UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT KELLY'S, MOTION TO BIFURCATE ISSUE OF ENTITLEMENT AND AMOUNT OF ATTORNEYS' FEES AND MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

Plaintiff, James Tracy, by and though the undersigned counsel, hereby files his Response in Opposition to Defendant Kelly's Motion to Bifurcate the Issue of Entitlement and Amount of Attorneys' Fees and Motion for Entitlement to Attorneys' Fees (hereinafter "Motion") [D.E. 475], and in support states as follows:

INTRODUCTION

Plaintiff initially pursued claims against Defendant Kelly in the above-captioned action because there was a good faith basis to believe Defendant Kelly was involved in Plaintiff's termination both as a supervisor and personally. Indeed, Plaintiff's claims against Defendant Kelly survived Defendant Kelly's direct challenges to Plaintiff's allegations at the motion to dismiss stage, which should itself be dispositive of Defendant Kelly's Motion. As the case developed, and discovery revealed additional facts and evidence supporting Plaintiff's claims against Defendant Kelly, Plaintiff in good faith moved for summary judgment against him. While the Court may have disagreed with Plaintiff and sided with Defendant Kelly on the issue of summary judgment, it was

wrong for the Court to label Plaintiff's claims against him "frivolous" because they were certainly not frivolous. There was never a Rule 11 motion for sanctions filed by Defendant Kelly, and significantly, once Defendant Kelly was awarded summary judgment, Plaintiff did not continue pursuing claims against Defendant Kelly personally, and did not appeal the Court's decision to award Defendant Kelly summary judgment.

Defendant Kelly's Motion relies solely upon the Court's opinion during the summary judgment stage of these proceedings that a single "contention" in Plaintiff's motion for summary judgment concerning Defendant Kelly was "frivolous". The out-of-context statement concerning Plaintiff's summary judgment arguments which the Defendant's Motion deceptively cited from this Court's Order [D.E. 362] is as follows:

> Plaintiff also argues that Defendant Kelly was personally involved in the events of this case because he sent an e-mail pertaining to Plaintiff in which he said he intended to "deal with this personally". That contention is frivolous.

While this Court may have sided with Defendant Kelly's version of events and downplayed the timing and significance of merely one of Defendant Kelly's recorded admissions during the summary judgment phase, Defendant Kelly's Motion nevertheless seeks to take advantage of and blow out of proportion this Court's opinion on a single piece of evidence referenced in the Court's summary judgment ruling to now exaggeratedly claim Plaintiff alleged "without any evidentiary foundation" that Defendant Kelly "supervised, facilitated, recommended and/or approved discipline and termination of Professor Tracy." However, Defendant Kelly's claim that there was "no record evidence" that Defendant Kelly was involved in Plaintiff's discipline or termination is contradicted by ample record evidence, including the facts and evidence set forth in Plaintiff's Motion for Partial Summary Judgment [D.E. 247], Plaintiff's Statement of Material Facts in Support of His Motion for Partial Summary Judgment [D.E. 248], Plaintiff's Statement of

Disputed Facts and Additional Material Facts in Opposition to Individual Defendants' Statement of Material Facts [D.E. 272] and Plaintiff's Response in Opposition to Defendant Kelly's Motion for Summary Judgment [D.E. 273], which are each incorporated herein by reference. The record reveals Plaintiff alleged in good faith that Defendant Kelly was involved in and monitored Plaintiff's termination and knew his subordinates would fire Plaintiff in retaliation for blogging and did not stop them. These facts and circumstances are not sufficient to award Defendant Kelly attorneys' fees under 42 U.S.C. § 1988. Accordingly, Defendant Kelly's Motion must be denied.

MEMORANDUM OF LAW

A. PLAINTIFF'S CLAIMS AGAINST DEFENDANT KELLY WERE NOT FRIVOLOUS OR WITHOUT EVIDENTIARY FOUNDATION

Under 42 U.S.C. § 1988, a district court may only award attorneys' fees to a prevailing defendant upon a finding that a plaintiff's lawsuit is frivolous or without foundation. *Sullivan v. School Board of Pinellas County*, 773 F.2d 1182, 1188 (11th Cir.1985). Determinations regarding frivolity are made on a case-by-case basis. *Id*. In order for a case to be frivolous, it must be so lacking in arguable merit as to be groundless or without foundation. *Id.* at 1188–1190. Typically, a case is found to be frivolous when a plaintiff does not introduce any evidence in support of their claim. *Ruszala v. Walt Disney Co.*, 132 F.Supp.2d 1347, 1351 (M.D. Fla. 2000). To award attorney's fees to defendants in a suit brought under § 1983 of this title, the plaintiff's actions must be meritless in the sense that it is groundless or without foundation. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Plaintiff's claims against Defendant Kelly were certainly not meritless or without evidentiary foundation and survived his motion to dismiss [D.E. 105].

Defendant Kelly argues Plaintiff's First Amendment retaliation claims against him were frivolous because of a single statement made by this Court concerning Defendant Kelly's personal involvement based upon merely one of Kelly's many email admissions at issue in this case.

However, Defendant Kelly's personal involvement in the termination was not a prerequisite for supervisory liability under Florida law, but rather only one of multiple factors that could give rise to liability. Defendant Kelly could have (and should have) been held individually liable in his supervisory capacity because he actually "personally participate[d] in the alleged unconstitutional conduct" and/or there was a causal connection between [his] actions….and the alleged constitutional deprivation." *Cottone v. Jenne*, 326 F. 2d 1352, 1360 (11th Cir. 2003). A causal connection can be demonstrated in several ways, including where the facts "support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *Id.* at 1360 (citing *Gonzalez v. Reno*, 325 F. 3d 1228, 1235 (11th Cir. 2003)). The facts and evidence in this case, including Defendant Kelly's emails, supported this inference despite the Court's summary judgment ruling.

The record in this case is filled with evidence establishing Defendant Kelly's personal involvement in Plaintiff's wrongful termination, including but not limited to Defendant Kelly's supervision of and participation in the September 4, 2015 Senate Faculty Meeting [D.E. 250-47] where multiple FAU faculty members put Defendant Kelly and his subordinates on notice of unconstitutional threats of discipline levied by Defendant Kelly's subordinates to FAU faculty members in retaliation for exercising their constitutionally protected freedom of speech. Despite the recorded request for a moratorium on unlawful threats of discipline using Defendant FAU's "Outside Activities" policy on September 4, 2015, Defendant Kelly did nothing to prevent Plaintiff's discipline and termination three months later for purportedly "not reporting" constitutionally protected personal blogging which Defendant Kelly was personally well aware of and monitoring with his wife. D.E. 249-16. Plaintiff presented ample facts in the record of this

case for a jury to determine that Defendant Kelly should be liable under either the personal participation or causal connection prong.

This Court's decision to grant Defendant Kelly summary judgment does not render Plaintiff's claims against Defendant Kelly—supported by the evidentiary foundation outlined herein—frivolous or without foundation. Plaintiff's claims against Defendant Kelly were certainly not unfounded and do not warrant an award of attorneys' fees under 42 U.S.C. § 1988. *See Mackenzie v. City of Rockledge*, 920 F.2d 1554, 1560 (11th Cir. 1991)(upholding district court's denial of defendant's motion for attorneys' fees under Section 1988, despite the granting of defendant's motion for summary judgment).

1. Defendant Kelly Was Personally Involved in Plaintiff's Termination

As this Court has already determined, Plaintiff alleged sufficient facts to create the "inference…that Defendant Kelly was personally (and not vicariously) involved in a retaliatory violation of Plaintiff's First Amendment Rights." D.E. 105 at 6. Plaintiff's allegations against Defendant Kelly were certainly supported by record evidence. Indeed, this inference was confirmed by the deposition testimony of Defendant Kelly himself, who admitted he had ultimate responsibility for the termination of faculty members, including Plaintiff. *See* Plaintiff's Response to Individual Defendants' Statement of Material Facts [D.E. 273] at ¶2. Defendant Kelly's admission was binding and should alone be dispositive of Defendant Kelly's Motion. Moreover, Defendant Kelly's continued false claim that he was not "involved" in Plaintiff's firing following a fire storm of controversy concerning Plaintiff's blogging is not only utterly implausible, it is completely contradicted by the record evidence in this case, including Defendant Kelly's recorded conduct.

On December 11, 2015—less than a week before Plaintiff's termination—Defendant Kelly responded to an e-mail sent by a purported friend of Sandy Hook parents by asking his Chief

Administrative Officer to put the parents "in direct contact" with Defendant Kelly because he "intend[ed] to deal with this personally." [D.E. 249-4]. Four days later, on December 15, 2015, Defendant Kelly received, "as requested", a collection of e-mails "about firing" Plaintiff. [D.E. 272-15]. Plaintiff was notified about his firing the very next day, on December 16, 2015 [D.E. 249-7].

After being put on notice that Plaintiff was being fired for his blogging, Defendant Kelly and his spouse—whom Defendant Kelly had enlisted to help monitor Plaintiff's blogging and media coverage of the highly-publicized controversy—communicated via e-mail regarding Plaintiff's termination. [D.E. 249-16] ("Good news not stirred up anything …. Yet."). E-mails between Defendant Kelly and his spouse reflect Defendant Kelly's personal awareness of and disgust for Plaintiff's constitutionally protected blogging. *Id.* ("[Plaintiff has] not posted anything about it on his sites…or any of the other Twitter ones. Nothing like last time with nasty stuff. All seems quiet for now…"). *Id.* In response to his wife's email indicating Plaintiff was no longer blogging shortly after his notice of termination, on January 6, 2016, Defendant Kelly responded, "Hope it stays that way!" [D.E. 272-17].

