UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KELVIN J. COCHRAN,

Plaintiff,

v.

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

Defendants.

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

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

After voluminous briefing on cross motions for summary judgment, it is clear that Defendants punished Chief Cochran based upon the content of his book. Defendants dutifully attempt to deny this obvious conclusion, baldly stating that "content . . . played no role in Mayor Reed's decision to suspend or terminate [Chief Cochran]." Defendants' Response to Plaintiff's Motion for Summary Judgment ("Defs.' Resp. Br.") 14. But a wealth of record evidence and Defendants' own admissions prove that Defendants' substantive disagreement with the messages conveyed in Chief Cochran's book drove their disciplinary process from start to finish.[1] Defendants themselves do not even appear to believe their own denial, executing an about face in the space of two sentences in their response to argue that "the damaging nature of [Chief Cochran's] speech" justified his punishment. *Id.* Astonishingly, Defendants go even further than

[1] *See* Defs.' Resp. Br. 16 (focusing on the "substance of [Chief Cochran's] speech" in arguing that his punishment was thereby justified); Defendants' Response to Plaintiff's Statement of Material Facts Not in Dispute ("Defs.' Resp. to Pl.'s Facts") ¶74 (admitting that Defendants "thought the content [of the book] was problematic"), ¶76 (admitting that Defendants found Chief Cochran's book "offensive"), ¶98 (admitting that Defendants publicly took issue with the content of the book upon suspending Chief Cochran); *see also* Defendants' Brief in Support of Summary Judgment 18 ("Defs.' Br.") (citing the "language" and "views" contained in the book as a predicate for discipline); Brief in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Br.") 6-10, 19 (establishing that Defendants punished Chief Cochran based upon their substantive disagreement with his speech).

this. Despite the fact that their own investigation showed that Chief Cochran never discriminated against anyone, *see* Pl.'s Ex. 13 at 3-4, they now argue—without any authority—that the messages conveyed in Chief Cochran's book "violat[e] . . . federal and local laws prohibiting workplace discrimination." Defs.' Resp. Br. 23 n.13. It is thus Defendants' position that the communication or even the revelation of Chief Cochran's religious beliefs—which by their own admission "are consistent with the Bible and historic Christian teaching"[2]—constitute per se discrimination justifying investigation and punishment. This extreme position not only definitively proves that content drove Defendants' decision making, but also betrays Defendants' self-characterized "legitimate, non-retaliatory reasons" for Chief Cochran's punishment to be mere pretexts. Defs.' Resp. Br. 20. When taken together with Defendants' failure to adduce any evidence whatsoever that Chief Cochran's speech resulted in any damage, disruption, or inefficiency to the administration of City government or AFRD operations, it becomes clear that Chief Cochran should be granted summary judgment on his retaliation claim.[3]

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[2] *See* Defs.' Resp. to Pl.'s Facts ¶42; *see also* Defs.' Resp. to Pl.'s Facts ¶¶40-41.

[3] Defendants improperly characterize Chief Cochran's First Amendment rights as "limited," but they are mistaken. Defs.' Resp. Br. 14. As "private religious speech," Chief Cochran's book "is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Defendants' further attempt to portray Chief Cochran's speech as "behavior" that is unprotected by the First

Furthermore, because Defendants have failed to raise any genuine issue of material fact to defeat Chief Cochran's viewpoint discrimination, prior restraint, unbridled discretion, and procedural due process claims, a grant of summary judgment in his favor is appropriate on each of those claims as well.

I. Chief Cochran is Entitled to Summary Judgment on His Retaliation Claim.

A. Chief Cochran's Interests Outweighs Defendant's Interests.

Having adduced no evidence of disruption or inefficiency brought about by Chief Cochran's speech, Defendant now argues that all it must show is a "[r]easonable possibility of adverse harm" to tip the scales in its favor. Defs.' Resp. Br. 18 (quoting *Moss v. City of Pembroke Pines*, 782 F.3d 613, 622 (11th Cir. 2015)). Defendant's resort to *Moss* and its relaxed standard is proof positive that it has abandoned any pretense that Chief Cochran's book caused any *actual* disruption or inefficiency. Moreover, its attempt to prevail in the balancing test enunciated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), by positing a lesser evidentiary burden on response comes to naught in any event, as *Moss* is entirely inapposite.

In *Moss* an assistant fire chief was discharged after he refused to abide by the fire chief's command that he "refrain from commenting on the budget and

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Amendment must also be rejected, Defs.' Resp. Br. 17, as this claim finds no support in the factual record or in the case law.

collective bargaining agreement issues," which issues were known to be "volatile" and "divisive" and had produced violence in similar negotiations involving the city's police department. *Id*. at 621-22. Given that history and the fact that the trial transcript contained a "wealth of evidence to support [a] showing" that "adverse harm" was possible and perhaps even likely, the Eleventh Circuit affirmed the district court's finding that "Plaintiff's interest in expressing his opposition" was outweighed by the "City's interest in avoiding dissension and discord." *Id*. at 621-22.

Nothing of the kind presents itself here. Chief Cochran wrote a book—on his own time—expressing traditional Christian beliefs in the hope of helping Christian men lead virtuous lives. Defs.' Resp. to Pl.'s Facts ¶¶38-40. That book was not an act of insubordination and it engendered no government dissension or discord. Indeed, up until someone voluntarily read the 162-page book and Defendant seized upon this instance of personal disagreement with the book's content to punish Chief Cochran for the "substance of his speech," Defs.' Resp. Br. 16, the book, the City, AFRD, and the community peacefully coexisted for over a year. Thus any attempt by Defendant to posit that "adverse harm" was reasonably possible or even impending must be rejected.[4] This conclusion is

[4] The fact that Defendant's own investigation exonerated Chief Cochran by finding that he had never discriminated against, or treated unfairly, any AFRD

especially appropriate when it is considered that it was Defendant itself who publicly repudiated Chief Cochran's beliefs, publicly suspended him without pay, and publicly launched a Title VII investigation into his leadership of AFRD. *See* Yancy Dep. 26:22, 68-69, 102, 105-06; Pl.'s Ex. 10. Defendant should not now be heard to blame Chief Cochran for the very notoriety it created itself through its public pronouncements disagreeing with his book. Nor should it be able to precipitate the controversy and then use that controversy to justify prevailing under *Pickering*.

Without any hint of even the possibility of "adverse harm," Defendant is left with nothing more than the disagreement of a largely unspecified and unquantified number of AFRD employees who apparently disagreed with the traditional Christian beliefs expressed in Chief Cochran's book, Pl.s' Ex. 13 at 3-4, along with its own unsupported conclusion that Chief Cochran's religious beliefs "threatened AFRD's ability to operate effectively and risked destroying the public's trust in the Department." Defs.' Resp. Br. 19. As to the former, a heckler's veto cannot justify punishing Chief Cochran for the content of his book. *Flanagan v. Munger*, 890 F.2d 1557, 1566-67 (10th Cir. 1989) (stating that the "Supreme Court has squarely rejected . . . the 'heckler's veto' as a justification for

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member, buttresses the conclusion that Defendant's asseveration of adverse harm is without support in the record. *See* Pl.'s Ex. 13 at 3-4.

curtailing 'offensive' speech," and finding disciplinary action unjustified where the evidence "pointed only to potential problems which might be caused by the public's reaction to plaintiff's speech"); *see also* Pl.'s Br. 14-15. As to the latter, Defendant has shown no actual or even potential internal disruption, and that is what is required.[5] *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969) (stating that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"). Indeed, if Defendant's "disruption by disagreement" logic were to be adopted, the right of public employees to speak as private citizens on matters of public concern would be effectively eviscerated, because a corpus of fellow employees holding alternative views and beliefs could always be identified. Fortunately, however, the natural and predictable difference of opinion in a free society with respect to matters of religion and moral life is not a proxy or substitute for disruption or inefficiency, and Defendant has cited no authority to the contrary.

[5] Janet Ward, who managed communications for the AFRD, testified that she didn't remember getting any media inquiries about Chief Cochran's book until near the time of Chief Cochran's suspension or the day of his suspension. *See* Ward Dep. 59:1-10. Thus any argument that the book itself caused disruption—rather than Defendant's unnecessarily public reaction to the content of the book—must be rejected out of hand.

