Cox v. City of Calhoun

United States District Court for the Northern District of Georgia, Rome Division

September 30, 2024, Decided

CIVIL ACTION FILE NO. 4:23-CV-00284-WMR-WEJ

Reporter
2024 U.S. Dist. LEXIS 177829 *

CHRISTOPHER COX, Plaintiff, v. THE CITY OF CALHOUN, LEONARD NESBITT, PAUL WORLEY, and TERRY MILLS, in their Official and Individual Capacities, Defendants.

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Opinion

[*1] **FINAL REPORT AND RECOMMENDATION**

Plaintiff, Christopher Cox, sues his former employer, defendant City of Calhoun (the "City"), and several City officials for allegedly discriminating against him and terminating him in retaliation for reporting sexual misconduct by a co-worker at the Fire Department. (See Am. Compl. [15].) Plaintiff alleges defendants tolerated a sexually hostile work environment and retaliated against him for complaining about the same in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e; violated his First Amendment right to free expression under 42 U.S.C. § 1983; retaliated against him in violation

of the Georgia Whistleblower Act ("GWA"), O.C.G.A. § 45-1-4; and engaged in a civil conspiracy, presumably in violation of 42 U.S.C. § 1985. (See Am. Compl. ¶¶ 65-110, Counts I-V.)1

This matter is before the Court on defendants' Motion for Judgment on the Pleadings [25] pursuant to Federal Rule of Civil Procedure 12(c). For the reasons set forth below, the undersigned **RECOMMENDS** that defendants' Motion be

GRANTED and judgment be entered in their favor.

I. THE FIRST AMENDED COMPLAINT

The City employed plaintiff as the Fire Department's Division Chief of Training from March 5, 2012 through December 12, 2022. (Am. Comp. ¶¶ 4, 14.) During the period at issue, defendant Leonard Nesbitt served as Chief (id. ¶ 5), defendant Terry Mills served [*2] as Deputy Chief (id. ¶ 7), and defendant Paul Worley served as City Administrator (id. ¶ 6).

A. Plaintiff's Allegations of Sexual Harassment and Misconduct

On February 22, 2012, plaintiff signed an Acknowledgement of Receipt of

Anti-Harassment Policy, which included a provision on how concerns about sexual

1Plaintiff consents to dismissal of his Fourteenth Amendment Due Process claim under 42 U.S.C. § 1983, set forth in Count III. (Pl.'s Resp. [26] 21.)

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harassment should be raised to City personnel. (Am. Compl. ¶ 15.) In addition to training the City's firefighters in firefighting, personal and public safety, and standard operating procedure, plaintiff taught new firefighters how to interact with the public and behave in a professional and courteous manner when dealing with citizens in their homes and businesses. (Id. ¶¶ 16-18.) During plaintiff's tenure, several situations involving sexual misconduct by other Fire Department leaders arose (discussed below), and plaintiff believed that he needed to voice his concerns about this misconduct to Chief Nesbitt. (Id. ¶ 19.)

In 2018, a local business owner complained to the prior City Administrator about repeated harassment of one of his female employees by Deputy Chief Mills. (Am. [*3] Compl. ¶ 20.) The business owner and staff continued to complain when firefighters subsequently visited the establishment. (Id.) Battalion Chief Todd Holbert called

plaintiff to help mediate the situation because Chief Nesbitt was out of town. (Id. ¶ 21.) Plaintiff and Battalion Chief Holbert met with the business owner, who complained that Deputy Chief Mills frequently harassed and attempted to prey on young female employees. (Id.) In an attempt to diffuse the situation, plaintiff told the business owner that he would share the information with Fire Department leaders immediately in order to stop the unwanted conduct. (Id. ¶ 22.) Plaintiff shared the complaint and additional evidence provided by the business

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owner with Chief Nesbitt. (Id.) Plaintiff told Chief Nesbitt and Deputy Chief Mills that the on-the-job harassing conduct toward women needed to stop. (Id. ¶ 23.)

Plaintiff alleges that he was labeled a troublemaker after bringing the above complaint forward and asserts that defendants retaliated against him, culminating in his December 12, 2022 termination. (Am. Compl. ¶ 23.) The predatory and harassing behavior by Fire Department leaders toward women did not stop but rather became [*4] a well-known pattern and practice. (Id. ¶ 24.) Those leaders, including Deputy Chief Mills and Battalion Chief Roger Smith, used their position and authority to make inappropriate gestures and advances toward young women they interacted with in restaurants, in the City, or in public in general while on the job. (Id.) Other firefighters told plaintiff that such conduct was offensive and made them uncomfortable during the course of their duties. (Id. ¶ 25.) Chief Nesbitt continued to tolerate and condone the misconduct, and his inaction sent the message to perpetrators that their misconduct was acceptable and that they would be protected. (Id. ¶ 26.)

On November 30, 2022, a woman (the "complainant") contacted plaintiff to share information about alleged sexual misconduct by Battalion Chief Smith toward a 17-year-old female high school student. (Am. Compl. ¶ 27.) According to the complainant, that misconduct occurred at the Fire Station while other

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firefighters were present. (Id. ¶ 28.) Battalion Chief Smith allegedly pursued the student and "was encouraging her to have sex with him at the Fire Station and stay overnight with him while other firefighters were present in the workplace." [*5] (Id.) He also allegedly made lewd, graphic, and vulgar comments to the student and touched her in a sexual manner while on Fire Department property. (Id. ¶ 29.) The complainant said that despite sharing her concerns with Courtney Taylor, who reported it to Chief Nesbitt and gave him text messages and audio recordings provided by the student to corroborate her claims, nothing was done. (Id. ¶ 30.)

The City's Non-Harassment Policy provides that a complaint of sexual harassment can be made to a supervisor, the personnel director, or the city administrator, and does not require employees to follow the chain of command or make such reports to their immediate supervisor. (Am. Compl. ¶¶ 42-43.) Therefore, on December 2, 2022, plaintiff reported the complainant's allegations to City Administrator Worley, who supervised Chief Nesbitt. (Id. ¶ 40.) Plaintiff complained out of concern that the other firefighters were being subjected to a hostile work environment. (Id. ¶ 41.) He was also concerned for the young women who were the objects of the alleged behavior and for the citizens, who might suffer due to the lack of focus and abuse of authority. (Id.)

