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Circuit Court of Florida,
17th Judicial Circuit.
Broward County
Matthew MALIN and Brandon Rivera, Plaintiffs,
v.
TOWN OF DAVIE, Defendant.
No. 05-015669 (13).
2008.

Order Granting Defendant's Motions for Summary Judgment as to All Claims of Brandon Rivera and Matthew Malin

Leroy H. Moe, Broward Circuit Court Judge.
THIS CAUSE having come on to be heard on Defendant's Motion for Summary Judgment and the Court having heard argument of counsel. and being otherwise advised in the premises. it is hereupon, ORDERED AND ADJUDGED that said Motion be. and the same hereby is GRANTED, and the Court sets forth the following reason for its decision.

BACKGROUND

The Plaintiffs filed a Second Amended Complaint setting forth one substantive count pursuant to Florida Statutes § 760.01 et *seq.* (hereinafter "FCRA"). Rivera brought suit based on the anti-retaliation clause of FCRA. which provides for a case of action if an employee]) complains about discrimination. 2) suffers adverse employment action thereafter and 3 can prove that the complaint of discrimination and the adverse employment action are causally thereafter ked *Guess v. City of Miramar*, 889 So. 2d 840, 846 (Fla. 4th DCA 2004); *Sweat v.Town of Davie.* 2007 WL 3234638 at p.4 (Broward Cir. Ct. 2007) (Damoorgian, J.). If a plaintiff is able to establish the foregoing prima facie case, the burden shifts to the Defendant-employer to provide a legitimate. non-retaliatory reason for the adverse employment action, and once the Defendant-employer does that. the burden shifts back to the employee to prove that the motivation for the adverse employment action was retaliation. *Id.* At the oral argument on the Defendant's Motion for Summary Judgment, Rivera argued that. he also had an associational discrimination claim against Davie.

In a nutshell. summary judgment is warranted with respect to Rivera's retaliation claim because Rivera cannot fulfill the first clement as he admits that he did not complain about discrimination. (*Dep. of Rivera* at 452). Rivera cannot. fulfill the second element because he was not terminated, as his employment ended when he failed to return from Family and Medical Leave after his leave period expired. and he was admittedly unfit for duty at the time (and both his psychologist and psychiatrist thought so as well), which is job abandonment. (*Dep. of Rivera* at 36-35, 84, 76-77). Rivera cannot fulfil the third element because he cannot satisfy the first or second elements, and also because Chief George, who accepted the discharge, did not know that Rivera had complained about any discrimination. (*Affidavit of Chief George* ¶ 2). Farther, Chief George, accepted the discharge of Rivera because of Rivera's 1) failure to notify the department of change of address; 2) improper use of personally assigned police vehicle; 3) failure to follow directions of his supervisor; 4) failure to attend court proceedings; 5) engaging in conduct unbecoming a police officer; and 6) being absent without leave. *Id.* ¶ 3. Despite

knowing that Davie was accusing Rivera of such misconduct, and setting a predetermination hearing at which the job misconduct was going to be discussed. and Rivera would he given a chance to tell his side of the story. Rivera chose not to show up. (*Dep. of Rivera* at 470).

Concerning Chief George's lack of knowledge of any complaint. and also given the above six (6) legitimate, non-retaliatory reasons for discharge. Rivera admitted that several of them be legitimate, non-retaliatory reasons supporting discharge. which is an admission that he cannot prove that retaliatory animus motivated his discharge. (*Dep. of Rivera* at 379 (admitting that be did not keep the department informed of his whereabouts), 395-97 (admitting that even nine (9) days after moving be did not notify the department of his new address), 398. 403 (Rivera admitted that he was supposed to respond to subpoenas while on leave but decided not to respond to them and thus missed court dates), and 406 (admitting that his FMLA leave expired and he knew it. but failed to report to work). Concerning Rivera's associational discrimination claim, it was not pled in his EEOC charge. and thus Rivera waived this claim, and Rivera testified in his deposition very plainly that he had no other claims (other than retaliation). *Id.* at 54, but even if he did, because there was no underlying discrimination as to Malin, summary judgment is appropriate as to the associational discrimination as well.

Malin sues for retaliation. religious discrimination. and religious harassment, based on being Jewish. (*Second Amended Complaint* ¶¶ 30-42). The only adverse employment action that Malin seeks relief for is the separation of his employment with Davie. Malin claims he was terminated, but it is clear that he abandoned his job by failing to return to work after his Family and Medical Leave had expired (he could not return as be was admittedly unfit to work as a police officer), and he neglected his job, and was insubordinate. (*Dep. of Malin* at 42-43. 174. 302 300, 591 575, 271-78. 540). A police officer cannot act in the manner in which Malin did (e.g., abandon a job. act insubordinately) and expect to sue and obtain relief from the courts under the FCRA, under the circumstances of this case.

MEMORANDUM OF LAW

I. THE LEGAL STANDARDS FOR GRANTING A MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 1.150(c)

Florida Rule of Civil Procedure 1.510 governs summary judgment motions. at provides, in pertinent part. as follows:

A party against whom a claim ... is asserted ... may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits,

Further. summary judgment

shall be rendered forthwith if the pleadings. depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fla. R. Civ. P. 1.150(c). The Florida courts have enforced this standard. *Snyder v. Cheezen Dev. Corp.*, 373 So. 2d 719 (Fla. 2d DCA 1979). In examining causes of action under the Florida Civil Rights Act. Florida. courts have adopted the same analytical framework utilized by the federal courts in cases arising under federal anti-retaliation and discrimination statutes. *Guess,* 889 So., 2d at 847. In a similar case against the Town of Davie. in which the alleged complaint of discrimination was too vague to constitute an actual complaint under FCRA and when the decision-maker (Chief George did not know of the alleged complaint of discrimination when he made the decision to fire the plaintiff Judge Damoorgian granted summary judgmemt in favor of Davie. *Sweat v. Town*

of Davie, 2007 WL, 3234638 (Broward Cir. Ct. 2007) (Damoorgian, J.). Rivera's case is similar to Sweat in that Chief George was not aware of any protected activity Rivera took before he determined that Rivera had abandoned his job. (*Affidavit of Chief George* ¶ 2).

Plaintiff Rivera's case is limited to the single claim for retaliation that is listed in his FCHR/EEOC Charge of Discrimination. *Schole v. RDV Sports Inc.*, 710 So. 2d 618. 622 (Fla. 5th DCA 1998). Rivera specifically testified that his claim was limited to a retaliation claim. as

Q. Let's start with that. Did you ever complain of discrimination against the Town of Davie with the EEOC?
A. Specifically no, I believe II was more retaliation?
Q. As we sit here today you are not making any claim that you were ever discriminated against by the Town of Davie: Is that a fair statement?
A. Yes.
Q. So your claim in this case is one of retaliation?
A. Yes.
Q. Anything else.
A. No.

(*Dep. of Rivera* at 54). Finally, the Florida Civil Rights Act has a statute of limitations of one year. from the filing of the charge of discrimination *Florida Statutes* § 760.11(1); *Martinez v. Abraham Chevrolet-Tampa. Inc.*, 891 So. 2d 579, 581 (Fla. 2d DCA 2004).[FN1] In this case. Rivera filed his Charge of Discrimination on December 8. 2004; therefore, all events (that could be considered retaliatory) that occurred before December 8, 2003. are time-barred. *Id.*

> FN1. *Florida Statues* § 760.11 (1) requires that before any lawsuit can be filed. a plaintiff must first exhaust his or her administrative remedies, by filing a charge of discrimination with the Florida Commission on Human Relations. the Broward County Human Rights Division, or the EEOC. *Florida Statutes* § 760.11(l): *Martinez v. Abraham Chevrolet-Tampa. Inc.*, 891 So. 2d 579 (Fla. 2d DCA 2004). The purpose of the charge of discrimination is to trigger the investigatory procedures of the EEOC (or FCHR), *Sciences v. Standard Brands*, 4 1 F.2d 455. 466 (5th Cir. 1970). The filing of a charge of discrimination with the EEOC (or FCHR) is a condition precedent to the bringing of a civil action. *Id.* at 460. The scope of the judicial complaint is limited to the scope of the EEOC investigation which can reasonably he expected to grow out of the charge of discrimination. *Id.: Mulhall v. Advanced Security. Inc.*, 19 F.3d 586, 589 & n.8 (11th Cir. 194).

II. PLAINTIFFS CANNOT MAINTAIN A CLAIM FOR RETALIATION

The Plaintiff must satisfy the following three elements to establish a prima facie case of retaliation. namely. that he: 1) engaged in statutorily protected conduct or expression: 2) suffered adverse employment action subsequent to such activity: and 3) there was a causal link between the protected conduct or expression and the adverse employment action. *Guess v. City of Miramar*, 889 So. 2d 840. 846 (Fla. 4th DCA 2004).

A. Plaintiffs Cannot Establish that They Engaged in Statutorily Protected Conduct or Expression Opposing Discrimination; Therefore Plaintiffs Cannot Fulfill the First Element of the Prima Facie Case for Retaliation

1. *Brandon Rivera*

In this case. Rivera cannot fulfill the first element of the prima facie case--because he did not engage in protec-

ted activity-for two reasons: 1) he did not specifically complain about religious harassment or disparate treatment discrimination and 2) even if he had, he certainly did not do so while having an objectively and subjectively reasonable belief that he or Plaintiff Malin was being subjected to religious harassment or disparate treatment discrimination. These two concepts will be discussed in turn.

The Fourth District Court of Appeal has recently held that an employee's complaint of discrimination or harassment must be specific and unequivocal. as follows:
an employee's statement or communication cannot be deemed to be in opposition to an unlawful employment practice unless it refers to a spec fie practice of the employer that is allegedly unlawful. 'Vagueness as to the nature of the grievance ... prevents a protest from qualifying as protected activity."

Guess v. City of Miramar, 889 So. 2d 840, 847 (Fla. 4th DCA 2004). In *Guess* the Fourth District Court of Appeal held that the plaintiff could not establish a retaliation claim. because the complaint was not unequivocal and specific. In comparing the case before it. to he *Dupont-Lauren v. Schneider (USA), Inc.,* 994 F. Supp, 802, 823 (S.D. Tex. 1998) case. the court noted that like "*Dupont-Lauren.* the plaintiff did not complain of any specific activity. nor did she accuse any specific person of discrimination against her. Thus. her comments were on vague to constitute protected activity under the opposition clause." *Id.* Accordingly. like the plaintiffs in Guess and *Dupont-Lauren,* here. Rivera's testimony shows that there are no allegations that he clearly conveyed to the proper officials at the Town of Davie that he was complaining about discrimination or harassment. (*Dep. of Rivera* at 452). On that page, Rivera testified as follows:
Q: Did you oppose discrimination to anyone in the workplace?
A: No.

Id.

The cases that affirm the grant of summary judgment on retaliation claims where the employee's "complaint" was vague or where the complaint failed to clearly convey to the employer that the employee was opposing unlawful discrimination or harassment are legion. *See, e.g., Sullivan v. River Valley Sch. Dist.,* 197 F.3d 804 (6th Cir. 2000) (affirming, grant of summary judgment when the "complaint" was vague); *Miller v. American Family Mut Ins. Co.,* 203 F.3d 997 (7th Cir. 2000) (affirming gram of summary judgment where the plaintiff merely complained of unfair treatment, and did not specifically convey to the employer that she was opposing pregnancy discrimination): *Sweat v. Town of Davie* 2007 WL 3234638 (Broward Cit. Ct. 2007) (Damoorgian. J,) (same).

In Plaintiffs deposition he testified that there was no opposition to any discrimination (*Dep. of Rivera* at 452), and Malin testified that Rivera did not oppose any discrimination either. (*Dep, of Malin* at 51 3). Even had Rivera opposed any sort of anti-semitic remark made about Malin the courts have held that opposition to an isolated remark is not actionable. *Little v. United Technologies.* 103 F.3d 956, 959-60 (11 Cir. 1997).[FN2] In *Little.* the Eleventh Circuit unequivocally held that an employee's "opposition to an isolated, racially offensive comment by a co-worker does not constitute statutorily protected activity because among other things. isolated comments are not attributable to employers. and thus do not constitute an unlawful employment practice. *Little v. United Technologies,* 103 F.3d 956. 959-60 (11th Cir. 1997). In *Little,* the Eleventh Circuit framed the issue as follows: "Is an employer's alleged retaliation against an employee for opposing an offensive or derogatory remark uttered by a co-worker actionable under Title VII?" *Id.* at 958. The court answered the question in the negative, and held that "We conclude that a racially derogatory remark by a co-worker. without more. does not constitute an unlawful employment practice under the opposition clause of Title VII." *Id.* at 961.[FN3] Accordingly,

the Court finds that Rivera failed to engage in statutorily protected activity. and thus fails to establish the first element to his prima facie case.

FN2. Other courts are in agreement with *Little* on this basic aphorism in employment law jurisprudence. In *Clark County Sch. Dist v. Breeden,* 532 U.S. 268 (2001). the Supreme Court of the United States reversed the Ninth Circuit's reversal of the grant of summary judgment to the Title VII defendant. The Court held that "no one could reasonably believe" that a single sexually explicit remark could be a violation of Title VII. The Court explained:
Just three Terms ago, we reiterated, what was plain from our previous decisions. hat. sexual harassment is actionable under Title VII only if it is "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment' " ... Workplace conduct is not measured in isolation, instead. 'whether an environment is sufficiently hostile or abusive' must be judged 'by looking at all the circumstances,' including the 'frequency of the discriminatory conduct its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " Hence, "[a] recurring point in [our] opinions is that simple teasing, offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.' "

No reasonable person) could have believed that the single incident recourted above violated Title VII's standard.

Id. at 268.

FN3. While Rivera testified in his deposition that he did not oppose discrimination in the workplace, in an answer to an interrogatory which asked Rivera to state all instances in which he opposed unlawful discrimination or harassment in the workplace, Rivera identified three instances: I) Major McInerney advised him to stay away from Malin and he reported discrimination to Dr. Bukstel (a Fraternal Order of Police psychologist); 2) he advised Lt. Allen that he wanted to confront Lt. Hill: and 3) he wrote a memorandum regarding discrimination. None of these instances constitute protected activity under FCRA. and they will be briefly discussed in turn.

While Rivera claims that Major McInerney told him to stay away from Malin in January 2004 (*Dep. of Rivera* at 353), Malin was on medical leave from the police department well before January 2004. and never returned to active duty. (See Exhibit 7 to Defendant's Statement of Facts Rivera). Further, Rivera acknowledged that he did not work together with Malin in the police Department in January 2004. (*Dep. of Rivera* 353-54).

Concerning Dr. Bukstel, he was not an employee of the Town of Davie, nor was as in Rivera's chain of command. *Id.* at. 357-58. Rivera. knew that General Order 400 set forth very specific guidelines and procedures for him to follow if he desired to complain about discrimination or harassment in the workplace, *Id.* at 357-58: Exhibit 8 to Defendant's Statement of Facts - Rivera. Moreover, nothing in Dr. Bukstel's report indicates that Rivera complained about discrimination or harassment. (*Dep. of Rivera* at

Concerning Rivera's conversations with Lt. Allen. Rivera admitted in his deposition that he never got specific enough with Lt. Allen to convey any allegations of discrimination. because Rivera was asked in his deposition whether he got specific enough to say that someone was discriminating and he said that he did not. (*Dep. of Rivera* at 158). Rivera admitted that Lt. Allen did not discriminate against him. and

that he had no reason to believe that Lt. Allen told anyone of their discussion. *Id.* at 252-53

> Concerning the memorandum. it was written in response to Davie's setting of a predetermination bearing concerning the fact Rivera abandoned his job with Davie, including but not limited to the following 1) failure to notify the department of change of address; 2) improper use of personally assigned police vehicle; 3) failure to follow directions of his supervisor; 4) failure to attend court proceedings; 5) engaging in conduct unbecoming a police officer; 6) being absent without leave, All of the foregoing actions on the part of Rivera are violations of Department General Orders. As an employee. Rivera had a requirement to follow the department practices, policies, and procedures. The most basic duties and expectations of an employee were not met by Rivera in this case. A clear reading of Rivera's memorandum in response to the predetermination hearing notice shows that when it was written Rivera did not believe that he had been retaliated against. (See Exhibit 9 to Defendant's Statement of Facts - Rivera). The memorandum was written on April 23. 2004, but on April 7. 2004, weeks before, Chief George relieved Rivera of duty based on serious concerns about Rivera's ability to serve as a police officer. (*See* Exhibit 10 to Defendant's Statement of Facts - Rivera). Even by March to, 2004. Chief George had written Davie's Human Resources Department and notified it of his intention to fill Rivera's position with another officer when it became available. (*See* Exhibit 11 to Defendant's Statement of Facts - Rivera). Because these actions by Chief George preceded the memorandum, the memorandum (even had Chief George seen it) could not possibly have motivated Chief George to take the action that he did seting the predetermination hearing). Rivera decided not to attend the predetermination hearing.
>
> (*See* Exhibit 3 to Defendant's Statement of Facts- Rivera).

2. *Matthew Malin*

The only evidence of record that could possibly lead to the conclusion that Malin engaged in protected activity was a memorandum that he provided to Chief George shortly before his Family and Medical Leave was set to expire. but it does not contain any references to specific activity/conduct or to a specific person. (See Exhibit 10 to Defendant's statement of Pacts - Malin). Malin simply referred to anti-semitic comments being uttered by unidentified officers. *Id.* Malin, in his memorandum to Chief George, would not specify who was discriminating against him. *Id.* Malin made references to anti-semitic comments being made without specifying what they were. *Id.* Malin stated he had independent witnesses, but would not say who they were. *Id.*

The next day after receiving Malin's letter, Chief George responded expressing concerns about the issues raised in Malin's letter and stated, “I am providing you with the direction that you are to contact Detective Crotty of Internal Affairs and provide the information that you documented in this facsimile so that your allegations can be thoroughly investigated.” (*See* Exhibit 11 to Defendant's Statement of Facts - Malin). The Chief, after receiving a call from Malin's attorney. taxed a memo to Detective Crotty, *Id.* The Chief stated that he did not even know if the fax alleging anti-semitism was from Malin or from someone who could have used Malin's name. *Id.* That was because the note was not hand delivered or received directly from Malin. Further, the Chief thought the complaint was unusual, since Malin was on leave for months and had little contact with the department (and had received no prior complaints from Malin about discrimination). (*See* Exhibit 12 to Defendant's Statement of Facts - Malin and *Dep. of Malin* at 200). Ultimately. Malin never provided any documentation to Crotty or Internal Affairs to support his allegations. (*Dep. of Malin* at 268). He further testified that he did not provide the information to Crotty because he thought it was a bogus investigation. *Id.* at 269.

Malin previously had made a complaint to Internal Affairs against his sergeant and did not allege anti-semitism. *Id.* at 121-22. When asked why be did not tell Internal Affairs of any anti-semitism. he testified that he did not trust Internal Affairs. *Id.* at 121-22.

Malin testified that he heard an anti-semitism remark from an officer in October of 2003. *Id.* at 203-04. When asked why he first complained to the Chief in January. 2004. rather than any time in October through December, he was unable to articulate any logical answer, other than to state that he was suffering from anxiety and panic at the time. *Id.* at 204. Importantly, Malin admits t not putting his anti-semitism complaints in writing until the letter to the Chief Id. He further admitted that he never made any references to any anti-semistim to the Chief before this letter. *Id*. at 200.

The alleged "opposition" to discrimination as discussed above, does not constitute opposition; it is too vague *Guess v. City of Miramar*, 889 So. 2d 840. 847 (F1a. 4th DCA 2004); *Sullivan v. River Valley Sch, Dist.*, 197 F.3d 804 (6th Cir. 2000) (affirming grant of summary judgment when the "complaint" was vague); *Miller v. American Family Mut Ins. Co.*, 203 F.3d 997 (7th Cir. 2000) (affirming grant of summary judgment where the plaintiff merely complained of unfair treatment, and did not specifically convey to the employer that she was opposing pregnancy discrimination); *Sweat v. Town of Davie*. 2007 WL 3234638 (Broward Cir. Ct. 2007) (Damoorgian, J.) (same). Malin was expressly ordered to discuss the allegations with Detective Crotty in Internal Affairs, so that the complaint could be investigated, but Malin chose not to do that. Malin's failure in this regard should not result in liability under FCRA to Davie

The fact that Malin heard one anti-semitic remark, and that he complained about it. does not mean that Malin has a retaliation claim, *e.g.*, that he opposed discrimination As stared above, the *Little* case clearly holds that an employee's "opposition' " to an isolated, racially offensive comment by a co-worker does not constitute statutorily protected activity because, among, other things, isolated comments are not attributable to employers, and has do not constitute an unlawful employment practice. *Little v. United Technologies*, 103 F.?d 956. 959-60 (11th Cir. 1.997). Accordingly, the Court finds that Rivera failed to engage in. statutorily protected activity, and thus fails to establish the first element to his prima facie case.

B. Plaintiffs Cannot Establish that They Suffered Adverse Employment Action, Because They Abandoned Their Employment; Plaintiffs Cannot Fulfill the Second Element of their Prima Facie Case for Retaliation.

The cases hold that when an employee abandons their job. such as by fating to report back to work after their Family and Medical Leave has expired, the courts hold that such employee has abandoned their job. and such abandonment is not adverse employment action. because it is voluntary on the part of the employee. *Cruz v. Publix Super Markets. Inc.*, 428 F.3d 1379 (llth Cir. 2005) (affirming grant of summary judgment on the ground that plaintiff abandoned her job by failing to report, back to work after FMLA leave expired): *Saa v. Pimey Bowes. Inc.*, 137 Fed. Appx. 203 (llth Cir. 2005) (affirming grant, of summary judgment to employer on ground that plaintiff's failure to return to work after short-term disability term ended constituted job abandonment).

1. *Brandon Rivera*

Here. Rivera cannot fulfill the second element, because he was not terminated, his employment ended when he failed to return from Family and Medical Leave after his leave period expired, and he was admittedly unfit for duty at the time (and both his psychologist and psychiatrist thought so as well). Rivera confirmed at his deposition that he was unfit for duty at the time he was terminated and his FMLA leave expired. (*Dep. of Rivera* at 36), Rivera testified that during the last three to four months of his employment with the town of Davie, he was

not capable of performing the duties of a police officer. *Id.* In fact, Rivera testified that even nine month after his termination from Davie, he was still not capable of being: a police officer. *Id.* at 84.

Rivera's psychiatrist further confirmed that Mr. Rivera was unfit for duty. *Id.* at 36-37, The Town of Davie referred Rivera for an independent medical examination to be performed by a psychologist named Dr. Lee H. Bukstel. *Id.* at 76. After meeting with Rivera on three separate occasions. Dr. Bukstel issued his report, confirming that Rivera was not ready to return in his current state. *Id.* at. 76-77.

Mr. Rivera's actions further support his inability to perform his duties as a police officer when on April 20. 2004. approximately six days before he was terminated, he applied for disability retirement under the Davie Pension Plan. (*See* Exhibit 12 to Defendant's Statement of facts - Rivera). In that application Rivera stated, “I am currently suffering from Anxiety and depression which causes fatigue, lack of concentration and sleeplessness advised by my psychiatrist that I am not fit for duty”. *Id.* He further confirmed that his psychiatrist was of the belief that “1 am mentally unfit to return to work as a police officer”. *Id.*

On November 29. 2004. the Board of Trustees of the Davit Police Pension fund denied Mr. Rivera's application for a service connected disability. (*See* Exhibit 13 to Defendants Statement of Facts - Rivera). The Board made this determination based on the .independent medical evaluation of Dr. Goldschmidt a psychiatrist in Broward County. Florida, *Id.*[FN4] In light of the foregoing, the Court finds that Rivera cannot, establish the second element to this prima facie case, because as a matter of law he did not suffer adverse employment action.

> FN4. Rivera has been painfully employed since his termination from Davie. For about a year from July, 2004, Mr. Rivera and his wife operated a franchise known as Lady's Fitness Express. (*Dep. of Rivera* at 15. 16). However, one month after being fired from Davie, Rivera was actively working on the franchise. *Id.* at 73. In fact. Rivera began his pursuit of the Ladies Fitness franchise even before taking have in Davie. *Id.* at 73-74. Thereafter, he worked other jobs and from December through present he has been employed as an EMT (promoted to paramedic) in Collier County, Florida, *Id.* at 8. 9.

2. *Matthew Malin*

In this case, Malin cannot fulfill the second element, because, like Rivera, he was not terminated, his employment ended when he failed to return from Family and Medica Leave after his leave period expired, and he was admittedly unfit for duty at the time (and both his psychologist and psychiatrist, thought so as well). (*Dep. of Malin* at 297. 300, 575. 230-31). Malin testified that he was fired after his medical leave expired. *Id.* at 300. Malin was aware that when his leave expired under FMLA. Davie could terminate him. and Malin admitted he was not ready to return when his leave expired, *Id.* at 591. Malin received a warning letter prior to his. termination that his leave was gong to expire and was provided in the letter with the expiration date for his leave. (*See* Exhibit 3 to Defendant's Statement of Facts - Malin).

Even as of February 5. 2007 (three years after Malin's termination). Malin admitted that he was still not capable of going back to law enforcement. (*Dep of Malin* at 297). Malin admits that the day he was fired, he was unfit for duty and was not fit for duty any time thereafter. *Id.* at 575. It was Malin's psychiatrist who thought Malin should take medical leave. *Id.* at 222; Exhibits 4 and 5 to Defendant's Statement of Facts - Malin). Dr. Axelberd. an independent psychologist also confirmed that Malin was unfit for duty. (*Dep. of Matin* at 230-31). Because Malin. like Rivera, admitted that his FMLA leave had expired, and he failed to report for work upon expiration of the leave, and in this case he was admittedly unfit for ditty, the Court finds that Malin did not suffer an adverse employment action.

C. Plaintiffs Cannot Establish any Causal Link Between Any Statutorily Protected Activity and Their Discharge

Although the courts have stated that to establish the causal link clement "a plaintiff merely has to prove that the protected activity and the negative employment action are not completely unrelated." *Coutu v. Martin County Bd. of County Commoners,* 47 F.3d 1068, 1074 (11th Cir. 1995), the courts have held that temporal proximity between the alleged protected activity and the adverse employment action, by itself is not always sufficient to satisfy the causal link element. *Mize v. Jefferson City Bd. of Educ,* 93 F.3d 739. 745 (1 l th Cir, 1996): *Count,* 47 F.3d at 1074; *Soileau v. Guilford of Maine, Inc.,* 105 F.3d 12 (1th Cir. 1997) (discounting plaintiff's temporal proximity argument by noting that the "narrow focus ignores the larger sequence of events and also the larger truth" and thus affirming the trial court's grant of summary judgment for the defendant): *Bartlik v. United Stales Dep't of Labor.* '3 F.3d 100. 103 n.") (6th Cir. 1995); *Johnson v. University of Wisconsin-Eau Claire.* 70 F.3d 469. 480 (7th Cir, 1996); *see Stevens v. St. Louis Univ. Med Ctr.,* 97 F.3d 268. 272 (8th Cir. 1996) (affirming summary judgment for the defendant, stating that while the allegation of temporal proximity was sufficient to establish the prima facie case, it did not rise to the level required to prove pretext). As the Eleventh Circuit has stated:

It does not follow, however, that even' time a person engages in constitutionally protected activity within a short time prior to an adverse employment decision that an inference may be drawn that they were related. Every act of expression is not equally as likely to draw a negative response from an employer as every other; for the link to be made, it must be reasonable to assume that the employer had cause to retaliate.

Mize. 93 F.3d at 745 (affirming summary judgment for the defendant, and analyzing causal link in terms of motive, and holding that when a third party must approve the adverse employment action recommended by the person that has a motive to retaliate against the plaintiff, whether retaliation occurred becomes highly attenuated). Concerning both Plaintiffs, one of the reasons that they cannot fulfill this element, is because neither one can fulfill the first or second elements. The following analysis is provided assuming, *arguendo*, that either Plaintiff could fulfill the first or second elements,

1. *Brandon Rivera*

In this case. Rivera applied for a pension with the Town of Davie Pension Board, prior to his separation of employment, well aware of the fact that he could not perform the services of a police officer, and thus he knew that his employment was ending for reasons that had nothing to do with opposition to discrimination. (*See* Exhibits 12 and 13 to Defendant's Statement of Facts - Rivera).

In any event., because Chief George had no idea about any "complaint" made by Plaintiff, he was thus not aware of any protected activity or "opposition" on the pan of Plaintiff, (*Affidavit of Chief George* ¶ 3), as a matter of law, he could not have terminated Plaintiff because of that "complaint". which requires summary judgment for Davie. *Gibbons v. State Public Employees Comm'n,* 702 So. 2d 536 (Fla. 2d DCA 1997) (holding that the "plaintiff, at a minimum, must establish that the employer was aware of the protected expression when it took the adverse employment action"): *Lubetsky v. Applied Card Sys., Inc.,* 296 F.3d 1301 (11th Cir. 2002) (affirming grant of summary judgment in favor of defendant-employer, because decision-maker did not know about the protected activity); *Strickland v. Water Works and Sewer Board of City of Birmingham.* 239 F.3d 1199 (11th Cir. 2001); *Clay v. Holy Cross Hosp.,* 253 F.3d 1000.1005-07 7th Cir, 2001) (affirming grant of summary judgment because decision-maker did not know about the protected activity): *Geraci v. Moody-Tottrup. Inc't Inc.,* 82 F.3d 578, 580-82 (3d Cir. 1996 (affirming grant of summary judgment where plaintiff could not prove that the decisionmake." knew that she was pregnant, despite plaintiff telling several co-workers that she was): *Robinson v.*

Adams. 847 F.2d 1315. 1316 (9th Cir. 1987) (affirming grant of summary judgment, because decision-maker did not the plaintiff's race). *See also L 'Argent v. United Space Alliance. L.L.C.* 2006 WL 680806 (M.D. Fla. 2006) (holding same as the above eases); *Cooper v. Miami-Dade County.* 2004 WL 2044288 (S.D. Fla. 2004) (holding same as the above eases;

In *Strickland,* a grant of summary judgment was affirmed by the court because the plaintiff had failed to establish a prima facie case because there was no evidence that the decision-maker had any knowledge of the plaintiffs protected activity. *Strickland.* 239 F.3d at 1199. Without such knowledge, it is impossible for the decision-maker to have been motivated by the protected activity when the plaintiff was disciplined, and therefore impossible for the plaintiff to establish the requisite causal link. *Id.* There are cases that concur with this ruling. *See e.g., Raney. Vinson Guard Sam., Inc.,* 120 F.3d 11 92. 1196 (llth Cir. 1997). Accordingly, the Court, even if it found that Rivera had sufficiently engaged in protected activity and suffered an adverse employment action (which it does not), summary judgment is properly granted in Davie's favor, because, the Plaintiff cannot satisfy the third element of the prima facie case--that (here was a causal link, between his alleged protected activity and the adverse employment action.

2. *Matthew Malin*

Malin cannot satisfy the causal, link element to his prima facie ease, Malin applied for social security benefits with the federal government, prior to his separation of employment, well aware of the fact that he could not perform the. services of a police officer, and thus, he knew that his employment was ending for reasons that had nothing 1.0 do with "opposition" to discrimination, as set forth above. Malin completely abandoned the duties that he was assigned as a. police officer, which break any chain of causation that could possibly exist. Initially, both Malin's psychiatrist and Dr. Axelberd. an independent psychologist, confirmed that Malin was unfit for duty. *Id.* at 222. 230-31; Exhibits 4 and 5 to Defendant's Statement of Facts - Malin). Malin admitted that he did not respond to certain court subpoenas despite being required to attend. *Id.* at 271-72. Malin admitted he did not attend required depositions either, *Id.* at 272. Malin refused to comply with subpoenas and did not appear at required depositions and hearings because he felt he was on leave despite being required to *Id.* at 272-73. Malin missed thirteen (13) mandatory traffic court appearances and did not pick up subpoenas because he said *most* of the time he was out: on FMLA leave. *Id.* at 273-74 and see Exhibit 6 to Defendant's Statement of Facts - Malin). Malin does not dispute that his leave memo contained a condition that required him to comply with all legal subpoenas for required court appearances and to attend court hearings and depositions in appropriate court attire. (*Dep. of Malin* at 275 and see Exhibit 7 to Defendant's Statement of Facts). Malin acknowledged receiving that memo. (*Dep. of Malin* at 276 and see Exhibit 7 to Defendant's Statement of Facts - Malin). Despite being directed to communicate with the Major if he had any questions about the memo. Malin just chose not to follow it. (*Dep. of Malin* at 276-78), Malin never notified the department that because of his condition, he could not follow these directions. *Id.* at 278. Malin acknowledged not attending mandatory training. *Id.* at 540. When asked about why he did not attend mandatory retraining, he testified that he did not recall why. but was under extreme stress, anxiety and depression. (*See* Exhibit 8 to Defendant's Statement of Facts - Malin and *Dep. of Malin* at 280-84).

In any event, simply because Chief George knew a few days before Malin's leave ended that Malin was taking the position that he was referred to by an inappropriate anti-semitic remark (as outlined in Malin's memorandum to him) does not require the conclusion that there was a causal link between Malin's termination and his "complaint", particularly given the gross failure of Malin to follow policies and procedures of the police force. It is important to note that the Davie Police Department, as a paramilitary organization, has an acute need to keep cohesion and morale among its members. *Rollins v. Florida Dep't of Law Enforcement,* 868 F.2d 397, 399 (l1th

Cir. 1989) (‘affirming judgment for The defendant on plaintiffs retaliation claim when plaintiff frequently expressed his complaints “in an *insubordinate* and antagonistic manner” by. among other things, questioning the credibility of the FDLE's Director). *See aha Rogers v. Miller.* 57 F.3d 986. 992 (11th Cir. 1995) (noting that “[s]tatements critical of the commanding officer of a paramilitary group, such as the office of the count’ sheriff, carry with them the real potential for damaging cohesion and morale”). In *Bushy v. Cir. of Orlando.* 931 F.2d 764.774 (11th Cir, 1.991,). the court noted that:

In quasi-military organizations such as law enforcement agencies, comments concerning co-workers performance of their duties and superior officers' integrity can ‘directly interfere[ ] with the confidentiality, esprit de corps and efficient operation of the [police department]

(alterations in original). Accordingly. Davie's decision to accept the discharge of a police officer for abandoning his job. being unfit for duty, and insubordination and dereliction of duty, as outlined above, should not be second-guessed by a Court, when there is no evidence to suggest that Davie was motivated by retaliatory intent,

Moreover. Malin cannot prove that the individual who accepted his discharge for completely abandoning his employment knew about any protected activity or opposition, and thus, as a matter of law. Malin could not have been terminated because of that “complaint”. which requires summary judgment for Davie. *Gibbons v, State Public Employees Comm'n.* 702 So. 2d 536 (Fla. 2d DCA 1997) (holding that the “plaintiff, at a minimum, must, establish that the employer was aware of the protected expression when it took the adverse employment action”1): *Lubetsky v. Applied Card Sys., Inc.,* 296 P.3d 1301 (llth Cir. 2002) (affirming grant of summary judgment in favor of defendant-employer, because decision-maker did not know about the protected activity), Malin has no idea whether Chief George was anti-semitic, and testified that there are at least a half a dozen Jewish police officers employed by Davie. (*Dep. of Malin* at 183-83) Accordingly, the Court finds that there is no record evidence tending to shew that there was any link between Malin's memorandum and his separation of employment from Davie, and that even if there were, there is significant evidence of wrongdoing on the part of Malin, coupled with the fact that he was not, admittedly, able to work as a police officer that breaks any such chain of causation.

III. EVEN IF PLAINTIFFS COULD ESTABLISH A PRIMA FACIE CASE FOR RETALIATION (WHICH THEY CANNOT), PLAINTIFFS CANNOT REBUT DAVIE'S LEGITIMATE, NON-RETALIATORY REASONS FOR ACCEPTING THEIR DISCHARGES.

When a plaintiff alleges retaliation, liability depends on whether the protected activity (or protected classification) actually motivated the employer in making the decision at issue. *Reeves v. Sanderson Plumbing Prods. Inc.,* 120 S. Ct. 2097. 2105 (2000). That is. the plaintiff's protected trait must have ‘actually played a role in [the decision-making] process and had a determinative influence on the outcome.” *Id.* Recently, the Eleventh Circuit, siting *en banc,* discussed the inner-workings of the *McDonnell-Douglas* framework in great detail. *Chapman v. At Transport.* 229 F.3d 1012 (11th Cir, 2000) (*en banc*). Under the *McDonnell-Douglas* framework, once a *prima facie* case is established, a presumption that the employ;)’ unlawfully discriminated against the employee arises. *Id.* at 1025. The defendant-employer must then articulate a legitimate, non-discriminatory reason for the challenged action. *Id.* Once the defendant-employer articulates one or more legitimate business reasons, the presumption of discrimination is eliminated. *Id.* Then, the plaintiff must come forward with significant procative evidence “to permit a reasonable fact finder to conclude the reasons given by the employer were not the real reasons for the adverse employment decision”, because

[i]f the employee does not proffer sufficient evidence to create a genuine issue of material fact regarding whether each of the defendant's articulated reasons is pretextual, the employer is entitled to summary judgment on the

plaintiffs claim.

Id. at 1024-25, It is clear that every single reason provided by the employer for the adverse employment action must be rebutted by the plaintiff. *Id.* In this case, Rivera admitted that several of the reasons provided by Davie warranted bis termination and were not retaliatory,

For example, 1) Rivera was aware of the rule that required officers not to keep their vehicles when on leave, *Id.* at 253; 2) other officers expressed concerns about working with Officer Rivera (*see.* Exhibit 14 to Defendant's Statement of Facts - Rivera), which was based on their personal observations of Rivera's conduct on duty, *see id.;* Rivera had anger management issues and received repeated warnings of insubordination by his supervisor, *id.;* 3) Rivera admitted in not keeping the department informed of his whereabouts when he was on leave. (*Dep. of Rivera* at 379); 4) Rivera admitted by nine days after moving his residence, he still did not notify the department of his change of address, *id.* at 395-97: only after he was served with a notice of violation did he notify the department of his new address, *id.* at 397; Rivera said the department learned of his new address when the department saw his vehicle not parked in the proper direction and police investigated it. *id.* at 396-97; Rivera said he believed someone in his neighborhood complained to the department about his ear, *id.* at 398; and 5) Rivera had agreed to continue serving subpoenas while on leave, *id.* at 398; notwithstanding. Rivera does not deny that he did not appear despite being subpoenaed for various court appearances. *Id.* at 403. Since Rivera cannot rebut each of Davie's reasons, summary judgment, should be granted for Davie. *Chapman v. AI Transport,* 229 F.3d 1012, 1024-25 (11th Cir. 2000) (en *banc*).

Significantly, a "plaintiff is not allowed to recast an employer's proffered non-discriminatory reasons or substitute her business judgment for that of the employer." *Id.* at 1030. Provided that the proffered reason is one that might motivate a reasonable employer, the employee must meet that reason head-on and rebut it and the employee cannot succeed by simply quarreling with the wisdom of that reason." *Id. See also Alexander v. Fulton County.* 207 F.3d 1303, 1341 (11th Cir. 2000) (holding that "it is not the court's role to second-guess the wisdom of an employer's decisions as long as the decisions are not racially motivated"). Federal court? "do not sit as a super-personnel department that re-examines an entity's business decisions. No matter how mistaken the firm's managers.' " the federal courts do not interfere. *Chapman,* 229 F.3d at 1030. Rather, the Court's "inquiry is limited to whether the employer gave an honest explanation of its behavior." *Id.* The Fourth District Court of Appeal has used these same standards discussed immediately above in this section. *Guess v. City of Miramar. 889* So. 2d 840.847-48 (Fla. 4th DCA 2004).

1. *Brandon Rivera*

In this case. even if Rivera could establish a prima facie ease of retaliation. he cannot rebut the legitimate, non-retaliatory reasons for his employment separation (some of which he admitted he could not rebut) as set. forth by Davie, including but not limited to the following: 1) failure to notify the department of change of address: 2) improper use of personally assigned police vehicle; 3) failure to follow directions of his supervisor; 4) failure to attend court proceedings; 5) engaging, in conduct unbecoming a police officer: 6) being absent, without leave. All of the foregoing actions on the part of Rivera (that are reasons for legitimate employment separation) arc violations of Department General Orders. As an employee. Rivera had a requirement to follow the department practices, policies, and procedures. The most basic duties and expectations of an employee were not met by Rivera in this case. Yet. where Davie wrote Rivera up for these derelictions of duty, Rivera did not even show up for the determination hearing. (*Dep. of Rivera* at 470). Thus, he abandoned any claim to his job.

Finally, it is clear in this case that absolutely no evidence of retaliation exist: (as none is alleged in the Amended Complaint), and that the Town of Davie's business judgment should not be .second-guessed by Rivera or the Court. *Alphin v. Sears, Roebuck. & Co.*, 940 F.2d 1497. 1501 (llth Cir. 1991) (stating that the court is not to '"sit as a super-personnel department that re-examines an entity's business decisions"): *Martin v. Ryder Distrib. Resources, Inc.*, 811 P. Supp. 658. 664 (S.D. Fla, 1992). The Court finds that there simply is no evidence that Rivera was retaliated against or that any of the employment decisions made with respect to him were the result of retaliatory motive on the part of anyone working for the Town of Davie.

2. *Matthew Malin*

Even if Malin could establish a prima facie case of retaliation, he cannot rebut the legitimate, non-retaliatory reasons for his employment separation (some of which he admitted he could not rebut) as set forth by Davie, including but not limited to he abandoned his job, committed misconduct, and was admittedly unfit for duty and thus could not work after his FMLA leave expired. (*Dep. of Matin* at 42-43). As an employee of Davie's police department, Malin had a requirement to follow the department practices, policies, and procedure: The most basic duties and expectations of an employee were not met by Malin in this case. This failure on Malin's part requires the conclusion that Malin cannot rebut Davie's reasons for why he is no longer working for the Town.

IV. PLAINTIFFS CANNOT ESTABLISH A CLAIM FOR DISCRIMINATION - RIVERA - ASSOCIATIONAL AND MALIN - RELIGIOUS DISCRIMINATION.

Title VII and FCRA covers discrimination in the general terms and conditions of an employee's employment. 42 U.S.C. § 2000e-2(a)(1) (2000). Plaintiff Rivera alleges in his Amended Complaint that he was subjected to disparate treatment discrimination'. Plaintiff Rivera, at the summary judgment oral argument, argued for the first time in the case that he had an associational discrimination claim. In *International Bhd. of Teamsters v. United Stales.* 431 U.S. 324 (1977), the Supreme Court of the United States defined disparate treatment The Court stated:

'Disparate treatment' such as alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical ...

Teamsters, 431 U.S. at 335-36 & n.15 (citations omitted). The. Eleventh Circuit has also noted that, "proof of discriminatory motive is a necessary element, of a disparate treatment case." *Ferryman v. Johnson Prods. Co.*, 698 F.2d 1138, 1141 n.4 (1 lth Cir. 1983). Malin's claim will be discussed first, followed by Rivera's claim.

1. *Matthew Malin*

To state a *prima facie:* case of discrimination in the terms and conditions of employment. Plaintiff must establish that: (1) he belongs to a protected class: (2) he performed his job satisfactorily; (3) he suffered an adverse employment action (*e.g.*, demoted, terminated, etc.); and (4) his employer treated similarly situated employees outside his classification mote favorably. *McDonnell Douglas Corp.*, 411 U.S. at 802. *See also Carter v. City of Miami.* 870 F.2d 578. 582 (11th Cir. 1989) (holding that "adverse employment action" is part of the *prima facie* case).

In this case, as set forth above in detail, the Plaintiff simply abandoned his job and was not fit for duty. The elements to the prima facie case will be discussed in turn. The Court does find that Malin satisfies the first element, because he has stated that he is Jewish The Court finds that Malin cannot satisfy the second element, because it

is clear that he did not perform his job satisfactorily, as set forth in great detail above, The Court finds that Malin cannot fulfill the third element, because he abandoned his job.

Concerning the fourth element, the courts have held that an employee must identify an individual (a comparator) who is not in the protected classification who was treated more favorably by the employer. *Holifield v. Reno.* 115 F.3d 1555. 1562 (1 lth Cir. 1997). If a plaintiff cannot demonstrate this, than summary judgment is appropriate for the employer *id.* The comparator's must be in an identical situation as the plaintiff in order to be a proper comparator to "prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." *Rioux v. City of Atlanta,* 520 F.3d 1269. 1276 (11th Cir. 2008). In this case. Malin has utterly failed to identify any comparator whose employment situation is similar to his. but who was treated more favorably than Malin. However, Davie points out. that Rivera's situation is actually quite similar to Malin's, given that both men had their FMLA leave expire and were unfit for duty upon that expiration, and thus failed to return to the force. The Court finds that both Rivera (a non-Jew) and Malin (a Jew) were treated the same, because both of them had their separations of employment accepted by Davie for failing to report to duty once leave expired. As stated above, an employer is free to do mat. Accordingly. Malin has no claim for religious discrimination.

With respect to Rivera, the Court finds that his claim was not contained in his EEOC Charge of Discrimination and he thus failed to exhaust his administrative remedies, which results in summary judgment being granted in favor of Davie on that claim. *Florida Statutes* § 760.11(1) (requiring that before any lawsuit can be filed, a plaintiff must first exhaust his or her administrative remedies, by filing a charge of discrimination with the Florida Commission on Human Relations, the Broward County Human Rights Division, or the EEOC): *Martinez v. Abraham Chevrolet-Tampa. Inc.,* 891 So. 2d 579 (Fla. 2d DCA 2004) (noting that § 760.11(1 must be followed to preserve a discrimination claim).

Even had Rivera included such a claim in his EEOC charge, the Court finds that because Malin has no discrimination claim. Rivera's claim for associational discrimination must fail as well, and it also fails because there is no evidence that Rivera suffered adverse employment action because of his friendship or support of Malin. *Zielonka v. Temple University,* 2001 WL 1231746. *5 n.7 (E.D. Pa.) (granting summary judgment in favor of defendant on ground that plaintiff had no evidence that adverse employment action resulted because of his association with a minority). As stated above in derail, there is no evidence that Rivera asserted any right of Malin's or otherwise complained that Malin was being discriminated against, and as the Court has already found. Rivera did not suffer adverse employment action. The fact that there arc other Jewish police officers in the Town of Davie also cuts against Rivera's claim for association discrimination. Finally, even if Rivera could establish a prima facie case of associational discrimination, he abandoned his job as stated above. Accordingly, summary judgment is warranted in favor of Davie against any associational discrimination claim that Rivera might have.

V. MALIN CANNOT ESTABLISH A CLAIM FOR RELIGIOUS HARASSMENT.

The courts recognize an independent cause of action for harassment based on a protected characteristic like religion, *Clark County Sch. Dist. v. Breeden,* 532 U.S. 268 (2001). However. as set forth above, the courts hold that an isolated racist remark or sexual remark does not make a claim for harassment. The fact 'that one anti-semitie remark was unered is not enough to constitute a harassment claim, *Clark County Sch. Dist v. Breeden,* 532 U.S. 268 (2(01): *Little v. Untied Technologies,* 103 F.3d 956. 959-60 (11th Cir. 1997). Initially, the Court notes that Malin admitted in his deposition that he had no harassment claim. (*Dep. of Malin* at 511).[FN5]

FN5. The elements necessary to establish a harassment claim require the employee l:o show: 1) he belongs in a protected group: 2) he was subjected to unwelcome religious harassment; 3) the harassment was based on his religion; 4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of his employment and created a discriminatorily abusive working environment and 5) a basis for holding the employer liable, *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (en banc). These elements, only one of which Mr. Malin is able to establish, will be addressed in turn. The fact that Malin is for claims to be) Jewish places him in a protected classification.

Malin was not subjected to unwelcome religious harassment, as that term is defined in the law. Malin refused to cooperate in any way. For example, Malin failed to inform Davie who the declarant was who allegedly uttered the words: “dirty f--g Jew pig”, and he failed to inform how he was subjected to a religiously hostile work environment. Malin's failure to cooperate with Davie's attempt to investigate his claims bars his claims under the law. *Coates v. Sundor Brands, Inc.*, 1(54 F.3d 1361, 1366 (11th Cir. 1900).

The fourth element--that the conduct complained of must be ‘'sufficiently severe or pervasive to alter the conditions of employment”--is the element that tests the mettle of most harassment claims. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Gupta v. Florida Bd. of Regents.* 212 F.3d 571, 583 (11th Cir. 2000). This requirement is regarded as ‘crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace--such as male-on-male horseplay or inter]religious] flirtation--for discriminatory’ ”conditions of employment.” *Gupta*. 212 F.3d at 583 (quoting *Oncale v. Sundowner Off Shore Servs., Inc.*, 523 U.S. 75. 81 (1998)). Indeed, the United Stares Supreme Court' has cautioned that although Title VII's prohibition on religious discrimination clearly includes religious harassment, Title VII is not a federal ‘”civility code.” *Oncale*, 523 U.S. at 81; *Faragher*, 524 U.S. at 788 (stating that “a recurring point in these opinions is that ‘simple leasing,’ off-hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment’ ”).

Establishing that harassing conduct was sufficiently severe or pervasive to alter in employee's terms and conditions of employment includes a subjective and an objective component. *Set Harris*, 510 U.S. at 21; *Mendoza*, 195 F,3d at 1246. Furthermore, “the objective severity of harassment, should he judged from the perspective of a reasonable person in the plaintiffs position, considering all the circumstances.” *Oncale* 523 U.S. at 81; *Mendoza*, 195 F.3d at 1246. The subjective and objective components will be discussed in turn.

Malin cannot, establish the subjective component, because an isolated comment, even one as ugly as the alleged comment contained in his Charge of Discrimination, cannot constitute unlawful harassment. *Harris*. 510 U.S. at 23; *Busby v. City of Orlando*, 931 F.2d 764. 785 (11th Cir. 1991). Finally, regarding the subjective component for Malin to prove the subjective component, he was required to cooperate with the employer's investigation. *Coates v. Sundor Brands. Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999). A finding of harassment cannot be made when the employee fails to inform the employer about any details of what occurred what occurred.

Further. Malin cannot establish the objective component either. The Supreme Court has identified the following four factors that should be considered in determining whether harassment objectively altered an employee's terms or conditions of employment: 1) the frequency of the conduct; 2) the severity of

the conduct; 3) whether the conduct is physically threatening or humiliating, or a mere offensive, utterance; and 4) whether the conduct unreasonably interferes with the employee's job performance. *Harris*, 510 U.S. at 23; *Hallen v. Tyson Foods.* 121 F.3d 642. 647 (11th Cir. 1997) (citing *Harris.* U.S. at 23); *Mendoza*, 195 F.3d at 1246.

The Eleventh Circuit in *Mendoza* and *Gupta* emphasized that district, courts trust, serve as gatekeepers in harassment cases by dismissing claims that fail to meet the "severe and pervasive" standard as defined by the courts. In so doing, it aligned itself with several other circuits that have established a baseline for actionable harassment. *Mendoza.* 195 F.3d at 1246.

In this case. Malin has utterly failed to allege any facts that evenly remotely demonstrate that his work environment was religiously hostile such that it could be said that any alleged religions harassment in that environment was severe and pervasive. Malin claims that he was subjected to one comment from a follow officer referencing him as a "Jewish pig 7. Assuming that this comment was made its the Court must on summary judgment, it does not. constitute a hostile work environment based on religion. The isolated comment does not come close to the level of severity and pervasity required by the Eleventh Circuit and Supreme Court.

Again, these allegations are grossly deficient. The severity and frequency factors are stringent. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1.998); *Webb v. R & B Holding Co.,* 992 F. Supp. 1382. 1389 (S.D. Fla. 1998); *Black v. Zaring Harms, Inc.*, 104 F,3d 822 (6th Cir. 1997). To he severe enough, the alleged hostile work environment must be completely ‘’polluted with [religious] discrimination." *Busby v, City of Orlando.* 931 F.2d 764, 785 (llth Cir. 1991). Suffice it to say. when courts uphold the finding of a hostile working environment based on religion, they find that the harassment was "repeated", "continuous"', and "prolonged", despite the plaintiffs objections. *Walker v. Ford Motor Co.,* 684 F.2d 1355, 1359 (llth Cir. 1982), The comment in this case, taken either individually or as a whole, fail to show that Malin's work environment was "polluted with discrimination' " or that the harassment was repeated, continuous, and prolonged.

Concerning the last element, whether Davie could be held liable, in assessing employer liability for harassment under Title VII, the Supreme Court has distinguished between hostile environments created by co-workers and those by supervisors. *See generally Burlington Indus, v. Elbert.* 118 S. Ct. 2257 (1998). An employer is liable for co-worker harassment only if it had actual or constructive notice of the harassment and failed to take prompt and appropriate action. *Id.* at. 2267. Malin cannot prove the. fifth Clement to his prima facie case of harassment, because he cannot show that Davie can be held liable here, first, Davie certainly had no actual notice of the harassment (until a couple of days before his FMLA leave expired, and even then the notice was woefully deficient to put Davie on notice as to who said what, and Malin failed to provide the information to Detective Crotty. although ordered to by Chief George!. Davie certainly had no constructive notice that there was a religiously hostile work environment from the. facts presented in this case. There are no facts from which anyone could even remotely infer that Davie should have known that Malin felt harassed or discriminated against because he is Jewish. Accordingly, Davie is entitled to summary judgment as to Malin's religious harassment claim.

Malin conceded in his first. Charge of Discrimination that the earliest religious harassment was in May, 2003. (*See* Exhibit 13 to Defendant's Statement of Facts - Malin). Malin's employment began in the Town of Davie in April of 2001. (*Dep. of Malin* at 87). So. Malin, by stating under oath in his first Charge of Discrimination that

the earliest religious discrimination against him was in May, 2003. admitted that he was not discriminated the first two years of his employment. (*See* Exhibit 13 to Defendant's Statement of Facts - Malin). Malin took a medical leave of absence beginning "November 5. 2003 and never returned to work for the Town of Davie, (*pep. of Malin* at. 174. 302. 510). Malin confirmed that between the time he went, on leave and the time he wrote the letter to the Chief there was no anti-semitism directed toward him from the Town of Davie. *Id.* at 543, So. any religious harassment that Malin was subjected to, if any. could have only taken place for a period of six. months. (*See* Exhibit 13 to Defendant's Statement of Facts - Malin: *Dep. of Malin* at 174. 302. 510).

In his first Charge of Discrimination. Malin could only provide one incident of purported religious harassment. (*See* Exhibit 13 to Defendant's Statement of Facts - Malin). This is despite the fact that he had the assistance of the EEOC in filling, out the charge, (*Dep of Malin* at 443). Malin stated that when he went to the EEOC, he told them everything he knew. *Id.* at 445. Approximately seven (7) months after filing the first Charge of Discrimination. Malin inexplicably filed a second Charge of Discrimination with the EEOC In Malin's second Charge of Discrimination, for the first time, Malin mentioned retaliation and provided other examples of discrimination. This is despite the fact that no other discrimination or retaliation could have taken place against Malin by the Town of Davie, because Malin had already been terminated prior to the filing of the first charge, (*See* Exhibits 13 and 14 to Defendant's Statement of Facts - Malia).

In providing new instances of alleged harassment in the second charge. Malin did not assert whether any of these purported claims occurred within 365 days of the filing of the second charge filed on August 3. 2004). (*See* Exhibit 14 to Defendant's Statement of Fa;ts - Malin), When Malin was asked why he did not assert April 21. 2001 as being the earliest date of purported discrimination against him in his first Charge of Discrimination, instead of May 1. 2003. he testified:

A. At this point 1 was extremely stressed out and my dates were just running all into each other. 1 was extremely panic ridden and anxiety filled. 1 could have very easily humanly made a mistake.
Q. You were two years off.
A. Still made a mistake.

(*Dep. of Malin* at 89). Malin does not dispute that his original charge did not complain about discrimination before May of 2003 and did not complain about retaliation, *Id.* at 90-91. Malin referred to the second charge as an amended charge. Yet. he later testified that he did not know if this was an amended charge or a new one. *Id.* at 91-92. Malin admitted that for the second charge, he had an attorney. For the first charge, he did not have an attorney. *Id.* at 91. Malin could not explain why the second charge did not indicate when the earliest date of discrimination took place. *Id.* at 93; and see Exhibit 14). Malin agreed that it did not look like he rectified the first charge by filing the second, with respect to the alleged earliest date of discrimination. (*Dep. of Malin* at 93). The Court finds that on the record before it, Malin was not subjected to religious harassment, and that Davie is entitled to summary judgment concerning this cause of action as well.

CONCLUSION

For the foregoing reasons, summary judgment should be granted in favor of the Town of Davie as to the Plaintiffs' Second Amended Complaint.

Accordingly, it is ORDERED AND ADJUDGED that Davie's Motions for Summary Judgment as Brandon Rivera and Matthew Malin are GRANTED as to all claims in the Second Amended Complaint for the reasons stated in this opinion.

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this _____ day of _____, 2008.

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Leroy H. Moe

Broward Circuit Court Judge

Copies furnished to:

Frank Shooster, Esq.

Chris Kleppin, Esq.

Malin v. Town of Davie
2008 WL 2752707 (Fla.Cir.Ct.) (Trial Order)

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