DeVito v. Palm Beach Cnty.

United States District Court for the Southern District of Florida

January 2, 2024, Decided; January 2, 2024, Entered on Docket

CASE NO. 23-80730-CIV-MATTHEWMAN

Reporter
2024 U.S. Dist. LEXIS 373 *

CHRISTOPHER DEVITO, Plaintiff, vs. PALM BEACH COUNTY, a political subdivision of the State of Florida, Defendant.

Counsel: [*1] For Christopher Devito, Defendant: Jennifer E. Daley, William Robert Amlong, Amlong & Amlong, Fort Lauderdale, FL; Karen Coolman Amlong, LEAD ATTORNEY, Amlong & Amlong PA, Fort Lauderdale, FL.

For Palm Beach County, a political subdivision of the state of Florida, Defendant: Toni-Ann S. Brown, LEAD ATTORNEY, Palm Beach County Attorney's Office, West Palm Beach, FL.

Judges: WILLIAM MATTHEWMAN, United States Magistrate Judge.

Opinion by: WILLIAM MATTHEWMAN

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT [DE 37]

THIS CAUSE is before the Court upon Defendant, Palm Beach County's ("Defendant") Motion to Dismiss Plaintiff's Second Amended Complaint ("Motion") [DE 37]. The Motion is fully briefed and ripe for review. *See* DEs 40, 43. The Court has carefully considered the Motion and is otherwise fully advised in the premises.

I. Background

On May 1, 2023, Plaintiff Christopher DeVito ("Plaintiff") filed a Complaint for Damages and Other Relief [Compl., DE 1]. Plaintiff filed his Amended, Supplemental Complaint for Damages and Other Relief ("Amended Complaint") on July 12, 2023 [Am. Compl., DE 19]. On October 2, 2023, the Court entered an Order Granting in [*2] Part and Denying in Part Defendant's Motion to Dismiss Plaintiff's Amended Complaint and Motion to Strike and Denying Plaintiff's Motion for Voluntary Dismissal Without Prejudice as to Counts III and VIII of the Amended Complaint [DE 33]. The Court granted Defendant's motion to dismiss as to Counts I, II, IV, and V and dismissed without prejudice Counts I, II, IV, and V. Plaintiff was provided leave to file a second amended complaint on or before October 16, 2023. *Id.* The Court also granted Defendant's motion to strike to the extent that that the allegation in the Amended Complaint that Fire Rescue is a "hyper-politically-correct" department was stricken. *Id.* The remainder of Defendant's motion was denied. *Id.* Finally, the Court denied Plaintiff's Motion for Voluntary Dismissal Without Prejudice as to Counts III and VIII of the Amended Complaint [DE 31] but stated that Plaintiff was free to omit those counts from the second amended complaint. *Id.*

On October 16, 2023, Plaintiff filed his Second Amended Complaint for Damages and Other Relief ("SAC") [DE 34]. The basis for the Second Amended Complaint, like the Amended Complaint before it, is that Defendant allegedly issued a written warning [*3] to Plaintiff "because a Black recruit reported (incorrectly and in contradiction to evidence that [Plaintiff] produced) that he heard [Plaintiff] demean Latinos—even though he said he did not believe [Plaintiff] was guilty" and that Defendant later "used an unconstitutionally broad and vague sexual-harassment policy to fire [Plaintiff] because of a risqué (but consensual) texting relationship he had with a female firefighter/paramedic with a history of several in-the-flesh sexual relationships with five other fire/rescue personnel who also outranked her, none of whom faced any discipline." *Id.* ¶ 1.

The Amended Complaint alleges six counts: Fourteenth Amendment Race Discrimination (Count I); Race Discrimination under the Florida Civil Rights Act (Count II); Title VII Sex Discrimination (Count III); Sex Discrimination under the Florida Civil Rights Act (Count IV); a First Amendment Claim for Damages and

Injunctive Relief Concerning Palm Beach County's Sexual Harassment Rules (Count V); and a (second) First Amendment Claim for Damages Concerning Palm Beach County's Sexual Harassment Rules (Count VI). *See* SAC.

II. Motion, Response, and Reply

Defendant moves pursuant to Federal Rules of Civil Procedure 12(b)(6) for dismissal of Counts I, II, III, and IV of the Second Amended Complaint, [*4] with prejudice. [DE 37]. In response, Plaintiff argues that no portion of the Second Amended Complaint should be stricken and that he has sufficiently pled the elements of Counts I, II, III, and IV. [DE 40]. In reply, Defendant again contends that Counts I—IV are insufficiently pled and should, at this point, be dismissed with prejudice. [DE 43]. The parties' more specific arguments will be discussed below.

II. Legal Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations and citations omitted). "A claim has facial [*5] plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. Pleadings, because they are no more than conclusions, are not entitled to the assumption of truth. *Id.* at 680-81 (citations omitted). The Court must review the "well-pleaded factual allegations" and, assuming their veracity, "determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679. A plaintiff must, under *Twombly*'s construction of Rule 8 cross the line "'from conceivable to plausible.'" *Id.* at 680 (citation omitted). When considering a motion to dismiss, the Court must accept all of the plaintiff's allegations as true in determining whether a plaintiff has stated a claim for which relief could be granted.

III. Discussion

A. Count I

Count I of the Second Amended Complaint alleges Fourteenth Amendment Race Discrimination. In the Motion, Defendant argues that "Plaintiff has not cured the deficiencies that resulted in the prior dismissal of this claim." [DE 37 at 5]. More specifically, "[d]espite the addition of allegations regarding the Fire Chief's authority [*6] to make and enforce the County's policies and regarding the alleged 'backlash' that the Fire Chief feared would stem from a failure to discipline Plaintiff, [DE 34 at ¶¶ 11-14], Plaintiff still fails to allege facts sufficient to state a cause of action for race discrimination under section 1983." *Id.* Defendant contends that the SAC "still fails to allege facts beyond Plaintiff's own experience—an isolated incident where Plaintiff alleges he was issued a written warning after a Black firefighter falsely accused Plaintiff, a White male, of making a statement that was demeaning to Latinos. [DE 34 at ¶¶ 1, 6-14, 21]." *Id.* According to Defendant, this allegation is "insufficient to show a widespread custom or practice of race discrimination by the County" and Plaintiff's "conclusory allegation that he was disciplined pursuant to 'a policy of Palm Beach County,' [DE 34 at ¶ 13(a)]" is not enough. *Id.* Defendant further asserts that amendment would be futile. *Id.*

Plaintiff first argues that the law relied on by Defendant in the Motion is inapposite. [DE 40 at 2]. Plaintiff notes that it is alleged in this case that a written order, "which became part of Chief DeVito's personnel records," was issued and [*7] Chief DeVito was unable to appeal it. *Id.* at 3. Plaintiff relies on the cases of *Pembaur v. Cincinnati*, 475 U.S. 469 (1986), and *Brown v. City of Fort Lauderdale*, 923 F.2d 1474 (11th Cir. 1991), for the premise that a city is responsible for the actions taken by any official who has ultimate authority to establish municipal policy with respect to the action ordered. *Id.* Next, Plaintiff relies on *Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633 (11th Cir. 1991), with regard to the three-part test for "determining when a single act of a municipal officer subjects the municipality to liability under section 1983: (1) acts which the municipality

officially sanctioned or ordered; (2) acts of municipal officers with final policy-making authority as defined by state law; and (3) actions taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area. . . ." *Id.* (citing *Lomelo*, 929 F.2d at 637). Finally, Plaintiff asserts that "Chief DeVito has alleged facts that would support a jury's finding that the fire chief was racially motivated in seeking to avoid a 'backlash' by not punishing Chief DeVito for something of which a Black firefighter had accused him but the evidence of which was so thin that the Fire Chief even stated that he did not believe it happened." *Id.* at 4.

In reply, Defendant explains that "Plaintiff ostensibly argues in [*8] his Response that by adding to his Second Amended Complaint the allegation that the Fire Chief was Palm Beach County's 'final decision-maker/policy-maker' in racially discriminating against him, he adequately pleads a case of race discrimination under section 1983." [DE 43 at 1]. Defendant further explains that "Plaintiff adds that the facts he alleged in the Second Amended Complaint would support a finding that by issuing the written warning, the Fire Chief was racially motivated in seeking to avoid 'backlash.'" *Id.* at 1-2. Defendant argues, however, that "the foregoing additions to, and arguments raised in, the Second Amended Complaint still fail to state a cause of action for race discrimination under section 1983." *Id.* at 2. This is because "[f]atal to Plaintiff's claim is his failure to sufficiently allege the existence of a custom or policy of the County that amounted to deliberate indifference to his constitutional right and which caused a violation of his constitutional right." *Id.* Defendant asserts that Plaintiff simply cannot "establish causation between the alleged written warning he received and the alleged custom or policy." *Id.* at 3. It further argues that the Fire Chief cannot have final policymaking [*9] authority as there is a grievance process in place; in other words, "the Fire Chief can be a final decision maker without being the final policymaker in the stead of the Board of County Commissioners or its designee." *Id.*

In order to "impose § 1983 liability on a local government body, a plaintiff must show: (1) that his constitutional rights were violated; (2) that the entity had a custom or policy that constituted deliberate indifference to that constitutional right; and (3) that the policy or custom caused the violation." *Scott v. Miami-Dade Cnty.*, No. 13-CIV-23013, 2016 WL 9446132, at *3-4 (S.D. Fla. Dec. 13, 2016), *report and recommendation adopted sub nom. Scott v. Miami Dade Dep't of Corr.*, No. 13-23013-CIV, 2017 WL 3336915 (S.D. Fla. Aug. 4, 2017), *aff'd sub nom. Scott v. Miami Dade Cnty.*, No. 21-13869, 2023 WL 4196925 (11th Cir. June 27, 2023).

In *Pembaur v. City of Cincinnati*, the Supreme Court set forth the following three-part test for determining when a single act of a municipal officer subjects the municipality to liability under § 1983: "(1) acts which the municipality officially sanctioned or ordered; (2) acts of municipal officers with final policy-making authority as defined by state law; and (3) actions taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area." *Manor Healthcare Corp.*, 929 F.2d at 637 (citing *Pembaur*, 475 U.S. at 480-83 & n.12). "[A] city is responsible for any actions taken by the particular official who 'possesses final authority to [*10] establish municipal policy with respect to the action ordered.'" *Brown*, 923 F.2d at 1480 (quoting *Pembaur*, 475 U.S. at 481). "In other words, a municipal official who has 'final policymaking authority' in a certain area of the city's business may by his or her action subject the government to § 1983 liability when the challenged action falls within that authority." *Id.* And, "[w]hether a particular official has final policymaking authority is a question of state law." *Id.* (citing *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989)). "[F]or a municipality to be held liable, it is not enough that the official who inflicted the constitutional injury possess final authority to act on behalf of the municipality. Instead, that official must 'also be responsible for *establishing final government policy respecting such activity* before a municipality can be held liable.'" *Darlow v. City of Coral Springs*, No. 21-CIV-60083-RAR, 2022 WL 110698, at *3 (S.D. Fla. Jan. 12, 2022), *appeal dismissed*, No. 22-10418-C, 2022 WL 1565126 (11th Cir. Mar. 31, 2022) (quoting *Manor Healthcare Corp.*, 929 F.2d at 637) (internal citations omitted).

The Court previously found that Count I was insufficiently pled as there were no allegations in the Amended Complaint that Defendant had a custom or policy that constituted deliberate indifference to Plaintiff's constitutional rights. [DE 33 at 7].

The SAC adds language that "Palm Beach County delegated to its fire chief the final authority to make and enforce the County's [*11] policies concerning interactions, including racial interactions, amongst fire-fighters and, in the case of written warnings, provided fire-fighters such as District Chief DeVito no method of appealing the chief's decisions." [SAC ¶ 12]. The SAC also alleges that District Chief DeVito was disciplined "[p]ursuant to a policy of Palm Beach County." *Id.* ¶ 13.

These new allegations are still insufficient. The SAC still fails to describe with nonconclusory, sufficient detail what customs or policies of Palm Beach County violate the First Amendment. Moreover, the SAC simply makes conclusory allegations that the fire chief was the final decisionmaker without any supporting facts. And, as pointed out by Defendant, the SAC itself identifies a grievance process. [SAC ¶¶ 4, 9d, 16c]. If there is, indeed, a process for meaningful administrative review, then the fire chief inherently cannot have all final policymaking authority.

In light of the foregoing, Count I of the Complaint is dismissed. This dismissal is without prejudice. While the Court finds it unlikely that Plaintiff can amend Count I in compliance with the applicable law, Federal Rule of Civil Procedure 11, and this Order, the Court, in an abundance of caution, will give him one more [*12] chance to do so.

B. Count II

Count II of the Amended Complaint asserts race discrimination under the Florida Civil Rights Act. Defendant seeks dismissal of Count II with prejudice because "Plaintiff has only added or altered allegations regarding the Fire Chief's authority to make and enforce the County's policies and regarding the alleged 'backlash' that the Fire Chief feared would stem from a failure to discipline Plaintiff." [DE 37 at 7]. Defendant maintains that "these altered or additional allegations do not cure the deficiencies that resulted in the prior dismissal of Plaintiff's FCRA race discrimination claim." *Id.* Defendant argues that, to the extent Plaintiff is alleging a prima facie case based on a "convincing mosaic" theory, "Plaintiff has not alleged facts to allow the inference that the County's reasons for its employment action were a pretext for intentional race discrimination." *Id.* This is because "it remains undisputed that Plaintiff makes no factual allegations of suspicious timing, ambiguous statements, and the like, from which an inference of discriminatory intent can be drawn. Likewise, there is no allegation showing systematically better treatment of similarly [*13] situated employees or that the County's justification is pretextual." *Id.*

In response, Plaintiff first argues that *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), does not even explicitly require any alleged comparator. [DE 40 at 4-5]. Plaintiff further argues that he pleaded sufficient facts to establish both an inference of discrimination and a convincing mosaic. *Id.* at 6. Plaintiff then cites to the specific evidence from the SAC that supports his convincing mosaic theory and contends that he has established a prima facie case of race discrimination. *Id.* at 6-7. This alleged evidence includes that, first, "Chief DeVito made his allegedly racially demeaning comments during an unrelated cell-phone call to another district chief, as confirmed by the district chief and verified by phone records"; second, "Black fire chief stated that he did not believe that Chief DeVito had made the discriminatory comments, as a Black firefighter had alleged"; and third, "the fire chief told a union officer he gave Chief DeVito a written warning anyway because not doing so would produce a 'backlash.'" *Id.* Plaintiff concludes that "Chief DeVito has pleaded a prima facie case of race discrimination under the Florida Civil Rights Act of 1992: Reasonable jurors could infer from those [*14] facts the real reason the fire chief gave Chief DeVito the written warning was Chief DeVito's race." *Id.* at 7.

In reply, Defendant maintains that the SAC "does not allege sufficient circumstantial facts from which the Court can infer that the County's justification for issuing a written warning to Plaintiff was a pretext for racial animus, that the County had an incentive to issue written warnings to White employees more than Black, Hispanic, or Asian employees, or that the County had consciously injected race into its discipline decision making without an adequate explanation for doing so." [DE 43 at 4]. Defendant further asserts that the SAC "lacks allegations that similarly situated persons who were alleged to have done what Plaintiff was alleged to have done were treated more favorably because of their race, let alone that they were systematically treated more favorably because of their race." *Id.*

Title VII of the Civil Rights Act of 1964 ("Title VII") and the Florida Civil Rights Act of 1992 ("FCRA") make it unlawful to discharge an employee because of the employee's race or sex, 42 U.S.C. § 2000e-2(a)(1); § 760.10(1)(a), Fla. Stat. The FCRA is patterned after Title VII, and claims for race and sex discrimination are analyzed under the same framework. *Dandridge v. Wal-Mart Stores, Inc.*, 844 F. App'x 214, 215 (11th Cir. 2021).

In the absence of direct evidence, [*15] a circumstantial case is analyzed using the burden shifting framework described in *McDonnell Douglas Corp. v. Green*, *supra*. Under that framework, a plaintiff must first prove that (1) he is a member of a protected class, (2) he was subjected to an adverse employment action, (3) the employer treated similarly situated, employees who were not members of the plaintiff's class more favorably

and (4) he was qualified to do the job or to the benefit at issue. *Cooper v. Jefferson Cnty. Coroner and Med. Exam'r Off*., 861 F. App'x 753, 756 (11th Cir. 2021); *see also Nealy v. SunTrust Bank*, No. 21-11358, 2021 WL 5112819, at *2 (11th Cir. Nov. 3, 2021).

In *Lewis v. City of Union City, Georgia*, 918 F.3d 1213 (11th Cir. 2019), the Eleventh Circuit stated that the comparator leg of this analysis (assessment of "similarly situated" employees) is necessarily conducted at the prima facie stage of the *McDonnell Douglas* framework. *Id.* at 1217. To satisfy this requirement, a plaintiff "must demonstrate that she and her proffered comparators were 'similarly situated in all material respects.'" *Id.* at 1218. "This determination is one of 'substantive likeness,' an inherently fact-sensitive inquiry which must be made on a case-by-case basis." *Thompson v. McDonald*, No. 16-80811-CIV, 2019 WL 11314995, at *5 (S.D. Fla. Mar. 25, 2019), *aff'd sub nom. Thompson v. Sec'y, U.S. Dep't of Veterans Affs*., 801 F. App'x 688 (11th Cir. 2020). Furthermore, "[e]xamples of 'similarly situated comparators' would ordinarily include persons who engaged in the same basic conduct (or misconduct) of the plaintiff; persons who were subjected to the same employment policy, guideline, or rule as plaintiff; persons who ordinarily, [*16] but not invariably, were under the jurisdiction of the same supervisor as the plaintiff, and persons who share the plaintiff's employment or disciplinary history." *Id.* (internal citations omitted); *see also Stimson v. Stryker Sales Corp.*, 835 F. App'x 993, 997 (11th Cir. 2020) ("Ordinarily, a similarly situated comparator will have engaged in the same basic misconduct as the plaintiff, been under the same supervisor, shared the plaintiff's disciplinary and employment history, and been subject to the same employment policy.").

However, Plaintiff's "failure to produce a comparator does not necessarily doom [his] case." *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1328 (11th Cir. 2011). "Instead, [ ]he may establish a 'convincing mosaic' of circumstantial evidence that would allow a jury to infer intentional discrimination by the decisionmaker by pointing to evidence such as (1) suspicious timing, ambiguous statements, or other information from which discriminatory intent may be inferred, (2) systematically better treatment of similarly-situated employees, and (3) pretext." *Daneshpajouh v. Sage Dental Grp. of Fla., PLLC*, No. 19-CIV-62700-RAR, 2021 WL 3674655, at *12 (S.D. Fla. Aug. 18, 2021) (citing *Lewis*, 934 F.3d at 1185). "When undertaking a convincing mosaic analysis, the Court first considers whether [Defendant's] cited reasons for firing [Plaintiff] are merely a pretext for discrimination." *Key v. Cent. Ga. Kidney Specialists, P.C.*, No. 19-00253, 2020 WL 7053293, at *6 (M.D. Ga. Oct. 28, 2020). The pretext inquiry requires Plaintiff to "demonstrate[ ] such [*17] weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1289 (11th Cir. 2005). Critically, though, "a reason is not pretext for discrimination unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Springer v. Convergys Customer Mgmt. Grp. Inc.*, 509 F.3d 1344, 1349 (11th Cir. 2007).

The Court previously found that Amended Complaint failed to sufficiently allege a convincing mosaic of circumstantial evidence, i.e., that Defendant's claimed reasons for firing Plaintiff were merely a pretext for discrimination. [DE 33 at 11]. The Court further noted that Count II was "very short and allege[d] very limited, barebone facts in support of the claim." *Id.* Plaintiff has not meaningfully changed Count II in the SAC and it still fails to allege a comparator and also fails to allege a convincing mosaic of circumstantial evidence. At this point, Count II shall be dismissed with prejudice since the Court finds that granting leave to amend the Second Amended Complaint would be futile at this juncture and notes that Plaintiff was already provided leave to amend the complaint once and failed to do so in compliance [*18] with all applicable law. *See Eiber Radiology, Inc. v. Toshiba Am. Med. Sys., Inc.*, 673 F. App'x 925, 930 (11th Cir. 2016) ("We have never required district courts to grant counseled plaintiffs more than one opportunity to amend a deficient complaint, nor have we concluded that dismissal with prejudice is inappropriate where a counseled plaintiff has failed to cure a deficient pleading after having been offered ample opportunity to do so."). The Court concludes that dismissal with prejudice is appropriate in light of Plaintiff's failure to cure the deficiencies in his pleadings after being put on notice of the same. *See Chiron Recovery Ctr., LLC v. United Healthcare Servs., Inc.*, 438 F. Supp. 3d 1346, 1356 (S.D. Fla. 2020).

C. Counts III and IV

Count III of the Amended Complaint alleges Title VII Sex Discrimination, and Count VI alleges Sex Discrimination under the Florida Civil Rights Act. In the Motion, Defendant argues that, to the extent Counts III and IV attempt to allege claims for disparate discipline, Plaintiff has failed "to allege that he committed the same misconduct as did a similarly situated employee but that

he was disciplined differently because of his male sex." [DE 73 at 9]. Defendant further contends that "Plaintiff has failed to allege facts to show that any alleged discrimination either in how he was treated or disciplined was because he is a male. Plaintiff [*19] further does not allege fact to support a plausible inference that his termination was ***because of*** his male sex." *Id.* It points out that "Plaintiff's claim also fails for want of a comparator." *Id.* Defendant maintains that "although Plaintiff added or altered some allegations of his sex discrimination claims in the Second Amended Complaint, [DE 34 at ¶¶ 29(a), 31(a), 31(d)(v)(1), 32, 35, 36], the changes still fail to sufficiently and clearly allege: (1) that Plaintiff was terminated because he was a male and (2) a comparator." *Id.* at 10. Thus, the SAC "does not state sufficient facts to show that Plaintiff was discriminated against because of his sex. On the contrary, the allegations in the Second Amended Complaint, if taken as true, establish that Plaintiff was terminated for alleged sexual harassment." *Id.*

In response, Plaintiff argues that he would not have filed this lawsuit if he had actually engaged in sexual harassment of Ms. Suit. [DE 40 at 8]. Next, Plaintiff seemingly argues that the facts and evidence in the case establish that Plaintiff did not sexually harass Ms. Suit, so his termination was clearly a pretext. *Id.* at 8-12.

In reply, Defendant argues that "[t]he allegations in the Second [*20] Amended Complaint, if taken as true, establish that Plaintiff was terminated for alleged sexual harassment, i.e., for making unwelcome sexual advances to Ms. Suit. By his own admission, Plaintiff sent at least one message of a sexual nature to Ms. Suit after he alleges she asked him to stop. [DE 34, ¶ 29(a), 31(d)(v)(1), 35]." [DE 43 at 5]. Defendant concludes that Plaintiff has not stated a cause of action for sex discrimination under either Title VII or the FCRA because, although he "maintains that he was the victim of discrimination, [DE 40, p. 10], he has not alleged that Ms. Suit or another Fire Rescue employee was alleged to have committed the same misconduct as he was alleged to have committed but that he was disciplined differently because of his male sex." *Id.* at 5-6.

Title VII "prohibits employers from discriminating 'against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Fernandez v. Trees, Inc.*, 961 F.3d 1148, 1152 (11th Cir. 2020) (quoting 42 U.S.C. § 2000e-2(a)(1)). "A claim under this statutory section is referred to as a 'disparate treatment' claim." *Ortiz v. Sch. Bd. of Broward Cnty., Fla.*, 780 F. App'x 780, 783 (11th Cir. 2019) (citation omitted). "Disparate treatment can take the form either [*21] of a tangible employment action, such as a firing or demotion, or of a hostile work environment that changes the terms and conditions of employment, even though the employee is not discharged, demoted, or reassigned." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 807 (11th Cir. 2010) (quotation marks and citation omitted). To make out a *prima facie* case of sexual discrimination a plaintiff must show that (1) he belongs to a protected class; (2) he was qualified to do the job; (3) he was subjected to adverse employment action; and (4) his employer treated similarly situated employees outside his class more favorably. *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008); *see also Maynard v. Bd. of Regents of Div. of Univs. of Fla. Dep't of Educ. ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1289 (11th Cir. 2003).

In the disparate-discipline context, a Plaintiff must demonstrate: "(1) that the plaintiff belongs to a class protected under Title VII; (2) that the plaintiff was qualified for the job; and (3) that the misconduct for which the employer discharged the plaintiff was the same or similar to what a similarly situated employee engaged in, but that the employer did not discipline the other employee similarly." *Lathem v. Dep't of Child. & Youth Servs.*, 172 F.3d 786, 792 (11th Cir. 1999)).

The Court previously determined that Plaintiff's Amended Complaint was confusing and improper as then pled. [DE 33 at 14]. More specifically, to the extent Plaintiff was alleging discrimination based on sex under Title [*22] VII and the Florida Civil Rights Act, the Court found that Plaintiff failed to plead sufficiently and clearly that he was terminated because he was a male and failed to allege a proper comparator. *Id.* at 14-15. The Court explained that Ms. Suit was not a proper comparator because she did not engage in the same misconduct as Plaintiff. *Id.* at 15. To the extent Plaintiff was pleading disparate discipline, the Court found that Plaintiff had not sufficiently and clearly pled that he committed the same or similar misconduct to a similarly situated employee. *Id.* This is because the Amended Complaint did not really allege that Ms. Suit committed the same or similar misconduct as Plaintiff. *Id.*

Count III of the SAC (and Count IV to the extent that it realleges and adopts the new allegations from Count III) has several additional allegations that did not appear in the Amended Complaint. The new allegations appear to be aimed at showing that Plaintiff did not actually sexually harass Ms. Suit and that his termination was a

pretext. *See* SAC ¶¶ 29-35. In Plaintiff's response to the Motion, he states that "evidence of [Ms. Suit's] relationship with the other five higher-ranking firefighters shows [*23] that she was not punished for engaging at least five relationships that the County 'strongly discourages,' DE 34, at 21, ¶ 46, but Chief DeVito has been fired for engaging in a single, non-physical relationship. That is evidence of pretext." [DE 40 at 12].

It is clear that Counts III and IV of the SAC do not sufficiently allege that Plaintiff's employer treated similarly situated employees outside his class more favorably or that the misconduct for which Plaintiff was discharged was the same or similar to what a similarly situated employee engaged in, but that the employer did not discipline the other employee similarly.[1] As alleged in the SAC, it again appears that Ms. Suit is not a proper comparator because she did not engage in the same misconduct as Plaintiff. This is especially true when it is alleged in the SAC that Plaintiff did "proclaim that a photograph she had posted to a link to which he was connected was '[s]o goddamn sexy'" after Ms. Suit had asked him to stop texting her. *See* SAC ¶ 31 (d)(v)(1). At that point, and as noted in the Court's Order on the prior motion to dismiss, the communications could no longer have been consensual. Additionally, a footnote in the SAC states [*24] that "Ms. Suit did, subsequent to resigning from Palm Beach County, file[ ] a discrimination action in which she accused District Chief DeVito of having sexually harassed her. Palm Beach County has denied all of her allegations of harassment." [SAC ¶ n. 1]. This allegation further supports the Court's finding that Ms. Suit could not have been a proper comparator.

Thus, neither a disparate treatment nor a disparate discipline claim has been properly pled. Finally, to the extent Plaintiff is relying on evidence outside of the four corners of the SAC [DE 40-1; DE 40-2], this is improper at the motion to dismiss stage. Based on the foregoing, Counts III and IV are due to be dismissed. While the Court finds it unlikely that Plaintiff can amend Counts III and IV in compliance with the applicable law, Federal Rule of Civil Procedure 11, and this Order, the Court, in an abundance of caution, will give him one more chance to do so. If Plaintiff opts to re-allege Count IV, Plaintiff shall plead clear allegations rather than simply realleging and readopting the allegations from Count III.

[1] The FCRA is analyzed identically to Title VII. *See Harper v. Blockbuster Entm't Corp.*, 139 F.3d 1385, 1387 (11th Cir. 1998).

IV. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint [*25] [DE 37] is **GRANTED IN PART AND DENIED IN PART, as follows**.
2. Count II of the Second Amended Complaint is DISMISSED WITH PREJUDICE.

3. Counts I, III, and IV of the Second Amended Complaint are DIMISSED WITHOUT PREJUDICE. Plaintiff shall file a third amended complaint on or before **January 17, 2024**. Plaintiff is hereby put on notice that this will be his last opportunity to cure any deficiencies in Counts I, III, and IV.

DONE AND ORDERED in Chambers at West Palm Beach, Palm Beach County, Florida, this 2nd day of January 2024.

/s/ William Matthewman

WILLIAM MATTHEWMAN

United States Magistrate Judge