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 **HEARING REQUESTED**

PLAINTIFF'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Plaintiff Professor James Tracy ("Plaintiff" or "Tracy"), pursuant to Fed. R. Civ. P. 50(b), renews his motion for judgment as a matter of law and respectfully requests that the Court enter judgment as a matter of law in his favor. In support, Plaintiff states as follows.

INTRODUCTION

In this case, the jury nullified the Plaintiff's First Amendment rights, ignoring long-standing fundamental constitutional law that protects speech even if it is hated or false, because the Jury disliked it. Specifically, Tracy, a former tenured FAU professor, sued FAU for First Amendment retaliation alleging that the university fired him based on his speech in an online blog, in which he denies that the Sandy Hook Elementary School shooting ever occurred. FAU contended that the Plaintiff was fired for "insubordination," based on his purportedly untimely submission of a form disclosing his blogging as outside employment pursuant to FAU's Conflict of Interest Policy ("the Policy"), even though blogging on public issues during his spare time unquestionably did not result in a conflict of interest, and the University was fully aware of the contents of the blogging since it is available to all. The jury was presented with two questions: (1) whether Plaintiff's speech was a motivating factor in his termination; and (2) if so, whether FAU would have fired Tracy absent his controversial speech. The jury answered the first question "no," and therefore did not reach the second question, ignoring overwhelming evidence in the process that proved Plaintiff was fired solely because of his speech. This Court should grant Tracy judgment as a matter of law because no reasonable jury could have found that

Plaintiff's speech was not a motivating factor in his termination, and there was no evidence to support that FAU would have fired the Plaintiff if not for his controversial speech.

First, as set forth below, the overwhelming evidence includes FAU's termination letter that reveals Tracy's speech was the impetus behind the termination, *see* DE 447-36 at pg 2 (Plf's Exh. 46), and Dean Heather Coltman's admission that:

> **with every blog post, tweet and proclamation** of false flags, hoaxes, child actors and millionaire imposter parents, pressures build in the public to strip all faculty of the protections of tenure. **His termination both holds Tracy accountable for his despicable behavior and reduces pressure on the elected officials to end tenure**.

Trial Transcript ("T.") at vol. 6, pg. 42; DE 447-35 (Plf's Exh. 45) (emphasis added).[1] The jury was not at liberty to disregard that evidence because it did not like Plaintiff's speech.

Second, FAU did not present legally sufficient evidence that it would have made the decision to fire Plaintiff, who had excellent annual performance reviews after more than a decade of work, absent the speech. At the time Plaintiff was terminated, no other professor had been fired, let alone lost tenure, for failing to timely turn in or complete the conflict of interest form pursuant to the Policy. Because the purpose of the Policy was to require reporting outside employment that could conflict with a professor's teaching duties, it is clear that it would not apply to a blog that constitutes an exercise of First Amendment rights, took minimal time to write, and that was available to everyone for free online. The evidence also established that FAU unevenly applied the Policy and reserved its harshest punishment for Plaintiff, while others with more egregious "violations" of the Policy were not fired or only lost their jobs after engaging in blatant conflicts of interest like failing to disclose actual outside employment with another school. Indeed, the evidence at trial regarding FAU's uneven application of the Policy confirmed that had Plaintiff not spoken critically about Sandy Hook and the government's alleged involvement, he would not have been singled-out and fired. Indeed, the evidence was that FAU had no written policy about blogging whatsoever.

Finally, Plaintiff renews his argument that he is entitled to judgment as a matter of law on his constitutional challenges to the Policy itself, encompassed within Counts 3, 4, and 5, consistent with his earlier motions for summary judgment and reconsideration, which the Court denied.

[1] All emphasis is added unless otherwise noted.

LEGAL STANDARD

The same standards apply to a renewed motion for judgment as a matter of law under Rule 50(b) as those which apply to an initial motion under Rule 50(a). *Hubbard v. BankAtlantic Bancorp, Inc.*, 688 F.3d 713, 724 (11th Cir. 2012). The Court may grant judgment as a matter of law when "a party has been fully heard on an issue during a jury trial and the [C]ourt finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1). That motion may be renewed within 28 days of the entry of judgment on the jury's verdict, or if on an issue not decided by the jury within 28 days after the jury was discharged. Fed. R. Civ. P. 50(b).

Although the Court considers the evidence in the light most favorable to the non-moving party, "the non-movant must put forth more than a mere scintilla of evidence suggesting that reasonable minds could reach differing verdicts." *Nebula Glass Int'l, Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1210 (11th Cir. 2006) (quotation marks omitted). Because a Rule 50(b) motion may only be analyzed as question of the sufficiency of the evidence, "the jury's particular findings are not germane to the legal analysis." *Chaney v. City of Orlando*, 483 F.3d 1221, 1251 (11th Cir. 2007). If the evidence "is so weighted in favor of one side," then "that party is entitled to succeed in his or her position as a matter of law." *Abel v. Dubberly*, 210 F.3d 1334, 1337 (11th Cir. 2000); *see also U.S. E.E.O.C. v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244, 1250 (11th Cir. 1997) (explaining judgment as a matter of law is proper in favor of the party having the burden of proof "when the evidence favoring the claimant is so one-sided as to be of overwhelming effect.").

ARGUMENT

Plaintiff is entitled to judgment as a matter of law because the jury could not have reasonably found that Plaintiff's speech was not a motivating factor in his termination, and because FAU did not present sufficient evidence that it would have fired Plaintiff absent the speech. In addition, Plaintiff is entitled to judgment as a matter of law on his constitutional challenges to the Policy itself.

I. THE JURY'S FINDING THAT THE SPEECH WAS NOT A MOTIVATING FACTOR IN PLAINTIFF'S TERMINATION IS CONTRARY TO OVERWHELMING EVIDENCE OF CAUSATION.

