UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 16-21658-CIV-WILLIAMS

HARRIUS JOHNSON,

Plaintiff,

vs.

MIAMI-DADE COUNTY,

Defendant.
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ORDER

THIS MATTER is before the Court on the Partial Motion to Dismiss filed by Defendant Miami-Dade County (the "County") (DE 28). Plaintiff Harrius Johnson filed a response in opposition to the motion (DE 32) and Defendant replied (DE 33). For the reasons discussed below, the motion is granted in part and denied in part.

I. BACKGROUND

On May 10, 2016, Johnson filed an initial Complaint (DE 1) against the County seeking "unpaid wages under the Fair Labor Standards Act [("FLSA")], and Florida common law." (DE 1 ¶ 1). After the County moved to dismiss (DE 17), Johnson filed an Amended Complaint (DE 18), again claiming violations of the FLSA (Count I) and Florida common law (Count II), but adding claims under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (Counts III and IV); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (Counts V and VI); and the Florida Civil Rights Act of 1992 (Counts VII and VIII).[1] Specifically, Johnson's additional claims allege that his employment with the Miami-Dade Police Department ("MDPD") was unlawfully terminated based on his race

[1] The County's first Motion to Dismiss was denied as moot.

and in retaliation for filing multiple charges with the Equal Employment Opportunity Commission ("EEOC"). Johnson also alleges that, upon termination, the County failed to pay him his final wages and other benefits. Specifically, Johnson claims he is owed unpaid wages, liquidated damages, unpaid holiday compensation, unpaid annual leave, unused insurance payouts, and a uniform deposit. (DE 14).

On August 15, 2016, the County filed a second Motion to Dismiss (DE 28), seeking to dismiss Counts I-IV of the Amended Complaint for failure to state a claim. Attached to the motion is a copy a collective bargaining agreement ("CBA") between the County and the Dade County Police Benevolent Association. Johnson filed a response to the motion (DE 32) on September 1, 2016 and the County filed its reply (DE 33) on September 12, 2016.

II. LEGAL STANDARD

To survive a motion to dismiss for failure to state a claim, a plaintiff must plead sufficient facts to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court's consideration is limited to the allegations in the complaint. *See GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). All factual allegations are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *Speaker v. U.S. Dep't. of Health & Human Servs. Ctrs. for Disease Control & Prevention*, 623 F.3d 1371, 1379 (11th Cir. 2010). Although a plaintiff need not provide "detailed factual allegations, a plaintiff's complaint must provide "more than labels and conclusions." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). "[A] formulaic recitation of the elements of a cause of action will not do." *Id.* Though Rule 12(b)(6) does not allow

dismissal of a complaint where the court anticipates "actual proof of those facts is improbable," the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007).

III. DISCUSSION

The County moves under Federal rule of Civil Procedure Rule 12(b)(6) to dismiss Counts I through IV. Specifically, the County argues that Count I under the FLSA is moot based on its three attempts to pay Johnson his final wages. With regard to Count II, the County argues that Johnson's benefits—namely, the uniform deposit, holiday and annual leave, and insurance payouts (DE 14)—are subject to the mandatory arbitration clause included in his CBA. As to Counts III and IV, the County argues that Johnson has failed to state a claim for municipal liability under 42 U.S.C. § 1983.

A. Count I: Johnson's FLSA claim

As a general rule, the settlement of a plaintiff's claim moots an action. *Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120, 120 (1985). FLSA claims are frequently mooted where an employer tenders full relief. *See, e.g.*, *Cameron-Gant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1244 (11th Cir. 2003). Here, the County's tender of Johnson's final paycheck does not equate to full relief because it fails to include an offer of judgment. *See Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1167 (11th Cir. 2012) (requiring an offer of judgment to satisfy full relief where a plaintiff requests such a judgment in its complaint). The County's tender also fails to account for Johnson's request for liquidated damages. Thus, the Court finds that Johnson's FLSA claim is not moot and the motion to dismiss Count I is denied.

B. Count II: Johnson's claim for annual leave and holiday compensation

Under Florida law, a claim for unpaid wages is essentially a breach of contract claim.[2] *See, e.g., Coffie v. Dist. Bd. Of Trustees, Miami-Dade Cmty. Coll.*, 739 So.2d 148, 149 (Fla. 3d DCA 1999); *see also Strasser v. City of Jacksonville*, 655 So. 2d 234, 236 (Fla. 3rd DCA 1995) (defining wages to include certain compensatory benefits such as annual leave). Employees claiming breach of a collective bargaining contract must resort to the dispute resolution mechanism provided in the agreement. *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1222 (11th Cir. 1985). If this agreed-upon mechanism is not used, the employee's claim against the employer must be dismissed. *Id.* (citing *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965)).

Article 3 of the CBA describes a five-step process for resolving disputes under the CBA—step five is binding arbitration. (DE 28-1 at 6). Johnson makes no reference to the CBA in the Amended Complaint. Instead, the County attaches the CBA to its Motion to Dismiss. Johnson argues in response that (1) the Court may not consider the CBA because it was not referenced in the Amended Complaint; (2) under Federal Rule of Civil Procedure 12(g), the County may not raise the CBA in a second motion to dismiss; and (3) the CBA was not in effect at the time his claims accrued.

1. The Court may consider the CBA.

Ordinarily, a court may not consider materials outside the complaint unless the extraneous documents are both central to a plaintiff's claim and undisputed. *Day v.*

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[2] The Court agrees with the County that Johnson's benefits are not recoverable under the FLSA. *See* 29 U.S.C. §§ 206-207. Moreover, while Johnson makes a claim for holiday compensation and annual leave under Count II (DE 18 ¶ 21), it appears he does not claim the uniform deposit or insurance payouts in the Amended Complaint. Since the County has not raised this argument, however, the Court declines to address the issue at this time.

Taylor, 400 F.3d 1272, 1275-76 (11th Cir. 2005); *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). "Undisputed" means that the document's authenticity is unchallenged. *Id.* The CBA attached to the County's motion satisfies both requirements because (1) Employment agreements containing arbitration clauses like the one included in the CBA have been held to be central to a plaintiff's claim and (2) the CBA is undisputed because it is a public record of which the Court may take judicial notice. *See Perera v. H & R Block Eastern Enterprises, Inc.*, 914 F. Supp. 2d 1284, 1289 (S.D. Fla. 2012); *Universal Express, Inc. v. U.S. Sec. and Exchange Comm'n*, 177 Fed. App'x 52, 53 (11th Cir. 2006).

2. The County properly raised its CBA defense in its second motion to dismiss.

Rule 12(g) prohibits a party from raising a defense in a second motion to dismiss that could have been raised in an earlier motion. Nevertheless, a plaintiff's failure to state a claim may still be raised in a motion for judgment on the pleadings under Rule 12(c). Fed. R. Civ. P. 12(h)(2). Even though the County could have raised its arguments regarding the CBA in its first motion to dismiss, the Court finds no reason to require both parties to litigate a separate Rule 12(c) motion after the pleadings close. *See Williamson v. Walmart Stores, Inc.*, 2015 WL 1565474, at *1 (M.D. Ga. April 8, 2015) (considering arguments raised in a second Rule 12(b)(6) motion after the first motion was declared moot); *Castellanos v. Starwood Vacation Ownership, Inc.*, 2015 WL 403274, at *3 (M.D. Fla. January 8, 2015) (construing a second Rule 12(b)(6) motion as a Rule 12(c) motion after the pleadings were closed).

3. The arbitration clause may be enforced after the expiration the CBA and it applies to Johnson's holiday and annual leave compensation.

By its express terms, the CBA expired on September 30, 2014. (DE 28-1 at 73). Johnson argues that his benefits are not subject to arbitration because they accrued after the CBA expired, however, arbitration clauses are routinely enforced after a CBA expires absent express language to the contrary. *See, e.g., Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionery Workers Union, AFL-CIO*, 430 U.S. 243, 255 (1977). For arbitration to be enforced, the post-expiration dispute must arise under the CBA. *Id.*; *Litton Financial Printing Div., A Div. of Litton Business Systems, Inc. v. N.L.R.B.*, 501 U.S. 190, 205-06 (1991) (distinguishing between disputes over terms and conditions of employment and disputes arising under the agreement). A post-expiration dispute arises under the contract where, *inter alia*, an action taken after expiration infringes a right that accrued or vested under the agreement. *Litton*, 501 U.S. at 205-06. Johnson's CBA contains a broad arbitration clause applying to "any dispute arising concerning [sic] the interpretation or application of this Agreement or with respect to the terms and conditions of employment . . . ." (DE 28-1 at 6). It contains no express or implied language prohibiting post-termination arbitration. The question thus becomes whether Johnson's benefits claims arise out of his CBA.

The Court finds that only Johnson's annual leave and holiday compensation arose under the CBA. Article 22(B) of the CBA states: "Employees may accrue annual leave up to a maximum of 500 hours." (DE 28-1 at 42). Whether or not annual leave is compensable is a question for the arbitrator, but it is clear from the CBA that Johnson's right to annual leave vested under the CBA. Likewise, Article 21(B)(3) states: "All

employees shall be paid for outstanding holiday leave at the time of separation. Such payment shall be at the employee's current rate of pay . . .." *Id.* at 40. While Johnson was not entitled to payout of his accrued holiday compensation until he separated from the MDPD—which occurred after the CBA expired—holiday compensation is a form a deferred compensation that clearly arose under the CBA. *See Nolde Brothers*, 430 U.S. at 248 n.4, 253 (finding severance pay to be a form of deferred compensation vested during the life of the CBA).

By contrast, Johnson's uniform deposit and insurance payouts do not arise under the CBA. Article 36(D) of the CBA refers to a uniform "allowance" for certain officers, but it does not refer to a uniform "deposit." Similarly, Article 7 refers to bi-weekly deductions in salary for purposes of association dues and insurance premiums, but never discusses any type of repayment of these deductions upon separation. Therefore, Johnson's uniform deposit and insurance payouts are not arbitrable. Accordingly, the County's motion to dismiss Count II is granted-in-part with respect to Johnson's claim for annual leave and holiday compensation.

C. Counts III and IV: Municipal Liability for discrimination and retaliation under § 1983

A municipality's liability under § 1983 may not be based on the doctrine of respondeat superior. *Grech v. Clayton County*, 335 F.3d 1326, 1329 (11th Cir. 2003). Instead, a municipality may only be held liable for one of the following: (1) an act that was officially sanctioned or decreed by the municipality; (2) an act performed by a municipal officer with final policy-making authority; or (3) an act that was part of an unconstitutional practice or custom. *Brown v. City of Fort Lauderdale*, 923 F.2d 1474, 1480 (11th Cir. 1991). The County contends that (1) Johnson's termination was not

carried out by an officer with final policy-making authority; and (2) Johnson has failed to allege an unconstitutional practice or custom of discrimination or retaliation.[3] Conclusory or "naked allegations" are insufficient to survive a motion to dismiss; instead a plaintiff must allege facts supporting a theory of municipal liability "that is plausible on its face." *Hoefling v. City of Miami*, 811 F.3d 1271, 1279 (11th Cir. 2016). While Johnson does not sufficiently allege an act by a final policymaker, it appears, at least at this initial stage, that he has satisfied his burden of alleging facts to support a custom or practice of racial discrimination and retaliation.

1. Johnson does not allege any act by an official with final policymaking authority.

Determining who has final policymaking authority is a question of law. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989). The Court has previously held that final policy-making authority for Miami-Dade County, including the MDPD, rests with the Board of County Commissioners, the County Manager, and the County Mayor. *Moore v. Miami-Dade County*, 502 F.Supp. 2d 1224, 1230 n.4 (S.D. Fla. 2007); *Buzzi v. Gomez*, 62 F. Supp. 2d 1344, 1359-60 (S.D. Fla. 1999); *La Bruno v. Miami-Dade County*, 2011 WL 1103783, at *2 n.2 (S.D. Fla. Mar. 23, 2011). Johnson does not allege that the Board, the County Manager or the County Mayor took any action against him. Instead, he argues that the County's final policymakers ratified the MDPD's conduct. While this may or may not be true, Johnson makes no such allegation in the Amended Complaint; at most, he alleges that the County Mayor was on notice of the MDPD's conduct. (DE 18 ¶¶ 11, 17, 20, 61). Notice alone is insufficient to establish municipal liability. *See Garvie v. City of Ft. Walton Beach, Fla.*, 366 F.3d 1186, 1189

[3] Johnson makes no claim that his termination was officially sanctioned or decreed by the County.

(11th Cir. 2004) ("For plaintiffs to state a successful § 1983 claim against a municipality based on a ratification theory . . . they must demonstrate that [final policymakers] had an opportunity to review the subordinate's decision and agreed with both the decision and the decision's basis.") (internal quotations omitted).

2. Johnson has sufficiently pled a widespread practice or custom of racial discrimination and retaliation.

A municipal custom or practice must be "so pervasive as to be the functional equivalent of a formal policy." *Grech*, 335 F.3d at 1330 n.6. A single incident of unconstitutional activity is not sufficient to establish a custom. *Craig v. Floyd County, Georgia et al.*, 643 F.3d 1306, 1310-1311 (11th Cir. 2011). Instead, a series of similar constitutional violations is required. *Id.* A municipality must "tacitly [authorize] these actions or [display] deliberate indifference" towards the misconduct. *Griffin v. City of Opa-Locka*, 261 F.3d 1295, 1308 (11th Cir. 2001); *see also Brown*, 923 F.2d at 1481 ("[A] longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it.").

a. Racial Discrimination

Johnson pleads multiple instances of the discriminatory conduct. For example, he alleges that in July 2013, a Hispanic officer—Juan Germosen—was disciplined for using racial slurs while a white officer—Rachel Meadors—was not. (DE 18 ¶ 11-14). Johnson also claims he was disciplined differently for his involvement in a police shooting versus white officers involved in similar shootings. (DE 18 ¶¶ 15-16). Plaintiff reported the MDPD's conduct to the EEOC, the County Commission and the County

Mayor's Office, but the County's investigations into the matters were allegedly biased.[4] (DE 18 ¶¶ 12, 17, 20).

In 2015, Johnson was criminally detained and accused of stealing another officer's cellular phone. (DE 18 ¶ 43). He claims that a white officer—Alex Diaz-De Villegas—was also present at the time but did not undergo the same detention. (DE 18 ¶ 48). Subsequently, Johnson's employment was terminated based in part on his failure to provide an updated home address. (DE 18 ¶ 65). He claims that similar policy violations by other non-black officers did not result in their termination. (DE 18 ¶ 74).

b. Retaliation

Likewise, Johnson pleads multiple instances of the MDPD's retaliatory conduct. Johnson alleges that, in July 2013, Lieutenant Leonard Ricelli began giving him unsatisfactory performance assessments in retaliation for reporting Officer Meador's use of racial slurs. (DE 18 ¶¶ 11-13). He claims these reports adversely affected his overall job evaluation and opportunities for advancement. (DE 18 ¶ 12). Johnson was then suspended for five days in December 2013, after filing a career service grievance against Lieutenant Ricelli. (DE 18 ¶ 18). On December 20, 2013, Johnson filed an EEOC charge with regard to Lieutenant Ricelli's conduct. (DE 18 ¶ 19; DE 18-1 at 2). In June 2015, Johnson was disciplined after refusing Captain Tyrone White's request that he alter another officer's disciplinary action report ("DAR"). (DE 18 ¶¶ 36-38). Specifically, Johnson was allegedly transferred to the Kendall District without requesting

[4] In support, Johnson claims, *inter alia*, that one of the officers he accused of wrongdoing was allowed to conduct several of the investigations and that the adjudicatory panel assigned to his complaints did not include any African Americans. (DE 18 ¶ 24).

such a transfer, and then temporarily relieved of duty by Captain White. (DE 18 ¶¶ 38-40). In response, Johnson filed a separate EEOC charge. (DE 18 ¶ 41; DE 18-1 at 8).

Johnson filed two additional EEOC charges in October 2015. The first was filed after Johnson was accused of stealing another officer's cellular phone. (DE 18 ¶¶ 41-49; DE 18-1 at 9). The second was filed after Johnson was accused of locking Captain White in an office. (DE 18 ¶¶ 50-58). Johnson claims that these EEOC charges are the real reason his employment was terminated in January 2016. (DE 18 ¶ 65).

Johnson's allegations are not mere conclusions. Rather, the allegations include specific facts that establish a municipal custom of discrimination and retaliation that is plausible on its face. *Compare Hoefling*, 811 F.3d at 1281 (listing multiple factual allegations that establish a plausible custom or policy), *with Weiland v. Palm Beach County Sheriff's Office*, 792 F.3d 1313, 1328-29 (11th Cir. 2015) (declining to find a custom of police misconduct based on a single allegation). The County argues that Johnson cannot base his allegations solely on his own experience. However, the Eleventh Circuit held in *Brown* that a plaintiff's own repeated experiences of discrimination were sufficient to plead a municipal custom. *Brown*, 923 F.2d at 1481. Defendant does not cite, nor is the Court aware of, any Supreme Court or Eleventh Circuit authority requiring that a custom be based on experiences of individuals other than the plaintiff.[5] *See Diamond v. Owens*, 131 F. Supp. 3d 1346, 138 (M.D. Ga. 2015).

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[5] In *Craig v. Floyd County, Georgia et al.*, 643 F.3d 1306, 1312 (11th Cir. 2011), the Eleventh Circuit stated that a plaintiff's reliance on his own experience is "at most, proof of a single incident of unconstitutional activity." However, *Craig* is distinguishable from this case. *Craig* involved a prisoner alleging a single isolated incident of inadequate care. *Id.* Plaintiff here pleads multiple incidents of retaliation and discrimination.

Therefore, Johnson has satisfied his burden and the County's motion to dismiss Counts III and IV is denied.

IV. CONCLUSION

For the reasons set out above, it is **ORDERED AND ADJUDGED** that Defendant Miami-Dade County's Partial Motion to Dismiss (DE 28) is **GRANTED IN PART AND DENIED IN PART**. With regard to Counts I, III, and IV, the County's motion is denied. With regard to Count II, the County's motion is granted-in-part with respect to Johnson's claim for annual leave and holiday compensation, but is otherwise denied. All deadlines set out in the Court's November 28, 2016 scheduling order (DE 39) remain in full force and effect.

DONE AND ORDERED in chambers in Miami, Florida, this 30 day of March, 2017.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE