UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

TERESA BUCHANAN — CIVIL ACTION

VERSUS — 16-41-SDD-EWD

F. KING ALEXANDER, DAMON ANDREW,
A.G. MONACO, AND GASTON REINOSO

RULING

This matter is before the Court on the cross *Motions for Summary Judgment*[1] by Defendants, F. King Alexander, Damon Andrew, A.G. Monaco, and Gaston Reinoso ("Defendants") and Plaintiff, Teresa Buchanan ("Plaintiff"). The parties have filed *Oppositions*[2] and *Replies*[3] to the cross-motions. On September 25, 2017, the Court held Oral Argument on limited issues raised in the Parties' motions, and the Court allowed the Parties to submit post-hearing memoranda.[4] The Court has considered all of the evidence presented, the arguments of counsel, and the law as applied to the undisputed facts of this case. For the following reasons, the Court finds that summary judgment should be granted in favor of the Defendants.

[1] Rec. Doc. Nos. 30 & 35. Defendants also moved for judgment on the pleadings (Rec. Doc. No. 26) which appears to have been improperly terminated by Rec. Doc. No. 32. However, because these issues are covered by the parties' cross-motions for summary judgment, the Court will address those matters herein.
[2] Rec. Doc. Nos. 42 & 43.
[3] Rec. Doc. Nos. 46 & 47.
[4] Rec. Doc. Nos. 60 & 61.
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I. FACTUAL BACKGROUND

This lawsuit arises out of the termination of Plaintiff's position of tenured professor by the Board of Supervisors ("the Board")[5] of Louisiana State University and Agricultural and Mechanical College ("LSU").[6] The Defendants are: F. King Alexander ("Alexander"), President and Chancellor of LSU; Damon Andrew ("Dean Andrew"), Dean of the College

In mid-November 2013, Ed Cancienne ("Cancienne"), Superintendent of the Iberville Parish Schools District, complained about Plaintiff's "professionalism and her behavior" during her visits to schools in his district while she was overseeing the PK-3 program.[12] Cancienne was reportedly very upset because he heard that Plaintiff had been condescending to the teachers during her site visits with LSU student teachers and their mentor teachers.[13]

fiancé was very supportive, Plaintiff allegedly responded, "yeah, he's supportive now while the sex is good, but just wait until you're married five years."[25] Curry testified that Student 1 stated: "I don't know who she is to make these assumptions about me, and to say it in front of a room full of people."[26]

Student 1 also reported to Curry that Plaintiff had recorded a student (Student 2) crying during an assessment team meeting and played the recording back for the student.[27] Student 2 met with Curry and complained that Plaintiff had intimidated and demeaned her by video recording this incident during a team assessment meeting. Regarding this incident, Dr. Curry testified:

> … during her assessment team meeting, [the student] began to cry. She said that Dr. Buchanan was yelling at her. And that when she started to cry, Dr. Buchanan got out her cell phone and did not ask her, but started to record her crying and then played it back for her, she said, look at yourself, look at yourself, you need to check yourself in somewhere and get help, get a break.[28]

Curry further testified that Student 2 reported that this meeting was "mortifying,"[29] and that:

> Terry [Plaintiff] was extremely aggressive during this assessment team meeting. She said every time she tried to talk, Terry would say, shut up, you're not listening, be quiet, be quiet, like screaming at her, very aggressive. She said it was more than intimidating. Like she felt attacked, fearful.[30]

Plaintiff claims that no administrator met with her to discuss these allegations, and

[25] *Id.* at p. 4; Deposition of Curry, p. 71, lines 19-21.
[26] *Id.*; Deposition of Curry, p. 71, lines 22-24.
[27] *Id.*; Deposition of Curry, p. 69, lines 13-16.
[28] *Id.*; Deposition of Curry, p. 70, lines 14-21.
[29] *Id.* at p. 5; Deposition of Curry, p. 72, line 3.
[30] *Id.*; Deposition of Curry, p. 72, lines 6-12.

Plaintiff was tenured.[36]

The Investigation

Dean Andrew instructed Curry to gather all information regarding prior complaints, and, while in the process of doing this, Curry was contacted by Cancienne, who advised that Plaintiff was no longer authorized to be on any Iberville Parish school campus.[37] After gathering additional evidence, Curry and Dean Andrew sought help from Human Resources regarding Plaintiff.[38] Human Resources Management administrator Reinoso interviewed witnesses and reported his findings to Dean Andrew, who then recommended to Provost Bell the appointment of a Policy Statement-104 ("PS-104") Faculty Senate Grievance Committee ("the faculty committee").[39]

The PS-104 committee conducted a 12 hour hearing during which several

complained. Donnelly also testified that she knew of complaints from four elementary schools that would no longer allow Plaintiff to mentor student teachers; Donnelly testified to knowledge of complaints about Plaintiff's behavior from Zachary schools,[42] the LSU Lab School,[43] Port Allen Elementary School,[44] and Iberville Parish Schools.[45]

Donnelly confirmed that Reinoso accurately reported that Plaintiff typically makes comments about sex because "that is how she is."[46] When asked what was meant by the comment that Plaintiff had "no self-awareness of what she says,"[47] Donnelly responded: "I'm not sure that was my exact word, but it's like when I said she doesn't have a filter. She just doesn't realize what sometimes she says, and how it sounds. She doesn't mean

with LSU Human Resource Management administrators, including Reinoso, to discuss the allegations of complaints by students and school administrators.[53] During the investigation, Plaintiff admitted to using profanity and language of a sexual nature which

claims that Reinoso's deposition testimony confirms that only the following allegations supported his finding that she violated the sexual harassment policy: (1) Plaintiff's remark to a student about birth control and condoms; (2) Plaintiff's remark to a student that her fiancé was only supportive now because "the sex is good"; (3) the use of profanity in

In reaction to Plaintiff's response, on June 17, 2014, Dean Andrew advised Plaintiff, in writing, as follows:

> I find this explanation to be unacceptable, and I do not condone any practices where sexual language and profanity are used when educating students, particularly those who are being educated to serve as PK-3 professionals. As a PK-3 faculty member, you are expected to set a good example for your students in the profession, and receiving bans from multiple school districts as a result of your inappropriate behavior does little to support legitimacy in the classroom.[63]

Andrew's correspondence further advised Plaintiff that he was considering pursuing dismissal "for cause" proceedings under LSU policy PS-104.[64]

Plaintiff contends she responded to Dean Andrew on July 1, 2014, advising that she had to contend with "vague and indefinite charges," and that, "[b]efore listening to the context or intention underlying my actions," Dean Andrew at the Human Resources Management team had drawn unfair conclusions that denied her "due process" and resulted in her loss of a promotion.[65] Plaintiff also questioned the reliability of the report findings which she claims "centered on the complaints of a few disgruntled students and answers to leading questions of others, entirely discounting my explanation of the events."[66]

Despite her response, Plaintiff claims she was informed of Dean Andrews' July 14, 2014 recommendation to Provost Stuart Bell that she be dismissed for cause from LSU ten days later on July 24, 2014.[67] On July 30, 2014, Provost Bell requested a PS-104

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[63] Rec. Doc. No. 31-1, p. 17 (Exhibit 8 to Deposition of Buchanan).
[64] *Id.*
[65] Rec. Doc. No. 36-1, ¶ 107.
[66] *Id.*
[67] Rec. Doc. No. 1, ¶ 33.
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proceeding.[68]

Plaintiff alleges she wrote to Provost Bell on August 3, 2014 to reiterate due process concerns and to explain how the complained-of speech was part of her pedagogical strategy:

