CASE NO.: 18-10173-G

L.T. Case No.: 9:16-cv-80655-RLRS

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

***

JAMES TRACY,

Plaintiff-Appellant,

— v.—

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

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR DEFENDANTS/APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

The present case is not about free speech rights under the First Amendment but, rather, is about the insubordination of an employee who, for reasons of his own, refused to comply with his employment agreement even after multiple directives from his supervisors to do so. Because the facts are straightforward and, on their face, support the challenged rulings made by the trial court and the jury's verdict, Defendants believe that oral argument would serve no useful purpose to the Court in this appeal.

PREFACE

Defendant/Appellee, Florida Atlantic University, will be referred to as "FAU" or "University."

Individual Defendants, Dr. John Kelly, Dr. Diane Alperin, and Dr. Heather Coltman, shall be referred to, respectively, as "Dr. Kelly," "Dr. Alperin," and "Dr. Coltman," and, collectively, as the "Individual FAU Defendants."

FAU and the Individual FAU Defendants shall sometimes be collectively referred to as the "FAU Defendants" or "Defendants."

All other persons or references shall be as set forth later in this Brief.

The record shall be cited to as "DE: _, p. __," setting forth the docket entry number and page number of the referenced material. If the referenced material is a deposition transcript, the page citation shall refer to the page number assigned by the court reporter. If a "§" or "¶" is included in the citation, that material will be found in the referenced section or paragraph in the cited document at the referenced page.

Citations to the trial transcript shall be as: Tr.V_:_, reflecting the volume and page number of the cited transcript. The trial transcripts, Volumes 1 through 9, are included in the record at DE 465 through DE 473, respectively.

Citations to trial exhibits shall be as: D. Ex.__; P. Ex.__.

Sometimes, citations to material shall be to both the summary judgment record and the trial evidence to efficiently respond to Plaintiff's appellate arguments relating to the summary judgment order and to the jury verdict.

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JURISDICTIONAL STATEMENT

The FAU Defendants concur in the Statement of Jurisdiction set forth in Plaintiff's Principal Brief.

STATEMENT OF THE ISSUES

The issues presented for this Court's determination are:

1. Whether the district court properly granted summary judgment on Plaintiff's claims for facial unconstitutionality, as-applied unconstitutionality, and declaratory relief, on the basis that Plaintiff failed to avail himself of the required grievance procedure set forth in the collective bargaining agreement, or any other basis properly established in the record.

2. Whether any reasonable jury could have concluded that the content of Plaintiff's blogging activities was not a motivating factor in FAU's decision to terminate Plaintiff's employment.

3. Whether the trial court abused its discretion in excluding evidence of an unrelated Faculty Senate Meeting.

STATEMENT OF THE CASE

A. Introduction

Plaintiff's introductory statement in his principal brief evinces the key conceptual error both in Plaintiff's appellate argument and in his position before the trial court below. Plaintiff writes about bedrock principles involving the First Amendment as though this case is really about those principles. In fact, there is no evidence in the record that Plaintiff's employer, FAU, or the Individual FAU Defendants take any issue with the First Amendment and the bedrock principles connected with it. And, consistently, there is no evidence in the record that any of the FAU Defendants ever restricted or even discouraged Plaintiff in any way in what he could say or blog, regardless of how unpopular or controversial it may be. Instead, this case is about a plaintiff who, for reasons of his own, refused to comply with his employment agreement (the "CBA") that, ironically, he helped to negotiate as president of the union and then approved and signed a few years before the events of this case.

The record shows conclusively that FAU never limited Plaintiff in what he could say on his blog or elsewhere. Rather, FAU simply asked Plaintiff to comply with the CBA's policy on disclosure of outside activity, a policy with which all FAU employees, and all public university employees in Florida, are required to

comply. He refused. And while this case has never been about the Plaintiff's right to speak, it is axiomatic that the First Amendment does not prevent an employee from agreeing to a contract that simply requires the employee to identify his or her outside activities so that the employer may know if there is a conflict of interest, a time-based conflict, or other concerns relative to the employment relationship.

In short, this case did not reach a possible restriction on free speech. Instead, Plaintiff chose to battle over compliance with procedural requirements set forth in his self-negotiated and approved CBA, acting insubordinately. As the jury and the district court determined, that is all this case is about.

B. The Facts

The Parties

FAU is a Florida public university that employs approximately 3,300 employees, including approximately 1,000 faculty members. (DE: 246-1, p. 25)

Dr. Diane Alperin ("Dr. Alperin") was the Vice Provost for FAU. (DE: 246-1, p. 13) As Vice Provost, Dr. Alperin was in charge of several academic departments. (*Id.*, pp:13-14, pp. 25-26) Dr. Alperin was responsible for decisions concerning termination of faculty members. (*Id.*, p. 16) Dr. Alperin delegated the duty to recommend discipline to each of the nine Deans. (*Id.*, pp. 18, 26) Dr. Heather Coltman ("Dr. Coltman") was the Dean of the Dorothy F. Schmidt

College of Arts and Letters. (DE: 246-2, pp. 8; 313-314) Dr. Coltman was responsible for recommending discipline for faculty in her College. (*Id.*, pp. 30-31)

Plaintiff was a tenured Associate Professor at FAU in the School of Communications and Multimedia Studies in the Dorothy F. Schmidt College of Arts and Letters.[1] (DE: 246-3, p. 40; DE: 246-19) As part of his annual assignment with FAU, Plaintiff had assignments in areas of teaching, research, and service. (DE: 246-1, p. 256; DE: 246-4, p. 128; Tr.V2:51) Plaintiff taught courses including Public Opinion and Modernity, Introduction to Multimedia Studies, and Culture of Conspiracy. (DE: 246-3, pp. 136-137) Plaintiff conducted research in areas including mass shootings, the JFK assassination, and the Sandy Hook Massacre. (DE: 246-3, pp. 148-150, 153-154, 159-161, 164-167)

Collective Bargaining Agreement

FAU and the United Faculty of Florida ("the Union") have entered into a series of collective bargaining agreements that govern the relationship between "in-unit" faculty members and FAU. Plaintiff served as Chapter President for the Union from 2009 through 2011. (DE: 246-5, pp. 9-10) As Chapter President, Plaintiff signed the collective bargaining agreement for the years 2009 through 2012. (DE: 246-3, p. 90) Plaintiff also voted in favor of ratifying the 2009-2012 collective bargaining agreement, which contained an identical definition of

[1] Plaintiff's wife was, and still is, an FAU employee. (Tr.V 2:49)

reportable outside activities to the definition in effect at the time of his termination from employment. (DE: 246-3, pp. 94-96) Plaintiff participated in bargaining over a version of the mandatory grievance and arbitration procedure that was nearly identical to the procedure in effect at the time of his termination from employment. (DE: 246-3, p. 95; DE: 246-5, pp. 9-10)

The 2012-2015 Collective Bargaining Agreement by and between FAU and the Union (the "CBA") was in effect at the time of Plaintiff's termination. (DE: 246-6, p. 9, ¶31; 76-183) The CBA contains the terms and conditions that govern the employment relationship between in-unit faculty and FAU. (*Id.*, p. 80)

Article 19 of the CBA, Conflict of Interest/Outside Activity (the "Policy"), requires 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 FAU facilities, equipment or services, so any potential conflicts of interest, including commitment of time, can be assessed. (DE: 246-6, pp. 131-133) The Policy originated in the legacy agreement between the Board of Regents and the United Faculty of Florida. (Tr.V2:68-69) The requirement to report outside activities has existed at FAU since at least 1979. (Tr.V5:58)

The Policy defines "reportable outside activity" as "any compensated or uncompensated professional practice, consulting, teaching or research, which is not

part of the employee's assigned duties and for which the University has provided no compensation." (*Id.*, p. 132) The Policy ensures FAU's compliance with its obligations under the Florida Code of Ethics for public employee conflicts of interest and work hours (Chapter 112, Part II, Fla. Stat.). (DE: 246-4, pp. 16-17) A "conflict of interest" is defined as "any conflict between the private interests of the employee and the public interests of the University…" or "any activity which interferes with the full performance of the employee's professional or institutional responsibilities or obligations" or "any outside teaching employment…" (DE: 246-6, p. 132) The disclosures in the Policy are often a condition of the University's receipt of research grants. (DE: 246-1, pp. 31-32; 214)

The Policy applies to both compensated and uncompensated activity, but when a faculty member has an expectation that money will be paid for an outside activity, the faculty member should report the proposed activity before engaging in it. (DE: 246-3, pp. 232-233; D.E. 22) The purpose of reporting is to allow the University to assess and avoid potential conflicts of interest. (D.E. 246-6, pp. 131-133)

The Policy prohibits the use of FAU's resources for outside activities without prior approval: "[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." (*Id.*, p. 133, ¶19.6) Faculty are required to

report their use of FAU equipment with their annual Report of Outside Employment or Professional Activity. (*Id.*, p. 132; ¶19.4)

The Policy provides an expedited grievance procedure if the proposed outside activity is determined to constitute a conflict and the employee disagrees with the determination. (*Id.*, p. 133, ¶19.5) Also, the CBA contains a mandatory grievance and arbitration procedure for all claims concerning the interpretation or application of the CBA's specific provisions. (*Id.*, pp. 133-142) Article 20.1 of the CBA provides that "[t]he procedure hereinafter set forth shall be the sole and exclusive method for resolving the grievances of employees as defined in this Article." (*Id.*, p. 133, ¶20.1) If there is any inconsistency between the CBA and FAU policies, the language of the CBA applies. (*Id.*, p. 81, ¶1.2)

Plaintiff's Outside Activities

In 2012, Plaintiff began working with Global Research, an alternative news or media aggregator. (DE: 246-3, p. 145) In March 2012, Plaintiff began a blog titled "Memory Hole Blog: Reflection on Media and Politics." (DE: 246-19, p. 1) Plaintiff established the blog as a way to bridge a divide between his scholarly endeavors and contemporary political issues and events. (DE: 246-3, pp. 228-229) There is significant overlap between the topics Plaintiff addressed in his blog and the scholarly work he performed pursuant to his assigned academic duties at FAU. (DE: 246-7, pp. 99-100; 102-106; DE: 246-3, pp. 153-154; 159-161; 164-167; 194-

196; DE: 246-8, pp. 92-93) Indeed, Plaintiff notified Dr. Coltman in February 2013 that his work on Memory Hole Blog and with Global Research may lead to scholarly endeavors. (DE: 246-6, p. 188)

Plaintiff solicited money on his blog through a "Donate" button that solicited donations for research. (DE: 246-3, pp. 229-230) Plaintiff received $2,211.84 in donations. (DE: 246-9, pp. 5-6) In addition, Plaintiff sought advertising income for "clicks" through his websites. (DE: 246-7, pp. 94-96)

Plaintiff also operated a weekly podcast through Truth Frequency Radio. (DE: 246-3, pp. 57-59) Although he did not disclose it and even denied it until just before his termination, Plaintiff used University resources for at least his weekly podcast. (DE: 246-3, pp. 189-190; DE: 246-6, pp. 279-282)

The Aftermath of the Sandy Hook Massacre

In late 2012 and early 2013, Plaintiff began writing on his blog about a mass shooting that occurred at Sandy Hook Elementary School in Newtown, Connecticut. (DE: 246-3, p. 110) The blog identified Plaintiff as an Associate Professor at FAU and was linked to his scholarly work. (Tr.V6:95) Plaintiff's writings on the Sandy Hook massacre received significant international media attention. (DE: 246-1, pp. 281-283)

In or around early January 2013, Plaintiff's blog was brought to the attention of Drs. Alperin and Coltman. (DE: 246-1, p. 280; DE: 246-2, p. 157) In January

2013, Drs. Alperin and Coltman met with Plaintiff to discuss concerns over Plaintiff's safety, the safety of his family and students, and the impact of the nationwide media attention. (DE: 246-1, pp. 80-81; DE: 246-2, pp. 212-214) Drs. Alperin and Coltman reminded Plaintiff of his obligations under the CBA for outside activities, including that he had an obligation to report outside activities pursuant to the Policy and to add an appropriate disclaimer to his blog to make it clear that his comments represented his personal opinions and were not official positions of FAU. (DE: 246-1, pp. 80-81; DE: 246-2, p. 220; DE: 246-6, p. 184) Dr. Coltman instructed Plaintiff to report his activity for Memory Hole Blog. (DE: 246-1, pp. 87-88; DE: 246-6, p. 184)

Neither the University nor Drs. Alperin and Coltman ever told Plaintiff that he could not speak, and it is undisputed that they did not restrict Plaintiff's speech in relation to Plaintiff's comments about Newtown or any other matter. (DE: 246-5, p. 165; DE: 246-7, p. 68; Tr.V6:120; Tr.V4:115). Dr. Coltman specifically told Plaintiff he could blog in his personal time, but cautioned that he had to make an effective disclaimer to avoid creating the appearance that he spoke for FAU. (DE: 246-6, p. 190) This was the proper approach not only from a management standpoint, but also was consistent with the requirements of the CBA.

At this time, Plaintiff's Union representative, Douglas Broadfield, advised Plaintiff to report his outside activities and, if FAU took any action that he

disagreed with, to grieve in accordance with the terms of the CBA. (DE: 246-10, p. 44) In fact, Dr. Broadfield's advice to any employee at FAU was that if an activity fell in a "gray area" and they were unsure whether to fill out the form, they should fill it out "and be done with it." (DE: 246-10, p. 55) Union official Michael Moats also told Plaintiff that if he intended to use his blog for future research, FAU could require him to report it. (DE: 246-11, p. 188-189)

After Plaintiff failed to utilize the appropriate disclaimer, in March 2013, Dr. Coltman disciplined Plaintiff for his failure to comply with his obligations under Article 5.3(d) of the CBA, which requires that "[w]hen speaking on any matter of public interest," the faculty member must "make clear when comments represent personal opinions and when they represent official University positions." (DE: 246-2, pp. 152-155; DE: 246-6, pp. 87, 189-190) Plaintiff grieved the discipline and reached a settlement agreement with FAU in September 2013 (the "Settlement Agreement"). (DE: 246-1, pp. 81-82; DE: 246-6, p. 205) Through the Settlement Agreement, Plaintiff agreed not to use his work title in any of his public postings or communications, unless the statements made were those of the University, and to publish a disclaimer to satisfy the provisions of Article 5.3(d) of the CBA. (DE: 246-6, p. 205) As part of the settlement, the notice of discipline was removed from Plaintiff's official personnel file. (DE: 246-12, pp. 367-369; Tr.V4:53)

Plaintiff's Continued Employment

After the January 2013 meeting, Plaintiff continued to post to his blog about other mass casualty events reported in the media, such as the 2013 Boston Marathon bombing. (DE: 246-3, pp. 110-111) Plaintiff continued to operate his Memory Hole Blog, from its inception through late 2016. (DE: 246-3, p. 213; DE: 250-2, p. 1) As far as FAU was concerned, the issue was resolved, and it was expected that Plaintiff would continue to speak about issues outside of work and would comply with the requirements of the CBA (Tr.V5:49-50). Plaintiff, however, did not submit any Report of Outside Activity or Professional Activity forms or University Equipment, Facilities and Services forms in 2013 or 2014. (DE: 246-2, p. 329; DE: 246-6, p. 219) This omission was not discovered by FAU until Plaintiff refused to accept his assignment and acknowledge his obligation to comply with the Outside Activity Policy in 2015. (D. Ex.25)

In 2014, Plaintiff taught his course, "Culture of Conspiracy" again. (DE: 246-2, p. 203; DE: 246-3, p. 140) Plaintiff's annual assignment in 2014 included his work for Project Censored, an organization educating students about investigative journalism and news censorship. (DE: 246-3, pp. 164, 168-169, 170) Several of Plaintiff's scholarly articles written for Project Censored relied on his own Global Research articles as resources. (DE: 246-3, pp. 170-173; 190-192)

Plaintiff's annual 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. (DE: 246-3, pp. 165-167)

Plaintiff's Refusal to Accept the Electronic Acknowledgment and Comply with his Obligations under the CBA

In 2014, FAU renewed its focus on outside activity reporting after conducting an internal audit on the process and hiring a new Vice President for the Division of Research. (Tr.V5:73) As a result of this renewed focus, in 2014, FAU added an electronic reminder of the Policy that required all faculty, as part of accepting their annual assignment, to check a computer prompt acknowledging their obligations to report outside activities and the use of University resources for outside activities. (DE: 246, pp. 35-36; DE: 246-8, p. 34; Tr.V4:148) The prompt, which required the faculty member to simply check "OK" to acknowledge the CBA reporting requirement, served as a reminder to all faculty to submit required forms in compliance with the Policy. (DE: 246-1, pp. 36-37; DE: 246-6, p. 22)

Despite doing so in the past, in October 2015, Plaintiff refused to accept his annual assignment by clicking the electronic acknowledgment affirming his obligation to comply with the Policy. (DE: 246-2, pp. 80, 154; DE: 246-12, p. 1)

Plaintiff refused multiple directives from his supervisor to electronically accept his annual assignment and click a simple acknowledgment of his obligation to report under the Policy. (DE: 246-1, p. 75; DE: 246-6, pp. 219-220) In fact, after

multiple requests, Plaintiff continued his refusal, instead delivering a hard copy signed annual assignment to *avoid* checking the online-only acknowledgment box. (DE: 246-12, p. 1; DE: 246-1, p. 75; Tr.V5:82) There was no evidence of any other FAU faculty member refusing to check the acknowledgement box and accepting their assignment.

Plaintiff was also directed by his supervisor, among others, to submit Report of Outside Employment or Professional Activity forms in compliance with his obligations under the Policy. (DE: 246-6, pp. 206-209) Robert Zoeller, President of the Union, advised Plaintiff to submit the required forms and comply with the Policy first, so he would not be insubordinate, and then file a grievance if FAU took action against him based upon the content that was disclosed. (DE: 246-8, pp. 43-44; DE: 246-6, p. 217; Tr.V7:86) Indeed, as multiple members of the Union testified, it is "Union 101" to comply with directives so as not to be insubordinate, and then to fight if adverse action is taken that the faculty member does not agree with—"comply then fight." (DE: 246-8, pp. 43-44; DE: 246-13, p. 226; DE: 246-14, pp. 28-29)

Rather than take the reasonable advice of his Union representatives, Plaintiff refused multiple directives from his supervisor, Dean Coltman, and other personnel to submit the Report of Outside Employment or Professional Activity forms in

compliance with the requirements that applied to him and all other in-unit faculty members under the CBA. (DE: 246-6, pp. 219-220; DE: 246-1, pp. 88-89)

Plaintiff's Discipline and Termination for Insubordination

On November 10, 2015, FAU, through Dr. Coltman, issued a Notice of Discipline-Reprimand, to Plaintiff for his insubordination. (DE: 246-6, pp. 219-220; P. Ex.35) The Notice required Plaintiff to electronically accept his annual assignment and submit the required forms to comply with his obligations under the CBA. (*Id.*) This Notice provided Plaintiff another opportunity to comply or face further discipline. (*Id.*) In its closing, the Notice of Discipline notified Plaintiff that "[t]his action, a reprimand, is subject to Article 20" of the CBA. (*Id.*)

Plaintiff refused to comply with the directive to submit the required forms, choosing instead to submit a lengthy response detailing why he, unlike any other professor in the State University System, should be exempt from the requirements of the CBA. (P. Ex.36) Plaintiff reached out to the Union to see if they would grieve the Notice of Discipline on his behalf. (DE: 246-3, pp. 89-90; DE: 246-6, p. 272) Plaintiff acknowledged that if the Union did not represent him in grieving the Notice of Discipline, he would have to file a grievance himself. (DE: 246-6, p. 272) Union officials determined they would not pursue a grievance on his behalf because they believed Plaintiff was in violation of the CBA. (DE: 246-8, pp. 47, 55-56; Tr.V5:82) In fact, Union President Zoeller testified that Plaintiff's blog was

reportable because it contained topics that "were arguably an extension of what he did professionally." (Tr.V7:92, 94).

Although not required by the CBA, after Plaintiff's insubordination had continued for weeks, on December 11, 2015, Dr. Coltman gave Plaintiff a last opportunity to comply with the simple obligation under the CBA by filing the required Report of Outside Employment or Professional Activity forms.[2] (DE: 246-1, p. 313; DE: 246-6, p. 273; P. Ex.34).

Plaintiff did not timely respond. (DE: 246-1, pp. 236-237) Rather, he attempted to submit materially incomplete forms after the final deadline. (*Id.*) They included a disclosure that, contrary to his prior representations, Plaintiff had been using University resources to support his outside activities. (DE: 246-6, pp. 279-282) Plaintiff's reason for thumbing his nose at his supervisors and his employer was that "he thought tenure would protect him." (Tr.V7:88)

Plaintiff never submitted a report of his activity for Memory Hole Blog to FAU under the Policy. (DE: 246-6, pp. 274-282) Plaintiff has offered no explanation for why he did not report his blogging activity, even though he reported Global Research, which he claims mirrors articles from his blog. (DE:

[2] Overall, Plaintiff was asked on six different occasions by three different administrators to check the acknowledgment and submit the requested report. (See D's Exh. 25, 26 at Attachment C; 49). Had he done so properly, he would not have been terminated from FAU. (Tr.V 5:36, 97-98)

246-3, pp. 144-145; DE: 246-7, p. 98) Moreover, Plaintiff knew, and admitted privately, that his blog was reportable activity. (Tr.V3:70)

Dr. Alperin made the decision to terminate Plaintiff's employment with FAU. (DE: 246-1, pp. 20-23) Dr. Alperin consulted with the Senior Associate General Counsel on her decision and the procedure for carrying it out and also advised the Provost. (DE: 246-1, p. 18) Dr. Alperin decided to terminate Plaintiff's employment for his repeated gross insubordination. (DE: 246-1, p. 21; D. Ex.28) Despite multiple requests from the Union representatives and his supervisors, progressive discipline, and repeated opportunities to comply, Plaintiff steadfastly refused to meet his obligations and was terminated for cause. (*Id.*)

On December 16, 2015, Dr. Alperin issued Plaintiff a Notice of Proposed Discipline – Termination, notifying him of the decision to terminate his employment. (D. Ex.29) Had Plaintiff submitted the Report of Outside Employment or Professional Activity forms as required, he would not have been terminated. (Tr.V5:36; 97-98) The Notice of Proposed Discipline – Termination confirmed that "[b]y simply submitting the completed Activity Forms, you would have been compliant with no further discipline." (DE: 246-6, p. 283; D. Ex.29) The Notice of Proposed Discipline – Termination ended by notifying Plaintiff that he had "10 days in which to respond in writing" and that "[t]his proposed disciplinary action is subject to CBA Article 20, Grievance Procedure." (*Id.*)

The Union Hires an Independent Attorney to Represent Plaintiff

Under the CBA, Plaintiff had ten days to respond to the Notice of Proposed Discipline – Termination. (*Id.*) The Union immediately hired an independent attorney for Plaintiff to assist in the grievance procedure. (DE: 246-6, p. 290)

FAU even granted Plaintiff an extension to respond to the Notice of Proposed Discipline – Termination to provide him time to hire and consult legal counsel. (DE: 246-16, pp. 68-69)

Dr. Alperin subsequently learned that in addition to his refusal to disclose his outside activities related to his Memory Hole Blog, Plaintiff did not disclose his contribution to a book titled "Nobody Died at Sandy Hook," which included his affiliation with FAU in the book's biographical information about its contributors, but did not include an appropriate disclaimer as required by the Settlement Agreement. (DE: 246-1, pp. 342-343) Plaintiff never reported his contribution to "Nobody Died at Sandy Hook" even though Plaintiff testified that he received an honorarium for his contribution to the book. (DE: 246-6, pp. 274-282; DE: 246-3, pp. 125-126) Dr. Alperin sent Plaintiff another letter regarding this violation of the Settlement Agreement. (D. Ex.78; DE: 246-1, p. 9)

Plaintiff did not respond to the Notice of Proposed Discipline – Termination. (DE: 246-3, pp. 102-104) Dr. Alperin sent Plaintiff a Notice of Termination on January 5, 2016. (D. Ex. 28; DE: 246-3, p. 244) The Notice of Termination

notified Plaintiff that this "action is subject to CBA Article 20, Grievance Procedure." (D. Ex.28)

Plaintiff Did Not Grieve FAU

Each disciplinary notice issued to Plaintiff stated "This disciplinary action, [] is subject to Article 20 of the BOT/UFF Collective Bargaining Agreement." (D. Ex.25; D. Ex.28; D. Ex.29; DE: 246-6, pp. 220, 325) As a former Union President, Plaintiff was well aware of the grievance process and his grievance rights under the CBA. (DE: 246-3, p. 95; DE: 246-6, p. 272) Despite previously acknowledging his ability to grieve on his own, Plaintiff did not grieve the Notice of Discipline. (DE: 246-3, pp. 103-104; DE: 246-6, p. 272; DE: 246-5, p. 70)

Plaintiff fired his Union appointed counsel in January 2016. (DE: 246-3, p. 101; DE: 246-6, pp. 294-297) Plaintiff hired his own legal counsel, still having enough time to utilize the grievance procedure, but did not do so. (DE: 246-3, pp. 101-102; DE: 246-7, pp. 26-27) Despite having filed several prior grievances against FAU and serving as Chapter President of his Union for three years, Plaintiff has claimed he did not know how to file a grievance. (DE: 246-3, pp. 104-105, 106)

C. Course of Proceedings

Rather than file a grievance, as called for by the CBA if Plaintiff did not agree with the Notice of Termination, Plaintiff filed the present lawsuit against

FAU, the Individual FAU Defendants, his union, and certain individual defendants at his union. (DE 1) During the pendency of the suit, Plaintiff reached a settlement agreement with all union defendants, leaving FAU and the Individual FAU Defendants in the case. (DE 362, p. 5)

As amended, the complaint requested a jury trial and included counts for civil rights retaliation pertaining to Plaintiff's right to free speech (Count I), a claim alleging conspiracy to interfere with Plaintiff's civil rights (Count II), a facial constitutional challenge with respect to the Policy (Count III), an as-applied constitutional challenge against the Policy (Count IV), a request for a declaration on the constitutionality of the Policy (Count V), and a breach of contract claim (Count VI). (DE 93)

Plaintiff moved for partial summary judgment, while Defendants moved for summary judgment on all counts of Plaintiff's complaint. (DE 247: DE 242, 245) In November, 2017, the district court entered its order on all pending motions for summary judgment, granting Defendants' motion with respect to Counts II-VI, including the claims for conspiracy, the three constitutional claims, and the contract claim. (DE 362) The trial court found a disputed issue of material fact only with respect to Count I, the retaliation claim, and required that claim to be submitted to a jury. (DE 362, p. 12)

With respect to the conspiracy count, the trial court found that there was no evidence in the record that would permit a reasonable juror to find a conspiracy between Plaintiff's union and Defendants with respect to his termination. (DE 362, p. 18) As for the three constitutional challenges, the district court found that the Policy was not a positive law subject to constitutional challenge for vagueness, that the grievance procedure applied to the claims raised by Plaintiff about the Policy, that his failure to grieve is a waiver, and that Plaintiff did not show or cite any evidence that it would have been futile to file a grievance "to establish the rationale, purpose, and scope of the Policy." (DE 362, pp. 19-20) As for the breach of contract count, like the constitutional claims, the district court found that Plaintiff's failure to grieve, and failure to show that the act of filing a grievance would have been so futile that it relieved his requirement to do so by law, precluded his contract claim. (DE 362, pp. 21-22) As part of the same ruling, the district court also dismissed the cases against the three Individual FAU Defendants. The district court found that Dr. Kelly did not participate in Plaintiff's termination, and that Drs. Alperin and Coltman were entitled to qualified immunity because, as required by case law, regardless of what Plaintiff asserts was the actual motivation for the termination, Drs. Alperin and Coltman "could have reasonably and lawfully decided to recommend Plaintiff's termination," based upon Plaintiff's

non-compliance with the Policy. (DE 362, p. 26) Consistent with these rulings, the court denied Plaintiff's motion for partial summary judgment.

The case was tried to a jury on the retaliation claim from November 29, 2017, to December 11, 2017. (DE 465-473) In order to establish the First Amendment retaliation claim, the jury had to find both that Plaintiff's blog speech was a motivating factor in FAU's decision to discharge him from employment, and that FAU would not have discharged Plaintiff from employment if it had not considered the blog speech.[3] (DE 437, p. 1) The jury resolved the case by answering "no" to the first question, finding that Plaintiff's blog speech was not a motivating factor in FAU's decision to discharge him from employment. (DE 437) That verdict was returned on December 12, 2017. (DE 437, p. 2) The district court entered judgment on the jury verdict on December 15, 2017. (DE 443)

Plaintiff filed a renewed motion for a judgment as a matter of law, referring back to a similar motion made during trial, and an alternative motion for new trial. (DE 450, 453) Plaintiff argued that the evidence could only support a judgment for Plaintiff and that, alternatively, Plaintiff was entitled to judgment on his constitutional challenges to the Policy itself. (DE 450, p. 3) As for the alternative motion for a new trial, Plaintiff argued the same evidence was insufficient to support the verdict and also argued that the trial court erred by excluding two

[3] Yet, as will be briefly discussed later in this Brief, Plaintiff never identified the alleged "speech" that he claims was the basis for the alleged retaliation.

pieces of evidence: an audio recording and the corresponding transcript of an FAU Faculty Senate Meeting in September, 2015. (DE 453, p. 1-2)

On April 24, 2018, the trial court entered its order denying the motion for new trial and the renewed motion for judgment as a matter of law. (DE 484) The trial court discussed the evidence that properly supported the jury's verdict, pointed out how Plaintiff's motion distorted much of the evidence in an effort to make the point, and reflected back on the court's detailed ruling made just before trial with respect to the largely irrelevant audio recording, pointing out that Plaintiff had alternative ways available to offer evidence to make the point Plaintiff sought to make. (DE 484, pp. 17-23)

Plaintiff timely appealed the district court's ruling on the post-trial motions and the final judgment. (DE 486)

D. <u>Standard of Review</u>

The FAU Defendants agree with the statement of the summary judgment standard set forth in the district court's order granting summary judgment. (DE 362, pp. 5-6) This Court's review of that order is *de novo*, applying the same legal standards as the district court. *Chapman v. AI Transp.*, 229 F. 3d 1012, 1023 (11th Cir. 2000). Plaintiff's discussion of a standard of review for constitutional facts is irrelevant because the district court properly determined that Plaintiff's constitutional claims were barred and that, in any event, provisions of an

employment agreement are not subject to constitutional analysis in the way that positive law is.

This Court reviews the district court's order denying Plaintiff's judgment as a matter of law *de novo*. *Nebula Glass International, Inc. v. Reichhold, Inc.*, 454 F. 3d 1203, 1210 (11th Cir. 2006). On the ruling on the motion for new trial, the trial court order is reviewed for abuse of discretion in the court's determination whether the verdict is against the great weight of the evidence, with the court permitted to weigh the evidence pursuant to that standard. *See Watts v. Great Atlantic & Pacific Tea Co., Inc.*, 842 F. 2d 307, 310 (11th Cir. 1988); *Pensacola Motor Sales, Inc. v. Eastern Shore Toyota, LLC*, 684 F. 3d 1211, 1231 (11th Cir. 2012).

This Court reviews the district court's decision to exclude evidence for abuse of discretion. *E.E.O.C. v. Manville Sales Corporation, 27 F. 3d 1089, 1092-93 (5th Cir. 1994).*

SUMMARY OF ARGUMENT

Plaintiff challenges the district court's grant of summary judgment in favor of FAU on Plaintiff's three constitutional claims relating to the interpretation of the CBA and challenges the jury's verdict on the claim of first amendment retaliation.

The trial court properly granted summary judgment on the constitutional law claims. Plaintiff's constitutional law claims are based upon the interpretation or application of the contract that binds him to the University, the CBA. The CBA

contains a mandatory grievance and arbitration procedure for all claims concerning the interpretation or application of its terms or provisions. That procedure is unambiguously exclusive. Plaintiff is a former union chapter president who participated in the bargaining over essentially the same CBA and executed it. His union strongly advised him that, for the assertions he was making, he had to file a grievance under the CBA. As a matter of law, provisions of a contract are not susceptible to constitutional law claims and, where a binding agreement specifies a remedy for interpretation of the contract, all parties are bound.

Plaintiff attempts to distinguish the law by saying that the present case is an impermissible content-and-viewpoint-based restriction on highly controversial expression. That argument highlights the significant misconception that Plaintiff perpetuates through his arguments: that his content was somehow restricted. That is simply not the case. Plaintiff chose not to comply with a reporting requirement about his outside activities – and would not even concede that he is bound by the terms of the agreement relating to the reporting requirement. That non-compliance with a term of the contract invoked the contractual remedy provisions, requiring Plaintiff to file a grievance if he sought to challenge FAU's decision to terminate his employment. Failing to do so, his constitutional claims were barred.

The district court properly denied Plaintiff's motion for new trial and renewed motion for judgment as a matter of law. Those motions essentially

challenged the quantum and quality of the evidence submitted to the jury. As the district court ruled, the evidence was overwhelmingly sufficient for the jury to conclude that Plaintiff was not the victim of retaliation for the exercise of First-Amendment rights. Plaintiff's analysis of the evidence often cherry-picks the record and seems to proceed from an assumption that the court must view evidence in the light most favorable to Plaintiff – the moving party – rather than applying the standard for review of such motions, which defer to the jury's determination. While there are many pieces and instances of evidence and submissions that supply overwhelming support for the jury's verdict, just the evidence that Plaintiff refused to comply with the CBA, the evidence that the decision-makers at FAU freely allowed Plaintiff to blog as he wished for three years without censure, and the decision-makers' affirmative testimony that they decided to terminate Plaintiff's employment for insubordination and not for the content of any speech that he generated, were enough for the jury to conclude that Plaintiff's blog speech was not a motivating factor in his termination. Similarly, that evidence together with the other evidence recited by the court that was presented to the jury showed that the verdict was not against the great weight of the evidence. In fact, as the district court explicitly found, the great weight of the evidence supported FAU's defense.

Finally, the district court did not abuse its discretion in excluding evidence of the September 2015 Faculty Senate meeting. The discussions at that meeting

contained hearsay, were irrelevant and, to the extent any probative value could be inferred from those discussions, were outweighed by the danger of unfair prejudice. Moreover, the Plaintiff's inability to offer such hearsay evidence was offset by Plaintiff being permitted to offer direct evidence from witnesses that, at least according to Plaintiff, supplied the same information that he argued was relevant from that unrelated Faculty Senate meeting. Therefore, Plaintiff established no prejudice, and the district court's decision was correct in excluding the hearsay evidence from the unrelated Faculty Senate meeting.

ARGUMENT

I. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR FAU ON THE CONSTITUTIONAL CLAIMS

Throughout his brief, Plaintiff commits a conceptual error that he then exploits to make constitutional arguments that are not relevant to the present fact pattern. Plaintiff continually confuses actual restrictions or limitations on speech (that did not occur and are only hypothetical or speculative) with the enforcement of his contractual duty to report his outside professional activities (which may include speech but involved no restrictions on speech). In other words, the factual proceedings that led to Plaintiff's termination never involved anyone deciding to, or trying to, limit his speech. On the other hand, Plaintiff refused to even acknowledge that he was bound by the reporting provisions of the CBA. All of this occurred 2 ½ years after Plaintiff discussed his blogging activities with FAU, when

FAU only insisted on the reasonable, and contractual, requirement that Plaintiff make clear in his blogging that he speaks for himself and not for FAU. FAU then did nothing to prevent Plaintiff from continuing to engage in what his attorneys now refer to as "deeply offensive blogging," for the 2 ½ years before the events of the fall of 2015 that caused Plaintiff's termination. (See Plaintiff's Brief at 5)

The evaluation of a contractual policy does not give rise to constitutional claims, as the district court properly found. And, relatedly, because the parties were mutually governed by the contract – the CBA – the district court correctly found that Plaintiff had to raise the issues he sought to raise in this litigation by the grievance procedure set forth in the CBA and that, by not doing so, he waived his right to file litigation in federal court.

A. The District Court Correctly Determined that Plaintiff's Constitutional Claims Are Barred By Plaintiff's Failure to Exhaust His Administrative Remedies

As the district court ruled, Plaintiff's claims based on interpretation or application of the CBA are barred because Plaintiff ignored the CBA's mandatory grievance procedure. Counts III and IV of the Complaint comprised, respectively, Plaintiff's facial and as-applied challenges to the Policy contained in Article 19 of

the CBA; and Count V requested that the court declare the Policy unconstitutional or enjoin its application as to Plaintiff.[4] (DE 93)

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. (DE: 246-6, pp. 133-142) That procedure is the sole and exclusive method to resolve grievances. (DE: 246-6, p. 133, ¶ 20.1) Paragraph 20.1 provides, "[t]he procedure hereinafter set forth shall be the sole and exclusive method for resolving the grievances of employees as defined in this Article." (Id.)

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. (DE: 246-5, pp. 9-10; DE: 246-3, pp. 94-96) Based upon the procedure, Plaintiff knew he had the opportunity to grieve his termination from employment for his refusal to complete a contractual requirement under the CBA, but he failed to do so. In fact, each disciplinary notice issued to Plaintiff stated, "this disciplinary action, [] is subject to Article 20 of the BOT/UFF Collective Bargaining Agreement." (DE: 246-6, pp. 220, 284, 325) When the Union provided Plaintiff an independent attorney to assist him in

[4] The district court also granted summary judgment with respect to Count VI, the contract claim, on the basis of failure to exhaust. However, Plaintiff did not challenge that decision in this appeal.

utilizing the grievance procedure, Plaintiff fired him. After that, Plaintiff hired his own legal counsel, still having enough time to utilize the grievance procedure; but for reasons of his own, he elected not to do so.[5] Rather than take one of many opportunities to avail himself of the CBA's mandatory grievance procedure, Plaintiff once again ignored the CBA's requirements. Instead, he filed this lawsuit, asserting violations of his First Amendment rights even though no speech was ever restrained.

Each of Plaintiff's constitutional claims (Counts III-V) sought interpretation, clarification or application of a specific provision in the CBA. (DE 93) Therefore, 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 for 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. School Board of Leon County,* 378 So. 2d 68, 69 (Fla. 1st DCA 1979); *Miami Ass'n of Fire Fighters Local 587 v. City of Miami,* 87 So. 3d 93, 96 (Fla. 3d DCA 2012). The pertinent provisions of

[5] During the course of this case, despite having filed several prior grievances against FAU and having served as chapter President of his Union for three years, Plaintiff incredibly claimed he did not know how to file a grievance. (DE: 246-3, pp. 104-106)

the CBA, Article V (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. (DE: 246-6; pp. 76-183) As such, all 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 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 of "interpretation and clarification is subject to the grievance and arbitration process." *Id.* at 350.

Similar to *Hawks*, in this case, Plaintiff's constitutional claims 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 district court could have reviewed his case, albeit on a narrow standard of review. *See Hawks*, 874 F. 2d at 350. As the district court observed, the plaintiff in *Hawks* had a stronger basis to argue that his collective bargaining agreement terms were subject to a constitutional challenge than the Plaintiff in the instant case. In *Hawks*, the plaintiff argued that the residency requirement originated from the City's Charter and had only been *incorporated* into his collective bargaining agreement. Id. at 349. The *Hawks* court rejected that argument, and there is no such nuance in the present case, anyway, as the relevant contractual provisions were negotiated by the parties to the CBA.

The district court addressed Plaintiff's argument that the holding in *Hawks* should not apply to this case because any grievance Plaintiff filed would have been futile. (DE 362, p. 2) The district court did not agree, explaining that if Plaintiff

had challenged the vagueness of the Policy by filing a grievance, the court "would have the benefit of evaluating the official rationale, purpose, and scope of the Policy through that grievance procedure – the plaintiff in *Hawks* complied with his grievance proceedings and the court had the benefit of the underlying record." (DE 362, p. 20)

As the district court recognized, and as stated in *Hawks*, the terms of a contract, such as the CBA, may not be challenged constitutionally in the same manner that positive law may be challenged. As the district court noted, the cases cited by Plaintiff are unremarkable cases in which positive law has been challenged. Plaintiff has provided *no* authority for the proposition that a negotiated collective bargaining agreement provision may be scrutinized by a claim of constitutional vagueness prior to the exhaustion of the administrative remedies provided by that collective bargaining agreement. (DE 362, p. 19)

Plaintiff also argues that *Hawks* is nothing like this case. (Initial Brief at 45) Plaintiff says that in *Hawks*, the plaintiff took issue with language that made unclear whether a residency provision only precluded his promotion or subjected him to demotion. (Id.) Plaintiff then says that, in this case, we have an impermissible content-and-viewpoint-based restriction on highly controversial expression. (Id.) Actually, though, both cases involve the interpretation of a contract affecting an employee's rights and obligations under that agreement.

Plaintiff continues to imply that if "highly controversial" speech is at issue, then the legal rights of both parties under a generally applicable contract provision are changed in favor of the speaker. No case law supports that proposition, nor do the facts of this case. A person does not enjoy greater rights than another person by admittedly uttering more offensive speech.[6]

Plaintiff has raised on appeal the additional argument that *Hawks* is not a First Amendment case and that no other court has applied it in a situation like the present one. (Initial Brief at 45). That is not surprising. As the district court observed, "As best as the Court's research can discern, this is because no collective-bargaining-plaintiff – besides the instant Plaintiff – has ever tried to challenge a policy sourced in a collective bargaining agreement as unconstitutionally vague without first exhausting the governing dispute procedures in the applicable collective bargaining agreement. Plaintiff certainly has provided no case law that supports his challenge here in the context of his failure to comply with his collective bargaining agreement." (DE: 484, pp.25-26) That remains true in the present appeal: plaintiff cites no case that supports a challenge based on

[6] Plaintiff asserts that the Policy applies to all employees, including non-unionized ones who are not parties to the CBA. This is also not true. The CBA version applies only to covered employees. A similar Policy applies to non-union employees but does not use the same language. (Tr.V4:138) The CBA governs. (Tr.V.7:119)

provisions in a collective bargaining agreement without first exhausting the governing dispute procedures set forth in the document.

Plaintiff also makes the confused argument that "substantive § 1983 claims do not need to be administratively exhausted." (Plaintiff's Brief at 43) This argument, which has been made by Plaintiff multiple times in the case, confuses the § 1983 retaliation claim based upon the First Amendment, set forth in Count I of the Complaint, with the constitutional claims set forth in Counts III-V. FAU has never contended that the § 1983 claim can be precluded for the failure to grieve. There is no exhaustion requirement to bring a § 1983 First Amendment claim. However, that has nothing to do with the constitutional claims based upon the contractual interpretation of the CBA. As the district court explained, addressing Plaintiff's point:

> …the Court is unable to make any sense of Plaintiff's argument that "[s]ubstantive 1983 claims such as these challenging a governmental Policy on First Amendment grounds do not need to be grieved." (Citing DE 450 at 20) Defendants have never sought to preclude Plaintiff's First Amendment section 1983 claim on failure-to-grieve grounds. Defendants have repeatedly stated the same in filings in this Court. E.g. DE 455 at 11. Plaintiff's First Amendment section 1983 claim was presented to the jury. Plaintiff's confusion, and his exercise of free speech under the parameters of FAU's policies and the collective bargaining agreement, were the central issue at trial. While Plaintiff may have included a reference to 42 U.S.C. § 1983 in his constitutional challenges against FAU's policies, section 1983 "is not itself a source of substantive rights," but merely provides "a method for

vindicating federal rights elsewhere conferred." *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979). Just as section 1983 claims do not require the exhaustion of administrative procedures, constitutional challenges to positive, enacted law also have no exhaustion requirement. There is no exhaustion requirement to attack the constitutionality of a Florida Statute. But contractual terms are not the same as positive law, and Plaintiff did not challenge the constitutionality of a state statute or some other enacted, positive law. *E.g. Stover v. U.S.*, No. 1:04CR298 2007 WL 928643 ("Positive law is defined as 'a system of law promulgated on and implemented within a particular community by political superiors…Positive law typically consists of enacted law – the codes, statutes, and regulations that are applied in the courts'" (quoting Black's Law Dictionary (8th Ed.))).

Plaintiff challenged the constitutionality of FAU policies sourced in the contract terms of a collective bargaining agreement that he agreed to. Plaintiff's own words, contained in his own pleading, confirmed that his challenge is sourced in the collective bargaining agreement: "You have recommended that I complete a 'Report of Outside Employment/Activity Form' in accordance with the BOT/UFF Collective Bargaining Agreement." (DE 93 at 17-18). Plaintiff's challenge rested on the premise that terms in the collective bargaining agreement, together with FAU's implementation of the same, were too vague. The Court has been unable to locate an example of a vagueness challenge against a collective bargaining agreement wherein the plaintiff did not first exhaust his administrative remedies. Plaintiff has provided no authority for the proposition that by inserting a reference to 42 U.S.C. § 1983 of the pleading of his contractual challenge that he is relieved of the obligation to comply with the terms of the grievance procedure in the very agreement he is challenging as vague, nor did Plaintiff distinguish the case law cited by the Court, *Hawks*, for

> the proposition that Plaintiff is *not* relieved of his requirement to grieve.

(DE 484, pp. 27-28) (emphasis in original)

As the district court also observed, the cases that Plaintiff cites are not on-point. (DE 484, p. 26, n. 15) Plaintiff relies upon *Patsy v. Florida*, 457 U.S. 496 (1982), but that case did not involve a challenge to the constitutionality of a collective bargaining agreement provision or policy; it is a discrimination case in the context of employment law. Likewise, Plaintiff's citation to *Narumanchi v. Connecticut State University,* 850 F. 2d 70 (1988) is to a Title VII case, which has nothing to do with a challenge to the constitutionality of a collective bargain agreement provision or policy. (Id.) Plaintiff's other citations, the *Hennessy* case and the *Hochman* case, are no different. *See Hennessy v. City of Long Beach,* 258 F. Supp. 2d 200, 206-07 (N. D. N. Y. 2003) and *Hochman v. Bd. of Ed. of City of Newark,* 534 F. 2d 1094, 1097 (3d Cir. 1976). *Hennessy* was cited for the proposition that a First Amendment § 1983 claim need not be grieved under the CBA, a proposition disputed by no one in this case. And, unremarkably, *Hochman* involved a First Amendment retaliation claim under § 1983, just like the present case.

Even if Plaintiff had not failed to exhaust his administrative remedy or somehow was not required to comply with the CBA in pursuing that remedy, there is nothing about the Policy that is either vague or restrictive on Plaintiff's First

Amendment right of expression (and there was certainly nothing unclear in his supervisor's directives that he check the acknowledgement box accepting his assignment and provide his outside activity forms). The words used in the Policy to direct the reporting of outside activities are words of common understanding, and non-compliance with that term of the CBA has consequences that are plainly spelled out in the CBA's terms. (DE: 246-6, pp. 131-133, 210; DE: 246-3, pp. 232-233) The Policy is not void for vagueness simply because it does not define every word. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002) (citing *Smith v. U.S.*, 508 U.S. 223, 228 (1993)) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). Moreover, even if the Policy was subject to constitutional scrutiny, it does not restrict speech and was not used to restrict Plaintiff's speech. Nowhere does the Policy require a faculty member to submit the content of their speech to the University for approval. (DE: 246-6, pp. 131-133) Rather, what is clear in the Policy is that each faculty member is required to submit content-neutral information sufficient for FAU, a government entity, to assess whether there is a conflict of interest, including by the use of University resources, or a conflict of time commitment created by the activity that would interfere with the faculty member's faithful and full performance of their duties as an employee of the State of Florida. (*Id.*) Here, Plaintiff would not even agree that he is bound by the CBA's

Policy – even though he was an employee willing to accept the paychecks – and would not even report the activity or acknowledge that he was required to comply with the outside activity policy. Plaintiff's arguments about vagueness and restrictions on speech are completely irrelevant on these facts.

It is undisputed that Plaintiff did not follow the mandatory process by filing a grievance, despite several opportunities to do so. In other words, there was no genuine issue of material fact with regard to Plaintiff's failure to exhaust the administrative remedies established by the CBA. Therefore, the district court properly granted summary judgment to FAU on Plaintiff's constitutional claims with respect to the CBA Policy.

B. As to Count IV, the As-Applied Challenge, the District Court Also Correctly Ruled that it was not Ripe

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,* this 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 his rights. *Id.* at 590.

In this case, Plaintiff alleges that he was required to submit his blogging "for administrative evaluation, monitoring or restriction." (DE 93, pp. 48-49) However, Plaintiff never submitted his blog to FAU under the Policy. (DE: 246-1, p. 184; DE: 246-6, p. 324) 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. In fact, the opposite was true. FAU took every step possible, including providing him with an appropriate disclaimer and giving him multiple opportunities to comply with the outside activity policy, which would have allowed him, as it had in the past, to continue to publish outside of his research responsibilities as a faculty member. 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 decided to use 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 then grieve, using Article 19 of the CBA's expedited grieving process, should FAU attempt to restrict his speech or otherwise use his disclosures in compliance in violation of the CBA. (DE: 246-6, p. 133, ¶19.5; DE: 246-8, pp. 43-44; DE: 246-6, p. 217; Tr.V7:86) Indeed, "comply and grieve" is considered standard Union advice. (DE: 246-8, pp.

43-44; DE: 246-13, p. 226; DE: 246-14, pp. 28-29) Even though Plaintiff knew and ignored that mandate, he still sought to make this claim based upon what he thinks might have happened.

On the additional basis of lack of ripeness, the district court correctly granted summary judgment on Count IV, the as-applied constitutional claim. Responding to Plaintiff's argument that the Policy was so unconstitutional that he didn't know what he had to report, the district court noted:

> Similarly, the court cannot discern how Plaintiff could argue that FAU's policies were so unconstitutional that those policies *caused* him to become insubordinate, which caused his termination, in light of the fact that (1) every other faculty member complied with FAU policies, (2) those faculty members did not become insubordinate while trying to comply with those policies, and (3) Plaintiff complied with FAU policies in the past without becoming insubordinate.

(DE 484, pp. 29-30) As the district court first observed, "Stated another way, Plaintiff made a deliberate, consci[ous] choice to engage in insubordination, even when peaceful avenues were available to him to dispute the constitutionality of FAU's policies – avenues Plaintiff chose not to utilize although he had used those avenues before." (DE 484, p. 30, note 19)

II. THE DISTRICT COURT PROPERLY DENIED PLAINTIFF'S MOTION FOR NEW TRIAL AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

After trial, Plaintiff renewed his prior motion for judgment as a matter of law and filed an alternative motion for new trial based upon the sufficiency of the evidence and other matters. (DE 450; DE 453) The common thread of the motions is that Plaintiff argues that the evidence at trial overwhelmingly supported his case and satisfied one or both standards for the applicable motions. The district court reviewed the evidence from trial and cited more than enough of it to demonstrate that the opposite is true: the evidence overwhelmingly supported FAU's defense. It is sufficient, though, if the evidence was legally sufficient for a jury to find that Plaintiff's blog speech was not a motivating factor in FAU's decision to terminate his employment and that the verdict was not against the great weight of the evidence.

The standard for granting the renewed motion for judgment as a matter of law is whether a reasonable jury would have a legally sufficient evidentiary basis to find for the prevailing party. Fed. R. Civ. P. 50(a)(1). The standard for whether a new trial should be granted is whether the verdict is against the great weight of the evidence. *See Pensacola Motor Sales, Inc. v. Eastern Shore Toyota, LLC,* 684 F. 3d 1211, 1231 (11th Cir. 2012) (a new trial should not be granted "unless, at a

minimum, the verdict is against the great – not merely the greater – weight of the evidence").

Plaintiff's arguments about the evidence reflect confusion about the standard. Plaintiff discusses the record as though the evidence must be viewed in a light most favorable to *Plaintiff*. As the district court observed, that is improper argument. (DE 484, pp. 5-6) In fact, where a plaintiff seeks a motion for judgment as a matter of law, the court is required to view the evidence in the light most favorable to *Defendants*, such that where there is an issue for the jury to decide, the jury should do so. Similarly, in analyzing the motion for new trial, the court must independently weigh the evidence introduced at trial to meet the appropriate standard, set forth above, and not refer back to the court's analysis of evidence viewed in the light most favorable to a specific party. (DE 484, p. 6)

In finding that the jury's verdict was supported by the evidence at trial, the district court concluded that rather than the jury's verdict being against the great weight of the evidence, "the Court concludes that the great weight of the evidence at trial was in favor of Defendants." (Id. at p. 6) Explaining that the jury may disregard or discredit Plaintiff's evidence so long as there is an evidentiary basis on which to do so, the court observed that, "Plaintiff's evidence was called into question in every possible way at trial." (Id.)

FAU offered substantial and overwhelming evidence throughout trial that clearly demonstrated that Plaintiff's blog speech was not a motivating factor in the decision to terminate his employment. There was consistent testimony and evidence presented throughout trial that the reason for Plaintiff's termination was insubordination for his knowing refusal to fill out a report about outside employment or professional activities after being directed to do so by a supervisor, ignoring his own Union's advice to do so, and having several opportunities to comply. The evidence that the jury heard included, but was not limited to, the following:

- Drs. Alperin and Coltman learned of Plaintiff's Memory Hole Blog in December 2012 or January 2013, approximately three years prior to Plaintiff's termination (D. Ex.15; Tr.V4:78-79);
- Drs. Alperin and Coltman told Plaintiff, both in meetings and in writing, that he could continue blogging, but he must comply with the requirements of the Collective Bargaining Agreement applicable to all in-unit faculty members, including the use of an appropriate disclaimer that his views do not represent the official positions of the University and the submission of Report of Outside Employment or Professional Activity forms (*Id.*);
- No one from FAU told Plaintiff to stop blogging (D. Ex.15; P. Ex.8);

- The University and Plaintiff reached an agreement about the disclaimer on Plaintiff's blog (D. Ex.19) and Plaintiff's employment continued for another two years without any further disciplinary action—clearly showing that FAU had no intention of interfering with Plaintiff's blog speech;
- Plaintiff taught Culture of Conspiracy uninhibited even *after* the University learned of Plaintiff's Memory Hole Blog (P. Ex.29, p. 27);
- Plaintiff was working on scholarly pieces related to Sandy Hook and other conspiracy theories, without censure (D. Ex.80);
- Plaintiff's supervisor, Dr. Williams, emailed Dr. Coltman that Plaintiff was "refusing" to check the acknowledgment required of all faculty members when accepting their annual assignment, acknowledging his obligation to submit Report of Outside Employment or Professional Activity forms for his outside activities (P. Ex.32);
- Plaintiff was asked on six different occasions by a total of three different administrators to check the acknowledgment and submit his Report of Outside Employment or Professional Activity forms (D. Ex.25; 26 attachment C; 49);
- Plaintiff's own union representatives told him that he should submit the reports and file a grievance if any adverse action was taken as a result (D. Ex. 45);

- Drs. Alperin and Coltman each testified they reviewed Plaintiff's correspondences, and each concluded that Plaintiff understood the Conflict of Interest/Outside Activity Policy (Tr.V4:147; Tr.V5:85; Tr.V6:124-125);
- Plaintiff submitted Report of Outside Employment or Professional Activity forms for Global Research and Truth Frequency Radio—two activities that are *related to* his Memory Hole Blog—but refused to report his Memory Hole Blog (D. Ex.24);
- Plaintiff promoted the book, *Nobody Died at Sandy Hook*, on his podcast in November 2015, telling listeners that it was written by "mainly academics, including myself," and that it was experiencing "brisk sales"; (D. Ex. 225; 165);
- Plaintiff solicited donations to support his "research" through his Memory Hole Blog, yet never reported the blog as either compensated or uncompensated activity (D. Ex.21, p. 2; compare D. Ex.24);
- Despite being listed as a contributor to the book *Nobody Died at Sandy Hook*, which identified Plaintiff as an Associate Professor at the University, Plaintiff never submitted a Report of Outside Employment or Professional Activity form for the activity (D. Ex. 3; compare D. Ex.24);

- Despite all directives and suggestions, Plaintiff did not timely or completely submit Report of Outside Employment or Professional Activity forms for all of his outside activities as required by the Collective Bargaining Agreement;
- Drs. Alperin and Coltman discussed terminating Plaintiff's employment *before* the *Sun Sentinel* article regarding Plaintiff's alleged harassment of the Pozner family (Tr.V5:91, 99-100, 124-126; Tr.V6:31-32);
- Dr. Coltman sent Dr. Alperin a draft Notice of Termination prior to the publication of the *Sun Sentinel* article regarding Plaintiff's alleged harassment of the Pozner family (P. Ex.39; compare P. Ex.37v);
- Despite having already discussed the possibility of termination, Dr. Coltman offered Plaintiff one more opportunity to comply with the directive to submit Report of Outside Employment or Professional Activity forms (D. Ex.49);
- Plaintiff did not comply by the extended deadline and, when he did, never reported his activity with Memory Hole Blog or his contribution to the book, *Nobody Died at Sandy Hook* (D. Ex.24);
- Dr. Alperin, the decision-maker regarding Plaintiff's termination, testified (and the documents support (*see* D. Ex.28; 29)) that she would not have terminated Plaintiff's employment if he had submitted a complete Report of Outside Employment or Professional Activity forms (Tr.V 5:36, 97-98); and

- Plaintiff was not the only faculty member terminated for insubordination for refusing to timely submit accurate and complete Report of Outside Employment or Professional Activity forms. (D. Ex.206). Chery-se Copeland also engaged in outside activities that she did not report to the University. The University learned of Ms. Copeland's outside activities and specifically asked her to submit Report of Outside Employment or Professional Activity forms. Like Plaintiff, Ms. Copeland submitted incomplete forms without candidly identifying all of her outside activities. And like Plaintiff, Ms. Copeland's employment was terminated. (Tr.V5:22-23; 25; Tr.V6:117; D. Ex. 206)

In short, the evidence adduced easily satisfied the requirement that a reasonable jury have a legally sufficient evidentiary basis to decide for the party for whom verdict was rendered and that the result was not against the great weight of the evidence. In its order, the district court reproduced some excerpts from trial demonstrating a few of the key points that, by themselves, sufficiently defeated the post-trial motions filed by Plaintiff. The district court cited testimony that supported the proposition that Plaintiff was always allowed to blog uncensored and that if Plaintiff had submitted the fully completed forms required under the CBA, he would have not received a notice of proposed termination. (DE 484, p. 7) As the district court noted, the period of time that ran from Plaintiff's most controversial

blog posts about Sandy Hook to the time of Plaintiff's termination was three years, severely calling into question the entire theory of Plaintiff's case.

The district court referred to testimony and evidence that showed that Plaintiff's refusal to fill out FAU forms was insubordinate in that Plaintiff was advised to fill out the forms by virtually everybody, including his Union representatives. (DE 484, pp. 8-9) There was evidence that Plaintiff himself privately admitted to others that his refusal to fill out the forms was a mistake but that he thought he would be protected from termination because of his tenured status. (DE 484, p. 9) The district court pointed to an email from Plaintiff that showed that Plaintiff knew his refusal to fill out the forms was insubordinate, as he referred to the insubordination charge as "cut-and-dry." (DE 484, p. 10; D. Ex. 111; Tr.V3:142)

As for Plaintiff's contention that he did not fill out FAU forms because they were confusing, substantial evidence called that decision into question. As the district court noted, it appeared that Plaintiff, and Plaintiff alone, completely refused to fill out the forms. (DE 484, p. 10) In essence, every other faculty member or everyone who was asked to fill out the forms managed to do so. A jury could logically infer that if other faculty members fill out the forms, how could they be so confusing to Plaintiff that he could not possibly fill them out? (DE 484, p. 10) Moreover, Plaintiff ultimately did fill out the forms, although it was after the

deadlines imposed by FAU, logically leading to the question as to how it was impossible for him to fill them out in a timely manner. Thus, the jury was entitled to conclude that Plaintiff simply *chose* not to fill out the forms for purposes of his own, which constituted insubordination. (Id.)

There was evidence that showed that Plaintiff's refusal to fill out the FAU forms was related to his actual violation of the Policy. As the district court stated, "Plaintiff admitted that he received compensation through his blog, he simply contended that, according to him, the compensation was not enough to warrant reporting. (DE 467 at 40-45) Still, Plaintiff admitted that the amount of compensation is not determinative as to whether compensation or inactivity should be reported. (DE 467 and 48) Plaintiff admitted to spending hundreds of hours on his blog and related research and that his blog was "closely related in terms of subject matter to the courses that he taught." (DE 484, pp. 11-12) He further eventually admitted that, at times, he used school equipment while working on his blog and associated podcast. (Id.) One of Plaintiff's emails privately conceded the close relationship between his blog and podcasts in the courses that he taught. (DE 484, p. 12; *see* D. Ex.217m) Further, evidence was admitted showing that Plaintiff admitted to the union that his outside activities were reportable. (DE 484, p. 12)

The district court also noted that the motion for new trial brought by Plaintiff consistently distorted the evidence that was introduced at trial. (DE 484, p. 13) One

example is Plaintiff attributing a quote to FAU employee, Heather Coltman, where it was undisputed that the words were actually spoken by an independent FAU faculty member completely uninvolved in Plaintiff's discipline proceedings. (DE 484, pp. 14-15) Plaintiff also distorts the evidence in his repeated emphasis on the idea that other professors at FAU did not report their personal blogs or social media accounts to FAU. (DE 484, p. 16) As the district court observed, "That was never the issue in this case. The issue was Plaintiff's refusal to report *anything* despite multiple direct orders to do so, his refusal to acknowledge his duty to report (in the form requested), and also whether Plaintiff's specific blog (for which he received compensation) was so closely related to his professional, paid activities that he was required to report it." (DE 484, p. 16) Summarizing the limited evidence supporting Plaintiff's claims, the district court stated, "When Plaintiff's evidence is juxtaposed to Defendants' evidence, the great weight of the evidence was in Defendants' favor, not Plaintiff's." (DE 484, p. 17)

The district court also recounted evidence that called into question Plaintiff's truthfulness in general. (DE 484, p. 13) For example, Plaintiff testified that the reason he did not communicate with FAU on certain things and did not respond to compliance demands in a timely fashion was because he was on paternity leave and, therefore, unable or unwilling to check his email in-box. However, other evidence showed that "Plaintiff offered detailed, lengthy e-mails concerning the

Sandy Hook Massacre during his paternity leave." (Id.) The district court observed, "Defendants' characterization of Plaintiff at trial was that he was condescending, arrogant, untruthful, and that he cared more about his blog than his duties as a teacher. The Court observed at trial that "the tone, demeanor, and vernacular of Plaintiff on the witness stand could support, if a jury was so inclined, Defendants' characterization of Plaintiff." (Id.)

As the record demonstrates, FAU never limited Plaintiff's speech. As the jury correctly determined, Plaintiff was dismissed for insubordination. The facts of this case never reached the point of a possible restriction of speech. Plaintiff brought the problem on himself by drawing a line in the sand, refusing to even acknowledge that he is bound by the Policy in the CBA that he helped to negotiate and sign, as president. He would not acknowledge that he had an obligation to even report to his employer the professional activities he engaged in outside of his FAU assignments. It was tantamount to Plaintiff saying, "I do not have to tell you what other activities I am involved in; whether I am engaged in a conflict of interest is none of your business; and you're not the boss of any aspect of my professional activities. But, of course, I'll expect my paychecks on time." There is no rational argument to support the idea that Plaintiff was not insubordinate in his conduct. He remained insubordinate even after several additional opportunities were given to

him by FAU, and his own union strongly advised him multiple times to comply with the Policy. In other words, Plaintiff received what he bargained for.

Finally, there is an alternative basis upon which this Court may affirm the jury verdict, under the legal principle that the Court may affirm for any other valid reason argued and established in the record, even if not relied upon by the district court. As a basis for a judgment as a matter of law at the conclusion of all the evidence, FAU argued to the district court that Plaintiff never identified the specific speech which he contends was a motivating factor in FAU's decision to terminate his employment. (Tr.V7:159-162; 168-69; 183-87; Tr.V8:48-50; 61-63; 71-72) As explained in this Court's decision in *J.R. Bryson v. City of Waycross,* 888 F. 2d 1562, 1565-66 (11th Cir. 1989), among the elements of Plaintiff's claim on which Plaintiff has the burden are the requirement to show that the specific speech may be "fairly characterized as constituting speech on a matter of public concern," and that the employee's speech played a "substantial part" in the decision to discharge the employee. *Id.* at 1565. As FAU argued to the district court, Plaintiff never specifically identified the speech that he contends was protected and played a substantial part in the decision to terminate him. *See Goffer v. Marbury*, 956 F.2d 1045, 1050 (11th Cir. 1992) ("In the case before us the First Amendment issues could not be addressed in the unitary or global fashion employed by the plaintiff and the district court."); *Kurtz v. Vickrey*, 855 F.2d 723

(11th Cir. 1988). The closest Plaintiff came to doing that was in his generic references to his blog or "blog speech," Therefore, Plaintiff never truly "teed up" his claim to the jury, and the district court could have granted judgment as a matter of law on the claim. Even though the district court did not do that, this Court may do so.

In light of the fact that Plaintiff's arguments proceed from a misapplication or misapprehension of the standards applicable to a motion for judgment as a matter of law and a motion for new trial and the twisting and cherry-picking of such evidence in pursuit of that misapprehension, coupled with the district court's cogent discussion of some of the key evidence which, by itself, was sufficient to support the jury's verdict, together with the other evidence recited above, it cannot reasonably be said that the trial court erred in denying the renewed motion for judgment as a matter of law or in denying Plaintiff a new trial. Alternatively, this Court may affirm the jury verdict on the basis that Plaintiff failed to identify the specific "speech" upon which the claim is founded.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE SEPTEMBER 2015 FACULTY SENATE MEETING

Plaintiff challenges the district court's decision to exclude an audio recording of a Faculty Senate meeting that took place in September 2015. Plaintiff argues that the Faculty Senate Meeting supports Plaintiff's professed confusion

and is, therefore, central to his First Amendment retaliation claim. (Plaintiff's Brief at 58) This reflects a significant misconception. The alleged vagueness or confusing nature of the Policy may have been relevant to the constitutional vagueness claim that was disposed of by summary judgment, but it was not a matter before the jury on the retaliation claim. Contrary to Plaintiff's suggestion, whether Plaintiff was acting reasonably in his own mind is not relevant to the retaliation claim. (Id.) The issue before the jury was FAU's motivation in terminating Plaintiff's employment – specifically, whether Plaintiff's "blog speech was a motivating factor" in the employment decision. (DE 437, p. 1) Therefore, evidence related to Plaintiff's subjective state of mind or to his own or other faculty members' alleged confusion was not relevant or probative to the issue in this case. *See Morgan v. Ford,* 6 F. 3d 750, 754 (11th Cir. 1993).

The district court analyzed the Faculty Senate Meeting evidence correctly. The Faculty Senate Meeting contained inadmissible hearsay, was irrelevant, and, any limited probative value of the evidence was substantially outweighed by the danger of unfair prejudice to the university. (DE 484, pp. 18-20)

The testimony of the various attendees regarding what they or others said during the September 2015 Faculty Senate Meeting are out-of-court statements offered to prove the truth of the matter asserted. *See Fed. R. Evid.* 801. Therefore, the testimony regarding what was said during the September 2015 Faculty Senate

Meeting is hearsay. (DE 484, pp. 18-19) *See Fed. R. Evid.* 802. Plaintiff's assertion on appeal that the meeting transcript was not hearsay because it would have been offered for its "effect" on Plaintiff and FAU is not valid. Plaintiff's state of mind is not relevant,. Again, the issue in the case was FAU's motivation for terminating Plaintiff's employment. *See Morgan, supra*, 6 F. 3d at 754.

Not only was the evidence relating to the meeting hearsay, but it was inadmissible hearsay. The statements by the professors were not statements representative of the University's Policy but, rather, were statements of the professors' own personal opinions about a specific situation unrelated to Plaintiff, his speech, or his refusal to submit the Report of Outside Employment or Professional Activity forms. *See Rowell v. BellSouth Corp.,* 433 F.3d 794, 800 (11th Cir. 2005). Statements made by other professors who had no involvement in Plaintiff's subsequent discipline and termination, made in the context of another scenario of which they had no personal knowledge and that was unrelated to Plaintiff, cannot bind FAU and are simply irrelevant and inadmissible hearsay. *Staheli v. Univ. of Miss.,* 854 F.2d 121, 127 (5th Cir. 1988) (statements made to plaintiff professor by a professor that was a member of the faculty senate were not admission of a party-opponent as the faculty senate professor "had nothing to do with [plaintiff]'s tenure decision- or with any personnel matter concerning

[plaintiff]."); c*ited with approval by Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1565 (11th Cir. 1991).

