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 RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant opens its brief with a series of self-serving "what if" questions to which it provides specious answers. Of course, the issue before the Court on this motion is not "what if" but rather what *is*. In other words, what does the evidence of record, viewed in the light most favorable to the non-moving party reveal? That is the only relevant question. The answer to that question, as set forth in detail herein, is that Mr. Bostock has, at the very least, raised triable issues of fact that must be presented to a jury for determination.[1]

[1] As the Court is aware, Mr. Bostock has filed his own motion for summary judgment and contends summary judgment should be granted in his favor.

The record is replete with evidence – including direct evidence from the undisputed decision maker - that Defendant terminated Mr. Bostock because of his sexual orientation in violation of Title VII. Defendant's motion must be denied.

II. FACTUAL BACKGROUND

Mr. Bostock incorporates by reference his Statement of Additional Material Facts and those facts in Defendant's Statement of Material facts that are undisputed.

III. ARGUMENT AND CITATION OF AUTHORITY

A. Summary Judgment Standard

Summary judgment is appropriate only when, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)). The court must draw all reasonable inferences in favor of the non-moving party, construe all facts in the light most favorable to the non-moving party, and resolve all reasonable doubts in the non-moving party's favor. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

B. Mr. Bostock Has Raised Triable Issues of Material Fact that Must be Presented to a Jury

As set forth in detail in Mr. Bostock's memorandum in support of his motion for summary judgment (doc. 127-1), Mr. Bostock is entitled to summary judgment in his favor on both his single motive and mixed motives claims of discrimination. Defendant's motion for summary judgment must therefore be denied on this ground alone. At the very least, however, Mr. Bostock has raised triable issues of fact that cannot be resolved on summary judgment. Thus, Defendant's motion must be denied.

1. Mr. Bostock Has Raised Triable Issues of Fact Under a Single Motive Theory of Discrimination

a. Mr. Bostock has established a prima facie case of discrimination

i. Mr. Bostock has presented direct evidence of discrimination

Defendant conveniently ignores the direct evidence of discrimination in this case. A party may prove a prima facie case of discrimination by direct evidence of discrimination. *See EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 923–24 (11th Cir.1990); *EEOC v. Beverage Canners, Inc.*, 897 F.2d 1067, 1070–72 (11th Cir.1990). As set forth in detail in Mr. Bostock's brief in support of his motion for summary judgment, Mr. Bostock has direct evidence of discrimination in the sworn testimony of Teske, the undisputed decisionmaker in Mr. Bostock's termination.

Teske admitted under oath that Mr. Bostock's sexual orientation was a "contributing factor" in his decision to terminate Mr. Bostock. (Teske Dep. 177:22-178:20); *see also Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) (holding in part that Title VII forbids sexual orientation discrimination). Moreover, Teske admitted that his alleged "suspicions" of Mr. Bostock's spending to recruit and retain volunteers for the CASA program - the entire basis of the audit - were "because [Mr. Bostock] is gay." (*Id.*) In other words, if Mr. Bostock were not gay, Teske would not have fired him. S*ee Alton Packaging Corp.*, at 901 F.2d at 924 (general manager's remark that "if it was his company, he wouldn't hire any black people," constituted direct evidence of discriminatory motive in failing to promote black employee when general manager was responsible for promotion decisions at issue); *Beverage Canners, Inc.*, 897 F.2d at 1068–69, 1070–71 & n. 9 (racially derogatory remarks made by plant manager and plant supervisor constituted direct evidence of racial motivation in adverse action). This direct evidence of discrimination is standing alone sufficient to establish a prima facie case of discrimination. The Court should deny Defendant's motion on this issue. Even if, however, the Court determines that Teske's undisputed statements do not constitute direct evidence of discrimination, Mr. Bostock has presented more than sufficient circumstantial evidence to raise a triable issue of discrimination as set forth below.

ii. Alternatively, Mr. Bostock has established a prima facie case by presenting a convincing mosaic of Defendant's discriminatory intent

Defendant, ignoring the direct evidence in this case, argues that Mr. Bostock cannot establish a prima facie case of discrimination allegedly because he was not replaced by someone outside his protected class and because he cannot show he was treated less favorably than straight employees. For the reasons set forth below, this argument is meritless.

