IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

RUBIN SCHULMAN,

Plaintiff,

v.

LAWANDA SAPP; TRAFFIC TROOPERS, INC.; THEODORE JACKSON; JIMMY CARTER; AND FRANKIE BROWN,

Defendants.

CIVIL ACTION FILE

NO. 1:18-cv-5359-TCB

O R D E R

This case comes before the Court on Defendants LaWanda Sapp, Traffic Troopers, Inc., Theodore Jackson, Jimmy Carter, and Frankie Brown's motions [132, 135] for summary judgment on the claims filed against them by Plaintiff Rubin Schulman. After careful consideration, the Court will grant Defendants' motions.

I. Background

Traffic Troopers, owned by Sapp, is a flagging and traffic directing company that hires Fulton County deputy sheriffs. Schulman was a reserve lieutenant with the Fulton County Sheriff's Office ("FCSO") who also owned a security company, Georgia Security Management. While working as a reserve lieutenant, he sought and obtained a second job with Traffic Troopers. This second job entailed directing traffic during roadwork or other construction.

On September 7, 2016, the Fulton County Sheriff's Office's Office of Professional Standards ("OPS") received an anonymous complaint about a deputy poorly directing traffic.

After receiving the complaint, Brown, a captain, directed Sergeant Sarah Gregory to open an investigation. Subsequently, Brown discovered that Schulman worked for Traffic Troopers and questioned Schulman about his duties there. Schulman responded that he was performing security and flagger work for Traffic Troopers. He also denied representing the Fulton County Sheriff's Office by wearing its uniform during his flagging work. The investigation concluded that

Schulman was not wearing the uniform while working at Traffic Troopers, and the Office closed the case.

Meanwhile, Sapp called "a commander on duty" and inquired whether Schulman was a deputy. [124] at 67:4-8. The commander said he was not. Sapp e-mailed Brown because she had believed (because he provided his POST certification and a copy of his FCSO identification) that Schulman was a non-reserve Fulton County sheriff's deputy.

After receiving Sapp's e-mail, Brown instructed Sergeant Gregory to re-open the prior investigation. Schulman repeated that he was hired for traffic control. OPS subsequently concluded that Schulman violated the OPS Procedures because he held himself out to be a law enforcement officer by providing his POST certification and FCSO identification to Sapp. OPS terminated Schulman's reserve deputy status.

This termination led to Schulman filing this lawsuit. He avers a conspiracy to racially discriminate against him and tortious interference with contract.

After filing suit, many FCSO officers told Schulman that they could not work for Schulman's company, Georgia Security Management. The sheriff's office has a policy that forbids any officer from working for a company that is owned or managed by persons involved in a pending lawsuit with the county. After the conclusion of discovery, Defendants filed their motions for summary judgment.

II. Summary Judgment Standard

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A "genuine" dispute as to a material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *FindWhat Inv. Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). In making this determination, however, "a court may not weigh conflicting evidence or make credibility determinations of its own." *Id.* Instead, the court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Id.*

"The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). If the nonmoving party would have the burden of proof at trial, there are two ways for the moving party to satisfy this initial burden. *United States v. Four Parcels of Real Prop.*, 941 F.2d 1428, 1437–38 (11th Cir. 1991). The first is to produce "affirmative evidence demonstrating that the nonmoving party will be unable to prove its case at trial." *Id.* at 1438 (citing *Celotex Corp.*, 477 U.S. at 324). The second is to show "an absence of evidence to support the nonmoving party's case." *Id.* (quoting *Celotex Corp.*, 477 U.S. at 323).

If the moving party satisfies its burden by either method, the burden shifts to the nonmoving party to show that a genuine issue remains for trial. *Id.* At this point, the nonmoving party must "'go beyond the pleadings,' and by its own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota*

White Sox, Inc., 64 F.3d 590, 593–94 (11th Cir. 1995) (quoting *Celotex Corp.*, 477 U.S. at 324).

III. Discussion

A. Schulman's 42 U.S.C. § 1981 Claim Against Defendants Jackson, Carter, and Brown

The issue before the Court is a novel one. Should the Court hear a plaintiff's § 1983 claim even though he did not plead it, yet the defendant, in summary judgment, has preemptively responded to the potential claim?

Schulman avers in his complaint that Jackson, Carter, and Brown (the "Fulton County Defendants") violated his rights under 42 U.S.C. § 1981. Section 1981, however, does not create a cause of action against state actors. *Jett v. Dallas Indep. Sch. Dist.,* 491 U.S. 701, 731, 735 (1989). "The remedial provisions of § 1983 are controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981." *Id.* at 731. Accordingly, § 1981 does not "authorize" damages under § 1981; a plaintiff must also plead a cause of action under § 1983 because Congress "has established its own remedial scheme" for state action claims. *Id.*

Inexplicably, Schulman did not plead § 1983 in his complaint under Count I and recognizes he did not. Schulman states in his response to Defendants' summary judgment motions that even though he did not plead a claim under § 1983, his claim is not barred because "the Eleventh Circuit has authorized § 1981 suits against state actors via § 1983." [134] at 4.

