No. 25-1952

IN THE
United States Court of Appeals
for the Third Circuit

ZACK DE PIERO,

Plaintiff-Appellant,

v.

PENNSYLVANIA STATE UNIVERSITY AND MARGO DELLICARPINI IN HER OFFICIAL CAPACITY, AND DAMIAN FERNANDEZ, LILIANA NAYDAN, CARMEN BORGES, ALINA WONG, LISA MARRANZINI, FRIEDERIKE BAER, AND ANEESAH SMITH, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA, NO. 2:21-CV-1299

REPLY BRIEF FOR PLAINTIFF-APPELLANT ZACK DE PIERO

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According to Penn State, it's not unlawful to send a barrage of direct, officially sanctioned anti-white messages to employees, instructing them that they are a "problem," they can't adequately do their jobs, and in fact have no hope of ever not perpetuating racism. And if any employee even respectfully objects to these characterizations, the employer can put a formal letter of reprimand in the employee's file and dock their performance review, without calling it an adverse employment action.

That is a remarkable view of the law. Remarkably wrong. *See Students for Fair Admissions v. Pres. and Fellows of Harvard College*, 600 U.S. 181, 230 (2023). And since the standards for employment actions are the same for white employees as they are for any other race, *Ames v. Ohio Dep't of Youth Svcs.*, 605 U.S. 303 (2025), Penn State's theory would give carte blanche to any employer to systematically demean and humiliate blacks, Hispanics, Asians, women, Muslims, Jews, and other individuals—and formally punish them if they complained, without consequence.

The better course is for the Court to reverse.

I. Appellees do not contest this Court's jurisdiction.

The Opening Brief explains why the District Court possessed subject matter jurisdiction, why this Court has appellate jurisdiction, and why De Piero's appeal was filed in a timely manner. Appellees appropriately do not contest these issues.

II. Appellees do not take issue with Plaintiff's Oral Argument Statement.

Appellees do not dispute that oral argument would materially assist the Court. *See* Opening Br. at xii ("15 minutes per side would be adequate to provide the Court with sufficient time to question the advocates").

III. Appellees do not contest the relevant standard of review.

With respect to the standard of review for De Piero's race discrimination claims, Appellees do not contest that granting summary judgment is inappropriate unless there is no genuine dispute as to any material fact, and the movant is entitled to judgment as a matter of law. Appellees also concede that this Court's review over the District Court's determinations is *de novo*. Answer Br. at 22; *Reedy v. Evanson*, 615 F.3d 197, 210 (3d Cir. 2010)("A district court's grant of summary judgment is subject to plenary review.").

Appellees also do not take issue with the point that all facts in the record are to be viewed in the light most favorable to the non-moving party. *See Harvard v. Cesnalis*, 973 F.3d 190, 199 (3d Cir. 2020). A district court commits reversible error if it makes even one material inference in favor of a party moving for summary judgment. *See Ideal Dairy Farms v. John Labatt,* 90 F.3d 737, 744 (3d Cir. 1996).

With respect to De Piero's speech claims, Appellees do not contest that a plaintiff need only allege facts that plausibly state a claim on their face. Plaintiffs are entitled to all reasonable inferences from their pleadings. Similar to the summary judgment stage, a district court commits reversible error if it makes even a single inference in favor of a defendant. *See, e.g.*, *Cortez Prods., Inc. v. Monterey Peninsula Artists, Inc.*, No. 03 C 4630, 2004 WL 609375 (N.D. Ill. Mar. 22, 2004)(courts may not make inferences in favor of a defendant, even reasonable ones, at the motion to dismiss stage).

IV. Appellees' *Ad Hominem* attacks on Plaintiff are irrelevant.

Penn State tellingly starts its Opening brief not with legal argument, but by recounting offensive text messages that De Piero sent to individuals not involved in the case.

These messages are wholly irrelevant to this Court's inquiry for two reasons: (1) they are the epitome of factual details whose import—if any—would be considered by a trier of fact; (2) they don't interact with the claims in the case, because plaintiffs need not be stoic, passive victims of harassment in order to advance Title VII claims. *Accord Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 69 (1986)(even voluntary participation in the harassing incidents at issue did not defeat a Title VII claim); *Rahn v. Junction City Foundry, Inc.*, 152 F. Supp. 2d 1249, 1257 (D. Kan. 2001) ("The fact that plaintiff wore a shirt labeled 'Big Johnson' may bear on the inquiry, but does not require a conclusion that she invited suggestive comments…").[1]

In other words, De Piero owed no duty to be a shrinking violet, particularly outside of the workplace. *See, e.g., Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989)("[T]he focus of the question of sexual harassment should be on the defendant's conduct, not the plaintiff's

