No. 25-

IN THE

Supreme Court of the United States

DR. JASMINE YOUNGE,

Petitioner,

v.

FULTON JUDICIAL CIRCUIT
DISTRICT ATTORNEY'S OFFICE, GEORGIA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 8(c)(1) of the Federal Rules of Civil Procedure provides that a party "must" plead "any" affirmative defense. The question presented is:

> Where a defendant has filed an answer without pleading an affirmative defense, may the defendant nonetheless assert that affirmative defense as the basis for a summary judgment motion, without amending or seeking to amend its answer to plead that affirmative defense, and may a defendant do so even if an amendment adding that affirmative defense would be barred by Rule 16(b)(4)?

PARTIES

The parties are Dr. Jasmine Younge and the Fulton Judicial Circuit District Attorney's Office, Georgia.

DIRECTLY RELATED CASES

Younge v. Fulton Judicial Circuit District Attorney's Office, Georgia, No. 23-11418, United State Court of Appeals for the Eleventh Circuit, judgment entered April 1, 2025

Younge v. Fulton Judicial Circuit District Attorney's Office, Georgia, Civil Action File No.: 1:20-cv-00684-WMR, United States District Court for the Northern District of Georgia, judgment entered March 30, 2025.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Page

Page

Page

Page

Statutes and Rules

Cited Authorities

Page

Page

Other Authorities

Petitioner Jasmine Younge respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on April 1, 2025.

OPINIONS BELOW

The April 1, 2025 opinion of the court of appeals, which is unofficially reported at 2025 WL 974309, is set out at pp. 1a-30a of the Appendix. The March 29,2023 order of the district court, which is unofficially reported at 2023 WL 3213871, is set out at pp. 31a-63a of the Appendix. The December 12, 2022 Final Report and Recommendation of the district court magistrate judge, which is not reported, is set out at pp. 66a-109a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on April 1, 2025. A timely petition for rehearing and rehearing en banc was denied on May 23, 2025. On August 6, 2025, Justice Thomas extended the date for filing the petition until September 22, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

RULES AND STATUTORY PROVISIONS INVOLVED

The rules and statutory provisions involved are set out in the Appendix.

INTRODUCTION

This case concerns a longstanding circuit conflict regarding a practice that often permits defendants to circumvent the pleading requirements of the Federal Rules of Civil Procedure.

Rule 8 requires a defendant to plead any affirmative defense as part of its answer. If a defendant fails to include an affirmative defense in its original answer, under Rule 15 the defendant can amend its answer to add that affirmative defense only with the consent of the court or the opposing party. Once a district court issues a scheduling order that sets a deadline for amendments to the pleadings, Rule 16 does not permit a defendant to amend its answer to add an affirmative defense (even if it could satisfy the Rule 15 standard) without showing good cause to modify that order.

A number of circuits permit a defendant to circumvent all these Rules. A defendant can fail to include an affirmative defense in its answer, not bother to seek to amend that answer, and do nothing until after the expiration of the scheduling order deadline. And then, despite all that, the defendant can simply assert the affirmative defense by filing a summary judgment motion based on that never-pled defense. Although there is one limitation on this tactic, it is far less demanding than the requirements of Rules 15 and 16, and this type of circumvention often succeeds, as it did in this case. The Eleventh Circuit has dismissed the literal requirements of Rules 8, 15 and 16, insofar as they apply to affirmative defenses, as mere "technicalit[ies]" that often need not and should not be enforced.

Unsurprisingly, several circuits have rejected this practice. The District of Columbia Circuit does not allow affirmative defenses to be raised for the first time in summary judgment motions, but instead requires defendants which want to raise as-yet-unpled affirmative defenses to do so in compliance with the provisions of Rules 15 and 16. Other circuits have adopted an intermediate standard. A dozen lower court decisions recognize the circuit conflict about this recurring problem.

STATEMENT OF THE CASE

Legal Background

Rule 8(c)(1) provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." If a defendant has failed to assert an affirmative defense in its original answer, a motion for leave to amend the answer to add that affirmative defense is governed by Rule 15(a). Except with regard to amendments made within 21 days of the original answer, "a party may amend its pleading only with the opposing party's written consent or the court's leave." F. R. Civ. P. 15(a)(2). There are a number of circumstances in which permission to amend can and should be denied, "such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [and] undue prejudice to the opposing party by virtue of allowance of the amendment...." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Amendments are further limited by Rule 16(b). Rule 16(b)(1) provides, with certain exceptions not relevant here, that "the district judge—or a magistrate judge when

authorized by local rule—must issue a scheduling order." Rule 16(b)(3) provides that "[t]he scheduling order must: limit the time to ... amend the pleadings." Rule 16(b)(4) states that "[a] schedule may be modified only for good cause and with the judge's consent."

Factual Background

Plaintiff Younge worked as the Deputy Chief of Staff and Director of Policy and Programs in the Fulton County District Attorney's Office. She was third in command under the District Attorney, Paul Howard. On July 1, 2019, Younge notified Howard that she was pregnant. The complaint asserts that Howard responded angrily, yelling at Younge and demanding "What is this supposed to mean" and "Is this a threat." Howard immediately began to reassign Younge's duties to other employees, and to exclude her from meetings. Younge's personnel file contained no disciplinary actions, reprimands, or complaints, even immediately after her termination. 108a. Howard's Chief of Staff testified that she was not aware of any discussion of terminating Younge prior to the time that Younge announced she was pregnant. 109a. Nevertheless, Howard fired Younge on July 15, 2019, only two weeks after learning of her pregnancy. 5a. The only complaints in Younge's personnel file regarding her work were solicited by Howard's Chief of Staff in August 2019, after Younge had been dismissed. 89a.

Proceedings Below

Younge commenced this action was commenced in 2020. The complaint alleged, inter alia, that the plaintiff had been dismissed because of her pregnancy, in violation

of Title VII of the Civil Rights Act of 1964. The defendant ultimately filed its answer on March 24, 2021. That answer asserted several affirmative defenses, but not the affirmative defense at issue here.

On April 27, 2021, the district court issued a Scheduling Order pursuant to Rule 16(b). That Order provided that any amendments to the pleadings must comply with the time limits for amendments set out in the Local Rules. Scheduling Order and Case Management Instructions, 1. The Local Rules provide that any amendments to pleadings must be sought within thirty days of the parties' Joint Preliminary Report and Discovery Plan. Northern District of Georgia Local Rule 84.1(c), App. B-12.

On April 26, 2021, the parties submitted a Joint Preliminary Report and Discovery Plan. The filing of that Plan triggered the Local Rule deadline for amendments to pleadings, which were thus due thirty days later, by May 26, 2021. The May 26, 2021 deadline passed without the defendant seeking to amend its answer to add any affirmative defenses.

Discovery closed on January 5, 2022, although a few disputed matters continued after that date. On March 14, 2022, at a hearing on such a discovery matter, the defendant indicated for the first time that it contemplated raising the affirmative defense at issue here, that the plaintiff was excluded from Title VII coverage by section 2000e(f) because her responsibilities made her a member of the personal staff of an elected official. 6a, 42a, 45a, 72a-73a.

If, as defendant asserted, Younge was a member of the personal staff of an elected official, she was in the wrong federal forum. Gender-based discrimination against such personal staff violates federal law, but such claims are covered by the Government Employees Rights Act ("GERA"), not Title VII. On defendant's theory, the EEOC should not have issued Younge a Title VII right to sue letter, but should have adjudicated her claim administratively under GERA. Younge should have sought to try a GERA claim before an EEOC administrative law judge, rather than file a Title VII claim in federal district court. And appellate review should have been in the Federal Circuit, not in the Eleventh Circuit. But the critical decisions by Younge and the EEOC that channeled this case into district court had been made in 2019, more than two years before the defendant first asserted that Younge's claim was not covered by Title VII.

The defendant did not seek to amend its answer to plead that proposed affirmative defense under section 2000e(f). Instead, on May 16, 2022, the defendant moved for summary judgment, asserting that affirmative defense as a basis for that motion.[1] The summary judgment motion was filed almost exactly a year after the expired 2021 Scheduling Order deadline for any proposed amendments to the pleadings. The defendant did not assert that there was good cause to modify that long-expired Scheduling Order deadline, or that it could have satisfied the Rule 15 standards for amending its answer.

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1. See Response Brief of Appellee, 11 ("The Defendant does not dispute that the personal staff exception was not raised in the first responsive pleading. Rather, Defendant raised the defense in his Motion for Summary Judgment.").

The summary judgment motion was first considered by a magistrate judge. The magistrate judge concluded that the section 2000e(f) exemption is an affirmative defense. 70a-71a. She noted that the "[d]efendant makes no argument that it pled the exemptions as affirmative defenses." 72a. The magistrate judge also concluded based on "the Court's own review of the Defendant's Answer ... that the Defendant did not plead the exemptions as affirmative defenses." 72a. During oral argument, the magistrate judge

> inquired about Defendant's failure to raise the employee exemptions earlier in the litigation, and defense counsel explained that the employee exemptions came to his attention when he began drafting the summary judgment motion in February or March [2022]. Defense counsel stated, and Plaintiff's counsel agreed, that Defendant did not put Plaintiff on notice of its intent to rely on the "personal staff" exemption until a hearing that the district judge held on an unrelated issue on March 14, 2022.

72a.

The plaintiff objected to consideration of the affirmative defense under these circumstances. But the magistrate judge held that, under Eleventh Circuit precedent in *Hassan v U.S. Postal Service*, 842 F.2d 260, 263 (11th Cir. 1988), a defendant can base a summary judgment motion on an unpled affirmative defense unless the plaintiff can show that he or she was prejudiced by the defendant's failure to timely amend its answer. 72a-73a.

Although Younge was not on notice that the defendant intended to raise the personal staff affirmative defense, the magistrate judge concluded that she was not prejudiced by the defendant's failure to plead that defense at an earlier stage in the litigation. 74a-80a. The magistrate judge on that basis held that the defendant could assert the unpled affirmative defense in its summary judgment motion. 80a. Finding that Younge fell within the scope of the personal staff exemption, the magistrate judge recommended dismissal of the complaint. 91a-106a.

The district judge adopted that recommendation. Plaintiff objected to consideration of the section 2000e(f) exemption, arguing that the exemption is an affirmative defense, and thus could not be considered since it had never been pled. 45a. But the district court held under *Hassan* a defendant can assert an unpled affirmative defense in a motion for summary judgment, even when an amendment adding that defense would be barred by Rule 16(b)(4), so long as the defendant's failure to raise that defense by a timely motion to amend did not prejudice the plaintiff. 46a-49a. The district judge concluded that the defendant's delay in raising the affirmative defense had not prejudiced the plaintiff (49a-51a), and that the defendant could thus raise by summary judgment motion the unpled section 2000e(f) affirmative defense. 51a. The district judge held that there was sufficient evidence that the defendant had acted with the alleged discriminatory motive (52a n.13), but upheld dismissal of her claims under the section 2000e(f) exemption. 52a.

On appeal the Eleventh Circuit reiterated that under *Hassan* a defendant can assert an unpled and untimely affirmative defense by relying on that affirmative defense

as the basis of a summary judgment motion. 9a-11a. The court stressed that "[s]ince *Hassan*, we have repeatedly reaffirmed that a district court may receive evidence of an unpleaded affirmative defense if the plaintiff was not 'prejudiced' by the defendant's failure to plead the defense in its answer." 10a.

The court of appeals acknowledged that other Eleventh Circuit decisions barred a defendant, after the expiration of a scheduling order deadline, from amending its answer to include an affirmative defense, unless the defendant could show good cause for modifying that order. 13a n.8. But those cases were irrelevant, the court reasoned, because the defendant in those cases had actually sought to amend its answer "instead of—as the DA's Office did here—raising an affirmative defense without amendment." *Id.* Under *Hassan* the defendant's tactical decision to move for summary judgment relying on the unpled affirmative defense, rather than seek to amend its answer to assert that affirmative defense, was critical. "[W]e simply treat unpleaded affirmative defenses [in summary judgment motions] differently from late motions to amend pleadings." *Id.*

The court of appeals concluded that the defendant's failure to amend its answer to assert the affirmative defense had not prejudiced the plaintiff, and that the defendant could therefore assert the unpled affirmative defense in its summary judgment motion. 11a-13a. The court held that Younge was within the personal staff exemption of section 2000e(f). 14a-30a

The court of appeals denied a timely petition for rehearing. App. 110a-112a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CIRCUIT CONFLICT REGARDING WHETHER, AND IF SO WHEN, A DEFENDANT CAN BASE A SUMMARY JUDGMENT MOTION ON AN UNPLED AFFIRMATIVE DEFENSE

This case presents a multi-faceted circuit conflict regarding whether defendants can circumvent the pleading requirements of the Federal Rules of Civil Procedure. That conflict is widespread; there are multiple decisions in each of the geographic courts of appeals. It is deeply embedded, having existed for several decades. And it is widely recognized, noted in a dozen reported federal lower court decisions.

There is no dispute about what the Federal Rules actually say, or about their literal meaning. Rule 8(c)(1) requires that a party "must" affirmatively plead "any" affirmative defense. There are no exceptions, and there is no dispute about the meaning of "must" and "any." Rule 15(a)(2) provides that in "all" other cases (except amendments within 21 days of the original answer) a pleading may be amended "only" with the consent of the court or the opposing party. There are no other exceptions, and there is no dispute about the meaning of "all" or "only." Rule 16(b)(4) provides that a scheduling order which establishes a deadline for amending pleadings can be modified "only" for good cause and with the judge's consent. There are no exceptions, and there is no dispute about the meaning of "only."

But there is a complex dispute about whether a defendant has to obey these Rules at all. The Eleventh Circuit, in *Hassan* and subsequent cases, has dismissed

these requirements as a mere "technicality." *Hassan*, 842 F.3d at 263; *Edwards v. Fulton County Ga.*, 509 Fed.Appx. 882, 887 (11th Cir 2013). In the Eleventh and several other circuits, a defendant which wishes to rely on an unpled affirmative defense does not need to amend its answer at all. Rather, the defendant, as in this case, can often circumvent all those Rules by filing a summary judgment motion based on the unpled affirmative defense.[2] In those circuits, that maneuver is sufficient—and the court will consider the affirmative defense on its merits--unless the plaintiff can show that it was prejudiced by the failure of the defendant to comply with the Rules and amend its answer. That limited prejudice exception to this practice is far less stringent than the requirements in Rules 15(a)(2) and 16(b)(4).

There are actually two distinct conflicts involved. First, there is a disagreement about whether a defendant can ever base a summary judgment motion on an unpled affirmative defense, or must always obtain leave from the court to amend its answer to add the affirmative defense. Three circuits require a motion to amend; eight circuits permit a summary judgment motion based on an unpled affirmative defense without any such motion to amend.

Second, the eight circuits which permit summary judgment motions based on unpled affirmative defenses disagree about when such a summary judgment motion is

2. This same problem arises, the same conflict exists, and the courts of appeals apply their same respective standards, when defendants rely on unpled affirmative defenses at trial or in a post-trial motion for judgment as a matter of law. Because in the instant case the question arose with regard to a summary judgment motion based on an unpled affirmative defense, for simplicity we describe the question in that context.

permissible. Five circuits, including the Eleventh Circuit, hold that the only circumstance in which such a motion is impermissible is when the plaintiff can show it was prejudiced by the defendant's failure to earlier amend its answer. Three circuits, on the other hand, preclude such motions, even absent prejudice to the plaintiff, if the defendant has engaged in undue delay or other lack of due diligence.

The existence of a circuit conflict regarding the permissibility of summary judgment motions based on unpled affirmative defenses has been expressly recognized by twelve lower court opinions. In the court below, defendant described the rule in *Hassan* as being followed by "[t]he majority of the Circuit Courts of Appeals." Response Brief of Appellee, 27.

A. Three Circuits Bar Summary Judgment Based On An Unpled Affirmative Defense

The District of Columbia Circuit has expressly and repeatedly held that a summary judgment motion cannot be based on an unpled affirmative defense. A defendant which wants to base a summary judgment motion on an as-yet-unpled affirmative defense must seek and obtain leave to amend its answer to plead that defense.

> In order to preserve the notice purpose of Rule 8(c) and the discretionary structure of Rule 15(a), we hold that Rule 8(c) means what it says: a party must first raise its affirmative defenses in a responsive pleading before it can raise them in a dispositive motion..... The District Court must not simply consider the defense in

> deciding the summary judgment motion.... On its face and on its logic, Rule 8(c) requires that a party actually plead its affirmative defenses, not that it plead them only in those cases where failure to plead would result in prejudice to the opposing party.

Harris v. Secretary, U.S. Dep't of Veterans Affairs, 126 F.3d 339, 345 (D.C. Cir. 1997). "The precise holding of *Harris* is that an affirmative defense not raised by answer cannot be raised in dispositive motions that are filed post-answer.... [U]npled affirmative defenses cannot be raised by dispositive motion unless that motion is the first responsive pleading." *Smith-Haynie v. District of Columbia,* 144 F.3d 575, 578 (D.C. Cir. 1998) (citing *Harris*, 126 F.3d at 345). The District of Columbia Circuit applied that rule in *Gilbert v. Napolitano*, 670 F.3d 258 (D.C. Cir. 2012), overturning an award of summary judgment because it was based on an affirmative defense which the defendant had failed to plead. District courts in the District of Columbia have repeatedly applied *Harris* to reject summary judgment motions based on unpled affirmative defenses.[3]

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3. *E.g., Vaughan v. Capital City Protective Services, LLC,* 2022 WL 2304068, at *4 (D. D.C. June 27, 2022) ("[b]ecause Capital City did not include failure to exhaust administrative remedies as an affirmative defense in either its motion to dismiss or its answer, it forfeited the availability of the sole defense raised in its summary judgment motion.... It is the law in the D.C. Circuit that an affirmative defense cannot be raised for the first time in a dispositive motion filed post-answer"); *Hyatt v. Lee,* 2017 WL 11676502, at *2 (D. D.C. March 16, 2017) ("plaintiff is correct that the Court ought treat it as a motion for summary judgment. An immediate consequence of this is that the [the defendant] must amend its answer to include [the

The Second Circuit agrees that a defendant's answer must be amended to include the affirmative defense that is the basis of a summary judgment motion, but, unlike the District of Columbia Circuit, does not require an express motion seeking to add that affirmative defense. "Although ... an affirmative defense … should be raised in the defendant's answer, the district court has the discretion to entertain the defense when it is raised in a motion for summary judgment, by construing the motion as one to amend the defendant's answer." *Monahan v. New York City Dep't of Corrections*, 214 F.3d 275, 283 (2d Cir. 2000). If a district court opts to construe the summary judgment motion as a motion to amend the answer, it applies the Rules governing such proposed amendments.

> Notwithstanding a defendant's failure to timely plead the preemption defense, a district court may still entertain affirmative defenses at the summary judgment stage in the absence of undue prejudice to the plaintiff, bad faith or dilatory motive on the part of the defendant, futility, or undue delay of the proceedings..... In such circumstances, the district court may construe the motion for summary judgment as a motion to amend the defendant's answer.

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affirmative defense]"); *Jones v. Mukasey,* 565 F.Supp.2d 68, 74 (D. D.C. 2008) ("exhaustion is generally considered to be an affirmative defense falling within the scope of Fed R. Civ. P. 8(c).... Therefore, it is improper for defendant to raise this issue for the first time in his summary judgment motion."); *Giardino v. District of Columbia,* 505 F.Supp.2d 117, 121 (D. D.C. 2007) ("the defense cannot be raised by a motion for ... summary judgment until the District first moves to amend its answer").

Saks v. Franklin Covey Co., 316 F.3d 337, 350 (2d Cir. 2003) (opinion joined by Sotomayor, J.). The existence of prejudice to the opposing party is not the only ground on which such a motion can be denied. *Id.*

The Tenth Circuit agrees with the District of Columbia Circuit that a summary judgment motion can only be based on a pled affirmative defense, but (unlike the District of Columbia Circuit) addresses this situation by treating a summary judgment motion based on an unpled affirmative defense as a motion to amend. In evaluating such a motion to amend, the Tenth Circuit applies the regular legal standards in the Federal Rules.

> We agree with the D.C. Circuit that the best procedure is to plead an affirmative defense in an answer or amended answer. And, as that court pointed out, absence of prejudice to the opposing party is not the only proper consideration in determining whether to permit an amended answer; a motion to amend may also be denied on grounds such as "'undue delay, bad faith or dilatory motive ... , or repeated failure to cure deficiencies by amendments previously allowed.'" .... Accordingly, courts should not permit a party to circumvent these other restrictions on amendments simply by filing a dispositive motion rather than a motion to amend.... But that concern can be obviated without a strict requirement that the answer be amended before raising a defense in a motion for summary judgment. Rather than demanding that the defendant first move to amend the answer, we need only apply the same standards that govern motions to amend when

> we determine whether the defendant should be permitted to "constructively" amend the answer by means of the summary-judgment motion.

Ahmad v. Furlong, 435 F.3d 1196, 1201-02 (10th Cir. 2006) (quoting *Harris*, 126 F.3d at 345). The existence of prejudice to the opposing party is not the only ground on which such a motion can be denied. *Id*. The Tenth Circuit reiterated this approach, and standard in *United States v. Travis*, 2024 WL 5220731, at *2 (10th Cir. Dec. 26, 2024) ("[w]e treat such untimely assertions of affirmative defenses as motions to amend the answer.").

District courts in the Tenth Circuit apply *Ahmad* and treat summary judgment motions based on as-yet-unpled affirmative defenses as motions to amend the answer to add that affirmative defense. Thus in *Harr v. Oklahoma Dept. of Transportation*, 2023 WL 2905580 (W.D. Okl. March 28, 2023), the district court, applying the Rule 15 undue delay standard, refused to permit the defendant to use a summary judgment motion to constructively amend its answer to add an affirmative defense. "[The defendant] has not articulated any reason for waiting until this stage in the litigation to present its ... defense.... The Court agrees the delay is undue...." 2023 WL 2905580, at *7. In *Kuykendall v. Leader Communications, Inc.*, 2020 WL 2461481, at *10-*11 (W.D. Ok. My 12, 2020), the district court declined to permit the defendant to use a summary judgment motion to constructively amend its complaint because the defendant had failed to address the standards governing amendments in Rule 15(a) and Rule 16(b)(4). Whereas in *Fields v Integris Health, Inc.*, 2019 WL 1433768, at *6 (W.D. Okl. March 29, 2019), the court permitted the defendant to constructively amend

its answer in this manner because the defendant was not guilty of undue delay and there was no prejudice to the plaintiff.

Because the District of Columbia, Second and Tenth Circuit require a defendant to amend its answer to assert any affirmative defense on which it is seeking summary judgment, defendants in each of those circuits must establish that such an amendment would be permissible under Rule 15(a)(2) and, if there is a scheduling order, Rule 16(b)(4). But there is a clear difference in the manner in which that issue is raised in those circuits. In the District of Columbia Circuit, the defendant must actually file a motion for leave to amend. In the Second Circuit, the district court has discretion either to reject the summary judgment motion in the absence of a formal motion to amend, or to construe the summary judgment motion as a motion to amend. And in the Tenth Circuit, district courts must treat summary judgment motions based on as-yet-unpled affirmative defenses as motions to amend, although district judges have the usual degree of discretion in deciding whether to permit that amendment.

B. Three Circuits Bar Summary Judgment Based On An Unpled Affirmative Defense If Either (1) Permitting It Would Prejudice The Plaintiff, or (2) The Defendant Has Been Guilty of Undue Delay or Lack of Diligence in Raising That Defense

The First Circuit does not require an amended answer to raise an unpled affirmative defense, but the absence of prejudice is not sufficient to enable a defendant to assert an

unpled affirmative defense through a summary judgment motion. The standard in that circuit was established in *Davignon v. Clemmey*, 322 F.3d 1, 15 (1st Cir. 2003)

> As an affirmative defense enumerated in Federal Rule of Civil Procedure 8(c), normally res judicata is deemed waived unless raised in the answer.... There are certain exceptions to the Rule 8(c) bar which might be invoked, inter alia, either where (i) the defendant asserts it without undue delay *and* the plaintiff is not unfairly prejudiced by any delay, see id.; or (ii) the circumstances necessary to establish entitlement to the affirmative defense did not obtain at the time the answer was filed....

