SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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JOHN RIORDAN and KIRK BIGELOW,

Plaintiffs,

- v -

ALBERTO GARCES, individually; ALBERTO GARCES, as president of AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3369 SSA; and AMERICAN FEDERATION OF GOVERNMENT EXMPLOYEES, AFL-CIO,

Defendants.

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INDEX NO. 161142/2017

MOTION DATE

MOTION SEQ. NO. 004, 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 46-49, 57, 59, 62 were read on this motion to dismiss.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 51-56, 58, 60-61 were read on this motion to dismiss.

Defendant Garces moves pursuant to CPLR 3211(a)(7) for an order dismissing plaintiffs' second and third causes of action. Plaintiffs oppose (mot. seq. 004).

Defendant American Federation of Government Employees, AFL-CIO (AFGE) moves pursuant to CPLR 3211(a)(2) and (7) for an order dismissing plaintiffs' fifth and sixth causes of action. Plaintiffs oppose (mot. seq. 005).

I. AMENDED COMPLAINT (NYSCEF 49)

Plaintiffs, former employees of the United States Social Security Administration (SSA), are members and former officers of AFGE's local affiliate, Local 3369 SSA (Local). Riordan is, and was at the time of the events in issue, president emeritus of Local; Bigelow is its former executive vice president; and from December 31, 2016 until December 14, 2017, Garces was its

acting president.

As pertinent here, the Local's constitution provides as follows:

> This local is a separate, independent organization functioning in conformance with AFGE's National Constitution. Neither the local nor its officers, employees, members, or other person, has the authority to act, nor shall it be deemed to act, on behalf of, or as agent for, the Federation or any of its other affiliates, unless such authority, as applicable, is expressly granted by the Federation, by written authorization of the National President, or by an affiliate, by written authorization in accordance with its governing procedures.

(NYSCEF 53).

Between September 2016 and January 2017, plaintiffs made multiple requests to review the financial records of Local, and Garces eventually told them that they could review the records at the union office on January 31, 2017. That day, Garces allowed plaintiffs to review a non-financial record from June 2016 only. In the presence of Local officers, Garces accused plaintiffs of engaging in "discourteous and extremely violent behavior" and demanded that they leave the premises.

On March 3, 2017, Garces scheduled and announced a union-wide special meeting for March 21, 2017 at a federal building in Queens.

On March 5, 2017, Riordan demanded to review the 2016 financial records.

On March 21, 2017, plaintiffs and other union members, arrived at the federal building before the scheduled meeting time, but were prevented from entering by security guards who stated that they had to be signed in by union personnel. The security guards unsuccessfully tried to get a union representative to sign in plaintiffs. After the meeting ended, plaintiffs confronted Garces and asked why they had been prevented from entering the meeting. After walking beside him on the sidewalk for half a block, Riordan called Garces a "jackass." Garces reentered the federal building, and shortly thereafter, a Federal Protective Service (FPS) inspector detained plaintiffs for having "threatened to kill" Garces.

After reviewing security camera footage of the incident, the FPS inspector said that although the incident had not occurred on federal property, Garces wanted to "press charges." The inspector thus called the New York Police Department (NYPD), and when officers arrived, Garces repeated that plaintiffs had threatened to kill him. The officers told plaintiffs that they were thereafter banned from union meetings and all federal buildings.

Later that evening, Riordan emailed SSA management officials about Garces's false claims of death threats. The next day, plaintiffs emailed the leadership of AFGE 2nd District, a collection of regional unions within AFGE, about Garces's false report.

On March 27, 2017, Garces emailed Riordan, copying four AFGE leaders, including its national president, advising that Riordan was banned from future Local meetings, and detailed the events of March 21, 2017, stating

> I am writing to inform you that you cannot enter any future [Local] membership meetings. On March 21, 2017 at approximately after 6:20 p.m., near the [federal building] employee main entrance/exit, you began by harassing me with witnesses present, yelling obscenities, shouting racial insults and using profanity because you alleged that I personally kept you from physically attending the [Local] meeting that commenced at 6 p.m. You continued and escalated your attacks outside the [federal] building and ultimately threatened to kill me. You threatened to physically harm me on Federal property. I have at least one eyewitness. You invaded my personal space, spilled saliva on my person and continued viciously threatening me after the fact. A report was filed with the [FPS], [SSA] and [NYPD]. You continued to follow me after the life threat. There is video footage captured by the SSA [federal building] security facility co-managed with FPS.
>
> . . .
>
> Consistent with my responsibilities and regulations as Local President overseeing the welfare of its members, I can no longer in good conscience allow you to continue to endanger the health and safety of the [Local] participants. You have a very extensive history of this type of behavior and given [sic] multiple opportunities to correct it. The membership was appalled and voiced concerns for his/her safety of future meetings. Just recently, on January 31, 2017 you were removed from the SSA Flushing office for discourteous and extremely violent behavior. You were also previously ejected from a Jamaica membership meeting for irate conduct jeopardizing the wellbeing of others.

That same day, Garces sent a nearly identical email to the same recipients but replaced Riordan's

name with Bigelow's.

Later that day, by telephone, Garces told three SSA officials:

> John Riordan continued to get in my personal space and taunt. I truly believe they both were provoking me to do something I would regret. [Riordan] purposely got in my face and got saliva on my coat and the side of my face. I did not want to physically nor verbally fight with 70 plus year old retired individuals jeopardizing my job. I was at the corner before I crossed over to Wendy's . . . that John Riordan said, 'I will fucking kill you.' John is the ringleader and always is the instigator. He previously served [as] [Local] President before my time in the agency. Then Kirk Bigelow said, 'I will fucking kill you too.' It was at this point that I decided to go back into the [federal building] to report their threats.
>
> The [FPS] got involved at this point. He got both sides of [the] story and then went to look at the security cameras . . . and informed me that since the [alleged] threat took place outside of the building, it is out of their jurisdiction. . . FPS contacted NYPD … NYPD informed me that since there was no broken skin (no bleeding), they could not charge them with anything other than harassment.
>
> …
>
> This is a continuation of serious conduct problems caused exclusively by [plaintiffs] that have no end in sight and will lead to dangerous consequences if not dealt with. I know this now with certainty. On 1/31/2017, in the Flushing [Local] office space co-located with the Flushing DO, a similar incident took place when [plaintiffs] were using profanity and acting irate towards myself, Jennifer Ramirez (Union Treasurer and CR in West Farms CS) and Edwin Osorio (Union Executive Vice President and Jamaica CS). What precipitated this incident was my denial for [plaintiffs'] very generic and ambiguous demand to review Union financial records.

On March 29, 2017, plaintiffs each sent letters to Garces demanding that he cease and desist from defaming them.

On April 21, 2017, Garces disseminated a letter to the entire membership of Local and AFGE 2nd District, comprising hundreds of thousands of members, in which he stated:

> My name is Alberto Garces. I am currently the President of [Local] …
>
> …
>
> Specifically, on January 31, 2017 the [plaintiffs] became extremely disruptive, loud and vulgar at a Union meeting held at the Union office located at 138-59 Barclay Ave. Flushing NY. This "open and notorious" conduct compelled SSA Management to enter

> the Union office with the Security Guard. Consequently, [plaintiffs] were escorted from the building.
>
> ...
>
> Furthermore, on March 21, 2017 the [plaintiffs] attempted to attend a Union meeting at the Union/SSA office located at 1 Jamaica Plaza [the federal building]. The meeting already started and, in accordance with local practice, I exercised my discretion to refuse their admittance to the Union meeting. After the meeting the [plaintiffs] confronted me in the lobby and on the street. They raised their voices and started calling me names including racial slurs. They followed me onto the street and one of the [plaintiffs] said: "I will f_king kill you too." As a result of this conduct and threats, I filed a complaint with the 103rd Precinct of the NYPD. Additional [sic], the SSA is conducting an internal investigation; and the incident of March 21, 2017 was recorded on SSA surveillance cameras.
>
> It is common knowledge that the [plaintiffs] have been escorted out of other Union meetings by SSA management due to this same loud, vulgar and threatening conduct.
>
> While this charge affects me personally, more important is the negative impact the [plaintiffs] have on Local and the AFGE. Their "open and notorious" conduct has a chilling effect on the membership. What is more, this conduct makes it very, very difficult to encourage non-members to join the AFGE.
>
> It is my hope that this charge results in the expulsion of the [plaintiffs] [from Local].

