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United States District Court,
N.D. Georgia, Atlanta Division.

Eve **WEXLER**, Plaintiff,
v.
KENNESAW PEDIATRICS, P.C., Defendant.

CIVIL ACTION FILE NUMBER 1:16-cv-1491-TCB
|
Signed 07/17/2017

Attorneys and Law Firms

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ORDER

Timothy C. Batten, Sr., United States District Judge

***1** This case comes before the Court on Magistrate Judge Justin S. Anand's Final Report and Recommendation (the "R&R") [42], which recommends denying Defendant Kennesaw Pediatrics, P.C.'s motion for summary judgment [23]. Kennesaw Pediatrics has filed objections [47].

I. Factual and Procedural Overview

Dr. Mark Long opened Kennesaw Pediatrics in May 2003. He hired other pediatricians to join the practice, including Dr. Briana I. Brugner, Dr. Maria Axelrod, and Dr. Jagdish K. Seth. On December 23, 2013, he hired Plaintiff Eve **Wexler** as a pediatrician. As a condition of her employment, she signed an employment agreement containing a non-solicitation clause that states in relevant part that "[p]hysician will not, directly or indirectly, alone or in any capacity, solicit or in any manner attempt to solicit or induce any person or persons employed by the Practice...." [23-4] at 7.

Leading up to the incident in question, **Wexler** received good reviews from Long in January 2014 and May 2014. After receiving the May 2014 review, **Wexler** indicated to Long and Brugner that she was happy at Kennesaw Pediatrics. Nevertheless, **Wexler** continued to look for other jobs. **Wexler** and Axelrod were in communication about the idea of opening and starting their own practice. On May 14, 2014, **Wexler** approached Seth about opening their own practice, to which **Wexler** attests doing so "at the urging of Dr. Axelrod...." [35] at ¶ 7.

Long testified that on May 15, 2014, one of his employees informed him that he needed to speak with Seth. Once he did, he discovered that **Wexler** had approached Seth about having a dinner with her and Axelrod to formalize a plan and to discuss details about forming a new practice.

Long then called **Wexler** on the phone and confronted her about the alleged solicitation. In response, **Wexler** claims that she began to reply, but was only able to say "[t]hat's not" before he interrupted her. [25] at 102. **Wexler** further alleges that she was not going to deny it, but that she was "going to tell him what happened." *Id.* at 102.

According to Long, he contacted Axelrod and asked whether she had discussed leaving the practice and starting her own. Long claimed that Axelrod admitted that she had discussions with **Wexler** about starting a practice and along with **Wexler**, had decided to approach Seth about the opportunity.

Long then fired **Wexler** on May 15, 2014, ostensibly because he believed that she had solicited Seth and then denied doing so. Long testified that **Wexler** had denied that she made any plans or made any attempts to leave the practice and take employees with her, while **Wexler** testified that she did not deny the accusation, but was not given the opportunity to answer. Long alleged that he would not have fired **Wexler** for solicitation if she had done what Axelrod did, i.e., told the truth about soliciting other employees. The letter attached to the proposed draft separation agreement stated, "[t]he reason for the termination is that it was in appropriate [sic], and a violation of your employment agreement, to solicit our physicians and nurses to go into practice with you." [23-22] at 4. There was no mention of lying as a reason for **Wexler's** termination.

***2** **Wexler** believes that she was fired because she told Long that she was going to take breaks at work for pumping breast milk for an extra two weeks. During a performance review meeting with Brugner and Long,

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Wexler informed Long that she was still taking pumping breaks and that she would be pumping for an additional two weeks. According to Wexler, Long became angry and was displeased with this news. Long attributed Wexler's alleged low productivity to her need to take pumping breaks. In addition, Wexler claims to have encountered difficulties in obtaining adequate time and a suitable location to pump enough breast milk for her son while working for Kennesaw Pediatrics.

On May 9, 2016, Wexler filed this action asserting that she was discriminated against on the basis of her pregnancy-related medical condition in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Pregnancy Discrimination Act ("PDA"). More specifically, Wexler's complaint alleges sex discrimination on the basis of a pregnancy-related medical condition under Title VII. In doing so, the complaint refers to two separate legal theories. First, Wexler alleges single-motive discrimination, arguing that Kennesaw Pediatrics, motivated by her sex/gender, discriminated against her by discharging her and then suing her. Second, in the alternative Wexler alleges a mixed-motive theory arguing that Kennesaw Pediatrics "motivated in part by Plaintiff's status as a female and motivated in part by other reasons, discriminated against Plaintiff in violation of Title VII by discharging her and then suing her." [1] at 14.

Kennesaw Pediatrics filed a motion for summary judgment on January 27, 2017. On May 2, the Magistrate Judge issued an R&R [42] recommending that the motion be denied as to both of Wexler's Title VII theories. In response, Kennesaw Pediatrics filed ninety-nine pages of objections to the R&R and Wexler filed a reply.

II. Analysis

A. Legal Standard on Review of a Magistrate Judge's R&R

A district judge has a duty to conduct a "careful and complete" review of a magistrate judge's R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (per curiam). 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); *see also Jeffrey S. v. State Bd. of Educ.*, 896 F.2d 507, 512 (11th Cir. 1990) (A judge must "give fresh consideration to those issues to which specific objection has been made by a party."). Those portions of the R&R to which no objection is made need only be reviewed for clear error. *Macort v. Prem, Inc.*, 208 Fed.Appx. 781, 784 (11th Cir. 2006).

"Parties filing objections must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." *Nettles*, 677 F.2d at 410 n.8. "This rule facilitates the opportunity for district judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act." *Id.* at 410.

The district judge also has discretion to decline to consider arguments that were not raised before the magistrate judge. *Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009). Indeed, a contrary rule "would effectively nullify the magistrate judge's consideration of the matter and would not help to relieve the workload of the district court." *Id.* (quoting *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000)).

After conducting a complete and careful review of the R&R, the district judge may accept, reject or modify the magistrate judge's findings and recommendations. 28 U.S.C. § 636(b)(1)(C); *Williams*, 681 F.2d at 732. The district judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. 28 U.S.C. § 636(b)(1)(C).

B. Kennesaw Pediatrics's Objections

***3** Kennesaw Pediatrics has submitted ninety-nine pages of multipart and many times repetitive objections. It does not structure or organize the objections and instead provides forty headings listing each individual objection and a subsequent analysis. The Court will respond to the objections by grouping them into categories; however, for those that do not fit into one particular category, the Court will respond individually.

The Court has conducted a careful de novo review of the R&R, Kennesaw Pediatrics' objections thereto, and the record evidence. Having done so, the Court finds no error in the Magistrate Judge's reasoning or determinations and concludes that Kennesaw Pediatrics' objections are without merit for the reasons discussed below.

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As an initial matter, the Court will not entertain many of Kennesaw Pediatrics' objections because they rely on record citations and quotations from depositions that were not contained in Kennesaw Pediatrics's statement of material facts [1] [Objs. 8 & 26], were not originally argued in its motion for summary judgment [Objs. 5, 17, & 18], or simply reincorporate arguments made in its summary judgment briefs [Obj. 18]. Further, Kennesaw Pediatrics objects to parts of the R&R by making the same arguments as it did in its motion for summary judgment but including new affidavits and evidence not previously included in its summary judgment briefings or its statement of material facts. [Objs. 11, 25, & 35]. Another objection simply reincorporates other objections already mentioned—even some that were not presented to the Court on Kennesaw Pedatrics's motion for summary judgment—and is simply an exhaustive recitation of various testimony that does not demonstrate that summary judgment is proper. [Objs. 15 & 31]. The Court declines to consider these objections because they are based on arguments and evidence that were not previously before the Magistrate Judge or are merely conclusory recitation of facts in this case.

1. Differences Between Wexler and Axelrod for Purposes of the Comparator Analysis

Kennesaw Pediatrics's first objection argues that while conducting the comparator or pretext analysis, the magistrate judge overlooked the fact that other reasons may have contributed to Long's decision to terminate **Wexler**. [Obj. 1].

Kennesaw Pediatrics's reasoning regarding this issue is not persuasive. The other reasons or factors that it claims justified Long's decision to terminate **Wexler** are irrelevant because the record is clear that Long's dispositive reason for the termination was **Wexler's** alleged lying about soliciting Seth. [41] at ¶¶ 145–46. The R&R was correct in finding that "Defendant cannot obtain summary judgment by arguing that it could have fired Plaintiff for reasons that it did not fire her. That is, just because an employer could have terminated an employee for a legitimate reason, if that is not the reason given, it is irrelevant and when proffered after the fact, it would be immediately rejected as pretextual." [42] at 58. Because Kennesaw Pediatrics relied on **Wexler's** solicitation and lying for the reason for termination, the other alleged reasons are irrelevant and disregarded.

***4** Similarly, Kennesaw Pediatrics's arguments [Objs. 2, 3, 4, 6, & 20] that the magistrate judge incorrectly concluded that Axelrod is a proper comparator, that the magistrate judge failed to find that "the quantity and quality of the comparator's misconduct be 'nearly identical' to the plaintiff's," and that the R&R did not consider other differences between Axelrod and **Wexler**, are meritless. *Washington v. United Parcel Serv., Inc.*, 567 Fed.Appx. 749, 751–52 (11th Cir. 2014).

For one, the R&R contemplated the quantity and quality of Axlerod's conduct. Here, there is no difference in the alleged misconduct that **Wexler** and Axelrod engaged in other than the fact that **Wexler** allegedly lied about it, which **Wexler** vehemently denies. [2] While there might be numerous factors to distinguish **Wexler** from Axelrod, none of them is material to the question of "why was Dr. **Wexler** terminated, and Dr. Axelrod was not?" other than the factor that **Wexler** had lied when confronted about the alleged solicitation.

Second, **Wexler** does not have to show that Axelrod is similar to her in all respects; merely in all relevant respects. *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1280 (11th Cir. 2008). The relevant aspect here is the alleged solicitation. Both **Wexler** and Axelrod allegedly engaged in the activity and discussed potentially opening a practice and competing with Kennesaw Pediatrics. The extraneous evidence, i.e., previous instances of **Wexler's** alleged dishonesty, her goofing off at work, or even being an "instigator" in the solicitation, that Defendants reference in order to distinguish **Wexler** and Axelrod is not relevant because Long's dispositive reason for terminating **Wexler** and not Axelrod was his belief that **Wexler** lied when confronted about the solicitation. This is evidenced by Long's own testimony and the Defendant's responses to **Wexler's** statement of material facts. [31] at 44.

Finally, the additional factors to which Defendant now cites to distinguish the two doctors must be rejected because they are being asserted for the first time in response to the R&R. In its brief in support of its motion for summary judgment, Kennesaw Pediatrics argued, "Dr. Axelrod is not a suitable comparator for Dr. **Wexler's** pregnancy discrimination claim (a) because Dr. **Wexler** solicited Dr. Seth and Dr. Axelrod did not and (b)

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because Dr. Axelrod admitted that she had discussions about opening a practice with Dr. **Wexler**." [23-1] at 11. Defendant did not provide these other alternative arguments as to why Axelrod is not a valid comparator to **Wexler**, and the Court will not entertain these novel arguments.

2. Genuine Dispute of Material Facts

Another group of objections do not warrant determination in favor of Kennesaw Pediatrics at the summary judgment stage. These objections claim that the magistrate judge was incorrect in determining that certain findings were disputes of fact that should be decided by the jury. After review of the following objections, it is clear that the magistrate judge correctly found that the contested findings are disputes of fact.

***5** • Obj. 4: Kennesaw Pediatrics states that the R&R fails to consider undisputed evidence that Long believed **Wexler** was soliciting physicians to leave the practice. While Long can have his own subjective determination, an objective evaluation demonstrates that there is a dispute of fact as to this issue—**Wexler** denies ever making a statement denying soliciting Seth—and summary judgment is not appropriate. *Chapman v. AI Transp.*, 229 F.3d 1012, 1034 (11th Cir. 2000) (finding that there must be "a clear and reasonably specific factual basis upon which [an employer] base[s] its subjective opinion"). Further, Long's own testimony that he interpreted **Wexler's** utterance of the words "that's not ..." to be a denial that she solicited Seth reveals that his contention lacks credibility. [31] at 44. Essentially, Long claims that he terminated **Wexler** because she made a statement denying soliciting Seth and **Wexler** denies making such a statement; consequently, there is evidently a dispute of fact as to this issue.

• Obj. 7: Kennesaw Pediatrics also objects to the magistrate judge's finding that there is a dispute of fact as to whether **Wexler's** answer to Long's question about solicitation was a denial. However, an objective evaluation of the testimony reveals that this is a genuine dispute of material fact that requires jury interpretation.

