

No. 23-5293

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ALLAN M. JOSEPHSON,

Plaintiff-Appellee,

v.

TONI M. GANZEL, in her official and individual capacities; KIMBERLY A. BOLAND, in her official and individual capacities; CHARLES R. WOODS, in his official and individual capacities; JENNIFER F. LE, in her official and individual capacities; BRYAN D. CARTER, in his official and individual capacities; WILLIAM D. LOHR, in his official and individual capacities,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Kentucky
Case No. 3:19-cv-00230-RGJ-CHL
The Honorable Rebecca Grady Jennings

Reply of Plaintiff-Appellee in Support of Motion to Dismiss

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INTRODUCTION

Defendants-Appellants oppose the instant Motion by saying that, where legal and factual disputes may be difficult to disentangle, this Court must wait for merits briefing before deciding jurisdictional issues. *See* Doc. 24 at 9. Defendants could have used their Response to the Motion as an opportunity to assure this Court that this appeal actually involves a dispute over legal questions over which it has jurisdiction. Instead, Defendants seek to elbow their way into a merits consideration by claiming Dr. Josephson cannot possibly know what their arguments are until full briefing has occurred. *See id.* at 8.

As cover for this tactic, Defendants rely on a passage from *Berryman v. Rieger*, 150 F.3d 561, 564 (6th Cir. 1998). *See* Doc. 24 at 7–8. There, the Court explained, “we *often* cannot adequately assess our jurisdiction to hear interlocutory appeals on qualified immunity until the appeal is fully briefed and argued.” *Berryman*, 150 F.3d at 564 (emphasis added). But “often” does not mean “always,” and *Berryman* is not a free pass to the merits in every case. *See id.* (noting that the court proceeded to merits briefing after Defendants identified “three legal issues” in response to an order to show cause why the appeal should not be dis-

missed). *Berryman* does not excuse Defendants' failure to offer even minimal argument explaining why the district court's denial of qualified immunity rested on anything other than clearly established law.¹

Nor is it impossible to assess Defendants' argument at this stage, even with their attempt to cloak their position by refusing to offer any legal argument in their Response. This appeal does not come from a vacuum. Rather, Defendants have filed six motions for summary judgment, all of which asserted qualified immunity.² Each Defendants' qualified immunity argument amounted to disclaiming a retaliatory motive (a factual claim) not saying that even under Dr. Josephson's allegations there was no legal violation. But the latter posture is exactly how the Defendants *must* approach the question of qualified immunity in order for this Court to have jurisdiction: "in order for such an interlocutory appeal based on qualified immunity to lie, the defendant must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case." *Berryman*, 150 F.3d at 562.

¹ See Mem. Op. & Order ("Order"), R. 99, Page ID ## 5764–65 ("Viewing the evidence in the light most favorable to Josephson . . . he has presented facts sufficient to find a violation of his First Amendment rights by each Defendant.").

² See Ganzel Br., R. 61-1, Page ID ## 1334–36; Woods Br., R. 58-1, Page ID ## 957–959; Boland Br., R. 63-1, Page ID ## 1594–1596; Le Br., R. 62-1, Page ID ## 1443–44; Carter Br., R. 59-1, Page ID ## 1087–88; Lohr Br., R. 60-1, Page ID ## 1267–69.

The district court properly recognized the facts underlying Defendants’ qualified immunity arguments were genuinely disputed—that is, whether a clearly established legal right was violated depends on which party is right about *what happened*, not which party is right about the law. This finding is not reviewable “under any other standard.” *Bomar v. City of Pontiac*, 643 F.3d 458, 462 n.8 (6th Cir. 2011). The First Amendment’s prohibition on retaliation against professors for their speech—either by means of termination or through the creation of a hostile environment—is clearly established beyond dispute. Defendants’ claim has always been that they did not violate the rule, not that the rule is not clearly established. That’s a factual argument, not a legal one. This Court should dismiss the appeal.

