IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NELSON LITTLE, Plaintiff, v. STAR ASIA INTERNATIONAL, INC., Defendant.	CIVIL ACTION FILE NO. 1:20-cv-397-WMR-JKL

FINAL REPORT AND RECOMMENDATION

This is an employment discrimination case arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and 42 U.S.C. § 1981, in which Plaintiff Nelson Little alleges that his former employer, Defendant Star Asia International, Inc., unlawfully fired him in December 2019 because of his race (African American) and gender. The case is before the Court on Defendant's Motion for Summary Judgment. [Doc. 38.] For the following reasons, it is **RECOMMENDED** the motion be **GRANTED**.

I. STANDARD ON MOTION FOR SUMMARY JUDGMENT

A court should grant summary judgment when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). The movant bears the initial burden of showing that it is entitled to summary judgment. *Id.* ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact."); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (holding that *Celotex* did not change the rule that the movant bore the initial burden, and stating, "Even after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial"). The movant may carry its burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

"Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608. The nonmovant is then required "to go beyond the pleadings" and to present competent evidence in the form of affidavits, answers to interrogatories, depositions, admissions and the like,

designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quotation omitted); *see* Fed. R. Civ. P. 56(c). "[M]ere conclusions and unsupported factual allegations are legally insufficient to defeat a summary judgment motion." *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). Resolving all doubts in favor of the nonmoving party, the court must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In evaluating a summary judgment motion, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor. *Id.* at 255.

II. BACKGROUND

A. Facts

In determining the material facts of this case, the Court has considered Defendant's Statement of Undisputed Material Facts ("DSMF" [Doc. 38-2]), Plaintiff's Statement of Additional Material Facts ("PSAF" [Doc. 49-2]), and the responses thereto ("R-DSMF" [Doc. 49-1], "R-PSAF" [Doc. 52]). The Court also has conducted its own review of the record, *see* Fed. R. Civ. P. 56(c)(3), and takes the facts in the light most favorable to Plaintiff as the non-moving party.

Defendant is a freight forwarding and a global third-party logistics company headquartered in Decatur, Georgia. (DSMF ¶ 1.) The company was founded by Peter N. Starosta, who serves as its Chief Executive Officer. (DSMF ¶ 4.) Bruce A. Shecter is Defendant's President and, in that role, handles the day-to-day administration of the company. (DSMF ¶¶ 9, 10.) Zina Sponiarova presently serves as the company's Chief Operating Officer ("COO"). (DSMF ¶ 11.)

Defendant hired Plaintiff as its HR Director effective July 5, 2018. (Dep. of Pl. [Doc. 39-1] at 67.) Shecter made the decision to hire Plaintiff. (DSMF ¶ 22.) Starosta did not interview Plaintiff and was not involved in the decision to hire him. (DSMF ¶ 23.) Plaintiff reported to Shecter and Sponiarova, interacting with them on a daily basis. (DSMF ¶ 26.)

From the start of Plaintiff's employment, Shecter observed that Plaintiff struggled with deadlines, work quality, and his job duties in general. (DSMF ¶ 29.) Shecter initially thought those issues were part of a learning curve; however, Plaintiff's performance did not improve. (DSMF ¶¶ 30, 31.) These issues were mild to moderate in nature, so Shecter did not document them early on. (DSMF ¶ 32.) Nonetheless, Shecter found that having to constantly supervise and revise

Plaintiff's work interfered with Shecter's own ability to perform his job duties. (DSMF ¶ 33.)

From August to October 2018, several events occurred that Plaintiff now points to as evidence that racial or gender bias motivated the company's decision to fire him in December 2019. The first incident occurred in August 2018 when Shecter and Plaintiff met at a coffeeshop to go over Shecter's expectations for Plaintiff. (Pl. Dep. at 68.) According to Plaintiff, during the conversation Shecter told Plaintiff that Starosta "would have preferred a white woman in this position, but I'm overriding that because I like you."[1] (*Id.*) The second incident occurred in August or September 2018, when Shecter temporarily took recruiting responsibility away from Plaintiff and gave it to an executive assistant, Bren Skeen, a white

[1] Shecter denies that Starosta ever told him that he preferred to have a white woman in Plaintiff's potion or that he (Shecter) ever told Plaintiff that Starosta preferred to have a white woman in Plaintiff's position. (*See* Decl. of Bruce Shecter [Doc. 38-3] ¶¶ 57, 58.) Starosta similarly denies having such a preference or telling Shecter that he had such a preference. (Decl. of Peter Starosta [Doc. 38-4] ¶¶ 30, 31.) For purposes of summary judgment, however, the Court must accept Plaintiff's version of the events as true.

Defendant also objects to Plaintiff's statement as hearsay. (*See* R-PSAF ¶ 3.) To the contrary, the testimony is admissible under Federal Rule of Evidence 801(d)(2)(D), which defines a statement made by a "party's agent or employee on a matter within the scope of that relationship and while it existed" as non-hearsay. *See also Kidd v. Mando Am. Corp.*, 731 F.3d 1196, 1207 (11th Cir. 2013).

woman. (Pl. Dep. at 77-79; DSMF ¶¶ 77-78.) According to Plaintiff, Shecter told him that he did so because Plaintiff "didn't know what the culture of the company was." (Pl. Dep. at 77.[2]) The third event occurred in October 2018 when Plaintiff first met Starosta at Defendant's offices in Decatur. (*Id.* at 82.) Starosta told him something along the lines of "I would have never hired you, but seeing that Bruce hired you, I have to deal with it now." (*Id.* at 72.) Plaintiff responded "you just have to deal with it now." (*Id.*)

In February 2019, Sponiarova was promoted to COO so that Shecter could focus more on the company's growth and less on administrative tasks, including supervising Plaintiff. (DSMF ¶ 34.) After Sponiarova's promotion, Plaintiff began reporting directly to her. (DSMF ¶ 35.) While supervising Plaintiff, Sponiarova similarly found that Plaintiff had problems with job performance. (DSMF ¶ 36.)

On August 13, 2019, Sponiarova conducted Plaintiff's annual performance review. (DSMF ¶ 37.) She rated Plaintiff's performance in numerous areas as "Needs Improvement," meaning that he "frequently fail[ed] to meet standards." (DSMF ¶ 38.) Among other things, the evaluation reflected that Plaintiff's work

[2] Defendant objects that this statement is inadmissible hearsay. (*See* R-PSAF ¶ 7.) The Court may consider the statement, however, for reasons explained in footnote 1.

was inaccurate, he struggled to multi-task, lacked initiative, failed to follow through on projects, did not actively participate in management discussions, took too long to respond to messages, and his written work product was unsatisfactory. (DSMF ¶ 39.) In his self-evaluation, Plaintiff rated himself mostly "satisfactory"—below "above average" and "excellent." (DSMF ¶ 40.)

After the negative evaluation neither Sponiarova nor Shecter noticed material improvement in Plaintiff's job performance. (DSMF ¶ 41.) Examples of unsatisfactory work include:

- Plaintiff did not follow guidelines for drafting minutes of a November 8, 2019 leadership meeting.[3] (DSMF ¶ 43.[4])

[3] At this meeting, Starosta stated that the current hiring process required him to do the "creepy stuff," including researching a candidate's background on the internet. (PSAF ¶ 9.) He additionally stated that there was "no rhyme or reason to it all other than what they graduated with, where they're from, where they live, [and] ***how they look***." (PSAF ¶ 10 (emphasis added).) Defendant does not dispute Starosta said these things; however, it objects to these statements as immaterial. (R-PSAF ¶¶ 9, 10.) The Court overrules the objections, and will address these facts in the legal discussion that follows.

[4] Plaintiff denies DSMF ¶ 43. Notably, the only item Plaintiff takes issue with is Defendant's contention that Plaintiff's notes contained "too many typographical and grammatical errors for a professional at his level." (R-DSMF ¶ 43.) To be sure, Plaintiff does not dispute that his work contained typographical and grammatical errors, instead, he simply submits that his notes contained "relatively few of these errors." (R-DSMF ¶ 43.) Because he points to no evidence to rebut Shecter's declaration testimony that Plaintiff did not follow guidelines in

- In Fall 2019, Plaintiff had difficulty renewing the company's health insurance plan, so Shecter had to take over negotiating and meeting with the insurer himself. (DSMF ¶ 44.[5])
- After the company's health insurance plan was successfully renewed, Shecter tasked Plaintiff with calculating the employee contribution amounts; however, a draft that Plaintiff prepared erroneously showed the insurance rates and contribution amounts as having doubled, apparently because Plaintiff had looked at paperwork for incorrect years. (DSMF ¶ 45.)
- Shecter and Sponiarova asked Plaintiff to create a job description for a position. (DSMF ¶ 49.) It took Plaintiff several weeks and multiple reminders before he provided a draft. Shecter then had to revise the draft due to substantive and grammatical mistakes. (*Id.*)
- Shecter instructed Plaintiff to prepare a draft advertisement for an accounting position. (DSMF ¶ 50.) Plaintiff created the ad, but

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preparing the minutes of the meeting, the Court deems that portion of the statement undisputed.

[5] Shecter clarified that he did not mind taking over the task. (R-DSMF ¶ 44.)

published it without Shecter's approval. (DSMF ¶ 51.) The ad contained substantive mistakes and created conflicts between the accounting department and the company's leadership. (DSMF ¶ 52.)

- Plaintiff had problems creating an organizational chart. (DSMF ¶ 53.) He made Defendant purchase two software programs to create the chart, but eventually Sponiarova became frustrated with waiting and prepared a chart herself using Excel, for which Defendant already owned a software license. (*Id.*)

On the evening of December 4, 2019, at 9:36 p.m., Plaintiff sent an email about benefits enrollment to all of Defendant's employees. (DSMF ¶ 55.) In the email, Plaintiff included information about more generous plans that were available only to Defendant's Executive Committee, which Defendant treated as confidential and had never disclosed to its entire workforce. (*Id*; *see also* PSAF ¶ 13.) The next morning, Starosta called Shecter, who was in Charlotte on a business trip, to tell him about the email. (PSAF ¶ 14; Dep. of Bruce Shecter [Doc. 48] at 38.) The email upset Shecter because he believed the disclosure of the information "would erode the one-team company culture" that Defendant had worked to build. (DSMF

¶ 56.) At 8:15 a.m. on December 5, Shecter emailed Plaintiff reprimanding him for sending the email. (DSMF ¶ 57.) Shecter wrote:

> Nelson,
>
> I need your help. This one is on you. You need to dig deep and figure out how to fully embrace who we are, and the message we want to send.
>
> We are one Company, moving in one direction, with one asset. Our people.
>
> We are not the Executive Team and everyone else.
>
> We do not ever want to send that message.
>
> If you have something just for the [Executive Committee], then send it just to us.
>
> The below does a lot of damage. I have no doubt that now we have a lot of people wondering what else does the [Executive Committee] Team get that we do not.
>
> We need better from you.
>
> Sorry for the e-mail, but I need to get it off my mind.

[Doc. 38-8 at 11; *see also* R-DSMF ¶ 58; PSAF ¶¶ 16-19.] At the time Shecter sent this email, no decision had been made to terminate his employment. (PSAF ¶ 20.)

After sending the email, Shecter and Starosta spoke about Plaintiff's employment with Defendant. (PSAF ¶ 22.) During the conversation they agreed that the email was harmful to the culture of the company, that Plaintiff did not "get" who the company was, and that they had lost confidence in him. (Shecter Dep. at

9; Dep. of Peter Starosta [Doc. 47] at 8.) Having received input from Starosta, Shecter decided to fire Plaintiff. (Shecter Dep. at 9-11; PSAF ¶ 24.)

Because Shecter was travelling, Starosta called Plaintiff and told him that his employment was being terminated. (Starosta Dep. at 10.[6]) During the conversation, Starosta told Plaintiff that he was being discharged because he was not a "cultural fit" in the organization. (PSAF ¶ 27.[7]) He also explained to Plaintiff that the last mistake was one too many. (DSMF ¶ 60.[8])

Following Plaintiff's termination from employment, Defendant learned of additional evidence that it claims had it been aware of prior to December 5, 2019,

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[6] The parties dispute whether Starosta offered to call Plaintiff or if Shecter asked him to do so. (DSMF ¶ 59; R-DSMF ¶ 59; PSAF ¶ 25; R-PSAF ¶ 25.) This dispute is immaterial because even if Starosta volunteered to call Plaintiff, as Plaintiff contends, it is not probative of gender or racial animus.

[7] Defendant objects that this statement is inadmissible hearsay. (*See* R-PSAF ¶ 27.) The Court may consider the statement, however, for reasons explained in footnote 1.

[8] Plaintiff denies that Starosta told him that the last mistake was one too many. (R-PSAF ¶ 60.) In support, Plaintiff cites to Shecter's deposition testimony that purportedly reflects that Plaintiff was terminated because of the December 4, 2019 email and not for any other mistakes. (*Id.*) Shecter's testimony, however, does not rebut Starosta's account of what he said. Moreover, as will be discussed presently, Plaintiff reads Shecter's deposition too narrowly—Shecter did not say that it was the December 4 email alone that resulted in Plaintiff's firing, rather he clearly testified that the email was the culmination of many months of performance problems.

would have resulted in his termination.[9] For example, Defendant discovered that Plaintiff had deducted long-term insurance premiums for employees who had not signed up for the benefit and the incorrect premium amount was being deducted for employees who had signed up for the benefit (DSMF ¶ 100); he had mishandled an employee's request to change her health savings account contribution, which resulted in the employee over-contributing to the plan and tax consequences for the employee (DSMF ¶¶ 101-02); he did not give profit-sharing plan or 401k enrollment information to three employees (DSMF ¶ 103); he did not set up the company's payroll system to transfer benefits information to two benefit providers (DSMF ¶ 104); he did not adequately track paid time off for some employees (DSMF ¶ 105); he did not timely or correctly order new office furniture (DSMF ¶

[9] Plaintiff generally objects that evidence Defendant learned of additional wrongdoing after his termination as immaterial. [*See generally* R-DSMF ¶¶ 98, *et seq*.] To the contrary, these facts are material to an "after-acquired evidence" defense—*i.e*., that "the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone." *Holland v. Gee*, 677 F.3d 1047, 1065 (11th Cir. 2012) (citation omitted). A defendant who can make such a showing can limit a plaintiff's damages. *See Thomas v. Home Depot U.S.A., Inc.*, 792 F. App'x 722, 725 (11th Cir. 2019). But, as will be discussed below, Plaintiff's discrimination claims do not survive summary judgment, as no reasonable factfinder could conclude he was fired because of his race or gender; thus, the Court need not—and does not—address whether Defendant has met its burden to show after-acquired evidence. Thus, the Court refers the evidence solely for context.

107-109); and he advised Shecter of the incorrect maximum amount that Shecter could contribute to a 401k and did not correctly set Shecter up in the payroll system (DSMF ¶¶ 111-12). According to Shecter, had he learned of these "serious and costly errors" while Plaintiff was employed, he would have fired Plaintiff. (DSMF ¶ 113.) In addition, after Plaintiff's termination from employment, Defendant learned that Plaintiff disclosed highly confidential human resources matters with another employee over an internal computer chat (DSMF ¶ 115); at the time Plaintiff started work with Defendant he was still employed and receiving full-time wages from another employer (DSMF ¶¶ 128, 130); and Plaintiff had not filed his personal income tax returns since 2014 for no reason (DSMF ¶ 136). Defendant would also have terminated Plaintiff's employment had it become aware of any of this information. (DSMF ¶¶ 121, 131, 137.)

Additional facts as discussed in context below.

B. Procedural Posture

In his complaint, Plaintiff asserts three claims: (1) discrimination on the basis of his race and color in violation of Section 1981 [Doc. 14 ¶¶ 15-27]; (2) discrimination on the basis of race in violation of Title VII [*id.* ¶¶ 28-36]; and discrimination on the basis of gender in violation of Title VII [*id*. ¶¶ 37-45].

On October 5, 2020, Defendant moved for summary judgment as to all of Plaintiff's claims. [Doc. 38.] On December 7, 2020, Plaintiff responded to the motion [Doc. 49], and on December 29, 2020, Defendant filed a reply [Doc. 51].

III. DISCUSSION

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). For Plaintiff to prevail on his claim that he was terminated from employment on the basis of his race and/or gender, he must show that Defendant intentionally discriminated against him on the basis of his race using direct evidence, statistical evidence that shows a pattern or practice of discrimination, or circumstantial evidence.[10] *See Kilpatrick v. Tyson Foods, Inc.*, 268 F. App'x 860, 861 (11th Cir. 2008); *see also Denney v. City of Albany*, 247 F.3d 1172, 1182 (11th Cir. 2001) (citing *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d

[10] Courts evaluate Section 1981 employment discrimination claims using the same legal frameworks applicable to Title VII claims when based on the same set of facts. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998). Since Plaintiff's Section 1981 claim is based on the same facts that form the basis for his Title VII race discrimination claim, the Court considers the claims together.

1263, 1286 (11th Cir. 2000)). Plaintiff contends he has direct evidence of discrimination, while Defendant denies that he has even circumstantial evidence of discriminatory intent.

A. Direct Evidence

In Title VII jurisprudence, direct evidence of discrimination is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption. *Standard*, 161 F.3d at 1330. In other words, it must evince both a discriminatory attitude and a correlation between that attitude and the discrimination complained of by the employee: "only the most blatant remarks, whose intent could mean nothing other than to discriminate on the basis of some impermissible factor constitute direct evidence of discrimination." *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1156 (11th Cir. 2020) (citation omitted). For example, in this case, "direct evidence would be a management memorandum saying, 'Fire [Plaintiff]—he is [African American].'" *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1082 (11th Cir. 1990). Importantly, remarks unrelated to the decision-making process itself are not direct evidence of discrimination. *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1228 (11th Cir. 2002); *Bass v. Bd. of Cnty. Comm'rs, Orange Cnty.*, 256 F.3d 1095, 1105 (11th Cir. 2001).

Plaintiff argues that the following constitutes direct evidence of discrimination: (1) Shecter's statement to Plaintiff in August 2018 (a month after Plaintiff was hired) that Starosta told him that he (Starosta) preferred to employ a white woman as HR Director; (2) Shecter's temporary reassignment in August or September 2018 of recruiting responsibility to a white woman and Shecter's explanation that he made the change was because Plaintiff did not understand the "culture"; (3) Starosta's comment to Plaintiff in October 2018 that he would not have hired Plaintiff, but that now that Plaintiff was in the HR Director position, he would have to deal with it; and (4) Starosta's statement on the December 5, 2019 phone call to Plaintiff terminating his employment that Plaintiff that he was not a "cultural fit." [Doc. 49 at 5-6.] Citing *Wright v. Southland Corp.*, 187 F.3d 1287, 1300 (11th Cir. 1999), Plaintiff argues that the above evidence constitutes direct evidence of discrimination because a reasonable jury could find from it that "more probably than not, a causal link between an adverse employment action and a protected personal characteristic." [*Id.* at 6.]

The Court disagrees. The statements in which Shecter and Starosta expressed Plaintiff's purported inability to understand the "culture" and that he was not a "cultural fit," items 2 and 4 above, are not "blatant remarks, whose intent

could mean nothing other than to discriminate on the basis of race or gender." *See Fernandez*, 961 F.3d at 1156. For the terms "culture" or "cultural" to be a euphemism for race or gender discrimination—and in this case, discrimination against African Americans or men—requires an inference. Thus, those two comments are not direct evidence of discrimination.

Plaintiff's argument that there is evidence that Shecter used the word "culture" to mean the racial or gender make-up of Defendant's workforce also misses the mark. Plaintiff cites Shecter's deposition testimony that when he hired Plaintiff, he liked the fact that Plaintiff was an African American man, and then later he was pleased to learn that Plaintiff is gay, as, in Shecter's view, those demographics helped with the company's image of having diverse workforce. (R-DSMF ¶¶ 61, 63; *see* Shecter Dep. at 34.) The problem with this argument is that Plaintiff presents no evidence that Shecter used the term "culture" to mean anti-African American or anti-male animus either generally or in connection with his decision to terminate Plaintiff's employment. Indeed, the record suggests the opposite: Plaintiff conceded at his deposition that he believed Shecter harbored no such bias toward him. (Pl. Dep. at 84.) Likewise, Shecter did not make the comment in the context of Plaintiff's termination of employment. *See Fernandez*,

961 F.3d at 1156 (stating that the Eleventh Circuit "has declined to classify comments about one employment context as direct evidence of discrimination in another context"). At most, to the extent that Shecter's testimony can be understood to reflect any bias, it would be a bias in ***favor*** of Plaintiff's gender and race. Thus, Shecter's testimony provides no basis to equate his use of word "culture" to anti-male or anti-African American animus, much less direct evidence of discrimination.

Starosta's statement that he would not have hired Plaintiff, item 3 above, is not direct evidence of discriminatory intent either. That statement reveals nothing about why Starosta would not have hired him, rather, for it to be evidence of discrimination, one must make an inference.

Finally, Starosta's statement that he would have preferred to have hired a white woman as the HR Director, item 1 above, is better understood to be circumstantial evidence as it is remote in time (it predates the termination decision by nearly sixteen months) and it was made by someone other than the ultimate decisionmaker. Thus, for Starosta's comment to reveal that Defendant's decision to fire Plaintiff was because of discriminatory intent, one must infer both that Starosta's discriminatory attitude continued and that it tainted Shecter's decision.

Accordingly, that evidence is circumstantial. *See Allen v. City of Athens*, 937 F. Supp. 1531, 1543 (N.D. Ala. 1996) ("Comments by a supervisor that are temporally remote from the challenged decision can hardly be direct evidence of discrimination, since they require an inference of a general discriminatory attitude, followed by another inference that the attitude entered into the making of the challenged decision.").

Wright, cited by Plaintiff, does not compel a different result. In *Wright,* the lead opinion endorsed the view that direct evidence of discrimination is evidence that "more probably than not" shows a link between discriminatory animus and an adverse employment action. *Wright*, 187 F.3d at 1300. This is broader than the definition that the Eleventh Circuit has used in other cases. *See, e.g.*, *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1086 (11th Cir. 2004) ("If the alleged statement suggests, but does not prove, a discriminatory motive, then it is circumstantial evidence."), *abrogated on other grounds by Lewis v. Union City, Ga.*, 918 F.3d 1213, 1218 (11th Cir. 2019) (en banc). Although *Wright* is a published decision, it is not precedential because the two other members of the panel concurred in judgment only and did not join the lead opinion. *See Wright*, 187 F.3d at 1306; *see also Robertson v. Riverstone Cmtys.*, __ F. App'x __, __, 2021 WL 840915, at *4

n.6 (11th Cir. Mar. 5, 2021) (explaining that *Wright* is not precedential because "[t]he two other judges on the panel concurred in judgment only; they did not join the lead opinion's articulation of the direct-evidence standard"); *East v. Clayton Cnty., GA*, 436 F. App'x 904, 910 (11th Cir. 2011) (observing that although *Wright* has not been overruled, no published circuit opinion has applied the standard in *Wright* since it was decided); *Hunt v. Bibb Cnty. Props., LLC*, No. CIV.A. 13-00241-KD-M, 2014 WL 2093796, at *5 n.4 (S.D. Ala. May 20, 2014) (declining to apply *Wright*'s broader definition of direct evidence), *aff'd sub nom. Brown v. Bibb Cnty. Props, LLC*, 602 F. App'x 755 (11th Cir. 2015).

But even if the *Wright* "more probably than not" definition of direct evidence did apply here, the Court would still find that Plaintiff has not presented direct evidence of discriminatory intent. Shecter's statement that he transferred recruiting responsibilities to Skeen because Plaintiff did not understand the "culture," Starosta's comment that he would not have hired Plaintiff, and Starosta's comment that Plaintiff was not a "cultural fit" simply do not evince discriminatory animus on account of race or gender for the same reasons discussed above. The strongest evidence is Shecter's purported comment to Plaintiff that Starosta preferred to employ a white woman as HR Director; however that comment is far too remote in

time, predating the decision to terminate Plaintiff's employment by nearly sixteen months. As such, these statements do not show more probably than not that there is a causal link between Plaintiff's race or gender and his termination.

For these reasons, the Court finds that Plaintiff has not presented direct evidence of discrimination. The Court will, however, consider the evidence in evaluating Plaintiff's arguments that he can show pretext or offer a convincing mosaic of discriminatory intent.

B. Circumstantial Evidence

1. The *McDonnell Douglas* Framework

Because Plaintiff has presented no direct evidence of discrimination (nor statistical evidence), he must prove discrimination through circumstantial evidence. One way to do that is by using the familiar *McDonnell Douglas* burden-shifting analysis. *See Holifield v. Reno*, 115 F.3d 1555, 1561-62 (11th Cir. 1997). Under that framework, the plaintiff first has the burden of establishing a prima facie case of discrimination. *Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000). To establish a prima facie case of race discrimination, a plaintiff must show that (1) he belongs to a protected class; (2) he was qualified to do the job; (3) he was subjected to an adverse employment action; and (4) that the defendant treated similarly situated employees outside his protected class more favorably or, in the

case of discharge, that he was replaced by a person from outside his protected class. *Maynard v. Bd. of Regents of Div. of Univ. of Fla. Dep't of Educ. ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1289 (11th Cir. 2003).[11]

If the plaintiff meets his burden, the burden shifts to the defendant to articulate legitimate, nondiscriminatory reasons for the adverse employment action. *Chapman*, 229 F.3d at 1024. This burden is one of production, not persuasion, and is "exceedingly light." *Turnes v. AmSouth Bank, N.A.*, 36 F.3d 1057, 1061 (11th Cir. 1994); *see also Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1141 (11th Cir. 1983). If the defendant does so, the plaintiff is then given a final opportunity to show that the defendant's proffered nondiscriminatory reasons were merely a pretext for discriminatory intent. *Chapman*, 229 F.3d at 1024.

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[11] Defendant describes the fourth prong as requiring a plaintiff to show that "he was terminated because of his membership in the protected class." [Doc. 38-1 at 14.] While some cases (especially in the ADEA context) use similar language to describe what a plaintiff must show at the fourth prong of the prima facie case, *see, e.g., Kelliher v. Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002), in Title VII disparate treatment cases such as the one at bar, the plaintiff can make that showing by presenting evidence that the employer replaced him with someone outside the protected class or treated similarly situated employees outside his class more favorably, *see Maynard*, 342 F.3d at 1289.

a. Prima Facie Case

Here, there's no dispute that Plaintiff can establish the first and third prongs of a prima facie case: Plaintiff is African American and male, and Defendant fired him. With respect to the second prong—whether Plaintiff was qualified for the position—Defendant contends that Plaintiff cannot make this showing because (1) the position requires a college degree, but Plaintiff in fact did not have one and, when he applied for the job he falsely claimed he had graduated college; and (2) Plaintiff was not competent to do the job, as evidenced by his poor job performance. [Doc. 38-1 at 14.] Plaintiff responds that the mere fact that he was employed in the position is enough to satisfy this prong of the prima facie case, and, thus, the fact he did not have a college degree or as Defendant contends he did not performed his job well is immaterial to this analysis. [Doc. 49 at 9 (citing *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1360 (11th Cir. 1999).] Plaintiff additionally argues that allegations of poor job performance are properly considered only after a prima facie case has been established. [*Id.* (citing *Damon*).] On reply, Defendant asserts Plaintiff would be entitled to an inference that he was qualified for the position only if he had held the position for a significant period of time, and here, Plaintiff held the position for only a year-and-a-half and had performance issues from the very beginning. [Doc. 51 at 7-8.]

Though a close call, the Court finds Plaintiff's approximately year-and-a-half tenure as the HR Director is sufficient under these circumstances to give rise to an inference that he was qualified to perform the job for purposes of establishing a prima facie case. A plaintiff's burden to establish a prima facie case is "not onerous" and, where a plaintiff has been discharged from a previously held position, the Eleventh Circuit has held that the plaintiff does not need to satisfy this prong of the prima facie case. *Damon*, 196 F.3d 1360 (explaining that plaintiffs "who have been discharged from a previously held position" do not have to present proof that they were qualified for their positions to establish their prima facie case because their qualification for their positions is inferred). Although the two plaintiffs in *Damon* had held their positions for 34 and 13 years respectively and received numerous accommodations and accolades, *see id.*, *Damon* does not set a floor as to what qualifies as a "significant period of time." Indeed, other courts in this Circuit have found working for one to two years in a position is sufficient to give rise to an inference that the Plaintiff meets the qualification prong of the prima facie case. *See Key v. Cent. Ga. Kidney Specialists, P.C.*, No. 5:19-CV-00253-TES, 2020 WL 7053293, at *4 (M.D. Ga. Oct. 28, 2020) (finding that plaintiff's one-and-a-half to two-year tenure was a significant period of time that satisfied the

qualification prong of her prima facie case), *appeal docketed*, No. 20-14351 (11th Cir. Nov, 19, 2020); *Herring v. Con-Way Freight, Inc.*, No. 2:06-CV-1955-JHH, 2008 WL 11374394, at *13 (N.D. Ala. May 14, 2008) (finding that year-and-a-half tenure was significant enough to establish that employee was qualified for the position); *see also Kaczorowski v. SimplexGrinnell LP*, No. 1:16-CV-2967-MHC-LTW, 2018 WL 9597049, at *9 (N.D. Ga. Aug. 16, 2018) (finding that plaintiff's "nearly two years . . . spent performing his safely role was significant enough to support the inference that Plaintiff was qualified to hold his position"), *report and recommendation adopted*, 2018 WL 9597042 (N.D. Ga. Sept. 24, 2018); *cf. Ruiz v. Royal Flowers, Inc.*, No. 08-20589-CIV, 2009 WL 10666958, at *5 (S.D. Fla. Mar. 27, 2009) (applying *Damon* and finding that plaintiff who held position for approximately six months and had job performance issues did not need to establish qualified prong of prima facie case). The Court is also not persuaded that Plaintiff's lack of a college degree necessarily disqualified him for the position. To be sure, it is reasonable to read his resume as representing that he attended four years of college at Winston-Salem State University and had graduated with a degree in political science, when, in fact, he left after three years without having obtained a degree. (Pl. Dep. at 53-54.) But one could reasonably also conclude that Plaintiff

did not affirmatively represent that he had a degree on his resume.[12] Also, the evidence is mixed as to just how much emphasis Defendant placed on having a college degree or whether it was, in fact, required for the job since Defendant did not ask him about his education during his interview. (PSAF ¶ 11). Finally, the Court finds that Plaintiff's alleged poor job performance is better addressed at the pretext stage. *See Clark v. Coats & Clark Inc.*, 990 F.2d 1217, 1227 n.3 (11th Cir. 1993) ("Whether an employee possesses the qualifications for a position thus is generally distinct from the issue whether he performed the job satisfactorily.").

Turning next to the fourth prong of the prima facie case, Plaintiff argues that he has presented evidence that he was treated less favorably than a similarly-situated individuals outside his protected class. [Doc. 49 at 9.] Specifically, he points to evidence that (1) his two predecessors in the position were white women and neither of them was terminated and instead left Defendant "of their own accord,"

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[12] To be clear, it is certainly reasonable to conclude that Plaintiff padded his resume to misrepresent his education. The pertinent portion of the resume appears as follows:

[Doc. 38-8 at 49.]

and (2) in August or September 2018, Defendant reassigned the recruiting responsibility to Skeen, a white woman. [*Id.* at 11-12.]

As noted above, a plaintiff can establish the fourth prong of the prima facie case by showing that he was treated less favorably than a similarly situated individual outside his protected class. *See Herron-Williams v. Ala. State Univ.,* 805 F. App'x 622, 628 (11th Cir. 2020). The Eleventh Circuit has explained that to be "similarly situated," the employees must be "similarly situated in all material respects." *Lewis v. City of Union City*, 918 F.3d 1213, 1224 (11th Cir. 2019) (en banc). Factors relevant to this analysis include whether the comparator engaged in the same basic conduct or misconduct as the plaintiff; whether the comparator was subject to the same employment policy, guideline, or rule as the plaintiff; whether the comparator and the plaintiff had the same supervisor; and whether the comparator shared the plaintiff's employment or disciplinary history. *Menefee v. Sanders Lead Co.*, 786 F. App'x 963, 967 (11th Cir. 2019) (citing *Lewis*, 918 F.3d at 1227-28). In short, the "plaintiff and [his] comparators must be sufficiently similar, in an objective sense, that they cannot reasonably be distinguished." *Lewis*, 918 F.3d at 1228 (citation omitted).

Plaintiff cannot make this showing. His two predecessors are not proper comparators, as there is no indication that they engaged in the same "basic conduct or misconduct" as Plaintiff or that they had a similar employment history as him. Moreover, Plaintiff's assertion that they were treated better because they were allowed to leave on their own accord is a non sequitur—Plaintiff does not complain that he was somehow prevented from quitting, rather the gravamen of his complaint is that the was fired.

Nor is Skeen a proper comparator. She holds a completely different title (executive assistant), there is no evidence as to her disciplinary or employment history, or whether she engaged in the same or similar offenses. Further, the reassignment of recruiting responsibilities is not at all probative of Defendant's discriminatory intent because it was Shecter who made the decision to reassign those responsibilities and there is no evidence that Shecter harbored any discriminatory animus against Plaintiff. Moreover, Plaintiff's deposition testimony appears to suggest that the recruitment responsibilities were transferred to Skeen temporarily so she could attend a job fair on behalf of Defendant while Plaintiff was on vacation. (Pl. Dep. at 79.) Finally, Plaintiff admits that Shecter and Sponiarova never did or said anything leading him to believe that they had any

issues with Plaintiff's race or gender or that Plaintiff might be terminated one day based on his race of gender. (DSMF ¶¶ 83, 84, 87, 88.)

For these reasons, Plaintiff cannot establish a prima facie case of discrimination on the basis of his race or gender.

b. Legitimate Nondiscriminatory Reason

Even assuming that Plaintiff could present a prima facie case of discrimination, Defendant proffers a legitimate, nondiscriminatory reason for discharging Plaintiff, namely, poor job performance. [Doc. 38-1 at 16.] In particular, Defendant points out that Plaintiff received a negative annual performance evaluation, after the evaluation he did not improve and continued to have problems performing his job, and he was finally terminated after he revealed confidential employee benefits information about Defendant's Executive Committee to the entire company. [*Id.*] Plaintiff counters that poor job performance cannot be Defendant's stated reason for its decision to terminate his employment because Shecter stated that Plaintiff was fired for sending the December 4 email in which he disclosed benefits information about the Executive Committee . [Doc. 49 at 12-13 (citing Shecter Dep. at 18-19); *see also* R-DSMF ¶ 54 (disputing Defendant's statement that Plaintiff was fired for "an accumulation of multiple issues," the last one occurring in December 2019).]

Contrary to Plaintiff's argument, Shecter's deposition testimony and Defendant's articulated reason for terminating Plaintiff's employment are consistent. Shecter did not testify that the December 4 email was the sole reason for deciding to terminate Plaintiff's employment, rather he stated that it was the "final reason for the separation" following a history of poor job performance. (Shecter Dep. at 12, 14-15, 19-20.) In other words, Plaintiff was terminated due to the cumulative effect of his poor job performance and the December 4 email was the final straw. Accordingly, Defendant has met its burden to articulate a legitimate, nondiscriminatory reason for terminating Plaintiff's employment, and the burden shifts back to Plaintiff to show that Defendant's proffered legitimate, non-retaliatory reason for its adverse employment action is merely pretext for unlawful discrimination.

c. Pretext

A plaintiff may establish pretext "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981). The burden of demonstrating pretext "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Id.* The plaintiff must "come forward

with evidence, including the previously produced evidence establishing the prima facie case, sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision," but that discrimination was instead. *Chapman*, 229 F.3d at 1024 (*quoting Combs v. Plantation Patterns, Meadowcraft, Inc.*, 106 F.3d 1519, 1528 (11th Cir. 1997)). The plaintiff cannot, however, "establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, so long as the reason is one that might motivate a reasonable employer." *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001).

Plaintiff contends that discrimination was the real reason for his termination because (1) Starosta was biased against Plaintiff because of his race and gender and (2) this bias infected Shecter's decision to fire Plaintiff. Plaintiff argues that his company-wide email disclosing confidential benefit plans was not the real reason for which he was fired because "Shecter himself stat[ed] that he did not intend to fire Plaintiff for the email," but instead decided to fire Plaintiff after speaking with Starosta. [Doc. 49 at 15 (citing Shecter Dep. at 8-9).] Based on this evidence, Plaintiff maintains that a reasonable jury could find that Defendant did not consider the December 4 email to be termination-worthy until Starosta intervened. [*Id.* at

16.] To link Starosta's alleged discriminatory intent to the decision to fire Plaintiff, Plaintiff points to evidence that (1) Starosta stated to Shecter that he would have preferred to have hired a white woman in Plaintiff's position; (2) Starosta stated that when considering job applications, there was "no rhyme or reason to it all other than what they graduated with, where they're from, where they live, and how they look"; and (3) Starosta told Plaintiff that he would have never hired Plaintiff and would have to deal with him. [*Id.*]

The Court disagrees that Starosta's statements and his role in Plaintiff's termination create a triable issue of fact. In evaluating the probative value of comments—that is, the strength of the inference of discrimination that can reasonably be drawn from them—courts look to their "substance, context, and timing." *Damon*, 196 F.3d at 1362; *see also Bonham v. Regions Mortg., Inc.*, 129 F. Supp. 2d 1315, 1332 (M.D. Ala. 2001). "[A] comment unrelated to a termination decision may contribute to a circumstantial case for pretext"; however, "it will usually not be sufficient absent some additional evidence supporting a finding of pretext." *Scott v. Suncoast Beverage Sales, Ltd.*, 295 F.3d 1223, 1229 (11th Cir. 2002) (emphasis omitted).

Viewing the evidence in the light most favorable to Plaintiff, Starosta's purported statement to Shecter sometime before August 2018 is the clearest indication of discriminatory intent; however, the comment occurred around sixteen months prior to the decision to terminate Plaintiff and was unrelated to the decision to fire Plaintiff. *See Williams v. Hous. Opportunities for Persons with Exceptionalities*, 777 F. App'x 451, 454-55 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 1113 (2020) (finding supervisor's statement to plaintiff that she "can't stand your black ass" did not create issue of fact because statement was unrelated to termination decision); *Benson v. Gen. Elec. Int'l, Inc.*, No. 1:04-CV-1677-BBM, 2005 WL 8154653, at *5 (N.D. Ga. Sept. 8, 2005) (finding that ageist comments by person involved in decision to terminate plaintiff's employment made six months earlier did not demonstrate pretext). As for Starosta's later comments, they simply do not reveal any animosity toward Plaintiff on account of his race or gender. But even if they did, they too were completely unrelated to the decision to fire Plaintiff.

At the end of the day, Plaintiff has not presented evidence from which a reasonable jury could find a causal link between Starosta's alleged bias and Shecter's decision to fire Plaintiff. Thus, the Court finds that even if Plaintiff could

establish a prima facie case of discrimination, he has not carried his burden to show that Defendant's reason for terminating his employment was pretext.

2. Convincing Mosaic

Plaintiff alternatively argues that Defendant is not entitled to summary judgment because he has presented a convincing mosaic of evidence from which a jury could conclude that he was fired because of his race or gender. Where a plaintiff does not have a comparator to point to, the Eleventh Circuit has held that a prima facie case may also be made by showing a "'convincing mosaic' of circumstantial evidence that warrants an inference of intentional discrimination." *Lewis*, 918 F.3d at 1221 n.6 (citing *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011)). In *Smith*, the Eleventh Circuit stated that "the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion in an employment case," and that a plaintiff can survive summary judgment if he "presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." 644 F.3d at 1328. This "convincing mosaic" may substitute for both the prima facie case of discrimination and a demonstration of pretext. *King v. Ferguson Enters., Inc.*, 971 F. Supp. 2d 1200, 1217-18 (N.D. Ga. 2013), *aff'd*, 568 F. App'x 686 (11th Cir. 2014); *see also Dukes v. Shelby Cnty. Bd. of Educ.*, 762 F.

App'x 1007, 1011-12 (11th Cir. 2019) (holding that the "convincing mosaic" method is a totality of the circumstances analysis that is not subject to the formalities of the *McDonnell Douglas* test). Indeed, the analysis

> is not intended to be a rigid formula; there is not one way of proving a case through its lens. Instead, it allows a reviewing court to consider relevant evidence of discrimination that does not fall within the ambit of the traditional prima facie case under *McDonnell-Douglas*, and to permit a plaintiff's claim to proceed where []he is unable to meet one of the prima facie elements under *McDonnell-Douglas* but nevertheless presents sufficient circumstantial evidence of discrimination.

Scott v. Soc. Involvement Missions, Inc., No. 1:17-cv-4963-AT-CCB, 2020 WL 7237702, at *4 (N.D. Ga. Dec. 9, 2020) (citing *Chapter 7 Trustee v. Gate Gourmet, Inc.*, 683 F.3d 1249 (11th Cir. 2012)). Even so, the Eleventh Circuit has specifically recognized three categories of circumstantial evidence that are relevant under the mosaic approach:

> (1) suspicious timing, ambiguous statements, and other bits and pieces from which an inference of discriminatory intent might be drawn, (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual.

Lewis, 934 F.3d at 1185 (citing *Lockheed-Martin*, 644 F.3d at 1328) (internal quotation marks and alteration omitted); *see also Smith v. City of New Smyrna Beach*, 588 F. App'x 965, 976 (11th Cir. 2014).

Here, Plaintiff attempts to piece together a convincing mosaic of discrimination using the same assertions discussed in the pretext inquiry, namely, Shecter did not consider Plaintiff's pre-December 4, 2019 problems to be termination-worthy; Starosta commented to Shecter sometime around August 2018 that he preferred a white woman in Plaintiff's position; Starosta told Plaintiff in October 2018 that he would not have hired Plaintiff and would now have to deal with him; Starosta remarked in a November 2019 management meeting that a job candidate's appearance is a factor to be considered in making hiring decisions; Shecter decided to fire Plaintiff only after getting input from Starosta; and Starosta told Plaintiff during the December 5, 2019 phone call that Plaintiff was not a "cultural fit." [Doc. 49 at 19-20.] But, as discussed above, the timing and content of Starosta's statements fail to raise a reasonable inference of discriminatory intent and Plaintiff had not rebutted Defendant's assertion that Plaintiff's poor job performance, culminating in his sending the December 4 email, was the reason he was fired. In addition, there is no evidence that Defendant systemically treated similarly situated employees better. As a result, this evidence does not present a mosaic of race or gender discrimination, let alone a convincing one. *See Hutchinson v. Sec'y, Dep't of Veterans Affairs*, 766 F. App'x 883, 889 (11th Cir.

2019) (finding plaintiff did not present a convincing mosaic of race or sex discrimination where she merely reiterated the same arguments she made to support her pretext argument); *Flowers v. Troup Cnty., Ga., Sch. Dist*., 1 F. Supp. 3d 1363, 1381 (N.D. Ga. 2014) (finding that plaintiff did not demonstrate a convincing mosaic of race discrimination where "most of the evidentiary tiles he proffers were discarded as insufficient or irrelevant in considering his other arguments against summary judgment" and that "[t]hese tiles cannot now be reassembled to create a convincing mosaic of discriminatory intent"), *aff'd*, 803 F.3d 1327 (11th Cir. 2015).

Accordingly, Plaintiff cannot withstand Defendant's motion for summary judgment on this alternate theory of proving discrimination.

C. Mixed Motive

Finally, Plaintiff invokes a mixed-motive theory of discrimination to argue that there is at least a triable issue of fact as to whether discriminatory animus motivated the decision to terminate his employment. [*See* Doc. 49 at 20-23.] To succeed on this theory, Plaintiff must show both legal and illegal rationales motivated an adverse employment action. *Heatherly v. Univ. of Ala. Bd. of Trustees*, 778 F. App'x 690, 693 (11th Cir. 2019) (citing *Quigg v. Thomas Cnty. Sch. Dist.,* 814 F.3d at 1235-36, 1235 n.4 (11th Cir. 2016)). This is in contrast to

the single-motive theory of discrimination, which requires "a showing that bias was the true reason for the adverse action." *Quigg*, 814 F.3d at 1235.

The Court evaluates a mixed-motive discrimination claim using a two-step inquiry. First, the Court determines whether the plaintiff has presented evidence that the defendant took an adverse employment action against him; and if so, the Court next assesses whether the plaintiff has presented sufficient evidence for a jury to conclude, by a preponderance of the evidence, that a protected characteristic was a motivating factor for the adverse employment action (even if other factors also motivated the action). *Heatherly*, 778 F. App'x at 693-94; *see also Burton v. Gwinnett Cnty. Sch. Dist.*, 756 F. App'x 926, 928 (11th Cir. 2018); *Quigg*, 814 F.3d at 1235, 1239.

A plaintiff may timely raise a mixed motive theory of discrimination so long as he does so "[a]t some point in the proceedings"—including as late as in opposition to a motion for summary judgment. *Williams v. Fla. Atl. Univ.*, 728 F. App'x 996, 999 (11th Cir. 2018) (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 n.12 (1989)). Even so, the plaintiff must present argument (and evidence), "that unlawful bias, in addition to other factors, motivated the adverse [employment] actions." *Smith v. Vestavia Hills Bd. of Ed.*, 791 F. App'x 127, 131

(11th Cir. 2019) (citing *Quigg*, 814 F.3d at 1235). "[A] single-motive case is not transformed into a mixed-motive case merely because the employer raises a legitimate, nondiscriminatory reasons for its action." *Id.* Otherwise, "every case would be a mixed-motive case and the *McDonnell Douglas* framework would be irrelevant." *Id.*

Here, Plaintiff argues that the same circumstantial evidence that supports his pretext argument is also sufficient to show that his race and gender were motivating factors in his termination. [Doc. 49 at 22.] The problem for Plaintiff is that even when making this argument, he still asserts that if it were not for Starosta's discriminatory animus, Shecter would not have fired him. Plaintiff writes:

> Even if the December 4, 2019 email or the other mistakes Defendant asserts played a role in his termination, the decision to terminate Mr. Little was made *after* Mr. Shecter, ***who was not going to fire Mr. Little***, spoke with Mr. Starosta who previously told Mr. Little he would never have hired him himself and told Mr. Shecter that he wanted a white woman in Mr. Little's role.

[Doc. 49 at 22 (second emphasis added).] In other words, what Plaintiff is really arguing is that but for Mr. Starosta's discriminatory intent, he would not have been fired. Thus, despite invoking a mixed-motive theory of discrimination, Plaintiff is, in fact, pursuing a single-motive theory of discrimination—*i.e.*, that the true reason

for his firing was his race or gender and that the employer's stated reasons for terminating his employment were pretext for discrimination.

But even if Plaintiff had properly presented a mixed motive theory of discrimination, no reasonable jury could find by a preponderance of the evidence that Plaintiff's race or gender motivated the decision to terminate his employment. To recap, Plaintiff contends that Starosta's racial or gender bias tainted Shecter's decision to fire Plaintiff and in support points to evidence that (1) the decision to fire Plaintiff was made only after Shecter spoke with Starosta; (2) Starosta previously told Plaintiff that he would have never hired Plaintiff himself; (3) Starosta previously told Shecter that he wanted a white woman in Plaintiff's position; and (4) Starosta emphasized in a management meeting that he was interested in how job applicants "looked." [Doc. 49 at 22-23.] This evidence is far too attenuated for a jury to reasonably conclude that gender or racial bias played a role in the decision to terminate Plaintiff's employment. To start, it is important to note that Starosta's statements that he would not have hired Plaintiff himself and that he was interested in how applicants "looked" do not reasonably show that Starosta harbored some sort of racial or sexist animus. The only comment that could reasonably evince some sort of bias is Starosta alleged comment to Shecter

that he preferred having a white woman in the role of HR director. Even so, as previously discussed, this comment (as well as Starosta's other comments) all occurred well over a year before Plaintiff was fired, and there is no evidence that Starosta repeated them or that he made similar ones that might evidence the existence of discriminatory animus at the time he spoke with Shecter just before Plaintiff was fired. *Cf. Quigg*, 814 F.3d at 1241-42 (holding that school superintendent presented sufficient circumstantial evidence that gender bias was a motivating factor in school board's decision not to renew her contract where members of the board made statements evincing a preference for a male "(1) during conversations about whether to renew [her] contract, (2) in relative temporal proximity to the vote, and (3) specifically referring to the composition of the office of the superintendent"). Absent evidence that reasonably links Shecter's decision-making process to allegations of discriminatory intent, Plaintiff's mixed motive theory fails.[13]

[13] Defendant also moves for summary judgment on Plaintiff's request for reinstatement, front pay, and back pay based on the after-acquired evidence defense. [Doc. 38-1 at 22-25.] Because Defendant is entitled to summary judgment on each of the claims in this case, the Court need not—and does not—address that issue. *Ducksworth v. Strayer Univ., Inc*., No. 2:16-CV-01234-JEO, 2019 WL 1897278, at *17 n.9 (N.D. Ala. Apr. 29, 2019) (declining to address after-acquired

IV. CONCLUSION

For the foregoing reasons, it is **RECOMMENDED** that Defendant's Motion for Summary Judgment [Doc. 38] be **GRANTED**.

IT IS SO RECOMMENDED this 10th day of March, 2021.

JOHN K. LARKINS III
United States Magistrate Judge

evidence defense where court granted summary judgment to defendant on underlying discrimination and retaliation claims).