UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RICHARD LOWERY,

Plaintiff,

v.

LILLIAN MILLS, *et al.*,

Defendants.

Case No. 1:23-cv-00129-DAE

PLAINTIFF'S MOTION TO DEFER CONSIDERATION OF DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

INTRODUCTION

Defendants' summary judgment motion came before Richard Lowery had an opportunity to depose Jay Hartzell, UT's Rule 30(b)(6) witness, and Meeta Kothare. Ruling now would deprive Lowery of a full and fair opportunity to gather evidence to prove his case. Plaintiff requests that—if this Court does not immediately deny the University of Texas' (UT) motion for partial summary judgment on Plaintiff's chilled-speech claim, *see* Dkt. 132—this Court, in the alternative, defer ruling on this motion until discovery in this case is complete.

Lowery has set forth the facts and arguments relevant to this motion in his response brief to Defendants' motion, which are incorporated by reference here. *See* Dkt. 134. Summarizing briefly, discovery is not yet complete. In March 2024, this Court granted Lowery leave to amend his complaint and to add UT President Jay Hartzell as a defendant. *See* Dkt. 123; Dkt. 120 at 5-7. Although the amendment primarily joined Hartzell and added a second speech-code claim, it also revised Lowery's speech-code claim. *Compare* Dkt. 126, ¶¶ 99-115 *with* Dkt. 94-4 at 27-30.

Prior to this Court granting leave to amend, the parties jointly filed a motion to abate discovery. Dkt. 121. The Court granted this abatement to give time for the resolution of an unrelated motion to dismiss. Dkt. 122. As a result, discovery has been paused since before the amendment, and Plaintiff never had the opportunity to complete key depositions and request additional documents related to his claims. Kolde Dec., ¶¶ 4-9.

ARGUMENT

Courts should not grant summary judgment until "the plaintiff has had a full opportunity to conduct discovery." *McCoy v. Energy XXI GOM, L.L.C.*, 695 F. App'x 750, 758-59 (5th Cir. 2017) (per curiam) (cleaned up); *see also Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 354 (5th Cir. 1989) ("Summary judgment should not

. . . ordinarily be granted before discovery has been completed.") (citation omitted). "[W]hen basic discovery has not been completed, particularly when the moving party has exclusive access to the evidence necessary to support the nonmoving party's claims," summary judgment must be refused as "premature and improper." *Austin Legal Video, LLC v. Deposition Sols., LLC*, No. 1:23-cv-00421-DAE, 2023 U.S. Dist. LEXIS 232404, at *6 (W.D. Tex. Nov. 16, 2023) (citations omitted).

Thus, Rule 56(d) permits "further discovery to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose." *Curtis v. Anthony*, 710 F.3d 587, 594 (5th Cir. 2013) (citation and quotation omitted). "Rule 56(d) motions for additional discovery are broadly favored and should be liberally granted." *Am. Family Life Assurance Co. v. Biles*, 714 F.3d 887, 894 (5th Cir. 2013) (citations omitted).

Additional discovery would support Plaintiff's opposition to UT's motion. Kolde Dec., ¶¶ 4-9. Most importantly, two major depositions—of defendant Jay Hartzell and of UT's 30(b)(6) representative—have not yet occurred. Meeta Kothare's deposition may also yield additional relevant information, especially if she coordinated her denunciations of Lowery and his tweets with others, or even at Hartzell's instigation.

Lowery has sought to depose Hartzell since the start of this lawsuit, although UT opposed this deposition. *See* Dkt. 16; Dkt. 19 at 6, 10-11. On March 26, this Court granted Lowery leave to amend and to add Hartzell as a defendant. Dkt. 123. The amended complaint and its revised chilled-speech claim both contain many allegations about Hartzell's role in the campaign to silence Lowery's speech. *See, e.g.*, Dkt. 126, ¶¶ 4, 10, 17-19, 27, 44-50, 66-67, 100, 106-07, 112-14.

Plaintiff, however, never had opportunity to depose Hartzell about his role in the chilling of Lowery's speech. When counsel for the parties conferred on March 11,

UT's counsel stated that Hartzell would agree to sit for a deposition if this Court denied its (then not-yet-filed) motion to dismiss but would oppose any deposition prior to resolution of this motion. Kolde Dec., ¶ 2. Parties also agreed to schedule at least two other depositions—of Lowery himself and of UT's 30(b)(6) representative—sometime after the motion to dismiss was decided. *Id.*, ¶¶ 2, 4. Plaintiff agreed to a discovery abatement to give time for this Court to resolve UT's pending motion to dismiss, *Id.*, ¶¶ 2-3., but it seems likely that UT sought the abatement to attempt to prevent President Hartzell from ever being deposed.

Summary judgment should be deferred until Lowery has had the opportunity to gather evidence necessary to support his chilled-speech claim by deposing Hartzell, UT's 30(b)(6) representative, and Meeta Kothare, as well as by seeking other documentary discovery related to those depositions. Hartzell, for instance, was personally involved in the events leading up to Lowery's self-censoring and is one of the main witnesses to these events. Indeed, it is plausible, as Lowery has long argued, that Hartzell initiated the campaign to chill Lowery into self-censoring.

Consider, for example, the conversation that Hartzell had with Titman the day after Lowery's podcast interview. For months, prior to Titman's deposition, UT insisted that Titman could not recall if "the reason for this brief conversation was 'Richard Lowery's public speech'." Dkt. 60-5 at 4. But at his deposition, Titman testified that Hartzell was "annoyed" with Lowery, "grumble[d] [to Titman] about something that Richard said," and "mention[ed] that Richard was being a pain." Ex. A at 100:11-102:14, 113:2-14. Titman admitted that he "can't recall exactly what [Hartzell] said" and "had no idea what [Hartzell] was talking about at the time," but the conversation "makes perfect sense" now that Titman knows it occurred right after the podcast interview. *Id.* at 100:23-101:2, 102:7-22.

The Titman-Hartzell conversation is one of the few non-privileged communications between Defendants about Lowery that Plaintiff can ask about. It confirms crucial facts about UT's motive to silence Lowery, for Carvalho and Lowery have testified that Titman later told them that Hartzell and Mills were upset and wanted UT officials to "do something" about Lowery's speech. *See* Ex. B at 151:10-152:24; Dkt. 17-1, ¶¶ 2-5. This conversation also goes to credibility, for Mills has denied that she or Hartzell ever wanted Lowery to "shut up." Ex. D at 202:18-204:6; *see also* Ex. B at 188:14-189:9. Lowery already probed Titman's memory of this July 19 conversation as much as possible, yet many facts remain unclear. Only Hartzell—the other participant in the conversation—can fill in these memory gaps.

Likewise, Richard Flores, Hartzell's Deputy for Academic Priorities, repeatedly texted Hartzell on June 8, 2022, offering to "help" Hartzell respond to a Texas Tribune article published that day about the Liberty Institute which quoted Lowery's criticisms. Kolde Dec., ¶ 23, Ex. N (text string); *cf.* Dkt. 8-8 (Texas Tribune article). Hartzell never texted back.* Only Hartzell can explain what Hartzell did to counter Lowery's published criticisms.

And, on August 9, Robert Rowling—one of the main donors for the hijacked Liberty Institute, Dkt. 8-8 at 5—contacted Hartzell directly about Rowling's concerns on Lowery's speech and received a personal email from Hartzell back. Kolde Dec. ¶ 24, Ex. O (Rowling email). From other discovery, Plaintiff already knows that less prominent donors communicated with UT's development office about Lowery's speech. *See* Dkt. 132-6 at 6-8. But only Hartzell can state if other

* Sometime between June 1 and June 10, Hartzell had multiple phone calls with UT's General Council "regarding First Amendment issues." Dkt. 119-1 at 10. According to UT, the calls were "[r]esponsive to Plaintiffs' (*sic*) interrogatories 2 and 7," *id.* at 10 n.1, so during these calls Hartzell evidently "consulted . . . on how to respond to or deal with Richard Lowery's speech," Dkt. 60-4 at 3, Dkt. 60-5 at 3-4.

donors—like Rowling—reached out to UT's president directly; only Hartzell can state if he took any action in reaction to donor concerns. Hartzell's knowledge, motives, and response to Lowery's speech is evidence necessary to support Plaintiff's chilled-speech claims. *See* Dkt. 126, ¶¶ 100, 106-07, 112-14.

Lowery should also have the opportunity to ask Hartzell about his own opinions about Lowery's speech—that is, if the speech was offensive, uncivil, rude, dangerous, and so forth—and whether Hartzell agrees with or approved the actions of his subordinates, Mills and Burris, including their attempts to get Carvalho to counsel Lowery stop speaking. If Hartzell agrees with their actions, it is probative of Lowery's theory regarding Hartzell's involvement. On the other hand, if he disagrees, it may show that Mills and Burris acted on their own, without the support of "the Tower." Similarly, Hartzell's role regarding the Jeff Graves email instructing Mills and Burris to follow-up is relevant. *See* Kolde Dec., ¶ 14, Ex. E (Graves email). Plaintiff would also inquire about whether any elected officials or UT regents ever talked with Hartzell about Lowery's tweets or op-eds; whether Hartzell has ever asked for any other faculty member to be counseled about tweets or other speech; and whether Hartzell promotes viewpoint diversity and academic freedom as central to UT's mission.

A deposition of UT's 30(b)(6) representative is also important to support allegations in the amended complaint and its revised chilled-speech claim. Lowery intends to ask, among other things, about UT's policies on faculty discipline, free speech, academic freedom, civility, and DEI, and to seek comparator information about other UT faculty that were—or were not—counseled or disciplined for their speech. *See id.*, ¶¶ 13-14, 100, 105, 109-11. Lowery will also press UT's 30(b)(6) representative to quantify how Lowery's speech was "disruptive to university operations," as Defendants insist. *See id.*, ¶¶ 57, 60, 63-67, 103, 106, 108. Discovery

into these topics directly contributes to Lowery's argument that Defendants were substantially motivated by Lowery's constitutionally protected speech and that UT's actions would chill a person of ordinary firmness from speaking.

Lowery has not had a full opportunity to conduct discovery into his chilled-speech claim. Thus, summary judgment is premature and improper.

CONCLUSION

This Court should defer ruling on UT's motion for partial summary judgment until discovery in the case is complete.

Respectfully submitted,

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