At trial, the Court read the following instruction to the jury:

> With respect to what you must decide, whether Professor Tracy's speech was a "motivating factor" in FAU's decision, for Professor Tracy to prove that his speech was a motivating factor in FAU's decision, Professor Tracy does not have to prove that his speech was the only reason for FAU's actions. **It is enough if Professor Tracy proves that his speech influenced FAU's decision**. If Professor Tracy's speech made a difference in FAU's decision, you may find that it was a motivating factor in the decision.

DE 436, at pg 12; T. at Vol. 9 pg 7.

No reasonable juror could have answered "No" to the first question on the verdict form: "Do you find from a preponderance of the evidence that Professor Tracy's blog speech was a motivating factor to discharge him from employment?" [DE 437]. The overwhelming evidence presented on this question included: FAU had no written policy anywhere regarding blogging; no one other than Tracy was asked to report blogging; and when asked under oath, FAU officials admitted blogging is protected by the First Amendment. Notwithstanding this, the jury also was also provided with statements in FAU's termination letter that Plaintiff was fired for blogging; admissions by FAU decision-makers that Plaintiff's termination holds him "accountable for his despicable" speech; Dean Coltman's notes that reveal FAU administrators conjured up a reason to fire Plaintiff. The jury also heard evidence of FAU's refusal to clarify what the Policy requires; of the disparate treatment of Plaintiff as compared to other professors who have not been fired for failure to report outside activities; of FAU's history of monitoring and disciplining Plaintiff for his blog; that Tracy submitted the form one day "late"; and that there was no legitimate basis to require the disclosure form since FAU was fully aware of the blog and that an expression of freedom of speech poses absolutely no conflict of interest with that of a University.

A. FAU Conceded Through Its Termination Letter That Plaintiff's Blog Influenced Its Decision To Fire Him.

First, Plaintiff's termination notice itself reveals that FAU fired Plaintiff based on his blog. Plaintiff's termination letter, written by FAU Vice Provost Diane Alperin, contains the following admissions by FAU showing the blog was the motivating factor for Plaintiff's firing:

> You again failed to submit any Activity Reports for the three years in question **for your blog**, which you clearly, spend time and resources maintaining and contributing to. . . You have yet again deprived the University of the Forms needed to assess if a conflict exists **for your blog**.

See DE 447-36 (Plf's Exh. 46).

Further, during her testimony at trial Alperin conceded that the motivating factor behind Plaintiff's termination was his blogging:

> Q. In 2013, you wanted him to report his blogging to you so you could have the right to approve or disapprove that activity, didn't you?
>
> **A. Correct.**
>
> Q. You wanted the same right in 2015, to approve or disapprove the activity?
>
> **A. Correct.**

T. Vol. 5, at pg 16:22-17:3.

Although FAU tried to characterize the firing as being caused by "insubordination" for failing to *report* the blog, rather than being caused by disapproval of the *content* of the blog, as set forth below, FAU's knowledge of and access to the blog itself, its disapproval of Plaintiff's speech, and the disparate treatment of Tracy as compared to other employees, shows that his termination was in fact retaliation for his speech.

B. <u>Evidence Of Complaints And Negative Publicity About Plaintiff's Blog Overwhelmingly Demonstrated That His Blogging Influenced FAU's Termination Decision.</u>

There was also significant evidence that FAU decision makers, including Alperin and Heather Coltman, the Dean of Plaintiff's college who served as a principal liaison to FAU faculty and administration, wanted to terminate Plaintiff for his speech after receiving negative publicity as a result of the blog. Both Coltman and Alperin testified at trial that FAU began receiving complaints and negative publicity about Plaintiff's blogging in early 2013, which prompted meetings wherein Coltman recorded FAU's primary objective was to "explore potential misconduct" for the blog. T. Vol. 5, at pg 174:11-17. The decision makers also testified that they continued to receive internal and external complaints about Plaintiff's blogging through December 2015, prior to termination decision, including complaints surrounding an article published in the *Sun Sentinel* calling for his termination for his blogging activities. *See* T. Vol. 6, at pg 36:7-39:23; DE 447-25, 27, 30, 32 (Plf's Exhs. 37b, 37v, 38o, 39).

It was further admitted at trial that the decision makers and other top FAU officials internally circulated this and several other articles, and recorded their expressions of disgust for Plaintiff's protected speech both before and after the termination. T. Vol. 6, at pg 39:13-41:15; DE 447-27 (Plf's Exh. 37v). It was also undisputed at trial that Alperin and Coltman circulated a

draft termination letter on December 10, 2015, after the *Sun Sentinel* article was published, but before Plaintiff's December 15 extended deadline to complete the forms. T. Vol. 4, at pg 185:8-187:10; T. Vol. 6, at pg 74:22-75:5; DE 447-32 (Plf's Exh. 39). This clearly shows that they had already decided to terminate Plaintiff before they even knew whether or not he would submit the conflict of interest form on time, revealing it was his speech—not his failure to timely submit the form or obey instructions—that caused his termination.

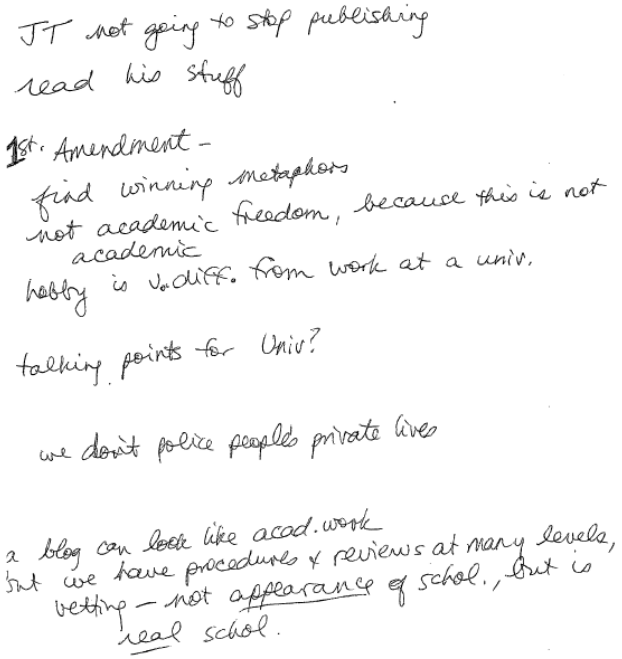
And if there was any doubt, Coltman admitted at trial to sending the following message to another FAU dean on December 18, 2015, shortly after the decision to terminate Plaintiff had been made:

> The decision by Florida Atlantic University to fire James Tracy is not an assault on the institution of tenure as some of his supports will claim . . . . **[W]ith every blog, post, tweet and proclamation** of false flags, hoaxes, child actors and millionaire imposter parents, pressures build in the public to strip all faculty of the protections of tenure. **His termination holds Tracy both accountable for his despicable behavior and reduces pressure on elected officials to end tenure**.