On June 28, 2017, Riordan filed an action against defendants in the United States District Court for the Southern District of New York, seeking to conduct a review of the financial records. The parties settled that action on September 10, 2017, and on October 27, 2017, plaintiffs went to the union office to conduct the review, where, in addition to plaintiffs and Garces, approximately six to eight people were present. During the review, Bigelow asked Garces how much money Local had in its bank account. Garces denied knowing. Bigelow stated that the finances were handled well when Riordan was president, to which Garces stated, "Why don't you suck his dick?" After Bigelow asked what Garces had said, Garces rose from his chair, raced around the table over to Bigelow, pressed his face within inches of Bigelow's face, and threateningly stated loudly, "Why don't you suck your own dick?" As it appeared that Garces

would strike Bigelow, the meeting ended.

On November 8, 2017, in a letter to the Regional Commissioner of SSA, Garces, and other attendees of the June 28, 2017 meeting, Riordan detailed the events of the meeting and requested another opportunity to review the union's financial records. On November 13, 2017, Garces responded by email, apologizing for his conduct.

Thereafter, plaintiffs commenced this action, advancing causes of action against Garces for defamation *per se*, intentional infliction of emotional distress, *prima facie* tort, and assault, plus causes of action for negligent hiring and supervision and negligence against AFGE and Local. They allege that the statements made about them are false and defamatory, and that they injure their business, trade, and profession. They deny being on federal property when the incidents occurred.

II. MOTION SEQ. 004

A. Contentions

1. Garces (NYSCEF 46-49)

Garces contends that plaintiffs' claim for intentional infliction of emotional distress should be dismissed because it is duplicative of their claims for defamation and assault and that the alleged conduct is insufficiently extreme and outrageous to support such a claim. He observes that he is not alleged to have touched plaintiffs or to have deprived them of property, liberty, or any legal rights. Moreover, plaintiffs failed to allege severe emotional distress or connect such distress to Garces's alleged conduct.

Plaintiffs' *prima facie* tort cause of action should be dismissed, Garces argues, because they fail to allege special damages and their claim is duplicative of their defamation claim. Moreover, as his alleged conduct was not lawful, Garces maintains that it cannot be the basis of a

prima facie tort.

2. Plaintiffs (NYSCEF 59)

Plaintiffs assert that their cause of action for intentional infliction of emotional distress should not be dismissed as duplicative, as it is pleaded in the alternative, and thus it would be premature to dismiss it on the possibility of duplicative recovery at trial. Moreover, each cause of action concerns different types of damages, as plaintiffs' defamation claim is premised on reputational damage, whereas their intentional infliction of emotion distress claim is based on their extreme and severe emotional distress, mental anguish and personal humiliation, and time, effort, and attorney fees. According to plaintiffs, having alleged that Garces undertook a deliberate and malicious campaign of harassment and intimidation, extreme and outrageous conduct is alleged, and that causation may be inferred from having been "falsely detained, wrongfully accused, and subjected to an ongoing campaign of harassment and threats of physical violence." They also contend that whether they suffered damages and whether the alleged conduct is sufficiently outrageous are factual questions reserved for the jury.

Whether their *prima facie* tort claim is duplicative is "irrelevant," plaintiffs assert, as they advance it in the alternative. Moreover, they do not need to allege acts that are otherwise lawful. To the extent that some conduct alleged does not serve as basis for the other torts alleged, they may be used to support the *prima facie* tort claim, and the potential harm to livelihood, litigation expenses, and reputational damages constitute special damages.

3. Reply (NYSCEF 62)

According to Garces, plaintiffs do not plead special damages, as they seek damages "in no event less than $1,000,000" which is too general, and moreover, attorney fees do not constitute special damages. He maintains that *prima facie* tort claims must be premised on

otherwise lawful conduct and denies that plaintiffs' claim is pleaded in the alternative, as they seek money damages for each cause of action.

Garces denies that the causation element of an intentional infliction of emotional distress claim is a jury question, and maintains that plaintiffs' allegations of causation and emotional distress are impermissibly conclusory. He reiterates that the conduct alleged is insufficiently outrageous, and that the claim is duplicative of the defamation claim, and thus, must be dismissed.

B. Analysis

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must construe the pleading liberally, accept the facts alleged to be true, and afford the plaintiff "the benefit of every possible favorable inference." (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]; *AG Cap. Funding Partners, LP v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

1. Intentional infliction of emotional distress

A cause of action for intentional infliction of emotional distress requires allegations of outrageous conduct intended to and successful in causing severe emotional distress. (*Chanko v Am. Broad. Companies Inc.*, 27 NY3d 46, 56 [2016]). To be sufficiently outrageous, the alleged conduct must be "beyond all possible bounds of decency" and be "utterly intolerable in a

civilized community." (*Marmelstein v Kehillat New Hempstead*, 11 NY3d 15, 23 [2008], quoting *Murphy v Am. Home Prod. Corp.*, 58 NY2d 293, 303 [1983]; *see also Chanko*, 27 NY3d at 57, quoting *Howell v New York Post Co.*, 81 NY2d 115, 122 [1993] [standard for outrageousness so strict that of every claim considered by Court of Appeals, "every one has failed because the alleged conduct was not sufficiently outrageous"]). However, while an individual act may be insufficient to state a claim, "a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff" may be actionable (*Seltzer v Bayer*, 272 AD2d 263, 264–265 [1st Dept 2000]), and the rigorous standard applied to individual acts, does not apply to such a campaign (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018]).

Assuming the truth of the allegations that Garces had filed false reports with the government and police, defamed plaintiffs, and assaulted them, and viewed in a light most favorable to plaintiffs, these allegations comprise a course of intentional conduct that is sufficiently outrageous. (*See e.g.*, *164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004], *lv dismissed* 2 NY3d 793 [2004] [allegation that defendant sent letters to plaintiffs, restaurateurs, claiming that they caused food poisoning could not, as a matter of law, be dismissed at pre-answer motion stage]; *Estreicher v Oner*, 148 AD3d 867, 868 [2d Dept 2017] [plaintiff called defendant, his family, and guests ethnic and racial epithets and threw items onto his property and threatened him with violence, leveled false criminal accusations at him, assaulted and battered him, and continued to engage in threatening and intimidating conduct nearly two months after physical confrontation giving rise to complaint]). Moreover, as Local's president, Garces is alleged to have used his position to intentionally inflict plaintiffs' emotional distress. (*See Scollar*, 160 AD3d at 146 [outrageous nature of conduct can be established when arising from abuse of position of power]).

A plaintiff must also have suffered "severe emotional distress" caused by the defendant's conduct to state a claim for intentional infliction of emotional distress. (*Howell*, 81 NY2d at 121). Here, affording plaintiffs the most favorable reading of their complaint and in light of the sufficiency of evidence of outrageousness, plaintiffs adequately allege that they have suffered severe emotional distress due to Garces's conduct. (*See Halio v Lurie*, 15 AD2d 62, 66 [2d Dept 1961] [it is for trier of facts to determine whether injuries actually suffered]).

Nevertheless, a cause of action for intentional infliction of emotional distress must be dismissed where it is duplicative of another tort, such as defamation. (*Matthaus v Hadjedj*, 148 AD3d 425, 425 [1st Dept 2017]; *164 Mulberry*, 4 AD3d at 58).

Here, as plaintiffs' cause of action for intentional infliction of emotional distress is premised on Garces's alleged defamation and assault, it is duplicative of the other torts. (*See e.g.*, *Doin v Dame*, 82 AD3d 1338, 1340 [3d Dept 2011], *lv denied* 17 NY3d 713 [2011] [dismissing intentional infliction of emotional distress claim where "the conduct complained of here fell squarely within the bounds of the traditional torts of nuisance and trespass"]; *Brancaleone v Mesagna*, 290 AD2d 467, 468 [2d Dept 2002] [affirming dismissal of intentional infliction of emotional distress claim that is duplicative of defamation claim]; *cf 164 Mulberry*, 4 AD3d at 58 [intentional infliction of emotional distress claim not duplicative where libel claims had been dismissed]).

2. *Prima facie* tort

To state a claim for *prima facie* tort, the plaintiff must allege "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful." (*Posner v Lewis*, 18 NY3d 566, 570 n 1 [2012]).

As special damages must be pleaded with specificity, plaintiffs' allegation that they are entitled to "in no event less than $1,000,000" is insufficient. (*See e.g.*, *Mancuso v Allergy Assocs. of Rochester*, 70 AD3d 1499, 1501 [4th Dept 2010] [plaintiff's allegation of damages not less than $1 million too general]; *Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 [1st Dept 2002] [damages alleged in round numbers too general]; *Leather Dev. Corp. v Dun & Bradstreet, Inc.*, 15 AD2d 761 [1st Dept 1962], *affd* 12 NY2d 909 [1963] [damages pleaded in round sums without attempt to itemize, deemed general damages]).

In any event, as with claims for intentional infliction of emotional distress, those for *prima facie* tort must be dismissed if duplicative of other alleged torts, even if pleaded in the alternative. (*Curiano v Suozzi*, 63 NY2d 113, 117 [1984]; *Matthaus*, 148 AD3d at 426). That Garces may not ultimately be found liable for those torts does not allow plaintiffs to reassert that conduct under a cause of action for *prima facie* tort. (*See Kickertz v New York Univ.*, 110 AD3d 268, 277 [1st Dept 2013], quoting *Bassim v Hassett*, 184 AD2d 908, 910 [3d Dept 1992] [cause of action for *prima facie* tort "not to provide a catch all alternative for every cause of action which cannot stand on its legs"]).

III. MOTION SEQ. 005

A. Subject matter jurisdiction

1. Contentions

a. AFGE (NYSCEF 51-56)

AFGE asserts that plaintiffs' complaint is preempted by the Civil Service Reform Act (CSRA), which bars unfair labor practice claims and that a breach of the duty of fair representation is an unfair labor practice. As plaintiffs allege that AFGE breached a duty to its members by placing Garces in a position to cause them harm, their claim concerns an unfair

labor practice. As plaintiffs allege an unfair labor practice, this court lacks subject matter jurisdiction.

b. Plaintiffs (NYSCEF 60)

Plaintiffs deny that their claims are preempted by the CSRA, absent allegations relating to unfair labor practice. Rather, state tort law claims "routinely" fall outside the scope of the CSRA.

c. Reply (NYSCEF 61)

AFGE maintains that the CSRA preempts plaintiffs' claims, because plaintiffs allege a breach of duty.

2. Analysis

Pursuant to CPLR 3211(a)(2), a complaint may be dismissed where the court lacks subject matter jurisdiction, such as where a cause of action lies within the exclusive jurisdiction of the federal courts. (*Finkel v D.H. Blair & Co.*, 213 AD2d 588, 589 [2d Dept 1995]).

The CSRA governs "labor relations in the federal sector" and "is the source of the collective-bargaining agent's duty of fair representation." (*Karahalios v Nat'l Fed'n of Fed. Employees, Local 1263*, 489 US 527, 531 [1989]). Under the CSRA, the Federal Labor Relations Authority (FLRA) has "exclusive jurisdiction" over complaints concerning unfair labor practices, which include the breach of the duty of fair representation. (*Wisham v Comm'r of I.R.S.*, 2009 WL 2526245, *3 [SD NY 2009]; *see also Greene v Am. Fed'n of Gov't Employees, AFL-CIO, Local 2607*, 2005 WL 3275903, *3 [D DC 2005]).

Actions that constitute unfair labor practices are listed in 5 USC § 7116(b) which does not include negligence or intentional torts. As plaintiffs claim only that AFGE negligently hired and supervised Garces, who committed intentional torts against them, their claims are not within

the scope of the CSRA. (*See Gutierrez v Flores*, 543 F3d 248, 255 [5th Cir 2008] [union's alleged defamation and intentional infliction of emotional distress not governed by CSRA]; *Wood v Am. Fed'n of Gov't Employees*, 255 F Supp 3d 190, 197 [D DC 2017] [union's allegedly defamatory "communications were unrelated to any personnel action connected to plaintiff's government employment"]).

AFGE offers no authority for its contention that its alleged negligent hiring and supervision of Garces implicates its duty to represent plaintiffs fairly. Nor can it, as a cause of action for negligent hiring and supervision arises from an employer's alleged breach of the "duty to use reasonable care and refrain from knowingly retaining in its employ a person with known dangerous propensities in a position that would present a foreseeable risk of harm to others" (*Haddock v City of New York*, 140 AD2d 91 [1st Dept 1988], *affd* 75 NY2d 478 [1990]), whereas a cause of action for the breach of the duty of fair representation arises from a union's failure "to represent[ ] the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership." (5 USC § 7114[a][1]). As the duties materially differ (*cf Ferrara v American ACMI*, 122 AD2d 930, 931 [2d Dept 1986] [union's negligence in performing contractual duty to maintain safe work space does not "amount to a breach of the union's duty to fairly represent the plaintiff"]), plaintiffs' claims are without the scope of the CSRA, and thus, are not preempted.

B. Failure to state a claim

1. Contentions

a. AFGE

AFGE contends that as an unincorporated association, it cannot be held liable because not every member has ratified its allegedly negligent actions. In addition, it argues that it cannot be

held liable because it had no control over Local's conduct even if it had constructive notice of it, observing that according to its constitution, Local is a "separate, independent organization" (NYSCEF 53) and there are no facts alleged that establish an agency relationship between them. Moreover, Garces was elected by the members of Local, over which AFGE exercises no control. AFGE observes that the alleged tort occurred at Local's headquarters, which it maintains no control over.

2. Plaintiffs

Plaintiffs claim entitlement to assert their claims against AFGE as its retention of Garces is "likely subject to a delegation of authority" from the entire union, and as unintentional torts may be advanced against unincorporated associations. Moreover, they claim, questions of fact exist as to the agency relationship between AFGE and Local, and thus, dismissal is premature. Moreover, as Local's constitution reflects that Local may be an agent of AFGE in certain circumstances, dismissal is not warranted. They allege that AFGE was made aware of the alleged conduct by plaintiffs and Garces and that they have met the liberal pleading standard for claims of negligent hiring and supervision and negligence.

3. Reply

AFGE contends that while unintentional torts may be pleaded against unincorporated associations, the alleged harm arises from intentional acts of Garces, AFGE's alleged agent, and thus, it cannot be held liable.

B. Analysis

To state a cause of action for an intentional tort against an unincorporated association, a plaintiff must "plead and prove that each member of the union authorized or ratified the alleged wrongful conduct." (*Palladino v CNY Centro, Inc.*, 23 NY3d 140, 147 [2014]; *Martin v Curran*,

303 NY 276, 280 [1951]]). To state a cause of action for an unintentional tort, including negligence and negligent hiring and retention, the plaintiff need not allege that the entire union membership authorized or ratified the negligent conduct. (*Piniewski v Panepinto*, 267 AD2d 1087, 1087 [4th Dept 1999], citing *Torres v Lacey*, 3 AD2d 998, 998 [1st Dept 1957], *rearg denied* 4 AD2d 831 [1st Dept 1957]).

While Garces's actions may have been intentional, the tort of negligent hiring and retaining Garces is a tort sounding in negligence and thus, that AFGE is an unincorporated association does not preclude plaintiffs' claims against it.

AFGE's liability for Local's alleged negligence depends on the existence of an agency relationship between them. (*See Doro v Sheet Metal Workers' Int'l Ass'n*, 498 F3d 152, 156 [2d Cir 2007]).

Local's constitution provides that it "shall" not "be deemed to act on behalf of or as agent for [AFGE]," whereas it may act on behalf of AFGE in circumstances when AFGE expressly grants such authority. Plaintiffs not only fail to allege express authorization, but they allege no facts demonstrating that AFGE had control of Local's conduct or decision to hire and retain Garces. Plaintiffs allege only that Garces was elected and then appointed to his position.

While the complaint is silent as to whether AFGE or Local appointed Garces to his position, even if AFGE had appointed him, no agency relationship would have been established. (*See e.g.*, *Campbell v. Int'l Bhd. of Teamsters*, 69 F Supp 2d 380, 386 [ED NY 1999] [intentional union's appointment of local union's officers did not create agency relationship]). AFGE's awareness of Garces's conduct also does not render it liable, as "[a]n international union has no independent duty to intervene in the affairs of its local chapters, even where the international has knowledge of the local's unlawful acts." (*Phelan v Local 305 of United Ass'n of Journeymen, &*

Apprentices of Plumbing & Pipefitting Indus. of U.S. & Canada, 973 F2d 1050, 1061 [2d Cir 1992], *cert denied* 507 US 972 [1993]).

Affording plaintiffs a liberal reading of the complaint (*Leon*, 84 NY2d at 87-88) does not change this result absent an allegation that AFGE had the requisite control over Local to warrant the imposition of liability on it for negligence and the negligent hiring retention of Garces.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motions to dismiss are granted in their entirety, and plaintiffs' second and third causes of action are severed and dismissed, and plaintiffs' fifth and sixth causes of action as asserted against defendant American Federation of Government Employees, AFL-CIO are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the parties appear for a preliminary conference on February 19, 2020 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

12/17/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE