

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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APPEAL NO. 20-10169-DD

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SAMUEL R. HAYES, III,

*Appellant/Plaintiff,*

v.

ATL HAWKS, LLC and JASON PARKER,

*Appellees/Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION  
CASE NO. 1:17-CV-02510-MLB

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**BRIEF OF APPELLANT (CORRECTED)**

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-1(a)(2), the following is a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and any other identifiable legal entities related to a party:

- 1) ATL Hawks, LLC (defendant/appellee)
- 2) Brown, Michael L. (U.S. District Court Judge)
- 3) Cleek, Alisa P. (counsel for defendants/appellees)
- 4) Gal, Raanon (counsel for defendants/appellees)
- 5) Hayes, III, Samuel R. (plaintiff/appellant)
- 6) Nordstrom, Tamika (former counsel for defendants/appellees)
- 7) Parker, Jason (defendant/appellee)
- 8) Smith Law, LLC (law firm for plaintiff/appellant)
- 9) Smith, Louise N. (counsel for plaintiff/appellant below)
- 10) Smith, William J. (counsel for plaintiff/appellant below and in this appeal)
- 11) Taylor English Duma, LLP (law firm for defendants/appellees)
- 12) Walker, Linda T. (U.S. District Court Magistrate Judge)

I hereby certify that no publicly traded company has an interest in this appeal.

**STATEMENT REGARDING ORAL ARGUMENT**

Appellant's counsel is not of the opinion that oral argument is necessary.

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**STATEMENT REGARDING SUBJECT-MATTER AND APPELLATE  
JURISDICTION**

This is an appeal from the Order of the District Court granting summary judgment to Defendants-Appellees ATL Hawks, LLC (“the Hawks”) and Jason Parker (“Parker”) (both Defendants-Appellees will collectively be referred to as “the Hawks” throughout) on Plaintiff-Appellant Samuel R. Hayes, III’s (“Hayes”) claims for racial discrimination and retaliation under 42 U.S.C. § 1981, (Doc. 128), and from the associated Judgment, (Doc. 129).

This lawsuit was filed in the U.S. District Court for the Northern District of Georgia, Atlanta Division, on July 3, 2017, (Doc. 1 at 1), and asserted two claims for relief arising under 42 U.S.C. § 1981 related to Hayes’s termination on April 28, 2017. Thus, the District Court had subject-matter jurisdiction over the cause of action under 28 U.S.C. § 1331.

The District Court’s Order was entered on December 13, 2019. (Doc. 128.) This appeal was filed in the District Court on Monday, January 13, 2020. (Doc. 131.) Thus, this appeal is timely. See FRAP 4(a)(1)(A), 26(a)(1)(C). This Court has appellate jurisdiction over this Appeal pursuant to 28 U.S.C. § 1291 because the District Court’s Order and Judgment fully and finally dismissed this case with prejudice.

**STATEMENT OF THE ISSUES**

1. Did Hayes present evidence sufficient for a jury to infer that intentional discrimination motivated his termination?
2. Did Hayes present evidence sufficient for a jury to infer that he had been fired because he opposed conduct that violated (or that he objectively believed violated) 42 U.S.C. § 1981?
3. Did the District Court clearly err by holding that Hayes's responses to the Hawks' statement of material facts violated Local Rule 56.1?



## **STATEMENT OF THE CASE**

### *i. Course of Proceedings and Disposition of the Court Below*

#### **I. Pleadings and Standing Order**

Hayes filed a lawsuit on July 3, 2017 against the Hawks and Parker alleging that he was unlawfully terminated (1) on the basis of his race, and (2) because he complained about the disparate treatment of black artists who had contracted with the Hawks to perform at Philips Arena. (Doc. 1.) The Hawks and Parker answered and the Hawks counterclaimed on October 18, 2017. (Doc. 11.) This case was assigned to Magistrate Judge Linda T. Walker, who entered a Standing Order on November 20, 2017. (Doc. 16.) That Standing Order set page limits for the movant's statement of material facts and for the non-movant's statement of additional material facts, but not for the non-movant's objections and responses to the movant's statement of material facts. (Doc. 16 at 6-7, § 2(B)). It also required the non-movant to "provid[e] citations to the record to support any denial as well as [] explain[] the reason for the denial of the fact." (Doc. 16 at 6, § 2(B)).

#### **II. Discovery**

During discovery, Hayes's counsel noticed and took FRCP 30(b)(1) depositions of Megan Lodestro, Brett Stefansson, Tabala Dixon, Steve Koonin, Keith Wente, Barry Henson, Jason Parker, Nzinga Shaw, and Trey Feazell. (Doc. 60; Doc. 61; Doc. 62; Doc. 63; Doc. 64; Doc. 65; Doc. 71; Doc. 72; Doc. 73; Doc.

100-7; Doc. 100-12; Doc. 100-4; Doc. 100-14; Doc. 100-8; Doc. 100-9; Doc. 100-2; Doc. 100-11; Doc. 100-12; Doc. 100-5.) After several discovery extensions, twelve total depositions, and the exchange of over 167,000 pages of document production, the Court set a final discovery deadline of January 4, 2019 “for the parties to review the discovery they currently have and to complete depositions.” (Doc. 67.<sup>1</sup>)

### **III. Discovery Dispute and Stipulation**

On December 21, 2018, Hayes noticed the 30(b)(6) deposition of the Hawks for January 4, 2019. (Doc. 74.) On December 26, 2018, the Hawks sought a protective order via email on the grounds that the notice was untimely and that the Hawks’ 30(b)(6) testimony would merely duplicate the testimony of the 30(b)(1) witnesses that Hayes had already deposed. See (Doc. 100-6 at 2, 7). Hayes responded via email the same day. See (Doc. 100-6 at 7).

Judge Walker held a discovery conference about the outstanding discovery dispute on February 7<sup>th</sup>. See (Doc. 100-6 at 2; 01/24/2019 docket entries). During that teleconference, Judge Walker: (1) ordered Hayes to provide the Hawks with a list of the topics in the 30(b)(6) notice for which he believed none of the 30(b)(1) deponents had testified (“No Testimony List”); and (2) as to the 30(b)(6) topics that were not on Hayes’s No Testimony List, the Hawks were to file a stipulation stating

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<sup>1</sup> This is a Minute Entry.

that the entirety of the 30(b)(1) testimony of Parker, Stefansson, Henson, Wentz, Feazell, Lodestro, Dixon, Koonin, and Shaw reflected the official position of the Hawks. See (Doc. 100-6 at 2, 3, 10-11).

On February 18<sup>th</sup>, Hayes served the No Testimony List on the Hawks. See (Doc. 100-6 at 3, 13-21). The No Testimony List sought: (1) information regarding any HR policies or procedures that the Hawks had implemented from May 2017 to the present, and (2) the identity of every person with the title of manager or higher who had been disciplined for 21 purported infractions (18 of which were pulled directly from Hayes's Final Written Warning) from December 2014 to May 2017. See (Doc. 100-6 at 13-14 (Items 4, 5); Doc. 100-1 (Hayes Dep. at Def. Ex. 7)). On February 28<sup>th</sup>, the Hawks responded to Hayes list. See (Doc. 100-6 at 3, 23-42). As to Item 4, the Hawks stated that, “[a]s [] Dixon testified, there has been no substantive change in ATL Hawks' progressive discipline policy, which governed the basis for Plaintiffs termination. (Dixon Dep. at 14-15).” (Doc. 100-6 at 24.) As to Item 5, the Hawks stated:

Defendants object to this category on the grounds that it is overly broad, unduly burdensome and seeks information that is not relevant nor proportional to the needs of this case. . . .Plaintiff was terminated for failing to follow ATL Hawks' policies in suspending and terminating subordinates. Defendants have not had to discipline and/or terminate any other management level employee for failure to follow ATL Hawks' policies in suspending and terminating subordinates during the relevant time frame.

(Doc. 100-6 at 25-26.)

Another discovery conference was held on March 20<sup>th</sup> during which Judge Walker “advised [Hayes] to draft his proposed defendants’ stipulation” per her order during the February 7<sup>th</sup> discovery conference. (Doc. 97.) On March 25<sup>th</sup>, the Hawks filed the required stipulation, which stated that

Plaintiff was terminated for failing to follow ATL Hawks’ policies in suspending and terminating subordinates. . . Defendants have not had to discipline and/or terminate any other management level employee for failure to follow ATL Hawks’ policies in suspending and terminating subordinates during the relevant time frame (i.e., from December 1, 2014 to present).

(Doc. 96 at ¶1.) It also incorporated the entirety of the testimony of Parker, Stefansson, Henson, Wente, Feazell, Lodestro, Dixon, Koonin, and Shaw (collectively, “Defense Witnesses”) as to several of the topics in Hayes’s 30(b)(6) notice to the Hawks. (Doc. 96 at ¶2; Doc. 74.)

#### **IV. The Hawks’ Motion for Summary Judgment and Hayes’s Response**

The Hawks moved for summary judgment (“Motion” or “MSJ”) on February 4, 2019. (Doc. 78.) On March 26<sup>th</sup>, Hayes filed his Brief in Opposition, (Doc. 98), his Objections and Responses to the Hawks’ Statement of Material Facts, (Doc. 98-1), and his Statement of Additional Material Facts, (Doc. 98-2), along with exhibits on that day and the day after, (Doc. 99; Doc. 100 through Doc. 100-17). Hayes also filed an Amended Brief, (Doc. 101), and an Amended Statement of Additional Material Facts, (Doc. 101-1), on the 27<sup>th</sup>.

On April 8<sup>th</sup>, Judge Walker struck (Doc. 98-1) on the ground that its 125-page length “is well in excess of what could be considered a concise response[,]” as well as (Doc. 101-1). (Doc. 103 at 2-3.) Judge Walker granted Hayes leave to refile but ordered him to limit his response to Defendant’s Statement of Material Facts to 35 pages and his Statement of Additional Material Facts to 15 pages. (Doc. 103 at 3.)

Hayes sought leave to file excess pages and a second amended brief on April 24<sup>th</sup>, (Doc. 104), and then filed his Second Amended Statement of Additional Material Facts ((Doc. 106)) on April 29<sup>th</sup> and his First Amended Objections and Responses to Defendants’ Statement of Material Facts ((Doc. 107)) on the 30<sup>th</sup>. On May 7<sup>th</sup>, Judge Walker struck these too given their page length, ordered Hayes to file another response to Defendants’ Statement of Material Facts that didn’t exceed 45 pages and another Statement of Additional Material Facts that didn’t exceed 25 pages, and granted leave to file a second amended brief. (Doc. 108.)

On May 17<sup>th</sup>, Hayes filed his Second Amended Brief in Opposition, (Doc. 109), his Second Amended Objections and Responses to Defendants’ Statement of Material Facts, (Doc. 109-1), and his Third Amended Statement of Additional Material Facts, (Doc. 109-2). On June 21<sup>st</sup>, the Hawks filed their Response to Hayes’s Statement of Additional Material Facts, (Doc. 118), and a Reply Brief, (Doc. 119).

**V. Report and Recommendation, Order and Judgment, and Appeal**

On September 9<sup>th</sup>, Judge Walker entered a Report and Recommendation (“R&R”) recommending that the Hawks’ Motion be granted. (Doc. 122.) Hayes filed objections on September 23<sup>rd</sup>. (Doc. 124.) The Hawks responded on October 7<sup>th</sup>, (Doc. 126), and Hayes replied on October 21<sup>st</sup>, (Doc. 127).

On December 13<sup>th</sup>, District Court Judge Michael L. Brown overruled Hayes’s objections, adopted the R&R, and granted the Hawks’ Motion. (Doc. 128.) Hayes’s notice of appeal was filed in District Court on January 13, 2020. (Doc. 131.)

*ii. Statement of the Facts*<sup>2</sup>

**I. Racism in the Hawks Organization Before Hayes’s Arrival**

In the years leading up to Hayes’s arrival, racial animus within the Hawks organization was exposed. On June 6, 2014, in a meeting to discuss acquiring NBA player Luol Deng (who is black and of Sudanese descent<sup>3</sup>), Basketball General Manager (“GM”) Danny Ferry (white) referred to Deng as “[having] a little African in him” in an apparent effort to imply that he was dishonest or untrustworthy. See

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<sup>2</sup> All factual inferences are modified by a word indicating subjective perception (e.g., “apparent,” “apparently,” “indicate,” “indicates,” “imply,” “implying,” “tacit,” etc.) or are followed by a “see” cite.

<sup>3</sup> Deng’s race and nationality are public record:  
[https://en.wikipedia.org/wiki/Luol\\_Deng](https://en.wikipedia.org/wiki/Luol_Deng);  
<https://www.theguardian.com/sport/2005/apr/03/ussport.features>.

(Doc. 100-15 at 4<sup>4</sup>). Ferry took a leave of absence starting on September 12, 2014 after his comments were made public on September 11, 2014. (Doc. 100-15 at 4.<sup>5</sup>)

After Ferry's comments were made, a member of ownership pressured the Hawks into conducting a companywide investigation. (Doc. 100-14 (Koonin Dep. 11:20-25)<sup>6</sup>; Doc. 100-15); n.5 supra. That investigation uncovered an email that then-majority owner Bruce Levenson (white) had sent in 2012 wherein he expressed concern that "the African-American audience was inhibiting the white audience from coming to the games." (Koonin Dep. 7-24, 9:6-8, Pl. Ex. 1; Doc. 100-15 at 7.) After that email was uncovered, CEO Steve Koonin (white) urged Levenson to sell the team "because of the stress he was under." (Koonin Dep. 10:13-17.) That email and the Ferry incident also prompted the Hawks to hire Nzinga Shaw (black) as its Chief Diversity and Inclusion Officer in December of 2014, but as former Security Systems Manager Megan Lodestro (white) stated, this was a "fluff" hire that was done for "show." (Doc. 109-2 ¶3; Doc. 100-10 (Shaw Dep. 73-75); Doc. 100-7 (Lodestro Dep. 92:13-14, 93:5, 93:10-11)); see n.5 supra.

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<sup>4</sup> Ferry went on to state, "[Deng's] like a guy who would have a nice store out front and sell you counterfeit stuff out of the back." (Doc. 100-15 at 4.)

<sup>5</sup> See also "Hawks GM Danny Ferry takes indefinite leave in wake of racism controversy," *USA Today* (Sept. 12, 2014), <https://www.usatoday.com/story/sports/nba/hawks/2014/09/12/danny-ferry-indefinite-leave-of-absence-atlanta-racist-scouting-report/15527829/>.

<sup>6</sup> In all cites to deposition transcripts, the page number cited is the number designated by the court reporter in the transcript.

In June of 2015 the team was sold to a new ownership group whereby Antony (“Tony”) Ressler (white) became the new majority owner. (Koonin Dep. 24:12; Doc. 100-15 at 5.) Ferry stepped down as Basketball GM that same month and was replaced by Wes Wilcox (white). (Koonin Dep. 24:12-16; Doc. 100-15 at 1.)

## **II. Hayes’s Hire and Initial Job Duties**

Hayes (black) was hired by the Hawks as the Security Manager for Philips Arena (“the Arena”) on August 8, 2016 and oversaw the physical security department in this role. (Doc. 109-1 ¶4; Doc. 98-1 ¶4; Doc. 100-1 (Hayes Dep. 77:24-78:1, 87:17-88:2); Doc. 109-2 ¶4.) “Physical security” encompasses the security of the Arena itself. (Doc. 109-1 ¶5; Doc. 98-1 ¶5; Doc. 100-12 (Stefansson Dep. 16:18-17:1); Doc. 100-2 (Parker Dep. 21, 60-61).) Hayes’s subordinates in the physical security department were all black. (Hayes Dep. 139:13-14, 298:17-18.)

Hayes reported to Parker (white), who was the VP of Security, Customer Service and Operations. (Parker Dep. 12:2-6) Upon hire, Hayes assumed he would have responsibility for everything within the job description, which included event security. (Hayes Dep. 88-89, 90-92, 261-263; Parker Dep. 59, Pl. Ex. 1 at 1 (4<sup>th</sup> bullet point on page), 2 (3<sup>rd</sup> and 8<sup>th</sup> bullet points on page).) Parker initially intended to eventually give Hayes all this responsibility, (Parker Dep. 220:13-16, 225:15-18); and early into his tenure Hayes was asked to address security issues during shows featuring black artists. (Doc. 99 (Hayes Decl. ¶¶2-3); Hayes Dep. 88-89, 261-263.)



### **III. Hawks Physical Security Policies**

As sole lessee and operator of the Arena, the Hawks employed standard security operating procedures (“SOPs”) that that were implemented and enforced by the security department. See (Doc. 109-2 ¶11; Doc. 100-5 (Feazell Dep. 20-26, 30-32); Doc. 100-8 (Wente Dep. 49-53, 53:11-23); Parker Dep. 273-274; Hayes Dep. 95:24, 203:15-20, 209:15-210:9, 221, 225, 229, 304-305; Doc. 109-3 (Def. Prod. 1462-1463, 3099-3100); Doc. 109-4 (Def. Prod. 21791-21792); Stefansson Dep. 14-15, 35:23-36:3; Lodestro Dep. 27, 29, 46; Doc. 88 (Jones Dep. 25-27, 78, 78:4-79:1)). These SOPs were supposed to apply to all events held at the Arena. See (id.).

The SOPs governing Arena entry/access control dictated that every person entering the Arena—performers included—had to go through a magnetometer (“mag”) (or, alternatively, be “wanded” by a handheld magnetometer), that every bag carried in by a person had to undergo a bag inspection, and that vehicles could not be parked in the “loading dock” during events. See (id.; Parker Dep. 76:1-18; Doc. 109-2 ¶12). Parker had power to deviate from the SOPs without prior authorization from anyone, but Parker’s boss, Arena General Manager/Executive VP of Arena Programming Trey Feazell (white), told Parker to keep him in the loop whenever Parker chose to deviate from SOP. (109-2 ¶11; Feazell Dep. 10:9-15, 31:1-17.) Feazell also had power to unilaterally deviate from SOP, but he’d communicate

any deviation to Parker so Parker could communicate it to the physical security staff. See (Parker Dep. 76:19-22; Feazell Dep. 44:19-45:12; Doc. 100 at 65.)

Feazell booked the shows, which involved agreeing to terms with the artists' promoters. (Feazell Dep. 18:12-14.) But he didn't discuss show security or security concession requests while booking the shows; he left that to Parker to sort out during the "security advance" process. (Feazell Dep. 18:1-11, 20:19-22:7.) Parker's security directives for each concert/show were communicated in "security advances," but Parker or Feazell (or even the event managers) sometimes deviated from the advances on the spur of the moment. (Doc. 98-1 ¶60; Feazell Dep. 44:19-45:12.) "Every artist" requested a mag and bag "bypass" during the security advance process. (Doc. 109-2 ¶13.) Parker frequently told Hayes (or stated in his hearing) when artist made a security concession request and whether it was going to be granted or denied. (Doc. 109-2 ¶14.)