ARGUMENT

Defendants’ insistence that their entitlement to qualified immunity is a legal determination that should only be reached after a full briefing on the merits rests on a misinterpretation of *Berryman* and an improper assumption of their own facts in order to frame a legal dispute that isn’t there. When the proper standard is applied—considering “whether the [P]laintiff’s version of facts demonstrates a violation of clearly established rights,” *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 277–78 (6th Cir. 2020) (cleaned up)—both the correctness of the district court’s

ruling and the absence of any real legal dispute on this appeal are manifest. Thus, this Court should dismiss the appeal.

I. Defendants’ qualified immunity argument raises no legal issues *unless* their version of the facts is correct, a posture this court has no jurisdiction to consider.

Defendants’ attempt to side-step Dr. Josephson’s motion to dismiss by refusing to make even a short-form version of their (purportedly) legal arguments stems from their misreading of *Berryman*. In fact, Defendants should have at least identified the legal issues they think this Court has jurisdiction to hear in their Response. Since they did not, this Court should dismiss the appeal because the qualified immunity arguments they have actually made all rely on factual disputes, not legal ones.

A. *Berryman* does not guarantee every qualified immunity appeal a free ride to the merits.

Defendants argue that the Court must have full “briefing and oral argument,” Doc. 24 at 8, in order to “adequately assess [the Court’s] jurisdiction to hear interlocutory appeals on qualified immunity.” *Berryman*, 150 F.3d at 564. But Defendants ignore what actually happened in *Berryman*. In that case, “the Clerk of [this] Court issued an order asking the parties to show cause why the appeal should not be dismissed for lack of jurisdiction.” *Id.* “The defendants responded in a letter assuring the court that their appeal involved three legal issues.” *Id.* After the defendants identified the specific legal issues they claimed their appeal raised, the clerk entered an order suggested dismissal would be inappropriate.

Id. The defendants then “erroneously” proceeded as if “they had cleared the jurisdictional hurdle.” *Id.*

Thus, *Berryman* shows how, even when a party specifically identifies the legal issues they believe support the Court’s jurisdiction in response to a show-cause order and the Court permits full briefing, they *still* may not assume that jurisdiction for the appeal lies. In this case, Defendants have staked out even shakier ground. Unlike the *Berryman* defendants—who at least identified three separate legal issues—Defendants have refused to make any real argument, assuming that by declining to do so they can barge their way to the merits. This Court should not reward this tactic.

B. Defendants’ Response identifies no meaningful legal dispute.

Defendants give some argument about the legal issues but fail to identify anything that’s meaningfully in dispute. *See* Doc. 24 at 10–12. They say that *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 682–83 (6th Cir. 2001) is not “dispositive of the legal issues in this case” because “*Hardy* involved a professor’s classroom speech” while “Josephson’s speech in this case involved non-classroom speech given off-campus.” Doc. 24 at 11. But this only shows that the right Dr. Josephson invokes is even *more* clearly-established. The right of employees to speak *outside* of work without facing retaliatory adverse action goes all the way back to *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968).

Subsequent cases like *Hardy* and *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) affirm that this protection extends *into* the university classroom.

In order to invoke this Court’s jurisdiction, Defendants must contest “the purely legal question of whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions.” *Gillispie v. Miami Twp.*, 18 F.4th 909, 916 (6th Cir. 2021) (cleaned up). Defendants have not contested whether the rule prohibiting government retaliation against employees for their speech is clearly established, because they cannot: *Pickering* clearly establishes the rule for speech outside of work, *Hardy* and *Meriwether* establish the rule as applied to professors’ speech inside the classroom, and *Thaddeus-X v. Blatter*, 175 F.3d 378 (6th Cir. 1999) clearly establishes the appropriate threshold for adverse action.³

Defendants also have appealed the district court’s ruling on sovereign immunity, but their Response does not even *mention* this concept, let alone identify any real legal dispute. Defendants blanketly insist that Dr. Josephson is “[in]correct about the arguments he purportedly anticipates that the appellants intend to make on appeal” while saying nothing about what those arguments actually are. Doc. 24 at 9. That’s because

³ See Order, R. 99, Page ID # 5764 (recognizing applicable legal standards).

this appeal raises no legal issues. If there were any, Defendants could point to them.

In reality this case is about the facts: if Defendants did what Dr. Josephson says they did for the reasons he says they did it, then Defendants violated clearly established law. The district court found that there was a genuine dispute of fact on this point, but that Dr. Josephson “has presented facts sufficient to find a violation of his First Amendment rights by each Defendant.”⁴

C. Defendants’ actual qualified immunity argument assumes their account of the facts to fabricate a faux legal dispute.

Defendants hope the absence of disputed legal issues can be kept under wraps by not making any argument in their Response and charging Dr. Josephson with attacking “arguments that haven’t been made.” Doc. 24 at 4. The problem is, arguments *have* been made, and they were all fact-based. In their summary judgment briefing, Defendants all used their version of the facts to create a false characterization of what the legal issues were, in order to avoid grappling with the clearly established legal rules Dr. Josephson actually alleged they violated.

For example, Defendants do not contest that, had they ended Dr. Josephson’s contract because of his speech, this would have violated a

⁴ Order, R. 99, Page ID # 5765.

clearly established right. Instead, they just use their factual assumptions to create a legal strawman for each university official:

- Ganzel says “there is no authority to suggest that Dr. Ganzel’s decision *to rely on accurate information* from Dr. Boland to accept her recommendation not to renew Dr. Josephson’s faculty appointment was unreasonable”⁵
- Boland says she didn’t violate clearly established law because “[n]o ‘reasonable official’ would understand that Boland’s *provision of information* concerning Josephson’s performance shortfalls, and accompanying recommendation against the renewal of his faculty appointment, violated any of Josephson’s constitutional rights.”⁶
- Woods says he didn’t violate clearly established law because “there is no authority to suggest that a reasonable public employee would think that requesting an employee step down from a leadership role *because of concerns about that individual’s ability* as a leader violates the First Amendment.”⁷
- Le says her involvement was limited to “*provision of accurate information* to her supervisor regarding Dr. Josephson’s performance

⁵ Ganzel Br., R. 61-1, Page ID # 1335 (emphasis added).

⁶ Boland Br., R. 63-1, Page ID # 1596 (emphasis added).

⁷ Woods Br., R. 58-1, Page ID # 958 (emphasis added).

and support of Dr. Boland’s recommendation not to renew the appointment” and, there can’t be any clearly established law against that.⁸

- Carter says all he did was have a “*disagreement* with a colleague” and so no “reasonable public employee would think” that “violates the First Amendment.”⁹
- Lohr says his own involvement was limited to engaging in his own constitutionally-protected speech.¹⁰

Well *of course* it doesn’t violate any clearly established law to rely on accurate information, furnish accurate information, act based on bona-fide leadership concerns, relay genuine performance-related concerns, have a disagreement, or engage in constitutionally-protected speech. This is just to say that it doesn’t violate the First Amendment to *not* retaliate, which is obvious.

But Dr. Josephson alleged that each Defendant *intentionally* retaliated against him because of his speech, and that *does* violate clearly established law.¹¹ Based on Defendants’ own emails, the district court concluded that there was a material dispute of fact on the question of motive

⁸ Le Br., R. 62-1, Page ID #1444 (emphasis added).

⁹ Carter Br., R. 59-1, Page ID # 1088 (emphasis added).

¹⁰ Lohr Br., R. 60-1, Page ID # 1268.

¹¹ Pl.’s Br., R. 64-1, Page ID ## 1834–1840; Pl.’s Resp., R. 72, Page ID ## 4616–4622.

for each Defendant.¹² This finding is not reviewable “under any other standard.” *Bomar*, 643 F.3d at 462 n.8. And this Court does “not have jurisdiction to review the factual determination of the district court that there was a genuine issue of material fact as to whether or not the defendants entertained unconstitutional motivations.” *Hoover v. Rada-baugh*, 307 F.3d 460, 466 (6th Cir. 2002). Because all of Defendants’ qualified immunity arguments are actually fact-based, and they have declined the opportunity to identify any meaningful legal issues raised by their appeal, this Court should grant the motion to dismiss.

II. Since the Plaintiff’s “version of facts demonstrates a violation of clearly established rights,” this court should dismiss for lack of jurisdiction.

Another way to tell that this appeal should be dismissed is to apply the correct standard. Where “the [P]laintiff’s version of facts demonstrates a violation of clearly established rights,” there is no jurisdiction for an interlocutory appeal on qualified immunity. *Ouza*, 969 F.3d at 277–78 (cleaned up). Thus, “the defendant must be prepared to overlook *any* factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff’s case.” *Berryman*, 150 F.3d at 562 (emphasis added). On this standard, it is plain that the district court correctly denied qualified immunity.

¹² Order, R. 99, Page ID ## 5765–66, 5768.

Dr. Josephson presented both direct and circumstantial evidence showing the personal participation of each Defendant in opposing the viewpoint of his speech and waging a campaign of harassment against him that ultimately culminated in his termination.¹³ Most tellingly, months before the decision to end his appointment, Defendants were engaged in an effort to collect “strong documentation” to “avoid Allan’s re-appointment.”¹⁴ Uncontested evidence shows that, for other employees, Defendants would have implemented a performance improvement plan.¹⁵ But, for Dr. Josephson, their goal was not to remediate any alleged performance issues, it was to see him gone.

Under “[P]laintiff’s version of facts,” Defendants undoubtedly retaliated against him through a campaign of harassment and eventual termination.¹⁶ *Ouza*, 969 F.3d at 277. This violates what “[f]or decades . . . has been clearly established[:] that the First Amendment tolerates neither laws nor other means of coercion, persuasion, or intimidation that cast a pall of orthodoxy over the free exchange of ideas in the classroom.” *Hardy*, 260 F.3d at 682 (cleaned up).¹⁷ Since Defendants have refused—

¹³ See Pl.’s Br., R. 64-1, Page ID ## 1828–1840; Pl.’s Resp., R. 72, Page ID ## 4616–4622.

¹⁴ Pl.’s Br., R. 64-1, Page ID # 1818 & n.225.

¹⁵ *Id.* at Page ID # 1818 & n.218–221.

¹⁶ Order, R. 99, Page ID ## 5764–66, 5768.

¹⁷ *Id.* at Page ID # 5763 (recognizing the same quote from *Hardy* as clearly established law in rejecting Defendants’ qualified immunity arguments).

even when given the opportunity in their Response to the instant Motion—to identify an “abstract issue of law relating to qualified immunity,” this Court has no jurisdiction to hear the appeal. *Berryman*, 150 F.3d at 563 (cleaned up).

CONCLUSION

Because all of Defendants’ arguments on qualified immunity and sovereign immunity rely on disputes of fact and not any dispute over clearly established law, this Court should dismiss the appeal for lack of jurisdiction.

Respectfully submitted this 2nd day of June, 2023.

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1. This document complies with the type-volume limit of FED. R. APP. P. 27(d)(2)(C) because, excluding the parts of the document exempted by FED. R. APP. P. 27(a)(2)(B) and 32 (f), as well as 6th Cir. R. 32(b), this document contains 2,545 words according to the word count function of Microsoft Word 365.

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Date: June 2, 2023

CERTIFICATE OF SERVICE

Under 6th Cir. R. 27, I hereby certify that on June 2, 2023, a digital copy of the foregoing document was filed electronically with the Court using its electronic filing system, which automatically sends an electronic notification to all attorneys of record.

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