IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 20-10169-DD

SAMUEL R. HAYES, III,

Appellant/Plaintiff,

v.

ATL HAWKS, LLC and JASON PARKER,

Appellees/Defendants.

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

REPLY BRIEF OF APPELLANT

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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.

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I. Defendants' "Facts"

Hayes takes issue with the following facts set forth by Defendants-Appellees ATL Hawks, LLC and Jason Parker (collectively, "Defendants" or "the Hawks"):

1. Hawks' Brief at p. 4 Lines 7-17; p. 5 Lines 1-5: Parker received *two* complaints in September 2016 from two of Hayes's black subordinates—Terry Taylor and Darriel Bailey. (Hayes Dep. (Doc. 100-1) at Def. Exs. 3, 4.)[1] Parker determined that Taylor was complaining about something that Parker himself had done "hundreds of times over the years[,]" and that Hayes responded positively to Parker's post-incident suggestions. (Hayes Dep. 127-131, 130:24-25, Def. Ex. 3.) Bailey's complaints were related to the fact that he believed he "was being treated like a child rather than a grown-ass man" by Hayes. (Parker Dep. (Doc. 100-2) 89:6-7; Hayes Dep. 131-132.) Parker perceived this as nothing more than "an employee complaining about a supervisor[,]" so he told Bailey to either address it with Hayes directly or to go to HR. (Parker Dep. 89:10-11, 89:15-18.)[2]

In other words, Parker didn't make a big deal out of either of these complaints at the time. Parker hired Hayes to boss around his black subordinates and told him to fire most of them, including Bailey—see (Hayes Dep. 252:21-254:18; Def. Prod.

[1] In all cites to deposition transcripts, the page number cited is the number designated by the court reporter in the transcript.
[2] See (Doc. 98-1 pp. 22-24 (Resp. 11); Doc. 109-1 pp. 9-10 (Resp. 11)).

(Doc. 109-3) 1758 (quoted on p. 28 n.20 of Hayes's initial brief)), so Parker initially viewed this as Hayes doing what he was hired to do—see e.g. (Def. Prod. (Doc. 109-3) 2782, 1758 (Parker email sent at 4:15 p.m.); Hayes Decl. ¶¶6-7). These only became issues when Parker needed fodder for the Final Written Warning. See (Hayes Decl. ¶¶6-7).

2. Hawks' Brief at p. 5 Lines 6-18: Hayes didn't "yell" at members of Schumer's production crew. (Hayes Decl. (Doc. 99) ¶¶14-15; Hayes Dep. 99:4-8; Def. Prod. (Doc. 109-3) 1632-1633.) Also, Lodestro had no authority to make security concessions—only to escalate them to Parker. (Lodestro Dep. (Doc. 100-7) 29-30, 44-45.) Further, the concession made by Lodestro that Hayes disputed involved magnetometer ("mag") bypasses for Schumer's production crew—not parking, and Hayes questioned this concession on October 14th—the day before the parking incident. (Def. Prod. (Doc. 109-3) 3096-3097.) Finally, there's no evidence in the record that a pre-show determination had been made related to parking, and Parker admitted that Hayes's parking directive was correct. (Parker Dep. 181:19-20, 181:25-182:4, 183:8-10, Pl. Ex. 11.)[3]

3. Hawks' Brief at p. 6 Lines 10-12: Hayes attacked the truthfulness of Parker's "18 complaints" assertion. (Doc. 98-1 pp. 47-49 (Resp. 23); Doc. 109-1 p. 16 (Resp.

[3] See (Doc. 98-1 pp. 31-32, 33-34, 34-36 (Resp. 14-16); Doc. 109-1 pp. 11-12 (Resp. 14-16)).

23).) When responding to Plaintiff's R&R objections, Defendants claimed for the first time that the "18 complaints" Statement of Fact wasn't being offered for its truth—the opposite of the position they took during summary judgment briefing. Compare (Doc. 126 at 6) with (Doc. 78-2 at 10; Doc. 119 at 8-9). According to Defendants, this meant that Hayes's hearsay objection was "improper" and justified the striking of (Doc. 98-1). (Doc. 126 at 6.)

4. **Hawks' Brief at p. 6 Lines 12-14:** The incident with Shaw happened on April 24, 2017. (Doc. 98-1 pp. 20-21 (Resp. 10); Hayes Decl. ¶¶10-12; Hayes Dep. 157-158; see also Doc. 109-1 (Resp. 10).) There's no evidence in the record that Shaw ever "reported" this to anyone or that it played any role in the Final Written Warning or in Hayes's termination. Rather, she told Hayes how she felt about the incident when they spoke privately after he'd been fired. (Id.) Hayes explained to Shaw that he was escorting a highly-intoxicated billionaire at the time and didn't intend to be abrasive or rude. (Id.)[4] Defendants have falsely implied that this occurred in 2016 and was one of the complaints referenced in the Final Written Warning (which was issued on November 8, 2016).

