

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-cv-80469-ALTMAN/Matthewman

NICOLE OFSOWITZ LUCAS,

*Plaintiff,*

*v.*

CITY OF DELRAY BEACH, *a Florida*  
*Municipal Corporation,*

*Defendant.*

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**ORDER ON SUMMARY JUDGMENT**

On June 2, 2020, our Plaintiff, Nicole Lucas, an officer with the City of Delray Beach Police Department published an expletive-laden rant about Black Lives Matter on her Facebook page and invited anyone who disagreed with her to “unfriend” her. After several members of the public brought Lucas’s angry post to the attention of the Police Department, Javaro Sims (the City’s Police Chief) initiated disciplinary proceedings against her—at the end of which the Police Department issued her a written reprimand. Lucas now claims that this reprimand cost her a chance to serve as an undercover agent for the DEA.

Under an agreement the Police Department had signed with the DEA, the Department could recommend one of its officers for a detail assignment on a DEA task force. Of course, the DEA—not the Police Department—had the final say over any applicant. When she wrote the incendiary post at issue here, Lucas *was* being considered for that special assignment. But, after it asked for a copy of Lucas’s internal-affairs file, the DEA passed her over. Seeing the Police Department’s hand in this decision, Lucas sued our Defendant—the City of Delray Beach—alleging one count of First Amendment retaliation under 42 U.S.C. § 1983 (Count I) and one count of sex discrimination, also

under § 1983 (Count II). After we denied the City’s motion to dismiss, the parties engaged in substantial discovery and have now asked us to resolve this case at summary judgment. While Lucas has moved for summary judgment *only* on her First Amendment claim, *see generally* Plaintiff’s Rule 56 Motion for Partial Summary Judgment (“Lucas’s MSJ”) [ECF No. 96], the City asks for judgment on both counts, *see generally* Defendant’s Motion for Summary Judgment (“City’s MSJ”) [ECF No. 97]. Having carefully reviewed the parties’ briefs,<sup>1</sup> the record, and the governing law, we now **GRANT** the City’s MSJ and **DENY** Lucas’s MSJ.

### THE FACTS<sup>2</sup>

By June of 2020, Nicole Ofsowitz Lucas had been “an undercover narcotics agent” in the Delray Beach Police Department’s “Vice, Intelligence[,] and Narcotics Unit since 2017 or 2018[.]” Plaintiff’s Local Rule 56.1(a) Statement of Material Facts in Support of Motion for Summary Judgment (“Lucas’s SOF”) [ECF No. 95] ¶ 2 (citing Dec. 15, 2021 Deposition of Nicole Ofsowitz Lucas (“Lucas Dec. Dep.”) [ECF No. 98-3] at 22:16–18); *see also* Defendant’s Response to Plaintiff’s Statement of Material Facts (“City’s Response SOF”) [ECF No. 101] ¶ 2 (“Undisputed.”). In those days, the City had a standing agreement with the DEA, under which the City would “detail one experienced officer

<sup>1</sup> Both motions are fully briefed and ripe for adjudication. *See* Defendant’s Response to the Plaintiff’s Motion for Summary Judgment (“City’s Response MSJ”) [ECF No. 100]; Plaintiff’s Response to the Defendant’s Motion for Summary Judgment (“Lucas’s Response MSJ”) [ECF No. 108]; Plaintiff’s Reply to the Defendant’s Response re: Plaintiff’s Motion for Summary Judgment (“Lucas’s Reply MSJ”) [ECF No. 115]; Defendant’s Reply in Support of its Motion for Summary Judgment (“City’s Reply SOF”) [ECF No. 122].

<sup>2</sup> “The facts are described in the light most favorable to the non-moving party.” *Plott v. NCL Am., LLC*, 786 F. App’x 199, 201 (11th Cir. 2019); *see also Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002) (“[F]or summary judgment purposes, our analysis must begin with a description of the facts in the light most favorable to the [non-movant].”). We accept these facts for summary-judgment purposes *only* and recognize that “[t]hey may not be the actual facts that could be established through live testimony at trial.” *Snac Lite, LLC v. Nuts ‘N More, LLC*, 2016 WL 6778268, at \*1 n.1 (N.D. Ala. Nov. 16, 2016); *see also Cox Adm’r US Steel & Carnegie Pension Fund*, 17 F.3d 1386, 1400 (11th Cir. 1994) (“[W]hat we state as ‘facts’ in this opinion for purposes of reviewing the rulings on the summary judgment motion may not be the actual facts. They are, however, the facts for present purposes[.]” (cleaned up)).

[from the Police Department] to the DEA West Palm Beach Task Force for minimum two-year periods, during which time the officer is [ ] under the direct supervision and control of DEA supervisory personnel assigned to Task Force.” City’s Statement of Material Facts (“City’s SOF”) [ECF No. 98] ¶ 65 (citing the Program-Funded State and Local Task Force Agreement [ECF No. 98-19] at 1); *see also* Plaintiff’s Amended Response to the Defendant’s Statement of Material Facts in Support of the Motion for Summary Judgment (“Lucas’s Response SOF”) [ECF No. 105] ¶ 65 (“Not disputed, but not relevant to summary judgment.”).<sup>3</sup> But the decision to accept an officer into the Task Force has always been reserved to the “DEA’s discretion.” City’s SOF ¶ 66; *see also* Lucas’s SOF ¶ 66 (“Not disputed[.]”).

At the same time, the City is “responsible for establishing the salary and benefits, including overtime, of the officers assigned to the Task Force[.]” City’s SOF ¶ 67; *see also* Lucas’s SOF ¶ 67 (“Not Disputed[.]”). And the City “does not change the salary or benefits of officers detailed to the Task Force . . . and would not have changed the salary or benefits of Lucas had she been detailed to the Task Force.” City’s SOF ¶ 68; *see also* Lucas’s SOF ¶ 68 (“Not Disputed[.]”). The Task Force also “doesn’t guarantee an officer any particular amount of overtime pay, including more overtime pay than that which the officer would ordinarily receive while not on the Task Force.” City’s SOF ¶ 69;

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<sup>3</sup> Most of Lucas’s responses to the City’ SOF repeat this bizarre phrase: “Not disputed, *but not relevant to summary judgment.*” Lucas’s Response SOF ¶ 65 (emphasis added). Since Lucas’s legal conclusion that a fact is “not relevant to summary judgment” does nothing to dispute the asserted fact, we’ll accept these facts as established. *See* FED. R. CIV. P. 56(c)(1) (“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: *citing to particular parts of materials in the record, including depositions, documents, electronically stored information . . . [.]*” (emphasis added)); *see also* S.D. FLA. L.R. 56.1(b)(2)(C) (“If an opponent’s Statement of Material Facts disputes a fact in the movant’s Statement of Material Facts, then the evidentiary citations supporting the opponent’s position must be limited to evidence specific to that particular dispute.”). And, since Lucas’s caveat (“but not relevant to summary judgment”) isn’t at all relevant to the question of whether a properly asserted fact has been genuinely disputed, we’ll omit this inapposite caveat going forward.

*see also* Lucas’s SOF ¶ 69 (“See response to ¶ 68, which Ms. Lucas adopts in response to this paragraph.”).<sup>4</sup>

On June 2, 2020, Lucas—still a police officer with Delray Beach and hoping to join the DEA Task Force—posted the following statement on her private Facebook page:

Fuck everyone who says black lives matter. I can’t take your fucking bullshit anymore. ALL LIVES MATTER! BLM encourages racial divide, violence and hate. Look at all the officers killed and injured for trying to protect people & property they don’t even know. Officers are being killed every fucking day & now even more so and no one riots or wears shirts that say POLICE LIVES MATTER. If you don’t agree with my feelings PLEASE do not comment. If you don’t like me now then just unfriend me. But know ALL LIVES MATTER TO ME, AND I GO ABOVE AND BEYOND TO HELP ALL PEOPLE.

City’s SOF ¶ 1 (quoting Facebook Post [ECF No. 98-1] at 1 (errors in original)); *see also* Lucas’s SOF ¶ 1 (“Plaintiff posted the statement that the City of Delray Beach quotes in ¶ 1.”).

Word of Lucas’s post quickly spread. Indeed, just one day after the post was published, Javaro Sims, the Chief of the Police Department, heard about it twice. *First*, “on June 3, 2020,” Chief Sims “received a copy of Lucas’[s] Facebook post in a text message from Sharon Edmonds.” City’s SOF ¶ 7; *see also* Lucas’s Response SOF ¶ 7 (“Admitted.”). Edmonds, who “became friends with [Lucas] approximately 18 years ago when Lucas was a probation officer,” City’s SOF ¶ 10; *see also* Lucas’s Response SOF ¶ 10 (“Admitted[.]”), was also “Facebook friends with Lucas,” City’s SOF ¶ 11; *see also*

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<sup>4</sup> Lucas’s response to paragraph 68 doesn’t adequately dispute *any* material fact. That response, in full, says only this: “Not disputed, but not relevant to summary judgment. However, historically Delray Beach Police Department officers assigned to the DEA task force earn substantial overtime during that assignment.” Lucas’s Response SOF ¶ 68. This may or may not have been a relevant fact if it had been properly supported. But it wasn’t. As our quotation makes plain, Lucas has chosen, in this paragraph, not to cite a single piece of evidence at all. And, as we’ve said, a party must rely on *evidence* (not argument or supposition) to survive summary judgment. *See* FED. R. CIV. P. 56(c)(1) (“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: *citing to particular parts of materials in the record*, including depositions, documents, electronically stored information . . . [.]” (emphasis added)).

Lucas’s Response SOF ¶ 11 (“Admitted.”). “Edmonds later unfriended Lucas” on Facebook. City’s SOF ¶ 12; *see also* Lucas’s Response SOF ¶ 12 (“Admitted[.]”).

*Second*, later that same day, at a “We Can’t Breathe” rally “concerning the murder of George Floyd and police reform,” City’s SOF ¶ 13; *see also* Lucas’s Response SOF ¶ 13 (“Admitted[.]”), “an anonymous individual approached Chief Sims and informed him of Lucas’[s] Facebook post, showing it to him on a cell phone,” City’s SOF ¶ 17; *see also* Lucas’s Response SOF ¶ 17 (“Plaintiff objects to ¶ 17 as inadmissible hearsay.” (citing *Hammond v. Hall*, 586 F.3d 1289, 1319 (11th Cir. 2009) (“Anonymous tips are not admissible into evidence to prove the truth of the matter stated in the tip.”))).<sup>5</sup>

After reading the Facebook post, Chief Sims worried that it “was a violation of [the Police Department’s] General Order 1917,” Videoconference Deposition of Chief Javaro Sims (“Sims Dep.”) [ECF No. 98-5] at 40:25–41:12, which prohibits employees from posting “racist, prejudice [sic], offensive, homophobic, sexist comments or hate speech,” Delray Beach Police Department General Order 1917 (“General Order 1917”) [ECF No. 98-14] at 3; *see also* City’s SOF ¶ 18 (“Upon seeing Lucas’[s] Facebook post, Sims concluded it likely violated one or more Department

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<sup>5</sup> Again, Lucas fails to dispute this point properly. The City, after all, isn’t offering this quote for the truth of the matter asserted. It’s simply using it (1) to highlight the state of mind of the individual in the crowd and (2) to explain how Chief Sims came to see the post for the second time. It thus *isn’t* hearsay and *is* admissible at summary judgment. *See United States v. Valdes-Fiallo*, 213 F. App’x 957, 960 (11th Cir. 2007) (“Evidence that is not offered to prove the truth of the matter asserted is not hearsay.” (citing FED. R. EVID. 801(c)); *see also Wills v. Walmart Assocs., Inc.*, 592 F. Supp. 3d 1203, 1219 (S.D. Fla. 2022) (Altman, J.) (“In a half-hearted attempt to conjure up a genuine dispute, Wills contends that the anonymous tip is inadmissible hearsay . . . . *First*, the employee’s anonymous complaint isn’t hearsay. Hearsay is ‘a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.’” (first quoting FED. R. EVID. 801(c); and then citing *Wright v. Farouk Sys., Inc.*, 701 F.3d 907, 910 (11th Cir. 2012) (“Hearsay is an out-of-court statement offered to prove the truth of the matter asserted in the statement . . . and is generally not admissible except as provided in the Rules of Evidence or a federal statute[.]”))).

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