[1] Actually, the text messages would likely be excluded under Fed. R. Evid. 403. *See Phoenix v. Coatesville Area Sch. Dist.*, 683 Fed. App'x 117, 120 (3d Cir. 2017)(affirming exclusion of exchanges under Rule 403, concluding they "were not directly relevant to Phoenix's discharge and that...any probative value was substantially outweighed by the likelihood of unfair prejudice and confusion of the issues").

perception or reaction to the defendant's conduct.")(quotation marks omitted); *Wilson v. Clay Cnty., Mississippi*, No. 1:22-CV-73-DAS, 2024 WL 1078213, *3 (N.D. Miss. Mar. 12, 2024)(M.J.)("[T]he court sees this as an issue better left for a jury.…To be sure, the defendant argues that the plaintiff was no shrinking violet, pointing to evidence that she engaged in sexual banter with co-workers and alleging she had sexual relationships with more than one of her co-workers. At this summary judgment stage, however, to grant the motion the court would need to find the sheriff's emails and his alleged behavior as objectively inoffensive, and looking at the totality of the circumstances, the court cannot.").

Thus, Penn State may not smuggle in offensive text messages here, because those messages serve no relevant legal purpose on summary judgment, if ever.

V. De Piero's Title VII claims should not have been dismissed.

a. Appellees fail to address De Piero's theory that an employer creates a *Per Se* triable issue of fact in some Hostile Environment cases.

When an employer deliberately imbues the workplace with racially charged concepts, and through official channels uses "derogatory and insulting terms directed at members of a protected class generally, and

addressed to [] employees personally," the strife and division intentionally caused by the employer will generally suffice to establish a hostile work environment. *Cf. Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1083 (3d. Cir. 1996)(employers may not instruct employees that they are "not full and equal members of the workplace," based on race); *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)("[A] supervisor's use of [racially offensive language] impacts the work environment far more severely than use by co-equals."); *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004)(public statements demeaning employees are especially impactful); Department of Justice, *Guidance For Recipients of Federal Funding*, July 29, 2025 (DEI training "[c]reates an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.").[2]

This explains the EEOC's recent commentary regarding Diversity, Equity, and Inclusion training conducted by employers. In turn, that commentary accords with Supreme Court case law and commentary on

[2] https://www.justice.gov/ag/media/1409486/dl?inline (last accessed Nov. 12, 2025).

race. *SFFA*, 600 U.S. at 221 ("[T]he university furthers stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.")(cleaned up); *Ames*, 605 U.S. at 318, n.3 (Thomas, J., concurring)("American employers have long been 'obsessed' with 'diversity, equity, and inclusion' initiatives and affirmative action plans.").

At a minimum, such top-down efforts may be considered by a trier of fact. *Aman*, 85 F.3d at 1083 ("A reasonable jury could find that statements like the ones allegedly made in this case send a clear message and carry the distinct tone of racial motivations and implications."); *McGlotten v. Omnimax International, Inc.*, 657 F.Supp.3d 663, 674-75 (E.D. Pa. 2023)(rejecting summary judgment*); see also Chislett v. New York City Dep't of Educ.*, No. 24-972-cv, —F.4th—, 2025 WL 2725669, *11 (2d Cir. 2025)("Collectively, Chislett presented evidence of racially-charged statements expressed during trainings, in meetings, and about another employee in her presence, creating a genuine dispute of material fact about whether the workplace was racially hostile.").

b. The environment was racially hostile under any standard.

Penn State's defense rests on minimizing the relentless, institutionalized racism De Piero faced, characterizing it as mere "academic discussions" or the airing of third-party viewpoints in optional settings. Ans. Br. at 5, 15, 35-43. This ignores the distinctions that define a hostile work environment based on top-down, ideological indoctrination. The Second Circuit recently confronted this exact defense and flatly rejected it, holding that the "purpose of the sessions was to combat race discrimination does not excuse the alleged presence of race discrimination in the conduct of the sessions." *Chislett*, 2025 WL 2725669, at *10 n.8 (2d Cir. 2025). The harassment here was severe and pervasive because it was institutional, directly impugned De Piero's professional competence based on race, and was designed to compel belief and alter workplace interactions indefinitely.

The severity of the harassment is magnified because it was not stray remarks from co-workers, but official, employer-mandated instruction disseminated by supervisors. Naydan spearheaded these professional development meetings (App. 3803-3804; App. 1539:2-6), determined the agenda, and compiled the materials (App. 1870-1871:9-4;

App. 1537:17-20). There were no rogue actors here; the dissemination of these views was pursuant to "the Campus Strategic Plan." (App. 3054).

This is precisely the scenario recognized in analogous litigation, where courts note that whether harassing acts "constituted official acts" of the employer is highly relevant to the Title VII analysis. *Young v. Colo. Dep't of Corrections*, 94 F.4th 1242, 1252 (10th Cir. 2024); *see also Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 763 (1998)("[A] supervisor's authority invests his or her harassing conduct with a particular threatening character[.]"); *Rodgers*, 12 F.3d at 675.

Crucially, this harassment went beyond generalized insults; it directly attacked De Piero's professional competence because of his race. This was not, as Appellees suggest, a general discussion about societal issues, that De Piero could brush off as irrelevant to his day-to-day job. *See* Ans. Br. at 33-34. It was specific instruction undermining his role as an educator. Penn State officially taught him that "White Teachers Are a Problem." (App. 3524). It taught that his "white body" rendered him incapable of effective teaching, ensuring he would "perpetuate White language supremacy" regardless of his efforts or intent. (App. 3410). It directly undercut the performance of his day-to-day job: trying to help

students of all races learn to write, not wallow in helplessness based on irreparable societal racism.

This mirrors the facts in *Chislett*, where the Second Circuit found a triable issue of fact precisely because instructors told the white plaintiff "that her 'interest in excellence was perfectionism and consistent with white supremacy.'" 2025 WL 2725669, *3. De Piero was explicitly told there was nothing he could do to "solve" this race-based deficiency. (App. 2834). Here, Penn State adopted a workplace philosophy that De Piero couldn't adequately do his job, and never would.

When harassment is "connected to [the plaintiff's] ability to perform her job," it creates a hostile work environment, particularly when performed "in front of a large group." *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000). It is difficult to conceive of harassment more severe than an employer officially instructing an employee (and his eagerly-listening colleagues) that his immutable racial characteristics make him permanently unfit for his profession.

Appellees' attempt to characterize the harassment as sporadic or isolated (Ans. Br. at 38) fundamentally misunderstands how top-down institutional training permeates a workplace. Pervasiveness stems not

merely from the frequency of the meetings, but from the compulsory nature of the ideology and its intended daily application. Workplace training, by definition, is intended to influence the "continuing future behavior of the participants," and lead them to "make a practical application of their workshop experiences." *Hartman v. Pena*, 914 F. Supp. 225, 230 (N.D. Ill. 1995). Even in abhorrent cases involving racial epithets, employers typically do not demand that the victim and his colleagues believe the truth of the slur.

The Second Circuit in *Chislett* approvingly cited the District Court's 12(b)(6) opinion in this very case, agreeing that "when employment trainings discuss any race 'with a constant drumbeat of essentialist, deterministic, and negative language [about a particular race], they risk liability under federal law.'" *Id.* at *12 (quoting *Plaintiff v. Pa. State Univ.*, 711 F. Supp. 3d 410, 424 (E.D. Pa. 2024)). Penn State's explicit goal was to "official[ly]" transform the writing program by incorporating these "anti-racist" pedagogies. (App. 3803-3804). An employer does not offer aggressive professional development—where rejection of the material is itself evidence of racist "white fragility"—unless it expects that development to be implemented in daily operations.

The nature of this ideology—and thus its pervasive impact—is confirmed by Penn State's reaction when De Piero respectfully questioned it. He was not allowed to engage in even mild dialogue; he was disciplined for non-compliance. Penn State found him to have engaged in "unprofessional" conduct, and subjected him to a formal performance improvement plan and a lower performance rating. (App. 3545-3546). This discipline proves that adherence to the racially hostile ideology was an expected condition of employment. Penn State cannot now reconceive of its efforts to sit De Piero down for ideological indoctrination, and also punish disagreement, yet simultaneously claim the impact was fleeting.

Furthermore, the training created a pervasive "multiplier effect," by fundamentally altering how colleagues were instructed to interact with De Piero. The hostility was not limited to De Piero's own reaction to the material; the training instructed the entire department to view white faculty as inherently problematic (App. 3524), beneficiaries of unearned "privileges" (App. 3413), and individuals who inevitably "perpetuate White language supremacy in [their] classrooms because [they] are White and stand in front of students." (App. 3410). When an employer

disseminates messaging that officially sanctions racial stereotyping and scapegoating, it inevitably "promote[s] racial discrimination and stereotypes within the workplace." *Young*, 94 F.4th at 1251; *see also Chislett*, 2025 WL 2725669, at *10 (recognizing that DEI training has a "spillover" effect of sowing racial hostility throughout the workplace). By training the entire department to view white employees through a racialized, negative lens, Penn State ensured the hostility was constant and unavoidable. *Cf. SFFA*, 600 U.S. at 221 ("[S]tereotyping can only cause continued hurt and injury."); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 298 (1978)(Powell, J.)(rejecting schools' efforts to "reinforce common stereotypes" that "hav[e] no relationship to individual worth"); *Holt v. Pennsylvania*, 683 Fed. Appx. 151, 160 (3d Cir. 2017) ("[B]ecause of the overlap between Title VII claims and constitutional discrimination claims, we have applied Title VII caselaw to equal protection claims.").

c. Penn State is wrong to place any weight on the argument that the training was "optional."

