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UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

TODD SCHMIDT, Plaintiff, **v.** **EDWARD SEIDEL**, in his official capacity as the President of the University of Wyoming, and **RYAN O'NEIL,** individually and in her official capacity as Dean of Students for the University of Wyoming, Defendants.	**CIVIL ACTION NO.: 2:23-cv-00101-NDF** **PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL**

Plaintiff Todd Schmidt ("Schmidt") hereby submits this Response in opposition to the Motion for Partial Dismissal brought by Defendants Ed Seidel ("Seidel") and Ryan O'Neil ("O'Neil) (referred to jointly as "UW Officials").

ARGUMENT

Entertaining a motion to dismiss, this Court is to weigh the legal sufficiency of the allegations set out in Schmidt's Verified Complaint. Fed. R. Civ. P. 12(b)(6). The Court assesses whether the complaint states a claim for which relief can be granted. *Miller v. Gianz*, 948 F.2d 1562, 1565 (10th Cir. 1991). With this exercise, all well-pled factual allegations are accepted as true and viewed in the light most favorable to the plaintiff. *Robbins v. Wilkie*, 300 F.3d 1208, 1210

(10th Cir. 2002). Dismissal is unwarranted unless the allegations fail to substantiate a valid legal theory or are factually implausible on their face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 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 (2009). The factual allegations need only rise above a "speculative level" to suffice. *Twombly*, 550 U.S. at 555.

A Rule 12(b)(6) motion is supposed to focus on "the four corners of the complaint…." *Mobley v. McCormick*, 40 F.3d 337, 340 (10th Cir. 1994) (citation omitted). UW Officials strayed outside of these corners with their motion. Though UW Officials referenced many paragraphs from the Verified Complaint, they presented a slanted version of the facts, frequently relying on statements outside of or contrary to the central pleading.[1] A reading of the Verified Complaint reveals Schmidt easily crosses his minimal barrier regarding all claims he brings against defendants, in both official and individual capacities. Schmidt alleges facts that establish his due process and equal protection claims, as well as his other claims, in challenging UW Officials' censorship on his speech and the ban they impose on breezeway table use in the Union. He is thus entitled to relief against the named defendants, including Defendant Ryan O'Neil in her individual capacity for nominal damages.

I. Allegations Support Schmidt's Due Process Claim

Aside from violating other constitutional rights, UW Officials' bar on Schmidt's viewpoint and ban on his table use are unduly vague restrictions in violation of his right to due process.

[1] The paragraphs of the complaint UW Officials cite in their motion often do not match the statements they claim the citations support. They also provide interpretations of various policies that find no support in the complaint. (Doc. 18, pp. 2-5).

Due process in the Fourteenth Amendment demands government extend fair notice to citizens of what conduct is prohibited to prevent officials from enforcing restrictions in an arbitrary and discriminatory manner. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). *See City of Chicago v. Morales*, 527 U.S. 41, 57-60 (199) (ordinance criminalizing "loitering" held vague because it was unclear what kind of loitering was prohibited and what was permitted). A due process claim is distinct from a free speech claim, involving different amendments to the U.S. Constitution and differing standards. But the requisite clarity for due process is amplified when free speech rights are adversely affected (as here). *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 499 (1982).

Schmidt challenges two unduly vague policies that were applied to him in contravention of due process: § 2.B.4 to censor his viewpoint and § 5.B.15 to bar his use of breezeway table. Notably, UW Officials do not claim these policies supply sufficient clarity, and they obviously do not. Their application to Schmidt's speech was and still plagues him, as delineated in his Verified Complaint.

In response to an ongoing controversy at UW, Schmidt attached a sign to his table stating: "God created male and female and Artemis Langford is a male." (Verified Complaint [VC], ¶¶ 85-103, 106). O'Neil approached Schmidt about the sign and eventually advised him that the sign violated § 2.B.4, which reads: "Requests may be denied for reasons which include, but may not be limited to, conflict with the mission of the University, conflict with the mission of Wyoming Union, unfeasible setup/turnaround time, and historic negligence and abuse." (VC, ¶¶ 115-116). O'Neil clarified that Schmidt specifically violated the mission of the university part of the policy. (VC, ¶¶ 117-118). And she ordered Schmidt to remove the message, warning him of police intervention should he refuse to abide by her directive. (VC, ¶¶ 121-125).

