IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BARTON THORNE, Plaintiff, v. SHELBY COUNTY BOARD OF EDUCATION and DR. JORIS M. RAY, in his official capacity as Superintendent of Shelby County Schools, Defendants.	Case No. 2:21-cv-02110-MSN-tmp

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT WITH PREJUDICE PURSUANT TO FED. R. CIV. P. 12(b)(6)

Defendants Shelby County Board of Education and Dr. Joris M. Ray, in his official capacity as Superintendent of Shelby County Schools (collectively, "SCS"), by and through counsel, hereby submits its Reply in Support of their Motion to Dismiss Plaintiff's Amended Complaint [Doc. 10 ("Am. Compl.").] For the reasons stated herein and in SCS' Motion to Dismiss and supporting and Memorandum of Law, Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted and should be dismissed with prejudice.[1] In further support of its Motion to dismiss, SCS states as follows:

I. INTRODUCTION

Plaintiff seeks to politicize an employment matter and pursue redress by constitutionalizing his employee grievance. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). Though he presents

[1] Plaintiff included "Oral Argument Requested" in the style of his Response but did not "explain why a hearing would be helpful or necessary" as required by Local Rule 7.2(d); *see also* Fed. R. Civ. P. 78(b).

multiple convoluted arguments, Plaintiff's complaint is actually quite simple: He is unhappy because the time he spent on paid administrative leave pending an internal investigation by his employer was longer than what he expected. While Plaintiff apparently argues that SCS' decision to place him on paid administrative leave was made in retaliation based upon the content of his school-wide remarks made on January 11, 2021 [*See* Am. Compl. ¶¶ 29], the facts as pled in his Amended Complaint do not support that argument. Plaintiff expressly acknowledges that he was placed on administrative leave "in response" to complaints filed by "one or several unknown SCS employees, parents, or students[.]" [Am. Compl. ¶¶ 37, 38.] Plaintiff also admits SCS investigated the complaints and ultimately determined that Plaintiff did not violate SCS policy. [Am. Compl. ¶¶ 56, 60.]

Plaintiff now offers a dubious interpretation of his pled facts in an apparent attempt to escape dismissal by this Court under well-settled law. Indeed, none of Plaintiff's arguments actually applies to the facts at issue here. As a matter of law, Plaintiff had no First Amendment rights in his statements indisputably made pursuant to his official duties as principal of Cordova High School, and none of the alternative First Amendment theories urged by Plaintiff changes that result. Further, Plaintiff has not pled facts that could establish that he was disciplined for violation of any policy or that SCS violated any contractual provision. To the contrary, the facts alleged in Plaintiff's Amended Complaint establish that Plaintiff was lawfully placed on paid administrative leave pending an internal investigation of staff, student, and/or parent complaints. Plaintiff fails to state a claim upon which relieve can be granted, and his Amended Complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

II. PLAINTIFF'S STATEMENTS ARE NOT PROTECTED BY THE FIRST AMENDMENT BECAUSE THEY WERE MADE PURSUANT TO HIS OFFICIAL DUTIES AS AN EMPLOYEE OF SCS.

Plaintiff recognizes that the Supreme Court's holding in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) is fatal to his First Amendment claims. Strangely, however, Plaintiff claims that *Garcetti* and its Sixth Circuit progeny do not apply in this case. [Am. Compl. pp. 12-13.] Plaintiff's argument is based on a clear misstatement of *Garcetti's* holding. Contrary to Plaintiff's assertion, *Garcetti's* application to employee speech is not limited to employee speech made in violation of employer instruction. Rather, the *Garcetti* Court clearly articulated its holding 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." *Garcetti v. Ceballos*, 547 U.S. at 421 (2006). Plaintiff's mischaracterization of *Garcetti* also ignores the facts of that case. The Court did not consider whether the content of the speech at issue violated employer instructions or policy; the "controlling factor" was that the employee's "expressions were made pursuant to his duties as a calendar deputy." *Id.* at 421. Plaintiff admits that his statements were made pursuant to his official duties as an employee of SCS, and *Garcetti* unquestionably controls.

Plaintiff similarly mischaracterizes the Sixth Circuit's holding in *Evans-Marshall v. Board of Education of Tipp City*, which applied *Garcetti*'s holding to statements by an educator employed by a k-12 institution. 624 F.3d 332 (6th Cir. 2010). The *Evans-Marshall* Court found the plaintiff's speech was not protected by the First Amendment because she was speaking pursuant to her official duties as a teacher, notwithstanding whether her speech was contrary to her employer's instructions. *Evans-Marshall* clearly establishes the law of the Sixth Circuit: *Garcetti* applies to

teachers' speech made pursuant to their official duties in the k-12 school environment, and any exception for "academic freedom" is limited to the college/university setting.[2]

Plaintiff's "nonpublic forum" argument is a red herring and does not apply to the facts as pled in Plaintiff's Amended Complaint. Not a single case cited by Plaintiff in his Response supports application of that theory to employee speech made pursuant to official duties. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (considering whether the First Amendment is violated when a union elected by the teachers is granted access to teachers' mailboxes while a rival union is excluded); *Am. Freedom Defense Initiative v. Suburban Mobility Auth. For Regional Transportation*, 978 F.3d 481 (involving advertisements on public buses).

The nonpublic forum analysis advanced by Plaintiff clearly does not apply in this context because the speech at issue is not protected speech. In *Cornelius v. NAACP Legal Defense and Educational Fund, Inc*., 473 U.S 788 (1985), the Supreme Court of the United States observed that, before determining whether speech occurred in a public or nonpublic forum, it must determine whether the speech at issue is speech protected by the First Amendment, "for, if it is not, we need go no further." *Id*. at 797. The Supreme Court's observation illustrates a significant problem with Plaintiff's argument: if speech is not protected by the First Amendment in the first instance, the forum is irrelevant.

Plaintiff's First Amendment claim fails under *Garcetti* and *Evans-Marshall* because Plaintiff spoke pursuant to his official duties as an employee of SCS. "When government employees speak 'pursuant to their official duties,' *Garcetti* teaches that they are 'not speaking as

[2] Footnote 5 to Plaintiff's Response [Doc. 16] reveals Plaintiff's likely motive in bringing a First Amendment claim clearly unsupported by Sixth Circuit precedent. Plaintiff's reservation of "the right to argue" that the Sixth Circuit Court of Appeals misinterpreted *Garcetti* does not save his Amended Complaint from dismissal based on binding precedent in this Circuit.

citizens for First Amendment purposes.'" *Evans-Marshall*, 624 F.3d at 336 (quoting *Garcetti*, 547 U.S. at 421)). Because Plaintiff spoke as a government employee and not as a citizen, his speech is not protected by the First Amendment. Designation of a "nonpublic forum" does not extend First Amendment protections to otherwise unprotected speech, but simply determines the latitude afforded the government in regulating protected speech by private citizens in that forum. *See Am. Freedom*, 978 F.3d at 485 (distinguishing between government speech and private speech and explaining that "the Free Speech Clause 'does not regulate government speech' [and] [t]he restrictions that the government may impose on **private speakers** who seek to use public property for their speech depend on the type of 'forum' that is at issue." (emphasis added) (internal citations omitted)).

Plaintiff's First Amendment claim fails under *Garcetti* and *Evans-Marshall* because Plaintiff's statements were made pursuant to his official duties as a public employee and therefore do not constitute private speech protected by the First Amendment. The standard applicable to a "nonpublic forum" applies only to protected private speech and is therefore inapposite here. Plaintiff's attempt to confuse the issues through discussion of an inapplicable standard for government regulation of private speech does not change the result. Plaintiff fails to state a claim for violation of the First Amendment because his statements are not protected by the First Amendment.

III. PLAINTIFF DOES NOT PLEAD FACTS TO ESTABLISH HE WAS DISCIPLINED FOR VIOLATION OF ANY POLICY VOID FOR VAGUENESS.

Plaintiff's "void for vagueness" argument cannot save his federal claims. As an initial matter, Plaintiff relies upon an inapplicable standard, again ignoring that his claims arise in the context of public employment. Contrary to Plaintiff's attempt to persuade the Court to apply a "more stringent vagueness test" [Doc. 16, pp. 7-8], it is actually a **less stringent** standard that

governs employment policies. *See, e.g., Meriwhether v. Hartop*, No. 20-3289, 2021 WL 1149377, *18 (6th Cir. Mar. 26, 2021) ("There is 'substantially more room for imprecision in regulations bearing only civil, or employment, consequences, than would be tolerated in a criminal code.'" (internal citations omitted)). "Even where First Amendment values are at stake, 'employment standards are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk' of discipline." *Id*. (internal citations omitted).

Here, the Court cannot apply the "ordinary person" standard governing employment policies (or any standard at all), because Plaintiff does not identify any policy or policies describing prohibited conduct in a way he claims to be unconstitutionally vague. Though he argues "SCS's policies . . . do not give a reasonable person fair notice that his speech would be considered misconduct," Plaintiff does not identify any policy that he claims was actually applied to him as a basis for discipline or standard of conduct. Instead, he refers vaguely to "SCS's policies" and to Paragraph 39 in his Amended Complaint, where he cites a handful of words from SCS Policies 4002 (Staff Ethics), 4012 (Disruption of the School or Work Environment), and 4018 (Non-Tenured Teacher Dismissals). Though Plaintiff seems to argue in his Response [Doc. 16] that terms allegedly contained in these policies, including "obscene," "profane," "discourteous," "harassing," "discriminatory," 'intimidating," "dangerous," "disruptive," "incompetence," and "improper conduct" are unconstitutionally vague, he alleges confidently in his Amended Complaint that none of those terms describe his January 11, 2021 remarks. [Am. Compl., ¶ 39.] Plaintiff also does not allege that SCS disciplined him for, or even accused him of, violating any of these policies.

Moreover, it is clear from the face of Plaintiff's Amended Complaint that Plaintiff **was not disciplined** for violating any SCS policy. *See Akridge v. Wilkinson*, 178 Fed. Appx. 474, 480 (6th Cir. 2006) (rejecting plaintiff's void for vagueness claim where he was not disciplined for a violation of that policy). To the contrary, Plaintiff was placed on paid administrative leave pending an internal investigation of complaints made by SCS students, staff, and/or parents. [Am. Compl. ¶¶ 37, 38.] These circumstances stand in stark contrast to the cases addressing the alleged vagueness of employment standards, which involve employee discipline resulting from violations of specific policies. *See, e.g. Meriwhether v. Hartop*, No. 20-3289, 2021 WL 1149377, *18 (6th Cir. Mar. 26, 2021) (considering claim by employee formally reprimanded for violation of discrimination policy and rejecting argument that the policy was unconstitutionally vague as applied to the employee); *Coker v. Whittington*, 858 F.3d 304, 306 (5th Cir. 2017) (considering claims by employees terminated for violation of the Code of Conduct and concluding that the Code was not unconstitutionally vague as written or enforced, "especially with regard to discipline that was not itself unconstitutional.").

Plaintiff's Amended Complaint does not seek redress for discipline suffered pursuant to an unconstitutionally vague employment policy. As noted above, the true basis for Plaintiff's claims is his complaint that SCS' investigation took longer that he thinks it should. Contrary to Plaintiff's arguments, however, he has not suffered discipline or any other adverse employment action. As Plaintiff acknowledges, "a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action." *Peltier v. U.S.*, 388 F.3d 984, 988 (6th Cir. 2004) (internal citations omitted). In *Peltier*, the Sixth Circuit upheld the dismissal of the plaintiff's gender discrimination claim, finding that she "admit[ed] that she was put on paid administrative leave pending the outcome of the investigation, and was returned to her position

upon the termination of the investigation[,] and "[t]herefore, she suffered no adverse employment action." *Id.* As in *Peltier*, Plaintiff admits he was placed "on administrative leave the day after his message aired[,]" that he "was reinstated to his job" upon the termination of the investigation, and that he was issued a reinstatement letter that stated "discipline was not warranted." [Am. Compl., ¶¶ 37, 59, 60, 61.] *See also Dendinger v. Ohio*, 207 Fed. Appx. 521, 527 (6th Cir. 2006) ("We have repeatedly held, however, that neither an internal investigation into suspected wrongdoing by an employee nor that employee's placement on paid administrative leave pending the outcome of such an investigation constitutes an adverse employment action.")

