UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SANDRA HERNDEN,

Plaintiff,

vs.

CHIPPEWA VALLEY SCHOOLS, FRANK BEDNARD and ELIZABETH PYDEN,

Defendants.
_____/

Honorable Mark A. Goldsmith
Magistrate David R. Grand
No. 22-12313

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DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

1. PLAINTIFF HAS NOT ALLEGED AN ADVERSE ACTION SUFFICIENT TO ESTABLISH A FIRST AMENDMENT RETALIATION CLAIM.

Plaintiff attempts to create a First Amendment retaliation claim based on strained interpretations of legal authority and distortions of the record. Plaintiff asserts that two emails, sent by Defendants Pyden and Bednard, are legally sufficient on which to base a First Amendment retaliation claim. To establish this prima facie claim, the Plaintiff must allege, among other things, that these actions caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) (per curiam). A chilling effect sufficient under this prong is not born of de minimis threats or "inconsequential actions." *Id*. at. 398.

In the present matter, Plaintiff cannot establish any retaliatory intent. First, Plaintiff incorrectly contends that the Sixth Circuit has recognized that mere complaints to a citizen's employer are sufficient to deter a person of ordinary firmness. First, in *Paige v. Conyer*, an official personally called the plaintiff's employer and made false statements—this action resulted in plaintiff's termination. 614 F.3d 273, 281 (6th Cir. 2010). Then, in *Fritz v. Charter Township of Comstock*, an official spoke with the plaintiff's employer three times and the plaintiff was ultimately terminated. 592 F.3d 718, 725 (6th Cir. 2010). Unlike the plaintiffs in *Paige* and *Fritz*, Plaintiff in the present matter suffered no threat to her economic livelihood. In fact, Plaintiff's then-employer took absolutely no action against

Plaintiff. In contrast, rather than limit her speech, Plaintiff continued to attend Board meetings and speak publicly and, to this day, continues to work as a police officer for a new department making more money.

Plaintiff broadly asserts the Sixth Circuit has recognized *potential* criminal investigation by federal law enforcement as a retaliatory act but only cites to case law where an investigation was *actually* conducted. *See Raboczkay v. City of Taylor*, No. 19-10255, 2019 WL 6254870 (E.D. Mich. Nov. 22, 2019)(where allegations of fraud were made against plaintiff in the press and to Michigan's Secretary of State and an investigation was actually conducted); *Haggart v. City of Detroit*, No. 2:19-CV-13394, 2021 WL 5040293 (E.D. Mich. Oct. 27, 2021)(where plaintiff actually was subject to an investigation for vigilantism). Plaintiff offers no information regarding what, if any, affect Defendant Bednard's email to the Department of Justice ("DOJ") had on her ability to engage in First Amendment protections. Further proof that Plaintiff suffered no adverse impact because of this email is evidenced by the fact that Plaintiff was not even aware of the communication to the DOJ until a friend informed her and Plaintiff admitted the email had no impact. See (**DE #25-2, Page ID.28-9.**)

The Sixth Circuit's decision in *Wurzelbacher v. Jones-Kelley* offers guidance where a plaintiff alleges no consequences such as Plaintiff Hernden. 675 F.3d 580 (6th Cir. 2012). In *Wurzelbacher*, the plaintiff "was not threatened with a continuing

governmental investigation," and "[did] not allege that defendants' actions in fact caused a 'chill' of his First Amendment rights." *Id*. at 584 (citing *Brown v. Crowley*, 312 F.3d 782, 801 (6th Cir.2002)("Where, as here, a challenged action has no consequences whatsoever, either immediate or long-term, it ineluctably follows that such an action is 'inconsequential'")). Even where Wurzelbacher alleged mere knowledge of an improper database search by government officials caused him to suffer "emotional distress, harassment, personal humiliation, and embarrassment," the Court upheld the dismissal of plaintiff's First Amendment retaliation claim as he was not deterred or chilled in the exercise of his First Amendment rights. *Id*. In the present matter, Plaintiff alleges even less than plaintiff Wurzelbacher.