In the first place, Defendant fails to even address that in the Eleventh Circuit "establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment discrimination case." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). "Rather, the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id*. "A triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Id*. (internal quotation marks and footnote omitted). Mr. Bostock has clearly presented such a convincing mosaic and Defendant's motion must be denied on this issue.

Defendant first argues that Mr. Bostock was not replaced by someone outside his protected class because his successor, Ms. Gossett, also is allegedly gay. As an initial matter, assuming Ms. Gossett is gay, she is a gay *woman*, not a gay *man*, and this is a sex discrimination case. Moreover, Teske's testimony and statements reference Mr. Bostock's alleged actions as a *gay man* (for example referring to alleged meals with former "boyfriends"). Moreover, Title VII's focus has always been on the individual. B*ostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1740, 207 L. Ed. 2d 218 (2020) (noting that under Title VII "our focus should be on individuals, not groups"). Thus, "an employer who intentionally treats a person worse because of sex—such as by firing the person for actions or attributes it would tolerate in an individual of another sex—discriminates against that person in violation of Title VII." *Id.*

Defendant next argues that Mr. Bostock cannot show he was treated less favorably than straight employees. In the first place, discovery in this case has uncovered no evidence that any other employee of Defendant was subjected to the "suspicion" that Teske attached to Mr. Bostock's activities simply *because Mr. Bostock is gay*. Teske's undisputed statements in his diary and his testimony establish not only that he fired Mr. Bostock "because of" his sexual orientation but that his "suspicion" of Mr. Bostock's recruiting CASA volunteers in Midtown

Atlanta was entirely driven by discriminatory animus. *See, e.g.*, (Teske Depo. at 177:1–6; Teske Depo., Ex. 43 at 11) ("it's that [sic] appearance that *because [Mr. Bostock] is gay* he is spending money on his own interests") (emphasis added). But for Mr. Bostock's sexuality, not only would Teske not have fired him, but Mr. Bostock never would have come under Teske's discriminatory "suspicion" in the first place.

Although Defendant speciously attempts to distinguish other audits of other employees, Defendant fails to acknowledge that based on the evidence of record, no other employee whose conduct was the subject of the audits Defendant references was subjected to an audit driven by their sexuality and infected by discriminatory animus in the manner of the audit concerning Mr. Bostock. (When Johnson met with Moore to launch the audit, the first thing he told her was that Mr. Bostock is gay. (See Section 1.b., infra.)

Further, Defendant attempts to distinguish the other audits by conclusorily asserting that Mr. Bostock spent funds outside of the parameters of the MOU. Construing inferences in favor of the nonmoving party, this reason can be viewed as pretextual where Teske and Johnson raised Mr. Bostock's sexuality in the events leading up to termination. Thus, it is, at the very least, a disputed issue for the jury.

Defendant also ignores the distinct nature of the GAL funds. On April 30, 2013, John Johnson wrote a memo to Stacey Merritt, Head of Internal Audits, with Slay and Teske copied on the memo, stating in part that the Juvenile Court administration did not have "any direct oversight authority" with respect to the GAL account. (John Johnson Depo. at 130:6–21; Ex. 94.) And on May 1, 2013, Teske wrote an email to Johnson with Slay and Merritt copied in which Teske stated that under the terms of the MOU, "we have no authority to gain access" to the GAL funds and directing that Johnson take the MOU "to legal and have them change the paragraph regarding where the monies go." (Merritt Dep. Ex. 59.) In other words, Defendant injected itself into an arrangement (1) over which it had no authority under the terms of the MOU; and (2) which did not involve court or county funds.

Additionally, Ms. Moore testified that the only other person she was aware of who was terminated as a result of an audit was an individual who was found to be stealing money. (Moore Dep. 67:24 – 68:19.) There was, of course, no such finding as to Mr. Bostock. (Moore Dep. 68:20-22.)

Moreover, Mr. Bostock is not required to identify a comparator because – even beyond the direct evidence in this case - he can show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination. *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1320 (11th Cir. 2012)

(holding that plaintiff does not have to show a comparator if she can show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination under convincing mosaic analysis, and finding that she had done so). Mr. Bostock has at the very least presented a convincing mosaic of Defendant's discriminatory intent. Thus, Defendant's motion must be denied.

b. Mr. Bostock has raised triable issues of fact concerning pretext

A plaintiff may demonstrate pretext either directly, by showing that a discriminatory or retaliatory reason more than likely motivated the employer, or indirectly, by showing that the proffered reason for the decision is not worthy of belief. *Young v. General Foods Corp.*, 840 F.2d 825, 828 (11th Cir. 1998). A plaintiff may also rely upon all of the evidence as part of his prima face case to show the defendant's true discriminatory and retaliatory animus. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143, (2000); In this case, there is abundant evidence of pretext.

Defendant contends that Teske fired Mr. Bostock for two reasons: (1) his conclusion that Mr. Bostock "had misused the GAL funds by spending these funds for purposes that were not permitted under the MOU" and (2) he "suspected that at least some of the expenditures of GAL funds were not business-related but rather were for personal pursuits." (Doc. 138-6 at 10-11.) Defendant ignores the fact that

any such "conclusions" or "suspicions" by Teske were – by his own admission – a product of his discriminatory animus.

Teske's contemporaneous statements and his deposition testimony are alone more than sufficient to establish pretext. Teske *admitted under oath* that Mr. Bostock's sexual orientation was a "contributing factor" in his decision to terminate Mr. Bostock. (Teske Dep. 177:22-178:20); *see also Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020) (holding in part that Title VII forbids sexual orientation discrimination). Moreover, Teske admitted that his alleged "suspicions" of Mr. Bostock's spending to recruit and retain volunteers for the CASA program - the entire basis of the audit - were "because [Mr. Bostock] is gay." (*Id.*) In other words, if Mr. Bostock were not gay, Teske would not have fired him. *See Alton Packaging Corp.*, at 901 F.2d at 924 (general manager's remark that "if it was his company, he wouldn't hire any black people," constituted direct evidence of discriminatory motive in failing to promote black employee when general manager was responsible for promotion decisions at issue); *Beverage Canners, Inc.*, 897 F.2d at 1068–69, 1070–71 & n. 9 (racially derogatory remarks made by plant manager and plant supervisor constituted direct evidence of racial motivation in failure to rehire employee who had been laid off).

Further evidence of pretext provided by Teske himself shows his discriminatory intent and deliberate mischaracterization of the audit:

- In two pages of his diary Teske wrote about his reason for firing Bostock, writing that Mr. Bostock had used GAL funds for "meals with friends (former boyfriends—he is gay)[2] and to sponsor a softball team in a gay softball league in Atlanta" (Teske Depo. at 170:3–8; Teske Depo., Exhibit 43 at 10), Teske was highly suspicious of Mr. Bostock's spending in Midtown because Mr. Bostock is gay and Teske considered Midtown "the gay district of Atlanta." (Teske Depo. at 176:24–178:16).
- Teske also wrote that expenditures for the softball league and for meals in Midtown Atlanta created an "appearance that because [Mr. Bostock] is gay he is spending money on his own interests." (Teske Depo. at 176:23 – 177:6; 168:11-169:1; Teske Depo., Exhibit 43 at 11.) Again, nothing in the audit report even remotely suggests this was the case.
- Teske considered all expenditures at restaurants or bars in Midtown Atlanta to be "suspicious" because the restaurants in Midtown Atlanta could be a "gay restaurant" or "gay bar." (Teske Depo. at 207:21–208:2.)

[2] Teske admitted he had no factual basis for this conclusion. (Teske Depo. at 171:1-5).

- Teske factored Mr. Bostock's sexual orientation into his conclusion that Mr. Bostock was spending money on "personal things" when he spent money in Midtown Atlanta. (Teske Depo. at 182:3–25). Once again, there is nothing in the audit report that suggests this. It is entirely a fiction spawned by Teske's discriminatory bias.
- Teske falsely told Crawford that Mr. Bostock had misused, mishandled, mismanaged, or stolen between $14,000 and $17,000 and that he had proof in the form of bank statements, even though the audit report says no such thing and even though Crawford - who has a background in bookkeeping and accounting - reviewed the bank statements and determined they did not reveal any evidence of such alleged misuse and that the expenditures were consistent with the MOU. (Teske Depo. at 68:17–69:4; Doc. 133, Crawford Depo. at 39:8–41:18; 41:19–24; 61:10-62:6).
- When Crawford objected to Teske's decision to terminate Mr. Bostock, Teske slammed his hand down on her desk and loudly said "But it was at a gay bar." (Crawford Depo. at 43:13–23).
- At an all-staff meeting, Teske stated Mr. Bostock was terminated because he misappropriated funds in sponsoring the gay softball team, an assertion that has no basis in fact. (Shelley Johnson Depo. at 40:16–41:5).

Amazingly, Defendant argues that Teske's own statements in his diary are not evidence of discrimination or pretext and are simply him "acknowledging the plaintiff's protected status." (Doc. 138-6 at 15.) This is simply absurd. Multiple references to Mr. Bostock's sexuality in the direct context of Teske's reasons for terminating him go far beyond simple "acknowledgement." Teske's words speak for themselves.[3] Moreover, Defendant's argument completely ignores Teske's sworn testimony that Mr. Bostock's sexual orientation was a "contributing factor" in his decision to terminate Mr. Bostock. (Teske Dep. 177:22-178:20.)

Defendant goes so far as to argue in part that Teske's use of the word "gay" in describing Midtown Atlanta bars and restaurants or the softball team merely "reiterated his suspicion that Plaintiff spent GAL funds on personal interests" and that "this was an objectively reasonable suspicion, given that (1) Plaintiff is gay." (Doc. 138-6.) Under Defendant's argument, if Mr. Bostock were Japanese and took a potential volunteer to a Japanese restaurant, he would be "reasonably" subject to "suspicion." The absurdity of this argument speaks for itself. Indeed, Johnson testified that if the word "black" were substituted for "gay" in Teske's diary it would be "troubling" to him as a person of color and a management-level employee and

[3] Teske's statements are direct evidence of discrimination. But should the Court conclude otherwise, any interpretation of his statements is an issue for the trier of fact to resolve.

that he would view it as evidence that race was a factor in the termination decision. (Johnson Dep. 204:20 – 207:7.) Similarly, Leslie Moore testified that the fact that Mr. Bostock might be recruiting in the gay community did not mean he was spending money on his own interests any more than if an African-American person were recruiting in the African-American community, that they would spending money on their own interests. (Moore Dep. 64:10-16.)

Defendant further argues that Teske's statements must be "considered in the context" of Teske's alleged support for LGBTQ issues. (Doc. 138-6 at 16-17.) Of course, the issue is what Teske did *to Mr. Bostock* in this case with respect to his termination and Teske's undisputed statements about *why he did it*. What he may have said or done on some other occasion is irrelevant or, at the very least, an issue for the trier of fact. Defendant's argument here is nothing less than a bald attempt to persuade this Court to construe inferences in favor of the moving party, rather than the non-moving party. This Court should not countenance such sophistry.

Defendant's statements and conduct at the time of Mr. Bostock's termination are further evidence of pretext. At the meeting during which Johnson carried out the termination, Mr. Bostock told Johnson that he knew what the meeting was about, and Johnson defensively responded, "This is not because you're gay." (Bostock Depo. at 13:8–22). The only reasonable interpretation of this unsolicited out-of-the-

blue remark is that it was indeed because Mr. Bostock was gay.[4] In fact, Johnson launched the audit by telling Moore that Bostock is gay. (Moore Depo. 37:8-19). Further, Johnson himself found the meeting of all staff in which Teske announced Mr. Bostock's termination and the reasons for it inappropriate because personnel matters are generally kept private. (John Johnson Depo. at 217:5–22). Such deviation from policy is further evidence of pretext. *Hurlbert v. St. Mary's Health Care Sys., Inc.*, 439 F.3d 1286, 1299 (11th Cir. 2006) (an employer's deviation from its own standard procedures may serve as evidence of pretext)

Defendant attempts to re-frame the issue of the MOU's authorization language as one of "interpretation." Under the MOU, Mr. Bostock was authorized to use these funds "to fund volunteer recruitment, training, and retention" of CASA volunteers. (Teske Depo. at 54:18–21; Teske Depo., Exhibit 3 at 2). That is what he did. Slay acknowledged that this directive in the MOU for how the fees are to be used is not specific. (Slay Depo. at 74:9–17). Moreover, Mr. Bostock reported to the

[4] Defendant disingenuously attempts to explain away this remark as Johnson simply "correctly surmise[ing] Plaintiff's thoughts about his termination." (Doc. 138-6 at 18.) Instead, the fact that Mr. Bostock's sexuality, of all reasons, was the reason Johnson defensively and immediately referenced shows that Mr. Bostock's sexuality was in fact the basis for his termination. At the very least, any interpretation of Johnson's remark would be an issue for the jury to determine and not appropriate for resolution at summary judgment. *See also Hamlet, Act 3, Scene 2 ("The lady doth protest too much, methinks.")*

FCCC board concerning the use of these funds and on a regular basis made the bank account records available to the board with explanation for all expenditures. (Crawford Depo. at 18:4–14; Bostock Depo. at 140:6–141:1). And in late 2011 or early 2012, Mr. Bostock began providing annotated copies of bank statements from the GAL account to Mr. Johnson and Mr. Slay for their review. (Slay Depo. at 92:12–18; John Johnson Depo. at 84:21–24 to 86:14).

Colin Slay reviewed the bank statements and generally found Mr. Bostock's explanations for expenditures appropriate. (Slay Depo. at 99:5–9). Johnson also reviewed them. (John Johnson Depo. at 84:21–24 to 86:14.) If Defendant had questions or concerns about Mr. Bostock's spending it had every opportunity to raise them. Teske ordered the audit only after Mr. Bostock began participating in the Hotlanta Softball League and recruiting CASA volunteers and sponsors in the Midtown area of Atlanta. (Teske Depo. at 183:17–184:17; Johnson Depo. 129:22-130:1; Johnson Depo. Ex. 94.)

Further evidence of pretext exists in the process and motivation for the audit of an account for which both Teske and Johnson admitted Defendant had no oversight authority. It is a product of discriminatory animus and marred by Defendant's failure to perform a thorough investigation. Even so it does not find any

wrongdoing by Mr. Bostock, nor does it recommend he be disciplined in any manner. The following facts are relevant here:

- Teske ordered the audit only after Mr. Bostock began participating in the Hotlanta Softball League and recruiting CASA volunteers and sponsors in the Midtown area of Atlanta. (Teske Depo. at 183:17–184:17; Johnson Depo. 129:22-130:1; Johnson Depo. Ex. 94.)
- On April 30, 2013, John Johnson wrote a memo to Stacey Merritt, Head of Internal Audits, with Slay and Teske copied on the memo, stating in part that the Juvenile Court administration did not have "any direct oversight authority" with respect to the GAL. (Johnson Depo. Ex. 94)
- In this April 30, 2013, memo, Johnson specifically questioned expenditures at "adult/alternative bars" which Johnson testified meant gay bars or alleged "gay friendly" establishments. (Johnson Depo. at 130:6–21; Ex. 94.).
- Johnson testified that the "concerns" he listed in his memo, which included the softball team and the gay bars were concerns that he, Slay, and Teske had. (Johnson Depo. 129:22-130:1).
- On May 1, 2013, Teske wrote an email to Johnson with Slay and Merritt copied in which Teske stated that under the terms of the MOU, "we have no authority to gain access" to the GAL funds and directing that Johnson take the MOU "to

legal and have them change the paragraph regarding where the monies go." (Merritt Dep. Ex. 59.)

- At the beginning of the audit, John Johnson told Ms. Moore that Mr. Bostock was gay. (Moore Depo. at 26:23–27:11; 37:11–19).
- The audit file contains printouts from websites of Midtown Atlanta area restaurants including a hand drawn circle around language "Atlanta[']s First and ONLY Gay Sports Bar" and highlighting "Atlanta's favorite neighborhood gay bar and restaurant" for two establishments. (Moore Dep. Exs. 82, 83, 84.)
- Johnson did not tell Moore, who conducted the audit, that Mr. Bostock had been providing him GAL bank account statements over the last couple of years and that he had been reviewing them. (Moore Depo. at 28:2–29:1). Ms. Moore testified that it would have been important for her to know this information "because the reason for [Johnson] coming to us about the audit was that there was lack of oversight, and he didn't know what the funds were being spent on" and that "if [Johnson] had been keeping tabs . . . on the bank statements, then that doesn't make sense to me." (Moore Depo. at 29:2–12).[5]

