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 MOTION FOR RECONSIDERATION OF THE COURT'S OMNIBUS ORDER ON ALL PENDING MOTIONS FOR SUMMARY JUDGMENT

Plaintiff James Tracy, pursuant to Fed. R. Civ. P. 59(e) and 60, moves the Court to reconsider certain rulings in its Omnibus Order On All Pending Motions For Summary Judgment. ECF No. 362. Specifically, Plaintiff respectfully requests the Court to reconsider its decision to grant summary judgment in favor of Defendants on Counts III, IV, and V, as well as its decision to grant summary judgment in favor of the individual defendants Alperin and Coltman on the basis of qualified immunity.

INTRODUCTION

As the Court is aware, Plaintiff's position is that Defendants' reason for firing him was pretextual and that FAU's Conflict of Interest Policy ("the Policy") was unconstitutionally vague, content-based, allowed for unbridled discretion, and thus violated his free speech rights. Despite the evidence in support of Plaintiff's position, the Court ruled that the Policy was nothing but a contractual term and Plaintiff needed to grieve under the collective bargaining agreement ("CBA") before he could bring his constitutional challenges in Counts III, IV, and V to this Court. The Court also ruled that individual defendants Coltman and Alperin, who admittedly were personally involved in the termination decision, were entitled to qualified immunity because, based on just four facts, they could have reasonably and lawfully fired him.

Plaintiff moves for reconsideration here because this is one of those rare instances where it is necessary to correct dispositive legal errors, which, if left uncorrected, would lead to manifest injustice, particularly with this case set for trial in less than two weeks, on November

27, 2017. As set forth in further detail below, Plaintiff's motion for reconsideration should be granted for the following reasons. First, the Policy is a unilateral governmental policy—not a contractual term—and, as such, it is subject to constitutional challenge. Second, Tracy's constitutional vagueness challenges are not barred for failure to exhaust the CBA's grievance procedures because a § 1983 First Amendment claim has no exhaustion requirement under *Patsy v. Regents of State of Fla.*, 457 U.S. 496 (1982). Third, Alperin and Coltman are not entitled to qualified immunity because the record evidence does not indisputably establish (as it must) that they were actually motivated by Plaintiff's delayed compliance with the Policy.

LEGAL STANDARD

While an order granting summary judgment is not an appealable final judgment, such an interlocutory order is subject to reconsideration under Federal Rules of Civil Procedure 59(e) and 60. *See, e.g.*, *Porto Venezia Condo. Ass'n, Inc. v. WB Ft. Lauderdale, LLC*, 926 F. Supp. 2d 1330, 1332 (S.D. Fla. 2013). Reconsideration is appropriate to correct clear error or a manifest injustice. *Blanco GmbH+Co. KG v. Vlanco Indus., LLC*, 992 F. Supp. 2d 1225, 1257 (S.D. Fla. 2014); *Alexandra H. v. Oxford Health Ins., Inc.*, No. 11-23948-CIV, 2013 WL 4002883, at *2 (S.D. Fla. Aug. 6, 2013). For instance, a district court should reverse itself if it misapplied the applicable law. *See, e.g.*, *Porto Venezia*. In addition, a district court should grant reconsideration "if it overlook[ed] a relevant factor that deserves significant weight … [or] if it consider[ed] all relevant factors, but, nonetheless, commit[ted] a 'palpable error of judgment in calibrating the decisional scales.'" *Silva v. Potter*, No. 804cv2542T17EAJ, 2006 WL 3219232, at *1 (M.D. Fla. Nov. 6, 2006); *Cheney v. Cyberguard Corp.*, No. 98-6879-CIV, 2001 WL 1916564, at *1 (S.D. Fla. Mar. 21, 2001).

ARGUMENT

The Court should reconsider its order granting Defendants' motion for summary judgment for the following reasons.

I. THE SCHOOL'S CONFLICT-OF-INTEREST POLICY IS A GOVERNMENTAL POLICY SUBJECT TO A VAGUENESS CHALLENGES AND NOT A "CONTRACTUAL PROVISION."

