UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NO. 1:23-cv-00129-DAE
	§	
LILLIAN MILLS, et al.,	§	
	§	
Defendants.	§	

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

Table of Contents

Table of Authorities

Page(s)

Cases

Constitutional Provisions

INTRODUCTION

Lowery's Amended Complaint continues to suffer from the same fundamental flaw that led the Court to dismiss Lowery's retaliation claim seven months ago: There has been no adverse employment action taken or even threatened against Lowery. Under Fifth Circuit precedent, this defect precludes a state employee's First Amendment claim. Lowery nonetheless asserts Defendants are liable because he self-chilled his speech out of a fear that some lesser consequence might follow if he continued to speak. But if Defendants would not have violated Lowery's First Amendment rights even if they had actually undertaken certain actions (none of which they took or threatened), then *a fortiori* in the absence of such actions they cannot be held liable under the First Amendment simply because Lowery purportedly fears that those actions might one day occur.

Faced with this fundamental flaw in his case, Lowery urges the Court not to consider Defendants' dismissal arguments as to the self-chill claim. But his law-of-the-case and estoppel arguments fail for numerous reasons: orders on motions to dismiss are interlocutory and courts may revisit them for any reason, Defendants have not changed their position on Lowery's inability to pursue a First Amendment claim for retaliation in the absence of any alleged adverse employment action, and the lack of an adverse employment action (or even threat of one) precludes the self-chill claim even under the *Keenan* framework.

Regarding Count Two, Lowery attempts to show that he alone has been subjected to an unwritten speech code due to the message he speaks. But rather than present a cognizable speech-code claim, the Amended Complaint alleges facts that instead show that no such unwritten speech code exists.

The Court should dismiss the Amended Complaint in its entirety.

ARGUMENT

I. The Court Should Dismiss the Self-Chilled-Speech Claim.

Lowery's self-chilled-speech claim is founded upon Lowery's alleged fear that, had he continued speaking as he wished, that speech would have prompted responses from Defendants that fall short of any adverse employment action. Specifically, Lowery alleges that he fears:

• "Defendants will not renew his appointment to the Salem Center, costing him the $20,000 annual stipend that comes with the position." Dkt. 126 (Am. Compl.) ¶ 87;

• "Defendants will remove his supervisory role at the Policy Research Lab, and the opportunities to publish academic research that the Policy Research Lab generates for Lowery." *Id.* ¶ 88; and

• Defendants will "label Lowery as lacking civility, being dangerous, violent, or in need of police surveillance." *Id.* ¶ 90.

Yet these alleged fears do not articulate any threatened adverse employment action under Fifth Circuit precedent—as the Court recognized in dismissing Lowery's retaliation claim seven months ago. Dkt. 51 (Order on the original motion to dismiss) at 24 (noting that Lowery's allegations were "insufficient to establish an adverse employment action for a First Amendment retaliation claim in the Fifth Circuit") (citing *Breaux v. City of Garland*, 205 F.3d 150, 160 (5th Cir. 2000)).

As the Fifth Circuit has explained, while teaching assignments and summer employment "might seem extremely significant to [the employee]" denial of these opportunities does "not rise to the level of a constitutional deprivation." *Dorsett v. Bd. of Tr.*, 940 F.2d 121, 123 (5th Cir. 1991). Likewise, the stipend attached to the Salem Center appointment is akin to a pay increase, the denial of which does "not rise to the level of a constitutional deprivation." *Harrington v. Harris*, 118 F.3d 359, 366 (5th Cir. 1997). And "accusations or criticism" including "oral threats or abusive remarks" do not qualify as adverse employment actions. *Breaux*, 205 F.3d at 157–58 (citing *Harrington*, 118 F.3d at 366).

Nor would conducting an actual police investigation rise to the level of an adverse employment action. *Breaux*, 205 F.3d at 158.

It is telling that despite conducting significant discovery on his self-chill claim over the past seven months, Lowery remains unable to make any factual allegation that he ever faced a threat of any adverse employment action due to his speech. *See generally* Amended Complaint; Dkt. 130 (Lowery's Br. in Opp. to the Mot. to Dismiss Am. Compl.). And Lowery's response to this motion to dismiss, which makes no attempt to engage on the issue of the types of actions that he fears Defendants would undertake if Lowery continued to speak, confirms that no adverse employment action has even been threatened, much less undertaken. Instead, Lowery brings to court a self-chill claim based upon his purported fear that "interfaculty dispute[s] [may] arise" over Lowery's "teaching assignments" or "administrative duties," items deemed by the Fifth Circuit to be "relatively trivial" and outside the courts' "competency [and] resources to micromanage." *Dorsett*, 940 F.2d at 123–24.

A self-chill claim that lacks even an allegation of a threatened adverse employment action as its foundation is not a cognizable claim. To hold otherwise would permit every failed First Amendment retaliation plaintiff to resurrect his claim as a self-chill claim and pursue First Amendment relief against an employer that has not undertaken any act to deprive the plaintiff of his constitutional rights. Thus, even under the *Keenan* framework Lowery's claim must fail as a matter of law.

Under *Keenan*, "[t]o establish a First Amendment retaliation claim *against an ordinary citizen*, [plaintiffs] must show that "(1) they were engaged in constitutionally protected activity, (2) the defendants' actions caused them to suffer an injury which would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated by plaintiffs' exercise of constitutionally protected conduct." *Keenan v. Tejeda*, 290 F.3d 252, 258 n.4 (5th Cir. 2002) (emphasis added). Whether courts consider the lack of any threatened adverse employment action to defeat element 2 of the test (without an allegation of an adverse employment action, defendants' actions cannot have caused plaintiffs to suffer a cognizable injury), or element 3 (without a threatened adverse employment action, defendants have not committed an "adverse action"), the point remains that a cognizable self-chill claim against an employer must be based upon an objectively reasonable fear that the employer would retaliate through an adverse employment action.

Put another way, if Defendants could *actually undertake* certain actions in response to Lowery's speech without subjecting themselves to First Amendment liability, then Lowery cannot create First Amendment liability merely by claiming that he ceased speaking because he feared those same actions. The Amended Complaint, just like the Original Complaint before it, makes no allegation that Lowery based his purported self-chill upon a feared adverse employment action by any Defendant. The Court should thus dismiss the self-chill claim for failure to state a claim upon which relief could be granted.

Unable to solve this fatal flaw in the Amended Complaint, Lowery focuses instead on urging the Court not to consider Defendants' argument based upon law-of-the-case or estoppel. Dkt. 130 (Lowery's Opposition Brief) at 4–7. But as Lowery acknowledges, the Court is not precluded from considering this basis for dismissal. *Id.* at 5–6. To the contrary, the Court may consider all of the arguments raised in Defendants' motion to dismiss Lowery's amended complaint. *Villegas v. City of El Paso*, No. EP-15-CV-00386-FM, 2020 WL 981878, *4 (W.D. Tex. Feb. 28, 2020) (aff'd sub nom. *Villegas v. Arbogast*, 836 Fed. Appx. 334 (5th Cir. 2021)) (citing *U.S. ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 322 (5th Cir. 2016)) (rejecting a law-of-the-case argument and explaining that the court "has authority to rule on all grounds for dismissal [of the amended complaint] presented in the Motions" because, inter alia, "an amended complaint supersedes the original complaint and renders it of no legal effect"); *Rotstain v. Trustmark National Bank*, 2021 WL 3372249, *3 (N.D. Tex. Aug. 3, 2021) (noting that the law-of-the-case doctrine was inapplicable to interlocutory orders and that "the court is free to reconsider an interlocutory order and reverse its decision for any reason it deems sufficient").[1] And the Court should consider Defendants' arguments for several reasons.

First, Defendants have consistently argued that Lowery cannot maintain a First Amendment self-chill claim without alleging that an adverse employment action has even been threatened. *E.g.*, Dkt. 15 (Defendants' Motion to Dismiss the Original Complaint) at 2 (explaining that because Lowery cannot "point to an adverse employment action, Lowery tries to make benign acts seem nefarious"), at 3 (noting that "Lowery has not received an adverse employment action") , at 12 (explaining that Lowery "fails to state a chilled-speech claim" in part because he "does not allege that Defendants have taken any action against him that qualifies as an adverse employment action under Fifth Circuit precedent"). This is not a newly raised issue; nor is Defendants' reliance on it here inconsistent with its prior motion to dismiss. And as explained above, the requirement that a self-chill employee plaintiff must allege an adverse employment action is not even inconsistent with the application of the *Keenan* framework.

Second, President Hartzell has been newly added to the case in Lowery's Amended Complaint. He has not yet had the opportunity to assert any grounds for dismissal of the case, including jurisdictional bars. Hartzell is entitled to assert those arguments and have them considered by the Court.

Finally, the self-chill claim was the subject of some discovery before the Court ruled on the original motion to dismiss and the subject of significant discovery since that ruling. As Defendants

[1] In making his law-of-the-case argument, Lowery cites cases having nothing to do with motions to dismiss, amended complaints, or arguments raised by newly added defendants. *See* Dkt. 130 (Lowery's Opposition Brief) at 5. For example, *U.S. v. Castillo*, 179 F.3d 321, 326–27 (5th Cir. 1999), involved a remand for resentencing following an appeal of a criminal conviction in which the Fifth Circuit explained that "when we resolve a legal issue and remand to the district court, our decision binds subsequent proceedings in the district court and on later appeal." And *Matter of AKD Investments*, 79 F.4th 487 (5th Cir. 2023), involved the Fifth Circuit's review of whether a bankruptcy court had properly invoked law-of-the-case when the parties disputed whether an issue was previously decided in a prior order of the bankruptcy court.

will show in their forthcoming motion for partial summary judgment, the record confirms that no adverse employment action has been threatened against Lowery, thus defeating his self-chill claim.

The Court should dismiss with prejudice the self-chill claim against all Defendants.

II. The Court Should Dismiss the Speech-Code Claim.

Lowery claims that the University maintains an unwritten speech code, and that Defendants have impermissibly enforced that code against him. This claim should be dismissed because it fails to satisfy *Iqbal*/*Twombly* in two related respects. First, Lowery has not pleaded enough facts that, even if true, would establish the existence of a policy or practice to police speech. And second, Lowery has not pleaded any facts from which it could be inferred that Defendants created this purported unwritten code or actually enforced it against Lowery.

Lowery alleges that:

- "UT maintains an unwritten speech code or practice that allows for administrators to counsel or discipline faculty for 'uncivil' or 'rude' speech," Dkt. 126 at ¶ 119;
- "UT's unwritten speech code or practice forbids faculty members, such as Richard Lowery, from advocating that donors stop donating to UT or that elected officials defund UT as a way of advocating for policy changes at UT," *id.* ¶ 120;
- "UT's unwritten speech code or practice does not sufficiently cabin official discretion and thereby invites selective enforcement against disfavored viewpoints or speakers," *id.* ¶ 121;
- "faculty expressing leftwing views are not asked to tone-down their tweets or make them more civil or less rude," *id.* ¶ 122;
- "Defendants' selective enforcement of UT's unwritten speech code or practice also invites other faculty or staff to make ill-conceived or bad-faith complaints about 'safety,' 'offensiveness,' or 'standards of ethics or respect for faculty' about speech that dissents from majority viewpoints on the UT campus," *id.* ¶ 123;
- Defendants, individually, and in concert with each other acted to enforce UT's unwritten speech code or practice against Lowery for his protected speech because it was embarrassing to them and others in the UT administration and also because they feared the possibility of elected officials or the public scrutinizing their behavior," *id.* ¶ 124;

- "Defendants also selectively enforced UT's unwritten speech code or practice against Lowery because they disagreed with his opinions, and found his commentary offensive and thought that it offended other, more favored faculty at UT," *id.* ¶ 125;
- Defendants retaliated against Lowery for his protected speech by seeking to have him 'counseled' over his speech, labeling his speech as 'uncivil' and 'disruptive," threatening to reduce Lowery's pay, involuntarily end his affiliation with the Salem Center, reduce his access to research opportunities, inquire about his tweets, labeling him, requesting that his speech be placed under police surveillance, or otherwise disciplining him," *id.* ¶ 126.
- Defendants' actions and threats were such that a reasonable person in Lowery's position would refrain from speaking in the ways at issue in this case," *id.* ¶ 127; and
- "By applying their unwritten speech code against Richard Lowery for his protected speech, Defendants . . . violated and continue to violate Richard Lowery's free speech rights under the First and Fourteenth Amendments," *id.* ¶ 128.

None of these bare assertions present sufficient factual allegations to support the existence or the enforcement of an unwritten speech code. Lowery does not allege that he has ever been disciplined for his speech or that any Defendant has accused him of violating a UT or McCombs speech policy, written or unwritten. And Lowery's allegation that the University does not enforce its purported unwritten policy against "other faculty members," Dkt. 126 at ¶ 122, serves only to highlight that what Lowery wants to depict as enforcements of an unwritten policy were merely instances of Defendants and others discussing Lowery's speech with persons other than Lowery and that resulted in no discipline for Lowery (*i.e.*, no enforcement of any policy or code).

Likewise, Lowery has not alleged facts that would establish the enforcement of any unwritten policy against Lowery. Tellingly, paragraphs 117–122 of Lowery's Amended Complaint do not allege any specific action by any Defendant. Rather, they point only to "UT" or "UT administrators." And rather than allege that any Defendant actually disciplined him (or even counseled him) over his speech, Lowery can only cite comments Defendants allegedly made to others about Lowery's speech. Lowery offers no case law or other support for the proposition that merely talking to other people about Lowery's speech amounts to enforcement of any unwritten speech code against him.

In the end, Lowery's newly added speech-code claim is merely another attempt by Lowery to impose First Amendment liability on Defendants who have not engaged in any First Amendment deprivation. As the Court already recognized, no retaliation has occurred for Lowery's First Amendment activities. That should be the end of a First Amendment case against the University Defendants. But rather than accept that his First Amendment rights remain intact, Lowery demands federal court interference with Defendants' abilities to manage the McCombs School to such a degree that even their discussing mild criticisms of Lowery or their preferences that Lowery engage in the University community in a more productive manner would be precluded by a federal court injunction.[2]

Federal courts are not meant to "micromanage the administration of thousands of state educational institutions," *Dorsett*, 940 F.2d at 124, but Lowery's view of this case is that is precisely what this Court must do, even after the Court has determined that no retaliatory adverse employment action has occurred. The motion to dismiss the amended complaint establishes that Lowery's speech-code claim is nothing more than an improper attempt to make an end-run around Lowery's lack of a cognizable retaliation claim, and Lowery's response to the motion utterly fails to show that the Amended Complaint offers a cognizable speech-code claim. *E.g.*, Dkt. 130 (Lowery's Opposition Brief) at 11–12 (claiming that non-Defendant Kelly Kamm's inquiry into the propriety of Lowery's speech establishes the existence of a speech code); at 12–14 (claiming that discussion regarding whether Lowery could be asked merely to tone down his speech and colleague inquiries regarding safety concerns posed by Lowery's speech amounted to acknowledgment by faculty members that a speech code exists).

The Court should dismiss with prejudice the speech-code claim against all Defendants.

[2] *E.g.*, Dkt. 126 (Amended Complaint) at Prayer for Relief (seeking a broad injunction to bar Defendants from, *inter alia*, "counseling" Lowery regarding his speech, "labeling his speech as uncivil or rude," or "suggesting that his speech was disruptive").

CONCLUSION

This Court should dismiss the amended complaint in its entirety.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: */s/ Matt Dow*
Charles L. Babcock
Texas State Bar No. 01479500
cbabcock@jw.com
Joel R. Glover
Texas State Bar No. 24087593
jglover@jw.com
Javier Gonzalez
Texas State Bar No. 24119697
jgonzalez@jw.com
1401 McKinney Street, Suite 1900
Houston, Texas 77010
(713) 752-4200 – Phone
(713) 752-4221 – Fax

Matt Dow
Texas State Bar No. 06066500
mdow@jw.com
Adam W. Aston
Texas State Bar No. 24045423
aaston@jw.com
Cody Lee Vaughn
Texas State Bar No. 24115897
100 Congress Ave., Suite 1100
Austin, Texas 78701
(512) 236-2056 – Phone
(512) 691-4456 – Fax

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2024, I caused a copy of the foregoing pleading to be served upon counsel of record for all parties via the Court's ECF system.

/s/ Matt Dow
Matt Dow