

**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 OBJECTIONS TO MAGISTRATE JUDGE’S
ORDER DENYING MOTION FOR LEAVE TO FILE
THIRD AMENDED COMPLAINT**

Pursuant to 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72 and LR 72.1, ND Ga. Plaintiff Gerald Bostock files the following objections to the Magistrate Judge’s Order denying Plaintiff’s Motion for Leave to file a Third Amended Complaint. [Doc. 51.]

Plaintiff objects to the Magistrate Judge’s determination that Plaintiff’s proposed amendment – addressing recent retaliatory conduct against Plaintiff by Judge Steven Teske – would somehow be futile. In particular, Plaintiff objects to the Magistrate Judge’s conclusion that Judge Teske was not an “agent and employee” of Clayton County as alleged in Plaintiff’s complaint. Plaintiff further objects to the Magistrate Judge’s determination that Plaintiff did not suffer an

adverse action as a result of Judge Teske's statements. Plaintiff also objects to the Magistrate Judge's determination that Plaintiff's proposed amendments failed to establish a causal connection between his protected activity and Judge Teske's statements. Finally, Plaintiff objects to the denial of the proposed amendment to the Complaint clarifying that Plaintiff asserts both single and mixed-motive claims.

FACTUAL AND PROCEDURAL HISTORY

On November 23, 2020, Mr. Bostock filed his motion for leave to file a Third Amended complaint. [Doc. 51.] The proposed Complaint includes a claim for retaliation based on recent events, and included language clarifying that Plaintiff brings both single motive and mixed motive claims under Title VII.

Mr. Bostock's proposed 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 significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects. (*Id.* ¶ 33.)

On January 8, 2021, the Magistrate Judge issued an order denying Plaintiff’s motion to amend. [Doc. 56.] As set forth in detail below, that decision is erroneous and should be reversed.

ARGUMENT AND CITATION OF AUTHORITY

A. The Court Should Apply the *De Novo* Standard of Review

The Court reviews a Magistrate Judge’s Report and Recommendation on dispositive matters *de novo*, Fed. R. Civ. P. 72(b)(3), and the Court reviews a Magistrate Judge’s order on a non-dispositive matter under a “clearly erroneous” standard of review. Fed. R. Civ. P. 72(a). In this case, the Court should treat the Magistrate Judge’s Order as dispositive and apply *de novo* review.

Motions to amend are not expressly included among the list of dispositive motions in 28 U.S.C. § 636 (b)(1)(a). But when a magistrate judge denies a motion

to amend on the grounds of futility, as the Magistrate Judge did here, then the magistrate judge has engaged in a Fed. R. Civ. P. 12(b)(6) analysis and decided the amendment fails to state a claim, thus making the decision dispositive and subject to *de novo* review.¹

¹ Plaintiff has not located an Eleventh Circuit case directly addressing this issue with respect to magistrate judges. *See, e.g., St. Charles Foods, Inc. v. Am.'s Favorite Chicken Co.*, 198 F.3d 815, 823 (11th Cir. 1999) (“Generally, a court's refusal to allow a plaintiff to amend its complaint is reviewed for abuse of discretion . . . however, when the denial is based upon a finding that amendment of the complaint as proposed would be futile, then the standard of review is *de novo*.”); *Freeman v. First Union Nat'l*, 329 F.3d 1231, 1234 (11th Cir. 2003) (performing *de novo* review of denial of a motion to amend complaint on futility grounds because this conclusion is based on a matter of law that amendment would fail); *Gramegna v. Johnson*, 846 F.2d 675, 678 (11th Cir. 1988) (reversing a magistrate judge's denial of a motion to amend complaint as an abuse of discretion, but not addressing whether the magistrate judge had the authority to rule upon the motion); *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262 (11th Cir. 2004) (“[T]he district court denied Hall's motion on the ground that granting it would be “futile” . . . We conclude this decision was not an abuse of discretion and affirm the district court's order denying Hall's motion to file a second amended complaint.) Some lower courts in the Eleventh Circuit, however, have determined *de novo* review applies when the basis for denying amendment is futility. *See Crosson v. LaSalle Bank, N.A. as Tr. for MLMI Tr. Series 2006-MLNI*, No. 108CV03720MHS/ASJB, 2009 WL 10711891, at *1 (N.D. Ga. Dec. 23, 2009), *report and recommendation adopted sub nom. Crosson v. Lasalle Bank, N.A.*, No. 1:08-CV-3720-MHS, 2010 WL 11646947 (N.D. Ga. Jan. 12, 2010) (noting that the Magistrate Judge’s research had revealed no Eleventh Circuit decision addressing whether a magistrate judge is authorized to enter an order, as opposed to a report and recommendation, in ruling on a motion to amend but determining that since the motion to amend should be denied in part on futility grounds and that this alternative ground for denying the motion for leave to amend used Rule 12(b)(6) analysis, the Magistrate Judge would issue his decision regarding the motion for leave to amend as a Report and Recommendation [and thus subject to *de novo*

Because the futility standard is akin to that for a motion to dismiss, (*see, e.g., Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999)), the court is “making the legal conclusion that the complaint, as amended, would necessarily fail.” *St. Charles Foods, Inc. v. Am.'s Favorite Chicken Co.*, 198 F.3d 815, 822-23 (11th Cir. 1999). The Magistrate Judge’s denial of Plaintiff’s Motion to Amend based on futility is dispositive of Plaintiff’s proposed cause of action for retaliation. Accordingly, the Court should apply *de novo* review. Regardless of the standard the Court applies, however, the Magistrate Judge erred for the reasons set forth below.

B. Plaintiff’s Proposed Amendment for Retaliation is Not Futile

A proposed amendment is futile only if the proposed amendment could not survive a motion to dismiss for failure to state a claim. *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1320 (11th Cir. 1999). Here, the Magistrate Judge erred in determining Plaintiff’s proposed amendment would be futile. In doing so, the Magistrate Judge engaged in improper factual inquiry, determination and analysis.

review] instead of an Order out of an abundance of caution.); *Lodge v. Kondaur Capital Corp.*, No. 1:10-CV-736-WCO-LTW, 2011 WL 13115486, at *4 (N.D. Ga. Sept. 21, 2011) (applying *de novo* review to futility determination) *Marco Island Cable, Inc. v. Comcast Cablevision of the South, Inc.*, No. 2:04-cv-26-FtM-29DNF, 2006 WL 1733860, *1 (M.D. Fla. June 21, 2006) (“Since it is at least arguable that a decision to deny a motion to amend a complaint is a dispositive ruling outside the authority of a magistrate judge, the undersigned will vacate the magistrate judge’s Order and determine the motion to amend *de novo*.”).

The court's role at this stage is to determine *only* the appropriateness of a motion to amend and not to make any factual findings as to what the evidence may be.

Duling v. Domino's Pizza, LLC, No. 1:13-CV-01570-WCO, 2014 WL 11955397, at *3 (N.D. Ga. Sept. 2, 2014). Such factual analysis “does not come under the umbrella of a futility determination in the context of a motion to amend.” *Id.* Thus, if making that determination requires a complex factual inquiry the proposed amendment is clearly not insufficient on its face and should not be denied on the ground of futility.” *Ameritox, Ltd. v. Aegis Servs. Corp.*, No. 07-80498-CIV-MARRA/JOHNSON, 2008 WL 11333447, at *1 (S.D. Fla. Jan. 25, 2008) (quoting *Taylor v. Fla. State Fair Auth.*, 875 F. Supp. 812, 815 (M.D. Fla. 1995)). In this case, however, that is exactly what the Magistrate Judge did in reaching his erroneous conclusion.

1. The Magistrate Judge erred in finding that Judge Teske was not Defendant's employee and agent.

Plaintiff's proposed Third Amended Complaint alleges in part that Juvenile Court Judge Steven Teske made retaliatory statements concerning Plaintiff and that in doing so, Judge Teske acted as the “agent and employee” of Defendant Clayton County. (Id. ¶¶ 33, 53.) The Magistrate Judge determined that Judge Teske “cannot be an ‘agent and employee’ of the County,” [Doc. 56 at 14-15], making elaborate suppositions based on the state statute that authorizes payment of

juvenile court judges. In doing so, the Magistrate Judge makes suppositions of fact outside of the pleadings and no allocation for the possibility that Judge Steven Teske also receives compensation from Clayton County or that he is otherwise subject to Clayton County policies, rules or regulations. That the Magistrate Judge made suppositions outside of the four corners of the pleadings, rather than strictly looking at the pleadings as required by law, requires that his order be overruled and that Plaintiff be permitted to amend his complaint. Further, in finding that Teske was not the employer or an agent for the employer the Magistrate Judge ignored the allegations of the proposed amended complaint as well as factual contentions contained in the very news articles that form the basis for Plaintiff's retaliation claim (and which were attached and relied upon in Defendant's Opposition To Plaintiff's Motion For Leave To File Third Amended Complaint (Defendant's Opposition)).²

In the July 17, 2020 *Daily Report* article, attached to Defendant's Opposition as Exhibit A, Clayton County Commissioner Jeff Turner "confirmed that [Judge Teske] *who was Bostock's supervisor and authorized his firing*, will have a *significant say* in determining what the county does next." [Doc. 53-1 (emphasis

² It is important to note that the Magistrate Judge read the articles in the course of making his decision, [Order pp. 16-17], stating his opinion on what a "fair minded reader" of either news article could conclude...." *Id.*

added).] Similarly, in a June 19, 2020 article in the *Atlanta Journal Constitution*, attached to Defendant's Opposition as Exhibit B, Teske stated in part that he and Plaintiff were close and that it was "very hard for *me to let him go.*" [Doc. 53-2 (emphasis added).] In another part of the same article, Judge Teske stated "If *we* wanted to get rid of [Plaintiff], *we could have done it then.*" [*Id.* (emphasis added).] Thus, the Magistrate Judge ignored issues of fact set forth plainly in Defendant's exhibits which demonstrate that Teske was not only Defendant's agent, *he was the very person who on behalf of Defendant authorized Plaintiff's firing.* This is confirmed by Defendant's Interrogatory responses which unequivocally state under oath that Judge Teske made the decision to terminate Plaintiff's employment. (Relevant response and verification attached as Exhibit 1).³ If he was authorized to act as Defendant's agent in firing Plaintiff, surely in making the recent comments, the same agency can be attributed to Judge Teske. These issues of fact cannot be resolved under a 12(b)(6) standard. In choosing to do so, the Magistrate Judge made his own impermissible findings of fact.

³ Although the Court conducts a Rule 12(b)(6) analysis on futility, Plaintiff contends that the Court may consider this discovery response without converting the motion or analysis into one for summary judgment because the motion arises under Fed R. Civ. P. 15 and because the attached document is (1) central to the plaintiff's claim and (2) undisputed. *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005).

2. The Magistrate Judge erred in holding that Plaintiff did not suffer 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. Plaintiff alleges in his proposed Third Amended Complaint that he suffered an adverse action as a result of Judge Teske’s retaliatory remarks, which caused Plaintiff significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects. (*Id.* ¶ 33.)⁴ The Magistrate Judge, however, determined that “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.” [Doc. 56 at 17.]

In doing so, the Magistrate Judge erroneously resolved what is clearly an issue of fact and a merits-based issue: the interpretation of Judge Teske’s

⁴ Importantly, 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.”); see also *Forsberg v. Pefanis*, 2009 WL 901015, at *14 (N.D. Ga. January 26, 2009), adopted in part 2009 WL 901012, *1-2 (N.D. Ga. March 27, 2009). To the extent the Magistrate Judge’s order suggests otherwise, that is erroneous.

statements and his intent. The Magistrate Judge described Judge Teske's comments as simply denials of Plaintiff's claims. This erroneous subjective interpretation is improper at this stage of the case. It also completely ignores Judge Teske's undisputed statements (pleaded in Plaintiff's proposed Third Amended Complaint) that accuse Mr. Bostock of untruthfulness and misappropriation of funds and the harm Mr. Bostock pleaded resulting from these statements. While Clayton County is free to make an argument about interpretation of Teske's statements before a jury, it has no bearing at this stage. And it is not the role of the Magistrate Judge to impose his own factual interpretation. The Magistrate Judge erred on this issue.

3. The Magistrate Judge erred in holding that there was no causal connection between Plaintiff's protected activity and Judge Teske's statements.

To establish a causal connection, a plaintiff in a retaliation case only needs to show "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). 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.”) He must simply allege causation, which he has done.

The proposed Third Amended Complaint alleges 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 could not have “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 [to the Supreme Court].” Thus, Mr. Bostock has pleaded not only temporal proximity but other evidence of causation as well.

The Magistrate Judge, however, inexplicably determined that Plaintiff failed to “establish” a causal connection between his protected activity and Judge Teske’s remarks. [Doc. 56 at 17.] But, as noted, Mr. Bostock is not required to “establish” anything at this stage. He must simply state a claim which he has more than done. The Magistrate Judge’s use of the term “establish” further evidences his erroneous analysis.

The Magistrate Judge determined that Plaintiff somehow failed to show causation because Judge Teske had made similar statements in the past, before Plaintiff engaged in protected activity. But the very point of retaliation is that is a further action taken in response to protected activity. That Judge Teske may have made negative remarks about Plaintiff before does not insulate Defendant from retaliatory conduct that occurs later. They are two entirely separate things.

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 reverse the Magistrate Judge and grant Plaintiff's motion.

C. The Magistrate Judge Erred in Denying Plaintiff's Second Proposed Amendment

The Magistrate Judge also denied Plaintiff's motion with respect to his proposed amendment clarifying that he was bringing both single and mixed motive claims. The basis for the Magistrate Judge's denial of this amendment was that "[t]here 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." [Doc. 56 at 19.] Although Plaintiff contends that this amendment is not legally necessary for purposes of offering proof on both single and mixed motives, Plaintiff offered the amendment to clarify the matter. Further, Defendant did not oppose this proposed amendment. 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)) Accordingly, the Magistrate Judge’s decision, which appears to be largely driven by his erroneous factual disposition of the retaliation claim, was erroneous as well

CONCLUSION

Mr. Bostock has established that good cause exists under Fed. R. Civ. P. 15(a)(2) to allow him to amend his Complaint. The Magistrate Judge’s order erroneously exceeded the applicable standard and engaged in impermissible factual determinations. Mr. Bostock respectfully requests that this Court reject the Magistrate Judge’s order, grant his motion allowing him to amend his complaint and that Plaintiff’s Third Amended Complaint be filed.

Respectfully submitted this 22nd day of January, 2021.

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Counsel for Plaintiff

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Plaintiff,)	
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)	NO: 1:16-cv-01460-ELR-WEJ
CLAYTON COUNTY,)	
)	
Defendant.)	

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.

/s/ Thomas J. Mew
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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, 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.

BUCKLEY BEAL, LLP

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EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT
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)	
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**DEFENDANT’S RESPONSES TO
PLAINTIFF’S FIRST INTERROGATORIES**

COMES NOW Clayton County (the “County”), the Defendant herein, by and through the undersigned counsel, and hereby responds to Plaintiff’s First Interrogatories as follows:

1.

Identify each individual who you know or believe possesses knowledge or information relevant to the subject matter of this litigation (Plaintiff’s claims and Defendant’s defenses) and, with respect to each identified individual, provide his or her contact information (address, e-mail, home and cell phone numbers), and a description of the knowledge or information you believe each such individual

hands may be determined by examining the discussion of Plaintiff's mishandling of public funds contained in Shawn Black's January 17, 2013 email to Mr. Johnson and in the County's November 22, 2013 position statement to the EEOC and exhibits attached thereto, including Mr. Slay's memorandum to Investigator Crenshaw dated June 7, 2013; Mr. Johnson's memorandum to Investigator Crenshaw dated June 12, 2013; and the Final Report of the Clayton County Internal Audit Department dated May 2013.

4.

State and describe in full detail the reason(s) for the termination of Plaintiff's employment, including the identity of each individual who made, participated in, reviewed, approved, or was otherwise involved in the decision to terminate Plaintiff, and, separately for each such individual, describe that individual's role with respect to the decision.

RESPONSE: Pursuant to Fed. R. Civ. P. 33(d), the information sought by this interrogatory can be determined by examining the County's correspondence to Plaintiff dated June 3, 2013 and the County's November 22, 2013 position statement to the EEOC and exhibits thereto, which are being produced in this litigation. By way of further response, the County states that Chief Judge Teske made the decision to terminate Plaintiff's employment after discussing the matter with Mr. Johnson

and Mr. Slay, both of whom agreed with Chief Judge Teske's decision and recommended Plaintiff's termination. Chief Judge Teske gave advance notice of Plaintiff's termination to Superior Court Chief Judge Deborah Benefield (who agreed with the decision to terminate Plaintiff) and consulted with Ms. Bright, the Personnel Director at the time, regarding the termination process.

5.

For all individuals identified in response to Interrogatory No. 4, state whether he or she were aware of Plaintiff's sexual orientation, and provide the details of his or her knowledge, and the date such knowledge was acquired.

RESPONSE: Chief Judge Teske, Mr. Johnson, and Mr. Slay knew at the time of Plaintiff's termination that Plaintiff identified as gay and had been so aware for many years before Plaintiff's termination. Chief Judge Teske learned of Plaintiff's sexual orientation in the early 2000s, shortly after Plaintiff's employment started, after Chief Judge Teske's wife, Deborah, befriended Plaintiff's partner at the time through her involvement with the Henry Players. Mr. Johnson and Mr. Slay cannot recall exactly how or when they became aware of Plaintiff's sexual orientation. The County does not know for certain whether Chief Judge Benefield or Ms. Bright (both of whom are retired) specifically was aware of Plaintiff's sexual orientation, but the fact that Plaintiff identified as gay was widely known to employees who worked in

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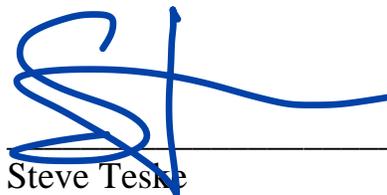
Defendant.)

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VERIFICATION

I, Steve Teske, the Chief Judge of the Juvenile Court of Clayton County, state that I am authorized to execute this Verification; that I have read the foregoing Defendant’s Responses to Plaintiff’s First Interrogatories; that the answers and responses therein are true and correct to the best of my knowledge and belief; and that I am competent so to testify. However, the answers and responses are not based solely on the knowledge of the executing party, but include information obtained by and through its agents, representatives, and attorneys. The word usage and sentence structure may be that of the attorney assisting in the preparation of the responses and does not necessarily purport to be the precise language of the executing party. By my signature below, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 8th day of January, 2021.



Steve Teske
Chief Judge, Juvenile Court of Clayton County