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On December 10, 2022, the complainant provided [*6] plaintiff with text messages and audio recordings from the student to corroborate her claims. (Am. Compl. ¶ 31.) The text messages were crude and graphic and damaging to the reputation of the Fire Department and the City, including messages about Battalion Chief Smith's "hose" and requesting "naughty" pictures. (Id. ¶¶ 31, 35-36.) The text messages and audio recordings confirmed that Battalion Chief Smith met with the student on Fire Department property, made comments to her of a sexual nature, and otherwise acted toward her in a sexually inappropriate manner. (Id. ¶ 32.) They also confirmed that he asked her to spend the night in the Fire Station with him to have sex while other firefighters were "piled up in the other room." (Id. ¶ 33.) He suggested that the other employees would only hear them "depending on how loud" she was. (Id.)

City Administrator Worley and Chief Nesbitt became worried that the complaint by plaintiff would become public knowledge and cause a scandal for the City and the Fire Department. (Am. Compl. ¶ 45.) On December 12, 2022, Worley and Nesbitt fired Mr. Cox for reporting the sexual harassment and misconduct of Battalion Chief Smith in an effort to prevent the [*7] matter from becoming public. (Id. ¶ 46.) During the termination meeting, plaintiff attempted to provide City Administrator Worley and Chief Nesbitt with all the text message

evidence

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regarding Smith as evidence of a hostile work environment and his sexual misconduct. (Id. ¶ 47.) They refused to accept it or even look at it. (Id.)

Immediately following the meeting, defendants forced plaintiff to leave the building, and he left printed copies of the text messages on his desk. (Am. Compl. ¶ 48.) After plaintiff's termination, the student's father contacted Chief Nesbitt and demanded that he address Battalion Chief Smith's conduct. (Id. ¶ 50.) The City gave Smith the option to resign or be terminated and, on December 20, 2022, he elected to resign. (Id. ¶ 52.)

B. Plaintiff's Allegations of Training Deficiencies

In late-2022, Chief Nesbitt became worried that the Fire Department's Shift A did not have enough training hours for the year. (Am. Compl. ¶ 53.) A training deficiency would negatively impact the Fire Department's score in the ISO audit, which is closely monitored by the City and insurance carriers, and reported to the public. (Id.) Plaintiff had raised this issue with Chief Nesbitt [*8] on at least seven occasions since 2021 because Shift A (managed by Battalion Chief Chuck Poarch at the time) refused to train in the summer heat. (Id. ¶ 54.) This issue continued after Smith received a promotion to lead Shift A in August 2022. (Id.)

Plaintiff believed that holding training sessions during the summer was important for numerous reasons, including because firefighters should be prepared

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to combat fires in all conditions. (Am. Compl. ¶ 55.) Chief Nesbitt, however, refused to address Battalion Chief Smith's failure to require his firefighters to attend training. (Id. ¶ 56.) The ISO audit takes place in early January 2023; therefore, Shift A did not have enough time to make up the training hours. (Id. ¶ 57.) As a result, Chief Nesbitt allegedly conspired with Deputy Chief Mills and City Administrator Worley and others to falsify the training records to pass the audit. (Id. ¶ 58.) Defendants knew that plaintiff would not allow the records to be falsified because Chief Nesbitt requested that he do so in the past and plaintiff had refused. (Id. ¶ 60.) Because Mr. Cox was responsible for recording training hours and accurately reporting them to the City's auditors, his termination [*9] (without reinstatement) was essential to the conspiracy. (Id. ¶ 59.)

C. Plaintiff's Appeal of his Termination

Pursuant to the City's Code of Ordinances (the "Code"), qualifying City employees who suffer an adverse employment action, e.g., demotion, suspension, or dismissal, may file a written demand for a hearing with the City's director of human resources within five working days of written notice of the disciplinary action. See Calhoun, Ga. Code § 70-34(b)(1) (submitted as Def.'s Ex. 1 [27-1] and available at https://library.municode.com/ga/calhoun/codes/code_of_ordinances). Thereafter, the mayor and council shall serve as the personnel review panel or they

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may appoint an impartial personnel review examiner who has the authority to sustain or reverse the disciplinary action. Id. However, an at-will employee, such as plaintiff, is not entitled to appeal his termination. See id. § 70-34(a). Nevertheless, on December 16, 2022, Mr. Cox did so. (Am. Compl. ¶ 62.)

For plaintiff's appeal, the mayor and council appointed attorney William Robert Thompson, Jr. as the examiner. (Def.'s Ex. A [16-1], at 22(Decision of Examiner In Re: Christopher Cox Disciplinary Appeal Determination).)3Pursuant to the Code, Calhoun, Ga. Code § 70-34(b)(1), Mr. Thompson conducted a [*10] hearing on January 18, 2023 to review plaintiff's termination (Am. Compl. ¶ 63; Pl.'s Ex. 1 [26-1] (Jan. 18, 2023 Hr'g Tr.) Def.'s Ex. A, at 2). As the panel or examiner, Mr. Thompson had the authority to sustain or reverse the disciplinary action. See Calhoun, Ga. Code § 70-34(b)(1). Pursuant to the Code, id. § 70-34(b)(4), the

2 The Court refers to the CM/ECF page numbers stamped on all exhibits.

3 A court may consider documents attached to a Rule 12(c) motion for judgment on the pleadings without converting the motion into a Rule 56 motion for summary judgment where the document is "(1) central to the plaintiff's claim and

(2) undisputed," i.e., the authenticity of the document is not challenged. Day v.Taylor, 400 F.3d 1272, 1276 (11th Cir. 2005); see also Horne v. Potter, 392 F. App'x 800, 802 (11th Cir. 2010) (per curiam) (permitting district court to take judicial notice of public records without converting motion to one for summary judgment where

documents are not subject to reasonable dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned).

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hearing procedures followed those of a civil case4and George P. Govignon, as the City Attorney, represented the City, with plaintiff represented by his counsel, Gregory Hodges of Oliver Maner, LLP (Def.'s Ex. A, at 2). The [*11] Code further provides that any employee aggrieved by the final decision of the examiner may apply for a writ of certiorari to the Superior Court of Gordon County, Georgia. See Calhoun, Ga. Code § 70-34(b)(7).

