

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case Number: 23-80730-cv-MATTHEWMAN

CHRISTOPHER DeVITO,

Plaintiff,

vs.

PALM BEACH COUNTY, a political
subdivision of the State of Florida,

Defendant.

Amended, Supplemental Complaint for Damages and Other Relief

Count I: Fourteenth Amendment Race Discrimination

Plaintiff, Christopher DeVito, on his own behalf and (as to equitable relief) on the behalf of himself and other employees of Palm Beach County, sues Palm Beach County, a political subdivision of the State of Florida and says:

Introduction and Summary

1. This is a case about a hyper-politically-correct fire/rescue department that, **First**, issued a written warning to Christopher DeVito, a white, male district chief in the Palm Beach County Fire Rescue Department (“PBCFR”) because a Black recruit reported (incorrectly and in contradiction to evidence that Chief DeVito produced) that he heard Chief DeVito demean Latinos — even though he said he did not believe Chief DeVito was guilty, and, **Second**,



used an unconstitutionally broad and vague sexual-harassment policy to fire Chief DeVito 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. Chief DeVito sues Palm Beach County:

One, under 42 U.S.C. § 1983 to enforce his rights under the Fourteenth Amendment's Equal Protection Clause, both as to race and sex discrimination;

Two, under § 1983 to enforce his rights under the First Amendment's Free Speech and Free Association clauses;

Three, under § 1983 to enforce his rights under the Fourteenth Amendment's Due Process clause;

Four, under Title VII of the Civil Rights Act of 1964, as amended, to enforce his rights against gender discrimination, and

Five, under the Florida Civil Rights Act of 1992 to enforce his state-law rights against race and gender discrimination.

Chief DeVito seeks damages, injunctive relief and his attorney's fees, costs and litigation expenses.

Jurisdiction and Venue

2. This Court has jurisdiction over Chief DeVito's federal claims pursuant to 42 U.S.C. 1983 and 28 U.S.C. §§ 1331 and 1343(a)(4). It has supplemental jurisdiction over Chief DeVito's claims under the Florida Civil Rights Act pursuant to 28 U.S.C. § 1357.

3. Venue is proper in the West Palm Beach division of the Southern District of Florida because defendant maintains its principal place of business there and because the action accrued there.

Parties

4. Plaintiff, Christopher DeVito is a white, male fire-fighter who has been employed by Palm Beach County Fire Rescue since January 6, 2003. As a district chief he commands eight battalions of firefighters/paramedics. A property right to his employment has been created by Palm Beach County's entry into several successive Collective Bargaining Agreements with the Professional Firefighters/Paramedics of Palm Beach County, Local 2928, International Association of Firefighters, Inc., which provides that discipline can only be imposed for "just cause."

5. Defendant, Palm Beach County is:

a. A political subdivision of the State of Florida which at all times material operated towards Chief DeVito, as well as all of its other employees, under color of state law, and

b. Chief DeVito's employer as envisioned by Title VII and the FCRA.

Count I: Fourteenth Amendment Race Discrimination

6. Chief DeVito realleges and adopts, as if fully set forth in Count I, the allegations of ¶¶ 1, 2, 3, 4 and 5(a).

7. Chief DeVito was falsely accused in June 2020 by Jonathan Forrester — a Haitian-heritage firefighter recruit who is married to a woman

of Mexican heritage — of stating “you speak that trash” within the hearing of himself and Firefighter Sebastian Alvarado, as Firefighter Forrester was bilingually registering Spanish-speaking patients at a COVID-19 testing site.

8. Chief DeVito was actually speaking on his cell phone with Tony Tozzi, a battalion chief who was suggesting that he had enjoyed being away from PBCFR while on vacation so much that he was considering leaving, to which Chief DeVito responded “quit talking that garbage.”

9. Notwithstanding that:

a. Chief DeVito denied that he was making any reference to Spanish-speakers;

b. Chief Tozzi wrote a letter to PBCFR management confirming the cell-phone conversation that he and Chief DeVito were having;

c. Chief DeVito’s cell-phone records confirmed that he was speaking with Chief Tozzi from 11:21 a.m. until 11:31 a.m. and from 11:34 a.m. until 11:45 a.m. June 19 — which is when Fire Fighter Forrester said he had heard what he reported as a racist remark, and

d. Reginald Duren, the then-Fire Chief, told Chief DeVito at a Step 3 Grievance hearing that he did not believe that Chief DeVito had said anything discriminatory.

10. Chief Duren, who is Black, nonetheless issued a written warning to Chief DeVito about the incident, which therefore became public record as part of Chief DeVito’s personnel file.

11. Captain Jeffery Newsome, who was then a vice president of the

fire-fighters' union (and is now its president), quoted Chief Duren as saying to Chief DeVito that if he did not discipline Chief DeVito, there would be "backlash."

12. Based on Chief Duren's having told Chief DeVito that he did not believe that Chief DeVito had made any racially disparaging remarks, and Chief Duren's having told Captain Newsome that he was imposing discipline to avoid a "backlash," there is evidence from which jurors could reasonably conclude that Chief DeVito was disciplined:

- a. Without justification and
- b. Because of his race.

13. Race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment is an irreparable harm for which there is no adequate remedy at law.

14. Although a written reprimand is the lowest form of discipline:

- a. It is a public record that:
 - i. falsely informed the fire-fighters and officers whom Chief DeVito commanded – a significant number of whom are either Black or Hispanic – that PBCFR had concluded that Chief DeVito had made a racially discriminatory statement;
 - ii. would be available to any future potential employer of Chief DeVito subsequent to his retirement from PBCFR.

b. It made Chief DeVito vulnerable pursuant to PBCFR's progressive-discipline policy for an escalation of punishment for any violation he might commit (although there was none), and

c. It could not be grieved pursuant to PBCFR's collective bargaining agreement with the fire-fighters' union does not permit grievances concerning written warnings.

15. Because there was no appeal available to Chief DeVito, Chief Duren was Palm Beach County's decision maker and final policy maker for falsely declaring that Chief DeVito was guilty of using racially inappropriate language.

16. As a direct, natural and proximate result of Palm Beach County's public-record declaration that Chief DeVito had engaged in racially discriminatory speech, Chief DeVito's reputation as a District Chief was damaged, which caused him a loss of prestige, a diminished employment record and emotional distress — for all of which he is entitled to damages.

17. Chief DeVito is entitled by 42 U.S.C. § 1988(b) to recover his attorney's fees and litigation expenses for suing pursuant to § 1983 to vindicate his Fourteenth Amendment right to be free from racial discrimination.

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has discriminated against Chief DeVito because of his race, in violation of the Equal Protection Clause

of the Fourteenth Amendment, by issuing the written warning;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to revoke the written warning issued to Chief DeVito and to remove it from his personnel file;

Four, award Chief DeVito his reasonable attorney's fees and litigation expenses, and

Five, grant such other and further relief as is just.

Count II: Race Discrimination Under the Florida Civil Rights Act

18. Chief DeVito realleges and adopts, as if fully set forth in Count II, the allegations of ¶¶ 1, 2, 3, 4, 5(b), 7, 8, 9, 10, 11, 12, 14 and 16.

19. The Florida Civil Rights Act of 1992 ("FCRA") states at § 760.10(1)(a), FLA. STAT., that "[i]t is an unlawful employment practice for an employer. . .[t]o. . . discriminate against any individual with respect to. . . terms, conditions, or privileges of employment, because of such individual's race. . . ."

20. Chief DeVito on September 22, 2020, filed a Charge of Discrimination with the Equal Employment Opportunity Commission concerning his being racially discriminatorily disciplined by Palm Beach County for making a racially discriminatory statement that he never uttered for no other reason than:

a. A black firefighter recruit had accused Chief DeVito of doing so and,

b. Chief Durden, who stated that he did not believe that Chief DeVito had made a racially discriminatory statement, issued him a written warning because — Chief Durden had told a union vice president — he feared that if he did not do so, there would be a “backlash.”

21. That charge of discrimination was, by operation of law, deemed cross-filed with the Florida Commission on Human Relations, which did not within 180 days of its receipt of that charge make an adverse finding against Chief DeVito, who gives Chief DeVito the right to sue Palm Beach County.

22. The FCRA provides at § 760.11(5), in pertinent part:

In any civil action brought under this section, the court may issue an order prohibiting the discriminatory practice and providing affirmative relief from the effects of the practice. . . . The court may also award compensatory damages, including, but not limited to, damages for mental anguish, loss of dignity, and any other intangible injuries. . . .

23. The FCRA further provides in that section that “[i]n any action or proceeding under this subsection, the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. . . .”

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has discriminated against Chief DeVito because of his race, in violation of the Florida Civil Rights Act;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to revoke the written warning issued to Chief DeVito and to remove it from his personnel file;

Four, award Chief DeVito his reasonable attorney’s fees and litigation

expenses, and

Five, grant such other and further relief as is just.

**Count III: Fourteenth Amendment Rights
Concerning Sexual Harassment Prosecutions**

24. Chief DeVito realleges and adopts, as if fully set forth in Count III, the allegations of ¶¶ 1, 2, 3, 4 and 5(a).

25. Palm Beach County terminated Chief DeVito August 23, 2022, based on his participation in a consensual, year-long flirting/texting relationship with Elizabeth Suit, a female fire fighter/paramedic who:

- a. Did not complain about the texts going back-and-forth between the two, and
- b. Had a history of five in-the-flesh – as opposed to digital – sexual relationships with higher-ranking PBCFR employees since joining the department in 2019,¹ including:
 - i. a captain with whom she was having a sexual relationship while she was a recruit going through the fire academy;
 - ii. Jason Martino, a special-operations captain who testified during Chief DeVito’s union arbitration challenging his termination about his own 18-month relationship with Ms. Suit;
 - iii. a Special Operations Driver Operator;
 - iv. another Special Operations captain, and

¹Chief DeVito is not revealing at this juncture the names of the three of the five higher-ranking fire/rescue personnel who have neither testified nor otherwise made their relationship with Ms. Suit public.

v. Lt. Rafael Suarez, her direct supervisor when she was assigned to Station 57 as a “floater” who would frequently be assigned to the dive-team at Station 57, which was one of the stations that Chief DeVito oversaw and the station at which he was headquartered, against none of five of whom Palm Beach County ever brought administrative charges because of his sexual relationship with Ms. Suit.

26. Chief DeVito’s termination was based on his alleged violation of:

a. Fire/Rescue Policy FR-A-107, which:

i. at ¶ 1(d)(v) prohibits Fire/Rescue personnel from “[s]exting or texting which **may be offensive** to others,” (emphasis supplied), and

ii. at ¶ 4(e) states, in pertinent part, in its definition of sexual harassment:

Consenting relationship (sic) may constitute sexual harassment under this policy when a professional power differential exists between Fire Rescue personnel and a romantic or sexual relationship develops. There is a potential for abuse of power, even in relationships of apparent mutual consent. Fire Rescue strongly discourages sexual relationships between a supervisor and a subordinate[, and]

iii. County Policy CW-P-029, which similarly provides in its section on “Sexual Harassment” as constituting “Prohibited Conduct”:

Consenting relationship may constitute sexual harassment under this policy when a professional power differential exists between employees and a romantic or sexual relationship develops. There is a potential for abuse of power, even in relationships of apparent mutual consent. The County strongly discourages sexual relationships between a supervisor and a subordinate.

27. Although both the County and Fire/Rescue policies provide

that “[s]exual harassment may occur among co-workers or when a person who is in a position to control, influence, or affect another individual’s job or career standing uses this power to either coerce the subordinate into sexual relationships or punish a refusal to participate in sexual activity,”

a. Firefighter/paramedic Suit, the alleged “victim” of Chief DeVito’s alleged “sexual harassment,” not only did not complain about Chief DeVito’s behavior, but made quite clear both to the captain to whom she initially reported it more than four months after it had ceased and to human-resources that she did not wish to be named as a complainant or to be a witness;

b. No specific allegations were contained in any charging document, which instead accused Chief DeVito generically of

Exhibiting discriminatory behavior, sexual harassment, or use of derogatory comments related to a person’s sex, race, color, creed, religion, national origin, age, disability or sexual preference. This may include failure of supervisor to take appropriate action. (sic) HIPPA Violations (sic) and retaliation[,]

the specifics (i.e., “Potential Charges”) of which were listed as:

C-6: Conduct unbecoming of personnel including actions which reflect unfavorably on the efficiency of the County, cause embarrassment or are damaging to the County, or in general reflect unfavorably on the County, its personnel or its citizens.

C-7: Exhibiting discriminatory behavior, sexual harassment, or use of derogatory comments related to a person’s face, sex, color, creed, religion, national origin, age, disability or sexual preference. This may include failure of a supervisor to take appropriate action.

F-1: Violation of rules, regulations, [sic] or policies.

H-1: HIPA (sic) violation,
and listed the complainants as Palm Beach County Fire Rescue
Administration/Captain Gregory Thomas, and someone whose name was
blacked out, assertedly pursuant to §§ 112.3187-112.31895, FLA. STAT.,
Florida's suite of public-sector whistle-blower statutes which at § 112.3188
includes a confidentiality provision, but

c. During pretermination proceedings:

i. Witnesses — including Ms. Suit and Lt. Suarez —
were interviewed only in the presence of Chief DeVito's union
representatives, but not of either Chief DeVito or his retained counsel, The
Amlong Firm;

ii. The transcripts of those interviews were not provided
to Chief DeVito or his counsel pretermination, but only after PBCFR
terminated him;

d. During a post-termination union arbitration challenging
Chief DeVito's termination:

i. The record was laden with such inadmissible hearsay
as the sworn statements of Ms. Suit and Lt. Juarez, who had never been
cross-examined by Chief DeVito's lawyers or by any union lawyers — either
pre- or post-termination;

ii. Neither Firefighter/Paramedic Suit or her new
husband, Lt. Suarez appeared to testify;

iii. Because Chief DeVito's counsel was not permitted to represent Chief DeVito, they were not able to either subpoena or question under oath either Ms. Suit nor Lt. Suarez;

iv. The only evidence of what either of them complained about was presented through:

(1) Anonymous sworn statements of Ms. Suit and Lt. Suarez taken without Chief DeVito's counsel even being present, much less being permitted to cross examine — which statements are therefore hearsay, which is inadmissible under Florida administrative law to prove a fact without non-hearsay testimony to supplement it;

(2) Hearsay testimony about what Ms. Suit and Lt. Suarez told Captain Thomas and Vanessa Steelman, a human-resources investigator, which was likewise inadmissible on a stand-alone basis, and

(3) Partial examples of the electronic communications between Chief DeVito and Ms. Suit — minus those portions posted by Ms. Suit that she deleted prior to forwarding them to Palm Beach County's human-resources function;

v. As soon as Ms. Suit informed Chief DeVito in November 2022 that she had begun a romantic relationship with someone else and did not wish him to text her any longer, he stopped:

(1) His only exception was to proclaim that a photograph that she had posted to a link to which he was connected was "[s]o goddamn sexy."

28. The relationship between Chief DeVito, a body builder, and Ms. Suit, a fitness competitor, simply did not constitute sexual harassment, but rather was a relationship between two consenting adults that is protected by the First Amendment to the United States Constitution (as well as Article I, § 23 of the Florida Constitution, "Right of privacy").

29. Chief DeVito's texting relationship came to the fire/rescue department's attention solely because Lt. Suarez reported it to management in late March 2022 more than four months after the text relationship had ceased — for reasons having nothing to do with sexual harassment:

a. Lt. Suarez expressed to Brian Iannitti — a Local 2928 district vice president for the battalion to which Ms. Suit was assigned and to which Lt. Suarez was a "floater" who frequently was assigned to the same shift and fire station as Ms. Suit and the rescue-diving captain for that battalion — that he was angry that Chief DeVito and Battalion Chief Neal Niemczyk were insisting that he be cleared by a physician before he could resume diving following what appeared to have been a transient ischemic attack (TIA) during a training dive March 16.

b. Lt. Suarez had walked out of a hospital emergency room against-medical-advice that day, had subsequently resisted Chief DeVito's insistence that he be cleared by a physician and told Capt. Iannitti that if he were not moved back to active diving by a certain date, "[t]he shit is going to hit the fan."

c. When March 31, 2022 came and Lt. Suarez had not been reinstated to the diving team without being cleared a physician, he filed a complaint alleging that Chief DeVito was preventing him from returning to diving not out of any concern for his safety — which his Battalion Chief, Neal Niemczyk, a veteran rescue diver, also shared.

d. Lt. Suarez instead alleged that the real reason was because Chief DeVito wished to keep him away from Ms. Suit.

30. The termination of Chief DeVito because of the texting relationship in which he and Ms. Suit engaged (until she asked him to stop, which he did) violated Chief DeVito's Fourteenth Amendment rights in two ways:

a. Chief DeVito's rights to equal protection against sex-discrimination were violated by Fire Chief Patrick Kennedy's terminating him, but not Ms. Suit, who violated Palm Beach County and its fire/rescue department's against "consensual relationships," and

b. Chief DeVito's denial of both pre-deprivation and post-deprivation rights to procedural due process — not because of any accident, e.g., a prison guard's losing an inmate's hobby kit, but because of the way in Palm Beach County has deliberately structured its disciplinary policies procedures for addressing (or not addressing) both sets of rights.

31. Because there was no effective internal appellate provision available to Chief DeVito for the predeprivation proceedings, nor any effective postdeprivation mechanism, Chief Kennedy was Palm Beach

County's decision maker and final policy maker for Chief DeVito's termination.

32. As a direct, natural and proximate result of Palm Beach County's disciplining Chief DeVito in violation of his Fourteenth Amendment rights to equal protection, Chief DeVito has been damaged, i.e., Chief DeVito has suffered a loss of prestige, a diminished employment record and emotional distress — for all of which he is entitled to damages.

33. Chief DeVito is entitled by 42 U.S.C. § 1988(b) to recover his attorney's fees and litigation expenses for suing pursuant to § 1983 to vindicate his Fourteenth Amendment right to be free from sex discrimination.

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has intentionally denied Chief DeVito both his pre-deprivation and post-deprivation rights to procedural due process;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to reinstate Chief DeVito as a district chief;

Four, award Chief DeVito his reasonable attorney's fees and litigation expenses, and

Five, grant such other and further relief as is just.

Count IV: Title VII Sex Discrimination

34. Chief DeVito realleges and adopts, as if fully set forth in Count IV, the allegations of ¶¶ 1, 2, 3, 4, 5(b), 25, 26(a)(ii) and (iii), 27(a) and (b)(F-1), 28 and 29.

35. Chief DeVito on December 15, 2022, filed a Charge of Discrimination with the Equal Employment Opportunity Commission concerning his being wrongfully terminated based on allegations of sexual harassment.

36. The Department of Justice issued a notice of right to sue January 31, 2023, within 90 days of which this action is being filed.

37. Title VII of the Civil Rights Act of 1964 provides, in pertinent part at 42 U.S.C. § 2000e(a)(1) that "[i]t shall be an unlawful employment practice for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . ."

38. As a direct, natural and proximate result of Palm Beach County's depriving Chief DeVito of his Title VII rights against gender discrimination, Chief DeVito has been damaged, i.e., Chief DeVito has suffered a loss of prestige, a diminished employment record and emotional distress — for all of which he is entitled to damages.

39. Title VII further provides at 42 U.S.C. § 2000e-5(k) that "[i]n any action or proceeding under this subchapter the court, in its

discretion, may allow the prevailing party. . . a reasonable attorney's fee (including expert fees) as part of the costs.”

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has discriminated against Chief DeVito because of his sex, in violation of the Title VII of the Civil Rights Act of 1964, as amended;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to revoke its termination of Chief DeVito and restore him to his position as a district chief;

Four, award Chief DeVito his reasonable attorney's fees and litigation expenses, and

Five, grant such other and further relief as is just.

Count V: Sex Discrimination Under the Florida Civil Rights Act

40. Chief DeVito realleges and adopts, as if fully set forth in Count V, the allegations of ¶¶ 1, 2, 3, 4, 5(b), 25, 26(a)(ii) and (iii), 27(a) and (b)(F-1), 28, 29 and 35.

41. Chief DeVito’s Charge of Discrimination was cross filed with the Florida Commission on Human Relations, which did not make any adverse finding against Chief DeVito.

42. As a direct, natural and proximate result of Palm Beach County’s depriving Chief DeVito of his Florida Civil Rights Act rights against gender discrimination, Chief DeVito has been damaged, i.e., Chief DeVito has

suffered a loss of prestige, a diminished employment record and emotional distress — for all of which he is entitled to damages.

43. The Florida Civil Rights Act also provides that this Court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee (including expert fees) as part of the costs." § 760.11(5), FLA. STAT.

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has discriminated against Chief DeVito because of his sex, in violation of the Florida Civil Rights Act of 1992;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to revoke the termination of Chief DeVito and reinstate his as a district chief;

Four, award Chief DeVito his reasonable attorney's fees and litigation expenses, and

Five, grant such other and further relief as is just.

Count VI: First Amendment Claim No. 1 for Damages and Injunctive Relief Concerning Palm Beach County's Sexual Harassment Rules

44. Chief DeVito realleges and adopts, as if fully set forth in Count VI, the allegations of ¶¶ 1, 2, 3, 4, 5(a), 26(a)(I)-(iii) and (b)(I)-(v), 27(a)(I)-(b)(C-6)(F-1), 28 and 29(a).

45. The First Amendment protects the rights of citizens, even public employees, to associate with others.

46. Chief DeVito was terminated because he and Ms. Suit engaged in a year-plus-long texting and flirtation association while she was employed as a firefighter/paramedic:

a. Which Chief DeVito ceased as soon as Ms. Suit stated that she wished him to cease;

b. About which Ms. Suit never complained (or testified) that Chief DeVito's interactions with her were unwelcome — and concerning which she demanded of Palm Beach County that she not be listed as a complainant, and;

c. Because of which relationship, Ms. Suit never obtained any advantage nor suffered any detriment in connection with her employment by Palm Beach County Fire Rescue.

47. The administrative prosecution and termination of Chief DeVito because of his relationship with Ms. Suit violates Chief DeVito's rights under the First Amendment because it is based on a relationship with Ms. Suit that cannot be said to have constituted sexual harassment since Ms. Suit never complained prior to Chief DeVito's termination (or afterwards) that it was unwelcome.

48. Neither Palm Beach County nor its Fire Rescue department have historically forbidden or disciplined fire-rescue employees for merely engaging in consensual relationships between couples comprised of unequal ranks, but each merely each has stated that it "strongly discourages" them — which in

reality neither Palm Beach County nor its Fire Rescue department has ever done:

a. Although the department in 2006 demoted to firefighter/paramedic Randolph Starling, a "rescue captain," whom Battalion Chief Ken Fischer ordered to end his association with Carolyn Smith, a fire fighter under Capt. Starling's command:

i. Palm Beach County disciplined Capt. Starling only after Chief Fisher issued him on January 11, 2006, an Employment Development Form, that accused Capt. Starling of:

ii. "caus[ing] a disruption for the station officer and for the crew," and

iii. Having "delivered a package for Smith when he was supposed to be responding to a call, cancelled a meeting session to spend time with her, and helped her at night with her reports when he was on duty. . . ."

b. Ten days after the issuance of the Employment Development Form, Palm Beach County initiated a disciplinary action, resulting in a demotion from captain to firefighter/paramedic February 6, 2006, which the union refused to take a arbitration. See generally, Starling v. Board of County Com'rs, 602 F.3d 1257 (11th Cir. 2010).

c. Although the Starling court resolved the case in favor of Palm Beach County using the balancing test spelled out in Pickering v. Board of Education, 391 U.S. 563(1968), Starling, at 602 F.3d 1260-61, and while

the court stated in dicta “[t]he mere potential for this kind of disruption in the Fire Department would likely justify a burden on a fundamental right to intimate association,” Starling, 602 F.3d at 1262, it went on to state “[t]his case, however, does not require such extrapolation: the undisputed record evidence shows that Starling's relationship with Smith was damaging operational efficiency.”

49. Additionally, Palm Beach County has historically not seen fit to likewise administratively prosecute:

a. Four other higher-ranked officers — two captains, a lieutenant and a driver-engineer — who engaged in in-the-flesh (as opposed to digital) sexual relationships with Ms. Suit since she joined the Fire Rescue Department in 2019, or

b. Twelve couples whom Captain Newsome, the union president, identified at the union arbitration of Chief DeVito's termination as being or having been employed by Palm Beach Fire Rescue when they began relationships at various times from the early 2000s, involving both Fire Rescue employees who have retired and Fire Rescue employees who are still on active duty,² and

²Although plaintiff has all of the names of the personnel involved, which names were used in the testimony at his union arbitration by Capt. Jeffrey Newsome, the current union precedent, at plaintiff's union-arbitration hearing, plaintiff's counsel has opted to not include them in a federal-court pleading that would immediately become public record. Defendant is aware of the names.

c. Those couples include a male captain and a female rookie firefighter who met when both were assigned to Station 45, who are now married and whom Capt. Newsome testified were recently investigated because of “an accusation made that the two of them were having inappropriate relations while on duty,” but against whom no action has been taken.

50. As a direct, natural and proximate result of Palm Beach County’s disciplining Chief DeVito in violation of his First Amendment rights to free association, Chief DeVito has been damaged, i.e., Chief DeVito has suffered a loss of prestige, a diminished employment record and emotional distress – for all of which he is entitled to damages.

51. Chief DeVito is entitled by 42 U.S.C. § 1988(b) to recover his attorney’s fees and litigation expenses for suing pursuant to § 1983 to vindicate his First Amendment right to be free from having his freedom of speech and freedom of association punished by Palm Beach County.

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has violated Chief DeVito’s associational rights under the First Amendment;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to revoke Chief DeVito’s termination and to reinstate him as a district chief;

Four, award Chief DeVito his reasonable attorney’s fees and

litigation expenses, and

Five, grant such other and further relief as is just.

Count VII: First Amendment Claim for Damages Concerning Palm Beach County's Sexual Harassment Rules

52. Chief DeVito realleges and adopts, as if fully set forth in Count VII, the allegations of ¶¶ 1, 2, 3, 4, 5, 26(a), 27(a)-(b), (28)(a)-(b)(C-6-F-1), 29, 30, 31, 32 and 37.

53. Palm Beach County and its Fire Rescue Department's sexual harassment allegations against Chief DeVito include that he violated:

a. Fire/Rescue Policy FR-A-107, ¶ 1(d)(v) which prohibits Fire/Rescue personnel from "[s]exting or texting **which may be offensive to others**," (emphasis supplied), and

b. Both Fire/Rescue Policy FR-A-107, ¶ 4(e), and County Policy CW-P-029, each of "strongly discourages" — but does not forbid a such a relationship — because

"Consenting relationship (sic) **may** constitute sexual harassment under this policy when a professional power differential exists between Fire Rescue personnel and a romantic or sexual relationship develops. There is a potential for abuse of power, even in relationships of apparent mutual consent. . . ."

54. Each of the consensual-relationship policies state as its raison d'être:

Sexual harassment may occur among co-workers or when a person who is in a position to control, influence, or affect another individual's job or career standing uses this power to either coerce the subordinate into sexual relationships or punish a refusal to participate in sexual activity. . . .

55. However:

a. Firefighter/Paramedic Suit, the alleged "victim" of Chief DeVito's alleged "sexual harassment," not only did not complain about Chief DeVito's behavior, but made it quite clear to Palm Beach County that she did not wish to be named as a complainant;

b. No such allegations that Ms. Suit had found Chief DeVito's texts to her unwelcome were contained in any charging document or investigative materials;

c. During the investigative and administrative proceedings against Chief DeVito, there were no allegations — let alone evidence — that he had threatened punishment against her if she did not participate in the texting relationship or that he had promised (or delivered) any advantages to her because of the relation, and

d. As soon as Ms. Suit informed Chief DeVito that she had begun a romantic relationship with someone else and did not wish him to text her any longer, he stopped.

56. To be actionable as sexual harassment under Title VII of the Civil Rights Act, and by extension subject to a local government's punishment of an employee for engaging in such behavior, the Supreme Court has held, "a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher v.

City of Boca Raton, 524 U.S. 775, 787 (1998), citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21-22 (1993).

57. Because there was no evidence presented to Palm Beach County officials that Ms. Suit found Chief DeVito's texts to her to be offensive, the three regulations of which Chief DeVito is accused of violating are, at least as applied to his relationship with Ms. Suit, in violation of Chief DeVito's fundamental rights under the First Amendment to freely associate and communicate.

58. As a direct, natural and proximate result of Palm Beach County's disciplining Chief DeVito in violation of his First Amendment rights to free association, Chief DeVito has been damaged, i.e., Chief DeVito has suffered a loss of prestige, a diminished employment record and emotional distress – for all of which he is entitled to damages.

59. Chief DeVito is entitled by 42 U.S.C. § 1988(b) to recover his attorney's fees and litigation expenses for suing pursuant to § 1983 to vindicate his First Amendment right to be free from having his freedom of speech and freedom of association punished by Palm Beach County.

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has violated Chief DeVito's associational rights under the First Amendment;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to revoke Chief DeVito's termination and to reinstate him as a district chief;

Four, award Chief DeVito his reasonable attorney's fees and litigation expenses, and

Five, grant such other and further relief as is just.

Count VIII: Fourteenth Amendment Claim Damages and Injunctive Relief Concerning Palm Beach County's Sexual Harassment Rules

60. Chief DeVito realleges and adopts, as if fully set forth in Count VIII, the allegations of ¶¶ 1, 2, 3, 4, 5(a), 26(a) and (b)(I)-(iii), 27(a) and (b),(C-6-5-1), (28), and 29(a).

61. A public employee accused of violating a disciplinary rule is guaranteed as part of his fundamental rights to substantive due process:

62. The two sexual-harassment rules and one texting rule concerning the alleged violations of which Palm Beach County terminated Chief DeVito provide that:

a. Fire/Rescue personnel must not engage in "[s]exting or texting **which may be offensive to others**," see, Fire/Rescue Policy FR-A-107, ¶ 1(d)(v), and

b. Both the county overall, and the fire/rescue department in particular, "strongly disapprove" inter-rank sexual relationships because of , each of "strongly discourages" because

Sexual harassment **may** occur among co-workers [in a consensual-relationship] or when a person who is in a position to control, influence, or affect another individual's job or career standing uses this

power to either coerce the subordinate into sexual relationships or punish a refusal to participate in sexual activity. . . .

See County Policy CW-P-029.

63. Each of those rules on their faces violate the due-process clause of the Fourteenth Amendment because neither:

- a. Provides the kind of notice that would enable ordinary people to understand what conduct it prohibits, and
- b. Each may authorize and even encourage arbitrary and discriminatory enforcement.

64. For the same reasons, each is also ineffective under the First Amendment, since each may be understood to cover protected speech.

65. In the case at bar, not only are the three challenged regulations facially unconstitutional, but, as they were applied:

- a. How was Chief DeVito to know whether what he was texting to Ms. Suit was something that "**may be offensive to others,**" particularly since Ms. Suit did not complain about it and refused to be listed as a complainant in Palm Beach County's attack on his relationship with Ms. Suit?
- b. Palm Beach County's failure to administratively prosecute the other five higher-ranking fire/rescue who actually had in-the-flesh sexual relationships with Ms. Suit conclusively demonstrates the arbitrariness of Palm Beach County and the fire/rescue department's enforcement of the

suggestion (since one could hardly call it a rule) that it “strongly discourages” consensual relationships between personnel of different ranks.

66. As a direct, natural and proximate result of Palm Beach County’s disciplining Chief DeVito in violation of his First Amendment rights to free association, Chief DeVito has been damaged, i.e., Chief DeVito has suffered a loss of prestige, a diminished employment record and emotional distress – for all of which he is entitled to damages. See generally Starling v. Board of County Com'rs, 602 F.3d 1257, 1259 (11th Cir. 2010)

67. Chief DeVito is entitled by 42 U.S.C. § 1988(b) to recover his attorney’s fees and litigation expenses for suing pursuant to § 1983 to vindicate his First Amendment right to be free from having his freedom of speech and freedom of association punished by Palm Beach County.

WHEREFORE, plaintiff, District Chief Christopher DeVito prays that this Court will:

One, determine that Palm Beach County has violated Chief DeVito’s associational rights under the First and Fourteenth Amendments;

Two, award Chief DeVito damages;

Three, enjoin Palm Beach County to revoke Chief DeVito’s termination and to reinstate him as a district chief;

Four, order Palm Beach County to strike the regulations as they are written;

Five, award Chief DeVito his reasonable attorney’s fees and litigation expenses, and

Six, grant such other and further relief as is just.

Demand for Jury Trial

Plaintiff demands trial by jury on all issues so triable.

Respectfully Submitted,

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Certificate of Service

I HEREBY CERTIFY that the above and foregoing has been filed this day using the ECF system of United States District Court for the Southern District of Florida and thereby automatically transmitted to all counsel of record.

/s/ William R. Amlong

WILLIAM R. AMLONG