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

DANNY LAMONTE, **Plaintiff,** **v.** **CITY OF HAMPTON, GEORGIA,** **Defendant.**	**CIVIL ACTION FILE NO.** **1:19-cv-03227-AT-CMS**

FINAL REPORT AND RECOMMENDATION

This employment discrimination case is before the Court on the motion for summary judgment filed by the defendant, the City of Hampton, Georgia ("Defendant" or the "City"). [Doc. 82].

Plaintiff worked for Defendant briefly from August 31, 2018 to September 11, 2018 as its first fulltime Director of Finance. In his Amended Complaint, Plaintiff alleges that he was unlawfully suspended and then terminated, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), based on his race (black), and in violation of the Georgia Whistleblower Act, O.C.G.A. § 45-1-4 ("GWA"), in retaliation for disclosing or expressing concerns regarding what he suspected were improper and unlawful expenditures of public funds in the City of Hampton's financial records. [Doc. 8, Am. Compl.]. He also asserts state law claims for breach

of contract, attorney's fees, and punitive damages. [*Id.* at 9–11].

For the reasons that follow, I RECOMMEND that Defendant's motion for summary judgment be GRANTED.

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact such that the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(a); *Ezell v. Wynn*, 802 F.3d 1217, 1222 (11th Cir. 2015). The moving party bears the initial burden of showing the court "the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact" and "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 325 (1986); *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (en banc). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the moving party fails to discharge this initial burden, the motion must be denied. *See Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993).

If the burden is met, however, the non-moving party must then "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for

trial.'" *Celotex Corp.*, 477 U.S. at 324 (citation omitted). "A 'mere scintilla' of evidence is insufficient; the non-moving party must produce substantial evidence in order to defeat a motion for summary judgment." *Garczynski v. Bradshaw*, 573 F.3d 1158, 1165 (11th Cir. 2009) (citation omitted). Mere conclusions and factual allegations unsupported by evidence are insufficient to survive a motion for summary judgment. *See Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005). "If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1534 (11th Cir. 1992) (citation omitted).

It is not the Court's function to scour the record in search of evidence to defeat a motion for summary judgment. Instead, the Court relies on the nonmoving party to identify the evidence which creates an issue of triable fact. *See* FED. R. CIV. P. 56(c)(1)-(3); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996). 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).

As the nonmoving party, all reasonable inferences will be made in Plaintiff's favor. *Duke v. Cleland*, 5 F.3d 1399, 1402 (11th Cir. 1993).

II. FACTS

In light of the foregoing summary judgment standard, the Court finds the following facts for the purpose of resolving Defendant's motion for summary judgment only.

The City of Hampton is a small city of approximately 8,000 residents located just south of Atlanta in Henry County, Georgia. [Doc. 82-2, Declaration of Ann Tarpley ("Tarpley Decl."), ¶ 2]. The City is governed by a city council consisting of six city councilmembers and a mayor. [Doc. 82-3 at 3, Declaration of Melissa Brooks ("Brooks Decl."), Exhibit 1 at 4–27, "City Charter"]. The mayor presides at all meetings of the city council, but only votes on city council matters in the event of a tie. [Doc. 82-3, City Charter, at 16, Section 2.32]. In addition to his tie-breaking function, the mayor generally oversees the City's affairs and functions as a liaison between the city council and the city manager. [*Id.*]. The mayor chiefly functions as the public face of the City. [Doc. 85-1, Deposition of Mayor Steve Hutchison ("Hutchison Dep."), at 36].[1]

[1] Unless otherwise indicated, citations to the record are to the electronic CM/ECF docket entry and heading at the top of the page; however, citations to depositions are to the CM/ECF docket entry number, but the actual page number of the hardcopy deposition transcript.

The city council has legislative authority over the City of Hampton. [City Charter, Section 2.10]. Pursuant to the City's Charter, the city council appoints a city manager, who is responsible for the day-to-day administrative operations of the City. [*Id.*, Section 2.27]. The city manager then nominates, designates, and hires officers and directors to serve under his supervision, subject to confirmation and approval by the city council. The City Charter provides that "All appointed officers and directors shall be employees at will and subject to removal or suspension at any time at the recommendation of the city manager, mayor, or any councilmember unless otherwise provided by law or ordinance." [*Id.*, Section 3.10(e); Doc. 86, Defendant's Statement of Material Facts ("DSMF"), ¶ 3]. Thus, the city council retains ultimate decision-making authority on the hiring and firing of directors.

At the time of Plaintiff's brief employment with the City in 2018, the members of the city council were Mayor Steve Hutchison (white male), Mayor Pro Tem Ann Tarpley (black female), Stephanie Bodie (white female), Elton Brown (black male), Henry Byrd (white male), Errol Mitchell (black male), and Willie Turner (black male). [Tarpley Decl. ¶ 4].

In April 2018, just a few months before Plaintiff was hired, the city council hired a new city manager, Charles Coney ("Coney") (black male).[2] [*Id.* ¶ 5]. Before

[2] Mr. Coney has since passed away. [Hutchison Dep. at 61].

Coney came on board, the City's chief of police, Derrick Austin, served as acting city manager. [Doc. 85-5, Deposition of Derrick Austin ("Austin Dep."), at 90].

Soon after Coney became city manager, he determined that there was a need to hire several department directors, and he undertook efforts to identify, interview, and recommend qualified candidates to the city council. Those positions included a new HR director, a community development director, the city clerk, reappointing the police chief, and hiring a finance director. [Doc. 85-3, Deposition of Stephanie Bodie ("Bodie Dep."), at 17; DSMF ¶ 12; Doc. 85-2, Deposition of Erroll Mitchell ("Mitchell Dep."), at 20–21, Ex. 1 at 69]. Some of the city councilmembers at the time were concerned about the state of the City's finances because the person who had been dealing with the accounts "was not a finance-trained person," and she was not responsive to requests for information about the City's finances. [Doc. 85-6, Deposition of Elton Brown ("Brown Dep."), at 15–16, 18]. Councilmember Byrd testified that the person who had been handling the City's finances "just didn't have the knowledge to do it . . . [s]he just wasn't giving information that would be asked for. Like, if you wanted to know something about numbers for the budget, how much money do we have, we're fixing to do a budget . . . what do we have so we know what we're looking at when we sit down to discuss it. . . we couldn't get that information." [Doc. 85-4, Deposition of Henry Byrd ("Byrd Dep."), at 27]. Councilmember Turner

testified that he thought it was important for the City to hire a finance director because the City's budget at the time was "so messed up," "all the books w[ere] in disarray," and "it was unclear in terms of where money was being spent." [Doc. 85-8, Deposition of Willie Turner ("Turner Dep."), at 19]. Councilmember Mitchell and Mayor Pro Tem Tarpley also had concerns about the City's finances. [*Id.* at 20]. Coney was tasked with evaluating and assessing "how things were," and making recommendations about how to improve the situation. [Brown Dep. at 18].

On July 23, 2018, Plaintiff submitted an application for the new City of Hampton finance director position. [Doc. 84-8, Def.'s Ex. 7, "Application"]. Plaintiff testified that he has over twenty years of experience as an accounting and finance professional; he holds a Masters degree in Business Administration, and he was previously employed with the City of Waycross, Georgia as its finance director. [Doc. 84-1, Deposition of Danny Lamonte ("Pl.'s Dep."), at 31, 34–35]. The Application that he submitted asked, "Have you ever been convicted of, or pleaded guilty or not guilty to, a felony or misdemeanor in the past 8 years (other than a minor traffic violation)?" [Doc. 84-8 at 10]. Plaintiff responded to the question by answering, "No." [*Id.*; DSMF ¶ 6].

