IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

AMY FROGGE, JILL SPEERING, and FRAN BUSH, individually, and in their official capacities as members of the Metropolitan Nashville Board of Public Education,	)	
Plaintiffs,	)	
v.	)	Case No.: 20-0420-III
SHAWN JOSEPH,	)	
and	)	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, acting by and through THE METROPOLITAN NASHVILLE BOARD OF PUBLIC EDUCATION,	)	
*Defendant*s.	)	

DEFENDANT DR. SHAWN JOSEPH'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

COMES Defendant Dr. Shawn Joseph ("Dr. Joseph") and offers this Response in Opposition to Plaintiffs Motion for Summary Judgment. In support of his position, Dr. Joseph asserts that Amy Frogge, Jill Speering, and Fran Bush, individually, and in their official capacities as members of the Metropolitan Nashville Board of Public Education (hereinafter "Plaintiffs") insist on the application of strict scrutiny to official speech not yet uttered concerning the employment of Dr. Joseph as Director of Schools and the severance agreement approved by the Board. Plaintiffs assert an improper standard under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006) and its progeny. Applying the correct standard, Plaintiffs' Motion for Summary Judgment should be denied for failure to comply with Tennessee's

standard of review of Motions for Summary Judgment because as the movants that bear the burden of proof at trial on the challenged claim, they failed to produce evidence that would entitle them to a directed verdict at trial.

STATEMENT OF FACTS

This lawsuit is brought by Plaintiffs Amy Frogge, Jill Speering, and Fran Bush. Complaint, ¶¶ 2-4. All three Plaintiffs are elected members of the Metropolitan Nashville Board of Public Education. *Id.*

The Complaint alleges that, in April 2019, over one year ago, the School Board voted to approve a severance agreement with Dr. Joseph, the former Director of Schools. (Attached to Dr. Joseph's Motion as *Exhibit A*). The severance agreement contained mutual non-disparagement provisions (the "Non-disparagement Provisions"). Complaint., ¶¶ 14-15. The Complaint further alleges that each of the three plaintiffs voted against approving the severance agreement. *Id*, ¶ 14. However, this agreement was adopted by a majority of the membership of the Board in compliance with T.C.A. § 49-2-202 and became an official action of the Board.

The Board's Non-disparagement Provisions state as follows:

f. (1) For purposes of this subsection (f), these terms have the following meanings:

> "Disparaging" means a false and injurious statement that discredits or detracts from the reputation of another person.
>
> "Defamatory" means a statement or communication tending to harm a person's reputation by subjecting the person to public contempt, disgrace, or ridicule, or by adversely affecting the person's business.
>
> (2) The Board will not make any disparaging or defamatory comments regarding Dr. Joseph and his performance as Director of Schools. This provision shall be effective for the Board collectively and binding upon each Board member individually. Dr. Joseph does not waive any right to institute litigation and seek damages against any Board member in his/her individual capacity who violates the terms and conditions this Article of the agreement.

Exhibit A, § 1.f.

Plaintiffs bring a declaratory judgment action challenging the enforcement of the Non-disparagement Provisions on the grounds that it violates their First Amendment rights and Tenn. Code Ann. § 8-50-602(a) (the Public Employee Political Freedom Act, or "PEPFA"). *Id.*, p. 9.

STANDARD OF REVIEW

A party moving for summary judgment must demonstrate that no genuine issue of material fact exists. Tenn. R. Civ. P. 56.03. The Supreme Court of Tennessee opined upon the standards necessary to support a motion for summary judgment in *Rye v. Women's Care Ctr. Of Memphis, MPLLC*, 477 S.W.3d 235 (2015). The court held that the summary judgment standard articulated in *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1 (2008), was unworkable and inconsistent with Rule 56 of the Tennessee Rules of Civil Procedure. See *Rye*, 477 S.W.3d at 264. The court overruled *Hannan* and took the opportunity to "fully embrace the standards articulated in the *Celotex* trilogy." Id. In Tennessee,

> if the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if

> uncontroverted at trial, would entitle it to a directed verdict. The burden then shifts to the nonmoving party to produce evidence showing that there is a genuine issue of fact for trial. On the other hand, when the nonmoving party has the burden of proof at trial, the burden shifting is the same as that set forth by [The Supreme Court of Tennessee] in *Rye* – the moving party may either negate an essential element of the nonmoving party's claim or show that the nonmoving party does not have sufficient evidence to prove an essential element of its claim.

TWB Architects, Inc. v. Braxton, LLC, 578 S.W.3d 879 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) (Brennan, J., dissenting)).

ARGUMENT

I. PLAINTIFFS CLAIM UNDER TENN. CODE ANN § 8-50-602, THE PUBLIC EMPLOYEE POLITICAL FREEDOM ACT, FAILS AS A MATTER OF LAW.

