UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CHARLES NEGY,

Plaintiff,

v. **Case No. 6:23-cv-666-CEM-DCI**

BOARD OF TRUSTEES OF THE UNIVERSITY OF CENTRAL FLORIDA, S. KENT BUTLER, ALEXANDER CARTWRIGHT, TOSHA DUPRAS, MICHAEL JOHNSON, and NANCY MYERS,

Defendants.
_____/

ORDER

THIS CAUSE is before the Court on Defendants' Dispositive Motion to Dismiss, or Alternatively, Motion to Strike Punitive Damages ("Motion," Doc. 32), to which Plaintiff filed a Response (Doc. 34). As set forth below, the Motion will be granted in part and denied in part.

I. BACKGROUND

Plaintiff is an associate professor at the University of Central Florida ("UCF"). (Am. Compl., Doc. 26, at 4). Defendants are the Board of Trustees of the University of Central Florida ("the Board") and several UCF administrators ("individual Defendants")—S. Kent Butler, Alexander Cartwright, Tosha Dupras,

Michael Johnson, and Nancy Myers—in their individual capacities. (*Id.* at 4–6). The events leading to up to this lawsuit began after Plaintiff posted tweets using his personal account that were "contrary to the ascendant orthodoxy on campus," such as "Blacks are not systematically oppressed in the United States." (*Id.* at 2). According to Plaintiff, after these tweets, he "became the target of a Twitter mob that demanded he be fired." (*Id.*). Defendants posted a statement to the university website: "Members of UCF's leadership urge current and former students to report discriminatory behavior they may have experienced from faculty and staff." (*Id.* at 11). Plaintiff alleges the post targeted him because it included the statement: "we are disgusted by the racist posts one of our faculty members has shared on his personal Twitter account." (*Id.*). Complaints against Plaintiff then surfaced. (*Id.* at 16).

After an investigation lasting several months, Defendant Myers issued a report finding that Plaintiff "had engaged in discriminatory harassment in the course of his classroom teaching," "had failed to report inappropriate behavior allegedly committed by one of his teaching assistants," and had provided false information during the investigation. (*Id.* at 20–21). Plaintiff alleges that any purportedly false information he provided during the investigation were "on account of his faulty memory in a few isolated instances." (*Id.* at 21). He further claims "[m]any of the alleged incidents of 'discriminatory behavior' . . . were instances of speech protected by academic freedom and the First Amendment." (*Id.*). UCF then

terminated Plaintiff. (*Id.* at 3). Plaintiff entered arbitration through the faculty union, asserting that UCF violated the collective bargaining agreement requiring six months' notice prior to termination for tenured faculty. (*Id.* at 3). An arbitrator ordered his reinstatement to the UCF faculty. (*Id.* at 3). Plaintiff now seeks damages as well as declaratory and injunctive relief against Defendants. (*Id.* at 41–42). Defendant moves for dismissal of all counts pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and in the alternative, Defendant moves to strike the punitive damages claim pursuant to Federal Rule of Civil Procedure 12(f).

II. LEGAL STANDARD

Defendants first challenge Plaintiff's Article III standing. A challenge to Article III standing implicates subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992). Pursuant to Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss the claims against it for "lack of subject-matter jurisdiction."

"Attacks on subject matter jurisdiction . . . come in two forms: 'facial attacks' and 'factual attacks.'" *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256, 1260–61 (11th Cir. 1997) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). Here, Defendants make only a facial attack. "Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint, and

the district court takes the allegations as true in deciding whether to grant the motion." *Morrison v. Amway Corp.*, 323 F.3d 920, 925 n.5 (11th Cir. 2003).

The remainder of Defendants' Motion argues that Plaintiffs have failed to state a claim, which is analyzed under Federal Rule of Civil Procedure 12(b)(6). "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." Fed. R. Civ. P. 8(a)(2). In determining whether to dismiss under Rule 12(b)(6), a court accepts the factual allegations in the complaint as true and construes them in a light most favorable to the non-moving party. *See United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1269 (11th Cir. 2009).

Nonetheless, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Furthermore, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. Generally, in deciding a motion to dismiss, "[t]he scope of the review

must be limited to the four corners of the complaint." *St. George v. Pinellas Cnty.*, 285 F.3d 1334, 1337 (11th Cir. 2002).

III. ANALYSIS

A. Standing for Injunctive Relief

Article III standing is a threshold inquiry, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998), so the Court addresses it first. To bring a case in federal court, a plaintiff must establish standing under Article III of the United States Constitution. *Lujan*, 504 U.S. at 559–60. Article III standing requires that "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan*, 504 U.S. at 560–61). Defendants challenge the first element—injury in fact.

"To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 578 U.S. at 339 (quoting *Lujan*, 504 U.S. at 560). For an injury in fact in the context of injunctive relief, a plaintiff must demonstrate a "real and immediate threat of future injury." *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1233 (11th Cir. 2021) (quoting *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1329 (11th Cir. 2013)).

Plaintiff alleges "he is fearful of teaching the controversial subjects covered in his classes for fear of additional complaints and investigations," (Doc. 26 at 29), and therefore requests the Court enjoin Defendants from "publicly soliciting complaints against [him] in response to his expressions of opinion on matters of public concern" and "from investigating or punishing Plaintiff for speech protected by the First Amendment." (Doc 26 at 41–42). Plaintiff relies on *Strickland v. Alexander*, 772 F.3d 876 (11th Cir. 2014), to argue that he has alleged a sufficiently real and immediate threat of future injury. In *Strickland*, the plaintiff had been subject to an unlawful garnishment proceeding and alleged with specificity that he had several more judgment creditors, that he did not have the ability to pay, and that in a very real and concrete way, it was inevitable that those creditors would be seeking garnishment in the future. *Id.* at 885. Plaintiff has not alleged any such concrete facts. Indeed, Plaintiff alleges that after the May 2022 arbitration, he was awarded "full reinstatement, with tenure, and with all compensation and benefits fully restored to that effect as of the termination date," (Doc. 26 at 24), and according to the allegations set forth in the complaint, no such repetition by Defendants has occurred in the nearly two years since Plaintiff's reinstatement. (*See generally id.*).

"It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *City of L.A. v. Lyons*, 461 U.S. 95, 107 n.8 (1983). "[P]ast exposure to illegal conduct does not in itself show a

present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495–96 (1974)). Beyond noting his subjective fears, Plaintiff has not shown—via alleging objective facts in the complaint—that "he is realistically threatened by a repetition of his experience." *Lyons*, 461 U.S. at 109; *see also Shed v. USF Bd. of Trs.*, No. 8:22-cv-1327-KKM-TGW, 2023 U.S. Dist. LEXIS 118370, at *6-7 (M.D. Fla. July 10, 2023) (determining that the plaintiff, who was a Ph.D. student dismissed from the defendant university, lacked standing to bring a claim for injunctive relief where the plaintiff was concerned about the university continuing to retaliate against him by continuing to tarnish his academic and employment reputation, noting that "whether the effects of [the university's] past alleged retaliation are ongoing is beside the point" because the plaintiff failed "to allege that [the university] continue[d] to retaliate against him").

Additionally, Plaintiff has failed to establish redressability as to the individual Defendants.[1] They are government officials being sued in their individual capacities and therefore do not have the power to address any of Plaintiff's purported future injuries. *See Barnes v. Dunn*, 2022 WL 10264034, at *5 (N.D. Ala. Aug. 17, 2022),

[1] Although Defendants make this argument specifically as to Defendants Butler and Dupras, it applies equally to all individual Defendants, and because standing is jurisdictional, the Court is permitted to raise it *sua sponte*. *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985).

report and recommendation adopted, No. 4:19-CV-00558-ACA-SGC, 2022 WL 4365709 (N.D. Ala. Sept. 21, 2022); *Scott v. Taylor*, 405 F.3d 1251, 1259 (11th Cir. 2005) (Jordan, D.J., sitting by designation, concurring) ("Standing, moreover, concerns the congruence or fit between the plaintiff and the defendants . . . . Thus, in a suit against state officials for injunctive relief, a plaintiff does not have Article III standing with respect to those officials who are powerless to remedy the alleged injury.")); *see also Okpalobi v. Foster*, 244 F.3d 405, 427 (5th Cir. 2001) (en banc) ("Because these defendants have no powers to redress the injuries alleged, the plaintiffs have no case or controversy with these defendants that will permit them to maintain this action in this court."). This is particularly true for Defendants Butler and Dupras, who no longer hold the positions at UCF they did during the times relevant to the complaint. (Doc. 26 at 4–5). So, even if an injunction against them in their individual capacities somehow bound their leadership roles, neither holds the authority as administrators they once did, and therefore, they certainly could not remedy or prevent any future injury. *See Scott*, 405 F.3d at 1259; *see also Okpalobi*, 244 F.3d at 427.

Accordingly, Plaintiff does not have standing to seek injunctive relief. But he continues to have Article III standing to seek damages, which Defendants do not dispute. Defendants next argue the Board should be dismissed from this action because of Eleventh Amendment immunity.

B. Eleventh Amendment Immunity

Eleventh Amendment immunity, like standing, touches upon subject matter jurisdiction. *See Seaborn v. State of Fla., Dep't of Corr.*, 143 F.3d 1405, 1407 (11th Cir. 1998). It bars suits against states by its own citizens in federal court. *Williams v. Dist. Bd. of Trs. of Edison Cmty. Coll., Fla.*, 421 F.3d 1190, 1192 (11th Cir. 2005). And it "protects a State from being sued in federal court without the State's consent." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003), *cert. denied*, 540 U.S. 1107 (2004). "It is well settled in Florida that state universities, and their boards of trustees, are arms of the state that are entitled to Eleventh Amendment immunity." *Baker v. Univ. Med. Serv. Ass'n.*, No. 8:16-cv-2978-T-30MAP, 2016 WL 7385811, at *2 (M.D. Fla. Dec. 21, 2016) (citing *Crisman v. Fla. Atl. Univ. Bd. of Trs.*, 572 F. App'x 946, 949 (11th Cir. 2014); *Irwin v. Mia.-Dade Cnty. Pub. Schs., et al.*, 398 F. App'x 503, 507 (11th Cir. 2010)). UCF is a state university and, therefore, an arm of the state. *See Hilleman v. Univ. of Cent. Fla.*, 167 F. App'x 747, 748 (11th Cir. 2006) ("UCF is a state entity"). Thus, the UCF Board is immune under the Eleventh Amendment unless the state waived or Congress abrogated such immunity. *See Edelman v Jordan*, 415 U.S. 651 (1974).

1. Counts I and II – Plaintiff's Federal Claims

As to Counts I and II, "Florida has not waived its Eleventh Amendment immunity, nor has Congress abrogated that immunity in § 1983 cases." *Hart v.*

Florida, No. 8:13-cv-2533-T-30MAP, 2013 WL 5525644, at *1 (M.D. Fla. Oct. 4, 2013) (citing *Zatler v. Wainwright*, 802 F.2d 397, 400 (11th Cir. 1986)).[2] One other exception remains. Under the *Ex parte Young* exception, a plaintiff may sue a state official seeking prospective injunctive relief for ongoing violations of federal law. *See Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1215 (11th Cir. 2009).

As discussed above, Plaintiff does not have standing to seek prospective injunctive relief against the Board. Additionally, even if he did, the *Ex parte Young* exception, "does not permit suit against state agencies or the state itself, even when the relief is prospective." *Eubank v. Leslie*, 210 F. App'x 837, 844 (11th Cir. 2006) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100–03 (1984)). As noted, the Board is an arm of the state, and therefore, the *Ex parte Young* exception does not apply. *See Page v. Hicks*, 773 F. App'x 514, 518 (11th Cir. 2019)

[2] Section 768.28 does not waive Florida's Eleventh Amendment immunity. *Hamm v. Powell*, 874 F.2d 766, 770 n.3 (11th Cir.1989); *Hill v. Dept. of Corrections*, 513 So.2d 129, 133 (Fla.1987). Section 768.28(18) reads:

> No provision of this section, or of any other section of the Florida Statutes, whether read separately or in conjunction with any other provision, shall be construed to waive the immunity of the state or any of its agencies from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States, unless such waiver is explicitly and definitely stated to be a waiver of the immunity of the state and its agencies from suit in federal court. This subsection shall not be construed to mean that the state has at any time previously waived, by implication, its immunity, or that of any of its agencies, from suit in federal court through any statute in existence prior to June 24, 1984.

(determining that "[b]ecause the Board is an 'arm of the state' itself—and not an individual officer—[the plaintiff's] request for injunctive relief against the Board" was not subject to the *Ex parte Young* exception and failed).

Plaintiff attempts to argue that he is suing the individual members of the Board, rather than the Board itself, in an effort to circumvent this precise outcome. This is a red herring. Based on the way it is currently pleaded—naming the Board and not providing the names of the individual members—it is not apparent that Plaintiff was attempting to name the members. Regardless, even assuming he was, Plaintiff makes clear that he would be suing the Board members in their official capacities. And even Plaintiff acknowledges that suits against an individual officer in their official capacity is "simply another way of pleading an action against an entity of which [the] officer is an agent" (Doc. 34 at 8 (quoting *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991)). Thus, whether Plaintiff is suing the individual Board members in their official capacity or the Board itself, it is a distinction without a difference—both ways of pleading ultimately name the entity itself and *Ex parte Young* does not apply. Accordingly, the Board is entitled to Eleventh Amendment immunity as to Plaintiff's federal claims.

2. Counts III, IV, and V—Plaintiff's State Law Claims

Defendants also argue that the Board is protected by Eleventh Amendment immunity against Plaintiff's state law claims brought here—comprising the

remaining Counts III, IV, and V. (Doc. 32 at 14–16). Because Florida has not waived its Eleventh Amendment immunity under section 768.28, this Court agrees. *See Schopler v. Bliss*, 903 F.2d 1373, 1379 (11th Cir. 1990). Plaintiff's state law claims, Counts III, IV, and V, against the Board are barred by Eleventh Amendment immunity.

3. Motion to Strike Punitive Damages

Defendants seeks to strike Plaintiff's claim for punitive damages against the Board pursuant to Federal Rule of Civil Procedure 12(f). Under Rule 12(f), "[t]he court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." "Motions to strike are generally disfavored and are considered to be a 'drastic remedy to be resorted to only when required for the purposes of justice.'" *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1250–51 (M.D. Fla. 2013) (citation omitted) (quoting *Augustus v. Bd. of Pub. Instruction of Escambia Cty.*, 306 F.2d 862, 868 (5th Cir. 1962)). Therefore, "[a] motion to strike should be granted only if the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." *U.S. ex rel. Chabot v. MLU Servs., Inc.*, 544 F. Supp. 2d 1326, 1330 (M.D. Fla. 2008) (quotation omitted).

Defendants argue punitive damages are unavailable against the Board because under Fla. Stat. § 768.28(5)(a), the state and its agencies are not liable for punitive

damages. (Doc. 32 at 24). This Court agrees. *See Shedrick v. Dist. Bd. of Trs. Of Miami-Dade College*, 941 F. Supp. 2d 1348, 1360 (holding punitive damages unavailable against community college because such relief is not authorized against state agencies); *D.L. ex rel. S.L. and R.L. v. Hernando Cnty. Sheriff's Office*, 620 F. Supp. 3d 1182, 1203 (M.D. Fla. 2022) (holding, under Florida law, punitive damages are unavailable against a municipality). But as previously discussed—under the Eleventh Amendment—the Board is immune from Plaintiff's federal claims, and Plaintiff's state claims are barred. Therefore, the motion will be denied as moot because all claims against the Board will be dismissed. Next, Defendants argue that the individual Defendants are entitled to qualified immunity on Plaintiff's § 1983 claims.

C. Qualified Immunity

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). To be entitled to qualified immunity, a government official must first show that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Sebastian v. Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019) (internal quotation marks omitted).

Defendants argue that Plaintiff's allegations against the individual Defendants only cover acts that were within the scope of their discretion as UCF administrators. (Doc. 32 at 11). This point is uncontested by Plaintiff. And the Court agrees. *See Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1283 (11th Cir. 1998) ("[W]e did not ask whether it was within the defendants' authority to suspend an employee for an improper reason; instead, we asked whether their discretionary duties included the administration of discipline." (discussing the Eleventh Circuit's finding in *Sims v. Metropolitan Dade Cnty.*, 972 F.2d 1230, 1236 (11th Cir. 1992))).

"After the defendant makes this showing, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Sebastian*, 918 F.3d at 1307 (internal quotation marks omitted). "To deny qualified immunity at the motion to dismiss stage, we must conclude both that the allegations in the complaint, accepted as true, establish a constitutional violation and that the constitutional violation was clearly established." *Id.* (emphasis in original) (internal quotation marks omitted). "We may consider these two prongs in either order, and a public official is entitled to qualified immunity if the plaintiff fails to establish either one." *Jacoby v. Baldwin Cnty.*, 835 F.3d 1338, 1344 (11th Cir. 2016) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

Now, the burden shifts to Plaintiff to show Defendants violated clearly established law. The Court will address the "clearly established" prong first.

1. Clearly Established

"For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). An officer may not be entitled to qualified immunity "even if there is no reported case 'directly on point.' But 'in light of pre-existing law,' the unlawfulness of the officer's conduct 'must be apparent.'" *Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017) (quoting *Iqbal*, 556 U.S. at 741, and *Anderson*, 483 U.S. at 640). The Court must determine if a reasonable public official would understand that investigating and terminating Plaintiff because of his Twitter posts and the subsequently solicited complaints violated Plaintiff's First Amendment rights.

It is clearly established that a state employer may not retaliate against a state employee for engaging in constitutionally protected speech. *Rankin v. McPherson*, 483 U.S. 378, 383 (1987). The First Amendment protects a public employee's speech that was "(1) spoken as a citizen and (2) addressed a matter of public concern." *See Boyce v. Andrew*, 510 F.3d 1333, 1341 (11th Cir. 2007). It does not protect statements made pursuant to the employee's official duties. *See id.* at 1342–43 (discussing *Garcetti v. Ceballos*, 547 U.S. 410 (2006)). A matter of public concern relates "to any matter of political, social, or other concern to the

community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). "In making this determination, we examine the content, form, and context of the employee's speech." *Chesser v. Sparks*, 248 F.3d 1117, 1123 (11th Cir. 2001).

Insofar as Plaintiff's statements were made in the classroom pursuant to his official duties as a professor at UCF, the First Amendment affords him no protection. *See Boyce*, 510 F.3d at 1342–43. As to Plaintiff's statements made outside the classroom, Defendants do not contest that Plaintiff's Twitter posts were made as a citizen on a matter of public concern. Plaintiff posted from his personal account, which was unaffiliated with his role as a UCF professor and disclaims "Opinions are my own." (Doc. 26 at 7). Therefore, those statements were in his capacity as a citizen rather than as a state employee. *See Boyce*, 510 F.3d at 1341. The exact content of the speech is not in the complaint, but Plaintiff alleges the speech argued that Black people were not systemically oppressed in the United States. (*See* Doc. 26 at 2). Twitter is often used by members of the public to air their views on wide-ranging topics. And to provide context, Plaintiff alleges the posts were "[i]n response to the national conversation around race." (Doc. 26 at 8). Therefore, Plaintiff has adequately alleged his speech was on a matter of public concern. *See Chesser*, 248 F.3d at 1123.

If the employee's speech can be "fairly characterized as constituting speech on a matter of public concern," the Court must use the *Pickering* balancing test.

Connick, 461 U.S. at 146. *Pickering* requires courts balance the employee's interest in speaking against the government's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Ed. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

Courts must consider three factors when conducting a *Pickering* balancing analysis: "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989). "Because no bright-line standard puts the reasonable public employer on notice of a constitutional violation, the employer is entitled to immunity except in the extraordinary case where *Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Dartland v. Metro. Dade County,* 866 F.2d 1321, 1323 (11th Cir.1989). When "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Rankin*, 483 U.S. at 390–91.

Plaintiff cites *McCullars v. Maloy*, No. 6:17-cv-1587-Orl-40GJK, 2018 U.S. Dist. LEXIS 55393, *10 (M.D. Fla. Apr. 2, 2018), in arguing that it is clearly established "that students' subjective offense at [Plaintiff]'s political expression, which was made as a private citizen and did not target anyone at UCF, does not

outweigh [Plaintiff]'s interest in expressing his views." (Doc. 34 at 15). In *McCullars*, after a state attorney stated she would never seek the death penalty in any case, the plaintiff made a social media post that "maybe she should get the death penalty," and "she should be tarred and feathered if not hung from a tree." *Id.* at *3. The court, while finding the statements "rude and insulting," held that *Pickering* balancing favored the employee's interest in free speech because "the Complaint is devoid of allegations that the Post impacted on Defendant Maloy's 'need to maintain loyalty, discipline[,] and good working relationships among those he supervises.'" *Id.* at *10 (quoting *Dartland*, 866 F.2d at 1324). And that is so here.

Defendants argue Plaintiff's statements caused great disruption on campus, impeding "UCF's interest in maintaining an efficient and non-disruptive work environment." (Doc. 32 at 13). These disruptions are well documented in Plaintiff's allegations—including protests by current students and calls for Plaintiff to be fired, (*see* Doc. 26 at 8–13), and current and incoming UCF students voicing concerns about the situation on campus, (*see id.* at 12). Even if the speech caused protests and campus unrest, it does not necessarily equate to an inefficient functioning of the university's public service: delivering education to its students. Disruption, debate, disagreement, and protest happen at educational institutions—whether the result of athletic wins and losses, controversial speakers and texts, or current national and

global events. But Plaintiff does not allege resulting disharmony within his UCF workplace. *See Dartland*, 866 F.2d at 1324.

This speech was also not a criticism of the university, its functioning, or his superiors—which are hallmarks of cases involving *Pickering* balancing in the higher education setting. *See Williams v. Ala. State Univ.*, 102 F.3d 1179, 1182–84 (11th Cir. 1997) (balancing did not favor professor who faced adverse action after criticizing textbook written by university administrator); *Maples v. Martin*, 858 F.2d 1546, 1552–54 (11th Cir. 1988) (balancing favored employer which took adverse action against professors who wrote report criticizing department head, despite the document critiquing the department's curriculum, facilities, and graduate performance on professional licensing exams). Plaintiff made statements on his personal Twitter account, did not attribute them in any way to UCF, and further alleges they were made "[i]n response to the national conversation around race." (Doc. 26 at 7, 8). While his job was not clerical in nature and he had to interact with students, Plaintiff served no confidential or policymaking role and was not required to interact with members of the public. *See Rankin*, 483 U.S at 389–92.

The Court now examines Plaintiff's interest in freedom of expression. The Eleventh Circuit has held that "[s]peech by members of an academic community, even when critical in nature, should not be easily denied constitutional protection." *Maples v. Martin*, 858 F.2d 1546, 1553 (11th Cir. 1988) (citing *Tinker v. Des Moines*

Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)). Although Plaintiff made statements that offended a significant portion of the UCF population, the First Amendment protects speech without regard for its social worth or if it is acceptable in the mainstream. *See Stanley v. Georgia*, 394 U.S. 557, 564–66. Nowhere is this more important than at an institution of higher learning. "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

The state interest here is not strong enough to outweigh Plaintiff's interest in free expression. This is one of the extraordinary circumstances where *Pickering* balancing shows Defendants' conduct was unconstitutional. The need to give in to the demands an offended, angry student body is not a basis to knowingly engage in content discrimination.[3] Therefore, at this early stage of the process, Plaintiff has met his burden of pleading that Defendants' conduct was forbidden by clearly established law. The Court will now proceed to the constitutional violation prong.

[3] "If the First Amendment is intended to protect anything, it's intended to protect offensive speech. If you're not going to offend anyone, you don't need protection." Larry Flynt.

2. Constitutional Violation

To state a claim for First Amendment retaliation, Plaintiff alleges must satisfy the four elements of the test set forth in *Bryson v. City of Waycross*. 888 F.2d at1565–66. First, the Court asks if the speech may be fairly characterized as on a matter of public concern. Second, the Court must conduct a *Pickering* balancing analysis. Third, if the employee's interests win out, the Court asks if the speech "played a 'substantial part' in the government's decision to discharge the employee." *Chesser*, 248 F.3d at 1123 (quoting *Fikes v. City of Daphne*, 79 F.3d 1079, 1084 (11th Cir. 1996)). Fourth, if so, the government must show by a preponderance of the evidence that it would have terminated the employee even without the protected conduct. *See id.* Because the clearly established prong was resolved in Plaintiff's favor, Plaintiff has shown the first two elements.

As for the third and fourth elements, the Court finds that Plaintiff's allegations meet these requirements. Defendants assert that "Plaintiff has failed to allege the existence of [precedential] opinions . . . finding a faculty member who makes public comments that cause substantial disruption to a university may not be fired for such comments without violating the First Amendment." (Doc. 32 at 14). Prior to his Twitter posts, Plaintiff alleges that he "received consistently superior performance reviews. In the four years leading up to his termination, he received an evaluation rating of 'Outstanding' for his instruction and advising." (Doc. 26 at 14). Within less

than a year, he was fired. (*Id.* at 21). The Eleventh Circuit has held, however, that "[c]omments that occur in the context of a longstanding dispute over internal policies have been held to justify drastic administrative action." *Maples*, 858 F.2d at 1554. There are no allegations of tensions between Plaintiff and his department or the administration.

Defendants do argue that the campus disruptions were "not only about Plaintiff's comments on Twitter, but comments he made during lectures that students found discriminatory, harassing, and demeaning." (Doc. 32 at 13). In the investigative report that led to his termination, Plaintiff was found to have "engaged in discriminatory harassment in the course of his classroom teaching" and "failed to report inappropriate behavior allegedly committed by one of his teaching assistants." (Doc. 26 at 20). But Plaintiff argues many of the instances of alleged harassment were protected under the First Amendment because the Eleventh Circuit has found that UCF's "discriminatory-harassment policy likely violates the First Amendment on the grounds that it is an overbroad and content- and viewpoint-based regulation of constitutionally protected expression." (*Id.* at 21 (quoting *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1113 (11th Cir. 2022)). And the Eleventh Circuit has held that granting qualified immunity is inappropriate where the record suggests the employer fired an employee for pretextual reasons. *See Tindal v. Montgomery Cnty. Comm'n*, 32 F. 3d 1535, 1540 (11th Cir. 1994). Plaintiff's allegations suggest the

investigation was a pretext to terminate him for his Twitter posts based on the timing of the investigation and Defendants' remarks to the angry student population. (Doc. 26 at 26–27).

Accepting the allegations in the Amended Complaint as true, Plaintiff was terminated in substantial part because of his controversial Twitter posts, and Defendants have been unable to show by a preponderance of the evidence that they would have terminated him absent that speech. Therefore, a reasonable official should have known that terminating an employee based on those Twitter posts violated the First Amendment. Thus, based on Plaintiff's allegations, individual Defendants are not entitled to qualified immunity on Plaintiff's § 1983 claims at this stage of the proceedings.

D. Failure to State a Claim—Counts IV and V

Defendants further contend that Plaintiff fails to state a claim for the state law causes of action. Because Count III was leveled only against the Board, and all claims against the Board will be dismissed, the Court will only examine Counts IV and V—intentional infliction of emotional distress and abuse of process, respectively—against the individual Defendants.

1. Intentional Infliction of Emotional Distress

Defendants argue that Plaintiff fails to state a claim for intentional infliction of emotional distress pursuant to Federal Rule of Civil Procedure 12(b)(6). Under

Florida law, intentional infliction of emotional distress requires Plaintiff show: "(1) deliberate or reckless infliction of mental suffering; (2) outrageous conduct; (3) the conduct caused the emotional distress; and (4) the distress was severe." *Nettles v. City of Leesburg--Police Dept.*, 415 F. App'x 116, 122 (11th Cir. 2010) (quoting *Hart v. United States*, 894 F.2d 1539, 1548 (11th Cir. 1990)).

"Outrageous conduct is conduct which 'is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Hart*, 894 F.2d at 1548 (quoting *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278–79 (Fla. 1985)). "In Florida, the issue of whether or not the activities of the defendant rise to the level of being extreme and outrageous so as to permit a claim for intentional infliction of emotional distress is a legal question in the first instance for the court to decide as a matter of law." *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1575 n.7 (internal quotation marks omitted). In *Vance*, the court found that the employer's conduct did not rise to the necessary level of outrageous when a black employee found nooses hung above her work station and was subjected to racial epithets while at work. *See id.* at 1575 n.7, 1583.

The Florida Supreme Court acknowledged that "[i]t has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been

characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." *McCarson*, 467 So.2d at 278. Defendants cite to two cases in the employee termination context to underscore this point: *Golden v. Complete Holdings, Inc.*, 818 F. Supp. 1495 (M.D. Fla. 1993) and *State Farm Mut. Auto. Ins. Co. v. Novotny*, 657 So. 2d 1210 (Fla. 5th DCA 1995). (Doc. 32 at 22).

Golden is distinguishable because, there, the plaintiff was terminated after experience a series of incidents suggesting age discrimination. 818 F. Supp. at 1496. The court found the employer's conduct was not outrageous despite allegations that the employer "induced Plaintiff to forego other employment opportunities, . . . systematically eliminated older employees, including the Plaintiff, . . . discharged Plaintiff without warning, ejected him from his office without giving him an opportunity to collect his personal effects (which Defendants destroyed), and refused for months to pay Plaintiff severance pay and other entitlements." *Id.* at 1499–1500.

The facts of *Novotny* are more readily analogous to the instant case. There, the employee was investigated over the course of a month; interviewed away from the office for forty-five minutes; and given the chance to resign, which she did. *Novotny*, 657 So. 2d 1211–12. The employee threatened suicide when she was driven back to the office and later received psychiatric treatment. *Id.* at 1212.

Because the employer had a legal right to pursue an investigation into the employee's conduct after receiving complaints and an interest in conducting interviews away from the office, the court held that the employer's conduct did not rise to the requisite level of outrageousness. *See id.* at 1212–13.

Here, Plaintiff was the subject of an allegedly pretextual investigation that lasted seven months, was interviewed for eight hours over two days, and was then terminated without adequate notice. (Doc. 26 at 3, 17, 37). He was later diagnosed with anxiety and major depressive disorder. (*Id.* at 38). Every factually analogous situation can be distinguished from *Novotny* in that, here, it is more extreme. But the conduct still falls short of the employer's conduct in *Vance*, which the Eleventh Circuit found was not outrageous. Despite the allegations of pretext, Defendants here also had the legal right purse an investigation into an employee's conduct. *See Novotny*, 657 So. 2d at 1212. Even conduct committed with criminal intent or that is malicious may not be "Outrageous!" *McCarson*, 467 So. 2d at 279. This Court cannot say that the individual Defendants' conduct rose to the level that is "utterly intolerable in a civilized community." *Id.* Therefore, this Count will be dismissed.

2. Abuse of Process

Defendants argue that Plaintiff fails to state a claim for abuse of process pursuant to Federal Rule of Civil Procedure 12(b)(6). Under Florida law, abuse of process requires the following: "(1) the defendant made an illegal, improper, or

perverted use of process; (2) the defendant had an ulterior motive or purpose in exercising the illegal, improper or perverted process; and (3) the plaintiff was injured as a result of defendant's action." *EMI Sun Village, Inc. v. Catledge*, 779 F. App'x 627, 635 (11th Cir. 2019). "Abuse of process involves the use of criminal or civil legal process against another primarily to accomplish a purpose for which it was not designed." *Aulicino v. McBride*, No. 6:16–cv–878–Orl–31TBS, 2017 WL 1113475, at *3 (M.D. Fla. Mar. 23, 2017).

Plaintiff argues that the process in question here was the months-long investigation. (Doc. 26 at 40). Defendants assert, and this Court agrees, Plaintiff fails to establish the first element of this claim. Here, Plaintiff does not allege that Defendants ever instituted any kind of legal proceedings against him—civil or criminal. *See Aulicino*, 2017 WL 1113475, at *3 (dismissing abuse of process claim where defendants nor anyone else filed a lawsuit against plaintiff). Therefore, this Count will be dismissed.

IV. CONCLUSION

In accordance with the foregoing, it is **ORDERED** and **ADJUDGED** as follows:

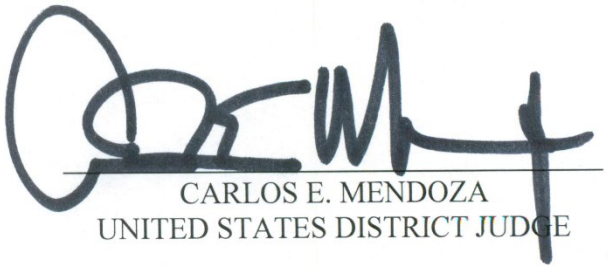
1. Defendants' Motion to Dismiss is **GRANTED in part** and **DENIED in part**.
    a. Plaintiff does not have standing to pursue injunctive relief.

b. All claims asserted against the Board are **DISMISSED without prejudice** based on Eleventh Amendment immunity.[4]

c. Counts IV and V are **DISMISSED without prejudice**.

d. The Motion is otherwise **DENIED**.

DONE and **ORDERED** in Orlando, Florida on April 29, 2024.



Copies furnished to:

Counsel of Record

[4] Defendants seek dismissal of these claims with prejudice, but "a dismissal based on Eleventh Amendment immunity is without prejudice." *Parker-Hall v. UF Bd. of Trs.*, No. 1:21-cv-138-AW-GRJ, 2021 U.S. Dist. LEXIS 264347, at *5 (N.D. Fla. Nov. 17, 2021) (citing *Nichols v. Ala. State Bar*, 815 F.3d 726, 733 (11th Cir. 2016); *Crisman v. Florida Atl. Univ. Bd. of Trs.*, 659 F. App'x 572, 577 (11th Cir. 2016)).