

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICHOLAS K. MERIWETHER, :
 :
 Plaintiff, : CASE NO. 1:18-cv-00753
 :
 v. : JUDGE DLOTT
 :
 THE TRUSTEES OF SHAWNEE : MAGISTRATE JUDGE LITKOVITZ
 STATE UNIVERSITY, et al., :
 :
 Defendants. :
 :

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. Introduction and Summary of Argument.

Plaintiff Nicholas Meriwether's Response in Opposition to the Defendant's Motion to Dismiss (Doc. #45), fails to cite to case law to support his claims based on the facts alleged in his First Amended Complaint. The Response(s) (Docs. # 45 and 46)¹ cite many general propositions of law, and make many conclusory allegations about Professor Meriwether's rights, without discussing the specifics of the actions in this case. Overall, the allegations made by Professor Meriwether show that the employees and officers of Shawnee State University took a measured, respectful and thoughtful approach. When a student filed a complaint about treatment in Professor Meriwether's classroom, the claim was investigated, a step the University's employees were required to take. Doc. #34, Amend. Comp. ¶ 185, Ex. 9 (letter), ¶¶ 189-91. Based on the clear and undisputed findings of that investigation, the University issued a written warning to Professor Meriwether. *See id.* ¶¶ 196 – 207; Ex. 13, pp. 3- 4; ¶ 233, Ex. 14; Exhs. 16, 17, 19 and 20. Professor Meriwether then had an ability to appeal that written warning to the Provost and the University President and, when the written warning was upheld, had an opportunity to file a grievance through his faculty union. *See id.*, Ex. 22. In denying the grievance, the President's designee, summarized the matter in this way:

[T]he warning was grounded on differential treatment based on transgender status. It is worth noting that Dr. Meriwether pointed out that in the initial classroom encounter discussed above, he was unaware that the student identified as a female. He also credibly stated that on a different occasion, in the course of a classroom

¹ On May 9, 2019, the Court issued an Opinion and Order granting the Intervenor's Motion to Intervene, lifting the Court's stay on briefing, and directing the Plaintiff to file a response to the Defendants' Motion to Dismiss (Doc. #36). (Doc. #43). The next day, the Intervenor's filed a Motion to Dismiss. (Doc. #44). Plaintiff filed a response to the Defendants' Motion to Dismiss on May 30, 2019, (Doc. #45), and a response to the Intervenor's Motion to Dismiss on May 31, 2019 (Doc. #46).

discussion, he mistakenly referred to the student by her non-preferred gender identifier. The written warning issued to Dr. Meriwether is not based upon these excusable, innocent mistakes, which were not a violation of policy.

Notably, however, Meriwether acknowledged that he refused to stop singling out the student because of her gender identity after receiving notice of the policy's requirements and options to accommodate his religious beliefs. The University espouses principles of non-discrimination. Board of Trustees Policy No. 5.01 prohibits discrimination based on race, color, genetic information, religion, age, disability, national origin, ancestry, sex, pregnancy, sexual orientation, gender identity, veteran status and military status. Procedure No. 5.01:2, which derives from Policy No. 5.01, provides in Section 18.3 that, "Negative or adverse treatment based on ... gender identity ... denies or limits the individual's ability to obtain the benefits of Shawnee State's programs or activities." Meriwether's differential treatment of the student was a violation of SSU's anti-discrimination policy.

... Dr. Meriwether was not required to espouse a belief with which he disagreed. He was not forced to give up a pedagogical tool; in fact, Dean Milliken provided alternatives to the use of his pedagogical tool that would be consistent with Policy 5.01, but Meriwether rejected them.

(Doc. #34-27, First Amended Comp. [Redacted], Ex. 27, p. 13 of 44, PAGEID #1799).

Meriwether's voluminous filings attached to the First Amended Complaint demonstrate a lengthy, thoughtful process used by the University defendants.

In contrast to the reasoned approach of the University defendants in this case, Professor Meriwether simply makes the conclusory argument that the proposals of University officials to simply use only first names or last names of the students in his classroom were "unreasonable" and "impossible." (Doc. #45, p. 19 of 20, PAGEID # 2023). This hyperbole illustrates Meriwether's misguided zeal to elevate a disagreement about how a Professor can address students in a classroom into a Constitutional issue. Meriwether's conclusory arguments also ignore an obvious point. It is abundantly clear from the many documents attached to the

Amended Complaint that Meriwether could have taught the substance of his course and communicated his views on differing viewpoints on philosophy in a manner that was respectful of his personal religious and political beliefs, all without singling out the transgender student in his classroom. That is not what occurred. The lengthy process the attachments to the Amended Complaint show, an informal discussion with the Dean, a formal Title IX investigation, an appeal to the Provost and University President, followed by a grievance with union representation, demonstrates that Meriwether refused to be reasonable and insisted on actions that discriminated against the transgender student in his classroom.

The Response(s) recognize none of this and generally fail to discuss the specific factual circumstances of this case, and the measured and appropriate steps that the individually-named University employees and officers took during each step in this process. Throughout the Response(s), Meriwether makes the far-fetched argument that his identification of students was “related to teaching” merely because it happened in a classroom. However, requiring Meriwether to tweak the way he referred to students in class did not “imperil academic freedom.” *See, e.g., Gorum v. Sessoms*, 561 F.3d 179, 186 (3rd Cir. 2009). And Meriwether fares no better with his argument that his “speech” was on a matter of public concern. The only “public” who had a “concern” about the words Meriwether used were the students sitting in that classroom, and Meriwether insisted on ignoring the University’s non-discrimination policy, and targeting a transgender student. Moreover, it is not plausible that there was a “message” in the honorifics used by Meriwether to anyone except Meriwether. Instead, the Response(s) continue to speak in generalities and cite to cases that primarily do not involve public employees or public university faculty or, in the few cases cited that do involve university faculty, arise out of facts where a faculty member was not renewed or terminated from employment or denied tenure –

facts clearly distinguishable from this case where no such adverse actions were taken. The Response(s), throughout their analysis, ignore the clearly distinguishing factors of nearly every case they cite as compared to Professor Meriwether's case.

Professor Meriwether's own allegations also make clear that much of this controversy was created by his own decision to treat one student differently than others in his classroom. He chose not to use the first names only or last names only of his students in the classroom, an alternative option made available to him. Professor Meriwether's challenges to these directives have been triggered by his own refusal to use the first names of the students in the classroom. He also challenges the directive to address that same transgender student using a female title ("Miss" or "Ms.") and pronouns ("she/her") or by not using such pronouns or titles to address any of the students in the class. Meriwether objects, citing his strongly-held personal, philosophical and/or religious beliefs, and contending the University's investigation and directive lends "credence to cultural ideas Dr. Meriwether does not share or wish to advance." *Doc. #34, Amend. Comp. ¶ 4*. Despite Professor Meriwether's contentions, the University went to great lengths to offer alternatives to him that balanced his personal preferences with the rights of a student to be treated with the same respect as her peers and to not be singled-out and treated differently on the basis of her sex.

The Response(s) avoid the simple, and meritless, nature of Meriwether's claims. The Court should reject Meriwether's contention that this case involves the "robust tradition of academic freedom" and comparisons to faculty speech about the government or controversial works of literature. Meriwether was not teaching anything about the nature of gender; he was calling on students. Nor was he compelled to "mouth support" for any viewpoint or express a message of any kind. Nothing in the Amended Complaint suggests that gender issues were part

of his curriculum; his claim is about a method of teaching that he could have easily changed to treat the transgender student in his classroom in an equal and non-discriminatory manner; he refused and consequently received a written warning.

The Response(s) drop the two state law claims (Count 8 and Count 9), however, the paucity of analysis in the Response(s) demonstrate that the remaining claims and this entire case should be dismissed as a matter of law.

II. Law & Argument.

A. Meriwether's Response to the Defendants' Motion to Dismiss the Amended Complaint fails to identify a plausible claim for a violation of any of the constitutional rights he identifies, and all of his claims should be dismissed.

The Defendants' motion to dismiss focuses heavily on *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), and the Response(s) fail to demonstrate that *Garcetti* should not control almost all of Professor Meriwether's claims. It is clear that this lawsuit challenges the simple act of Professor Meriwether's conduct in his classroom, not the broad and general propositions the Response(s) attempt to use to gloss over the simple nature of this case. As discussed in the motion to dismiss, whether Meriwether's "speech" is protected by the First Amendment is a question of law for the Court. *See Fox v. Traverse City Area Pub. Schs. Bd. of Edn.*, 605 F.3d 345, 350-51 (6th Cir. 2010), and therefore makes it appropriate for review by the Court in the Rule 12 motion(s) filed.

1. Meriwether's "First Cause of Action" should be dismissed because he did not engage in protected speech and he did not suffer an adverse employment action.

A plain reading of the First Amended Complaint indicates that the only interaction that is the subject of the University's policies is Professor Meriwether's refusal to respect the "choice of titles and pronouns" of one student in his classroom. *See Doc. #34*, ¶ 310. The simple act of

using a “title” and/or “pronoun” or not when addressing students is part of Meriwether’s responsibilities as a Professor at the University, and not a means or forum for him to express his personal beliefs. Importantly, Professor Meriwether’s “speech” here is as a public employee, and not “as a citizen” in the language of *Connick v. Myers*, 461 U.S. 138, 146-47 (1983). It is well-established that a government employee’s speech is not protected where it is made “pursuant to his duties.” *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). As is made clear in the pleadings, Professor Meriwether was not instructed to acknowledge the student by any particular pronoun, but instead instructed not to treat the student differently than others in the class. Proper conduct towards students is an employment responsibility for faculty. The *Garcetti* Court established that the restrictions the Constitution places upon the government in its capacity as lawmaker and sovereign are not the same restrictions that it places upon the government as an employer. Professor Meriwether cannot satisfy this *Garcetti* requirement because the simple act of the use of titles (“Ms.” or “Miss”) and pronouns (“she/her”) relate to *his position* as a classroom instructor for the University addressing students of the University in that capacity and, therefore, are not protected by the First Amendment as a matter of well-established case law.

Meriwether’s Response in Opposition makes only the most cursory response to the cases cited by the Defendants, which detail and support the proposition that the First Amendment does not protect a teacher’s in-class conduct because during class the teacher acts as the educational institution’s proxy; and the education institution, not the individual teacher, has the final say in how to teach students. In addition to the Supreme Court’s pronouncements in *Garcetti*, the Sixth Circuit Court of Appeals has held that teaching “methods” are not entitled to First Amendment protections in the way that academic arguments may be protected. *See Frieder v. Morehead State Univ.*, 770 F.3d 428, 430 (6th Cir. 2014). Moreover, the Sixth Circuit has long recognized

that the First Amendment does not make a university professor “a sovereign unto himself”, and the university may take action against a professor whose pedagogical attitude and teaching methods do not conform to institutional standards. *See Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989). *See also Connick*, 461 U.S. at 154 (holding that the First Amendment does not require an employer to “tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships”). *See Brown v. Armenti*, 247 F.3d 69, 74-75 (3rd Cir. 2001) (holding that a public university professor does not have a First Amendment right to expression via schools’ grade assignment procedures, because grading is pedagogic: the assignment of the grade is subsumed under the university’s freedom to determine how a course is to be taught). The institution, not the teacher, has control over the “four essential freedoms” that comprise academic freedom: the right of an institution to choose “who may teach, who may be taught, how it shall be taught, and who may be admitted to study.” *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 492 (3d Cir. 1998) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1979)).

The Response only cites general language from *Garcetti* about a possible exception for academic speech; this does not apply in this case, and does not limit the University’s authority based on the allegations. Neither does the decision of the Fourth Circuit in *Adams v. Trustees of Univ. of N.C. Wilmington*, 640 F.3d 550, 564-65 (4th Cir. 2011), have any relevance to this case, since that involved the denial of tenure of a faculty member. In addition, the “speech” in that case involved publications by the Plaintiff faculty member, such as “Welcome to the Ivory Tower of Babel” and “Indoctri-Nation: How universities are destroying America.” *Adams*, 640 F.3d at 554. No such academic publications, or academic speech outside the classroom is at issue in this case, and those concerns are not implicated by Professor Meriwether’s First

Amended Complaint.

More broadly, Meriwether's alleged "speech" does not relate to the rights of a public employee to "participate in public affairs" under long established case law. *See Connick v. Meyers*, 461 U.S. 138, 144-45 (1983). The *Garcetti* Court distinguished the unprotected speech related to a public employee's duties, from the classic example of protected speech of a letter to a newspaper by a school teacher in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), "whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day." *Garcetti*, 547 U.S. at 422.² The First Amendment does not give public employees "a right to perform their jobs however they see fit." *Id.*, 547 U.S. at 422; nor does the First Amendment "constitutionalize the employee grievance." *Garcetti*, 547 U.S. at 420, quoting *Connick*, 461 U.S. at 154. Meriwether's Amended Complaint is based upon specific classroom interactions, the use or nonuse of titles and pronouns to address a student, which the University has not only the right, but a responsibility to manage under federal and state law, as well as its own policies and rules.

The Defendants did not "punish" Meriwether for his speech. (Doc. #45, p.15); the Response ignores the case law that his "written warning" is simply not an "adverse employment action" under *Savage*, and thus it eliminates another element of his First Amendment retaliation claim. *See Savage v. Gee*, 665 F.3d 732, 738 (6th Cir. 2012); *see also Poppy v. City of*

² As referenced in the Motion to Dismiss the First Amended Complaint, it is not necessary to reach the question of so-called *Pickering* balancing under *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *see also Gillis v. Miller*, 845 F.3d 677 (6th Cir. 2017) ("The *Pickering* balancing test is used 'to determine if the employee's free speech interests outweigh the efficiency interests of the government as employer'" quoting *Scarborough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006) and *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000), at this juncture of the case, as Defendants assert that all of Meriwether's claims should be dismissed without even reaching *Pickering* analysis, but the Defendants do not waive their right to assert this argument at another time.

Willoughby Hills, 96 Fed. Appx. 292, 295 (6th Cir. 2004) (review of employee time sheets, inspection of employee's records did not adversely affect employment or deter plaintiff from exercising her First Amendment rights); *Dennison v. Murray State Univ.*, 465 F. Supp. 2d 733, 747 (W.D. Ky. 2006) (decrease in office size and "antiquated" telephone not a materially adverse employment action in First Amendment retaliation case). *De minimis* actions, including a state agency's review of a plaintiff's confidential files, do not constitute adverse actions that would deter a person of ordinary firmness from engaging in protected speech. See *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580 (6th Cir. 2012). Neither does "an employer's commencement of an investigation, [or] . . . criticisms, accusations, threats, or 'bad mouthing'" constitute adverse actions in First Amendment retaliation cases. *Magley v. Wright*, 2001 U.S. Dist. LEXIS 4612 at *19 (W.D. Mich. Mar. 30, 2001) (citations omitted); *Hornbeak-Denton v. Myers*, 361 Fed. Appx. 684, 688 (6th Cir. 2010)(in First Amendment retaliation case, finding that "[m]ere threats . . . are generally not sufficient to satisfy the adverse action requirement") (quoting *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 182 (6th Cir. 2004)) (alterations in original).

Finally, Professor Meriwether's self-serving allegation that he has ceased all discussions regarding gender issues and transgenderism is insufficient to state a claim upon which relief can be granted. Despite the voluminous attachments to his filings, no proposed or changed syllabus is attached to the Amended Complaint. Nor are there any allegations that Meriwether discussed these issues before the warning. If true, neither would that state a claim, since the course content of the syllabus is within the discretion of the University based on *Frieder v. Morehead State Univ.*, 770 F.3d 428, 430 (6th Cir. 2014) and *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989), as discussed above.

Because Meriwether's "speech" at issue was pursuant to his responsibilities as University

faculty, and he did not suffer an adverse employment action, his First Amendment retaliation claim should be dismissed.

2. Meriwether’s “Second Cause of Action” should be dismissed because the Defendants did not engage in “content” or “viewpoint discrimination”.

The University Defendants did not engage in “content” or “viewpoint discrimination”, contrary to the unsupported arguments in the Response(s). (Doc. #45, p. 15, PAGEID #2019). In response to the Motion to Dismiss this second claim, the Response cites to *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), a case involving a criminal ordinance and the prosecution of a citizen for burning a cross. It does not involve a public employee in the workplace, and again ignores the bright line the U.S. Supreme Court has drawn between the government regulating the speech of private citizens as a sovereign, and the government managing the conduct of its employees. As discussed above, this is “speech” about how to address students, which is not protected under *Garcetti*.

The Amended Complaint only generally alleges the policies are overbroad, that is, that they prohibit a substantial amount of protected speech, *see, e.g., Leonardson v City of E. Lansing*, 89 F.2d 190, 195 (6th Cir. 1990). The Response(s), as with the Amended Complaint, fail identify any protected speech that is captured by these policies, since it focuses only on Meriwether’s classroom interactions. As discussed in the motion to dismiss, this overbreadth challenge fails to identify how the policy is overbroad on its face, and simply repeats the same talking points, without examples and analysis. *See, e.g., Speet v. Schuette*, 726 F.3d 867, 872-73 (6th Cir. 2013); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987); *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). In this context “substantial” overbreadth means that the policy prohibits a “substantial amount of protected speech both in an absolute sense and relative to [the policy’s] plainly legitimate sweep[.]” *Speet, supra, quoting*

Carey v. Wolnitzek, 614 F.3d 189, 208 (6th Cir. 2010). Professor Meriwether relies only on his own misunderstood interpretation of the First Amendment, and fails to state an overbreadth claim.

Professor Meriwether also only generally alleges that the University's policies are unconstitutionally vague. *See Leonardson, supra*; *see also Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1183-84 (6th Cir. 1995). Meriwether again makes the conclusory argument that the policies grant University officials "unbridled discretion", (*Doc. #45*, p. 17, PAGEID# 2021). Professor Meriwether's filings and the voluminous attachments, however, show a lengthy process. He received guidance multiple times in how to address the student and given multiple options that would treat the student equally, and even though he understood the guidance he was given, he failed to follow those straightforward directives. As discussed in the Defendants' Motion to Dismiss the Amended Complaint, the University's ultimate decision to uphold the written warning was not imposed because of any inadvertent slip-up or mistake on Professor Meriwether's part during one classroom interaction, but because he repeatedly and unfairly singled out the student in a discriminatory manner. The "speech" in this instance occurred during Meriwether's class, during a course taught pursuant to University curriculum requirements, in a University classroom, and by a Professor who was compensated by the University and has been an employee of the University for over 20 years. Meriwether has not plausibly alleged that he was ever subject to potential discipline for conduct that occurred outside the University, and even if he did, a nexus could exist that would allow for the University to reasonably direct him to cease discriminatory conduct towards a student. *See, e.g., Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006).

Professor Meriwether's lawsuit is a similar attempt to challenge conduct-related policies,

prohibiting discriminatory conduct and harassing conduct, under a superficial First Amendment analysis. The same arguments made here could be made regarding policies on equal employment opportunities, non-discrimination and discriminatory harassment for every employer in the United States who complies with Title IX for institutions of higher education, and Title VII of the Civil Rights Act of 1964, and various other federal and state non-discrimination laws. The vagueness and overbreadth doctrines are prudential doctrines, which are only relied upon by courts to strike down statutes (or policies) “as a last resort.” *See Staley v. Jones*, 239 F.3d 769, 776-77 (6th Cir. 2001)(quoting *Broadrick v. U.S.*, 413 U.S. 601, 613 (1973)). “Sustaining a facial attack to the constitutionality of a state law ... is momentous and consequential. It is an ‘exceptional remedy.’” *Speet, supra, quoting Carey v Wolnitzek*, 614 F.3d 189, 201 (6th Cir. 2010). Meriwether’s difference of opinion with the University’s administration does not a constitutional claim make.

3. Meriwether’s Third claim for “compelled speech” also should be dismissed.

In his third cause of action, Meriwether does not state a claim for “compelled speech” for similar reasons cited in the arguments above, based above all on *Garcetti*. The Response merely cites to cases for general propositions that are not analogous to the facts alleged, or records attached to the Amended Complaint. Again, on this claim of “compelled speech”, Professor Meriwether’s argument is particularly weak, since he could have used all of the student’s first names, and he was offered an alternative to simply use last names, when the Dean on multiple occasions said he could simply stop using all articles/titles (i.e. “Mr.” or “Ms.”) when he addressed students in his class, and he rejected this option. *See Doc. #34, Amend. Comp.* ¶¶ 153-55, and Exhibit 17, Dean’s Letter of May 29, 2018. The Response(s) simply make the conclusory argument that these choices were “unreasonable” without any meaningful analysis or

case law to support the position. This claim should be dismissed.

4. Meriwether's Fourth claim for violation of his rights to freely exercise his religion should be dismissed.

The Response in Opposition also fails to discuss the specific factual allegations in this case, again reverting to general propositions of law instead of specific analysis. As discussed above in regard to the First Amendment retaliation claims, the classroom is not Professor Meriwether's personal forum to express his own political and religious ideas, it is a forum that is the responsibility of the University to maintain and he is an employee of the University. The Response on this point (although made in a separate brief) again cites to general propositions of law without finding case law that applied these principles in a similar context to a public employee performing his duties. (Doc. #46, pp. 13-15). These policies are neutral and of general applicability; only a law that is not neutral or of general applicability "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest." See *Doe v. Cong. of the United States*, 891 F.3d 578, 591 (6th Cir. 2018) (free exercise challenge asserting that U.S. currency use of the motto "In God We Trust" motto promotes Christian monotheistic message), quoting *Church of the Lukumi Bablu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993). The nondiscrimination policies challenged by this lawsuit are part of the University's obligations under Title IX and Title VII, and fall into this category of neutral rules of general applicability.

The Response(s) simply call the Defendants actions "hostile" without engaging in any meaningful analysis supported by precedent. The Supreme Court has held that "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause[.]" *Doe*, 891 F.3d at 591, quoting *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015)(citing *Emp't Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-82

(1990)). The nondiscrimination policy challenged here is neutral, based on federal and state laws prohibiting discrimination, and does not fall within precedents requiring a “compelling” governmental interest or that need be “narrowly tailored.” A law, or the nondiscrimination policies challenged in this case, is not neutral “if the object of [the] law is to infringe upon or restrict practices because of their religious motivation,” or if the “purpose of [the] law is the suppression of religion or religious conduct.” *Doe*, 891 F.3d at 591, quoting *Lukumi*, 508 U.S. at 533. Meriwether does not, and cannot, point to any language in these policies that suppresses the Christian religion or religious practices.

Neither does the Amended Complaint state a claim for some “as applied” challenge to the implementation of the policies in this case. His Amended Complaint states that he was first notified by his Union of the non-discrimination policy, and its applicability in the transgender context, back in August 2016. *See Doc. #34*, Amend. Comp. ¶¶ 106-07. He received written guidance from the Dean, had a fair and undisputed investigation, and received a written warning that he could and did challenge through his union. The policy is neutral on its face, and, given the straightforward, undisputed nature of the conduct he admits, his attempts to cast this as prejudiced against his Christian beliefs ignores the neutral, general applicability of the policy. That same general directive was enforced throughout.

5. Meriwether’s Fifth claim for “unconstitutional conditions” should be dismissed.

The Response in Opposition appears to cite the U.S. Supreme Court’s decisions in *Perry v. Sinderman*, 408 U.S. 593, 597 (1972), and *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) for broad, general propositions of First Amendment protections in support of the “unconstitutional conditions” argument asserted in the First Amended Complaint. The Response does not respond to the arguments in the motion to dismiss that Professor Meriwether has lost no

salary and had no change in title or responsibilities as a tenured professor as a result of the “written warning” he received in 2018. Since this “Fifth Cause of Action” simply restates Professor Meriwether’s First Amendment retaliation arguments, and the perfunctory analysis in the Response in Opposition only addresses those issues in the most superficial way, this claim should be dismissed as well.

6. Meriwether’s Sixth claim based on Due Process challenges to the University’s non-discrimination policies as “overbroad” or “vague” should be dismissed.

Professor Meriwether does not have a claim for due process violations, and the Response(s) fail to identify any claim he can pursue on this point. Also without merit is Meriwether’s overlapping Sixth “Cause of Action” that the non-discrimination policies of the University are unconstitutionally overbroad or vague and “encompass a substantial amount of constitutionally protected speech” and that his “expression regarding gender identity is protected by the First Amendment.” *See Doc. #34*, Amend. Comp. ¶¶ 350-51. The simple act of the use of a title or a pronoun during a class discussion is not First Amendment protected speech, based on *Garcetti, supra*. As discussed above in III.B.2., in determining whether a policy is unconstitutionally overbroad, the Court first looks at whether “the regulation reaches a substantial amount of constitutionally protected speech.” *Leonardson v City of E. Lansing*, 89 F.2d 190, 195 (6th Cir. 1990). Meriwether’s argument fails on this point, as he only points to his own, unprotected speech to support his claims. Only a policy that is “substantially overbroad” fails on its face. *See Speet v. Schuette*, 726 F.3d 867, 872-73 (6th Cir. 2013), *citing City of Houston, Tex. v. Hill*, 482 U.S. 451, 458 (1987); *New York v. Ferber*, 458 U.S. 747, 769 (1982); *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *Carey v. Wolnitzek*, 614 F.3d 189, 208 (6th Cir. 2010). Since Meriwether’s lawsuit relies only on his own misunderstood interpretation of the First Amendment, he fails to state a claim that the policy is overbroad.

As in the overbreadth and vagueness analysis above, there is no due process claim that the University's policies are unconstitutionally vague. *See Leonardson, supra; see also Dambrot v. Cent. Michigan Univ.*, 55 F.3d 1177, 1183-84 (6th Cir. 1995). The conclusory argument that the policies are "unconstitutionally vague because they grant University officials unbridled discretion in deciding what constitutes 'gender identity' and 'gender identity discrimination'", *Doc. #34*, Comp. ¶ 354, is belied by the attachments to Meriwether's filing. He was notified multiple times on nondiscriminatory ways he could address the student, and he chose to ignore those notifications. This is not a vagueness case where a Plaintiff can allege the policies either (1) deny fair notice of the standard of conduct applicable; or (2) constitute "an unrestricted delegation of power," inviting "arbitrary, discriminatory and overzealous enforcement." *See, e.g., Leonardson*, 896 F.2d at 196, quoting *Washington Mobilization Committee v. Cullinane*, 566 F.2d 107, (D.C. Cir. 1977). Meriwether was notified by his Union of these standards in August 2016, and had multiple interactions with his Dean and Department Chair on the issue. After a formal investigation, he was given only a written warning, which is not even an adverse action under well-established First Amendment case law, and he was afforded the opportunity to challenge the action through his Union and the Union's grievance process, which he began but abandoned for unknown reasons.

7. Meriwether's Seventh claim based on the Equal Protection clause should be dismissed.

Professor Meriwether's Response(s) also fail to make any meaningful response to the Defendants' Motion to Dismiss his Equal Protection claim, other than to cite general propositions from *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985), and *Plyler v. Doe*, 457 U.S. 202 (1987). The latter case involved a challenge to the state of Texas denying a public education to undocumented school age children, while the former case involved zoning

regulations that arbitrarily excluded the developmentally disabled residents of group homes from an entire city in Texas. The Response(s) (Docs. #45 and 46) contain almost no other analysis of Professor Meriwether's equal protection claims, and should arguably be treated as waived. On the merits, as discussed in the Motion to Dismiss, Professor Meriwether's "Seventh Cause of Action" simply misunderstands the Equal Protection clause. The Equal Protection Clause "protects against arbitrary classifications, and requires that similarly situated persons be treated equally." *Jackson v. Jamrog*, 411 F.3d 615, 618 (6th Cir. 2005). Although the lawsuit generally alleges that Professor Meriwether is "similarly situated to other professors at the University", he alleges disparate treatment based upon his refusal to "endorse" concepts of "gender identity." *Doc. #34*, ¶¶ 358-59. His claim essentially restates his varied First Amendment claims which, as has been discussed above, are not based upon "speech" protected by the First Amendment. Essentially, the Amended Complaint alleges an archaic "class of one" theory of the Equal Protection Clause that has been dismissed by the U.S. Supreme Court. *See Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 598 (2008) ("[T]he class of one theory of equal protection does not apply in the public employment context."). Meriwether's claim is based on his conduct in the classroom, and that is his only argument for a denial of equal protection; it is not based upon any recognized theory of an "arbitrary classification" under the Equal Protection clause.

Because he has failed to respond with any meaningful analysis of why his equal protection claim should go forward, the claim should be dismissed.

B. The Court should dismiss the individual Board of Trustees members, and the Department Chair who is not a "supervisor."

Professor Meriwether dropped Counts 8 and 9, his state law claims, and the analysis above shows that all of his remaining constitutional claims should be dismissed. Despite the voluminous nature of the filings, and the convoluted, overlapping and redundant discussion of

inapplicable cases, Professor Meriwether has failed to make out any constitutional claims in this case. Instead, the voluminous filings demonstrate the thoughtful and respectful approach of the University Defendants in responding to Professor Meriwether's arguments. Professor Meriwether would not follow the informal guidance of his Dean, he would not accept the findings of a Title IX investigation finding that he had singled out a transgender student in his classroom, he would not accept the denial of his appeal by the Provost and the President's office, and would not accept the results of the grievance he filed through his union. He had ample "due process" and the lengthy filings show a deliberate and respectful process by the University Defendants. This simple matter should be dismissed.

The Motion to Dismiss the Amended Complaint (Doc. #36), also contended that the individual members of the Board of Trustees and Department Chair Pauley should be dismissed, and the Response makes no meaningful rejoinder to these claims. The Response simply refers to *Ex Parte Young*, without explaining why the official capacity claims against the President, Provost, Dean, and Title IX officers cannot provide him satisfactory injunctive relief. Again, Professor Meriwether asserts no fact, allegation, or even suspicion that any of the members of the Board of Trustees were involved in any of the actions at the core of his constitutional challenges, but instead makes only conclusory allegations that fail to state a plausible claim for relief. The Amended Complaint only generally alleges that the Trustees have "final policymaking authority for rules and regulations that govern the University" and that the Trustees "have not modified the policies challenged herein." See Doc. #34, Amend. Comp. ¶¶ 13 – 18. He does not allege any specific acts that the Trustees had anything to do with developing or instituting the policies he challenges, or that they were involved in communicating with him or carrying out the action he challenges under the University's policies. Having alleged

no identifiable facts against the Trustees at all, he has failed to adequately plead a claim against them, and the Court should dismiss them as parties. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Lawsuits against state officials in their official capacities are the same as suits against the state itself. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989); *see also Hall v. Med. Coll. Of Ohio*, 742 F.2d 299, 307 (6th Cir. 1984). These defendants should be dismissed.

The Response makes no mention of the argument regarding Department Chair Dr. Jennifer Pauley, that she is not a supervisor charged with implementing University policy, and she should be dismissed. The collective bargaining agreement attached to Professor Meriwether's own Amended Complaint establishes that Pauley, as a "Department Chairperson", is a position in the same faculty bargaining unit that Professor Meriwether is a member of. Doc. #34, Ex. 4, Art. 5, § 1.A.3, p. 11. The Department Chair is not an administrator of University policy, and cannot impose discipline or materially affect his terms and conditions of employment, any more so than other faculty can under academia's shared governance system. *See id.*, Ex. 4, Art. 18.

CONCLUSION

For the foregoing reasons, Defendants submit that this Motion to Dismiss is well-taken and respectfully request that the Court dismiss Plaintiff's First Amended Complaint, and this lawsuit, in its entirety as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2019, a true and accurate copy of the foregoing *Defendants' Reply Brief in Support of Motion to Dismiss Plaintiff's First Amended Complaint* was electronically filed. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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