IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JOSEPH MICHAEL PHILLIPS, *Plaintiff,* v. COLLIN COUNTY COMMUNITY COLLEGE DISTRICT *et al.*, *Defendants.*	Civil Action No.: 4:22-cv-184-ALM

REPLY BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON CAUSES OF ACTION THREE, FOUR, FIVE, SIX, AND SEVEN

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Per Fed. R. Civ. P. 56 and Local Rules CV-7 and CV-56(b), Plaintiff Dr. Michael Phillips respectfully submits this reply to Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment (Dkt. #64) to Plaintiff's Motion for Partial Summary Judgment on Causes of Action Three, Four, Five, Six, and Seven. (Dkt. #58, Pl.'s Mot. for Summ. J.)

INTRODUCTION

Defendants claim the authority to terminate professors like Dr. Phillips if they speak disrespectfully about their supervisors or the College. But what happens if the "disrespectful" speech is on matter of public concern? According to Defendant Matkin, "[s]ometimes we end up in a federal lawsuit, I guess."[1]

To be precise, the College has ended up in three federal lawsuits for using its vague and overly broad policies to punish professors for speaking on matters of public concern, and Dr. Phillips is the last plaintiff remaining. (Final Judgment, *Burnett v. Collin Cnty. Cmty. Coll. Dist.*, No. 4:21-cv-857 (E.D. Tex. Feb. 7, 2022), ECF No. 14; Order Granting Stipulation of Dismissal, *Jones v. Matkin*, No 4:21-cv-733 (E.D. Tex. Nov. 28, 2022), ECF No. 43.) Dr. Phillips has shown that the College's vague and overly broad Code of Ethics and Employee Expression Policy restrict employee speech on matters of public concern even though the College has utterly failed to identify any harm that justifies these wholesale restrictions on protected speech.

[1] (Dep. of Neil Matkin (attached as Exhibit A, "Ex. A, Matkin Dep.") 47:4-48:3.)

In their response, Defendants largely repeat the arguments advanced in their Motion for Summary Judgment on his facial challenges and claims for declaratory relief. (Dkt. #59, Defs.' Mot. for Summ. J.) For the same reasons those arguments fail on Defendants' cross-motion, so too do they fail on Defendants' opposition brief. (Dkt. #63, Pl.'s Resp. in Opp'n to Defs' Mot. for Summ. J.) The undisputed facts establish that Collin College's policies impose a prior restraint on faculty expression about public issues, despite lacking any need to do so, suppress substantially more protected speech than necessary to achieve their goals, and make it impossible for employees to know what speech might lead to discipline. Accordingly, Dr. Phillips is entitled to summary judgment on Causes of Action Three, Four, and Five. Three more reasons highlight why Defendants' opposition fails to show that Dr. Phillips is not entitled to partial summary judgment:

1. Defendants attack Dr. Phillips's as-applied Cause of Action Six by claiming they terminated Dr. Phillips for being "disrespectful" but fail to acknowledge that all of Dr. Phillips's allegedly "disrespectful" speech was protected speech on matters of public concern, which does not lose protection solely because it concerned his workplace;
2. Fifth Circuit precedent shows Defendants are wrong that Dr. Phillips must show animus on the part of each Defendant for his as-applied challenge to the College's unconstitutional policies in Cause of Action Six; a government official's motive does not matter for a direct restriction of First Amendment rights; and

3. Collin College's own Trustee confirmed that Defendant Matkin has final say over employment decisions, refuting Defendants' claim that Matkin is not a final policymaker under the Seventh Cause of Action.

For these reasons and those explained in Dr. Phillips's motion, the Court should grant summary judgment to Dr. Phillips on Causes of Action Three, Four, Five, Six, and Seven.

ARGUMENT

I. Defendants Admit That the Code of Ethics Reaches Protected Speech Like Dr. Phillips's Allegedly Disrespectful Criticism of His Superiors on Social Media Challenged in Cause of Action Six.

Defendants argue they fired Dr. Phillips because he did not show respect toward his superiors at the College, shared his concerns outside "internal channels of communication[,]" and "bullied/intimidated students."[2] (Dkt. #64, ¶¶ 3.12, 4.7.) Defendants fail to acknowledge, however, that Dr. Phillips's allegedly disrespectful speech shared outside "internal channels" was protected by the First Amendment because he was speaking about matters of public concern—a fact Defendants' testimony proves.

At Collin College, administrators considered it disrespectful for Dr. Phillips to speak on matters of public concern in violation of the College's unconstitutional prior

[2] As Defendant O'Quin acknowledged, Dr. Phillips's alleged "bullying" consisted of comments made during an in-class lecture on the history of masking during the pandemics in the United States. (Dep. of Chaelle O'Quin (attached as Exhibit B, "Ex. B, O'Quin Dep.") 83:15-20.) In the Fifth Circuit, the First Amendment protects professors' in-class speech on matters of public concern. *Buchanan v. Alexander*, 919 F.3d 847, 853 (5th Cir. 2019).

restraints—the Code of Ethics and Employee Expression Policy. Specifically, the College testified that one of Dr. Phillips's Facebook posts explaining how immunocompromised individuals could request reasonable accommodations during COVID was disrespectful because he was "bringing up a concern that he had not given his Associate Dean or Dean the opportunity to address." (Dep. of Fed. R. Civ. Pro. 30(b)(6) Designee Mary Barnes-Tilley (attached as Exhibit C, "Ex. C, Barnes-Tilley 30(b)(6) Dep.") 69:11-15). Although the College claims that Dr. Phillips's Facebook post concerned his "personal complaints about the conditions of his employment at the college[,]" (Dkt. #64, ¶3.10 n.5), Dr. Phillips testified that he made his posts in order to give advice to friends who were immunocompromised. (Dep. of Michael Phillips (attached as Exhibit D, "Ex. D, Phillips Dep.") 43:1-24.) As Dr. Phillips testified, "I didn't want friends to die, you know." (Ex. D, Phillips Dep. 43:22-24.)

Defendant Matkin confirmed in testimony that supervisors could use the Code of Ethics to discipline professors (like Drs. Phillips, Burnett, and Jones) for speech on matters of public concern if their supervisor deems the speech disrespectful.[3] (Ex. A, Matkin Dep. 47:4-48:3). Although Dr. Matkin acknowledged that "we all have the right to speak about [matters of public concern] in any venue we choose[,]" he

[3] As summarized by the American Association of University Professors (AAUP) when it announced that Collin College would be added to its list of censured administration on May 16, 2023, "[t]he investigating committee found that the Collin administration's actions involved 'egregious violations' of all three faculty members' academic freedom to speak as citizens and to criticize institutional policies, and, in the case of Phillips, of academic freedom in teaching." Am. Ass'n of Univ. Professors, *Collin College and Emporia State University Added to Censure List* (May 16, 2023), https://www.aaup.org/news/collin-college-and-emporia-state-university-added-censure-list.

flippantly testified that the punishment of professors for protected speech "[s]ometimes . . . end[s] up in a federal lawsuit, I guess." (Ex. A, Matkin Dep. 47:4-48:3).

Moreover, Defendants attempt to evade liability by arguing that Dr. Phillips's social media posts were "predominately" of a private concern. (Dkt. #64, Defs.' Resp. in Opp'n to Pl.'s Mot. for Summ. J. ¶¶ 3.10, 4.7). However, Defendants fail to recognize that "[t]he mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *Lane v. Franks*, 573 U.S. 228, 240 (2014).

Setting aside the legal deficiencies with Defendants' arguments, they also tacitly admit that *some* of Dr. Phillips social media posts were on matters of public concern by arguing that "many" as opposed to "all" of those posts were "predominately" of a private concern. (Dkt. #64, ¶¶ 3.10 n.5, 4.7). But Defendants failed to provide any evidence to support their claim that any post was over private concerns. Dr. Phillips's criticisms of the College's response to COVID were not employment grievances, but rather sincere critiques of his public employer's public health policy positions. Dr. Phillips testified he was trying to bring information about the College's COVID policies to the public's attention. (Ex. D, Phillips Dep. 45:6-22, 63:6-8, 67:20-22, 86:13–87:5.) As Dr. Phillips clearly testified concerning his decision to post about the College's COVID plan, "the public had the right to know what a public institution was doing about COVID safety." (Ex. D, Phillips Dep. 63:6-8.)

Unlike other employment settings, public colleges and universities are "peculiarly the 'marketplace of ideas,'" where even vigorous debate is to be accepted and encouraged. *Healy v. James*, 408 U.S. 169, 180 (1972). Thus, a college professor's right to use his "private social media account as a vehicle for engaging the public in a governmental response to a matter of public concern" is "clearly established." *Jones v. Matkin*, No. 4:21-CV-00733, 2022 WL 3686532, at *11 (E.D. Tex. Aug. 25, 2022) (Mazzant, J.). "A mere element of personal concern . . . does not prevent finding that an employee's speech as a whole includes a matter of public concern." *Buchanan*, 919 F.3d at 853 (cleaned up).

Allowing government employers to use vague policies like the Code of Ethics to punish citizen speech on matters of concern whenever a superior thinks that speech is "disrespectful" would devastate the First Amendment rights of the millions of public employees across the country because those employees would be forced to guess about what their individual supervisor deems disrespectful. Not to mention, the proper analysis is whether such citizen speech causes a real harm such that the public employer's interests in efficient operation outweigh the employee's strong speech rights under *Pickering* and *NTEU*—analyses with which Defendants still refuse to engage. Based upon an application of the correct legal standard, Dr. Phillips is entitled to summary judgment.

II. Dr. Phillips's As-Applied Challenges to Defendants' Policies in Cause of Action Six Require Only That Defendants Applied a Policy in a Way That Violated His Constitutional Rights.

Defendants are incorrect that Dr. Phillips must show animus on the part of each Defendant on his as-applied challenges to the College's unconstitutional policies.

"[T]he First Amendment expressly targets the operation of the laws—i.e., the 'abridg[ement] of speech'"—rather than merely the motives of those who enacted them." *Reed v. Town of Gilbert*, 576 U.S. 155, 167 (2015) (citing U.S. Const. Amend. I). Thus, a government official's direct restriction of First Amendment rights—the focus of Dr. Phillips's as-applied challenges, is a violation distinct from First Amendment retaliation. *See Colson v. Grohman*, 174 F.3d 498, 508–09 (5th Cir. 1999) (contrasting the two distinct First Amendment violations). Indeed, while Dr. Phillips has retaliation claims pending, he has not moved for summary judgment on them. (Dkt. #1, Compl. ¶¶ 160–170.)

Challenging a public employer's policy as applied means the government applied the policy to deprive a public employee of their right to speak on matters of public concern. As Dr. Phillips explains in his Motion for Partial Summary Judgment, Defendants applied the College's policies requiring faculty to "bring credit to the College District," always exhibit "dignity and respect," "exercise appropriate restraint," and "seek revision in a judicious and appropriate manner" to abridge his right to speak on matters of public concern. (Dkt. #58, Pl.'s Mot. for Summ. J. at 12–15).

Because the College's policies were applied to Dr. Phillips through the various disciplinary forms and his eventual termination, the College's policies operated in a way that violated Dr. Phillips's ability to speak about matters of public concern such as COVID-19 and race relations. That is unconstitutional, regardless of Defendants' motives. *See Reed*, 576 U.S. at 167.

III. Defendant Matkin Is a Final Policymaker Under Cause of Action Seven.

Defendants attack Dr. Phillips's *Monell* claim in Cause of Action Seven by arguing that Defendant Matkin is not the final policymaker for employment decisions. Not only do Defendants lack any evidence to support this claim, but the College's own Trustee refutes the College's argument. "The Fifth Circuit has found that a city impliedly delegated its policymaking authority to [a chief executive] where 'the [chief executive] [was] the sole official responsible for internal police policy' and was authorized to speak on the city's behalf through its General Orders." *Mote v. Walthall*, No. 4:16-CV-00203, 2017 WL 2651705, at *11 (E.D. Tex. June 20, 2017), *aff'd,* 902 F.3d 500 (5th Cir. 2018). There is no dispute here: Defendant Board of Trustees has delegated final policymaking authority to Defendant Matkin for employment decisions. (Ex. A, Matkin Dep. 86:16-87:9, Ex. 13; Ex. C, Barnes-Tilley 30(b)(6) Dep. 16:5-14.) In fact, Trustee Stacy Donald testified that the Board of Trustees could not reconsider the terminations of Drs. Jones and Heaslip because "that was not something that was within the board's purview to vote on." (Dep. of Stacy Donald (attached as Exhibit E, "Ex. E, Donald Dep.") 17:18-18-15.) Based on the evidence, Defendant Matkin clearly possesses final policymaking authority in the area of employment decisions.

CONCLUSION

Dr. Phillips has long fought to improve his community by spending his time advocating for matters of public concern, including working to improve his own public college's culture of free speech. For raising his concerns outside of the College's

approved channels, the College labeled him "disrespectful" and terminated him. For the foregoing reasons, this Court should grant Plaintiff's Motion for Partial Summary Judgment on Causes of Action Three, Four, Five, Six, and Seven.

Dated: May 26, 2023

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Plaintiff's counsel confirms that a true and correct copy of the foregoing was served via the Court's electronic filing system on this day, May 26, 2023. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated below and parties may access this filing through the Court's electronic filing system.

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