2. PLAINTIFF RELIES ON CASE LAW ADDRESSING REASONABLY FORESEEABLE ACTIONS WHERE NO ACTIONS OCCURRED.

To establish her prima facie claim, Plaintiff must also allege the Defendants' adverse actions were substantially motivated against the Plaintiff's exercise of constitutionally protected conduct. *Thaddeus*-X, 175 F.3d at 394. However, in the present case, Ms. Pyden and Mr. Bednard were concerned that Plaintiff's actions and words were escalating and could constitute legal harassment or threatening behavior. As a society, we encourage school officials to report concerning behavior to law enforcement when appropriate. Certainly, the public policy is to not discourage reporting of concerns out of a fear of being sued. *See, e.g.*, MCL 722.623 and .633 (requiring certain school officials to make reports or face criminal liability). Even

the case law Plaintiff cites recognizes these protections. See *McBride v.Village of Michiana*, 100 F.3d 457, 462 (6th Cir.1996)(cautioning that the defendants could not be held liable for exercising their own first amendment rights). Further, it would contradict the evidence in this case and legal precedent for Defendants' in the present matter to be held responsible for "reasonably foreseeable" third-party retaliation caused by their actions where no retaliation has actually occurred. Threats of retaliation in case law have been clear and what Plaintiff asserts is too ambiguous. *Kubala v. Smith*, 984 F.3d 1132, 1140 (6th Cir. 2021)(finding that no adverse action was taken against plaintiff who engaged in First Amendment activity where plaintiff alleged he was told not to attend certain political functions and was asked if he wanted to change his job classification.)

3. THE ACTIONS OF AN INDIVIDUAL SCHOOL BOARD MEMBER IS NOT AN ACTION OF THE BOARD OF EDUCATION.

The unrebutted evidence shows that Defendant Bednard sent the email to the DOJ on his own and the Board never adopted this referral as an official Board action. "[N]ot every decision by municipal officers automatically subjects the municipality to § 1983 liability. Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. The fact that a particular official—even a policymaking official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion." See, *e.g., Oklahoma City*

v. Tuttle, 471 U.S. 808, 822–824, 105 S.Ct. 2427, 2435–2436 (1985).

No individual board member can bind the School District or promulgate Policy. It takes a quorum and a majority vote, which is then memorialized in minutes or a resolution. The Michigan Supreme Court has made this clear. *Tavener v. Elk Rapids Rural Agr. Sch. Dist.*, 341 Mich. 244, 251, 67 N.W.2d 136, 139 (1954)(a school board "resolution speaks for itself. . . .Defendant [school board] **speaks only through its minutes and resolutions**.") The District adheres to this practice under Board Bylaw 0143 – *Authority*, which provides:

> Individual members of the Board do not possess the powers that reside in the Board of Education. The Board speaks through its minutes and not through its individual members. **An act of the Board shall not be valid unless approved at an official meeting by at least a majority vote of the members elected to and serving on the Board**.

(**Exhibit A: Board Bylaw 0143 – *Authority*** (citing MCL 380.1201))(emphasis added.) Interestingly, Plaintiff even admits in her Response that "if the Board itself condemned Plaintiff's rhetoric or conduct in an official statement, it would have been engaged in protected government speech." (**DE #29, PageID.448**.) Nevertheless, the evidence, or lack thereof, shows the Plaintiff's claims against the District must be dismissed.

CONCLUSION

For the reasons stated above, as well as those stated in Defendants' Motion for Summary Judgment, this Court should grant Defendants' Motion and dismiss

Plaintiff's lawsuit in its entirety with prejudice.

/s/TIMOTHY J. MULLINS
GIARMARCO, MULLINS & HORTON, PC
Attorney for Defendants

DATED: November 27, 2023

CERTIFICATE OF ELECTRONIC SERVICE

TIMOTHY J. MULLINS states that on November 27, 2023, he did serve a copy of **Defendants' Reply in Support of Motion for Summary Judgment** via the United States District Court electronic transmission on the aforementioned date.

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