> "[Profanity] is part of the common vernacular even among very young children today, and teacher-education students need to be aware that they will be confronted with that language and professionally decide how they will respond. I have never had a student tell me that it was offensive or that they were uncomfortable with my language."[69]

Plaintiff further claims that she:

> informed Bell that she utilizes humor to help student teachers recognize their "own feelings regarding dress and sexuality" to prepare them for their future interactions with "children from family backgrounds that are different from their own" and their responsibility "for establishing and maintaining effective and reciprocal relationships with all families."[70]

Subsequently, Provost Bell impaneled a faculty committee to conduct an evidentiary hearing to determine whether Plaintiff had violated LSU's policies and/or federal law. Plaintiff acknowledges she was notified of her right, and did in fact exercise her right, to object to any individuals nominated to serve on this committee.[71] Plaintiff also had notice of two pre-hearing meetings and participated in these meetings with the aid of her legal counsel.[72] On March 9, 2015, the committee conducted a twelve-hour hearing during which the committee heard testimony regarding Plaintiff's conduct as described above herein. Plaintiff was given an opportunity to address the committee and

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[68] *See* Rec. Doc. No. 31-4, p. 9.
[69] Rec. Doc. No. 1, ¶ 34.
[70] *Id.* ¶ 35.
[71] Rec. Doc. No. 31-1, pp. 4-5; Deposition of Buchanan, pp. 80-81.
[72] *Id.*

was allowed to submit exhibits and call witnesses; indeed, all of the witnesses on Plaintiff's witness list testified before the committee except for one released by Plaintiff.[73]

Procedural Due Process

Plaintiff contends committee members were not provided with materials or training on how to conduct the hearing or how to interpret the sexual harassment standards set forth in PS-73 and PS-95.[74] Plaintiff notes that the committee chair, William Stickle, testified that he understood the sexual harassment standard to be one of "offensiveness" and that sexual harassment is "in the eye of the beholder."[75] Further, Plaintiff alleges that neither Cancienne nor any of the students who allegedly lodged complaints against Plaintiff testified at the hearing.[76] Rather, Curry and Dean Andrew presented "second and third-hand information they had gathered."[77] Plaintiff also claims she did not receive a copy of the Human Resources Management report until just prior to the hearing.[78]

The Faculty Committee Findings & Recommendation

On March 20, 2015, although the committee found insufficient findings to establish an ADA violation,[79] the written findings of the faculty committee concluded that Plaintiff's conduct violated PS-73 and PS-95 "through her use of profanity, poorly worded jokes, and sometimes sexually explicit 'jokes'."[80] The committee further found that Plaintiff's conduct created a "hostile learning environment."[81] Despite these findings, the committee

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[73] *Id.*, Deposition of Buchanan, pp. 195-196.
[74] Rec. Doc. No. 36-1, ¶¶ 124-125, citing Rec. Doc. No. 35-6, pp. 43-44, Deposition of William Stickle, pp. 48-52.
[75] Rec. Doc. No. 35-6, pp. 47-48, Deposition of William Stickle, pp. 137-138.
[76] Rec. Doc. No. 36-1, ¶¶ 121, 129.
[77] Rec. Doc. No. 35-1, p. 17, citing Rec. Doc. No. 36-1, ¶ 130.
[78] Rec. Doc. No. 36-1, ¶ 123.
[79] *See* Rec. Doc. No. 65-3, p. 26.
[80] Rec. Doc. No. 31-2, p. 14,
[81] *Id.*

testified that his decision was based on his discussions with the Provost and legal staff.[90] Plaintiff also contends that, despite the fact that Reinoso's report confirmed that Cancienne's complaint had nothing to do with sexual harassment, Alexander testified that his recommendation was largely based on Cancienne's complaint,[91] and he "mistakenly believed the case was about more than just profanity, poorly worded jokes, or occasionally sexually explicit jokes."[92]

Plaintiff appealed Alexander's initial recommendation and requested an opportunity to address the Board.[93] Plaintiff was allowed to address the Board;[94] however, Alexander's recommendation remained unchanged.[95] Prior to the Board meeting, Plaintiff communicated with Board members via email and attached her supporting documentation.[96]

Plaintiff has acknowledged that LSU Policy PS-73 defines sexual harassment as:

> includes quid pro quo harassment and hostile environment harassment, which "has the purpose or effect of unreasonably interfering with an individual's academic, work, team or organization performance or creating an intimidating, hostile or offensive working environment.[98]

Plaintiff also acknowledged that PS-95 describes examples of hostile work environment, including "unwelcome touching or suggestive comments, offensive language or display of sexually oriented materials, obscene gestures, and similar sexually oriented behavior of an intimidating or demeaning nature."[99] However, LSU's policies are much more specific than what Plaintiff has acknowledged. Indeed, LSU expressly acknowledges that the policies are "not intended to infringe upon constitutionally guaranteed rights nor upon academic freedom."[100] The policies also include definitions that expound upon what conduct is deemed violative.[101]

Nevertheless, from Plaintiff's selective reference to the policies, she argues that LSU had begun interpreting these policies to mirror what the U.S. Departments of Education and Justice have called "a blueprint for colleges and universities" which defines sexual harassment broadly; however, neither LSU policy nor the "blueprint" implements the standards of Title VII which require actionable sexual harassment to be severe, pervasive, and objectively offensive. Plaintiff also claims that the Board was not provided with the hearing transcript and exhibits but was instead only given a few items selected by Monaco, including a legal memorandum addressing the constitutionality of LSU's anti-sexual harassment policy.[102]

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[98] *Id.* ¶ 24, quoting Rec. Doc. No. 1-2, p. 6.
[99] *Id.* at ¶ 25.
[100] Rec. Doc. No. 1-2, p. 2.
[101] *Id.* at p. 3.
[102] Rec. Doc. No. 36-1, ¶¶ 151, 153.
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On June 19, 2015, Plaintiff was dismissed by the Board. Plaintiff contends that, in response to her termination, the LSU Faculty Senate adopted a resolution to censure Alexander, Dean Andrew, and Provost Bell, which stated: "great universities have in place three significant measures to ensure the continued observance of academic freedom: Tenure; faculty governance; and due process;" and "all three measures have been violated in the case of Associate Professor Teresa Buchanan."[103]

Plaintiff filed this lawsuit asserting claims pursuant to 42 U.S.C. § 1983 for an alleged violation of her right to free speech and academic freedom under the First and Fourteenth Amendments to the United States Constitution. She also alleges a violation of procedural and substantive due process under the Fourteenth Amendment, a facial challenge to the sexual harassment policies implemented by LSU, and she seeks reinstatement, declaratory, and injunctive relief. The parties have filed cross-motions for summary judgment, which are now before the Court.