322 F.3d at 15 (emphasis added). The requirement of an absence of undue delay, in addition to a lack of prejudice, has been reiterated in subsequent First Circuit decisions. *Lawless v. Town of Freetown*, 63 F.4th 61, 65 (1st Cir. 2023) (quoting *Davignon*, 322 F.3d at 15); *O'Brien v. Town of Bellingham*, 943 F.3d 514, 518 (1st Cir. 2019) (quoting *Davignon*, 322 F.3d at 15); see *Davis v. Dominion Diagnostics, LLC*, 2020 WL 5751509, at *2 (D. R.I. Sept. 25, 2020) (quoting and applying *O'Brien* in denying summary judgment motion based on unpled affirmative defense); *Malden Transportation, Inc., v. Uber Technologies*, 404 F.Supp. 404, 424 (D. R.I. 2019) (quoting and applying *Davignon* in denying summary judgment motion based on unpled affirmative defense.).

The Seventh Circuit has repeatedly held that a defendant's diligence and timeliness, as well as the presence or absence of prejudice to the plaintiff, are

relevant to whether a defendant may base a summary judgment motion on an unpled affirmative defense. In *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997), the Seventh Circuit held that courts may and should reject a summary judgment motion based on an unpled affirmative defense when the motion and defense were only raised after unexcused delay "[I]f Rule 8(c) is not to become a nullity, we must not countenance attempts to invoke [affirmative] defenses at the eleventh hour, without excuse and without adequate notice to the plaintiff." 123 F.3d at 969. Where a defendant's failure to raise an affirmative defense is unexcused, district courts in the Seventh Circuit have repeatedly rejected summary judgment motions based on the unpled affirmative defense, without requiring an additional showing of prejudice. *Bancorp Bank v. Metropolitan Diagnostic Imaging, Inc.*, 2023 WL 180082, at *10 (N.D. Ill. Feb. 7, 2023) (denying summary judgment motion based on unpled affirmative defenses because the defendants "offered no excuse or explanation for failing to plead the defense in [their] answers or for raising the defense so late") (quoting *Reed v. Columbia St. Mary's Hospital*, 915 F.3d 473, 482 (7th Cir. 2019)); *Lyon Financial Services, Inc. v. Illinois Paper and Copier Company*, 2016 WL 147654, at *18 (N.D. Ill. Jan 13, 2016) (denying summary judgment based on unpled affirmative defense, regardless of whether plaintiff was not prejudiced, because defendant's "explanation for its delay is simply inadequate") (citing *Venters*); *Phipps v. Sheriff of Cook County*, 681 F.Supp.2d 899, 906 (N.D. Ill. 2009) (rejecting summary judgment motion based on statute of frauds because that affirmative defense was "raised ... for the first time in [the defendant's] motion for summary judgment"; citing *Venters*); *Canadian Pacific Railway Co. v. Williams-Hayward Protective Castings,*

Inc. 2005 WL 782698, at *17 (N.D. Ill. April 6, 2005) (rejecting summary judgment motion based on statute of frauds because "there is no excuse for [the defendant's] failure to raise its affirmative defense earlier in the proceedings"); *Sterling v. Riddle*, 2000 WL 198440, at *4 (N.D. Ill. Feb. 11, 2000) (denying motion for summary judgment based on statute of limitations and res judicata because "[t]he availability of these defenses was apparent from the time the complaint was filed and the city gives no reason for the delay"; quoting *Venters*); *see Illinois Extension Pipeline Company, L.L.C. v. Summann*, 2016 WL 630022, at *4 (S.D. Ill. Feb. 17, 2016) (refusing to permit defendant to raise unpled affirmative defense in response to plaintiff's motion for summary judgment because ""[s]urprises' such as new arguments or defense theories propagated after the completion of discovery and filing of summary judgment are wisely discouraged.") (quoting *Crest Hill Land Dev., LLC v. City of Joliet*, 396 F.3d 801, 804 (7th Cir. 2005) and citing *Venters*).

The Sixth Circuit generally permits a judge to consider an affirmative defense raised for the first time in a summary judgment motion if there is no resulting surprise or prejudice. *Rogers v. I.R.S.*, 822 F.3d 854, 856-57 (6th Cir. 2016). But rejection of such a summary judgment motion is warranted, "even without a showing of prejudice, [if the district court] finds that a defendant has failed to show 'that it made a good faith effort to comply with the standard procedure for raising affirmative defenses....'" *Henricks v. Pickaway Correctional Institute*, 782 F.3d 744, 750-51 (6th Cir. 2015) (quoting *U.S. Fire Ins. Co. v City of Warren,* 87 Fed.Appx. 485, 491 (6th Cir. 2003)).

C. Five Circuits Permit Summary Judgment Based On An Unpled Affirmative Defense Unless Permitting It Would Prejudice The Plaintiff

The Eleventh Circuit has held since its 1988 decision in *Hassan* that a defendant can use summary judgment to assert an unpled affirmative defense, except if doing so would prejudice the plaintiff. That standard in *Hassan* and its progeny for when a defendant can use a summary judgment motion to assert an unpled affirmative defense is avowedly different than the standard that would apply under Rules 15(a)(2) or 16(b)(4) if the defendant sought leave to amend its answer to add that affirmative defense. As the court below candidly explained, "we simply treat unpleaded affirmative defenses differently from late motions to amend pleadings." 13a-14a n.8. That is precisely the opposite of the rule in the District of Columbia, Second and Tenth Circuits, which avowedly apply to a summary judgment motion based on an unpled affirmative defense "the same" standard that would apply to a motion to amend. *Ahmad v. Furlong*, 435 F.3d at 1202.

The Eleventh Circuit's distinction between the standard applied under *Hassan*, and the standards that would be applied under Rules 15(a)(2) and 16(b)(4), is illustrated by a series of cases in that Circuit in which the court, applying those Rules, first expressly rejected a defendant's motion to amend its answer to assert an affirmative defense, but then, applying *Hassan*, permitted the defendant to assert the rejected affirmative defense by proffering it as the basis for a summary judgment motion. In *Pierce v. National Specialty Insurance Co.*, the defendant sought to amend its answer to add an affirmative

defense 10 months after the deadline set by the scheduling order. The district court, applying Rule 16(b)(4), denied that motion to amend. "Defendant has not explained why it did not move to amend ... before the close of the deadline to amend. Defendant has failed to make any showing of diligence in its attempts to meet the deadline to amend." 2023 WL 11054067, at *2 (M.D. Fla. Nov. 21, 2023). But then, applying the standard in *Hassan*, the district court held that the defendant could use that affirmative defense as the basis for summary judgment because the plaintiff had not been prejudiced by the defendant's delay. 2024 WL 3224726, at *1-*2 (M.D. Fla. June 12, 2024). The Eleventh Circuit upheld that decision, explaining that the motion to amend was governed by Rule 16(b)(4), whereas the motion for summary judgment (based on the rejected amendment) was correctly decided "pursuant to our caselaw," citing *Hassan*. 2025 WL 985350, at*2 (11th Cir. 2025).

Recognizing the clear difference between the requirements in Rules 15(a)(2) and 16(b)(4), on the one hand, and the far less demanding standard under *Hassan*, on the other, district courts in the Eleventh Circuit have repeatedly rejected motions to amend answers to add an affirmative defense, only to then permit the defendant to use a summary judgment motion to assert that very rejected affirmative defense. *Nolaco v. AKS Cartage Corp.*, 2018 WL 2332599, 81 and *6-*7 (S.D. Fla. May 22, 2018) (denying motion to amend because the defendant's failure to comply with Rule 16 scheduling order "is not excusable," but nonetheless permitting the defendant under *Hassan* to raise that affirmative defense through a motion for summary judgment); *Sanders v. M & M Waste, Inc.*, 2010 WL 1143294, at *1 and *3 (N.D. Ga. Sept. 27, 2010) (denying motion to amend under Rule 16 because

there is "no explanation of [the defendant's] failure to meet the scheduling order," but nonetheless permitting the defendant under *Hassan* to raise that affirmative defense through a motion for summary judgment); *Pinares v. United Technologies Corp.*, 2018 WL 10502427, at *2-*3 (S.D. Fla. Dec. 6, 2018) (denying motion to amend because "[d]efendant has not met the Rule 16(b) good cause standard," but nonetheless permitting the defendant to raise that affirmative defense under Eleventh Circuit decisions applying *Hassan*).

Four other courts of appeals apply the same standard, holding that—absent a showing of prejudice—a defendant can base a summary judgment motion on an affirmative defense that had not been pled. *Brinkley v. Harbour Recreation Club,* 180 F.3d 598, 612 (4th Cir. 1999) (citing cases); *First Union Nat. Bank v. Picket Overseas Trust Corp., Ltd.*, 477 F.3d 616, 622 (8th Cir. 2007); *McGinest v. GTE Service Corp.*, 247 Fed.Appx. 72, 75 (9th Cir. 2007). The Third Circuit at one time applied a standard similar to that in the First and Seventh Circuits, considering not only whether a plaintiff had been prejudiced by a defendant's failure to plead an affirmative defense, but also "whether there was a reasonable modicum of diligence in raising the defense," and "whether the defendant[] violated any scheduling orders in raising the defense for the first time in the[] summary judgment motion[]." *Eddy v. V.I. Water & Power Authority*, 256 F.3d 204, 209 (3d Cir. 2001) (opinion by Alito, J.). But the Third Circuit has abandoned the *Eddy* standard, and now permits a defendant to raise an affirmative defense in a summary judgment motion even if there has been no diligence in raising the defense, and even if the summary judgment motion raises that affirmative defense after the scheduling

order deadline for amendments to leadings. "Under our precedents, 'affirmative defenses may be raised at any time, even after trial, so long as the plaintiff suffers no prejudice.'" *Clews v. City of Schuykill*, 12 F.4th 353, 358 (3d Cir. 2021) (quoting *Sharp v Johnson*, 669 F.3d 144, 158 (3d Cir. 2012)).

D. The Circuit Conflict Is Widely Recognized

A dozen lower court opinions have recognized this circuit split. The Fifth Circuit has twice pointed that out. "The circuit courts disagree whether the affirmative defenses listed in Fed.R.Civ.P. 8(c) must be asserted in the defendant's answer or may be raised for the first time in a motion to dismiss or other dispositive motion." *United States v. Burzynski Cancer Research Institute*, 819 F.2d 1301, 1307 (5th Cir. 1987). "There is disagreement among the circuits on the extent to which affirmative defenses can be raised by motions, including motions for summary judgment under Fed.R.Civ.P. 56." *Funding Systems Leasing Corp. v. Pugh,* 530 F.2d 91, 98 (5th Cir. 1976). The Tenth Circuit pointed out that the District of Columbia standard in *Harris* differs from some other circuits.

> The D.C. Circuit has held that an affirmative defense may not be raised for the first time in a post-answer motion without first amending the answer. *Harris v. Secretary, U.S. Dep't of Veterans Affairs*...., But .... "[m]ost other courts are not so strict [as the D.C. Circuit]. They do permit a defendant to raise an affirmative defense for the first time in a post-answer motion if the defense is raised in sufficient time that there is no prejudice to the opposing

> party merely because of the delay." 2 James Wm. Moore et al., Moore's Federal Practice, § 8.07[2] (3d ed.1997).

Ahmad v. Furlong, 435 F.3d 1196, 1201-02 (10th Cir. 2006). The District of Columbia Circuit insists that *Harris* is "the majority view'" *Smith-Haynie v. Department of Commerce*, 155 F.3d 575, 578 (D.C. Cir. 1998), necessarily recognizing the division on this issue. And *Harris* itself expressly disagreed with the practice in several circuits of permitting a defendant to raise an unpled affirmative defense through a summary judgment motion. *Harris*, 126 F.3d at 344-45 (noting "some circuits permit parties to raise affirmative defenses for the first time in dispositive motions where no prejudice is shown" and objecting that this "alters the structure dictated by Rules 8(c) and 15(a)....").

Multiple district court opinions have recognized the conflict. *McDevitt v. Pennsylvania Dep/t of Corrections-State Correctional Institute at Cresson,* 2007 WL 128007, at *2 (W.D. Pa. Jan. 11, 2007) (noting "a split in federal authority" illustrated by the difference between *Monahan* in the Second Circuit and *Harris* in the District of Columbia Circuit): *Central States Southeast and Southwest Areas Pension Fund v. Jordan*, 1987 WL 17483, at *2 (N.D. Ill. Sept. 21, 1987) ("[t]he circuits vary as to the extent to which they will allow parties to raise affirmative defenses by motion, including motions for summary judgment"); *Nurriddin v. Goldin*, 382 F.Supp.2d 79, 91 (D. D.C. 2009) (noting that the District of Columbia Circuit decision in *Harris* is "unlike some circuits"); *Astor Holdings, Inc. v. Roski*, 325 F.Supp.2d 251, 260 n.6 (S.D.N.Y. 2003) ("the District of Columbia Circuit opinion

[in *Harris*] acknowledges that its ... holding is the minority view, citing cases from the Third, Sixth, Seventh, Ninth, and Tenth Circuits"); *Selective Insurance Company of America v. Moseley*, 2021 WL 3268380, at *6 (D. D.C. July 30, 2021) (noting that "the D.C. Circuit [in *Harris*] has departed from those courts [that permit a defendant to raise an unpled affirmative defense in a dispositive motion]"); *Holocheck v. Luzerne County Head Start, Inc.*, 2007 WL 954308, at *12 n.5 (M.D. Pa. March 28, 2007) ("*Harris* .... rejected the approach of other circuits...."); *In re Fair Finance Company*, 2018 WL 1069443, at *27 (N.D. Ohio Feb. 23, 2018) ("unlike at least one other circuit court, the Sixth Circuit does not insist that a party first move for leave to amend its answer before considering the merits of a previously unraised affirmative defense. Compare, e.g., [*Smith v.*] *Sushka*, 117 F.3d [965,] 969 [6th Cir. 1997)], with *Harris*....").

II. THE COURT OF APPEALS HAS DECIDED INCORRECTLY AN IMPORTANT QUESTION OF FEDERAL LAW

The fundamental flaw in the seminal Eleventh Circuit opinion in *Hassan*, and thus in the decision below applying *Hassan*, is apparent on the face of *Hassan* itself. The Eleventh Circuit in *Hassan* did not base its holding on the text of Rules 8, 15 or 16. Rather, the court of appeals candidly explained that it had instead chosen to "avoid hypertechnicality in pleading requirements and focus, instead, on enforcing the actual purpose of the rule." 842 F.3d at 263. *Hassan* did not hold that a defendant is complying with the Federal Rules if it moves for summary

judgment based on an unpled affirmative defense.[4] Nor did it suggest that there was any ambiguity in Rules 8, 15, or 16 that could be resolved by liberal interpretation. Rather, *Hassan* reasoned that the failure of a defendant to ever plead the affirmative defense which it was asserting was merely "noncompliance with a technicality." *Id.* So as long as a defendant's violation of Rule 8 had not prejudiced the plaintiff, *Hassan* reasoned, there was no reason to enforce that Rule.

But the Federal Rules of Civil Procedure are not a laundry list of general purposes to be implemented by the lower courts on an ad hoc case-by-case basis. The Federal Rules of Civil Procedure are rules,[5] and the plain meaning of those rules is clear. "When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law[.]" *Bostock v. Clayton Cty.*, 590 U.S. 644, 654 (2020). Rule 8(c)(1) provides that "a party must affirmatively state any ... affirmative defense." There is nothing ambiguous about "must" or "any." As the District of Columbia Circuit correctly held in *Harris*, "Rule 8(c) means what it says: a party must first raise its affirmative defenses in a responsive pleading before it can

4. *Hassan* accurately described a summary judgment motion based on an unpled affirmative defense as a "failure to comply with Rule 8(c)." 842 F.2d at 263. Defendant described this case as involving "the defendant's failure to comply with Fed. R. Civ. P. 8(c)." Response Brief of Appellee, 1.

5. Defendant objected in the court of appeals that "Younge demands that the precedent [in *Hassan*] be ignored and the rule for amendments of pleadings be substituted in its place." Response Brief of Appellee, 13.

raise them in a dispositive motion." 126 F.3d at 345. The decisions in *Hassan* and the court of appeals in this case rewrite Rule 8(c)(1) to mean "a party must affirmatively state an affirmative defense if, but only if, its failure to do so would prejudice the opposing party." But, as the court of appeals noted in *Harris*, "[o]n its face ... Rule 8(c) requires that a party actually plead its affirmative defenses, not that it plead them only in those cases where failure to plead would result in prejudice to the opposing party." *Id.*

Hassan conflicts as well with Rule 15. Once a defendant has filed an answer that fails to contain a particular affirmative defense, it can "only" amend that pleading (except after the expiration of the 21-day period for amendment as of right) with the consent of the court (or the opposing party). The Rule 15(a)(2) requirement of such judicial approval of an amendment is not limited to amendments that would prejudice the opposing party; it applies to all amendments to all pleadings. *Foman v. Davis* makes clear that there are numerous grounds other than prejudice on which leave to amend could properly be denied, including "undue delay, bad faith or dilatory motive on the part of the movant." 371 U.S. 178, 182 (1962). As *Harris* observed, "automatically permitting late raising of affirmative defenses where no prejudice has occurred reduces the multifarious reasons for denying leave to amend envisioned by the Court in *Foman* to the single, non-exhaustive factor of prejudice." 126 F.3d at 345.

Allowance (in the absence of prejudice) of summary judgment motions asserting unpled affirmative defenses conflicts as well with Rule 16 when, as here, the motion is filed after the deadline for amendments established by a scheduling order. In that situation Rule 16(b)(4) precludes

even considering a request to amend a defendant's answer unless there is a showing of good cause to modify the scheduling order. The presence or absence of prejudice is simply irrelevant to good cause, which turns instead on whether the party seeking modification of the scheduling order can demonstrate that for some reason it was unable prior to meet the court-imposed deadline for amendments. *Sosa v. Airprint Sys.*, 133 F.3d 1417, 1418 (11th Cir. 1998).

If, in May of 2022, the defendant had moved to amend its answer to assert an affirmative defense under section 2000e(f), that motion would have been denied on multiple grounds. Because the defendant could not have shown good cause to alter the Scheduling Order's May 2021 deadline for amendments, such a motion would have been denied under Rule 16. Even in that absence of that deadline, such a motion would have been denied under Rule 15 for undue delay. The defendant in this case understandably did not bother to file what would have been a futile motion to amend. It renders meaningless Rules 8, 15 and 16 to permit the defendant to circumvent the requirements of those Rules by simply filing a motion for summary judgment.

Although the circumvention scheme sanctioned in the Eleventh Circuit and other circuits does not apply to a summary judgment motion based on an unpled affirmative defense that would prejudice a plaintiff's ability to address the affirmative defense, that limitation is often toothless. Under *Hassan*, that limitation would only apply if the delay in raising the affirmative defense impaired a plaintiff's ability to engage in needed discovery. 11a-13a. But many affirmative defenses turn on information that a plaintiff would already have, so access to discovery would not

matter, and thus under *Hassan* a defendant's failure to plead such affirmative defenses would never be prejudicial. That would be true of some of the most common affirmative defenses, such as statute of limitations, res judicata, and failure to exhaust administrative remedies. And it would be true of the section 2000e(f) affirmative defense, which turns on the nature of an employee's duties, which would of course be known to that employee. Defendant argued on that ground that its failure to raise that affirmative defense in a timely manner could not be prejudicial.[6]

Permitting defendants to circumvent in this way the requirements of Rules 8, 15 and 16 is often, as here, outcome-determinative. Relying on that standard, the defendant was able to obtain dismissal of plaintiff's discrimination claim, even though both the magistrate judge and the district judge concluded that there was sufficient evidence of a discriminatory motive on the part of the defendant. 52a, 106a, 109a. If the summary judgment motion in this case had been filed in the District of Columbia Circuit, it would have been denied under *Harris*. This is not a minor procedural problem which a plaintiff could avoid by proceeding in a different manner. The plaintiff here did everything she was required to under the Federal Rules; her suit was dismissed because

6. "Younge *could not* have been prejudiced by permitting Howard to raise the personal staff exception since the evidence the District Court relied on to determine that the personal staff exception applied was largely based on Younge's own testimony." Response Brief of Appellee, 22 (emphasis added); see 77a (lack of additional discovery sought by Younge's counsel not prejudicial because "[t]his is information that should be known to Younge."), 94a (magistrate finding "largely based on Younge's own testimony").

the defendant was not required to do the same. The only way the plaintiff could have avoided this problem would have been to sue the Fulton County District Attorney's Office not in Georgia, but in the District of Columbia or one of the other circuits that hold defendants to a more demanding standard than does the Eleventh Circuit. Venue requirements clearly precluded the plaintiff from doing so.

It is important that the Court grant review to resolve the conflict regarding whether this method of circumventing Rules 8, 15 and 16 is consistent with the Federal Rules of Civil Procedure. That would be true even if this circumvention of the Federal Rules were permitted to plaintiffs and defendants in equal measure. But as a practical matter this circumvention scheme is largely limited to defendants. The circumvention-permitting rule applies only to affirmative defenses, and in the vast majority of cases the defendant is the only party that would want to assert an affirmative defense. *Hassan* and the circumvention scheme it permits would only benefit a plaintiff who was the subject of a counterclaim, a relatively uncommon situation.

Plaintiffs, of course, frequently want to amend their complaints to add new claims, but *Hassan* does not exempt them from the requirements of the Federal Rules. In the Eleventh Circuit and elsewhere plaintiffs' amendments seeking to add additional claims remain subject to the requirements of Rules 15 and 16. The Eleventh Circuit (except with regard to affirmative defenses) vigorously enforces the good cause requirement in Rule 16(b)(4). *Sosa v. Airprint Sys., Inc.,* 133 F.3d 1417, 1418-19 (11th Cir. 1998). But because defendants in the Eleventh Circuit,

under *Hassan*, often are effectively exempted from any need to amend an answer after the expiration of a scheduling order deadline, they can often avoid complying with Rule 16(b)(4), as occurred in the instant case.

If, in May 2022, the plaintiff had wanted to assert a new claim against the defendant, she could not have done so by summary judgment motion, but would have been required—as the defendant was not—to show good cause to modify the scheduling order under Rule 16, and then to show under Rule 15 that she was not guilty of undue delay in raising that new claim. When, in the court below, plaintiff objected that the defendant was being excused from complying with the usual Rule 16 requirement of a showing of good cause, the court of appeals candidly explained "we simply treat unpleaded affirmative defenses differently from late motions to amend pleadings." 13a n.8. That difference may indeed be "simpl[e]," but it is patently inconsistent with the Federal Rules of Civil Procedure.

This Court should grant review to resolve the underlying circuit conflict and end this longstanding disregard of the plain language of the Federal Rules. It should adopt the standard in the District of Columbia decision in *Harris*, and should hold that "must" and "any" (in Rule 8(c)(1)) mean must and any, that "only" (in Rules 15(a)(2) and 16(b)(4)) means only, and that the provisions of the Federal Rules of Civil Procedure are indeed rules, not—as the Eleventh Circuit put it dismissively in *Hassan*—a mere "technicality."

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case presents a perfect vehicle for resolving the question presented. The defendant never moved to amend its answer to assert the section 2000e(f) affirmative defense. The defendant never argued, and the court of appeals never suggested, that a motion to add that affirmative defense—had it been filed—could have satisfied the standards in Rule 15(a)(2) or Rule 16(b)(4). The only reason that the defendant was able to obtain dismissal of the complaint was that the Eleventh Circuit avowedly "treat[s] unpleaded affirmative defenses differently from late motions to amend pleadings." 13a n.8. This Court should grant certiorari to hold that such differing treatment is impermissible under the plain language of the Federal Rules of Civil Procedure.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED APRIL 1, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-11418

DR. JASMINE YOUNGE,

Plaintiff-Appellant,

versus

FULTON JUDICIAL CIRCUIT DISTRICT ATTORNEY'S OFFICE, GEORGIA,

Defendant-Appellee,

PAUL L. HOWARD, JR., FULTON COUNTY DISTRICT ATTORNEY; IN HIS INDIVIDUAL CAPACITY,

Defendant.

