IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
CASE 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.	)	**PLAINTIFF'S SUR-REPLY IN OPPOSITION TO MOTION TO DISMISS**

INTRODUCTION

On March 1, 2022, Defendants submitted their reply in support of their motion to dismiss (D.E. 23). In their reply, Defendants raise a new legal argument, alleging for the first time that Plaintiff seeks only retrospective relief from this Court. Moreover, Defendants now argue that Plaintiff has alleged nothing more than the type of "petty slights and minor annoyances that often take place at work and that all employees experience" (D.E. 23 at 6), despite the existence of newly decided authority and clear factual evidence to the contrary.

ARGUMENT

I. Plaintiff's Complaint Alleges a Claim for Prospective Relief

Desperate for this Court to dismiss Plaintiff's Complaint without regard to the merits, Defendants now assert that Plaintiff has not alleged any "on-going constitutional violation or…real and immediate threat of such an injury in the future," despite the fact that Plaintiff continues to be excluded from the life of his department. (D.E. 23, at 3). Rather, Defendants allege that their acts of kicking Plaintiff out of the Higher Education Program Area in 2019 and excluding him from the new Program Area of Study in 2021 are merely past violations that cannot be redressed without infringing on their sovereign immunity.

In support of this argument, Defendants cite *Jemsek v. North Carolina Medical Board*, 2017 U.S. Dist. LEXIS 23570 (E.D.N.C. Feb. 20, 2017). In *Jemsek*, the North Carolina Medical Board issued two letters of discipline to the plaintiff, a physician, over his use of long-term antibiotics and hyperbaric chambers to treat Lyme disease, finding in both 2006 and 2008 that he was operating below acceptable standards of medical practice. Jemsek sued, arguing that the letters were issued as part of a conspiracy between the medical board and a private insurance company to fix the price of Lyme disease treatment. He argued that since the letters were a matter of public record, their continued existence was causing him ongoing harm. The court found that the relief Jemsek sought was retrospective:

> Relief is retrospective when the effect of an injunction or declaration directed at state officials 'would be to undo accomplished state action **and not to**

> **provide prospective relief against the continuation of the past violation**.' (Emphasis added).

Jemsek, 2017 U.S. Dist. LEXIS at *27 (internal citations omitted).

In the instant case, Plaintiff is seeking prospective relief against the continuation of the past violation. Plaintiff has repeatedly protested his exclusion from meetings, programs, and events critical to his ability to attract and retain PhD advisees – a core aspect of his job – and Defendants have repeatedly refused to include him despite his requests. (D.E. 1 at ¶ 82, 90-92, 97, 105, 112). Plaintiff has every reason to believe that his requests to participate in activities central to his job performance will continue to be denied unless this Court intervenes.

A far more analogous case than *Jemsek* is *McConnell v. Adams*, 829 F.2d 1319 (4th Cir. 1987), in which the Fourth Circuit ordered county officials in Virginia to reappoint two registrars who sued after they were discharged because of their political party affiliation. The Court held that the district court's injunction ordering the county to rehire the registrars was "injunctive relief governing its officials' future conduct," such that *Ex Parte Young* applied. *McConnell*, 829 F.2d at 1329-30. *See also Bland v. Roberts*, 730 F.3d 368, 390 (4th Cir. 2013) ("Because reinstatement is a form of prospective relief, the refusal to provide that relief when it is requested can constitute an ongoing violation of federal law such that the *Ex Parte Young* exception applies"); *Coakley v. Welch,* 877 F.2d 304, 307 (4th Cir. 1989) (holding that terminated state employee's suit for injunction ordering his

reinstatement alleged an "ongoing violation" of federal law within *Ex Parte Young* exception).

Like the plaintiffs in *McConnell, Bland*, and *Coakley*, Plaintiff is seeking prospective relief from his ongoing exclusion from key aspects of his job – exclusion that Defendants have continued to insist upon despite Plaintiff's repeated requests to be included.

II. Defendants Have Subjected Plaintiff to Adverse Employment Actions

Defendants maintain that their systematic exclusion of Plaintiff from doctoral activities, and their siloing of him in a dying Program Area of Study of which he is the sole primary member, are not adverse employment actions capable of constituting First Amendment retaliation. (D.E. 23 at 5). In their reply brief, Defendants minimize their actions to a far greater degree than even in their initial motion, characterizing them as no more than "petty slights or minor annoyances that often take place at work and that all employees experience." (D.E. 23, at 7). While the cases cited in Plaintiff's response (D.E. 22) refute this argument, Plaintiff also asks that this Court take note of a decision refuting Defendants' position that was issued after he submitted his initial response to Defendants' motion to dismiss on January 14, 2022.

In *Jackson v. Wright*, 2022 U.S. Dist. LEXIS 8684 (N.D. Tex. Jan. 18, 2022), the Northern District of Texas denied the University of North Texas's (UNT's) motion to dismiss Professor Timothy Jackson's complaint that alleged the

university removed him as editor of the academic journal he founded in retaliation for his publication of an essay critical of a Black music theorist. Like Defendants in the instant case, UNT argued that Jackson had not alleged an adverse employment action with regard to his removal from the journal. The court disagreed, holding that "Plaintiff alleges he was de facto removed from the Journal in retaliation for the symposium's criticisms of Professor Ewell. This is a plausible assertion that states a legal claim" for First Amendment retaliation. *Jackson*, 2022 U.S. Dist. LEXIS at *46.

Timothy Jackson, like Plaintiff, is a professor who has been subjected to the increasingly common "death by a thousand cuts" strategy universities employ to chill dissenting professors' speech while simultaneously attempting to avoid accountability under the First Amendment. Faculty around the country now routinely self-censor to avoid not only acute consequences like termination, but also the kind of slow-motion career death imposed upon those, like Plaintiff, who express views out of step with institutional orthodoxy. As the district court in *Jackson* just recognized, career-gutting actions like banishment from an academic journal or from involvement with doctoral students are penalties severe enough to deter a reasonable person from engaging in protected First Amendment activities. This chilling of faculty speech poses a significant threat to the American university, "where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 835 (1995).

CONCLUSION

For the foregoing reasons, the Court should reject Defendants' newly raised argument and deny their Motion to Dismiss.

This the 9th day of March, 2022.

/s/ Samantha K. Harris
Samantha K. Harris
ALLEN HARRIS LAW
PO Box 673
Narberth, PA 19072
(860) 481-7899
sharris@allenharrislaw.com
PA Bar No. 90268
Attorney for Plaintiff

/s/ Jonathan A. Vogel
Jonathan A. Vogel
VOGEL LAW FIRM PLLC
6000 Fairview Road
South Park Towers, Suite 1200
Charlotte, NC 28210
Telephone:704.552.3750
Facsimile:704.552.3705
jonathan.vogel@vogelpllc.com
NC State Bar No. 34266
Local Civil Rule 83.1(d) Counsel for Plaintiff