Plaintiff suggests in his Response [Doc. 16] that whether paid administrative leave pending an investigation is an adverse employment action depends upon the duration of the investigation and on the employer's good faith purpose in conducting the investigation. Plaintiff is wrong. The cases cited by Plaintiff in an effort to distinguish *Peltier* actually involve **no internal investigation at all**. In *Thompson v. Quorum Health Res*., LLC, the plaintiff was suspended with pay **after** the employer's investigation "for deliberately and continuously refusing to comply with [the employer]'s Code of Conduct and his resulting insubordination." *Thompson*, 485 F. App'x 783, 786 (6th Cir. 2012). The *Thompson* Court was clear that it was the lack of investigation (and not the duration of the investigation) that distinguished that case from *Peltier*:

> No internal investigation of Thompson's code violations was conducted after he was suspended and Quorum began to process his termination soon thereafter. Therefore, Thompson's suspension preceding termination was essentially a *de facto* termination. Finally, Thompson was never reinstated after his suspension.

Id. at n. 2. Likewise, *Smith v. City of Salem Ohio* did not involve a suspension pending an internal investigation, 378 F.3d 566 (6th Cir. 2004). Rather, the plaintiff in that case was suspended "for one twenty-four hour shift, based on his alleged infraction of a City and/or Fire department policy." *Smith*, 378 F.3d at 569; *see also Kuhn v. Washtenaw County*, 709 F.3d 612, 626 (6th Cir. 2013)

(finding an internal investigation of suspected wrongdoing was not an adverse employment action and rejecting the plaintiff's argument that *Peltier* requires "a good faith basis for suspecting employee wrongdoing").

Plaintiff's contention that his six-week paid administrative leave constitutes an adverse employment action under the law would frustrate a practice that has a rich tradition in employment jurisprudence. Plaintiff's theory would effectively put a "shot clock" on employers to complete investigations into potential employer policy violations, ignoring the intricacies of workplace investigations and necessity of performing a thorough, fair review of allegations for the benefit of employees and employers alike. Such outcome is irrational and is not supported in the law.

IV. PLAINTIFF DOES NOT STATE A CLAIM FOR BREACH OF CONTRACT UNDER TENNESSEE LAW.

As explained in SCS' Motion to Dismiss, Plaintiff fails to state a claim for breach of contract under Tennessee law. Among other deficiencies, Plaintiff does not allege any conduct by SCS could have violated any term of the alleged contract. Instead of explaining or clarifying the alleged violations in his Response, Plaintiff just vaguely refers to "four relevant provisions of the standard employment contract" noted in his Amended Complaint [Doc. 6], none of which was violated by any alleged action or inaction of SCS.

Plaintiff also fails to allege damages related to any breach of contract, and the cases cited in Plaintiff's Response do not change that result. *See, e.g., Smith v. Am Gen. Corp.*, No. 87-79-II, 1987 WL 15144 (Tenn. Ct. App. Aug. 5, 1987) (recognizing changes in an employee's authority as breach of employment contract because the contract in that case "expressly guaranteed the continuation of existing duties and authority . . . ."); *Walker v. City of Cookeville*, No. M2002-01441-COA-R3-CV, 2003 WL 21918625 (Tenn. Ct. App. Aug. 12, 2003) (finding breach of employment contract where employer failed to pay contractual severance benefits upon

employee's constructive discharge). Plaintiff fails to plead facts which could establish damages for breach of the alleged contract under Tennessee law, and his breach of contract claim should therefore be dismissed with prejudice.

V. CONCLUSION

For the reasons stated herein and in SCS' Motion to Dismiss and supporting Memorandum, Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted and should therefore be dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing has been forwarded pursuant to the Court's electronic filing system to the following:

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