Filed April 1, 2025

OPINION

[DO NOT PUBLISH]

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-00684-WMR

Appendix A

Before BRANCH, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq.,* on its own terms, does not extend its protections to elected officials or their "personal staff." 42 U.S.C. § 2000e(f).[1] And in Georgia, district attorneys are elected officials. Yet after Jasmine Younge, who was third-in-command of the Fulton County District Attorney's Office ("the DA's Office"), brought this Title VII suit against her employer,[2] the DA's Office failed to raise Title VII's personal-staff exemption until after discovery closed. The DA's Office did not "realize[] this was an issue" until it began preparing its motion for summary judgment.

The district court allowed the DA's Office to assert the personal-staff exemption for the first time as an affirmative defense at summary judgment because the court found that Younge was not prejudiced by the DA's Office's failure to timely plead that defense. The district

1. Under Title VII, an "employee" does not include "any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff." 42 U.S.C. § 2000e(f).

2. Paul L. Howard, Jr. served as Fulton County DA at all relevant times. He, however, is not a party to this appeal in either his personal or official capacity. In this opinion, we refer to both the DA's Office (as an entity and party) and Howard (as a person) where relevant.

court then granted summary judgment to the DA's Office after finding that Younge was a member of Howard's personal staff.

Younge appeals that decision and argues (1) that the district court should have applied a good-cause standard, not a prejudice standard, to determine whether the DA's Office could assert an unpleaded affirmative defense at summary judgment; (2) that the DA's Office's late defense prejudiced her; and (3) that she was not a member of Howard's personal staff by the time she was fired.

This appeal requires us to decide whether the district court properly considered the DA's Office's belated defense when it granted summary judgment to the DA's Office based on the personal-staff exemption. After careful review, and with the benefit of oral argument, we affirm.

I. Background

In April 2019, Howard hired Younge as Deputy Chief of Staff and Director of Policy and Programs of the DA's Office at a salary of $120,282. Howard initially tried to hire Younge as a Director at a salary of $125,000, but Fulton County did not allow him to hire Younge at that title and salary combination. Howard made Younge's formal title "Deputy Chief of Staff" to allow him to pay a salary close to the $125,000 that Younge had requested. Younge's offer letter specified that she would "be assigned to the Policy Division under the supervision of the District Attorney," and her offer was "contingent upon the approval of the Fulton County Personnel Department and Finance Department."

Younge began working for the DA's Office the next month. Younge's job description stated that she would oversee "policy implementation and development, management and oversight of bureaus, strategic communications, and responsive constituent services." Her job description also provided that she would be the principal writer of criminal justice and crime prevention policies and programs, and she would develop, implement, and administer the programs.[3]

While Younge worked for the DA's Office, she was third-in-command after Howard and his Chief of Staff, Lynne Nelson. Younge supervised more than thirty employees and fifteen to twenty different policies and programs implemented by the DA's Office. In so doing, Younge testified that she frequently met with dignitaries, community leaders, and members of the public who visited the DA's Office. Howard also attended these meetings.

In carrying out her duties, Younge and Howard worked closely together. Howard was Younge's only supervisor, and the two discussed Younge's work and programs every day. Howard even sent Younge messages on the weekends. As Younge averred, Howard "demanded constant availability around the clock" from her. Younge testified that her schedule was "pretty much the schedule that . . . Howard had." Howard averred that he closely supervised Younge's work because voters would judge him based on how Younge interacted with the public and

3. Younge contends that her predecessor created most of the programs she worked on, meaning she merely ran the programs.

implemented policies and projects on behalf of the DA's Office. If Howard "needed something done[,] [Younge] would handle it." Younge was "always in and out" of Howard's office because she was one of "the essential folks" in the DA's Office. Younge testified that she was "literally [Howard's] go-to person for almost everything," and was "one of the few on staff that was just able to just walk into his office at any time." Howard similarly testified that Younge was "a key member" and "a high ranking part" of the DA's Office.

Around July 1, 2019, approximately two months after she started her job, Younge told Howard that she was pregnant. Afterwards, Howard stopped meeting with Younge, excluded her from his meetings with others, treated her dismissively, and reassigned some of her work duties. Two weeks later, he fired Younge.

Following her termination, Younge sued the DA's Office for, in relevant part, pregnancy discrimination in violation of Title VII.[4] In its answer, the DA's Office asserted several affirmative defenses but did not assert

4. Younge's complaint also alleged claims for retaliation in violation of Title VII, race discrimination in violation of Title VII, race discrimination in violation of 42 U.S.C. § 1981, and gender-based discrimination in violation of the Fourteenth Amendment's Equal Protection Clause and 42 U.S.C. § 1983. On the DA's Office's motion to dismiss, the district court dismissed all of Younge's claims except for pregnancy discrimination and retaliation under Title VII. At summary judgment, Younge abandoned her retaliation claim. Accordingly, Younge's pregnancy-discrimination claim under Title VII is her sole remaining claim.

that Younge was "personal staff" of an elected official exempt from Title VII's protections.[5] On March 14, 2022, after discovery had closed, the DA's Office notified Younge and the district court of its intent to raise the personal-staff exemption at summary judgment. Two months later, the DA's Office moved for summary judgment and argued that Younge was part of Howard's "personal staff" exempt from Title VII's protection. Younge opposed summary judgment and argued that the DA's Office could not belatedly raise this affirmative defense absent good cause.

After oral argument on the DA's Office's motion for summary judgment, a magistrate judge issued a report and recommendation ("R&R") finding that the DA's Office could assert the personal-staff exemption as a belated affirmative defense because the late assertion would not prejudice Younge. Then, the magistrate judge recommended summary judgment in favor of the DA's Office because there was no genuine dispute of material fact that Younge was part of Howard's personal staff.

Over Younge's objections, the district court agreed that the DA's Office could assert the personal-staff exemption as an affirmative defense and that the DA's Office was entitled to summary judgment because of this defense. Accordingly, the district court granted summary judgment to the DA's Office. Younge timely appealed.

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5. Neither party disputes that the district attorney for a judicial circuit is an elected position in Georgia. *See* O.C.G.A. § 15-18-3(1).

II. Discussion

Younge argues that the district court erred by (1) applying a prejudice standard to determine whether the DA's Office could assert an unpleaded affirmative defense at summary judgment; (2) finding that the DA's Office's late defense did not prejudice her; and (3) finding that she was a member of Howard's personal staff. We address each issue in turn.

A. We assume without deciding that the personal-staff exemption is an affirmative defense

As relevant here, Title VII provides that an employer may not "discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII does not define the term "any individual," but "we have held that only those plaintiffs who are 'employees' may bring a Title VII suit." *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242 (11th Cir. 1998). Title VII defines "employee" to mean "an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff." 42 U.S.C. § 2000e(f).

We have never addressed whether Title VII's exemptions to employee status are affirmative defenses or elements of a plaintiff's *prima facie* case. Our sister

circuits that have addressed the question have come to different conclusions. In the Fourth Circuit, "employee status is an element of a substantive Title VII claim" which defendants can challenge "by a motion under Fed. R. Civ. P. 12(b)(6) for failure to state a claim." *Curl v. Reavis,* 740 F.2d 1323, 1327 n.2 (4th Cir. 1984). But in the Fifth Circuit, the personal-staff exemption is an affirmative defense because it "allows the defendant to avoid liability even if the plaintiff meets his burden of proof under Title VII." *Oden v. Oktibbeha Cnty.,* 246 F.3d 458, 467 (5th Cir. 2001). This difference matters because it changes which party must include the exemption in its pleadings. *See* Fed. R. Civ. P. 8(a)(2), (b)(1)(A).

We need not decide this issue today, however, because the parties have fully litigated this case as if the personal-staff exemption is an affirmative defense. The magistrate judge agreed with the Fifth Circuit and recommended treating the personal-staff exemption as an affirmative defense. The DA's Office did not object to that recommendation. The district court treated the personal-staff exemption as an affirmative defense, and the DA's Office does not appeal that holding. Indeed, the DA's Office argues to us on appeal that we need not decide this question and treats the personal-staff exemption as an affirmative defense in its brief. Accordingly, we assume without deciding that Title VII's personal-staff exemption is an affirmative defense.

B. A district court may consider a defendant's unpleaded affirmative defense at summary judgment if there is no prejudice to the plaintiff

The district court determined that it could consider the DA's Office's personal-staff defense because Younge was not prejudiced by the DA's Office's failure to timely plead that defense. Younge argues that this determination was error because the DA's Office failed to show good cause for not timely pleading the personal-staff exemption. The DA's Office responds that the district court correctly considered whether Younge was prejudiced by the DA's Office's failure to timely plead the personal-staff exemption.

We review a district court's ruling on waiver of affirmative defenses for abuse of discretion. *See E.E.O.C. v. White & Son Enters.*, 881 F.2d 1006, 1009 (11th Cir. 1989). A district court abuses its discretion when it applies an incorrect legal standard, relies on clearly erroneous factual findings, or commits a clear error of judgment. *Bradley v. King*, 556 F.3d 1225, 1229 (11th Cir. 2009).

Generally, Federal Rule of Civil Procedure 8(c) requires a party to "affirmatively state any avoidance or affirmative defense" when "responding to a pleading." Fed. R. Civ. P. 8(c)(1). We have explained the consequences of failing to comply with Rule 8(c):

> [T]he general rule is that, when a party fails to raise an affirmative defense in the pleadings, that party waives its right to raise the issue at trial. However, the liberal pleading rules

> established by the Federal Rules of Civil Procedure apply to the pleading of affirmative defenses. . . . When a plaintiff has notice that an affirmative defense will be raised at trial, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice. And, when the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue.

Hassan v. U.S. Postal Serv., 842 F.2d 260, 263 (11th Cir. 1988) (internal citation omitted). Since *Hassan,* we have repeatedly reaffirmed that a district court may receive evidence of an unpleaded affirmative defense if the plaintiff was not "prejudiced" by the defendant's failure to plead the defense in its answer. *See, e.g., Pensacola Motor Sales Inc. v. E. Shore Toyota, LLC,* 684 F.3d 1211, 1221-22 (11th Cir. 2012) (holding that "[t]he district court did not abuse its discretion in allowing [the defendant] to raise" an affirmative defense "a month and a half before trial in a motion for summary judgment" because the plaintiff "ha[d] not suggested that it suffered any prejudice from the delay in asserting the defense"); *Proctor v. Fluor Enters., Inc.,* 494 F.3d 1337, 1350-52 (11th Cir. 2007) (holding that "the district court erred in excluding evidence" concerning an affirmative defense because the plaintiff "had notice of [the affirmative defense] and was not prejudiced"); *Miranda de Villalba v. Coutts & Co. (USA) Int'l,* 250 F.3d 1351, 1353 (11th Cir. 2001) (holding that at summary judgment, "[a] court may consider an affirmative defense that did not appear in the answer, if the plaintiff has suffered no prejudice from the failure to raise the defense in a timely fashion"); *Grant v. Preferred*

Rsch., Inc., 885 F.2d 795, 797-98 (11th Cir. 1989) ("When there is no prejudice, the trial court does not err by hearing evidence on [an affirmative defense]."); *see also Mitchell v. Jefferson Cnty. Bd. of Educ.,* 936 F.2d 539, 544 (11th Cir. 1991); *Easterwood v. CSX Transp., Inc.,* 933 F.2d 1548, 1551 (11th Cir. 1991).

The DA's Office did not plead the personal-staff exemption in its answer. Accordingly, we next consider whether the DA's Office prejudiced Younge by asserting the personal-staff exemption after discovery closed. *See Hassan,* 842 F.2d at 263.

C. The DA's Office did not prejudice Younge by belatedly asserting the personal-staff exemption

The district court, over Younge's objection, determined that Younge did not suffer any prejudice arising from the DA's Office's late reliance on the personal-staff exemption. On appeal, Younge argues that consideration of the DA's Office's unpleaded affirmative defense prejudiced her because Younge "was denied the opportunity to conduct purposeful discovery on" the personal-staff exemption.

We review a district court's ruling on waiver of an affirmative defense for abuse of discretion. *See White & Son Enters.,* 881 F.2d at 1009. In *Hassan,* we held that "there was no prejudice" to the plaintiff arising from the defendant's unpleaded affirmative defense. 842 F.2d at 263. We reached that conclusion because, during discovery, the defendant deposed the plaintiff and "questioned her extensively" about facts pertaining to the affirmative

defense before the defendant first asserted the defense at trial. *Id.* The defendant also asked the plaintiff about facts underlying the affirmative defense in an interrogatory. *Id.* Thus, the defendant's unpleaded affirmative defense did not "unfairly surprise[] or prejudice[] the plaintiff." *Id.* at 264.

Here, the district court similarly determined that Younge was not prejudiced because "discovery focused on matters highly relevant to the 'personal staff' exemption." As we will discuss further below, courts consider six factors when determining if an individual is on an elected official's personal staff. *See Laurie v. Ala. Ct. of Crim. Appeals,* 88 F. Supp. 2d 1334, 1338 (M.D. Ala. 2000), *aff'd,* 256 F.3d 1266 (11th Cir. 2001). And here, as we will detail, the record contains copious discovery evidence concerning each of the six factors. Thus, "we cannot say that the [DA's Office's] argument unfairly surprised or prejudiced" Younge. *Hassan,* 842 F.2d at 263-64.[6]

Tellingly, Younge never moved to reopen discovery despite the magistrate judge's willingness to do so. Both below and on appeal, Younge has attempted to identify more discovery she would have sought if the DA's Office timely pleaded this defense. But we cannot credit Younge's argument that she suffered prejudice when she rejected the magistrate judge's invitation to seek more

6. We also note that Younge conceded below that the DA's Office's discovery responses made "five references to [Younge] being a member of Howard's 'personal staff.'" That concession bolsters our conclusion that Younge was not "unfairly surprised or prejudiced" by the personal-staff exemption. *Hassan,* 842 F.2d at 263-64.

discovery.[7] Accordingly, the district court did not clearly err by finding that Younge had not suffered prejudice from the DA's Office's late assertion of the personal-staff exemption.[8] We next turn to whether Younge was a member of Howard's personal staff.

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7. For example, Younge proposed to identify, subpoena, and depose various members of the public to gauge their opinion on whether they believed Younge represented Howard. Younge, however, failed to identify any particular people she would have sought to depose, so we agree with the R&R that this discovery would be a "mere fishing expedition." Moreover, Younge proposed further discovery on Fulton County's regulations governing Howard's ability to hire staff. But discovery about regulations and how they apply is legal research, not fact discovery.

8. In opposition to this conclusion, Younge cites Federal Rules of Civil Procedure 15 and 16 and a separate line of our cases applying a good-cause standard to late motions to amend pleadings, and she argues that the good-cause and prejudice standards conflict in this case. We find no such conflict: we simply treat unpleaded affirmative defenses differently from late motions to amend pleadings. The former requires a showing of no prejudice, while the latter requires a showing of good cause. *Compare, e.g., Grant,* 885 F.2d at 797-98 ("When there is no prejudice, the trial court does not err by hearing evidence on [an unpleaded affirmative defense]."), *with, e.g., Sosa v. Airprint Sys., Inc.,* 133 F.3d 1417, 1418-19 (11th Cir. 1998) ("[B]ecause Sosa's motion to amend was filed after the scheduling order's deadline, she must first demonstrate good cause under Rule 16(b) before we will consider whether amendment is proper under Rule 15(a)."). Each of the cases Younge cites in which we applied the good-cause standard were late-amendment cases governed by Rules 15 and 16, not unpleaded-affirmative-defense cases. In other words, in each of the cited cases, a party affirmatively moved to amend a pleading instead of—as the DA's Office did here—raising an

D. Application of the personal-staff exemption

The district court determined that Younge was on Howard's personal staff. Thus, the district court granted summary judgment to the DA's Office. On appeal, Younge argues that the district court did not view the evidence in the light most favorable to her, and that genuine disputes of material fact exist concerning her status as a member of Howard's personal staff. The DA's Office responds that the evidence is "overwhelming" that Younge was on Howard's personal staff.

"We review *de novo* a district court's grant of summary judgment, applying the same standard as the district court." *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1214 (11th Cir. 2024) (quotation omitted). "Namely, summary judgment is appropriate '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.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). Our job is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The mere existence of some evidence to support the non-moving party is not sufficient for denial of summary judgment; there must be 'sufficient evidence favoring the

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affirmative defense without amendment. *See, e.g., Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1250 (11th Cir. 2015); *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1287 (11th Cir. 2003). As discussed, under the rule that squarely governs this case, Younge suffered no prejudice. *See Hassan*, 842 F.2d at 263-64; *Grant*, 885 F.2d at 797-98.

nonmoving party for a jury to return a verdict for that party.'" *Bailey v. Allgas, Inc.,* 284 F.3d 1237, 1243 (11th Cir. 2002) (quoting *Anderson,* 477 U.S. at 249), *abrogated in part on other grounds by White Sands Grp., L.L.C. v. PRS II, LLC,* 32 So. 3d 5, 14 (Ala. 2009). "In applying this standard, the court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in the non-movant's favor." *Snell,* 102 F.4th at 1214.

1. We assume without deciding that the *Laurie* factors govern our analysis

We have never addressed, in a published decision, how to decide whether an individual was on an elected official's "personal staff" under Title VII. But in *Laurie v. Alabama Court of Criminal Appeals,* the United States District Court for the Middle District of Alabama considered six factors to evaluate whether the plaintiff was on the defendant's personal staff:

> (1) Whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship

> between the elected official and the person filling the position.

88 F. Supp. 2d at 1338 (alteration adopted) (quotation omitted). We affirmed the district court on this issue "on the basis of the district court's well-reasoned opinion." 256 F.3d at 1269.

Generally, an affirmance without opinion "does not necessarily adopt the reasoning of the district court; it merely holds that the judgment is not erroneous." *In re Gen. Coffee Corp.,* 828 F.2d 699, 703 (11th Cir. 1987); *see United States v. Cerceda,* 172 F.3d 806, 812 n.6 (11th Cir. 1999) (*en banc*). When we adopt the reasoning of a district court on an issue, we do so specifically and explicitly. *See, e.g., Bodine v. Fed. Kemper Life Assurance Co.,* 912 F.2d 1373, 1376-77 (11th Cir. 1990) ("We agree with the district court's conclusion and adopt the following portion of its reasoning:. . . . "); *Wiggins v. Warrior River Coal Co.,* 696 F.2d 1356, 1359 (11th Cir. 1983) ("In so holding, we adopt the following reasoning of the district court judge:. . . . ").

In *Laurie,* we split the baby. We did not merely affirm without opinion; we affirmed "on the basis of the district court's well-reasoned opinion." 256 F.3d at 1269. But this line is also not the specific, explicit adoption of the district court's reasoning that we typically employ. Thus, we question whether the *Laurie* district court's six-factor test binds us when deciding the applicability of the personal-staff exemption.

But we leave that question for another day. Below, the parties litigated the personal-staff exemption using

Laurie's six-factor test, and the district court applied *Laurie*'s six-factor test when it granted summary judgment to the DA's Office. Neither party appeals the district court's use of that test. Indeed, both parties continue to litigate the personal-staff exemption using the *Laurie* six-factor test in their briefing before us. Accordingly, we assume without deciding that *Laurie*'s six-factor test is the proper standard to determine whether an individual was on an elected official's personal staff under Title VII. *See Laurie,* 88 F. Supp. 2d at 1338 (listing the six factors).

2. There is no genuine dispute of material fact that Younge was on Howard's personal staff

We now turn to whether Younge was on Howard's personal staff. As discussed, we will apply *Laurie*'s six-factor test to answer this question. Again, those six factors are:

> (1) Whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship

> between the elected official and the person filling the position.

Id. (alteration adopted) (quotation omitted). Courts construe the personal-staff exemption "narrowly." *Teneyuca v. Bexar Cnty.*, 767 F.2d 148, 152 (5th Cir. 1985). Younge argues that she has demonstrated a genuine dispute of material fact concerning factors (1), (3), and (6); thus, summary judgment for the DA's Office is inappropriate. Younge concedes that factors (2), (4), and (5) weigh in favor of applying the personal-staff exemption. Because our review is *de novo,* we take each of the factors in turn.

a. The first factor, plenary powers of appointment and removal, is neutral

The district court found that this factor was neutral because Howard had plenary power to remove Younge but not to appoint her. Younge argues on appeal that this factor "weighs against applying the Exemption" because Howard "did not have 'plenary' powers of appointment." Younge's argument fails.

We have explained that the "Georgia statutory code expressly empowers the District Attorney to hire and discharge personnel and to 'define the duties and fix the title of any attorney or other employee of the district attorney's office.'" *Peppers v. Cobb Cnty.,* 835 F.3d 1289, 1299 (11th Cir. 2016) (quoting O.C.G.A. § 15-18-20(a)). Specifically, under Georgia law,

> [t]he district attorney in each judicial circuit may employ such additional assistant district attorneys, deputy district attorneys, or other attorneys, investigators, paraprofessionals, clerical assistants, victim and witness assistance personnel, and other employees or independent contractors as may be provided for by local law or as may be authorized by the governing authority of the county or counties comprising the judicial circuit.

O.C.G.A. § 15-18-20(a). Moreover, Georgia law empowers "[t]he district attorney [to] define the duties and fix the title of any attorney or other employee of the district attorney's office." *Id.* Finally, Georgia law empowers district attorneys to fire personnel, although compensation is determined by the relevant counties:

> Personnel employed by the district attorney pursuant to this Code section shall serve at the pleasure of the district attorney and shall be compensated by the county or counties comprising the judicial circuit, the manner and amount of compensation to be paid to be fixed either by local Act or by the district attorney with the approval of the county or counties comprising the judicial circuit.

Id. § 15-18-20(b).

This statutory framework demonstrates that Howard had plenary power to terminate Younge. *See, e.g., E.E.O.C.*

v. Reno, 758 F.2d 581, 584-85 (11th Cir. 1985) (holding that Florida assistant state attorneys were exempted "personal staff" of the state attorney under the Age Discrimination in Employment Act's personal-staff exemption, in relevant part, because "the assistant state attorneys serve at the pleasure of the appointing state attorney"). Howard could also hire candidates, but his hiring power was circumscribed by "local law or as . . . authorized by the governing authority of the county or counties comprising the judicial circuit." O.C.G.A. § 15-18-20(a). Indeed, Younge's offer letter explained that her offer was "contingent upon the approval of the Fulton County Personnel Department and Finance Department." Younge testified that Howard initially hired her to a director position but had to change her title to "deputy chief of staff . . . so that [the DA's Office] could get the salary that [Younge] had requested." Thus, Howard had plenary power to terminate Younge but more limited power to appoint her. Accordingly, we agree with the district court that, when viewing this evidence in the light most favorable to Younge, this factor is neutral.

