UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

BRUCE GILLEY,

Plaintiff,

v.

TOVA STABIN, in her individual capacity; and the COMMUNICATION MANAGER of the University of Oregon's Division of Equity and Inclusion, in his or her official capacity,

Defendants.

Case No. 3:22-cv-01181-HZ

POST-APPEAL JOINT STATUS REPORT

1. Plaintiff's Position: Plaintiff respectfully requests that this Court grant his pending motion for a preliminary injunction, and enjoin enforcement of the vague, subjective, and viewpoint discriminatory portions of UO's social media guidelines for @UOEquity by the DEI Communications Manager or anyone acting in concert with him or her; specifically, the prohibitions on "hateful," "racist," "offensive," or "otherwise inappropriate" speech (Dkt. 29 at 60); or from enforcing the permanent "ban" portions of UO social media guidelines *(Id.)*. In addition, Plaintiff requests that this Court enjoin the viewpoint discriminatory application of the "off-topic" provision of UO's social media guidelines *(Id.)* to posts that are critical of the ideology of diversity of equity and inclusion (DEI) but relevant to the broader topic

of racism. A copy of UO's guidelines with those provisions highlighted is attached for the Court's reference as Exhibit A.

Although Gilley's amended complaint made an overbreadth claim (Dkt. 29 at 22, ¶ 105) entitling him to assert the rights of other similarly situated persons, for present purposes, Gilley has no objection to focusing the preliminary injunction on providing relief to Gilley with regard to interactions with the @UOEquity account, the DEI's Communication Manager and anyone acting in concert with him or her. Gilley does object to the injunction making unwarranted comments about how UO has interpreted those guidelines during this litigation. And Gilley objects to Defendants' use of this JSR to file what amounts to a legal brief.[1]

Following entry of the preliminary injunction, Plaintiff requests that the Court stay this case for 60 days to allow the parties to attempt to negotiate a resolution of the case. As the Ninth Circuit noted, "In arguing before us that there was a policy, but that [S]tabin violated it, the University shows that it lacks sufficient policies to prevent such departures from policy by a rogue employee." Dkt. 67 at 5. Although no concrete offers or demands have been exchanged, it is plausible that with a preliminary injunction in place, the parties may be able to reach a resolution that avoids further briefing, hearings, and litigation. Plaintiff does not believe that negotiations would be productive absent a preliminary injunction being in place. In

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[1] Gilley reserves further legal arguments for a later time, should the Court invite further briefing. Gilley also reserves the right to prosecute his overbreadth claim in the event no preliminary injunction issues.

the absence of a preliminary injunction, Gilley would ask that this case enter regular discovery with a case schedule for dispositive motions and a bench trial.

Otherwise, Plaintiff requests that Dkt. 38 (order striking Discovery and Pretrial Scheduling Order) remain in effect until such time as the 60 day period for settlement negotiations has expired.

Lead Plaintiffs' counsel will also be traveling out of the country from July 3-July 12 and likely also from July 24-August 2.

2. Defendants' position:

Defendants tova stabin and the Communication Manager of the University of Oregon's Division of Equity and Inclusion generally agree with plaintiff Bruce Gilley that the most orderly next steps for this litigation is for the Court to address Gilley's Motion for Preliminary Injunction post-remand from the Ninth Circuit and then allow the parties 60 days to explore settlement.

However, it is not obvious from the Ninth Circuit's Memorandum Disposition whether a preliminary injunction should now issue and, if it should, the scope of the injunction. As for the first question—whether a preliminary injunction should issue—when the Ninth Circuit intends to direct the entry of a preliminary injunction, it says so. *See, e.g.*, *Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 918 (9th Cir. 2014) ("We therefore reverse the district court's denial of plaintiffs' motion for a preliminary injunction and remand with instructions to issue the requested preliminary injunction."); *Khorenian v. Union Oil Co. of California*, 761 F.2d 533, 536 (9th Cir. 1985) ("The order denying an injunction is reversed, and

the district court is directed to grant a preliminary injunction."). Here, the Ninth Circuit panel majority's decision leaves the question open what the District Court should do on remand.

Although, admittedly, the panel majority held that facts alleged by Gilley nearly two years ago "readily demonstrate irreparable harm," Mem. Disp. at 5 ¶ 5, much has changed in the past two years. Among those changes: Ms. stabin's retirement was effective the day after this case was filed, her position has remained vacant for an extended period, and a new person was recently hired to fill the Communication Manager position. That person's onboarding includes training on moderation of social media channels. Moreover, the University has put in place new systems of oversight to ensure that moderators of the University's social media channels (including the new Communication Manager) do not block users based on viewpoint or otherwise based on protected speech.

Furthermore, if a preliminary injunction is still warranted despite intervening events, Defendant's position is that any preliminary injunction should be narrow in scope: it should be tailored to the parties (i.e., Mr. Gilley and the newly hired Communication Manager) and to the asserted irreparable harm (i.e., Mr. Gilley's stated desire to interact with DEI Division social media content). *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs"); *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) ("Injunctive relief, however, must be tailored to remedy the specific harm

alleged."). Accordingly, to ensure a preliminary injunction is narrow and not more burdensome than necessary—and to emphasize its maintenance of the status quo[2]—the preliminary injunction should state words to the effect that: "Consistent with how the Defendants have interpreted and applied the social media guidelines throughout the pendency of this litigation, the Communications Manager shall not block Plaintiff's social media posts based on viewpoint or for otherwise engaging in speech protected by the First Amendment."

In light of the absence of specific direction in the Ninth Circuit's Memorandum Disposition, as well as the passage of time and intervening events, Defendants respectfully suggest that they prepare witness declarations to update the record and that the parties provide the Court with summary briefing (not to exceed eight pages) on (1) whether a preliminary injunction should issue; and (2) if it should, what the preliminary injunction's scope should be. As mentioned, Defendants agree with Plaintiff's proposal of a 60-day period to explore settlement once the preliminary injunction matter is decided.

With regard to scheduling, counsel for Defendants will be out-of-state on vacation from June 14 to 23, 2024. Counsel for Plaintiff has already advised the Court that he will be traveling out of the county from July 3 to 12, 2024. To allow

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[2] "The basic function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits." *Chalk v. U.S. Dist. Ct. Cent. Dist. of California*, 840 F.2d 701, 704 (9th Cir. 1988).

time for preparation of declarations and short briefs, Defendants respectfully suggest that submissions be due on July 1.

Respectfully submitted,

Dated: June 10, 2024

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