IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION

No. 7:07-CV-00064(H)

MICHAEL S. ADAMS, Plaintiff, v. THE TRUSTEES OF THE UNIVERSITY OF NORTH CAROLINA-WILMINGTON, et al., Defendants.	)	**ORDER**

This matter is before the court on defendants' motion to dismiss plaintiff's complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff has responded and defendants have replied. This matter is ripe for adjudication.

STATEMENT OF THE CASE

Plaintiff, an Associate Professor of Criminology at the University of North Carolina-Wilmington (UNCW), brought suit against sixteen defendants including UNCW's Chancellor, Rosemary DePaolo; twelve members of UNCW's Board of Trustees; Dr. David Cordle, Dean of the College of Arts and Sciences; Dr. Diane Levy, the former interim Chair of the Department of Sociology and Criminal Justice (the Department); and the Department's current chair, Dr. Kimberly Cook. The defendants have all been sued in

both their official and individual capacities. Plaintiff alleges that defendants: (1) retaliated against him for his protected expression, as prohibited by the First Amendment and 42 U.S.C. § 1983; (2) discriminated against him based on his viewpoint, in violation of the First Amendment and 42 U.S.C. § 1983; (3) violated the equal protection afforded to plaintiff by the Fourteenth Amendment and 42 U.S.C. § 1983; and (4) discriminated against him based on his religion, in contravention of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000 *et seq.*).

On February 15, 2007, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in Raleigh, North Carolina. Plaintiff alleged that defendants discriminated against him based on his religion and retaliated against him for exercising his First Amendment rights. The EEOC issued plaintiff a right-to-sue letter on March 12, 2007, and plaintiff filed the instant action on April 10, 2007.

STATEMENT OF FACTS[1]

Plaintiff was hired by UNCW as an Assistant Professor of Criminology in 1993. At the time of his hiring, plaintiff was an atheist who held politically liberal beliefs. At his first review, plaintiff was praised by the Department Chair, Dr. Steven McNamee, as a "very good department and university citizen, whose wit and

[1] For purposes of this order, the court construes the facts in favor of plaintiff as the non-moving party. See Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997).

charm ... [provide a] boost to the collective moral [sic] of his colleagues" with "great potential as a scholar." (Annual Evaluation, May 17, 1994 [DE #1-5].) More positive reviews would follow.

Dr. McNamee lauded plaintiff in every area of his annual evaluation—teaching, advising, research, and service—in 1994 and 1995. Dr. McNamee concluded that "Dr. Adams is an [sic] superb teacher, dedicated advisor, active scholar, and responsible department citizen." (Annual Evaluation, May 23, 1995 [DE #1-5].) Dr. McNamee's successor, Dr. Cecil Willis, also thought highly of plaintiff. In 1996, Dr. Willis nominated plaintiff for a UNCW teaching award; that same year, plaintiff was honored in Who's Who Among College Teachers. Throughout this time, plaintiff also earned excellent reviews from his students.

In 1998, plaintiff was recognized as UNCW's Faculty Member of the Year. He was also promoted to an associate professorship. Dean Jo Ann Seiple, recommending plaintiff for his promotion, cited his "outstanding teaching record," "impressive record of research," and "impressive" record of service. (Promotion and Tenure Recommendation, November 17, 1997 [DE #1-8].) Dean Seiple opined that plaintiff's "accomplishments are remarkable" for someone just four years removed from his doctoral work. (Id.) In 2000, plaintiff was recognized as Faculty Member of the Year for a second time.

Also in 2000, plaintiff experienced a conversion to

Christianity, and adopted a politically conservative viewpoint. Shortly after his conversion, plaintiff commented on the lack of ideological diversity at UNCW. This prompted Dr. Lynn Snowden, then the Faculty Senate President, to remove plaintiff from the Senate mailing list, allegedly because he was "campaigning for Bush." (Compl. at ¶ 49). At this time, plaintiff had not written publicly of his newfound political beliefs, and received another positive evaluation from Dr. Willis.