The City called four witnesses at the hearing: City Administrator Worley, Chief Nesbitt, Deputy Chief Mills, and Chief of Police Tony Pyle. (Def.'s Ex. A, at 3.) Both the City and Mr. Cox presented documents, which Mr. Thompson admitted for consideration. (Id.) However, Mr. Cox did not testify and presented no witnesses on his behalf. (Id. at 5.) Both parties submitted legal briefs. (Id. at 3.) Plaintiff took the position that his actions relating to Battalion Chief Smith's inappropriate behavior were whistleblower activity protected by state and federal law, and that the City's stated reasons for his termination were pretext. (Id. at 4.) The City, however, maintained that it terminated Mr. Cox for violating the chain

4The Code requires the mayor, upon written application of any party, to issue subpoenas requiring the appearance of witnesses for the purpose of taking evidence or requiring the production of any books, papers or documents relevant to the inquiry. See Calhoun, Ga. Code § 70-34(b)(5).

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of command when reporting Smith's behavior, [*12] making false allegations of a

coverup by Chief Nesbitt and Deputy Chief Mills, and either deliberately or

negligently failing to fulfill his duties as the Chief Training Officer. (Id.)

On March 2, 2023, Mr. Thompson issued a Decision of Examiner in

plaintiff's appeal, summarizing his findings as follows:

Ultimately, the Examiner finds that Cox was terminated for a combination of three basic reasons: The first relates to violating the appropriate chain of command; second, that in addition to allegations made relating to Smith as outlined above, Cox made false allegations of coverup and potentially criminal allegations against Nesbitt and Mills; and third, Cox failed to appropriately fulfill his duties by deliberately or negligently disregarding requests concerning training shortcomings at the City of Calhoun Fire Department. These reasons are outlined in Counts One through Five of the Appeal Notice dated December 23, 2022.

(Def.'s Ex. A, at 11.)

Mr. Thompson made specific findings of fact in reaching the above

conclusion. He found that the normal chain of command in the Fire Department

would have been for Mr. Cox to go to Deputy Chief Mills or Chief Nesbitt with the

information he had regarding [*13] Battalion Chief Smith, but that plaintiff did neither.

(Def.'s Ex. A, at 6.) Mr. Thompson also found that plaintiff had gone around the

chain of command on numerous occasional and had been warned to discontinue

that practice. (Id.) He also determined that plaintiff made two main allegations to

City Administrator Worley: (1) that Battalion Chief Smith had engaged in 11

inappropriate sexual activity with a minor and possibly on Fire Department grounds

and that he was possibly engaged in inappropriate pornographic activity over the

internet;5 and (2) that Deputy Chief Mills and Chief Nesbitt were involved in a

cover-up of Smith's activities. (Id. at 7.)

Mr. Thompson found that the Calhoun Police Department investigated

plaintiff's allegations and concluded that, although inappropriate, Smith's behavior

was not chargeable criminal conduct. (Def.'s Ex. A, at 7.) He also found that

investigators had concluded that plaintiff's superiors were not guilty of any

criminal activity and were not guilty of engaging in a coverup for Smith. (Id. at 8.)

Mr. Thompson concluded that, on December 12, 2022, the City made the decision

to terminate plaintiff due in part to the nature of his false allegations against his [*14]

superiors. (Id.) Mr. Thompson found that plaintiff had ongoing issues with his

superiors and with the rank and file within the Fire Department dealing with his

attitude and performance of his training responsibilities. (Id. at 9.)

5In the Findings of Law section of his final decision, Mr. Thompson concluded that Mr. Cox's allegations regarding Battalion Chief Smith's behavior rose to the level of a whistleblower disclosure under the GWA. (Def.'s Ex. A, at 13.) Mr. Thompson also found that "failing to follow the chain of command with regard to this allegation would not, in and of itself, be sufficient grounds for termination." (Id. at 14.)

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Mr. Thompson concluded as follows:

Cox's attempt to go after Nesbitt and Mills largely led to his own dismissal. Because he had to embellish his Whistleblower complaint beyond what he had been told, and the disclosure he made to Worley appears to be motivated by more than just a desire to be of assistance to his employer, he has brought about the end of his own career with the City of Calhoun.

(Def.'s Ex. A, at 10-11.) Ultimately, Mr. Thompson determined that plaintiff's

termination was justified, denied the appeal, and affirmed the termination. (Am.

Compl. [*15] ¶ 64; Def.'s Ex. A, at 20.) Plaintiff did not seek a writ of certiorari to the

Superior Court of Gordon County. See O.C.G.A. § 5-4-16 (vesting superior courts with the authority to review decisions of "any inferior judicatory"); see also

Calhoun, Ga. Code § 70-34(b)(7) (aggrieved employee may appeal examiner's

decision by applying for a writ of certiorari to Superior Court of Gordon County).

6This statute was in effect until June 30, 2023, when it was repealed and replaced with O.C.G.A. § 5-3-1 et seq. to create a uniform modern appeals process for persons appealing decisions of lower judicatories. See O.C.G.A. § 5-3-2(b) (effective July 1, 2023). Notably, the amended statute specifically defines "judicatory" as "any court, official, board, tribunal, commission, municipal or county authority, council, or similar body exercising judicial or quasi-judicial powers authorized by law." Id. § 5-3-3.

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II. COLLATERAL ESTOPPEL (FACT PRECLUSION)

Defendants argue that plaintiff is bound by the findings of fact made by Mr.

Thompson in his capacity as hearing examiner with regard to Mr. Cox's First

Amendment § 1983 and GWA claims.7 (Def.'s Mot. & Mem. 9.) Plaintiff argues

that the January 18, 2023 hearing was nothing more than a discretionary internal

appeal to which he was not entitled and the findings set [*16] forth in the March 2, 2023

Decision of Examiner cannot carry the same preclusive effect as those issued by an

external administrative body. (Pl.'s Resp. 3, 5-7.) Plaintiff explains that he chose

not to present evidence or call witnesses in support of his claims because the appeal

was not to an independent state agency. (Id. at 7 n.3.) Regardless, plaintiff argues

that collateral estoppel does not apply to GWA claims. (Id. at 11-13.)

As the Supreme Court explained in University of Tennessee v. Elliott, "when

a state agency acting in a judicial capacity . . . resolves disputed issues of fact

properly before it which the parties have had an adequate opportunity to litigate,

7The case law is clear that the rules of preclusion do not apply to Title VII claims. See Univ. of Tenn. v . Elliott, 478 U.S. 788, 795-96 (1986) (holding that Congress intended to override the established preclusion rules when it enacted Title VII). Thus, plaintiff is not collaterally estopped from relitigating the reasons for his termination as they related to his Title VII claims. Additionally, for the reasons set forth infra Part IV.E, plaintiff's civil conspiracy claim fails as a matter of law and the question of fact preclusion is moot as to that claim.

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federal courts must [*17] give the agency's factfinding the same preclusive effect to which it would be entitled in the State's courts." 478 U.S. at 799 (internal citation and quotation marks omitted). However, before applying state law to determine if fact preclusion applies, the following conditions must be met: (1) the agency or administrative body must be performing a judicial function, (2) the parties must have had an adequate opportunity to litigate the issues, and (3) the issues must be properly before the agency. Nix v. Hardison, 712 F. Supp. 185, 188 (N.D. Ga. 1989). If so, the Court must then look to state law to determine the preclusive effect of the factfinding. Blackwell v. Ga. Real Estate Comm'n, 421 S.E.2d 716, 717-18 (Ga. Ct. App. 1992).

With regard to the first factor, Mr. Cox appealed his termination pursuant to City Code § 70-34, which provides for a personnel review panel or appointment of an impartial personnel review examiner with the authority to sustain or reverse a disciplinary action (the later applies here). See Calhoun, Ga. Code § 70-34(b)(1). Notably, the Code provides that the hearing procedures follow those of a civil case, id. § 70-34(b)(4), and an employee aggrieved by the examiner's final decision may apply for a writ of certiorari to the Superior Court of Gordon County, id. § 70-34(b)(7). Thus, Mr. Thompson in his capacity as hearing examiner performed a

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judicial function when he conducted [*18] the January 18, 2023 hearing and issued the final March 2, 2023 Decision of Examiner upholding plaintiff's termination.

With regard to the parties' opportunity to litigate the issues at that time, the parties are clearly in privity and both had legal representation at the hearing, with Attorney Govingnon representing the City and Attorney Hodges representing Mr. Cox. That Mr. Cox failed to take full advantage of the process by calling witnesses and testifying himself is not the fault of defendants, and there is no evidence he was not afforded those opportunities. Notably, plaintiff's counsel made arguments on his behalf, proffered documentary evidence (although plaintiff declined to testify or proffer witnesses), and submitted a legal brief to the hearing examiner. Therefore, the second condition above is met, as plaintiff and defendants had an adequate opportunity to litigate the appeal with counsel.

With regard to the propriety of Mr. Cox's appeal, that he was an at-will employee and not entitled to the process the City afforded him is irrelevant. It is undisputed that he requested the appeal and, although the Code did not require it, the City generously gave plaintiff the due process [*19] he requested. Likewise, it makes no difference that the City is not a "state agency," as the case law makes it clear that the administrative body adjudicating the issues in question does not need to be an actual arm of the State. See Hous. Auth. of Augusta v. Gould, 826 S.E.2d 107,

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108 (Ga. 2019) (holding that quasi-judicial decisions of state and local governments carry the imprimatur of judicial decisions of inferior courts and were subject to judicial review by superior courts under O.C.G.A. § 5-4-1 (in effect at the time of the events at issue)); see also Univ. of Tenn., 478 U.S. at 798 n.6 ("Where an administrative forum has the essential procedural characteristics of a court, . . . its determinations should be accorded the same finality that is accorded the judgment of a court." (quoting the Restatement (Second) of Judgments § 83, p. 269 (1982))).

Because all three conditions necessary for fact preclusion apply here, the Court must look to Georgia law to determine what preclusive effect Mr. Thompson's factfinding has on plaintiff's claim in this case. "Under Georgia law, once an administrative body rules on questions of fact, the questions of fact are thereafter precluded from re-litigation." Travers v. Jones, 323 F.3d 1294, 1296 (11th Cir. 2003) (per curiam). In Georgia,

the prerequisites to the application of the doctrine of issue preclusion are: "(1) that the issue at stake [*20] be identical to the one involved in the prior litigation; (2) that the issue has been actually litigated in the prior litigation; and (3) that the determination of the issue in the prior litigation has been a critical and necessary part of the judgment." Nix, 712 F. Supp. at 188.

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Traversis particularly instructive here because the Eleventh Circuit addressed fact preclusion under Georgia law as applied to First Amendment claims litigated in federal court under § 1983. See Travers, 323 F.3d at 1296. Travers, a firefighter employed by DeKalb County, had a verbal encounter with the County's chief executive officer while picketing outside the DeKalb County administration building. Travers, 323 F.3d at 1295. The fire chief suspended Travers without pay for insubordination and unbecoming conduct. Id. Pursuant to the Code of DeKalb County, he appealed the suspension to a merit system hearing officer, who found that the facts regarding the exchange did not indicate any non-job related factor or any errors of fact that would reverse the suspension. Id. at 1296. Travers then filed a § 1983 action in federal district court, alleging that he was disciplined in retaliation for engaging in protected union activity and in violation of his First Amendment rights. Id. at 1295. The trial court denied qualified immunity on the basis that [*21] there were issues of fact concerning the reasons Travers was disciplined. Id. On appeal, the defendants argued that the district court was bound by the hearing officer's earlier determination that Travers's rights were not violated. Id.

In deciding whether the district court was bound by the hearing officer's findings of fact, the Eleventh Circuit held as follows:

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Those findings are binding upon the court in a case such as this one if the employee received a full and fair opportunity to present his case in the administrative hearing. When a state agency, acting in a judicial capacity, resolves disputed issues of fact properly before it that the parties have had an adequate opportunity to litigate, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's court.

Travers, 323 F.3d at 1296. The Circuit concluded that Travers had received a full and fair opportunity to present his case on the factual dispute that ultimately was at

issue in the district court, and because those fact disputes were resolved by the

hearing officer, the district court was bound by the resolution reached at the

administrative hearing. Id. at 1297.

Although Travers does not address [*22] the applicability of collateral estoppel to

GWA claims, Mr. Cox's arguments that that it does not are unconvincing. Plaintiff

attempts to analogize the statutory language of the GWA to that of Title VII, to

which fact preclusion does not apply. (See Pl.'s Resp. 10-13.) With regard to Title

VII claims, the Supreme Court found that Congress' instruction that the EEOC give

"substantial weight to final findings and orders made by State or local authorities

in proceedings commenced under State or local law," 42 U.S.C. § 2000e-5(b),

would be irrelevant if state agency findings were entitled to preclusive effect in

federal Court employment discrimination actions. Univ. of Tenn., 478 U.S. at 795.

However, the GWA has no similar language, see generally O.C.G.A. § 45-1-4, and

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plaintiff's argument that the remedies available under the GWA differ from those available via a state agency determination is nonsensical, as collateral estoppel does not prohibit a plaintiff from suing in court, but simply prevents re-litigation of prior factfinding if the multitude of factors set forth above are met.

Moreover, Mr. Cox is wrong that Colon v. Fulton Cnty., 751 S.E.2d 307 (Ga. 2013), supports his assertions. (See Pl.'s Resp. 12-13.) In Colon, the Georgia Supreme Court found that the state had waived its sovereign immunity by creating [*23] a whistleblower cause of action against "public employers," and that barring such

claims by public employees would render the statute meaningless. Id. at 310. Notably, collateral estoppel only applies to public employees like Mr. Cox who previously availed themselves of quasi-judicial due process and holds them to the fact-finding therein. It does not prevent public employees from suing under the GWA in state or federal court. Finally, plaintiff cites no other case law supporting his position and the Court has found none. Rather, this Court has previously applied fact preclusion under Georgia law to a GWA claim. See Ferguson v.Atlanta Indep. Sch. Sys., No. 1:08-CV-28-TCB, 2010 WL 11508304, at *6 (N.D. Ga. Feb. 4, 2010). Thus, plaintiff has proffered no legal support for his contention that collateral estoppel does not apply to his GWA claim.

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There issue at stake before this Court is the reason for plaintiff's termination, the same issue addressed in his appeal and subsequent January 18, 2023 administrative hearing. As discussed above, the parties actually litigated that issue before Mr. Thompson in his capacity as the independent hearing examiner, including being represented by counsel, presenting evidence and testimony (although plaintiff chose not to), making similar arguments as those proffered [*24] here, and submitting briefs. Mr. Thompson then had to resolve the same facts that are before the Court in this case in order reach a determination as to the reasons for plaintiff's termination (the same issue plaintiff seeks to revisit here), as set forth in his March 2, 2023 Decision of Examiner. Therefore, under Georgia law, the questions of fact resolved by Mr. Thompson are precluded from re-litigation as to all but plaintiff's Title VII claims. Accordingly, the undersigned **REPORTS** that collateral estoppel or fact preclusion applies here and the Court must adopt Mr. Thompson's findings of fact when ruling on plaintiff's First Amendment § 1983 and GWA claims.

III. STANDARD FOR JUDGMENT ON THE PLEADINGS

"Judgment on the pleadings is appropriate where there are no material facts

in dispute and the moving party is entitled to judgment as a matter of law." Perezv. Wells Fargo N.A., 774 F.3d 1329, 1335 (11th Cir. 2014) (internal quotation

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marks and citation omitted). As with a Rule 12(b)(6) motion, the Court accepts as true all material facts alleged in the non-moving party's pleading, and views those facts in the light most favorable to the non-moving party. Id. "Dismissal is not appropriate unless the complaint lacks sufficient factual matter to state a facially plausible claim [*25] for relief that allows the court to draw a reasonable inference that the defendant is liable for the alleged misconduct." Jiles v. United Parcel Serv.,Inc., 413 F. App'x 173, 174 (11th Cir. 2011) (per curiam) (citing Bell Atl. Corp. v.Twombly, 550 U.S. 544 (2007)); see also Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

While the complaint need not provide "detailed factual allegations," it must provide factual allegations sufficient to plausibly set forth a plaintiff's entitlement to relief. Twombly, 550 U.S. at 555. Providing only "labels and conclusions" is insufficient, "and a formulaic recitation of the elements of a cause of action will not do." Id. The Court is not required to accept as true legal conclusions couched as factual statements, Iqbal, 556 U.S. at 678, and "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not shown-that the pleader is entitled to relief," as required by Rule 8(a)(2). Id. at 679 (internal quotation marks, bracket, and citation omitted). Furthermore, if assuming the truth of the factual allegations of

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the amended complaint there is a dispositive legal issue that precludes relief or if it is based on a meritless legal theory, dismissal is warranted. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford Cnty., Ga., 960 F.2d 1002, 1009-10 (11th Cir. 1992).

IV.DISCUSSION

A. Counts I: Title VII Sexually Hostile Work Environment Claim

In his response, plaintiff clarifies that he is not bringing [*26] a Title VII disparate treatment claim, but rather a claim that he was exposed to a sexually hostile work environment. (Pl.'s Resp. 17.) Plaintiff argues that "his workplace was permeated with severe and pervasive sexual misconduct and other patently offensive conduct, such as his co-worker requesting child pornography and attempting to groom a 17-year-old high school girl to have sex with him in the workplace while other employees were present." (Id.) Plaintiff contends that the above behavior altered the

terms and conditions of his employment and that he should be allowed to develop facts in discovery to prove that he "suffered unique harm due to his gender and due to his position as a Fire Department leader." (Id. at 18.) In support of his argument, plaintiff cites the Supreme Court's opinion in Oncale v. SundownerOffshore Services, Inc., 523 U.S. 75 (1998), explaining that "the proper inquiry is 'whether members of one sex are exposed to disadvantageous terms or conditions

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of employment to which members of the other sex are not exposed.'" (Pl.'s Resp. 18 (quoting Oncale, 523 U.S. at 80).)

To establish a hostile work environment claim under Title VII, a plaintiff must show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; [*27] (3) that the harassment was based on a protected characteristic of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or direct liability. Walton v. Johnson & Johnson Servs., Inc., 347 F.3d 1272, 1279-80 (11th Cir. 2003) (per curiam) (citing Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002)). As plaintiff observes, the Supreme Court held that this standard also applies in cases alleging same-sex sexual harassment. Oncale, 523 U.S. at 80.

Accepting the facts set forth in the Amended Complaint as true, plaintiff simply has failed to allege a sexually hostile work environment claim. The crux of Mr. Cox's allegations is that male firefighters engaged in predatory and harassing behavior toward female members of the general public and that Fire Department leadership did not stop that behavior. With regard to elements one and two, Mr.

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Cox belongs to a protected group (i.e., males) and he allegedly witnessed and received complaints regarding his colleagues' unwelcome sexual advances on non-employee females while on duty. However, based on his allegations, Mr. Cox cannot establish element three above because he clearly [*28] was not subjected to harassment directed toward him or toward his protected group. The Amended Complaint simply does not allege that male employees of the Fire Department were exposed to disadvantageous terms or conditions of employment to which female firefighters were not exposed. Thus, plaintiff's sexually hostile work environment claim fails as a matter of law.

Moreover, nothing in the Amended Complaint even hints at a work environment so permeated with sexually hostile behavior as to be sufficiently severe or pervasive to violate Title VII. See Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993). Plaintiff's receipt of complaints regarding Battalion Chief Smith's bad actions (as offensive and inappropriate as they were) and his efforts to stop/address that behavior by virtue of his leadership role in the Fire Department does not constitute exposure to harassment sufficiently severe or pervasive enough to alter the terms and conditions of Mr. Cox's employment. While the determination of whether conduct rises to the level of severe or pervasive is generally a finding more appropriately made at the summary judgment stage after

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discovery, the Amended Complaint is clear that the worst of Smith's behavior occurred via private communications [*29] (whether Smith was physically on Fire Department property at the time is irrelevant), and that plaintiff only learned of it through second and third-hand complaints. The undersigned agrees with defendants' observation that discovery will not improve plaintiff's claim. (Defs.' Reply [27] 12-13 & n.4.)

Accordingly, the undersigned **REPORTS** that Mr. Cox's Title VII sexually hostile work environment claim fails as a matter of law, and **RECOMMENDS** that defendants' Motion be **GRANTED** as to Count I.

B. Count II: Title VII Retaliation Claim

Plaintiff argues that his complaint regarding Battalion Chief Smith's behavior concerned the exposure of other Fire Department employees to sexual conduct in the workplace and therefore constitutes protected activity. (Pl.'s Resp. 19.) Mr. Cox alleges that he complained about sexual comments to women while other employees were present, the groping of a women on Fire Department property while other employees were present, and the extension of an invitation to have intercourse at the firehouse while other employees were in an adjacent room. (Id. at 19-20.) Alternatively, plaintiff argues that his complaint was based on a

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good faith reasonable belief that defendants [*30] were engaged in an unlawful employment practice under the circumstances. (Id. at 20-21.)

In the absence of direct evidence, Title VII retaliation claims are analyzed under the McDonnell Douglas burden-shifting framework, which requires the plaintiff establish a prima facie case. See Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). Although plaintiff's Amended Complaint need not plead a prima facie case, it must at least state a plausible claim for relief. SeeSwierkiewicz v. Sorema N.A., 534 U.S. 506, 510-11, 515 (2002). Thus, the Court considers the elements of a retaliation claim to determine if Mr. Cox has done so.

A prima facie case for retaliation in violation of Title VII requires a plaintiff to establish (1) engagement in protected activity, (2) a materially adverse employment action, and (3) a causal connection between the two events. Manleyv. DeKalb Cnty., Ga., 587 F. App'x 507, 512 (11th Cir. 2014) (per curiam). The parties focus on whether Mr. Cox engaged in protected activity; therefore, the Court does as well.

With regard to the first element above, the case law is clear that

[a]n employee is protected from discrimination if (1) "he has opposed any practice made an unlawful employment practice by this subchapter" (the opposition clause) or (2) "he has made a charge, testified, assisted, or participated in any manner in an investigation,

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proceeding, [*31] or hearing under this subchapter" (the participation clause).

Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1350 (11th Cir. 1999) (quoting 42

U.S.C. § 2000e-3(a)). Because Mr. Cox had not filed a charge of discrimination at

the time of his termination, his claim arises (if at all) under the opposition clause.

See Muhammad v. Audio Visual Servs. Grp., 380 F. App'x 864, 872 (11th Cir.

2010) (per curiam) (opposition clause protects activity before the filing of a charge

with the EEOC, such as submitting an internal complaint of discrimination to an

employer or informally complaining of discrimination to a supervisor).

Here, Mr. Cox's complaints of inappropriate behavior toward non-employees by Deputy Chief Mills, Battalion Chief Smith, and other Fire

Department employees were not protected activity because he was not opposing an

unlawful employment practice as defined by Title VII.8 As the Eleventh Circuit

8Likewise, plaintiff's claim that defendants terminated him in part based on his 2018 opposition to inappropriate behavior by Deputy Chief Mills toward women in the general public also fails as a matter of law because four years elapsed between Mr. Cox's objection to that behavior and his termination in 2022. (Am. Compl. ¶¶ 20 -23, 83.) Plaintiff simply cannot establish a causal connection between those two events. See Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004) ("If there is a substantial [*32] delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law."). The Court focuses on plaintiff's

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explained in Stimson v. Stryker Sales Corp., 835 F. App'x 993 (11th Cir. 2020) (per curiam), "Title VII's definition of an unlawful employment practice does not cover discrimination against third-party, nonemployees." Id. at 996.

