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.	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Clayton County (the "County"), the Defendant in the above-referenced case, and file this, its Memorandum of Law in Support of its Motion for Summary Judgment.

I. STATEMENT OF THE CASE

If a court has a special source of money set aside to support the recruitment, training, and retention of volunteer court-appointed special advocates (hereinafter "Clayton County CASA GAL volunteers") to represent children in custody disputes, funded by court-assessed fees on the affected families, should the court take steps to ensure the money is spent in line with this purpose? Absolutely. It would be utterly irresponsible not to do so.

What if the court discovers that the public employee in charge of this source of

money is using it (1) to pay for meals, alcoholic drinks, and other entertainment outside the county he serves; (2) to support the mission of a private, 501(c)(3) organization, including the recruitment of prospective volunteers and donors for that separate organization (as opposed to serving as Clayton County CASA GAL volunteers); and (3) to fund a recreational softball team on which he plays? May the court lawfully discipline the employee for spending the money in this manner, particularly if the employee is unable to identify a single Clayton County CASA GAL volunteer to be recruited from these efforts in more than two years? Again, it would be a breach of the public trust *not* to discipline the employee for spending public funds in this manner.

The question presented in this case is whether the public employee's sexual orientation makes any difference to the above analysis. It does not. The Plaintiff in this case, Gerald Bostock, served the County as the Child Welfare Services Coordinator and was the primary person with access to the bank account (the "GAL account") funded by a $500 fee that families in custody disputes paid through the court. His sexual orientation was well-known throughout the court administration and had been for over ten years by the time of the audit. If the County had wanted to terminate him because of his sexual orientation, it had plenty of opportunities to do so.

Instead, Plaintiff remained employed until an internal audit revealed a host of "red flags" with his management of the GAL account, including an utter absence of separation

of duties and frequent expenditures on meals and entertainment outside the County; activities that filled the coffers of the Friends of Clayton County CASA, Inc. ("FCCC")—a private, non-County organization; and expenses to support a softball team on which Plaintiff himself played. Juvenile Court Chief Judge Steve Teske reasonably suspected Plaintiff may have been using the GAL account for personal interests and directly asked him to justify how these expenditures were related to the recruitment, training, and retention of Clayton County CASA GAL volunteers. Not surprisingly, Plaintiff was unable to identify a single individual recruited to serve as a Clayton County CASA GAL volunteer in the more-than-two-year period preceding the audit. Judge Teske thus terminated Plaintiff's employment.

The record contains no evidence that Judge Teske made this decision because Plaintiff is gay. Plaintiff appears to base this assertion solely on the fact that the softball team he sponsored and many of the midtown Atlanta establishments on which he spent GAL funds advertise themselves as "gay-friendly" or catering to a gay clientele. But nothing in the record suggests Plaintiff would have been treated any differently if the softball team was not in a "gay" league or if the midtown Atlanta bars and restaurants were not known as "gay-friendly" establishments. The County actually hired a gay person to replace Plaintiff, which simply would not make sense if Plaintiff was terminated for being gay. Plaintiff's claim that the County discriminated against him

because of his sexual orientation lacks any support in the record, and this entire action should be dismissed in full, with prejudice, on this motion.

II. PROCEDURAL HISTORY

On September 12, 2016, Plaintiff filed his Second Amended Complaint ("SAC") asserting that he was terminated from his employment because of his sexual orientation. (Doc. 10). On July 21, 2017, the Court dismissed the SAC on the ground that sexual orientation was not a protected class under Title VII. (Doc. 24). The case eventually reached the Supreme Court, which on June 15, 2020 issued an opinion holding that sexual orientation discrimination is prohibited under Title VII.

The case was remanded back to this Court for further proceedings. On November 23, 2020, Plaintiff filed a motion for leave to file a Third Amended Complaint ("TAC") (Doc. 51), which was granted in part on November 9, 2021, insofar as Plaintiff was allowed to plead a mixed-motive claim. (Doc. 100). Plaintiff filed his TAC on November 12, 2021 (Doc. 101), which the County answered on November 26, 2021. (Doc. 104). In the meantime, the parties engaged in discovery, and the discovery period closed on February 4, 2022. (Doc. 108).

III. FACTS

The County incorporates herein its Statement Of Material Facts As To Which There Exists No Genuine Issue To Be Tried ("SMF") filed simultaneously herewith.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. The County Is Entitled To Summary Judgment On Plaintiff's Single-Motive Sexual Orientation Discrimination Claim

Under the single-motive theory of liability, applying the familiar McDonnell Douglas framework, Plaintiff must first establish a *prima facie* case of sexual orientation discrimination. If he does so, the burden shifts to the County to articulate a legitimate, nondiscriminatory reason for his termination. If the County does so, the burden shifts back to Plaintiff to show that the reasons given by the County for terminating Plaintiff are a pretext for discrimination because of his sexual orientation.

1. Plaintiff Cannot Establish A *Prima Facie* Case

a. Plaintiff Was Not Replaced By Someone Outside His Protected Class

In order to establish a *prima facie* case of discrimination arising out of his termination, the plaintiff must show either that he was replaced by someone outside his protected class or that he was treated less favorably that a similarly situated person outside his protected class. Hogan v. S. Ga. Med. Ctr., 749 F. App'x 924, 931 (11th Cir. 2018); Flowers v. Troup Cnty., Ga. Sch. Dist., 803 F.3d 1327, 1336 (11th Cir. 2015).

In this case, Plaintiff cannot show that he was replaced by someone outside his protected class because Judge Teske replaced Plaintiff with Carol Gossett, who also is gay and thus is of the same protected class as Plaintiff. (SMF, ¶¶ 13, 74). Gay men and

women are in the same protected class because both are attracted to individuals of the same sex as themselves. If Plaintiff had been replaced by a straight male employee, he would contend he was replaced by an individual outside his protected class (gay).

b. Plaintiff Cannot Demonstrate That He Was Treated Less Favorably Than Similarly-Situated Heterosexual Employees

Another possible avenue for Plaintiff to establish a *prima facie* case of sexual orientation discrimination is to show that he was treated less favorably than a similarly-situated heterosexual employee. The Eleventh Circuit has held that whether a proposed comparator is similarly situated is properly analyzed as part of the plaintiff's *prima facie* case. Lewis v. City of Union City, 918 F.3d 1213, 1221-24 (11th Cir. 2019) (*en banc*). Moreover, the Eleventh Circuit has clarified that this requires a showing that the plaintiff and a comparator "are similarly situated in all material respects." Id. at 1227. This requires that the plaintiff and the comparator "be sufficiently similar, in an objective sense, that they 'cannot reasonably be distinguished.'" Id. at 1228 (citation omitted). Thus, a valid comparator ordinarily must have "engaged in the same basic conduct (or misconduct), as the plaintiff[.]" Id. at 1227.

i. Plaintiff Was Not Similarly Situated To John Johnson

In this case, Plaintiff likely will attempt to argue that he was treated less favorably than John Johnson, who was allowed to retire rather than be terminated after he was accused of shielding from disciplinary action a subordinate employee with whom he had

an extra-marital affair. However, as set forth above, the Eleventh Circuit requires a high degree of similarity between the conduct of the plaintiff and the alleged conduct of a proposed comparator. Here, having an extra-marital affair with a married female employee and shielding her from discipline because of that relationship is substantially different from Plaintiff's misuse and misappropriation of public funds. (SMF, ¶¶ 18-19, 21-22, 39-54, 57-72).

ii. Plaintiff Was Not Similarly Situated To Employees Whose Actions Were The Subject Of Other Audits

Plaintiff contends that several subsequent audits relating to the Juvenile Court reported problems for which the purported wrongdoer was not terminated, including (1) an April 2014 audit of the Juvenile Justice Incentive Grant; (2) an April 2014 audit of the Victims of Crime Act (VOCA); (3) an April 2014 audit of the Forward Promise Grant; (4) a March 2015 audit of the VOCA grant; (5) a June 2015 of the Georgia CASA grant; (6) a 2017 audit of the CASA bank account and related email; and (7) a 2019 audit of the juvenile court bank account. (SMF, ¶ 75; Bostock Dep., pp. 65:24 – 67:25).

However, several of these audits asserted that grant funds should not be utilized to pay the salary and benefits for certain employees. (SMF, ¶ 75; Slay Decl., ¶¶ 8-10, 15). Any such alleged allocation errors as to which source of public funds (a grant or the Juvenile Court's general funds) was the appropriate one to use to pay a Juvenile Court employee's salary and benefits is not remotely similar to Plaintiff's misconduct in

spending public funds generated from court-imposed fees to wine and dine potential donors, sponsors and volunteers for private, non-profit entities and to facilitate marketing and fundraising endeavors for these organizations, instead of to recruit, train and retain Clayton County CASA volunteers as required by the governing MOU. (SMF, ¶¶ 18-19, 21-22, 39-54, 57-72). In any event, the Juvenile Court administration properly concluded that the grant funds at issue were properly being used to pay the salary and benefits of the employees at issue. (SMF, ¶ 75; Slay Decl., ¶¶ 8-10, 17-20).

Another audit cited by Plaintiff chronicled bookkeeping and disbursement errors made by a former employee who had retired. (SMF, ¶ 75; Slay Decl., ¶ 12). Such errors were not remotely similar to Plaintiff's misconduct. In any event, the Juvenile Court administration hardly could discipline a former employee. Another one of the audits (and a related email) cited by Plaintiff involved the failure of a first-year Child Welfare Coordinator to perform the mundane task of reconciling bank statements on a monthly basis. (SMF, ¶ 75; Slay Decl., ¶ 11). Once again, such a job performance issue is not remotely similar to Plaintiff's misconduct, which had been ongoing for more than two years. (SMF, ¶¶ 18-19, 21-22, 39-54, 57-72). The remaining audits addressed issues relating to the first year-administration of a new grant (SMF, ¶ 75; Slay Decl., ¶¶ 5-7, 13-16, 21), which again bear no relationship to Plaintiff's misconduct, which had been ongoing for more than two years.

In sum, none of the audits cited by Plaintiff involved the improper use of public funds instead of private funds, or the use of public funds to circumvent oversight as to the use of private funds. (SMF, ¶¶ 20, 23). Accordingly, Plaintiff cannot establish a *prima facie* case of discrimination based on his sexual orientation, and the County thus is entitled to summary judgment on his single-motive sexual orientation discrimination claim.

2. Plaintiff Cannot Create A Triable Issue Of Pretext

Even if Plaintiff could establish a *prima facie* case of discrimination because of his sexual orientation, Plaintiff cannot create a triable issue of pretext. In order to create a triable issue of pretext under Plaintiff's single-motive theory, Plaintiff must create a triable issue of pretext as to all the reasons given by Judge Teske for Plaintiff's termination. See, e.g., Chapman v. A1 Transport., 229 F.3d 1012, 1037 (11th Cir. 2000) (*en banc*); Rodriguez v. Cargo Airports Servs. USA, LLC, 648 F. App'x 986, 989 (11th Cir 2016).

Judge Teske terminated Plaintiff for two reasons. First, he concluded that Plaintiff had misused the GAL funds by spending these funds for purposes that were not permitted under the MOU, which limited the use of these funds to the recruitment, training, and retention of Clayton County CASA volunteers who served as *guardians ad litem* in Clayton County cases. (SMF, ¶¶ 2-3, 17-19, 21, 44-54, 58-67, 71-72). Judge Teske

justifiably and understandably determined that Plaintiff's use of GAL funds at restaurants and bars in Midtown and other portions of Atlanta was not part of a legitimate or *bona fide* effort to recruit individuals to travel many miles to Clayton County on a regular basis to serve as Clayton County CASA GAL volunteers and to regularly work a Clayton County caseload. (SMF, ¶¶ 65-66).

Indeed, Plaintiff's explanations for the expenses questioned by the audit revealed that a substantial portion of the expenses from the GAL account were for fundraising or publicity purposes, and not for the recruitment, training, or retention of Clayton County CASA GAL volunteers. (SMF, ¶¶ 65-66). Although Plaintiff contends that recruiting efforts sometimes are successful and sometimes unsuccessful, Plaintiff cannot escape the fact that more than two years of "recruiting" by wining and dining purported prospects in Atlanta (not surprisingly) failed to yield a single Clayton County CASA volunteer. (SMF, ¶¶ 24, 47, 49-50, 58, 60-61, 65). Judge Teske was more than entitled to conclude that Plaintiff's use of GAL funds in this manner constituted an unacceptable violation of Plaintiff's obligations under the MOU.

Similarly, Judge Teske understandably and justifiably concluded that Plaintiff's use of GAL funds to sponsor an Atlanta-based softball team and to pay for an out-of-state banquet was not part of a legitimate or *bona fide* effort to recruit Clayton County CASA GAL volunteers. (SMF, ¶¶ 52-53, 58, 62-63, 67). Once again, Plaintiff's explanations

for these expenses questioned by the audit revealed that the overriding purpose of these expenditures was fundraising, marketing and publicity for the FCCC. (SMF, ¶¶ 62, 67). Not surprisingly, Plaintiff could not and did not identify for Judge Teske any Clayton County CASA GAL volunteer whom he had successfully recruited as a result of his use of GAL funds to sponsor his softball team. (SMF, ¶ 67).

Second, Judge Teske suspected that at least some of the expenditures of GAL funds were not business-related but rather were for personal pursuits. (SMF, ¶¶ 68-69). This suspicion was based on a number of factors, including Judge Teske's disbelief that the expenditures in Atlanta could have been related to the training, retention or recruitment of Clayton County CASA GAL volunteers because it was too far away from Clayton County; the fact that no such Clayton County CASA GAL volunteers had been recruited as a result of these expenses; that the expenses at gay restaurants and bars in Midtown Atlanta may not have been business-related; and the fact that there were some missing bank statements and receipts, meaning that Plaintiff could not explain all the expenditures. (SMF, ¶¶ 24, 41, 47, 61, 69). In addition, Judge Teske believed that Plaintiff personally benefited from the sponsorship of his softball team (which was itself a personal pursuit) from the standpoint of gaining prestige with his teammates as someone who could provide them with a free t-shirt and free refreshments in another state. (SMF, ¶ 68). Judge Teske also viewed Plaintiff's softball team teammates as Plaintiff's personal

friends. (SMF, ¶ 69).

a. Plaintiff's Contention That He Did Not Misuse GAL Funds Does Not Create A Triable Issue Of Pretext

Plaintiff contends that he did not misuse the funds in the GAL account because the MOU authorized the expenditure of GAL funds on the training, recruitment and retention of "volunteers" and did not limit the type of "volunteers" that could be recruited with these funds. (SMF, ¶¶ 21-22). Thus, under Plaintiff's interpretation of the MOU, GAL funds could be used to recruit volunteers to participate in fundraising events for FCCC such as the Duck Derby and even fundraising events for other organizations such as Georgia CASA and the Metro Atlanta CASA Collaborative. (SMF, ¶¶ 8-9, 21-22).

However, it is axiomatic that courts do not sit as a super-personnel department and do not second-guess the wisdom of an employer's business decisions. See, e.g., Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1266 (11th Cir. 2010). Thus, "[a]n employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1363 n.3 (11th Cir. 1999).

In this case, Plaintiff's "interpretation" of the MOU as permitting him to use GAL funds for FCCC, Georgia CASA and Metro Atlanta CASA Collaborative fundraising and marketing purposes is untenable. The MOU does not mention fundraising or marketing at all. The stated purpose for the development of the MOU and the exclusive

focus of the MOU is the Clayton County CASA GAL volunteers who undergo 40 hours of training, are certified and sworn in and devote an average of 6-8 hours per week carrying out their responsibilities as a *guardian ad litem* for children in cases pending in the Clayton County Juvenile Court and custody cases pending in the Clayton County Superior Court. (SMF, ¶¶ 2-3, 17-19). Regardless, Judge Teske was more than entitled to exercise his own judgment as to what type of expenses were permissible under the MOU and for him to conclude that the MOU only authorized the use of GAL funds for the recruitment, training, and retention of Clayton County CASA GAL volunteers. (SMF, ¶¶ 2-3, 17-19, 65-67). Indeed, two other senior Juvenile Court administrators (Mr. Johnson and Colin Slay), the two auditors and Superior Court Judge Deborah Benefield all agreed with Judge Teske's assessment and his decision to terminate Plaintiff. (SMF, ¶¶ 64, 70).

Similarly, Plaintiff cannot create a triable issue of pretext by asserting that it was permissible for him to spend GAL funds on alcohol because the MOU did not expressly prohibit the expenditure of GAL funds on alcohol, and that the County's well-known prohibition against use of County funds on alcohol did not apply because the funds belonged to the FCCC, not the County. (SMF, ¶¶ 71-72). Once again, Judge Teske was more than entitled to conclude that these monies were still County funds because they were generated by the Superior Court of Clayton County, and that the MOU just allowed

the FCCC to be the custodian of the funds. (SMF, ¶¶ 18-19, 72). Mr. Slay, Mr. Johnson and the auditors agreed with Judge Teske's assessment that the use of GAL funds for alcohol was not permitted. (SMF, ¶ 72). The fact that Plaintiff interprets the MOU differently does not create a triable issue of pretext.

b. Plaintiff's Contention That He Did Not Spend GAL Funds On Personal Interests Does Not Create A Triable Issue Of Pretext

Plaintiff likely will contend that all of his expenses from the GAL account were business-related, that none of these expenses were for personal pursuits, and that there is no evidence to the contrary. However, Judge Teske honestly believed some of the expenses may have been for personal pursuits for the reasons discussed above. (SMF, ¶¶ 24, 41, 47, 61, 68-69). Even if Judge Teske's belief was mistaken as Plaintiff contends, such a mistaken but honest belief does not create a triable issue of pretext. Damon, 196 F.3d at 1363 n.3.

Moreover, Judge Teske's suspicion that some of the expenses may have been personal was well-founded. At least one individual for whom Plaintiff expended GAL funds for meals was someone that Plaintiff had dated or was dating, and several of the expenses were for a restaurant where this individual was a manager. (SMF, ¶ 61). Furthermore, as the audit noted, many of the claimed expenses did not have any supporting documentation or receipts, and thus there was no way to verify that the expenses were for the business purposes that Plaintiff claimed. (SMF, ¶ 50).

c. Plaintiff's Contention That Judge Teske Terminated Him For Being Too Outspoken As A Gay Man Does Not Create A Triable Issue Of Pretext

To the extent that Plaintiff contends that Judge Teske terminated Plaintiff because he was more outspoken about being gay, as manifested by his participation in his gay softball team, any such contention is meritless. Plaintiff cannot escape the fact that Judge Teske employed – and promoted – other openly gay employees within the Juvenile Court. (SMF, ¶ 13, 74). Although Plaintiff attempts to characterize Ms. Gossett as being "closeted," the reality is that Ms. Gossett's status as gay was widely known by Juvenile Court employees, including Plaintiff, Judge Teske, Mr. Johnson and Mr. Slay. (SMF, ¶ 13). As previously discussed, Judge Teske's concern with Plaintiff's use of GAL funds to sponsor his softball team was not that it was a gay softball team, but rather that it was based in Atlanta – not Clayton County – and thus could not reasonably be expected to (and did not) lead to the successful recruitment of any Clayton County CASA GAL volunteers. (SMF, ¶¶ 52-53, 62-63, 67).

d. Judge Teske's Statements In His Diary And Elsewhere Do Not Create A Triable Issue Of Pretext

[redacted]

[redacted]

Similarly, Plaintiff's assertions that Judge Teske referred to the fact that Plaintiff spent GAL funds at "gay" bars and restaurants in Atlanta" and on a "gay" softball team in Atlanta in other meetings during which he discussed Plaintiff's termination also do not create a triable issue of pretext. Once again, these alleged statements by Judge Teske simply recite accurately what the auditors discovered during the audit. (SMF, ¶¶ 42, 52, 61). These alleged statements do not suggest that Judge Teske's concern was that the expenses were for "gay" restaurants and bars and for a "gay" softball team rather than the fact that the restaurants, bars and softball team were located in Atlanta.

Furthermore, Judge Teske's alleged statements should be considered in the context of Judge Teske's advocacy in favor of LGBTQ youth (SMF, ¶ 5), his longstanding support for the legal proposition that employment discrimination on the basis of sexual orientation should be prohibited (id.), his retention and promotion of openly gay employees (SMF, ¶¶ 11, 14, 74), his previous lenient treatment of Plaintiff

with respect to personnel matters (SMF, ¶ 26), and the fact that he previously had socialized with Plaintiff and his partners on a frequent basis. (SMF, ¶ 14).

Given this record, no reasonable person could possibly conclude that Judge Teske harbored animus or bias against individuals such as Plaintiff who are gay.

e. Mr. Johnson's Alleged Statements Do Not Create A Triable Issue Of Pretext

Finally, statements that Plaintiff attributes to Mr. Johnson also do not create triable issues of pretext. It is well established that stray remarks or comments isolated and unrelated to the challenged employment decision are insufficient to create a triable issue of pretext. See, e.g., Alvarez v. Royal Atlantic Developers, Inc., 610 F.3d 1253, 1268 (11th Cir. 2010); Rojas v. Florida, 285 F.3d 1339, 1342-43 (11th Cir. 2002); Steger v. General Electric Co., 318 F.3d 1066, 1079 (11th Cir. 2003).

In this case, Plaintiff contends that Mr. Johnson's alleged remark in 2003 that it "probably doesn't matter" to Plaintiff that other female employees were interested in him somehow creates a triable issue of pretext. However, Mr. Johnson did not make the decision to terminate Plaintiff (SMF, ¶ 64), and this alleged comment was made more than 10 years before Plaintiff's termination.

Plaintiff's assertion that, during the termination meeting, Mr. Johnson commented that "it's not because you're gay" likewise does not create a triable issue of pretext. Plaintiff admits that Mr. Johnson made this alleged comment only in response to

Plaintiff's statement that "I know what this is about," which Plaintiff admitted was because Plaintiff thought his termination was because he is gay. Thus, at most, Mr. Johnson's alleged comment shows that he correctly surmised Plaintiff's thoughts about his termination.

B. The County Is Entitled To Summary Judgment On Plaintiff's Mixed-Motive Sexual Orientation Discrimination Claim

In conclusory fashion, Plaintiff alleges in his Third Amended Complaint that he also asserts a mixed-motive claim of discrimination. (TAC ¶¶ 6, 31.) Such claim requires Plaintiff to prove that (1) the County took an adverse employment action against him, and (2) a protected characteristic was a motivating factor for the adverse employment action. Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1232-33 (11th Cir. 2016). No evidence of record supports the second element above.

When a mixed-motive claim relies on alleged discriminatory comments, the plaintiff must show that the circumstances surrounding the comments demonstrate the employer "actually relied on [a protected characteristic] in making its decision." Id. at 1241. In Quigg, for example, the Court held there was a jury question as to whether a female school district superintendent's sex played a motivating factor in the non-renewal of her contract when school board members allegedly said (1) that "it is time to put a man in there"; (2) that plaintiff should hire a tough "hatchet man" as assistant superintendent; (3) that plaintiff should consider a male assistant superintendent because it is important

to achieve gender balance in the school administration; and (4) that plaintiff "needed a strong male to work under her to handle problems, someone who could get tough." Id. In finding these comments suggested sex was a motivating factor in the decision not to renew the plaintiff's contract, the Court emphasized that the comments specifically referred to the desired gender composition of the plaintiff's office. Id. at 1242.

By contrast, the record here contains no evidence of similar comments as found in Quigg (or other evidence) to support a mixed-motive claim, particularly no comments expressing a desired sexual orientation for the position of Child Welfare Services Coordinator. To the extent Plaintiff intends to base his claim on Mr. Johnson's alleged remark that it "probably doesn't matter" to Plaintiff that other female staff members were interested in him, this statement could not possibly have had any connection to Plaintiff's termination as Plaintiff alleges it occurred in 2003—*ten years* earlier—and Plaintiff admits Mr. Johnson did not make any other similar remarks during the intervening period. (SMF ¶ 15.) As for Mr. Johnson's alleged comment during the termination meeting that "it's not because you're gay," the literal meaning of this comment *disclaims* Plaintiff's sexual orientation as being a motivating factor. Furthermore, as Plaintiff testified, Mr. Johnson allegedly made this remark only in response to Plaintiff's statement, "I know what this is about," which Plaintiff admits was expressing his belief that he was being terminated for being gay.

