UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CHRISTIAN F. MEISTER,

Plaintiff,

v. CASE NO. 2:06-CV-444-FTM-34SPC

LEE COUNTY (FL) SHERIFF'S OFFICE, MIKE SCOTT, in his individual capacity as Sheriff of the Lee County (FL) Sheriff's Office, each of J.J. CARROLL, RICHARD SNYDER, RYAN JUSTHAM, STEPHAN PIERCE, GENE SIMS, PEDRO SOTO, MIKE JOHNSTON, each of the foregoing, jointly and severally,

Defendants.
_________________________________/

DEFENDANT SCOTT'S MOTION TO FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

COMES NOW Defendant MIKE SCOTT in his official capacity as Sheriff of Lee County, Florida and MIKE SCOTT in his individual capacity as Sheriff of Lee County, Florida, by and through his undersigned counsel, and pursuant to Rule 56(c) of the Federal Rules of Civil Procedure and files its Motion for Summary Judgment and states as follows:

1. Plaintiff, a male of Austrian national origin, brings the instant action pursuant to 42 U.S.C. § 1983 seeking redress for various alleged constitutional violations including national origin and gender discrimination arising out of his attendance at the Southwest Florida Public Service Academy (hereinafter "Academy") in 2005. Additionally, Plaintiff asserts a number of tort claims under Florida law including libel, slander, fraud and wrongful interference with employment relationship as well as claims for breach of contract and for violation of 29 U.C.S. 1132 "ERISA". Plaintiff's federal and state law claims are all premised upon alleged disparate

treatment by his instructors and fellow recruits at the Academy as well as his contention that he was unjustly given unfavorable performance evaluations by said instructors.

2. Against Defendant Mike Scott, individually and in his official capacity as Sheriff of Lee County, Plaintiff asserts the following claims:

a. Count 9-10, 26-28- §1983, Civil Rights Act of 1964, and Florida Civil rights Act. Discrimination on basis of Gender stereotyping in violation of the 14th Amendment, Civil Rights Act of 1964, and Florida Civil rights Act;

b. Count 11-13- §1983, Civil Rights Act of 1964, Civil Rights Act of 1871, and Florida Civil rights Act. Discrimination on the basis of national origin stereotyping in violation of the 14th Amendment, Civil Rights Act of 1964, and Florida Civil rights Act

c. Count 17-19- §1983, Civil Rights Act of 1964, and Florida Civil rights Act, "disparate treatment" in violation of the 14th Amendment, Civil Rights Act of 1964, and Florida Civil rights Act;

d. Count 32-34 §1983, Civil Rights Act of 1964, and Florida Civil rights Act, "disparate treatment" gender discrimination in violation of the 14th Amendment, Civil Rights Act of 1964, and Florida Civil rights Act;

e. Count 37-39- §1983, Civil Rights Act of 1964, and Florida Civil rights Act, Hostile work environment gender discrimination in violation of the 14th Amendment, Civil Rights Act of 1964, and Florida Civil rights Act;

f. Count 47-49- §1983, Civil Rights Act of 1964, and Florida Civil rights Act, Retaliation in violation of the 14th Amendment, Civil Rights Act of 1964, and Florida Civil rights Act;

g. Count 50-51- Wrongful Termination; Breach of Contract for Violation of Agreement, Breach of the Covenant of Good Faith and Fair Dealing in Employment Contract;

h. Count 52 - Breach of Contractual Agreement - Money unlawfully withheld from paycheck;

i. Count 68-71, 73, 76-80, 84-87, 88-91 - §1983, Civil Rights Act of 1964, and Florida Civil Rights Act; Violation of Procedural Due Process on basis of a protected property interest and property interest in education; failure to provide pre and post termination hearing.

j. Count 92-93, 96 - §1983, Civil Rights Act of 1964, and Florida Civil Rights Act; Violation of Substantive Due Process on basis of a protected property interest and property interest in education; failure to provide pre and post termination hearing.

k. Count 97-99, 100-101 - §1983, Civil Rights Act of 1964, and Florida Civil Rights Act, Violation of the Equal Protection Clause of the 14th Amendment;

l. Count 103 - §1983, Civil Rights Act of 1964, and Florida Civil Rights Act; Failure to Train;

m. Count 104-105 - False Light;

n. Count 114-115- Libel and slander;

o. Count 131-132, 134-135, 138-139 - §1983, Violation of the liberty clause of the 14th Amendment;

p. Count 141-142- §1983, Violation of the First Amendment, "Pursuit of Occupation";

q. Count 143, 145 - Fraud;

r. <u>Count 144</u> - Violation of "ERISA";

s. <u>Count 146</u> - Violation of Florida Statutory Law; Unpaid Wages; and

t. <u>Count 147</u> - Violation of Federal Statutory Law; Unpaid Wages.

3. Plaintiff has failed to provide any evidence to support a claim against Defendant Scott, in his individual capacity because Plaintiff has failed to allege, or provide any evidence of an act undertaken by Scott that violates any right of Plaintiff's. Defendant SCOTT, individually, is not an employer subject to liability under Title VII or the Florida Civil Rights Act. (Counts 11, 17, 26, 32, 37, 47, 50, 52, 68-71, 76-79, 84-87, 88-91, 92-93, 96-101, 105, 122, 132, 135, 139, 142, 143, 145).

4. Plaintiff has failed to provide any evidence to support his claim under §1983 against Defendant Scott as Plaintiff has failed to provide evidence of a underlying constitutional violation. Even assuming arguendo a constitutional violation occurred, Plaintiff has failed to provide evidence of a custom, policy or practice attributed to Defendant Scott in his official capacity which caused the alleged constitutional violation. Moreover, there is no evidence to show that Defendant Scott was a policy maker for the Academy, let alone evidence that Defendant Scott actually promulgated an offending policy, custom or practice for the academy. (Counts 9-13, 17-19, 26-28, 32-34, 37-39, 47-49, 68-71, 73, 76-80, 84-93, 96-101, 103, 131-132, 134-135, 138-139, 141-142).

5. Plaintiff has failed to provide any evidence to support his claims against Defendant Scott, for wrongful termination and "Beach of the Covenant of Good Faith and Fair Dealing in Employment Contract." Plaintiff testified that he did not have a written contract of employment with the Lee County Sheriff's Office ("LCSO") and has not provided evidence of an oral contract of employment between the LCSO and Plaintiff. Further, Plaintiff has provided no

evidence to support his claim for "Beach of Contractual Agreement -money unlawfully withheld from paycheck." In fact, the only evidence provided by Plaintiff clearly contradicts his allegations. In the signed tuition/training cost agreement attached as Exhibit "1" to the 5th Amended Complaint, Plaintiff clearly provides authorization to the LCSO to withhold funds from Plaintiff's paycheck. (Counts 50-52).

6. Plaintiff has failed to provide any evidence to support his claim against Defendant Scott for "Violation of Florida Statutory Law; Unpaid Wages" and once again, the only evidence provided by Plaintiff contradicts his claim. Plaintiff signed Exhibit "1" to the 5th Amended Complaint which specifically authorizes the LCSO to withhold funds from Plaintiff's payroll checks for total training costs and expenses. Even if Exhibit one did not exist, Plaintiff's claim under Florida law for wages would still be barred by the statute of limitations. (Count 146).

7. Plaintiff has failed to provide evidence to support his claim against Defendant Scott for "Violation of Federal Statutory Law; Unpaid Wages" and, as stated above, has actually provided evidence that contradicts his claim. Plaintiff signed Exhibit "1" to the 5th Amended Complaint which specifically authorizes the LCSO to withhold funds from Plaintiff's payroll checks for total training costs and expenses. (Count 147).

8. Plaintiff has failed to provide any evidence to support his claim against Defendant Scott under § 1983 for alleged retaliation premised on the equal protection clause of the 14th Amendment as such provision does not prescribe a right to be free from retaliation. (Counts 47-49).

9. Plaintiff has failed to provide evidence to support his claim of vicarious liability against Defendant Scott for alleged false light, libel and slander. Defendant Scott is entitled to summary judgment for four independent reasons: (1) the alleged communications on which the

claims are based were absolutely privileged; (2) Plaintiff has failed to provide written notice of his claims against Defendant Scott in his official capacity in accordance with Fla. Stat. § 768.28(6)(a); (3) Plaintiff asserts that the alleged false communications made by Defendants Snyder, Justham, Pierce, Sims, Soto, and Johnston were willfully, wantonly and maliciously made, therefore the imputing of liability to Defendant Scott in his official capacity is precluded pursuant to Fla. Stat. § 768.28(9)(a); and (4) there is no evidence that Defendant Scott in his official capacity was Defendant Pierce, Sims, Soto, or Johnston's employer for purposes of their work at the Academy, thus there can be no respondeat superior liability imputed to Defendant Scott. (Counts 104-105, 114-115, 121).

10. Plaintiff has failed to provide any evidence to support his claims under § 1983 against Defendant Scott for failure to train. First, as previously stated, Plaintiff has not provided any evidence that Defendant Scott was a policy maker for the Academy, let alone evidence that Defendant Scott actually promulgated an offending policy, custom or practice for the academy. Second, assuming, for the sake of argument, that Defendant Scott was the policy maker for the Academy, Plaintiff has failed to provide any evidence that Defendant Scott knew of a need to train and/or supervise the LCSO employees in a particular area and then made a deliberate choice not to take any action. (Count 103).

11. Finally, Plaintiff has failed to provide any evidence to support his claim against Defendant Scott for a violation of 29 U.S.C. 1132 ("ERISA"). Plaintiff has not attached to the complaint a copy of the ERISA plan upon which his claim is based or recited the applicable provisions such that the Court can determine whether he has standing, is vested, and could be entitled to the relief he claims. Additionally, assuming, for the sake of argument that Plaintiff is vested in a plan, has standing and is entitled to the relief he claims, Plaintiff has failed to provide

any evidence that he has exhausted his available administrative remedies as is required prior to commencement of a Federal action. (Count 144).

12. Based on the facts, as supported by the Affidavits of Defendants Scott, Pierce, Sims, and Soto, the deposition of Defendant Pierce and Plaintiff Meister, and Plaintiff's 5th Amended Complaint, there are no genuine issue of material fact and Defendants Snyder, Justham, Pierce, Sims, Soto, and Johnston are entitled to summary judgment as a matter of law.

MEMORANDUM OF LAW

I. FACTS

Plaintiff Meister applied to the LCSO on March 29, 2004. Plaintiff Meister was admitted into the training program and began classes at the Academy in January of 2005. (Deposition of Plaintiff, 77:24-25, 78:1).

The Academy: The Criminal Justice Standards and Training Commission governs the 41 state certified criminal justice academies throughout the state. The Commission breaks down the 41 academies into 16 regions. Region 10 is comprised of Collier, Lee, Charlotte, Hendry and Glades Counties. The regional counsel does not have any regulatory authority for day to day operations of the academies. (Aff. of Mike Scott, Sheriff of Lee County)

The Defendants: Defendant Scott is the Sheriff of Lee County and was not involved with the day to day running of the Academy and did not promulgate policies and procedures for the Academy. (Aff. of Scott). Defendant Pierce at all times relevant, was the LCSO's Academy Recruit Commander whose duty it was to evaluate all Academy personnel sponsored by the Lee County Sheriff's Office to make sure that the cadets graduating from the Academy had the qualifications and received the training necessary to safely perform the job of a law enforcement officer for the LCSO. (Aff. of Pierce¶ 3). Pierce also worked at the Academy, which is operated

through the Lee County School Board. (Aff. of Pierce¶ 3). Part of Defendant Pierce's duties as liaison to the Academy included the monitoring of cadets, including Plaintiff, to ascertain their qualifications and suitability for the position of law enforcement officer with LCSO. (Aff. of Pierce¶ 4).

Defendants Soto, Sims and Johnston were employees of the LCSO. Separate and apart from their duties with the LCSO they provide training and instruction to the cadets at the Academy through the Lee County School Board. (Aff. of Soto, ¶ 3, Aff. of Sims, ¶ 3). Defendant Soto was the Lead Instructor at the Academy and taught the "First Responder" training block to Plaintiff. (Aff. of Soto, ¶ 4). Defendant Sims had an opportunity to evaluate Plaintiff's performance while at the Academy (Aff. of Sims, ¶ 4). Defendants Snyder and Justham were recruits in the same class as the Plaintiff and did not hold any rank over Plaintiff. (Plaintiff, 166:2-14).

<u>The Agreement:</u> Plaintiff signed an "Academy Tuition/Training Cost Agreement" (the "Agreement") on December 10, 2004 which is attached as Exhibit "1" to Plaintiff's 5th Amended Complaint. (Plaintiff, 57:17-19). Plaintiff understood he was obligated to repay $2,226.00 to the LCSO in the event that he didn't begin work for the Sheriff's Office following completion of training. (Plaintiff, 58:2-25, 59:1, 64:10-14). Plaintiff also admitted that Exhibit "1"did not constitute" a contract of employment" (Plaintiff, 62:20-25, 63:1) and admitted that he did not have a written contract of employment with the LCSO. (Plaintiff, 64:25, 65:1-15). Other than Exhibit "1" Plaintiff was not aware of any other agreement that he signed with the LCSO[1]. (Plaintiff, 67:10-14).

<u>Plaintiff's Performance at the Academy:</u> DEFENSIVE TACTICS: Plaintiff went through Defensive Tactics in February of 2005. (Plaintiff, 98:10-12). Plaintiff admittedly failed a

portion of the Defensive Tactics final. (Plaintiff, 98:14-15, Aff. of Pierce ¶ 6). Plaintiff also failed to double lock the handcuffs on the restraint device portion of the Defensive Tactics block. (Plaintiff, 99:4-7). Defendant Pierce discussed this failure with the Plaintiff and had Plaintiff sign a form stating that Plaintiff can remediate and take the test again. (Plaintiff, 99:8-14). Defendant Pierce told Plaintiff that his "apparent fear, hesitancy, and overly cautious manner in Defensive Tactics prevented Plaintiff from applying his training in a useable technique. (Aff. of Pierce ¶ 6). Plaintiff also failed to properly conduct the physical frisk and physical search portion of the training block (Plaintiff, 99:21-23). It was Defendant Pierce's opinion that Plaintiff Meister lacked the psychomotor skills, attitude, and confidence necessary for success in Defensive Tactics. (Aff. of Pierce, ¶ 6). Plaintiff Meister often became confused and frustrated with the instructors and himself during class. Id. In fact, Plaintiff required an inordinate amount of instructor attention and still had a hard time keeping pace with the rest of the class. Id.

FIRST RESPONDER: While in the "First Responder" block, Plaintiff Meister refused to perform the "lift and drag" test. (Plaintiff, 103:23-25, Aff. of Soto ¶ 5). Plaintiff testified that Defendant Soto told him several times, in front of the group consisting of seven recruits, that he had to do the test. (Plaintiff, 105:8-14). Plaintiff Meister admitted that Defendant Soto did not threaten him in any way (Plaintiff, 118:7-8) nor did Defendant Soto make any statements about Plaintiff's national origin, accent or manliness. (Plaintiff, 118:9-15). After Plaintiff refused to perform the test, Defendant Soto modified the instructions and asked Plaintiff to simply demonstrate the proper positioning for the "lift and drag" and was prepared to give Plaintiff whatever additional time he needed to complete the block but Plaintiff still refused to perform the test. (Aff. of Soto, ¶ 7). According to Plaintiff, the actions of Defendant Soto in repeatedly requesting that Plaintiff perform the test constituted harassment and gender stereotyping.

---

1 Exhibit "1" to Plaintiff's 5th Amended Complaint is also marked as Exhibit "2" to Plaintiff's deposition.

(Plaintiff, 105-9-14, 113:1-4). Yet, Plaintiff Meister admitted that he did not know if Defendant Soto had treated male recruits differently than female recruits (Plaintiff, 113:17-22) and admitted that Defendant Soto asked all the recruits in Plaintiff's group to do the exercise and Plaintiff was the only one that refused. (Plaintiff, 113:23-25, 114:1-4, 213:9-11).

FIREARMS: Defendant Sims, who is familiar with Plaintiff's performance while at the Academy stated that Plaintiff Meister's performance with firearms was marginal at best and that Plaintiff struggled at times and required extra attention to successfully complete the required firearms training. (Aff. of Sims ¶ 4, Aff. of Pierce ¶ 7). Plaintiff failed the written portion of the firearms exam and had to retake the test before passing. (Aff. of Pierce, ¶ 8)

TRAFFIC: Plaintiff also failed the Traffic exam in May of 2005. (Aff. of Pierce, ¶ 8). Plaintiff eventually passed the Traffic exam after being retested. Id.

DEFENSIVE DRIVING: Plaintiff did not exhibit confidence in his ability, constantly questioned his ability, and questioned the instructors to the point that he held the rest of the group back. (Aff. of Pierce, ¶ 9). Plaintiff had to be basically "dragged through the driving block." Id. Plaintiff's performance in High Risk Traffic Stops was average. (Aff. of Pierce, ¶ 11).

MISC. TRAINING: Plaintiff was unable to perform the wheel barrel exercise because his "arms collapsed." (Plaintiff, 95:4-13). In fact during this exercise the other recruits in his class helped him complete the exercise. (Plaintiff, 96:4-5). Plaintiff was terminated on May 18, 2005. (Plaintiff, 215:17).

Defendant Sims, Soto and Pierce did not treat Plaintiff any differently than the other recruits at the Academy. (Aff. of Sims, ¶ 6, Aff. of Soto, ¶ 8, Aff. of Pierce, ¶ 16).

Plaintiff: Plaintiff seemed to struggle with showing up on time and often appeared unshaven and not well groomed. (Aff. of Pierce, ¶ 13). Plaintiff admitted to being late two or

three times (81:8-10) and testified that other recruits were criticized if they were tardy (Plaintiff, 145:6-7) and one recruit even had to do push-ups as punishment for consistently being late. (Plaintiff, 145:9-13). Plaintiff Meister was told that he was not shaven (Plaintiff, 147:17-18) and he admitted that other recruits were also criticized for being unshaven. (Plaintiff, 147:6-9). Plaintiff showed a bad attitude, had a marginal level of performance and was unwilling to socialize with other members of his class, or even eat lunch with them while at the Academy. (Aff. of Pierce, ¶ 13). Plaintiff also refused to wear the LCSO windbreaker or other issued materials showing esprit d'corps. Id. Plaintiff lacked the ability to make the connection between what he should know through his training and class work, and the ability to apply it in a practical setting. Id. Defendant Pierce had numerous counseling sessions with Plaintiff during which Defendant Pierce pointed out some of Plaintiff's problems. Id. In May of 2005 Plaintiff's girlfriend obtained a Domestic Violence Injunction against Plaintiff accusing Plaintiff of battery. (Plaintiff, 32:14-25, 33:1-4). Defendant Pierce believed that Plaintiff did not meet the standards required to become a law enforcement officer with the LCSO. Id. at ¶ 17. Defendant Pierce believed that allowing Plaintiff to continue to work for the LCSO would have placed Plaintiff, other law enforcement officers, and the public at great risk. Id. On May 18, 2005 Plaintiff was terminated (Plaintiff, 42:2).

Harassment: Defendants Snyder and Justham first "harassed" Plaintiff on March 31, 2005. (Plaintiff, 78:18-20). Plaintiff did not make any complaints of harassment to any instructor prior to March 31, 2005. There are four incidents that from the basis of Plaintiff Meister's harassment claim. (Plaintiff, 205:19-23). On March 30, 2005 the recruits were "tasered" as part of the taser certification. (Plaintiff, 134:4-5). Plaintiff Meister took a one second current while everybody else took a five second current. (Plaintiff, 134:6-8). The first incident happened as a

result of this, when the following day fellow recruits, Defendants Justham and Snyder "harassed" Plaintiff by calling him names like "Alice" and said that he had 'alligator clips attached to his panty hose." (Plaintiff, 194:14-16). The second incident was the result of Plaintiff confronting Defendants Snyder Justham about the name calling and asking them to step outside. (Plaintiff, 197:2-6). Plaintiff reported this name-calling incident to Mr. Romano and Mr. Boris who were the instructors that day. (Plaintiff, 199:11-22). Mr. Romano told Plaintiff that he would observe them in class and see if there are anymore issues. (Plaintiff,200: 19-21). There were no further statements by Defendants Snyder or Justham in Mr. Romano's class. (Plaintiff, 202:2-7). The third incident occurred the day after Plaintiff confronted Defendants Snyder and Justham when Snyder and Justham made similar comments behind the back of Plaintiff at the gun range. (Plaintiff, 203:3-11). The final incident supporting Plaintiff's harassment claims occurred a few weeks later when Plaintiff took the wrong seat in class and Defendant Justham said to Plaintiff "why don't you sit next to your buddy Mike Scott (another recruit). (Plaintiff, 203:19-25, 204:1). Plaintiff got upset and "wanted to put [Justham] in his place." (Plaintiff, 204:14-15). At that point Defendant Justham called Plaintiff a "cocksucker."(Plaintiff, 204:15).

Due Process: Plaintiff's due process claims are based on his belief that he was entitled to an Internal Affairs investigation prior to his termination. (Plaintiff, 210:8-13). Also, Plaintiff believes that he should have been rehired after the June 27, 2005 hearing when a Judge did not extend the Domestic Violence injunction against him. (Plaintiff, 211:5-9). Plaintiff believes he was also entitled to a meeting with the Sheriff prior to his termination. (Plaintiff, 211:16-18).

False Light, Libel, Slander, Defamation: As support for his claims of false light, libel and slander, Plaintiff claims that Defendants Snyder, Justham, Pierce, Johnston, Soto and Sims made false statements about Plaintiff's performance at the Academy. (Plaintiff, 170:10-25,

171:1-8). Specifically, Plaintiff claims the opinions of Captain Pierce in a letter of May, 18, 2005 recommending that Plaintiff be terminated were a "misstatement of [Plaintiff's] abilities, a falsification, in order to deceive or manipulate information to some other party." (Plaintiff, 172:2-8). And, Plaintiff believes that Johnston made false statements when he stated that Plaintiff was average when Plaintiff believed he was above average (Plaintiff,179:15-17) and that Plaintiff displayed little confidence in himself. (Plaintiff, 181:10-17). Plaintiff believed that Defendant Soto made false statement when he said that Plaintiff refused to perform the "lift and drag" which is a required test. Plaintiff admits that he refused to perform the test but says that he would have performed it had he been "hooked" up with a recruit that wasn't so large. Also, another instructor told him that the test was not required.. (Plaintiff, 185:16-25, 186:1-7, 15-20). Plaintiff believes that Captain Sims made a false statement when he stated that Plaintiff needed a lot of extra attention. (Plaintiff, 188:8-13).

Discrimination: GENERAL: Plaintiff claims that he was discriminated against because he was assigned a score of average, yet testified that everyone received a score of average. (Plaintiff, 230:20-25, 231:1-3)

NATIONAL ORIGIN, GENDER: First, Plaintiff admitted that the "teasing" that he received at the Academy from fellow recruits Snyder and Justham was not based on his national origin. (Plaintiff, 89:22-25). Second, Plaintiff bases his claim for gender stereotyping, in part, on Defendant Soto's "pressuring" him to do the "lift and drag" test as Plaintiff believed that Defendant Soto was discriminating against Plaintiff because Plaintiff did not "fit to what [Soto] perceived a man should do or should not do." (Plaintiff, 111:25, 112:1-2). However, Plaintiff admitted that he did not know whether Defendant Soto made the same request to female recruits (Plaintiff, 113:5-22) and admitted that Defendant Soto asked all the recruits in his group to do

the exercise and Plaintiff was the only one that refused. (Plaintiff, 113:25, 114:1-4). Plaintiff admitted that Defendant Soto did not threaten him and did not make any statements about Plaintiff's national origin, accent or manliness. (Plaintiff, 118:7-15). Third, Plaintiff's claims of national origin discrimination are based mainly on two incidents. The first incident involved an instructor who told Plaintiff that he reminded him of a "fictional…character supposedly in a movie called Balki." (Plaintiff, 233:6-12) However, Plaintiff admits that this instructor was not critical of Plaintiff in any evaluation. (Plaintiff, 234:2-8). The second incident involved another instructor who requested, on one occasion, that Plaintiff give a police command in German. (Plaintiff, 234:12-15). However, Plaintiff admitted that the instructor "emphasized that I should bring out my German…the strongness of the German, you know, how the Germans are very strong, their talking is very…authoritative." (Plaintiff, 234:16-22). Plaintiff also admitted that he did not recall if this instructor gave him a negative evaluation and that this instructor was not mentioned in the May 18, 2005 letter recommending Plaintiff's termination. (Plaintiff, 235:9-12).

II. ARGUMENT

a. Plaintiff Fails to State Any Claim Under § 1983, Including Claims for Hostile Work Environment Gender Discrimination, Against Defendant Scott in His Official Capacity.

As argued at length in Defendants, Snyder, Pierce, Sims, Soto and Johnston's Motion for Summary Judgment and Memorandum of law, Plaintiff has failed to assert a constitutional violation. Because Plaintiff has failed to assert a constitutional violation, he fails to state a claim for which relief can be granted under § 1983 against Defendant Scott in his official capacity as claims under § 1983 may not be premised on a theory of respondeat superior. Edwards v. County Board of Education of Richmond County, 2007 WL 2345239 (S.D. Ga. 2007). As stated by the U.S. Supreme Court in the seminal case of Monell v. Dept. of Social Services of the City of New York, 436 U.S. 658, 694 (1978):

> We conclude therefore that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Florida sheriffs acting in their official capacities are recognized as governmental entities for purposes of § 1983 claims. Partington v. Scott, 207 WL 1871136 (M.D. Fla. 2007). As such, Defendant Scott in his official capacity may only be held liable for the execution of an official governmental policy or custom which caused the asserted constitutional violations. Collins v. City of Harker Heights, Tex., 503 U.S. 115, 120-21 (1992).

In this regard, Plaintiff has failed to provide any evidence that Defendant Scott was a policy maker, much less the final policy maker with respect to the Academy, which is operated by the School Board of Lee County. He has further failed to produce evidence of a specific custom, policy or practice implemented by the LCSO which led to the alleged violations of Plaintiff's civil rights.[2] The only "policy" that Plaintiff has alleged is a policy whereby the Academy of evaluating cadets pursuant to a scale utilizing the term "average" on exams and exercise. Consequently, as Defendant Scott is not the policy maker for the Academy, he may not be held accountable for constitutional violations allegedly suffered by Plaintiff in the course of his training at the Academy. See Partington, supra (held that a Florida sheriff acting in his official capacity could not be held liable for alleged 1st Amendment retaliation as he was not the final policy maker with respect to termination decisions as such power was vested in the Board of County Commissioners). Thus, Defendant Scott is entitled to summary judgment as a matter of law as it relates to Plaintiff's claims pursuant to § 1983 and his claims for Hostile Work Environment Gender Discrimination. (Counts 9-13, 17-19, 26-28, 32-34, 38-39, 47-49, 68-71,

73, 76-80, 84-93, 96-101, 103, 131-132, 134-135, 138-139, 141-142).

III. Plaintiff Fails to State Claims for Libel, Slander or False Light Under Florida Law Against Defendant Scott in His Official Capacity.

Plaintiff's claims against Defendant Scott in his official capacity for false light, libel or slander, premised on the alleged conduct of Defendants Snyder, Justham, Pierce, Soto, Sims and Johnston, also fail for a number of independent reasons. First, under Florida law, Public officials who make alleged defamatory statements within the scope of their duties are absolutely immune from causes of action premised on such statements. Alfino v. Department of Health and Rehabilitative Services, 676 S.2d 447 (Fla. 5th DCA 1996); Stevens v. Geoghegan, 702 S.2d 517, 522 (Fla. 2nd DCA 1997). This immunity from suit applies to lower-level as well as high-placed, public officials. City of Miami v. Wardlow, 403 So.2d 414, 415 (Fla. 1981; Stephens, 702 So.2d at 522. "Conduct is within the scope of one's employment if it is the type of conduct which the employee is hired to perform, the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and the conduct is activated at least in part by a purpose to serve the employer." Alfino, 676 So.2d at 449. As the alleged communications by Defendants Snyder, Justham, Pierce, Soto, Sims and Johnston occurred in the scope of their employment as instructors they are absolutely privileged, there can be no liability to impute to Sheriff Scott. See Alfino v. Department of Health and Rehabilitative Services, 676 S. 2d 447 (Fla. 5th DCA 1996); Stevens v. Geoghegan, 702 S. 2d 517, 522 (Fla. 2nd DCA 1997). Furthermore, Defendant Scott in his official capacity did not employ, nor has Plaintiff provided evidence that Defendant Scott employed, Defendants Snyder, Justham, Pierce, Soto, Sims and Johnston for purposes of their work at the Academy and therefore Defendant Scott cannot be held vicariously liable for any alleged torts of Defendants Snyder, Justham,

---

2 In fact, the Southwest Criminal Justice Academy is not operated by the Sheriff of Lee County, but rather by the Lee County School

Pierce, Soto, Sims and Johnston while working at the Academy in the course and scope of their employment with the Lee County School Board.

Moreover, Plaintiff has not pled, nor has he provided any evidence that he has complied with the notice requirements of Fla. Stat. § 768.28(6)(a). Pursuant to § 768.28(6)(a): An action may not be instituted against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, … presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues… Florida sheriffs acting in their official capacities are considered subdivisions of the state for purposes of § 768.28(6)(a). Kuper v. Perry, 718 So.2d 859, 860 (Fla. 5th DCA 1998). As such, Plaintiff was required to present Defendant Scott with the written notices prescribed by § 768.28(6)(a). Compliance with the notice provision of §768.28 is mandatory and a condition precedent to maintaining a suit. Maynard v. Department of Corrections, 864 So.2d 1232, 1234 (Fla. 1st DCA 2004); Raffone v. Fort Lauderdale Police, 920 So.2d 644 (Fla. 4th DCA 2005). Additionally, the complaint must contain an allegation that such notice has been properly given. Id. As Plaintiff has failed to satisfy the requirements of §768.28(6), all claims sounding in tort, including the libel, slander and false light claims (Counts 104-105 and 114-115) against Defendant Scott must be dismissed.

IV. Plaintiff Fails to State a Claim For Breach of Contract Against Defendant Scott.

Plaintiff has failed to provide evidence to support his claims against Defendant Scott under state law for "Wrongful Termination in Breach of Contract", "Breach of Contract for Violation of Agreement", "Breach of Contractual Agreement" and "Breach of Covenant of Good Faith and Fair Dealing in Employment Contract." The document that that Plaintiff has attached to the complaint is entitled "Academy Tuition/Training Cost Agreement" and specifically

---

Board.

provides that "this agreement does not constitute, and shall not be construed in any manner, as a contract of employment nor does it limit the right of the Sheriff to terminate the Trainee at will." Plaintiff admits that this agreement does not constitute an employment contract and that he is not aware of any other document that he signed with the LCSO. The "Academy Tuition/Training Cost Agreement" also contains the following language:

> "It is further understood that Trainee will reimburse the Sheriff for the full amount of training costs provided, if Trainee…fails to satisfactorily graduate from the training program… In the event the Trainee [Meister] is terminated…an amount equal to the total training costs and expenses that are due will be recovered by the Lee County Sheriff's Office from the final payroll checks, unless otherwise determined by the Sheriff."

Plaintiff has alleged that Defendant Scott unlawfully withheld money from his paycheck. However, the agreement that Plaintiff signed and attached as "Exhibit 1" to the 5th Amended Complaint and Plaintiff's deposition testimony contradict this claim. When there is a conflict between the allegations of the complaint, and any exhibit attached pursuant to Fed. R. Civ. P. 10(c), the exhibit prevails. International Star Registry of Illinois v. Omnipoint Marketing LLC., 510 F.Supp.2d 1015, 1022 (S.D. Fla. 2007) citing Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991). In addition, Plaintiff testified that the agreement requires him to repay the $2,226.00 to the LCSO should Plaintiff fail work for the LCSO for one year upon the completion of his training. The agreement authorizes Defendant Scott to withhold an amount equal to the total training costs and expenses that are due from Plaintiffs final payroll check. As such, Defendant Scott is entitled to summary judgment as a matter of law as it relates to Plaintiff's claims for "Breach of Contractual Agreement" for unlawfully withholding money from Plaintiff's paycheck.

Finally, in Florida an employer may fire an employee for a good reason, a bad reason, or no reason at all, so long as termination is not the result of unlawful discrimination. See Nix v.

WLCY Radio/Rayhall Communications, 738 F.2d 1181, 1187 (11th Cir. 1983). It is not the role of the Courts to determine the reasonableness of the disciplinary action taken in response to the offense. Id. at 1339. Further, as constitutional officers of the State of Florida, county sheriffs are given complete discretion in appointing and revoking the appointments of their deputy sheriffs. Therefore, Defendant Scott is entitled to summary judgment as a matter of law as it relates to Plaintiff's claims for "Wrongful Termination in Breach of Contract", "Breach of Contract for Violation of Agreement", "Breach of Contractual Agreement" and "Breach of Covenant of Good Faith and Fair Dealing in Employment Contract." (Counts 50, 4197-98).

V. **Plaintiff fails to state a cause of action under § 1983 against Defendant Scott for failure to train employees as Plaintiff has not alleged that Defendant Scott was a policy maker at the Academy nor has he alleged that Scott had notice of a need to train in a particular area**.

Plaintiff has failed to provide any evidence in support of his claim against Defendant Scott for failure to train under §1983 because he has not alleged, nor has he produced any evidence that Defendant Scott was the official policy maker for the Academy operated by the School Board of Lee County. Plaintiff also failed to allege or provide any evidence that Defendant Scott had actual knowledge of a need to train and/or supervise in a particular area yet made a deliberate choice not to take any action. Because a municipality rarely has an express policy of inadequately training its employees, the Supreme Court has found that a "policy" may be proven by showing that the municipality's "failure to train" showed a "deliberate indifference" to the rights of its citizens. Gold v. City of Miami, 151 F.3d 1346, 1350 (11th Cir. 1998) citing City of Canton v. Harris, 489 U.S. 378, 388-89 (1989). Municipal liability under § 1983 attaches "where-and only where-a deliberate choice to follow a course of action is made from among various alternatives" by policy makers. City of Canton v. Harris, 378 F.3d at 388-89.

In order to establish a "deliberate or conscious choice" or a "deliberate indifference" Plaintiff must allege, and provide evidence to support his allegation that Defendant Scott knew of a need to train and/or supervise in a particular area and made a deliberate choice not to. Board of County Com'rs v. Brown, 520 U.S. 397 (1997); Young v. City of Augusta, Georgia, 59 F.3d 1160, 1171-72 (11th Cir. 1995); Church v. City of Huntsville, 30 F.3d 1332, 1342-46 (11th Cir. 1994). The Supreme Court has repeatedly held that "without notice of a need to train or supervise in a particular area, a municipality is not liable as a matter of law for any failure to train and supervise." Wright v. Sheppard, 919 F.2d 665 (11th Cir. 1990)(emphasis added); Church v. City of Huntsville, supra, 30 F.3d at 1342-46. The 11th Circuit Court of Appeals, in Gold v. City of Miami, supra, stated:

> "This high standard of proof is intentionally onerous for plaintiffs; imposing liability on a municipality without proof that a specific policy caused a particular violation would equate to subjecting the municipality to respondeat superior liability-a result never intended by § 1983 As the Supreme Court has explained,
>
> '[t]o adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983. In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a § 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. Thus, permitting cases against cities for their "failure to train" employees to go forward under § 1983 on a lesser standard of fault would result in de facto respondeat superior liability on municipalities....'"

Gold v. City of Miami, 151 F.3d at 1351; citing City of Canton, 489 U.S. at 391-92.

Because Plaintiff Meister has not alleged or provided any evidence that Defendant Scott was the official policy maker for the Academy nor did Plaintiff provide any evidence that Defendant Scott knew of a need to train and/or supervise in a particular area and made a deliberate choice not to take any action, Defendant Scott is entitled to summary judgment as a matter of law as it relates to Plaintiff's § 1983 claim failure to train.

VI. Plaintiff Fails to State a Claim For Violation of 29 U.S.C. Sec. 1132 "ERISA" Against Defendant Scott as he has not attached a copy of the alleged ERISA plan, provided proof of standing or alleged that he has exhausted available administrative remedies.

Plaintiff has failed to provide any evidence to support his claim against Defendant Scott for violation of 29 U.S.C. Sec.1132 "ERISA." First and foremost, Plaintiff has failed to attach a copy of the particular ERISA plan to the complaint or recite the operative provisions such that Defendant Scott and the Court can determine whether Plaintiff has standing, is vested, and could be entitled to the relief he claims. Plaintiff must have standing to bring a claim for ERISA benefits in Federal Court. Without standing, a district court may dismiss ERISA claims without providing the opportunity to amend the complaint. See Hammond v. Reynolds Metal, 219 Fed. Appx. 910, 915 (11th Cir. 2007). Second, Plaintiff must exhaust available administrative remedies before bringing suit in Federal Court. Perrino v. Southern Bell Telephone & Telegraph Co., 209 F.3d 1309, 1315 (11th Cir. 2000). In the present matter, Plaintiff has failed to allege or provide any evidence that he has exhausted his available administrative remedies or that he was entitled to a waiver of this requirement. Plaintiff has also failed to allege or provide any evidence that administrative remedies would be futile, inadequate or that he was denied meaningful access to them. As such, Plaintiff has failed to provide evidence to support his claim for a violation of 29 U.S.C. Sec. 1132 "ERISA" and Defendant Scott is entitled to summary judgment as a matter of law.

VII. Plaintiff Fails to State a Claim Against Defendant Scott For Violation of Florida Statutory Law or Federal Statutory Law for unpaid wages as these claims are barred by the applicable statute of limitations.

Plaintiff has failed to provide any evidence to support his claim against Defendant Scott for "Violation of Florida Statutory Law; Unpaid Wages" or "Violation of Federal Statutory Law; Unpaid Wages." In fact, the only evidence provided by Plaintiff is the Tuition/Training Cost

Agreement which clearly contradicts the allegations that Defendant Scott wrongfully withheld wages from the Plaintiff. Since a conflict between the allegations in the complaint and the attachments to the complaint exists, any attachment, made per *Federal Rule of Civil Procedure 10(c)*, prevails. See International Star Registry v. Omnipoint, supra, 738 F.2d at 1465. In addition, Plaintiff's claim under Florida law for wages is barred by the statute of limitations, as set forth in Fla. Stat. §95.11, and is evident from the face of the complaint. Because of these reasons, Defendant Scott is entitled to summary judgment as a matter of law. Also, Plaintiff has failed to provide any evidence to support his claim for against Defendant Scott for "Violation of a Federal Statutory Law; Unpaid Wages" and has even failed to identify any Federal Statute allegedly violated.

WHEREFORE, Defendant Scott respectfully requests that this Court grant summary judgment in his favor and against Plaintiff and grant such other appropriate relief.

Respectfully submitted,

/s/ Robert C. Shearman
Robert C. Shearman

I HEREBY CERTIFY that on April 11, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: RICHARD M. PIERRO, JR., ESQUIRE and MARK M. LEVITT, ESQUIRE, Allen, Norton & Blue, 324 S. Hyde Park Ave., Suite 225, Tampa, FL 33606-4127. I further certify that I mailed the foregoing document and the Notice of Electronic Filing by first-class

mail to the following non-CM/ECF participants: CHRISTIAN F. MEISTER, Pro Se, P.O. Box 570291, Miami, FL 33257

HENDERSON, FRANKLIN, STARNES & HOLT
Attorneys for Defendants
Post Office Box 280
Fort Myers, Florida 33902-0280
239.344.1346
E-mail: robert.shearman@henlaw.com

By:/s/ Robert C. Shearman
Robert C. Shearman
Florida Bar No. 614025