In Stimson, the Circuit held that the plaintiff's complaint of a coworker's sexual harassment of a non-employee is not protected activity under Title VII. 835 F. App'x. at 997. Specifically, the Circuit explained that the "to be an unlawful employment practice the discrimination must be perpetrated by an employer and it must involve the individual's employment." Id. at 996. Thus, the object of the harassment must work for the employer who allegedly violated Title VII. See alsoEdwards v. Ambient Healthcare of Ga., Inc., 674 F. App'x 926, 930 (11th Cir. 2017) (per curiam). Notably, the Circuit rejected the plaintiff's argument that his co-worker's harassment of a non-employee created a hostile work environment as inconsistent with the plain language of Title VII and unsupported by precedent. Stimson, 835 F. App'x at 997. As the Circuit observed, Title VII defines an

"unlawful employment practice" as "an employer's termination of or discrimination against 'any individual [*33] with respect to his compensation, terms,

December 2 and 12, 2022 complaints because they immediately preceded his December 12, 2022 termination.

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conditions, or privileges of employment'" because of a protected characteristic. Id. at 996 (quoting 42 U.S.C. § 2000e-2(a)(1).)

Accepting the facts alleged in the Amended Complaint as true, Mr. Cox's complaints concerned conduct by Fire Department employees against women who were not employed by the City (i.e., "women they interacted with in restaurants, in the City of Calhoun, or in public in general"). (Am. Compl. ¶ 24.) Thus, his colleagues' boorish behavior cannot meet the definition of an unlawful employment practice because it was not exacted upon other employees. Furthermore, plaintiff's contention that he had a good faith reasonable belief that defendants were engaged in an unlawful employment practice by allowing employees to be exposed to (or potentially exposed to) sexual behavior while on duty also falls short of Title VII's definition of employment practice and cannot constitute a hostile work environment.

A good faith reasonable belief must be both subjectively and objectively reasonable. Howard v. Walgreen Co., 605 F. 3d 1239, 1244 (11th Cir. 2010). As the Circuit explained in Stimson, behavior directed toward a non-employee [*34] simply does not meet Title VII's definition of an unlawful employment practice. Plaintiff has not cited new precedent since Stimson which changes that analysis and the Court has not found any. Therefore, Mr. Cox cannot have had an objectively

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reasonable belief that he was reporting an unlawful employment practice in

December 2022. Ultimately, plaintiff's complaints were not protected activity as

a matter of law and they cannot support a retaliatory termination claim.

Accordingly, the undersigned **REPORTS** that Mr. Cox's Title VII retaliation claim fails as a matter of law, and **RECOMMENDS** that defendants'

Motion be **GRANTED** as to Count II.

C. Count III: 42 U.S.C. § 1983 First Amendment Claim

Plaintiff argues that collateral estoppel does not bar his First Amendment

claim because the hearing examiner applied the wrong legal standard in reaching

his conclusion and did not make any factual findings about the elements of that

claim. (Pl.'s Resp. 9.)

The law is clear that an employer may not demote or discharge a public

employee for engaging in protected speech. Rankin v. McPherson, 483 U.S. 378,

383 (1987). To sustain a claim of retaliation for protected speech under the First

Amendment, a public employee must show the following:

(1) the employee's speech is on a matter of public concern; [*35] (2) the employee's First Amendment interest in engaging in the speech outweighs the employer's interest in prohibiting the speech to promote the efficiency of the public services it performs through its employees; and (3) the employee's speech played a "substantial part" in the employer's decision to demote or discharge the employee. Once the employee succeeds in showing the preceding factors, the burden then shifts to the employer to show, by a preponderance of the evidence,

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that "it would have reached the same decision . . . even in the absence of the protected conduct."

Battle v. Bd. of Regents for Ga., 468 F.3d 755, 759-60 (11th Cir. 2006) (quoting Anderson v. Burke Cnty., Ga., 239 F.3d 1216, 1219 (11th Cir. 2001)).

Here, Mr. Thompson considered and ultimately rejected plaintiff's arguments that he was terminated in retaliation for exercising his right to free speech. Even accepting that Mr. Cox was speaking on a matter of public concern

when he complained about Battalion Chief Smith's inappropriate behavior (but not regarding his unsupported slander of superiors), and that his interest outweighed that of defendants, plaintiff cannot establish the third element above. Fact preclusion requires the Court to adopt Mr. Thompson's findings that defendants terminated plaintiff for three basic reasons: (1) violating the appropriate chain [*36] of command; (2) making false allegations of a coverup and potentially criminal allegations against Chief Nesbitt and Deputy Chief Mills; (3) and failing to fulfill his duties by deliberately or negligently disregarding requests concerning training shortcomings at the Fire Department. (Def.'s Ex. A, at 11.)

Moreover, regardless of whether Mr. Thompson failed to address the correct standards to establish a First Amendment violation, his rejection of plaintiff's retaliation argument was a result of his finding that defendants terminated Mr. Cox

based on the above rationales and not his report of Battalion Chief Smith's 32

potentially criminal conduct. Collateral estoppel only requires that the proceedings share "identical issues," not identical claims. Coffee Iron Works v. QORE, Inc., 744 S.E.2d 114, 117 (Ga. Ct. App. 2013). Thus, accepting the fact determination set forth in the March 2, 2023 Decision of Examiner, the Court must find that no First Amendment constitutional violation occurred. As the Circuit explained in Travers, while an employer may not terminate a public employee for engaging in public speech, "[a]n employer may, however, discipline an employee for insubordination." Travers, 323 F.3d at 1296. Accordingly, the undersigned

REPORTS that Mr. Cox's § 1983 First Amendment claim fails as a matter of law and **RECOMMENDS** that defendants' [*37] Motion be **GRANTED** as to Count III.

D. Count IV: O.C.G.A. § 45-1-4 Whistleblower Act Claim

Plaintiff argues that, regardless of whether collateral estoppel applies, the examiner concluded that his complaints to City Administrator Worley constituted protected activity under the GWA, but applied the wrong framework when dismissing that claim. (Pl.'s Resp. 13-15). Plaintiff contends that his termination involved a mixed-motive since one of defendants' reasons (i.e., circumventing the chain of command when complaining about Smith's possible criminal activity) constituted protected activity under the GWA. (Id. at 15 (citing Decision of Examiner 12-13).) Plaintiff acknowledges that Georgia courts look to Title VII

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precedent to analyze retaliation claims under the GWA and cites Quigg v. ThomasCounty School District, 814 F.3d 1227 (11th Cir. 2016), to support his contention that the mixed motive standard applies here. (Pl.'s Resp. 15.)

The GWA prohibits public employers from retaliating against employees "for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity." O.C.G.A. § 45-1-4(d)(2). Generally, GWA claims [*38] are evaluated under the McDonnell-Douglas burden-shifting analysis used in Title VII retaliation cases. Lamar v. Clayton Cnty. Sch. Dist., 605 F. App'x 804, 806 (11th Cir. 2015) (per curiam) (citing Forrester v. Ga. Dep't of Hum. Servs., 708 S.E.2d 660, 665 (Ga. Ct. App. 2011)).

Following that framework, a GWA retaliation claim requires the plaintiff to establish the following prima facie elements: (1) a public employer; (2) the employee disclosed a "violation of or noncompliance with a law, rule, or regulation to a supervisor or agency"; (3) the employee was subjected to an adverse employment decision as an act of retaliation; and (4) a causal link between the disclosure and the adverse employment decision. Lamar, 605 F. App'x at 806; Coward v. MCG Health, Inc., 802 S.E.2d 396, 399 (Ga. Ct. App. 2017). If the

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employee does so, the employer must articulate a legitimate, non-retaliatory reason for the adverse employment action taken. See Lamar, 605 F. App'x at 806. The plaintiff must then demonstrate that the stated reason for the adverse employment action is pretextual. See id. (citing Forrester, 708 S.E.2d at 666); see also Coward, 802 S.E.2d at 399.

As an initial matter, the Court notes that plaintiff's citation to Quigg is inapplicable to his GWA retaliation claims, as the Circuit was addressing a Title VII discrimination claim. Notably, "it is well-established that the mixed-motive framework does not apply to Title VII retaliation claims." Yelling v. St. Vincent'sHealth Sys., 82 F. 4th 1329, 1338 (11th Cir. 2023) (per curiam)

(citing Univ. ofTex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013), and plaintiff has provided no support [*39] for the extension of the mixed-motive framework to GWA retaliation claims. Therefore, the undersigned **REPORTS** that the McDonnell-Douglas burden-shifting analysis above applies to plaintiff's GWA retaliation claim.

As discussed supra Part IV.C, Mr. Thompson considered and rejected Mr. Cox's contention that his termination was in retaliation for alerting City Administrator Worley of Battalion Chief Smith's potentially criminal behavior. Again, accepting that plaintiff disclosed a violation of a law, rule, or regulation in that regard, he cannot establish the last two elements necessary to prevail on a

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GWA claim. Fact preclusion requires the Court to adopt Mr. Thompson's findings that defendants terminated plaintiff for making false allegations of a coverup and failing to fulfill his duties by deliberately or negligently disregarding requests concerning training shortcomings at the Fire Department. (Def.'s Ex. A, at 11.) Thus, as a matter of law plaintiff cannot show that he suffered an adverse employment action in retaliation for his protected disclosure. Even if plaintiff could show a tenuous link between his report of Smith behavior and his termination, he cannot show pretext because [*40] defendants proffered several legitimate reasons for his termination, which Mr. Thompson found to be true and which this Court must accept as fact. Accordingly, the undersigned **REPORTS** that Mr. Cox's GWA claim fails as a matter of law and **RECOMMENDS** that defendants' Motion be

GRANTED as to Count IV.

E. Count V: Civil Conspiracy Claim

In Count V, plaintiff alleges Chief Nesbitt and Mr. Worley acted in concert and "engaged in conduct that constitutes a tort, specifically the coverup of Roger Smith's criminal sexual misconduct toward an underage girl." (Am Compl. ¶ 105.) Plaintiff also alleges that those defendants "engaged in conduct that constitutes a tort, specifically the illegal and retaliatory termination of plaintiff for reporting Roger Smith[]." (Id. ¶ 107.) Finally, plaintiff alleges Chief Nesbitt, Mr. Worley,

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and Deputy Chief Mills acting in concert "engaged in conduct that constitutes a tort, specifically the falsification of records related to the Fire Department's training so the Fire Department could pass the ISO audit in January 2023." (Id. ¶ 108.)

The term "Civil Conspiracy" appears in Count V's subheading; therefore, the Court assumes plaintiff intends to pursue his conspiracy [*41] claims against Chief Nesbitt, Mr. Worley, and Deputy Chief Mills under 42 U.S.C. § 1985. (See Am. Comp. Count V, at 17 (titled "Fifth Claim for Relief Civil Conspiracy").) As plaintiff alleges, the City of Calhoun is a public employer (id. ¶ 3) which employed those defendants (id. ¶¶ 5-7). Therefore, the Court must determine whether plaintiff's civil conspiracy claim is barred by the intracorporate conspiracy doctrine.

"Under the intracorporate conspiracy doctrine, a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation." Dickerson v. Alachua Cnty. Comm'n, 200 F.3d 761, 767 (11th Cir. 2000). The doctrine applies to both private corporations and public entities, id., and holds that acts of corporate agents are attributed to the corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy. McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1036 (11th Cir. 2000). "Simply put, . . . a corporation cannot conspire with its

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employees, and its employees, when acting under the scope of their employment, cannot conspire among themselves." Id.

Dickersonis instructive here, as it involved allegations of civil conspiracy involving a public entity and its employees. In Dickerson, the plaintiff sued his county employer for demoting him in violation [*42] of his constitutional rights and asserted a claim of civil conspiracy under § 1985 and civil rights violations under § 1983, § 1981, and Title VII. 200 F.3d at 764. The Eleventh Circuit held that the county and its employees were a single legal entity, incapable of conspiring among themselves, and that the intracorporate conspiracy doctrine barred the plaintiff's conspiracy claim. Id. at 770.

Thus, the undersigned **REPORTS** that the intracorporate conspiracy doctrine applies to plaintiff's civil conspiracy claim against defendants Nesbitt, Worley, and Mills. Accordingly, that claim fails as a matter of law and the undersigned **RECOMMENDS**

defendants' Motion be **GRANTED** as to Count V.

V. CONCLUSION

For the reasons set forth above, the undersigned **RECOMMENDS** that

defendants' Motion for Judgment on the Pleadings and Incorporated Memorandum [25] be **GRANTED** and judgment be entered in their favor as to all counts.

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SO RECOMMENDED, this 30th day of September, 2024.

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