IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 20-10169-DD

SAMUEL R. HAYES III, Plaintiff-Appellant
v.
ATL HAWKS, LLC, et al., Defendants-Appellees

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

BRIEF OF DEFENDANTS-APPELLEES

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Samuel Hayes III v. ATL Hawks, LLC, et al. **20-10169-DD**

DEFENDANTS-APPELLEES' CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R App. P. 26.1 and Eleventh Circuit Rule 26.1, Defendants-Appellees certify, by and through their undersigned counsel of record, that to their knowledge, the following constitutes a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, and corporations that have an interest in the outcome of this case:

ATL Hawks, LLC – Defendant-Appellee

Brown, Hon. Michael L. – U.S. District Court Judge

Cleek, Alisa P. – Counsel for Defendants-Appellees

Gal, Raanon – Counsel for Defendants-Appellees

Hayes, III, Samuel R. – Plaintiff-Appellant

Parker, Jason – Defendant-Appellee

Smith Law, LLC

Smith, Louise – Counsel for Plaintiff-Appellant

Smith, III, William Julian – Counsel for Plaintiff-Appellant

Taylor English Duma LLP

Walker, Hon. Linda T. Walker – U.S. District Court Magistrate Judge

STATEMENT REGARDING ORAL ARGUMENT

Because the issues in this appeal are straightforward, Defendants-Appellees do not believe oral argument is necessary.

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STATEMENT OF THE ISSUES

I. Did the District Court properly conclude that Plaintiff did not present sufficient evidence for a jury to infer that intentional race discrimination was the reason that the ATL Hawks terminated his employment?

II. Did the District Court properly conclude that Plaintiff failed to 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?

III. Did the District Court properly exercise its discretion by striking Plaintiff's Response to Defendants' Statement of Undisputed Material Facts (Doc. 98-1)[1/] and deeming certain facts admitted in Plaintiff's Second Amended Response to Defendants' Statement of Undisputed Material Facts (Doc. 109-1) because said Responses violated Local Rule 56.1?

COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff-Appellant Samuel R. Hayes III ("Plaintiff") filed a Complaint on July 3, 2017, alleging race discrimination and retaliation claims under Section 1981, 42 U.S.C. § 1981(a). (Doc. 1.) Defendants-Appellees ATL Hawks, LLC, ("ATL

[1/] "Doc." numbers herein correspond to the document numbers assigned on the district court docket in *Hayes v. ATL Hawks, LLC, et al.*, United States District Court, Northern District of Georgia, Atlanta Division, Civil Action No. 1:17-cv-02510. Citations to page numbers correspond to the page number of the document reflected in the district court docket entries in blue at the top of each document.

Hawks") and Jason Parker (collectively "Defendants") filed their Answer and Counterclaims on October 18, 2017. (Doc. 11.) After the close of discovery, Defendants filed a Motion for Summary Judgment as to all of Plaintiff's claims. (Docs. 78, 119.) In response to Defendants' Motion for Summary Judgment, Plaintiff filed three different Response filings (Docs. 98, 101, 109.) The District Court struck Plaintiff's original Objections and Responses to Defendants' Statement of Material Facts, Plaintiff's Statement of Additional Material Facts, and Plaintiff's Amended Statement of Additional Material Facts for noncompliance with Local Rule 56.lB and granted Plaintiff leave to refile his response with specific instructions on page limitations. (Doc. 103.) Plaintiff filed a Second Amended Statement of Material Facts and Responses to Defendants' Material Facts that did not comply with the District Court's order. (Docs. 106, 107.) The District Court accordingly struck Plaintiff's Second Amended Statement of Additional Material Facts and First Amended Objections and Responses to Defendants' Statement of Undisputed Material Facts and provided Plaintiff an opportunity to refile a response to Defendants' Statement of Undisputed Material Facts that did not exceed 45 pages, a Statement of Additional Material Facts that did not exceed 25 pages, and an Amended Brief in Opposition that did not exceed 25 pages. (Doc 108.)[2/] The Court

[2/] The Court also granted Plaintiff's motion for extension to respond to Defendants' Undisputed Material Facts to 45 pages.

warned that if Plaintiff again failed to comply with the Local Rules and the Court's instructions, the Court would strike the non-compliant filing and consider Defendants' Motion for Summary Judgment unopposed. (Doc. 108 at 2-3.) Plaintiff filed his third filing to Defendants' Motion for Summary Judgment on May 17, 2019. (Doc 109.) Plaintiff's filings still did not comply with the Local Rules and the Court's specific instructions. (Doc. 122 at 2-4.)

On September 9, 2019, the United States Magistrate Judge issued a 57-page Final Report and Recommendation ("R&R") granting Defendants' Motion for Summary Judgment in its Entirety. (Doc 122.)[3/] Plaintiff filed his Objections to the R&R with the District Court. (Doc. 124.) Defendants timely filed a Response to Plaintiff's Objections. (Doc 126.)

On December 13, 2019, the District Court filed an Order adopting the R&R and then entered judgment in the case. (Docs. 128, 129.)

STATEMENT OF THE CASE

1. Defendant ATL Hawks Hires Plaintiff as a Security Manager.

Plaintiff applied for a Security Manager position with ATL Hawks in May 2016. (Doc. 78-1 at 1, DSMF 2.) Jason Parker, Vice President of Customer Service and Operations, hired Plaintiff with the approval and recommendation of other team

[3/] Plaintiff accepted Defendants' offer of settlement as to Defendants' counterclaims and Defendants' counterclaims were dismissed on July 29, 2019. (Doc 121.)

members who interviewed Plaintiff. (Doc. 78-1 at 3, DSMF 13.) Plaintiff worked as a Security Manager for ATL Hawks from August 8, 2016, until April 28, 2017. (Doc. 78-1 at 2, DSMF 4.) Plaintiff was responsible for physical security and managed the security officers working in Phillips Arena[4/] ("the Arena"). (Doc. 78-1 at 2, DSMF 5.)

2. <u>Complaints about Plaintiff in September and October 2016</u>.

Only one month into his employment, in September 2016, Parker received multiple complaints regarding Plaintiff's behavior, including one instance where Plaintiff had a physical interaction with an employee and Parker counseled Plaintiff regarding these incidents. (Doc. 78-1 at 3, DSMF 11.) Parker emailed Plaintiff informing him that Terry Taylor, an employee, complained that Plaintiff was physically inappropriate and then was either dismissive or aggressive after the interaction. (Doc. 100-1 at 184.) Parker counseled Plaintiff to avoid physical interactions and to be mindful of his tone, body language, manner, and style of engaging others. (*Id*.) Plaintiff testified that Taylor was watching a performance instead of manning his post during a loud concert. (Doc. 100-1 at 32, 127:16-19.) Because Taylor could not hear him over the music, Plaintiff claimed he held Taylor's shoulders, turned him around, and told him to go back to his post. (Doc 100-1 at 32,

[4/] Now called State Farm Arena.