II. LAW AND ANALYSIS

A. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[104] "When assessing whether a dispute to any material fact exists, we consider all of the evidence in the record but refrain from making credibility determinations or weighing the evidence."[105] A party moving for summary judgment "must 'demonstrate the

[103] Rec. Doc. No. 36-5, p. 145, Faculty Senate Resolution 15-15. The Court notes that this document of prwasess p5

absence of a genuine issue of material fact,' but need not negate the elements of the nonmovant's case."[106] If the moving party satisfies its burden, "the non-moving party must show that summary judgment is inappropriate by setting 'forth specific facts showing the existence of a genuine issue concerning every essential component of its case.'"[107] However, the non-moving party's burden "is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence."[108]

Notably, "[a] genuine issue of material fact exists, 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'"[109] All reasonable factual inferences are drawn in favor of the nonmoving party.[110] However, "[t]he Court has no duty to search the record for material fact issues. Rather, the party opposing the summary judgment is required to identify specific evidence in the record and to articulate precisely how this evidence supports his claim."[111] "Conclusory allegations unsupported by specific facts … will not prevent the award of summary judgment; 'the plaintiff [can]not rest on his allegations … to get to a jury without any "significant probative evidence tending to support the complaint."'"[112]

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[106] *Guerin v. Pointe Coupee Parish Nursing Home*, 246 F.Supp.2d 488, 494 (M.D. La. 2003)(quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(en banc)(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. at 2552)).
[107] *Rivera v. Houston Independent School Dist.,* 349 F.3d 244, 247 (5th Cir. 2003)(quoting *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998)).
[108] *Willis v. Roche Biomedical Laboratories, Inc.,* 61 F.3d 313, 315 (5th Cir. 1995)(quoting *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).
[109] *Pylant v. Hartford Life and Accident Insurance Company*, 497 F.3d 536, 538 (5th Cir. 2007)(quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).
[110] *See Galindo v. Precision American Corp*., 754 F.2d 1212, 1216 (5th Cir. 1985).
[111] *RSR Corp. v. Int'l Ins. Co.*, 612 F.3d 851, 857 (5th Cir. 2010).
[112] *Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 713 (5th Cir. 1994)(quoting *Anderson*, 477 U.S. at 249).
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of Eleventh Amendment immunity."[118]

C. Prescription

Defendants Andrew, Reinoso and Monaco contend all claims against them are subject to dismissal because they are time-barred. The Supreme Court has held that the appropriate statute of limitations to be applied in all Section 1983 actions is the forum state's statute of limitations governing personal injury actions.[119] However, the date that a Section 1983 claim accrues is governed by federal law, not state law. Under federal law, the limitations period begins to run when the plaintiff "becomes aware that [she] has suffered an injury or has sufficient information to know that [she] has been injured."[120] Louisiana law provides a one-year liberative prescriptive period for personal injury claims.[121] Accordingly, Plaintiff was required to have filed suit within one year of the date that she became aware that she has suffered injury or had sufficient information to know that she has been injured.

Defendants rely on the decision in *Van Heerden v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College* wherein the court held that a plaintiff could not use the continuing violation theory for alleged acts of First

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[118] *New Orleans Towing Ass'n v. Foster*, 248 F.3d 1143, *3 (5th Cir. 2001)(citing *Wilson v. UT Health Ctr.*, 973 F.2d 1263, 1271 (5th Cir.1992))("*Pennhurst* and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities."), *cert. denied*, 507 U.S. 1004, 113 S.Ct. 1644, 123 L.Ed.2d 266 (1993); *Hays County Guardian v. Supple*, 969 F.2d 111, 125 (5th Cir.1992) ("The Eleventh Amendment does not bar state-law actions against state officials in their individual capacity."), *cert. denied*, 506 U.S. 1087, 113 S.Ct. 1067, 122 L.Ed.2d 371 (1993); *Crane v. Texas*, 759 F.2d 412, 428 n. 17 (5th Cir.) ("The Eleventh Amendment is obviously no bar to actions for damages against officials sued in their individual capacities[.]"), *cert. denied*, 474 U.S. 1020 (1985); *see also Hafer v. Melo*, 502 U.S. 21, 30-31, 112 S.Ct. 368, 116 L.Ed.2d 307 (1991)).

[119] *See Wilson v. Garcia*, 471 U.S. 261, 276–80 (1985) (superseded by statute on other grounds); *see also Hitt v. Connell*, 301 F.3d 240, 246 (5th Cir. 2002) (applying state personal injury statute of limitations to First Amendment retaliation claim).

[120] *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir.1987).

[121] *See Bourdais v. New Orleans City*, 485 F.3d 294, 298 (5th Cir. 2007)(internal citation omitted)(citing La. Civ.Code art. 3492).

Amendment retaliation.[122] The court held:

> As the Fifth Circuit has noted, though, "courts, including this one, are wary to use the continuing violation doctrine to save claims outside the area of Title VII discrimination cases."

harassment policies.[125]

The Court agrees that the First Amendment claims brought against Dean Andrew, Reinoso, and Monaco are prescribed.[126] There is no allegation that Monoco, Reinoso, or Dean Andrew actually terminated Plaintiff. Further, Plaintiff's attempt to distinguish *Van Herdeen* is without merit and without any jurisprudential support. The law is clear that she cannot aggregate discrete acts for First Amendment retaliation. Plaintiff's argument that "Defendants' various actions are part of a single course of conduct that applied an unconstitutional sexual harassment standard and culminated in"[127] her termination is a clear attempt to apply the continuing violation theory to her First Amendment retaliation claim. Such an argument is foreclosed under applicable jurisprudence.[128] The First Amendment claims against Dean Andrew, Reinoso, and Monaco are dismissed with prejudice.

D. Final Decision-Makers

Defendants also move for summary judgment on the grounds that they were not the final decision-makers who terminated Plaintiff's employment. Defendants note that only the Board is authorized to terminate employees, and Defendants maintain that, since none of them actually terminated Plaintiff, her claims against the Defendants individually

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[125] *Id.*, ¶ 28; Rec. Doc. No. 30.

[126] Alternatively, the Court finds that Defendants Andrew, Reinoso, and Monaco would be entitled to qualified immunity for the reasons set forth hereafter.

[127] Rec. Doc. No. 35-1, p. 36 (Brief, p. 29).

[128] *See Hamic v. Harris Cnty., W.C. & I.D*. No. 36, 184 Fed.Appx. 442, 447 (5th Cir. 2006) (holding that the continuing violations doctrine does not apply to claims of retaliation because "retaliation is, by definition, a discrete act, not a pattern of behavior"); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002)("Discrete discriminatory acts are not actionable if time barred," even when they are related to acts that are the subject of timely complaints."); *Vandenweghe v. Jefferson Parish*, No. 11-2128, 2012 WL 1825300, *6 (E.D. La. May 18, 2012)(court held in case where First Amendment retaliation claims were asserted, "to the extent [plaintiff] seeks redress for injuries known to have been sustained prior to August 25, 2012, the Court finds that these claims are facially time-barred.").

must be dismissed. In support of this argument, Defendants rely on the Fifth Circuit's decision in *Culbertson v. Lykos*, where the court held that, at the time, "[i]t was unsettled...whether someone who is not a final decision-maker and makes a recommendation that leads to the plaintiff being harmed can be liable for retaliation under Section 1983."[129] On the other hand, Plaintiff points out that the *Culbertson* court also stated, referring to a prior similar case: "We did not necessarily hold that there was no individual liability simply because the board made the decision."[130] Ultimately, if the recommendations by the Defendants constitute the reason that the Board terminated Plaintiff, then individual liability could attach.[131]

The decision in *Powers v. Northside Independent School District*[132] is applicable on this issue. In *Powers*, a terminated school principal and assistant principal sued the school district for alleged Section 1983 free speech violations under federal and Texas constitutions. Specifically, these plaintiffs alleged that Superintendent Woods "'used his influence as superintendent' to effect their terminations."[133] After a series of events which included complaints being filed against the plaintiffs relating to their administration of testing, plaintiffs' suspensions for suspected misconduct, and plaintiffs' filing of 8, 65 0(5179 T7.5(r. 2015)5.2().nc)-5..00

in their complaint that Woods "used his authority … as superintendent to create a bogus case for termination against Plaintiffs and, in conjunction with his influence over the Board of Trustees, effected the termination of Plaintiffs' employment by Board action."[136]

Woods challenged the sufficiency of these allegations and argued that such allegations were not actionable because they did not constitute "adverse employment actions" under Section 1983.[137] Essentially, Woods argued that the plaintiffs "failed to allege that [he] caused their termination."[138]

contract with Harris County. *See id*. at 621. Considering whether the contractors stated a claim against the ADA in her individual capacity, the *Culbertson* court discussed *Beattie* in detail, noting that "some later decisions ... have interpreted *Beattie* to hold that only final decision-makers may be held liable for First Amendment retaliation under § 1983." *Id*. at 626 (internal quotation omitted).

