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.
_____/

JOSE SMITH'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW

Defendant, Jose Smith, Esq., ("Smith") by and through his undersigned counsel, and pursuant to the Federal Rules of Civil Procedure, hereby files his 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, the only factual allegation referencing Smith in the entire Complaint is as follows:

> Defendant, Jose Smith, is the City Attorney of the city of North Miami Beach, Inc., in the State of Florida is located at 17011 N.E. 19th Avenue, North Miami Beach Florida 33162."

See Am. Compl. at ¶10.

Shockingly, while Plaintiff attempts to charge Smith with committing serious civil rights violations, he fails to set forth a single allegation regarding any act committed by Smith and fails to set forth a single allegation identifying any specific federal rights Plaintiff claims were violated by Smith. Moreover, pursuant to the City Charter, Smith, in his capacity as City Attorney, **does not have the authority to take any actions under color of law** with respect to the City Council, of which Plaintiff is a member, Code Compliance Department, or any other department within the City administration. *See* City Charter, Art. III, Sec. 6. Notwithstanding the absence of any factual allegations against Smith, Plaintiff purports to set forth the following five (5) causes of action against Smith: Count II: Racial Discrimination in Violation of 42 U.S.C. §1983; Count V: Retaliation in Violation of 42 U.S.C. §1983; Count VIII: Hostile Work Environment in Violation of 42 U.S.C. §1983; Count XII: National Origin Discrimination in Violation of 42 U.S.C. §1983; and Count XIV: Intentional Infliction of Emotional Distress.

Accordingly, all claims against Smith must be dismissed, or dismissed with prejudice where 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.

B. Legal Argument

1. The entire Complaint must be dismissed as Plaintiff has not alleged that Smith engaged in any actionable conduct.

All of Plaintiff's claims against Smith must be dismissed as the entirety of the 77 paragraph Complaint does not contain a single allegation setting forth any conduct engaged in by Smith towards Plaintiff. The only factual allegation in the Complaint that references Smith, is that Smith serves as the City Attorney for NMB. *See* Am. Compl. at ¶10. There are no allegations in the purported "Facts" section that refer to Smith or allege any civil rights violations or tortious conduct committed by Smith. *See* Am. Compl. at ¶¶13-34. In fact, subsequent to paragraph 10, the only references to Smith in the entire Complaint consist of legal conclusions within the various counts attempting charge Smith with civil rights violations based

on conduct that has not been alleged anywhere in the Complaint. Accordingly, all of Plaintiff's claims against Smith must be dismissed.

2. Plaintiff's claims under 42 U.S.C. § 1983 must be dismissed as Plaintiff has failed to allege the deprivation of any federally protected rights.

In Counts II, V, VIII, and XII, Plaintiff purports to maintain claims against Smith "to redress the deprivation of rights secured by 42 U.S.C. 1983." *See* Am. Compl. at ¶¶1, 36, 42-45, 53-55, 67-70. 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, Plaintiff has failed to allege the deprivation of any federally protected rights "through [Smith's] own individual actions." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (holding that to state a claim under Section 1983, "a plaintiff *must plead* that each Government-official defendant, through the official's own *individual* actions, has violated"

his federal rights) (emphasis added). Accordingly, all of Plaintiff's claims under Section 1983 must be dismissed.

3. Plaintiff's national origin discrimination claim (Count XII) must also be dismissed as 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 XII 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 ¶68. To the extent Plaintiff contends paragraph 68 is not referring to Title VII, Count XII is still subject to dismissal as Section 1983 provides no substantive rights upon which a claim may brought. *See Chapman, supra*. As a further reflection of the meritless and haphazard fashion in which this action is brought, Plaintiff's claim of national origin discrimination actually alleges he was discriminated against on the basis of race. *See* Am. Compl. at ¶68.

4. Plaintiff's discrimination claims based on race and national origin (Counts II and XII) must also be dismissed as Plaintiff has failed to state a claim for 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 allegations 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 must be dismissed.

5. Plaintiff's retaliation claim (Count V) must also be dismissed because he spoke as an elected official at all times.

Plaintiff's retaliation claim must 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 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 settled that when public employees "make statements pursuant to their official duties, the employees are not speaking as citizens" and their communications cannot form the basis for a retaliation claim. *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 within 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

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

November 18, 2014, City Council meeting, a review of the video recording of the 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 the 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 ¶42. Accordingly, Plaintiff's retaliation claim in Count V must be dismissed.

6. Plaintiff's hostile work environment claim (Count VIII) must be dismissed as Plaintiff cannot allege Smith acted under color of law to create a hostile work environment.

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

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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).

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);

sufficiently severe and pervasive to alter the terms and conditions of his employment and create a discriminatorily abusive working environment; (5) Smith acted under color of law; and (6) Smith acted with discriminatory purpose or intent. *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).

Plaintiff's hostile work environment claim must be dismissed as his claim is devoid of any allegation specifically referencing Smith or identifying any conduct engaged in by Smith towards Plaintiff. *See* Am. Compl. at ¶¶ 13-34; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (holding that to state a claim under Section 1983, "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.") (emphasis added); *Gonzalez v. Reno*, 325 F.3d 1228, 1234 (11th Cir. 2003) (holding that officials sued in their individual capacity are not held liable on the basis of respondeat superior or vicarious liability).

In addition, Plaintiff has failed to set forth any allegations showing that Smith, in his capacity as City Attorney, had any supervisory authority over Plaintiff such to be deemed to be acting under color of law to create a hostile work environment. *See Edwards v. Wallace Cmty. Coll.*, 49 F.3d 1517, 1523 (11th Cir. 1995) (holding that co-employees of the plaintiff without any supervisory authority over the plaintiff could not act under color of law such to be liable for a hostile work environment under Section 1983). In fact, pursuant to the City Charter, it is actually Plaintiff who has the authority to act under color of law towards Smith. *See* City Charter, Art. III, Sec. 6 ("The affairs of the City of North Miami Beach shall be conducted by the city council and city manager…. The *city council shall appoint a full-time city attorney to serve at the pleasure of the council.*") (emphasis added).

Plaintiff's hostile work environment claim must also be dismissed as the conclusory allegations in Count VIII 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 any 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). Accordingly, Plaintiff's hostile work environment claim must be dismissed.

7. Plaintiff's intentional infliction of emotional distress claim must be dismissed for failure to allege any outrageous conduct committed by Smith.

As an initial matter, it is indecipherable as to whether Plaintiff is alleging a violation of 42 U.S.C. §1983 based on an alleged intentional infliction of emotional distress or a stand-alone claim for IIED under Florida common law. *See* Am. Compl. at ¶77. Nevertheless, Plaintiff's IIED must still fail as he has failed to allege any sufficiently outrageous conduct on the part of Smith.

Under Florida law, to state a claim for intentional infliction of emotional distress ("IIED"), Plaintiff must allege: (1) the wrongdoer's conduct was intentional or reckless, that is, he intended his behavior and he knew or should have known that emotional distress would likely result; (2) the conduct was outrageous, that is, to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) the conduct caused

emotional distress; and (4) the emotional distress was severe. *Frias v. Demings*, 823 F.Supp.2d 1279 (M.D. Fla. 2011) (citing *LeGrande v. Emmanuel*, 889 So. 2d 991, 994 (Fla. 3d DCA 2004); *Metro Life Ins. Co. v. McCarson*, 467 So. 2d 277 (Fla. 1985). Florida law exhibits a strong disfavor against IIED claims in the employment context and imposes a very high standard on a plaintiff to establish outrageous conduct in the employment realm, requiring that the conduct be "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.; Ball v. Heilig-Meyers Furniture Co.*, 35 F. Supp. 2d 1371, 1376 (M.D. Fla. 1999) (noting that discrimination or harassment by coworkers is generally not deemed to be outrageous conduct). With regards to severity of the emotional distress, "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." *Frias*, 823 F.Supp.2d at 1288-89 (stating that "[w]hether alleged conduct is outrageous enough to support a claim of intentional infliction of emotional distress is a matter of law, not a question of fact."). Further, Plaintiff's use of pejorative buzz words and conclusory allegations that Smith's alleged actions were "outrageous" is not sufficient to state a cause of action for IIED. *See Mamani v Berzain*, 654 F.3d 1148, 1153 (11th Cir. 2011).

Here, the Complaint is devoid of any allegations specifically referencing Smith, much less any allegations that Smith personally engaged in any outrageous conduct towards Plaintiff that can support a claim for IIED. *See* Am. Compl. at ¶¶ 13-34. Moreover, the unspecified conduct alleged by Plaintiff in the Complaint is insufficient as a matter of law to state a claim of IIED in the employment context. In *Williams v. Worldwide Flight SVCS., Inc.*, 877 So. 2d 869 (Fla. 3d DCA 2004), the court upheld the trial court's dismissal of the plaintiff's complaint with prejudice for failing to allege sufficiently outrageous conduct to state a cause of action for IIED under Florida law. The plaintiff in *Williams* alleged that his supervisor repeated called him racial

epithets and slurs to his face and in front of other employees. *Id.* at 870. The plaintiff also alleged his supervisor attempted to create a record of false disciplinary reports against him, falsely accused him of stealing, constantly threatened to terminate his employment, and made him work in dangerous conditions. *Id.* The *Williams* court held that while the allegations reflected conduct that was objectionable and offensive, the conduct did not, as a matter of law, rise to the level of extreme and outrageous conduct needed to survive a motion to dismiss. *Id.* It follows that because no conduct on the part of Smith is alleged by Plaintiff, Plaintiff's claim does not rise to any level of outrageousness, let alone the insufficient level reached in *Williams.* Accordingly, Plaintiff's IIED claim must be dismissed.

WHEREFORE, Defendant, Mr. Jose Smith, Esq., respectfully requests that this Honorable Court enter an Order dismissing Plaintiff's Amended Complaint, *with prejudice* as appropriate, as to all claims brought against Mr. Jose Smith, Esq., award him his 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.

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Respectfully submitted,

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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
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