Section 2.B.4 does not appear to cover revocation of use but initial approval. (VC, ¶ 116). Also, nothing in the UW mission statement addresses the situation involving the sign. (VC, ¶ 119). Schmidt does not know how he violated the mission statement, O'Neil failed to explain how he did, and yet he was subject to criminal arrest. (VC, ¶¶ 120, 125). These allegations make out a valid due process violation for the application of § 2.B.4.

This same is true for § 5.B.15. O'Neil cited § 5.B.15 as the basis for the ban on Schmidt's breezeway table. (VC, ¶¶ 147, 150). The section reads:

> The union breezeway tabling will be maintained as a safe and non-threatening environment for student organizations, university departments, university organizations, outside entities sponsored by one of the previous groups listed, local merchants, vendors, and/or non-profits. Language or actions that discriminate or harass the above groups will not be tolerated. Students are expected to recognize that respecting the dignity of every person is essential for creating and sustaining a flourishing University community. Students should act to discourage and challenge those whose actions may be harmful to and/or diminish the worth of others, in accordance with Student Code of Conduct. All individuals tabling, whether UW unaffiliated or not, are expected to bring their views in a respectful and civil manner.
>
> a. Complaints received about students will be brought to the office of the Dean of Students as a potential Student Conduct. Complaints received about external community members will be warned once. Subsequent complaints may result in a loss of access to tabling. (VC, ¶ 144).

Familiarity with this policy could hardly serve as notice to Schmidt that he was risking one-year table suspension with his sign. O'Neil, in her letter, specified a couple of things about this policy. (VC, ¶ 150). One, she referenced language or actions that discriminate or harass the above groups. (VC, ¶¶ 147, 150). The statement appears inapplicable to Schmidt, as it references the duties of students toward individuals tabling. (VC, ¶ 150). Moreover, Schmidt did not – nor could he reasonably – perceive that he was discriminating against or harassing anyone by offering his opinion on a contested and public issue. (VC, ¶ 163). Two, O'Neil mentioned the requirement that views be presented in a respectful and civil manner. (VC, ¶¶ 147, 150). While this statement

does apply to those manning a table, Schmidt had no reason to believe he was uncivil or disrespectful with his sign. (VC, ¶ 150). He wanted to present his view that Artemis Langford is a male and did so in a civil and respectful way. (VC, ¶¶ 102, 109, 139, 158, 163).

Also, Schmidt did not receive a warning prior to the table suspension as contemplated by § 5.B.15. (VC, ¶¶ 160-161). The only instructions he received before the incident were about leaving the table and abiding by COVID policies, which are not mentioned in this section. (VC, ¶ 162). UW representatives never warned him about being uncivil or disrespectful, and when O'Neil directed Schmidt to remove the message about Langford, he complied. (VC, ¶¶ 126-127, 160-163).

Additionally, the reference to UW Regulation 4-2 does not save the ambiguity with § 5.B.15. It is not evident how Schmidt's sign could constitute "discriminatory harassment" by merely stating Artemis Langford is a male. (VC, ¶¶ 163-170). The application of § 5.B.15, as with § 2.B.4, violated his right to due process.

II. Allegations Support Schmidt's Equal Protection Claim

The Equal Protection clause is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Under this clause, interference with a fundamental right warrants the application of strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). And a claim can be asserted either as part of a group or as a class of one. *A.N. by and through Ponder v. Syling*, 928 F.3d 1191, 1196 (10th Cir. 2019). Schmidt's claim involves his status in a group: those of his Christian ilk who share the religious belief that sex is a status fixed at conception and cannot be changed. (VC, ¶¶ 19-20, 94).

In this case, Schmidt is similarly situated to other groups who table in UW Union. The only real distinction between Schmidt and others with tables who avoid suspension is the particular viewpoint about Artemis Langford. (VC, ¶¶ 104-176). UW Officials cannot begin to justify their

denial of equal protection to Schmidt, as their sole justification is that the expression of a view purportedly amounted to discrimination and harassment. Schmidt did not discriminate or harass Langford or have any intention of doing so. (VC, ¶¶ 36, 94, 96-102). Indeed, UW Officials commit discrimination here, against Schmidt's views, and it cannot stand.

III. O'Neil is Not Entitled to Qualified Immunity Defense

On behalf of O'Neil, UW Officials also invoke the doctrine of qualified immunity as a way to dismiss the claims levied against her in her individual capacity.

Qualified immunity is unavailable to a government official when her alleged conduct violates clearly established rights of which a reasonable person knew or should have known. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). For an official to be held liable, the precise law and circumstances at issue need not be adjudicated; in consideration of prior case law, the unlawfulness need only be apparent. *Anderson v. Creighton*, 483 U.S. 635 (1987).

O'Neil is not entitled to qualified immunity. Presented at this early stage of the proceedings, the qualified immunity defense faces a formidable hurdle because it is couched in the framework of a Fed. R. Civ. P. 12(b)(6) motion, requiring the Court to accept all well-pled allegations in the complaint as true and draw all reasonable factual inferences from those facts in the plaintiff's favor. *Robbins*, 300 F.3d at 1210. UW Officials cannot clear this hurdle. First, the allegations show that O'Neil violated Schmidt's constitutional rights. She censored the message on his sign (VC, ¶¶ 105-127) and enforced a subsequent table ban on his speech (VC, ¶¶ 147-153), violating his constitutional rights in several ways. (VC. ¶¶ 192-214). Second, in carrying out these egregious actions, O'Neil knew or should have known she was violating Schmidt's constitutional rights.

UW Officials contend Schmidt's "right to harass and/or discriminate against a student at a table in a University student union based upon her membership in a class protected by law (transgender female) – is not clearly established…." (Doc. 18, p. 8). However, as reflected in the allegations of the Verified Complaint, Schmidt seeks no such right. He wants to share his viewpoint on a public issue in a public place but O'Neil disallows his speech due to university disagreement with his opinion. O'Neil should know viewpoint discrimination is unconstitutional, "that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va*., 515 U.S. 819, 829 (1995). But she committed this discrimination against Schmidt anyway, with the censorship and table ban.

UW Officials also mistakenly claim the law is not clearly established in the absence of a case in which a university dean acted under similar circumstances. (Doc. 18, p. 10). A qualified immunity defense does not turn on whether the instant facts line up with facts of another case, but whether the challenged conduct violates constitutional rights that were clearly established at the time. *Pearson*, 555 U.S. at 231. O'Neil discriminated against Schmidt on the basis of his viewpoint and his right to speak free of viewpoint discrimination was a well-established right. *E.g*., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-96 (1992); *Summum v. Callaghan*, 130 F.3d 906, 919 (10th Cir. 1997). As the Supreme Court has recognized, applying a speech restriction to only one side of the debate is "a clear form of viewpoint discrimination that [] support[s] an as-applied challenge to the [restriction]." *McCullen v. Coakley*, 573 U.S. 464, 484-85 (2014); *see also R.A.V.*, 505 U.S. at 392 (government "has no [] authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules").

Additionally, setting aside the discriminatory aspect of O'Neil's actions, no reasonable official would punish individuals with policies that fail to address the complained-of behavior, as

O'Neil did with the censorship and the table suspension. She should have known she was violating Schmidt's due process rights as well. If the government applies a regulation in a way that defies its language, it is unconstitutionally vague as applied. *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 620 (1976).

IV. Schmidt is Entitled to Nominal Damages against O'Neil

For retrospective relief, Schmidt is entitled to receive nominal damages against O'Neil in her individual capacity - for violating his constitutional rights. Schmidt is not pursuing nominal claims against either defendant in their official capacities.

When a party's constitutional rights have been violated, an award of nominal damages is mandatory. *Carey v. Piphus*, 435 U.S. 247, 266 (1978). The Eleventh Amendment does not bar this important remedy when brought against state officials in their individual capacities. *Cummins v. Campbell,* 44 F.3d 847, 850 (10th Cir. 1994).

CONCLUSION

For all these reasons, Plaintiff Todd Schmidt respectfully requests this Court deny Defendants' Motion of Partial Dismissal in all respects.

Respectfully submitted this 31st day of July 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response in Opposition of Defendants' Motion for Partial Dismissal was filed with the Clerk of Court using the CM/ECF system, sending notification to all counsel of record, this the 31st day of July.

s/ Nathan W. Kellum
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