In opposition to this conclusion, Younge argues that "the factor is not phrased as 'whether the elected official has plenary powers of appointment or removal,' such that plenary power in either area qualifies. It is phrased as 'plenary powers of appointment and removal.'" (emphasis in original) (quoting *Teneyuca,* 767 F.2d at 151). Thus, according to Younge, this factor weighs against applying the personal-staff exemption because Howard did not have *both* plenary powers. But "[t]he language of an opinion is not always to be parsed as though we were dealing with

language of a statute." *Nat'l Pork Producers Council v. Ross,* 598 U.S. 356, 373 (2023) (quoting *Reiter v. Sonotone Corp.,* 442 U.S. 330, 341 (1979)); *see also Kanter v. Barr,* 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting) ("[J]udicial opinions are not statutes, and we don't dissect them word-by-word as if they were."). The *Laurie* factors are judicially created; they are not in the governing statute. *See* 42 U.S.C. § 2000e(f). And the Fifth Circuit has observed that whether an individual falls within the personal-staff exemption is a "highly factual" inquiry, and the six identified factors are "not intended to be exhaustive." *Teneyuca,* 767 F.2d at 152. Thus, we decline to disregard Howard's plenary power to terminate Younge simply because his power to appoint was more limited. Accordingly, the district court properly held that this factor was neutral.

b. The second factor, sole accountability to the elected official, weighs in favor of applying the exemption

Younge concedes that this factor weighs in favor of applying the personal-staff exemption. The record shows that Younge was personally accountable only to Howard. Younge's offer letter explains that she "will be assigned to the Policy Division under the supervision of the District Attorney." Younge testified that Howard was her only supervisor. Howard testified that he was Younge's immediate supervisor. Younge also testified that she met with Howard every day, she handled anything Howard needed done, she discussed the progress of her work with Howard every day, she had meetings with Howard

all the time, and she did not need to make appointments to see Howard because she was "essential" and Howard's "go-to person." Howard also testified that he supervised members of his staff like Younge "personally and directly." Howard testified that "Ms. Younge had complete access to [his] office, and so several times a day she would walk into [Howard's] office and usually a conversation early in the morning was, so [they] would talk about the activities for that day." Accordingly, Younge was personally accountable solely to Howard, so this factor weighs in favor of applying the personal-staff exemption to Younge.

c. The third factor, representation of the elected official to the public, weighs in favor of applying the exemption

The district court concluded that Younge represented Howard to the public. On appeal, Younge argues that Howard represented himself to the public and removed Younge's public-facing duties before firing her. We find this factor also favors the DA's Office.

When considering this factor, courts generally look to the public-facing nature and responsibilities (or lack thereof) of the plaintiff's job. *See Gunaca v. Texas,* 65 F.3d 467, 471 (5th Cir. 1995); *Montgomery v. Brookshire,* 34 F.3d 291, 295-96 (5th Cir. 1994); *Ramirez v. San Mateo Cnty. Dist. Att'y's Off.,* 639 F.2d 509, 510-13 (9th Cir. 1981); *Laurie,* 88 F. Supp. 2d at 1348. Younge herself testified that she was "in contact with a lot of persons in the community on behalf of the DA's office." She stated that "[a]ny dignitaries or anybody—any visitors that came to the office and had meetings with the DA, [Younge] was in."

This testimony mirrored that of Howard. He testified that Younge, as "the third highest official in our office," would speak for him. Howard also averred that because of Younge's "job duties and her interaction with [Fulton County] constituents, such as the public, community leaders, and dignitaries, [Younge] represented the DA in the community more than any other member of [Howard's] personal staff." Thus, the record shows Younge represented Howard to the public, just like other DA employees that courts, including us, have considered personal staff. *See, e.g., Shahar v. Bowers,* 114 F.3d 1097, 1104 n.15 (11th Cir. 1997) (*en banc*) (discussing, in the Title VII personal-staff-exemption context, "lawyers who serve at the pleasure of their policy-making chief" and their responsibilities "acting and speaking before others on behalf of the chief"); *Gunaca,* 65 F.3d at 471 (discussing investigators' job functions, "which necessarily involve[] interaction with the public," in holding that "investigators are . . . representatives of the district attorney" under the Age Discrimination in Employment Act's identical personal-staff exemption); *Ramirez,* 639 F.2d at 513 (holding that a deputy district attorney is "personal staff" of the district attorney under Title VII's personal-staff exemption).

Younge resists this conclusion by arguing that Howard represented himself to the public: "[w]henever Younge met with members of the public, Howard was also present," and "Younge did not run any of these meetings." Thus, according to Younge, "the inference that most favors the non-moving party" is that "because Howard was always present in meetings with the public[,] members

of the public perceived Howard himself (not Younge) as representing him."

Younge's argument fails. "In passing upon a motion for summary judgment, a finding of fact which may be inferred but not demanded by circumstantial evidence has no probative value against positive and uncontradicted evidence that no such fact exists." *Bald Mountain Park, Ltd. v. Oliver*, 863 F.2d 1560, 1564 (11th Cir. 1989) (quotation omitted). Younge cites nothing to support the inference that she asks us to draw. Just because Howard was present in meetings does not mean that Younge did not *also* speak for Howard, especially when Younge was the third-ranking member of the DA's Office as Deputy Chief of Staff and Director of Policy and Programs. Indeed, the record demonstrates, largely through Younge's own testimony, that Younge often acted and spoke on Howard's behalf to the public. For example, Younge stated she had "so many" projects that she "was actually responsible for," which required her to be "in contact with a lot of persons in the community on behalf of the DA's office." Howard corroborated Younge's testimony. Given that evidence, Younge's strained inference cannot defeat summary judgment in favor of the DA's Office. *See Bald Mountain Park, Ltd.*, 863 F.2d at 1564.[9]

9. Younge also argues that this factor weighs against applying the personal-staff exemption to her because Howard effectively demoted Younge by removing her public-facing duties before terminating her. Younge advances a similar argument concerning the intimacy of her working relationship with Howard. We deal with these arguments together below.

d. The fourth factor, the elected official's control over the position, weighs in favor of applying the exemption

Younge concedes that this factor weighs in favor of applying the personal-staff exemption. The record supports Younge's concession: Howard set the agenda for the initiatives and programs that Younge worked on. Howard remained "very involved" in Younge's work; Younge testified Howard was "[a]bsolutely" a "micro manager." Howard averred that he "was very involved with [Younge's] work because [he] knew that [the] voters would judge [him] based on the job [Younge] did implementing [the DA's Office's] policies and projects." Younge and Howard testified that they talked about Younge's work every day. Accordingly, Howard exercised a great deal of control over Younge's work, so this factor weighs in favor of applying the personal-staff exemption.

e. The fifth factor, the position in the chain of command, weighs in favor of applying the exemption

Younge concedes that this factor weighs in favor of applying the personal-staff exemption. We agree. Younge was third in the chain of command in the DA's Office. Younge testified that for "any and every project that had to do with the [Fulton] DA's office," she "was in that meeting." Younge further testified that "the schedule that . . . Howard had, was [her] schedule. [She] . . . was on almost every meeting . . . that he had." Younge also testified that she was "[p]retty much" involved "with everything [the

DA's] office did." After all, Younge was Howard's "go-to person for almost everything." Howard similarly testified that Younge was a "key member" and "high ranking part" of his staff. Accordingly, Younge had a high place in the DA's Office's chain of command, so this factor weighs in favor of applying the personal-staff exemption to Younge.

f. The sixth factor, the intimacy of the working relationship, weighs in favor of applying the exemption

The district court concluded that Younge and Howard had a close working relationship. On appeal, Younge argues that Howard ended their intimate working relationship before terminating Younge, which constituted a *de facto* demotion out of Howard's personal staff. The DA's Office argues that Younge's argument "is circular logic that would render the personal staff exception meaningless."

Younge's own testimony demonstrates that she had a close working relationship with Howard for most of her employment. When asked how often she spoke to Howard about the programs she oversaw, Younge testified, "[a]ll day every day." Howard even sent Younge messages on the weekends. Although Younge later claimed that this testimony was "obviously hyperbole," she averred that she and Howard "worked closely together, and [Howard] demanded constant availability around the clock." Howard's schedule was Younge's schedule. Younge was "literally [Howard's] go-to person for almost everything." If Howard "needed something done[,] [Younge] would handle it." Younge was "probably one of the few on staff

that was just able to just walk into [Howard's] office at any time," whereas "most folks would have to schedule an appointment or . . . request to see him through his executive assistant." Younge "had kind of an open-door access" to Howard.

Howard corroborated Younge's testimony about the pair's working relationship. Howard testified that "somebody like [Younge] wouldn't even have to knock" to enter Howard's office. Howard testified that Younge was a "high ranking part" of his staff in whom Howard "entrusted a great deal of confidence." Younge and Howard spoke about work "several times" per day. Howard also averred that he "was very involved with [Younge's] work." Accordingly, Younge and Howard had an intimate working relationship; thus, this factor weighs in favor of applying the personal-staff exemption to Younge.

In opposition to this conclusion, Younge argues that this intimate relationship ended when she announced her pregnancy. Younge contends that Howard's colder treatment of her, and the removal of her public-facing duties, constituted a *de facto* demotion out of Howard's personal staff. According to Younge, if she was personal staff before her pregnancy announcement, she was no longer personal staff between that announcement and her firing, so she can still maintain her Title VII suit based on her termination. In response to Younge's argument, the DA's Office points out that Howard never demoted Younge and directs our attention to *Townsend v. Shook*, 323 F. App'x 245 (4th Cir. 2009).

In *Townsend,*[10] the plaintiff was Chief Deputy Sheriff and sued the Sheriff, an elected official, for violating Title VII. 323 F. App'x at 247-48. The district court granted summary judgment to the Sheriff on the plaintiff's Title VII claims after finding that the plaintiff was a member of the Sheriff's personal staff. *Id.* at 248. On appeal, the plaintiff argued, in relevant part, that "after several months in her position as Chief Deputy Sheriff, she was Chief Deputy Sheriff on paper only and that [the] Sheriff . . . relied on her more as a friend with whom he would confide personal feelings, rather than professionally, based on their respective positions." *Id.* at 250. The Fourth Circuit rejected that argument, reasoning that "such an argument, if accepted, would eliminate the exclusion to any member of any elected official's personal staff inasmuch as a loss of trust and intimacy would be the forerunner of most terminations." *Id.* (quotation omitted).

We agree with the DA's Office that the same reasoning forecloses Younge's argument. Howard never demoted Younge. After she announced her pregnancy, she remained in "the same job position, in the same department, and at the same desk." *Pierri v. Medline Indus., Inc.,* 970 F.3d 803, 808 (7th Cir. 2020). Instead, Howard stopped meeting with Younge, treated her coldly, and started meeting with Younge's teams without her.[11] Younge experienced

10. *Townsend,* as an unpublished opinion from a sister circuit, does not bind us. Nevertheless, the district court relied on *Townsend,* and the DA's Office has cited the case to us. As we will explain, we find the Fourth Circuit's reasoning persuasive.

11. These facts also materially distinguish *Cromer v. Brown,* 88 F.3d 1315 (4th Cir. 1996), a case Younge relies on. In *Cromer,*

behavior that precedes most terminations. *See Townsend,* 323 F. App'x at 250. Like the Fourth Circuit, we decline to elevate that behavior to an actionable demotion, lest we effectively "eliminate" the personal-staff exemption from Title VII. *Id.* (quotation omitted).

* * *

In sum, five of the six *Laurie* factors weigh in favor of finding that Younge was on Howard's personal staff. The factor concerning the elected official's hiring and firing power is neutral. In weighing these factors, there is no genuine dispute of material fact that Younge, as Howard's Deputy Chief of Staff and Director of Policy and Programs, was on Howard's personal staff.[12] Accordingly,

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the plaintiff—a police officer—was demoted from captain to lieutenant. 88 F.3d at 1323-24. As captain, the plaintiff was personally accountable to the sheriff (an elected official), met weekly with the sheriff, had a leading role in developing the sheriff 's department policies, and dealt with the public on behalf of the sheriff. *Id.* at 1324. After his demotion, the plaintiff no longer helped develop department policy, was no longer supervised by or directly accountable to the sheriff, and rarely saw the sheriff. *Id.* at 1323-24. Younge did not face such drastic, tangible changes in her responsibilities; Howard never demoted Younge, he simply treated her more coldly before firing her.

12. This conclusion comports with our precedent. In *Shahar,* we observed that

> we, in our Title VII . . . jurisprudence, [have] held that assistant state attorneys and the like—lawyers who serve at the pleasure of their policy-making chief—were not employees protected by the statutes, but were

Younge was not an "employee" under Title VII, and she cannot invoke Title VII's protections. *See* 42 U.S.C. § 2000e(f); *Llampallas,* 163 F.3d at 1242. Thus, the district court did not err by granting summary judgment to the DA's Office.

III. Conclusion

For the foregoing reasons, we affirm the district court's grant of summary judgment to the DA's Office.

AFFIRMED.

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members of the personal staff of the chief lawyer: the position is one of policy-making level, involving one who necessarily advises, and acts upon, the exercise of constitutional and legal powers of the chief 's office.

114 F.3d at 1104 n.15.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED MARCH 29, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO:
1:20-cv-00684-WMR

DR. JASMINE YOUNGE,

Plaintiff,

v.

FULTON JUDICIAL CIRCUIT DISTRICT ATTORNEY'S OFFICE, GEORGIA,

Defendant.

ORDER

Before the Court is the Magistrate Judge's Final Report and Recommendation ("R&R") [Doc. 128] on the Motion for Summary Judgment [Doc. 104] filed by Defendant Fulton Judicial Circuit District Attorney's Office ("Defendant"). The Magistrate Judge recommends the Court grant Defendant's Motion for Summary Judgment on Plaintiff Jasmine Younge's claims of gender discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.

("Title VII").[1] Plaintiff objects to the Magistrate Judge's recommendation that the Court grant Defendant's Motion [Doc. 132]. For the reasons discussed herein, the Court agrees with the Magistrate Judge's recommendations and thus grants Defendant's Motion for Summary Judgment.[2]

I. BACKGROUND

The underlying allegations of fact regarding this case are more specifically set forth in the R&R, which

1. As the Magistrate Judge noted, Plaintiff's claims for race discrimination (Counts Three and Four) and gender-based discrimination in violation of Equal Protection Rights Under the Fourteenth Amendment Pursuant to 42 U.S.C. § 1983 (Count Five) were dismissed from the case on March 10, 2021. [*See* Doc. 52]. Because Counts Four and Five were dismissed, Paul Howard, who was serving as district attorney at the time of Plaintiff's employment, was terminated as a defendant. [*See* Doc. 42 at 12]. In addition, to the extent Count One of the Amended Complaint purported to allege a non-pregnancy related sex discrimination claim, that portion of Count One was dismissed. [*See* Doc. 52 at 9].

2. No party objects to the Magistrate Judge's findings that Plaintiff's retaliation claim (Count Two) should be deemed abandoned, that Defendant waived its right to assert a defense based on the "policymaking appointee" exemption, or that Defendant's arguments concerning the right-to-sue notice will not be considered. [*See* Doc. 128 at 4, 16-18, 27]. Finding no clear error, the Court adopts those recommendations. This order is therefore limited to the Magistrate Judge's recommendation that the Court grant Defendant's Motion for Summary Judgment on Plaintiff's pregnancy-related sex discrimination claim (Count One) because the "personal staff" exemption prevents Plaintiff from seeking a Title VII remedy.

are incorporated herein.[3] To summarize, in April 2019, Plaintiff was hired by then District Attorney Howard as Deputy Chief of Staff and Director of Policy and Programs at a salary of $120,282, which was one of the top three salaries in the District Attorney's Office. [Doc. 105 ¶¶ 1, 2; Doc. 112-2 ¶¶ 1, 2; Doc. 104-4, Ex. A-2, Interview Schedule; Doc. 104-4, Ex. A-3, Job Offer; Doc. 111-2 ¶ 3]. Howard initially sought to hire Plaintiff in the Director position at a salary of $125,000, but he was not permitted by Fulton County to hire her at that position or that salary, so she was instead hired as Deputy Chief of Staff at a lower salary of $120,282. [Doc. 112-2 ¶ 6; Doc. 93 at 26-28]. To enable Plaintiff to get the $125,000 salary she requested and that had been offered in the Job Description for the Director position, Howard had to make Plaintiff's formal title in the Fulton County system "Deputy Chief of Staff." [Doc. 93 at 27; Doc. 109-3 ¶ 5; Doc. 104-4, Ex. A-1]. As part of the process of hiring Plaintiff at the initial salary of $120,282, Howard signed an Official Oath in Support of Hiring Personal Staff, swearing that he had "reviewed the definition of 'personal staff' contained in the Fulton County Personnel Policies and Procedures" and that he intended to hire Plaintiff as Deputy Chief of Staff "to be a member of [his] personal staff." [Doc. 104-4, Ex. A-4].

Plaintiff then began working for Defendant as Deputy Chief of Staff and Director of Policy & Programs beginning on or about on May 1, 2019. [Doc. 111-2 ¶ 3]. According to

3. As the Magistrate Judge did, the Court views the evidence and all factual inferences in the light most favorable to Plaintiff, the nonmoving party. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

the Job Descriptions for her position, Plaintiff oversaw "policy implementation and development, management and oversight of bureaus, strategic communications, and responsive constituent services." [Doc. 104-4, Ex. A-1, Job Descriptions]. The Job Descriptions further provide that she was the principal writer of Criminal Justice and Crime Prevention policies and programs, and she developed, implemented, and administered the programs. [*Id.*]. Plaintiff avers, however, that most of the programs she worked on, except for one or two, were created by Plaintiff's predecessor, and Plaintiff was tasked with merely running the programs "efficiently and effectively." [Doc. 111-2 ¶ 6]. Plaintiff also does not recall writing any policies while she worked at the District Attorney's Office. [*Id.*]. Plaintiff did collect criminal justice data at the direction of Howard, and she worked closely with Howard on a daily basis. [Doc. 105 ¶ 8; Doc. 112-2 ¶ 8].

Plaintiff was third in the chain of command for the entire District Attorney's Office. [Doc. 105 ¶ 3; Doc. 112-2 ¶ 3]. Plaintiff supervised more than thirty employees across more than seven departments at the District Attorney's Office. [Doc. 105 ¶ 7; Doc. 112-2 ¶ 7]. Moreover, at any given time up until the time that she notified Howard of her pregnancy, Plaintiff supervised fifteen to twenty different policies and programs implemented by the District Attorney's Office. [Doc. 105 ¶ 11; Doc. 112-2 ¶ 11; Doc. 104-4 ¶ 6]. Howard set the agenda for the policies and programs that would be a focus of the District Attorney's Office, which Plaintiff oversaw. [Doc. 105 ¶ 15; Doc. 112-2 ¶ 15].

Appendix B

Throughout most of the time that Plaintiff was employed by Defendant, Plaintiff met with dignitaries, community leaders, and members of the public who came into the office. [Doc. 93 at 34-35, 39; Doc. 104-4 ¶ 5]. Howard was always present for these meetings. [Doc. 111-2 ¶ 19]. Plaintiff represented Howard to the public more than any other member of Howard's personal staff, and Plaintiff was constantly involved with his work because the voters would judge him based on how well Plaintiff implemented the Office's policies and projects. [Doc. 93 at 36-37, 39; Doc. 104-4 ¶¶ 5, 7].

In her position as Deputy Chief of Staff and Director of Policy and Programs, Plaintiff reported to Howard. [Doc. 93 at 62; Doc. 104-4 ¶ 4; Doc. 95 at 24]. Howard's Chief of Staff, Lynne Nelson, sometimes directed Younge to execute tasks or conveyed Howard's instructions to Younge, but Nelson was not Younge's supervisor. [Doc. 112-2 ¶ 7; Doc. 95 at 24; Doc. 94 at 39; Doc. 93 at 62]. Up until the time that Plaintiff notified Howard of her pregnancy, Plaintiff met with Howard every day. [Doc. 105 ¶ 13; Doc. 112-2 ¶ 13; Doc. 93 at 38].

Plaintiff's schedule was "pretty much the schedule that DA Paul Howard had," and Plaintiff was involved in "pretty much [everything]" that had to do with the District Attorney's Office. [Doc. 93 at 34-38]. If Howard "needed something done, [Plaintiff] would handle it." [*Id.* at 38]. Plaintiff testified that she discussed the progress of initiatives she was overseeing with Howard "[a]ll day every day." [*Id.* at 43]. Plaintiff had meetings with Howard "all the time," and she "was in and out of his office because [the]

executive staff were . . . the essential folks [in the Office]." [*Id.* at 46-47]. Plaintiff testified that Howard was "very involved [with the policies and programs she oversaw] . . . He made it a point to be very involved in every single thing . . . ." [Doc. 105 ¶ 19; Doc. 112 ¶ 19]. Howard would even send Plaintiff work related messages on weekends. [Doc. 105 ¶ 19; Doc. 112 ¶ 19]. Up until the time that Plaintiff notified Howard of her pregnancy, Plaintiff did not need to make appointments to see Howard because she "was literally his go-to person for almost everything," and she was "one of the few on staff that was just able to walk into his office at any time." [Doc. 93 at 68]. According to Howard, Plaintiff was "a key member of [his] personal staff" and "a high-ranking part of [his] staff, because that is certainly what [he] considered her [to be]." [Doc. 95 at 110]. Before Plaintiff's pregnancy announcement, Plaintiff and Howard met frequently, she had "open door" access to his office, and he required Plaintiff to be available around the clock. [Doc. 11-2 ¶ 24; Doc. 123 ¶ 24].

Approximately two months after Plaintiff began working for the District Attorney's Office in May 2019, Howard fired Plaintiff from her position on July 15, 2019, after she informed Howard of her pregnancy on July 1, 2019. [Doc. 105 ¶ 38; Doc. 112-2 ¶ 38; Doc. 31 at 5]. From the time Plaintiff informed Howard of her pregnancy to the time of her termination, "Howard stopped meeting with [Plaintiff], excluded her from meetings, dismissed her when she tried to talk to him, and reassigned some of her work duties." [Doc. 128 at 24]. According to Howard, complaints from coworkers and instances of unprofessional behavior—rather than the pregnancy—led

him to terminate Plaintiff, though there were no such records of misconduct in Plaintiff's personnel file. [*Id.* at 25-26].

Following her termination, Plaintiff filed this Title VII action. [Doc. 1]. After significant discovery and a partially successful motion to dismiss, Defendant moved for summary judgment, relying heavily on the argument that Plaintiff was a member of Howard's "personal staff" rather than a qualifying "employee" under Title VII.[4] [Doc. 104]. In the R&R, the Magistrate Judge concludes that Plaintiff is not an "employee" within the meaning of Title VII and that a Title VII remedy is thus not available in this case. [Doc. 128].

Plaintiff filed timely objections to the R&R. [Doc. 132].

II. LEGAL STANDARD

In reviewing the R&R, the Court "make[s] a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). After review, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." *Id.* Here, Plaintiff filed objections to certain portions of the R&R [Doc. 128], so the Court reviews those parts of the R&R de novo.

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4. As this Order will address later, a member of a public officer's personal staff is exempt from Title VII's definition of "employee" and is therefore not eligible for relief under the Act. 42 U.S.C. § 2000e(f).

III. DISCUSSION

The Court "shall 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). In evaluating a summary judgment motion, "[a]ll evidence and factual inferences are viewed in the light most favorable to the non-moving party, and all reasonable doubts about the facts are resolved in favor of the non-moving party." *Hardigree v. Lofton*, 992 F.3d 1216, 1223 (11th Cir. 2021).

A. Title VII's "Personal Staff" Exemption and the R&R's Conclusion

Title VII prohibits employers from discriminating against their employees based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). As amended by the Pregnancy Discrimination Act, "for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of sex." *Newport News Shipbuilding and Dry Cock Co. v. EEOC*, 462 U.S. 669, 684 (1983). Nevertheless, to have a cognizable claim under Title VII, an employer-employee relationship must exist. Title VII defines the term "employee" as:

> an individual employed by an employer, except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal

> staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

42 U.S.C. § 2000e(f). The statute thus exempts four categories of workers from the definition of "employee": (1) elected officers; (2) the individuals chosen by such an officer to be members of his or her "personal staff"; (3) such officer's appointees "on a policy-making level"; and (4) an immediate advisor with respect to the exercise of the "constitutional or legal powers of the office." 42 U.S.C. § 2000e(f). Here, Defendant contends that Plaintiff was chosen by Howard, an elected official,[5] to be on his "personal staff."[6] The issue thus centers on whether Plaintiff is exempt from Title VII's protection as a member of Howard's "personal staff."

Though Title VII does not define the term "personal staff," the question of whether an individual should

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5. The District Attorney for a judicial circuit is an elected position in Georgia. *See* O.C.G.A. § 15-18-3(1). There is thus no dispute that Howard was an elected official.

6. Defendant also argued that the "policymaking appointee" exemption applied to Plaintiff [Doc. 104 at 15-17], but the Magistrate Judge determined that Defendant waived its right to assert a defense based on the "policymaking appointee" exemption [Doc. 128 at 16], and no party objected to that finding. As mentioned previously, the Court finds no clear error with this finding and thus adopts the R&R's conclusion on this point. Because the "policymaking appointee" defense was waived, the Court considers only the "personal staff" exemption.

be considered an "employee" is "a question of federal, rather than of state, law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985) (citing *Calderon v. Martin Cnty.*, 639 F.2d 271, 272-73 (5th Cir., Unit B, 1981)). However, "[s]tate law is relevant insofar as it describes the plaintiff's position, including [her] duties and the way [s]he is hired, supervised and fired." *Id.* (citing *Calderon*, 639 F.2d at 273). Courts are "properly guided by the [state] statute describing [the employment] relationship" in determining "to whom the Act's protections apply." *Id.* at 584-85. Such exemptions are to be "narrowly construed." *Id.* at 584; *see also Milliones v. Fulton Cnty. Gov't*, No. 1:12-CV-3321, 2013 U.S. Dist. LEXIS 78761, 2013 WL 2445206, at *4 (N.D. Ga. June 5, 2013) (noting Congress's intent that "the exception apply only to those individuals who are in highly intimate and sensitive positions of responsibility on the staff of the elected official") (quoting *Teneyuca v. Bexar Cnty.*, 767 F.2d 148, 152 (5th Cir. 1985)).

The term "personal staff" "embodies the general and traditional proposition that positions of confidentiality, policy-making, or acting and speaking on behalf of the chief are truly different from other kinds of employment." *Shahar v. Bowers*, 114 F.3d 1097, 1104 n.15 (11th Cir. 1997). In determining whether an individual qualifies as "personal staff," courts engage in a "highly factual" inquiry that emphasizes "the nature and circumstances of the employment relationship between the complaining individual and the elected official." *Milliones*, 2013 U.S.

Dist. LEXIS 78761, 2013 WL 2445206 at *4. "Although the exemptions are highly fact dependent, summary judgment may be appropriate when there is no genuine issue of material fact as to the applicability of the relevant factors." *Watts v. Bibb Cnty., Ga.*, No. 5:08-CV-413 (CAR), 2010 U.S. Dist. LEXIS 103570, 2010 WL 3937397, at *8 (M.D. Ga. Sept. 30, 2010). In particular, courts focus on the following non-exhaustive list of factors when assessing the applicability of the personal staff exemption:

> (1) Whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship between the elected official and the person filling the position.

Laurie v. Ala. Ct. of Crim. App., 88 F. Supp. 2d. 1334, 1338 (M.D. Ala. 2000), *aff'd*, 256 F.3d 1266 (11th Cir. 2001) (citations and internal alterations omitted).

Noting that "the Eleventh Circuit has not addressed whether the exemptions to employee status under Title VII are affirmative defenses," the Magistrate Judge first determined the "personal staff" and "policymaking

appointee" exemptions are affirmative defenses that defendants must plead under Rule 8(c).[7] [Doc. 128 at 5-7]. As the Magistrate Judge noted, Defendant makes no argument that it pled the exemptions as affirmative defenses. [*Id.* at 7]. During the hearing that the Magistrate Judge held on Defendant's Motion for Summary Judgment, the Magistrate Judge determined that Defendant did not put Plaintiff on notice of its intent to rely on the "personal staff" exemption until a hearing that this Court held on an unrelated issue on March 14, 2022. [*Id.* at 7-9]. This was approximately two months after discovery had closed, except for ongoing litigation regarding a second deposition that was to be taken of Howard. [*Id.*]. The Magistrate Judge concluded, however, that Defendant did not waive the "personal staff" defense because discovery had focused on matters highly relevant to the "personal staff" exemption and thus Defendant's delay did not prejudice Plaintiff.[8] [*Id.* at 9-16].

Concluding that the discovery the parties took was highly relevant to the factors that courts consider in determining whether the "personal staff" exemption applies, the Magistrate Judge noted that Plaintiff,

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7. No party disputes that the exemptions are affirmative defenses. [*See* Doc. 122 at 2-15; Doc. 109 at 5-8].

8. In contrast, the Magistrate Judge found that Defendant waived its argument as to the "policymaking appointee" exemption because "there was not extensive discovery on the policymaking aspects of [Plaintiff]'s job functions and there is no indication that Defendant mentioned the "policymaking appointee" exemption during the telephone hearing with the district judge." [Doc. 128 at 16].

Howard, and Howard's Chief of Staff, Lynne Nelson, "were questioned extensively [in their depositions] about (1) the circumstances of [Plaintiff]'s hiring and firing, including who made those employment decisions; (2) the reporting structure to which [Plaintiff] adhered; (3) the work that [Plaintiff] did for the District Attorney's Office, including out in the community and in meetings with dignitaries, community leaders, and members of the public; (4) the amount and nature of Howard's control over [Plaintiff]'s position and the work she performed; (5) the organizational hierarchy within the District Attorney's Office, including [Plaintiff]'s placement in that hierarchy; and (6) the nature of Howard's working relationship with [Plaintiff] and other members of his personal or executive staff." [*Id.* at 11]. In addition to relying on the discovery's general focus as a basis for finding no prejudice suffered by Plaintiff, the Magistrate Judge found that Plaintiff's inability to point to additional discovery she would have taken if the "personal staff" exemption had been raised earlier also demonstrated a lack of prejudice. [*Id.* at 12-15]. Because the Magistrate Judge did not find any prejudice caused by the belated notice of Defendant's intent to rely on the "personal staff" exemption, the Magistrate Judge concluded that the "personal staff" exemption is "properly before the Court and should be considered on the merits." [*Id.* at 16].

The Magistrate Judge went on to "easily find, largely based on [Plaintiff]'s own testimony, that she was a member of Howard's personal staff." [*Id.* at 31]. The Magistrate Judge thoroughly analyzed each of the six "personal staff" factors and determined that "five of the

six factors weigh heavily in favor of the applicability of the exemption." [*Id.* at 31-44]. To reach that conclusion, the R&R relied on a number of facts, including deposition testimony suggesting that Mr. Howard was Plaintiff's only supervisor, evidence that Plaintiff represented Mr. Howard to the public and accompanied him in meetings, and indications that Mr. Howard constantly interacted with Plaintiff and oversaw all aspects of her work. [*Id.* at 34, 38, 41]. The Magistrate Judge also considered relevant the fact that Plaintiff was third in command at the office, was a key member of Howard's "executive staff," and had a close working relationship with and easy access to Howard. [*Id.* at 41-42]. Taken together, the Magistrate Judge found that these facts showed that Plaintiff was solely accountable to Mr. Howard, represented Mr. Howard in the eyes of the public, occupied a position in which Mr. Howard exercised considerable control over, held a position high within the office's chain of command, and had an intimate working relationship with Mr. Howard. [*Id.* at 43-44].

Thus, the Magistrate Judge concluded that Plaintiff was not an "employee" of Defendant within the meaning of Title VII based on the "personal staff" exemption, "and no reasonable jury could reach a different conclusion." [*Id.* at 43-44]. The Magistrate Judge therefore recommended that "summary judgment be granted on [Plaintiff]'s pregnancy discrimination claim." [*Id.* at 44].

B. Plaintiff's Objections

Plaintiff raises twelve objections to the R&R, which Plaintiff organizes under two overarching objections:

(1) "[t]he R&R erred by considering Defendant's unpled affirmative defense, which should have been considered waived," and (2) "[t]he R&R erred in its analysis of defendant's personal staff defense by repeatedly ignoring the summary judgment standard." [Doc. 132 at 5, 19]. The Court will now address those objections in turn.

1. Objections Regarding the Unpled Affirmative Defense

The question of whether the R&R improperly allowed Defendant to raise the affirmative defense of the "personal staff" exemption at this stage of the litigation is at the heart of Plaintiff's first four objections. Plaintiff's first objection contends that the R&R erred in granting Defendant a *de facto* "amendment" without a showing of good cause. [Doc. 132 at 5]. As Plaintiff correctly points out, Defendant did not plead the "personal staff" affirmative defense in its Answer, nor did Defendant seek to amend its Answer to include this defense. [*Id.* at 5-7]. According to Plaintiff, because "Defendant did not plead the Personal Staff Exemption, the R&R's consideration of that defense is essentially granting Defendant a *de facto* "amendment" of its Answer to add that defense," which was improper because the R&R "never considered whether Defendant proved 'good cause' for allowing an untimely amendment." [*Id.* at 6]. Instead of timely amending its Answer, Defendant first expressed its intent to rely on the defense at a hearing eleven months after the Scheduling Order's deadline for amendments.[9]

9. As mentioned previously, this telephone hearing occurred on March 14, 2022. [Doc. 128 at 7-9].

[*Id.* at 7-8]. "[E]ven if one were to liberally construe the announcement in a hearing as a backhanded motion to amend," Plaintiff argues that "Defendant has not demonstrated good cause for the amendment." [*Id.* at 8]. Plaintiff points out that "Defendant does not argue that it did not or could not have known about the information underlying the Personal Staff Exemption before the deadline to amend" and emphasizes that the "Personal Staff Exemption exclusively involves facts regarding the nature of Plaintiff's working relationship with Howard and of his authority over her," which is "all information that would have been within Defendant's knowledge from the beginning." [*Id.* at 9-10]. Thus, Plaintiff contends, "[t]he R&R erred in failing to consider Defendant's clear lack of 'good cause.'" [*Id.* at 10]. In conjunction with this "good cause" objection, Plaintiff lodges her second, third, and fourth objections: (2) "[t]he R&R erred in failing to even consider which of the conflicting lines of precedent should apply," (3) "[t]he R&R erred in adopting, without consideration, a rule that rewards dilatory behavior," and (4) "[t]he R&R erred in finding Plaintiff was not prejudiced by allowing defendant to assert an unpled defense months after discovery had closed." [*Id.* at 10-19].

The Court disagrees with these objections. To determine whether Defendant had waived the "personal staff" defense, the Magistrate Judge appropriately considered "whether Plaintiff ha[d] suffered any prejudice." [Doc. 128 at 9-10]. The Magistrate Judge properly stated that "[w]hen the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue." [*Id.*

at 10 (quoting *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988) (internal quotation marks omitted))]. Plaintiff objects to the Magistrate Judge "asserting that 'the key question . . . is whether Plaintiff has suffered any prejudice'" because the cases applying the "good cause" standard "are just as much binding Eleventh Circuit precedent as the cases cited by the R&R," which applied the "prejudice" standard. [Doc. 132 at 10]. Plaintiff points to three Eleventh Circuit cases that apply the "good cause" standard, though only one of them (*Saewitz*) involves an affirmative defense. *See Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1418-19 (11th Cir. 1998) (applying good cause standard to reject plaintiff's effort to amend complaint to add another defendant); *Pugh v. Kobelco Constr. Mach. Am., LLC*, 413 F. App'x 134, 135 (11th Cir. 2011) (applying good cause standard to reject plaintiff's effort to amend complaint to substitute party); *Saewitz v. Lexington Ins. Co.*, 133 F. App'x 695, 699-700 (11th Cir. 2005) (applying good cause standard to reject defendant's effort to amend answer and add affirmative defense).

However, *Sosa* is the only published decision cited by Plaintiff, and unpublished decisions are not binding authority. *See McNamara v. Gov't Emps. Ins. Co.*, 30 F.4th 1055, 1060 (11th Cir. 2022) ("While our unpublished opinions may be cited as persuasive authority, they are not considered binding precedent.") (internal quotation marks and citation omitted). Moreover, *Hassan* provides the earliest line of precedent and should be followed under the Eleventh Circuit's "earliest case" rule. *See Walker v. Mortham*, 158 F.3d 1177, 1188-89 (11th Cir.1998) (ruling that "when circuit authority is in conflict, a panel should

look to the line of authority containing the earliest case, because a decision of a prior panel cannot be overturned by a later panel"). Thus, the Magistrate Judge properly relied on *Hassan*, which makes no mention of "good cause" and held that a party who fails to raise an affirmative defense in its pleadings does not waive its right to later assert that defense when such delay "does not prejudice the plaintiff." 842 F.2d at 263 (11th Cir. 1988)

("[T]he liberal pleading rules established by the Federal Rules of Civil Procedure apply to the pleading of affirmative defenses," and "[w]e must avoid hypertechnicality in pleading requirements and focus, instead, on enforcing the actual purpose of the rule," which is "simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it."). Even though the R&R did not discuss the "good cause" cases, no error occurred because the "prejudice" standard is the correct one to apply.[10] The Magistrate Judge expressed concern about "Defendant's failure to raise the employee exemptions earlier in the litigation" and noted that "by the time Defendant explicitly mentioned its intent to rely on the 'personal staff' exemption, discovery had closed approximately two months prior, except for ongoing litigation regarding a second deposition that was to be taken of Howard." [Doc. 128 at 7, 9]. After noting these concerns, the Magistrate Judge properly cited the 11th Circuit's rule that if a plaintiff receives notice

10. The Court also notes that no party mentioned "good cause" in any of the summary judgment briefing. [*See* Docs. 104, 109, 122].

of an affirmative defense by some means other than the pleadings, "the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice." *Hassan*, 842 F.2d at 263.

Applying this rule, the Magistrate Judge concluded that "Defendant's failure to raise the 'personal staff' exemption earlier has not prejudiced [Plaintiff]" and "should [thus] be considered on the merits." [Doc. 128 at 10, 16]. Plaintiff faults the Magistrate Judge for "even consider[ing] Defendant's unpled Personal Staff defense." [Doc. 132 at 19]. Plaintiff contends that the "accidental overlap" in "some of the information obtained in discovery" with information relevant to the "personal staff" factors "is not enough to show there was no prejudice because Plaintiff never had the opportunity to conduct discovery intentionally directed toward learning about this defense." [*Id.* at 12-13]. The Court disagrees. As the Magistrate Judge found, two points show that Plaintiff has not suffered any prejudice from Defendant's belated assertion of the "personal staff" exemption: (1) "[t]he breadth of relevant discovery concerning the 'personal staff' exemption" and (2) Plaintiff's counsel's inability to identify any specific discovery or evidence regarding the second and third factors that he does not already have and that he would have sought but did not.[11] [Doc. 128 at 11,

11. The second and third factors are as follows: "(2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public." *Laurie*, 88 F. Supp. 2d. at 1338 (M.D. Ala. 2000), *aff'd*, 256 F.3d 1266 (11th Cir. 2001) (citations and internal alterations omitted).

12-15]. The Court has reviewed the depositions of Plaintiff, Howard, and Howard's chief of staff, Lynne Nelson, and the deponents' testimony, particularly Plaintiff's, largely focused on Plaintiff's job duties and facts related to Plaintiff's work relationship with Howard. [*See* Docs. 93, 94, 95]. The Court agrees with the Magistrate Judge that these deponents "were questioned extensively about (1) the circumstances of [Plaintiff]'s hiring and firing, including who made those employment decisions; (2) the reporting structure to which [Plaintiff] adhered; (3) the work that [Plaintiff] did for the District Attorney's Office, including out in the community and in meetings with dignitaries, community leaders, and members of the public; (4) the amount and nature of Howard's control over [Plaintiff]'s position and the work she performed; (5) the organizational hierarchy within the District Attorney's Office, including [Plaintiff]'s placement in that hierarchy; and (6) the nature of Howard's working relationship with [Plaintiff] and other members of his personal or executive staff." [Doc. 128 at 11]. Thus, the Court cannot say that Defendant's argument "unfairly surprised or prejudiced" Plaintiff.[12]

12. The Court also notes that Plaintiff never requested an opportunity to seek additional discovery. As the Magistrate Judge pointed out, Defendant put Plaintiff on notice of its intent to rely on the "personal staff" exemption in a telephone hearing held by this Court on March 14, 2022. The Court agrees with the Magistrate Judge that, "while the discovery period had technically closed" by March 14, 2022, "summary judgment motions had not yet been filed, given the outstanding second deposition of Howard," and "there was [thus] an opportunity for [Plaintiff] to seek leave to take additional discovery on the 'personal staff' exemption before Defendant filed a dispositive motion." [Doc. 128 at 9]. Plaintiff's failure to seek additional discovery after March 14, 2022, further convinces the

See Grant v. Preferred Rsch., Inc., 885 F.2d 795, 797-98 (11th Cir. 1989) (holding that the district court did not err by addressing the merits of the defendant's statute of limitations defense, even though defendant failed to plead it as required by Rule 8(c), where the defendant raised the defense in a motion for summary judgment approximately one month before trial and thus the "plaintiff was fully aware that [the defendant] intended to rely on a statute of limitations defense").

After conducting a de novo review, the Court agrees with the Magistrate Judge that Defendant did not waive the "personal staff" defense because discovery focused on matters highly relevant to the "personal staff" exemption, and therefore Defendant's delay in raising the defense did not prejudice Plaintiff. The Court therefore overrules Plaintiff's objections to the contrary.

2. Objections Regarding the Summary Judgment Standard

Plaintiff's next eight objections fall under Plaintiff's assertion that the evidence regarding the "personal staff" exemption is "mixed, and not so one-sided as to

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Court that Plaintiff was not prejudiced by Defendant's belated assertion of the "personal staff" defense. Additionally, Plaintiff testified that she was told the day of her termination that she could not bring a discrimination claim due to her being a member of Howard's executive staff. [*See* Doc. 93 at 131 ("[The representative from Fulton County] let me know that I could not file a grievance with them because I was executive staff.")]. This, too, should have alerted Plaintiff to take discovery on this matter if she so wished.

justify granting summary judgment and taking this ["personal staff" exemption] issue away from the jury." [Doc. 132 at 19-30]. Despite these objections, the Court, albeit reluctantly, agrees with the Magistrate Judge: "[c]onstruing the facts in the light most favorable to [Plaintiff], I easily find, largely based on [Plaintiff]'s own testimony, that she was a member of Howard's personal staff."[13] [Doc. 128 at 31]. The Magistrate Judge analyzed the applicability of the "personal staff" exemption factor-by-factor and concluded that "[f]ive out of the six factors decisively weigh in favor of applying the exemption, including the most important factor (i.e., intimacy of the working relationship)."[14] [*Id.* at 43]. Plaintiff objects

13. The Court agrees with another conclusion of the Magistrate Judge's: "But for my opinion that the 'personal staff' exemption precludes [Plaintiff] from obtaining Title VII relief, I agree that she has presented a convincing mosaic of circumstantial evidence creating triable issues of fact as to Howard's discriminatory intent [regarding Plaintiff's pregnancy discrimination claim]." [Doc. 128 at 46]. Notwithstanding the Court's misgivings about the unfairness of Title VII's "personal staff" exemption, particularly in a case where the plaintiff's pregnancy discrimination claim would otherwise survive summary judgment, the Court is constrained by the law to find that Plaintiff, as a member of Howard's personal staff, is excluded from the anti-discrimination protections of Title VII.

14. For ease of reference, the Court again lists the "personal staff" exemption factors:

> (1) Whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a

to this determination, arguing that "2 of the factors weigh against applying the Personal Staff Exemption, 2 others weigh in favor applying the Exemption, and 2 others are neutral." [Doc. 132 at 22]. "Given this mixed record," Plaintiff contends that summary judgment is inappropriate. [*Id.*]. The Court now addresses Plaintiff's specific objections.

Plaintiff first objects to the Magistrate Judge's analysis of the sixth factor—the actual intimacy of the working relationship between the elected official and the person filling the position at issue. Alleging that "this factor is at most, neutral, if not weighing against application of the Exemption," Plaintiff objects to "the R&R wrongly dismiss[ing] the fact that the intimacy of [Plaintiff]'s working relationship with Howard radically changed after she told him she was pregnant."[15] [*Id.* at 23]. Plaintiff points to a Fourth Circuit case to argue that the Magistrate Judge's acknowledgement that Plaintiff "had 'easy access' to Howard and a 'close day-today working relationship' with Howard for the majority of the time that she was employed by Defendant and working on Howard's staff" was misplaced. [*Id.* at 23; Doc. 128 at 43].

> considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship between the elected official and the person filling the position.

Laurie, 88 F. Supp. 2d. at 1338 (M.D. Ala. 2000), *aff'd*, 256 F.3d 1266 (11th Cir. 2001) (citations and internal alterations omitted).

15. Plaintiff labels this as "Objection #5." [Doc. 132 at 23].

Relying on *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996), Plaintiff contends that the "radical change in the working relationship [between Plaintiff and Howard] constitutes a *de facto* demotion." [Doc. 132 at 24]. Plaintiff emphasizes that she "no longer worked closely with the elected official (Howard) by the time she was terminated," so "[e]ven if she had been 'personal staff' before, now she wasn't." [*Id.*]. Plaintiff thus contends that the R&R's "dismissal" of this fact "is evidence of its failure to view the evidence in the light most favorable to the nonmovant." [*Id.*].

This argument fails. Even as persuasive authority, *Cromer* is inapplicable here. In *Cromer*, the court held that an individual who served as both captain and lieutenant in a sheriff's office was part of the sheriff's personal staff when serving as captain, but not when serving as lieutenant. The individual in *Cromer* changed job titles and roles. Here, Plaintiff served as Deputy Chief of Staff and Director of Policy and Programs for the entirety of her employment with Howard. [*See* Doc. 112-2 ¶ 31]. Neither Plaintiff's job title nor role changed to a lower rank, like that of captain to a lieutenant. Though there is evidence that Howard began treating Plaintiff differently after she announced that she was pregnant, such as excluding her from meetings, reassigning some of her duties, and limiting the usual access that she had to Howard, this does not change the fact that Plaintiff remained a member of Howard's personal staff. [*See* Doc. 112-2 ¶¶ 23, 24, 28, 29, 30; Doc. 93 at 83-84, 87-88, 98-99, 102]. Plaintiff's argument that she seemingly lost the trust of Howard prior to her termination would, if accepted, "eliminate the exclusion to any member of any elected official's personal

staff inasmuch as a loss of trust and intimacy would be the forerunner of most terminations." *Townsend v. Shook*, 323 F. App'x 245, 250 (4th Cir. 2009) (internal quotation marks and citations omitted). Plaintiff's interpretation would give the exclusion developed by Congress no meaning, and this Court cannot adopt such an interpretation.

Plaintiff next objects to the R&R's "fail[ure] to address Howard's admission that he maintained an open door and allowed *all* employees—not just [Plaintiff]—to come to his office to talk to him about issues" because it "constitutes a failure to view the evidence in the light most favorable to the nonmovant.[16] " [Doc. 132 at 24-25]. Though Plaintiff contends that Plaintiff's "open door access" to Howard did not "really distinguish her from most employees in the DA's office," the Magistrate Judge considered the "open door access" as just one factor in her analysis of the intimacy of the working relationship between Howard and Plaintiff. [*Id.* at 25; Doc. 128 at 42]. Among other points from Plaintiff's deposition and declaration testimony, the Magistrate Judge also took into account Plaintiff's testimony that she and Howard "worked closely together," communicated about work on the weekends, and discussed work issues "whenever his door was open, without an appointment." [Doc. 128 at 42-43 (quoting Plaintiff's testimony)]. Plaintiff's cherry-picking of one sentence from Howard's testimony that "all of the [236 employees in the DA's office]" were "free to come and talk to [him] in [his office]" does not negate the fact that Plaintiff and Howard had a particularly close working

16. Plaintiff labels this as "Objection #6." [Doc. 132 at 25].

relationship in which Plaintiff's work schedule was "pretty much the [same as the] schedule DA Paul Howard had." [*Id.*]. The Magistrate Judge carefully viewed the evidence in the light most favorable to Plaintiff, as the non-movant, by focusing on Plaintiff's own testimony when analyzing this "intimacy-of-working-relationship" factor. [*See id.*]. Moreover, the Magistrate Judge did not ignore Howard's testimony regarding his open-door policy. Rather, the Magistrate Judge specifically noted that Howard testified that, although all employees had access to his office, "somebody like [Plaintiff] wouldn't even have to knock" before coming in his office. [*Id.* at 43 (quoting Doc. 95 at 116)]. The Court thus finds that the sixth factor weighs in favor of finding that the "personal staff" exemption applies.

Plaintiff's next objection involves the Magistrate Judge's analysis of the first factor—whether the elected official has plenary powers of appointment and removal.[17] [Doc. 132 at 25-27]. Plaintiff objects to the Magistrate Judge's finding that this factor weighs neither in favor nor against applying the "personal staff" exemption in this case. [*Id.*]. Plaintiff specifically argues that because "Howard was limited in his authority to hire by regulations and the County's approval, then he did not have 'plenary' powers of appointment," and thus this factor weighs against applying the exemption. [*Id.*]. However, the Magistrate Judge took note of the Georgia statutory law providing that the District Attorney's employment of workers is "as may be provided for by local law or as may

17. Plaintiff labels this as "Objection #7." [Doc. 132 at 25].

be authorized by the governing authority of the county or counties comprising the judicial circuit." [Doc. 128 at 32 (quoting O.C.G.A. § 15-18-20(a))]. The Magistrate Judge also acknowledged that Plaintiff's job offer stated that it was "contingent upon the approval of the Fulton County Personnel Department and Finance Department." [*Id.* (quoting Doc. 104-4, Ex. A-3)]. In contrast, the Magistrate Judge also pointed out that district attorneys have "wide latitude to appoint and remove District Attorney's Office employees." [*Id.* (citing *Peppers v. Cobb Cnty., Ga.*, 835 F. 3d 1289, 199 (11th Cir. 2016) ("Georgia statutory code expressly empowers the District Attorney to hire and discharge personnel and to 'define the duties and fix the title of any attorney or other employee of the district attorney's office.'"). These conflicting facts persuaded the Magistrate Judge to conclude that Howard had complete and absolute power to remove employees but not plenary power to appoint individuals for employment. The Court agrees with this conclusion and finds that this factor plays a neutral role in the "personal staff" exemption analysis.

Plaintiff's eighth and ninth objections take issue with the Magistrate Judge's analysis of the second factor—whether the person in the position at issue is personally accountable to only that elected official. [Doc. 132 at 26-27]. Plaintiff contends that this factor does not "weigh heavily" in favor of applying the "personal staff exemption," as the Magistrate Judge found, and is instead "neutral, at most." [*Id.* at 26]. In particular, Plaintiff asserts that "the affirmative evidence that the R&R cites to show [Plaintiff] was personally accountable

only to Howard is weak."[18] [*Id.*]. Plaintiff critiques the R&R for "cit[ing] a bunch of evidence regarding how closely [Plaintiff] and Howard (initially) worked together" because this "just shows they worked together" rather than showing Plaintiff "was accountable only to Howard." [*Id.*]. Plaintiff also challenges the R&R's reliance on the Official Oath in Support of Hiring Personal Staff signed by Howard because "given the evidence of Howard's personal dishonesty," a jury could "disbelieve anything he says." [*Id.* at 26-27]. Relatedly, Plaintiff argues that the R&R "wrongly dismisse[d] evidence that other officials—specifically Chief of Staff Nelson—also directed [Plaintiff]'s work at times."[19] [*Id.* at 27].

The Court disagrees with these objections as well. To be sure, the Magistrate Judge heavily cited Plaintiff's testimony regarding her close working relationship with Howard. [*See* Doc. 128 at 34]. But the Magistrate Judge also relied on Plaintiff's consistent testimony that Howard was her only supervisor, as well as Nelson's testimony that Howard was Plaintiff's "immediate supervisor." [*See id.* (citing Doc. 93. at 62, 124, 133; Doc. 94 at 39)]. The Court also notes that the nature of Plaintiff's position, as Deputy Chief of Staff and Director of Policy and Programs for the District Attorney, makes her accountable to Howard, as the District Attorney. *See* O.C.G.A. § 15-18-20(a) ("The district attorney shall define the duties and fix the title of any attorney or *other employee* of the district attorney's office.") (emphasis added). Even wholly discounting

18. Plaintiff labels this as "Objection #8." [Doc. 132 at 26].

19. Plaintiff labels this as "Objection #9." [Doc. 132 at 27].

Howard's testimony on this point, Plaintiff herself testified that Howard directed Plaintiff to come into the office before her official start date to "observ[e] off the books," assigned Plaintiff work, and set the expectations for Plaintiff to have "constant availability around the clock." [Doc. 112-2 ¶ 30; Doc. 93 at 30]. Even though Plaintiff occasionally took direction from Chief of Staff Nelson regarding discrete tasks, as the Magistrate Judge noted, the Court finds that Plaintiff's work with Nelson does not amount to Plaintiff being "accountable" to Nelson. [Doc. 128 at 37]. Rather, Plaintiff's and Nelson's interactions appear more akin to everyday workplace collaboration, where one colleague will direct another for the sake of facilitating an efficient and productive workflow, even though that colleague does not actually have the power to control the other colleague's work. The Court also agrees that Plaintiff's "failure to come forward with any [] specific examples [in which Plaintiff found herself directly accountable to Nelson] further demonstrates that she was accountable only to Howard." [Doc. 128 at 37]. In sum, the Court finds that Plaintiff was clearly "personally accountable" only to Howard.

Plaintiff's last three objections concern the Magistrate Judge's analysis of the third factor—whether the person in the position at issue represents the elected official in the eyes of the public. [Doc. 132 at 26-27]. Arguing that this factor weighs against the application of the "personal staff" exemption, Plaintiff again takes issue with the R&R's reliance on Howard's testimony because a "reasonable jury could disbelieve anything Paul Howard

says based on his admitted dishonesty."[20] [Doc. 132 at 27]. Plaintiff next contends that the Magistrate Judge failed to follow the summary judgment standard by finding that "[i]t was certainly conceivable that Howard could have been present at a meeting and the public could have viewed [Plaintiff] as a representative of Howard at that meeting, too."[21] Plaintiff emphasizes that "the point isn't what's conceivable;" rather, "[t]he point, at summary judgment is what the evidence shows when viewed in the light most favorable to the non-moving party." [Doc. 132 at 28]. Last, Plaintiff again objects to the R&R's "failure to view the evidence in the [proper] light" by not considering the "*de facto* demotion" Plaintiff experienced after communicating her pregnancy to Howard.[22]

Reviewing the evidence in the light most favorable to Plaintiff, no genuine issue of material fact precludes a finding that this factor weighs in favor of applying the "personal staff" exemption. As to Plaintiff's objection that a "jury could disbelieve anything Howard says" and that his testimony should thus be disregarded, "[a]t summary judgment it is improper for the court to consider the credibility of any witness." *Lane v. Celotex Corp.*, 782 F.2d 1526, 1528 (11th Cir.1986). The Court can neither

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20. Plaintiff labels this as "Objection #10." [Doc. 132 at 27]. Plaintiff points to Mr. Howard's invocation of his Fifth Amendment rights in a deposition as evidence that he dishonestly "used donations from the City of Atlanta to 'charities' he owned to pad his salary." [*Id.* at 25].

21. Plaintiff labels this as "Objection #11." [Doc. 132 at 28].

22. Plaintiff labels this as "Objection #12." [Doc. 132 at 29].

credit nor discredit Howard at this stage. But, even if the Court were to discount Howard's testimony on this point, the nature of Plaintiff's position, along with her own testimony, persuades the Court that Plaintiff unquestionably represented Howard in the eyes of the public.

Plaintiff testified that "[a]ny dignitaries or anybody—any visitors that came to the office and had meetings with the DA, [Plaintiff] was in. Sometimes that was in addition to the chief of staff and sometimes that was without her." [Doc. 93 at 34]. Plaintiff also stated that, as part of her work supervising various projects in her role as Deputy Chief of Staff and Director of Policy and Programs, she was "in contact with a lot of persons in the community on behalf of the DA's Office." [*Id.*]. As the Magistrate Judge noted, Plaintiff's role as Deputy Chief of Staff and Director of Policy and Programs is one that "embodies the general and traditional proposition that positions of confidentiality, policy-making or acting and speaking before others on behalf of [the DA] are truly different from other kinds of employment." *Shahar v. Bowers*, 114 F.3d 1097, 1104 (11th Cir. 1997) (quoting *Wall v. Coleman*, 393 F.Supp. 826, 831 (S.D.Ga.1975)) (internal quotation marks omitted). Plaintiff contends that she never ran any of the meetings and that whenever she met with members of the public, Howard was also present. [*See* Doc. 93 at 34, 35, 36-37]. However, this does not change the fact that Plaintiff, due to her position, represented Howard at all times, regardless of whether Howard was present or not. *See Shahar*, 114 F.3d at 1104 (quoting *Wall*, 393 F.Supp. at 831) ("As a matter of common knowledge and experience

we know that a district attorney gets public credit for the good job done and impression made by his assistants and gets public criticism for the poor performance or impression made by his assistants.") (internal brackets omitted). Finally, the Court overrules Plaintiff's twelfth objection for the same reason explained above: Plaintiff's argument that she experienced a "*de facto* demotion" after communicating her pregnancy to Howard would give the exclusion developed by Congress no meaning, and the Court reiterates that it cannot adopt such an interpretation.

After conducting a de novo review of the above factors, the Court agrees with the Magistrate Judge that no genuine dispute of material fact exists as to whether Plaintiff was a part of Howard's "personal staff." As explained above, five of the six factors decisively weigh in favor of applying the "personal staff" exemption in this case.[23] Plaintiff's Title VII claim is thus precluded as a matter of law by the "personal staff" exclusion contained in the statute, and the Court therefore overrules Plaintiff's objections to the contrary. Accordingly, the Court will grant Defendant's Motion for Summary Judgment.

IV. CONCLUSION

Accordingly, Defendant's Motion for Summary Judgment [Doc. 104] is **GRANTED**.

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23. The Court notes that Plaintiff concedes the fourth and fifth factors and does not address either directly. [*See* Doc. 132 at 21-32].

IT IS SO ORDERED, this 29th day of March, 2023.

/s/ William M. Ray, II
WILLIAM M. RAY, II
UNITED STATES DISTRICT JUDGE

APPENDIX C — CLERK'S JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED MARCH 30, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:20-cv-00684-WMR

DR. JASMINE YOUNGE,

Plaintiff,

vs.

FULTON JUDICIAL CIRCUIT DISTRICT ATTORNEY'S OFFICE, GEORGIA ET AL,

Defendants.

JUDGMENT

This action having come before the court, Honorable William M. Ray, II, United States District Judge, for consideration of the Magistrate Judge's Final Report and Recommendation of Defendants' Motion for Summary Judgment, and the court having adopted the same and GRANTED said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby is, **dismissed**.

Appendix C

Dated at Atlanta, Georgia, this 30th day of March, 2023.

KEVIN P. WEIMER
CLERK OF COURT

By: s/ T. Schoolcraft
Deputy Clerk

APPENDIX D — FINAL REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION, FILED DECEMBER 12, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO.
1:20-cv-684-WMR-CMS

DR. JASMINE YOUNGE,

Plaintiff,

v.

FULTON JUDICIAL CIRCUIT DISTRICT ATTORNEY'S OFFICE,

Defendant.

FINAL REPORT AND RECOMMENDATION

Plaintiff Jasmine Younge brings claims in this case under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"), for gender discrimination (Count One) and retaliation (Count Two) against her former employer, Defendant Fulton Judicial Circuit District Attorney's Office ("Defendant").[1] [Doc. 31, Am.

1. Younge's claims for race discrimination (Counts Three and Four) and gender-based discrimination in violation of Equal

Compl.]. Younge alleges she was treated differently and ultimately terminated after she informed Paul Howard, who was serving as district attorney at the time, that she was pregnant. [*Id.* ¶¶ 14-22, 29-31, 35-38]. Thus, Younge's gender discrimination claim specifically alleges that she was discriminated against on the basis of her pregnancy in violation of Title VII, as amended by the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k). [Am. Compl. ¶ 45].

Defendant presently moves for summary judgment on several grounds. [Doc. 104]. First, Defendant argues that Younge is barred from seeking relief under Title VII because she was not an "employee" but was someone chosen by an elected official, then District Attorney Paul Howard, to be on his personal staff and was an appointee on the policymaking level. [Doc. 104-1 at 4-17]. [2] Defendant next argues that even if Younge meets the definition of "employee" under Title VII, the undisputed facts establish that Defendant did not discriminate against Younge on the basis of her pregnancy and that Howard, having no knowledge of any protected conduct by Younge at the

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Protection Rights Under the Fourteenth Amendment Pursuant to 42 U.S.C. § 1983 (Count Five) were dismissed from the case on March 10, 2021. [Doc. 52, Order]. In addition, to the extent Count One of the amended complaint purported to allege a non-pregnancy related sex discrimination claim, that portion of Count One was dismissed. [*Id.*].

2. For purposes of this Report and Recommendation, unless otherwise indicated, citations to the record are made to the CM/ECF heading at the top of the page cited; citations to deposition pages are to the actual page number of the hardcopy deposition transcript.

time he made the termination decision,[3] did not retaliate against Younge. [*Id.* at 17-23]. Defendant finally argues that the case should be dismissed because Younge did not obtain the requisite right-to-sue notice from the Attorney General prior to commencing this lawsuit. [*Id.* at 23-25].

Younge has filed a response to the summary judgment motion, asserting multiple arguments as well. [Doc. 109]. Younge maintains that Defendant failed to plead the employee exemptions as affirmative defenses and that Defendant therefore has waived them. [*Id.* at 4-7]. Younge argues that she has been prejudiced in her ability to gather evidence pertaining to the "personal staff" exemption but maintains that the limited evidence available indicates that there are genuine disputes of material fact that preclude Defendant from establishing on summary judgment that she was a member of Howard's "personal staff." [*Id.* at 7-12]. Younge argues that she had no ability to explore the policymaking appointee defense. [*Id.* at 12]. Younge next asserts that Defendant failed to plead with particularity her alleged failure to obtain a right-to-sue notice from the Attorney General, [*id.* at 12-17], and she objects to Defendant's argument on this matter being considered by the Court at all because Defendant only raised the argument after the Court ordered Defendant to refile its summary judgment motion in a manner that complied with the Court's Scheduling Order and Case

3. Defendant specifically argues that Younge did not engage in protected activity until after she was terminated and that Howard, the decisionmaker, had no knowledge that Plaintiff engaged in protected activity until after she was terminated. [Doc. 104 at 21-22].

Management Instructions, [*id.* at 15-16; doc. 110]. Finally, Younge argues that she has presented a convincing mosaic of circumstantial evidence of pregnancy discrimination. [Doc. 109 at 17-26].

On December 9, 2022, I held a hearing on Defendant's motion for summary judgment. One of the issues that I raised, among many, was Younge's failure to make any arguments in her response brief pertaining to her retaliation claim. I advised that I would be recommending that the retaliation claim be deemed abandoned, and Plaintiff's counsel confirmed that Younge did not intend to pursue the retaliation claim. *See Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000) ("[F]ailure to brief and argue [an] issue . . . before the district court is grounds for finding that the issue has been abandoned."). During the hearing, Plaintiff's counsel and defense counsel also provided information and additional argument pertaining to the remaining pregnancy discrimination claim, including potential affirmative defenses to that claim, and my analysis of the pregnancy discrimination claim will take much of that information and argument into account.

Defendant's motion for summary judgment having been fully briefed and the Court having had the benefit of oral argument, Defendant's motion for summary judgment is now ripe for resolution. For the reasons stated below, I will recommend that the motion for summary judgment be **GRANTED**.

Appendix D

I. PRELIMINARY MATTERS

A. Defendant's Failure to Plead "Employee" Exemptions in Answer

As mentioned above, Defendant argues on summary judgment that Younge does not meet the definition of an "employee" under Title VII because of the "personal staff" and "policymaking appointee" exemptions, which are set forth in 42 U.S.C. § 2000e(f). Younge asserts that these exemptions are affirmative defenses that Defendant has waived by failing to plead them in its responsive pleading.

1. Employee Exemptions are Affirmative Defenses

The Eleventh Circuit has not addressed whether the exemptions to employee status under Title VII are affirmative defenses. Circuit courts that have considered the issue have reached contradictory conclusions. The Fourth Circuit has held that "employee status is an element of a substantive Title VII claim," which can be raised in a motion at any time up to and including during a trial on the merits. *Curl v. Reavis*, 740 F.2d 1323, 1327 n.2 (4th Cir. 1984) (holding that the issue of employee status was not untimely raised where defendants first presented the issue in a motion to dismiss on the second day of trial). In contrast, the Fifth Circuit has held that the "personal staff" exemption is an affirmative defense that must be pled, reasoning that the defense "allows the defendant to avoid liability even if the plaintiff meets his burden of proof

under Title VII." *Oden v. Oktibbeha Cnty., Miss.*, 246 F.3d 458, 467 (5th Cir. 2001) (affirming district court's denial of motion for judgment as a matter of law, which was filed after jury returned verdict and the district court entered its judgment, because the personal staff exemption raised in the motion for the first time had not been raised in the defendants' responsive pleading); *cf. Nichols v. Hurley*, 921 F.2d 1101, 1111 (10th Cir. 1990) (analyzing the merits of the "personal staff" exemption using a burden-shifting framework that suggested the court considered the exemption an affirmative defense). I find the reasoning of the Fifth Circuit persuasive, as have most district courts that have considered this issue, including at least one district court within the Eleventh Circuit. *See Douglas v. Bd. of Trs. of Cloud Cmty. Coll.*, No. 21-2400-KHV, 2022 U.S. Dist. LEXIS 88034, 2022 WL 1538678, at *8 (D. Kan. May 16, 2022) ("The personal staff exemption is an affirmative defense that defendants must plead under Rule 8(c)."); *Crenshaw v. City of Wetumpka, Ala.*, No. 2:15-cv-413-WKW, No. 2:15-cv-696-WKW, 2017 U.S. Dist. LEXIS 163940, 2017 WL 4330776, at *4 (M.D. Ala. Sept. 29, 2017) (finding *Oden* persuasive and concluding that the "personal staff" and "policy-making-appointee" exemptions are affirmative defenses); *Donatello v. Cnty. of Niagara*, No. 15-cv-39V, 2016 U.S. Dist. LEXIS 71951, 2016 WL 3090552, at *9 (W.D.N.Y. June 2, 2016) ("The Court will treat the [Title VII "employee"] exemptions as affirmative defenses." (citing *Oden*, 246 F.3d at 467)); *Hindman v. Thompson*, 557 F. Supp. 2d 1293, 1301 (N.D. Okla. 2008) (agreeing with *Oden* that the personal staff exemption is an affirmative defense that must be pleaded).

2. Notice of Defendant's Intent to Rely on Employee Exemptions

Here, Defendant makes no argument that it pled the exemptions as affirmative defenses. *See generally* [Doc. 122 at 2-15]. Moreover, the Court's own review of Defendant's Answer to Plaintiff's First Amended Complaint for Damages [Doc. 53] indicates that Defendant did not plead the exemptions as affirmative defenses. During oral argument, I inquired about Defendant's failure to raise the employee exemptions earlier in the litigation, and defense counsel explained that the employee exemptions came to his attention when he began drafting the summary judgment motion in February or March. Defense counsel stated, and Plaintiff's counsel agreed, that Defendant did not put Plaintiff on notice of its intent to rely on the "personal staff" exemption until a hearing that the district judge held on an unrelated issue on March 14, 2022.[4] *See* [Doc. 91].

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4. Younge acknowledges that Defendant made five references in its discovery responses to Younge being a member of Howard's "personal staff." [Doc. 109 at 7]. In addition to these references, during the deposition of Howard's chief of staff, Lynne Nelson, Younge's own attorney asked Nelson whether Younge was a member of Howard's "personal staff." [Doc. 94, Deposition of Lynne Nelson "Nelson Dep." at 30]. Plaintiff's counsel also asked Nelson about the supervisory oversight for Younge's position, with Nelson testifying that Younge was not her immediate subordinate and that only Howard was Younge's supervisor. [Id. at 39]. Howard also testified during his deposition about Younge being a "key member of [his] personal staff" and how he interacted with Younge, as her immediate supervisor, and others who reported directly to him as part of his "personal staff." [Doc. 95, Deposition of Paul Howard "Howard Dep." at 15, 24, 28, 110, 116]. In her own deposition, Younge did not use the

Younge acknowledges that courts have allowed defendants to avoid waiver of unpled defenses where the plaintiff has notice that the issue is being litigated, such as when the issue is the subject matter of discovery. *Edwards v. Fulton Cnty.*, 509 F. App'x 882, 887 (11th Cir. 2013) ("We have . . . concluded that an omission of an affirmative defense in responsive pleadings does not prejudice a plaintiff when the defendant first raises the defense in a pretrial motion or discussion and the subject matter of discovery suggests that the defendant will rely on the defense."); *Hassan v. U.S. Postal Serv.*, 842 F.2d 260, 263 (11th Cir. 1988) ("When a plaintiff has notice that an affirmative defense will be raised at trial, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice."); *Jones v. Miles*, 656 F.2d 103, 107 n.7 (5th Cir. Unit B Aug.1981) ("Neglect to affirmatively plead [an affirmative defense] is simply noncompliance with a technicality and does not constitute a waiver where there is no claim of surprise.").

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terminology "personal staff," but she made several references to being a part of Howard's "executive staff" and testified about what that entailed. [Doc. 93, Deposition of Jasmine Younge "Younge Dep." at 46, 47, 72, 121, 131]. Indeed, one of the facts that Younge alleged in her amended complaint and about which she testified during her deposition was that she was told by Human Resources that she could not file a complaint or grievance with Human Resources because she was part of Howard's executive staff. [Doc. 31, Am. Compl. ¶ 33; Younge Dep. at 131]. Notwithstanding these various references to "personal staff" and "executive staff" earlier during the litigation, it is now clear to the Court that Defendant was not even thinking about the employee exemptions at the time these references were made. Thus, Defendant did not purposefully put Plaintiff on notice of its intent to rely on the employee exemptions until March 14, 2022.

In this case, discovery did not put Younge on notice that Defendant would raise the employee exemptions as affirmative defenses. Furthermore, by the time Defendant explicitly mentioned its intent to rely on the "personal staff" exemption, discovery had closed approximately two months prior, except for ongoing litigation regarding a second deposition that was to be taken of Howard. Still, while the discovery period had technically closed, summary judgment motions had not yet been filed, given the outstanding second deposition of Howard. Thus, there was an opportunity for Younge to seek leave to take additional discovery on the "personal staff" exemption before Defendant filed a dispositive motion. Younge did not do so, and Plaintiff's counsel argued during the hearing that Defendant should have had the burden of seeking leave to amend its answer to assert the affirmative defenses.

3. Prejudice to Plaintiff

Regardless of what could or should have happened from a procedural perspective to address the belated injection of the employee exemptions into the case, the key question that I must address in deciding whether the proposed affirmative defenses should be determined to be waived is whether Plaintiff has suffered any prejudice. "[W]hen the failure to raise an affirmative defense does not prejudice the plaintiff, it is not error for the trial court to hear evidence on the issue." *Hassan*, 842 F.2d at 263. In the instant case, I find that Defendant's failure to raise the "personal staff" exemption earlier has not prejudiced Younge but that Defendant's failure to raise

the "policymaking appointee" exemption earlier has been prejudicial.

a. "Personal Staff" Exemption

Even though the parties were not focused on the "personal staff" exemption during discovery, the discovery they took is highly relevant to the "personal staff" exemption and the factors that courts consider in determining whether the exemption applies. Specifically, courts typically consider the following non-exhaustive list of factors:

> (1) Whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship between the elected official and the person filling the position.

Laurie v. Ala. Ct. of Crim. App., 88 F. Supp. 2d 1334, 1338 (M.D. Ala. 2000), *aff'd*, 256 F.3d 1266 (11th Cir. 2001) (citations omitted). "[C]ase law indicates that the sixth factor is the most important factor." *Laurie*, 88 F. Supp. 2d at 1338 (citing cases).

