UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KELVIN J. COCHRAN,

Plaintiff,

v.

CITY OF ATLANTA, GEORGIA; and MAYOR KASIM REED, IN HIS INDIVIDUAL CAPACITY,

Defendants.

Case No. 1:15-cv-00477-LMM

PLAINTIFF'S RESPONSE TO DEFENDANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Through their request for supplemental briefing, Defendants are merely rehashing the same arguments already made to the Court in prior briefing and at oral argument. Indeed, they fail to provide any new authorities to challenge any claims other than Plaintiff Cochran's free speech retaliation claim. The motion to dismiss standard requires the Court to accept the "factual allegations in the complaint as true and construe them in the light most favorable" to Cochran. *Edwards v. Prime Inc.*, 602 F.3d 1276, 1291 (11th Cir. 2010). Following are several crucial facts:

(1) From 2012 to 2013, Cochran wrote and published a "non-work-related … religious book that expresses his religious beliefs." Compl. ¶¶ 8, 83-104.

(2) Between January and March 2014, in addition to selling his book online, Cochran handed out copies to Defendant Reed, three City Council Members, and certain AFRD employees who requested copies or had previously shared their Christian faith with Cochran. *Id.* ¶¶ 117-130.

(3) Between 2012 and 2014, Cochran and AFRD attained several professional milestones demonstrating the department's efficiency.[1]

(4) Cochran's religious expression did not threaten the City's ability to administer public services, or interfere with internal operations or internal order and discipline and was not likely to do so. *Id.* ¶¶ 231-32.

(5) There were no complaints until Councilmember Wan saw passages from Cochran's book discussing the Bible's teachings on sexual morality. Wan and the Defendants showed their bias against people like Cochran who hold

[1] Cochran was awarded Fire Chief of the Year and, among other accolades, AFRD obtained a Class 1 Public Protection Classification. *Id.* ¶¶ 60-66.

certain religious beliefs by terminating Cochran—despite no allegations that Cochran ever discriminated against anyone. *Id.* ¶¶ 136-153, 168, 195-201.

(6) Confirming that the termination was based on Cochran's beliefs, Defendant Reed publicly stated that "I profoundly disagree with and am deeply disturbed by the sentiments expressed" in the book. *Id.* ¶¶ 157-59.

These averments are tellingly absent from Defendants' brief. They instead focus on allegations not in the four corners of the Complaint, namely, the City's Investigative Report and an irrelevant quote from Cochran's book. Neither are proper documents for consideration at this stage of the case.[2]

I. Cochran's Book Discusses a Matter of Public Concern.

"[T]he 'public concern' threshold test … prevent[s] the federal courts from becoming a roundtable for employee complaints over internal office affairs." *Kurtz v. Vickrey*, 855 F.2d 723, 727 (11th Cir. 1988) (quotation omitted). The Eleventh Circuit employs a two-prong test, examining "(1) if the government employee spoke as an employee or citizen and (2) if the speech addressed an issue relating to the mission of the government employer or a matter of public concern." *Boyce v. Andrew*, 510 F.3d 1333, 1342 (11th Cir. 2007). Both are satisfied here: Cochran's book was not written "in his capacity as AFRD Fire Chief," Compl. ¶ 114,[3] "expresses his personal

[2] While the Court may consider "a document attached to a motion to dismiss" if it is "(1) central to the plaintiff's claim and (2) undisputed," *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002), Defendants did not attach Cochran's book or the Investigative Report to their Motion. Nor is the Investigative Report—which was published after Cochran's termination—"central" to his claims. Also, the Investigative Report supports the Complaint's averments that Cochran never discriminated against anyone.

[3] Cochran obtained permission from Ethics Officer Nina Hickson to identify his position in the "About the Author" section of his book. Compl. ¶¶ 110-13.

religious beliefs," *id*. ¶ 115, was non-work-related, *id*. ¶ 106, and focuses on "guid[ing] men on how to … live a faith-filled, virtuous life," *id*. ¶ 94.

Defendants' own cases support this conclusion. In *Polion v. City of Greensboro*, 26 F. Supp. 3d 1197, 1209 (S.D. Ala. 2014), a police officer who accused his supervisors of "ineptitude" and "malfeasance" spoke on issues of "core public concern[]." The officer was not motivated "purely or even partially [by] personal revenge, and the mere fact that he addressed City officials privately rather than publicly … does not withdraw his speech from First Amendment protection." *Id*. at 1209-10. Here, Cochran's book has no revenge element, and his book was disseminated both publicly through online sales and privately through his gifting of it to others.

Indeed, the elements of revenge and intra-office dispute were key to the court's conclusion in *Mitchell v. Hillsborough County*, 468 F.3d 1276 (11th Cir. 2006), that an employee's vulgar rant in a public meeting directed against a commissioner was not a matter of public concern. "Such ad hominem attacks, unaccompanied by any content touching an issue of public concern, cannot be said to touch on a matter of public concern." *Id*. at 1285. None of these elements are at issue here, as Cochran's book contains no personal attacks but instead opines on religious and social issues that have long been held to be matters of public concern.[4] *See BMI Salvage Corp. v. Manion*, 366 F. App'x 140, 143 (11th Cir. 2010) ("[A]ny statement involving a matter of political, social, or other concern to the community is protected."). Defendants' own cases thus demonstrate the broad scope of speech considered

[4] While Defendants label the contents of Cochran's book as merely his personal beliefs, the book's teachings on sexuality are "consistent with the Bible and historic Christian teaching." Compl. ¶¶ 98-101.

to touch upon a public concern—including speech with far less social value than Cochran's religiously-based moral guidance.[5]

Defendants argue that Cochran's statement in the book that he desires to "cultivate [AFRD's] culture for the glory of God" (a quote about personal work ethic taken completely out-of-context)[6] shows that he spoke in his official capacity. But as stated in the Complaint, "Cochran did not write or publish the book in his capacity as AFRD Fire Chief." Compl. ¶ 114.

Finally, speech discussing homosexuality and same-sex marriage was recognized as entitled to First Amendment protection in *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) ("[I]t must be emphasized that … those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."). Defendants' reliance on *Flanagan v. City of Richmond*, No. 14-CV-02714-EMC, 2015 WL 5964881, at *14 (N.D. Cal. Oct. 13, 2015), is misplaced because there, the plaintiff's statements "were not simply expressions of disagreement with homosexuality," but rather "condemn[ed] … specific individuals like Ms. Taylor and PRS Aberson's mother."

II. Cochran's Book Did Not Disrupt the Operations of AFRD.

As alleged in the Complaint, which must be accepted as true, there was

[5] In *Morales v. Stierheim*, 848 F.2d 1145, 1149 (11th Cir. 1988), an employee's statement that "[t]he one who is lying is you," directed to a board member, was a matter of public concern. "While the actual words Morales spoke cannot be said to be valuable to the public at large, the first amendment's protections do not turn on the social worth of the statements." *Id.*

[6] This quote is not properly before this Court. *Supra* n. 2. And as averred in the Complaint, Cochran sought to cultivate a culture that treats his co-workers "with dignity justice, equity, and respect, regardless of any personal characteristic that sets them apart." Compl. ¶ 75.

no disruption from Cochran's book at AFRD. Compl. ¶¶ 137, 231-32. To the contrary, during the same time period when Cochran wrote, published, and distributed his book, AFRD achieved unparalleled success. *Id*. ¶¶ 60-66.

Bound by these allegations, Defendants argue that the "strong negative reactions [to the book] from multiple City departments," specifically Councilmember Wan, are a disruption. But that is the fact pattern of many First Amendment retaliation cases: an employee makes a statement that upsets a supervisor. If the negative reactions of supervisors (who do not even work in the same department) were alone sufficient to establish disruption, then no employee would ever prevail.

Defendants' own cases undercut their argument. In *Fikes v. City of Daphne*, 79 F.3d 1079 (11th Cir. 1996), a police officer elicited negative reactions from co-workers whom he had reported to the Alabama Bureau of Investigation. He was warned to "be quiet" and even interrogated by his colleagues. *Id*. at 1081. Vacating the dismissal of his First Amendment claims, the Eleventh Circuit found "no indication that Fikes' actions disrupted the functioning of the Daphne police department." *Id*. at 1084.

Importantly, nearly 10 months passed between when Cochran first distributed his book to Defendant Reed and others and when he was investigated and ultimately terminated. A similar time gap existed in *Waters v. Chaffin*, 684 F.2d 833 (11th Cir. 1982), where 9 months after a police officer called his Chief of Police a "bastard" and "son-of-a-bitch" to a co-worker, the officer was charged for insubordination for the name-calling. Ruling for the officer, the Eleventh Circuit found no "reasonable likelihood of harm to [the departments'] efficiency, discipline, or harmony." *Id*. at 840.