As to Dr. Alperin, who was present at the meeting, Plaintiff argues that she made statements that are admissions and challenges the exclusion of those portions of the transcript and audio where Dr. Alperin speaks. However, as discussed below, the limited comment of Dr. Alperin at the meeting was not relevant to Plaintiff's claim or his termination. Moreover, the court also excluded the September 2015 Faculty Senate Meeting under Rule 403, and, throughout trial, Plaintiff otherwise elicited significant testimony from Dr. Alperin regarding the Conflict of Interest/Outside Activity Policy. (DE 484, pp. 18, 20) Therefore, Plaintiff's substantial rights were not affected by the court's exclusion of hearsay statements from an unrelated meeting.

In the lengthy transcript of the meeting, Dr. Alperin speaks only very briefly, near the very end. (*See* meeting transcript excerpt at DE: 250-47, pp. 24-25) Dr. Alperin's statements include confirmation that the University had been working to get the Report of Outside Employment or Professional Activity form changed for two years and that she agreed there needed to be clarity on what the Division of Research needs on the form. (*Id.*) At trial, Plaintiff's counsel asked Dr. Alperin about changes to the guidance offered on the Conflict of Interest/Outside Activity Policy and changes to the Report of Outside Employment or Professional Activity

form. (Tr.V4:213-214) It was no secret that the University had been working with the Division of Research on updates and additional guidance needed to comply with regulations governing research. Further, Dr. Alperin testified that the changes to the form and to the additional guidance would not have impacted Plaintiff as he did not engage in sponsored research (e.g. federal grants). (Tr.V5:71-72) Thus, Dr. Alperin's limited statements during the September 2015 Faculty Senate Meeting offered no probative value, and there was no harm to Plaintiff in the exclusion of Dr. Alperin's statements along with the rest of the transcript and audio because Plaintiff was permitted to elicit consistent testimony on the same subject and cross-examine Dr. Alperin on the subject at trial.

As the district court found, this discussion at the September 2015 Faculty Senate Meeting was largely not relevant. (DE 484, p. 19) The discussion concerned FAU's efforts at outside community activities during which various faculty members expressed frustration regarding a specific communication (e.g. a "nasty letter") sent to another faculty member from a member of the "administration." That letter related to an op-ed that was written as part of the faculty member's job duties. (DE: 250-5, p. 41) Notably, none of the members who spoke were the actual recipient of the email, and they were all speaking abstractly without personal knowledge. Additionally, the specific communication was a disagreement between employees who were not even in the same organizational reporting structure, not

disciplinary action, nor did the sender have authority to issue disciplinary action to faculty members. Importantly, the individual in question was not disciplined and the article at issue related to his promotion of an event he was planning on behalf of the University, rather than any outside activity. (*Id.*) Moreover, this meeting occurred well before Plaintiff refused to submit his Report of Outside Employment or Professional Activity. Based on all of the above, the September 2015 Faculty Senate Meeting was not relevant, and the Court was correct to exclude the transcript and audio from that meeting.

The Court was also correct in excluding the September 2015 Faculty Senate Meeting pursuant to Rule 403. (DE 484, pp. 19-20) Although the court determined that Plaintiff's alleged confusion had *some* relevance, it also determined that it was of limited probative value. (Id.) Importantly, the Court permitted Plaintiff to testify and introduce evidence to support his alleged confusion and to call other faculty members to the stand to testify as to whether they were confused. (DE Tr.V1:50, 57) The faculty members' reactions and their discussion of University policies were framed by issues and communications that were entirely irrelevant to the case.[7]

[7] Plaintiff apparently realized the meeting audio's lack of both probative value and usefulness to his claim. While Tim Lenz and Marshall DeRosa, the two most outspoken faculty members at the meeting, were included on the Plaintiff's trial witness list, Plaintiff chose not to call them to testify. (DE: 250-47, pp. 4-18)

The Faculty Senate Meeting audio reflects that the faculty members were angry, and their frustration could be noticeably heard. (DE 484, p. 20) Additionally, several faculty members offered lay legal opinions—referring to the requirement to seek prior approval before submitting an article on behalf of the University as a "prior restraint." Still, Plaintiff continues to confuse the constitutional vagueness claim, disposed of on summary judgment, with the § 1983 retaliation claim submitted to the jury. Even assuming, for the moment, that a constitutional vagueness challenge could be brought with respect to a provision in a collective bargaining agreement and that the Policy at issue here was vague, FAU would not be liable for retaliation merely for enforcing this "vague" Policy. The issue is whether FAU was motivated by Plaintiff's "blog speech." Thus, given that the vast majority of the September 2015 Faculty Senate Meeting was irrelevant and the probative value, if any, was extremely limited on the one hand, and given the prejudice to FAU of angry faculty members drawing legal conclusions about an unrelated situation on the other, the district court acted within its discretion to exclude the September 2015 Faculty Senate Meeting pursuant to Rule 403. And, as mentioned above, because the trial court permitted Plaintiff to offer the same-purposed evidence through live testimony, Plaintiff cannot reasonably claim to have been prejudiced by the decision in any event.

Finally, Plaintiff alleges that the University "opened the door" to evidence related to the Faculty Senate Meeting by simply referencing the Faculty Senate during testimony. (Plaintiff's Brief at pp. 24, 60) That argument is a non sequitur. Dr. Alperin testified regarding all of the options available to Plaintiff to challenge his discipline and termination if he felt it violated the Policy or the law. (DE 484, pp. 20-21) One of the options mentioned was to make a complaint to the Academic Freedom and Due Process Committee of the Faculty Senate. (Tr.V5:39; DE 484, p. 20) However, an admissible reference to a specific committee within the Faculty Senate does not open the door to inadmissible, irrelevant, unduly prejudicial hearsay . Dr. Alperin did not mention the inadmissible September 2015 Faculty Senate Meeting that was excluded or any of the discussion mentioned therein. Her admissible testimony regarding the existence of a committee within the Faculty Senate did not open the door to evidence regarding the inadmissible September 2015 Faculty Senate Meeting. *See Gov't of Virgin Islands v. Archibald*, 987 F.2d 180, 187 (3d Cir. 1993) (a party opens the door to introduction of otherwise inadmissible evidence only by introducing inadmissible evidence*); U.S. v. Brown,* 921 F.2d 1304, 1307 (D.C. Cir. 1990) (same).

For all of these reasons, and because Plaintiff did not demonstrate that he was substantially affected by the exclusion of the evidence, the district court did

not abuse its discretion in excluding evidence of the September 2015 Faculty Senate Meeting.

IV. THE DISTRICT COURT PROPERLY DISMISSED THE INDIVIDUAL DEFENDANTS FROM THE CASE BEFORE TRIAL

FAU includes this argument only in an abundance of caution. Plaintiff did not identify as an issue on appeal the propriety of the district court's order dismissing the Individual Defendants from the case in its order granting summary judgment. (See Plaintiff's Brief at 1) There is no heading in the brief that would put FAU on notice that this is an issue on appeal, even aside from the listing of the issues and the table of contents.

Plaintiff addresses this issue in a single sentence on page 51 of the Brief, arguing that if the summary judgment on vagueness is reversed and the verdict on retaliation does not stand, "the judgment for the Individual Defendants Alperin and Coltman must also be reversed." (Plaintiff's Brief at 51) The judgment for Individual Defendants Alperin and Coltman should not be reversed, for multiple reasons.

First, Plaintiffs did not properly raise this issue on appeal. In order to state an issue on appeal, it must be included in the statement of issues and separately identified in the brief as an issue on appeal, including a developed argument. *See Anderson v. City of Boston*, 375 F. 3d 71, 91 (1st Cir. 2004). Because Plaintiff did

not do that, the issue of the dismissal of Individual Defendants Alperin and Coltman has been waived.[8]

Second, even if Plaintiff is somehow deemed to have adequately raised the issue, Plaintiff's one-sentence proposition that the judgment for Drs. Alperin and Coltman should be reversed is incorrect. As the district court properly ruled, the mere existence of an issue of material fact on whether Plaintiff was terminated at least in part in retaliation for his blog speech does not dispose of the issue of whether Drs. Alperin and Coltman are entitled to qualified immunity. (DE 362, p. 25) The question is whether there are existing facts that make the termination of Plaintiff *objectively reasonable* under the circumstances, even if there is evidence for mixed motives. (Id. at p. 26) This Court explained the doctrine well in *Sherrod v. Johnson*, 667 F. 3d 1359 (11th Cir. 2002).

Applying the standard of *Sherrod*, the district court articulated how the facts supporting an objectively reasonable decision to terminate were undisputed, noting that the Policy under the CBA existed, FAU's administration of the Policy required Plaintiff to undertake certain actions, Plaintiff willfully did not comply despite advice to the contrary, and if Plaintiff ever attempted to fully comply, his attempt was untimely. (DE 362, p. 26) The district court properly found that Drs. Alperin and Coltman were entitled to qualified immunity on the basis that they could have

[8] Defendant does not address the dismissal of Individual Defendant Kelly anywhere in its Brief, and any issue relating to Kelly has also been waived.

reasonably and lawfully decided to recommend Plaintiff's termination, based upon how Plaintiff governed himself after being directed to comply with the Policy. (Id.)

While FAU submits that Plaintiff did not properly raise the issue of the dismissal of Drs. Alperin and Coltman as an appellate issue, in the event that this Court determines otherwise, FAU, for a fuller discussion of these issues, incorporates herein the district court's explanation of its ruling and the relevant portions of the motion for summary judgment filed by the Individual FAU Defendants. (*See* DE 362, pp. 25-26; DE 242, pp. 7-12)

CONCLUSION

Based upon the foregoing, the jury's verdict and the decisions of the district court under review should be affirmed in all respects.

CERTIFICATE OF COMPLIANCE

The undersigned attorneys hereby certifies that this brief complies with the type-volume set forth in Rule 32(a)(7)(B) and Eleventh Circuit Rule 28-1. This brief contains 1,294 lines of text. Additionally, the type size and style used in the body of this brief is fourteen point Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2018, I electronically filed the foregoing with the Clerk of the Court for the Eleventh Circuit by using the CM/ECF system and seven (7) paper copies were sent to the Clerk by FedEx. I also certify that the foregoing document is being served electronically by the Notice of Docket Activity transmitted by the CM/ECF system on the following parties on the attached service list.

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