

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

CASE NO. 16-CV-80655-ROSENBERG/HOPKINS

JAMES TRACY,
Plaintiff,

v.

FLORIDA ATLANTIC UNIVERSITY
BOARD OF TRUSTEES a/k/a FLORIDA
ATLANTIC UNIVERSITY; et al.,

Defendants.

**PLAINTIFF’S MOTION FOR LEAVE TO FILE CROSS-REPLY TO DEFENDANTS’
REPLY TO PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANTS’ MOTION
FOR COSTS, OR ALTERNATIVELY, TO FILE AMENDED RESPONSE**

Plaintiff, JAMES TRACY, by and through the undersigned counsel, files this Motion for Leave of Court to File a Cross-Reply to Defendants’ Reply [D.E. 498] to Plaintiff’s Response in Opposition to Defendants’ Motion for Costs, or alternatively to File Amended Response in Opposition to Defendants’ Motion for Costs [D.E. 454] (“Motion”), and in support states:

1. It has been more than three (3) years since Plaintiff filed his original Response [D.E. 462] in Opposition to Defendants’ Motion for Costs, which was denied by the Court on February 5, 2018 [D.E. 464].

2. Plaintiff originally opposed and still opposes Defendants’ Motion because, as outlined in the filing [D.E. 462], Defendants should not have prevailed in this case, as a matter of law, for the reasons set forth in Plaintiff’s Motion for Partial Summary Judgment [D.E. 247], Plaintiff’s Renewed Motion for Judgment as Matter of Law [D.E. 450], Plaintiff’s Alternative Motion for New Trial [D.E. 453], and Amended Notice of Appeal [D.E. 486], which are incorporated herein by reference. Additionally, Plaintiff contests Defendants’ costs as excessive, unreasonable and unnecessary. Plaintiff further opposes the Defendants’ bankrupting costs award based upon the severe financial hardship he has suffered from his termination by the Defendants, which was akin to a death sentence in academia.

3. In an effort to mislead this Court, Defendants' Reply [DE 498] falsely accuses Plaintiff of failing to mitigate damages. Defendants' filing suggests Plaintiff and his family have not suffered from extreme financial hardship as a result of Plaintiff's wrongful termination, and can somehow pay their exorbitant litigation costs, despite Plaintiff's well-documented hardship.

4. Defendants baselessly claimed in their Reply, "Plaintiff has not provided any facts to support his claimed inability to pay other than his mere conclusory statements" and that "Plaintiff failed to mitigate his alleged damages" despite the fact that during discovery Defendants discovered following his termination, Plaintiff applied for employment, but was rejected, for positions at Missouri State University, Saint Michael's College, Morrisville State College, Auburn University, University of Nevada, Seattle University, University of South Carolina, Manhattan College, University of Oregon, State University at Albany, California Polytechnic State University, Florida State University, Loyola University Maryland, University of North Alabama, University of Houston, Penn State University, Texas Tech University, North Central College, and California State University at Fresno. [D.E. 270-11], pages 6-7. Defendants' attempt to now claim there is a lack of evidence in the record about Plaintiff's economic loss and hardship is beyond disingenuous given Plaintiff was not permitted by this Court to testify or present evidence at trial about his damages and economic loss following the Court's rulings on Defendants' motions to exclude this evidence from trial [D.E. 409] ("Plaintiff's expert witnesses on damages will not testify at trial and may instead be called, if necessary, at any hearing after a jury verdict is rendered in this case.").

5. Plaintiff's cross-reply or amended response is not only necessary to rebut Defendant's false claim that Plaintiff failed to mitigate damages, but to provide the Court with further support for Plaintiff's Response in Opposition to Defendant's Motion, including but not limited to bringing to the Court's attention the bankruptcy action recently filed by Plaintiff's spouse. The Court should recall Defendant Coltman making fun of Plaintiff's spouse in a record e-mail to her supervisor while she and other administrators from the Defendant University celebrated finally finding the "winning metaphor" to circumvent the First Amendment [D.E. 249-13] ("How is your employee [Plaintiff's spouse]? Mine [Plaintiff] is packing up his office today").

6. Plaintiff's cross-reply or amended response will necessarily update the Court on how more than five (5) years after Plaintiff's termination, Plaintiff and his family are still suffering from financial hardship caused by the Defendants, including Plaintiff's spouse filing for

bankruptcy in 2020—which the Court should take judicial notice of. *See In re Maris Lani Hayashi*, Case No. 20-16035-EPK. Additionally, Plaintiff’s cross-reply or amended response would update the Court on his employment status, which remains largely unchanged since 2016 aside from Plaintiff earning only approximately \$4,677.54 working as a Census enumerator in 2020—Plaintiff’s first employment since 2015. This information should be considered by the Court because if Defendants’ Motion for Costs is granted, it is likely that Plaintiff, like his spouse, will also be forced into bankruptcy.

7. If the Court is nevertheless inclined to award Defendants’ costs, despite their disgraceful conduct and the severe financial hardship Defendants have actually caused Plaintiff and his family of seven—including two minor children whom have significant developmental disabilities—Plaintiff respectfully requests the Court defer any costs judgment pending the outcome of Plaintiff’s appeal to the United States Supreme Court.

8. The deadline for Plaintiff to file petition for writ of certiorari is 150 days from the date of the Eleventh Circuit’s denial of Plaintiff’s petition for rehearing, which falls on July 25, 2021. *See* Miscellaneous Order of the United States Supreme Court dated March 19, 2020, available online at https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf (“IT IS ORDERED that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.”).

9. Defendants, who are a state university and its officials, have endless resources at their disposal, will suffer no prejudice from the relief sought herein. Plaintiff, on the other hand, will suffer prejudice without such relief. There is good cause for the Court to deny Defendants’ Motion, or alternatively, abstain from entering judgment, particularly if the Supreme Court reverses the jury verdict and rulings at issue on appeal, which would render Defendant’s Motion moot. If the Motion is not denied, the Court’s postponement pending final determination by the Supreme Court would best serve considerations of judicial economy and fairness to the litigants.

10. Per Local Rule 7.1(a)(3), Plaintiff’s counsel has conferred with counsel for Defendants, who indicated without explanation Defendants object to the relief Plaintiff seeks herein.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that, if the Court does not deny Defendants' Motion, Plaintiff hereby requests that the Court grant Plaintiff leave of court to file a Cross-Reply to Defendants' Reply [D.E. 498], or alternatively, an Amended Response in Opposition to Defendants' Motion. Additionally, Plaintiff respectfully requests that, given the circumstances, if the Court does not deny the Defendants' Motion, that the Court defer any costs ruling or judgment pending the outcome of Plaintiff's appeal to the United States Supreme Court, or expiration of the period of time Plaintiff has to file his petition for writ of certiorari to the United States Supreme Court, which is due on or before July 25, 2021.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March, 2021, 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.

/s/ Louis Leo IV
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