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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

v.

TOVA STABIN, in her individual capacity; and the **COMMUNICATION MANAGER** of University of Oregon Division of Equity and Inclusion, in his or her official capacity,

Defendants.

Case No. 3:22-cv-01181-HZ

DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS AND IN OPPOSITION TO PRELIMINARY INJUNCTION

I. INTRODUCTION

This supplemental brief summarizes the relevant evidence gathered through expedited discovery. As described below, the uncontested evidence shows that Plaintiff was never blocked by tova stabin[1] based on his viewpoint and that the University of Oregon (the "University") has never engaged in a pattern or practice of viewpoint discrimination. The evidence also shows that the provisions of the University's social media guidelines that Plaintiff now seeks to enjoin have never been used to block him and that any risk of future harm to Plaintiff is purely speculative. Perhaps most importantly, the evidence shows that the issue of Plaintiff's blocking could have been resolved with a simple phone call or email to the University's Communications Department or General Counsel's Office. At base, Plaintiff invites the Court to penalize Defendants for holding views that he perceives as being different than his own. The Court should decline this invitation by denying his motion for a preliminary injunction and dismissing this case for lack of jurisdiction.

II. DISCUSSION

1. Ms. stabin blocked Plaintiff because she did not understand his retweet and thought it was unrelated to the original prompt, not because she disagreed with or intended to suppress his viewpoint.

The most important fact to emerge from discovery is that Plaintiff was never blocked by Ms. stabin based on his viewpoint. In fact, Ms. stabin agreed with the statement made by Plaintiff that "all men are created equal." (Carp Decl. Ex. 2 (Stabin Dep. Tr. 52:12–17, 66:21–24, 102:7–11).) What Ms. stabin did not "understand," however, was why Plaintiff made what she viewed as a self-evident and true statement about all people being created equal when the prompt to which Plaintiff had responded was about engaging with statements that make a listener "uncomfortable" because they may be perceived as "racist." (*Id.* (Stabin Dep. Tr. 51:14–52:17, 95:20–97:9).) As Ms. stabin explained, she did not think the statement "all men are created equal" was related or responsive to the prompt because, whereas the prompt was meant to help users start a productive dialogue with someone who makes a racist or otherwise offensive remark, Ms. stabin did not think

[1] Ms. stabin spells her name using all lowercase letters.

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Plaintiff's statement "all men are created equal" was racist or offensive at all. (*Id.* (Stabin Dep. Tr. 51:14–52:17, 95:20–97:9, 102:7–11).) It would not make any sense, she explained, if a person attempted to start a dialogue about a perceived racist comment by responding to the statement "all men are created equal" with "is that what you really meant?" because the statement "all men are created equal" is not itself racist or offensive. (*Id.* (Stabin Dep. Tr. 51:14–52:17; 102:7–11).) Thus, Ms. stabin testified that she blocked Plaintiff because she did not understand the point Plaintiff was trying to make and perceived his post as being "off-topic" and unrelated to the prompt.[2] (*Id.* (Stabin Dep. Tr. 52:22–53:12, 53:23–54:3, 55:16–21, 95:20–97:9, 102:7–11).)

This fact is important because both Plaintiff's retrospective and prospective claims rely on the assumption that the University and, by association, Ms. stabin hold certain viewpoints that would cause them to interpret his statement as racist, offensive, or otherwise opposed to their own viewpoints. But there is no support in the record for the proposition that Ms. stabin, the University, or anyone else who administered the @UOEquity account disagreed with the statement in Plaintiff's retweet or viewed it as racist, offensive, or inconsistent with their own viewpoints. Plaintiff assumed that Ms. stabin and the University blocked him because they interpreted his statement "all men are created equal" as problematic or critical of diversity, equity, and inclusion programs. Plaintiff further assumed that, because he was blocked, it must have been because Ms. stabin (1) interpreted his retweet in the way he anticipated or intended, (2) disagreed with the statement in his retweet, and then (3) blocked him because she understood and disagreed with the message he intended with his retweet. But none of these assumptions are supported by the record: Ms. stabin did not understand what Plaintiff was trying to say in his retweet, did not disagree with or take offense to the statement made in the retweet, and only blocked Plaintiff because she did not understand the retweet and thought it was off-topic.

[2] Ms. stabin articulated how she perceived Plaintiff's statement by giving the example of a person quoting the Declaration of Independence in response to a prompt about dinner recipes: "[Y]ou may not object to the Declaration of Independence," she explained, "but you wonder what it has to do with potatoes au gratin." (Carp. Decl. Ex. 2 (Stabin Dep. Tr. 93:8–15).)

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2. Twitter users regularly post dissenting views on the @UOEquity account and, of the thousands of retweets and replies directed at the account since 2013, only 3 have ever been removed by the account (i.e., one tenth of one percent).

The strongest evidence that Defendants neither engage in viewpoint discrimination nor interpret their social media guidelines to allow for viewpoint discrimination is the uncontroverted fact that, of the more than 2,550 retweets and replies that have been directed at the @UOEquity account since 2013, only 3 have been blocked. (Larson Decl. iso. Supp. Br. ¶¶ 3–6.) That number represents just one tenth of one percent of all the activity directed at the account. Critically, these 2,550+ retweets and replies have not been uniformly supportive of the account—they sometimes express dissenting viewpoints, are taunting, or are critical of @UOEquity, the University, and/or the Division of Equity and Inclusion (the "Division"). (*See id.* ¶ 6 & Ex. 1.) When viewed in this light, Plaintiff's temporary blocking was an anomaly—not part of a pattern or practice—and it is his unblocking and freedom to post dissenting viewpoints that is typical of how the @UOEquity account operates. It would be flatly contrary to the evidence to find that, based on the history of how the @UOEquity account has applied the University's social media guidelines, Plaintiff faces a "reasonable probability" of being blocked in the future for expressing a viewpoint.

3. Plaintiff has never been subject to the provisions of the social media guidelines that he now seeks to enjoin, and they do not allow for viewpoint discrimination.

Plaintiff claims that he is nevertheless still likely to be blocked by @UOEquity in the future because a University employee might consider one of his future comments to be hateful, racist, or offensive. He argues that this is true because the University's social media guidelines—despite containing an express prohibition on viewpoint discrimination that is the prime directive for all decisions about content moderation—allow University employees to remove "hateful," "racist," and "offensive" posts when "there's [no] viewpoint stated." (Carp Decl. Ex. 4 at 8 (first quotation clause); Carp. Decl. Ex. 1 (Hunter Dep. Tr. 204:10–13) (second quotation clause).) Setting aside the fact that the statistics cited above prove that the @UOEquity account does not systematically engage in viewpoint discrimination, as well as the presumption of good faith afforded to the

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University as a government defendant, there are three major problems with Plaintiff's theory of future harm.

First, Plaintiff has never been subject to the provisions of the social media guidelines that relate to racist, hateful, and offensive posts. As Ms. stabin testified, she did not apply any of these provisions when she made the decision to block Plaintiff—she only applied the provision relating to posts that are "off topic." (Carp Decl. Ex. 2 (Stabin Dep. Tr. 53:18–54:3); Carp Decl. Ex. 4 at 9.) In fact, Plaintiff has identified no evidence that Ms. stabin or anyone else at the University has ever applied the now-challenged provisions to block Plaintiff or any other member of the public, let alone in a viewpoint discriminatory manner. Plaintiff may not like these provisions but that does not mean he has been or will be harmed by them. Indeed, because Plaintiff has never been blocked pursuant to these provisions, he is no more likely than any other member of the public to be blocked pursuant to them in the future. This is dispositive of his claim for prospective relief because "a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution . . . and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

Second, as described above, the record shows that Ms. stabin did not interpret Plaintiff's retweet as being racist or offensive (as Plaintiff assumed), and there is no evidence that the University has ever interpreted it as such. (Carp Decl. Ex. 2 (Stabin Dep. Tr. 51:14–52:17, 95:20–97:9, 102:7–11); Carp Decl. Ex. 1 (Hunter Dep. Tr. 48:12–52:7).) More than that, there is no evidence that Ms. stabin or the University has ever interpreted the many other critical comments posted to the @UOEquity account as racist or offensive. It would also be plain error to find that the University employee who will be administering the @UOEquity account in the future—i.e., the as-yet-to-be hired Communications Manager—would interpret a post by Plaintiff as racist or offensive, let alone that they would violate the University's express prohibition on viewpoint discrimination to block him. Thus, for the Court to find that Plaintiff is likely to be blocked

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pursuant to these provisions would require it to (1) engage in an unsupportable degree of speculation about how an unidentifiable future employee of the University would interpret an unknown future comment by Plaintiff, and (2) conclude that this future employee would, for the first time ever, apply these provisions to a post by Plaintiff and ignore the University's express prohibition on viewpoint discrimination.

Finally, even if the Court were to assume that the University or one of its employees were likely to interpret an unknown future comment by Plaintiff as racist or offensive—a conclusion that itself depends on multiple layers of speculation—it does not follow that Plaintiff would be blocked for the comment. As the University testified at length, the social media guidelines do not allow an employee to block social media users for expressing a viewpoint, regardless of whether that viewpoint is racist, offensive, or contrary to views held by the University or its employees. (Carp Decl. Ex. 1 (Hunter Dep. Tr. 50:1–4, 50:15–18, 85:3–21, 97:23–98:4, 118:12–17, 150:16–151:16, 152:8–18, 184:14–185:19); Carp Decl. Ex. 3 (Alex-Assensoh Dep. Tr. 52:4–10, 98:3–20).) This prohibition is not a suggestion or best practice; rather, the University made clear that employees who administer its social media channels "must abide by" its social media guidelines. (Carp Decl. Ex. 1 (Hunter Dep. Tr. 198:6–16; *see also id.* 197:14–17).) Critically, if the University learns that an employee failed to "follow" the social media guidelines, they are subject to counseling and other corrective actions, up to and including termination of employment if they again "blocked someone [based] on viewpoint." (*Id.* (Hunter Dep. Tr. 196:19–197:13).)

4. Plaintiff's claim that he is self-censoring for fear of being blocked is refuted by his unreserved and very public criticism of diversity, equity, and inclusion programs, including in a recent essay published in *The Wall Street Journal*.

Plaintiff attempts to sidestep the speculative nature of any potential future injury by arguing that he is presently self-censoring. Specifically, he argues that he is self-censoring for fear that "I could be blocked again in the future for expressing a viewpoint critical of the ideology of diversity, equity, and inclusion." (Gilley Decl., ECF No. 5, ¶ 65.) He also alleges that he worries "UO's Social Media Guidelines will be used to block or permanently ban me for . . . dissenting from DEI

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ideology," and that his fear is informed by his belief that "DEI adherents" are "hostil[e] toward dissenting viewpoints." (Supp. Gilley Decl., ECF No. 33, ¶¶ 16 & 18.) In short, Plaintiff would have the Court believe that, despite the University unblocking him and repeatedly representing that he will not be blocked for expressing a viewpoint, he is so afraid of being blocked that he cannot express viewpoints that he thinks are contrary to those held by the University.

Plaintiff's claim of self-censorship, however, is contradicted by his unreserved and very public criticism of diversity, equity, and inclusion viewpoints since he filed this lawsuit. For example, in an essay he recently published in *The Wall Street Journal*—one of the largest newspapers in the world by circulation—Plaintiff criticized another academic institution for its alleged efforts to "get woke with equity teams, affinity groups, Black Lives Matter movements, Native American land acknowledgments, transgender affirmations, climate-change hysteria and all the rest." (Isaak Decl. iso. Supp. Br. ¶ 7 & Ex. 2.) Similarly, in an appearance broadcast live on *The Charlie Kirk Show*, Plaintiff made the argument that "colonialism was the greatest antiracism program in world history." (*Id.* ¶¶ 3 & 9.) And in an article published on the website of the James G. Martin Center for Academic Renewal, Plaintiff argued that "DEI's degradations of the search for truth and the vigorous contestation of ideas are akin to the way that cancer spreads from one part of the body to another and eventually kills it." (*Id.* ¶ 8 & Ex. 1.) Plaintiff cannot shout from the proverbial mountaintop and then claim that he is unable to speak.

5. Ms. stabin did not work for the Division and never spoke with the Vice President for Equity & Inclusion about Plaintiff, blocking users on the @UOEquity account, or the social media guidelines.

To prove that he faces more than a "theoretical possibility" of being blocked in the future, Plaintiff must also contend with the fact that Ms. stabin—the individual who blocked him—is now retired and thus cannot block him again. Plaintiff will likely do so by arguing that Ms. stabin was merely a conduit for decisions or practices that were, in fact, directed or encouraged by the University and/or Vice President for Equity & Inclusion Yvette Alex-Assensoh, PhD ("Dr. Alex-Assensoh"). But the evidence shows that there are two major flaws with this theory.

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First, Ms. stabin reported directly to the Communications Department—not the Division of Equity and Inclusion—and there is no evidence that Dr. Alex-Assensoh or anyone else in the Division had any involvement in Ms. stabin's decision to block Plaintiff or any other decision about content moderation. (Carp Decl. Ex. 2 (Stabin Dep. Tr. 81:23–82:1; *see also id*. 22:8–23, 80:14–18); Carp Decl. Ex. 1 (Hunter Dep. Tr. 11:24–12:21); Carp Decl. Ex. 3 (Alex-Assensoh Dep. Tr. 26:24–27:6; 27:25–28:1, 48:22–24).) To the contrary, Ms. stabin testified that she "did not consult anyone" when making the decision to block Plaintiff, and Dr. Alex-Assensoh testified that she had not previously seen Plaintiff's retweet that is the subject of this lawsuit and is not even "familiar" with the @UOEquity account. (Carp Decl. Ex. 2 (Stabin Dep. Tr. 81:23–82:1); Carp Decl. Ex. 3 (Alex-Assensoh Dep. Tr. 49:7–50:9); Carp Decl. Ex. 5 at 1.) Although Dr. Alex-Assensoh did agree that she "communicate[d] with [t]ova in order to tell her [about] the division's communications-related needs" (i.e., affirmative messaging), there is no evidence that Ms. stabin's decision to block Plaintiff or any other user was directed or even influenced by Dr. Alex-Assensoh or any University employee in any way.[3] (Carp Decl. Ex. 3 (Alex-Assensoh Dep. Tr. 28:8–12).)

Second, although Dr. Alex-Assensoh has expressed views in her scholarship that are likely different from those held by Plaintiff, it does not follow that she is likely to cause the as-yet-to-be-hired Communications Manager to block Plaintiff on social media in the future. Dr. Alex-Assensoh clearly and unequivocally testified that the University "should not block users on social media based on their viewpoints," and that to do so would be antithetical to "the work that we do at the university in the Division of Equity and Inclusion." (*Id.* (Alex-Assensoh Dep. Tr. 98:13–20).) She added: "We value diverse people, ideas, and viewpoints and . . . everyone is invited and welcomed

[3] Plaintiff may nevertheless point to the fact that Dr. Alex-Assensoh was copied on a string of emails from the Public Records Office seeking information for a response to a public records request filed by Plaintiff. The problem for Plaintiff is that the public records request (1) was filed after Plaintiff was blocked on June 14, 2022, (2) did not describe any of the facts pertaining to his blocking or suggesting he was allegedly blocked based on viewpoint, (3) and did not ask that he be unblocked. (Widdop Decl., ECF No. 25, Ex. 1.) Moreover, Dr. Alex-Assensoh never responded to these emails and testified that, when they were sent, she was leading a student trip to Ghana with limited Internet access and could not recall seeing the emails until recently when this lawsuit was filed. (Carp Decl. Ex. 3 (Alex-Assensoh Dep. Tr. 43:15–46:4); Carp Decl. Ex. 6.)

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to contribute. . . . [T]hat is what we uphold and that is what we have done." (*Id.* (Alex-Assensoh Dep. Tr. 98:5–12).) Dr. Alex-Assensoh's response is consistent with what the University repeated throughout its testimony. (Carp Decl. Ex. 1 (Hunter Dep. Tr. 50:1–4, 50:15–18, 85:3–21, 97:23–98:4, 118:12–17, 150:16–151:16, 152:8–18, 184:14–185:19).)

Importantly, the fact that Dr. Alex-Assensoh holds views that are different from those held by Plaintiff is in no way contrary to or inconsistent with the repeated and unrebutted testimony that the University does not allow viewpoint discrimination and encourages people to share diverse viewpoints. This is especially so given the total lack of evidence showing that Dr. Alex-Assensoh has ever been involved in blocking or silencing any social media user, let alone Plaintiff. At base, Plaintiff is asking the Court to penalize Dr. Alex-Assensoh and the University for Dr. Alex-Assensoh holding views that are different from those held by Plaintiff.[4] That is an extraordinary proposition in a First Amendment lawsuit ostensibly intended to protect free speech, and for the Court to endorse it would inflict far greater damage on the First Amendment rights of Dr. Alex-Assensoh and the University than it would serve to protect those of Plaintiff. Indeed, if a plaintiff could show a future likelihood of viewpoint discrimination based solely on his or her viewpoint being different from that of a public entity or public servant, everyone would have the necessary injury to seek and obtain prospective injunctive relief. That is not the law.

[4] This is the only conclusion supported by the record, which shows that (1) the one person involved in the decision to block Plaintiff (i.e., Ms. stabin) has retired, (2) Dr. Alex-Assensoh has never been directly or indirectly involved in a decision to silence any social media user, (3) the University expressly prohibits viewpoint discrimination, and (4) neither the University nor the @UOEquity account has engaged in a pattern or practice of viewpoint discrimination.

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