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 REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, James Tracy, replies as follows to the Response in Opposition [DE 269] to Plaintiff's Motion for Partial Summary Judgment [DE 247], filed by Defendants Florida Atlantic University Board of Trustees a/k/a Florida Atlantic University ("FAU"), Dr. John Kelly, Dr. Diane Alperin, and Dr. Heather Coltman.

I. TRACY IS ENTITLED TO SUMMARY JUDGMENT ON LIABILITY.

A. Tracy Is Entitled To Summary Judgment On His First Amendment Retaliation Claim (Counts I, V).

In their response, Defendants do not dispute that Tracy's blogging is constitutionally protected. While FAU half-heartedly questions this in footnote 3 of its Summary Judgment ("SJ") Motion [DE 245 at 7], Defendants do not respond to Tracy's affirmative argument that his speech is protected. It is, for all the reasons set forth in Plaintiff's SJ Motion. [DE 247 at 5-6]. Defendants likewise cannot genuinely dispute that their retaliatory conduct adversely affected the protected speech, given that Tracy needs only show an "adverse employment action," and he was unquestionably fired and lost tenure. [DE 247 at 5]. Accordingly, the first and second prongs of Tracy's First Amendment retaliation claim have been met. [DE 247 at 3].

Rather, Defendants focus their response on the third and fourth prongs of the *Bennett*/*Mt. Healthy* test: (3) the causal connection between their decision to fire Tracy and his speech, and (4) whether they would have made the same decision absent the speech. Those elements have been conclusively established in Tracy's favor.

1. Tracy's speech was a substantial motivating factor in Defendants' decision to fire him.

As set forth in Tracy's SJ Motion [DE 247 at 6], determining whether the employment action was substantially motivated by the speech requires an assessment of several factors, including: (1) whether the defendant's asserted reasons are pretextual; (2) whether the employment action closely followed the protected activity ("temporal proximity"); (3) whether the defendant's asserted reason for its action has varied; and (4) circumstantial evidence of causation such as who initiated the employment action, evidence of management hostility to the speech, or an employer motive to retaliate. *Stanley v. City of Dalton*, 219 F.3d 1280, 1291 n.20 (11th Cir. 2000). Tracy's SJ Motion explains how each factor is present here. [DE 247 at 6-10].

Defendants focus their SJ Response on pretext and temporal proximity. [DE 269 at 2-12]. They wholly ignore the fact that their asserted reason for firing Tracy has, indeed, varied. *See, e.g.*, [DE 250-45 at 2 ("for the record, Tracy was not fired because he didn't report things")].[1] Likewise, Defendants ignore the strong circumstantial evidence that supports a causal connection between the firing and the speech, including the fact that the same administrators that fired Tracy in 2015: (1) were admittedly aware of the blog and speech in 2013; (2) disciplined Tracy for his speech in 2013 for much of the same reasons they disciplined him in 2015; (3) disagreed with, and even hated, his speech and mocked him following his termination; and (4) had motive to retaliate against him for his speech given the backlash and public-relations nightmare caused by the speech, and as demonstrated by their celebrations after his termination. Tracy's SOF DE 248 ¶¶ 13-38. Those factors, which the Court must also consider, all show that the speech was a substantial motivating factor of Tracy's firing.

[1] Defendants' objection in footnote 2 of its response to Tracy's SOF [DE 270 at 1] to this email and other source material under SD Local Rule 56.1(a)(2), as "non-record evidence" that cannot be considered at the summary-judgment stage, should be rejected. Virtually all of the objected-to materials, including the email at DE 250-45, were produced **by Defendants** during discovery after the depositions in this case were taken. Some may qualify as admissions. As for the FAU Faculty Senate Hearing Transcript excerpt at DE 250-47, that is a transcription of an audio clip that was played at several depositions in this case. Tracy had the audio clip officially transcribed for the Court's convenience.

Thus, not only is it entirely improper and unfair for Defendants to object to these materials now, Defendants can hardly claim these documents are not authentic or should not be used. The Court should see this objection for what it is: an obvious attempt to defeat summary judgment on a procedural technicality. Notably, Defendants cite no case law in support of their application of the local rule. Nevertheless, in an abundance of caution, Plaintiff has concomitantly filed affidavits authenticating the records at issue.

(a) The "official" reason for Tracy's firing was pretextual.

In response to Tracy's argument and the overwhelming evidence demonstrating that Defendants' reason for firing Tracy was pretextual [DE 247 at 6-9], Defendants respond by arguing he was fired for "insubordination," and that there is no evidence to contradict that was the "official" reason for his firing. [DE 269 at 7, 12]. This type of circular reasoning does not create a material fact issue with respect to causation, much less prove anything other than the fact Tracy was truly fired in retaliation for his speech. Tracy was only "insubordinate" because, according to Defendants, he failed to comply with his supervisors' directives to completely and timely fill out an ambiguous "outside activities" form—a form that required him, they claim, to identify his blog, *i.e.*, the platform **for his speech**. [DE 269 at 3]. Thus, even accepting that such "insubordination" is the "official" reason for the firing, as Plaintiff did in his motion, it is impossible to separate that "official" reason for Tracy's firing from his speech.

Moreover, even after Tracy reluctantly submitted forms reporting that he spent three-to-six hours per week on blogging activities and that he received no income for it—thus revealing he had no "conflict" of interest in pursuing his personal blogging activities—FAU still fired him. According to Alperin's December 16, 2015 letter, this was so because he failed to disclose the existence of his "personal blog," obviously referring to the Memory Hole blog that everyone knew about, and because he had used his work computer even though there was an incidental-use exception permitting this. *See* Tracy's SOF [DE 248] ¶¶33, 43 (citing [DE 249-7 at 2]). Simply put, Tracy was only "insubordinate" because he failed to fully disclose his speech, if not curtail it. That "official" reason for his firing is patently pretextual in itself.

Other evidence confirms the decision was pretextual. [*See* DE 247 at 6-9]. First and foremost, Tracy was the first FAU professor disciplined for not disclosing his blogging activities, and the only one to lose his (tenured) job for failing to timely and completely disclose the same, even though the university is aware of others that have not disclosed their blogging activity. Tracy's SOF [DE 248] ¶¶42-43, 46. There is also the email from the FAU administrator in Coltman's college bluntly confessing mere days after the firing that "Tracy was not fired because he didn't report things." [DE 250-45 at 2]. Proof of pretext is seldom this compelling.

If Defendants want to focus only on the "decision makers," they need look no further than Tracy's 2015 termination letter that Alperin and Coltman had already started drafting well before the December 14 deadline for Tracy to submit the forms, demonstrating that their minds

had already been made up and that "insubordination" was but a ruse. Tracy's SOF [DE 248] ¶30. Coltman also approved the statement of another FAU professor addressed to the *New York Times* and *Sun Sentinel* a few days after the termination notice was sent to Tracy, explaining that the reason he was fired was to hold him "accountable for his despicable behavior"—obviously referring to his speech, not his failure to timely fill out a form. *Id*. at ¶¶34-35. There are also numerous emails reflecting that Coltman, Alperin, and Kelly were all keenly aware of the content of Tracy's speech and complaints caused by it—if not monitoring the blog directly. *Id*. at ¶¶19, 27-29, 37-38. Defendants' comment that it is not unusual for FAU to monitor news articles that mention the university does little to explain why Defendants were compiling news articles that mention Tracy only, or why those so-called "reports" were widely circulated and sent to the university president. *Id*. at ¶¶27-28.

All of this is in addition to Coltman's 2013 handwritten notes, showing where the pretext began. Defendants' bold statement that there is "not a single shred of evidence" supporting pretext [*see* DE 269 at 12] improperly ignores the forgoing evidence and is simply not true.

It remains only to note that Plaintiff has never questioned the benefits of, or purposes served by, a clear content-neutral conflict of interest policy. But to be sure, FAU's Policy is not that. As discussed in Tracy's SJ Motion [DE 247 at 10-16] and again below, the Policy can be and was used to impermissibly restrict speech and is content-based and unconstitutionally vague. Defendants reliance on *Keeffe v. Library of Congress*, 777 F.2d 1573 (D.C. Cir. 1985), is similarly misplaced. [DE 269 at 16]. *Keeffe* is a political association case that does not address a government entity's conflict of interest policy with regard to freedom of speech. Defendants also cannot be heard to argue that their interest in preventing conflicts of interest and in the safety of students and faculty outweighs Tracy's speech. [DE 269 at 5-6, 7-8]. This *Pickering*-balancing argument is inapplicable here, as discussed in Tracy's SJ Motion [DE 247 at 3 n.3], because the speech at issue has nothing to do with the university, and Defendants have not defended their actions on the basis that Tracy was fired for his speech.

(b) There is a close temporal proximity between the speech and firing.

Defendants' "temporal proximity" argument is weak. It hinges on facts simply not present in this case, namely: (1) a significant gap of time between the protected conduct and the adverse employment action; or (2) the adverse action taking place before the protected acts. *Stanley v. City of Dalton, Ga.*, 219 F.3d 1280 (11th Cir. 2000), is Defendants' example of the

former. *Cotton v. Cracker Barrel Old Country Store Inc.*, 434 F.3d 1227 (11th Cir. 2006), and *Smith v. Quintiles Transnational Corp.*, 509 F. Supp. 2d 1193 (M.D. Fla. 2007) are their examples of the latter.

In *Stanley*, there was a single act of protected conduct—the plaintiff reporting to state investigators suspicions that a fellow police officer was involved in a theft of money from the evidence room—and it occurred four years before the plaintiff's termination. 219 F.3d at 1282. Even then, the court found there was sufficient evidence of causation despite the lack of temporal proximity. *Id*. at 1291. The case at bar is nothing like *Stanley*. It is undisputed that Tracy was regularly engaged in protected conduct at all relevant times; and Defendants were not only aware of it, but they received ongoing reports on his speech and the media reaction to it as noted above.

This case is also nothing like *Cotton* and *Smith*, both of which involved evidence of a decision to engage in adverse employment action that predated all protected activity. In *Cotton*, the plaintiff was informed that her hours would be reduced before she was allegedly harassed or retaliated against. 434 F.3d at 1233. Similarly, in *Smith*, the employer's decision to discipline the plaintiff occurred before she made a claim of inappropriate activity. Here, Defendants were aware of—and ever increasingly fixated on—Tracy's conduct for years prior the decision to terminate. Tracy's SOF [DE 248] ¶¶13-15. In fact, Tracy's case is the antithesis of Defendants' cases. Here, the protected conduct was ongoing at the time Defendants terminating his employment, so there is neither the causation issues present in *Cotton* and *Smith*, nor the long interruption between protected conduct and adverse action that was key in *Stanley*.

Defendants' assertion that Tracy was only on FAU's radar for discipline after he spoke up about the check-box feature in 2015 is pure fabrication. If this was only ever about *checking a box* as Defendants claim, then why did they begin meeting in 2013 with the express "objective" of "explor[ing] potential misconduct [for the] blog," including whether Tracy's blog constituted a conflict of interest? *Id*. at ¶¶7-8 (citing notes at [DE 250-10] indicating belief that Tracy's continued tenure would be "reckless + irresponsible" and a "black eye on all faculty"). And why did Tracy's 2015 request for clarification concerning the check-box quickly find its way up the administrative chain to legal and then the Vice Provost's office? [DE 250-52 at 3]. The minor administrative issues merely provided the camouflage Defendants felt that they needed to do what they plainly desired: to get rid of Tracy in retaliation for his exercise of academic freedom and controversial speech. The record dispels any notion that Defendants would have treated

Tracy the way they did absent their intense dislike of Tracy's speech and their desire to separate themselves from it. Among other things, they were fixated on his speech and media reaction to it, monitoring his blog and compiling news articles in their so-called "JT media reports." *Id.* at ¶27. But, perhaps the best evidence of their true intent is the various writings and quotes from the administration in the wake of his termination (mocking him and joking about his termination; calling Tracy a "Nut job"; making fun of the fact Tracy was "packing up his office"; and later clarifying "for the record, Tracy was not fired because he didn't report things"). *Id.* at ¶¶37, 45.[2]

(c) Tracy has identified a comparator to support pretext.

Defendants' insistence on comparator evidence is puzzling. They seem to suggest: (1) that Tracy's evidence of retaliation and retaliatory animus is based solely on being treated differently than other employees; or (2) that comparator evidence is the only way a plaintiff can establish a First Amendment retaliation claim. They are wrong on both accounts. As Defendants' own authority makes clear, this sort of circumstantial analysis is necessary where "no other evidence of discrimination is present." *Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) (citation omitted). While it is certainly telling that FAU has never before terminated an employee for the sort of administrative reporting issues they claim to be the basis of Tracy's firing, and even later communicated that was not their true reason, there is significant additional evidence of Defendants' distress over Tracy's speech and their desire to get rid of him because of it, as discussed in Tracy's SJ Motion and elsewhere herein. If Defendants' assertion about the import of identical comparators was true, that would mean that government employers could engage in arbitrary retaliatory conduct so long as they did so in original ways. That is clearly not the law.

2. Defendants would not have fired Tracy absent the speech.

Tracy regularly received positive performance reviews from his superiors while employed at FAU and ultimately achieved the status of tenure, a crowning achievement for any

[2] Defendants' reliance on *Henderson* and *Hankins* is similarly unavailing. In these cases, there was a break between the protected conduct and the alleged retaliation coupled with a break in the causal connection caused by some independent, intervening act that, standing alone, was indisputably cause for the adverse action. *Henderson v. FedEx Express*, 442 F. App'x 502, 506 (11th Cir. 2011) (no causation in light of intervening falsification of time card and no evidence of employer knowledge of protected activity); *Hankins v. AirTran Airways, Inc.*, 237 F. App'x 513, 520 (11th Cir. 2007) ("flagrant act of misconduct" in violation of clearly defined standards "broke the causal chain"). Similar circumstances are not presented here. There is no break in the causal link between Tracy's speech and his termination, and no basis for concluding that Tracy would have been fired for the proffered administrative issues in the absence of his speech.

professor in academe. Tracy's SOF [DE 248] ¶3. It was not until he started blogging about Sandy Hook in late 2012, however, that he was subjected to discipline and adverse scrutiny from the administration. The record is clear FAU would not have fired Tracy absent the speech.

B. The Policy is Content Based and Fails Strict Scrutiny (Counts III, IV, V).

The Policy is content based for the reasons set forth in Tracy's SJ Motion. [DE 247 at 10-12]. By Defendants' own admission, Tracy was required to report "the activity, including . . . the **nature and extent** of the activity." [DE 269 at 15]; [DE 270 ¶9]. In turn, the only way to determine whether the "nature and extent" of blogging activity constitutes a "professional activity" is by assessing whether the blog is related to the speaker's employment, whether it took considerable time to research and write, and whether it draws upon the speaker's area of study. None of this can be determined without reviewing the content of the speech. Defendant Alperin's candid assessment of another professor's blog at her deposition—which Defendants ignore—confirms this. [*See* DE 247 at 11]. Consider also the paucity of information solicited on the conflict of interest form. [DE 250-35]; Exh. 1. It is impossible to determine from the form alone whether a "proposed" activity is a conflict. The speech must be reviewed and content assessed.

Finally, that the Policy is content based is demonstrated by the fact that FAU has only required Tracy to submit a form for his blog, despite the fact that FAU knows others blog and it has not required them to fill out a form for their blogging activity, or disciplined them. Tracy's SOF [DE 248] ¶¶42, 46. Surely, Tracy would not have been required to fill out a form had he been praising the first responders at Sandy Hook.

Defendants alternatively argue that the Policy is not subject to constitutional scrutiny and should instead properly be interpreted pursuant to the CBA's grievance process. This argument fails for the reasons already stated in Plaintiff's Response to FAU's SJ Motion, [DE 275 at 2-7], namely that the grievance process does not apply to Plaintiff's constitutional challenges, and even if it did, the process would be futile and therefore unnecessary as a matter of law. Plaintiff incorporates those arguments here, but also notes in brief that FAU's current litigation position on this matter is contradicted by contemporaneous statements from its own general counsel, who specifically acknowledged on the day Plaintiff received his termination notice that Plaintiff had the right "to challenge in court adverse employment actions that affect . . . constitutionally protected rights." Resp. to Ind. Def's SOF [DE 272-1]. That analysis was correct at the time and remains correct now.

C. The Policy is Vague on its Face (Counts III, V).

In all of the language in the Policy, blogging is never mentioned or defined. Defendants ignore this, instead arguing that "the Policy is not void for vagueness simply because it does not define every word." [DE 269 at 14]. This is of course true, but misrepresents Tracy's vagueness challenge. Tracy's argument is not based on Defendants' failure "to define every word," but rather on the ambiguity created by the Policy's failure to define any of its material terms such as "professional practice," "public interests," "uncompensated activity," and "full performance."

As explained in Tracy's SJ Motion [DE 247 at 14-17], this case is governed not by the Seventh Circuit and D.C. Circuit cases cited by Defendants, but by the Eleventh Circuit's recent decision in *Wollschlaeger v. Governor, Fla.*, 848 F. 3d 1293 (11th Cir. 2017).[3] The facts in *Wollschlaeger* were similar. In that case, the Eleventh Circuit held that the term "unnecessarily harassing" was incomprehensibly vague as a result of the modifier "unnecessary," which was undefined and created ambiguity for the doctors governed by the policy. *Id.* at 1319. As the Court noted, the Defendant took a plain word —"harassing"—and "rendered it incomprehensible by appending a wholly nebulous adverb" —"unnecessarily." *Id.* at 1321. Defendants have the same problem here. By defining "professional practice" to include *uncompensated* activity, Defendants have rendered the term "professional practice" incomprehensible.

For example, if an "uncompensated activity" is within the umbrella of "professional practices," then **any** activity may qualify, and employees are left in the dark as to which activities they are required to report under the Policy. *See* Tracy's SOF [DE 248] ¶¶21-22 (citing [DE 250-47 at 5-6] (FAU professor noting that "no one knows" what the reporting requirement means, including deans and faculty supervisors)). Likewise, since the phrase "public interests" is no defined, **any** activity may conflict with FAU's "public interests." And, since the policy does not define what constitutes "full performance" or "interfere," any activity, regardless of how little time it takes, may "interfere" with an employee's "full performance" of his duties. This is a textbook example of impermissible vagueness. *See Wollschlaeger*, 848 F. 3d at 1319 ("A law

[3] If anything, *Keefe* supports Tracy's claim that the Policy is unconstitutionally vague, because there the conflict of interest policy provided for "reasonably defined standards," and the employer provided guidance that was "precise" resulting in "no ambiguity." 777 F.2d 1579, 1581. *Weinberg* is inapposite in that it involved the word "newspaper," a common word the court was able to give ordinary meaning. 310 F.3d 1029, 1042-43 (7th Cir. 2002). The Court cannot do that here.

'can be impermissibly vague … if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.'") (citation omitted).

Defendants' response, which does not cite *Wollschlaeger*, much less attempt to distinguish it, fails to create a fact issue precluding summary judgment on this ground.

D. The Policy Authorizes Arbitrary and Discriminatory Enforcement and Is Vague As Applied.

As a further response to Tracy's constitutional challenge, Defendants argue that Tracy was punished pursuant to the CBA based on "insubordination in its purest form," consisting of alleged repeat failures to comply with the Policy, including after being given an extension by Defendant Coltman. [DE 269 at 14-15]. Essentially, Defendants' argument is that Tracy did not comply when told to do so, which illustrates the arbitrary nature of the Policy. There is no predictability and no standard for enforcement. An employee cannot know what he must report until he speaks out about the policy or is singled out by an administrator and instructed to report an activity, both which occurred here. Defendants are effectively advocating for a finding that the policy applies whenever they say it does. This is the epitome of arbitrary enforcement: enforcing a policy with no guidelines or criteria for doing so. *See Wollschlaeger*, 848 F. 3d at 1319 (a law can be impermissibly vague "if it authorizes or even encourages arbitrary and discriminatory enforcement."). And there is no inkling that loss of tenure would be the sanction.

II. PLAINTIFF SHOULD BE REINSTATED AND AWARDED COMPENSATORY AND PUNITIVE DAMAGES.

In arguing against Tracy's request for compensatory damages, Defendants make a mitigation argument, emphasizing the fact that Tracy waited over a year to apply for a new job after being terminated by FAU. Plaintiff incorporates by reference the arguments in his Response to FAU's SJ Motion [DE 274 at 17-20], explaining (1) that a professor is not required to seek alternative employment outside his or her field; (2) that Plaintiff in fact made diligent efforts to find similar employment, submitting 20 job applications; (3) that obtaining a new tenured professorship in the middle of a school year is "virtually impossible"; and (4) that applying for a tenured professorship after being very publicly fired for alleged insubordination would be futile.

Defendants further challenge Tracy's entitlement to front pay on the grounds that Tracy has not found a new job, characterizing his request for front pay as an attempt "to further avoid his obligation to find alternative employment." [DE 269 at 18]. To be clear, Tracy's request for front pay is only as an alternative to his first choice of being reinstated to his tenured position at

FAU, to which he is entitled. Front pay is an appropriate alternative for reinstatement "where discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy." *Haskins v. City of Boaz*, 822 F. 2d 1014, 1016 (11th Cir. 1987); *see also Farley v. Nationwide Mut. Ins. Co.*, 197 F. 3d 1322, 1339 (11th Cir. 1999) (affirming award of front pay due to antagonism and hostility between the plaintiff and his supervisors). Thus, to avoid front pay, Defendants must give Tracy his job back.

As for emotional distress damages, Defendants clearly fail to appreciate that such damages "may be inferred from the circumstances as well as proved by the testimony." *Marable v. Walker*, 704 F.2d 1219, 1220 (11th Cir. 1983) (internal citations omitted).

As for punitive damages, instead of trying to distinguish or dispute Tracy's evidence in support, Defendants continue the fiction that Defendants terminated Tracy for legitimate reasons and that there is no evidence to the contrary. [DE 269 at 18]. As noted above and extensively in Tracy's response to the individual Defendants' SJ Motion [DE 273 at 8-11], the opposite is true.

To establish entitlement to punitive damages in the First Amendment context, Tracy must show "evil motive or intent" or "reckless or callous indifference" by Defendants. *Smith v. Wade*, 461 U.S. 30, 56 (1983). Reckless or callous indifference can be shown where the defendant knew the speech was protected and retaliated anyway. *Cabral v. U.S. Dept. of Justice*, 587 F. 3d 13, 25 (1st Cir. 2009).

The record is full of evidence satisfying the punitive damages standard with respect to the individual Defendants. *See, e.g.*, [DE 273 at 8-11]; Tracy's SOF [DE 248 ¶¶7-8] (Defendants Coltman and Alperin recognizing Tracy's First Amendment rights, but scheming to terminate Tracy as early as 2013); *id.* ¶¶37-38 (Coltman calling Tracy a "Nut job," Defendants participating in e-mail chains calling for Tracy's termination, saying "tenure be damned" and "tenure is not immunity," and school administrators sending rounds of congratulatory e-mails after Tracy's termination); [DE 273 at 3-6] (describing Kelly's involvement, including receiving updates regarding Tracy's conduct, volunteering to "personally deal with" complaints, sending out the termination message, being ultimately responsible for the termination, and closely monitoring the fallout); Exh. CZ (Exh. 2) (Coltman celebrating Tracy's termination by e-mailing a picture of a cocktail in response to news reports about Tracy losing his job).

Defendants elected to take a head-in-the-sand approach instead of addressing the record evidence. The Court should grant Plaintiff summary judgment and award punitive damages.

Respectfully submitted,

Dated: September 5, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 5, 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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