To summarize, Defendant Kelly was personally involved in Plaintiff's termination. Defendant Kelly admittedly received updates regarding Plaintiff's blogging, he volunteered to "personally deal" with complaints about Plaintiff resulting in Plaintiff being terminated within a week by Defendant Kelly's subordinates, and Defendant Kelly closely monitored fallout from the termination. Defendant Kelly and his wife circulated emails indicating they had been monitoring Plaintiff and his controversial blogging for quite some time. The record is replete with evidence confirming Defendant Kelly's personal involvement in Plaintiff's termination, which is why summary judgment should not have been awarded to Defendant Kelly, and why Defendant Kelly's

Motion should also be denied. *See Aurich v. Sanchez*, 2011 WL 5838233, at *1 (S.D. Fla. Nov. 21, 2011) ("If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then the court must not grant summary judgment.")(citing *Hairston v. Gainesville Sun Publishing Co.*, 9 F. 3d 913 (11th Cir. 1993)). While Plaintiff chose not to appeal the Court's decision to grant Defendant Kelly's motion for summary judgment, Defendant Kelly's motion for attorneys' fees must still be denied because there was evidentiary support for Plaintiff's claims. *See Mackenzie*, 920 F.2d at 1560 (11th Cir. 1991).

2. Plaintiff Established a Causal Connection Between Defendant Kelly's Actions and Plaintiff's Constitutional Injury

As noted above, supervisory liability could have and should have been imposed on Defendant Kelly based on a causal connection between his conduct and Plaintiff's constitutional injury. Such causal connection can be established by showing either (1) a "history of widespread abuse such that a reasonable supervisor would be put on notice of the need to correct the alleged deprivation"; (2) "an improper custom or policy" by the supervisor resulting in deliberate indifference to constitutional rights; or (3) "facts which support an inference that the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so." *Echevarria-D.E.-Pena v. U.S.*, 2013 WL 616932, at *7 (S.D. Fla. Feb. 19, 2013) (citing *Gonzalez*, 325 F. 3d at 123 and *Rivas v. Freeman*, 940 F. 2d 1491, 1495 (11th Cir. 1991)). There was ample evidence in the record for a jury to determine that Defendant Kelly either directed his subordinates to terminate Plaintiff, or knew that they would do so and failed to stop them. Defendant Kelly admitted that he was ultimately responsible for the conduct of his subordinates with respect to discipline and removal of personnel. [D.E. 243-1], p. 65-68; [D.E. 243-2], at 27:15-28:2 ("…ultimately I am the responsible party…"); 89:18-20.

Defendant Kelly's subordinates—Defendants Alperin and Defendant Coltman—were directly responsible for Plaintiff's termination and had plotted for years to find a way to find "winning metaphors" for the First Amendment and fire Plaintiff in retaliation for his controversial speech, going all the way back to the January 2013 meeting in which they discussed Plaintiff's blogging activities and planned to "explore potential misconduct" by Plaintiff while minimizing the paper trail by agreeing not to exchange emails on the subject. [D.E. 250-10]. As discussed above, record evidence demonstrates Defendant Kelly personally monitored Plaintiff's blogging for a long period of time, requested and received media reports regarding the Plaintiff, and intended to "personally deal" with the circumstances relating to Plaintiff's blogging. All of this taken together is sufficient to create an inference that Defendant Kelly either personally directed or tacitly approved of Defendant Alperin and Defendant Coltman's termination of the Plaintiff.

Moreover, Defendant Kelly admitted during his deposition that he understood the First Amendment protected Plaintiff's blogging and was well aware of Plaintiff's controversial blogging prior to becoming FAU President. [D.E. 243-2], 15:21-16:16; 105:13-16, 128:13-19. The record reveals Defendant Kelly nonetheless monitored Plaintiff's blogging and compiled news articles critical of Plaintiff in secret dossiers. [D.E. 249-1]. Defendant Kelly and his subordinates, acting under Defendant Kelly's supervision, were clearly and persistently hostile towards Plaintiff's speech, with Defendant Kelly's subordinates calling Plaintiff a "Nut job" and participating in email chains celebrating Plaintiff's unlawful termination. [D.E. 249-14][D.E. 249-13].

Defendant Kelly plainly ignored the record evidence when he and his counsel, in an effort to continue retaliating against Plaintiff long after ending his career and livelihood, speciously claimed in Defendant Kelly's Motion that there is "no record evidence" he was "involved" in Plaintiff's firing. Yet, as outlined above, on the day of Plaintiff's termination, Defendant Kelly

was monitoring Plaintiff's blogging activities and social media, expressly hoping that Plaintiff would remain "quiet" [D.E. 272-17]. That same day, Defendant Kelly even personally emailed a statement on behalf of his University confirming he indeed supervised, facilitated and approved of Plaintiff's termination in accordance with his duties and responsibilities as FAU President. [D.E. 272-10].

CONCLUSION

For the foregoing reasons, Defendant Kelly's Motion to Bifurcate the Issue of Entitlement and Amount of Attorneys' Fees and Motion for Entitlement to Attorneys' Fees must be denied.

Dated: March 29, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record per the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

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