The *Culbertson* court reviewed the facts of *Beattie*, noting in particular that the board "fired Beattie for permissible, constitutional motives independently of Acton's and Jones's recommendation" and that those permissible motives were a "superseding cause" which "shield[ed] [Acton and Jones] from liability." *Id*. at 625 (quoting *Beattie*). In short, Acton and Jones's unproven retaliatory motives were "displaced by other motives." *Id.*

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The *Culbertson* court then pointed to *Jett v. Dallas Independent School District*, 798 F.2d 748, 758 (5th Cir.1986), a pre-*Beattie* decision which required only that a plaintiff show "an affirmative causal link" between the individual actor's conduct and the adverse employment action taken by the decision maker for individual liability to attach.

precedent that forecloses Sims's claim. In *Culbertson v. Lykos*, 790 F.3d 608 (5th Cir. 2015), the court held that, as of 2015, "[i]t was unsettled...whether someone who is not a final decision-maker and makes a recommendation that leads to the plaintiff being harmed can be liable for retaliation under Section 1983." *Id.* at 627. Because when Covington allegedly acted, "the law was not clearly established that a mere recommendation of termination to a higher authority who makes the final decision causes an adverse employment action" for purposes of First Amendment retaliation, qualified immunity precludes the relief Sims seeks. *See id*.

Sims cannot distinguish *Culbertson*. The plaintiff, Amanda Culbertson, like Sims, alleged that she was fired for asserting her First Amendment rights. *Id*. at 614–16. Culbertson, like Sims, sought damages under § 1983 from someone who recommended that she be fired but who did not have the authority to fire her. *Id*. The Fifth Circuit held that qualified immunity barred Culbertson's First Amendment claim against the nondecisionmaker. *Id.* at 627. Sims attempts to rely on language from *Culbertson* analyzing the underlying constitutional violation, *id.* at 625–26, but he ignores the opinion's qualified-immunity holding, *id.* at 627. (Docket Entry No. 86, Ex. 1 at p. 29). Under *Culbertson*, Sims's claim must fail.[142]

filing suit and has been dismissed as prescribed. In any event, both Andrew and Alexander are entitled to qualified immunity for Plaintiff's termination as set forth in *Culbertson* and *Powers* and for the reasons set forth below.

E. Qualified Immunity

Defendants also move for summary judgment on claims brought against them in their individual capacities on the assertion of the qualified immunity defense. Qualified immunity is addressed as a threshold matter, and its elements require an analysis of the substance of each constitutional claim raised. Qualified immunity protects government officials—from suit under 42 U.S.C. § 1983 and related statutes, including § 1985—performing "discretionary functions" when their actions are reasonable regarding the rights that the official allegedly violated.[143] Essentially, it is a defense available to "all but

decide.[160] The inquiry into whether Plaintiff's interests in speaking outweigh LSU's interests in regulating Plaintiff's speech is a factual determination conducted under the well-known *Pickering* balancing test.[161] If Plaintiff's interests in the prohibited speech

employee's speech, which contributes to the [disciplinary action], relates to a matter of public concern, the court must conduct a balancing of interests test as set forth in *Pickering v. Board of Education*."[169]

The Court finds that Plaintiff's use of profanity and discussions regarding her own sex life and the sex lives of her students in the classroom do not constitute First Amendment protected speech, are not matters of public concern, and are not, as claimed by Plaintiff, part of her overall pedagogical strategy for teaching preschool and elementary education to students as there is no summary judgment evidence to support such a claim. The Court finds support from the Fifth Circuit's decision in *J.D. Martin v. Parrish*,[170] a case wherein a college teacher brought a Section 1983 action against Midland College alleging that he had been discharged for exercising his First Amendment right to free speech. Martin, an economics professor at Midland, was disciplined after students complained about his constant use of profanity in the classroom. Despite administrative attempts to stop Martin's behavior, he persisted in cursing and ultimately delivered the following "outburst" in class in response to student complaints: "the attitude of the class sucks … is a bunch of bullshit," "you may think economics is a bunch of bullshit," and "if you don't

free speech, abridgement of an alleged right of academic freedom, and denials of due process and equal protection.[172] Although Martin won a jury verdict in his favor on his free speech claim, the Fifth Circuit reversed and noted: "Some of the jury interrogatories regarding the free speech issue asked for a balancing of Martin's language between its usefulness to his instruction and its disruptive tendency. Such balancing involves a question of law for the court."[173]

The Fifth Circuit noted that "[t]he 'rights' of the speaker are thus always tempered by a consideration of the rights of the audience and the public purpose served, or disserved, by his speech. Appellant's argument, by ignoring his audience and the lack of any public purpose in his offensive epithets, founders on several fronts."[174] The court held as follows regarding whether Martin's speech was a matter of public concern:

> There is no doubt that Martin's epithets did not address a matter of public concern. One student described Martin's June 19, 1984, castigation of the class as an explosion, an unprovoked, extremely offensive, downgrading of the entire class. In highly derogatory and indecent terms, Martin implied that

the trial testimony that Martin's conduct strongly influenced the students in that one student claimed he had "lost interest in economics as a result of Martin's belittling comments," and another student "expressed his reticence to asking questions in class for fear of Martin's ridicule."[177] Ultimately, the court held: "To the extent that Martin's profanity was considered by the college administration to inhibit his effectiveness as a teacher, it need not be tolerated by the college… ."[178] Further, distinguishing jurisprudence on which Martin relied, the Fifth Circuit stated:

> However, we hold that the students in Martin's classroom, who paid to be taught and not vilified in indecent terms, are subject to the holding of *Pacifica*, which, like *Cohen*, recognizes that surroundings and context are essential, case-by-case determinants of the constitutional protection accorded to indecent language. Martin's language is unprotected under the reasoning of these cases because, taken in context, it constituted a deliberate, superfluous attack on a "captive audience" with no academic purpose or justification.[179]

Although not binding, decisions from other federal appellate courts also support the Court's holding. The Sixth Circuit's decision in *Bonnell v. Lorenzo*[180] is particularly applicable to this case. The college professor in *Bonnell* was disciplined for his gratuitous in-class use of the words "pussy," "cunt," and "fuck," which had given rise to a sexual

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[177] *Id.*

[178] *Id.* at 585-86. The court noted in n 4: "Our conclusion that a public college teacher's classroom use of profanity is unprofessional and may be prohibited by the school relies on the judgment of the Midland College administrators who testified at trial. As the Supreme Court held in *Board of Education v. Pico*, 457 U.S. 853, 864–65, 102 S.Ct. 2799, 2806, 73 L.Ed.2d 435 (1982), federal courts should ordinarily decline to intervene in the affairs of the public schools, where the 'comprehensive authority of States and of school officials ... to prescribe and control conduct has historically been acknowledged'. This rule has been enforced in all but the most sensitive constitutional areas. Several Midland College administrators testified on the basis of strong educational credentials and years of experience in their vocation and in the local community. On their shoulders rest the college's educational standards and its utility as a publicly-supported institution. The federal courts thus appropriately respect the professional conclusion of those whose past and future careers depend upon the esteem due to Midland College. 'The determination of what manner of speech in the classroom ... is inappropriate properly rests with the school board.' *Bethel School District No. 403 v. Fraser*, 106 S.Ct. 3159, 3165 (1986)."

[179] *Id.* at 586.

[180] 241 F.3d 800 (6th Cir. 2001).

harassment complaint filed by one of the professor's students.[181] Because Bonnell's offensive language was “not germane to the subject matter,” the court concluded that he did “not have a constitutional right to use [these terms] in a classroom setting.”[182] Specifically, the university had issued a warning to the plaintiff as follows:

> Unless germane to discussion of appropriate course materials and thus a constitutionally protected act of academic freedom, your utterance in the classroom of such words as ‘fuck,’ ‘cunt,’ and ‘pussy’ may serve as a reasonable basis for concluding as a matter of law that you are fostering a learning environment hostile to women, a form of sexual harassment. Federal and state law imposes a duty on the College to prevent the sexual harassment of its students and therefore requires that the College discipline you if it finds that you have created a hostile environment.[183]

Despite this warning, the complaints about Bonnell continued. One student complained that his comments were “dehumanizing, degrading, and sexually explicit.”[184]

In support of its holding, the *Bonnell* court relied on and discussed in detail the Fifth Circuit’s decision in *Martin* and held:

> speech is conveyed—a classroom where a college professor is speaking to a captive audience of students, *see Martin*, 805 F.2d at 586, who cannot "effectively avoid further bombardment of their sensibilities simply by averting their [ears]." *Hill,* 120 S.Ct. at 2489. Although we do not wish to chill speech in the classroom setting, especially in the unique milieu of a college or university where debate and the clash of viewpoints are encouraged-if not necessary—to spur intellectual growth, it has long been held that despite the sanctity of the First Amendment, speech that is vulgar or profane is not entitled to absolute constitutional protection. *See Pacifica*, 438 U.S. at 747, 98 S.Ct. 3026. [185]

The Second Circuit's decision in *Vega v. Miller* is also applicable here.[186] In *Vega*, a professor terminated by a state college sued college administrators under Section 1983 for violation of his First and Fourteenth Amendment rights. The administrators moved for summary judgment on the basis of qualified immunity. The district court held the administrators were not entitled to qualified immunity, and they appealed. The background facts are as follows:

> In the summer of 1994, Vega taught a six-week composition course at the College's Summer Institute, a program designed for pre-freshmen who need remedial courses prior to matriculation. The students were male and female, aged 17 and 18. On July 21, Vega conducted a free-association exercise called "clustering," in which students were invited to select a topic, then call out words related to the topic, and finally group related words together into "clusters." According to Vega, the exercise is intended to help students reduce the use of repetitive words in college-level essays.
>
> The students selected "sex" as the topic for the "clustering" exercise. Vega understood the topic to be "sex and relationships." Vega then invited the students to call out words or phrases related to the topic, and he wrote at least many of their responses on the blackboard. The first words called out were, as Vega described them, "very safe words," such as "marriage," "children," and "wedding ring." As the exercise continued, the words called out included "penis," "vagina," "fellatio," and "cunnilingus." Toward the end of the exercise, with all but one of the students yelling and two standing on chairs, the following words and phrases were called out: "cluster fuck,"

“slamhole,” “bearded clam,” “fist fucking,” “studded rubbers,” “your [sic] so hard,” and “eating girls out.”[187]

Hardy is easily distinguished from the present case. There is no argument or jurisprudence before the Court which support Plaintiff's claim that using the word "pussy" and "fuck," or discussing her own or students' sex lives and/or reproductive decisions, are relevant to educating students on becoming teachers of preschool through third grade students. These words and/or discussions are not relevant to the subject matter being taught. Indeed, even *Hardy* makes clear that academic freedom protects only speech in the context of instructional communication of "an idea transcending personal interest or opinion which impacts our social and/or political lives."[199] Even in *Vega* and *Cohen*, the

and/or harassed by Plaintiff's conduct. Dr. Cheek reported that a "cohort" of between ten and twelve students complained that they felt sexually harassed by Plaintiff and submitted a written complaint in 2012 regarding Plaintiff's classroom language and conduct.[201] Curry testified that one student previously discussed felt "attacked" and fearful" following Plaintiff's classroom conduct.[202] Curry testified that, when asked if she wanted to speak to Plaintiff about the incident, this student responded: "I don't want to ever have her as a professor again."[203]

public concern. As such, “it is unnecessary for the court to scrutinize the reason for the discipline.”

2. Constitutional Challenge to LSU's Sexual Harassment Policies

Plaintiff also claims that LSU's sexual harassment policies are unconstitutional both facially and as-applied because they are overbroad and lack the necessary objective test for offensiveness. Defendants challenge Plaintiff's standing to seek a declaratory judgment that LSU's sexual harassment policies are unconstitutional pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57 and a permanent injunction prohibiting Defendants from enforcing these policies on LSU faculty and students. Defendants also contend LSU's policies are reasonable *per se* for purposes of qualified immunity because the policies are consistent with federal policies on sexual harassment. Defendants maintain that they reasonably believed Plaintiff's speech in violation of the policies was unprotected under the First Amendment. LSU's sexual harassment policies are allegedly consistent with the United States Department of Education's Office of Civil Rights ("OCR") and Department of Justice ("DOJ") "blueprint for colleges and universities throughout the country."[206]

Plaintiff argues she has standing to seek declaratory and injunctive relief against the Defendants because, although she no longer teaches at LSU, and may not return, "the collateral and future consequences of applying PS-73 and PS-95 to her, given the blemish on her record, afford her standing to challenge them."[207]

Plaintiff claims that any regulation of harassment aimed at preventing a hostile educational environment must be drafted and applied with narrow specificity to avoid violating the First Amendment. Plaintiff contends the sexual harassment definitions in

[206] *See* www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf.
[207] Rec. Doc. No. 35-1, p. 17, n. 21, citing *Esfeller v. O'Keefe*, 391 Fed. Appx. 337, 340 (5th Cir. 2010).

LSU's policies violate the basic constitutional requirements set forth by the Supreme Court's decision in *Davis v. Monroe County Board of Education*.[208] Further, Plaintiff contends LSU's policy definitions are effectively the same as those held unconstitutional by the Third Circuit in *DeJohn v. Temple University*.[209] Relying on the Third Circuit's language, Plaintiff contends that "unwelcome verbal … behavior of a sexual nature," without any requirement of objective offensiveness or interference with a reasonable person's access to his or her education, encompasses any potentially sex-related speech deemed "unwelcome" even if that person is uniquely sensitive. Citing the Supreme Court's decision in *Papish v. Board of Curators of Univ. of Mo.*,[210] Plaintiff maintains that, "[u]nder the First Amendment, a public institution may not broadly ban any sex-related speech based simply on its potential to offend."[211] Therefore, Plaintiff contends that LSU's policies lack the requirement of an objective test for offensiveness and are, thus, unconstitutional.

Plaintiff also contends Defendants' reliance on the OCR/DOJ blueprint is irrelevant as various university speech codes and enforcement actions have been invalidated despite the schools' invocation of their obligation to enforce such rules under civil rights statutes.[212] Plaintiff argues that the OCR/DOJ blueprint upon which LSU relies lacks necessary constitutional safeguards, and "[n]o 'interpretive guidance' from the federal government can alter these constitutional minimums."[213] Plaintiff contends that federal

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[208] 526 U.S. 629 (1999).
[209] 537 F.3d 301 (3rd Cir. 2008).
[210] 410 U.S. 667, 670 (1973).
[211] Rec. Doc. No. 35-1, p. 18.
[212] *Id.* at p. 19, citing *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ.*, 993 F.2d 386, 388-89 (4th Cir. 1993); *Saxe*, 240 F.3d at 205-06; *Rodriguez*, 605 F.3d at 709 ("First Amendment principles must Id.

agency interpretations cannot immunize universities against constitutional claims because such pronouncements are only controlling if they do not violate the Constitution.

emphasized by some witnesses admittedly did not constitute sexual harassment.[218] Indeed, most of what was deemed inappropriate did not play a role in the sexual harassment finding. Plaintiff claims that, ultimately, the sexual harassment finding "rested on a handful of scattered, isolated utterances."[219] Thus, Plaintiff contends Reinoso's report "finding" that she committed sexual harassment, based in large part on conduct not considered to be sexual harassment, "snowballed toward[s] Buchanan's dismissal."[220]

Plaintiff contends Dean Andrew relied on Reinoso's faulty report in setting the matter for a PS-104 hearing. Plaintiff further claims that Dean Andrew's memo to the Provost is "a confession not only of intent to fire a tenured professor based on pedagogy and performance, but that the only way he could think of to do so was through LSU's defective sexual harassment policies."[221] Next, she claims the hearing testimony only further advanced the same problematic information. Further, even though the committee found sexual harassment policy violations, it did not recommend termination.

Notwithstanding this recommendation, Plaintiff claims Defendants continued to pursue her termination based on "irrelevant evidence."[222] Plaintiff contends Alexander rejected the committee recommendation "despite having not read the PS-104 hearing transcript, not knowing the definition of sexual harassment the committee used, not understanding the constitutional standard, and generally not knowing what actually happened."[223]

harassment policies are not sufficiently defined or limited, and it is why she claims her termination was unconstitutional.

a. *Policy Language*

LSU Policy PS-73 defines sexual harassment as:

> speech and/or conduct of a sexually discriminatory nature, which was neither welcomed nor encouraged, which would be so offensive to a

an intimidating, hostile or offensive working environment."[227]

Further, PS-95 describes examples of hostile work environments, including "unwelcome touching or suggestive comments, offensive language or display of sexually oriented materials, obscene gestures, and similar sexually oriented behavior of an intimidating or demeaning nature."[228]

b. *Standing*

Defendants claim Plaintiff lacks standing to challenge the constitutionality of LSU's sexual harassment policies because she has been discharged and cannot be reinstated. Plaintiff relies on the Fifth Circuit's decision in *Esfeller v. O'Keefe*[229] in support of her standing to bring this claim.

In *Esfeller*, a student at LSU filed suit against the Chancellor and Board of Supervisors under Sections 1983 & 1988, seeking a preliminary and permanent injunction against enforcement of LSU's code of conduct. Esfeller had been charged with four non-academic misconduct violations arising from a dispute he had with his former girlfriend, who had filed a complaint with LSU police.[230] The former girlfriend alleged that Esfeller had persistently harassed and stalked her through various social networking sites and that he had physically confronted her.[231]

Esfeller met with a dean regarding the alleged violations, and the dean conducted an investigation which ultimately resulted in Esfeller being found in violation of the code

[227] *Id.* ¶ 24, quoting Rec. Doc. No. 1-2, p. 6 (emphasis added).
[228] *Id.* at ¶ 25.
[229] 391 Fed. Appx. 337 (5th Cir. 2010).
[230] *Id.* at 338.
[231] *Id.*

reflected on his academic record and he seeks to prevent the University from enforcing that punishment. **Thus, there are collateral or future consequences sufficient to satisfy the case or controversy requirement**.

when there is no “realistic danger” that the law will “significantly compromise recognized First Amendment protections of parties not before the Court.”

“substantially interfere with the work of the school or impinge upon the rights of other students.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). Thus, for Esfeller's facial challenge to succeed, the overbreadth must be “substantial in relation to the [provision's] legitimate reach.” *Hersh*, 553 F.3d at 762.

policy for overbreadth.[252] The anti-harassment policy in *Saxe* provided that:

> Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance

environment' prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone.[258]

However, the *Saxe* court stated:

> We do not suggest, of course, that no application of anti-harassment law to expressive speech can survive First Amendment scrutiny. Certainly, preventing discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest. *See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987). And, as some courts and commentators have suggested, speech may be more readily subject to restrictions when a school or workplace audience is "captive" and cannot avoid the objectionable speech. *See, e.g., Aguilar*, 87 Cal.Rptr.2d 132, 980 P.2d at 871–73 (Werdegar, J., concurring). We simply note that we have found no categorical rule that divests "harassing" speech, as defined by federal anti-discrimination statutes, of First Amendment protection.[259]

The *Saxe* court further stated:

> We do not suggest, of course, that a public school may never adopt regulations more protective than existing law; it may, provided that those regulations do not offend the Constitution. Such regulations cannot be insulated from First Amendment challenge, however, based on the argument that they do no more than prohibit conduct that is already unlawful.
>
> Moreover, the Policy's prohibition extends beyond harassment that objectively denies a student equal access to a school's education resources. Even on a narrow reading, the Policy unequivocally prohibits any verbal or physical conduct that is based on an enumerated personal characteristic and that "has the *purpose or effect* of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment." (emphasis added). Unlike federal anti-harassment law, which imposes liability only when harassment has "a systemic effect on educational programs and activities," *Davis*, 526 U.S. at 633, 119 S.Ct. 1661 (emphasis added), the Policy extends to speech that merely has the "purpose" of harassing another. This formulation, by focusing on the speaker's motive rather than the effect of speech on the learning environment, appears to sweep in those "simple acts of teasing

[258] *Id.* at 217.
[259] *Id.* at 209.

> and name-calling" that the *Davis* Court explicitly held were insufficient for liability.[260]

The Court finds the *Saxe* case factually distinguishable from the case at bar. First, the harassment policy in *Saxe* is far more broad than LSU's policies as set forth above. The *Saxe* policy contained a catch-all category of "other personal characteristics" upon which one could be harassed that is not present in the LSU policies, and it even prohibited speech directed at one's "values."[261] Thus, *Saxe* is applicable to the issue herein only to the extent that it holds that a "severe or pervasive" requirement should be in a policy.

Plaintiff also relies heavily on another Third Circuit decision, *DeJohn v. Temple University*,[262] and it is the strongest case in her favor. In *DeJohn*, the plaintiff filed suit against Temple University arguing that the following university policy governing sexual harassment was overbroad:

> For all individuals who are part of the Temple community, all forms of sexual harassment are prohibited, including ... expressive, visual, or physical conduct of a sexual or gender-motivated nature, when ... (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or (d) such conduct has the purpose or effect of creating an intimidating, hostile, or offensive environment.[263]

university's obligation to regulate the classroom speech of its students and that of its faculty. Indeed, the university has a responsibility and obligation to ensure that its students are not being harassed or abused by those it has hired to educate.

The Court acknowledges that the language in LSU's policies is similar to that in the policy at issue in *DeJohn*, but the policies are not exactly the same. Although they lack the exact words "severe" or "pervasive," LSU's policies do inject an objective standard and require a heightened level of offense by the phrase "so offensive to a reasonable person" in PS-73, which is further enhanced by the definitions and examples of prohibited conduct set forth in the policy as quoted above. The definitions and examples set forth in the policy reveal a requirement that the conduct be severe and pervasive.

The Court has also considered the Ninth Circuit's decision in *Cohen v. San Bernardino Valley College*[277] which is, in the Court's view, the most factually analogous to the case before the Court. In *Cohen*, a tenured professor brought a Section 1983 action against public community college officials in response to a student grievance claiming sexual harassment which allegedly violated the professor's First Amendment rights. Cohen taught a remedial English class wherein one student became offended by Cohen's repeated focus on topics of a sexual nature, his use of profanity and vulgarities,

controversial viewpoints.[279] Cohen proceeded to give the students an assignment discussing pornography, and the complaining student asked for an alternative assignment. When Cohen refused to accommodate this request, the student stopped attending Cohen's class and received 3e81e7f12 ra

frequent use of derogatory language, sexual innuendo, and profanity.[284] Ultimately, the Board found Cohen in violation of the policy, ordered him to take specific corrective actions, and warned him that further violation of the policy would result in further discipline "up to and including suspension or termination."[285]

The Ninth Circuit held that the university's policy was unconstitutionally broad and violated Cohen's constitutional rights:

> In this case, the College punished Cohen based on his teaching methods under the provision of the Policy which prohibits conduct which has the "effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment." Cohen, admittedly, uses a confrontational teaching style designed to shock his students and make them think and write about controversial subjects. He assigns provocative essays such as Jonathan Swift's "A Modest Proposal" and discusses controversial subjects such as obscenity, cannibalism, and consensual sex with children. At times, Cohen uses vulgarities and profanity in the classroom and places substantial emphasis on topics of a sexual nature.
>
> We do not decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy. Rather, we hold that the Policy is simply too vague as applied to Cohen in this case. Cohen's speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy's nebulous outer reaches to punish teaching methods that Cohen had used for many years. Regardless of what

present case is that LSU's policies include the objective standard "so offensive to a reasonable person," which was lacking in the *Cohen* policy.

The Second Circuit in *Vega*, discussed above, also addressed Vega's constitutional challenge to the college's sexual harassment policy. Vega claimed that the sexual harassment policy implemented against him was unconstitutionally vague and overbroad. The district court ruled that there was a factual issue as to whether Vega was terminated pursuant to the policy and denied summary judgment as to the administrators.[288] The district court distinguished the Ninth Circuit's decision in *Cohen*, finding that "the policy in that case was 'different and narrower' than the one at issue here."[289]

The Second Circuit reversed the district court and held:

> Vega's academic freedom claim asserts that the First Amendment prevented the Defendants from disciplining him for this conduct, and we have ruled above that, whether or not that claim is valid, the Defendants were objectively reasonable in believing that it did not. Since the Defendants

the Court must (1) first assess whether the speech deserves protection, (2) then

obligation to protect its students from harassment and abuse, and LSU's obligation to protect its academic and professional reputation in the community, the Court finds that the actions taken against Plaintiff were objectively reasonable under the facts of this case. The record in this case is replete with examples of vulgar and demeaning language and conduct by the Plaintiff. As succinctly stated in *Vega*, in view of the vulgarities and conduct expressed by Plaintiff, "no reasonable jury could fail to find that the Defendants would have terminated [Plaintiff] solely because they considered [her] conduct beyond the bounds of proper classroom performance, even if [LSU] had no sexual harassment policy."[297] Accordingly, summary judgment is granted in favor of Defendants on Plaintiff's constitutional challenges to LSU's harassment policies.

3. Alleged Due Process Violations

Plaintiff claims that the investigation, hearing, and termination deprived her of procedural and substantive due process under the Fourteenth Amendment to the Constitution.

a. Parties' Arguments

Plaintiff claims that her termination violated her Fourteenth Amendment right to due process. She contends that the "bare recital of steps LSU took"[298] cannot demonstrate the "notice and opportunity to be heard" to which she was entitled as a tenured professor. Plaintiff argues that the charges against her were "never clear, at any stage of the process"[299] because of Reinoso's classification of his "finding" as sexual harassment and how decision-makers thereafter relied on this "finding." Plaintiff claims

[297] *Vega*, 273 F.3d at 470.
[298] Rec. Doc. No. 35-1, p. 23.
[299] *Id.*

that, when she met with Reinoso initially, she was questioned but not given specific information regarding the allegations against her or those making the claims.[300] Further, the HRM-EEO findings that were later provided to her consisted only of conclusions and

Board.

Plaintiff claims none of this information was communicated to her during the investigation, and even once she received the full report, she was forced to guess which allegations implicated sexual harassment and which had been disregarded, depriving her of any opportunity to address these distinctions at any stage before any decision-maker. Plaintiff argues the fact that an explanation from Reinoso only came once he was deposed, many months after Plaintiff's termination, negated her ability to present her side as to specific charges lodged against her.

While Plaintiff acknowledges she received a hearing before the faculty committee and was permitted to appeal, she claims these steps cannot cure a due process violation because "an adjudication … tainted by bias cannot be constitutionally redeemed by review in an unbiased tribunal."[305] Plaintiff claims that bias is demonstrated here because Reinoso failed to particularize what conduct constituted sexual harassment and affected all subsequent levels of the decision-making process. Plaintiff further claims these "inherent deficiencies" are critical and do not constitute the notice and opportunity to be heard guaranteed by the Due Process Clause.[306]

Defendants claim Plaintiff was afforded due process, and summary judgment should be granted in their favor on this claim. Defendants note that Plaintiff has acknowledged that she: (1) was notified of the allegations against her, (2) participated in pretrial meetings, (3) was afforded an evidentiary hearing before the faculty committee,

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[305] Rec. Doc. No. 35-1, p. 32, quoting *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 333 (9th Cir.1995). The Court notes that the *Clements* case is non-binding and factually distinguishable from the present case.

[306] *Id*.

for such an action because they were within the Provost's and Dean Andrew's discretion, and LSU has a responsibility to protect its students and the PK-3 program.

Thus, Defendants contend they have established by summary judgment evidence that Plaintiff was afforded due process. Plaintiff's argument that she did not learn the specifics of the charges until Reinoso was deposed is contradicted by the plethora of documents that she has attached to her pleadings. It is undisputed that Dr. Cheek made Plaintiff aware of the allegations, allowed her a response, and Plaintiff was excluded from several school campuses "long before the PS-104 hearing."[315] Additionally, Reinoso, Curry, and Dean Andrew all testified at the committee hearing, and Plaintiff was permitted to question each of them. When Alexander rejected the committee's recommendation and recommended Plaintiff's termination to the Board, Plaintiff was permitted to appeal to Alexander and appear before the Board before the final decision was made.

b. *Procedural Due Process*

The United States Constitution provides that, "No State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Where a tenured public university faculty member is terminated, due process requires both notice and an opportunity to be heard.[316] The type of hearing necessary—the process due—is a function of the context of the individual case.[317] Due Process is not a rigid and fixed concept, but, rather, it is "flexible and calls for such procedural protections

[315] Rec. Doc. No. 46, p. 8, citing Rec. Doc. No. 35-6, Ex. 5, pp. 81 & 84.
[316] *Jones v. Louisiana Bd. of Sup'rs of University of Louisiana Systems*, 809 F.3d 231, 236 (5th Cir. 2015)(citing *Texas Faculty Association v. University of Texas at Dallas*, 946 F.2d 379, 384 (5th Cir.1991); *Russell v. Harrison*, 736 F.2d 283, 289 (5th Cir.1984)).
[317] *Id.*

as the particular situation demands."[318]

c. *Substantive Due Process*

"Public officials violate substantive due process rights if they act arbitrarily or capriciously."[322] A public employer's decision to terminate a tenured employee's property interest in continued employment is arbitrary or capricious if the decision "so lacked a basis in fact" that it may be said to have been made "without professional judgment."[323] The terminated employee "must show that the decision was 'made without a rational connection between the known facts and the decision or between the found facts and the evidence.'"[324]

The standard for establishing a substantive due process violation is "demanding"[325] because "a federal court is generally not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."[326] "The standard may be even more demanding in the context of higher education personnel

Plaintiff's substantive due process claim of bias is also unsupported by any summary judgment evidence. Plaintiff claims that Reinoso showed bias because he did not interview persons she believed should be interviewed. This does not establish bias for purposes of due process. The United States Supreme Court has held that an employer is entitled to limit his investigation and make credibility determinations in employment situations.[329]

The Fifth Circuit has held that, "the members of an adjudicative body have been found to be unconstitutionally biased in three circumstances:

> (1) where the decision maker has a direct personal, substantial, and pecuniary interest in the outcome of the case; (2) where an adjudicator has been the target of personal abuse or criticism from the party before him; and (3) when a judicial or quasi-judicial decision maker has the dual role of investigating and adjudicating disputes and complaints."[330]

Plaintiff has failed to present summary judgment evidence satisfying any of the above circumstances of bias. While Reinoso did investigate the allegations against Plaintiff and submitted findings, the faculty committee was not bound by these findings, and there is no evidence that Reinoso had any hand in the final decision reached by the committee or Alexander's recommendation to the Board.[331] The record is devoid of evidence of

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[329] *See Waters v. Churchill*, 511 U.S. 661, 680 (1994)(holding that a government employer may make credibility determinations and that its failure to interview additional witnesses who would have supported the plaintiff's claim was immaterial as "[m]anagement can only spend so much of their time on any one employment decision").

[330] *Klingler v. University of Southern Mississippi, USM*, 612 Fed. Appx. 222, 231 (5th Cir. 2015)(quoting *Valley v. Rapides Parish Sch. Bd*., 118 F.3d 1047, 1052 (5th Cir.1997) (citation omitted)).

[331] Even if Reinoso was considered an "adjudicator," Plaintiff has failed to overcome "strong presumptions of (1) the adjudicators' honesty and integrity and (2) that the decision was made in the public interest." *Id.*,

improper communications or predetermined conclusions by investigators. Plaintiff has offered no evidence of bias other than a decision that runs contrary to her subjective belief, which is not summary judgment evidence.

There is likewise no evidence that the decision to terminate Plaintiff was arbitrary or capricious because Plaintiff has failed to present evidence establishing that her termination lacked a basis in fact or was made without professional judgment. To the contrary, there is abundant evidence in the record, discussed at length above, establishing that Plaintiff engaged in conduct and used speech that violated LSU's anti-harassment policies, and the faculty committee's conclusion confirms this.

On the Plaintiff's claims of procedural and substantive due process violations, the Court is guided by the Fifth Circuit's decision in *Pastorek v. Trail*,[332] a case involving the termination of a tenured professor at LSU's Medical School ("LSUMS"). The plaintiff specialized in the treatment of high-risk pregnancies and performed consultations on patients referred by a local obstetrician.[333] The referring physician came under scrutiny and was subjected to investigatory hearings due to allegations that he was harming patients by over-utilizing high-risk procedures. Based on this development, the Chair of the Obstetrics-Gynecology department at the medical school encouraged the plaintiff not to participate in and support the referring physician's practices.[334] When the plaintiff refused, the Chair sent a formal letter of complaint and recommended the commencement of termination proceedings to the LSUMS's Chancellor, Dr. Mervin L.

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1 (1976) ("A showing that the Board was 'involved' in the events preceding this decision ... is not enough to overcome the presumption of honesty and integrity in policy makers with decisionmaking power.").
[332] 248 F.3d 1140, 2001 WL 85921 (5th Cir. 2001).
[333] *Id.* at *1.
[334] *Id.*

Trail ("Trail").[335]

The plaintiff was informed of the charges and provided a copy of the Chair's complaint. The plaintiff's obstetrics privileges were suspended, but he was allowed to continue teaching and practicing gynecology pending an investigation and hearing. A committee was appointed to review the charges against the plaintiff, and the committee sought independent review from another physician.[336] This review resulted in a finding that the plaintiff engaged in "very questionable obstetrical practices."[337] In response to this conclusion, the committee recommended further investigation, and Dr. Trail sought independent review by the American College of Obstetricians and Gynecology ("ACOG"). The ACOG found that sixteen of the nineteen consultations that it reviewed were unsatisfactory due to inadequate documentation, and two clearly fell below the standard of care required by a physician.[338]

Following this conclusion, Trail terminated the plaintiff's employment. The plaintiff appealed this decision to the Dean of LSUMS, the LSUMS Standing Appeals Committee, and the President of LSU. The plaintiff lost each appeal and claimed that all of the hearings were biased against him. The LSU Board of Supervisors ultimately ratified the decision to terminate the plaintiff.[339] The plaintiff sued under Section 1983 and alleged that his procedural and substantive due process rights were violated. The district court granted summary judgment in favor of LSU and the LSU defendants, and the plaintiff

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[335] *Id.*
[336] *Id.*
[337] *Id.*
[338] *Id.*
[339] *Id.*

> hearing biased against him. Just as in *Duke*, such participation does not constitute partiality, particularly where, as here, the allegedly partial individual did not participate in the actual decision to terminate. Summary judgment against appellant on his procedural due process claims was appropriate.[342]

The plaintiff also claimed that his substantive due process rights were denied because he was terminated without cause. The Fifth Circuit noted that, to prevail on such a claim, the plaintiff had to show that he had a property interest in his employment and that his termination was arbitrary or capricious.[343] Further, the court stated: "A public employer's termination of an employee does not violate substantive due process unless the determination 'so lacked a basis in fact that their decision to terminate him was arbitrary or capricious, or taken without professional judgment.'[344] The fact that reasonable minds could disagree on the propriety of the decision is insufficient to defeat a public official's qualified immunity."[345] The Fifth Circuit rejected the substantive due process challenge, finding as follows:

> In this case, Dr. Gary Cunningham, a physician not associated with LSUMS, determined that appellant engaged in "questionable obstetrical practices." An independent review by the ACOG resulted in a finding that, in two cases, appellant's care fell below the standard required of a physician. The ACOG also found that appellant's performance was unsatisfactory in another sixteen cases because of inadequate medical record documentation. Appellant was provided a hearing, an opportunity to defend himself, and several appeals. Appellant may not agree with Dr. Cunningham's or the ACOG's findings, but it cannot be said that the decision to terminate him lacked a basis in fact. Further, the extensive proceedings afforded appellant show that the decision to terminate him was not made arbitrarily or capriciously. Therefore, neither Trail nor Elkins violated appellant's substantive due process rights and summary judgment in their favor on this issue was appropriate.[346]

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[342] *Id.*
[343] *Id.*, citing *State of Texas v. Walker*, 142 F.3d 813, 819 (5th Cir.1998).
[344] *Id.* at *5, quoting *Walker*, 142 F.3d at 819.
[345] *Id.*, citing *Walker*, 142 F.3d at 819.
[346] *Id.*

III. CONCLUSION

For the reasons set forth above, Defendants' *Motion for Summary Judgment*[349] is GRANTED, and Plaintiff's *Motion for Summary Judgment*[350] is DENIED. Plaintiff's claims are dismissed with prejudice.

Judgment shall be entered accordingly.

IT IS SO ORDERED.

Signed in Baton Rouge, Louisiana on January 10, 2018.

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JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

[349] Rec. Doc. No. 30.
[350] Rec. Doc. No. 35.

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