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

ANDRE DAVIS,	:	CIVIL ACTION NO.
	:	1:20-CV-1574-LMM-JSA
Plaintiff,	:	
	:	
v.	:	
	:	
DEKALB COUNTY, GA,	:	**FINAL REPORT AND**
	:	**RECOMMENDATION ON A MOTION**
Defendant.	:	**FOR SUMMARY JUDGMENT**

Plaintiff Andre Davis filed this action on April 13, 2020. Plaintiff alleges that Defendant DeKalb County, Georgia ("Defendant" or "the County"), his former employer, discriminated against him based on his race, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq*., and 42 U.S.C. § 1981 ("§ 1981").

The action is before the Court on the Defendant's Motion for Summary Judgment [34]. For the reasons set forth below, the undersigned **RECOMMENDS** that Defendant's Motion for Summary Judgment [34] be **GRANTED** and that judgment be entered in favor of Defendant on all of Plaintiff's claims.

I. FACTS

Unless otherwise indicated, the Court draws the following facts from Defendant's "Statement of Material Facts to Which There Is No Issue to Be

Tried" [34-2] ("Def. SMF"), Plaintiff's "Statement of Additional Undisputed Material Facts" [42-3] ("Pl. SMF"), and their associated exhibits. Some facts may also taken from Plaintiff's "Responses to Defendant's Statement of Undisputed Material Facts" [42-2] ("Pl. Resp. SMF") and Defendant's "Response to Plaintiff's Statement of Additional Undisputed Material Facts" [45-1] ("Def. Resp. SMF").

For those facts submitted by Defendant that are supported by citations to record evidence, and for which Plaintiff has not expressly disputed with his own citations to record evidence, the Court must deem those facts admitted, pursuant to Local Rule 56.1(B). *See* LR 56.1(B)(2)(a)(2), NDGa ("This Court will deem each of the movant's facts as admitted unless the respondent: (i) directly refutes the movant's fact with concise responses supported by specific citations to evidence (including page or paragraph number); (ii) states a valid objection to the admissibility of the movant's fact; or (iii) points out that the movant's citation does not support the movant's fact or that the movant's fact is not material or otherwise has failed to comply with the provisions set out in LR 56.1(B)(1)."). Accordingly, for those facts submitted by Defendant that Plaintiff has failed to dispute with citations to record evidence, the Court must accept the facts as true, so long as the facts are supported by citations to record evidence, do not make credibility determinations, and do not involve legal conclusions. *See E.E.O.C. v. Atlanta*

Gastroenterology Assocs., LLC, No. CIV. A. 1:05-CV-2504-TWT, 2007 WL 602212, at *3 (N.D. Ga. Feb. 16, 2007).

The Court has also excluded assertions of fact by either party that are clearly immaterial, or presented as arguments or legal conclusions, and has excluded assertions of fact unsupported by a citation to admissible evidence in the record or asserted only in a party's brief and not in its statement of facts. *See* LR 56.1(B)(1), NDGa ("The court will not consider any fact: (a) not supported by a citation to evidence . . . or (d) set out only in the brief and not in the movant's [or respondent's] statement of undisputed facts."); *see also* LR 56.1(B)(2)(b) (respondent's statement of facts must also comply with LR 56.1(B)(1)). The Court has nevertheless viewed all evidence and factual inferences in the light most favorable to Plaintiff, as required on a defendant's motion for summary judgment. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *McCabe v. Sharrett*, 12 F.3d 1558, 1560 (11th Cir. 1994); *Reynolds v. Bridgestone/Firestone, Inc.*, 989 F.2d 465, 469 (11th Cir. 1993).

Plaintiff Andre Davis, who is African-American, began his employment with the Fire & Rescue Department ("DCFD") of DeKalb County (the "County") as a Firefighter Recruit on November 2017. Def. SMF at ¶¶ 1, 3. Plaintiff was a member of Recruit Class #109. Pl. SMF at ¶ 1. As a Recruit, Plaintiff's primary

responsibilities were to participate in classes and training, and prepare for subsequent testing. Def. SMF at ¶ 1; Pl. Resp. SMF at ¶ 1.

Darnell Fullum ("Chief Fullum"), who is also African-American, is the Fire Chief of the DCFD. Def. SMF at ¶¶ 4, 5. As Fire Chief, Chief Fullum has overall responsibility for the operations of the DCFD, including but not limited to, making hiring decisions and carrying out employee discipline. Def. SMF at ¶ 6. Whenever a disciplinary matter comes before Chief Fullum for consideration, he receives a packet containing all documentation relevant to the infraction and supporting the disciplinary recommendation. Def. SMF at ¶ 7. Moreover, when an employee is arrested, it is the DCFD's practice to request a copy of the police report directly from the arresting agency. Def. SMF at ¶ 8.

In this case, Plaintiff was arrested on March 31, 2018, in the City of East Point for obstruction and disorderly conduct. Def. SMF at ¶ 9. Chief Fullum received a copy of Plaintiff's police report. Def. SMF at ¶ 10. According to the police report, on March 31, 2018, Plaintiff was at a bar called the UBAR when a fight broke out inside the bar and spilled outside. Def. SMF at ¶ 11. The police report states that officers approached Plaintiff and asked him to "get off of the rail" of the patio and move away from the area, but Plaintiff responded, "why the hell I have to get off the rail?" Def. SMF at ¶ 12. The police report further states that Plaintiff was asked again

to leave the area, but he refused. Def. SMF at ¶ 13. According to the police report, during the exchange, Plaintiff accused the officers of harassment and began using profanity. Def. SMF at ¶ 14. Plaintiff is quoted in the police report as screaming "Fuck You!" to one of the officers who approached Plaintiff and made physical contact with him. Def. SMF at ¶ 15. The police report explains that the verbal altercation continued with Plaintiff continuously using profanity towards the officers. Def. SMF at ¶ 16.

Plaintiff is also quoted in the police report as saying, "you touched my fuckin dog tags why you touch my dog tag?" and continuously screaming language to this effect. Def. SMF at ¶ 17. The police report also states that Plaintiff called the officers "butt wipes." Def. SMF at ¶ 18. The police report further states that after five minutes of acting erratic and "hosting a show for the patrons," Plaintiff was placed in handcuffs, but the profanity continued. Def. SMF at ¶ 19. Although Plaintiff does not dispute that the police report stated as such, he denies that the police report was accurate and denies that he did or said most of the things he is accused of doing in the report. *See* Pl. Resp. SMF at ¶¶ 12-19. Specifically, Plaintiff denies screaming "Fuck You!" at Corporal Allen, does not recall using "f'ing" when referencing his dog tags, denies referring to the officers as "butt wipes," and does not recall screaming profanity on the way to the patrol vehicle. Pl. SMF at ¶¶ 32-37.

According to Plaintiff, on the evening of March 30-31, 2018, he went to a bar in Camp Creek, Georgia, after work hours with several Firefighter Recruits from Plaintiff's class. Pl. SMF at ¶ 9. While he on the bar's outdoor patio area talking to two unidentified women, Plaintiff became aware of an altercation occurring inside. Pl. SMF at ¶ 10. Plaintiff entered the establishment to locate his friends and was met with security asking people to disperse. Pl. SMF at ¶ 11. Plaintiff then left the building and began walking towards the outdoor patio to inform the two women that he was leaving. Pl. SMF at ¶ 12.

When Plaintiff approached the two women, he was told by a female officer (later identified as Corporal Allen) that he "need[ed] to get away" and that she already told him to leave. Pl. SMF at ¶ 13. Plaintiff informed Cpl. Allen that he had not previously spoken to her and that he was informing the women he was with where to go upon exiting the establishment. Pl. SMF at ¶ 14. Cpl. Allen began to raise her voice and ask Plaintiff if he intended to incite a riot. Pl. SMF at ¶ 15. Plaintiff thereafter agreed to meet with one of the women he was speaking to and was told by Cpl. Allen that he, "[didn't] know when to keep [his] mouth shut." Pl. SMF at ¶ 16.