[5] Moore attempts to claim in her declaration that it would have merely been "helpful" to know this fact. (Doc. 136-5 ¶ 5.) That is inconsistent with her deposition testimony that the whole basis for the audit was that there was an alleged lack of oversight and that if Johnson had been reviewing the statements then that reason did not make

- The audit did not find that Mr. Bostock used GAL funds for meals with former boyfriends. (Moore Depo. at 53:24–54:2).
- Teske admitted that he had no evidence that Mr. Bostock was having lunch with former boyfriends, notwithstanding his diary entry to the contrary. (Teske Depo. at 175:6-8).
- The audit did not conclude that recruiting efforts among the gay community meant that Mr. Bostock was spending money on his own interests. (Moore Depo. at 64:6–16).
- Ms. Moore did not consider it an inappropriate use of the GAL funds to take people to lunch and try to recruit them. (Moore Depo. at 25:20–23).
- There was no restriction in the MOU with respect to Mr. Bostock recruiting or training in Midtown Atlanta. (John Johnson Depo. at 98:16–20).
- Slay testified that engaging in a recruiting event at a gay bar would not be an improper use of funds. (Slay Depo. at 114:1–5).
- The audit report did not state that Mr. Bostock engaged in any wrongdoing, nor did it suggest he should be disciplined in any manner. (Moore Depo. at 8:12–9:2; 84:24–85:4).

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sense. (Moore Depo. at 29:2–12.)

Thus, although the reason provided for initiating the audit was discriminatory, (Moore Depo. 37:11–19) nothing in the audit provides any basis for terminating Mr. Bostock.

In *Smith*, the Eleventh Circuit determined that "[the employer's] injection of race into its decision-making process yields an unavoidable inference that the employee's race impacted the discipline determination, and it is a jury's province to decide whether race actually bore on the decision to terminate [the plaintiff]." 644 F.3d at 1346. In the same manner, even if the Court were to deny Mr. Bostock's motion for summary judgment, it is at a minimum the jury's province in this case to determine whether Defendant's injection of Mr. Bostock's sexual orientation into its termination decision, coupled with the other evidence of pretext and discrimination set forth herein is sufficient for Mr. Bostock to carry his ultimate burden at trial. Defendant's motion must be denied.

2. Mr. Bostock Has at the Very Least Raised Triable Issues of Fact on His Mixed Motives Claim

An employee can succeed on a mixed-motive claim by showing that illegal bias, such as bias based on sex or gender, was a "motivating factor" for the adverse employment action, even though other factors also motivated the action. *Quigg v. Thomas Cty. Sch. Dist.*, 814 F.3d 1227, 1239 (11th Cir. 2016)*; see also* 42 U.S.C. § 2000e–2(m) ("[A]n unlawful employment practice is established when the

complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.")

An employee can succeed on a mixed-motive claim if he demonstrates that "discriminatory input," such as sex or gender-based bias, factored into the "decisional process." *Quigg*, 814 F.3d at 1241. Defendant contends that there is "no evidence of record" that Mr. Bostock's sexuality was a motivating factor for his termination. This completely ignores Teske's sworn testimony *admitting* that Mr. Bostock's sexual orientation was a "contributing factor" in his decision to terminate Mr. Bostock. (Teske Dep. 177:22-178:20.) Defendant's motion must be denied on this ground alone.

Moreover, there is abundant evidence – as discussed in detail in Sections 1a and 1b that discriminatory animus and input infected the entire decision making process, from the beginning of the audit, through its execution, and finally in Teske's conclusions based on Mr. Bostock's sexual orientation. As set forth in Mr. Bostock's memorandum supporting his motion for summary judgment, Mr. Bostock is entitled to summary judgment on both his single motive and mixed motive claims. At a minimum, Mr. Bostock has raised triable issues of fact on both these claims. Consequently, Defendant's motion must be denied.

3. Defendant Cannot Show That it Would Have Reached the Same Decision Absent a Discriminatory Motive

Defendant argues in the alternative that if the Court determines there is sufficient evidence to support Mr. Bostock's mixed-motives claim, it would have made the same decision in the absence of Mr. Bostock's sexual orientation as a motivating factor. This argument is meritless.

Defendant seeks to remove Mr. Bostock's sexual orientation from the audit and decision making process in this case. But, as set forth in Section 1.b., Mr. Bostock's sexuality was front and center before, during and after the audit and the audit itself is a tainted product of discriminatory animus.

Defendant cannot rely on the audit as a "same decision" defense for the additional reason that Teske deliberately mischaracterized or ignored the actual contents of the audit and instead relied upon his own discriminatory assumptions that because Mr. Bostock is gay, any expenditures in Midtown Atlanta must have been personal in nature rather than CASA related.

In its argument on this issue, and elsewhere in its brief, Defendant raises the issue of expenditures for alcohol and that this allegedly violated Defendant's policy on spending County funds for alcohol. In the first place, under the MOU, checks for GAL fees were payable to Friends of Clayton County CASA – a private non-profit corporation - and not to the court. (Johnson Dep. Ex. 3.) Thus, the funds at issue

were not "court funds" "or county funds" (Johnson Dep. 178:5-179:15.) Teske and Johnson admitted their lack of oversight authority. (Merritt Dep. Ex. 59; Johnson Depo. Ex. 94.)

Moreover, nothing in the MOU contains any prohibition on use of these different funds for alcohol. And no one ever told Mr. Bostock that this was an issue, including Mr. Johnson, who had been reviewing for *three years* receipts that reflected in part the purchase of alcoholic beverages as part of the recruitment, training, and retention expenditures. (Johnson Dep. 137:6-16.) And, of the $1026.22 reflected in the audit report for 2013 recruitment, training, and retention expenditures, alcohol expenditures comprise only three percent. (Moore Dep. Ex. 10; Moore Dep. 79:2-25.)

Defendant also relies on Mr. Bostock's alleged lack of success in recruiting volunteers from Atlanta or the softball league. This ignores the fact that Mr. Bostock provided Teske with detailed information concerning pledges, donations, and volunteers for training he secured from these recruiting efforts. (Bostock Dep. Ex. 10.) As Mr. Bostock explained at his deposition, an individual could volunteer for the CASA program in multiple ways beyond becoming a court appointed advocate or guardian ad litem. (Bostock Dep. 206:8-21.) And in at least one instance, an individual who was to begin the CASA application process as the result of Bostock's

recruiting stopped doing so after Mr. Bostock was fired, due to his support of Mr. Bostock. (Bostock Dep. 207:6-208:14.) And of course, Defendant terminated Mr. Bostock only a short time after he began recruiting among softball league members which obviously ended the opportunities with the potential volunteers he was recruiting and the further success he may have had.

Defendant points to declarations it submitted with its summary judgment filing in which other individuals state that they agreed with Teske's termination decision. (Docs. 136-2 – 136-8.) Of course, none of these individuals were the decision makers so their after-the-fact statements are irrelevant.[6] Moreover, Teske's declaration regarding what Judge Benefield allegedly said is inadmissible hearsay. (Doc. 136-4 ¶ 8.) Regardless, by Teske's own admission, Judge Benefield relied upon what Teske told her , which further undermines any alleged evidentiary value.

Thus, Defendant cannot, as a matter of law, sustain a "same decision" defense. The Court should deny Defendant's motion.

[6] Moore's statement in her declaration also contradicts her deposition testimony that she was "surprised" to learn that Mr. Bostock had been terminated. (Compare Doc. 136-5 ¶ 9 with Moore Dep. 84:3-5.) Although Moore now states she was surprised because Johnson had previously told her Mr. Bostock had been treated leniently in the past (doc. 136-5 ¶ 10), she did not give this reason at her deposition when asked why she was surprised. (Moore Dep. 84:6-13.)

IV. CONCLUSION

When viewed in its proper context and under the proper standard, the evidence in this case shows that Defendant initiated the audit because Mr. Bostock is gay, scrutinized his expenditure of funds based on his sexual orientation and terminated Mr. Bostock because he is gay. Defendant's spurious attempts to explain away direct evidence of discrimination or mischaracterize the basis for its termination of Mr. Bostock simply do not pass muster. The Court should deny Defendant's motion, grant Plaintiff's motion for summary judgment and this case should proceed to trial on the sole issue of damages recoverable by the Plaintiff.

Respectfully submitted this 25th day of April 2022.

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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.	)	

CERTIFICATE OF COMPLIANCE

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

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all counsel of record.

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