

**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.

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) Case No. 9:16-cv-80655-RLR
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**PLAINTIFF’S STATEMENT OF MATERIAL FACTS IN SUPPORT OF HIS MOTION
FOR PARTIAL SUMMARY JUDGMENT**

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56.1, Plaintiff provides the following Statement of Material Facts in support of his Motion for Partial Summary Judgment. As set forth below, this case arises out of the termination of former FAU professor James Tracy (“Tracy”), on January 5, 2016. Tracy was fired by Defendants for his highly provocative and controversial public speech, particularly blog posts challenging the conventional narrative about the Sandy Hook massacre.

1. Defendant Florida Atlantic University Board of Trustees, a/k/a Florida Atlantic University (“FAU”) is a state university. Exh. A, ¶8. Defendant John Kelly served on the Board and as FAU President from 2014 to the present. Exh. C, Vol. I, 7:2-3. Defendant Diane Alperin served as Vice Provost from 2013 to 2016. Exh. D, Vol. I, 14:14-18. Defendant Heather Coltman served as Dean of the College of Arts and Letters from 2011 to 2017. Exh. E, Vol. I, 8:12-16.

Tracy begins working at FAU and blogging on Sandy Hook

2. In 2003, FAU hired Tracy as a faculty member of its School of Communications and Multimedia Studies. Exh. A, ¶4. He worked there for thirteen years and was awarded tenure in 2008. *Id.* at ¶4. He taught and researched in the area of communications and multimedia, which included teaching classes called the “Culture of Conspiracy.” Exh. E, Vol. II, 186:16-23. Tracy regularly received “excellent” and “outstanding” reviews from his superiors for his work. Exh. AR, pg 6-7, 13-15, 24-26; Exh. E, Vol. II, 182:20-183:2; 192:13-15. Tracy had never been disciplined by FAU prior to 2013, as discussed herein. Exh. E, Vol. I, 153:10-25.

3. FAU's policy on academic freedom encourages all faculty, including Tracy, to research and publish articles in their respective fields of study. Exh. E, Vol. II, 190:7-10.

4. In his personal time since 2012, Tracy has maintained a personal blog called "Memory Hole: Reflections on Media and Politics" (available at <http://www.memoryholeblog.com>), where he blogs about his observations, opinions, thoughts and viewpoints on government, the media, current events, history, and politics. Exh. A, ¶¶36, 37, 45, 46; Exh. B, ¶7 pg 9-25. The blog is disseminated to the public for free on the Internet, and Tracy is not compensated for his blogging activity. Exh. BT, Vol. I, 79:2-80:3. Tracy blogs from home and his office after work hours or on the weekend, taking only a few hours per week of personal time while employed by FAU. Exh. BF, pg 6-8; Exh. CC, Vol. 224:13-225:2.

5. After a widely-reported, mass-casualty event at Sandy Hook Elementary School on December 14, 2012, Tracy began blogging about the event. Exh. B, pg 11. His postings in late December 2012 and early January 2013 suggested that the mass shooting did not take place in the way depicted by the government and mainstream media, and that the event may have been staged by the government to promote gun control. Exh. BK, pg 8-9; *see, e.g.*, Jan. 1, 2013 post regarding the use of crisis actors available at: <http://memoryholeblog.com/2013/01/01/sandy-hook-the-illusion-of-tragedy/>.

6. Tracy's blog posts on Sandy Hook garnered national attention and were widely reported by the press including, for example, national segments featuring CNN's Anderson Cooper, who called for Tracy's firing. Exh. A, ¶¶47, 48; Exh. CF. People also complained to FAU. Exh. E. Vol. I, 45:1-12.

Defendants' early attempts at censorship

7. In January 2013, Defendants Alperin and Coltman, and other FAU officials, met on and between January 8 and 18 to discuss Tracy's blogging activities, the "impact" of the negative press, and to "explore potential misconduct" by Tracy. *See* Exh. G, pg 1-7, at 3; *see also* Exh. K, ¶1; Exh. E, Vol. II, 196:16-199:6; 197:13-21; 210:25-212:12. The group agreed not to exchange emails on the subject and kept handwritten minutes instead. Exh. G, pg 1.

8. Coltman's handwritten minutes reflect that FAU was bound by "freedom of speech" and "acad[emic] freedom," but state that Tracy's continued tenure would be "reckless + irresponsible" and a "black eye on all faculty." Exh. G, pg 3. The minutes further state that "JT [is] not going to stop publishing," and the group was encouraged to "read his stuff" and "find

winning metaphors” to circumvent the “1st Amendment.” *Id.* at pg 4. The minutes note that the blog lacked a sufficient “disclaimer,” even though it expressly stated that Tracy was not writing on behalf of FAU; the minutes also suggested that his blog may have been a “conflict of interest” under Article 19 of the Collective Bargaining Agreement (“CBA”), *i.e.*, the Conflict of Interest/Outside Activities Policy (the “Policy”). *Id.* at pg 5, 7.

9. The Policy requires employees to provide their supervisors with a written description of any “reportable outside activity” they engage in. Exh. AD. “Reportable Outside Activity” is defined as “any compensated or uncompensated professional practice, consulting, teaching or research, which is not part of the employee’s assigned duties....” Exh. AA, pg 1-2. The Policy does not define “professional practice” and does not include blogging. *Id.*

10. The Policy also prohibits conflicts of interest. *Id.* The definition of “conflict of interest” includes: “any conflict between the private interests of the employee and the public interests of the University, the Board of Trustees, or the State of Florida....” *Id.* The definition of “conflict of interest” also includes “any activity which interferes with the full performance of the employee’s professional or institutional responsibilities or obligations.” *Id.* The Policy does not define FAU’s “public interests,” “private interests,” or explain what constitutes interference with an employee’s duties. *Id.*

11. With respect to the Policy in general, it is encompassed by multiple documents and forms created by Defendant FAU, including Exhibits AA (Art. 19), AB, AC, AD, N, AE, AF (Sec. 08), none of which provide any definitional guidance.

12. The Policy is intentionally broad so it can “encompass the different types of activities that are applied to it.” Exhibit “E” 69:13-69:20.

The 2013 Discipline

13. On January 18 and 28, 2013, Defendant Coltman directed Tracy to report his blogging as a potential conflict of interest under the Policy. Exh. F. On January 18 and February 2, 2013, Tracy objected, citing his First Amendment rights, and because he believed his personal blogging activities did not need to be reported under the Policy. Exh. A, ¶ 57; Exh. T.

14. On March 28, 2013, FAU issued a notice of discipline to Tracy, stating that the disclaimer on his blog was insufficient, and that he had been improperly using his job title, “Associate Professor,” on his blog. *See* Exh. V; *see also* Exh. J, ¶75; Exh. K, ¶2; Exh. BS, pg 12, Art. 5.3(d). The Notice did not provide that FAU was disciplining Tracy for refusing to report his

blogging activities. *See* Exh. V; *see also* Exh. A, ¶¶79, 80; Exh. U; Exh. E, Vol. II, 195:19-196:12; 221:8-13; Exh. D, Vol. II, 239:10-17.

15. In April 2013, FAU faculty members, including Professor Jeffrey Morton, published an article in the *Palm Beach Post* stating Tracy was “not an academic” and “should resign.” Exh. W, pg 1. The letter was distributed to all FAU faculty mailboxes, and Tracy reported this as harassment to Defendant Alperin but was ignored. Exh. BW, pg 1-3; Exh. D, Vol. II, 293:2-308:21.

16. Also in April, FAU received cease-and-desist letters from the American Association of University Professors (“AAUP”) and the Foundation for Individual Rights in Education (“FIRE”) concerning the discipline sought against Tracy for his blogging activities. *See* Exh. X, pg 1-8; *see also* Exh. J, ¶¶97, 98; Exh. E, Vol. II, 285:5-286:5; Exh. D, 263:16-265:19. Tracy’s union representation also helped to defend against the discipline. Exh. CG, pg 183:5-185:15.

17. In September 2013, FAU and Tracy entered into an agreement to settle the matter, whereby FAU agreed to drop the discipline and remove the March 28, 2013 Notice of Discipline from Tracy’s personnel file, and Tracy agreed to change the disclaimer on his blog and stop using his FAU title in his blog postings. Exh. U; Exh. J, ¶¶75, 80. The March 28, 2013 Notice of Discipline was not removed from Tracy’s FAU personnel file and would later be produced by FAU to multiple media outlets, including the *Palm Beach Post*, in response to public records requests for Tracy’s “personnel file”. Exh. J, ¶¶95; Exh Z; Exh Y, ¶24.

18. Tracy did not fill out a conflict of interest form in 2014, and was not disciplined under the Policy that year. Exh. E, Vol. II, 221:14-18.

19. FAU continued to receive complaints about Tracy’s blogging, including a September 2015 complaint that was forwarded to Defendants Coltman and Alperin. Exh. BX (“Tracy, keeps posting abusive trash about moms, dads and residents of Sandy Hook . . .”).

Confusion about reporting requirements under the Policy

20. Beginning in 2015, FAU began implementing changes to the Policy. Exh. J, ¶¶60, 84, 88, 90; Exh. AK, pg 1-4; Exh. AL, pg 1-3; Exh. AM, pg 1-4; Exh. E, Vol. 1, 69:21-23; Exh. D, Vol. II, 340:12-342:5; Exh. H, 118:7-18. One change included having faculty members check off an affirmation “check box” during an online assignment submission process, to remind them of the need to complete the form. Exh. BY; Exh. H, Vol. 1, 87:8-91:2. Previously, annual assignment submission did not require this online affirmation. Exh. E, Vol. I, 147:16-24.

21. On September 4, 2015, FAU faculty members held a meeting, at which Defendants Kelly, Alperin, and Coltman were present. Exh. AP. Several faculty members voiced concerns about the Policy being applied to constitutionally protected activities, particularly speech. Exh. AP, 4:10-25:6.

22. Faculty members also submitted complaints requesting clarification about the Policy and a moratorium on any discipline related to the Policy until their complaints were resolved. Exh. A, ¶ 194; Exh. AP, 4:11:24-12:2, 14:3-15; Exh. C, Vol. II, 334:24-343:14; Exh. D, 245:4-250:9; Exh. E, Vol. I, 72:21-72:25; 130:23-134:2.

23. Notwithstanding the confusion, on October 20, 2015, while on paternity leave, David Williams (Tracy's supervisor) sent his staff including Tracy an email with instructions to complete and submit the conflict of interest form located at the enclosed hyperlink. Exh. AH; Exh. E, Vol. I, 89:9-90:6. At the time, the link (<http://www.fau.edu/hr/files/OutsideBusinessV2.pdf>) was broken and did not work. Exh. AI; Exh. D, Vol. I, 47:23-48:25; Exh. E, Vol. I, 145:16-21; Exh. AJ, pg 1-2. Tracy did what he was accustomed to by signing his annual assignment and submitting a paper copy to Mr. Williams. Exh. AZ, pg 1, 8-11.

24. On several occasions in October and November 2015, Tracy asked his supervisors for clarification about the scope and application of the Policy. Exh. E, Vol. I, 74:17-19; Exh. AU; Exh. E, Vol. I, 57:13-58:2; Vol. II, 303:20-305:24. Tracy also requested "a signed statement asserting [FAU's] position that his personal activities (media criticism, alternative journalism, "blogging")" did not fall within the definition of "conflict of interest," "conflict of commitment," or "outside activities" under the Policy. Exh. AT, pg 1. Williams and Tracy's other supervisors did not provide clarification. Exh. AV; Exh. AU; Exh. E, Vol. I, 74:17-76:24; 87:23-88:19; Vol. II, 298:23-300:14; 303:20-305:24. Exh. AT; Exh. AX; Exh. D, Vol. II, 314:1-317:7.

25. On November 10, 2015, Defendant Coltman on behalf of FAU sent Tracy a Notice of Discipline, which he did not receive until November 20, 2015, for purportedly refusing to acknowledge receipt of his annual assignment and for failing to submit conflict of interest forms for 2013, 2014, and 2015. *See* Exh. AY; *see also* Exh. E, Vol. 1, 161:5-10; Exh. H, Vol. 2, 218:5-17. The Notice required Tracy to comply within 48 hours or face "additional disciplinary action," but it did not explain that Tracy could be terminated for noncompliance. Exh. AY.

26. On November 22, 2015, Tracy responded by letter, informing Defendant Coltman that he had not received clarification on the "considerable confusion" created by the Policy that he and

other faculty members had been expressing, and that he maintained concerns about the Policy's breadth and that it violated his First Amendment rights and academic freedom. Exh. AZ; Exh. E, Vol. I, 135:25-136:4; Exh. K, ¶6. Tracy also explained that he had since electronically affirmed receipt of his annual assignment. Exh. AZ, pg 4.

Defendants monitor Tracy's blog

27. Around this time, as the third-year anniversary of Sandy Hook approached, email traffic between Defendants demonstrates that Defendants, including Defendant Kelly, were monitoring Tracy's blog and internally circulating articles from the media and complaints from the public that were critical of Tracy and FAU for not having fired him for his provocative speech on Sandy Hook. Exh. BA, pg 1-40. Administrators were also compiling the negative news articles into email reports, and calling them "The morning's JT round up" and "Update on media coverage." Exh. BA, pg 6-8, 9-10.

28. The public were also submitting an ever increasing number of complaints to the school about Tracy's speech, which Defendants circulated amongst themselves, friends, and family. Exh. BB, pg 1-79. In response to one email, from a close friend of one of the Sandy Hook victim's family, Defendant Kelly states: "I intend to deal with this personally" and copied FAU Chairman Anthony Barbar, who responded: "Thank you John." Exh. BD pg 1-4; Exh. C, Vol. II, 239:15-24.

29. On December 10, 2015, the Sun Sentinel published an op-ed written by a Sandy Hook victim's parents, "Mr. and Mrs. Pozner," claiming that Tracy had harassed them by asking for proof of Mr. Pozner's copyright claim with respect to a photograph posted on Tracy's blog. Exh. BZ; Exh. CA. The Pozners' op-ed was widely viewed and resulted in many complaints calling for Tracy to be fired. Exh. C, Vol. II, pg 251:2-253:24.

Defendants fire Tracy

30. Later on December 10, 2015, Coltman and Alperin exchanged an email enclosing a draft word document called "tracy termination.docx." Exh. BC, pg 1-3. The document is the preliminary draft version of the Notice of Termination FAU eventually sent Tracy (see below at ¶33). In the document, Coltman commented on text that Alperin had drafted, asking "DOES THIS MEAN THAT A REPRIMAND IS THE NEXT STEP, RATHER THAN TERMINATION?" *Id.* at pg 2.

31. On December 11, 2015, Coltman officially responded to Tracy's November 22 letter via email, informing him that he has until 5:00 pm on December 14, 2015, to completely and accurately fill out the conflict of interest forms, otherwise he will "receive further disciplinary action up to and including termination." Exh. AX.

32. Tracy did not receive Coltman's December 11 email until the evening of December 15, 2017, as he was still on paternity leave. Exh. BF, pg 1. He indicated he would submit the conflict of interest forms, which he did later that evening. Exh. BF, pg 2-11.

33. On December 16, 2015, Defendant Alperin sent Tracy a Notice of Termination, stating that Tracy had failed to submit the forms by the December 14 deadline. Exh. AR. The Notice also states that Tracy remained "recalcitrant" in refusing to report other activities that "may be in conflict with [his] employer," such as his "personal blog," and that by doing so he has "deprived" FAU of the ability "to assess if a conflict exists for the blog activity" Exh. AR, pg 2. The Notice goes on to explain: "It is for the administration to decide, with your input, if a conflict exists, and how to manage a conflict where necessary. You have repeatedly and willfully failed to provide the administration the information it needs to discharge its responsibilities." *Id.* The Notice gave Tracy 10 days to respond. *Id.*

34. On December 18, 2017, FAU, through one of its professors, issued the following statement for publication to the New York Times and Sun Sentinel regarding Tracy's firing:

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. His harassment of the parents of murdered children was vulgar, repulsive and an insult to the academic profession. Faculty concerned about the status of tenure should, in fact, be relieved that FAU began termination procedures. While there are real reasons to protect tenure for academic research, Tracy's "scholarship" makes a mockery of what academics do. 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 holds both Tracy accountable for his despicable behavior and reduces pressure on elected officials to end tenure.

Exh. BH.

35. Upon reading the statement in ¶34, Defendant Coltman called the author her "hero." *Id.* She then forwarded the statement to another FAU administrator in an email titled "complete statement." Exh. BI.

36. On January 5, 2016, after Tracy did not file a formal response, Defendant FAU terminated

Tracy. Exh. BJ; Exh. A, ¶116. Defendant Kelly authorized Defendants Alperin and Coltman to discipline and terminate Tracy. Exh. A, ¶12-14, 16, 17; Exh. C, Vol. 1, pg 27:15-28:2; 89:10-20; Exh. D, Vol. I, pg 18:4-21; Exh. E, Vol. II, pg 256:3-7.

37. Defendants and other FAU administrators mocked Tracy and joked about his termination in emails. Exhs. BL, BN, & BO. In one email with the subject “check out today’s memory hole blog,” Defendant Coltman calls Tracy a “Nut job”. Exh BN. On Tracy’s last day, Defendant Coltman sent her colleague an email stating: “How is your employee?”—referring to Tracy’s wife (Associate FAU Librarian)—“Mine is packing up his office today.” Exh. BM.

38. On January 6, 2017, Defendant Kelly and his wife were monitoring Tracy’s blogging activities and social media. Exh. BP. In response to his wife’s email stating that Tracy was “quiet” on his blog, Defendant Kelly responds: “I hope it stays that way.” *Id.* Defendant Kelly was aware of Tracy’s blogging activities prior to becoming President of FAU in 2014. Exh. C, Vol. I, pg 15:21-16:16.

The Policy has never before been used to require reporting of speech activities

39. The conflict of interest form that Tracy was required to submit was the same in 2013, 2014 and 2015. Exh. AD; Exh. H, Vol I, pg 19:15-20:5. The form was changed in 2016, after Tracy’s termination. Exh. CD; Exh. H, Vol I, pg 20:6-24:10.

40. The Policy is referred to by FAU employees and administrators by many names, including: “Outside Activity” Policy; “Outside Employment” Policy; “Outside Business” Policy; and the “Outside Income” Policy. See Exh. J, ¶58; Exh. E, Vol. I, pg 51:7-52:18; 55:15-57:23; 89:9-24. Exh. M, ¶5; Exh. I, ¶5; Exh. AG, ¶5. Defendant FAU’s administrators, including Defendants Kelly, Alperin and Coltman did not fully understand the Policy. Exh. E, Vol. I, pg 57:13-58:2; 63:12-64:12; 84:2-11; 98:21-99:12; 101:9-20; 104:22-105:4; Exh. D, Vol. II, pg 224:7-16; 226:2-227:25; 228:17-229:4; Exh. C, pg Vol. I, pg 167:7-173:15. Exh. J ¶4, 6, 8, 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 100.

41. With respect to employee blogging in general, Defendant FAU has no policies on blogging. Exh. H, Vol. I, pg 9:15-11:16. Exh. E, Vol. I, pg 64:2-12; 98:17-99:21; Exh. L, pg 71:22-72:22. FAU does not define “blogging” or list blogging, including blogging on social media, as reportable outside activities under the Policy, which has been in existence for decades. Exh. E, Vol. 1, pg 63:12-64:12; Exh. M ¶4.

42. Many other FAU faculty members who blog have not reported their blogging activities. Exh. H, Vol. II, pg 174:6-184:18, 185:11-186:10; Exh. E, Vol. 1, pg 103:22-112:10; Exh. P; Exh. Q, pg 32:11-24; Exh. R, pg 52:22-53:6; Exh. S pg 39:1-25; Exh. J, ¶65; Exh. L, pg 71:22-72:18; Exh. O, ¶7, 8.

43. FAU faculty members are not required to report incidental use of FAU equipment for blogging activities. Exh. N; Exh. D, Vol II, pg 227:8-20; Exh. C, Vol. II, pg 180:2-9; Exh. E, Vol I, pg 96:9-97:9; 100:5-7; Exh. L, pg 72:6-22; 81:5-83:11; Exh. O, ¶7, 8.

44. Prior to Tracy's termination, FAU faculty members were not provided with training from supervisors on how to comply with the Policy. Exh. AC; Exh. AK; Exh. AL; Exh. E, Vol. II, 300:4-11; Exh. S, pg 38:5-7; Exh. L, pg 79:11-80:4. Exh. Q, pg 46:15-47:9. FAU eventually provided instructions called "Additional Explanation" to its employees in June 2016. Exh. J, ¶ 88, 90; Exh. AC.

45. After Tracy's firing in 2016, FAU faculty members were confused and questioned the Policy. Exh. J ¶ 83, 88, 90; Exh. AL; Exh. AO; Exh. AN. In response to a concern from a faculty member about the reporting requirements and reason for Tracy's firing, an FAU dean responded: "*for the record, Tracy was not fired because he didn't report things.*" Exh. AN, pg 2 (emphasis added).

46. Tracy was the first FAU faculty member required to report blogging activities and disciplined for failing to report blogging activities under the Policy. Exh. J, ¶51-57, 65, 74; Exh. C, Vol. I, pg 35:21-25; Exh. L, pg 71:22-72:22; Exh. E, Vol. I, pg 104:5-112:10; Exh. O ¶7, 8; Exh. Q, pg 32:11-24; Exh. R, pg 52:22-53:6; Exh. S pg 39:1-25; Exh. AW, pg 41:7-11.

47. In July 2016, Defendant FAU disciplined another tenured professor, Stephen Kajiura, for failing to comply with the Policy along with violations of local, state and federal law, and endangering students, and gave him a five-day suspension without pay. Exh. BQ; Exh. H, Vol. 2, 191:14-193:22. In April 2017, an arbitrator reversed the discipline of Kajiura. Exh. BR, pg 38.

48. Despite reasonable efforts, Tracy has not found gainful employment since his termination. Exh. CC, Vol. I, 108:10-110:2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2017, 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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