IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION

TABATHA L. KING **PLAINTIFF**

VS. **NO. 3:21-cv-03086-MEF**

BAXTER COUNTY, ARKANSAS;
JOHN MONTGOMERY, Sheriff, in his individual and official capacities;
SERGEANT STEVEN GOODE; and DOES 1-10, in their individual and official capacities **DEFENDANTS**

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Separate Defendant Steven Goode, in his individual capacity (Goode), by and through his undersigned counsel, ROSE LAW FIRM, A PROFESSIONAL ASSOCIATION, and for his Motion for Summary Judgment, respectfully requests that the Court dismiss Plaintiff Tabatha L. King's (Plaintiff) claims against Goode with prejudice and enter judgment in favor of Goode.

I. BACKGROUND

A. The Beginning of Plaintiff's Employment with Defendant Baxter County, Arkansas, and Applicable Policies.

This is an employment discrimination and retaliation case. In February 2018, Plaintiff was hired as a "jailer/matron" at the Baxter County Sheriff's Office. Exhibit 1, *Tabatha King Personnel File Excerpts*, at p. 8.[1] Shortly after being hired, Plaintiff received the General Orders and Policy and Procedures manual and signed an acknowledgement of the same. *Id.* at pp. 6-7; *see also* Exhibit 2, *Tabatha King Depo. Trans. (Vol. I)*, at 103:19-22, 104:15-105:5.

The manual set out the general policies and procedures that at-will employees, like Plaintiff, were "expected to read, understand, and comply with." *See* Exhibit 3, *Personnel Policy*

[1] Some exhibits feature internal pagination while others do not, so to avoid confusion, pin-citations to exhibits are to the sequential page number of the exhibit that is being cited to.

Manual Excerpts, at p. 1. The manual's workplace drug policy stated in relevant part: "a safety-sensitive employee who has been prescribed a medication that might cause drowsiness or otherwise impair the employee[. . . shall] provide a written statement from the prescribing practitioner certifying that such use will not impair the employee's ability to safely perform his or her essential job functions. . . . [to] continue working in the same position." *Id.* at p. 4. A "safety-sensitive position" was defined, in relevant part, as including any position where the employee carries a firearm. *Id.*

The manual instructed that any perceived discrimination, harassment, or retaliation within Baxter County should be reported to one of several designated individuals. *Id.* at pp. 6-7. This policy also instructed that no one would be harassed, discriminated against or retaliated against for making a report. *Id.* at p. 7.

Baxter County also maintained a "disciplinary offenses" policy regarding conduct that would subject an offending employee to disciplinary action.[2] *See* Exhibit 1, pp. 18-20. The policy established a progressive-discipline system to be used in some instances of improper conduct, but advised that "other instances such as misconduct or gross misconduct . . . may warrant a higher level of disciplinary action." *Id.* at p. 18. Examples of misconduct listed in the policy included "[m]aking a false report or giving untruthful or incomplete answers to questions or inquiries made by a supervisor, including falsifying any documents or official records," and "[f]ailure to properly care for and use Sheriff's Office equipment." *Id.* at pp. 19-20. Ultimately, the disciplinary policy

[2] Plaintiff was aware of the discipline policy during her tenure with Baxter County. On August 18, 2019, she received verbal coaching from Sergeant Tony Beck for initially refusing to perform work assigned to her by Corporal Ethan Raymond and yelling at Corporal Raymond that she "want[ed] off [his] fucking shift." *Id.* at pp. 12-14. On September 9, 2019, Corporal Raymond wrote in an annual performance evaluation of Plaintiff that she "is, at times, insubordinate to her supervisors and has been written up on such in the past." *Id.* at p. 31. On September 21, 2020, Corporal Clark issued a Written Reprimand to Plaintiff for failing to report to work on time. *Id.* at p. 29. On February 22, 2021, Corporal Clark issued Plaintiff another Written Reprimand for failing to timely report to work on February 18 and 22, 2021. *Id.* at p. 1. This Written Reprimand warned Plaintiff that future occurrences of that conduct would result in a two-day suspension without pay. *Id.* Plaintiff's issues with insubordination and work attendance were again noted in a March 18, 2021, performance evaluation of her by Goode. *Id.* at p. 4.

established that the "level and particular type of disciplinary action imposed will be within the discretion of the Sheriff or Chief Deputy." *Id.* at p. 18. Defendant Montgomery maintained a well-known zero-tolerance policy that any employee who was untruthful during an investigation would be terminated. *See* Exhibit 13, *Grievance Hearing Trans.*, at 16:5-8, 16:20-17:20.

B. Plaintiff and Goode.

Sometime in the spring of 2019, Plaintiff claims to have been helping Goode carry inmate mats to the top part of the jail. Exhibit 2, at 119:5-14, 122:3-6. She alleges that Goode grabbed her shoulder, forced her to her knees, and placed his penis in her mouth before she pulled away and left the room. *Id.* at 120:5-11, 120:17-19. She claims that the incident occurred in a few seconds, and that she did not yell or call out for help. Exhibit 4, *Tabatha King Depo. Trans. (Vol. II)*, at 96:16-20. Plaintiff did not tell anyone afterwards that she had been sexually assaulted.[3] *Id.* at 97:22-25. There is no video or audio recording of this alleged incident. Exhibit 2, at 118:12-14.[4]

Afterwards, Plaintiff continued working and communicating with Goode without reporting any sexual assault to anyone throughout 2019 and 2020. *See id.* at 124:23-25, 129:14-18; Exhibit 10, *Robert King Depo. Trans.*, at 68:11-17; Exhibit 11, *Joyce Parker Depo. Trans.*, at 50:17-21, 70:22-23, 74:3-5. Plaintiff and Goode continued to exchange text messages during that time. *See* Exhibit 5, *King and Goode Text Messages*, at pp.1-6. At some point, Plaintiff received a text message containing a picture of Goode's penis, in addition to two other text messages containing pictures of him in underwear.[5] *Id.* at pp. 8-10. Plaintiff did not receive any other photographs from

[3] Goode adamantly denies that any sexual assault occurred, but as discussed in a subsequent section, it is a moot point because Plaintiff offers no competent evidence of a sexual assault for summary judgment purposes.