As noted above, Penn State's training sessions were not optional, in the ordinary sense. But that debate has less import than Penn State thinks, because even optional events count toward an employee's hostile

environment. Otherwise, may bosses engage in sexual harassment at optional cocktail parties? May employers segregate the use of their coffee machines by race, if employees are free to get coffee anywhere? Appellees suggest, although they do not offer any authority in support of their contention, that non-mandatory employer events are not part of a hostile environment inquiry. That is simply not the case. *Cf. Macias v. Sw. Cheese Co., LLC*, 624 Fed. App'x 628, 638 (10th Cir. 2015)(holding that outside misconduct could form part of a hostile environment claim where it replicated in-office violations and thereby evidenced a recurring scheme); *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 352 (S.D.N.Y. 2003). Here, Plaintiff adequately presented disputed material questions of fact to establish that the behavior referenced in the training sessions was reflected throughout Penn State's operations.

d. The EEOC's Guidance on Title VII is entitled to *Skidmore* Deference.

The EEOC has concluded that where an employee can allege or prove that employment training is discriminatory "in content, application, or context," a hostile work environment claim may lie. In the

same vein, the EEOC noted that an employee in this context need merely show "some injury" under Title VII.[3]

While the Court is not bound by EEOC Guidance, the Court is welcome, even after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), to give such Guidance persuasive value based on that agency's "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor*, 477 U.S. at 65 (cleaned up); *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 399 (2008)(EEOC policy statements are "entitled to a measure of respect"); *cf. Miller Plastic Products Inc v. National Labor Relations Board*, 141 F.4th 492, 502 (3d Cir. 2025)(giving deference to NLRB interpretations post-*Loper Bright*).

In this context, the EEOC Guidance is especially persuasive, because it interprets recent case law from the Supreme Court. It also represents some of the only Guidance surrounding recent cases involving discriminatory DEI training like that here. *See id.* at n.42 (citing cases, including the District Court's decision at the motion to dismiss stage in this matter); *see also* DOJ Guidance, at 9 ("Trainings should not require

[3] *See* EEOC Technical Assistance Document, *What You Should Know About DEI-Related Discrimination at Work* (Mar. 19, 2025), https://www.eeoc.gov/wysk/what-you-should-know-about-dei-related-discrimination-work#_edn42.

participants to affirm specific ideological positions or 'confess' to personal biases or privileges based on a protected characteristic.").[4]

e. De Piero suffered retaliation under Title VII.

The District Court rejected the Appellees' contention that De Piero did not plead a retaliation claim. And there is no question that De Piero objected to discrimination in his formal complaint with Penn State. Appellees' contentions regarding the issue of causation are quintessential factual questions. And the discipline absolutely rose to the level of retaliation. *See supra*, Section VI(c).

VI. De Piero adequately pled a claim for First Amendment retaliation.

a. De Piero's claims aren't barred by *Garcetti*.

The District Court did not rely on either *Garcetti v. Ceballos*, 547 U.S. 410 (2006), or *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009), a Third Circuit decision elaborating on *Garcetti's* employee speech framework. (App. 0025 (footnote 7)). The District Court's silence on this score is best read as a holding that neither *Garcetti* nor *Gorum* applies in the academic context. Yet Appellees put it front and center in their brief.

[4] *See supra*, n. 2

But *Garcetti* and *Gorum* themselves indicate that a carveout applies to "speech related to scholarship or teaching." *Garcetti* 547 U.S. at 425 ("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")(internal citation omitted); *see also Gorum* 561 F.3d at 186 n.6 (observing, "[w]here *Garcetti's* official duty test does not apply to…speech 'related to scholarship or teaching,' courts apply the traditional First Amendment…analysis established in [*Pickering* and *Connick*]."). Here, scholarship and teaching are the very subjects at issue, and the *Garcetti* carveout applies.

The Court in *Garcetti* wanted the issue to percolate in the Circuit Courts. *Id*. However, the Court has made clear that the law should function to protect academic expression, not hinder it: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. . .the First Amendment. . .does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967); *see also Sweezy v. New*

Hampshire, 354 U.S. 234, 250 (1957)(holding "government should be extremely reticent to tread" on "liberties in the areas of academic freedom and political expression").

The court in *Gorum*, like *Garcetti*, did not squarely address academic expression in public universities. The speech at issue in *Gorum* addressed non-academic issues such as a prayer breakfast and a student disciplinary hearing. *Gorum*, 561 F.3d at 186. But here, Plaintiff's speech directly relates to scholarship and teaching: *e.g.*, challenging the idea that professors should consider their students' race when grading; challenging claims about the inherent teaching defects of white teachers; challenging the instruction that white teachers need to compensate for their "whiteness" in the classroom; and challenging claims that white teachers' preferred teaching methods are simply a product of their "white racial habitus" and white supremacy. (App. 0116—0117).

If this speech were not protected under the First Amendment, every public school in the country would be permitted to punish teachers who challenge, as in this case, discriminatory orthodoxies in the very space meant to foster rigorous academic scrutiny. This is precisely the danger

that led the Supreme Court to carve out *Garcetti's* "official duties" standard to academic scholarship and teaching.

Since *Garcetti*, all Circuit Courts to address this issue have come down firmly on the side of protecting academic expression. *See Meriwether v. Hartop*, 992 F.3d 492, 504 (6th Cir. 2021)(recognizing "expansive freedoms of speech and thought associated with the university environment"); *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014)("We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court"); *Buchanan v. Alexander*, 919 F.3d 847, 852-53 (5th Cir. 2019); *Adams v. Trustees of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011); *Heim v. Daniel*, 81 F.4th 212, 226-28 (2d Cir. 2023)("*Garcetti's* bar on First Amendment protection for any 'official-duty' speech would…exil[e] all public-university faculty scholarship and instruction from the shelter of the First Amendment. That cannot be.").

This Court should join the Circuits that reject the "strait jacket" that *Garcetti* would impose on "the intellectual leaders in our colleges

and universities." *See Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957).

b. De Piero's comments were on a matter of public concern.

Appellees echo the District Court's error, insisting that when a public employee challenges the legality and pedagogical soundness of his employer's racially discriminatory policies, he is merely airing "personal grievances" that may "brush against a matter of public concern." Ans. Br. at 25. This conclusion misreads Third Circuit precedents and undervalues the inherently public nature of exposing unlawful discrimination at a state institution.

To be protected, a public employee's speech need merely involve any matter of public concern—that is, speech "fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983); *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709–10 (9th Cir. 2009)("We have defined the scope of the public concern element broadly.")(cleaned up).

The Supreme Court has held that this standard encompasses challenges to discrimination in public institutions. The Court emphasized that "it is clear that…statements concerning the school

district's allegedly racially discriminatory policies involved a matter of public concern." *Connick,* 461 U.S. 138, 146 (1983)(discussing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979)). This Court, too, has long recognized that allegations of discrimination by a public employer fall squarely into this category. *See, e.g.*, *Fender v. Delaware Div. of Revenue*, 628 Fed. App'x 95, 97 (3d Cir. 2015)(noting that an allegation of discrimination is "clearly a matter of political and social concern"); *Azzaro v. County of Allegheny*, 110 F.3d 968, 978 (3d Cir. 1997)(*en banc*). This is because speech that seeks "to bring to light actual or potential wrongdoing or breach of public trust" by government officials is vital to public discourse. *Connick*, 461 U.S. at 148.

Plaintiff's speech—both internally and in his published Op-Ed—did not concern mundane workplace issues. He challenged Penn State's official adoption of "anti-racism" pedagogies that characterized white faculty as inherently problematic and encouraged race-based grading. (App. 0110—0112). He publicly criticized policies he argued would "exacerbate student achievement gaps by lowering standards." (App. 0112). And he specifically alleged that the University was violating federal anti-discrimination laws. (App. 0114). These are textbook

examples of speech addressing the conduct and legal compliance of a public university.[5]

Appellees rely on *De Ritis v. McGarrigle*, 861 F.3d 444 (3d Cir. 2017), to reframe Plaintiff's substantive challenges as mere expressions of personal "discomfort" or "disagreement" with colleagues. Ans. Br. at 25–26. As explained in Plaintiff's opening brief, *De Ritis* is inapposite. Opening Br. at 64-65 (arguing that, unlike the case here, the employee's speech in *De Ritis* concerned only his own alleged inefficiency, and lacked any allegations that his employer was engaged in cognizable wrongdoing

[5] In a footnote, Appellees wrongly state that the only speech at issue in Plaintiff's First Amendment claim is his internal resistance to Penn States' illegal discrimination. Ans. Br. at 26 n.10. To the contrary, as the District Court recognized, Plaintiff's claim was based on two independent grounds: retaliation for his internal comments and retaliation based on his *published* commentary criticizing the university. (App. 0005 ("De Piero made his feelings known, both to university administrators and in the press, and alleges that he was disciplined in response.")). Plaintiff alleged both grounds in his complaint, and evidence emerged that the disciplinary actions taken against Plaintiff occurred mere days after he published an Op-Ed, and that some of the key university decision makers were aware of and concerned about the publication prior to green-lighting the retaliation. (App. 162-0166 ¶¶ 83-84, 90, 96, 101-111; App. 4565 (Oct. 19, 2021 e-mails from Appellee Baer raising concerns about Plaintiff's Op-Ed); App. 4564 (Oct. 29, 2021 e-mail to Appellee Borges highlighting Op-Ed)). Of course, since these claims were prematurely dismissed, discovery was not allowed, and the record is incomplete.

or any breach of the public trust). In opposition, Appellees do not engage with the facts of *De Ritis* at all, and functionally give up on its relevance.