In 2016, however, approximately two years before Plaintiff submitted his Application to the City, Plaintiff had pled not guilty to the crime of family violence

battery in Waycross where he was living at the time and working as finance director for the City of Waycross. [DSMF ¶ 7; Doc. 82-4 at 2–3, Accusation and Plea signed by Plaintiff]. Plaintiff's not-guilty plea related to an incident in which Plaintiff had an argument with his then-fiancee, who he was living with, and admitted to pushing her off their bed. [Lamonte Dep. at 75–78, 83]. She called the police, and because her children were at the residence, Plaintiff was arrested, taken to jail, and charged with misdemeanor family violence battery. The charges were later dismissed. [DSMF ¶¶ 8–9; Lamonte Dep. at 77; Doc. 82-5 at 2, "Final Disposition"]. When asked during his deposition about his answer on the Application, Plaintiff testified that he did not recall ever entering a plea, and then the case was dismissed and the case was placed under seal, so he thought the matter had been taken care of. [Lamonte Dep. at 78–79, 142; Doc. 84-11 at 1].

As part of the hiring process, City Manager Coney asked Police Chief Austin to conduct a background check on Plaintiff. [Austin Dep. at 29]. Despite Plaintiff's 2016 arrest, Plaintiff's criminal background check came back clear. [*Id.* at 31]. When Coney called to offer Plaintiff the job of finance director, Coney mentioned to Plaintiff that he wanted to discuss the job, but he had a problem. [Lamonte Dep. at 82–83]. Coney apparently had concerns about some things that had shown up on Plaintiff's credit report, including past due real estate taxes, two bankruptcies, and

some other items. [*Id.*]. Plaintiff, however, assumed that Coney was referring to Plaintiff's arrest in Waycross, so he started to explain and tell his side of the story—that his fiancee pushed him, he pushed her, she made up a lot of false allegations, and "all of it was thrown out." [*Id.* at 83; Doc. 99, Pl.'s Stmt. of Add'l Facts ("PSAF"), ¶ 1]. Midway through his explanation, Coney stopped him and told him, "Look, I'm not calling about that, I'm fine with that," he said, because Plaintiff's criminal record came back clear. [Lamonte Dep. at 83]. Instead, Coney stated that he was concerned about items on Plaintiff's credit report, including tax liens, bankruptcy filings, and other financial issues. According to Plaintiff, after Plaintiff explained the reason for the tax liens and that the bankruptcy was because he had gone through a divorce, Coney told him that he had the job, and he liked Plaintiff's qualifications, but he wanted Plaintiff to clean up his financial situation within three months, and Plaintiff agreed to do that. [*Id.* at 53–57, 83–84; PSAF ¶ 2].

Following Coney's offer to Plaintiff, Coney made a formal recommendation to the city council at its next meeting that the City create a new position of Finance Director and hire the candidate that he had selected for that position.[3] [Mitchell Dep. at 23]. Based on Coney's recommendation, the city council voted to hire a finance

[3] Coney did not mention the specific candidate's (Plaintiff's) name or race during that meeting. [Bodie Dep. at 15–17; Doc. 82-6, Bodie Declaration ("Bodie Decl.") at ¶¶ 3–5; Doc. 82-7, Henry Byrd Declaration ("Byrd Decl.") at ¶¶ 3–5].

director in a four-to-two vote. [Bodie Dep. at 13–14; Tarpley Decl. ¶ 7; DSMF ¶ 13; Doc. 95-1 at 4]. The two votes against hiring a finance director were Councilwoman Stephanie Bodie and Councilman Henry Byrd. Bodie testified that she did not vote in favor of the new position because the budget for 2019 had not been prepared yet, and she was not comfortable adding a position when she had not been shown how the City was going to be able to afford to pay another department head. [Bodie Dep. at 13, 17–18, 22]. Councilman Byrd testified that he did not vote to hire a finance director because he did not think the City needed one, there was not enough work to keep the employees they already had busy all the time, and "[t]here just wasn't enough work to hire multiple people at high salaries for this small a town." [Byrd Dep. at 25–26].

It is undisputed that neither Bodie nor Byrd knew Plaintiff's race when they voted against the creation of the new position. [*See supra* n.3]. Nor were any of the councilmembers aware at the time they voted that Plaintiff had recently been arrested for family violence battery or that his credit report had reflected some financial issues, including two bankruptcies and various liens. [DSMF ¶¶ 16–17; Lamonte Dep. at 141–42; Byrd Dep. at 45–46, 57; Tarpley Decl. ¶ 6; Bodie Dep. at 44, 51; Brown Dep. at 41]. Bodie testified that Coney later admitted to her that he did not tell the city council about Plaintiff's financial issues before Coney recommended that the City hire

Plaintiff because he had intended "to work with [Plaintiff] to help him fix it." [Bodie Dep. at 44].

According to Plaintiff, at the outset of his employment with the City, Coney told him that he had some questions about the City's financials, and he wanted Plaintiff to start by looking at "all the financials, look at the transactions, look at credit card statements," because Coney had concerns "about some discrepancies, some irregularities, some stuff that shouldn't be bought" in the City's financials. [Lamonte Dep. at 93]. Accordingly, on September 4, 2018, Plaintiff's first full day in his office, because he did not yet have access to the computer system, Plaintiff began looking through paper copies of the City's financial records that he located in a nearby office of the former employee who had been handling the City's finances, including budget and amendment material, bank statements, and credit card statements. [*Id.* at 98–99]. The next day, he contacted the bank the City used, and once he received access to the City's bank account, he noticed that there were former employees who were still on the bank account, and a current employee, Tiffany Wilson, "who did a lot of transactions with money, . . . didn't even have a log in. She was actually using somebody else's log-in to transfer public funds." [*Id.* at 101]. When he asked Ms. Wilson why she was not on the bank account (because she handled payroll and did "everything"), she told him that she just used the log-in that had been "established for

years." [*Id.* at 104]. Plaintiff also found what he thought were questionable charges on various consumer credit card accounts, like Best Buy and Home Depot, "overran budgets," and "an alarming amount of budget amendments" that lacked backup support. [*Id.* at 101–03, 119–20, 147].

After reviewing the documents, Plaintiff informed City Manager Coney of his observations and concerns, and Coney told Plaintiff to keep looking and do what he thought he needed to do to "get this right." [Lamonte Dep. at 115, 118, 179–80]. Coney told Plaintiff that he was not surprised, but he "was alarmed that this stuff was going on for this long [a] period of time . . . they just never had anybody that was a fully dedicated finance director . . . so there was . . . a lot of things that needed to be fixed." [*Id.* at 130]. Coney mentioned to Councilmember Turner that Plaintiff had some concerns regarding City expenditures, budget amendments, and the mayor's budget. [Turner Dep. at 21–23]. When Councilmember Turner met Plaintiff in passing at City Hall, he asked Plaintiff how things were going, how the numbers were going as far as the City's finances, and Plaintiff told him he was running into "some issues, but it's something he could correct." [*Id.* at 21].

According to Plaintiff, on September 6, 2018, Mayor Hutchison summoned Plaintiff into his office and closed the door.[4] [Lamonte Dep. at 121]. Mayor Hutchison started off with "small talk," then asked for an update as to what Plaintiff was looking at and finding. Plaintiff shared that he had some concerns with the mayor's budget and some of the transactions he was seeing. Plaintiff testified that in response, the mayor said that it was not a good thing for things to be over budget line by line, and suggested doing some amendments and transferring funds to make the budget look okay. [*Id.* at 121–22].[5]

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[4] Mayor Hutchison's recollection of that meeting differs from Plaintiff's. Mayor Hutchison testified that he only met with Plaintiff one time in his office briefly for introductions, to welcome him aboard, like he did every department head, and to ask him to provide a little background about himself and what he did. [Hutchison Dep. at 77–81]. According to Mayor Hutchison, during that meeting, Plaintiff never raised concerns regarding City finances, the meeting lasted about five minutes, and the door was open throughout their meeting. [*Id.* at 80–81].

[5] According to Chief Austin, the City's practice was that you could go over in a line item; you just could not go over the person's or the department's bottom line. [Austin Dep. at 47–48]. Chief Austin testified that when the former city clerk, Pat Watson, was preparing the budget, he heard her explain on several occasions that a certain department "would go over on a line, but as long as they were good at the bottom, they were okay." [*Id.* at 50]. Chief Austin testified that you could "shift money to cover something else if you go over a particular line item"; and that was not a formal policy, but it was always the practice. [*Id.* at 48]. If there was a need for a budget amendment, the person would make a request for a budget amendment to the city clerk, try and get that on the agenda, and then go in front of the city council and ask for that. [*Id.* at 47–48]. Then during the audit process or the end-of-the-year closeout, it would be addressed. [*Id.* at 49].

In response to Mayor Hutchison's suggestion about preparing a budget amendment and transferring funds, Plaintiff testified that he refused and told the mayor that he could not do that. [Lamonte Dep. at 122]. According to Plaintiff, the mayor responded that actually Plaintiff could, that the public did not need to see that the City was not handling public funds correctly and that the budgets were out of balance. The mayor then asked how long Plaintiff had been doing this type of work, at which point a councilwoman entered the office, greeted Plaintiff, and told him she was glad to have him on board. Plaintiff testified that he then left the office and went back to work, continuing to look at things he had concerns about. [*Id.* at 122–26].

Later that afternoon, on September 6, 2018, Councilwoman Bodie received a call from a friend, saying that he had seen a mugshot of Plaintiff online. [Bodie Dep. at 23–24]. Councilwoman Bodie searched online for Plaintiff and found the mugshot, which showed that Plaintiff had previously been arrested in Waycross on two simple battery charges. [*Id*. at 24]. Bodie then called Chief Austin to ask for advice on what the protocol was for what she should do, and he advised her to reach out to Mayor Hutchison and the city attorney, L'Erin Wiggins. [*Id.* at 26, 29]. Bodie forwarded a copy of the mugshot via email to Mayor Hutchison, and asked him if he was aware of

Plaintiff's arrest.[6] [*Id.* at 26, 34]. Bodie did not contact City Manager Coney directly because he had previously instructed her not to contact him directly, as per the City Charter, and to go through Mayor Hutchison instead. [*Id.* at 29–30].

After receiving the mugshot, Mayor Hutchison tried to call City Manager Coney several times, but he was out of the office at an event at Georgia Tech, and he did not answer his phone. [Hutchison Dep. at 44, 93]. The mayor then called City Attorney Wiggins to discuss how to proceed. [*Id.* at 42–44]. According to the mayor, City Attorney Wiggins advised him that he could suspend Plaintiff, place him on administrative leave with pay pending an investigation, and have Chief Austin notify Plaintiff and escort him out of City Hall, which is what Mayor Hutchison did. [*Id.* at 44–45]. After speaking with the city attorney, Mayor Hutchison called Chief Austin

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[6] In Bodie's email sent to Mayor Hutchison at 3:44 p.m. on September 6, 2018, she wrote,

> Someone brought this mugshot to my attention and I felt I needed to make you both aware, if Not Already [sic] known. Is this the cities finance manager Mr Lamonte? (I have not met him yet). Was a background check completed when Mr. Lamonte was hired and was this found on this background check?

[Doc. 85-3 at 82]. In response, Mayor Hutchison wrote, "I don't know wish this had been brought to me. This citizen should have brought it to me." [*Id.* at 81]. Bodie later emailed, "I have tons of concerns with this but My big concern with this.. If it's true and there's a bad background on this man his photo is out there where our city has put him with kids. . . we have women in and out of city hall. Are they safe?" [*Id.*].

to ask why this information had not come to light when he did a background check, and asked him to find out what was going on and the details of the arrest. [*Id.* at 90, 94, 107–08; Austin Dep. at 55, 64–66]. At the mayor's direction, Chief Austin then went to Plaintiff's office, told Plaintiff that he was being suspended, asked for Plaintiff's keys, and escorted Plaintiff out of the building. [Lamonte Dep. at 131–32, 139]. Mayor Hutchison did not inform the city councilmembers before he suspended Plaintiff that he was doing so. However, the mayor called each one of them afterwards and told them that Plaintiff had been suspended with pay, pending an investigation of his family violence arrest. [Hutchison Dep. at 103].

Following the call from Mayor Hutchison, Chief Austin called the arresting jurisdiction and learned that (1) Plaintiff had been arrested for family violence battery in Waycross, Georgia; (2) the case was dismissed; but (3) the record had been sealed. [Hutchison Dep. at 95; Austin Dep. at 64–65]. Chief Austin provided the information he had obtained to City Manager Coney, because that was his direct report. [Austin Dep. at 67].

Mayor Hutchison also called the City of Waycross, where Plaintiff had previously worked as finance director, and spoke with Wilson Deloach, the acting city manager there, to see if there "was something that [the City of Hampton] had missed." [Hutchison Dep. at 104–05]. Mayor Hutchison asked if Plaintiff had been employed

there and if he was a good employee, to which Mr. Deloach responded that yes, he had been, but he did not provide any further details. [*Id.* at 105]. Mayor Hutchison then relayed to Coney that he had spoken with the acting city manager in Waycross and reported what they had discussed. [*Id.*].

After Plaintiff was escorted out of the building, he called City Manager Coney and left a voice mail. [Pl.'s Dep. at 141–42]. By the time Coney returned his call, Coney had apparently been made aware of the situation. Plaintiff told Coney that he thought this had all been resolved and was not going to be a problem because they had discussed the arrest before Plaintiff was hired. [*Id.* at 142]. Coney told Plaintiff that no one on the city council knew about the arrest, but that if Plaintiff could locate a copy of the dismissal, he "might have a fighting chance." [*Id.*]. Plaintiff then called the attorney who had represented him in the Waycross case and obtained a copy of the dismissal, which he forwarded to Coney. [*Id.*].

On the afternoon of September 7, 2018, after receiving a copy of the dismissal from Plaintiff, Coney forwarded a copy via email to the mayor, Mayor Pro Tem Ann Tarpley, and the city attorney. [Doc. 84-11]. Coney wrote:

> Attached please find attached the document shared by Employee Danny Lamonte. I have been on the phone with him and he adamantly asserts that the matter was to have been taken care of and that is why he did not disclose—he in no way meant to mislead us. I offered to him that all

> documents affirm that the incident occurred and as such we, the City of Hampton, must move forward with the vetted knowledge that we have. He wanted me to share with everyone how much he wants to continue to work for the City and how he has enjoyed the small amount of time he has had with us. I asked for his resignation to be delivered to Chief Austin by 2:00 p.m. today. Otherwise, the matter will be handled by the City Council during its next executive session. I am also attaching his online application (see page 10). If questions, I am available. Regards, Charles.

[*Id.* at 1].

According to written notes made at the time by Chief Austin, on September 10, 2018, Mayor Hutchison called Chief Austin and asked for a copy of the credit report that Chief Austin had obtained on Plaintiff, which Mayor Hutchison wanted to bring to the city council's executive session scheduled for the next evening. [Austin Dep. at 71]. Mayor Hutchison asked Chief Austin not to notify City Manager Coney he was doing that, but to put the report in an envelope and leave it at the mayor's residence with his wife. [*Id.* at 71–72].

On September 11, 2018, the city council, Mayor Hutchison, City Attorney Wiggins, and City Manager Coney met in executive session to discuss Plaintiff's employment with the City of Hampton. [Tarpley Decl. ¶ 8; Doc. 85-7, Deposition of L'Erin Wiggins ("Wiggins Dep.") at 68]. Coney reported to the city council for the first time about Plaintiff's financial issues uncovered in his background check.

[Tarpley Decl. ¶ 6]. Although all councilmembers agree that Coney presented them with a recommendation that Plaintiff be terminated, some of their recollections differ as to the reason or reasons that Coney presented for why he was recommending termination. Councilmembers Byrd, Bodie, and Mitchell recall that Coney recommended that the city council vote to terminate Plaintiff because he lied on his application. [Byrd Dep. at 46; Bodie Dep. at 46–47; Mitchell Dep. at 44; Tarpley Decl. ¶ 9]. Councilwoman Bodie testified that Coney told the councilmembers "that Mr. Lamonte had not been truthful on his application and because of that, he recommended termination."[7] [Bodie Dep. at 42]. Bodie also recalls a discussion of Plaintiff's credit history and financial issues, and remembers thinking that even though she did not vote for the finance director position at the time, "I would hope a finance director would not have that number of liens and finance issues." [*Id.* at 44, 48–49]. She recalls Coney explaining that he had not said anything to the city council about Plaintiff's credit history before because he had intended to work with Plaintiff to fix those issues. [*Id.* at 49].

[7] Councilman Byrd does not recall being told that the charges against Plaintiff had been dismissed, only that they were under seal, so "you couldn't find out." [Byrd Dep. at 51]. Councilman Turner could not remember one way or the other, if the councilmembers were told the charges against Plaintiff had been dismissed. [Turner Dep. at 28].

Councilman Brown recalled a slightly different reason behind Coney's recommendation to terminate Plaintiff, namely, that Plaintiff's reputation had been significantly damaged. [Brown Dep. at 35–36].

Following the discussion in executive session, and Coney's recommendation, the city council reentered the open city council meeting, and Mayor Pro Tem Tarpley moved to terminate Plaintiff's employment. [Tarpley Decl. ¶ 10]. Councilman Brown seconded Tarpley's motion, and the city council voted unanimously to terminate Plaintiff. [*Id.*; DSMF ¶¶ 27–31].

On January 25, 2019, following Plaintiff's termination, Plaintiff's attorney sent a formal ante litem notice on behalf of Plaintiff to the City of Hampton, Georgia, pursuant to O.C.G.A. § 36-33-5. [Doc. 8-2 at 2–3]. The letter notified the City that Plaintiff intended to assert claims against the City, including a claim under Georgia's public-official whistleblower statute, a claim for lost wages and benefits, a claim for breach of an employment contract, and a claim for damages under Title VII. [*Id.*]. Plaintiff also filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), and the EEOC issued Plaintiff a notice of right to sue on April 19, 2019. [Doc. 8-1 at 2–3]. On July 16, 2019, Plaintiff timely filed a complaint in this court. [Doc. 1, Compl.]. On October 15, 2019, Plaintiff filed an Amended Complaint, which is now the operative complaint before this Court.

On January 29, 2021, following the close of discovery, the City filed the instant motion for summary judgment [Doc. 82], which has now been fully briefed. The motion, Plaintiff's response, and the City's reply are before me for consideration and a Report and Recommendation.

III. ANALYSIS

A. Plaintiff's Title VII Claim

In Count One of his Amended Complaint, Plaintiff alleges that the City unlawfully discriminated against him on the basis of race (African American), in violation of Title VII, when it suspended him, escorted him out of City Hall, and then terminated his employment. [Am. Compl. at 6–7 & ¶ 30].

Title VII prohibits employment discrimination with respect to an employee's compensation, terms, conditions, or privileges of employment, because of the individual's race. 42 U.S.C. § 2000e-2(a)(1). To prevail on a Title VII race discrimination claim, a plaintiff must prove that the defendant acted with discriminatory intent. *Hawkins v. Ceco Corp.*, 883 F.2d 977, 980-81 (11th Cir. 1989) (citing *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983)). Such discriminatory intent may be established either by providing direct evidence of discrimination or by showing circumstantial evidence of discrimination. Where, as here, there is no direct evidence, a claim of discrimination is proven by circumstantial

evidence and is generally evaluated under the burden-shifting *McDonnell Douglas* framework. *E.E.O.C. v. Joe's Stone Crabs, Inc.*, 296 F.3d 1265, 1272 (11th Cir. 2002); *see also Rainey v. Holder*, 412 F. App'x 235, 237 (11th Cir. 2011).

Under *McDonnell Douglas*, the plaintiff must first establish a prima facie case of discrimination. Once the plaintiff employee has established a prima facie case, the burden shifts to the defendant employer to proffer a legitimate, nondiscriminatory reason behind the complained-of employment action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). If the employer proffers a legitimate, nondiscriminatory reason for the employment action, the burden shifts again to the employee to show that the employer's proffered reason is a pretext for a discriminatory motive. *Id.* at 256.

Under *McDonnell Douglas*, a plaintiff establishes a prima facie case of discrimination by showing 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) he was replaced by or treated less favorably than someone similarly situated outside his protected classification. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004); *Coutu v. Martin County Bd. of County Comm'rs*, 47 F.3d 1068, 1073 (11th Cir. 1995).

Defendant first argues that Plaintiff cannot prevail on his claim that his paid suspension was an adverse employment action. Defendant argues that multiple courts in this and other circuits have found that a short-term paid suspension is not an adverse employment action under Title VII. [*See* Doc. 103, Def.'s Reply Br., at 2, citing *Brown v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 1:14-cv-0365-LMM-LTW, 2016 WL 4925792, at *9 (N.D. Ga. Feb. 12, 2016) (collecting Eleventh Circuit and district court cases that all "concluded that a paid suspension or placement on administrative leave for less than a month is not an adverse employment action"), R&R *adopted by* 2016 WL 5419787 (N.D. Ga. Mar. 1, 2016); *Jones v. Southeastern Pa. Transp. Auth.*, 796 F.3d 323, 325–26 (3d Cir. 2015) (holding that a paid suspension pending an investigation of an employee's alleged wrongdoing does not fall under any of the forms of adverse action mentioned by Title VII's substantive provision, and collecting cases from five other circuit courts of appeal holding same); *but see Hairston v. Gainesville Sun Pub'g Co.*, 9 F.3d 913, 920 (11th Cir. 1993) (concluding, without any analysis, that a thirty-day suspension with pay was an adverse employment action for ADEA purposes)].

In response, Plaintiff argues that the mayor's unilateral decision to suspend Plaintiff "and march him out of city hall . . . qualifies independently as an adverse employment action, one that was taken by the mayor under such odd circumstances

contrary to regular practice as to strongly suggest discriminatory animus." [Doc. 98, Pl.'s Resp. Br., at 20]. Plaintiff, however, has not cited any authority to support his claim that his paid suspension was an adverse employment action, under Title VII.

To demonstrate an adverse employment action, "an employee must show a serious and material change in the terms, conditions, or privileges of employment," as viewed by a reasonable person in the circumstances. *Brown*, 2016 WL 4925792, at *9 (citing *Davis v. Town of Lake Park*, 245 F.3d 1232, 1239 (11th Cir. 2001)). "Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." *Id.* Not every unkind act is an adverse employment action; it is not enough that the challenged employment action imposes some de minimis inconvenience or alteration of responsibilities. *Id.* (citing *Doe v. DeKalb Cty. Sch. Dist.*, 145 F.3d 1441, 1445 (11th Cir. 1998)). Although proof of direct economic consequences is not required in all cases, the asserted impact "cannot be speculative and must at least have a tangible adverse affect on the plaintiff's employment." *Id.* (citing *Hyde v. K.B. Home, Inc.*, 355 F. App'x 266, 269 (11th Cir. 2009); *Gray v. Vestavia Hills Bd. of Educ.*, 317 F. App'x 898, 904 (11th Cir. 2008)).

Here, Plaintiff has produced no evidence tending to show that his placement on paid administrative leave for three or four days had a tangible effect on his employment.[8] Nor has he cited any binding or even persuasive authority that a brief paid suspension like his constitutes an adverse employment action under Title VII. Accordingly, I will conclude for purposes of this Report and Recommendation that Plaintiff's brief suspension of employment while the City investigated his previous arrest was not an adverse employment action, as defined under Title VII.

As to Plaintiff's termination, the City acknowledges that Plaintiff has satisfied the first three elements of his prima facie case—namely, he is African American, he was qualified to do the job, and he was terminated. The City argues, however, that Plaintiff cannot establish a prima facie case of discrimination because he cannot show that he was treated less favorably than any similarly-situated employee outside his protected class, or that he was replaced by someone of a different race. In the Eleventh Circuit, a plaintiff must show that he and his comparators are "similarly situated in all material respects." *See Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1218 (11th Cir. 2019). For purposes of establishing a prima facie case, it is necessary to consider whether the two employees were involved in, or accused of, the same or

[8] For the same or similar reasons, the same applies to Plaintiff's allegation that being escorted out of City Hall by the police chief was an adverse employment action, as defined under Title VII.

similar conduct but were disciplined in different ways. If the plaintiff fails to show the existence of a similarly-situated employee, summary judgment is appropriate where no other evidence of discrimination is present. *Holifield v. Reno*, 115 F.3d 1555, 1565 (11th Cir. 1997).

In Plaintiff's response to the City's motion for summary judgment, Plaintiff has effectively conceded that he has no valid comparator outside of his protected class who had a similar arrest background and/or credit history, yet was treated more favorably. [Doc. 98 at 17]. Plaintiff has also failed to point to any probative evidence from which the court could infer that the City's proffered reasons for terminating Plaintiff's employment were pretextual for intentional race discrimination. *See Brooks v. County Comm'n of Jefferson County, Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (proof of pretext requires proof that the reason is false and the real reason is intentional discrimination). It is undisputed that the majority-black city council voted six to zero to terminate Plaintiff's employment, following the black city manager's recommendation that Plaintiff's employment as finance director be terminated. Although the councilmembers may have had a variety of reasons for voting to terminate Plaintiff, Plaintiff has failed to produce probative evidence showing that any of their reasons was unlawfully based on Plaintiff's race. *See Tidwell v. Carter*

Prods., 135 F.3d 1422, 1428 (11th Cir. 1998) (stating that the existence of additional non-conflicting reasons for termination does not prove pretext).

Plaintiff, nevertheless, argues that even if he cannot point to a valid comparator, he can still establish a "convincing mosaic" of facts from which a jury could reasonably infer racial discrimination. [Doc. 98 at 17]. In the Eleventh Circuit, where no comparators are available, as an alternative to the *McDonnell Douglas* analysis, a plaintiff may attempt to establish a prima facie case by pointing to sufficient "bits and pieces" of compelling circumstantial evidence to establish a convincing mosaic of discriminatory animus, such as:

> (1) suspicious timing, ambiguous statements, similar behavior directed at other members of the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn; (2) systematically better treatment of those outside the protected class; and (3) pretext in the employer's justification.

Robertson v. Riverstone Communities, LLC, No. 1:17-cv-2668-CAP-JKL, 2019 WL 4399492, at *11 (N.D. Ga. May 28, 2019) (citing *Smith v. City of New Smyrna Beach*, 588 F. App'x 965, 976 (11th Cir. 2014); *see also Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328–29 (11th Cir. 2011). "This convincing mosaic of circumstantial evidence can substitute for either a prima facie case of discrimination or a demonstration of pretext." *Robertson*, 2019 WL 4399492, at * 11 (citing *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)). As the Eleventh Circuit has stated, "[a] triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.'" *Lockheed-Martin*, 644 F.3d at 1328 (quoting *Silverman v. Chicago Bd. of Educ.*, 637 F.3d 729, 734 (7th Cir. 2011)). The Eleventh Circuit has explained that "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. . . . Rather, the plaintiff will always survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.* (citation omitted).

Plaintiff contends the following facts comprise a convincing mosaic of circumstantial evidence that his suspension and termination were motivated by impermissible racial animus:

- The city council vote to hire him was divided on racial lines in a 4-2 vote;
- One of the white councilmembers who voted against hiring a finance director was the person who first saw and circulated

Plaintiff's mugshot from his family violence arrest, and raised a question as to whether the City's women and children were safe;

- The City's white mayor launched an independent investigation into Plaintiff's background that excluded the black city manager and black councilmembers; and
- The mayor lacked the authority to suspend Plaintiff, and was untruthful about the city attorney directing him to suspend Plaintiff.

[Doc. 98, Pl.'s Resp. Br., at 18]. Plaintiff argues that even though the chief of police testified that an arrest without a conviction "wouldn't count against" anyone seeking a job with the City,[9] the mayor used Plaintiff's arrest to justify (1) suspending Plaintiff's employment, (2) having the police chief escort Plaintiff out of City Hall, (3) destroying Plaintiff's local reputation, and then (4) terminating Plaintiff's employment. [*Id.* at 19]. Plaintiff contends all of the mayor's actions were outside of the City's normal policies and practices, and thus they "smack of the 'extraordinary

[9] Plaintiff's summary of the police chief's testimony is not completely accurate. The police chief actually testified that in the police department (which has separate policies and procedures from the City's), if an applicant had a previous arrest but no conviction, "that wouldn't be held against anybody," and it would not prevent the applicant from being hired [for a position in the police department]. Chief Austin testified that he did not think the City had a policy regarding hiring individuals with either an arrest record or a conviction. [Austin Dep. at 21–22].

arbitrar[iness]' found by the *Lewis* Court to suggest discrimination." [*Id.* (citing *Lewis*, 934 F.3d at 1185–86)].

In *Lewis*, the Court found a convincing mosaic where the employer's conduct was "extraordinarily arbitrary," such as when the plaintiff's supervisor refused plaintiff's request to return to work from leave, yet terminated her for being absent without leave. *See Lewis*, 934 F.3d at 1185. Plaintiff, however, has shown no such arbitrary conduct here. The evidence shows that neither of the two dissenting councilmembers in the initial vote to hire (or not hire) a finance director were aware of Plaintiff's race at the time the vote was taken. [Bodie Decl. ¶¶ 3–5; Byrd Decl. ¶¶ 3–5]. As to Plaintiff's suspension, it is undisputed that City Manager Coney was out of the office when the mayor learned of Plaintiff's previous arrest, and Coney could not be reached for consultation. Once Plaintiff was suspended, the mayor informed all six councilmembers and Coney of what had happened, and why. The evidence shows that Mayor Hutchison did call the acting city manager in Waycross to ask about Plaintiff's track record there. But there is no evidence that any of the councilmembers or City Manager Coney relied on Mayor Hutchison's investigation into Plaintiff's conduct when Coney made his termination recommendation and the city councilmembers voted to terminate Plaintiff's employment on September 11, 2018.

Rather, after Coney spoke with Plaintiff to get his side of the story, and asked Plaintiff to provide a copy of his arrest record, the evidence shows that Coney made the decision to ask for Plaintiff's resignation; then he recommended that the city council terminate Plaintiff after Plaintiff chose not to resign. [Doc. 85-7 at 136]. Following the discussion in executive session, Mayor Pro Tem Tarpley, who is black, moved "to approve the City Manager's Recommendation relative to the Director of Finance position," and the motion was seconded by black councilmember Elton Brown. [Doc. 85-7 at 141, Pl's Ex. 8, September 11, 2018 Meeting Minutes]. It is undisputed that all six councilmembers of the majority-black city council then voted to approve City Manager Coney's recommendation to terminate Plaintiff. [*Id.*; Bodie Dep. at 46; Tarpley Decl. ¶ 11; Mitchell Dep. at 44]. According to Councilwoman Bodie, it was Coney, not the mayor, who told the councilmembers during their executive session that Plaintiff had lied and admitted he failed to disclose the criminal battery incident on his Application. [Bodie Dep. at 46]. None of the city councilmembers present at the executive session of the city council on September 11, 2018 testified that they recall the mayor expressing any opinion about Plaintiff's employment or that they based their decision on something the mayor said or discussed, or a document he showed them in their presence. [*See, e.g.*, Bodie Dep. at 42–43 ("Q. What was Mr. Hutchison's role during the executive session? A. He

chairs the meeting, but for the most part I think Mr. Coney did the talking [at] that meeting."), 46–48 ("A. I just don't recall the mayor saying anything.").

There is no evidence in the record that Plaintiff's race, or the issue of race in general, was raised or discussed either before, during, or after the city council's executive session and/or open session meeting on September 11, 2018 at which the vote was unanimous to terminate Plaintiff's employment as finance director. Nor has Plaintiff presented any evidence showing that the city council injected race into or explicitly (or even implicitly) considered Plaintiff's race in its decision to terminate his employment. *See O'Neill v. Cotton Holdings, Inc.*, No. 1:18-cv-05713-ELR-CMS, 2020 WL 4668143, at *13 (N.D. Ga. July 1, 2020) (concluding that the plaintiff failed to show that the decisionmakers explicitly considered age when the decision was made to terminate the plaintiff's employment or that age played any role in his termination), R&R *adopted by* 2020 WL 4668141, at *1 (N.D. Ga. July 16, 2020), *appeal dismissed,* 2020 WL 6580019 (11th Cir. Sept. 23, 2020).

The Eleventh Circuit has "repeatedly and emphatically held" that employers "are free to fire their employees 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.'" *Flowers v. Troup Cnty., Ga., Sch. Dist.*, 803 F.3d 1327, 1338 (11th Cir. 2015) (citation omitted).

Because Plaintiff has the burden of persuasion on this point, it is his responsibility to advance sufficient evidence of racial discrimination to create a triable factual dispute. The only evidence that Plaintiff offers that even touches on his race is the fact that the mayor and the two councilmembers who voted not to hire a finance director are white, that one of those white councilmembers was the person who circulated Plaintiff's mugshot, and that the white mayor seemed displeased with what Plaintiff reported he was finding in the City's financial records and Plaintiff's refusal to do a budget amendment. The evidence shows, however, that the mayor neither voted to hire Plaintiff for, nor to fire Plaintiff from, the finance director position. Also, it is undisputed that neither of the white councilmembers was aware of Plaintiff's race at the time the vote was taken to hire a finance director. [Bodie Decl. ¶¶ 3–5; Byrd Decl. ¶¶ 3–5]. Any potential causal connection between Plaintiff's race and his termination is further undercut by the fact that Charles Coney not only hired Plaintiff knowing his race, but also recommended termination less than two weeks later.[10]

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[10] Plaintiff has failed to address or overcome the "same actor" inference that there was no discriminatory animus where, like here, the same manager that hired Plaintiff recommended his termination less than two weeks later. *See Hawkins v. BBVA Compass Bancshares, Inc.*, 613 F. App'x 831, 837 (11th Cir. 2015) (affirming summary judgment and finding that supervisor's hiring of the plaintiff only a year before her termination "undermined the notion that any actions toward her were gender-motivated"); *Oliver v. VSoft Corp.*, No. 1:09-cv-0185-CAP-WEJ, 2010 WL 11505776, at *7 (N.D. Ga. Feb. 2, 2010) (noting that the supervisor's hiring of plaintiff gave rise to an inference that he did not act with discriminatory animus in

To show pretext, Plaintiff argues that the councilmembers offered inconsistent recollections of the reasons presented to them by Coney for terminating Plaintiff's employment. Plaintiff speculates that the reason for this may be because the mayor had irreparably ruined Plaintiff's reputation by suspending him and marching him out of City Hall, making it impossible for Plaintiff to continue on as the City's finance manager, or that it was impossible to ascertain whether Plaintiff had really committed a criminal battery because the case against him was unresolved and under seal. [Doc. 98 at 21]. Plaintiff, however, has cited no evidence in the record to support his unsupported conclusions and bare speculation.

Plaintiff also accuses the mayor of fabricating a story that Plaintiff's prior employer at the City of Waycross told the mayor that Plaintiff was guilty of the charges against him.[11] [Doc. 98, Pl.'s Resp. Br., at 21–22; PSMF ¶ 12]. Plaintiff then argues that, under the cat's paw theory, the mayor's racial animus against him "must be imputed to the city council, which 'rubber stamped' the mayor's conclusions without any independent investigation." [Doc. 98 at 22]. But again, other than Plaintiff's own triple hearsay testimony about what Coney told Plaintiff the mayor

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terminating plaintiff's employment).

[11] The City objects to this statement as inadmissible hearsay. [Doc. 104, Def.'s Resp. to PSMF ¶ 12]. It is.

told him about the mayor's telephone call with the city manager in Waycross, Plaintiff cites no probative evidence to support his assertion. [*Id.*, citing Pl.'s Dep. at 174].

To establish that a non-decisionmaker used the decisionmaker to carry out a discriminatory termination, the plaintiff "must provide evidence that the recommender's alleged discriminatory animus directly caused the decision-maker to take adverse employment action against its employee." *See Williamson v. Adventist Health Sys./Sunbelt, Inc.*, 372 F. App'x 936, 938 (11th Cir. 2010) (citing *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1331 (11th Cir. 1999)).

Here, Plaintiff has neither submitted nor pointed to any evidence that the mayor had discriminatory animus against him or that the city council's decision to terminate Plaintiff was "directly caused" by the mayor's alleged discriminatory animus. *See Williamson*, 372 F. App'x at 938. Plaintiff's conclusion that the mayor somehow manipulated the majority-black city council and/or the black city manager to terminate Plaintiff based on his race is unsupported by any probative evidence in the record. Where, like here, a plaintiff has provided no meaningful context for his unsupported conclusion that the decisionmaker was somehow manipulated by another individual "to get rid of Plaintiff" on account of his race, the plaintiff's "cat's paw" argument fails as a matter of law. *See O'Neill*, 2020 WL 4668143, at *14.

Based on the cited authority, and for the reasons discussed above, Plaintiff has failed to establish a prima facie case of race discrimination under either the *McDonnell Douglas* burden-shifting framework, or the alternative "convincing mosaic" analysis. Plaintiff has also failed to show a material fact dispute that the reasons given by the City for terminating Plaintiff's employment were pretextual and that race discrimination was the real reason. I therefore RECOMMEND that the City's motion for summary judgment as to Plaintiff's Count One Title VII race discrimination claim be GRANTED.

B. Plaintiff's Georgia Whistleblower Act Claim

In Count Two of his Amended Complaint, Plaintiff alleges that the City of Hampton, a public employer, violated Georgia's Whistleblower Act, O.C.G.A. § 45-1-4 (the "GWA"), when the City retaliated against him by suspending and terminating his employment shortly after Plaintiff met with the mayor and expressed his concerns regarding what Plaintiff suspected were "improper and unlawful expenditures of public funds" and other financial irregularities that he was beginning to find in his initial review of the City's financial records.

The GWA prohibits public employers from

> (1) retaliating against a public employee for disclosing a violation of or noncompliance with a law, rule, or regulation to either a supervisor or a government agency; or

> (2) retaliating against a public employee for objecting to, or refusing to participate in, any activity, policy, or practice of the public employer that the public employee has reasonable cause to believe is in violation of or noncompliance with a law, rule, or regulation.

Coward v. MCG Health, Inc., 342 Ga. App. 316, 318, 802 S.E.2d 396, 398–99 (2017) (citing O.C.G.A. § 45-1-4). To evaluate whether summary judgment is appropriate on a GWA claim, Georgia courts utilize "the *McDonnell Douglas* burden-shifting analysis used in Title VII retaliation cases." *Id.* at 319, 802 S.E.2d at 399.

Under the *McDonnell Douglas* framework, a plaintiff must first make a prima facie case of retaliation. If the plaintiff is able to do so, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. If the employer successfully meets this burden of production, then the burden shifts back to the plaintiff to show that each proffered reason was pretext. *Id.* (citing *Tuohy v. City of Atlanta*, 331 Ga. App. 846, 848–49, 771 S.E.2d 501 (2015)).

To establish a prima facie case of retaliation under the GWA, a plaintiff must show that (1) he was employed by a public employer; (2) he engaged in protected activity by making a protected disclosure of, or objection to, "a violation of or noncompliance with a law, rule, or regulation"; (3) he suffered an adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *Coward*, 802 S.E.2d at 399. Under the

GWA, a law, rule, or regulation "includes any federal, state, or local statute or ordinance or any rule or regulation adopted according to any federal, state, or local statute or ordinance." *Id.* (quoting O.C.G.A. § 45-1-4(a)(2)).

The City does not dispute that it is a public employer, for purposes of the GWA, that it employed Plaintiff (albeit briefly), and that it terminated his employment, which constitutes an adverse employment action. The City argues, however, that Plaintiff has failed to provide any evidence, despite concerted efforts through discovery, to establish that he made a protected disclosure or objection to a "violation of or noncompliance with a law, rule, or regulation." [Doc. 82-1 at 21–22].

Plaintiff testified that during his fifteen-to-twenty minute meeting with the mayor on September 6, 2018 (Plaintiff's third full day on the job), the mayor asked Plaintiff for an update as to what he was looking at and what he had found so far. [Lamonte Dep. at 121]. Plaintiff told the mayor that he had some concerns with the mayor's budget and some of the transactions he was seeing, at which point the mayor suggested "do[ing] some amendments and transfer[ring] some funds to make the whole department budget look okay . . . ," which Plaintiff refused to do. [*Id.* at 121–24]. According to Plaintiff, "If there's questionable charges or line items overspent, that's what it's going to be." [*Id.* at 122]. Plaintiff testified that at that point, he was still at the research stage, and though he was seeing what he considered

to be certain questionable expenditures, he had not yet verified whether those expenditures had been approved or authorized. [*Id.* at 179–80].

Plaintiff has produced no evidence that when he shared his concerns with the mayor over what he was seeing in the City's disordered financial records, he identified any particular law, rule, or regulation that he thought the City or the mayor were violating.[12] Georgia courts have dismissed whistleblower claims in similar factual scenarios. *West v. City of Albany, Georgia*, 830 F. App'x 588, 598 (11th Cir. 2020) (citing *Coward v. MCG Health, Inc.*, 342 Ga. App. 316, 802 S.E.2d 396, 400 (2017); *Edmonds v. Bd. of Regents of the Univ. Sys. of Ga.*, 302 Ga. App. 1, 689 S.E.2d 352, 357 (2009) (granting judgment as a matter of law on the plaintiff's GWA claim that he was fired in retaliation for voicing laboratory safety concerns because there was no evidence that the plaintiff complained that his employer was violating one or more laws, rules, or regulations, as those terms are defined in the statute), *disapproved in part on other grounds*, *Wolfe v. Bd. of Regents of the Univ. Sys. of Ga.*, 300 Ga. 223, 794 S.E.2d 85 (2016)). In *Coward*, two nurses alleged that they were terminated as retaliation for speaking out against understaffing. *Coward*, 802 S.E.2d at 398. But

[12] One of the councilmembers testified that the main reason Plaintiff had been hired as finance director was because the City's budget at the time was "so messed up," "all the books w[ere] in disarray," and "it was unclear in terms of where money was being spent." [Doc. 85-8, Turner Dep., at 19].

the court held that one of the plaintiff's complaints "identified only internal operating procedures . . . as the basis for her concerns," not a violation of "any law, rule, or regulation." *Id.* at 400. Thus, the court concluded that her complaints were not "the type of protected activity the Whistleblower Statute was intended to protect." *West*, 830 F. App'x at 598.

Similarly, in *West*, the Eleventh Circuit affirmed the district court's grant of summary judgment on the plaintiff's GWA claim where the plaintiff complained to her supervisor about lax internal cash-control protocols. *West*, 830 F. App'x at 598 (concluding that "[t]hose protocols, or any violation of those protocols, did not constitute a violation of any law, rule, or regulation . . . [a]nd West did not allege otherwise.").

The same is true in this case. Here, Plaintiff shared with the mayor his concerns about the City's (and the mayor's) lax internal budget protocols, questionable expenditures, and lack of supporting documentation. Plaintiff then refused the mayor's request to adjust the budget. Plaintiff now argues (but did not allege) that his review of the City's financial records revealed information that "could have" violated the limitations set out in the City's Charter against using property owned by the government for personal benefit or exceeding the amount appropriated for an expenditure. [Doc. 98 at 23–24]. However, there is no probative evidence in the

record from which the Court could infer that when Plaintiff met with the mayor on September 6, 2018, Plaintiff told the mayor that what he was discovering in the City's financial records violated any law, rule, or regulation. Thus, Plaintiff's concerns were not the type of protected activity the GWA was intended to protect. *See West*, 830 F. App'x at 598; *see also Coward*, 802 S.E.2d at 400 (finding no protected disclosure where the plaintiff had complained that insufficient nurse-to-patient ratios had contributed to a patient's attempted suicide).

But even if Plaintiff could make out a prima facie case (which he has not), the City has met its burden to present legitimate, nonretaliatory reasons for terminating Plaintiff's employment—namely, Plaintiff's failure to disclose on his application form that he had been arrested in 2016, underlying issues with his finances as reflected in his credit report, damage to his reputation, and/or the city manager's recommendation that Plaintiff be terminated.

The burden then shifts back to Plaintiff to show that the City's proffered non-retaliatory reasons for suspending and then terminating Plaintiff's employment were pretextual. To establish pretext, Plaintiff points to the evidence he discussed with regard to his Title VII claim, and also the close temporal relationship between his alleged whistleblower report to the mayor and his suspension the following day and termination less than one week later. However, the law is clear that "intervening

events can negate the inference of causation that may arise from temporal proximity." *Hollan v. Web.com Grp., Inc.*, No. 1:14-cv-00426-LMM-WEJ, 2015 WL 11237023, at *21 (N.D. Ga. Apr. 7, 2015). Here, Councilwoman Bodie's sending Plaintiff's mugshot to the mayor, alerting the mayor and others in City government to Plaintiff's prior arrest in Waycross, Georgia, and the City's investigation constitute intervening events that severed any possible inference of causation between Plaintiff's alleged whistleblower report to the mayor and his subsequent suspension and ultimate termination. *See Hankins v. AirTran Airways, Inc.*, 237 F. App'x 513, 521 (11th Cir. 2007) (despite 20-day temporal proximity, plaintiff's failure to meet performance standards "broke the causal connection (if any) between the protected activity and her eventual termination"). None of the individuals present at the city council meeting on September 11, 2018 (including the mayor, the mayor pro tem, the city attorney, and all six councilmembers) testified that what Plaintiff found in the City's financial records or his conversation with the mayor on September 6, 2018 played any part in the city council's decision to terminate Plaintiff's employment. Nor is there any evidence in the record that any of the six councilmembers had knowledge of the alleged conversation between Plaintiff and the mayor—or that Plaintiff had purportedly disclosed to the mayor what he considered to be financial

irregularities—before the city council voted unanimously to terminate Plaintiff's employment.

For the reasons stated, Plaintiff has failed to establish a prima facie case of a GWA violation. Plaintiff has also failed to proffer any admissible evidence suggesting that the City's reasons for terminating him were pretext for retaliation following Plaintiff's alleged whistleblower report to the mayor. Accordingly, I RECOMMEND that the City's motion for summary judgment on Plaintiff's Count Two GWA claim be GRANTED.

C. Plaintiff's Breach of Contract Claim

In Count Three of his Amended Complaint, Plaintiff alleges that the City offered, and he accepted, a written contract of employment for a defined duration for his position as the City's finance director. [Am. Compl. ¶ 46]. Plaintiff alleges that pursuant to his employment contract, he was entitled to receive an annual salary of $80,000 and certain benefits, including health and dental coverage, a retirement plan, life insurance, paid time off for vacation and sick leave, paid holidays, a laptop, and a cellphone in exchange for his work as the City's director of finance. [*Id.* ¶ 48]. Plaintiff further alleges that the City breached its agreement with Plaintiff by wrongfully terminating him, entitling him to the salary and benefits he would have

received under the agreement, and damages as a probable result of the breach. [*Id.* ¶¶ 49–50].

Under Georgia law, "[t]he elements of a breach of contract claim are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." *Bates v. JPMorgan Chase Bank, NA*, 768 F.3d 1126, 1130 (11th Cir. 2014) (citing *Norton v. Budget Rent A Car Sys., Inc.*, 307 Ga. App. 501, 705 S.E.2d 305, 306 (2010); O.C.G.A. § 13-6-1)).

Employment contracts are enforceable under Georgia law only if they include "[t]he nature and character of the services to be performed, the place of employment[,] and the amount of compensation to be paid." *H&R Block Eastern Enters., Inc. v. Morris*, 606 F.3d 1285, 1295 (11th Cir. 2010) (quoting *Farr v. Barnes Freight Lines, Inc.*, 97 Ga. App. 36, 101 S.E.2d 906, 907 (1958) (holding that the subject employment contract was too uncertain for enforcement)). The employment contract must also specify the duration or term of the plaintiff's employment. *Culpepper v. Thompson*, 254 Ga. App. 569, 571, 562 S.E.2d 837, 840 (2002) (citing O.C.G.A. § 34-7-1; *Burton v. John Thurmond Constr. Co.*, 201 Ga. App. 10, 11, 410 S.E.2d 137 (1991) (holding that an "employment contract containing no definite term of employment is terminable at the will of either party, and will not support a cause of action against the employer for wrongful termination.")). If any of these "essential

elements" are omitted, "there is no agreement." *See H&R Block*, 606 F.3d at 1295. In the absence of an agreement, Georgia follows an "at-will" employment doctrine, which permits the employer to discharge the employee for any reason whatsoever, "without acquiring a cause of action for wrongful termination." *Id.* (citing *Nida v. Echols*, 31 F. Supp.2d 1358, 1376 (N.D. Ga. 1998) (citing O.C.G.A. § 34-7-1)).

The City argues that Plaintiff's claim for breach of contract fails because Plaintiff admitted in his deposition that there was no written contract of employment, only an offer letter that he recalls signing. [*See* Lamonte Dep. at 159–60]. It is undisputed that the offer letter did not state the duration of the term of employment for the finance director position or promise severance benefits should Plaintiff's employment be terminated. [Doc. 84-12 at 1, Offer Letter]. The City contends that without a definite term of employment, Plaintiff was an at-will employee, his employment with the City was terminable at will by either party, and the City did not breach any agreement with Plaintiff by terminating his employment and not paying him his full salary and benefits pursuant to the offer letter. [Doc. 82-1 at 24–25].

Plaintiff argues, however, that at the outset of his employment with the City, City Manager Coney promised Plaintiff that he could have three months to resolve any

outstanding credit issues.[13] And thus, to the extent Plaintiff was terminated during that three-month period because of his outstanding credit issues, Plaintiff argues that termination violated the oral contract of employment entered into between Plaintiff and the City through its city manager, Charles Coney. [Doc. 98 at 25]. Plaintiff cites *Parker v. Crider Poultry, Inc.*, 275 Ga. 361, 361–62, 565 S.E.2d 797 (2002) for the proposition that even if an employee with an employment agreement of indefinite duration may not successfully pursue a wrongful termination claim upon termination of employment, the employee may still have a claim for breach of contract if the employer orally agreed to perform some act, but failed to do so.

Parker, however, is distinguishable. Contrary to Plaintiff's argument, that case did not involve an oral employment agreement between the parties. Rather, the case involved a written provision set forth in a letter drafted and signed by the employer and counter-signed by the plaintiff, that provided for three months notice for either party to terminate the plaintiff's employment agreement (that contained no definite term of employment). *Parker*, 275 Ga. at 362, 565 S.E.2d at 798–99. Here, there was no provision in the City's offer letter to Plaintiff concerning a three-month grace

[13] This argument mischaracterizes Plaintiff's testimony. Plaintiff testified in his deposition that during Coney's telephone call with Plaintiff in which he offered him the finance director job, Coney told Plaintiff he wanted Plaintiff "to get [his tax lien situation] cleaned up in three months," and Plaintiff agreed. [Pl.'s Dep. at 83].

period within which to resolve Plaintiff's outstanding financial issues. Thus, *Parker* is inapposite.

Plaintiff's "oral agreement" argument is further foreclosed by at least two provisions in the City Charter. The first provision is Article III, Section 3.10(e), which provides that "[a]ll appointed officers and directors shall be employees at will and subject to removal or suspension at any time at the recommendation of the city manager, mayor, or any councilmember unless otherwise provided by law or ordinance." [Doc. 82-3 at 17]. This provision supports the City's position that Plaintiff's employment was terminable at will. The second provision, Article VI, Section 6.32, provides that, "No contract with the city shall be binding on the city unless: (1) It is in writing; and (2) It is made or authorized by the city council and such approval is entered in the city council journal of proceedings pursuant to Section 2.21 of this charter." [*Id.* at 26]. Plaintiff has failed to provide any evidence or case law that would support his argument that his purported oral contract with City Manager Coney contained a definite duration term and is binding on the City of Hampton. *See Stewart v. City of Greensboro, Ga.*, No. 3:18-CV-129 (CAR), 2020 WL 1551828, at *10–11 (M.D. Ga. Mar. 31, 2020) (holding that the alleged verbal agreement between the city manager and the former employee was not binding on the city because the city's charter required that contracts be approved by the city council); *H.G. Brown*

Fam. Ltd. P'ship v. City of Villa Rica, 278 Ga. 819, 820, 607 S.E.2d 883 (2005) ("Where a city charter specifically provides how a municipal contract shall be made and executed, the city may only make a contract in the method prescribed; otherwise, the contract is invalid and unenforceable. A municipality's method of contracting, once prescribed by law or charter, is absolute and exclusive."). The purported oral contract alleged by Plaintiff does not satisfy the standards required by the City Charter, and thus, cannot supply a definite duration term to the offer letter, which is silent as to the issue.

For the reasons stated, I conclude that Plaintiff's employment was for an indefinite period of time and, thus, was employment at will, terminable, with or without cause, at any time for any reason by the City. O.C.G.A. § 34-7-1; *Burton*, 201 Ga. App. at 11, 410 S.E.2d at 137. Accordingly, Plaintiff has no cause of action for the City's decision to no longer employ him. *H&R Block*, 606 F.3d at 1295. Plaintiff's claim for breach of contract, therefore, fails as a matter of law.

D. Remaining Counts for Relief

Finally, Plaintiff's Amended Complaint asserts a claim for attorney's fees (Count Four) and a claim for punitive damages (Count Five). These claims, however, are derivative in nature, and are effective only if there is a valid claim for actual damages to which the claim(s) could attach. Attorney's fees and punitive damages

may not be recovered if the party's substantive claims have failed. *See J. Kinson Cook of Ga., Inc. v. Heery/Mitchell*, 284 Ga. App. 552, 561, 644 S.E.2d 440, 449 (2007).

Because I have concluded that Defendant is entitled to summary judgment on all of the substantive claims against it, no claim exists to which a claim for attorney fees and/or a claim for punitive damages claim can attach. *See Wood v. Archbold Med. Ctr.*, 738 F. Supp. 2d 1298, 1371 (M.D. Ga. 2010). Accordingly, I RECOMMEND that summary judgment be GRANTED as to Plaintiff's claims for attorney's fees and punitive damages.

IV. CONCLUSION

In sum, for the reasons discussed above, I **RECOMMEND** that Defendant's Motion for Summary Judgment [Doc. 82] be **GRANTED** in its entirety.

IT IS SO RECOMMENDED, this 27th day of July, 2021.

Catherine Salinas

CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE