UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:17-CV-20337-FAM

FRANTZ PIERRE,

Plaintiff,
v.

THE CITY OF NORTH MIAMI BEACH,
a political subdivision of the State of Florida,
WILLIAM SERDA as Deputy City Manager,
individually, and JOSE SMITH as City Attorney,
individually,

Defendants.
_____/

**THE CITY OF NORTH MIAMI BEACH'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW**

Defendant, the City of North Miami Beach (the "City" or "NMB") by and through its undersigned counsel, and pursuant to the Federal Rules of Civil Procedure, hereby files its Motion to Dismiss Plaintiff's Amended Complaint and in support thereof states as follows:

## I. STATEMENT OF FACTS

Frantz Pierre ("Plaintiff"), an elected City of North Miami Beach ("NMB") Councilman, filed his original Complaint [D.E. 1] on January 26, 2017. Plaintiff initially attempted to state various employment discrimination claims arising under Title VII of the Civil Rights Act of 1964 ("Title VII") against Smith, the City Attorney for NMB, in his *individual capacity*. However, after being advised as to the futility of his claims under Title VII, Plaintiff filed his nearly identical Amended Complaint [D.E. 14] (the "Complaint") whereby he merely changes his theory of recovery from Title VII to civil rights claims arising under to 42 U.S.C. § 1983.

Critically, within the 77 paragraph Complaint, there are no allegations identifying an official NMB policy or custom that is alleged to have caused the alleged deprivation of Plaintiff's rights. While Plaintiff attempts to charge NMB with committing serious civil rights violations, he has failed to set forth a single allegation regarding any official policy or custom of NMB and failed to set forth a single allegation identifying the specific federal rights he claims were violated by NMB. Notwithstanding the absence of any factual allegations against NMB, Plaintiff purports to set forth the following causes of action against NMB: Count I: Racial Discrimination in Violation of 42 U.S.C. §1983; Count IV: Retaliation in Violation of 42 U.S.C. §1983; Count VII: Hostile Work Environment in Violation of 42 U.S.C. §1983; and Count X: National Origin Discrimination in Violation of 42 U.S.C. §1983. Incredulously, Plaintiff has charged NMB with violating his rights without alleging any factual basis for holding NMB liable.

Accordingly, all claims against NMB must be dismissed, *with prejudice* as appropriate.

## II. MEMORANDUM OF LAW

### A. Standard of Law for Motion to Dismiss

In reviewing a motion to dismiss, the Court must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff. *Erickson v. Pardus*, 551 U.S. 89 (2007). However, "[t]o survive a motion to dismiss, a [c]omplaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of

a cause of action will not do." *Puig v. Miami-Dade County*, 09-20822-CIV, 2010 WL 1631896, at *1 (S.D. Fla. Jan. 13, 2010) (citing *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 561 (2007). As the Supreme Court explained in *Ashcroft v. Iqbal,* "the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal,* 556 U.S. at 678. Legal conclusions couched as factual allegations are not sufficient, nor are unwarranted inferences, unreasonable conclusions, or arguments. *See Twombly,* 550 U.S. at 555.

For the reasons more fully explained below, each of Plaintiff's claims against the City are due to be dismissed with prejudice

**B. Legal Argument**

**1. The entire Complaint must be dismissed as Plaintiff has failed to allege the deprivation of any constitutionally protected rights and failed to allege a basis for municipal liability.**

In Counts I, IV, VII, and X, Plaintiff attempts to maintain claims against NMB "to redress the deprivation of rights secured by 42 U.S.C. 1983." *See* Am. Compl. at ¶¶1, 35, 38-41, 50-52, 59-62. However, it is well settled that Section 1983 does not provide any substantive rights, but rather provides a vehicle for individuals to seek redress for deprivations of federally protected rights. *See Chapman v. Houston Welfare Rights Org.,* 441 U.S. 600, 617 (1979) (holding that "one cannot go into court and claim a 'violation of § 1983'—for section 1983 by itself does not protect anyone against anything."); *Afkhami v. Carnival Corp.,* 305 F. Supp. 2d 1308, 1328 (S.D. Fla. 2004) (holding that in order to state a claim under Section 1983, a plaintiff must allege the defendant violated a right preserved by a federal law, other than Section 1983).

Notably, the allegation prohibited by *Chapman* appears verbatim in the Amended

Complaint. *See* Am. Compl. at ¶1 ("Specifically, Plaintiff, Frantz Pierre, brings this action..., for 'violation of 42 U.S.C. 1983'…"). Moreover, the Complaint is wholly devoid of any allegation identifying the substantive federal right needed to state a claim under Section 1983, aside from the improper reference to Section 1983 itself. *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (stating that the threshold requirement to stating a claim under Section 1983 is the plaintiff's identification of the specific right allegedly infringed).

In addition, it is well settled that a municipality, such as NMB, may not be held vicariously liable under Section 1983. *See Monell v. Dep't of Soc. Services of City of New York*, 436 U.S. 658 (1978). Rather, to state a claim against NMB under Section 1983, Plaintiff must allege he suffered a deprivation of his rights pursuant to an official policy or custom of NMB. *Id.* at 694; *see also Brown v. City of Fort Lauderdale,* 923 F.2d 1474, 1479 (11th Cir. 1991) ("It is well established that a municipality may be held liable under § 1983 only when the deprivation at issue was undertaken pursuant to city 'custom' or 'policy,' and not simply on the basis of *respondeat superior*."). Here, the Complaint does not contain any allegation identifying any official policy or custom of NMB that caused the alleged deprivation of his rights. *See* Am. Compl. at ¶¶13-34. Additionally, the Complaint does not contain any allegation identifying a NMB official with "final policymaking authority" with respect to alleged deprivations of his rights as neither the City Attorney nor the Deputy City Manager possess final policymaking authority for the City, as such authority is vested with the City Manager and City Council, of which Plaintiff is a member. *See* City Charter, Art. II, Sec. 5 ("The form of government of the City of North Miami Beach shall be that of council-manager, the powers of which city shall be exercised by a city council and a city manager, and other officers, as hereinafter set forth."); City Charter, Art. II, Sec. 6 ("The affairs of the City of North Miami Beach shall be conducted by the

city council and city manager with the assistance of officers who shall be selected as provided herein and whose powers and duties shall be as prescribed in this charter."). Accordingly, Plaintiff's claims under Section 1983 must be dismissed.

**2. Plaintiff's national origin discrimination claim (Count X) must also be dismissed because a Section 1983 claim cannot be premised on an alleged Title VII violation.**

Notwithstanding that Plaintiff was on notice that his Title VII claims are inapplicable to elected officials, Count X is also subject to dismissal on the grounds it attempts to state a cause of action under Section 1983 based on an alleged violation of Title VII. It is well settled that a Section 1983 claim cannot be premised upon an alleged violation of Title VII. *See Arrington v. Cobb County,* 139 F.3d 865 (11th Cir. 1998) (holding that an alleged violation of Title VII cannot provide the basis for a Section 1983 claim). Defendant must reasonably conclude that Plaintiff's vague reference to "the Civil rights Act (sic) as amended by the aforementioned Civil Rights Act" is referring to Title VII of the Civil Rights Act of 1964 rather than Section 1983 of the Civil Rights Act of 1871 as a reference to Section 1983 would be redundant in this context. *See* Am. Compl. at ¶60. To the extent Plaintiff contends paragraph 60 is not referring to Title VII, Count X is still subject to dismissal as Section 1983 provides to substantive rights upon which a claim may brought. *See Chapman, supra.*

**3. Plaintiff's discrimination claims based on race and national origin (Counts I and X) are due to be dismissed with prejudice as Plaintiff has failed to allege any disparate treatment.**

In order to state a claim for discrimination under Section 1983, Plaintiff must allege "that he was treated differently from similarly situated persons and that any such disparate treatment was based on his membership in a protected class." *Wusiya v. City of Miami Beach,* 614 Fed. Appx. 389, 393 (11th Cir. 2015). Plaintiff's race and national origin discrimination claims must

be dismissed as Plaintiff has failed to identify any similarly situated persons, much less allege that he was treated differently than any other similarly situated persons. *See* Am. Compl. at ¶¶13-34; *see also GJR Investments, Inc. v. County of Escambia, Fla.,* 132 F.3d 1359, 1367-68 (11th Cir. 1998) *overruled on other grounds by Randall v. Scott,* 610 F.3d 701 (11th Cir. 2010) (holding that plaintiff failed to state a claim under Section 1983 where its complaint did not allege any unequal treatment as compared to similarly situated individuals outside of the plaintiff's protected class).

In fact, the Complaint does not contain any allegations regarding any difference in treatment provided to any other individual as compared to Plaintiff. *Id.* While Plaintiff alleges at Paragraph 30 that he "believes that he was targeted because he was the only Black Haitian-American;" he still fails to allege that other similarly situated individuals outside of his protected class received different treatment. *See Eisenberg v. City of Miami Beach,* 1 F. Supp. 3d 1327, 1342 (S.D. Fla. 2014) (dismissing a "class-of-one" discrimination claim where plaintiff failed to identify comparators and allege intentional "discriminatory treatment different from others similarly situated.").

Moreover, Plaintiff has no allegation of fact to support the plausibility of his claims as he acknowledges by merely alleging that he subjectively "believes" he was targeted due to his race and national origin. *See* Am. Compl. at ¶30. Accordingly, Plaintiff's claims under Section 1983 in Counts I and X must be dismissed.

**4. Plaintiff's retaliation claim (Count IV) must be dismissed because he spoke as an elected official at all times.**

Plaintiff's retaliation claim is due to be dismissed as the facts alleged in the Complaint establish that he is unable to state a claim for retaliation. In order to properly state a claim against the City for retaliation based on speech, Plaintiff must allege that he: (1) spoke as a

citizen; (2) on a matter of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2004). It is well-established that when public employees "make statements pursuant to their official duties, the employees are not speaking as citizens" and their communications are not insulated from employer discipline. *Garcetti*, 547 U.S. at 421. Whether Plaintiff spoke as private citizen is a question of law to be decided by the Court. *Alves v. Bd. of Regents of the Univ. Sys. of Ga*., 804 F.3d 1149, 1159 (11th Cir. 2015).

Plaintiff alleges that he was elected to public office in the City where he serves a Councilman. *See* Am. Compl. at ¶¶7,14. Plaintiff alleges that during a November 2014 City Council meeting, he told the City's Chief of Police that he should resign due to alleged misconduct committed by members of the police department. *See* Am. Compl. at ¶15. The City held two (2) City Council meetings in November of 2014, on November 4th and November 18th, 2014[1]. Notably, Plaintiff was not present at the November 4, 2014, City Council meeting and thus could not have engaged in any protected activity at that meeting[2]. While Plaintiff was present at the November 18, 2014, City Council meeting, a review of the video recording of the

---

1 The Court may take judicial notice of the actual dates of the City Council meetings referenced in the Complaint without converting the instant motion to dismiss into a motion for summary judgment as such records are a part of the public record and not subject to reasonable dispute. *See* Fed. R. Evid. 201(b); *see also Lozman v. City of Riviera Beach, Fla.,* 713 F.3d 1066, 1075 n.9 (11th Cir. 2013).

2 The Court may also take judicial notice of the statements actually made by Plaintiff, or lack thereof, during the November 2014 City Council meetings as video of the entire proceedings are available in the public record at http://www.citynmb.com/VideosOnDemand, and same will supply the Court with the necessary information to determine whether Plaintiff has plausibly alleged he engaged in a protected activity in November 2014 as alleged in the Complaint. *See Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010) (citing Fed. R. Evid. 201(b)) (holding that a court may take judicial notice of materials in the public record on a motion to dismiss without converting the motion to a motion for summary judgment where the public records are not subject to reasonable dispute because their accuracy can be determined by resort to sources whose accuracy cannot be questioned).

November 18th meeting[3] conclusively establishes that Plaintiff did not engage in any protected activity concerning the Chief of Police as alleged in the Complaint.

Moreover, the allegations in Complaint taken in connection with the video recording of the November 18th meeting, further establish that all times Plaintiff spoke in his capacity as an elected Councilman for the City in accordance with his official duties, and at no time did he leave the dais and engage in public commentary as a private citizen. *See Garcetti*, 547 U.S. at 421–22 (defining speech made pursuant to an employee's job duties as "speech that owes its existence to a public employee's professional responsibilities" and speech the "employer itself has commissioned or created"). As such, Plaintiff's allegation that he engaged in a "statutorily protected activity" amounts to a mere legal conclusion unsupported by any factual allegations sufficient to survive a motion to dismiss. *See* Am. Compl. at ¶38. Accordingly, Plaintiff's retaliation claim in Count IV must be dismissed.

**5. Plaintiff's hostile work environment claim (Count VII) must be dismissed as Plaintiff cannot allege a basis for holding the City liable and failed to allege any outrageous conduct.**

To state a claim for hostile work environment under Section 1983, Plaintiff must allege that (1) he belonged to a protected group; (2) he was subjected to unwelcome harassment; (3) the harassment was based upon his membership in a protected group; (4) the harassment was sufficiently severe and pervasive to alter the terms and conditions of his employment and create a discriminatorily abusive working environment; and (5) there is a basis for holding the City liable. *Robinson v. LaFarge N. Am., Inc.*, 240 Fed. Appx. 824, 829 (11th Cir. 2007); *Watkins v. Bowden*, 105 F.3d 1344, 1355 (11th Cir. 1997).

3 *See* November 18, 2014 Regular Council Meeting, City of North Miami Beach, http://view.earthchannel.com/PlayerController.aspx?&PGD=nmiafl&eID=379 (last visited Feb. 21, 2017);

Plaintiff's hostile work environment claim must be dismissed as the conclusory allegations in Count VII do not allege what protected category the alleged harassment was based on. Nonetheless, Plaintiff has similarly failed to set forth any allegations establishing that the alleged harassment was based on membership in a protected class. *See Robinson v. LaFarge N. Am., Inc.*, 240 Fed. Appx. 824, 829 (11th Cir. 2007) (quoting *Gupta v. Fla. Bd. of Regents* 212 F.3d 571, 583 (11th Cir. 2000)) ("the statements and conduct must be of a [racial] nature" or "relate to the [race] of the actor or of the offended party"); *White v. Sch. Bd. of Hillsborough County*, 636 F. Supp. 2d 1272, 1281 (M.D. Fla. 2007) (dismissing racially hostile work environment claim brought pursuant to §1983 for failure to state a claim in part due to the plaintiff's failure to allege any harassment "based on" race).

In addition, Plaintiff has failed to allege that there is a basis for holding the City liable as he has not alleged that any of the alleged harassment was directed at him pursuant to an official municipal "custom or policy" as needed maintain a claim under Section 1983. *Id.* at 1281 (citing *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991)). Accordingly, Plaintiff's hostile work environment claim in Count VII must be dismissed.

WHEREFORE, Defendant, The City of North Miami Beach, respectfully requests that this Honorable Court enter an Order dismissing Plaintiff's Amended Complaint, *with prejudice* as appropriate, as to all claims brought against the City of North Miami Beach, award it its attorneys' fees pursuant to 42. U.S.C. § 1988(b), and grant all such other further relief deemed justified and warranted under the circumstances.

Dated this 21st day of February, 2017.

Respectfully submitted,

***/s/ Stephen Hunter Johnson***
STEPHEN HUNTER JOHNSON, ESQ.
Florida Bar No.:
shj@lydeckerdiaz.com
STEPHANIE PIDERMANN, ESQ.
Florida Bar No.:
sp@lydeckerdiaz.com
LASELVE E. HARRISON
Florida Bar No.: 112537
leh@lydeckerdiaz.com

LYDECKER | DIAZ
1221 Brickell Ave., 19th Floor
Miami, FL 33131
Tel: (305) 416-3180
Fax: (305) 416-3190
*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that a true and correct copy of the foregoing was served this day via transmission of Notices of Electronic Filing generated by CM/ECF on all counsel or parties of record on the Service List below.

*/s/ Stephen Hunter Johnson*
STEPHEN HUNTER JOHNSON, ESQ.

**SERVICE LIST**

Gregory D. Curtis, Esq.
17325 N.W. 27th Avenue, Ste. 103
Miami Gardens, FL 33056
Tel: (305) 622-9199
Fax: (305) 622 9129
FBN: 0492108
curtislegalgroup@aol.com