UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 1:17-CV-24197-SCOLA

EMILE HOLLANT,
Plaintiff,

versus

CITY OF NORTH MIAMI, et al.,
Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND/OR MOTION TO STRIKE PLAINTIFF'S COMPLAINT, WITH INCORPORATED MEMORANDUM OF LAW

Plaintiff Emile Hollant opposes the defendants' Motion to Dismiss Plaintiff's Corrected First Amended Complaint (DE32), pursuant to Federal Rule of Civil Procedure 27(a)(3).

INTRODUCTION

The City's Motion to Dismiss misreads the first amended complaint ("FAC") when arguing that it should be dismissed in its entirety. Yet, the defense only addresses part of the FAC's claims and persists in ignoring (as it did in its earlier motion) the clear allegations of liability. The motion should be denied because Police Commander Emile Hollant ("Hollant") properly alleged his fundamental constitutional rights to liberty and due process were violated when the City suspended him without leave, wrongfully placed him on administrative leave with virtual house arrest, and terminated him for alleged conduct the Miami-Dade State Attorney ("SAO") and the Florida Department of Law Enforcement ("FDLE") determined never happened. The facts, all of which must be presumed to be true, demonstrate Hollant is entitled to relief on all Counts. For these reasons, the City's request to dismiss the complaint should be denied.

The essence of the FAC is that the City empowered its decision makers to deprive Hollant

of his constitutionally protected interests without any semblance of due process or fair consideration. Shockingly, as outlined in the FAC, the City and its senior personnel ignored the truth in favor of its rush to judgment in framing Holland for conduct that never occurred.

FACTUAL BACKGROUND

1) This case arises from the July 18, 2016 nationally-covered tragic and preventable police shooting of Charles Kinsey by North Miami Police Officer Aledda (DE30, ¶¶ 21, 24). Hollant was not the shooting officer; he cooperated fully; and he testified truthfully (DE30, ¶ 26). He was present just before the shooting and immediately after the shooting (DE30, ¶ 39). He did not witness the actual shooting because he had been retrieving binoculars from his police vehicle in an effort to assist the on-scene officers in determining whether the small shiny object in the hand of Charles Kinsey's patient was a firearm (DE30, ¶ 27). Notwithstanding his cooperation and truthful testimony, he became the target of false accusations by North Miami City Manager Larry Spring and the City of North Miami (DE30, ¶¶ 33-36).

2) The adverse personnel actions began when persons within the department falsely claimed Hollant was present during the shooting and therefore lied about not being present (DE30, ¶ 28). Based on this information, then-police Chief Gary Eugene recommended to City Manager Larry Spring, the City Attorney, and PIO Natalie Buissereth that Commander Hollant be placed on administrative leave (DE30, ¶ 29). The City Manager determined the suspension should be *without* pay (DE30, ¶ 29). This decision was made at 5:00 pm on July 21, 2018. Immediately thereafter, the Police Chief listened to the radio transmission and determined it corroborated and shed light on Commander Hollant's statements concerning his whereabouts during the shooting (DE30, ¶ 31).

3) The next morning on July 22, 2016, around 9:00 a.m., Chief Eugene advised the

City Manager and the City Attorney of the new development (DE30, ¶¶ 32-33). The Police Chief advised the City Manager to place a hold on the decision to suspend Commander Hollant and to listen to the radio transmissions, which Chief Eugene was holding in his hand (DE30, ¶ 32-33). The City Manager responded with fury and declined to change his decision, much less even listen to the radio transmission (DE30, ¶ 33). The City Manager explained that the media was already aware of the City's suspension decision (DE30, ¶ 33). The City Manager ordered Chief Eugene to relieve Commander Hollant of duty and waited in Chief Eugene's office until the Chief did so (DE30, ¶ 34).

4) Later that same day, the City launched an internal affairs investigation to create the veneer that Hollant was guilty (DE30, ¶ 50), and suspended him without pay (DE30, ¶ 34), announcing it on a nationally-televised press conference (DE30, ¶ 37). During this conference, City Manager Spring accused Commander Hollant of fabricating information about the shooting by lying about his whereabouts when the shots were fired (DE30, ¶ 38). At that same press conference, North Miami Councilman Scott Galvin falsely and maliciously accused Hollant of "betraying the badge" and "jeopardizing the lives" of fellow officers (DE30, ¶ 40). Hollant was not given notice and an opportunity to be heard (DE30, ¶ 35). Nor was he ever given an opportunity to address the false allegation that he betrayed the badge and jeopardized the lives of his fellow officers (DE30, ¶ 123).

5) The national and local media attention triggered a Miami-Dade County State Attorney (SAO) investigation into whether Hollant lied or intended to mislead or obstruct investigators (DE30, ¶ 42). Importantly, the SAO did far more than just decline to file charges. After hearing from Hollant (DE30, ¶¶ 43-45), the SAO issued its closing memorandum declaring

that there was insufficient evidence to generate even a formal criminal investigation (DE30, ¶ 45).[1] The SAO detailed its reasoning in an August 2, 2016 memorandum: "Commander Hollant did not lie, and [ ] there was no evidence of intent by Commander Hollant to mislead or obstruct investigators or command staff officers regarding his involvement in the police shooting and that **any discrepancy was the result of a miscommunication**." (DE30, ¶ 45) (emphasis added).

6) This did not stop the defendants' targeted efforts to malign Hollant's character and to destroy what was his unblemished law enforcement career. On August 22, 2016, the City placed Hollant on indefinite administrative leave with pay, a virtual house arrest (DE30, ¶¶ 47, 77). Hollant opposed the employment action.

7) The City continued its unrelenting plan to destroy Hollant's career by concocting its own "investigation." Toward the conclusion of its investigation, the Police Department brought additional testimony to the SAO on February 27, 2017. In two communications delivered to the SAO on April 5 and April 14, 2017, Sgt. Roman asked the SAO to amend or retract its Closeout Memo that found there was insufficient evidence to initiate a formal criminal investigation into whether Hollant made a false statement (DE30, ¶¶ 48-49). Specifically, Sgt. Roman sought to amend the memo to eliminate the SAO's explicit conclusion: "We concluded that Commander Hollant did not lie." (DE30, ¶ 49).

8) The SAO refused the City's request (DE30, ¶ 49), instead confirming its original finding that Hollant did not lie and that there was not enough evidence to initiate a formal criminal investigation.

9) The City also ignored the conflicting recommendations of law enforcement tasked

[1] The SAO stated: "there is insufficient evidence in this matter to generate a formal criminal investigation." (DE1, ¶ 41).

with recommending what if any adverse personnel actions should be taken against Commander Hollant. When Major Tim Belcher received the Disposition Panel's erroneous finding that Commander Hollant obstructed the law enforcement investigation by making false statements, he only recommended that Commander Hollant be demoted to the rank of Sergeant (DE30, ¶¶ 64-65). Then-Assistant Chief of Police Neal Cuevas submitted a contrary recommendation, disagreeing with the Major's recommendation. Assistant Chief Cuevas explained: "IA's Panel's finding was not substantiated by the statements and evidence. . . . I do not agree with Major Belcher's recommendation. His interpretation of the facts in this case is flawed." (DE30, ¶ 66). Within a year of this opposition, Assistant Chief Cuevas was demoted to Sergeant (DE30, ¶ 67).

10) The City replaced Chief Eugene with Larry Juriga, who pursued Commander Hollant's termination. Acting Chief Juriga ignored Major Belcher's recommendation and Assistant Chief Cuevas' objection, instead informing Hollant that he intended to terminate Hollant's City employment (DE30, ¶¶ 68-69).

11) Hollant's suspension without pay, suspension with pay, and other adverse workplace actions were unjustified and violated Hollant's rights.

STANDARD OF REVIEW

12) The standard for granting a motion to dismiss is high, considering that "A motion to dismiss is granted only when the movant demonstrates 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Spain v. Brown & Williamson Tobacco Corp*., 363 F.3d 1183, 1187 (11th Cir. 2004) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102 (1957)). For this reason, every defendant "Bears the 'very high burden' of showing that the plaintiff cannot conceivably prove any set of facts that would entitle him to relief." *Beck v. Deloitte & Touche, Deloitte, Haskins & Sells, Ernest & Young, L.L.P.*, 144

F.3d 732, 735-36 (11th Cir. 1998) (quoting *Jackam v. Hospital Corp. of Am. Mideast, Ltd.*, 800 F.2d 1577, 1579 (11th Cir. 1986)). "The Court is required to take the material allegations of the Complaint as true," and "construe those allegations literally in favor of the Plaintiff." *Fundiller v. City of Ft. Lauderdale*, 777 F.2d 1436 (11th Cir. 1985).

13) As much as the City would prefer that Hollant plead the entirety of his case (and not just a *prima facie* case) in the Complaint, he is not required to plead his way to victory. Rule 8(a) of the Federal Rules of Civil Procedure only requires that the Complaint "must provide fair notice of what the plaintiff's claims are and the grounds upon which they rest." *Conley v. Gibson*, 355 U.S. 41 (1957); *Brown v City of Ft. Lauderdale*, 923 F.2d 1474 (11th Cir. 1991). Commander Hollant has met and exceeded that standard.

MEMORANDUM OF LAW

I. Counts I-IV State Viable Causes of Action.

14) Counts I-IV allege § 1983 due process violations in connection with actions of the City of North Miami. The Police Department is a division of the City; City Manager Larry Spring is the chief administrative officer; Scott W. Galvin is a City Councilman. The FAC furnishes clear factual specifics supporting the claims raised.

15) **Count I**: City Manager Spring, City of North Miami, and Juriga violated Hollant's property interest in his continued employment by suspending Hollant without pay, placing him on paid administrative leave, and terminating him (DE30, ¶ 104) without sufficient notice and without a meaningful opportunity to be heard (DE30, ¶¶ 72, 107-11).

16) **Count II**: The City violated Hollant's liberty interest in his reputation by making false statements impugning his good name and reputation in pursuing his unlawful and retaliatory discharge (DE30, ¶¶ 119-) without a meaningful name-clearing hearing (DE30, ¶ 122).

17) **Count III**: City Manager Spring violated Hollant's liberty interest in his reputation

by making false statements impugning Hollant's good name and reputation (DE30, ¶¶ 129-30) in connection with Hollant's administrative suspension without pay, suspension with pay, and ultimate termination (DE30, ¶ 131).

18) **Count IV**: Galvin violated Hollant's liberty interest in his reputation by knowingly and maliciously making false statements in his individual, non-privileged capacity (DE30, ¶ 139) concerning Hollant's discharge (DE30, ¶¶ 137-39). Galvin's statements were knowingly made with reckless disregard for truth or falsity and with the malicious intent to harm Hollant's reputation and ability to obtain future employment (DE30, ¶¶ 140-41).

A. Commander Hollant Alleges His Pre-Determination Hearing Was Not Meaningful.

The defense first contends that Count I should be dismissed because Hollant received a pre-determination hearing (DE32:3). The argument is confusing and misreads the complaint. The FAC clearly alleges that Hollant received no pre-determination hearing before his suspension without pay and the administrative leave with pay, wherein Hollant was placed on house arrest (DE30, ¶ 104). To be sure, the City Manager refused to take a few minutes to listen to the radio transmissions before suspending Hollant for lying and never gave him a constitutionally sufficient opportunity to defend himself against claims made by the City Manager and Councilman Galvin.

The defense motion only targets the alleged pre-determination hearing held before Hollant's termination, but that hearing was inadequate (DE30, ¶¶ 70, 110-11). Hollant was given no opportunity to cross-examine the witnesses against him, the hearing was not before a neutral panel, and Hollant was not afforded a full post-termination hearing with the Personnel Review Board (DE30, ¶¶ 71-72, 110-11). The defense rightly has not contested the allegations that the hearing was not before a neutral arbiter. Because Florida law offered Hollant no remedy to appeal the City's decision (DE30, ¶¶ 74-75), he was entitled to a fair and neutral process. *Rico v. Sch. Bd.*

of Miami-Dade County Pub. Sch., 733 F. Supp. 2d 1319, 1331 (S.D. Fla. 2010). To be sure, the City reneged on its earlier position that he was entitled to a full post-termination hearing before the panel.

Moreover, under the facts alleged in the FAC, there can be no meaningful contention that Hollant received a fair hearing. Under no set of circumstances should Hollant have been terminated. The SAO twice determined Hollant did not lie and that there were insufficient facts to even open an investigation. Major Belcher recommended that Hollant only be demoted, while dissenting voices within the police department believed no action should be taken. Not to be forgotten is the City's Civil Service Rules, which provide that if an employee is separated from an unclassified position, the employee shall be returned to the position and classification held in the classified service immediately prior to becoming an unclassified employee. Rule IX(F), North Miami Civil Service Rules (DE30, ¶ 100). Thus, under the City's Civil Service Rules, Hollant should have been returned to unclassified service.

The defense suggestion that the City is not required to provide an opportunity to cross-examine witnesses is perplexing. The right to cross-examine is even accorded to individuals who do not have a property interest in their continued employment. *Id*. at 1345; *McCall v. Montgomery Hous. Auth.*, 809 F. Supp. 2d 1314, 1324 (M.D. Ala. 2011) ("In order to terminate such a protected property interest, due process requires (1) timely and adequate notice, including the reasons for the proposed termination, (2) an opportunity to be heard at a pre-termination hearing, including the right to present evidence and confront and cross-examine witnesses, (3) a right to be represented by counsel at the hearing, (4) a written decision, including the reasons for the determination and the evidence on which the decision maker relied, and (5) an impartial decision maker.").

"The purpose of such a [pre-deprivation] hearing is to prevent a substantively unfair or mistaken deprivation of the claimant's interest." *Campbell v. Pierce County, Ga. By & Through Bd. of Com'rs of Pierce County*, 741 F.2d 1342, 1344–45 (11th Cir. 1984); *Gilbert v. Homar*, 520 U.S. 924, 929 (1997) (explain that "a public employee dismissable only for cause was entitled to a very limited hearing prior to his termination, to be followed by a more comprehensive post-termination hearing"). The process provided by the City did not come close.

B. Under The Complaint Allegations, Commander Hollant Did Not Receive An Adequate Opportunity To Clear His Name.

The defense's second argument targets the liberty interest violations alleged in Counts II-IV. Misreading the complaint, it argues that Hollant's allegation that he had a pre-determination hearing negates his claim of not receiving a "name clearing" hearing. In truth, the FAC asserts Hollant did not have a *meaningful* name-clearing hearing:

> 122. The Defendant City provided Commander Hollant no meaningful opportunity for a name clearing hearing. He was given a Pre-Determination Hearing, but he was not given the opportunity to cross-examine any witnesses.
>
> 132. The Defendants City and Spring provided Commander Hollant no meaningful opportunity for a name clearing hearing.

As the defendants concede in their own memorandum of law, the opportunity to clear one's name must be meaningful and give the plaintiff an opportunity to clear one's reputation (DE32:5). "While the features of such a hearing itself have been prescribed with substantial flexibility, courts have required that the claimant have notice of the charges which have been raised against him, and an opportunity to refute, by cross-examination or independent evidence, the allegations which gave rise to the reputational injury." *Campbell*, 741 F.2d at 1345.

Looking to the four corners of the FAC, sufficient facts demonstrate Hollant was not given a meaningful opportunity to clear his reputation. Accepting the allegations as true and drawing all inferences in favor of the plaintiff, Hollant was never given an opportunity to address the most

serious and slanderous claims made to the national media in connection with his dismissal. He was never given notice and an opportunity to address the City Manager and Councilman Galvin's claims that he betrayed the badge and jeopardized Mr. Kinsey's life, the life of Kinsey's client, and the life of every police officer serving in the City of North Miami (DE30, ¶ 123). For the remaining claims for which he did receive notice, he was given no opportunity to cross-examine any witness. *See Johnston v. Borders*, 17-10642, 2018 WL 798421, at *3 (11th Cir. Feb. 9, 2018) (name clearing hearing inadequate, in part, where plaintiff "had no opportunity to cross-examine adverse witnesses or rebut their claims").

Finally, not to be forgotten is the unfairness of the process. The Police Department postponed its investigation to await the determination by the SAO and the FDLE on whether Hollant lied (DE30, ¶ 53). The City received the results but ignored them. It continued with its own investigation aimed at justifying the City Manager's decision to unlawfully place Hollant on administrative leave without pay. The City sent repetitive information to the SAO asking it to withdraw its conclusion that Hollant did not lie (DE30, ¶¶ 48-49). The SAO refused, instead reiterating its original finding that there was insufficient evidence to initiate an investigation (DE30, ¶ 49). The City did not just ignore the State Attorney, the City ignored Major Belcher's recommendation that Commander Hollant only be demoted to Sergeant, and it also ignored Assistant Chief Cuevas's opposition, going as far as to demote Cuevas within a year of the recommendation (DE30, ¶¶ 64-67).

The cases cited by the defense are summary judgment cases that do not provide support for the dismissal motion. *Wilson v. Farley*, 203 Fed. Appx. 239, 249 (11th Cir. 2006); *Lapham v. Fla. Dept. of Corr.*, 2009 WL 151161, *2 (S.D. Fla. 2009); *Dressler v. Jenne*, 87 F. Supp. 2d 1308, 1317-18 (S.D. Fla. 2000). Furthermore, unlike *Wilson*, 203 Fed. Appx. at 249, Hollant had no

opportunity to initiate an appeal with the personnel review board. The City reneged on its earlier position that Hollant would be given a full hearing before the City's personnel review board (DE30, ¶¶ 74-76).

Discovery is needed to discover the factual specifics, including the lack of an opportunity to cross-examine Hollant's witnesses and the entire absence of transparency. *Gunasekera v. Irwin*, 551 F.3d 461, 470 (6th Cir. 2009) (agreeing with the Second Circuit that under certain circumstances, "requiring that name-clearing hearings involve some form of publicity would not necessarily put an undue burden on the government").

C. The Complaint Sufficiently Pleads A § 1983 Claim For Municipal and Individual Liability.

The defense pertinaciously argues that Counts I and II fail to support a claim for municipal liability because there is insufficient evidence of a policy, practice, and custom (DE32:6-8). Its pleadings continue in failing to address the final policymaker theory of liability. In the Eleventh Circuit, "municipal officials who have 'final policymaking authority' may subject the municipality to section 1983 liability for their actions." *Martinez v. City of Opa-Locka, Fla.*, 971 F.2d 708, 713 (11th Cir. 1992) (quoting *Bannum, Inc. v. City of Fort Lauderdale*, 901 F.2d 989, 997 (11th Cir. 1990)). Importantly, Hollant need not "identify[] and prov[e] that a final policymaker acted on behalf of a municipality" because it "is 'an evidentiary standard, and not a pleading requirement.'" *Hoefling v. City of Miami*, 811 F.3d 1271, 1280 (11th Cir. 2016) (quoting *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 510 (2002)); *Williams v. Fulton County Sch. Dist.*, 181 F. Supp. 3d 1089, 1125 (N.D. Ga. 2016) ("Plaintiffs need not identify who precisely was the final policymaker in their Complaint, because that inquiry is "fact sensitive" and requires development of the record.").

The defense is aware that the City is a commission-manager system of local government under which City Manager Spring has final-decision making authority. The FAC so alleges (DE30,

¶81). The Eleventh Circuit has acknowledged that the city manager of the City of Opa-Locka has final policymaking authority. *Martinez*, 971 F.2d at 713-15 (finding final policymaking authority where "the City Manager's decision to hire or fire administrative personnel is completely insulated from review"). Still, the allegations of the City's custom or practice are sufficiently alleged, with the defense motion actually conceding it has a policy of now granting its councilmen authority to grant name-clearing hearings when the officials make damaging remarks to the media, in connection with a public employee's dismissal (DE32:11).

Because Counts I & II allege municipal liability, the motion to dismiss should be denied.

D. The Complaint Asserts Spring, Galvin, and Juriga Are Not Entitled to Qualified Immunity.

The defense next argument asks the Court to dismiss the actions against Spring, Juriga, and Galvin to the extent the FAC seeks an action against them in their official capacities. The motion concedes that a § 1983 action may be asserted against government officials in both their individual and official capacities (DE32:8-9). But it argues that it is appropriate to dismiss the named individuals in their official capacity to avoid redundancy and confusion at trial (*Id*.). The argument ignores the fact that the defense has simultaneous moved for dismissal of the City and that the City plans to seek summary judgment after the conclusion of discovery. Plaintiff is entitled to plead in the alternative, and finalize his theory at the appropriate time.

The defense further claims the FAC fails to sufficiently allege Spring, Galvin, and Juriga are not entitled to qualified immunity (DE32:8-11). In support thereof, the defense claims that "the individual Defendants are accused of doing nothing more than making public statements about the termination of Plaintiff's employment and granting Plaintiff a pre-determination hearing." (DE32:10). This is not so. Spring is accused of recklessly claiming that Hollant lied and obstructed the police investigation during a nationally-televised press conference when he knew that his

police chief had withdrawn his recommendation that Hollant be suspended. Councilman Galvin falsely accused Hollant of betraying the badge and putting people's lives in danger.

The complaint alleges a violation of Hollant's liberty interest in his reputation in Counts II and II, the violation of which was clearly established long before 2016 by *Andreu v. Sapp*, 919 F.2d 637, 645 (11th Cir. 1990). *Andreu* arose from a sheriff's investigation into whether the plaintiff knowingly purchased a stolen gun. After the arrest, the plaintiff was suspended without pay. Although charges were dropped, he was nonetheless discharged from his position. During the period between the dropping of charges and the termination, the defendants uttered stigmatizing statements to the media. *Id*. at 643. The Eleventh Circuit concluded it was clearly established law that false and stigmatizing statements violated an individual's liberty interest in his reputation when made in connection with his discharge. *Id*. The Court further concluded that "[i]t should have been clear to the defendants when they made statements about [the plaintiff] pending a decision regarding his employment that the statements were made in the course of his dismissal." *Id*. Finally, the Court held that it was clearly established that the plaintiff was entitled to a name-clearing hearing, even though the State Attorney had dropped charges before the discharge decision was made. *Id*. at 645.

Count I, alleging City Manager Spring and Acting Chief Juriga violated Hollant's property interest in his continued employment, similarly conforms to clearly established law. Hollant was entitled to a reasonable hearing before being suspended *without* pay, since his contract provided he could only be suspended *with* pay pending an investigation. *Hardiman v. Jefferson County Bd. of Educ.*, 709 F.2d 635, 638 n.1 (11th Cir. 1983). "When employees have a protected property interest in continued employment, temporary suspensions without pay are considered deprivations and are evaluated under the same basic framework as permanent actions such as terminations."

Burton v. Alabama Dept. of Agric. & Indus., 587 F. Supp. 2d 1220, 1227 (M.D. Ala. 2008). He was given no opportunity to address the suspension without pay, or the allegations made in support thereof.

E. Galvin Had No Authority To Grant Plaintiff A Name Clearing Hearing.

The defense appears to draw from outside the FAC in arguing Galvin, a member of the City Council, could not grant a name-clearing hearing. Still, the argument effectively concedes the City has a policy and practice of restricting employees from having name-clearing hearings. As a matter of policy, its officials who publicly make false and defamatory statements in the context of an employee's dismissal are not empowered to provide those same officials with a name-clearing hearing.

II. Hollant States a Claim for Relief in Counts V, VI, and VII.

A. Count V — Whistleblower Act Violation.

Count V alleges a claim under Florida's Whistleblower Act, a legislative enactment to "prevent agencies . . . from taking retaliatory action against an employee who reports to an appropriate agency violations of law on the part of a public employer . . . that create a substantial and specific danger to the public's health, safety, or welfare." § 112.3187(2), Fla. Stat. The defense argument that Hollant failed to identify the specifics of his disclosure ignores that the allegations supporting Count V are not limited to paragraphs 116-28 (DE1312). Instead, paragraphs 73-74 detail the disclosures forming the basis of the whistleblower count (DE30, ¶¶ 73-74):

> 155. In his FDLE investigative interview on August 11, 2016, Commander Hollant disclosed that Milton Reed drove Officer Aledda, the shooting officer and the subject of the investigation, to his house; that individuals within the police department were trying to shift the blame from Aledda to him by making false statements; and that the local investigation into the police shooting was led by a person with a conflict of interest.
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> 156. In his January 2017, MDCOE complaints, Commander Hollant disclosed that the investigation into the shooting may not be objective, as demonstrated by their

> failure to observe standard operating procedures in pursuing the shooting investigation.

The defense further argues that there can be no whistleblower complaint protection because Commander Hollant did not make his protected disclosure to defendant City Manager Spring (DE32:12). The statute is not so. It only requires that a disclosure be made to the "chief executive officer . . . or other appropriate local official." § 112.3187(6), Fla. Stat. The "other appropriate local official" is for circumstances like this when the chief executive local official is part of the offending conduct. The First District Court of Appeal, reviewing Florida court decisions and Attorney General Opinions, concluded, "the person or entity deemed to be an 'other appropriate local official' was [is generally] affiliated with the local government in some way." The Miami-Dade Commission on Ethics & Public Trust is an affiliated entity of the City of North Miami with jurisdiction to review and enforce the City's Code of Ethics Ordinances. § 2-1072(a) Miami-Dade County Code. *See* Op. Att'y Gen. Fla. 96–40 (1996) (finding city's ethics commission was appropriate local official under statute because it could investigate and take corrective action).

Similarly, the Florida Department of Law Enforcement is an appropriate local authority, because the City has delegated to the FDLE the authority and power to investigate police-involved shootings. *Harris v. Dist. Bd. of Trustees of Polk Cmty. Coll.*, 9 F. Supp. 2d 1319, 1328 (M.D. Fla. 1998) (reporting conduct to the FDLE constituted the "appropriate local official" in satisfaction of § 112.3187(6)). The City simply cannot delegate to the FDLE the authority to investigate police-involved shootings and then claim in federal court that the FDLE is not an affiliated entity.

The defense finally makes the novel argument that Hollant's report to the FDLE does not account because he was a subject of the investigation (DE32:13). The argument is quite perplexing. Commander Hollant was only a target of the investigation because of the defendants' lack of objectivity and failure to observe standard operating procedures in pursuing the shooting

investigation. The defense is hard pressed to argue that Hollant could not report the City's malfeasance to the FDLE, simply because he was a victim of the City's malfeasance.

B. Count VI.

Count VI asserts discrimination. Hollant claims he was "being discriminated against because he is a Haitian-American who complained about white and Hispanic police officers not being objective in their investigation of an incident involving a black citizen." (DE30, ¶ 93). The defense argues that Hollant failed to allege he suffered an adverse employment action or that he was treated less favorably than a similarly situated person outside his protected class (DE32:14).

First, Hollant alleges he was suspended without pay on July 22, 2016, and ultimately terminated (DE30, ¶¶ 73, 161-62). "There is no question that [Hollant's] suspension without pay constitutes an adverse employment action." *Rogers v. Shinseki*, CV 112-194, 2014 WL 5643473, at *4 (S.D. Ga. Nov. 4, 2014); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998) (one-day suspension constituted an adverse employment action for purposes of an employment retaliation claim). As does his termination (DE30, ¶ 73).[2]

Second, the complaint identifies Officer Aledda as a similarly-situated person:

> 163. Officer Aledda, a non-Haitian American, received different treatment and was more than similarly situated.
>
> 164. Although Officer Aledda was the shooter and radio communications demonstrated he should have known the alleged victim of the shooting was merely holding a toy gun, he was placed only on administrative leave.
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> 165. Officer Aledda remained on administrative leave with pay even after being arrested and charged with attempted manslaughter and culpable negligence for his role in the shooting on April 12, 2017. Under the Collective Bargaining Agreement, the City was authorized to suspend him without pay because of the filing of an information or indictment charging him with a felony. Article 17(M), *Agreement Between City Of North Miami, Florida And Dade County Police Benevolent*

[2] The termination occurred while this complaint was pending and the plaintiff is filing a proper EEOC action raising the termination.

Association.

The FAC alleges that the difference in treatment was because of Hollant's national origin (DE30, ¶ 166).

C. Count VII.

Count VII alleges infliction of emotional distress against City Manager Spring, Acting Chief Juriga, Councilman Galvin, and Sgt. Roman (DE30, ¶ 133). The defense again overlooks that Hollant incorporated detailed factual allegations into the individual counts (DE13:13). The defense claims that the complaint does not include facts showing outrageousness ignores the complaint details, citing only the allegations contained in paragraphs 168-73 (DE32:17). The motion to dismiss does not address the outrageous conduct alleged in paragraphs 1 through 99, which Commander Hollant was not required to regurgitate in every count to survive a motion to dismiss.

III. Count VIII — Galvin Is Not Entitled to Absolute Immunity.

Count VIII alternatively alleges slander against Galvin in connection with malicious false statements uttered against Hollant (DE30, ¶¶ 174-81). Paragraphs 40 and 63 detail the statements:

> 40. At that same July 22, 2016 conference, North Miami Councilman Scott Galvin falsely accused Commander Hollant of "betraying the badge" and "jeopardizing the lives" of his fellow officers. The press conference was broadcast worldwide and is published on the CNN link: http://www.cnn.com/videos/us/2016/07/22/charles-kinsey-north-miami-shooting-presserbts.wplg.
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> 63. Around June 2017, Galvin posted and published on his personal website that "Earlier today, the City of North Miami announced they are terminating the employment of Commander Emile Hollant who was present at last summer's shooting of unarmed caretaker Charles Kinsey." And also "He Lied to Me, the Commander Completely Lied to Me". www.scottgalvin.com.

The defense concedes Galvin is only entitled to absolute immunity if the communications were within the scope of his duties (DE30:18). Yet, the dismissal motion struggles to articulate how Galvin's comments fell within the scope of his responsibilities, since they were done via his

personal website (DE13:18). The defense attaches a portion of the City's charter outlining the responsibilities of the Council, but excludes the provisions defining the City Manager's responsibilities. The Charter is not a part of the Complaint and cannot be considered in this motion. But a review of it nonetheless confirms Galvin was not in charge of or allowed to be involved in hiring or firing decisions. Article IV, Section 21(2) of the City Ordinance empowers the City Manager to appoint and remove all employees. The FAC absolutely alleges the email was not an official city record and is not part of the public record (DE30, ¶ 178). Furthermore, should the City contend Galvin's slanderous remarks that Hollant betrayed the badge and jeopardized the lives of his fellow officers was not an official statement for which the City is responsible, Galvin would be personally liable. Indeed, the City has already made this apparent inasmuch as it has argued the Councilman had no authority to grant Hollant a name hearing (DE32:11). Hollant is no doubt entitled to bring this allegation in the alternative.

The First District Court of Appeal, under similar facts, rejected a County Commissioner's absolute immunity defense. *Albritton v. Gandy*, 531 So. 2d 381, 387 (Fla. 1st DCA 1988). In *Albritton*, the commissioner "argue[d] that the statements he made and actions he took regarding [the plaintiff] were within the scope of his authority." On review of the record evidence, the Court determined that "this [wa]s not true." *Id*. "The statements made by [the commissioner] were not made while [he] was exercising an official duty. [The commissioner] was not in charge of hiring or firing, and thus, there was no official purpose for [the Commissioner]'s statements regarding Gandy's county employment." *Id*.

Galvin's identical lack of authority to hire and fire means he was not exercising any official or pursuing any purpose when issuing his statements. He is not entitled to absolute immunity.

CONCLUSION

For all these reasons, the Court should deny the defendants' motion to dismiss and order

an answer to the FAC.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that on April 9, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify the foregoing document is being served this day on all counsel of record either via transmission of Notices of Electronic Filing generated by CM/ECF or in another authorized manner for those counsel or parties not authorized to receive electronically Notices of Electronic Filing.

By: *S/ Benedict P. Kuehne*
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