#### **IV. Hayes Notices Differences in the Enforcement of SOPs Based on Race**

Very soon into his tenure, Hayes's black subordinates began complaining to him that show security policy differed from show to show based on the race of the artist who was performing. (Doc. 109-2 ¶17). Hayes told them he'd investigate and began observing in order to determine whether their complaints were legitimate. (Hayes Dep. 113:1-115:10.) By September of 2016, Hayes had determined that they were and raised the issue with Parker. (Doc. 109-2 at ¶16; Hayes Dep. 113:1-

115:10.) In fact, during his 9-month tenure, Hayes identified at least 12 black artists performing at the Arena who made mag and bag bypass requests (or some other security concession request) that were denied, and at least 11 white artists performing at the Arena who made mag and bag bypass requests (or some other security concession request) that were granted. (Doc. 109-2 ¶¶15, 16, 19, 20, 21, 22, 26, 30, 32, 33, 44, 45, 46, 56, 59, 60, 66, 69, 72, 74, 80.)

#### **V. The Amy Schumer Incident and its Fallout**

In September of 2016, after noting several instances where black artists performing at the Arena had made security concession requests that were denied, Hayes questioned why a certain security concession was granted to a white artist. (Doc. 109-2 ¶¶15, 16.) By October, Hayes’s questioning had morphed into more vocal opposition, and on October 14<sup>th</sup>, after Lodestro granted a security concession to the production crew for comedian Amy Schumer (who is white), Hayes openly opposed the concession. (Doc. 109-2 ¶22.) In response to Hayes’s opposition, Lodestro vented to Parker that Hayes “need[ed] to be chilled.” (Id. ¶23.)

The next day (the day of the show), Hayes correctly gave Schumer’s promoter (Bill Allen of Live Nation, who is white) a directive related to parking that was identical to the directive that Parker had given to then-Atlanta Mayor Kasim Reed (who is black) the month before; and Hayes also protested when a white member of Schumer’s production crew directed disparaging language toward one of Hayes’s

black subordinates. (Id. ¶23; Doc. 109-3 (Def. Prod. 1631-1632); Hayes Decl. at ¶15.) Schumer’s promoter complained to Parker, and Parker addressed the complaint with Hayes on October 17<sup>th</sup>. (Doc. 109-2 ¶27.)

During that October 17<sup>th</sup> conversation, Parker told Hayes that people perceived him as “aggressive,” admonishing him that “you are a large black man with an intimidating voice and a commanding presence, [so] watch your tone.” (Id.) He also told Hayes that Hayes needed to write a letter apologizing to Allen. (Hayes Dep. 100, 106-107; Parker Dep. at 204-205). Hayes turned the conversation to security policy and directly asked Parker why it appeared that the Hawks disparately enforced its security policy based on the performer’s race. (Doc. 109-2 ¶27.) Parker responded that “white acts make more money and they charge higher ticket prices, so the people who come to those shows are not going to act out.” (Id.)

This October 15<sup>th</sup> incident, which Parker blamed on Hayes’s “tone” (which, per Parker, was perceived as “aggressive” because Hayes is black), is ultimately why Parker refused to give Hayes authority over event security and told him to stay away from events. (Id. ¶25.)

## **VI. Other October 2016 Events Culminating in the Event Ban**

After the October 17<sup>th</sup> meeting, Hayes again raised the issue of disparate enforcement of security policy later that month during a department meeting. (Id. ¶29; Hayes Dep. 185:7-21.) Then on October 20<sup>th</sup> and 21<sup>st</sup>, Hayes was kept off

several emails related to a mag and bag bypass request granted to singer Sia (who is white) for her November 1<sup>st</sup> concert at the Arena. (Doc. 109-2 ¶30.) On October 28th, Hayes questioned Lodestro about a security concession that was granted to singer Adele (white). (Id. ¶33.) Parker responded by venting to VP of HR Tony Donato (who is white) that Hayes “doesn’t get it,” and then by banning Hayes from involving himself in event security. (Id.; Hayes Dep. at Pl. Ex. 8.)

## **VII. November 1<sup>st</sup> Through November 8<sup>th</sup>**

On November 1<sup>st</sup>, Parker and Donato met with Hayes for a “verbal counseling.” (Doc. 109-2 ¶34.) Parker claimed that 18 people had complained about Hayes since the time that his employment started. (Id.) Parker wouldn’t tell Hayes who those people were or what they complained about, but stated generally that the complaints were related to Hayes’s tone and that Parker “expect[ed] to see change.” (Id.) Parker also told Hayes during that conversation that the Hawks Event Manager for the Sia concert (Paul Krajewski (white)) purportedly didn’t want Hayes to “shadow” him during the concert that evening. (Id. ¶35.) After Hayes questioned why this was so, Parker complained to Donato that Hayes “[is] always the victim[.]” (Id.)

On November 6<sup>th</sup>, Lodestro complained to Parker that someone told her Hayes had called her and Security Systems Coordinator Emily Drexler (who is white)

“racists.” (Id. ¶36.) Parker’s response to Lodestro was “Dear Megan[:] have faith. Let’s chat tomorrow[.]” (Id. ¶37; Doc. 109-5 (Def. Prod. 35316).)

Two days later on November 8<sup>th</sup>, Parker gave Hayes a Final Written Warning that addressed the same matters discussed in the “verbal counseling” on November 1<sup>st</sup>. (Doc. 109-2 ¶38.) The only required performance adjustment set forth in the Final Written Warning was “being intentional in each interaction to be respectful, professional, mindful of your tone and approach.” (Id. ¶39.) After Hayes received the Final Written Warning, he asked Parker why he’d escalated the same matters discussed in the “verbal counseling” to a final written warning. (Doc. 98-1 ¶22.) Parker didn’t mention Lodestro’s most recent complaint or give Hayes an opportunity to respond to it, but merely quipped that he’d “sat back and thought about the answers and the way the conversation went, and he felt that[] this was the way that [they] needed to go.” (Doc. 98-1 ¶22; Hayes Dep. 293-295, 300-304, 295:6-9, 303:4-10, 304:7-9, Def. Ex. 7; Doc. 109-6 (Def. Prod. 35377).)

### **VIII. More Organizational Race Problems in 2016**

Meanwhile, the Hawks continued its troubling history of race relations in 2016. In September, during an internal meeting of Hawks employees, then-Basketball GM Wes Wilcox (white) made a comment about performing the “brown paper bag” test on his mixed-race children. (Hayes Dep. 315-316; Fezell Dep. 14-16.) On October 24<sup>th</sup>, during a “Chalk Talk” event, Wilcox again referred to the

“brown paper bag” test in relation to his mixed children. (Doc. 109-6 (Def. Prod. 84835).) After Shaw brought it to his attention, Koonin responded by saying that he would “coach” Wilcox about it. (Id.) Then on December 7, 2016, during a “Chalk Talk” event with Hawks season ticketholders that had gotten contentious, Wilcox stated that he “is married to a black woman with three mixed kids and is accustomed to being yelled at” (implying that blacks are angry and argumentative). (Doc. 109-2 ¶42.) After a black season ticketholder complained to Koonin, Koonin addressed the issue with Wilcox by telling him that “[h]umor is subjective[] so please refrain from humor.” (Doc. 109-2 ¶43.)

#### **IX. Parker’s Efforts to Fire Hayes in December and January**

On November 30<sup>th</sup>, Lodestro spoke to Parker about the status of the investigation into Hayes purportedly calling her and Drexler “racists.” (Doc. 109-2 ¶40.) On December 7<sup>th</sup>, apparently at Parker’s urging, she made a formal complaint to HR about the “racist comment.” (Id.)

On December 31<sup>st</sup>, Hayes attempted to grant special entry to ticketed personal guests for the Old School Hip Hop Fest being held that night at the Arena. (Id. ¶47.) A part-time member of Guest/Premium Services named Yolanda Travis denied the request. (Id. ¶47; Wentz Dep. 12:18-13:6.) Both Parker and Senior Director of Customer Service and Service Operations Keith Wentz (white) confirmed afterward that Hayes had the authority to make this request, and Parker couldn’t confirm that

Hayes was “aggressive” towards Travis. (Doc. 109-2 ¶49.) Still, Parker sought to fire Hayes in the first week of January 2017 for an “aggressive approach, failure to follow procedures and protocol and using his role as leverage to get things that he wanted.” (Id.) Hayes would’ve been fired then, but HR Manager Tabala Dixon (who is black) saved him from termination by agreeing to help modify his “aggressive” behavior. (Id. ¶50.)

**X. Dixon Tries to “Modify” Hayes’s “Aggressive” Behavior**

After “saving” Hayes from termination in early January, Dixon “tried to describe the culture of the organization” to Hayes. (Id. ¶51.) Per Dixon, the key to success within the organization was being more “respectful.” See (Id. ¶51).

**XI. January Through March 2017**

From the time Hayes received the Final Written Warning through March of 2017, Hayes went into job preservation mode: he stayed away from events and didn’t openly oppose the disparate security policies that continued at the Arena. (Doc. 98-1 pp.10-11; Hayes Dep. 91:14-22, 115:11-116:13, 164:1-13, 216:20-217:9.) But he continued to complain about them privately: he complained twice to Wentle, once to Dixon,<sup>7</sup> and once to Shaw and Kim Miller (who was Feazell’s Administrative Assistant and is black). (Doc. 109-2 ¶¶ 52-53, 57.) During Hayes’s discussion with Shaw and Miller, Shaw said that the racism within the organization is “largely

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<sup>7</sup> When Dixon asked Parker about Hayes’s complaint, Parker stated that “there [was] a difference [], based on artists, [] how things were handled.” (Doc. 109-2 ¶54.)



ignored at the executive level”<sup>8</sup> and called Parker a “narcissist closet racist[.]” (Doc. 109-2 ¶58.)<sup>9, 10</sup>

Hayes even brought the issue back up with Parker in February of 2017, but rather than being directly accusatory, he told Parker that his staff was still asking him why it appeared security policy was being enforced differently based on the ethnicity of the entertainer, and that they were looking for an answer to this question. (Doc. 109-2 ¶61.) Parker responded that the security policies varied based on the demographic of the show and claimed that there are more security problems at “black” shows. (Id.) During that same conversation, Hayes told Parker that he wanted to diversify the department by hiring some non-black security officers given the Hawks’ purported commitment to diversity, to which Parker responded, “Yeah,

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<sup>8</sup> As an example, Payroll and Customer Service Assistant Anthony Leakes (who is black) told Hayes that his co-employee Pat Wynne (who is white) would say derogatory things about black people in his presence and would call him demeaning things like “you fuckin’ stupid ass,” and that he went to HR about her “many times” and “nothing happened.” When discussing the organizational culture, Leakes told Hayes that “in their head they’re not being racist” and “they’re ignorant to their racism.” (Doc. 98-1 p.95; Hayes Decl. ¶32.)

