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 IN SUPPORT OF HIS
RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Plaintiff James Tracy ("Plaintiff" or "Tracy"), replies as follows to the Response in Opposition to Plaintiff's Renewed Motion for Judgment as a Matter of Law [DE 455], filed by Defendant Florida Atlantic University.

I. PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON HIS FIRST AMENDMENT RETALIATION CLAIM.

In its Response, FAU describes the evidence it presented at trial to support that Plaintiff had been fired for non-retaliatory insubordination as "overwhelming, "substantial," and "ample." DE 455 at pg 1, 3, 6, 9. In reality, FAU relied entirely on the self-serving testimony of just two former University administrators who fired this tenured professor for his controversial blogging: Vice Provost Diane Alperin and Dean Heather Coltman. FAU did not call any other administrator or professor to corroborate their testimony or support their claims concerning FAU's decision to terminate Tracy. Nor did it offer any internal reports, documents, or emails between FAU administrators to support their trial testimony that Professor Tracy was insubordinate because he did not disclose his blogging. This is scarcely surprising since they long knew about the blog; access to its content was publically available and considered highly

controversial; they understood it was an exercise of protected speech that could not as such have constituted a conflict of interest with the University; and they knew FAU had no policy at all about blogging, let alone requiring disclosure of it.

This unsupported self-serving testimony from these two Defendants can hardly be considered "overwhelming," "substantial," or "ample." This is particularly true given that it must be assessed in context with the totality of the record evidence, which included testimony from four professors other than Plaintiff who testified that FAU was selectively enforcing the Conflict of Interest Policy ("Policy"), along with a mountain of emails evidencing FAU's hostility toward his speech, and the evidence establishing the policy was so vague that it could be, and was, used to engage in viewpoint-based discrimination.

Indeed, FAU's argument that Plaintiff presented no direct evidence that FAU's decision to terminate him was motivated by his Sandy Hook blog speech is belied by the trial record. Plaintiff's direct and circumstantial evidence, showing that FAU was motivated by the speech, included: (1) the termination letter admitting Plaintiff was fired for not reporting the blog that FAU already knew about and had reviewed, despite the fact FAU had no policy on blogging; (2) Dean Heather Coltman's email statement to another administrator wherein she admitted (or adopted the admission) that Plaintiff was fired for his speech ("with every blog post, tweet and proclamation . . . His termination . . . holds Tracy accountable for his despicable behavior"); (3) Coltman's 2013 handwritten notes openly acknowledging Plaintiff had a First Amendment right to blog and that FAU would have to "find winning metaphors" to overcome that right (such as "insubordination"); (4) the draft termination letter that FAU circulated internally before the December 14 deadline for Plaintiff to complete the Conflict of Interest Policy ("Policy") form, confirming it did not matter what Plaintiff disclosed on the form because FAU had already

decided to terminate him for what can only be his speech, as he had yet to be "insubordinate" for failing to disclose the blog; and (5) documents reflecting that FAU hated the speech, which caused negative publicity and other adverse reactions. *See* DE 450, pg 1-17; DE 453, pg 3-5.

This is only a fraction of the evidence that was presented at trial showing that the decision to fire Plaintiff was, without a doubt, motivated by his speech rather than insubordination. The ultimate issue presented by this Motion, then, is whether a reasonable jury could find the unsupported self-serving testimony of these two Defendant former administrators established, given the context of the record taken as a whole, that Tracy's controversial speech was not even a "motivating factor" in the firing of this tenured professor.

Critically, unlike most First Amendment retaliation cases, FAU does not claim it fired Tracy due to poor performance (his performance evaluations were excellent).[1] Nor could FAU claim it fired Plaintiff because he had engaged in criminal activity or disrupted school functions. FAU's only "non-retaliatory" reason for terminating Plaintiff was "insubordination," for failing to comply with a confusing Policy by disclosing his well-known publically accessible blog on public issues. But this blatantly pretextual reason could not legally justify Tracy's termination for the reasons set forth in Plaintiff's Motion. *See* DE 450, pg 13-15. FAU ignores this argument in its Response.

Instead, FAU argues there was no evidence to contradict Alperin and Coltman's self-serving testimony that they believed Plaintiff knew what was expected of him and how to fill out the form and that he willingly refused to do so for some unknown reasons. DE 455, pg 4. FAU forgets, however, that the overwhelming evidence presented at trial established that everyone

[1] For that reason alone, the claim that the time spent blogging could have caused a conflict for the time demands for his teaching fails. That argument also fails because the publically available blog could be reviewed as to its likely time commitment without the need for forms.

was confused by the Policy, including Christopher Robe who said the Policy was "absolutely" confusing, even for a former union president, and noncompliance was rampant. *See* citations at DE 450, pg 9-12, 15-16. Plaintiff likewise testified he was confused by the Policy. *E.g.*, T. Vol. 2, at pg 135:16-17. Even Alperin and Coltman had trouble answering basic questions concerning the Policy (like, "are all outside activities are reportable?"), showing they too were confused by the Policy. *See, e.g.*, T. Vol. 5, at pg 137-43. Thus, the evidence overwhelmingly established that no one, including Plaintiff, understood what was required to be disclosed under the Policy.[2] That is why the University created the slogan "when in doubt, fill it out." T. Vol. 6, at pg 119:7-8. Everyone was in doubt.

And when Plaintiff asked questions about the Policy, FAU did not answer them. DE 450 at 7-9. FAU never called Plaintiff to discuss his situation or the blog, despite having done so with others and being required to do so according to University regulations. DE 450 at pg 16. Instead, FAU administrators forwarded Plaintiff's questions to the legal department, and then FAU noticed Plaintiff for discipline for being "insubordinate" for failing to comply with the Policy. Thereafter, despite never expressly telling him to include the blog on the form, FAU waited for Plaintiff's disclosure so that it could pass judgment on the speech activity—the precise thing Plaintiff feared. T. Vol. 3, at pg 95:12-13 ("that is the essence of this case, should I submit it to a state institution, my public speech, for scrutiny"). Alperin admitted as much at trial. *See* citations at DE 450 at pg 5 ("you wanted him to report his blogging to you so you could have the right to approve or disapprove that activity, didn't you? . . . Correct").

[2] The confusion captured in the Senate Faculty meeting audio recording and transcript that the Court should have admitted would have been critical here to demonstrate pretext as to Plaintiff, in that it would have shown the Policy was so vague it allowed FAU administrators to engage in viewpoint- and content-based discrimination and retaliate against him for controversial speech.

Alperin also admitted that an employee was not insubordinate every time an employee failed to follow directives. T. Vol. 4, at pg 78:2-8. To be sure, Plaintiff was not hiding his blog. He simply did not believe he needed to disclose it under the Policy because it was a personal blog and not a professional or compensated activity. His beliefs found further support in FAU's own actions. For instance, FAU did not discipline Plaintiff for failing to disclose the blog in 2013 and 2014, despite the fact the same two administrators were aware of the blog and disciplined him for its disclaimer in 2013.

FAU further argues the lapse of time between the 2013 discipline and the 2015 discipline somehow proves the termination decision was not motivated by the speech. It does not. The overwhelming evidence at trial, including Coltman's handwritten notes that FAU could not explain away, confirmed that FAU was looking for ways to discipline Plaintiff for his speech beginning in 2013, and that the pressure from the public on FAU to fire Plaintiff for his speech never subsided. FAU ultimately found a way—pretextual insubordination—when Plaintiff began asking about FAU's changes to the Policy in 2015.

As for the termination letter that FAU drafted before Plaintiff's December 14 deadline to complete the Policy forms, FAU argues the testimony of its employee, Jason Ball, establishes it was drafted before the *Sun Sentinel* article. First, his testimony does no such thing. The "-0500" on the timestamp of the email containing the draft termination letter is a time zone abbreviation for Eastern Standard Time, meaning the email was sent five hours behind Coordinated Universal Time. It could not mean, as Ball attempted to testify, that Alperin's email was sent five hours before the time stamp indicated on the email. *See* T. Vol. 7, at pg 27, 29-30. His testimony to the contrary was incredible and should have been rejected by the jury as not rationally sound.

Regardless, in its Response FAU admits, as it must, that this letter was drafted well *before* Plaintiff ever filled out the forms. This shows that FAU had already made the decision to fire Plaintiff before it knew what he was going to disclose and whether there was a conflict. And there was but one reason for this: it did not matter what Plaintiff's forms said. FAU was going to terminate him regardless because of his speech.

It remains only to note that FAU had never before applied the Policy to blogging activity, and the evidence overwhelmingly demonstrated it selectively enforced the Policy—points FAU does not dispute in its Response. Plaintiff was the first and only professor to be disciplined for his blogging, despite the fact many other professors blogged or wrote substantive articles on social media sites like Facebook or Twitter. Such disparate treatment, among the other evidence cited in Plaintiff's Motion and herein, proves that his speech was a motivating factor in FAU's decision. The jury was wrong to disregard this evidence.

Accordingly, the Court should enter a judgment as a matter of law on Plaintiff's First Amendment retaliation claim (Count I).

II. THE COURT SHOULD REVERSE SUMMARY JUDGMENT IN FAVOR OF FAU AND ENTER JUDGMENT AS A MATTER OF LAW ON PLAINTIFF'S CHALLENGES TO THE POLICY (COUNTS III, IV, AND V).

The Court should further reverse the summary judgment entered in FAU's favor on Plaintiff's facial and as-applied constitutional challenges to the Policy and enter judgment as a matter of law in Plaintiff's favor on those claims. FAU contends that (1) judgment as a matter of law on these counts would be improper because they were not before the Court for the jury trial; (2) Plaintiff cannot assert a constitutional challenge to the "vagueness" of the Collective Bargaining Agreement ("CBA"); and (3) Plaintiff was required to exhaust his administrative remedies before challenging the CBA. DE 455 at 9-12. Each of these arguments is incorrect.

First, FAU argues that the Court should not or cannot reconsider its summary judgment rulings at the Rule 50 stage. The law provides otherwise. *See St. Louis Convention & Visitors Com'n v. Nat'l Football League*, 154 F. 3d 851, 861 (8th Cir. 1998) ("The court's prior decision on summary judgment did not control the outcome of the Rule 50 motion…."); *Lee v. Glessing*, 51 F. App'x 31, 32 (2d Cir. 2002) (Because "the denial of summary judgment is an interlocutory decision which remains subject to modification or adjustment prior to the entry of a final judgment… the district court's earlier denial of summary judgment did not preclude it from granting the Rule 50(a) motion."); *Barnard v. Las Vegas Metro. Police Dep't*, 2011 WL 221710 at *3 (D. Nev. Jan. 21, 2011) ("Rule 50 permits a court to grant judgment as a matter of law at the trial stage despite having denied summary judgment at the pretrial stage under Rule 56, at which point a court has less evidence before it."). The Court may consider the previously adjudicated summary judgment motions at this procedural stage and should for the reasons stated in Plaintiff's Motion and herein.

Second, as set forth in Plaintiff's Motion, unlike in *Hawks v. City of Pontiac*, 874 F.2d 347, 349 (6th Cir. 1989), the challenged Policy is not just a provision of the CBA—it is comprised of several university regulations, forms, guidelines, and standards in addition to the CBA. DE 450 at pg 19. Nevertheless, employees may challenge provisions in government contracts, including CBAs, as unconstitutionally vague. *See Gilson v. Pa. State Police*, 676 F. App'x 130, 137 (3d Cir. 2017) (adjudicating whether CBA provision was unconstitutionally vague); *see also Hamilton v. U.S. Postal Serv.*, 746 F.2d 1325, 1327-28 (8th Cir. 1984) (same).

Third, the Plaintiff's constitutional claims did not have to be grieved. As the Eleventh Circuit made clear in *Holley v. Seminole County School District*, a "plaintiff suing under § 1983 need not exhaust or make use of administrative remedies prior to, or in lieu of, bringing a claim

of denial of constitutional right to federal court." 755 F.2d 1492, 1501 (11th Cir. 1985) (citing *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496 (1982)). Even if a plaintiff does exhaust administrative remedies, because § 1983 vests federal courts with original, not appellate, jurisdiction, "deference to the administrative record and factfinding is inappropriate when the claim is that an unconstitutional result could be reached…." *Id*. at 1502 (internal citation omitted). Thus, a plaintiff asserting a First Amendment right is entitled to a "*de novo* hearing in federal court regardless of whether that teacher resorted to an administrative hearing or whether such hearing purported to decide the constitutional issue. The policy enunciated by § 1983 in vesting original jurisdiction for constitutional claims in the district court requires no less." *Id*. at 1503-04; *see also Harden v. Adams*, 841 F.2d 1091 (11th Cir. 1988) ("The trial court noted that the Eleventh Circuit has consistently encouraged district courts to conduct *de novo* reviews of first amendment claims, rather than to defer to the findings of the administrative panels that initially decided to fire the claimants…. Based on this principle, the court properly concluded that it had authority to consider all evidence relating to Dr. Harden's first amendment claim.").

FAU does not cite a single case to the contrary. Instead, it contends that the vagueness claim is a challenge to a "contract term" and not a challenge brought under § 1983. DE 455 at 11-12. However, Plaintiff's vagueness claim is a constitutional cause of action brought under 42 U.S.C. § 1983. As Plaintiff alleged in the Complaint, the vagueness claim concerns "Professor Tracy's rights under the United States Constitution" because the "Conflict of Interest/Outside Activities" policy "imposes prior restraints on speech, gives public school officials unfettered discretion whether to allow expression and under what conditions, and that are vague, overbroad, and not narrowly tailored to serve a substantial government interest." DE 1 at ¶¶155-56. Unlike the claim in *Hawks*, Plaintiff thus asserted a First Amendment vagueness claim that does not

have to be grieved. *See Wollschlaeger v. Governor, Fla.*, 858 F.3d 1293, 1320 (explaining that standards for vagueness are "strict in the area of free expression").

CONCLUSION

For the forgoing reasons, the Court should grant Plaintiff's Motion and enter judgment as a matter of law on Counts I, III, IV, and V.

Dated: January 29, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 29, 2018, 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.

/s/ *Richard J. Ovelmen*

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