B. Chief Cochran's Speech Played a Substantial Role in Defendant's Decision to Suspend and Terminate Him.

Defendant asserts that Chief Cochran's speech "[p]layed [n]o [r]ole" in its punishment of Chief Cochran. Defs.' Resp. Br. 20. But the record is replete with evidence proving that this is simply untrue. *See* supra at n.1, Pl.'s Br. 19; *see also* Pl.'s Resp. Br. 7-10. Moreover, Defendant devotes multiple pages of both its response brief and its opening brief on summary judgment to detailing the ostensibly problematic nature of the beliefs expressed in Chief Cochran's book, which ultimately led Defendant to suspend and terminate him. *See* Defs. Resp. Br. 16 (arguing that the "substance of [Chief Cochran's] speech" justified his punishment), 17 (concluding that the "language" in Chief Cochran's book "is directly contrary to myriad federal and local non-discrimination laws"), 22 (admitting that "the content of the book was certainly considered by the Mayor and his team"), 24 (admitting that "Mayor Reed and the City sought to distance themselves from—and even reject outright—the message" conveyed in Chief Cochran's book); *see also* Defs.' Br. 16 (focusing on the "message" conveyed in the book), 18 (relying on the "language" and "views" expressed in the book to justify punishment), 22 (arguing that Chief Cochran punishment was appropriate because he "expressed views antithetical to the City's"). Given thus the record facts and Defendant's own arguments, Defendant's denial must be rejected. Chief Cochran has more than shown that speech played a substantial role in

Defendant's decision to punish him.[6] *See Beckwith v. City of Daytona Beach Shores, Fla.*, 58 F.3d 1554, 1564-65 (11th Cir. 1995) (internal quotations and citations omitted) (stating that "an employee's burden is not a heavy one" to prevail on this factor).

C. Defendant Has Not Shown It Would Have Terminated Chief Cochran Absent His Speech.

Defendant proffers three reasons why Chief Cochran's termination was justified, to wit: his alleged violation of the City's Ethics Code, his communications with co-religionists during his suspension, and the City Law Department's investigative findings. Each of these reasons, however, fails as a predicate for termination. *See* Pl.'s Br. 20-23; *see also* Pl.'s Resp. Br. 10-18. Moreover, Defendant's general assertion that Chief Cochran had "lost the trust of his subordinates," Defs.' Resp. Br. 24, is completely unsubstantiated—it is a self-serving conclusion improperly presented as record evidence. In fact, the only two AFRD employees to testify in this action contradict Defendant's claim. AFRD Community Affairs Director Janet Ward testified that in her experience working for Chief Cochran she concluded that he "treat[ed] everybody the same," Ward

[6] Defendant's preoccupation with content would be inexplicable if content was not material to its disciplinary decision. Additionally, Defendant cannot negate evidence that it punished Chief Cochran based upon his speech by asserting other reasons for its discipline, as this mistakenly conflates the "substantial role" inquiry with the "but for" inquiry concluding this Court's free speech retaliation analysis.

Dep. 47:17-49:2, and she notified Chief Cochran just one day after his suspension that he had her "support in everything" and that in her opinion he was "the best person [she] ha[d] ever worked for." Pl's Ex. 17. And union president Stephen Borders testified that despite the fact that Chief Cochran's beliefs had become widely known, he could have worked for him if he had returned to work rather than having been terminated. Borders Dep. 108:11-14.

In sum, because Chief Cochran's interest in his right to free speech outweighs Defendant's interest, speech played a substantial role in Defendant's punishment, and Defendant is unable to show that it would have suspended or terminated Chief Cochran absent that speech, summary judgment in his favor as to his First Amendment retaliation claim is warranted.

II. Defendant Engaged in Content and Viewpoint Discrimination When It Suspended and Terminated Chief Cochran Based Upon the Content of His Book.

In its response Defendant proffers one argument to counter Chief Cochran's viewpoint discrimination claim, arguing that a precise mirror-image comparator is required to sustain such claims. Defendant is mistaken in asserting that any such requirement exists. There need be no showing of unequal treatment of ideological competitors before a viewpoint discrimination claim can obtain. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (recognizing use of hypothetical comparator to demonstrate

viewpoint discrimination); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (stating that it is "objectionable . . . to exclude one, the other, or yet another political, economic, or social viewpoint"); *see also* Pl.'s Resp. Br. 20-22. Moreover, the record shows that Defendant did treat high-level employees who publicly expressed support for same-sex marriage and various LGBT causes more favorably than it did Chief Cochran—in fact, rather than leveling punishment for such beliefs Defendant specifically created a position to advance the interests of the LGBT community, and permitted the public communication of such beliefs without incident. *See* Shahar Dep. 21-22 (discussing creation of new LGBT Advisor position); 114-117 & Pl.'s Ex. 61 (revealing communications between Shahar and Mayor Reed's cabinet officials, in which she discussed her interaction with a New York Times reporter in connection with Shahar's support for the pro-LGBT group Georgia Equality's efforts to defeat Georgia's proposed religious freedom restoration act, which interaction produced not even a hint of discipline or concern from the Mayor or his cabinet officials).

In this case the record reveals that Defendant punished and eventually terminated Chief Cochran because the beliefs he expressed in his book were apparently considered offensive by some City employees, and because those beliefs conflicted with the views officially adopted and approved by the City. *See*

Pl.'s Ex. 10 (stating that the "contents of [Chief Cochran's] book do not reflect the views of Mayor Reed or the Administration"); Defs.' Resp. Br. 24 (outlining Mayor Reed's and the City's views regarding LGBT issues and same-sex marriage and Defendant's characterizing Chief Cochran's book as a "message of condemnation and judgment"); Defs.' Resp. Br. 23 (arguing that the "message of inequality [Chief Cochran] espoused [in his book] is antithetical to and in violation of federal and local laws prohibiting workplace discrimination"); Defendant even ordered Chief Cochran to undergo sensitivity or diversity training to remediate his wayward beliefs before it would permit him to return to work. *See* Yancy Dep. 76:6-9. Defendant, in other words, discriminated based on viewpoint when it punished and terminated Chief Cochran, and thus summary judgment in his favor is warranted on this claim. *See Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (rejecting the idea that the "Government has an interest in preventing speech expressing ideas that offend" as "strik[ing] at the heart of the First Amendment"); *Id.* at 1769 (Kennedy, J., concurring) (stating that the "First Amendment does not entrust . . . to the government's benevolence" the power to prohibit "speech found offensive to some portion of the public").

III. Defendant's Pre-Clearance Policies Cannot Be Constitutionally Applied to Chief Cochran.

In its response Defendant confirms that it considers a religious book written by a private citizen on issues of public concern—one that implicates none

of the concerns of the City or AFRD—to be a fit subject of review for its pre-clearance policies. *See* Defs. Resp. Br. 30 (explaining that any work "receiv[ing] compensation" triggers the policies). In spite of this admission, Defendant maintains that its policies do not burden speech, are narrowly tailored, and do not grant unbridled discretion. But in practice such asseverations cannot withstand scrutiny.

As to the burden on speech, Defendant claims that "[e]mployees remain free to speak [or] write . . . without seeking approval . . . so long as they do not receive compensation for doing so." Defs.' Resp. Br. 30. But the record reveals this to be untrue. *See* Yancy Dep. 88:3-5; 52:5-7 (stating that employees need to "get permission . . . to do anything outside of work," even if compensation is only "perceived"). Moreover, in practice,[7] Defendant clearly burdened the speech of Chief Cochran by punishing him for writing and publishing a book when it did not even know whether he had made a profit on it.[8]

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[7] Defendant seeks to distinguish the cases cited by Chief Cochran on the basis that the regulations in those cases more specifically targeted speech. *See* Defs.' Resp. Br. 30-31. Defendant, however, raises a distinction without a difference. Defendant punished Chief Cochran because it disagreed with his speech. It would be difficult to conceive of a more direct form of targeting than that. Thus the cases cited by Chief Cochran are entirely apposite. *See* Pl.'s Br. 26-29.

[8] Defendant has provided no evidence that Chief Cochran made a profit on the book. Defendant, in fact, did not know whether Chief Cochran had profited from the book before it disciplined him. *See* Yancy Dep. 51:16-52:5 (stating that Defendant only knew the book was "for sale"). Moreover, Chief Cochran actually suffered a loss of approximately $3,385.11 on the book until sales were kick

As to narrow tailoring, Defendant has applied its policies in this case to speech by a private citizen on a matter of public concern that is wholly unrelated to the operations of City government or AFRD. Additionally, pursuant to its exception for "single speaking engagements," Def. Resp. Br. 30, Defendant's policies would permit Chief Cochran to deliver for compensation a speech explicating the contents of his book, but those same policies forbid him to write and publish for compensation identical speech in the form of a book. Defendant's policies are thus both overinclusive (by targeting religious speech which poses no conflict and inflicting punishment based thereon) and underinclusive (by ignoring speech that could potentially pose a conflict simply because it is spoken once, rather than written and published in book form), which means that they are anything but narrowly tailored. *See Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005) (stating that "[a] narrowly tailored regulation is one that . . . does not sweep too broadly [and] does not leave significant influences bearing on the interest unregulated").

started late in 2014 by Defendants' exceedingly public suspension and termination announcements. *See* Pl.'s Ex. 152 (revealing only $1,628 in book sale profits for 2014 after accounting for speaking engagements); Defs.' Ex. 25 (revealing a contract cost of $1,250.00 to publish the book); Defs.' Ex. 31 (revealing a further publishing and goods charge from the book's publisher for $585.39); Pl.'s Ex. 155 (revealing $3,533.72 in book purchases by Chief Cochran from late 2013 until Nov. 18, 2014, just days before he was suspended, and only $356 in royalties).

Finally, as to unbridled discretion, Defendant claims that its policies "are sufficiently limited to pass Constitutional muster" because approval is "based solely on whether the outside employment creates a conflict of interest or otherwise interferes with the employee's City employment." Defs.' Resp. Br. 31-32. These are, however, broadly formulated interests and not the "narrowly drawn, reasonable, and definite standards" required to "avoid unbridled discretion." *Bloedorn v. Grube*, 631 F.3d 1218, 1236 (11th Cir. 2011). Defendant has identified no such standards. Accordingly, Chief Cochran should be granted summary judgment on his claim challenging Defendant's pre-clearance policies.

IV. Defendants Violated Chief Cochran's Right to Procedural Due Process.

Chief Cochran has already established that Defendants violated his right to procedural due process by invoking the Code of Ethics as a sword to punish him, while depriving him of the shield that was his due by statutory right. *See* Pl.'s Br. 33-35. In response Defendants claim that Chief Cochran's alleged violation of the Code provides them with an independent predicate for termination. *See* Defs.' Resp. Br. 20, 23. But Defendants also claim, in the alternative, that the City Charter establishes that Chief Cochran's employment was at-will, which they contend gave them carte blanche to terminate him for any reason, with or without the Ethics Code. *Id.* at 34. Thus Defendants invoke the Code when it suits them in the *Pickering* balancing inquiry, but pivot to the

Charter when the Code fails them, here in the procedural due process context. *See id.* ("In the event of a discrepancy between the City Code and the City Charter, the Charter controls."). Defendants, in other words, want to have it both ways—they advance the classic "heads we win, tails you lose" proposition. But such convenient (and clearly pretextual) toggling back and forth between the Code and the Charter—as the situation dictates—should not be countenanced by this Court, as it amounts to the very type of unbridled discretion that is odious to the Constitution. *See* Pl.'s Br. 29-31. Indeed, permitting such arbitrary pretexts to suffice as adequate justifications for punishment would place a judicial imprimatur on patently discriminatory conduct, would improperly reward Defendants for dressing up punishment for disfavored speech as mere compliance with City guidelines, and would compound the already egregious violation of due process visited upon Chief Cochran by Defendants. Fortunately, however, because Defendants have failed to assert any valid justification for depriving Chief Cochran of the procedural protections promised him by the Code, a grant of summary judgment on his procedural due process claim is warranted.

CONCLUSION

For the foregoing reasons, and those contained in his Brief in Support of Summary Judgment, Chief Cochran respectfully requests that the Court grant his Motion for Summary Judgment.

Respectfully submitted this 20th day of July, 2017.

By: /s/ Kevin H. Theriot

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this document was prepared in Century Schoolbook 13-point font and fully complies with Local Rules 5.1C and 7.1D.

/s/ Kevin H. Theriot
Kevin H. Theriot

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of July, 2017, the foregoing document was filed with the Clerk of the Court using the ECF system, which will effectuate service on all parties.

/s/ Kevin H. Theriot
Kevin H. Theriot
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