UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 16-CV-80655-ROSENBERG/HOPKINS

JAMES TRACY,

Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES a/k/a FLORIDA ATLANTIC UNIVERSITY; et al.,

Defendants.
_____ /

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

Defendants, FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES a/k/a FLORIDA ATLANTIC UNIVERSITY; JOHN W. KELLY, President of Florida Atlantic University; HEATHER COLTMAN, Dean of the College of Arts and Letters at Florida Atlantic University; DIANE ALPERIN, Associate Provost of Florida Atlantic University (hereinafter collectively "FAU Defendants"), pursuant to Rule 12(b)(6), *Federal Rules of Civil Procedure*, and Defendants FLORIDA EDUCATION ASSOCIATION ("FEA"), UNITED FACULTY OF FLORIDA ("UFF"), ROBERT ZOELLER, JR., and MICHAEL MOATS (hereinafter collectively "Union Defendants"), pursuant to Rule 12 12(b)(6), *Federal Rules of Civil Procedure*, hereby move to dismiss Plaintiff's Second Amended Complaint for failure to assert a cognizable claim under either 42 U.S.C. § 1983 or § 1985. In support of this motion, Defendants state as follows:

I. INTRODUCTION

Put simply, Plaintiff claims he was wrongfully terminated. Despite the simplicity of his underlying claim, Plaintiff continues, for improper motives, to complicate his claim by filing a

six-count Second Amended Complaint targeting eight separate Defendants alleging damages arising from his termination from employment at Florida Atlantic University ("FAU").[1] Plaintiff's fifty-four page Second Amended Complaint contains over two-hundred unsupported conclusory allegations and forty-four exhibits in an attempt to distract the Court from the true core of this matter: whether the Plaintiff was wrongfully terminated as a result of Plaintiff's failure to follow both the University and the Union's direct and repeated instructions to comply with a policy applicable to all faculty members at FAU. Instead, Plaintiff continues to use the Second Amended Complaint, and the Court's resources, as his soapbox to launch vindictive claims against individuals, not his employer or parties to the contract at issue, by way of unsupported conclusory rhetoric unsupported with a factual basis. Despite the sensationalized allegations against the University's President, Provost, and Administrators (in their personal capacities), Plaintiff's Second Amended Complaint fails to state a claim against Defendant Kelly for retaliation, against any of the Defendants for conspiracy or for an as-applied challenge to FAU's Outside Activities/Conflict of Interest Policy.[2]

II. LEGAL STANDARD

Under Rule 12(b)(6), *Federal Rules of Civil Procedure*, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a

[1] The Second Amended Complaint refers to the eight Defendants in three separate groups: (1) the "Defendant University," referring to the Florida Atlantic University Board of Trustees, (2) the "FAU Defendants," referring to three individuals who are University administrators, and (3) the "Union Defendants," referring to the Florida Education Association, the United Faculty of Florida, and two additional individuals.

[2] Defendants are not moving to dismiss all counts of the Second Amended Complaint. Defendants rely on legal decisions in this district, the Middle District of Florida, and the Northern District of Florida which state that a party need not file an answer while a partial motion to dismiss is pending. *See Ferk v. Mitchell*, 2014 WL 7369646 (S.D. Fla. Dec. 29, 2014); *Jacques v. The First Liberty Ins. Corp.*, 2016 WL 3221082 (M.D. Fla. June 9, 2016); *Beaulieu v. Bd. of Trustees of Univ. of West Fla.*, 2007 WL 2020161 (N.D. Fla. July 9, 2007). Defendants are aware that the Court, in certain cases, has entered trial orders stating that the filing of a pre-answer motion to dismiss based on Rule 12(b)(6), *Federal Rules of Civil Procedure*, will not presumptively toll the time required to plead an answer, but the trial order entered in this case contains no such procedure relating to Preliminary Motions. D.E. 26. As a result, Defendants are in good faith doubt regarding their obligation to answer the remaining counts while their partial motion to dismiss is pending. If the Court requires Defendants to answer before ruling on the partial motion to dismiss, Defendants respectfully request an enlargement of time of ten (10) days to answer the remaining counts.

formulaic recitation of the elements of a cause of action will not do. *See Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (internal citations omitted). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *See id.* A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *See id.* at 679. While legal conclusions can provide a framework of a complaint, they must be supported by well-pleaded factual allegations in order for the court to determine whether the complaint plausibly gives rise to an entitlement to relief. *See id.*

III. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR RETALIATION AGAINST DEFENDANT KELLY (COUNT I)

Throughout the Second Amended Complaint, Plaintiff makes conclusory allegations regarding Defendant Kelly's alleged participation in the decision to discipline and terminate Plaintiff without recitation of any facts to support Plaintiff's allegations. The only factual allegation pled by Plaintiff to support his claim for retaliation against Defendant Kelly is a single email exchange between Defendant Kelly and Stacy Volnick regarding FAU's response to complaints received regarding Plaintiff's recent actions towards victims of the Sandy Hook massacre. Plaintiff alleges that an individual named Paul Stern wrote to FAU claiming to be the friend of someone who lost a child in Sandy Hook. Sec. Am. Comp. ¶ 103; Ex. AP. In response, Defendant Kelly asked that Mr. Stern put the parents of the child in direct contact with him to deal with the complaint personally. *Id.* There are no further factual allegations supporting Defendant Kelly's alleged role in Plaintiff's discipline or termination, nor does Plaintiff provide any explanation for how Defendant Kelly's response to a public complaint regarding Plaintiff

relates to the discipline and termination of Plaintiff. Instead, Plaintiff provides only conclusory allegations that Defendant Kelly "supervised, facilitated, recommended and/or approved discipline and termination of Professor Tracy in retaliation [] for engaging in his constitutionally protected speech and expression on his personal blog." Sec. Am. Comp. ¶ 14. Yet, Defendant Kelly neither signed nor received a copy of any of the disciplinary actions taken against Plaintiff. *See* Sec. Am. Comp. Exs. R, Y, AI.

Plaintiff cannot hold Defendant Kelly liable for the allegedly unconstitutional acts of his subordinates on the basis of respondeat superior or vicarious liability. *See Keith v. DeKalb Cnty., Ga.*, 749 F.3d 1034, 1047 (11th Cir. 2014); *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999), *Braddy v. Fla. Dep't of Labor*, 133 F.3d 797, 801-802 (11th Cir. 1998). "Instead, to hold a supervisor liable a plaintiff must show that the supervisor either directly participated in the unconstitutional conduct or that a causal connection exists between the supervisor's actions and the alleged constitutional violation." *Keith*, 749 F.3d at 1047-48. There are no facts pled by Plaintiff in the Second Amended Complaint to support his allegations that Defendant Kelly "supervised, facilitated, recommended and/or approved discipline and termination" of Plaintiff in violation of his constitutional rights. Plaintiff's mere conclusory allegations are insufficient to state a claim. *See Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. Accordingly, Count I for Retaliation should be dismissed against Defendant Kelly, with prejudice.

IV. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR CONSPIRACY AGAINST THE UNION DEFENDANTS (COUNT II)

A. The Second Amended Complaint's Allegations Against the Union Defendants

The FEA and UFF are employee organizations engaged in the representation of public employees, including the Plaintiff, in connection with their employment rights. Sec. Am. Comp. ¶ 20, 21. The Plaintiff was a dues-paying member of the FEA and UFF. Sec. Am. Comp. ¶ 22.

The Defendants Moats and Zoeller are union representatives and agents of FEA and UFF. Sec. Am. Comp. ¶ 23-25.

The Second Amended Complaint alleges that on December 17, 2015, Defendant Zoeller met with FAU General Counsel Glick, somewhere on the FAU campus, and agreed that Defendants UFF and FEA "would help the Defendant University, and Defendants Kelly, Alperin and Coltman in securing Professor Tracy's termination, or resignation in lieu of termination." Sec. Am. Comp. ¶ 110.[3] The Plaintiff expands upon his conspiracy allegations in ¶ 116 of the Second Amended Complaint, wherein he alleges that in November and December of 2015, Defendants Zoeller, Moats and other unnamed representatives and agents of the Defendants UFF and FEA entered into an understanding and agreement with unnamed officials and representatives of FAU to subject the Plaintiff to disciplinary action and termination in retaliation for the Plaintiff's personal blogging.[4] The Plaintiff goes on to allege that "in 2015, in furtherance of the conspiracy, Defendants Moats and Defendants UFF and FEA about-faced Professor Tracy and aided and abetted Professor Tracy's unlawful discipline and termination for his personal blogging. Defendants Moats and Defendant UFF and FEA agreed not to file a grievance or respond to Defendant University's notices of discipline on Professor Tracy's behalf, while actively deceiving Professor Tracy into believing that a timely response and grievance would be filed by Defendants UFF and FEA." Sec. Am. Comp. ¶ 150.

In its order dismissing the Plaintiff's claim against the Union Defendants based on the Plaintiff's allegation that the Union Defendants had conspired with the University Defendants to

[3] Later in the Second Amended Complaint the Plaintiff avers that in November and December 2015, including on December 17, 2015, Defendant Zoeller met with FAU General Counsel Glick and that during these meetings, Zoeller and Glick, in their representative capacity, agreed to "sabotage" Plaintiff's defense against FAU's unlawful discipline, and to secure Tracy's termination or resignation in lieu of termination. Sec. Am. Comp. ¶ 149.

[4] In paragraph 91 of the Second Amended Complaint, the Plaintiff infers that "upon information and belief" FAU General Counsel Glick and Defendant Zoeller met and reached an agreement that Defendants UFF and FEA would not contest FAU's notice of intention to termination the Plaintiff's employment.

violate the Plaintiff's constitutionally-protected rights, the Court instructed that the Plaintiff ". . . needs to plead his conspiracy counts with greater clarity as to who, what, where, when, and why." D.E. 92 (Citing *Briggs v. Briggs*, 245 F.App'x 934, 935 (11th Cir. 2007)). Despite his efforts to salvage his claim against the Union Defendants, Count II of the Plaintiff's Second Amended Complaint fails to state a cause of action against them for violating the Plaintiff's First Amendment rights. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court addressed the requirements to state a cause of action in the context of a conspiracy claim arising under the Sherman Act, 15 U.S.C. §§ 1-7, and the Court held that a plaintiff's obligation to provide the grounds for his entitlement to relief requires more than the use of labels and the recitation of conclusions. The Court stated that "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." In upholding the trial court's dismissal of the plaintiff's complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P, the Court held that the plaintiff failed to allege enough facts to state a claim to relief that is plausible on its face. *Id.* at p. 510. *See, also, Watts v. Florida International University*, 495 F.3d 1289 (11th Cir. 2007) (plaintiff must allege enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element. It is sufficient if the complaint succeeds in identifying facts that are suggestive enough to render [the element] plausible"). *Id.* at p. 1296.

The allegations in the Second Amended Complaint that pertain to the purported conspiracy between the Union Defendants and the University Defendants to violate the Plaintiff's constitutional rights, fall short of the mark. The only conspiracy allegation pleaded with any degree of specificity relates to a meeting which took place between Defendants Zoeller and FAU General Counsel Glick on December 17, 2015, at which Zoeller is claimed to have

committed that the Defendants UFF and FEA would "help" the University Defendants "in securing Professor Tracy's termination, or resignation in lieu of termination." Sec. Am. Comp. ¶ 110. The Plaintiff later characterizes the purported understanding reached between the Union Defendants and the University Defendants as an agreement to "sabotage" the Plaintiff's defense against FAU's disciplinary action against him. Sec. Am. Comp. ¶ 149.

Nowhere in his complaint does the Plaintiff attempt to reconcile the claim that the Union Defendants would not contest the Plaintiff's termination (Sec. Am. Comp. ¶ 91), that they would "help" the University Defendants in securing the Plaintiff's termination (Sec. Am. Comp. ¶ 110) and/or that they would act in concert with the University Defendants to "sabotage" the Plaintiff's defense (Sec. Am. Comp. ¶ 149) with the actions the Union Defendants took after they allegedly entered into the claimed conspiracy with the University Defendants. Thus, the Plaintiff acknowledges that Defendant Moats advised the Plaintiff, via an email sent to the Plaintiff on December 17, 2015, that Moats would seek to extend the time to respond to the notice of intent to terminate the Plaintiff's employment to January 6, 2016. Sec. Am. Comp. ¶ 111. Nor does the Plaintiff attempt to explain why the Union Defendants, after purportedly entering into the conspiracy with the University Defendants, would engage an attorney to represent the Plaintiff and would pledge to file a grievance on the Plaintiff's behalf. Sec. Am. Comp. ¶ 112.

Further undercutting the plausibility of the Plaintiff's conspiracy claim against the Union Defendants is the absence of any allegation in the Second Amended Complaint that the Union Defendants, or any of them, were in a position to administer discipline to the Plaintiff for the Plaintiff's blogging activities. To the extent that the Plaintiff maintains that the Union's alleged failure timely to file a grievance on the Plaintiff's behalf challenging the termination of his employment in some way abetted the University Defendants' intention to punish the Plaintiff for

his blogging activities, the Plaintiff fails to reconcile such claim with the fact that the Plaintiff could have filed a grievance challenging the decision to terminate his employment without the assistance of, or participation by, UFF. Sec. Am. Comp. Ex. C, Article 20.5.[5]

The Plaintiff's conspiracy allegations against the Union Defendants, even when viewed in the light most favorable to the Plaintiff, do not present a recitation of events from which the court could reasonably infer that such a conspiracy was entered into, and acted upon, by the Union Defendants. Indeed, in his attempt to allege the who, what, where, when and why of the conspiracy, the Plaintiff can point only to a meeting that occurred on December 17, 2015, between one of the Union Defendants, Zoeller, and a representation of the Defendant University, General Counsel Glick. Without providing any additional context with regard to this meeting, the Plaintiff suggests that it is reasonable to infer that Zoeller and Glick must have agreed that the Union Defendants and the University Defendants would join forces to ensure that the Plaintiff's employment would be terminated and that the Union Defendants would aid and abet the termination, all in an effort to punish the Plaintiff for the views he expressed in his blog. While it is conceivable that such a conspiracy was hatched at this meeting, given the assistance previously provided to the Plaintiff by the Union Defendants to protect the Plaintiff's right to express his personal views via his blog, the Plaintiff's recitation of facts pertinent to the alleged conspiracy does not present a plausible assertion that a conspiracy was, in fact, formed by the Union Defendants and the University Defendants. Likewise, the Plaintiff's more general assertions regarding the alleged conspiracy fail to advance this claim from the "conceivable" to the "plausible." In paragraph 16 of the Second Amended Complaint, the Plaintiff alleges that ". .

[5] To the extent that the Plaintiff maintains that the Union Defendants violated the duty of fair representation by not pursuing a grievance on his behalf, the Court, in its order of December 15, 2016, dismissing Counts IX and X of the Amended Complaint, determined that these claims are preempted by the Florida Public Employees Relations Act, Fla. Stat. § 447.201, *et seq*.

. in November and December of 2015, Defendants Zoeller, Moats and other representatives of Defendants UFF and FEA, had entered into an understanding and agreement amongst themselves, and with officials and representatives of the Defendant University to subject Professor Tracy to disciplinary action and termination in retaliation for his personal blogging." Similar generalized allegations concerning the formation of the alleged conspiracy appear at paragraph 149 (referencing meetings that are said to have occurred in November and December 2015) and paragraph 150 (alleging that "in 2015, Defendant Moats and unnamed representatives of UFF and FEA agreed not to respond to the Defendant University's notice of its intent to discipline the Plaintiff"). These allegations, even when coupled with the more specific allegation concerning the December 17, 2015, meeting between Defendant Zoeller and FAU General Counsel Glick, "have not nudged [the Plaintiff's] claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

V. PLAINTIFF FAILS TO STATE A CLAIM FOR CONSPIRACY AGAINST THE FAU DEFENDANTS (COUNT II)

In the spirit of more does not always mean better, despite including approximately twenty-nine new allegations against the FAU Defendants and the Union Defendants in his claim for conspiracy, Plaintiff still fails to state a claim. Generally, a plaintiff may state a Section 1983 claim for conspiracy to violate constitutional rights by pleading facts to support a finding that a conspiracy existed and resulted in the denial of some underlying constitutional right. *See Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1260 (11th Cir. 2010). In attempting to establish such a conspiracy, Plaintiff must show that two or more parties "reached an understanding" to deny Plaintiff his constitutional rights. *Id.* at 1260 (citing *Bendiburg v. Dempsey*, 909 F.2d 463, 468 (11th Cir. 1990) and *Bailey v. Bd. of Cty. Comm'rs of Alachua Cnty.*, 956 F.2d 1112, 1122 (11th Cir. 1992)). When one of the parties to an alleged conspiracy is a corporation, the "corporation's

employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation," requiring an understanding with an outside third party. *Dickerson v. Alachua County Commission*, 200 F.3d 761, 767 (11th Cir. 2000); *see also Grider*, 206 F.3d at 1261 ("The [intracorporate conspiracy] doctrine applies to public entities").

Plaintiff's Second Amended Complaint fails to plead facts supporting a finding that a conspiracy existed and that it resulted in the denial of an underlying constitutional right. Plaintiff's allegations fail to allege any meeting of the minds or understanding between the individual FAU Defendants, Defendants Alperin, Coltman, and Kelly, with an outside third party to support a claim of conspiracy against them in their individual capacities. Additionally, Plaintiff's conspiracy claim fails against FAU because he cannot identify an underlying right which he was denied by the alleged conspiracy between FAU and the Union Defendants.

A. Plaintiff Fails to Allege Defendants Alperin, Coltman, and Kelly Participated in a Conspiracy

In support of his claims of conspiracy in Count II, Plaintiff alleges that Defendants Alperin, Coltman, and Kelly conspired to interfere with Plaintiff's civil rights by disciplining and terminating him in retaliation for his constitutionally protected speech. Sec. Am. Comp. ¶ 139. Plaintiff alleges that Defendants Alperin, Coltman, and Kelly took a variety of actions against him in furtherance of the alleged conspiracy, beginning in 2013 and culminating in the decision to discipline and terminate him in 2015.[6]

[6] According to Plaintiff, Defendants Alperin, Coltman, and Kelly participated in the alleged conspiracy by: beginning to plan in January 2013 how they could violate Plaintiff's civil rights (¶ 144); internally labeling Plaintiff the "poster child" to "quit UFF membership" (¶ 145); planning to use the 2013 controversy surrounding his personal blogging to undermine Plaintiff's representation by Defendants UFF and FEA (¶ 145); cancelling Plaintiff's course "Media, War and Crisis" in 2013 (¶ 146); reassigning Plaintiff in 2013 to an undergraduate course he had not previously taught at times of the day that conflict with his child care schedule (¶ 146); attempting to unlawfully discipline Plaintiff for his personal blogging in November and December of 2015 (¶ 147); disregarding and dismissing multiple faculty complaints and requests for FAU officials to cease and desist infringing upon constitutionally protected faculty speech and expression (¶ 151); ignoring Plaintiff's complaints that his uncompensated, constitutionally protected personal blogging could not be subjected to restriction (¶ 152);

In not one of Plaintiff's allegations does he allege that Defendants Alperin, Coltman, or Kelly communicated with the Union Defendants regarding this alleged conspiracy. *See Bailey*, 956 F.2d at 1122 ("[T]he linchpin for conspiracy is agreement, which presupposes communication."). Instead, Plaintiff alleges that Larry Glick, General Counsel for FAU met with the Union Defendants and was "acting on behalf of the Defendant University and Defendants Kelly, Alperin and Coltman." Sec. Am. Comp., ¶ 149. Plaintiff's conclusory allegation that Mr. Glick was "acting on behalf of" Defendants Kelly, Alperin, and Coltman is unsupported by fact. Indeed, Plaintiff provides no factual details regarding how Mr. Glick acted "on behalf of" Defendants Kelly, Alperin, and Coltman, nor does Plaintiff allege that Defendants Kelly, Alperin, and Coltman even knew of the alleged meeting or of the alleged conspiracy. *See Kivisto v. Miller, Canfield, Paddock and Stone, PLC,* 413 Fed. App'x 136, 139 (11th Cir. 2011) ("A plaintiff claiming a conspiracy under § 1983 must make particularized allegations that a conspiracy exists."). This is simply insufficient to plead a claim against Defendants Alperin, Coltman, and Kelly in their individual capacities for conspiracy. *See Hansel v. All Gone Towing Co.*, 132 Fed. App'x 308, 310 (11th Cir. 2005) ("Simply put, such conclusory allegations, with no factual support, are insufficient to state a claim.").

As described above and found throughout the Plaintiff's Second Amended Complaint, Plaintiff alleges that Defendants Alperin, Coltman, and Kelly conspired with one another and FAU against Plaintiff. Indeed, Plaintiff's allegations against Defendants Alperin and Coltman date to 2013, prior to any allegation of involvement of the Union Defendants. Regardless, Defendants Alperin, Coltman, Kelly, and FAU cannot legally conspire with one another. "The intracorporate conspiracy doctrine holds that acts of corporate agents are attributed to the

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demanding Plaintiff submit four years of personal blogging to FAU (¶ 153); unlawfully disciplining Plaintiff in retaliation for his personal blogging (¶ 155); and unlawfully issuing a Notice of Intent to Terminate Plaintiff (¶ 157).

corporation itself, thereby negating the multiplicity of actors necessary for the formation of a conspiracy." *Grider*, 618 F.3d at 1261 (quoting *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1036 (11th Cir. 2000)). When a corporation's employees are acting within the scope of their employment, they cannot be part of a conspiracy with the corporation because the corporation cannot conspire among itself. *Id*. *See also Denney v. City of Albany, GA*, 247 F.3d 1172, 1191 (11th Cir. 2001).

Here, Defendants Alperin, Coltman, and Kelly are accused of conspiring to cancel classes, make assignments, discipline, and terminate Plaintiff—all actions which are within the scope of their employment and in furtherance of their position with FAU. *Grider*, 618 F.3d at 1261 ("the question of whether a defendant acted within the scope of his employment is distinct from whether the defendant acted unconstitutionally. The scope-of-employment inquiry is whether the employee [] was performing a function that, but for the alleged constitutional infirmity, was within the ambit of the [employee's] scope of authority (i.e., job-related duties) and in furtherance of the employer's business."). As such, they were acting on behalf of FAU and are considered to be part of the same legal entity and cannot have conspired with one another against Plaintiff. *Dickerson v. Alachua County Commission*, 200 F.3d 761, 767 (11th Cir. 2000) (internal citations omitted).

Plaintiff's allegations that Defendants Alperin, Coltman, and Kelly conspired among themselves and with FAU to allegedly deny him some right are insufficient to state a claim against them. Since Plaintiff has not alleged that Defendants Alperin, Coltman, and Kelly had any communication with the Union Defendants or were involved in any communications to reach a conspiracy, Count II should be dismissed against them with prejudice.

B. Plaintiff was not denied an underlying constitutional right

Plaintiff cannot identify an underlying constitutional right which was violated by the alleged conspiracy between the Defendants. The only alleged communication, understanding or agreement among two or more parties specifically identified by Plaintiff in support of his conspiracy claim is an alleged meeting on December 17, 2015[7] between Defendants Zoeller, individually and allegedly on behalf of the Defendants UFF and FEA, and FAU General Counsel Larry Glick, on behalf of the Defendant University and allegedly on behalf of Defendants Kelly, Alperin and Coltman. Plaintiff alleges that during this meeting, an understanding and agreement was reached "to sabotage Professor Tracy's defense against FAU's unlawful discipline, and to secure Professor Tracy's termination or resignation in lieu of termination."[8] Sec. Am. Comp. ¶ 149. Notably, Plaintiff alleges that he received a Notice of Discipline on November 10, 2015 and Notice of Intent to Terminate on December 16, 2015, prior to this meeting. Sec. Am. Comp. ¶¶ 95; 107. Accordingly, the only potential conspiracy alleged by Plaintiff is a conspiracy to "sabotage" Plaintiff's defense against his termination, to wit, his ability to grieve the decision.

This Court has already determined that Plaintiff was afforded due process with respect to his termination. D.E. 92. According to Plaintiff's allegations, FAU had already begun the termination process at the time that it allegedly met with Defendant Zoeller. *See, e.g.* Sec. Am. Comp. ¶¶ 107; 110. After the alleged meeting, the Union Defendants requested an extension of

[7] As discussed in Section IV, *infra*, December 17, 2015 is the only meeting identified by Plaintiff in response to this Court's direction that he identify the "who, what, when, where, and why" of the conspiracy. Plaintiff otherwise makes general, conclusory allegations that meetings occurred in November and December 2015, between the Union Defendants and "other representatives and agents of the Defendant University." Sec. Am. Comp. ¶ 116. As discussed in Section IV, these generalized allegations simply do not state a claim.

[8] In other locations throughout the Second Amended Complaint, Plaintiff describes the alleged understanding and agreement as an agreement Defendants UFF and FEA "would not contest the discipline and termination of Professor Tracy" (¶ 91), an agreement that Defendants UFF and FEA "would help the Defendant University, and Defendants Kelly, Alperin and Coltman in securing Professor Tracy's termination, or resignation in lieu of termination" (¶ 110), and as an agreement to subject Professor Tracy to disciplinary action and termination in retaliation of his personal blogging by failing to timely respond to the Notice of Intent to Terminate (¶ 116).

time for Plaintiff to respond to the Notice of Intent to Terminate, which was granted, and on December 18, 2015, hired Plaintiff independent legal counsel. *See* Sec. Am. Comp. Exs. AA, AB. Plaintiff had the opportunity to grieve his termination, either through his legal counsel or on his own. *See* Sec. Am. Comp. Ex. C, pp. 58-67. As this Court recognized in its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, "Plaintiff knew about available procedures, and he chose not to avail himself of those procedures." D.E. 92, p. 16.

Plaintiff was not denied due process. *Id*. He has further failed to identify any other underlying constitutional right impacted by the alleged conspiracy between FAU and the Union Defendants to "sabotage" his defense to his termination. Plaintiff could have availed himself of the grievance procedure available to defend against his termination but individually elected not to do so. Consequently, not only has Plaintiff failed to adequately plead facts to support any conspiracy between the Defendants, he has failed to identify an underlying constitutional right which was denied as a result of the alleged conspiracy. *See Denny v. City of Albany*, 274 F.3d 1172, 1190 (11th Cir. 2001) (where plaintiffs' substantive claims of racial discrimination fail on the merits, their conspiracy claim fails as well); *Crenshaw v. City of Defuniak Springs*, 2014 WL 667689, fn 5 (N.D. Fla. Feb. 20, 2014) ("The court's disposition of the Crenshaw's race-based discrimination claim obviates the need to address their conspiracy claim under 42 U.S.C. § 1985(3)."). Accordingly, Count II should be dismissed against the FAU Defendants.

VI. PLAINTIFF HAS FAILED TO STATE A CLAIM FOR AN AS-APPLIED CHALLENGE (COUNT IV)

A. Plaintiff's Allegedly "As-Applied" Challenge Is Duplicative of the Facial Challenge

Plaintiff has failed to adequately plead an "as-applied" constitutional challenge against FAU based on its Outside Activities/Conflict of Interest Policy (the "Policy"), instead merely duplicating the facial challenge raised in Count III of the Amended Complaint. A facial

challenge, as distinguished from an as-applied challenge, seeks to invalidate a statute or regulation itself. *See Rubenstein v. Fla. Bar,* 72 F. Supp. 3d 1298, 1309 (S.D. Fla. 2014) (citing *U.S. v. Frandsen,* 212 F.3d 1231, 1235 (11th Cir. 2000)). When a plaintiff attacks a law facially, the plaintiff bears the burden of proving that the law could never be constitutionally applied. *See Rubenstein,* 72 F. Supp. 3d at 1309 (citing *Jacobs v. The Fla. Bar,* 50 F.3d 901, 906 n. 20 (11th Cir. 1995)). By contrast, where the plaintiff seeks to vindicate his own rights, the challenge is as-applied. *See id.* (citing *Jacobs,* 50 F.3d at 906). In an as-applied challenge, the plaintiff contends that application of the statute in a particular context in which he has acted, or in which he proposes to act, would be unconstitutional. *See id.* (citing *Ross v. Duggan,* 402 F.3d 575, 583 (6th Cir. 2004)). Therefore, the as-applied challenge is limited to the plaintiff's particular situation.

Despite the fact that Plaintiff labels his Count IV as an "as-applied" constitutional challenge, a review of Plaintiff's allegations reveals that Plaintiff raises only a facial challenge based on the alleged vagueness and overbreadth of FAU's Policy. The Eleventh Circuit has confirmed that the target of Plaintiff's claim and the nature of the relief sought is paramount, not the facial versus as-applied label he attaches. *See Rubenstein,* 72 F. Supp. 3d at 1309-10. The Court is not bound by Plaintiff's designation of his claim and must look to the complaint to determine what claims, if any, his allegations support. *See id.* at 1310-11. Plaintiff's allegations under Count IV clearly indicate that the target of Plaintiff's constitutional objection to the Policy is facial in nature, seeking to bar the application of the Policy in every instance based on vagueness and overbreadth. *See, e.g.,* Sec. Am. Compl. at ¶ 193 ("The Policy is so vague and overbroad, persons of common intelligence must necessarily guess at its meaning"); ¶ 195 (describing the "fear and uncertainty" allegedly shared by other FAU faculty members, and

stating in reference to the definition of "outside activity" that "[n]o one knows what that means. The deans don't know what it means. Faculty supervisors don't know what it means"); ¶ 207 ("Although officials at the Defendant University repeatedly acknowledged faculty and administrative confusion, uncertainty, and fear about the meaning, scope, and application of the Policy, these well-founded concerns were disregarded; ¶ 209 ("[B]oth faculty and administrative officials tasked with enforcement of the Policy could not understand it…"). Significantly, Plaintiff does not allege what particular circumstances make the Policy unconstitutional as applied to him specifically, rather than the other faculty members. Indeed, the entire thrust of Plaintiff's Count IV appears to be aimed at striking down the Policy because allegedly no one in the faculty or administration could understand it, which is a pure facial challenge. To the extent that the facial challenge raised in Count IV is duplicative of the challenge raised in Count III, Count IV should be dismissed with prejudice.

B. Plaintiff's "As-Applied" Challenge Not Ripe Where Plaintiff Failed to Exhaust Administrative Remedies

Additionally, Plaintiff's "as-applied" challenge is not ripe where he failed to exhaust the administrative remedies available to contest the application of the Policy to him under his applicable collective bargaining agreement. As the Court acknowledged in its December 15, 2016, Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, "[w]hile the theoretical possibility exists that the Form could be used, by FAU, to restrict speech or otherwise restrict an outside activity, Plaintiff never reached that particular point as Plaintiff refused to fill out the Form. Instead, by Plaintiff's own allegations, his termination was due to his untimely execution of the Form, not from any content disclosed on the Form or his actions taken in connection therewith." D.E. 92, at 9; *see also* Sec. Am. Compl. at ¶ 107 (alleging FAU's Notice of Intent to Terminate Plaintiff stated that he was being terminated for his failure to timely

submit Activity Forms by the deadline). Contrary to Plaintiff's allegations, the supposedly unconstitutional Policy could not have been "applied" to Plaintiff unless and until an administrative decision had been formalized. *See Digital Properties, Inc. v. City of Plantation,* 121 F.3d 586, 590 (11th Cir. 1997). Without the presentation of a binding conclusive administrative decision, no tangible controversy exists and the Court has no authority to act. *See id.* Plaintiff's "as-applied" challenge assumes, without support, that given full information about Plaintiff's outside activities, FAU would have interpreted the Policy in such a way as to violate Plaintiff's First Amendment rights. Where Plaintiff did not timely submit his Form for consideration, Plaintiff's action constitutes only a potential dispute that the Court does not have the power to resolve. Accordingly, Plaintiff's Count IV should be dismissed with prejudice.

VII. CONCLUSION

Plaintiff simply fails to state facts sufficient to make a plausible claim against Defendant Kelly that he retaliated against Plaintiff in violation of his constitutional rights. Further, despite the addition of a multitude of new factual allegations, Plaintiff's Second Amended Complaint still fails to state a claim of Conspiracy against the Defendants. Finally, Plaintiff's allegations of an as-applied constitutional violation are duplicative of his allegations that the policy is unconstitutional on its face and simply fail to state a claim for an as-applied constitutional violation. As such, this Court should dismiss count I against Defendant Kelly and counts II and IV of the Second Amended Complaint with prejudice.

WHEREFORE, Defendants FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES a/k/a FLORIDA ATLANTIC UNIVERSITY; JOHN W. KELLY; HEATHER COLTMAN; and DIANE ALPERIN ("FAU Defendants"), FLORIDA EDUCATION ASSOCIATION ("FEA"), UNITED FACULTY OF FLORIDA ("UFF"), ROBERT ZOELLER, JR., and MICHAEL MOATS ("Union Defendants") respectfully request that the Court enter an

order dismissing count I against Defendant Kelly and counts II and IV of the Second Amended Complaint against all Defendants for failure to state a claim, along with any further relief that the Court deems just and appropriate under the circumstances.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 16, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Holly L. Griffin

SERVICE LIST

Tracy v. Florida Atlantic University Board of Trustees, *et al.*
Case No. 16-cv-80655-ROSENBERG/HOPKINS

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