In the fall of 2001, plaintiff was accused by a UNCW student of intimidation and defamation after he commented negatively on an email, sent by the student, the general subject of which was the political events leading up to the terrorist attacks of September 11, 2001. Plaintiff forwarded the message to several friends, as requested in the student's email. The student, who is a faculty member's daughter, filed a formal complaint. UNCW Provost John Cavanaugh appointed University Counsel Harold M. White, Jr. to investigate. As part of the investigation, Mr. White conducted a search of plaintiff's email account. On November 9, 2001, plaintiff appeared on the television show *Hannity & Colmes* to discuss the "frivolous" investigation.

On November 27, 2001, Dr. Snowden reported that her office had been the subject of "workplace terrorism." Someone broke into her office, and allegedly sprayed tear gas in an attempt to poison her. Based on information obtained from Dr. Snowden, State Bureau of Investigation detectives considered plaintiff a suspect in the

break in. Plaintiff would be cleared of any wrong doing in the matter in April 2006.

Despite all this, plaintiff continued to receive favorable reviews from Dr. Willis. In 2001 and 2002, plaintiff was cited as a skilled instructor, commended for his teaching and research work, and praised for his community service. The review in May 2002 came just after plaintiff published a column titled "The Campus Crusade Against Christ," which criticized UNCW and the Department for religious intolerance. (See [DE #1-17].) This would be the first of several columns concerning similar topics. Nevertheless, plaintiff's subsequent review, in May 2003, was again positive.

In April 2004, Dr. Willis asked plaintiff to refrain from discussing his nationally syndicated columns at work because it made the Department secretary uncomfortable. The same secretary became upset several months later, when she read in one of plaintiff's columns a reference (not by name) to her behavior. Also in 2004, plaintiff applied for promotion to full professor.

Plaintiff met with the interim Chair of the Department, defendant Levy, to discuss the process. Plaintiff also provided defendant Levy with a list of his ten peer-reviewed publications and asked for her opinion whether these publications would warrant promotion. Defendant Levy, who is alleged by plaintiff to be an outspoken feminist, politically liberal, and of Jewish descent (Compl. ¶ 94), did not respond until ten months later, when she issued plaintiff's 2004 annual review. In this review, defendant

Levy noted that plaintiff remained popular with students and had recently published another article in a peer-reviewed journal. She questioned his service to UNCW, however, labeling his participation on UNCW committees "nominal," and concluded that plaintiff needed to increase his scholarship and publication before promotion to full professor. (Annual Review, June 1, 2005 [DE #1-20].) This last statement was in contrast to alleged comments by the previous Department Chairs, Drs. McNamee and Willis, that ten peer-reviewed publications were sufficient for promotion. Later, on October 19, 2004, defendant Levy met with plaintiff to reprimand him over his weekly nationally syndicated column. Defendant Levy criticized the content and tone of plaintiff's columns, even though she "know[s] there's the First Amendment and all that." (Compl. ¶ 96.) Defendant Levy asked plaintiff to change his writing style in an effort to make the office environment more pleasant.

Defendant Cook became Chair of the Department on August 1, 2005. Defendant Cook, who is an alleged feminist, atheist, and open critic of Christianity, purportedly told a recruitment committee that her "image of a perfect job candidate is a lesbian with spiked hair and a dog collar." (Compl. ¶¶ 97-98). In June 2006, defendant Cook filed her 2005 annual review of plaintiff, rating him satisfactory in all areas. Defendant Cook deleted from plaintiff's review a faculty member's evaluation that was critical of plaintiff's political activity. Additionally, defendant Cook

helped plaintiff bring about a close to Dr. Snowden's 2001 allegations.

