No. 12-3218

United States Court of Appeals for the Sixth Circuit

CRYSTAL DIXON,
Plaintiff-Appellant,

v.

UNIVERSITY OF TOLEDO,
Defendant,

AND

LLOYD JACOBS, Individually and in his official capacity as President, University of Toledo; **WILLIAM LOGIE**, Individually and in his official capacity as Vice President for Human Resources and Campus Safety, University of Toledo,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
HONORABLE DAVID A. KATZ
Civil Case No. 3:08-cv-02806

APPELLANT'S REPLY BRIEF

JAMES R. ACHO, ESQ.
CUMMINGS, MCCLOREY, DAVIS & ACHO
33900 SCHOOLCRAFT
LIVONIA, MI 48150
(734) 261-2400

THOMAS A. SOBECKI, ESQ.
405 MADISON AVENUE, SUITE 910
TOLEDO, OH 43604
(419) 242-9908

ROBERT JOSEPH MUISE, ESQ.
AMERICAN FREEDOM LAW CENTER
P.O. BOX 131098
ANN ARBOR, MI 48113
(734) 635-3756

ERIN ELIZABETH MERSINO, ESQ.
THOMAS MORE LAW CENTER
P.O. BOX 393
ANN ARBOR, MI 48106
(734) 827-2001

Attorneys for Plaintiff-Appellant

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INTRODUCTION

Defendants-Appellees ("Defendants") offer this court a tendentious view of the facts and law in a feckless attempt to avoid the inevitable conclusion: Defendants retaliated against Plaintiff and terminated her government employment because she expressed her *personal*, Christian viewpoint in the *Toledo Free Press* on a matter of public concern in violation of her clearly established constitutional rights. Plaintiff's speech was not made *pursuant to* her official duties nor was it related to her *political affiliation* or *substantive policy*. Instead, it was an expression of her personal religious convictions on an important issue of social concern.

Accepting Defendants' arguments would require this court to endorse a position that conservative Christians such as Plaintiff are disqualified from serving in managerial positions at the University of Toledo ("University") because of their personal, private, religious beliefs—a very dangerous (and unlawful) precedent. Moreover, Defendants' claim that this court should ignore the religious nature of Plaintiff's speech because this is not a "First Amendment Establishment of Religion Clause or Free Exercise of Religion Clause" case (Defs.' Br. at 3) demonstrates a misapprehension of the First Amendment. As U.S. Supreme Court precedent makes plain, "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected *under the Free Speech Clause* as secular

private expression." *Capitol Square Rev. & Adv. Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (emphasis added); *see also Widmar v. Vincent*, 454 U.S. 263, 269 (1981) ("[R]eligious worship and discussion . . . are forms of speech and association protected by the First Amendment."). And despite Defendants' strong and visceral opposition to Plaintiff's personal religious convictions, the record is clear on this point: Plaintiff has always been fair and equitable in her treatment of others as an employee of the University.[1] The same, however, cannot be said of Defendants.

In sum, Plaintiff is not a "confidential or policymaking public employee" as a matter of fact and law. She was fired for speaking as a private citizen on a matter of public concern (homosexuality) because her government employer disagreed with the content and viewpoint of her speech. And Plaintiff's First Amendment right to speak freely on this important public issue significantly outweighs the one-way "diversity" interests of the University. Thus, this court should reverse the district court and enter judgment in Plaintiff's favor on her constitutional claims.

SUMMARY OF MATERIAL FACTS

- From approximately July 9, 2007, until she was terminated on or about May 8, 2008, for expressing her personal opinion and Christian viewpoint in a letter

[1] Indeed, in the very opinion piece that caused Defendants to fire her, Plaintiff expressed her firm conviction that all persons should be treated equally and with dignity, stating, "[H]uman beings, regardless of their choices in life, are of ultimate value to God and should be viewed the same by other humans" and "Jesus Christ loves the sinner but hates the sin as seen in John 8:1-11." (R-60: Dixon Op., Pl.'s Exs. 7 & 8).

published in the *Toledo Free Press*, Plaintiff held the position of interim Associate Vice President for Human Resources at the University. (R-71-4: Dixon Dep. at 64, 65, 66).

- Plaintiff's position at the University was a *nonpolitical* position and (1) she was not a policymaker for the University nor was any such authority delegated to her;[2] (2) she did not hold a position to which a *significant portion* of the *total* discretionary authority available to policymakers was delegated; (3) she was not a confidential advisor who spent a *significant portion* of her time on the job advising policymakers *or* advising those to whom a significant portion of the total discretionary authority available to policymakers was delegated; and (4) she did not control the lines of communication to any policymaker, to any person to whom a significant portion of the total discretionary authority available to policymakers was delegated, or to any of their confidential advisors. Rather, she spent the *significant portion* of her time on the job *managing* the human resources department pursuant to existing University policies. (R-72-1: Dixon Decl. at ¶¶ 2-13).

[2] Defendants cannot point to one policy (let alone a *significant* number of policies) for which Plaintiff was responsible for making for the University because she did not possess such authority. (*See* Defs.' Br. at 31-32). Plaintiff was a manager who was obligated, *like every other employee of the University*, to follow policy, and when necessary, enforce it.

- On or about April 3, 2008, Plaintiff read an opinion piece published in the *Toledo Free Press* that was authored by the editor-in-chief Michael Miller and titled, "Lighting the Fuse: Gay Rights and Wrongs." (R-60: Miller Op., Pl.'s Ex. 6). Miller's opinion piece equated homosexual activism with the struggles of African-American civil rights victims. (R-60: Miller Op., Pl.'s Ex. 6).

- Plaintiff disagreed with the viewpoint *expressed by Miller* and decided to submit her own opinion piece to the *Toledo Free Press* to express her personal *Christian* viewpoint on this matter of public concern. (R-60: Dixon Op., Pl.'s Exs. 7 & 8). So she sat down at her home computer on a Sunday and wrote a response. (R-71-4: Dixon Dep. at 155).

- Plaintiff, an African-American woman and sincere practicing Christian, believes that homosexuality is a grave offense against the Law of God and that comparing homosexual activism with the struggles of African-American civil rights victims is wrong and untenable because homosexuality is a lifestyle choice and not an immutable or inherent genetic and biological characteristic like skin or eye color. (R-60: Dixon Op., Pl.'s Exs. 7 & 8). Plaintiff also firmly believes, *and stated so in her opinion piece*, that all persons, regardless of their sexual orientation, must be treated fairly and without discrimination because "human beings . . . are of ultimate value to God and should be viewed the same by other humans." (R-60: Dixon Op., Pl.'s Exs. 7 & 8).

- On April 18, 2008, Plaintiff's opinion piece, titled "Gay Rights and Wrongs: Another Perspective," was published in the *Toledo Free Press* online edition. The *Toledo Free Press* is a private newspaper with no affiliation with the University. (R-60: Dixon Op., Pl.'s Exs. 7 & 8).
- In the opinion piece, Plaintiff expressed her personal Christian viewpoint, stating, in part, "I respectfully submit a different perspective for Miller and *Toledo Free Press* readers to consider . . . . I take great umbrage at the notion that those choosing the homosexual lifestyle are civil rights victims." Plaintiff signed her opinion piece as "Crystal Dixon, Maumee, Ohio." (R-60: Pl.'s Op., Pl.'s Ex. 8).
- Plaintiff did not write her opinion piece pursuant to her official duties at the University, and never once did she claim to be writing on behalf of the University or in her capacity as a University employee. Plaintiff wrote her opinion piece as a private citizen addressing a matter of public concern. (R-71-4: Dixon Dep. at 155 ("I was writing as a private citizen on a Sunday from my home computer."); R-60: Dixon Op., Ex. 8; R-60: Logie Dep. at 66, Pl.'s Ex. 1; R-60: Dixon Mem. to Jacobs, Pl.'s Ex. 9).
- In her opinion piece, Plaintiff described herself "as a Black woman who happens to be an alumnus of the University of Toledo's Graduate school, an employee and business owner." (R-60: Pl.'s Op., Pl.'s Ex. 8). She did not identify

herself by any official title, nor did she say she was employed by the University. (R-60: Pl.'s Op., Pl.'s Ex. 8).

- In her opinion piece, Plaintiff did not name one University official, employee, or student. (R-60: Pl.'s Op., Pl.'s Ex. 8). Thus, it is factually incorrect to claim that Plaintiff criticized any particular University official, employee, or student. And thus it is factually incorrect to claim that she criticized anyone with whom she worked in the human resources department. (*See* Defs.' Br. at 37) (making the false claim that "her comments that homosexuals can wake up tomorrow and not be homosexual were a direct attack on the gay and lesbian employees and students of UT, including the gay employees in the HR Department").

- In her opinion piece, Plaintiff did not criticize one University policy. Instead, she stated, in relevant part, "I found your [referring to Miller] reference to the alleged benefits disparity at the University of Toledo to be incomplete and a bit disingenuous. . . . To suggest that homosexual employees on one campus are being denied benefits avoids the fact that ALL employees on the two campuses regardless of them being gay or straight, have different benefit plans *and the university is working diligently to address this issue in a reasonable and cost-*

efficient manner, for all employees, not just one segment."[3] (R-60: Pl.'s Op., Pl.'s Ex. 8) (emphasis added). Thus, Plaintiff was confirming that the University does not discriminate against anyone on the basis of sexual orientation and pointing out that any perceived disparity in benefits discussed by Miller (who was incorrectly claiming that the University was discriminating on the basis of sexual orientation) was being addressed by the University. Consequently, Plaintiff was praising the University and its efforts, while correcting Miller's misrepresentation, which he was using for political purposes. Indeed, ***Defendants admit that the only part of Plaintiff's opinion piece that remotely touches upon University policies "was arguably supportive of the University***." (Defs.' Br. at 46) (emphasis added).

- There is no evidence demonstrating that either before or after Plaintiff expressed her personal opinion and Christian viewpoint in the *Toledo Free Press* that she ever discriminated against anyone at the University (*or directed any employee to discriminate against anyone for any reason, including directing anyone to discriminate in the opinion piece for which she was fired*). In fact, the undisputed record reveals the very opposite. (*See* R-60: Pl.'s Perform. Evals., R-60: Pl.'s Exs. 2 & 3; R-60: Logie Dep. at 29, Pl.'s Ex. 1) ("Crystal continues to set the standard for an HR Professional Manager. Her willingness to re-think issues

[3] As Defendants admit, this information was public knowledge. (R-66: Jacobs Dep. at 210 ["I don't disagree with the fact that a lot of this is common knowledge."]).

despite personal biases speak to her extra-ordinary character. What a great person to be working with!”). As Defendant Logie acknowledged in his deposition, “There isn’t a day that goes by that [Plaintiff] doesn’t demonstrate the highest degree of professionalism, dignity and behaviors that exemplify her *Christian* values.” (R-68: Logie Dep. at 30-31) (emphasis added).

- On May 12, 2008, Plaintiff received a letter from Defendant Jacobs dated May 8, 2008, stating that effective immediately her employment at the University was terminated because of “the public position you have taken in the *Toledo Free Press*.” (R-60: Jacobs Ltr., Pl.’s Ex. 12). The official termination letter did not claim that Plaintiff was “insubordinate” toward anyone—because she wasn’t.

- At all relevant times, Defendant Logie was Plaintiff’s direct supervisor, and he fully supported and concurred with the firing of Plaintiff for expressing her personal religious beliefs in the *Toledo Free Press*. (R-60: Logie Dep. at 46, Pl.’s Ex. 1) (stating that Plaintiff could no longer do her job “[b]ecause now by putting [her personal religious beliefs] in print *she was putting out publicly which had heretofore been private*”) (emphasis added).

ARGUMENT

I. By Firing Plaintiff, Defendants Seek to Prescribe What Shall Be Orthodox in Matters of Opinion in Direct Violation of the Constitution.

As a matter of established law and based on the material facts of this case, Defendants cannot force Plaintiff to surrender her constitutional rights as a

condition of her government employment. *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006) ("It is well settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.'") (quoting *Connick v. Myers*, 461 U.S. 138, 142 (1983)); *Rankin v. McPherson*, 483 U.S. 378, 383 (1987) ("[A] State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."). Yet, this is precisely what Defendants did here. In fact, this entire case can be summed up as follows: We (*i.e.*, *the government*) do not like Plaintiff's personal religious beliefs regarding homosexuality,[4] so even though she has a long and stellar employment history demonstrating that she *in fact* has never discriminated against anyone, she is nonetheless disqualified from her employment on the basis of her personal, religious views (even though these religious views, as expressed in the speech for which she was punished, hold that all humans should be treated equally). Indeed, Defendants' position directly contravenes the *most fundamental precept of our Constitution*: "If there is any fixed star in our constitutional constellation, it is that *no official*, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).

[4] Defendant Jacobs pejoratively referred to Plaintiff's deeply held religious beliefs as "irresponsible utterances." (Defs.' Br. at 39) (quoting Defendant Jacobs).

II. Defendants Retaliated Against Plaintiff for Expressing Her Personal Opinion and Christian Viewpoint on a Matter of Public Concern in Violation of the First Amendment.

On its face, Plaintiff should prevail in this case, as noted here and in her opening brief. Nonetheless, to determine whether Defendants violated Plaintiff's right to freedom of speech, the parties agree that this court must consider whether (1) Plaintiff engaged in a constitutionally protected activity (freedom of speech); (2) an adverse action was taken against Plaintiff that would deter a person of ordinary firmness from continuing to engage in that constitutionally protected activity; and (3) there is a causal connection between the exercise of the constitutionally protected right and the adverse action (*i.e.,* that the speech was a motivating factor for the adverse action). *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 337 (6th Cir. 2010); (Defs.' Br. at 21). Each of these factors favors Plaintiff, as demonstrated in her opening brief and further below.

A. Plaintiff Was Fired for Engaging in Constitutionally Protected Activity.

To determine whether Plaintiff was engaged in constitutionally protected speech activity, this court must (1) determine whether Plaintiff's speech involved a matter of public concern; (2) balance Plaintiff's interest as a private citizen to comment on a matter of public concern against the interest of the University as an employer in promoting the public services it performs; and (3) determine whether

Plaintiff's opinion piece was written *pursuant to* her official duties as an employee of the University. *Evans-Marshall*, 624 F.3d at 337-40; *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

The undisputed material facts compel the conclusion that when Plaintiff expressed her personal, religious viewpoint on the issue of homosexuality *in response to an opinion piece published by the editor-in-chief* of the *Toledo Free Press*, she was engaging in constitutionally protected activity. *Connick*, 461 U.S. at 143 (holding that the First Amendment protects the speech of government employees when that speech involves "matters of public concern"). That is, Plaintiff was speaking as a private citizen on a matter of public concern. *Id.* (holding that speech that "fairly [may be] considered as relating to" issues "of political, social, or other concern to the community" is speech involving "matters of public concern"); *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 256 (6th Cir. 2006) (stating that "[s]peech made to a public audience, outside the workplace, and involving content largely unrelated to government employment indicates that the employee speaks as a citizen, not as an employee, and speaks on a matter of public concern" and that "the entire speech does not have to address matters of public concern, as long as some portion of the speech does") (internal quotations and citations omitted). Consequently, *there can be no dispute* that Plaintiff's speech addressed a matter of *significant* public concern and should thus

be accorded the *highest* protection under the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982) (recognizing "that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values' and that 'speech concerning public affairs is more than self-expression; it is the essence of self-government'") (citations omitted).

Furthermore, there is no dispute that as a result of her speech (and more accurately, as a result of the Christian viewpoint she expressed in her speech),[5] Plaintiff was fired, thereby deterring her free speech activity. *Pickering*, 391 U.S. at 574 ("[T]he threat of dismissal from public employment is . . . a potent means of inhibiting speech.").

Thus, an adverse action was taken against Plaintiff, and *there is a direct causal connection* between the exercise of her constitutionally protected right and the adverse action. (R-60: Jacobs Ltr., Pl.'s Ex. 12) (admitting that Plaintiff was fired because of "the public position [she had] taken in the *Toledo Free Press*").

In sum, there is no reasonable dispute that Plaintiff's opinion piece expressed her personal, religious viewpoint on a matter of significant public concern; that she was fired from her government employment; and that a causal connection exists between the content and viewpoint of her speech and the adverse employment consequences (*i.e.*, she was fired for expressing her religious

[5] (*See, e.g.,* Defs.' Br. at 37) (objecting to Plaintiff describing homosexuality as a "sin").

viewpoint on this public issue). Consequently, the only issues remaining are whether Plaintiff's speech was made pursuant to her official duties and whether, upon balancing the competing interests, Plaintiff's right to engage in speech that rests "on the highest rung of the hierarchy of First Amendment values" outweighs the University's interest in suppressing that speech so as to allegedly promote its "diversity" interests.

B. Plaintiff Did Not Write Her Opinion Piece *Pursuant to* Her Official Duties and She Was Not a Confidential or Policymaking Public Employee *Commenting on Her Political Affiliation or Substantive Policy*.

The crux of Defendants' argument centers around two requests: (1) that this court broadly construe Plaintiff's job description so as to convert her from a nonpolitical, manager of the human resources department into a political "confidential or policymaking public employee" for which political affiliation matters, and/or (2) that this court conclude that the personal opinion piece that Plaintiff wrote at her home on a Sunday on her personal computer was done pursuant to her official duties as a University employee.[6] (*See* Defs.' Br. at 22-51). Both requests should be summarily rejected.

[6] Simply writing an opinion piece in a local newspaper that discusses content that might, in some part, "relate to" a person's employment does not make the writing "pursuant to" the person's employment under *Garcetti v. Ceballos*, 547 U.S. 410 (2006) ("The memo concerned the subject matter of Ceballo's employment, but this, too, is nondispostive"); *see also Pickering*, 391 U.S. at 572 (same).

Beginning with the second request, Defendants invite error by asking this court to ignore Supreme Court precedent. In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Court clearly and forcefully rejected the argument that Defendants present here, stating,

> We reject . . . the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. . . . The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Id. at 424-25. As the Court noted, a government employer cannot create an "excessively broad" job description as a way of suppressing an employee's free speech rights, as Defendants are attempting to do here. Indeed, as a "practical" matter, writing a personal opinion piece in the *Toledo Free Press* that discussed her Christian viewpoint on a matter of public concern was simply <u>not</u> a "task within the scope of [Plaintiff's] professional duties for First Amendment purposes." And there is no evidence to conclude otherwise. *Compare id*. at 421 (finding that an employee's speech in an official memorandum he prepared as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case was not protected by the First Amendment). Indeed, on this point the district court was correct: it concluded that Plaintiff's opinion

piece was not written or published pursuant to any of her official duties. (R-79: Op. at 8).

Similarly, this court should reject Defendants' (and the district court's) effort to expand and transform Plaintiff's position so as to shoehorn this case into one involving a political "confidential or policymaking public employee." As an initial matter, the application of the *Elrod/Branti* exception, which is grounded in the notion that "party affiliation is an appropriate requirement for the effective performance of the public office involved" so as not to thwart the goals of the in-party, *Branti v. Finkel*, 445 U.S. 507, 518 (1980), to the facts of this case is disturbing. It is one thing to say that one's party affiliation is an important factor when accepting a high-level political position, but it is quite another to say that government officials can fire a nonpolitical employee because they disagree with her religious beliefs, as in this case. Consequently, Defendants should not be permitted here to avail themselves of this exception, which is largely applicable to cases involving political patronage. Indeed, the cases cited by Defendants for the proposition that Plaintiff fits the "policymaking or confidential" public employee profile illustrate this point. (*See* Defs.' Br. at 33-34 (citing *Wargo v. Moon*, 323 F. Supp. 2d 846, 850 (N.D. Ohio 2004) [upholding the firing of the plaintiff because his "speech was sharply critical of defendant's political and policy-based decisions" in a case brought against an employer who was an elected judge];

Balogh v. Charron, 855 F.2d 356 (6th Cir. 1988) [holding that the firing of a court officer who was employed by an elected judge and who supported the political opponent of his employer was lawful because it fell within the political patronage exception]; *Branti*, 445 U.S. at 518 [stating that "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved"]; *Hoard v. Sizemore*, 198 F.3d 205 (6th Cir. 1999) [concluding that the positions were inherently political and thus fell within the political patronage exception allowing for the dismissal of the employees based on political affiliation]). Thus, these cases do not stand for the proposition that a nonpolitical employee can be fired for expressing a personal, religious belief that her public employer opposes.

Nonetheless, Plaintiff understands that this Circuit has "adopt[ed] the rule that, where a confidential or policymaking public employee is discharged on the basis of speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law." *Rose v. Stephens*, 291 F.3d 917, 921 (6th Cir. 2002). However, this rule for policymaking officials only applies, if it applies at all to Plaintiff's position, "where the employee's speech relates to either his political affiliation or substantive policy." *Id*.

As noted by the court, this limited exception applies to four general categories: (1) positions specifically named in relevant law in which the employee

is granted policymaking authority; (2) positions to which a "*significant portion*" of policymaking authority has been delegated, or positions not specifically named by law but inherently possessing such policymaking authority; (3) confidential advisors who spend a "*significant portion*" of their time on the job advising category-one or category-two position-holders or who control the lines of communications to such persons; or (4) positions that are part of a group of positions filled by balancing out political party representation or by balancing out selections made by different government bodies. *Id.* at 924.

Whether this limited exception applies in this case involves a two-step inquiry. First, the court must conclude that Plaintiff's position fits one of these "categories." *Id.* If it doesn't, that ends the inquiry. However, if the court determines that Plaintiff does occupy one of these political positions, the next "step" in the analysis is to determine whether the offending opinion piece directly addressed "party affiliation" or "substantive policy." *Id.* at 924; *see also Silberstein v. City of Dayton*, 440 F.3d 306 (6th Cir. 2006) ("Thus, "if Silberstein occupied a policy-making position . . . <u>*and*</u> if her letter to the editor related to her policy views, then her free speech interests presumptively lose out . . . .") (emphasis added).

In this case, Plaintiff's position does not fall within any of these "confidential or policymaking public employee" categories. Plaintiff's position

was nonpolitical. Plaintiff was not granted policymaking authority nor was a "significant" portion of policymaking authority delegated to her. And Plaintiff was not a "confidential advisor" who spent a "significant portion" of her time advising a policymaker. Indeed, "political affiliation" is not even a factor. Moreover, Plaintiff's position involved managing the human resources department and enforcing existing policies. Consequently, this court should not proceed beyond the first step.

Nonetheless, the second step abruptly ends the inquiry because Plaintiff's opinion piece did not relate to her political affiliation or substantive policy—it expressed her personal opinion and Christian viewpoint on the issue of homosexuality—an opinion and viewpoint for which she was fired. Indeed, she was not fired for correcting Miller's misrepresentation about the University and its efforts to unify the benefit plans provided at the different campuses (information that was public knowledge and that defended the University against Miller's false, politically-motivated attack). In fact, Defendants concede, as they must, *that the only part of Plaintiff's opinion piece that remotely touches upon University policies "was arguably supportive of the University*." (Defs.' Br. at 46) (emphasis added).

In the end, Defendants simply cannot prevail on this issue. *Compare Silberstein*, 440 F.3d at 320 (upholding the firing of a policymaking employee for

publishing a letter in *The Dayton Daily News* that *directly criticized* the Commissioners' actions regarding the implementation of a specific policy and thus concluding that the plaintiff was "a policymaking employee commenting upon matters of policy").

Moreover, this exception should not apply to an employee simply because that employee is responsible for carrying out some broad policy objectives or "diversity" goals of the University. If that were the case, then Defendants could fire virtually any employee at the University (since everyone is bound to carry out policies and promote the University's "diversity" goals) for expressing a disfavored "political" view.

In summary, Plaintiff's job was nonpolitical, and it involved *enforcing* policy and *managing* the human resources department for the University consistent with existing policy[7]—tasks that she performed in an extraordinary and non-discriminatory fashion both before and after publishing her personal, Christian views in the *Toledo Free Press*. (R-72: Dixon Decl. at ¶¶ 2-12, Ex. 1); *see Everson v. Bd. of Educ. of the Sch. Dist. of the City of Highland Park*, No. 02-72552, 2006 U.S. Dist. LEXIS 13248, at *20-21 (E.D. Mich. Mar. 10, 2006) (holding that a school principal was not a policymaking or confidential employee

[7] Defendants concede, perhaps unwittingly, this point as well, stating that Plaintiff "had responsibility to monitor and enforce UT's policy prohibiting discrimination against or harassment of employees based on sexual orientation." (Defs.' Br. at 45).

pursuant to the *Elrod*/*Branti* exception because her duties were largely managerial and she enforced policy handed down by the Board of Education). And Plaintiff's opinion piece was not speech that "relates to either [her] political affiliation or substantive policy." Plaintiff was clearly expressing a personal viewpoint from her perspective as an African-American, Christian woman on the issue of whether the comparison made by the editor-in-chief of the *Toledo Free Press* between the civil rights struggles of African-Americans and the struggles of homosexuals is a legitimate comparison. The only reference to the University was to correct a misstatement of fact regarding the disparity in benefit plans between the two campuses—information that was public. And this comment was hardly critical. In fact, it was supportive of the University, as Defendants concede. (Defs.' Br. at 46). Indeed, Plaintiff praised the University for "working diligently to address this issue in a reasonable and cost-efficient manner, *for all employees*." (R-60: Dixon Op., Pl.'s Ex. 8) (emphasis added).

In the final analysis, Defendants cannot avail themselves of the *Elrod/Branti* exception in this case.

C. The Balance of Interests Favors Protecting Plaintiff's Right to Express Her Personal Opinion and Religious Viewpoint on a Matter of Public Concern in the *Toledo Free Press*.

The balance of interests strongly favors protecting Plaintiff's fundamental right to express her personal opinion and religious viewpoint on a matter of public

concern in a local newspaper. It is not even a close call. In *Pickering*, the Supreme Court stated, "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, *it is essential* that they be able to speak out freely on such questions without fear of retaliatory dismissal." *Pickering*, 391 U.S. at 572 (emphasis added). The same is true here. As an African-American woman, Plaintiff is clearly a "member[] of a community most likely to have informed and definite opinions as to" the civil rights struggles of African-Americans and any comparisons of these struggles with the lifestyle choices of homosexuals. Accordingly, "*it is essential*" to her, and the public at large, that she "be able to speak out freely on such questions without fear of retaliatory dismissal." *See id.* at 573 (noting that "[t]he public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is . . . *great*") (emphasis added); *see also N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964) (acknowledging "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). Couple this with the fact that Defendants can present no evidence that Plaintiff has ever discriminated against anyone at the University or even directed someone else to discriminate against anyone at the

University—indeed, Plaintiff's long employment history demonstrates the exact opposite—and the balance falls hard on Plaintiff's side.

In sum, there is no credible evidence that Plaintiff's personal, religious views would have had *any* measurable, detrimental effect on the public services provided by the University. In fact, the evidence all points to the contrary. Therefore, the balance weighs heavily in favor of protecting Plaintiff's speech.

D. Defendants' Position Is Duplicitous.

A fine example of the duplicity of Defendants' position throughout this litigation is demonstrated by this remarkable assertion: "UT's policy is that its high-level, policymaking and/or confidential employees cannot publicly attack or undermine policies that they are charged with promoting, implementing or enforcing."[8] (Defs.' Br. at 50). Indeed, despite this assertion, the evidence shows that Defendants quickly turned a blind eye when a high-level, confidential policymaking official at the University publicly attacked Christians. One would assume that Defendants would know that there are Christians at the University, applying the standard they ask this court to apply with regard to homosexuals. And they certainly knew that Plaintiff was a Christian prior to this "public attack." (R-73: Defs.' Opp'n at 10) ("UT knew [Plaintiff's] viewpoint for several years

[8] In their argument to the district court, Defendants stated this "policy" as follows: "UT's policy is that its confidential policymakers *cannot publicly attack the values* that they are charged with promoting and undermine the policies that they are charged with enforcing." (R-73: Defs.' Opp'n at 17) (emphasis added).

before she was terminated."). As the record reveals, the Vice Provost of the University, Carol Bresnahan,[9] *who was identified by her official University position in the article*, was quoted in the *Toledo Blade* in December 2007 as stating, "[B]igotry is to blame for those who oppose the [domestic-partner registry] law. '*It's their religious beliefs*, and bigotry in the name of religion is still bigotry.'" (R-60: *Toledo Blade* Article, Pl.'s Ex. 13; Jacobs Dep. at 218, Pl.'s Ex. 4) (emphasis added). Despite this public attack against religion (when did religion no longer become a civil right at the University?), Defendant Jacobs did not reprimand Ms. Bresnahan for her bigoted, anti-religious comments, let alone terminate her employment. (R-60: Jacobs Dep. at 218, Pl.'s Ex. 4). Indeed, Defendant Jacobs himself pejoratively described Plaintiff's expression of her religious beliefs as "irresponsible utterances." (Defs.' Br. at 39) (quoting Defendant Jacobs).

In sum, this court should give little weight to Defendants' duplicitous, one-way diversity.

III. Defendants' Speech Restriction Is Viewpoint-Based in Violation of the First Amendment.

There is no dispute that Defendant Jacobs is a policymaker for the University. (Defs.' Br. at 53) (acknowledging that "President Jacobs certainly was

[9] Bresnahan was a member of the "Executive Strategic Planning Committee," which was responsible for developing the University's "Strategic Plan." (R-71-8).

and is a UT policymaker"). Consequently, his decision to terminate Plaintiff's employment because she expressed a religious viewpoint that is contrary to the official orthodoxy of opinion at the University is, from a constitutional perspective, as if a statute decreed such a result. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (stating that a school official's decision to allow an invocation and benediction at graduation "is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur"). Consequently, Defendants cannot escape the fact that the speech restriction they employed here against Plaintiff is viewpoint based—the most egregious form of discrimination in the speech context.[10] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Indeed, University employees can "avoid the risk of loss of employment, and perhaps profession, only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964).

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[10] Contrary to Defendants' self-serving assertion that Plaintiff "was not terminated because her viewpoint was 'offensive' or 'controversial,'" (Defs.' Br. at 49), there is no reasonable dispute that Defendants fired Plaintiff because they disapproved of her viewpoint. Is there any doubt that had Plaintiff expressed the very opposite viewpoint (*i.e.,* if she had expressed a viewpoint that agreed with the viewpoint expressed by the editor-in-chief of the *Toledo Free Press*, as Defendant Jacobs did as a matter of his "personal stance") that she would still be employed by the University today?

IV. Defendants' Speech Restriction Violates the Equal Protection Guarantee of the Fourteenth Amendment.

By permitting other employees, including such "high-level" employees as Ms. Bresnahan and even Defendant Jacobs himself, to express *personal views* in the local newspapers,[11] such as the *Toledo Blade* and the *Toledo Free Press*, but yet punish Plaintiff for expressing her personal views in this very same forum, Defendants violated the equal protection guarantee of the Fourteenth Amendment. Defendants' effort to avoid the controlling *principle of constitutional law* set forth in *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) ("[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views."), by claiming that this principle only applies when the government acts as "gate keeper to a public forum," is unavailing. (Defs.' Br. at

[11] On May 4, 2008, an opinion piece authored by "Dr. Lloyd Jacobs, University of Toledo President" was published in the *Toledo Free Press*. (R-60: Jacobs Op., Pl.'s Ex. 10). In this published piece, Defendant Jacobs stated, in relevant part, "Crystal Dixon is associate vice president for Human Resources at the University of Toledo, her comments do not accord with the values of the University of Toledo. . . . It is necessary, therefore, for me to repudiate much of her writing. . . . We (the University) will be taking certain internal actions in this instance to more fully align our utterances and actions with this value system. . . . It is my hope there may be no misunderstanding *of my personal stance*, nor the stance of the University of Toledo, concerning the issues of 'Gay Rights and Wrongs.'" The opinion piece concluded, "Dr. Lloyd Jacobs is president of the University of Toledo." (R-60: Jacobs Op., Pl.'s Ex. 10) (emphasis added).

54). Indeed, the government is never a "gate keeper to a public forum" as Defendants use that phrase. The government might impose restrictions that limit a persons' access to, or use of, a forum (public or otherwise) for speech activity, but those restrictions (such as penalizing a person through a fine or imprisonment, denying a permit, or terminating a person's employment) must comply with the First Amendment. *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992) (stating that the government may not "impose *special prohibitions* on those speakers who express views on disfavored subjects" or on the basis of "hostility—or favoritism—towards the underlying message expressed") (emphasis added). By imposing "special prohibitions" on those speakers who express disfavored viewpoints in a local newspaper, as in this case, the government violates the equal protection guarantee of the Fourteenth Amendment in addition to the free speech protection of the First Amendment. *See also Hansen v. Ann Arbor Pub. Schs.*, 293 F. Supp. 2d 780, (E.D. Mich. 2003) (finding that the school district violated the Equal Protection Clause by discriminating against the plaintiff on account of her religious viewpoint on homosexuality). Indeed, how is it that the University is not a "gate keeper" (using Defendants' imprecise term) to opinion pieces published by its employees in the *Toledo Free Press*? If you are an employee and desire to express your private, personal opinion in this newspaper, you better not run afoul of the viewpoint police at the University who will terminate you if you say something

contrary to the government's enforced, orthodoxy of opinion. *See West Va. State Bd. of Educ.*, 319 U.S. at 642.

In sum, Defendants' actions violated not only the First Amendment, but the Equal Protection Clause of the Fourteenth Amendment as well.

V. Defendants Are Not Entitled to Qualified Immunity.

Defendants do not enjoy qualified immunity here because "Supreme Court decisions rendered long before the actions at issue in this case recognize that government actions may not retaliate against an individual for the exercise of protected First Amendment freedoms." *Dietrech v. Burrows*, 167 F.3d 1007, 1013 (6th Cir. 1999); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 897, 824-25 (6th Cir. 2007) (same). Consequently, Plaintiff's right to be free from government retaliation for exercising her right to freedom of speech was clearly established when she was fired. Therefore, Defendants do not enjoy qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that individual defendants do not enjoy qualified immunity when they violate "clearly established statutory or constitutional rights of which a reasonable person would have known").

CONCLUSION

Plaintiff respectfully requests that this court reverse the grant of summary judgment in Defendants' favor, reverse the denial of Plaintiff's motion for summary judgment, and enter judgment in Plaintiff's favor as to liability on all claims.

Respectfully submitted,

AMERICAN FREEDOM LAW CENTER

By: /s/ Robert J. Muise
Robert J. Muise, Esq.

CUMMINGS, MCCLOREY, DAVIS & ACHO

By: /s/ James Acho
James Acho, Esq.

LAW OFFICE OF THOMAS A. SOBECKI

By: /s/ Thomas A. Sobecki
Thomas A. Sobecki, Esq.

THOMAS MORE LAW CENTER

By: /s/ Erin Mersino
Erin Mersino, Esq.

Attorneys for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7), the foregoing Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 6,540 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise (P62849)

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that all of the participants in this case are registered CM/ECF users.

AMERICAN FREEDOM LAW CENTER

/s/Robert J. Muise
Robert J. Muise (P62849)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description
R-73	Defendants' Opposition to Plaintiff's Motion for Summary Judgment