Even more important, Appellees cannot transform speech about systemic discrimination into a private grievance simply because the discrimination also affected the speaker personally. The District Court conceded that the underlying issue—"how to address racial inequality in the classroom"—is a matter of public concern. (App. 0027). Even *De Ritis* acknowledged that where statements on "matters of public concern...overlap with [purely personal] matters," the speech remains protected. *De Ritis*, 861 F.3d at 456. By characterizing De Piero's challenge to institutional discrimination as a mere personal grievance, the District Court committed reversible error.

c. An ordinary person would be chilled by Penn State's conduct.

To properly plead First Amendment retaliation, Plaintiff must show that the university engaged in adverse action against him. *Thomas v. Indep. Twp.*, 463 F.3d 285, 296 (3d Cir. 2006). To show adverse action, Plaintiff must allege facts demonstrating that the "retaliatory conduct was sufficient to deter a person of ordinary firmness from exercising

his First Amendment rights." *Id. quoting McKee v. Hart*, 436 F.3d 165, 170 (3d Cir. 2006).

An ordinary employee would avoid, at significant cost, (1) having a false report of racism filed against them; (2) discipline based on the false complaint, (3) a letter of reprimand being placed in their file, and (4) the lowering of their performance review. That is precisely what Plaintiff has alleged. (App. 0116—0117).

That retaliation would significantly deter a reasonable person from continuing to speak out against Penn State's discrimination. Yet the District Court incorrectly concluded that Penn State's discipline against Plaintiff "does not even rise to the level of critical comments or reprimands." (App. 0026). That decision ignored key allegations in Plaintiff's complaint and warrants reversal.

Specifically, false disciplinary reports filed against a public employee by their supervisor commonly constitute an adverse action. *See Millea v. Metro-N. R. Co.*, 658 F.3d 154, 165 (2d Cir. 2011)("In this objective light, we think (and conclude that a reasonable jury could decide) that a letter of reprimand would deter a reasonable employee from exercising his FMLA rights.").

That retaliation is even more evident where those reports result in an official sanction by the employer and other employment consequences that restrict the speaker's ability to air opposed viewpoints. *See Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 464 (1979).

Finally, an undeserved performance evaluation may also constitute an adverse action. *See Halfacre v. Home Depot, U.S.A., Inc.*, 221 Fed. Appx. 424 (6th Cir. 2007)(markedly lower performance evaluation scores given employee could be sufficiently materially adverse); *Pérez-Cordero v. Wal-Mart P.R., Inc.*, 656 F.3d 19, 31 (1st Cir. 2011); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987)("Transfers of job duties and undeserved performance ratings, if proven, would constitute 'adverse employment decisions'"); *Allen v. Napolitano*, 774 F. Supp. 2d 186, 202 (D.D.C. 2011)("The D.C. Circuit has repeatedly recognized that receiving a poor performance evaluation that increases the likelihood of denial of a bonus or promotion could dissuade a reasonable worker from pursuing charges of discrimination.")(citing cases).

Plaintiff alleged that his supervisor filed a false report against him for challenging discrimination within his department. (App. 0120)("But because Plaintiff challenged Penn State's racist orthodoxy ascribing

'racism' to all white people…Defendant Naydan and Lee-Amuzie filed a bullying and harassment complaint against Plaintiff after he dared to ask questions."); (App. 0115)("Borges informed Plaintiff that he had used intimidating body language at the meeting. Plaintiff reminded Borges that the meeting was on Zoom and detailed various facts: he was seated the entire time, he did not point his finger in the camera, he did not raise a fist, he did not gesture about wildly, he did not raise his voice, he did not use profanity, he did not insult anybody, and he did not intentionally interrupt anybody.").

Plaintiff also alleged that the university formally sanctioned him based on his supervisor's false report. (App. 0116)("Defendant Borges determined that Plaintiff had bullied and harassed his colleagues during the meeting by asking questions that challenged Penn State's race-based orthodoxy."); (App. 0117)("Defendant Marranzini and Defendant Baer issued a formal Performance Expectations Notice that stated, 'Your colleagues' accounts of what transpired in that meeting reflect poorly on you, as you caused significant disruption to the meeting.'"); (App. 0118)("At Penn State, a Performance Expectations Notice is defined as a

'sanction' in Penn State's policy AD91 Discrimination and Harassment and Related Inappropriate Conduct.").

Plaintiff also alleged that the sanction instructed him to alter his workplace behavior, including to stop challenging his supervisor's discriminatory teachings targeting white men. (App. 0116)("Penn State officially warned Plaintiff that any 'future repeat of such conduct as was exhibited in the meeting on October 18,' meaning dissenting from Penn State's race-based dogma, 'may result in disciplinary action.'").

d. Appellees are not entitled to judgment as a matter of law on De Piero's speech claims.

Anticipating reversal on the District Court's dismissal of Plaintiff's speech claims, Appellees urge this Court to independently undertake its own review the record—even though all discovery was taken on other claims—and determine that Plaintiff's speech claims would be barred at the summary judgment stage. The Court should decline to engage in this exercise. *See Home Depot USA, Inc. v. Lafarge North America, Inc.*, 59 F.4th 55, 64 (3d. Cir. 2023)("[W]e are a court of review, not first view…").

VII. Appellees rely on disputed facts even before this Court.

Appellees' brief, mirroring the District Court's error, violates the cardinal rule of summary judgment motions: don't resolve disputed

material facts. Yet Appellees unilaterally resolve numerous material disputes in their own favor.

A central pillar of Appellees' argument is that the Writing Program professional development (PD) meetings, where much of the racial hostility occurred, were entirely "optional" and "voluntary." Ans. Br. at 4–5. They suggest this undermines pervasiveness, implying Plaintiff could have simply avoided the harassment.[6]

This is a disputed fact. Appellees rely on testimony from their own witnesses claiming attendance was not formally tracked. Ans. Br. at 5. They ignore Plaintiff's testimony that he attended the meetings precisely because he understood that participation was important for his annual performance evaluation. (App. 0567–0568). A reasonable juror could easily conclude that professional development sessions organized by the department head, directly related to the core function of the job (teaching writing), are *de facto* mandatory for non-tenured faculty, regardless of formal attendance policies. The dispute over whether these sessions were truly voluntary is a material fact precluding summary judgment.

[6] As noted above, *infra* Section V(c), the fact that an employer's discrimination occurs in an "optional" setting has very little import.

In a related attempt to minimize the impact, Appellees argue these were not "training sessions," but mere "academic discussions" where faculty were free to disagree. Ans. Br. at 4–5. This characterization ignores the disputed context and purpose of the meetings.

The record shows these sessions were designed to "official[ly]" transform the writing program to incorporate these specific "anti-racist" pedagogies. (App. 3803-3804). The dissemination of these views was done pursuant to "the Campus Strategic Plan." (App. 3054). When an employer mandates professional development, the strong inference is that it expects the content to be implemented. Indeed, Penn State identifies no other unequivocal statements made to its employees that they may freely disregard. Whether these sessions constituted mere discussion or mandatory training designed to alter the terms and conditions of Plaintiff's employment is a disputed fact for the jury.

Appellees also rely on an assertion that Appellee Baer was Plaintiff's sole supervisor, and that Appellee Naydan, the Writing Program Coordinator, "did not supervise" full-time faculty. Ans. Br. at 4. Appellees again ignore record evidence. An official university report explicitly referred to Naydan as Plaintiff's "co-supervisor." (App. 3064).

Naydan was responsible for spearheading the relevant training/professional development meetings, determining the annual agenda, and compiling the required materials. (App. 1537:17-20). Resolving this conflicting evidence is a task for the factfinder.

Appellees separately adopt the District Court's impermissible finding that Plaintiff was "[seeking] out opportunities to rustle up disharmony" (App. 0067), implying that he welcomed the harassment. Ans. Br. at 1. But determining a plaintiff's subjective state of mind is a classic function of the jury. The record contains ample evidence that Plaintiff felt "humiliated, disgraced, [and] appalled" due to Penn State's conduct. (App. 00781 at 3–4, App. 3042). Weighing this testimony and determining Plaintiff's credibility is inappropriate on summary judgment.

Likewise, whether Penn State "endorsed" the materials is contested. A jury could easily find that when a supervisor (Naydan) declares that the materials (Inoue's work) will be a "common read" for the year (App. 2766), incorporates them into the official agenda (App. 2768), and facilitates the author leading a session personally (App. 2046), all pursuant to the "Campus Strategic Plan," they constitute

endorsement. These facts directly dispute Penn State's narrative that these were mere academic discussions of unendorsed ideas.

The most glaring example of Appellees' reliance on disputed facts concerns the October 18, 2021 meeting. Appellees argue that "Plaintiff's conduct was confrontational, unprofessional, and improperly targeted Naydan and Lee-Amuzie." Ans. Br. at 17. But that narrative collapses when confronted with the objective evidence. An audio recording of the meeting exists. (App. 3002). When confronted with this recording during depositions, the very individuals who lodged or reviewed the complaints—Naydan, Borges, and Rigilano—failed to identify any point where Plaintiff acted in a hostile or unprofessional manner. *See, e.g.*, (App. 1510:21-24, 1512:4-12 (Naydan); App. 1360:4-10, 1363:12-18 (Borges); App. 1080:9-14, App. 1084:2-20 (Rigilano)).

Crucially, Naydan conceded that it was the content of Plaintiff's questioning—his challenging the legality of the training—not his demeanor, that created the perceived "hostility." (App. 1530:2-8, 1532:21-24, 1556:5-20). Furthermore, Plaintiff did not dominate the discussion, despite complaints to that effect; only one person spoke less than he did.

(App. 4361-4362). Appellees cannot rely on subjective interpretations at the summary judgment stage.

VIII. Penn State is liable under a *respondeat superior theory*.

An employer's liability for a hostile work environment depends on whether the harasser is the victim's supervisor or a co-worker. If a supervisor commits the harassment, the employer is strictly liable, unless no tangible employment action occurred. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). If the harassment is by co-workers, the employer is liable only if it was negligent—that is, if it knew or should have known about the harassment and failed to take prompt and appropriate remedial action. *See Huston v. Procter & Gamble Paper Prod. Corp.*, 568 F.3d 100, 104 (3d Cir. 2009). Appellees incorrectly argue that they are insulated under both theories. Ans. Br. at 45–48.

Appellees' attempt to frame this case as involving isolated remarks by rogue actors ignores the reality that the hostile environment stemmed directly from official University policy, and was implemented by supervisors and high-ranking officials. *Accord Chislett*, 2025 WL 2725669 at *12 ("Based on Chislett's evidence, a rational juror could find that such

harassment was 'so manifest as to imply the constructive acquiescence of senior policy-making officials.'")

The racially hostile messaging was not merely tolerated by Penn State; it was mandated. It was disseminated pursuant to "the Campus Strategic Plan" (App. 2046: 18-23) and campus-wide "anti-racism" resolutions (App. 3473-3482). It was distributed via official platforms (App. 4295) and implemented by the Writing Program Coordinator, Appellee Naydan (App. 1537:17-20), to transform the program (App. 3803-3804). Key instances of harassment were perpetrated by management-level officials, including the AVP for Educational Equity Wong (App. 4089) and Director of DEI Smith (App. 2704).

And Plaintiff did suffer tangible employment actions resulting from this harassment, including formal discipline (the performance improvement plan), (App. 3545-3546) and his ultimate constructive discharge (App. 3092-3093). Liability is therefore firmly established.

Even analyzing the case under a negligence standard (applicable to co-worker harassment or where the employer attempts the *Faragher/Ellerth* defense), Penn State remains liable because its response to the known harassment was wholly inadequate. Plaintiff

formally complained about the racial harassment in his September 13, 2021, Bias Report. (App. 2972-2974). This triggered Penn State's duty to take action "reasonably calculated to prevent further harassment." *Huston*, 568 F.3d at 110; *see also Riggins v. Town of Berlin*, No. 23-868-cv, 2024 WL 2972896, *3 (2d Cir. 2024)(employer owed duty under Title VII to respond to accusation that female employee was involved in a sex scandal, when it could "determine that [the] accusations were false and put an end to [a colleague's] harassment.").

Its response did the opposite. Appellee Borges, the Associate Director for the Affirmative Action Office, entirely dismissed his concerns. When Plaintiff highlighted the inherent harassment in being trained that "white teachers are a problem," Borges validated the training, stating, "It's about the white race. Yes. It's about the white race, but it's not about you." (App. 2982 at 30:54-31:03). She instructed him to continue engaging with the racist material and to "get beyond" the "shocking titles." (App. 2982 at 17:20-17:40, 24:45-25:00).

Telling an employee to simply tolerate racial harassment is not remedial; it is ratification. Indeed, Penn State's inadequate response led directly to the subsequent complaints and discipline against De Piero

when he continued to question the hostile environment. (App. 3019, 3026-3027).

Conclusion

This Court should reverse.

Respectfully submitted,

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Combined Certifications

Statement of Bar Membership

I, William E. Trachman, am duly admitted to practice law before the United States Court of Appeals for the Third Circuit.

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Statement of Compliance with Frap 32(a)(7)(b)

This brief was prepared using Microsoft 365. The font is Century Schoolbook, 14-point, double spaced. The word count of the body of the brief, including footnotes and point headings, is 6,500 words.

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I, William E. Trachman, hereby certify that seven hardcopy briefs have been properly served on the court the date of the ECF filing of this brief.

/s/ William E. Trachman
William E. Trachman

Statement of Identical Compliance Briefs

I, William E. Trachman, hereby certify that the briefs are served in compliance with the Court's rules and identical to one another and the electronic PDF version.

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