Plaintiff authored his eleventh peer-reviewed article in 2006 and reapplied for promotion to full professor. This is alleged to be a greater number of publications than that which other, more liberal faculty members published before promotion to full professor. Before an advisory meeting of senior faculty members, where defendant Cook was required by UNCW guidelines to solicit input from the faculty regarding plaintiff's desired promotion, defendant Cook told plaintiff that "everything looks good" regarding his application. (Compl. ¶ 104.) That meeting was held on September 14, 2006. The same day, defendant Cook—with whom the ultimate responsibility to decide on promotion recommendations rested—denied plaintiff's application. In response to plaintiff's request for a written explanation for his denial, defendant Cook wrote plaintiff a letter explaining that "[t]he senior faculty in the Department, in an overwhelming consensus, did not support [plaintiff's] promotion to professor at this time." (Letter, September 21, 2006 [DE #1-25].) This assessment is disputed by plaintiff, who claims a senior faculty member, who was part of the advisory committee, told plaintiff that the decision was the hardest the committee had made in twenty years. (Compl. ¶ 111.)

Plaintiff sought further explanation from defendant Cook. In a second letter to plaintiff, defendant Cook set out UNCW's criteria for promotion to full professor:

> For appointment to the rank of professor a candidate shall have exhibited during her/his career distinguished accomplishment in teaching, a tangible record of research or artistic achievement, and a significant record of service. An individual with the rank of professor should have a reputation as an excellent teacher and be recognized as a scholar within her/his field.

(Letter, September 29, 2006 [DE #1-26].) Defendant Cook wrote (and plaintiff disputes) that plaintiff was deficient in all three areas: "scholarly research productivity" (although plaintiff had allegedly published a greater number of peer-reviewed articles than the minimum suggested by previous Chairs); "distinguished accomplishment" in teaching (although students and peers rated plaintiff in the "excellent" range, and despite plaintiff's several teaching awards); and a "significant record of service" (although plaintiff was on multiple UNCW committees, advised several student organizations each year, and had won an award for his service). (Id.) Upon hearing of defendant Cook's conclusion that plaintiff was deficient in all three areas, the same senior faculty member who disputed that faculty sentiment was overwhelmingly against plaintiff's promotion exclaimed "[Expletive deleted]! That isn't the way the department voted." (Compl. ¶ 111.)

On December 18, 2006, defendant Cook advised plaintiff that he needed to include all his speaking engagements in a list of external professional activities required for his application for promotion. Defendant Cook also noted that he had missed several

recent Department meetings and a committee meeting. Plaintiff alleges this was a reprimand and it was not uncommon for professors to miss these meetings. Beginning in 1995 and continuing for at least five years, defendant Levy and her husband, who was also a professor, alternated their attendance at faculty meetings, each attending only half; no disciplinary action was taken against either of them. Also in December 2006, defendant Cook approved a phased retirement package for Dr. David Evans, alleged to be a Democrat and avowed critic of Christianity, and allowed him to be exempt from all department meetings. Finally, another faculty member, Dr. Jammie Price, cancelled class for one week during March 2003 to protest Operation Iraqi Freedom. Dr. Price gave extra credit to students who assisted in this protest and used Department resources to produce anti-war fliers. No disciplinary action was taken against Dr. Price.

COURT'S DISCUSSION

I. Motion to Dismiss

A. Standard of Review

A federal district court confronted with a motion to dismiss for failure to state a claim should view the allegations of the complaint in the light most favorable to the plaintiff and draw all reasonable factual inferences from those facts in the plaintiff's favor. See Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997). The intent of Rule 12(b)(6) is to test the sufficiency of

a complaint; "importantly, [a Rule 12(b)(6) motion] does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999) (citing Republican Party v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)). "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007).

A motion to dismiss "should be granted only in very limited circumstances." Rogers v. Jefferson-Pilot Life Ins. Co., 883 F.2d 324, 325 (4th Cir. 1989). This is especially true when the plaintiff seeks redress under 42 U.S.C. § 1983. See Harrison v. U.S. Postal Serv., 840 F.2d 1149, 1152 (4th Cir. 1988). "In evaluating a civil rights complaint for failure to state a claim under ... 12(b)(6), [the court] must be especially solicitous of the wrongs alleged. [The court] must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory [that] might plausibly be suggested by the facts alleged." Id.

B. Plaintiff's Claims Are Not Barred By Any Statute of Limitations.

Title VII requires a party to file a complaint with the EEOC within 180 days of the allegedly unlawful employment action. 42 U.S.C. § 2000e-5(e). A plaintiff seeking to bring suit in a federal court may only do so based on acts of discrimination that

occurred within the applicable limitations period. Id; see also Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S.Ct. 2162, 2165 (2007). The limitation period begins to accure when the employee receives notification of the allegedly discriminatory act, not at the point at which the consequences of the act occur. Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989); Hamilton v. First Source Bank, 928 F.2d 86, 89-90 (4th Cir. 1990) (en banc).

Plaintiff's § 1983 claims, meanwhile, are subject to the statute of limitations imposed by state law on personal injury actions. See Wilson v. Garcia, 471 U.S. 261 (1985). In North Carolina, § 1983 claims must be filed within three years of the injury alleged. N.C. Gen. Stat. § 1-52; Brooks v. City of Winston-Salem, 85 F.3d 178, 181 (4th Cir. 1996).

In the instant case, plaintiff filed his charge with the EEOC on February 15, 2007. Therefore, plaintiff is barred from recovery for any cause of action arising under Title VII if the alleged violation occurred before August 19, 2006 (180 days prior). Furthermore, plaintiff filed his amended complaint on May 2, 2007. He is therefore barred from raising claims, brought pursuant to § 1983, arising before May 2, 2004. The mere fact that he has alleged discrimination outside these limitation periods, however, does not mean that plaintiff's Title VII or § 1983 claims must be dismissed.

Discrete acts of uncharged discrimination that occurred prior to the applicable limitations period are procedurally barred and

cannot form the basis for recovery. Ledbetter, 127 S.Ct. at 2174. A plaintiff may, however, offer prior discriminatory acts as background evidence to support a timely claim. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002). Additionally, discriminatory acts that occur outside the statute of limitations period, but constitute a continuing violation, are actionable under § 1983 and Title VII. Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 347 (4th Cir. 1994). To constitute a continuing violation, the acts of discrimination must be a "series of separate but related acts" that "manifest in a continuing violation." Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980) (per curiam). There must also be a present violation within the statutory period. Hill v. AT&T Techs., Inc., 731 F.2d 175, 180 (4th Cir. 1984).

Plaintiff complains of various injuries suffered at the hands of defendants, including but not limited to: numerous harassing investigations; asking him to terminate his First Amendment-protected activities; and refusing to promote him to full professor. Some of these incidents occurred outside the 180-day period for Title VII recovery; others occurred outside the three-year period for recovery under § 1983. Defendants seek to have plaintiff's claims dismissed on these grounds. Plaintiff responds that the activities occurring outside the statutes of limitations constitute a continuing violation of his rights or, in the alternative, are permissible evidence of the two incidents that

took place within both statutes of limitations: refusal to promote plaintiff to full professor on September 14, 2006 and the verbal reprimand for missing faculty meetings on December 18, 2006. The court's ruling is the same for the claims under both statutes.

Plaintiff has alleged incidents- the refusal to promote and the reprimand- that are not barred by the limitations under either Title VII or § 1983. Plaintiff is correct that prior incidents may be used to support causes of action arising from these incidents. See Ledbetter, at 2171, n.3; Morgan, 536 U.S. at 113. Plaintiff has stated claims under Title VII and § 1983 that arose based on the refusal and reprimand, and that may be supported by incidents outside the limitation periods. In addition, the court cannot say as a matter of law, after examining plaintiff's complaint, that he can prove no set of facts that would support the theory that all of the incidents complained of constitute an ongoing violation. Therefore, defendants' motion to dismiss based on the statutes of limitations is DENIED.

C. Plaintiff's Religious Discrimination Claim Under Title VII.

To prevail on a disparate treatment claim for failure to promote, plaintiff must establish that he was treated less favorably because of his religion. See Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 268 (4th Cir. 2005). Applying the standard announced in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Fourth Circuit has said that a prima facie

case of discrimination is established under Title VII if (1) plaintiff is a member of a protected group; (2) plaintiff applied for the position in question; (3) plaintiff was qualified for that position; and (4) the defendants rejected plaintiff's application under circumstances that give rise to an inference of unlawful discrimination. Anderson, 406 F.3d at 268. Defendants aver that plaintiff has failed to meet the fourth prong.

A plaintiff must plead facts sufficient to allege each element of his claim. Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir. 2002). Plaintiff has pleaded facts detailing discrepancies in the accounts of the debate concerning his promotion, a modification of the standards for promotion, and treatment that is different than others who do not share his beliefs. Whether discovery bears out these allegations, the court cannot say that plaintiff's claims fails as a matter of law. Defendants' motion to dismiss is DENIED on those grounds.

Defendants also move the court to dismiss plaintiff's Title VII claims against them as individuals. In Lissau v. Southern Food Service, Inc., the Fourth Circuit joined all other circuit courts that had considered the question when it stated that "supervisors are not liable in their individual capacities for Title VII violations." 159 F.3d 177, 181 (1998). Plaintiff responds that "[t]he law is clear: state officials may be sued in their *official* capacities under Title VII," citing as authority Causey v. Balog, 162 F.3d 795, 801 n.1 (4th Cir. 1998). (Plaintiff's Br. In Opp. at

25 (emphasis added) [DE #111].) Plaintiff has properly cited Causey, but for the wrong proposition. Footnote One in Causey reaffirms that individuals may be sued in their representative capacities, not in their individual capacity. See Id. Given the unambiguous pronouncement in Lissau that Title VII suits may not lie against supervisors in their individual capacity, the court must GRANT the defendants' motion and DISMISS plaintiff's Title VII claim for religious discrimination against all the individual defendants in their individual capacities.[2] The claims against the individual defendants in their official capacities remain before the court for adjudication.

D. Plaintiff's § 1983 Actions

1. Eleventh Amendment Immunity

Defendants claim that the Eleventh Amendment bars plaintiff from recovering compensatory damages under § 1983 against defendants in their official capacities. Official capacity suits against government authorities are another way of pleading an action against the government- in this case, the state of North Carolina. Monell v. New York City Dept. of Social Svcs., 436 U.S. 658, 690, n.55 (1978). Damages actions against a state in federal court are barred absent a waiver by the state or congressional

[2] Defendants also move for dismissal of plaintiff's claims for punitive damages because punitive damages may not be recovered against a government or government agency. See 42 U.S.C. § 1981a(b)(1). Plaintiff's complaint, however, seeks punitive damages against defendants only in their *individual* capacities. (See Compl. ¶ 138(E).) The issue is, therefore, moot.

override. Kentucky v. Graham, 473 U.S. 159, 169 (1985). Section 1983 provides for monetary recovery against "persons," and the Supreme Court has ruled that neither the states nor their officials are "persons" for purposes of monetary relief under § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989). There being no indication that North Carolina has waived its immunity or that the state's immunity was abrogated by Congress, monetary recovery against defendants in their official capacities is not available to plaintiff. Prospective relief, on the other hand, is expressly allowed. Id. at 71 n.10. Therefore, defendants' motion to dismiss is GRANTED as to any monetary claims against defendants in their official capacites. However, insofar as plaintiff seeks injunctive and declaratory relief against the defendants in their official capacities, defendants' motion to dismiss is DENIED.

2. Plaintiff Has Stated a Claim Under § 1983

To establish liability under 42 U.S.C. § 1983, a plaintiff must allege that "the official charged acted personally in the deprivation of the plaintiff's rights." Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985) (internal citations omitted). Defendants seek to have plaintiff's § 1983 claims dismissed against every defendant except defendant Cook because only defendant Cook corresponded with plaintiff about the denial of his promotion and defendant Cook stated, in her letter of September 21, 2006, that she alone made the decision not to promote plaintiff. It is true that plaintiff's complaint is sparse with regard to specific

factual allegations concerning the other defendants. Plaintiff has, however, alleged a kind of institutionalized bias that is sufficient to withstand a motion to dismiss. For example, plaintiff points to the investigation into the disturbance in Dr. Snowden's office, and alleges that UNCW played a part in keeping the investigation ongoing for roughly five years. Plaintiff has also alleged facts from which it may be inferred that his political and religious views may have been a factor in denying his promotion. As plaintiff points out, determining who was involved in what plaintiff has characterized as an ongoing and systematic abuse of his rights is a factually intense determination. The court cannot make such a determination at this stage, and therefore must DENY defendants' motion to dismiss on that basis plaintiff's § 1983 claims.

Defendants further seek to dismiss plaintiff's First Amendment claims against all defendants because the claims are barred by the Supreme Court's ruling in Garcetti v. Ceballos, 547 U.S. 410 (2006). "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Consitution does not insulate their communications from employer discipline." Id. at 421. Activities undertaken in the course of performing one's job are activities pursuant to official duties. Id. Defendants argue that plaintiff's political writings, lectures and appearances, and internet columns should be considered as part of plaintiff's

official duties because he submitted them for consideration with his application for promotion.

Defendants cite a list of cases from other circuits in support of their position. See, e.g., Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006) (holding prison guard's internal complaints documenting her superior's failure to respond to inmates' sexually explicit behavior toward her were not protected speech); Battle v. Bd. of Regents, 468 F.38 755 (11th Cir. 2006) (university employee's report alleging improprieties in her supervisor's handling and management of federal financial aid funds was part of her official duties, and thus not protected speech); Mills v. City of Evansville, 452 F.3d 646 (7th Cir. 2006) (police officer's negative remarks following official meeting to discuss plans to reorganize department were not protected because they were made in her capacity as public employee contributing to formation and execution of official policy). Each of the three cases cited by defendants consider comments made about internal issues and published within the institutions those issues concerned. Applying that doctrine to this case would require the court to extend it, even assuming the court were to adopt such a theory. At this stage of the litigation, the court cannot find as a matter of law that plaintiff's political writings, published in newspapers and on webpages, are part of his official duties. Plaintiff's claims are, therefore, not barred by Garcetti, and defendants' motion must be DENIED.

E. Equal Protection

Defendants argue, quite briefly, that plaintiff's equal protection claim should be dismissed because it "is, at its core, a free speech retaliation claim." (Br. in Sup. of Mot. to Dismiss at 25-26.) "A pure or generic retaliation claim ... does not implicate the Equal Protection Clause." Edwards v. City of Goldboro, 178 F.3d 231, 250 (4th Cir. 1999). Plaintiff's equal protection claim is more, however, than a "mere rewording of his First Amendment Retaliation claim." See id. Plaintiff has alleged that other professors seeking the same promotion were deemed qualified after publishing the same number of peer-reviewed articles plaintiff has published. Plaintiff has also alleged that he was "reprimanded" for actions over which other professors were not. Defendants' motion to dismiss is, therefore, DENIED.

F. Defendants' Claims of Qualified Immunity

"Qualified immunity protects government officials from civil damages in a § 1983 action 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Edwards, 178 F.3d at 250 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "Qualified immunity may be invoked by a government official sued in his personal, or individual, capacity." Ridpath v. Board of Governors Marshall University, 447 F.3d 292, 306 (4th Cir. 2006). To the extent plaintiff's claims are asserted against the

defendants in their official capacities, qualified immunity is not available to them. See id. To determine whether qualified immunity bars suit against the individual defendants in their personal capacities, the court must first specifically identify the right the plaintiff asserts was infringed. Edwards, 178 F.3d at 250. The court must then consider whether at the time of the violation that right was clearly established. Id.

1. Plaintiff's First Amendment Claims

Plaintiff has alleged that defendants violated his First Amendment rights by (1) retaliating against him in their workplace decision because he spoke out on political and religious issues that concerned not only his employment situation, but the general state of the country's political order as well; and (2) discriminating against him by refusing to promote him, even though he alleges he was qualified for promotion, based on his political and religious viewpoint. It has been settled law for at least forty years that a state cannot discriminate against a public employee in a way that infringes the employee's First Amendment rights. See Connick v. Myers, 461 U.S. 138, 142 (1983); Ridpath, 447 U.S. at 320.

To determine whether a public employee has stated a claim under the First Amendment for retaliatory discharge, the court determines whether (1) the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest; (2) the interest of the employee in

speaking upon the matter of public concern outweighs the government's interest in providing effective and efficient services to the public; and (3) the employee's speech was a substantial factor in the employee's adverse employment action. McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998). A review of plaintiff's complaint reveals that plaintiff has sufficiently alleged a violation of his First Amdendment rights. Although some of his writings concerned his own experiences within UNCW, he also frequently commented on matters of national political import, as would a citizen commenting upon a matter of public concern. There is no indication that this caused any interruption in the effective and efficient provision of services to the public. Finally, considering the attention his writing received and the commentary upon it by UNCW faculty and administration, plaintiff has sufficiently alleged that his political speech was a substantial factor in the decision. Plaintiff has thus satisfied the requirement, for his first two § 1983 claims, that he allege defendants have violated an established right.

The court now turns to the second prong of the qualified immunity test--determining whether the right allegedly violated was a "clearly established" right which a reasonable person would know about. In Ridpath, the Fourth Circuit acknowledged that the "prohibition against retaliation for protected speech [is] clearly established." 447 F.3d at 320. The court went on to say that "a public employer can find no refuge in qualified immunity when an

adverse employment decision clearly contravenes a public employee's First Amendment rights." Id. at 320-21. Defendants' alleged retaliation and discrimination constitute such a contravention of plaintiff's well-established rights and, therefore, defendants are not entitled to qualified immunity on these claims.

2. Plaintiff's Equal Protection Claim

Plaintiff has alleged that defendants treated him differently than other similarly situated persons, in violation of the Equal Protection Clause. The Equal Protection Clause protects "all fundamental rights comprised within the term liberty," including "[t]he right of free speech, the right to teach, and the right to assembly." Whitney v. California, 274 U.S. 357, 373 (1927). Plaintiff has alleged that he was removed from the faculty mailing list, asked not to discuss his columns at work, told his political speaking engagements interfered with his teaching, asked to change the tone of his columns, and reprimanded for missing faculty meetings. At the same time, plaintiff alleges that other professors and Department employees discussed his columns, engaged in political protest, and missed faculty meetings but were not subject to rebuke or harm to their careers.

Government may not pick and choose the viewpoints it will support. See Carey v. Brown, 447 U.S. 455, 463 (1980); Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972). Plaintiff has alleged that defendants intentionally disfavored his application for promotion and reprimanded him for his views while others with

views different than his were not similarly treated. These allegations state a claim under established Equal Protection principles. Therefore, defendants are not entitled to qualified immunity.

The court's denial of qualified immunity on all claims is made without prejudice to defendants' rights to re-raise the issue on summary judgment if it becomes clear, following discovery, that defendants should be entitle to the same.

CONCLUSION

For the forgoing reasons, defendants' motion to dismiss [DE #109] is:

GRANTED as to any monetary claims against defendants in their official capacities;

GRANTED as to plaintiff's Title VII claims for religious discrimination against all the individual defendants in their individual capacities; and

DENIED as to all other claims.

This 31st day of March 2008.

MALCOLM J. HOWARD
Senior United States District Judge

At Greenville, NC
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