As support for his argument, he relies on *Webster v. Fulton County,* 283 F.3d 1254 (11th Cir. 2002). *Webster* is inapplicable to Schulman's case, however, as it dealt with a municipality's retaliatory behavior. A contractor sued Fulton County for disparate treatment racial discrimination. Fulton County then refused to award the contractor any contracts in retaliation for filing the lawsuit. The Eleventh Circuit held that the county violated § 1981 because it refused to award the contract to the contractor in retaliation for filing the lawsuit and noted that § 1981 "supports a retaliation cause of action." *Webster,* 283 F.3d at 1256.

Schulman has not averred that the Fulton County Defendants have retaliated against him. In fact, Schulman does not mention

retaliation in any of his pleadings. Accordingly, Schulman's reliance on *Webster* is misplaced.

In an attempt to persuade the Court that failing to plead § 1983 is not a fatal error, Schulman also cites an unpublished Eleventh Circuit opinion, *King v. Butts County,* 576 F. App'x 923 (11th Cir. 2014) (per curiam). *King* stands for the proposition that a plaintiff need not explicitly plead § 1983 if the defendants were put on notice of that claim.

The Eleventh Circuit has not addressed this issue in a published opinion. The only comparable case the Court has found is *Ebrahimi v. City of Huntsville Board of Education,* 905 F. Supp. 993 (N.D. Ala. 1995).

In *Ebrahimi,* the question was whether a plaintiff who sues individuals in their individual capacity can seek redress under § 1983 via § 1981 if the plaintiff has not explicitly pled a claim under § 1983. The plaintiff believed his claim would be incorporated by reference through § 1981. The defendants did not preemptively reply to the

potential § 1983 claim. The court held that § 1983 cannot be incorporated by reference into a § 1981 claim.

The Court declines to follow the Northern District of Alabama's holding. The defendants in *Ebrahimi* did not address that plaintiff's potential § 1983 claim, unlike the Fulton County Defendants here. The Fulton County Defendants had notice of Schulman's § 1983 claim. In fact, they stated that they were responding to Schulman's "possible . . . section 1983 equal protection claims against the Fulton County Defendants." [132] at 12.

Now, the question becomes whether it would be unjust to Defendants for the Court to hear Schulman's § 1983 claim. Federal Rule of Civil Procedure 8(a)(2) provides that "a pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(f) provides that "all pleadings shall be so construed as to do substantial justice." Schulman's operative complaint in paragraph 3 states that "[t]his action is also brought by Plaintiff for conspiracy for the purpose of depriving Plaintiff

of the equal protections of the law pursuant to 42 U.S.C. § 1983, et seq." [129] ¶ 3.

Since the Fulton County Defendants recognized and responded to Schulman's unpled § 1983 claim, it would not be unjust to consider the claim at this juncture even though Schulman did not plead it explicitly in count one. To be clear: had the Fulton County Defendants not preemptively responded to the unpled § 1983 claim, the Court would not have considered it. Thus, the Court narrowly holds that if a defendant responds to an unpled but possible § 1983 claim, the Court can consider the claim.

B. Schulman's 42 U.S.C. § 1983 Claim Against the Fulton County Defendants

42 U.S.C. § 1983 grants legal remedies to a plaintiff who can prove that a person acting under color of state law committed an act that deprived the plaintiff of some right, privilege, or immunity created by the Constitution or laws of the United States. *Hale v. Tallapoosa Cnty.*, 50 F.3d 1579, 1582 (11th Cir. 1995) (quoting 42 U.S.C. § 1983). The familiar test under *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), applies to not only Title VII claims, but also to § 1983 racial

discrimination claims. *Busby v. City of Orlando,* 931 F.2d 764, 777 (11th Cir. 1991).

The *McDonnell Douglas* test begins with the § 1983 plaintiff having the initial burden of establishing a prima facie case of racial discrimination. *Id.* (citing *McDonnell Douglas Corp.,* 411 U.S. at 802). If the plaintiff establishes a prima facie case of discrimination, the burden then shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the employer's actions. *Id.* (citing *McDonnell Douglas Corp.,* 411 U.S. at 802). If the employer meets its burden, then the plaintiff must show that the legitimate reason was merely pretextual.

Schulman thus has the initial burden of showing that the Fulton County Defendants discriminated against him. He has met his burden of proving a prima facie case of discrimination. He argues that "none of the black employees were the subject of false claims by Sapp and none of the black employees were subject to a sham IA investigation. While Jackson, Carter, and Brown approved the applications for secondary

employment of black employees to work for Sapp, mine were always denied." [132-2] at 7–8.

Schulman, who is a white male, could not obtain secondary employment, while the black employees could. Neither Brown, Carter, nor Jackson explain why they denied Schulman's application but allowed other black officers to obtain secondary employment. Accordingly, Schulman has satisfied his burden of proving a prima facie case of discrimination.

Next, the burden is on the Fulton County Defendants to show they had a nondiscriminatory reason for terminating Schulman's employment. The Fulton County Sheriff's Office received a complaint about Schulman poorly directing traffic. Brown began asking the traffic control companies if Schulman was their employee. Sapp said that Schulman worked for her.

During the investigation, Sapp contacted the sheriff's office because she thought Schulman was a Fulton County sheriff. The sheriff's office determined that Schulman held himself out to be a Fulton County sheriff when he produced his Fulton County ID to Sapp

to gain employment. Brown stated that he "asked her not to have [Plaintiff] working there no more, to stop his employment because he is not authorized to be working over there under the sheriff's office umbrella." [107] at 50:25–51:2.

Considering the totality of the circumstances—the fact that Schulman provided his POST-certification badge and his Fulton County ID badge—Brown reasonably concluded that Schulman held himself out as a deputy sheriff to work for Traffic Troopers. As such, Brown had the authority to take disciplinary action because Schulman was not authorized to have secondary employment. There is no evidence that Brown's decision was based on Schulman's race. Brown acted because Sapp was concerned that a Fulton County deputy sheriff was working for her without permission from the sheriff's office. Thus, the Fulton County Defendants have presented a legitimate, nondiscriminatory reason for terminating Schulman's employment.

The burden now shifts back to Schulman to show that the Fulton County Defendants' reason for terminating him was pretextual rather than legitimate. Schulman fails to satisfy his burden.

This situation arose out of an anonymous complaint about Schulman's ability to direct traffic. During the investigation, Sergeant Gregory concluded that Schulman "falsely represented to TT/Integrity that his services were in the capacity of a law enforcement officer." [132-2] ¶ 11. Schulman does not dispute this fact. Schulman also does not dispute that reserve deputies are prohibited from working unauthorized secondary jobs in any law enforcement capacity.

Sapp emailed Brown inquiring into Schulman's status as a Fulton County deputy sheriff. As a result of that email, the sheriff's office reopened the investigation. Traffic Troopers' employment policy restricted hires to those individuals with credentials from a law enforcement agency. Schulman provided his POST-certification and his Fulton County Sheriff's Office identification credentials to gain employment with Traffic Troopers. The sheriff's office found that Schulman held himself out as a Fulton County deputy sheriff when he was not authorized to have secondary employment. The badge, which was given to Schulman by the Fulton County Sheriff's Office, clearly

states, "Fulton County Sheriff's Office" with Schulman's photograph and "Sergeant" beneath his name.

Viewing all the evidence in record in the light most favorable to Schulman and drawing all reasonable inferences in his favor, the Court does not find any evidence of racial discrimination. Schulman cannot point to any specified instances of racial discrimination outside of his complaint's general allegations and does not dispute that his personnel file does not contain complaints by him alleging racial discrimination.

There is not any evidence that the sheriff's office discriminated against Schulman based on his race. Thus, Schulman's termination was not pretextual because the sheriff's office had a legitimate reason to investigate Schulman as well as terminate him for violating protocol.

C. Schulman's 42 U.S.C. § 1985(3) Claim Against Defendants

To prevail on a § 1985(3) claim, a plaintiff must prove four elements: (1) the existence of a conspiracy; (2) for the purpose of depriving a person or class of persons of equal protection under the law; (3) an act in furtherance of the conspiracy; and (4) a resulting injury or deprivation of a constitutional right. *Denney v. City of Albany,* 247 F.3d

1172, 1190 (11th Cir. 2001) (quoting *Lucero v. Operation Rescue,* 954 F.2d 624, 627 (11th Cir. 1992)). A plaintiff must show that two or more people agreed to deprive him of his civil rights. 42 U.S.C. § 1985(3).

In this case, Schulman has not shown the existence of a conspiracy against him. He claims that the Fulton County Sheriff's Office conspired with Sapp to deprive him of working at Traffic Troopers. He contends that because Brown said the sheriff's office was in a "partnership" with Traffic Troopers, a conspiracy exists. *See* [109] at 44:17–21 ("I felt the need to reach out to her and have her operate as a partner with the sheriff's office because she was employing so many of our staff members").

The partnership did not constitute a "conspiracy." Brown explained what the term "partnership" meant in this context. He described the protocol that the flagging and traffic agencies, including Sapp's, followed to hire deputies for secondary employment. Ensuring that deputies are permitted to have secondary employment is not a conspiracy.

Moreover, if a conspiracy existed within the sheriff's office, the intracorporate conspiracy doctrine applies. That doctrine provides that "a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation." *Dickerson v. Alachua Cnty. Comm'n,* 200 F.3d 761, 767 (11th Cir. 2000). The Eleventh Circuit has adopted this doctrine for employees within the same public offices. *Id.* at 769.

Applying this doctrine, Schulman must show that at least one of the Fulton County Defendants conspired with Sapp—not multiple Fulton County Defendants conspiring together. The record, however, does not show a conspiracy between the Fulton County Defendants and Sapp. Schulman contends that the one e-mail Sapp sent to Brown and Sapp's one meeting with Brown are enough to show a conspiracy. Sapp discovered irregularities in Schulman's billing hours, which caused her to contact Brown. Schulman's race was not the impetus for Sapp to contact the sheriff's office—she was protecting her company from potential liability. *See* [124] at 68:19–21; 69:1–2 ("I can't have you out there representing my company. If something happened, I lose

everything . . . what'd I look like losing it all for nothing and somebody I don't even know").

Further, Schulman does not dispute that reserve deputies are specifically prohibited from "working unauthorized secondary jobs in any law enforcement capacity." [132] ¶ 21. Schulman readily admits that he was a reserve deputy. Thus, Schulman violated the sheriff's office's rules on secondary employment because he cannot have secondary employment as a reserve deputy without authorization.

Finally, Schulman has not introduced any disputed material facts to show he was harmed by Defendants. Schulman worked in the reserve deputy unit, which was an unpaid position. His company also retained a utilities contract, despite his assertions that Defendants conspired against him to prevent performance under the contract. Schulman states that the Defendants "hurt him bad" and therefore were malicious. [109] at 103:14–16. Having hurt feelings alone is not enough

to show a conspiracy to racially discriminate. Defendants' summary judgment motions will be granted.[1]

D. Schulman's State Law Claims Against Sapp and Traffic Troopers

Schulman also asserts state law claims against Sapp and Traffic Troopers. A district court has the power to exercise supplemental jurisdiction over a plaintiff's state law claims. *Parker v. Scrap Metal Processors, Inc.,* 468 F.3d 733, 742 (11th Cir. 2006) (citing *United Mine Workers of America v. Gibbs,* 338 U.S. 715 (1966)); 28 U.S.C. § 1367. A district court has discretion in deciding whether to exercise supplemental jurisdiction. Declining supplemental jurisdiction is appropriate in four cases: (1) the supplemental claim raises a novel or complex issue of state law; (2) the supplemental claim substantially predominates over the claim or claims over which the district court has

[1] The Court was not immediately inclined to grant summary judgment for Sapp as there was not a statement of undisputed material facts filed along with her motion for summary judgment. However, because the Fulton County Defendants have shown that there are no disputed facts that could show a conspiracy, the Court has no choice but to grant Sapp's motion as well. There cannot be a conspiracy with only one person participating in the conspiracy. *See* 42 U.S.C. § 1985(3) ("If two or more persons in any State or Territory conspire. . . for the purpose of depriving. . . any person or class of persons of the equal protection of the laws. . .").

original jurisdiction; (3) the district court has dismissed all claims over which it has original jurisdiction; or (4) other compelling reasons exist for declining jurisdiction. 28 U.S.C. § 1367(c).

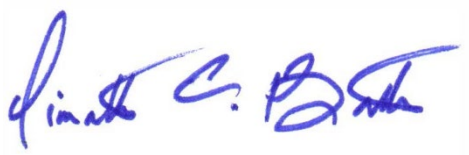
First, state tort claims generally are not considered novel or complex. *Parker,* 468 F.3d at 743. Here, Schulman avers in count two that Sapp and Traffic Troopers owe him for his services, as well as engaged in tortious interference with contractual and business relations.

The Eleventh Circuit has encouraged district courts to "dismiss any remaining state claims if the federal claims have been dismissed prior to trial." *Raney v. Allstate Ins. Co.,* 370 F.3d 1086, 1089 (11th Cir. 2004) (citing *L.A. Draper & Son v. Wheelabrator-Frye, Inc.,* 735 F.2d 414, 428 (11th Cir. 1984)). Since the Court has granted summary judgment as to the federal cause of action, the Court declines to retain jurisdiction over count two. Accordingly, count two will be dismissed without prejudice.

IV. Conclusion

For the foregoing reasons, Defendants' motions [132, 135] for summary judgment are granted, and Schulman's state law claim is dismissed without prejudice. The Clerk is directed to close the case.

IT IS SO ORDERED this 17th day of August, 2021.



Timothy C. Batten, Sr.
Chief United States District Judge