5. **Hawks' Brief at p. 7 Lines 1-2:** Parker didn't know who this individual was, (Parker Dep. 230:4-11, 234:9-19), and Hayes indicated that he first learned about the subject matter of Lodestro's November 6th complaint during his deposition,

[4] See (Doc. 98-1 pp. 20-21 (Resp. 10); Doc. 109-1 p. 9 (Resp. 10).)

(Hayes Dep. 166:7). Hayes denied that this person was his personal guest and identified her as Security Officer Mikayla Garmin—a Hawks employee who was on duty at the time. (Hayes Dep. 165:18-168:19, 166:5-11, Def. Ex. 8.)

6. Hawks' Brief at p. 7 Lines 1-6: Per Hayes, **"**the primary reason [Parker] was telling me to stay away from events was because there were security decisions being made during the events that I was stepping into and saying that's -- that's against policy….[T]hat's not what's in our security handbook." (Hayes Dep. 94:10-15.) "[W]hen it started to look to me like [] these security concessions were being made based on race, I started to question these things. And [] I was being told that my -- the mere questioning of it was inappropriate." (Hayes Dep. 109:23-110:2.)

7. Hawks' Brief at p. 7 Lines 7-18: Parker, Donato and Hayes had spoken about the subject matter of the Final Written Warning on November 1, 2016, and Parker told Hayes at the time that the conversation was a "verbal counseling." But after receiving the email from Lodestro on November 6th wherein she accused Hayes of calling her a "racist" (which never happened), Parker used the same exact matters discussed in the "verbal counseling" as the basis for a Final Written Warning. (Hayes Depo at pp. 293-295, 300-304, 295:6-9, 303:4-10, 304:7-9, Def. Ex. 7; Def. Prod. (Doc. 109-6) 35377; Hayes Dep. 169:14-170:10.)[5] So even if there really were 18

[5] See (Doc. 98-1 p. 45 (Resp. 22); Doc. 109-1 p. 15 (Resp. 22); see also Doc. 109-2 ¶¶34, 36, 37, 38, 39.)

complaints against Hayes, those were only enough to warrant a verbal counseling—*until* Lodestro falsely accused Hayes of calling her a racist.[6]

8. Hawks' Brief at p. 8 Lines 6-14: Both Wente and Parker confirmed that Hayes was authorized to grant this access. (Doc. 109-2 ¶49.) Further, Ira Dobbins witnessed the conversation between Hayes and the employee who denied access—Yolanda Travis—and Dobbins told Larry Taylor that neither person raised their voice. (Id.; Def. Prod. (Doc. 109-5) 35334.) Despite that, after a white woman (Catie Scott, who was Lodestro's best friend) complained to Parker about this incident, Parker wanted to fire Hayes for reasons that were patently false and that Parker couldn't corroborate. (Doc. 109-2 ¶49; Hayes Dep. 266:24.)[7]

9. Hawks' Brief at p. 8 Line 20, p. 9 Lines 1-2: Hayes met daily with Dixon *voluntarily* because he liked her and viewed her as an ally. No one forced him to do this. (Hayes Decl. ¶21.)[8]

10. Hawks' Brief at p. 9 Lines 12-15: Height was a part-time employee, so Hayes could remove her from the schedule or fire her at his whim. (Hayes Dep. 137:3-9; Doc. 98-1 p. 54; Doc. 109-2 ¶65; see also Parker Dep. 227:21-229:1, Pl.

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[6] And, as Hayes has already detailed in his initial brief, Defendants claimed in discovery papers that the Final Written Warning infractions were irrelevant and stipulated on the record that the Final Written Warning had nothing to do with Hayes's termination. (Brief of Appellant 4-6, 38-39.)

[7] See (Doc. 98-1 Resp. 30; Doc. 109-1 Resp. 30; Doc. 109-2 Resp. 47, 49.)

[8] See (Doc. 98-1 Resp. 29; Doc. 109-1 Resp. 29).

Ex. 16; Hayes Dep. 147:24-148:12, Def. Ex. 6.) Hayes didn't need to "alert" or get permission from anyone in HR to do this. (Hayes Dep. 136:12-13, 137:3-9; Def. Prod. (Doc. 109-3) at 242 ("Suspension"); Brief of Appellant p.28 n.20; see also Parker Dep. 227:21-229:1, Pl. Ex. 16; Hayes Dep. 147:24-148:12, Def. Ex. 6.) That said, Hayes informed his boss—Jason Parker—that he suspended Height on the day he did it, (Hayes Dep. 146:21-147:4); and Hayes intended to inform Dixon—who was Hayes's "go-to" for employee relations issues—about the incident and advise her that he was terminating Height after Dixon returned from vacation. (Hayes Dep. 143:19, 143:22-24, 144:9-12; Dixon Dep. 12; Def. Prod. (Doc. 109-4) 15588 (Hayes email sent at 9:39 a.m.); Hayes Decl. ¶21; see also Def. Prod. (Doc. 109-3) 1704 (Donato email sent at 4:56 p.m.).) But Dixon was out of the office for two weeks on vacation and attending training. (Def. Prod. (Doc. 109-4) at 15588 (Hayes email sent at 9:39 a.m.); Hayes Dep. 144:13-145:1.) Thus, the cause of the two-week delay was *Dixon being out of the office*. See (Hayes Decl. ¶26).[9] Also, there is no evidence that Hayes violated any HR policy by not communicating with Height for two weeks, and it would've made no sense for him to communicate with Height during those two weeks: Hayes was planning on firing Height—not reinstating her, and he wanted to inform Dixon about the pending termination before communicating it to Height.

[9] (Doc. 98-1 Resp. 1, 26, 38, 41; Doc. 109-1 Resp. 1, 26, 38, 41.)

11. Hawks' Brief at p. 9 Lines 16-19: Hayes didn't threaten to call the police on Height—Darriel Bailey did. (Hayes Dep. 145:11-21; Def. Prod. (Doc. 109-4) 19518.) Hayes told Bailey *not* to call the police. (Hayes Dep. 145:21.) Hayes did tell Bailey that Height needed to leave, but he did so because *Parker told him* that Height needed to leave. (Hayes Dep. 145:24-146:9.) All three of them were authorized to tell Height to leave. (Dixon Depo at 66:1-21.)[10]

12. Hawks' Brief at p. 9 Line 19, p. 10 Lines 1-2: Defendants only reimbursed Height $123.00 for the single shift that she lost with PAW, the third-party vendor. (Def. Prod. (Doc. 109-5) 29280 (Dixon email sent at 6:02 p.m.); Dixon Dep. 64:20-24.) Height was *not* reimbursed for the 5 shifts she lost with the Hawks as a result of the suspension. (Id.) This indicates that the suspension was justified. (Def. Prod. (Doc. 109-3) 242 ("[u]nless the employee is found not at fault for the action in question, the suspended time will be unpaid").)[11]

13. Hawks' Brief at p. 10, Lines 5-9: The Hawks didn't rescind Womack's termination because "[he] had known medical issues and was on medication[.]" If such was the case, Parker and HR wouldn't have signed off on Womack's Corrective Action Notice form two days after Womack was fired. (Doc. 109-2 ¶70; Def. Prod. (Doc. 109-4) 19566; Parker Dep. 285-286, Pl. Ex. 23; Dixon Dep. 34:4-6, Pl. Ex. 3;

[10] (Doc. 98-1 Resp. 39; Doc. 109-1 Resp. 39.)
[11] (Doc. 98-1 Resp. 40; Doc. 109-1 Resp. 40.)

Hayes Dep. 164-165, 305-306, 329-331.) Because Womack was cleared to return to work with no restrictions, the Hawks didn't know that Womack was purportedly on medication until Parker received Womack's letter dated April 22nd (Womack was fired on April 12th). (Doc. 98-1 at 73; Def. Prod. (Doc. 109-5) 27367-27368, 28252-28253, 35197-35198; Def. Prod. (Doc. 109-4) 15589 (1st paragraph of email sent by Donato at 9:16 a.m.).) There is no evidence that any action was taken to reinstate Womack until Parker received Womack's letter. Rather, the Hawks only reinstated Womack *after* receiving his letter, and they only did so because they were afraid he'd sue them. (Hayes Dep. 329:21-330:9; Def. Prod. (Doc. 109-4) 15589 (2nd paragraph of email sent by Donato at 9:16 a.m.), 15590.)[12]

14. Hawks' Brief at p. 10 Lines 11-16: Hayes followed "the appropriate HR process" with respect to Height and Womack, and Dixon did *not* have to authorize the termination of full-time employees. (Brief of Appellant 27-28.) Donato communicated a new policy related to terminations to Hayes the day before he was fired, but tacitly admitted that such had never previously been communicated. (Brief of Appellant 31-32.)

15. Hawks' Brief p. 10 Lines 17-20, p. 11 Lines 1-3: Defendants are intentionally conflating progressive discipline and immediate termination. Hayes was encouraged to use progressive discipline on full-time employees to the extent

[12] (Doc. 98-1 Resp. 36; Doc. 109-1 Resp. 36.)

feasible. (Hayes Dep. 140:7-11.) This directive is set forth in the Employee Handbook. (Def. Prod. (Doc. 109-3) 241-242.) As Hayes understood it, there were six steps of progressive discipline—the last three of which were "written infractions." (Hayes Dep. 303:17-304:4; see also Def. Prod. (Doc. 109-3) 241-242.) These "written infractions" are the "WRITTEN disciplinary actions" that Donato told Hayes to have HR review before submitting them to the employee. (Def. Prod. (Doc. 109-3)1704.) But Donato and HR were only proofreading—they weren't approving Hayes's decisions. (Hayes Dep. 138:11-17, 138:18-139:25.)

In contrast, some infractions—like sleeping on post—were egregious enough to warrant on-the-spot termination. (Hayes Dep. 142:16-19, 164:25-165:8.) Per the Employee Handbook, the Security Handbook, and Donato's September 2016 email, Hayes did not have to go through progressive discipline as to these infractions and didn't need to get prior HR approval to terminate for these infractions. (Def. Prod. (Doc. 109-3) 241, 1704; Brief of Appellant 26-28, 26 n.17.) Hayes correctly understood that he had this authority, communicated his understanding to Dixon, acted pursuant to this understanding throughout his 9-month tenure, and was never disabused of this understanding until the day before he was terminated—when Donato set forth a policy that contradicted what was written in the Employee Handbook. (Brief of Appellant pp. 26-28; Hayes Decl. ¶¶1, 20, 25, 27.)[13]

[13] (Doc. 98-1 Resp. 1; Doc. 109-1 Resp. 1.)

16. Hawks' Brief p. 12 Lines 1-2: Dixon's relationship with Hayes was collaborative in nature and did not involve "coaching." (Hayes Decl. ¶21.)[14]

17. Hawks' Brief p. 13 Lines 17-19: There was no such thing as the "event security team" until Larry Cooper was hired as the Event Security Supervisor in or about November of 2016. (Def. Prod. (Doc. 109-4) 12449; Hayes Dep. 92-93.) Cooper was hired by Hayes and reported to him, and the "event security team" was part of physical security. (Hayes Decl. ¶4; Def. Prod. (Doc. 109-4) 11612-11614.) Further, Hayes did "participate" in the "decision-making regarding security advances" because he started attending the pre-show security meetings in late September and was privy to many of those conversations, (Hayes Dep. 208-209, 209:1-2, 225:1-12); and Cooper began getting involved in the security advance process in or about April of 2017, (Def. Prod. (Doc. 109-5) 31695).[15]

18. Hawks' Brief at p. 13 Lines 19-20, p. 14 Line 1: Hayes knew exactly how and why security decisions were made because Parker told him. As to "how," Parker would frequently tell Hayes when an artist's security detail would ask for a concession and whether Parker was going to grant or deny it. (Hayes Dep. at 198-199, 217-220, 221-225, 225:1-12.) As to "why," Parker told Hayes that he granted concessions to white acts because they made more money and drew a different type

[14] (Doc. 98-1 Resp. 29; Doc. 109-1 Resp. 29.)
[15] (Doc. 98-1 Resp. 62; Doc. 109-1 Resp. 62.)

of crowd than black acts. (Hayes Dep. at pp. 106, 113, 120-121, 182, 184, 298-299.)[16]

II. Hayes Has Created a Jury Question Regarding Defendants' Discriminatory Intent.

A. A Comparator is Not Required.

This Circuit has clearly and consistently indicated that the lack of a comparator does not doom a plaintiff's case. Lewis v. City of Union City, 934 F.3d 1169, 1185 (11th Cir. 2019). See also Giraldo v. Miami-Dade Coll., No. 16-21172-CIV-LENARD/GOODMAN, 2017 U.S. Dist. LEXIS 29008, at *15-16 (S.D. Fla. Feb. 28, 2017). Regardless of whether a plaintiff can point to a suitable comparator, "[a] plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011). Thus, "in cases where a plaintiff cannot establish a prima facie case, summary judgment only will be appropriate where no other evidence of discrimination is present[.]" (Quotes omitted.) Giraldo, 2017 U.S. Dist. LEXIS 29008, at *16 (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)).

Further, the notion that the evidence presented under the "convincing mosaic" approach must be more persuasive than that presented under the McDonell Douglas

[16] (Doc. 98-1 Resp. 63; Doc. 109-1 Resp. 63.)

framework due to the lack of a comparator is incorrect: "[t]he ultimate question in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but whether the defendant intentionally discriminated against the plaintiff." (Quotes omitted.) Palmer v. Stewart Cty. Sch. Dist., 178 F. App'x 999, 1002 (11th Cir. 2006). Thus, when searching for evidence of discriminatory intent under the convincing mosaic approach, the Court must simply focus on whether "something links the [employer's] actions to the employee's protected class." (Quotes omitted.) Giraldo, 2017 U.S. Dist. LEXIS 29008, at *16 (quoting Turner v. Fla. Prepaid Coll. Bd., 522 F. App'x 829, 833 (11th Cir. 2013)). So here, the question for the Court is simply whether Hayes presented evidence of a link between his race and the actions Defendants took against him.

He did.

B. Defendants Have Adopted New Stated Reasons for Termination.

Realizing the weakness of the initial Stated Reason (which was actually two reasons), Defendants have now completely cast it off and have adopted three entirely new reasons (hereinafter, "New Stated Reasons"). (Hawks' Brief 18.) This *in itself* is evidence of a glaring inconsistency in Defendants' "legitimate, non-discriminatory reason" sufficient for a reasonable jury to infer pretext.

Defendants' Statement of Material Fact ("SOMF") number 1, which was preceded by the heading "Relevant ATL Hawks Employment Policy," clearly set

forth the policy that Defendants believed was at issue: "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.)[17] In other words, per Defendants, the relevant policy was that managers had to get permission from HR before firing or issuing written discipline to full-time employees. (Id.) SOMF 1 directly cited to pages 55 and 56 of the Employee Handbook. (Id; Doc. 78-1 pp. 73-74.) SOMF 1 also cited to testimony from Parker and Dixon that directly referenced the Employee Handbook, (Dixon Dep. 14:12-14; Parker Dep. 61:16-18); and Wente's testimony also appeared to make reference to a written policy, (Wente Dep. pp. 40-41).[18] Defendants stipulated that this was the policy Hayes was supposedly fired for violating: "[Hayes] was terminated for failing to follow ATL Hawks' policies in suspending and terminating subordinates." (Doc. 96 ¶1.)

But now, after Hayes has eaten away at the Stated Reason and has shown that the Employee Handbook doesn't say what Defendants thought it said, Defendants have entirely cast off the Stated Reason and fully adopted New Stated Reasons: (1) that Hayes didn't "alert" HR before suspending Height, (2) that Hayes didn't "alert" HR before firing Womack, and (3) that both disciplinary actions had to be rescinded

[17] Note that this policy is silent on suspensions and on disciplining part-time employees.

[18] Wente didn't work in HR and there's no evidence that he ever gave Hayes any directive about any HR policies.

because Hayes failed to "alert" HR before taking those actions. (Hawks Brief 18.) As noted above, this pivot *in itself* is evidence of pretext; but notwithstanding that fact, the New Stated Reasons fare no better than the old ones.

First, the Hawks have pointed to no policy that required Hayes to "alert" HR before suspending a subordinate—let alone a part-time subordinate like Height. Hayes could take part-timers off the schedule, suspend them, and fire them at his whim; plus, the Employee Handbook doesn't indicate that Hayes had to "alert" HR *at all* before suspending a subordinate. (Appellant Brief pp. 27-28; supra Part I, ¶¶10, 14.)

Second, Hayes didn't have to "alert" HR before firing a subordinate for an instantly terminable offense. (Appellant Brief pp. 26-28.) Sleeping on post was an instantly terminable offense. (Appellant Brief p. 29, p. 29 n.22.) This is precisely why Paul Shepherd—the Security Officer who fell asleep next to Womack and was also fired—wasn't reinstated. (Appellant Brief p. 31 n.24.)

Third, Hayes's disciplinary actions weren't rescinded because he failed to "alert" HR beforehand. Regarding Height's suspension, Hayes's employee relations go-to in HR (Dixon) was *on vacation* at the time he suspended Height, (Appellant Brief 29; supra Part I, ¶10). Further, Height's suspension was temporary by its very nature and was going to end at some point—either in reinstatement or in termination. Though it ended in reinstatement, Height wasn't reimbursed for the 5 shifts that she

missed with the Hawks, which indicates that the suspension was justified and that it was *not* "rescinded." (Supra Part I, ¶12.)

Regarding Womack's termination, it wasn't rescinded because Hayes failed to "alert" HR beforehand.[19] If the failure to alert HR beforehand was the issue, then Parker and HR wouldn't have signed off on Womack's Corrective Action Notice form two days after he was fired, and Paul Shepherd would've got his job back too. Rather, it was rescinded because the Hawks found out sometime between April 22nd and April 26th that Womack was supposedly on post-surgery medication that made him drowsy, and they didn't want Womack to sue them. (Supra Part I, ¶13.)

But even if both disciplinary actions were rescinded because Hayes didn't alert HR beforehand, the Hawks have put on no evidence of any policy, practice, or custom that in any way indicates that the rescission of a manager's corrective action is, in itself, grounds for termination.

Defendants also attempt to argue that it's undisputed that Hayes was told to "go[] through the appropriate HR process when taking disciplinary action against an employee[,]" and they cite to pages 34 and 136 (lines 8-12) of Hayes's deposition in support of their assertion. Page 34 isn't relevant at all. At 136:8-12, Hayes described the typical progressive discipline process for infractions that were *not* instantly

[19] Hayes fired Womack for sleeping on post the morning of April 12th. Hayes "alerted" HR that he'd terminated Womack at 7:26 a.m. *that same morning.* (Def. Prod. (Doc. 109-4) 19566.)

terminable. But Hayes *also* explained that *some* infractions—like sleeping on post—were egregious enough to warrant on-the-spot termination. (Hayes Dep. 142:16-19, 164:25-165:8.) Per the Employee Handbook, the Security Handbook, and Donato's September 2016 email, Hayes did not have to go through progressive discipline as to these infractions and didn't need to get prior HR approval to terminate for these infractions. (Def. Prod. (Doc. 109-3) 241, 1704; Brief of Appellant 26-28, 26 n.17; Doc. 100-3 at 139100, 139116.[20]) Hayes correctly understood that he had this authority, communicated this understanding to Dixon, acted pursuant to this understanding throughout his 9-month tenure, *and was never disabused of this understanding until the day before he was terminated*—when Donato set forth a policy that contradicted what was written in the Employee Handbook. (Brief of Appellant 26-28; Hayes Decl. ¶¶1, 20, 25, 27.)[21] 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

[20] "The progressive discipline process is as follows: Verbal Warning, Written Warning, Final Written Warning and Termination. Management has the discretion to skip a step in the progressive discipline process based on the severity of the policy violation or issue." (Doc. 100-3 at 139116.)

[21] And even then, Donato told Hayes that he was only *expected* to "engage upper management and/or HR" when he "ha[d] questions [about] how to handle a situation." (Appellant Brief 31; Hayes Dep. at Def. Ex. 5; Def. Prod. (Doc. 109-4) 15589.)

Shift Supervisor Darriel Bailey—whom Hayes *never fired*. (Hayes Decl. ¶20; Hayes Dep. 140:12-24, 258:10-11.)

Defendants further argue that "there is no policy that states that HR and Supervisors cannot provide additional directives outside of a handbook[.]" (Hawks' Brief 19 n.7.) While that may be true, that's not what happened: Dixon and Parker explicitly testified that the policy they conveyed to Hayes was set forth in the Employee Handbook, (Dixon Dep. 14:12-14; Parker Dep. 61:16-18); and the Hawks explicitly cited to the Employee Handbook as containing the "relevant employment policy," (Doc. 78-1 ¶1).

Finally, Defendants argue that "[t]he 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." (Hawks Brief at pp. 20-21.) But again, Defendants' Stated Reason was violation of policies—*not* rescission of disciplinary decisions, and during discovery Defendants went to great lengths to convince Hayes's counsel and the Magistrate that the Final Written Warning had *nothing* to do with the termination. (Brief of Appellant 4-6, 38-39.)

So, Defendants' reasons for Hayes's termination clearly have changed, and the New Stated Reasons are just as incredible as the original ones.

C. <u>A Jury Could Have Inferred That Hayes Was Fired Because of His Race.</u>

"The ultimate question in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but whether the defendant intentionally discriminated against the plaintiff." (Quotes omitted.) Palmer, 178 F. App'x at 1002. The analysis used in Section 1981 race discrimination claims is the same as that used in a Title VII race discrimination claim. Smith, 644 F.3d at 1325 n.14. Title VII prohibits discrimination "because of" race. 42 U.S.C. § 2000e-2(a)(1). As the Supreme Court has recently reminded us, Title VII's "because of" language is a "but-for" test:

> [A] but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.
>
> This can be a sweeping standard. Often, events have multiple but-for causes.…When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's [race] was one but-for cause of that decision, that is enough to trigger the law. See *ibid*.; *Nassar*, 570 U. S., at 350.
>
> No doubt, Congress could have taken a more parsimonious approach.…[But] [i]f anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, §107, 105 Stat. 1075, codified at 42 U. S. C. §2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if [race] *wasn't* a but-for cause of the employer's challenged decision.

Bostock v. Clayton County, No. 17–1618, slip op. at 5-6 (U.S. Sup. Ct. Jun. 15, 2020), 590 U.S. ____ (2020). Based on this standard, a reasonable jury could have

inferred that Hayes was fired "because of" his race based on the evidence presented. (Appellant Brief 42-46.)

Defendants assert that "there is no record evidence that Parker had issues only when Plaintiff gave directives to white people[,]" (Hawks Brief p. 22); but the record does in fact demonstrate that Parker's reactions were markedly different based on who Hayes was giving directives to and who was complaining about Hayes. As noted supra, Bailey and Taylor are both black, and Parker didn't make a big deal out of either of their complaints. (Supra at Part I ¶1.) Also, there's no evidence that Parker even *knew* about the Hayes/Shaw "incident" at the NBA game, let alone that it factored into any of Parker's disciplinary or termination decisions with regard to Hayes. (Supra at Part I ¶4.)

But Parker's reaction was very different when Hayes interacted with whites in manner that Parker deemed "disrespectful":

- After Lodestro (white) complained on October 14th and Bill Allen (white) complained on October 15th, Parker (1) verbally coached Hayes on October 17th, (2) told him, "you are a large black man[, so] watch your tone[,]" (3) made him write an apology to Allen, and (4) decided to ban him from events. (Appellant Brief 13-14.)
- On October 28th, Hayes again questioned Lodestro about another security concession granted to a white artist. (Id. 15.) Four days later, Parker and the

VP of HR (Donato) held a meeting with Hayes wherein Parker (1) "verbally counseled" Hayes, (2) asserted that 18 people had complained about Hayes (without telling him who those people were), (3) stated that those complaints were related to Hayes's tone and that he and Donato "expect[ed] to see change," and (4) communicated the event ban to Hayes and told him that he would not be shadowing the Event Manager at the concert that evening. (Id.)

- On November 8th—two days after Lodestro falsely accused Hayes of calling her a racist, Parker escalated the *same* issues that formed the basis for the "verbal counseling" to a Final Written Warning, wherein the only required performance adjustment was "to be respectful [and] mindful of your tone[.]" (Id. 15-16; supra Part I ¶7.)
- In January of 2017—after Catie Scott (white) complained to Parker about Hayes on December 31st, Parker tried to fire Hayes for reasons that were patently false and that Parker couldn't corroborate. (Appellant Brief 17-18; supra Part I ¶8.)
- On April 20, 2017—after Hayes directly addressed the issue of racially disparate security policies during an Operations meeting the day before and had an "uncomfortable" exchange with VP of Operations Barry Henson (white) at that meeting, Parker asked Arena GM Brett Stefansson (white) for a meeting to discuss Hayes. During that meeting, Parker told Stefansson that

he was going to fire Hayes for not abiding by the Final Written Warning (which required Hayes to be respectful and mindful of his tone). (Appellant Brief 22-23.)

Next, Defendants attempt to downplay the racially charged comments that Parker made to Hayes. This effort is unavailing. As to the October 17th comment, it's true that Parker was attempting to "explain[] why other people might find [Hayes] intimidating." (Hawks Brief 22-23.) But there's no evidence that those "other people" invoked race; Parker did that on his own. Then to top it off, Parker volunteered the solution to the problem created by Hayes's race: *watch your tone* (in other words, "you need to speak softer and be more respectful because you're black"). (Appellant Brief 14.) Taking Hayes's facts as true, this is virtually unassailable proof that Parker held Hayes to some subjective and amorphous standard of appropriate tone and respectfulness *because of* Hayes's race.

In addition to that October 17th comment, Parker called Hayes "the large, angry black man" four or five times. (Id. 20.) Parker would try to drop this remark in jest, but Hayes wasn't laughing. (Id.) Parker also explicitly told Hayes on October 17th and in February of 2017 that he (Parker) disparately enforced the Hawks' security policies based on the performer's race. (Id. 14, 19.) Further, Parker inferred either that Hayes or that the security staff itself could reasonably be viewed as "less than capable" because the entire staff was black. (Id. 19-20.) Finally, Shaw told

Hayes that she believed Parker was a "narcissist closet racist." (Id. 19.) Far from how Defendants have portrayed it, Hayes isn't hanging his hat on a lone stray comment; rather, he's identified 9-10 comments that all point to the conclusion that Parker treated blacks worse based on their race.

Next, Defendants assert that because two black women (Dixon and Shaw) "agreed" with the decision to terminate, and because Dixon "spent significant time working with Plaintiff," the Hawks couldn't have terminated Hayes "to avoid giving him a black supervisor." (Hawks Brief 24.) That's a red herring. The correct inference from the timing of the termination is that Parker knew George Turner wouldn't have fired Hayes (and that Donato and Stefansson wouldn't have fired Hayes if Turner wanted to keep him), so Parker rushed to do it before he was replaced.[22]

All of this evidence sufficiently "links" Hayes's race to the adverse actions taken against him.

III. Security Concessions Were Privileges and Benefits of the Contract Between the Artists and the Hawks.

Defendants intentionally misstate Hayes's argument on page 26 of their brief. Hayes never argued that "security measures were privileges and benefits of the contract." (Hawks Brief p. 26.) Rather, he argued that security *concessions* were

[22] Further, neither Dixon nor Shaw was Hayes's supervisor.

privileges and benefits of the contract. (Appellant Brief pp. 47-48.) Section 1981 "embrace[s] *all* aspects of the contractual relationship[.]" (Emphasis added.) Chawla v. Emory Univ., No. 1:95-CV-0750-JOF, 1997 U.S. Dist. LEXIS 23595, at *36-37 (N.D. Ga. Feb. 12, 1997) (quoting Rivers v. Roadway Express, 511 U.S. 298, 303, 128 L. Ed. 2d 274, 283, 114 S. Ct. 1510 (1994)). Thus, the granting or the denying of requests for security concessions to artists who contracted with the Hawks to perform at the Arena are definitely within its purview.

Here, the Hawks had rules ("security measures") related to building entry. The Hawks contracted with artists to perform at the Arena. Every artist asked the Hawks to "bend" the rules related to building entry between the time of contracting and the time of the show. The Hawks would regularly *agree* to "bend" the rules related to building entry for white artists, but the Hawks would regularly *refuse* to "bend" the rules related to building entry for black artists. (Appellant Brief 11-13.) Thus, the "bending" of the rules (i.e., the granting of security *concessions*) was a "privilege" of the contractual relationship that was extended to white artists, but not to black ones.[23, 24]

[23] Defendants' argument attempting to analogize this to a "request to show [the artist] where the nearest restroom is," (Hawks Brief 26), is a bad analogy because an artist making that request wouldn't be asking the Hawks to bend the security rules.