127:20-128:9.) Next, a supervisor, Darrel Bailey (who was subordinate to Plaintiff), emailed and met with Parker to complain that his poor working relationship with Plaintiff was unhealthy and stressful. (Doc. 100-1 at 185; Doc. 100-2 at 23, 87:22-89:14.) Plaintiff's impression, however, was that Bailey was insubordinate and gave him push back based on how things used to be done. (Doc. 100-1 at 33, 131:20-25.)

On October 15, 2016, Megan Lodestro, who was then the Security Systems Manager, received a call from a security person associated with Amy Schumer's tour reporting that Plaintiff was yelling at him and telling him that he could not do something Lodestro had approved. (Doc. 78-1 at 4, DSMF 14-16; Doc. 100-7 at 7, 23:22-25; *id.* at 16, 60:20-61:4.) Plaintiff refused to allow Amy Schumer's tour to park her car outside the media door, explaining that Mayor Kasim Reed was not allowed to park there the week before. (Doc. 100-1 at 24, 96:20-97:15.) Plaintiff did not know what pre-show conditions or security discussions ATL Hawks had with Amy Schumer's tour related to parking. (Doc. 78-1 at 4, DSMF 17; Doc. 100-1 at 25, 98:25-99:3.) Plaintiff later exchanged emails with Lodestro about the incident and criticized Lodestro's decision. (Doc.100-7 at 17, 63:11-14.) Bill Allen, the Live Nation tour manager responsible for promoting Amy Schumer Live, submitted a written complaint about Plaintiff's behavior. (Doc. 78-1 at 4, DSMF 18.)

3. Coaching, November 6, 2016 Incident and Final Written Warning.

Plaintiff met with Parker on October 17, 2016, to discuss the incident with Amy Schumer's tour. (Doc. 109-2 at 8, PSMF 27.) According to Plaintiff, Parker stated that people perceive him as aggressive because he is a large, black man with an intimidating voice and commanding presence. (Doc. 100-1 at 74, 295:25-296:7.) Parker advised Plaintiff to be mindful of his tone. (Doc. 100-1 at 74, 296:8-9.) Parker told Plaintiff to write a letter of apology to the Live Nation tour manager, which Plaintiff did with Parker's assistance. (Docket 78-1 at 5, DSMF 19; Doc. 100-1 at 74, 295:22-24.)

Over the course of the first few months of Plaintiff's employment, Parker testified that he received more than eighteen (18) complaints about Plaintiff's behavior. (Doc. 100-2 at 12, 42:17-43:5.) On November 1, 2016, Parker and Tony Donato, Vice President of Human Resources, met with Plaintiff. (Doc. 109-2 at 10, PSMF 34.) Even ATL Hawks' Chief Director of Diversity and Inclusion reported an incident where Plaintiff treated her in an abrasive and rude manner during an NBA game. (Doc. 78-1 at 3, DSMF 10.) Parker and Donato had an extended conversation with Plaintiff about the concerns, which were later reflected in a Final Written Warning. (Doc. 78-1 at 6, DSMF 25.) On November 6, 2016, Lodestro informed Parker that Plaintiff tried to bring a ticketed guest through the loading dock without going through proper protocols. (Doc. 78-1 at 6, DSMF 30; Doc. 100-2 at

139-40; Doc. 109-5 at 28.) Parker investigated and concluded that the allegation was true. (Doc. 100-2 at 58-59, 229:24-230:3.) After multiple negative interactions with the event security team and/or artists' management/production teams, in November 2016, Parker instructed Plaintiff to stay away from the Arena during events because his interference was too disruptive to the process. (Doc. 78-1 at 5, DSMF 21.)

On November 8, 2016, Plaintiff received a Final Written Warning. (Doc. 78-1 at 5, DSMF 22.) The email from Parker stated it was being sent "as a follow up to our conversation with Tony Donato" to "serve as a final written warning regarding systemic performance issues stemming from repeated conflicts with colleagues, partners and clients both internal and external …" (Doc, 100-1 at 191-92.) The email listed the following issues: "disrespectful confrontation;" "questioning of others in an unprofessional manner, including tone, choice of words and being dismissive;" behaving "in a condescending tone towards others;" and "refusal to accept ownership for your role in creating the conflicts." (*Id*.) The email advised that Parker and Donato expected to see immediate and substantial change in Plaintiff's daily interactions, including being intentional in each interaction, respectful, professional, and mindful of tone and approach. (*Id*.)

When Parker asked Plaintiff about these interactions, Parker observed that Plaintiff changed his recollection of what occurred, contradicted the other person's

story, or took issue with the interpretation of his behavior. (Doc. 100-2 at 11-12, 40:1-2, 9-12, 41:6-42:7.) While initially Parker believed the complaints could stem from misinterpretations, after it continued to happen, Parker came to believe that Plaintiff was the source of the problem. (Doc. 100-2 at 11-12, 40:13-16, 42:8-16.)

4. <u>December Incidents and Involvement of Dixon</u>.

In December 2016, there was an incident where Plaintiff invited his girlfriend to attend a show, advised her to park in a secured lot, and ended up confronting, over the phone, the employee who denied her access through a private security entrance. (Doc. 78-1 at 6-7, DSMF 30; Doc. 100-1 at 29, 115:15-21; Doc. 100-4 at 19-20, 73:21-74:10.) Catie Scott, Event Manager, emailed Parker about the incident on December 31, 2016. (Doc. 109-4 at 25.) The employee, whom Plaintiff confronted, wrote up a summary by email on January 5, 2017, and emailed it to Larry Taylor, Director of Premium Services. (Doc. 109-5 at 32-33; Doc. 109-6 at 1-2; Doc. 100-2 at 16, 59:18-19, 21.)

The ATL Hawks had recently hired Tabala Dixon on December 5, 2016, as a Human Resources Manager. (Doc. 100-4 at 3, 7:23-8:1.) Following the incident involving Plaintiff's girlfriend, Dixon met with Parker and Donato to discuss whether to terminate Plaintiff's employment. (Doc. 100-2 at 35, 134:23-135:9; *id.* at 39, 152:14-18; Doc. 100-4 at 5, 16:5-10; i*d*. at 20, 74:17-20.) Dixon advised Donato and Parker not to terminate Plaintiff yet, and Dixon volunteered to work on

mentoring and coaching Plaintiff. (Doc. 100-2 at 35, 135:10-136:2; Doc. 100-4 at 20, 74:17-75:9.) Plaintiff met with Dixon daily when she was in the office. (Doc. 100-1 at 43, 171:25-172:3.) Parker indicated that Plaintiff became an engaged, positive employee for about four to six weeks while Dixon was counseling him. (Doc. 100-2 at 37, 144:2-8.)

