**UNITED STATES DISTRICT COURT**
**MIDDLE DISTRICT OF FLORIDA**
**ORLANDO DIVISION**

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| **STEPHEN M. DAVIS,** | : | |
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| **Plaintiff,** | : | |
| | : | |
| **v.** | : | **Case No. 6:22-cv-2222-PGB-EJK** |
| **ORANGE COUNTY,** | : | |
| | : | |
| **Defendant.** | : | |

**PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT**

COMES NOW Plaintiff Stephen Davis, by and through undersigned counsel and opposes Defendant's Motion to Dismiss ("MTD") Plaintiff's First Amended Complaint ("FAC"), for the reasons set forth below.

It is puzzling the level of malevolence that Defendant Orange County is willing to reach against this Plaintiff Mr. Davis. This is a case in which, Mr. Davis, by all accounts a stellar employee and exceptional leader – on the short list for promotion to Assistant Chief – suddenly fell out of grace with Defendant. But, this was not by error or legal violation or other lapse in judgment by Mr. Davis. No, Defendant has engaged in a relentless campaign of discrimination and overt retaliation against Mr. Davis because he sought to save Defendant from legal liability under state and federal law to its employees during its implementation of a brand new policy in October of 2021.

Having been unsuccessful at trying to silence Mr. Davis from blowing the whistle on Defendant's many legal misdeeds, Defendant Orange County, a large local government body and

public employee, sought to *evade service* of this lawsuit under Fl. Stat. §48.111 over many months. Defendant's Mayor Jerry Demings refused proper service twice in April and May 2022, indicating there was an error in the caption Defendant name, despite undersigned counsel having served Defendant in October 2021, using an identical caption title for Defendant, and despite the clerk of the 9th Judicial Circuit for Orange County stating there was absolutely no error in the caption format of the pleading. Mr. Davis provided a waiver of service packet to Defendant under Rule 4(d) in June, but only after a local journalist confronted Mayor Demings' in June regarding Mr. Davis' case and Mayor Demings' publicly asserted he was unaware of Mr. Davis' thrice-served case did Defendant Orange County acknowledge the third service attempt via Rule 4(d). Defendant also did not engage in the grievance process with Mr. Davis and his union representatives in good faith – withholding critical documents material to his defenses against Defendant's charges against him, and never notifying him whatsoever that it had agreed with the his union to drop his grievance process after arbitration was already being set for the calendar.[1]

Apparently, this is not enough fraud, waste, and abuse of tax-payer resources for Defendant Orange County. Nor is it enough harassment of Mr. Davis. Defendant is content now to file its second Motion to Dismiss Mr. Davis' claims which motion should be denied, as Mr. Davis' allegations are properly pled.

FACTS PERTINENT TO THE MOTION

Prior to his unlawful termination in 2021, Mr. Davis was a long-time employee of Defendant's Fire Rescue department and servant to the people of Orange County as a firefighter

[1] In this suit as filed at the state court, Defendant filed a Motion to Dismiss on August 25, 2022, but never sought a hearing or advanced its defenses. Prior to the hearing for the motion set by undersigned counsel, prior judge Reginald Whitehead recused himself, so the motion was never heard before Mr. Davis filed his First Amended Complaint and Defendant removed the case to this Court.

and first responder. FAC ¶ 11. Not only was Mr. Davis highly trained in his field and decorated for his achievements, but he was also on the "short list" for promotion to Assistant Chief within the department. FAC ¶¶ 12-13. When Defendant fired Mr. Davis, he was in the role of Battalion Chief, with authority over roughly fifty employees in six stations. In that role, he had the responsibility of issuing discipline of written reprimand or less to employees under his command. FAC ¶ 14.

When Defendant, through Mayor Demings, decreed its Covid-19 vaccine mandate for all county employees, Mr. Davis promptly submitted his religious exemption request. He never received any communication or discussion from Defendant regarding the status of his request, however. FAC ¶ 16. On Defendant's alleged deadline for obtaining and reporting the Covid-19 vaccination, Defendant and I.A.F.F. Local 2057 allegedly reached a negotiated Memorandum of Understanding ("MOU") through which, employees who did not obtain the Covid-19 shots and did not report the injection would be issued written reprimand. However, ostensibly, unlike all other progressive discipline under Defendant's and the department's ordinances, Rules, and SOPs, these written reprimands would, by agreement, "not be considered or used in the bargaining unit member's performance evaluation."[2] FAC ¶¶ 17-18, Exh. B. The next day, Mr. Davis, together with several dozen other employees of Defendant's Fire Rescue department, filed a lawsuit against Defendant, alleging violations of law in the imposition of Defendant's Covid-19 vaccination mandate. FAC ¶ 20; *Wheat, et al. v. Orange County*, 2021-CA-009579-O (9th

[2] It is important to note that Mayor Demings admitted on the record around October 2021 in an open Board of Commissioners meeting that indeed, despite the dire threat and warnings of the prior several months that non-compliant employees would be fired, "it was never the intention of the county to terminate anyone's employment" over the Covid-19 vaccine mandate. Such an admission obviates the need for the MOU and calls into question further its validity, beyond its hasty and improper negotiation.

Jud. Cir. Ct., Orange County, 2021). As a battalion chief, Mr. Davis would be tasked with issuing written reprimands in accordance with the MOU's alleged terms. FAC ¶ 19.

On October 5, 2021, on his first shift after the effective date of the MOU and after the filing of the multi-plaintiff lawsuit in which he was the only officer among the plaintiffs, Mr. Davis was provided very late in the day the list of employees to receive discipline under the Covid-19 shot mandate and MOU. FAC ¶¶ 21-22, 30. Mr. Davis could not verify his list of names against Human Resources' records of compliant employees, including employees with filed exemption requests because Defendant's HR office was then closed for the day. FAC ¶ 25. Therefore, he went to his superior in his chain of command, Assistant Chief Buffkin, and discussed his concern at seeing individuals subject to discipline issued by him who he knew personally were compliant with the policy, particularly, who had filed religions exemption to the mandate. FAC ¶¶ 23-25. He outlined all of Defendant's violations of law by phone and followed up with an email, specifying the two employees on his list who were compliant with the mandated injections and additionally asserting that the testing kits for the policy of the MOU were expired across several stations. FAC ¶¶ 25, 28-30, Exh. E.

Mr. Davis *was not the lone officer receiving and delivering* complaints of erroneous Covid-19 mandate disciplinary lists to upline officers in command within Defendant's Fire Rescue department. FAC ¶ 32-35, 46, Exh. F, J. However, Mr. Davis *was the only* employee who made disclosures of Defendant's violation of law in the mandate enforcement *who was then fired for his disclosures* and his objection to issuing unlawful discipline against employees in his command. FAC ¶¶ 31, 44, Exh I. AC Buffkin who suspended Mr. Davis for his protected acts of disclosure and objection to following an unlawful order informed all other battalion chiefs of precisely Mr. Davis' concerns of illegality and advised them - as their superior officer - that they

were to confirm the veracity of their discipline lists with HR. This was precisely the remedy sought by Mr. Davis the night before and denied to him by AC Buffkin. FAC ¶¶ 36-37, Exh. H. Defendant held a predetermination hearing ("PDH") regarding Mr. Davis' retaliatory suspension by AC Buffkin, for which he provided written evidence of Defendant's unlawful conduct and misfeasance, submitted on his behalf by his legal representative within the union. FAC ¶¶ 41-43. However, Defendant through its agent officers AC Howe disregarded all of Mr. Davis' allegations of misconduct and retaliatory action against him, and confirmed the unsubstantiated and defamatory disciplinary charges against him as well as approving Mr. Davis' unlawful termination, effective October 19, 2021. FAC ¶¶ 44, 49, Exh. I.

There is no other reasonable reading of Defendant's conduct with Mr. Davis since 2021 than animus against him for his outspoken beliefs and multiple challenges of Defendant's violations of law in an effort to hold Orange County accountable for its lawless pattern of conducting its business and treating its employees. Even after firing Mr. Davis and slandering his excellent reputation in his field within his community and the entire state of Florida, Defendant has only continued to double-down against Mr. Davis, engaging in the grievance process he initiated regarding his termination in bad faith. FAC ¶¶ 57-60. Defendant never entered the written reprimands Mr. Davis challenged on October 5 prior to the change of state law prohibiting Defendant's Covid-19 vaccine mandate on November 19, 2021. FAC ¶ 51. However, when Mr. Davis challenged Defendant through the public records request process regarding the improper handling of these public record written reprimands, Defendant suddenly entered the discipline, now in violation of Florida state law. FAC ¶¶ 53-54.

STANDARD OF REVIEW

Under Fed. R. Civ. P 8(a), a pleading must contain only a short and plain statement of the claim showing that the pleader is entitled to relief together with the demand for relief sought, including alternate forms of relief. FRCP 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Rule 8 further dictates that "no technical form is required" for allegations, though they must be "simple concise, and direct," and a fact-finder is to construe a pleading "so as to do justice." FRCP 8(d), 8(e). The critical issue of format of pleading allegations is clarity and notice for the other party regarding the nature of the claims and defenses and legal basis alleged therefor. *Weiland v. Palm Beach County Sheriff's Office,* 792 F.3d 1313, 1323 (11th Cir. 2015). "[O]rdinary pleading rules are not meant to impose a great burden upon a plaintiff." *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347 (2005).

When deciding a Rule 12(b)(6) motion to dismiss, the inquiry is whether the complaint has pled "enough facts to state a claim to relief that is plausible on its face." *EEOC v. STME, LLC*, 938 F.3d 1305, 1313 (11th Cir. 2019) (internal citations omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to make an inference that the defendant is liable for alleged misconduct. *Iqbal*, 556 U.S. at 678. A court "must accept all of the Complaint's allegations as true, construing them in the light most favorable to the plaintiff." *Bentley v. Miami Air Int'l.,* No. 16-CY-24607-HUCK/OTAZO-REYES, 2017 U.S. Dist. LEXIS 234188 at *3 (S.D. Fla. Feb. 13, 2017); *and see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "[A] motion to dismiss should concern only the complaint's legal sufficiency, and is not a procedure for resolving factual questions or addressing the merits of the case." *Am. Int'l Specialty Lines Ins. Co. v. Mosaic*

*Fertilizer, LLC,* 8:09-cv-1264-T-26TGW, 2009 WL 10671157, at *2 (M.D. Fla. Oct. 9, 2009) (Lazzara, J.).

Defendant Orange County brings its Motion to Dismiss before this Court under FRCP 12(b)(6) and cites also FRCP 12(f), but only moves the court for dismissal under the Rule 12(b)(6) standard: "Plaintiff's First Amended Complaint is entirely insufficient, and Plaintiff has not stated a single claim against Defendant ORANGE COUNTY upon which relief can be granted." MTD at 4, 25. Since a motion to strike is an inappropriate vehicle at this time, Defendant does not further present this Court with valid motion other than that under Rule 12(b)(6), and because Mr. Davis' claims amply meet the pleading standard under the Rules to withstand a motion to dismiss under Rule 12(b)(6), Mr. Davis' requests this Court disregard Defendant's reference to Rule 12(f).

## ARGUMENT

### *A. Plaintiff's protected actions under Fl. Stat. § 112.3187 properly pled in his pleading are the basis for Defendant's overt retaliation against him.*

Mr. Davis' claims of retaliation by Defendant against him for his protected acts under Florida's Whistle-Blower's Protection Act are so strong and properly pled in his complaint, that Defendant is relegated to wild misinterpretations of the plain allegations of the FAC to assert an argument against Mr. Davis' Count I. MTD at 5, ftnt 1. It is patently false that Mr. Davis has "not allege[d] that his refusal to issue written reprimands is refusal to participate in an adverse action" and protected by the act. *Id. cf* FAC ¶¶ 23-31, 68-73. Specifically, after incorporating by reference all facts alleged above, Mr. Davis copies in Count I the language of the statute protecting employees "who refuse to participate in any adverse action prohibited by this section" (FAC ¶ 68), then alleges that "he accurately suspected he was being ordered to violate federal and state law to issue written reprimands to firefighters who had timely filed for exemptions and

accommodation," violating employees' fundamental rights "if he *were to discipline* them" (FAC ¶ 70-71, emphasis added), and as a result, he "challenged unlawful orders to his superior officer" "in accordance with OCFR Rule 35", the Rule for refusing to follow unlawful orders. FAC ¶¶ 70, 73. By reference to Rule 35 in Count I and all prior facts alleged, is clear that Mr. Davis' "challenge" of the unlawful orders *was his refusal to follow them* to discipline employees under his charge. Mr. Davis further alleges protected actions by refusal to participate in illegality and written complaints regarding illegality under the act *inter alia*:

- Filing a civil lawsuit against Defendant, served on the appropriate official under Fl. Stat. § 112.3187(6), for violations of law regarding its Covid-19 vaccine mandate issued July 2021, endangering county employees and violating their fundamental rights (FAC ¶¶ 20, 29);
- Initiating CBA-compliant Rule 35 complaint to superior AC Buffkin and under the Rule, refusing to follow an unlawful order (FAC ¶¶ 23-31) to engage in adverse actions against employees who were compliant and filed exemption requests; and
- Submitting detailed written defenses during his PDH to his upline command, including AC Howe and Fire Chief Fitzgerald, which document details his belief that the order given was illegal and that he refused to obey it on those grounds (FAC ¶¶ 42-44).

On a motion to dismiss under Rule 12(b)(6) standard, Mr. Davis' complaint must allege that 1) he engaged in a protected activity, 2) suffered an adverse employment action, 3) and the adverse action is not wholly unrelated to the protected activity. *Shaw v. Town of Lake Clarke Shores*, 174 So. 3d 444, 446 (Fla. 4th DCA 2015); see also *Henley v. City of North Miami*, 329 So.3d 791, 792 (Fla. 3d. DCA 2021) The Florida Supreme Court has ruled the "Act is remedial

and should be given a liberal construction." *Irven v. Department of Health and Rehabilitative Svcs.,* 790 So.2d 403, 405 (Fla. 2001) (citing *Hutchison,* 645 So.2d 1047, 1049 (Fla. 3d DCA 1994), and quoting *Martin County v. Edenfield*, 609 So.2d 27, 29 (Fla. 1992), "As a remedial act, the statute should be construed liberally in favor of granting access to the remedy.").

Defendant's argument that it is unclear which writing Mr. Davis' alleges as protected activity under the act is belied by its own clear identification of protected disclosures as pled by Mr. Davis. Defendant identifies accurately the protected acts identified above, but denies their compliance with the act to constitute protected disclosures and refusal to participate in adverse action prohibited by the act. MTD at 8-9. Similarly, Defendant's arguments that Mr. Davis' alleged protected disclosures under the act do not include the pertinent information under the act fail. MTD 8-10. The details of what conduct is complained of, to whom the complaints are delivered, and that they are made by Mr. Davis and on his behalf by his legal representatives are fully alleged by Mr. Davis as outlined above. Defendant makes an odd argument on MTD at 10 that the PDH defenses of Mr. Davis which fully set forth Defendant's unlawful actions and orders which he refused to obey cannot be a protected disclosure because he was already relieved of duty (adverse action) and the pleading is unclear whether the written defenses were provided during or after the PDH. Mr. Davis alleged that the written defenses were provided for the hearing and the same became part of the documents reviewed after the hearing by the officers in his chain of command who made the final determination regarding his discipline *after the PDH.* FAC ¶¶ 42-44, 67, 73. Defendant does not dispute that Mr. Davis has suffered adverse action of suspension and ultimately termination. MTD at 7. Moreover, the act should be read liberally as a remedial statute (*Hutchison,* 645 So.2d at 1049), and under the Rule 12(b)(6) motion standard of review, Mr. Davis' allegations should be viewed as true and the complaint construed in the

manner most favorable to him in determining whether his allegations are sufficient to state a claim for relief. Mr. Davis' claims are sufficient to provide notice to Defendant Orange County of the claim for relief under Florida's Whistle-Blower's Act, for which it is liable to Mr. Davis, and as such withstand Defendant's motion to dismiss them.

***B. Plaintiff has properly pled his claims for retaliation, and Defendant's arguments challenging exemptions to its defunct mandate fail.***

In an attempt to dismiss Mr. Davis' well pled allegations of retaliation under the Florida Civil Rights Act ("FCRA") Fl. Stat. § 760.10(7), Title VII of the federal Civil Rights Act of 1964 ("Title VII") 42 U.S.C. § 2000e-3(a), and the Americans with Disabilities Act ("ADA") 42 U.S.C. § 12203(a), Defendant appears to try to litigate substantively whether its Covid-19 vaccinate or terminate mandate violates civil rights law. MTD 14-17. However, under a Rule 12(b)(6) motion, construing Mr. Davis' claims most favorably to him, it is clear from his allegations that the focal point of the retaliation suffered by Mr. Davis arises out of his refusal to follow the unlawful order to issue discipline to employees whom he knew or reasonably believed had sought exemption from Defendant's mandate, as well as discipline without cause against others who were otherwise compliant. FAC ¶¶ 31-44, 51-57, 68, 70-73, 82-83, 85, 94-95, 97, 108-110.

To make out his case for retaliation under the FCRA, Title VII and the ADA, Mr. Davis must plead sufficient facts to show a) that he engaged in a protected expression under the act(s), b) that he suffered an adverse action; and c) that the adverse action was causally related to the protected expression. *Ricks v. Indyne, Inc.*, 552 F.Supp.3d 1255, 1256 (2021); *Queen E. Parker v. Economic Opportunity for Savannah-Chatham County Area, Inc., et al.,* No. 14-11743 (11th Cir. 2014), at *3, citing *Stewart v. Happy Herman's Cheshire Bridge*, 117 F.3d 1278, 1287 (11th

Cir. 1997). Under the statutes, the first element may be demonstrated as opposition to an employer's conduct which a plaintiff subjectively believes in good faith is unlawful and which belief is also objectively reasonable. *Id.* at *3-4, citing *Howard v. Walgreen Co.,* 605 F.3d 1239, 1244 (11th Cir. 2010); *see also Portfliet v. H&R Block Mortgage Corporation,* No. 07-14516, at *4 (11th Cir. Aug. 21, 2008).

At this stage of reviewing Mr. Davis' claims under a Rule 12(b)(6) motion, however, summary judgment standards of Defendant's cited caselaw do not dictate *pleading* sufficiency with regard to Mr. Davis' allegations regarding subjective good faith or objective reasonable beliefs regarding Defendant's unlawful conduct. *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 511 (2002) (Addressing claims of discrimination under Title VII: "[t]his Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss."), citing *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974)("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitle to offer evidence to support the claims.").

Defendant's focus in its argument to refute Mr. Davis' allegation that the mandate itself was unlawful illustrates Defendant's animus toward Mr. Davis underlying its pattern of retaliatory conduct against him for his beliefs put into practice, blowing the whistle on and refusing to participate in Defendant's myriad unlawful practices…at great cost to him. MTD at 13-19. In fact, Mr. Davis adequately alleges all elements of his claims in Counts II-IV stating a claim of retaliation by Defendant under each respective statute. Mr. Davis engaged in protected expression, specifically and principally, withholding discipline from employees under his command despite being ordered to do so, until the list of those to receive discipline could be

verified through Defendant's records regarding their exemption application status and vaccination status – because he reasonably believed issuing the discipline violated law. FAC ¶¶ 3, 22-26, 28-31, 70, 82, 94, 108. Mr. Davis was suspended, then terminated (on pretextual grounds under defamatory disciplinary charges, FAC 4, 31, 44, 85, 97, 110), and these adverse employment actions were a due to his protected expression. FAC ¶¶ 31, 37, 41, 43, 47-48, 73, 85, 97[3], 110.

Without litigating here the entirety of Defendant's now-banned Covid-19 vaccinate-or-terminate mandate, Mr. Davis refutes Defendant's arguments, demonstrating to this Court the sufficiency of Mr. Davis' claims for retaliation regarding his subjective good faith in opposing Defendant's conduct, including its unlawful order that he issue discipline to employees in his command. FAC ¶¶ 24, 27-31, 42-43, 70-71, 81-82, 93-94, 107-108. Additionally, the *objectively reasonable* nature of Mr. Davis' views of Defendant's Covid-19 vaccine mandate was amply demonstrated just one month after he was terminated when the State of Florida agreed with his views.[4] The legislature passed, and governor DeSantis signed into law a complete bar on Defendant's Covid-19 vaccine mandate. Fl. Stat. § 112.0441 ("Notwithstanding any other law to the contrary, an educational institution or a governmental entity may not impose a COVID-19 vaccination mandate for any full-time, part-time, or contract employee. Any existing ordinance, rule, or policy imposing such mandate is null and void as of November 18, 2021." § 112.0441(2)(a)). The state law significantly limited private companies' vaccinate-or-terminate mandates as well by decreeing that any such Covid-19 vaccination policy *must issue*

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[3] If leave to amend is granted by this Court pursuant to Defendant's motion, undersigned counsel points out a scrivenor's error in ¶ 97 referencing FL CRA rather than Title VII.
[4] Also of note regarding objective reasonableness of Mr. Davis' view of Defendant's mandate is that the Attorney General of Florida filed an amicus brief in the lawsuit in favor of plaintiffs in *Wheat, et. al. v. Orange County*.

any one or more of five types of exemption requests upon request by any employee under the mandate. Fl. Stat. § 381.00317 ("A private employer may not impose a COVID-19 vaccination mandate for any full-time, part-time, or contract employee without providing individual exemptions that allow an employee to opt out of such requirement…. If an employer receives a completed exemption statement authorized by subsection (1), the employer must allow the employee to opt out of the employer's COVID-19 vaccination mandate." § 381.00317(1), (2)).

Notably, courts around the country have also held vaccinate-or-terminate mandates unlawful under civil rights grounds as well as under the very low Administrative Procedures Act standard of not "arbitrary and capricious." *Dollar, et al. v. Goleta Water District, et al.,* Case No. 2:22-cv-03723 (C.D. Cal. Dec. 29, 2022); *Medical Professionals for Informed Consent*, *et al., v. Mary T. Bassett, et. al.*, Index No. 008575/2022 (N.Y., Jan. 5, 2023) (declaring the New York Health Commissioner's Covid-19 vaccine mandate for medical providers within the state under 10 NYCRR § 2.61 *ultra vires* and void, and further holding that "***the COVID-19 shots do not prevent transmission***" (emphasis in order), rendering the mandate not meeting the "arbitrary and capricious" threshold standard for any legal requirement.) (case orders attached hereto for the Court's convenience). *See also* $10,000,000.00 settlement won by employees of Northshore University Healthsystem, asserting claims against their employer for violations of civil rights laws for imposition of the Covid-19 vaccine mandatae, E.D. Ill., 2022, Case No. 1:21-cv-05683.

As to Mr. Davis' *objectively reasonable* belief that issuing written reprimands in discipline to individuals who were compliant with the mandate, specifically by virtue of having timely requested exemptions under FCRA, Title VII, and/or ADA, is unlawful is amply demonstrated by the public records held by Defendant, and alleged by Mr. Davis in detail. **Defendant even admits in its motion its knowledge and *plan* to discipline first, check later**,

based on the allegations and corresponding exhibits set forth in Mr. Davis' complaint. MTD at 17 ("exhibits that establish Defendant had received so many exemptions and proofs of vaccinations…Defendant had decided to move forward with issuing the written reprimands and would retract and/or rescind the same should they have been issued to an employee who had timely complied."). Public records Mr. Davis retrieved show BC Sherrill questioning the disciplinary lists, and BC Atan sought guidance regarding reprimands where employees showed proof of requesting exemption, for example. FAC ¶¶ 32-35, Exh. F, G. Defendant's own actions through its officers at the Fire Rescue department indeed *prove* objective reasonableness of Mr. Davis' view that discipline would be unlawful. AC Buffkin even did exactly what Mr. Davis asked of her in his meeting October 5 – verify the lists with HR – and advised her other battalion chiefs to do the same *after* she suspended Mr. Davis for pretextual charges of misconduct. FAC ¶ 36-37, Exh H, J; see also Defendant's HR department acknowledge the error FAC ¶ 35; Defendant's HR non-entry of written reprimands and public records manipulation in cover-up of error. FAC ¶¶ 38-40, 51-56, etc.

Defendant makes some additional absurd arguments,[5] including that Mr. Davis has not pled that he told Defendant "explicitly or implicitly" his belief that the written reprimands being issued were prohibited by Title VII, the ADA, or the FCRA. MTD at 19. Mr. Davis asserts this precise fact in various places in his pleading: FAC ¶¶ 3, 28 ("Chief Davis expressed his concern

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[5] Defendant also argues an absurdity based on a complete misinterpretation of Mr. Davis' complaint, that Mr. Davis is arguing that "an employee that chooses not to be vaccinated has a physical or mental impairment that substantially limits one or more major activities" and further baldly declares that an unvaccinated employee being "regarded as having such an impairment is patently frivolous." MTD at 16. A "regarded as disabled" discrimination claim in the ADA referenced by Mr. Davis in his complaint does not require that the victim of discrimination assert they are disabled, but rather that the employer like Defendant viewed them as such. Given that Defendant asserted that those who did not get this shot could no longer work in the county, per Defendant's mandate, it is not a frivolous claim that Defendant perceived the unvaccinated as disabled under the ADA's terms.

regarding the unlawful order to issue discipline to the twelve employees on his list. He provided details by telephone to his superior Assistant Chief Buffkin regarding the laws he believed would be violated if he were to pursue enforcement of the county's vaccine mandate and issue discipline….”), ¶ 29 (“he cited…that, to issue written discipline against those employees who sought exemption violated Florida's civil rights law and federal law under Title VII and Americans with Disabilities Act.”), etc. Defendant also argues that, pursuant to Mr. Davis' allegations, the written reprimand he believed to be unlawful if issued, “could not be used in an evaluation” and thus “was not an adverse employment action.” MTD at 17-18. First, Defendant's argument fails because Mr. Davis has adequately pled that these disciplines *did not* comply with the ostensible “toothless” terms of the MOU. FAC ¶¶ 2, 17-18, 24, 40, 56 Exh B. (Written reprimands obtained from Defendant's mandate through public records request in March 2022, showed “CONSEQUENCES OF INSUFFICIENT IMPROVEMENT OR RECURRENCE MAY RESULT IN FUTURE DISCIPLINARY ACTION UP TO AND INCLUDING TERMINATION.”). Moreover, Defendant's argument that these written reprimands could not be adverse action under the civil rights statutes, rendering Mr. Davis' belief that issuing the discipline was a violation of the laws “objectively unreasonable” is an argument outside the scope of a Rule 12(b)(6) motion. There remains a factual question, as there would at this stage in the case on basic Rule 8 pleading of allegations to state a claim, whether these disciplines will ultimately meet the evidentiary standard required. Mr. Davis has adequately pled the fact that these disciplines were not in accordance with the MOU (Exh. B), which means by the language in the reprimand itself and in accordance with the department's general disciplinary procedures, the written reprimand was part of progressive discipline (and thus greater than an oral reprimand), which, could result in termination. However, these are

evidentiary matters to be developed further; Defendant is at this stage, fully on notice of the claims of retaliation alleged against it by Mr. Davis.

It is truly baffling that Defendant considers its admission (MTD at 17) in the face of Mr. Davis' allegations a proper argument to dispose of his claims. If Defendant knew, and Mr. Davis alerted Defendant, to the illegality and impropriety of its action, **why did it suspend, then fire Mr. Davis?!?** If Defendant agreed with Mr. Davis that a few hours difference and a quick check with Defendant's HR department could resolve Mr. Davis' concerns, **why did it suspend, then fire Mr. Davis, but provide all other battalion chiefs the guidance to vet the lists which Mr. Davis sought?** There is truly only one logical conclusion, and that is retaliation against Mr. Davis for his consistent opposition to Defendant's pattern of unlawful behavior. Mr. Davis has properly pled these claims for relief under the respective statutes.

***C. Plaintiff's breach of contract claims are not under the exclusive jurisdiction of PERC, and Plaintiff's claims state a claim upon which relief may be granted.***

Defendant Orange County's two part argument for dismissing Mr. Davis' Count V for breach of contract rest on a fundamental misinterpretation of Mr. Davis pleading as a whole, and specifically his purpose in raising the claims ostensibly under the CBA. However, Defendant is correct that the standard here is under Rule 12(b)(6), not Rule 12(b)(1), despite its arguments. *Bentley v. Miami Air Int'l.,* No. 16-CY-24607-HUCK/OTAZO-REYES, 2017 U.S. Dist. LEXIS 234188 at *3 (S.D. Fla. Feb. 13, 2017). Analyzing whether labor statutes and exclusive remedies apply where labor provisions are implicated must first look to whether the claims are "major" or "minor", and thus subject to the PERC in Mr. Davis' case (Fl. Stat. § 447.203(3)), or neither, in which case, the claims may proceed in this Court. "(1) 'major disputes,' which 'relate to the formation of collective bargaining agreements or efforts to secure them'; and (2) 'minor

disputes,' which 'gro[w] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions[,]' and 'involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation.'" *Bentley*, 2017 U.S. Dist. LEXIS 234188 at *6-7, quoting *Hawaiian Airlines Inc. v. Norris*, 512 U.S. 246, 252-53 (1994). "[S]imply because a CBA might need to be referenced or consulted in resolving a plaintiffs claim, this is insufficient to trigger RLA preclusion where interpretation of the terms of the CBA is not necessary." *Id.* at *10; *see also Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1987). Statutorily provided labor dispute resolution schemes do not preempt causes of action to enforce rights that are independent of the CBA, including statutory rights like Mr. Davis' Counts I-IV. *Stewart v. Spirit Airlines, Inc.*, 503 F. App'x 814, 818 (11th Cir. 2013).

As in the *Bentley* case, Mr. Davis' claims arise out of his rights under civil rights statutes. His opposition as "protected expression" element of his claims under Counts II-IV (retaliation under civil rights law) is his "refusal to follow an unlawful order" as set forth in Defendant's Fire Rescue Department Rule 35. FAC ¶¶ 85, 97, 110, 119, Exh. C "Disobedience to Unlawful Orders". A dispute between Defendant and Mr. Davis as to the propriety of his conduct under the Rules implicates the terms of his CBA, as discipline for Rule violations is handled through the CBA terms (Art 10, Exh. D), as is Mr. Davis' right within his employment position to challenge or "grieve" Defendant's handling of that discipline. Art 12, Exh. D. Similarly, Mr. Davis' protected acts under Fl. Stat. § 112.3187(7), as he alleged in Count I, include his opposition and refusal to participate – pursuant to department Rule 35 - in adverse action against employees under his command, which he deemed an "unlawful order". FAC ¶¶ 30, 73. Also, as pled by Mr. Davis, it is Defendant's discipline - which it purports to have undertaken against Mr. Davis pursuant to department Rules and SOPs, Defendant's ordinances and Mr. Davis' CBA –

that constitutes the retaliatory adverse action against him under civil rights statutes and Florida's Whistle-Blower's act.[6] FAC ¶¶ 31, 41-45, 57-60, 115 Exh. I, K. Mr. Davis alleges that Defendant's actions taken against him under the guise of contractual proceedings, are purely pretextual.

Thus, Mr. Davis' claims in Count V fundamentally draw from the terms of the CBA only with regard to his claims for retaliation under statutory provisions providing for their own administrative remedy and civil right of action, not with regard to the interpretation of the CBA terms themselves or the provisions of Florida's labor laws. Fl. Stat. § 447.201, *et seq.* Moreover, claims under equal employment opportunity laws are typically not "grievable" claims under Mr. Davis' CBA (Art 12(2), Exh. D: "Grievances are limited to claims that are dependent for resolution exclusively upon interpretation or application of one or more express provisions of this Agreement…."), and thus are not exclusively bound to be disputed through the CBA-grievance process, contrary to Defendant's argument that the CBA itself negates Mr. Davis' claims. MTD at 20, 22-23. Read in light of the purpose of Mr. Davis' claims, his allegations in Count V set forth a claim for which relief can be granted: the use or abuse of the CBA proceedings are retaliatory actions taken against Mr. Davis as a result of his protected acts under statutes with their own administrative procedures and remedies. Mr. Davis has exhausted the administrative remedies which precede his right to bring his claims to this Court. FAC ¶¶ 61-62, and see Fl. Stat. § 112.3187(8)(b). As such, Mr. Davis is not required to bring his contractual claims in this manner exclusively to the PERC, as Defendant argues. MTD at 20-22.

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[6] Defendant's motion (at 24) misunderstands the posture of Mr. Davis' case. Before his grievance was apparently "ghosted" (FAC ¶60), Mr. Davis' understood that his union and Defendant had agreed to proceed to arbitration. FAC ¶ 59. Part of the pattern of animus toward Mr. Davis under Fl. Stat. § 112.3187 and the civil rights acts is this negation of his grievance rights after arbitration was determined to proceed.

CONCLUSION

For the foregoing reasons, thoroughly demonstrating Mr. Davis has sufficiently pled his claims upon which relief may be granted, Mr. Davis respectfully requests this Court deny Defendant's Motion to Dismiss Plaintiff's First Amended Complaint. Should this Court deem any aspect of Mr. Davis' claims insufficient to meet his Rule 12(b)(6) pleading standard, Mr. Davis respectfully requests the right to amend his pleading.

This 17th Day of January, 2023. _____/S/ Rachel L.T. Rodriguez______

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 17, 2023, I electronically filed the foregoing Opposition to Defendant Orange County's Motion to Dismiss Plaintiff's First Amended Complaint with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to: Douglas Noah, Esq. at DNoah@drml-law.com, John W. Keller IV, Esq. at jkeller@anblaw.com, Patricia Rego Chapman, Esq. at PChapman@drml-law.com, Wayne Helsby, Esq. at whelsby@anblaw.com, Antoinette@drml-law.com, Jillian@drml-law.com, kmaxson@anblaw.com, marissa@drml-law.com, dianaw@drml-law.com.

Respectfully Submitted,

__/s/ Rachel Rodriguez___
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