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.
_____ /

DEFENDANT FLORIDA ALTANTIC UNIVERSITY'S MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Defendant, Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University ("FAU"), pursuant to Rule 56(b), Federal Rules of Civil Procedure, and Local Rule 56.1, moves for entry of an Order granting Final Summary Judgment with respect to claims asserted against FAU in the Second Amended Complaint [DE 93] filed by Plaintiff, James Tracy.[1] In support, FAU states:

Introduction

Despite years of requests and repeated warnings that his failure to comply with FAU's policy would result in disciplinary action, it remains undisputed that Plaintiff refused to acknowledge and timely and candidly complete the Report of Outside Employment or Professional Activity and use of University resources forms required of all faculty members covered by the Collective Bargaining Agreement ("CBA") by and between FAU and the United Faculty of Florida ("Union"). The decision makers, Dr. Heather Coltman, Dean of the Dorothy F. Schmidt College of Arts and Letters and Dr. Diane Alperin, Vice Provost, each confirmed that they terminated his employment for insubordination after many requests and opportunities to comply. There is no evidence to show that Plaintiff ever timely or candidly complied, nor is there any evidence to show that Drs. Alperin and Coltman's decisions to discipline and terminate were

[1] FAU has filed a Statement of Undisputed Material Facts concurrently with this Motion. The undisputed facts upon which this Motion is based are cited as (Facts ¶ ___).

based on anything other than Plaintiff's undisputed insubordinate acts. Notably, the evidence is also undisputed that Drs. Alperin and Coltman never restrained Plaintiff's speech.

Plaintiff, the former Union Chapter President, voted in favor of and signed the CBA on behalf of the Union. That CBA defined the term "reportable outside activity." In his role as faculty representative, Plaintiff agreed to comply with the Conflict of Interest/Outside Activity Policy in Article 19 of the CBA (the "Policy") and its requirements for all in-unit faculty. The Policy applies to all in-unit faculty so that the University, which is a public agency, can ensure employee compliance with the State of Florida's Code of Ethics and with external grant funding agencies' accountability requirements. Nevertheless, as an individual employee, Plaintiff refused to comply with the Policy, refused to accept a computer prompt acknowledging his obligations under the Policy and refused to timely, candidly or fully complete the appropriate conflict disclosure and use of University resources forms. Instead, Plaintiff engaged in intentional and repeated acts of insubordination, refusing requests from his supervisors to simply acknowledge his obligations via a computer prompt sent to all faculty, and then to comply with his obligations under the CBA. Both Plaintiff's supervisors and Union leadership told Plaintiff to submit the required forms to avoid discipline for insubordination, but Plaintiff stubbornly refused.

When Dr. Alperin eventually terminated Plaintiff's employment for misconduct, the Union provided him independent legal counsel to assist Plaintiff with challenging his termination by filing a grievance, as required under the CBA. But Plaintiff spurned the mandatory grievance process that the Union he once headed had negotiated. Instead, Plaintiff chose to fire his Union-provided counsel, hire his own attorney, and file this sensationalized lawsuit blaming his Union and FAU for the consequences of his acts of insubordination. With no admissible evidence to support his claims, Plaintiff accuses FAU administrators, employees, President Kelly, Dr. Alperin, Dr. Coltman, and his Union officials – the same persons who pled with him to comply with applicable policies (none of which would have restricted his speech) – of entering into a conspiracy to terminate his employment, deprive him of his legal counsel, and violate his constitutional rights. Plaintiff's allegations are illogical, premature, and most importantly, unsupported by material fact, and FAU is entitled to summary judgment.

Plaintiff's claims against FAU fail because (1) Plaintiff did not exhaust his administrative remedies; (2) speech was not the cause for Plaintiff's discipline, rather FAU's actions or decisions determined and carried out by Drs. Alperin and Coltman were based on legitimate,

non-retaliatory reasons-to wit, Plaintiff's insubordinate refusal to comply with his supervisors' requests, University policies, and the CBA he helped negotiate; and (3) Plaintiff has no admissible evidence to support a claim of conspiracy and the claim is legally barred under the doctrines of sword and shield and judicial estoppel. FAU is further entitled to partial summary judgment due to Plaintiff's failure to mitigate.

Legal Standard

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Harlow v. Fitzgerald,* 457 U.S. 800, fn 26 (1982). This standard provides that the mere existence of *some* factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). Because the purpose of summary judgment is to determine whether there is a genuine issue for trial, if the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *Id.* at 249-250 (citing *Adickes v. S.H. Kress & Co.,* 398 U.S. 144 (1970); *First Nat'l Bank of Az. v. Cities Service Co.,* 391 U.S. 253, 288-89 (1968); *Dombrowski v. Eastland,* 387 U.S. 82 (1967)).

Argument

A. Plaintiff's Contract-Based Claims Are Barred Because Plaintiff Failed to Exhaust Administrative Remedies (Counts III - VI).

Plaintiff's claims based on the interpretation or application of the CBA are barred because Plaintiff ignored the CBA's mandatory grievance procedure. Counts III through VI of the Second Amended Complaint each raise claims that Plaintiff was required to exhaust under the CBA before proceeding to Court: Counts III and IV involve, respectively, Plaintiff's facial and as-applied challenges to the Policy contained in Article 19 of the CBA; Count V requests that the Court declare the Policy unconstitutional, or enjoin its application as to Plaintiff; and Count VI contains Plaintiff's breach of contract action based on alleged breaches of Articles 5 and 16 of the CBA. The CBA contains a mandatory grievance and arbitration procedure for all claims concerning the interpretation or application of the CBA's specific terms or provisions. (Facts ¶14). The procedure is the sole and exclusive method to resolve grievances. (Facts ¶15)

("[t]he procedures hereinafter set forth shall be the sole and exclusive method for resolving the grievances of employees as defined in this Article"). As Plaintiff failed to exhaust administrative remedies, his claims based on the CBA must fail.

i. Plaintiff was Required by the CBA to File a Grievance

Plaintiff, a former Union Chapter President familiar with the CBA, participated in bargaining over a nearly identical version of the mandatory grievance and arbitration procedure during his tenure as President, and was well-informed of the procedure's requirements. (Facts ¶¶6, 40). Under this procedure, Plaintiff knew he had the opportunity to grieve his termination from employment, but he failed to do so. (Facts ¶¶40, 51-53). Indeed, each disciplinary action issued to Plaintiff stated "This disciplinary action, [] is subject to Article 20 of the BOT/UFF Collective Bargaining Agreement." (Facts ¶¶38, 45, 51-52). When the Union provided Plaintiff an independent attorney to assist him with utilizing the grievance procedure, Plaintiff fired him. (Facts ¶¶46, 54). After that, Plaintiff hired his own legal counsel, still with enough time to utilize the grievance procedure, but for reasons Plaintiff seeks to conceal (using the shield of the attorney-client privilege), failed to do so.[2] (Facts ¶¶ 55, 64). Rather than take one of many opportunities to avail himself of the CBA's mandatory grievance procedure, Plaintiff ignored the CBA's requirements. Instead he filed this lawsuit, asserting the violation of his First Amendment rights, even though no speech was ever restrained.

Because Plaintiff's Counts III through VI each seek interpretation, clarification or application of a specific provision in the CBA, Plaintiff was required to go through the agreement's mandatory grievance and arbitration process before proceeding to court. *See Hawks v. City of Pontiac*, 874 F.2d 347, 349 (6th Cir. 1989). "Employees claiming breach of a collective bargaining agreement or wrongful termination of employment by their employer are bound by that agreement's terms providing a method for resolving disputes between them and their employer." *Mason v. Continental Grp., Inc.*, 763 F.2d 1219, 1222 (11th Cir. 1985). *See also Blanchette v. Sch. Bd. of Leon Cnty.*, 378 So. 2d 68, 69 (Fla. 1st DCA 1979); *Miami Ass'n of*

[2] Each and every disciplinary letter sent to Plaintiff stated "This disciplinary action, [] is subject to Article 20 of the BOT/UFF Collective Bargaining Agreement." (Facts ¶¶38, 45, 51-52). During the course of this case, despite having filed several prior grievances against FAU and serving as chapter President of his Union of three years, Plaintiff claims he did not know how to file a grievance. (Facts ¶56). Notably, Plaintiff's counsel has attempted to block all efforts to ask Plaintiff's former Union-appointed attorney the obvious questions arising out of Plaintiff's claims that the Union, through the Union lawyer, sabotaged his efforts. (Facts ¶¶63-64).

Firefighters Local 587 v. City of Miami, 87 So. 3d 93, 96 (Fla. 3d DCA 2012). Article 5 (Academic Freedom and Responsibility), Article 16 (Disciplinary Action and Job Abandonment), and Article 19 (Conflict of Interest/Outside Activity) are all contractual terms in the CBA, and as such, are subject to interpretation under the CBA's mandatory grievance procedure. *See Hawks*, 874 F.2d at 349. In *Hawks*, the plaintiff police officer asked the court to strike down the residency requirement of his applicable collective bargaining agreement on vagueness grounds. *See id.* at 348-49. The Sixth Circuit agreed with the district court that the officer had no valid vagueness claim, because the residency requirement was called into question based on its enforcement as a contractual term in the collective bargaining agreement. *Id.* at 349. "As a contract provision entered into through voluntary collective bargaining, it may not be characterized as a positive law subject to due process challenge for vagueness." *Id.* at 349-50. The Court held that the provision's "interpretation and clarification is subject to the grievance and arbitration process." *Id.* at 350.

Similarly, in this case, Plaintiff's Counts III through VI each require the Court to interpret or clarify specific articles of the CBA and assess their application to the Plaintiff, a task left exclusively to the CBA's grievance and arbitration procedure. "When employees asserting an arbitrable grievance have not attempted to utilize the dispute resolution machinery available to them under the agreement, their independent suit against the employer **must be dismissed**." *Mason*, 769 F.2d at 1222 (emphasis added). "It would be a strange doctrine indeed under which an employee could relieve himself of engaging in the grievance process merely by supinely accepting an adverse decision of his employer as unchallengeable until the filing of an action in court. Such a rule would render the exhaustion principle itself entirely meaningless." *City of Miami v. Fraternal Order of Police Lodge No. 20 of the City of Miami*, 378 So. 2d 20, 25 (Fla. 3d DCA 1979). If Plaintiff had grieved his termination through the final arbitration stage and then filed suit, the Court could review his case, albeit on a narrow standard of review. *See Hawks*, 874 F.2d at 350. However, it is undisputed that Plaintiff failed to follow the mandatory process by filing a grievance, despite several opportunities to do so. In other words, there is no genuine issue of material fact with regard to Plaintiff's failure to exhaust the administrative remedies established by the CBA. Thus, Plaintiff's claims based on violations of the CBA are barred and FAU Defendants are entitled to summary judgment on Counts III through VI.

ii. Plaintiff's As-Applied Challenge is Not Ripe

Plaintiff further challenges the application of the Policy to him in Count IV of the Second Amended Complaint. However, the Policy was never applied to Plaintiff because Plaintiff refused to comply with its requirements. "The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). In *Digital Properties*, the court determined that the plaintiff's claim was not ripe because the plaintiff presumed that a zoning ordinance would be used to violate plaintiff's constitutional rights, but there was never a formal decision denying the plaintiff of its rights. *Id*. at 590.

In this case, Plaintiff alleges that he was required to submit his blogging "for administrative evaluation, monitoring or restriction." (Facts ¶57). However, Plaintiff never submitted his blog to FAU under the Policy. (Facts ¶58). Although Plaintiff may have feared, in his own mind, that he would be subject to censure if he reported his blog or other articles or books under the Policy, the undisputed facts prove that the Policy was never used to restrict Plaintiff's speech. (Facts ¶¶29-32, 43, 58). Plaintiff's claim of an "as-applied" violation of his First Amendment rights is not ripe when it is founded on an anticipated belief that FAU may have used the policy to violate his rights, rather than an actual use of the Policy to violate his rights. *Digital Properties*, 121 F.3d at 590. Ironically, Plaintiff was repeatedly and consistently told by his Union representatives that he must comply with the Policy but could grieve, using Article 19 of the CBA's expedited grievance process, should FAU attempt to restrict his speech or otherwise use his disclosures and compliance in violation of the CBA. (Facts ¶¶13, 36). Indeed, "comply and grieve" is considered stock Union advice. (Facts ¶36). Even though Plaintiff knew and ignored that mandate, he still seeks to make this claim based on what he thinks might have happened.

B. Plaintiff's Employment Was Terminated for Legitimate, Non-Retaliatory Reasons (Count I).

Plaintiff attempts to focus this employment dispute on his constitutional claims as a way to deflect or somehow justify his undisputed acts of insubordination by repeatedly refusing to comply with his bargained for obligations. Plaintiff was first asked to accept a computer prompt, required of all faculty members when accepting their annual assignment, acknowledging his obligations to report reportable outside activities and use of University resources for outside

activities. (Facts ¶33-35). After ignoring several demands from his supervisors, after initially attempting to circumvent the checkbox by submitting a hand signed copy, and after finally receiving a written reprimand for his insubordination, Plaintiff eventually checked the prompt acknowledging his obligations. (Facts ¶38). Next, under Article 19, Plaintiff, like all other in-unit faculty at FAU, was required to submit forms listing his reportable outside activities so conflicts of interest could be assessed, including his use of University resources for outside activities. (Facts ¶9-12, 36). Plaintiff did not submit the required forms for years 2013, 2014, or 2015. (Facts ¶¶36-37). Despite multiple requests from Union representatives and his supervisors, despite measured progressive discipline properly imposed against him by the University, and despite multiple further opportunities to comply offered by his supervisors, Plaintiff steadfastly refused to meet his obligations and was terminated for cause. (Facts ¶¶36-39, 41-45). All of the evidence shows that Plaintiff's employment was terminated for this reason, after multiple opportunities for correction. While FAU does not concede (and indeed does not agree) that Plaintiff's speech was protected under the First Amendment, Drs. Alperin and Coltman did not consider Plaintiff's speech when deciding to discipline him or terminate his employment. Thus, for purposes of this motion only, FAU has not addressed whether Plaintiff's speech was protected.[3]

i. Plaintiff Has Presented No Evidence of a Causal Connection Between Any Allegedly Protected Speech and His Termination from Employment.

The University, acting through its representatives, Drs. Coltman and Alperin, disciplined Plaintiff and terminated Plaintiff's employment for his repeated gross insubordination. (Facts ¶¶34-39, 41-45). The undisputed facts demonstrate that they did not take into consideration or factor into their decisions any of the allegedly protected speech by Plaintiff, including but not limited to his blog (Facts ¶¶24, 27, 29-32, 37-39, 41-45). In fact, Dr. Coltman told Plaintiff in 2013 that he could blog in his personal time, so long as he did not drag "FAU into [his] personal endeavors" by failing to utilize the disclaimer mandated by the CBA. (Facts ¶25). Had Plaintiff timely, accurately, and completely submitted the forms as required, he would not have been

[3] Plaintiff has not established that his speech is protected as speech by a private citizen on a matter of public concern because he has not identified any specific speech that he alleges was protected under the First Amendment. Additionally, Plaintiff's speech is not protected because any interest Plaintiff may have had in his blog is outweighed by FAU's interest in peacefully fulfilling its educational mission.

terminated. (Facts ¶45). There is no evidence showing a causal connection between any protected speech and his termination from employment. Nor does Plaintiff have evidence to establish pretext or causation. Finally, the undisputed facts show that Plaintiff knew he was engaging in reportable outside activities but he stubbornly refused to report them. (Facts ¶¶11, 18, 19, 26).

Plaintiff has no evidence of a causal connection. It is undisputed that Plaintiff continued to operate his Memory Hole Blog after Drs. Alperin and Coltman learned of its existence in January 2013. (Facts ¶29). Plaintiff was permitted to teach his course, "Culture of Conspiracy" in 2014 without incident, (Facts ¶30), and Plaintiff also continued his academic work with Project Censored, an organization that educates students and the public by promoting independent investigative journalism and identifying news censorship. (Facts ¶31). Finally, Plaintiff's annual job assignment in 2015 included his work editing a book titled "Governing by Crisis" which was anticipated to include articles by Plaintiff and others on the Sandy Hook Massacre. (Facts ¶32). All of these facts show that after Drs. Alperin and Coltman became aware of Plaintiff's blogging in January 2013, (Facts ¶23), no one at FAU did anything to stop his speaking, writing, or research into conspiracy or other topics. Plaintiff was however required to comply with the CBA, which required Plaintiff (and all other faculty) to comply with the Policy and submit the necessary disclosure forms. Plaintiff refused.

Plaintiff also cannot meet his burden of pretext by Drs. Alperin and Coltman by identifying a similarly situated employee who received different treatment. "To establish that a defendant treated similarly situated employees more favorably, a plaintiff must show that h[is] comparators are 'similarly situated in all relevant aspects.'" *Foster v. Biolife Plasma Svs., LP*, 566 Fed. App'x 808, 811 (11th Cir. 2014) (quoting *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997)). In the context of disciplinary actions, "the quality and quantity of a comparator's conduct must be nearly identical to the plaintiff's in order to prevent courts from second-guessing a reasonable decision by the employer." *Id.* (citing *Maniccia v. Brown*, 171 F.3d 1364, 1368-69 (11th Cir. 1999)).

Plaintiff has not identified another employee at FAU who committed the same policy violations. Consequently, Plaintiff has not identified another employee who committed the same policy violations and who Drs. Alperin and Coltman did not terminate from employment. First, Plaintiff refused multiple directives from his supervisor to electronically accept his annual

assignment after clicking a simple acknowledgment of his obligation to report under the Policy. (Facts ¶¶33-35). In fact, after multiple requests, Plaintiff delivered a signed hard copy of his annual assignment to avoid checking the acknowledgment box. (Facts ¶35). Next, Plaintiff refused multiple directives from his supervisor, Dean, and other personnel to submit Report of Outside Employment or Professional Activity forms in compliance with the Policy. (Facts ¶¶36-39, 41-43). The Policy is necessary and important to the operations of the University and was collectively bargained between the University and its faculty to protect faculty research endeavors. (Facts ¶¶9-10). The Policy ensures the University is in compliance with its obligations under the Florida Code of Ethics for public employee conflicts of interests and work hours (Chapter 112, Part II, Florida Statutes). (Facts ¶10). In part, the disclosures required by the Policy ensure accountability for the taxpayer dollars used to fund faculty salaries, and are often required as a condition of the University's receipt of research grants, which provide funding for sponsored research conducted by the faculty. (Facts ¶10). The CBA requires all in-unit faculty members to report all reportable outside activities, including the name of the recipient of services, the funding sources, the location where the activity will be performed, the nature and extent of the activity, and any intended use of University facilities, equipment or services, so conflicts of interest could be assessed. (Facts ¶¶9-10). Plaintiff had previously represented to Dr. Coltman that his outside activities did not involve the University. (Facts ¶¶27, 42). The Policy specifically states "[a]n employee engaging in any outside activity shall not use the facilities, equipment, or services of the University in connection with such outside activity without prior approval," and faculty are required to report the use of University resources for outside activities with their annual reports. (Facts ¶12). When Plaintiff finally submitted his partially completed forms, they included a disclosure that, contrary to his prior representations to his supervisor, he had been using University resources to support his outside activities. (Facts ¶¶27, 42). Finally, Dr. Alperin learned that Plaintiff contributed to a book titled "Nobody Died at Sandy Hook" that included his affiliation with FAU, but did not include an appropriate disclaimer as required by the CBA and the 2013 Settlement Agreement with the Plaintiff. (Facts ¶50).

