E-FILED
Monday, 05 March, 2018 04:47:16 PM
Clerk, U.S. District Court, ILCD

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

NICOLE BOGART,	)	
	)	
Plaintiff,	)	
v.	)	**Case No. 16-CV-1088**
	)	
MICHAEL MARRON, individually and in his official capacity as Vermilion County Board Chairman, and VERMILION COUNTY,	)	
	)	
Defendants.	)	

ORDER

Plaintiff, Nicole Bogart, filed her Amended Complaint (#19) on January 13, 2017, alleging that her rights under the First Amendment were violated when she was terminated from her position as Financial Resource Director of Vermilion County because of her political affiliation. Defendants[1], Michael Marron and Vermilion County, filed their Motion for Summary Judgment (#32) on December 1, 2017. Plaintiff filed her Response (#34) on January 11, 2018, to which Defendant's Reply (#35) was filed on January 25, 2018. For the following reasons, Defendant's Motion for Summary Judgment (#32) is GRANTED.

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[1]For simplicity's sake, since all the allegations involve the alleged actions of Defendant Marron, the court will refer to "Defendant" in the singular throughout this order, even though there are two Defendants.

BACKGROUND[2]

Plaintiff was the Financial Resources Director (FRD) of Vermilion County, Illinois, from July 2, 2007, until January 30, 2015. Plaintiff is a member of the Democratic Party and ran unsuccessfully for Vermilion County Recorder in 2012. Defendant Mike Marron was elected Vermilion County Board Chairman by the County Board on December 2, 2014. He is a member of the Republican Party.

Plaintiff's Hiring by Former County Board Chairman McMahon

In 2007, then-Vermilion County Board Chairman Jim McMahon, a Democrat, fired Tina Cravens, who had done some work for the Republican Party, from the FRD position. In July 2007, McMahon hired Plaintiff as FRD. McMahon knew that Plaintiff had previously served on the County Board as a Democrat. Plaintiff's employment offer stated that her employment would be considered at-will. Regarding Plaintiff's role in his administration, McMahon testified that he "couldn't keep from raising your taxes six years in a row without [Plaintiff]" and that he would not have been able to run a multimillion dollar government and not raise taxes without her.

Republicans Take Over the County Board

In December 2012, Republicans took control of the Vermilion County Board, and Gary Weinard became County Board Chairman. Weinard, a Republican, testified that fellow Republican Board members Chuck Mockbee and Dennis Miller wanted him to

[2]The background facts are taken from Defendant's Undisputed Statement of Material Facts in Defendant's motion, Plaintiff's Additional Facts in her Response, and the exhibits attached by the parties to their filings.

get rid of all the Democrats in the County Board Office, but he declined to do so. From 2012 to 2014, while Weinard was Chairman, Defendant was the County Board Vice Chairman. Plaintiff's duties did not change from 2012 through the end of 2014. In 2013, under Weinard's stewardship, there was a tax increase based on information provided by Plaintiff to Weinard.

The County Board Office and the Powers and Duties of the FRD Position

In 1985, the County Board restructured the County Board Office to have a full time Chairman, Human Resource Manager, Financial Resource Manager, Clerk/Typist II, and Executive Secretaries. The Board also approved an organization chart for the County Board Office, incorporated into Resolution 85-115, which placed the Financial Resource Manager (sometime before 2007, the Financial Resource Manager position was renamed Financial Resource Director) directly under the Finance Committee, a sub-committee of the County Board. At the end of 2014, when Defendant became Chairman, the County Board Office had six full time employees: the Executive Secretary (Terrie Sherer), the Civil Attorney (Bill Donahue), the Human Resource Manager (Nancy Boose), the Payroll Clerk (Nancy Brumfield), the FRD, and the Chairman.

The 2007 Position Classification Description[3], which was in effect when Plaintiff was hired, describes the job duties of the FRD and requires the FRD to report directly to the County Board Chairman and work at the direction of the Chairman. Plaintiff admitted she reported to the Chairman and worked at his direction. The 2007 description also included such duties as assisting the Finance Committee in their meetings and ensuring that information about the County's finances was available to all Board members. Plaintiff admitted that she did do this when she was FRD. The 2007 description also required the FRD to work with the County Treasurer, Auditor, and other department heads and elected officials in the day to day operations of the County so as to comply with generally accepted accounting practices and procedures as adopted by the Vermilion County Board. Plaintiff did this as well when she was FRD. In addition, Chairman McMahon testified that it was important that the FRD have a good working relationship with the County Auditor and Treasurer, two elected officials, so all the finances go smoothly.

Illustrative examples of FRD work from the 2007 description included: (1) developing both long and short-range financial plans involving revenue and expenditure projections; (2) conducting budget preparation, review, and control and

[3]Plaintiff objects to this exhibit, as well as Resolution 85-115, as "unauthenticated" and "hearsay." However, the Resolution is a signed resolution of the County Board, and attested to by the Vermilion County Clerk, and thus would qualify as a public record exception to the hearsay rule under Federal Rule of Evidence 803(8) and is self-authenticating under Rule 902. Further, the Position Classification Description was identified as such by Plaintiff herself and former Chairman McMahon at their depositions. The exhibits are admissible.

preparing the fiscal year budget for adoption and public review; (3) exercising ongoing budget analysis by tracking expenditures and reviewing requests for line-item transfers; (4) assisting in the operation of county purchasing policies; (5) coordinating the preparation of bid specifications; (6) coordinating the County accounting system including revenue, expenditures, and entries; (7) reviewing grant applications with federal funds through state agencies to determine compliance with applicable regulations; and (8) performing other related duties as assigned or required.