As Plaintiff was already walking away from the bar, Cpl. Allen commanded for a second time that he leave. Pl. SMF at ¶ 17. A male officer (later identified as

Corporal Frazier) approached Plaintiff from his side, grabbed Plaintiff's dog tags, and asked Plaintiff if he was in the military. Pl. SMF at ¶ 18. Cpl. Frazier then tackled Plaintiff and claimed that Plaintiff was resisting arrest. Pl. SMF at ¶¶ 19, 36. When Plaintiff asked why he was being arrested, he was told by Cpl. Allen that he was trying to incite a riot. Pl. SMF at ¶ 20. When Firefighter Recruit Jermaine Dailey approached to find out what happened to Plaintiff, Cpl. Allen asked Dailey if he also wanted to go to jail and if he was also trying to start a riot. Pl. SMF at ¶ 21.

Plaintiff was arrested for obstruction and disorderly conduct and transported to Fulton County Jail by Cpl. Allen, where he was booked by jail intake staff. Pl. SMF at ¶ 22. During his booking, Cpl. Allen discovered Plaintiff's DCFD identification in his wallet and threatened Plaintiff by stating she would make sure he lost his job with the Fire Department. Pl. SMF at ¶ 23. Plaintiff later completed forty hours of community service in exchange for the dismissal of his charges. Pl. SMF at ¶ 24.

Following Plaintiff's release, he called Instructor William Gouveia to inform DCFD of his arrest on the evening of March 30-31, 2018. Def. SMF at ¶ 20; Pl. SMF at ¶¶ 25-26. Plaintiff admitted to Gouveia that he had alcoholic beverages, that he used profanity towards the police officers during his arrest, and that he did not tell Cpls. Allen and Frazier that he was a firefighter. Def. SMF at ¶ 20; Pl. SMF at ¶ 26.

According to Defendant, Plaintiff also admitted that he had to be told more than once by police to disperse from the area on the night he was arrested. Def. SMF at ¶ 20; Pl. Dep. [36] 155-56. Although Plaintiff does not dispute that, he "clarifies that he was already walking away at the time of Corporal Allen's second instruction to disperse." Pl. Resp. SMF at ¶ 21; Pl. Dep. 174. Gouveia told Plaintiff that he would talk to Captain Bullock and instructed Plaintiff to come to work the following Monday. Pl. SMF at ¶ 27. Upon his return to work, Plaintiff wrote down his own account of the events at the direction of Captain Bullock. Pl. SMF at ¶ 28.

Plaintiff also met with Chief Fullum, Captain Bullock, Captain Roberts, and a Human Resources employee. Pl. SMF at ¶ 29. At the time of the meeting, Chief Fullum had not yet been provided with a copy of the police report. Pl. SMF at ¶ 30. Defendant contends that Chief Fullum met with Plaintiff to allow him the opportunity to explain his actions, and Plaintiff admitted to yelling and swearing at police and not following instructions. Def. SMF at ¶ 22. Although Plaintiff does not dispute that, he "clarifies that he only admitted to using profanity with Allen and Frazier in response to feeling harassed." Pl. Resp. SMF at ¶¶ 22, 29; Pl. Dep. 158, 178-79, 181, 183.

In addition to his written statement, Plaintiff provided verbal statements in conversations with DCFD, admitting to his use of profanity with Cpls. Allen and

Frazier in response to feeling harassed. Pl. SMF at ¶ 31. After Plaintiff's statements, Chief Fullum stated that he spoke with one of the officers involved and that the officer alleged Plaintiff identified himself as a firefighter on the night of his arrest, which Plaintiff denied. Pl. SMF at ¶ 40. Plaintiff was suspended pending Chief Fullum's receipt of the police report. Pl. SMF at ¶ 41. The police report verified that Cpl. Allen obtained Plaintiff's Firefighter ID from his wallet, not that Plaintiff informed her that he was a Firefighter as Chief Fullum was previously informed. Pl. SMF at ¶ 42.

Plaintiff was cited with violating DCFD's "Violation of Law" policy, which sets forth a recommended schedule of penalties for first, second, and third offenses. Def. SMF at ¶ 23; Pl. SMF at ¶ 46. The "Violation of Law" policy prohibits the violation or attempted violation of any Federal, State, County or Municipal Law, whether criminal proceedings are instituted or not. Pl. SMF at ¶ 68. For a first offense, as was the case for Plaintiff, the recommended penalty is a 40-hour suspension for a 40-hour employee. Def. SMF at ¶ 24. However, according to Defendant, recommendations for levels of corrective action set forth in the DCFD's Employee Manual are merely guidelines and do not limit Chief Fullum's authority as the Fire Chief to impose a different penalty. Def. SMF at ¶ 25; Fullum Decl. at ¶ 9.

According to Plaintiff, the DCFD Employee Manual states that mitigating circumstances are circumstances surrounding the incident that "may warrant a more severe or less severe corrective action" including: (a) the employee's attitude; (b) the severity of the incident; (c) the length of service time of the employee with a good work record; or (d) if more than one violation occurs out of the same act of misconduct. Pl. Resp. SMF at ¶ 25; Pl. SMF at ¶ 63; Pl. Dep., Ex. 3, pp. 53-54. Plaintiff also contends that the Manual states that the Investigating Supervisor must document the mitigating circumstances involved in determining the corrective action, and when an employee is charged with multiple violations, those violations may be considered separately in arriving at the final recommendation for corrective action. Pl. Resp. SMF at ¶ 25; Pl. SMF at ¶¶ 64-65; Pl. Dep., Ex. 3, pp. 53-54.

Defendant contends that Chief Fullum is not required to apply progressive discipline in cases of serious infraction or in the case of probationary employees who are still completing their working test period. Def. SMF at ¶ 26; Fullum Decl. at ¶ 9. Probationary employees are not only responsible for learning the profession academically but also for demonstrating that they possess the necessary character and integrity to hold the position of Firefighter. Def. SMF at ¶ 27; Fullum Dep. [35] 23-24.

Plaintiff's employment was terminated effective April 10, 2018, at which time he was still a probationary employee. Def. SMF at ¶ 28; Pl. SMF at ¶ 45. According to Plaintiff, Chief Fullum informed him that he allegedly violated the "Violation of Law" policy. Pl. SMF at ¶ 46. Plaintiff also contends that Chief Fullum told him that his arrest, if made public, would reflect poorly on the Department, more so because there was alcohol involved. Pl. SMF at ¶ 47. Plaintiff was also informed that, as a probationary employee, he did not have a right to appeal under the DeKalb County Personnel Code. Pl. SMF at ¶ 48.

Chief Fullum testified that he terminated Plaintiff's employment because he was arrested and because of conduct that he admitted to during his incident with police. Def. SMF at ¶ 29; Fullum Dep. 18-19. Chief Fullum further testified that he declined to adopt the recommended discipline for a first offense of the "Violation of Law" policy in Plaintiff's case, because Plaintiff was a probationary employee, and his display of disrespect for authority and lack of judgment made it impossible for Chief Fullum to recommend Plaintiff for certification as a Firefighter. Def. SMF at ¶ 30; Pl. SMF at ¶ 60; Fullum Dep. 22-24, 40-41.

Although Plaintiff does not dispute that Chief Fullum testified as such, Plaintiff disputes that Chief Fullum's stated reason was the real reason why Chief Fullum declined to adopt the recommended discipline. Pl. Resp. SMF at ¶ 30. After

Plaintiff was terminated, he learned that Justin Smalley, another recruit in Class 109, was also arrested but was not terminated. Pl. SMF at ¶ 49; Pl. Resp. SMF at ¶ 30. According to Plaintiff, Smalley's discipline followed the table of penalties in the Employee Manual, while Chief Fullum failed to document the mitigating circumstances in his corrective action form for Plaintiff pursuant to policy. Pl. Resp. SMF at ¶ 30; Pl. SMF at ¶ 66; Pl. Dep., Ex. 2, Ex. 3. Although Smalley reported to different instructors, all Firefighter Recruits in Class 109 reported to the same Training chain of command: Chief Roberts, Captain Bullock, and all instructor firefighters. Pl. SMF at ¶ 50.

For a Firefighter Recruit to become a Firefighter, Chief Fullum must sign a document that goes to the State of Georgia, which speaks to having the character and/or traits that are expected of a Firefighter. Def. SMF at ¶ 31. Chief Fullum testified that DCFD Firefighters must work and interact with police officers daily, and Plaintiff's display of disrespect was not in line with the high level of integrity the public expects of DCFD personnel. Def. SMF at ¶ 32. Chief Fullum also testified that amid the altercation with police, Plaintiff was given the opportunity to walk away, but instead, he made choices which ultimately led to his arrest. Def. SMF at ¶ 33; Fullum Dep. 34-35. Plaintiff states, however, that he was not given the

opportunity to walk away as Cpl. Frazier began approaching Plaintiff as he walked away. Pl. Resp. SMF at ¶ 33; Pl. Dep. 149, 156, Ex. 7.

Chief Fullum testified that Plaintiff's actions showed a lack of judgement and untrustworthiness to make sound decisions and are not qualities or characteristics of an individual who is trying to become a firefighter. Def. SMF at ¶ 34. In making his decision to terminate Plaintiff, Chief Fullum relied on the disciplinary packet that included a memo from Plaintiff's supervisor, the police report, and the written statements of the Recruit Firefighters who witnessed the incident. Def. SMF at ¶ 35. Chief Fullum also relied on his meeting with Plaintiff, which was set up to afford Plaintiff an opportunity to speak with Chief Fullum before he made his final decision. Def. SMF at ¶ 36.

Chief Fullum testified that race was not a factor in his decision to terminate Plaintiff's employment. Def. SMF at ¶ 37; Fullum Decl. at ¶ 12. While Plaintiff does not dispute that Chief Fullum testified as such, he maintains that his race was a factor in Chief Fullum's decision to terminate him. Pl. Resp. SMF at ¶ 37; Pl. Dep. 112, 117, 129.

Plaintiff alleges that he was subjected to race discrimination when Chief Fullum terminated him for being arrested but did not terminate Recruit Justin Smalley, who was also arrested. Def. SMF at ¶ 38; Pl. SMF at ¶ 51. Smalley is a

Caucasian male who was also hired as a Recruit Firefighter. Def. SMF at ¶¶ 39-40; Pl. SMF at ¶ 49. Smalley was also a probationary employee at the time of his arrest. Def. SMF at ¶ 41; Pl. SMF at ¶ 49. Smalley was arrested for public drunkenness in the City of Duluth on July 1, 2018. Def. SMF at ¶ 42. According to Smalley's police report, an officer witnessed Smalley walking on Peachtree Industrial Boulevard and the officer noticed Smalley lose his balance and stumble into the roadway. Def. SMF at ¶¶ 43-44. According to Smalley's police report, the officer then initiated an investigatory stop which revealed that Smalley was intoxicated, and Smalley told the officer that he had a few drinks and was trying to walk home. Def. SMF at ¶¶ 44-45. The police report states that Smalley was arrested for being publicly intoxicated and was placed into the officer's car where he "compliantly took a seat." Def. SMF at ¶ 47.

Smalley reported his arrest to the DCFD in a timely manner. Def. SMF at ¶ 48. Based on the arrest, Chief Fullum suspended Smalley effective August 27, 2018, for 40 hours without pay, for a first offense violation of the DCFD's "Violation of Law" policy. Def. SMF at ¶ 49; Pl. SMF at ¶ 61. After speaking with Smalley and reviewing the police report, Chief Fullum decided suspension was appropriate because his decision not to drive home after realizing that he had been drinking showed at least some level of judgment on Smalley's part. Def. SMF at ¶ 50; Pl.

SMF at ¶ 62. Chief Fullum further testified that Smalley's actions showed certain redeeming characteristics; namely, he demonstrated an understanding that his drinking could have resulted in him getting a DUI, therefore he left his vehicle at a restaurant and walked home so that he would not find himself in that situation. Def. SMF at ¶ 51; Pl. SMF at ¶ 62. Chief Fullum also testified that, according to the police report, Smalley was compliant and obeyed the directions and orders of the arresting officer, which was yet another redeeming factor and played a role in his decision to suspend Smalley rather than terminate him. Def. SMF at ¶ 52.

Plaintiff alleges that Chief Fullum has a bias against black people. Def. SMF at ¶ 53. According to Defendant, Plaintiff admitted that this belief is based on hearsay and his own situation. Def. SMF at ¶ 54; Pl. Dep. 188. Plaintiff disputes this and contends that he believes that he was discriminated against based on his race because of Smalley's termination and the culture of the Department. Pl. SMF at ¶ 51; Pl. Resp. SMF at ¶ 54; Pl. Dep. 112, 117, 141. Plaintiff testified that Recruit William Devereaux told him that black firefighters do not like or trust Chief Fullum. Def. SMF at ¶ 55. Plaintiff admitted, however, that he cannot "speak to how Fullum thinks" as it relates to black firefighters. Def. SMF at ¶ 56.

Plaintiff testified that Instructor Lindsay once told him to "stay focused and do well in the program because they're looking for any reason to get rid of black

recruits." Def. SMF at ¶ 63; Pl. SMF at ¶ 53. Plaintiff also claims that he was "informed that racially-charged comments were occurring within the workplace, such as shifts that were scheduled with a majority of Black employees being referred to as 'Soul Patrol.'" Pl. SMF at ¶ 54; Pl. Dep. at 192. Defendant has objected to both of these allegations on the ground that they are hearsay, as Plaintiff does not state that he personally heard anyone make these "racially-charged comments." Def. Resp. SMF at ¶¶ 53-54.

Plaintiff also testified that it "seemed to [him]" like there was racial division in the DCFD. Def. SMF at ¶ 57. By way of example, Plaintiff testified that he observed members of his recruit class segregating themselves into groups based on race during lunch or self-study. Def. SMF at ¶ 58. Plaintiff admitted that the manner in which recruits grouped themselves was up to their own discretion and was not the product of any directive, suggestion, or other official practice. Def. SMF at ¶ 59.

Plaintiff testified that Recruit Jones, an African American, and Recruit Dyer, a Caucasian American, both arrived at class late during a morning of inclement weather, and based on Plaintiff's understanding, Jones was reprimanded but Dyer was not. Def. SMF at ¶ 60; Pl. SMF at ¶ 52. Plaintiff claimed that he learned of Jones's reprimand through conversations with classmates, as well as with Jones. Def. SMF at ¶ 61. Plaintiff admits that he has never spoken to Dyer about the incident;

he is not sure whether Dyer actually received a reprimand; he is not sure if Dyer even arrived late on the date in question; and his entire understanding of this alleged incident is based on conversations that he has had with classmates. Def. SMF at ¶ 62.

In 2017, Chief Fullum hired Conner Johnson, a Caucasian male, as a Recruit Firefighter. Def. SMF at ¶ 64. On or about December 20, 2017, Chief Fullum terminated Johnson for violating the DCFD's Employee Manual; specifically, Chapter 2, Section VI, Number 42 – Violation of Law. Def. SMF at ¶ 64(b).[1] Specifically, Johnson's termination stemmed from his arrest for DUI by Cobb County Police on or about November 28, 2017. Def. SMF at ¶ 65.

According to the police report generated for Johnson's arrest, Johnson was discovered "passed out asleep" in his vehicle, which was on and blocking an intersection. Def. SMF at ¶ 66. The police report stated that the officer who investigated the incident determined that Johnson was driving under the influence of alcohol and he was arrested. Def. SMF at ¶ 67. Chief Fullum terminated Johnson because his decision to drive while intoxicated, which ultimately led to his arrest, displayed poor judgement and character unbecoming of an individual aspiring to be a DeKalb County Firefighter. Def. SMF at ¶ 68.

[1] Defendant's Statement of Facts includes two paragraphs numbered "64." *See* Def. SMF at ¶ 64.

Plaintiff filed a Charge of Discrimination against Defendant with the Equal Employment Opportunity Commission ("EEOC") on or about July 23, 2018. Pl. SMF at ¶ 55. Plaintiff received his Notice of Right to Sue on or about January 13, 2020. Pl. SMF at ¶ 58.