• Obj. 19: Kennesaw Pediatrics objects to the R&R's finding that "[i]t is undisputed that Dr. Long discovered that Dr. Axelrod was also discussing potentially opening a practice and competing with Kennesaw Pediatrics." [42] at 46. This objection, however, is entirely at odds with Kennesaw Pediatrics' responses to **Wexler's** statement of material facts. [41] at ¶¶ 120,129, & 130.

• Obj. 22: Kennesaw Pediatrics argues that the R&R incorrectly found that "the fact that Dr. Axelrod had a chance to explain herself, but Plaintiff did not, in itself suggests that Dr. Long had already made up his mind as to terminating Plaintiff." Again, the magistrate judge is referring to what the jury could infer if it was to credit **Wexler's** testimony as true. If the jury believes **Wexler's** testimony, then the jury is permitted to decide Long had made up his mind to terminate **Wexler**.

• Obj. 23: Kennesaw Pediatrics objects to a finding by the R&R that "Dr. Axelrod, by contrast, testified that his conversation with Dr. Long lasted 10 or 15 minutes—demonstrating another difference between Dr. Long's treatment of Plaintiff and Dr. Axelrod." Contrary to Kennesaw Pediatrics's assertion, the magistrate judge is not crediting the fact—i.e., that Plaintiff was denied an opportunity to explain herself that Dr. Axelrod was afforded, and therefore infer disparate treatment—as true; he is just stating that a jury may credit it as true if it believes **Wexler** and Axelrod's testimony. The magistrate judge was correct in making this statement based upon **Wexler** and Axelrod's deposition testimony.

• Obj. 34: Kennesaw Pediatrics objects to the "admission" of the statement "[b]y May 2014, both Drs. Axelrod and **Wexler** were unhappy with the work environment at Kennesaw Pediatrics." The R&R merely states what **Wexler** testified to regarding her perception of unhappiness on Axelrod's part. Again, this is an issue of fact for the jury to resolve.

• Objs. 37 & 38: Kennesaw Pediatrics objects to the R&R's finding that "Plaintiff was concerned that Dr. Long would fire her then and there." Further, it objects to the finding that "Dr. **Wexler** believed this was a warning not to assert her right to pump and that if she spoke up again she would lose her job." Kennesaw Pediatrics' objections are an argument for the jury because viewing the evidence in the light most favorable to **Wexler**, the Court cannot grant

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summary judgment as to the question of whether she actually perceived what she testified to perceiving.

3. Objections Unsupported by the Record

The following objections are unsupported by the evidence and therefore are meritless.

***6** • Obj. 21: Kennesaw Pediatrics contends that the magistrate judge erred in his finding that "Dr. Seth testified that she told Dr. Long that Plaintiff and Dr. Axelrod wanted to meet with her about starting a new practice, although it was Plaintiff who actually spoke with Dr. Seth at the time." The deposition testimony cited to by Kennesaw Pediatrics does not stand for this proposition. Instead, the deposition testimony of Seth is clear that **Wexler** was asking her to join in on a conversation with Axelrod about opening a practice. [28] at 51–52.

• Obj. 24: Kennesaw Pediatrics objects to a finding that "Dr. Long testified that Dr. Axelrod admitted to engaging in solicitation activities." This objection is contradicted by Long's testimony that he could have fired Axelrod for cause for what she did and that the only reason she was not fired was because she did not lie about the activities. [31] at 58.

• Obj. 27: Kennesaw Pediatrics objects to the R&R's finding that "Dr. Long then called Dr. Seth, and she came into his office" on the grounds that it requires minor clarification. Besides this objection being seemingly immaterial, it is also without merit given that Kennesaw Pediatrics failed to clarify this in its response to **Wexler's** statement of material facts. [41] at ¶¶ 110–11.

• Obj. 28: This objection is also without merit because the facts asserted in the R&R are not disputed by Kennesaw Pediatrics in its response to **Wexler's** statement of material facts. *Id.* at ¶¶ 119, 128, 143.

• Obj. 29: This objection is meritless because Kennesaw Pediatrics admits that it made an error by not objecting to paragraph 118 in **Wexler's** statement of material facts. [41] at ¶ 118. Kennesaw Pediatrics cannot now attempt to amend its response.

• Obj. 30: Kennesaw Pediatrics objects to the R&R's finding that "Plaintiff denies that Dr. Long asked her any questions." It cites to **Wexler's** testimony for the proposition that when she stated she "answer[ed]" Long, she used the word to mean "to answer a question" as opposed "to answer an accusation." However, the testimony does not support this contention, especially viewing it in the light most favorable to **Wexler**. Kennesaw Pediatrics's argument is a factual one that should be left to the jury.

• Obj. 32: Kennesaw Pediatrics is wrong in its objection to the R&R's finding that "[i]n each of their depositions, Dr. Axelrod, Dr. **Wexler** and Dr. Seth never mention the idea of asking any nurses to join them in their alleged solicitation activities." Not only does Kennesaw Pediatrics add facts to the finding not contained within its statement of material facts, but the citations it provides do not support its argument.

• Obj. 33: This objection is directly contradicted by Kennesaw Pediatrics's failure to dispute this finding in its response to **Wexler's** statement of material facts. [41] at ¶ 69.

• Obj. 36: Kennesaw Pediatrics objects to the R&R finding that "there was no request made to open a practice, no jobs were offered, no one was asked to leave their current position, [and] no one was offered a job...." In support, it cites to Seth's deposition and claims that **Wexler** asked if she wanted to join her medical practice. *See* [28] at 18–19 & 72–73. However, these citations do not reflect this assertion. Instead, it shows that **Wexler** merely asked Seth if she was interested in going to dinner to discuss potentially opening a new practice.

• Obj. 39: Kennesaw Pediatrics objects to the R&R's finding that "neither doctor was doing rounds at the hospital when Dr. **Wexler** was fired." This is unsupported by Kennesaw Pediatrics's response to **Wexler's** statement of material facts. [41] at ¶ 107.

4. Miscellaneous Objections

***7** Some of the objections could not be categorized, and the Court will address these individually. Similar to the foregoing objections, they are also meritless.

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- Obj. 9: Kennesaw Pediatrics states that the R&R incorrectly concluded that "Dr. Long had no basis to believe that Plaintiff had lied ... [and] there is no contemporaneous statement that refers to a lie nor does the Separation Agreement reference anything with regard to that." This objection is confusing, and the Court is not entirely sure what is being objected to. The R&R correctly found that there was not a contemporaneous statement that **Wexler** had lied on the termination call or that Long fired her because he believed that she lied. Further, even the separation agreement that was sent to **Wexler** days after her termination did not reflect this reasoning.

- Obj. 10: Kennesaw Pediatrics objects on the grounds that the R&R incorrectly failed to consider or admit "Dr. **Wexler's** April 6, 2016 Affidavit ¶ 8, where she admits that Dr. Long accused her of dishonesty on the phone when he fired her and incorrectly concludes that her affidavit spoke only to her 'April 2016 awareness.' " Again, this objection is not relevant to Kennesaw Pediatrics's motion for summary judgment. As the R&R states, "[t]here is nothing to indicate that Plaintiffs April 2016 awareness is at all material or relevant to what Dr. Long told her contemporaneously to when she was fired." [42] at 57–58. Further, viewing the entirety of the affidavit cited by Kennesaw Pediatrics in the light most favorable to **Wexler**, it does not demonstrate that Long conveyed the reason for her termination "contemporaneously to when she was fired."

- Obj. 12: Kennesaw Pediatrics contends that the R&R improperly considered the draft separation agreement because it was a proposed settlement agreement between the parties in this litigation. Therefore, it argues that it is not admissible under Fed. R. Evid. Rule 408. This argument is without merit for multiple reasons. First, the document is not Rule 408 settlement material because there was no lawsuit filed or any threat of litigation at the time the draft separation agreement was provided to **Wexler**. Moreover, no portion of the agreement offering to settle is being offered as evidence of liability. Instead, the "preamble" to the proposed agreement is being offered as evidence of what each party contends led to the separation.

- Obj. 13: Kennesaw Pediatrics argues that the R&R incorrectly concluded that **Wexler** produced evidence of statements made by Long indicating a bias against pregnancy and pregnant employees. In making this argument, it goes into a discussion—using a recently filed declaration—regarding how breast-pumping breaks could impact an employee's productivity. However, even if this is a valid concern, the PDA does not allow an employer to discriminate based on that possibility. Further, Kennesaw Pediatrics objects to the use of Long's testimony associating pumping with lower productivity on the ground that it is prejudicial and confusing under Fed. R. Evid. Rule 403. However, it does not provide any further reasoning, and the Court finds that such testimony is relevant to the jury's overall assessment of the case and is not unduly prejudicial.

***8** • Obj. 14: This objection argues that the R&R improperly admitted "me too" evidence from Dr. Levine, a pediatrician formerly with the practice who provided testimony of instances in which Long allegedly made negative statements about pregnancy and even treated her differently because of her desire to become pregnant. Specifically, Kennesaw Pediatrics contends that the R&R erroneously determined that Levine's statements were admissible when she was not even employed at the same time as **Wexler**. The statements made by Long to Levin as to his perceptions of the effects of pregnancy on productivity are admissible because they are material and certainly relevant. *See Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1285 (11th Cir. 2008) (finding that evidence from employees, other than the plaintiff, of race discrimination by the defendant was admissible to prove the intent of the defendant to discriminate and retaliate). Despite being "me too" evidence, the statements are proper for consideration because the employment decisions were made by the same decision maker, and Levine's statements are probative of **Wexler's** basis for her claim—that Long has displayed a bias and has taken adverse employment actions against employees who are pregnant or desire to get pregnant. *See Wolchok v. Law Offices of Gary Martin Hays & Assocs., P. C.*, 2008 WL 11336109 (N.D. Ga. Aug. 27, 2008) ("While the circumstances of the employment decisions were not identical, the decisions were made by the same decision maker who terminated Plaintiff ... [and]

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[t]he evidence is closely related to Plaintiff's apparent theory of the case....").

- Obj. 16: Kennesaw Pediatrics states that the R&R improperly fails to address **Wexler's** mosaic theory and should have found that theory to be unavailable because she has failed to present a compelling mosaic of circumstantial evidence. According to the Eleventh Circuit, "[a] triable issue of fact exists if the record, viewed in a light most favorable to the plaintiff, presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker.' " *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011) (quoting *Silverman v. Bd. of Educ.*, 637 F.3d 729, 733 (7th Cir. 2011)). The R&R demonstrated that there was enough circumstantial evidence for a jury to infer intentional discrimination by Long. Kennesaw Pediatrics does not provide any specific objection to this finding, and the Court finds no clear error in the magistrate judge's finding.

- Obj. 17: Kennesaw Pediatrics seems to contend that **Wexler** must choose between a "mixed motive" discrimination claim and a pure "pretext" case. However, Kennesaw Pediatrics provides no case law to support this assertion, and the Court finds no reason why **Wexler** must do so at this stage in the litigation.

- Obj. 25: Kennesaw Pediatrics also objects to the R&R's finding that "Dr. Long testified that he did not choose to terminate Plaintiff based on the fact that she had solicited Dr. Seth." [42] at 53. This is incorrect given the fact that Long testified that he would not have fired **Wexler** for soliciting had she not lied about it. [31] at 44.

- Obj. 40: For some unknown reason, Kennesaw Pediatrics restates Objection Fourteen.

III. Conclusion [3]

Accordingly, the Court adopts as its order the R&R [42] and denies Kennesaw Pediatrics's motion for summary judgment [23].

IT IS SO ORDERED this 17th day of July, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 3034338

Footnotes

1 "Local Rule 56.1B(1) requires parties to include all material facts in their separate Statement of Material Facts, not only in their brief, and further provides that '[t]he court will not consider any fact ... set out only in the brief.' " *Richardson v. Jackson*, 545 F. Supp. 2d 1318, 1326 (N.D. Ga. 2008) (quoting Local Rule 56.1B(1)).

2 The Court also finds that despite the alleged difference that Axelrod did not lie about the solicitation and **Wexler** did, Axelrod is still a suitable comparator. For one, there is testimony that Axelrod had a chance to explain herself while **Wexler** did not, suggesting that Long had made up his mind to terminate **Wexler** before even asking her about the solicitation. Further, the distinction that Axelrod lied but **Wexler** did not is in dispute. Not only does **Wexler** deny that she lied about the solicitation, but also there is no mention of this reasoning in the separation agreement.

3 **Wexler** also filed a motion to strike Kennesaw Pediatrics's objections to the R&R. [48]. This motion is denied.

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