See DE 447-35 (Plf's Exh. 45); T. Vol. 6, at pg 42:21-46:15.

C. Coltman's Notes Confirm Plaintiff Was Fired For His Speech.

Dean Coltman's notes also confirm Plaintiff's blogging was the *only* motivating factor and cause of his discipline and termination. *See* DE 447-2 (Plf. Exh. 2A). Coltman testified that the notes, which were recorded during meetings with Alperin and other FAU officials, reflected that the first objective in response to the public outcry over Plaintiff's speech was to "explore potential misconduct" with respect to the blog. T. Vol. 5, at pg 173:25-174:17; DE 447-2 at pg 3 (Plf's Exh. 2A). The following notes, although written in 2013, confirm that Plaintiff's blogging was a substantial motivating factor in the 2015 termination decision:


JT not going to stop publishing
read his stuff

1st. Amendment –
find winning metaphors
not academic freedom, because this is not academic
hobby is v. diff. from work at a univ.

talking points for Univ?

we don't police people's private lives

a blog can look like acad. work
but we have procedures & reviews at many levels, vetting – not appearance of schol., but is real schol.

DE 447-2 at pg 4 (Plf's Exh. 2A).

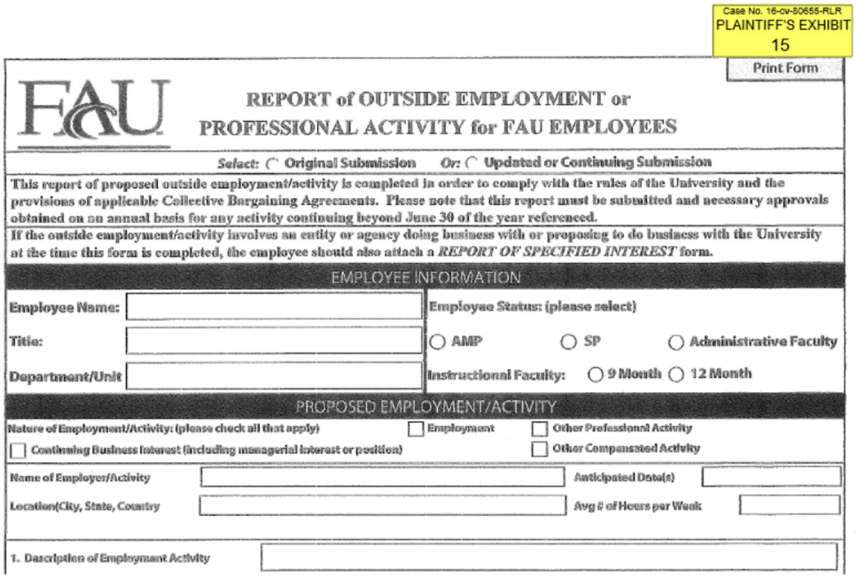
While Coltman tried to explained away her other notes, she could not explain what she meant by "First Amendment - Find Winning Metaphors." She claimed it was just a "collection of words." T. Vol. 5, at pg 176:19-177:17; T. Vol. 6, at pg 178:19-179:6. These words, perhaps the most important words of the trial, are self-explanatory—Coltman and Alperin knew Plaintiff was not going to stop blogging, and that the activity was protected by the First Amendment. So they had to find another seemingly valid reason to discipline him because they knew his blogging was "not academic" and just a "hobby," which is "very different" from "work at a university." T. Vol 5, at pg 179:9-181:21; DE 447-2 at pg 4 (Plf's Exh. 2A). Coltman also admitted, despite telling Plaintiff that his blog was a "reportable" activity, that the Policy says nothing about reporting blogging, social media, or any other form of uncompensated speech online for any reason. *See id.* at 183:20-23; T. Vol. 4, at pg 217:3-12.

D. FAU Refused To Clarify What The Policy Required, And The Form Itself Did Not Require That Professors Needed To Report Uncompensated Activities, Let Alone Blogging.

The fact that FAU fired Plaintiff based on his speech, and not for failing to comply with the Policy, was further made clear by evidence that FAU intended the Policy to be vague so that it would not be clear to Plaintiff whether he was required to report the blog or not, nor would it

prevent FAU from acting arbitrarily or with view point discrimination. For instance, Dean Coltman was vague in her 2015 directives to Plaintiff so that he would not know how to comply with the Policy, and she never specifically instructed Plaintiff to put the blog on the form. T. Vol. 6, at pg 20:6-9; 21:4-22:3; 28:6-14. Moreover, Coltman admitted at trial that she knew in 2015 that Plaintiff had previously sent her a letter on February 2, 2013, indicating Plaintiff did not believe he had an obligation to report blogging or social media pursuant to FAU's Policy. *Id*. at 22:4-10; T. Vol. 5, at pg 192:21-193:16; DE 447-4 (Plf's Exh. 6). Coltman never responded by telling Plaintiff to report his blogging. T. Vol. 5, at pg 194:21-195:5; 203:7-11. When asked whether blogging and social media was a "reportable" activity, Coltman admitted she did not know and that it depends. T. Vol. 5, at pg 206:25-207:6; 211:1-14. The fact that Plaintiff's own boss did not know whether his blog speech was reportable compels the only conclusion that the decision to fire him had to be motivated by his highly controversial speech, particularly given that the speech caused (among other things) school officials to receive nasty emails from the public, donors to withdraw funds, and prospective students to stop applying to FAU. T. Vol. 4, at pg 78:24-80:3; T. Vol. 5, at pg 45:20-46:4.

