IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CIVIL ACTION NO: 5:21-cv-00365-BO

STEPHEN R. PORTER, PH.D.,

Plaintiff,

v.

BOARD OF TRUSTEES OF NORTH CAROLINA STATE UNIVERSITY, W. RANDOLPH WOODSON, MARY ANN DANOWITZ, JOY GASTON GAYLES, JOHN K. LEE, AND PENNY A. PASQUE, individually and in their official capacities,

Defendants.

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

The arguments in Plaintiff's Response are conclusory, misstate the applicable legal standards, and rely on facts, theories, and claims which are not in the Complaint.[1] Plaintiff's Response, like his Complaint, fails to identify an actionable adverse employment action, the expression by Plaintiff of protected speech, or retaliatory conduct by Defendants. Plaintiff's Response, like his Complaint, also fails to overcome the immunities which bar his claims.

REPLY

I. Plaintiff's claims against Defendants BOT and Woodson are legally insufficient.

In an attempt to save his claims against Defendants BOT and Woodson from sovereign and Eleventh Amendment immunity, Plaintiff disregards the allegations in the Complaint and discusses theories and purported facts which are not included in the Complaint. Specifically, Plaintiff argues that he has asserted Section 1983 claims against Defendants BOT and Woodson in their individual (as well as official) capacity. (DE 22 at 4-5). *This is not so.* It is clear from the allegations in the Complaint that these Defendants are sued in their official capacity only. (DE 1 ¶¶7-8). Paragraph 7 expressly states that the BOT is the governing body of a governmental entity (NC State)[2] and that "[a]t all times relevant to this complaint, the Trustees of the Board acted under color of state law and are sued in their official capacities." (DE 1 ¶7). Likewise, Paragraph 8 unambiguously states that Defendant Woodson is being sued in his official capacity. (DE 1 ¶8). There are no allegations addressed to Defendants BOT and Woodson in their individual capacities. (DE 1 ¶¶7-8).

Plaintiff's attempt to rewrite his Complaint in his Response is improper. A party may not use a brief to raise new claims or allegations in order to survive dismissal. Beck v. City of Durham, 129 F. Supp.

[1] Pursuant to Fed. R. Civ. P. 10(c), Defendants incorporate by reference the legal authorities and arguments in their Memorandum in Support of Defendants' Motion to Dismiss Plaintiff's Complaint (the "Memorandum"). (DE 16). Any argument in the Memorandum that Plaintiff did not oppose in the Response (DE 22) is deemed conceded. E.g., Feldman v. Law Enforcement Assocs. Corp., 955 F. Supp. 2d 528, 536 (E.D.N.C. 2013), aff'd, 752 F.3d 339 (4th Cir. 2014).

[2] Plaintiff does not explain how an entity such as the BOT can be ever sued in an *individual* capacity.

2d 844, 855 (M.D.N.C. 2000). "Because the Court's consideration of Defendants' Motions to Dismiss is limited to the allegations stated in the Complaint, Plaintiff cannot attempt to create claims . . . in his response to Defendants' Motions to Dismiss." Id. at 855. Additionally, "the Court cannot rely on facts alleged in the Plaintiff's Response brief when evaluating the legal sufficiency of a complaint on a motion to dismiss." Aero. Mfg., Inc. v. Clive Merch. Grp., LLC, 2006 U.S. Dist. LEXIS 33144, at *10 n.4 (M.D.N.C. May 23, 2006). "[The plaintiff] is bound by the allegations contained in its complaint and cannot, through the use of motion briefs, amend the complaint." Zachair, Ltd. v. Driggs, 965 F. Supp. 741, 748 n.4. Md. 1997), aff'd, 141 F.3d 1162 (4th Cir. 1998).

Plaintiff's claims against Defendants BOT and Woodson are legally deficient in other ways. *No* allegations of wrongful conduct by BOT or Woodson are set forth in the Complaint. Here, again, Plaintiff cannot use his Response to rewrite the Complaint. In his Response, Plaintiff states that Defendants BOT and Woodson were personally involved in violating constitutional rights because they are NC State's "ultimate decision-makers and policy makers," and they were responsible for what Plaintiff calls vague and ambiguous "'collegiality' regulations" and "grievance procedures." (DE 22 at 5). No allegations of this nature, however, are contained in the Complaint. Even if they were, these allegations are conclusory at best and still insufficient as a matter of law. "[B]are allegations are insufficient to raise [a] right to relief above the speculative level." Swaso v. Onslow Cty. Bd. of Educ., 698 F. App'x 745, 749 (4th Cir. 2017). A complaint "must identify specific acts or conduct taken by each defendant to state a claim." Shinaberry v. Town of Murfreesboro, 2018 U.S. Dist. LEXIS 63287, at *13 (Apr. 16, 2018). See also Al-Deen v. Trs. of the Univ. of N.C. Wilmington, 102 F. Supp. 3d 758, 764 (E.D.N.C. 2015) (court dismissed Section 1983 monetary and declaratory injunctive claims against Trustees and state officials of UNCW based on speculative nature of allegations).

II. The Ex parte Young exception does not apply to Plaintiff's claims.

Realizing that, under sovereign immunity and Eleventh Amendment immunity, he is not entitled to monetary damages from the BOT and the individual Defendants in their official capacities, Plaintiff

incorrectly contends that he is entitled to injunctive relief under Ex parte Young, 209 U.S. 123, 159-60 (1908), which provides a limited exception to Eleventh Amendment immunity in Section 1983 claims where suit is brought against state officials and "(1) the violation for which relief is sought is an ongoing one, and (2) the relief sought is only prospective." Republic of Paraguay v. Allen, 134 F.3d 622, 627 (4th Cir.1998). The Ex parte Young exception "does not permit federal courts to entertain claims seeking retrospective relief, either compensatory or other, for completed, not presently ongoing violations of federally protected rights." Id. "[A] court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective' to determine if *Ex parte Young* applies." Verizon Md. Inc. v. PSC 535 U.S. 635, 645 (2002) (citation omitted).

Plaintiff points to no factual allegations or legal authority to support his blanket assertion that the Ex parte Young exception applies to his claims against Defendants. In this case, Plaintiff seeks retrospective relief only. Plaintiff's Complaint is void of any facts of an alleged on-going constitutional violation or of a real and immediate threat of such an injury in the future. The Complaint alleges discrete, *past* violations. Per the Complaint, Plaintiff's claims arise out of his removal, in 2019, from the Higher Education Program Area (DE 1 ¶¶77-79, 127), and the refusal by faculty members, in 2021, to allow Plaintiff to join a PH.D. Program Area of Study (DE 1 ¶¶108, 127).

Courts have repeatedly held that ongoing violations do not exist when a claim seeks redress only for consequences of alleged past actions which may still persist. See e.g. Green v. Mansour, 474 U.S. 64, 73 (1985) (holding that a State is immune from declaratory judgments that would provide retrospective relief pursuant to the Eleventh Amendment); Jemsek v. N.C. Med. Bd., 2017 U.S. Dist. LEXIS 23570, at *15 (E.D.N.C. Feb. 20, 2017) (holding that a doctor's request for injunctive relief directing a state medical board to retract a disciplinary order did not meet the Ex Parte Young criteria), affirmed by 697 F. App'x 234 (4th Cir. 2017). Here, at best, Plaintiff complains of alleged consequences of alleged past acts. This being so, all of Plaintiff's claims (for monetary damages and for injunctive and declaratory relief) against the BOT and the individual Defendants in their official capacities should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), (2),

and (6).

III. Plaintiff's Complaint fails to state a freedom of speech retaliation claim.

While Plaintiff argues in his Response that the pleading requirements for his claims constitute a low bar, he is, like all plaintiffs, "required to allege facts that support a claim for relief." Bass v. E. I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003), cert. denied 540 U.S. 940 (2003). To avoid dismissal under Rule 12(b)(6), he is required to include sufficient factual allegations "to raise a right to relief above the speculative level[]" for the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

Plaintiff's Complaint falls far short of this standard, and his reliance in his Response on conclusory allegations and facts that are not included in the Complaint does not change the outcome. As is discussed in detail in Defendant's Memorandum, Plaintiff's Complaint fails to sufficiently plead *any* of the four elements[3] of a free speech retaliation claim.

A. Plaintiff's Complaint fails to state an adverse employment action.

Plaintiff argues that his removal from the Higher Education Program Area and not being invited to join the new PH.D. Program Area of Study constitute adverse employment actions[4] because they could lead him to "languish in a program area of study drained of students and starved for resources." (DE 22 at 8). This argument is speculative and insufficient to state an adverse employment action. Plaintiff does not assert in the Complaint (or in his Response) that he has, in fact, languished in any way, that his tenure has been questioned, that he has lost advisees, or that he has suffered economically by these alleged actions. Rather, under the Fourth Circuit precedent cited by Defendants in their Memorandum, the actions

[3] The failure to plead sufficiently even one of the required elements is fatal to his claims. Here, Plaintiff's Complaint fails to plead sufficiently each of the four elements.

[4] In the Complaint, Plaintiff alleges that he was initially asked to teach a fifth course (which he never had to do). Plaintiff does not mention this allegation at all in his Response. Therefore, he has waived any arguments that the fifth course is an adverse employment action.

Plaintiff alleges in his Complaint do not amount to adverse employment actions. See, e.g., Boone v. Goldwin, 178 F.3d 253, 256-47 (4th Cir. 1999) (holding that employment actions that do not cause a "decrease in compensation, job title, level of responsibility, or opportunity for promotion" do not constitute adverse employment actions); Hoyle v. Freightliner, LLC, 650 F.3d 321, 337 (4th Cir. 2011) (finding plaintiff's reassignment from her regular off-line position to perform janitorial duties and later termination could constitute an adverse employment action); James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 376-77 (4th Cir. 2004)("[The plaintiff's] lengthy list of complaints[5] does nothing to impeach the district court's holding that he did not suffer an adverse employment action. It was significant to the district court, as it is to us, that James retained his position of Senior Associate and received the same pay, benefits, and other terms and conditions of employment."); see also Mann v. Winston-Salem State University, 2017 U.S. Dist. LEXIS 113586, at *41 (M.D.N.C. Jul. 21 2017) (holding that professor's objections to classes assigned and schedule alteration constituted a minor annoyance rather than an adverse employment action)); Adams v. Anne Arundel Cnty. Pub. Sch., 789 F.3d 422, 431 (4th Cir. 2015) ("[D]islike of or disagreement with an employer's decisions does not invariably make those decisions ones that adversely affected some aspect of employment.").

Plaintiff's reliance on Burlington Northern & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006), Engler v. Harris Corp., 2012 U.S. Dist. LEXIS 122167, *26-27 (D. Md. Aug. 28, 2012), and Cravey v. Univ. of N.C. at Chapel Hill, 2018 U.S. Dist. LEXIS 158890, *14 (M.D.N.C. Sept. 18, 2018) is misplaced.

[5] Some of the complaints raised by the plaintiff in James are similar to those raised by Plaintiff herein:

> James asserts that his potential for promotion and professional development was stymied by his reassignment in February 1999 and his subsequent treatment. He claims he was not considered for managing other projects and that because of that he was able to bill less. As a result of this lower billing, he claims that he would have been ineligible for future bonuses and that harassment about his low billing suggested that his job was in jeopardy. He asserts further that he was excluded from important meetings dealing with the WMATA project and excluded from a conference that a similarly situated white male was permitted to attend.

James, 368 F.3d at 376.

While Plaintiff characterizes the standard in White as a lower bar than that advanced by Defendants, the White court did require that a plaintiff be able to establish that a reasonable employee would find the challenged action materially adverse. White, 548 U.S. at 68. The Supreme Court specifically drew a distinction between significant and trivial harms and noted that employees cannot be immunized against "petty slights or minor annoyances that often take place at work and that all employees experience." White, 548 U.S. at 68.

In White, the Supreme Court went on to find that reassignment of the plaintiff to less desirable duties and her eventual suspension without pay constituted materially adverse actions. Id. at 70. Similarly, in Engler, the employees alleged that they were *terminated* or *forced to resign or retire*. Engler, 2012 U.S. Dist. LEXIS 122167, at *1 (emphasis added). And, in Cravey, the plaintiff professor alleged that she was denied teaching assistant support or the ability to teach certain courses resulting in her *denial of tenure*. Cravey, 2018 U.S. Dist. LEXIS 158890, at *3-4. These cases, like the cases cited by Defendants in their Memorandum, reveal the types of actions (such as dismissal, forced resignation, and denial of tenure) required to support a claim.[6] Plaintiff's allegations do not rise to the level of material adversity required, and the failure to meet this element requires dismissal of his claim.

B. The statements on which Plaintiff relies for his claims do not constitute protected speech involving public concern.

In his Response, Plaintiff acknowledges that his claims are based on three specific statements that Plaintiff made during a two-year period of time. Plaintiff fails, however, to demonstrate that these communications involved speech related to a matter of public concern so as to give rise to a free speech constitutional claim. As is discussed in Defendants' Memorandum and the cases cited therein, Plaintiff's communications amount to nothing more than personal grievances and comments regarding potential

[6] Plaintiff also references Patane v. Clark, 508 F.3d 106, 116 (2d Cir. 2007), (executive secretary was removed from '''virtually all of her secretarial functions," and her supervisors "specifically conspired to 'not give [her] work' in order to 'make her leave,'") and Gentry v. Jackson State Univ., 161 F. Supp. 3d 418, 422 (S.D. Miss. 2015) (no adverse employment action where professor's removal as Coordinator of Master's Program came 18 months after she filed her EEOC charge).

candidates for hire and/or the internal operation of the ELPHD department. Plaintiff's attempts, in his Response, to elevate the three communications into something more fails.[7]

As to Plaintiff's communication during the Spring 2016 departmental meeting regarding the proposed addition of a diversity question to student course evaluations, Plaintiff specifically asserts that he was not expressing opposition to diversity or the school's approach to diversity. (DE 1 ¶ 21). Instead, Plaintiff asserts in the Complaint that he voiced concern over the department's "design" of the question, stating that "he was concerned that in response to social pressure, the department was rushing to include a question that had not been properly designed and thus might be harmful to faculty without yielding useful information." (DE 1 ¶ 22). Per the Complaint, the communication was very specific and addressed the design, not the concept, of the question. This is a far cry from the allegations in Scallet v. Rosenblum, 911 F. Supp. 999, 1017 (W.D. Va. 1996), a case relied on by Plaintiff in which the plaintiff professor alleged that he was subjected to retaliation due to his advocacy of diversity in the classroom and in faculty meetings. Id. at 1014, 1017-18 (finding that the professor's speech addressed "the general debate on multiculturalism"). In contrast to the limited communication herein, the court in Scallet stressed that "Scallet was speaking as a concerned citizen, albeit one within the University community, who wished to advance a dialogue at [the school] because he thought changes in society demanded that [the school] engage in that dialogue." Id. Notably, in Scallet, the school *refused to renew the plaintiff's teaching contract* in retaliation for his communications. Id. at 1003. No allegations of this nature are included in Plaintiff's Complaint.

No argument can be made that Plaintiff's April 11, 2018 email to the faculty in the Higher Education Program Area involved a matter of public concern. In this communication, Plaintiff made a sarcastic remark to a colleague serving as the head of a search committee regarding an article about a

[7] Plaintiff argues in the Response that his speech concerned the nature of what is taught at NCSU, the composition of the faculty, and "an issue at the heart of a current and 'passionate political and social debate.'" (DE 22 at 16). These after-the-fact characterizations cannot convert his communications into political speech.

candidate that appeared in *Inside Higher Ed*. Plaintiff's comments were focused on how the article might reflect on the department; despite his arguments in the Response, nothing in the email suggests that Plaintiff was speaking as a concerned citizen who wished to advance a dialogue regarding anything of interest to the public at large. Compare Scallet, 911 F. Supp. at 1018. Plaintiff cites no legal authority that this type of comment constitutes protected speech and does not address or distinguish the cases cited in Defendants' Memorandum in which courts have specifically held otherwise, including McReady v. OMalley, 804 F. Supp. 2d 427, 439 (D. Md. 2011), aff'd, 468 F. App'x 391 (4th Cir. 2012).

Plaintiff's contention in the Response that his September 3, 2018 blog post constitutes a "criticism of the direction in which the field of higher education has moved in recent years" is, like his arguments regarding the other communications, an effort to embellish the allegations in the Complaint and is belied by the contents of the post itself. In the Complaint, Plaintiff does not assert what the blog states or how it is a criticism of public concern. (DE 22 at 14). In fact, the blog expressed Plaintiff's personal preference for AEFP over ASHE. See DE 15-1 The blog is nothing more than Plaintiff's airing of his own personal dissatisfaction with ASHE. This is personal commentary and does not implicate a matter of public concern.[8] See Brooks v. Arthur, 685 F.3d 367, 372 (4th Cir. 2012).

Accordingly, Plaintiff's arguments and allegations fail to satisfy the second element of a free speech retaliation claim, i.e. that he engaged in protected speech. None of the communications referenced in the Complaint implicates Plaintiff's constitutional rights.

C. Plaintiff's Complaint fails to show that his right to free speech was outweighed by Defendants' interests.

While Plaintiff contends that his right to free speech was not outweighed by NC State's need to promote the efficient operation of its degree programs, Plaintiff concedes in his Response that he was not removed from the Higher Education Program until after: (1) students raised concerns after the ASHE

[8] While Plaintiff argues that the blog post concerned the politicization of the annual conference of ASHE and was "clearly a criticism of the direction in which the field of higher education has moved," see DE 22 at 14, he later acknowledges that the post was merely "a brief blog comparing the relative prevalence of particular terms in sessions at the ASHE conference," see DE 22 at 20.

president mentioned Plaintiff at a conference (DE 22 at 20); (2) he did not follow through on his department head's request that he engage in a community discussion to address the student concerns (DE 22 at 20); (3) he used profanity in a departmental meeting (DE 22 at 21); and (4) he was counseled about his behavior, described at times as bullying, towards colleagues. (DE 22 at 21, see also DE 1 ¶¶16, 29, 38, 46, 60-63, 74, 78, DE 16 at 22-24).

As discussed in the Memorandum, Defendants' alleged actions regarding Plaintiff's participation in program areas are entirely consistent with NC State's mission of providing educational services to its students and its interest in promoting smooth operation within academic departments. See Rankin v. McPherson, 483 U.S. 378, 388 (1987). Plaintiff's allegations reveal that Defendants were attempting to manage and effectively operate the ELPHD department and its program study areas. Clearly, NC State had a right to do so – particularly in light of the documented complaints concerning Plaintiff's conduct *as outlined by Plaintiff in the Complaint*. The alleged wrongful action taken by Defendants was not overly restrictive on any balancing test spectrum and was tailored to the problems which Plaintiff noted in the Complaint. Plaintiff was not demoted, disciplined, or subjected to economic harm, and Plaintiff does *not* allege that he was ever told that he could not express his opinions or post on his personal blog.

D. The Complaint fails to show a causal connection between Plaintiff's alleged expression of protected speech and any alleged adverse employment actions.

In the Response, Plaintiff argues that there is a clear causation between his alleged protected speech and Defendants' actions. (DE 22 at 22-23). Plaintiff fails to cite sufficient facts or *any* legal authority, however, to support this contention. Plaintiff concedes that the timing of the events prevents him from establishing causation on temporal proximately alone. (DE 22 at 23). Plaintiff was not removed from the Higher Education Program Area until July 5, 2019, *almost eleven months after* his last alleged expression of speech on September 3, 2018. (DE 16 at 25-26). By this time, *per the allegations of the Complaint*, Plaintiff had a demonstrated and documented pattern of objectionable and disruptive conduct.

IV. Plaintiff's claims are barred by qualified immunity.

Even if Plaintiff's Complaint satisfied the pleading requirements for a retaliation claim, which it does not, Plaintiff's claims against the individual Defendants are barred by qualified immunity. The facts in this case are far less compelling than the facts in Pike v. Osborne, 301 F.3d 182, 185 (4th Cir. 2002) and Crouse v. Town of Moncks Corner, 848 F.3d 576, 583 (4th Cir. 2017), discussed in Defendants' Memorandum, *where the Fourth Circuit ruled in favor of the defendants as a matter of law based on qualified immunity*. Plaintiff does not address these cases at all in his Response, relying instead (without any discussion of the facts) on Adams v. Trs. of the Univ. of N.C.-Wilmington, 640 F.3d 550 (4th Cir. 2011). In Adams, the plaintiff (an associate professor) alleged that he was *denied a promotion* because he *published a book* and *appeared on radio and television broadcasts* where he promoted his conservative beliefs. Id. at 553, 555. No comparable allegations are included in Plaintiff's Complaint. While Plaintiff argues that "[t]here was no good-faith misunderstanding here about whether Plaintiff was speaking on a matter of public concern, " (DE 22 at 26), for the reasons set forth above and in the Memorandum, the three statements on which Plaintiff relies do not constitute protected speech. However, if they were ultimately found to constitute protected speech, the Fourth Circuit has recognized that it is rare that it would be clearly established that a public employee's speech is constitutionally protected. See Pike, 301 F.3d at 185. And again, Plaintiff was not demoted, fired, asked to resign, disciplined, or subjected to any economic harm by Defendants. Thus, in contrast to Adams, no argument exists that the individually-named Defendants' alleged conduct violated a clearly established statutory or constitutional right which a reasonable person would have known at the time of the action would deprive Plaintiff of his rights. As such, the individual Defendants are entitled to qualified immunity.

CONCLUSION

Defendants respectfully request that all claims herein be dismissed with prejudice and that Plaintiff's requests for declaratory and injunctive relief be denied.

This the 1st day of March, 2022.

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CERTIFICATE OF COMPLIANCE WITH PAGE LIMIT

The undersigned hereby certifies that the foregoing reply complies with Rule 7.2(f) of the Local Rules, in that it does not exceed 10 pages in length, excluding the cover page, case caption, signature block, and certificate of service pages.

Respectfully submitted this the 1st day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT** with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all registered CM/ECF users, including Samantha K. Harris, sharris@allenharrislaw.com, and Jonathan A. Vogel, jonathan.vogel@vogelpllc.com.

Respectfully submitted this the 1st day of March, 2022.

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