The Court committed clear legal error by treating a unilateral university-wide conflict-of-interest policy as if it was a bargained-for contract term. Under controlling law, the public university's Policy is subject to constitutional challenge like any other governmental policy. *See, e.g.*, *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960 (5th Cir. 1972).

In *Shanley*, the then-Fifth Circuit reversed the district court for dismissing a First Amendment challenge to a school policy that affected students' off-premises conduct (publication of an underground newspaper). The Fifth Circuit had no issue "balanc[ing] school discipline against the First Amendment," concluding that the policy constituted "an unconstitutional usurpation of the First Amendment," and declaring the policy "facially unconstitutional as both overbroad and vague." *Id*. at 964, 968, 975. As *Shanley* notes, schools, like any other arm of the state, must "abide by constitutional precepts." *Id*. at 967. Not surprisingly, there are numerous cases in which an educational or work policy is challenged for vagueness. *See, e.g*., *Borden v. Sch. Dist. of the Twp. of E. Brunswick*, 523 F.3d 153, 166 (6th Cir. 2008) (involving vagueness challenge to school board policy); *Hardwick v. Heyward*, 711 F.3d 426, 442 (4th Cir. 2013) (same); *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992) (involving vagueness challenge to dismissal standards in the "public employment context").

In the Order, the Court relied on *Hawks v. City of Pontiac*, 874 F.2d 347 (6th Cir. 1989), for the proposition that the Policy could not be constitutionally challenged. In *Hawks*, the challenged residency requirement, while originating from a city charter, was only in the CBA as far as the opinion reveals. Applying *Hawks*, the Court reasoned that "the Policy is part of the collective bargaining agreement between FAU and its faculty," and, thus, "the constitutionality of the Policy cannot be challenged on the record before the Court." ECF No. 362, at 18-19.

But the Policy is not merely "part of" the CBA. Rather, as set forth in Plaintiff's summary judgment papers and herein, it is a unilaterally-imposed university policy incorporated by reference in the CBA and elsewhere. *See* ECF No. 248, ¶ 11. Indeed, complying with the CBA provision alone (however that is done) is not sufficient to comply with the Policy. The Policy requirements are set out in a number of documents that impose their own requirements. For instance, the Report of Outside Employment Guidelines provide guidance (albeit not sufficiently clear guidance) for FAU employees to report their conflicts of interest, conflicts of commitment, and outside activities. *See* ECF No. 250-33 at 3. The Guidelines refer to the CBA as well as university regulations and state law in determining what conflicts must be reported in accordance with school policy, thus demonstrating that the Policy requires compliance with state law and university regulations in addition to the CBA. *See id.* Even the CBA references outside regulations, stating that it is school policy for employees to "observe the highest standards of

ethics consistent with the code of ethics of the State of Florida … and Board and University regulations." ECF No. 250-32, § 19.1.

The Guidelines further explain the interplay between the CBA and the Policy as follows:

> Florida Atlantic University has promulgated [University Ethics] Regulation 5.011 concerning university ethics, outside activities and financial interests. The Collective Bargaining Agreement between the FAU Board of Trustees and the FAU Chapter of the United Faculty of Florida contains analogous provisions in Article 19 that apply to those faculty and administrative, managerial and professional staff members within the bargaining unit. **The policy reflected in the agreements and regulations is that** an employee may participate in outside activities and hold financial interests as long as these activities and interests are reported and do not conflict with the employee's duties to the university."

ECF No. 250-33 at 7 (emphasis added). The Guidelines thus show that the Policy is merely reflected in the CBA and not defined or constrained by it.

Moreover, the Form to Report of Outside Employment of Professional Activity for FAU Employees itself states that it must be filled out "in order to comply with the rules of the University" *in addition to the CBA*. ECF No. 250-35. Section 8 of FAU's Personnel Policy also forbids employees from having any interest that interferes with "the full and competent performance of the employee's duties." ECF No. 250-37. It also requires employees to "seek proper review and approval prior to engaging in such employment or activity by completing [the Outside Employment Form]," and directs employees to fill out the form on an annual basis, and to "[p]lease see [the Outside Employment Guidelines] for specific policy language." *Id.* Nowhere does Section 8 mention the CBA.

Proof that the Policy exists outside of the CBA also consists of the fact that the Policy applies to all FAU employees including unionized faculty, nonunionized faculty, and staff who are not eligible for union membership because they are not faculty. *See* ECF No. 250-33, at 9 ("The responsibility for adhering to the law and regulations on conflict of interest, conflict of commitment and outside activities rests with the individual faculty or staff member."). Because the Policy applies to employees who are not parties to the CBA, including member who left the union, the Court erred in treating the Policy as merely a contractual term that is "part of" the CBA and thus shielded from constitutional scrutiny. Accordingly, this Court should reconsider its ruling that FAU's Policy is not subject to Plaintiff's constitutional vagueness challenges and reach the merits of Plaintiff's claims as presented in his summary judgment motion on Counts III, IV, and V. ECF No. 247 at 10-17.

II. PLAINTIFF DID NOT NEED TO GRIEVE HIS VAGUENESS CHALLENGE BECAUSE § 1983 CLAIMS HAVE NO EXHAUSTION REQUIREMENT UNDER THE SUPREME COURT'S *PATSY* DECISION.

Although the Court held that "a grievance was required," (ECF No. 362, at 20), the exhaustion of administrative remedies is not a prerequisite to bringing § 1983 claims. *See* ECF No. 275 at 2 (citing *Patsy v. Regents of State of Fla.*, 457 U.S. 496 (1982)); *see also Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1226 (11th Cir. 2006) ("The Supreme Court and this Court have held that there is no requirement that a plaintiff exhaust his administrative remedies before filing suit under § 1983."); *Holley v. Seminole Cnty. Sch. Dist.*, 755 F.2d 1492 (11th Cir. 1985) ("A plaintiff suing under § 1983 need not exhaust or make use of administrative remedies prior to, or in lieu of, bringing a claim of denial of constitutional right to federal court.").

There is a deluge of case law holding a plaintiff is not required to exhaust contractual remedies in a CBA agreement. *See Naurumanchi v. Bd. of Trustees of Conn. State Univ.*, 850 F.2d 70, 73 (2d Cir. 1988) ("Nor is it permissible, in light of *Patsy v. Bd. of Regents,* to require initial recourse to available state proceedings, **including union grievance proceedings**, for the enforcement of First Amendment rights protectable in federal court pursuant to section 1983."; "First Amendment rights, in contrast to those rights protected by the procedural component of the Due Process Clause, are substantive in nature. As such, they may not be infringed regardless of the procedural 'protection' accompanying the deprivation.") (emphasis added); *see also Clark v. Yosemite Comm. Coll. Dist.*, 785 F.2d 781, 790-91 (9th Cir. 1986) (same for union teacher). Because the Court's determination is contrary to established law, it must be reconsidered.

III. GENUINE ISSUES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT IN DEFENDANTS' FAVOR ON THE QUALIFIED IMMUNITY ISSUE.

As identified by the Court, the proper inquiry to determine whether the individual defendants are entitled to qualified immunity "is not whether they knew that terminating [Plaintiff] in retaliation for protected speech was lawful, but rather whether terminating him based on all the information available to them at the time, to include any knowledge of his protected speech, was objectively reasonable." *Sherrod v. Johnson*, 667 F.3d 1359, 1364 (11th Cir. 2012). In other words, "unless it, as a legal matter, is plain under the specific facts and circumstances of the case that the defendant's conduct—despite his having adequate lawful reasons to support the act—was the result of his unlawful motive, the defendant is entitled to immunity." *Foy v. Holston*, 94 F.3d 1528, 1535 (11th Cir. 1996).

But, critical to the analysis, "it is not sufficient for [the individual defendants] to establish that there exists a lawful basis for a reasonable [school administrator] to have terminated [Plaintiff]. Rather, in order for the *Foy* analysis to apply, [the individual defendants themselves] must have been **actually** motivated, at least in part, by that lawful basis." *Stanley v. City of Dalton*, 219 F.3d 1280, 1296 n.29 (11th Cir. 2000) (emphasis added). When the record does not "**indisputably establish**[ ]" that a defendant was in fact motivated a by lawful consideration, qualified immunity must be denied. *Id.* at 1296 (emphasis added); *see, e.g.*, *Bogle v. McClure*, 332 F.3d 1347, 1356 (11th Cir. 2003) ("Viewing the facts in the light most favorable to the Librarians, the record evidence does not undisputably [sic] indicate that Appellants were in fact motivated, at least in part, by objectively valid reasons."). Viewing the facts in the light most favorable to Plaintiff, the record does not indisputably establish that the individual defendants were actually motivated—even in part—by Plaintiff's delayed compliance with the Policy.

