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

ROBERT BAILEY,

Plaintiff,

v.

HENRY COUNTY; and CHERI HOBSON-MATTHEWS,

Defendants.

CIVIL ACTION NO.
1:19-cv-03504-LMM-RDC

FINAL REPORT AND RECOMMENDATION

Plaintiff Robert Bailey filed this employment discrimination action against Defendants Henry County and Cheri Hobson-Matthews [1] and, following the disposition of Defendants' second motion to dismiss, the following remains: a claim alleging violations of the due process clause of the Fourteenth Amendment asserted under 42 U.S.C. § 1983 ("Section 1983"); a claim for attorney's fees under 42 U.S.C. § 1988; and a request for punitive damages. Defendants have filed a motion for summary judgment, seeking judgment as a matter of law. For the reasons below, the undersigned **RECOMMENDS** that Defendants' motion for summary judgment, (Doc. 55), be **GRANTED**.

[1] Defendants assert that the individual defendant is incorrectly identified, and her correct name is "Cheri Hobson-Matthews." (Doc. 55 at 1 n.1).

I. BACKGROUND

This case concerns Plaintiff's termination from his position as a firefighter following his arrest for driving under the influence of alcohol.

A. Factual Background[2]

i. June 2017 Incident

On August 28, 2006, Plaintiff was hired as a recruit firefighter for the Henry County Fire Department ("HCFD"). (Defs. SMF ¶ 1).[3] On June 14, 2017, Plaintiff was involved in a single vehicle accident. (*Id.* ¶ 2). After the accident, Plaintiff flagged down an individual driving by, who drove Plaintiff to Walmart and later told officers it was because he felt threatened by Plaintiff. (*Id.* ¶¶ 3, 19; Doc. 57 at 30, 34, 35–36 ["Pl. Dep."]).

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[2] In general, the facts considered in this Report and Recommendation are limited to those deemed by the parties to be relevant to the Court's adjudication of the pending motion for summary judgment, (Doc. 63-1; Doc. 72; Doc. 76). *See Mendenhall v. Blackmun*, 456 F. App'x 849, 852 (11th Cir. 2012) (finding it within the district court's discretion to limit its review to the specific portions of the exhibits expressly cited by the parties in their pleadings). However, while the Court "need consider only the cited materials," it may also consider other materials in the record. Fed. R. Civ. P. 56(c)(3). The facts recited in this section are intended to establish the context of the case. Additional facts will also be recited in the discussion section below.

[3] The relevant facts are generally taken from the Defendants' Statement of Material Facts, (Doc. 55-2 ["Defs. SMF"]). Of the 44 paragraphs in Defs. SMF, Plaintiff disputes only 2 of them and provides only 2 additional facts that he believes present a genuine issue for trial. (Doc. 58-1 ["Pl. Resp."]). Where the parties offer conflicting accounts of the events in question, the undersigned draws all inferences and presents all evidence in the light most favorable to Plaintiff as the non-moving party. *See Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012).

Plaintiff hit his head in the accident and, according to him, the events following were blurry or fuzzy. (Defs. SMF. ¶ 4; Pl. Dep. at 29, 31, 35–36). Officers from the Henry County Police Department arrived at Walmart and asked Plaintiff about the accident. (Defs. SMF. ¶ 5). The police report indicated that Plaintiff was uncooperative during the investigation. (*Id.* ¶ 19).

Officers told Plaintiff that the jail would not accept him until after he went to the hospital, but he did not want to go to the hospital. (*Id.* ¶¶ 6–7). Officers cited Plaintiff for driving under the influence, hit and run, and improper lane change. (*Id.* ¶ 8). Firefighters from the HCFD arrived on scene to treat Plaintiff. (*Id.* ¶ 9).

A lot of Plaintiff's interactions with the firefighters on scene—his coworkers—were blurry due to his head injury, but he recalled significant details of the incident, including that: he was not the driver of the vehicle; officers told him that the jail would refuse to take him because of his injuries; and although he should have been treated due to his head trauma, he did not want to be treated by his coworkers or transported to the hospital. (Pl. Dep. at 39–44). Plaintiff denied threatening his coworkers. (*Id.* at 59).

Plaintiff was taken to the hospital for treatment. (Defs. SMF ¶ 11). Plaintiff left prior to receiving treatment, against the advice of healthcare professionals. (*Id.* ¶ 12).

ii. Investigation Following June 2017 Incident

Deputy Chief Chris Sherwood was assigned to investigate the June 2017 Incident. (*Id.* ¶ 13). On June 15, 2017, Deputy Chief Sherwood sent an email to Chief Nishiyama Willis and others recommending immediate termination or suspension without pay through July 12, 2017, based on the police report. (*Id.* ¶ 14; Doc. 55-4 at 1). Plaintiff received a copy of the email but was unsure when he first saw it. (Defs. SMF ¶ 15; Pl. Dep. at 49). In the email, Deputy Chief Sherwood cited Henry County Employee Policies, (Doc. 55-5), and indicated that Plaintiff was in violation of the following: offensive conduct or conduct unbecoming an employee of the county on or off duty; failure to cooperate in drug or alcohol testing; failure to cooperate in an investigation; and other activity, which is not compatible with good public service. (*Id.* ¶ 16).

Henry County's disciplinary policies allow a department head, with the division director's approval, to suspend an employee without pay for cause for up to 30 days. (Doc. 55-5 at 1). The policies also allow an employee who is under criminal indictment or has a warrant against him to be suspended without pay for an indefinite time pending the resolution of the criminal charges after an investigation by the department head and with the division director's approval. (*Id.*). Finally, the disciplinary policies allow an employee to be fired for the following relevant reasons: offensive conduct or conduct unbecoming an employee of the county on or

off duty; failure to cooperate in drug or alcohol testing; and failure to cooperate in an investigation. (*Id.* at 2–3).

On June 16, 2017, Captain Aaron Lunsford, Firefighter Benjamin Johnson, and Firefighter Christopher Gaddis provided statements to Deputy Chief Sherwood regarding the incident on June 14, 2017. (*Id.* ¶ 20). According to their statements, Plaintiff was uncooperative, "threaten[ing]", and "hostile" towards Johnson and Gaddis. (*Id.* ¶ 21).

On June 23, 2017, Plaintiff met with Chief Willis, who placed him on administrative leave with pay pending the outcome of the investigation, gave him a copy of his *Garrity*[4] rights, and told him to give the information to his attorney. (*Id.* ¶¶ 22–23). On June 25, 2017, Plaintiff sent Chief Willis a written statement regarding the events on the evening of June 14, 2017, which indicated that he "was a passenger in a one vehicle rollover" and sustained a head injury. (*Id.* ¶ 24). Plaintiff believed that Chief Willis requested his statement. (*Id.* ¶ 25). On July 5, 2017, Plaintiff met with Chief Willis and Deputy Chief Sherwood, at which time he received notice that his employment was terminated effective July 3, 2017. (*Id.* ¶ 27). The reasons listed for Plaintiff's termination were "Offensive conduct or

[4] *Garrity* rights provide a public employee with immunity; and when given, protect an employee so that statements made for internal investigations will not be used against the employee in a criminal prosecution. *Lefkowitz v. Turley*, 414 U.S. 70, 79–80 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

conduct unbecoming an employee of the County on or off duty" and "Failure to cooperate in drug or alcohol testing." (*Id.* ¶ 28; Pl. Dep. Exhibit 6). Plaintiff was given instructions on how to appeal his termination. (Defs. SMF ¶ 29).

iii. Post-Termination Appeal

On July 12, 2017, Plaintiff filed an appeal of his termination. (*Id.* ¶ 35). An appeal hearing was set for September 25, 2017. (*Id.* ¶ 36). Plaintiff was instructed to provide names and details of any witnesses who would appear at the hearing. (*Id.* ¶ 37). Plaintiff appeared with counsel at the appeal hearing. (*Id.* ¶ 38). Hobson-Matthews, the County Manager and hearing officer, had previously reversed decisions made by the fire chief but, in this matter, found that evidence supported Plaintiff's termination. (*Id.* ¶¶ 40–41; Pl. Dep. at 57; Doc. 55-10 at 1; Doc. 55-12 ¶¶ 2–3). Plaintiff and Hobson-Matthews had never met before the appeal hearing. (Defs. SMF ¶ 42).

On February 8, 2018, Plaintiff was acquitted of all criminal charges related to the June 2017 incident. (*Id.* ¶ 44).

B. Procedural Background

Plaintiff initiated the instant action on August 2, 2019. (Doc. 1). After Defendants filed a motion to dismiss, (Doc. 2), Plaintiff amended his complaint, (Doc. 4). Defendants filed a second motion to dismiss, (Doc. 6), which was granted in part and denied in part, and the District Judge ordered Plaintiff to file a second

amended complaint ("SAC"). (Doc. 23). In September 2020, Plaintiff filed his SAC, (Doc. 25), which is the operative complaint in this proceeding, and Defendants once again moved to dismiss, (Doc. 28). Following the District Judge's resolution of that motion to dismiss, (Doc. 28), a claim asserting that Defendants violated his right to procedural due process under the Fourteenth Amendment brought under Section 1983 is the only remaining substantive claim in Plaintiff's SAC. (*See* Docs. 25, 34, 37). Plaintiff's SAC also asserts that he is entitled to attorney's fees under 42 U.S.C. § 1988 and punitive damages against Hobson-Matthews. (Doc. 25, Docs. 25, 34, 37).

Discovery in this matter is complete, and Defendants have now moved for summary judgment, (Doc. 55). The undersigned has considered the record and reviewed the motion for summary judgment under the corresponding legal standard.

II. LEGAL STANDARD

A reviewing court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." 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 (1986). The party moving for summary judgment "bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial." *Clark v. Coats*

& Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Those materials may include "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). "Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark*, 929 F.2d at 608.

The non-moving party is then required "to go beyond the pleadings" and present competent evidence "showing that there is a genuine issue for trial." *Celotex*, 477 U.S. at 324 (quotation marks omitted). Generally, "[t]he mere existence of a scintilla of evidence" supporting the non-movant's case is insufficient to defeat a motion for summary judgment. *Anderson*, 477 U.S. at 252. When the non-moving party has the burden of proof on an element essential to his case and, after adequate discovery, does not make a showing sufficient to establish that element, summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 322–23. The Court must view the evidence and factual inferences in the light most favorable to the non-moving party. *See United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437 (11th Cir. 1991) (*en banc*).

III. DISCUSSION

In his SAC, Plaintiff alleges that he had a property interest in his continued employment as a firefighter for HCFD and Henry County's custom and practice dictated that he could be terminated only for cause after an appropriate notice and hearing, which Defendants failed to provide. (Doc. 25). Plaintiff additionally alleges that Defendants violated his right to due process by: presuming he was guilty; targeting him for termination even though he had not violated any procedures; not giving him a meaningful hearing in front of a neutral arbiter; and not giving him a meaningful opportunity to contest the charges against him before terminating him.

In their motion for summary judgment, Defendants argue that: (a) Hobson-Matthews is shielded from personal liability under qualified immunity; (b) Plaintiff has not shown Henry County has an improper custom or policy; and (c) Plaintiff is not entitled to punitive damages or attorney's fees because he cannot prevail on his only remaining substantive claim. (Doc. 55).

Reviewing the SAC and parties' arguments, the undersigned understands Plaintiff to be alleging two violations of his right to procedural due process: the first occurred when he was not afforded a constitutionally adequate pre-termination hearing and the second occurred due to inadequacies during his post-termination hearing. The undersigned addresses each purported violation in this report.

A. Qualified Immunity

Defendants argue that Defendant Hobson-Matthews is entitled to qualified immunity because her decision to terminate Plaintiff was an employment decision within her discretionary authority, and thus, Plaintiff must show a violation of a clearly established right—which he has not done. Plaintiff responds that: (1) his right to procedural due process was clearly established; (2) his right was violated when his employment was effectively terminated before he was given a meaningful opportunity to be heard; and (3) no evidence supported his termination.

Qualified immunity protects government officials from civil damages so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quotation marks omitted). A defendant claiming qualified immunity must first show that she acted "within the scope of . . . discretionary authority when the allegedly wrongful acts occurred." *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1991) (quotation marks omitted). Whether an official was acting within her discretionary authority depends on whether the official was "(a) performing a legitimate job-related function . . . (b) through means that were within [her] power to utilize" at the time the conduct occurred. *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004). An official "can prove [s]he acted within the scope of [her] discretionary authority by showing objective

circumstances which would compel the conclusion that [her] actions were undertaken pursuant to the performance of [her] duties and within the scope of [her] authority." *Rich v. Dollar*, 841 F.2d 1558, 1564 (11th Cir. 1988) (quotation marks omitted).

If a showing that an official was acting within her discretionary authority is made, then the plaintiff must be able to establish that the official's conduct (1) violated a statutory or constitutional right that (2) was clearly established by law. *See Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). The Court must review the facts in connection with the alleged violation in the light most favorable to Plaintiff. *McClish v. Nugent*, 483 F.3d 1231, 1237 (11th Cir. 2007). For a right to be "clearly established," a plaintiff must identify either "(1) case law with indistinguishable facts, (2) a broad statement of principle within the Constitution, statute, or case law, or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Crocker v. Beatty*, 995 F.3d 1232, 1240 (11th Cir. 2021) (quotation marks and citation omitted). Courts may approach the elements of plaintiff's burden in any order. *Pearson*, 555 U.S. at 242.

As a threshold matter, Plaintiff does not contest that Hobson-Matthews was acting within her discretionary authority when she terminated him. Because it is uncontested that Hobson-Matthews was performing a legitimate job-related function through means that were within her power when she terminated Plaintiff, the burden

shifts to Plaintiff to establish that his termination violated a statutory or constitutional right that was clearly established by law. *See Holloman*, 370 F.3d at 1265; *Vinyard*, 311 F.3d at 1346.

i. Whether Plaintiff's Right to Due Process was Violated

Plaintiff alleges that Defendants violated his right to due process by terminating his employment without cause, appropriate notice, or appropriate hearing procedures. Plaintiff further alleges that any evidence presented at the post-termination hearing—specifically the police report—was hearsay evidence that was insufficient to support a termination for cause.

In their motion for summary judgment, Defendants argue that Plaintiff cannot show that his right to due process was violated because he was aware of the pending investigation into his arrest, spoke with Chief Willis, and was given a copy of his *Garrity* rights. (Doc. 55). Defendants argue that, even if Plaintiff could show that he was not given adequate notice, he had a later procedural remedy in the form of a full hearing, including the right to representation by counsel and the right to call witnesses.

A Section 1983 claim alleging deprivation of due process requires proof of three elements: "(1) a deprivation of a constitutionally protected liberty or property interest; (2) state action; and (3) constitutionally inadequate process." *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) (quotation marks omitted).

State law determines whether someone has a property interest in a Section 1983 case. *Paul v. Davis*, 424 U.S. 693, 709 (1976). In this case, the relevant state law is Georgia's, and "[u]nder Georgia law a public employee has a property interest in her job whenever she may only be dismissed for cause." *Maxwell v. Mayor of Savannah*, 226 Ga. App. 705, 707, 487 S.E.2d 478, 481 (1997).

A procedural due process claim challenges the fairness of the procedures through which the government denies a constitutionally protected interest in life, liberty, or property. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). To determine whether a constitutional violation has occurred, the Court looks at what process the defendant provided and whether it was constitutionally adequate. *Id*. at 125–26.

An employee with a property interest in his employment "'is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story' before a state or state agency may terminate [him]." *McKinney v. Pate*, 20 F.3d 1550, 1561 (11th Cir. 1994) (*en banc*) (quoting *Cleveland Bd. Of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)). Though an employee is not entitled to "a mini-trial," and the hearing "need not definitely resolve the propriety of the discharge[,] [i]t should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id*. (quotation marks omitted).

Here, Defendants concede that Plaintiff had a property interest in his employment. (*See* Doc. 55 at 12–13). And because Defendants do not contest that Plaintiff's termination was a state action, the only issue of contention regarding the pre-termination hearing portion of his due process claim is whether Plaintiff was provided constitutionally adequate process before his termination. Thus, the undersigned must determine whether a genuine issue of material fact exists as to whether Plaintiff received written or oral notice of the charges against him, an explanation of his employer's evidence against him, and an opportunity to present his story. Defendants argue that Plaintiff did because he was aware of the investigation into his arrest; he spoke with Chief Willis, who gave him a copy of his *Garrity* rights; and he submitted a written statement to Chief Willis.

The parties agree that Deputy Chief Sherwood recommended by email that Plaintiff be terminated on June 15, 2017 for a number of violations of Henry County's Employee Policies and HCFD's Policies and Procedures. However, the record is unclear whether Plaintiff saw that email before he was terminated. Plaintiff testified that he was unsure whether he saw the email before his termination, (*see* Pl. Dep. at 48–49, 68–69), and Plaintiff was not included on the email chain. (*See* Doc. 55-4). Moreover, Plaintiff testified that he was unsure when he learned that Deputy Chief Sherwood was investigating the incident. (Pl. Dep. at 48–49).

The parties also agree that Plaintiff met with Chief Willis on June 23, 2017, and at that meeting, she provided Plaintiff with a copy of his *Garrity* rights and informed him that he was on administrative leave with pay pending the outcome of an investigation. (*See* Doc. 55-7). They agree that Plaintiff provided a statement of his version of the June 2017 Incident to Chief Willis on June 25, 2017 because he believed she had requested it. (Doc. 55-8; Pl. Dep. at 51, Exhibit 5). While these agreed-upon facts establish that Plaintiff had some notice that there were charges against him (the notice in the record did not specify what those charges were) and he had an opportunity to provide his side of the story, they do not address whether his employers explained their evidence to Plaintiff.

As discussed, Plaintiff is unsure whether he saw Deputy Chief Sherwood's email recommending his termination before he was terminated. As to the statements prepared by Plaintiff's coworkers regarding the June 2017 Incident, Plaintiff testified that he had not seen those until after his termination as well—and Defendants do not contend that he was provided those statements earlier. (Pl. Dep. at 59–60). While Chief Willis may have advised Plaintiff regarding what evidence Defendants were considering during an in-person meeting, nothing in the record supports that assumption. (*See* Pl Dep. at 48–51). Moreover, Defendants have the burden to show that there is no genuine dispute as to any material fact, and the undersigned must make factual inferences in the light most favorable to Plaintiff.

Accordingly, the undersigned finds that Defendants have not met their burden to show that Plaintiff was adequately provided his right to procedural due process in the form of a pre-termination hearing as a matter of law.

Next, the undersigned must decide whether the post-termination hearing cured the inadequate pre-termination process. Defendants argue that they were able to cure this procedural deprivation by providing a later remedy, citing *McKinney*. The undersigned finds that this argument is misguided.

In *McKinney*, the plaintiff asserted a procedural due process claim against his former employer, alleging that he was not afforded a fair pre-termination hearing because the board that held the hearing and made the termination decision was biased. 20 F.3d at 1560–61. The Eleventh Circuit held that an unbiased decision maker was not required at a pre-termination hearing, and thus, it was acceptable for the State to cure that problem through a later hearing. *Id.* at 1562. Ultimately, the Court concluded that because the plaintiff could have availed himself of state court procedures that would have provided him with adequate relief and satisfied his interest in due process, there was no due process violation. *Id.* at 1567.

McKinney is distinguishable because, unlike Plaintiff here, McKinney received a formal hearing before his termination, and McKinney argued the hearing was inadequate because the State failed to provide an unbiased decision maker—which is not one of the rights enumerated in *Loudermill*. *See McKinney*, 20 F.3d at

1555 (noting that the board held a three-day hearing prior to the plaintiff's termination and that the plaintiff and his counsel participated in the hearing). Thus, the portion of Plaintiff's procedural due process claim that is premised on Defendants' failure to provide him with an adequate pre-termination hearing is not barred by *McKinney*. *See Galbreath v. Hale Cnty., Ala. Comm*., 754 F. App'x 820, 828 (11th Cir. 2018) ("[W]here a due process violation is already complete because no hearing was held as required by *Loudermill*, *McKinney* has no application."); *Williams v. Town of Morris, Ala.*, No. 2:18-CV-01307-AKK, 2019 WL 2058716, at *5 (N.D. Ala. May 9, 2019) (finding that the defendant was not entitled to summary judgment on the plaintiff's due process claim when he failed to seek state court remedies prior to filing suit because there was a question of fact regarding whether the defendant afforded the plaintiff an adequate pre-termination hearing); *Enterprise Fire Fighters' Ass'n v. Watson*, 869 F.Supp. 1532, 1541 (M.D. Ala. 1994) ("[W]hen the violation of due process is the failure to provide a pretermination hearing, the violation cannot be cured subsequent to termination."). Accordingly, there is a question of fact regarding whether Plaintiff was afforded a pre-termination hearing.

Finally, while the undersigned finds that Plaintiff's due process violation as it relates to his lack of a pre-termination hearing survives at this point, to the extent Plaintiff alleges that his post-termination hearing violated his right to due process is a separate issue that will be addressed in the next section.

ii. Whether Plaintiff's Right to Due Process was Clearly Established

Next, Defendants argue that there are no factually similar cases in the U.S. Supreme Court, Eleventh Circuit, or Georgia Supreme Court that would support that Plaintiff's right to due process was violated. In support of his contention that his right to due process was clearly established, Plaintiff relies on the following cases from the U.S. Supreme Court and Eleventh Circuit: *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); and *Harrison v. Wille*, 132 F.3d 679, 683 (11th Cir. 1998), *as amended* (Apr. 1, 1998). The undersigned finds that the facts in *Matthews* are not "particularized" to the facts of this case and, thus, does not consider it in this analysis. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense[.]"); *Matthews,* 424 U.S. at 321 (holding that an evidentiary hearing was not required prior to the termination of Social Security disability payments and the administrative procedure prescribed under the Social Security Act comported with due process). However, the undersigned finds that *Loudermill* and *Harrison* provide sufficient clarity on whether Defendants should have understood that their purported conduct violated Plaintiff's right to due process. *See Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would

understand that what he is doing violates that right.").

To meet his burden to show that qualified immunity is not appropriate—in addition to showing that Defendants violated a constitutional right—Plaintiff must show that the right at issue was clearly established at the time of Defendants' alleged misconduct. *See Pearson*, 555 U.S. at 232. The "salient question" is whether the state of the law gave Defendants "fair warning" that their alleged conduct was unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Court "looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation." *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011).

As mentioned previously, in *Loudermill,* the Supreme Court held that an individual with a property interest in his employment must be given an opportunity for some kind of hearing before he is terminated. 470 U.S. at 542–46. The Court additionally held that the employee was "entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. *Loudermill* involved two plaintiffs who were both fired without the opportunity to respond to the charges against them or challenge their dismissals but were afforded post-termination hearings. *Id.* at 535–37.

In *Harrison*, the Eleventh Circuit held that a terminated sheriff's deputy failed to establish issues of material fact about his procedural due process claims. 132 F.3d at 683. In that case, plaintiff was asked to give multiple statements to investigating deputies when items were stolen on several occasions from the evidence room; plaintiff was given notice of a pre-disciplinary conference, where a defendant explained the charges against him and summarized the information gained so far in the investigation; a second pre-disciplinary conference was held before plaintiff was terminated; and plaintiff appealed his termination, which resulted in a post-termination hearing where his termination was sustained and ratified. *Id.* at 681–83. The Circuit noted that Plaintiff had several opportunities to be heard, was afforded ample notice of the charges against him, and was advised of the evidence discovered by the investigation before each stage of the disciplinary process. *Id.* at 684.

The undersigned finds that *Loudermill* and *Harrison* support Plaintiff's assertion that his due process rights required some kind of pre-termination hearing. While Defendants continue to stand by their assertion that the post-termination hearing cured the deficient pre-termination hearing, *Loudermill* directly contradicts that assertion. The plaintiffs in *Loudermill* were given full post-termination hearings, and yet the Supreme Court continued to emphasize the importance of their lack of a hearing *before* their terminations. And *Harrison* further supports the contention that an employee with a property interest in his employment must be

given the rights enumerated in *Loudermill before* his termination. 132 F.3d at 684. Accordingly, the undersigned finds that Plaintiff clearly established that his right to procedural due process required a pre-termination hearing.

As previously alluded to, the undersigned must address Plaintiff's allegations that his post-termination hearing violated his right to procedural due process. On this point, the undersigned agrees with Defendants that Plaintiff has failed to meet his burden to show his rights were clearly established. Plaintiff appears to argue that the post-termination hearing violated his right to procedural due process because he was unable to contest hearsay evidence and Hobson-Matthews was biased. The only case that Plaintiff cites in support of these contentions is *Neal v. Augusta-Richmond Cnty. Pers. Bd.*, 304 Ga. App. 115, 695 S.E.2d 318 (2010). The undersigned has previously advised Plaintiff that a right to confront hearsay evidence in a post-termination hearing is not clearly established under federal law and that his reliance on a Georgia Court of Appeals decision for that proposition is misguided. (*See* Doc. 34 at 24–26 & n.7). Plaintiff fails to provide any support for his assertion that he had a right to a non-biased arbiter at his post-termination hearing. Moreover, the record belies Plaintiff's assertion that Hobson-Matthews was biased towards him, as the parties agree that Plaintiff and Hobson-Matthews had not met until the appeal hearing, and Plaintiff testified that while he knew of her, he did not believe she knew who he was. (Defs. SMF ¶ 42; Pl. Dep. at 56–57). Accordingly, the undersigned

finds that Plaintiff has failed to meet his burden to show he had clearly established rights to contest hearsay evidence or have a neutral arbiter preside over his post-termination hearing, and thus, summary judgment is appropriate as to the portion of his due process claim that relates to his post-termination hearing.

Finally, while the parties have not addressed this issue in their briefing, the undersigned notes that Hobson-Matthews' purported conduct is not relevant to Plaintiff's procedural due process claim as it relates to his pre-termination hearing. The undisputed facts establish that Hobson-Matthews did not become involved in Plaintiff's termination until September 25, 2017. (*See* Doc. 55-12 ¶¶ 4–5; Defs. SMF ¶ 42). Accordingly, no genuine dispute of material fact exists as to her liability in denying Plaintiff a pre-termination hearing, and summary judgment is appropriate as to Hobson-Matthews. Thus, the undersigned **RECOMMENDS** Defendant Hobson-Matthews be **DISMISSED** from this case. The undersigned must now decide whether the only portion of Plaintiff's claim that remains—that his procedural due process was violated because he did not have a constitutionally adequate pre-termination hearing—survives as to Defendant Henry County.

B. Whether Plaintiff has shown that Henry County has an Improper Custom or Policy

Defendants argue that Plaintiff has not shown that Henry County has an improper custom or policy because it has policies in place to protect any alleged property interest he had in his employment. Plaintiff responds that Henry County's

disciplinary policies of placing employees on administrative leave without pay while an investigation against them is pending and terminating employees who are not adjudicated guilty of a crime are improper.

A county may be held liable under Section 1983 only when its custom or official policy causes the constitutional violation at issue. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694–695 (1978); *Grech v. Clayton Cnty.*, 335 F.3d 1326, 1329 (11th Cir. 2003) (*en banc*). For a municipality to be liable under Section 1983, the plaintiff must establish: "(1) that his constitutional rights were violated; (2) that the municipality had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004).

Here, the undersigned has found that Plaintiff's claim against Henry County that his right to procedural due process was violated when he was not afforded a pre-termination hearing has—thus far—survived summary judgment. Plaintiff asserts that Henry County's disciplinary policies were improper and caused that violation. The undersigned disagrees.

Henry County's disciplinary policies are not the cause of the purported violation of Plaintiff's right to a pre-termination hearing. His right to procedural due process afforded him the rights enumerated in *Loudermill*—notice of the charges against him, an explanation of the evidence against him, and an opportunity to

provide his side of the story—and nothing about the Henry County's disciplinary policies precludes those rights from being observed. In fact, the disciplinary policies require a department head to personally meet with an employee, provide notice of the charge and proposed disciplinary action, and afford the employee an opportunity to respond before a suspension without pay or dismissal occurs. (*See* Doc. 55-5 at 2). Plaintiff's right to procedural due process required only the rights enumerated in *Loudermill*, to require more—including that Henry County wait to fire an employee until he was adjudicated guilty of an offense—"would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *See Loudermill*, 470 U.S. at 546. Accordingly, because Plaintiff has failed to establish an essential element of his claim—that the County's policy caused the violation of his constitutional right—summary judgment is appropriate. *See Celotex Corp.*, 477 U.S. at 322–23

Thus, the undersigned **RECOMMENDS** that Defendants' motion for summary judgment be **GRANTED** and Henry County be **DISMISSED** from this action. Because the undersigned recommends the dismissal of Plaintiff's only remaining substantive claim, he is not entitled to punitive damages or attorney's fees.

IV. CONCLUSION

For the reasons stated above, the undersigned **RECOMMENDS** that Defendants' motion for summary judgment, (Doc. 55), be **GRANTED**.[5] The Clerk is **DIRECTED** to terminate the reference to the undersigned Magistrate Judge.

IT IS SO **RECOMMENDED** on this 27th day of June 2022.

R. Cannon

REGINA D. CANNON
United States Magistrate Judge

[5] Additionally, the undersigned **DIRECTS** the Clerk to mark Defendants John Does 1–3 as terminated, as they have already been dismissed with prejudice from this proceeding, (*See* Doc. 21 at 15, 22; Doc. 23); and update the case caption to include the individual Defendant's correct name, "Cheri Hobson-Matthews," (*See* Doc. 55 at 1 n.1).