No. 15-_____

In The
Supreme Court of the United States

CHARLES FLOWERS,

Petitioner,

v.

TROUP COUNTY SCHOOL DISTRICT, *et al*.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Reeves v. Sanderson Plumbing Products, Inc., held in an action under the Age Discrimination in Employment Act, that a plaintiff may ordinarily prove the existence of an unlawful motive by establishing a prima facie case and demonstrating the falsity of the employer's proffered explanation for the disputed employment, and that a plaintiff who does so need not also offer some other additional evidence of discrimination. The Eleventh Circuit held in this Title VII action that the existence of an unlawful motive may not be established in that manner; a plaintiff who establishes a prima facie case and the falsity of an employer's proffered reason is required to also adduce additional evidence of discrimination.

The question presented is:

Does the standard of proof established by *Reeves* apply in a Title VII action?

PARTIES

The petitioner is Charles Flowers.

The respondents are the Troup County, Georgia, School District, Dr. Cole Pugh, individually and in his official capacity as Superintendent of the Troup County School District, John Radcliffe, individually and in his official capacity as Assistant Superintendent of the Troup County School District, Ted Alford, individually and in his capacity as a member of the Board of Education of Troup County, Debbie Burdette, individually and in her capacity as a member of the Board of Education of Troup County, and Rev. Allen Simpson, individually and in his capacity as a member of the Board of Education of Troup County.

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Petitioner Charles Flowers respectfully prays that this Court grant a writ of certiorari to review the judgment and opinions of the United States Court of Appeals entered on October 16, 2015.

OPINIONS BELOW

The October 16, 2015, opinion of the court of appeals, which is reported at 803 F.3d 1329 (11th Cir. 2015), is set out at pp. 1a-27a of the Appendix. The March 5, 2014, opinion of the district court, which is reported at 1 F.Supp.3d 1363 (N.D.Ga. 2014), is set out at pp. 28a-70a of the Appendix. The Magistrate Judge's Report and Recommendation of December 26, 2013, which is not reported, is set out at pp. 71a-126a of the Appendix. The December 11, 2015, order of the court of appeals is set out at pp. 127a-30a of the Appendix.

JURISDICTION

The decisions of the court of appeals were entered on October 16, 2015. A timely petition for rehearing and rehearing en banc was denied on December 11, 2015. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer –
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 1981 of 42 U.S.C. provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens...."

Section 1 of the Fourteenth Amendment provides in pertinent part: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This case presents a question of fundamental importance to the resolution of the thousands of Title

VII cases that are brought each year in federal and state court.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), this Court set out, in a case under the Age Discrimination in Employment Act ("ADEA"), a general standard for resolving discrimination claims. *Reeves* held that a plaintiff can ordinarily demonstrate the existence of an unlawful motive by establishing a prima facie case and by showing that the employer's proffered explanation for the disputed action is false. *Reeves* expressly rejected a line of cases which had held that a plaintiff, over and above proving that the employer lied about its motives, must also adduce some *additional* evidence of discrimination, a requirement that in practice had often been impossible to meet.

Since 2000 the courts of appeals have generally agreed that the *Reeves* standard applies to cases arising under Title VII and other federal anti-discrimination cases. At one time the Eleventh Circuit also held that a Title VII plaintiff could demonstrate the existence of an unlawful purpose by establishing a prima facie case and by showing that the employer's proffered explanation for the disputed action is false. But in the avowedly precedent-setting decision below, the Eleventh Circuit emphatically repudiated its own earlier Title VII precedent, and now insists that a plaintiff must also produce additional evidence. This is precisely the "additional evidence" requirement that was expressly rejected by this Court in *Reeves*, and that all other circuits in the

wake of *Reeves* have repeatedly refused to impose in Title VII actions.

A. Legal Background

This Court's decision in *Reeves* addressed in the context of the ADEA the general standard governing proof of discrimination in employment. "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148. "[R]ejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." 530 U.S. at 147 (emphasis in original) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)). *Reeves* expressly rejected the lower court decisions which had held that proof of such falsity is never sufficient, and that a plaintiff always must both demonstrate that the employer's account was a lie (a pretext) and offer some additional proof of discrimination. (That requirement is referred to in the lower courts as the "pretext-plus" rule.[1]) "[B]ecause a prima facie case

[1] *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1240 (10th Cir. 2002):

> [T]he Supreme Court in ... *Reeves* cleared away a circuit split over the so-called "pretext-plus" theory which said that a jury's rejection of an employer's proffered explanation could not, by itself, suffice to show discriminatory motive.... The Supreme Court ... explain[ed] that [its prior precedent] forbade summary

(Continued on following page)

and sufficient evidence to reject the employer's explanation may permit a finding of liability, the court of appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination." 530 U.S. at 149.

This Court has on a number of occasions cautioned that the standard of proof governing claims under the ADEA might differ from the standard appropriate in Title VII cases.[2] Nonetheless, unlike the precedent-setting Eleventh Circuit decision in the instant case, the other circuit courts have consistently applied the *Reeves* standard to Title VII claims.

B. Factual Background

1. The First Investigation of Flowers

Troup County is a racially diverse county on the western border of Georgia. About one third of the population, and a higher percentage of the public school students, is African-American. Between the desegregation of the public schools in 1973, and the summer of 2010, every head football coach at the county's three high schools was white. App. 5a.

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judgment for a defendant where the plaintiff, after presenting a prima facie case, presented evidence that the defendant's proffered explanation was pretextual.

[2] *Reeves*, 530 U.S. at 142; *Gross v. FBL Financial Services*, 557 U.S. 167, 174-79 (2009); *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 240-42 (2005); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996).

Charles Flowers, a black alumnus of one of the Troup County high schools, is one of the most successful high school coaches in the state. Prior to the events giving rise to this litigation, "Flowers distinguished himself at [a] High School in Columbus, Georgia, winning multiple coach-of-the-year awards and state championships in baseball and football." App. 4a. When there was a vacancy in the position of head football coach at Troup High School, the black assistant principal in charge of athletics contacted Flowers and invited him to apply for the position.

Flowers applied for the position and volunteered to work without pay beginning in early 2010, running both the high school's spring football program and summer weight camp. "Seven months before he was officially hired, ... [school] administrators subjected [Flowers] to an unusually intensive background check, with a particular focus on discovering any potential recruiting violations." The reason for this unusual lengthy investigation of Flowers is a matter of dispute. App. 5a. "After that investigation came up empty, Troup County School District confirmed Flowers's employment." *Id.*

2. The Second Investigation of Flowers

In the summer of 2010, the School Board received the first of several letters from officials in neighboring Lanett, Alabama, just across the state line. The letters asserted that a number of students who actually lived in Lanett had improperly enrolled at Troup

High School, with the intent of playing on that high school's sports teams. App. 6a. The first three letters only addressed the issue of where the students actually lived, and did not mention any possible involvement of Troup school officials.[3] A fourth letter commented somewhat equivocally that the students "may or may not have been recruited," apparently referring to recruitment by someone in Troup County.[4] These letters did not prompt Troup School Board officials to take any action related to Flowers at that time.

On February 1, 2011, a new County Superintendent of Education, Cole Pugh, took office.[5] "On his first day of work, Superintendent Pugh met with the principal of Troup High School, who alleged that Pugh told him that Pugh 'understood [Flowers] was a recruiter.' The principal denied that Flowers was a recruiter, Push responded that he has 'learned that where there's smoke, there's fire.'" App. 7a. Pugh denied making that statement. App. 87a n.20. Pugh "directed that an investigation be made into suspected recruiting violations committed by Flowers.... [I]n April 2011, the Troup County School Board hired a private investigator ... to look into allegations of recruiting violations made against Flowers." App. 7a. The detective's particular assignment was to investigate any possible "recruiting violations by

[3] Doc. 133-1, Letters 1-3.

[4] Doc. 133-1, Letter 4.

[5] Pugh, who is white, replaced the Acting County Superintendent of Education, who was black.

Flowers." App. 7a.[6] The motive behind this investigation is a matter of dispute.

In his first report, sent on May 14, 2011, the private investigator expressed his belief that at least some of the students mentioned in the Lanett letters did not live in the Troup High School attendance zone. But the investigator exonerated Troup school officials, including Flowers, stating that "any involvement of Troup County Staff in efforts to falsify students' residencies [sic] was 'unfounded.'" App. 7a. The report "found no evidence that any Troup County employee had helped students establish fraudulent residences." App. 55a.

3. The Third Investigation of Flowers

In July 2011, the investigator notified the assistant superintendent that he had received a report about a possible involvement by Flowers in arranging housing for a family whose sons had earlier been on the football team. The two boys, Jalen and Zanquanarious Washington, had been on the team in the fall of 2010. In February 2011, after the football season had ended, the boys' mother, Shayla Washington, who had been renting another home in the Troup High School attendance zone,[7] applied for an apartment at the Happy Hallow Apartments. Ric Hunt, a co-owner of the apartment, assertedly told

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[6] Doc. 127, Exh. 23; Doc. 129, p. 57; Doc. 113, p. 44.

[7] That first home was at 904 Avenue D in West Point, Georgia.

the detective that Flowers had called him on Ms. Washington's behalf and had paid her rent and deposit with a check. In this same report to the assistant superintendent, the detective noted that the Washingtons had since moved away. They moved out of Georgia, and the boys did not play on the Troup High School football team thereafter.

Flowers did not learn of this accusation until he was fired months later. "[A]t no time prior to the meeting at which he was fired did anyone from the School District speak with Flowers, which violated the District's policy of first giving warnings to employees under investigation." App. 8a (footnote omitted). And "Pugh 'made no attempt to verify the information' provided by Ric Hunt, the co-owner of the apartment...." App. 18a. "At no point in the investigation did [the detective] or any other Troup County School District official interview Shayla Washington directly." App. 8a.[8]

In September 2011, Pugh and the assistant superintendent met with Hunt. Pugh took no further action for four months. Then, in January 2012, Pugh instructed the assistant to obtain a written statement from Hunt. Finally, on February 16, 2012, Pugh met with Flowers and told him he was being dismissed for having paid the rent and/or deposit on the Washingtons' apartment, and for calling Hunt to offer to

[8] "Pugh ... did [not] grant the private investigator's request to question [Ms.] Washington and Flowers."

make those payments. Pugh did not assert that the dismissal was based on any claim that Flowers had engaged in improper activity prior to February 2011. Flowers, who first learned of the charges only when he was dismissed, denied having spoken with Hunt or having paid the Washingtons' rent or deposit. The dismissal was to take effect on February 29.

4. The Final Termination Decision

Before the termination could become final, Flowers provided the defendants with information which largely discredited the allegations on which Pugh claimed to have relied.

> The next day [following his dismissal], Flowers returned to Pugh's office with Tseyonka Davidson (one of the Washington brothers' uncles) and his wife. Davidson provided Pugh with a signed statement attesting that he had paid the deposit and rent for the department. He also informed Pugh that he, not Flowers, had made the phone call to Hunt about securing the apartment. To back up Davidson's story, Flowers provided Pugh with a statement from the resident manager of Happy Hallow Apartments, who declared that Davidson and [Ms.] Washington had paid the deposit and rent.

App. 36a-37a. Because Hunt had asserted that Flowers had paid Washington's rent with a check, the

assistant superintendent emailed Hunt and asked for a copy of the alleged check.[9] Hunt never replied.

"[D]espite the evidence indicating that Hunt's statement was false, Pugh did not relent." App. 37a. In light of the exculpatory information provided by Flowers, and of Hunt's failure to provide a copy of the alleged check, Pugh now focused his attack on the claimed telephone call from Flowers to Hunt.[10] Pugh insisted that on February 16, Flowers had admitted making that call.[11] (Flowers denied having made either the call or any such admission. App. 12a). And the alleged phone call would not necessarily have provided a ground for dismissal, because it was not at all clear that such a call would even violate the applicable anti-recruiting rules. "Pugh called [the Georgia High School Association's] executive director, to confirm that making a call to secure an apartment for an athlete would be considered recruiting. Pugh testified that [the director] said it would. But in his affidavit [the director] state[d] that he never 'makes decisions with regard to the application of the [Association's anti-recruiting rules] by telephone.'" App. 54a.[12]

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[9] Doc. 133-2.

[10] Doc. 113, p. 74.

[11] *Id.*, pp. 53-54.

[12] "The contents of the Pugh-Swearngin telephone conversation ... are ... disputed by the parties." App. 12a n.6.

Pugh decided to stand by his initial decision to dismiss Flowers. The Board of Education then voted to approve Flowers' dismissal, "based upon the information and recommendation Superintendent Pugh provided."[13] Flowers' employment ended on February 29. He was replaced by a white head football coach.

C. Proceedings Below

Flowers commenced this action in the District Court for the Northern District of Georgia, alleging that he had been dismissed because of his race, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the Fourteenth Amendment. Flowers contended, inter alia, that the school board's justification for the dismissal, the alleged "recruiting" violation related to the Washingtons' apartment, was just a pretext. After a period of discovery, the district court granted the defendant's motion for summary judgment. App. 28a-70a.

The court of appeals concluded that there was indeed evidence that the reason given for firing Flowers was a pretext. The evidence, it found, would "support an inference that the School District's investigation into Flowers's potential recruiting violations may have been pretext of *something*. The School District's ham-handed investigation and actions singling out Flowers could lead a reasonable jury to

[13] Doc. 108-6, p. 6.

conclude that Pugh had it in for Flowers from the beginning." App. 19a-20a (emphasis in original). The appellate court set out some of the evidence that suggested that the asserted recruiting violation was not the defendants' real reason for firing Flowers. App. 18a-19a. The court of appeals noted that "[t]he parties fiercely dispute the existence of, and the meaning to be drawn from, many of the ins and outs of the events leading to and following Flowers's termination." App. 3a.

But, the Eleventh Circuit held, even if the reason given by school officials for firing Flowers was "a bald-faced lie" (App. 22a), that would be legally insufficient to support a finding of discrimination. In an earlier era, the Eleventh Circuit had held that this type of evidence *could* suffice to defeat a summary judgment motion. *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998). But, the court below explained, subsequent Eleventh Circuit decisions had overturned *Combs* and precluded proving discrimination in that manner.

> At one time under this Circuit's law, Flowers could have gotten his claims before a jury after making a prima facie case and merely contradicting the School District's proffered legitimate, nondiscriminatory reason. *See Combs v. Plantation Patterns*, ... *recognized as modified, Chapman v. AI Transport*, 229 F.3d 1012, 1025 n.11 (11th Cir. 2000) (en banc). Intervening precedent has since closed this avenue for Title VII plaintiffs. Contradicting the School District's asserted reason

> alone, though doing so is highly suggestive of pretext, no longer supports an inference of unlawful discrimination.... "[A] contradiction of the employer's proffered reason for the termination of an employee is sometimes enough, *when combined with other evidence*, to allow a jury to find that the firing was the result of unlawful discrimination."

App. 22a-23a (quoting *Kagor v. Takeda Pharm. Am. Inc.*, 702 F.3d 1304, 1307 (11th Cir. 2012); emphasis in opinion below). In *Reeves*, this Court had expressly cited the decision in *Combs* – now repudiated by the Eleventh Circuit – as an example of the line of cases that conflicted with the Fifth Circuit in *Reeves*. 530 U.S. at 140.

Proof of the falsity of the particular explanation actually given by a defendant is insufficient, the Eleventh Circuit insisted, because such evidence does not also disprove the "virtually limitless possible non-discriminatory reasons" that might hypothetically have been behind an employer's action.

> There are virtually limitless possible nondiscriminatory reasons why the Troup County School District could have wanted to fire Flowers.... [T]he school district, though not believing that Flowers had committed recruiting violations, could have wanted a football program free from the appearance of impropriety. Or the School District could have wanted to avoid an interstate kerfuffle with school officials in Lanett, Alabama. Or the School District could have wanted to

> make room for a new head coach – perhaps even a new coach who would be *more* willing to commit recruiting violations. Or the School District could have simply grown tired of Flowers. We just don't know.

App. 21a (emphasis in original; footnote omitted).

To defeat a motion for summary judgment, the Eleventh Circuit held, a plaintiff must establish a prima facie case, prove the falsity of the defendant's proffered explanations, and then offer some *additional* evidence of discrimination.

> Because ... Flowers has failed to put forth any additional evidence that would support an inference of unlawful discrimination, it is insufficient for Flowers merely to make a prima facie case and – assuming that he could do so – call into question the School District's proffered legitimate, nondiscriminatory reason. The burden placed on Title VII plaintiffs to produce additional evidence suggesting discrimination after contradicting their employer's reasons is not great, but neither is it nothing.

App. 23a-24a.

The Eleventh Circuit denied a timely petition for rehearing en banc. App. 127a-30a.

REASONS FOR GRANTING THE WRIT

This case marks the resurgence in the Eleventh Circuit of the pretext-plus doctrine long ago abandoned by the other courts of appeals. The Eleventh Circuit has emphatically and expressly repudiated that circuit's "one time" rule that plaintiffs can demonstrate discrimination by proving that an employer's proffered justification for a disputed action is a fabrication; in the Eleventh Circuit today proof that an employer was guilty of even a "bald-faced lie" will not suffice. The court below insists that this stringent limitation on the permissible method of proving discrimination is mandated by Eleventh Circuit precedents from 2000 to 2012. A plaintiff cannot rely on a prima facie case and proof of the falsity of an employer's proffered reason, but must also adduce "additional evidence." That is precisely the rule applied by the Fifth Circuit in *Reeves*, and rejected by this Court in *Reeves*. The standard announced in the decision below conflicts with Title VII decisions in every other geographical circuit.

The Eleventh Circuit's pointed explication of its standard makes palpably clear that this standard is incompatible with this Court's precedents, and with common sense. Proof that an employer's reason is a fabrication is insufficient, the court of appeals insisted, because it only rules out the reasons the employer actually gave. Such proof fails to exclude the "virtually limitless *possible* nondiscriminatory reasons" which might instead have motivated an employer. App. 28a (emphasis added). In the Eleventh

Circuit a plaintiff not only must disprove the reasons an employer did give, but also must negate every conceivable reason an employer might have given, and even reasons that are the opposite of what the employer actually asserted. Thus in this case, although the Eleventh Circuit recognized that Flowers had adduced evidence that the defendants did not fire Flowers because they believed he had violated a recruiting rule, it faulted Flowers for failing to also demonstrate that he was not fired for the opposite reason, because the school board wanted a coach who – unlike the scrupulous Flowers – "would be more willing to commit recruiting violations." App. 21a.

I. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH TITLE VII DECISIONS IN ALL TWELVE GEOGRAPHICAL CIRCUITS

(1) The Eleventh Circuit holds in this Title VII case that "it is insufficient for [a plaintiff] merely to make a prima facie case and ... call into question the [defendant's] proffered legitimate, nondiscriminatory reason." App. 23a-24a. Every other circuit applies the opposite rule in Title VII cases.

The Third, Sixth, Ninth, and Tenth Circuits, addressing the specific procedural posture of this case, insist that a plaintiff in a Title VII case can defeat summary judgment by the very type of showing that the Eleventh Circuit held insufficient. "Evidence that the employer's proffered reason for the

termination was not the actual reason ... does not mandate a finding for the employee, ... but it is enough to survive summary judgment." *Griffin v. Finkbeiner*, 689 F.3d 584, 594 (6th Cir. 2012).[14] "[A] disparate treatment plaintiff can survive summary judgment without producing any evidence of discrimination beyond that constituting his prima facie case, if that evidence raises a genuine issue of material fact regarding the truth of the employer's proffered reasons." *Chuang v. University of California Davis, Bd. of Trustees*, 225 F.3d 1115, 1127 (9th Cir. 2000).[15]

> A plaintiff can withstand summary judgment if she presents evidence sufficient to raise a genuine issue of material fact regarding whether the defendant's articulated reason for the adverse employment action is pretextual.... "Pretext exists when an employer does not honestly represent its reasons...."

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[14] See *Moffatt v. Wal-Mart Stores, Inc.*, 624 Fed.Appx. 341, 350 (6th Cir. 2015) ("A plaintiff's prima facie case, together with evidence showing the employer's proffered reason is false, permits the jury to infer the ultimate fact of intentional discrimination.").

[15] *Lespron v. Tutor Time Learning Center*, 550 Fed.Appx. 509, 510 (9th Cir. 2013) ("[o]nce a plaintiff raises a genuine issue of material fact about the veracity of a defendant's proffered explanation, summary judgement is inappropriate; the question of whether the 'real reason' for the action was discrimination is a question for the factfinder.").

Konzak v. Wells Fargo Bank, N.A., 492 Fed.Appx. 906, 910 (10th Cir. 2012) (quoting *Miller v. Eby Realty Group, LLC*, 396 F.3d 1105, 1111 (10th Cir. 2005)).[16]

> [T]o avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a factfinder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a post-hoc fabrication or otherwise did not actually motivate the employment action (that is, the proffered reason is a pretext).

Abramson v. William Paterson College of New Jersey, 260 F.3d 265, 283 (3d Cir. 2001) (quoting *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)).[17]

The Fourth and Fifth Circuits have concluded more generally in Title VII cases that a trier of fact *can* infer the existence of an unlawful motive from the existence of a prima facie case and the falsity of an employer's proffered reasons. "[T]he plaintiff's *prima facie* case, combined with ... evidence which is

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[16] *Neal v. Roche*, 349 F.3d 1246, 1249 (10th Cir. 2003) ("in cases where the employer advances a legitimate, non-discriminatory reason for an employment action, the plaintiff may survive summary judgment by showing that the employer's asserted reason was pretextual.").

[17] See *Burton v. Teleflex, Inc.*, 707 F.3d 417, 427 (3d Cir. 2013) ("the factfinder may infer from the combination of the prima facie case, and its own rejection of the employer's proffered reason, that the employer engaged in the adverse action for an invidious reason.").

sufficient for a reasonable jury to find the employer's proffered reason is false, permits the trier of fact to infer that [the employer] discharged [the plaintiff] in violation of Title VII...." *Siraj v. Hermitage in Northern Va.*, 51 Fed.Appx. 102, 112 (4th Cir. 2002).[18] "[T]he Supreme Court[ ] expl[ained in *Reeves*] that a fact-finder may infer the ultimate fact of retaliation from the falsity of the explanation." *Gee v. Principi*, 289 F.3d 342, 348 (5th Cir. 2002).

The First, Second, Seventh, Eighth, and District of Columbia Circuits hold in Title VII cases that a prima facie case combined with proof of the falsity of an employer's explanation will ordinarily, although not invariably, permit an inference of discrimination. "In Title VII cases, we have made clear that summary judgment *usually* 'may be defeated where "a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false may permit the trier of fact to conclude that the employer unlawfully discriminated."'" *Duzant v. Electric Boat Corp.*, 81 Fed.Appx. 370, 372 (2d Cir. 2003) (opinion joined by Sotomayor, J.) (emphasis added; quoting *Byrnie v. Town of Cromwell*, 243 F.3d 93, 102 (2d Cir. 2001)). "A plaintiff's prima-facie case, combined with sufficient

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[18] *Ham v. Washington Suburban Sanitary Comm'n*, 158 Fed.Appx. 457, 463 (4th Cir. 2005) ("the plaintiff must prove that the defendant's proffered reason is mere pretext for discrimination.... This may be accomplished by showing that the proffered reason is false....").

evidence to find that an employer's asserted justification is false, may permit a trier of fact to conclude that the employer unlawfully [discriminated against] the plaintiff." *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 27 (1st Cir. 2001); see *Greene v. Potter*, 557 F.3d 765, 769-70 (7th Cir. 2009); *Dixon v. Pulaski County Special School Dist.*, 578 F.3d 862, 869 (8th Cir. 2009); *Evans v. Sebelius*, 716 F.3d 617, 621 (D.C.Cir. 2013).

(2) The linchpin of the Eleventh Circuit standard is that at least in Title VII cases plaintiffs cannot avoid summary judgment by establishing a prima facie case and demonstrating the falsity of an employer's proffered explanation; plaintiffs must also offer "additional evidence" of discrimination. App. 23a-24a. Ten circuits have in Title VII cases expressly rejected any such requirement of additional evidence.

In the First Circuit, "'introduction of additional evidence is not necessarily required' when the plaintiff makes a prima facie showing and adduces evidence of pretext." *Ahmed v. Johnson*, 752 F.3d 490, 498 (1st Cir. 2014) (quoting *Dominguez-Cruz v. Shuttle Caribe, Inc.*, 202 F.3d 424, 430 n.5 (1st Cir. 2000)). In the Second Circuit, "it is 'err[or] [to] proceed[ ] from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.' ... Thus, the District Court erred in holding that the plaintiff's proof that defendants' explanation was false was 'immaterial' because she had not introduced additional, independent evidence of discrimination." *Sands v. Rice*, 619 Fed.Appx. 31, 32 (2d Cir. 2015)

(quoting *Reeves*, 530 U.S. at 149). "[C]ircumstances in which plaintiffs will be required to submit evidence beyond evidence establishing a *prima facie* case and evidence permitting a finding that a proffered explanation was false 'in order to survive a motion for judgment as a matter of law ... will be uncommon.'" *Duzant v. Electric Boat Corp.*, 81 Fed.Appx. 370, 372 (2d Cir. 2003) (opinion joined by Sotomayor, J.) (quoting *Zimmermann v. Assocs. First Capital Corp.*, 251 F.3d 376, 381 (2d Cir. 2001) and *Reeves*, 530 U.S. at 154 (Ginsburg, J. concurring)). And the Third Circuit holds that "if a plaintiff has come forward with sufficient evidence to allow a finder of fact to discredit the employer's proffered justification, she need not present additional evidence of discrimination beyond her prima facie case to survive summary judgment." *Burton v. Teleflex, Inc.*, 707 F.3d 417, 427 (3d Cir. 2013).

The Fourth Circuit has made clear in a Title VII case that "a plaintiff is not required to provide additional evidence that race was the true reason for the employment decision." *Burgess v. Bowen*, 466 F.3d 272, 277 (4th Cir. 2012). That circuit has repeatedly overturned district court decisions applying an additional evidence requirement in a Title VII case.[19] In

[19] *Leake v. Ryan's Family Steakhouse*, 5 Fed.Appx. 228, 232 (4th Cir. 2001) (emphasis in original) ("the district court ... appl[ied] the 'pretext-plus' standard. Under this standard, which was the law of this circuit at the time the district court rendered its decision, [the plaintiff] was required to demonstrate that the explanation proffered by [the defendant] was pretextual *and*

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the Fifth Circuit, if a Title VII plaintiff establishes a prima facie case and shows that the employer's "explanation is false or unworthy of credence ... [,] '[n]o further evidence of discriminatory animus is required because "once the employer's justification has been eliminated, discrimination ... may well be the most likely alternative explanation."'" *Staten v. New Palace Casino, LLC*, 187 Fed.Appx. 350, 358 (5th Cir. 2006). "If the plaintiff can show the employer's asserted justification is false, this showing, coupled with a *prima facie* case, may permit the trier of fact to conclude that the employer discriminated against the plaintiff without additional evidence." *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002); see 283 F.3d at 721 n.4 ("[plaintiff] is not required to present additional independent evidence of discrimination").[20]

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produce evidence (beyond his prima facie case) that the real reason for his discharge was retaliation ... since the district court decided this case, however, the Supreme Court has rejected the pretext-plus standard. *See Reeves*...."); *Crosland v. Caldera*, 2000 WL 1520597 at *1 (4th Cir. Oct. 13, 2000) ("We vacate and remand because the district court relied upon this Circuit's 'pretext-plus' case law, which has since been rejected by the Supreme Court. Under this theory where a plaintiff has already established a prima facie case of discrimination and the employer has advanced an alleged legitimate nondiscriminatory reason for its action, a plaintiff ... must show ... something additional.... [T]he Supreme Court rejected the 'pretext-plus' approach. *See Reeves*....").

[20] *Handzlik v. U.S.*, 93 Fed.Appx. 15, 19 (5th Cir. 2004) ("The Supreme Court has held that the trier of fact may infer retaliation or discrimination from the falsity of the employer's

(Continued on following page)

The Sixth Circuit, applying the same standard in Title VII cases, has repeatedly reversed district court decisions which required a plaintiff to offer additional evidence over and above a prima facie case and proof of the falsity of an employer's proffered reason.

> The district court ... required [the plaintiff] to introduce additional evidence beyond the evidence necessary to support a prima facie case and a showing of pretext in order to survive summary judgment.... The district court ... erred in assuming that [the plaintiff] had to produce additional evidence of discrimination in order to survive summary judgment.

Griffin v. Finkbeiner, 689 F.3d 584, 594 (6th Cir. 2012); see *Moffatt v. Wal-Mart Stores, Inc.*, 624 Fed.Appx. 341, 350 (6th Cir. 2015) ("No additional proof of discrimination is required...."); *Carter v. Toyota Tsusho America, Inc.*, 529 Fed.Appx. 601, 609-10 (6th Cir.

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explanation.... The plaintiff need not, therefore, introduce additional evidence of discrimination in order to survive summary judgment."); *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir. 2003) ("Evidence demonstrating that the employer's explanation is false or unworthy of credence, taken together with the plaintiff's prima facie case, is likely to support an inference of discrimination even without further evidence of defendant's true motive.... No further evidence of discriminatory animus is required because 'once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation....' ") (quoting *Reeves*, 530 U.S. at 147-48); *Gee v. Principi*, 289 F.3d 342, 348 (5th Cir. 2002) ("In such cases, a plaintiff may withstand a motion for summary judgment without adducing additional, independent evidence of retaliation.").

2013) ("[T]o the extent prior case law suggests that to survive summary judgment a plaintiff must do more than sufficiently call into question the employer's proffered reasons for its employment decision, ... it is no longer the law of this circuit in light of *Reeves*"); *Layne v. Huish Detergents, Inc.*, 40 Fed.Appx. 200, 206-07 (6th Cir. 2002) ("[The plaintiff] was not required to submit additional evidence to reach a threshold of sufficiency to support th[e] conclusion [of retaliation]."); *Livingston v. Wheeling Pittsburgh Steel Corp.*, 2000 WL 1720630 at *3 (6th Cir. Nov. 7, 2000) ("[B]ecause [the plaintiff] showed that the proffered reason was insufficient to warrant a discharge, a fact-finder would be permitted to infer that discrimination was the true reason, and he was not required to introduce additional direct evidence of discrimination."). In the Seventh Circuit as well, it is reversible error to require a Title VII plaintiff to adduce such additional evidence. *Powell v. Rumsfeld*, 42 Fed.Appx. 856, 859 (7th Cir. 2002). Similarly, in the Ninth Circuit "the factfinder may infer 'the ultimate fact of intentional discrimination' without additional proof once the plaintiff has made out her *prima facie* case if the factfinder rejects the employer's proffered nondiscriminatory reasons as unbelievable." *Noyes v. Kelly Services*, 488 F.3d 1163, 1169-70 (9th Cir. 2007) (quoting *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1194 (9th Cir. 2003)).

The Tenth Circuit recognizes that a requirement of "additional evidence" would recreate the pretext-plus doctrine rejected in *Reeves*. "The plaintiff does

not have to come forward with additional, direct evidence of a discriminatory motive (sometimes referred to as 'pretext plus')." *Neal v. Roche*, 349 F.3d 1246, 1249 (10th Cir. 2003). "Under pretext-plus, the plaintiff must do more than show pretext; [she] must also come forward with additional, direct evidence of a discriminatory motive.... This circuit has rejected the pretext-plus doctrine." *Konzak v. Wells Fargo Bank, N.A.*, 492 Fed.Appx. 906, 910 n.2 (10th Cir. 2012) (quoting *Jaramillo v. Colo. Judicial Dep't*, 427 F.3d 1303, 1312 (10th Cir. 2005)); see *McCowan v. All Star Maintenance, Inc.*, 273 F.3d 917, 922 (10th Cir. 2001).[21] And the District of Columbia Circuit reversed summary judgment in a Title VII case because the district court – like the Eleventh Circuit in the instant case – had held that "employment discrimination plaintiffs are presumptively required to submit evidence over and above [evidence of pretext] in order

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[21] See *Lundien v. United Airlines*, 2000 WL 1786579 at *4 (10th Cir. Dec. 6, 2000):

> [T]he district court applied an incorrect legal standard.... [T]he district court rule that even if plaintiff had presented evidence that ... her demotion was based on erroneous facts, she failed to establish pretext because she did not present "evidence indicating that her demotion was motivated, at least in part, by her gender." ... This is a "pretext-plus" test, which the Supreme Court recently rejected in *Reeves*.... Because a showing of pretext, in itself, is all that is required to raise the inference of discriminatory intent, and no additional showing of actual discriminatory animus is necessary, the district court incorrectly evaluated plaintiff's evidence.

to avoid summary judgment." *Colbert v. Tapella*, 649 F.3d 756, 759 (D.C.Cir. 2011) (quoting *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1293 (D.C.Cir. 1998) (en banc); emphasis in *Colbert*).

(3) Under the standard established by the Eleventh Circuit, proof that an employer deliberately gave a false explanation for a disputed employment action is inherently insufficient in a Title VII action to provide a basis for a finding of unlawful motive. A defendant is entitled to summary judgment, under the decision below, "[e]ven if [its] purported explanation ... [is] a bald-faced lie." App. 22a.

All of the eleven other geographical circuits have held in Title VII actions that proof that an employer's proffered reason is a lie is "particularly" probative, and will ordinarily support an inference that the employer lied in order to cover up an unlawful discriminatory purpose. *Lockridge v. University of Maine*, 597 F.3d 464, 470 n.4 (1st Cir. 2010) (quoting *St. Mary's Honor Center*); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 38 (2d Cir. 1994) (quoting *St. Mary's Honor Center*); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1066 (3d Cir. 1996) (quoting *Reeves*); *Dennis v. Columbia Colleton Medical Center, Inc.*, 290 F.3d 639, 648 (4th Cir. 2002) (quoting *Reeves*); *Laxton v. Gap, Inc.*, 333 F.3d 572, 580 (5th Cir. 2003) (quoting *Reeves*); *Hicks v. SSP America, Inc.*, 490 Fed.Appx. 781, 788 (6th Cir. 2012) (quoting *St. Mary's Honor Center*); *Rudin v. Lincoln Land Community College*, 420 F.3d 712, 726 (7th Cir. 2005) (quoting *St. Mary's Honor Center*); *Torgerson v.*

City of Rochester, 605 F.3d 584, 597 (8th Cir. 2010) (quoting *Reeves*); *Washington v. Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993) (quoting *St. Mary's Honor Center*); *Robinson v. Cavalry Portfolio Services*, 365 Fed.Appx. 104, 111 (10th Cir. 2010) (quoting *St. Mary's Honor Center*); *Barbour v. Browner*, 181 F.3d 1341, 1347 (D.C.Cir. 1999) (quoting *St. Mary's Honor Center*). In these circuits, proof that the employer has told an ordinary lie will usually suffice to defeat summary judgment; bald-face lies are not required.

"When evidence indicates that an employer's proffered reason for taking an adverse action is false, a factfinder can decide that the employer was lying to mask its true unlawful purpose." *Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205, 1217-18 (10th Cir. 2003). "The jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent." *Colbert v. Tapella*, 649 F.3d 756, 759 (D.C.Cir. 2011) (quoting *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1293 (D.C.Cir. 1998) (en banc)).

(4) Under the standard established by the Eleventh Circuit, a plaintiff cannot avoid summary judgment merely by demonstrating the falsity of the particular nondiscriminatory justification actually proffered by an employer; that evidence is insufficient because it does not also rule out the "virtually limitless [other] possible discriminatory reasons" that might explain the employer's actions. Under the decision below it is irrelevant that the employer itself never claimed to have acted for any of those other imaginable purposes.

Seven circuits have quoted and applied in Title VII cases the opposite rule, set out in *Reeves*, that "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." 530 U.S. at 147. *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376, 383 (2d Cir. 2001) (quoting *Reeves*); *Colussi v. Woodruff Family Services, LLP*, 173 Fed.Appx. 118, 122 n.3 (3d Cir. 2006) (quoting *Reeves*); *Burgess v. Bowen*, 466 F.3d 272, 277 (4th Cir. 2012) (quoting *Reeves*); *Ellerbrook v. City of Lubbock, Texas*, 465 Fed.Appx. 324, 331 (5th Cir. 2012) (quoting *Reeves*); *Kimble v. Wasylysyn*, 439 Fed.Appx. 492, 497 (6th Cir. 2011) (quoting *Reeves*); *Imwalle v. Reliance Medical Products, Inc.*, 515 F.3d 531, 545 (6th Cir. 2008) (quoting *Reeves*); *Harvey v. Office of Banks and Real Estate*, 377 F.3d 698, 711 (7th Cir. 2004) (quoting *Reeves*); *Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205, 1217-18 (10th Cir. 2003); see *Kovacevich v. Kent State University*, 224 F.3d 906, 839 (6th Cir. 2000) (Gilman, J., concurring) ("[L]et us be realistic. The most reasonable inference for jurors to draw, once they disbelieve the defendant's proffered explanation for its actions, will ordinarily be that the real reason the defendant acted as it did was illegal discrimination.").

The Eleventh Circuit's holding that summary judgment can be based on the existence of the virtually unlimited merely "possible" alternative nondiscriminatory explanations conflicts as well with Title

VII decisions in other circuits which insist that explanations other than that relied on by the defendant are irrelevant unless conclusively established by record evidence. "[T]his is certainly not the type of case suggested by *Reeves* in which 'no rational fact-finder could conclude that the action was discriminatory.' ... The record in this case does not conclusively reveal some other, nondiscriminatory reason for [the defendant's] decision to discharge [the plaintiff]." *Siraj v. Hermitage in Northern Va.*, 51 Fed.Appx. 102, 112 (4th Cir. 2002) (quoting *Reeves*, 530 U.S. at 148).

> *Reeves* ... preclude[s] us from ordering judgment as a matter of law when a defendant has merely made a [non-conclusive] evidentiary showing [that some other motive may have prompted its action]. That is, such a judgment requires a more conclusive evidentiary showing by [the defendant] than the mere presentation of circumstances suggesting *possible* alternatives to both discrimination and its proffered nondiscriminatory reason....

Dennis v. Columbia Colleton Medical Center, Inc., 290 F.3d 639, 649 (4th Cir. 2002) (emphasis added).

"[T]he 'rare' instances in which a showing of pretext is insufficient to establish discrimination [include] when the record conclusively reveals some other, nondiscriminatory reason for the employer's decision...." *Laxton v. Gap, Inc.*, 333 F.3d 572, 578 (5th Cir. 2003).

> [T]o overcome as a matter of law a finding of discrimination based on pretext plus a *prima facie* case a defendant must point to evidence in the record clearly indicating that for some reason, plaintiff's evidence of pretext ... should not carry the weight normally assigned to it under the general principles of evidence law.... Columbia has not produced the strong, independent evidence of a third motive or alternative rationale that *Reeves* requires to overcome a plaintiff's proof of pretext and prevail as a matter of law.

Weinstock v. Columbia University, 224 F.3d 33, 58-59 (2d Cir. 2000). The "virtually limitless" "possible" but purely hypothetical nondiscriminatory explanations are simply irrelevant in other circuits.

(4) Two circuits go even further, holding that in a Title VII case a jury must be specifically instructed that it can infer the existence of an unlawful motive from a prima facie case and a finding that an employer's proffered explanation is untrue.

> In *Smith* [*v. Borough of Wilkinsburg*, 147 F.3d 272 (3d Cir. 1998)], the court held it to be reversible error to fail to instruct the jurors that "they are entitled to infer, but need not, that the plaintiff's ultimate burden of demonstrating intentional discrimination by a preponderance of the evidence can be met if they find that the facts needed to make up a prima facie case have been established and they disbelieve the employer's explanation for its decision." ... While the Magistrate

> Judge gave a variant of the *Smith* charge for the ADA claim, she did not explicitly reiterate that point in the sex-discrimination charge.... This was error in light of *Smith*.

Watson v. Southeastern Pennsylvania Transp. Authority, 207 F.3d 207, 222-23 (3d Cir. 2000) (opinion by Alito, J.).

> A trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may – but need not – infer that the employer's true motive was discriminatory.... [A] pretext instruction is ... required where ... a rational finder of fact could reasonably find the defendant's explanation false and could "infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."

Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241 (10th Cir. 2002) (quoting *Reeves*). The Tenth Circuit requires this instruction to assure that a jury does not mistakenly assume that plaintiffs are obligated to adduce some type of additional evidence, the very requirement mistakenly imposed by the Eleventh Circuit in the instant case. *Id.*

The Ninth Circuit permits counsel for plaintiffs to argue to the jury that it should infer the existence of an unlawful motive from the falsity of an employer's proffered justification. *Browning v. U.S.*, 567 F.3d 1038, 1042 (9th Cir. 2009).

II. THE DECISION OF THE ELEVENTH CIRCUIT IS CLEARLY INCORRECT

The Eleventh Circuit decision in this case is palpably inconsistent with *Reeves*. The avowedly precedent-setting standard adopted by the Eleventh Circuit in this case is identical to the standard applied by the Fifth Circuit, and rejected by this Court, in *Reeves*.

The Eleventh Circuit below held that "it is insufficient for [a plaintiff] merely to make a prima facie case and ... call into question the [defendant's] proffered legitimate, nondiscriminatory reason." App. 23a-24a. *Reeves* held, to the contrary, that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." 530 U.S. at 148. The court below held that "[c]ontradicting the [employer's] asserted reason alone, though doing so is highly suggestive of pretext, no longer supports an inference of unlawful discrimination." App. 23a. *Reeves* held, to the contrary, that "rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." 530 U.S. at 147 (emphasis in original). The Eleventh Circuit held that "[t]he burden [is] placed on Title VII plaintiffs to produce additional evidence suggesting discrimination after contradicting their employer's reasons...." App. 24a. *Reeves* held that the Fifth Circuit in that case had "erred in proceeding from the premise that a plaintiff must

always introduce additional, independent evidence of discrimination." 530 U.S. at 149. That is precisely the error made by the Eleventh Circuit in the instant case.

The magnitude and gravity of the Eleventh Circuit's error is highlighted by its objection that Flowers had failed to discredit "the virtually limitless possible nondiscriminatory reasons why the Troup County School District could have wanted to fire Flowers." App. 21a. The Court below insisted it was not sufficient that Flowers discredited the Board's actual proffered explanation that it fired Flowers for violating recruiting rules; under the Eleventh Circuit holding, Flowers was also required to discredit even the opposite "possible ... reason[ ]" hypothesized by the court of appeals, that the Board dismissed Flowers because it wanted "a new coach who would be *more* willing to commit recruiting violations." App. 21a (emphasis in original).

Although *Reeves* concerned a claim under the ADEA, while the instant case arises under Title VII, the decisions cannot conceivably be distinguished on that ground. The analysis in *Reeves* does not rest in any way on the text or prior interpretations of the ADEA. To the contrary, the threshold premise of *Reeves* is that the standard governing the presentation and evaluation of a claim of intentional discrimination under the ADEA is the same as the standard applicable to Title VII cases. 530 U.S. at 142. All of

the Supreme Court precedents relied on in *Reeves* were Title VII opinions.[22] In describing the "conflict among the Courts of Appeals" which certiorari was granted to resolve, the Court referred without distinction to cases involving Title VII,[23] the ADEA,[24] and other statutes.[25] 530 U.S. at 140-41. Clearly *Reeves* announced a standard applicable to all claims of intentional discrimination, and emphatically applicable to Title VII.

The reasoning in *Reeves* is as applicable to claims of race discrimination under Title VII as it is to claims of age discrimination under the ADEA. The Court explained that "once the employer's justification

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[22] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *St. Mary's Honor Center v. Hicks*; *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

[23] *Combs v. Plantation Patterns*, 106 F.3d 1519 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3d Cir.), cert. denied, 521 U.S. 1129 (1997); *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc).

[24] *Gaworski v. ITT Commercial Finance Corp.*, 17 F.3d 1104 (8th Cir.), cert. denied, 513 U.S. 946 (1994); *Anderson v. Baxter Healthcare Corp.*, 13 F.3d 1120 (7th Cir. 1994); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C.Cir. 1998) (en banc); *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989 (5th Cir. 1996); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994).

[25] *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284 (D.C.Cir. 1998) (en banc) (Americans With Disabilities Act); *Theard v. Glaxo, Inc.*, 47 F.3d 676 (4th Cir. 1995) (42 U.S.C. § 1981); *Woods v. Friction Materials, Inc.*, 30 F.3d 255 (1st Cir. 1994) (state law claim).

has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." 530 U.S. at 147. Here, as in *Reeves*, the trier of fact's rejection of the employer's proffered reason could well lead to the conclusion that discrimination was the most likely alternative explanation. *Reeves* recognized that proof that an employer had lied about its motives would be substantial evidence of an attempt to hide an unlawful purpose.[26] Such mendacity is equally probative when a trier of fact is assessing a claim of race discrimination, as in the instant case, or age discrimination, as occurred in *Reeves*.

[26] 530 U.S. at 147 ("the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.") (quoting *St. Mary's Honor Center*, 509 U.S. at 511):

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."

530 U.S. at 147 (quoting *Wright v. West*, 505 U.S. 277, 296 (1992)).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit. Alternatively, the petition for a writ of certiorari should be granted and the judgment below summarily reversed.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-11498

D.C. Docket No. 3:12-cv-00152-TCB

CHARLES FLOWERS,

Plaintiff-Appellant,

versus

TROUP COUNTY, GEORGIA, SCHOOL DISTRICT,
DR. COLE PUGH, individually and in his
official capacity as Superintendent of the
Troup County School District,
JOHN RADCLIFFE, individually and in his
official capacity as Assistant Superintendent
of the Troup County School District,
TED ALFORD, individually and in his
capacity as a member of the Board of
Education of Troup County,
DEBBIE BURDETTE, individually and in
her capacity as a member of the Board of
Education of Troup County, Georgia, et al.,

Defendants-Appellees,

REV. ALLEN SIMPSON,
individually and in his capacity as a member of the
Board of Education of Troup County, Georgia,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

(October 16, 2015)

Before TJOFLAT and JILL PRYOR, Circuit Judges, and MOODY,* District Judge.

TJOFLAT, Circuit Judge:

Employers covered by Title VII of the Civil Rights Act of 1964 may not "fail or refuse to hire or . . . discharge any individual, or otherwise . . . discriminate against any individual . . . because of such individual's race." 42 U.S.C. § 2000e-2(a)(1). Charles Flowers is the former head football coach of Troup High School in Troup County, Georgia. Following his termination from that position, Flowers brought suit against the Troup County School District under Title VII and related federal laws that outlaw racially discriminatory employment decisions. The School District argues that it fired Flowers because Flowers committed recruiting violations that resulted in ineligible students being enrolled at Troup High School to play football. Flowers denies any wrongdoing and claims that the School District singled him out for special treatment under the pretext of investigating

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* The Honorable James S. Moody, Jr., United States District Judge for the Middle District of Florida, sitting by designation.

alleged recruiting violations. The parties fiercely dispute the existence of, and meaning to be drawn from, many of the ins and outs of the events leading to and following Flowers's termination.

Although the voluminous record before us is admittedly complex, the conclusion to be drawn from it is simple. Title VII functions only as a bulwark against unlawful discrimination; it does not substitute the business judgment of federal courts for any other nondiscriminatory reason. Flowers, though he has produced sufficient evidence that could lead a reasonable jury to infer that he was treated unfairly,[1] has failed to produce any evidence suggesting that his treatment was on account of his race. When we hack back the thicket of factual disputes and excise Flowers's conclusory allegations, we are left with nothing more than a routine disagreement between employer and employee. Any indication that racial discrimination informed the School District's decision to fire Flowers is conspicuously absent from the evidence presented. We therefore affirm the District Court's grant of summary judgment.[2]

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[1] Though Flowers might be able to assert state-law remedies for defamation or unlawful termination – an issue on which we express no opinion – Title VII provides him no succor.

[2] We pause briefly to highlight a matter that the District Court declined to rule on, but should have. Precedent makes it abundantly clear that qualified immunity should have been granted to seven of the ten individual defendants, Troup County School District officials who were caught up in Flowers's trawl by their sheer proximity to the intended catch. These officials –

(Continued on following page)

I.

A.

At the end of 2009, Troup High School, part of Georgia's Troup County School District, began its search for a new head football coach. Both the school's athletic director and the then-head coach reached out to Charles Flowers, an alumnus of Troup High School. Flowers had distinguished himself at Shaw High School in Columbus, Georgia, winning multiple coach-of-the-year awards and state championships in both baseball and football between 1987 and 2005. Following his tenure at Shaw High School, Flowers served as the athletic director of the Muscogee County

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Troup County School Board members Ted Alford, Debbie Burdette, John Darden, Dianne Matthews, Alfred McNair, Sheila Rowe, and Rev. Allen Simpson – took discretionary actions approving the investigation into Flowers and his subsequent termination based, at least in part, on a nondiscriminatory reason: the punishment of suspected recruiting violations. There is nothing in the record to suggest that the board members were on actual or constructive notice that any of their actions could possibly be considered a violation of Flowers's constitutional rights. *See, e.g.*, *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1282-85 (11th Cir. 2008); *see also Harrison v. Culliver*, 746 F.3d 1288, 1298 (11th Cir. 2014) (citing *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir. 2003) (quotation marks omitted)).

Nor does Flowers advance any evidence suggesting that the board members acted in anything but good faith at all times. Indeed, their involvement is only tangentially related to the events at the heart of Flowers's case. Allowing the board members to remain in the proceedings, then, exposes these individuals to exactly the sort of burdensome costs that qualified-immunity doctrine is designed to eliminate.

School District for a year and a half and then became the head football coach of the Dougherty Comprehensive High School in Albany, Georgia. The Troup County School District's Board of Education extended to Flowers an at-will one-year contract on August 1, 2010, making Flowers the first black head football coach in Troup County since the School District had been racially desegregated in 1973. Despite having retired from teaching in 2010, Flowers agreed to coach Troup High School's football team as a part-time, "49% employee." This arrangement allowed Flowers to coach football while receiving his retirement benefits.

Seven months before he was officially hired, Flowers began holding workouts and practices while administrators subjected him to an unusually intensive background check, with a particular focus on discovering any potential recruiting violations. After that investigation came up empty, Troup County School District confirmed Flowers's employment. In subsequent contracts, Flowers also became the Defensive Coordinator of the football team, Events Coordinator, and Department Chair of Health and Physical Education. The School District later offered Flowers a second year-long employment contract, which provided that Flowers would also serve as Assistant Athletic Director.

After hiring Flowers, the School District's administrators decided that they needed to update the School District's policies regarding athletic eligibility and improper recruiting. On August 19, the School

Board took "swift action" to adopt a new "Competitive Interscholastic Activities Policy," which came to be known as the "Charles Flowers Policy" as a result of allegations of recruiting violations made against Flowers. Between August 5, 2010 and February 28, 2011, Troup County School District officials received seven letters from school officials in neighboring Lanett, Alabama, questioning eight students' eligibility to play for Troup High School.[3] The first letter, sent by a Lanett City Schools attendance officer on August 5, 2010, declared that Lanett officials had "verified" that two Troup High School students and football players – Jalen and Zanquanarious Washington – lived in the Lanett City School District, and that Lanett officials were "in the process of verifying . . . the residence" of a third Troup High School student and football player.

The Washington brothers had previously attended Lanett High School, where they had also played football, before enrolling at Troup High School in 2010. Concerned with her boys' educational opportunities in Lanett, Shayla Washington decided to enroll her sons Jalen and Zanquanarious Washington at Troup High School. Shayla Washington's residential eligibility to do so, however, became the subject

[3] Lannett, Alabama and Troup County, Georgia abut one another roughly halfway along the Alabama – Georgia line.

of a months-long investigation by both Lanett and Troup County officials.[4]

Troup County Superintendent Cole Pugh, who assumed office on February 1, 2011, directed that an investigation be made into suspected recruiting violations committed by Flowers. On his first day of work, Superintendent Pugh met with the principal of Troup High School, who alleged that Pugh told him that Pugh "understood [Flowers] was a recruiter." Though the principal denied that Flowers was a recruiter, Pugh responded that he has "learned that where there's smoke, there's fire." Two months later, in April 2011, the Troup County School Board hired a private investigator, Duke Blackburn, who had been recommended by the Troup County Sheriff's Office, to look into the allegations of recruiting violations made against Flowers.

In his first report, sent on May 14, 2011, Blackburn originally stated that "any involvement of Troup County Staff" in efforts to falsify students' residencies was "unfounded." Blackburn then sent two follow-up emails after he learned in July 2011 that

[4] Because the actual status of the Washington brothers' eligibility is irrelevant to whether the Troup County School District unlawfully discriminated against Flowers, we decline to recount the entire history of the investigation though we do note that the parties contest the details and conclusions of the investigation fiercely and at considerable length. As we are required to do in reviewing a disposition on summary judgment, we credit Flowers's contention that the Washington brothers were in fact eligible to enroll at Troup High School.

Shayla Washington and her children had been evicted from their apartment in Troup County. After speaking with the co-owner of that apartment, Ric Hunt, Blackburn reported that Shayla Washington's application had been denied because of her bad credit but that Flowers had intervened to guarantee the rent payments. At no point in the investigation did Blackburn or any other Troup County School District official interview Shayla Washington directly.

On September 22, 2011, Superintendent Pugh and Assistant Superintendent of Operations John Radcliffe interviewed Ric Hunt, who again stated that Flowers had called on Shayla Washington's behalf and made rental payments to secure the apartment. On January 19, 2012, Pugh and Radcliffe obtained a signed statement from Hunt to that effect. Having waited several months until the end of the football season, Pugh met with Flowers and fired him on February 16, 2012. Though Pugh had the authority as superintendent to fire Flowers on his own because of Flowers's status as a "49% employee," the Troup County School Board approved Pugh's decision to fire Flowers.

B.

Six months after his termination, Flowers brought suit in the Northern District of Georgia claiming that the Troup County School District, and a host of school officials in both their official capacities and individually, discriminated against him on the basis of race in

violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e; 42 U.S.C. §§ 1981 and 1983; and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[5] The District Court referred Flowers's case to a Magistrate Judge for report and recommendation. The Magistrate Judge, after a careful and in-depth review of both parties' accounts, concluded that summary judgment should be granted because Flowers had been unable to show that the School District's proffered reason for firing him – the School District's belief that Flowers had committed recruiting violations – was pretext for racial discrimination.

The District Court agreed with the Magistrate Judge's recommendation and granted summary judgment for the Troup County School District. After summarizing the series of events leading to Flowers being fired, the court analyzed all of Flowers's federal race-discrimination claims under Title VII's *McDonnell Douglas* burden-shifting framework, which is used in cases where the only evidence of unlawful discrimination is circumstantial. Under that familiar framework, a plaintiff first must establish a prima facie case of unlawful discrimination. If the plaintiff

[5] Not relevant here, Flowers also brought state-law tort claims of slander and intentional interference with contractual relations against Daves Nichols, the former chairman of the Troup County School Board, in Nichols's individual capacity. On summary judgment, the District Court held against Flowers on his federal race-discrimination claims and declined to exercise supplemental jurisdiction over the remaining state-law claims.

succeeds, a presumption of discrimination arises and the defendant then bears the burden of producing a legitimate, nondiscriminatory reason for its allegedly discriminatory action. Should the defendant put forth a reasonably clear legitimate, nondiscriminatory reason, all presumptions drop from the case and the plaintiff must prove, as a factual matter, that he suffered unlawful discrimination.

The Magistrate Judge concluded that Flowers had established a prima facie case of race discrimination and that the School District had advanced a legitimate, nondiscriminatory reason for firing Flowers. Neither party objected. The District Court then adopted these conclusions, noting that neither was "clearly erroneous." The sole issue before the District Court, as well as on appeal, is whether Flowers has produced enough evidence of pretext that would allow a reasonable jury to conclude that the School District fired Flowers because of his race.

Flowers made three objections to the Magistrate Judge's findings and conclusions on the issue of pretext. First, Flowers argued that "a genuine dispute exists about whether he actually committed a recruiting violation" because it is unsettled whether the Washington brothers or any of the other allegedly ineligible Troup High School football players were in fact ineligible. Second, Flowers argued that the School District's "reason for firing him is unworthy of credence" because Superintendent Pugh gave "inconsistent reasons for his termination." Third, Flowers argued that "two similarly situated comparators,"

white head football coaches in Troup County also accused of recruiting violations, "were neither investigated nor disciplined."

The District Court considered, and rejected, all three of Flowers's objections. After correctly reciting the standard for summary judgment – that the moving party must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law" when the evidence is viewed in the light most favorable to the nonmoving party, Fed. R. Civ. P. 56(a) – the court noted that Flowers could survive summary judgment by showing either (1) that the School District's "proffered reason is pretext and thus unworthy of credence," (2) that Flowers's "similarly situated comparators were treated more favorably," or (3) that there exists "a convincing mosaic of circumstantial evidence" that would allow a reasonable jury to conclude that Flowers was terminated because of his race. The District Court summarized Flowers's approach to showing pretext as a "three-front attack," and rejected each front in turn.

First, the court concluded that it was irrelevant whether Flowers had actually committed a recruiting violation. So long as "Pugh fired Flowers based on an honest belief that Flowers had violated the recruiting rules," merely proving that Pugh's belief was mistaken or unfounded does not show pretext, even if the belief is "dead wrong." Moreover, the court held that, though Flowers had advanced factual disputes concerning the details of the meeting at which Pugh fired Flowers, those disputes were not material. Specifically,

Flowers asserted that he never admitted to making the call to Ric Hunt to guarantee Shayla Washington's rent and that Pugh provided inconsistent reasons for firing him. Flowers alleged that Pugh initially told him that he had been fired for recruiting violations but Pugh later testified at a deposition that Pugh was unsure about whether Flowers's actions constituted recruiting until he contacted Ralph Swearngin, the Executive Director of the Georgia High School Association, after Pugh had already fired Flowers.[6] The court expressed skepticism about the materiality of Pugh's after-the-fact decision to reach out to Swearngin and "merely . . . verify" Pugh's belief that Flowers had committed a recruiting violation. In any event, the court concluded that Pugh's and Swearngin's statements were "not fundamentally inconsistent" and "do not create a jury question on the issue of pretext."

Second, the court rejected the comparators put forth by Flowers because it determined that they were not similarly situated. Flowers directed the court's attention to Donnie Branch and Pete Wiggins, white head football coaches in Troup County who had also been accused of recruiting violations. Branch

[6] The contents of the Pugh – Swearngin telephone conversation, but not its existence, are also disputed by the parties. Regardless of the actual contents of that conversation, as with the many other factual disputes in this case, the critical issue remains that Flowers has failed to put forth any evidence that tends to show that the Troup County School District fired Flowers because of his race.

allegedly had a meeting with an ineligible student at which Branch offered the student his choice of position and told the student that "[he] would be highly recruited if he played safety or outside linebacker." Wiggins allegedly provided an ineligible student with expensive equipment and cash payments of an undisclosed amount, as well as transportation to the student's residence, which was located outside of Troup County. The court reasoned that recruiting violations "can occur in myriad ways" and "fall along a spectrum" depending on their "nature and quality," including the magnitude of any "monetary value" received, the relative "likelihood of success," and "the risk of detection." Given that Flowers's alleged misconduct involved providing two students more than $1,500 of support, securing their physical presence to be able to enroll at Troup High School, and doing so in a manner especially likely to go undetected, the court held that Branch and Wiggins were not sufficiently similar comparators.

Finally, the court held that Flowers failed to establish "a convincing mosaic of circumstantial evidence" that would support a reasonable jury's inference that Flowers was the victim of racial discrimination. Noting that "most of the evidentiary tiles [Flowers] proffers" had already been "discarded as insufficient or irrelevant," the court determined that "[t]hese tiles cannot now be reassembled" to create a mosaic of discriminatory intent. Simply put, "no reasonable jury could conclude that [Flowers] was fired because he is African-American."

The District Court granted summary judgment to the School District. Flowers appealed. We affirm.

II.

We review the District Court's grant of summary judgment de novo. *Cook v. Bennett*, 792 F.3d 1294, 1298 (11th Cir. 2015). To do so, we view all evidence in the light most favorable to Flowers and draw all reasonable inferences in his favor. *Id.* Summary judgment is appropriate only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A factual dispute will preclude summary judgment if its resolution "might affect the outcome of the suit under the governing law" or "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

III.

Title VII of the Civil Rights Act of 1964, in relevant part, forbids covered employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race."[7] 42

[7] Though Flowers brought claims under the Fourteenth Amendment's Equal Protection Clause and 42 U.S.C. §§ 1981 and 1983 as well, their fates rise and fall with his Title VII

(Continued on following page)

U.S.C. § 2000e-2(a)(1). Employees who believe that they are the victims of racial discrimination may, of course, present direct evidence of that discrimination. When direct evidence of unlawful discrimination is lacking, Title VII plaintiffs may instead turn to the burden-shifting framework set out in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

Under the well-trod *McDonnell Douglas* framework, a plaintiff first must make out a prima facie case of discrimination that "in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094. In race-discrimination cases, a plaintiff makes out a prima facie case when he shows by a preponderance of the evidence (1) that he is a member of a protected racial class, (2) that he was qualified for the position, (3) that he experienced an adverse employment action, and (4) that he was replaced by someone outside of his protected class or received less favorable treatment than a similarly situated person outside of his protected class. *Maynard v. Bd. of Regents*, 342 F.3d 1281, 1289 (11th Cir. 2003) (citing *McDonnell Douglas Corp.*, 411 U.S. at 802, 93 S. Ct. at 1824). If the plaintiff can make this showing – which is "not onerous" – the establishment

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claim. *See, e.g.*, *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1324-25 & n.14 (11th Cir. 2011).

of a prima facie case creates a presumption that the employer discriminated against the plaintiff on the basis of race. *Burdine*, 450 U.S. at 253-54, 101 S. Ct. at 1094.

At the time this presumption of discrimination arises, the burden then shifts to the employer to produce "a legitimate, nondiscriminatory reason" for the action taken against the plaintiff. *Id.* at 254, 101 S. Ct. at 1094. The employer's initial showing, just as the plaintiff's, is a low bar to hurdle. The burden placed on the employer is only an evidentiary one: a burden of production that "can involve no credibility assessment." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509, 113 S. Ct. 2742, 2748, 125 L. Ed. 2d 407 (1993). Once the employer advances its legitimate, nondiscriminatory reason, the plaintiff's prima facie case is rebutted and all presumptions drop from the case. *Burdine*, 450 U.S. at 255, 101 S. Ct. at 1094-95. Having "frame[d] the factual issue with sufficient clarity," the parties now "have a full and fair opportunity" to litigate whether the employer's proffered reason for its action is pretext. *Id.* at 255-56, 101 S. Ct. at 1095. At all times, the plaintiff retains "the ultimate burden of persuading the court that she has been the victim of intentional discrimination." *Id.* at 256, 101 S. Ct. at 1095.

This burden-shifting analysis helps to filter out particularly obvious cases and works to frame more clearly the specific issues to be litigated. It does not, however, relieve Title VII plaintiffs of their burden to put forth evidence of discrimination on the basis of

race. As we have made clear, "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 Title VII cases. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). The critical decision that must be made is whether the plaintiff has "create[d] a triable issue concerning the employer's discriminatory intent." *Id.*

On appeal, Flowers questions only the District Court's failure to adopt his pretext arguments and reprises his three-front attack against the Troup County School District. First, Flowers claims that he never committed the alleged recruiting violations and that the investigation into his conduct was pretext because the School District knew Flowers to be innocent. Second, Flowers argues that the School District's shifting and inconsistent explanations for his firing support an inference of pretext. Third, Flowers asserts that he has identified sufficiently similar comparators to allow a jury to decide whether their disparate treatment turned on the basis of race. We face each front in turn.

A.

First, Flowers claims to have put forth "abundant evidence" that the Troup County School District's investigation into him was pretext for his firing and that the District "knew" Flowers had not committed

any recruiting violations. The "abundant evidence" identified by Flowers is as follows:

- First, Troup County School District had not had a black head football coach before Flowers since the District was racially desegregated in 1973, performed an unusually intense background check on Flowers, and specially adopted "a detailed recruiting policy" in response to Flowers being hired.
- Second, when Superintendent Pugh assumed office after Flowers had been hired, Pugh continued to investigate Flowers based on "false allegations from Lanett, Alabama school officials" who "had a vested interest" in retaining the allegedly ineligible students "to play football at their high school."
- Third, Pugh neither ended the investigation into Flowers after the School District's investigation initially turned up nothing nor did he grant the private investigator's requests to question Shayla Washington and Flowers.
- Fourth, Pugh and Assistant Superintendent of Operations Radcliffe were aware of the investigation's flaws because both "have college degrees" and "years of experience in school administration and management."
- Fifth, Pugh "made no attempt to verify the information" provided by Ric Hunt, the co-owner of the apartment Flowers allegedly secured for the Washington family.

- Sixth, Flowers maintains that he would not have violated the School District's Competitive Interscholastic Activities Policy even if he had called Hunt and offered to pay the rent for the Washington family – allegations Flowers continues to dispute – because that policy applies only to recruiting efforts outside the District.

- Finally, at no time prior to the meeting at which he was fired did anyone from the School District speak with Flowers, which violated the District's policy of first giving warnings to employees under investigation.[8]

Flowers contends that, taken together, he has offered sufficient evidence of pretext to allow a reasonable jury to infer that the School District's true motivation was racially discriminatory. We disagree.

As a theoretical matter, could the School District's actual reason for firing Flowers have been that Flowers is black? Of course. Has Flowers produced any evidence, outside of his own conclusory say-so, that would support an inference of racial discrimination from the circumstances? He has not. In the light most favorable to Flowers, the evidence at most might support an inference that the School District's

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[8] Whether the Troup County School District indeed had a general policy of giving at-will employees pretermination warnings, like so much of the record, is disputed. We, of course, resolve this factual uncertainty in Flowers's favor and assume that the District did have such a policy.

investigation into Flowers's potential recruiting violations may have been pretext of *something*. The School District's ham-handed investigation and actions singling out Flowers could lead a reasonable jury to conclude that Pugh had it in for Flowers from the beginning. But Flowers offers no evidence, after conducting extensive discovery and assembling a lengthy record, that the investigation was pretext of *discrimination on the basis of his race*.

As we have "repeatedly and emphatically held," employers "may terminate an employee for a good or bad reason without violating federal law." *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999) (citing *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991)). Title VII does not allow federal courts to second-guess nondiscriminatory business judgments, nor does it replace employers' notions about fair dealing in the workplace with that of judges. We are not a "super-personnel department" assessing the prudence of routine employment decisions, "no matter how medieval," "high-handed," or "mistaken." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) (quotation marks, citations, and alterations omitted). Put frankly, 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." *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1187 (11th Cir. 1984).

There are virtually limitless possible nondiscriminatory reasons why the Troup County School District could have wanted to fire Flowers. Most obviously, the School District could have honestly believed that Flowers had committed recruiting violations. Or the School District, though not believing that Flowers had committed recruiting violations, could have wanted a football program free from the appearance of impropriety. Or the School District could have wanted to avoid an interstate kerfuffle with school officials in Lanett, Alabama. Or the School District could have wanted to make room for a new head coach – perhaps even a new coach who would be *more* willing to commit recruiting violations.[9] Or the School District could have simply grown tired of Flowers. We just don't know.

Because Flowers 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 Flowers offers that even touches on his race is the fact that he became the first black head football coach in Troup County since 1973. Regardless of the unaddressed reality that the School District not only *hired* Flowers knowing of his race but also *rehired* him for a second

[9] We have no reason to believe that the Troup County School District condones or encourages recruiting ineligible students to play football. We simply note that even if the School District were so disposed, Flowers's case would find no surer legal footing.

yearlong contract,[10] without more there is nothing to suggest a causal connection between his race and his termination.

B.

Second, Flowers argues that the Troup County School District gave shifting and inconsistent reasons for firing him, and that these inconsistent reasons demonstrate pretext. We agree with the District Court's assessment that the alleged inconsistencies in the School District's explanation for firing Flowers – which concern what Pugh said to Flowers during their meeting on February 16, 2012, and whether Pugh changed his tune in the following weeks – are easily reconciled. Even if Pugh's purported explanation for his decision to fire Flowers had been a bald-faced lie, however, Flowers's claims would still fail to survive summary judgment.

At one time under this Circuit's law, Flowers could have gotten his claims before a jury after making a prima facie case and merely contradicting the School District's proffered legitimate, nondiscriminatory reason. *See Combs v. Plantation Patterns*, 106 F.3d 1519, 1529 (11th Cir. 1997), *recognized as modified,*

[10] The status of such "same actor" evidence remains unsettled in this Circuit. *See Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1442-43 (11th Cir. 1998). Because it is unnecessary to do so to resolve Flowers's case, we do not decide what, if any, adjudicative weight is due the School District's decisions to hire and rehire Flowers with the knowledge of his race.

Chapman v. AI Transport, 229 F.3d 1012, 1025 n.11 (11th Cir. 2000) (en banc). Intervening precedent has since closed this avenue for Title VII plaintiffs. Contradicting the School District's asserted reason alone, though doing so is highly suggestive of pretext, no longer supports an inference of unlawful discrimination. "Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the [employer's] action was discriminatory." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 2109, 147 L. Ed. 2d 105 (2000). Allowing the plaintiff to survive summary judgment would be inappropriate, for example, if the record "conclusively revealed some other, nondiscriminatory reason" or the "plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.*; *see also Kragor v. Takeda Pharm. Am., Inc.*, 702 F.3d 1304, 1307 (11th Cir. 2012) ("[A] contradiction of the employer's proffered reason for the termination of an employee is sometimes enough, *when combined with other evidence*, to allow a jury to find that the firing was the result of unlawful discrimination." (emphasis added)).

Because, as discussed above, Flowers has failed to put forth any additional evidence that would support an inference of unlawful discrimination, it is insufficient for Flowers merely to make a prima facie

case and – assuming that he could do so – call into question the School District's proffered legitimate, nondiscriminatory reason. The burden placed on Title VII plaintiffs to produce additional evidence suggesting discrimination after contradicting their employer's stated reasons is not great, but neither is it nothing. Though we do not require the "'blindered recitation of a litany,'" we cannot "ignore the failure to present evidence of discrimination." *Hawkins v. Ceco Corp.*, 883 F.2d 977, 984 (11th Cir. 1989) (quoting *Byrd v. Roadway Express, Inc.*, 687 F.2d 85, 86 (5th Cir. 1982)).

Flowers's challenge, then, fails on this score as well.

C.

Finally, Flowers asserts that he has identified two similarly situated comparators whose more-favorable treatment could support a reasonable jury's inference that the Troup County School District's decision to fire him was pretext for race discrimination. Flowers points to Donnie Branch and Pete Wiggins, the white head football coaches at the two other high schools in Troup County during Flowers's tenure at Troup High School. Branch and Wiggins had both been flagged as recruiters in communications directed to School District officials for various alleged violations – including extending offers, making cash payments, and providing transportation and expensive equipment to ineligible players – though

neither Branch nor Wiggins had been investigated intensely or fired as a result.

In order to use comparators to support an inference of race discrimination in the context of workplace discipline, a plaintiff must show that the comparators' alleged misconduct is "nearly identical to the plaintiff's in order 'to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.'" *Silvera v. Orange Cty. Sch. Bd.*, 244 F.3d 1253, 1259 (11th Cir. 2001) (quoting *Maniccia v. Brown*, 171 F.3d 1364, 1368-69 (11th Cir. 1999)). Though the comparators need not be the plaintiff's doppelgangers, the "nearly identical" standard requires much more than a showing of surface-level resemblance. Take, for example, our decision in *Burke-Fowler v. Orange County, Florida*, 447 F.3d 1319 (11th Cir. 2006). In *Burke-Fowler*, the plaintiff was a certified correctional officer who entered into a romantic relationship and married an inmate serving time at another correctional facility and was subsequently fired, allegedly for that reason. *Id.* at 1321-22. Believing her employer's reason to be pretext for discrimination based on her race, the plaintiff, who is black, brought suit and pointed to four white corrections officers who had also fraternized with inmates but went unpunished. *Id.* at 1322, 1324-25. Some of the comparators had romantic relationships with individuals who were subsequently incarcerated; others had post-incarceration relationships with inmates that were not romantic. *Id.* at 1325. Despite their superficial similarity, we held

that the plaintiff in *Burke-Fowler* had failed to establish valid comparators due to the "significant" differences in "type or degree of fraternization" because the plaintiff's misconduct was the only instance of officer – inmate fraternization that involved romance *and* that occurred after the inmate had been incarcerated. *Id.*

The District Court identified three ways in which Flowers's and his comparators' alleged recruiting violations differed – the magnitude of any "monetary value," the likelihood of success of recruiting ineligible players, and "the risk of detection" – and noted that "Flowers's alleged misconduct could likely be distinguished in other ways as well." We agree. The most salient difference not discussed by the District Court is the intensity and frequency of the recruiting allegations leveled against Flowers. Starting mere days after Flowers was first hired, Troup County School District officials received, over a period of roughly six months, seven letters from Lanett, Alabama school administrators questioning eight students' eligibility to play for Troup High School. Flowers, in turn, points to the statements of the principal of Troup High School and two Troup High School students and football players, one of whom was Flowers's nephew, alerting Troup County officials to potential recruiting violations committed by Branch and Wiggins – all of which were made *only after* the investigation into Flowers had begun. The obvious differences between Flowers's circumstances and those of his purported

comparators are hardly the stuff of an apples-to-apples comparison.

Moreover, Flowers's argument essentially boils down to quibbling about whether Branch's and Wiggins's alleged violations were *worse* than his own, not about whether they were *sufficiently similar*.[11] On-the-ground determinations of the severity of different types of workplace misconduct and how best to deal with them are exactly the sort of judgments about which we defer to employers. That Branch and Wiggins were treated differently, then, matters not.

IV.

Accordingly, the District Court's decision to grant summary judgment is AFFIRMED.

AFFIRMED.

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[11] Flowers disagrees with the District Court's judgment about the relative harms posed by his alleged recruiting violations compared to those of Branch and Wiggins. Flowers asserts that his alleged violations concerned improper benefits of lesser monetary value, were less likely to succeed in securing commitments from ineligible players, and were more likely to result in Flowers's misconduct being discovered. Precisely because reasonable minds can disagree on such matters, we leave their resolution to the discretion of employers.

1 F.Supp.3d 1363
United States District Court,
N.D. Georgia,
Newnan Division.

Charles FLOWERS, Plaintiff,
v.

TROUP COUNTY, GEORGIA,
SCHOOL DISTRICT, et al., Defendants.

Civil Action No. 3:12-cv-152-TCB.
|
Signed March 5, 2014.

Attorneys and Law Firms

Ruth W. Woodling, Woodlinglaw, LLC, Atlanta, GA, for Plaintiff.

Kenneth Drew Jones, Russell Alan Britt, Hall Booth Smith & Slover, P.C., Atlanta, GA, for Defendants.

ORDER

TIMOTHY C. BATTEN, Senior District Judge.

This case is before the Court on Plaintiff Charles Flowers's objections to the magistrate judge's report and recommendation. The magistrate judge recommends granting the School District Defendants'[1] motion for summary judgment on Flowers's race-discrimination

[1] Troup County, Georgia, School District, Dr. Cole Pugh, John Radcliffe, Ted Alford, Debbie Burdette, John Darden, Dianne Matthews, Alfred McNair and Sheila Row.

claims, and if supplemental jurisdiction is retained over Flowers's state-law claims, the magistrate judge recommends granting Defendant Daves Nichols's motion for summary judgment.

I. Standard of Review

After conducting a "careful and complete" review of a magistrate judge's findings and recommendations, a district judge may accept, reject or modify a magistrate judge's R & R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir.1982) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir.1982) (en banc)) (internal quotation mark omitted).[2] A district judge "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The district judge must "give fresh consideration to those issues to which specific objection has been made by a party." *Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir.1990). Those portions of an R & R to which an

[2] The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions issued before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc). Additionally, all decisions issued after that date "by a non-unit panel of the Former Fifth, the full en banc court of the Former Fifth, or Unit B panel of the Former Fifth Circuit" are binding precedent absent a contrary en banc Eleventh Circuit decision. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir.1982); *see also United States v. Schultz*, 565 F.3d 1353, 1361 n. 4 (11th Cir.2009) (discussing the continuing validity of *Nettles*).

objection is not asserted may be reviewed for clear error. *United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir.1983).

Here, the magistrate judge recommends granting the School District Defendants' motion for summary judgment.[3] This recommendation is based primarily on the following findings and conclusions:

> *First*, that contrary to the School District Defendants' contention, Flowers may establish a prima facie case of race discrimination under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), without evidence that similarly situated comparators were treated differently;
>
> *Second*, that the School District Defendants met their "exceedingly light" burden to articulate a legitimate, nondiscriminatory reason for terminating Flowers;
>
> *Third*, that the issue is whether Flowers was terminated based on an honest belief that he violated the rules against athletic recruiting, not whether he actually committed a recruiting violation;
>
> *Fourth*, that the "undisputed evidence of record" shows that Flowers was terminated

[3] Because the Court declines to retain supplemental jurisdiction after adopting this recommendation, the findings and conclusions related to Flowers's state-law claims against Nichols will not be considered.

based on the honestly held belief that he committed a recruiting violation; and

Fifth, that Flowers failed to establish a jury question as to whether the School District Defendants' proffered reason for terminating him was pretext for unlawful discrimination.

Flowers timely objected to the third, fourth and fifth findings and conclusions.

II. Background[4]

The Troup County School District is a political subdivision of the State of Georgia and is governed by the Troup County Board of Education. The BOE designates an attendance zone for each district school, and students must attend the schools in which they are zoned. BOE policy and Georgia law prohibit nonresidents of Troup County from attending Troup County district schools.

In January 2010, Charles Flowers began working (without compensation) as the head coach of the Troup County High School football team. He conducted weight training and practices during that spring and summer, and on August 1, his employment contract for the 2010-2011 school year took effect. Although Troup County schools were integrated in

[4] Additional facts not relevant to the Court's review of Flowers's objections are set forth in the R & R.

1973, Flowers was the first African-American head football coach of a Troup County high school. He received a second contract for the 2011-2012 school year.

Athletic coaches in Troup County are subject to two sets of rules that prohibit recruiting: the school district's Competitive Interscholastic Activities Policy (CIAP) and the Georgia High School Association (GHSA) by-laws. The CIAP is intended to be consistent with the GHSA by-laws and was adopted to provide guidance to district employees on improper recruiting activities. Both sets of rules were in place by mid-September 2010.

Starting in August 2010, the School District Defendants were contacted by school officials from the Lanett City School District about students who resided in Lanett, Alabama but were attending school in Troup County. Most communications were from Kelley Farrar, the attendance officer for Lanett City Schools. While each communication mentions several students, here it is only the residency of S. Washington and her sons (the Washington brothers) that is relevant. The communications can be summarized as follows:

> August 5, 2010: Farrar sent the Troup County BOE a letter stating that he had "verified" that the Washington brothers resided in Lanett. This letter was received by Daves Nichols, who was the chair of the BOE until December 31, 2010. Nichols circulated the letter to the other BOE members.

> August 11, 2010: The superintendent for Lanett City Schools sent a letter to the principal of Troup County High School explaining that the Washington brothers had been reported as living in Lanett but attending Troup County High School. The superintendent requested that they be withdrawn by August 13.
>
> December 31, 2010: On Nichols's last day as chair of the BOE, Farrar sent him a letter. Farrar reiterates that the Washington brothers reside in Lanett but attend Troup County High School. Importantly, Farrar reveals that during his investigation he heard from parents, students and members of the community that some students were being recruited to play sports at Troup County High School. He thus informed Nichols that the Washington brothers "may or may not have been recruited."

On February 1, 2011, Cole Pugh began his tenure as the school district's superintendent. Three weeks later, he received a packet from the superintendent for Lanett City Schools explaining that his staff had been investigating reports of Lanett students attending school in Troup County. The packet contained copies of the August 5, August 11 and December 31 letters discussed above. Also enclosed was Farrar's August 10, 2010 letter to Ralph Swearngin, executive director of the GHSA, about the Washington brothers. That letter notes that the Washington brothers had been cleared to register at Troup County High School and would soon be submitted as eligible to play

football, even though S. Washington told the principal of Lanett High School that she was neither moving to Troup County nor releasing custody of her children.

Not long after Pugh received this packet, he instructed John Radcliffe, the school district's assistant superintendent of operations, to contact the county sheriff's office for help finding a private investigator to look into the Lanett school officials' allegations.

In April 2011, Duke Blackburn was hired to investigate, among other things, where the Washington brothers resided. Blackburn in turn provided the school district a two-step investigation proposal: first, he would ascertain whether students who resided in Alabama were attending Troup County schools (as had been alleged); and second, he would determine whether any district employee, specifically a coach, aided or coerced these students and their families to misrepresent their true residency in order to participate in athletic programs. Recognizing the time-sensitive nature of the investigation, he stated that both investigations would be completed by early May. The proposal was approved by Radcliffe, who served as Blackburn's primary point of contact.

In early May, Blackburn submitted an initial investigation report. He stated that he had not uncovered any evidence of Troup County employees helping students establish fraudulent residency. He also stated that he still had some questions about

whether the Washington brothers should be considered residents of Troup County.

Two months later Blackburn emailed Radcliffe specifically about the Washington brothers.[5] This email contained a reference to Ric Hunt, the co-owner of Happy Hallow Apartments, the complex into which S. Washington and her sons moved in February 2011.[6] The next day Blackburn filed a report that included details of his discussion with Hunt. According to Hunt, Flowers called him looking for a place where the Washington brothers could live so that they could continue to play football for Troup County High School.

A month passed, and Blackburn emailed Radcliffe again. Blackburn confirmed Hunt's willingness to cooperate with any investigation of Flowers and reported that, according to Hunt, Flowers had guaranteed payment for the apartment S. Washington rented, after her application was denied for poor credit.

Finally, on September 22, 2011, a month after Blackburn's last email to Radcliffe and more than

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[5] This email also advised Radcliffe that S. Washington and her children had been evicted from Happy Hallow Apartments for nonpayment of rent.

[6] This was their second residence within the Troup County High School attendance zone. The first one was located at 904 Avenue D.

four months after his initial report, Pugh and Radcliffe met with Hunt. During this meeting, Hunt reiterated that Flowers had called him and paid the deposit and rent for the apartment in which S. Washington and her sons resided during the previous school year.[7]

Several months passed. On January 19, 2012, Pugh instructed Radcliffe to obtain a signed statement from Hunt about Flowers's efforts to allegedly obtain housing for the Washington brothers at Happy Hallow Apartments.

Armed with this statement, Pugh and Sequita Freeman, the school district's chief human resources officer, met with Flowers on February 16, 2012. Pugh informed Flowers that he was being terminated for violating the CIAP and GHSA by-laws' prohibitions on recruiting by helping the Washington brothers and their mother to obtain housing within the Troup County High School attendance zone.

The next day, Flowers returned to Pugh's office with Tseyonka Davidson (one of the Washington brothers' uncles) and his wife. Davidson provided Pugh with a signed statement attesting that he had paid the deposit and rent for the apartment. He also informed Pugh that he, not Flowers, had made the phone call to Hunt about securing the apartment. To

[7] The Washington brothers did not play football in Troup County during the 2011-2012 school year.

back up Davidson's story, Flowers provided Pugh with a statement from the resident manager of Happy Hallow Apartments, who declared that Davidson and S. Washington had paid the deposit and rent.

Even though his termination was not yet final, and despite the evidence indicating that Hunt's statement was false, Pugh did not relent. Flowers was paid through the end of the month and then officially terminated.

Six months later, Flowers filed a race-discrimination suit against the School District Defendants. At the same time, he sued Nichols for intentional interference with contractual relations and slander under Georgia law.

After discovery closed, the School District Defendants and Nichols moved for summary judgment. The magistrate judge recommends granting both motions, assuming that supplemental jurisdiction over the state-law claims against Nichols is retained.

III. Race Discrimination Under Title VII, §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment

Flowers asserts that the School District Defendants treated him disparately because he is African-American, thereby violating Title VII, 42 U.S.C.

§§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment.

Title VII makes it unlawful for employers to hire, fire or otherwise discriminate against their employees regarding "compensation, terms, conditions, or privileges of employment" on the basis of race. 42 U.S.C. § 2000e-2(a)(1). Section 1981 grants "[a]ll persons within the jurisdiction of the United States" an equal right "to make and enforce contracts" free from racial discrimination. Race-discrimination claims levied against state actors, like the School District Defendants, must be brought under § 1983. *Butts v. County of Volusia*, 222 F.3d 891, 892 (11th Cir.2000). The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny any person within its jurisdiction the equal protection of the law." Individuals thus have a constitutional right to be free from race-based employment discrimination by public officials, *Williams v. Consol. City of Jacksonville*, 341 F.3d 1261, 1268 (11th Cir.2003), and violations of this constitutional right are enforced under § 1983, *see Whiting v. Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir.1980).

Disparate-treatment claims under Title VII, §§ 1981 and 1983, and the Equal Protection Clause that rely on the same set of facts are analyzed under the Title VII analytical framework. *See Brown v. Am. Honda Motor Co.*, 939 F.2d 946, 949 (11th Cir.1991) ("[T]he test for intentional discrimination in suits under § 1981 is the same as the formulation used in Title VII discriminatory treatment causes."); *Crawford*

v. Carroll, 529 F.3d 961, 970 (11th Cir.2008) ("[T]he analysis of disparate treatment claims under § 1983 is identical to the analysis under Title VII where the facts on which the claims rely are the same."); *Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1508 (11th Cir.1995) ("When section 1983 is used as a parallel remedy for violation of section 703 of Title VII [42 U.S.C. § 2000e-2], the elements of the two causes of action are the same." (alteration in original) (quoting *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 n. 16 (11th Cir.1982)) (internal quotation marks omitted)). Flowers's race-discrimination claims will thus be analyzed together under the Title VII framework.

To succeed in this Title VII action, Flowers must prove that the School District Defendants intentionally discriminated against him on the basis of race. *Walker v. NationsBank of Fla., N.A.*, 53 F.3d 1548, 1557 (11th Cir.1995). Intentional discrimination based on disparate treatment is a question of fact that may be established through either direct or circumstantial evidence. *Underwood v. Perry Cnty. Comm'n*, 431 F.3d 788, 793 (11th Cir.2005). Because Flowers relies on circumstantial evidence, the analysis of his discrimination claims proceeds under the familiar burden-shifting framework established in *McDonnell Douglas*, 411 U.S. 792, 93 S.Ct. 1817, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and their follow-on cases. Under that framework, the burden of production shifts back and forth between

Flowers and the School District Defendants, but the burden of persuasion always falls on Flowers. *Burdine*, 450 U.S. at 253, 101 S.Ct. 1089. That is, the ultimate question remains "whether [Flowers] was the victim of intentional discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

Flowers bears the initial burden of establishing a prima facie case of race discrimination. *Evans v. McClain of Ga., Inc.*, 131 F.3d 957, 963 (11th Cir.1997). This is not an onerous burden; indeed, it merely requires that he "establish facts adequate to permit an inference of discrimination." *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir.1997). If he succeeds, then "a legal presumption of unlawful discrimination arises and the burden shifts to the [School District Defendants] to articulate a legitimate, nondiscriminatory reason for the challenged employment action." *Evans*, 131 F.3d at 963. Their burden, however, is one of production rather than persuasion and is "exceedingly light." *Smith v. Horner*, 839 F.2d 1530, 1537 (11th Cir.1988). Indeed, to meet it they need only offer "'a clear and reasonably specific' nondiscriminatory basis" for firing Flowers. *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 770 (11th Cir.2005) (quoting *Burdine*, 450 U.S. at 254-55, 101 S.Ct. 1089).

If the School District Defendants meet their burden, "the presumption of discrimination created by the *McDonnell Douglas* framework 'drops from the case,' and 'the factual inquiry proceeds to a new level

of specificity.'" *Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir.1997) (quoting *Burdine*, 450 U.S. at 255 & n. 10, 101 S.Ct. 1089). At this point, Flowers's burden under the *McDonnell Douglas* framework – rebutting the proffered reason – "merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089. For purposes of summary judgment, however, "the question becomes whether the evidence, considered in the light most favorable to [Flowers], yields the reasonable inference that the [School District Defendants] engaged in the alleged discrimination." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1326 (11th Cir.2011).

IV. Objections to the R & R

No party objects to the magistrate judge's conclusions that Flowers established a prima facie case without providing a similarly situated comparator and that the School District Defendants articulated a legitimate, nondiscriminatory reason for terminating Flowers. Neither conclusion is clearly erroneous, so they are adopted.[8]

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[8] As this Court has noted, some Eleventh Circuit opinions seem to "establish a one-size-fits-all criteria for the prima facie case," but this view is inconsistent with *McDonnell Douglas* itself and the primary purpose of the prima facie case requirement. *King v. Ferguson Enters., Inc.*, 971 F.Supp.2d 1200, 1213-14, No. 11-cv-1901-TCB, 2013 WL 5201547, at *8 (N.D.Ga. Sept.

(Continued on following page)

Flowers objects to the magistrate judge's findings and conclusions on the issue of pretext. In his opposition brief, he contends that summary judgment is improper for three reasons:

> First, a genuine dispute exists about whether he actually committed a recruiting violation;
>
> Second, the School District Defendants' reason for firing him is unworthy of credence because Pugh offered inconsistent reasons for his termination; and
>
> Third, two similarly situated comparators – Caucasian head football coaches who were accused of recruiting – were neither investigated nor disciplined.[9]

17, 2013). Indeed, "*McDonnell Douglas* neither requires proof of a comparator nor provides the only way for plaintiffs to use circumstantial evidence to survive summary judgment." *Id.* at 1216, 2013 WL 5201547 at *11. This view is supported by well-established circuit precedent. "A prima facie case of discriminatory discharge may be established in different ways. One way is . . . : if [a member of a protected class] establishes that he was qualified for the job, but was fired and replaced by someone outside the protected class." *Nix v. WLCY Radio/Rahall Commc'ns*, 738 F.2d 1181, 1185 (11th Cir.1984). Thus, the magistrate judge correctly concluded that Flowers established a prima facie case: he is African-American; he was fired; he was qualified; and he was replaced by a Caucasian.

[9] Flowers also mentions other comparators in his opposition brief. But his objections to the R & R focus solely on the Caucasian head football coaches. Because the conclusion that the other comparators are not similarly situated is not clearly erroneous, it is affirmed.

After reviewing Flowers's proffered evidence, the magistrate judge concluded that he had not established a jury question on the issue of pretext. At bottom, this conclusion rested on a factual finding: at the time of the termination meeting in February 2012, Pugh honestly – even if mistakenly – believed that Flowers had committed a recruiting violation. The warrant for this (possibly mistaken) belief was Hunt's statement that Flowers had not only contacted him about securing an apartment for the Washington brothers but also offered to pay the deposit and rent.

Flowers identifies three specific errors in the R & R: the magistrate judge (1) improperly disregarded evidence that establishes pretext, (2) impermissibly made credibility determinations and drew inferences in favor of the School District Defendants, and (3) incorrectly applied the applicable legal standards to his evidence. Given the interrelated nature of these objections, it is appropriate to review the issue of pretext de novo.

V. Whether Summary Judgment Is Appropriate

Summary judgment is proper when no genuine issue about any material fact is present, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The

movant carries the initial burden and must show that there is "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir.1991).

The nonmovant is then required to "go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324, 106 S.Ct. 2548. "The mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. And "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

Here, because the School District Defendants have rebutted the presumption of discrimination, Flowers's ultimate burden – proving by a preponderance of the evidence that he was the victim of race discrimination – merges with his burden of showing that that the School District Defendants' proffered

reason for his termination was merely pretext for racial discrimination. *Burdine*, 450 U.S. at 256, 101 S.Ct. 1089. This would be his burden at trial.

On summary judgment, Flowers's burden is to present "sufficient evidence" that a jury question exists about whether the proffered reason for his termination was pretextual. *Combs*, 106 F.3d at 1529. His evidence must "demonstrate weaknesses or implausibilities in the proffered legitimate reason so as to permit a rational jury to conclude that the explanation given was not the real reason, or that the reason stated was insufficient to warrant the adverse action," thus allowing a reasonable jury to infer that unlawful discrimination was the real reason. *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1279 (11th Cir.2008); *see also Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir.2004) ("A plaintiff may prevail on an employment discrimination claim by either proving that intentional discrimination motivated the employer or producing sufficient evidence to allow a rational trier of fact to disbelieve the legitimate reason proffered by the employer, which permits, but does not compel, the trier of fact to find illegal discrimination.").

Put plainly, because of the merger of pretext and his ultimate burden, Flowers can survive summary judgment "(1) by showing that the legitimate nondiscriminatory reasons should not be believed; or (2) by showing that, in light of all of the evidence, discriminatory reasons more likely motivated the decision than the proffered reasons." *Standard v. A.B.E.L.*

Servs., Inc., 161 F.3d 1318, 1332 (11th Cir.1998). And to make this showing he can either introduce new evidence or rely on the evidence that established the prima facie case. *Combs*, 106 F.3d at 1528.

This case is a prime example of when additional evidence is required; the four facts that established the prima facie case are not enough. But not all evidence is material; materiality is determined by the governing law. Here, therefore, evidence is material only insofar as it helps establish (1) that the School District Defendants' proffered reason is pretext and thus unworthy of credence, *Rioux*, 520 F.3d at 1279; (2) that similarly situated comparators were treated more favorably, *Nix*, 738 F.2d at 1186; or (3) "a convincing mosaic of circumstantial evidence" from which a reasonable jury could conclude that race discrimination was the reason for Flowers's termination, *Smith*, 644 F.3d at 1328.

A. Evidence of Pretext

Flowers's first and second objections principally take aim at the magistrate judge's finding that Pugh honestly believed that Flowers had committed a recruiting violation when he fired him on February 16, 2011. He contends that this finding omits certain material facts, namely, facts contained in several affidavits about where the Washington brothers resided. In his view, these affidavits should have been considered because "they not only establish that the conclusions of the [School District Defendants']

investigation of [him] were wrong, but that the investigation was phony and a setup. These affidavits not only plainly demonstrate that [he] did not engage in recruiting, but how easy it was to establish that fact." He also claims that the magistrate judge impermissibly made credibility determinations and drew inferences in favor of the School District Defendants.

All told, Flowers mounts a three-front attack on the credibility of the proffered reason. His first approach is to show that a genuine dispute exists over whether he committed a recruiting violation. His second approach is to raise questions about the legitimacy of the School District Defendants' investigation of him. His third approach is to attack the consistency of Pugh's explanations for his termination. No approach, however, succeeds in satisfying his burden to "meet [the proffered] reason head on and rebut it" without "simply quarreling with the wisdom of that reason." *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir.2000) (en banc).

1. Whether Flowers Committed a Recruiting Violation

Flowers ascribes considerable importance to whether he actually committed a recruiting violation. For example, in his opposition brief, he posits that because he was fired for allegedly violating a work rule, he can prove pretext by "showing . . . that he did not violate the work rule." To support this claim he offers only a general citation to *Sparks v. Pilot Freight*

Carriers, Inc., 830 F.2d 1554 (11th Cir.1987). Additionally, in his objections to the R & R, he contends that where the Washington brothers resided is "of critical importance." In his view, "even if he did talk to Ric Hunt on the telephone about finding an apartment for them at Happy Hallow Apartments" – which he vehemently disputes – helping them "find a residence" in the Troup County High School attendance zone does not constitute recruiting because they already resided in the school's attendance zone.

The magistrate judge implicitly rejected Flowers's claim that he could establish pretext by simply showing that he did not commit a recruiting violation, and Flowers does not specifically object to this conclusion. Yet whether *Sparks* is controlling demands an explicit analysis. If it is, then facts touching on whether Flowers actually committed a recruiting violation are material and should have been considered. *See Anderson*, 477 U.S. at 248, 106 S.Ct. 2505.

Like Flowers, Sparks established a prima facie case by showing that she was replaced by a person outside of her protected group. And like the School District Defendants, the employer's legitimate, nondiscriminatory reason for firing her was the violation of a work rule. Under these circumstances, the court held that "the employee must prove pretext by showing either that she did not violate the work rule, or that if she did, other employees not within the protected class who engaged in similar acts were not similarly treated." 830 F.2d at 1563. Although Flowers's opposition brief does not specifically cite this

portion of *Sparks*, this is the rule he intended to reference.

Sparks, however, is distinguishable on its facts. Unlike the School District Defendants, the employer in *Sparks* had personal knowledge of the underlying conduct that gave rise to the alleged work-rule violation. Indeed, the evidence at summary judgment indicated that the employer concluded that a violation occurred based on a never-before-used construction of an *unwritten* work rule. These facts, the court held, could allow a reasonable jury to conclude that this explanation was implausible and unworthy of credence.

A different rule applies when an employer determines that a violation occurred without personal knowledge of the putative violation. In that case the question is whether the employer honestly believed that a violation occurred, not whether the employee actually committed the violation. *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir.1991). And this rule applies here.

In this circuit, it is not what Flowers actually did or whether Hunt was telling the truth that matters. What matters is whether Pugh fired Flowers based on an honest belief that Flowers had violated the recruiting rules. To be blunt, Pugh's belief can be dead wrong, but so long as it was honestly held, then

Flowers's race-discrimination claims cannot succeed.[10] *See Alvarez v. Royal Atl. Developers*, 610 F.3d 1253, 1266 (11th Cir.2010) ("The inquiry into pretext centers on the employer's beliefs, . . . not on reality as it exists outside of the decision maker's head."). And because Flowers challenges the veracity of the proffered reason, "[the] inquiry is limited to whether the employer gave an honest explanation of its behavior." *Kragor v. Takeda Pharm. Am., Inc.*, 702 F.3d 1304, 1310-11 (11th Cir.2012) (alteration in original) (quoting *Elrod*, 939 F.2d at 1470) (internal quotation marks omitted). The fairness or prudence of that decision is irrelevant. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir.1999). In the end, Pugh "may fire [Flowers] for a good reason, a bad reason, a reason based on erroneous facts,

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[10] As the R & R notes, it is well established in this circuit that when an employer fires an employee under the honest but mistaken belief that the employee violated company policy, race was not the reason for the discharge. For example, in a race-discrimination action under Title VII and § 1981, the Eleventh Circuit held that the following jury instruction was adequate, meaning that "the jury understood the issues and the controlling law and was not misled in any way":

> [I]f an employer discharges an individual under an honest belief pursuant to the information available to the employer that the employee has violated a policy of the employer, the fact that the employer's belief may be mistaken or wrong in fact does not mean that such belief cannot constitute a legitimate reason for the employer's discharge of the plaintiff.

Smith v. Papp Clinic, P.A., 808 F.2d 1449, 1452-53 (11th Cir.1987).

or for no reason at all, as long as its action is not for a discriminatory reason." *Nix*, 738 F.2d at 1187.

So even assuming that Flowers did not commit a recruiting violation, he fails to demonstrate pretext unless the sincerity of Pugh's belief is called into question. And to do that, he cannot simply dispute that a violation occurred because Pugh based his decision on Hunt's statement rather than on personal knowledge.[11] *See Vessels*, 408 F.3d at 771.

2. The Legitimacy of the School Board Defendants' Investigation

Flowers also attempts to call into question the sincerity of Pugh's belief by challenging the legitimacy of the investigation of him. He characterizes this investigation as "phony and a setup." As proof he offers the following.

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[11] Flowers's contention that no recruiting violation could occur if he called Hunt to help the Washington brothers "find a residence" at Happy Hallow Apartments because they already resided in the Troup County High School attendance zone is a red herring. Even if he were correct, this would not be evidence that Pugh did not honestly believe that making such a call (even without offering to pay the deposit and rent on the apartment) was a recruiting violation. Nor does it accurately reflect the facts: Hunt told Pugh not only that Flowers called to find a residence for the Washington brothers but also offered to pay the deposit and rent on that residence. Whether Hunt's statement is true is beside the point.

The initial investigation report found no evidence that Flowers had helped students establish fraudulent residences. But the investigation of Flowers did not stop. It continued until Hunt, co-owner of the complex where S. Washington and her sons last resided, was found. According to Hunt, Flowers called looking for a place where the Washington brothers could live and continue to play football at Troup County High School and that Flowers said he would pay the deposit and rent. Yet the evidence – documents, affidavits and deposition testimony – reveals that Hunt spoke to Davidson, one of the Washington brothers' uncles, from his cellphone and that the deposit and rent were paid by Davidson and S. Washington.

Flowers also points out that the School District Defendants waited nearly five months after their meeting with Hunt to terminate him, even though his violation was so serious that he was terminated without receiving a warning.[12] During this time, no attempt was ever made to ask him about Hunt's allegations.

Considerable evidence proves that the Washington brothers resided in the Troup County High School attendance zone: first at 904 Avenue D and then at

[12] The School District Defendants admit that prior to Flowers no district employee had ever been fired without first receiving a warning except for violations of the drug or sexual-misconduct polices.

Happy Hallow Apartments. For example, Troup County High School itself twice determined that the boys lived at 904 Avenue D. In fact, had they been asked, many people, including school-district employees, could have confirmed where the Washington brothers resided.

Flowers argues that despite being presented with substantial evidence that he did not call Hunt or pay the deposit and rent for S. Washington's apartment, Pugh refused to reverse his termination, which did not take effect until February 29. Instead, Pugh "continued to fish for grounds to terminate Flowers even after Flowers produced substantial evidence that he hadn't violated the recruiting policies of either the District or the State."

According to Flowers, after the February 16 meeting Pugh's reason for terminating Flowers shifted. Pugh began to rely on Flowers's admission during their meeting that he had called Hunt. (Neither party disputes that Flowers denied paying the deposit and rent.) But it is doubtful that Flowers admitted to making this call. First, no notes of the meeting were taken. Second, Freeman, who joined Pugh at the meeting, testified that she did not remember the details of the meeting, but in a subsequent affidavit she stated that Flowers denied paying rent but admitted calling Hunt. Freeman's "enhanced recollection" creates a credibility question and is evidence of pretext.

Finally, Flowers points out that a few days after the February 16 meeting, Pugh called Swearngin, GHSA's executive director, to confirm that making a call to secure an apartment for an athlete would be considered recruiting. Pugh testified that Swearngin said it would. But in his affidavit Swearngin states that he never "makes decisions with regard to the application of the Constitution and By-Laws of the GHSA by telephone." According to Flowers, this discrepancy not only creates an issue of fact that precludes summary judgment but also shows that Pugh did not honestly believe that he had committed a recruiting violation.

a. Evidence of Conduct Before February 16, 2012

Flowers has not persuasively challenged the legitimacy of the School District Defendants' investigation. The holes that he attempts to point out either do not exist or are too small to raise a jury question on the issue of pretext. In their proper context, the facts indicate that the investigation of him was not "phony or a setup." To the contrary, the decisions made during the investigation are those of a reasonable employer. That Flowers, or any other reasonable person, would have taken different actions or made different decisions is not evidence of pretext. The Eleventh Circuit has made clear that "a plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where . . . the reason

is one that might motivate a reasonable employer." *Combs*, 106 F.3d at 1543.

To be sure, the private investigator's initial report found no evidence that any Troup County employee had helped students obtain fraudulent residences in order to participate in an athletics program. But this report also notes that unresolved questions about the residences of some children, including the Washington brothers, remained. As a result, it is hardly surprising that the investigation continued.

Flowers next suggests that if the investigation was designed to simply determine where the Washington brothers resided, there were a lot of people who could have been questioned but were not. While true, this does not mean that the investigation was a sham. Indeed, a review of the notes attached to the investigator's July 20, 2011 executive summary indicate just the opposite. From July 13-19, the investigator looked into where S. Washington worked as well as whether the Washington brothers resided at Happy Hallow Apartments. As part of his investigation, he received Hunt's contact information and left a message for him. Hunt returned the investigator's call and stated that Flowers had called to secure a place in which the Washington brothers could reside and promised that the deposit and rent would be paid. Indeed, Hunt claimed that Flowers had paid the deposit by check. Hunt also told the investigator that S. Washington and her sons had recently moved out.

Even if Hunt's statements were incorrect, it was not unreasonable for the School District Defendants to rely on them. Nor was there any reason for the School District Defendants to confirm Hunt's statements with, for example, the resident apartment manager who worked for Hunt. Again, the fact that Flowers or another reasonable person would have inquired further is not evidence of pretext. This Court is not permitted to sit in review of the business decisions of employers, including how they investigate alleged work-rule violations, absent evidence of a discriminatory motive. "This is true '[n]o matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers.'" *Alvarez*, 610 F.3d at 1266 (quoting *Chapman*, 229 F.3d at 1030 (quotation marks and citations omitted)).

Flowers's next move is to criticize the School District Defendants' decision to wait almost five months to terminate him, even though his conduct was allegedly so severe that no warning was given. He also notes that during this period no one asked him about the allegations. Pugh testified that because the 2011-2012 football season had already begun when he met with Hunt (on September 22, 2011), he decided to delay any action against Flowers. This decision is one that a reasonable employer could make. In addition, nothing in the record suggests that the School District Defendants were required to give Flowers a warning or to ask him about the allegations before firing him. These facts are mentioned in

an attempt to show that Flowers was treated disparately. But being treated differently is not enough to avoid summary judgment; Flowers must show that a similarly situated comparator was treated differently.

In sum, Flowers has presented no evidence that calls into question the sincerity of Pugh's belief that Flowers had committed a recruiting violation as of the February 16, 2012 termination meeting. Thus, Flowers has failed to present any evidence from which a reasonable jury could conclude that the proffered reason was pretext for race discrimination.

b. Evidence of Conduct on and After February 16, 2012

It is undisputed that Pugh informed Flowers that he was fired at their February 16 meeting. Nor is it disputed that Flowers denied that he paid the deposit and rent on S. Washington's residence at Happy Hallow Apartments. What is disputed is whether during that meeting Flowers admitted to calling Hunt. On summary judgment, this factual dispute must be resolved in favor of Flowers.

But even assuming that he denied recruiting in any way, Pugh's refusal to reverse his decision is not by itself evidence of pretext. Whether the evidence presented to Pugh after the February 16 meeting should have persuaded him to reverse his decision raises questions of factual correctness, fairness and prudence. These questions, however, are not within the Court's purview. *Damon*, 196 F.3d at 1361.

Although Flowers's proffered evidence raises a few factual disputes, the disputed facts are not material. In the end, it is irrelevant whether he actually committed a recruiting violation or whether another reasonable person would have conducted the investigation differently. Based on the proffered evidence, no reasonable jury could find that Pugh did not honestly believe that Flowers had committed a recruiting violation when he fired him on February 16. Nor could a reasonable jury conclude that Pugh's refusal to reverse his decision was because Flowers is African-American. Accordingly, Flowers has failed to raise a jury question on the issue of pretext.

3. Pugh's Allegedly Inconsistent Statements

Flowers can establish pretext by offering evidence of "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [the] proffered legitimate reasons for [his termination] that a reasonable factfinder could find them unworthy of credence." *Cooper v. S. Co.*, 390 F.3d 695, 725 (11th Cir.2004). He claims that Pugh provided inconsistent reasons for firing him:

> *First*, in his answers to interrogatories, Pugh states that he fired Flowers for violating the CIAP and the GHSA by-laws by assisting the Washington brothers in obtaining a residence within the Troup County High School attendance zone.

> *Second*, during his deposition, Pugh testified that he was not sure whether Flowers had violated the CIAP but that he contacted Swearngin to confirm that if someone made a call to secure an apartment for an athlete, this would constitute recruiting. Swearngin answered in the affirmative.

