UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF PARTIAL SUMMARY JUDGMENT AND RESPONSE TO PLAINTIFF'S MOTION TO DEFER

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Richard Lowery cannot escape the fatal flaw in his chilled-speech claim: his purported decision to self-chill was not based upon any threatened action that would amount to an adverse employment action under Fifth Circuit precedent. In the sixteen months since Lowery filed his Original Complaint, significant written discovery has been exchanged between the parties, and Lowery deposed Defendants Mills and Burris, as well as his own witness Carlos Carvalho, for 6 hours each (7 hours for Dean Mills). Despite all that, Lowery's First Amended Complaint fails to allege that Defendants took or threatened any adverse employment action in response to his speech. That is reason enough to grant summary judgment on the chilled-speech claim.

A public employee's First Amendment retaliation claim must be based upon an adverse employment action. Adverse employment actions include discharge, refusal to hire, and formal written reprimands; they do *not* include oral reprimands, criticism, or accusations, administrative decisions regarding teaching assignments, pay raises, or similar matters. A chilled-speech claim against a public employer must likewise be founded upon a threatened adverse employment action, because to permit otherwise would (1) impose First Amendment liability on public employers who have not violated plaintiff's First Amendment rights, and (2) permit as a "remedy" injunctions that prohibit public employers from taking constitutionally permissible actions. In short, a plaintiff who alleges that he chilled his own speech in fear of actions that defendants could lawfully undertake as a response to his speech has no cognizable First Amendment claim.

The First Amended Complaint does not allege that Lowery feared losing his tenured faculty position in the McCombs School or being demoted from Associate Professor. Instead, he claims only that he began chilling his speech in August 2022 out of a fear that he might not obtain future appointments to the Salem Center (a policy research center within McCombs to which he has been appointed and reappointed for each academic year since 2020–21) or that he might be called "rude" or "uncivil"

by others at the University. The lack of any threatened adverse employment action defeats Lowery's self-chill claim as a matter of law. Additional factual discovery cannot fix this legal flaw in Count One in Lowery's amended lawsuit, nor could it generate a genuine issue of material fact on that claim. The motion for partial summary judgment is not premature, and the Court should grant judgment in Defendants' favor on Count One.[1]

ARGUMENT

The Court should enter judgment in Defendants' favor on Count One because Lowery lacks a cognizable self-chilled-speech claim as a matter of law.

I. Defendants are entitled to judgment on Lowery's self-chill claim because it is not based upon any allegation of an adverse employment action.

As demonstrated in the motion for partial summary judgment, *see* Dkt. 132 (MPSJ) at 7–11, Lowery's First Amended Complaint does not assert a cognizable chilled-speech claim because it does not allege that Lowery based his purported decision to self-chill upon any threatened adverse employment action. "[A] First Amendment retaliation claim" requires "a public employee [to] show (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *Hawkland v. Hall*, 860 F. App'x 326, 329-30 (5th Cir. 2021) (quoting *Wilson v. Tregre*, 787 F.3d 322, 325 (5th Cir. 2015) (internal quotation marks and citation omitted)). Likewise, a chilled-speech claim that fails to even allege that the decision to self-chill was based upon the fear that continuing to speak would result in an adverse employment action is not a cognizable self-chill claim.

[1] Defendants have also filed a motion to dismiss the First Amended Complaint in its entirety. These motions should be heard together, and the Court should rule upon both before discovery is reopened because both rulings will inform whether any claims remain in the case and, thus, whether and to what extent additional discovery would be appropriate.

Lowery argues that his self-chilling claim is not required to be based on a threatened adverse employment action. *E.g.*, Dkt. 134 (Lowery's Response Brief) at 18). But Lowery's position would allow courts to impose First Amendment relief against employers that have not undertaken any act of retaliation to deprive a plaintiff of his constitutional rights, nor even threatened to do so. As a chilled-speech, employee-speaker plaintiff, Lowery alleges only that he feared actions that Defendants *could lawfully undertake* in response to his speech without violating his First Amendment rights. That is not a viable claim.

Fifth Circuit precedent limits "[a]dverse employment actions [to] discharges, demotions, refusals to hire, refusals to promote, and reprimands." *Benningfield v. City of Houston*, 157 F.3d 369, 376 (5th Cir. 1998) (quoting *Pierce v. TDCJ*, 37 F.3d 1146, 1149 (5th Cir. 1994)). Yet Lowery claims to fear only the possibility that he would not be reappointed to the Salem Center, that he would be labeled as rude or uncivil, or that his speech might be monitored. Am. Compl. ¶¶ 87–88, 92, 109. Tellingly, Lowery asserts that his "most important" fear was that UT leaders would "cancel or refuse to renew Lowery's position as a Senior Scholar at UT's Salem Center" with its corresponding stipend. Dkt. 134 (Lowery's Response Brief) at 15–16. Lowery does not allege that any of the Defendants spoke to him about his speech, and Defendants dispute that they threatened him with any of actions he purportedly fears. **MPSJ Ex. K** (Mills Decl., previously filed as Dkt. 14-1) at ¶¶ 5–8; **MPSJ Ex. L** (Burris Decl., previously filed as Dkt. 14-2) at ¶¶ 4–5. But in any event, Lowery's purported fears do not amount to adverse employment actions.

University decisions regarding secondary administrative roles are akin to the "teaching assignments, pay increases, and administrative matters" that the Fifth Circuit has refused to include as adverse employment actions. *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997); *see also Dorsett v. Board of Trustees*, 940 F.2d 121, 123 (5th Cir. 1991) (holding that denial of preferred teaching assignments

and summer employment "might seem extremely significant to [the public educator]" but "nevertheless . . . do not rise to the level of a constitutional deprivation"). Lowery's fear of losing the stipend accompanying his Salem Center position is akin to the "harm resulting from decisions concerning 'pay increases'" that the Fifth Circuit has held "does not rise to the level of a constitutional deprivation." *Harrington*, 118 F.3d at 366 (quoting *Dorsett*, 940 F.2d at 124). Consistent with those holdings, this Court has recognized that even a "verbal threat of termination" would not rise to the level of an adverse employment action. *Kincheloe v. Caudle*, No. A-09-CA-010 LY, 2009 WL 3381047, at *16 (W.D. Tex. Oct. 16, 2009) (citing *Breaux v. City of Garland*, 205 F.3d 150, 159–60 (5th Cir. 2000)).

If defendants *actually taking* the actions at issue in *Dorsett* and *Harrington* did not arise to the level of an adverse employment action, then Lowery's alleged fears that similar actions *might* occur cannot provide the necessary adverse employment action to support a cognizable self-chill claim under the First Amendment. Accordingly, even accepting as true (for summary judgment purposes) that Lowery felt his Salem Center position was threatened, that would not amount to an adverse employment action to support a cognizable First Amendment claim. This Court implicitly recognized as much when it dismissed Lowery's retaliation claim because his allegations are "insufficient to establish an adverse employment action for a First Amendment retaliation claim in the Fifth Circuit." Dkt. 51 (MtD Order) at 24 (citing *Breaux*, 205 F.3d at 160).[2]

In his summary judgment response, Lowery says that he also feared "a decrease [in] his prestige and academic freedom," "fewer and less interesting job responsibilities, there would be "less use of Lowery's skills and experience," or he might lose other opportunities to "advance his career," if he

[2] Notably, even threats of termination are not considered adverse employment actions. *Chandler v. La Quinta Inns, Inc.,* 264 F. App'x 422, 425, 2008 WL 280880, at *3 (5th Cir. Feb. 1, 2008) (stating that even a defendant's threat to terminate the plaintiff "would be insufficient to establish an adverse employment action"); *Breaux*, 205 F.3d at 160 (recognizing that "retaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over termination," and that "the [Supreme] Court did not hold or imply that threats of termination alone . . . would generate liability").

lost his appointment to the Salem Center. Dkt. 134 (Lowery's Response Brief) at 16. Those allegations do not appear in the First Amended Complaint, but they do not rise to actionable grounds for a self-chill claim in any event.[3]

Next, although Lowery's Response Brief does not focus on his purported fear that "Defendants will attempt to label Lowery as lacking civility, being dangerous, violent, or in need of police surveillance," Dkt. 126 (Am. Compl.) at ¶ 90; *see also id.* at ¶ 92, 109, he does allege that Defendants sought to counsel him in a manner that "served as a pre-disciplinary warning," Dkt. 134 (Lowery's Response Brief) at 16. But Lowery admits that Carvalho never counseled him in such a manner. Dkt. 134 (Lowery's Response Brief) at 16. Even if Carvalho had done so, "mere accusations or criticism," including "oral threats," would not qualify as adverse employment actions. *Breaux*, 205 F.3d at 157–58 (citing *Harrington*, 118 F.3d at 366); *Colson v. Grohman*, 174 F.3d 498, 511 (5th Cir. 1999) (adverse employment actions do not include "accusations, verbal reprimands, and investigations"). Similarly, even if Lowery feared an *actual* police investigation—rather than the fear of merely being labeled as "in need of police surveillance" that he described in the First Amended Complaint, Dkt. 126 (Am.

[3] In determining what is an adverse employment action for First Amendment purposes, the Fifth Circuit has recognized that "some retaliatory actions—even if they actually have the effect of chilling the plaintiff's speech—are too trivial or minor to be actionable as a violation of the First Amendment." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Thus, in the public-employment context, "the requirement of an adverse employment action serves the purpose of weeding out minor instances of retaliation." *Id.* at fn. 4 (citing *Colson*, 174 F.3d at 510, 514). The adverse-employment-action requirement likewise weeds out self-chilling claims based on perceived minor slights and grievances. If a professor could bring a First Amendment claim based on his alleged fear that his employer might take some action that would make his job less interesting or less prestigious, then practically every workplace dispute could be turned into a federal lawsuit. The Fifth Circuit has rejected that notion, explaining that "across this nation, interfaculty disputes arise daily over teaching assignments . . . administrative duties . . . and a host of other relatively trivial matters" that courts have "neither the competency nor the resources to micromanage." *Dorsett*, 940 F.2d at 123–24; *see also Connick v. Myers*, 461 U.S. 138, 154 (1983) (noting that the First Amendment does not empower public employees to "constitutionalize the employee grievance").

Compl.) at ¶ 90—that would not qualify as an adverse employment action under the First Amendment. *Breaux*, 205 F.3d at 158; *Colson*, 174 F.3d at 511.

In sum, the Amended Complaint fails to allege a cognizable First Amendment claim for self-chilled-speech. Defendants are thus entitled to judgment as a matter of law on this claim.

II. The motion for partial summary judgment is not premature, and the Court should consider it together with the pending motion to dismiss the First Amended Complaint.

Lowery's lead argument in his response complains of the timing, not the substance, of Defendants' motion for partial summary judgment. Dkt. 134 (Lowery's Response Brief) at 9–11; *see also* Dkt. 135 (Lowery's Motion to Defer Consideration of Partial Summary Judgment). Lowery asks for more time to conduct discovery before the Court considers the motion, suggesting that he needs to depose UT President Hartzell, a University 30(b)(6) witness, and non-party Professor Meeta Kothare. *Id.* But as explained above, the *legal* defect in Lowery's self-chill claim cannot be cured through fact discovery, so Lowery's desire for additional depositions is no basis for delaying the Court's consideration of Defendants' motion for partial summary judgment, which should be considered together with the pending motion to dismiss the First Amended Complaint in its entirety.[4]

In any event, nothing that Lowery could learn through depositions at this point could belatedly bolster his purported decision to self-chill nearly two years ago, much less present a threatened adverse employment action to save his self-chill claim. Thus, it is unsurprising that Lowery asks the Court for delay in vague terms—he says he needs "the opportunity to gather evidence necessary to support his

[4] This is a motion for partial summary judgment based upon a legal defect in Lowery's pleading as to Count One (chilled-speech). Defendants do not assert all grounds upon which summary judgment might, after completion of additional discovery, be appropriate as to Count One, and they do not seek summary judgment on any basis for the newly added Count Two (unwritten speech code). To do so likely would have been premature, and Defendants recognize that if either of those Counts survive the motion to dismiss (and Count One also survives this limited summary-judgment motion), then discovery will resume. But it is precisely because this motion seeking partial summary judgment is limited in scope that the Court should reject Lowery's requests for delay in the consideration of this motion.

chilled-speech claim," *e.g.*, Dkt. 134 (Lowery's Response Brief) at 11; Dkt. 135 (Lowery's Motion to Defer) at 2 (seeking "evidence to prove his case"), rather than explain precisely why he believes that further discovery will create a genuine issue of material fact as to his never-articulated perceived threat of an adverse employment action. For that reason, *Bailey v. KS Management Services, LLC* undercuts, rather than supports, Lowery's request for delay. 35 F.4th 397, 401 (5th Cir. 2022) (requiring a movant seeking deferral of summary judgment to show that "additional discovery will create a genuine issue of material fact"). Lowery cannot satisfy the requirement that the non-movant must "set forth a plausible basis for believing that specified facts . . . if adduced, will influence the outcome of the pending summary judgment motion;" it is not enough to "simply rely on vague assertions that discovery will produce needed, but unspecified facts." *Id.* (quotations omitted).

Lowery says he still needs discovery to learn "Hartzell's role in the campaign to silence Lowery's speech," Dkt. 135 (Lowery's Motion to Defer) at 3; "what Hartzell did to counter Lowery's published criticisms," *id.* at 5; whether donors reached out to Hartzell regarding Lowery's speech and, if so, how Hartzell responded, *id.* at 5–6; Hartzell's "own opinions about Lowery's speech—that is, if the speech was offensive, uncivil, rude, dangerous, and so forth," *id.* at 6; whether Hartzell has ever asked for any other faculty member to be counseled about tweets or other speech, *id.*; and whether Hartzell promotes viewpoint diversity and academic freedom as central to UT's mission, *id.* And Lowery wants a Rule 30(b)(6) deposition to ask "about UT's policies on faculty discipline, free speech, academic freedom, civility, and DEI." *Id.* Those questions offer no reason to delay consideration of this partial summary judgment motion because the answers could not generate any genuine issue of material fact regarding Lowery's lack of an adverse employment action. And the alleged fears motivating Lowery's purported decision to self-chill in August 2022 have always been within his own personal knowledge. Accordingly, Lowery is incorrect to claim that he "'cannot adequately oppose'" this

limited motion for partial summary judgment without additional discovery. Dkt. 135 (Motion to Defer) at 2 (quoting *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013)).

CONCLUSION & PRAYER

This Court should deny the motion to defer consideration of Defendants' motion for partial summary judgment, grant Defendants' motion for partial summary judgment, and enter judgment in Defendants' favor on Count One in Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief (Dkt. 126).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 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
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