5. Termination and Suspension of Employees.

On March 28, 2017, Plaintiff observed an employee, Kimberley Height, yelling on the loading dock because she was upset about having to write a narrative concerning an incident that occurred the previous week. (Doc. 100-1 at 36, 143:5-11.) Plaintiff sent Height home and told her to wait for Human Resources ("HR") to contact her with next steps. (Doc. 100-2 at 36, 142:24-143:11; *id.* at 79-80, 312:24-313:1.) Plaintiff, however, never communicated with Height after telling her to go home and failed to communicate with anyone in HR regarding Height for approximately two weeks. (Doc. 78-1 at 8, DSMF 38; Doc.100-2 at 36-37, 144:3-8, 144:24-145:1.) Plaintiff informed Parker that he suspended Height and told her to go home until HR contacted her. (Doc. 100-2 at 37, 146:12-147:4.) When Height attempted to return to the Arena to work her other job with a vendor in the Arena, she was told by Plaintiff that the police would be called if she did not leave the building. (Doc. 78-1 at 8, DSMF 39.) When Dixon finally became aware of the

situation with Height, Height was fully reinstated and ATL Hawks ultimately reimbursed her for the income she lost. (Doc. 78-1 at 9; Doc. 78-1 at 8, DSMF 40.)

On April 12, 2017, Plaintiff terminated Danny Womack, a full-time employee, for sleeping on post without first consulting HR. (Doc. 78-1 at 8, DSMF 35; Doc. 100-1 at 36, 141:9-10.) ATL Hawks ultimately rescinded Plaintiff's termination decision because Womack had known medical issues and was on medication and these factors would have been considered prior to immediately terminating his employment if Plaintiff had consulted HR as required by ATL Hawks' policy. (Doc. 78-1 at 8, DSMF 37; Doc. 100-4 at 17, 64:9-24; Doc. 100-1 at 37, 147:5-6.) Plaintiff had the authority to terminate employees and to send them home. (Doc. 100-2 at 58, 226:8-22; *id*. at 72, 282:6-25.) However, Parker and Dixon had multiple conversations with Plaintiff about going through the appropriate HR process when disciplining or terminating employees. (Doc. 100-4 at 8-9, 28:10-30:3, *id*. at 20, 75:10-77:1; Doc. 100-2 at 33-34, 126:19-128:5, 130:7-17, 131:132:5, 132:7-133:19.) Dixon had to personally authorize the termination of full-time employees. (Doc. 100-4 at 4, 13:14-21.)

While Plaintiff admits that he was told to consult with HR, Plaintiff testified that he did not believe he needed anyone's input or approval to terminate a full-time employee. (Doc. 100-1 at 35, 137-140, 139:22-25.) Plaintiff admits, however, that Parker and Dixon told him that they needed documentation to terminate a full-time

employee. (Doc. 100-1 at 34, 136:8-12.) Dixon also informed Plaintiff that ATL Hawks needed to "make sure that we have enough paperwork and ... take progressive steps of discipline to be able to terminate." (Doc. 100-1 at 35, 140:7-11.) HR also told Plaintiff in the context of a specific employee's termination that he needed to discuss the reasons with her and ensure they had the right documentation. (Doc. 100-1 at 35, 140:12-22.)

6. Plaintiff's Termination.

On April 20, 2017, Parker sent Brett Stefansson, Executive Vice President and General Manager of the Arena, an email that listed four "hot topics," including "Security Transition" and "Sam," (*i.e.*, Plaintiff) (Doc. 109-6 at 30.) On April 23, 2017, Parker emailed Stefansson about offering a position to someone else if they terminated Plaintiff. (Doc. 109-6 at 29.) In an email dated April 26, 2016, Donato wrote that Plaintiff's termination was moving forward because of continued complaints after his Final Written Warning. (Doc. 109-6 at 24-25.) On the same day, Stefansson stated in an email that Plaintiff was being terminated "for a variety of reasons." (Doc. 109-6 at 28.)

Plaintiff was fired on April 28, 2019. (Doc. 78-1 at 9, DSMF 43.) Parker recommended the termination because of the two disciplinary decisions that had to be rescinded after Plaintiff had received a Final Written Warning. (Doc. 78-1 at DSMF at 2-7, DSMF 7-8, 10-11, 14-15, 18, 20-23, 30; Doc. 100-2 at 76, 298:1-

299:7.) As Dixon pointed out, the disciplinary decisions Plaintiff made that had to be rescinded occurred after extensive coaching by HR. (Doc. 100-4 at 20, 76:1-20.) Dixon worked with Plaintiff more than any other manager and Plaintiff was in Dixon's office at least two to three times a week. (*Id*.) Parker testified that in explaining Plaintiff's termination to Stefansson, Parker said Plaintiff was unable to abide by the requirements in the Final Written Warning and those last two incidents "kind of put a bow on it." (Doc. 100-2 at 76, 298:10-16.) Dixon and Donato agreed with the decision. (Doc. 78-1 at 9, DMSF 42; Doc. 100-4 at 20, 75:10-76:1) Dixon stated that Parker recommended termination based on the Womack and Height incidents. (Doc. 100-4 at 20, 75:10-20.)

After his termination, Plaintiff sent an email to Stefansson, copied Nzinga Shaw, Chief Diversity & Inclusion Officer for ATL Hawks, and alleged that he was terminated for bringing up the security guards' perceptions of racial disparities in security screenings and requested his job back. (Doc. 78-1 at 11, DSMF 53.) This was the only written complaint ATL Hawks received from Plaintiff. (Doc. 78-1 at 11, DSMF 54.) On May 2, 2017, Shaw emailed Steven Koonin, President and CEO of the ATL Hawks, and explained that she spoke to Plaintiff on May 1, 2017, that she evaluated the allegations, and did not believe that Parker discriminated against him during his tenure. (Doc. 78-1 at 11, DSMF 55; Doc 109-3 at 1; Doc. 100-14 at 3, 7:14-21.)

7. <u>ATL Hawks Security Procedures/Protocol</u>.

Plaintiff did not offer any evidence that security protocols were part of the contract between the artists and the arena or the negotiation of it. (Doc. 122 at 53.) In fact, Plaintiff admitted that security protocols were not negotiated in the artists' contracts. (Doc. 109-1 at 10-13(¶¶ 13, 17.)) Indeed, Plaintiff admits they were part of ATL Hawks' standard operating procedures. (Doc. 109-2 at 9, ¶ 11.)

The event security managers responsible for managing events and artists' entry and exit from the Arena during events would coordinate the tour/show needs with the show's separate security/management team and forward the details of how security would be handled to the rest of the security team in a "security advance." (Doc. 78-1 at 12, DSMF 59.) Even after the security advance was issued, changes to the security plan for events could occur up to and through the time of the actual event, depending on the needs and circumstances of the event, artist, promoters and/or other safety considerations. (Doc. 78-1 at 12, DSMF 60.) The racial demographic of the artists performing in the Arena had no bearing on the security determinations made for each event. (Doc. 78-1 at 12, DSMF 61.)

Neither Plaintiff nor the security officers reporting to Plaintiff were members of the event security team and did not participate in the decision-making regarding security advances. (Doc. 78-1 at 13, DSMF 62.) Plaintiff and the security officers reporting to Plaintiff admittedly had no idea how security decisions were made for

events occurring in the Arena. (Doc. 78-1 at 13, DSMF 63.) Lodestro worked closely with the physical security officers who reported to Plaintiff and she never heard any complaints from them regarding any of the security policies not being fairly enforced. (Doc. 78-1 at 13, DSMF 64.)

