UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

JAMES TRACY, Plaintiff, v. FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES, a/k/a FLORIDA ATLANTIC UNIVERSITY, et al. Defendants.	)	Case No. 9:16-cv-80655-RLR-JMH

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT FLORIDA ATLANTIC UNIVERSITY'S MOTION FOR FINAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7.1, Plaintiff, James Tracy ("Tracy") hereby files his Response in opposition to the Defendant, Florida Atlantic University's ("FAU") Motion for Final Summary Judgment ("Motion") [DE 245], and states:

INTRODUCTION

FAU's Motion should be denied on multiple grounds: First, the exhaustion of administrative remedies is not a prerequisite to a Section 1983 claim; the scope of the collective bargaining agreement does not extend to Tracy's other claims; even were there an administrative remedy, it would have been futile and insufficient for Tracy to invoke it; and FAU is estopped from asserting it. Second, the as-applied claim is ripe under the binding ripeness precedent of this Circuit, as stated in the en banc opinion in *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017), and other decisions. Third, for the reasons stated in Tracy's summary judgment motion, and as a recapitulated below, FAU fired Tracy for his First Amendment blogging activity and has failed to show that it would have done so otherwise. Fourth, there is

overwhelming evidence of a conspiracy amongst the Defendants, including direct testimony from an FAU professor. Fifth, FAU has failed to show Tracy's damages claim should be dismissed on mitigation grounds.

MEMORANDUM OF LAW

A. FAU Is Not Entitled To Summary Judgment For Any Alleged Failure to Exhaust Administrative Remedies.

Defendant FAU argues that Counts III through VI are barred because Tracy failed to exhaust administrative remedies prior to bringing those claims. The argument fails for the following reasons: (1) as a matter of well-settled law, exhaustion of administrative remedies is not a condition precedent for §1983 claims; (2) the CBA grievance process does not apply to the challenged counts; (3) even if appropriate, any grievance would have been futile; and (4) Defendant is estopped or has waived this argument since both the Union and the University's general counsel independently confirmed that Tracy did not need to pursue the grievance process.

1. Exhaustion of administrative remedies is not a pre-requisite for § 1983 claims (Counts III and IV).

It is settled law that the exhaustion of administrative remedies is not a pre-requisite to the initiation of §1983 actions. *See Patsy v. Bd. of Regents of Fla.,* 457 U.S. 496 (1982); *Konikov v. Orange County, Fla.*, 410 F. 3d 1317, 1322 (11th Cir. 2005) ("As for the distinct question of whether a plaintiff must exhaust administrative remedies before bringing a §1983 claim, *Patsy v. Fla. Bd. of Regents* has already answered in the negative."); *Sweet Sage Café, LLC v. Town of N. Redington Beach, Fla.*, 2017 WL 385756, at *6 (M.D. Fla. Jan. 27, 2017) ("The law is clear that parties raising federal claims under §1983 are generally exempt from any requirement that they first exhaust administrative remedies."). Either unaware of this law or deliberately attempting to skirt it, Defendant characterizes Tracy's claims as "contract-based claims," but Counts III and IV

are plainly brought under §1983 and are thus not subject to an administrative remedies defense.[1] Defendant's motion should be denied on this ground.

2. The CBA grievance process does not apply to Counts III-VI.

Defendant's arguments as to Counts III through VI of the Second Amended Complaint fail because those counts are not subject to the CBA's grievance procedures. Pursuant to the CBA, the grievance procedure should be utilized for "resolving disputes regarding rights or benefits which are **provided exclusively** by [the CBA]." Individual Defendants' Statement of Material Facts ("Ind. Def. SOF") Exh. A [243-1], pg 136 § 20.8(a)(2) (emphasis added).

The grievance process was not intended to address constitutional claims like those brought by Tracy here. Instead, the CBA grievance process is properly utilized to resolve disputes regarding the specific rights and benefits clearly enumerated in the CBA, such as reimbursement for professional activities (21.1), office space (21.2), safe conditions (21.3), a limitation on personal liability (21.4), travel advances (21.5), whistleblower protection (21.6), retirement credits (24.4), free university courses (24.7) and other specified rights and benefits. *See also* CBA at Section 24 ("Benefits"), Section 21 ("Other Employee Rights").[2]

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[1] In addition to the cases cited above, there are hundreds of decisions throughout the country applying the Supreme Court's *Patsy* decision and holding that exhaustion of administrative remedies is not necessary before bringing a §1983 action. *See, e.g., Daniels v. Area Plan Com'n of Allen Cty.*, 306 F. 3d 445, 454 (7th Cir. 2002) ("In general, *Patsy* does not "require exhaustion of judicial remedies as a precondition to bringing a federal civil rights suit."); *Jones v. New York State Division of Military & Naval Affairs*, 166 F. 3d 45, 54 (2d Cir. 1999) ("[A]bsent Congressional direction to the contrary, the exhaustion of administrative remedies is not a prerequisite to bringing an action pursuant to 42 U.S.C. § 1983."); *Daily Servs., LLC v. Valentino*, 756 F. 3d 893, 900 (6th Cir. 2014) (referencing the "well-established principles that a plaintiff may maintain a § 1983 action without exhausting state judicial remedies.").

[2] Certain benefits, including tenure, are by their CBA definitions *not* provided "exclusively" by the CBA and are thus not subject to the grievance procedure. *See* Ind. Def. SOF Exh. A [243-1], pg 124 §15.1(c)(1) (noting that tenure decisions may be based on factors outside the CBA, *i.e.*, "established criteria specified in writing by the Board and University"); *id.*, pg 125 §15.1(c)(4) (providing a mechanism for the Board and University to modify tenure criteria with notice to the union).

As discussed in greater detail below, Tracy received Union confirmation (after consultation with Defendants) that the grievance process was *not* the proper avenue of redress for his claims. And most significantly, in an internal e-mail to the University's Trustees, the University's General Counsel, David L. Kian, acknowledged that Tracy could go to court to challenge his termination, specifically stating that "as is the case with any employer, university employees **may always challenge in court adverse employment actions that affect statutorily or constitutionally protected rights."** Resp. to FAU's SOF ¶14 (Exh. CH) (emphasis added). Despite Defendant's current claims to the contrary, that contemporaneous analysis was correct. The challenged counts seek judicial redress for claims beyond the scope of the grievance process. Specifically, Counts III and IV challenge Defendant's Policy as being unconstitutional, both facially and as applied to Tracy. Count V seeks declaratory and injunctive relief regarding the Policy. And Count VI is a breach of contract claim for violation of Article 5 of the CBA acknowledging Tracy's freedom to "exercise constitutional rights without institutional censorship or discipline."

Tracy's constitutional rights are not "provided exclusively" by the CBA, are not required to go through the grievance process, and in any event, as constitutional issues, could not be adequately addressed through that process. *See Fla. Pub. Employees Council 79, AFSCME v. Dep't of Children & Families*, 745 So. 2d 487, 491 (Fla. 1st DCA 1999) (noting the Florida Supreme Court's concern that "it is pointless to require parties to endure the time and expense of full administrative proceedings which could have no effect on the dispositive constitutional issue.").

Defendant's cases are distinguishable. In *Hawks v. City of Pontiac*, the Sixth Circuit affirmed summary judgment after concluding that the plaintiff "has not demonstrated that

procedures used in the past would be futile in this case." 874 F. 2d 347, 351 (6th Cir. 1989). That is not the case here. In *Mason v. Continental Group*, the collective bargaining agreement at issue contained much more expansive language than the CBA in this case, defining grievances broadly and also requiring that "any dispute over whether the complaint is subject to these procedures shall be handled as a grievance." 763 F. 2d 1219, 1223 (11th Cir. 1985). The Eleventh Circuit in that case noted that "having agreed to such a broad arbitration clause, plaintiffs are bound to submit arguably extrinsic claims, such as fraud, to the grievance and arbitration process." *Id.* Similarly, the grievance language in *Blanchette v. School Bd. Of Leon County* was so broad as to encompass all "complaints which are grievable or litigable." 378 So. 2d 68, 69 (Fla. 1st DCA 1979). And in *Miami Ass'n v. Firefighters Local 587 v. City of Miami*, the Public Employees Relationship Commission (PERC) required "submission of all unresolved issues to an appointed mediator or special magistrate." 87 So. 3d 93, 96 (Fla. 3d DCA 2012). The clauses and requirements in those cases are a far cry from this CBA's narrow requirement that grievances be used to resolve disputes regarding rights and benefits provided exclusively by the CBA.

3. Even if appropriate, any grievance would have been futile and therefore unnecessary.

Even if the grievance procedure had been appropriate, Tracy was excused from any obligation to grieve because doing so would have been meaningless under the circumstances. The exhaustion of administrative remedies is not required where the administrative proceeding would have been futile. *Artz ex rel. Artz v. City of Tampa*, 102 So. 3d 747, 751 (Fla. 2d DCA 2012) (a party need not exhaust administrative remedies where doing so would be futile because "the law requires no futile act."); *see also N.B. by D.G. v. Alachua County School Bd.*, 84 F. 3d 1376, 1379 (11th Cir. 1996) (in context of IDEA claim, noting that

"the exhaustion of the administrative remedies is not required where resort to administrative remedies would be 1) futile or 2) inadequate.").

In this case, filing a grievance would have been a meaningless gesture by Tracy for several reasons. First, Tracy received guidance from the Union that his discipline was not grievable. Resp. to FAU SOF ¶36, 40, 69 (specifically, Exh. CS where Union advised Tracy that "it was our collective decision that your situation is not grievable."); Resp. to FAU SOF ¶73 (specifically, Exh. CO, where Tracy's Union-hired lawyer explaining "Nothing we could have said would have satisfied them."). Based on that guidance, Tracy justifiably elected not to file a grievance.

Second, as detailed later in this response, it is obvious that Tracy's alleged violation of the Policy was a pretext for his firing. The University's Assistant Dean admitted as much when allaying a faculty member's concern that she too could be disciplined for failing to comply with the Policy, assuring her that "**for the record, Tracy was not fired because he didn't report things.**" Tracy's SOF ¶45 (emphasis added).[3] Defendants clearly wanted to fire Tracy earlier based on his speech, but were stopped and had to wait until the alleged Policy violation gave them the opportunity to terminate Tracy. This was obviously a pretext, as Defendants enforced the Policy as to Tracy with a severity not seen before or since.[4] There are no facts showing that anyone else was disciplined for failing to report blogging. Tracy's SOF ¶42. After years of monitoring his speech and devising ways to fire Tracy without appearing to have violated his

[3] References to the Statement of Facts in Support of Tracy's Summary Judgment Motion are referred to herein as "Tracy's SOF" and are incorporated by reference into the Response to FAU's Statement of Facts at paragraph 67.

[4] The only other employee disciplined under the Policy was Professor Stephen Kajiura in July 2016, who allegedly violated the Policy along with local, state and federal law. Relative to Tracy's punishment, Kajiura received a slap on the wrist, as FAU imposed only a five-day suspension without pay that was later reversed by an arbitrator. Tracy's SOF ¶47.

constitutional rights, Tracy was terminated for the alleged minor violation of a Policy never rigorously applied to any other employee. Under these circumstances, pursuing a grievance process—with the same group of people that engineered his termination—would have been a waste of time.

B. There Is No Merit to Defendants Ripeness Challenge.

Defendant argues that Tracy's as-applied challenge (Count IV) is not ripe and the Court should therefore grant summary judgment as to that count. FAU's Mot. at 6. As a preliminary matter, the Court should consider this ripeness issue from the "most permissive" viewpoint, *i.e.*, in the light most favorable to Tracy, because this case involves a violation of the First Amendment. *See Beaulieu v. City of Alabaster*, 454 F. 3d 1219, 1227-28 (11th Cir. 2006) ("The injury requirement is most loosely applied when a plaintiff asserts a violation of First Amendment rights based on the enforcement of a law, regulation or policy.") (*citing Digital Props., Inc.*, 121 F. 3d 586, 590 (11th Cir. 1997)); *see also Cheffer v. Reno*, 55 F. 3d 1517, 1523 n. 12 (11th Cir. 1995) ("[T]he doctrine of ripeness is more loosely applied in the First Amendment context.").

On substance, Defendant argues that Count IV is not ripe because "the undisputed facts prove that the Policy was never used to restrict Plaintiff's speech." FAU's Mot. at 6. This is at best willful ignorance, as the record demonstrates that Defendants specifically alleged a violation of the Policy as justification for Tracy's termination, which as discussed below was a pretext. Tracy's SOF ¶33 (Exh. BG [DE 249-7, pg 2-3]) ("You have engaged in continued misconduct in violation of … CBA Article 19 [the Policy]. Therefore … this letter constitutes formal Notice of Proposed Discipline—Termination.").

In support of their argument, Defendant again cites only to the inapplicable *Digital Properties, Inc.* case, which was a *commercial speech* case involving an adult book store and

zoning ordinances. The *Digital* case is further distinguishable because in that case, the city did not actually apply the zoning ordinance at issue to Digital. *See* 121 F. 3d at 591 (finding no ripeness and noting that "in order for the city to have 'applied' the ordinance to Digital, a city official with sufficient authority must have rendered a decision regarding Digital's proposal."). In contrast, as outlined above, in this case Defendants explicitly applied the Policy in Tracy's termination letter. But even if FAU was correct, its argument would still be of no consequence because this Circuit tolerates pre-enforcement challenges that implicate the First Amendment. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1305 (11th Cir. 2017) (en banc) ("Where the 'alleged danger' of legislation is 'one of self-censorship,' harm 'can be realized even without an actual prosecution'"); *Hallandale Prof'l Fire Fighters Local 2238 v. City of Hallandale*, 922 F. 2d 756, 760 (11th Cir. 1991) (discussing *Solomon v. City of Gainesville*, 763 F. 2d 1212 (11th Cir. 1985), and *Int'l Soc. For Krishna Consciousness of Atlanta v. Eaves*, 601 F. 2d 809, 817 (5th Cir. 1979), and noting that both cases allowed "pre-enforcement challenges to local ordinances based on first amendment.").

C. The Summary Judgment Record Does Not Support FAU's Naked Assertion That It Fired Tracy For Legitimate Reasons Unrelated To His Speech.

FAU's main argument in favor of summary judgment as to Count I (§ 1983/First Amendment Retaliation)—that it terminated Tracy for legitimate, non-retaliatory reasons—is wholly unpersuasive at best. The undisputed record establishes the opposite is true. The following factors are relevant to a claim § 1983 for First Amendment retaliation:

> [First,] a plaintiff must show: "[1] that his speech or act was constitutionally protected; [2] that the defendant's retaliatory conduct adversely affected the protected speech; and [3] that there is a casual connection between the retaliation and the adverse effect on speech." *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). . . . Once established, the burden [then] shifts to the defendant to prove: [4] that it would have made the same adverse employment decision absent the speech. *See Morgan*, 6 F.3d at 754 (citing *Mt. Healthy City Sch. Dist. Bd. of*

> *Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977)); *see also Ricciuti v. Gyzenis*, 832 F. Supp. 2d 147, 153 (D. Conn. 2011) (the "*Mt. Healthy* defense").

Tracy SJ Mot. at 3-4 (footnote omitted) (the "*Bennett/Mt. Healthy* factors"). FAU does not challenge the first factor. FAU Mot. at 7 (conceding, for purposes of its motion, that the speech is protected); *see also* Tracy SJ Mot. at 4-5. Instead, it pins its case to the untenable position that the other factors remain unmet because his firing was unrelated to speech. FAU Mot. at 7.[5]

The University would like this Court to believe its transparent pretext: that Tracy, a tenured-track faculty member, was fired for a minor administrative issue, which had never before led to such a termination and likely never will again.[6] Unfortunately for FAU, this argument—which strains credulity to begin with—absolutely crumbles under the weight of the summary judgment record. As Tracy's summary judgment motion documents, Defendants have been hostile to Tracy's speech since 2013 (and were continually looking ways to terminate him for it). Tracy SJ Mot. at 6-9 (citing to Tracy's SOF [DE 248] ¶¶7-8, 13-14, 16-17, 19-20, 25-27, 29-35, 37-38, 44-45). Among other things:

- They met repeatedly to discuss the speech and what to do about it;
- They decided to forego e-mail conferral to protect their scheming from public records laws;

[5] In footnote 3, FAU alludes to a hypothetical basis for a *Pickering* analysis by speculating that, if it had fired Tracy for his speech (which it steadfastly denies), there are circumstances under which it could have done so lawfully. FAU Mot. at 7 n.3. Defendants, however, have waived or are estopped from making such an argument. *See* Tracy SJ Mot. at 3 n.3. Moreover, its statement of material facts says his termination was unrelated to his blogging and there is no paragraph stating that the speech was disruptive.

[6] Many other faculty members participate in blogging and yet have never been required to submit outside activity forms about it (and certainly never been fired for it). Resp. FAU's SOF ¶18. Failure to timely submit a form has never before resulted in termination. Earlier this year, in an apparent attempt to demonstrate that the school regularly disciplines professors for failing to turn in the form, FAU brought disciplinary action against another professor for failing to comply. Tracy's SOF ¶47. By contrast, he only received a 5-day suspension, a decision which was reversed by an arbitrator on the grounds that the Policy was unenforceable and vague. *Id*.

- Even after recognizing this was a matter of free speech and academic freedom, they scoured his blog posts for "winning metaphors" to get around the "1st Amendment" and compiled news articles critical of his speech;
- They raised issues with the sufficiency of the blog's clear and adequate disclaimer (which Tracy then revised) and contemplated whether the blog constituted a "conflict of interest" under Article 19 before settling upon a plan to go after Tracy using the vague "outside activity" form;
- Behind Tracy's back, some referred him a "nub job" because of his speech while others called for his termination saying: "tenure be damned" and "tenure is not immunity";
- In the wake of a December 10, 2015 Sun-Sentinel article about Tracy's speech—and calling for his firing—Defendants decided now was the time to fire Tracy and, that same day, they circulated the draft termination letter; and
- Then, on December 11, they e-mailed Tracy demanding his compliance with an administrative reporting requirement by December 14, and used the fact that he reported one day after that deadline as a basis of his termination.

Id. Both the timing of these events, and the communications that followed them, makes clear that Tracy's firing had everything to do with his speech. The fact that the Notice of Termination was in draft when they sent the December 11 e-mail shows that the decision to fire him had already been made and the purported reason for firing Tracy was pretextual. Assistant Dean Barclay Barrios admitted this directly, telling a faculty member concerned that she too would be fired for failing to submit a Conflict of Interest/Outside Activities statement: "**And, for the record, Tracy was not fired because he didn't report things**." Tracy's SOF ¶45 (emphasis added). On December 18, 2015, another FAU professor admitted the true reason for Tracy's firing to the press, stating: "His termination both holds Tracy accountable for his despicable behavior and reduces pressure on elected officials to end tenure." *Id*. ¶34. Defendant Coltman approved this message ("my hero") and forwarded it to a colleague. *Id*. ¶35.

On this record, there is no legitimate argument that the remaining *Bennett*/*Mt. Healthy* factors favor Defendants. Termination for engaging in speech plainly constitutes retaliatory conduct adversely affecting speech, satisfying the second factor. *Bennett*, 423 F.3d at 1250-51 ("A plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter a person of ordinary firmness from the exercise of First Amendment rights") (collecting considerable authority). The threat of getting fired for engaging ins protected speech is more than sufficient to satisfy this standard. The third and four factors are met, as described above, by: (1) the temporal proximity (mere days, even hours) between the adverse employment action and controversy over Tracy's speech; (2) the pretextual nature of Defendants' purported reason for firing Tracy; (3) the varying nature in the record for Defendants' asserted reason for the employment actions; and (4) circumstantial evidence of causation, including management hostility toward the speech and motivation to retaliate. *See Stanley v. City of Dalton*, 219 F.3d 1280, 1291 (11th Cir. 2000) (discussing above factors courts consider in this analysis, none of which is determinative but all of which are present here); *see also* Tracy SJ Mot. at 6-9. FAU attempts to avoid this result by ignoring the continuing nature of the University's issues with Tracy's speech, which began in early 2013 and escalated in the days leading up to his termination. *See* FAU Mot. at 11 (fashioning argument without reference speech, and related controversy, occurring contemporaneous with firing). The record simply does not support FAU's naked assertion it would have made the same adverse employment decision absent the speech. It shows the opposite is true—that Tracy was fired because he shared an unpopular opinion about a national tragedy and not "because he didn't report things." Tracy's SOF ¶45. This is reinforced by the round of e-mails exchange among school administrators congratulating themselves on finally getting rid of Tracy. Tracy's SOF ¶¶37-38. And, the undisputed fact is that

other faculty who have not reported blogging or other social media activity, have not been disciplined, let alone terminated.

D. Sufficient Evidence Supports A Conspiracy Among The Defendants.

FAU argues that Tracy's conspiracy claim (Count II) fails because there is no evidence that FAU and the Union entered into an agreement to deny Tracy his constitutional rights. In doing so, FAU pays short shrift to the evidence that supports Tracy's conspiracy claim, and instead focuses only on evidence that supports the school's position, which cannot be done at the summary judgment stage. As set forth below, the evidence indeed supports that FAU, through Kelly, Alperin, Coltman and non-party FAU counsel Larry Glick, conspired with the Union, through Zoeller and Moats, to discourage and prevent Tracy from grieving the underlying offense (insubordination) and, instead, to encourage him to accept that he was wrong and tender his resignation. At the very least, a genuine fact issue exists, precluding summary judgment on Count II.[7]

To state a claim for conspiracy under § 1983, Tracy must show that the parties "reached an understanding" to deny him his constitutional rights. *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1260 (11th Cir. 2010). An agreement to conspire may "be proved by circumstantial as well as direct evidence," and "may be inferred from the relationship of the parties, their overt acts and concert of action, and the totality of their conduct." *United States v. Schwartz*, 541 F.3d 1331, 1361 (11th Cir. 2008) (internal quotation marks omitted); *see also Bailey v. Bd. of County Com'rs of Alachua County, Fla.*, 956 F.2d 1112, 1122 (11th Cir. 1992) ("the linchpin for conspiracy is agreement, which presupposes communication") *Bendiburg v. Dempsey*, 909 F.2d

[7] Plaintiff did not move for summary judgment on Count II, precisely because the evidence on this issue is in dispute.

463, 469 (11th Cir. 1990) (no "smoking gun" required; nothing more than an "understanding" and "willful participation" between defendants is necessary).[8] The following supports Count II.

1. The evidence shows a conspiracy between FAU and the Union.

On November 10, 2015, the same day Coltman issued the Notice of Discipline to Tracy, Defendant and Union President Zoeller advised Tracy that he should complete the forms and then grieve. Resp. FAU's SOF ¶68 (Exh. CL). He gave the same advice on November 19. *Id*. (Exh. CK). On November 24, Tracy contacted Zoeller, requesting that the Union do just that and prepare a grievance. *Id*. (Exh. CR).

Things changed on November 30. On that date, there was a meeting at which the following persons were present: FAU Defendants Kelly and Alperin; Senior Assistant to the General Counsel for FAU Larry Glick; and Union Defendants Zoeller and Moats. FAU neither disputes that this meeting took place, nor that these persons were present. Officially, the purpose of the meeting was to discuss various matters, including the "status of tenure." Resp. FAU's SOF ¶69. Unofficially, however, an agreement on Tracy's future at FAU was reached as the following evidence shows.

FAU professor Shane Eason, also serving as Union secretary, confirmed at his deposition that FAU counsel Glick and Zoeller also talked about Tracy during the November 30 meeting "downtime," and that they had reached an agreement that would result in the termination of Plaintiff's employment. Resp. FAU's SOF ¶69 (DE 250-21 at pg 94:16-18). Eason—who

[8] It also bears noting that there is an exception to the intracorporate conspiracy doctrine, noted by FAU, for claims like Tracy's against an entity whose "conduct involved a series of acts over time going well beyond simple ratification of a managerial decision by directors." *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir. 1984) (three-year conspiracy); *see, e.g.*, *Byrd v. Salvation Army*, No. 87-375-civ-orl-19, 1988 WL 63346, at *2 (M.D. Fla. May 20, 1988) (applying exception to deny summary judgment where complaint alleged "a series of discriminatory actions, taken because of personal bias and not out of concern for the employer, eventually resulting in Plaintiff's termination").

feared that FAU would retaliate against him for giving this testimony—specifically acknowledged, albeit reluctantly, that FAU and the Union had agreed "to get rid of Professor Tracy." *Id*. (DE 250-21 at pg 87:6-15; 91:23-92:1).[9] It is entirely reasonable for a jury to conclude, based on Eason's direct testimony, as well as the change in the advice Zoeller was offering Tracy immediately prior to the December 11 deadline, that FAU and the Union had agreed to tell Tracy his cause could not be grieved in the hope that he would not file a grievance within the allotted time. And the plan worked.

The next day after this meeting, on December 1, Zoeller informed Tracy that he and Moats had come to the conclusion that Tracy's "situation" was "not grievable." Resp. FAU's SOF ¶69 (Exh. CS). They reached this conclusion despite Zoeller's earlier advice and later concession that "everything is grievable." *Id*. Relying on this advice, Tracy consequently did not grieve before the grievance deadline on December 11. According to Zoeller and Moats, failing to grieve the November 10 Notice of Discipline had the effect of waiving Tracy's ability to challenge the underlying insubordination, and going forward all Tracy could challenge would be FAU's decision with respect to the punishment itself. *Id*. ¶70.

After the December 11 deadline passed without a grievance, Zoeller returned to telling Tracy he should start the grievance process "ASAP." *Id.* ¶71 (Exh. CU). Moats, however, informed his Union colleagues, which had just hired Tracy a lawyer: "don't let [Tracy] respond," apparently referring to the December 16 Notice of Discipline—Termination letter. *Id*. (Exh. CT).

[9] Discussing the matter was so traumatic for Eason, in fact, that he was brought to tears in the middle of his deposition, Resp. FAU's SOF ¶69 (DE 250-21 at pg 72), as an available video recording of the deposition confirms.

To his face, Moats informed Tracy that he talked to FAU and secured an extension to file a response, but that he did "not expect" it would make "any difference." *Id*. ¶72 (Exh. CM). Instead, Moats encouraged Tracy "to seriously consider an agreement to resign to avoid the termination." *Id*. According to Moats, it was now his understanding that the discipline had nothing to do with Tracy's blog. *Id*. Notably, Moats had previously informed Tracy that he interpreted the discipline as a First Amendment issue, which was consistent with the Union's position in 2013 when it successfully defended Tracy. *Id*. ¶69 (Exh. CP). Moats nevertheless informed Tracy that the Union would file a grievance before the extended deadline, which it never did. *Id*. ¶72. Tracy's Union-hired lawyer would later explain that no grievance was filed because "Nothing we could have said would have satisfied them, so there was no reason to put anything on the record to use against us later." *Id*. ¶73 (Exh. CO). Having lost confidence the Union-hired lawyer was acting in his best interests, Tracy subsequently ended that relationship. *Id*.

The forgoing evidence is more than sufficient to support a finding that FAU and the Union conspired to terminate Tracy's employment. FAU seemingly concedes that Eason testified there was a conspiracy afoot, and resorts to challenging whether he had personal knowledge of the conspiracy and whether his testimony is sufficient. That argument is without merit, however, as his knowledge is based on the confession of one of the conspirators. Taken together, the totality of the evidence is more than enough to support that there was an agreement between FAU and the Union to guarantee Tracy's termination in retaliation for his speech. *Cf Brantley v. Wysocki*, 145 F. Supp. 3d 407, 412 (E.D. Pa. 2015) (denying employment supervisor's summary judgment motion where plaintiff adduced evidence from which a jury could find her supervisor "willfully participated in joint activity" with police officer to help

procure prosecution to retaliate against plaintiff for exercising her First Amendment rights), *aff'd*, 662 F. App'x 138 (3d Cir. 2016).

FAU's next argument that there could not have been a conspiracy because it gave Tracy the opportunity to grieve on several occasions also fails to persuade in light of the forgoing. Remarkably, FAU completely ignores Zoeller's e-mail encouraging Tracy not to grieve before the December 11 deadline, as well as the evidence leading up to the January deadline that reflects Tracy was under the impression the Union would grieve and then was told it was not the best course of action. FAU's related argument that the Union-hired lawyer's involvement somehow negates that there could have been a conspiracy likewise fails. That counsel was retained by the Union after the November 30 meeting and December 11 deadline had passed, Resp. FAU's SOF ¶69-73, which was after the opportunity to challenge the insubordination itself—*i.e.*, after damage to Tracy had already been done.

2. Tracy should not be estopped from pursuing Count II.

Finally, the Court should reject FAU's estoppel argument, which posits that Tracy cannot pursue a conspiracy claim when he, until recently, maintained the attorney-client privilege with respect to his communications with the Union-hired lawyer (other than those e-mails attached to the pleadings), as he had every right to do. FAU cites *Pitney-Bowes, Inc. v. Mestre* 86 F.R.D. 444 (S.D. Fla. 1980), and *Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 185 (M.D. Fla.), in support of their argument that a plaintiff is estopped from pursuing a conspiracy claim against a defendant alleging it conspired with their former attorney by asserting a continued attorney-client privilege. Neither case supports Defendant's argument.

Pitney involved a plaintiff that placed the issue of his attorney's interpretation of a contract at issue but nevertheless tried to hide the communications. The district court held that where the intent of an attorney is raised by a plaintiff the attorney-client *privilege* is waived. It

did not suggest that a plaintiff waives the right to bring an argument against a defendant by asserting the privilege. Likewise, *Int'l Tel*. involved a motion to gain access to attorney-client communications on the basis that the underlying suit was a sham and not whether plaintiffs were estopped from bringing a claim against defendant on the basis of maintaining their attorney-client privilege.

It should be noted that here Tracy has produced all of communications with the Union-hired lawyer. Resp. FAU's SOF ¶64. But regardless of whether Tracy has or had claimed an attorney-client privilege with respect to those communications, the Union-hired lawyer's involvement does not undermine the evidence demonstrating that FAU conspired with the Union to sabotage Tracy's chances at challenging the underlying finding of insubordination. *See supra* at 13-15.[10]

E. The Record Does Not Support Summary Judgment For Failure To Mitigate Damages.

FAU has the burden of establishing failure to mitigate damages. *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994). "To satisfy this burden, the defendant must establish that substantially equivalent positions were available and that the plaintiff failed to exercise reasonable care and diligence in seeking those positions." *Id*. FAU has not identified a single substantially equivalent position, or shown that Tracy failed to exercise reasonable care.[11]

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[10] Moreover, the legal fee "claim" that FAU mischaracterizes as damages related to Tracy's firing of his Union counsel is, in fact, Tracy's rough estimate of the **statutory fees** to which Plaintiff may be entitled under § 1988 if successful on liability and not, in fact, "damages" caused by his wrongful termination. *See Hensley v. Eckerhart*, 461 U.S. 424, 432 (1983).

[11] Nor do FAU's cases support its position. In three of its four cases, the court found that the plaintiff exercised reasonable diligence in mitigating damages. *See Meyers*, 14 F.3d at 1119; *E.E.O.C. v. Joe's Stone Crab, Inc.*, 15 F. Supp. 2d 1364, 1379 (S.D. Fla. 1998); *McClure v. Indep. Sch. Dist. No. 16*, 228 F.3d 1205, 1214 (10th Cir. 2000). And *Nicholson v. Esteves* is inapposite. There the court found that the plaintiff in an excessive force case did not make reasonable efforts to mitigate because he waited two years after being diagnosed with carpel

A professor is not required to mitigate by seeking employment "outside of the educational field," or to go to a different locality. *See, e.g., Howard University v. Roberts-Williams*, 37 A.3d 896, 911 (D.C. 2012) (holding professor made reasonable effort to mitigate even though she "had not looked for employment other than as a professor anywhere outside of the Washington Metropolitan area"); *Selland v. Fargo Pub. Sch. Dist. No. 1*, 302 N.W.2d 391 (N.D. 1981) (explaining mitigation "requires the school district to prove that the teacher could have obtained similar employment in the vicinity by the exercise of reasonable diligence"); *Zeller v. Prior Lake Pub. Schs.*, 108 N.W.2d 602, 606 (Minn. 1961) (same); *Higgins v. Lawrence*, 309 N.W.2d 194 (Mich. Ct. App.) (noting employee only had to accept jobs of "like nature," meaning similar in "the type of work, the hours of labor, the wages, tenure, working conditions, etc.").

Tracy has made diligent efforts to retain employment of a "like nature." To date, he has submitted twenty job applications, even though there are few universities in south Florida with tenured professor positions available. Resp. Individual's SOF ¶55; Resp. FAU's SOF ¶66. "[N]o specific number of contacts is necessary to establish reasonable diligence." *Bd. of Educ. of Berwyn Sch. Dist. No. 100 v. Metskas*, 436 N.E.2d 587, 591 (Ill. App. Ct. 1982) (contacting eight other teachers to inquire about job openings was sufficient). Though FAU claims waiting a year and a half to start applying was unreasonable, Tracy was terminated just before the start of the 2016 spring semester, so at the earliest, he could not have started a new job until the following school year. *See State ex rel. McGhee v. St. John*, 837 S.W.2d 596, 602 (Tenn. 1992) (finding it would have been "virtually impossible" for teacher to acquire another teaching position for the

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tunnel syndrome to get a surgery he knew was necessary to reduce his symptoms. 2010 WL 914931, at *7 (E.D. Penn. 2010). Tracy did not consciously ignore a measure he could take to reduce his damages; instead he has diligently searched and applied for teaching positions.

1989-90 school year, "given the fact that the academic year was well under way by the time she was constructively discharged"). In addition, obtaining a tenured position at a university is not the same as getting a new job as a high school teacher, or even a police officer.

Even if Tracy had applied to other positions sooner, his search would have been futile. In *Fogg v. Gonzales*, the D.C. Circuit affirmed that a former U.S. Marshal's damages should not have been reduced for failure to mitigate because he was fired for insubordination, and therefore "any efforts to find a comparable law enforcement position would have been futile." 492 F.3d 447, 455 (D.C. Cir. 2007). Here too it was widely publicized that Tracy was fired for "insubordination," diminishing his chances of being hired by any university. *Frye v. Memphis State University* is precisely on point. There, the court held that a professor did not fail to exercise reasonable diligence, even though he did not seek employment after being terminated, because "his professional reputation was sufficiently damaged that applying with other colleges or universities would simply amount to a futile act." 806 S.W.2d 170, 173 (Tenn. 1991). Specifically, the court explained:

> What sets this case apart is that the employee was a tenured professor, a highly protected employment status under the law, whose specialty was such that his professional reputation was perhaps his most valued asset. The press release essentially accusing Plaintiff of theft and fraud, the extensive media coverage, and the investigation of the ethics committee of his licensing association, would have obviously made it exceedingly difficult, if not impossible, for the Plaintiff to locate a job commensurate with his training and within his professional capacity.

Id. at 173-74.

The same is true here: Tracy was a tenured professor, whose professional reputation was his most valued asset. The press—including articles in the *New York Times* and *Huffington*

Post[12]—reported that he was "repeatedly 'insubordinate'" and failed to follow university policies. Thus, as in *Frye* and *Fogg*, any efforts to obtain alternative employment would have been futile. Although FAU bears the burden on mitigation, it did not present any evidence to the contrary. Accordingly, its mitigation argument fails. *See Fogg*, 492 F.3d at 455.

CONCLUSION

For the foregoing reasons, FAU's motion for summary judgment should be denied.

Dated: August 28, 2017

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[12] *See* Resp. FAU's SOF ¶74 (citing www.nytimes.com/2016/01/07/us/florida-professor-who-cast-doubt-on-mass-shootings-is-fired.html & www.huffingtonpost.com/entry/james-tracy-fired_us_568c533de4b0a2b6fb6db915 (both last viewed on August 28, 2017)).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF to be served this day per the attached Service List.

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