<sup>9</sup> During that same conversation, when Hayes told Shaw that Parker called him a “large angry black man,” Shaw said “that was some racist bullshit.” Also, Shaw called Wilcox “the biggest racist of them all” and told Koonin on a number of occasions that “you need to do something about that racist motherfucker” (referring to Wilcox). (Doc. 98-1 p.95; Doc. 109-2 ¶58.)

<sup>10</sup> Consistent with Shaw’s description of Parker as a “narcissist closet racist,” former Hawks Security Officer Jeremy Carr stated that “I have seen Mr. Parker talk down to several black security officers.” (Doc. 4 (Carr Decl. ¶22).)

because when you have a department full of African-Americans, I could see where people would see you as being less than capable.” (Id. ¶62.)

Yet Hayes’s lack of open opposition to these disparate policies (in addition to his excellent work) over this three-month period was apparently garnering him Parker’s favor, as Parker told him that he was doing a “great job” and “had accomplished more in six months than the prior [security manager] had in a year.” (Id. ¶55; Doc. 98-1 pp.14-15.) This didn’t tamp down Parker’s “closet racism” however: during a department meeting in March of 2017, Parker referred to Hayes as the “large, angry black man” for the third time (out of four or five total instances), to which Hayes verbally responded, “totally not cool.” (Doc. 109-2 ¶63.)

## **XII. April 2017**

On April 1st, Parker granted mag and bag bypasses to the British rock group Radiohead (all of whom are white), as well as to the band’s manager (white) and the band’s immediate family members (all of whom are white). (Id. ¶66.) Parker then blamed Hayes for why the concession was granted. (Id.<sup>11</sup>)

This caused Hayes to fear for his job (he was still on a Final Written Warning), so on April 3<sup>rd</sup> he spoke with Shaw and explained that he believed Parker was trying to fire him for opposing racially disparate security practices. (Id. ¶67.) He also

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<sup>11</sup> During his deposition, Parker indicated that Hayes was authorized to do the very thing that Parker blamed him for doing. See (Parker Dep. 231:22-232:15.)

complained to Shaw that the physical security department (which was almost entirely black) was the only department that hadn't received a raise in years. (Id.) Shaw asked Hayes to write a statement, but he declined because he feared retaliation if Parker obtained it. (Id.) Instead, he asked Shaw to open an investigation and to make him write a statement as part of that investigation. (Id.) Shaw told Hayes that she'd raise his complaints with Arena GM Brett Stefansson (who is white). (Id.) She raised them with Stefansson shortly thereafter and Stefansson said he'd look into it with HR. (Id.)

Also on April 3<sup>rd</sup>, Hayes met with Donato to express his concern that Parker was targeting him for termination because he kept bringing up the disparate enforcement of security protocols. (Id. ¶68.)

On April 12<sup>th</sup>, singer Ariana Grande (white) performed at the Arena. (Id. ¶69.) Prior to the show, one of the (white) members of Ariana Grande's show production crew refused to go through the mag. (Id. ¶72.) After Security Officer Tim Jones (black) told the man that he had to go through it, the man took his pants off and threw them at Jones. (Id.) Hawks Event Manager Catie Scott (white) came down and let the crew member bypass the mag. (Id.) Promoter Bill Allen, who was the Live Nation rep for that show and witnessed the incident, told Scott that he'd take his business elsewhere if this kept happening. (Id.) Allen also stated that "the [Security]

Officers [were] a reflection of [Hayes's] attitude.” (Id.) Scott relayed Allen's statements to her boss, VP of Operations Barry Henson (white). (Id.)

Shortly after the Ariana Grande show on April 12<sup>th</sup> (but before April 24<sup>th</sup>), Hayes complained to Parker again that the staff was continuing to question why so many security concessions are made for white performers but not for black performers, and why security was often heightened at black shows but not at white shows. (Id. ¶75.) In response, Parker stated that “hip hop acts draw a different crowd, and the white acts bring in more money.” (Id.)

On April 18<sup>th</sup>, Hayes requested another meeting with Donato because he still believed that Parker was targeting him for termination because he'd complained about the disparate enforcement of security policies. (Id. ¶76.)

On April 19<sup>th</sup>, an operations meeting was held. (Id. ¶77.) Henson, Hayes, Parker and Fezell were among those in attendance. (Id.) During the meeting, the conversation turned to security, and Hayes stated, “are we also going to discuss why there seems to be a clear disparity between the way that security policies are exercised based on ethnicity?” (Id.) Henson responded, “well, white entertainers make more money, so Tim McGraw is not going to come in here and blow up the building,” to which Hayes replied, “well, neither is Drake.” (Id.) Hayes's question made quite a few people uncomfortable. (Id.) After that meeting, “the energy shifted” between Hayes and Parker: Parker began “avoiding [him],” “his answers []

bec[a]me more detached,” and he began acting as if Hayes “had gotten on his nerves.” (Id.)

On April 20<sup>th</sup>, Parker asked Stefansson for a meeting to discuss four “hot topics,” three of which were “Ariana Grande,” “Security Transition,” and “Sam.” (Id. ¶78.) During that meeting, Parker told Stefansson that he and Donato were going to terminate Hayes because he “continue[d] to not demonstrate that he[ was] able to abide by the requirements that were in the final written warning” during a “window of three weeks” in April of 2017. (Id. ¶79; Stefansson Dep. 19:17-23.) Apparently, the decision was all but made at that meeting: the next day, Parker sent an email about a future “transition” meeting to HR and to all the management-level employees that reported to him except for Hayes, (Doc. 109-2 ¶78); and on April 23<sup>rd</sup>, Stefansson told Parker and Donato that they should get an offer out to the new person they were planning on hiring (Kevin Dooley, who is white) in order to fill the “void” that would be left in the Physical Security department after they terminated Hayes. (Doc. 109-2 ¶82; Doc. 109-6 (Def. Prod. 167284, 167292).)

On April 24<sup>th</sup>, Hayes spoke with Parker again about security disparities based on race. (Doc. 109-2 ¶83.) Parker responded by telling Hayes that he had done an “incredible job,” but Parker was annoyed that Hayes was bringing up the same issue again, so he told Hayes to “tell [the Security Officers] to come ask me.” (Id.)

On April 25<sup>th</sup>, Hayes met with Stefansson and expressed concern that Parker was targeting him for termination because he'd made complaints about security disparities based on race, and stated that he believed Parker was trying to use the Kimberly Height situation<sup>12</sup> as a ruse to fire him. (Id. ¶84.) Stefansson told Hayes not to worry about the Kimberly Height issue. (Id.) He also told Hayes that he didn't have to worry about Parker trying to fire him because he'd no longer be reporting to Parker once former Atlanta Police Department Chief George Turner (who is black) took over the Physical Security department on May 1<sup>st</sup>, and that he (Stefansson) had already told Turner that he was pleased with the way Security was going and wanted Turner to support Hayes. (Id.)<sup>13</sup>

On April 26<sup>th</sup>, Stefansson emailed his boss (Chief Operating Officer Thad Sheely, who is white) and stated, “[w]e are going to term Sam (24 hour mgr) for a variety of reasons[.]” (Doc. 109-2 ¶85.) Later that evening, Donato also emailed Sheely and stated, “Sam Hayes - previously issued Final Written Warning - continue to have complaints about him – moving forward with termination this week[.]” (Id.)

On Friday, April 28, 2017—one business day before Hayes would've started reporting to Turner—Parker told Hayes he was being fired because of the Kimberly

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<sup>12</sup> The “Kimberly Height situation” is discussed in Part XIV below.

<sup>13</sup> That same day, Washington Wizards owner Ted Leonsis complimented Hawks owner Tony Ressler on the Hawks' staff and mentioned Hayes by name. Hayes forwarded it to Parker, who forwarded it to Koonin, who praised *Parker*. (Doc. 109-5 (Def. Prod. 22399-22401).)

Height and Danny Womack incidents.<sup>14</sup> (Id. ¶¶88, 84.)<sup>15</sup> Shortly after he was fired, Hayes sent an email to Stefansson and cc'ed Shaw, who forwarded it to Koonin. (Doc. 109-3 (Def. Prod. 6-8).)

Between April 28<sup>th</sup> and May 1<sup>st</sup>, after Hayes's termination, Shaw spoke with Wentz, Carla Hyman, and Parker. Wentz and Hyman confirmed that there were "inconsistent policies regarding security systems in the Arena" depending on the "composition of the act[]." (Doc. 109-2 ¶90; Shaw Dep. 168:15-19.)

Shaw then contacted Hayes on May 1<sup>st</sup>. (Doc. 109-2 ¶91.) She told Hayes that decisions about security have nothing to do with race and that Parker told her that he (Parker) had six or seven people "lined up" who were prepared to state that Hayes "was terminated because he's difficult to work with[] and tough to get along with in a work setting." (Id.; Shaw Dep. 165:11-25.) Shaw also told Hayes that he should've complained in writing before he was fired and that there was nothing she could do for him. (Doc. 109-2 ¶91.)

After Hayes was fired, Drexler became the new Security Manager. (Id. ¶92; Doc. 100-17 at 4.)

