UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-780 PSG (Ex)	Date	February 14, 2014
Title	Hodge v. Antelope Valley Community College District, *et al.*		

Present:	The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings: **(In Chambers) Order DENYING Plaintiff's and Defendants' Motions for Summary Judgment as to the First Amendment Retaliation Claim, and GRANTING Defendants Qualified Immunity for Monetary Damages as to this Claim; GRANTING Defendants' Motion for Summary Judgment as to the First Amendment Academic Freedom Claim; and GRANTING Defendants' Motion for Summary Judgment as to the Fourteenth Amendment Due Process Claim.**

Pending before the Court are cross-motions for summary judgment. *See* Dkts. # 55, 59. After considering the moving and opposing papers, along with the arguments presented at hearing on February 10, 2014, the Court DENIES the motions as to the First Amendment retaliation claim, and GRANTS Defendants qualified immunity for monetary damages as to this claim; GRANTS Defendants' motion as to the First Amendment academic freedom claim; and GRANTS Defendants' motion as to the Fourteenth Amendment due process claim.

I. Introduction

Plaintiff Lance Hodge ("Plaintiff"), an instructor at Antelope Valley Community College, brings this suit against the Trustees of the Antelope Valley Community College District (the "District"), Steve Buffalo, Earl Wilson, Betty Weinke, Michael Adams, Jack Seefus, Mayela Montano; Dr. Jackie L. Fisher Sr.; Sharon Lowry; Shane Turner; and Dr. Karen Howell

(collectively, "Defendants") to recover for alleged retaliation arising from statements made while teaching.[1] *See* Dkts. # 14, 59.

Plaintiff's First Amended Complaint ("FAC") asserts causes of action for: (1) violation of 42 U.S.C. § 1983 ("§ 1983") for First Amendment retaliation; (2) violation of § 1983 for infringement of academic freedom under the First Amendment; (3) violation of § 1983 for infringement of Plaintiff's Fourteenth Amendment right to equal protection of law; and (4) violation of § 1983 for infringement of Plaintiff's Fourteenth Amendment right to due process of law. *See* Dkt. # 14. The parties filed cross-motions for summary judgment, or, in the alternative, partial summary judgment, as to Plaintiff's first, second, and fourth causes of action. *See* Dkts. # 55, 59; *see also* Dkt. # 53. The parties have stipulated to the dismissal of Plaintiff's § 1983 claim for infringement of his Fourteenth Amendment right to equal protection of law. *See* Dkt. # 31; *see also* Dkt. # 32.

II. Background

Plaintiff has taught courses in Emergency Medical Technology at Antelope Valley Community College ("AVC") since 1992. *See Plaintiff's Separate Statement of Uncontroverted Facts* ("PSSUF") # 2. Plaintiff's courses prepare students to take the National Registry exam to become emergency medical technicians ("EMTs") and to work in the field as first responders. *See PSSUF* # 4.

Plaintiff often anecdotes his lectures with real-life examples of emergency calls he has handled as a paramedic. *Id.* Plaintiff believes that when students are trained to understand the technical and medical procedures required of an EMT, as well as what to expect when they respond to emergency calls under high-pressure and hostile circumstances, they will perform at a higher level, benefiting both the patient and the community at large. *Id.* # 5. As a result, Plaintiff's real-world illustrations often include the same offensive language as is sometimes used by patients, family members, and bystanders at a given incident. *Id.* # 6. Plaintiff does not believe that sugarcoating his description of an emergency call accurately or effectively conveys the true scene, or the reality of the field as a whole. *Id.*

In April 2010, the District conducted a formal performance evaluation of Plaintiff's teaching. *See Defendants' Separate Statement of Undisputed Facts* ("DSSUF") # 13. As part of Plaintiff's evaluation, Defendant Karen Cowell – the Dean of Health Sciences for the District,

[1] On February 7, 2014, the parties stipulated to dismiss Trustee Defendants Steve Buffalo, Earl Wilson, Betty Weinke, Michael Adams, Jack Seefus, and Mayela Montano. *See* Dkt. # 72.

observed the first hour of Plaintiff's April 2010 Lecture on pediatrics. *See PSSUF* # 8-9. During this portion of the Lecture, Plaintiff discussed a variety of cultural practices an EMT might encounter in the field.[2] *Id.* # 12-14. According to Defendant Cowell, Plaintiff referred to various cultural practices, such as the eating of placentas from women who have just given birth, as "weird" practices. *See DSUFF* # 14, 17. In describing other "weird" practices, Plaintiff incorrectly referred to the practice of "coining" – where heated coins are placed on the bodies of ill individuals in an attempt to heal them – as "burning." *Id.* # 15-16. Plaintiff also told his students, as he raised his hands over his head, wiggled his fingers, and spoke in a high-pitched voice, that they might encounter "witch stuff" in the field. *Id.* # 18.

Following the April 2010 Lecture, Defendant Cowell prepared an Observation Report detailing her general impressions of Plaintiff's teaching. *See PSSUF* # 16. The Observation Report mentions, among other things, that Plaintiff's "tone, gestures and use of language [sic] was inappropriate and disrespectful to the cultural beliefs of patients." *Id.* The Observation Report further mentions that Plaintiff should use "neutral tone, gestures, and descriptive, respectful language when discussing cultural beliefs." *Id.*

In addition to the Observation Report, Defendant Cowell and other members of the evaluation committee prepared a Tenured Faculty Evaluation Report ("TFER"). *Id.* # 17. The TFER addresses Plaintiff's references to the practices of "coining" and "witch stuff," as mentioned in the April 2010 Lecture. *Id.* # 18. It characterizes Plaintiff's tone and gestures with respect to these references as "flippant," and recommends that Plaintiff use "a neutral tone and respectful language when discussing cultural beliefs." *Id.* The TFER also rates Plaintiff's performance in the area of "sensitivity to diversity" as "needs improvement," meaning that Plaintiff "partially meets the standard for given criteria . . . [but] with increased attention to [the] area, it is expected that [Plaintiff] will meet [the] criteria." *See DSSUF* # 25, 26; *see also Stipulated Facts*, Ex. 3.

The TFER further provides specific directives for Plaintiff to improve his sensitivity to diversity while in the classroom. *Id.* # 30. It states, in relevant part:

> The committee recommends the following to ameliorate the rating of "needs improvement." [Plaintiff] must write a ten-page report (with references to professional literature) addressing California and federal laws related to discrimination and

[2] The parties debate whether Plaintiff actually observed these practices in the field; however, as explained *infra*, the Court does not view this as a material fact for purposes of the instant motions. *See Defendants' Statement of Genuine Issues of Fact* # 12-14.

> Antelope Valley Board Policy 7100 in the classes he teaches. The paper will be submitted to the Vice President of Academic Affairs before [February 11, 2011]. [Plaintiff] will include a one-hour class on cultural diversity in his EMT 101 lecture. The lesson plan for the class will be submitted to the peer-team at least two weeks prior to the presentation of the lesson to the class.

Id.; *see also Stipulated Facts*, Ex. 3.

In response to the TFER's directive, Plaintiff submitted a 27-page paper entitled, "California and Federal Laws Related to Discrimination and Antelope Valley College Board Policy 7100 Regarding Commitment to Diversity." *See DSSUF* # 33; *see also Stipulated Facts*, Ex. 4. Although Defendant Sharon Lowry – AVC's Vice President for Academic Affairs – felt that the paper was lacking with respect to a discussion of Board Policy 7100's commitment to diversity, she accepted the submission. *See PSSUF* # 49.

Plaintiff also submitted a 14-page lesson plan ("Lesson Plan") on cultural diversity entitled, "Political correctness vs. the real world: The EMT and professionalism in the face of offensive language or behavior and our understanding of stereotyping and prejudice." *See id.*; *see also Stipulated* Facts, Ex. 5. However, Defendant Shane Turner – AVC's Vice President of Human Resources, instructed Plaintiff not to present the lesson plan as it failed to adequately address cultural diversity and contained various epithets that might subject the District to a lawsuit for discrimination or harassment. *See PSSUF* # 50, 54. Defendant Turner further informed Plaintiff that he would be subjected to "disciplinary action" if he went ahead and delivered the Lesson Plan. *See PSSUF* # 50-52; *see also Stipulated Facts*, Ex. 6. Notwithstanding Defendant Turner's instructions on behalf of the District, Plaintiff would like to present the Lesson Plan because he deems it relevant to what EMTs can expect to encounter in the field.[3] *See PSSUF* # 71.