[4] Plaintiff testified in her deposition that she had "thousands" of recordings she took of coworkers saved on her home computer, but then changed her testimony to having "multiple" recordings, possibly including recordings of Goode, and that she had not given any of those recordings to her attorney for discovery production in this case. *Exhibit 2*, *at* 61:6-62:18. To date, Plaintiff has not produced any recordings.

[5] The dates of these text messages, along with the full conversation preceding and following them, are unknown because out of thousands of messages exchanged, Plaintiff kept only the few text messages she felt she needed as "evidence" if she ever "eventually [was] in this position." Exhibit 2, at 122:18-19; Exhibit 13, at 60:19-21. Goode incorporates by reference herein the Brief in Support of the pending Motion for Sanctions and the Supplement

Goode after these that she believed were inappropriate. Exhibit 4, at 10:3-9. Goode also sent Plaintiff a text message stating "how much fun we could have if we all got together," to which Plaintiff responded, "Did you just say three some !!! [sic]" Exhibit 5, at 7. At an unknown time, Plaintiff sent Goode a text message containing a picture of her with her blouse unbuttoned. *See* Exhibit 13, at 61:5-7.[6] On or after December 2, 2019, Plaintiff left a "heart" reaction on a public Facebook post made by Goode's wife about Goode. *See* Exhibit 6, *Tabatha King December 2019 Facebook Activity*.

On December 18, 2019, Plaintiff was working on the day shift, Rotation C, where she was supervised by Goode. Exhibit 2, at 172:13-17. Plaintiff told Goode via text message that she was planning to request a shift change, to which he responded, "[o]k." Exhibit 5, at p. 5.[7] Plaintiff verbally asked Corporal Ethan Raymond and Lieutenant Brad Lewis for a shift change. Exhibit 2, at 172:13-173:2. Lieutenant Lewis denied the request, saying "[w]e put you where we need you." *Id.* at 173:2-10, 174:6-12. Plaintiff did not formally request a shift change in writing. *Id.* at 173:5-8, 174:9-14.

At unknown times, Plaintiff showed the pictures she received of Goode to a few employees at the Baxter County Sheriff's Office. For example, in 2020, she sent the pictures to Dawn Dunford and discussed the photographs with Dunford in a normal, "upbeat attitude." Exhibit 15, *Internal Investigation Records* p. 13. Plaintiff believes Dunford then sent the photographs to Lieutenant Brad Lewis. *See* Exhibit 4, at 11:24-12:3.

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thereto (ECF Nos. 58, 94), and asks the Court should grant that Motion and grant Defendants the relief sought therein before ruling on this Motion.

[6] Plaintiff denied, under oath, ever sending any pictures of herself to Goode, but then upon follow-up questioning, immediately admitted to sending the picture of herself with her shirt unbuttoned. Exhibit 13, at 60:22-61:7. Plaintiff later unequivocally denied in her deposition that she ever sent pictures of herself to Goode. Exhibit 2, at 153:12-16. Despite testifying under oath that at least one such picture exists, Plaintiff has not produced it during discovery in this case.

[7] This was not Plaintiff's only consideration of shift changes during her tenure at Baxter County, though, as she and Goode once exchanged text messages when they were on separate shifts about one transferring to the other's shift. *See* Exhibit 5, at p. 4.

Sometime around May 2020, Plaintiff asked Captain Jeff Lewis what to do if she was being harassed by a coworker. Exhibit 15, at p. 66; Exhibit 2, at 167:22-168:7. He told her to file a formal complaint. Exhibit 15, at p. 67. She did not do so and did not bring up the subject with Lewis again. *Id.*

C. Plaintiff's Visit to the Emergency Room on October 25, 2020, and Her Subsequent Claims to have Suffered a Miscarriage.

On October 21, 2020, Plaintiff saw her doctor, Michael Adkins, to have a weight check and a pregnancy test performed [redacted] *See* Exhibit 7, *Adkins Medical Records*, at p. 18. The pregnancy test returned a negative result. *Id.*

On October 25, 2020, after finishing her shift at work, Plaintiff went to the emergency room at Baxter Health in Mountain Home, Arkansas, because she [redacted] Exhibit 2, at 183:5-7, 183:22-23. After arriving, she reported experiencing those symptoms and that she was less than twenty weeks pregnant. *Id.* at 192:15-19; *see also* Exhibit 8, *Affidavit of Sarah Eaton, APRN*. A physical examination was performed, including a pregnancy test that returned a negative result.[8] Exhibit 8. Plaintiff was diagnosed [redacted] and was discharged that night with instructions to follow up with her primary care provider. *Id.*; *see also* Exhibit 9, *Baxter Health Medical Records*, at pp. 2-6. Plaintiff claims that she "verbally" followed up with her doctor, Dr. Adkins, *see* Exhibit 2, at 185:22-24, but no medical record substantiates any such discussion. *See* Exhibit 7, at pp. 1-18.

Afterwards, despite undergoing several negative pregnancy tests and being advised at Baxter Health that she was not pregnant, Plaintiff began telling people that she suffered a

[8] Early in pregnancy, a patient's human chorionic gonadotropin (hCG) levels roughly double every 48-60 hours. Exhibit 8. A pregnant patient's hCG levels would be significantly elevated three weeks after a missed menstrual cycle or positive pregnancy test. *Id.* A pregnancy test will not reflect a positive result until hCG levels are between 30 and 45 miU/ml. *Id.* On October 25, 2020, Plaintiff's hCG levels were less than 1 miU/ml, so the healthcare providers determined she was not pregnant. *Id.*

miscarriage at the emergency room on October 25, 2020. *See* Exhibit 10, at 52:9-11; Exhibit 11, at 57:6-11. At Plaintiff's deposition on January 23, 2023, she testified in disturbing detail that the doctor was "scraping and pulling" "baby pieces" out of her. *See* Exhibit 2, at 184:6-185:21. But no medical records from Baxter Health, or since that time from her primary care provider, Dr. Adkins, reflect that she was ever pregnant in October 2020 or that she suffered a miscarriage on October 25, 2020. To the contrary, the records demonstrate that she was not pregnant during that time. *See* Exhibit 7, at pp. 1-18, Exhibit 9, at pp. 2-6.

D. Plaintiff Receives Her Annual Performance Evaluation for 2021 and Reports that She Was Taking Anti-Anxiety Medication.

On March 18, 2021, Goode wrote a performance evaluation of Plaintiff, noting that she was "proficient in performing her job in the jail," but he "would like Tabatha to listen to supervisors when instructed to do an assignment without arguing." Exhibit 1, at p. 4. Goode also noted that "if there is an issue about getting to work on time[,] let supervisors know as soon as possible." *Id.* Plaintiff's annual performance evaluation in April 2021 likewise graded her at "below expectations" for reporting to work on time and noted she had multiple instances of arguing with supervisors. *Id.* at pp. 26-28. However, the April 2021 evaluation ultimately rated Plaintiff as "meeting expectations" and recommended her for a merit pay increase. *Id.* at p. 28. Plaintiff approached Captain Lewis about the negative aspects of the evaluation, and he told her that she could write a response to the evaluation, which she did on the form, disputing that she ever argued with supervisors. *Id.*

Sometime in 2021, Plaintiff notified the nurse at the Baxter County Sheriff's Office that she was taking anti-anxiety medication.[9] Exhibit 2, at 179:16-119. As a result, her gun-and-badge

[9] Plaintiff was diagnosed with Major Depressive Disorder and Anxiety Disorder and was taking various medication such as Xanax, Alprazolam, and Lorazepam, as far back as July 19, 2018. *See* Exhibit 7, at pp. 33-34.

privileges were revoked for a day that she was not scheduled to work.[10] *Id.* at 200:14-17. Captain Lewis told Plaintiff to obtain a doctor's note stating she could carry a gun while on the medication, and she provided such a note from Dr. Adkins the next day. *See id.* at 180:1-5; Exhibit 1, at p. 5. Her gun-and-badge privileges were restored, and she did not miss any pay, benefits, or shifts because of the one-day revocation. Exhibit 2, at 200:14-20.

E. Plaintiff is Terminated After Abusing a Coworker's County-Provided Electronic Equipment and Providing an Untruthful Statement During a Subsequent Investigation Into that Incident.

On April 14, 2021, Plaintiff was in D Pod when jailer Dawn Laurie entered behind her and lightly pushed her in the back. *See* Exhibit 17, *Video Footage of Guardian Incident*, at 0:41. Plaintiff turned around and lightly pushed Laurie, before leaving and reentering D Pod. *Id.* Plaintiff then took a Guardian[11] from Laurie's hands and threw it across the room, where it landed on the concrete floor and broke into several pieces. *Id.* Plaintiff retrieved the Guardian pieces and attempted to reassemble them, before taking a pen from Laurie's front pocket and throwing it to the ground. *Id.* at 1:59. Laurie later told Corporal Maze about this incident. Exhibit 1, at p. 22.

On April 15, 2021, Plaintiff claims that she spoke with Captain Lewis and mentioned that she had been sexually harassed and assaulted. Exhibit 2, at 202:21-25. However, the only record from Captain Lewis regarding a conversation with Plaintiff about harassment reflects a conversation occurring roughly a year prior, around May 2020, and no discussion of sexual assault was recorded. Exhibit 15, at pp. 66-67.

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[10] Plaintiff claims that Goode revoked her gun-and-badge privileges after eavesdropping and overhearing her report to the nurse. Exhibit 2, *Tabatha King Depo. Trans. (Vol. I)*, at 179:20-25. However, Plaintiff did not explain how or why she knows that, nor does any evidence substantiate that claim.

[11] A Guardian is a hand-held electronic device used by jailers at the Baxter County Sheriff's Office to monitor the location of inmates and record when inmates are given medication. Exhibit 13, at 10:19-11:10. A Guardian costs several thousand dollars. *Id.* at 11:16-20.

Plaintiff and Laurie were asked to submit written statements regarding the Guardian incident. On April 19, 2021, Laurie submitted a written statement that she entered D Pod, approached Plaintiff from behind, and said "boo," at which point Plaintiff turned around, took the Guardian from her, and threw it across the pod, where it shattered into three pieces.[12] Exhibit 1, at p. 22. Laurie reported that Plaintiff told her she would "regret it" if she told anyone what happened, and Laurie wrote she did "not want any problems with Tabatha King because of my dealings with her in the past." *Id.* On April 20, 2021, Plaintiff submitted a written statement, reporting that Laurie entered D Pod, snuck up behind her, squeezed her ribs, and yelled to scare her. *Id.* at p. 21. Plaintiff stated she reacted by jumping, hitting Laurie's hand in the process, which knocked the Guardian to the ground. *Id.*

The video footage of the Guardian incident was pulled, and Defendant Montgomery watched it and reviewed the two written statements with the Division Commander, Lieutenant Brad Lewis. Exhibit 13, at 8:12-21. After determining that Plaintiff's written statement was demonstrably untrue when compared to the video footage, Defendant Montgomery decided to terminate her employment pursuant to his no-tolerance policy against employees lying during investigations. *Id.* at 13:22-14:22, 15:24-16:15.

On April 23, 2021, Defendant Montgomery terminated Plaintiff from Defendant Baxter County, Arkansas. Exhibit 1, at pp. 16-20. Plaintiff met with Defendant Montgomery that day and indicated to him, for the first time, that she had been sexually harassed while employed at Baxter County. Exhibit 15, at p. 50.

[12] Laurie's statement says the incident occurred on April 19, 2021, which appears to be a typographical error because video footage from the incident shows the date as April 14, 2021. Exhibit 17; *see also* Exhibit 13, at 9:23-10:4 (discussing the date and time stamp on video footage being automatically generated by the machine while it records the footage).

F. Events Occurring After Plaintiff's Termination.

On April 24, 2021, Plaintiff went to the office of Sergeant Jackie Stinnett, who worked in the Criminal Investigations Division of the Arkansas State Police. Exhibit 14, *Affidavit of Jackie Stinnett*, at p. 1. Plaintiff reported that Goode sent her nude photographs in 2019. *Id.* She showed Sergeant Stinnett screenshots of the photographs on her cell phone but refused to let him download a copy of the photographs and other text communications between her and Goode. *Id.* Plaintiff did not report that Goode (or anyone else) had sexually assaulted her. *Id.* at p. 2.

Two weeks later, Plaintiff returned to Sergeant Stinnett's office to again discuss the photographs. *Id.* Sergeant Stinnett informed her that the Arkansas State Police was not investigating the complaint as a criminal matter. *Id.* He informed her that she could report the matter to the prosecuting attorney in Baxter County, Arkansas. *Id.* A month later, Plaintiff's attorney called Sergeant Stinnett and stated that Goode had raped Plaintiff. *Id.* This was the first and only time that anyone claimed to Sergeant Stinnett that Plaintiff had been raped. *Id.*

On April 27, 2021, Plaintiff submitted a written grievance regarding her termination. Exhibit 1, at pp. 2-3. Plaintiff suggested that the discrepancies in her written report of the Guardian incident were excusable because she prefaced it with "I do not recall," and that she was on medication "due to [the] stress of working for a superior individual whom have [sic] been sexually harassing me," which made her memory "cloudy." *Id.* at pp. 2-3. Plaintiff's written grievance made no mention of rape or sexual assault, nor did it name the superior she claimed was harassing her. *See id.*

Baxter County began an internal investigation into Plaintiff's allegations of sexual harassment and retaliation at the Baxter County Sheriff's Office, interviewing seventy employees there. *See generally* Exhibit 15. Only fourteen of those employees indicated knowledge of Plaintiff

receiving inappropriate photographs, with the ones who separately discussed them with her describing her demeanor during the conversation as ranging from "crying" to "joking."[13] *See id.* at pp. 1-2, 7-8, 10-11, 13-14 19, 37-39, 42, 61, 66-67. One employee stated he felt Plaintiff had a "blackmail agenda" in mind when discussing the photographs. *Id.* at pp. 10-11.

The investigation further revealed that Plaintiff had engaged in sexually suggestive or harassing conduct toward other Baxter County Sheriff's Office employees, and one non-employee. *See id.* at pp. 1-2, 31, 78-79; Exhibit 16, *Kaitlyn Wayland Complaint*. For example, non-employee Kaitlyn Wayland reported that on separate occasions, Plaintiff told her she would "make [Wayland] turn into a lesbian," said she should spank Wayland, and put her hand on Wayland's thigh and moved her hand up her leg. Exhibit 16. Other employees reported that Plaintiff told people in the parking lot of the Baxter County Sheriff's Office that she had a "wet pussy." Exhibit 15, at pp. 78-79. On one occasion, Plaintiff showed commercial pornography on her phone to a coworker. *Id.* at p. 31. At some point, Ethan Raymond lodged a complaint about receiving sexually harassing text messages from Plaintiff. *Id.* at pp. 1-2.

On May 7, 2021, the Baxter County Quorum Court held a hearing on Plaintiff's grievance and heard sworn testimony from Defendant Montgomery, Dawn Laurie, and Plaintiff. *See* Exhibit 13, at pp. 1, 3, 43:9-10. During her testimony, Plaintiff stated under oath that she reacted to Dawn Laurie in D Pod and "hit her hand – her wrist, and then the Guardian went flying." *Id.* at 50:18-20. Plaintiff also testified that she met with Defendant Montgomery the day she was terminated, and during that conversation, told him that she reported sexual harassment and retaliation two weeks prior. *Id.* at 56:13-17. Plaintiff did not testify that she had been sexually assaulted by a Baxter County employee. Exhibit 2, at 206:11-13. When asked if she ever had sexual contact with Goode,

[13] One employee who described Plaintiff's demeanor as "crying" was Sierra Hollis, who was Plaintiff's friend. Exhibit 15, at p. 42; *see also* Exhibit 2, *Tabatha King Depo. Trans. (Vol. I)*, at 101:9-11.

she unequivocally testified "no." Exhibit 13, at 62:6-10. After hearing all testimony, the quorum court upheld Plaintiff's termination. *Id.* at 68:15-24.

On June 28, 2021, Plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC). On September 2, 2021, the EEOC dismissed the Charge of Discrimination and issued Plaintiff a right-to-sue letter. Exhibit 12, *EEOC Right-to-Sue Letter*.

Sometime after filing this lawsuit on December 15, 2021, Plaintiff sent a text message to Captain Jeff Lewis and offered to give him and his brother, Lieutenant Brad Lewis, one-third of any money she won from this case. Exhibit 2, at 226:1-6. On April 28, 2022, Plaintiff filed an Amended Complaint (ECF No. 28), alleging, *inter alia*, that Defendants committed sex discrimination/harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Title VII); 42 U.S.C. § 1983; and the Arkansas Civil Rights Act, Ark. Code Ann. § 16-123-101 et seq. (ACRA). Relevant here, she also asserts state-law claims under Ark. Code Ann. § 16-118-107 and the tort of outrage.

Plaintiff's claims against Goode have no merit. In her pleadings and throughout discovery, Plaintiff presented no credible, competent evidence to support those claims. Consequently, she cannot demonstrate the existence of any material facts in genuine dispute. Against the objective, undisputed facts in the record, Goode is entitled to summary judgment as a matter of law and the Court should dismiss all claims asserted against him, individually, with prejudice.

II. LEGAL STANDARD

The standard for summary judgment is well established. A party may seek summary judgment on any claim, defense, or "part of [a] claim or defense." Fed. R. Civ. P. 56(a). 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); *Krenik v. Cnty. of LeSueur*, 47 F.3d 953, 957 (8th Cir. 1995). This involves a "threshold inquiry

of . . . whether there is a need for trial—whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they reasonably may be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A fact is material only when its resolution affects the outcome of the case, and a dispute is genuine only if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Id.* at 248, 252.

The nonmoving party "may not [in response] rest upon mere allegations or denials," but instead must demonstrate the existence of specific facts in the record showing that there is a genuine issue for trial. *Enter. Bank v. Magna Bank*, 92 F.3d 743, 747 (8th Cir. 1996); *see also Anderson*, 477 U.S. at 256; *Krenik*, 47 F.3d at 957. The Court considers all the evidence and all reasonable inferences that arise from the evidence in a light most favorable to the nonmoving party. *Nitsche v. CEO of Osage Valley Elec. Co-Op*, 446 F.3d 841, 845 (8th Cir. 2006). However, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 378 (2007).

III. DISCUSSION

There is no genuine dispute of material fact warranting any of Plaintiff's claims against Goode proceeding to trial. Each claim is discussed below.[14]

A. Goode is Entitled to Summary Judgment on Plaintiff's Title VII and ACRA Claims, which are Untimely and Do Not Provide for Individual Liability.

Plaintiff's initial Complaint asserted Title VII and ACRA claims of sexual harassment, hostile work environment, and retaliation against all Defendants, including Goode. *See* ECF No.

[14] The following discussion concerns only Plaintiff's claims against Goode in his individual capacity.

2. Plaintiff later filed a First Amended Complaint that also alleges "the Defendants" engaged in conduct that violated Title VII and the ACRA. *See* ECF No. 28. It is not entirely clear whether Plaintiff still asserts Title VII and ACRA claims against Goode, but out of an abundance of caution, Goode moves for summary judgment on any such claims.

As a threshold matter, any Title VII claim asserted by Plaintiff is untimely and must be dismissed. An action brought under Title VII must be filed within ninety days of receipt of the EEOC's right-to-sue letter. 42 U.S.C. § 2000e–5(f)(1).

The EEOC issued Plaintiff a right-to-sue letter on September 2, 2020. Exhibit 12. Even if the Court presumes that Plaintiff did not receive the letter until September 5, 2020, *see Hales v. Casey's Mktg. Co.*, 886 F.3d 730, 736 (8th Cir. 2018) ("It is presumed that a plaintiff will receive the [EEOC right-to-sue letter] three days after the mailing date."), she did not file this case until December 15, 2021, more than ninety days afterwards. Thus, Plaintiff is time-barred from bringing her Title VII claims. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393-96 (1982). Goode is therefore entitled to summary judgment as a matter of law on any Title VII claims against him in this case.

Similarly, Plaintiff's ACRA claims are at least partially time barred. ACRA claims must be filed either "within one (1) year after the alleged employment discrimination occurred, or within ninety (90) days after receipt of a 'Right to Sue' letter or 'Determination' notice from the EEOC regarding the alleged unlawful employment practice, whichever is greater." Ark. Code Ann. § 16-123-107(c)(4). As discussed above, Plaintiff did not file this case within ninety days of receipt of a right-to-sue letter from the EEOC. Thus, she can only assert an ACRA claim regarding conduct that allegedly occurred up to one year before December 15, 2021, the date she filed this case. Plaintiff's claims, in part, are about events occurring throughout 2019 and 2020, most of which are beyond the permissible scope of the appliable one-year filing period. Plaintiff's ACRA claims

are untimely, and therefore must be dismissed, to the extent they relate to alleged events occurring before December 15, 2020. *Zipes*, 455 U.S. at 393-96.

The Title VII and ACRA claims also fail as a matter of law to the extent that they are asserted against Goode, individually. Title VII and ACRA claims are subject to the same analytical framework. *See Crone v. United Parcel Serv., Inc.*, 301 F.3d 942, 945 (8th Cir. 2002). Title VII "provides remedies to employees for injuries related to discriminatory conduct and associated wrongs by employers." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 342 (2013). Title VII and ACRA claims can be asserted only against employers, not individual employees. *See Schaffhauser v. United Parcel Serv., Inc.*, 794 F.3d 899, 902 (8th Cir. 2015); *Van Horn v. Best Buy Stores, L.P.*, 526 F.3d 1144, 1147 (8th Cir. 2008); *McCullough v. Univ. of Ark. For Med. Sciences*, 559 F.3d 855, 860 n.2 (8th Cir. 2001); *see also Carson v. Lacy*, 856 F. App'x. 53, 54 (8th Cir. 2021); *Steinbuch v. Univ. of Ark.*, 2019 Ark. 358, at *15, 589 S.W.3d 350, 360.

There is no evidence demonstrating that Goode, in his individual capacity, was Plaintiff's employer. Plaintiff concedes as much in a prior pleading. *See* ECF No. 25, p. 3 ("Goode was not the Plaintiff's 'employer' as defined by Title VII . . . or the Arkansas Civil Rights ACT [sic]."). Thus, Goode has no personal liability for any alleged violation of Title VII or the ACRA. *See Cordell v. West*, No. 3:22-cv-00321-BSM, 2023 WL 5487643, at *1 (E.D. Ark. Aug. 24, 2023) (dismissing Title VII and ACRA claims of sex discrimination and retaliation against an employee of a county sheriff's department).

Accordingly, any Title VII or ACRA claim asserted by Plaintiff against Goode, individually, fails as a matter of law. Goode is entitled to summary judgment on those claims, which the Court should dismiss with prejudice.

B. Goode is Entitled to Summary Judgment on Plaintiff's Section 1983 Claim because Plaintiff Cannot Produce Competent, Admissible Evidence Supporting That Claim.

Plaintiff brings a claim under 42 U.S.C. § 1983, alleging Goode and Defendant Montgomery violated her right to equal protection under the United States Constitution. Plaintiff must demonstrate that Goode acted under color of state law and thereby violated a right of Plaintiff's that is secured by the Constitution. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Dunham v. Wadley*, 195 F.3d 1007, 1009 (8th Cir. 1999). Plaintiff claims generally that Defendants' conduct constituted harassment and retaliation in violation of her equal protection rights.

Plaintiff's section 1983 claim is analyzed under the same framework as a Title VII claim. *See Tipler v. Douglas Cnty., Neb.*, 482 F.3d 1023, 1027 (8th Cir. 2007) (noting the similar analysis for Title VII and section 1983 claims based on a violation of equal protection). The harassment and retaliation components of Plaintiff's claim will be addressed separately.

1. Plaintiff's Harassment Claim Fails as a Matter of Law Because Plaintiff Cannot Produce Competent, Admissible Evidence to Satisfy the Requisite Elements of the Claim.

"Sexual harassment by state actors violates the Fourteenth Amendment and establishes a section 1983 action." *Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003). A claim of harassment based on a hostile work environment requires a four-part showing: (1) the employee belongs to a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; and (4) the harassment affected a term, condition, or privilege of her employment. *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 933 (8th Cir. 2002). Plaintiff cannot demonstrate the last three prongs.

Conduct must be "unwelcome" in that Plaintiff regarded it as undesirable or offensive and neither solicited nor invited it. *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 966 (8th Cir. 1999). The proper inquiry is whether she indicated by her conduct that the alleged harassment was unwelcome.

Id. Plaintiff cannot establish unwelcome harassment if she failed to contemporaneously complain about the alleged harassment. *See Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 632 (8th Cir. 2000).

The harassment allegedly began in spring 2019 and continued as Plaintiff received photographs and text messages from Goode later that fall, but she did not say a word to a supervisor about it until sometime in May 2020. Exhibit 15, at p. 66; Exhibit 2, at 167:22-168:7. At minimum, at least five months passed and even then, Plaintiff did not disclose the name of her alleged harasser and, when told to file formal complaint, did not do so. Exhibit 15, at p. 67.

Plaintiff claims she kept quiet because she was afraid of retaliation, but there is no evidence of any credible threat of retaliation. Baxter County's anti-harassment policy contained an express anti-retaliation provision, *see* Exhibit 3, at p. 7, which undercuts any possible argument on that point. *See Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007). Plaintiff's contemporaneous conduct did not indicate that she was experiencing unwelcome harassment as it occurred, meaning her hostile work environment claim fails as a matter of law.

Moreover, a "sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998). "Harassment is actionable if it is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998) (internal quotation marks omitted). To clear the high threshold of actionable harm, Plaintiff must show that "the workplace [was] permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). "[O]ffhand comments[] and isolated incidents generally cannot amount to severe or pervasive harassment." *Klein v. McGowan*, 198 F.3d 705, 709 (8th Cir. 1999). To determine whether conduct objectively creates a hostile environment, the Court must examine the totality of the circumstances, including

"the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23.

Plaintiff will likely argue that she can create a dispute of fact for trial on her hostile work environment claim because she was sexually assaulted by Goode. There is no dispute that "at the summary judgment stage[,] the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Conolly v. Clark*, 457 F.3d 872, 876 (8th Cir. 2006). But to overcome a summary judgment motion, a "plaintiff may not merely point to unsupported self-serving allegations, but must substantiate allegations with sufficient probative evidence that would permit a finding in the plaintiff's favor." *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638 (8th Cir. 2005). Accordingly, district courts have held—and the Eighth Circuit has affirmed—that summary judgment is proper when a plaintiff attempts to resist summary judgment with his or her own affidavit testimony that lacks any corroborating evidence. *See, e.g.*, *Johnson v. Walmart Inc.*, No. 4:21-cv-558-JM, 2023 WL 4494238, at *2 (E.D. Ark. July 12, 2023); *Meeks v. Ark. Dep't of Human Servs.*, No. 4:15-cv-0662-KGB, 2017 WL 6513160, at *6 (E.D. Ark. Aug. 28, 2017), *aff'd sub nom. Meeks v. Dep't of Human Servs.*, 732 F. App'x 486 (8th Cir. 2018); *see also Argenyi v. Creighton Univ.*, 703 F.3d 441, 446 (8th Cir. 2013); *Collins v. Cash*, No. 6:18-cv-6028-SOH, 2019 WL 3219154, at *2 (W.D. Ark. July 17, 2019).

Courts hold similarly when a nonmoving party's own self-serving deposition testimony, is the only relevant summary judgment evidence offered on a topic. *See, e.g.*, *Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 945-46 (8th Cir. 1994) (stating a plaintiff failed to show pretext for discrimination because the plaintiff "presented no . . . evidence [of similarly situated coworkers] other than his own unsubstantiated allegations in deposition"); *Jackson v. Gen. Motors, LLC*, No. 4:18-CV-1243 RLW, 2020 WL 3469334, at *9 n.12 (E.D. Mo. June 25, 2020); *Woods*

v. K.R. Komarek, Inc., No. CV 15-4155(DSD/BRT), 2017 WL 2312868, at *6 n.12 (D. Minn. May 26, 2017); *Eckert v. Bowen*, No. 1:11-cv-211-LMB, 2013 WL 3884165, at *4 (E.D. Mo. July 26, 2013).

There is no video footage of the alleged sexual assault and, although Plaintiff sometimes secretly recorded her coworkers, there is no audio recording. Exhibit 2, at 61:8-62:18, 118:12-14. She did not report or reference the alleged sexual assault to anyone until after she was terminated. The only evidence of the alleged sexual assault is her own, self-serving deposition testimony, which by itself is not sufficient evidence for summary judgment purposes. Thus, the Court must reject any argument by Plaintiff that she can satisfy her burden with her deposition testimony recounting the alleged sexual assault.

If Court disagrees, it should nevertheless disregard the testimony because it directly conflicts with Plaintiff's prior, sworn testimony. *See Frevert v. Ford Motor Co.*, 614 F.3d 466, 474 (8th Cir. 2010). Plaintiff testified under oath at her grievance hearing on May 7, 2021, that she never had any sexual contact with Goode. Exhibit 13, at 62:6-10. The Court cannot not allow Plaintiff to contradict this unequivocal sworn testimony, years after the fact. *See Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365-66 (8th Cir. 1983) ("If testimony under oath, however, can be abandoned many months later by [subsequent sworn testimony], probably no cases would be appropriate for summary judgment. A party should not be allowed to create issues of credibility by contradicting [her] own earlier testimony."). Further, Plaintiff's deposition testimony on other subjects (such as various rumors about Goode she heard secondhand from other coworkers, and her belief that Goode revoked her gun-and-badge privilege after overhearing her report to the nurse that she was taking anti-anxiety medicine) is inadmissible and must be disregarded to the extent it is "made without personal knowledge, consist[s] of hearsay, or

purport[s] to state legal conclusions as fact." *Howard v. Columbia Pub. Sch. Dist.*, 363 F.3d 797, 801 (8th Cir. 2004).

Plaintiff identified ten text messages as the entirety of the inappropriate texts she received from Goode. Exhibit 2, at 224:4-225-6. Only three of those messages contain inappropriate photographs. *See generally* Exhibit 5. Although inappropriate for the workplace, those messages are isolated incidents that do not rise to the level of severity and pervasiveness needed to alter the conditions of Plaintiff's employment. The Eighth Circuit has rejected hostile-work-environment claims based on equally or more egregious facts. *See, e.g.*, *Cross v. Prairie Meadows Racetrack & Casino, Inc.*, 615 F.3d 977, 981 (8th Cir. 2010); *Anderson v. Family Dollar Stores of Ark., Inc.*, 579 F.3d 858, 862 (8th Cir. 2009).

Plaintiff performed her duties and worked all shifts unimpeded by the alleged harassment, which she cannot show was so intimidating, offensive, or hostile that it "poisoned the work environment." *See Scusa*, 181 F.3d at 967. Federal "anti-discrimination laws do not create a general civility code. Conduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of the law." *Shaver v. Indep. Stave Co.*, 350 F.3d 716, 721 (8th Cir. 2003). Moreover, "evidence of a hostile work environment falls flat in light of the fact that [Plaintiff repeatedly] engaged in the very type of conduct about which she now complains." *Id.*; *see also* Exhibit 15, at pp. 1-2, 31, 78-79; Exhibit 16. Thus, Plaintiff's harassment claim under section 1983 fails as a matter of law.

2. *Plaintiff's Retaliation Claim Fails as a Matter of Law Because Plaintiff Cannot Demonstrate that Goode Subjected Her to a Materially Adverse Action because She Engaged in Protected Conduct.*

Plaintiff's retaliation claim fares no better. "[S]ection 704(a) of Title VII may not be the basis for a retaliatory discharge claim in a § 1983 action." *Burton v. Ark. Sec'y of State*, 737 F.3d 1219, 1236-37 (8th Cir. 2013). Instead, section 1983 "provides a vehicle for redressing claims of

retaliation *on the basis of the First Amendment.*" *Id.* (emphasis in original). "The right to be free from retaliation is clearly established as a *first amendment* right and as a statutory right under Title VII; but no clearly established right exists under the *equal protection* clause to be free from retaliation." *Id.* (emphasis in original). Plaintiff does not allege that she was retaliated against in violation of her First Amendment rights. Accordingly, her section 1983 claim against Goode, individually, fails as a matter of law and must be dismissed with prejudice. *Id.*

Assuming *arguendo* that the Court finds otherwise, Plaintiff must show: (1) she engaged in protected conduct; (2) reasonable employees would have found the challenged retaliatory action materially adverse; and (3) the materially adverse action was causally linked to the protected conduct. *Weger*, 500 F.3d at 726. "The materially adverse action prong is objective, requiring us to consider whether a reasonable employee in the plaintiff's position might have been dissuaded from making a discrimination claim because of the employer's retaliatory actions." *Id.* (internal quotation marks omitted).

As discussed above, the Court should not consider the testimony regarding the alleged sexual assault at all because it lacks any independent, corroborating evidence and, alternatively, because it conflicts with Plaintiff's prior, sworn testimony. But even if the Court disagrees, the alleged assault cannot serve as a basis for finding retaliation because there is no evidence that Plaintiff engaged in any protected activity prior to the spring of 2019, and thus, there can be no causal link. *See Chivers v. Wal-Mart Stores, Inc.*, 641 F.3d 927, 933 (8th Cir. 2011).

Plaintiff made an informal, verbal, and vague complaint about harassment to Captain Lewis around May 2020, and she claims that Goode retaliated against her by giving her a negative performance evaluation in April 2021. Not only is a negative job evaluation, by itself, not a materially adverse action, *Sutherland v. Mo. Dep't of Corr.*, 580 F.3d 748, 752 (8th Cir. 2009), but, the performance evaluation by Goode was *positive*, rated Plaintiff as "meeting expectations"

overall, and recommended her for a merit pay increase. Exhibit 1, at pp. 26-27, 30. Plaintiff suffered no negative impact from the evaluation and cannot "characterize [it] as an *adverse* action, let alone a materially adverse one." *Weger*, 500 F.3d at 727 (emphasis in original). Moreover, the almost year-long gap between the complaint and the evaluation defeats any inference of causal connection.[15] *See Lewis v. St. Cloud State Univ.*, 467 F.3d 1133, 1138 (8th Cir. 2006); *Weger*, 500 F.3d at 727.

Plaintiff has also claimed that Goode retaliated against her by revoking her gun-and-badge privileges after overhearing her report to the nurse, but the only evidence of this is her own deposition testimony that did not establish her personal knowledge of that assertion, making that testimony inadmissible. Exhibit 2, at 179:15-25. Regardless, Plaintiff's privileges were revoked in accordance with the workplace drug policy. *See* Exhibit 3, at p. 4. Plaintiff provided a doctor's note the next day and her privileges were restored. She lost no shifts, pay, or benefits as a result. Exhibit 2, at 200:14-20. Thus, she did not experience a materially adverse action. *See Wagner v. Campbell*, 779 F.3d 761, 766-67 (8th Cir. 2015). And as before, the year-long gap between the protected activity and this event undercuts any value it has for Plaintiff's retaliation claim. *Lewis v. St. Cloud State Univ.*, 467 F.3d at 1138.

To the extent that Plaintiff argues Goode retaliated by being generally rude or unpleasant to her, that constitutes the type of "petty slights and snubs" that do not materially and adversely impact employees. *See Weger*, 500 F.3d at 728. Thus, that any such conduct is not retaliation. *Id.*

[15] Engaging in protected activity does not "insulate an employee from discipline for violating the employer's rules or disrupting the workplace." *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999). "Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of temporal proximity." *Hervey v. Cnty. of Koochiching*, 527 F.3d 711, 723 (8th Cir. 2008). Plaintiff's tendency to argue with supervisors was well documented by other supervisors prior to the April 2021 evaluation by Goode. *See* Exhibit 1, at pp. 4, 12-14.

Finally, to the extent that Plaintiff alleges her termination was retaliation, there is no evidence that Goode was a decisionmaker or was in any way a participant in the termination decision. Defendant Montgomery made that decision himself. Exhibit 13, at 7:7-15, 16:1-17, 55:12-18. Thus, Goode cannot be liable for retaliation based on Plaintiff's termination. *See Mahler v. First Dakota Title Ltd. P'ship*, 931 F.3d 799, 805 (8th Cir. 2019).

Any attempt to create an issue of fact on the section 1983 claim solely through Plaintiff's unsubstantiated and inadmissible deposition testimony should be disregarded, particularly where it is directly contradicted by her prior sworn testimony or objective medical records. *See Scott*, 550 U.S. 372, 380 (stating a court should not adopt version of facts "blatantly contradicted by the record" for purposes of a motion for summary judgment). Plaintiff cannot produce competent summary judgment evidence for her section 1983 claim against Goode, individually, which the Court should dismiss with prejudice.

C. Goode is Entitled to Summary Judgment on Plaintiff's State-Law Claims because Plaintiff Can Produce No Competent Evidence of Conduct Rising to the Level Required by Arkansas Law.

As a preliminary matter, if the Court dismisses Plaintiff's federal claims against Goode, as discussed above, it should also decline to exercise supplemental jurisdiction over Plaintiff's state-law claims against Goode, individually.

"[W]hen federal claims are resolved before trial, the normal practice is to dismiss pendent claims without prejudice." *Marianist Province of U.S. v. City of Kirkwood*, 944 F.3d 996, 1003 (8th Cir. 2019). The Court's dismissal of Plaintiff's section 1983 claim (and Title VII claim, if any) against Goode will leave only pendent state-law claims against him, individually. The Court should decline to exercise supplemental jurisdiction over those claims and dismiss them without prejudice.

But assuming *arguendo* that the Court reaches Plaintiff's outrage claim, it fails as a matter of law. In Arkansas, a claim under the tort of outrage requires proof on four essential elements:

> (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was extreme and outrageous, was beyond all possible bounds of decency, and was utterly intolerable in a civil community; (3) the actions of the defendant were the cause of plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it.

Kelley v. Georgia-Pac. Corp., 300 F.3d 910, 912 (8th Cir. 2002) (applying Arkansas law).

The question of whether conduct is so "extreme and outrageous" to be tortious is initially one of law, rather than fact, and the Court considers "the conduct at issue; the period of time over which the conduct took place; the relation between the plaintiff and defendant; and defendant's knowledge that plaintiff is particularly susceptible to emotional distress by reason of some physical or mental peculiarity." *Doe v. Wright*, 82 F.3d 265, 269 (8th Cir. 1996); *Givens v. Hixson*, 275 Ark. 370, 372, 631 S.W.2d 263, 264 (1982). Outrage is "an extremely narrow tort." *Silverman v. Vill.*, No. 5:17-cv-00329-JLH, 2019 WL 2881586, at *8 (E.D. Ark. July 3, 2019). "[T]he standard . . . to satisfy the elements of outrage in Arkansas 'is an exceptionally high one,'" and is even higher in employment cases like this one. *Doe*, 82 F.3d at 269. Plaintiff cannot carry her burden by demonstrating "insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Seals v. Corr. Med. Servs., Inc.*, 473 F. Supp. 2d 912, 925 (E.D. Ark. 2007). Moreover, "[m]erely describing certain conduct as outrageous does not make it so under Arkansas law." *Kelley*, 300 F.3d at 912.

Plaintiff's text messages and in-person communications with Goode do not rise to the level required for outrage. Crude, profane, and sexually inappropriate comments from coworkers—even when combined with a co-worker exposing his genitals—do not rise to a sufficient level for an outrage claim. *See Sharbine v. Boone Expl., Inc.*, No. 1:09-cv-1025-HFB, 2010 WL 892117, at

*1-3 (W.D. Ark. Mar. 9, 2010); *see also Burkhart v. Am. Railcar Indus., Inc.*, 603 F.3d 472, 474-75, 478 (8th Cir. 2010).

Like in *Sharbine* and *Burkhart*, the text message and in-person communications from Goode to Plaintiff, while inappropriate and unprofessional, are not so extreme and outrageous as to go beyond all possible bounds of decency and to be utterly intolerable in civilized society. This is particularly so in light of the ten identified text messages across a two-year period, only three of which contain sexual content from Goode. *See generally* Exhibit 5. Thus, to the extent that Plaintiff bases her outrage claim on those communications, it fails as a matter of law.

Plaintiff's unsubstantiated claims that Goode revoked her gun-and-badge privilege for one day when she reported taking prescription medication, and that he made untrue negative comments in an annual performance evaluation, are also insufficient to amount to outrage. The one-day revocation was in line with the workplace drug policy. *See* Exhibit 3, at p. 4. Plaintiff's April 2021 performance evaluation was a positive evaluation that recommended her for a pay increase and briefly noted the same issues documented in Plaintiff's evaluations dating back to 2019. Exhibit 1, at pp. 26-27, 29-31. An employer's intentional demotion, denial of raises, and issuance of a defamatory performance evaluation following an employee's workplace complaint is not outrage under Arkansas law. *See Puckett v. Cook*, 864 F.2d 619, 620, 622 (8th Cir. 1989). If that type of intentionally wrongful conduct is not considered outrage, neither can the legitimate, non-retaliatory instances Plaintiff complains of.

That leaves only the alleged sexual assault. As discussed above, Plaintiff's self-serving deposition testimony, without any other corroborating evidence, is insufficient summary judgment evidence to create a triable issue of fact on that issue. *Davenport*, 30 F.3d at 945-46; *Jackson*, 2020 WL 3469334, at *9 n.12. The Court should disregard Plaintiff's deposition testimony summary judgment evidence for that reason. Alternatively, the Court should disregard that testimony

because it plainly contradicts Plaintiff's unequivocal sworn testimony two years prior at her grievance hearing that she never had sexual contact with Goode. *See Frevert*, 614 F.3d at 474; *see also Camfield Tires, Inc.*, 719 F.2d at 1365-66. There is no evidence of conduct rising to the level required for Plaintiff's claim of outrage, which must be dismissed with prejudice.

For the same reasons, Plaintiff's claim under Ark. Code Ann. § 16-118-107, which provides a civil cause of action to someone injured by another person's felonious conduct, also fails. Plaintiff cannot present credible, competent, and admissible testimony regarding any alleged sexual assault by Goode. Accordingly, she cannot demonstrate felonious conduct. Her claim under Ark. Code Ann. § 16-118-107 therefore fails and must be dismissed with prejudice.

IV. CONCLUSION

The law and the undisputed facts are in Goode's favor. Plaintiff cannot present credible, competent, and admissible evidence establishing a genuine dispute of material fact on any of her claims against Goode, individually. No reasonable jury could find in Plaintiff's favor on those claims. Accordingly, Defendant Steven Goode, in his individual capacity, respectfully requests that the Court enter summary judgment in his favor and dismiss Plaintiff's claims against him with prejudice.

Respectfully submitted,

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