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<sup>14</sup> The "Danny Womack incident" is discussed in Part XIV below.

<sup>15</sup> An email sent from Parker to Henson and Feazell mere minutes after Hayes's termination indicates that they had input into the termination decision and had advance notice of it. Dixon was involved in determining the logistics of the termination, but the emails sent by Stefansson on April 23<sup>rd</sup> and 26<sup>th</sup> and Donato on the 26<sup>th</sup> indicate that she was not a decisionmaker. (Doc. 98-1 ¶43, Doc. 109-5 (Def. Prod. 29275); Doc. 109-6 (Def. Prod. 167132).)

### **XIII. Hayes's Power to Fire and Suspend Subordinates**

As Security Manager, Hayes had the power to hire, fire, and reprimand/discipline his subordinates. (Doc. 109-2 ¶5.) Pursuant to the policies set forth in The Atlanta Hawks & Philips Arena Team Member Handbook (“Employee Handbook”), HR encouraged Hayes and the other managers to engage in progressive discipline with full-time subordinates to the extent feasible. (Hayes Dep. 140:7-11, 162:22-163:1, 164:16-165:8, Doc. 109-3 (Def. Prod. 241).) However, Hayes was explicitly empowered by the Employee Handbook to immediately terminate individuals on the spot, without engaging in any prior steps of progressive discipline, if Hayes felt that the offense warranted immediate termination. (Doc. 109-3 (Def. Prod. 241<sup>16</sup>); Hayes Dep. 142:16-19, 164:16-165:3.)<sup>17</sup> Hayes correctly understood that he had this power, communicated that understanding to Dixon, and was never disabused of this understanding by Dixon or anyone else prior to April 27<sup>th</sup>. (Doc.

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<sup>16</sup> “Corrective action, up to and including immediate termination, may result from an employee violating any rule, policy, procedure, written contract, or for failing to properly or satisfactorily perform one’s job. ... At times, corrective action may be administered in a sequence of increasing severity, if the concern or problem continues. In other instances, more severe action may be appropriate due to the severity of the conduct, concern or problem. In such cases, some or all of the corrective action below will be condensed or omitted.”

<sup>17</sup> Hayes never received a copy of the Employee Handbook during his tenure, (Hayes Dep. 134:25-135:8), but he did receive a copy of the Physical Security Handbook (“Security Handbook”), (Hayes Dep. 247-249). The Security Handbook indicates that managers (and even *supervisors*) had the power to terminate, that security staff could be terminated “immediately” (i.e., on the spot), and makes no mention of consulting with HR or seeking HR approval. See (Doc. 98-1 at pp.5-6, 54 ¶26).



109-2 ¶87; Hayes Dep. 139:22-140:6, 140:23-24, 142:3-8, Def. Ex. 5; Doc. 109-4 (Def. Prod. 15588-15591).) Likewise, Hayes was empowered to remove part-time subordinates from the schedule or fire them at his whim. (Doc. 98-1 at p. 54, Doc. 109-2 ¶65.) Also, Hayes was explicitly empowered to suspend subordinates in his discretion (which is functionally the same as removing them from the schedule) without engaging in any prior steps of progressive discipline. (Doc. 98-1 at p. 54, Doc. 109-2 ¶65.) Further, the Employee Handbook does not indicate that Hayes had to notify HR when he suspended a subordinate. (Doc. 109-3 (Def. Prod 242 (“Suspension”)).)

Critically, the Employee Handbook explicitly empowered Hayes to take the disciplinary actions noted above without previously consulting with or obtaining prior permission from HR: the only two forms of discipline that required a manager to consult with HR prior to taking action were (1) when a Final Written Warning was issued as initial corrective action, and (2) when a Performance Improvement Plan was issued. (Doc. 109-3 (Def. Prod. 242<sup>18</sup>); *id.* (Def. Prod. 242<sup>19</sup>); Hayes Dep. 140:23-24.) Per the explicit terms of the Employee Handbook, the other forms of discipline—verbal counseling, written counseling, suspension, and termination—

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<sup>18</sup> “In the event management believes that a Final Written Warning is warranted as initial corrective action, management should contact Human Resources to discuss the circumstances before taking action.”

<sup>19</sup> “No employee should be placed on a Performance Improvement Plan unless it has first been reviewed by Human Resources.”

did *not* require prior consulting with or approval from HR. (Doc. 109-3 (Def. Prod. 241-242).)<sup>20</sup> Throughout his tenure, Hayes was only told to divert from the directives in the Employee Handbook and to obtain approval from HR before disciplining or terminating *once* in relation to *one* subordinate—Physical Security Shift Supervisor Darriel Bailey—whom Hayes never fired. (Hayes Decl. ¶20; Hayes Dep. 140:12-24, 258:10-11.)<sup>21</sup> In fact, Hayes terminated numerous subordinates (both full-time and part-time) without previously consulting with or obtaining prior permission from HR throughout his 9-month tenure and was never coached or reprimanded for doing so until April 27<sup>th</sup>—the day before he was fired. (Hayes Dep. 142:9-23, 164:25-165:3, 141:15-142:8, 329:5-330:28, Def. Ex. 5; Parker Dep. 285:8-286:4, Pl. Ex. 23.)

#### **XIV. Facts Relating to the Hawks’ Stated Reason for Termination**

<sup>20</sup> Hayes even explicitly asked Donato in September of 2016 (with Parker cc’ed to the email) whether he had to send Donato “every disciplinary/ counseling write-up or only the one[s] where termination is being pursued.” (Doc. 109-3 (Def. Prod. 1704).) Donato responded by stating that Hayes must submit “all WRITTEN disciplinary actions” to HR for review before giving them to the employee. (Emphasis in original.) (Id.) Donato’s directive was slightly different from what is set forth in the Employee Handbook because Donato’s directive would’ve included written counselings (which, per the Employee Handbook, did not need prior HR approval), but Donato’s directive still *explicitly excluded* verbal counselings, suspensions, and terminations.

Likewise, after Hayes suspended a subordinate (Terry Taylor) by telling him to “go home” and the subordinate asked Parker whether Hayes was authorized to do that, Parker said that Hayes’s actions were “perfectly appropriate” and that he “ha[d] no reason to have to reinforce [Hayes’s] directions to his team members.” (Doc. 109-3 (Def. Prod. 1758).) (When Hayes told Taylor to “go home,” he was suspending him. See (Hayes Dep. 146:14-15).)

<sup>21</sup> This unique policy was implemented for Bailey because Bailey had previously complained to HR about Hayes. (Hayes Decl. ¶20; Doc. 98-1 p. 23.)

On March 28, 2017, Hayes suspended part-time Security Officer Kimberly Height for “insubordination” and “inappropriate behavior” by telling her to “go home,” and that she would receive further instructions from him or human resources. (Doc. 98-1 ¶37 (Response (b)); Hayes Dep. 146:14-15, 143:5-11.) That same day, Hayes told Parker that he’d “told Height to go home until HR contacted her.” (Hayes Dep. 146:24-25, 146:21-22.) Dixon (who had been established as Hayes’s “go-to” for employee relations issues) was on vacation, but when she returned Hayes intended to “inform [her about] what happened and advise her that [he] was terminating [] Height[.]” (Hayes Dep. 143:19, 143:22-23; Dixon Dep. 12.)

On the morning of April 12, 2017, Hayes terminated Security Officer Danny Womack and Security Officer Paul Shepherd for sleeping on post during load-in for the Ariana Grande concert. (Doc. 109-2 ¶70.)<sup>22</sup> Hayes notified Parker and HR of the termination decision that same day at 7:26 a.m. (Doc. 109-2 ¶70.) Parker approved both terminations by signing Womack’s and Shepherd’s Corrective Action Notice forms on April 14<sup>th</sup>. (Doc. 109-4 (Def. Prod. 19566); Parker Dep. 285-286, Pl. Ex. 23; Dixon Dep. 34:4-6, Pl. Ex. 3; Hayes Dep. 164-165, 305-306, 329-331.)

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<sup>22</sup> Sleeping on post was a serious offense that could subject an employee to immediate termination. (Hayes Dep. 142:16-19, 165:1-3; Parker Dep. 289:15-21; Dixon Dep. 37:1-3.)

Also on the morning of April 14<sup>th</sup>, Shift Supervisor Darriel Bailey informed Hayes that Height was in the building working for a third-party vendor called PAW. (Doc. 109-2 ¶73.) After Hayes informed Parker, he told Hayes that Height needed to leave since she was still on suspension. (Id.) Hayes then informed Bailey, who told Height that she needed to leave, which she eventually did (after becoming argumentative and cursing at Bailey). (Id.) Parker, Hayes, and Bailey were all authorized to tell Height to leave the Arena. (Id.) Height then complained to Stefansson. (Id.)<sup>23</sup>

On April 22<sup>nd</sup>, ten days after Womack was fired, he wrote Parker a letter stating that he fell asleep because he was on post-surgery medication that made him drowsy. (Doc. 98-1 at p. 73; Doc. 109-5 (Def. Prod. 35197-35198).) This was news to Hayes: Womack was cleared by his doctor to return to work without restrictions on March 27<sup>th</sup> after having surgery on March 17<sup>th</sup> (with no mention made of sleep-inducing prescription medication), was cleared by HR to return to work on April 3<sup>rd</sup>, and had worked 8 shifts (several of which were night shifts) from April 3<sup>rd</sup> through April 11<sup>th</sup> without mentioning medication or being caught sleeping on post. (Doc.

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<sup>23</sup> Hayes didn't see Dixon for a period of "about two weeks" because, after she got back from vacation, she was out of the office for another extended period attending a training class. (Hayes Dep. 143-145.) Height had complained to Stefansson by the time Dixon returned to the office. (Hayes Dep. 145:1-3.)

98-1 at p. 73; Doc. 109-5 (Def. Prod. 27367-27368, 28252-28253, 35197-35198); Hayes Dep. 188.)

On or about April 26<sup>th</sup>, Hayes was informed that Womack's termination had been rescinded. (Doc. 109-3 (Def. Prod. 1570-1571); Hayes Dep. 329:21-330:5.)<sup>24</sup> Hayes protested this decision on the morning of April 27<sup>th</sup>. (Doc. 109-4 (Def. Prod. 15589-15590).) Donato responded that same morning that Womack was reinstated

because proper procedures were not followed when Mr. Womack was found sleeping. He should have been questioned immediately about why he was sleeping (which would have given him an opportunity to let us know about the medication he was taking if that was a factor in him falling asleep). He should have the[n] been sent home pending consultation with Human Resources. A determination would have been made to what type of disciplinary action should be taken and why.

(Hayes Dep. Def. Ex. 5; Doc. 109-4 (Def. Prod. 15588-15591); Doc. 109-2 ¶87.) In a tacit admission that this "procedure" wasn't in the Employee Handbook and had never previously been explained to Hayes, Donato then stated:

I understand that you have not been here for a long time and that you are not aware of all of our procedures (there is not a manual that can cover every situation), but you are expected to engage upper management and/or HR when you have questions as to how to handle a situation.

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<sup>24</sup> Paul Shepherd's termination was not rescinded because "sleeping on post is a terminable offense." (Dixon Dep. 37:1-3.) Parker told Hayes (and Donato also indicated in his April 27<sup>th</sup> email) that Womack was reinstated because the Hawks were afraid of being sued. (Hayes Dep. 329:21-330:5, Def. Ex. 5.)

(Hayes Dep. Def. Ex. 5; Doc. 109-4 (Def. Prod. 15588-15591).) Hayes responded that

[Womack] was questioned by me when he was caught sleeping. He tried to deny it. As for procedures, at the time I had no questions about how to handle the situation because I've never worked anywhere where my decision as the department manager, would have been an issue regarding a security officer found sleeping. I was under the impression that decisions such as that, were mine to make followed by notification and documentation to HR. Now I know different, duly noted.

(Hayes Dep. Def. Ex. 5; Doc. 109-4 (Def. Prod. 15588-15591).) Hayes then summarized this new policy that Donato had just laid out and stated: “If this is correct, I will adjust and adhere to these steps for future incidents.” (Hayes Dep. Def. Ex. 5; Doc. 109-4 (Def. Prod. 15588-15591).)

On April 28<sup>th</sup>, Parker fired Hayes for the Womack and Height incidents. (Doc. 109-2 ¶¶88.)<sup>25, 26</sup>

***iii. Statement of Standard or Scope of Review for Each Contention***

[This Court] reviews a district court's application of its local rules for abuse of discretion, requiring a plaintiff to demonstrate that the district court made a clear error of judgment. *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1302 (11th Cir. 2009). [The Court] review[s] the grant of

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<sup>25</sup> This purported reason for Hayes’s termination was also communicated to the shift supervisors and the security officers. (Doc. 4 (Carr Decl. ¶24).)

<sup>26</sup> Also on April 28<sup>th</sup>, Height asked to be reimbursed for the 5 days of work that she missed with the Hawks while on suspension, and for the 1 day that she missed with PAW on April 14<sup>th</sup>. (Doc. 109-5 (Def. Prod. 29280).) Dixon told her that she’d be reimbursed for the work she missed with PAW on April 14<sup>th</sup>, but not for the 5 days that she missed with the Hawks, (*id.*), which indicates that Height deserved to be suspended. See (Doc. 109-3 (Def. Prod. 242 (“[u]nless the employee is found not at fault for the action in question, the suspended time will be unpaid”))).)

summary judgment de novo. *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1274 (11th Cir. 2008). "Summary judgment is rendered 'if 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 a judgment as a matter of law.'" *Id.* In making this assessment, we view all evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party, and resolve all reasonable doubts about the facts in favor of the nonmovant. *Id.*

Aning v. Fannie Mae, 633 Fed. Appx. 773, 775 (11<sup>th</sup> Cir. 2016).

### **SUMMARY OF THE ARGUMENT**

Hayes's discrimination claim should have overcome summary judgment because Hayes presented evidence from which a reasonable jury could have inferred that discriminatory intent was (a) the true reason for, or (b) a factor that played a role in, his termination.

Hayes's retaliation claim should have overcome summary judgment because Hayes presented evidence from which a reasonable jury could have inferred that Hayes was fired because he opposed practices that (a) violated 42 U.S.C. § 1981, or (b) Hayes reasonably believed to be violations of the statute.

Finally, the District Court clearly erred when it held, to Hayes's prejudice, that Hayes's responses to the Hawks' Statement of Material Facts violated Local Rule 56.1.

### **ARGUMENT**

**I. Hayes Presented a Convincing Mosaic of Circumstantial Evidence Sufficient for His Discrimination Claim to Overcome Summary Judgment**

“[A] plaintiff will always survive summary judgment if he presents a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination.” (Internal quotes, citations, and punctuation omitted.) Lewis v. City of Union City, 877 F.3d 1000, 1018 (11th Cir. 2017) (vacated on other grounds by Lewis v. City of Union City, 893 F.3d 1352, 1353 (11th Cir. 2018)) (quoting Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011), quoting Silverman v. Bd. of Educ. of City of Chi., 637 F.3d 729, 734 (7th Cir. 2011)). A plaintiff may prove discrimination under the “convincing mosaic” approach by presenting *any one* of three broad types of evidence: (1) “suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn[.]” Silverman, 637 F.3d at 734; (2) “evidence showing that the employer systematically treated other, similarly situated[] employees [outside the protected class] better[.]” id.; and (3) “evidence that the plaintiff suffered an adverse employment action and that the employer's justification is pretextual[.]” id.

Here, Hayes has presented the Hanoi Ceramic Road of circumstantial evidence mosaics.



**a. The Hawks' Stated Reason for Termination is Pretextual**

Starting back-to-front, a reasonable jury could find that Hayes “suffered an adverse employment action and that the employer's justification is pretextual.” Id. Here, it’s undisputed that Hayes suffered an adverse employment action given that he was fired. The Hawks’ official reason for firing Hayes (which is actually two separate reasons) was that he “was terminated for failing to follow ATL Hawks’ policies in suspending and terminating subordinates[,]” (Doc. 96 ¶1) (hereinafter, “Stated Reason”). This Stated Reason is pretextual. “[P]retext means a lie, specifically a phony reason for some action[.]” (Internal quotes and citations omitted.) Chapman v. AI Transp., 229 F.3d 1012, 1050 (11th Cir. 2000). See also id. (quoting Black's Law Dictionary 1206 (7th ed.1999), which defines “pretext” as “[a] false or weak reason or motive advanced to hide the actual or strong reason or motive”).

[A] [p]laintiff may prove pretext by either [] (1) presenting evidence that defendant's proffered reason is not worthy of belief, thereby enabling the jury to infer that discrimination was defendant's real reason, or (2) presenting evidence that discrimination was, in fact, defendant's real reason.”

(Internal quotes and citations omitted.) Painter v. Fulton Cty., No. 1:08-CV-1989-TCB-RGV, 2010 U.S. Dist. LEXIS 149316, at \*\*56-57 (N.D. Ga. Aug. 4, 2010) (citing Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 146-47, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)).

**i. The Hawks' Stated Reason Is Not Worthy of Belief**

To show that the employer's reason is "not worthy of belief," a plaintiff

must provide evidence that reveals such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence.

(Internal punctuation omitted.) Palmer v. Potter, No. 1:08-CV-3876-CAM-AJB, 2010 U.S. Dist. LEXIS 149100, at \*134-135 (N.D. Ga. Jan. 12, 2010) (quoting Vessels v. Atlanta Ind. Sch. Sys., 408 F.3d 763, 767 (11th Cir. 2005)).

Here, the Hawks' Stated Reason is riddled with inconsistencies, contradictions, implausibilities and weaknesses. First and most obviously, Hayes did *not* violate the "policies in suspending and terminating subordinates" that are set forth in the Employee Handbook, nor did he violate the directive in Donato's September 2016 email. See Part XIII supra. This is a gigantic inconsistency that various Defense Witnesses have tried to patch over by asserting that Hayes violated *verbal* policies that were consistently communicated but never actually reduced to writing until the day before Hayes was fired. See e.g. (Dixon Dep. 37:6-18). This is a truly preposterous assertion that Hayes has flatly denied in his sworn testimony; the *lone* exception was for Darriel Bailey, whom Hayes *never fired*. See Part XIII supra.

Second, the Employee Handbook and the testimony of the Defense Witnesses (which the Hawks adopted, Doc. 96 ¶2) blatantly contradict each other. Parker,

Dixon and Wentz claimed that “ATL Hawks managers are required to consult and obtain approval from human resources prior to issuing written discipline and/or terminating full-time employees.” (Doc. 78-1 ¶1.) Dixon and Parker even explicitly testified that this policy is set forth in the Employee Handbook. (Dixon Dep. 14:6-22, 13:9-15:5; Parker Dep. 61:10-18.)<sup>27</sup> Nothing could be further from the truth: the Employee Handbook does *not* say what these three claim it says; in fact, it indicates the *exact opposite*. See Part XIII supra.<sup>28</sup>

Third, the Hawks claim that Hayes was the *only* management-level employee fired *or disciplined* for this purported infraction from December 1, 2014 to March 25, 2019. (Doc. 96 ¶1.) This is highly implausible.

Fourth, Stefansson (whose testimony the Hawks adopted, Doc. 96 ¶2) testified, without qualification, that Hayes had power to hire, fire and reprimand. (Stefansson Dep. 17:2-6.) This is inconsistent with Dixon’s and Parker’s testimony (which the Hawks also adopted, Doc. 96 ¶2).

