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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiff's Response does not dispute the following material facts: (1) Plaintiff failed to obtain approval from the City's Board of Ethics prior to publishing and selling his book, *Who Told You That You Were Naked?*, in violation of the City's Ethics Code; (2) Plaintiff's book explicitly condemns broad swathes of the diverse workforce he led and the diverse community the Atlanta Fire and Rescue Department ("AFRD") serves; (3) Plaintiff provided copies of his book to his subordinates in the workplace, triggering potential Title VII liability for the City; (4) while Plaintiff was suspended, he made public comments related to his suspension, including statements perpetuating the false narrative that the City suspended him for his religious beliefs; (5) Plaintiff supported a

massive public relations campaign against Mayor Reed personally, and took no steps to mitigate the resulting angry backlash, either before or after it began; and (6) shortly thereafter, the City's Law Department informed Mayor Reed that individuals within AFRD had lost faith in Plaintiff's continued ability to lead them.

These undisputed material facts demonstrate that the City suspended and then terminated Plaintiff for reasons wholly unrelated to his religious beliefs. While Plaintiff seeks to overcome summary judgment by continuing the false narrative he began while suspended, his attempt fails in light of the evidence in the record. Summary judgment is therefore warranted on his claims.

I. Plaintiff's Retaliation Claim Fails as a Matter of Law.

To survive summary judgment on his First Amendment retaliation claim, Plaintiff must show both that his "speech played a substantial or motivating role in the adverse employment action" and that "his interests as a citizen outweighed the interests of the State as an employer" under the *Pickering* balancing test. *Leslie v. Hancock Cnty. Bd. of Educ*., 720 F. 3d 1338, 1346 (11th Cir. 2013). Plaintiff makes neither showing.

A. The Content of Plaintiff's Book Had No Bearing on the City's Decisions.

The content of Plaintiff's book played no role in the City's decision to suspend or fire him. Rather, Mayor Reed suspended Plaintiff due to Plaintiff's violation of the

City's Ethics Code. (Deposition Transcript of Kasim Reed ("KRT"), portions attached as **Ex. A**, at 102:19-103:1; 104:12-13; 119:2-120:1, 121:10-14; Deposition Transcript of Yvonne Yancy ("YYT"), portions attached as **Ex. B**, at 47:9-16, 48:17-50:10). The City then terminated Plaintiff's employment because Plaintiff violated the terms of his suspension by publicly asserting that he was suspended for his religious beliefs, which led to a coordinated public outcry against Mayor Reed and the City, and because Plaintiff's publication and distribution of his book had eroded his subordinates' trust in his ability to lead AFRD. (KRT,136:17-137:24;151:18-22;169:8-20).

1. Plaintiff Cannot Overcome the Legitimate Reasons for His Suspension and Termination.

Plaintiff seeks to excuse his ethics violation by arguing that the City's Ethics Officer, Nina Hickson, never informed him that he needed to obtain Ethics Board approval prior to publishing his book, even though he asked her for advice on the subject. This excuse fails. First, Hickson testified that she informed Plaintiff that publication of a book *would* necessitate approval from the Board. (Deposition Transcript of Nina Hickson ("NHT"), portions attached as **Ex. C**, at 45:14-18). Regardless, as the Code of Ethics required Plaintiff to obtain written approval from the Board notwithstanding Hickson's oral advice on the matter. (Deposition Transcript of Kelvin Cochran ("KCT"), portions attached as **Ex. D**, at 110:9-18, Ex. 10 at §2-820(d)).

Plaintiff also seeks to downplay his conduct during his suspension, characterizing it as nothing more than the "occasional reportage … to his concerned co-religionists [] on the mere fact of his suspension." (Plaintiff's Response, 17). Plaintiff's characterization fails, as 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 the Mayor was engaging in "spiritual warfare" designed to undermine Christians' religious freedoms. (KCT, 251:21-252:18; 257:16-18; 261:22-262:14; 264:16-24, Exs. 49, 50 at PL 001902; 268:10-18, 269:12-270:15, Ex. 51).

While Plaintiff argues that he did not actually organize these initiatives, he admits that he made no attempt to temper or prevent them, even when told he could do so by the organizers. (KCT, 264: 16:24; KCT, 271:11-13). Further, Plaintiff's contention that this conduct could not have been grounds for his termination because Mayor Reed was unaware of the exact nature of his involvement is belied by the Mayor's testimony that he strongly suspected Plaintiff was playing a part in spurring the public outcry.[1] (KRT, 137:19-138:13). Finally, whether or not Plaintiff actually caused the outcry is irrelevant;

[1] Mayor Reed testified that during Plaintiff's suspension, he "had a strong suspicion that Chief Cochran was coordinating with members from certain communities that didn't agree with the judgment that I made to communicate their displeasure to that." (KRT, 137:20-24).

the only relevant inquiry is whether the Mayor believed he did so. *See Hampton v. City of S. Miami,* No. 03-22323-CIV, 2005 WL 5993476, at *15, 18 (S.D. Fla. Jul. 29, 2005) (plaintiff's First Amendment retaliation claim failed despite plaintiff's argument that employer's reasons for terminating him were false; "the proper inquiry is not whether the employer's reason for an adverse employment action is correct, but rather, whether the employer reasonably believed the employee committed the infraction which led to the adverse employment action").

Plaintiff also attacks Defendants' contention that the Mayor fired Plaintiff in part due to the Law Department's finding that "[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." Plaintiff alleges that Defendants presented no evidence that the Law Department's conclusion was, in fact, accurate. However, Plaintiff does not, and cannot, dispute that the Mayor relied upon the Law Department to conduct an investigation, that this conclusion was presented to the Mayor prior to making his decision, and that he reasonably believed it was true. (KRT, 163:2-8, 164:17-21). *See Hampton,* 2005 WL 5993476 at *15-16 (collecting cases supporting principle that whether misconduct actually occurred is irrelevant in evaluating employer's reasons for taking an adverse action; only employer's reasonable belief that misconduct occurred is relevant). As Plaintiff cannot establish that the content of his book played a substantial

or motivating role in the Mayor's suspension and termination decisions, summary judgment is warranted on his retaliation claim.

2. Plaintiff Cannot Distract the Court from the Legitimate, Non-Retaliatory Reasons for the City's Decisions.

Plaintiff argues that Defendants suspended and then terminated him for his beliefs by contending that his book's content pervaded Defendants' handling of the disciplinary process. Plaintiff also points to Defendants' public expressions of disagreement with the book's content as further proof of their alleged motivations.

The evidence is contrary to Plaintiff's arguments. While the Mayor and his team certainly considered the book's content, their consideration focused on the Title VII concerns that content -- *combined with Plaintiff's misconduct* -- implicated. (YYT, 87:9-13, 94:7-19, 97:15-20; Deposition Transcript of Robin Shahar ("RST"), portions attached as **Ex. E**, at 44:13-45:6). Given Plaintiff's decision to tie the beliefs expressed in his book directly to his position with AFRD and to distribute the book at work (prompting at least one subordinate to report concerns about it), Defendants were required to consider the legal risks and impact of Plaintiff's actions. (RST, 56:9-16). While Plaintiff contends this proves that Defendants took adverse action against him because of the book's contents, this is not so. It merely reflects the motivations behind Defendants' decision to launch a Title VII investigation while Plaintiff was suspended.

Defendants' public expressions of disagreement with Plaintiff's views are also insufficient to undermine the Mayor's stated reasons for suspending and then terminating Plaintiff. It is unsurprising that Mayor Reed and the City sought to distance themselves from -- and even reject outright -- the message of condemnation and judgment Plaintiff conveys in his book given the City's and Mayor Reed's shared history of advocacy and support for equality. (*See, e.g.,* City Code, § 94-111 *et seq*., § 94-91 *et seq*., § 94-68 *et seq*.; KRT, 143:17-145:8; RST, 21:19-25, 120:6-16).

B. The Book's Content Authorized the Mayor's Suspension and Termination Decisions Under *Pickering*.

In any event, the City's interests as an employer vastly outweigh Plaintiff's First Amendments rights as AFRD Chief given the damaging nature of his speech.

Plaintiff relies heavily on the Law Department's finding that he did not engage in any proven acts of discrimination to argue that his book did not cause any actual disruption to AFRD's operations. In so doing, Plaintiff ignores the clear signs of disruption that did occur. For instance, the City became aware of the book only after Plaintiff distributed it to his subordinates and one of them complained about it. (Deposition Transcript of Stephen Borders ("SBT"), portions attached as **Ex. F**, at 54:5-11, 55:5-7, 17-20, 62:2-9; 63:21-64:2; KCT, 142:2-4; 217:6-15). Accordingly, the City's HR Commissioner and Mayor Reed determined that Plaintiff's distribution of the

book in the workplace raised Title VII liability concerns for the City, triggering an investigation into Plaintiff's management of AFRD. That investigation revealed that, within AFRD, the contents of the book had "eroded trust and [] compromised the ability of the chief to provide leadership in the future."[2] These are the exact types of adverse effects courts point to in finding the *Pickering* balancing test weighs in favor of the employer. *See Leslie,* 720 F.3d at 1346 (relevant *Pickering* considerations 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").

Further, "[t]he government's legitimate interest in avoiding disruption does not require proof of actual disruption. Reasonable possibility of adverse harm is all that is required." *Moss v. City of Pembroke Pines,* 782 F.3d 613, 622 (11th Cir. 2015) (internal citations omitted). Defendants present substantial evidence of a reasonable possibility -- even likelihood -- of harm here. Given the importance of the public's perception of

[2] While Plaintiff challenges the admissibility of the Law Department's findings as hearsay, he cannot dispute that the findings were presented to and reasonably relied upon by the Mayor. As such, its content need not be relied on to prove the truth of the matter asserted therein, thus negating Plaintiff's hearsay objection. Fed. R. Evid. 801 (defining hearsay as a statement submitted to prove the truth of the matter asserted therein).

AFRD, and Plaintiff's role as its most visible spokesperson, it was reasonably foreseeable that his condemnation of large swathes of the community AFRD serves would harm AFRD's reputation and its ability to serve that community. Indeed, Defendants present evidence of the actual harm caused by a rank-and-file firefighter's public use of the word "fags" on Facebook, which resulted in a serious complaint lodged by a member of the LGBT community questioning whether AFRD could or would serve him. (*See* Ex. K to DMSJ). Likewise, Plaintiff's book refers to homosexuals as "unclean" and "the opposite of purity," and it groups them with those who practice bestiality, pederasty, and "all other forms of sexual perversion." (KCT, at Ex. 36, p. 82). Plaintiff uses similarly harmful language to describe anyone who falls under his definition of "naked" (including those who have sex outside of marriage and all non-Christians) as "wicked," "un-Godly," "deceitful," "loathsome," and "evildoer[s]." (KCT, 176:24-177:5; 178:18-23). Given the harm that a low-level firefighter caused with such language on a social media post, the risk of harm posed by the AFRD Chief's use of similar derogatory language in a published book is far greater. Plaintiff's retaliation claim fails as a matter of law.

II. Plaintiff's Remaining First Amendment Claims Also Fail.

A. Defendants Took No Adverse Action Based on Plaintiff's Viewpoint, Exercise of Religion, or Associative Activity.

Plaintiff's remaining First Amendment claims fail because the Mayor's decisions to suspend and later fire Plaintiff were based on a host of factors unassociated with Plaintiff's religious viewpoint, the exercise of his religion, and/or his religious association with others. (*See* DMSJ, 17-20). Plaintiff's counterarguments are unavailing.

With respect to his viewpoint discrimination claim, Plaintiff's failure to identify a similarly situated comparator with opposing views who Defendants did not terminate for similar misconduct dooms his claim. While Plaintiff argues that he does not need to present a comparator to succeed on his claim, the cases to which he cites involve situations in which no question existed that the defendant's actions were motivated by the plaintiff's viewpoint. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (upholding viewpoint discrimination claim related to school's denial of application to show religious film series even without comparator where there was no record evidence that the denial was motivated by anything other than the film's religious viewpoint, nor that non-religious films on same subject matter would have been similarly prohibited); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S.

819, 825 (1995) (upholding viewpoint discrimination claim where university justified its denial of participation in forum to group on the religious nature of its message).

Here, by contrast, Defendants deny taking any action against Plaintiff because of his viewpoint; and Plaintiff presents no evidence that the City would not have disciplined others like him with differing views for engaging in similar misconduct such that Defendants' denial might be undermined. His claim fails.

With respect to his freedom of association claim, Plaintiff cannot show that the publication and sale of his book constitutes collective associative activity under the First Amendment. To further the protection of an individual's right to speak and to worship, the First Amendment also protects an individual's right to associate with others in pursuit of those goals -- the "freedom to engage in *group* effort toward those ends." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (emphasis added). Accordingly, the freedom of association is intended to protect *group* activity, not an individual's self-publication of a book espousing his own personal religious views. *See id.* (the First Amendment protects an individual's "right to associate *with others* in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends") (emphasis added). Plaintiff reasons that his book represents associative activity because he wrote it and made it available to the broader community "as a member of his

church." (Plaintiff's Response, 35). However, the record reflects, and Plaintiff cannot deny, that he completed his book entirely of his own volition, without any direction, financing, or other material support from his church or any other religious group. (KCT, 305:21-306:8). As such, his right to associate is not implicated here.

B. Plaintiff's Prior Restraint and Religious Test Challenges of the Pre-Approval Requirements Similarly Fail As a Matter of Law.

