

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No.: 9:16-cv-80655-RLR

JAMES TRACY,

Plaintiff,

vs.

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

Defendants.

/

VIDEOTAPED DEPOSITION OF TIM LENZ

APRIL 3, 2017
9:28 A.M. TO 11:53 A.M.

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SUITE 1240
ROCA RATON, FLORIDA 33431

REPORTED BY:

JESSICA COOPER, FPR, COURT REPORTER
NOTARY PUBLIC, STATE OF FLORIDA



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1 VIDEOTAPED DEPOSITION OF TIM LENZ

2 APRIL 3, 2017

3 THE COURT REPORTER: Okay. We're now on the
4 video record. Today's date is April 3rd, 2017 and
5 the time is 9:38 a.m. This is the video deposition
6 of Tim Lenz taken in the matter of James Tracy vs.
7 Florida Atlantic University Board of Trustees,
8 a/k/a Florida Atlantic University, et al. Case
9 Number 9:16-cv-80655-RLR. We are located at 2013
10 Yamato Road Suite 1240, Boca Raton, Florida 33431.
11 The Court Reporter is Jessica Cooper with the firm
12 Universal Court Reporting. Would counsel please
13 introduce themselves for the record?

14 MR. LEO: Louis Leo IV along with Joel
15 Medgebow. We also have Intern Anthony Maroun
16 present who represents the Plaintiff, James Tracy.

17 MS. HEFFNER: Katherine Heffner, representing
18 UFF FEA.

19 MS. HUFF: Sara Huff representing the FAU,
20 Defendants.

21 Thereupon:

22 TIM LENZ,
23 was called as a witness, and after having been first
24 duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 BY MR. LEO:

2 Q **Good morning.**

3 A Good morning.

4 Q **How are you doing today?**

5 A Well.

6 Q **Do you go by doctor or professor?**

7 A Doesn't make any difference.

8 Q **Do you have a preference?**

9 A Professor is easier.

10 Q **Professor is easier, okay. Professor, where**
do you work?

12 A Florida Atlantic University, Department of
13 Political Science.

14 Q **And how long have you worked there?**

15 A Thirty-three years.

16 Q **And are you a tenured faculty member?**

17 A Yes, I am.

18 Q **And how long have you been tenured?**

19 A Subtract six from 33.

20 Q **Twenty-four?**

21 A It's not quite good math.

22 Q **Twenty-seven.**

23 A Roughly.

24 Q **All right, 27 years. Is this the first time**
you've given a deposition?



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1 A I think I've given one in the past.

2 Q Okay. Let's just go over some ground rules.

3 I'm just going to ask you some questions. Your job is
4 just to answer truthfully and to the best of your
5 ability. Is there any reason why you couldn't answer
6 truthfully?

7 A No.

8 Q Do you take any medications or --

9 A I take CRESTOR for cholesterol and baby
10 aspirin for blood thinner.

11 Q Okay. You're not under the influence of any
12 drugs or alcohol today though?

13 A No.

14 Q Is there anything that would affect your
15 ability to testify to the best of your knowledge?

16 A No.

17 Q And did you speak to anybody in preparation
18 for your testimony today?

19 A In prep -- have I spoken to anyone about this?

20 Q Yes.

21 A Yes, I've spoken with -- someone from a law
22 firm called me a week ago and asked me what kinds of
23 questions you think they will ask me, and I've spoken
24 with Bob Zoeller.

25 Q What's the first person you spoke with? Was

1 **it somebody from the law firm?**

2 A Yes, McKee.

3 **Q McKee. You spoke to someone by the name of**
4 **McKee?**

5 A Yes.

6 **Q And you said he asked you questions about what**
7 **you --**

8 A She.

9 **Q You spoke with a woman?**

10 A Yes.

11 **Q What was her name? This counsel sitting here?**

12 A Yes.

13 **Q Okay. And what did she ask you?**

14 A She just basically asked me what do you think
15 they're going to ask.

16 **Q And what did you tell her?**

17 A I responded that I assumed they would ask me
18 about communications that I had with Professor Tracy.

19 **Q Okay. Anything else?**

20 A Also, had I had any communications with
21 University -- with UFF officials.

22 **Q And what was your response to that?**

23 A My response was that I believe that I had two
24 telephone conversations with Professor Tracy and because
25 I was an interim director of grievances, I had meetings

1 with Bob Zoeller, Doug McGetchin who was being trained
2 as my replacement and perhaps a UFF representative.

3 **Q Okay. Is there anything else that you**
4 **discussed?**

5 A I think that's all we discussed.

6 **Q You said you also spoke with Mr. Zoeller. Can**
7 **you tell us about those conversations?**

8 A He was -- he was concerned with having someone
9 take over for me as the grievance representative and I
10 agreed to produce a short grievance training module for
11 my successor. And it was in those contexts that we
12 discussed grievances. There were a number of other
13 grievances or faculty members who had contacted me about
14 potential grievances. So, it was in those contexts that
15 I had communications with Professor Zoeller.

16 **Q Okay. And we can come back to the other**
17 **grievances, but let's focus on Dr. Tracy for just a**
18 **moment. Did you talk to Mr. Zoeller about Tracy's**
19 **issues?**

20 A Yes.

21 **Q And what did you guys discuss?**

22 A I don't remember all of the details but they
23 were irrelevant to the process of filing grievances
24 and --

25 **Q So, these were discussions that happened a**

1 **long time ago?**

2 A Yes.

3 **Q That you're referring to?**

4 A Yes.

5 **Q Was there any more recent discussions prior to**
6 **your testimony today that you can recall?**

7 A A brief conversation last Friday, I believe it
8 was at a UFF Annual Membership and Election Function.

9 **Q And what did you guys discuss then?**

10 A Well, that was just about when are you
11 scheduled for the deposition and I responded, "On April
12 3rd."

13 **Q Did he ask any questions about your**
14 **anticipated testimony or --**

15 A No.

16 **Q -- anything like that? Has anybody made any**
17 **threats to you about your testimony or conveyed any kind**
18 **of promises or anything with respect to your testimony**
19 **today?**

20 A I don't think I had any promises or threats
21 made to me at any time about my work as a grievance
22 representative or about this particular grievance.

23 **Q Okay. Did you speak to anybody at FAU other**
24 **than that individual you just mentioned, any**
25 **administrators or staff, about your testimony?**

1 A No.

2 Q Nobody at FAU asked you if you were given a
3 deposition or anything like that?

4 A No.

5 Q I want to ask you a little bit about your
6 expertise, you teach constitutional law?

7 A Yes.

8 Q What kind of courses do you teach in
9 constitutional law?

10 A I teach courses on government powers and civil
11 rights and civil liberties and courses on the courts and
12 law and society. So, those are the public law area
13 courses and research that I do.

14 Q Do you teach the First Amendment?

15 A Yes.

16 Q And do you write about the Constitution?

17 A Yes.

18 Q How often?

19 A The latest publication was a publication about
20 the media and images of criminal law. So, public law
21 images in the popular media, television and film. I
22 also am editing an Introduction to American Government
23 textbook which has blocks of materials on the media
24 campaigning First Amendment, the constitution. Prior to
25 that I think my next previous publication was several

1 years prior to that.

2 Q **How long have you been teaching constitutional**
3 **law?**

4 A Thirty-three years.

5 Q **All at FAU?**

6 A Yes.

7 Q **And prior to FAU, where did you go to school?**

8 A The University of Minnesota was where I
9 received my doctoral degree.

10 Q **And what was that degree in?**

11 A Political science.

12 Q **Political science. Did you receive any other**
13 **degrees?**

14 A No -- a master's degree.

15 Q **A master's. And what was your master in?**

16 A Political science.

17 Q **Have you been given any awards for your**
18 **constitutional law experience?**

19 A No.

20 Q **And do you follow the cases?**

21 A Yes.

22 Q **You're familiar with Pickering -- the**
23 **Pickering case?**

24 A No.

25 Q **How about Garcetti?**



1 A No.

2 Q Do you have an opinion as to whether Professor
3 Tracy's firing at FAU was unconstitutional or not?

4 MS. HEFFNER: Objection as to form, but you
5 can answer.

6 Q (By Mr. Leo) You can answer the question.

7 A I don't think it was unconstitutional.

8 Q And why do you think that?

9 A Because I don't know why he was fired. I have
10 some opinions about why I think he was terminated but my
11 focus in this case has primarily been on the terms of
12 the contract and also I have some awareness of
13 employer's ability to condition official acts based on
14 speech.

15 Q Can you elaborate on that?

16 A I think there are some job requirements that
17 are -- that you accept with some constraints placed upon
18 freedom of speech, to make comments that are directly
19 related to your official capacity or performance of the
20 job.

21 Q Are you suggesting that Professor Tracy was
22 speaking about -- things about his job and --

23 A No, no, I'm just saying that in principle
24 there are some limits -- there are some employer based
25 limits on speech, you know, in an official capacity.

1 **Q How do those limits apply to Professor Tracy's**
2 **discipline?**

3 A I'm not sure.

4 **Q I only asked because you brought -- you bring**
5 **out these limits, I'm just curious how they --**

6 A Yeah, I would have to have more specific
7 context for that. I'm just talking about that
8 principle.

9 **Q You're speaking generally?**

10 A Yes.

11 **Q With respect to Professor Tracy's discipline,**
12 **and particularly termination, would you agree that he**
13 **was fired for his blogging?**

14 MS. HEFFNER: Objection as to form, but you
15 can answer.

16 A I believe that's the case.

17 **Q (By Mr. Leo) And do you believe that FAU had**
18 **the authority to do that, to fire him for his blog?**

19 MS. HEFFNER: Objection as to form, you can
20 answer.

21 A Based on the language in the contract which
22 includes some very broad language, the University's
23 requirement that we meet certain disclosure activities
24 gives them the authority to terminate a faculty member.

25 **Q (By Mr. Leo) Professor, have you have a chance**

1 to review Professor Tracy's lawsuit?

2 A I believe I read the brief that you submitted
3 to the court a year or so ago.

4 | Q Okay.

5 A But I haven't gone back and looked.

6 Q Okay. Have you read the complaint itself or
7 just --

8 A Yes, I have.

9 Q Okay. Because there's been some different
10 versions of the complaint -- we're now on the second
11 amendment complaint.

12 A Oh, then I have not.

13 Q So, you read the first one?

14 A Yes.

15 Q Okay. You mentioned that the -- that there is
16 some broad language. Are you referring to the outside
17 activities, conflict of interest policy?

18 A Yes. Yes.

19 Q And particularly that's Article 19?

20 A I haven't been keeping up with that but it's
21 Article 18 or 19.

22 Q Okay. Let me just mark this because I want to
23 talk to you about it. I'm going to just show this to
24 the opposing counsel first.

25 (Thereupon, Plaintiff's Exhibit P1 was entered

1 into the record.)

