

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

FILED IN CHAMBERS U.S.D.C. ROME
Date: Jan 08 2021
JAMES N. HATTEN, Clerk
By: s/Kari Butler
Deputy Clerk

GERALD LYNN BOSTOCK,

Plaintiff,

v.

CLAYTON COUNTY,

Defendant.

CIVIL ACTION FILE NO.

1:16-CV-001460-ELR-WEJ

ORDER

This matter is before the Court on plaintiff Gerald Lynn Bostock’s Motion for Leave to File Third Amended Complaint [51]. The defendant, Clayton County, Georgia (the “County”), opposes this Motion. (See Def.’s Opp’n to Pl.’s Mot. for Leave to File Third Am. Compl. [53].) For the reasons explained below, because the proposed amendment would be futile, plaintiff’s Motion is **DENIED**.

I. BACKGROUND

Plaintiff filed this action [1] pro se on May 5, 2016, against the Clayton County Board of Commissioners (the “Board”), alleging sexual orientation discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (“Title VII”). On August 2, 2016, through counsel he filed a First Amended Complaint [4] against the Board. On August 23, 2016, defendant filed a Motion to Dismiss [7] the First Amended Complaint on

the grounds that (1) sexual orientation discrimination was not a legally cognizable claim under Title VII, and (2) the Board was not a legal entity capable of being sued. On September 12, 2016, plaintiff filed a Consent Motion [8] seeking to file a Second Amended Complaint to add a claim based on gender stereotyping discrimination under Title VII and to substitute the County as the defendant. The undersigned granted that Motion on the same date [9], which mooted the pending Motion to Dismiss [7]. The Second Amended Complaint [10] became the operative pleading.

On September 26, 2016, the County filed a Motion to Dismiss Plaintiff's Second Amended Complaint [13], asserting that it failed to state a claim upon which relief may be granted. The undersigned recommended that defendant's Motion be granted. (See R. & R. of Nov. 3, 2016 [16].)¹ The Honorable Orinda D. Evans, Senior United States District Judge, adopted that R. & R. on July 21, 2017 [24] and issued a judgment [25] in the County's favor.

Plaintiff appealed that judgment to the Eleventh Circuit on August 21, 2017 [26]. In an opinion issued on May 20, 2018, the Circuit first noted that Mr.

¹ The R. & R. recommended dismissal with prejudice on three grounds: (1) Title VII does not encompass claims of sexual orientation discrimination, (2) the Second Amended Complaint contains no factual allegations supporting a gender stereotyping claim, and (3) the gender stereotyping claim was not referenced in plaintiff's EEOC charge and thus he failed to exhaust administrative remedies.

Bostock had abandoned any challenge to the district court's dismissal of his gender stereotyping claim because he did not specifically appeal its dismissal. Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964, 965 (11th Cir. 2018) (per curiam); see also this Court's Docket [30]. Second, the Circuit held that the district court did not err in dismissing Mr. Bostock's complaint for sexual orientation discrimination under Title VII. Bostock, 723 F. App'x at 965.

Mr. Bostock sought certiorari in the United States Supreme Court, which was granted. See Bostock v. Clayton Cty., Ga., ___ U.S. ___, 139 S. Ct. 1599 (2019). The Supreme Court then reversed and remanded the decision of the Eleventh Circuit. See Bostock v. Clayton Cty., Ga., ___ U.S. ___, 140 S. Ct. 1731 (2020). The Supreme Court held that, under the "plain terms" of Title VII, an employer intentionally and illegally discriminates against an individual because of such individual's sex when the employer discriminates against an employee for being homosexual or transgender. Id. at ___, 140 S. Ct. at 1741, 1743. On remand from the Supreme Court, the Eleventh Circuit reversed this Court's dismissal of Mr. Bostock's Title VII claim and remanded this case for further proceedings consistent with that decision. Bostock v. Clayton Cty. Bd. of Comm'rs, 819 F. App'x 891, 892 (11th Cir. 2020) (per curiam); see also this Court's Docket [34, 35, 36].

The County filed its Answer [40] on October 21, 2020. The parties filed a Joint Preliminary Report and Discovery Plan on October 23, 2020 [44], and this Court entered a Scheduling Order [45] October 26, 2020, which set December 21, 2020, as the deadline for amendments. The instant Motion for Leave to File Third Amended Complaint [51] followed on November 23, 2020.

Plaintiff writes that the “proposed amendments seek to add an additional claim for retaliation [Count II] based on recent events and, although Plaintiff contends it is not necessary as a matter of law, to clarify that Plaintiff brings both single motive and mixed motive claims under Title VII.” (Pl.’s Mot. for Leave to File Third Am. Compl. [51] 1.) The Court summarizes the relevant allegations of the proposed Third Amended Complaint [51-1] below.

Mr. Bostock is a gay male. (Prop. Third Am. Compl. ¶ 14). He began working for defendant on January 13, 2003. (Id. ¶ 13.) The County employed plaintiff as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County; he was primarily responsible for the Clayton County Court Appointed Special Advocate (“CASA”) program. (Id. ¶ 15.)

Beginning in January 2013, Mr. Bostock became involved with a gay recreational softball league called the Hotlanta Softball League. (Prop. Third Am. Compl. ¶ 17.) Mr. Bostock actively promoted Clayton County CASA to softball league members as a source for volunteer opportunities. (Id. ¶ 18.) In the months

after plaintiff joined the Hotlanta Softball League, he alleges “on information and belief” that his participation in the league and his sexual orientation and identity were openly criticized by one or more persons who had significant influence on defendant’s decision making. (Id. ¶ 19.)

In or around April 2013, defendant advised Mr. Bostock that it was conducting an internal audit on CASA program funds he managed. (Prop. Third Am. Compl. ¶ 20.) Mr. Bostock contends that he did not engage in any improper conduct regarding those program funds, and alleges that defendant initiated the audit as a pretext for discrimination based on his sexual orientation and failure to conform to a gender stereotype. (Id. ¶¶ 21-22.)

Plaintiff further alleges, “[o]n information and belief,” that in May 2013, during a meeting held about the time the County terminated him, Clayton County Chief Juvenile Court Judge Steven Teske made disparaging comments about plaintiff’s sexual orientation and identity, his participation in the gay men’s softball league, and his recruiting of volunteers at a gay bar, to a member of the Friends of Clayton County CASA Advisory Board, and stated that plaintiff would be fired. (Prop. Third Am. Compl. ¶ 23.)

On June 3, 2013, the County terminated Mr. Bostock’s employment. (Prop. Third Am. Compl. ¶ 24.) The stated reason for termination was conduct unbecoming of a County employee. (Id.) Plaintiff alleges that this purported

reason was a pretext for discrimination against him based on his sex and/or sexual orientation. (Id.) At that time, Judge Teske summoned the media and publicly gave false and pretextual reasons for plaintiff's termination which damaged his reputation and were calculated to humiliate him. (Id.)²

Count I of the proposed Third Amended Complaint alleges sex discrimination in violation of Title VII. It is identical to Count I of the Second Amended Complaint except for the following new paragraph:

Plaintiff's sexual orientation was a "motivating factor" in Defendant's decision to terminate his employment, even if there are legitimate non-discriminatory reasons that also motivated these actions.

(Prop. Third Am. Compl. ¶ 41.) As already noted, plaintiff contends that it was not necessary as a matter of law to clarify that he brings both single motive and mixed motive claims under Title VII. (Pl.'s Mot. for Leave to File Third Am. Compl. [51] 1.)

Count II of the proposed Third Amended Complaint is new. It is captioned, "Retaliation in Violation of Title VII of The Civil Rights Act of 1964, as Amended." Plaintiff alleges that he is an "employee" and the County is an

² Paragraphs 25-28 of the proposed Third Amended Complaint recount this matter's procedural history, including plaintiff's filing of an EEOC charge and this lawsuit. Plaintiff filed his charge on September 5, 2013. (See Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss Ex. A [14-1].) Paragraphs 29-33 of the proposed Third Amended Complaint contains allegations about plaintiff's retaliation claim that are repeated verbatim in Count II, paragraphs 50-53 (quoted infra).

“employer” as those terms are defined under Title VII. (Prop. Third Am. Compl. ¶¶ 47-48.) He further alleges that he engaged in protected activity by filing an EEOC charge and this lawsuit under Title VII. (Id. ¶ 49.) Plaintiff then makes the following allegations:

50.

In a June 17, 2020 article published in the Fulton County Daily Report, just two days after the Supreme Court issued its decision, [Clayton County Chief Juvenile Judge Steven C.] 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.”

51.

In the same article, [Judge] 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.” [Judge] Teske made similar comments in an article published on June 19, 2020 in the Atlanta Journal-Constitution.

52.

[Judge] Teske’s comments in the June 17, 2020 article were made in retaliation for Plaintiff’s engaging in protected activity.

53.

Plaintiff suffered an adverse action due to the County’s retaliatory action, through its agent and employee [Judge] Teske, which caused Plaintiff significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.

(Id. ¶¶ 50-53.) The County filed copies of the two articles referenced in these allegations with its Response. (See Def.’s Ex. A [53-1], from June 17, 2020

Fulton Daily Report; Def.'s Ex. B [53-2], from June 19, 2020 Atlanta-Journal Constitution ("AJC").³

II. GOVERNING STANDARDS

Pursuant to Federal Rule of Civil Procedure 15(a), a party may amend its complaint only by leave of court or written consent of the adverse party when it has been more than 21 days after service of a responsive pleading or motion. The rule also provides, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Even so, granting leave to amend is not automatic. Faser v. Sears, Roebuck & Co., 674 F.2d 856, 860 (11th Cir. 1982). Indeed, district courts have "extensive discretion" in deciding whether to grant leave to amend and may choose not to allow a party to amend "when the amendment would prejudice the defendant, follows undue delays, or is futile." Campbell v. Emory Clinic, 166 F.3d 1157, 1162 (11th Cir. 1999). A district court may properly deny leave to amend on grounds of futility when the complaint as amended is still subject to dismissal for failure to state a claim. Hatcher v. Ala. Dep't of Human Servs., 747 F. App'x 778, 781 (11th Cir. 2018) (per curiam); see also Patel v. Ga. Dep't BHDD, 485 F. App'x 982, 982 (11th Cir. 2012) (per

³ The Court may consider these articles in ruling on Mr. Bostock's Motion because they are referenced in the Proposed Third Amended Complaint; they are central to his claims; and their authenticity is not in dispute. See Brooks v. Blue Cross and Blue Shield of Fla., Inc., 116 F.3d 1364 (11th Cir. 1997) (per curiam).

curiam) (“Futility justifies the denial of leave to amend where the complaint, as amended, would still be subject to dismissal.”).

“The futility threshold is akin to that for a motion to dismiss; thus, if the amended complaint could not survive [Federal Rule of Civil Procedure] 12(b)(6) scrutiny, then the amendment is futile and leave to amend is properly denied.” Ala. State Port Auth. v. China Ocean Shipping (Grp.) Co., No. 08-00058-CG-B, 2008 WL 4701046, at *2 (S.D. Ala. Oct. 21, 2008) (citations omitted); see also Amick v. BM & KM, Inc., 275 F. Supp. 2d 1378, 1381 (N.D. Ga. 2003) (“In the Eleventh Circuit, a proposed amendment is futile when the allegations of the proffered complaint would be unable to withstand a motion to dismiss.”).

In determining whether leave to amend should be granted, the Court must “tak[e] the pleaded facts as true[and] resolv[e] those facts in the light most favorable to [the plaintiff.]” Kaloe Shipping Co. v. Goltens Serv. Co., 315 F. App’x 877, 882 (11th Cir. 2009) (per curiam). “[A] plaintiff must plead ‘enough facts to state a claim to relief that is plausible on its face,’ rather than merely conceivable.” Patel, 485 F. App’x at 983 (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). “[T]he burden is upon the defendant to demonstrate that the

allegations of the proposed amended complaint would be unable to withstand a motion to dismiss.” EEOC v. Sirdah Enters., Inc., No. 1:13-CV-3657-RWS-RGV, 2015 WL 12644983, at *3 (N.D. Ga. Feb. 25, 2015).

III. ANALYSIS

If plaintiff’s proposed retaliation claim could not survive a motion to dismiss, then allowing the amendment would be futile. The Court must, therefore, delve into Title VII’s anti-retaliation provision, the statute’s definitions, and the elements of a retaliation claim.

Title VII’s anti-retaliation provision provides, in relevant part, that it is unlawful “for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].” 42 U.S.C. § 2000e-3(a). The first clause (opposing a practice made unlawful) is known as the “opposition” clause, while the second clause (participating in any manner in an investigation, proceeding, or hearing) is known as the “participation” clause. See Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1134 (11th Cir. 2020) (en banc). All of the protected activity identified by Mr. Bostock occurred after his June 2013 discharge, i.e., the filing of his EEOC charge on September 5, 2013 [14-1] and the filing of this lawsuit on May 5, 2016

[1]. Thus, Mr. Bostock's retaliation claim arises, if at all, under the participation clause.

In a retaliation case like this one which relies on circumstantial evidence, courts apply the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). See Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1181 (11th Cir. 2010). Under the first step of that framework, a plaintiff must establish a prima face case. See Bryant v. Jones, 575 F.3d 1281, 1307 (11th Cir. 2009). In the retaliation context, this means that the plaintiff must show that: (1) he engaged in statutorily protected activity; (2) he suffered a materially adverse action; and (3) there was a causal connection between the protected activity and the adverse action. Butler v. Ala. Dep't of Transp., 536 F.3d 1209, 1212-13 (11th Cir. 2008).

With regard to element two of the prima facie case, a materially adverse action by an employer is one that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006) (internal quotation marks omitted). With regard to element three, a plaintiff "must establish that his or her protected

activity was a but-for cause of the alleged adverse action by the employer.” Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362 (2013).⁴

Title VII’s anti-retaliation provision makes it unlawful for an *employer*⁵ to retaliate against one of its *employees*.⁶ 42 U.S.C. § 2000e-3(a). As the Supreme Court has made clear, “[t]he anti-retaliation provision seeks to prevent employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms . . . by prohibiting employer actions that are likely ‘to deter victims of discrimination from complaining to the EEOC,’ the courts, and their employers.” White, 548 U.S. at 68 (quoting Robinson, 519 U.S. at 346). Indeed, it is the *employer* who can be held liable for retaliation if it takes a materially adverse action that “might have dissuaded a reasonable worker from making or supporting a charge of

⁴ If a plaintiff establishes a prima facie case, the employer has an opportunity to articulate a legitimate, non-retaliatory reason for the challenged employment action. Meeks v. Computer Assocs. Int’l, 15 F.3d 1013, 1021 (11th Cir. 1994). The ultimate burden of proving by a preponderance of the evidence that the reason provided by the employer is a pretext for prohibited, retaliatory conduct remains on the plaintiff. Pennington v. City of Huntsville, 261 F.3d 1262, 1266 (11th Cir. 2001).

⁵ Title VII defines an “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b). A “person” is defined as “one or more individuals, governments, governmental agencies, [or] political subdivisions.” Id. § 2000e(a).

⁶ The term “employee” in Title VII means an “individual employed by an employer.” 42 U.S.C. § 2000e(f). Employee includes a former employee. Robinson v. Shell Oil Co., 519 U.S. 337, 346 (1997).

discrimination.” Id. at 68 (internal quotation marks and citation omitted). Moreover, the protected activity must be a “but-for cause of the alleged adverse action by the *employer*.” Nassar, 570 U.S. at 362 (emphasis added).

Plaintiff alleges that the County was his employer. (See Prop. Third Am. Compl. ¶¶ 1, 5, 13, 38, 48.) Plaintiff does not allege that the individual who made the allegedly retaliatory comments—Judge Teske—was his employer. The proposed amendment alleges only that Judge Teske was the “agent and employee” of Clayton County. (Id. ¶¶ 33, 53.) However, as discussed below, this Court cannot accept that legal conclusion given the controlling Georgia law. See Twombly, 550 U.S. at 555 (although for purposes of a motion to dismiss a court must take all of the factual allegations in the complaint as true, it is “not bound to accept as true a legal conclusion couched as a factual allegation”); Muhammad v. JP Morgan Chase Co., No. 1:15-CV-0107-AT, 2015 WL 13777036, at *2 n.2 (N.D. Ga. July 30, 2015) (“While courts must liberally construe and accept as true allegations of fact in the complaint and inferences reasonably deductive there from, they need not accept factual claims that are internally inconsistent; facts which run counter to facts of which the court can take judicial notice; conclusory allegations; unwarranted deductions; or mere legal conclusions asserted by a party.”) (quoting Sterling v. Provident Life & Accident Ins. Co., 519 F. Supp. 2d 1195, 1209 (M.D. Fla. 2006)).

Georgia juvenile courts are authorized under the Georgia Constitution and created by state statute. Ga. Const. art. VI, § 1, ¶ I (2018) (“The judicial power of the state shall be vested exclusively in the following classes of courts: magistrate courts, probate courts, juvenile courts, state courts, superior courts, Court of Appeals, and Supreme Court.”); *Id.* art. VI, § 1, ¶ VI (2018) (“The state shall be divided into judicial circuits, each of which shall consist of not less than one county. Each county shall have at least one superior court, magistrate court, a probate court, and, where needed, a state court and a juvenile court.”); O.C.G.A. § 15-11-50(a) (“There is created a juvenile court in every county in the state.”).

Juvenile court judges are generally appointed by “a majority of the judges of the superior court in each circuit.” O.C.G.A. § 15-11-50(b). State law sets the qualifications, training requirements, and other rules for juvenile court judges. *Id.* §§ 15-11-51 to 15-11-59. Juvenile court judges are paid by state grants. *Id.* § 15-11-52(c). Finally, the power allotted to counties by the Georgia Constitution does not extend to “[a]ction affecting any court or the personnel thereof.” Ga. Const. art. IX, § 2, ¶ I(c)(7).

Given these State constitutional and statutory provisions, it is clear that the Clayton County Juvenile Court is an entity separate from the County. See Lockette v. Columbus Consol. Gov’t, No. 4:17-CV-47 (CDL), 2018 WL 6419303, at *2 (M.D. Ga. Dec. 6, 2018). Judge Teske is a State judicial officer,

not a County employee. Therefore, Judge Teske cannot be an “agent and employee” of the County as alleged.⁷ The proposed amendment fails to state a claim because, in the absence of a materially adverse action taken by plaintiff’s *employer*, there can be no cognizable retaliation.

Even if it could be assumed that Judge Teske was an “agent and employee” of the County as alleged, the Court agrees with the County that plaintiff cannot establish a *prima facie* retaliation case. (See Def.’s Resp. [53] 7-11, 14-16.) Although plaintiff engaged in protected activity (element one), Judge Teske’s public denials of plaintiff’s discrimination claim, made almost seven years after the filing of the EEOC charge and over four years after the filing of this civil case, do not constitute a materially adverse action (element two).

The County asserts that it is aware of no authority holding that an individual’s speaking to the press to deny allegations a plaintiff made about him in a lawsuit constitutes a materially adverse action. (Def.’s Resp. [53] 7.) The County also asserts that Mr. Bostock cited no authority for this proposition in his Brief [51-3]. Although he had the opportunity to cite such authority in his Reply

⁷ Even though the Clayton County Juvenile Court and Clayton County are separate entities, Mr. Bostock could nevertheless show that the Juvenile Court was also his employer if he satisfied the stringent “single employer” test. See Peppers v. Cobb Cty., Ga., 835 F.3d 1289, 1299 (11th Cir. 2016). However, plaintiff has not alleged that the Clayton County Juvenile Court (or even Judge Teske) was his employer under that test in any of his four Complaints. The deadline to amend has now passed.

Brief [55], Mr. Bostock did not do so.⁸ Such authority likely does not exist because it would be highly irregular if Mr. Bostock were allowed to say whatever he wanted about Judge Teske in the press, but the Judge's response and denial in the press constituted a materially adverse action.

