

(2) On June 4, 2019, Chief Mosby was terminated due to her sex and gender identity in violation of Title VII of the Civil Rights Act;

(3) On June 4, 2019, Chief Mosby was terminated due to her disabilities, as described herein, in violation of the Americans with Disabilities Act; and,

(4) As described herein, Chief Mosby was terminated for reasons connected to her disabilities known to her employer, without first being provided

with a reasonable accommodation, in violation of the Americans with Disabilities Act.

Please do not hesitate to reach out to us if you have any questions, or need additional information, documentation, or the names of witnesses. We appreciate the EEOC's time and attention to this matter.

Sincerely yours,

KENNETH E. BARTON

KEB/nagm
Enclosures
cc: Ms. Rachel J. Mosby (via email)
Joshua A. Carroll, Esq. (via email)

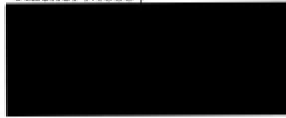
159180001.L03.EEOC Charge

[DATED JUNE 6, 2019]

Notice of Designation of Attorney

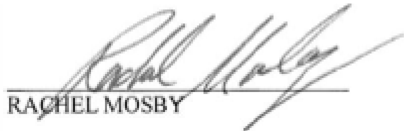
Effective Date: June 6, 2019

I, RACHEL MOSBY, do hereby designate the individual(s) and law firrn(s) named below to act as my attorney/representative in all matters pertaining to my formal Charge of Discrimination to be filed with the Equal Employment Opportunity Commission.


Charging Party:
Rachel Mosby

Attorney/Representative:
Kenneth E. Barton, Esq.
COOPER, BARTON & COOPER, LLP
170 College Street
Macon, Georgia 31201
(478) 841-9007- telephone
(478) 841-9002- facsimile
keb@cooperbarton.com

I understand that I, or any other individual that I so delegate, may cancel this notice, and that I am responsible for notifying the Office of Equal Employment Opportunity in writing in the event of a cancellation.


RACHEL MOSBY

DATE

[DATED JUNE 18, 2019]

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85° Macon, GA

'I've never seemed happier in my life:' Transgender Byron fire chief shares her journey

Author: Suzanne Lawler
Published: 11:36 PM EDT April 29, 2019
Updated: 11:51 PM EDT April 29, 2019

LOCAL 1 ART

CHAPTER 1
'It's important to have visibility for those that can't'

EXPLORE

CHAPTER 1

EXHIBIT A PAGE 1 OF 4

'It's important to have visibility for those that can't'

n the sma Peach County town of Byron, the same person has ed the fire department for the ast 11 years.

Same eadersh p, same sk s on the job, but one not ceab e change – Ch ef Rache Mosby s transgender, tak ng the steps to go from a man to a woman dur ng her t me n one of the c ty's top jobs.

Laura Dern Wants One More Appeal In 'Trial By Fire'

FEATURED BY

RELATED: Here's the 'Good News' that happened in Central Georgia: April 21-27

" t was just organ zed chaos and everybody work ng together putt ng a fire out, and 've been do ng t ever s nce," Rache sa d. For most of her work ng career and ha f her fe, Rache Mosby has worn a un form. " n 2004, became a d str ct ch ef," she reca ed.

She came to Byron three years ater as a fire marsha . " n 2008, they nom nated and voted for me to be the fire ch ef," she sa d .

Transgender fire chief on career at fire department (Pt. 1)

She was a d fferent person back then. " t started n 2016, started med ca y trans t on ng," Rache sa d.

Rache s transgender. Uncomfortab e as a man, she began the journey to becom ng a woman. " most y grew up n a sma town, sma er than the one ve n now, and nformat on wasn't ava ab e and t wasn't someth ng you just went and asked grownups about. there just wasn't nformat on sources for th s stuff," she exp a ned.

We asked Rache about the man she was before the trans t on and she d dn't rea y want to go nto that. For her, he s mp y doesn't ex st anymore.

But he ex sted to the guys at the fire stat on, and n a profess on where very few women, much ess transgender nd v dua s, fi the ranks, Rache had some ntense conversat ons ahead of her.

EXHIBIT A PAGE 2 OF 4

" needed to be ab e to trust them w th th s the way that   ask them to trust me every day when they come to work," Rache sa d. "These peop e are   ke my fam y here at the fire department. We're a   fam y, and t's the same th ng   ke go ng to fam y w th that, and   th nk that the major ty of the re uctance on my part had to do w th my own underest mat on of the r character, and n the end, t wound up not be ng as b g of a dea as   thought t was."

You can't h de trans t on ng from a man to a woman, and as the fire ch ef, Rache had to expand those conversat ons to c ty department heads -- a perce ved tough task n a sma   town n the B b e Be t. "What 've found s that a   es and fr ends have come from some of the most unexpected p aces," she sa d.