In addition, the "Outside Employment" form itself does not in any way suggest blogging activities must be reported. The form offers check boxes for only four types of activities: "Employment"; "Professional Activity"; "Compensated Activity"; and "Continuing Business Interest."



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PLAINTIFF'S EXHIBIT
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Print Form

FAU

REPORT of OUTSIDE EMPLOYMENT or
PROFESSIONAL ACTIVITY for FAU EMPLOYEES

Select: ○ Original Submission *Or:* ○ Updated or Continuing Submission

This report of proposed outside employment/activity is completed in order to comply with the rules of the University and the provisions of applicable Collective Bargaining Agreements. Please note that this report must be submitted and necessary approvals obtained on an annual basis for any activity continuing beyond June 30 of the year referenced.

If the outside employment/activity involves an entity or agency doing business with or proposing to do business with the University at the time this form is completed, the employee should also attach a *REPORT OF SPECIFIED INTEREST* form.

EMPLOYEE INFORMATION

Employee Name: | Employee Status: (please select)

Title: | ○ AMP ○ SP ○ Administrative Faculty

Department/Unit | Instructional Faculty: ○ 9 Month ○ 12 Month

PROPOSED EMPLOYMENT/ACTIVITY

Nature of Employment/Activity: (please check all that apply) ☐ Employment ☐ Other Professional Activity

☐ Continuing Business Interest (including managerial interest or position) ☐ Other Compensated Activity

Name of Employer/Activity | Anticipated Date(s)

Location(City, State, Country | Avg # of Hours per Week

1. Description of Employment Activity

DE 447-10 (Plf's Exh. 15).

No check box is offered for any type of uncompensated activity, let alone protected speech, like blog speech. *Id.* The form also requires faculty members to set forth the "Description of **Employment** Activity." *Id.* No reasonable university administrator, faculty member, or juror looking at this form could possibly think blogging, or any other form of uncompensated online speech, should be reported as an "Employment Activity."

In fact, as this Court stated: "Defendant's outside activities policy was confusing to some, including Plaintiff, and that … policy underwent revision soon after Plaintiff was terminated. Notwithstanding that revision and earlier confusion, the earliest draft of the policy was applied against Plaintiff." T. Vol. 8, at pg 70:20-25. The vague Policy was applied against Plaintiff, without clarification as to what was required, because "Defendant was seizing upon an opportunity to terminate Plaintiff because of his earlier protected speech." *Id*. at 71:2-3.

E. No Other FAU Professor Was Disciplined Or Discharged For Failing To Report Their Online Speech Or Social Media Activities Proves Causation.

While confusion and uncertainty about the scope and application of the Policy was a recurring theme during testimony at trial, every single witness, including Alperin, the Corporate Representative of FAU and administrator with the most knowledge of the Policy, testified that not all FAU faculty members were required to submit forms for blogging or social media activities. T. Vol. 5, at pg 17:12-18:5; 18:9-19:1; 19:18-20:14; 20:20-22:1; T. Vol. 6, at pg 179:21-184:18. It was also undisputed that FAU had no policy on blogging. T. Vol. 4, at pg 217:3-23. Indeed, after reviewing the blogging activities of other similarly situated faculty members, Alperin did not know if those activities needed to be reported. T. Vol. 5, at pg 21:2-22:1. She further testified that FAU's current Vice Provost did not see "an issue" with other faculty members' failure to report online activities for blogging and micro-blogging on social media platforms like Twitter and Facebook. *Id.* at p. 21:15-17.

In fact, not all FAU faculty members who engage in outside activities were required to submit forms. T. Vol 5, at pg 201:11-18. Several FAU faculty members with known outside employment did not submit forms for their outside activities and were not disciplined for it. T. Vol. 6, at pg 195:12-196:3. And for those faculty who did not submit "reportable" activities, including Dean Coltman, they were given meetings and told what to submit on the forms and were not disciplined for failing to report. T. Vol. 4, at pg 140:13-141:23; 161:2-10.

1. Douglas McGetchin

FAU Professor Doug McGetchin admitted at trial that he posts online about mass shootings and gun control (with contrary views compared to Plaintiff), refers to himself as FAU professor, and does not have disclaimer. T. Vol. 6, at pg 179:21-184:18. McGetchin also testified that he does not turn in forms for Facebook or Twitter activities and has never been asked to use disclaimer on postings. *Id.* at 185:7-13; 190:15-191:14. Yet, Alperin admitted that there was no "issue" with McGetchin's or any other FAU faculty bloggers' failure to "report" such blogging activities. T. Vol. 5, at pg 21:15-20.

2. Christopher Robe

FAU Professor Christopher Robe, who like Plaintiff previously served as President of FAU's faculty union, also testified that he had online social media activities but did not report them. T. Vol. 6, at pg 220:3-221:2. In 13 years at the university, he never turned in an "Outside Activity" form. *Id.* at pg 229:12-25. Robe further testified that FAU never provided training or instructed faculty on how to comply with the Policy or that online speech may be reportable. *Id.* at 221:3-18. The Policy "absolutely" confused him and it "seemed to be applied differently at different times." *Id.* at 221:19-222:3. Robe's testimony starkly contrasted with FAU's argument at trial that Plaintiff, a former union president, should have understood the Policy, given that Robe was a former president of the faculty union himself. *Id.* at 222:20-24. Robe's testimony also debunks FAU's contention at trial that Plaintniff should have known to report his blog simply because he was a former union official and signed the CBA.

3. Douglas Broadfield

Former tenured FAU Professor Douglas Broadfield, who was employed by FAU for 15 years and also served as the "Grievance Chair" for FAU's faculty union and represented countless faculty members facing discipline for approximately 8 years, also testified consistent with Plaintiff's theory his speech was the real and only reason he was fired:

> Q. Do you know whether the policy was evenly applied while you were working at the university?
>
> A. In my experience with the faculty I had contact with, I don't think that it was applied evenly across all members of the university.
>
> Q. Why is that?
>
> A. There were faculty who filed outside activity forms for, in particular, paid activities and those certainly seemed like the university had signed off on,

> but there were also faculty who engaged in outside employment who never filed and they have been known, in my knowledge, by a chair or somebody like that to have been doing outside activity and never told to file or required to file.
>
> Q. And those faculty members who did not turn in forms while you were there, were they disciplined for not filing forms?
>
> A. Not to my knowledge.

T. Vol. 6, at pg 195:12-196:3.

Broadfield confirmed that Tracy never violated the disclaimer requirements in the CBA, that Plaintiff's discipline in 2013 was unwarranted, and that Plaintiff followed his Union's advice in 2013 not to turn in forms for blogging. T. Vol. 6, at pg 196:4-14; 197:22-24; 198:5-7; 211:16-22. Broadfield also confirmed that FAU faculty members did not report use of computer equipment to communicate online for their personal speech, and that, while he worked at the school for 15 years until 2015, no training was provided to FAU faculty with respect to reporting a blog or use of a computer. *Id.* at 210:19-211:2.

4. Steven Kajiura

Another tenured FAU professor who was similarly confused by the Policy, Steven Kajiura, testified that he was disciplined for non-compliance with the Policy and for research misconduct, and instead of termination he was disciplined with a 5-day suspension without pay that was later reversed at arbitration. T. Vol. 3, at pg 26:17-30:3. Kajiura's violations of FAU regulations, which included actual harm to animals and potential harm to students, were patently more serious than Plaintiff's purported violations for not reporting a blog she knew about. *See* DE 447-39 (Plf's Exh. 53). Yet Kajiura and Alperin's testimony, along with every other witness who testified at trial about the scope and application of the Policy, confirmed that the Policy was selectively and arbitrarily enforced and was used to fire Plaintiff for his constitutionally protected speech because it was unpopular and caused problems for FAU.

Thus, the trial testimony reflected that other faculty members who did not report activities on the same form were advised by their deans, including Dean Coltman, about what was specifically expected of them and given an opportunity to report the activity on the form without any discipline at all. T. Vol. 4, at pg 132:21-137:8; DE 444-24 (Def's Exh. 85); T. Vol. 4, at pg 139:18-141:23; DE 445-7 (Def's Exh. 100). Plaintiff was not given this opportunity before he was terminated. T. Vol. 4, at pg 173:15-174:12; 177:18-180:6; 189:15-

190:1; 194:5-195:4. In light of all the controversy surrounding Plaintiff's speech, this disparate treatment constitutes irrefutable evidence that FAU was motivated by Plaintiff's speech to terminate him that the jury was not free to disregard. The other faculty who were given specific directives and provided with opportunities to comply with those specific directives were not engaged in any controversial or unpopular speech. Plaintiff's speech in his blog clearly motivated Coltman and Alperin and influenced them to depart from standard procedure and terminate Plaintiff for failing to do something that he was never told he needed to do.

F. FAU's History Of Monitoring The Blog Further Shows Intent To Fire Plaintiff Based On His Speech.

It was uncontroverted at trial that Plaintiff was also disciplined for his blogging by Coltman in March 28, 2013. T. Vol. 6, at pg 165:21-166:20; DE 447-6 (Plf's Exh. 8). Notably, FAU never even suggested then that Plaintiff should be disciplined for failing to "report" his blog or "insubordination" for failing to comply with directives at that time. T. Vol. 5, at pg 194:18-195:22. FAU later offered to remove the March 28, 2013 Notice of Discipline if Plaintiff agreed to use a blog disclaimer written by FAU and to not use his title of "professor" in any online postings. T. Vol 2, at pg 120:2-121:8; DE 447-5 (Plf's Exh. 7). After Plaintiff agreed, however, FAU never removed the Notice of Discipline from Plaintiff personnel file. T. Vol 2, at pg 121:15-22. FAU also retaliated against Plaintiff for his blog speech by canceling his courses without explanation and changing his class schedule to times which interfered with his child care duties. *Id.* at 124:11-127:2.

The fact that Tracy was disciplined in 2013 for the blog shows a history of FAU monitoring his speech. It also shows that FAU was aware of the blog at that time, but did not discipline Plaintiff in 2013 or 2014 for violating the Policy, despite knowing that he had not turned in forms for his blog during those years. T. Vol. 4, at pg 200:13-202:10. Coltman admitted she did not know why Plaintiff was not disciplined for not reporting his blog in 2013, despite being aware that he did not turn in a form for his blog and recognizing that he did not believe blogging or social media was a "reportable" activity. T. Vol. 5, at pg 198:17-205:6.

This evidence of FAU monitoring the blog, being disgusted by its content, conjuring up pretextual grounds to terminate Plaintiff, and unequally enforcing the Policy against Plaintiff overwhelmingly established that Plaintiff's speech was a motivating factor for his termination. As this Court acknowledged, the evidence showed "that there was pressure on Defendant to

terminate [Plaintiff] because of his speech, pressure that never ceased, despite the passage of time"; there was "evidence of personal animus against him, due to his speech, by decision makers [of] Defendant"; and there was "evidence that Defendant continually and carefully monitored the Plaintiff while that pressure was present." T. Vol. 8, at pg 69:22-70:6. The jury ignored this evidence because it, too, disliked Plaintiff's speech. This Court stated: "It is not for this Court to pass judgment on Plaintiff's views." *Id*. at 77:4-5. Similarly, it was not for the jury to disregard the evidence because of its judgment of Plaintiff's speech. Accordingly, the verdict on First Amendment retaliation should be vacated.

II. THE COURT SHOULD ENTER JUDGMENT AS A MATTER OF LAW ON PRETEXT BECAUSE FAU WOULD NOT HAVE FIRED PLAINTIFF ABSENT HIS HIGHLY CONTROVERSIAL SPEECH.

Much of the same evidence also proves that the purported reason for Plaintiff's discharge—insubordination—was a blatant pretext and that no reasonable jury could have concluded that FAU would have fired Plaintiff absent the speech.

A. The Evidence That Plaintiff Was Insubordinate Was Legally Insufficient.

During trial, despite being accused of insubordination in refusing to follow directives, it was uncontroverted that Plaintiff never refused directives of his supervisors. T. Vol. 4, at pg 162:9-164:6. The evidence established that he was directed to submit "Outside Employment" forms despite having no reportable outside employment. T. Vol. 5, at pg 201:2-21. Plaintiff submitted forms for two uncompensated, non-employment and non-professional activities, both of which consisted only of his constitutionally protected speech online on websites owned and operated by third-parties. T. Vol. 2, at pg 187:17-199:22; DE 447-33 (Plf's Exh. 42A).

Plaintiff further testified at trial that he experienced fear and uncertainty about the Policy and expressed that fear and uncertainty in requests for clarification to his supervisors. T. Vol. 2, at pg 153:3-156:9. He did not understand why he needed to submit forms for his constitutionally protected speech online, which he did not believe in any way qualified as an outside activity such that it needed to be reported. T. Vol. 2, at pg 201:19-204:6. Plaintiff's beliefs were buttressed by the advice he received back in 2013, from his FAU faculty union representative, Michael Moats, who helped him write his February 2, 2013 response letter to Coltman saying that he had no obligation to report his blog. DE 447-4 (Plf's Exh. 6); T. Vol. 2, at pg 84:21-89:23.

The first and only time FAU notified Plaintiff that he should report his blog was more than two years later, on December 16, 2015, **after** FAU announced through Alperin that it

intended to terminate Plaintiff for not reporting his blog. T. Vol. 4, at pg. 201:8-202:10. Coltman and Alperin thus waited nearly three years after Plaintiff originally denied that he had an obligation to report the blog before disciplining him for failing to report it, after another round of criticism in the press and from the public about Plaintiff's speech on Sandy Hook, showing without a doubt that the firing was pretextual.

Plaintiff, however, did not report his blog because he did not know and was never instructed that he was required to do so. T. Vol. 2, at pg 201:19-203:24. After Plaintiff's November 22, 2015 letter requesting clarification on the Policy went unanswered, as well as multiple requests for clarification to Plaintiff's supervisor David Williams about the Policy, on December 11, 2015, Coltman sent Plaintiff a "final warning" to submit forms or face termination—the day **after** she and Alperin already started drafting his termination letter. DE 447-22; DE 447-24 (Plf's Exhs. 36 & 34). And then one day after he submitted the forms, FAU terminated him for not "reporting" the blog FAU knew about and on which it had previously asked him to include a disclaimer. T. Vol. 6, at pg 108:22-109:1; DE 447-34 (Plf's Exh. 43). According to Alperin, despite the fact FAU did not have a policy or guidance on blogging, Plaintiff was "insubordinate" because he "interpreted blogging differently than [she] did" and concluded it was not a reportable activity. T. Vol. 4, at pg 217:3-23. That was his grave offense.

As for FAU's alternative reasons for firing Plaintiff offered after his notice of proposed termination—for allegedly writing a book, earning money on the blog, and using work equipment without permission—they are all equally without merit and lacking in evidentiary support. With respect to the book, *Nobody Died At Sandy Hook*, it was undisputed that Plaintiff did *not* write the book, that the book merely included a re-production of two of his blog posts from 2012-2013 with permission, and that Plaintiff did not receive any compensation from the book or any activity other than his employment at FAU. T. Vol. 2, at pg 58:11-12; 191:6-192:5; 193:24-195:16. And even if he had written a book, Alperin conceded that not all books had to be reported. DE 447-13 (Plf's Exh. 26); T. Vol. 4, at pg 207:22-209-3, 212:12-25.

As for the money Plaintiff received from the blog, that was not income but rather consisted of modest donations that Plaintiff used to maintain the blog. T. Vol 3., p. 54:9-19; 139:4-15; 139:24-140:4. And even if the $1,000 Plaintiff received over two years from blog readers could be could be considered income, the evidence at trial established that it was so insignificant in amount that it would not be considered reportable under the Policy. DE 447-9

(Plf's Exh. 14) (setting financial interest disclosure amount at $5,000 and above); T. Vol. 6, at pg 215:13-25. Moreover, faculty members routinely did not report money received from honorariums or investments, and Alperin conceded that money received from gambling was not reportable, thus proving that not all money changing hands was reportable. DE 447-13 (Plf's Exh. 26); T. Vol. 4, at pg 210:20-211:4, 215:17-216:23.

Finally, Plaintiff's use of his school computer to blog was permissible pursuant to FAU's "incidental use" exception, which allowed faculty members to use school equipment to do things such as blog on Facebook or Twitter while at school, without having to report same. T. Vol. 2, at pg 198:3-199:22; 195:18-197:7. As Broadfield explained, "if equipment is being used incidentally in a manner that would be consistent among all faculty, essentially, then you don't have to file for outside activity, or in this case, use of equipment." T. Vol. 6, at pg 210:5-13. It was further undisputed at trial that faculty members did not report use of their computers to communicate online. *Id.* at 210:19-211:2.

B. Plaintiff Presented Overwhelming Evidence That FAU's Official Reason For Firing Plaintiff Was Pretextual.

In addition to a lack of legally sufficient evidence of insubordination, there was also overwhelming evidence of pretext that the jury was not at liberty to disregard, entitling Plaintiff to judgment as a matter of law in his favor on the First Amendment retaliation claim.

1. No Other FAU Professor Has Been Fired Or Lost Tenure For Violating The Policy By Failing To Report Blogging.

Despite the number of FAU faculty members discussed above not reporting their blogging activities to FAU under the Policy, there was no evidence at trial that any other faculty member had been disciplined or fired for failing to report their blogging activities. T. Vol. 6, at pg 179:21-184:18; 185:7-13; 190:15-191:14; 220:3-221:2; T. Vol. 4, at pg 21:15-17; T. Vol. 5, at pg 113:16-25. At trial, FAU attempted to demonstrate that there was at least one other professor who was fired for violating the Policy, but this evidence backfired in that it showed what a true conflict of interest looks like. The professor, Char-Sy T. Copeland, was a non-tenured instructor who worked for eight other schools teaching eleven classes online for income, failed to disclose this outside employment on the "Outside Activities" form, and lied about it when confronted. DE 444-31 (Def's Exh. 206). This blatant conflict of interest and violation of the Policy stands in stark contrast to Plaintiff's firing, which was based on the highly subjective interpretation and application of the Policy to blogging by school administrators who were openly repulsed by

Plaintiff's blog speech. Moreover, before Copeland was disciplined or terminated, her dean had a meeting with her to discuss the situation, whereas Plaintiff was never provided with such a meeting before being disciplined and then terminated. T. Vol. 5, at pg 114:5-21; T. Vol. 2, at pg 148:5-10, 165:2-4; T. Vol 4 pg 195:1-4, 197:3-9; T. Vol. 5, pg 151:11-18. Also, after her meeting with her dean, Copeland resigned, demonstrating that she neither intended to comply with her supervisor's directives nor remain employed by FAU. DE 444-31 (Def's Exh. 206); T. Vol. 5, at pg 112:23-121:9. In contrast, Plaintiff asked for clarification and specific direction from his supervisors multiple times, to no avail, irrefutably demonstrating his intent to understand and comply with FAU's requests and remain employed. T. Vol. 2, at pg 153:3-156:9; 201:19-204:6; T. Vol. 6, at pg 28:20-30:2; DE 447-24 (Plf's Exh. 36).

2. FAU Departed From Its Disciplinary Procedures In Firing Plaintiff.

It was undisputed at trial that FAU disregarded its own procedures in terminating Plaintiff. *See* DE 447-44 (Plf's Exh. 69). Coltman admitted that she had an obligation to meet with Plaintiff prior to disciplining him, yet she made no attempt to do so. T. Vol. 4, at pg 179:12-19; 189:8-14. DE 447-2 (Plf's Exh. 2A); T. Vol. 5, at pg 173:8-23. Coltman further refused to clarify what she expected Tracy to include on the vague and confusing "Outside Employment" form and made no effort to respond to Plaintiff until after she received another public complaint about Tracy's blogging. T. Vol. 6, p. 26:1-30:14; DE 447-27 (Plf's Exh. 37v).

Alperin and Coltman also did not look at Plaintiff's performance evaluations as required by Disciplinary Regulation 5.02. T. Vol. 4, at pg 205:13-206:23. Had they looked, discipline would not have been appropriate because Plaintiff's performance evaluations were excellent and outstanding from 2012-2015, and did not show any conflict of time. T. Vol. 2, at pg 213:8-217:15; DE 447-14 (Plf's Exh. 29). Alperin and Coltman also did not meet with the Employee Relations Services Team, as required by FAU's Disciplinary Process Overview prior to disciplining Plaintiff. T. Vol. 4, at pg 169:14-170:4, 189:8-190:7. Nor did they make a determination that discipline was appropriate in severity; in fact, they admitted that they did not need to terminate Plaintiff for his purported failure to report a blog they already knew about. *Id.* at 192:17-193:10.

3. FAU Attempted To Clarify Its Unconstitutionally Vague Policy Only After It Terminated Tracy For Non-Compliance With The Policy.

It was also undisputed that shortly after failing to clarify the Policy for Plaintiff and then terminating him for non-compliance, FAU attempted to clarify the Policy for all other faculty

members. *See* DE 447-12 (Plf's Exh. 23); DE 447-9 (Plf's Exh. 14); DE 447-13 (Plf's Exh. 26); T. Vol. 4, at pg 209:7-214:13. Even though those "additional explanations" were being prepared while Plaintiff was still employed, FAU never gave him the benefit of those explanations before he was terminated. *Id*. at 214:25-215:13 The fact that FAU's vague and confusing Policy was widely questioned and misunderstood by both faculty and administrators tasked with enforcement of the Policy also confirms that the Policy was used as a pretext to fire Plaintiff for his blogging. *See* T. Vol. 4, at pg 209:7-214:13; T. Vol. 5, at pg 211:11-212:8; 215:2-219:10; T. Vol. 6, p. 28:17-30:2; 221:16-222:3; DE 447-17 (Plf's Exh. 32c).

4. FAU Selectively Enforced The Policy Based On Speech Content.

There was also evidence presented at trial that showed FAU selectively enforced the Policy based on whether it approved of the message of the speech conveyed. For instance, Alperin admitted that she was aware of an article written in April 2013 by three FAU faculty members, including Professor Jeffrey Morton, and published in both the *Palm Beach Post* and *Sun Sentinel*, disparaging Plaintiff for, ironically, his speech on Sandy Hook. T. Vol. 4, at pg 126:20-127:6. The publication contained no disclaimer and identified the FAU faculty members by their job titles. *Id.* at pg 127:7-128:1. According to Alperin, FAU administrators were not concerned that the statements did not have disclaimers or could be attributed to FAU. *Id*. at 126:20-127:14; 129:11-130:16. Nevertheless, she did not investigate the incident or discipline the professors involved for violating the Policy. T. Vol. 4, at pg 128:5-132:15; T. Vol. 6, at pg 169:22-170:14; DE 447-41 (Plf's Exh. 58). The only reasonable conclusion to be drawn is that FAU made this decision because it approved of the speech criticizing Plaintiff's speech.

5. FAU's Decision Makers Celebrated Plaintiff's Firing.

Evidence of pretext is further demonstrated by FAU's conduct following his termination. Coltman testified at trial that she did not want to discipline or fire Tracy, as if Plaintiff somehow left on his own volition. T. Vol. 6, at pg 77:2-5; 79:1-5. This is belied by the evidence, however, as emails between top FAU officials show Coltman celebrating his discharge with a cocktail glass and calling him a "nut job." DE 447-30 (Plf's Exh. 38o); T. Vol. 6, at pg 53:16-54:22 ("Again, this is another instance of my casual, light-hearted way of using words, **yeah, kind of a nut job**. He seemed to have this theory that we were out to get him because of his blog and that was never the case. Yes, kind of nutty."); DE 447-46 (Plf's Exh. 85).

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

Finally, Plaintiff renews his motion made at trial that the Court should enter judgment as a matter of law on his constitutional facial and as-applied challenges to the Policy, included in Counts III, IV, and V, and necessarily reverse the summary judgment entered in favor of FAU. *See* T. Vol. 8, pgs 50-58; *see also* DE 247, 373.[2] As argued at trial, the record unquestionably establishes that FAU implemented a government policy, in the form of the conflict of interest Policy, that unconstitutionally chilled the speech of Plaintiff and others. This is so for several reasons.

First, the Policy cannot be enforced without reference to the subject-matter of employees' speech to determine whether it contradicts FAU's undefined "public interests." *See Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015) (defining content based as a statute or policy that "'on its face' draws distinctions based on the message a speaker conveys"). Second, the Policy is viewpoint discriminatory because it was (and can be) selectively enforced against those faculty members with whom FAU disagrees. Third, the Policy allows for FAU administrators to demand speech for analysis and approval in advance of publication, much like a prior restraint. And fourth, the vague Policy gave (and continues to give) FAU officials unbridled discretion to target speech they believe conflicts with the undefined "public interests" of the university.

FAU has offered no evidence to show the Policy survives strict scrutiny, and the requirement for Plaintiff to disclose his blogging certainly served no legitimate governmental function since the blog was publicly available to everyone, his free speech activity did not present a conflict of interest with the goals of the university, and the CBA says nothing about agreeing to disclose blogging or that outside free speech activity is subject to the CBA or must be grieved if violated by the university.

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[2] While the Court's grant of summary judgment in favor of FAU is appealable from the Final Judgment, *see Akin v. PAFEC Ltd.*, 991 F.2d 1550, 1563 (11th Cir. 1993), there is language in Eleventh Circuit case law that suggests the Court's denial of Plaintiff's motion for summary judgment on these claims is not appealable unless Plaintiff moves for judgment as a matter of law. *Lind v. United Parcel Service, Inc.*, 254 F.3d 1281, 1284 (11th Cir. 2001) ("the denial of a motion for summary judgment is not reviewable after a trial on the merits has occurred"). Therefore, in an abundance of caution, Plaintiff respectfully requests that the Court enter judgment as a matter of law on Plaintiff's constitutional challenges to the Policy.

In addition, the Policy—which is comprised of several university regulations, forms, guidelines and standards in addition to the CBA, *see* DE 447-12 at 4 (Plf's Exh. 23)—is unconstitutionally vague. Reasonable people, including FAU's own faculty and administrators, do not understand what it prohibits, and it encourages arbitrary or discriminatory enforcement and facilitates censorship. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (Marcus, J., concurring) (defining unconstitutional vagueness); *see also id.* at 1305 (en banc) ("Where the 'alleged danger' of legislation is 'one of self-censorship,' harm 'can be realized even without an actual prosecution'"). Because there are minimal guidelines on how to apply the Policy and what key terms mean, the result is arbitrary and selective enforcement as occurred in this case.

Although the Court previously ruled that Plaintiff's challenge to the Policy was waived because he did not file a grievance pursuant to the CBA, *see* DE 362 at 18-21; DE 392, respectfully Plaintiff could not have waived his right to challenge the Policy on First Amendment grounds when he signed the CBA because the Policy was so vague he could not possibly have known that any First Amendment rights were waived by the CBA, and the CBA itself contains no reference to blogging or waiver of First Amendment rights. *See Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011) ("There are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment. 'Our responsibility is to ensure that citizens are not deprived of [these] fundamental rights by virtue of working for the government.'").

Furthermore, the case upon which the Court relied in basing its ruling that a grievance was required, *Hawks v. City of Pontiac*, 874 F. 2d 347, 351 (6th Cir. 1989), was not a First Amendment case, let alone a binding Eleventh Circuit decision. Remarkably, *Hawks* cites no case for this proposition, and no case has cited to it for this proposition save this Court. Furthermore, contrary to *Hawks*, wherein the residency requirement was expressly incorporated into the CBA, there was no waiver of Tracy's First Amendment rights in the CBA nor any reference to blogging as a reportable conflict of interest. *Cf. Hamilton v. U.S. Postal Serv.*, 746 F.2d 1325 (8th Cir. 1984) (adjudicating vagueness claim in CBA and noting no independent constitutional claim, like First Amendment claim, was made). Consequently, *Hawks* is distinguishable and Plaintiff's unconstitutional vagueness claims that implicate the First Amendment should be more heavily scrutinized than ordinary vagueness claims, because more is

at stake. *See Cramp v. Bd. of Pub. Instruction of Orange Cty., Fla.*, 368 U.S. 278, 287–88 (1961). ("The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit **the exercise of individual freedoms affirmatively protected by the Constitution**. … [S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."). Substantive 1983 claims such as these challenging a governmental policy on First Amendment grounds do not need to be grieved. *See Patsy v. Regents of State of Fla.*, 457 U.S. 496 (1982); *Naurumanchi v. Bd. of Trustees of Conn. State Univ.*, 850 F.2d 70, 73 (2d Cir. 1988).

REQUEST FOR HEARING

Pursuant to Local Rule 7.1, Plaintiff requests a hearing on this motion to assist this Court with resolution of the issues raised above in light of the gravity of the claims and the fundamental rights at stake.

CONCLUSION

Plaintiff James Tracy respectfully requests that the Court enter judgment in his favor on his claims.

Dated: January 8, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 8, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF to be served this day per the attached Service List.

/s/ Richard J. Ovelmen

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