As already discussed, Title VII's retaliation provision exists to punish employers who take actions that are likely "to deter victims of discrimination from complaining to the EEOC, the courts, and their employers," or that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." White, 548 U.S. at 68 (internal quotation marks and citation omitted). It is implausible that statements Judge Teske made to the press over seven years after plaintiff filed his EEOC charge might have deterred a discrimination victim from complaining to the EEOC, the courts, and employers or dissuaded a reasonable worker from making or supporting a charge of discrimination. In fact, as the County correctly points out, Judge Teske's comments affirmatively disclaimed any retaliatory motive. He repeatedly made clear that he agreed with the Supreme Court's Bostock decision, that he supported Mr. Bostock's argument that Title VII should extend to protect members of the

⁸ The two cases that plaintiff did cite in his Reply Brief addressing post-employment retaliation claims are inapposite. See Russo v. Payroll Servs., LLC, No. 5:14-cv-02302-CLS, 2015 WL 3505666 (N.D. Ala. May 15, 2015); Persichitte v. Univ. of N. Colo., No. 05-cv-01508-PSF-PAC, 2006 WL 2790407 (D. Colo. Sept. 27, 2006).

LGBTQ community, that he was proud of Mr. Bostock for taking this case to the Supreme Court, and that he was glad that Mr. Bostock won. No fair-minded reader of either news article could conclude that Judge Teske intended any harm to Mr. Bostock because he filed an EEOC charge or lawsuit.

Plaintiff also fails to establish element three of his prima facie case (causal connection). Judge Teske mentioned to the Fulton Daily Report and the AJC in the June 2020 articles that plaintiff mismanaged court fees and that he used money intended for recruiting CASA volunteers to fund an out-of-county softball team. However, Judge Teske's statements regarding the internal audit and mismanagement of court fees cannot have been causally connected to Mr. Bostock's protected activity, because Judge Teske made essentially these same comments to the news media well before Mr. Bostock filed his EEOC charge. See Drago v. Jenne, 453 F.3d 1301, 1308 (11th Cir. 2006) (no causal connection to establish retaliation when employer contemplates adverse action before protected activity and continues with adverse action after protected activity).

On June 4, 2013, shortly after Mr. Bostock's termination and months before plaintiff filed his EEOC charge in September 2013, Judge Teske gave a television interview to a reporter for WSB-TV in Atlanta and made comments about Mr. Bostock's handling of CASA funds and the softball team. (See Richard Belcher, Clayton Court Official Under Investigation Over Misused

Money, June 4, 2013, available at <https://www.wsbtv.com/news/local/clayton-court-official-under-investigation-over-mi/243075701/#:~:text=JONESBORO%2C%20Ga> (last visited Jan. 7, 2021).⁹

Because the June 2020 statements attributed to Judge Teske in the proposed Third Amended Complaint regarding mismanagement of court fees are largely identical to statements he made in June 2013, well before Mr. Bostock filed his EEOC charge or this lawsuit, there could be no causal connection between Mr. Bostock's protected activity and Judge Teske's statements. See Drago, 453 F.3d at 1308. Accordingly, the proposed retaliation amendment is futile.

Finally, plaintiff argues that because defendant's Response [53] did not address his other requested amendment—the “clarification” that he asserts both single and mixed-motive claims—defendant has waived any opposition to it. (Pl.'s Reply [55] 1 n.1.) As already noted, plaintiff wrote that this other requested

⁹ The Court may take judicial notice of Judge Teske's statements in this television interview, not for the truth of his statements, but for the fact of their publication. See Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt. L.P., 435 F.3d 396, 401 n.15 (3d Cir. 2006) (court may take judicial notice of news reports to ascertain “what was in the public realm” at a given time). The Court notes that plaintiff referred to Judge Teske's interviews in his amended pleading. (See Proposed Third Am. Compl. ¶ 24 (“At the time Defendant terminated Plaintiff, Chief Juvenile Court Judge Steven Teske summoned the media and publicly gave false and pretextual reasons for Plaintiff's termination which damaged his reputation and were calculated to humiliate him.”)).

amendment (see Prop. Third Am. Compl. ¶ 31) was not necessary, but sought only to clarify that he was bringing both single motive and mixed motive claims under Title VII. (Pl.'s Mot. for Leave to File Third Am. Compl. [51] 1.) There is no need to allow the filing of a Third Amended Complaint to add a single paragraph containing a one-sentence clarifying allegation that plaintiff believes is unnecessary.

IV. CONCLUSION

For the reasons explained above, Plaintiff's Motion for Leave to File Third Amended Complaint [51] is **DENIED**. The Second Amended Complaint [10] remains the operative pleading here.

SO ORDERED, this 8th day of January 2021.



WALTER E. JOHNSON
UNITED STATES MAGISTRATE JUDGE