Fifth, in their Response to Hayes’s Objections to the Magistrate’s Report and Recommendation at (Doc. 126) (“Objection Response”), the Hawks argued for the

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<sup>27</sup> Dixon and Parker were clearly referring to a written policy that was purportedly in existence, (Dixon Dep. at 14:12-14, Parker Dep. at 61:16-18), and Wentz was apparently making reference to a written policy too, (Wentz Dep. at pp. 40-41), so their testimony is hearsay. Fed. R. Evid. 801(c).

<sup>28</sup> Donato’s and Parker’s September 2016 emails also indicate the exact opposite. See n.20 supra.

first time that Hayes was fired (1) because he didn't "alert" HR about his suspension of Height and his termination of Womack, and (2) because both actions were rescinded by HR. (Doc. 126 at 13.) These reasons contradict the stated reasons for termination in (Doc. 96). See (Doc. 96 at ¶ 1). Further, the Employee Handbook doesn't state that Hayes was required to notify HR about employee suspensions, Part XIII supra, Hayes alerted HR about Womack's termination the same morning he was fired, Part XIV supra, and the Hawks haven't produced a shred of evidence indicating that the rescission of a manager's disciplinary action is grounds for termination. And oddly, while the Hawks acknowledged through its lawyers that Height was suspended ((Doc. 126 at 13)), the Hawks asserted through Tabala Dixon (whose testimony they adopted) that Height was *not* suspended, (Dixon Dep. 67:15-20). This newly-hatched "legitimate" reason, and the giant holes in it, further weaken the believability of the Hawks' Stated Reason.

Sixth, the Hawks also argued in their Objection Response that "the decision to terminate was based on the history of the performance issues and not just the final incident." (Doc. 126 at 13.) This is an odd reason since, between January 1, 2017 and April 28, 2017, the record is devoid of *any* other disciplinary infractions by Hayes except for the Height and Womack incidents (which are shams for the reasons explained below). More importantly, this argument nullifies the relevance objection that the Hawks made when Hayes sought 30(b)(6) testimony from the Hawks about

the 18 purported infractions set forth in Hayes's Final Written Warning. (Doc. 100-6 at pp. 25-26.) That relevance objection was explicitly made because, according to the Hawks, the infractions in Hayes's Final Written Warning had *nothing* to do with his termination; rather, "Plaintiff was terminated for failing to follow ATL Hawks' policies in suspending and terminating subordinates." (Doc. 100-6 at pp. 25-26.) Clearly the Hawks change their reason as it suits them.

Seventh, the record evidence contradicts the Hawks' Stated Reason for termination given at (Doc. 96 ¶ 1): Stefansson claimed Hayes was terminated "for a variety of reasons," Part XII supra;<sup>29</sup> Parker claimed Hayes was fired because he "continue[d] to not demonstrate that he[ was] able to abide by the requirements that were in the final written warning" during a "window of three weeks" in April 2017, Part XII supra;<sup>30</sup> Donato claimed Hayes was fired because he was "previously issued [a] Final Written Warning [and we] continue to have complaints about him[,]" Part XII supra; Shaw told the media (on behalf of the Hawks) that Hayes was fired "for poor performance, (Doc. 78-1 p. 110);<sup>31</sup> and Parker told Shaw that Hayes was fired

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<sup>29</sup> "Variety" means "a number or collection of different things especially of a particular class[.]" <https://www.merriam-webster.com/dictionary/variety>.

<sup>30</sup> The Final Written Warning makes no mention of suspending or terminating subordinates. Thus, Parker could not have been referring to Height's suspension or to Womack's termination.

<sup>31</sup> This is contradicted by Parker's statements to Hayes in February and April that he was doing a great job, and by Stefansson's statement to Hayes on April 25<sup>th</sup> that he was pleased with the way security was going and that Hayes would soon be reporting to George Turner rather than Parker. Parts XI, XII supra.

“because he's difficult to work with[] and tough to get along with in a work setting[,]” (Shaw Dep. 165:11-25). Contrary to what the Hawks claimed during briefing below and what the Court below held, these reasons are completely different from the Stated Reason.

But that's not all. As to the “termination” portion of the Stated Reason (which relates to Womack's termination), (1) the Employee Handbook, the Security Handbook, and Donato's September 2016 email all validate Hayes's belief that certain offenses (like sleeping on post) were instantly terminable even in the absence of prior written discipline; (2) Parker and Dixon affirmed that sleeping on post was a terminable offense (as did Donato in his April 27<sup>th</sup> email), which is why Paul Shepherd wasn't reinstated; (3) Hayes notified Parker and HR about Womack's termination on the morning it happened; (4) Parker signed off on Womack's termination two days after he was fired, and the termination didn't become a problem until April 22<sup>nd</sup> when Womack wrote Parker claiming (dubiously) that he was on post-surgery medication that made him drowsy (which hadn't previously been communicated to Hayes); (5) Hayes had fired several subordinates (both full-time and part-time) during his 9-month tenure without first consulting with and obtaining approval from HR, yet was never told that he was purportedly violating company policy until the day before he was fired; and (6) Hayes technically complied with Donato's April 27<sup>th</sup> directive to “engage upper management and/or HR when you

have questions as to how to handle a situation” because Hayes had *no* “questions” about what to do with a security officer whom he caught sleeping on post.

As to the “suspension” portion of the Stated Reason (which relates to Height’s suspension), (1) Hayes didn’t need prior authorization from Parker or HR before suspending subordinates; (2) Hayes could remove part-timers like Height from the schedule (which is what happens when someone is suspended) at his whim; (3) the Employee Handbook says nothing about when a manager must communicate with an employee who is on suspension; (4) Hayes told Parker about Height’s suspension on the same day that he suspended her; (5) Hayes’s employee relations “go-to” (Dixon) was out of the office for about two weeks, so Hayes couldn’t talk to her about the Height suspension; (6) when Hayes told Parker that Height was in the building working for a vendor on April 14<sup>th</sup>, Parker told Hayes that Height needed to leave since she was still on suspension; (7) Parker, Hayes and Bailey were all authorized to tell Height to leave the Arena; (8) Height was not reimbursed for the five days of work that she missed with the Hawks due to Plaintiff putting her on suspension, which indicates that the suspension was justified; (9) Dixon claimed that Height wasn’t suspended *at all*; and (10) Dixon didn’t identify any policy in the Employee Handbook (or any other policy) that Hayes violated by sending Height home and not communicating with her for two weeks.

On this record, a reasonable jury could find that the Hawks' Stated Reason is a total sham because it is so inconsistent, incoherent and weak.

**ii. Discrimination Was the Hawks' Real Reason**

A plaintiff can also establish pretext and create a triable issue by showing that discrimination was the real reason for the termination. Painter, 2010 U.S. Dist. LEXIS 149316 at \*57. Here, a reasonable jury could infer from this record that Parker's discriminatory attitudes were the real reason why Hayes had his job duties scaled back early on and why he eventually was fired. This is borne out by "connecting the dots" in this swamp of facts. Based on the events precipitating and following (1) Hayes's verbal counseling on October 17<sup>th</sup>, (2) the decision to ban Hayes from shows, (3) Hayes's verbal counseling on November 1<sup>st</sup>, (4) Hayes's Final Written Warning on November 8<sup>th</sup>, (6) Parker's initial attempt to fire Hayes in January 2017, (7) Parker's efforts to fire Hayes starting on April 20<sup>th</sup> of 2017, and (8) Hayes's termination, a jury could infer that, basically, Parker had issues with Hayes questioning and giving directives to whites. Parker had no problem with Hayes bossing blacks around (which is what he hired him for), but once he started questioning, giving directives to, and opposing whites he was labeled as "aggressive" because he is black, was told to "watch his tone" because he is black, was counseled for his tone, was written up for his tone, was almost fired for his tone, and ultimately *was* fired for his tone (under the ruses that are the Womack and Height



incidents). The inescapable inference is that if Hayes had not been black, he would not have been fired for his tone.

Further, Shaw's comments about Parker and several comments by Parker himself could lead a reasonable jury to infer that Parker harbored discriminatory racial attitudes that prompted him to fire Hayes: (1) Shaw believed Parker was a "closet racist," (2) Parker told Hayes, in so many words, that he had to watch his tone because he is black, (3) Parker applied tighter security protocols for black shows than for white shows and justified this with derogatory stereotypes about black people, (4) Parker implied that an all-black security staff could reasonably be perceived as "less than capable," and (5) Parker called Hayes "the large, angry black man" four or five times. Again, the inescapable inference is that had Hayes not been black, Parker would have treated him differently.

The evidence further shows that the Hawks' brass was complicit in all of this. The Hawks had a pattern of ignoring and trivializing racial issues in the organization or covering them up with "fluff" hires when they were exposed. With regard to Hayes's situation, Shaw, Donato and Stefansson did absolutely nothing about Hayes's race-related complaints made in early April. Rather, Donato and Stefansson *collaborated with* the guy Hayes was complaining about (Parker) in his efforts to fire Hayes, Stefansson lied to Hayes's face about his future with the company after

having already signed off on Hayes's termination, and Shaw justified Hayes's termination even though she was able to confirm that his complaints had merit.

So, a jury could easily find that race was the real reason for Hayes's termination.

**b. Other Types of "Mosaic" Evidence**

**i. Suspicious Timing**

As explained above in Part I(a)(ii) of the Argument section of this Brief, every adverse action that befell Hayes during his employment happened shortly after he questioned, gave a directive to, or opposed a white person. Also, Parker fired Hayes one business day before he would've started reporting to George Turner (who is black). Finally, Parker and Stefansson both praised Hayes's performance days before he was fired, and Stefansson lied to Hayes's face about his future with the company.

**ii. Ambiguous Statements**

Lodestro told Parker that Hayes "need[ed] to be chilled" days before Hayes's first verbal counseling on October 17<sup>th</sup>. During that meeting, Hayes was told in so many words that people perceived him as aggressive because he is black, so he needed to watch his tone. Parker told Donato that Hayes "doesn't get it" days before Hayes's second verbal counseling on November 1<sup>st</sup>. After Hayes asked why he was pulled off the Sia show on November 1<sup>st</sup>, Parker told Donato that Hayes is "always the victim." Parker told Lodestro to "have faith" after she complained about Hayes

on November 6<sup>th</sup>—two days before Parker issued Hayes a Final Written Warning. In February of 2017, Parker implied that an all-black security staff could reasonably be perceived as “less than capable.” Finally, Parker called Hayes “the large, angry black man” four or five times throughout his employment.

**iii. Other “Bits and Pieces”**

In meetings with Hayes on October 17<sup>th</sup> and in February of 2017, Parker justified using disparate security protocols based on racially derogatory stereotypes about black people. This same racially derogatory rationale was repeated by Barry Henson in an operations meeting on April 19<sup>th</sup>. After Hayes openly pushed back on the 19<sup>th</sup>, Parker told Stefansson on the 20<sup>th</sup> that he was going to fire Hayes for not abiding by the requirements of the Final Written Warning, and he started acting as if Hayes had gotten on his nerves. Finally, Shaw’s comment that Parker was a “closet racist,” her comment that racism is largely ignored by the organization, the Hawks’ pattern of racial problems and their blasé attitude towards Wilcox’s racially derogatory comments, and Stefansson’s and Donato’s efforts to help Parker fire Hayes after he had complained to them about Parker wanting to fire him for bringing up the racial disparities in security protocols, are all “bits and pieces” from which a jury can infer discriminatory intent.

In sum, under either a “pretext/true reason” or a “motivating factor” analysis,<sup>32</sup> for the above reasons, Hayes’s discrimination claim should have survived summary judgment because he presented a convincing mosaic of circumstantial evidence.

## **II. Hayes Presented Sufficient Evidence to Overcome Summary Judgment on His Retaliation Claim**

To establish a claim for retaliation, a plaintiff must show that “[t]he engaged in protected activity, such as opposing an unlawful employment practice; (2) [t]he suffered an adverse employment action; *and* (3) a causal connection exists between the activity and adverse action.” (Internal citation omitted.) Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1244, 26 Fla. L. Weekly Fed. C 40 (11th Cir. 2016); see also Jimenez v. Wellstar Health Sys., 596 F.3d 1304, 1311 (11th Cir. 2010). A plaintiff need not show that the employment practice he opposed was unlawful if he had a good faith, objectively reasonable belief that it was unlawful. Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

### **a. Hayes Opposed a Practice That Violated Section 1981**

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<sup>32</sup> The difference in the two approaches is discussed in Quigg v. Thomas Cty. Sch. Dist., 814 F.3d 1227, 1235 (11th Cir. 2016). Hayes hasn’t discussed the “motivating factor” approach at length because the same facts set forth supra are relevant to that approach too. But under that approach too, Hayes’s case should have survived summary judgment.

Here, Hayes engaged in protected activity because he opposed a practice that violated 42 U.S.C. § 1981 (“Section 1981”). Section 1981 “encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related ‘right.’” CBOCS West, Inc. v. Humphries, 553 U.S. 442, 445, 128 S. Ct. 1951, 170 L.Ed.2d 864 (2008). Section 1981 states that “[a]ll persons [] shall have the same right [] to make and enforce contracts[] as is enjoyed by white citizens[.]” 42 U.S.C. § 1981(a). “[T]he term ‘make and enforce contracts’ includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981(b).

Here, the artists who performed at the Arena had a contractual relationship with the Hawks because they agreed with the Hawks to perform at the Arena. See O.C.G.A. § 13-1-1; see also Benton v. Cousins Props., 230 F. Supp. 2d 1351, 1373 (N.D. Ga. 2002) (“nothing in the language of Section 1981 requires that a written contract be in place”). Security concessions were requested by the artists and granted or denied to the artists between the time of contracting (agreement) and the time of performance (the actual concert), so they clearly fall within Section 1981’s purview. See 42 U.S.C. 1981(b). The SOP for building entry was that everyone was to undergo a mag and bag search, yet “every artist” asked for a mag and bag bypass during the “security advance” process. This mag and bag bypass was regularly

granted to white artists (in addition to other security concessions). It follows, then, that the security concessions that were granted to white artists (particularly the mag and bag bypass) were “privileges” or “benefits” of the contractual relationship between the Hawks and those artists. These same “privileges” and “benefits” were regularly denied to black artists who requested them. The practice of regularly granting this privilege to white artists and not to black artists is precisely the kind of behavior that Section 1981 renders unlawful. This is what Hayes was complaining about; thus, his complaints were protected by the statute.

But even if the Hawks’ practice was not unlawful, Hayes had an objective, good-faith belief that it was unlawful for the reasons explained above. A reasonable person would construe the mag and bag bypass and the other security concessions afforded to white artists as privileges of the contractual relationship. Further, Hayes’s belief that unlawful discrimination was happening was reasonable because (1) he had personally witnessed the disparity multiple times and had been told by his subordinates that it was happening; (2) Parker and Henson provided him with justifications that were facially discriminatory; and (3) Hayes knew from experience that black shows weren’t more dangerous than white shows, (Doc. 109-2 ¶28; Hayes Decl. ¶35; Hayes Dep. 296-299).

**b. Hayes’s Opposition Led to His Termination**

Almost every coaching, discipline, reprimand, or adverse action that befell Hayes during his employment happened shortly after he questioned or opposed a security concession that was being granted to a white artist and that had not also been granted to black artists who made the same or similar requests. In particular, *the day after* Hayes made his last and most vocal complaint about racially disparate security measures on April 19<sup>th</sup> (and was met with a facially discriminatory justification by Henson), Parker told Stefansson that he was going to fire Hayes. Thus, a reasonable jury could find that Hayes's protected conduct led to his termination.

### **III. The Court Erred by Holding That Hayes Violated LR 56.1**

For the reasons set forth in (Doc. 124 at 1-10) and (Doc. 127 at 1-11) (which are incorporated herein by reference), the District Court committed plain error by holding that the Magistrate correctly struck (Doc. 98-1) on the ground that it violated LR 56.1, and that (Doc. 109-1) also violated LR 56.1. See (Doc. 124 at 1-10), (Doc. 127 at 1-11). The Court's main argument was that Hayes violated LR 56.1 because he provided circumstantial rather than direct evidence, that this circumstantial evidence wasn't "directly on point," and that he presented too much of it. (Doc. 128 at 6-9). If this violates LR 56.1, then practically *every* plaintiff's presentation of *every* race discrimination claim using the mosaic approach would likely violate LR 56.1, because it is a *fact-heavy* approach that is based on *circumstantial* evidence.

The Court also erred in claiming that (Doc. 98-1) was argumentative. Hayes was explaining why the facts that he was citing to refuted the Hawks' statements of fact because the Magistrate's Standing Order required that. See (Doc. 16 at 6, § 2(B)). But nowhere in (Doc. 98-1) or (Doc. 109-1) did he make legal arguments or connect facts to law. Finally, many of the purported deficiencies in (Doc. 109-1) that the Court notes (e.g., cross-referencing to Hayes's Third Amended Statement of Additional Material Facts ((Doc. 109-2))<sup>33</sup>) were created because of the page limitation that the Magistrate imposed *post hoc* on (Doc. 98-1). The Court's other arguments in (Doc. 128) are addressed by Hayes's arguments in (Doc. 124 at 1-10) and (Doc. 127 at 1-11). The Court's holdings as to (Doc. 98-1) and (Doc. 109-1) clearly affected its view of the facts to Hayes's prejudice.<sup>34</sup> Thus, the Court's holdings as to this issue must be reversed.

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<sup>33</sup> This did not violate LR 56.1 because a statement of additional material facts is "other material"/"other responsive material." See FRCP 56(c)(1)(A); LR 7.1(B), NDGa. It is *not* a "pleading." See Linscheid v. Natus US Med., Inc., No. 3:12-cv-67-TCB, 2015 U.S. Dist. LEXIS 40255, at \*2 (N.D. Ga. Mar. 30, 2015). FRCP 56(c)(1)(A) explicitly permits citation to "other materials" in the record. LR 56.1 is void to the extent it conflicts with FRCP 56. See Reese v. Herbert, 527 F.3d 1253, 1269 n.27 (11th Cir. 2008).

<sup>34</sup> Take, for example, the District Court's interpretation of Paragraph 49 of (Doc. 109-1). (Doc. 128 at p. 16.) Hayes can't fathom how the Court drew that from Paragraph 49. Compare (Doc. 128 at 16) with (Doc. 109-1 ¶49). What the Court *should* have drawn from Paragraph 49 and the evidence it cited is that Parker had no reasonable basis for trying to fire Hayes for the December 31<sup>st</sup> incident. (This isn't the only unfathomable inference that the Court drew from this record. See e.g. (Doc. 128 at 30 (first paragraph)), (Doc. 78 (filed on February 4<sup>th</sup>)), (Doc. 96 (filed on March 25<sup>th</sup>)).)



## **CONCLUSION**

For the above reasons, Hayes respectfully requests that this Honorable Court REVERSE the Order of the District Court granting summary judgment in its entirety, VACATE the associated Judgment, and REMAND the case back to the District Court for proceedings consistent with this Court's Order.

Respectfully submitted this 3<sup>rd</sup> day of April, 2020.

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This 3<sup>rd</sup> day of April 2020.

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I hereby certify that on this 3<sup>rd</sup> day of April, 2020, I have electronically filed the foregoing document using the CM/ECF system, which will automatically send email notification of such filing to Appellees' counsel of record.

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