

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

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

PLAINTIFF’S MOTION TO SUPPLEMENT SUMMARY JUDGMENT RECORD

Plaintiff JAMES TRACY (“Tracy”), by and through his undersigned counsel and pursuant to Local Rules 16.1 and 56.1, hereby moves to supplement his Statements of Disputed Facts and Additional Material Facts in Opposition [DE 274] [DE 272] to Defendants’ Statements of Material Facts [DE 246] [DE 243] to supplement new evidence, and in support Plaintiff states as follows:

1. On August 21, 2017, the FAU Defendants filed their Motions for Summary Judgment and Statements of Facts. [DE 245] [DE 242] [DE 246] [DE 243].
2. On August 28, 2017, Plaintiff filed his Statements of Disputed Facts and Additional Material Facts in Opposition to Defendants’ Statements of Material Facts. [DE 274] [DE 272]. The summary judgment briefing is complete and pending resolution.
3. One of the issues raised in the summary judgment briefing is whether Defendants conspired with Tracy’s union representatives to terminate his employment and whether Tracy was told not to grieve.

4. FAU Defendants sought leave of Court to depose Plaintiff's former union appointed attorney Thomas Johnson (hereinafter "Johnson"), after the close of discovery.

5. On October 10, 2017, Johnson testified that he advised Tracy that a grievance was futile and he should instead bring a First Amendment lawsuit to remedy violations of his civil rights. *See* Exhibit DC Johnson Dep. 73:11-13 ("I thought the better -- the better position would have been to go with the First Amendment claim, if for no other reason, that if Dr. Tracy was harmed to the point where he didn't have his salary . . . he could get compensatory instead of just backpay."); 169:18-21 ("Q. And Dr. Tracy followed your advice? When you advised him to file the First Amendment lawsuit, that's what he did? A. Oh, yeah. That's what I suggested.")

6. Johnson also testified that the grounds for Plaintiff's termination were pretextual:

Q. . . . Would you agree that this [Defendant Coltman's "final warning" email dated December 11, 2015 [DE 250-55] not only does not clarify, but it, in fact, misrepresents Dr. Tracy's obligations under FAU's express guidelines?

A. **Yeah, I don't -- again, there was a reason that I thought he should file a First Amendment claim and not a -- and not a grievance.**

Q. And that was because this was a pretextual firing?

A. **I thought it was.**

Id. at 201:2-12.

7. Johnson's testimony is dispositive of, *inter alia*, FAU Defendants' allegation that Plaintiff could have or should have filed a grievance.

8. Accordingly, Plaintiff seeks to amend and supplement the following:

Paragraph 47 of [DE 272] and Paragraphs 52 and 53 of [DE 274] as follows:

Tracy was advised by his Union appointed lawyer, Thomas Johnson, that a grievance was futile and was counseled to file a First Amendment lawsuit. *See* Exhibit DC, 73:11-13, 169:18-21, 201:2-12.

MEMORANDUM OF LAW

Under Local Rule 16.1, supplements may be allowed for newly discovered evidence or information. Additionally, supplements are authorized when the materials presented for consideration were not known to exist. *Dickens v. Castle Key Ins. Co.*, 2014 WL 11878437, at *2 (S.D. Fla. Dec. 18, 2014); *see also* Local Rule 16.1(i) (“Use may be allowed by the Court in furtherance of the ends of justice”). It is in the interest of justice to allow Plaintiff to amend his Statements of Disputed Facts of Disputed Material Facts in opposition to Defendants’ Statements of Material Facts because critical new facts have come to light since Plaintiff’s initial response was filed on August 28, 2017.

WHEREFORE, Plaintiff respectfully prays that this Honorable Court enter an Order granting leave for him to amend his Statements of Disputed Material Facts as set forth herein, and granting such further relief as the Court deems necessary and just under the circumstances.

Respectfully submitted,

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LOCAL RULE 7.1 (A)(3) CERTIFICATION

Pursuant to Local Rule 7.1(A)(3), the undersigned counsel certifies that his office has conferred with FAU Defendants’ counsel in a good faith effort to resolve the issues raised in this Motion and FAU Defendants would not agree to the relief sought herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of October, 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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