The ordinances Plaintiff challenges (the "Pre-Approval Requirements") require that all employees obtain prior approval from their department heads before engaging in paid outside employment, and that high-level City officials obtain written approval from the Ethics Board prior to doing so. Atl. City Code, §§ 114-436-37, 2-820(d). The Pre-Approval Requirements neither target nor burden employee speech, and are reasonably tailored to the City's legitimate interest in "avoiding impropriety or the appearance thereof among its employees," as well as "maintaining the public's confidence in the integrity of public service, which in turn contributes to the government's effectiveness." *Wolfe v. Barnhart*, 446 F.3d 1096 (10th Cir. 2006). *See also* DMSJ, 24-25.

Plaintiff does not dispute the importance of these interests. Instead, he contends that application of the Pre-Approval Requirements to his book does not further the

City's interests. Plaintiff cannot dispute that he earned money from the sale of his book.[3] Regardless of the book's content, the fact that Plaintiff collected income triggered application of the Pre-Approval Requirements. The City has a well-recognized right to enforce conflict of interest rules on its public employees. *See* DMSJ, 25 (collecting cases upholding conflict of interest rules). Plaintiff presents no articulable explanation for why his outside business activity should not be subject to these rules.

Plaintiff next argues that the Pre-Approval Requirements unconstitutionally grant the City "unbridled discretion" to apply them. In so doing, he ignores the existence of the guidelines provided both in the text of §§ 114-436-37 and the placement of § 2-820(d) within the City's broader Ethics Code. (DMSJ, 27-28). Instead, Plaintiff contends these guidelines merely operate to show that "discernible and workable guideposts are entirely absent," but he fails to provide any substantive support for this claim. (Plaintiff's Response, 25). He also speculates that the City would have approved of his book only if he had "toed the City line." (*Id.*). This is pure conjecture, as Plaintiff never sought approval pursuant to these protocols. Plaintiff cannot base his constitutional challenge on unsubstantiated opinions and hypotheticals.

[3] Plaintiff argues that he did not "intend" for his book to make a profit. Plaintiff's intent is irrelevant, as he admits that: (1) he made his book available for sale on Amazon, Barnes & Noble, and at speaking events; (2) he priced his book to provide for a profit margin; and that (3) he earned a profit as a result. (KCT, 79:8-12; 80:19-81:2; 149:8-25).

Plaintiff's religious test challenge fails as well, as the Pre-Approval Requirements do not target religious beliefs and are generally applicable to all City employees who engage in paid outside employment, regardless of whether that employment has a religious aspect or the employee holds a particular religious belief. (DMSJ, 30-31). By contrast, the unconstitutional statutes discussed in the case on which Plaintiff primarily relies are wholly distinguishable, and merely serve as a stark contrast. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535-36 (1993) (striking down ordinances prohibiting animal sacrifice as impermissibly targeting practitioners of the Santeria religion; express text of ordinances revealed intent was to target religious sacrifice, and "almost the only conduct subject to [them was] the religious exercise of Santeria church members"). As no such targeting exists here, Plaintiff's religious test challenge fails along with his prior restraint one.

III. Plaintiff Had No Due Process Rights In His Employment, and Thus Can Bring No Due Process Claim.

As provided by the City's Charter, Employee Handbook, and AFRD's written policies, Plaintiff was an unclassified, at-will employee who could be fired for almost any reason. Accordingly, he had no property interest in his employment and has no standing to bring a due process claim. (KCT, 17:9-17; 37:2-7; 39:25-40:11; 60:22-61:14; 61:10-24, 83:16-84:1; Ex. 11, at §§ 9.1-9.2; Ex. 15, at p. 2).

Plaintiff argues that the due process provisions of the City's Ethics Code bestowed him with a property interest contrary to the City Charter. They cannot do so. The City Charter expressly provides that Plaintiff's position is at-will. (City of Atl. Charter, §§ 3-305(a) and 3-301(c)). 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"). *See also City of Buchanan v. Pope*, 222 Ga. App. 716, 719 (1996) (police department manual could not create property interest in employment in conflict with city charter; "a city's charter must control where inconsistent with personnel regulations"). Plaintiff argues that the City should not "benefit" from such a discrepancy, yet provides no legal authority to justify this opinion. Once again, Plaintiff cannot survive summary judgment.

IV. Conclusion.

Defendants respectfully request that the Court grant their motion, enter summary judgment on each and all of Plaintiff's claims, and dismiss them with prejudice.

Respectfully submitted this 20th day of July, 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 20th day of July, 2017.

s/ Kathryn Hinton
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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *Defendants' Reply 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:

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This 20th day of July, 2017.

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