[24] Defendants also assert that Hayes testified that he knew these concessions weren't a part of the artist's contracts. But they fail to cite any evidence in support of Hayes's purported "knowledge" because no such evidence exists. And oddly, they assert on

For these reasons and for the reasons set forth in Hayes's initial brief, Hayes's retaliation claim should have survived summary judgment. (Appellant Brief 46-49.)

IV. Hayes's Purported Violations of LR 56.1

District Courts can, and do, consider additional facts presented in response to a movant's statement of material facts. See Lewis v. Residential Mortg. Sols., No. 1:17-CV-1422-ELR-WEJ, 2018 U.S. Dist. LEXIS 220680, at *5 (N.D. Ga. Aug. 31, 2018) (a Court can consider facts set forth in the non-movant's response to the movant's statement of facts); Brown v. Houser, No. 1:13-CV-1807-WSD-WEJ, 2015 U.S. Dist. LEXIS 119079, at **3-4 (N.D. Ga. May 18, 2015) ("[t]he Court modifies one party's proposed fact per the other's response when the latter better reflects the record cited"); cf. United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 145 F. Supp. 3d 1220, 1223 n.1 (N.D. Ga. 2015) (adopting certain facts contained within movant's statement of material facts that were "material, or at the very least, essential to understanding the full context of the parties' motion for summary judgment" [and] "helpful to the overall context of th[e] case[,]" even though the movant's statement was "far from concise, topping 740 paragraphs in nearly 180 pages"). Further, this Circuit has clearly indicated that "[t]he proper course in applying Local Rule 56.1 at the summary judgment stage is for a district

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pages 13-14 of their brief that "[Hayes] [] had no idea how security decisions were made for events occurring in the Arena." (Hawks Brief 13-14.)

court to disregard or ignore evidence relied on by the [non-movant] -- but not cited in its *response to the movant's statement of undisputed facts* -- that yields facts contrary to those listed in the movant's statement." (Emphasis added.) Reese v. Herbert, 527 F.3d 1253, 1268 (11th Cir. 2008). Yet this Magistrate and this District Judge viewed practically every denial in (Doc. 98-1) as "not concise" and/or "argumentative" *precisely because* those denials cited to and explained evidence yielding contrary facts.

By contrast, FRCP 56 permits citation to "other materials" and to evidence *only*, without requiring *any* explanation. FRCP 56(c)(1)(A). Any standing order or Local Rule that violates FRCP 56 is void. Reese v. Herbert, 527 F.3d 1253, 1266 n.20, 1269 n.27 (11th Cir. 2008). In (Doc. 109-1), in order to meet the Magistrate's page limit,[25] Hayes cited to "other materials" (i.e., to his statement of additional material facts ((Doc. 109-2)) and to other responses contained within (Doc. 109-1), which are *not* pleadings), and also cited to evidence without providing additional explanation. This Magistrate and this District Judge claimed that these responses violated LR 56.1 too.

Finally, Hayes was chided for making relevancy objections although LR 56.1(B)(2)(a)(2)(iii) explicitly contemplates a "materiality" objection (which is the

[25] The page limit violated Hayes's substantive rights by hindering his ability to fully present his case. See Timmerman v. U. S. Bank, N.A., 483 F.3d 1106, 1112 (10th Cir. 2007).

functional equivalent of a relevance objection, see FRE 401, Furcron v. Mail Ctrs. Plus, LLC, 843 F.3d 1295, 1308 (11th Cir. 2016)); was chided for making "vagueness" objections although they are contemplated by FRE 403, see Furcron, 843 F.3d at 1309; and was chided for making hearsay objections although they are permitted under FRE 801. In fact, it doesn't appear that the Magistrate or the District Court took cognizance of *any* of Hayes's objections in either (Doc. 98-1) or (Doc. 109-1).[26]

All of these rulings were made without a sound legal basis and should be reversed for that reason. See Furcron, 843 F.3d at 1309. Hayes was doomed for providing too much information and doomed for providing too little. The Magistrate's and the District Court's interpretation of LR 56.1 turned the summary judgment process into a talismanic, hyper-technical ritual that is virtually impossible for a discrimination plaintiff to traverse unscathed. This completely defeats the purpose of FRCP 56 and LR 56.1.

Respectfully submitted this 22nd day of June, 2020.

SMITH LAW, LLC

By: */s/ William J. Smith*
William J. Smith

[26] Defendants also assert that "Plaintiff fails to point to a single fact that the Court improperly deemed admitted." (Hawks Brief 35.) Frankly, it isn't apparent *what* facts the District Court deemed admitted, because according to the District Court, "[t]he Magistrate Judge considered *all* of the evidence about Plaintiff's termination." (Emphasis added.) (Doc. 128 at 30.)

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This 22nd day of June, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 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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