'I've never seemed happier in my life:' Transgender Byron fire chief shares her journey

LOCAL

' t's mportant to have v s b   ty for those that can't'

CHAPTER 1

And then she went one step further -- she ta ked to us. She d dn't have to share her story, but she fe t a need. " t's mportant to have v s b   ty for those that can't. There's a ot of fo ks that are unab e to be v s b e w th the r trans t on because of a ot of d fferent reasons," she sa d. "And then there's peop e that are afra d of everyth ng that goes w th t -- t's not a ways smooth for everyone that fo ows th s path."

These days, Rache says she s at peace, comfortab e n her own sk n, and fee s proud to take a eadersh p ro e n the transgender commun ty.

"Everybody who knows me or has known me for some t me says 've never seemed happ er n my   fe," she sa d w th a sm e.

RELATED: Here's the 'Good News' that happened in Central Georgia: April 14-20

Rache has served on severa pane s n the transgender commun ty. As for og st cs n the firehouse, the s eep ng arrangements haven't changed -- the guys and Rache just change c othes n the bathroom. Both of the bathrooms are un sex.

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[DATED APRIL 29, 2005]

City of Byron
Personnel Policies

Policy Number: 8. 1
Effective Date: April 29,2005
Revised Dates: March 15, 2012
December 11, 2012
August 8, 2016
January 14, 2019

Special Instructions: None
Subject: Disciplinary Actions

Number of Pages: 6
Distribution: All Employees of the City of Byron

AN ORDINANCE OF THE MAYOR AND COUNCIL OF THE CITY OF BYRON, GEORGIA TO REPEAL POLICY NO. 8.1 OF THE CITY OF BYRON PERSONNEL POLICIES (SUBJECT: DISCIPLINARY ACTIONS) AND SUBSTITUTE IN ITS PLACE A NEW PERSONNEL POLICY NO. 8.1 TO PROVIDE FOR DISCIPLINARY ACTIONS AGAINST AND APPEAL PROCEDURES FOR EMPLOYEES, TO DISTINGUISH THE STATUS OF APPOINTIVE OFFICERS, DEPARTMENT HEADS AND DIRECTORS, AND TO PROVIDE FOR NAME CLEARING HEARINGS, AND FOR OTHER PURPOSES.

BE IT ORDAINED BY THE MAYOR AND COUNCIL of the City of Byron, Georgia, and it is

hereby so ordained that Policy No. 8.1 of the City of Byron Personnel Policies is hereby repealed in its entirety and a new Policy No. 8.1 (Subject: Disciplinary Actions) substituted in its place as follows:

A. GENERAL

It shall be the duty of all City employees to comply with and assist in carrying out the provisions of the City's personnel rules and regulations. No employee shall be disciplined except for violation of established rules and regulations, and such discipline shall be in accordance with procedures established by the personnel rules and regulations.

It shall be the duty of each employee to maintain high standards of conduct, cooperation, efficiency, and economy in his/her work with the City. Whenever work habits, attitude, production, or personal conduct of any employee falls below the accepted norm for all employees, supervisors should point out those behavioral deficiencies to the employee at the time they are observed or a reasonable time thereafter. Corrections and suggestions should be presented in a constructive and helpful manner in an effort to elicit cooperation and goodwill from all employees. Supervisors shall assist employees in attaining competence through on-the-job training and additional training as required. Whenever possible, oral and/or written warnings shall precede formal discipline.

B. EMPLOYEE AND SUPERVISOR RESPONSIBILITIES

(1) It Is the duty of every employee to correct any faults In performance when called to his/her attention and to make every effort to avoid conflict with the City's rules and regulations.

(2) It is the duty of every supervisor to discuss improper or inadequate performance with the employee in order to correct deficiencies and to avoid the need to exercise disciplinary action. Discipline shall be in the hands of the Department Head and should be of an increasingly progressive nature. The steps of progression shall generally be oral reprimand, written reprimand, suspension, demotion and finally dismissal. However, this is not to say that the Department Head should not immediately terminate an employee for any one of the reasons listed in this policy. Discipline should correspond to the offense.

C. DISCIPLINARY ACTION

Disciplinary action shall be taken as expeditiously as possible and as soon as a final determination is made that a violation has occurred. This normally should not require more than five days after the occurrence is established or after a determination is made that discipline is to be based on multiple violations which have occurred over a period of time. If disciplinary action is delayed for administrative review or investigation purposes, the employee should normally be notified and advised that the Imposition of disciplinary action is being considered.

D. GROUNDS FOR DISCIPLINARY ACTION

The following are declared to be grounds for oral reprimand, written reprimand, demotion, suspension, or removal of an employee. (However, this is not intended to be an exhaustive listing of all grounds for disciplinary action):

(1) conviction of a felony or other crime involving moral turpitude or involving alcoholic beverages or drugs.

(2) Incompetent, negligent or inefficient performance of the duties of the position held.

(3) Absence without leave.

(4) Insubordination which creates a serious breach of discipline.

(5) Intentional failure or refusal to carry out instructions.

(6) Misappropriation, destruction, theft, conversion, or misuse of City property.

(7) Employee subsequently becomes physically or mentally unfit for the performance of

his/her essential functions.

(8) Acts of misconduct while on duty.

(9) Willful disregard of orders.

(10) Habitual tardiness and/or absenteeism.

(11) Falsification of any information required by the City for employment purposes.

(12) Failure to properly report on-the-job accidents or personal injuries.

(13) Neglect or carelessness resulting in damage to City property or equipment.

(14) Repeated convictions during employment of misdemeanor and/or traffic charges.

(15) Introduction, possession, or use on City property or in City equipment, or working under the influence of intoxicating liquor, wine, malt beverages, or any schedule drugs without prescription.

(16} Wantonly offensive conduct or language toward the public or city officials or employees.

(17) Violations of the City Charter, City Ordinances, personnel rules and regulations or department rules; and

(18) An accumulation of violations or infractions which indicate an employee's inability or unwillingness to conform to appropriate standards of performance or conduct.

(19) Failure to become or remain approved as an acceptable driver by the city's insurer whenever driving a city owned vehicle is required for the position.

Employees shall be subject to the following alternatives for disciplinary action as determined by their department head; or, in the case of department heads, as determined by the City Administrator:

(1) Written reprimand;

(2) Reduction in pay to the extent permitted by law;

(3) Suspension without pay for up to 90 days or shift equivalent to the extent permitted by law;

(4) Demotion;

(5) Discharge.

E. WRITTEN REPRIMANDS

(1) Notice: The employee to be reprimanded shall be provided with a written notice of reprimand stating any and all reasons for the reprimand. A reprimand need not include statements of witnesses or other supporting documents, but shall set forth the circumstances in sufficient detail to permit the employee to understand the nature and basis of the action. Written responses shall be placed in the employee's personnel file.

(2) Response: The employee shall have the right to submit a written response to the reprimand within fifteen (15) days of receipt of notice of written reprimand. The employee's response will be placed in the employee's personnel file.

F. NOTIFICATION OF SUSPENSION, REDUCTION IN PAY, DEMOTION, AND TERMINATION

The employee against whom disciplinary action is taken shall be provided with a written notice stating the reasons for the disciplinary action. The written notification should contain the effective date of the action, the specific charges or reasons for the action, the specific action, and a statement informing the employee of his or her right to appeal the action as well as the procedure for doing so. The employee shall also receive notification that failure to submit an appeal will result In the loss of the opportunity to appeal the adverse action.

G. COMPUTATION OF TIME

When a period of time measured in days, weeks, months, years, or other measure of time except hours is prescribed for the exercise of any privilege or the discharge of any duty, the first day shall not be counted, but the last day shall be counted; and, if the last day falls on a Saturday, Sunday, or legal holiday, the party having such privilege or duty shall have through the next day which is not a Saturday, Sunday or legal holiday to exercise the privilege or discharge the duty. When a period of time is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

H. APPEALS

(1) Filing an Appeal

a. Except as otherwise provided in this policy, any employee, other than a department head that reports directly to the City Administrator, who is disciplined shall have the right to appeal such disciplinary action to the City Clerk who will schedule a hearing with the City Administrator. The appeal shall be in writing and must be received in the Office of the City Clerk within five (5) days following the notice confirming imposition of discipline. Department heads that report directly to the City Administrator are not entitled to an appeal.

b. There shall be no right for any employee to appeal a written reprimand or for a probationary employee to appeal any disciplinary action.

(2) Hearing

a. The City Administrator shall conduct an informal fact-finding hearing. Extensions of time until the hearing or continuances of hearings may be approved by the City Administrator.

b. The employee who has requested review shall proceed first. The employee shall offer testimony and documentary evidence which rebuts the reason given for the proposed adverse action and/or which challenges the severity of the proposed adverse action. The employee bears the burden of establishing that the reason or the adverse action is untrue and/or that the severity of the adverse action is inappropriate given the facts and circumstances.

c. The employee's supervisor or Department Head shall next be permitted to offer evidence in support of the proposed action and/or in response to evidence offered by the employee.

d. A hearing may be continued by the appointing authority pending the need to gather additional information.

e. A designee may be appointed to hear the appeal at the discretion of the appointing authority.

f. In arriving at a decision, the City Administrator shall consider the testimony and documents presented in the hearing as well as any other relevant information. The City Administrator may approve, reject, or modify the proposed adverse action and make a

written decision within five (5) business days of the hearing. This decision shall be final.

(3) Any employee, including department heads and appointive officers, who alleges hey have been subject to an action that damages their name, reputation, or integrity, may request a public name-clearing hearing before the Mayor and Council. Such hearing may be requested by filing notice with the City Clerk who will schedule a hearing to include the affected employee. In the event the City Clerk shall desire such a hearing, he or she shall submit the notice directly to the mayor. For good cause, the Mayor and City Council can continue a hearing for up to 20 days past its originally scheduled date. Such hearings shall not serve as appeals of the appointing authority's decision regarding continued employment or discipline.

I. EMPLOYEE INDICTED, CHARGED OR BOUND OVER

(1) If an employee is arrested and bound over to a grand jury or indicted for a felony or serious misdemeanor, the department head shall consult with the City Attorney to determine the appropriate status of the employee during the pendency of the criminal charges.

(2) Normally, if the conduct resulting in the criminal charges is also an offense against the employment relationship with the city, the appropriate disciplinary action shall be instituted and the employee discharged if appropriate.

(3) If the conduct resulting in the criminal charges does not relate directly to the duties of the position

held, but is of a serious and aggravated nature so as to interfere with the employer-employee relationship or embarrass the city, the employee may be suspended pending disposition of charges.

(4) If the conduct resulting in the criminal charges is completely unrelated to city employment and will not be likely to damage the employment relationship, the employee should usually be allowed to continue working.

(5) An employee suspended pending the disposition of criminal charges shall not report to work or be present in his/her normal work site during the period of suspension.

(6) If the criminal charges are disposed of in favor of the employee, he/she shall be reinstated with back pay from the date of suspension less any compensation received from any other source during the period of suspension.

(7) If a suspended employee is not available for work within 30 days of the institution of criminal charges, the position may be declared vacant and filled in the normal course of filing vacancies. Any employee who is unable to report to work for reasons other than suspension is subject to the requirements specified for absenteeism.

J. PROBATIONARY EMPLOYEES

Employees who have not completed twelve months of employment are probationary employees and have no guarantee of continued employment and no protected property interest or rights requiring procedural safeguards. Probationary employees may be terminated for any reason with no right to a due process hearing . In order to terminate a probationary

employee, the department head must deliver a notice to the employee that his/her employment is terminated as an "unsatisfactory probationary employee" , and send a copy to the City Clerk.

K. APPOINTIVE OFFICERS AND DIRECTORS

Pursuant to Article Ill , Section 3 . 10 (e) of the City Charter, all appointive officers and director shall be employees at-w ill and subject to removal or suspension at any time by the appointing authority unless otherwise provided by law or ordinance.

SO ORDAINED BY THE MAYOR AND COUNCIL OF THE CITY OF BYRON, GEORGIA, on the 14th day of January, 2019.

CITY OF BYRON, GEORGIA

Mayor:

Lawrence C. Collins

Michael L. Chidester, Mayor Pro-Tem

James Richardson, Council Member

Russell G. Adams, Council Member

Michael S. Chumbley, Council Member

(absent)

Alan C. Dorsey, Council Member

Attest:

Telina Allred, City Clerk

[DATED JUNE 4, 2019]

Chief Mosby
1473 Neweii Road
Byron, GA 31008

Chief Mosby,

I regret to inform you that your employment with the City of Byron is hereby terminated immediately.

The City no longer has confidence in your ability to lead our Fire Department.

Some of the most recent indicators of lack of performance are listed below:

(1) Failure to release new/renewal business licenses for approval in a timely manner, causing undue delays in processing customers' requests. This has been an issue since late in 2018 and you have been notified several times via email and in Staff Meetings.

(2) The GAFC Conference was in Savannah between 03/30/2019 - 04/03/2019. You were in Savannah during the time of the entire conference, but only attended five (5) classes out of twenty-one (21) offered. The first two (2) full days in attendance, you didn't take any classes, which cost travel monies that should not have been spent.

(3) Failure to maintain the Fire Investigator certification required by the Fire Chief job description. You have attended the Arson Investigator class no less than two (2) times at the

expense of the City but have failed to maintain the certification.

The foregoing constitute the following grounds for disciplinary action (including discharge) under the City's personnel policy: 8.1 D (2), (5), and (9).

Pursuant to policy: 8.1 H (1), as a department head, you are not entitled to an appeal. However, 8.1 H (3) authorizes a public name clearing at your request before the mayor and council. The purpose of such a hearing is not to offer an appeal of this decision but is to provide you with an opportunity to clear your name, reputation, and integrity. If you desire such a hearing, you must file a notice with the City Clerk.

This termination is effective immediately (June 4, 2019).