UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-60772-CIV-SINGHAL/VALLE

JEFFERY R. BELL,

Plaintiff,

v.

GREGORY TONY, in his official capacity as Sheriff of Broward County,

Defendant.
_____/

ORDER

THIS CAUSE is before the Court on Defendant Gregory Tony's Motion to Dismiss (DE [16]). The matter is fully briefed and is ripe for review. Plaintiff has requested a hearing, but the issues are well presented and a hearing is not necessary. Because Plaintiff cannot establish that he has suffered an adverse employment action, the Motion to Dismiss is granted.

I. BACKGROUND

In this action brought under 42 U.S.C. § 1983, Plaintiff Jeffery R. Bell ("Bell") seeks declaratory and injunctive relief against his employer, Gregory Tony, the Sheriff of Broward County, Florida ("Sheriff") for allegedly suspending Bell in violation of Bell's First Amendment rights. In addition to the Sheriff's Motion to Dismiss, Bell has pending his Motion for Preliminary Injunction (DE [4]).

Bell is employed as a deputy with the Broward Sheriff's Office ("BSO") and serves as the elected President of the International Union of Police Associations Local 6020 ("Union"), which represents member deputies and sergeants employed by BSO. Bell

alleges that shortly after the *Sun-Sentinel* newspaper published an opinion piece by him criticizing the Sheriff's response to the COVID-19 crisis on behalf of the Union, the Sheriff commenced an internal affairs investigation and suspended him with pay. The internal affairs investigation notice cites several alleged violations: SPM 2.5.2 Truthfulness; SPM 2.3.2 Corrupt Practices: SPM 2.18 Employee Statements; SPM 2.3 Conduct Unbecoming an Employee; and SPM 1.11.18 Discretion. Bell further alleges that because the internal affairs investigation rendered him "not in good standing" he was removed from the recall position that allowed him to serve as the Union president full time.

Bell asks the Court to declare that the Sheriff's actions violated Bell's First Amendment rights, to order the Sheriff to reinstate Bell as a deputy and return him to his full release status, and to enjoin the Sheriff from disciplining Bell or continuing to threaten to discipline Bell for exercising his First Amendment rights attached to his role as Union president.

The Sheriff moves to dismiss the Complaint for failure to state a claim upon which relief can be granted. First, the Sheriff argues that Bell has failed to adequately identify the speech that he claims is constitutionally protected. Second, the Sheriff argues that Bell's Complaint fails to allege that his interests as a citizen outweigh the interests of the Sheriff in maintaining order within BSO. Third, the Sheriff argues that a suspension with pay and an internal affairs investigation are not "adverse employment actions" that would support a claim of retaliation. Finally, the Sheriff argues that Bell has not been removed as Union president and that his removal from full release status was done pursuant to the collective bargaining agreement between BSO and the Union.

II. MOTION TO DISMISS STANDARDS

At the pleading stage, a complaint must contain "a short and plain statement of the claim showing the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). Although Rule 8(a) does not require "detailed factual allegations," it does require "more than labels and conclusions . . . a formulaic recitation of the cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, "factual allegations must be enough to raise a right to relief above the speculative level" and must be sufficient "to state a claim for relief that is plausible on its face." *Id.* at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In considering a Rule 12(b)(6) motion to dismiss, the court's review is generally "limited to the four corners of the complaint." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009) (quoting *St. George v. Pinellas Cty.,* 285 F.3d 1334, 1337 (11th Cir. 2002)). Courts must review the complaint in the light most favorable to the plaintiff, and it must generally accept the plaintiff's well-pleaded facts as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). However, pleadings that "are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Iqbal*, 556 U.S. at 679.

III. ANALYSIS

"While a government employer may not demote or discharge a public employee in retaliation for speech protected under the first amendment, a public employee's right to

freedom of speech is not absolute." *Hubbard v. Clayton Cty. Sch. Dist.,* 756 F.3d 1264, 1266-67 (11th Cir. 2014) (citations omitted). In order "for a government employee's speech to have First Amendment protection, the employee must have (1) spoken as a citizen and (2) addressed matters of public concern." *Boyce v. Andrew*, 510 F.3d 1333, 1341 (11th Cir. 2007) (citing *Connick v. Myers,* 461 U.S. 138, 140 (1983) and *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205,* 391 U.S. 563, 568 (1968)). The primary question is "whether the speech at issue was made primarily in the employee's role as a citizen, or primarily in the role of an employee." *Id.* (quoting *Kurtz v. Vickrey*, 855 F.2d 723, 777 (11th Cir. 1988). "When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences." *Garcetti v. Ceballos*, 547 U.S. 410, 423 (2006). If the subject of the speech is a matter of public concern, the employee "must show that his First Amendment interests, as a citizen, in commenting upon matters of public concern outweigh the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Anderson v. Burke Cty., Ga.*, 239 F.3d 1216, 1220 (11th Cir. 2001) (citing *Pickering*, 391 U.S. at 568). Finally, the employee's speech must have played a substantial part in the employer's decision. *Id.*

This case involves important competing interests. Law enforcement agencies are granted "more latitude in responding to the speech of its officers than other government employers" because of the "heightened need for order, loyalty, morale and harmony" within the agencies. *Oladeinde v. City of Birmingham,* 230 F.3d 1275, 1293 (11th Cir. 2000). The balance of considerations is affected "by the special concerns of quasi-

military organizations such as police departments." *Busby v. City of Orlando*, 931 F.2d 764, 774 (11th Cir. 1991). Maintaining public confidence in the law enforcement agency's ability to carry out its public safety mission is a compelling and legitimate government interest. *Anderson*, 239 F.3d at 1221-22.

Likewise, speech on behalf of a union "occupies the highest rung of the hierarchy of First Amendment values" and merits "special protection." *Janus v. Am. Fed'n of State, County, & Mun. Employees, Council 31*, 138 S. Ct. 2448, 2476 (2018). Furthermore, "[p]ublic employee speech on matters of public concern receives protection under the First Amendment, partly because public employees are well situated to provide information on matters of public concern, both to the public and to decisionmakers." *Rodin v. City of Coral Springs, Fla.*, 229 Fed. Appx. 849, 857 (11th Cir. 2007).

A. Whether Bell Spoke as a Citizen or a Public Employee

The first inquiry is whether Bell spoke as a private citizen or a public employee. *Boyce*, 510 F.3d at 1342. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court stated that as long "as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." 547 U.S. at 419. By contrast, statements made by employees pursuant to their official duties are not insulated from employer discipline. *Id.* "The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Carollo v. Boria*, 833 F.3d 1322, 1329 (11th Cir. 2016) (quoting *Lane v. Franks*, 134 S. Ct. 2362, 2379 (2014). Whether a plaintiff spoke as a citizen or as an employee is a question of law for the court to decide. *Id.*

At the time of his suspension Bell held a "full release position" from his law enforcement duties as a traditional deputy which enabled him to serve full time as Union president (Complaint ¶ 4). Bell's Complaint alleges that he spoke as the president of the Union on behalf of BSO deputies and sergeants (Complaint, ¶ 13). Indeed, the letters written by Bell to the Sheriff attached to the Complaint are written on Union letterhead (DE [1-1] [1-2]). The opinion piece published in the *Sun-Sentinel* identifies Bell as "president of the Broward Sheriff's Office Deputies Association Union (International Union of Police Associations, Local 6020) and a law enforcement Deputy Sheriff at the Broward Sheriff's Office with 26 years of experience. The union represents more than 1,400 law enforcement officers at BSO." (DE [1-4]).

In *Hubbard v. Clayton Cty. Sch. Dist.*, 756 F.3d 1264 (11th Cir. 2014), the Eleventh Circuit held that speech made by a teacher who was "on loan" from the school district to the union to serve as union president was speech made as a citizen, not as an employee of the school district. *Id.* at 1267. The court agreed with cases from other circuits that held statements made by employees serving as union officials were made as citizens, not as employees. *See Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006) (deputy sheriff's statements made in capacity as union president were made as a citizen, not as deputy sheriff); *Ellins v. City of Sierra Madre*, 710 F.3d 1049 (9th Cir. 2013) (speech made in context of plaintiff's role as union official made as private citizen). Bell's Complaint clearly alleges that at the time of his speech he was acting as the Union president. He was on "full release" from BSO to serve as Union president full time and his comments were made on behalf of the Union. Accordingly, for purposes of the Motion to Dismiss, the Court must conclude that his statements were made as a citizen, not as an employee.

B. Whether Bell's Statements Were About a Matter of Public Concern

The Court must next consider whether Bell's statements were about a matter of public concern. "Speech addresses a matter of public concern when the speech can be 'fairly considered as relating to any matter of political, social, or other concern to the community.'" *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996) (quoting *Connick v. Meyers*, 461 U.S. 138, 146 (1983)).

Bell's Complaint alleges that on March 10, 2020, Broward County declared a local state of emergency due to the prevalence of COVID-19 (Complaint, ¶ 10). This emergency declaration followed similar declarations on the state and national levels. On March 16, 2020, Bell wrote a letter to the Sheriff expressing his concern on behalf of the Union and its members that deputies had not been provided sufficient personal protective equipment ("PPE") to guard against exposure to coronavirus while on duty (*Id.* ¶ 13). That same day, Bell received an email from BSO stating that his charges of inadequate supplies of PPE were not true and warning him not to make further untrue statements that "may lead to unwarranted anxiety and fear in the public and within BSO." (DE [1-1]).[1] He was warned that making further inaccurate statements would lead to disciplinary action. (DE [1-1]). Bell alleges that after receiving that email he appeared on a radio show but "self-censored" his speech because of the threatened disciplinary action. (Complaint, ¶ 15).

On April 6, 2020, the *Sun-Sentinel* published an opinion piece written by Bell, in which Bell again complained that deputies were not being provided adequate PPE to protect deputies or "the public from deputies transmitting the deadly virus while on duty."

[1] A copy of the email from BSO to Bell is attached as an exhibit to Bell's Complaint.

(DE [1-4]). The article also detailed the Union's complaints about the Sheriff's lack of responsiveness to Union communications and his leadership of BSO. (*Id.*).

The Sheriff argues that Bell's Complaint fails to identify the speech he claims is protected. The Court disagrees. Bell has clearly identified the speech that he alleges instigated his suspension and removal from full release status: complaints about the lack of PPE available to BSO deputies and the Sheriff's comments to the contrary. Likewise, the speech identified is clearly a matter of public concern and the Sheriff does not dispute this. The novel coronavirus and COVID-19 have occupied the political, social, economic, and religious aspects of life in the United States (and much of the world) for the previous three months. Thus, the Court concludes that Bell's Complaint alleges speech that is a matter of public concern.

C. Whether the Complaint Alleges that Bell's Speech Outweighs the Sheriff's Interests

Where a government employee has spoken on a matter of public concern, courts are to conduct a balancing test to determine whether the First Amendment affords protection. *Pickering*, 391 U.S. at 568-69. "[T]he interests of the government employee, as a citizen, in commenting upon matters of public concern must be balanced with the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Boyce*, 510 F.3d at 1343 (internal quotation marks omitted) (quoting *Pickering*, 391 U.S. at 568).

The Sheriff argues that Bell has not alleged any facts to establish that his First Amendment interests outweigh the interests of the Sheriff as a pubic employer. To the contrary, the Complaint identifies Bell as the president of the Union that represents BSO deputies and sergeants and that he has spoken on a matter of safety on behalf of both

the union members and the public. To properly conduct the balancing test prescribed by *Pickering*, the Court must consider the agency's interests and to what extent Bell's comments interfered with those interests. However, it is premature to make that analysis. But the Complaint does allege facts that support Bell's interests in speaking as he did and, therefore, withstands the Motion to Dismiss.

D. Whether the Complaint Alleges an Adverse Employment Action

On April 10, 2020, Bell was notified of the internal affairs investigation of him.[2] He was suspended with pay, turned in his badge, access card, and equipment. He was also removed from his "full release" status pursuant to the collective bargaining agreement. (DE [1-6]). The Sheriff moves to dismiss the Complaint because Bell fails to sufficiently allege that he has suffered an adverse employment action. The Sheriff argues that Bell's suspension with pay pending an internal affairs investigation is not an adverse employment action for purposes of obtaining relief from the courts.

Bell acknowledges that he is getting paid, but argues that he has lost his full release status to the Union, cannot access the BSO premises, and his Union activities have been "disrupted." Bell alleges that because of his suspension and removal from full release status, he is unclear whether he can meet with Union members or conduct Union activity at all. Bell alleges that "[o]n April 10, 2020, an "Internal Memo" from General Counsel from the Sheriff's Office advised Plaintiff that because he was suspended he was no longer permitted to act as Union President because he lost his "full release" status. (Complaint, ¶ 24). However, the memo itself does not reflect that Bell was not permitted

[2] Bell also alleges that on April 10, 2020, he wrote a "whistleblower" letter, pursuant to Florida Statute § 112.3187(6) (2019) to the Sheriff and requested a meeting. The Complaint does not, however, allege a violation of the Florida Whistleblower Act.

to act as Union president (DE [1-6]).[3] It simply states that Bell was removed from "full release" status because of his suspension. Significantly, Bell does not allege that he is unable to assemble with or represent the Union membership; he states that he is "uncertain" about his ability to do so. (Complaint, ¶ 28).

The collective bargaining agreement between BSO and the Union is also attached to Bell's Complaint (DE [1-7]). The relevant portion relating to "full release" states that "[a] union selected executive board member of the union will be on full release for the purposes of conducting union business so long as the "e-board" member is a BSO employee." Nothing in the collective bargaining agreement requires the Union president to be on full release. Bell's removal from full release has no bearing on his position as Union president.

Bell offers no allegations of a negative *employment* consequence. "A paid suspension is neither a refusal to hire nor a termination, and by design does not change compensation." *Jones v. Southeastern Pa. Trans. Auth.,* 796 F.3d 323, 326 (3rd Cir. 2015). "Nor does it effect a serious and tangible alteration of the terms, conditions, or privileges of employment, because the terms and conditions of employment ordinarily include the possibility that an employee will be subject to an employer's disciplinary policies in appropriate circumstances." *Id.* (quotations omitted).

In retaliation claims, "some benefit must be denied or some negative consequence must impinge on the Plaintiff's employment before a threat of discharge is actionable." *Breux v. City of Garland,* 205 F.3d 150, 159 (5th Cir. 2000) (being placed on paid leave is not an adverse action that would support a First Amendment retaliation

[3] Under the Federal Rules of Civil Procedure, exhibits to a complaint "are part of the pleading for all purposes." *Griffin Indus., Inc. v Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007); Fed. R. Civ. P. 10(c).

claim); *see also Jones,* 796 F.3d 323 (suspension with pay not adverse employment action under Title VII) (citing *Joseph v. Leavitt,* 465 F.3d 87, 91 (2d Cir. 2006) ("[A]dministrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action"); *Singletary v. Mo. Dep't of Corr.,* 423 F.3d 886, 891–92 (8th Cir. 2005); *Peltier v. United States,* 388 F.3d 984, 988 (6th Cir. 2004); *Von Gunten v. Maryland,* 243 F.3d 858, 869 (4th Cir. 2001) (holding that "placing [an employee] on administrative leave with pay for a short time to allow investigation" is not an adverse action for retaliation purposes), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 60 (2006); *Breaux,* 205 F.3d at 158 (placement on paid administrative leave is not an adverse action for purposes of a First Amendment retaliation claim)); *but see Dahlia v. Rodriguez,* 735 F.3d 1060, 1078-79 (9th Cir. 2013) (paid leave amounted to an adverse employment action when plaintiff was denied opportunity to take sergeants' exam, forfeited on-call and holiday pay, and prevented from furthering investigative experience crucial to job advancement).[4]

Plaintiff has been placed on paid leave during the pendency of an internal affairs investigation. This is not an adverse employment action. Whether the internal affairs investigation was prompted by Plaintiff's speech or by other matters is, at this juncture, not a matter for the Court to consider. Plaintiff has not, and cannot at this time, allege an adverse employment action. Accordingly, it is hereby

[4] The parties have not cited, and the Court is not aware of, Eleventh Circuit binding precedent on this issue.

ORDERED AND ADJUDGED that Defendant's Motion to Dismiss (DE [16]) be and the same is **GRANTED.** This cause is **DISMISSED.** The Clerk of the Court is directed to **CLOSE** this case and **DENY AS MOOT** any pending motions.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 22nd day of May 2020.

RAAG SINGHAL
UNITED STATES DISTRICT JUDGE

Copies furnished counsel via CM/ECF