In this case, depositions were taken of Younge, Howard, and Howard's chief of staff, Lynne Nelson. These deponents were questioned extensively about (1) the circumstances of Younge's hiring and firing, including who made those employment decisions; (2) the reporting structure to which Younge adhered; (3) the work that Younge did for the District Attorney's Office, including out in the community and in meetings with dignitaries, community leaders, and members of the public; (4) the amount and nature of Howard's control over Younge's position and the work she performed; (5) the organizational hierarchy within the District Attorney's Office, including Younge's placement in that hierarchy; and (6) the nature of Howard's working relationship with Younge and other members of his personal or executive staff. The breadth of relevant discovery concerning the "personal staff" exemption suggests that Younge has not suffered any prejudice. *See Edwards*, 509 F. App'x at 888 ("Because the Defendants first raised the defense in their motion for summary judgment . . . and because discovery largely focused on . . . the subject matter of the defense, we cannot conclude that the district court abused its discretion in denying that the Defendants prejudiced Edwards by raising the defense on summary judgment and rejecting the argument that the Defendants waived the defense."). I will examine the issue of prejudice more closely below.

During oral argument on Defendant's motion, I heard from the parties regarding any prejudice that Younge has suffered as a consequence of the belated assertion of the "personal staff" exemption affirmative defense, and I specifically asked Plaintiff's counsel to inform me

of discovery he would have taken if the "personal staff" exemption had been raised earlier. Plaintiff's counsel mentioned three topics about which he would have taken discovery: (1) whether Younge was subject to the sole supervision of Howard; (2) whether Howard had plenary authority to appoint and remove Younge; and (3) whether Younge represented Howard in the eyes of the public.

Younge and Howard both have testified regarding the first and third topics, and Plaintiff also has obtained testimony on the first topic from Chief of Staff Nelson and Tisa Grimes, who was the HR Director/Office Manager for Fulton County District Attorney's Office when Younge applied and was hired. Regarding the first topic, each deponent testified that Howard was Younge's supervisor. [Younge Dep. at 62; Howard Dep. at 24; Nelson Dep. at 39]. Howard and Nelson specifically rejected the suggestion by Plaintiff's counsel that Nelson supervised Younge. [Howard Dep. at 24; Nelson Dep. at 39]. Younge has her own declaration testimony and the declaration testimony of HR Director Grimes indicating that Howard's Chief of Staff sometimes directed Younge to execute tasks and conveyed what Howard wanted done. [Doc. 111-2, Declaration of Dr. Jasmine Younge "Younge Decl." ¶ 33; Doc. 109-3, Declaration of Tisa Grimes "Grimes Decl." ¶ 5]. During oral argument, Plaintiff's counsel could not specify what other discovery he would take on the first topic, but in her brief opposing the summary judgment motion, Younge argued that she would "have delved more deeply into other ways that Younge was held accountable to Nelson or other officials besides Howard." [Doc. 109 at 10]. This is information that should be known to Younge.

There is no prejudice resulting from Younge's inability to take additional discovery on this topic.

Regarding whether Younge represented Howard in the eyes of the public, Younge and Howard have been questioned and have provided relevant testimony. Notably, Younge testified that she was "in contact with a lot of persons in the community on behalf of the DA's Office." [Younge Dep. at 39]. She also testified that before she notified Howard of her pregnancy, she was at every meeting Howard had with dignitaries and visitors to the District Attorney's Office. [*Id.* at 34]. Howard testified that he saw Younge as someone who spoke for him. [Howard Dep. at 42]. Howard likewise averred that "[b]ecause of Plaintiff's job duties and her interaction with [his] constituents, such as the public, community leaders, and dignitaries, Plaintiff represented the DA in the community more than any other member of [his] personal staff." [Doc. 104-4, Declaration of Paul Howard Jr. ("Howard Decl.") ¶ 5]. Plaintiff's counsel suggested that he might have been interested in deposing members of the public, but he did not have any particular persons in mind. This answer to my question reveals that any additional discovery on this topic would be a mere fishing expedition.

With respect to the second topic, Plaintiff's counsel asserted that he would have deposed representatives of Fulton County to inquire about the rules that apply to Howard's appointment and removal of staff members and to understand the circumstances of the purported rejection of Howard's initial appointment of Younge. However, the evidence upon which Younge relies to argue that her initial appointment was rejected does not

support that characterization of what transpired. Rather, Younge testified that Howard simply had to change her formal title in the Fulton County system from that of Director of Policy and Programs to Deputy Chief of Staff for her to receive her desired salary and the salary that was offered. [Younge Dep. at 27]. While Younge was designated in Fulton County's system as Deputy Chief of Staff, Younge acknowledges that she was hired to work as Director of Policy and Programs and Deputy Chief of Staff. [*Id.*; Howard Decl., Ex. A-2, Interview Schedule; Ex. A-3, Job Offer; Ex. A-4, Official Oath in Support of Hiring Personal Staff; Younge Decl. ¶ 3]. Thus, whereas the "personal staff" exemption balancing test is concerned with the appointment and removal powers of the elected official, the issue here was Younge's salary, not her selection to be appointed to Howard's personal staff. *See Conley v. City of Erie, Pa.*, 521 F. Supp. 2d 448, 453 (W.D. Pa. 2007) (holding that an elected official still had plenary powers of appointment and removal over the plaintiff even though the elected offical did not have the authority to hire as many individuals as he wanted or control the salary decisions for the plaintiff's position). I do believe that it may have been worthwhile for Younge to take discovery pertaining to the application of the rules that apply to Howard's appointment and removal of staff members under O.C.G.A. § 15-18-20(a). However, as I will explain in detail below, even if Howard did not have plenary powers of *appointment* and removal, the other five factors of the balancing test so overwhelmingly favor finding that Younge was a member of Howard's personal staff that Howard's inability to explore this limited topic in discovery really is insignificant.

Because Plaintiff's counsel has not persuasively argued a basis for finding prejudice as it relates to the belated notice of Defendant's intent to rely on the "personal staff" exemption, I conclude that the "personal staff" exemption is properly before the Court and should be considered on the merits.

b. "Policymaking Appointee" Exemption

I find that the "policymaking appointee" exemption is not properly before the Court. Again, Defendant makes no argument that this exemption was pled as an affirmative defense, and Defendant also makes no argument that notice of the litigation of this exemption was provided through discovery or otherwise. In contrast to the "personal staff" exemption, there was not extensive discovery on the policymaking aspects of Younge's job functions and there is no indication that Defendant mentioned the "policymaking appointee" exemption during the telephone hearing with the district judge. Defense counsel also conceded during the hearing that Defendant's focus is primarily on the "personal staff" exemption, not the "policymaking appointee" exemption. Therefore, I conclude that Defendant waived its right to assert a defense based on the "policymaking appointee" exemption.

B. Defendant's Failure to Timely Assert Argument Regarding Right-to-Sue Notice

Defendant argues in its summary judgment motion that Younge failed to obtain the required right-to-sue

notice form the Attorney General, as required by 42 U.S.C. § 2000e-5(f)(1) and 29 C.F.R. § 1601-28(d). As mentioned above, Younge objects to this argument as being untimely raised. [Doc. 110]. Defendant has not offered any response to Younge's objection. Having considered Younge's objection and the record of the case, I sustain Younge's objection and will not consider the merits of Defendant's argument concerning the right-to-sue notice because Defendant did not timely assert the argument by the deadline to file summary judgment motions.

The deadline to file dispositive motions in this case was April 8, 2022. [Doc. 88]. Defendant filed a summary judgment motion on April 8, 2022, and then filed an amended summary judgment motion on April 11, 2022.[5] In neither of these filings did Defendant mention any issue with the right-to-sue notice. *See generally* [Docs. 96-1, 97-1]. Due to Defendant's failure to follow the Court's procedural instructions concerning the filing of summary judgment motions, as set forth in the Court's Scheduling Order and Case Management Instructions, the Court struck Defendant's summary judgment filings and ordered Defendant to refile its motion in a manner that complied with those instructions, including the Court's Order Modifying Local Rule 56.1. [Doc. 103]. Defendant did not request, and this Court did not grant, leave for Defendant to amend the substance of its motion for summary judgment. Nevertheless, in the summary judgment motion that Defendant filed on May 16, 2022, Defendant raised

5. The amended motion for summary judgment included two additional exhibits.

the issue concerning the right-to-sue notice. Raising this issue after the dispositive motions deadline and without leave of court was improper. Therefore, the Court sustains Younge's objection and will not consider Defendant's arguments concerning the right-to-sue notice.[6]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is authorized when "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). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The court must view the evidence and all factual inferences in the light most favorable to the nonmoving party. *Adickes*, 398 U.S. at 158-59.

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6. I note that the requirement that the right-to-sue notice come from the Attorney General is a non-jurisdictional requirement. *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1524-26 (11th Cir. 1983) ("[A]ll Title VII procedural requirements to suit are henceforth to be viewed as conditions precedent to suit rather than as jurisdictional requirements."). Therefore, I have no problem finding that Defendant has waived this issue as a basis for seeking summary judgment. *Cf. Solomon v. Hardison*, 746 F.2d 699 (11th Cir. 1985) (holding that the requirement that a plaintiff secure a right-to-sue notice from the Attorney General was a condition precedent that was due to be equitably waived in that case).

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The nonmoving party must "go beyond the pleadings" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed facts. *See Anderson*, 477 U.S. at 249. Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are not. *Id.* at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id.*

III. FACTS

Considering the foregoing summary judgment standard, I find the following facts for the purpose of resolving Defendant's pending motion for summary judgment only.

Appendix D

A. Younge's Employment with the Fulton Judicial Circuit District Attorney's Office

In April 2019, Younge was hired by then District Attorney Paul Howard as Deputy Chief of Staff and Director of Policy and Programs at a salary of $120,282.00, which was one of the top three salaries in the District Attorney's Office. [Doc. 105, Def.'s Stmt. of Mat. Facts ("DSMF"), ¶¶ 1, 2; Doc. 112-2, Pl.'s Resp. to Def.'s Stmt. of Mat. Facts ("RSMF") ¶¶ 1, 2; Howard Decl., Ex. A-2, Interview Schedule; Ex. A-3, Job Offer; Younge Decl. ¶ 3]. Howard initially sought to hire Younge in the Director position at a salary of $125,000.00, but he was unable to hire her in that position with that salary. [Doc. 112-2, Pl.'s Stmt. of Additional Facts ("PSAF") ¶ 6; Younge Dep. at 26-28]. To enable Younge to get the salary she requested and that had been offered in the Job Description,[7] Howard had to make Younge's formal title in the Fulton County system "Deputy Chief of Staff." [Younge Dep. at 27; Grimes Decl. ¶ 5; Howard Decl., Ex. A-1, Job Descriptions]. As part of the process of hiring Younge at the initial salary of $120,282.00, Howard signed an Official Oath in Support of Hiring Personal Staff, swearing that he had "reviewed the definition of 'personal staff' contained in the Fulton County Personnel Policies and Procedures" and that he intended to hire Younge as a Deputy Chief of Staff "to be a member of [his] personal staff." [Howard Decl., Ex. A-4, Official Oath in Support of Hiring Personal Staff].

7. Younge testified that while she started at a salary lower than $125,000.00, there was going to be a countywide raise occurring within a month after she started that would have increased her salary to $125,000.00. [Younge Dep. at 27-28].

Appendix D

From May 1, 2019, Younge's first day of employment, throughout most of the time that Younge was employed by Defendant, Younge oversaw the administrative division of the District Attorney's Office. [DSMF ¶ 4; RSMF ¶ 4; Howard Decl., Ex. A-1, Job Descriptions; Younge Decl. ¶ 3]. According to Job Descriptions for her position, Younge oversaw the "policy implementation and development, management and oversight of bureaus, strategic communications, and responsive constituent services." [Howard Decl., Ex. A-1, Job Descriptions]. The Job Descriptions further provide that she was the principal writer of Criminal Justice and Crime Prevention policies and programs, and she developed, implemented, and administered the programs. [*Id.*]. Younge avers, however, that the vast majority of programs she worked on, except for one or two, were created by Younge's predecessor and Younge simply was tasked with running the programs efficiently and effectively. [Younge Decl. ¶ 6]. Younge also does not recall writing any policies while she worked at the District Attorney's Office. [*Id.*]. Younge did collect criminal justice data at the direction of Howard, and she worked closely with Howard on a daily basis. [DSMF ¶ 8; RSMF ¶ 8].

Younge was third in the chain of command for the entire District Attorney's Office. [DSMF ¶ 3; RSMF ¶ 3]. Younge supervised more than thirty employees in more than seven departments at the District Attorney's Office. [DSMF ¶ 7; RSMF ¶ 7]. Moreover, at any given time up until the time that she notified Howard of her pregnancy, Younge supervised fifteen to twenty different policies and programs implemented by the District Attorney's Office.

[DSMF ¶ 11; RSMF ¶ 11; Howard Decl. ¶ 6]. Howard set the agenda for the policies and programs that would be a focus of the District Attorney's Office. [DSMF ¶ 15; RSMF ¶ 15].

Throughout most of the time that Younge was employed by Defendant, Younge met with dignitaries, community leaders, and members of the public who came into the office. [Younge Dep. at 34-35, 39; Howard Decl. ¶ 5]. Howard was always present for these meetings. [Younge Decl. ¶ 19]. Younge represented Howard to the public more than any other member of Howard's personal staff, and Howard was constantly involved with her work because the voters would judge him based on how well Younge implemented the Office's policies and projects. [Younge Dep. at 36-37, 39; Howard Decl. ¶¶ 5, 7].

In her position as Deputy Chief of Staff and Director of Policy and Programs, Younge was accountable to Howard. [Younge Dep. at 62; Howard Decl. ¶ 4; Howard Dep. at 24]. Howard's chief of staff, Nelson, sometimes directed Younge to execute tasks or conveyed Howard's instructions to Younge, but Nelson was not Younge's supervisor. [PSAF ¶ 7; Howard Dep. at 24; Nelson Dep. at 39; Younge Dep. at 62]. Up until the time that she notified Howard of her pregnancy, Younge met with Howard every day. [DSMF ¶ 13; RSMF ¶ 13; Younge Dep. at 38]. Younge's schedule was "pretty much the schedule that DA Paul Howard had," and Younge was involved in "anything" that had to do with the District Attorney's Office. [Younge Dep. at 34-37]. If Howard "needed something done, [Younge] would handle it." [*Id.* at 38]. Younge testified

that she discussed the progress of initiatives she was overseeing with Howard "[a]ll day every day." [*Id.* at 43]. Younge had meetings with Howard "all the time," and she "was in and out of his office because [the personal staff] were . . . the essential folks [in the Office]." [*Id.* at 46-47]. Younge testified that Howard was "very involved [with the policies and programs she oversaw] . . . He made it a point to be very involved in every single thing . . . ." [DSMF ¶ 19; RSMF ¶ 19]. Howard would even send Younge work-related messages on weekends. [DSMF ¶ 19; RSMF ¶ 19]. Up until the time that Younge notified Howard of her pregnancy, Younge did not need to make appointments to see Howard because she "was literally his go-to person for almost everything," and she was "one of the few on staff that was just able to walk into his office at any time." [Younge Dep. at 68]. According to Howard, Younge was "a key member of [his] personal staff" and "a high-ranking part of [his] staff, because that is certainly what [he] considered her [to be]." [Howard Dep. at 110]. Before Younge's pregnancy announcement, Younge and Howard met frequently, she had "open door" access to his office, and he required Younge to be available around the clock. [PSAF ¶ 24; Doc. 123, Def.'s Resp. to Pl.'s Stmt. of Add'l Facts "DRPSAF" ¶ 24].

B. Younge's Pregnancy, Termination, and Replacement

Younge became pregnant during her employment, and her pregnancy was diagnosed as "high risk." [PSAF ¶ 1; DRPSAF ¶ 1]. On July 1, 2019, Younge provided Howard a letter stating that she was pregnant and that

the pregnancy was "high risk." [DSMF ¶ 37; RSMF ¶ 37]. After Younge notified Howard of her pregnancy, Howard stopped meeting with Younge, excluded her from meetings, dismissed her when she tried to talk to him, and reassigned some of her work duties. [PSAF ¶¶ 24-26; Younge Decl. ¶¶ 23, 24, 28, 29, 30; Young Dep. at 83-84, 87-88, 98-99, 102].

Howard and his chief of staff, Nelson, both claim that Younge exhibited serious performance deficiencies and unprofessional behavior long before Younge's July 1st pregnancy announcement—as early as May. [PSAF ¶ 31; DRPSAF ¶ 31; DSMF ¶¶ 23-34]. On July 15, 2019, Howard met with Younge to terminate her, and Howard told Younge the reasons that she was being let go, including the number of complaints made by coworkers in less than two months and behavior issues. [DSMF ¶ 38; RSMF ¶ 38]. Howard admits that nothing happened between the July 1st pregnancy announcement and the July 15th termination meeting that caused him to believe Younge should be terminated. [PSAF ¶ 21; DRPSAF ¶ 21]. Howard claims that the incident that was the "final straw," which led to his decision to terminate Younge, occurred near the end of June, when Howard says he observed Younge being rude to an attorney who was trying to meet with Howard. [PSAF ¶ 38; DRPSAF ¶ 38; Howard Decl. ¶ 12; Howard Dep. at 128-31]. Younge disputes that these complaints and behavior issues actually occurred, and she states that none of these purported issues were brought to her attention before the time that she notified Howard of her pregnancy. [RSMF ¶¶ 23-34; PSAF ¶¶ 32-33, 39; Younge Decl. ¶¶ 7-18, 25-27].

Appendix D

According to HR Director Grimes, if there were problems with Younge's performance or behavior, those problems should have been documented contemporaneously in Younge's personnel file. [PSAF ¶ 34]. There were no disciplinary actions, warnings, reprimands, complaints, or documentations of conflicts in Younge's personnel file—even immediately after her termination. [*Id.* ¶ 35]. The only complaints in existence regarding Younge's behavior or performance during her employment at the District Attorney's Office were reduced to writing in mid-August 2019, weeks after Younge's termination. [*Id.* ¶ 36]. These statements were solicited by Nelson, at Howard's request, after Younge's termination and after Howard said he believed Younge would file a lawsuit and he wanted to "be prepared." [PSAF ¶ 37; Nelson Dep. at 13-16; Grimes Decl. ¶¶ 16-17, 21; Doc. 109-10, Post-Termination Statements].

Younge stated during the termination meeting that she would provide a resignation letter and insinuated that she was going to resign anyway "because of things that were not in the interest of [herself] and [her] intelligence level." [DSMF ¶ 40; RSMF ¶ 40]. Younge was directed to turn in her badge and access card during the July 15th termination meeting. [DSMF ¶ 41; RSMF ¶ 41]. Younge testified that she was terminated after the July 15th meeting; she then sent final emails to tell people "she was no longer [with the District Attorney's Office]," and called her husband because she was out of a job. [DSMF ¶ 42; RSMF ¶ 42]. Younge did not file any complaints or charges with the Equal Employment Opportunity Commission "EEOC" until after the July 15th termination meeting, and Howard had no knowledge of complaints until after

Younge's termination on July 15th. [DSMF ¶¶ 43, 44; RSMF ¶¶43, 44].

It is undisputed that the decision to terminate Younge was made solely by Howard. [DSMF ¶ 35; RSMF ¶ 35]. Because Chief of Staff Nelson was Howard's top advisor on staffing issues, Howard told Nelson about his intent to terminate Younge before he ever carried it out. [PSAF ¶¶ 28, 29; DRPSAF ¶¶ 28, 29]. Nelson testified that she is sure she spoke to Howard about Younge's performance issues prior to her termination and prior to the pregnancy announcement, but Nelson admits she was not aware of any discussion of terminating Younge before Younge announced her pregnancy. [PSAF ¶ 30; DRPSAF ¶ 30; Nelson Dep. at 29-30, 38-39]. Howard hired Ms. Becker-Brown, who was not pregnant, to replace Younge. [PSAF ¶ 27; DRPSAF ¶ 27].

IV. DISCUSSION

Younge asserts a claim for pregnancy discrimination under Title VII, as amended by the Pregnancy Discrimination Act, and Younge has abandoned her retaliation claim. Defendant argues that Younge was not an "employee" of Defendant within the meaning of Title VII based on the "personal staff" exemption and that she therefore is not entitled to any relief in connection with the pregnancy discrimination claim. I agree with Defendant and will recommend that summary judgment be granted.

Appendix D

A. "Personal Staff" Exemption

Title VII prohibits employment discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment, because of the individual's sex. 42 U.S.C. § 2000e-2(a)(1). The determination of whether an individual should be considered an 'employee' under Title VII "is a question of federal, rather than of state, law; it is to be ascertained through consideration of the statutory language of the Act, its legislative history, existing federal case law, and the particular circumstances of the case at hand." *EEOC v. Reno*, 758 F.2d 581, 584 (11th Cir. 1985) (citing *Calderon v. Martin Cnty.*, 639 F.2d 271, 272-73 (5th Cir., Unit B, 1981)). However, "[s]tate law is relevant insofar as it describes the plaintiff's position, including [her] duties and the way [s]he is hired, supervised and fired." *Id.* (citing *Calderon*, 639 F.2d at 273).

Title VII defines the term "employee" as follows:

> [A]n individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. . . .

42 U.S.C. § 2000e(f). Defendant contends that Younge was chosen by Howard, an elected official,[8] to be on his personal staff.

Title VII does not define the term "personal staff." "Courts have construed the personal staff exemption narrowly, however, because 'Congress intended . . . the . . . exception to apply only to those individuals who are in highly intimate and sensitive positions of responsibility on the staff of the elected official.'" *Milliones v. Fulton Cnty. Gov't*, No. 1:12-cv-3321-TWT, 2013 U.S. Dist. LEXIS 78761, 2013 WL 2445206, at *4 (N.D. Ga. June 5, 2013) (quoting *Teneyuca v. Bexar Cnty.*, 767 F.2d 148, 150 (5th Cir. 1985)). "The term 'personal staff' 'embodies the general and traditional proposition that positions of confidentiality, policy-making, or acting and speaking on behalf of the chief are truly different from other kinds of employment.'" *Milliones*, 2013 U.S. Dist. LEXIS 78761, 2013 WL 2445206, at *4 (quoting *Shahar v. Bowers*, 114 F.3d 1097, 1104 n.15 (11th Cir. 1997)).

"The determination of whether an individual is part of an elected official's personal staff involves a 'highly factual' inquiry that focuses on 'the nature and circumstances of the employment relationship between the complaining individual and the elected official. . . .'" *Milliones*, 2013 U.S. Dist. LEXIS 78761, 2013 WL 2445206, at *4 (quoting *Teneyuca*, 767 F.2d at 152). As mentioned previously, when making such determinations, courts have considered the following non-exhaustive list of factors:

8. The District Attorney for a judicial circuit is an elected position in Georgia. *See* O.C.G.A. § 15-18-3(1). There is thus no dispute that Howard was an elected official.

> (1) Whether the elected official has plenary powers of appointment and removal, (2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises a considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship between the elected official and the person filling the position.

Laurie v. Ala. Ct. of Crim. App., 88 F. Supp. 2d 1334, 1338 (M.D. Ala. 2000), *aff'd*, 256 F.3d 1266 (11th Cir. 2001) (citations and internal alterations omitted); *Milliones*, 2013 U.S. Dist. LEXIS 78761, 2013 WL 2445206, at *4. "[C]ase law indicates that the sixth factor is the most important factor." *Laurie*, 88 F. Supp. 2d at 1338 (citing cases).

The exemption allows a defendant to avoid liability even if a plaintiff meets her burden of proof under Title VII. *Oden*, 246 F.3d at 467. "The defendant bears the initial burden of demonstrating that the personal staff exception applies." *Id.* (citing *Nichols*, 921 F.2d at 1111). If the defendant meets that burden, the burden then shifts to the plaintiff "to demonstrate that a material issue of fact existed as to the true nature of her relationship with the elected official in question, i.e., that it was in fact other than that implied by the defendant's evidence." *Nichols*, 921 F.2d at 1111 (citing *Teneyuca*, 767 F.2d at 152). If "the

plaintiff fail[s] to make a sufficient showing of an issue of material fact," then summary judgment is appropriate. *Nichols*, 921 F.3d at 111 (citing *Teneyuca*, 767 F.2d at 153); *see also Watts v. Bibb Cnty.*, No. 5:08-CV-413 (CAR), 2010 U.S. Dist. LEXIS 103570, 2010 WL 3937397, at *8 (M.D. Ga. Sept. 30, 2010) (While "the exemption[] [is] highly fact [dependent], summary judgment may be appropriate when there is no genuine issue of material fact as to the applicability of the relevant factors.").