II. DISCUSSION

A. *Summary Judgment Standard*

Summary judgment is authorized when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 175 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). The movant carries this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving party must come forward with specific facts that demonstrate the existence of a

genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The nonmoving party is required "to go beyond the pleadings" and to present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmoving party's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

If a fact is found to be material, the court must also consider the genuineness of the alleged factual dispute. *Id.* An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is "merely colorable" or is "not significantly probative." *Id.* at 250. A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 242. Moreover, for factual issues to be genuine, they must have a real basis in the record. *Matsushita*, 475 U.S. at 587. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (quoting *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). Thus, the standard for summary judgment mirrors that for a directed verdict: "whether the

evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 259.

When considering motions for summary judgment, the court does not make decisions as to the merits of disputed factual issues. *See Anderson*, 477 U.S. at 249; *Ryder Int'l Corp. v. First Am. Nat'l Bank*, 943 F.2d 1521, 1523 (11th Cir. 1991). Rather, the court only determines whether there are genuine issues of material fact to be tried. Applicable substantive law identifies those facts that are material and those that are irrelevant. *Anderson*, 477 U.S. at 248. Disputed facts that do not resolve or affect the outcome of a suit will not properly preclude the entry of summary judgment. *Id*.

B. *Plaintiff's Claims*

In the Complaint, Plaintiff asserts two counts. In Count I, he asserts a claim for race discrimination in violation of Title VII. Compl. [1] at ¶¶ 30-35. In Count II, he asserts a claim for race discrimination in violation of § 1981. *Id*. at ¶¶ 36-41. In both counts, Plaintiff alleges that the DCFD discriminated against him because of his race when it terminated his employment, and that "[t]he treatment of similarly-situated Caucasian employees of Defendant, versus that of Plaintiff, provides

evidence of discriminatory animus." *Id*. at ¶¶ 34, 40. Defendant has moved for summary judgment on all of Plaintiff's claims.

1. Standards of Proof under Title VII and § 1981

Title VII provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate 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). To prevail on a Title VII claim for discrimination based on disparate treatment, a plaintiff must prove that the defendant acted with discriminatory intent. *See Hawkins v. Ceco Corp.*, 883 F.2d 977, 980-81 (11th Cir. 1989); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983).

In addition to asserting a claim of race discrimination under Title VII, Plaintiff has also brought a claim of race discrimination under § 1981. That statute provides as follows:

> **(a) Statement of equal rights**
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

> **(b) "Make and enforce contracts" defined**
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> **(c) Protection against impairment**
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981.

It is well-settled law that § 1981 prohibits race discrimination in both the public and private employment context. *See Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 961 (11th Cir. 1997) ("It is well-established that § 1981 is concerned with racial discrimination in the making and enforcement of contracts."); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991) ("The aim of the statute is to remove the impediment of discrimination from a minority citizen's ability to participate fully and equally in the marketplace."); *see also St. Francis College v. Al-Khazraji*, 481 U.S. 604, 609 (1987) ("Although § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts.").

In cases in which a plaintiff has asserted a claim under § 1981 as a remedy for race discrimination in the employment context, the elements required to establish a

claim under § 1981 generally mirror those required for a Title VII claim. *See Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (the same analysis applies to a Title VII race discrimination claim and a § 1981 race discrimination claim because both statutes "have the same requirements of proof and use the same analytical framework"); *see also Howard v. B.P. Oil Co.*, 32 F.3d 520, 524 n.2 (11th Cir. 1994); *Brown v. American Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir. 1991). Accordingly, the standards of proof for Plaintiff's claim of race discrimination under Title VII also generally apply to his claim of race discrimination brought under § 1981.

Discrimination claims "are typically categorized as either mixed-motive or single-motive claims." *Quigg v. Thomas Cnty. Sch. Dist.*, 814 F.3d 1227, 1235 (11th Cir. 2016). An employee can succeed on a mixed-motive claim under Title VII by showing that illegal bias was a motivating factor for an adverse employment action, although other factors may have also motivated the action. *See id.* By contrast, single-motive claims, *i.e.*, pretext claims, require a plaintiff to show that discrimination was *the* true reason for the adverse action. *Id.* Claims of race discrimination under § 1981 may not proceed under a mixed-motive theory; rather, a plaintiff asserting such a claim must show that race discrimination was a "but-for" cause of the adverse employment action. *See Comcast Corp. v. Nat'l Ass'n of African*

Am.-Owned Media, 140 S. Ct. 1009, 1019 (2020). Both single-motive and mixed-motive claims can be established with either direct or circumstantial evidence. *Id.*; *see also McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Thus, under both Title VII and § 1981, to prevail on a claim for race discrimination, a plaintiff must prove that the defendant acted with discriminatory intent. *See Hawkins v. Ceco Corp.*, 883 F.2d 977, 980–81 (11th Cir. 1989); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983). Discriminatory intent may be established either by direct evidence or by circumstantial evidence meeting the four-pronged test set out for Title VII cases in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Lewis v. City of Union City*, 918 F.3d 1213, 1220 (11th Cir. 2019) (*en banc*).

Direct evidence is evidence "that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Evidence, Black's Law Dictionary* 596 (8th ed. 2004); *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1226 (11th Cir. 1993); *Carter v. City of Miami*, 870 F.2d 578, 581–82 (11th Cir. 1989); *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 n.6 (11th Cir. 1987). Only the most blatant remarks whose intent could only be to discriminate constitute direct evidence. *Clark*, 990 F.2d at 1226; *Carter*, 870 F.2d at 581. Evidence that only suggests discrimination or that is subject to more than one

interpretation does not constitute direct evidence. *See Harris v. Shelby Cty. Bd. of Educ.*, 99 F.3d 1078, 1083 n.2 (11th Cir. 1996). "[D]irect evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1555 (11th Cir. 1990); *see also Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641–42 (11th Cir. 1998).

Evidence that merely "suggests discrimination, leaving the trier of fact to infer discrimination based on the evidence" is, by definition, circumstantial. *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1081–82 (11th Cir. 1990). Because direct evidence of discrimination is seldom available, a plaintiff must typically rely on circumstantial evidence to prove discriminatory intent, which can be done using the framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See Holifield v. Reno*, 115 F.3d 1555, 1561–62 (11th Cir. 1997), *abrogated on other grounds by Lewis*, 918 F.3d at 1226; *Combs v. Plantation Patterns*, 106 F.3d 1519, 1527–28 (11th Cir. 1997). Under this framework, a plaintiff is first required to create an inference of discriminatory intent, and thus carries the initial burden of establishing a *prima facie* case of discrimination. *McDonnell Douglas*, 411 U.S. at 802; *see also Jones v. Bessemer Carraway Med. Ctr.*, 137 F.3d 1306, 1310, *reh'g*

denied and opinion superseded in part, 151 F.3d 1321 (11th Cir. 1998); *Combs*, 106 F.3d at 1527.

Demonstrating a *prima facie* case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. *Jones*, 137 F.3d at 1310–11; *Holifield*, 115 F.3d at 1562; *see Burdine*, 450 U.S. at 253–54. Once the plaintiff establishes a *prima facie* case, the defendant must "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. *McDonnell Douglas*, 411 U.S. at 802; *Jones*, 137 F.3d at 1310. If the defendant carries this burden and explains its rationale, the plaintiff must then show that the proffered reason is merely a pretext for discrimination. *See Burdine*, 450 U.S. at 253–54; *Perryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983).

A plaintiff is entitled to survive a defendant's motion for summary judgment if there is sufficient evidence to demonstrate the existence of a genuine issue of material fact regarding the truth of the employer's proffered reasons for its actions. *Combs*, 106 F.3d at 1529. A *prima facie* case along with sufficient evidence to reject the employer's explanation is all that is needed to permit a finding of intentional discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993); *Combs*, 106 F.3d at 1529.

The *McDonnell Douglas* proof structure "was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983); *see also Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 594 (11th Cir. 1987). The Eleventh Circuit has held that this framework of shifting burdens of proof is a valuable tool for analyzing evidence in cases involving alleged disparate treatment, but the framework is only a tool. *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1184 (11th Cir. 1984), *abrogated on other grounds by Lewis*, 918 F.3d at 1226. Indeed, "establishing the elements of 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 discrimination case." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011).

A plaintiff may also defeat a motion for summary judgment by presenting "a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker." *Id.* (internal quotation marks omitted). The Eleventh Circuit has held that a "plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case." *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) (quoting *Smith*, 644 F.3d at 1328). "Even

without similarly situated comparators," a plaintiff will survive summary judgment if they present a convincing mosaic of circumstantial evidence from which a factfinder can infer discriminatory motivation. *Lewis*, 934 F.3d at 1185. The plaintiff retains the ultimate burden of proving that the defendant is guilty of intentional discrimination. *Burdine*, 450 U.S. at 253.

2. Plaintiff's *Prima Facie* Case

In this case, Plaintiff does not argue that he has presented direct evidence that Chief Fullum discriminated against him on the basis of his race, and the Court finds that he has not cited to any direct evidence that Chief Fullum intended to discriminate against Plaintiff on the basis of his race when he made the decision to terminate Plaintiff's employment. As a result, the Plaintiff's case rests solely on circumstantial evidence that must generally be analyzed under the evidentiary framework set forth in *McDonnell Douglas*.[2] Under that framework, Plaintiff must first present sufficient evidence to establish a *prima facie* case of race discrimination.

[2] While the Supreme Court decision in *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009 (2020), found that a plaintiff asserting a claim of race discrimination under § 1981 must ultimately prove that discrimination was a "but-for" cause of the adverse action taken against him, it did not limit the application of the *McDonnell Douglas* framework in analyzing § 1981 claims based on circumstantial evidence. *See Comcast Corp.*, 140 S. Ct. at 1019 ("For its part, *McDonnell Douglas* sought only to supply a tool for assessing claims, typically at summary judgment, when the plaintiff relies on indirect proof of discrimination . . . , it did not address causation standards.").

Under the *McDonnell Douglas* framework, a plaintiff may generally establish a *prima facie* case of unlawful discrimination under Title VII or § 1981 by showing that: (1) he is a member of a protected class, (2) he was subjected to an adverse employment action by his employer, (3) he was qualified to do the job in question, and (4) his employer treated similarly situated employees outside his protected classification (*i.e.*, those of a different race) more favorably than it treated him. *See McDonnell Douglas*, 411 U.S. at 802; *see also Wright v. Southland Corp.*, 187 F.3d 1287, 1290 (11th Cir. 1999).

A plaintiff can generally establish a *prima facie* case of discrimination under Title VII by showing that his employer treated a similarly situated person outside his protected class more favorably than it treated him under similar circumstances. *See Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997); *see also Knight v. Baptist Hospital of Miami*, 330 F.3d 1313, 1316 (11th Cir. 2003); *Silvera v. Orange County School Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001); *Nix v. WLCY Radio/Rahall Comm.*, 738 F.2d 1181, 1185 (11th Cir. 1984). "When evaluating an allegation of disparate treatment," courts "require that a comparator be similarly-situated to the plaintiff in all relevant respects." *Stone & Webster Constr. v. U.S. Dep't of Labor*, 684 F.3d 1127, 1135 (11th Cir. 2012) (quotations and citation omitted). "Even if a plaintiff and comparator are similar in some respects, differences in their overall

record may render them not 'similarly situated' for purposes of establishing a *prima facie* case." *Brown v. Jacobs Eng'g, Inc.*, 401 F. App'x 478, 480 (11th Cir. 2010). Courts also consider whether the plaintiff and the proffered comparator were employed for similar periods. *See Roy v. Broward Sheriff's Office*, 160 F. App'x 873, 875 (11th Cir. 2005) (finding that proffered comparator was not similarly situated because comparator had been with department for sixteen years, while plaintiff had less than 18 months of service).

Courts consider whether the proffered comparator had the same supervisor, *see Morris v. Potter*, 251 Fed. App'x 667, 668-669 (11th Cir. 2007), as well as the type of position the plaintiff holds and the content of the plaintiff's work. *See Simionescu v. Bd. of Tr. of the Univ. of Alabama*, 482 F. App'x 428, 430-431 (11th Cir. 2012) (finding that two university faculty members were not similarly situated because one was not tenure-track, while plaintiff was, and second faculty member taught in a different department than did plaintiff). Finally, courts also consider whether the plaintiff and the proffered comparator were employed for similar periods and whether they had similar records of performance. *See Jarvis v. Siemens Med. Solutions USA, Inc.*, 460 Fed. App'x 851, 857-858 (11th Cir. 2012) (minority plaintiff failed to show that Caucasian co-worker was similarly situated because the record showed that the plaintiff had several significant employment performance

deficiencies not seen in Caucasian employee's record); *Roy v. Broward Sheriff's Office*, 160 Fed. App'x 873, 875 (11th Cir. 2005) (proffered comparator was not similarly situated because comparator had been with department for sixteen years, while plaintiff had less than eighteen months of service).

In *Lewis v. City of Union City*, the Eleventh Circuit explained that evidence that an employer "has treated like employees differently" is necessary to "supply the missing link and provide a valid basis for inferring unlawful *discrimination*" through use of the framework. *Lewis v. City of Union City*, 918 F.3d 1213, 1221-24 (11th Cir. 2019) (emphasis in original). A plaintiff is "like" other employees only when "she and her comparators are similarly situated in all material respects." *Id.* at 1224. While a plaintiff need not show that he and his comparator are "nearly identical" in their circumstances, they should be similar in the legitimate circumstances that may have factored into their employer's decision to act adversely toward them, such as their conduct, their work histories, and the policies under which they operate. *See id.* at 1225-28. Without such a comparator, a plaintiff cannot generally establish a *prima facie* case under the *McDonnell Douglas* framework. *Id.* at 1224.

The Eleventh Circuit has nevertheless reiterated that a "plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case." *Lewis v. City of Union City* ("*Lewis II*"), 934 F.3d 1169, 1185 (11th Cir. 2019) (quoting *Smith*,

644 F.3d at 1328). "Even without similarly situated comparators," a plaintiff will survive summary judgment if he can present a convincing mosaic of circumstantial evidence from which a factfinder can infer discriminatory motivation. *Lewis II*, 934 F.3d at 1185. This can "be shown by evidence that demonstrates, among other things, (1) 'suspicious timing, ambiguous statements . . ., and other bits and pieces from which an inference of discriminatory intent may be drawn,' (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual." *Id.* (quoting *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 733–34 (7th Cir. 2011)). While the "convincing mosaic" method bears similarities to the *McDonnell Douglas* method, it operates as a totality-of-circumstances test rather than a rigid step-by-step analysis.

In this case, it is undisputed that Plaintiff is a member of a protected class, that he was subjected to an adverse employment action when DCFD terminated his employment, and that he was qualified to do the job he held when he was terminated. Defendant argues, however, that Plaintiff cannot establish a *prima facie* case of race discrimination because he has failed to present sufficient evidence that the County treated a similarly situated employee of a different race more favorably than it treated him. *See* Def. Br. [34-1] at 8-12. In particular, Defendant argues, Justin Smalley cannot be considered a relevant comparator because there were "significant

differences" between his misconduct and that of Plaintiff, and those differences had a "critical impact on the level of discipline that each received." *Id*. at 9-10.

Plaintiff argues, however, that Smalley is a relevant comparator under the guidelines established by the Eleventh Circuit. *See* Pl. Br. [42-1] at 12-14 (citing *Lewis*, 918 F.3d at 1227-28). According to Plaintiff, he and Smalley were both recruits and members of the same Firefighter Recruits Class 109; they reported to the same chain of command; and they committed the same or similar misconduct in violation of the DCFD "Violation of Law" policy when they were arrested for misdemeanor offenses during their probationary period.[3] *See id*. at 13.

In sum, Plaintiff argues, the evidence shows that Smalley is a relevant comparator under all four of the factors explained in *Lewis*: (1) the employee engaged in the same basic misconduct as the plaintiff; (2) the employee was subject

[3] Plaintiff also contends that his and Smalley's arrests "were their first violation of policy with the Defendant, demonstrating their shared employment and disciplinary history." Pl. Br. at 13. In support of that allegation, Plaintiff cites to Fullum's deposition transcript, in which Fullum testified that it was Plaintiff's "first offense" of the Violation of Law policy, and it was also Smalley's "first offense" of the Violation of Law policy. *See* Fullum Dep. at 22, 40. Plaintiff has not cited to evidence that it was his first violation of any DCFD policy, nor has he cited to any evidence that it was Smalley's first violation of any policy. Neither party, however, has presented evidence that either Plaintiff or Smalley committed other infractions or policy violations that were considered by Chief Fullum in making the determinations regarding the discipline that each received. Thus, the Court assumes that it was Plaintiff's first offense and Smalley's first offense.

to the same employment policy, guideline, or rule as the plaintiff; (3) the employee was under the jurisdiction of the same supervisor as the plaintiff; and (4) the employee had a similar employment or disciplinary history to the plaintiff. *Id*. at 13 (citing *Lewis*, 918 F.3d at 1227-28). Defendant does not dispute that Plaintiff and Smalley were similarly situated in those ways. It argues, however, that "Plaintiff's argument oversimplifies the facts and serves to mask the gravity of his misconduct," and that "Plaintiff asks this Court to focus solely on the fact that he and Smalley were arrested for misdemeanor offenses and ignore the actual misconduct giving rise to their arrests." Def. Reply Br. [45] at 2.

The Court finds that, in essence, the parties are arguing over whether it is Plaintiff's burden to show that he and Smalley engaged in similar misconduct, or whether it is Defendant's burden to explain how the misconduct of Smalley and that of Plaintiff were so different that it led to different disciplinary outcomes for them. Viewing all of the facts and evidence in the light most favorable to Plaintiff, as it is required to do on a defendant's motion for summary judgment, the Court finds that Plaintiff has presented sufficient evidence that Smalley could be considered a relevant comparator for all of the reasons set forth by Plaintiff. While the specific circumstances of their arrests were different, it remains undisputed that both Smalley and Plaintiff were firefighter recruits in the same DCFD recruit class, and both were

arrested for misdemeanor offenses during their probationary period as a first offense of the "Violation of Law" policy. It is further undisputed that Smalley, the White recruit, was suspended 40 hours without pay, while Plaintiff, who is African-American, was terminated from his employment.

Accordingly, the Court finds that Plaintiff has presented sufficient evidence to establish that the County treated Smalley, a similarly situated White employee, more favorably than it treated Plaintiff for similar misconduct. For that reason, the Court finds that Plaintiff has presented a *prima facie* case of race discrimination. Thus, the burden shifts to Defendant to present a legitimate reason for the decision to terminate Plaintiff's employment that was not related to Plaintiff's race.

3. Defendant's Legitimate Non-Discriminatory Reason

Defendant argues that, even if Plaintiff has established a *prima facie* case of race discrimination, it has presented sufficient evidence that it had a legitimate reason to terminate Plaintiff's employment and Plaintiff has failed to present sufficient evidence that Defendant's reason was a mere pretext to disguise unlawful race discrimination. Def. Br. at 12-14. Defendant contends that, while Smalley and Plaintiff were both arrested for misdemeanor offenses during their probationary period as firefighter recruits, the specific circumstances that led to their arrests were markedly different, and Chief Fullum determined that Plaintiff's misconduct was

more serious and warranted the termination of his employment, while Smalley's misconduct did not warrant termination.

The facts and circumstances surrounding the arrests of Plaintiff and Smalley are set forth in detail above. In sum, it is undisputed that Plaintiff was arrested on March 31, 2018, in the City of East Point for obstruction and disorderly conduct. Def. SMF at ¶ 9; Pl. SMF at ¶ 22. According to the police report, on March 31, 2018, Plaintiff was at a bar called the UBAR when a fight broke out inside the bar and spilled outside. Def. SMF at ¶ 11. The police report states that officers approached Plaintiff and asked him to "get off of the rail" of the patio and move away from the area, but Plaintiff responded, "why the hell I have to get off the rail?" Def. SMF at ¶ 12. The police report further states that Plaintiff was asked again to leave the area, but he refused. Def. SMF at ¶ 13. According to the police report, during the exchange, Plaintiff accused the officers of harassment and began using profanity. Def. SMF at ¶ 14. Plaintiff is quoted in the police report as screaming "Fuck You!" to one of the officers who approached Plaintiff and made physical contact with him. Def. SMF at ¶ 15. The police report explains that the verbal altercation continued with Plaintiff continuously using profanity towards the officers. Def. SMF at ¶ 16.

Plaintiff is also quoted in the police report as saying, "you touched my fuckin dog tags why you touch my dog tag?" and continuously screaming language to this

effect. Def. SMF at ¶ 17. The police report also states that Plaintiff called the officers "butt wipes." Def. SMF at ¶ 18. The police report further states that after five minutes of acting erratic and "hosting a show for the patrons," Plaintiff was placed in handcuffs, but the profanity continued. Def. SMF at ¶ 19. Although Plaintiff disputes the accuracy of the police report, he admits that he used profanity towards the police officers, and he admits that the officers had to tell him to disperse more than once. *See* Pl. Resp. SMF at ¶¶ 12-19. When Plaintiff met with Chief Fullum after his arrest, Plaintiff admitted to yelling and swearing at police and not following instructions. Def. SMF at ¶ 22; Pl. SMF at ¶ 31.

After his arrest, Plaintiff was cited with violating DCFD's "Violation of Law" policy, which sets forth a recommended schedule of penalties for first, second, and third offenses. Def. SMF at ¶ 23; Pl. SMF at ¶ 46. For a first offense, as was the case for Plaintiff, the recommended penalty is a 40-hour suspension for a 40-hour employee. Def. SMF at ¶ 24. However, Chief Fullum was not required to apply progressive discipline in cases of serious infraction or in the case of probationary employees who are still completing their working test period. Def. SMF at ¶ 26.

Plaintiff's employment was terminated effective April 10, 2018, when he was still a probationary employee. Def. SMF at ¶ 28; Pl. SMF at ¶ 45. Chief Fullum terminated Plaintiff's employment because he was arrested and because of conduct

that he admitted to during his incident with police. Def. SMF at ¶ 29; Fullum Dep. 18-19. According to Chief Fullum, he declined to adopt the recommended discipline for a first offense of the "Violation of Law" policy in Plaintiff's case, because Plaintiff was a probationary employee, and his display of disrespect for authority and lack of judgment made it impossible for Chief Fullum to recommend Plaintiff for certification as a Firefighter. Def. SMF at ¶ 30. Chief Fullum testified that DCFD Firefighters must work and interact with police officers daily, and Plaintiff's display of disrespect was not in line with the high level of integrity the public expects of DCFD personnel. Def. SMF at ¶ 32.

Chief Fullum also testified that amid the altercation with police, Plaintiff was given the opportunity to walk away, but instead, he made choices which ultimately led to his arrest. Def. SMF at ¶ 33. Chief Fullum believed that Plaintiff's actions showed a lack of judgement and untrustworthiness to make sound decisions and are not qualities or characteristics of an individual who is trying to become a firefighter. Def. SMF at ¶ 34. In making his decision to terminate Plaintiff, Chief Fullum relied on the disciplinary packet that included a memo from Plaintiff's supervisor, the police report, and the written statements of the Recruit Firefighters who witnessed the incident. Def. SMF at ¶ 35. Chief Fullum also relied on his meeting with

Plaintiff, which was set up to afford Plaintiff an opportunity to speak with Chief Fullum before he made his final decision. Def. SMF at ¶ 36.

Justin Smalley is a Caucasian male who was also hired as a Recruit Firefighter, and was also a probationary employee at the time of his arrest. Def. SMF at ¶¶ 39-41. Smalley was arrested for public drunkenness in the City of Duluth on July 1, 2018. Def. SMF at ¶ 42. According to Smalley's police report, an officer witnessed Smalley walking on Peachtree Industrial Boulevard and the officer noticed Smalley lose his balance and stumble into the roadway. Def. SMF at ¶¶ 43-44. According to Smalley's police report, the officer then initiated an investigatory stop which revealed that Smalley was intoxicated, and Smalley told the officer that he had a few drinks and was trying to walk home. Def. SMF at ¶¶ 44-45. The police report states that Smalley was arrested for being publicly intoxicated and was placed into the officer's car where he "compliantly took a seat." Def. SMF at ¶ 47.

After Smalley's arrest, Chief Fullum suspended Smalley effective August 27, 2018, for 40 hours without pay, for a first offense violation of the DCFD's "Violation of Law" policy. Def. SMF at ¶ 49. After speaking with Smalley and reviewing the police report, Chief Fullum decided suspension was appropriate because his decision not to drive home after realizing that he had been drinking showed at least some

level of judgment on Smalley's part. Def. SMF at ¶ 50. According to Chief Fullum, Smalley's actions showed certain redeeming characteristics; namely, he demonstrated an understanding that his drinking could have resulted in him getting a DUI, therefore he left his vehicle at a restaurant and walked home so that he would not find himself in that situation. Def. SMF at ¶ 51. According to the police report, Smalley was compliant and obeyed the directions and orders of the arresting officer, which was yet another redeeming factor and played a role in his decision to suspend Smalley rather than terminate him. Def. SMF at ¶ 52.

Based upon the above facts and evidence presented by Defendant, the Court finds that Defendant has presented sufficient evidence that it had a legitimate reason to terminate Plaintiff's employment that was not related to Plaintiff's race, and that it had a legitimate reason for suspending Smalley rather than terminating his employment. To defeat Defendant's Motion for Summary Judgment, Plaintiff must present evidence that Defendant's reasons were a mere pretext to disguise unlawful race discrimination.

4. Pretext

Under the *McDonnell Douglas* framework, a plaintiff may carry the burden of showing that the employer's proffered reasons are pretextual by showing that they have no basis in fact, that they were not the true factors motivating the decision, or

that the stated reasons were insufficient to motivate the decision. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *see also Wisdom v. M.A. Hanna Co.*, 978 F. Supp. 1471, 1479 (N.D. Ga. 1997). A plaintiff can either directly persuade the court that a discriminatory or retaliatory reason more likely motivated the employer or show indirectly that the employer's ultimate justification is not believable. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981); *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1522 (11th Cir. 1991).

In other words, a plaintiff can 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. *Burdine*, 450 U.S. at 256; *McDonnell Douglas*, 411 U.S. at 804; *see also Chapman v. AI Transp.*, 229 F.3d 1012, 1024 (11th Cir. 2000) (*en banc*); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1530 (11th Cir. 1997) ("In order to establish pretext, the plaintiff is not required to introduce evidence beyond that already offered to establish the *prima facie* case."). A court may consider all of the plaintiff's evidence supporting the *prima facie* case, including comparator evidence, when evaluating whether the defendant's reasons for adverse employment action were pretextual. *See Rioux v. City of Atlanta*, 520 F.3d 1269, 1276–77 (11th Cir. 2008).

A plaintiff cannot show that an employer's proffered reasons for terminating him were pretextual simply by "quarreling with the wisdom" of those reasons. *See Brooks v. Cty. Comm'n of Jefferson Cty.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (quoting *Chapman*, 229 F.3d at 1030). Nevertheless, a plaintiff may establish pretext if he presents sufficient evidence demonstrating "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Combs*, 106 F.3d at 1538 (quoting *Sheridan v. E.I. DuPont De Nemours & Co.*, 100 F.3d 1061, 1072 (3d Cir. 1996) (*en banc*)). However, "[a] reason is not pretext for discrimination unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Brooks*, 446 F.3d at 1163 (emphasis in original) (quoting *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993)). Stated another way, it is not the truth of the employer's justifications, alone, that a plaintiff is required to rebut. Rather, it is a plaintiff's burden to prove that the employer did not, in fact, rely on those justifications in taking any adverse action against him.

Because a plaintiff bears the burden of establishing that the defendant's reasons are a pretext for discrimination or retaliation, he "must present 'significantly probative' evidence on the issue to avoid summary judgment." *Young v. General*

Foods Corp., 840 F.2d 825, 829 (11th Cir. 1988) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). "Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions." *Young*, 840 F.2d at 830; *see also Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1228 (11th Cir. 1993).

The Eleventh Circuit has recently reiterated that a plaintiff is not required to present evidence that rigidly follows the *McDonnell Douglas* factors in order to defeat a motion for summary judgment. In *Lewis v. City of Union City*, 934 F.3d 1169, 1185 (11th Cir. 2019) ("*Lewis II*"), the Eleventh Circuit held that a plaintiff can survive summary judgment if they present a "convincing mosaic" of circumstantial evidence from which a factfinder can infer discriminatory motivation. *Lewis II*, 934 F.3d at 1185. This can "be shown by evidence that demonstrates, among other things, (1) 'suspicious timing, ambiguous statements . . ., and other bits and pieces from which an inference of discriminatory intent may be drawn,' (2) systematically better treatment of similarly situated employees, and (3) that the employer's justification is pretextual." *Id.* (quoting *Silverman v. Bd. of Educ. of City of Chi.*, 637 F.3d 729, 733–34 (7th Cir. 2011)). While the "convincing mosaic"

method bears similarities to the *McDonnell Douglas* method, it operates as a totality-of-circumstances test rather than a rigid step-by-step analysis.

As set forth above, Defendant has presented evidence that Plaintiff's employment was terminated because he was arrested during his probationary period for obstruction and disorderly conduct, and the facts in the police report, along with Plaintiff's admission that he used profanity to the police officers during his arrest, led Chief Fullum to terminate his employment. Chief Fullum believed that Plaintiff's display of disrespect for authority and lack of judgment made it impossible to recommend Plaintiff for certification as a Firefighter because Firefighters must interact with police officers daily, and Plaintiff's display of disrespect was not in line with the high level of integrity the public expects of DCFD personnel.

Plaintiff argues that he can show pretext because, he argues, there were inconsistencies in the reasons Defendant gave for his termination, and there were inconsistencies in the application of employee policies. Pl. Br. at 19-22. Plaintiff first contends that, according to Chief Fullum, Plaintiff's status as a probationary employee meant that he was not "afforded discipline in line with the table of penalties." *Id*. at 19. Plaintiff argues that Smalley was also a probationary employee, so this "inconsistency in Fullum's reasoning" would "lead a reasonable factfinder to question its validity." *Id*. But as Defendant argues, Chief Fullum did not contend

that Plaintiff's probationary status was the sole or even primary reason for his termination, only that his probationary status meant that Chief Fullum was not required to apply the progressive discipline under the Manual that would ordinarily be applied to employees who were not in the probationary period. *See* Def. Reply Br. at 6-7; *see also* Def. SMF at ¶ 26; Fullum Decl. at ¶ 9.

Plaintiff's next argument is that, when Chief Fullum claims that Plaintiff failed to demonstrate the "character" or "integrity" of a Firefighter, he unfairly relied on the police report of Plaintiff's arrest, rather than Plaintiff's own statements about the arrest. Pl. Br. at 19-20. Plaintiff contends that he "disputed the characterization of events," but "Fullum's blind acceptance of the police report despite repeated contradictory statements by Plaintiff demonstrates weakness in that business reason for a reasonable factfinder to question." *Id*. at 20.

The Court finds that Plaintiff's evidence that he "disputed" the contents of the police report to Chief Fullum also does not meet his burden to show that Defendant's reasons for terminating him were mere pretext. As set forth above, Plaintiff disputes several statements in the police report. Specifically, Plaintiff denies screaming "Fuck You!" at Corporal Allen, does not recall using "f'ing" when referencing his dog tags, denies referring to the officers as "butt wipes," and does not recall screaming profanity on the way to the patrol vehicle. Pl. SMF at ¶¶ 32-37. Nevertheless, it is

undisputed that Plaintiff admitted to Instructor Gouveia that he used profanity towards the police officers during his arrest. Def. SMF at ¶ 20; Pl. SMF at ¶ 26. It is also undisputed that Plaintiff admitted that he had to be told more than once by police to disperse from the area on the night he was arrested, although Plaintiff claims that he was "walking away" at the time. *See* Pl. Resp. SMF at ¶ 21. It is further undisputed that, when Chief Fullum met with Plaintiff, Plaintiff admitted to yelling and swearing at police and not following instructions. Def. SMF at ¶ 22.

While Plaintiff complains that Chief Fullum's "blind acceptance of the police report" was somehow unfair or improper, Plaintiff does not dispute that he used profanity towards the police officers during his arrest. Furthermore, Plaintiff cites to no authority indicating that Chief Fullum would be required to accept his version of events over those found in the official police report. The undisputed evidence shows that Chief Fullum reviewed the official police report as well as interviewed Plaintiff, and also reviewed statements from the other recruits that were present during the incidents that led to Plaintiff's arrest before making the decision to terminate Plaintiff's employment. Plaintiff's argument that he disputed some statements in the police report is insufficient to establish that Chief Fullum's reasons for terminating him were mere a pretext to disguise race discrimination.

Plaintiff also challenges Chief Fullum's reasons for choosing not to terminate Smalley as evidence of pretext. Pl. Br. at 21-22. According to Chief Fullum, he decided that suspension was appropriate for Smalley because his decision not to drive home after realizing that he had been drinking showed at least some level of judgment on Smalley's part. Def. SMF at ¶ 50. Chief Fullum further testified that Smalley's actions showed certain redeeming characteristics; namely, he demonstrated an understanding that his drinking could have resulted in him getting a DUI, therefore he left his vehicle at a restaurant and walked home so that he would not find himself in that situation. Def. SMF at ¶ 51. Chief Fullum also testified that, according to the police report, Smalley was compliant and obeyed the directions and orders of the arresting officer, which was yet another redeeming factor and played a role in his decision to suspend Smalley rather than terminate him. Def. SMF at ¶ 52.

Plaintiff contends that Chief Fullum's stated reasons were pretextual because "Smalley played his own role in his public intoxication arrest when he chose to drink, when he got out of his ride's car, and when he chose to walk him in his intoxicated state." *Id*. Thus, Plaintiff argues, "Defendant has failed to establish that Smalley's own arrest was not a result of his actions and to provide any basis for Fullum to have surmised such." *Id*. at 22. Plaintiff also argues that Chief Fullum ignored his own

statement that he was attempting to walk away from the police officers before he was arrested. *Id*.

The Court finds that Plaintiff's argument in this respect also does not meet his burden to show pretext. First, Plaintiff does not cite to any evidence in his Statement of Facts or his brief to support his allegation that Smalley "got out of his ride's car." Furthermore, Plaintiff does not dispute that Smalley's police report, in stark contrast to that of Plaintiff's police report, indicates that Smalley was compliant rather than combative and argumentative with the police officers who arrested him. Significantly, there is no allegation that Smalley yelled at the police officers, used profanity at them, or failed to follow any directives. Thus, Plaintiff's attempt to paint Smalley's conduct as identical to his own fails.

Plaintiff's final argument regarding pretext is that Chief Fullum did not apply the employee policies consistently to both Plaintiff and Smalley. Pl. Br. at 22-23. Plaintiff argues that "[i]t stands against reason that Smalley's discipline would be so much lighter than Plaintiff's when both parties were arrested for disorderly conduct misdemeanors." *Id*. at 22. While it is true that both parties were arrested for misdemeanors, as discussed, there were significant and crucial differences between the conduct described in the police report of Plaintiff's arrest as compared to the police report of Smalley's arrest, and Plaintiff does not dispute these significant and

crucial differences. It is undisputed that Plaintiff yelled and swore at the police officers who arrested him, while there is no such allegation that Smalley did so, and in fact, the report indicated that he was compliant.

In sum, Plaintiff's argument is that he and Smalley were both arrested for misdemeanors, and thus, it should not matter what their specific behavior or conduct was during the course of their arrests, it should only be the arrest itself that matters in determining the level of discipline for the arrest. But Chief Fullum, who himself is African-American, disagrees with that. It is undisputed that Chief Fullum determined, after reviewing the police reports and the statements from the recruits, that Plaintiff's conduct differed from Smalley's in significant ways, such that Plaintiff's conduct showed a serious lack of respect and judgment in a way that Smalley's did not. Indeed, when another Caucasian recruit firefighter (Johnson) was arrested for DUI, an offense reflecting more lack of judgment than public intoxication, Chief Fullum acted consistently with his treatment of Plaintiff and also terminated that Caucasian recruit.

Plaintiff's argument of pretext, therefore, is a classic example of quarreling with the wisdom of Chief Fullum's decision to distinguish among the very different conduct underlying these arrests. This does not meet his burden to show that Chief

Fullum's reasons for terminating Plaintiff were a mere pretext to disguise race discrimination.

While Title VII prohibits discrimination based on race, harsh or unfair treatment by itself is not a violation of Title VII, and the Court cannot sit in judgment of an employer's decision, absent evidence that a discriminatory motive was the underlying basis. As the Eleventh Circuit has explained:

> Title VII does not take away an employer's right to interpret its rules as it chooses, and to make determinations as it sees fit under those rules. Title VII addresses discrimination. . . . Title VII is not a shield against harsh treatment at the workplace. Nor does the statute require the employer to have good cause for its decisions. The employer may fire an employee for a good reason, a bad reason, *a reason based on erroneous facts,* or for no reason at all, as long as its action is not for a discriminatory reason. While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason . . . does not have to be a reason that the judge or jurors would act on or approve.

Nix v. WLCY Radio/Rahall Comm., 738 F.2d 1181, 1187 (11th Cir. 1984) (internal quotes and citations omitted, emphasis added); *see also Rojas v. State of Florida*, 285 F.3d 1339, 1344 (11th Cir. 2002) (Title VII does not permit courts to sit in judgment of "whether a business decision is wise or nice or accurate"); *Combs v. Plantation Patterns*, 106 F.3d 1519, 1543 (11th Cir. 1997) ("[f]ederal courts do not sit to second-guess the business judgment of employers"); *Shealy v. City of Albany*, 89 F.3d 804, 806 n.6 (11th Cir. 1996) (court "does not sit as a sort of 'super personnel

officer . . . correcting what the judge perceives to be poor personnel decisions"); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (the court does "not sit as a super-personnel department that reexamines an entity's business decisions . . . no matter how mistaken").

In the end, Plaintiff's argument is nothing more than a dispute with the wisdom or fairness of the Defendant's decision to terminate his employment, when compared to Defendant's decision to suspend Smalley rather than terminate him. As cited above, the Eleventh Circuit has repeatedly rejected this as evidence of pretext.

Plaintiff also has not cited to any evidence suggesting a "convincing mosaic" of circumstantial evidence that would suggest that Chief Fullum harbored an intent to discriminate against Plaintiff based on his race. Plaintiff claims that Recruit William Devereaux told him that black firefighters do not like or trust Chief Fullum; that Instructor Lindsay once told him to "stay focused and do well in the program because they're looking for any reason to get rid of black recruits"; and that he was "informed that racially-charged comments were occurring within the workplace, such as shifts that were scheduled with a majority of Black employees being referred to as 'Soul Patrol.'" Def. SMF at ¶¶ 55, 63; Pl. SMF at ¶ 54. But, as Defendant argues, these allegations largely rest on hearsay evidence that Plaintiff heard from others, and Plaintiff does not allege that he ever heard Chief Fullum make any

statement suggesting that he harbored any discriminatory animus or bias against other Black Firefighters.

In sum, viewing all evidence and inferences in the light most favorable to Plaintiff, the Court finds that Plaintiff has failed to present sufficient evidence to create a genuine dispute of fact as to whether Defendant's stated reason for its decision to terminate Plaintiff's employment was false or was not the true factor motivating that decision. Thus, based on all the facts and evidence, the Court finds that Plaintiff has failed to present sufficient evidence suggesting that Defendant's stated reason for terminating his employment was merely a pretext to disguise unlawful race discrimination. For that reason, the Court finds that Defendant is entitled to summary judgment on Plaintiff's claims of race discrimination under Title VII and § 1981.

Accordingly, the Court **RECOMMENDS** that Defendant's Motion for Summary Judgment [34] be **GRANTED** as to Plaintiff's claims of race discrimination under both Title VII and § 1981, and that judgment be entered in Defendant's favor on all Counts of the Complaint.

III. RECOMMENDATION

For the reasons discussed above, **IT IS RECOMMENDED** that Defendant's Motion for Summary Judgment [34] be **GRANTED** and that judgment be entered in favor of Defendant on all of Plaintiff's claims.

As this is a Final Report and Recommendation, there is nothing further in this action pending before the undersigned. Accordingly, the Clerk is **DIRECTED** to terminate the reference of this matter to the undersigned.

IT IS SO RECOMMENDED this 23rd day of July, 2021.

JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE