

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

CHRISTIAN F. MEISTER,

Plaintiff,

v.

Case No. 2:06-cv-444-FtM-99SPC

MIKE SCOTT in his official capacity as Sheriff of Lee County, Florida; MIKE SCOTT in his individual capacity as Sheriff of Lee County, Florida; DON HUNTER in his official capacity as Sheriff of Collier County, Florida; each of J.J. CARROLL, RICHARD SNYDER, RYAN JUSTHAM, STEPHAN PIERCE, GENE SIMS, PEDRO J. SOTO, MIKE JOHNSTON, each of the foregoing, jointly and severally,

Defendants.

**DEFENDANTS J.J. CARROLL AND DON HUNTER'S MOTION FOR
SUMMARY JUDGMENT, STATEMENT OF UNDISPUTED FACTS
AND SUPPORTING MEMORANDUM OF LAW**

COME NOW, DEFENDANTS J.J. CARROLL (hereinafter "Defendant Carroll") and DON HUNTER in his official capacity as Sheriff of Collier County, Florida (hereinafter "Defendant Hunter"), and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move for final summary judgment as follows:

INTRODUCTION

1. Plaintiff Meister, a male of Austrian national origin, attended the Southwest Florida Public Service Academy in 2005, as a law enforcement recruit of the Lee County Sheriff's Office. Defendant Carroll, a deputy with the Collier County Sheriff's Office, served as one of Plaintiff's instructors. At all times relevant, Defendant Hunter served as the Sheriff of Collier County.

2. Plaintiff brings the instant action, in part, against Defendants Carroll and Sheriff Hunter pursuant to 42 U.S.C. § 1983 for alleged constitutional violations, including national origin discrimination, arising out of his attendance at the Academy.

3. Against Defendant Carroll, Plaintiff asserts the following specific counts in his 5th Amended Complaint:¹

- a. Counts 7 and 9- § 1983, National origin discrimination on the basis of national origin stereotyping in violation of the 14th Amendment;
- b. Count 15- § 1983, National origin discrimination on the basis of disparate treatment in violation of the 14th Amendment;
- c. Count 40- § 1983, Retaliation in violation of the 14th Amendment;
- d. Count 54- Breach of contract and agreement;
- e. Count 67- Wrongful interference with employment relationship;
- f. Count 107- False light;
- g. Count 114- Libel and slander;
- h. Count 124- § 1983, Violation of the “Liberty Clause” of the 14th Amendment;
- i. Count 148- Breach of the covenant of good faith and fair dealing; and
- j. §1983, Liberty Violation- “Stigma Plus” in violation of the 14th Amendment.

4. Plaintiff’s claims against Defendant Carroll are premised exclusively on two allegations: (1) Carroll once referred to Plaintiff as “strange, but ok;” and (2) in response to a request from Captain Pierce, Plaintiff’s supervisor, made alleged false statements regarding

¹ Defendants Carroll and Hunter previously filed a Motion to Dismiss Plaintiff’s 5th Amended Complaint which consists of approximately 600 enumerated paragraphs covering approximately 100 pages. Plaintiff has responded to the Motion. Although the Motion is still pending, Defendants have filed the instant Motion for Summary Judgment in light of the dispositive motions deadline of April 11, 2008.

Plaintiff's training.

5. Against Defendant Hunter, in his official capacity as Sheriff of Collier County,

Plaintiff asserts the following claims:

- a. Count 14- § 1983, National origin discrimination on the basis of national origin stereotyping in violation of the 14th Amendment;
- b. Count 20- § 1983, National origin discrimination on the basis of disparate treatment in violation of the 14th Amendment;
- c. Counts 51 and 53- Breach of contract;
- d. Count 106- False light;
- e. Count 102- § 1983, Failure to train in violation of the 14th Amendment;
- f. Count 123- Libel and slander;
- g. Count 133- § 1983, Violation of the Liberty Clause of the 14th Amendment;
and
- h. Count 137- § 1983, Liberty Violation- "Stigma Plus" in violation of the 14th Amendment.

6. The § 1983 claims against Defendant Sheriff Hunter are based upon an assertion that the alleged constitutional deprivations caused by Defendant Carroll were the result of a custom, policy or practice, including an alleged failure to train. The tort and contract claims against Defendant Sheriff Hunter in his official capacity are premised on a theory of vicarious liability (*respondeat superior*) for the alleged wrongs committed by Defendant Carroll.

7. Plaintiff's claims under §1983 against Defendant Carroll fail as a matter of law

because Plaintiff cannot establish that he was subjected to a constitutional violation. Regardless of how Plaintiff labels his § 1983 claims, calling an individual “strange, but ok” does not amount to a constitutional deprivation. Likewise, Defendant Carroll’s opinions as to Plaintiff’s performance at the Academy do not support such a claim. Moreover, Plaintiff cannot show that Carroll treated him less favorably in this regard than similarly-situated non-Austrian individuals.