Construing the facts in the light most favorable to Younge, I easily find, largely based on Younge's own testimony, that she was a member of Howard's personal staff. Significantly, five of the six factors weigh heavily in favor of the applicability of the exemption. I will address each factor in turn below.

1. Howard's Plenary Powers of Appointment and Removal

Pursuant to Georgia statutory law, Howard had wide latitude to appoint and remove District Attorney's Office employees. "Georgia statutory code expressly empowers the District Attorney to hire and discharge personnel and to 'define the duties and fix the title of any attorney or other employee of the district attorney's office.'" *Peppers v. Cobb Cnty., Ga.*, 835 F.3d 1289, 1299 (11th Cir. 2016) (citing O.C.G.A. § 15-18-20(a)).[9] However, Section 15-18-20(a)

9. Defendant argued, without explanation, that O.C.G.A. §§ 15-18-19 and 15-18-20.1 governed Howard's appointment and removal powers. The statutory provisions cited by Defendant apply to state-paid personnel employed by district attorneys. Defendant cites no

also provides that the District Attorney's employment of "additional assistant district attorneys, deputy district attorneys, or other attorneys, investigators, paraprofessionals, clerical assistants, victim and witness assistance personnel, and *other employees*" is "as may be provided for by local law or as may be authorized by the governing authority of the county or counties comprising the judicial circuit." O.C.G.A. § 15-18-20(a). This qualifying language, as applied in Fulton County, is the subject matter about which Plaintiff's counsel stated he would have taken discovery, if he had been provided earlier notice of the "personal staff" exemption being at issue. This statute further provides that "[p]ersonnel employed by the district attorney . . . shall serve at the pleasure of the district attorney and shall be compensated by the county or counties comprising the judicial circuit, the manner and amount of compensation to be paid to be fixed either by local Act or by the district attorney with the approval of the county or counties comprising the judicial circuit." *Id.* § 15-18-20(b). Notably, Younge's job

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evidence that Younge was paid by the state or pursuant to a contract that Fulton County had "with the Prosecuting Attorneys' Council of the State of Georgia to provide such additional personnel in the same manner as is provided for state paid personnel." O.C.G.A. §§ 15-18-20.1. There likewise is no evidence that Younge was considered a state employee. To the contrary, there is evidence that Younge's position was in Fulton County's system, her employment paperwork was processed by Fulton County, Younge received Fulton County benefits, Younge participated in Fulton County orientation, and Younge was a Fulton County employee. [Younge Dep. at 27, 29, 31, 32, 130]. Therefore, based upon my review of the statutory provisions, the case law analyzing these statutory provisions, and the evidence of record, I conclude that O.C.G.A. § 15-18-20 is the statute that governs.

offer stated that it was "contingent upon the approval of the Fulton County Personnel Department and Finance Department . . . ." [Howard Decl., Ex. A-3, Job Offer].

Based on the above statutory framework, it appears that Howard had plenary powers to select persons for employment and to make termination decisions, but the actual hiring of a candidate, once selected, was subject to local laws or the authorization of the governing authority of Fulton County. Moreover, the salary at which a selected candidate was hired was subject to the approval of Fulton County. Of course, in this case, Younge ultimately was able to be hired at a salary a little less than what was stated on the Job Description but only after Younge's formal job title in the Fulton County system was altered and only after Howard took and signed an Official Oath in Support of Hiring Personal Staff, swearing that he had "reviewed the definition of 'personal staff' contained in the Fulton County Personnel Policies and Procedures" and that he intended to hire Younge as a Deputy Chief of Staff "to be a member of [his] personal staff." [Howard Decl., Ex. A-4, Official Oath in Support of Hiring Personal Staff].

Viewing these facts in the light most favorable to Younge, I find that Howard had complete and absolute power to remove employees but not plenary power to appoint individuals for employment. While Howard had sole and absolute authority to select individuals for employment, Howard's hiring power was subject to local laws or the authorization and approval of the governing authority of Fulton County. Accordingly, I conclude that factor one weighs neither in favor nor against applying the "personal staff" exemption in this case.

2. Younge's Personal Accountability to Only Howard

With respect to the second factor, Defendant points to an abundance of evidence that Younge was accountable to only Howard. As an initial matter, everyone deposed in this case, including Younge, consistently testified that Howard was Younge's only supervisor. [Younge Dep. at 62, 124, 133; Howard Dep. at 24; Nelson Dep. at 39]. Additionally, as Defendant highlights in its statement of facts and brief, Younge testified in detail regarding her accountability to and close working relationship with Howard:

- she met with Howard every day;
- if Howard "needed something done, [she] would handle it";
- she would discuss the progress of initiatives she was overseeing with Howard, "All day every day";
- she had meetings with Howard "all the time" and, as a member of his personal staff, she "was in and out of his office because [the personal staff] were . . . the essential folks;
- she did not need to make appointments to see Howard because she "was literally his go-to person for almost everything," and she was "one of the few on staff that was just able to walk into his office at any time";

- "most folks would need to schedule an appointment or . . . would request to see him through his executive assistant. But [she] had kind of an open-door access to him";

[Doc. 104-1 at 7-8].

Howard testified that he was Younge's immediate supervisor and that he supervised members of his personal staff, like Younge, "personally and directly." [Howard Dep. at 15]. He "closely directed" these employees. [*Id.*]. Howard testified that Younge came to his office "several times a day" and explained that they typically would have an early-morning conversation to "talk about the activities for that day." [*Id.* at 95]. "[A]t the end of the day [they] would generally sort of summarize what had gone on that day and what [they] were planning to do the next day or the immediate future." [*Id.*].

Moreover, when Howard signed the Official Oath in Support of Hiring Personal Staff, he represented, among other things, that he had reviewed the definition of "personal staff" as set forth in the Fulton County Personnel Policies and Procedures and that Younge would be a member of his personal staff. The Fulton County Personnel Policies and Procedures define "Personal staff of elected officials" as "any person who is chosen, appointed and/or hired by a person elected to public office for Fulton County ("elected official") to be on such elected official's personal staff and who is *directly supervised and personally accountable to only that elected official*." Fulton County Personnel Policies and Procedures, https://www.fultoncountyga.gov/for-employees/policies-and-procedures (Dec. 12, 2022,

8:00 AM) (emphasis added). "'[W]hen a job includes this level of personal accountability to one elected official, it is precisely the sort of job Congress envisioned to be within the 'personal staff' of that official and thus exempt from Title VII.'" *Owens v. Rush*, 654 F.2d 1370, 1376 (10th Cir. 1981) (quoting *Ramirez v. San Mateo Cnty.*, 639 F.2d 509, 513 (9th Cir. 1981)).

Attempting to demonstrate that she was not accountable only to Howard or to at least create an issue of material fact as to this issue, Younge points to testimony that she ranked under Chief of Staff Nelson, and that she worked on the budget with Nelson and occasionally took direction from her. [Doc. 109 at 9-10; Younge Decl. ¶¶ 3, 33; Grimes Decl. ¶ 5]. During oral argument, Plaintiff's counsel stressed that Younge was the "deputy chief," which he argued definitively showed that she reported to Nelson, the chief.

With respect to the budget, Younge avers that she submitted work to Nelson and would take direction from her to obtain information from others to put into the budget. [Younge Dep. ¶ 33]. While Younge may have occasionally taken direction from Nelson on discrete tasks, there is no evidence that Younge was *accountable* to Nelson or that she was obligated to answer to her. To the contrary, both Howard and Nelson rejected the suggestion by Plaintiff's counsel during their respective depositions that Nelson was Younge's supervisor or that Younge was Nelson's subordinate. [Howard Dep. at 24; Nelson Dep. at 39]. If Younge was aware of any particular situation in which Younge found herself directly accountable to Nelson, Younge could have included that example in her

declaration filed in opposition to the motion for summary judgment. In my view, Younge's failure to come forward with any such specific examples further demonstrates that she was accountable only to Howard.

Hence, while Younge was ranked under Nelson and occasionally worked with her on the budget, I conclude that there is no genuine dispute that Younge was personally accountable only to Howard and that Younge is precisely the type of individual that Title VII was not designed to cover. *See Hemminghaus v. Mo.*, 756 F.3d 1100, 1108 (8th Cir. 2014) (holding that the plaintiff, who was a court reporter, was personally accountable only to the elected judge who appointed her to her position, even though the court reporter occasionally transcribed testimony at the request of attorneys and occasionally worked for other judges); *cf. Dubisar-Dewberry v. Dist. Attorney's Office of the Twelfth Judicial Circuit of the State of Ala.*, 927 F. Supp. 1479, 1485 (M.D. Ala. 1996) (applying personal staff exemption and "find[ing] little significance in the fact that [the plaintiff] answered to not only the District Attorney, but also to the Chief Deputy District Attorney, the Chief Investigator, and the Chief Administrative Assistant."). This second factor weighs heavily in favor of finding that Younge was a member of Howard's personal staff and that she was not an employee within the meaning of Title VII.

3. Younge's Representation of Howard in Eyes of the Public

Regarding the third factor, Howard testified that Younge was a key member of his personal staff and that

he saw Younge as someone who spoke for him. [Howard Dep. at 42, 110]. Moreover, the unrefuted evidence of record is that Younge represented Howard to the public more than any other member of Howard's personal staff. [Howard Decl. ¶ 5]. Even Younge acknowledged that she was "in contact with a lot of persons in the community on behalf of the DA's Office." [Younge Dep. at 39]. Younge also testified: "Any dignitaries or anybody—any visitors that came to the office and had meetings with the DA, I was in. Sometimes that was in addition to the chief of staff and sometimes that was without her." [*Id.* at 34].

As one district court in the Eleventh Circuit aptly noted:

> As a matter of common knowledge and experience we know that [a district attorney] gets public credit for the good job done and impression made by his assistants and gets public criticism for the poor performance or impression made by his assistants. At election time he is judged by what he and his assistants have done.

Wall v. Coleman, 393 F. Supp. 826, 831 (S.D. Ga. 1975); *see also Shahar v. Bowers*, 114 F.3d 1097, 1104 n.15 (11th Cir. 1997) (stating that the Eleventh Circuit previously held "that assistant state attorneys and the like—lawyers who serve at the pleasure of their policy-making chief—were not employees protected by the statutes, but were members of the personal staff of the chief lawyer") (citing *Reno*, 758 F.2d at 584 and quoting *Wall*, 393 F. Supp.

831). Consistent with the *Wall* court's statement, Howard averred in his declaration: "Because Plaintiff represented me in the eyes of the community, I was very involved with her work because I knew that my voters would judge me based on the job Plaintiff did implementing our Office's policies and projects." [Howard Decl. ¶ 7].

Younge contends that she was not permitted to serve in a capacity to represent Howard in the eyes of the public. [Doc. 109 at 10]. Younge points to testimony that Howard was always present when she met with dignitaries or members of the public. [Younge Dep. at 34, 35, 36-37; Younge Decl. ¶ 19]. Younge also points to testimony that indicates she did not run any of the meetings. *See* [Younge Dep. at 36-37]. While Younge testified that she did not run the meetings, she did state that she participated and had a voice in them. [*Id.* at 37]. Moreover, Howard's presence at meetings, along with Younge, does not show that Younge did not represent Howard in the eyes of the public. It is certainly conceivable that Howard could have been present at a meeting and the public could have viewed Younge as a representative of Howard at that meeting, too. Thus, this factor also weighs in favor of finding that the "personal staff" exemption applies.

4. Howard's Control Over the Position

Next, Howard exercised considerable control over Younge's position and her day-to-day activities. *See Gunaca v. Texas*, 65 F.3d 467, 471 (4th Cir. 1995) (stating that this fourth factor is concerned with the degree of control an elected official "actually exerts over the

[plaintiff's] day-to-day activities"). Here, Howard set the agenda for the policies and programs that Younge oversaw. [DSMF ¶ 15; RSMF ¶ 15; Howard Decl. ¶ 8]. When asked during her deposition how involved Howard was with the programs she oversaw, Younge testified that Howard was "very involved." [Younge Dep. at 42]. Younge further testified that she met with Howard daily and that they discussed the programs "all day every day." [*Id.* at 43]. According to Younge, Howard would sometimes even send text messages to her work cell phone on the weekends. [*Id.*]. Howard similarly averred that "[he] was very involved with her work because [he] knew that [his] voters would judge [him] based on the job [Younge] did implementing [the] Office's policies and projects." [Howard Decl. ¶ 7]. Howard testified that he saw or spoke to Younge multiple times every day. [Howard Dep. at 110]. Based on Howard's constant interaction with Younge and his close oversight of the work Younge performed related to the District Attorney's policies and programs, I find that this fourth factor weighs firmly in favor of finding that Younge was a member of Howard's personal staff.

5. The Level of the Position Within the Chain of Command

The level of Younge's position within the chain of command at the District Attorney's Office also supports the applicability of the "personal staff" exemption. Younge was third in the chain of command for the entire office while employed by Defendant. [DSMF ¶ 3; RSMF ¶ 3; Younge Decl. ¶ 3; Grimes Decl. ¶ 5; Nelson Dep. at 15; Howard Dep. at 42]. Younge testified that she was in every

meeting for "any and every project that had to with the DA's Office." [Younge Dep. at 34]. Younge further testified: "Any dignitaries or anybody—any visitors that came to the office and had meetings with the DA, I was in. Sometimes that was in addition to the chief of staff and sometimes that was without her . . . pretty much the schedule that DA Paul Howard had, was my schedule." [*Id*]. She testified that she was "pretty much" involved with everything related to the District Attorney's Office and that she was Howard's "go-to person for almost everything." [*Id.* at 37, 68]. Howard likewise considered Younge a "key member of [his] personal staff" and "a high-ranking part of [his] staff." [Howard Dep. at 110]. Of significance, too, Younge was the second-or third-highest paid staff member at the District Attorney's Office. [Howard Decl. ¶ 9]. Hence, the level of Younge's position within the chain of command supports a finding that the "personal staff" exemption applies, and Younge has made no argument to the contrary with respect to this factor.

6. Intimacy of the Working Relationship Between Howard and Younge

Finally, Younge's deposition and declaration testimony both indicate that Younge and Howard had a close working relationship. While Younge attempts to explain as hyperbole her deposition testimony that she discussed her work with Howard "all day every day," she still acknowledges in her declaration that she and Howard "worked closely together." [Younge Decl. ¶ 30]. She also avers that he "demanded constant availability around the clock," which is consistent with her deposition testimony

that he would send her text messages on the weekends. [*Id.*; Younge Dep. at 43]. Younge also continues to acknowledge in her declaration that she had "open door access" to Howard and that she "could go into his office and talk to him about something whenever his door was open, without an appointment." [Younge Decl. ¶ 31]. This is consistent with Howard's testimony that Younge did not even need to knock before coming in. [Howard Dep. at 116]. Of course, one of Younge's main contentions in the lawsuit is that all of this changed after she notified Howard of her pregnancy, but there is no dispute that Younge had "easy access" to Howard and a "close day-to-day working relationship" with Howard for the majority of the time that she was employed by Defendant and working on Howard's staff. [Younge Decl. ¶ 31]. Thus, I agree with Defendant that Younge's working relationship with Howard was the kind of "highly intimate and sensitive position[] of responsibility on the staff of [an] elected official" that Congress contemplated when it enacted the "personal staff" exemption. *Teneyuca*, 767 F.2d at 152 (quoting *Owens*, 654 F.2d at 1375). As the most important factor, this sixth factor makes it abundantly clear that the "personal staff" exemption applies in this case. *Laurie*, 88 F. Supp. 2d at 1338.

7. Conclusion Regarding "Personal Staff" Exemption

In sum, there is no genuine issue of material fact as to the applicability of the "personal staff" exemption factors. Five out of the six factors decisively weigh in favor of applying the exemption, including the most important

factor (i.e., intimacy of the working relationship), and no reasonable jury could reach a different conclusion. As a result, I will recommend that summary judgment be granted on Younge's pregnancy discrimination claim.

B. Pregnancy Discrimination

I have concluded that (1) the "personal staff" exemption should not be deemed waived by Defendant's failure to plead it or otherwise formally raise it; and (2) there is no fact issue as to whether the "personal staff" exemption applies to bar Title VII relief in this case. Under these circumstances, additional analysis of the remaining issue—i.e., whether there is a material fact dispute as to whether Younge was the victim of pregnancy discrimination—is not necessary. In the interest of efficiency and thoroughness, however, I will address this final issue so that the district judge will have the benefit of my analysis in the event that he disagrees with my conclusions regarding the "personal staff" exemption.

Under Title VII, as amended by the PDA, "pregnancy, childbirth, or related medical conditions" must be recognized as sex-based characteristics of women. 42 U.S.C. § 2000e(k). "The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of sex." *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983). "The analysis required for a pregnancy discrimination claim is the same type of analysis used in other Title VII sex discrimination

suits." *Armindo v. Padlocker, Inc.*, 209 F.3d 1319, 1320 (11th Cir. 2000).

Where a plaintiff claims discrimination based on circumstantial evidence, courts ordinarily apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Under the *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of discrimination. 411 U.S. at 802-04. Once the plaintiff employee has established a prima facie case, the burden shifts to the defendant employer to proffer a legitimate, nondiscriminatory reason behind the complained-of employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). If the employer proffers a legitimate, nondiscriminatory reason for the employment action, the burden shifts again to the employee to show that the employer's proffered reason is a pretext for a discrimination. *Id.* at 256; *see also Anyanwu v. Brumos Motor Cars, Inc.*, 496 F. App'x 943, 946 (11th Cir. 2012).

Eleventh Circuit authority holds that "the plaintiff will always survive summary judgment if [s]he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). A triable issue that must go before a jury exists if, "viewed in a light most favorable to the plaintiff, [the record] presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.'" *Id.* Younge

maintains that a convincing mosaic of circumstantial evidence demonstrating intentional discrimination by Howard exists in this case. But for my opinion that the "personal staff" exemption precludes Younge from obtaining Title VII relief, I agree that she has presented a convincing mosaic of circumstantial evidence creating triable issues of fact as to Howard's discriminatory intent.

Among other evidence, there is evidence that Howard began treating Younge differently after she announced that she was pregnant, including by excluding her from meetings, reassigning some of her duties, and limiting the usual access that she had to Howard. [Younge Decl. ¶¶ 23, 24, 28, 29, 30; Young Dep. at 83-84, 87-88, 98-99, 102]. The timing of the termination meeting—only two weeks after the pregnancy announcement—also suggests discriminatory intent. *Wolchok v. Law Offices of Gary Martin Hays & Assocs., P.C.*, No. 1:07-cv-765-CC, 2008 U.S. Dist. LEXIS 126115, 2008 WL 11336109, at *4 (N.D. Ga. Aug. 27, 2008) ("Close temporal proximity between a pregnant employee's announcement of her pregnancy and the termination of the employee may be used to demonstrate pretext."). Furthermore, while Howard heavily relied upon complaints from other District Attorney's Office staff members as his basis for terminating Younge, there is testimony from Younge that Howard never brought these issues to her attention before she notified Howard of her pregnancy. [Younge Decl. ¶¶ 25-27; Younge Dep. at 60, 115-16]. Significantly, too, it is undisputed that none of these complaints were documented and placed in Younge's personnel file until weeks after she was terminated. [Nelson Dep. at 13-16; Grimes Decl. ¶¶ 16-17, 21; Doc. 109-10, Post-Termination

Statements]. Even Chief of Staff Nelson, Howard's top advisor on staffing issues, testified that she was not aware of any discussion of terminating Younge prior to the time that Younge announced she was pregnant. [Nelson Dep. at 38-39]. Finally, it is undisputed that Younge was replaced by a non-pregnant employee. [PSAF ¶ 27; DRPSAF ¶ 27; Howard Dep. at 16-17, 100-01]. Therefore, if the district judge concludes that the "personal staff" exemption is waived or does not apply, the evidence I have summarized above warrants denying summary judgment and permitting Younge's pregnancy discrimination claim to go before a jury.

V. CONCLUSION

Based on the foregoing, I conclude that Younge is not an "employee" within the meaning of Title VII and that a Title VII remedy is not available in this case. I **RECOMMEND** that Defendant's Motion for Summary Judgment be **GRANTED**.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

SO RECOMMENDED this 12th day of December, 2022.

/s/ Catherine M. Salinas
Catherine M. Salinas
United States Magistrate Judge

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, FILED MAY 23, 2025

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

May 23, 2025

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 23-11418-DD
Case Style: Jasmine Younge v. Fulton Judicial Circuit District Attorney's Office
District Court Docket No: 1:20-cv-00684-WMR

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Appendix E

Clerk's Office Phone Numbers

General Information: 404-335-6100	Attorney Admissions: 404-335-6122
Case Administration: 404-335-6135	Capital Cases: 404-335-6200
CM/ECF Help Desk: 404-335-6125	Cases Set for Oral Argument: 404-335-6141

REHG-1 Ltr Order Petition Rehearing

Appendix E

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-11418

DR. JASMINE YOUNGE,

Plaintiff-Appellant,

versus

FULTON JUDICIAL CIRCUIT DISTRICT ATTORNEY'S OFFICE, GEORGIA,

Defendant-Appellee,

PAUL L. HOWARD, JR., FULTON COUNTY DISTRICT ATTORNEY; IN HIS INDIVIDUAL CAPACITY,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:20-cv-00684-WMR

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BRANCH, LUCK, and LAGOA, 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 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

APPENDIX F — RULES AND STATUTORY PROVISIONS INVOLVED

Rule 8 of the Federal Rules of Civil Procedure provides in pertinent part: "In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense . . . ."

Rule 12(b) of the Federal Rules of Civil Procedure provides:

> (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
>
> (1) lack of subject-matter jurisdiction;
>
> (2) lack of personal jurisdiction;
>
> (3) improper venue;
>
> (4) insufficient process;
>
> (5) insufficient service of process;
>
> (6) failure to state a claim upon which relief can be granted; and
>
> (7) failure to join a party under Rule 19.
>
> A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed.

> If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

Rule 15 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Amendments Before Trial.
>
> > (1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course no later than:
> >
> > > (A) 21 days after serving it, or
> > >
> > > (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.
> >
> > (2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.
> >
> > (3) Time to Respond. Unless the court orders otherwise, any required response to an amended

> pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.
>
> (b) Amendments During and After Trial.
>
> (1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

Rule 16(b) of the Federal Rules of Civil Procedure provides:

> (b) Scheduling and Management.
>
> (1) Scheduling Order. Except in categories of actions exempted by local rule, the district judge—or a magistrate judge when authorized by local rule—must issue a scheduling order:
>
> (A) after receiving the parties' report under Rule 26(f); or

> (B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference.
>
> (2) Time to Issue. The judge must issue the scheduling order as soon as practicable, but unless the judge finds good cause for delay, the judge must issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has appeared.
>
> (3) Contents of the Order.
>
> (A) Required Contents. The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.
>
> * * *
>
> (4) Modifying a Schedule. A schedule may be modified only for good cause and with the judge's consent.

42 U.S.C. § 2000e(f) provides in pertinent part:

> (f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff . . . .

Appendix F

42 U.S.C. § 2000e-16b(a) provides :

(a) Practices

All personnel actions affecting the Presidential appointees described in section 12191 of Title 2 or the State employees described in section 2000e-16c of this title shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 2000e-16 of this title;

(2) age, within the meaning of section 633a of Title 29; or

(3) disability, within the meaning of section 791 of Title 29 and sections 12112 to 12114 of this title.

42 U.S.C. § 2000e-16c provides in pertinent part:

(a) Application

The rights, protections, and remedies provided pursuant to section 2000e-16b of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by administrative action

(1) In general

Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of Title 5, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) Referral to State and local authorities

(A) Application

Section 2000e-5(d) of this title shall apply with respect to any proceeding under this section.

(B) Definition

For purposes of the application described in subparagraph (A), the term "any charge filed by a member of the Commission alleging an unlawful employment practice" means a complaint filed under this section.

(c) Judicial review

Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of Title 28. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of Title 28.