In addition to being inconsistent, Flowers asserts that there is a disputed issue of fact about whether Pugh actually received an affirmative answer from Swearngin, who never "makes decisions with regard to the application of the Constitution and By-Laws of the GHSA by telephone."

Pugh's statements are not inconsistent. His first statement refers to his reasons for firing Flowers prior to February 16: a belief that Flowers violated the CIAP and GHSA by-laws' prohibitions on recruiting. His deposition testimony refers to the period *after* the February 16 meeting. Pugh testified that Flowers admitted during the meeting to calling Hunt but denied that he paid the deposit or rent. Pugh's question to Swearngin – which Flowers does not dispute he asked – concerned whether such a call itself would constitute recruiting. As the magistrate judge correctly noted, Pugh called Swearngin merely to verify his belief that Flowers had committed a recruiting violation. Considered in their proper context, Pugh's statements are not fundamentally inconsistent and thus do not create a jury question on the issue of pretext. *See Tidwell v. Carter Prods.*, 135

F.3d 1422, 1428 (11th Cir.1998) (holding that additional, undisclosed, nondiscriminatory reasons for firing an employee are not evidence of pretext).

Further, even if Swearngin's affidavit created an issue of fact about whether he told Pugh that making a call to secure a residence for an athlete could constitute recruiting – a conclusion that is far from obvious because he does not dispute that Pugh called or discuss their conversation at all – this fact would be immaterial because Pugh's statements are not fundamentally inconsistent. Thus, Flowers has failed to produce evidence from which a reasonable jury could conclude that the proffered reason for his termination – violating the recruiting rules – was pretext.

B. Similarly Situated Comparators

In his third objection, Flowers asserts that the magistrate judge applied "a standard [not] applied by the Eleventh Circuit" when determining whether an employee is similarly situated: "that [his] comparators be exactly the same." Presumably, he believes that this error occurred because of the R & R's reliance on nonprecedential decisions, which his brief devotes several pages to discussing. Then, with a hint of irony, he cites the Eighth Circuit's decision in *Burton v. Arkansas Secretary of State*, 737 F.3d 1219 (8th Cir.2013), as support for his preferred construction of the similarly situated test: "The similarly

situated co-worker inquiry is a search for a substantially similar employee, not a clone."[13] With that said, the first step is to ascertain the law in this circuit governing when a comparator is similarly situated.

"Disparate treatment exists when similarly situated workers are treated differently even though they have committed similar acts." *Osram Sylvania, Inc. v. Teamsters Local Union 528*, 87 F.3d 1261, 1265 (11th Cir.1996). Where, as here, discriminatory discipline is alleged, "[t]he most important variables . . . are the nature of the offenses committed and the nature of the punishments imposed." *Jones v. Gerwens*, 874 F.2d 1534, 1539-40 (11th Cir.1989) (alteration in original) (quoting *Moore v. City of Charlotte*, 754 F.2d 1100, 1105 (4th Cir.1985)) (internal quotation marks omitted). The plaintiff's burden is to show that a comparator is "similarly situated in all relevant respects." *Holifield*, 115 F.3d at 1562. This requires courts to consider "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." *Id.* In order "to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges," *Silvera v. Orange Cnty. Sch. Bd.*, 244

[13] This quote from Flowers's objections to the R & R is itself a direct quote of *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1085 (8th Cir.2013), *quoted in Burton*, 737 F.3d at 1231. The original source of this quote, as *Ridout* and *Burton* acknowledge, is the Seventh Circuit's decision in *Chaney v. Plainfield Healthcare Center*, 612 F.3d 908, 916 (7th Cir.2010).

F.3d 1253, 1259 (11th Cir.2001), the "comparator must be *nearly identical* to the plaintiff," *Wilson*, 376 F.3d at 1091 (emphasis added).[14] And this occurs only if "the quantity and quality of the comparator's misconduct is nearly identical." *Maniccia v. Brown*, 171 F.3d 1364, 1368 (11th Cir.1999).

Flowers offers Donnie Branch and Pete Wiggins as comparators. Both men are Caucasian and were head football coaches in the school district during his tenure. He contends that the magistrate judge erred by concluding that they were not similarly situated. The three coaches had the following in common: they had the same job; they performed the same duties; they had the same supervisor; and they were all accused of recruiting football players. This makes them, in Flowers's eyes, "obviously all apples."

But are they? In this circuit employees can work for the same employer, have the same job, allegedly violate the same work rule, yet not be deemed similarly situated. *See, e.g.*, *Burke-Fowler*, 447 F.3d at 1325. In that case, the county fired Burke-Fowler, an

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[14] To the extent Flowers contends that comparators are not evaluated under a "nearly identical" standard, such a contention has no basis in circuit precedent. The nearly identical requirement has been a staple of the circuit's Title VII case law since at least 1982. *See Davin v. Delta Air Lines, Inc.*, 678 F.2d 567, 570 (5th Cir. Unit B 1982) (holding that to establish similarly situated comparator the Title VII plaintiff had to show "that the misconduct for which she was discharged was *nearly identical* to that engaged in by a male employee whom [her employer] retained" (emphasis added)).

African-American correctional officer, for fraternization with an inmate. She sued the county for, among other things, race discrimination. After the district court granted summary judgment to the county, she appealed. *Id.* at 1322.

On appeal, Burke-Fowler argued that summary judgment was improper because she established a prima facie case and showed that the proffered reason was pretext. As support, she pointed to four Caucasian correctional officers who were not fired even though they either violated or allegedly violated the same anti-fraternization policies. Looking beyond the surface similarities between her and the comparators – that they were county correctional officers who had at least allegedly violated the same polices – to the nature of the alleged violations, the Eleventh Circuit held that "[n]one of them are appropriate comparators." *Id.* at 1325. Burke-Fowler had pursued a romantic relationship with an inmate who had recently left her direct supervision. Conversely, two of the comparators never had a romantic relationship with an inmate. But the others did. Yet their misconduct was not "nearly identical" to hers because those relationships began *before* the inmates were incarcerated. *Id.*

Burke-Fowler helps explain Flowers's contention that each coach was accused of the same type of recruiting violation: "facilitating the participation of football players in playing football outside their attendance zones." But the facts belie this attempt to pigeonhole the alleged violations. More importantly,

however, they reveal that the nature and quality of their alleged misconduct were different.

Branch allegedly had a meeting with a student who lived in another attendance zone during which he expressed an interest in having the student play for him, stated that the student would be highly recruited if he played safety or outside linebacker, but offered the student a chance to play any position he wanted. Wiggins allegedly not only knew that a student lived in an adjacent county but also transported him to his out-of-zone residence on many occasions. Further, Wiggins allegedly gave expensive equipment to the student and provided him with cash a couple of times a week. Flowers allegedly assisted students in securing a residence within the Troup County High School attendance zone by paying the deposit and rent for the apartment where they lived.

Burke-Fowler establishes that not all violations of the same work rule have the same nature or quality. But it does not explain how courts are to ascertain these differences; instead, the court simply asserts that the comparators' conduct was not "nearly identical" after recounting the facts of their alleged violations. Even so, it is unlikely that the court's conclusion was purely factual. Rather, the better explanation is that how Burke-Fowler and her comparators violated the anti-fraternization policies affected the nature and quality of their misconduct. In the end, for a comparator to be similarly situated, the nature and quality of the violation – not how it is committed – must be nearly identical.

Here, like the anti-fraternization polices in *Burke-Fowler*, recruiting violations under the CIAP and GHSA by-laws can occur in myriad ways. This implies that the nature and quality of recruiting violations fall along a spectrum and that coaches who allegedly commit such violations may not be similarly situated comparators – even if they have the same job, duties and supervisor. That is the case here.

First, the monetary value to the students and their families of the alleged misconduct is different. Flowers allegedly provided more than $1,500 of support – the deposit and rent for an apartment. While Wiggins allegedly provided some monetary benefits (transportation, equipment and cash), the value is unknown. Branch is not alleged to have offered anything of monetary value. Thus, in terms of monetary value, Flowers's alleged misconduct is not "nearly identical" to that of Branch and Wiggins.

Second, all attempts to woo an athlete are not equal; some are more likely to succeed than others. Branch allegedly made promises of collegiate recruitment and autonomy, and in some cases such promises may work (though not for Branch, as the student he allegedly recruited did not actually play for him). Wiggins allegedly offered transportation, equipment and cash. Such benefits are more likely to succeed than bare promises because they mitigate some of the difficulties associated with playing a sport outside of the proper attendance zone. Flowers allegedly helped two students and their mother secure an in-zone residence by paying the deposit and

rent on an apartment. Of the three this is the most likely to succeed. Thus, in terms of the likelihood of success, Flowers's alleged misconduct is not "nearly identical" to that of Branch and Wiggins.

Finally, once students are successfully recruited, the risk of detection varies with the misconduct. For example, coaches who recruit students by transporting them to their out-of-zone residences (like Wiggins allegedly did) confront a higher risk of detection than coaches who recruit students by helping them secure in-zone residences (like Flowers allegedly did). One reason for this is that different types of investigation are needed to ferret out the violation. For instance, proof that a coach transported a student to his or her out-of-zone residence may be enough to take action, but proof of transportation to an in-zone residence almost certainly is not. As a result, in terms of the risk of detection, Flowers's alleged misconduct is not "nearly identical" to that of Wiggins.

Flowers's alleged misconduct could likely be distinguished in other ways as well. Yet the foregoing discussion sufficiently establishes that Branch and Wiggins are not similarly situated comparators because their alleged misconduct is not "nearly identical" to his. So the fact that they were subject to different types of investigations or disciplinary actions is irrelevant for purposes of establishing pretext. Consequently, Flowers has failed to raise a jury question on the issue of pretext.

C. A Convincing Mosaic of Circumstantial Evidence

Although Flowers has failed to show that the School District Defendants' proffered reason is unworthy of credence or that similarly situated comparators were treated more favorably than he, Flowers can still survive summary judgment by establishing "a convincing mosaic of circumstantial evidence" that would allow a reasonable jury to infer that he was the victim of racial discrimination. *See Smith*, 644 F.3d at 1328. In other words, his race-discrimination claims "survive summary judgment if he presents circumstantial evidence that creates a triable issue concerning the employer's discriminatory intent." *Id.*

He has failed to meet this burden. Unlike in *Smith*, where considerable circumstantial evidence suggested that race played a prominent role in the termination decision, Flowers has not adduced comparable evidence. To the contrary, most of the evidentiary tiles he proffers were discarded as insufficient or irrelevant in considering his other arguments against summary judgment. These tiles cannot now be reassembled to create a convincing mosaic of discriminatory intent. Put differently, even after drawing all reasonable inferences in favor of Flowers, no reasonable jury could conclude that he was fired because he is African-American. Accordingly, the School District Defendants' motion for summary judgment on his race-discrimination claims will be granted.

VI. Supplemental Jurisdiction over the State-Law Claims Against Nichols

Once all claims over which a district court has original jurisdiction have been dismissed, the court may decline to exercise supplemental jurisdiction. 28 U.S.C. § 1367(c)(3). In deciding whether to retain supplemental jurisdiction, "a federal court should consider, and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity." *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988)) (internal quotation marks omitted).

The Supreme Court has recognized that "in the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine – judicial economy, convenience, fairness, and comity – will point toward declining to exercise jurisdiction over the remaining state-law claims." *Cohill*, 484 U.S. at 350 n. 7, 108 S.Ct. 614. Consequently, the Eleventh Circuit "encourage[s] district courts to dismiss any remaining state claims when, as here, the federal claims have been dismissed prior to trial." *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1089 (11th Cir.2004).

Nichols encourages the Court to exercise supplemental jurisdiction even though the federal claims

will be dismissed. He asserts that because the dismissal of the federal claims occurred after discovery, motions for summary judgment, and an R & R, it would be unfair to dismiss without prejudice the state-law claims against him this late in the game. Indeed, he posits that trial is just around the corner and that to say this case is in the "'early stages of litigation' is laughable."

Nichols's invitation to exercise supplemental jurisdiction is declined. This is a typical case. Indeed, district courts often decline to exercise supplemental jurisdiction after dismissing federal claims on summary judgment. *See, e.g.*, *Estate of Rush v. Haddock*, No. 5:10-cv-152/RS-EMT, 2011 WL 2199718, at *6 (N.D.Fla. June 6, 2011), *aff'd*, 459 Fed.Appx. 833 (11th Cir.2012); *Wright v. Sanders Lead Co.*, No. Civ. A. 2:05CV371-ID, 2006 WL 905336, at *11 (M.D.Ala. Apr. 7, 2006), *aff'd*, 217 Fed.Appx. 925 (11th Cir.2007). Further, while Flowers may decide to pursue his claims in state court, Nichols has not suggested that this will be especially unfair to him; that is, he offers no reason to think that this is in any way unusual. Lastly, issues of Georgia law should be decided by state courts where possible. *Baggett v. First Nat'l Bank of Gainesville*, 117 F.3d 1342, 1353 (11th Cir.1997). For these reasons, "the values of judicial economy, convenience, fairness, and comity" weigh in favor declining to exercise supplemental jurisdiction.

VII. Conclusion

Accordingly, the R & R is ADOPTED IN PART and REJECTED IN PART. The School District Defendants' motion for summary judgment is GRANTED, and Flowers's race-discrimination claims under Title VII, §§ 1981 and 1983, and the Equal Protection Clause of the Fourteenth Amendment are DISMISSED. Having dismissed the federal claims, the Court declines to exercise supplemental jurisdiction over Flowers's state-law claims, and those claims are DISMISSED WITHOUT PREJUDICE.[15] For this reason, Nichols' motion for summary judgment is DENIED AS MOOT. The Clerk is DIRECTED to close this case.

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[15] In his opposition brief, Flowers admits that his slander claim is time-barred and offers to dismiss this claim with the consent of the parties. No separate consent motion was ever filed. The magistrate judge recommends granting summary judgment on this claim. This recommendation is rejected. The Court declines to selectively exercise supplemental jurisdiction. In any event, given Flowers's admission and offer of dismissal, if he subsequently seeks relief in state court it is improbable that he will assert a claim for slander.

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

CHARLES FLOWERS, Plaintiff,	:	
v.	:	CIVIL ACTION NO.
TROUP COUNTY, GEORGIA, SCHOOL DISTRICT, et al.,	:	3:12-cv-00152-TCB-RGV
Defendants.	:	

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

(Filed Dec. 26, 2013)

Plaintiff Charles Flowers ("Flowers") brings this action against defendants Troup County, Georgia, School District ("TCSD"), Dr. Cole Pugh ("Pugh"), John Radcliffe ("Radcliffe"), Ted Alford ("Alford"), Debbie Burdette ("Burdette"), John Darden ("Darden"), Dianne Matthews ("Matthews"), Alfred McNair ("McNair"), and Sheila Rowe ("Rowe"), collectively referred to as the "TCSD defendants," alleging that he was terminated based on his race in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.*; 42 U.S.C. § 1981 ("§ 1981"); 42 U.S.C. § 1983 ("§ 1983"), and the Fourteenth Amendment to the United States Constitution. [Doc.

1].[1] Flowers also brings state law claims of slander and intentional interference with contractual relations against defendant Daves Nichols ("Nichols").[2] [*Id.*]. The TCSD defendants and Nichols seek summary judgment, [Doc. 108 (TCSD defendants summary judgment motion); Doc. 110 (Nichols' summary judgment motion)], which Flowers opposes, [Doc. 119 (response to TCSD defendants' motion);[3] Doc. 120 (response to Nichols' motion)]. For the reasons set forth herein, it is **RECOMMENDED** that the motions for summary judgment, [Docs. 108 & 110], be **GRANTED**.

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[1] The listed document and page numbers in citations to the record refer to the document and page numbers shown on the Adobe file reader linked to the Court's electronic filing database, CM/ ECF, with the exception of deposition transcripts, which are also cited according to the transcript page number.

[2] In his motion for summary judgment, Nichols argued that Flowers' slander claim asserted against him was barred by the applicable one-year statute of limitations. *See* [Doc. 110-1 at 14-15]. In his response, Flowers concedes that his slander claim is time-barred and therefore due to be dismissed. *See* [Doc. 120 at 1-2]. Accordingly, it is hereby **RECOMMENDED** that Flowers' slander claim asserted against Nichols be **DISMISSED** and this claim and any associated statements of fact will not be further discussed.

[3] Flowers filed three separate responses to the TCSD defendants' motion for summary judgment, *see* [Docs. 119, 123, & 124], all of which are identical except that Flowers attached additional exhibits to Document 124 that were not previously submitted, *see* [Docs. 124-1 through 124-9].

I. FACTS AND PROCEDURAL BACKGROUND

A. Preliminary Issues

In compliance with Local Rule 56.1B(1), the TCSD defendants and Nichols, as movants, have filed separate statements of material facts as to which there are no genuine issues for trial, [Doc. 108-11 (TCSD defendants statement); Doc. 114 (Nichols' statement)[4]], to which Flowers has responded, [Doc. 121 (response to TCSD defendants' statement); Doc. 122 (response to Nichols' statement)]. Flowers also submitted his own statements of material facts which he contends present genuine issues for trial, [Docs. 125 (facts as to Nichols) & 126 (facts as to the TCSD defendants)],[5] to which the TCSD defendants and Nichols have responded, [Docs. 140 & 143 (TCSD defendants' response & amended response); Doc. 144 (Nichols' response)]. The Court accepts as undisputed those facts which the parties admit or have failed to

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[4] Nichols filed his initial statement of material facts as to which there are no genuine issues for trial on May 13, 2013, *see* [Doc. 110-2]; however, he amended that statement on May 17, 2013, *see* [Doc. 114], and the Court will refer only to Nichols' amended statement for purposes of the pending motions.

[5] Flowers' statement of material facts as to which there are genuine issues to be tried with regard to the TCSD defendants, [Doc. 126], contains numerous numbering errors, *see* [*id.* at 2 (two paragraphs numbered 3), 4 (two paragraphs numbered 13), 6 (omission of paragraph 19), 8 (two paragraphs numbered 29), 11 (two paragraphs numbered 42), 12 (two paragraphs numbered 45), 14-15 (paragraphs 48 through 52 following paragraph 52), 30 (omission of paragraph 111)].

properly dispute or deny.[6] *See* [Doc. 121, admitting or failing to properly dispute ¶¶ 2-20, 22-25, 27-48, and parts of ¶¶ 1, 21, and 26 of TCSD defendants' statement, Doc. 108-11; Doc. 122, admitting or failing to properly dispute ¶¶ 1-6, 8-9, 12, 14, 16-19, 21-42, 44, 46-47, and parts of ¶¶ 7, 11, 13, 15, 20, and 45 of Nichols' statement, Doc. 114; Docs. 140 & 143, admitting or failing to properly dispute ¶¶ 2-6, 8-14, 16, 18, 21-25, 27, 29, 32-33, 35, 39-44, 46-52, (second paragraph numbered) 52, 53-56, 58-61, 64-65, 67-72, 78, 81, 87-89, 91, 95-99, 101, 103-09, 112-19, 121, and

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[6] Specifically, Local Rule 56.1B(2) requires the non-moving party to include with the responsive brief "[a] response to the movant's statement of undisputed facts[ ] . . . [that] contain[s] individually numbered, concise, nonargumentative responses corresponding to each of the movant's numbered undisputed material facts." LR 56.1B(2)a(1), NDGa.; *see also Williams v. Slack*, 438 F. App'x 848, 849 (11th Cir. 2011) (per curiam) (unpublished); *Linao v. GCR Tire Ctrs.*, Civil Action No. 2:09-CV-134-RWS, 2010 WL 4683508, at *2 (N.D. Ga. Nov. 12, 2010). If the non-moving party fails to respond to a material fact contained in the moving party's statement by directly refuting the fact with concise responses supported by specific citations to evidence, stating a valid objection to the admissibility of the fact, pointing out that the movant's citation does not support the movant's fact, or showing that the movant's fact is not material, the fact will be deemed admitted. *See* LR 56.1B (2)a(2), NDGa.; *BMU, Inc. v. Cumulus Media, Inc.*, 366 F. App'x 47, 49 (11th Cir. 2010) (per curiam) (unpublished). Additionally, "[t]he court will deem the movant's citations supportive of its facts unless the respondent specifically informs the court to the contrary in the response," and a response "that a party has insufficient knowledge . . . is not an acceptable response unless the party has complied with the provisions of Fed.R.Civ.P. 56(d)." LR 56.1B(2)a(3)-(4), NDGa.

parts of ¶¶ 1, 15, 17, 20, 26, 30, 34, 36, 38, 45, (second set of paragraphs numbered) 50-51, 57, 62-63, 79-80, 86, 90, 92, 94, 100, 110, and 120 of Flowers' statement as to the TCSD defendants, Doc. 126; Doc. 144, admitting or failing to properly dispute ¶¶ 1-25, 27-32, 35-50, 52, 55-82, 85-93, and parts of ¶¶ 26, 34, 51, and 53-54 of Flowers' statement as to Nichols, Doc. 125]. Additionally, "'for purposes of this motion, when facts are in dispute the court must assume that any admissible evidence proffered by the plaintiff is true, and must also draw all reasonable inferences from the evidence in the plaintiff's favor." *Smith v. Pefanis*, 652 F. Supp. 2d 1308, 1317 n.5 (N.D. Ga. 2009), adopted at 1316 (*quoting Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1216 (D. Or. 2002), adopted at 1216); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Therefore, the Court will discuss the material disputed facts in addressing the merits of the pending motions. *See* [Doc. 108-11 ¶ 49; Doc. 114 ¶¶ 10, 43; Doc. 125 ¶¶ 33, 83-84; Doc. 126 ¶¶ 7, 28, 31, 37, 73-77, 82-85, 93,122, and part of ¶ 94]. The Court, however, has omitted certain facts which are not material to the issues presented in the pending motions, were stated as an issue or legal conclusion, or were not supported by citations to evidence. *See* LR. 56.1B(1), (2)a(2), NDGa.[7]

[7] Furthermore, "[t]he substantive law will identify which facts are material, and material facts are those which are key to establishing a legal element of the substantive claim which

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B. Statement of Facts

The TCSD is a political subdivision of the State of Georgia that was consolidated into its present form after the merger of other school systems in the 1980s, and it is governed by the Troup County Board of Education ("BOE").[8] [Doc. 127 (Anderson Dep.) at 10-11 pp. 9-10; Doc. 108-4 at 2 ¶ 4]. Sequita Freeman ("Freeman") is the Chief Human Resources Officer for the TCSD, and she oversees most of the TCSD employment matters at the direction of the TCSD Superintendent of Schools. [Doc. 108-3 (Freeman Aff.) at 2 ¶ 3].[9]

The BOE designates an attendance zone for each TCSD school, and students attend the TCSD school

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might affect the outcome of the case." *Campbell v. Shinseki*, No. 13-11974, 2013 WL 6153250, at *2 (11th Cir. Nov. 25, 2013) (per curiam) (unpublished) (citation and internal marks omitted).

[8] Alford, Burdette, and Matthews have served as members of the BOE since January 1, 2001; Darden served as a member of the BOE from January 1, 1994, until December 31, 2012; McNair has served on the BOE since January 29,1988; Rowe has served on the BOE since August 1, 1993; and Nichols served as a member of the BOE from sometime in 1999 through December 31, 2010, and he served as chair of the BOE from 2008 to 2010. [Doc. 108-2 (Radcliffe Aff.) at 2 ¶ 4; Doc. 108-4 (Alford Aff.) at 2 ¶ 4; Doc. 108-5 at 2 ¶ 4; Doc. 108-6 (Burdette Aff.) at 2 ¶ 4; Doc. 108-7 (McNair Aff.) at 2 ¶ 4; Doc. 108-8 (Rowe Aff.) at 2 ¶ 4; Doc. 108-9 (Matthews Aff.) at 2 ¶ 4; Doc. 112 (Nichols Dep.) at 19 p. 18].

[9] Taryl Anderson ("Anderson) is the former Chief Human Resources Officer for the TCSD. [Doc. 127 at 14-15 pp. 13-14]. During her employment, Anderson also served two stints as the Interim Superintendent of Schools. [*Id.* at 14 p. 13].

for their particular grade level based upon their residential address being located within that particular TCSD school's attendance zone. [Doc. 108-1 (Pugh Aff.) at 2 ¶ 5; Doc. 108-7 at 2 ¶ 5]. BOE policy and Georgia law, O.C.G.A. § 20-2-133, prohibit non-residents of Troup County from attending TCSD schools, [Doc. 108-1 at 3 ¶ 6], and BOE policy does not allow students to attend a TCSD school outside of their proper attendance zone based on their Troup County residential address, [Doc. 108-8 at 3 ¶ 6].

From July 1, 2009, through June 30, 2012, Dr. Michael Lehr ("Lehr") served as the Principal of Troup High School ("THS"). [Doc. 123-5 (Lehr Stmt.) at 1 ¶ 2]. In late 2009, THS began its search for a new Head Football Coach and Ricky Thrash ("Thrash"), the Assistant Principal and Athletic Director at THS, as well as Bubba Jeter ("Jeter"), THS's Head Football Coach at the time, contacted Flowers, who is an African-American male graduate of THS, to see if he would be interested in the position, and Flowers expressed interest in being considered. [Doc. 105 (Pl.'s Dep.) at 25-26 pp. 25-26, 32-33 pp. 32-33; Doc. 124-4 (Thrash Stmt.) at 1 ¶ 3]. In January of 2010, Flowers began working at THS as a Head Football Coach,[10]

[10] In particular, Flowers conducted weight training and practice sessions between January, 2010, and August 1, 2010, without compensation. [Doc. 123-1 at 1 ¶ 3; Doc. 123-5 at 2 ¶ 6]. Flowers asserts that there was resistance to his hiring from Caucasian coaches and administrators, and he was subjected to additional scrutiny prior to being offered a written employment contract. [Doc. 123-5 at 2 ¶ 7]. Thrash conducted a background

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and on August 1, 2010, the BOE officially hired Flowers[11] and provided him with an employment contract as the Head Football Coach at THS for the 2010-2011 school year.[12] [Doc. 105 at 36 p. 36; Doc.

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check of Flowers' employment history and found no issues. [Doc. 124-4 at 1 ¶ 2, 2 ¶ 6]. Despite having found no issues, Dr. Ed Smith ("Smith"), the Superintendent at the time, who is African-American, instructed Lehr to have Thrash "go back and check again," but Thrash refused. [Doc. 123-5 at 2 ¶ 8; Doc. 111 (Lehr Dep.) at 34 p. 34]. The BOE also instructed Anderson and John Taylor ("Taylor"), an attorney for the BOE and the TCSD, to meet with Dr. Ralph Swearngin ("Swearngin"), the Executive Director of the Georgia High School Association ("GHSA"), to inquire as to whether Flowers had been accused of recruiting in his prior positions due to allegations that had been previously made against Flowers. [Doc. 127 at 56 p. 55; Doc. 123-5 at 3 ¶ 9; Doc. 123-6 (Swearngin Stmt.) at 1]. Following the meeting, Anderson reported that Swearngin had assured them that there were no recruiting violations issued against Flowers. [Doc. 127 at 56 p. 55; Doc. 123-5 at 3 ¶ 9]. Flowers asserts that Swearngin advised him that no administrator or attorney had ever come to his office regarding an allegation against a coach. [Doc. 105 at 48 p. 48]. Based on the results of the background check into Flowers' employment history, Smith recommended to the BOE that Flowers be offered an employment contract as Head Football Coach for THS. [Doc. 123-5 at 3 ¶ 10].

[11] Nichols, the chair of the BOE, had previously hired Flowers to work in the school system as a teacher, [Doc. 105 at 167 p. 167], and he voted to approve the decision to hire Flowers as Head Football Coach at THS, [Doc. 112 at 87p. 86].

[12] Supplemental contracts also provided that Flowers would serve in the positions as Defensive Coordinator, Events Coordinator, and Department Chair of Health and Physical Education. [Doc. 123-1 at 1 ¶ 3]. Additionally, Flowers was given a second contract of employment as Head Football Coach at THS for the 20112012 school year, running from August 2, 2011, through May 23, 2012. [Doc. 123-1 at 1 ¶ 4; Doc. 108-1 at 27].

123-1 (Flowers Stmt.) at 1 ¶¶ 2-3; Doc. 108-1 at 26]. Flowers was the first African-American Head Football Coach hired to coach at any of the high schools in Troup County since the federal court ordered the schools integrated in 1973, [Doc. 123-5 at 2 ¶ 7], and he had a stellar career as a Head Football Coach and Head Baseball Coach at Shaw High School in Columbus, Georgia, prior to being hired by the TCSD, [*id.* at 1 ¶ 3; Doc. 105 at 15 p. 15]. Although Flowers was a retired certified teacher in the State of Georgia at Level 7, the highest level of certification, *see* [Doc. 123-1 at 2 ¶ 5], he was hired as a part-time, "49%" employee since state law prohibits an individual from obtaining retirement benefits while still employed as a full-time, certified teacher, [Doc. 108-1 at 26].[13]

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[13] Flowers' employment contract also provides that he was "understood to be at the will of the Troup County [BOE] under Policy GCN and carries no property right or expectation of continued employment" and that he was "not entitled to the benefits and privileges provided for tenured employees under the Georgia Fair Dismissal Act, O.C.G.A. 20-2-940, et. Seq." [Doc. 108-1 at 26; *see also* [Doc. 105 at 3031 pp. 30-31; Doc. 108-1 at 8 ¶ 20]. Although Flowers contends that only non-certified employees can be employed at will, *see* [Doc. 126 at 3 ¶ 7], the GCN Policy provides that "[n]on-certified personnel shall be employed to serve at the will of the [BOE]," but does not state that non-certified employees are the only category of employees that can be hired as at-will employees, *see* [Doc. 108-1 at 25], and it is undisputed that Flowers' employment contract specifically provides that his employment is at-will, *see* [*id.* at 26]. Additionally, the only employment positions in the TCSD subject to the administrative processes and procedures set forth in the Georgia Fair Dismissal Act for an adverse employment action are state certified teachers hired pursuant to a full-time teaching contract.

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Shortly after Flowers was offered an employment contract in August, 2010, the TCSD administrators, including Superintendent Smith, conducted a comprehensive review of current BOE policies and determined that a policy regarding student athlete eligibility and improper recruiting conduct was necessary, and the BOE subsequently adopted the Competitive Interscholastic Activities Policy ("CIAP"). [Doc. 127 at 61-62 pp. 60-61; Doc. 108-1 at 3 ¶ 7; Doc. 108-7 at 4 ¶ 9].[14] On September 10, 2010, Smith advised all

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[Doc. 108-1 at 8 ¶ 19]. TCSD employees not hired pursuant to the standard TCSD full-time certified teacher contract are considered at-will employees subject to termination at any time. [*Id.*]. The TCSD Superintendent, under TCSD Policy GCN, has the authority to terminate any TCSD part-time, at-will employee without BOE approval. [*Id.* at 7 ¶ 18]; *see also* [Doc. 108-1 at 25; Doc. 108-6 at 6 ¶ 14].

[14] The purpose of enacting the CIAP was to make BOE policy consistent with the GHSA's rules and to provide TCSD employees guidance on the expectations regarding student activity eligibility and the improper recruitment of athletes. [Doc. 127 at 62p. 61; 135 p. 134; Doc. 108-7 at 4 ¶ 9]. The CIAP prohibits TCSD employees, staff, and coaches from recruiting or assisting students from outside of their school's attendance zone to participate in competitive activities. [Doc. 108-1 at 3 ¶ 7; Doc. 108-8 at 4 ¶ 9]. The CIAP was adopted without the required second reading, *see* [Doc. 132-2 at 3], due to the urgency of needing it to be put in place since coaches across Troup County were pointing fingers at each other regarding recruiting violations, *see* [Doc. 127 at 68 p. 67, 88 p. 87, 132 p. 131, 136-37 pp. 135-36], and although Flowers asserts it was passed without public input, it was placed on the agenda in August, 2010, for which the public had an avenue to provide input, *see* [*id.* at 137 p. 136; Doc. 129 (Radcliffe Dep.) at 41 p. 40; Doc. 112 at 95 p. 94; Doc. 140 at 10 ¶ 17]. Lehr avers that he and others referred to the

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middle school and high school principals, athletic directors, and sponsors of competitive interscholastic activities of the implementation of the CIAP. [Doc. 132-13 at 1].

In August of 2010, TCSD officials began receiving letters from officials of the Lanett City School System ("Lanett Officials") regarding several students attending TCSD schools while residing in Lanett, Alabama. [Doc. 108-1 at 4 ¶ 8; Doc. 108-1 at 16-24; Doc. 108-9 at 3 ¶ 8].[15] Specifically, on August 5, 2010, Kelley Farrar ("Farrar"), the Attendance Officer for the Lanett City Schools, sent the BOE a letter in which he stated in part that the Lanett Officials had "verified that the following students live in the Lanett City School District: Jalen Washington and Zanquanarious Washington." [Doc. 108-1 at 17]. Nichols circulated this letter, as well as the other letters received from the Lanett Officials, to the BOE. [Doc. 112 at 60 p. 59]. Anderson, TCSD's Chief Human Resources Officer, also received allegations pertaining to Zanquanarious and Jalen Washington's (the "Washington brothers") residence and their possible recruitment by Flowers. [Doc. 127 at 41-44 pp. 40-43].

CIAP as "The Charles Flowers Policy" due to recruiting allegations that had been made against Flowers. [Doc. 123-5 at 3 ¶ 11, 4 ¶ 12]; *see also* [Doc. 127 at 134 p. 133].

[15] Around this same time, Smith retired as Superintendent, and the BOE, headed by Nichols, began its search for a new Superintendent. [Doc. 112 at 37 p. 36].

Shayla Washington ("S. Washington"), the Washington brothers' mother, lived with her children in Lanett, Alabama, during the 2009-2010 school year while her sons attended Lanett High School, where they also played football. [Doc. 106 (S. Washington Dep.) at 3 p. 9; Doc. 123-2 (S. Washington Stmt.) at 1 ¶ 2; Doc. 105 at 222-23 pp. 222-23, 229 p. 229]. S. Washington was unhappy with the fact that her sons were failing in school but were still allowed to play football, and she expressed her concerns to Tseyonka Davidson ("Davidson"), Jalen Washington's uncle and godfather, who lived in West Point, Georgia. [Doc. 123-2 at 1 ¶¶ 3-4; Doc. 123-9 (Z. Washington Stmt.) at 1 ¶¶ 3-4]. Davidson suggested that he and his wife could become the Washington brothers guardians so they could attend school in Troup County, and S. Washington contemplated giving them custody, but changed her mind when she realized she would be giving up legal custody of her sons. [Doc. 123-2 at 1 ¶ 4, 2 ¶ 5; Doc. 123-9 at 1 ¶ 4, 2 ¶ 5; Doc. 106 at 52 p. 207; Doc. 107 (Davidson Dep.) at 13 p. 51].

During the summer of 2010, prior to the Washington brothers enrolling in THS, Davidson introduced S. Washington to Flowers, whom Davidson had known since his childhood.[16] [Doc. 106 at 7 p. 25; Doc.

[16] During the summer of 2010, but sometime after Flowers first met the Washington brothers, they began weight training with the THS football team. [Doc. 105 at 209-11 pp. 209-11]. The Washington brothers were picked up by a Troup County bus or van in West Point, Georgia, transported to the THS gymnasium for weight training, and then transported back to West Point.

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105 at 102 p. 102, 104 p. 104, 221 p. 221, 224 p. 224; Doc. 107 at 8 p. 30, 11 pp. 41-44]. S. Washington even\tually found a residence within Troup County located at 904 Avenue D in West Point, Georgia, and she enrolled the Washington brothers in THS in the middle of August, 2010, after the school year had already begun. [Doc. 123-2 at 2 ¶¶ 6-7; Doc. 123-9 at 2 ¶¶ 6-8]. Flowers did not allow the Washington brothers to participate in football practice or play in the first football scrimmage and game at THS because their residence in the attendance zone had not yet been certified. [Doc. 123-2 at 2 ¶ 8; Doc. 123-9 at 2 ¶ 8]. In mid-August, 2010, S. Washington provided all of the paperwork required by the TCSD to register her sons as students at THS, including a copy of the lease on the house located in West Point, Georgia,

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[*Id*. at 212-13 pp. 212-13]. Although summer workouts were not official football team practices, a football coach was present for the workouts. [*Id.* at 213-14 pp. 213-14]. Prior to the start of the 2010 school year, Lanett Officials learned that the Washington brothers were voluntarily participating in weight training at THS and Farrar, the Lanett City Schools Attendance Officer, began an investigation to determine if the Washington brothers and other students were living in Alabama but attending school in Georgia. *See* [Doc. 117 at 5]. Farrar spoke to Lehr and addressed this issue with him. *See* [*id.*]. In addition, on August 10, 2010, Farrar sent Swearngin a letter, advising him that the Washington brothers resided in Lanett, Alabama, but had been cleared to register at THS and were going to be submitted for football eligibility for THS. *See* [Doc. 108-1 at 18]. Farrar also advised Swearngin that he had provided this information to Lehr and that S. Washington had stated to the principal of Lanett High School that she did not intend to move and was not going to release custody of her children. [*Id.*].

and the Washington brothers were admitted to THS.[17] [Doc. 123-2 at 2 ¶ 9]; *see also* [Doc. 134-1 at 49-66].

On August 11, 2010, Phillip Johnson ("Johnson"), the Superintendent for Lanett City Schools, sent Lehr a letter in which he explained that five students, including the Washington brothers, had been reported as living in Lanett, Alabama, but being enrolled in Troup County schools and requested that those students be withdrawn by August 13, 2010. [Doc. 108-1 at 19-20].[18] Subsequently, on December

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[17] However, questions remained regarding the paperwork provided by S. Washington and her actual address. *See* [Doc. 127 at 43-44 pp. 42-43]. In fact, Davidson had tried to enroll the Washington brothers in THS at some point even though he was not their legal guardian. [Doc. 107 at 16 pp. 62-63]. Additionally, Anderson had received information regarding the Washington brothers from various people and she noted that several adults had attempted to enroll the Washington brothers in THS with "different pieces of paperwork" and that it was "not just straight forward enrolling students into any school district," but that "[i]t really took a lot of turns and twists[.]" [Doc. 127 at 44 p. 43, 152-53 pp. 151-52].

[18] In November, 2010, Nichols, who was still chair of the BOE at the time, met with newly-elected BOE member, Allen Simpson ("Simpson"), at Simpson's book store. [Doc. 123-4 (Simpson Stmt.) at 1]. During this meeting, Nichols advised him that there were three issues the BOE was going to have to deal with: (1) Bibles in the schools, (2) students coming across state lines to attend Troup County schools, and (3) Flowers, who he stated "has a record of illegal recruiting, but that he hadn't been caught yet." [*Id.*]. Nichols also provided Simpson copies of letters the BOE had received from the Lanett Officials regarding Flowers alleged recruiting actions. [*Id*.]. Simpson, however, was removed from the BOE in November, 2011, when the district lines were

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31, 2010, Farrar sent Nichols a letter, which stated in relevant part:

> I am contacting you concerning a problem that exists in the tri-city area of Lanett, West Point, and Valley, regarding students attending schools outside of their attendance zones. The students in this case are students that reside within the Lanett City School district and attend [THS]. Listed below are the names of students we are aware of at this time: 1) Jalen Washington 2) Zanquanarious Washington 3) [S.B.] 4) [S.B.] 5) [R.S.]
>
> When this problem was brought to my attention in late July, I began an investigative process to determine the identity of the students and their city of residence. When I concluded my investigation I contacted the proper authorities in Troup County and made them aware of the situation. I was not a personal witness but there were statements from parents, students, and members of the communities about students who were being recruited to attend [THS] to participate in athletics. The above lists of students are attending school outside of their district; they may or may not have been recruited.
>
> . . .
>
> My concerns are only for the students in such cases as these. Students should attend

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redrawn and his residence fell outside the new lines, but he returned to the BOE in June of 2012. [*Id.* at 1-2].

> school in the district in which they reside. Any manipulation of these standards is unethical and unprofessional. If you can assist me in this effort, I will greatly appreciate your support.

[Doc. 108-1 at 21].

The BOE hired Pugh as the TCSD Superintendent,[19] and he began his employment on February 1,

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[19] On January 18, 2011, prior to Pugh beginning his employment as Superintendent, Nichols, who was no longer a BOE member, met with Pugh and discussed allegations concerning Flowers' alleged recruiting, among other things, and he provided Pugh additional copies of the letters the BOE had received from the Lanett Officials, though Pugh was already aware of the contents of the letters. [Doc. 112 at 41-42 pp. 40-41; Doc. 113 (Pugh Dep.) at 34 p. 33, 145-46 pp. 144-45]. On January 27, 2011, Farrar and Nichols had a telephone conversation in which they discussed the ongoing residency issues, *see* [Doc. 117 at 10], and on January 31, 2011, Farrar sent Nichols a letter confirming the Alabama addresses of the students previously identified as living in Lanett but attending school in Troup County, *see* [*id.*; Doc. 108-1 at 22]. During this time, S. Washington could no longer afford the rent on the West Point, Georgia, house and she asked Davidson to help her find another place to live with her sons in West Point. [Doc. 123-2 at 5 ¶ 17]. On January 28, 2011, Anderson sent S. Washington a letter in which she advised her that there was credible evidence that she was no longer residing at 904 Avenue D in West Point, Georgia, and that she was not a resident of any other locations in Troup County, Georgia, but was a resident of the State of Alabama. [Doc. 134-1 at 28]. Consequently, Anderson notified her that her sons were not eligible to attend school in Troup County and were being withdrawn, effective that day. [*Id.*]. S. Washington met with Anderson and advised her that she and her sons were still residing at the 904 Avenue D address and her sons were subsequently allowed to return to school. [Doc. 123-2 at 4 vii 15-16]. Thereafter, Davidson

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2011,[20] which included overseeing the operation of all TCSD schools and managing all TCSD employees.

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found an apartment at the Happy Hollow Apartments in West Point, Georgia, and while he and S. Washington went to look at the apartment, Davidson saw Flowers and told him about the potential apartment and Flowers accompanied them to the apartment to ensure that it was located in Troup County, which Flowers confirmed. [*Id.* at 5 vii 18-19; Doc. 123-1 at 2 ¶ 8; Doc. 130-6 (T. Davidson Stmt.) at 4 vii 15-17]. On February 17, 2011, S. Washington and her children moved into the new apartment. [Doc. 123-2 at 6 ¶¶ 22-23].

[20] On his first day, Pugh met with Lehr, and Lehr averred that Pugh told him that "he understood [his] coach was a recruiter." [Doc. 123-5 at 5 ¶ 16]. Pugh denies that he referred to Flowers as a recruiter, but testified that he "probably said [he had] heard the rumors that one of your coaches might be recruiting athletes." [Doc. 113 at 34 p. 33]. Lehr responded that the "allegations were untrue" to which Pugh stated that "he's learned that where there's smoke, there's fire." [Doc. 123-5 at 5 ¶ 16; Doc. 113 at 35 p. 34]. Lehr replied that in his experience, "where there's smoke, somebody may have set the fire." [Doc. 123-5 at 5 ¶ 16]. A few days later, Lehr provided Pugh a copy of a memorandum he had sent to Anderson and shared with Smith that refuted the recruiting allegations against Flowers and that contained the names of 11 students that were allegedly playing sports outside of their attendance zone and described that all of those students' coaches were Caucasian. [*Id.* at 5 ¶ 17]. Lehr averred that he was not aware that any of the Caucasian coaches were investigated as a result of his memorandum, *see* [*id.* at 4 ¶ 13]; however, Pugh testified that any list of students that came to his attention was provided to Shanitra Ransom ("Ransom"), an employee in the TCSD Office of Student Assignment, for investigation, [Doc. 113 at 39-40 pp. 38-39]. In fact, Flowers even admits that Pete Wiggins ("Wiggins"), one of the Caucasian coaches listed in Lehr's memorandum, was eventually questioned about allegations that he recruited Quan Bray ("Bray"), a student who attended Callaway High School and is also Flowers' nephew, after Bray provided a letter to the TCSD stating

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[Doc. 108-1 at 2 ¶ 4; Doc. 123-5 at 5 ¶ 16]. On February 21, 2011, Johnson, the Superintendent for Lanett City Schools, sent Superintendent Pugh a letter, advising him that his staff had been investigating reports of Lanett, Alabama students attending Troup County schools and enclosing several letters that Farrar had sent to the BOE as well as to Swearngin. [Doc. 108-1 at 4 ¶ 8]; *see also* [*id.* at 16]. Among the students identified in the letters were the Washington brothers. [*Id.* at 4 ¶ 8].[21] Pugh instructed Radcliffe,

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that he lived in Meriwether County the entire time he attended Callaway High School and that Wiggins was aware of his residential address since they regularly picked him up and dropped him off at his home. *See* [Doc. 126 at 9 ¶ 32 (*citing* [Doc. 123-7 (Bray Stmt.) at 1 ¶¶ 2-3, 2 ¶¶ 4-5])]. The investigation resulted in a determination that the allegations were unsubstantiated, *see* [Doc. 132-14 at 8-9], though Bray was never contacted about the information he provided in his letter, *see* [Doc. 123-7 at 3 ¶ 7].

[21] Additionally, on February 28, 2011, Clifford Story ("Story"), the Head Football Coach and Athletic Director at Lanett High School, sent Nichols a letter in which he stated that he and his wife owned a business four blocks from the Washington brothers' Lanett, Alabama address, that the Washington brothers did not move prior to enrolling in THS, and that he discussed this issue with Flowers who indicated that he would meet with him but that he never showed up or mentioned it again. [Doc. 108-1 at 23-24]. Despite continued questions concerning the Washington brothers' residency, *see* [Doc. 127 at 43-44 pp. 42-43; Doc. 108-1 at 4 ¶ 8; Doc. 117 at 11], S. Washington averred that she and her sons "lived continuously in the house at 904 Avenue D in West Point, Goergia, until [they] moved to Happy Hollow Apartments, which were also in West Point, in mid-February, 2011, although [they] sometimes spent weekends in Lanett visiting [her] third son, Travon and his father, and also [her] older

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the Assistant Superintendent of Operations for the TCSD, to contact the Troup County Sheriff's Office for guidance in finding a private investigator to assist the TCSD with an investigation into these allegations, and the Sheriff's Office recommended Duke Blackburn ("Blackburn"). [*Id.* at 5 ¶ 10; Doc. 108-2 at 2 ¶ 4, 3 ¶ 8, 4 ¶ 9].[22] In April, 2011, Blackburn was hired by the BOE to investigate students living in Alabama but attending school in Troup County as well as whether these students had been aided or coerced by Flowers to misrepresent their true residency so they could participate in the athletic program, and he provided the BOE an investigation proposal on

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daughter and [her] mother," [Doc. 123-2 at 3 ¶¶ 10,12]; *see also* [Doc. 123-9 at 3 ¶ 10; Doc. 136-1 (Williams Stmt.) at 1 ¶ 2; Doc. 124-6 (Slay Stmt.) at 1; Doc. 124-7 (Higgins Stmt.) at 1; Doc. 124-8 (H. Davidson Stmt.) at 1].

[22] In March, 2011, Nichols met with Lehr and advised him that Flowers "was a recruiter, and that the CIAP required [him] as the Principal of [THS] to enforce the CIAP with regard to [] Flowers." [Doc. 123-5 at 6 ¶ 19]. Nichols also provided Lehr with a copy of the CIAP as well as copies of several letters he had received from the Lanett Officials relating to students they claimed lived in Lanett, Alabama, but attended school in Troup County, including the Washington brothers. [*Id.* at 6 ¶ 20; Doc. 113 at 78-79 pp. 77-78]. Nichols denies mentioning anything related to recruiting during this meeting, but admits he discussed students being enrolled in Troup County schools while residing in Lanett, Alabama. *See* [Doc. 112 at 111 p. 110]. A few days later, Nichols visited Lehr for a second time, regarding the CIAP and the letters from the Lanett Officials. [Doc. 123-5 at 6 ¶ 21]. Lehr stated that he "felt strongly that [he] was being threatened by [] Nichols with regard to [his] enforcement of the CIAP as it related to [] Flowers." [*Id.*].

April 4, 2011. [Doc. 108-1 at 6 ¶¶ 13-14; Doc. 132-7; Doc. 129 at 58 p. 57; Doc. 133-1 at 17].[23] In his initial May 14, 2011, investigation report, Blackburn stated that S. Washington had gone to great lengths to establish a Georgia residence so her sons could attend THS and he then cited law supporting his contention that S. Washington's primary residence was where her withholding taxes were paid, which he believed was in Alabama. *See* [Doc. 133-1 at 17-18; Doc. 129 at 64 p. 63].[24] In this initial report, Blackburn also stated that, "[a]s far as any involvement of Troup County Staff actually helping the students establish a fraudulent residence solely to meet the requirement of residency in order to attend Troup County Schools was unfounded [sic]." [Doc. 133-1 at 18].[25]

In July of 2011, Blackburn sent Radcliffe an e-mail in which he reported that S. Washington and her children had been evicted for non-payment from

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[23] As part of his investigation, Blackburn rode the Troup County school buses, followed vehicles, and surveilled homes of individuals identified in his report as "suspected students." [Doc. 129 at 114 p. 113; Doc. 124-7 at 1].

[24] Flowers points out that S. Washington actually paid her withholding taxes for her job at Interface Flor in Georgia. [Doc. 123-2 at 3 ¶ 11]; *see also* [Doc. 126 at 17 ¶ 59]. Blackburn was interested in interviewing S. Washington, but neither he nor any other representative from the TCSD ever discussed with her the allegations against Flowers or her residency. [Doc. 133-2 at 28; Doc. 123-2 at 6 ¶ 25; Doc. 129 at 117 p. 116].

[25] In May, 2011, the Washington brothers stopped attending THS and S. Washington and her sons moved back to Lanett, Alabama. [Doc. 123-2 at 6 ¶ 23].

Happy Hollow Apartments and that he had tracked down the co-owner, Ric Hunt ("Hunt"), who advised him that S. Washington did not have good credit to rent the apartment and that Flowers had paid the initial rent. [Doc. 133-2 at 26; Doc. 123-10 (Brooks Stmt.) at 1 ¶ 2]. Subsequently, on August 30, 2011, Blackburn sent Radcliffe another e-mail in which he advised Radcliffe that Hunt had agreed to cooperate with any investigation regarding the Washington brothers. [Doc. 133-2 at 27]. In the e-mail, Blackburn reported that Hunt told him that after he denied S. Washington's credit application, Flowers "contacted him and guarenteed [sic] payment for the apartment." [*Id.*].[26]

On September 22, 2011, Pugh and Radcliffe met with Hunt and he again advised them that Flowers had called him and paid rent for the Washington brothers and their mother for the apartment during the previous school year. [Doc. 108-1 at 7 ¶ 15; Doc. 108-2 at 5 ¶ 11; Doc. 108-2 at 7-8; Doc. 132-10 at 1-2]. On January 19, 2012, Pugh instructed Radcliffe to

[26] Flowers maintains that Davidson actually contacted Hunt using Flowers' cell phone, identified himself as Davidson, and advised him that "[S.] Washington wanted the apartment because it was in the Troup Zone and her sons could still play football," though he admits that he could not hear the actual phone conversation. [Doc. 130-6 at 4 ¶¶ 17-18]; *see also* [Doc. 123-1 at 3 ¶¶ 9-10; Doc. 107 at 23 pp. 90-91]. He further asserts that he did not pay any rent on behalf of S. Washington, but rather, Davidson and S. Washington paid the rent and deposit by money order. [Doc. 123-10 at 3 ¶ 9; Doc. 123-2 at 6 ¶ 22; Doc. 130-6 at 5 ¶ 19].

obtain a signed statement from Hunt regarding the efforts Flowers allegedly had made on behalf of the Washington brothers in obtaining their apartment in West Point, Georgia. [Doc. 108-1 at 7 ¶ 17; Doc. 108-2 at 5 ¶ 12].

On February 16, 2012, Pugh and Freeman met with Flowers, and Pugh advised him that he was being terminated for violating the CIAP and GHSA policies by assisting the Washington brothers and their mother in obtaining housing inside the THS attendance zone. [Doc. 108-1 at 9 ¶ 21; Doc. 108-3 at 2 ¶ 4; Doc. 113 at 56 p. 55].[27] On the following day, Flowers returned to Pugh's office with Davidson and his wife, and Davidson provided Pugh a sworn statement, stating that he had paid the rent and deposit on S. Washington's apartment. [Doc. 123-1 at

[27] Pugh testified that he decided it was in the best interest of THS and its football program to wait until after the season was over to terminate Flowers. [Doc. 113 at 110 p. 109]. Flowers testified that during the February 16 meeting Pugh told him that "he had a statement and that [Flowers] was a recruiter and [he] was fired." [Doc. 105 at 108-09]. However, Flowers asserts that he denied that he ever paid rent or contacted Hunt on behalf of the Washington brothers and their mother and that he told Pugh that he knew who did, but Pugh and Freeman assert that while Flowers denied paying rent, he admitted that he had made a phone call to Hunt to secure an apartment on behalf of S. Washington and her children and that Pugh based his termination of Flowers on Hunt's statement and the confirmation that Flowers' cell phone had been used to place the call to Hunt. [Doc. 108-1 at 9 ¶ 21; Doc. 108-3 at 2 ¶ 4; Doc. 123-1 at 4 ¶ 13; Doc. 113 at 56p. 55, 68-69 pp. 67-68, 75 p. 74, 80-81 pp. 79-80, 88 p. 87].

4 ¶¶ 14-15; Doc. 130-6 at 6 ¶ 23]. Davidson also advised Pugh that he had made the phone call to Hunt regarding the apartment. [Doc. 130-6 at 6 ¶ 23; Doc. 123-1 at 4 ¶ 15].[28] Flowers also provided Pugh with a statement from Pepper Brooks ("Brooks"), the Resident Manager at Happy Hollow Apartments, in which Brooks stated that Davidson and S. Washington had paid the rent and deposit on the apartment at issue. [Doc. 123-1 at 5 ¶ 16; Doc. 123-10 at 2 ¶ 7]. A couple of days later, Pugh contacted Brooks regarding her statement and asked her whether she knew Flowers, and Brooks responded that she knew "of" him but that she did not know him personally. [Doc. 123-10 at 3 ¶ 8].

Although BOE approval of Flowers' termination was not required since he was not employed in a full-time state certified position, the BOE approved his termination.[29] [Doc. 108-4 at 6 ¶ 14; Doc. 108-5 at 6

[28] The TCSD defendants admit that Davidson advised Pugh both that he had made the phone call and paid the rent on the apartment on behalf of S. Washington, but they assert that this information directly contradicted Flowers' alleged admission the day prior about making the phone call and Hunt's statement that the person he spoke with identified himself as Flowers. [Doc. 140 at 50 ¶ 96 (*citing* [Doc. 113 at 77 p. 76, 88 p. 87])]. Pugh testified that after Flowers admitted he made the phone call to secure the apartment, the focus was no longer on who paid the rent but who made the call to Hunt as he believed the phone call to also be a violation. [Doc. 113 at 92p. 91, 94 p. 93].

[29] Flowers asserts that unlike Caucasian coaches against whom allegations were made, he was investigated, but never told by the TCSD about the allegations against him nor given an

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¶ 14; Doc. 108-6 at 6 ¶ 14; Doc. 108-7 at 6 ¶ 14; Doc. 108-8 at 6 ¶ 14; Doc. 108-9 at 6 ¶ 14; Doc. 123-1 at 5 ¶ 17; Doc. 113 at 101 p. 100]. Lynn Kendall ("Kendall"), a Caucasian male, was hired to replace Flowers as Head Football Coach at THS, [Doc. 123-1 at 7 ¶ 23]; *see also* [Doc. 105 at 157-58 pp. 157-58], and Flowers is currently employed as the ninth grade football coach at Smiths Station Junior High School in Smiths Station, Alabama, [Doc. 105 at 15 p. 15, 17-18 pp. 17-18].

II. SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, the Court views all evidence in the light most favorable to and draws all reasonable inferences in the favor of the non-moving party. *Gray v. City of Jacksonville,*

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opportunity to refute them. [Doc. 123-1 at 4 ¶ 12, 5 ¶¶ 1819, 6 ¶¶ 20-21]; *see also* [Doc. 123-5 at 4 ¶ 13]. On March 21, 2012, Pugh sent Swearngin a letter advising him that the TCSD found that Flowers had engaged in recruiting violations and that he was no longer employed by the TCSD. *See* [Doc. 126 at 29 ¶ 103; Doc. 140 at 53-54 ¶ 103]. Flowers asserts that as a result of the accusations against him, Swearngin informed him that his eight-year teaching agreement with the GHSA was suspended. [Doc. 123-1 at 6 ¶ 22]. Flowers also asserts that despite allegations against a Caucasian coach, Donnie Branch ("Branch"), he was never investigated and he still remains in his position. *See* [Doc. 123-8 (Dunlap Stmt.) at 2 ¶ 8; Doc. 123-1 at 5 ¶ 19]. Flowers also maintains that there were other Caucasian TCSD employees who violated the CIAP, but were either not investigated or were investigated but had no action taken against them. *See* [Doc. 126 at 30 ¶¶ 109-10, 31 ¶¶ 113-21].

Fla., 492 F. App'x 1, 3 (11th Cir. 2012) (per curiam) (unpublished) (citations omitted). "Summary judgment shall be granted if the movant shows that there is 'no genuine issue as to any material fact', such that the movant is entitled to judgment as a matter of law." *Terome v. Barcelo Crestline, Inc.*, 507 F. App'x 861, 863 (11th Cir. 2013) (per curiam) (unpublished) (*quoting* Fed. R. Civ. P. 56(a)); *see also Holmes v. Ga. ex rel. Strickland*, 503 F. App'x 870, 872-73 (11th Cir. 2013) (per curiam) (unpublished) (citations omitted); *Young v. FedEx Express*, 432 F. App'x 915, 916 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted).

The party moving for summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material facts, upon which the non-moving party must then submit specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Premier Assocs., Inc. v. EXL Polymers, Inc.*, No. 1:08-cv-3490-WSD, 2010 WL 2838497, at *8 (N.D. Ga. July 19, 2010) (citations omitted). "[A] party opposing a properly supported motion for summary judgment may not rest upon mere allegation[s] or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." *Jackson v. B & L Disposal, Inc.*, 425 F. App'x 819, 820 (11th Cir. 2011) (per curiam) (unpublished) (first alteration in original) (citation and internal marks omitted); *see also Shuler v. Ingram & Assocs.*, 441 F. App'x 712, 715 (11th Cir. 2011) (per curiam) (unpublished)

(citation and internal marks omitted); *Bryant v. U.S. Steel Corp.*, 428 F. App'x 895, 897 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted). "Speculation or conjecture cannot create a genuine issue of material fact." *Shuler*, 441 F. App'x at 715 (citation omitted); *see also Howard v. Or. Television, Inc.*, 276 F. App'x 940, 941 (11th Cir. 2008) (per curiam) (unpublished) (citation omitted); *Goodman v. Ga. Sw.*, 147 F. App'x 888, 891 (11th Cir. 2005) (per curiam) (unpublished) (citation and internal marks omitted) ("All reasonable inferences arising from the undisputed facts should be made in favor of the nonmovant, but an inference based on speculation and conjecture is not reasonable."). "Moreover, the non-moving party cannot create a genuine issue through evidence that is 'merely colorable' or 'not significantly probative." *Morales v. Ga. Dept of Human Res.*, 446 F. App'x 179, 181 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted). In addition, "[t]here is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment," *Anyanwu v. Brumos Motor Cars, Inc.*, 496 F. App'x 943, 945-46 (11th Cir. 2012) (per curiam) (unpublished) (citation and internal marks omitted), and "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, summary judgment for the moving party is proper," *Premier Assocs., Inc.*, 2010 WL 2838497, at *9 (alteration in original) (citation and internal marks omitted).

III. DISCUSSION

Flowers asserts a race discrimination claim under Title VII against the TCSD. [Doc. 1 ¶¶ 101-04]. Flowers also asserts race discrimination claims under §§ 1981 and 1983 and the Fourteenth Amendment against the individual TCSD defendants in their official and individual capacities. [*Id.* ¶¶ 105-13]. Finally, Flowers asserts a state law claim for intentional interference with contractual relations against Nichols. [*Id.* ¶¶ 114-16]. The TCSD defendants contend that Flowers' race discrimination claims are due to be dismissed because: (1) he has failed to set forth a prima facie case of race discrimination; (2) that even if he could establish a prima facie case, they have articulated a legitimate, non-discriminatory reason for his termination which Flowers has failed to show was pretextual; (3) the individual TCSD defendants, sued in their individual capacities, are entitled to qualified immunity; and (4) the TCSD cannot be held liable under §§ 1981 and 1983 for alleged constitutional violations by its employees. *See* [Doc. 108-10]. In addition, Nichols contends that Flowers' claim for intentional interference with contractual relations fails as a matter of law. *See* [Doc. 110-1].

A. Flowers' Federal Race Discrimination Claims

1. Statutory Framework

Flowers asserts race discrimination claims against the TCSD defendants pursuant to Title VII, §§ 1981 and 1983, and the Fourteenth Amendment to the

Constitution enforced via § 1983. [Doc. 1 ¶¶ 101-13]. Title VII prohibits discrimination in employment on the basis of "race, color, religion, sex or national origin." *See* 42 U.S.C. § 2000e-2(a)(1); *Blue v. Dunn Constr. Co.*, 453 F. App'x 881, 883 (11th Cir. 2011) (per curiam) (unpublished); *Bolton v. Potter*, No. 8:03-CV-2205-T-27EAJ, 2006 WL 118286, at *5 (M.D. Fla. Jan. 13, 2006) (*citing* Intl *Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)); *see also Branham v. Astrue*, Civil Action No. 7:08-CV-123(HL), 2010 WL 419395, at *3 (M.D. Ga. Jan. 28, 2010). Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts[[30]] . . . as is enjoyed by white citizens[.]" 42 U.S.C. § 1981(a).[31] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," and therefore affords individuals a right to

[30] "Make and enforce contracts" encompasses "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

[31] Section 1983 "is not itself a source of substantive rights" – rather it provides "a method for vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979). It is well established in this Circuit that § 1983 constitutes the exclusive remedy against state actors for violations of the rights contained in § 1981. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 733 (1989); *Butts v. Cnty. of Volusia*, 222 F.3d 891, 893-95 (11th Cir. 2000).

be free from racial discrimination. *See* U.S. Const., amend. XIV § 1.

Discrimination claims under Title VII, §§ 1981 and 1983, and the Equal Protection Clause utilize the same analytical framework. *See Bryant v. Jones*, 575 F.3d 1281, 1296 n.20 (11th Cir. 2009) (citations omitted) (noting that discrimination claims brought under the Equal Protection Clause, § 1981, or Title VII are subject to the same standards of proof and employ the same analytical framework); *Koch v. Rugg*, 221 F.3d 1283, 1297 n.31 (11th Cir. 2000) (citation omitted) (recognizing that the analytical structure for a Title VII employment discrimination prima facie case is also applicable to a claim of racial discrimination under § 1983); *Standard v. A.B.E.L. Servs., Inc.*, 161 F.3d 1318, 1330 (11th Cir. 1998) (stating that Title VII and § 1981 "have the same requirements of proof and use the same analytical framework"); *Harris v. Bd. of Trs. Univ. of Ala.*, 846 F. Supp. 2d 1223, 1243 (N.D. Ala. 2012) (citation omitted) (noting that the Fourteenth Amendment Equal Protection Clause "borrows from Title VII elements and analysis"). Therefore, the Court will address Flowers' Title VII race discrimination claim in connection with his Equal Protection and §§ 1981 and 1983 claims.

Where, as here, there is no direct evidence of discrimination, the Court evaluates Title VII claims by using the burden shifting framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Maddox-Jones v. Bd. of Regents of Univ. Sys. of Ga.*, 448 F. App'x 17, 19 (11th Cir. 2011) (per curiam)

(unpublished); *see also Miller-Goodwin v. City of Panama City Beach, Fla.*, 385 F. App'x 966, 969 (11th Cir. 2010) (per curiam) (unpublished); *Coar v. Pemco Aeroplex*, Inc., 372 F. App'x 1, 3 (11th Cir. 2010) (per curiam) (unpublished). "Under that framework, [Flowers] must first establish a prima case of intentional discrimination, which gives rise to a rebuttable presumption of such discrimination." *Peters v. HealthSouth of Dothan, Inc.*, No. 13-10721, 2013 WL 5567734, at *3 (11th Cir. Oct. 10, 2013) (per curiam) (unpublished) (citation omitted). "Demonstrating a prima facie case is not onerous; it requires only that [Flowers] establish facts adequate to permit an inference of discrimination." *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (per curiam) (citations omitted); *see also Tex. Dept of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981).

If Flowers establishes a prima facie case as to his claim, an inference of discrimination arises, and the burden shifts to the TCSD defendants to articulate a legitimate, non-discriminatory reason for their actions. *Berman v. Orkin Exterminating Co.*, 160 F.3d 697, 702 (11th Cir. 1998); *see also Entrekin v. City of Panama City Fla.*, 376 F. App'x 987, 997 (11th Cir. 2010) (per curiam) (unpublished); *Batts v. Silver Line Bldg. Prods. Corp.*, Civil Action File No. 1:08-CV-3355-WSD-ECS, 2010 WL 966860, at *9 (N.D. Ga. Feb. 22, 2010), adopted by 2010 WL 966861, at *2 (N.D. Ga. Mar. 12, 2010). The TCSD defendants burden, one of production and not of persuasion, is "exceedingly light." *Smith v. Horner*, 839 F.2d 1530, 1537

(11th Cir. 1988) (citations and internal marks omitted); *see also Bagwell v. Peachtree Doors & Windows, Inc.*, Civil Action File No. 2:08-CV-191-RWS-SSC, 2011 WL 1497831, at *21 (N.D. Ga. Feb. 8, 2011) (citation omitted), adopted by 2011 WL 1497658, at *1 (N.D. Ga. Apr. 19, 2011). "It is not necessary that the court believe the evidence; the court's analysis can involve no credibility assessment." *Matthews v. City of Dothan*, No. 1:04-CV-640-WKW, 2006 WL 3742237, at *5 (M.D. Ala. Dec. 18, 2006) (citation and internal marks omitted). "So long as the employer articulates 'a clear and reasonably specific' non-discriminatory basis for its actions, it has discharged its burden of production." *Vessels v. Atlanta Indep. Sch. Sys.*, 408 F.3d 763, 770 (11th Cir. 2005) (per curiam) (citation omitted).

If the TCSD defendants meet their burden of production with respect to Flowers' claim, the inference of discrimination is erased, and the burden shifts back to Flowers to show that the TCSD defendants' articulated reason is merely a pretext for discrimination. *Entrekin*, 376 F. App'x at 997; *Berman*, 160 F.3d at 702; *see also Saunders v. Emory Healthcare, Inc.*, 360 F. App'x 110, 113, 115 (11th Cir. 2010) (per curiam) (unpublished). That is, "[o]nce the employer proffers a legitimate, nondiscriminatory reason, in order to survive summary judgment, the [plaintiff] must proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant[s'] . . . articulated reasons [are] pretextual." *Dockery v. Nicholson*, 170 F. App'x 63, 65-66

(11th Cir. 2006) (per curiam) (unpublished) (last alteration in original) (citation and internal marks omitted); *Bagwell*, 2011 WL 1497831, at *25. Despite this burden-shifting framework, the "ultimate burden of persuading the trier of fact that the defendant[s] intentionally discriminated against the plaintiff remains at all times with the plaintiff." *See Burdine*, 450 U.S. at 253 (citations omitted).

2. *Analysis*

a. Prima Facie Case

The Eleventh Circuit applies "different formulations of the elements of a *prima facie* case, depending on the facts of the individual case." *Maddox-Jones*, 448 F. App'x at 20. Flowers' race discrimination claim is based on his allegation that he was treated differently than employees from outside his protected class when he was terminated from his employment. [Doc. 1 ¶¶ 102, 106, 111]; *see also* [Doc. 108-10 at 18; Doc. 119 at 5-6]. Flowers may establish a prima facie case of discriminatory termination by showing that (1) he is a member of a protected class; (2) he was qualified for the job; (3) he was subjected to an adverse employment action; and (4) he was replaced by someone outside of his protected class. *Hudson v. Middle Flint Behavioral Healthcare*, 522 F. App'x 594, 596 (11th Cir. 2013) (per curiam) (unpublished) (citation omitted); *see also Jefferson v. Burger King Corp.*, 505 F. App'x 830, 833 (11th Cir. 2013) (per curiam) (unpublished) (citation omitted); *Paul v. Americold*

Logistics, LLC, 450 F. App'x 850, 853-54 (11th Cir. 2012) (per curiam) (unpublished) (citation omitted). "Rather than demonstrate that [ ]he was replaced by someone outside of [his] protected class, a plaintiff may instead demonstrate that [his] employer treated similarly situated employees outside of [his] class more favorably." *Hudson*, 522 F. App'x at 596 (citation omitted); *see also Peters*, 2013 WL 5567734, at *4 (citation omitted); *Beal v. Convergys Corp.*, 489 F. App'x 421, 423 (11th Cir. 2012) (per curiam) (unpublished) (citation omitted); *Santillana v. Fla. State Court Sys.*, 450 F. App'x 840, 843 (11th Cir. 2012) (per curiam) (unpublished); *Lee v. U.S. Steel Corp.*, 450 F. App'x 834, 839 (per curiam) (unpublished) (11th Cir. 2012); *Tweedy v. Bibb Cnty. Sch. Dist.*, No. 5:11-cv-226 (CAR), 2013 WL 5437641, at *5 (M.D. Ga. Sept. 27, 2013) (footnote omitted).[32]

It is undisputed that Flowers, an African-American, is a member of a protected class, that he was qualified for his position, and that he suffered an adverse employment action when he was terminated from his position as Head Football Coach at THS. *See*

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[32] Furthermore, "'where the evidence does not fit neatly into the classic prima facie case formula . . . a prima facie case of disparate treatment can still be established by any proof of actions taken by the employer' that shows a 'discriminatory animus,' where 'in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations.'" *Coar*, 372 F. App'x at 3 (alteration in original) (*quoting Schoenfeld v. Babbit*, 168 F.3d 1257, 1268 (11th Cir. 1999)).

[Doc. 108-10 at 18; Doc. 119 at 5]. The TCSD defendants argue that Flowers has not presented a prima facie case of race discrimination because he has failed to identify a similarly-situated comparator. [Doc. 108-10 at 18]. In fact, the parties solely focus on whether Flowers has identified a similarly-situated comparator from outside of his protected class who engaged in the same type of conduct but was afforded more favorable treatment, *see* [Doc. 108-10 at 1819; Doc. 119 at 5-7; Doc. 139 at 2-6]; however, the undisputed evidence establishes that Flowers was replaced as Head Football Coach at THS by Kendall, a Caucasian male, *see* [Doc. 123-1 at 7 ¶ 23], and he has therefore satisfied the fourth prong of a prima facie case, *see Jiann Min Chang v. Ala. Agric. & Mech. Univ.*, 355 F. App'x 250, (11th Cir. 2009) (per curiam) (unpublished) (second emphasis added) (citation and internal marks omitted) ("A plaintiff may establish a *prima facie* case of discriminatory termination under Title VII by showing that he . . . was replaced by someone outside his protected class *or* was treated less favorably than a similarly-situated individual outside his protected class."); *Melton v. Nat'l Dairy LLC*, 705 F. Supp. 2d 1303, 1319 (M.D. Ala. 2010) (citation omitted) (noting that a plaintiff "can bypass the 'similarly situated' prongs . . . by demonstrating instead that he was replaced by someone outside his protected class"). Accordingly, the undersigned finds that Flowers has established a prima facie case of race discrimination

based on his termination.[33] *See Delong v. Best Buy Co.*, No. Civ.A. 104CV25TWT, 2006 WL 562195, at *11 (N.D. Ga. Mar. 7, 2006), adopted at *1.

b. Legitimate, Non-Discriminatory Reasons & Pretext

The TCSD defendants maintain that they are still entitled to summary judgment on Flowers' race discrimination claims because they have articulated a legitimate, non-discriminatory reason for his termination, which Flowers has failed to prove by a preponderance of the evidence is a pretext for prohibited, discriminatory conduct. [Doc. 108-10 at 19-21].

[33] Because the evidence shows that Flowers was replaced by someone outside of his protected class, the Court need not address the parties' arguments regarding a similarly-situated comparator. Furthermore, the prima facie case need not be discussed in detail where the defendants have proffered a legitimate, nondiscriminatory reason for their actions and the issues are intertwined with the question of pretext. *See Morrison v. City of Bainbridge, Ga.*, 432 F. App'x 877, 881 n.2 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted) ("[W]hen an employer has offered a legitimate, nondiscriminatory reason for an [alleged adverse employment action], whether a plaintiff made out a prima facie case is almost always irrelevant in considering a motion for summary judgment."); *see also Smith v. Fed. Express Corp.*, 191 F. App'x 852, 856 (11th Cir. 2006) (per curiam) (unpublished); *Musgrove v. Gov't of the Dist. of Columbia*, 775 F. Supp. 2d 158,169 (D.D.C. 2011) (citation omitted) ("[W]hen considering a motion for summary judgment in an employment discrimination case, a district court need not consider whether a plaintiff has actually satisfied the elements of a prima facie case if the defendant has offered a legitimate, non-discriminatory reason for its actions.").

Specifically, the TCSD defendants explained that they had received allegations concerning the Washington brothers' residency from Lanett Officials that may or may not have involved recruiting on the part of Flowers, and that Pugh therefore directed that an investigation be conducted into those allegations. [Doc. 127 at 43-44 pp. 42-43, 152-53 pp. 151-52; Doc. 108-1 at 4 ¶ 8, 5 ¶ 10; Doc. 108-2 at 2 ¶ 4, 3 ¶ 8, 4 ¶ 9; Doc. 108-1 at 16-24; Doc. 108-9 at 3 ¶ 8; Doc. 113 at 34 p. 33, 145-46 pp. 144-45]. Blackburn, the investigator hired by the TCSD, reported that his investigation revealed that S. Washington had gone to great lengths to establish a Georgia residence, but Blackburn believed that her primary residence was in Alabama, and that Hunt stated that Flowers aided the Washington brothers in securing housing within the THS attendance zone. [Doc. 133-1 at 17-18; Doc. 129 at 64 p. 63; Doc. 108-1 at 7 ¶ 15; Doc. 108-2 at 5 ¶ 11; Doc. 108-2 at 7-8; Doc. 132-10 at 1-2; Doc. 133-2 at 26-27]. Pugh subsequently met with Hunt and obtained a statement from him, and based on that information, he decided to terminate Flowers for violating the CIAP and GHSA policies. [Doc. 180-1 at 9 ¶ 21; Doc. 108-3 at 2 ¶ 4; Doc. 113 at 56 p. 55, 68-69 pp. 67-68, 75 p. 74, 80-81 pp. 79-80, 88 p. 87]. Because this explanation constitutes a legitimate, non-discriminatory reason for the alleged employment decision at issue, *see Bogle v. Orange Cnty. Bd. of Cnty. Comm'rs*, 162 F.3d 653, 657 (11th Cir. 1998), the onus is on Flowers to prove by a preponderance of the evidence that the reason provided by the TCSD defendants is a pretext for prohibited, discriminatory conduct, *see Edmond v. Univ. of*

Miami, 441 F. App'x 721, 724-25 (11th Cir. 2011) (per curiam) (unpublished); *Tiggs-Vaughn v. Tuscaloosa Hous. Auth.*, 385 F. App'x 919, 923 (11th Cir. 2010) (per curiam) (unpublished).

To demonstrate pretext, Flowers' evidence must reveal "'such weaknesses, implausibilities, inconsistencies, incoherencies or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could find them unworthy of credence.'" *Maples v. UHS of Ga., Inc.*, 716 F. Supp. 2d 1266, 1274 (N.D. Ga. 2010) (*quoting Combs v. Plantation Patterns*, 106 F.3d 1519, 1538 (11th Cir. 1997)). Flowers may prove pretext by "either proving that intentional discrimination motivated the employer or producing sufficient evidence to allow a rational trier of fact to disbelieve the legitimate reason proffered by the employer, which permits, but does not compel, the trier of fact to find illegal discrimination." *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1088 (11th Cir. 2004) (citations omitted); *see also Shuford v. City of Montgomery*, Civil Action No. 2:10cv203-WHA-WC (WO), 2011 WL 1375297, at *5 (M.D. Ala. Apr. 12, 2011). Thus, Flowers may create an issue of fact at the pretext stage by (1) presenting evidence that the TCSD defendants' proffered reason is not worthy of belief, thereby enabling the jury to infer that discrimination was its real reason, or (2) presenting evidence that discrimination was, in fact, the TCSD defendants' real reason. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-47 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

"Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action." *Tolley v. United Parcel Serv.*, No. Civ.A.1:05CV606TWT, 2006 WL 486523, at *5 (N.D. Ga. Feb. 27, 2006) (citation and internal marks omitted). "Thus, the inquiry is limited to whether the employer offered an honest, nondiscriminatory explanation for [the adverse action], regardless of whether the decision might have been mistaken." *Id.* (citations omitted). "Ultimately, an employee must meet the employer's stated reason 'head on and rebut it, and [he] cannot succeed by simply quarreling with the wisdom of that reason." *Young*, 432 F. App'x at 917 (alteration in original) (citation omitted).

First, in an effort to show pretext, Flowers disputes whether he in fact violated any policies by denying that he had any contact with Hunt and proffering testimony from Davidson who asserts that he in fact contacted Hunt using Flowers' cell phone and paid rent on behalf of S. Washington and her sons. *See* [Doc. 119 at 7, 10].[34] Indeed, Flowers asserts that he never admitted to calling Hunt during the February 16, 2012, termination meeting with Pugh,

[34] Flowers also proffers an affidavit from Brooks, the Resident Manager at Happy Hollow Apartments, to support his contention that he did not pay rent on behalf of S. Washington and her sons, but that Davidson helped her with the rent and deposit for the apartment at issue. [Doc. 123-1 at 5 ¶ 16; Doc. 123-10 at 2 ¶ 7].

though Pugh and Freeman contend otherwise. *See* [*id.* at 10]; *see also* [Doc. 108-1 at 9 ¶ 21; Doc. 108-3 at 2 ¶ 4]. While there is a dispute of fact as to whether Flowers admitted to placing the phone call to Hunt on behalf of S. Washington and her sons in order to secure an apartment within THS's attendance zone, Flowers' arguments do not refute that Pugh made the decision to terminate Flowers before their meeting on February 16, 2012, based on Hunt's statement that Flowers had contacted him in an attempt to secure the apartment and Pugh's belief that Flowers had engaged in recruiting that violated the CIAP and GHSA policies.[35] While Flowers strongly denies Hunt's statement, it is uncontested that Pugh relied on Hunt's statement as the basis for terminating Flowers, [Doc. 113 at 68-70 pp. 67-69, 74-75 pp. 73-74; Doc. 108-1 ¶¶ 21-22]; *see also* [Doc. 113 at 80 p. 79], and he arrived at that decision well before the February 16, 2011, meeting with Flowers, [Doc. 108-1 ¶¶ 16, 21; Doc. 128 at 28 p. 27, 50 p. 49; Doc. 108-3 ¶ 4; Doc. 113 at 110-11 pp. 109-10]. Thus, the factual dispute about whether Flowers admitted making the phone call to Hunt at the meeting was not material to the termination decision, which had already been made.

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[35] Moreover, it is undisputed that Hunt made the statements that Pugh relied on to terminate Flowers. *See* [Doc. 105 at 108-09 pp. 108-09; Doc. 108-2 at 7-8; Doc. 113 at 66-69 pp. 65-68].

It is understandable that Flowers disputes the fairness of the decision since he denies the underlying conduct and was never questioned about the allegations prior to his termination, but given the undisputed evidence of record that Pugh relied on Hunt's statement about Flowers conduct in deciding to terminate Flowers, the Court cannot second-guess the fairness or wisdom of the employment decision. "To discredit the employer's proffered reason . . . [Flowers] cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Kim-Foraker v. Allstate Ins. Co.*, Civil Action No. 09-3786, 2011 WL 2786431, at *10 (E.D. Pa. July 15, 2011) (first alteration in original) (citation and internal marks omitted); *see also Baker v. Russell Corp.*, No. 3:07-CV-1127-WKW[WO], 2009 WL 1357242, at *6 (M.D. Ala. May 6, 2009) (citation omitted). Indeed, the Eleventh Circuit has held:

> If an employer discharges an individual under an honest belief pursuant to the information available to the employer that the employee has violated a policy of the employer, the fact that the employer's belief may be mistaken or wrong in fact does not mean that such belief cannot constitute a legitimate reason for the employer's discharge of the plaintiff.

Smith v. Papp Clinic, P.A., 808 F.2d 1449, 1452 (11th Cir.1987). "Here, nothing in the record usurps [the TCSD defendants'] contention that they honestly believed [Flowers] violated their policies." *King v. Augusta, Ga.*, No. CV 106-148, 2008 WL 268913, at *8 (N.D. Ga. Jan. 29, 2008) (citation omitted). "The Court will not second-guess [Pugh's] assessments and ultimate decision; [the Court is] not interested in whether the conclusion is a correct one, but whether it is an honest one." *King v. Butts Cnty., Ga.*, 939 F. Supp. 2d 1310, 1329 (M.D. Ga. 2013) (footnote and internal marks omitted). "In the end, the issue in this lawsuit is not whether [Flowers] actually committed a . . . violation, or whether any violation should have been excused because of a misunderstanding [ ] or failure to communicate . . . [; t]he issue is whether [Flowers] was terminated because [Pugh] believed that he had committed a violation. Even a mistaken, unfairly arrived at belief that an employee committed a rules violation does not suggest discrimination." *Goode v. Wings of Alpharetta, Inc.*, Civil Action No. 1:11-CV-1337-WSD-JSA, 2013 WL 997669, at *15 (N.D. Ga. Jan. 18, 2013), adopted by 2013 WL 997558, at *5 (N.D. Ga. Mar. 13, 2013) (citation omitted). "Title VII is not about fairness in the workplace, nor does it authorize a mini-trial to determine exactly what happened," and "[n]one of this refutes what [Pugh] states . . . , that [Flowers] was fired because [he violated the CIAP and GHSA policies], or at least a belief that he had[.]" *Id.* at *16. "Given [Flowers'] failure to set forth evidence of discriminatory intent, [his] arguments disputing whether or not

[the CIAP or GHSA] policies were actually violated ring hollow." *King*, 2008 WL 268913, at *8.

Flowers also claims that Pugh has given inconsistent reasons for his termination, which he contends shows pretext. *See* [Doc. 119 at 8-10]. Specifically, Flowers argues that in his affidavit, Pugh stated that he terminated him because Flowers had violated the CIAP and GHSA policies by assisting in obtaining housing for the Washington brothers within the THS attendance zone, but that in his deposition, Pugh testified that he was not sure whether Flowers had violated the CIAP but that he contacted Swearngin via telephone to confirm that if someone made a call to an apartment owner to secure an apartment for an athlete, it would be considered recruiting.[36] *See* [*id.* (*citing* [Doc. 108-1 at 9 ¶ 21; Doc. 113 at 54 p. 53])]. Contrary to Flowers' arguments,

[36] Flowers also asserts that there is a genuine dispute as to whether Pugh called Swearngin based on Swearngin's affidavit in which he averred that he never makes "decisions with regard to the application of the Constitution and By-Laws of the GHSA by telephone," [Doc. 123-6 at 1], but his statement does not specifically contradict Pugh's testimony that Swearngin confirmed that certain actions would be considered recruiting, nor did Swearngin aver that he did not make such a statement. In any event, the evidence is undisputed that Pugh informed Flowers at the February 16, 2011, meeting that he was terminated for recruiting based on Hunt's statement, [Doc. 105 at 108-09], and any communication Pugh had with Swearngin was subsequent to the termination decision, and therefore, was not the basis for the termination, but at best, merely to "verify" Pugh's belief that Flowers had engaged in recruiting, [Doc. 113 at 55-57].

these allegedly "conflicting" reasons do not establish pretext for discrimination because each of these reasons pertained to and stemmed from the independent investigation by Blackburn which led to Hunt's statement that Flowers had contacted him in an effort to secure the apartment at issue on behalf of S. Washington and her sons, which Pugh believed was a recruiting violation. Based on this belief, mistaken or not, Pugh scheduled a meeting with Flowers on February 16, 2011, to inform him that he was terminated. Indeed, Flowers testified that Pugh told him that "he had a statement and that [Flowers] was a recruiter and [he] was fired." [Doc. 105 at 108-09]. Thus, Flowers has not established pretext on this basis of alleged conflicting reasons. *See Moore v. Jefferson Cnty. Dept of Human Res.*, 277 F. App'x 857, 860 (11th Cir. 2008) (per curiam) (unpublished) (finding that although reasons cited for promoting female candidates in EEOC position statement differed slightly from deposition testimony, that alone did not establish pretext, as none of the reasons were inconsistent with one another); *Phillips v. Aaron Rents, Inc.*, 262 F. App'x 202, 210 (11th Cir. 2008) (per curiam) (unpublished) (finding no evidence of pretext where reasons were not fundamentally inconsistent, among other reasons).

Flowers also points to sworn statements from two former students to show that they were recruited by Caucasian coaches, Branch and Wiggins, who were

not investigated or disciplined in any way. *See* [Doc. 119 at 7].[37] Despite Flowers' assertions in this regard, the evidence shows that Wiggins was in fact investigated but that the investigation resulted in a determination that the allegations were unsubstantiated. *See* [Doc. 132-14 at 8-9]. Moreover, Flowers has not shown that either Branch or Wiggins were in fact similarly-situated based on the conduct alleged, and his "attempt to establish pretext based on a comparison of [him] and [these other coaches'] disciplinary treatment is insufficient to raise a genuine issue of fact."[38] *Floyd v. Fed. Express Corp.*, 423 F. App'x 924,

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[37] Flowers also points to Lehr's statement that in July of 2010, he provided Anderson and Smith, the Superintendent at the time, a memorandum that refuted any recruiting allegations against Flowers and included a list of students in the district that he believed were playing sports outside of their attendance zones, but that he "was not informed that any of the coaches of these students was investigated as a result of [his] [] memorandum to [] Anderson. . . ." [Doc. 123-5 at 4 ¶¶ 12-13; Doc. 119 at 7]. Lehr also provided Pugh this same memorandum once he became the Superintendent. *See* [Doc. 123-5 at 5 ¶ 17]. However, the fact that Lehr was not informed of any investigation does not mean that the allegations were not in fact investigated, and Pugh testified that any list of students that came to his attention was provided to Ransom for investigation. [Doc. 113 at 39-40 pp. 38-39].

[38] "When a Title VII plaintiff attempts to show discriminatory intent by pointing to non-protected class members treated differently, the proffered comparator must be nearly identical to the plaintiff." *Woods v. Cent. Fellowship Christian Acad.*, No. 13-11642, 2013 WL 6169569, at *5 (11th Cir. Nov. 26, 2013) (per curiam) (unpublished) (citation and internal marks omitted). The evidence proffered by Flowers alleges that Wiggins was aware that the student at issue was attending a school in the

(Continued on following page)

931 (11th Cir. 2011) (per curiam) (unpublished). That is, "[i]n order to raise a question of fact as to pretext, [Flowers] must show that [these comparators were] similarly situated in all respects and that there were no mitigating circumstances that would differentiate them," which he has failed to do. *Brown v. Ohio State*

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wrong attendance zone and that Branch met with another student in an attempt to persuade him to play football for him, not that the coaches allegedly assisted these students in obtaining housing within a particular zone, nor is there any evidence that other school officials were notifying the TCSD about these coaches' alleged actions. *See* [Doc. 123-7 at 1 ¶ 3, 2 ¶ 4; Doc. 123-8 at 1 ¶ 4, 2 ¶ 6]; *Foster v. BioLife Plasma Servs., LP*, No. 2:12-cv-707-JHH, 2013 WL 3864338, at *12 (N.D. Ala. July 24, 2013) (citations and internal marks omitted) ("Binding precedent from the Eleventh Circuit . . . requires [p]laintiff s comparators to be similarly situated in all relevant respects to those comparators []he identifies. . . . Both the quantity and the quality of the comparator's misconduct must be nearly identical to prevent courts from second-guessing employer's reasonable decisions and confusing apples and oranges."). Additionally, to the extent Flowers points to Janet Greer ("Greer") as a comparator, *see* [Doc. 105-2 at 26; Doc. 119 at 6], she was the former Assistant Principal of LaGrange High School, who is alleged to have engaged in misconduct with regard to Jamius Gunsby, *see* [Doc. 105-2 at 26], but this alleged misconduct is of a different "quantity and quality" than Flowers' alleged misconduct. Moreover, these allegations were not made until after Flowers was terminated in February, 2012, and while the allegations against Wiggins were investigated, there is no evidence that Pugh, the decisionmaker in this case, was ever made aware of the allegations against Branch or Greer. *See* [Doc. 105-2 at 26; Doc. 113 at 131 p. 130; Doc. 123-7 at 2 ¶ 6; Doc. 123-8 at 2 ¶ 8]; *Foster*, 2013 WL 3864338, at *12 (citation omitted) ("[T]he actions of the employer toward the proffered comparators are only relevant if the decisionmaker knew of rule violations by the comparators and took no action against them.").

Univ., 616 F. Supp. 2d 740, 756 (S.D. Ohio 2009) (citation omitted).[39] Indeed, "the standard is more onerous at the pretext stage, at which [p]laintiff must present significantly probative evidence on the issue to avoid summary judgment," and here, "[p]laintiff's comparator evidence . . . does not create a triable issue of fact as to pretext." *Bernstein v. Ga. Dept of Educ.*, No. 1:11-cv-3989-WSD, 2013 WL 4761133, at *19 (N.D. Ga. Sept. 4, 2013), adopted at *3 (citation and internal marks omitted); *see also Curtis v. Teletech Customer Care Mgmt. (Telecomms.), Inc.*, 208 F. Supp. 2d 1231, 1247 (N.D. Ala. 2002) (second alteration in original) (internal marks omitted) (rejecting pretext argument where plaintiff "merely argue[d] vaguely that she and Webb engag[ed] in the same alleged misconduct, poor performance, and that she was terminated while he was only warned.").

Furthermore, while Flowers takes issue with the fact that Blackburn was specifically hired to investigate his actions with regard to the Washington brothers and not any other Caucasian coaches' actions, *see* [Doc. 119 at 10], it is undisputed that the letters the TCSD received from Lanett Officials specifically identified students believed to have been residing in Lanett, Alabama, but attending THS and that

[39] In fact, although Flowers contends that a private investigator had never been hired to investigate any other coach, the evidence shows otherwise. *See* [Doc. 132-14 at 7 (noting that a private investigator was hired to investigate the allegations against Travis Hart)].

statements from parents, students, and members of the community indicated that these students were being recruited to attend THS to participate in athletics. *See* [Doc. 108-1 at 21].[40] The persistent complaints from the Lanett Officials that ultimately were elevated to the Superintendent level precipitated the formal investigation, and Flowers has not pointed to any evidence that the TCSD received a similar barrage of allegations from another school district that potentially

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[40] Flowers also challenges the investigation itself, arguing that because he was never informed of the allegations against him or given an opportunity to refute them and because S. Washington was never interviewed regarding her residency, but instead, the TCSD "chose to rely on false information provided by school officials in Lanett, Alabama, that was in conflict with open and available records" as well as a "false statement by [] Hunt that easily could have been refuted through simple inquiries," that the reasons offered for his termination were pretext for discrimination. [Doc. 119 at 11-12]. Flowers further maintains that the fact that Pugh waited five months until the end of the football season to terminate him rather than terminating him immediately shows pretext. [*Id.* at 13-14]. However, "[t]he court is not in the business of second-guessing the reasonable decisions of employers." *Foster*, 2013 WL 3864338, at *13 (citation omitted). Indeed, while Flowers "criticizes the sufficiency and depth of the investigation[ ]" and "would have this Court second-guess [defendants'] investigation," this Court "is not tasked with grading [defendants'] practices or performing a *de novo* [racial discrimination] investigation," and "[n]othing in [Flowers'] argument or evidence creates genuine issues of fact as to whether [defendants] honestly believed [Flowers] to have violated the . . . polic[ies] at the time of [his] dismissal." *Rowell v. Winn Dixie*, Civil Action No. 07-0433-WS-M, 2008 WL 4369003, at *14 n. 32 (S.D. Ala. Sept. 23, 2008) (citation omitted).

implicated a Caucasian coach, yet did not undertake an investigation. There is simply no evidence that the investigation was instigated for race-based reasons, and Flowers "cannot establish pretext by simply demonstrating facts that suggest [discriminatory] animus, but must specifically respond to each of the employer's explanations and rebut them."[41] *Burgos-Stefanelli v. Secy, U.S. Dep't of Homeland Sec.*, 410 F. App'x 243, 247 (11th Cir. 2011) (per curiam) (unpublished) (citation omitted); *see Johnson v. Douglas Cnty. Sch. Dist.*, 467 F. App'x 830, 830 (11th Cir. 2012) (per curiam) (unpublished) (finding no error in district court's granting of summary judgment where plaintiff, among other things, had not shown that the alleged discriminatory employment action "would not have occurred but for Defendants' discriminatory animus").

"If the plaintiff fails to demonstrate that there is a genuine issue of material fact concerning whether the employer's articulated reasons for the adverse employment action are pretextual, then the employer

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[41] While Flowers asserts that there was resistance to his hiring by Caucasian coaches and administrators and that he was subjected to additional scrutiny prior to being offered an employment contract, *see* [Doc. 123-5 at 2 ¶ 7], the fact remains that he was hired and was actually approved for a second term of employment at THS, *see* [Doc. 123-1 at 1 ¶ 4; Doc. 108-1 at 27]. Therefore, Flowers' allegations in this regard in no way support his argument that a reasonable jury could infer that Pugh's professed reasons for his termination are unworthy of credence.

is entitled to summary judgment on the [discrimination] claim." *Johnson v. Advertiser Co.*, 778 F. Supp. 2d 1270, 1277 (M.D. Ala. 2011) (*citing Combs*, 106 F.3d at 1528). Because Flowers has failed to present sufficient rebuttal evidence to the TCSD defendants' legitimate, non-discriminatory reason, he has failed to create any genuine issue with regard to pretext. *See Morrison*, 432 F. App'x at 881; *Burgos-Stefanelli*, 410 F. App'x at 247; *Odum v. Gov't Emps. Ins. Co.*, 405 F. App'x 396, 396 (11th Cir. 2010) (per curiam) (unpublished); *Jenkins v. J.C. Penny, Inc.*, Civil Action No. CV107-034, 2009 WL 2524499, at *3 (S.D. Ga. Aug. 17, 2009). Accordingly, it is **RECOMMENDED** that the TCSD defendants' motion for summary judgment, [Doc. 108], be **GRANTED** on Flowers race discrimination claims.[42]

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[42] Because Flowers' claims fail on the merits, he has not demonstrated that his rights under the Equal Protection Clause and §§ 1981 and 1983 to be free from discrimination have been violated. Therefore, the Court need not address the TCSD defendants' remaining arguments that TCSD is not liable under § 1983 or that the individual TCSD defendants are entitled to qualified immunity. *See Drakeford v. Ala. Co-op. Extension Sys.*, 416 F. Supp. 2d 1286, 1315 (M.D. Ala. 2006) (declining to address defendants' remaining arguments regarding Eleventh Amendment immunity and qualified immunity where summary judgment was due to be granted on the merits as to all claims); *see also Hope For Families & Cmty. Serv., Inc. v. Warren*, 721 F. Supp. 2d 1079, 1162 n. 88 (M.D. Ala. June 30, 2010); *Grizzle v. Macon Cnty., Ga.*, Civil Action No. 5:08-CV-164 (CAR), 2009 WL 2611319, at *4 (M.D. Ga. Aug. 20, 2009).

B. State Law Claim for Intentional Interference with Contractual Relations

Flowers has brought a state law claim against Nichols for intentional interference with contractual relations. [Doc. 1 ¶¶ 114-16]. Although supplemental jurisdiction may be exercised over state law claims related to federal claims in any action in which the Court has original jurisdiction, "when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988) (footnote and citation omitted); *Scarfo v. Ginsberg*, 175 F.3d 957, 962 (11th Cir. 1999); *see also Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999) (per curiam) ("If no federal claim survives summary judgment, the court sees no reason why the other claims should not be dismissed or remanded pursuant to 28 U.S.C. § 1367(c)(3)."). Since Flowers has failed to state any claims against any defendant for which relief could be granted under federal law, the Court need not exercise supplemental jurisdiction over his state law claim against Nichols. *Ingram v. Sch. Bd. of Miami-Dade Cnty.*, 167 F. App'x 107, 108 (11th Cir. 2006) (per curiam) (unpublished); *see also Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1327 (N.D. Ga. 2009), adopted at 1289 ("In this case, the state law claims are best left for the Georgia courts."). However, should Court elect to retain jurisdiction, it is **RECOMMENDED** that summary

judgment be **GRANTED** as to Flowers' state law claim of intentional interference with contractual relations asserted against Nichols.

Nichols moves for summary judgment on Flowers' claim of intentional interference with contractual relations, asserting that this claim fails as a matter of law. [Doc. 110-1 at 15-20; Doc. 141]. In order to state a claim for intentional interference with an employment contract, a plaintiff must allege "'the existence of an employment relationship, interference by one who is a stranger to the relationship, and resulting damage to the employment relationship. In addition, it must be shown that the alleged intermeddler acted maliciously and without privilege.'" *Brewer v. Schacht*, 509 S.E.2d 378, 383 (Ga. Ct. App. 1998) (*quoting Lee v. Gore*, 472 S.E.2d 164, 167 (Ga. Ct. App. 1996)); *Wood v. Archbold Med. Ctr.*, No. 6:05 CV 53(HL), 2006 WL 1805729, at *7 (M.D. Ga. June 29, 2006) (citation and internal marks omitted) ("Under Georgia law, to adequately state a claim for tortious interference with employment, trade or profession, a plaintiff must plead facts which, if proven, would support the following elements: (1) an independent wrongful act or interference by a stranger to a contract; (2) malicious intent to cause injury; and (3) resulting damages.").

Nichols argues that this state law claim fails because he did not act maliciously, the TCSD did not consider anything said by Nichols when it terminated

Flowers, and because he was not a stranger to the contractual relationship at issue.[43] [Doc. 110-1; Doc. 141]. "'In order to be liable for tortious interference, one must be a stranger to both the contract at issue and the business relationship giving rise to and underpinning the contract.'" *Harrick v. Nat'l Collegiate Athletic Ass'n*, 454 F. Supp. 2d 1255, 1260 (N.D. Ga. 2006) (*quoting Atlanta Market Ctr. Mgmt., Co. v. McLane*, 503 S.E.2d 278, 283 (Ga. 1998)). "In other words, all part[ies] to an interwoven contractual arrangement are not liable for tortious interference with any of the contracts or business relationships." *McLane*, 503 S.E.2d at 283-84 (citation omitted). "In tortious interference cases, the term 'stranger' has been interpreted broadly by Georgia courts," and "[o]ne is not a stranger to the contract just because

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[43] With regard to Nichols' argument that Flowers has failed to show that he is liable for tortious interference because Flowers cannot establish that he was a stranger to the employment contract at issue, *see* [Doc. 141 at 6-7], the Court notes that Nichols raised this argument for the first time in his reply brief. "Courts generally do not consider issues raised for the first time in a reply brief." *Obester v. Lucas Assocs., Inc.*, Civil Action File No. 1:08-CV-03491-MHS-AJB, 2010 WL 8292401, at *42 (N.D. Ga. Aug. 2, 2010), adopted by 2010 WL 8304884, at *4 (N.D. Ga. Sept. 7, 2010) (citations omitted). However, "the Eleventh Circuit has held that district courts have wide discretion in deciding whether to consider arguments raised for the first time in a party's objections to a magistrate judge's report and recommendation," and therefore, "in case the District Court decides to consider the argument[] raised for the first time in [Nichols'] reply brief, the Court will [] address the merits of [that] argument[]." *Id.* at *67 (citation omitted).

one is not a party to the contract." *Lee v. Caterpillar, Inc.*, 496 F. App'x 914, 915-16 (11th Cir. 2012) (per curiam) (unpublished) (citations and internal marks omitted). "Proof that a defendant was not a stranger to the business relations at issue is fatal to [a plaintiff's] claim of tortious interference with business relations." *Harrick*, 454 F. Supp. 2d at 1260 (alteration in original) (citation and internal marks omitted).

Even when viewing the evidence in the light most favorable to Flowers, it is clear that Nichols was not a stranger to the employment contract at issue since, as Chair of the BOE, he voted for the initial approval of the hiring of Flowers. *See Sam v. Reich*, No. 1:03-CV-3178-JOF, 2006 WL 319259, at *5 (N.D. Ga. Feb. 9, 2006); *see also Johnson v. Metro. Atlanta Rapid Transit Auth.*, 429 S.E.2d 285, 288 (Ga. Ct. App. 1993). In fact, the Lanett Officials, as well as other members of the community, contacted Nichols regarding the issue surrounding students attending Troup County schools when living outside of the attendance zones and the possible recruitment of students by Flowers due to Nichols' position on the BOE. *See* [Doc. 108-1 at 17, 21-24]. Although Nichols was no longer a member of the BOE as of December 31, 2010, this does not render him a stranger to the contractual relationship at issue. Nichols was indisputably part of the "interwoven contractual arrangement[s]" at issue and he is thus "not liable for tortious interference with any of the contracts or business relationships." *McLane*, 503 S.E.2d at 283-84 (citation

omitted); *see also Suber v. Bulloch Cnty. Bd. of Educ.*, 722 F. Supp. 736, 743 (S.D. Ga. 1989).

Assuming for purposes of Nichols' motion that Flowers satisfied the element that Nichols was a stranger to the contractual relationship at issue, his state law claim for tortious interference still fails because he has not shown that Nichols "caused a party to discontinue . . . a business relationship with [Flowers]," *B & F Sys., Inc. v. LeBlanc*, Civil Action No. 7:07-CV-192 (HL), 2011 WL 4103576, at *16 (M.D. Ga. Sept. 14, 2011) (citation omitted), or that Nichols' actions proximately caused damage to Flowers, *see Lady Deborah's, Inc. v. VT Griffin Servs., Inc.*, Civil Action No. CV207-079, 2007 WL 4468672, at *3 (S.D. Ga. Oct. 26, 2007) (citation omitted) (noting that a plaintiff must show that defendant's tortious conduct proximately caused damage to plaintiff in order to state a claim under Georgia law for tortious interference with contractual relations). "To establish that [Nichols] engaged in improper action or wrongful conduct, [Flowers] must show more than that [Nichols] simply persuaded a person to break a contract." *Savage & Turner, P.C. v. Fid. & Deposit Co. of Maryland*, 854 F. Supp. 2d 1359, 1361 (S.D. Ga. 2011) (citation and internal marks omitted). Rather, Flowers "must offer evidence of conduct wrongful in itself, or action that generally involves predatory tactics such as physical violence, fraud or misrepresentation, defamation, use of confidential information, abusive civil suits, and unwarranted criminal prosecutions." *Id.* (citation and internal marks omitted); *see also*

Matthew Focht Enters., Inc. v. Lepore, No. 1:12-cv-04479-WSD, 2013 WL 4806938, at *7 (N.D. Ga. Sept. 9, 2013) (citations omitted).

The evidence shows that Pugh made the decision to investigate and subsequently terminate Flowers, and he specifically testified that his termination of Flowers was not based on anything that Nichols said or gave to him and that he did not take anything Nichols said or did into consideration in making that decision. [Doc. 113 at 149 p. 148]. Furthermore, at the time of Flowers' termination, Nichols was no longer serving on the BOE, *see* [Doc. 112 at 19 p. 18], and he therefore did not participate in the BOE vote to approve Flowers termination, [Doc. 108-4 at 6 ¶ 14].[44] Because Flowers has failed to show that any actions on the part of Nichols induced Pugh or the BOE to terminate Nichols, or proximately caused Flowers

[44] Although Flowers points to an incident where Nichols approached Simpson, another member of the BOE, and allegedly made disparaging comments about Flowers, *see* [Doc. 120 at 3-4]; *see also* [Doc. 123-4 at 1], it is undisputed that Simpson was no longer a member of the BOE at the time Flowers was terminated, [Doc. 123-4 at 1-2], and he therefore did not participate in the vote to approve Flowers' termination. Flowers also points to a meeting Nichols had with Lehr in March, 2011, *see* [Doc. 120 at 5], but there is no evidence that Lehr participated in any way in the decision to terminate Flowers. In fact, the evidence proffered by Flowers shows that Lehr actually supported Flowers. *See* [Doc. 123-5]. Additionally, Flowers has failed to show that Nichols acted with malice. Indeed, Flowers even testified that he could not say that Nichols acted maliciously. *See* [Doc. 105 at 291 p. 291].

damage, it is **RECOMMENDED** that Nichols motion for summary judgment, [Doc. 110], be **GRANTED**.

IV. CONCLUSION

For all of the foregoing reasons, it is **RECOMMENDED** that the TCSD defendants and Nichols' motions for summary judgment, [Docs. 108 & 110], be **GRANTED** in their entirety.

The Clerk is **DIRECTED** to terminate this reference.

IT IS SO RECOMMENDED, this 26th day of December, 2013.

/s/ Russell G. Vineyard
RUSSELL G. VINEYARD
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11498-EE

CHARLES FLOWERS,

Plaintiff-Appellant,

versus

TROUP COUNTY, GEORGIA, SCHOOL DISTRICT,
DR. COLE PUGH,
individually and in his official capacity as
Superintendent of the Troup County School District,
JOHN RADCLIFFE,
individually and in his official capacity as Assistant
Superintendent of the Troup County School District,
TED ALFORD,
individually and in his capacity as a member of the
Board of Education of Troup County,
DEBBIE BURDETTE,
individually and in her capacity as a member of the
Board of Education of Troup County, Georgia, et al.,

Defendants-Appellees,

REV. ALLEN SIMPSON,
individually and in his capacity as a member of
the Board of Education of Troup County, Georgia,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed Dec. 11, 2015)

BEFORE: TJOFLAT and JILL PRYOR, Circuit Judges, and MOODY,* District Judge.

PER CURIAM:

The petition(s) for panel rehearing filed by Appellant Charles Flowers is DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES
CIRCUIT JUDGE

ORD-41

* The Honorable James S. Moody, Jr., United States District Judge for the Middle District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11498-EE

CHARLES FLOWERS,

Plaintiff-Appellant,

versus

TROUP COUNTY, GEORGIA, SCHOOL DISTRICT,
DR. COLE PUGH,
individually and in his official capacity as
Superintendent of the Troup County School District,
JOHN RADCLIFFE,
individually and in his official capacity as Assistant
Superintendent of the Troup County School District,
TED ALFORD,
individually and in his capacity as a member of the
Board of Education of Troup County,
DEBBIE BURDETTE,
individually and in her capacity as a member of the
Board of Education of Troup County, Georgia, et al.,

Defendants-Appellees,

REV. ALLEN SIMPSON,
individually and in his capacity as a member of
the Board of Education of Troup County, Georgia,

Defendant.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Dec. 11, 2015)

BEFORE: TJOFLAT and JILL PRYOR, Circuit Judges, and MOODY,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Gerald Bard Tjoflat
UNITED STATES
CIRCUIT JUDGE

ORD-42

* The Honorable James S. Moody, Jr., United States District Judge for the Middle District of Florida, sitting by designation.