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.	)	

DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

COMES NOW Clayton County (the "County"), the Defendant in the above-referenced case, and files this Response in Opposition to Plaintiff's Motion for Summary Judgment.

I. INTRODUCTION

Plaintiff opens his initial brief with a quote from Judge Teske's deposition that Plaintiff apparently believes to be so inflammatory that no reasonable jury could fail to find in his favor. Plaintiff characterizes this testimony as an admission under oath that Judge Teske fired Plaintiff for being gay. *Judge Teske did not make any such "admissions."*

All Judge Teske "admitted" is what he has maintained since Plaintiff's termination: that in addition to Plaintiff's spending funds from the guardian ad litem

("GAL") account outside the scope of the Memorandum of Understanding ("MOU"), Judge Teske suspected that Plaintiff also spent GAL funds on personal expenses based on the location of the expenditures (midtown Atlanta), the type of establishments (bars and restaurants, including many that advertised themselves as catering to a gay clientele), and the fact that Plaintiff could not identify *a single soul* he recruited to be a volunteer court-appointed special advocate (hereinafter "Clayton County CASA GAL volunteer") as a result of his use of GAL funds at any of these establishments.

Zero Clayton County CASA GAL volunteers. This fact bears emphasis. Plaintiff was supposed to use the GAL funds to recruit, train, and retain individuals to serve as CASA GAL volunteers in Clayton County. He contends that his expenditures in midtown Atlanta, many at gay-friendly or gay-themed establishments, should not be questioned because nothing in the MOU prohibits recruiting Clayton County CASA GAL volunteers from gay establishments in midtown Atlanta. But Plaintiff admits he did not recruit *any* Clayton County CASA GAL volunteers from these outings in over a two-year period. The only possible explanations for this failure are (1) Plaintiff had an extremely long losing streak (in which case his continued efforts to "recruit" at these venues show remarkably poor judgment); (2) Plaintiff spent the GAL funds on non-recruiting purposes, such as marketing or fundraising (neither or which is contemplated by the MOU); or (3) perhaps these bar and restaurant expenditures were personal

outings and not CASA-related events at all (in which case Plaintiff would have been misrepresenting how he used these funds). Any of these conclusions is a legitimate, nondiscriminatory reason for his termination.

Nothing in Title VII requires an employer to be willfully blind to an employee's potential misconduct because of his sexual orientation. Nor does the law require gay employees to be given more favorable treatment than individuals of other sexual orientations. To the contrary, the purpose of antidiscrimination laws is to treat all employees the same regardless of their protected characteristics.

If Plaintiff were not gay and still had spent Clayton County funds in midtown Atlanta bars and restaurants, without a single Clayton County CASA GAL volunteer to show for these expenses incurred over the course of more than two years, the inescapable conclusion still would be that Plaintiff either (1) showcased poor judgment in chasing a fruitless source of Clayton County CASA GAL volunteers; (2) spent the GAL funds for purposes other than recruiting Clayton County CASA GAL volunteers, such as fundraising or publicity; or (3) actually spent GAL funds on meal and alcohol purchases for himself and/or his friends for personal reasons. No evidence of record shows this would not be so. For this reason, Plaintiff's Motion for Summary Judgment should be denied and summary judgment instead should be entered in favor of the County.

II. FACTS

The County incorporates by reference herein its Response to Plaintiff's Statement of Undisputed Material Facts (hereinafter, "Def.'s Resp. to Pl.'s SMF") and the County's Statement of Additional Material Facts Demonstrating That Plaintiff's Motion for Summary Judgment Should Be Denied (hereinafter, "Def.'s SAMF").

III. ARGUMENT AND CITATION TO AUTHORITY

A. Plaintiff Failed To Show Any Direct Evidence Of Discrimination

"Direct evidence is evidence, that, if believed, proves the existence of a fact without inference or presumption." Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004) (brackets and internal quotation marks omitted). In the context of employment discrimination, "only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." Id. (internal quotation marks omitted). But "stray remarks in the workplace," "statements by nondecisionmakers," and "statements by decisionmakers unrelated to the decisional process itself" do *not* constitute direct evidence of discrimination. EEOC v. Alton Packaging Corp., 901 F.2d 920, 924 (11th Cir. 1990).

In Quigg v. Thomas Cnty. Sch. Dist., 814 F.3d 1227, 1242 n.11 (11th Cir. 2016), in which a female school superintendent alleged the school district failed to renew her

employment contract because of her sex, the Eleventh Circuit analyzed whether the following comments by school board members constituted direct evidence of sex discrimination: (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." The Eleventh Circuit held these comments did ***not*** constitute direct evidence of sex discrimination because each statement required an additional inference to reach the conclusion that the school board voted against the plaintiff because of her sex. Id.

If the statements in Quigg are not direct evidence of discrimination, then the quoted passages from Judge Teske's deposition testimony could not possibly be direct evidence. Judge Teske testified that one of the reasons he terminated Plaintiff was that he was "highly suspicious that [Plaintiff's] up there [in midtown Atlanta] doing personal, more so than business stuff." (Def.'s Resp. to Pl.'s SMF, ¶¶ 53, 62.) When Plaintiff's counsel asked Judge Teske if, by "personal," he meant "gay stuff," Judge Teske said "it doesn't matter whether you're gay [or] you're straight." (Id., ¶¶ 53, 62.) This is right in line with Judge Teske's statements in his personal diary (which he never intended to make public) that "[i]t's not the gay thing that upsets me." (Id., ¶ 51.) Thus,

for a jury to find Judge Teske's statements to be direct evidence of sexual-orientation discrimination, the jury at least would have to make the additional inference or presumption that Judge Teske did not mean what he said when he expressly disclaimed having an anti-gay discriminatory motive. See Wilson, 376 F.3d at 1086 (direct evidence requires proof of fact "without inference or presumption").

Judge Teske further explained in his deposition (in sections left unquoted by Plaintiff) that he found it unbelievable Plaintiff could be successfully recruiting individuals from midtown Atlanta to serve as CASA GAL volunteers in Clayton County, and Judge Teske thus was suspicious these were personal outings being charged to the GAL account. (Def.'s Resp. to Pl.'s SMF, ¶¶ 52-53, 62-63.) After Plaintiff failed to identify in the post-audit questionnaire a single CASA GAL volunteer he recruited, Judge Teske believed his suspicions to be justified. (See Def.'s SAMF ¶¶ 65, 68-69.) In this context, the knowledge that many of these midtown Atlanta establishments advertised themselves as gay-friendly, and that Plaintiff also is gay, reinforced the already reasonable, common-sense suspicion that Plaintiff was just going out to bars and restaurants near where he lived and dishonestly claiming to have been "recruiting" Clayton County CASA GAL volunteers.

The case authority Plaintiff cites in his brief as examples of direct evidence contain statements even less like Judge Teske's testimony. See Alton, 901 F.2d at 922,

924 (decisionmaker's statement that "if it was his company, he wouldn't hire any black people" constituted direct evidence of race discrimination); EEOC v. Beverage Canners, 897 F.2d 1067, 1068 & n.3, 1070 & n.6, 1071-72 (11th Cir. 1990) (plant manager's and other supervisors' frequent, "flagrant, revolting, and insulting racially derogatory remarks towards and in the presence of blacks," including frequent uses of the n-word, sufficient to constitute a racially hostile work environment, also constituted direct evidence of race discrimination). Nowhere does Judge Teske say he did not want a gay man as Child Welfare Services Coordinator or that he wanted a straight person in that position; nor is there any evidence in the record of Judge Teske making any derogatory comments about gay individuals. (Def.'s SAMF, ¶ 15). To the contrary, Judge Teske expressly states in his diary that Plaintiff was *not* terminated for being gay. (Def.'s Resp. to Pl.'s SMF, ¶ 51). Thus, since Judge Teske expressly disclaims a discriminatory motive, his statements could not possibly constitute statements "whose intent could mean nothing other than to discriminate on the basis of some impermissible factor," and it would require an additional "inference or presumption" to conclude otherwise. See Wilson, 376 F.3d at 1086.[1]

[1] Elsewhere in Plaintiff's brief, he references an alleged statement by John Johnson during the termination meeting to the effect of "This is not because you're gay." (See Doc. 127-1, pp. 21-22.) While Plaintiff does not contend this statement is direct evidence of discrimination, he does state that "[t]he only reasonable interpretation" of this alleged comment "is that it was indeed because [Plaintiff] was gay." (Id., p. 22.) In

B. No Evidence Shows Plaintiff's Sexual Orientation Was The "But For" Cause Of His Termination

Plaintiff contends his sexual orientation was the "but for" cause of his termination based on self-serving assertions that, if Plaintiff were not gay, "not only would Teske not have fired him, but [Plaintiff] never would have come under Teske's discriminatory 'suspicion' in the first place." (Doc. 127-1, pp. 15-16.) No evidence of record supports these assertions.

First, nothing in the record supports the assertion that the County would not have fired Plaintiff for his misuse of the GAL funds if he had not been gay. His own admissions as to how he spent GAL funds show multiple, repeated expenditures that were *not* aimed at recruiting, training, or retaining Clayton County CASA GAL volunteers, as the MOU demanded. (Def.'s SAMF, ¶¶ 61-62, 64-65; Def.'s Resp. to

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any event, this alleged statement (which Mr. Johnson denies uttering (Def.'s Resp. to Pl.'s SMF, ¶ 73)) could not be direct evidence of sexual orientation discrimination because (1) even if uttered, it was a statement by a nondecisionmaker, see Alton, 901 F.2d at 924, as there is no dispute that Judge Teske was the decisionmaker behind Plaintiff's termination (Id., ¶ 61); and (2) the literal meaning of "This is not because you're gay" is that Plaintiff's sexual orientation was *not* the reason behind his termination. Thus, it necessarily would take an additional inference to conclude that Mr. Johnson did not mean what he said and that Plaintiff actually was terminated for being gay. See Wilson, 376 F.3d at 1086; Alton, 901 F.2d at 924. Furthermore, Plaintiff mischaracterizes this alleged statement as an "unsolicited out-of-the-blue remark" because he admitted in his deposition that he himself prompted the alleged remark by first telling Mr. Johnson, "I know what this is about," which Plaintiff admitted was meant to imply that he thought he was being fired for being gay. (Def.'s Resp. to Pl.'s SMF, ¶ 73).

Pl.'s SMF, ¶ 57). In his written responses to the post-audit questionnaire, Plaintiff identified dozens of expenditures on dinners and/or drinks with individuals he was soliciting to volunteer at fundraising events for the Friends of Clayton County CASA, Inc. ("FCCC"), which is *not* a County organization but rather an entirely separate, private, 501(c)(3) organization. (Def.'s SAMF, ¶¶ 8, 62; Def.'s Resp. to Pl.'s SMF, ¶¶ 14, 57.) The funds raised at FCCC fundraisers did *not* flow to the County but rather went into the FCCC's separate bank account, over which the County had no control. (Def.'s SAMF, ¶ 9.) The irony of Plaintiff's using the GAL account in this way is that the FCCC's mission was to support the Clayton County CASA program, but Plaintiff instead used the GAL account to support the FCCC. Plaintiff took court-assessed funds from the GAL account, which were earmarked for recruiting, training, and retaining Clayton County CASA GAL volunteers, and used those funds to swell the coffers of this separate, private charity. As Judge Teske put it in his deposition, Plaintiff was taking "from Peter to pay Paul." (Def.'s SAMF, ¶ 67). Plaintiff's use of GAL funds for FCCC fundraising and other purposes that were not for the recruitment, training, or retention of Clayton County CASA GAL volunteers was one of Judge Teske's reasons for terminating Plaintiff, even absent the suspicion that Plaintiff also used GAL funds for personal purposes. (Def.'s SAMF, ¶¶ 67-69, 71; Def.'s Resp. to Pl.'s SMF, ¶ 57).

While Plaintiff asserts he would not have been suspected of misusing the GAL

funds had he not been gay, the evidence of record is to the contrary. Mr. Johnson long had had concerns over Plaintiff's uses of the GAL account and lack of oversight, but he testified he felt it was futile to raise such concerns because of previous leniency towards Plaintiff by Mr. Johnson's superiors.[2] (Def.'s SAMF, ¶ 31). Shawn Black also emailed Mr. Johnson in January 2013—before the audit—that Plaintiff had misused GAL funds on several personal items. (Id., ¶ 32). Mr. Black himself is gay (id., ¶ 13), and nothing in the record suggests the highly improbable conclusion that Mr. Black sent this email out of any anti-gay animus. In addition, Stacey Merritt, the County's Director of Internal Audits, personally interviewed Plaintiff in April 2013 and recommended an audit of the GAL account based on numerous "red flags" and "risk of inappropriate actions" she ascertained from that interview. (Id., ¶ 36). Nothing in the record suggests she bore any anti-gay animus towards Plaintiff at any time. Thus, the record is replete with numerous reasons for suspecting Plaintiff may have been misusing or

[2] On this point, Mr. Johnson testified that he believed Plaintiff should have been terminated after another juvenile court employee discovered photographs of nude men on Plaintiff's work computer, but the Chief Judge of Juvenile Court at the time, Judge Banke, instead decided that, if Plaintiff did not engage in any additional misconduct, the write-up of this incident and the photographs themselves would be shredded, and the photographs and write-up actually were shredded two years later. (Def.'s SAMF ¶ 25.) Mr. Johnson also testified that Judge Banke had instructed him not to include negative comments in Plaintiff's performance evaluations. (Id. ¶ 27.) On another occasion where Mr. Johnson had issued Plaintiff a written warning following complaints from several other employees, Judge Teske had this written warning removed from Plaintiff's personnel file. (Id. ¶ 26.)

mismanaging the GAL account, reasons having nothing to do with his sexual orientation.

Another reason Plaintiff's sexual orientation could not have been the "but for" cause of his termination is that his sexual orientation was widely known throughout the juvenile court, including by Judge Teske, for *over ten years* at the time of Plaintiff's termination. (Id., ¶ 11; Def.'s Resp. to Pl.'s SMF, ¶ 6.) This fact is undisputed and begs the question: if Plaintiff's sexual orientation was the "but for" cause of his termination, then why did it take ten years? The record contains evidence of several complaints from subordinates about Plaintiff's management style, accusations of favoritism towards certain staff members, accusations that he created a hostile work environment, complaints of forcing Clayton County CASA staff to volunteer their time at FCCC events, and numerous disciplinary incidents, including one particularly egregious incident of storing nude photographs on his County-issued workplace computer. (Def.'s SAMF, ¶¶ 25-26, 28-29.) If Judge Teske truly wanted to terminate Plaintiff for being gay, he had countless opportunities over the preceding years to do so.

Plaintiff attempts to explain Judge Teske's decade-long delay in acting upon this alleged discriminatory animus by pointing out that the audit took place only after he used GAL funds to sponsor his softball team and began "recruiting CASA volunteers and sponsors in the Midtown area of Atlanta." (Doc. 127-1, p. 17.) The undisputed

evidence, however, shows that the audit was initiated after Ms. Merritt learned, as part of her preparation for a routine audit of the Juvenile Court, that Plaintiff was maintaining an under-the-radar bank account (the GAL account). (Def.'s SAMF, ¶¶ 33-34). Ms. Merritt made the decision to speak to Plaintiff about the GAL account, and she recommended a full audit of the GAL account after her short conversation with Plaintiff regarding the GAL account raised "red flags" and revealed "risk of inappropriate actions." (Id., ¶¶ 35-36). Based on Ms. Merritt's recommendation and other information provided to them, Judge Teske and Chairman Turner agreed to the audit. (Id., ¶ 38; Def.'s Resp. to Pl.'s SMF, ¶ 39).

Moreover, the record is devoid of any evidence supporting Plaintiff's assertion that the audit only took place after he used the GAL funds to sponsor his softball team and began his purported recruitment activity in Midtown Atlanta. First, Plaintiff did not recruit *any* Clayton County CASA GAL volunteers after more than two years of wining and dining purported prospects in Midtown Atlanta. (Def.'s SAMF ¶ 24.) He identified no such recruits in the post-audit questionnaire, nor in his deposition. (Id., ¶¶ 61-65.)

Second, soliciting sponsorships has nothing to do with the GAL account. Plaintiff made clear in his testimony that any funds generated from these alleged sponsorships would have flown to the FCCC—***not*** to the GAL account or any other County fund. (Id., ¶ 9.) As explained in the MOU, the purpose of the GAL account was

to fund the recruitment, training, and retention of Clayton County CASA GAL volunteers—***not*** to secure sponsorships for the FCCC. (Id.,¶¶ 17-19; Def.'s Resp. to Pl.'s SMF, ¶¶ 19-21) If the FCCC wanted Plaintiff to wine and dine potential sponsors for its fundraising efforts, Plaintiff should have used the FCCC's own funds for these purposes—***not*** court-assessed fees collected from families in child custody proceedings. (Def.'s SAMF, ¶¶ 17-19; Def.'s Resp. to Pl.'s SMF, ¶¶ 19-21).

Finally, the softball team sponsorship is an obvious misuse of GAL funds, regardless of whether it was in a "gay" softball league or not. Sponsoring a softball team bears no recognizable connection to recruiting, training, or retaining Clayton County CASA GAL volunteers, particularly when nearly half of the funds funneled to the softball team went to pay for "light refreshments" at "an informal reception" in Birmingham, Alabama. (Def.'s SAMF, ¶ 64). Plaintiff cannot identify any other County employee who has done anything remotely similar—not even his replacement, Carol Gossett, who also is gay. (Id., ¶ 13). Unsurprisingly, the internal audit concluded that "sports league sponsorships do not fall within the current intentions of the GAL account." (Id., ¶ 55). Nothing in the record suggests any anti-gay bias on the part of the internal auditors.

To put the matter plainly, consider the reaction if a family that paid into the juvenile court the required $500 fee (a not insignificant sum) had asked what the money

would be used for, and were told the Child Welfare Services Coordinator planned to use the money to play softball with his friends in Atlanta and play in a softball tournament in Birmingham. Would it not be understandable for such a family to question how this softball team was going to benefit their child? Would it not be reasonable if they concluded the Child Welfare Services Coordinator appeared to benefit more from this arrangement than any child? Would it not be logical for the public to see this as an instance of a government official using public funds for personal benefit? All such concerns are understandable, reasonable, and logical. The fact that the softball team was in a "gay" softball league does nothing to render these conclusions less valid.

Under these circumstances, Plaintiff has failed to demonstrate that the "but for" cause for his termination was his sexual orientation rather than the non-discriminatory reasons given by Judge Teske.

C. The Evidence Of Record Shows The County Would Have Made The Same Employment Decision Regardless Of Plaintiff's Sexual Orientation

Plaintiff argues the County cannot support a "same decision" defense by referring to the audit report.[3] (Doc. 127-1, pp. 16-22.) He addresses no other potential

[3] In his brief, Plaintiff raises the "same decision" defense in the context of discussing his single-motive claim based on purported direct evidence. It is not clear if Plaintiff intended his arguments also to apply to the County's "same decision" defense to Plaintiff's mixed-motive claim. To the extent this is the case, however, the County's

basis for a "same decision" defense, including his admissions as to how he spent GAL funds or his failure to identify any Clayton County CASA GAL volunteer he recruited via these expenditures. (See id.)

Plaintiff's failure to bring up these points is significant because there is no dispute Judge Teske would have terminated Plaintiff for expending GAL funds outside the scope of the MOU, even absent any suspicion that Plaintiff spent GAL funds on personal interests. (Def.'s SAMF, ¶ 71.) In Plaintiff's own telling of how he spent GAL funds, he identified dozens of expenditures on marketing, awareness, and fundraising endeavors and events for FCCC, Georgia CASA, and the Metro Atlanta CASA Collaborative—all non-County entities—including (1) the Duck Derby (FCCC); (2) Georgia CASA Luncheon and Fashion Show; (3) the Metro Atlanta CASA 5K Superhero Run at Piedmont Park; and (4) the Georgia CASA Luncheon and Preview Party. (Id., ¶ 62.) Even Plaintiff's attempted justification for the softball team sponsorship showed no recognizable relationship to the MOU's parameters for GAL account expenditures, as he admitted the purpose of this sponsorship was to secure potential sponsors for the Duck Derby, generate ticket sales for the Duck Derby, place Clayton County CASA in contention for a charitable donation from the softball league

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arguments in this section apply with equal force to Plaintiff's purported direct-evidence claim and his mixed-motive claim.

the following year, and increase general public awareness of the Clayton County CASA program. (Id., ¶ 64.) The MOU makes no mention whatsoever of any such marketing or fundraising efforts; nor would it make sense for the GAL account to fund such activities when the financial benefits would flow to the FCCC's separate bank account. (See id., ¶¶ 9, 21.) Nothing in the record suggests Judge Teske would not have terminated Plaintiff for using the GAL account in this manner.

Furthermore, nothing in the record supports Plaintiff's assertion that "the audit itself is a product of discriminatory animus." (See Doc. 127-1, p. 17.) As previously discussed, no record evidence suggests any bias on the part of the auditors, Ms. Merritt or Ms. Moore. Ms. Merritt interviewed Plaintiff before the audit took place and noted multiple "red flags." (Def.'s SAMF, ¶ 36.) Even before this interview, Mr. Black emailed Mr. Johnson to report several instances of alleged improper expenditures from the GAL account (id., ¶ 32), and nothing suggests Mr. Black acted with anti-gay animus. Plus, as Plaintiff himself acknowledges, neither the auditors nor anyone else testified that recruiting Clayton County CASA GAL volunteers at gay establishments was prohibited. (See Doc. 127-1, p. 19.) The problem was that Plaintiff did not actually recruit *anyone* at any of these venues to be a Clayton County CASA GAL volunteer, and for the most part, Plaintiff did not even attempt to claim that he was trying to do so. (Def.'s SAMF, ¶¶ 24, 61-62, 64-65; Def.'s Resp. to Pl.'s SMF, ¶ 57).

Plaintiff emphasizes that the audit report found no "wrongdoing" and did not recommend that he be "disciplined." (Doc. 127-1, p. 17.) But both auditors testified it is not their role to pass such judgments or make disciplinary recommendations. (Def.'s Resp. to Pl.'s SMF, ¶ 59; Def.'s SAMF, ¶ 72). Further, Plaintiff is flat-out incorrect in asserting that "nothing in the audit provide[d] any basis for terminating" him. (See Doc. 127-1, p. 19.) The audit report noted multiple "red flags" and opportunities for impropriety, including, but not limited to, Plaintiff's failure to produce bank statements for several months, Plaintiff's violation of separation of duties in overseeing money both coming into and going out of the GAL account, Plaintiff's failure to reconcile the GAL account on a regular basis, Plaintiff's spending GAL funds on alcohol, restaurants and bars outside Clayton County and to sponsor a softball team on which he himself played, and the absence of meaningful FCCC oversight over Plaintiff's expenditures from the GAL account. (Def.'s SAMF, ¶¶ 46-55.) In addition, both auditors testified not only that they concluded that Plaintiff engaged in misconduct with respect to his handling of the GAL account, but also that the changes they recommended were intended to prevent such misconduct from occurring again in the future. (Id., ¶ 56). Indeed, both auditors would have terminated Plaintiff because of his misconduct they discovered during the audit, if it had been their decision to make. (Id., ¶ 72).

While Plaintiff asserts that Judge Teske "deliberately mischaracterized or

ignored" the contents of the audit report, the examples he cites show no such mischaracterization.[4] (See Doc. 127-1, pp. 20-22.) Judge Teske's suspicions that Plaintiff used the GAL account for personal expenses were objectively reasonable for the reasons discussed above. See supra Part III.A-B. Judge Teske accurately characterized Plaintiff's use of the GAL account as "misuse" because Plaintiff's own admissions in the post-audit questionnaire show dozens of expenditures unrelated to recruiting, training, or retaining Clayton County CASA GAL volunteers (Def.'s SAMF, ¶¶ 61-62, 64-65; Def.'s Resp. to Pl.'s SMF, ¶ 57); the audit report did conclude the softball team sponsorship was outside the scope of the MOU (Def.'s SAMF, ¶¶ 54-55); and the total GAL account deposits during the audit's review did exceed $14,000.[5] (Id., ¶ 47.) All of these representations are accurate.

Thus, Plaintiff's motion should be denied on the issue of whether the County can

[4] It is not clear why Plaintiff included in this bullet-pointed list the allegations that Judge Teske said to Ms. Crawford, "But it was at a gay bar," or that Mr. Johnson told Plaintiff "This is not because you're gay." (Doc. 127-1, p. 21.) These allegations do not appear to have anything to do with the audit report or show any "mischaracterization" of it. In any event, both Judge Teske and Mr. Johnson deny that these alleged incidents occurred, so these allegations cannot properly support Plaintiff's Motion for Summary Judgment. (Def.'s Resp. to Pl.'s SMF, ¶¶ 69, 73).

[5] Contrary to Plaintiff's assertions in his brief, Ms. Crawford testified she could not recall if Judge Teske had accused Plaintiff of "stealing" from the GAL account, but that he told her Plaintiff "was using the GAL funds to pay for things that he should not have been using the GAL funds for." (Def.'s Resp. to Pl.'s SMF, ¶ 65.) No evidence of record shows this to be an inaccurate statement.

establish the "same decision" defense, and summary judgment instead should be granted to the County on this issue for the reasons discussed above and in the County's Motion for Summary Judgment. (See Doc. 136-9, pp. 23-25; Doc. 138-6, pp. 23-25.)

D. Plaintiff Has No Evidence To Support A Mixed-Motive Claim

Plaintiff provides virtually no argument for why he believes he is entitled to summary judgment on establishing a mixed-motive claim. He merely cites Quigg for the proposition that Title VII provides liability for a mixed-motive claim and then asserts in conclusory fashion that, if the Court denies summary judgment as to Plaintiff's "but for" causation claim, then it should grant summary judgment on the mixed-motive claim. (Doc. 127-1, pp. 23-24.) He cites no authority for why this should be the case.

The statements by Judge Teske that Plaintiff references are nothing like the comments at issue in Quigg. That case concerned a female school superintendent's claim of sex discrimination in the nonrenewal of her employment contract. The Eleventh Circuit held there was a jury question as to whether her sex played a motivating factor 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." Quigg, 814 F.3d at 1241. In finding these comments suggested sex may have been 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 statements on which Plaintiff relies here express no desired sexual orientation for the position of Child Welfare Services Coordinator or any other juvenile court employee. Nor would it make sense for Judge Teske to express a preference regarding sexual orientation because he promoted Ms. Gossett, who also is gay, to replace Plaintiff in that position. (Def.'s SAMF, ¶¶ 13, 75). Instead, Judge Teske's references to Plaintiff's sexual orientation or to any particular restaurant or bar as being "gay-friendly" arose in the context of further reinforcing the already reasonable suspicion that Plaintiff was spending the GAL account on personal interests. The County already was faced with the fact that Plaintiff had more than two years' worth of GAL account expenditures at establishments outside Clayton County, which included purchases for alcohol and meals, and for which he was not able to identify a single person recruited to be a Clayton County CASA GAL volunteer. (Id., ¶¶ 24, 62-65, 67-69, 74). This set of circumstances, in and of itself, is more than enough to give rise to a suspicion that Plaintiff may have been using the GAL account for personal gain. Once

this is established, the knowledge that Plaintiff is gay and that many of these businesses actively catered to a gay clientele (id., ¶ 63) is additional circumstantial evidence to reinforce the above suspicion.

While Plaintiff appears to argue that any mention of his sexual orientation is sufficient to prove a mixed motive claim, this is not the law. For example, in Lewis v. Metro. Atlanta RTA, 343 F. App'x 450, 455 (11th Cir. 2009), 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 must have played a motivating factor in the termination decision. Id. The Eleventh Circuit, 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 mere fact that his employer recognized and/or acknowledged the plaintiff's Chinese national origin was itself insufficient to sustain a mixed-motive claim.

As Lewis and Lieu demonstrate, an employer's recognition or acknowledgment 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. (Def.'s SAMF, ¶¶ 68-71.) 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—including in Alabama—and yet Plaintiff was not able to identify a single Clayton County CASA GAL volunteer he recruited from any of these outings. (Id., ¶¶ 24, 65, 68-69.) This conspicuous absence of recruits itself warrants the suspicion that Plaintiff

may have spent GAL funds on personal interests. The suspicion only is reinforced when one adds the knowledge that these purported recruiting ventures also happened to be at establishments that expressly catered towards a gay clientele. (Id., ¶ 63).

In this full context, Judge Teske's references to Plaintiff's sexual orientation or to gay-friendly establishments are legitimate recognitions of Plaintiff's sexual orientation in Judge Teske's explanation for why he honestly believed Plaintiff may have been using GAL funds for personal interests. 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 for Judge Teske to acknowledge Plaintiff's sexual orientation in suspecting Plaintiff may be spending GAL funds on personal interests. This common-sense acknowledgment of Plaintiff's sexual orientation in no way means his sexuality was a motivating factor behind the *termination* decision. No reasonable jury could interpret Judge Teske's uses of "gay" to express an anti-gay animus, particularly since it is undisputed that (1) he had known of Plaintiff's sexual orientation for *over ten years* by the time of Plaintiff's termination (Def.'s SAMF, ¶ 11); (2) Judge Teske had socialized with Plaintiff and his partner for years (id., ¶ 12; Def.'s Resp. to Pl.'s SMF, ¶ 48); (3) Judge Teske replaced

Plaintiff with another gay employee (Def.'s SAMF, ¶¶ 13, 75); and (4) Judge Teske has been a forceful advocate on behalf of LGBTQ youth and agreed with Plaintiff that Title VII should prohibit discrimination on the basis of sexual orientation. (Id., ¶ 5). 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); Suggs v. Sam's East, Inc., No. 1:18-cv-01064-JEO, 2020 WL 1640181, 2020 U.S. Dist. LEXIS 58037, at *30-31 (N.D. Ala. Apr. 2, 2020) (white plaintiff's mixed-motive race-discrimination claim failed, despite evidence Black supervisor used phrases such as "white ass" and "white trailer trash," where no evidence showed plaintiff's race to be motivating factor behind coaching or termination decisions).

Moreover, even if Judge Teske had been mistaken in believing Plaintiff spent GAL funds on personal interests, this still would not show Plaintiff's sexual orientation to be a motivating factor behind his termination because it is well-settled an employer's "mistaken but honest impression" about an employee's conduct is insufficient to prove discrimination based on a protected characteristic. See Williams v. Florida Atl. Univ., 728 F. App'x 996, 999 (11th Cir. 2018) (affirming summary judgment to employer on mixed-motive claim where plaintiff argued employer incorrectly believed she failed to

follow employer's policy and showed poor judgment).

In light of the foregoing, Plaintiff is not entitled to summary judgment on the issue of mixed-motive liability. To the contrary, the Court instead should grant summary judgment on this issue in favor of the County. (See also Doc. 136-9, pp. 18-23; Doc. 138-6, pp. 18-23.)

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be denied. Not only has Plaintiff failed to show the absence of any genuine issue of disputed fact requiring judgment as a matter of law in his favor, the evidence of record actually shows summary judgment should be entered in favor of the County.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the within and foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'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 25th day of April, 2022.

/s/ Jack R. Hancock
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the within and foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFF'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:

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