UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KELVIN J. COCHRAN, Plaintiff, v. **CITY OF ATLANTA, GEORGIA; and MAYOR KASIM REED, IN HIS INDIVIDUAL CAPACITY,** Defendants.	Case No. 1:15-cv-00477-LMM

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiff Kelvin Cochran brings a multitude of Constitutional claims against Defendants City of Atlanta (the "City") and Mayor Kasim Reed ("Reed" or the "Mayor") arising from the suspension and ultimate termination of his employment as the City's Fire Chief. Plaintiff's allegations are founded on an inflammatory, but baseless, narrative that the City persecuted him because of the religious beliefs he expressed in his self-published book entitled *Who Told You That You Were Naked?*. In fact, the City suspended Plaintiff for failing to gain approval from its Ethics Office and to investigate whether Plaintiff had improperly imposed his religious views in the workplace. It later fired Plaintiff after he violated the terms of his suspension by

publicly asserting that he was suspended for his religious beliefs, which irreparably damaged his relationship with the Mayor, and because Plaintiff's publication and distribution of his book had demonstrably eroded his subordinates' trust in his ability to lead the Atlanta Fire Rescue Department ("AFRD") in an even-handed manner. For these reasons, summary judgment is warranted on each and all of Plaintiff's claims.

I. FACTUAL BACKGROUND

Plaintiff first served as Fire Chief of AFRD under former Mayor Shirley Franklin in 2008-2009. (KCT,[1] relevant portions attached as **Ex. A**, at 17:3-8, Exs. 1-2). Mayor Reed later appointed Plaintiff to reprise his role as Fire Chief in his administration in 2010. (KRT, relevant portions attached as **Ex. B**, 19:23-24; 62:6-15; KCT, Ex. 6). In this capacity, Plaintiff served as an at-will employee at the Mayor's pleasure. (KCT, 17:9-17; 83:16-84, Ex. 15, at p. 2).

AFRD provides fire and rescue, homeland security, and emergency medical services for the City of Atlanta. (KCT, 51:10-20; 52:4-24). As Fire Chief, Plaintiff was responsible for overseeing and ensuring AFRD's successful operation. (KRT, 63:2-6; KCT, 42:1-4, Ex. 8). Plaintiff reported to the City's Chief Operating Officer,

[1] All source materials referred to as defined in Defendant's Statement of Material Facts.

Michael Geisler, who in turn reported directly to the Mayor. (KCT, 21:13-16; KRT, 18:23-19:10). Plaintiff was a member of the Mayor's Cabinet, which includes the heads of all major departments within the City and the Mayor's senior policy advisors. (KRT, 18:20-19:5).

A. Plaintiff Was Subject to the City's Facially Neutral Conflict-of-Interest Rules.

Under the City's Code of Ordinances, all employees, regardless of position, are required to obtain the approval of their department head prior to accepting additional paid outside employment to ensure that no conflict of interest exists with their City employment. (City Code, § 114-436; KCT, 19:11-24, 20:7-12; NHT, relevant portions attached as **Ex. C**, 54:11-55:15).[2] Plaintiff fully subscribed to this requirement as a department head, as he was charged with reviewing outside employment requests submitted by subordinate firefighters. (KCT, 63:3-20).

City employees are also subject to the City's Ethics Code, which is interpreted and enforced by the City's Ethics Office.[3] Given Plaintiff's high-level position, this ordinance required him to also obtain written approval from the City's Board of Ethics

[2] This requirement is reflected in the City's Ethics Pledge, which Plaintiff signed and agreed to abide by at the commencement of his 2010 employment. (KCT, 72:1-3, 72:22-73:5, Ex. 12, at ¶ 7).

[3] During the relevant period, the Ethics Office was led by Ethics Officer Nina Hickson, who reported to a seven-member Board of Ethics. (NHT, 15:3-20).

("the Board") before engaging in any outside employment for remuneration. (KCT, 23:12-24:8, Ex. 4; 55:18-23; 56:8-57:10, Ex. 10 at § 2-820(d)).

B. As Fire Chief, Plaintiff Authored *Who Told You That You Were Naked?*

Plaintiff describes himself as a well-known, devout evangelical Christian. (KCT, 34:3-20; 206:8-17). Indeed, Reed hired Plaintiff with full knowledge of Plaintiff's strong religious faith.[4] (KCT, 31:4-32:1).

In January 2013, Plaintiff decided to turn his bible study materials into a book. (KCT, 115:1-12). In May 2013, he contacted a publisher about self-publishing a book, which he titled *Who Told You That You Were Naked?,* (KCT, Ex. 25), and selling it via outlets such as Barnes and Noble and Amazon. (*Id*., 122:1-25, Ex. 25, at ¶ IV). In or around November/December 2013, Plaintiff submitted his book for publication. (KCT, 138:6-11; 139:5-10).

Plaintiff targeted his book to Christian men struggling with overcoming condemnation. (KCT, 108:15-109:11; 143:1-3). Therein, Plaintiff presents the dichotomy of the words "naked" and "clothed" as used throughout the Bible. (KCT, 172:15-19). According to Plaintiff, a "naked" man is one who lacks a working relationship with God. Conversely, a "clothed" man is one who enjoys a working

[4] Plaintiff also highlighted his evangelical faith on the resume he submitted to Reed. (*See* KCT 29:14-22; 30:2-11, Ex. 5, at p. 7).

relationship with God because he has accepted Jesus Christ as his Lord and Savior. (KCT, 173:3-174:8). To be clothed, a man must be a born-again Christian. (KCT, 174:9-10). Those who are clothed are righteous; those who are naked are sinners. (KCT, 176:2-4). Further, no gradations or degrees of nakedness exist -- every person, if naked, is equally sinful. (KCT, 176:5-9).

Based on this framework, Plaintiff identifies broad categories of people he considers naked. This list includes homosexuals, murderers, rapists, pedophiles, those who have sex outside of marriage, those who engage in bestiality, and all non-Christians. (KCT, 191:11-22; 193:2-4, Ex. 36, at 82; 195:12-15; 196:17-24; 197:1-10). Plaintiff characterizes these individuals as "wicked," "un-Godly," "deceitful," "loathsome," and "evildoer[s]," (KCT, 176:24-177:5; 178:18-23), and writes that there will be "celebration" when they perish. (KCT, 177:6-178:17).

Plaintiff's book also presents his view on women, including his belief that mankind would never have fallen from grace if Eve had consulted with Adam before eating the forbidden fruit. (KCT, 183:17-24; 186:20-187:4; 182:15-183:4). Positive examples of women are conspicuously absent. (KCT, 188:18-190:2).

Plaintiff also identifies himself as AFRD's Fire Chief throughout his book. In the "About the Author" Section, Plaintiff states that he "is currently serving as Fire Chief of the City of Atlanta Fire Rescue Department (GA)." (KCT, 171: 2-6, Ex. 34).

Plaintiff also asserts that his religious beliefs govern the manner in which he leads AFRD: "My job description as a fire chief of Atlanta Fire Rescue Department is [t]o cultivate its culture for the glory of God." (KCT, 180:2-10, Ex. 35 at p. 76).

Notwithstanding the clear language of the aforementioned ordinances, Plaintiff never sought or received written permission from the Ethics Board to sell his book. (KCT, 76:3-13). Plaintiff also never discussed his plan to sell his book with Geisler or Reed. (KCT, 152:11-14; MGT, relevant portions attached as **Ex. D**, at 27:17-23; 28:21-23). Plaintiff contends instead that he obtained verbal approval from Ethics Officer Hickson; Hickson denies this. (KCT 110:9-18; NHT, 45:14-18). This discrepancy is immaterial, however, as it is undisputed that Hickson lacked the authority to grant Plaintiff approval from the Ethics Board for his book, and that she never did so in writing. (KCT, 110:9-18, Ex. 10 at §2-820(d)).

C. Plaintiff Distributed Copies of His Book To His Work Subordinates, While Actively Marketing and Selling It to the Public.

Plaintiff distributed copies of his book to between nine and twelve of his subordinates, including all of his direct reports (deputy chiefs) and four of the six assistant chiefs who reported to them. (KCT, 139:16-20; 142:8-11; 216:21-217:18). Plaintiff contends that several of these individuals requested a copy, but he admits that

he handed out at least three unsolicited copies as well. (KCT, 140:2-141:15; 142:8-11; 216:21-217:18).[5]

By mid-2014, Plaintiff was actively selling his book for a profit, as well as incorporating the sale of his book into paid and unpaid speaking engagements. In all of these venues, Plaintiff discussed his book and its contents while identifying himself as AFRD's Fire Chief. (KCT, 149:18-25, 150:1-2, 151:6-23, 152:11-16, 153:17-155:6, 156:3-158:6, Ex. 30).

D. One of Plaintiff's Subordinates Raised Concerns about the Content of His Book.

In or around late October 2014, Assistant Chief Wessels, one of Plaintiff's subordinates, brought Plaintiff's book to the attention of Stephen Borders, president of the firefighters' union. (SBT, relevant portions attached as **Ex. E**, at 54:5-11, 55:5-7; KCT, 142:2-4; 217:6-15). Wessels informed Borders that Plaintiff gave him a copy "during a work event," and that he found that the book contained statements related to homosexuality that concerned him, particularly in light of the fact that Plaintiff had also "very clearly and explicitly" identified himself as AFRD's Fire Chief in the book. (SBT, 55:17-20; SBT, 62:2-9; 63:21-64:2).

[5] Plaintiff gave one of those unsolicited copies to Stephen Hill, a then-battalion chief, at the conclusion of Hill's annual one-on-one counseling discussion at which Hill's career and opportunities for advancement within AFRD were discussed. (KCT, 211:12-213:19).

Borders, in turn, brought Wessels' complaint and a copy of Plaintiff's book to the attention of Atlanta City Councilman Alex Wan. (SBT, 60:9-12, 64:25-65:16, 65:17-25; AWT, relevant portions attached as **Ex. F**, at 46:3-11). Councilman Wan concluded that the book constituted a Human Resources ("HR") matter and took the book to Yvonne Yancy, the City's HR Commissioner. (AWT, 51:22-52:2).

Yancy read Plaintiff's book, informed Geisler and the Mayor of its existence, and asked if either knew about or had approved its publication. Neither did. (YYT, relevant portions attached as **Ex. G**, at 22:10-18; 26:1-6, 26:11-27:2). Yancy informed Reed that she was concerned that Plaintiff had referenced his position with the City without permission, and that she personally found parts of the book offensive, especially those related to women, as well as members of the Jewish and LGBT communities. (YYT, 26:11-27:2; KRT, 93:13-15; 94:18-21).

Yancy also expressed concern that Plaintiff's decision to distribute his book in the workplace could create a hostile work environment under Title VII of the Civil Rights Act and local law. (YYT, 87:9-13, 94:7-19, 97:15-20). In response, Reed asked Yancy to investigate whether Plaintiff had received the Ethics Board's written approval to sell the book, and to forward her concerns to City Attorney Cathy Hampton. (YYT, 32:21-33:7; KRT, 99:1-2, 16-23).

Several days later, Yancy informed Reed that Plaintiff had published his book during his administration; that Plaintiff's book was for sale on Amazon; and that she did not believe Plaintiff had obtained the required written consent from the Board of Ethics to sell his book. (YYT, 42:15-43:18; 45:20-24; 47:2-4; 49:2-7). Yancy further confirmed that Plaintiff explicitly identified himself as the AFRD Fire Chief in his book and that he had distributed copies of his book to City employees. (KRT, 100:2-11). Yancy recommended terminating Plaintiff's employment, but the Mayor declined to do so. (YYT, 47:4-6; KRT, 101:6-9).

Instead, Reed opted to suspend Plaintiff for thirty days without pay in order to discipline Plaintiff for selling his book without providing the requisite notice or obtaining written approval, and to investigate AFRD's potential Title VII liability. (KRT, 102:19-103:1; 104:12-13; YYT, 47:9-16, 48:17-50:10; KRT, 119:2-9, 119:17-21, 119:21-120:1, 121:10-14).

Yancy, Chief of Staff Candace Byrd, and Chief Counsel Bob Godfrey then met with Plaintiff to inform him of his suspension. (YYT, 74:17-23; 75:22-76:2; 76:3-7; 93:13-94:1). Byrd also conveyed to Plaintiff that the Mayor instructed that he not publicly comment on his suspension during his leave. (YYT,76:22-25; CBT, relevant portions attached as **Ex. H**, at 40:7-11, 43:1-3, 43:20-44:2; KRT, 105:3-7; KCT, 222:13-223:2).

E. Rather Than Comply with the Mayor's Instruction, Cochran Publicly Portrayed Himself As a Religious Martyr, Spurring a Public Relations Campaign Against His Employer.

Almost immediately, Plaintiff ignored the Mayor's directive. He responded to emails of public support with statements such as: "I am grateful for this divine opportunity **to suffer this for Christ** and rejoicing every day," and "The Lord [is] with me during **this time of spiritual warfare**." (KCT, 247:12-24, 248:14-17, Exs. 46-47) (emphasis added).

Plaintiff also spoke at the Georgia Baptist Convention's ("GBC") executive committee meeting consisting of approximately 200 pastors. (KCT, 255:3-19). During his speech, Plaintiff referenced his suspension at least once. (KCT, 259:24-260:6). The following week, Plaintiff enlisted the GBC's assistance in creating a comprehensive public relations "**battle plan**" to fight his suspension, including the publication of a web-based editorial criticizing his suspension, which Plaintiff reviewed and approved; an online petition linked to a forum on which to purchase Plaintiff's book; a social media campaign directed at pressuring the Mayor to reconsider Plaintiff's suspension; and the posting of a recording of Plaintiff's GBC speech to the GBC website. (KCT, 251:21-252:18; 257:16-18; 261:22-262:14; 264:16-24, Exs. 49, 50 at PL 001902).

(*See also* GBC Mission Board, "Help Us Defend Religious Liberty!", *available at* https://gabaptist.org/petition/, last visited April 17, 2017, attached as **Ex. I**).[6]

In mid-December, Plaintiff approved yet another public relations "**offensive fire attack**" against the City, which included a social media campaign calling on the public to contact the Mayor and demand that he apologize to Plaintiff for violating his First Amendment rights. (KCT, 268:10-18, 269:12-270:15, Ex. 51). Plaintiff also spoke to the congregations of two churches, arguing once again that the Mayor suspended him solely because of his religious beliefs. (KCT, 274:13-22).[7]

As a result, the Mayor became the recipient of more than 17,000 angry emails, phone calls to his home, and even death threats. Among other things, Plaintiff's supporters called him a "nigger", a "terrorist", and the "anti-Christ". (KRT, 136:17-137:24; 151:18-22; 138:20-139:5).

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[6] *See also* December 15, 2014 Georgia Baptist Convention Press Release, *available at* https://gabaptist.org/wp-content/uploads/2014/12/GBC_News_Religious_Liberty_12-15-14.pdf (last visited April 19, 2017), attached as **Ex. J**).

[7] In one of his speeches, Plaintiff stated:

> In the book I deal with sexuality as God intended it. God intended for a man and a woman to be married and to have children to populate the earth, and that any sex outside of marriage and outside of a man and a woman, outside of holy matrimony is against the word of God, and *for that stand, I've been laid off for 30 days without pay.*

(KCT, 275:15-277:15) (emphasis added).

F. Plaintiff's Conduct During His Suspension, as Well as the Law Department's Investigation, Led to His Termination.

Meanwhile, the City's Law Department conducted a Title VII investigation, the results of which were compiled in an investigative summary. (KRT, Ex. 13). It concluded that Plaintiff had not obtained the Ethics Board's written authorization prior to selling his book, in violation of Section 2-820(d) of the City's Ethics Code. (KRT, Ex. 13, at p.2). It also concluded that although there was no evidence that Plaintiff had engaged in any unlawful discrimination, "[t]here … is general agreement the contents of the book have eroded trust and have compromised the ability of the chief to provide leadership in the future." (KRT, Ex. 13, at pp. 3-4).

After learning of Plaintiff's speeches and suspecting his involvement in the orchestration of the PR campaigns during his suspension, and upon reviewing the Law Department's findings, Reed decided to terminate Plaintiff's employment given his lack of trust and confidence in Plaintiff and his belief that Plaintiff "could not continue with the support of the people that worked for him." (KRT,136:17-137:24;151:18-22;169:8-20).

II. ARGUMENT AND CITATION TO AUTHORITY

A. Standard of Review.

Summary judgment is proper when the moving party shows that "there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once this burden is met, the burden shifts to the non-movant to come forward with evidence raising a triable issue of fact. *Id.* Summary judgment must be granted when the non-movant lacks evidence to meet his burden of proof with respect to any essential element of his case. *Celotex*, 477 U.S. at 322.

B. Plaintiff's Retaliation Claim Fails on Several Grounds.

To establish a First Amendment retaliation claim, Plaintiff must show that:

> (1) []he was speaking as a citizen on a matter of public concern; (2) h[is] interests as a citizen outweighed the interests of the State as an employer; (3) the speech played a substantial or motivating role in the adverse employment action.

Leslie v. Hancock Cnty. Bd. of Educ., 720 F.3d 1338, 1346 (11th Cir. 2013) (quoting *Vila v. Padron*, 484 F.3d 1334, 1339 (11th Cir. 2007)). "If the plaintiff establishes these elements, the burden shifts to the defendant to prove it would have made the same adverse employment decision absent the employee's speech." *Id.* (quoting *Vila,* 484 F.3d at 1339).