8. Plaintiff fails to state a claim against Defendant Carroll under § 1983 for alleged retaliation premised on the “Equal Protection Clause” of the 14th Amendment as § 1983 does not prescribe a right to be free from retaliation.

9. Plaintiff’s § 1983 liberty interest claims must fail as Plaintiff did not have a constitutionally protected right in his provisional appointment with the Lee County Sheriff’s Office.

10. Defendant Carroll, is entitled to qualified immunity as it was not clearly established that the alleged wrongful conduct amounted to a violation of any federal statutory or constitutional right.

11. Plaintiff’s § 1983 claims against Defendant Hunter fail as a matter of law as Plaintiff cannot establish an underlying constitutional violation. Plaintiff cannot demonstrate a custom, policy or practice, including an alleged failure to train, attributed to Defendant Hunter which caused the alleged constitutional violation(s). Also, Defendant Hunter was not and is not an official policy-maker for the Academy which currently and at all times relevant was operated by the Lee County School Board.

12. Plaintiff’s claims against Defendant Carroll for false light, libel, slander and

wrongful interference with an employment relationship fail because Florida law precludes a cause of action against a government employee premised on alleged false statements made in the course and scope of his employment no matter how willful, wanton or malicious his motive is alleged to have been.

13. Plaintiff fails to state claims for vicarious liability against Defendant Hunter for alleged torts attributed to Defendant Carroll for four independent reasons: (1) the alleged communication on which the claims are based was absolutely privileged; (2) Plaintiff has failed to comply with the notice requirements of Fla. Stat. § 768.28(6)(a); (3) Plaintiff asserts that the alleged false communication made by Defendant Carroll was willful and malicious, such that imputing liability to Defendant Hunter in his official capacity is precluded by Fla. Stat. § 768.28(9)(a); and (4) Defendant Hunter in his official capacity was not Defendant Carroll's employer for purposes of Carroll's work at the Academy, thus there can be no *respondeat superior* liability imputed to Defendant Hunter.

14. Finally, Plaintiff's claims against Defendant Carroll and Hunter for breach of an employment contract or any covenant of good faith associated therewith fails as neither Carroll nor Hunter were parties to any contract with Plaintiff.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Defendant Lt. Carroll is a law enforcement officer in good standing with the Collier County Sheriff's Office ("the CCSO") located in Naples, Florida, and has been employed by the CCSO since 1988. His ultimate superior at the CCSO is Defendant Sheriff Don Hunter. (Carroll Aff. ¶ 3; Hunter Aff. 4).

2. Contemporaneous with his employment with the CCSO, Lt. Carroll has served

as an Instructor at the Southwest Public Service Academy (“the Academy”) in Fort Myers, Florida. The Academy, which is owned and operated by the Lee County School Board, provides training and certification for individuals seeking to become licensed law enforcement officers in the state of Florida. (Carroll Aff. 4).

3. The CCSO has no responsibility for the operation of the Southwest Public Service Academy. The CCSO neither makes nor implements policies regarding the operation of the Academy or the instruction and evaluation of its law enforcement trainees. (Hunter Aff. 6 and 7).

4. Although the CCSO permits Lt. Carroll to work at the Academy, the CCSO does not employ or supervise Lt. Carroll for purposes of his activities at the Academy, and his compensation for said work has at all times been paid solely by the Lee County School Board. (Carroll Aff. 5 and 6; Hunter Aff. 8).

5. The law enforcement training program at the Academy includes several blocks of instruction including, but not limited to, defensive driving, defensive tactics and firearms. In order to successfully complete the training, Academy cadets must meet minimum standards set by the Florida Department of Law Enforcement (“FDLE”) in each training block measured by their performance on written examinations as well as practical hands-on exercises. (Carroll Aff. 7).

6. A cadet’s successful completion of the practical exercises and written examinations does not in and of itself indicate that the cadet is suited to be a law enforcement officer. Moreover, a cadet’s satisfaction of the FDLE minimum standards does not entitle the cadet to employment with a law enforcement agency. (Carroll Aff. 8).

7. Beginning in January 2005, Plaintiff Meister attended the Academy as a recruit of the Lee County Sheriff's Office ("the LCSO"). In connection therewith, Meister entered an Academy Tuition/Training Cost Agreement" (the "Agreement"). Meister understood he was obligated to repay \$2,226.00 to the LCSO in the event that he didn't begin work for the LCSO upon completion of training. Meister also admitted that the Agreement did not constitute "a contract of employment.". (Meister depo., 57:17-19, 58:2-25, 59:1, 64:10-14, 64:25, 65:1-15, 67:10-14, 62:20-25, 63:1, Ex. 2).

8. At no time has Meister been an employee or a law enforcement recruit of the CCSO. In addition, Meister has had no affiliation or relationship of any kind with the CCSO. The CCSO has at no time entered into any contracts or agreements, written or otherwise, with Meister. (Carroll Aff. 9; Hunter Aff. 10; Meister Depo. pp. 251-252).

9. During Meister's attendance at the Academy, Lt. Carroll served as Lead Instructor in the defensive driving block of instruction. In the course of the practical driving exercises, Lt. Carroll noted that Meister exhibited a lack of confidence in his abilities and it was reported to him by other instructors that Meister required an excessive amount of personal attention. Meister even stated to him that he did not have confidence in his ability to complete the exercises. Furthermore, Meister constantly questioned the instructors such that the entire group of cadets was held back. A number of training recruits actually commented to Lt. Carroll that they felt Meister was detrimentally impacting the group in this regard. (Carroll Aff. 10).

10. Meister ultimately completed the driving exercises and passed the written examination. Though Meister met the minimum standards set by the FDLE, based upon Lt.

Carroll's observations of Meister's performance as well as the information shared by other instructors, Lt. Carroll believed that Meister did not have the ability to apply the skills he learned at the Academy as a certified law enforcement officer. More specifically, Lt. Carroll did not feel that Meister could make the split-second decisions often required of law enforcement officers in real-life situations. The ability of law enforcement officers to make such decisions without hesitation is absolutely necessary to ensure the safety and well-being of the citizens they protect and serve, their fellow officers, and themselves. (Carroll Aff. 11).

11. During Meister's attendance at the Academy, Lt. Carroll neither observed nor was informed by fellow instructors of any other cadets who exhibited the performance issues described above with respect to Meister. (Carroll Aff. 12).

12. On or about May 18, 2005, Captain Stephan Pierce, Meister's supervisor at the Lee County Sheriff's Office, contacted Lt. Carroll and inquired as to his assessments regarding the performance of LCSO law enforcement recruits, including Meister. Lt. Carroll stated that during the driving block of instruction, Meister exhibited no confidence in himself, questioned his own abilities, and further directed numerous repetitive questions to the instructors, to such an extent that he actually held the entire class back. Moreover, Lt. Carroll noted that Meister had to be virtually dragged through the driving exercises. (Carroll Aff. 13).

13. The issues articulated by Carroll to Pierce were just a few of the numerous concerns regarding Meister's performance at the Academy which ultimately led to Pierce's recommendation that Meister's probationary appointment be withdrawn. (See Pierce Aff. 6-

18).²

14. Captain Pierce did not ask for nor did Lt. Carroll provide a recommendation as to whether Meister's probationary appointment should be withdrawn. (Carroll Aff. 14).

15. Christian Meister accuses Lt. Carroll of discriminating against him on the basis of his Austrian national origin by virtue of Carroll's assessment of Meister's his performance in the driving block of instruction. Specifically, he contends Carroll perceived that the "style" of his questions and his "expectations" did not meet supposed "American standards." He further accuses Carroll of forming a "bias" against him because he allegedly "exhibited the Austrian-Germanic culturally-inherent direct-style questions and Austrian-Germanic expectations." Meister's only basis for this contention are the statements made by Carroll to Pierce. (Carroll Aff. 15; Meister Depo. p. 273).

16. Lt. Carroll neither associated a certain question "style" or "expectation(s)" as being associated with one of Austrian or German ethnicity or decent nor did he perceive Meister's style of questions or expectations as being typical of Austrians or Germans, let alone form a bias on such grounds. Lt. Carroll did not take issue with the style of Meister's questions or any apparent expectations he may have had. Lt. Carroll's issues regarding Meister's questions were the sheer number of questions and their repetitive nature which adversely impacted the overall progress of the training group. (Carroll Aff. 16).

17. Meister further contends that Lt. Carroll discriminated against him on the basis of an alleged perception that he had "a limited ability to grasp the English language." However, Meister concedes that Lt. Carroll never made any comment to him regarding his English language abilities and further admits that he never indicated to Carroll that he had

² See also Motion for Summary Judgment of Defendants Snyder et al, pp 6-8).

difficulty understanding English. Lt. Carroll did not perceive Meister as having either an inability to understand the English language or difficulty communicating in English. (Carroll Aff. 17; Meister Depo. pp. 176, 235-236).

18. Lt. Carroll's statements to Captain Pierce were based only upon his unbiased observation of Meister's performance as well as information received from other instructors regarding their impressions of his performance. The statements to Captain Pierce were in no way based upon Meister's ethnicity or national origin. (Carroll Aff. 18).

19. Meister contends that Lt. Carroll treated him less favorably than co-recruit Hans Gullekson. Gullekson initially failed the written examination in the driving block of instruction; however, upon remediation, he was able to pass the examination. Gullekson otherwise performed the driving exercises without issue and ultimately successfully completed the Academy training. At no time did Gullekson exhibit a lack of confidence or hesitation in performing the driving exercises or require extensive personal attention. Gullekson did not question his own abilities or ask repetitive questions to the instructors to the point that he interfered with the efficient instruction of the entire training group. (Carroll Aff. 19).

20. Meister asserts that Lt. Carroll exhibited a bias against his national origin by allegedly commenting to Meister at an Academy cook-out that he was "strange, but ok." Lt. Carroll does not deny making such comment or the like. However he denies that such statement or similar was made to disparage Meister's ethnicity or national origin. The comment was isolated and there is no evidence that Lt. Carroll made any reference to

Meister's ethnicity or national origin. (Carroll Aff. 20; Meister Depo. pp. 256, 260-262).³

21. In all instances where Lt. Carroll has evaluated the performance of law enforcement recruits at the Academy, his formal and informal assessments of their performance have at all times been based solely upon the objective criteria mandated by the FDLE as well as his years of experience as a law enforcement officer. (Carroll Aff. 21).

22. Prior to his training of Meister in 2005, Lt. Carroll had completed diversity training which in part emphasized prohibitions against discrimination on the basis of race, ethnicity, sex and other protected categories. Sheriff Hunter had no notice that Lt. Carroll needed additional training in this regard. Lt. Carroll has no disciplinary history with the CCSO, and aside from the accusations of Plaintiff Meister, Lt. Carroll has never been accused of unlawful discrimination. (Carroll Aff. 22; Hunger Aff. 4 and 9).

MEMORANDUM OF LAW

ARGUMENT & CITATION OF AUTHORITY

I. Plaintiff's claims under § 1983 for national origin discrimination against Defendant Carroll fail as a matter of law.

To establish his national origin discrimination claim, Plaintiff must establish: 1) he is a member of a protected class; 2) he was subjected to an adverse employment action; 3) he was treated differently than similarly-situated, non-Austrian individuals; and 4) there is sufficient evidence to suggest a causal connection between his national origin and the disparate treatment. *Denny v. City of Albany*, 247 F.3d 1172, 1182-83 (11th Cir. 2001); *Weaver v. Tech Data Corporation*, 66 F.Supp 1258, 1269 (M.D. Fl. 1999).

Plaintiff cannot satisfy the second element of a *prima facie* case, i.e. an adverse

³ Despite his contentions, Meister recalls that Lt. Carroll tried to encourage him during the training and said "Meister you too can do it." (Meister Depo. p. 265).

employment action. He asserts that Defendant Carroll's comments to Defendant Pierce, Plaintiff's supervisor, that Plaintiff "had no confidence in himself and constantly questioned his own ability to complete the driving exercises...that not only would Meister question his own ability, but would also question the instructors to the point that he actually held the group back" amounted to false statements.

Defendant Carroll was neither Plaintiff's supervisor nor an employee of the Lee County Sheriff's Office. As such, Defendant Carroll was not a decision-maker with respect to Plaintiff's appointment with the LCSO. It should also be noted that Carroll's statements regarding Meister were not based exclusively on his own observations. Carroll received complaints from other instructors which figured into his communication to Captain Pierce. More importantly, it is undisputed that Captain Pierce's recommendation that Plaintiff's provisional appointment be terminated was not based solely on the statements of Carroll. Pierce's memorandum recommending the termination and the reasons therefore cites to opinions expressed by a number of instructors, not just Carroll. An unfavorable assessment of an individual's performance in and of itself does not constitute an adverse employment action for purposes of an equal protection claim. *Brown v. Snow*, 440 F.3d 1259, 1265 (11th Cir. 2006); *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232 (11th Cir. 2001). "Not everything that makes an employee unhappy is an actionable adverse action, otherwise, every trivial personnel action that an irritable chip-on-the shoulder employee did not like would form the basis of a discrimination suit." *Greene v. Lowenstein*, 99 F.Supp.2d 1372, 1378 (S.D. Fla. 2000)(citing *Doe v. Dekalb County School District*, 145 F.3d 1441, 1449 (11th Cir. 1998)). Additionally, it has been consistently held that "isolated, negative statements generally do not

rise to the level of a material adverse employment action.” *Bothwell v. RMC Ewell, Inc.*, Slip Copy, 2007 WL 2254496 (M.D. Fla. 2007)(citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998)).

Plaintiff’s national origin claim also fails because he cannot establish that he was treated less favorably than a similarly-situated cadet outside of his protected class. He points to his co-recruit Hans Gullekson as a comparator; however, Gullekson was simply not similarly-situated. There is no evidence that either Lt. Carroll or Captain Pierce received overall negative assessments of Gullekson which called into question Gullekson’s ability to succeed as a law enforcement officer. Though Gullekson required remediation on a failed exam, which he ultimately passed, there is no evidence that he exhibited a lack of confidence or hesitation in his execution of the required hands-on driving exercises. Moreover, there is no evidence of complaints to the effect that Gullekson constantly questioned his instructors to the point of interfering with the progress of the entire training group.

Additionally, Plaintiff cannot demonstrate a causal connection between the alleged adverse action and his national origin. Plaintiff relies upon the allegation that Defendant Carroll commented to him that he was “strange, but ok.” Assuming the truth of this allegation, it simply does not establish a causal connection between any adverse action and Plaintiff’s nationality. In fact, the alleged comment has no apparent connection to Plaintiff being Austrian and even if it did, it would be insufficient to create an actionable claim. See *Godoy v. Habersham County*, 2006 WL 3592415 (11th Cir. 2006)(indicating that “mere offensive utterances” do not support a *prima facie* case of discrimination).

Likewise, Defendant Carroll’s assessment of Plaintiff’s performance in the driving

block of instruction is not remotely indicative of animus toward Plaintiff's ethnicity or a product of national origin stereotyping. Plaintiff absurdly contends that Defendant Carroll "formed a bias" against Plaintiff because he "exhibited the Austrian-Germanic culturally-inherent direct-style questions and Austrian-Germanic expectations." It remains a mystery as to how such a characteristic is uniquely Austrian-Germanic. Defendant Carroll never made any reference to the "style" of Plaintiff's questions or his "expectations," let alone any comment that his questions or expectations ran contrary to "American standards." The undisputed facts show that Defendant Carroll simply took issue with Plaintiff's voluminous repetitive questions, his apparent lack of confidence in performing the required driving exercises, and the inordinate amount of personal attention he required from the instructors.

Even assuming, *arguendo*, that Plaintiff could prove a violation of his federal rights, he has not set forth facts necessary to negate Defendant Carroll's entitlement to qualified immunity. Qualified immunity protects government officials from liability while performing discretionary functions, so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known. *Snider v. Jefferson State Community College*, 344 F.3d. 1325, 1328 (11th Cir. 2003) (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)). "When case law is needed to 'clearly establish' the law applicable to the pertinent circumstances, we look to decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state." *Snider v. Jefferson State Community College*, 344 F.3d. 1325, 1329 (11th Cir. 2003) (quoting *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032-33 n.10 (11th Cir. 2001) (en banc)).

To benefit from qualified immunity, a government official must make a threshold

showing that his actions were undertaken pursuant to performance of his duties within the scope of his authority. *Akins v. Fulton County, Georgia*, 420 F.3d 1293, 1299-1300 (11th Cir. 2005). It is undisputed that Defendant Carroll was at all times relevant acting in the scope of his employment at the Academy.

“The next step in the qualified immunity inquiry is to determine whether the plaintiff’s allegations, if true, establish a constitutional violation. *Id.* at 1300. The Supreme Court recently addressed qualified immunity in *Scott v. Harris*, 549 U.S. ---, 127 S. Ct. 1769, 1774 (2007).

In resolving questions of qualified immunity, courts are required to resolve a “threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer’s conduct violated a constitutional right? This must be the initial inquiry.” *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If, and only if, the court finds a violation of a constitutional right, “the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case.” *Ibid.*

Once the defense is raised, the burden is on the plaintiff to show that the qualified immunity defense is not appropriate. *Snider v. Jefferson State Community College*, 344 F.3d 1325, 1328 (11th Cir. 2003) (citing *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002)); *Foy v. Holston*, 94 F.3d 1528, 1532 (11th Cir. 1996). In the instant case, the pertinent inquiry is: (1) whether the alleged conduct of Defendant Carroll violated Plaintiff Meister’s constitutional right(s); and (2) whether that constitutional right(s) was clearly established. Plaintiff cannot satisfy either component of the qualified immunity analysis.

As discussed above, Plaintiff cannot establish a violation of his federal rights. Assuming for argument’s sake that Plaintiff could show a violation, he still cannot negate

Defendant Carroll's entitlement to qualified immunity. "The plaintiff bears the burden of proving that his clearly established right was violated." *Levin v. Palm Beach Gardens*, 2007 WL 1959202, *4 (S.D.Fla. July 2, 2007).

In this instance, it is not enough for Plaintiff simply to demonstrate that a reasonable law enforcement instructor would know the general principle that it violates the law to discriminate against a trainee on the basis of his national origin. *Stanley v. City of Dalton*, 219 F.3d 1280, 1294 (11th Cir. 2000). Instead, Plaintiff must show that Defendants' specific conduct "in this particular factual context violated clearly established law." *Id.* at 1294. The relevant question is therefore whether it was clearly established that making an isolated comment to Plaintiff such as "strange, but ok" without any reference to Plaintiff's national origin or any insinuation that the comment was meant to disparage Plaintiff's national origin amounted to a violation of Plaintiff's constitutional rights. Defendant is unaware of any case law establishing constitutional protection against such alleged conduct. To the contrary, as discussed above, "mere offensive utterances," even if inappropriately premised on the target's national origin do not give rise to a constitutional claim.

Additionally, it was not clearly established that Defendant Carroll's statements regarding Plaintiff's training performance amounted to an adverse action, particularly where Carroll made no decision regarding Plaintiff's appointment. The fact that Lt. Carroll and Plaintiff's relationship was one of teacher/student, is also not insignificant. There is no precedent clearly establishing constitutional protection from Lt. Carroll's alleged false statements in this context and public policy dictates that it should not be created. To allow liability to attach in such instance would encourage students and trainees of public institutions

to sue their teachers and instructors simply because they disagree with their grades or evaluations.

II. Plaintiff's claims under § 1983 against Defendant Carroll for alleged liberty interest violations fail as a matter of law.

Contrary to Plaintiff's contentions, he did not have a property interest in his prospective employment with the Lee County Sheriff's Office ("LCSO"). His written agreement with LCSO, clearly stated that no contract of employment was thereby created. Even assuming, for the sake of argument only, that Plaintiff had a vested right in prospective, conditional employment with LCSO, rights created by contract or state law are not "fundamental" rights subject to constitutional protection. *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir. 1995).

Plaintiff further alleges that Defendant Carroll violated a liberty interest in his reputation. Damage to reputation, standing alone, does not give rise to a cause of action under § 1983. *Bailey v. Town of Lady Lake*, 2007 WL 677995, 7 (M.D. Fla. 2007). Plaintiffs must satisfy a six-factor test and show: (1) a false statement; (2) of a stigmatizing nature; (3) attending a governmental employee's discharge; (4) was made public; (5) by the governmental employer; and (6) without a meaningful opportunity for an employee name clearing hearing. *Id.* at 7.

Plaintiff cannot establish a false statement of a stigmatizing nature attributed to Defendant Carroll. Plaintiff simply accuses Defendant Carroll of making an isolated false statement regarding his performance as a trainee. This is insufficient to satisfy the "stigmatizing nature" prong of the analysis. *See Roley v. Pierce County Fire Protection Dist. No. 4*, 869 F.2d 491, 496 (9th Cir. 1989)(distinguishing stigmatizing reasons which

permanently exclude an individual from a profession).

Plaintiff cannot show a deprivation of a constitutional liberty or property right, let alone a clearly established right necessary to overcome Defendant Carroll's entitlement to qualified immunity. *See Bailey*, 2007 WL 677995 at 7 (“[Plaintiff] has not properly alleged a violation of a clearly established constitutional or statutory right with respect to his reputation, and the individual Defendants are entitled to qualified immunity...”).

III. Plaintiff's official capacity claims under § 1983 against Defendant Hunter fail as a matter of law.

Plaintiff's § 1983 claims against Defendant Hunter are all premised on the alleged constitutional deprivations attributed to Defendant Carroll. As discussed above, Plaintiff cannot establish a constitutional violation at the hands of Defendant Carroll as a matter of law for which Defendant Hunter could be held accountable. However, even assuming *arguendo* a constitutional violation, Plaintiff's claims against Defendant Hunter still must fail.

Official capacity 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. Dep't. 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 sheriff's acting in their official capacities are recognized as governmental entities for purposes of § 1983 claims. *Partington v. Scott*, 2007 WL 1871136 (M.D. Fla. 2007). As such, Defendant Hunter may only be held liable for the execution of an official governmental

policy or custom which caused a constitutional violation. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 120-21 (1992).

There is no evidence that Defendant Hunter implemented any policy regarding the Academy, let alone a policy which led to a deprivation of Plaintiff's civil rights. 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). In fact, the CCSO had no control of the Academy whatsoever as it was at all times relevant owned and operated by the Lee County School Board.

Nevertheless, Plaintiff contends that Defendant Hunter failed to adequately train Defendant Carroll. See *Rivals v. Freeman*, 940 F.2d 1491 (11th Cir. 1991) ("Under certain circumstances, a law enforcement agency's failure to adequately train its officers may constitute a 'policy' giving rise to governmental liability"). However, as discussed by the 11th Circuit in *Gold v. City of Miami*, 151 F.3d 1346, 1350-1351 (11th Cir. 1998):

There are only limited circumstances in which an allegation of a failure to train or supervise can form the basis for liability under § 1983. The Supreme Court has instructed that these "limited circumstances" occur only where the municipality inadequately trains or supervises its employees, this failure to train or supervise is a city policy, and that city policy causes the employees to violate a citizen's constitutional rights...

We hold today that the inadequacy of police training may serve as a basis for § 1983 liability only where the failure to train amounts to a deliberate indifference to the rights of persons with whom the police come into contact... Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983... Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality... can a city be liable for such failure under § 1983.

To establish a “deliberate or conscious choice”...a plaintiff must present some evidence that the municipality knew of a need to train and/or supervise in a particular area and the municipality made a deliberate choice not to take any action...**This court repeatedly has 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...**

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 section 1983...

(emphasis added).

Plaintiff cannot satisfy this exacting standard. It is undisputed that Defendant Carroll attended required diversity training. Furthermore, there is no evidence that Defendant Hunter had notice that Carroll exhibited wrongful conduct indicative of racial or ethnic insensitivity or animus such that the need for additional training was apparent. Without such notice, liability under § 1983 premised upon an alleged failure to train cannot attach as a matter of law.⁴

Finally, Plaintiff’s assertion that Sheriff Hunter is liable for the alleged constitutional violations by virtue of permitting Lt. Carroll to wear his CCSO uniform and drive to and from the Academy in a CCSO vehicle is without merit. Again, an offending policy for purposes of § 1983 liability must evince a deliberate indifference to the federal rights at issue. In this instance, there is no apparent connection whatsoever between such permission and the alleged constitutional deprivations, let alone exhibition of the requisite deliberate indifference. If Plaintiff is simply trying to establish that the CCSO employed Lt. Carroll for purposes of his

⁴ In his recent response to Defendants’ Motion to Dismiss the 5th Amended Complaint, Plaintiff suggests that the alleged discriminatory conduct of Carroll for which he seeks redress, in and of itself supports the notion that Defendant Hunter failed to provide adequate training. Of course, such argument is completely illogical in light of the notice requirement articulated in *Gold*, supra.

work at the Academy, he is way off base. As already discussed, § 1983 liability cannot be premised on *respondeat superior*.

IV. Plaintiff's § 1983 claim against Defendant Carroll for alleged retaliation fails as a matter of law.

Plaintiff seeks to hold Defendant Carroll accountable pursuant to § 1983 for alleged retaliation in violation of the equal protection clause of the 14th Amendment. However, the equal protection clause of the 14th Amendment does not provide a right to be free from retaliation and thus the claim must fail. *Ratliff v. Dekalb County*, 62 F.3d 338, 340 (11th Cir. 1995); *Allen-Sherrod v. Henry County School District*, 2007 WL 1020843 (N.D. Ga. 2007).

V. Plaintiff's claims for libel, slander, false light and wrongful interference with employment against Defendant s Carroll and Hunter fail as a matter of law.

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). “However false or malicious or badly motivated the accusation may be, no action will lie therefore in this state.” *Grady v. Scaffie*, 435 S.2d 954, 955 (Fla. 2nd DCA 1983). The court in *Stevens* stressed the breadth of this rule, stating: “This grant of immunity is justified because it is in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.” 702 S.2d at 522. 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; *Stevens*, 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.

Plaintiff contends that Defendant Carroll made alleged defamatory statements regarding Plaintiff’s performance to Captain Pierce. As Defendant Carroll was Plaintiff’s instructor, Carroll was undoubtedly acting within the course and scope of his employment when the subject communication was made. Plaintiff does not dispute this. As such, absolute immunity applies and precludes any cause of action sounding in tort premised upon the alleged defamatory communication notwithstanding any assertion that Defendant Carroll acted with wrongful intent.

Additionally, Plaintiff’s false light claim fails due to the “single action” rule. *Ovadia v. Bloom*, 756 So.2d 137, 140-141 (Fla. 3rd DCA 2000); *Byrd v. Hustler Magazine, Inc.*, 433 So.2d 593, 594-95 (Fla. 4th DCA 1983). Because the communication allegedly giving rise to the false light claim was absolutely privileged, as discussed above, it is not actionable regardless of how Plaintiff labels or “retools” his purported cause of action. *Stephens*, 702 So. 2d at 525 (dismissing intentional infliction claim which was based upon privileged communications); *Orlando Sports Stadium, Inc. v. Sentinel Stars Co.*, 316 So.2d 607, 609 (Fla. 4th DCA 1975)(single publication/single action rule does not permit multiple actions to be maintained when they arise from the same publication upon which a failed defamation claim is based).

Likewise, Plaintiff’s wrongful interference claim is barred by the “single action” rule. See *Ovadia*, supra. Again, the alleged wrongful communication was absolutely privileged

and therefore not actionable regardless of how Plaintiff labels his cause of action. *Callaway Land & Cattle Co., Inc. v. Banyon Lakes C. Corp.*, 831 So.2d 204, 208-209 (Fla. 4th DCA 2002)(held: tortious interference claim was properly dismissed pursuant to single action rule); and *Goetz v. Noble*, 652 So.2d 1203, 1205 (Fla. 4th DCA 1995)(holding that public officials have absolute immunity to tortious interference with contract claims arising from alleged defamatory statements made in connection with their official duties).

Accordingly, as there is no evidence of an underlying tort committed by Defendant Carroll, the vicarious liability claims against Defendant Hunter also must fail. 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). The vicarious liability claims additionally fail for three independent reasons. First, Defendant Hunter in his official capacity did not employ Defendant Carroll for purposes of his work at the Academy. Even if Defendant Hunter employed Defendant Carroll for purpose of the latter's work at the Academy, summary judgment is still appropriate as Plaintiff asserts that Defendant Carroll acted with malicious intent. Under Florida law, governmental entities may not be held accountable for the alleged willful, wanton or malicious conduct of their employees. Fla. Stat. § 768(9)(a).

Finally, Plaintiff has not complied with the notice requirements of Fla. Stat. § 768.28(6)(a). 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). 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). Though Plaintiff purportedly sent the notice to the Department of Financial Services, he did not send the notice to the Collier County Sheriff's Office. Plaintiff's attempt to properly furnish the notice by mailing it to undersigned counsel is insufficient for purposes of the § 768.28(6)(a). The undersigned called Plaintiff's attention to this defect upon receipt of the notice. However, to date, Plaintiff has not cured the defect. Even aside from the lack of proper service of the notice, Defendant Hunter and the Dept. of Financial Services have not been given the requisite six (6) months to consider the subject claims. § 768.28(6)(a).

VI. Plaintiff's contract claims against Defendants Carroll and Hunter fail as a matter of law.

Finally, Plaintiff's claims for alleged breach of contract against Defendants Carroll and Hunter must fail as neither Carroll nor Hunter was a party to any contract with him. Plaintiff relies in part on the written Agreement between him and the Lee County Sheriff's Office. However, there is absolutely no mention of either Defendant Hunter or Carroll in the Agreement.

Furthermore, Plaintiff does not contend that either defendant made any promise to him, let alone a promise in exchange for valid consideration. See *Real Estate World Florida Commercial, Inc. v. Piemat, Inc.*, 920 So.2d 704, 705 (Fla. 4th DCA 2006); and *Pick Kwik Food Stores, Inc. v. Tenser*, 407 So.2d 216 (Fla. App. 1981). As neither Defendant Carroll nor Hunter was a party to a contract with Plaintiff, they could not very well have breached one. *Exit 242 Tourist Information v. Florida Room Service, Incorporated* 792 So.2d 1283, 1285 (Fla. 5th DCA 2001); *Thompson v. Investment Management and Research, Incorporated*, 745 S. 2d 475, 476 (Fla. 5th DCA 1999). Plaintiff additionally claims that Defendant Carroll

breached a covenant of good faith and fair dealing associated with a contract, but again, there is no evidence of a valid contract to which such a covenant would attach.

CONCLUSION

For the foregoing reasons, Defendants Carroll and Hunter, in his official capacity, are entitled to summary judgment as to all claims asserted against them.

Dated: April 11, 2008

Respectfully submitted,

s/ Richard M. Pierro, Jr.

MARK E. LEVITT

Florida Bar No. 0193190

mlevitt@anblaw.com

RICHARD M. PIERRO, JR.

Florida Bar No. 0013023

rpierro@anblaw.com

ALLEN, NORTON & BLUE, P.A.

324 S. Hyde Park Avenue, Suite 225

Tampa, Florida 33606-4127

(813) 251-1210

(813) 253-2006 – Fax

*Counsel for Defendants J.J. Carroll and
Don Hunter*

CERTIFICATE OF SERVICE

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: Robert C. Shearman, Esq., Henderson, Franklin, Starnes & Holt, P.A., 1715 Monroe Street, P.O. Box 280, Fort Myers, Florida 33902-0280. 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, Florida 33257.

s/ Richard M. Pierro, Jr.