STATEMENT OF STANDARD OF REVIEW

The standard of review of an entry of summary judgment is de novo. *See Jones v. UPS Ground Freight*, 683 F.3d 1283, 1291 (11th Cir. 2012). The standard of review of evidentiary rulings is abuse of discretion. *See Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1304 (11th Cir. 2016).

SUMMARY OF THE ARGUMENT

Plaintiff fails to offer any evidence that creates a genuine issue of material fact with respect to his § 1981 claims of discrimination and retaliation. As to the discrimination claim, Plaintiff failed to present a sufficient "mosaic" in part because the evidence failed to support an inference that Defendant Parker had any discriminatory animus in terminating him. Defendants provided nondiscriminatory reasons for terminating Plaintiff (for example, the many complaints Defendant Parker received about Plaintiff's aggressive and overbearing communication style with other employees and his failure to follow company protocol). Plaintiff has also failed to present persuasive evidence showing the proffered reason was a pretext for racial discrimination.

Next, Plaintiff alleges that he was terminated in retaliation for opposing security measures being enforced differently based on the race of an artist. Plaintiff, however, cannot show that the security measures were part of the artists' right to make and enforce contracts or that he had a good faith belief that Defendant was acting unlawfully. Plaintiff admits that security measures were not part of the artists' contracts and as such, his claim must fail.

Finally, Plaintiff fails to offer any evidence that the District Court abused its discretion in striking his initial Response to Defendants' Statement of Undisputed Material Facts (Doc. 98-1) and deeming certain facts admitted in his Second Amended Response to Defendant's Statement of Undisputed Material Facts (Doc. 109-1.) Plaintiff contends that his responses to specific facts in general were longer because he was relying on circumstantial evidence to support a mosaic theory of discrimination. This argument might be compelling with regard to the brief where a party needs to argue its case, but it is not persuasive with regard to his responses to specific statements of fact, to which he must admit or deny. The District Court identified specific responses by Plaintiff that were (1) unresponsive and/or argumentative; (2) properly undisputed, but then improperly argued as to their legal effect; (3) improperly objected to as not relevant or as vague and likely to confuse a jury; (4) cited to other pleadings; and (5) responded "disputed" but then did not cite

to the record. Indeed, Plaintiff does not point to a single finding of the District Court that was incorrect.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court Properly Dismissed Plaintiff's Section 1981 Discrimination Claim.[5/6/]

In his appeal, Plaintiff argues that the District Court failed to recognize that he established a mosaic of circumstantial evidence demonstrating intentional race discrimination. A plaintiff may show a convincing mosaic through evidence demonstrating, among other things, (1) suspicious timing and ambiguous statements as well as "other bits and pieces from which an inference of discriminatory intent might be drawn," (2) systematically better treatment of similarly-situated employees, and (3) that the employer's justification is pretextual. *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019). The convincing mosaic theory is not intended to undermine the usual requirement of an identified comparator. *Turner*

[5/] As he did not address it in his brief, Plaintiff apparently concedes that he cannot establish a prima facie case of disparate treatment under the *McDonnell Douglas* framework. *Howard v. Oregon Television, Inc*., 276 F. App'x 940, 942 (11th Cir. 2008) (unpublished); *Maynard v. Bd. of Regents of Div. of Univ. of. Fla. Dep't of Educ. ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1289 (11th Cir. 2003). For example, Plaintiff does not and cannot identify a similarly situated comparator.

[6/] Given the District Court's ruling on Plaintiff's violations of the Local Rules, several of Plaintiff's arguments about statements of fact already deemed admitted should not be considered. However, Defendants respond to Plaintiff's arguments out of an abundance of caution.

v. Fla. Prepaid Coll. Bd., 522 F. App'x 829, 833 (11th Cir. 2013) (per curiam) (unpublished). Some District Courts in this Circuit have found that the evidence presented under the 'convincing mosaic' must be sufficient enough to overcome the lack of comparator evidence. *Blash v. City of Hawkinsville & Pulaski Cty.*, Case No. 5:17-cv-00380-TES, 2019 U.S. Dist. LEXIS 222156, *40 (M.D. Ga. Dec. 30, 2019).

Here, Plaintiff argues that he can establish the "Hanoi Ceramic Road of circumstantial evidence mosaics" (Appt. Brief at 34) because (1) the reason for his termination was pretextual and that discrimination was the real reason for his termination and (2) there was "suspicious timing", "ambiguous statements" and "other bits and pieces." As described in more detail below, Plaintiff has failed to rebut Defendants' proffered nondiscriminatory explanation for firing him.

A. <u>Defendant Cannot Establish Pretext</u>.

The crux of Plaintiff's argument is that the District Court should have found pretext because (1) he did nothing wrong in regards to the discipline of Womack and Heights, and (2) the ATL Hawks gave several reasons for terminating him. To establish pretext, Plaintiff must "demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them

unworthy of credence." *Ellison v. St. Joseph's Candler Health Sys., Inc.*, 775 F. App'x 634, 644 (11th Cir. 2019) (unpublished) (internal quotation marks omitted).

First, Plaintiff claims that he had authority to terminate Womack and suspend Heights. Plaintiff is simply dodging the issue. The ATL Hawks do not dispute that Plaintiff could fire and send home an employee. (Doc. 100-2 at 58, 226:8-22, *id*. at 72, 282:6-25.) The issue was that (1) Plaintiff did not alert HR (which he was instructed to do) regarding the suspension of Height and termination of Womack before doing so and (2) that because he failed to do so, both disciplinary actions had to be rescinded by HR. The undisputed evidence showed Parker and Dixon had multiple conversations with Plaintiff about going through the appropriate HR process when taking disciplinary action against an employee. (Doc. 100-1 at 34, 136:8-12; Doc. 100-4 at 8, 28:10-30:3, *id*. at 20, 75:10-77:1; Doc. 100-2 at 33-34, 126:19-128:5, 130:7-17, 131:132:5, 132:7-133:19.) Dixon informed Plaintiff that the ATL Hawks needed to "make sure that we had enough paperwork and ... to show a progressive steps of discipline to be able to terminate." (Doc. 100-1 at 35, 140:7-11.) HR also told Plaintiff in the context of a specific employee's termination that he needed to discuss the reasons with HR and ensure they had the right documentation. (Doc. 100-4 at 35, 140:12-22.) Simply put, Plaintiff was aware of

his obligation to consult HR before terminating an employee. (Doc. 100-2 at 35, 140:7-11, 140:12-22.)[7/]

Moreover, because Plaintiff failed to follow directions, the Hawks had to rescind the disciplinary action he took. As to Womack, the undisputed evidence established that Womack had medical issues and was on medication and these factors would have been considered before termination if Plaintiff had consulted HR. (Doc. 100-4 at 10, 40:7-41:3) To avoid a claim from Womack, the company reinstated him.