2 MS. HEFFNER: Thank you.

3 Q (By Mr. Leo) I'm handing you what's been
4 marked as Plaintiff's 1 for today. Do you recognize
5 this document?

6 A Yes.

7 Q Is this the policy you were just referring to?

8 A Yes.

9 Q The Conflict of Interest, Outside Activities
10 policy? And can you tell us about this policy? How
11 long has this policy been around?

12 A I was on the UFF team that negotiated the
13 first contract with FAU after power devolved from the
14 state to the universities. And --

15 Q And when was that?

16 A I don't remember the year but this was a long
17 time ago.

18 Q Could you estimate?

19 A 2003 -- I don't remember, something like that.

20 Q Okay. Continue --

21 A And I remember having a discussion about this
22 during the bargaining process of when we were coming up
23 with the first contract.

24 Q And what's your recollection as to the intent
25 of this policy?

1 A Well, when we were negotiating this, the
2 University seemed to insist on such broad language that
3 I knew they wouldn't enforce it. And so, we weren't
4 even going to go to the mat to have the very broad
5 language removed from the string, the bargaining
6 process.

7 **Q Which language in your opinion is broad?**

8 A The reportable outside activity. I'm not
9 referring now specifically to this document but the
10 original language was extremely broad. It was so broad
11 that it required us to -- I used to say I would have to
12 report to my supervisor that I planned on going fishing
13 Friday night. And when we brought those things up,
14 again, I just think that no one would enforce it. If
15 you strictly enforce, this is the whole thing would
16 collapse from paperwork. That was my understanding of
17 that.

18 **Q And how was this policy enforced by the
19 University initially?**

20 A I don't know the answer to that question
21 because I'm not familiar with all of the units where
22 this would be enforced, but in my --

23 **Q In your experience.**

24 A Yes, as a grievance officer and as a member of
25 the University Faculty Senate who was active in faculty

1 governance, this was not enforced to the letter of the
2 language in 19.4.

3 **Q So, the University was selectively enforcing**
4 **the policy?**

5 A I don't know whether it was selectively
6 enforcing it across the board. I know of some instances
7 where I think that it was selectively enforced.

8 **Q Can you provide us with some examples?**

9 A One example which is -- that's a little
10 complicated was one of my colleagues who had a letter of
11 discipline put in his personal file for having written
12 an opinion piece for the Palm Beach Post that the
13 University did not like, and therefore he was
14 disciplined.

15 **Q Who was this colleague?**

16 A Do I have to mention his name?

17 MS. HEFFNER: Yes.

18 **Q (By Mr. Leo) Yes.**

19 A Professor Wagner.

20 **Q Professor Wagner. And when was he threatened**
21 **with discipline, if you remember?**

22 A He wasn't threatening with discipline. He had
23 a letter of discipline put in his personal file.

24 **Q So, he was actually disciplined?**

25 A I haven't seen it but it's my understanding

1 that he had that letter put into his personal file as
2 opposed to -- and the reason why I'm a little uncertain
3 is for a while there were some non-discipline letters of
4 discipline that were also being put in -- into faculty
5 personal files for activity that the administration did
6 not like.

7 **Q Can you say that again, you said non-**
8 **discipline letter of discipline?**

9 A Right.

10 **Q What would that be?**

11 A It's like a letter was put in your personal
12 file but it was stated that it wasn't a letter of
13 discipline.

14 **Q Is that a big deal?**

15 A Yes, because I believe that that is part of
16 the paper trail that the University can -- that the
17 administration can then use to either further discipline
18 or terminate a faculty member under the progressive
19 discipline.

20 **Q Tell us about the progressive discipline. How**
21 **does that work? How is it supposed to work?**

22 A Oh, you're not supposed to be terminated for a
23 first violation of the terms of the contract.

24 **Q Okay.**

25 A For example, if I am sick but I don't file the

1 right forms and my chair asked me about it, I'm not --
2 wouldn't be progressive discipline for me to be
3 terminated for the first time something like that
4 happened.

5 **Q Going back to the Outside Activities Policy,**
6 **what documents does the University provide faculty with**
7 **in connection with this policy if any?**

8 A I'm not sure I can answer that. I know that
9 we regularly get communications instructing us to report
10 outside activity or -- and/or conflicts of interest.

11 **Q How regularly are you told to do that?**

12 A Perhaps regularly wasn't the right word. We
13 receive those notices.

14 **Q And how often do you get the notice?**

15 A Perhaps once a year, maybe not even.

16 **Q Is it with your course or assignment**
17 **submission that you're given this notice?**

18 A I actually don't recall.

19 **Q For example, does your administrative**
20 **department supervisor --**

21 A No, I was the department chair and I did not
22 submit to every faculty member on a semester or yearly
23 basis the information about the outside activity or
24 conflict of interest. And I believe that my current
25 chair does not regularly submit that information with

1 our semester or yearly assignments.

2 **Q Are all faculty asked to submit these forms**
3 **generically or are individuals targeted based on their**
4 **specific conduct that's being watched or monitored?**

5 A I don't think I can answer that question. I
6 don't think I have information about it.

7 **Q Okay.**

8 A As a matter of policy, I don't know the answer
9 to that.

10 **Q Are there guidelines that the University**
11 **provides the faculty in connection with complying with**
12 **the policy?**

13 A I'm unaware of guidelines.

14 **Q So, when they say submit the forms, they don't**
15 **say, "Here's some guidelines that can help you**
16 **understand and navigate this policy"?**

17 A I'm unaware of the guidelines.

18 **Q Okay. Have you ever heard of a monitoring**
19 **plan?**

20 A I have never heard of a monitoring plan.

21 **Q Let me show you -- I'm going to have this**
22 **marked as -- let's mark this as P2.**

23 (Thereupon, Plaintiff's Exhibit P2 was entered
24 into the record.)

25 **Q (By Mr. Leo) I'm going to show you what's been**



1 **marked as Plaintiff's 2 for today. Do you recognize**
2 **this document?**

3 A No, I do not.

4 Q **As you can see, it's quite extensive. If you**
5 **turn to the last page -- all right, do you see there's**
6 **an individual's name to the last page at the bottom of**
7 **the --**

8 A Yes.

9 Q **Larry Lemanski. Do you know who Mr. Lemanski**
10 **is?**

11 A I don't know if he's still in the position,
12 but he was a research administrator.

13 Q **This is the first time you're seeing this form**
14 **today?**

15 A Yes.

16 Q **So, nobody has ever indicated that there's a**
17 **monitoring plan?**

18 A I was unaware of any monitoring plan. The --
19 when I was a member of the board of trustees, I had to
20 sign a form that was more detailed about conflicts of
21 interest but that would be the only thing that was even
22 similar to this. But it's not the same document.

23 Q **Is the Outside Activities Policy, and for the**
24 **record I'm referring to the Outside Activities Conflict**
25 **of Interest Policy Article 19, is compliance with the**

1 **policy a condition of employment at FAU?**

2 A I don't know the answer to the question, I
3 don't know. I don't know whether or not it's included
4 in employment contracts.

5 Q **It's in the Collective Bargaining Agreement,**
6 **correct?**

7 A Yes.

8 Q **Have you ever been asked to affirm that you're**
9 **in compliance with the policy, by the University?**

10 A Me personally?

11 Q **Yes.**

12 A No.

13 Q **The University never sent you a online**
14 **submission form or check box, something to that effect**
15 **saying, "I'm in compliance with the policy"?**

16 A I don't think I've ever been sent such a
17 document or request.

18 Q **Let me mark this as P3.**

19 (Thereupon, Plaintiff's Exhibit P3 was entered
20 into the record.)

21 Q **(By Mr. Leo) I'm showing you what's been**
22 **marked as P3 for today. Do you recognize this language?**

23 A I don't recall seeing this.

24 Q **Have you ever had to agree to this**
25 **affirmation?**

1 A I have never had --

2 Q You've never agreed to this language before or
3 never checked a box on -- what I mean --

4 A I don't recall ever having checked a box.

5 Q Okay. Do, you know if any other faculty
6 members have been required to agree to this language?

7 A I don't recall ever hearing of a faculty
8 member who was required.

9 Q Do you have a problem with this affirmation?

10 MS. HEFFNER: Objection as to form, you can
11 answer.

12 A No.

13 Q (By Mr. Leo) It's okay?

14 A Well, that's not the same thing. I think the
15 University does have the authority to enforce language
16 like this.

17 Q When reviewing this language in light of your
18 views on the broad nature of Outside Activities Policy,
19 do you see any issues there or problems?

20 A Yes.

21 Q And what would that be?

22 A I don't believe the University consistently
23 requires all faculty members to report outside activity
24 as described in Article 19.

25 Q Let me show you another document P4.

1 (Thereupon, Plaintiff's Exhibit P4 was entered
2 into the record.)

3 **Q (By Mr. Leo) I'm showing you what's been
4 marked as P4 for today. Do you recognize this document?**

5 A Yes.

6 **Q What document is this?**

7 A The report of outside employment or
8 professional activity for FAU employees.

9 **Q And what is this document used for, if you
10 know?**

11 A When faculty members receive money from
12 sources other than the University including teaching.

13 **Q They have to report that activity?**

14 A Yes.

15 **Q Would this form be necessary for a
16 constitutionally protected speech?**

17 A No.

18 **Q Such as blogging -- personal blogging?**

19 A What do you mean? Such as -- I don't believe
20 that this form would require a faculty member to report
21 personal blogging or political activity, if that's your
22 question.

23 **Q How about like a Facebook page?**

24 A Same answer, I don't think that this form
25 would require a faculty member to report personal

1 activity.

2 **Q If a faculty member was asked to submit this**
3 **form for their personal online activity outside of the**
4 **University, what would you tell them to do?**

5 A If an administrator directed a faculty member
6 to fill this out and submit it?

7 **Q Right. For their blog, for their Facebook**
8 **page, something like that.**

9 A I would tell the faculty member that based on
10 my experience as a grievance officer they should fill
11 the form out and then file a grievance if they have an
12 objection.

13 **Q So, how would you tell them to fill this out,**
14 **for example for your blog?**

15 A Describe it, what do you mean --

16 **Q Where would you put your blog on here? Under**
17 **name of employer?**

18 A Description of employment -- well, it's not
19 employment. Well, this form wouldn't work if it weren't
20 employment, if it's outside activity, but as I
21 understand employment that's something where you're
22 receiving monetary compensation for the work.

23 **Q So, this form is designed for commercial**
24 **activity or compensated activity?**

25 A Well, it's -- actually I have to modify that

1 statement, I mean if it's professional activity; it's
2 not just employment, it's professional activity. So,
3 it's --

4 **Q What is professional activity?**

5 A Professional activity would include research,
6 conference, attendance, an activity where a faculty
7 member was identified by title or position and that was
8 a reason for their participation in activity campaigns,
9 for example.

10 **Q Would a personal blog be professional
activity?**

12 A If it were related to someone's academic
13 credentials or professional employment.

14 **Q How would you make that distinction?**

15 A That's a difficult one. For example, I don't
16 think we even know what a journalist is today and we've
17 broken down some of those professional distinctions.

18 **Q In your opinion, is this form, is this
something that all faculty should submit without
question for their online activities?**

21 A If a supervisor directs a faculty member to
22 submit a form like this, I advise them to submit this
23 and then raise the objections and the objections could
24 be personal communications with the supervisor or the
25 filing of a grievance.

1 **Q By completing this form for online activity,**
2 **is that in a sense agreeing or giving the University the**
3 **ability to regulate that activity?**

4 A I don't think so.

5 **Q In a sense, is this form something that you**
6 **use to get approval from the administration to conduct**
7 **the activity?**

8 A Could you repeat that?

9 **Q What I'm asking is, is this form, is it meant**
10 **to require approval of the activity? So, for example, I**
11 **have a Facebook page. Do I need to submit this form to**
12 **the administration before I can post on Facebook or do I**
13 **need to submit it to them after I post on Facebook to**
14 **make sure that what I said was not a conflict of**
15 **interest? Do you see what I'm saying?**

16 MS. HEFFNER: Objection as to form. You can
17 answer.

18 A As a grievance representative, I regularly
19 advise faculty members to comply with the supervisor's
20 request to submit forms and then you fight. This also
21 get's put into the bargaining basket where we during
22 bargaining bring up language in the contract that
23 creates problems. But I don't think the submission of
24 this gives the administration the right to approve or
25 deny the activity. Well, I actually I guess they can

1 deny it, and then we'd have to grieve it.

2 **Q Do you submit these forms, or have you**
3 **submitted a form like this for any reason?**

4 A I don't think I've ever submitted one of
5 these.

6 **Q In over 30 years, you've never filled out one**
7 **of these forms?**

8 A I do not recall ever having submitted one of
9 these forms.

10 **Q Do you have a Facebook page?**

11 A I do not.

12 **Q Do you have any social media --**

13 A I do not.

14 **Q Accounts?**

15 A I have one, but it's inactive.

16 **Q Inactive. If you were going to be online,**
17 **blogging or posting on Facebook, would you fill out a**
18 **form like this?**

19 A I would be sensitive to this issue because in
20 my position as a grievance officer and a faculty
21 representative, you know, I worry about the
22 administration's concern about its image and its
23 branding. For example, I am politically active. I've
24 worked in campaigns and I am reluctant to identify
25 myself as an FAU Employee, for example, when examining

1 or coding the results of resident surveys. I've been
2 asked to do that as part of a political campaign. And
3 because of what I perceive as the current
4 administration's concern about its image, I am much more
5 cautious than your average person. I think I'm more
6 cautious than your typical faculty member would be about
7 these kinds of things.

8 **Q Are you afraid of the current administration?**

9 MS. HEFFNER: Objection.

10 A I am not afraid of them, but I -- again, in my
11 grievance capacity, I've seen a number of instances
12 where I think their concern about image, bad publicity,
13 getting control over faculty, staff, and students has
14 resulted in a tightening of the enforcement of some of
15 this language. That's my understanding.

16 **Q (By Mr. Leo) With respect to faculty speech,
17 you talked a little bit earlier about some limitations
18 on that speech. But is there, in your opinion, any
19 interest in regulating constitutionally protected speech
20 from the University's perspective?**

21 A Well, I don't know what their -- their
22 interest in other than -- as I've described it, I do
23 think that they are not particularly concerned about
24 that boundary and they have broadly interpreted this
25 language and I think to selectively called faculty

1 members out for activities that administrators didn't
2 like for one reason or another.

3 **Q Typically, because they disagree with what**
4 **they're saying?**

5 A Or -- when the Kelly administration came on
6 board, I believe that they were given some instructions
7 to tighten the ship, and as a result of that some new
8 administrators took closer looks at this policy and, for
9 example, an administrator would be listening to public
10 radio and hearing a faculty member give an interview and
11 suddenly the administrator says "Wait a minute now, did
12 that person fill out one of these forms," and if the
13 answer was no, then the administrator would contact the
14 faculty member and try to say well "You know, you got to
15 report this stuff," and I -- that's the context within
16 which I have seen what I think was a tightening of the
17 enforcement of these provisions.

18 **Q Would a faculty member calling in to public**
19 **radio be an activity that should be reported on these**
20 **forms?**

21 A It depends. If the public radio station
22 contacted the faculty member because the faculty member
23 was a professional with expertise in an area, then --
24 could you rephrase or -- pardon me, repeat -- or did you
25 say should they or are they required to?

1 **Q I'll ask you both. Let's start with the**
2 **first, should, should they?**

3 A I do not think that faculty members should be
4 required to report all of this outside activity because
5 the University wants us to do this. And so, it doesn't
6 work, for example, for a faculty member who gets a call
7 from the media at 4 o'clock on a Friday afternoon to
8 stop and say "Wait, I have to call the chief
9 administrator on the third floor in the administration
10 building before I can speak to you." That's not the way
11 good universities run. Do they have the right to do
12 this based on some of this -- or authority to do this
13 based on this language, probably, but I again fall back
14 on my original position which is I wasn't that concerned
15 about this language when it was originally drafted,
16 because I knew it wasn't going to be enforced.

17 **Q How does Article 19 -- how does it work with**
18 **other provisions in the Collective Bargaining Agreement?**
19 **Are they all to be read together, or do they consider**
20 **any provisions that conflict in your experience? Are**
21 **they supposed to?**

22 A Well, you know, we negotiate these things
23 paragraph by paragraph by paragraph and we don't always
24 sit back and look globally at whether or not articles
25 reinforce or conflict with other articles, but that's

1 why they're renegotiated periodically and you try to
2 identify those kinds of issues where there are problems.

3 **Q Are you familiar with Article 5?**

4 A Refresh me, please.

5 **Q Sure. I'm going to show you what's been**
6 **marked as P5 for today.**

7 (Thereupon, Plaintiff's Exhibit P5 was entered
8 into the record.)

9 A Yes, I am.

10 **Q (By Mr. Leo) You recognize this policy?**

11 A Yes.

12 **Q What is this?**

13 A Well, this is the provision which attempts to
14 incorporate the broad parameters of academic freedom and
15 professional responsibility.

16 **Q All right. And if I can direct your attention**
17 **to 5.2D, are you familiar with this provision?**

18 A Not -- this is probably a more recent addition
19 to this than when I was familiar with the contract, but.

20 **Q Do you know when this provision was put into**
21 **effect?**

22 A I do not.

23 **Q I notice its Article 5, though article we were**
24 **discussing before is Article 19. Far down the line in**
25 **this 108 or so page agreement, is there a reason for the**

1 **placement of this Article 5 as one of the earlier**
2 **provisions?**

3 A No, I'm not certain about that but there has
4 been some lingering confusion over, or lack of clarity
5 over the difference between what the contract protects
6 and constitutional rights, particularly regarding
7 freedom of expression. And as a grievance
8 representative, you know, I regularly hear faculty
9 members conflate the distinctions between contractual
10 rights and constitutional rights. I assume that this
11 was included to address some of those concerns.

12 **Q Would you agree that Article 5 of the CBA**
13 **incorporates constitutional rights into your contract**
14 **with the University?**

15 A Yes.

16 **Q Would you agree that the outside-activities**
17 **form, if it was being used to require faculties to**
18 **submit their constitutionally protected speech for**
19 **approval or monitoring or anything like that, that that**
20 **would be a violation of Article 5?**

21 MS. HEFFNER: Objection as to form. You can
22 answer.

23 A No, I don't and you -- the question is, you
24 know, what's it being -- what is the administration
25 doing with it. The requirement that we submit for their

1 review to see whether or not they have an interest.
2 Seems to me similar to the requirement that we submit
3 patents to them and then they decide on their interest
4 in patent rights and then alter patent rights.

5 **Q (By Mr. Leo) I just want to distinguish a**
6 **patent from constitutionally protected speech or**
7 **activity. Patent would be more like commercial**
8 **activity, right?**

9 A Yeah.

10 Q You don't have a constitutional right to open
11 up a patent necessarily, do you?

12 A Well, there are property rights which I think
13 are included in the constitution and their limits on
14 what a state employee -- pardon me, a state employer can
15 say about those constitutional property rights.

16 Q Are you familiar with the term prior
17 restraint?

18 A Yes.

19 Q What's prior restraint?

20 A Well, it's conventionally understood as
21 censorship.

22 Q Censorship. For example, requiring somebody
23 to tell you about speech before speaking, would that be
24 a prior restraint?

25 A I don't think that would be the restraint part

1 of the prior. You know, it certainly raises some red
2 flags and it could be used to intimidate, but I don't
3 think a requirement that something be submitted for
4 review would necessarily be prior restraint.

5 **Q Do you think that there's a chilling effect on**
6 **requiring speech to be submitted for approval?**

7 A Yes.

8 Q **And would you agree that that could cause**
9 **restraint?**

10 A Yes.

11 Q **Going back to the Outside Activities Policy,**
12 **would you agree that it's being used to target some**
13 **speech and not others?**

14 A In my judgment, that has happened.

15 Q **Would you agree that that happened in**
16 **Professor Tracy's case?**

17 A Could you repeat the question, please?

18 MR. LEO: Jessica, can you read back the
19 question before the last question to him?

20 THE COURT REPORTER: Sure.

21 (Thereupon, a short discussion was held off
22 record.)

23 (Deposition resumed.)

24 Q **(By Mr. Leo) Just to be clear, the question**
25 **was whether Article 19, the Outside Activities Policy,**

1 **was being used to target Professor Tracy's speech in the**
2 **way which --**

3 A Yes.

4 **Q Targets some speech and not others?**

5 A Yes.

6 **Q A moment ago you had mentioned something about**
7 **University needing to have the forms to be able to**
8 **evaluate whether those are conflict of interests. Do**
9 **you recall saying something along those lines?**

10 A Yes.

11 **Q Would that apply to speech that the University**
12 **is already aware of?**

13 A Yes.

14 **Q For example, if the University knows that**
15 **you're engaging in a certain form of speech, would they**
16 **need you to submit a form to evaluate whether there's a**
17 **conflict of interests, or can they do that without the**
18 **form?**

19 A Well, the fact that an administrator was aware
20 of it doesn't mean that other administrators are aware
21 of it. And so it seems to me that it could -- we could
22 be required to submit this form and then have the
23 administration review whether or not it is to be
24 approved.

25 **Q Looking at this policy historically in your**

1 **experience, has any faculty member that you know of been**
2 **disciplined for non-compliance with this policy, Article**
3 **19?**

4 A I'm hesitating to answer that because I don't
5 know whether or not a loop has been closed, but I did
6 receive enquiries from faculty members who are concerned
7 about being disciplined for outside activities. And I
8 don't know whether or not a letter of discipline was
9 actually put in that faculty member's personnel file but
10 in my position as a grievance officer, I did receive
11 communication from faculty members who were worried
12 about this during a time period when these kinds of
13 issues seem to have been of greater concern to the
14 administration. But I do not know whether or not the
15 faculty members who actually contacted me ultimately did
16 receive a letter of discipline in their personnel file.

17 Q **You're referring to Professor Wagner's**
18 **situation?**

19 A No, others as well.

20 Q **How many other professors have?**

21 A I was aware of about four or five faculty
22 members in a very short period of time after President
23 Kelly assumed his position and, you know, I -- during
24 that time period those were the kinds of issues that I
25 was contacted about.

1 **Q Could you name these professors that you just**
2 **referenced, four or five?**

3 A Offhand, no.

4 **Q If you remember.**

5 A Yes, they are just not coming to my mind right
6 now.

7 **Q We can come back to it. And were any of the**
8 **professors that spoke to you about President Kelly's**
9 **enforcement of this policy or use of the policy, were**
10 **any of them dealing in failure to submit this form?**
11 **Were any of these complaints would've been regards to**
12 **the turning in of the form, the outside activities form?**

13 A I'm little uncertain about that. The concerns
14 that faculty members expressed to me included their
15 supervisors contacting them about outside activity that
16 had not been approved. And so, I'm not exactly sure at
17 what stage in the process of communication this
18 occurred, whether or not they were actually saying, "I
19 don't want to sign this form," or whether or not it was
20 just -- and "My supervisor has notified me that I've
21 been engaging in activity that's not compliant with the
22 requirements of this form."

23 **Q What kind of activity were you talking about?**

24 A Well, I mentioned the one, the National Public
25 Radio interview and another one was -- I believe it was

1 also a blog or a social media presence.

2 **Q Okay.**

3 A And in both of those instances, a supervisor
4 called the faculty members' attention to that in a way
5 that let the faculty member think that they were not in
6 compliance and could be subject to discipline.

7 **Q With respect to the blog and social media
8 account, do you know which faculty member that was?**

9 A Yes.

10 **Q Which one?**

11 A It was a music faculty member.

12 **Q Music?**

13 A I'm sorry. I know the person and eventually I
14 could give you the name, I just don't --

15 **Q Are you afraid to give his name?**

16 A No, I'm not. No, I'm not. I'm honestly
17 saying, I do not remember the two names.

18 **Q Okay.**

19 A I know them and they are prominent members of
20 faculty and I can provide you with the names; I just
21 can't do so right now.

22 **Q Okay. But one was a music professor?**

23 A I'm not concerned -- one was in music --
24 actually they're both involved in music, except one of
25 them worked in the library.

1 **Q So, how many examples involved blogging or**
2 **social media?**

3 A I'm uncertain because one of them was the
4 radio interview and I am not certain what the other one
5 was, exactly the form of concern about the outside
6 activity.

7 **Q Was Professor Tracy the first faculty member**
8 **to be fired using the Outside Activity Policy?**

9 A I don't know the answer to that question; he
10 is the first faculty member that I am aware of who was
11 fired for the outside activity.

12 **Q And going back to the complaints that you**
13 **received from other faculty members, were these all**
14 **tenured faculty members that were complaining?**

15 A Two of them were, another one wasn't actually
16 -- you know, there was a third one that -- a science
17 faculty member on another campus who was concerned about
18 being disciplined for commenting about the University's
19 control of dangerous chemicals in a lab or about the
20 University's development of areas of the campus that had
21 an adverse environmental impact. I don't know much more
22 about that one and I -- so, I don't know whether or not
23 she was a tenured.

24 **Q That wouldn't be protected speech though,**
25 **would it, commenting on the employment -**

1 **employer/employee relationship?**

2 A I'm not sure I understand the context of the
3 question.

4 **Q I'm just asking if that would be protected**
5 **speech -- constitutionally protected speech if one is**
6 **speaking about something with respect to their job**
7 **duties or the school, if you know.**

8 A Well, that gets into the area of, for example,
9 whistleblowing and --

10 **Q Or could be protected in other way?**

11 A Yes, yes.

12 **Q Okay. With respect to the complaints you**
13 **received, you said it was shortly after President Kelly**
14 **took over?**

15 A Yes.

16 **Q When did he become president?**

17 A I don't recall. Five years ago -- four or
18 five years ago.

19 **Q Four or five years ago? And before him was?**

20 A President Saunders.

21 **Q President Saunders. And my understanding is,**
22 **President Saunders has a pretty controversial**
23 **presidency?**

24 A She had a very-very controversial tenure.

25 **Q Did President Saunders exhibit the same for at**

1 **least issues with respect to outside activities?**

2 A No.

3 **Q Did any faculty members complain about**
4 **President Saunders' enforcement of the outside-**
5 **activities policy other than Professor Tracy?**

6 A I wasn't in that grievance position during
7 that time period, but I'm unaware of any such similar
8 concern.

9 **Q Were you familiar or are you aware of the 2013**
10 **dispute concerning Professor Tracy's blogging at the**
11 **University?**

12 A I think I am.

13 **Q Did you speak to anybody at the University**
14 **regarding the discipline that happened or the**
15 **threatening discipline?**

16 A You mean at the University, or with
17 administrators, or faculty member?

18 **Q I'm asking very generally,**

19 A Yes, with faculty member.

20 **Q So, back in 2013, the University attempts to**
21 **discipline Professor Tracy for his blog shortly after**
22 **the whole Sandy Hook matter. Did you speak to anybody**
23 **at the University at that time about --**

24 A Yes.

25 **Q Any of these concerns with the policy?**



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1 A Yes.

2 Q Who did you speak to?

3 A Colleague.

4 Q Faculty members?

5 A Faculty members, yes.

6 Q How about administrators?

7 A I have -- I may have mentioned something to my
8 department chair, I don't recall, but other than that,
9 certainly, no.

10 Q All right. At the time you said you weren't
11 involved in the grievance process?

12 A Right.

13 Q All right. So, you weren't in any official
14 capacity at United Faculty of Florida?

15 A Right.

16 Q Did they seek advice from you at any point in
17 2013?

18 A Who's they?

19 Q United Faculty of Florida.

20 A About what and during what timeframe?

21 Q About the threatened discipline in 2013
22 against Professor Tracy for his blogging, did anybody
23 seek counsel from you or advice on, for example,
24 constitutional issues?

25 A No.



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1 **Q Are you aware that the association of American**
2 **University Professors --**

3 A AUP?

4 **Q Yeah. Are you aware that they wrote a letter**
5 **to the University, are you familiar with that?**

6 A I vaguely recall that, yes.

7 **Q And what do you remember about the letter?**

8 A There is a concern about employers in general
9 using their authority to regulate both academic freedom
10 and constitutional protected expression.

11 **Q Which is --**

12 A Academic freedom.

13 **Q Which is why Article 5 exists?**

14 A Yes.

15 **Q Earlier you had stated that if Article 19 was**
16 **being used in a way that targeted or interfered with the**
17 **exercise of constitutionally protected speech that that**
18 **wouldn't be a violation? Is that a --**

19 A I don't think I said that. If -- the
20 University does not have the right to violate the United
21 States Constitution.

22 **Q And what about Article 5?**

23 A I don't think Article 5 violates the
24 Constitution.

25 **Q No, my question is, whether the University can**

1 **violate Article 5, particularly 5.2D, in the**
2 **administration of the university?**

3 A No, I mean it's a basis for a grievance among
4 other things.

5 Q **That was my next question. So, if the**
6 **University using was any policy not just Article 19, but**
7 **any policy in a way that violated Article 5.2D, that**
8 **will be grievable?**

9 A Yes.

10 Q **Okay. Did anybody that you know of within**
11 **United Faculty of Florida ever bring that to your**
12 **attention?**

13 A Yes. I mean, I've had many conversations with
14 faculty members about the difference between terms and
15 conditions of employment and First Amendment protected
16 activities.

17 Q **Did any of the faculty members that came to**
18 **you, they say the University is violating Article 5.2D?**

19 A I don't recall any specifically, but I imagine
20 some did, because most faculty members tend to think of
21 the First Amendment rather than the terms and conditions
22 of employment. That's where our instructional role
23 comes into play.

24 Q **All right. Do you recall ever speaking to the**
25 **administration, or to faculty, or to both about your**

1 **concerns about use of this policy in a way that would be**
2 **consider non-constitutional?**

3 A About which policy, Article 5 or --

4 Q **You said -- I'm sorry, use of Article 19.**

5 A Article 19, yes.

6 Q **And when was that?**

7 A At a University Faculty Senate Meeting in
8 particular.

9 Q **And do you remember when that was?**

10 A I do not.

11 Q **Does September 2015 sound about right?**

12 A That sounds about right.

13 Q **September 4th?**

14 A I didn't realize it was in fall, I thought it
15 was in spring. I didn't.

16 Q **That was shortly before Professor Tracy was**
17 **targeted and disciplined using Article 19?**

18 MS. HEFFNER: Objection as to form.

19 Q **(By Mr. Leo) Would you agree with that**
20 **timeline?**

21 A I assume you have the right date. In my mind
22 I thought that was one of the last senate meetings in
23 the spring, but it -- I accept that it was September.

24 Q **One of the things that you stated in your**
25 **speech which was recorded, was that there had been a**

1 **change to the language in the collective bargaining**
2 **agreement, do you remember saying that?**

3 A I do not.

4 Q **Would you like me to play what you said?**

5 A Please.

6 Q **Okay. That will make this easier.**

7 MR. LEO: Is this picking up okay?

8 (Thereupon, an audio is being played)

9 Q **(By Mr. Leo) Okay.**

10 A I really don't recall what change in the
11 language I was referring to there.

12 Q **Okay. Does that refresh your recollection as**
13 **to what you said?**

14 A Yes, yes.

15 Q **That was you speaking, right?**

16 A Yes.

17 Q **When you gave that speech, was President Kelly**
18 **in the room?**

19 A Yes, he was.

20 Q **Was Diane Alperin in the room?**

21 A I don't recall.

22 Q **How about Heather Coltman?**

23 A I don't recall.

24 Q **How about Robert Zoeller?**

25 A I think he was there.



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1 **Q Okay. Was there any other UFF FAU Officers**
2 **that were present at the time?**

3 A I assume so because some of them were also
4 members of the senate, but I can't recall with any
5 specificity.

6 **Q You talked about the President Kelly's --**
7 **well, I'm sorry, let me back up. The -- it was Senator**
8 **Beetle who was speaking before you, correct?**

9 A Yes.

10 **Q He referred to an ad hoc committee and a**
11 **taskforce. I guess this was started by President Kelly,**
12 **is that --**

13 A The Community Engagement Initiative.

14 **Q What's your knowledge of this taskforce?**

15 A Well, I was a great supporter of the idea and
16 I think it's an essential part of FAU's growth and
17 development, but I don't think the University was really
18 interested in community engagement.

19 **Q And why is that?**

20 A Because they could have promoted it better and
21 they were doing some things which I think stifled it.

22 **Q What were they doing that stifled?**

23 A Well, my colleague's letter of discipline;
24 they were sending a clear message that if you engage in
25 outside activity, it's risky in an environment where no

1 one knows exactly where the boundaries are between
2 permitted and non-permitted activity.

3 **Q Are you on this committee?**

4 A No, absolutely not.

5 **Q Do you know who's on the ad hoc committee?**

6 A I don't know whether it's still in existence,
7 but I believe Chris Beetle was referring to Ron Nyhan
8 who, to my knowledge, is a faculty member who is
9 responsible or head -- responsible for heading this
10 community engagement initiative.

11 **Q So, the committee was being represented as**
12 **something to encourage faculty outside activity?**

13 A Yes.

14 **Q Do you know if this committee was being used**
15 **in any other way?**

16 A I do not. I think it was probably being used
17 to meet some of the terms and conditions of the Carnegie
18 Status for universities as having placed an emphasis on
19 community engagement.

20 **Q Do you know if this committee was being used**
21 **to monitor outside activity?**

22 A I don't think that's how it was being used.

23 **Q It was more to promote engagement?**

24 A Well, I thought that's what it was for but I'm
25 not sure it was used to promote it. I think it was used

1 more for a way to make it easier for FAU to get that
2 Carnegie Status.

3 **Q Other than the professors that we discussed, I**
4 **got a music teacher, a science teacher --**

5 A I know their names now.

6 **Q You know their names? Okay, good. Go ahead**
7 **with them.**

8 A Aaron Kula, Eminent Scholar of Music but he --
9 his position is in the FAU libraries. Then the other
10 one was a Professor of Music, Jamie Cunningham.

11 **Q Okay. When you were talking about the fear**
12 **and uncertainty, were you referring to these**
13 **individuals' fears or more than just them?**

14 A I was -- it was my concern that the
15 administrator was using these provisions in the contract
16 to get control of faculty members in a way that was
17 going to be selective and it was going to discourage the
18 community engagement initiatives that they were
19 promoting.

20 **Q Do you remember who spoke after you in this**
21 **meeting --**

22 A I do not.

23 **Q Another constitutional law professor, DeRosa,**
24 **is that --**

25 A Oh, that's my colleague, Marshall DeRosa; I do

1 not recall but.

2 **Q** You don't remember what he said? Did he
3 **express fear and uncertainty if you remember?**

4 **A** I don't remember.

5 **Q** Did Professor Tracy ever express fear and
6 **uncertainty to you regarding the outside-activities**
7 **policy?**

8 **A** Yes.

9 **Q** **When did he first express them?**

10 **A** I don't know -- recall the timeframes but I
11 believe there were two telephone conversations at which
12 this issue was discussed.

13 **Q** **And when was the first conversation?**

14 **A** I don't recall when and as I said I was
15 surprised to hear that the University Faculty Senate
16 Meeting was in September rather than in spring; I would
17 say sometime late summer or fall.

18 **Q** **Was it before or after he was given Notice of**
19 **Discipline?**

20 **A** I don't recall.

21 **Q** **All right. Did Professor Tracy come to you**
22 **and say, "They want me to submit these outside-**
23 **activities forms for my blog?"**

24 **A** That was part of the conversation, yes.

25 **Q** **All right. And what did you tell Professor**

1 **Tracy?**

2 A Submit the forms that your supervisor requires
3 and then file a grievance.

4 **Q Regarding the submission of the forms, would
5 the submission of the forms be required to file a
6 grievance?**

7 A Yes, because you can't file a grievance over a
8 proposed action; you have to file a grievance
9 challenging an action.

10 **Q What about a directive? You said you can't
11 file a grievance in response to a proposed action, but
12 what if you had received a directive, "Submit these
13 forms or you will be disciplined." Would that be
14 grievable?**

15 A There is a provision to file a chapter
16 grievance and I think that that would be an instance
17 where a chapter grievance might be appropriate. But, in
18 general, you know the rule is a grievance is a claim
19 that a provision of the contract has been violated.

20 **Q So, if the University was using Article 19 to
21 censor or to otherwise interfere with the exercise of
22 the constitutional rights, would that be something that
23 a chapter grievance could be filed for?**

24 A Yes, yes.

25 **Q When you told the senate faculty of your**

1 **concerns and the concerns of your peers, did anybody**
2 **from United Faculty of Florida or Florida Education**
3 **Association or anybody in the Union umbrella, did they**
4 **contact you or talk to you about your concerns?**

5 A Bob Zoeller.

6 Q **Bob Zoeller did. When did he first bring**
7 **these -- or when did he first come to you?**

8 A He just -- he simply acknowledged my comments
9 as a member of the University Faculty Senate -- again, I
10 assume he was there, but he commented about them.

11 Q **Did he ever tell you -- and I'm referring to**
12 **Mr. Zoeller, did he ever tell you that we should file a**
13 **chapter grievance?**

14 A No, I'm unaware of any discussion of whether
15 or not to file a chapter grievance over. They tightened
16 -- what I perceive to be the tightened enforcement of
17 Article 19.

18 Q **The outside-activities policy?**

19 A Yes.

20 Q **Did at some point Zoeller file a chapter**
21 **grievance against outside-activities policy?**

22 A I don't know.

23 Q **Would it surprise you if he did?**

24 A Yes.

25 Q **I'm going to show you --**

1 MR. LEO: Let's mark this. Would that be six?

2 THE COURT REPORTER: Um-hum.

3 (Thereupon, Plaintiff's Exhibit P6 was entered
4 into the record.)

5 **Q (By Mr. Leo) I'm going to show you what's been**
6 **marked as P6 for today. Do you recognize this? Have**
7 **you ever seen this before?**

8 A I don't think I've seen this before.

9 **Q Are you aware of the University's response to**
10 **this grievance if there has been one?**

11 A I'm unaware of a response.

12 **Q And If you'll notice the bottom there, there's**
13 **a stamp. It has a date, April 19th, 2016. Is -- are**
14 **you familiar with the stamp?**

15 A No.

16 **Q It says 'KL'. Does that mean anything to you?**
17 **It does say provost as well.**

18 A No.

19 **Q Have you ever filed a grievance before?**

20 A Yes.

21 **Q When you file a grievance, walk me through the**
22 **process from the beginning.**

23 A The faculty member contacts a grievance
24 representative and asks about whether or not a
25 university action is in violation of the contract, or

1 they contact a faculty member expressing a concern about
2 the university action or even a proposed university
3 action. And then we spend some time thinking about what
4 actually has happened or what's being proposed and then
5 emphasize the fact that a grievance is a claim that a
6 provision of the contract has been violated. And then
7 grievance representative -- and it's also a good idea to
8 have the grievant go through the contract to think of
9 what provisions of the contract might be relevant, and
10 then we work on language and we submit the grievance.

11 **Q Going back to this Exhibit P6, this grievance**
12 **has two individuals' names on it. One looks like a**
13 **Robert Zoeller Jr., President, and then Doug McGetchin,**
14 **is that the same faculty member you said was -- you were**
15 **his mentor?**

16 A Yes, I conducted a grievance training session
17 with Doug and -- Doug McGetchin and with Bob Zoeller,
18 you know, in preparation for handing this off because I
19 only agreed to step in.

20 **Q When was the grievance training?**

21 A I don't recall.

22 **Q Was it before or after Professor Tracy was**
23 **fired?**

24 A I don't recall.

25 **Q And you said it was Zoeller and McGetchin, who**

1 **you trained at this training?**

2 A Yes.

3 **Q Was there any other individuals that were**
4 **present?**

5 A Well, I think that a UFF representative was on
6 campus.

7 **Q Do you remember the name of that individual?**

8 A But I don't recollect right now.

9 **Q Was it Michael Moats?**

10 A Yes, it was Michael Moats.

11 **Q Okay. And you said you don't remember when**
12 **this training was, was it in 2015?**

13 A I wouldn't even say that. I don't remember
14 exactly when it was. It was during the time period when
15 I agreed to step in after the UFF grievance
16 representative left the University. So, it was after
17 that time.

18 **Q Who was the --**

19 A Doug Broadfield.

20 **Q Right.**

21 A So, Doug Broadfield left the University and
22 they needed someone to step in because I had previous
23 experience, and I was asked to step in.

24 **Q Do you know when Doug Broadfield left?**

25 A December of some year.

1 Q **Maybe '14?**

2 A It's possible.

3 Q **It was prior to Professor Tracy's firing?**

4 A Yes.

5 Q **Broadfield, he was the representative who**
6 **originally grieved on behalf of Professor Tracy in 2013,**
7 **isn't that correct?**

8 A I don't know.

9 Q **Were you aware that Professor Tracy filed a**
10 **grievance in 2013?**

11 A I don't recall.

12 Q **Were you aware that the University entered**
13 **into a settlement agreement with Professor Tracy?**

14 A Yes.

15 Q **And that was the result of a grievance that**
16 **was filed.**

17 A Okay.

18 Q **Did Professor Tracy ever communicate his**
19 **interest or wish to file a grievance against the**
20 **proposed discipline in November of 2015 before he was**
21 **fired?**

22 A So, this would be --

23 Q **After your senate faculty speech.**

24 A Right.

25 Q **But before the --**

1 A This would be in one of those two telephone
2 conversations, yes.

3 Q **Okay. Was it just you and Professor Tracy on**
4 **the phone or was there any --**

5 A No, this was -- it was a telephone call
6 between Professor Tracy and myself.

7 Q **Was there any other participants in the call?**

8 A No.

9 Q **And Professor Tracy said, "I want to challenge**
10 **this Notice of Discipline." How did it --**

11 A I don't remember the exact conversation, but
12 it was about the grievance process and concerns about
13 what was happening to him at FAU.

14 Q **Okay. Did you actually see a copy of the**
15 **Notice of Discipline that Professor Tracy received in**
16 **November or 2015?**

17 A I'm not sure.

18 Q **Let's mark this as P7.**

19 (Thereupon, Plaintiff's Exhibit P7 was entered
20 into the record.)

21 MR. LEO: While I'm doing that, can we go off
22 the record for a second?

23 MS. HEFFNER: Yes.

24 (Thereupon, a short discussion was held off
25 record.)

1 (Deposition resumed.)

2 Q (By Mr. Leo) Professor, I'm going to show you
3 what's been marked as P7 for the day. Just take a look
4 at that and let me know if that refreshes your
5 recollection as to whether you've seen this document.

6 A It seems familiar.

7 Q And this is the Notice of Discipline that
8 Professor Tracy was given in November of 2015 and its
9 dated November 10th, 2015. Do you remember whether
10 Professor Tracy was actually at the University in
11 November of 2015, he was on leave or not?

12 A I don't recall.

13 Q You don't remember if he was on paternity
14 leave at the time?

15 A I don't recall.

16 Q Okay. So, Professor Tracy, he called you and
17 he talked to you about this Notice in November?

18 A There were two telephone -- I think there were
19 two telephone conversations. I do not know exactly when
20 they occurred.

21 Q Okay. The directive in this Notice says,
22 "Within 48 hours of receiving this letter, you are
23 required to acknowledge receipt of your annual
24 assignment through the fair system with all terms and
25 conditions." Are you familiar with the fair system?

1 A Yes.

2 Q **And the terms and conditions?**

3 A Yes.

4 Q **The terms and conditions are what?**

5 A On the fair system, it's nothing more than --
6 these are the class -- the breakdown of teaching
7 research and service. These are the courses. This is
8 the percentage of the 100% employment breakdown. I
9 think that's all it is.

10 Q **Is it a system where you submit your
11 assignment for the year to the University?**

12 A No, your supervisor -- it's where the
13 supervisor enters in your teaching research and service
14 assignments for an academic year and the percentage of
15 weight allocated to each of those categories.

16 Q **Do you use this, the fair system to submit
17 your --**

18 A Well, I don't submit it. All I do is sign it.

19 Q **Okay.**

20 A When I was a department chair, I had to fill
21 them out. Now, I simply sign it.

22 Q **All right, going back to P3. Is this one of
23 the terms and conditions of the annual assignment
24 system?**

25 A I don't recall.

1 **Q Do you know if that is what this directive in**
2 **Exhibit P7 is referring to when it says,**
3 **"Acknowledgement and terms and conditions?"**

4 **A Which line -- in which paragraph are you --**

5 **Q Down here which it says --**

6 **A Your refusal to follow?**

7 **Q The directive, "Within 48 hours of receiving**
8 **this letter, you are required to acknowledge receipt of**
9 **your 2015-16 annual assignment with all terms and**
10 **conditions."**

11 **A I assume that's what it entails.**

12 **Q Okay. And then it says, "Submit report of**
13 **outside employment activity forms for 2013-14, 2014-15**
14 **and 2015-16."**

15 **A There is a question embedded there?**

16 **Q These directives, these were regarding**
17 **Professor Tracy's blogging.**

18 **A Okay.**

19 **Q Correct, if you know?**

20 **A I'm not certain.**

21 **Q Did Professor Tracy tell you?**

22 **A Yeah, I assume that that's what this was**
23 **about. It was whether or not he should sign the**
24 **electronic form and whether or not that constituted**
25 **recognizing that the blog activity was some -- was**

1 activity that had to be approved by the University.

2 Q Right. Professor Tracy told you he was
3 uncomfortable signing the affirmation --

4 A Yes.

5 Q That he was in compliance with the outside-
6 activities policy and he was uncomfortable --

7 A Yes.

8 Q Submitting forms for his personal blogging?

9 A Yes.

10 Q Okay. And it says here at the bottom,
11 "Failure to meet any of the requirements listed may
12 result in further disciplinary action." Is this Notice
13 of Discipline, is this disciplinary action?

14 A Technically, no, Notice of -- it's always been
15 rather convoluted because you can get a Notice of Intent
16 to Discipline which is not actually discipline. That's
17 my understanding of some of the confusion about what
18 discipline actually is.

19 Q Is this November 10th, Notice of Discipline,
20 is this grievable?

21 A Yes.

22 Q Did you tell Professor Tracy that he should
23 grieve this?

24 A I don't recall whether I told him he should
25 grieve this. I basically said what you must do is

1 submit the forms that your administrator is asking you
2 to submit -- pardon me, the -- submit the annual -- sign
3 the documents that the administration -- that your
4 supervisor is asking you to sign and then grieve it.

5 **Q And you're referring to -- when you say submit**
6 **the form, you're referring to submit P4, the outside**
7 **activity form?**

8 A And also the fair assignment, so --

9 **Q P3, the checkbox.**

10 A If your supervisor is asking you to sign an
11 employment form or an -- I don't know -- pardon me, not
12 an assignment form but the fair system, you sign it and
13 if they're asking you to submit documents, you sign the
14 documents and then file a grievance.

15 **Q Right. In your opinion, you would check the**
16 **box, submit the form?**

17 A Yes.

18 **Q But absent a directive, you wouldn't?**

19 A You mean absent, my supervisor asking me to
20 submit the -- to sign the fair form or submit the
21 documents, no. If you're not being asked to submit
22 something, you don't submit it, but if your supervisor
23 asks me to sign something or submit a form, you sign it
24 and then grieve it.

25 **Q Like Professor Tracy who didn't submit outside**

1 **activities forms for his personal blogging, you haven't**
2 **submitted outside activities forms for your outside**
3 **activities?**

4 A Political activities for example, yes.

5 **Q What about publications?**

6 A No.

7 **Q Like a book or an article?**

8 A That's a little complicated. I received some
9 University funding for the book and so -- and that
10 triggers on reporting requirements but no political
11 activities that I've engaged in for example has been
12 reported.

13 **Q What about any articles that you've written**
14 **that weren't funded by the University?**

15 A No, never.

16 **Q And then just to be clear, you testified that**
17 **you've never filled out one of these forms.**

18 A I can't say that I've never signed one. I
19 don't think that I've ever signed -- no, I have never
20 filed a report of outside activity -- employment.

21 **Q Or activity --**

22 A Or professional -- I don't think I've ever
23 submitted one.

24 **Q Okay. Does it concern you that you haven't**
25 **submitted forms for any outside activities that could**

1 **arguably fall within the broad definition of the**
2 **University?**

3 A No, actually I have to be careful. I -- a
4 year ago I was asked to speak to a delegation of
5 Vietnamese officials who were coming to Florida Atlantic
6 University and we were going to be paid by them, and so
7 that -- I was concerned about that. So, I may have
8 submitted something about that as a matter of fact. I'm
9 sorry, I just didn't recall that one.

10 Q **Sure. But if you were going to go online and,**
11 **for example, you see an article on the Palm Beach Post**
12 **and you wanted to comment at the bottom where its open**
13 **inquiry, would you submit a form for that before you did**
14 **it?**

15 A No.

16 Q **Would you submit a form after you post it?**

17 A No.

18 Q **And your testimony is that if after posting**
19 **that, the University came to you and said, "We want a**
20 **form for that activity," your testimony is that you**
21 **would submit the form and then grieve?**

22 A Yes.

23 Q **Okay. Did you tell Professor Tracy that he**
24 **couldn't grieve at any time?**

25 A No.

1 Q Did you tell President Zoeller or Doug
2 McGetchin that this is a grievable notice, the November
3 10th Notice?

4 A I don't recall whether I ever told them that
5 that was a grievable notice.

6 Q Did President Zoeller contact you about the
7 November 10th Notice of Discipline if you remember?

8 A There must've been some discussion of it, but
9 I don't recall any specific discussion.

10 Q Did you ever meet with him in person -- with
11 President Zoeller about Professor Tracy's November 10th
12 Notice of Discipline?

13 A My recollection is the only meeting would be a
14 grievance training session.

15 Q Let me just -- I'm going to mark this. This
16 is going to be P8.

17 (Thereupon, Plaintiff's Exhibit P8 was entered
18 into the record.)

19 Q (By Mr. Leo) I'm handing you what's been
20 marked as P8. Do you recognize this message?

21 A I don't recall.

22 | Q Your e-mail is lenz@fau.eu?

23 A Yes. So, I received it.

24 Q Okay. So, in November 23rd, this looks like a
25 message from president at UFF FAU, is that Robert

1 **Zoeller?**

2 A Yes.

3 **Q He writes to Doug McGetchin, is that D**
4 **McGetchin?**

5 A Yes.

6 **Q Okay. He writes to Doug McGetchin and to you**
7 **and he says, "Gentlemen, I suggest we meet this week to**
8 **make sure we're all on the same page with ongoing**
9 **grievances as well as the situation with Dr. Tracy," and**
10 **he provides some dates and times. Does this refresh**
11 **your recollection as to whether you met with him,**

12 **President Zoeller?**

13 A I don't remember.

14 **Q Whether**

15 A Whether there was a --

16 **Q Whether you met with him or --**

17 A No, I -- there were discussions about
18 grievance policy and this particular grievance but --
19 and other grievances, but I don't recall a specific
20 meeting resulting from this e-mail.

21 **Q What were the other grievances that President**
22 **Zoeller is referring to in this e-mail?**

23 A Professor Babbar in the College of Business
24 was being given -- was given a letter of discipline.

25 **Q And what was that discipline regarding?**

1 A As I recall it was about his failure to comply
2 with an administrative direction that he not comment
3 about a promotion of tenured candidate in the college;
4 it was something like that.

5 Q **So, he was being disciplined for making**
6 **comments or speaking?**

7 A Yes, outside of the regular process for
8 participating in a promotion and tenure review of a
9 faculty member.

10 Q **I see, what was the result of that grievance?**

11 A I don't recall.

12 Q **And you said, it was Babbar?**

13 A Yes.

14 Q **Going back to P7 with the November 10th Notice**
15 **of Discipline, what would the deadline to file a**
16 **grievance on behalf of Professor Tracy be for the United**
17 **Faculty of Florida?**

18 A I don't recall the specific timeframe. It
19 used to be 30 days from the point at which a faculty
20 member knew or should've known of the action being read.
21 I don't know whether that 30-day timeline is still in
22 the contract, but it's a timeframe like that.

23 Q **If it is a 30-day timeline, is it safe to say**
24 **that December 10th, 2015 would've been the deadline for**
25 **Professor Tracy to -- and the United Faculty of Florida**

1 **to file a grievance in response to the Notice of**
2 **Discipline from November 10th?**

3 A Yes, depending on the language content,
4 business days or calendar days.

5 **Q What is the effect of failure to grieve by**
6 **that deadline?**

7 A You lose your opportunity to file a grievance.

8 **Q Okay.**

9 A The administration's actions are --

10 **Q In your opinion, did the United Faculty of**
11 **Florida by failing to file a grievance by December 10th,**
12 **2015, did that waive Professor Tracy's right to grieve**
13 **the Notice of Discipline?**

14 A Yes.

15 **Q I'm going to show you -- this is Exhibit --**

16 MR. LEO: Are we on nine now?

17 THE COURT REPORTER: Um-hum.

18 (Thereupon, Plaintiff's Exhibit P9 was entered
19 into the record.)

20 **Q (By Mr. Leo) I'm just going to hand you what's**
21 **been marked as P9 for today. Do you recognize this**
22 **communication?**

23 A I don't recognize it, but --

24 **Q You're included on the correspondence --**

25 A I'm included on, right, yes. So, I assume I

1 got it and --

2 Q Okay. Do you remember this message at all?

3 A No.

4 Q Was the training that you had with President
5 Zoeller and Doug McGetchin, who were both --- looks like
6 they're on this thread, was that anywhere in this
7 timeline?

8 A I don't recall.

9 Q Going back to this P9, there is a question I
10 have about the bottom here. From President Zoeller, he
11 copies you, he is writing to Doug. He says, "I'll be on
12 campus Monday the 30th for a consultation." What is
13 consultation?

14 A A consultation is a meeting between the
15 administration and UFF officials -- FAU UFF officials.

16 Q Who, if you know, did President Zoeller meet
17 with on the 30th?

18 A I have no idea.

19 Q Is consultation typically conducted between
20 certain officials?

21 A I don't know how it's done now. When I was
22 president of the union, the president and several other
23 people would meet with either the president or the other
24 designated University representatives to discuss issues,
25 but I have no idea what it's like in the last say 10

1 years.

2 Q At consultation, would they be discussing
3 grievances?

4 A Consultations are a way for both sides to
5 bring up issues regarding terms and conditions of
6 employment, so yes.

7 Q Did president Zoeller ask you about any issues
8 that he should bring to the University's attention at
9 the consultation?

10 A I don't recall.

11 Q Did you ever tell President Zoeller to convey
12 any kind of message to the administration perhaps along
13 the lines of stop violating constitutional rights for
14 example?

15 A I don't recall.

16 Q After your September 4th comments, what steps
17 did you take to address any of your concerns that were
18 expressed in that meeting?

19 A I don't know whether I took any steps.

20 Q Did you tell President Zoeller, "We need to
21 file a chapter grievance on this?"

22 A I don't recall whether I ever said or
23 recommended filing a chapter grievance.

24 Q Did any of the United Faculty of Florida, FAU
25 members speak to you about your comments after giving

1 **that speech at the senate faculty meeting?**

2 A Did any UFF members?

3 Q Right. Any of the other faculty members that
4 UFF represents, did they approach you or contact you
5 about their concerns that they had?

6 A I don't recall any.

7 Q I know a lot of people clapped when you were
8 done speaking, would you say it was -- your speech was
9 well received by the faculty?

10 A By some faculty members.

11 Q **Did any faculty members not agree with you?**

12 A I'm not aware of anyone who disagreed.

13 Q **So, is it safe to say that all of the faculty**
14 **members at FAU are concerned about how this policy is**
15 **being used?**

16 MS. HEFFNER: Objection as to form.

17 A I can't answer that question.

18 Q **(By Mr. Leo) I'm referring to Article 19 --**

19 A I can't answer the question about all -- it
20 was an area of concern, yes.

21 Q **Is it still an area of concern?**

22 A Yes.

23 Q **Did failure of United Faculty of Florida to**
24 **file a grievance of any kind in 2015 with respect to**
25 **Article 19 in the use of the policy, does that concern**

1 **any faculty members?**

2 A I haven't heard any.

3 **Q Would the complaints that were levied at the**
4 **senate faculty meeting in September 2015, would the**
5 **clock be running after your presentation for example on**
6 **filling a chapter grievance?**

7 A I don't think so, because I don't know whether
8 or not there was any official change in the University's
9 policy. What I was concerned about was the change in
10 the implementation.

11 **Q Were you concerned with censorship?**

12 A Yes.

13 **Q Are you still concerned with censorship?**

14 A I'm not as involved as I was. I'm no longer a
15 member of the senate, so I'm less aware of those kinds
16 of concern. But I would say, yes, because I was
17 involved in a campaign at spring and, again, I was
18 hypersensitive to anything that I do that had my
19 official title attached to it because I am aware of what
20 the University had been doing with tightening these
21 provisions.

22 **Q Let's talk a little bit about the UFF FAU**
23 **executive committee. When did you become an executive**
24 **committee member if you remember?**

25 A I don't remember.

1 **Q You're currently an executive committee**
2 **member?**

3 **A I don't even know. I don't attend meetings**
4 **now. I have -- I had --**

5 **Q Let me just hand you what's been marked as**
6 **P10. I'm going to give a copy to them.**

7 (Thereupon, Plaintiff's Exhibit P10 was
8 entered into the record.)

9 **Q (By Mr. Leo) Just go ahead and take a look at**
10 **what's been marked as P10. Have you seen this before?**

11 **A I'm sure I have.**

12 **Q And you'll notice you're listed under**
13 **committee chair.**

14 **A Yes.**

15 **Q It says, you're grievances and contract**
16 **enforcement?**

17 **A Yes.**

18 **Q Are you currently a grievance contract**
19 **enforcement chair?**

20 **A I handed that off to Professor McGetchin.**

21 **Q And you don't remember when that was**
22 **precisely?**

23 **A No, but I haven't been involved with**
24 **grievances for a year.**

25 **Q After November -- actually, let's go back to**

1 **November real quick. Did you ever tell President**
2 **Zoeller or Doug McGetchin that they needed to file a**
3 **grievance within 30 days of the November 10th Notice of**
4 **Discipline?**

5 A I don't recall whether I ever said that they
6 had to file a grievance in response to that. You know,
7 if there is action that can be grievable, the timeframe
8 must be recognized.

9 **Q Would you have to say that or is it understood**
10 **by the chapter -- the UFF FAU Chapter that there is**
11 **timetables on this?**

12 A That is an awfully -- that is a very important
13 part of contract enforcement, timelines, because the
14 University wins if we don't meet timelines.

15 **Q It would be like a default?**

16 A Yes.

17 **Q Has anybody expressed concerns about United**
18 **Faculty of Florida's abandonment of Professor Tracy when**
19 **faced with discipline in 2015?**

20 MS. HEFFNER: Objection as to form, you can
21 answer.

22 A There have been faculty members who think that
23 the principle is an important one worth fighting for.

24 **Q (By Mr. Leo) And by that you mean that faculty**
25 **members felt that he should be defended -- Professor**

1 **Tracy should be defended regardless of what he was**
2 **saying on principle.**

3 A The public versus private distinction.

4 **Q Can you explain that?**

5 A If it's private activity, the employer should
6 not have the ability to discipline a faculty member.

7 **Q In November -- in December of 2015, did any**
8 **faculty members express those concerns to you regarding**
9 **the United Faculty of Florida's --**

10 A I don't recall.

11 **Q Role in defending Professor Tracy?**

12 A Any faculty members expressed concerns? I
13 don't know about within that timeframe but faculty
14 members did express some concern. In fact, I believe
15 there was a letter to the editors submitted by three
16 faculty members who recommended that the University fire
17 Professor Tracy. So, this was part of the discussion; I
18 don't know specifically.

19 **Q Are you referring to a letter where they wrote**
20 **it up in the paper?**

21 A Yes, right.

22 **Q I think it was actually they said he should**
23 **resign, is that --**

24 A I don't recall the specifics.

25 **Q Are you familiar with any of those professors**

1 **being disciplined or subject to discipline for writing**
2 **that letter?**

3 A I am unaware of any discipline against any of
4 those faculty members.

5 Q **Would that be an outside activity that should**
6 **be reported pursuant to Article 19?**

7 A I think that the -- if the University is
8 enforcing the provisions of Article 19 consistently
9 according to the broad language then, yes, that would be
10 required to be reported as outside activity. Whether or
11 not they could discipline is another issue, but I think
12 -- the broad language in Article 19 could be construed
13 to include those kinds of activities where you sign your
14 name as a professor. Now, I don't know whether or not
15 that letter to the editor included the employment status
16 of those individuals, but if so --

17 Q **For example, if they signed their names as**
18 **Professor at FAU --**

19 A Professor at FAU, yes, that's the official --
20 that can be one of the official triggers of that broad
21 language.

22 Q **Is the University consistently enforcing the**
23 **outside activities' conflict of interest policy in your**
24 **opinion?**

25 A In my opinion, no.

1 Q And did anybody at United Faculty of Florida
2 or Florida Educational Association -- not within the
3 chapter I'm speaking more broadly, the umbrella
4 organizations, did anybody from those organizations
5 contact you or speak to you about the use of the policy?

6 A I don't recall.

7 Q Are you aware of any agreement between any
8 United Faculty of Florida officer and any administrator
9 or FAU employee regarding Professor Tracy's discipline?

10 A I'm not.

11 Q Okay. For example, are you aware of any
12 agreement not to defend Professor Tracy?

13 A I'm not.

14 Q Did anybody ever tell you that they were going
15 to pressure Professor Tracy into resigning?

16 A I'm unaware of any such action.

17 Q If there was some kind of an agreement to not
18 defend Professor Tracy, would that be a problem?

19 A Absolutely.

20 MS. HEFFNER: Objection.

21 Q (By Mr. Leo) And what would the problem be?

22 A Well, we have a duty of fair representation
23 among others.

24 Q Okay. Would that be a breach of the
25 collective bargaining agreement as well?

1 A Yes.

2 Q **If there was an agreement to pressure**
3 **Professor Tracy into resigning, would that be a problem**
4 **with respect to tenure?**

5 A I'm not sure I understand the question.

6 Q **Would not defending Professor Tracy, would**
7 **pressuring him to resign, would that be a problem for**
8 **tenure?**

9 A You mean would that expose -- would that
10 weaken tenure because it would --

11 Q **You tell me.**

12 A Yes, in a sense that it would increase the
13 perception that tenure had conditions and some of those
14 conditions are, you know, incompetence and bad conduct
15 and the bad conduct here could include private behavior
16 that exposed tenure.

17 Q **Would you characterize Professor Tracy's**
18 **blogging as private conduct?**

19 A I haven't -- you know I'm not familiar with
20 the website, so I'm not sure. For example, the
21 connection between his employment status and the
22 University and the private activity.

23 Q **If Professor Tracy's blog was a personal blog,**
24 **uncompensated, he was not being paid for what he was**
25 **writing, would that be private conduct?**

1 A Yes. Again, with the stipulation that it's
2 not FAU Professor of Communication, Jim Tracy.

3 Q Right. **If he had a disclaimer on his blog**
4 **that said --**

5 A Yes.

6 Q "I don't speak on behalf of University".

7 A In my opinion, that's private.

8 Q Okay. All right, is there any question as to
9 **whether Professor Tracy was fired for his blogging?**

10 A I imagine there is a question.

11 Q **In your mind, was he fired for his blogging?**

12 A Yes.

13 Q **So, would you agree that he was fired for his**
14 **speech?**

15 A Yes, and I think the pretext was the form
16 filing.

17 Q **The pretext was the failure to submit the**
18 **forms, is that what you're saying?**

19 A Or the failure to submit the forms after the
20 initial Letter of Discipline.

21 Q Right. Just so we're clear, when you say the
22 form filing, we're talking about P4; this is the report
23 of outside employment or professional activity --

24 A Or the fair report.

25 Q **Or the fair --**



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1 A I mean the assignment report.

2 Q This is P3, the acknowledgement of compliance
3 with the policy. Ultimately, what the University was
4 asking Professor Tracy was to officially report his blog
5 to the University on these forms?

6 A Yeah.

7 Q And Professor Tracy was fired for not doing
8 that -- for not disclosing his blog on these forms, is
9 that correct?

10 A I'm not sure exactly why he would -- the
11 official language in the dismissal letter, I don't know
12 what that said.

13 Q Did you read the Notice of Termination?

14 A I don't remember if I read it.

15 Q Okay. If the Notice of Termination said that
16 you're being terminated for failure to disclose the
17 personal blogging or something along those lines, would
18 that change your opinion?

19 A I'm not sure what the question was again?

20 Q My question was whether Professor Tracy was
21 being fired for not submitting his blogging on the
22 outside activities form. Your response was, "I'm not
23 sure exactly why he was fired, right?" f the Notice of
24 Termination said, "Professor Tracy, you failed to submit
25 your blog or failed to submit these forms at all," would

1 **you agree that he's being fired for not reporting his**
2 **blog -- he's being fired for his blog?**

3 A Yes.

4 Q **Let's just take a quick break just a few**
5 **minutes.**

6 (Thereupon, a short discussion was held off
7 record.)

8 (Deposition resumed.)

9 THE COURT REPORTER: Back on the record.

10 MR. LEO: We're back on?

11 THE COURT REPORTER: Um-hum.

12 Q **(By Mr. Leo) I just want to ask you about the**
13 **grievance process once more and enforcement of the**
14 **contract and stuff that seems to be what your area was**
15 **with the chapter. Although, just to be clear, you're**
16 **not actively chairing despite what the website says?**

17 A No, I'm not -- I mean, although I may be
18 officially listed as a member of the executive
19 committee, I haven't attended a UFF to my knowledge all
20 year, so I couldn't --

21 Q **Okay. So, you weren't at the March 31st**
22 **meeting last week?**

23 A No.

24 Q **Okay. Has anybody from the union, United**
25 **Faculty of Florida, Professor Zoeller, McGetchin,**

1 **contacted you since the Tracy dispute?**

2 A You mean about a grievant?

3 Q **About anything. I mean I have a very broad**
4 **question.**

5 A Well, I sometimes interact with UFF leadership
6 and membership but --

7 Q **Did you ever tell President Zoeller or Doug**
8 **McGetchin not to include you on communications regarding**
9 **Professor Tracy?**

10 A No, I don't recall ever making such a request.

11 Q **Did they ever ask you whether you want to be**
12 **included? For example, in November you're on some**
13 **emails at the end of November.**

14 A I don't recall making such a request.

15 Q **Did they ever tell you that they were not**
16 **going to include you on communications?**

17 A Okay. I don't recall receiving such
18 communication.

19 Q **Okay. And you said that you're not aware of**
20 **the April 2016 grievance that was filed by Zoeller or**
21 **McGetchin?**

22 A I just didn't recall it.

23 Q **So, you were aware of it?**

24 A I remember you showed it to me. I just don't
25 remember seeing it.

1 **Q Yeah, I just want to be clear for the record,**
2 **P6, and this goes into my question about grievances**
3 **generally. Do all United Faculty of Florida, FAU,**
4 **members have say in a chapter grievance?**

5 **A No.**

6 **Q Who makes the decision to file a grievance on**
7 **behalf of the chapter?**

8 **A That would be the executive committee or a**
9 **subset thereof including the grievance committee which**
10 **is sometimes a committee and sometimes it's an informal**
11 **committee.**

12 **Q Going back to 2015 in the fall, who would make**
13 **that decision -- for example after you're speaking at**
14 **the senate faculty meeting, who would actually make the**
15 **determination we need to file a chapter grievance on**
16 **this?**

17 **A The president and the grievance committee.**

18 **Q Is anybody outside of the university in UFF**
19 **FAU involved in that process?**

20 **A In terms of soliciting advice from statewide**
21 **officials for example perhaps?**

22 **Q In any capacity, for example, Michael Moats --**

23 **A You mean officially making the decision, no.**

24 **Q Or involved in any way. For example, Michael**
25 **Moats.**

1 A Well, we might ask for advice; I mean that's
2 not unprecedented. But, again, I'm not as familiar with
3 the relationship between the chapters and the statewide
4 office over the last several years.

5 Q **Have you ever spoken with Michael Moats about**
6 **a grievance, any grievance?**

7 A Yes.

8 Q **Have you ever spoken with Michael Moats about**
9 **Professor Tracy's grievance?**

10 A I may have. I don't recall.

11 Q **Okay.**

12 A That would be the one.

13 Q **Did Michael Moats ever tell you that Professor**
14 **Tracy's discipline was not grievable?**

15 A No.

16 Q **Did Professor Zoeller or President Zoeller**
17 **ever tell you that Professor Tracy's discipline was not**
18 **grievable?**

19 A No.

20 Q **Did Doug McGetchin every tell you that**
21 **Professor Tracy's discipline was not grievable?**

22 A No.

23 Q **Are you aware of any collective decision by**
24 **anybody at United Faculty of Florida that Professor**
25 **Tracy's discipline -- particularly I'm speaking of**

1 November 2015, the discipline then, did anybody ever
2 tell you about his discipline not being grievable?

3 A Not that I'm aware of.

5 MS. HEFFNER: Objection as to form. You can
6 answer.

7 Q (By Mr. Leo) If someone said to you that
8 Professor Tracy can't grieve this November 10th Notice
9 of Discipline, would that be ridiculous?

10 A Within the timeframes provided --

11 Q Right.

12 A Absolutely, absolutely. If a faculty member
13 receives a letter of discipline that's grievable.

14 Q And if somebody like President Zoeller or
15 Michael Moats said to you that the Notice of Discipline,
16 November 10th, 2015 is not grievable, what would you
17 say?

18 A I'll say a faculty member can file a grievance
19 alleging a violation of an article in the contract, as
20 long as it's within the timeframes.

21 MR. LEO: That's -- I think I'm good. Do you
22 have any follow up?

23 | CROSS EXAMINATION

24 BY MS. HEFFNER:

0 Just a couple if that's okay. Good morning.

1 A Good morning.

2 Q How are you? We talked a little bit about the
3 outside activities policy and how the union negotiates
4 that policy with FAU. When negotiating that policy, are
5 you aware or do you have any knowledge of a plan or
6 conspiracy to terminate James Tracy or deprive him of
7 his first-amendment rights?

8 A No.

9 Q Are you aware of the settlement agreement that
10 James Tracy came to with FAU in -- around 2014 -- after
11 the 2013 incident that he had?

12 MR. LEO: Object to form.

13 Q (By Ms. HEFFNER) You can answer.

14 A Vaguely, yes.

15 Q Vaguely, okay. Were you aware or do you have
16 any knowledge of whether or not that settlement
17 agreement was a plan to deprive James Tracy of his First
18 Amendment rights or to terminate James Tracy?

19 A No.

20 Q You talked a little bit about your outside
21 political activities. Were you ever told by
22 administration to report your political activities at
23 any point?

24 A Mine? No.

25 Q Okay. If you could look at Exhibit 9, which

1 is the email dated 11/24/2005. You had talked about --
2 if you can go to the bottom -- third line from the
3 bottom before the signature, "Yeah, I'll be on campus
4 Monday the 30th for consultation." Is the consultation
5 part of the grievance -- any grievance procedure or part
6 of the University procedure with the union?

7 A I don't know if that's still in the collective
8 bargaining agreement but I think there used to be a
9 provision that provided for consultation.

10 Q Okay. And would any consultation be part of a
11 part of a plan to deprive anyone of their first-
12 amendment rights, to freedom of expression, or freedom
13 of speech?

14 MR. LEO: Object to form.

15 A I can't ask -- answer that question.

16 Q (By Ms. HEFFNER) Okay. To your knowledge and
17 recollection, did FAU and UFF, or FEA, or Michael Moats
18 of Bob Zoeller have an agreement to terminate James
19 Tracy in deprivation of his First Amendment rights?

20 A No.

21 Q Do you have any authority on hiring procedures
22 at all or termination procedures?

23 A No.

24 Q Okay. You talked about the fact that you
25 believed Tracy was fired for his blogging. Can you tell

1 **me a little bit about why you believe that?**

2 A I believe that because the University was
3 extremely concerned about scandals and they thought that
4 some of his blogging was a scandal for FAU's reputation
5 and that they were looking for reasons to make that go
6 away.

7 **Q Okay. And in looking for those reasons, was**
8 **there ever a plan to deprive James Tracy of his First**
9 **Amendment rights to freedom of expression or freedom of**
10 **speech?**

11 MR. LEO: Object to form.

12 A Can you repeat that?

13 **Q (By Ms. HEFFNER) Sure. In the reasons that**
14 **they had, was there to your knowledge and recollection**
15 **any plan created from those reasons to deprive James**
16 **Tracy of his First Amendment rights?**

17 A I'm unaware of any such plan.

18 MS. HEFFNER: Okay. I have no further
19 questions. Counsel does --

20 MS. HUFF: No.

21 MS. HEFFNER: No. We are done.

22 MR. LEO: I think we're good. I don't what
23 is --

24 THE COURT REPORTER: You have the option to
25 read the transcript or --

1 THE WITNESS: I don't want to read it.

2 THE COURT REPORTER: No. Okay, waive.

3 (Deposition concluded at 11:53 a.m.)

4 (Reading and signing of the deposition by the
5 witness has been waived.)

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2 STATE OF FLORIDA

3 COUNTY OF PALM BEACH

4

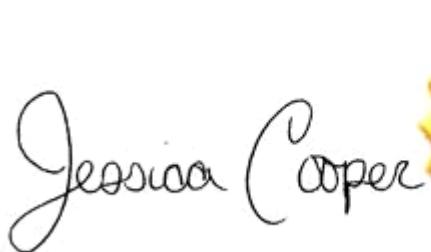
5 I, JESSICA COOPER, Court Reporter and Notary
6 Public for the State of Florida, do hereby certify that
7 I was authorized to and did digitally report and
8 transcribe the foregoing proceedings, and that the
9 transcript is a true and complete record of my digital
10 notes.

11

12 I further certify that I am not a relative,
13 employee, attorney or counsel of any of the parties,
14 nor am I a relative or employee any of the parties'
15 attorney or counsel connected with the action, nor am I
16 financially interested in the action.

17

18 Witness my hand and official seal this 18TH day of
19 APRIL, 2017.

20  

21 JESSICA COOPER, FPR, COURT REPORTER
22 NOTARY PUBLIC, STATE OF FLORIDA
23 Commission No.: FF 943563
24 Commission Exp: 12/15/19

25

1 CERTIFICATE OF OATH

2 STATE OF FLORIDA

3 COUNTY OF PALM BEACH

4

5 I, JESSICA COOPER, the undersigned authority,
6 certify that TIM LENZ personally appeared before me
7 and was duly sworn.

8 Witness my hand and official seal this 3RD day of
9 APRIL, 2017.

10 

11 JESSICA COOPER, FPR, COURT REPORTER
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