

March 15, 2017

VIA E-MAIL DELIVERY

Louis Leo IV, Esq.
Florida Civil Rights Coalition, P.L.L.C.
4171 W. Hillsboro Blvd. Suite 9
Coconut Creek, FL 33073

Re: FAU Defendants' Answer and Affirmative Defenses

Dear Mr. Leo:

We write in response to your letter dated March 8, 2017, requesting clarification on the FAU Defendants' Answer and Affirmative Defenses to the Second Amended Complaint filed February 28, 2017. We address the Answer and each affirmative defense below in turn:

Answer

FAU Defendants agree to amend the responses to Paragraphs 11, 12, 13, 32, 33, 34, 35, 58, 74, 107, 169, 178, 225, and 226.

However, with respect to the remaining Paragraphs identified in your letter, Paragraphs 64, 65, 68, 70, 75, 85, 86, 87, 89, 90, 92, 95, 97, 103, 104, 105, 106, 108, 119, 171, 172, 174, 176, 177, 179, 180, 181, 182, 200, 209, 224, and 227, the FAU Defendants have provided a response under the rules and do not agree to an amendment. In response to these Paragraphs, the FAU Defendants have denied the characterization of any of the documents which are quoted or relied upon in the Second Amended Complaint, and have denied the allegations to the extent any further response is necessary. In doing so, these Paragraphs have been denied. *See Gomez v. U.S.*, 2010 WL 3834211, *2 (S.D. Fla. Sept. 28, 2010) ("Similarly, with respect to paragraph 57 of the United States' counterclaim, the Plaintiff starts off improperly by noting that the document 'speaks for itself,' but then goes on to deny 'any and all liability and any and all penalties.' The Plaintiff has thus denied the allegations in paragraph 57."); *Celebrity Cards International, Inc. v. Johnson*, 2014 WL 11878466 (S.D. Fla., Feb. 24, 2014) ("To be sure, CCI's answer to that allegation is far from artfully pleaded. It reads: "Other than relying upon the fact that the document speaks for itself, CCI lacks sufficient knowledge of information to form a belief as to

the truth or falsity of the allegations in Paragraph 50 and therefore denies them. But, as CCI maintains, it ultimately ‘denies them.’”).

Affirmative Defenses

By agreeing to remove any affirmative defenses below, the FAU Defendants do not waive the right to reassert any defenses as appropriate during the course of litigation.

Affirmative Defense 1

1. *Plaintiff's claim fails to state a cause of action upon which relief can be granted.*
 - **The FAU Defendants agree to remove this affirmative defense.**

Affirmative Defense 2

2. *Plaintiff's claim against the Defendant University is barred by sovereign immunity and the Eleventh Amendment to the U.S. Constitution.*
 - **The FAU Defendants will amend this affirmative defense to limit its application to Counts I and II of the Second Amended Complaint.**

Contrary to your letter, this affirmative defense does not attempt to assert two separate defenses as one. Eleventh Amendment immunity and sovereign immunity are not entirely separate and distinct legal concepts, and your cited case law, *Alden v. Maine*, 527 U.S. 706 (1999) stands for no such proposition. *Alden* merely explains that sovereign immunity existed prior to the Eleventh Amendment so the phrase “Eleventh Amendment immunity” is something of a misnomer. *See id.* at 713. The fact that the Eleventh Amendment did not establish sovereign immunity as a constitutional principle does not mean they are entirely separate and distinct legal concepts.

While much of the relief currently requested of FAU in the Second Amended Complaint is not barred by sovereign immunity, Plaintiff also requests “all further relief as is just and proper.” *See* D.E. at ¶¶ 136, 166 (Counts I and II). Because Plaintiff did not specify he was seeking only further *equitable* relief, this indicates Plaintiff is seeking further relief which may be barred by sovereign immunity. FAU will, therefore, retain this affirmative defense.

Affirmative Defense 3

3. *Plaintiff's claim against the individual FAU Defendants is barred by the doctrine of qualified immunity.*

- **The FAU Defendants will amend this affirmative defense to limit its application to Defendants Kelly, Alperin, and Coltman, on Counts I and II of the Second Amended Complaint.**

With the aforementioned amendment, Affirmative Defense 3 will be properly pled. Affirmative defenses must comply with Rule 8, *Federal Rules of Civil Procedure*, which governs general pleading requirements. *See Helman v. Nationstar Mortgage, LLC*, 2015 WL 11199691, at *1 (S.D. Fla. May 29, 2015). In the Eleventh Circuit, however, the law remains unclear as to whether the heightened pleading standards of Rule 8(a) set out in *Twombly* and *Iqbal* apply to affirmative defenses, which are specifically governed by 8(b) and 8(c). *See id.* Regardless of whether the *Twombly* and *Iqbal* standards apply to affirmative defenses, the Eleventh Circuit has stated that the main purpose of affirmative defenses is to give a plaintiff notice of what defenses may be presented at trial. *See id.* The aforementioned amendment to Affirmative Defense 3 will accomplish this goal.

Affirmative Defense 4

4. Plaintiff's claim is barred, in whole or in part, because he failed to exhaust administrative remedies under the applicable collective bargaining agreement.

- **The FAU Defendants will keep this affirmative defense as drafted.**

Contrary to your letter, the Court has not “already rejected all of FAU Defendants’ arguments pertaining to Plaintiff’s purported failure to exhaust administrative remedies.” Rather, the Court held that “a factual record is required” to evaluate the defense with respect to Count IV. *See* D.E. 105, at p. 14.

Affirmative Defense 5

5. Plaintiff's claims fail because any actions or decisions in connection with Plaintiff's employment were based on legitimate, non-retaliatory reasons, and would have been taken even in the absence of any alleged protected speech. Plaintiff was repeatedly warned that his failure to follow policy would result in disciplinary action, including possible termination. Plaintiff flaunted Defendant University's policy by refusing to comply. Plaintiff's belligerent, rebellious conduct was deliberate and intentional. While Plaintiff appeared to embrace his nonconformist behavior thinking it would publicize his interests in the light he deemed helpful, the Defendant University's policy and intent were unrelated to such interests and were intended to provide Defendant University with necessary information for various legitimate and proper reasons. While Defendant University embraces and endorses free-speech, Defendant University maintains policies applicable to all employees (not just to Plaintiff), which do not inhibit free speech and

are designed to ensure that the Defendant University is able to address and anticipate in a reasonable manner potential conflicting circumstances which include, among other things, business and personal interests outside of the Defendant University that create conflicts of interest or commitment on the part of Defendant University's personnel.

- **The FAU Defendants will amend this affirmative defense to limit its application to Count I of the Second Amended Complaint.**

Contrary to your letter, this affirmative defense does not “intertwine[] multiple legal defense theories.” Rather, the affirmative defense states the single legal theory that Defendant’s actions were based on legitimate, non-retaliatory reasons and provides facts in support of that theory.

Further, Affirmative Defense 5 is clearly an affirmative defense. *See Goldsmith v. Babgy Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008) (“After the plaintiff has established the elements of a claim, the employer has an opportunity to articulate a legitimate, nonretaliatory reason for the challenged employment action as an affirmative defense to liability”).

Affirmative Defense 6

6. Plaintiff's claims are barred or otherwise fail because at all relevant times the FAU Defendants (i) published, disseminated, and enforced an internal and neutral policy requiring disclosure of outside activities and conflicts of interest, (ii) Plaintiff unreasonably failed to follow the FAU Defendants' policy, and (iii) Plaintiff unreasonably failed to take advantage of the due process rights afforded to him by the FAU Defendants or to otherwise avoid harm.

- **The FAU Defendants will keep this affirmative defense as drafted.**

The FAU Defendants do not agree with Plaintiff’s assertions that the Court has “already denied all of FAU Defendants’ arguments pertaining to procedural due process.” While the Court denied Defendants’ motion to dismiss based on the Defendants’ procedural due process arguments, it did so because the Court is required at the motion to dismiss stage to accept Plaintiff’s allegations as true. *See* D.E. 105, at p. 12. This does not mean that Defendants may not raise arguments pertaining to procedural due process later in the case, such as on summary judgement.

Affirmative Defense 7

7. Plaintiff's claims fail or are limited to the extent Plaintiff has failed in any respect to mitigate or minimize his alleged damages. Any earnings by Plaintiff and any amounts earnable with reasonable diligence by Plaintiff will reduce damages otherwise allowable to Plaintiff.

- **The FAU Defendants will keep this affirmative defense as drafted.**

Contrary to your letter, failure to mitigate damages is a recognized affirmative defense. *See Helman v. Nationstar Mortgage, LLC*, 2015 WL 11199691, at *2 (S.D. Fla. May 29, 2015) (holding that the affirmative defense of failure to mitigate damages was not subject to a motion to strike because it put the plaintiff on notice of a defense that the defendants intend to assert).

Affirmative Defense 8

8. *Plaintiff's claims are barred or are limited to the extent Plaintiff's damages resulted from his own actions.*

- **The FAU Defendants will amend this affirmative defense to add a short and plain statement of factual support.**

Affirmative Defense 9

9. *Plaintiff's conspiracy claim fails against the individual FAU Defendants on the grounds of the intra-corporate conspiracy doctrine.*

- **The FAU Defendants will keep this affirmative defense as drafted.**

Contrary to your letter, the Court has not "already made a legal determination that intracorporate conspiracy doctrine is not applicable to Plaintiff's claim of conspiracy." While the Court denied Defendants' motion to dismiss based on the intracorporate conspiracy doctrine, it did so because the Court is required at the motion to dismiss stage to accept Plaintiff's allegations as true. *See* D.E. 105, at p. 12. This does not mean that Defendants may not raise the defense of the intracorporate conspiracy doctrine later in the case, such as on summary judgement.

Affirmative Defense 10

10. *Plaintiff's claims for punitive damages are barred by sovereign immunity and the Eleventh Amendment to the U.S. Constitution.*

- **The FAU Defendants will amend this affirmative defense to limit its application to the Defendant University.**

While much of the relief currently requested of FAU in the Second Amended Complaint is not barred by sovereign immunity, Plaintiff also requests "all further relief as is just and proper." *See* D.E. at ¶¶ 136, 166 (Counts I and II). Because Plaintiff did not specify he was seeking only

further *equitable* relief, this indicates Plaintiff is seeking further relief which may be barred by sovereign immunity. FAU will, therefore, retain this affirmative defense.

Affirmative Defense 11

11. Plaintiff's claims for punitive damages are barred or limited because the FAU Defendants did not have knowledge that they may be acting in violation of federal or state law (which conduct the FAU Defendants deny).

- **The FAU Defendants agree to remove this affirmative defense.**

Affirmative Defense 12

12. Plaintiff's claims for punitive damages are barred or limited because any alleged retaliation (which the FAU Defendants deny) was contrary to the FAU Defendants' good faith efforts to comply with the requirements of applicable law.

- **The FAU Defendants agree to remove this affirmative defense.**

Affirmative Defense 13

13. Plaintiff's claims for punitive damages are barred or limited because the FAU Defendants did not act with malice or reckless indifference to Plaintiff's protected rights. Further, the FAU Defendants did not act in a manner that was willful, wanton, or intentional with regard to Plaintiff's protected rights.

- **The FAU Defendants agree to remove this affirmative defense.**

Affirmative Defense 14

14. Plaintiff cannot recover punitive damages because a managing agent of the Defendant University did not act with willful, reckless indifference, or malicious intent with regard to the Plaintiff's protected rights.

- **The FAU Defendants agree to remove this affirmative defense.**

Affirmative Defense 15

15. Plaintiff's claims are barred by the doctrine of estoppel and waiver.

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- **The FAU Defendants agree to amend this affirmative defense to add a short and plain statement of factual support.**

We hope this letter has provided the necessary clarification sought by your letter dated March 8, 2017. The FAU Defendants will file an Amended Answer and Affirmative Defenses within ten (10) days of the date of this letter. Please do not hesitate to contact with us should you have any further questions or should you wish to meet and confer on these requests.

Sincerely,

A handwritten signature in black ink, appearing to read "Holly J. D." followed by a horizontal line and the number "601".

Keith E. Sonderling

KES/snh

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