Plaintiff cannot identify another employee who reported to Dr. Coltman (1) who refused to check the electronic box acknowledging the obligation to report outside activities; (2) who repeatedly refused directives from his or her supervisor to submit Report of Outside Employment or Professional Activity forms; (3) who misrepresented their use of FAU resources for outside

activities; and (4) who violated a previous Settlement Agreement with FAU regarding disclaimers on their outside activity. The undisputed fact is that Plaintiff's repeated insubordinate conduct, evasiveness, and deception led to his termination from employment – not his speech. (Facts ¶44-45). Indeed, multiple members of the Union have testified that it is "Union 101" to comply with directives so as not to be insubordinate, and then fight if adverse action is taken that the faculty member did not agree with – "comply and grieve." (Facts ¶36, 26).

Drs. Alperin and Coltman, the decision makers, each have documented and testified, repeatedly and consistently, that Plaintiff was disciplined and terminated because they believed he engaged in repeated acts of insubordination. (Facts ¶¶38, 44-45). There is no evidence contrary to this testimony—direct or circumstantial. Not a single witness or document states Drs. Alperin and Coltman did not, in fact, believe that Plaintiff's acts were insubordinate and that those actions were the reason Drs. Alperin and Coltman decided to discipline Plaintiff and terminate his employment. Plaintiff relies on the suggestion that it is natural to think that because Plaintiff engaged in hateful, contentious speech, they probably retaliated against him. Plaintiff's unsupported speculation about ulterior, sinister motives of Drs. Alperin and Coltman does not prevent summary judgment. The Eleventh Circuit has stated,

> A plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute [his] business judgment for that of the employer. Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and [he] cannot succeed by simply quarreling with the wisdom of that reason.

Alvarez v. Royal Atlantic Developers, Inc., 610 F.3d 1253, 1265-66 (11th Cir. 2010) (quoting *Chapman v. AI Transp.*, 229 F.3d 1012, 1030 (11th Cir. 2000)). It is also not the Court's duty to question the business judgment of the employer. "Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the [law] does not interfere." *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). *See also Jolibois v. Fla. Internat'l Univ. Bd. of Trustees*, 654 Fed. App'x 461, 464 (11th Cir. 2016) ("[F]ailure to abide by the CBA requirements, or breach of some other internal policy, alone, does not constitute a sufficient showing of pretext [and] . . . we will not sit as a super-personnel department and reexamine an entity's business decision."). "The inquiry into pretext centers on the employer's beliefs, not the employee's beliefs and, to be blunt about

it, not on reality as it exists outside of the decision maker's head." *Alvarez*, 610 F.3d at 1266. "A reason is not pretext for [retaliation] unless it is shown both that the reason was false, and that [retaliation] was the real reason." *Brooks v. Cnty. Com'n of Jefferson Cnty., Ala.*, 446 F.3d 1160, 1163 (11th Cir. 2006) (citing *St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502, 515 (1993)). Plaintiff has utterly failed to show that Dr. Coltman's and Dr. Alperin's reasons were false, or that retaliation was the real reason. There is no question that the basis for Plaintiff's discipline and the termination of Plaintiff's employment were correct, and the decision to terminate Plaintiff's employment was non-retaliatory, unbiased, legitimate, and necessary to protect the University and its faculty. Having provided this Court no similarly situated comparators and no direct or secondary evidence to attack Dr. Coltman and Dr. Alperin's reasons for termination, summary judgment is required.

Plaintiff also cannot rely on an inference of causation based on temporal proximity. *See Stanley v. City of Dalton, Ga.*, 219 F.3d 1280, 1291 (11th Cir. 2000). In *Stanley*, the court determined that the plaintiff could not show an inference of causation from temporal proximity when there was an almost four-year gap between his protected speech and his termination. While Drs. Alperin and Coltman became aware of Plaintiff's blog beginning in January 2013, (Facts ¶23), Plaintiff's employment was not terminated until three years later, in January 2016. (Facts ¶51). In retaliation cases such as these, where there is a significant time gap between the protected expression and the adverse action, Plaintiff must offer additional evidence to demonstrate a causal connection, such as a pattern of antagonism or that the adverse action was the first opportunity to retaliate. *See Jones v. Suburban Propane, Inc.*, 577 Fed. App'x. 951, 955 (11th Cir. 2014). Plaintiff provides no such evidence.

The evidence shows that Plaintiff engaged in some activities that his Dean thought might be reportable outside activity under the Policy in late 2012 or January 2013. Dr. Coltman instructed him to report his activities and fill out the required forms in 2013. (Facts ¶24). Plaintiff knew that the Policy requires reporting for both uncompensated and compensated activities, but, when money is expected, the outside activity is certainly reportable prior to being undertaken. (Facts ¶11). The University must assess whether the outside activity will present a conflict of interest for the University as a state agency. (Facts ¶¶9-10). The expectation of compensation for an outside activity must certainly be assessed to prevent a potential conflict. Not only did Plaintiff solicit money on his blog for "research," but he also received money in response. (Facts

¶19). Plaintiff has offered no explanation for why he did not report his blogging activity but, when submitting his belated reports in 2015, reported Global Research, which he claims only mirrors articles from his blog. (Facts ¶43). At best, from Plaintiff's perspective, Plaintiff's conduct was in a grey area that suggested reporting his activities was the prudent course of action. His own Union representatives told him this as early as 2013. (Facts ¶26).

Despite clear instructions from his supervisor, his Dean, and his Union, and knowing that he was soliciting funds (which material fact he withheld from his Union representative, Dr. Broadfield, and FAU), Plaintiff refused to disclose his blogging and other activities, his solicitation of funds, and his use of University resources, perhaps fearing that his required disclosures would require peer review as part of his scholarly activities or lead to retaliation or for other notions, all of which must be left to conjecture. . (Facts ¶¶18-21, 24, 26, 27, 36-39, 41-45). Rather than comply with his supervisors' directives and his CBA obligations, he chose insubordination. Had he complied and suffered restraint or retaliation for his speech, a discussion of First Amendment retaliation may then be necessary. But as it stands, Plaintiff cannot point to any evidence that shows the decisions against him were motivated by his speech activities, rather than the undisputed misconduct with which FAU charged him. *See Carter v. City of Melbourne, Fla.*, 731 F.3d 1161, 1170 (11th Cir. 2013). As a result, his claims must fail.

ii. Drs. Alperin and Coltman would have made the same employment decision absent Plaintiff's speech.

Plaintiff's claim of retaliation fails because Drs. Alperin and Coltman reached the decision to terminate Plaintiff's FAU employment without regard to his speech. *See Stanley*, 219 F.3d at 1292 (citing *Harris v. Shelby Cty. Bd. of Educ.*, 99 F.3d 1078, 1086 (11th Cir. 1996) (granting summary judgment for defendant on a First Amendment retaliation claim because the defendant showed the same decision would have been made even absent the protected speech)). FAU had a legitimate reason to terminate Plaintiff: his repeated insubordination and refusal to comply with the CBA governing his employment. *See id.* at 1293 (citing *Holley v. Seminole Cty. Sch. Dist.*, 755 F.2d 1492, 1505 (11th Cir. 1985)). As a result of Drs. Coltman and Alperin's knowledge that Plaintiff repeatedly failed to comply with CBA requirements and supervisor instructions, and the policy applicable to all in-unit faculty members of FAU at the time of Plaintiff's termination, Drs. Coltman and Alperin were clear that Plaintiff was terminated for

gross insubordination regardless of any alleged protected speech. . (Facts ¶¶38, 44-45). *Id.* (citing *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kansas v. Umbehr*, 518 U.S. 668, 685 (1996)).

As stated above, it would have been prudent for Plaintiff to submit the forms for his outside activities. (Facts ¶26). Plaintiff's repeated refusals to meet his obligations under the CBA, despite several warnings from his supervisors and Union representatives, *see infra*, constituted insubordination, and were a legitimate reason for his termination for cause. (Facts ¶¶18-21, 24, 26, 27, 36-39, 41-45). In short, since Plaintiff would have been terminated absent any allegedly protected speech, FAU is entitled to summary judgment.

C. Plaintiff Has No Evidence Of A Conspiracy Among Defendants (Count II).

To state a successful claim for conspiracy under 42 U.S.C. § 1983, Plaintiff must establish that two or more parties reached an understanding to deny him his constitutional rights. *See Grider v. City of Auburn, Ala.,* 618 F.3d 1240, 1260 (11th Cir. 2010). Under the intra-corporate conspiracy doctrine, FAU's employees acting as agents of FAU are deemed incapable of conspiring among themselves or with FAU. *See Dickerson v. Alachua Cty. Comm'n,* 200 F.3d 761, 767 (11th Cir. 2000); *Grider*, 618 F.3d at 1261. Accordingly, to succeed on a conspiracy claim, Plaintiff must establish that one or more of the Union Defendants conspired with FAU to deny Plaintiff his constitutional rights and cause him damage.

i. Plaintiff Cannot Show that FAU and the Union Defendants Reached an Understanding to Deny Him His Constitutional Rights.

Plaintiff lacks evidence of an agreement between FAU and the Union Defendants to conspire. While Plaintiff need not provide a "smoking gun," Plaintiff must be able to provide at least some circumstantial evidence which shows that an agreement to conspire took place. *Lee v. Christian,* 221 F. Supp.3d 1370, 1378-79 (S.D. Ga. 2016) (citing *United States v. Houser,* 754 F.3d 1335, 1349 (11th Cir. 2014)). All Plaintiff offers in support of his allegations of conspiracy are (1) that on November 30, 2015, President Kelly participated in a "consultation" with the Union as prescribed by the CBA and (2) that on December 17, 2015, FAU's Associate General Counsel Larry Glick met with the Union Defendants during a routine annual collective bargaining meeting.[4] (Facts ¶59). However, mere presence at a meeting is insufficient to create a

[4] Plaintiff's Verified Second Amended Complaint alleges that a meeting occurred on December 17, 2015 between Senior Associate General Counsel Lawrence Glick and Dr. Zoeller. No such meeting occurred on that date. Although no agreement to conspire was reached, Senior Associate

genuine issue of material fact regarding an agreement to conspire. *Lee*, 221 F. Supp. 3d at 1379 (citing *Terry Props., Inc. v. Std. Oil Co. (Ind.)*, 799 F.2d 1523, 1539 (11th Cir. 1986)). Plaintiff needs evidence of something more, such as retaliatory comments made at the meeting, in order to show a conspiracy. *Id.*

No such retaliatory comments were made at either meeting, which were simply routine labor-management consultations and collective bargaining sessions between FAU administrators and the Union, as required by the CBA. On November 30, 2015, President Kelly, Senior Associate General Counsel Glick, and Provost Gary Perry met with members of the Union, including Mr. Moats and Dr. Zoeller, for the CBA prescribed "consultation." (Facts ¶60). These meetings are planned in advance, with an agenda, and last approximately one (1) hour. (Facts ¶60). The parties do not deviate from the meeting agenda and not a single person mentioned Plaintiff at the meeting. (Facts ¶60). Plaintiff simply has no factual evidence to support that the Union and FAU reached an agreement to conspire against him at the November 30, 2015 consultation.

The only other meeting alleged by Plaintiff concerned a routine meeting for collective bargaining on December 18, 2015. (Facts ¶59). Following a routine collective bargaining meeting on December 18, 2015, as the meeting attendants were either preparing to go on break or just following a break, Dr. Zoeller approached Senior Associate General Counsel Glick and asked to see him. (Facts ¶48). Dr. Zoeller told Senior Associate General Counsel Glick that the Union was in the process of getting an attorney for Plaintiff, and may need an extension of time to respond to the Notice of Proposed Discipline – Termination. (Facts ¶48). The conversation lasted only one or two minutes. (Facts ¶48). While Dr. Alperin may have come in at the tail end of the conversation to inform Senior Associate General Counsel Glick and Dr. Zoeller that the bargaining session was restarting, she did not say anything about Plaintiff. (Facts ¶48). This conversation was the only time Senior Associate General Counsel Glick spoke to Dr. Zoeller about Plaintiff. (Facts ¶48). The evidence does not support that an agreement to conspire to deny Plaintiff his constitutional rights took place in the one- or two-minute conversation between Dr. Zoeller and Senior Associate General Counsel Glick. If anything, Dr. Zoeller was advocating on behalf of Plaintiff's grievance rights, not conspiring against them. Significantly, Senior Associate

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General Counsel Glick and Dr. Zoeller met on December 18, 2015 during routine collective bargaining.

General Counsel Glick is not a named Defendant in this action, and Plaintiff has no support for his allegation that Senior Associate General Counsel Glick was "acting on behalf of" Drs. Alperin, Coltman, or Kelly during his brief conversation with Dr. Zoeller. In fact, the only evidence Plaintiff has to support that this meeting resulted in an alleged agreement is the testimony of Shane Eason, who testified repeatedly that while he told Plaintiff that Dr. Zoeller and Senior Associate General Counsel Glick conspired against him, he did not have any personal knowledge of an agreement and was only speculating and speaking in hypotheticals. (Facts ¶61). Where Plaintiff cannot show any evidence of an agreement to conspire, his conspiracy claims must fail.

ii. Plaintiff Cannot Show That He Was Denied An Underlying Constitutional Right.

As stated above, Plaintiff alleges that the understanding to form a conspiracy occurred on December 17, 2015. (Facts ¶59). This understanding was allegedly reached *after* Plaintiff received the Notice of Discipline on November 10, 2015, and *after* he received the Notice of Proposed Discipline - Termination on December 16, 2015. Plaintiff cannot, therefore, allege that the conspiracy was formed to discipline him, or to terminate his employment, because those actions had already occurred. Instead, Plaintiff is limited to alleging that the Defendants conspired to deny him constitutional rights in grieving his termination from employment. However, to the extent Plaintiff alleges the conspiracy was intended to "sabotage" his defense against termination, Plaintiff will fail because the evidence shows that he was afforded due process.

The Union Defendants encouraged Plaintiff to meet his obligations under the CBA and offered to represent him in a grievance if any action was taken against him for the outside activities he reported. (Facts ¶36). Plaintiff rejected their advice, acted insubordinately, and was disciplined accordingly. (Facts ¶37-39, 41-43). Despite Plaintiff's blatant insubordination, the Union Defendants hired Plaintiff independent legal counsel when he received his Notice of Proposed Discipline – Termination. (Facts ¶46). FAU even extended the deadline for Plaintiff to respond to the Notice of Proposed Discipline – Termination to provide him sufficient time to hire and coordinate with legal counsel. (Facts ¶¶47-49). As a former Union President himself, Plaintiff was well aware of the grievance process and his grievance rights under the collective bargaining agreement. (Facts ¶¶40, 53). Nevertheless, Plaintiff fired his Union provided counsel

in January 2016 and chose to hire his own counsel. (Facts ¶54-55). Despite sufficient time remaining to file a grievance with his new private attorney, it is undisputed that Plaintiff failed to do so. (Facts ¶55).

Given that the Union provided Plaintiff with independent legal counsel to pursue Plaintiff's grievance rights, and given that FAU extended the deadline for Plaintiff to respond to the Notice of Proposed Discipline – Termination with his counsel, Plaintiff cannot allege facts to support his claim for conspiracy. Plaintiff has suffered no damages from any alleged conspiracy between the Union and FAU. Because the Union provided Plaintiff with a Union-funded attorney to grieve Plaintiff's termination of employment from FAU within the required time for filing a grievance, Plaintiff was afforded his due process right to challenge the termination. Had Plaintiff not terminated the Union-funded attorney, he would not have suffered the attorneys' fees and costs he now claims as his damages for bringing this lawsuit. (Facts ¶54, 62-64). Indeed, Plaintiff has maintained that his communications with his Union-provided counsel are privileged. (Facts ¶64). Plaintiff cannot allege that the Union-provided counsel materially participated in and facilitated the conspiracy depriving him of his grievance, and simultaneously use attorney-client privilege as a shield to hide any evidence from that alleged participant to support his claim. *See Pitney-Bowes, Inc. v. Mestre,* 86 F.R.D. 444, 446 (S.D. Fla. 1980) (citing *Laughner v. U.S.*, 373 F.2d 326, 327 (5th Cir. 1967)); *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 185 (M.D. Fla. 1973).

Without evidence of the involvement of the Union-provided counsel following Plaintiff's receipt of the Notice of Proposed Discipline – Termination, Plaintiff cannot support his claim of conspiracy. In essence, the Union's appointment of a Union-funded attorney after Plaintiff's receipt of the Notice of Proposed Discipline – Termination shows there was no conspiracy between the Union and FAU to violate Plaintiff's rights as he was provided his own independent counsel to pursue his grievance and protect his legal rights. The only independent damage to Plaintiff that could possibly result from the alleged conspiracy was caused by Plaintiff himself, when he failed to grieve and terminated his Union-funded attorney and hired his own independent counsel at significant expense. By virtue of Plaintiff's position taken recently with this Court by which he defeated FAU's essential discovery requests based upon his alleged injection of these issues into the case, (Facts ¶64), Plaintiff is judicially estopped from pursuing a claim for conspiracy or damages involved with or related to his Union provided counsel (e.g.

deprivation of grievance, loss of free counsel, or other due process/legal rights) and any actions or communications involved therewith. Plaintiff successfully relied upon a position that asserted that those issues and claims were no longer part of his case. As a result, Plaintiff is barred from now taking a contrary position for his personal benefit which would allow unfair material prejudice to Defendants. As an example, Plaintiff claims $500,000 to $1,000,000 for attorneys' fees caused by his loss of the free Union attorney, which he claims to have fired as a result of his conspiracy, thus entitling him to seek his fees as damages in this action against FAU. (Facts ¶62-63). Since Plaintiff has failed to adduce evidence demonstrating a conspiracy between his former attorney and FAU, and, further, since Plaintiff has actively blocked FAU's efforts to obtain evidence regarding the same, such claims cannot survive summary judgment as a matter of law.

D. Plaintiff Has Failed to Mitigate His Damages.

FAU is entitled to summary judgment on its affirmative defense of mitigation of damages. "In a § 1983 case the plaintiff has a duty to mitigate damages." *Meyers v. City of Cincinnati,* 14 F.3d 1115, 1119 (6th Cir. 1994); *see also Nicholson v. Esteves,* 2010 WL 914931, at *7 (E.D. Penn. Mar. 12, 2010) ("Plaintiffs seeking compensation have a duty to mitigate damages"). Following his termination from employment, Plaintiff was required mitigate his damages by seeking employment "substantially equivalent" to the position for which he was terminated." *See E.E.O.C. v. Joe's Stone Crab, Inc.,* 15 F. Supp. 2d 1364, 1378 (S.D. Fla. 1998). A defendant meets its burden of showing failure to mitigate damages where the plaintiff does not make reasonable efforts to obtain comparable work, or that comparable work was available and Plaintiff did not seek it out. *Id.*

Plaintiff admitted that he did not search for any work, comparable or otherwise, until after his deposition on May 2, 2017, more than eighteen months after his termination from employment. (Facts ¶65). While Plaintiff's duty to mitigate does not require success, it does require "an honest, good faith effort." *Id.* (citation omitted); *Cf. McClure v. Indep. Sch. Dist. No. 16,* 228 F.3d 1205, 1214 (10th Cir. 2000) (holding that the plaintiff used reasonable diligence to find work where she sent out fifty to seventy applications seeking employment in every school district in a sixty to ninety mile radius). For a year and a half after his termination, Plaintiff assumed that a job search would have been pointless, allegedly because he believed his reputation has been so harmed he would not be hired anyway. (Facts ¶66). However, Plaintiff's

assumption is entirely unsupported by fact, because Plaintiff made no effort to search for work for nearly eighteen (18) months. Where Plaintiff admitted to failing to mitigate his damages, FAU Defendants are entitled to summary judgment on this defense.

WHEREFORE, Defendant, Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University, respectfully requests the entry of an Order granting full or partial summary judgment in its favor and the entry of final judgment in its favor against the Plaintiff, James Tracy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 21, 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 attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ G. Joseph Curley
G. Joseph Curley

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

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