

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

GERALD LYNN BOSTOCK,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	NO: 1:16-cv-01460-ELR-WEJ
CLAYTON COUNTY,)	
)	
Defendant.)	

**PLAINTIFF’S REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE
THIRD AMENDED COMPLAINT**

In his Memorandum in Support of his Motion for Leave to File Third Amended Complaint [doc. 51-3], Mr. Bostock established that good cause exists under Fed. R. Civ. P. 15(a)(2) to allow him to amend his Complaint.

In its response, Defendant argues that one¹ of Mr. Bostock’s proposed amendments – addressing recent retaliatory conduct by Defendant’s agent and employee Judge Steven Teske – would somehow be futile. Defendant’s futility

¹ Defendant’s Response did not address Mr. Bostock’s other requested amendment - the clarification that he asserts both single and mixed-motive claims. Defendant has therefore waived any opposition to that amendment. *See, e.g., Hudson v. Norfolk Southern Ry. Co.*, 209 F.Supp.2d 1301, 1324 (N.D.Ga.2001) (providing that “[w]hen a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned[]”) (citing *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995))

argument pays lip service to the proper standard but then puts the cart far in front of the horse. Rather than properly focusing on Mr. Bostock's proposed Third Amended Complaint and the sufficiency of what is pleaded there, Defendant essentially seeks to conduct a mini-trial on the merits of the claim. There is a time and a place for arguing the merits, but it is not here and it is not now.

The bottom line is that the retaliation claim is sufficiently pleaded and the proposed amendment meets the standards of Rule 15(a)(2). That is all that is required and the Court should grant Plaintiff's motion.

ARGUMENT AND CITATION OF AUTHORITY

Mr. Bostock has clearly stated a claim for post-employment retaliation

“A claim for retaliation requires that the Plaintiff prove that (1) he engaged in a protected activity, (2) he suffered an adverse action, and (3) there is a causal connection between the two events (i.e. that the protected activity and the adverse action are not wholly unrelated).” *See Vinnett v. General Elec. Co.*, 2006 WL 618410, at *8 (N.D. Ga. March 8, 2006). An employee claiming post-employment retaliation need not show an adverse employment action. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64, 67 (2006) (“the scope of [Title VII’s] anti-retaliation provision extends beyond workplace-related or employment related

retaliatory acts and harm” and “is not limited to discriminatory actions that affect the terms of employment.”).

Mr. Bostock’s retaliation claim alleges (1) Plaintiff engaged in protected activity by filing an EEOC charge and by filing a lawsuit under Title VII. (Doc. 51-1 ¶ 26); (2) In a June 17, 2020 article published in the Fulton County Daily Report, just two days after the Supreme Court issued its decision in this case, Clayton County Chief Juvenile Court Judge Steven C. Teske (“Teske”) stated about Plaintiff: “I don't appreciate him not telling the whole truth, ... he couldn't have gotten there if he had revealed the whole truth. Because he didn't reveal the whole truth, he got there.” (*Id.* ¶ 29); (3) In the same article, Teske stated that Plaintiff’s firing “was about mismanagement of court fees. Some of those funds intended to recruit CASA volunteers improperly went to the softball team.” Teske made similar comments in an article published on June 19, 2020 in the Atlanta Journal-Constitution. (*Id.* ¶ 30); (4) Teske’s comments were made in retaliation for Plaintiff’s engaging in protected activity. (*Id.* ¶ 32); and (5) Plaintiff suffered an adverse action due to the County’s retaliatory action, through its agent and employee Teske, which caused Plaintiff damages. (*Id.* ¶ 33.) Thus, Mr. Bostock has clearly stated a claim for retaliation.

Defendant's futility argument is meritless

Leave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant. *See Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004). As noted, Mr. Bostock's claim as pleaded establishes its viability. It would clearly survive a motion to dismiss or immediate summary judgment motion. Defendant argues, however, that Mr. Bostock has not sufficiently alleged either an adverse action or causation. These arguments are meritless.

Mr. Bostock has sufficiently alleged an adverse action

With respect to adverse action, the plaintiff need only plead action harmful to the point that it "could well dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57. That is *exactly* what Mr. Bostock has done here. Teske has not only accused Mr. Bostock of being untruthful but stated that he mismanaged court fees. *See Russo v. Payroll Servs., LLC*, 2015 WL 3505666 (N.D. Ala. May 15, 2015) (determining that employee sufficiently alleged a post-employment retaliation claim by alleging that former employer "began making false statements about Plaintiff to several of their mutual acquaintances, including telling others Plaintiff was under an ongoing investigation by the Department of Human Services and was going to have her

children taken away from her”); *Persichitte v. Univ. of North CO.*, 2006 WL 2790407, at *6 (D. Colo. Sept. 27, 2006) (recognizing cause of action for post-employment retaliation where the former employer said false information about the former employee to a newspaper, which resulted in a story being published that alleged the plaintiff misused state funds and determining that “[s]uch alleged actions ‘could well dissuade a reasonable worker from making or supporting a charge of discrimination’ for purposes of a motion to dismiss. Further, such assertions if proven could ‘carry a significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.’”)

Defendant devotes substantial space to arguing that Teske’s words (which are there in print for the public to read) were either taken out of context or somehow alleviated by Teske’s self-serving comments about supposedly being pleased with the outcome of the Supreme Court’s decision and that he harbors no anti-gay animus. But that argument has no bearing at this stage where Mr. Bostock has pleaded undisputed comments by Teske that go far beyond Defendant’s disingenuously benign characterization and accuse Mr. Bostock of untruthfulness and misappropriation of funds. Mr. Bostock has also pleaded the harm to him resulting from Teske’s statements. And of course, all of Mr. Bostock’s allegations must be taken as true at this stage. Fed. R. Civ. P. 12(b)(6).

Defendant also argues that Teske was merely seeking to defend himself. But his undisputed comments, as pleaded, go beyond that and constitute retaliation, which is, of course, unlawful.²

Mr. Bostock has adequately pleaded causation

Defendant also contends that Mr. Bostock failed to plead sufficient facts concerning causation. According to Defendant's meritless argument, since Mr. Bostock's protected activity began in 2013, Teske's retaliatory remarks in 2020 are too far removed in time. This argument fails both legally and as a matter of common sense.

First, Mr. Bostock is not required to *prove* causation at the pleading stage. *Shipley v. Hypercom Corp.*, No. 1:09-CV-0265-CAP-RGV, 2010 WL 11453635, at *9 (N.D. Ga. Mar. 15, 2010), report and recommendation adopted, No. 1:08-CV-265-CAP-RGV, 2010 WL 11455943 (N.D. Ga. Apr. 29, 2010) (holding that "whether the lapse of time between plaintiff's protected activity and the allegedly retaliatory action precludes her retaliation claim as a matter of law is not appropriately resolved on a motion for judgment on the pleadings since plaintiff is not yet required to prove that a causal connection exists.")

² *Valdez v. New Mexico*, 109 F. App'x 257, 263 (10th Cir. 2004), cited by Defendant for its argument, was a First Amendment case and is inapposite.

Moreover, temporal proximity is not the only way to establish causation. A plaintiff “may present other evidence of causation rather than rely on mere temporal proximity.” *Shiple*, 2010 WL 11453635, at * 9. Defendant’s argument ignores the fact that not only did Teske make his retaliatory remarks *only two days after and in response to* the Supreme Court’s decision in this case (as has been alleged in the proposed amended complaint), he *specifically referred to* Mr. Bostock’s protected activity by stating that Mr. Bostock “couldn't have gotten there [i.e., the Supreme Court] if he had revealed the whole truth. Because he didn't reveal the whole truth, he got there.” Thus, Mr. Bostock has pleaded not only temporal proximity but other evidence of causation as well. Defendant’s causation argument is simply meritless.

CONCLUSION

Mr. Bostock has established that good cause exists under Fed. R. Civ. P. 15(a)(2) to allow him to amend his Complaint. Defendant’s arguments to the contrary are without merit. Mr. Bostock respectfully requests that this Court enter an Order allowing him to amend his complaint and that Plaintiff’s Third Amended Complaint be filed.

Respectfully submitted this 21st day of December, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing has been prepared in Times New Roman 14 font, as approved by the Court in LR 5.1B.

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record.

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