Critically, the facts the Court relies upon for its qualified immunity analysis are not undisputed. According to the Court, there is no material dispute that: (i) the Policy existed; (ii) FAU's administration of the Policy required Tracy to undertake certain actions; (iii) Tracy willfully did not comply with the specifics of what FAU required despite advice to the contrary; and (iv) if Tracy did attempt to fully comply with the Policy, the attempt was not timely. ECF No. 362 at 26. But the Court cannot divorce these cursory statements from the entire record.

First, the Court's analysis ignores the fact that the vague Policy went routinely unenforced. Not only did Plaintiff request clarification on the Policy from his superiors, several faculty members expressed concern over the Policy and submitted complaints requesting clarification about it, some as recently as September 2015 (three months before the notice of termination). ECF No. 248, ¶¶ 21, 22, 24.[1] Further, the Court's recitation of the facts ignores the rest of the record. Not only did Tracy never receive clarification on the Policy, he was also on paternity leave and did not immediately receive Defendant Coltman's notice and email. *Id.*, ¶¶ 26, 32. Despite this, after receiving Coltman's December 11 email he promptly complied and filled a conflict of interest form the evening he received it. *Id.*, ¶¶ 31, 32.

The Court's analysis impermissibly ignores the following critical facts:

[1] Plaintiff incorporated by reference these facts in his response to the individual defendants' statement of facts. *See* ECF No. 272, ¶ 56.

- the Policy does not expressly apply to blogging or include blogging among the activities that must be reported as potential conflicts, ECF No. 248, ¶¶ 9, 41;
- faculty members were not provided with training on how to comply with the Policy, *id.*, ¶ 44;
- other faculty members have blogs and have not reported their blogging activities, *id.*, ¶ 42;
- Tracy was the first faculty member to report blogging activities and the first disciplined (let alone fired) for allegedly failing to report same under the Policy, *id.*, ¶ 46;
- Plaintiff was hired in 2003, and had never been disciplined prior to 2013, regularly receiving "excellent" or "outstanding" reviews from his superiors, *id.*, ¶¶ 2, 3;
- the same two defendants, Coltman and Alperin, tried to use the Policy to discipline Plaintiff in 2013, but decided against it due to, among other things, Plaintiff's First Amendment rights, *id.*, ¶¶ 7-8, 13;
- Plaintiff was not disciplined in 2014 when he did not fill out a form for his blogging, *id.*, ¶ 18;
- the November 10, 2015 notice of discipline did not state that Tracy could be terminated for noncompliance, *id.*, ¶ 25; and
- the notice of termination was drafted on December 10, 2015, the day before Defendant Coltman sent an email to Plaintiff providing him with the December 14, 2015 deadline to complete the form, showing that the decision to terminate Plaintiff had already been made, *id.*, ¶ 30.

Taking all of these facts into consideration, this case is unlike previous Eleventh Circuit decisions where defendants were entitled to qualified immunity under a mixed-motives analysis. The record in those cases incontrovertibly established that a lawful justification motivated the adverse action. *See Sherrod*, 667 F.3d at 1364; *Foy*, 94 F.3d at 1535; *Stanley*, 219 F.3d at 1296-97. In *Sherrod*, the case upon which the Court almost exclusively relies, the Eleventh Circuit held that defendants were entitled to qualified immunity because the undisputed facts demonstrated the adverse faculty action was motivated by unsatisfactory evaluations and complaints from parents and thus lawfully justified. *See* 667 F.3d at 1359. That is unlike the

case here. *See Foy v. Holston*, 94 F.3d 1528, 1535 (11th Cir. 1996) (holding that lawful justifications existed to protect children from physical abuse and mistreatment where "the record [made] it clear that Defendants' acts were actually motivated by lawful considerations without which they would not have acted"); *Johnson v. City of Fort Lauderdale, Fla.*, 126 F.3d 1372, 1378 (11th Cir. 1997) (concluding that "transcripts of the disciplinary hearings against Johnson offer conclusive support for the defendants' claimed adequate lawful motives for demoting and discharging Johnson").

In *Stanley*, although Stanley had denied a number of allegations made against him, the record revealed that a polygraph test indicated Stanley's use of deception during an internal investigation and that he had admitted to using profanity and placing his hands on a coworker—all of which were undisputed and adequate lawful bases for his termination. The court emphasized that, because the protected speech occurred in 1993 but he was not terminated until *after* numerous incidents and warnings in 1997, it was indisputable that, even given his speech, he would not have been terminated in 1997 absent those incidents. *See* 219 F.3d at 1296-97.

Here, unlike *Stanley*, there was no gap in time between Plaintiff's protected speech, which was ongoing, and his termination—indeed, the Sun Sentinel article criticizing Plaintiff was published a mere six days before his termination and in reaction to Plaintiff's speech activities. ECF No. 248, ¶¶ 29, 33-34. Nor was there a similar specific triggering moment—here there was no clear violation of the Policy because the Policy was vague and unenforced. FAU continued to receive complaints about Plaintiff's blogging between 2013 and 2015, and these individual defendants were among those actively monitoring Plaintiff's blog and internally circulating negative news article at FAU. *Id.*, ¶¶ 19, 27-28. Further, an FAU dean would later confirm: "for the record, Tracy was not fired because he didn't report things." *Id.*, ¶ 45.

The circumstances surrounding Plaintiff's termination better track the Eleventh Circuit's analysis in *Bogle*. In *Bogle*, a group of librarians alleged that they had been transferred to "dead-end jobs at branch libraries" because of their race. *See* 332 F.3d at 1350. The board trustees and director of the library system asserted qualified immunity under *Foy*, claiming that the transfers had been part of a race-neutral, system-wide reorganization. Viewing the facts in the light most favorable to the librarians, the court concluded that the record evidence did not indisputably indicate that the defendants were in fact motivated by objectively valid reasons. It reasoned that, "given the [l]ibrarians' evidence suggesting the reorganization plan was a sham

designed to cover up the race-based transfers, a reasonable jury had reason to doubt [the defendants'] asserted nondiscriminatory reason for the transfers." *Id.* at 1356.

Similar to the librarians in *Bogle*, Plaintiff has presented evidence suggesting that the defendants' Policy enforcement was a bogus cover-up for retaliation. The record therefore does not indisputably indicate that the defendants were actually motivated by objectively valid reasons. *See also Pattee v. Ga. Ports Auth.*, 477 F. Supp. 2d 1253, 1268 (S.D. Ga. 2006) (denying claim of qualified immunity because there were no grounds to conclude that plaintiff's lie, even if an objectively valid reason for termination, indisputably motivated the decision to fire him); *Fong v. City of Zephyrhills, Fla.*, 2011 WL 1575382, at *8 (M.D. Fla. April 26, 2011) (denying qualified immunity because there were genuine issues of material fact regarding whether decision not to hire plaintiff was actually motivated by the proffered legitimate reasons of prior disciplinary problems and tardiness).

The record here, taken in the light most favorable to Plaintiff, does not establish that Defendants Alperin and Coltman indisputably were actually motivated by Tracy's alleged insubordination. Because there is a genuine dispute of fact regarding their motivation, the individual Defendants are not entitled to qualified immunity and summary judgment should not have been granted on that basis.

CONCLUSION

In sum, the Court respectfully should reconsider its Omnibus Order On All Pending Motions For Summary Judgment, ECF No. 362, because the Court improperly viewed the Policy as a part of the CBA, improperly required Plaintiff to grieve his § 1983 First Amendment claims contrary to *Patsy*, and misapplied the test for determining whether to apply qualified immunity in the mixed-motives context. The Court should rule on the merits of Plaintiff's constitutional claims with respect to Counts III, IV, and V, find that there is a genuine issue of material fact on the qualified immunity issue to be determined at trial, and grant any and all other relief the Court deems just and proper.

Dated: November 15, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 15, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF to be served this day per the attached Service List.

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