UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JAMES TRACY,

Plaintiff,

v. **Case No. 9:16-cv-80655-RLR**

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

Defendants.
_____/

MEMORANDUM IN SUPPORT OF UNION DEFENDANTS' MOTION TO DISMISS

The Union Defendants seek dismissal of the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Both the federal claim under §§ 1983 and 1985 and the state law claims are based on allegations that essentially describe a breach of the duty of fair representation, an arguable violation of the Florida Public Employees Relations Act (PERA), Fla. Stat. § 447.201, *et seq*, and therefore fall within PERC's exclusive primary jurisdiction over unfair labor practice claims. The federal claims fail because the allegations fail to show that the Union Defedants are "state actors" and thus subject to § 1983 liability, and are too vague and conclusive to show a plausible "conspiracy" that would subject them to liability under §§ 1983 or 1985.

The Complaint's allegations against the Union Defendants

The Florida Atlantic University is a public university. (¶7) The FEA and UFF are employee organizations engaged in the representation of public employees, including Plaintiff, in connection with their employment rights (¶¶ 20-22, 26), and Plaintiff was a dues-paying member (¶23). The Defendants Moats and Zoeller are sued as representatives and agents of FEA and UFF (¶¶24-25).

In January of 2013, various FAU officials began conspiring to discipline Plaintiff and "undermine and prevent meaningful union faculty representation" (¶55); there is no allegation that the Union Defendants were part of this conspiracy. On January 18, 2013, Plaintiff was called to a meeting with FAU officials about his outside activities; his Union representative at the meeting opposed the FAU officials and asserted Plaintiff's free speech right. (¶58) The Union Defendants then began advising and counseling Plaintiff that his blogging was protected speech and not subject to FAU's "Conflict of Interest/Outside Activities" policy. (¶¶61-65)

When FAU issued Plaintiff a written "Notice of Discipline" on March 28, 2013, for having referred to FAU in his personal blog, the Union Defendants advised him to file a grievance, which he later did (¶¶66-67, 72). The grievance was resolved by mutual agreement of the parties. (¶76) In fall 2015, the FAU changed its policies to require that all faculty agree to report all outside activity on forms generated by FAU, and to acknowledge electronically their awareness of the policy. (¶81) Plaintiff complained to the Union Defendants that he found the new policy and reporting requirement confusing. (¶83) The Union Defendants advised Plaintiff that they would address this in collective bargaining with FAU. (¶85) Plaintiff then, apparently without consulting the Union

Defendants, informed the FAU that he could not affirm his compliance with an unconstitutional and confusing policy. (¶86) When he did seek advice from the Union Defendants, he was told to comply with the FAU instructions and then file a grievance. (¶¶87-88)

The FAU then issued Plaintiff a "Notice of Discipline" directing him to submit the required forms and acknowledgments. (¶89) Plaintiff consulted with the Union Defendants, who again advised him to comply with the FAU directives "under duress" and take action afterwards. (¶90) Instead of following this advice, Plaintiff responded to the Notice by restating his opposition to it. (¶91) Two days later, he asked the Union Defendants to file a grievance, but they responded that his situation was not grievable. (¶¶92-93) On December 15, 2015, Plaintiff finally submitted his "Outside Activity" forms, but the next day, FAU issued him a Notice of Intent to Terminate "for failing to timely submit the requisite forms and electronic acknowledgment of compliance with FAU policy." (¶97)

Plaintiff again sought representation and the filing of a grievance, but the Union Defendants eventually concluded that his situation was hopeless and his only option was to negotiate a resignation, further advising him to avoid statements or actions that could hurt those efforts. (¶¶98-100) When Plaintiff communicated with FAU on his own and made public statements against the Union Defendants' advice, they rebuked him and later failed to respond to the Notice of Intent to Terminate, telling Plaintiff there was nothing they could do, and Plaintiff was terminated on January 6, 2016. (¶¶101-105) The complaint does not allege that Plaintiff invoked his remedy of filing an unfair labor practice charge with PERC.

In Count VI of his complaint, Plaintiff alleges that the Union Defendants conspired with FAU, in violation of 42 U.S.C. §§ 1983 and 1985, to terminate his employment and deprive him of his constitutional and due process rights by "failing to defend or act on [plaintiff's] behalf," and failing to file a grievance or otherwise respond to the Notice of Intent to Terminate. (¶¶165-167) Count VII vaguely alleges that the purpose of the conspiracy was "to violate [plaintiff's] constitutional rights." (¶¶172-176) Count VIII asserts a state law claim for breach of the collective bargaining agreement between the FAU and the UFF. (¶¶178-187) Count IX is a separate state law contract claim against the Union Defendants. (¶¶189-193) Count X is a state law claim against the Union Defendants for breach of fiduciary duties allegedly owed the Plaintiff under the collective bargaining agreement. (¶¶195-206)

The standard for disposition of the motion to dismiss

The standard determining the motion is set forth in *Gadzinski v. City of Fort Walton Beach*, ____ F.Supp. ____ 2011 WL 2690403 (N.D. Fla. July 8, 2011):

> A motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure seeks dismissal of a complaint for lack of subject matter jurisdiction. Challenges to subject matter jurisdiction under Rule 12(b)(1) can be facial or factual. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). "A factual attack challenges the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* (internal quotation marks and citation omitted). With a facial attack, on the other hand, the court looks only at whether the plaintiff has sufficiently alleged a basis for subject matter jurisdiction in his complaint. *Id.* "As it does when considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the court construes the complaint in the light most favorable to the plaintiff and accepts all well-pled facts alleged . . . in the complaint as true." *Id.* A facial 12(b)(1) motion is properly granted when, even accepting the plaintiff's allegations as true,

he has not pled facts sufficient to establish a basis for subject matter jurisdiction. *See id.*

A motion pursuant to Rule 12(b)(6) seeks dismissal of the complaint for failure to state a claim on which relief can be granted. Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief;" detailed allegations are not required. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct 1937, 1949, 173 L.Ed.2d 868 (2009). As noted, in considering a Rule 12(b)(6) motion, the court accepts all factual allegations of the complaint as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F./3d 1282, 1284 (11th Cir. 2008). The motion is properly denied if the complaint "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). This "plausibility standard" requires a showing of "more than a sheer possibility" that the defendant is liable on the claim. *Id.*

The allegations of the complaint must set forth enough facts "to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In other words, the complaint must contain sufficient factual matter, accepted as true, to permit a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949. However, the court need not credit "[t]hreadbare recitals" of the legal elements of a claim unsupported by plausible factual allegations because "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* When considering a motion to dismiss, "the court limits its consideration to the pleadings and exhibits attached thereto" and incorporated into the complaint by reference. *Thaeter v. Palm Beach County Sheriff's Office*, 449 F.3d 1342, 1352 n. 7 (11th Cir. 2006) (internal marks omitted).

The Court lacks subject matter jurisdiction over the claims Against the Union Defendants

The determinative effect of the Florida Legislature's grant of exclusive jurisdiction over unfair labor practice complaints to PERC is also well summarized in *Gadzinski v. City of Fort Walton Beach*, *supra*:

> The Florida Legislature ("Legislature") enacted the Public Employee Relations Act ("PERA") to regulate labor union activities involving public employees and created the PERC to "settle disputes regarding alleged unfair labor practices." Fla. Stat. § 447.503 (2009). Florida courts have interpreted the PERA broadly and have held that the PERC has exclusive jurisdiction over "activities which 'arguably' constitute unfair labor practices as defined by section 447.501." *Browning v. Brody*, 796 So.2d 1191, 1192 (Fla. 5th DCA 2001) (quoting *Maxwell v. Sch. Bd. of Broward Cnty.*, 330 So.2d 177, 180 (Fla. 4th DCA 1976)). According to § 447.501, unfair labor practices include, among others, "[i]nterfering with, restraining, or coercing public employees in the exercise of any rights guaranteed them under [the PERA]" and "[r]effusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement." Fla. Stat. §§ 447.501(1)(a) and (f). Although the plaintiff has asserted a claim for breach of contract, his claim is more appropriately characterized as a breach of the duty of fair representation, which is an unfair labor practice within the exclusive jurisdiction of the PERC. *See Alexander v. Orange Cnty. Pub. Schs.*, 2009 WL 2870504, at *1 (M.D. Fla. Sept. 1, 2009) (holding that plaintiff's breach of contract claim was more appropriately characterized as a breach of the duty of good faith and fair representation, which is an unfair labor practice covered by § 447.501, thereby falling within the PERC's exclusive jurisdiction); *see also Browning*, 796 So.2d at 1193 (holding that the decision not to process a grievance for lack of merit is subject to the duty of fair representation and within the exclusive jurisdiction of the PERC). Because the plaintiff's claim falls within the exclusive jurisdiction of the PERC, this court lacks jurisdiction over it. [footnote omitted]

The *Alexander* decision, cited by the court in *Gadzinski*, also shows that the state law claims against the Union Defendants are beyond this Court's jurisdiction, while *Florida Education Ass'n v. Wojcicki*, 930 So. 2d 812, 813-14 (Fla. 3d DCA 2006), *citing Stafford v. Meek*, 762 So. 2d 925, 926 (Fla. 3d DCA 2000), shows that the Plaintiff's claims against the individual Union Defendants, as well as those against the Unions themselves, are similarly preempted or immunized and beyond the jurisdiction of this Court.

The federal claims against the Union Defendants are similarly preempted by PERC's exclusive jurisdiction. As explained in *Gadzinski, supra*, the claims based on

procedural due process must fail because an adequate state remedy was available to Plaintiff through PERC's unfair labor practice jurisdiction:

> A procedural due process claim is actionable under § 1983 "only when the state refuses to provide a process sufficient to remedy the procedural deprivation." *Cotton v. Jackson*, 216 F.3d 1328, 1330-31 (11th Cir. 2000) (quoting *McKinney*, 20 F.3d at 1557). In other words, "the state must have the opportunity 'to remedy the procedural failings of its subdivision and agencies in the fora--agencies, review boards, and state courts' before being subjected to a claim alleging a due process violation.'" *Id.* at 1331 (quoting *McKinney*, 20 F.3d at 1560). If the plaintiff had adequate state remedies at his disposal and failed to take advantage of them, he cannot claim that the state deprived him of procedural due process. *Id*. at 1331; *see Zinermon v. Burch*, 494 U.S. 113, 124, 110 S. Ct. 975, 108 L.Ed.2d 100 (1990) (holding that § 1983 provides a federal remedy for procedural due process claims only when state remedies are inadequate). State procedures need not provide all the relief available under § 1983 to be adequate; rather, they need only "correct whatever deficiencies exist and . . . provide the plaintiff with whatever process is due." *Id.*
>
> ***4** The PERC has full authority to adjudicate employment disputes, including the authority to conduct evidentiary hearings and order relief when appropriate. *See* Fla. Stat. § 447.503. The Eleventh Circuit has thus recognized that the PERA provides an adequate remedy to public employees claiming a denial of procedural due process. *See Wilson v. Farley*, 203 Fed. Appx. 239, 249 (11th Cir. 2006). The plaintiff does not dispute that the PERA provides an adequate state law remedy; rather, he argues that he is not required to exhaust his state administrative remedies in order to bring a § 1983 claim. While it is true that a plaintiff does not have to exhaust state administrative remedies in order to bring a § 1983 claim, *see Patsy v. Bd. Of Regents of the State of Fla.*, 457 U.S. 496, 507, 102 S.Ct 2557, 73 L.Ed.2d 172 (1982) a plaintiff cannot maintain a § 1983 claim if the state afforded him an adequate remedy, *see Cotton*, 216 F.3d at 1331. Because adequate state law remedies were available to the plaintiff under the PERA, the plaintiff has failed to allege facts sufficient to state a § 1983 claim. *See Wilson*, 203 Fed. Appx. At 249. [footnote omitted]

The claims against the Union Defendants for first amendment retaliation are similarly preempted and beyond this Court's jurisdiction. In similar circumstances, the

federal courts defer to the comparable preemptive jurisdiction of federal administrative agencies. *Carter v. Kurzejeski*, 706 F.2d 835 (8th Cir. 1983). Other courts have reached a different result when the claimant had in fact availed himself of his state administrative remedies. *Butcher v. City of McAllster*, 956 So. 2d 973, 978-79 (10th Cir. 1992); *Wilton and City Council of Baltimore*, 772 F.2d 88, 89 n. 1 (4th Cir. 1985). Here there is no allegation that Plaintiff invoked his available remedies before PERC.

Counts VI and VII fail to state claims against the Union Defendants.

Even if the First Amendment retaliation claims against the Union Defendants are not barred by preemption or failure to exhaust administrative remedies, Plaintiff has failed to state claims for relief under either §§ 1983 or 1985. First, the Union Defendants are not "state actors" for purposes of subjecting them to § 1983 liability. *See Montgomery v. City of Ardmose* 365 F. 3d 926, 942 (10th Cir. 2004); *Ciamrbriello v. County of Nassau*, 292 F. 3d 307, 323-24 (2d Cir. 2002); *Wegsheid v. Local Union 2911*, 117 F. 3d 986, 988 (7th Cir. 1997). The vague and conclusory allegations of "conspiracy" fall woefully short of the particularity required to sustain such an allegation. *See, e.g., Ciamrbriello, supra*, 292 F. 3d at 324; *Luft v. Citigroup Global Markets Realty Corp., 620 Fed Appx. 702, 704 (11th Cir. 2015); Harvey v. City of Stuart*, 296 Fed. Appx. 824, 826, 2008 WL 4605926 (11th Cir. 2008). Such an allegation is inherently implausible in light of the more detailed allegations showing that the Union Defendants persistently and aggressively advanced Plaintiff's interests in opposition to the interests of FAU, and only abandoned such efforts after and because Plaintiff ignored their advice and indeed acted in contravention to it, after which they concluded, in apparent exasperation, that there was nothing more they could do. The complaint alleges no facts plausibly suggesting

that their efforts on his behalf up to this point were merely some sort of charade, nor any conceivable basis for inferring any *sub rosa* animus toward Plaintiff that might have motivated them to an abrupt about-face toward him, or indeed that any motivation existed, apart from their clearly-stated reasons expressed in the complaint and the attached exhibits.

Conclusion

Based on the foregoing, the Union Defendants urge the Court to dismiss the claims against them with prejudice.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2016, I filed this document with the Clerk of the Court by using the CM/ECF system, which will send notice to Louis Leo, IV, Esquire (Louis@floridacivilrights.org), Joel Medgebow, Esquire (joel@medgebowlaw.com, Florida Civil Rights Coalition, P.L.L.C. & Medgebow Law, P.A., 4171 W. Hillsboro Boulevard, Suite 9, Coconut Creek, Florida 33073; and to G. Joseph Curley, Esquire (gcurley@gunster.com), Gunster, Yoakley & Stewart, P.A., 777 F. Flagler Drive, Suite 500 East, West Palm Beach, FL 33401.

/s/ Robert F. McKee

ROBERT F. McKEE
Florida Bar Number 295132
yborlaw@gmail.com
CHRISTOPHER T. BORZELL
Florida Bar Number 68277
cborzell@gmail.com
ROBERT F. McKEE, P.A.
1718 E. 7th Ave., Suite 301
Tampa, FL 33605
(813) 248-6400/(813) 248-4020 (Fax)
Secondary Email: bdjarnagin@gmail.com