The rescinding of the Height suspension closely mirrors the problem with the Womack termination. It is undisputed that (1) Plaintiff failed to inform HR that he told Height to go home in the middle of her shift and that she would receive further instructions from him or HR after she had a verbal altercation with another employee, and (2) Plaintiff did not follow up with Height after sending her home. (Doc. 100-4 at 17, 62:5-64:24; Doc. 100-1 at 36-37, 143:5-147:4; Doc. 100-2 at 70-71, 277:1-280:24.) Instead, when Height attempted to return to the Arena to work

[7/] Plaintiff also argues that the directive was pretextual because it was not in the handbook. (Appt. Brief at 38.) There are several issues with this argument. First, Plaintiff admits that the directive was given verbally to him to contact HR with paperwork before the Womack and Height discipline issues. (Doc. 100-2 at 34-35, 136:8-12; 137:13-22; 139:2-11; 140:7-22.) Second, there is no policy that states that HR and Supervisors cannot provide additional directives outside of a handbook – especially to an employee who is on a Final Written Warning for, among other things, his conflicts with other employees.

her other job with a vendor, she was told that the police would be called if she did not leave the building. (Doc. 100-4 at 17, 62:5-64:24; Doc. 100-1 at 36, 143:5-147:4; Doc. 100-2 at 70-71, 277:1-280:24.) Several weeks passed before Dixon in HR became aware of the situation with Height and ultimately Height was fully reinstated and reimbursed for the income she lost. (Doc, 100-4 at 17, 62:5-64:24; Doc. 100-2 at 70-71, 277:1-280:24.) Thus, the evidence does not support Plaintiff's argument.

Next, Plaintiff claims that the ATL Hawks were flip-flopping on the reasons for his termination. The record does not support this argument. The basis for Plaintiff's termination has never changed. Parker recommended the termination because of the two disciplinary decisions that had to be rescinded after Plaintiff had received a Final Written Warning.[8/] (Doc. 78-1 at 2-6, DSMF ¶¶ 7-8, 10-11, 14-15, 18, 20-23, 30; Doc. 100-2 at 76, 298:1-299:7.) As Dixon pointed out, the disciplinary decisions that had to be rescinded were also after being coached by HR. (Doc. 100-4 at 20, 76:1-20.) Dixon worked with Plaintiff more than any other manager and Plaintiff was in Dixon's office at least two to three times a week. (*Id*.) There is no inconsistency either in how various witnesses described the decision to

[8/] Moreover, because Parker interviewed and hired Plaintiff, a jury could infer that Defendant Parker did not harbor racial animus against Plaintiff. *See Williams v. Vitro Servs. Corp*, 144 F.3d 1438, 1443 (11th Cir. 1998) (noting evidence that employee who terminated plaintiff also hired plaintiff may support "permissible inference" that no discriminatory animus motivated the termination decision). The District Court did not give any great weight to this fact. (Doc. 128 at 32, n. 7.)

terminate Plaintiff or in how Defendants have presented it during litigation.[9/] Plaintiff mistreated the two employees after having received the Final Written Warning. The reasons Parker, Donato, Stefansson, and Shaw gave for Plaintiff's termination were not inherently contradictory, as they encompassed one or both of those performance related issues.

B. Plaintiff has not Offered Evidence That His Termination was Because of his Race.

Plaintiff claims that the Hawks terminated him because he is black because (1) Parker only had issues with Plaintiff when giving directives to white people; (2) various comments made by Parker or about Parker; (3) Plaintiff was terminated one day prior to reporting to George Turner (who is black); (4) random ambiguous statements were made; and (5) Parker pushed back regarding what he perceived to

[9/] In an email dated April 26, 2016, Donato wrote that Plaintiff's termination was moving forward because of continued complaints after his final written warning. (Doc. 109-6 at 24-25.) On the same day, Stefansson stated in an email that Plaintiff was being terminated "for a variety of reasons." (Doc. 109-6 at 28.) Plaintiff was fired on April 28, 2019. (Doc. 78-1 at 9, DSMF 43.) Parker recommended terminating Plaintiff, and Dixon and Donato agreed with the decision. (Doc. 100-4 at 20, 75:10-76:1.) Plaintiff thought he recalled Parker saying he was fired because of the Height and Womack incidents. (Doc. 100-1 at 44, 174:20-23.) Parker testified that in explaining Plaintiff's termination to Stefansson, he said Plaintiff was unable to abide by the requirements in the Final Written Warning and those last two incidents "kind of put a bow on it." (Doc. 100-2 at 75, 298:10-16.) Dixon stated that Parker recommended termination based on the Womack and Height incidents. (Doc. 100-4 at 20, 75:10-20.)

be racist security protocols. These allegations do not support his claim of intentional race discrimination by Defendants.

Plaintiff's first allegation is made out of whole cloth. There is no record evidence that Parker had issues only when Plaintiff gave directives to white people. The evidence is undisputed that both white and black employees made complaints against Plaintiff and that people did not like Plaintiff's rude and brazen behavior. (Doc. 79-1 at 3-5, DSMF 11-23.) Even Shaw, the Chief Diversity Officer (who is Black), reported an incident where Plaintiff treated her in an abrasive and rude manner during an NBA game. (Doc. 100-1 at 158; Doc. 100-10 at 11 39-40; *id.* at 157.) Plaintiff may disagree with others' perception of his attitude, but Title VII (42 U.S.C. § 2000e) and § 1981 do not turn personal disagreements into impermissible discrimination. *See McCollum v. Bolger*, 794 F.2d 602, 610 (11th Cir. 1986). Moreover, there is no dispute that Defendants rescinded the errant discipline of two employees by Plaintiff due to his failure to reach out to Human Resources. (Doc. 78-1 at 8-9, DSMF 36 and 40.)

Next, Plaintiff claims that Parker discriminated against him because Parker stated that people perceive him as aggressive because he is a large, black man with an intimidating voice and commanding presence. (Doc. 100-1 at 74, 295:25-296:7.) Plaintiff admits that Parker never directly called him an "angry black guy" but used the phrase in the context of explaining why other people might find Plaintiff

intimidating. (Doc. 100-1 at 32, 125:19-126:25.) Plaintiff admitted that he also referred to himself as a "large black man" when recounting what was said on the voicemail or when stating that Parker referred to him as such. (Docket 99 at 9, ¶ 33.) This is not inference of discriminatory intent as Parker was merely informing Plaintiff of a comment made by a non-employee. Plaintiff also claimed that Parker "inferred" that Plaintiff could be viewed as less capable with an entirely black security staff. (Doc. 100-1 at 49, 196:17-20.) Such stray comments alone are insufficient to infer a causal connection between the comments and Parker's decision to terminate Plaintiff. *See Rojas v. Florida*, 285 F.3d 1339, 1342-43 (11th Cir. 2002) (holding that an isolated comment, unrelated to the termination decision, is insufficient to establish question of material fact on issue of pretext); *Crawford v. Atlanta Indep. Sch. Sys.*, No. 1:16-CV-04680-ELR-RGV, 2018 WL 5095058, at *24 (N.D. Ga. June 22, 2018), *report and recommendation adopted*, No. 1:16-CV-4680-ELR, 2018 WL 5095056 (N.D. Ga. July 20, 2018) (holding that a stray remark does not give rise to an inference of intentional discrimination).

