No. _____

In The

Supreme Court of the United States

JAMES C. WETHERBE, PH.D.,

Petitioner,

v.

BOB SMITH, PH.D. AND
LAWRENCE SCHOVANEC, PH.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Garcetti v. Ceballos, 547 U.S. 410, 422 (2006), holds that government-employee speech made pursuant to official duties is not protected. However, in *Garcetti*, the Court also explicitly stated that it was not ruling on speech related to scholarship or teaching. *Id*. at 425. The Fifth Circuit below and the Seventh Circuit have applied *Garcetti* to speech related to scholarship or teaching. *See Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008). The Fourth Circuit and Ninth Circuit have held that *Garcetti* does not apply to speech related to scholarship or teaching. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 561-63 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).

During Petitioner's interview to become dean of his college, he discussed: (1) his views in opposition to the practice of university tenure; and (2) his prior expressions, spanning a period of 20 years, of these views. Applying *Garcetti*, the Fifth Circuit below held that, because Petitioner's expressions during his interview for the deanship "relate to his own job function and went up the chain of command," they did not constitute protected speech, not even his acknowledgment of his prior expressions. 593 F.App'x 323, 328 (2014) (citing *Davis v. McKinney*, 518 F.3d 304, 313 n.3 (5th Cir. 2008)). The Fourth Circuit holds that protected speech is not converted into unprotected speech when that speech is acknowledged

QUESTIONS PRESENTED – Continued

in a job application proceeding. The Fifth Circuit below holds that Petitioner Wetherbe's prior expressions *were* converted into unprotected speech when he acknowledged them in his interview.

The questions presented are:

Is a professor's speech criticizing the practice of granting academic tenure at universities properly analyzed under *Garcetti*?

If *Garcetti* does in fact apply to this case, was Petitioner's twenty years of public speech against tenure converted into unprotected speech when he acknowledged this speech in his interview?

PARTIES TO THE PROCEEDING

Petitioner James C. Wetherbe, Ph.D., was Plaintiff and Appellee below.

Respondents Bob Smith, Ph.D., and Lawrence Schovanec, Ph.D., were Defendants and Appellants below.

RULE 29.6 DISCLOSURE STATEMENT

No parties are corporate entities.

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PETITION FOR A WRIT OF CERTIORARI

Dr. James Wetherbe ("Wetherbe") respectfully submits this petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit ("Fifth Circuit"), reversing the District Court for the Northern District of Texas ("District Court") and rendering judgment of dismissal is available at 593 F.App'x 323 (5th Cir. 2014). The order of the Fifth Circuit denying Plaintiff-Appellee's Petition for Rehearing is not reported (App. 38-39). The opinion of the District Court denying in relevant part Defendant-Appellant's Motion to Dismiss is not reported (App. 17-37).

JURISDICTION

The Fifth Circuit entered judgment on November 24, 2014. The Fifth Circuit denied the Motion for Rehearing filed by Wetherbe, Plaintiff-Appellee below, on January 5, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

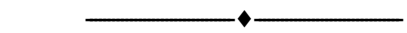
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. Amend. I.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ."

42 U.S.C. § 1983.



STATEMENT OF THE CASE

This Petition arises from the Fifth Circuit's reversal and judgment of dismissal, under Federal Rule of Civil Procedure 12(b)(6), of Wetherbe's First Amendment retaliation claim.

Wetherbe is a professor in the field of Management Information Systems. He is one of the top scholars in the history of this discipline. Plaintiff's Third Amended Complaint ("Complaint"), Dkt. 51 at p. 5, and Exhibits 3, 23, 24, and 26. He has published 32 books and over 200 articles, *id.* at p. 5, and Exhibit 6,

including numerous articles in *MIS Quarterly*, the preeminent journal in the information systems field, which journal awarded him its inaugural distinguished scholar award. *Id.* at p. 5, and Exhibits 21, 22 and 45.

A common guideline used by business schools for promotion to the rank of full professor is being cited 100 times. Complaint, Dkt. 51, Exhibit 26, and Dkt. 52, Exhibit 67. Wetherbe has been cited more than 6,500 times. Dkt. 51 at p. 6, and Exhibit 67.

Since 2000, he has been a chaired professor at his alma mater, Texas Tech University's ("Texas Tech") Rawls College of Business ("business school"), where he earned his M.B.A and Ph.D. Dkt. 51 at p. 4. Prior to returning to Texas Tech, he served on the faculty of the University of Houston, the University of Memphis, and the University of Minnesota, where he "was one of two people who drove the [University of Minnesota] to the top of the information systems field." *Id.*, and Exhibit 18.

As a Texas Tech professor, Wetherbe has continued to be a prolific researcher and publisher. Dkt. 51 at Exhibit 3, pp. 4-7, and Exhibit 18. He has won several teaching awards. Dkt. 51 at Exhibit 3, p. 3, and Exhibit 17. And Texas Tech MBA students consistently name him as the first or second highest-rated professor at the business school. Dkt. 51 at p. 5, and Exhibit 17.

Over the course of his academic career, Wetherbe has been a key factor in bringing in tens of millions of

dollars in research funds and donations to his respective academic institutions, including Texas Tech. Dkt. 51 at p. 5, and Exhibit 45; Additional Exhibits to Complaint, Dkt. 52 at Exhibit 67, p. 6; *see also* Complaint, Dkt. 51 at Exhibit 38, at 38:3-13, 38:22-39:9, 40:11-14. He has also donated most of his salary at Texas Tech to endow professorships, establish scholarships, and support the building fund there. Dkt. 51 at p. 10, and Exhibit 37, p. 6.

Over the last 20 years, Wetherbe has given hundreds of keynote addresses, speeches to corporations, professional organizations, and universities. Dkt. 51 at p. 5. In many of these speeches, Wetherbe has been an outspoken critic of tenure, because, in his view, tenure is more about job security than academic freedom and is an "obstacle to change." *Id.* at pp. 5 and 7.

As part of his expression of opposition against tenure, and to enhance his credibility with the business world, Wetherbe resigned tenure nearly 20 years ago while he was at the University of Minnesota, declined an offer of tenure at the University of Memphis, where he was a chaired professor, and again declined an offer of tenure when he joined Texas Tech as a chaired professor. *Id.* at pp. 6 and 9. He had hoped to use the last 25-30 years of his career to document in academic literature the viability and advantages of serving without tenure. *Id.* at p. 7.

While at Texas Tech, Wetherbe has "always been open" regarding his tenure status, and his position

against tenure is "common knowledge" at the business school and within the Texas Tech community at large. Dkt. 51 at Exhibit 38; *see also* Dkt. 51 at p. 26.

"[Tenure] is not anything we want to lose, particularly in the political times we are in now[,]" said the Texas Tech Provost, Bob Smith ("Smith"), at one of Wetherbe's internal grievance hearings at which he unanimously prevailed. Dkt. 51 at p. 1. The grievance hearings arose from adverse actions Smith took against Wetherbe because of Wetherbe's speech against the practice of academic tenure at universities. Dkt. 51 at pp. 5 and 7.

Because of Wetherbe's speech against tenure, Smith took three adverse actions against him: (1) he prevented Wetherbe from receiving Texas Tech's Paul Whitfield Horn Professorship ("Horn Professorship"); (2) he refused to advance Wetherbe as a finalist applicant for the position of dean of Texas Tech's business school; and (3) he claimed Wetherbe's employment contract invalid and told him his rank of Professor would be forfeited.

