UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

*Plaintiff*,

v.

LILLIAN MILLS, *et al.*,

*Defendants*.

Case No. 1:23-cv-00129-DAE

**PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO DEFER CONSIDERATION OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

## REPLY ARGUMENT

### 1. Because objective chill is a mixed question, this Court should defer ruling on summary judgment

To establish his chilled-speech claim, Lowery must demonstrate that "(1) [he] engaged in constitutionally protected activity, (2) the defendants' actions caused [him] to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendants' adverse actions were substantially motivated against the plaintiff['s] exercise of constitutionally protected conduct." Dkt. 51 at 25 (quoting *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002)). According to UT, this Court should not permit Lowery to complete discovery, because his chilled-speech claim contains a "*legal* defect" that "cannot be cured through fact discovery." Dkt. 136 at 9 (emphasis original).

UT misrepresents the *Keenan* test. "Whether a person of ordinary firmness would be chilled" by Defendants' acts is a mixed question of law and fact, for "[t]he analysis necessarily turns on the nature and extent of the injury." *McLin v. Ard*, No. 13-538-SDD-RLB, 2013 U.S. Dist. LEXIS 154600, at *13 (M.D. La. Oct. 28, 2013), *aff'd*, 866 F.3d 682 (5th Cir. 2017). This Court cannot determine the chill Lowery suffered without a complete factual record concerning what threats Defendants made; what actions Defendants (including Jay Hartzell) took; and what forms of discipline UT's policies allow, which a faculty member thus might reasonably fear. *See* Dkt. 135 at 4-7.

Courts evaluate chill objectively, looking at the response of "a person of ordinary firmness," Dkt. 51 at 25, rather than the subjective experience of the named plaintiff. "The focus, of course, is upon whether a person of ordinary firmness would be chilled, rather than whether the particular plaintiff is chilled." *Smith v. Plati*, 258 F.3d 1167, 1177 (10th Cir. 2001); *cf. Keenan*, 290 F.3d at 258 (5th Cir. 2002) (adopting "[t]he settled law of other circuits" about chilled-speech claims and citing

*Smith* as key example of this settled law). "[I]t would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity." *Perkins v. Hart*, 617 F. Supp. 3d 444, 467 & n.216 (E.D. La. 2022) (citing *Keenan*, 290 F.3d at 258 and *Smith*, 258 F.3d at 1176), *aff'd in part*, No. 22-30456, 2023 U.S. App. LEXIS 31734, at *20 (5th Cir. Nov. 30, 2023); *see also McLin*, No. 2013 U.S. Dist. LEXIS 154600, at *12 (similar). As a result, UT is wrong to assert that objective chill can be evaluated solely with respect to facts "within [Lowery's] own personal knowledge." Dkt. 136 at 10. UT confuses an objective inquiry with a subjective one.[1]

Without discovery into UT's threats, actions, and practices, this Court cannot know the full range of discipline that Lowery potentially would have suffered had he not self-censored. Lowery, for example, has testified that UT administrators' actions and counseling caused Lowery to fear "loss of pay or *other disciplinary consequences* if [he] continued criticizing GSLI and its events" and to self-censor to avoid "the risk to [his] career." Dkt. 8-1, ¶ 49-50, 60 (emphasis added).

Already, evidence reveals that Defendants threatened to decrease Lowery's pay by $20,000 annually, to not renew his valuable Salem Center appointment, and to end his supervisory role over Salem's fellows. Dkt. 8-2, ¶¶ 8-10; Dkt. 8-1, ¶¶ 3-5, 7, 49, 61-62. Defendants also "counseled" him about speech they labelled as rude, uncivil, and dangerous speech. Dkt. 8-2, ¶ 11; Dkt. 8-1, ¶¶ 49, 52-57, 60, 63; Dkt. 132-4 at 136:4-137:15, 145:18-146:9. Additional discovery can elucidate if this

[1] UT has wrongly treated the second *Keenan* element as solely subjective before. *See* Dkt. 69 at 10 n.2; Dkt. 66 at 3, 5. In truth, this element is both subjective and objective. The plaintiff must subjectively fear, and that fear must be objectively reasonable. *See McLin*, 866 F.3d at 696-97. UT's analysis is selective and deployed primarily when it seeks to prevent discovery into evidence that would support an objective fear that its officials sought to silence Lowery.

counseling was pre-disciplinary—perhaps the groundwork for eventual tenure removal if Lowery had not self-censored. *See* Dkt. 69-3; Dkt. 132-4 at 199:6-8.

Moreover, if further discovery reveals that Jay Hartzell wanted Lowery's speech chilled, it becomes even harder for Defendants to claim they did not chill Lowery. It is self-evident that if the executive at the top of UT's chain-of-command wanted an employee silenced, that corroborating evidence is probative of whether subordinate officials acted to silence the employee. *See* FED. R. EVID. 401; *see also Muslow v. La. State Univ.*, No. 22-30585, 2023 U.S. App. LEXIS 22501, at *26 (5th Cir. Aug. 24, 2023) (reversing summary judgment as corroborating evidence supported objective reasonableness of employee's belief); *Jianhui Sun v. Barr*, 754 F. App'x 294, 295 (5th Cir. 2019) (noting insufficient corroborating evidence to support objective reasonableness of plaintiff's fear).

So too is evidence that UT officials refrained from counseling leftwing faculty over provocative tweets, or potential evidence that Meeta Kothare coordinated her denunciation of Lowery with people, such as Laura Starks, linked to Jay Hartzell. The fact that UT is so eager to have this Court resolve the chilled-speech claim before this important discovery occurs, itself signals that UT's officials fear what Lowery will uncover. Until discovery is finished, partial summary judgment is "premature and improper." *Austin Legal Video, LLC v. Deposition Sols., LLC*, No. 1:23-cv-00421-DAE, 2023 U.S. Dist. LEXIS 232404, at *6 (W.D. Tex. Nov. 16, 2023).

**2. Because the threat of an adverse employment action is a mixed question, this Court should defer ruling on summary judgment**

This Court should also defer ruling, until discovery into UT's threatened adverse employment actions is complete. UT insists that its threat can only objectively chill Lowery's First Amendment rights if Lowery's decision to self-censor "was based upon the fear that continuing to speak would result in an adverse employment

action." Dkt. 136 at 5. UT cites no legal authority for this supposed rule, *see id.*, which would wrongly conflate chilled-speech claims and retaliation claims. Chilled-speech claims only require "an injury that would chill a person of ordinary firmness from continuing to engage in that activity." Dkt. 51 at 25. Regardless, Lowery has explained why evidence demonstrates that UT officials threatened him with adverse employment actions, such as loss of pay. *See* Dkt. 134 at 20-22.

Moreover, whether a threat menaces an adverse employment action is a mixed question, which requires applying facts to law. By way of analogy, in employment retaliation cases, discipline is actionable if it is "equivalent to a discharge, demotion, refusal to hire, refusal to promote, or reprimand in its seriousness, causing 'some serious, objective, and tangible harm[.]'" *Ellis v. Crawford*, Civil Action No. 3:03-CV-2416-D, 2005 U.S. Dist. LEXIS 3457, at *27-28 (N.D. Tex. Mar. 3, 2005) (quoting *Serna v. City of San Antonio*, 244 F.3d 479, 482-83 (5th Cir. 2001)). "A change in or loss of job responsibilities may still amount to the equivalent of a demotion if it is so significant and material that it rises to the level of an adverse employment action." *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209, 218 (5th Cir. 2023) (cleaned up). If a "new position proves objectively worse—such as being less prestigious or less interesting or providing less room for advancement," the change is "equivalent to a demotion." *Sharp v. City of Hous.*, 164 F.3d 923, 933 (5th Cir. 1999).

The Fifth Circuit has set out factors assessing if a position is objectively superior or inferior to another, including "whether the position: entails an increase in compensation or other tangible benefits; provides greater responsibility or better job duties; provides greater opportunities for career advancement; requires greater skill, education, or experience; is obtained through a complex competitive selection process; or is otherwise objectively more prestigious." *Alvarado v Tex. Rangers,* 492

F. 3d 605, 614 (5th Cir. 2007). These factors scrutinize the specific facts of the case. A court can only grant summary judgment if no "reasonable juror could find that these facts support the conclusion that [the plaintiff] was effectively demoted." *Wallace*, 57 F.4th at 219-20.

UT officials threatened to stop renewing Lowery's prestigious Salem Center position if he continued to speak freely. Removal from the Salem Center is objectively equivalent to a demotion, for it entails a $20,000 decrease in salary, fewer and less interesting responsibilities, loss of his supervisory authority over Salem's undergraduate and postdoctoral fellows, fewer opportunities for career advancing research, and less use of Lowery's skills and experience. Dkt. 8-2, ¶¶ 8-10; Dkt. 8-1, ¶¶ 3-5, 7, 43, 49, 61-62.

Moreover, Lowery seeks discovery into the "other disciplinary consequences" he would have suffered if he continued to criticize UT. Dkt. 8-1, ¶¶ 49, 60; *see also* Dkt. 126, ¶¶ 109-10 ("Defendants' threats to . . . otherwise discipline him are designed to silence Lowery's criticisms"). Defendants "counseled" Lowery and acquiesced to his investigation by UT police in a way indicates that harsher consequences would come later if Lowery did not alter his speech. *See* Dkt. 8-2, ¶¶ 6-8, 11; Dkt. 8-1, ¶¶ 49, 52-57, 60, 63. Lowery has alleged that UT's president, Jay Hartzell, played a role in these threats but has not had opportunity to depose Hartzell—let alone to conduct the other depositions and discovery that Lowery needs. *See* Dkt. 126, ¶¶ 44-50, 100, 106-07, 112-14. With so many facts unknown, this Court cannot apply the fact-intensive equivalency standard. Deferring summary judgment is essential.

## CONCLUSION

This court should defer ruling on UT's motion for summary judgment until Lowery has completed discovery in the case.

Respectfully submitted,

*s/Endel Kolde*
Endel Kolde
Washington Bar No. 25155
Courtney Corbello
Texas Bar No. 24097533
Nathan J. Ristuccia†
Virginia Bar No. 98372
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, D.C. 20036
Tel: (202) 301-1664
Fax: (202) 301-3399
dkolde@ifs.org
ccorbello@ifs.org
nristuccia@ifs.org

*Counsel for Richard Lowery*

Dated: June 13, 2024

*s/Michael E. Lovins*
Michael E. Lovins
Texas Bar No. 24032555
LOVINS | TROSLCAIR, PLLC
1301 S. Cap. Of Texas
Building A Suite 136
Austin, Texas 78746
Tel: (512) 535-1649
Fax: (214) 972-1047
michael@lovinslaw.com

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† Not a D.C. Bar Member but providing legal services in the District of Columbia exclusively before federal courts, as authorized by D.C. Ct. App. R. 49(c)(3).