NOT RECOMMENDED FOR PUBLICATION

No. 22-6106

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 16, 2024
KELLY L. STEPHENS, Clerk

DOCTOR JULIA GRUBER, et al.,

Plaintiffs-Appellants,

v.

TENNESSEE TECH BOARD OF TRUSTEES, dba Tennessee Technological University,

Defendant,

and

DOCTOR LORI BRUCE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

O R D E R

Before: GRIFFIN, WHITE, and MURPHY, Circuit Judges.

Dr. Julia Gruber and Andrew Smith, represented by counsel, appeal the district court's grant of summary judgment to Dr. Lori Bruce. The parties waived oral argument, and this panel unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we affirm the district court's judgment.

As relevant to this appeal, Gruber and Smith are professors at Tennessee Technological University (TTU). They filed a 42 U.S.C. § 1983 complaint against Bruce, who is TTU's provost and vice president for academic affairs, in her individual and official capacities. The complaint alleged claims of First Amendment retaliation and the denial of procedural due process based on discipline that Bruce imposed on Gruber and Smith after they distributed flyers on campus. The flyers included a photograph of another professor, Dr. Andrew Donadio, and stated that

(1) Donadio is a racist who was helping start a chapter of Turning Point USA at TTU, (2) Turning Point USA is a national hate group that allows racist students to unite to harass, threaten, intimidate, and terrorize minorities and other groups, and (3) Donadio and Turning Point USA are not welcome at TTU. Gruber and Smith sought monetary, declaratory, and injunctive relief.

The district court granted summary judgment to Bruce. The court concluded that Bruce was entitled to judgment as to the plaintiffs' official capacity retaliation claim on the basis that their speech was unprotected because their interest in speaking was outweighed by TTU's interest in promoting the efficiency of the public services it performs through its employees. The court further concluded that Bruce was entitled to qualified immunity as to the plaintiffs' individual capacity retaliation claim and that, as to the due process claim, the plaintiffs did not establish a protected liberty or property interest or show that they were deprived of adequate process.

On appeal, Gruber and Smith challenge only the district court's grant of summary judgment to Bruce as to their official capacity retaliation claim. They argue that the district court erred by concluding that TTU's interest in disciplining them for distributing the flyers outweighed their speech interest. In response, Bruce argues that this appeal is moot because the sanctions imposed on Gruber and Smith have expired and, alternatively, that the district court properly granted summary judgment.

As an initial matter, this appeal is not moot. Bruce contends that it is because Gruber and Smith are challenging only the grant of summary judgment as to their official capacity retaliation claim, meaning that they can obtain only prospective injunctive relief. *See Boler v. Earley*, 865 F.3d 391, 412 (6th Cir. 2017). And, Bruce further argues, Gruber and Smith's requested relief—revoking the sanctions imposed on them—is not prospective injunctive relief because all of the sanctions expired by May 2023. One form of relief that Gruber and Smith requested, however, was an order revoking the sanctions imposed on them, which would otherwise remain on their employment record and potentially subject them to negative future consequences. That request for relief prevents this appeal from becoming moot. *See Overdam v. Tex. A&M Univ.*, 43 F.4th 522, 529 (5th Cir. 2022) (per curiam) (recognizing that a lawsuit to expunge a student's

disciplinary record is not moot based on the student's graduation), *cert. denied*, 143 S. Ct. 2466 (2023); *Esfeller v. O'Keefe*, 391 F. App'x 337, 340 (5th Cir. 2010) (per curiam); *Flint v. Dennison*, 488 F.3d 816, 824–25 (9th Cir. 2007).

We review de novo a district court's grant of summary judgment. *Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 759 (6th Cir. 2010). Summary judgment is appropriate where the evidence, viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.* at 759–60.

To establish a First Amendment retaliation claim, a plaintiff must show that she engaged in private, constitutionally protected speech or conduct, the defendant took an adverse action against her that would deter a person of ordinary firmness from continuing to engage in that conduct, and the adverse action was motivated at least in part by the protected conduct. *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 537 (6th Cir. 2020); *see also DeCrane v. Eckart*, 12 F.4th 586, 594 (6th Cir. 2021) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (6th Cir. 2006)). When deciding whether the plaintiff engaged in protected activity, we first determine whether the action constitutes speech on a matter of public concern, and if it does, we apply the "*Pickering* balancing test" to determine whether the plaintiff's interest in commenting outweighs the defendant's interest as an employer in promoting the efficiency of the public services it performs through its employees. *Bennett*, 977 F.3d at 537 (citing *Pickering v. Bd. of Educ. of Twp. High School District 205*, 391 U.S. 563, 568 (1968)). The balancing test considers the manner, time, and place of the expressive action, and the pertinent considerations include whether the action (1) impairs discipline by superiors or harmony among coworkers, (2) negatively affects close working relationships for which personal loyalty and confidence are necessary, (3) impedes performance of the speaker's duties or interferes with the employer's regular operations, and (4) undermines the employer's mission. *Id.* at 539–40. Application of the balancing test is a legal matter that we review de novo. *Id.* at 537.

TTU does not dispute that the district court properly concluded that the plaintiffs' speech was a matter of public concern. Even so, as the district also properly concluded, the plaintiffs' distribution of the flyers was not protected speech because their speech interest was outweighed by TTU's interest in preventing a disruption to its pedagogical and collegial environment. *Myers v. City of Centerville*, 41 F.4th 746, 764 (6th Cir. 2022) (explaining that a government employer carries its *Pickering* burden if it demonstrates "potential disruptiveness" caused by the speech at issue). Bruce argues that the plaintiffs' distribution of the flyers threatened to, and did, impair harmony among coworkers and otherwise disrupt TTU's operations and mission. Gruber and Smith argue that their free speech rights outweigh any interest TTU may have in disciplining them because the flyers were taken down immediately and did not cause any significant disruption. Based on the specific facts of this case, we agree with Bruce and the district court that the plaintiffs' speech was not protected.

At the outset, the "manner" of the plaintiffs' speech decreased its expressive value and increased TTU's operational interests. *Connick v. Myers*, 461 U.S. 138, 152 (1983). Plaintiffs did not speak in the classroom or through scholarship, where professors' "rights to academic freedom and freedom of expression are paramount." *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); *see also Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 679-82 (6th Cir. 2001). Nor is this a simple case of one professor raising a race-related issue with another or expressing disagreement with a group's ideology, perhaps one-on-one or in a more private setting. *Contra Rankin v. McPherson*, 483 U.S. 378, 389 (1987) (finding an employee's remark made in private conversation to be protected speech). Instead, the plaintiffs posted flyers in an academic building at a time they knew students would be on campus for class and posted an additional flyer the next day. Those flyers were highly likely to cause disruption, and they did so in several ways.

Specifically, the flyers identified Donadio as a "racist college professor" and branded members of Turning Point USA as "racist students." R. 90, PageID 8939. They stated in bold text that the professor and group's "hate & hypocrisy are not welcome at Tennessee Tech." *Id.* The dissemination of "disrespectful, demeaning, insulting, and rude" messages targeting a colleague

and students—regardless of whether some accusations may have had basis in fact—to the entire university community undoubtably threatened to disrupt TTU's learning environment and academic mission. *Shi v. Montgomery*, 679 F. App'x 828, 835 (11th Cir. 2017) (per curiam).

For one, flyers that publicly attack a colleague as racist and threaten that the colleague is on the anonymous author's "list" certainly "impairs . . . harmony among co-workers." *Bennett*, 977 F.3d at 539–40 (quoting *Rankin*, 483 U.S. at 388) (considering the fact that "the harmony of the office was disrupted" when balancing the *Pickering* factors); *Bonnell*, 241 F.3d at 824 (explaining that universities have an interest in maintaining a "hostile-free learning environment"); *see also Mitchell v. Hillsborough County*, 468 F.3d 1276, 1288 (11th Cir. 2006) (explaining that a government employer is within its discretion to impose discipline when an employee's speech is "disrespectful, demeaning, rude, and insulting" and is perceived that way in the workplace).[1]

Perhaps more critically, by attacking students, the flyers threatened the core of TTU's educational "mission" and undermined the plaintiffs' ability to perform their teaching "duties." *Bennett*, 977 F.3d at 539–40. The flyers insinuated that, like Donadio, all students who were members of Turning Point USA were racist. The accusations harmed these students' educations. For example, one Turning Point USA member, having been deemed a racist, missed class because of the fallout. In addition, the accusations affected the plaintiffs' effectiveness in the classroom. Students in the club, or those considering joining the club, who were taking courses with Gruber and Smith might reasonably fear the potential treatment they would receive in class due to differing political views. *See Bonnell*, 241 F.3d at 823–24 (noting that First Amendments rights "are not absolute to the point of compromising a student's right to learn in a hostile-free environment"). This case is thus factually distinguishable from cases like *Pickering*, where a teacher was disciplined for writing a letter to a local newspaper criticizing the school district that was "in no way directed towards any person with whom [the teacher] would normally be in contact in the

[1] Plaintiffs protest that they did not interact with Donadio professionally, so there was no harmony to impair. But even if the professors did not work closely together, they were nonetheless colleagues on TTU's faculty, and it was not unreasonable for Bruce to conclude that on-campus and public accusations of racism—even between colleagues who did not work together—could cause disruption of the university's operations.

course of his daily work as a teacher." 391 U.S. at 569–70. And most basically, TTU has "an interest in fostering a collegial educational environment." *Trejo v. Shoben*, 319 F.3d 878, 888 (7th Cir. 2003). Permitting professors to circulate flyers with personal attacks on colleagues and students undoubtably undermines that interest.

To be sure, the flyers were quickly collected and affected only a handful of students and professors. But evidence of widespread disruption is not necessary: it was reasonable for Bruce to believe that, had the flyers remained posted, they could have caused far greater disruption. *See Gillis v. Miller*, 845 F.3d 677, 687 (6th Cir. 2017) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.") (citation and internal quotation marks omitted).

Lastly, the "place" of the plaintiffs' speech undermines their interests even further. *Connick*, 461 U.S. at 152. Even if they did not undertake this speech pursuant to their official duties, *see Garcetti*, 547 U.S. at 426, they also did not engage in it away from campus as private citizens. Rather than make their claims on their personal Facebook pages or in a local newspaper, *cf. Pickering*, 391 U.S. at 569–70, they chose to use TTU's own property as the billboard for their speech. But public employers have greater interest in regulating speech "at the office" (or here on campus) than they do away from the public employers' property. *Connick*, 461 U.S. at 153. Indeed, the conclusion that the First Amendment protected the plaintiffs' speech would mean that TTU remained powerless to remove the flyers off of its property. So this case raises no concern that TTU sought to "leverage" its employment relationship with the plaintiffs to regulate their speech "outside" the context of its university functions. *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 214-15 (2013).

All told, the *Pickering* balancing test weighs against the plaintiffs' speech being protected. The flyers, which attacked a professor and student organization and stated that they were not welcome on campus, created a reasonable threat of disrupting TTU's academic mission and is the type of speech that a learning institution has a strong interest in preventing. Under the *Pickering*

balancing test, TTU's interest in preventing a potential disruption to its pedagogical and collegial environment outweighed the plaintiffs' interest in distributing the flyers. Thus, the plaintiffs' speech was not protected, foreclosing their First Amendment retaliation claim.

Accordingly, we **AFFIRM** the district court's judgment.

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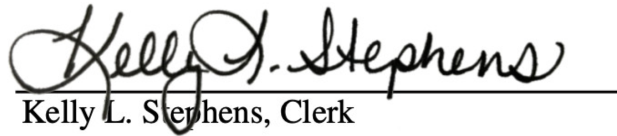

Kelly L. Stephens, Clerk