1. The City's Interests as Plaintiff's Employer Vastly Outweigh Plaintiff's Limited First Amendment Rights.

The second element of Plaintiff's retaliation claim calls on the Court to scrutinize "whether an employee's interest as a citizen outweighed the interests of the state as an employer." *Leslie,* 720 F.3d at 1346. To do so, this Court must apply the *Pickering* balancing test, which "seeks 'to arrive at a balance between the interests of the public employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of public services it performs through its employees.'" *Id*. (quoting *Pickering v. Bd. of Educ*., 391 U.S. 563, 568 (1968)). "'The manner, time, and place of the employee's expression' and the 'context in which the dispute arose' are relevant to" this analysis. *Id*. (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

> Other relevant considerations at this stage include:
>
> > whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.

Leslie, 720 F.3d at 1346 (quoting *Rankin*, 483 U.S. at 388). The nature and scope of the employee's position with his employer is another key factor in this equation. *Bates v. Hunt*, 3 F.3d 374, 378 (11th Cir. 1993). Further, fire departments in particular

"'have a strong interest in the promotion of camaraderie and efficiency' as well as 'internal harmony and trust,' and therefore [courts] accord 'substantial weight' to a fire department's interest in limiting dissension and discord." *Grutzmacher v. Howard Cnty.*, 851 F.3d 332, 345 (4th Cir. 2017) (quoting *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352-53 (4th Cir. 2000)).

AFRD's mission is to provide fire and rescue, homeland security, and emergency medical services to the City of Atlanta. Plaintiff's responsibility was to ensure that AFRD was successful in its mission. (KCT, 51:10-20; 52:4-24). To do so, a key component of Plaintiff's job was to attract and retain an inclusive and diverse workforce necessary to garner the trust and respect of Atlanta's diverse community. (KCT, 47:25-48:6). According to Plaintiff, this requires AFRD to be "ism free," or free of racism, sexism, favoritism, and all forms of prejudice and discrimination, including that based on religious identity, sexual orientation, and/or marital status. (KCT, 47:2-20; 85:10-20; 130:22-25). Plaintiff testified that absent a positive relationship with the community, AFRD's core mission is threatened. (KCT, 49:13-20).

For this reason, AFRD closely guards its public perception. By way of example, in August 2012, an AFRD firefighter posted a comment on a Facebook photo of AFRD firefighters, dressed in uniform, in which he used the word "fags." (KCT, 293:14-294:2, 294:25-295:5). A member of the public saw the posting and submitted a

complaint to Plaintiff, explaining that the comment made him question the firefighter's -- and AFRD's -- ability to serve the LGBT community. (Aug. 2, 2012 S. Deaderick Email to K. Cochran, attached as **Ex. K**). Plaintiff promptly responded to this complaint by suspending the perpetrating AFRD employee for thirty days without pay. (KCT, 300:21-24).

Like that firefighter's use of the word "fags," Plaintiff's condemnation of non-Christians, the LGBT community, and others threatened AFRD's ability to operate effectively and risked destroying the public's trust in the Department. As AFRD Chief, he conveyed the message that there will be "celebration" when those who do not follow his religious beliefs *perish*. The First Amendment does not protect such behavior. *See Lumpkin v. Brown*, 109 F.3d 1498, 1500 (9th Cir. 1997), (upholding termination of state human rights commissioner fired after making public statements as a reverend condemning homosexuality as a sin; the First Amendment does not assure him job security when he preaches homophobia while serving as a City official charged with the responsibility of 'eliminating prejudice and discrimination.'); *McMullen v. Carson*, 754 F.2d 936, 939 (11th Cir. 1985) (affirming termination of clerical employee in sheriff's office after publicly identifying himself as KKK member; even as a low-level employee, association of sheriff's office with KKK endangered the public's trust in the police as a whole); *Grutzmacher*, 851 F.3d at 346 (upholding

termination of battalion chief for Facebook postings; "the expressive activities of a highly placed supervisory employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority and discretion") (quoting *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997)). Because Plaintiff fails the *Pickering* balancing test, his claim should be dismissed.

2. Plaintiff's Beliefs Played No Role in the Mayor's Decision to Suspend and Then Terminate His Employment.

To advance his retaliation claim, Plaintiff must also prove that his speech "played a substantial or motivating role in the adverse employment action." *Leslie*, 720 F.3d at 1346. This he cannot do.

a. Plaintiff Violated the City's Ethics Code and Risked Title VII Liability For the City.

Pursuant to the City Code, Plaintiff, like all City employees, was required to obtain his supervisor's approval before accepting paid outside employment. The City's Ethics Code also required Plaintiff to obtain written approval from the Board of Ethics prior to engaging in any outside employment for which he received remuneration. Plaintiff fulfilled neither of these requirements prior to selling his book for profit. While Plaintiff may dispute whether Ethics Officer Hickson gave him verbal permission to do so, that is immaterial, as Hickson lacked such authority. She never provided written approval in any event.

Further, Plaintiff's book contains language denigrating and demeaning wide swathes of people based on characteristics protected by federal and local discrimination laws, including gender, religion, and sexual orientation; and the book explicitly associates such views with Plaintiff's role as Fire Chief of AFRD. Plaintiff then disseminated his book to his subordinates at work, one of whom raised concerns about the book and the lawfulness of Plaintiff's conduct.

Plaintiff cannot dispute that each of these legitimate, non-retaliatory reasons unrelated to his personal beliefs were before the Mayor when he suspended Plaintiff. (KRT, 102:19-103:1, 104:2-13, 119:17-21) (YYT, 47:9-16, 48:17-50:10; CBT, 32:22-33:1; 33:20-24; Deposition Transcript of Robin Shahar ("RST"), relevant portions attached as **Ex. L**, at 44:22-45:6). Accordingly, Plaintiff cannot establish that his suspension was due to his religious beliefs; and his retaliation claim fails. *See Thaeter v. Palm Beach Cnty. Sheriff's Off.*, 449 F.3d 1342, 1357 (11th Cir. 2006) (deputy sheriffs' First Amendment claim failed when terminated for violating rule requiring prior written approval for off-duty employment).

b. The Law Department's Findings, as well as Plaintiff's Misconduct During his Suspension, Led to His Termination.

Nor can Plaintiff show that the Mayor fired him because of his religious beliefs. Instead: (1) Plaintiff's decision to ignore the Mayor's instruction and speak repeatedly

and publicly about his suspension;[8] (2) the Mayor's (correct) suspicion that Plaintiff helped orchestrate a public relations campaign challenging his suspension; and (3) the Law Department's conclusion that AFRD subordinates lacked faith in Plaintiff's continued leadership, led the Mayor to that outcome.

One can hardly posit a more combative response to his suspension than Plaintiff's, which saw him endorse a public relations "battle plan" and "offensive fire attack" premised on an inflammatory narrative that his boss was engaging in "spiritual warfare" designed to undermine Christians' religious freedoms.[9] This reckless course of action led to the Mayor receiving thousands of angry emails, hateful phone calls to his home, and even death threats. Indeed, given the ferocity of his response, it is

[8] While Plaintiff insists that Byrd only advised him not to hold any press conferences or respond to any requests for interviews, he admits that the intent behind Byrd's directive was clear: "she didn't want me to publicly disclose my side of the story." (KCT, 257:4-13).

[9] As Yancy testified, in discussing the circumstances leading to Plaintiff's termination:

> [T]o suggest that the City was impugning upon his freedom of religion and that he was in this trial by God because of how he espoused his views was just -- not just offensive, but false. And so we found ourselves explaining that to people continuously when we shouldn't have had to talk about it at all.

(YYT, 115:7-22).

difficult to fathom how, after unleashing this public attack on his supervisor, Plaintiff could possibly have intended to return to his job. (MGT, 87:13-24; YYT, 115:7-22).[10]

C. Plaintiff's Viewpoint Discrimination Claim Also Lacks Merit.

Plaintiff also alleges that the City engaged in viewpoint discrimination by firing him for his opposition to same-sex marriage and homosexuality while allowing employees with supportive views on these topics to keep their jobs. As a threshold matter, Plaintiff can point to no other public safety head who ignored the City's Ethics Code, distributed unauthorized materials to work subordinates, ignored the Mayor's directive during his suspension, and sacrificed his subordinates' trust as he did yet was allowed to remain employed due to his support of LGBT rights. On this count alone, Plaintiff's claim fails. *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 971 (9th Cir. 2009) (viewpoint discrimination claims fail where plaintiff claims disparate treatment as compared to a party that is not similarly situated); *Pine v. City of West Palm Beach, Fla.*, No. 13–80577–CIV, 2013 WL 5817651, at *7 (S.D. Fla. Oct. 29, 2013)

[10] Even if Plaintiff could establish the *prima facie* elements of his retaliation claim, the evidentiary burden would have shifted to Defendant "to prove that it would have terminated Plaintiff even in the absence of his speech." *Moss v. City of Pembroke Pines,* 782 F.3d 613, 618 (11th Cir. 2015). As outlined above, Plaintiff's violation of the Ethics Code, the erosion of trust in him as a leader, and his inflammatory and insubordinate conduct during his suspension caused his termination. Accordingly, the same legal result would be reached.

(plaintiff's viewpoint discrimination claim failed where he could not show any disparate treatment).

Plaintiff's Free Speech claim also fails because the City has the right to speak for itself, and select "the messages it wishes to convey." *Walker v. Tex. Div., Sons of Confederate Vets., Inc*., 135 S. Ct. 2239, 2246 (2015). Accordingly, "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker,* at 2245. Thus, "government statements (and government *actions* and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Walker*, 135 S. Ct. at 2245 (emphasis added); *Pleasant Grove City, Ut. v. Summum*, ("A government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.") (internal citations omitted).

The Atlanta City Council, acting as the legislative arm of the City, has long supported LGBT equality by passing comprehensive laws barring discrimination in a variety of contexts on the basis of sexual orientation, gender identity, and domestic relationship status. (*See, e.g.,* City Code, § 94-111 *et seq*., § 94-91 *et seq*., § 94-68, *et seq*.). In December 2014, the City Council adopted a resolution in support of same-sex marriage. (AWT, 32:21-33:2). Reed, as the Mayor of Atlanta, is an avowed advocate of LGBT equality. (KRT, 143:17-145:8; RST, 21:19-25, 120:6-16; AWT, 32:15-20).

The City is entitled to express its own social views, and it has consistently done so with respect to LGBT equality. Plaintiff, while purporting to represent the City as Fire Chief, expressed views antithetical to the City's. If the City terminated Plaintiff as a result, such was a lawful act of free expression. *See Walker*, 135 S. Ct. at 2246 (DMV did not engage in viewpoint discrimination when it denied request for specialty license plate featuring Confederate battle flag where license plate was a form of government expression; *Summum*, 555 U.S. at 472-73 (as monuments in public park represented government speech, government had right to select which viewpoints it wished to express through grant or denial of monument placement requests without scrutiny under Free Speech Clause).

D. Plaintiff's Challenge of the City's Pre-Approval Rules Fails.

Plaintiff next contends that the City's pre-approval requirements -- Sec. 2-820(d) and Sec. 114-436-7 of the City Code (the "Pre-Approval Requirements") -- constitute an overbroad prior restraint on public speech, both facially and as applied.[11] Plaintiff does not dispute that he violated these ordinances, nor that, as Fire Chief, he understood and approved of their purpose. Now, however, he challenges their very constitutionality. As with all of Plaintiff's claims, this one, too, fails.

[11] In this context, the analysis of facial and as-applied challenges is essentially the same. Accordingly, Defendants will consider the two challenges as one. *See Sanjour v. EPA*, 56 F.3d 85, 92 (D.C. Cir. 1995).

As in the First Amendment retaliation context:

> [r]estraints on the speech of government employees on 'matters of public concern' are governed by a balancing test; they are permissible where the government interest in 'promoting the efficiency of the public services it performs through its employees' outweighs the interests of prospective speakers and their audiences in free dissemination of the speakers' views.

Weaver v. U.S. Info. Agency, 87 F.3d 1429, 1439 (D.C. Cir. 1996) (quoting *United States v. Nat'l Treasury Emps. Union* ("*NTEU*"), 115 S.Ct. 1003, 1012-14 (1995)). "Where a restraint is accomplished through a generally applicable statute or regulation … the regulation's sweep [must be] reasonably necessary to protect the efficiency of the public service." *Id*. (quoting *NTEU*, 115 S.Ct. at 1017). This analysis is known as the *Pickering/NTEU* test. *Sanjour v. E.P.A.,* 56 F.3d 85, 91 (D.C. Cir. 1995). In applying this analysis, courts consider several factors, including the extent to which protected employee speech is burdened; the risk of government utilizing unbridled discretion to engage in viewpoint discrimination under the challenged policy; the legitimacy of the government's interests underlying the challenged policy; and the extent to which the challenged policy is narrowly tailored to protect those interests. *See Sanjour*, 56 F.3d at 94-98.

1. The Pre-Approval Requirements Are Reasonably Tailored to Legitimate Government Interests.

The challenged ordinances require that all City employees obtain prior approval from their department heads before engaging in paid outside employment, and that high-level employees obtain written approval from the Board of Ethics prior to doing so. City Code, §§ 114-436-37, 2-820(d). As such, they allow the City to ensure that its employees do not have conflicts of interest or otherwise engage in outside activities that could improperly influence or interfere with their official City duties (or even appear to).[12] These are important goals of any governmental entity long recognized by the courts. *See, e.g., Wolfe v. Barnhart*, 446 F.3d 1096 (10th Cir. 2006) ("The importance of the government's interest in avoiding impropriety or the appearance thereof among its employees is well established. … Underlying this concern is the

[12] The introductory provision of the City's Ethics Code -- in which Sec. 2-820(d) is found -- explains:

> It is the purpose of this division to promote the objective of protecting the integrity of the government of the city by prohibiting any official or employee from engaging in any business, employment or transactions, from rendering services or from having contractual, financial, or personal interests, direct or indirect, which are in conflict with or would create the justifiable impression in the public of conflict with the proper discharge of the official or employee's official duties or the best interest of the city or which would tend to impair independence or objectivity of judgment or action in the performance of official duties.

(City Code, § 2-802).

'legitimate interest in maintaining the public's confidence in the integrity of the [public] service, which in turn contributes to the government's effectiveness.'") (quoting *Crandon v. United States*, 494 U.S. 152, 164 (1990)). Even Plaintiff admits that he believed these requirements were necessary to prevent conflicts of interest and work that might distract from AFRD duties. *(*KCT, 64:25-65:14).

Accordingly, pre-approval requirements such as these are routinely upheld as a reasonable way of pursuing these legitimate government interests. *See, e.g., Gibson v. Office of Atty. Gen., State of Ca.,* 561 F.3d 920, 928 (9th Cir. 2009) (state OAG's requirement that its attorneys obtain approval prior to engaging in private practice of law reasonably related to OAG's "legitimate interest" in avoiding conflicts of interest and ensuring that its employees were devoting their full attention to its business); *Williams v. IRS*, 919 F.2d 745, 746-7 (D.C. Cir. 1990) (requirement that IRS employees obtain written permission from agency before engaging in outside employment or business activities was "tailored to the government's interest in efficiency and avoiding the appearance of impropriety"); *Reichelderfer v. Ihrie*, 59 F.2d 873 (D.C. Cir. 1932) (total ban on outside remunerative employment by DC firemen upheld "to prevent firemen from dividing their strength as well as their interest and attention between their departmental duties and outside pursuits").

2. Employee Speech Is Neither Targeted Nor Burdened by the Pre-Approval Requirements.

Further, neither of these ordinances specifically targets expressive activities, let alone protected public speech. Sec. 114-437 merely requires employees to obtain approval from their department heads prior to engaging in paid outside employment, while Sec. 2-820(d) requires a select group of high-level City employees to obtain written approval from the Board of Ethics prior to doing so. Employees remain free to speak, write, or otherwise express whatever they choose without seeking approval pursuant to these provisions so long as they do not receive compensation for doing so. Moreover, Sec. 2-820(d) *excepts* "single speaking engagements" and "participation in conferences or on professional panels" from its purview. No evidence exists that the Pre-Approval Requirements have ever been used to prohibit employee speech, and Plaintiff himself admits he never interpreted Sec. 2-820(d) as governing expressive activity. (KCT, 58:1-15, 159:10-19).

This is a far cry from the types of regulations typically found unconstitutionally burdensome pursuant to the *Pickering/NTEU* test, which specifically target employee speech and operate as either an outright ban on such speech or strongly discourage it. *See, e.g., NTEU*, 513 U.S. 454 (striking down complete ban on lower-level federal employees accepting compensation, including honoraria, for making speeches or

writing articles); *Sanjour*, 56 F.3d 85 (striking down EPA's ethics regulation prohibiting expense reimbursements for unofficial speaking or writing activities relating to official duties); *Harman v. City of N.Y.*, 140 F.3d 111, 117-18 (2d Cir. 1998) (striking down social service agency's policies requiring employees to obtain permission prior to speaking with media about anything to do with the agency's operations; "These regulations clearly aim at speech that is of considerable importance to the public.").

3. The Pre-Approval Requirements Do Not Grant the City Unbridled Discretion to Engage in Viewpoint Discrimination.

Government regulations that "vest[] essentially unbridled discretion in the agency to make … determination[s] on the basis of the viewpoint expressed by the employee" are often held unconstitutional. *See Sanjour*, 56 F.3d at 96 (striking down regulation in part because it allowed "official approval only for speech that is 'within the mission of the agency'").

Approval of these requests is based solely on whether the outside employment creates a conflict of interest or otherwise interferes with the employee's City employment. Sec. 114-436 outlines the specific elements an outside employment request must satisfy to be approved under Sec. 114-437, including that it does not: "interfere with or affect the performance of the employee's duties;" "involve a conflict

of interest or a conflict with the employee's duties;" "involve the performance of duties which the employee should perform as part of such employee's employment with the city;" or "involve the use of records or equipment of the city." As a department head, Plaintiff based his decisions on outside business requests on these considerations. (KCT, 64:25-65:12).

> Sec. 2-820(d) reflects a similar focus, providing that:
>
> City employment shall remain the first priority of the employee, and if at any time the outside employment interferes with the city job requirements or performance, the official or employee shall be required to modify the conditions of the outside employment or terminate either the outside employment or the city employment.

(*See also* Declaration of Nina Hickson ("Hickson Dec."), attached as **Ex. M**, at ¶¶ 5-6).

Accordingly, the reach of the Pre-Approval Requirements is sufficiently limited to pass Constitutional muster. *See Gibson*, 561 F.3d at 927 (requirement that OAG attorneys obtain prior approval before engaging in private practice of law was not unlawful prior restraint under First Amendment; policy was reasonably tailored to allow AG to evaluate whether outside work would create a conflict of interest or adversely affect employees' job performance); *Williams*, 919 F.2d at 747 (upholding IRS's prior approval requirement for outside employment under First Amendment.

E. Nor Can Plaintiff Establish a Violation of His Right to Freely Exercise His Religion, or the Existence of an Unlawful Religious Test.

Plaintiff next alleges that his suspension and termination based on the Pre-Approval Requirements violated his right to freely exercise his religion. Plaintiff asserts that these policies created an unconstitutional religious test for City employment that excludes those who hold and profess historical Christian beliefs about marriage and sexuality. Nothing could be further from the truth.

1. Plaintiff Cannot Show Any Unlawful Burden on the Exercise of His Religious Beliefs.

To plead a valid free exercise claim, Plaintiff must show that the City has impermissibly burdened one of his "sincerely held religious beliefs." *Watts v. Fla. Intern. Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007). Plaintiff alleges that his faith "requires that he believe, profess, and teach others about historical Christian teachings regarding the one-man-one-woman nature of marriage and the sinfulness of sexual conduct outside of that union." (Compl., ¶ 283).

Of course, the City's Pre-Approval Requirements had no bearing on Plaintiff's ability to believe, profess, or teach whatever he chooses. Plaintiff freely admits as much at pages 158-160 of his deposition transcript. The only limitation placed on Plaintiff was that he obtain approval to engage in outside employment *for which he received remuneration*. As the Pre-Approval Requirements "neither caused [Plaintiff]

to do anything that compromised [his] religious beliefs nor prevented [him] from doing anything essential to [his] exercise of religion," *Braswell v. Bd. of Regents*, 369 F. Supp. 2d 1362, 1367-68 (N.D. Ga. 2005) (Thrash, J), his claim fails.

2. Plaintiff's Claim Also Fails in Light of the Neutrality of These Pre-Approval Requirements.

"The prevailing constitutional standard under the Free Exercise Clause mandates that 'a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.'" *Keeton v. Anderson-Wiley*, 733 F. Supp. 2d 1368, 1380 (11th Cir. 2010) (quoting *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274, 1285 (11th Cir. 2010)). "Such a law need only have a rational basis, and is presumed to be constitutional." *Id*.

"A law is neutral unless 'the object of the law is to infringe upon or restrict practices because of their religious motivation,' and "a law is generally applicable if it does not 'in a selective manner impose burdens only on conduct motivated by a religious belief.'" *Eternal Word Tel. Network, Inc. v. Sec. of U.S. Dept. of Health and Human Servs*., 818 F.3d 1122, 1164 (11th Cir. 2016) (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533, 543 (1993)). Here, the City simply requires pre-approval for paid outside employment. They are neutral -- they do not

target religious beliefs or single out religious speech. As written, they are aimed only at "any private employment [and] any services for private interests for remuneration," (City Code, § 2-820(d)), and "any paid employment of an employee … in addition to such employee's employment with the city." (City Code, § 114-436).

They are also generally applicable, as Sec. 114-436 applies to all City employees who wish to engage in outside employment for pay, and Sec. 2-820(d) applies to all high-level City employees who wish to do so, without regard to whether that employment has a religious aspect or the employee holds a particular religious belief. *See Hall*, 2013 WL 2484089, at *11 (finding employee policy generally applicable because it "applies equally to all … employees, regardless of religion").

F. Plaintiff's Freedom of Association Claim Cannot Succeed.

Plaintiff further alleges that the City retaliated against him for exercising his right to associate with his church by suspending and them terminating him based on the beliefs he expressed in his book. To succeed on this claim, Plaintiff must first establish that he "engag[ed] in associative activity" protected by the First Amendment. *Caruana v. Columbia Cnty. Bd. of Educ*., No. CV 110–036, 2012 WL 1067969, at *6 (S.D. Ga. Mar. 29, 2012), *aff'd* 493 F. App'x 34 (11th Cir. 2012). Plaintiff cannot meet this threshold requirement.

While Plaintiff alleges that in publishing his book, he "acted as an extension of his church and participated in the church's efforts to proclaim a religious message about marriage and sexuality," (Compl., ¶ 303), the evidence contradicts this assertion. Plaintiff's church did not finance Plaintiff's book, ask him to publish it, or even encourage him to do so. (KCT, 305:21-306:8). No evidence exists that anyone other than Plaintiff and his publisher (who had no affiliation with Plaintiff's church), had any role in the book's creation. Plaintiff's claim is further undercut by the fact that his alleged "associational activity" -- the self-publication of his book -- was undertaken for profit. *See Rivers v. Campbell*, 791 F.2d 837, 840 (11th Cir. 1986) ("While the first amendment protects the right to associate with others in pursuing a wide variety of social, political, educational, and economic ends, the more commercial the associational interest involved the less likely first amendment protection attaches."). As Plaintiff cannot establish that his book constitutes an associative activity within the meaning of the First Amendment, his claim fails outright.

Further, as outlined fully above, Plaintiff cannot show that the beliefs expressed in his book were the basis for the City's adverse employment decisions, (*see* Section B(2), *supra*), yet another requirement he must satisfy to succeed on this claim. *See Douglas v. DeKalb Cnty., Ga.*, No. 1:06-CV-0584-TWT, 2007 WL 4373970, at *3 (N.D. Ga. Dec. 11, 2007) (freedom of association claim failed where "Defendants have

presented compelling evidence showing that the Plaintiffs were not disciplined for being members of a union, [but for] violating Dekalb County policies."). Finally, Plaintiff's freedom of association retaliation claim, like his free speech claim, must survive application of the *Pickering* balancing test. *Id.* at *2-3. The City has already established that Plaintiff's First Amendment interests in his book do not outweigh the City's interest in ensuring the efficiency of its operations. (*See* Section B(1), *supra*). As such, these claims fail together.

G. Plaintiff's Procedural Due Process Claim Lacks All Merit.

Finally, Plaintiff alleges that Defendants violated his right to procedural due process, in violation of 42 U.S.C. § 1983, by failing to provide him with notice of the charges against him and a meaningful opportunity to present his side of the story, both before he was suspended and terminated. However, it is well-settled that "[a] public employee's claim that an employer violated his or her procedural due process rights must fail unless the employee had a protected interest in his or her employment." *City of St. Mary's v. Brinko*, 324 Ga. App. 417, 419 (2013). Further,

> [u]nder Georgia law, a public employee has a property interest in employment when that employee can be fired only for cause. In the absence of a contractual or statutory 'for cause' requirement, however, the employee serves 'at will' and may be discharged at any time for any reason or no reason, with no cause of action for wrongful termination under state law. Such 'at-will' employees have no legitimate claim of

> entitlement to continued employment and, thus, have no property interest protected by the due process clause.

Id. (quoting *Wilson v. City of Sardis*, 264 Ga. App. 178, 179 (2003)).

Plaintiff was an "unclassified" employee who was employed at-will and could be fired for any reason. (KCT, 37:2-7; 60:22-61:14; 17:9-17; 83:16-84:1, Ex. 15, at p. 2). Unclassified employees have no due process rights with respect to their employment, and Plaintiff freely admits as much. (KCT, 39:25-40:11; KCT, 61:10-24, Ex. 11, at §§ 9.1-9.2). Accordingly, Plaintiff had no property interest in his employment. *See Sykes v. City of Atl.*, 235 Ga. App. 345, 347 (1998) (unclassified employee had no property interest in her employment with the City, and thus no due process claim); *Harris v. City of Atl*., No. 2015CV264583, at *7 (Ga. Sup. Ct. Apr. 12, 2017), attached hereto as **Ex. N** (same).

Plaintiff instead argues that he had a property interest in his employment because the City Code provides that "[n]o employee shall be dismissed from employment or otherwise adversely affected as to compensation or employment status except for cause." (City Code, § 114-528(a)). As that section is not expressly limited to classified employees, Plaintiff argues, it must apply to all employees, including him.

Plaintiff's reliance on this Code section is misplaced, as the City Charter expressly provides that Plaintiff's position is at-will. (City of Atl. Charter, §§ 3-305(a)

and 3-301(c)) (AFRD Chief "may be removed at the pleasure of the Mayor"). In the event of a discrepancy between the City Code and the City Charter, the Charter controls. *See* O.C.G.A. § 36-35-3(a) (granting municipalities the power to adopt ordinances "for which no provision has been made by general law and which are not inconsistent with the Constitution or any charter provision applicable thereto"). Plaintiff's claim also fails because he cannot show that he sought a writ of mandamus prior to bringing suit, a procedural prerequisite for bringing a due process claim. *See Bradford v. City of Roswell*, No. 1:11-cv-0787-JEC, 2014 WL 3767794, *5 (N.D. Ga. Jul. 31, 2014) (quoting *Goodman v. City of Cape Coral*, 581 Fed. Appx. 736 (11th Cir. 2014)); *Joiner v. Glenn*, 288 Ga. 208, 210 (2010); *Harris*, No. 2015CV264583, at *9.

III. CONCLUSION

In light of the foregoing, Defendants respectfully request that the Court grant this Motion, enter summary judgment in their favor, and dismiss all of Plaintiff's claims, in their entirety and with prejudice.

Respectfully submitted this 27th day of April, 2017.

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies the foregoing document has been prepared with one of the font and point selections (Times New Roman, 14 point) approved by the Court in local rule 5.1(C) and 7.1(D).

This 27th day of April, 2017.

s/ Kathryn Hinton
Kathryn J. Hinton
GA Bar No. 542930

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *Defendants' Brief in Support of Their Motion for Summary Judgment* via the Court's ECF filing notification which will automatically send an electronic copy of the foregoing to the following attorney of record for Plaintiff:

Kevin Theriot, Esq.
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This 27th day of April, 2017.

s/ Kathryn Hinton
Kathryn J. Hinton
GA Bar No. 542930

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KELVIN J. COCHRAN,

Plaintiff,

v.

CITY OF ATLANTA, GEORGIA; and MAYOR KASIM REED, IN HIS INDIVIDUAL CAPACITY,

Defendants.

Case No. 1:15-cv-00477-LMM

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COME NOW Defendants City of Atlanta and Mayor Kasim Reed, and hereby file this Motion for Summary Judgment, seeking the entry of summary judgment on all of Plaintiff's claims pursuant to Fed. R. Civ. P. 56. Defendants have filed a Brief in Support of this Motion, as well as a Statement of Material Undisputed Facts concurrently herewith.

Respectfully submitted this 27th day of April, 2017.

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This 27th day of April, 2017.

s/ Kathryn Hinton
Kathryn J. Hinton
GA Bar No. 542930

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This 27th day of April, 2017.

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