[3] The FAC's prayer for relief does not mention Plaintiff's desire to present the Lesson Plan. *See FAC* at 18. Nonetheless, the Court considers Plaintiff's request for three reasons. First, Plaintiff asks for "all further relief to which Plaintiff may be entitled," which the Court interprets to include Plaintiff's request to present the Lesson Plan. *See id.* Second, Plaintiff's request to present the Lesson Plan is inextricably intertwined with the remainder of the Court's substantive analysis, as the Lesson Plan is a byproduct of the Observation Report and the TFER. Third, the parties seem to agree with the Court's conclusion as to this issue, as each party spends a significant portion of its papers addressing the merits of Plaintiff's request to present the Lesson Plan. *See* Dkts. # 55, 59.

Based on these largely undisputed facts, Plaintiff and Defendants now move for summary judgment, or, in the alternative, partial summary judgment, as to each of Plaintiff's claims for: (1) violation of § 1983 for First Amendment retaliation; (2) violation of § 1983 for infringement of academic freedom under the First Amendment; and (3) violation of § 1983 for infringement of Plaintiff's Fourteenth Amendment right to due process of law. *See* Dkts. # 55, 59.

III. Legal Standard

Federal Rule of Civil Procedure 56(a) provides that a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the initial burden to demonstrate the lack of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant satisfies this burden, the nonmovant must set forth specific evidence showing that there remains a genuine issue for trial, and "may not rest upon mere allegation or denials of his pleading." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

The showing each party must make at the summary judgment stage depends on which party bears the burden of proof at trial on a particular issue. *See Celotex*, 477 U.S. at 325; *In re Brazier Forest Prods., Inc.*, 921 F.2d 221, 223 (1990). The moving party always bears the initial burden of informing the court of the basis for its motion and identifying the evidence on the record that it believes shows an absence of a genuine issue of fact. *See Celotex*, 477 U.S. at 323. However, "if the nonmoving party bears the burden of proof on an issue at trial, the moving party need not produce affirmative evidence of an absence of fact to satisfy its burden." *Brazier*, 921 F.2d at 223 (citing *Celotex*, 921 F.2d at 323). When the nonmoving party has the burden at trial, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. If the moving party points to an absence of evidence on an issue for which the nonmoving party bears the burden at trial, the nonmoving party must then respond with evidence to support all essential elements. Thus, to survive a motion for summary judgment, "[t]he nonmoving party must [] make a sufficient showing to establish the existence of all elements essential to their case on which they will bear the burden of proof at trial." *Brazier*, 921 F.2d at 223 (citing *Celotex*, 477 U.S. at 322-23). If the nonmoving party fails to make such a showing, summary judgment must be granted. *Celotex*, 477 U.S. at 325. In short, a moving party may prevail on a motion for summary judgment on an issue on which the nonmoving party bears the burden by establishing that the nonmoving party does not have evidence to support its claim. *Id.*

An issue of fact is a genuine and material issue if it cannot be reasonably resolved in favor of either party and may affect the outcome of the suit. *See Anderson*, 477 U.S. at 249-50. A party asserting that a fact cannot be genuinely disputed must support that assertion by citing to "materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56(c)(1)(A). A party may object that material cited would not be admissible in evidence. *See id.* 56(c)(2). Admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible in evidence, and must show that the declarant or affiant is competent to testify on the matters stated. *See id.* 56(c)(4).

IV. Discussion

To state a claim under § 1983, a plaintiff must show that the conduct complained of was committed by a person acting under color of state law, and that the conduct deprived the plaintiff of a constitutional right. *Rinker v. Napa Cnty.*, 831 F.2d 829, 831 (9th Cir. 1987). The parties here do not dispute that Defendants are employees and officials of the State of California, or that they were acting under color of law throughout the events of this case. *See* Dkts. # 55, 59. The instant dispute focuses only on the second inquiry as to whether Plaintiff was deprived of his constitutional right under the First Amendment and the Fourteenth Amendment. The Court considers each of Plaintiff's constitutional claims separately and in turn.

A. First Amendment Retaliation Claim under § 1983

Until a few weeks ago, Plaintiff's First Amendment retaliation claim presented a novel question of law in this Circuit: To what degree are a public university professor's teaching and writing protected by the First Amendment? The Supreme Court explained in *Garcetti* 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. 410, 421 (2006). However, the Supreme Court did note a possible exception to this far reaching rule, reserving the question of whether its holding applied to "speech related to scholarship or teaching." *Id.* at 425.

Seizing upon this potential exception, the Ninth Circuit recently held that *Garcetti*'s "official duty" test does not apply to teaching and academic writing performed pursuant to the official duties of a public school teacher or university professor. *See Demers v. Austin*, No. 11-35558, 2014 U.S. App. LEXIS 1811, at *3-4 (9th Cir. Jan. 29, 2014). The Ninth Circuit reasoned that because teaching and academic writing are at the core of the official duties of

teachers and professors, such speech must receive greater protection under the First Amendment than what *Garcetti* currently provides. *See id.* at *16-25. Indeed, "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Id.* at *17-18 (internal citations and quotations omitted).

In place of *Garcetti*'s official duty test, the Ninth Circuit ruled that a public university professor's academic speech is protected by the First Amendment under the analysis set forth in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See Demers*, 2014 U.S. App. LEXIS 1811, at *19-25. The *Pickering* test, as later confirmed in the Supreme Court's decision in *Connick*, contains two essential inquiries. *See id.*; *see also Connick v. Myers*, 461 U.S. 138, 146 (1983).

First, in order for a public employee's speech to receive protection under the First Amendment, the employee must show that his or her speech addresses "matters of public concern." *See Pickering*, 391 U.S. at 568; *see also Connick*, 461 U.S. at 146. Second, an employee's interest "in commenting upon matters of public concern" must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *See Pickering*, 391 U.S. at 568. Under this inquiry, the burden shifts to the government to show that its "legitimate administrative interests outweigh the employee's First Amendment rights." *See, e.g.*, *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004).

Along with these two essential inquiries, the Ninth Circuit has "unravel[ed] *Pickering*'s tangled history" to establish a number of additional showings that a public employee must make in order to prevail on a First Amendment retaliation claim.
See Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009); *see also Demers*, 2014 U.S. App. LEXIS 1811, at *34-35 (stating issues to consider in evaluating a First Amendment retaliation claim). A public employee must also show that the government "took adverse employment action . . . [and that the] speech was a 'substantial or motivating' factor in the adverse action." *See Eng*, 552 F.3d at 1071 (citing *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003)). And finally, if the government fails the *Pickering* balancing test, it alternatively bears the burden of demonstrating that it "would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct." *See Eng*, 552 F.3d at 1072 (internal citations omitted). In other words, the government may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In this case, then, the Court must consider a four-step series of questions in order to determine whether Defendants retaliated against Plaintiff for exercising his free speech rights under the First Amendment: (1) whether Plaintiff's speech involves a matter of public concern; (2) whether Defendants' legitimate administrative interests outweigh Plaintiff's First Amendment rights to free speech; (3) whether Plaintiff's protected speech was a substantial or motivating factor in an adverse employment action; and (4) whether Defendants would have subjected Plaintiff to the adverse employment action even absent the protected speech.[4] *See Demers*, 2014 U.S. App. LEXIS 1811, at *34-35.

The parties here largely dispute the two essential prongs of the *Pickering* test, *to wit*, whether Plaintiff spoke on a matter of public concern, and whether Defendants interest in regulating Plaintiff's speech outweighs Plaintiff's free speech interests. *See Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 146. The Court therefore considers these two inquiries first. The Court then considers whether Plaintiff's speech was a substantial or motivating factor in an adverse employment action. Because this issue of whether Plaintiff was subjected to an adverse employment action disposes of both parties' cross-motions for summary judgment, the Court does not reach the final inquiry as to whether Defendants would have taken adverse employment action even absent the protected speech.[5]

i. Matter of Public Concern

[4] The Ninth Circuit generally considers five questions under the *Pickering* test, including whether the speech was performed according to the employee's official duties. *See Eng*, 552 F.3d at 1070. *Demers*, however, effectively eliminated that inquiry with respect to public school teachers and professors' academic speech. *See Demers*, 2014 U.S. App. LEXIS 1811, at *16-35.

[5] To the extent Defendants argue that the Court need not reach the merits of Plaintiff's argument because Plaintiff has failed to demonstrate the lack of any genuine issue as to Defendants' affirmative defenses, *see Buffalo Opp.* 4:3-6, the Court rejects the argument. Because Plaintiff brings his motion for summary judgment as to all claims pleaded in the FAC, and ultimately claims entitlement to relief based on such claims, he has satisfied his burden to point out the lack of any genuine issue as to Defendants' affirmative defenses. As a result, the burden shifts to Defendants to demonstrate a factual dispute as to these affirmative defenses, such as qualified immunity, which the Court discusses *infra*. *See Celotex Corp.*, 477 U.S. at 323.

The first step in determining whether Plaintiff's speech is protected under the First Amendment is to determine whether it addresses a matter of public concern. *Pickering*, 391 U.S. at 568. Public concern is "defined broadly." *Demers*, 2014 U.S. App. LEXIS 1811, at *30 (citing *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 978 (9th Cir. 2002); *see also Roe v. City & Cnty. of San Francisco*, 109 F.3d 578, 586 (9th Cir. 1997) (adopting a "liberal construction" of "public concern" for purposes of evaluating a First Amendment free speech retaliation claim under *Pickering*). "Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir. 1995) (quoting *Connick*, 461 U.S. at 146). The fundamental question before the Court is therefore "whether the speech addressed matters of public as opposed to personal interest." *Demers*, 2014 U.S. App. LEXIS 1811, at *30 (citing *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009)).

1. The April 2010 Lecture

Neither Plaintiff nor Defendants dispute the fact that Plaintiff's April 2010 Lecture, as a whole, pertains to matters of public concern. *See Buffalo Opp.* 4:18-25; *see also Hodge Reply* 3:13-15. That much is clear, especially considering that Plaintiff's course is not only intended to prepare students to take the National Registry exam to become EMTs, but also to train students to work in the community as first responders. *See PSSUF* # 4. What Defendants do dispute, though, is whether Plaintiff's speech regarding *certain* topics during the April 2010 Lecture involve matters of public concern. *See Buffalo Opp.* 5:1-5. Defendants specifically attack two statements made by Plaintiff during the April 2010 Lecture. Defendants first take issue with Plaintiff's use of the word "burning" to describe a healing method more properly referred to as "coining." *See id.* 5:6-8. Defendants also object to Plaintiff's "flippant tone" while describing "weird" things in the field, such as a "witch stuff."[6] *See id.* 5:8-10.

To the extent Defendants argue, most generally, that neither of these statements involve matters of public concern simply because Plaintiff failed to expressly "connect his discussion of cultural practices to particular incidents he had observed" in the field, the Court must disagree. *See Buffalo Opp.* 5:1-6:6, 8:6-9; *see also Defendants' Statement of Genuine Issues* # 12-14. Even if Plaintiff did not explicitly connect his speech regarding "burning" and other "weird" cultural practices to specific incidents he had personally observed in the field, this does not mean, as a matter of law, that Plaintiff's speech lacked any and all public concern. Put another

[6] Although Defendants allude to Plaintiff's additional reference to the cultural practice of eating placentas, *see* DSSUF # 8, Defendants do not maintain any argument in their opposition brief specifically referencing this fact, *see Buffalo Opp.* 5:5-6:6.

way, the content of Plaintiff's speech, by itself, is not the sole inquiry before the Court. *See Connick*, 461 U.S. at 147-48. The Court must also consider "the content, form, *and* context of a given statement, as revealed by the whole record." *See id.* (emphasis added); *see also Anderson v. Central Point Sch. Dist. No. 6*, 746 F.2d 505, 507 (9th Cir. 1984).

Here, the form and context of the April 2010 Lecture clearly reveal that Plaintiff's speech involved matters of public concern. Plaintiff's entire Lecture was devoted to "discuss[ing] the unexpected cultural practices that the EMT may encounter when responding to calls." *See PSSUF* # 12. Defendants' Opposition admits as much, declaring that Plaintiff "referred . . . to 'weird' things *in the field* including 'witch stuff.'" *See Buffalo Opp.* 5:9-11 (emphasis added). Thus, because the overarching premise of the April 2010 Lecture was to prepare students to work in the community as first responders, where they will presumably face these issues and a variety of other safety hazards, Plaintiff's related comments cannot be stylized as presenting only matters of private concern, rather than public concern. *See, e.g.*, *Posey v. Land Pend Orielle Sch. Dist. No 84*, 546 F.3d 1121, 1130 (9th Cir. 2008) (finding safety policies at a public school district to constitute a matter of public concern); *Chappel v. Montgomery Cty. Fire Protection Dist. No. 1*, 131 F.3d 564, 578 (6th Cir. 1997) ("Speech on matters directly affecting the health and safety of the public is obviously a matter of public concern.").

Indeed, if the Court found otherwise, public university professors would be required to connect the dots for each and every controversial or polemic statement they make during an academic lecture. This cannot be the rule, lest the Court impose an "intellectual straight jacket upon the intellectual leaders in our colleges and universities . . . imperil[ing] the future of our Nation" henceforth and for all time. *See Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."); *see also Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[T]he university is . . . so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment."). The Court thus rejects Defendants' first attempt to strip Plaintiff's speech of all its notions of public concern.

Defendants' additional attempts to cast doubt on the public nature of Plaintiff's speech lack merit as well. Defendants argue that Plaintiff's speech lost its First Amendment protection because Plaintiff was "flippant" and "wiggled his fingers" while speaking. *See Buffalo Opp.* 5:13-20. Yet Defendants cite no authority to support this proposition, except for a conclusory reference to the Supreme Court's decision in *City of San Diego v. Roe*, which is entirely

inapposite to the facts of this case.[7] *See* 543 U.S. 77, 84 (2004). In fact, the Supreme Court has suggested the opposite of what Defendants now contend, as the free speech protections of the First Amendment trigger even when other aspects of a communication do not qualify as a public concern. *See, e.g.*, *Connick*, 461 U.S. at 149. Therefore, even if certain components of Plaintiff's speech do not constitute a matter of public concern, some part of the speech did address a matter of public concern, so it meets the public concern requirement under *Pickering*. *See id.*

Defendants also commit the same error as before, placing one factor of Plaintiff's speech far above the rest. This time, however, Defendants consider the form of Plaintiff's speech to the exclusion of its context and content. As the Supreme Court made clear in *Connick*, all of these factors must be considered together, rather than apart. *See Connick*, 461 U.S. at 147-48 (stating that "the content, form, *and* context of a given statement, as revealed by the whole record," must be considered by the court in determining whether the speech relates to a matter of public concern) (emphasis added). So once again, because the content, context *and* form of Plaintiff's speech ultimately shows that Plaintiff's statements addressed a matter of public concern, neither Plaintiff's "flippant" attitude, nor the fact that he "wiggled his fingers," vitiates the fact that Plaintiff's speech addressed a matter of public concern, as discussed *supra*.

Finally, Defendants argue that by erroneously labeling the healing practice of "coining" as "burning," Plaintiff forfeited all protection under the First Amendment. *See Buffalo Opp.* 5:22-6:6. But this is not the rule – some inaccuracy in the content of speech must be tolerated. *See Pickering*, 391 U.S. at 570-72. The First Amendment protects a public employee's speech involving matters of public concern even when the protected comments are critical, or even false. *See Pickering*, 391 U.S. at 571 (holding that a teacher could not be dismissed for criticizing school board's budget management, even though the criticism included false allegations against board members); *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1065 (9th Cir. 2009) ("[P]ublic employees have a First Amendment right to be free from retaliation for commenting on matters of public concern, even when the protected comments are critical of their employers."); *see also Multnomah Cnty.*, 48 F.3d at 424 (stating "that recklessly false statements are not per se unprotected by the First Amendment when they substantially relate to matters of public concern"). Thus, just as Defendants' previous two rejoinders fail to convince

[7] In *Roe*, the Supreme Court held that a San Diego police officer's widely disseminated pornographic video did not qualify as a matter of public concern. *See City of San Diego v. Roe*, 543 U.S. 78, 84 (2004). This case is readily distinguishable because, unlike Plaintiff in this case, the police office was not communicating anything of public concern through dissemination of the pornographic video.

the Court otherwise, so too does their final argument. Plaintiff's speech during the April 2010 Lecture, including the comments Defendants now challenge, relates to matters of public concern under *Pickering*.

2. Lesson Plan

In addition to Plaintiff's speech during the April 2010 Lecture, the Court finds that the subject matter of Plaintiff's Lesson Plan entitled, "Political correctness vs. the real world," also presents a matter of public concern. *See Joint Stipulated Facts*, Ex. 5. The face of the Lesson Plan makes that much clear, as its first page states that the "lesson focuses on two main topics . . . the need for EMT students to participate in a frank, free, and open discussion of offensive language and behavior that they may encounter [in the field], along with its relationship to stereotyping, prejudice, and racism." *See id.* at 1. The remaining text of the Lesson Plan sticks to that goal, as the content of the Lesson Plan seeks to prepare EMT students for the highly charged emotional situations they will presumably face when practicing in the field. *See generally id.* The Lesson Plan is filled with both hypotheticals and real life examples of situations in which an EMT must cope with diverse cultures as well as offensive language. *See generally id.* This speech therefore relates to matters of public concern as well. *See Posey*, 546 F.3d at 1130 (finding safety and emergency policies at a public school district to constitute a matter of public concern); *see also Rutherford*, 2008 WL 2953560, at *3.

Furthermore, while Defendants make much ado over the Lesson Plan's inclusion of pejorative terms and other epithets, *see Buffalo Opp.* 6:23-7:7, this does not disqualify the lecture as a matter of public concern. The fact remains that these students, as future EMTs in our surrounding communities, are eminently likely, if not guaranteed, to encounter such vulgarity while performing in the field. As such, because the Lesson Plan's provocative language was not merely gratuitous profanity, but was germane to an academic discussion of the words themselves, along with how an EMT should handle emotionally charged emergencies while in the field, Plaintiff's speech cannot be so easily stripped of its public concern. *See Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 678-80 (6th Cir. 2001) (finding that a public university professor's in-class use of profanity involved matters of "overwhelming public concern" because it related to the "subject matter of his lecture on the power and effect of language," as well as "race, gender, and power conflicts in our society"); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (finding professor's "speech advocating the legalization of marijuana, criticizing national drug-control policy, and debating civil disobedience on its face implicates matters of public concern"); *cf. Bonnell v. Lorenzo*, 241 F.3d 800, 820-21 (6th Cir. 2001) (finding college professor's profanity was "not germane to the subject matter" and thus did not present a matter of public concern); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1187-

189 (6th Cir. 1995) (finding that public university basketball coach's profanity failed to present a matter of public concern because it did not "advance[] an idea transcending personal interest or opinion which impacts our social and/or political lives").

Defendants also hyperbolize the extent to which the Lesson Plan mentions Plaintiff's personnel disputes with the AVC administration. *See Buffalo Opp.* 6:17-22. Even a cursory review of the Lesson Plan shows that among the Lesson Plan's 14-pages of text, the only reference to Plaintiff's administrative disputes appear in a few scattered sentences. *See Joint Stipulated Facts*, Ex. 5 at 12, 14. What's more, the content, context, and form of the Lesson Plan, viewed separately and even apart, show that these select statements do not relate to purely personnel matters. *Cf. Desrochers*, 572 F.3d at 713 (declining to find that speech raised an issue of public concern because it merely raised a "personality dispute" regarding the employee's management style); *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996). Instead, the passages evince Plaintiff's attempt to "illustrate the lesson" regarding politically correct versus incorrect speech, and the manner in which such speech "could result in a future safety risk to the EMT student," *see id.*, Ex. 5 at 12, or a student "overreacting to hearing [a] word [that] is exactly the sort of thing they must NOT do as an EMT," *see id.*, Ex. 5 at 14. The Lesson Plan is not, therefore, stripped of all public concern simply because it cursorily refers to Plaintiff's personnel dispute with the AVC administration. *See, e.g.*, *Posey*, 546 F.3d at 1130 n.5 ("We therefore agree with the Sixth Circuit that statements presenting 'mixed questions of private and public concern' properly fall within the scope of First Amendment protection.") (citing *Bonnell v. Lorenzo*, 241 F.3d 800, 812 (6th Cir. 2001)).

Defendants finally argue, albeit very weakly, that Plaintiff's Lesson Plan does not deserve First Amendment protection because it contains unprotected "fighting words." *See Buffalo Opp.* 7:8-11. But in view the context, content, *and* form of Plaintiff's Lesson Plan, any profanity included within it cannot be objectively interpreted to "inflict injury or tend to incite an immediate breach of the peace." *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); *see also Cohen v. California*, 403 U.S. 15, 20 (1971) (employing objective test to determine that "[n]o individual actually or likely to be present [at the scene of the speech] could reasonably have regarded the words on appellant's jacket as a direct personal insult").

Additionally, because Plaintiff's Lesson Plan does not direct these words at a particular student, such speech cannot be interpreted as a direct personal insult, and thus does not present "fighting words" *qua* "fighting words." *See Cohen*, 403 U.S. at 20 (holding that the profanity did not include "fighting words" because it could not be reasonably construed as a "direct personal insult"); *see also United States v. Poocha*, 259 F.3d 1077, 1080-81 (9th Cir. 2001) ("To characterize speech as actionable 'fighting words,' the government must prove that there existed

'a likelihood that the *person addressed* would make an immediate violent response.'") (emphasis added) (quoting *Gooding v. Wilson*, 405 U.S. 518, 528 (1972)); *cf. The UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin System*, 774 F. Supp. 1163, 1170-175 (E.D. Wis. 1991) (rejecting university's reliance on fighting words doctrine to prohibit racist speech). Defendants' final rejoinder thus meets the same fate as the others. Just as Plaintiff's April 2010 Lecture presents matters of public concern, so too does Plaintiff's Lesson Plan.

ii. Pickering Balancing

The fact that Plaintiff's speech touched on a matter of public concern does not end the Court's inquiry. The "public concern" prong is a necessary, but not a sufficient, condition of constitutional protection under the First Amendment. "It merely brings the claim within the 'coverage' of the First Amendment, and [ ] ensures that a court will test the reasons for restrictions against First Amendment standards." *Gilbrook v. City of Westminster*, 177 F.3d 839, 867 (9th Cir. 1999) (internal citation and quotations omitted).

Once a plaintiff shows that his or her statements were of public concern, the burden shifts to the defendant to show that, under the *Pickering* balancing test, its legitimate administrative interests in regulating the speech outweigh the plaintiff's First Amendment rights. *Bauer v. Sampson*, 261 F.3d 775, 784 (9th Cir. 2001). The balancing "requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Voigt v. Savell*, 70 F.3d 1552, 1561 (9th Cir. 1995). "This issue is one of law and a determination is to be made by the court." *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1200 (9th Cir. 2000).

The Ninth Circuit has listed five factors for use in the *Pickering* balancing analysis: (1) whether the employee's speech disrupted harmony among co-workers; (2) whether the relationship between the employee and the employer was a close working relationship with frequent contact which required trust and respect in order to be successful; (3) whether the employee's speech interfered with performance of his or her duties; (4) whether the employee's speech was directed to the public or to a colleague; and (5) whether the employee's statements were ultimately determined to be false. *See Brewster v. Bd. of Educ.*, 149 F.3d 971, 980-81 (9th Cir. 1998). Because *Pickering* requires the balancing of these factors, which involves a fact-sensitive inquiry based on the totality of the circumstances, no factor is dispositive. *Gilbrook*, 177 F.3d at 868.

In *Bauer*, the Ninth Circuit applied these factors to find that a public university's interests as an employer did not outweigh the plaintiff-professor's First Amendment rights. *See Bauer*,

261 F.3d at 780-85. In that case, a tenured professor at the Irvine Valley College ("College") had prepared and circulated various writings and illustrations in a campus newspaper called "Dissent." *Id.* at 780. The College's Chancellor, however, did not approve of the professor's speech. *Id.* When analyzing the College's interests in prohibiting the speech as compared to the professor's interests in free speech, the court noted first that while the professor's speech created some disharmony among his colleagues, it was unlikely that the speech was the primary reason for disharmony on the College campus because the school was going through a contentious period. *Id.* at 785. Second, the court reasoned that given the nature of academic life, especially at the college level, it was not necessary for the professor and the administration to enjoy a close working relationship. *Id.* Third, the court determined that the College had not shown that the professor's speech had any negative impact on his teaching or other professional responsibilities. *Id.* Fourth, the court found that the speech had not been directed to the media or a government colleague, but exclusively to the College community. *Id.* And fifth, the court found that the professor's expression was an opinion, and not factual assertions that could be proven false. *Id.*

Here, neither party argues, nor has either party presented any evidence, to suggest that Plaintiff's speech caused disharmony among Plaintiff and his colleagues. *See generally Buffo Opp.* Second, the Court notes the Ninth Circuit's determination in *Bauer* that a "close working relationship" is not necessary at the university level. *See Bauer*, 261 F.3d at 785. Third, Defendants have not proffered any convincing evidence that the speech had any significant negative impact on Plaintiff's teaching or other professional responsibilities. *See generally Buffo Opp.* While Defendants do present evidence of two students who dropped Plaintiff's class in 2006, these events far preceded the incidents in question. *See DSSUF* # 12. Moreover, none of the students in Plaintiff's April 2010 class complained about his comments or conduct to Defendant Cowell. *See PSUFF* # 15. Nor have these students complained that Plaintiff's comments interfered with their ability to learn in the class. *See id.* Fourth, Plaintiff's speech has been distributed only to his students and colleagues, and not to any outside media or the public at large. *See PSSUF* # 12-14. And finally, while the parties dispute whether Plaintiff's statement regarding "coining" was factually accurate, and whether he improperly called the practice "burning," the Court finds that even if it assumed that Plaintiff incorrectly referred to the practice as "burning," one misspoken word does not support the conclusion that Plaintiff's speech was largely inaccurate. *Cf. Pickering*, 391 U.S. at 571.

Like in *Bauer*, then, the evidence offered by both parties suggests that Plaintiff's speech, as presented in the April 2010 Lecture and Lesson Plan, outweighs the Defendants' interest in regulating such speech. *See Bauer*, 261 F.3d at 785; *see also Gilbrook*, 177 F.3d at 870; *cf. Hudson v. Craven*, 403 F.3d 691, 699-701 (9th Cir. 2005) (finding public college's interest in the

safety of students and interest in maintaining its political neutrality strongly outweighed college instructor's associational interests).

To the extent Defendants raise additional interests beyond these five factors, they also fail to tip the balance in their favor. Defendants posit the following additional justifications for restricting Plaintiff's speech: (1) Defendants have legitimate pedagogical concerns regarding diversity that are consistent with Sections 87360 and 87663(d) of the California Code of Education; (2) Defendants have an interest in preventing "disruption" that might be caused by Plaintiff delivering the Lesson Plan; (3) Plaintiff's Lesson Plan involves "cultural diversity," which is not part of the curriculum; and (4) Plaintiff's students constitute a "captive audience." *See Buffalo Opp.* 11:15-14-16; *Buffalo Mot.* 14:7-16:8.

As to the first point, Defendants aver that their interest in regulating the speech outweighs Plaintiff's free speech interests because the California Code of Education insures availability of educational resources to students of all races, ethnicities, religions, and protected classifications. *See Buffalo Opp.* 11:6-8; *Buffalo Mot.* 14:10-14. In support of this proposition, Defendants cite two sections of the California Code of Education, namely, Section 87360 and Section 87663(d). *See id.*

Upon review of the two provisions, however, the Court finds that neither statute has anything to do with classroom speech, or any other issue currently before the Court. Section 87360 states that sensitivity to student diversity is among the criteria for *hiring* community college faculty.[8] *See* Cal. Ed. Code § 87360 (2014). Section 87663(d) fares no better, as it discusses the need for affirmative action and demographic equality in the peer review process.[9] *See* Cal. Ed. Code § 87663(d) (2014). Furthermore, Defendants offer no authority to support the proposition that either statute has ever been used to regulate classroom speech, and the Court

[8] Section 87360 of the California Code of Education states: "In establishing hiring criteria for faculty and administrators, district governing boards shall . . . develop criteria that include a sensitivity to and understanding of the diverse academic, socioeconomic, cultural, disability, and ethnic backgrounds of community college students."

[9] Section 87663(d) of the California Code of Education states: "The peer review process shall be on a departmental or divisional basis, and shall address the forthcoming demographics of California, and the principles of affirmative action. The process shall require that the peers reviewing are both representative of the diversity of California and sensitive to affirmative action concerns[.]"

similarly finds none. This argument does not, therefore, favor Defendants under the *Pickering* balancing test.

With respect to the second point, Defendants claim that their interest in preventing disruption caused by the speech outweighs Plaintiff's free speech interests. *See Buffalo Opp.* 17:7-18:3. Although the Court must accord some weight to Defendants' reasonable judgments regarding the curriculum and the workplace more generally, Defendants cannot prevail under *Pickering* based on mere speculation that Plaintiff's conduct might cause disruption in the future. *See Nichols v. Dancer*, 657 F.3d 929, 933-34 (9th Cir. 2011). "[R]eal, not imagined, disruption is required" to tip *Pickering*'s scale in favor of Defendants here. *Nunez v. Davis*, 169 F.3d 1222, 1229 (9th Cir. 1999).

Defendants cannot meet this standard. First and foremost, when Plaintiff used similar speech during his April 2010 Lecture, none of the students in Plaintiff's class complained about that speech. *See PSSUF* # 15. Nor did any students cause a disruption. *See id.* Further still, while the Court recognizes that two students dropped Plaintiff's class in 2006 because they were purportedly offended by Plaintiff's profane language, no disruption occurred as a result. *See DSSUF* # 12; *see also Gustafson v. Jones*, 290 F.3d 895, 911 (7th Cir. 2002) (stating that predictions of disruption were unpersuasive "given that four months had passed without any evidence of ill effects from the speech before [the negative employment action] took place"). In view of these facts, and Defendants' failure to proffer any additional facts, Defendants' disruption claim amounts to nothing more than "rank speculation [or] bald allegation." *See Nichols*, 657 F.3d at 934. The Court thus refuses read the tea leaves, or even trust Defendants' untested clairvoyance, to conclude that Defendants' interest in preventing disruption outweighs Plaintiff's interest in free speech. *See id.* at 935 (finding school district's interest in preventing disruption did not outweigh plaintiff's free speech interests because it "did not produce evidence to establish that its predictions of disruption . . . are anything but speculation").

As to the third point, Defendants contend that their interest in prohibiting Plaintiff from delivering the Lesson Plan overrides Plaintiff's right to free speech because the Lesson Plan is not responsive to Defendants' request to teach cultural diversity. *See Buffalo Opp.* 13:1-5. According to Defendants, the Lesson Plan instead teaches political correctness, and highlights Plaintiff's personnel disputes with the administration. *See id.*

Both of these contentions, though, distort the plain meaning and purpose of Plaintiff's Lesson Plan. Although the Lesson Plan is, admittedly, entitled "Political correctness vs. the real world," the content of the Lesson Plan cannot be cabined to its title. *See Joint Stipulated Facts*, Ex. 5. The scope and content of the Lesson Plan reveals its multifaceted and idiosyncratic

nature, as it includes elements of political correctness *and* cultural diversity – to the extent the two topics even call for separation. The Introduction to the Lesson Plan makes that indisputably clear:

> We all have somewhat different upbringings, cultural differences, beliefs, and sensitivities; and we should remember that *diversity*, and tolerance is about understanding those differences, and treating each other with appropriate respect and dignity, which goes both ways, in that we must learn to accept our differences rather than try to make others conform to our beliefs. THAT is *diversity*, and tolerance. . . . The EMT will find [sic] themselves working in an environment where people of virtually every conceivable culture, race, color, background, upbringing, and sensitivity will be part of their emergency response sooner or later. We live in a world were *diversity* is the norm, and differences between us can sometimes be profound.

Joint Stipulated Facts, Ex. 5 at 1-2 (emphasis added). So too do the hypothetical and real-world examples that follow, as they emphasize the fact that "EMTs work in every imaginable social environment, from the poorest to the most wealthy neighborhoods, with the young and the old, and with the most respectful and well behaved and the most disrespectful and unruly." *Id.* at 3. Plaintiff's nominal and stray allusions to his own personnel disputes with the administration do not alter this conclusion, as the Court explained *supra*. *See, e.g.*, *Posey*, 546 F.3d at 1130 n.5. Moreover, even if the Lesson Plan did refer to notions of political correctness as opposed to cultural diversity, Plaintiff's speech is still germane to training EMTs to better perform in the field, thereby raising matters of public concern. As a result, Defendants have still not shown that their interest in regulating Plaintiff's speech prevails under *Pickering*.

Last but not least, Defendants argue that they must be allowed to regulate Plaintiff's speech because Plaintiff's students are a "captive audience," meaning that the students must listen to Plaintiff's speech, or drop out of Plaintiff's class altogether. *See Buffalo Opp.* 14:9-15. While it is true that students in Plaintiff's class must make such a decision, it is not true that Plaintiff's students constitute a "captive audience," as that term is used by federal courts. Unlike a public elementary or high school setting, where students are required by law to attend school and, as such, listen to a teacher's speech, the same does not apply here. In this case, Plaintiff's students are not only adults, but they are not required by law to take Plaintiff's courses or to listen to his speech – they choose to do so, on their own free will. *Cf. Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 968 (9th Cir. 2011) (noting that students in a public high school are required by law to attend school and are thus "captive minds" to the teacher's speech). Plaintiff's students are therefore not a captive audience, as that term is used by federal courts.

In sum, none of Defendants' additional interests in regulating Plaintiff's speech, viewed separately or even together, change the Court's conclusion *supra*. Plaintiff's interest in training future EMTs to perform safely and effectively when responding to emergency calls in the community, as expressed in the April 2010 Lecture and the Lesson Plan, override Defendants' interest in regulating his speech.[10] *See Bauer*, 261 F.3d at 785; *see also Gilbrook*, 177 F.3d at 870.

iii. Adverse Employment Action

Although Plaintiff's speech is protected both as a matter of public concern and under the *Pickering* balancing analysis, Plaintiff still bears the burden to show that he suffered an adverse employment action as a result of that speech, and that his speech was a motivating factor in the adverse employment action. *See Marable v. Nitchman*, 511 F.3d 924, 930 n.10 (9th Cir. 2007) ("It is [the plaintiff's] burden to show that his constitutionally protected speech was a motivating factor in [the state's] adverse employment action."); *see also Demers*, 2014 U.S. App. LEXIS 1811, at *34-35 (remanding to district court to address adverse employment action criterion).

The Ninth Circuit has defined an "adverse employment action" in the context of First Amendment retaliation claims as "an act that is reasonably likely to deter employees from engaging in constitutionally protected speech." *Coszalter v. City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003). The Ninth Circuit has also clarified that "[t]o constitute an adverse employment action, a government act of retaliation need not be severe and it need not be of a certain kind."

[10] Plaintiff also offers the alternative argument that he was subjected to a "prior restraint." The Court rejects the argument summarily. *See Hodge Mot.* 19:5-20:17. In the context of employee speech, courts in the Ninth Circuit evaluate prior restraints under the *Pickering* test, rather than the traditional heightened standard employed for these types of free speech issues. *See Gibson v. Office of Atty. Gen. State of California*, 561 F.3d 920, 926-28 (9th Cir. 2009). Also, "[a] prior restraint on speech is a *law, regulation or judicial order* that suppresses speech," not a verbal directive from an employer informing an employee not to speak on certain matters, as Plaintiff claims here. *See Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 41 (10th Cir. 2013) (citing *Alexander v. United States*, 509 U.S. 544, 550 (1993)) (emphasis added); *see also Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023 (9th Cir. 2009) ("The relevant question [in determining whether something is a prior restraint] is whether the challenged *regulation* authorizes suppression of speech in advance of its expression[.]") (emphasis added); *cf. Healy v. James*, 408 U.S. 169, 172 (1972) (denial of student group recognition pursuant to licensing scheme).

Id. at 975. "Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden." *Id.* However, when the retaliatory action is so *de minimis* that it does not deter the exercise of First Amendment rights, it does not constitute an adverse employment action, and a plaintiff has no First Amendment retaliation claim under *Pickering*. *See id*.

Here, Plaintiff avers that Defendants subjected him to adverse employment action in two ways. *See Hodge Opp.* 14:10-15:13; *see also Hodge Reply* 9:1-17. Plaintiff first contends that he received a "needs improvement" rating in the area of "sensitivity to diversity" on his Tenured Faculty Evaluation Report as a result of the April 2010 Lecture. *See PSSUF* # 18; *see also Joint Stipulated Facts*, Ex. 3 at 4-5. The Ninth Circuit has suggested that an undeserved performance rating, when accompanied by a transfer of job duties, qualifies as an "adverse employment action." *See Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). But Plaintiff neither argues, nor do the facts of this case show, that Plaintiff was transferred to a different department as a result of the performance rating. *See generally Hodge Mot.*; *see also Hodge Reply* 9:1-17.

To the extent Plaintiff contends that he is personally offended by the rating, separate and apart from its professional ramifications, this too does not suffice as an adverse employment rating for purposes of a First Amendment retaliation claim. As the Ninth Circuit explained in *Nunez*, "harsh words," without more, do not constitute adverse employment action. *See Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998); *cf. Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1045 (9th Cir. 1994) ("[D]amage to reputation is not actionable under § 1983 unless it is accompanied by 'some more tangible interests.'") (quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

And finally, it remains unclear whether the "needs improvement" rating was "designed to retaliate against and chill" Plaintiff's speech. *See Ellins v. City of Sierra Madre*, No. 11-55213, 2013 U.S. App. LEXIS 19645, at *25-26 (9th Cir. Mar. 22, 2013) (stating that, on summary judgment, the court must determine whether a jury could reasonably find that defendant's action was "designed to retaliate against and chill" the plaintiff's speech). The performance rating states only that Plaintiff exhibited "weakness" in his "sensitivity to diversity" and that "with increased attention to the area, it is expected [that Plaintiff] will meet the criteria." *See Joint Stipulated Facts*, Ex. 5 at 4-5. There is no indication that such a rating was sufficiently final to serve as a basis for altering the nature of Plaintiff's employment or imposing any type of formal penalty upon Plaintiff. Thus, for all of these reasons, the Court cannot conclude that Plaintiff's "needs improvement" rating, by itself, qualifies as an adverse employment action.

Plaintiff's second argument, however, fares a bit better. Plaintiff asserts that Defendants subjected him to an adverse employment action by requiring him to write a 10-page paper addressing cultural diversity, and to compose a lesson plan incorporating that subject matter. *See PSSUF* # 23, 27; *see also Stipulated Facts*, Ex. 3. He also mentions that Defendants prevented him from presenting the Lesson Plan once he had submitted it to Defendants pursuant to their request. *See id.* # 50. Plaintiff's argument presents an interesting, but ultimately difficult question for the Court to answer.

On the one hand, the Court is aware of the Ninth Circuit's rather liberal interpretation of the term "adverse employment action." According to the Ninth Circuit, an adverse employment action is one that is "reasonably likely to deter" an employee from engaging in constitutionally protected speech. *See Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 n.1 (9th Cir 2010); *accord Coszalter*, 320 F.3d at 976. On the other hand, neither party cites any authority to support or negate the proposition that the assignment of additional work, or the inability to present such work, qualifies as an adverse employment action for purposes of Plaintiff's claim. *Cf. Dahlia v. Rodriguez*, 735 F.3d 1060, 1078-79 (9th Cir. 2013) (compiling examples of adverse employment actions).

But more importantly, the Court sees how the facts of this case bend both ways. While a fact finder could find that a slightly increased workload is "reasonably likely to deter" Plaintiff from engaging in constitutionally protected speech, a fact finder just as well might not. In other words, the additional burdens imposed on Plaintiff are not strong enough for the Court to conclude that Plaintiff was subject to adverse employment action as a result of his speech; however, these facts are enough to establish the *possibility* that he was subjected to adverse employment action as a result of his speech, especially when these burdens are viewed collectively, rather than separately. *See Coszalter*, 320 F.3d at 976-77 (stating that multiple diverse employment actions, if related to the same claim, can be considered together to determine if the employer's actions are reasonably likely to chill protected speech). For these reasons, the Court cannot conclude, on summary judgment, that Defendants' actions did, or did not, constitute an adverse employment action. Only a fact finder can answer that question. The Court thus DENIES both parties' motions for summary judgment as to the First Amendment retaliation claim.

Although the Court denies both parties' motions, the Court further notes that, even if Plaintiff prevails on his claim for First Amendment retaliation, Defendants are still entitled to qualified immunity, and thus Plaintiff cannot seek monetary damages with respect to this claim. *See Demers*, 2014 U.S. App. LEXIS 1811, at *35-36 ("[B]ecause there is no Ninth Circuit law on point to inform defendants about whether or how *Garcetti* might apply to a professor's

academic speech, we cannot say that the contours of the right in this circuit were sufficiently clear that every reasonable official would have understood that this conduct violated that right.") (internal citations and quotations omitted). Neither party disputes this conclusion. *See Hodge Reply* 11:14-16.

At best, then, Plaintiff is left only with his claims for declaratory and injunctive relief. *See FAC* ¶ 66. Because the Court considers these claims equitable in nature, the remaining issues as to Plaintiff's First Amendment claim thus rest exclusively with the Court rather than a jury. *See Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970); *see also Leary v. Daeschner*, 349 F.3d 888, 911 (6th Cir 2003) (reaching same decision on similar facts); 5 Wright & Miller, Federal Practice and Procedure § 1260, at 380-81 (2d ed. 1990) ("If [plaintiff] asserts an equitable claim and requests relief in the form of specific performance or an injunction, the action will be considered equitable in nature and neither party has a right to a jury trial."). However, the Court abstains, at the current moment, to switch roles to a fact finder in order to ensure that the parties have exhausted the factual record as to whether Defendants subjected Plaintiff to an adverse employment action, and, if so, whether Defendants would have taken the adverse employment action even absent the protected speech. The Court finds deferment of its decision especially necessary considering the rather minimal attention both parties paid to such questions in their cross-motions for summary judgment.[11] *See generally* Dkt. # 55, 61.

B. First Amendment Academic Freedom under § 1983

Plaintiff's second cause of action for violation of his First Amendment right to academic freedom under § 1983 is unclear at best. *See FAC* ¶¶ 67-71. The claim is virtually identical to Plaintiff's retaliation claim, except that it emphasizes Defendants' alleged discrimination "on the basis of viewpoint and content." *See id.* ¶ 68.

[11] For instance, the current factual record does not indicate whether Defendants' decision to assign the 10-page paper to Plaintiff was "designed to retaliate against and chill" Plaintiff's speech. *See Ellins*, 2013 U.S. App. LEXIS 19645, at *25-26. The record indicates only that Defendant Lowry testified that she consulted with Defendant Turner, who offered the idea of assigning Plaintiff a paper to write. *See PSSUF* # 25. Further, the current factual record also does not indicate whether Plaintiff would have been subjected to any disciplinary measures had he not submitted the paper and lesson plan pursuant to the TFER's "recommendation." And finally, the current factual record does not indicate whether Plaintiff was compelled to resubmit a revised Lesson Plan, given the unsatisfactory nature of his original submission. All of these facts, and more, would influence the Court's decision as to whether Plaintiff was subjected to an adverse employment action by Defendants.

The Court is not aware of any authority allowing Plaintiff to raise an "academic freedom" claim separate and apart from his retaliation claim, and Plaintiff cites no additional authority to enlighten the Court. *See generally Hodge Mot.*; *see also Hodge Opp.* 17:13-18. In fact, while the Ninth Circuit has not addressed the question head-on, all other authority suggests that a plaintiff cannot bring a stand-alone claim for "academic freedom" under § 1983. *See Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 172 n.14 (3d Cir. 2008) ("[I]t is the educational institution that has a right to academic freedom, not the individual teacher."); *accord Johnson-Kurek v. Abu-Absi*, 423 F.3d 590, 593 (6th Cir. 2005), cert. denied, 546 U.S. 1175 (2006); *Wozniak v. Conry*, 236 F.3d 888, 891 (7th Cir. 2001); *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000); *see also Heublein v. Wefald*, 784 F. Supp. 2d 1186, 1199 (D. Kan. 2011) (rejecting claim of "academic freedom" claim because there is no such claim under § 1983); *Salami v. Monroe*, No. 1:07-CV-621, 2008 U.S. Dist. LEXIS 59058, at *17-18 (M.D.N.C. Aug. 1, 2008) (same); *Stronach v. Va. State Univ.*, No. 3:07-CV-646-HEH, 2008 U.S. Dist. LEXIS 2914, at *11-12 (E.D. Va. Jan. 15, 2008) (same). Because the Court finds these cases persuasive, it GRANTS Defendants' motion for summary judgment as to the "academic freedom" claim.

C. Fourteenth Amendment Due Process Claim under § 1983

Plaintiff's fourth and final cause of action raises a claim under § 1983 for violation of his Fourteenth Amendment right to due process of law. *See FAC* ¶¶ 77-81. Although Plaintiff's FAC fails to state whether he is asserting a substantive or procedural due process claim, Plaintiff's motion for summary judgment, and Plaintiff's opposition to Defendants' motion for summary judgment, suggest that Plaintiff is raising a void for vagueness challenge. *See Hodge Mot.* 20:21-25:15; *see also Hodge Opp.* 18:14-23:11. Plaintiff specifically argues that the suggestions and directions offered to him as part of the evaluation process were impermissibly vague; that Plaintiff had never been advised that he was required to use a "neutral" tone or gestures, or "respectful language," when describing cultural beliefs in the classroom; and that he still has no clear guidance as to what those terms mean. *See id.* For two independent reasons, Defendants are entitled to summary judgment on this claim. The first is procedural; the second is on the merits.

With respect to the procedural issue, the Court notes that summary judgment is not a second chance to flesh out inadequate pleadings. *See Trishan Air, Inc. v. Fed. Ins. Co.*, 635 F.3d 422, 435 (9th Cir. 2011); *see also Pickern v. Pier 1 Imports (U.S.) Inc.*, 457 F.3d 963, 968-69 (9th Cir. 2006). Plaintiff must have already pleaded all necessary factual averments to support his void for vagueness challenge before raising such an argument at this late stage of the case. *See Wasco Prods. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("The necessary

factual averments are required with respect to each material element of the underlying legal theory.").

Plaintiff's motion for summary judgment, and opposition to Defendants' motion for summary judgment, do not meet this standard. While both briefs contend that Defendants violated Plaintiff's due process rights under a void for vagueness theory, Plaintiff's FAC alleges nothing of the kind. Instead, Plaintiff's FAC grounds his claim on the general assertion that Defendants "knew or should have known that they explicitly and implicitly discriminated against Plaintiff on the basis of viewpoint and deprived him of his clearly established right to due process[.]" *FAC* ¶ 79. Furthermore, the FAC's list of allegations explicitly discussing "Defendants' unconstitutional treatment of Plaintiff" vindicates the Court's conclusion, as it fails to include any fact germane to Plaintiff's current vagueness challenge. *See id.* ¶¶ 43-56. Plaintiff may not, then, at this late date, ambush Defendants with such a newfangled factual and legal challenge. *See, e.g.*, *Wasco Prods.*, 435 F.3d at 992. Purely because of this procedural defect, the Court has enough reason to grant Defendants' motion as to Plaintiff's due process claim. *See id.*

But the flaw in Plaintiff's argument runs deeper. Even if the Court allowed Plaintiff to raise this procedurally defective claim, it would still fail on the merits. In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Supreme Court carefully articulated the void for vagueness doctrine, representing a synthesis of past teachings:

> It is a basic principle of due process that an *enactment* is void for vagueness if its prohibitions are not clearly defined. Vague *laws* offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague *laws* may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, *laws* must provide explicit standards for those who apply them. A vague *law* impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague *statute* abut[s] upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-09 (internal quotations and citation omitted) (emphasis added).

These words leave little doubt that the void for vagueness doctrine applies to "vague laws," "vague statutes," and other ambiguous "enactments." *See id.* The Ninth Circuit has repeatedly emphasized as much, stating that "under the 'void-for-vagueness' doctrine, due process requires *enactments* to be written with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Castro v. Terhune*, 712 F.3d 1304, 1307 (9th Cir. 2013) (internal citations and quotations omitted); *accord Alphonsus v. Holder*, 705 F.3d 1031, 1042 (9th Cir. 2013) ("To succeed on a facial vagueness challenge under the Fifth Amendment's Due Process Clause, the challenger must prove that the *enactment* is vague[.]") (emphasis added); *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 941-42 (9th Cir. 1997). Other federal circuit courts agree. *See, e.g., Pro-Choice Network v. Schenck*, 34 F.3d 130, 37-38 (2d Cir. 1994) (noting that "void-for-vagueness challenges target municipal *ordinances*, criminal *statutes* and other generally applicable *laws*") (emphasis added). And so too do federal district courts in the Ninth Circuit. *See, e.g., Calop Bus. Sys. v. City of L.A.*, No. CV 12-07542 MMM (RZx), 2013 U.S. Dist. LEXIS 169483, at *17 (C.D. Cal. Oct. 30, 2013) ("It is a basic principle of due process that an *enactment* is void for vagueness if its prohibitions are not clearly defined.") (emphasis added) (internal citations omitted).

Notwithstanding this avalanche of controlling and persuasive authority, however, Plaintiff's void for vagueness challenge does not attack any law, statute, ordinance, regulation, or other formal enactment.[12] Instead, Plaintiff attacks the mere comments and suggestions made in Defendant Cowell's Observation Report and the Tenured Faculty Evaluation Report ("TFER"). *See Hodge Mot.* 22:14-20; *see also Hodge Opp.* 20:8-22. Plaintiff specifically takes issue with Defendant Cowell's comment that his "tone, gestures, and use of language [during the April 2010 Lecture] were inappropriate and disrespectful to the cultural beliefs of patients." *Id.* Plaintiff also objects to the notation made in the TFER that Plaintiff's appeared "flippant," and that Plaintiff would do well to use a "neutral tone" and "respectful language" when speaking in class. *Id.*

[12] The California Civil Code defines the term "enactment" as "a constitutional provision, statute, charter provision, ordinance, or regulation." Cal. Gov't Code § 810.6 (1995). Merriam Webster's Dictionary defines the term "enact" even more narrowly: "to make (a bill or other legislation) officially become part of the law." *See* Merriam-Webster Online Dictionary, 2014, http://www.merriam-webster.com (February 1, 2014).

Such comments and suggestions, even if they required Plaintiff to write a 10-page paper on cultural diversity, cannot ground Plaintiff's due process claim. Plaintiff has cited no authority indicating that suggestions and comments made in a performance evaluation – as opposed to legislative enactments such as statutes, rules, regulations, and ordinances, *et cetera* – are subject to a void for vagueness challenge under the due process clause. *See Hodge Mot.* 20:22-25:15; *see also Hodge Opp.* 18:1-25:14. The only cases Plaintiff does cite are either inapposite or unpersuasive. *See Cohen v. San Bernardino Valley College*, 92 F.3d 968, 972 (9th Cir. 1996); *see also Soglin v. Kauffman*, 295 F. Supp. 978 (W.D. Wisc. 1968).

In *Cohen*, for instance, the Ninth Circuit concluded that a public university's sexual harassment *policy* was simply too vague as applied to the plaintiff-professor because his "speech did not fall within the core region of sexual harassment as defined by the Policy." *See Cohen*, 92 F.3d at 972. Unlike in *Cohen*, Plaintiff here attacks no policy, rule, regulation, or other enactment for vagueness; rather, Plaintiff attacks comments and suggestions made in his observation report and performance evaluation, for which Plaintiff readily admits that no formal policy exists. *See Hodge Mot.* 22:27-23:1 ("[N]o such rule or policy existed[.]").

As such, Plaintiff's failure to challenge any formal enactment dooms his due process claim. *See Lopez v. Ayers*, No. C 08-05341 JW (PR), 2010 U.S. Dist. LEXIS 47825, at *21 (N.D. Cal. Apr. 13, 2010) (noting that mere interpretations and descriptions of board policies, rather than the text of the policies themselves, are not amenable to void for vagueness challenges); *cf. Grayned*, 408 U.S. at 108-09 (describing rationale for invalidating vague laws and collecting cases in which laws have been challenged under the void for vagueness doctrine). Indeed, if every ambiguous assertion or suggestion offered in an employee performance evaluation could support liability for a due process claim, then every performance evaluation in which guidance is offered would represent a risk for litigation. The Court is unwilling to fashion such a rule, as doing so would effectively end the practice of employee performance evaluations for evermore.

Further still, even if Defendants' comments and suggestions could serve as a basis for Plaintiff's due process challenge, unhinged from any statutory foundation, these suggestions are not vague enough to violate Plaintiff's due process rights under the Fourteenth Amendment. Plaintiff cites to *Soglin* – a half-century old case from the United States District Court for the Western District of Wisconsin – to support his claim. *See Hodge Opp.* 19:17-26 (citing *Soglin*, 295 F. Supp. 978 (W.D. Wisc. 1968)). In that case, a public university claimed the authority to discipline college students for, among other things, "misconduct." *See id.* at 990-91. The students argued that "misconduct" as a standard of disciplinary action was fatally vague and overbroad, and thus violated their rights under the First and Fourteenth Amendments. *See id.*

The court agreed with the students, finding that the university's reliance on a "misconduct" standard violated the First and Fourteenth Amendments by reason of the term's vagueness and overbreadth. *See id.* at 996. And on appeal, the Seventh Circuit affirmed, emphasizing that the university's "misconduct" standard "contain[ed] no clues which could assist a student, an administrator[,] or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment by the [u]niversity as 'misconduct.'" *Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969).

The instant case is distinguishable. Whereas the term "misconduct" is devoid of all clues for a student or court to determine whether a person is susceptible to punishment, Defendants' suggestions and comments are considerably more specific. Defendants' comments and suggestions urge Plaintiff to improve his "sensitivity to diversity," and use a "neutral tone" and "respectful language" while speaking in the classroom. *See PSSUF* # 16. These terms are not so fatally overbroad or vague that a person of "common intelligence must necessarily guess at [their] meaning." *See Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *cf. Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 572-73 (1998) (noting that criterion requiring "respect for diverse beliefs" was not void for vagueness). In fact, because these terms are such a regular part of common discourse, within and beyond academia, Plaintiff need not speculate as to their meaning, even if the suggestions could be clearer. *See Baker v. Downey City Board of Educ.*, 307 F. Supp. 517, 523 (C.D. Cal. 1969) ("[T]he requirement for reasonable certainty in the school laws and regulations does not preclude the use of ordinary terms which find adequate interpretation in common usage and understanding."); *see also Roth v. United States*, 354 U.S. 476, 491 (1957) ("[The] Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding[.]") (internal citations and quotations omitted).

The Court's conclusion is all the more true given the specific facts of this case, as Plaintiff's due process challenge must be "made with respect to the actual conduct of the actor who attacks the statute and not with respect to hypothetical situations at the periphery of the statute's scope or with respect to the conduct of other parties who might not be forewarned by the broad language." *See DiLeo v. Greenfield*, 541 F.2d 949, 953 (2d Cir. 1976) (citing *United States v. Powell*, 423 U.S. 87, 93 (1975); *United States v. Mazurie*, 419 U.S. 544, 500 (1975); and *Parker v. Levy*, 417 U.S. 733, 756 (1974)). Plaintiff is not only an college instructor, but he has attended several training sessions addressing issues of cultural diversity, including one seminar that covered such issues just nine days before Plaintiff delivered the April 2010 Lecture. *See DSSUF* # 62. In view of these additional and noteworthy facts, the Court has no hesitation in finding that Plaintiff knows and understands how to improve his sensitivity to diversity, along with his tone and language, while speaking in the classroom.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 12-780 PSG (Ex)	Date	February 14, 2014
Title	Hodge v. Antelope Valley Community College District, *et al.*		

Accordingly, even if Plaintiff could challenge the comments and suggestions made by Defendants in the Observation Report and the TFER, the Court must still find that Plaintiff's due process claim fails as a matter of law. Not only are Defendants' comments and suggestions unhinged from any statutory source, but these statements are not void for vagueness under the Fourteenth Amendment. For these reasons, the Court GRANTS Defendants' motion for summary judgment as to Plaintiff's due process claim.

V. Conclusion

Thus, based on the foregoing, the Court:

- DENIES the cross-motions for summary judgment as to the First Amendment retaliation claim under § 1983, and GRANTS Defendants qualified immunity for monetary damages as to this claim;
- GRANTS Defendants' motion for summary judgment as to the First Amendment academic freedom claim under § 1983;
- GRANTS Defendants' motion for summary judgment as to the Fourteenth Amendment due process claim under § 1983.

IT IS SO ORDERED.