U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STEPHEN M. DAVIS, **CASE NO: 6:22-cv-2222-PGB-EJK**

Plaintiff,

vs.

ORANGE COUNTY,

Defendant.
_____/

DEFENDANT ORANGE COUNTY'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

COMES NOW Defendant ORANGE COUNTY ("County") by and through undersigned counsel and pursuant to Federal Rule of Civil Procedure 12(b)(6) and 12(f) and hereby files this Motion to Dismiss Plaintiff's First Amended Complaint and incorporated memorandum of law and states as follows:

I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Plaintiff's First Amended Complaint recounts that, during the COVID-19 Pandemic, a County Mandatory Vaccination Policy Agreement was reached between the County and Plaintiff's Union. [Doc. 1-1, ¶ 15; Exhibit B]. This Agreement set forth a policy that required employees to, by September 30, 2021, submit certifications they received a COVID-19 vaccine, or in the alternative, request an accommodation and, if granted, undergo weekly COVID-19 testing. [Doc. 1-1, ¶ 18]. An employee who failed to timely submit a certification or

accommodation, would receive a written reprimand, that could not be used or referred to in the employee's evaluation. [Doc. 1-1, ¶ 18]. Plaintiff alleges he submitted a religious exemption request. [Doc. 1-1, ¶ 17]. Plaintiff further alleges he filed an unrelated suit against Defendant over this vaccination policy. [Doc. 1-1, ¶ 20].

On October 5, 2021, Plaintiff was provided a list of employees that were to be issued written reprimands via e-mail by Chief Buffkin. [Doc. 1-1, ¶ 22]. Plaintiff alleges he thought some of the employees listed had requested exemptions and therefore written reprimands were not warranted. [Doc. 1-1, ¶ 23]. Plaintiff spoke with Chief Buffkin on the phone to inquire about his concerns and emailed Chief Buffkin seeking the following clarification: "Mesa and Landers are state they are vaccinated and filled out the County forms. Is there a way to confirm this?" [Doc. 1-1, ¶¶ 25, 30, Ex. C]. There are no other allegations of any e-mails or written documents sent by Plaintiff to anyone with the County prior to his termination. [Doc. 1-1]. The e-mail also inquires about expired test kits. [Doc. 1-1, Ex. C]. That is the full extent of Plaintiff's written disclosure on this topic. [Doc. 1-1].

Following this e-mail, on that same date, Plaintiff refused to issue the written reprimands. [Doc. 1-1, ¶¶ 28-29]. Plaintiff recounts he continued to refuse following a direct order from Chief Buffkin given in person. [Doc. 1-1, ¶ 31].

Following Plaintiff's refusal to comply with Chief Buffkin's direct order, Plaintiff alleged he was relieved from duty. [Doc. 1-1, ¶ 31].

Plaintiff recounts he was ultimately terminated following a predetermination hearing for his refusal to comply with Chief Buffkin's orders. [Doc. 1-1, ¶¶ 41-42]. At this hearing, Plaintiff alleges he expressed concerns "in writing," during the hearing but also attests this "writing" was provided after the hearing. [Doc. 1-1, ¶ 42]. Plaintiff received notice of his termination October 18, 2021. [Doc. 1-1, ¶ 44]. Following this, Plaintiff "provided written notice of the unlawful termination and retaliation to Orange Mayor Demings" on October 19, 2021. [Doc. 1-1 ¶ 50]. Plaintiff has gone through the Grievance and Arbitration procedure provided for in the Orange County Fire Rescue Collective Bargaining Agreement. [Doc. 1-1 ¶¶ 57-60, Ex. D].

On April 18, 2022, Plaintiff filed suit in Florida state court asserting a claim under Florida's Whistle-blower statute. Defendant moved to dismiss Plaintiff's initial complaint based on Plaintiff's claim under Florida's Whistle-blower statute failing as a matter of law. Before Defendant's motion could be heard, Plaintiff filed this First Amended Complaint asserting claims under Florida's Whistle-blower statute, retaliation under Fla. Stat. § 760.10(7), retaliation under Title VII 42 U.S.C. § 2000e-3(a), retaliation under ADA 42 U.S.C. § 12203(a), and for breach of contract.

Despite Defendant alerting Plaintiff of the issues with its prior complaint through its prior Motion to Dismiss, the issues with Plaintiff's First Amended Complaint have only grown. Each of Plaintiff's five counts present their own deficiencies and are insufficient as a matter of law. Plaintiff's First Amended Complaint must then be dismissed.

II. MEMORANDUM OF LAW

A. Standard of Review

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed "if the facts as plead do not state a claim for relief that is plausible on its face." *See SinaItrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260-61 (11th Cir. 2009). In considering a motion to dismiss, a court accepts all well-plead allegations as true and construes the allegations in the light most favorable to the non-moving party. *Id*. However, a court need not accept as true conclusory allegations or "unfounded deductions of fact." *Id*. But rather, a plaintiff's allegations of fact must be sufficient to raise a right to relief beyond a speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Accordingly, "naked assertions devoid of further factual enhancement" will not suffice to state a claim. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009).

In testing the sufficiency of a plaintiff's allegations, the Court does not presume that the plaintiff can prove facts that are not stated, nor does the Court

assume that the defendant has violated laws in ways not alleged. *Associated Gen. Contractors v. Cal State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Sinaltrainal*, 578 F. 3d at 1260-61. Thus, if the Complaint does not contain well plead allegations that "plausibly give rise to an entitlement of the relief," the action must be dismissed. *See Iqbal*, 139 S.Ct. at 1950.

B. Count I: Violation of Florida Whistle-blower's Act

Plaintiff alleges a claim of Violation of Florida Public Employee Whistleblower Act under the theory that Plaintiff has engaged in a protected disclosure.[1] [Doc. 1-1, ¶¶ 65-74].

"To overcome a motion to dismiss for failure to state a cause of action with a retaliation claim under the [Whistleblower's] Act, the complaint must include sufficient facts to allege: (1) the plaintiff engaged in a protected activity (i.e. a protected disclosure); (2) the plaintiff suffered an adverse employment action; and (3) the two events are not wholly unrelated. *Shaw v. Town of Lake Clarke Shores*, 174 So. 3d 444, 445–46 (Fla. 4th DCA 2015)[2]; *see also Nazzal v. Fla. Dep't of Corr.*, 267 So.

[1] With respect to what is considered a "protected activity" under Fla. Stat. § 112.3187, the Act potentially includes employees "who refuse to participate in any adverse action prohibited by this section," "employees who file any written complaint to their supervisory officials," and other activity. In this matter, Plaintiff only makes a claim under protective activity through filing a written complaint as Plaintiff does not allege that his refusal to issue written reprimands is refusal to participate in an adverse action under the Act.

[2] Florida Courts apply Title VII's retaliation analysis to claims asserted under the Whistle-blower's Act. *Griffin v. Deloach*, 259 So. 3d 929, 932 (Fla. 5th DCA 2018). The Supreme Court has clarified that the causal element in Title VII retaliation claims requires that the adverse act would not have occurred "but for" the protected activity. *University of Tex. Southwestern Med. V. Nassar*,

3d 1094, 1096 (Fla. 1st DCA 2019) ("To establish a prima facie case under the Whistle-blower's Act, the plaintiff must show that (1) prior to her termination, she made a disclosure protected by the Act; (2) she suffered an adverse employment action; and (3) some causal connection exists between the first two elements."). "Relief under the Whistle-blower's Act requires a protected disclosure." *Hatfield v. N. Broward Hosp. Dist.*, 277 So. 3d 121, 123 (Fla. 4th DCA 2019).

Pursuant to Florida Statute § 112.3187(7), employees are protected by the Public Employee Whistleblower Act if they "…disclose information on their own initiative in a written and signed complaint" or if they "…are requested to participate in an investigation, hearing, or other inquiry conducted by any agency or federal government entity." *See* Fla. Stat. § 112.3187(7). A "protected disclosure" in the context of this case constitutes an employee's written and signed complaint or a written complaint. *Walker v. Fla. Dept. of Veterans' Affairs*, 925 So.2d 1149, 1150 (Fla. 4th DCA 2006); *Crouch v. Public Serv. Comm'n*, 913 So.2d 111, 111 (Fla. 1st DCA 2005) ("under the plain language of the statute, the complaints had to be in writing"). The purpose of this requirement "is to document what the employee disclosed, and to whom the employee disclosed it, thus avoiding

570 U.S. 338, 362; 133 S.Ct. 2517, 2534 (2013). Therefore, Defendant intends to challenge *Shaw's* articulation of the causal standard as: "not wholly unrelated." However, as argued below, Defendant is entitled to dismissal for reasons unrelated to the causal standard.

problems of proof for purposes of the Whistleblower's Act." *Hutchinson v. Prudential Ins. Co. of Am., Inc.*, 645 So.2d 1047, 1050 (Fla. 3d DCA 1994) (finding a signed letter to be sufficient). Furthermore, "…for disclosures concerning a local governmental entity, including any…municipal entity…the information must be disclosed to a chief executive officer as defined in s. 447.203(9) or other appropriate local official." *See* Fla. Stat. § 112.3187(6).

The nature of information falling within the confines of the Public Employee Whistleblower Act are reports of "any violation or suspected violation of any federal, state, or local law, rule, or regulation committed by an employee or agent of an agency…which creates and presents a substantial and specific danger to the public's health, safety, or welfare" and of "any act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds…or gross neglect of duty committed by an employee or agent of an agency or independent contractor." *See* Fla. Stat. § 112.3187(5).

In the instant case, the allegations contained within the Complaint and its exhibits are legally insufficient to constitute protected activity under Fla. Stat. § 112.3187. Though Plaintiff can show he suffered an adverse employment action as he was terminated, he cannot as a matter of law, even taking all of Plaintiff's allegations as true and in a light most favorable to him, establish he engaged in a statutorily protected expression.

The complaint is unclear as to which writing is relied upon as protected activity. Within Count I, Plaintiff states that "Because Chief Davis challenged unlawful orders to his superior officer and reported his concerns in writing through official channels, without backing down from his conviction of their illegality, Defendant unlawfully terminated him, in violation of Fl. Stat. § 112.3187, on October 19, 2021." [Doc. 1-1, ¶ 73]. This conclusory statement the he "reported his concerns in writing through official channels" cannot serve as protective activity under Fla. Stat. § 112.3187 as Plaintiff fails to provide any of the required information under the Florida Statute § 112.3187(5), fails to identify if the letter was disclosed to appropriate local official under Fla. Stat. § 112.3187(6); fails to show the disclosure reports a violation covered by the Act; and fails to show the disclosure meets any of the requirements under Fla. Stat. § 112.3187(7). *See also Broward Cnty. Sherriff's Office v. Hamby*, 300 So. 3d 213 (Fla. 4th DCA 2020) (holding that vague and conclusory allegations are insufficient to show a protected disclosure under the whistleblower act); *Scheirich v. Town of Hillsboro Beach*, 2008 WL 1886621 (S.D. FL. Jan. 18, 2008) (holding that a plaintiff fails to state a protected disclosure by making vague references to other alleged communications); *Nazzal*, 267 So. 3d at 1097 (holding conclusory statement was insufficient to show a protected disclosure under the Act); *Caldwell v. Fla. Dep't of Elder Affairs*, 121 So. 3d 1062, 1063 (Fla. 1st DCA 2013) (holding the prima facie case not pled where there

were conclusory allegations failing to describe any act or suspected act of misfeasance).

Looking elsewhere none of the potential protected activities alleged in the First Amended Complaint fulfill the requirements to be protected activity under the Fla. Stat. § 112.3187. Initially, it must be noted that verbal statements cannot serve as protected activity to invoke Fla. Stat. § 112.3187. *See* Fla. Stat. § 112.3187(7); *Crouch*, 913 So.2d at 111–112 (holding that verbal complaints did not constitute protected disclosures). Turning to allegations of written statements, first, Plaintiff's request for religious exemption cannot serve as protected activity because it fails to assert the necessary violation or misconduct under Fla. Stat. § 112.3187(5) and fails to show it was made to the appropriate local official under Fla. Stat. § 112.3187(6). [Doc. 1-1, ¶ 16, Ex. A]. Second, the email sent by Plaintiff to Chief Buffkin on October 5, 2021, cannot serve as the protected activity. [Doc. 1-1, ¶ 30, Ex. E]. This email is merely seeking clarification and does not allege the necessary violation or misconduct under Fla. Stat. § 112.3187(5). *See Pickford v. Taylor County School Dist.*, 298 So.3d 707, 711 (Fla. 1st DCA 2020) (finding that plaintiff's alleged communication disputing pay did not rise to the level of a statutorily protected disclosure under the Act where the letter failed to identify any violation of law, rule, or policy that would present a "substantial and specific danger to the public's health, safety, or welfare," nor did it identify any act of

misfeasance, malfeasance, or other gross conduct that would trigger the Act's protections; instead, the Court found that the letter merely reflected the plaintiff's understanding of the policy).

Third, Plaintiff makes various references to communications sent by other parties to various persons throughout the scope of this litigation. [Doc. 1-1]. These other communications cannot serve as the protected activity under Fla. Stat. § 112.3187(7) as they are not made by the Plaintiff or someone representing the Plaintiff. *See Shaw*, 174 So. 3d, at 445–46 (to establish a prima facie case, the plaintiff must make the disclosure protected by the act and the defendant must know it came from the plaintiff); *see also Nazzal*, 267 So. 3d, at 1096.

Fourth, after Plaintiff was relieved of duty, Plaintiff alleges "[a]t the [Predetermination hearing], Chief Davis yet again, in writing expressed his grave concerns of the illegality of Defendant's conduct and demand that he engage in that unlawful conduct. This written defense was provided to higher command after the PDH, which was attended by two assistant chiefs and a union representative, together with Chief Davis." [Doc. 1-1, ¶ 42]. Plaintiff vaguely asserts that he expressed his concern in writing, however in one part states that it as at the predetermination hearing, then later says after the predetermination hearing. Either way, this single vague conclusory unsupported allegation is insufficient to show protected activity under Fla. Stat. § 112.3187 as it fails to show

the requirements of Fla. Stat. § 112.3187(5) to show the required violation or misconduct, Fla. Stat. § 112.3187(6) to show it was given to the appropriate local official, and 112.3187(7) to show amongst other requirements that it was signed and written. *See also Broward Cnty. Sherriff's Office*, 300 So. 3d, at 213; *Scheirich*, 2008 WL 1886621, *5; *Nazzal*, 267 So. 3d at 1097; *Caldwell*, 121 So. 3d, at 1063.

Fifth, Plaintiff asserts that he "provided written notice of the unlawful termination and retaliation to Mayor Demings on October 19, 2021." [Doc. 1-1, ¶ 50]. This vague, conclusory, and unsupported statement falls ill to many of the same issues discussed as fails to meet the requirements of Fla. Stat. § 112.3187(5) to any violation or misconduct, of Fla. Stat. § 112.3187(7) to show amongst other requirements that it was signed and in writing, and that is entirely too vague. *See also Broward Cnty. Sherriff's Office*, 300 So. 3d, at 213; *Scheirich*, 2008 WL 1886621, *5; *Nazzal*, 267 So. 3d at 1097; *Caldwell*, 121 So. 3d, at 1063. This statement further fails as it has no casual connection to Plaintiff's alleged adverse employment action of termination, as Plaintiff asserts that he was removed from duty on October 5, 2021, had his predetermination hearing on October 13, 2021, and received notice that he was terminated dated on October 18, 2021. [Doc. 1-1, ¶ 44]. All of these events occurred before Plaintiff ever sent this "written notice," so there is no casual connection to any adverse employment action.

Plaintiff asserts only vague and conclusory statements and unrelated documents in support of his claim under Florida's Whistle blower statute. None of these efforts by Plaintiff meet the requirements to show protected activity under Fla. Stat. § 112.3187 and so Plaintiff's claim must be dismissed.

C. Counts II, III, and IV – Retaliation under Title VII, FCRA, and ADA

To establish a *prima facie* case of retaliation under Title VII, the ADA, or the FCRA,[3] Plaintiff must demonstrate: 1) he engaged in statutorily protected expression; 2) he experienced an adverse employment action and; 3) a causal connection between the two. *Brown v. Alabama Dept. of Transp.*, 597 F.3d 1160, 1181 (11th Cir. 2010), quoting, *Bryant v. Jones*, 575 F.3d 1281, 1307-08 (11th Cir. 2009); *Crawford v. Carroll*, 529 F.3d 961, 970 (11th Cir. 2008), citing *Pennington v. City of Huntsville*, 261 F.3d 1262, 1266 (11th Cir. 2001). Taking all of Plaintiff's allegations as true, he has not pled a viable retaliation claim under Title VII, the ADA, or the FCRA.

There are two types of protected activity: those afforded protection under the "participation clause" and those afforded protection under the "opposition

[3] Federal court decisions interpreting the anti-retaliation provision of Title VII, also apply to anti-retaliation claims brought under FCRA. *Hinton v. Supervision Int'l, Inc.*, 942 So.2d 986, 989 (Fla. 5th DCA 2006). Like with Title VII claims, claims raised under the Florida law are analyzed under the same framework as the ADA. *See Greenberg v. BellSouth Telecomm., Inc.,* 498 F.3d 1258, 1263–64 (11th Cir.2007); *Downing v. UPS, Inc.,* 215 F.Supp.2d 1303, 1308 (M.D.Fla.2002) ("[C]auses of actions under the FCRA are examined using the same framework as the ADA[.]").

clause." *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 555 U.S. 271, ___; 129 S.Ct. 846, 850 (2009). The Participation Clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge [of discrimination] with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC." *Equal Employment Opportunity Commission v. Total Systems Services, Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000). There is no allegation that Plaintiff filed a Charge of Discrimination prior to his termination, nor did he. Thus, Plaintiff cannot proceed under the participation clause.

To establish statutorily protected conduct under the opposition clause, Plaintiff must demonstrate he possessed a good faith, reasonable belief that the employer was engaged in practices made unlawful under the Act. *Howard v. Walgreen Co.*, 605 F.3d 1239, 1244 (11th Cir. 2010); *Clover v. Total System Services, Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999). A reasonable belief requires a showing of objective reasonableness. *Howard*, 605 F.3d at 1244; *Clover*, 176 F.3d at 1351. Objective reasonableness, in turn, must be measured against existing substantive law. *Howard*, 605 F.3d at 1244; *Clover*, 176 F.3d at 1351, *citing*, *Harper v. Block Buster Entertainment Corp.*, 139 F.3d 1385, 1388 n.2 (11th Cir. 1998). To be protected under the opposition clause, Plaintiff's opposition must "explicitly or implicitly communicate[] a belief that the [opposed] practice constitutes unlawful

employment discrimination." *Murphy v. City of Aventura*, 383 Fed. App. 915, *918 (11th Cir. 2010). This means that "the employee must . . . 'at the very least, communicate h[is] belief that discrimination is occurring to the employer,' and cannot rely on the employer to 'infer that discrimination has occurred.'" *Demers v. Adams Homes of Northwest Fla. Inc.*, 321 Fed. App. 847, *852 (11th Cir. 2009).

In the Amended Complaint, Plaintiff identifies the following as his "protected activity:" Plaintiff first alleges that "Defendant engaged in prohibited employment practices … by imposing a covid-19 vaccine mandate which threated to fire and refuse to hire individuals because of their religious belief against covid-19 vaccination and Defendant's perception of their "handicap" or lack of vaccination." [Doc. 1-1, ¶¶ 79, 91, 104]. Defendant then alleges he "actively opposed" Defendant's violations of the FCHR, the ADA, and Title VII, when he "refused to issue unlawful reprimands" and was terminated as a result. [Doc. 1-1, ¶¶ 81, 85, 93, 97, 107, 110].

However, regardless of Plaintiff's hyperbolic and conclusory legal allegations that Defendant was violating employee rights, it was unequivocally not objectively reasonable to believe that the County's COVID-19 Mandate and the County issuing the challenged written reprimands constituted employment discrimination under Title VII, the ADA, or the Florida Civil Rights Act.

To constitute employment discrimination under Title VII or the FCRA, an employee has to be (1) a member of a protected class; (2) qualified for the job; (3) have suffered an adverse employment action; and (4) there must be similarly situated employees outside the protected class treated more favorably. *Holland v. Gee*, 677 F.3d 1047, 1055 (11th Cir. 2012). To establish disability discrimination the employee must (1) have a "disability" within the meaning of the Act; (2) be "a qualified individual with a disability," meaning they can perform the essential functions of the employment position they holds or seek, with or without reasonable accommodation by the employer; and (3) have suffered an adverse employment action because of the disability. *See Lucas v. W.W. Grainger, Inc.,* 257 F.3d 1249, 1255 (11th Cir.2001); *Reed v. Heil Co.,* 206 F.3d 1055, 1061 (11th Cir.2000); *Davis v. Florida Power & Light Co.,* 205 F.3d 1301, 1305 (11th Cir.2000).

As it applies to the protected class under Title VII, Plaintiff appears to allege the discriminatory practice was premised on treating those with religious exemptions differently. However, as it applies to the disability discrimination practice – it is entirely unclear what Plaintiff is attempting to allege here. It appears Plaintiff may be arguing that the unvaccinated employees fell into a category of employees with a perceived disability. [Doc. 1-1, ¶ 80, 105, 106]. This turns reason on its head and is an extremely tortured reading of the ADA and the authorities analyzing the same.

To assert a claim of discrimination under the ADA, an employee must first establish they are disabled. *Hillburn v. Murata Electronics North America, Inc.*, 181 F.3d 1220, 1226 (11th Cir. 1999). The term "disability" means, with respect to an individual – (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having an impairment. 42 U.S.C. § 12102 (2009). "Major life activities" include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C.A. § 12102(2)(A) (2009). An individual may establish coverage under the ADA under any one of the three prongs of the definition of "disability." 29 C.F.R. § 1630.2(g)(2). To argue that an employee that chooses not to be vaccinated has a physical or mental impairment that substantially limits one or more major activities or was regarded as having such an impairment is patently frivolous. It was by no means objectively reasonable for Plaintiff to believe that Defendant's COVID-19 Mandate violated the ADA by discriminating against non-vaccinated employees. Just the opposite, such a belief is unreasonable.

In any case, by Plaintiff's own allegations, he discovered *prior* to raising his concerns about the written reprimand that this written reprimand was being improperly issued to employees who had both turned in the religious exemption

paperwork timely / opted out being vaccinated and to those who had not claimed any religious exemption and gotten the vaccine timely. [Doc. 1-1, ¶ 23]. Thus, by Plaintiff's allegations, this was not an employment practice targeting only those who submitted religious exemptions or those who were unvaccinated. In fact, Plaintiff goes on to allege and attach exhibits that establish Defendant had received so many exemptions and proofs of vaccinations on the deadline of September 30, that it had not been able to process the same yet, but that 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. [Doc. 1-1, ¶ 33, 35, Ex. F, Ex. G].

Further, by Plaintiff's own allegations, the written reprimand was not an adverse employment action. Plaintiff's allegations make clear the underlying discipline he was refusing to issue was a written reprimand that could not be used in an evaluation. [Doc. 1-1, ¶ 18]. Eleventh Circuit precedent establishes that, where the underlying employment action is a written reprimand with no tangible harm in the form of lost pay or benefits, then the same cannot be found to be an adverse employment action needed for a *prima facie* disparate treatment case as a matter of law. *See Wallace v. Georgia Dept. of Transp.*, 212 Fed. Appx. 799, 801 (11th Cir. 2006). To constitute an adverse employment action, "the employer's action must impact the terms, conditions, or privileges of the plaintiff's job in a real and

demonstrable way." *Davis v. Town of Lake Park, Fla.,* 245 F.3d 1232, 1239 (11th Cir. 2001). This means plaintiff "must show a *serious and material* change in the terms, conditions, or privileges of employment." *Davis,* 245 F.3d at 1239 (emphasis in original); *Webb-Edwards v. Orange County Sheriff's Office,* 525 F.3d 1013, 1031 (11th Cir. 2008) (same). This is an objective standard as viewed by a reasonable person in the circumstances – the employee's subjective view is not controlling. *Id.*; *see also*, *Doe v. DeKalb County School Dist.,* 145 F.3d 1441, 1448 – 49 (11th Cir. 1998) (applying Title VII *prima facie* precedent in the context of the Americans with Disabilities Act). Further, the impact to Plaintiff's employment must be tangible. *Webb-Edwards* 525 F.3d at 1031. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries,* 524 U.S. at 760 – 61. Here, clear legal precedent establishes this written reprimand did not constitute an adverse employment act.

Thus, while it is certainly clear that Plaintiff objected to Defendant's COVID-19 Mandate and did not believe the County had any right to mandate that he be vaccinated or be subject to routine covid-19 tests prior to going out and serving the public, Defendant's Mandate very clearly did not violate Title VII, the ADA, or the FCRA, and it was not objectively reasonable for Plaintiff to believe

otherwise based on the substantive law. Thus, Plaintiff's refusal to issue the written reprimands does not constitute protected activity as a matter of law.

Further, "the employee must . . . 'at the very least, communicate h[is] belief that discrimination is occurring to the employer,' and cannot rely on the employer to 'infer that discrimination has occurred.'" Here, by Plaintiff's own allegations, Plaintiff raised objections to the mandate – however, there are no allegations that Plaintiff explicitly or implicitly communicated a belief that the written reprimands being issued was prohibited by Title VII, the ADA, or the FCRA. That Plaintiff filed a complaint against the County raising various concerns with the Vaccine Mandate does not constitute protected activity because these concerns do not implicate the Act - only discrimination and retaliation concerns under Title VII, the ADA, or the FCRA.

Thus, as matter of law, Plaintiff did not engage in protected activity under the ADA, Title VII, or the FCRA, where, taking all the facts pled as true, Plaintiff cannot demonstrate he possessed a good faith, reasonable belief that the employer was engaged in practices made unlawful under the ADA, Title VII, or the FCRA.

D. Count V Breach of Contract

Count V of Plaintiff's First Amended Complaint purports to allege a claim of breach of contract. Count V essentially alleges that the Defendant violated the Collective Bargaining Agreement ("CBA") attached to the Amended Complaint as

Exhibit D by: 1) failing to engage in the grievance process in good faith; 2) withholding evidence; 3) failing to conduct a fair investigation; 4) applying Orange County Fire and Rescue rules "unequally;" 5) making changes to the CBA's disciplinary process without appropriately bargaining with the union; 6) inappropriately disciplining Plaintiff in violation of the CBA; and, 7) failing to timely select an arbitrator and "move forward with the grievance process." Count V of the Amended Complaint must be dismissed for two (2) reasons: first, Plaintiff's alleged unfair labor practices (the alleged violations of the CBA) fall within the exclusive and preemptive jurisdiction of the Public Employees Relations Commission ("PERC"); and, second, the plain language of the CBA that Plaintiff attached to his Amended Complaint as Exhibit D expressly negates the allegations of Count V.

The allegations of Count V are alleged unfair labor practices improperly veiled as breach of contract claims to attempt to improperly invoke the jurisdiction of this Court. Florida Statutes § 447.501 delineates unfair labor practices, which are the crux of Plaintiff's allegations: "[r]efusing to discuss grievances in good faith pursuant to the terms of the collective bargaining agreement…" (§ 447.501(1)(f)) and "[r]efusing to bargain collectively [and] failing to bargain collectively in good faith…" (§ 447.501(1)(c)). In 1974, the Florida Legislature enacted Part II of Chapter 447, Florida Statutes, the Public Employees Relations Act, which established

guidelines and standards for the collective bargaining rights of employees. *PERC v. City of Naples*, 327 So.2d 41, 42 (Fla. 2d DCA 1976). The Florida Legislature also designated PERC exclusively to resolve all labor disputes. See *Browning v. Brody*, 796 So.2d 1191 (Fla. 5th DCA 2001); *City of Orlando v. Central Florida Police Benevolent Ass'n*, 595 So.2d 1087, 1089 (Fla. 5th DCA 1992); *Maxwell v. Sc. Bd. of Broward County*, 330 So.2d 177 (Fla. 4th DCA 1976); *PERC v. FOP*, 327 So.2d 43, 45 (Fla. 2d DCA 1976) (the Legislature "intended for PERC to have exclusive jurisdiction over unfair labor practice questions."). Each and every allegation contained in Count V asserts violations of the collective bargaining agreement between the County and the International Association of Firefighters ("IAFF") as the sole and exclusive certified bargaining agent of employees in positions such as the Plaintiff. As such, the Florida Public Employees Relations Commission has exclusive jurisdiction over these claims. They are not appropriately brought in Federal Court under a breach of contract claim.

This very issue was recently decided in *City of Hollywood v. Perrin*, 292 So. 3d 808 (Fla. 4th DCA 2020). In *Perrin*, the plaintiff filed a complaint in circuit court to compel arbitration for alleged violations of a collective bargaining agreement that the plaintiff was covered by. *Id.* at 810. As with the instant case, the collective bargaining agreement was attached to the complaint. *Id.* The Fourth District Court of Appeal found that even though the plaintiff asserted that the complaint did not

involve a charge of an unfair labor practice, "'whether a claim is within PERC's exclusive jurisdiction depends on the nature and substance of the claim, not on how the plaintiff labels the claim.' Here, the [plaintiff's] claim alleges the [defendant] refused to discuss the grievance in good faith, which is an inherent interference with section 447.401, and 'constitutes conduct prohibited by Section 447.501(1)(a).'" *Id*. at 812. quoting *Amato v. City of Miami Beach, 208 So. 3d 235*, 237 (Fla. 3d DCA 2016). Consequently, the Fourth DCA held that the trial court erred in denying the defendant's motion to dismiss because the plaintiff's "complaint arguably contained an unfair labor practice charge under the exclusive jurisdiction of PERC." *Id*. at 812-13.

Here, too, the allegations of Count V of Plaintiff's Amended Complaint allege unfair labor practices that fall within the exclusive and preemptive jurisdiction of PERC. Consequently, this Court lacks subject matter jurisdiction over the allegations of Count V and must dismiss Count V of the Amended Complaint. Further, these claims should be dismissed with prejudice because Plaintiff cannot replead these allegations in good faith to fall within the Court's jurisdiction.

Additionally and alternatively, the Defendant moves to dismiss Count V of the First Amended Complaint because the plain language of the CBA Plaintiff attached to the Amended Complaint negates Plaintiff's allegations. Rule 10(c) of

the Federal Rules of Civil Procedure provides that "[a] copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Consequently, this Court may consider the CBA attached to the Amended Complaint as Exhibit D when ruling on this Motion to Dismiss. See *Int'l Star Registry v. Omnipoint Mktg.*, LLC, 510 F. Supp. 2d 1015 (S.D. Fla. 2007) ("[W]here there is a 'conflict between the bare allegations of the complaint and any exhibit attached pursuant to Rule 10(c), Fed. R. Civ. P., the exhibit prevails.'"), quoting *Abbott Lab., Inc. v. GE Capital*, 765 So. 2d 737, 740 (Fla. 5th DCA 2000).

Article 10 of Exhibit D to Plaintiff's First Amended Complaint provides in paragraph 7 that "[t]his Agreement shall establish the exclusive procedures for taking disciplinary action as well as grievances/appeals therefrom." Consequently, the claims in Count V of the Amended Complaint must be dismissed because the contract (the CBA) Plaintiff attached to his Amended Complaint provides that the grievance procedures contained therein are the exclusive remedy the disciplinary action that forms the basis of Plaintiff's allegations.

Additionally, Article 12 of the CBA delineates the Grievance and Arbitration Procedures[4]. The Amended Complaint concedes in paragraph 57 - 59 that he

[4] Notably, the very first paragraph of Article 12 states that "Bargaining unit employees will follow all written and verbal orders given by superiors even if such orders are alleged to be in conflict with this Agreement… Compliance with such orders will not prejudice the right to file a

completed Step I, Step II, and Step III grievances pursuant to the Article 12 of the CBA. Accordingly, paragraph 4 of Article 12 applies here, which provides that "[i]f any grievance is not determined in STEP THREE above, the grievant may request arbitration… a bargaining unit employee shall not have the right to advance a grievance to arbitration on his/her own behalf, except if the Union declines to advance the grievance to arbitration because the employee is not a dues paying member." (emphasis added). The Amended Complaint does not allege that Plaintiff was not a dues paying member; rather, it implies that Plaintiff was a dues paying union member. Thus, Plaintiff's allegations that the Defendant violated the CBA grievance procedures by failing to arbitrate his claims are expressly negated by the language of the CBA, which provides that it was the Union's right, not Plaintiff's, to request arbitration. However, even assuming *arguendo* that Plaintiff's allegations are not expressly negated by the CBA he attached to his Amended Complaint, the alleged unfair labor practices would nevertheless be the exclusive and preemptive jurisdiction of PERC as set forth in more detail above. Thus, Count V of the Amended Complaint must be dismissed.

III. CONCLUSION

grievance… nor shall compliance affect the ultimate resolution of the grievance." Paragraph 4 of the Amended Complaint states that Plaintiff "refused" to "issue improper written reprimands" as ordered by his superiors. Thus, Plaintiff's Amended Complaint admits that Plaintiff himself violated the CBA.

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. As such, Defendant ORANGE COUNTY respectfully requests that this Court dismiss Plaintiff's First Amended Complaint.

I HEREBY CERTIFY that on December 7, 2022, I electronically filed the foregoing with the Clerk of the Courts by using the CM/ECF system which will send a notice of electronic filing to Rachel Rodriguez, Esq., Vires Law Group, PLLC, 515 N. Flagler Drive, Suite P300, West Palm Beach, FL 33401.

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