Plaintiff also claims that alleged comments by Shaw supports his claims.[10/] Quite the opposite, her testimony demonstrates the fallacy of Plaintiff's contention of discrimination:

[10/] Shaw vehemently denies that these comments were made. (Doc. 100-10 at 35, 136:7-23.)

> He (Plaintiff) was never able to fully describe the facts behind statements that were purportedly made, or the setting in which things occurred… [F]or somebody who is making such serious allegations against individuals, I would assume that they would have fact based definitive ways to describe what occurred, versus, you know, I believe that they are racist. I heard that he does not like black people, it just seemed very general….there's no fact based information to support the allegations….
>
> I was not convinced that blackness was the reason that he had bad relationships with these people. It perhaps could have been his terse behavior and his volatile and oftentimes combative demeanor.

(Doc. 100-10 at 40, 155-157.)

Next, Plaintiff claims that there was racial animus because he was terminated close to the time he would have reported to a black manager.[11/] Again, there is no evidence to support that assertion. Both Dixon and Shaw, who are African-American, agreed with the decision to terminate, and Dixon spent significant time working with Plaintiff. This fact belies Plaintiff's claim that the ATL Hawks somehow terminated him to avoid giving him a black supervisor.

Finally, Plaintiff cites evidence related to alleged security concessions to white performers. However, Plaintiff admits that he does not know why the security decisions were made, as neither Plaintiff nor the security officers reporting to

[11/] ATL Hawks hired George Turner (African-American Former Atlanta Police Chief) to run all of security for the Hawks.

Plaintiff were members of the event security team and did not participate in the decision-making regarding security advances. (Doc. 100-1 at 119-120.)

In sum, Plaintiff has not presented a "convincing mosaic" of evidence and nothing in the record suggests that Plaintiff's termination was motivated in whole, or in part, by his race.

II. The District Court Did Not Err in Dismissing Plaintiff's Section 1981 Retaliation Claim.

To establish his claim of retaliation under section 1981, Plaintiff must prove three things: (1) that he engaged in statutorily protected activity, (2) that he suffered a materially adverse action, and (3) that there was some causal relation between the two events. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1276 (11th Cir. 2008) (citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)). Plaintiff failed to satisfy the first or third prong of the prima facie case – *i.e.*, that he engaged in protected activity or that a causal connection exists between his alleged protected activity and the adverse action.

A liberal reading of Plaintiff's brief reveals that he contends the District Court erred in finding: (1) that security measures were not part of the artists' right to make and enforce contracts, which the District Court noted includes the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship; and (2) even if security measures where not contractual rights of the artists, Plaintiff had a

good faith belief that Defendants were acting unlawfully. Plaintiff's arguments fail to meet his burden for the reasons set forth below.

First, Plaintiff contends that security measures were privileges and benefits of the contract between the artists and the arena, because artists would request security concessions after entering into the contract but before fulfilling it through their performance. If this were the standard, then anything an artist requests during that time period would become a privilege and benefit of the contract. For instance, taking it to its logical conclusion, it would include a request to show them where the nearest restroom is if said request was made between the signing of the contract and the time the artist performed. Plaintiff's argument simply does not hold water.

Simply put, Plaintiff did not offer any evidence that security protocols were part of the contract or the negotiation of it. (Doc. 122 at 449.) In fact, Plaintiff admitted that security protocols were not negotiated in the artists' contracts. (Doc. 109-1 at 10-13(¶¶ 13, 17.)) Indeed, Plaintiff admits that they were part of ATL Hawks' standard operating procedures. (Doc. 109-2 at 4(¶11.)) As such, any request for a concession of security measures was a request to modify ATL Hawks' standard operating procedures, not to exercise a benefit or privilege of the contract.

Next, Plaintiff contends that he had a good faith belief because a reasonable person would think that security measures were part of the contractual relationship. Plaintiff simply could not have had a good faith belief because he knew it was not

part of the contract. It is his own testimony that reveals that a reasonable person in his position would have known that it was not part of the contract, because he admits that he knew it was not part of the contract. Here, there is no ambiguity because there is a written contract, which Plaintiff admits has no provision regarding security measures.

III. Plaintiff Did Not Comply with Local Rule 56.1, NDGa.

Plaintiff contends that the District Court committed plain error in affirming the Magistrate Judge's striking of Plaintiff's initial Response to Defendants' Statement of Undisputed Material Facts ("Initial Response") (Doc. 98-1) and Plaintiff's Second Amended Response to Defendants' Statement of Undisputed Material Facts ("Second Amended Response") (Doc. 109-1) on the grounds that they violated NDGa, LR 56.1. (Appt. Brief at 51.) Specifically, Plaintiff contends that the District Court erred in finding Plaintiff's responses violated LR 56.1 because: (1) Plaintiff relied on circumstantial rather than direct evidence, (2) the circumstantial evidence presented by Plaintiff was not "directly on point," (3) Plaintiff presented too much circumstantial evidence, and (4) the pleadings were argumentative. Finally, with regard to the Second Amended Response, Plaintiff

further contends that the purported deficiencies were created because of the page limitation imposed *post hoc* by the Magistrate Judge.[12/]

With regard to the first three enumerated reasons above, Plaintiff cites to pages 6 through 9 of the District Court's Order (Doc. 128 at 6-9) to support his contention that the District Court made these findings. (*See* Appt. Brief at 51.) A review of those pages of the District Court's Order, however, reveal the Court made no such finding. Even if it did, Plaintiff does not dispute these findings, (*Id.*), but merely contends that this is the exact approach required by the mosaic theory of discrimination, which is a "fact-heavy approach" based on "circumstantial evidence." (*Id.*) Plaintiff, however, fails to appreciate the reasons articulated by the Magistrate Judge and adopted by the District Court as to why these pleadings were struck – which included that he did not need to argue the mosaic theory of discrimination in his responses to undisputed material facts and should have saved it for his brief.

A. The District Court Did Not Err in Upholding the Magistrate Judge's Striking of Plaintiff's Initial Response to Defendant's Statement of Undisputed Material Facts.

[12/] Notably, Plaintiff does not contend that the District Court set forth the wrong standard: that LR 56.1 requires the nonmovant to refute directly each of a movant's facts with concise, non-argumentative responses and specific citation to the evidence and that failure to comply is not a mere technical deficiency. (*See* Doc. 128.)

The District Court found that it was evident that Plaintiff's Initial Response was not concise in that it was 125 pages in response to a 15-page Statement of Material Facts by Defendants. In reviewing Plaintiff's specific responses, the District Court confirmed that they included rambling arguments based on interpretation of evidence. (Doc. 128 at 5-6.) As such, the District Court found that the Initial Response violated LR 56.1.

Plaintiff does not respond to the specific examples provided by the District Court of his unresponsive and/or argumentative statements. This is probably so because the Court aptly described them as such. This Court need look no further than Plaintiff's response to Defendants' undisputed material fact 1. Defendant asserted that ATL Hawks managers (like Plaintiff) had to consult with and obtain approval from human resources before terminating full-time employees. (Doc. 128 at 6, *citing* Doc. 78-1 at 1(¶1.)) Defendants cited to the testimony of three witnesses, all of which was directly on point, to support their factual assertion. *See Id.* To this one fact, the District Court noted that Plaintiff's response spanned over 5 pages and:

- Summarized a portion of the employee handbook that does not address whether a manager must consult HR before terminating an employee but then implied that the handbook was not even relevant because he did not receive a copy of it;

- Described a conversation that he had with a human resources employee, but then argued the same conversation was not relevant because he was not seeking advice about the issue at hand;
- Argued that documents discussing ATL Hawks' termination process authorized him to terminate employees without speaking to HR because the documents discuss that some offenses warrant immediate termination;
- Argued other documents that warn employees that they can be terminated for various offenses relieves him of having to speak to HR in advance of terminating them.

(Doc. 128 at 6-8.) The District Court correctly found that Plaintiff's response to undisputed material fact 1 was neither responsive nor concise. *See Brown v. Houser*, No. 1:13-CV-1807-WSD-WEJ, 2015 U.S. Dist. LEXIS 119079, *8 (N.D. Ga. May 18, 2015) ("[A] response to a statement of material fact is not an opportunity to write another brief. If the fact stated is true, admit it. If the fact is legitimately disputed, then say why, cite the evidence that supports the denial, and stop.") (citations and quotations omitted). Notably, Plaintiff does not argue that this specific finding by the District Court was error and thus Plaintiff has waived the issue. *See, e.g.*, *Mesa Air Grp., Inc. v. Delta Air Lines, Inc.*, 573 F.3d 1124, 1130 n.7 (11th Cir. 2009) (holding that argument not made in initial brief is waived); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (11th Cir. 2006) ("[A]rguments not

raised in the opening brief are waived."); *United States v. Jernigan*, 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) ("Under our caselaw, a party seeking to raise a claim or issue on appeal must *plainly and prominently* so indicate. Otherwise, the issue—even if properly preserved at trial—will be considered abandoned.") (emphasis added). Plaintiff's improper attempt to "incorporate[] … by reference" (Appt. Brief at 49) over twenty pages of his briefing in the District Court would constitute an end run around this Court's type-volume limitations and do not substitute for setting forth arguments in an opening brief as required. *See, e.g., Johnson v. Cty. of Paulding*, 780 F. App'x 796, 799 (11th Cir. 2019) (unpublished) ("[A] party's appellate brief may not incorporate by reference arguments made in other pleadings so as to have us 'ferret out and review any and all arguments,' to assess which ones may have merit.") (quoting *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167, n.4 (11th Cir. 2004)); *Four Seasons*, 377 F.3d at 1167 n.4 ("[Appellant] attempts to both bypass the rules governing space limitations and transfer its duty to make arguments to the judges of this panel. We now take the opportunity to join the many other Circuits that have rejected the practice of incorporating by reference arguments made to district courts, and we hold that [Appellant] has waived the arguments it has not properly presented for review.").

The District Court also noted that Plaintiff's response to Defendant's undisputed material fact 1 was but one example. (Appt. Brief at 9.) The Court

pointed out that Plaintiff's responses to undisputed material facts 8, 11, 36 and 42 contained pages and pages of pure legal and factual argument. For example, undisputed material fact 42 stated that after Plaintiff's conduct with two employees (Womack and Height), the decision makers decided termination was appropriate. (Doc. 98-1 at 79-87 (¶42.)) Plaintiff disputes the conduct with the two employees "led" to his termination. (*Id*.) Plaintiff then spent 8 pages arguing that the real reason was retaliation. (*Id*.) The undisputed material fact did not even address what "led" to his termination, but the "timing" of it.

Another egregious example of Plaintiff's disregard for LR 56.1 noted by the District Court was that he responded to fourteen (14) facts as "undisputed" but then improperly argued the legal effect of those facts or provided other facts he wanted the Court to consider. (Doc. 128 at 9-10, *citing* Doc. 98-1 at 27-110(¶¶ 3, 5, 6, 18, 21, 22, 24, 35, 37-39, 53, and 60.)) For instance, undisputed material fact 3 stated that Parker selected Plaintiff for hire after approval and recommendation of the other team members who interviewed Plaintiff. (Doc 98-1 at 8(¶3.)) Plaintiff responded "undisputed subject to clarification" and then went into great detail to describe each interview he had before Parker offered him the position. Plaintiff's Initial Response is replete with responses of this nature that the District Court properly found violate LR 56.1. *See Wint v. Neurosurgical Grp. Of Chattanooga, P.C.*, No. 11-CV-0185, 2013 WL 10178335, at *15 n.31 (N.D. Ga. Jan 22, 2013) ("[A] majority of Plaintiff's

tendered responses did not constitute valid objections to the admissibility of the DSMF statements to which they were directed; instead, Plaintiff merely presented arguments regarding the legal effect of those statements, or additional facts and statements that Plaintiff believed that the Court should consider.") In his opening brief, Plaintiff again does not argue that this specific finding by the District Court was error and thus this issue is also waived.

In addition, the District Court correctly found that Plaintiff had imposed thirty-four (34) improper relevancy objections. (Doc. 128 at 11, *citing* Doc. 98-1, at 2-124(¶¶ 1, 7-21, 23-25. 35-38, 52-58, 62-63, 70-71, 74, and 77.)) The District Court pointed out that Plaintiff made baseless arguments that common terms such as "complain," "management," and "coaching" were vague and likely to confuse the jury. (Doc. 128 at 11.) Notably, the jury does not read this pleading so an objection that these terms might confuse a jury is not appropriate.

Finally, Plaintiff also made numerous other improper objections that the District Court did not specifically enumerate, but that are clearly encompassed by its Order. For instance, undisputed material fact 10 asserts that Shaw, the Chief Director of Diversity and Inclusion, reported an incident where Plaintiff treated her in an abrasive and rude manner during an NBA game. (Doc. 98-1 at 20-22(¶ 10.)) Plaintiff responded that it is "[u]ndisputed that Shaw believed" what she reported but Plaintiff disputes that he "actually treated Shaw" in that manner. (*Id*.) Plaintiff

then spent two pages defending his behavior and arguing his position. (*Id*.) The undisputed material fact only addressed what was reported, not whether it was true or not. As such, Plaintiff's response was in violation of LR 56.1.

In his Brief, Plaintiff essentially argues that he was being punished for presenting a fact-intense case of circumstantial evidence to support the mosaic theory of discrimination. The District Court's ruling, however, was unrelated to Plaintiff's reliance on circumstantial evidence but was tied to the manner in which he attempted to argue it in response to "undisputed" facts and as part of his objections.

B. The District Court Did Not Err In Upholding the Magistrate Judge's Striking of Plaintiff's Second Amended Response to Defendants' Statement of Undisputed Material Facts.

The District Court also found that certain responses in Plaintiff's Second Amended Response (Doc. 98-1 at 20) violated LR 56.1 and, therefore, deemed certain facts admitted. After striking Plaintiff's Initial Response, the Magistrate Judge set a page limit of 35 pages. Plaintiff filed a 57-page amended response, disregarding the page limit. The Magistrate Judge then struck Plaintiff's amended response and set a new limit of 45 pages. Plaintiff then filed his Second Amended Response, but he again failed to comply with LR 56.1.

With regard to the Second Amended Response, the Magistrate Judge deemed admitted: (1) any fact in response to which Plaintiff cited to another pleading or

response within his Second Amended Response (*see* Doc. 109-1 at 12-44(¶¶ 16, 25, 30, 44, 45, 51, 74)); (2) any facts to which Plaintiff responded "Undisputed subject to clarification" or "Undisputed responding further" (*see* Doc. 109-1 at 4-26(¶¶ 3, 5, 18, 22, 24 39)); (3) any facts to which Plaintiff responded "disputed" with a citation to the record but without an explanation if the dispute was not readily apparent (*see* Doc. 109-1 at 10-38(¶¶ 12, 13, 14, 20, 21, 32, 34, 44, 61, 86))[13/]; and (4) facts that were disputed and included long, argumentative narratives and citations to the evidence with no clear enunciation for the basis of the denial (*see* Doc. 109-1 at 2-38(¶¶1, 6, 11, 23, 31, 36, 42, 55, 59, 62.)) Again, Plaintiff erroneously argues that his responses were necessary because he was relying on the mosaic theory of discrimination. He further contends that his responses were not argumentative and that the purported deficiencies were created because of the page limitation imposed *post hoc* by the Magistrate Judge.

Notably, Plaintiff fails to point to a single specific fact that the Court improperly deemed admitted. Plaintiff does not, and cannot, dispute that a cross-reference to another pleading does not comply with LR 56.1's explicit requirement that the response include a specific citation to evidence. LR 56.1, NDGa. ("This

[13/] The District Court cited to Plaintiff's response to undisputed material fact 86, which is a scrivener's error as there is no such fact. A review of Plaintiff's responses reveals that the Court transposed the numbers and meant statement of fact 68.

Court will deem each of the movant's facts as admitted unless the response … directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number.")

Plaintiff also fails to explain how a fact that is undisputed needs clarification. If the fact is undisputed, then Plaintiff's clarification or further response should be addressed in his brief. *See Wint v. Neurosurgical Group of Chattanooga, P.C.*, No. 4:11-CV-0185-HLM, 2013 U.S. Dist. LEXIS 189393, *50, n. 31 (N.D. Ga. January 22, 2013) (finding that the plaintiff's responses were not valid objections to the admissibility of the statement to which they were directed, but were "arguments regarding the legal effect of those statements, or additional facts and statements that Plaintiff believed that the Court should consider" and therefore, the facts were deemed admitted); *Aim Staffing, LLC v. Nots Logistics, LLC*, No. 4:11-CV-00240-HLM, 2013 U.S. Dist. LEXIS 201447, *5, n. 5 (N.D. Ga. January 9, 2013) (similar).

Plaintiff also does not dispute that a citation to evidence without any explanation does not comply with LR 56.1's requirement that it include a "concise response." For example, undisputed material fact 44 states that Plaintiff did not complain of discrimination in regard to his own job duties or performance. In other words, Plaintiff only complained of discrimination towards security measures related to black artists. Plaintiff disputed the fact 44 and cited to 15 of his Third Amended Statement of Additional Material Facts. (Doc. 109-1, *citing* Doc. 109-2

at 6-23 (¶¶ 17, 22, 27, 29, 52, 53, 57, 61, 67, 68, 75, 76. 77, 83, 84.)) None of these facts relate to complaints of discrimination regarding Plaintiff's job duties or performance, but rather mostly relate to Plaintiff's complaint about security measures related to artists. By responding in this manner, Plaintiff did not provide a "concise response" in violation of LR 56.1. *See Aponte v. Royal Caribbean Cruise Lines Ltd.*, 739 F. App'x 531, 535 (11th Cir. 2018) (unpublished) (finding that the district court did not err in excluding evidence for noncompliance with Local Rule 56.1 because the party cited to entire depositions); *see Ruch v. McKenzie*, No. 1:15-CV-03296, 2019 U.S. Dist. LEXIS 52212, *6, n. 7 (N.D. Ga. March 28, 2019) (stating that court is not required to "investigate the record in search of an unidentified genuine issue of material fact to support a claim or defense. That is Plaintiff's job.") (citations and quotations omitted).

Finally, the District Court again found that Plaintiff responded to a number of the facts with long, argumentative narratives and citations to the evidence with no clear enunciation for the basis of the denial. For instance, undisputed material fact 6 simply states that the duties and responsibilities of event and physical security are different. Plaintiff responded "as stated, disputed." He then proceeded to argue who was responsible for each type of security but never disputed that the duties for each are different. (Doc. 109-1 at 5-6(¶6.)) Similarly, undisputed material fact 31 states that Parker and Donato were prepared to terminate Plaintiff for various reasons.

Plaintiff responds that it is "undisputed" that they were prepared to terminate him for those state reasons, but he then proceeded to argue that he did not actually commit the acts leading to his termination. Undisputed material fact 42 set forth that the decision was made to terminate Plaintiff after a certain final event occurred. Plaintiff disputes the fact, explains and includes a citation to evidence. Plaintiff, however, does not stop there. He then states, "Responding further, Defendants' stated reasons for why Hayes was fired are consistent …." which he then spends half a page arguing. Again, these are the types of arguments that could have been discussed in his brief.

Plaintiff simply cannot show that the District Court made a clear error of judgment and committed an abuse of discretion. *See Clark v. Housing Auth. of Alma*, 972 F.2d 723, 727 (11th Cir. 1992) (holding that district courts are given great deference in interpreting their local rules). Indeed, other than to generally contend that his responses were not argumentative, Plaintiff does not point to a single specific ruling by the District Court and explain how the Court got it wrong. The fact that he does not is telling and further supports that the District Court did not commit an abuse of discretion.

Furthermore, Plaintiff does not explain how the page limit "created" the purported deficiencies in his Second Amended Response. The Magistrate Judge's setting of a page limit for the refiling of Plaintiff's Initial Response was within her

discretion. A federal judge may institute a page limit so long as it is "consistent with federal law, rules adopted under 28 U.S.C. § 2072 and § 2075, and local rules of the district." Fed. R. Civ. P. 83(b). After the page limit was set, Plaintiff requested an extension of the page limit to 45 pages, which was granted. Plaintiff did not request an extension of the page limit that was denied.

CONCLUSION

For the foregoing reasons, ATL Hawks, LLC and Jason Parker respectfully request this Court affirm the opinion of the U.S. District Court for the Northern District of Georgia granting Defendants-Appellees' Motion for Summary Judgment.

Respectfully submitted this 1st day of June 2020.

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,558 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.
2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman Font.

Respectfully submitted, this 1st day of June 2020.

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