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September 25, 2019

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VIA ELECTRONIC FILING

The Honorable David J. Smith
 Clerk, Eleventh Circuit Court of Appeals
 56 Forsyth Street, N.W.
 Atlanta, Georgia 30303

**Re: Tracy v. Florida Atlantic University
 Case No. 18-10173**

Dear Mr. Smith:

Pursuant to Federal Rule of Appellate Procedure 28(j) and this Court's Order during Oral Argument, Appellant files the attached supplemental authorities.

A central issue in this appeal is whether the reporting standard for FAU's conflict-of-interest policy—comprised of many documents and forms—is unconstitutionally vague. Record evidence shows there was no policy on blogging and at least twenty faculty members who blogged or used social media did not report it. D.E.250-14 ¶¶4-50; D.E.250-20. Vice Provost Alperin—who fired Tracy and was responsible for administering the policy—admitted she had never seen a disclosure form submitted for blogging. T.Vol.5:20&144. Dean Coltman testified at deposition she did not know whether blogging was a reportable outside

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activity, but at trial testified she thought it would be decided on a case-by-case basis. T.Vol.5:211&183. The Faculty Senate was in an uproar during an official 2015 meeting because of the vagueness of the policy, and there Alperin admitted: “I agree with you there needs to be clarity[.]” Attached transcript, 24 (D.E.250-47:24). Alperin later testified Tracy could have asked that same Faculty Senate to remedy the vagueness. T.Vol.5:39.

For these reasons, Tracy is submitting the following relevant supplemental authorities, which address 42 U.S.C. §1983 challenges to vague government and public university policies:

- *Walter v. Queens College*, 390 F. Supp. 3d 382 (E.D.N.Y. 2019) (professor could proceed with §1983 vagueness challenge to university’s sexual harassment policy despite contesting termination through “final and binding” CBA grievance procedure);
- *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (affirming grant of summary judgment to terminated coach because university’s discriminatory harassment policy, located in affirmative action plan, was unconstitutionally vague);

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• *National Abortion Federation v. Metropolitan Atlanta Rapid Transit Authority*, 112 F. Supp. 2d 1320 (N.D. Ga. 2000) (granting summary judgment to §1983 plaintiff because transit authority's advertising policy was unconstitutionally vague).

These authorities, discussed at Oral Argument, support Tracy's challenge to the policy's unconstitutional vagueness under §1983. *See* IB 42-46, Reply 10-15; *see also* *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496 (1982) (allowing employee to sue under §1983 before grieving despite university's elaborate grievance procedure).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this letter complies with the word limit of Federal Rule of Appellate Procedure 28(j) because the body of the letter contains 350 words.

/s/ Richard J. Ovelmen _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 25, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF to be served this day per the attached service list.

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390 F.Supp.3d 382
United States District Court, E.D. New York.

John D. WALTER, Plaintiff,
v.

QUEENS COLLEGE, Felix V. Matos Rodriguez, Pamela S. Silverblatt, Cynthia W. Rountree and Glenda Grace, Defendants.

18 CV 3060 (RJD) (SLT)

Signed 06/03/2019

Synopsis

Background: Former adjunct lecturer brought § 1983 action against state-run university and several of its officers alleging violations of his rights to substantive and procedural due process, arising from his termination due to alleged violation of university's sexual misconduct policy. Defendants moved to dismiss for failure to state claim.

Holdings: The District Court, [Raymond J. Dearie](#), J., held that:

[1] sovereign immunity barred plaintiff's claims against university;

[2] plaintiff failed to allege that employer's conduct was uniquely governmental, as required to state claim for substantive due process violation;

[3] plaintiff stated claim that sexual misconduct was unconstitutionally vague; and

[4] plaintiff stated claim that he was deprived of pre-deprivation procedural due process.

Motion granted in part and denied in part.

West Headnotes (31)

[1] Federal Courts

🔑 Higher education; colleges and universities

City University of New York (CUNY) was "arm of state," and thus, sovereign immunity applied to bar terminated adjunct lecturer's § 1983 claims that CUNY's sexual misconduct policy was vague as applied to his alleged conduct and therefore failed to put him on notice that his alleged conduct constituted a policy violation, and that CUNY failed to afford him constitutionally adequate pre- or post-deprivation process with regard to his termination. [U.S. Const. Amend. 11](#); [42 U.S.C.A. § 1983](#).

Cases that cite this headnote

[2]

Federal Courts

🔑 Suits Against States; Eleventh Amendment and Sovereign Immunity

Federal Courts

🔑 Waiver by State; Consent

Eleventh Amendment bars lawsuits against a state or its agencies absent an explicit Congressional waiver of the state's immunity in the federal law at issue. [U.S. Const. Amend. 11](#).

Cases that cite this headnote

[3]

Constitutional Law

🔑 Termination or discharge

Education

🔑 Grounds

Adjunct lecturer's allegations that his termination from state-run university for alleged violations of the university's sexual misconduct policy was arbitrary, irrational, or motivated by bad faith, failed to allege conduct that was uniquely governmental, as required to state claim for substantive due process violation under § 1983; university's alleged conduct was employment-related action that could have been imputed to private employer, and did not shock the conscience or interfere with rights implicit in the concept of ordered liberty. [U.S. Const. Amend. 14](#); [42 U.S.C.A. § 1983](#).

Cases that cite this headnote

[4]

Constitutional Law

🔑 [Egregiousness; "shock the conscience" test](#)

Plaintiff bringing action under § 1983 for violation of substantive due process must establish not only government action, but also that the government action was so egregious and so outrageous that it may fairly be said to shock the contemporary conscience. [U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.](#)

[Cases that cite this headnote](#)

[5] Constitutional Law

🔑 [Public Employment Relationships](#)

Substantive component of the Due Process Clause does not provide a § 1983 remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer. [U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.](#)

[Cases that cite this headnote](#)

[6] Constitutional Law

🔑 [Conduct and Control; Deprivations and Adverse Employment Actions](#)

In order for a government employee to adequately plead a substantive due process claim under § 1983, the alleged government conduct must be uniquely governmental in character, and sufficiently severe as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights. [U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.](#)

[Cases that cite this headnote](#)

[7] Federal Civil Procedure

🔑 [Matters considered in general](#)

University sexual misconduct policy, collective bargaining agreement between university and staff, arbitration rules, and mediation procedures could all be considered on motion to dismiss former adjunct lecturer's procedural due process claims for failure to state claim, even though complaint did not expressly incorporate those documents by reference; complaint quoted extensively from misconduct policy and relied exclusively on its terms to

plead vagueness claim, remaining documents effectively functioned like contract incorporated by reference in breach of contract claim, plaintiff had actual notice of the documents, and consideration of the documents would not require court to weigh any evidence or choose between reasonably competing interpretations. [U.S. Const. Amend. 14; Fed. R. Civ. P. 12\(b\)\(6\).](#)

[Cases that cite this headnote](#)

[8] Federal Civil Procedure

🔑 [Matters considered in general](#)

District court must limit its analysis to the four corners of the complaint in deciding a motion to dismiss for failure to state claim. [Fed. R. Civ. P. 12\(b\)\(6\).](#)

[Cases that cite this headnote](#)

[9] Federal Civil Procedure

🔑 [Matters considered in general](#)

Federal Civil Procedure

🔑 [Motion](#)

For purposes of motion to dismiss complaint for failure to state claim, complaint is deemed to include any statements or documents incorporated in it by reference, as well as any document upon which the plaintiff solely relies and which is integral to the complaint, even if not incorporated by reference, without converting the motion to dismiss into a motion for summary judgment. [Fed. R. Civ. P. 12\(b\)\(6\).](#)

[Cases that cite this headnote](#)

[10] Federal Civil Procedure

🔑 [Matters considered in general](#)

Motion to dismiss complaint for failure to state claim, even if a document is not incorporated by reference in the complaint, so long as the plaintiff has actual notice of the document, or has relied upon it in framing the complaint the document may be considered. [Fed. R. Civ. P. 12\(b\)\(6\).](#)

[Cases that cite this headnote](#)

[11] Federal Civil Procedure

 [Matters considered in general](#)

Before materials outside the complaint may become the basis for dismissal, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document, and it must be clear that there exists no material disputed issue of fact regarding the relevance of the document. [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[Cases that cite this headnote](#)

[12] Constitutional Law

 [Termination or discharge](#)

Education

 [Grounds](#)

Former adjunct lecturer's allegation, that university's sexual misconduct policy was unconstitutionally vague as applied to conduct resulting in his termination, alleged that person of ordinary intelligence would not have reasonable opportunity to understand that policy prohibited lecturer's alleged receipt of short, voluntary neck pressure from student and that such conduct warranted termination, and that policy authorized or encouraged arbitrary and discriminatory enforcement, as required to state claim under § 1983 that policy was unconstitutionally vague in violation of due process; policy prohibited unwelcome physical conduct of sexual nature, lecturer claimed that he understood contact to be therapeutic due to his sharp neck pain, and term "sexual" was not defined, allowing school officials to imbue term with own, personal gloss. [U.S. Const. Amend. 14; 42 U.S.C.A. § 1983](#).

[Cases that cite this headnote](#)

[13] Constitutional Law

 [Certainty and definiteness; vagueness](#)

Due process requires that a statute must provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[14] Constitutional Law

 [Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties](#)

A law is unconstitutionally vague if it authorizes or even encourages arbitrary or discriminatory enforcement.

[Cases that cite this headnote](#)

[15] Constitutional Law

 [Certainty and definiteness; vagueness](#)

Although a statute or regulation is not required to specify every prohibited act in order to satisfy due process, and although it may instead embody flexibility and reasonable breadth, it must nevertheless set reasonably clear guidelines to prevent arbitrary and discriminatory enforcement. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[16] Constitutional Law

 [Statutes](#)

Modest flexibility in determining whether a statute is unconstitutionally vague is necessary to allow for the drafting of statutes and regulations that are both general enough to take into account a variety of human conduct, and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

[Cases that cite this headnote](#)

[17] Constitutional Law

 [Education](#)

School disciplinary rules need not be as detailed as a criminal code in order to survive due process challenge on vagueness grounds, in part because maintaining security and order in the school requires a certain degree of flexibility in school disciplinary procedures. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[18] Federal Civil Procedure

 [Motion and proceedings thereon](#)

Former adjunct lecturer did not abandon his claims, brought under § 1983, that state-run university denied him pre- and post-deprivation procedural due process when it terminated his employment for violation of its sexual misconduct policy, even though lecturer did not feature the claims in his brief in opposition to defendants' motion to dismiss for failure to state claim, where circumstances as whole, particularly counsel's discussion and representations at oral argument, showed that lecturer did not intend to abandon his claims. [U.S. Const. Amend. 14](#); [42 U.S.C.A. § 1983](#); [Fed. R. Civ. P. 12\(b\)\(6\)](#).

[Cases that cite this headnote](#)

[19] Federal Civil Procedure

🔑 Motion and proceedings thereon

District court may, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed.

[Cases that cite this headnote](#)

[20] Federal Civil Procedure

🔑 Waiver, abandonment, or default

Where abandonment of a claim by a counseled party is not explicit but such an inference may be fairly drawn from the papers and circumstances viewed as a whole, district courts may conclude that abandonment was intended.

[Cases that cite this headnote](#)

[21] Constitutional Law

🔑 Procedural due process in general

In order to assert a violation of procedural due process rights, a plaintiff must: (1) identify a property or liberty right, (2) show that the government has deprived him of that right, and (3) show that the deprivation was effected without due process. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[22] Constitutional Law

🔑 Termination or discharge

When government terminates public employee with constitutionally protected right to tenure, procedural due process is satisfied if the government provides notice and a limited opportunity to be heard prior to termination, so long as a full adversarial hearing is provided afterwards. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[23]

Constitutional Law

🔑 Notice

In order to satisfy procedural due process, notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action, and afford them an opportunity to present their objections. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[24]

Constitutional Law

🔑 Notice

Procedural due process requires that notice do more than simply inform an aggrieved party of his entitlement to a hearing; rather, notice must adequately inform the party as to what the critical issue of the hearing will be. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[25]

Constitutional Law

🔑 Certainty and definiteness; vagueness

Particularity with which alleged misconduct must be described in order to comply with due process notice requirement varies with the facts and circumstances of the individual case; the degree of required specificity also increases with the significance of the interests at stake. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[26]

Constitutional Law

↳ Duration and timing of deprivation; pre- or post-deprivation remedies

Whether limited opportunity to be heard pre-deprivation is constitutionally sufficient under due process clause, regardless of post-deprivation process afforded, depends upon: (1) the nature of the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[27] Constitutional Law

↳ Notice and Hearing; Proceedings and Review

Pre-deprivation hearing in the context of public employment need not be elaborate to satisfy procedural due process. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[28] Constitutional Law

↳ Termination or discharge

In context of government employer terminating a plaintiff's employment, pre-deprivation hearing satisfies procedural due process so long as it provides opportunity to present reasons, either in person or in writing, why proposed action should not be taken. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[29] Constitutional Law

↳ Termination or discharge

Pre-termination process in context of termination of public employment does not purport to resolve the propriety of the discharge, but serves mainly as a check against a mistake being made by ensuring there are reasonable grounds to find the charges against employee are true and would support his termination. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

[30] Constitutional Law

↳ Termination or discharge

Education

↳ Notice and hearing

Former adjunct lecturer's allegations, that state-run university deprived him of pre-deprivation due process when it terminated his employment due to alleged violation of university's sexual misconduct policy, alleged lack of sufficient notice or opportunity to be heard, as required to state § 1983 procedural due process claim; email correspondence summoning lecturer to in-person meeting referred only to "confidential matter of importance" and did not inform him of critical issue of meeting, lecturer was not informed that meeting was investigatory interview or that he faced termination, lecturer was required to respond immediately upon learning of charges and was not informed whether he would have subsequent opportunity to do so, and investigator did not attempt to compile balanced factual record. [U.S. Const. Amend. 14](#); [42 U.S.C.A. § 1983](#).

[Cases that cite this headnote](#)

[31] Constitutional Law

↳ Alternative dispute resolution

Collective bargaining agreement (CBA) mandated arbitration procedures provide adequate post-deprivation due process for constitutional purposes. [U.S. Const. Amend. 14](#).

[Cases that cite this headnote](#)

Attorneys and Law Firms

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[David Bruce Diamond](#), [Todd Alan Spiegelman](#), Office of the New York State Attorney General, New York, NY, for Defendants.

MEMORANDUM & ORDER

DEARIE, District Judge:

**1 On January 27, 2016, Plaintiff John D. Walter (“Plaintiff” or “Walter”) was terminated from his position as an adjunct lecturer at the Aaron Copland School of Music at Queens College (“College”) after serving in the position for over nine years. Walter taught a variety of music courses to hundreds of students, including one called “Private Vocal Lesson,” which, as a matter of practical necessity and longstanding College practice was held off campus because in the College’s view, the fees paid to adjunct professors were not enough to justify the expense of traveling to campus for private lessons. Walter, who suffered from chronic [atrial fibrillation](#), held lessons at his apartment, which he shared with a female roommate. Walter’s termination came after an allegation surfaced that he had engaged in sexually inappropriate conduct during a private vocal lesson in violation of the College’s Policy on Sexual Misconduct (“Policy”). Prior to the single in-person meeting where Walter was made aware of the allegation, he received no information about the nature or subject of the meeting, and at no time was Walter informed that he faced termination. On January 26, 2016, two weeks after Walter’s only in-person meeting, which he attended alone, without a Union representative as was his right pursuant to his Collective Bargaining Agreement (“CBA”), the College’s Title IX coordinator, Defendant Rountree, issued a written report regarding the allegation. The next day Walter was terminated. Walter subsequently *387 contested his termination through a three-step grievance procedure pursuant to his CBA. The appeals were unsuccessful.

Walter now brings procedural and substantive due process claims pursuant to [42 U.S.C. § 1983](#) against Queens College and various Queens College employees (together, “Defendants”). Specifically, Walter’s procedural due process claims arise under two theories: (i) the College’s Policy regarding sexual misconduct is vague as applied to his alleged conduct and failed to put Walter on notice that his alleged conduct constituted a Policy violation, and (ii) the Defendants failed to afford Walter constitutionally adequate pre- or post-deprivation process. Defendants move to dismiss the complaint against Queens College on the grounds of Eleventh Amendment immunity and against all Defendants for failure to state a claim. For the reasons that follow, Defendants’ motion is granted with respect to Queens College

and Walter’s substantive due process claim and denied with respect to Walter’s vagueness and pre-deprivation procedural due process claims.

BACKGROUND**I. The College’s Policy on Sexual Misconduct**

The Policy on Sexual Misconduct states, in relevant part, “[t]his policy prohibits sexual harassment, gender-based harassment and sexual violence” and explains that “[s]exual harassment includes unwelcome conduct of a sexual nature, such as unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, graphic and electronic communications or physical conduct that is sufficiently serious to adversely affect an individual’s participation in employment, education or other CUNY activities.” Defs.’ Br., Ex. C, ECF No. 30-3. The policy goes on to explain that conduct is considered “unwelcome if the individual did not request or invite it and considered the conduct to be undesirable or offensive.” *Id.* For example, the policy notes that “inappropriate or unwelcome physical contact or suggestive body language, such as touching, groping, patting, pinching, hugging, kissing, or brushing against an individual’s body” as well as “verbal abuse or offensive comments of a sexual nature, including sexual slurs, persistent or pervasive sexually explicit statements” or “undue and unwanted attention” including “making sexually suggestive gestures” are circumstances that might constitute sexual harassment “depending on the totality of the circumstances.” *Id.*

II. Events Leading to Walter’s Termination

**2 As part of his course in the fall 2015 semester, Walter provided one-on-one tutorials in his home, consistent with long-standing College practice and because “the fees paid to adjunct professors do not justify the time and expense of traveling to campus to teach private lessons.” Complaint, ECF No. 1, at ¶¶ 6, 93. At the end of the semester, while hosting a female student for a vocal lesson, Walter began experiencing acute physical symptoms and physical pain including body aches and neck pain—side effects of certain medications he was prescribed following three different surgeries related to his [chronic atrial fibrillation](#). *Id.* ¶¶ 51. As alleged in the Complaint, Walter expressed his physical pain to his female student, who responded by voluntarily offering to apply pressure to his neck to relieve the pain using a technique she learned from her grandmother. *Id.* ¶¶ 8, 53. Walter alleges the student stood up from the piano, where he and the student

were sitting, stood behind him and applied pressure to his neck using her thumb for less than one *388 minute. *Id.* ¶¶ 8, 54. At the end of the vocal lesson, Walter asked the student to apply pressure to his neck a second time and the student allegedly obliged “without hesitation,” and applied pressure again for less than one minute. *Id.* ¶ 55. The student left Walter's apartment. She ultimately received a B+ in her vocal class, which she was allegedly “unhappy with” and “felt should have been higher.” *Id.* ¶ 56.

On December 22, 2015 the student met with the College's Title IX coordinator, Rountree. The student claimed that while in Walter's apartment for a vocal lesson, Walter made comments to her “of a sexual nature” and “on one occasion laid on a couch and insisted that she give him a massage.” *Id.* ¶ 91. Rountree emailed Walter on January 8, 2016, requesting an in-person meeting “to discuss a confidential matter of importance.” *Id.* ¶¶ 84, 86. When Walter asked if he could participate in the meeting by telephone in light of his medical condition, he stated “my employment is not in jeopardy, so I don't understand why I am being summoned with no explanation.” *Id.* ¶ 86. Rountree did not respond to Walter's statement and “refuse[d] to provide Walter with notice of why she wanted to meet with him, or the fact that he was under investigation by Queens College.” *Id.* ¶ 87. Walter met with Rountree on January 12, 2016, and was told, for the first time, that he was under investigation by the College for a violation of its Policy on Sexual Misconduct, and in particular its prohibition on making unwelcome comments of a sexual nature and for asking a student “to massage his neck while he lay on the couch” in his home. *Id.* ¶ 95. However, Rountree did not provide Walter with a “written summary of the allegations” “as mandated by Queens College's Policies and Procedures.” *Id.* ¶ 94. Walter denied the allegations and claimed that he never received a “massage” on his couch. *Id.* ¶ 96. He admitted that the student applied pressure to his neck while they sat at the piano. *Id.* ¶ 97. Walter left the meeting and was never asked to identify or provide any names of any witnesses. *Id.* ¶ 98. Walter alleges he left the meeting “completely confused about what was going on.” *Id.* At some point following Walter's meeting with Rountree, but before his termination, Walter learned, and subsequently notified Rountree, that the complaining student had “physically and sexually assaulted” another student and “had been dismissed from a prominent jazz club as an intern for harassing another employee.” *Id.* ¶ 108. The complaint does not make any allegations with respect to whether Rountree investigated or substantiated those allegations in compiling her report.

After the meeting with Walter, Rountree concluded her investigation by interviewing three other students—who were identified as “witnesses” by the complaining student but were not actually present during her private lessons—and conducted an additional interview of the complaining student. *Id.* ¶ 99, 105. One witness, whom Rountree interviewed while the complaining student sat in the same room, recalled what the complaining student said about Walter but claimed Walter “never engaged in inappropriate conduct” towards her, did not report hearing Walter make any comments of a sexual nature in her presence and could only recall that at one point Walter “stated that his ex-girlfriend was Japanese.” *Id.* ¶ 101. Another student similarly recounted the complaining students' allegations and claimed that Walter made “sexual comments” to her during two private lessons. *Id.* ¶ 104. The third student stated she never heard Walter make any inappropriate comments. *Id.* ¶ 106. Thereafter, the complaining student advised Rountree that she kept audio recordings of her vocal lessons that should contain inappropriate *389 comments.¹ *Id.* ¶ 106. The student never provided Rountree with any recordings, claiming that after about two hours of review of the recordings she found herself “pretty depressed” and stopped searching. *Id.* ¶ 112. Rountree made no attempts to secure these critical recordings. *Id.* ¶¶ 113-14.

**3 Rountree prepared a written report, dated January 26, 2016, which was never disclosed to Walter. *Id.* ¶¶ 114-15. The report concluded that the complaining student's allegations regarding knee touching and massaging while Walter lay face down on the couch and moaned loudly could not be substantiated. *Id.* ¶ 117. Rountree did, however, credit the student's claim that Walter asked her “to massage his neck” and “made unwelcome comments of a sexual nature” while sitting at the piano. *Id.* ¶ 118. Notwithstanding the fact that Walter was never “provided with a written summary of the allegations” against him, the next day, the President of Queens College terminated Walter's employment. *Id.* ¶ 124. That decision was formally transmitted to Plaintiff via letter from Rountree on February 8, 2016. *Id.*

III. Events Following Walter's Termination

Following his termination, Walter commenced the three-step grievance process outlined in his CBA. He filed a “Step One” grievance on January 28, 2016, contesting his allegedly “improper discharge without just cause.” *Id.* ¶ 126. The grievance demanded Walter be reinstated and awarded back pay for the spring 2016 semester. *Id.* Walter participated in

a “Step One” grievance meeting on March 24, 2016, along with a Professional Staff Congress (“PSC”) representative and Defendant Grace, acting as “the President’s designee.” *Id.* ¶ 127. After the meeting, Grace concluded that the College had just cause to terminate Walter given the fact that Rountree substantiated a student’s claim that Walter engaged in behavior constituting sexual harassment under the Policy. *Id.* ¶ 129. Grace did not provide any factual basis or reasoning supporting this conclusion. *Id.* ¶ 130. Grace also concluded that Rountree’s findings revealed Walter received due process pre-termination because the student’s complaint was corroborated by “*two students* indicating [Plaintiff] made inappropriate comments of a sexual nature and Walter’s having requested a massage from the Complaining Student,” even though only one of the three witnesses said Plaintiff had previously made inappropriate comments of a sexual nature. *Id.* ¶¶ 130-32.

On May 12, 2016, Walter filed a “Step Two” grievance under the CBA with the assistance of independently retained counsel. *Id.* ¶ 138. The grievance meeting was held by Sandy A. Curko but a decision was ultimately issued by Defendant Silverblatt, who was not present at the “Step Two” meeting. *Id.* At his “Step Two” grievance hearing on June 17, 2016, Walter, for the first time, introduced written statements from his own witnesses—students who denied inappropriate behavior by Walter, including making comments of a sexual nature as well as the testimony of a College student who said the complaining student had sexually assaulted her. *Id.* ¶ 139. Silverblatt issued a decision on September 6, 2016. *Id.* ¶ 143. Silverblatt’s decision noted that Rountree’s investigation concluded Walter “had inappropriately touched the complainant,” which Walter contends is inconsistent with the findings in Rountree’s report—that Walter “asked the complainant to massage his neck” and made unwelcome comments of a sexual nature but the *390 complainant’s allegation that Plaintiff “touched” her and “on one occasion tapped her knee” could not be substantiated. *Id.* ¶¶ 144-45. Walter also alleges that Silverblatt’s decision falsely stated Walter admitted he asked the complainant to give him a massage at his home, even though Walter specifically stated to Rountree that he asked the complainant to apply pressure to his neck after she made an initial offer, and he did not ask her to give him a “massage.” *Id.* ¶ 146.

Walter filed a “Step Three” grievance and participated in a hearing held on March 9, 2017 and April 17, 2017. *Id.* ¶ 150. The CBA provides for arbitration at the “Step Three” stage and states that “the disciplinary arbitrator’s decision

regarding guilt or innocence and the sufficiency of grounds for the penalty shall be final and binding upon the parties.” *Id.* ¶ 149. On May 15, 2017, the arbitrator denied Plaintiff’s “Step Three” grievance. *Id.* ¶ 151. The arbitrator noted, in relevant part, “at issue in this case is whether [Plaintiff] engaged in misconduct in violation of CUNY policy, whether he was afforded due process under basic just cause principles and whether the penalty imposed was appropriate for the proven misconduct.” *Id.* ¶ 152. The arbitrator concluded that even if Walter viewed the touching as “therapeutic” rather than “sexual,” that is not enough to remove the conduct from the Policy on Sexual Misconduct’s ambit. *Id.* ¶ 155. Finally, the arbitrator concluded that Walter “still received due process because Grace, Silverblatt and the “Step Three” grievance provided Walter ‘an opportunity to be heard.’ ” *Id.* ¶ 157.

LEGAL STANDARD

**4 A complaint should be dismissed pursuant to *Fed. R. Civ. P. 12(b)(6)* where it does not contain enough factual allegations to state a claim for relief that is “plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). When deciding a motion to dismiss, the court is required to accept all material facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff’s favor. *Id.* “In ruling on a motion pursuant to *Fed. R. Civ. P. 12(b)(6)*, the duty of a court is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof.” *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111, 113 (2d Cir. 2010) (“[w]hen there are well-pleaded factual allegations, a court should assume their veracity and *then* determine whether they plausibly give rise to an entitlement to relief”).

However, “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009); *see also Iqbal*, 556 U.S. at 678-79, 129 S.Ct. 1937 (“A pleading that does nothing more than recite bare legal conclusions is insufficient to unlock the doors of discovery”). Indeed, “where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” *Iqbal*,

556 U.S. at 678, 129 S.Ct. 1937. The “plausibility standard” requires “more than a sheer possibility that defendant has acted unlawfully.” *Id.*

DISCUSSION

I. Claims Against Defendant City University of New York (“CUNY”)

[1] [2] The Eleventh Amendment bars lawsuits against a state or its agencies *391 absent an explicit Congressional waiver of the state's immunity in the federal law at issue. *Diaz v. City University of New York*, 2014 WL 10417871, at *12 (S.D.N.Y. Nov. 10, 2014) (citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)). Congress did not waive the states' Eleventh Amendment immunity from suit when it enacted section 1983. *Quern v. Jordan*, 440 U.S. 332, 345, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979) (“[section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States ...”); *see also Will*, 491 U.S. at 67, 109 S.Ct. 2304. CUNY has long been considered “an arm of the state” of New York for purposes of sovereign immunity and as a result, Walter's section 1983 claims against CUNY, as opposed to the individual defendants, are barred. *Diaz*, 2014 WL 10417871, at *12; *see also Skalafuris v. City of New York*, 444 F. App'x 466, 468 (2d Cir. 2011); *Clissuras v. City of New York*, 359 F.3d 79, 82 (2d Cir. 2004).

II. Walter's Substantive Due Process Claim

[3] Walter claims he has adequately alleged Defendants' employment-related conduct was “arbitrary, irrational, or motivated by bad faith” and “discernable from the actions taken by a private employer.” Pl. Opp. Br., ECF No. 32, at 19-22. Walter asserts instead that Defendants' conduct rises to the level of “affirmative state action” actionable under the substantive due process doctrine. *Id.* On the other hand, Defendants contend Walter's substantive due process claim (i) “is premised on the same allegations [Plaintiff] asserts in support of his procedural due process ... claims” and (ii) in any event, is based on acts that “could have been taken on behalf of a private employer.” Defs.' Br., ECF No. 31, at 24.

[4] “The doctrine of substantive due process protects the individual against certain government actions regardless of the fairness of the procedures used to implement them,” *McClary v. O'Hare*, 786 F.2d 83, 88 (2d Cir. 1986), but the scope of the doctrine “is very limited.” *Doe v. United*

States Merchant Marine Acad., 307 F. Supp. 3d 121, 156 (E.D.N.Y. 2018) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997)). A plaintiff must establish “not only government action but also that the government action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Pena v. DePrisco*, 432 F.3d 98, 112 (2d Cir. 2005); *see also Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (the challenged government decision must be “arbitrary or irrational or motivated by bad faith”).

**5 [5] [6] However, “[w]here the government's control is lessened, so is its duty, and its failings are less likely to be of constitutional proportions cognizable under section 1983.” *McClary*, 786 F.2d at 88-89. For example, “[t]he substantive component of the Due Process Clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer.” *Id.* at 89 (no substantive due process claim with respect to a public employee's decedent's wrongful death claim against the decedent's government employer). Instead, to adequately plead a substantive due process claim, the alleged government conduct must be “uniquely governmental” in character and “sufficiently severe ... as to transcend the bounds of ordinary tort law and establish a deprivation of constitutional rights.” *Id.* at 88-89 & n.6; *see also Cherry v. N.Y.C. Housing Auth.*, 2017 WL 4357344, at *29 (E.D.N.Y. Sept. 29, 2017) (where government employees fabricated statements *392 leading to termination of Plaintiff's employment, “such conduct is not the type of abuse of government power necessary to state a substantive due process claim”); *Bertram v. Metropolitan Transp. Auth.*, 2014 WL 748933, at *8 (S.D.N.Y. Feb. 26, 2014) (plaintiff did not plead “uniquely governmental” action where “the gravamen of plaintiff's allegations is that Defendants harassed him and disciplined him on numerous occasions”); *North Star Contracting Corp. v. Long Island R.R. Co.*, 723 F. Supp. 902, 911 (E.D.N.Y. 1989) (“A substantive due process right is not implicated ... where the only tie the government has to the case is the fact that it is one of the parties”).

Walter's complaint does not plausibly allege a substantive due process violation. At its core, the complaint alleges Defendants are constitutionally liable for employment-related actions that could just as well be imputed to a private employer. Walter was a professor at a state-run educational institution. However, the fact that the College is state-run is only a qualifier, it is not the institution's defining

feature, and as a result, Walter's allegations do not rise to the level of "uniquely governmental" conduct. Indeed, Walter's attempts to distinguish his case from the facts of [McClary](#) are misplaced. Walter argues that unlike [McClary](#), he does not bring a claim "sounding in tort," but has instead "alleged that the Individual Defendants utilized their powers as state officials to harm him." Pl. Opp. Br, ECF No. 32, at 23. However, *just like* [McClary](#), "the actions of which Plaintiff complains—however egregious they may be—are the same kinds of employment actions that any employer, whether public or private, could potentially take with respect to an employee," and do not constitute an abuse of power unique to the College's role as a state-run entity. [Mancuso v. Village of Pelham](#), 2016 WL 5660273, at * 17 (S.D.N. Y Sept. 29, 2016). Defendants are not alleged to have abused "some power unique to [their] role as [government officials]."[Perfetto v. Erie Cty. Water Auth.](#), 2006 WL 1888556, at *10 (W.D.N.Y. Jul. 7, 2006). Rather, Defendants allegedly engaged in tortious acts akin to wrongful termination or breach of employment contract, and the mere fact that Walter was employed by a state-run institution does not "transform" these allegations into substantive due process violations. [Thomas v. New York City Dept. of Educ.](#), 938 F. Supp. 2d 334, 354 (E.D.N. Y 2013).

Moreover, even if Defendants' alleged conduct was "uniquely governmental," as alleged in the complaint, it was careless, slip-shod and perhaps unbalanced but the allegations do not describe conduct so egregious or motivated by otherwise "illegitimate ... concerns" so as to shock the conscience or interfere with rights implicit in the concept of ordered liberty. [John E. Andrus Memorial, Inc. v. Daines](#), 600 F. Supp. 2d 563, 586 (S.D.N.Y. 2009). Walter's substantive due process claim is therefore dismissed.

III. Walter's Procedural Due Process Claims

a. Documents That May Be Considered

[7] Defendants attach the following documents as exhibits to their motion to dismiss: (i) the CBA between CUNY and the PSC, (ii) the CUNY Policy on Sexual Misconduct, (iii) emails exchanged between Walter and Rountree, (iv) Rountree's investigative report on Walter's conduct, (v) Walter's letter of termination, (vi) the "Step One" grievance decision, (vii) the "Step Two" grievance decision, (viii) the "Step Three" arbitration opinion and award, and (ix) the AAA Employment Arbitration Rules and Mediation Procedures. Defendants

argue that the Court should *393 consider all of these documents because they are "integral to the complaint" and "courts have considered agency decisions that penalize public employees in resolving due process challenges to those actions." See [Zynger v. Dep't of Homeland Sec.](#), 615 F. Supp. 2d 50, 61 (E.D.N.Y. 2009), *aff'd* 370 F. App'x 253 (2d Cir. 2010) (finding Disciplinary Review Board's decision "integral to the complaint" because "Plaintiff's claims arise out of her firing, which was upheld by the [Board] decision" and because the "complaint alleges flaws in the [Board] decision and proceedings"). On the other hand, Walter argues that mere discussion of documents in a complaint or even including short quotations from them does not constitute incorporation by reference. [Cosmas v. Hassett](#), 886 F.2d 8, 13 (2d Cir. 1989).

**6 [8] [9] [10] [11] As a general matter, the Court "must limit its analysis to the four corners of the complaint" in deciding a motion to dismiss. [Adams v. New York State Educ. Dept.](#), 2010 WL 624020, at *19 (S.D.N.Y. Feb. 23, 2010) (citing [Kopec v. Coughlin](#), 922 F.2d 152, 154-55 (2d Cir. 1991)). The complaint, however, is "deemed to include ... any statements or documents incorporated in it by reference," as well as any document upon which the Plaintiff solely relies and which is integral to the complaint, even if not incorporated by reference, without converting the motion to dismiss into a motion for summary judgment. [Int'l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.](#), 62 F.3d 69, 72 (2d Cir. 1995). Indeed, even if a document is not incorporated by reference in the complaint, so long as the "plaintiff has actual notice" of the document or "has relied upon [it] in framing the complaint" the document may be considered. [Cortec Indus., Inc. v. Sum Holding L.P.](#), 949 F.2d 42, 44 (2d Cir. 1991); *see also* [Bancorp Servs., LLC v. Am. General Life Insur. Co.](#), 2016 WL 4916969, at *2 n.3 (S.D.N.Y. Feb. 11, 2016). Compare with [Sira v. Morton](#), 380 F.3d 57, 67 (2d Cir. 2004) ("Limited quotation from or reference to documents that may constitute relevant evidence in a case is not enough to incorporate those documents, wholesale, into the complaint"). However, before materials outside the complaint may become the basis for dismissal (i) it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document, and (ii) it must be clear that there exists no material disputed issue of fact regarding the relevance of the document. [DiFolco](#), 622 F.3d at 113 (reinstating claim where district court considered documents outside the complaint to "assay[] the weight of the evidence ... and improperly chose between reasonably competing interpretations" to dismiss the complaint).

The complaint relies extensively upon the terms and effect of the CUNY Policy on Sexual Misconduct. Indeed, the complaint devotes 15 paragraphs to discussion of the Policy, quotes from it liberally and relies exclusively on its terms to plead its vagueness claim. The Court will thus consider the Policy itself, rather than limit its consideration to the excerpts cited in the complaint. Moreover, the CBA and AAA Arbitration Rules and Mediation Procedures spell out the “rules of the road” for Walter and the College and thus effectively function like a contract incorporated by reference in a breach of contract claim. Plaintiff had actual notice of these documents because Walter's pre- and post-deprivation process claims rely at least in part on the Defendants' failure to abide by their terms. [Cortec Indus., Inc., 949 F.2d at 44](#). Finally, considering these documents would not require the court to weigh any evidence or “cho[o]se between reasonably competing interpretations.” [DiFolco, 622 F.3d at 113](#). In sum, there is no dispute regarding the accuracy of these documents and thus they merit the Court's consideration.

*394 However, at this stage, the Court will not consider the full set of reports and decisions concerning Walter's termination, the emails exchanged between Rountree and Walter or Walter's letter of termination. Defendants claim that like [Zynger](#), in which the Court considered an administrative decision on a motion to dismiss, Walter's “claims arise out of [his] firing, which was upheld by [three different decisions] and because the complaint alleges flaws in [those] decision[s] and proceeding[s],” the decisions themselves are “integral to the complaint.” [615 F. Supp. 2d at 61](#). [Zynger](#) dealt with a *single* administrative decision, rather than the *four separate decisions and reports* issued in Walter's case. As alleged in the complaint, the four decisions and reports are factually inconsistent and reveal “material disputed issues of fact” and potential inaccuracies rendering them inappropriate for consideration at this stage. [DiFolco, 622 F.3d at 111](#). Cf. [Kramer v. Time Warner, Inc., 937 F.2d 767, 774 \(2d Cir. 1991\)](#) (“Courts routinely take judicial notice of documents filed in other courts ... *not for the truth of the matters asserted* in the other litigation but rather to establish the fact of such litigation” (emphasis added)). If the Court considers these reports and decisions (as well as the emails and letter of termination) without providing Walter the opportunity to seek discovery regarding their factual bases and drafting processes, the Court would effectively be in the position of weighing an incomplete evidentiary record before ruling on a 12(b)(6) motion. At the motion to dismiss stage, the Court is

constrained to evaluating the legal feasibility of the complaint and thus will not consider these documents.

b. Whether the Policy is Unconstitutionally Vague

**7 [12] Walter argues that the Policy is vague and failed to put him on notice that the conduct as alleged in the complaint—the application of “therapeutic pressure” to his neck for less than one minute on two occasions, one voluntary and unsolicited, the other on request—was proscribed and thus violates his due process rights. To that end, Walter contends that the terms “sexual harassment” and “sexual nature” in the policy are “impermissibly vague.” However, Defendants argue Walter's conduct, which according to Defendants includes “the actions as found by the arbitrator in the Step Three Decision,” fell squarely within the Policy's prohibition on sexual misconduct and specifically the prohibition on “inappropriate or unwelcome physical contact or suggestive body language, such as touching, groping, patting ...” [Farrell v. Burke, 449 F.3d 470, 490 \(2d Cir. 2006\)](#) (citing [Birzon v. King, 469 F.2d 1241, 1243 & n.4 \(2d Cir. 1972\)](#)).

[13] [14] The Supreme Court recognizes two independent grounds on which a statute or policy “may be so vague as to deny due process of law.” [Thibodeau v. Portuondo, 486 F.3d 61, 65 \(2d Cir. 2007\)](#). First, the statute must “provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits.” [Id.](#); see also [Farrell, 449 F.3d at 483](#) (as-applied vagueness challenges do not require the Court to determine “whether the *actual* plaintiff knew that his or her conduct was prohibited” (emphasis added)). Second, “a law is unconstitutionally vague if it authorizes or even encourages arbitrary or discriminatory enforcement.” [Thibodeau, 486 F.3d at 66](#) (statutes must be specific enough “to avoid resolution on an *ad hoc* and subjective basis”).

[15] [16] [17] Though a “statute or regulation is not required to specify every prohibited act” and “may instead embody flexibility *395 and reasonable breadth,” it must nevertheless “set reasonably clear guidelines ... to prevent arbitrary and discriminatory enforcement.” [Perez v. Hoblock, 368 F.3d 166, 174-75 \(2d Cir. 2004\)](#); [United States v. Rybicki, 354 F.3d 124, 142-43 \(2d Cir. 2003\)](#) (the law, as applied to the specific conduct at issue, must define what is prohibited “with sufficient definiteness” such that the policy will “channel the discretion” of those who are charged with enforcement). This modest flexibility is “necessary to allow for the drafting

of statutes and regulations that are both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.” [Piscottano v. Murphy](#), 2005 WL 1424394, at *11 (D. Conn. June 9, 2005) (citing [Arnett v. Kennedy](#), 416 U.S. 134, 159-60, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)). With respect to statutes which mandate civil rather than criminal penalties, “the Supreme Court has expressed greater tolerance of enactments with civil ... penalties because the consequences of imprecision are qualitatively less severe.” [Perez](#), 368 F.3d at 175 (citing [Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.](#), 455 U.S. 489, 498-99, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982)). To that end, “[s]chool disciplinary rules need not be as detailed as a criminal code.” [A.F. by Fenton v. Kings Park Cent. Sch. Dist.](#), 341 F. Supp. 3d 188, 198 (E.D.N.Y. 2018), in part because “maintaining security and order in the school requires *a certain degree* of flexibility in school disciplinary procedures.” [Bethel Sch. Dist. No. 43 v. Fraser](#), 478 U.S. 675, 686, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (emphasis added).

The Policy Walter supposedly violated prohibits “sexual harassment, gender-based harassment and sexual violence against CUNY students, employees or visitors.” Complaint, ECF No. 1, ¶ 70. Sexual harassment includes “unwelcome conduct of a sexual nature ... including physical conduct of a sexual nature” such that it creates a “hostile environment,”² evaluated from the perspective of a reasonable person in the position of a complainant. [Id.](#) ¶ 71. Moreover, conduct is unwelcome if the individual did not request or invite it and considered the conduct to be undesirable or offensive. [Id.](#) ¶ 72. For example, “conduct that might constitute sexual harassment depending on *the totality of the circumstances*” includes “inappropriate or unwelcome physical contact or suggestive body language, such as touching, groping, patting, pinching, hugging, kissing or brushing against an individual’s body” as well as “undue and unwanted attention, such as repeated inappropriate flirting, staring or making sexually suggestive gestures.” [Id.](#) ¶ 74.

i. Relevant Conduct

**8 Defendants insist that the relevant conduct for purposes of an as-applied vagueness analysis is the conduct as determined by the “Step Three” arbitrator post-deprivation. However, the cases Defendants cite consider “charged” conduct in criminal cases, Defs.’ Br., ECF No. 31, at 20 (citing [United States v. Smith](#), 985 F. Supp. 2d 547, 593

(S.D.N.Y. 2014)), and, the civil cases Defendants cite confine their analysis of relevant conduct to “the facts as presented by the Plaintiffs as true,” [A.F. by Fenton](#), 341 F. Supp. 3d at 198, as well as “actual conduct ... not with respect to hypothetical situations at the periphery of *396 the statute’s scope,” [VIP of Berlin, LLC v. Town of Berlin](#), 593 F.3d 179, 189 (2d Cir. 2010). Therefore, in a civil case, on a motion to dismiss, Walter’s “actual” conduct for purposes of the Court’s vagueness analysis is the conduct *as alleged in his complaint*. Accordingly, this Court accepts as true (i) that “while sitting at his piano Walter began to wince and rub his neck, while verbalizing his pain and discomfort,” (ii) that the student “offered to use the same application of pressure points [she learned from her grandmother] to Walter’s neck to provide relief,” (iii) that the student then “stood behind Walter and using the tips of her thumb and index fingers applied pressure to Walter’s neck” for approximately 30 seconds, (iv) that Walter asked the student to apply pressure once again at the end of the lesson “for less than one minute,” and (v) that as a result of this conduct, the College determined Walter violated the Policy on Sexual Misconduct and terminated him.

ii. Whether A Person of Ordinary Intelligence Would Have A Reasonable Opportunity to Know What Conduct the Policy Prohibits

Walter states a plausible claim that a person of ordinary intelligence would not have a reasonable opportunity to understand that the College’s Policy prohibits the voluntary and initially unsolicited application of therapeutic pressure to one’s neck for less than a minute and that such conduct warrants termination. The cases cited by Defendants do not compel a contrary conclusion. Though the cases Defendants cite suggest schools enjoy wide latitude in fashioning disciplinary policies, at first blush rendering them virtually impenetrable to a vagueness challenge, these cases typically deal with the conduct of high school students, and the penalties are often some modest term of suspension. For example, in [Fraser](#), a high school student was suspended for two days for violating the school’s “disruptive-conduct rule” and making a sexually explicit speech during an assembly. The Supreme Court concluded that “maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures” and “[g]iven the school’s need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions.” 478

U.S. at 686, 106 S.Ct. 3159. Accordingly, “[t]wo days’ suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution.” *Id.*

Unlike *Fraser*, Walter’s conduct, on the face of the complaint, is far more innocuous and yet his consequence far more severe. On the one hand, there is a high school student (i) charged with violating a disciplinary policy prohibiting “[c]onduct which materially and substantially interferes with the education process ... including the use of *obscene, profane* language and gestures” (ii) by giving a speech referring to another student “in terms of an *elaborate, graphic and explicit* sexual metaphor,” (iii) who received a two-day suspension. *Id.* at 678, 106 S.Ct. 3159. On the other hand, there is a professor of almost 10 years with an unblemished record (i) charged with violating a policy that prohibits “unwelcome [physical] conduct of a sexual nature” including “inappropriate or unwelcome physical contact or suggestive body language” (ii) for receiving a voluntary application of therapeutic neck pressure for less than one minute, (iii) who was terminated from his employment. As-applied vagueness challenges must be analyzed with respect to the specific conduct at issue, and thus the Court finds that the *397 deference conferred to the high school’s disciplinary process in *Fraser* is not warranted here. At virtually every turn, the facts, policies and penalties are distinct between the two cases. Perhaps most significantly, Walter faced termination, not a two-day suspension. With a penalty that serious, even in the context of a school policy, greater clarity is necessary.³

**9 Defendants also point to a single district court case in Colorado declining to find that a similar sexual misconduct policy was unconstitutionally vague. *Vanderhurst v. Colorado Mountain College Dist.*, 16 F. Supp. 2d 1297, 1305 (D. Colo. 1998). However, that one case does not control the Court’s decision with respect to Mr. Walter. *First*, in *Vanderhurst*, the Court considered the vagueness challenge on summary judgment, with the benefit of a more developed factual record. *Id. Second*, *Vanderhurst* dispensed with plaintiff’s vagueness challenge in three sentences only stating that the policy did not violate the Supreme Court’s vagueness test but declining to provide any analysis or explanation as to why the policy *as applied* to plaintiff’s conduct was not unconstitutionally vague. *Id.*

Unpersuaded by the cases cited by Defendants, the Court finds that Walter states a plausible claim that the College’s Policy on Sexual Misconduct would not “provide people of

ordinary intelligence a reasonable opportunity to understand what conduct it prohibits” as applied to his particular alleged conduct. *Thibodeau*, 486 F.3d at 65. The Policy prohibits unwelcome physical acts that are “sexual” in nature. A person of ordinary intelligence would plausibly be inclined to understand that where alleged conduct is undertaken for a medical or therapeutic purpose such conduct is decidedly not “sexual” in nature. Indeed, just as the physical acts comprising mouth-to-mouth resuscitation would surely be deemed sexual in nature *if not for the fact that they are performed for a specific medical purpose*, here, where the alleged conduct came after an explicit and voluntary offer to relieve physical pain, it is plausible that a person of ordinary intelligence may not understand that a policy on sexual misconduct proscribes such therapeutic touching.⁴

iii. Whether the Policy Authorizes or Encourages Arbitrary or Discriminatory Enforcement

Walter also states a plausible claim with respect to the second prong of the vagueness analysis—the College’s Policy on Sexual Misconduct, as applied to his alleged conduct, “authorizes or even encourages arbitrary and discriminatory enforcement.” *398 *Id.* at 65-66. The Policy defines “sexual activity,” “sexual harassment,” “sexual assault,” “sexual misconduct” and “sexual violence,” but the Policy does not define the term “sexual” as a standalone term. Accordingly, the Title IX coordinator maintains discretion to imbue the term “sexual” with her own personal gloss, rather than some more objective, even if imperfect, standard. A sexual misconduct policy that leaves ambiguous whether physical touching for a medical or therapeutic purpose is, nevertheless, “sexual,” is a policy vulnerable to arbitrary enforcement.

Though the Court appreciates the need to craft statutes and policies with sufficient breadth so as not to “convert the Constitution into an insuperable obstacle” to school policymaking, *id.* at 69, without language appropriately cabining the term “sexual,” the scope and reach of the Policy is too nebulous and the Title IX coordinator’s authority too unfettered. To be clear, there are circumstances in which whether or not conduct is “sexual” in nature cannot be disputed and indeed, the Policy’s definition of “sexual activity” refers to some of this more explicit conduct. However, the gray areas, lacking an adequate definitional anchor, leave victims *and* the accused most vulnerable to arbitrary and inconsistent enforcement, uncertain of when a school official may decide physical contact rises to the

level of a Policy violation or should be dismissed as a mere “misunderstanding.” Given the facts pleaded in this complaint, a Policy on Sexual Misconduct without sufficient guidance on the word “sexual” as a standalone term leaves open the possibility that physical touching performed for a purported therapeutic purpose can result in termination without warning and thus encourages arbitrary or discriminatory enforcement. Walter has pleaded facts sufficient to state a plausible claim that the Policy, as applied to the conduct alleged in the complaint, is vague because (i) it does not provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits and (ii) it authorizes or encourages arbitrary or discriminatory enforcement.

*c. Pre-Deprivation Procedural Due Process*⁵

**10 [18] [19] [20] [21] [22] “In order to assert a violation of procedural due process rights, a plaintiff *399 must ‘first identify a property [or liberty] right, second show that the government has deprived him of that right, and third show that the deprivation was effected without due process.’” [Doe v. United States Merchant Marine Academy](#), 307 F. Supp. 3d 121, 149 (E.D.N.Y. 2018) (citing [Local 342, Long Island Pub. Serv. Emps., UMD, ILA, AFL-CIO v. Town Bd. of Huntington](#), 31 F.3d 1191, 1194 (2d Cir. 1994)).⁶ “In the context of a public employee, procedural due process is satisfied if the government provides notice and a limited opportunity to be heard prior to termination, so long as a full adversarial hearing is provided afterwards.” [Locurto v. Safir](#), 264 F.3d 154, 173 (2d Cir. 2001); [see also](#) [Thompson v. New York City](#), 2013 WL 6409326, at *11 (S.D.N.Y. Dec. 9, 2013).

[23] [24] [25] First, notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [Mullane v. Central Hanover Bank & Trust Co.](#), 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950). Notice “must do more than simply inform an aggrieved party of his entitlement to a hearing. Rather ... notice must adequately inform the party as to what the critical issue of the hearing will be.” [Nnebe v. Daus](#), 184 F. Supp. 3d 54, 74 (S.D.N.Y. 2016) (citing [Turner v. Rogers](#), 564 U.S. 431, 131 S.Ct. 2507, 180 L.Ed.2d 452 (2011)). “The particularity with which alleged misconduct must be described [in a notice] varies with the facts and circumstances of the individual case ... the degree of required specificity also increases with the significance of the interests at stake.”

[Spinelli v. City of New York](#), 579 F.3d 160, 172 (2d Cir. 2009).

[26] [27] [28] [29] Second, whether the “limited” opportunity to be heard pre-deprivation is constitutionally sufficient, *regardless of post-deprivation process afforded*, depends upon: (i) the nature of the private interest that will be affected by the official action, (ii) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (iii) the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Mathews v. Eldridge](#), 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); [see also](#) [United States v. James Daniel Good Real Prop.](#), 510 U.S. 43, 53, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) (finding the [Mathews](#) test “provides guidance” in assessing whether to “tolerate” anything less than “notice and a hearing” pre-deprivation); [Patterson v. Coughlin](#), 761 F.2d 886, 893 (2d Cir. 1985) (“Once a cause of action for a constitutional violation accrues, nothing that the state does subsequently *400 can cut off the § 1983 claim”). A pre-deprivation hearing in the context of public employment “need not be elaborate.” [Cleveland Bd. of Educ v. Loudermill](#), 470 U.S. 532, 544, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (“affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays”); [Locurto](#), 264 F.3d at 173 (“requiring more than notice of the charges, an explanation of the nature of the employer’s evidence, and an opportunity for the employee to respond would impede the government’s interest in quickly removing from service an unsatisfactory employee”); [see also](#) [O’Connor v. Pierson](#), 426 F.3d 187, 198 (2d Cir. 2005). Indeed, [Loudermill](#) simply requires “the opportunity to present reasons, either in person or in writing, why proposed action should not be taken,” 470 U.S. at 546, 105 S.Ct. 1487, bearing in mind that pre-termination process “does not purport to resolve the propriety of the discharge, but serves mainly as a check against a mistake being made by ensuring there are reasonable grounds to find the charges against employee are true and would support his termination,” [Locurto](#), 264 F.3d at 174.

i. Notice

**11 [30] In common parlance, Walter alleges he was effectively sandbagged by the College’s Title IX coordinator,

Defendant Rountree. During email correspondence prior to his in-person meeting, Rountree referred only to a “confidential matter of importance,” and declined to inform Walter of the “critical issue” of the hearing, or that the meeting would even be anything like a hearing where Walter might be called upon to defend himself. [Nnebe](#), 184 F. Supp. 3d at 74. Moreover, during Walter's in-person meeting he was verbally informed that “allegations had been made against him by a student alleging the use of unwelcome comments of a sexual nature and asking her to massage his neck while he lay on the couch” and told who the student was. Compl., ECF No. 1, ¶ 95. However, Rountree allegedly did not inform Walter that the meeting was “an investigatory interview, that it was disciplinary or that it was official,” nor did she provide Walter with a “written summary of the allegations” against him. *Id.* ¶¶ 95, 98. Notably, Walter was not aware that he was facing termination during the meeting, an omission only exacerbated by the fact that just prior to the meeting, when Walter asked to conduct the meeting over the phone to accommodate his health condition, he stated “my employment is not in jeopardy, so I don't understand why I am being summoned with no explanation.” *Id.* ¶ 86.

First, Walter's email exchange with Rountree was too vague and not “reasonably calculated” to apprise him of the “pendency of the action” and “afford [him] an opportunity” to respond. [Mullane](#), 339 U.S. at 314, 70 S.Ct. 652. Being summoned suddenly to discuss a “confidential matter of importance” says nothing of the substance of any charges and affords no notice of “the critical issue of the hearing.” [Nnebe](#), 184 F. Supp. 3d at 74. To the contrary, notice of a “confidential matter of importance” does not even suggest there are any charges or that there will be some proceeding akin to a hearing. Second, the verbal notice of charges Walter received during the in-person meeting with Rountree might have informed Walter of the “critical issue of the hearing”—allegations of unwelcome sexual touching and sexual comments—but, according to the complaint, Walter left the meeting “completely confused about what was going on” because he was not informed that the meeting was an “investigatory interview” or that it was “disciplinary” and *might *401 result in termination*. Where the only notice Walter received of the charges against him (i) was delivered simultaneously with his opportunity to be heard, and (ii) failed to apprise Walter that he faced termination, such notice is not “reasonably calculated” to afford an opportunity, even if limited, to respond. Walter cannot realistically be expected to develop an appropriate, albeit limited, response to charges of sexual misconduct that threaten his livelihood

and professional standing at the precise moment he is finally notified of those charges. Accordingly, Walter was entitled to notice sufficient to apprise him of all relevant details concerning his charges, including possible penalties, and with some time between the notice and the opportunity to respond.

ii. Limited Opportunity to be Heard

Although the opportunity to be heard pre-deprivation is limited in the context of public employment, the employee is nevertheless entitled to *some* opportunity to respond. According to the complaint, once Walter was notified of the charges against him, he had to respond immediately and was not informed whether he would have any subsequent opportunities before Rountree issued a decision. Moreover, Walter was never asked to provide the names of any potential witnesses. Under [Mathews](#), Rountree's sandbagging (i) improperly minimized “the nature of the private interest that will be affected”—loss of Plaintiff's livelihood—(ii) ignored “the risk of an erroneous deprivation” by interviewing only the complainant's witnesses and declining to seek out the complainant's lesson recordings—unassailable evidence of what did, or did not occur during the lesson—without attempting to compile a more balanced factual record, and (iii) focused almost exclusively on “the Government's interest.” The loss of one's livelihood must loom large in a [Mathews](#) analysis, and Plaintiff was entitled to a more robust opportunity to be heard before his termination—it is not enough to point to Walter's three-step process post-termination as a suitable antidote. [Loudermill](#), 470 U.S. at 543, 105 S.Ct. 1487 (“[T]he significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood”); [Patterson](#), 761 F.2d at 893.

**12 In [Faghri v. University of Connecticut](#), Defendants were entitled to summary judgment on Plaintiff's procedural due process claim where a University dean was summoned to a face-to-face meeting, “received oral notice of the university's intent to remove him from the deanship, a brief explanation of the university's evidence, and an opportunity to be heard ... in that meeting and immediately afterward” there was no due process violation. 621 F.3d 92, 100 (2d Cir. 2010). However, in [Faghri](#), the Plaintiff faced a demotion—removal of his deanship—not total loss of employment. *Id.*; see also [Ciambriello v. Cty. of Nassau](#), 292 F.3d 307, 320 (2d Cir. 2002) (“[Plaintiff's] interest in not being demoted ... is undoubtedly less significant than a public employee's interest

in not being dismissed altogether [but] the private interest [in not being demoted] is still substantial"). Moreover, the Court noted in [Faghri](#) that the Plaintiff had an opportunity to respond both at the face-to-face meeting *and* after the meeting. [Faghri](#), 621 F.3d at 100. Here, accepting the allegations in the complaint as true, Walter was not made aware of any subsequent opportunity to respond or supplement his response following the in-person meeting with Rountree.

Even in [Zeyer v. Board of Education](#), where the court noted “[i]n the case of an employee with access to grievance procedures under a CBA, generally there is no due process violation where ... pre-deprivation notice is provided and the deprivation at issue can be fully remedied through the grievance procedures provided for in *402 the collective bargaining agreement,” 98 F. Supp. 3d 425, 435 (D. Conn. 2015) (citing [Adams v. Suozzi](#), 517 F.3d 124, 128 (2d Cir. 2008)), the Court nevertheless denied Defendants’ motion to dismiss because based on the allegations in the complaint, it was “entirely possible” that Plaintiff received notice “after her employment status had already been changed, or only a day or two beforehand” and never had a hearing. Here too, the allegations in the complaint make it “entirely possible,” indeed, plausible, that because Walter’s notice and opportunity to respond came simultaneously, he was deprived of even a *limited* opportunity to be heard. Moreover, here, Walter faced termination whereas in [Zeyer](#) the Plaintiff faced a change in employment status, not outright termination. Accordingly, Walter states a plausible procedural due process claim: he was entitled to a more meaningful opportunity to be heard after receiving notice, and Defendants’ motion to dismiss Plaintiff’s procedural due process claim should therefore be denied.⁷

[31] The substantial nature of Walter’s interest in retaining his livelihood combined with the dearth of information Walter received regarding any subsequent opportunity to be heard compel the Court to conclude that Walter has stated a plausible pre-deprivation procedural due process claim. Though the government’s interest in protecting the CUNY student body from unwelcome comments or conduct of a sexual nature is undoubtedly significant, Walter’s interest in his livelihood “cannot be gainsaid” or otherwise minimized. [Loudermill](#), 470 U.S. at 543, 105 S.Ct. 1487 (finding a

violation of due process where employee was terminated without a pre-deprivation opportunity to be heard for lying about his *criminal* record). Rountree did not release the report that ultimately resulted in Walter’s termination until two weeks after the in-person meeting and during that time Rountree only interviewed complainant’s witnesses but did not interview or much less inquire into any witnesses Walter might have been able to provide. Rountree did not even secure available recordings of Walter’s lessons with the complainant in finalizing her report. A constitutionally appropriate limited opportunity to respond would provide Walter an explicit opportunity to supplement his responses following the meeting. Without such an opportunity, and in light of the penalty he faced, Walter has alleged a plausible pre-deprivation procedural due process claim.⁸

CONCLUSION

**13 The Court fully appreciates the concerns of the College about the conduct of its *403 teaching faculty and administration and the need for a strict and sensible Policy on Sexual Misconduct. Indeed, allegations of sexual harassment must not be taken lightly and the Court does not quarrel with the College’s well-intentioned efforts to enforce its Policy. But, even well-intentioned, aggressive enforcement must respect constitutional assurances of fairness and due process. Given the facts alleged in this case, and despite the limited process due in the public employment context and the flexibility typically afforded to school disciplinary policies, Walter has alleged plausible vagueness and pre-deprivation procedural due process claims and the case should proceed toward some appropriate resolution or a trial on the merits. Accordingly, Defendants’ motion is granted with respect to Walter’s substantive due process claim and denied with respect to Walter’s vagueness and pre-deprivation procedural due process claims. All claims against Defendant Queens College are dismissed.

SO ORDERED.

All Citations

390 F.Supp.3d 382, 2019 WL 2342700

Footnotes

¹ Walter alleges he requires all of his students to record their lessons.

2 A "hostile environment" exists where the "conduct is sufficiently serious that it alters the conditions of, or has the effect of substantially interfering with, an individual's educational or work experience by creating an intimidating, hostile, or offensive environment." Complaint, ECF No. 1, ¶ 71.

3 Similarly, Defendants cite [A.F. by Fenton](#) where high school students received a one-day suspension after they received a text message containing a sexually explicit video. 341 F. Supp. 3d at 198. However, there the Court concluded on somewhat of a technicality that although the students were punished for conduct falling outside the scope of the school's disciplinary policy, Plaintiff's complaint failed to state a vagueness claim because the complaint did not allege that the disciplinary policy failed to provide notice of what behavior was proscribed, only that the Policy was erroneously applied to them. *Id.* at 199. [A.F. by Fenton](#) is thus procedurally inapposite. Here, the issue is not erroneous application of a policy but whether Walter has plausibly alleged that the Policy, as applied to his conduct, was too vague to provide him with constitutionally adequate notice that his conduct was proscribed.

4 There are numerous examples where some form of physical touching may be medically necessary or suggested. Perhaps a student is injured on campus and requires assistance fashioning a bandage or applying ointment or some other medication—all acts that require physical touching for a medical or therapeutic purpose. As alleged in the complaint, Walter received a similar form of physical touching that is not addressed explicitly in the Policy.

5 Defendants argue Walter abandoned his pre- and post-deprivation procedural due process claims because they were not featured in his opposition brief. However, of the two cases Defendants cite, one was decided on summary judgment, [Esperanza v. City of N.Y.](#), 325 F. Supp. 3d 288, 298 (E.D.N.Y. 2018), and in the single case Defendants cite ruling on a motion to dismiss, the Court's primary basis for dismissal was plaintiff's "failure to allege facts" to support their claim, and not plaintiff's cursory treatment of the claim in its opposition brief, [Bilinski v. Keith Haring Found., Inc.](#), 96 F. Supp. 3d 35, 47 & n.10 (S.D.N.Y. 2015); see also [Simon v. City of New York](#), 2015 WL 2069436, at *2 (S.D.N.Y. May 4, 2015) (dismissing Plaintiff's section 1983 claims because "it is well established that private employers are not liable under Section 1983 ... unless the plaintiff proves that action pursuant to official policy of some nature caused a constitutional tort," while also noting "[p]laintiffs failed to respond to Defendants' arguments with respect to those claims, so those claims are deemed abandoned"); [Chamberlain v. City of White Plains](#), 986 F. Supp. 2d 363, 392 (S.D.N.Y. 2013) (dismissing a complaint that "contain[ed] no factual content regarding this [Monell] theory," while also noting plaintiff's motion papers did not address the Monell claim).

Indeed, "[a] court *may*, and generally will, deem a claim abandoned when a plaintiff fails to respond to a defendant's arguments that the claim should be dismissed," [Chamberlain](#), 986 F. Supp. 2d at 392 (emphasis added), and "[w]here abandonment by a counseled party is not explicit but such an inference may be fairly drawn from the papers and *circumstances viewed as a whole*, district courts may conclude that abandonment was intended," [Jackson v. Federal Exp.](#), 766 F.3d 189, 196 (2d Cir. 2014) (emphasis added). Walter's pre-deprivation procedural due process claim is not the sort of "kitchen sink," meritless claim that warranted dismissal on 12(b)(6) grounds in [Bilinski](#), [Chamberlain](#) or [Simon](#). Considering the *circumstances as a whole*, particularly counsel's discussion and representations at oral argument, the Court finds that Walter did not intend to abandon his pre- and post-deprivation procedural due process claims. In ruling on Defendants' 12(b)(6) motion, Walter may stand on the pre- and post-deprivation procedural due process allegations in his complaint.

6 Defendants do not dispute that Plaintiff had a property interest in his continued employment as an adjunct lecturer for the remainder of his term appointment with CUNY. Defs.' Br, ECF No. 31, at 11. Nor do Defendants dispute that Plaintiff had a protected liberty interest in his reputation. *Id.* Accordingly, the Court must consider only whether Plaintiff was deprived of those rights without due process of law.

7 There are numerous other cases in this Circuit where constitutionally adequate pre-deprivation process is distinguishable from the facts Walter alleges in his complaint. See, e.g., [United States v. Barrett](#), 32 F. App'x 612, 614 (2d Cir. 2002) (Plaintiff had 20 days to respond to pre-deprivation notice of forfeiture); [Zynger](#), 370 F. App'x at 255 (plaintiff given two opportunities to offer an alternative explanation for positive drug test results first during a meeting with a medical review officer and later in a meeting with her supervisor and even if plaintiff "may quarrel with defendants' rejection of her explanation" she was provided with sufficient opportunity to be heard); [Chernoff v. City of New York](#), 2009 WL 816474, at *3 (E.D.N.Y. Mar. 26, 2009) (No due process violation where plaintiff received written notice of charges in April 2003 and again in January 2004, and thus plaintiff had adequate opportunity to respond); [DeMasi v. Benefico](#), 567 F. Supp. 2d 449 (S.D.N.Y. 2008) (No due process violation where plaintiff was ordered to report for "light transitional" work duty following injury, plaintiff in fact returned to work, was able to perform "light transitional" duties, was informed via a subsequent letter that his benefits would be terminated unless plaintiff provided medical evidence to the contrary).

8 With respect to post-deprivation process, CBA-mandated arbitration procedures provide adequate post-deprivation process for constitutional purposes. [O'Connor v. Pierson](#), 426 F.3d 187, 198 (2d Cir. 2005) ("CBA-mandated grievance procedures are routinely (though not always) held to provide adequate post-deprivation process"). Indeed, in [Harhay v. Town of Ellington Bd. of Educ](#), 323 F.3d 206 (2d Cir. 2003), the Court found that where the CBA governing plaintiff's employment established a grievance and arbitration procedure, which the plaintiff took advantage of and pursued arbitration, were sufficient to satisfy due process. See also [Wojcik v. Mass. State Lottery Comm'n](#), 300 F.3d 92, 102 (1st Cir. 2002); [Wilson v. New York](#), 2017 WL 9674497 (E.D.N.Y. Jan. 24 2017).

After Plaintiff's termination he exercised his right to a three-step grievance process culminating in arbitration. Typically, grievance procedures pursuant to a CBA "provide adequate post-deprivation process." [O'Connor](#), 426 F.3d at 198. Here, Plaintiff's post-deprivation three-step *de novo* process was likely adequate, but that does not cure any and all pre-deprivation deficiencies. Indeed, Plaintiff was entitled to "notice, and a limited opportunity to be heard prior to termination, so long as a full adversarial hearing is provided afterwards." [Locurto](#), 264 F.3d at 173. Even if "a full adversarial hearing is provided afterwards," Plaintiff was still entitled to "a limited opportunity to be heard" pre-deprivation, and Rountree's simultaneous notice and hearing procedure was likely inadequate. See also [Faghri](#), 621 F.3d at 99 ("The due process clause requires a government employer to provide 'notice and opportunity for a hearing' *before terminating* an employee with a protected property interest in his employment" (emphasis added)).

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Declined to Extend by [Ridley v. Massachusetts Bay Transp. Authority](#), 1st Cir.(Mass.), November 29, 2004

55 F.3d 1177
United States Court of Appeals,
Sixth Circuit.

Keith DAMBROT, Plaintiff–
Appellant/Cross–Appellee,
Lakeith Boyd, et al., Plaintiffs/Cross–Appellees,
v.
CENTRAL MICHIGAN UNIVERSITY, et al.,
Defendants–Appellees/Cross–Appellants.

Nos. 94–1015, 94–1056 and 94–1908.

Argued Feb. 2, 1995.

Decided June 5, 1995.

Synopsis

Former head coach of university basketball program, who used word “nigger” in locker room session with players, brought action against university and its officials alleging that his discharge violated First Amendment. Basketball players joined action as plaintiffs alleging that university's discriminatory harassment policy violated First Amendment. The United States District Court for the Eastern District of Michigan, [Robert H. Cleland](#), J., 839 F.Supp. 477, entered summary judgment for players and for university on coach's claim. Coach appealed. University and officials cross-appealed. The Court of Appeals, [Keith](#), Circuit Judge, held that: (1) policy was unconstitutionally vague and overbroad and was not valid prohibition of fighting words; (2) coach's use of word “nigger” was not speech on matter of public concern; (3) coach's use of word was not protected under concept of academic freedom; and (4) players were entitled to attorney fees.

Affirmed.

West Headnotes (20)

[1] Federal Courts

 Summary judgment

Court of Appeals reviews grant of motion for summary judgment de novo.

[1 Cases that cite this headnote](#)

[2] Constitutional Law

 Overbreadth in General

Constitutional Law

 Freedom of Speech, Expression, and Press

Overbreadth doctrine provides exception to traditional rules of standing and allows parties not yet affected by statute to bring actions under First Amendment based on belief that certain statute is so broad as to “chill” exercise of free speech and expression. [U.S.C.A. Const.Amend. 1](#).

[17 Cases that cite this headnote](#)

[3] Constitutional Law

 Overbreadth in General

Statute is unconstitutional on its face on overbreadth grounds if there is realistic danger that statute itself will significantly compromise recognized First Amendment protections of parties not before court. [U.S.C.A. Const.Amend. 1](#).

[5 Cases that cite this headnote](#)

[4] Constitutional Law

 Prohibition of substantial amount of speech

First step in analyzing overbreadth claim under First Amendment is to determine whether regulation reaches substantial amount of constitutionally protected speech. [U.S.C.A. Const.Amend. 1](#).

[6 Cases that cite this headnote](#)

[5] Constitutional Law

 Coaches and other athletic department personnel

Education

 Exercise of rights; retaliation

Public Employment

 Prohibited or Improper Grounds in General

University's discriminatory harassment policy, which prohibited any verbal or nonverbal behavior that subjected individuals to intimidating, hostile, or offensive environment by demeaning or slurring individuals through written literature because of their racial or ethnic affiliation or by using symbols, epithets, or slogans that inferred negative connotations about their racial or ethnic affiliation, reached substantial amount of protected speech, so that it was overbroad, notwithstanding language in policy that policy would not be applied to interfere with free speech and contention that policy contained no enforcement mechanism and university enforced policy with respect for First Amendment rights; that basketball coach was discharged on basis of policy indicated that university could enforce policy, there was nothing to ensure that university would not violate First Amendment even if that was not its intention, and any language or writing, intentional or unintentional, regardless of political value, could be prohibited upon university's initiative. [U.S.C.A. Const.Amend. 1.](#)

[11 Cases that cite this headnote](#)

[6] Constitutional Law

 [Vagueness](#)

After determining that regulation reaches substantial amount of constitutionally protected speech, next step in analyzing overbreadth claim is to determine whether regulation is substantially overbroad and constitutionally invalid under void for vagueness doctrine. [U.S.C.A. Const.Amend. 1.](#)

[8 Cases that cite this headnote](#)

[7] Constitutional Law

 [Education](#)

Education

 [Employment in general](#)

Education

 [Employment in general](#)

University's discriminatory harassment policy, which prohibited any verbal or nonverbal behavior that subjected individuals to

intimidating, hostile, or offensive environment by demeaning or slurring individuals through written literature because of their racial or ethnic affiliation or by using symbols, epithets, or slogans that inferred negative connotations about their racial or ethnic affiliation, was void for vagueness; in order to determine what conduct would be considered "negative" or "offensive" by university, subjective reference was required, and defining what was offensive was wholly delegated to university officials.

[8 Cases that cite this headnote](#)

[8]

Constitutional Law

 [Post-Secondary Institutions](#)

Education

 [Employment in general](#)

Education

 [Employment in general](#)

University's discriminatory harassment policy, which prohibited any verbal or nonverbal behavior that subjected individuals to intimidating, hostile, or offensive environment by demeaning or slurring individuals through written literature because of their racial or ethnic affiliation or by using symbols, epithets, or slogans that inferred negative connotations about their racial or ethnic affiliation, was not valid prohibition against fighting words; policy necessarily required university to assess racial or ethnic content of speech, and identity of speaker and target were important in determining whether there was violation of policy. [U.S.C.A. Const.Amend. 1.](#)

[8 Cases that cite this headnote](#)

[9]

Constitutional Law

 [Employees](#)

Public employee's untenured status will not defeat First Amendment claims against employer. [U.S.C.A. Const.Amend. 1.](#)

[1 Cases that cite this headnote](#)

[10]

Constitutional Law

 [Discharge](#)

In determining whether discharge of public employee violates First Amendment, threshold question is whether employee's speech may be fairly characterized as constituting speech on matter of public concern. [U.S.C.A. Const.Amend. 1.](#)

[25 Cases that cite this headnote](#)

[11] Constitutional Law

 [Discharge](#)

In determining whether discharge of public employee violates First Amendment, if employee's speech is found to touch upon matter of public concern, court must apply balancing test; if employee's free speech interests outweigh efficiency interests of government as employer, employee's First Amendment rights have been violated. [U.S.C.A. Const.Amend. 1.](#)

[27 Cases that cite this headnote](#)

[12] Constitutional Law

 [Discharge](#)

If First Amendment violation was substantial or motivating factor in termination of public employee, employer may present evidence that employee would have been terminated in absence of protected conduct. [U.S.C.A. Const.Amend. 1.](#)

[7 Cases that cite this headnote](#)

[13] Federal Courts

 [Public employment in general](#)

Question of whether public employee's speech touches upon matter of public concern is one of law, to be reviewed de novo. [U.S.C.A. Const.Amend. 1.](#)

[14 Cases that cite this headnote](#)

[14] Constitutional Law

 [Public or private concern; speaking as "citizen"](#)

In determining whether public employee's speech is on matter of public concern, court must ask to what purpose employee spoke;

controversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection. [U.S.C.A. Const.Amend. 1.](#)

[31 Cases that cite this headnote](#)

[15] Constitutional Law

 [Coaches and other athletic department personnel](#)

Education

 [Exercise of rights; retaliation](#)

Public Employment

 [Protected activities](#)

University basketball coach's use of word "nigger" in locker room session with players was not speech on matter of public concern, so that his discharge for that speech did not violate First Amendment; coach used word was intended in context of motivational talk to flatter some players and to encourage players to be aggressive on basketball court, a matter which, while of concern to coach, was not public issue. [U.S.C.A. Const.Amend. 1.](#)

[19 Cases that cite this headnote](#)

[16] Constitutional Law

 [Public or private concern; speaking as "citizen"](#)

For purposes of determining whether speech is protected by First Amendment, analysis of what constitutes matter of public concern and what raises academic freedom concerns is of essentially same character; linchpin of inquiry is extent to which speech advances idea transcending personal interest or opinion which impacts on public's social or political lives. [U.S.C.A. Const.Amend. 1.](#)

[25 Cases that cite this headnote](#)

[17] Constitutional Law

 [Coaches and other athletic department personnel](#)

Education

 [Exercise of rights; retaliation](#)

Public Employment **Protected activities**

University basketball coach's use of word "nigger" in locker room session with players was not protected under concept of academic freedom, so that his discharge for that speech did not violate First Amendment, even though coach intended to use word in positive and reinforcing manner by encouraging his players to be "niggers" or "fearless, mentally strong, and tough" on court, but not in classroom; use of word was not essence of coach's communicative act as coach's message was that players needed to play harder, not that "niggers" are "fearless, mentally strong, and tough," but out of place in classroom, use of word was not intended to foster debate in light of coach's role, and university had right to disapprove of use of word as motivational tool and of coach's message regarding conduct on court and classroom. [U.S.C.A. Const.Amend. 1.](#)

[14 Cases that cite this headnote](#)

[18] Federal Courts **Costs and attorney fees**

Award of attorney fees is reviewed for abuse of discretion.

[Cases that cite this headnote](#)

[19] Civil Rights **Costs and Fees**

University students were "prevailing parties" and, thus, were entitled to attorney fees in their civil rights action in which university's discriminatory harassment policy was held to violate First Amendment, notwithstanding contention that students' success was de minimis as policy had never been enforced. [U.S.C.A. Const.Amend. 1.](#)

[5 Cases that cite this headnote](#)

[20] Civil Rights **Employment practices**

District court did not abuse its discretion in refusing to reduce attorney fee award, in

civil rights action in which former university basketball coach alleged that his discharge violated First Amendment and basketball players alleged that university's discriminatory harassment policy violated First Amendment, for limited success or duplicated efforts, even though policy was held to be unconstitutional, but coach's claim was not successful; court found that there was commonality between claims from plaintiffs' perspective, and, balancing factors, complexity and undesirability of case was as strong as success was limited. [U.S.C.A. Const.Amend. 1.](#)

[7 Cases that cite this headnote](#)

Attorneys and Law Firms

***1179** [Robert A. Sedler](#) (argued and briefed), Wayne State University Law School, Detroit, MI, James Schuster (briefed), Southfield, MI, for Keith Dambrot.

[Leonard M. Niehoff](#) (briefed), [Robert M. Vercruyse](#) (argued and briefed), Bernice M. Tatarelli (briefed), Butzel, Long, Gust, Klein & Van Zile, Detroit, MI, [Steven W. Martineau](#), Lynch, Gallagher, Lynch, Shirley & Martineau, Mt. Pleasant, MI, for Central Michigan University, Leonard E. Plachta, Russ Herron and Dave Keilitz in Nos. 94-1015 and 94-1056.

[Robert M. Vercruyse](#) (argued), Bernice M. Tatarelli, Butzel, Long, Gust, Klein & Van Zile, Detroit, MI, for Central Michigan University, Leonard E. Plachta, Russ Herron, Dave Keilitz in No. 94-1908.

Before: [KEITH](#) and [NELSON](#), Circuit Judges; [BELL](#), District Judge.*

Opinion

[KEITH](#), Circuit Judge.

There are two sets of plaintiffs in this case (collectively the "Plaintiffs"). The first is Keith Dambrot, ("Dambrot") former head coach of Central Michigan University's men's basketball program. The second includes five students ¹ — Leonard Bush, Deshanti ***1180** Foreman, Keith Gilmore, Tyrone Hicks, and Amere May (collectively the "Student Plaintiffs")—who were members of the 1992-93 Central Michigan University ("CMU") men's basketball team

coached by Dambrot. Defendants are CMU and Leonard E. Plachta (“Plachta”), Russ Herron (“Herron”), and Dave Keilitz (“Keilitz”) officially and in their private capacities (collectively “Defendants” or “CMU”).² Dambrot appears before the court appealing the grant of summary judgment in favor of Defendant CMU regarding his wrongful termination claim.³ Defendants cross-appeal the district court’s grant of summary judgment in favor of Plaintiffs regarding the unconstitutionality of CMU’s discriminatory harassment policy. Defendants also cross-appeal the district court’s award of attorney’s fees to the Student Plaintiffs. The Student Plaintiffs come before the court as cross-appellees. For the reasons stated below, we **AFFIRM** the district court’s grant of summary judgment in favor of Plaintiffs finding the CMU discriminatory harassment policy violates the First Amendment. We also **AFFIRM** the district court’s grant of summary judgment in favor of Defendants finding CMU’s termination of Coach Dambrot’s employment does not violate the First Amendment. Finally, we **AFFIRM** the district court’s award of attorney’s fees.

I. Statement of the Case

On May 12, 1991, Dambrot became the head coach of the Central Michigan University men’s basketball team. His responsibilities as head coach included, among other things, offering and renewing player scholarships, deciding which players could remain on the team, determining the amount of playing time for each player and selecting assistant coaches. This lawsuit arises from events which occurred during the 1992–93 men’s basketball season.

The 1992 CMU men’s basketball team was made up of eleven African Americans and three Caucasians.⁴ The team’s full-time coaching staff included two assistant coaches, Derrick McDowell (an African American) and Barry Markwart (a Caucasian). The part-time coaching staff included one voluntary graduate assistant, Chip Wilde (a Caucasian), three managers (all Caucasian), and a professional trainer (a Caucasian).

In January of 1993, Dambrot used the word “nigger” during a locker room session with his players and coaching staff either during the halftime or at the end of a basketball game in which the team lost to Miami University of Ohio. According to Dambrot’s testimony, Dambrot told the players they hadn’t been playing very hard and then said “Do you mind if I use

the N word?” After one or some of the players apparently indicated it was okay, Dambrot said “you know we need to have more niggers on our team.... Coach McDowell is a nigger, ... Sand[er] Scott who’s an academic All-American, a Caucasian, I said Sand[er] Scott is a nigger. He’s hard nose, [sic] he’s tough, et cetera.” He testified he intended to use the term in a “positive and reinforcing” manner. The players often referred to each other using the N-word during games and around campus and in the locker room. Dambrot stated he used the word in the same manner in which the players used the term amongst themselves, “to connote a person who is fearless, mentally strong and tough.”

Prior to the January incident, the record shows Dambrot had used the N-word on at ***1181** least one other occasion. In November, Dambrot apparently addressed the team after a practice and said he wanted the players to ‘play like niggers on the court’ and wished he had more niggers on the basketball court. He then said he did not want the team to act like niggers in the classroom. When asked why he made these statements Dambrot stated:

Well, that’s really a very easy question for me to answer, because we had had an incident early in the year where we had five or six basketball players, some of our bigger kids on our team, in a math class. And our kids were aggressive, tough, you know, a little bit loud, abrasive. And the lady was intimidated, because it was the first year that she ever had taught. And they almost got kicked out of the math class. A matter of fact, Dave Keilitz, myself, Pat Podoll, Doug Nance, who is the faculty rep, and then the head of the department,—I don’t remember his name—the math department, met and discussed the situation. And it was my feeling that you can’t be aggressive, tough, hard-nosed, abrasive in class, or you’re going to get thrown out of classes, especially at a school like Central Michigan where the faculty members don’t understand a lot about black people or have many black people in class. And I think our players understood what I meant by, “Don’t be niggers in the classroom.”

JA at 504.

The news Dambrot had used the N-word in the locker room incident became known to persons outside the basketball team. In February 1993, Keilitz interviewed members of the men’s basketball team at Dambrot’s request. Keilitz reported all the African American players he interviewed said they were not offended by the coach’s use of the term. At some point after those interviews, a former member of

the men's basketball team, Shannon Norris, complained to the university's affirmative action officer, Angela Haddad, regarding Dambrot's use of the N-word during the November incident. The affirmative action officer confronted Dambrot who admitted using the word but stated he used it in a positive manner. The officer viewed Dambrot's use of the word as a violation of the university's discriminatory harassment policy and recommended Dambrot be disciplined. Dambrot accepted the proposed disciplinary action in lieu of a more formal investigation and was suspended without pay for five days.

News of the locker room incident spread through the campus after Dambrot was suspended. An article in the student newspaper was printed in which Dambrot told his side of the story. The statement was characterized by the district court as "considerably more explanatory and defensive than apologetic in tone." *Dambrot*, 839 F.Supp. at 478. Students staged a demonstration and local, regional and national news media reported accounts of the incident at CMU.

On April 12, 1993, Keilitz, the athletic director, informed Dambrot he would not be retained as head coach for the 1993–94 season. The university stated that it believed Dambrot was no longer capable of effectively leading the men's basketball program.

Dambrot instituted a lawsuit on April 19, 1993, alleging, *inter alia*, he was fired because he used the term "nigger," and the termination violated his First Amendment rights to free speech and academic freedom. Several members of the basketball team joined the lawsuit alleging the university's discriminatory harassment policy was overbroad and vague and violated their First Amendment rights.

On June 17, 1993, the district court granted in part Plaintiffs' motion for preliminary injunction. The preliminary injunction enjoined the university from enforcing its discriminatory harassment policy. On July 16, 1993, Plaintiffs and Defendants moved for summary judgment. A motion hearing was held on September 21, 1993. Judge Robert H. Cleland rendered his decision in a written opinion and order on November 26, 1993. *Dambrot v. Central Mich. Univ.*, 839 F.Supp. 477 (E.D.Mich.1993). As was stated above, the district court granted Student Plaintiffs' motion for summary judgment holding the university's discriminatory harassment policy was facially unconstitutional. The district court also granted Defendants' motion for *1182 summary judgment holding Dambrot was not wrongfully terminated.

Dambrot filed a notice of appeal on December 23, 1993. On December 27, 1993, Plaintiffs filed a motion for attorney's fees. On January 4, 1994, Defendants filed a notice of cross-appeal. On June 20, 1994, the district court granted Plaintiffs' motion for attorney's fees. Defendants appealed the grant of attorney's fees to Plaintiffs the same day.

II. Discussion

Defendants appeal the district court's grant of summary judgment holding the CMU discriminatory harassment policy overbroad and void for vagueness violating the First Amendment. Plaintiffs appeal the district court's grant of summary judgment holding CMU's termination of Dambrot did not violate the First Amendment. Defendants also appeal the district court's award of attorney's fees to Plaintiffs. For the following reasons we AFFIRM the district court on each issue.

A. The District Court Did Not Err in Granting Summary Judgment For Plaintiffs Finding the CMU Discriminatory Harassment Policy Unconstitutional.

1. Standard of Review

[1] This court reviews the grant of a motion for summary judgment *de novo*. *Faughender v. City of North Olmsted*, 927 F.2d 909, 911 (6th Cir.1991).

Summary judgment is proper if the moving party shows there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine issue of material fact*." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

2. The Discriminatory Harassment Policy is Unconstitutional on its Face.

[2] [3] The overbreadth doctrine provides an exception to the traditional rules of standing and allows parties not yet affected by a statute to bring actions under the First Amendment based on a belief that a certain statute is so broad as to "chill" the exercise of free speech and expression. *Leonardson v. City of E. Lansing*, 896 F.2d 190, 195 (6th Cir.1990); *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93

S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). A statute is unconstitutional on its face on overbreadth grounds if there is “a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court....” *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772 (1984).

[4] [5] The CMU policy, located in the Plan for Affirmative Action at Central Michigan University, states discriminatory harassment will not be condoned. Racial and ethnic harassment is defined in the policy as

any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by ... (c) demeaning or slurring individuals through ... written literature because of their racial or ethnic affiliation; or (d) using symbols, [epithets] or slogans that infer negative connotations about the individual's racial or ethnic affiliation.

Plan for Affirmative Action at Central Michigan University, Section III(b)(1), Racial and Ethnic Harassment. The first step in analyzing an overbreadth claim is to “determine whether the regulation reaches a substantial amount of constitutionally protected speech.” *Id.* at 195. The language of this policy is sweeping and seemingly drafted to include as much and as many types of conduct as possible. On its face, the policy reaches “a substantial amount of constitutionally protected speech.” *Id.*

CMU argues the policy does not present a “realistic danger” of compromising First Amendment rights because 1) there is no enforcement mechanism and 2) the university *1183 enforces the policy with respect for First Amendment rights. Defendants' first argument is not persuasive. Although there are no formal mechanisms of enforcement, it is clear from the sanctions imposed on Dambrot that the university can pursue violations to the policy.

Secondly, CMU argues any concerns the policy will reach constitutionally protected speech have been abated by language in the policy which states:

The University will not extend its application of discriminatory harassment so far as to interfere impermissibly with individuals rights to free speech.

In *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir.1995), this Circuit declined to save an unconstitutional ordinance by accepting the representations of the City's counsel that the ordinance would be enforced in a particular way. Similarly, this court declines to accept the representations of CMU.

The University of Michigan made an argument similar to CMU's in *Doe v. University of Michigan*, 721 F.Supp. 852, 864 (E.D.Mich.1989). In that case, the University of Michigan's anti-discrimination policy was struck down as constitutionally overbroad.⁵ The court noted that “[t]he University repeatedly argued that the Policy did not apply to speech that is protected by the First Amendment.” *Id.* The policy, however, was held to be both invalid on its face and had been applied in a manner which violated the First Amendment.

In the instant case, there is nothing to ensure the University will not violate First Amendment rights even if that is not their intention. It is clear from the text of the policy that language or writing, intentional or unintentional, regardless of political value, can be prohibited upon the initiative of the university. The broad scope of the policy's language presents a “realistic danger” the University could compromise the protection afforded by the First Amendment.

The district court decision in *Doe* noted:

[T]he University may subject all speech and conduct to reasonable and non-discriminatory time, place, and manner restrictions which are narrowly tailored and which leave open ample alternative means of communication.

What the University could not do, however, was establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas

or messages sought to be conveyed.... Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people.

Id., at 863 (citations omitted).

On its face, the CMU discriminatory harassment policy “sweeps within its ambit both constitutionally protected activity ... and unprotected conduct, making it subject to an overbreadth challenge.” *Leonardson*, 896 F.2d at 195.

[6] [7] The next step in analyzing an overbreadth claim is to determine whether the policy is “substantially overbroad and constitutionally invalid under the void for vagueness doctrine.” *Leonardson*, 896 F.2d at 195–96.

Vagueness may take two forms, both of which result in a denial of due process. A vague ordinance denies fair notice of the standard of conduct to which a citizen is held accountable. At the same time an ordinance is void for vagueness if it is an *1184 unrestricted delegation of power, which in practice leaves the definition of its terms to law enforcement officers, and thereby invites arbitrary, discriminatory and overzealous enforcement.

Id. (citing *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C.Cir.1977)). As the district court notes “[i]n the instant case, both problems—fair notice, and unrestricted delegation—are present.” *Dambrot*, 839 F.Supp. at 484. In order to determine what conduct will be considered “negative” or “offensive” by the university, one must make a subjective reference. Though some statements might be seen as universally offensive, different people find different things offensive. The facts of this case demonstrate the necessity of subjective reference in identifying prohibited speech under the policy. Several players testified they were not offended by Dambrot’s use of the N-word while student Norris and affirmative action officer Haddad were extremely offended. The CMU policy, as written, does not provide fair notice of what speech will violate the policy. Defining what is offensive is, in fact, wholly delegated to university officials. This “unrestricted delegation of power” gives rise to the

second type of vagueness. For these reasons, the CMU policy is also void for vagueness.

3. Even if the N-word Constitutes a “Fighting Word,” the Discriminatory Harassment Policy Remains Unconstitutional.

[8] Defendant CMU argues the policy is a prohibition of “fighting words.” Assuming, *arguendo*, CMU is correct, the policy is still constitutionally prohibited. *R.A.V. v. St. Paul*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). In *R.A. V.*, the petitioner and other teenagers allegedly erected and burned a cross inside the fenced yard of a Black family. The City of St. Paul brought suit under the St. Paul Bias Motivated Crime Ordinance, St. Paul, Minn.Legis.Code § 292.02 (1990).⁶ The Supreme Court held the First Amendment does not allow the imposition of “special prohibitions on those speakers who express views on disfavored subjects.” *Id.* at —, 112 S.Ct. at 2548. The ordinance was found to contain limitations on content and viewpoint which rendered it facially unconstitutional. The Court held:

Although the [ordinance has been limited] to reach only those symbols or displays that amount to “fighting words,” the remaining, unmodified terms make clear that the ordinance applies only to “fighting words” that insult, or provoke violence, “on the basis of race, color, creed, religion or gender.” Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use “fighting words” in connection with other ideas—to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality—are not covered.

Id., at — — —, 112 S. Ct. at 2547–48. CMU’s policy prohibits “written literature, ... symbols, [epithets] or slogans that infer negative connotations *about the individual’s racial or ethnic affiliation*.” Under *R.A.V.*, the CMU policy constitutes content discrimination because it necessarily requires the university to assess the racial or ethnic content of the speech.

R.A.V. also held the St. Paul ordinance constituted viewpoint discrimination because it prohibited fighting words used against persons because of their racial or ethnic affiliation but did not prohibit fighting words which could be hurled in response to a race or ethnic-based attack, even if the fighting words were the same. *See id.* The ability to use certain words depended on the identity and affiliation of the speaker. This

impermissible viewpoint discrimination could easily occur under the CMU policy as the identity of the speaker and the target are important *1185 in determining whether there has been a violation.

Because the CMU discriminatory harassment policy is overbroad and void for vagueness and because it is not a valid prohibition against fighting words, the CMU discriminatory harassment policy violates the First Amendment of the United States Constitution. The district court's grant of summary judgment in favor of Plaintiffs on this issue is therefore **AFFIRMED**.

B. The District Court Did Not Err in Finding Dambrot Was Permissibly Terminated.

Dambrot seeks relief from an alleged wrongful termination for the following reasons stated in his amended complaint:

20. Plaintiff's communication with his players is speech protected by the First Amendment.
21. Plaintiff Dambrot's use of the term "nigger" in the sense set forth above in the instructional context is fully protected by the First Amendment.
22. The Defendants, acting under color of state law, terminated Plaintiff's employment, solely because of his exercise of expression fully protected by the First Amendment.

JA at 30. The district court described Dambrot's argument, as stated in the briefs and oral argument, this way: (1) CMU's policy is unconstitutional because it suppresses speech that is protected by the First Amendment; (2) Plaintiff Dambrot was sanctioned pursuant to the policy and eventually terminated from employment as a result of such sanctioning; (3) therefore, plaintiff's termination was violative of the First Amendment. *Dambrot*, 839 F.Supp. at 485. The district court correctly noted while Dambrot's argument has a seductive logic, Dambrot can only demonstrate harm resulted from the application of the invalid policy if his speech was in fact protected. Without a finding that Dambrot's speech is protected under the First Amendment, the application of the policy does not injure Dambrot. Without the demonstration of some harm, Dambrot cannot recover.

The other argument intimated by Dambrot in # 21 of his complaint is that he is protected under the concept of academic freedom. From either perspective, the central

issue is whether Dambrot's speech is protected by the First Amendment. We find it is not.

1. CMU's Termination of Dambrot was Permissible Because Dambrot's Speech Does Not Touch a Matter of Public Concern.

[9] The Supreme Court has held a government employee retains her First Amendment right to comment on matters of public concern without fear of reprisal from the government as employer. *Connick v. Myers*, 461 U.S. 138, 140, 103 S.Ct. 1684, 1686, 75 L.Ed.2d 708 (1983) (citing *Pickering v. Board of Education*, 391 U.S. 563, 574, 88 S.Ct. 1731, 1737-38, 20 L.Ed.2d 811 (1968) (teacher's comments regarding whether school system required additional funds touched upon a matter of public concern and could not provide basis for dismissal); *see also*, *Matulin v. Village of Lodi*, 862 F.2d 609, 612 (6th Cir.1988) ("It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.") (quoting *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S.Ct. 2891, 2896, 97 L.Ed.2d 315 (1987) (public employee's statement's regarding shooting of President Reagan touched on matter of public concern)). Moreover, an employee's untenured status will not defeat constitutional claims. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (untenured junior college professor entitled to hearing on issue of whether nonrenewal of his contract violated free speech rights under First Amendment).

The *Pickering* Court developed a balancing test which weighed "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*, at 568, 88 S.Ct. at 1734-35 (cited in *Connick*, 461 U.S. at 140, 103 S.Ct. at 1686). Prior to *Connick*, courts applied the *Pickering* balance test when determining whether the government's discipline *1186 or termination of a public employee violated the First Amendment. *See e.g.*, *Stern v. Shouldice*, 706 F.2d 742 (6th Cir.), cert. denied, 464 U.S. 993, 104 S.Ct. 487, 78 L.Ed.2d 683 (1983) (non-tenured professor's advice to student to seek legal advice about suspension protected under First Amendment); *Hildebrand v. Board of Trustees of Michigan State Univ.*, 662 F.2d 439 (6th Cir.1981), cert. denied, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982) (professor's tenure denial based, in part, on professor's protected speech did not provide cause of action where he would have been denied tenure regardless of

protected activities); *Anderson v. Evans*, 660 F.2d 153 (6th Cir.1981) (interest of school board in maintaining efficient, regularly functioning school system and employing effective teachers outweighed interest of tenured teacher in making remarks reflecting her attitude about Black persons).

[10] [11] In *Connick*, the Supreme Court incorporated the *Pickering* test into a two step analysis for determining when the discharge of a public employee violates the First Amendment.⁷ *Id.*, see also, *Matulin*, *supra*. “The threshold question ... is whether [the employee's] speech may be ‘fairly characterized as constituting speech on a matter of public concern.’ ” *Matulin*, 862 F.2d at 612 (quoting *Rankin*, 483 U.S. at 384, 107 S.Ct. at 2897 (quoting *Connick*, 461 U.S. at 146, 103 S.Ct. at 1689)). Second, if the speech is found to touch upon a matter of public concern, the court must then apply the *Pickering* balancing test. If the employee's free speech interests outweigh the efficiency interests of the government as employer, the employee's First Amendment rights have been violated.

[12] If the First Amendment violation was a substantial or motivating factor in the termination, the employer may present evidence the employee would have been terminated in the absence of protected conduct. *See Mt. Healthy City Sch. Dist. Board of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977) (where untenured teacher was not rehired based in substantial part on protected conduct, proper inquiry was whether school district would have reached the same decision in the absence of the protected conduct); *Matulin*, 862 F.2d at 613.

Defendants assert there were reasons other than Dambrot's speech for terminating his employment. The *Connick* court noted, however, “if [the speech] cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reason for [the] discharge.” *Id.* Thus, if Dambrot's speech is not a matter of public concern, the court's inquiry ends.

[13] The question of whether speech touches upon a matter of public concern is one of law, to be reviewed *de novo*. *Rahn*, 31 F.3d at 411; *Barnes*, 848 F.2d at 733.

The *Connick* court describes speech upon matters of public concern as “relating to any matter of political, social, or other concern to the community.” *Id.*, at 146, 103 S.Ct. at 1690. “Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context

of a given statement, as revealed by the whole record.” *Id.*, at 147–48, 103 S.Ct. at 1690. This Circuit has applied the *Connick* test in several areas, none, however, similar to the facts of the instant case.⁸

*1187 [14] The Seventh Circuit offers a particularly instructive explanation of the *Connick* test in *Linhart v. Glatfelter*, 771 F.2d 1004 (7th Cir.1985) (holding former police chief's expressions of personal opinion regarding competency of Village Manager were not protected by First Amendment). The *Linhart* court described the proper inquiry as not “what might incidentally be conveyed by the fact that the employee spoke in a certain way, [but] the *point* of the speech in question.” *Id.*, at 1010. The court must ask to what purpose the employee spoke. Controversial parts of speech advancing only private interests do not necessarily invoke First Amendment protection.

The Fifth Circuit focused on the intent of the speech in question in *Martin v. Parrish*, 805 F.2d 583 (5th Cir.1986). Plaintiff Martin had been discharged for incessant use of profanity in his college classroom. He denigrated his students' ability because they were accustomed to part-time, allegedly less rigorous, instructors at another college. The Fifth Circuit held his speech did not touch a matter of public concern because the profanity used by Martin served only to reflect his attitude toward his students. The court noted “Appellant has not argued that his profanity was for any purpose other than cussing out his students as an expression of frustration with their progress—to ‘motivate’ them—and has thereby impliedly conceded his case under *Connick*.” *Martin*, 805 F.2d at 585.

[15] Focusing on the “content, form and context” of Dambrot's use of the word “nigger,” this Court can find nothing “relating to any matter of political, social or other concern to the community.” Dambrot's locker room speech imparted no socially or politically relevant message to his players. The *point* of his speech was not related to his use of the N-word but to his desire to have his players play harder. Like the use of profanity in *Martin*, Dambrot's use of the N-word was intended to be motivational and was incidental to the message conveyed. As the district court discussed:

[T]he coach was intending to be motivational and ... thought he was permitted through circumstances or by specific agreement of the players to make use of such language in the locker room. The Court further assumes the truth of Dambrot's assertion that he was attempting

to flatter some players by applying the term to them as they often did to themselves in his presence. He thought he would humiliate (or motivate) others by *withholding* the description from them (or by referring to them as only “half-nigger”). In these ways he was using their “street language” as shorthand to call their attention to enthusiasm and toughness on the basketball floor, or to their lack of it.

A coach's distress about the degree of aggressiveness shown by his players on the basketball court is a reasonable matter of concern, certainly, to the coach, but not *1188 the kind of question that is fairly cast as a “public” issue.

Dambrot, 839 F.Supp. at 487.

The district court constructs an interesting and useful test for assessing under *Connick* the “form and context” of Dambrot's speech.

[O]ne way to evaluate the possibility of the “public concern” component in questioned speech is to imagine it being discussed in public. The political compulsion of public employees partially at issue in *Connick, supra*, the allegations of corruption noted in *McMurphy, supra*, and comments concerning the level of fire protection in a town discussed in *Brasslett v. Cota*, 761 F.2d 827 (1st Cir.1985), all can easily be envisioned as the subjects of heated disputation, with the contesting points of view hashing it out from soapboxes in the public square. It is considerably more difficult to imagine Coach Dambrot stepping up to the microphone and letting everyone know that his basketball players were expected to be “niggers” during games. [footnote omitted] Therefore, the facts that Dambrot's speech was given in the particular words chosen, and made in the locker room for his players' private consumption, only add further support to the conclusion that, at least to the “form and context” of

it, his speech was not on a matter of public concern. [citations omitted].

This hypothetical exercise illustrates well how context can provide insight as to intent. In applying the *Connick* test assessing “content, form and context,” the essence of the inquiry is how each of these indicators clarifies the communicative purpose of the speaker. The fact Dambrot was in a locker room rather than a stadium is not determinative of the public nature of the speech. See, *Dambrot*, 839 F.Supp. at 487; *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). It does, however, support the conclusion Dambrot did not intend to speak on a matter of public concern.

2. Dambrot's Speech Does Not Enter the Marketplace of Ideas Or the Realm of Academic Freedom.

Dambrot argues *Connick* is not applicable to his claim but instead the court should recognize his constitutionally protected right to academic freedom because he “was terminated because of the purported ‘public outcry’ that arose over what he said to his players, *when he was instructing them about how they should be playing basketball and about how they should behave in the classroom.*”

[16] The analysis of what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character. In *Swank v. Smart*, 898 F.2d 1247, 1250 (7th Cir.1990), a police officer was terminated from his employment based on a coworker's report that he picked up a young college student and gave her a ride on the back of his motorcycle. During the ride the officer and the student talked about numerous topics including her coursework, the motorcycle and her former boyfriend. After his dismissal the officer sued the town alleging, *inter alia*, the termination had violated his free speech rights guaranteed by the First Amendment. The Seventh Circuit held that conversations between the police officer and the young woman did not touch a matter of public concern and merited no First Amendment protection. Judge Posner recognized

[t]he purpose of the free-speech clause ... is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery,

opinions—scientific, political, or aesthetic—to an audience whom the speaker seeks to inform, edify, or entertain. Casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values and consequences of the speech that is protected by the First Amendment.

Id.

The principle of academic freedom emphasizes the essentiality of free public expression of ideas. In **1189 Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S.Ct. 675, 683, 17 L.Ed.2d 629 (1967), the Supreme Court recognized

[t]he classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.”

The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives.

[17] Compare with the instant case two cases out of the Second Circuit involving the First Amendment rights of two professors from the City University of New York (CUNY). See *Levin v. Harleston*, 966 F.2d 85 (2d Cir.1992); *Jeffries v. Harleston*, 21 F.3d 1238 (2d Cir.1994), vacated, remanded, 513 U.S. 996, 115 S.Ct. 502, 130 L.Ed.2d 411 (1994).⁹ In both cases, professors made derogatory remarks about persons of certain racial or ethnic groups and, in both cases, the University took some action which the professor alleged was in retaliation for the exercise of his First Amendment rights. Professor Levin wrote three letters which were published in the New York Times and two journals in which he made denigrating comments about the intelligence

of African Americans. The University created a “shadow section” for one of Levin’s classes and set up an Ad Hoc Committee to review his fitness to teach. Professor Jeffries made a speech in which he discussed racial bias in the New York public school system and made derogatory comments about Jews. In his case, the University denied Jeffries a three-year term as chairman of the Black Studies department, the post he had held since the department’s inception in 1972. In *Levin*, the Second Circuit found Professor Levin’s expression of ideas demanded First Amendment protection. *Levin*, 966 F.2d at 87. In *Jeffries*, the Second Circuit found the speech in question satisfied the first prong of the *Connick* test, touching a matter of public concern. *Jeffries*, 21 F.3d at 1245. The speech and letters advanced viewpoints, however repugnant, which had as their purpose influencing or informing the public debate. Dambrot’s speech did not have such a purpose.

Likening himself to the professor in *Parate v. Isibor*, 868 F.2d 821 (6th Cir.1989), Dambrot attempts to bring himself under the protection of academic freedom. Professor Parate, a native of India, was forced to change the grade of a Nigerian student at the insistence of the Dean of the School of Engineering & Technology at Tennessee State University, also a native Nigerian. This Circuit held the action of the Dean forcing Parate to change the grade, rather than the school changing it, constituted a violation of Parate’s right to free speech. “Because the assignment of a letter grade is symbolic communication intended to send a specific message to the student, the individual professor’s communicative act is entitled to some measure of protection.” *Id.*, at 827.

***1190** Dambrot’s use of the N-word, unlike Parate’s grade, was not the essence of his communicative act. While Professor Parate’s specific message to the student by issuing a grade was that he deserved a “B,” Dambrot’s message was that his players needed to play harder, not that “niggers” are “fearless, mentally strong and tough” but out of place in the classroom.

Dambrot’s use of the N-word is even further away from the marketplace of ideas and the concept of academic freedom because his position as coach is somewhat different from that of the average classroom teacher. Unlike the classroom teacher whose primary role is to guide students through the discussion and debate of various viewpoints in a particular discipline, Dambrot’s role as a coach is to train his student athletes how to win on the court. The plays and strategies are seldom up for debate. Execution of the coach’s will is paramount. Moreover, the coach controls who plays and for

how long, placing a disincentive on any debate with the coach's ideas which might have taken place.

While Dambrot argues and we accept as true that he intended to use the term in a positive and reinforcing manner, Dambrot's total message to the players is disturbing. Corey Henderson, one of the players on the 1992–93 team touched on the concern in his deposition testimony.

Q What did that phrasing that he had wanted you to play like niggers on the basketball floor but not be niggers in the classroom mean to you as a students? [sic]

A I really am not sure. Because in the context he was trying to use it in, I mean, nigger I guess as a—he wanted us—I guess he wanted us to play harder, I suppose, and I didn't understand why if it was good enough on the court then why it wasn't good enough in the classroom.

I mean, I was kind of shocked that he used that word being a coach and all because he—I didn't think that was appropriate for him to use that word, him or any coach, talking to a group of mostly young adult black males. I didn't think it was right for him to use that word.

But then I was kind of disgusted when he said not being one in the classroom. I didn't understand why it was good enough on the court but not good enough in the classroom.

The First Amendment protects the right of any person to espouse the view that a “nigger” is someone who is aggressive in nature, tough, loud, abrasive, hard-nosed and intimidating; someone at home on the court but out of place in a classroom setting where discipline, focus, intelligence and interest are required. This same view has been and is held about African Americans by many who view the success of Black athletes as a result of natural athletic ability and the success of Black executives as the result of affirmative action.

What the First Amendment does not do, however, is require the government as employer or the university as educator to accept this view as a valid means of motivating players. An instructor's choice of teaching methods does not rise to the level of protected expression. *Hetrick v. Martin*, 480 F.2d 705, 708–9 (6th Cir.), cert. denied, 414 U.S. 1075, 94 S.Ct. 592, 38 L.Ed.2d 482 (1973) (university's nonrenewal of untenured teacher based on her teaching style did not violate constitutional rights to academic freedom and freedom of speech). Assuming but not deciding, Dambrot is subject to the same standards as any teacher in a classroom (as opposed to

a locker room setting), Dambrot's speech served to advance no academic message and is solely a method by which he attempted to motivate—or humiliate—his players. In the instant case, the University has a right to terminate Dambrot for recklessly telling these young men to be athletically ardent but academically apathetic in his attempt to boost athletic performance. The University has a right to terminate Dambrot for telling his players that success on the basketball court is not premised on the same principles of discipline, focus and drive that bring success in the classroom. The University has a right to disapprove of the use of the word “nigger” as a motivational tool just as the college in *Martin* was not forced to *1191 tolerate profanity. Finally, the University has a right to hold Coach Dambrot to a higher standard of conduct than that of his players. Dambrot's resort to the First Amendment for protection is not well taken.

For the foregoing reasons, Dambrot's speech cannot be fairly characterized as touching a matter of public concern. Thus, there is no need to reach the *Pickering* balancing of government efficiency interests and the employee's interest in expression. Moreover, there is no need to reach the question of whether the speech was the primary reason for the termination or whether CMU had other reasons for terminating Dambrot. Neither does Dambrot's speech raise any academic freedom concerns. Accordingly, the district court's grant of summary judgment for CMU on this issue is **AFFIRMED**.

C. The District Court Did Not Err in its Decision to Grant Attorney's Fees.

Plaintiffs sought and were granted attorney's fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, [42 U.S.C. § 1988](#) (1976 ed., Supp V). Defendants oppose the district court's award of fees on three grounds: 1) plaintiffs are not prevailing parties; 2) the district court should have reduced the total amount of recovery to reflect non-meritorious claims and duplicated efforts.

1. The District Court Did Not Err in Finding Plaintiffs Are Prevailing Parties.

[18] The award of attorney's fees is reviewed for abuse of discretion. *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983); *Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 273–74 (6th Cir.1983). See also, *Scales v. J.C. Bradford & Co.*, 925 F.2d 901, 909 (6th Cir.1991).

[19] Defendants argue Plaintiffs are not properly considered prevailing parties. In *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93, 109 S.Ct. 1486, 1494, 103 L.Ed.2d 866 (1989), the Supreme Court held “[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute.” Defendants argue there has been no “material alteration of the legal relationship of the parties” and that Plaintiffs’ victory on the unconstitutionality of the CMU policy is *de minimis*.

In *Garland*, a teachers’ association had challenged the school board’s policy limiting communications with teachers relating to employee organization. The Supreme Court had affirmed the Fifth Circuit’s judgment finding the limitations on teacher communications as well as the limitation on the employee organization’s use of school facilities were unconstitutional. See *Garland Indep. Sch. Dist. v. Texas State Teachers Ass'n*, 479 U.S. 801, 107 S.Ct. 41, 93 L.Ed.2d 4 (1986). The subsequent application for attorney’s fees was denied by the district court and the Fifth Circuit which held the plaintiffs were not prevailing parties. The Supreme Court reversed the Fifth Circuit and found plaintiffs were prevailing parties within the meaning of 42 U.S.C. § 1988. The Court noted:

For example, in the context of this litigation, the District Court found that the requirement that nonschool hour meetings be conducted only with prior approval from the local school principal was unconstitutionally vague ... The District Court characterized this issue as “of minor significance” and noted that there was “no evidence that the plaintiffs were ever refused permission to use school premises during non-school hours.” ... If this had been petitioners’ only success in the litigation, we think it clear that this alone would not have rendered them “prevailing parties” within the meaning of § 1988. Where the plaintiff’s success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the “generous formulation” we adopt today has not been satisfied.

Garland, 489 U.S. at 792, 109 S.Ct. 1486. In the context of a case seeking to prevent limitations placed on teachers’ attempts to organize, the invalidation of a rule limiting use of school facilities can be said to be minor. In the instant case, however, Plaintiff’s *1192 success cannot be termed purely technical or *de minimis*. The main issue in this case was the constitutionality of Dambrot’s speech and the university’s permissible restrictions on that speech.

Defendants argue because the discriminatory harassment policy had never been enforced, Plaintiffs experience no real benefit from the judgment. However, the lack of enforcement of the facilities use limitation in *Garland* was not the only factor which made it *de minimis*. The nature of that victory was also only tangentially related to the primary victory on teachers’ rights to communicate regarding employee organizations.

Defendants further argue Plaintiffs do not meet the Supreme Court’s recent restatement of the prevailing party standard in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

“In short, a plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”

Id. at —, 113 S.Ct. at 573. In *Farrar*, plaintiffs sued the Lieutenant Governor of Texas for alleged due process violations after the Governor participated in closing down the Correctional School for Adolescents owned and operated by the plaintiffs. Plaintiffs requested \$17 million but received a one dollar nominal judgment. The district court awarded \$280,000 in fees. The Supreme Court upheld the Fifth Circuit’s reversal of the fee award, citing the “technical” and “insignificant” nature of the victory. Defendants argue Plaintiffs are not prevailing parties because they do not benefit materially from the judgment that the CMU discriminatory harassment policy is unconstitutional. There is, however, a vast difference between a case where no meaningful recovery was had against the Lieutenant Governor and a case where the recovery sought and achieved is the right to speak freely. Although the Defendants argue their behavior has not been modified, their distinction is one between positive and negative action. Where Defendants previously had the right to prohibit Plaintiff’s speech, now they do not.

In *Citizens Against Tax Waste v. Westerville City School Dist. Bd. of Educ.*, 985 F.2d 255 (6th Cir.1993), an “unincorporated association of property owners” sought to enjoin the enforcement of a policy adopted by the Board of Education which required persons in the same position as plaintiffs “to obtain prior approval from the [Board]

President ... before speaking." *Id.* at 256. In response to the plaintiffs' lawsuit the Board revised its policy after having agreed to "defer implementation of the alleged policy pending a hearing." *Id.* Though the objectionable policy was never enforced, this Circuit held the plaintiffs

accomplished some significant relief or benefit sought.... Since plaintiffs have attained "at least some relief on the merits of [its] claim," CATW should be deemed a prevailing party. *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 2675, 96 L.Ed.2d 654 (1987). We also deem this relief or benefit to have changed, to some extent, the preexisting "legal relationship" between the parties. *See Garland*, 489 U.S. at 792, 109 S.Ct. at 1493. The question to answer in plaintiffs' quest for fees is whether plaintiffs have accomplished a "material alteration of the legal relationship of the parties." *Farrar v. Hobby*, 506 U.S. 103, —, 113 S.Ct. 566, 572, 121 L.Ed.2d 494 (1992) [citation omitted].

Id. at 258. The vindication of rights under the First and Fourteenth Amendments, whether or not such rights had been infringed upon, constitutes relief such that Plaintiffs should be deemed prevailing parties. Thus, the district court's finding that Plaintiffs are prevailing parties is **AFFIRMED**.

2. The District Court Did Not Abuse Its Discretion By Declining to Reduce the Fee Award to Reflect Nonmeritorious or Unsuccessful Claims or Duplicated Efforts.

[20] Defendants state in their brief "[t]he district court is simply cautioned to 'make clear that it has considered the relationship between the amount of the fee awarded and the results obtained.'" Defendants' brief at 12, n. 11 (citing **1193 Hensley*, 461 U.S. at 436–37, 103 S.Ct. at 1941). The district court stated the following in making its fee determination:

As noted earlier, plaintiff's overall success is the most salient factor in the instant civil rights litigation. *Farrar* [506 U.S. at — — —, 113 S.Ct. at 574–75], 121 L.Ed.2d at 505. Here, the plaintiffs have been altogether successful in vindicating the first amendment rights of plaintiffs and future plaintiffs and all those in an equivalent position. However, as stated earlier, since plaintiff Dambrot's claim of wrongful discharge was not successful, and could not have affected the legal relationship between plaintiff Dambrot and defendants, no fees may be recovered based on that claim.

However, the court also notes that [in] this case there is a commonality among the claims. Plaintiff Dambrot's argument was that the policy violated the first amendment, Dambrot was terminated for speech which violated the policy; therefore, Dambrot's termination was vindicated by the first amendment. From the plaintiffs' perspective, the claims were not only common but practically coextensive. From the court's perspective, the analysis involved in Count II (wrongful discharge of public employee), was largely distinct from the facial challenge of the policy under the First Amendment. Therefore, it could be argued that plaintiff's fees should be reduced because counts I and II required divergent analyses and plaintiffs succeeded with respect to and are eligible for recovery of fees only as to Count I. On the other hand, plaintiff's actual time spent may well be consistent with or nearly consistent with time spent on Count I.

Where commonality is present, 'the district court should focus on the significance of the overall relief obtained by plaintiff in relation to the hours reasonably expected in the litigation.' Limited success may justify the reduction of the overall amount, but the court may not reduce the initial figure by 'comparing the total number of issues in the case with those actually prevailed upon.'

Phelan v. Bell, 8 F.3d 369, 374 (6th Cir.1993).

.....

In balancing some of the other factors against [Plaintiff's] limited success, ... the court finds that the complexity and undesirability of the case is as strong as the success was limited, i.e. the amount of time spent on Count II is comparable to the complexity of the issue in Count I. There need not be any adjustment upward or downward as the competing factors effectively cancel each other out.

Dambrot v. Central Michigan Univ., No. 93–CV–10117–BC, slip op. at 10–11 (E.D.Mich. filed June 20, 1994). The district court, held to an abuse of discretion standard of review, has fulfilled its obligation under *Hensley* and *Farrar* with the above discussion.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the grant of summary judgment in favor of Plaintiffs finding the

CMU discriminatory harassment policy violates the First Amendment, we **AFFIRM** the grant of summary judgment in favor of Defendants finding CMU's termination of Coach Dambrot's employment does not violate the First Amendment, and we **AFFIRM** the award of attorney's fees by the Honorable Robert H. Cleland of the United States District Court for the Eastern District of Michigan, Northern Division.

All Citations

55 F.3d 1177, 63 USLW 2784, 100 Ed. Law Rep. 869, 10 IER Cases 1130, 1995 Fed.App. 0168P

Footnotes

- * The Honorable [Robert Holmes Bell](#), United States District Judge for the Western District of Michigan, sitting by designation.
- 1 When Dambrot filed his initial Complaint on April 19, 1993, he was joined by nine members of the University men's basketball team. Approximately one week later, an additional student plaintiff was added. On June 16, 1993, the claims of student plaintiffs Daniel West, Mario Patterson, and Marcus Culbreth were voluntarily dismissed with prejudice. On July 8, 1993, the claims of student plaintiff Torey Mills were voluntarily dismissed with prejudice. On July 19, 1993, the claims of student plaintiff Lakeith Boyd were voluntarily dismissed with prejudice.
- 2 Plachta, for all times relevant was the CMU President. Herron, for all times relevant was the Vice President for University Relations. Keilitz was, for all times relevant, the CMU Athletic Director.
- 3 Dambrot also brought claims for violation of his due process rights, the Elliott–Larsen Civil Rights Act and for defamation. The district court granted summary judgment in favor of Defendants on the first two claims. Dambrot has not appealed these judgments. The district court noted that Dambrot and the Defendants stipulated to dismiss, without prejudice, the defamation count "in order that limited discovery could proceed focused upon the motion at issue herein." As a result, the district court has withheld and deferred action on the stipulated dismissal. See [Dambrot v. Central Mich. Univ.](#), 839 F.Supp. 477, 480 n. 3 (E.D.Mich.1993).
- 4 The team had included two other African Americans, but they quit the team early on.
- 5 The University of Michigan policy assessed disciplinary action for certain conduct. The policy provided, in part, sanctions for:
 - 1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status and that
 - a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or
 - b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extracurricular activities or personal safety; or
 - c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities....
- 6 The ordinance stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.
- 7 In [Connick](#), a former assistant district attorney brought a civil rights action alleging she was impermissibly terminated for circulating a questionnaire after a decision was made by a superior to transfer her to a different section of criminal court. The Supreme Court found one of the matters—whether employees felt pressured to work in political campaigns—was a matter of public concern but the interests of her employer in "the effective and efficient fulfillment of its responsibilities to the public" outweighed any harm to the Plaintiff.
- 8 See e.g., [Rahn v. Drake Ctr.](#), 31 F.3d 407 (6th Cir.1994), cert. denied, 515 U.S. 1142, 115 S.Ct. 2578, 132 L.Ed.2d 828 (1995) (statements made in press release attacking use of funds from recent tax levy benefiting Drake Center and conversion of 75% of hospital beds to private status did not touch matters of public concern); [Williams v. Kentucky](#), 24 F.3d 1526 (6th Cir.) cert. denied, 513 U.S. 947, 115 S.Ct. 358, 130 L.Ed.2d 312 (1994) (public employee's statements critical of political patronage practices and suspected political involvement by DES office were matters of public concern);

Thomson v. Scheid, 977 F.2d 1017, 1021 (6th Cir.1992), cert. denied, 508 U.S. 910, 113 S.Ct. 2341, 124 L.Ed.2d 251 (1993) (conversation concerning proper procedure in fraud investigation was matter of “internal department policy and [could not] be considered speaking out on matters of public concern.”); *Boger v. Wayne County*, 950 F.2d 316 (6th Cir.1991) (petitioner’s response to newspaper reporter’s inquiry about charges of racial discrimination addressed matter of public concern); *Meyers v. City of Cincinnati*, 934 F.2d 726 (6th Cir.1991) (statements regarding method of implementing affirmative action were matters of public concern); *Langford v. Lane*, 921 F.2d 677 (6th Cir.1991) (statements in dispute over office policy not matters of public concern but statements at public hearing regarding office policy were matters of public concern); *Brown v. City of Trenton*, 867 F.2d 318 (6th Cir.1989) (patrolman’s letter complaining about superior’s policy decisions did not touch matter of public concern); *Matulin, supra*, (public employees statements in solicited newspaper interview discussing racial and retaliatory harassment at workplace were matters of public concern); *Barnes v. McDowell*, 848 F.2d 725 (6th Cir.1988), cert. denied, 488 U.S. 1007, 109 S.Ct. 789, 102 L.Ed.2d 780 (1989) (public employee’s allegations of corruption were not genuine and as such did not touch upon matter of public concern); *Solomon v. Royal Oak Township*, 842 F.2d 862, 865 (6th Cir.1988) (“speech disclosing public corruption is a matter of public interest”); *McMurphy v. City of Flushing*, 802 F.2d 191 (6th Cir.1986) (certain remarks made out of spite by police officer were insubordination and did not touch upon matter of public concern); *Marohnic v. Walker*, 800 F.2d 613 (6th Cir.1986) (statements regarding operation of public organizations in accordance with law are matters of public concern). For an overview of other circuits determinations of various matters of public concern, see *Dambrot*, 839 F.Supp. at 486 n. 13.

9 The Second Circuit held Jeffries’s speech was protected based on the jury’s findings that CUNY would not have removed Jeffries from his position as chairman of the Black Studies department but for his speech. The judgment was remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994). In *Waters*, a plurality of the Supreme Court held the *Connick* test should be applied to what the government reasonably thought was said, i.e. the government should not be held to the same evidentiary standards used by a jury when making its decision whether or not to terminate an employee based on what is thought to be unprotected speech. The Court further concluded “where the government is acting as employer, its efficiency concerns should ... be assigned a greater value.” *Id. at* —, 114 S.Ct. at 1888. This inquiry, of course, occurs after the speech has been found to touch a matter of public concern. The Second Circuit reconsidered its decision under *Waters* in *Jeffries v. Harleston*, 52 F.3d 9 (2d Cir. (N.Y.)). The court construed the *Waters* court to hold “that the closer the employee’s speech reflects on matters of public concern, the greater must be the employer’s showing that the speech is likely to be disruptive before it may be punished.” *Jeffries*, 52 F.3d at 13. Finding, as a matter of law, that the potential disruptiveness of Jeffries speech outweighed whatever First Amendment value the speech might have had, the Second Circuit, reversed the district court’s decision to reinstate Jeffries and remanded with instructions to enter judgment for the defendants.

 KeyCite Yellow Flag - Negative Treatment

Declined to Extend by [American Civil Liberties Union v. Mineta](#), D.D.C.,
June 2, 2004

112 F.Supp.2d 1320
United States District Court,
N.D. Georgia,
Atlanta Division.

NATIONAL ABORTION FEDERATION, Plaintiff,

v.

**METROPOLITAN ATLANTA RAPID
TRANSIT AUTHORITY**, Defendant.

Civil Action No. 1:99-CV-1090-CAP.

|
June 7, 2000.

Synopsis

Association of abortion providers filed action against metropolitan transit authority, alleging that transit authority violated its First and Fourteenth Amendment rights under [42 U.S.C.A. § 1983](#) by refusing to accept association's advertisements in and around buses and trains, and seeking a permanent injunction. Both parties moved for summary judgment. The District Court, [Pannell](#), J., held that: (1) transit authority's interest in protecting its employees and passengers from violence that allegedly might result if transit authority allowed such advertising was too remote to rise to the level of a compelling state interest that would justify rejection of the ads under strict scrutiny analysis, and rejection of the ads would be found to be improperly content based; (2) transit authority's policy that restricted access to its advertising space to those ads that did not support or oppose any position in regard to a matter of public controversy was vague and unenforceable; and (3) association was entitled to permanent injunction.

Judgment for association.

West Headnotes (15)

[1] Constitutional Law

 [Government Property and Events](#)

For purposes of determining whether individual's First Amendment free speech rights have been violated, before the court can decide in what

type of forum the speech occurred, court must first decide the relevant forum by looking at the access that was sought by the complaining party. [U.S.C.A. Const.Amend. 1](#).

Cases that cite this headnote

[2]

Constitutional Law

 [Transit systems and stations](#)

Relevant forum, for purposes of determining whether metropolitan transit authority's rejection of ads from association of abortion providers violated association's First Amendment free speech rights, was all advertising space controlled by the metropolitan transit authority on its buses and trains, in its stations and surrounding areas, and in bus shelters owed by third party, where association sought access to all those areas, and transit authority maintained control over the content of the advertising displayed in those areas, even though bus shelters were owned by third party. [U.S.C.A. Const.Amend. 1](#).

Cases that cite this headnote

[3]

Constitutional Law

 [Nature and requisites](#)

Constitutional Law

 [Nature and requisites](#)

Constitutional Law

 [Nature and requisites](#)

For purposes of First Amendment free speech analysis, government property is generally defined as a traditional public forum, a designated public forum, or a non-public forum; "traditional public forum" is a place which by long tradition or by government fiat has been devoted to assembly and debate, whereas "designated public forum" arises when the government designates a forum for use by the public at large for purposes of assembly and speech, for use by certain speakers, or for the discussion of certain subjects, and, finally, "non-public forum" is a forum that the government has closed to public discourse and assembly. [U.S.C.A. Const.Amend. 1](#).

[Cases that cite this headnote](#)**[4] Constitutional Law** [Transit systems and stations](#)

For purposes of determining relevant forum involved in claim by association of abortion providers that First Amendment free speech rights have been violated by metropolitan transit authority that rejected association's ads, transit authority could not create a public forum by failing to act or by allowing limited public discourse, but, rather, it had to affirmatively and intentionally open its forum to public discourse. [U.S.C.A. Const.Amend. 1.](#)

[Cases that cite this headnote](#)**[5] Constitutional Law** [Transit systems and stations](#)

To determine whether metropolitan transit authority intended to open its forum to public discourse, for purposes of First Amendment free speech analysis, court had to look at the policy and practice of metropolitan transit authority to determine whether it intended to create a public forum, and had to take into account the nature of the property and its compatibility with expressive activity. [U.S.C.A. Const.Amend. 1.](#)

[Cases that cite this headnote](#)**[6] Constitutional Law** [Transit systems and stations](#)

Although metropolitan transit authority's written policy was not to accept advertising that supported or opposed any position in regard to a matter of public controversy, transit authority opened its advertising forum to such speech when it permitted public interest speech and speech by non-profit entities on subjects ranging from AIDS awareness to racial and religious tolerance to homosexual rights, and thus, at best, transit authority had created a limited public forum that excluded only political speech; therefore, strict scrutiny applied to transit authority's rejection of advertising by association of abortion providers. [U.S.C.A. Const.Amend. 1.](#)

[Cases that cite this headnote](#)**[7] Constitutional Law** [Justification for exclusion or limitation](#)

If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny, and government must then show that its rejection of advertising was necessary to serve a compelling state interest and that it was narrowly drawn to achieve that end. [U.S.C.A. Const.Amend. 1.](#)

[Cases that cite this headnote](#)**[8] Constitutional Law** [Transit systems and stations](#)**Municipal Corporations** [Means of public transportation and communication](#)

Metropolitan transit authority's interest in protecting its employees and passengers from violence that allegedly might result if transit authority allowed advertising by association of abortion providers in and around buses and trains was too remote to rise to the level of a compelling state interest that would justify transit authority's rejection of the ads under strict scrutiny analysis; thus, transit authority's rejection of the ads was not necessary to serve a compelling state interest and would be found to be improperly content based. [U.S.C.A. Const.Amend. 1.](#)

[Cases that cite this headnote](#)**[9] Constitutional Law** [Statutes in general](#)**Constitutional Law** [Statutes](#)

Void for vagueness doctrine serves two main purposes: (1) to provide fair notice of prohibitions so that individuals may steer clear of unlawful conduct, and (2) to prevent arbitrary and discriminatory enforcement of laws.

[Cases that cite this headnote](#)

[10] Constitutional Law Carriers and Public Utilities**Municipal Corporations** Means of public transportation and communication

Metropolitan transit authority's written policy that restricted access to its advertising space to those ads that did not support or oppose any position in regard to a matter of public controversy was vague and unenforceable; although the policy defined the term "public controversy" as a matter which is (1) widely reported by the media in the area served by the transit authority, and (2) it reasonably appears from such reports that the subject matter arouses strong feelings in a substantial number of people, the phrases "widely reported," "reasonably appears," "arouses strong feelings," and "substantial number of people," were constitutionally vague and put too much discretion into the hands of the transit authority officials.

[1 Cases that cite this headnote](#)**[11] Statutes** Effect of Partial Invalidity; Severability

Facial invalidity of policy alleged to be overly broad and void on its face is an extreme measure, and generally, a statute should be declared invalid to the extent that it reaches too far, but otherwise left intact.

[Cases that cite this headnote](#)**[12] Constitutional Law** Necessity of Determination**Constitutional Law** Zoning, planning, and land use**Municipal Corporations** Means of public transportation and communication

Metropolitan transit authority's policy that restricted access to its advertising space to those ads that did not support or oppose any position in regard to a matter of public controversy was overly broad in that policy could be interpreted to

include a wide range of matters that went beyond what was needed to protect any possible interests of the transit authority; however, because the policy had already been declared void for vagueness, court would not decide to what extent the policy was overly broad.

[Cases that cite this headnote](#)**[13] Injunction** Likelihood of success on merits

Standard for preliminary injunction is essentially the same as for permanent injunction with the exception that plaintiff must show likelihood of success on the merits rather than actual success.

[1 Cases that cite this headnote](#)**[14] Injunction** Grounds in general; multiple factors

Plaintiff moving for permanent injunction must show: (1) actual success on the merits; (2) substantial threat of irreparable injury; (3) that threatened injury to plaintiff outweighs injury to nonmovant; and (4) that injunction would not disserve the public interest.

[2 Cases that cite this headnote](#)**[15] Abortion and Birth Control** Civil liability and proceedings; injunction

Association of abortion providers was entitled to permanent injunction to preclude metropolitan transit authority from improperly rejecting its advertising in and around buses and trains, where association showed actual success on the merits in that transit authority's policy was found to be unconstitutionally vague and transit authority's rejection of ads was found to be improperly content-based, association showed substantial threat of irreparable injury in that its First Amendment rights were at stake, constitutional weight of association's injury far outweighed any injury to transit authority, and permanent injunction would not disserve the public interest but would protect the public interest by protecting those rights to which it too was entitled. [U.S.C.A. Const.Amend. 1.](#)

3 Cases that cite this headnote

Attorneys and Law Firms

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[Paul Arnold Howell, Jr.](#), Pursley Howell Lowery & Meeks, Atlanta, GA, for defendant.

ORDER

[PANNELL](#), District Judge.

The plaintiff filed the instant action, alleging that the defendant violated its First and Fourteenth Amendment rights under [42 U.S.C.A. § 1983](#) by refusing to accept the plaintiff's advertisements for placement in the defendant's advertising spaces, and seeking a permanent injunction. The matter is before the court on the plaintiff's motion for summary judgment [Doc. No. 18-1] and the defendant's motion for summary judgment [Doc. No. 21-1].

I. FACTUAL DISCUSSION

The plaintiff, the National Abortion Federation ("NAF") is a non-profit professional association of abortion services providers. One of the purposes of the NAF is to educate and communicate with the public about medical issues related to abortion. In March 1999, the NAF embarked on its first public service campaign. One part of this campaign was to run advertisements on city buses in several major metropolitan areas that would alert the public to the work of the NAF. Atlanta, Georgia, was one city in which the NAF sought to run its ads.

The defendant, Metropolitan Atlanta Rapid Transit Authority ("MARTA"), is a joint public instrumentality of the City of Atlanta and several counties which either contain or border the City of Atlanta. MARTA sells advertising space on the inside and outside of its buses and trains, in its rail and bus stations and shelters, and around its facilities. It sells this advertising space through two different companies. Transportation Displays, Inc. ("TDI") sells the spaces located within and without the buses and trains and within and without the bus and train stations. Outdoor Systems, Inc. ("OSI") sells the spaces located at bus stop shelters, which it erects and owns, but over which MARTA has at least some control concerning the ads that appear there.

The NAF submitted two different ads to TDI and OSI. The first is a black and white photo of a woman showing only her head turned sideways and the tops of her shoulders with copy that reads "Wife, Daughter, Mother" in large letters and "A few names women who've had an abortion actually deserve to be called" in smaller letters. It also includes text discussing statistics claiming that by age 45, nearly half of all women in America will have had an abortion. The point of the ad, according to the plaintiff, is to remove the negative stigma attached to having an abortion by suggesting that it is likely that someone the public knows and loves will have had one.

The second ad is a black and white photo of a woman, who appears to be a medical doctor, that reads "Our doctors have learned everything there is to know about making abortion safe" in large letters and "Except what to wear to work" in smaller letters. The ad also includes text discussing violent acts that have been committed against doctors for performing abortions. Both ads include the NAF logo and a toll-free telephone number which can be used to obtain more information *1324 about abortion or a referral to a qualified abortion provider.

MARTA rejected both of the NAF's ads citing its advertising policy as its reason. The relevant portion of MARTA's policy reads:

No advertising that supports or opposes any position in regard to a matter of public controversy shall be displayed in the Authority's stations, vehicles, or other facilities. For this purpose, a matter is considered to be one of public controversy if it is widely

reported by the newspapers, television or radio stations, or other news media in the area served by the Authority, and it reasonably appears from such reports that the subject matter arouses strong feelings in a substantial number of people.

Following MARTA's rejection of its ads, the NAF filed the instant action.

II. **LEGAL DISCUSSION**

Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment when all "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." The party seeking summary judgment bears the burden of demonstrating that no dispute as to any material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970); *Johnson v. Clifton*, 74 F.3d 1087, 1090 (11th Cir.1996). The moving party's burden is discharged merely by "showing"—that is, pointing out to the District Court that there is an absence of evidence to support [an essential element of] the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. *Clifton*, 74 F.3d at 1090. Once the moving party has adequately supported its motion, the nonmovant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

In deciding a motion for summary judgment, it is not the court's function to decide issues of material fact but to decide only whether there is such an issue to be tried. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). The applicable substantive law will identify those facts that are material. *Anderson*, 477 U.S. at 247, 106 S.Ct. at 2510. Facts that in good faith are disputed, but which do not resolve or affect the outcome of the case, will

not preclude the entry of summary judgment as those facts are not material. *Id.*

Genuine disputes are those by which the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* In order for factual issues to be "genuine" they must have a real basis in the record. *Matsushita*, 475 U.S. at 586, 106 S.Ct. at 1356. When the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Id.* (citations omitted).

To state a claim under 42 U.S.C. § 1983, a plaintiff must show that a person, acting under color of any statute, ordinance, regulation, custom, or usage, deprived him of a right, privilege, or immunity secured by the Constitution. The plaintiff bases its Section 1983 claim on its right to freedom of speech under the First Amendment and the Georgia Constitution, and on the privileges and immunities clause of the Fourteenth Amendment.

There is no dispute in this case that MARTA is a person within the meaning of the statute. There is also no dispute that MARTA was acting pursuant to a statute, *1325 ordinance, regulation, custom, or usage, namely its advertising policy, and is, therefore, a state actor acting under color of law. The issue to be resolved on the parties' cross motions for summary judgment is whether MARTA deprived the NAF of a right, privilege, or immunity secured by the Constitution while it was acting under color of state law.

In order to resolve the issue of whether MARTA deprived the NAF of its constitutional rights, the court must first determine the relevant forum to which the NAF sought access. Once it does so, it must then determine what type of forum it is. There are essentially three types: traditional public forum, designated public forum, and non-public forum. Once the court decides these issues, it then applies the applicable level of scrutiny to the state's actions in deciding whether MARTA's restriction of the NAF's speech violated the NAF's constitutional rights.

A. **The Relevant Forum**

[1] Before the court can decide in what type of forum the speech occurred, it must first decide the relevant forum. A court determines the relevant forum by looking at the access that was sought by the complaining party. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 801, 105 S.Ct. 3439, 3448, 87 L.Ed.2d 567 (1985). In a case where a plaintiff sought to compel a city to accept

political advertisements on city-owned buses, the Supreme Court held that only the advertising spaces on the outside of the buses were the relevant forum. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300, 94 S.Ct. 2714, 2715, 41 L.Ed.2d 770 (1974).

[2] In the instant case, the NAF submitted its ads for placement within MARTA's buses and trains and on the bus shelters. The NAF contends that the access sought was access to all of MARTA's advertising, not just the specific areas for which it originally applied. MARTA argues that because it does not actually own the shelters serviced by OSI and because the NAF applied only for access to the interiors of MARTA's trains and buses, the relevant forum is only the inside of the trains and buses. The evidence before the court shows that the NAF initially sought access only to the inside of the trains and buses and to the shelters, but that it subsequently requested access to all of MARTA's advertising. Further the court finds MARTA's argument that the bus shelters should not be included in the relevant forum to be unpersuasive. Even though OSI owns the physical structures, MARTA maintains control over the content of the advertising displayed therein. Therefore, the court finds that the relevant forum for purposes of its forum analysis is all advertising space controlled by MARTA on its buses and trains, in its stations and surrounding areas, and in the bus shelters owned by OSI.

B. The Type of Forum

[3] For purposes of First Amendment analysis, government property is generally defined as a traditional public forum, a designated public forum, or a non-public forum. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). A traditional public forum is a place which by "long tradition or by government fiat ha[s] been devoted to assembly and debate." *Id.* at 45, 103 S.Ct. at 954. A designated public forum arises when the government designates a forum for use by the public at large for purposes of assembly and speech, for use by certain speakers, or for the discussion of certain subjects. *Id.* at 45–46, n. 7, 103 S.Ct. at 955, n. 7. The Supreme Court differentiates between designated forums that are generally open to expressive activity and limited open forums that are limited to certain types of expressive activity or subjects. *Id.* The last type of forum, non-public, is a forum that the government has closed to public discourse and assembly. *Id.*

*1326 Neither party contends that the relevant forum in the instant case is a traditional public forum. The NAF

contends that by accepting advertising from public interest groups, religious organizations, and non-profits, as well as commercial advertising, MARTA has opened its advertising space to the public for general discourse on a wide range of topics, creating a designated public forum. MARTA, however, argues that it has maintained control over the content of the advertising it accepts and consistently applies its advertising policy. If true, then the advertising space is either a non-public forum or, at most, a limited public forum.

[4] [5] MARTA cannot create a public forum by failing to act or by allowing limited public discourse, but, rather, it must affirmatively and intentionally open its forum to public discourse. *Perry*, 460 U.S. at 46, 103 S.Ct. at 955. The court must look at the policy and practice of MARTA to determine whether it intended to create a public forum. *Cornelius*, 473 U.S. at 802, 105 S.Ct. at 3449. The court must also take into account the "nature of the property and its compatibility with expressive activity" to determine the government's intent. *Id.*

[6] The relevant forum in the instant case is MARTA's advertising space. The nature of advertising space is to communicate information to the public. As can be seen by the wide variety of creative advertising today, such space is very compatible with expressive activity. The court finds that MARTA's advertising space is a type of forum that is conducive to being opened as a public forum if it was so intended. Therefore, the court must consider MARTA's policy and practice to determine if MARTA intended such a result.

MARTA's written policy, as stated above, is not to accept political ads or ads that support or oppose any position in regard to a matter of public controversy. In its summary judgment brief, MARTA sets forth the following policy goals: (1) allow MARTA to maintain a neutral position on matters of public controversy without being identified with the position of either side in such a matter; (2) preserve its reputation; (3) keep from making MARTA's passengers uncomfortable and dissuading them from riding MARTA's buses and trains, thus defeating MARTA's purpose for existing; (4) keep advertisers from withdrawing their ads; and (5) protect MARTA's property, employees and passengers from violence. See Def.'s Brief in Supp. of MARTA's Mot. for Sum. Judg. Pgs. 7–8. These policy goals suggest that MARTA did not intend to open its advertising areas for public discourse on all topics, but only opened these forums for commercial purposes or, by implication, for the purpose of discourse on topics that are not matters of public controversy or which refer to political elections, referenda, etc.

However, MARTA's practice has been somewhat inconsistent with its written policy. While the court finds that MARTA has been consistent with regard to rejecting political advertising, it has not been as consistent with regard to other types of ads. The court finds that, at best, MARTA has created a limited public forum which excludes only political speech. The evidence shows that MARTA has accepted advertising on subjects ranging from AIDS awareness to racial and religious tolerance to homosexual rights. While there has been no evidence presented that shows MARTA accepted advertising by any specific pro-life organizations, it has permitted advertising for pregnancy counseling and adoption services. By permitting these various forms of public interest speech and speech by non-profit entities, MARTA has opened its advertising forum to such speech and, as discussed below, strict scrutiny applies to MARTA's rejection of the NAF ads.

C. Strict Scrutiny Analysis of MARTA's Rejection of the NAF Ads

[7] "If the government excludes a speaker who falls within the class to which *1327 a designated public forum is made generally available, its action is subject to strict scrutiny." *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666, 677, 118 S.Ct. 1633, 1641, 140 L.Ed.2d 875 (1998). Under a strict scrutiny analysis, MARTA must show that its rejection of the NAF ads was necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Widmar v. Vincent*, 454 U.S. 263, 270, 102 S.Ct. 269, 274, 70 L.Ed.2d 440 (1981).

[8] The only interest cited by MARTA that the court finds compelling is its interest in protecting its employees and passengers from violence. The NAF has averred that other transit systems in other cities are currently running the ads at issue without incident. MARTA has not presented any evidence that there is a threat of violence if it runs the NAF ads, that violence has resulted in other cities, or that somehow running the ads in Atlanta presents a greater risk. While the court recognizes that the state need not always wait for violence or danger to manifest itself in order to take steps necessary to prevent it, the court finds that whatever danger is present in the instant case is too remote to rise to the level of a compelling state interest.

Because MARTA's rejection of the NAF ads was not necessary to serve a compelling state interest, the court holds that MARTA should have accepted the NAF's advertisements. The court finds that MARTA's rejection of the NAF's ads was

content based. Content based restrictions in a public forum are limited to time, place and manner restrictions. While MARTA may reject ads such as the NAF's, or future ads from pro-life organizations, if they are obscene, vulgar, repulsive, etc., it may not reject the ads based on their content.

D. Void for Vagueness Doctrine and Overbreadth

(1) Vagueness

The NAF contends that, regardless of the type of forum involved, MARTA's policy is overly broad and vague in that it puts too much discretion in the hands of MARTA officials in rejecting advertisements. MARTA contends that its written policy sets forth neutral minimum standards which direct its officials' decisions.

[9] The void for vagueness doctrine serves two main purposes: (1) to provide fair notice of prohibitions so that individuals may steer clear of unlawful conduct; and (2) to prevent arbitrary and discriminatory enforcement of laws. *Mason v. Florida Bar*, 208 F.3d 952, 959 (11th Cir.2000). Vague laws improperly delegate basic policy matters to individuals with no policy-making authority for resolution in a subjective, case-by-case manner which creates the risk that the individual will either discriminate, consciously or unconsciously, against those views with which it disagrees or will apply the policy arbitrarily. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972). "If arbitrary and discriminatory enforcement is to be prevented, [the government's policies] must provide explicit standards for those who apply them." *Id.*

[10] The court finds that MARTA's written advertising policy is vague and unenforceable. MARTA's policy restricts access to its advertising space to those ads which do not support or oppose any position in regard to a matter of public controversy. The policy does define the term "public controversy," but therein lies the problem. "Public controversy" is defined as a matter which is (1) widely reported by the newspapers, television or radio stations, or other news media in the area served by the Authority, and (2) it reasonably appears from such reports that the subject matter arouses strong feelings in a substantial number of people. The court finds that the phrases "widely reported," "reasonably appears," "arouses strong feelings," and "substantial number of people," are constitutionally vague. These *1328 subjective standards put too much discretion into the hands of MARTA officials.

In fact, the NAF has presented evidence that several different MARTA officials have interpreted the policy differently. One MARTA official, Alice Wiggins testified in her deposition that the term “public controversy” included ads supporting or opposing religion. See Dep. Of Alice Wiggins p. 98. However, Chuck Schadl, Ms. Wiggins’ predecessor at MARTA, approved religious ads for inclusion on MARTA’s advertising space. Ms. Wiggins also testified that she would have removed the words “Use a condom every time” from two safe sex ads that were reviewed and approved by Mr. Schadl. While different applications by different officials may not always mean that the policy or statute is vague, in the instant matter, it illustrates the subjective and arbitrary nature of the policy and suggests that there is a potential for abuse. Therefore, the court finds that MARTA’s advertising policy is void for vagueness.

(2) Overbreadth

[11] [12] The NAF also contends that MARTA’s policy is overly broad and void on its face. Facial invalidation of a policy such as this is an extreme measure and “courts should be cautious in utilizing this drastic remedy.” *Gay, Lesbian, Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1550 (11th Cir.1997). In general, a statute should be “declared invalid to the extent that it reaches too far, but otherwise left intact.” *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 2802, 86 L.Ed.2d 394 (1985). The court holds that the statute does reach too far in that it can be interpreted to include a wide range of matters that go beyond what is needed to protect any possible interests of MARTA. For example, under the definition of “public controversy” contained in MARTA’s advertising policy, a MARTA official could reject ads promoting the Atlanta Braves. The Braves are widely reported on by the local media and they certainly arouse strong feelings in a great number of people. However, since the court has already declared the policy void for vagueness, it need not decide to what extent it is overly broad.

(3) The NAF’s Request for Permanent Injunction

[13] [14] “The standard for a preliminary injunction is essentially the same as for a permanent injunction with the exception that the plaintiff must show a likelihood of success on the merits rather than actual success.” *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 1404, 94 L.Ed.2d 542 (1987). Adjusting the standard accordingly, a plaintiff moving for a permanent injunction must show: (1) actual success on the merits; (2) a substantial threat of irreparable injury; (3) that the threatened injury to the plaintiff outweighs the injury to the nonmovant; and (4) that the injunction would not disserve the public interest. *Statewide Detective Agency v. Miller*, 115 F.3d 904 (11th Cir.1997).

[15] As the court is granting the plaintiff’s motion for summary judgment, the NAF has shown actual success on the merits. The NAF has also shown a substantial threat of irreparable injury because its First Amendment rights are at stake. The constitutional weight of the NAF’s injury far outweighs any injury to MARTA. Further, the court finds that a permanent injunction would not disserve the public interest. Rather, it would protect the public interest by protecting those rights to which it too is entitled.

III. CONCLUSION

For the foregoing reasons, the court hereby GRANTS the plaintiff’s motion for summary judgment [Doc. No. 18-1]; DENIES the defendant’s motion for summary judgment [Doc. No. 21-1]; and GRANTS the plaintiff’s request for a permanent injunction. The plaintiff is directed to submit a proposed judgment for a permanent *1329 injunction consistent with this order. In preparing the proposed order, the plaintiff shall confer with opposing counsel as to the form of the injunction. The proposed judgment shall be submitted within thirty days of the docketing of this order.

All Citations

112 F.Supp.2d 1320

EXCERPT

OF

FAU FACULTY SENATE MEETING

September 4th, 2015

1 APPEARANCES:

2

3 CHRIS BEETLE, Professor, Physics,
4 Faculty Senate President

5

6 TIM LENZ, Professor, Political Science,
7 Senator

8

9 MARSHALL DEROSA, Professor, Political
10 Science, Senator

11

12 RON NYHAN, Associate Professor of Public
13 Administration, Senator, Former
14 Faculty Senate President

15

16 GARY PERRY, University Provost, Non-voting
17 Senate member

18

19 ROBERT RABIL, Associate Professor,
20 Political Science

21

22 FRED HOFFMAN, Professor, Mathematics,
23 Senator

24

25 JENNIFER LOW, Professor, English,

26

27 BILL BOSSHARDT, Associate Professor,
28 Business, Senator

29

30 MS. ALPERIN

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1 THEREUPON:

2 MR. BEETLE: Okay. This brings us down to
3 the business items, and there are two. The
4 first is that as many of you may know community
5 engagement is a key part of the strategic plan
6 for the university.

7 And as faculty, it behooves us to involve
8 ourselves as much as possible in figuring out
9 what our community engagement at this
10 university is going to look like in the future.

11 For that reason, I am going to form an ad
12 hoc committee to examine this question --
13 committee of faculty, one person representative
14 from each college.

15 You've seen the charge. It's attached to
16 the agenda here today, and the members of this
17 committee will be invited to serve on the
18 President's Task Force which is chaired by some
19 guy called Ron Nyhan.

20 And so, anybody who is serving on this
21 committee will be invited also to play a role
22 in that other committee, but this will be a
23 senate committee.

24 The membership of this committee is open
25 to senators, of course, but also to all faculty

1 in the university, and we will be taking
2 nominations.

3 You can email them to Arcadia and we will
4 be hoping to form that committee at the next
5 senate meeting.

6 MR. LENZ: Would you take questions on
7 this?

8 MR. BEETLE: I will take questions about
9 this.

10 MR. LENZ: In the spirit of providing the
11 administration with advice about this
12 initiative I'd like to say one thing, and that
13 is please call off your dogs until you get your
14 act together when it comes to community
15 engagement.

16 And by calling off the dogs I mean the
17 administration has been sending faculty members
18 who are engaged in outside activity, nasty
19 letters, letters of discipline or letters that
20 threaten faculty members who are engaged in
21 outside activity with discipline.

22 And this should stop until the
23 administration gets its act together. And by
24 getting its act together I mean this initiative
25 says that we're supposed to increase outside

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1 activity, increase faculty engagement with the
2 community. We support this.

3 But the very actions that I've been
4 describing are discouraging this activity.

5 There's a lot of fear and uncertainty.

6 And if you read the language in our
7 collective bargaining agreement about outside
8 activity it says that like the collective
9 bargaining at other universities in the state
10 that we have to report all professional related
11 activity paid or unpaid if it's not part of our
12 assignments.

13 No one knows what that means. The deans
14 don't know what this means. Faculty
15 supervisors don't know what this means.

16 And until there's some clarity about what
17 outside activity has to be reported I would
18 recommend, as a good piece of advice, that any
19 new faculty member who asks their supervisor or
20 their peer about what kind of outside
21 activity they would engage in I would say do
22 nothing because any outside activity exposes
23 you to risk. And that risk includes discipline
24 up to dismissal from the university.

25 This is serious, and no one knows what

1 outside activity the university is targeting.

2 There has been a change in the language in the
3 collective bargaining agreement. And I
4 understand where this comes from.

5 The president is right to try to get more
6 control of the university. The previous
7 administration had to deal with some scandals.

8 And this effort to gain control of faculty
9 makes some sense, but the way this is being
10 done is creating major problems.

11 For you to come to us asking for more
12 faculty engagement in outside activity while
13 some other arm of the university is sending
14 these nasty letters, that's a problem.

15 And it's a problem that eventually will
16 probably have to be addressed with a Freedom
17 of Information Act request because there's a
18 great deal of suspicion that you can say or
19 write or do something, but if you say, write or
20 do something that the administration disagrees
21 with you are going to get one of these nasty
22 letters put in your personnel file.

23 And that's untenable, and it's not what we
24 want. We want to encourage this activity. This
25 is serious. It's an extremely important part of

1 the university's future, growth and
2 development. But you're doing things which are
3 frustrating this.

4 MR. BEETLE: So, let me respond to some of
5 the points you've made. So, at least one of
6 the specific instances that you're talking
7 about I became aware of this Tuesday, and since
8 then I have been doing a bit of leg work.

9 I've had lengthy conversations both with
10 Peter Hull, the VP for public affairs, and with
11 Provost Perry about this very issue, and I
12 agree that there are some things to be
13 clarified.

14 If the terms of the collective bargaining
15 agreement are to be changed that, of course, is
16 something to be bargained, and that should run
17 through the Union, and we should have a
18 conversation about that.

19 I came away from the meetings that I've
20 had less concerned than I was at the beginning.

21 And I understand that Peter Hull has
22 reached out to the person that I heard from on
23 Tuesday and that there is an attempt to resolve
24 the situation.

25 One of the things that all of us as

1 faculty should be aware of -- I put it this way
2 to Peter. FAU, since I have been here
3 certainly, has been the epitome of a do it
4 yourself university. Grab that paintbrush and
5 do it, right?

6 And in this instance there was an event
7 coming up that a faculty member had organized
8 and in fact had secured external funding to
9 help support, which is exemplary of what
10 faculty should be doing at this university and
11 should definitely be encouraged. However, it
12 needed to be advertised.

13 And so, in an effort to do that the
14 faculty member had not gone through the Public
15 affairs Office and the Media Relations
16 Department.

17 What I want to tell -- the message that I
18 want to get out to faculty generally is that
19 the Media Relations Department has a renewed
20 vigor and an eagerness to assist with exactly
21 that sort of problem.

22 And we, as faculty, need to recognize
23 first of all that those resources are there for
24 us to use, and second of all that we have a
25 responsibility to take advantage of them

1 because we don't want to have every department
2 at the university or even every individual
3 faculty member running their own media
4 relations operation.

5 We have to proceed strategically on many,
6 many fronts. And I think it behooves us as
7 faculty to approach this administrative wing
8 first rather than after the fact. And so, this
9 is one of the things that I came away with.

10 The other thing, I still have some
11 questions to ask and some conversations to
12 have. And so, I don't know if we should talk
13 further about that because I still need to find
14 the facts about -- in order to just have my own
15 opinion and you're asking me the question.

16 MR. LENZ: This is far -- this problem is
17 far broader than just who gets to speak for
18 the university, speak to the press.

19 It's for example, if a faculty member
20 publishes a book and wants to give a talk at the
21 Boca Raton Library do they have to go to this
22 vice-president to get permission to do that?

23 These are the kinds of questions that have
24 to be addressed --

25 MR. BEETLE: Right.

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1 MR. LENZ: -- because no supervisor can
2 tell their faculty member that they can do that
3 without getting permission.

4 And if someone says something in a public
5 address that the media covers and the
6 university reacts strongly against that they're
7 going to be exposed to discipline.

8 MR. BEETLE: So, Senator, I share your
9 opinions about this, and I want the faculty --
10 I think that there should be the ability to
11 take initiative in these efforts that we're
12 going to have.

13 I'm still trying to figure out exactly
14 what the policy is at the moment, and I'm not
15 sure that I understand. So, we can have a
16 conversation about that when the time comes.

17 I would also suggest that this might be
18 the very type of issue that is going to come up
19 in the community engagement committee that
20 we're trying to put together.

21 We need to have an approach to this
22 problem that is going to work for the faculty
23 because the faculty will be the face that's
24 engaging with the community in many events.

25 Ron, did you have a comment that you

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1 wanted to add?

2 MR. NYHAN: No. On the, again, I don't
3 know about the particular issues, all of the
4 issues that have been raised, but the intent of
5 the community engagement initiative is one that
6 I think that could benefit the faculty a great
7 deal.

8 And to the extent that there are
9 misunderstandings if there are or adjustments
10 that need to be made I think the purpose is to
11 move forward in every opportunity for the
12 faculty to have to render engagement in the
13 community, and also to communicate that.

14 So, perhaps to the extent that our issues
15 are to be raised, and obviously you're raising
16 some here today, that's why the Senate should
17 have a committee doing this not only separate
18 from but also incorporated into the large
19 university one.

20 So, I thank you for bringing up the
21 issues, and hopefully more people who have real
22 concern in this area, as well as want to expand
23 it, will be a part of the committee.

24 MR. LENZ: We need a moratorium on sending
25 these letters threatening discipline for

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1 faculty members who are engaging in legitimate
2 outside activity until this occurs.

3 MR. BEETLE: Chris? I want to -- I think
4 that -- so, I'm going to take a comment from
5 Provost Perry because I think it's germane to
6 what's been said before --

7 MR. DEROSA: Well, this is germane too.
8 Let's hear it.

9 MR. BEETLE: -- and then I'm going to call
10 on you.

11 MR. DEROSA: Okay.

12 MR. BEETLE: Provost?

13 PROVOST PERRY: Okay. Thank you,
14 Mr. President. And let me applaud you a second
15 there, by the way.

16 I would just like to say we -- all of us,
17 want to encourage public comment by our
18 faculty. You are experts in your field, that's
19 why you are employed here at Florida Atlantic
20 University.

21 But when you make such a public comment
22 all we ask is that you follow what is laid out
23 in the collective bargaining agreement.

24 And I'll read you the section that is
25 pertinent to this. It's article 5.3, Section

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1 D. This had been a part of the BOT/UFF
2 Connective Bargaining Agreement for many years.

3 When speaking on any matter of public
4 interest the faculty member shall make clear
5 when comments represent personal opinions and
6 when they represent official university
7 opinions. That's a simple statement.

8 Thank you. And all we ask, all of us at
9 the university, not just the administration --
10 of events that we abide by the rules of our own
11 collectively bargained agreement.

12 MR. BEETLE: Senator Derosa?

13 MR. DEROSA: I've chaired the academic
14 freedom of due process committee, I guess at
15 least going on a third year, and this is a very
16 serious matter.

17 I have a couple questions. One of which
18 is by what authority is the vice-president of
19 public affairs writing letters to faculty
20 members?

21 I also have a concern that the collective
22 bargaining agreement -- and I agree with the
23 programs, absolutely.

24 If you've issued a disclaimer that you're
25 not speaking on behalf of the university, I

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1 mean, that's almost a no-brainer, but we have
2 to get prior approval?

3 I would consider this a form of prior
4 restraint of academic freedom for academics to
5 engage in community without getting a
6 permission note from the administration.

7 I have a colleague that was taken into the
8 wood shed because he wrote an op-ed latter to
9 the local newspaper.

10 This is highly inappropriate. I don't
11 think we need a committee for community
12 engagement when it comes to academic freedom.

13 And to be quite frank, I don't care what
14 the collective bargaining agreement says we
15 have certain rights as academics to engage in
16 the community, to speak our minds, to engage
17 and participate in the marketplace of ideas.

18 And I agree with Tim. We need to have a
19 cease and desist order from this
20 vice-president, who is not an academic, to stop
21 writing letters to professors.

22 I don't want to have to get a permission
23 note before I write something on the internet
24 or go to a meeting some place that's unrelated
25 to the university. This is absurd; it's

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1 insane.

2 And secondly and thirdly, the scandal that
3 Tim referred to, that's not a scandal from
4 faculty members; that was a scandal of the
5 administration, the previous administration
6 and how they handled it.

7 MR. BEETLE: So, let me --

8 MR. DEROSA: Would somebody please
9 explain to me, perhaps the president could, why
10 this vice-president is writing letters to
11 academics, to professors, and more or less
12 chastising them for engaging in their 1st
13 Amendment Rights?

14 MR. BEETLE: So, I can say that I don't
15 believe that the VP was actually the person
16 that wrote that letter. I have not seen the
17 letter at this point, but he seems to be
18 surprised that there had been some further
19 discussion.

20 So, again, I agree with a lot of what you
21 said.

22 MR. DEROSA: What don't you agree with?

23 MR. BEETLE: I do think that it's
24 important to have a robust academic environment
25 here where academic freedom can be exercised.

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1 I think that there is a conversation to be
2 had about this issue of what needs to be
3 reported and what does not.

4 MR. DEROSA: But what --

5 MR. BEETLE: And we certainly must not end
6 up with a --

7 MR. DEROSA: -- what needs to be
8 reported?

9 MR. BEETLE: Excuse me.

10 MR. DEROSA: It throws --

11 MR. BEETLE: We certainly must not end up
12 with a situation where the content of what a
13 faculty member says ends up being the deciding
14 factor in whether action is taken, right?

15 So, I think that particularly as we push
16 forward on this initiative, which is essential
17 to the university's strategic vision for where
18 we want to go, that we need to think very
19 seriously about these issues.

20 And I think that the situation that all of
21 us are talking obliquely about is an example
22 that we should keep in mind as we have these
23 conversations.

24 But I think that we need to have these
25 conversations civilly and to try to come to

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1 some sort of shared vision of how this process
2 is going to work at FAU.

3 And that is what we need to focus on going
4 forward, I think.

5 MR. DEROSA: But see, there's the
6 problem.

7 MR. BEETLE: So, --

8 MR. DEROSA: We're going some place, and
9 where that place is seems to be a departure
10 from academic freedom.

11 If there's academic freedom and a
12 professor or an academic makes the --

13 MR. BEETLE: So, --

14 MR. DEROSA: -- disclaimer I am not
15 speaking on behalf of my employer --

16 MR. BEETLE: What I've just said was that
17 we need to have a conversation about how this
18 scenario would play out in the future, right?

19 And how and what role academic freedom has
20 played in this and to what extent academic
21 freedom may or may not have been compromised in
22 this scenario, and how the process should work
23 in the future to minimize any adverse impact --

24 MR. DEROSA: Well, it's --

25 MR. BEETLE: -- on academic freedom.

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1 MR. DEROSA: Sir, would you --

2 MR. BEETLE: So, I'm going to ask to --

3 MR. DEROSA: -- to the committee?

4 MR. BEETLE: -- table any further

5 discussion or questions about this because it
6 is premature, because I don't know enough about
7 the specifics of this instance.

8 And I welcome any of you to talk to me
9 privately about this. I don't know if we can
10 go forward playing this oblique game --

11 MR. DEROSA: This is the faculty senate,
12 Chris. This is where we have these discussions.
13 There's nothing to be private about.

14 It impacts the faculty. The senators
15 represent the faculty.

16 MR. BEETLE: But at the moment it is not a
17 fact that is before this senate what the impact
18 has been.

19 So, this is not a conversation that we can
20 have properly at the moment.

21 MR. DEROSA: I don't understand what not.
22 That's why we're here. This is a discussion
23 forum.

24 MR. RABIL: Can I say something, please?

25 MR. BEETLE: Yes, you may.

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1 MR. RABIL: Can I say something? Thank
2 you.

3 Well, I work where the media a lot and I'm
4 asked from Iran, China, Saudi Arabia and
5 everybody to comment.

6 But what I can tell you is this, I will
7 never say anything that goes against the
8 interests of the university. And I make that
9 sure when I go over any TV or I write or go
10 over including U.S. Government meetings, and I
11 go to them on a frequent basis.

12 But this is -- it's okay with me. But
13 what you are saying here, and this is where it
14 does not sit well with me -- and I felt kind of
15 disappointed, really when I received an email,
16 and this is what the email said: It's
17 extremely important to know that FAU has
18 requirements including but not limited to
19 receiving permission from the Office of
20 University of Communication and the Office of
21 the Provost prior to speaking to the media
22 including student media every single time you
23 engage in such activity.

24 So, what you are saying, already you have
25 movement in the direction to curb us from

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1 talking to the media. And here I am someone
2 that I consider myself extremely loyal and I
3 love FAU, and I call FAU, my home. So, this is
4 where it is really conflicting to us.

5 MR. BEETLE: And okay. So, I am not aware
6 of this email. And I think that this is an
7 issue where we need to have a conversation
8 about how this is supposed to work at this
9 university.

10 I don't know that this is the place for it
11 because we have not had an opportunity as a
12 group to look at the facts around this
13 situation.

14 So, what I am asking is that we approach
15 this at a later meeting.

16 MS. LOW: Would it be appropriate to send
17 it to the academic freedom --

18 MR. BEETLE: I don't think that that is
19 warranted at this time. The academic freedom
20 and due process committee should -- there is
21 nothing to send to them at the moment --

22 MR. HOFFMAN: Of course there is.

23 MR. BEETLE: -- as far as --

24 MS. LOW: Okay.

25 MR. BEETLE: No, there's not.

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1 MR. HOFFMAN: Of course there is.

2 MR. BEETLE: There is not, Fred.

3 All right. I see four more hands that are
4 up. Bill?

5 MR. BOSSHARDT: But I assume, Chris, that
6 in your deliberations over the next week or two
7 that if you do find some cause that you would
8 refer it to the committee?

9 MR. BEETLE: Yes, I would.

10 MR. BOSSHARDT: Okay.

11 MS. LOW: So, do we put this on the agenda
12 for next meeting?

13 MR. BEETLE: I do not know what's going to
14 be on the agenda for next time about this.

15 MS. LOW: Now, the request has been made
16 that until it's settled, what the policy is,
17 that we should not be -- a request has been
18 made that until the policy is settled that no
19 more threatening letters should be sent.

20 I don't know where they originate from,
21 and certainly it seems as if it's not always
22 clear, but I think it does seem like a
23 reasonable request, so I think that it can be
24 forwarded and hopefully addressed because it's
25 impossible.

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1 It seems as if the letters aren't an
2 indication that a policy has been made without
3 our input then a policy is being enacted
4 without being fully vetted.

5 MR. BEETLE: Thank you.

6 UNIDENTIFIED MALE: The problem is very
7 simple. Hypocrisy and freedom of expression
8 are incompatible, okay?

9 Thank you.

10 MR. BEETLE: Fred, and then we will --

11 MR. HOFFMAN: Yeah. I think -- that
12 shutoff. Is that working? Okay.

13 Yeah. Just the point here, Tim said --
14 raised the question does a person wanting to
15 speak at the public library to discuss his book
16 possibly even to sell copies of it, does he
17 need permission from the Office of Public
18 Affairs before making such a speech.

19 We know that he has to say any opinions
20 that I express here do not represent the
21 university. If he doesn't do that he's in
22 trouble, and he should be in trouble. But does
23 he have to get permission?

24 Tim asked the question; Robert gave an
25 example of where he was told he needed to ask

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1 permission before giving a talk or suggested
2 that by -- it was suggested by the nature of
3 that correspondence.

4 Can we know from -- we've got top
5 administrators here. Can we know the answer to
6 that question and why is it not appropriate for
7 that question if there is a conflict on it to
8 be referred now to academic freedom and due
9 process?

10 That's how I understood what academic
11 freedom and due process was supposed to do.

12 MR. BEETLE: Okay. Does anybody want to
13 comment on that?

14 PROVOST PERRY: As Provost I would just
15 restate what I said earlier.

16 We welcome our faculty to make public
17 comments and to give the appropriate
18 attributions as necessary as stated, very
19 simply, in the collective bargaining agreement.

20 I will just call out and say Robert, I'd
21 love to see that email because I can assure you
22 no such policy has been issued from the Office
23 of Academic Affairs.

24 MR. BEETLE: I will also add that one of the
25 of things that I've done this week is to look

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1 at the form that needs to be filled out, and
2 it's a little bit -- it's confusing about
3 whether it applies in this hypothetical
4 scenario that you're talking about.

5 I understand that there is a revision to
6 that form because of new Federal Laws
7 surrounding grants and conflicts of interest
8 and so forth.

9 So, the form is currently being revised,
10 and I hope we will see a draft of that form
11 soon so that it becomes clear, you know, how it
12 would work in that scenario.

13 MS. ALPERIN: Are you talking about the
14 outside employment forms?

15 MR. BEETLE: I am.

16 MS. ALPERIN: Yeah. We are -- we'll
17 definitely give you a draft. We've been trying
18 to get it changed to that for about two years.
19 We're still working on it, but I agree with you
20 there needs to be clarity in that form as to
21 what we need --

22 MR. BEETLE: Right.

23 MS. ALPERIN: -- for their -- their needs
24 to be, especially from the division of
25 research, clarity of -- there's conflicts that

1 all we're trying to -- I think it's rare that
2 we took that amount of time.

3 MR. BEETLE: Okay. So, I am very pleased
4 to see how passionate everybody is about this
5 issue. This is a very good sign for the
6 university.

7 So, let us go on to our -- to the second
8 business item here which is the draft of the
9 sustained performance evaluation policy.

10 (Thereupon, the requested portion of the
11 meeting was concluded.)

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1 CERTIFICATE OF REPORTER
2
34 THE STATE OF FLORIDA:
5
67 :ss:
8
910 COUNTY OF BROWARD :
11
1213 I, NICK BRUENS, certify that I was
14 authorized to and did transcribe the foregoing
15 recorded events.16 I do further certify that the foregoing is
17 a true and accurate transcript of the events as
18 provided to me on the CD taken at the time, place
19 and date hereinabove set forth.20 I further certify that I am not an
21 attorney or counsel for any of the parties, nor
22 related to any of the parties, nor financially
23 interested in the action.24
25 Dated this 15th day of August, 2017

Nick Bruens

Typist