UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

SANDRA HERNDEN,

an individual,

Plaintiff,

v.

CHIPPEWA VALLEY SCHOOLS BOARD OF EDUCATION, a government body, FRANK BEDNARD, in his official capacity as President of Chippewa Valley Schools and in his individual capacity, and ELIZABETH PYDEN, in her official capacity of Secretary of Chippewa Valley Schools and in her individual capacity.

Defendants.

Case No.: 2:22-cv-12313-MAG-DRG

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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COUNTER STATEMENT OF MATERIAL FACTS

The parties.

1. Admitted.
2. Admitted.
3. Admitted in part and denied in part. Admitted that the source cited by Defendants describes Moms for Liberty as an extremist group, but denied that characterization is accurate. Answering further, one third-party group's characterization of another, neither of which is a party to this case, is irrelevant, inflammatory, a non-material fact, and one which Plaintiff intends to challenge via Motion in Limine should this matter not be resolved on the pleadings.
4. Admitted in part and denied in part. Admitted as to Plaintiff's desire regarding in person learning and masking. Denied as to the overly-simplified characterization of Plaintiff's comment. While Plaintiff did compare masking and vaccine requirements to forcing Jewish individuals to wear stars during World War II, Plaintiff's larger point was the division she believed the Board's policies were causing in the community. Plaintiff's comments related to critical race theory and social emotional learning, which she viewed as a form of mandatory indoctrination analogous to requirements that Mein Kampf be read in Germany during the period in which Hitler was in power. Plaintiff's comment specifically described this book as "racist ramblings meant to stigmatize, belittle, divide, oppress, and segregate," and she later shared the personal story of a family member who had been sent to a

concentration camp for refusing to assist the Nazi regime.[1] While Plaintiff's comments were hyperbolic, they cannot fairly be interpreted as being in favor of Nazism.

5. Admitted.

6. Denied. PageID.249.

7. Admitted.

8. Admitted as to the fact Defendants have testified as such.

9. Admitted in part and denied in part. Denied that whether the Board of Education and the District are legally equivalent is a material fact. Admitted as to the fact that this Court previously concluded that the District, rather than the Board, is the proper party.

10. Denied. Plaintiff did not suggest that Defendant Bednard had the authority to adopt policy on behalf of the Board. Plaintiff was referring to Bylaw 0143.1, which is an official policy of Defendant Board designating him its spokesperson. Compare PageID.278 with PageID.374. Regardless, the question of whether Defendant Bednard was acting pursuant to official Board policy is a question of law.

    a. Admitted as to the fact Defendants have testified as such. Denied as to the legal conclusion those statements represent, which was expressly contradicted by this Court's Order of June 22, 2023. PageID.212 ("The Court agrees with Hernden that the District cannot escape allegations that the Board made a final decision potentially subjecting it to Monell liability merely because there is no vote or resolution on record.").

[1] Sandra Hernden, Public Comment to the Chippewa Valley School Board (Sept. 13, 2021), available at: https://www.youtube.com/watch?v=PlO5JFDvo68 (Time: 1:03:40).

b. Admitted as to the fact Defendants have testified as such. Denied as to the legal conclusion those statements represent for the reason described immediately above.

Factual background.

11. Admitted as to the fact the Reuters article was accurately quoted. Denied as to the implicit characterization that Plaintiff's activity amounted to threats of violence or constituted illegal harassment.

12. Admitted as to the fact the United States Attorney General issued a memorandum encouraging certain behaviors be reported. Denied as to Defendants' speculation regarding the motivation behind as the issuance of that memorandum.

13. Admitted the heated interactions occurred.

14. Admitted in part and denied in part. Admitted that the quoted language of Plaintiff's e-mail is accurate. Denied that this is a complete recreation of her e-mail, as it specifically omits a link to a Sixth Circuit case relating to a school board being found liable for violating parents' First Amendment rights at public meetings. PageID.24.

15. Admitted in part and denied in part. While Defendants accurately quote a portion of Plaintiff's e-mail, they omit her inclusion of the hyperlink to the case described immediately above. *Id*. Further denied that Plaintiff's e-mail contained a physical threat.

16. Admitted in part and denied in part. Admitted as to what Defendant Bednard's testimony stated. Denied as to the objective accuracy of his interpretations of Plaintiff's behavior, the intent behind Plaintiff's remarks, and Defendant Bednard's characterizations of his efforts to control Plaintiff's speech or Plaintiff's response to those efforts. Admitted that, as of September 13, 2021, the District did not have a mask mandate. Answering further, the issue

of masking was still a matter of public debate, with the District being one of the two largest districts without a mandate at the time, and subsequently adopted one.[2]

17. Admitted as to the fact Defendant Bednard has testified as such. Denied as to the characterization of Plaintiff's behavior.

18. Neither admitted nor denied, as Plaintiff does not know what Defendant Bednard viewed. Admitted as to the fact Defendant Bednard has testified as such.

19. Admitted that Plaintiff alleges two school board members sent e-mails violating her First Amendment rights. Denied as to Defendants' characterizations of her conduct.

20. Admitted, except as to Defendants' statement that the e-mail being referenced was "allegedly" sent by Defendant Pyden. See Ex. A, Defs.' Resp. to Plf's. Req. for Admis. ¶ 1 (admitting ownership of the e-mail account in question and acknowledging Defendant Pyden had reported Plaintiff to her supervisor).

21. Admitted as to what Defendant Pyden testified to.

22. Admitted, except as to Defendants' statement that the e-mail being referenced was "allegedly" sent by Defendant Bednard. *Id.*, ¶¶ 2(a)((iii)-(b) (admitting submission of the report to the DOJ and ownership of the e-mail account associated with the relevant e-mail). See also, PageID.26; Page ID.358, 361 (opposing counsel acknowledging that Defendant Bednard was the author of the e-mail).

23. Neither admitted nor denied, as this paragraph is purely a legal conclusion accompanied by a policy statement.

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[2]Minutes of the Chippewa Valley School Board, Jan. 10, 2022, available at: https://www.chippewavalleyschools.org/downloads/boe-agendaminutes/220110-final.pdf; French, Ron, *Six northern Michigan counties join Wayne with newest school mask mandates*, BRIDGE MAGAZINE (Aug. 27, 2021), available at https://www.bridgemi.com/talent-education/six-northern-michigan-counties-join-wayne-newest-school-mask-mandates.

24. Admitted that Plaintiff acknowledged individuals being threatened, as defined by law, should report such threats to law enforcement. PageID.362-63. Denied as to Defendants' characterization of Plaintiff's testimony.

25. Admitted as to what Defendants have testified to.

26. Denied. Plaintiff initially acknowledged that she did not have information about what members of the Board knew, but later stated that she was aware of a Board member who apologized for the Board. Page.ID.375-76.

27. Admitted as to the fact Defendants have testified as such. Denied as to their characterizations of Plaintiff's behavior.

28. Admitted in part and denied in part.

    a. Denied that Plaintiff posted Defendant Pyden's home address online. PageID.379. Admitted that Defendant Pyden stated to the contrary in her affidavit.

    b. Admitted as to what Defendant Pyden stated in her affidavit. Denied that Plaintiff was a party to, or encouraged, any of the behavior being referenced. See, e.g., PageID.378-79.

    c. Admitted. Answering further, Plaintiff specifically called for Defendant Pyden to be censured by the Board. PageID.345. Plaintiff denies any inference that her call to the Board to take official action condemning Defendant Pyden's behavior was intended as a general call to action to any non-party individual or group. See, e.g., PageID.163. Ex. B., 2021.02.08 E-mail to Board.

    d. Denied as to Defendants' characterization of the nature of Plaintiff's messages as personal or hateful. Admitted that Plaintiff argued with Defendant Pyden over her policy positions. See, e.g., PageID.17-22.

29. Admitted as to the fact Defendants have testified as such.

30. Admitted in part and denied in part. Admitted that various members of the Board testified they did not recall seeing Plaintiff's e-mails. Denied as to the fact that they did not see Defendant Bednard's e-mail, as the Board was provided a copy of that e-mail. PageID.24.

31. Admitted as to the fact Defendants have testified as such.

32. Admitted as to the fact Defendants have testified as such but denied as to the legal conclusion Defendants have reached regarding Plaintiff's conduct. Plaintiff further notes that the alleged conduct of Moms for Liberty, or its members, cannot be imputed to her in the absence of evidence of her direct involvement therein.

Response to Defendants' claim that Plaintiff did not suffer any adverse action.

33. Admitted.

34. Admitted in part and denied in part. Plaintiff denies she did not suffer any emotional injury, but admits she is not seeking to recover damages for those injuries. While Plaintiff suffered emotional turmoil, she has neither pled nor is attempting to recover for those injuries.

35. Admitted.

36. Admitted.

37. Admitted in part and denied in part. Admitted as to the fact that Plaintiff became aware of Defendant Pyden's e-mail to Harper Woods Police Department because her supervisor informed her as such. PageID.331. Denied as the to characterization that she was "reassured" there was no violation on departmental policy or that no adverse employment action would be taken. Plaintiff admits that she was informed she had been investigated after the investigation was completed. *Id*. At that time, Plaintiff was also informed that the Department had determined she did not violate departmental rules. *Id.* Admitted that Plaintiff was not disciplined or sanctioned as a result of that investigation. *Id.*

38. Admitted in part and denied in part. Admitted that Defendants Pyden and Bednard have First Amendment rights, despite that allegation being a legal conclusion. Admitted that Defendant Pyden's and Defendant Bednard's correspondence are the root of Plaintiff's retaliation claim. Answering further, Defendant Pyden's and Bednard's communication led to a workplace investigation and the threat of a criminal investigation. PageID.331, 348-49. Plaintiff's subjective knowledge of First Amendment law is irrelevant.
39. Admitted in part and denied in part. Defendant Bednard's correspondence with the DOJ expressly requests that the DOJ take steps to "curb" Plaintiff's behavior. PageID.26. Admitted that Defendant Pyden disclaimed an intent to cause an adverse action, but denied as to whether that disclaimer is credible. PageID.17.
40. Admitted that Defendant Pyden has testified as such. Denied as to Defendant Pyden's intent.

Response to Defendants' claim that Plaintiff's speech was not "chilled."

41. Admitted in part and denied in part. Admitted as to the fact Plaintiff appeared at Board meetings following the correspondence sent by Defendants Pyden and Bednard. Denied as to Defendants' characterization of the manner in which she addressed the Board.
42. Admitted in part and denied in part. Plaintiff does not claim that her speech was actually chilled by Defendants' conduct. Plaintiff's claim rests on the grounds that a reasonable person in her position would have been chilled, not that she actually was. Denied as to the ongoing implication that that the alleged actions of other Moms for Liberty members can be fairly attributed to Plaintiff without additional proofs.

Procedural history.

43. Admitted.
44. Admitted.

45. Admitted.

46. Admitted.

ARGUMENT

Even accepting the facts as advanced in Defendants' motion, Plaintiff is entitled to prevail as a matter of law. As to Defendant Pyden and Bednard, the facts are such that even if inferences are made in Defendants' favor, there can be no reasonable dispute as to the motivation behind their retaliatory acts. Similarly, Defendant Bednard's retaliatory correspondence was sent pursuant to an officially promulgated Board policy delegating him the authority to speak on behalf of the Board. Thus, the Board can be held legally responsible for his statements. Defendants' remaining arguments are based on a fundamental misunderstanding of applicable First Amendment law, and incorrectly apply that law based on subjective, rather than objective analysis. Under proper analysis, Plaintiff should prevail.

I. Defendant Pyden's and Bednard's acts were retaliatory.

Defendants' motion casts both Defendant Pyden and Defendant Bednard as the victims in this case by arguing that their actions were merely an exercise of their own protected speech. See, e.g., PageID.299-300. Had Defendant Pyden and Bednard had simply publicly denounced Plaintiff's conduct as private citizens, this argument may have some merit. Here, however, Defendants reported Plaintiff to authority figures with the power to take adverse action against her while invoking their status as public officials. This was not mere speech—it was actionable First Amendment retaliation.

A. Defendants' conduct extended beyond the exercise of their own First Amendment rights.

Had Defendant Pyden or Bednard merely denounced Plaintiff's conduct in such a way that would not reasonably lead to additional adverse action, that speech would have been arguably

protected. Similarly, if the Board itself condemned Plaintiff's rhetoric or conduct in an official statement, it would have been engaged in protected government speech. See generally, *DeCrane v. Eckhart*, 12 F. 4th 586, 594-95 (6th Cir. 2021). Instead, Defendant Pyden reported Plaintiff to her direct supervisor a mere week after media had reported that another parent had been terminated after a school board complained to her supervisor. PageID.245 at n. 5. Even if the Court finds Defendant Pyden's statements about not wanting Plaintiff to face adverse action to be credible, that disclaimer is ultimately irrelevant. Defendant Pyden can be held responsible for the reasonably foreseeable consequences of her actions. *King v. Zamiara*, 680 F. 3d 686, 697-98, n. 11 (6th Cir. 2012) (concluding a public official can be liable for the reasonably foreseeable consequences of her actions and stating "[a]s we further explained, to hold otherwise would allow an officer with retaliatory intent to insulate herself entirely from liability by writing a memo with trumped up allegations requesting no action at all but intending an rightfully expecting severe consequences to follow."); *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F. 3d 592, 609 (6th Cir. 2007).

Defendant Bednard, meanwhile, reported Plaintiff to the DOJ a mere day after the DOJ announced its intention to criminally investigate the conduct of parents at school board meetings. PageID.241-42. These actions amount to more than mere speech—they were targeted attempts to put pressure on Plaintiff to silence her. The Sixth Circuit has recognized that even speech that "would be proper if prompted by purely business or governmental concerns," would violate the First Amendment if "prompted by retaliatory motives." *Paige v. Coyner*, 614 F. 3d 273, 283 (6th Cir. 2010). Defendant Bednard can, and should, be held legally responsible for the reasonably foreseeable consequence of his actions, namely, a potential criminal investigation by the DOJ. *Siggers-El v. Barlow*, 412 F. 3d 693, 702 (6th Cir. 2005) ("Similarly, a court may consider the reasonably foreseeable consequences that would follow from a retaliatory act in considering

whether the plaintiff suffered an adverse action."). That consequence is made only more foreseeable by Attorney General Garland's memo, which both invited reports and expressed a willingness to conduct criminal investigations. Defendant Bednard should not be able to escape the natural consequences of his actions. The law does not permit government officials to induce third parties to quell dissent, and then claim the protection of the First Amendment after doing so.

Plaintiff is not arguing that Defendants' speech, without more, is inherently actionable, nor is she claiming that it would become such if spoken with ill-intent. Plaintiff's claim is centered on the idea that Defendants' speech, even if free of malice, was intended to retaliate against her for speaking out against government policy. This case is not a matter of two public officials expressing their opinions, but rather one in which those officials' speech was an implied threat to silence Plaintiff through reasonably foreseeable consequences. The Sixth Circuit has recognized that, while malice alone is not enough to support a constitutional claim, "[c]ircumstantial evidence, like the timing of events or the disparate treatment of similarly situated individuals, is appropriate" when considering the motivations behind an allegedly retaliatory act. *Sensabaugh v. Haliburton*, 937 F. 3d 621, 629 (6th Cir. 2019). Here, Plaintiff has identified such evidence, including the timing of both Defendant Pyden's and Defendant Bednard's correspondence, as well as the fact that both specifically reference Plaintiff's speech on matters of public interest in their complaints. See, e.g., PageID.236-38, 241-42.

The cases Defendants cite do not alter the conclusion that their correspondence was not protected speech by government officials acting in a personal capacity. *Dixon v. Burke Cnty.*, 303 F. 3d 1271 (11th Cir. 2002), is not a First Amendment retaliation case, instead dealing with an equal protection claim. The court rejected that claim due to insufficient evidence that one potentially-biased member of a public body had tainted the vote of a twelve-member board. *Lynch*

v. Ackley, 811 F.3d 569 (2d Cir. 2016) cuts against Defendants' position, as it related to a public official's speech in a private capacity, on a matter of public interest, rather than speech undertaken in an official capacity. In *Theyerl v. Manitowoc Cnty.*, No. 15-C-440, 2015 WL 7779210 (E.D. Wis., Dec. 2, 2015), the plaintiff's claim failed because a reasonable person would not have been chilled by the allegedly adverse action, and the nature of the alleged retaliatory act were mere statements that could not reasonably be expected to lead to adverse action.[3] None of these cases parallel the circumstances of this case, in which Defendants' speech exposed Plaintiff to the potential loss of employment and a criminal investigation.

B. It was reasonably foreseeable that Defendants' correspondence would lead to adverse action against Plaintiff.

Defendants' assertion that "mere criticism is not actionable" is inapplicable to this case. Defendants Pyden and Bednard did not merely criticize Plaintiff—they specifically took actions aimed at silencing her speech through threats to her employment and a potential criminal investigation. By doing so, they trespassed beyond the behavior tolerated by the Constitution. The Sixth Circuit has consistently held that public officials can be held responsible for retaliation if the consequences of their actions are reasonably foreseeable, even if it is a third-party that performs the ultimate retaliatory act. See, *Powers*, 501 F. 3d at 609 ("Even if a third party is the immediate trigger for the plaintiff's injury, the defendant may still be proximately liable, provided the third-party's actions were foreseeable."); *King*, 680 F. 3d at 696 ("[A] person who sets in motion an adverse action can be liable for retaliation for the reasonably foreseeable consequences of his

[3] Plaintiff notes that none of the cases Defendants cite when discussing the boundaries of permissible speech by government officials are binding on this court. See, e.g., PageID.299-300. The same is true for the cases Defendants cite when arguing that a retaliation claim based on speech must be accompanied by a "threat, coercion, or intimidation." PageID.301-05. Binding Sixth Circuit precedent has foreclosed these arguments, which are not addressed by Defendants' brief. See Section I of this Brief.

actions.") (citation omitted); *Paige*, 614 F. 3d at 281-282 (holding that a public official can be responsible for the retaliatory act of a third-party when that act is reasonably foreseeable). Even if this Court is persuaded by Defendants' argument that speech must be accompanied by "a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow," those circumstances have been met here. PageID.301, citing *Suarez v. McGraw*, 202 F.3d 676, 688 (4th Cir. 2000).

The Sixth Circuit has found that reports to other government agencies can give rise to a retaliation claim. In *Wenk v. O'Reilly*, 783 F. 3d 585, 594 (6th Cir. 2015), the Sixth Circuit recognized that a report of child abuse to an outside agency was a sufficiently adverse action to support a retaliation claim. It reached a similar conclusion in *Jenkins v. Rock Hill Local School District*, 513 F. 3d 580 (6th Cir. 2008) regarding a report by public officials to child services. See also, *A.C. ex rel. J.C. v Shelby Cnty. Bd. of Educ.*, 711 F. 3d 687 (6th Cir. 2013). Courts have found a variety of circumstances constitute adverse action, including when public officials: instigate a criminal investigation (*Raboczkay v. City of Taylor*, 2019 WL 6254870 (E.D. Mich. Nov. 22, 2019)), threaten a governmental investigation (*Wurzelbacher v. Jones-Kelley*, 675 F. 3d 580, 584 (6th Cir. 2012)), threaten an individual's economic livelihood, (*Fritz v. Charter Twp. of Comstock*, 592 F. 3d 718 (6th Cir. 2010) (concluding that "[a] person of ordinary firmness would be deterred from engaging in protected conduct, if as a result, a public official encouraged her employer to terminate the person's contract or to have her change her behavior."); *McBride v. Vill. of Michiana*, 100 F. 3d 457, 459-61 (6th Cir. 1996) (same), and defamation (*Fritz*, 592 F. 3d at 726). Both Defendant Pyden's and Defendant Bednard's complaints transgressed Plaintiff's rights in a manner that has been clearly established as unconstitutional.

C. Plaintiff faced adverse action as a result of Defendants' conduct

Defendants also err as to what constitutes an cognizable adverse action in First Amendment retaliation cases. Defendants cite *Harmon v. Beaumont Independent School District*, No. 1-12-CV-571, 2014 WL 11498077 (E.D. Tex. Apr. 7, 2014) for the proposition that a report to an individual's employer is insufficient to give rise to First Amendment retaliation because the only adverse action that resulted was a discussion between that individual and their supervisor. PageID.302-03. That case is factually distinguishable, as the plaintiff's complaints in that case were not related to matters of public interest. *Harmon*, 2014 WL 11498077 at *4. Similarly, the complaint to the plaintiff's employer in *Harmon* was merely that she was disrupting traffic flow. *Id*. Here, meanwhile, Defendant Pyden essentially accused Plaintiff of conduct unbecoming of an officer and suggested that she was a racist. PageID.17. Defendant Bednard, meanwhile, asked that Plaintiff be criminally investigated by federal authorities. The reasonably foreseeable consequences of these claims are orders of magnitude higher than those faced by the *Harmon* plaintiff. Had a violation of departmental rules been found based on Defendant Pyden's complaint, Plaintiff would have faced discipline and possible termination. Similarly, Defendant Bednard's correspondence not only directly requested that the DOJ "curb" Plaintiff's exercise of her protected First Amendment speech, but simultaneously exposed her to a potential criminal investigation. PageID.26. Both consequences are an actionable adverse action under the First Amendment.

D. The fact that Plaintiff was not actually chilled from exercising her First Amendment rights is not dispositive.

Defendants also assert that the fact Plaintiff was not actually chilled in the exercise of her First Amendment rights is fatal to her claim. PageID.302. Defendants misunderstand the applicable legal test. As recognized by the Sixth Circuit in *Thaddeus-X*, the relevant standard is an objective test which asks "whether an official's acts 'would chill or silence a person of ordinary firmness'

from future First Amendment activities." *Thaddeus-X v. Blatter,* 175 F. 3d 378, 397 (6th Cir. 1999), quoting *Crawford-El v. Britton*, 93 F. 3d 813, 826 (D.C. Cir. 1996). The question is not whether a particular plaintiff is chilled, but rather whether a person of ordinary firmness would be. Thus, the fact that Defendants' actions did not chill Plaintiff has no legal bearing. The relevant test does not concern itself with an individual plaintiff's circumstances, fortitude, employment, or any other factual detail. If the retaliatory act would have chilled an ordinary person from the further exercise of protected rights, that is sufficient to establish an appropriately adverse action. See, *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F. 3d 807, 822 (6th Cir. 2007) ("[T]he Sixth Circuit has never required that an individual plaintiff actually be chilled in the exercise of his First Amendment rights to succeed on a retaliation claim."); *Hill v. Lappin*, 630 F. 3d 468, 472 (6th Cir. 2010) (concluding that actual deterrence need not be show to prevail in a retaliation claim) (citation omitted).

E. Defendants cannot rely on government speech as a defense

Somewhat confusingly, Defendants have relied on cases concerning the protections surrounding government speech in its arguments that Defendant Pyden's and Defendant Bednard's speech was protected. See, e.g., PageID.299-300. At the same time, Defendants deny that Defendant Pyden and Defendant Bednard were acting on behalf of the Board. PageID.310-11. Defendants cannot have it both ways. If Defendant Pyden's and Defendant Bednard's speech was, in fact, government speech, then they were not acting in their individual capacities. "[W]hen public officials make statements pursuant to their official duties, the employees are not speaking a citizen for First Amendment purposes…." *Weisbarth v. Geauga Park Dist.*, 499 F. 3d 538, 543-44 (6th Cir. 2007). Further, when personal matters are "aired by government officials intent on penalizing a citizen for exercising her First Amendment rights…" a claim under 42 U.S.C. § 1983 is appropriate. *Mattox v. City of Forest Park*, 183 F. 3d 515, 520 (6th Cir. 1999).

Alternatively, if Defendants Bednard and Pyden were engaged in government speech, then they were necessarily speaking on behalf of the Board. Defendants Pyden and Bednard cannot claim the protections available to government speech unless their actions were undertaken in an official capacity (thereby subjecting the Board to liability under *Monell v. Dept. of Soc. Serv. of City of New York*, 436 U.S. 658 (1978)).[4] Put another way, the government speech cases cited by Defendants are either inapplicable to this case, or subject the Board to liability for their actions.

II. The law has clearly established that retaliating against a citizen for protected speech is unconstitutional.

Sixth Circuit precedent is clear that retaliation against an individual for exercising protected First Amendment rights is a constitutional violation. This is true for both retaliation which jeopardizes a plaintiff's future employment, and that which subjects a plaintiff to the risk of a criminal investigation.

Defendants argue that it is not clearly established that Plaintiff has a right to be free from First Amendment retaliation under the facts of this case. But Defendants take too narrow of view of when a constitutional violation is clearly established. A public official "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). A right can be clearly established even if there is not a case that directly parallels the facts of a specific case, so long as existing precedent has placed the constitutional question beyond debate. *Morgan v. Fairfield Cty., Ohio*, 903 F. 3d 553, 564 (6th Cir. 2018) (subsequent history omitted). A right is clearly established when "existing precedent has placed

[4] This Court has previously determined that the Board cannot be liable for Defendant Pyden's actions under *Monell*. Plaintiff does not currently believe that Defendants intended their arguments relating to government speech to be interpreted as a tacit admission that she was acting on behalf of the Board and does not intend to make that argument considering this Court's prior ruling. Plaintiff would, however, respectfully request the opportunity for additional briefing on this point if Defendants are, in fact, making such an admission.

the statutory or constitutional question confronted by the official beyond debate." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). Such is the case here.

The right to be free from retaliation by public officials is clearly established. *Zilich v. Longo*, 34 F. 3d 359, 364 (6th Cir. 2007). "[T]here is no justification for harassing people for exercising their constitutional rights," and as such, anything beyond de minimis acts can give rise to a retaliation claim. *Siggers-El*, 412 F.3d at 701; see also *Thaddeus-X*, 175 F. 3d at 398. In reporting Plaintiff to her employer, and later the DOJ, Defendants violated that right.

In *Paige*, the Sixth Circuit was asked to evaluate whether an official's false statements to a citizen's employer, which resulted in her being terminated, constituted retaliation under the First Amendment. 614 F.3d. 273, 281 (6th Cir. 2010). The Court concluded that job loss was a severe enough consequence that it would deter a person of ordinary firmness from speaking at public meeting. *Id.* The Court extended this holding in *Fritz*. There, a township supervisor contacted a citizen's employer and suggested that her continued speech at public meetings could jeopardize future business with the township. *Fritz*, 592 F. 3d at 725. The Court concluded that such a threat, even without an actual loss of employment, was likely to deter a person of ordinary firmness from continuing to engage in protected activities. *Id*. at 728; see also, *McBride*, 100 F.3d at 459-61, abrogated on other grounds by *Fritz*, 592 F. 3d at 724, n. 3. . The Sixth Circuit has clearly established that threats to economic livelihood are sufficient to give rise to liability under First Amendment retaliation.

The same is true of threats of criminal investigations. This Court has repeatedly held that criminal investigations will deter a person of ordinary firmness from continuing to engage in protected First Amendment Activity. *Raboczkay*, No. 19-10255, 2019 WL 6254870 at *4 (E.D. Mich. Nov. 22, 2019), PageID.272-73; *Haggart v. City of Detroit*, No. 2:19-CV-13394, 2021 WL

5040293, at *4 (E.D. Mich. Oct. 27, 2021), PageID.275-76. The same is true of a threatened criminal investigation. *Wurzelbacher*, 675 F. 3d at 584. Even investigations falling outside the criminal process can deter a person of ordinary firmness if they have "powerfully dissuasive" consequences that would chill protected activity. *Wenk*, 783 F. 3d at 595 (finding a report of child abuse to be sufficient deterrence to engaging in protected activity). Defendant Bednard's complaint exposed Plaintiff to a federal criminal investigation, which has been clearly established to be a constitutional violation under relevant precedent.

III. Defendant Pyden's and Defendant Bednard's correspondence were not efforts to address threatening behavior.

Defendants have claimed that Defendants Pyden and Bednard acted out of concern that Plaintiff was a threat to the District, or to them personally. PageID.309. They then assert that Defendants' affidavits are unrebutted, and therefore must be accepted. Defendants have adopted an overly narrow reading of the evidence.

Both Defendant Pyden's and Defendant Bednard's communications speak for themselves. Neither focuses on threats or threatening behavior. Defendant Pyden's e-mail to Chief Smith focused on Plaintiff's "disrespect," "anger" and "veiled racism." PageID.228. She then asked that Chief Smith, Plaintiff's supervisor, offer her guidance on how she should conduct herself in the community. *Id.* At no point did Defendant Pyden express concern for her safety, or even assert that she was being individually harassed; instead the focus was on Plaintiff's pushback to Board policy. *Id.* Had these threats been the motivating factors behind Defendant Pyden's complaint, it stands to reason they would have been prominently featured in her complaint.

The same is true of Defendant Bednard. Defendant Bednard's complaint refers to Plaintiff's challenges to those with opposite viewpoints, her attempts to promote "her agenda," and the disruption caused by Moms for Liberty at the Board's meetings. PageID.24. Although

Defendant Bednard claims Plaintiff's conduct at meeting was threatening or harassing, he offers no specific examples of such behavior other than Plaintiff making a comparison between the Board and the authoritarianism of Nazi Germany. *Id.* The supposed threat giving rise to Defendant Bednard's complaint to the DOJ was an implied threat of legal action. PageID.377-78.

Neither complaint describes behaviors that pose a threat to safety or property. In fact, there are not even allegations of the same. The substance of both complaints focuses on Plaintiff's protected speech. That alone is evidence of retaliatory motive.

IV. Defendant Board is liable for Defendant Bednard's correspondence, as it was sent pursuant to official Board policy which delegated him that authority.

Defendant Bednard's correspondence with the DOJ was sent pursuant to official Board policy for which the Board is liable under *Monell*. Liability can be established under *Monell* based not only on the existence of an illegal official policy or legislative enactment, but also when an official is endowed with the final authority to make retaliatory decisions. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481-83 (1986).

Defendant Board has adopted Bylaw 0143.1, which governs "public expression of board members." PageID.278. That bylaw explicitly states that "[t]he Board President functions as the official spokesperson for the Board." *Id.* While the bylaw acknowledges that individual Board members may make public statements on school-related matters, it also tightly regulates those circumstances. *Id*. To avoid the implication that the statements made by individual members of the Board represent the expression of the Board itself, Board members speaking in a personal capacity are instructed to identify their message as not reflecting an official policy of the Board. *Id.*

Defendant Bednard's correspondence contained no such declaimer. His use of plural pronouns, and his expression that any action the DOJ would take to "curb" Plaintiff's speech would be appreciated by "our Board" indicate that he was acting pursuant to his expressly delegated

authority as Board spokesperson. As spokesperson, Defendant Bednard is a final policymaker for purposes of *Monell*, as he has been delegated the authority to speak on behalf of the Board. His complaint may "fairly be said to represent official policy." *Monell*, 436 U.S. at 694. Defendant Bednard's single retaliatory act, undertaken pursuant to official policy, is sufficient to impose liability. *Pembaur*, 475 U.S. at 480.

RELIEF REQUESTED

For the reasons stated above, Plaintiff requests that this Court deny Defendants' motion for summary judgment, and grant Plaintiff's motion for the same.

Respectfully Submitted,

/s/ Stephen Delie
Stephen Delie (P80209)
Attorney for Plaintiff
Mackinac Center for Public Policy

November 14, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

SANDRA HERNDEN,

an individual,

Plaintiff,

v.

CHIPPEWA VALLEY SCHOOLS BOARD OF EDUCATION, a government body, FRANK BEDNARD, in his official capacity as President of Chippewa Valley Schools and in his individual capacity, and ELIZABETH PYDEN, in her official capacity of Secretary of Chippewa Valley Schools and in her individual capacity.

Defendants.

Case No.: 2:22-cv-12313-MAG-DRG

PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

INDEX OF EXHIBITS

Exhibit	**Description**
A	Defs.' Resp. to Plf's. Req. for Admis.
B	February 8, 2021 E-mail.

Exhibit A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SANDRA HERNDEN,

Plaintiff,

v

CHIPPEWA VALLEY SCHOOLS, FRANK BEDNARD and ELIZABETH PYDEN,

Defendants.
_____/

Judge Mark A. Goldsmith
Magistrate David R. Grand
No. 22-12313

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ANSWERS TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Defendants, CHIPPEWA VALLEY SCHOOLS, FRANK BEDNARD and ELIZABETH PYDEN, by and through their attorneys, GIARMARCO, MULLINS & HORTON, P.C., state their responses to Plaintiff's Request for Admissions as follows:

1. For Defendant Pyden only:

   a. In your December 11, 2020 e-mail to Chief Vince Smith, you stated that you did not expect him to take any adverse action against Plaintiff. Please admit that this e-mail was intended to lead to some action being taken to deter Plaintiff from continuing her conduct. If you deny this, please explain your

reasoning for sending this e-mail.

ANSWER: Denied in the manner alleged and because it is untrue. Plaintiff (and/or her proxies) subjected Ms. Pyden to severe and pervasive harassment, which included (1) defamatory and threatening statements, (2) threats to "ruin" Ms. Pyden, (3) calling her obscene names, such as "special kind of stupid," "libtard," "bitter bitch," and "Nazi", (4) persons parking outside of her home, for the sole purpose of harassing and threatening Ms. Pyden. These actions were directed against Ms. Pyden outside of Board Meetings, as well as at board meetings. Ms. Pyden simply wanted the threatening behavior to stop, and had no intention of Plaintiff's employer taking any adverse employment action. Defendants now know, however, that Plaintiff has previously been disciplined by her employer for imprudent social media usage. Additionally, law enforcement agencies are tasked with investigating potential threats and/or criminal harassment. Ms. Pyden wanted to make sure her concerns were reported, so that they could be looked into by appropriate authorities, should those authorities believe it appropriate to do so. School employees and officials are routinely criticized (and sometimes sued), for not reporting potential threatening behavior, so Ms. Pyden erred on the side of protecting the safety and welfare of the District's stakeholders.

b. Please admit that the e-mail address "elizabethpyden@sbcglobal.net" is one of your personal e-mail accounts.

Admit.

c. Please admit that BPyden@cvs.k12.mi.us was your official Board of Education e-mail during the time period you were a member of that Board.

Admit.

2. For Defendant Bednard only:

a. In your October 4, 2021 e-mail title "DOJ Investigations for Threatening/Intimidating behavior at School Board Meetings", you stated "We know that they have not gained any traction as it is the same 10-15 people that show up every meeting to intimidate, threaten, and harass. Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community." Please admit:

i. The behavior referenced by Defendant Bednard was Plaintiff's conduct at Board meetings and her communications with the Board;

ANSWER: Denied in the manner alleged and because it is untrue. Plaintiff, and her colleagues affiliated with MOL, engaged in harassing behavior outside of board meetings and directed at single board members, not just the "Board".

ii. The statement "Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community" was intended to encourage the DOJ to investigate Plaintiff's conduct.

ANSWER: Denied in the manner alleged and because it is untrue. Based on guidance from the NASB and the DOJ, I erred on the side of caution. Law enforcement agencies are tasked

Exhibit B

From: sandra hernden
To: Delie, Steve
Subject: Fwd: Formal complaint
Date: Tuesday, June 21, 2022 10:54:20 AM
Attachments: DOC122120-12212020142901.pdf

Sent from my iPhone

Begin forwarded message:

From: sandra hernden <herndens883@yahoo.com>
Date: February 8, 2021 at 7:13:56 PM EST
To: psibley@cvs.k12.mi.us, dbrosky@cvs.k12.mi.us, daquino@cvs.k12.mi.us, apatzert@cvs.k12.mi.us, lcardamone@cvs.k12.mi.us, rroberts@cvs.k12.mi.us, fbednard@cvs.k12.mi.us
Subject: Formal complaint

My name is Sandra Herndon a parent of two CVS students. “The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the first amendment guards“

With that being said the CVS school board is no exception. It is your job as an elected official to except scrutiny at every level. The nefarious malicious and pre-meditated ask taken by this board against me because I dared to voice my opinion and scrutinize your decisions has undoubtedly called into question the dignity and integrity and of the school board. The X taken part by the school board shows the lack of respect for concerned parents. This board has shown how far it will go to silence anyone who defies them, The extent they will go to take away the First Amendment rights of parents and how willing they are to push a false narrative. As a board members know I have been an advocate a face-to-face learning voicing my opinion via emails. I never identified myself as a public employee bus allowing me to speak not only as a taxpayer but are concerned and loving parent exercising their First Amendment right. And December 11, 2020 Liz Pyden Send an email to my chief of police regarding my emails. In her email she identified herself as a CVS school board member and represented the school board taking away her right as a private citizen and acting in her official capacity. Liz Pyden stated that I was a racist, apparently because of my job as a police officer. After all racist cops get fired. Obviously when she doxed me and couldn’t find anything negative about me on the Internet that was her fallback response. She contributed to the false narrative across the nation regarding lawn Forssman officers.As if officers are worried enough about things these days now we can’t even voice our opinions as a concerned and loving parent. Liz also demanded I be stripped of my awards that show my hard work and dedication to my community. She also demand she take part in deciding the disciplinary actions that would be taken against me. This is prima facia Evidence that the school board and its members will stop at nothing to push their agenda and silence those who defined them. The petulant behavior of Lis Pyden needs to be addressed by the school board. Liz is

in an employment attorney and knew what she was doing. Also as a sworn attorney and member of the school board she violated the oath she took to uphold the Constitution of the United States. Except this is my formal complaint as no forms were available on the CVS website.
I expect and demand a full investigation, sanctions, and this board to encourage her to step down immediately to preserve the dignity, integrity, and reputation of this board.
In closing I have cause for concern for speaking up. I hope and pray my children will not fall victim to further harassment at the hands of their teachers, their coaches, the superintendent, any school board member, Liz Pyden, Maryanne Levine, or any of her minions, or any other teacher/school board member in neighboring districts.
I will expect to have my request resolved and decision submitted in writing without further delay.

I have included a copy of all emails that I obtained via a FOIA sent by Liz Pyden.

Respectfully,

Sandra Hernden

Sent from my iPhone