A. Denial of Horn Professorship

During the 2011-2012 academic year, Wetherbe was nominated for the Horn Professorship at Texas Tech. Complaint, Dkt. 51 at p. 11. The Horn Professorship is the highest honor Texas Tech may bestow on a Texas Tech faculty member and comes with supplemental funding and salary. *Id.* at p. 10, Exhibit 16. Fewer than 40 Texas Tech faculty – out of more

than 1,000 – hold a Horn Professorship. Dkt. 51. at p. 11.

Sometime before March 2012, Dr. Wetherbe's nomination for the Horn Professorship was approved by the Horn Committee and by Texas Tech Provost Bob Smith ("Smith"). *Id.* at p. 12, and Exhibit 29.

However, on or about March 27, 2012, Smith reconvened the Horn Committee in an attempt to persuade it to change its vote on Wetherbe's nomination. Dkt. 51 at p. 13. The Horn Committee refused to change its vote, but Smith nonetheless withdrew his recommendation and – contrary to Texas Tech's operating policy and the subsequent Texas Tech grievance committee's unanimous and explicit recommendation – Wetherbe's nomination was never forwarded to the Board of Regents. *Id.* at pp. 13, 16, 18-19, and Exhibits 32 and 40.

Smith took these actions in part because Wetherbe had declined an offer for tenure after being vetted when he was hired by Texas Tech and, per Smith, had "chosen not to engage in the tenure process." Dkt. 51 at pp. 13-15. However, Smith's statement about Wetherbe not choosing "to engage" is misleading, when in fact he had been tenured twice and successfully vetted four times for tenure. *Id.* at p. 15.

At the subsequent grievance hearing initiated by Wetherbe, one of the professors in attendance described tenure as "sacred." Dkt. 51 at Exhibit 38, at 30:7-9. Smith agreed: "[i]t's not anything we want to

lose, particularly in the political times we're in." *Id.* at Exhibit 38, at 30:10-11.

Importantly, Smith also testified that he believed Wetherbe's "views" on tenure made him unfit to be a Horn Professor. Dkt. 51 at p. 20, and Exhibit 7, at 48:22-24.

B. Refusal to Advance Deanship Application

In August 2011, the dean of the Texas Tech business school announced plans to retire. Dkt. 51 at p. 20. Under the heading "Qualifications," the public posting for the position stated, "[t]he successful candidate will have a distinguished record of accomplishment, which merits appointment at the rank of professor and which ideally will include having an earned doctorate in a discipline appropriate to the college." Dkt. 51 at p. 20, and Exhibit 43.

Years prior, while at the University of Memphis, Wetherbe declined the invitation to serve as dean there, stating that Texas Tech, his alma mater, was likely the only place he would be willing to serve as dean. Dkt. 51 at Exhibit 48.

Wetherbe was initially included as a member of the Search Committee assembled by Smith to fill the dean's position. Dkt. 51 at pp. 20-21. However, Wetherbe later withdrew from serving on the committee, and instead became a candidate for the dean's position. *Id.* at p. 21. Wetherbe received nominations from a number of Texas Tech faculty members, faculty

members at other institutions, and business leaders. *Id.* at pp. 21-23 and Exhibits 44-66. On February 14, 2012, Wetherbe accepted his nomination in a letter detailing his qualifications. Dkt. 51 at p. 23, and Dkt. 52 at Exhibit 67.

Wetherbe successfully advanced to the round of off-campus interviews. However, Smith added a question regarding "tenure history" to the off-campus interviews specifically because of Wetherbe. Dkt. 51 at p. 24, and Exhibit 38 at 28:21-29:3; *compare* Dkt. 52 at Exhibit 70 *with* Exhibit 71.

Smith inappropriately inserted himself into the process in other ways in an attempt to keep Wetherbe from making the final round of applicants. Dkt. 51 at pp. 23, 28-29, and Exhibit 73.

After vetting 60 nominations and applicants, the search committee recommended four finalists to interview on campus with the university provost (Smith) and the university president. Dkt. 51 at p. 25, and Dkt. 52 at Exhibit 76. Wetherbe was included in this group of four finalists; however, Smith unilaterally eliminated Wetherbe as a candidate. Dkt. 51 at p. 25.

When one of the three remaining candidates withdrew from the process a few weeks later, Smith chose to again pass over Wetherbe and selected a replacement applicant whom the search committee had not recommended. *Id*.

Smith took these actions in part because Wetherbe did not have tenure, which was not a

requirement for the position. *Id.* at pp. 25-26, and Exhibit 37. He also subsequently testified that he believed Wetherbe's "views on tenure made him unfit as a dean candidate." Dkt. 51 at p. 20, and Exhibit 7 at 48:25-49:2. However, the previous Dean, Allen McInnes, did not have tenure. Plaintiff's Brief in Opposition to Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Third Amended Complaint, Dkt. 59-1 at p. 9.

C. Smith's Knowledge of Wetherbe's Speech Regarding Tenure

At the latest, Smith became aware of Wetherbe's lack of tenure at Texas Tech while Wetherbe was exploring the possibility of applying for the deanship. *Compare* Complaint, Dkt. 51 at p. 26 *with* Dkt. 59-1 at p. 23. Additionally, Smith would have reviewed Wetherbe's employment file containing his hire offer letter, when he rejected an offer of tenure, when he was appointed Associate Dean for Outreach approximately three years earlier. Wetherbe's record reflects the fact that he rejected an offer of tenure when he was hired by Texas Tech as a full professor. Dkt. 51 at p. 9. This rejection of tenure was, and remains emblematic of his stated view on that subject. Had Wetherbe accepted tenure at Texas Tech in 2000, his credibility when speaking or writing in favor of abolishing tenure would have been impaired.

Smith probably learned of Wetherbe's views on tenure prior to the deanship and Horn Professorship

application processes at issue. *Id.* at p. 8, and Exhibit 7 at 48:16-19. At the very latest, Smith learned of Wetherbe's views on tenure on February 3, 2012, in the midst of the Horn Professorship nomination process and prior to the deanship application process. *Compare* Dkt. 51 at p. 26 *with* pp. 11, 23, and Exhibit 17.

D. Procedural History

Wetherbe filed suit for First Amendment retaliation in the United States District Court, Northern District of Texas. The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Smith moved to dismiss Wetherbe's First Amendment retaliation claim under Federal Rule of Civil Procedure 12(b)(6). The District Court denied the motion in relevant part. App. 30.

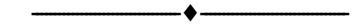
The Fifth Circuit reversed and rendered a judgment of dismissal. App. 15-16. In doing so, it divided Wetherbe's speech on tenure into three categories: (1) his decision not to be tenured; (2) his views against tenure expressed in public speeches over the past twenty (20) years; and (3) his speech on tenure made while he was applying to be dean and Horn Professor. App. 10-11.

As to the first category, the Fifth Circuit stated that even if Wetherbe's decision not to be tenured was expressive conduct, Wetherbe was not speaking as a citizen under the framework provided by *Garcetti v. Ceballos*, 547 U.S. 410 (2006) because his tenure

status is "a condition of his employment inextricably entwined with his role as an employee." App. 8.

As to the second, the Fifth Circuit distinguished Wetherbe's "views" from his "speech." The Fifth Circuit found it dispositive that the complaint did not specifically allege that Smith was aware of Wetherbe's outside "speech" against tenure, and that the Complaint did not allege that Smith retaliated against Wetherbe specifically for these "speaking activities." App. 10. According to the Fifth Circuit, retaliation against Wetherbe only for his (publicly expressed) "views" is not retaliation against First Amendment-protected activity. *Id.*

As to the third category, the Fifth Circuit again relied on *Garcetti,* and held that Wetherbe "was not speaking as a private citizen" during the Horn Professorship and dean application processes because his speech related to his own job function and went "up the chain of command." App. 11 (citing *Davis v. McKinney*, 518 F.3d 304, 313 n.3 (5th Cir. 2008)).



REASONS FOR GRANTING THE PETITION

A. There Is an Unresolved Circuit Split Regarding G*arcetti's* Application to Speech Related to Scholarship or Teaching.

Since *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968), this Court has recognized a public employee's right to free speech, so long as the speaker's interest as a citizen, in commenting on matters of public

concern, outweighs the employer's interest in promoting efficiency. In 2006, with *Garcetti v. Ceballos*, 547 U.S. 410, 422, this Court placed an important limitation on that right, holding that speech by a public employee, made pursuant to official duties, is unprotected.

In *Garcetti*, however, this Court explicitly reserved the question of whether *Garcetti's* new limitation even applies to cases arising from an academic setting: "We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching." *Id*. at 425.

The Fourth Circuit and the Ninth Circuit have held that *Garcetti's* limitation does not apply to speech related to scholarship or teaching. *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 561 (4th Cir. 2011); *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014).

In *Adams*, the plaintiff sought promotion from the rank of associate professor to full professor at a public university. *Adams*, 640 F.3d at 553. As part of his application, he listed his previous columns, publications, and public appearances, which were conservative and Christian in nature. *Id*. at 553, 558. The court held that *Garcetti's* limitation did not apply either to the initial speech or to the acknowledgment of that speech in the application materials because the speech was related to scholarship or teaching. *Id*. at 561-63.

In *Demers*, the Ninth Circuit held that a proposed plan for splitting in two the communications school at the university where the plaintiff was employed "related to scholarship or teaching" and must therefore be analyzed under *Pickering*, and not *Garcetti*. *Demers*, 746 F.3d at 415.

The Seventh Circuit and, in the instant case, the Fifth Circuit, have applied *Garcetti* to speech related to scholarship or teaching. *See Renken v. Gregory*, 541 F.3d 769, 773-74 (7th Cir. 2008); *Wetherbe v. Smith*, 593 F.App'x 323 (5th Cir. 2014).

In *Renken*, a professor brought a First Amendment retaliation claim based on his criticisms and complaints of how the university proposed to use his grant funds. *Renken*, 541 F.3d at 773. The Seventh Circuit relied on *Garcetti* to affirm summary judgment against the professor and hold that his speech was not protected; however, the Seventh Circuit did not apply or even mention *Garcetti's* explicit caveat for scholarship and teaching. *Id*. at 773-74.

In the present case, to classify Wetherbe's: (1) rejection of tenure; and (2) speech during the application process as unprotected, the Fifth Circuit relied on *Garcetti*. App. 9 and 11. Thus, the Fifth Circuit holds that *Garcetti* applies to speech that relates to scholarship and teaching. *Id.*

Granting certiorari will allow this Court to resolve this important circuit split and give additional guidance as to the reach and limits of *Garcetti* within an academic setting. *See Gorum v. Sessoms*,

561 F.3d 179, 186 (3d Cir. 2009) (full implications of *Garcetti* regarding speech related to scholarship or teaching are not clear).

B. The Fifth Circuit's Holding That Wetherbe's Speech During the Application Processes Was Not Protected Is in Conflict with Fourth and Ninth Circuit Precedent.

In the above-discussed *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011), the Fourth Circuit held that a plaintiff's earlier protected speech "was [not] converted into unprotected speech" simply because he acknowledged it in his promotion application. *Adams,* 640 F.3d at 561-62.

In the present case, the Fifth Circuit took the opposite view. During Wetherbe's off-campus interview – at which Smith was present – Wetherbe was asked about his tenure status. Complaint, Dkt. 51 at p. 24. In response, Wetherbe explained "that he had rejected [the protection of] tenure and why, consistent with his previous public expression of his views." *Id.* at pp. 24-25.

Thus, as with the speech at issue in *Adams*, Wetherbe's interview for the deanship contained speech within speech. Unlike *Adams*, however, the Fifth Circuit below held that Wetherbe's acknowledgement of his previous speech against tenure – including his resignation of tenure – was not protected. App. 7-8.

Thus, even if the Fifth Circuit was correct to apply *Garcetti* to the instant case, it implicitly held, in conflict with Fourth Circuit precedent, that by mentioning his previous speech against tenure in his application process, Wetherbe's prior speech – which was protected when it was made – was converted into unprotected speech when it was acknowledged before Smith and the dean search committee in the off-campus interview. App. 7-8.

C. The Fifth Circuit's Holding that Wetherbe's "Views" Are Not Protected Is in Conflict with Supreme Court and Ninth Circuit Precedent.

In its opinion, the Fifth Circuit stated, "It is not enough for Wetherbe to aver that Smith acted against him because of Wetherbe's views on tenure." App. 9.

Conflicting with this ruling, the Ninth Circuit stated that *Pickering* protects beliefs as well as speech. *Hobler v. Brueher*, 325 F.3d 1145, 1150 (9th Cir. 2003) (citing *Walker v. City of Lakewood*, 272 F.3d 1114, 1132 (9th Cir. 2001)).

The Fifth Circuit's ruling is also inconsistent with this Court's precedent. In *Rutan v. Republican Party*, 497 U.S. 62, 75 (1990), the landmark case in which this Court held that the First Amendment forbids government discrimination against low-level employees based on party affiliation, this Court also stated that "deprivations" that "press state employees

and applicants to conform their *beliefs* and associations to some state-selected orthodoxy" violate First Amendment rights. *Rutan,* 497 U.S. at 75 (emphasis added).

At best, the Fifth Circuit's holding is in conflict with the Ninth Circuit, and at worst, it is in direct conflict with this Court's precedent.

CONCLUSION

The instant case gives this Court opportunity to resolve these questions and divisions among the circuits. Accordingly, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 6, 2015

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-11162

JAMES C. WETHERBE, PH.D,

Plaintiff-Appellee

versus

BOB SMITH, PH.D.,
Individually and in His Official Capacity;
LAWRENCE SCHOVANEC, PH.D.,
Individually and in His Official Capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:12-CV-218

(Filed Nov. 24, 2014)

Before SMITH, BARKSDALE, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

James Wetherbe, a professor at Texas Tech University ("Texas Tech"), sued Bob Smith, the former provost, under 42 U.S.C. § 1983 for allegedly retaliating against Wetherbe for his views on tenure. The district court denied Smith's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim and on the ground of qualified immunity ("QI"). Because Wetherbe fails to state a claim and therefore does not satisfy the first prong of QI, we reverse and render a judgment of dismissal on the First Amendment-retaliation claim and remand for proceedings as needed.

I.

Wetherbe has been a professor at Texas Tech since 2000 and before then was a professor at other institutions for twenty-seven years. When he was a professor at the University of Minnesota twenty or so years ago, he resigned tenure and has continued to decline offers of tenure, thinking that tenure is damaging to the educational system and that foregoing tenure gives him credibility in the business world. He has been outspoken on his views about the alleged evils of tenure for at least two decades.

In August 2011, the dean of Texas Tech's Rawls College of Business announced his plan to retire. The outgoing dean had not had tenure, and the announcement did not specify that tenure was required for the deanship. Smith, then the provost, put Wetherbe on the search committee for the new dean, but Wetherbe

resigned from the committee so that he could pursue the position himself.

At that time, Wetherbe was nominated for the Horn Professorship, a prestigious position that comes with certain financial advantages. The Horn Committee approved the nomination and scheduled it for the March 2012 meeting of the Board of Regents, but at the request of the President's Office the item was pulled from the agenda in February. At Smith's behest, the Committee conducted a new vote on Wetherbe in a meeting at which Smith changed his vote; the nomination still was approved.

Wetherbe was in an interview group for the deanship in March 2012. A new question had been added to the set of inquiries for the candidates asking whether each applicant had tenure. Smith admitted that the question was added because he had found out only during the dean-application process that Wetherbe was not tenured. Wetherbe shared his views on tenure with the search committee at the off-site interview, at which Smith was present.

The committee listed Wetherbe as one of its four top recommendations for an on-campus interview, but Smith decided to interview only the other three top candidates. When one of them withdrew, Smith selected another candidate who had been recommended lower by the search committee; that person was ultimately selected to be the dean. Smith would later testify that he had not designated Wetherbe for an interview because he thought the off-site interview had

gone poorly, he did not like the fact that Wetherbe had no tenure, and he did not agree with "some of [Wetherbe's] philosophies on being a leader."

In a meeting with Dean McInnes at the end of March 2012, Wetherbe learned that Smith considered him ineligible for the Horn Professorship because he did not have tenure. Smith met with Wetherbe and said that he was not actually eligible to be a professor at all because he was not tenured. Wetherbe asked about his application for the Horn Professorship in May, in response to which Smith reiterated that he was not eligible for it.

At a grievance hearing in July 2012, Smith confirmed that he considered a person who was neither tenured nor tenure-track not to be a professor. In August, Smith gave a deposition in another case in which Wetherbe was a party, stating that he did not think an untenured faculty member should be a professor, let alone a Horn Professor. When asked how he came to know of Wetherbe's opinion on tenure, Smith first said that it came out "in his application" and "in his off-campus interview." Wetherbe does not dispute that Smith became aware of his views on tenure during the application process for the Horn Professorship. In his deposition, Smith confirmed that he thought Wetherbe's "views on tenure" made him unfit to be a Horn Professor and dean.

In May 2013, the new dean of the business school circulated a revised organizational chart; one change was to eliminate the position of Associate Dean for

Outreach, which was held by Wetherbe. That did not mean that Wetherbe lost his teaching job, but he contends that his teaching position was still in danger as a result of the earlier statements by Smith that Wetherbe's appointment to a professorship without tenure was a mistake.

II.

Wetherbe sued. The only party who remains relevant to this appeal is Smith, who Wetherbe alleges retaliated against him in violation of the First Amendment for his speech about tenure, specifically in impeding his candidacy for the Horn Professorship and the deanship and for removing the associate dean position that Wetherbe had held.

Smith moved to dismiss for failure to state a claim and for QI. The district court denied the motion, holding that Wetherbe had adequately pleaded a case of First Amendment retaliation and that Smith was not entitled to QI because the allegations showed that he had violated Wetherbe's clearly established right not to "suffer an adverse employment decision for engaging in protected speech."

III.

We have jurisdiction because a denial of a motion to dismiss that is predicated on a defense of QI is a collateral order that is immediately reviewable. *Club Retro, L.L.C. v. Hilton,* 568 F.3d 181, 193-94 (5th Cir.

2009). We review the denial of a motion to dismiss *de novo, Atteberry v. Nocona Gen. Hosp.,* 430 F.3d 245, 252 (5th Cir. 2005), accepting all well-pleaded facts in the complaint as true. *Id.*

The parties dispute the correct pleading standard. Smith asserts that, because he could raise QI as a defense, the complaint needed to include additional factual pleading to show why the plaintiff could overcome QI. Wetherbe contends that the pleading standard is the same one that applies in most other cases, requiring only a short and plain statement of the facts that states a plausible claim for relief.[1] Where a defendant can claim QI, the plaintiff must include additional material in his pleadings.[2] The Supreme Court, however, has repeatedly reversed decisions that apply some form of heightened pleading,[3] although it has expressly reserved the question whether the burden of pleading can be higher where the defendant could claim QI.[4]

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[1] *See* Fed. R. Civ. P. 8(a)(1); *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009).

[2] *See, e.g., Brown v. Glossip,* 878 F.2d 871, 873-74 (5th Cir. 1989); *Jackson v. City of Beaumont Police Dep't,* 958 F.2d 616, 620 (5th Cir. 1992).

[3] *See, e.g., Johnson v. City of Shelby, Miss.,* 135 S. Ct. 346, 347 (2014); *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 515 (2002).

[4] *See, e.g., Leatherman v. Tarrant Cnty. Narcotics Intel. & Coord. Unit,* 507 U.S. 163, 166-67 (1993).

We need not resolve that debate here. To overcome QI at the motion-to-dismiss stage, the plaintiff must allege facts that "make out a violation of a constitutional right." *Pearson v. Callahan,* 555 U.S. 223, 232 (2009). Wetherbe has failed to allege facts necessary to state a case for First Amendment retaliation. Because he has not satisfied the requirement that he plead a violation of a constitutional right, we do not decide whether or how the second prong of QI changes his pleading obligations.[5]

IV.

Parts of Wetherbe's complaint and brief focus on his lack of tenure as a motivation for Smith's alleged adverse actions. To the extent that Wetherbe alleges retaliation for his lack of tenure, he fails to state a claim. Under *Garcetti v. Ceballos,* 547 U.S. 410 (2006), a threshold inquiry for a First Amendment-retaliation claim is whether the employee was speaking as a citizen on a matter of public concern. If not, he cannot state a claim for First Amendment retaliation. *See id.* at 418. He is speaking as a citizen where the speech is "the kind of activity engaged in by citizens who do not work for the government," but "activities undertaken in the course of performing one's job"

[5] Under the second prong of QI, a defendant is entitled to QI if his conduct was not objectively unreasonable in light of "clearly established" law at the time of the conduct. *Callahan,* 555 U.S. at 232, 244.

are not protected. *Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689, 693 (5th Cir. 2007).

Even if we accept that Wetherbe's decision not to have tenure is expressive conduct that contains some speech element, his tenure status is a condition of employment that is inextricably entwined with his role as an employee. He is no more protected from adverse action for his tenure status than a plaintiff would be for refusing to attend training or complete peer evaluations.

We reached a similar conclusion in *Communications Workers of America v. Ector County Hospital District,* 467 F.3d 427 (5th Cir. 2006) (en banc). In holding that the government employer's uniform nonadornment policy for employees did not constitute First Amendment retaliation even where it penalized wearing pro-union pins, we stated that an employee is not speaking as a private citizen on a matter of public concern when the speech aspect of the conduct is only incidental to his performance of his job duties. *See id.* at 438-39. Although that case dealt with uniform adornments that were visible during the health workers' on-the-clock job performance, the rationale is instructive: A government employee cannot claim the protection of the First Amendment to set his own job conditions. The Court said as much in *Garcetti*: "Restricting speech that owes its existence to a public employee's professional responsibilities does not

infringe any liberties the employee might have enjoyed as a private citizen."[6]

V.

Wetherbe alleges that Smith retaliated against him for his views and speech on tenure. It is not enough for Wetherbe to aver that Smith acted against him because of Wetherbe's views on tenure. A First Amendment-retaliation claim requires that the defendant retaliated in response to some protected speech. There is no freestanding First Amendment prohibition on taking action against a public employee for his beliefs; such a claim must be made to fit within a particular prohibition, such as retaliation under *Garcetti* or political discrimination under *Branti v. Finkel,* 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois,* 497 U.S. 62 (1990). Wetherbe has elected to claim retaliation, and so he must make a short and plain statement of facts that, accepted as true, plausibly alleges First Amendment retaliation.

Wetherbe identifies instances of speech that can be grouped into two categories. The first includes his public speeches and consulting work covering the issue of tenure over the past twenty years. The second is his speech while applying to be dean and a Horn Professor.

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[6] *Garcetti,* 547 U.S. at 421-22; *see also Commc'ns Workers,* 467 F.3d at 439.

The first category does not provide a basis for relief because Wetherbe has not alleged that Smith was aware of this speech or that it motivated his actions. Because these are requirements of Wetherbe's claim for First Amendment retaliation, this deficiency means that Wetherbe's claim fails to defeat QI. Accepting all of the factual allegations in the complaint as true, Smith first became aware of Wetherbe's views on tenure through Wetherbe's application to be a Horn Professor. The only indication in the complaint that Smith was aware of Wetherbe's outside activities was an excerpt from Smith's deposition in which he stated that he knew Wetherbe used his non-tenure status to bolster his credibility when consulting. That testimony took place in August 2012, after Wetherbe had already been denied the Horn Professor and dean positions and had filed grievances against Smith for both decisions.

There is nothing in the complaint that alleges Smith was aware of any of Wetherbe's outside speech when Smith allegedly wronged Wetherbe, not even a bare allegation of knowledge; in regard to Smith's knowledge of Wetherbe's views, the complaint even says that "clearly it came out during the course of looking at him as a potential candidate to be a Horn Professor." Likewise, Wetherbe does not claim that Smith retaliated against him for those outside speaking activities. The complaint alleges that Smith acted against Wetherbe because of his views on tenure, but a First Amendment-retaliation claim must be based on retaliation against First Amendment-protected

activity. The second category – Wetherbe's speech to Smith and other university agents while he was applying for these positions – does not provide a ground for a retaliation claim because Wetherbe was not speaking as a private citizen on a matter of public concern. Because this prevents Wetherbe from having a claim for First Amendment retaliation regarding this speech, QI likewise bars his claim here.

The core principle of *Garcetti* is that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti,* 547 U.S. at 421-22. Though a First Amendment-retaliation claim can attach even where he speaks only to other government employees, an employee generally does not have First Amendment protection for communications that "relate to his own job function up the chain of command. . . ." *Davis v. McKinney,* 518 F.3d 304, 313 n.3 (5th Cir. 2008).

The speech in this case most closely resembles such a circumstance. Wetherbe's speech about tenure during interviews and other application-related conversations consisted of communications to the individuals responsible for screening and hiring candidates, and his comments were related to an issue of central importance to the operation of the university in which he sought a position of prominence. This is a situation in which the speech plainly owes its existence to the government, whose purpose in conducting interviews is for the applicant to speak to the government,

answer its questions, and make statements in an effort to get hired.[7]

Treating speech during interviews categorically as private-citizen speech under *Garcetti* would create an unworkable system for government employers. Interviews necessarily involve discussions that touch on matters that – when addressed in the public sphere – might count as issues of public concern. Especially when evaluating an applicant for a high-responsibility leadership position, an employer will want to ask about his leadership philosophy, his opinion on issues that are central to the operation and mission of the institution, and other concerns that will allow the interviewers to gauge whether the applicant will be an effective employee. Nothing in First Amendment jurisprudence suggests that a government employer is so restricted relative to a private employer that the government cannot screen applicants to ensure that they actually will perform their duties with maximal diligence.[8]

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[7] In addition, the purely self-serving nature of statements made during job interviews cautions strongly against considering the applicant's statements to be on matters of public concern. *See Foley v. Univ. of Houston Sys.,* 355 F.3d 333, 341 (5th Cir. 2003) ("Speech that is primarily motivated by, or primarily addresses, the employee's own employment status rather than a matter of public concern does not give rise to a cause of action under § 1983.").

[8] We need not answer today whether and to what degree the questioning must be related to the position that the applicant is seeking; the facts of this case would satisfy even an

(Continued on following page)

VI.

The only remaining claim is the alleged violation of Article I, Section 8 of the Texas Constitution. The Texas Constitution's free-speech protections can be more extensive than the First Amendment's protections, but the Texas courts will assume the protections are identical if the litigant does not show why they are different.[9] This is the same approach we applied in *Finch v. Fort Bend Independent School District,* 333 F.3d 555, 563 n.4 (5th Cir. 2003), in which the parties disagreed about whether the state constitution is more protective of speech than is the First Amendment.

The district court did not clearly state the ground on which it denied Smith's motion respecting the state-law claim. Smith's motion to dismiss that gave rise to this appeal specifically mentions the state-law claim only when it asserts that Wetherbe failed to state a claim, omitting any reference to the state claims in its QI analysis. And Smith's briefs make no mention of the district court's decision on the state-law claim. The only conclusion we can draw is that this appeal does not reach the decision not to dismiss the free-speech claims under the Texas Constitution.

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exacting standard. And nothing here speaks to the standard for how a government employer must treat an applicant's speech that occurred outside of the interviewing context.

[9] *See Pruett v. Harris Cnty. Bail Bond Bd.,* 249 S.W.3d 447, 455 n.5 (Tex. 2008); *Tex. Dept. of Transp. v. Barber,* 111 S.W.3d 86, 105-06 (Tex. 2003).

The order denying the motion to dismiss the First Amendment-retaliation claim is REVERSED, and a judgment of dismissal for failure to state a claim is RENDERED on that issue. We express no opinion on the decision not to dismiss the state-law free-speech claim. This matter is REMANDED for further proceedings as needed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-11162

D.C. Docket No. 5:12-CV-218

JAMES C. WETHERBE, PH.D.,

Plaintiff-Appellee

v.

BOB SMITH, PH.D.,
Individually and in His Official Capacity;
LAWRENCE SCHOVANEC, PH.D.,
Individually and in His Official Capacity,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas, Lubbock

Before SMITH, BARKSDALE, and HAYNES, Circuit Judges.

JUDGMENT

(Filed Nov. 24, 2014)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is reversed in part and rendered in part, and the cause is remanded to the District Court

for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that plaintiff-appellee pay to defendants-appellants the costs on appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

JAMES C. WETHERBE, PH.D., Plaintiff, v. BOB SMITH, PH.D., Individually and in his Official Capacity, and LAWRENCE SHOVANEC, PH.D., Individually and in his Official Capacity, Defendants.	)	Civil Action No. 5:12-CV-218-C

ORDER

(Filed Sep. 26, 2013)

On this date, the Court considered:

(1) Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Second Amended Complaint, filed May 6, 2013;

(2) Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Third Amended Complaint, filed July 1, 2013;

(3) Plaintiff's Response, filed August 5, 2013; and

(4) Defendants' Reply, filed August 30, 2013.

I. FACTS

A. Background

Plaintiff, James Wetherbe, has been a professor of management information systems at Texas Tech University since 2000. He has had a lengthy career in academia and has served on various corporate boards and consulted with private businesses. Wetherbe is also a prolific speaker, having given hundreds of keynote addresses and speeches worldwide for corporations, professional organizations, and universities. He has authored or co-authored dozens of books and numerous articles and has been ranked as one of the twenty most influential scholars in his field.

Wetherbe is a frequent speaker on issues of change and technology, and he often speaks out against tenure as an obstacle to change. He believes that tenure is not viewed well by business leaders and taxpayers because it leaves little remedy for sub-par teaching, the effects of which are often experienced by taxpayers and their children. Wetherbe also speaks on how tenure is more about job security than academic freedom and has added to the cause of rising tuition rates at universities. He advocates for academics to either voluntarily resign tenure or to forego seeking it and to replace the tenure system with five-year rolling contracts. Wetherbe, leading by example, resigned tenure at the University of Minnesota nearly 20 years ago and has since declined offers of tenure at other universities, including Texas Tech.

B. The Horn Professorship

The Horn Professorship is the highest honor that Texas Tech may bestow on members of its faculty and is granted in recognition of a faculty member's attainment of national or international distinction for outstanding research or other creative, scholarly achievement. Wetherbe received a nomination for the Horn Professorship during the 2011-2012 academic year. The nomination was supported by a number of individuals both from the Texas Tech business college and from private industry. His nomination was approved by the Horn committee and by Bob Smith, the then provost and a defendant here. Wetherbe's nomination was placed on the draft agenda for the March 2012 meeting of the Board of Regents, but the item was withdrawn at the request of Guy Bailey, the then president of the University.

The nomination was withdrawn because Smith had learned that Wetherbe did not have tenure; however, tenure is not a requirement for the Horn Professorship designation. Smith informed the committee that Wetherbe did not have tenure, but the committee chose not to change its vote. Yet, Smith changed his vote and did not recommend Wetherbe for the Horn Professorship, and Bailey concurred with Smith. Contrary to Texas Tech operating procedures, Bailey did not forward Wetherbe's nomination to the Board of Regents. Wetherbe contends that Smith did not

recommend him for the Horn Professorship because of Wetherbe's views on tenure.[1]

C. The Deanship

In August 2011, the then dean of the Texas Tech business school announced his retirement, and a posting for the job was made public. The posting did not require that the candidate be tenured, and then-Dean Allen McInnes did not have tenure when he held the position. Wetherbe contends that for the dean of a business school to be untenured is not unusual because of the value placed on the credentials and experience of business executives.

Wetherbe originally was appointed to the search committee but resigned when he decided to apply for the position. Ultimately, Wetherbe was one of the few candidates selected by the committee for an off-campus interview. Smith requested that the committee ask each interviewee to speak to his or her tenure status and history. Wetherbe contends that early versions of Smith's drafts of interview questions did not contain this inquiry but that he added the question specifically to vet Wetherbe's non-tenured status.

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[1] Specifically, Wetherbe cites the following question and Smith's answer from Smith's deposition:

> Q: Did you believe that Dr. Wetherbe's views on tenure made him unfit to be a Horn Professor?
>
> A: Yes.

At his off-campus interview, the committee inquired as to Wetherbe's tenure status, and he explained that he had rejected tenure and why, consistent with his publicly expressed views on the matter. Following the off-campus interviews, the committee recommended that four candidates advance to on-campus interviews. Although Wetherbe was recommended for an on-campus interview, Smith unilaterally eliminated him as a candidate. Smith stated that he chose not to advance Wetherbe through the interview process because his off-campus interview did not go well, because he did not agree with some of his philosophies on being a leader of a college, and because he is a non-tenured faculty member. Similar to the treatment of his Horn Professorship nomination, Wetherbe contends that Smith eliminated him as a candidate for the Deanship because of Wetherbe's views on tenure.[2]

D. The Associate Deanship and Wetherbe's Employment with Texas Tech

In May 2013, Wetherbe attended a strategic planning meeting of the entire faculty and staff of the Texas Tech business school at which the Dean presented a new organizational chart. The chart omitted

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[2] Specifically, Wetherbe cites the following question and Smith's answer from Smith's deposition:

> Q: Did you think that [Wetherbe's] views on tenure made him unfit as a dean candidate as well?
>
> A: Yes.

Wetherbe's position of Associate Dean for Outreach. After the meeting, Wetherbe sent an email to the Dean, who confirmed the change and also indicated that Wetherbe would no longer be a member of the Leadership Council, the Coordinating Council, and the Chief Executive Roundtable, a program Wetherbe had directed for five years. Finally, Wetherbe contends that Smith has implied that his employment with the University may be in jeopardy and that he may be stripped of his rank as professor; however, Wetherbe is still employed by the University and he has not yet been stripped of his rank as professor.

II. STANDARD

In order for a complainant to state a claim for relief, the complainant must plead a short, plain statement of the claim showing entitlement to such relief. *See* Fed. R. Civ. P. 8. To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter that, if accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* It follows that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] – that the pleader is entitled to relief." *Id.* at

679 (quoting Fed. R. Civ. P. 8(a)(2)). While this standard does not require the complainant to make detailed factual allegations, it does demand more than a complainant's bare assertions or legal conclusions. *Id.* at 678. Hence, formulaic recitations of the elements of a cause of action supported by mere conclusory statements do not satisfy Rule 8. *Id.*

III. ANALYSIS

A. First Amendment Retaliation

Wetherbe claims that Smith retaliated against him for exercising his First Amendment right to comment on the issue of tenure in the university setting. "Public employees do not surrender all their free speech rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen on matters of public concern." *Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689, 691 (5th Cir. 2007). "A public employee's speech is protected by the First Amendment when the interests of the worker 'as a citizen commenting upon matters of public concern' outweigh the interests of the state 'as an employer, in promoting the efficiency of the services it performs through its employees." *Id.* at 692 (citing *Pickering v. Bd. of Educ.,* 391 U.S. 563, 568 (1968)).

To state a claim for First Amendment retaliation, a plaintiff must allege that (1) he suffered an adverse employment decision, (2) his speech involved a matter of public concern, (3) his interest in commenting on

matters of public concern outweighs the defendant's interest in promoting workplace efficiency, and (4) his speech motivated the defendant's action. *Modica v. Taylor,* 465 F.3d 174, 179-80 (5th Cir. 2006). Whether a plaintiff engaged in protected speech is a question of law that must be determined by the court. *Id.* at 180.

1. Wetherbe Was Speaking As a Citizen

Before examining the substance of Wetherbe's speech, the Court must first decide whether he was speaking as a citizen or as an employee of Texas Tech. In *Garcetti v. Ceballos,* the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. 410, 421 (2006). However, if an employee takes his concerns to persons outside the workplace in addition to his employer, then those external communications are ordinarily made as a citizen and not as an employee. *Davis v. McKinney,* 518 F.3d 304, 313 (5th Cir. 2008).

In *Charles v. Grief* the plaintiff, an employee of the Texas Lottery Commission, sent an email to high-ranking Commission officials raising concerns about racial discrimination and retaliation against him and other minority employees. 522 F.3d 508, 510 (5th Cir. 2008). He subsequently sent an email to certain members of the Texas Legislature with oversight authority

over the Commission, alleging violations of the Texas Open Records Act, misuse of state funds, and other misconduct by Commission management. *Id.* When the plaintiff's immediate supervisor and a human resources manager questioned him about the emails, he requested that the Commission's questions be put in writing so that he could respond in writing. *Id.* The plaintiff's superior accused him of refusing to respond to requests from his immediate supervisor, and he was fired for subordination soon thereafter. *Id.*

Even though the plaintiff's speech concerned special knowledge he obtained through his employment with the Commission and he identified himself in the emails as a Commission employee, the Fifth Circuit held that the plaintiff was speaking as a citizen and not as a public employee. *See id.* at 513-14. The court noted that the plaintiff sent the emails from his personal email address and that he identified himself as a Commission employee to demonstrate the veracity of the factual allegations he was making. *Id.* Most importantly, however, the Court pointed out that the plaintiff's speech was not made in the course of performing or fulfilling his job responsibilities as a systems analyst. *Id.* at 514. Even without the plaintiff's job description before it, the Court reasoned that the emails in issue concerned topics far removed from any conceivable job duties of the plaintiff. *Id.* Finally, the Fifth Circuit noted that the fact that the plaintiff's speech was made externally to the Texas legislators was indicative of speech as a citizen as opposed to as a public employee. *Id.* Considering these factors,

the Court held that the plaintiff was speaking as a citizen and not as a public employee.

Wetherbe's role as speaker is similar to that of the plaintiff in *Charles*. While he may have formed his opinion on tenure through working in the university setting, this fact does not mean that his speech is unworthy of protection because "[T]o hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights." *Id.* at 513. Moreover, Wetherbe alleges that he expresses his views on tenure externally to business groups and academic audiences outside of Texas Tech. And, like in *Charles,* although Wetherbe's job description is not before the Court, it is probable that Wetherbe's role at Texas Tech as a professor of management information systems, which likely includes teaching on and conducting research related to management information systems, does not include speaking out against tenure in the university setting. The Court concludes that Wetherbe has alleged facts that he was speaking as a citizen and not as a public employee.

2. Wetherbe's Speech Involved a Matter of Public Concern

Next, the Court must decide whether Wetherbe's speech touched on a matter of public concern. The Supreme Court has defined a matter of public concern as one that "relat[es] to any matter of political, social,

or other concern to the community." *Connick v. Myers,* 461 U.S. 138, 146; *see also Modica,* 465 F.3d at 181 (noting fact that plaintiff chose to voice her concerns to someone other than her employer "supports her contention that the speech is public"). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement." *Connick,* 461 U.S. at 147-48.

Wetherbe alleges that he has given speeches to academics and business groups in which he speaks out against tenure at the university level. In support of his position, Wetherbe contends that tenure needlessly inflates the cost of tuition and breeds sub-par teaching, which degrades the quality of a university education. Both the cost of tuition and the quality of education are matters of public concern, especially to the taxpayers who fund public universities and the students who consume such educational services.

Defendants argue that tenure is merely a contractual matter between professors and their university-employers and therefore is not an issue of interest to the community. The Court disagrees. The integrity and quality of higher education, and the public financing thereof, are of political and social interest in any community because education is a social good and public universities are financed, in large part, by tax monies. Moreover, in *Charles,* the plaintiff's speech in issue concerned, among other topics, racial discrimination in the public workplace. 522 F.3d at 510. The Fifth Circuit held that this issue is a

matter of public concern. *Id.* at 514-15. Just as the court did not hold that racial discrimination in the workplace was a matter of concern solely between employer and employee, so this Court declines to hold that tenure is a matter of concern solely between professors and universities. As Wetherbe alleges, the issue of tenure has implications beyond the university employment setting. Therefore, the Court concludes that Wetherbe's speech on tenure touches on a matter of public concern.

Defendants do not challenge Wetherbe's pleadings as to any other element of the First Amendment retaliation claim. Based on the above, the Court is of the opinion that Wetherbe has pleaded a prima facie claim for First Amendment retaliation; therefore, the Court turns to Smith's assertion of qualified immunity.

3. Qualified Immunity

"To determine whether an official is entitled to qualified immunity, the court asks (1) whether the plaintiff has alleged a violation of a constitutional right, and (2) whether the defendant's conduct was objectively reasonable in light of clearly established law at the time of the incident." *Connelly v. Tex. Dep't of Criminal Justice,* 484 F.3d 343, 346 (5th Cir. 2007). Since the Court has determined that Wetherbe has alleged a violation of his First Amendment rights, it now turns to the second inquiry of the qualified immunity analysis.

First, Smith argues that his actions were objectively reasonable because Wetherbe has failed to demonstrate that no reasonable university official would have believed that an applicant could be denied a prestigious title or a deanship based on his lack of tenure. Smith also argues that his belief that tenure was required for the title and deanship was reasonable. Yet, Wetherbe alleges not only that Smith denied him the Horn Professorship and the Deanship because of his lack of tenure, but also because of his publicly expressed views on tenure. Smith's argument essentially attacks the causation element of Wetherbe's claim; he contends that his actions were based on Wetherbe's lack of tenure while Wetherbe contends that Smith's actions were based on both Wetherbe's lack of tenure as well as his publicly expressed views on the matter. Resolution of this issue is to be made at trial, not during the motion-to-dismiss stage.[3]

Next, Smith contends that no clearly established law at the time indicated that a university official could not take adverse action against an employee based on his lack of tenure. Again, Wetherbe alleges that Smith took action not only based on his lack of tenure but on his *views* on tenure. In any event, while Wetherbe does not cite to any case that is directly on

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[3] Because Wetherbe alleges that Smith based his actions on Wetherbe's *views* on tenure, the Court need not reach the question of whether Wetherbe's lack of tenure *status* constitutes protected speech.

point, the Court is of the opinion that, based on clearly established law, Smith, and any reasonable university official, should have known that his conduct violated Wetherbe's constitutional rights.

"The central concept is that of 'fair warning': The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights.'" *Kinney v. Weaver,* 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope v. Pelzer,* 536 U.S. 730, 740 (2002)); *see also Hope,* 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

It is clearly established law that causing an employee to suffer an adverse employment decision for engaging in protected speech is a violation of the employee's First Amendment rights. *Charles,* 522 F.3d at 51; *Perry v. Sinderman,* 408 U.S. 593, 597 (1972) ("[The government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech."). Because Wetherbe has pleaded facts that give rise to an inference that Smith's actions were objectively unreasonable in light of clearly established law, Smith is not entitled to qualified immunity at this stage of the proceedings. Accordingly, his Motion to Dismiss should be **DENIED**.

4. No Claim for First Amendment Violation Against Schovanec

Wetherbe also contends that Defendant Schovanec is liable in his individual capacity for the violation of Wetherbe's First Amendment rights. Yet, Wetherbe makes no inculpatory allegations against Schovanec in his individual capacity. Therefore, Schovanec's Motion to Dismiss Wetherbe's First Amendment retaliation claim against him in his individual capacity should be **GRANTED**.

B. Due Process

Wetherbe alleges that Defendants deprived him of due process by denying him the Horn Professorship, the Deanship,[4] and the Associate Deanship for Outreach.[5] He also contends that Smith indicated an intent to terminate his employment with Texas Tech or to strip him of his rank as professor, although he continues to be employed by the University and does not contend that he has yet been demoted.

To state a claim for a violation of due process, a plaintiff must first identify the protected life, liberty,

[4] Wetherbe's complaint is not clear as to whether he intends to allege a claim for due process violation for the denial of the Deanship, although he makes the argument in his response. The Court addresses the claim out of an abundance of caution.

[5] Wetherbe refers to his position as the Associate Dean for Outreach at one point in his complaint but as the Associate Dean for Research at a later point. At any rate, the distinction is immaterial to the Court's analysis.

or property interest at issue and show that governmental action resulted in a deprivation of that interest. *Baldwin v. Daniels,* 250 F.3d 943, 946 (5th Cir. 2001). In order to have a protected property interest under the Fourteenth Amendment, a plaintiff must have more than a unilateral expectation to it; there must be a legitimate claim of entitlement to the interest. *Bd. of Regents v. Roth,* 408 U.S. 564, 577 (1972). Property interests are not created by the Constitution but rather from independent sources such as state statutes, local ordinances, existing rules, contractual provisions, or mutually explicit understandings. *Perry,* 408 U.S. at 599-601. Wetherbe does not have a protected liberty or property interest in the Horn Professorship, the Deanship, or the Associate Deanship for Outreach.

First, with regard to Defendants' denial of the Horn Professorship and the Deanship, Wetherbe has not pleaded any facts that give rise to an inference that he had anything but a unilateral expectation for the title and the position. Again, the due process clause protects liberty and property interests to which one must have a legitimate claim of entitlement. *Roth,* 408 U.S. at 577. Wetherbe has not pleaded such interests in the Horn Professorship or the Deanship.

Next, Wetherbe alleges that Defendants "failed to follow TTU Operating Procedures including but not limited to President Bailey's refusal to forward Dr. Wetherbe's Horn Professor nomination to the Board of Regents." This allegation merely complains

of Defendants' failure to comply with internal procedure; however, under Texas law, entitlement to a procedure does not create a property interest. *Cnty. of Dallas v. Wiland,* 216 S.W.3d 344, 353 (Tex. 2007); *see also Davis v. Dallas Indep. Sch. Dist.,* 448 F. App'x 485, 495 (5th Cir. 2011) (Texas courts have consistently concluded that procedural regulations – or an agency's failure to follow those procedures – do not give rise to a property right). Therefore, that Defendants failed to follow internal procedure regarding Wetherbe's Horn Professor nomination does not give rise to the deprivation of a property interest.

Furthermore, Wetherbe claims that Defendants violated his right to due process when he was removed from the position of Associate Dean for Outreach. Yet, again, nowhere in Wetherbe's Third Amended Complaint does he plead a factual basis for his alleged property interest in this position. The due process clause does not protect Wetherbe's specific job duties or responsibilities absent a statute, rule, or express agreement reflecting an understanding that he had a unique property interest in those duties or responsibilities. *See DePree v. Saunders,* 588 F.3d 282, 289-90 (5th Cir. 2009); *Kelleher v. Flawn,* 761 F.2d 1079, 1087 (5th Cir. 1985) (rejecting a public employee's claim of entitlement to specific duties, where neither state law nor the employee's contract supplied a basis for a claim of entitlement to those duties). Therefore, to establish a due process claim in connection with this demotion, Wetherbe is required to point to some state or local law, contract, or understanding

that created a property interest in the Associate Deanship for Outreach. He makes no such showing, and he does not have a due process right to a particular administrative function such as the Associate Dean for Outreach. *See Gentilello v. Rege,* 627 F.3d 540, 544-45 (5th Cir. 2010) (holding that plaintiff had no due process right to be a department chair).

Finally, in a claim that is not entirely clear to the Court, Wetherbe complains that Smith has expressed an intent to terminate his employment with Texas Tech or to demote him from his professor rank; however, Wetherbe remains employed by the University and does not allege that he has been stripped of his professor rank. Even assuming that Wetherbe might be terminated or demoted at some point in the future, he makes no showing that merely being threatened with termination or demotion constitutes a due process violation.

Finally, to the extent that Wetherbe seeks to assert a distinct cause of action under substantive due process, that claim must fail. "[W]here another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." *Conn v, Gabbert,* 526 U.S. 286, 293 (1999) (quotation marks and citation omitted). Here, Wetherbe's claims are rooted in procedural due process and the First Amendment. "Those provisions are [the Court's] exclusive guideposts," and his general substantive due process claim should be dismissed.

Wilson v. Birnberg, 667 F.3d 591, 599 (5th Cir. 2012) (citing *Velez v. Levy,* 401 F.3d 75, 94 (2d Cir. 2005) ("[P]laintiffs seeking redress for [specifically] prohibited conduct in a § 1983 suit cannot make reference to broad notion of substantive due process.")).

C. Injunctive and Declaratory Relief

The nature of the injunctive and declaratory relief Wetherbe seeks is not clear to the Court. To the extent that his requests relate to his claim for First Amendment retaliation, Defendants' Motion to Dismiss is **DENIED**. To the extent Wetherbe's requests relate to his claim for violations of due process, Defendants' Motion to Dismiss is **GRANTED**.

D. Texas Constitution

Wetherbe alleges that Defendants violated his rights under the Texas Constitution, specifically Article I, Section 8 (freedom of speech) and 19 (due course of law). Based on the above rulings, Defendants' Motion to Dismiss is **DENIED** with regard to Wetherbe's state-law freedom-of-speech claim and is **GRANTED** with regard to his state-law due-course-of-law claim. *See Lindquist v. City of Pasadena,* 525 F.3d 383, 388 n.3 (5th Cir. 2008) (noting that the Due Process clause and the Texas Constitution's Due Course of Law Clause are analyzed the same).

IV. CONCLUSION

Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Second Amended Complaint is **DENIED** as moot. For the reasons stated herein, the Court makes the following rulings on Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiff's Third Amended Complaint:

1) as to the claim for First Amendment retaliation, the motion is **DENIED**, except that it is **GRANTED** as to Defendant Shovanec in his individual capacity;

2) as to the claim for violations of due process, the motion is **GRANTED**;

3) as to the claims for injunctive and declaratory relief, the motion is **DENIED** to the extent the requests relate to Wetherbe's claim for First Amendment retaliation and **GRANTED** to the extent the requests relate to his claim for violations of due process; and

4) as to the claims under the Texas Constitution, the motion is **DENIED** with regard to Wetherbe's state-law freedom-of-speech claim and is **GRANTED** with regard to his state-law due-course-of-law claim.

SO ORDERED.

Dated this 26th day of September, 2013.

/s/ Sam R. Cummings
SAM R. CUMMINGS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13-11162

JAMES C. WETHERBE, PH.D.,

Plaintiff-Appellee

v.

BOB SMITH, PH.D.,
Individually and in His Official Capacity;
LAWRENCE SCHOVANEC, PH.D.,
Individually and in His Official Capacity,

Defendants-Appellants

Appeal from the United States District Court
for the Northern District of Texas, Lubbock

ON PETITION FOR REHEARING EN BANC

(Filed Jan. 5, 2015)

(Opinion ___, 5 Cir., ___, ___, F.3d ___)

Before SMITH, BARKSDALE, and HAYNES, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for

Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Jerry Smith
UNITED STATES CIRCUIT JUDGE