Plaintiff admitted that she participated in or was involved in some of the illustrative examples listed on the 2007 description, such as: developing long and short-range financial plans involving revenue and expenditure projections; conducting budget preparation, review, and preparing the final year budget for adoption and public review; and, exercising ongoing budget analysis by tracking expenditures and reviewing requests for line item transfers. However, as FRD, she reported and performed work at the direction of the Chairman. The Chairman relies on the FRD to compile information for the budgets, but it is the Chairman who gives directives to the FRD as to how he wants the budgets set up, i.e., if he will accept a tax increase or deficit. Plaintiff also testified that she did not review grant applications funded with federal funds through state agencies to determine compliance with applicable regulations. She also testified that she neither assisted in the operation of the County purchasing policies nor coordinated the preparation of bid specifics while she worked as FRD.

McMahon testified that Plaintiff was involved in all of the illustrative examples listed in the 2007 description, and was additionally responsible for the financial side of developing the County's health insurance program. Plaintiff, however, needed help from the Auditor when performing certain of those duties. According to McMahon, the FRD helps the Board Chairman prepare the budget and maintain budget accuracy throughout the year and is the accounting side of the County Board Office. Plaintiff testified that her other duties included annual budget preparation, participation in the annual audit, and overseeing and maintaining the County's insurance policies. Plaintiff had "significant input into the development of the health insurance program" on the financial side.

She also facilitated the creation of the County's $42 million budget. However, Plaintiff testified that she did not "control" the budget, but rather just put the budget together. She would send it to the Finance Committee, which could alter it at their pleasure, and she would then make the changes the committee dictated before it was sent to the full Board for approval. Plaintiff was also responsible for preparing the budgets for 25 of 26 County funds, such as Animal Control, Building and Grounds, EMA, workers' compensation, and liability insurance.

In 2012, former Chairman Weinard required Plaintiff to draft a document listing her duties as FRD. In response, Plaintiff listed the following duties:

- Conducts budget preparation, review and control. Prepares the fiscal year budget for public review and adoption, including creating 23 of the County's 109 budgets and monitors those budgets monthly, analyzing all 109 budgets and communicates concerns, changes, and historical data to

the County Board Chairman, the Finance Committee Chairman, and Auditor, and scrutinizes expenditures, continually seeking out savings and revenue opportunities.

- Coordinates the County's annual independent audit, including scheduling, preparing audit schedules and confirmations, and generally assisting in the process.

- Prepares the annual Management Discussion and Analysis report to analyze the financial health of the County and to explain the audit results.

- Oversees the County's insurance programs and maintains insurance policies, including preparing and distributing invoices to various departments for participation in funding various expenses such as workers' compensation, general liability, and unemployment insurance, and prepares monthly reconciliation of member payments and insurance charges for the County's Health Insurance Program, and distributes monthly invoices to collect funding from various sources.

- Prepares monthly invoices and processes rent and maintenance payments for the Danville Public Building Commission for reimbursement of Public Safety Building and Juvenile Detention Center expenses.
- Tracks/Invoices salary reimbursements that are General Fund Revenue for the Public Defender, Probation, Juvenile Detention Center, State's Attorney, Supervisor of Assessments, and Workforce Investment Board.

Weinard testified that Plaintiff completed all of these duties. The Board Chairman relied on the FRD's ability and expertise to complete the duties as outlined in the Duties of FRD document compiled by Plaintiff. The Chairman also relied on the information provided by the FRD in order to determine whether he would accept a tax increase or not, or a deficit or not. Weinard testified that Plaintiff, in her role as FRD, had a lot of input in the direction of the County budget. Weinard further testified that it

was important for the Chairman to be able to trust the FRD to provide accurate information, and to trust the person in the FRD position. The FRD is a confidential position in relation to the Chairman.

Both Defendant and Weinard testified that the FRD serves as the finance advisor to the Chairman and the County Board. Defendant described the FRD's duties to include meeting with department heads to develop their budgets, helping the Chairman to craft the County budget, and implementing tax strategies. The FRD is instrumental in the formulation of the Board Office's policy concerning the budget, and is the Chairman's chief policy advisor.

However, Weinard also testified that it is the Chairman who has the authority to draft budgets, set budgetary goals, and approve budgets before they are sent out to the various County committees for approval. He also testified that the FRD does not have the power to make County policies and that the FRD position did not grant broad discretion over County budget or financial planning. Weinard also stated that Plaintiff, in her position as FRD, did not have any power to thwart or block the political goals of the Chairman or those of the Republican Party. He further testified that Plaintiff's political affiliation did not interfere with her ability to do her job, and that being the same political party as the Chairman of the Board was not a requirement for the position of FRD.

The FRD Position in Relation to the County Treasurer and Auditor

In Vermilion County, the Auditor was responsible for the expenses and balanced them with the budget. The Treasurer had control over the cash balances in the County's account, wrote checks, and reconciled the accounts. It was a general and routine practice of the County Board that Plaintiff make a transfer of funds without prior approval where the Auditor gives notification of an overdrawn account. Monitoring and notifying regarding overdrafts of the County accounts are the duties of the Treasurer, not the FRD.

County Personnel Policies

The Vermilion County Personnel Policies and Procedures was approved by the County Board in 1991 and revised in 2006. The policies were provided to County employees "as a tool to communicate personnel policies and procedures and provide a source of authority for reference and guidance." The policies state that, unless "exempted by County ordinance, union contracts, federal or state statute, all persons engaged in County service are subject to these policies and procedures, including department/agency heads, officeholders and administrative personnel." The policies further state that they are not intended to create a contract of employment, but rather are "a policy and information guide to guide employees." The policies also contain several anti-discrimination and equal opportunity employment statements. While the policies do not have a definitions section, Article 4 is entitled "Employee Classifications," and includes classifications for appointed and elected officials,

including the Chairman. Article 14.01 of the policies concerns political influence, and states:

> No employee of Vermilion County shall be subject to direct or indirect political influence or coercion. Employees are not required to participate in or contribute financially to political campaigns. Political affiliation or support is not a contingency for employment with Vermilion County.

Political Maneuvering

At some point after he became Chairman in 2012, Weinard told Plaintiff and other County employees, on numerous occasions, that Defendant was pressuring him to terminate Plaintiff. He told Auditor Linda Anstey that he was getting a lot of pressure to fire Plaintiff. There were at least two other Republican Board members pressuring Weinard to fire Plaintiff. They wanted to "clean house" and get rid of Democrats in the in the County Board Office after Republicans took over the County Board. Weinard told Defendant that he was approached by them in regard to Plaintiff's termination, but that he had no intention to dismiss anyone. Weinard resigned as Board Chairman effective on December 31, 2014, and was succeeded in that position by Defendant. One month later, on January 30, 2015, Defendant terminated Plaintiff's employment as FRD.

Defendant held many elected positions and worked on the County Board for many years. He also worked with Plaintiff before he became the Board's Chairman. Defendant became familiar with the County's personnel policies after becoming Chairman in December 2014. He is also familiar with the fact that public employees

have certain rights within the workplace, and that First Amendment rights in the U.S. and Illinois Constitutions grant the right to run for a political office. He further testified that he recognized that for a government employer to terminate a government employee for running for political office would be unlawful.

Procedural History of This Case

Plaintiff filed her original Complaint (#1) on March 18, 2016. Following this court's granting in part and denying in part a Motion to Dismiss (#16), Plaintiff filed an Amended Complaint (#19) on January 13, 2017. The Amended Complaint alleged seven counts against Defendant: Counts I and II- violations of the Illinois Local Government Employees Political Rights Act (50 Ill. Comp. Stat. 135); Count III- state law retaliatory discharge; Count IV- violation of the First Amendment to the U.S. Constitution's rights of freedom of speech and assembly based on political belief; Count V- violation of freedom of speech, assembly, and petition under the Illinois Constitution; Count VI- deprivation of constitutional rights under the Illinois Election Code (10 Ill. Comp. Stat. 5/29-17); and Count VII- violation of the Equal Protection Clause of the U.S. Constitution pursuant to 42 U.S.C. § 1983. Defendant filed another Motion to Dismiss (#21) concerning only Count VII, the Equal Protection claim, which this court granted in an order (#24) on March 6, 2017. Counts I through VI of the Amended Complaint remain pending. This instant summary judgment motion

concerns only Count IV, the U.S. Constitution First Amendment claim. If the court grants the motion as to Count IV, Defendant asks the court to send the remaining Illinois state claims to Illinois state court.

ANALYSIS

Defendant argues that the undisputed facts demonstrate that political loyalty was a valid qualification for the FRD position and, thus, Plaintiff's termination is not actionable under the First Amendment to the U.S. Constitution. Alternatively, Defendant argues that he is entitled to qualified immunity, as the law on this issue is not clearly established. Plaintiff responds that there is ample evidence that political affiliation was not required for the FRD position, and that Plaintiff's role and authority were actually passive and limited. Plaintiff further argues that Defendant is not entitled to qualified immunity because it is "clearly established under both the U.S. and Illinois Constitutions that termination based on political belief is unlawful."

Summary Judgment Standard

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." Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In ruling on a motion for summary judgment, a district court "has one task and one task only: to decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial." *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). In making this determination, the court must construe the evidence in the light

most favorable to the nonmoving party and draw all reasonable inferences in favor of that party. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Singer v. Raemisch*, 593 F.3d 529, 533 (7th Cir. 2010). However, a court's favor toward the nonmoving party does not extend to drawing inferences which are only supported by speculation or conjecture. See *Singer*, 593 F.3d at 533. In addition, this court "need not accept as true a plaintiff's *characterization* of the facts or a plaintiff's legal conclusion." *Nuzzi v. St. George Cmty. Consol. Sch. Dist. No. 258*, 688 F. Supp. 2d 815, 835 (C.D. 2010) (emphasis in original).

The party opposing summary judgment may not rely on the allegations contained in the pleadings. *Waldridge*, 24 F.3d at 920. "[I]nstead, the nonmovant must present definite, competent evidence in rebuttal." *Butts v. Aurora Health Care, Inc.*, 387 F.3d 921, 924 (7th Cir. 2004). Summary judgment "is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events." *Koszola v. Bd. of Educ. of City of Chicago*, 385 F.3d 1104, 1111 (7th Cir. 2004), quoting *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). Specifically, to survive summary judgment, the nonmoving party "must make a sufficient showing of evidence for each essential element of its case on which it bears the burden at trial." *Kampmier v. Emeritus Corp.*, 472 F.3d 930, 936 (7th Cir. 2007), citing *Celotex Corp.*, 477 U.S. at 322-23.

Waiver

As a preliminary matter, Plaintiff argues that Defendant waived the affirmative defense of *Elrod-Branti* because it was not raised in Defendant's Answer (#20) to Plaintiff's Amended Complaint, in violation of Federal Rule of Civil Procedure 8(c). Plaintiff makes a similar argument with regard to the "small office exception" to First Amendment protection from patronage firings.

Rule 8(c) states that, in responding to a pleading, a party must affirmatively state any avoidance or affirmative defense. Rule 8(c) then goes on to list numerous affirmative defenses as examples, but the *Elrod-Branti* exception, which is an exception to the general rule that public employees cannot be terminated for political reasons, is not among the list. While the Seventh Circuit has not addressed whether *Elrod-Branti* or the small office exception must be pled under Rule 8, at least one district court has held that failure to raise *Elrod-Branti* as an affirmative defense in an answer does not bar it from being raised in support of a motion for summary judgment. See *Rouse v. Nielsen*, 851 F.Supp. 717, 727-28 (D.S.C. 1994). Further, the Seventh Circuit has held "that a delay in asserting an affirmative defense waives the defense only if the plaintiff was harmed as a result[,]" i.e. that a plaintiff was in some way "prejudiced" by the defendant's failure to include the affirmative defense in their answer. *Curtis v. Timberlake*, 436 F.3d 709, 711 (7th Cir. 2005). The Seventh Circuit has recently stated that "'the rule that forfeits an affirmative defense not pleaded in the answer (or by an earlier motion) is, we want to make clear, not to be applied rigidly.'" *Garofalo v. Village of Hazel*

Crest, 754 F.3d 428, 436 (7th Cir. 2014), quoting *Matthews v. Wisconsin Energy Corp., Inc.*, 642 F.3d 565, 570 (7th Cir. 2011).

Here, while the *Elrod-Branti* affirmative defense was not raised in Defendant's February 3, 2017 Answer (#20), it was raised (and extensively briefed) in the earlier Motion to Dismiss (#16) concerning Plaintiff's original Complaint, which was filed on July 18, 2016. Thus, this affirmative defense was pleaded in an "earlier motion," and should not be forfeited under Rule 8(c). See *Garofalo*, 754 F.3d at 436. Plaintiff has been on notice of this defense since at least July 2016, and, based on how thoroughly the issue is addressed in Plaintiff's Response (#34) to Defendant's Motion for Summary Judgment, and how it was the focal point for much of the deposition testimony and discovery utilized by both parties, Plaintiff cannot argue that she was surprised or prejudiced in any way by the defense's inclusion in Defendant's summary judgment motion. Indeed, Plaintiff must have been expecting it. The court further agrees with Defendant that the small office exception should not be barred because it is not a separate defense from *Elrod-Branti*, but rather an alternative argument for *Elrod-Branti*'s application. See *Meeks v. Grimes*, 779 F.2d 417, 422-23 (7th Cir. 1985); *McReynolds v. Martin*, 2007 WL 2669565, at *4 (C.D. Ill. Aug. 14, 2007).

First Amendment

The court turns first to Defendant's argument that Plaintiff's dismissal did not violate the First Amendment to the U.S. Constitution, because it fell within the *Elrod-*

Branti exception to that amendment's prohibition on employment termination for political reasons.

"As a general matter, political patronage dismissals violate the First Amendment." *Embry v. Calumet City, Ill.*, 701 F.3d 231, 235 (7th Cir. 2012). However, while the First Amendment, in general, prohibits state employers from terminating the employment of a worker on the basis of her political beliefs, there is an exception to this rule for certain government positions where political affiliation is an appropriate requirement for employment. *Moss v. Martin*, 614 F.3d 707, 710 (7th Cir. 2010). This exception grows out of the U.S. Supreme Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980), and is known as the *Elrod-Branti* exception. *Elrod-Branti* applies to positions where the job involves the making of policy and thus the exercise of political judgment; the provision of political advice to the elected superior; or to jobs (such as speechwriting) that give the office holder access to his or her political superiors' confidential, politically sensitive thoughts. *Riley v. Blagojevich*, 425 F.3d 357, 359 (7th Cir. 2005).

For "policymaking jobs," the government employer's need for political allegiance outweighs the employee's freedom of expression, and thus the employees in policymaking positions may be fired solely because of their political affiliation, and this exception applies not only when a new political party takes power, but also includes patronage dismissals when one faction of a party replaces another faction of the same party. *Embry*, 701 F.3d at 235. The policymaker exception to *Elrod-Branti* protects

elected officials from the risk that employees politically opposed to them might undermine their policies. *Hagan v. Quinn*, 867 F.3d 816, 825 (7th Cir. 2017). However, identifying the jobs that fall into the exception "is no mean feat[,]" as almost all jobs in government above the lowest levels require the holder of the job to exercise at least a modicum of discretion. *Riley*, 425 F.3d at 359.

The Seventh Circuit has written:

> An employee holds a policymaking position when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518, 100 S.Ct. 1287. Political allegiance is a valid job requirement when "the position authorizes, either directly or indirectly, meaningful input into government decisionmaking on issues where there is room for principled disagreement on goals or their implementation." *Davis v. Ockomon*, 668 F.3d 473, 477 (7th Cir. 2012) (citation omitted). Discretion is also important: when an employee exercises broad discretionary power, the state cannot easily fire the employee for insubordination even though "the employee's performance frustrates the implementation of the administration's policies." *Selch v. Letts*, 5 F.3d 1040, 1044 (7th Cir. 1993). We examine the powers inherent in the office when considering whether an employee holds a policymaking job, even if the employee never actually exercises those powers. *Tomczak v. City of Chicago*, 765 F.2d 633, 640–41 (7th Cir. 1985) (citations omitted); see also *Riley*, 425 F.3d at 360–61.

Embry, 701 F.3d at 235-36.

While the question of whether a position is exempted from the First Amendment patronage dismissal ban is a factual one that should ordinarily be left for a jury to determine, in some cases, the duties and responsibilities of a particular position are clearly outlined by law. *Pleva v. Norquist*, 195 F.3d 905, 912 (7th Cir. 1999). In such

cases, the court may make the determination, as a matter of law, that a certain position involves policymaking. *Pleva*, 195 F.3d at 912.

The Seventh Circuit has urged district courts to use job descriptions, whenever possible, to apply *Elrod-Branti*. *Allman v. Smith*, 790 F.3d 762, 765 (7th Cir. 2015). The court is to look to what the employee *usually* did, not what duties were conceivable under unlikely conditions, because it is the position's normal duties that matter. *Allman*, 790 F.3d at 765-66. Elected officials may rely on official job descriptions to determine the inherent powers of a given office and whether these duties render political loyalty appropriate, and, without some basis for thinking the official job description is systematically unreliable, the job description is the "pivot on which the case turns," even if a plaintiff is prepared to self-servingly testify that a job description is inaccurate. *Davis*, 668 F.3d at 478, quoting *Riley*, 425 F.3d at 360-61. "By relying on the job description, a protracted and likely inconclusive factual inquiry could be avoided." *Davis*, 668 F.3d at 478.

In this instance, the court has recent job descriptions for the Vermilion County FRD position: the 2007 FRD Position Classification Description attached Exhibit G to Defendant's Motion for Summary Judgment (#32), and Plaintiff's 2012 memorandum listing her duties as FRD, attached as Exhibit H to Defendant's motion. The 2007 Position Classification states, in relevant part, that the FRD reports to and performs work at the direction of the County Board Chairman, and assists the Finance Committee in their meetings. The FRD also assists the County Treasurer, Auditor, and other

department heads in the day-to-day operations of the County. Relevant illustrations of the FRD's work include: developing long and short-term financial plans; conducting budget preparation, review, and control; exercising on-going budget analysis by tracking expenditures and reviewing requests for line-item transfers; coordinating the preparation of bid specifications and assisting in operation of County purchasing policies; and reviewing grant applications to determine compliance with applicable regulations. Among the skills, knowledge, and abilities necessary for the job, is the ability to "plan and direct fiscal and business service." The FRD is also required to have extensive knowledge of the functions of County government and to have the ability to establish and maintain satisfactory working relationships with subordinates, County departments, and the general public.

In her 2012 memorandum explaining the FRD's duties, Plaintiff notes that she creates 23 of the County's 109 budgets, and analyzes all 109 budgets "and communicates concerns, changes and historical data to the Chairman of the Board, Chairman of the Finance Committee, and Auditor." The FRD also prepares the annual management discussion and analysis report to analyze the financial health of the County and to explain the audit results. The FRD also "[o]versees the County's insurance programs and maintains insurance policies."

The court finds that the relevant duties, as listed in the 2007 Position Classification Description and the 2012 memorandum, qualify the Vermilion County FRD position as one with policymaking authority. The relevant inquiry into whether a

position has policymaking authority is whether the a person in the position has "meaningful input into government decisionmaking." *Warzon v. Drew*, 60 F.3d 1234, 1240 (7th Cir. 1995).

Here, the job descriptions reveal that Plaintiff developed long and short-term financial plans as well as preparing, reviewing, and controlling the County budget. Preparing and controlling the budget is a significant task, one that would provide the FRD with substantial input into how the County is governed. The 2012 memorandum expands upon this duty, noting that the FRD not only creates 23 of Vermilion County's 109 departmental budgets, but that the FRD "communicates concerns, changes and historical data to the Chairman of the Board, Chairman of the Finance Committee, and Auditor" for *all* of the County's budgets. By communicating concerns to the Chairman about the budget, the FRD, as the resident expert on the County budget, is providing meaningful input into County operations, even if the Chairman disregards that advice. See *Warzon*, 60 F.3d at 1240. In directing her concerns and possible solutions to her superior, Plaintiff had considerable input into government decisionmaking and the implementation of goals stemming from that process. See *Allen v. Martin,* 460 F.3d 939, 945 (7th Cir. 2006) ("[i]n directing these concerns and possible solutions to his superior, the Director of Finance and Administration, the Bureau Chief has considerable input into government decisionmaking and the implementation of goals stemming from that process.").

This shows that the FRD had wide policymaking responsibilities in financial and budgetary matters. This responsibility for the preparation of the county budget, and oversight of said budget (including accounting and auditing), "provides ample evidence of the policymaking nature of her position, as such decisions may be quite personal and contentious." *Nader v. Blair*, 549 F.3d 953, 960 (4th Cir. 2008); see also *Blair v. Meade*, 76 F.3d 97, 100 (6th Cir. 1996) ("Money consistently plays a very important role in politics. As a result, budgetary decisions are among the most significant, and the most political, actions which government officials take."); *Cordero v. Jesus-Martinez*, 867 F.2d 1, 13-14 (1st Cir. 1989) (upholding political patronage firing of financial director).

The FRD's duties also included, according to the 2012 memorandum, oversight and maintenance of the County's insurance programs. The oversight and maintenance of a county's insurance programs is a large responsibility, a broadly phrased duty that could include many opportunities for meaningful input into governmental decisionmaking. See *Warzon*, 60 F.3d at 1240 (plaintiff's position as financial manager and administrator of county health care plan, who had authority to hire consultants and submit proposed budgets for and reports on status of the health care plan, was factor weighing in favor of finding plaintiff was a policymaker).

Further, the FRD's position in terms of preparing and controlling the budget is a policymaking position of great *political* importance to the County and the Chairman. Both the 2007 Position Classification Description and 2012 memorandum make clear that the FRD reports to and performs work at the Chairman's direction, and the 2007

Position Description notes that it is required for the FRD to establish and maintain a "satisfactory working relationship" with others. Although not listed, this would undoubtedly refer to the County Board Chairman to whom the FRD reports and works with closely in the "preparation, review, and control" of the Vermilion County budget. Based on the job descriptions, the FRD position is one of primary importance in structuring and maintaining the financial landscape of Vermilion County, an impression reinforced by the testimony of the former Board Chairman McMahon that he could not have kept from raising taxes for six years without Plaintiff. Budget issues, deficits, and taxes are central to the political discourse surrounding government at the county level. Thus, the effective and reliable execution of the FRD's budget function and financial function is of great political value. See *Allen*, 460 F.3d at 945.

A primary function of county government, including Vermilion County, is the preparation of a county budget, as well as long-term financial plans involving revenue and expenditure projections for the county and county purchasing operations. Office holders of opposing political parties could reasonably differ on how best to provide or to prioritize these services. While ultimately all might be expected to agree on the end result, there is ample room for principled disagreement in the development and implementation of plans to achieve that goal. Therefore, even if the court were to determine that Plaintiff was terminated due to her political affiliation, because her position was such that her political affiliation was a legitimate and relevant

consideration, the *Elrod-Branti* exception would apply. See *Bagienski v. Madison County, Ind.*, 484 F.Supp.2d 938, 950 (S.D. Ind. 2007).

Plaintiff argues that (1) the 2007 Position Classification Description and 2012 memorandum are not reliable, and (2) that the job description in those documents is not clear enough to warrant summary judgment. Thus, Plaintiff argues, the court can look beyond the job descriptions to evidence adduced during discovery, and that evidence demonstrates that a genuine issue of material fact exists concerning whether the FRD position qualifies for the *Elrod-Branti* exception.

In evaluating whether the FRD position is one for which political affiliation is an appropriate criterion, the court focuses on the inherent powers of the office as presented in the official job description, and it may only look past the job description if Plaintiff can demonstrate some systematic unreliability in that description. See *Allen*, 460 F.3d at 944; *Moss v. Martin*, 473 F.3d 694, 699 (7th Cir. 2007). To show such systematic unreliability, Plaintiff must provide specific facts demonstrating that the description was unreliable and unauthoritative. *Moss*, 473 F.3d at 699.

Here, in terms of reliability, Plaintiff argues only that the 2007 Position Classification Description is ten years old, and that there is no evidence the 2012 memorandum, prepared by Plaintiff at the direction of then-County Board Chairman Weinard, ever became official. The court finds these arguments to be unavailing. The 2012 memorandum was prepared by Plaintiff herself, at the direction of the County Board Chairman, and reinforced and detailed the duties outlined in the 2007

description. It was not prepared in anticipation of litigation, or manipulated to suit some other purpose. There is no reason to doubt the 2012 memorandum's reliability. Further, the 2007 description is ten years old, but the Seventh Circuit, in *Allen*, upheld the reliability of a job description that was nearly twenty years old. *Allen*, 460 F.3d at 944. Rather, to show unreliability, Plaintiff must demonstrate, for example, that the "description has been manipulated in some manner by officials looking to expand their political power," and the court must look to see if the document bears any outward indications of having been recently manipulated to be suddenly drawn within the realm of policymaking. *Allen*, 460 F.3d at 944. Neither the 2007 description or the 2012 memorandum evince such manipulation, and Plaintiff has not argued as much. Therefore, the court finds the job description to be reliable.

Plaintiff next argues that the job description itself is vague and does not establish that Plaintiff is required to exercise her political judgment in the FRD position. Plaintiff argues that she only provided professional judgment and information "as an accountant" by preparing budgets in accordance with the Chairman's own policy goals. Plaintiff argues that the evidence shows Plaintiff did not have any discretion or authority as to budget planning, because she had to alter the budget to reflect changes made by the Finance Committee, was only responsible for preparing numbers for budgets that were general to the County, and that each department head was responsible for his or her own budget.

Plaintiff's arguments are not persuasive. First, Plaintiff is, again, relying heavily on her own affidavit and evidence adduced through discovery, as opposed to the job description itself. Because the job description has not been shown to be unreliable, the court, on summary judgment, does not look beyond the FRD's official job description to consider the tasks actually performed by Plaintiff. See *Allen*, 460 F.3d at 944. Plaintiff has not pointed to any portion of the 2007 Position Classification Description or 2012 memorandum themselves to support her argument, arguing only "[l]ooking at the text of the description alone, a reasonable inference can be drawn that the position does not involve policymaking." That statement is not followed up on or developed any further. Rather, Plaintiff argues that she only acted as an accountant, putting together a budget and presenting it to the Finance Committee, and if the Committee had disagreements, reformulating the budget to conform to their demands (again, this is not in the job description, but from deposition testimony). However, it is not the ability to advance one's own policy goals contrary to the goal's of one's superior that is the test for determining the appropriateness of considering political affiliation in government hiring, but rather the court looks to the ability to offer input into government decisionmaking. *Allen*, 460 F.3d at 945; *Warzon*, 60 F.3d at 1240. As noted above, the job descriptions clearly show that Plaintiff, as FRD, prepared and controlled the budget, and thus had the opportunity to offer substantial input into County operations.[4]

[4]Even if the court had looked beyond the job description, Plaintiff's own words indicate that she exercised much authority and discretionary policy decisionmaking as FRD. She admitted that she was responsible for developing long and short-term

Plaintiff cites to the Seventh Circuit's decision in *Carlson v. Gorecki*, 374 F.3d 461 (7th Cir. 2004) to support her argument that the FRD position does not qualify under the *Elrod-Branti* exception. In *Carlson*, an investigator for the state's attorney's office was fired by the new state's attorney. The defendant argued that the fired investigators qualified under *Elrod-Branti* because they were policymakers or confidential employees. The Seventh Circuit disagreed, noting that by focusing solely on whether the investigator position fit within the policymaker or confidential label, she was ignoring "the broader and determinative question of whether party or political affiliation [was] an appropriate requirement for the job." *Carlson*, 374 F.3d at 465. The court also noted that "there is sufficient evidence in the record to defeat [the defendant's] motion for summary judgment, including [the first assistant state's attorney's] deposition, indicating that political affiliation was not important to the job." *Carlson*, 374 F.3d at 465. The court went on to focus on the policymaking and confidential nature of the job, looking to both to the historical treatment of the job and to the work performed by those

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financial plans for the County involving revenue and expenditure projections, and was responsible for preparing around 25 budgets. She also testified that she oversaw and maintained the County's insurance policies, which included speaking to two different County Board Chairmen about trying to have the County switch to a different insurance provider. Such control and input over the insurance policy weighs strongly in favor of finding the FRD position falls under *Elrod-Branti*. See *Warzon*, 60 F.3d at 1240. Further, Chairman Weinard testified that Plaintiff had a lot of input in the direction of the budget, a key factor in determining that the FRD position falls under the *Elrod-Branti* exception. See *Allen*, 460 F.3d at 945; *Warzon*, 60 F.3d at 1240. On the whole, the testimonial evidence beyond the job description establishes that the FRD position was one that included considerable discretion, authority, and discretionary political decisionmaking.

who presently held the position to determine the inherent nature of the job, finding that the tasks performed by the investigators were almost exclusively ministerial. *Carlson*, 374 F.3d at 465.

Carlson is distinguishable from the circumstances confronting the court in this case. First, and most crucially, there does not appear to have been a written job description in *Carlson*, unlike in the instant case. The absence of such a description allowed the court to go to deposition testimony, and also to examine the "historical treatment of the job" and the "work performed by those" who presently held the position to determine the nature of the job. Further, the court found that, based on the evidence, the job at issue was almost exclusively "ministerial." By contrast, in this case, where the court does have an official job description, that description demonstrates that the job allows for significant input into policy, *i.e.* creation, control, and presentation of the County budget and long-range and short-term financial plans.

Finally, Plaintiff argues that the County's policy banning political patronage practice is relevant to evaluate the FRD position. Article 14 of the County's Personnel Policies states that no Vermilion County employee should be subject to direct or indirect political influence or coercion, and that political affiliation or support is not a contingency for employment in Vermilion County. Plaintiff argues that this policy sheds light on the nature of the FRD job, and that, because the job descriptions do not clearly establish that political affiliation is a requirement for the position, the court should look to this additional evidence in its analysis.

In support, Plaintiff cites to the Seventh Circuit's decision in *Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006). In *Fuerst*, the court determined that there was a genuine issue of material fact as to whether sheriff's department sergeants were policymaking officials under *Elrod-Branti*, as they had "modest supervisory authority and excercise[d] a broader discretion than the deputy sheriffs," but they did not formulate departmental policy. *Fuerst*, 454 F.3d at 773. The court also wrote that it was "worth noting" that a Wisconsin statute provided that "no law enforcement officer may be prohibited from engaging in political activity when not on duty or not otherwise acting in an official capacity, or be denied the right to refrain from engaging in political activity." *Fuerst*, 454 F.3d at 773. The court found this made clear that sergeants were not expected to be political loyalists of the sheriff. The court found that the Wisconsin statute, in effect, amended the job description, which the court found was vague. *Fuerst*, 454 F.3d at 773. The court stated that the statute was relevant to the sergeant's "appeal not because the statutory provisions may confer legally enforceable rights on him, an issue of state law that is not before us, but because they cast additional light on the nature of the sergeant's job." *Fuerst*, 454 F.3d at 773.

Plaintiff also briefly cites to the Illinois Local Government Employees Political Rights Act (LGEPR), which states:

> (a) No unit of local government or school district may make or enforce any rule or ordinance that in any way inhibits or prohibits any of its employees from exercising the employee's political rights.
> (b) No employee of a unit of local government or school district may (I) use his or her official position of employment to coerce or inhibit others in

> the free exercise of their political rights or (ii) engage in political activities while at work or on duty.

50 Ill. Comp. Stat. 135/10.

The court agrees with Defendant that *Fuerst* and the LGEPR do not apply in this situation. First, the court has found that the job description at issue is clear, and that must be the measure with which the court determines if Plaintiff was a policymaker for purposes of *Elrod-Branti*. In *Fuerst*, by contrast, hardly any job description was cited by the court, which, in any event, referred to the job description as "vague."[5] *Fuerst*, 454 F.3d at 773. Further, were the court to apply the ordinance in question and LGEPR to override the clear job description, this would have the effect of nullifying the *Elrod-Branti* exception for *any and all* local government employees in Vermilion County and the state of Illinois, no matter how obviously confidential, discretionary, and politically sensitive their position. Plaintiff has cited to no Seventh Circuit decision embracing such an expansive view of the LGEPR, or even *Fuerst.* Therefore, the court finds that judgment should be granted in favor of Defendant.

Qualified Immunity

The court further finds that Defendant Marron is entitled to qualified immunity. In a qualified immunity analysis, a court must decide (1) whether the facts that a

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[5]It should also be noted that the Wisconsin statute at issue in *Fuerst* specifically concerned law enforcement officers. The *Fuerst* case involved a sheriff's department sergeant. This is a decidedly less political/policymaking position than the FRD position in the instant case, a position that prepares and controls and offers input on the County budget.

plaintiff has alleged or shown make out a violation of a constitutional right, and, (2) if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Thus, qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Pearson*, 555 U.S. at 232. "In other words, 'existing precedent must have placed the ... constitutional question beyond debate.'" *Abbott v. Sangamon County, Ill.*, 705 F.3d 706, 725 (7th Cir. 2013), quoting *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012).

Even if the court were operating on the assumption that Plaintiff's discretion was sufficiently circumscribed and her authority removed enough from the confidential or policymaking realm within Vermilion County that the job would not have been covered by *Elrod-Branti*, the court still needs to ask whether it was clearly established at the time that Defendant fired Plaintiff that such an action would violate her First Amendment rights. See *Moss v. Martin*, 614 F.3d 707, 712 (7th Cir. 2010). The court thus cannot rely on the broad proposition that the First Amendment protects against certain political patronage firings; it must instead look to see if the violation was clear in the specific context of the case. *Moss*, 614 F.3d at 712. This does not necessarily require Plaintiff to find a factually indistinguishable case on point, but if there is no such case, then she needs to offer a different explanation for why the constitutional violation is obvious. *Moss*, 614 F.3d at 712.

Plaintiff has cited to no closely analogous case in support of her argument against qualified immunity. Instead, Plaintiff (1) argues that it is well established that public employees cannot be terminated based on their political beliefs under the U.S. and Illinois Constitutions and (2) points to Defendant's knowledge of the County's policy against political patronage firings and Defendant's testimony during the deposition that he knew that terminating a public employee for running for political office was unlawful.

As noted, given the indefinite nature of the application of *Elrod-Branti* to political patronage dismissal cases, which largely turns on the facts of each particular case, it cannot be said that Plaintiff's termination violated a clearly established constitutional right. See *Brown v. Smith*, 6 F.Supp.3d 974, 985 (S.D. Ind. 2014); *Moss*, 614 F.3d at 712. Further, with regard to Defendant's admissions during the deposition, the actual question posed to Defendant was "[a]nd you recognize as well that, *just as a general matter*, that for a government employer to terminate a government employee for running for political office would be unlawful, correct?" That, "as a general matter," a public employee cannot be terminated for political reasons is well settled. But the question posed to Defendant did not implicate or even mention the *Elrod-Branti* exception, or whether the FRD was a policymaking position. Defendant's "admission" on this point weighs little in finding that the right was "clearly established." Therefore, even if there was a question of material fact as to whether the FRD position fell somewhere between a strictly menial governmental worker and a political

policymaking position, it could not be said that Plaintiff's termination was an obvious violation of a constitutional right such that Defendant Marron should not personally be protected by qualified immunity. See *Brown*, 21 F.Supp.3d at 985.

State Law Claims

Defendant argues that, if the court grants summary judgment in his favor on Plaintiff's First Amendment claim, it should decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367(c)(1) over the remaining Illinois state law claims and send those claims to state court. Plaintiff has failed to respond to this argument, so any argument she would have in opposition is waived. *Palmer v. Marion County*, 327 F.3d 588, 597-98 (7th Cir. 2003).

The usual practice in the Seventh Circuit is for district courts to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial, and as Plaintiff has offered no argument to justify a departure from this usual course, the court finds the questions presented by the state law claims are questions best left for an Illinois court to resolve. See *Hagan*, 867 F.3d at 830. The state law claims are dismissed without prejudice.

IT IS THEREFORE ORDERED:

(1) Defendant's Motion for Summary Judgment (#32) is GRANTED. Judgment is entered in favor of Defendants Michael Marron and Vermilion County and against Plaintiff Nicole Bogart on Plaintiff's First

Amendment claim. The remaining state law claims are dismissed without prejudice. Plaintiff may refile these claims in state court.

(2) The final pretrial conference scheduled for April 2, 2018, and the jury trial scheduled for April 10, 2018, are hereby VACATED. All other pending motions are hereby deemed MOOT.

(3) This case is terminated.

ENTERED this 5th day of March, 2018.

s/ COLIN S. BRUCE
U.S. DISTRICT JUDGE