To the extent Plaintiff intends to base a mixed-motive claim on Sabrina Crawford's testimony that Judge Teske said Plaintiff spent GAL funds in gay bars/restaurants, Shelley Johnson's testimony that Judge Teske acknowledged the Atlanta softball team on which Plaintiff spent GAL funds was in a gay softball league, [redacted]; each of these alleged comments arose in the context of explaining that Plaintiff spent money from the GAL account on personal expenses outside the scope of the MOU (*i.e.*, alcohol, meals, and entertainment in midtown Atlanta, and a recreational sports team also outside Clayton County). [redacted] This was an objectively reasonable suspicion, given that (1) Plaintiff is gay, and (2) when asked, he was unable to identify a single CASA volunteer recruited from such efforts.

Unlike the comments in Quigg, none of the alleged remarks attributed to Mr. Johnson or Judge Teske expresses a desire for the Child Welfare Services Coordinator or any other juvenile court employee to have a particular sexual orientation. To the extent Plaintiff argues that merely acknowledging his sexual orientation is evidence of discriminatory intent, case law in this circuit holds the exact opposite. For example, in Lewis, 343 F. App'x at 455, the employer terminated a white employee for suggesting

his subordinates, all of whom were Black, bring a watermelon to roll call. The plaintiff argued that, since his employer took his race into account in finding the comment to be offensive, then his race played a motivating factor in his termination. Id. The court, however, held that the employer's merely *recognizing* the plaintiff's race was insufficient to support a mixed-motive claim where the plaintiff failed to show the recognition to be for an improper purpose. Id.

Similarly, in Lieu v. Board of Trs., No. 5:15-cv-02269-MHH, 2020 U.S. Dist. LEXIS 244752, at *33 (N.D. Ala. Nov. 30, 2020), the plaintiff (a professor) argued his Chinese national origin was a motivating factor in his removal as department chair because the university's president said he was opposed to hiring lecturers "from overseas"; the president expressed concern that a visiting Chinese lecturer may be a "spy" for China; and the provost said the plaintiff's persistent advocacy for the same Chinese lecturer was one of the reasons they removed him as chair. Despite these statements, the Court granted summary judgment for the university because there were valid logistical and budgetary reasons not to hire from overseas; the visiting lecturer's actions and statements were sufficiently suspicious to raise concerns of potential espionage; and the plaintiff's defense of this same lecturer created trust issues between him and the university. Id. at *33-38.

The above cases demonstrate that an employer's recognition of an employee's

protected characteristic is not sufficient to support a mixed-motive claim where the *context* shows a legitimate reason for comments referencing the characteristic. Judge Teske testified repeatedly that he believed Plaintiff used GAL funds for personal interests instead of for the recruitment, training, and retention of Clayton County CASA GAL volunteers. (SMF ¶¶ 68-69.) He based this suspicion primarily on the fact that several expenditures on alcohol, meals, and entertainment (including the softball team) took place outside Clayton County—in one instance, in Alabama—and yet Plaintiff was not able to identify a single Clayton County CASA GAL volunteer that he recruited from any of these outings. (SMF ¶¶ 63, 66-67.) To put another way, Plaintiff's batting average for recruiting Clayton County CASA GAL volunteers from 2011 through 2013 was .000. This abysmal success rate itself warrants the suspicion that Plaintiff may have spent GAL funds on personal interests. When combined with the fact that several GAL expenditures occurred at establishments that expressly catered towards a gay clientele, including the gay softball league, and knowing that Plaintiff is gay, the suspicion that Plaintiff may have been using GAL funds for personal gain is unavoidable.

In this full context, [redacted]. Just as it

was legitimate for the employer in Lewis to consider the racial difference between the plaintiff and his subordinates in finding the "watermelon" comment to be racially offensive, and just as it was legitimate for the employer in Lieu to acknowledge the plaintiff's Chinese national origin in being concerned about foreign espionage, so too was it legitimate [redacted] in suspecting that Plaintiff may be spending GAL funds on personal interests. [redacted], particularly since it is undisputed that he had known of Plaintiff's sexual orientation for *over ten years* by the time of Plaintiff's termination. See also Williams v. Hous. Auth. of Savannah, Inc., 834 F. App'x 482, 489 (11th Cir. 2020) (mixed-motive claim based on sex failed, despite evidence of sexually-objectifying comments, where plaintiff could not rebut reason offered for termination or show sexual bias in termination decision).

C. The County Is Entitled To Summary Judgment On The Same-Decision Defense

Alternately, in the event the Court determines there is sufficient evidence to support a mixed-motive claim, the County shows that no reasonable jury could conclude the County would not have made the same termination decision in the absence of Plaintiff's sexual orientation as an alleged motivating factor. Title VII provides that if an

employer can demonstrate it "would have taken the same action in the absence of the impermissible motivating factor, the court . . . shall not award damages" or certain equitable relief. 42 U.S.C. § 2000e-5(g)(2)(B).

Taking Plaintiff's sexual orientation out of the equation does nothing to resolve the legion of concerns regarding his handling of the GAL account. Mr. Johnson long had been concerned about Plaintiff's ability to receive and spend money from the GAL account with virtually no oversight; Plaintiff often failed or delayed in submitting bank statements to Mr. Johnson; Mr. Black reported that Plaintiff had been using GAL funds for multiple inappropriate expenditures, including on alcohol and personal matters; Ms. Merritt's pre-audit conversation with Plaintiff raised numerous "red flags"; the audit itself concluded there were multiple opportunities for impropriety in how Plaintiff managed the GAL account; and nearly all of the "recruitment, training, and retention" expenditures over a two-year period were for meals and entertainment, for which Plaintiff was not able to identify a single volunteer recruited to serve as a CASA GAL in Clayton County. (SMF ¶¶ 28, 33-34, 38, 44-53, 63, 66-67.) Even by Plaintiff's own admission, many of his expenditures from the GAL account were on fundraising and networking activities that financially benefited the FCCC—a separate, non-County organization—which Judge Teske rightly described as "taking from Peter to pay Paul." (SMF ¶ 65.) The foregoing is concerning regardless of the sexual orientation of the person involved.

To put it bluntly, no evidence of record suggests the County would have kept employing Plaintiff had he been a straight man who repeatedly spent GAL funds outside the scope of the MOU, including on meals and alcohol purchases at bars and restaurants in midtown Atlanta (and Alabama) and to sponsor a softball team on which he played, when he could not justify these expenditures by identifying even one Clayton County CASA GAL volunteer to have come from these efforts in a more-than-two-year period. To any objective observer, such an individual either is misusing public funds on personal interests or exercising extremely poor judgment in repeated unsuccessful attempts to recruit new Clayton County CASA GAL volunteers for the court. Whether the bar, restaurant, or softball team advertises itself as gay-friendly or not is beside the point. No reasonable person in Judge Teske's position would have retained Plaintiff under these circumstances, as Judge Benefield, Mr. Johnson, Mr. Slay, Ms. Merritt, and Ms. Moore all agreed. (SMF ¶¶ 64, 70.)

V. CONCLUSION

Accordingly, for the foregoing reasons, the County's Motion for Summary Judgment should be granted and this action dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D), I hereby certify that the within and foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** has been prepared in compliance with Local Rule 5.1(B) in 14-point Times New Roman type face.

This 21st day of March, 2022.

/s/ Jack R. Hancock
Jack R. Hancock
Georgia Bar No. 322450

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the within and foregoing **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following counsel of record:

Thomas J. Mew, IV
Edward D. Buckley
Andrew Beal
Buckley Beal LLP
600 Peachtree Street, NE, Suite 3900
Atlanta, GA 30308

This 21st day of March, 2022.

/s/ Jack R. Hancock
Jack R. Hancock
Georgia Bar No. 322450