UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NICHOLAS K. MERIWETHER, Plaintiff, vs. THE TRUSTEES OF SHAWNEE STATE UNIVERSITY, ET AL. Defendants and JANE DOE and SEXUALITY AND GENDER ACCEPTANCE, Defendant-Intervenors.	:	Case No. 1:18-cv-753 Judge Susan J. Dlott Magistrate Judge Karen L. Litkovitz

DEFENDANT-INTERVENORS JANE DOE AND SEXUALITY AND GENDER ACCEPTANCE'S REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Jennifer L. Branch #0038893
Gerhardstein & Branch Co. LPA
441 Vine Street, Suite 3400
Cincinnati, OH 45202
(513) 621-9100 (tel)
(513) 345-5543 (fax)
Jbranch@gbfirm.com

Shannon P. Minter (admitted *pro hac vice*)
Asaf Orr (admitted *pro hac vice*)
Christopher F. Stoll (admitted *pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, California 94102
(415) 392-6257
sminter@nclrights.org
aorr@nclrights.org
cstoll@nclrights.org

Adam G. Unikowsky (admitted *pro hac vice*)
Michael E. Stewart
Jennifer J. Yun
JENNER & BLOCK LLP
1099 New York Avenue, NW #900
Washington, DC 20001
(202) 639-6000 (tel)
(202) 639-6066 (fax)
aunikowsky@jenner.com

ARGUMENT

I. Plaintiff's Free Speech Claim Fails As A Matter Of Law.

A. Plaintiff's Classroom Speech Is Not Subject To First Amendment Protection.

Plaintiff does not dispute that, under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the speech of a public employee in the course of his assigned work—such as Plaintiff's speech here—ordinarily enjoys no First Amendment protection. Pl. Resp., Doc. 46, at PageID 2036-37 & n.2. Instead, Plaintiff argues that this case is different because *Garcetti* did not "decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425.

That argument is foreclosed by Sixth Circuit precedent. As the Sixth Circuit has explained, "*Garcetti*'s caveat" concerned "the applicability of the decision to 'academic freedom in public colleges and universities.'" *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 343-44 (6th Cir. 2010) (citation omitted). And "[i]t is *the educational institution* that has a right to academic freedom, *not the individual teacher*." *Id.* at 344 (emphasis added) (quotation marks omitted). Thus, even "in the university arena," a "teacher's invocation of academic freedom does not warrant judicial intrusion upon an educational institution's decisions." *Id.* Because any university-specific exception to *Garcetti* thus could not apply here—and Plaintiff does not dispute that *Garcetti* would bar his claim absent such an exception—Plaintiff's claim necessarily fails.

Plaintiff argues that he is asserting "his own free speech rights as a professor," not a "First Amendment academic freedom claim." Pl. Resp., Doc. 46, at PageID 2037. But to the extent *Garcetti* leaves open the possibility that professors enjoy First Amendment rights that are unavailable to ordinary public employees, the only possible basis for such a heightened right is academic freedom. *See Garcetti*, 547 U.S. at 425 (addressing the decision's potential

"ramifications for academic freedom"); *see also id.* at 438 (Souter, J., dissenting) ("I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities."). And the Sixth Circuit has squarely held that "[t]o the extent the Constitution recognizes any right of 'academic freedom' above and beyond the First Amendment rights to which every citizen is entitled, the right inheres in the University, not in individual professors." *Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005) (quotation marks omitted). In so holding, the Sixth Circuit made clear that individual professors do not enjoy a special protection by virtue of their academic roles "above and beyond the First Amendment rights to which every citizen is entitled." *Id.* (quotation marks omitted). Thus, if Plaintiff really is asserting "his own free speech rights" and is not asserting any special prerogatives associated with academic freedom, his claim is no different from a claim by a Shawnee secretary or custodian who objects to Shawnee's nondiscrimination policy. And just as *Garcetti* would bar the claim of any such employee, *Garcetti* bars Plaintiff's claim. *See Johnson-Kurek*, 423 F.3d at 595 ("The freedom of a university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.").

Plaintiff's claim that "[n]umerous circuits have validated his position" on the *Garcetti* question, Pl. Resp., Doc. 46, at PageID 2038, appears to refer to two decisions by the Fourth and Ninth Circuits. Neither helps Plaintiff here. First, the Fourth Circuit simply held *Garcetti* inapplicable "under the facts of this case" because the plaintiff's speech "was intended for and directed at a national or international audience on issues of public importance unrelated to any of [his] assigned teaching duties." *Adams v. Trs. of the Univ. of NC-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011). Second, the Ninth Circuit's decision to recognize "academic freedom" as an

individual right of professors is at odds with controlling Sixth Circuit precedent. *See Demers v. Austin*, 746 F.3d 402, 411-12 (9th Cir. 2014); *supra* at 1. In any event, *Demers* addressed a proposal that "would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it," *id.* at 415; nothing in *Demers* suggests that the First Amendment would prevent a university from requiring professors to adhere to a nondiscrimination policy when interacting with students in their capacity as school employees.

B. Plaintiff's Manner Of Addressing Shawnee Students In Class Is Not Speech On A Matter Of Public Concern.

Even if *Garcetti* did not require dismissal of Plaintiff's claims, Plaintiff's use of honorifics and pronouns would also be unprotected under *Connick v. Myers*, 461 U.S. 138 (1983), and *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968), because it does not constitute speech on a "matter[] of public concern." *Mayhew v. Town of Smyrna*, 856 F.3d 456, 462 (6th Cir. 2017) (quotation marks omitted). Plaintiff contends that "a teacher's in-class speech presumptively qualifies" under this test, Pl. Resp., Doc. 46, at PageID 2038, but he cites no authority for such a presumption. In fact, the Sixth Circuit has held that—in the classroom context as elsewhere—"the court must look to the 'content, form, and context of a given statement.'" *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 678 (6th Cir. 2001). That context-sensitive inquiry aims to pin down "not *why* the employee spoke, but *what* he said." *Farhat v. Jopke*, 370 F.3d 580, 591 (6th Cir. 2004) (citations omitted). Moreover, "the proper inquiry is *not* what might be 'incidentally conveyed' by the speech," but rather is limited to the "'focus' or 'point' of the speech" at issue. *Id.* at 592.

Here, the focus or point of the utterances that Plaintiff refuses to make—*e.g.*, "Ms. Doe, what do you think of Plato?"—is not to communicate ideas about gender or gender identity. The "point" or "focus" is to invite an individual student, Ms. Doe, to comment on Plato. Plaintiff

claims that how he refers to Ms. Doe *also* "communicate[s] his own views on gender identity." Pl. Resp., Doc. 46, at PageID 2039 (quoting Am. Compl. ¶ 204, alterations omitted). But the focus of the public-concern analysis is not on Plaintiff's subjective intentions, but on the objective content, form, and context of his speech—which is simply to call on a particular student to participate in class. Any implicit message that Plaintiff believes he is communicating would at best amount to "'fleeting' references to an arguably public matter," and such references "do not elevate the speech"—here, the verbal act of calling on a student—"to a matter of 'public concern.'" *Farhat*, 370 F.3d at 592.

Moreover, if the "focus" of the speech acts disputed here extended to gender identity at all, that focus would be restricted to *Ms. Doe's* gender identity. In other words, suppose that the statements at issue here (*e.g.*, "Ms. Doe, do you agree with Mr. Smith?") somehow amounted to utterances whose "point" or "focus" is that Ms. Doe is a woman. *Cf.* Pl. Resp., Doc. 46, at PageID 2038 n.3 (arguing that Plaintiff is being required to say that Ms. Doe is a woman). Even that would not help Plaintiff, because that subject—i.e., *whether Ms. Doe is a woman*—is plainly not a matter of public concern. Ms. Doe is not a public figure, and Plaintiff would have no reason to address her gender if she were not his student. Indeed, this Court allowed Ms. Doe to proceed under a pseudonym in this case precisely because the Court agreed with Ms. Doe that her identity as a transgender woman is a "matter 'of the utmost intimacy,'" especially considering the "social stigma associated with transgender identity, and the increased threat of violence to which transgender individuals are exposed." Order, Doc. 32, at PageID 1084-85 (quoting *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004)).

Plaintiff argues that, if he were teaching *about* gender identity, his choice of honorifics would become relevant because it would subject him to charges of "hypocrisy" or compromise his

"credibility." Pl. Resp., Doc. 46, at PageID 2040. In addition to being purely speculative, even if Plaintiff were teaching a course about gender identity, that would not elevate a particular student's identity into an issue of public concern. Plaintiff's subjective belief does not transform his use of female honorifics to refer to an individual student to speech on a matter of public concern.

Plaintiff's position would have staggering consequences. Under Plaintiff's view, academic officials could not supervise *any* in-class speech by a professor, so long as the speech—however inflammatory, disruptive, or simply pedagogically ill-advised—even tangentially, in the professor's own subjective view, implicates issues of social controversy. *See* Int. Mem., Doc. 44, at PageID 1982, 1985-86 (offering examples). Any efforts by a professor's employer to ensure a respectful in-class environment for all students would invite open-ended litigation—with the ultimate pedagogical judgments to be made by a judge applying a case-by-case balancing test, rather than by the university itself. No court has adopted this radical view. And far from vindicating First Amendment principles, such a constitutional rule would gravely undermine "the freedom of a university to make its own judgments as to education." *Evans-Marshall*, 624 F.3d at 344.

C. Plaintiff Cannot Prevail Under *Pickering*.

Even if Plaintiff's claim were subject to the *Pickering* balancing test, it would fail. Shawnee has powerful interests in maintaining its nondiscrimination policy—including interests in complying with the law and, independently, in fostering an inclusive, pedagogically sound environment for all students. Plaintiff fails to meaningfully address either one.

First, the Sixth Circuit has held that discrimination against transgender individuals is discrimination on the basis of sex, and Shawnee has an obvious interest in complying with circuit precedent. *See* Int. Mem., Doc. 44, at PageID 1987 (citing *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (2019)). Plaintiff

argues that the legal environment remains uncertain because other circuits have rejected the Sixth Circuit's interpretation of Title VII and, by implication, Title IX. But Shawnee has a clear interest in complying with *the governing law of this circuit*. Moreover, Shawnee has a compelling interest in avoiding even a substantial risk of violating federal antidiscrimination law; it need not test the law's limits. *Cf. Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) (explaining, even under strict scrutiny, that "legislators may have a strong basis in evidence to use racial classifications in order to comply with a statute when they have *good reasons* to believe such use is required, even if a court does not find that the actions were necessary for statutory compliance" (internal quotation marks omitted)).

Second, it is reasonable for a university to impose a code of conduct on its employees that ensures students will be free to take courses of their choice without fear of discrimination (or fear of being outed as transgender by a professor). If transgender students are deterred from taking some professors' courses, then the university's mission will be compromised. *See* Int. Mem., Doc. 44, at PageID 1987-88. Plaintiff responds that, according to his allegations, his conduct did not disrupt his class or cause Ms. Doe any "distress." Pl. Resp., Doc. 46, at PageID 2035, 2045. But Plaintiffs' own complaint indicates otherwise. *See* Am. Compl., Doc. 34, at PageID 1475, ¶¶ 140-144 (describing verbal altercation that resulted when Plaintiff would not agree to use female honorifics for Ms. Doe in future class sessions). Even if Plaintiff were correct, a university may establish a general policy designed to ensure that transgender students will not be deterred from taking advantage of all the educational opportunities the university offers, including participating in class. Without such a policy, professors like Plaintiff, and other employees, would have the authority to circumscribe the educational opportunities available to transgender students. Plaintiff's subjective assessment of—or willful blindness to—the impact of his discriminatory

conduct on Ms. Doe does not reduce a university's general interest in enforcing an evenhanded nondiscrimination policy.[1]

Plaintiff also repeatedly asserts that "Defendants cannot override constitutional rights to enforce federal law, eliminate discrimination, or maintain civility on campus." Pl. Resp., Doc. 46, at PageID 2045. But that assertion simply misunderstands the relevant analysis. Under *Pickering*, it is the weighing of competing interests—including all of the interests that Plaintiff names—that determines whether Plaintiff *has* a constitutional right in the first place. *See, e.g.*, *Lane v. Franks*, 573 U.S. 228, 242 (2014) (explaining the *Pickering* framework); *Bonnell v. Lorenzo*, 241 F.3d 800, 823-24 (6th Cir. 2001) (finding that a university's institutional interests in faculty discipline and enforcing nondiscrimination policies outweighed a professor's claimed interest in free speech). If Shawnee's interests are weightier than Plaintiff's, he has no valid constitutional claim.

And in contrast to Shawnee's interests outlined above, Plaintiff's side of the *Pickering* balance is all but empty. Shawnee's policy does not prohibit Plaintiff from commenting on matters of public concern—whether on his own time, or as part of his writing and publishing as an academic employed by Shawnee. The policy demands only that Plaintiff *manage his classroom* in the manner that the school considers most pedagogically appropriate. Plaintiff thus still enjoys the "opportunities to contribute to public debate" that *Pickering* is intended to preserve. *Pickering*, 391 U.S. at 572-73. Moreover, the policy permits Plaintiff to avoid compromising any of his felt convictions by simply eschewing gendered terminology. *See infra* Section I.D. Shawnee's interests easily outweigh Plaintiff's interests in refusing to comply with the university's nondiscrimination policy.

[1] Plaintiff asserts that he was trying to "accommodate" Ms. Doe, rather than "sing[ling her] out." Pl. Resp., Doc. 46, at PageID 2035. But Ms. Doe *was* singled out—she was the *sole* student that Plaintiff did not address with an honorific conforming to her gender identity. As such, regardless of Plaintiff's subjective intent, Plaintiff's own allegations establish that he violated Shawnee's nondiscrimination policy—which it has a substantial interest in enforcing.

D. All of Plaintiff's Free Speech Claims Must Be Dismissed.

The foregoing analysis establishes that all of Plaintiff's free speech claims must be dismissed—whether couched as "[c]ompelled [s]peech," "[u]nconstitutional [c]onditions," or "[c]ontent & [v]iewpoint [d]iscrimination." *See* Int. Mem., Doc. 44, at PageID 1977. Plaintiff's speech is unprotected, and his First Amendment claim therefore fails no matter how it is styled.

Plaintiff argues that because this case involves compelled speech—that Shawnee is "forc[ing] a philosopher to affirm as true ideas he believes are not," Pl. Resp., Doc. 46, at PageID 2035—his First Amendment claim is strengthened. This argument is doubly wrong: this is not a compelled-speech case, and even if it was, the First Amendment analysis would stay the same.

First, Plaintiff's "compelled speech" rhetoric is simply at odds with his allegations. Plaintiffs alleges that Dean Milliken advised him to *avoid* gendered terminology altogether in order to preempt any felt conflict between his convictions and university policy. *See* Am. Compl., Doc. 34, at PageID 1476, ¶ 154. Plaintiff rejected that accommodation on the grounds that, in his judgment, it "would undermine the serious pedagogical environment he seeks to create" and would be too cumbersome. *Id.* ¶ 155. But Plaintiff has no constitutional right to eschew prescribed classroom requirements that he finds onerous. "While the First Amendment may protect [Plaintiff's] right to express [his] ideas about pedagogy, it does not require that the university permit [him] to teach [his] classes in accordance with those ideas." *Johnson-Kurek*, 423 F.3d at 595. Because Plaintiff was fully free to just use first or last names whenever he referred to students in class—a practice that the university, in its authoritative judgment, deemed pedagogically acceptable—any "compulsion" to refer to Ms. Doe using one gendered term rather than another was of Plaintiff's own making.

Second, even if a compelled-speech analysis applied in this case, it would not matter. It is irrelevant whether Plaintiff styles his claim as challenging a restriction on using male pronouns,

or a requirement of using female pronouns. The "difference between compelled speech and compelled silence … is without constitutional significance." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988). "[I]f the speech in question is part of an employee's official duties, the employer may insist that the employee *deliver* any lawful message." *Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2473 (2018) (emphasis added)). Thus, Plaintiff's free-speech claim fails whether or not it is styled a claim against "compelled" speech. *See also Evans-Marshall*, 624 F.3d at 341 (rejecting the possibility that a teacher could "respond to a principal's insistence that she discuss certain materials by claiming that it improperly compels speech").[2]

II. Plaintiff's Free Exercise Claim Fails.

Plaintiff seeks an exemption from a general policy that applies regardless of anyone's religion on the ground that its application to him interferes with his "right to exercise his faith." Pl. Resp., Doc. 46, at PageID 2046. That legal theory is foreclosed by *Employment Division v. Smith*, 494 U.S. 877 (1990), *superseded in part by statute as stated in Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). And Plaintiff cannot avail himself of any special exceptions to *Smith* for churches or for clergy performing weddings. *Cf.* Pl. Resp., Doc. 46, at PageID 2047 (citing such cases). Nor can he invoke the Constitution's protection against laws that classify *on the basis of religion* and so "expressly require[] [a church] to renounce its religious character" as a funding condition. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024 (2017).

[2] Plaintiff's overbreadth theory also lacks merit. He cites no case applying that narrow doctrine to public employee speech, and he fails to establish that the nondiscrimination policy is unconstitutional in *any* of its applications, let alone in a large fraction of them. *See supra* Section I.

Plaintiff alleges that Shawnee's policy is not actually neutral between religious employees and others. But he "has not nudged his claims of invidious discrimination across the line from conceivable to plausible." *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009). Although Plaintiff relies heavily on *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), he fails to allege either of the facts that were pivotal there. First, he alleges no instance in which Shawnee engaged in "disparate consideration of [his] case compared to the cases of [any] other [employees]" who are not religious. *Id.* at 1732.

Second, he makes no substantial allegation that Shawnee applied its nondiscrimination policy to him out of anti-religious animus. It is Dean Milliken who instructed Plaintiff that he "must utilize a student's preferred pronoun," interpreted the nondiscrimination policy with reference to his situation, threatened him with disciplinary action, and ultimately issued him a written warning for violating the policy. Am. Compl., Doc. 34, at PageID 1472, 1478, 1480, 1482-83, 1485, 1487, ¶¶ 112, 169-171, 186-87, 212, 215, 233, 246. But Plaintiff never alleges that Dean Milliken ever expressed any kind of anti-religious sentiment at all. Further, even if Plaintiff's allegations about peripheral decisionmakers—Bauer and Pauley—are considered, they are wholly insubstantial. Plaintiff offers nothing to suggest that Bauer's alleged laugh (an event of little significance regardless) reflected religious animus. And an argument between Plaintiff and his department chair about religion, more than a year before Ms. Doe even took his class, cannot possibly taint the university's entire nondiscrimination policy with respect to transgender individuals.[3] Because Plaintiff has no plausible claim that Shawnee acted out of religious animus

[3] Plaintiff also alleges that Shawnee initially considered an approach more accommodating of Plaintiff's preferences, but rejected it when Ms. Doe—one of the students the policy serves to protect—found that accommodation objectionable. *See* Pl. Resp., Doc. 46, at PageID 2049-50. Plaintiff does not explain how this episode in any way implicates religion or suggests a departure from religious neutrality on the part of the university.

here—rather than out of a legitimate concern to ensure a respectful and inclusive educational environment for Ms. Doe and others—his free exercise claim fails.

CONCLUSION

Plaintiff's amended complaint should be dismissed in its entirety with prejudice.

Date: June 14, 2019

Respectfully Submitted,

/s/ Adam G. Unikowsky
Adam G. Unikowsky (admitted *pro hac vice*)
Michael E. Stewart
Jennifer J. Yun
JENNER & BLOCK LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001
(202) 639-6000 (tel)
(202) 639-6066 (fax)
aunikowsky@jenner.com

Jennifer L. Branch #0038893
Gerhardstein & Branch Co. LPA
441 Vine Street, Suite 3400
Cincinnati, OH 45202
(513) 621-9100 (tel)
(513) 345-5543 (fax)
Jbranch@gbfirm.com

Shannon P. Minter (admitted *pro hac vice*)
Asaf Orr (admitted *pro hac vice*)
Christopher F. Stoll (admitted *pro hac vice*)
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street Suite 370
San Francisco, California 94102
(415) 392-6257 (tel)
(415) 392-8442 (fax)
sminter@nclrights.org
aorr@nclrights.org
cstoll@nclrights.org

Attorneys for JANE DOE and SEXUALITY AND GENDER ACCEPTANCE

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2019, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Asaf Orr
Attorney for Jane Doe and
Sexuality and Gender Acceptance