> [T]he long delay between the incident and the notice of discharge belies the argument that the comments actually had an adverse effect on the department.... As we have stated, the reasonable possibility of adverse harm will generally be enough to invoke the full force of judicial solicitude for a police department's internal morale and discipline. In cases like this, however, where delay has belied what once was a reasonable expectation of harm, such solicitude is unwarranted.

Id. at 839. Here, the 10 month gap between Cochran's book distribution and his termination undermines any claim of disruption by Defendants.

All but one of the cases Defendants cited for the argument that Cochran's book disrupted AFRD were not decided at the motion to dismiss stage, and they follow four fact patterns, none of which are present here:

(1) **An employee insulted or acted hostile to a colleague.** *Mitchell*, 468 F.3d at 1288 n.30 (bench trial) (employee's "obvious personal distaste for Storms" as evidenced by his sexually explicit comments made at a public meeting, would "affect his work"); *Morales*, 848 F.2d at 1150 (jury trial) (public agency would be discredited where community was "present at a meeting in which a principal planner accused the … Chairman of lying"); *Bates v. Hunt,* 3 F.3d 374, 378 (11th Cir. 1993) (summary judgment) ("[T]he Constitution … does not require the Governor to delegate [] authority to someone who has *voluntarily* aided a civil lawsuit … for damages against the Governor personally and, thereby, has demonstrated hostility to him.").

(2) **An employee disobeyed direct orders.** *Oladeinde v. City of Birmingham*, 230 F.3d 1275, 1294 (11th Cir. 2000) (jury trial) (refusing a commander's order "demonstrates that the plaintiffs' speech interfered with the BPD's strong interest in maintaining discipline and loyalty").

(3) **An employee advocated racial hostility or government**

revolt. *Sims v. Metro. Dade Cnty.*, 972 F.2d 1230, 1234, 1238 (11th Cir. 1992) (summary judgment) (employee, whose job required him to "ease mounting [racial] pressures before they erupt into violence," could not cause racial hostility by advocating "for black citizens to stop doing business with white and Hispanic establishments"); *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1303 (N.D. Ga. 2014) (qualified immunity standard) (stating, where discipline was swift instead of following a 10-month delay indicating a lack of disruption, that "[a]ppearing to advocate revolution during a presidential election" and associat[ing] that idea with a Confederate flag" sends a "partisan, if not prejudicial, message to many" in the police department and the community).

(4) **The case involved the right to intimate association.** *Shahar v. Bowers*, 114 F.3d 1097, 1102 (11th Cir. 1997) (summary judgment) (overturning "strict scrutiny review of a government employee's freedom of intimate association claim").

III. Cochran Has Standing to Challenge Policies that Injured Him.

Defendants say they terminated Cochran because he violated Atlanta Code of Ordinances § 2-820(d). If that is true, Cochran was injured by that Section and has standing to challenge it.[7] He did not need to ask the Board of Ethics for permission regarding his book to create standing. *See CAMP Legal Def. Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1274-75 (11th Cir. 2006). To hold otherwise would be especially troubling given that the text of § 2-820(d) does not clearly cover Cochran's conduct and Ethics Officer Nina Hickson indicated that it did not. Compl. ¶¶ 108, 110-111, 172-173. It would also

[7] Defendants conceded at the motion to dismiss hearing that Cochran has standing to facially challenge § 2-820(d). Hr'g Tr. 26:7-12. But they now claim a lack of standing for as-applied *and* facial challenges. ECF No. 36 at 8.

ignore Cochran's argument that § 2-820(d) is overbroad if it requires him to seek permission to engage in the speech at issue. *Id.* ¶¶ 255-257.

As Defendants admitted at the hearing, their standing argument does not apply to Cochran's challenges to the City's policies and practices that are not codified in § 2-820(d). Hr'g Tr. 23:1-14. In his Second Cause of Action, Cochran repeatedly asserts defects in Defendants' policies and practices, whether written or unwritten. *See* Compl. ¶¶ 251-253, 256. Cochran alleges that Defendants' policies and practices constitute viewpoint discrimination by allowing similarly-situated employees to express "beliefs and viewpoints in favor of and approving of same-sex marriage and homosexual conduct" while punishing Cochran for expressing contrary views. *See, e.g., id.* Contrary to Defendants' suggestion that such unwritten policies and practices do not exist, ECF No. 36 at 7, "the City suspended Cochran ... because of the religious beliefs expressed in his book and because those beliefs differed from the Mayor's and the City's beliefs," Compl. ¶¶ 156-161. Defendants suggested the truth of this claim during the hearing, admitting that "It's not the book. The book has been out there. He has been out there. It's what the book contains and the statements in the book about gays and lesbians, about women. Those, again, are his personal beliefs." Hr'g Tr. 42:3-7.

IV. *Elrod-Branti* is Limited to Political Patronage Terminations.

The *Elrod-Branti* framework was designed to allow elected officials to remove upper level, policy-making employees to ensure that individuals with the same political affiliation occupy those positions. *Branti v. Finkel*, 445 U.S. 507, 518 (1980) ("[T]he question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the

effective performance of the public office involved."). As set forth in the Complaint, which must be accepted as true, Cochran not only shares the same political affiliation as Defendant Reed, but he also supports the non-discrimination policy goals of the City. Compl. ¶¶ 73-75, 168, 238.

Cochran's religious beliefs, not his political affiliation, motivated Defendants to terminate him. *Id*. ¶¶ 156, 166, 242. Defendants' cases confirm that *Elrod-Branti* only applies to political patronage terminations. *Terry v. Cook*, 866 F.2d 373, 377 (11th Cir. 1989) ("[I]t is important to retain the distinction between actions that assert employees' right of expression and actions that challenge discharge decisions based on political patronage."); *McCabe v. Sharrett*, 12 F.3d 1558, 1565 (11th Cir. 1994) (*Elrod-Branti* applies "where a public employee has suffered adverse employment action solely because of affiliation with a certain political party").

V. Cochran Has a Statutory Property Interest in His Employment.

City Code § 114-528 states that "no employee shall be dismissed from employment … except for cause." As Defendants' own cases recognize, this provides Cochran with a property interest in his employment. *Warren v. Crawford*, 927 F.2d 559, 562 (11th Cir. 1991) ("A public employee who may be terminated only for cause … has a protected property interest in continued employment."); *Zimmerman v. Cherokee Cnty.*, 925 F. Supp. 777, 781 (N.D. Ga. 1995) (no property interest because "a draft of the Policies and Procedures—providing for dismissal only for cause—... never were adopted by the County's Board of Commissioners").

VI. Defendant Reed is Not Entitled to Qualified Immunity.

Even though a balancing analysis is involved, the Eleventh Circuit has

denied qualified immunity in cases involving *Pickering* analysis and this Court should do the same. *See Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005). This is especially true because, following a Supreme Court decision in 2002, the Eleventh Circuit has emphasized that general statements of law can provide clear and fair warning to officials even if the specific action in question has not been addressed.[8] *Id.*

In evaluating the second step of the *Pickering* analysis—whether Cochran's First Amendment interests outweigh Defendants' interests in effective and efficient operation of City government and functions—the balance tilts conclusively in Cochran's favor. At this motion to dismiss stage, Defendants have no evidence that their legitimate interests were in jeopardy. "Cochran's religious expression did not threaten the City's ability to administer public services and was not likely to do so." Compl. ¶ 231. Neither did it "interfere with the fire department's internal operations or with internal order and discipline," nor was it likely to do so. *Id.* ¶ 232. Indeed, "Cochran never discriminated against, and was never accused of discriminating against, anyone" based on gender or sexual orientation, Compl. ¶ 168, and there is no reasonable basis to conclude that Cochran's expression of his beliefs would change that. With Cochran's interest in addressing a matter of public concern weighed against Defendants' baseless concerns (given the allegations), qualified immunity is improper at this stage.

CONCLUSION

For these reasons, Defendants' Motion to Dismiss should be denied.

[8] In addition to his speech claims, Cochran also asserts that Defendant Reed violated other clearly-established rights, such as those relating to free exercise, free association, equal protection, and due process.

TYPESET CERTIFICATION

Undersigned counsel hereby certifies, pursuant to Local Rules 5.1C and 7.1D, that this document was prepared in Century Schoolbook 13-point font.

Respectfully submitted this 23rd day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 2015, a copy of the foregoing document was filed with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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