The Public Employee Political Freedom Act of 1980 explicitly states that no "public employee shall be prohibited from communicating with an elected public official for any job-related purpose whatsoever." Tenn. Code Ann. § 8-50-602. An action under this act "is governed by the one-year statute of limitations contained in Tennessee Code Annotated section 28-3-104(a)." There isn't a single case in Tennessee, state nor federal, applying PEPFA to an elected official.

Plaintiffs here are elected members of the Metropolitan Nashville Board of Public Education, and not employees of the Metropolitan Nashville Board of Public Education. Complaint, ¶¶ 2-4. Even if the court did find PEPFA could apply, the Complaint was filed on May 4th, 2020, more than one year after their cause of action accrued. Complaint ¶¶ 14-15.

II. UNDER *GARCETTI V. CEBALLOS* AND ITS PROGENY, STRICT SCRUTINY IS INAPPLICABLE TO PLAINTIFFS' FIRST AMENDMENT CLAIMS.

Plaintiffs, elected public officials, insist on the application of strict scrutiny to their constitutional claims. *See generally* Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment. But an entirely separate analysis applies regarding the existence of a First

Amendment cause of action and their claims. See generally *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951 (2006); *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968). If public employees make "statements pursuant to their official duties, the [employee] not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Lunsford v. Montgomery County*, 2007 Tenn. App. LEXIS 194, *12 (Tenn. Ct. App., Apr. 4, 2007) (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951 (2006)). Alternatively, "public employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection…" *Id*. If the statements do address a matter of public concern, then "the court must balance the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the governmental entity, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id* at *15-16 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)).

While *Garcetti* arose within the context of an employment dispute, "the Supreme Court itself…broached *Garcetti* outside the context of retaliatory discharge." *Amalgamated Transit Union v. Chattanooga Area Reg'l Transp. Auth.*, 431 F. Supp. 3d 961, 982 (E.D. Tenn. January 6, 2020) (citing *Harris v. Quinn*, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014)); see also *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011) (The reasoning in *Garcetti* applies to a claim other than the First Amendment); *Tenn. Secondary Sch. Athletic Assn v. Brentwood Acad*., 551 U.S. 291, 127 S. Ct. 2489, 2495-96, 168 L. Ed. 2d 166 (2007) ("Just as government's interest in running an effective workplace can in some circumstances outweigh employee speech rights…so to can an athletic league's interest in enforcing its rules sometimes warrant curtailing the speech of its voluntary participants.")

Multiple courts within the Sixth Circuit, including the Sixth Circuit Court of Appeals itself, have applied that same analysis to First Amendment claims by elected officials. Compare *Aquilina v. Wriggelsworth*, 759 Fed. Appx. 340, 344 (6th Cir. 2018) (6th Circuit Court of Appeals applied the *Garcetti* analysis to a First Amendment retaliation claim by an elected member of the judiciary in Michigan.); *Shields v. Charter Twp. of Comstock*, 617 F.Supp.2d 606, 615 (W.D. Mich. 2009) (The court applied *Garcetti* where a plaintiff elected official claimed a violation of his First Amendment rights because the public board he upon which he served as an elected member voted on a motion to amend the agenda to allow the plaintiff more time to speak that failed and another, separate motion to adjourn the meeting before he finished speaking that passed.); *Hartman v. Register*, No. 1:06-cv-33, 2007 U.S. Dist. LEXIS 21175, 2007 WL 915193, at *18 (S.D. Ohio Mar. 26, 2007) (applying the analysis in *Garcetti* and denying that the plaintiff's expressions were protected by the First Amendment when the plaintiff, an elected official on a public board, engaged in expressions opposing the approval of the public board's minutes.); with *Perkins v. Clayton Twp*., No. 2:08-CV-14033, 2009 U.S. Dist. LEXIS 98674, 2009 WL 3498815 (E.D. Mich. Oct. 23, 2009) ("Garcetti does not apply here because the speech at issue…was not within the scope of her employment" as an elected official.).

Further, the United States Court of Appeals for the Sixth Circuit held earlier this year that an amendment to a state's constitution that limited future official speech *and* circumscribed some private speech by commissioners selected by the Secretary of State was constitutional under *Garcetti*. *Daunt v. Benson*, 956 F.3d 396, 2020 WL 1875175 (6th Cir. Apr. 15, 2020).

Here, Plaintiffs are elected members of the Metropolitan Nashville Board of Public Education. Complaint, ¶¶ 2-4. Their claim revolves around a motion that passed at the April 9th,

2019 Board Meeting of the Metropolitan Nashville Board of Public Education, though each of the Plaintiffs voted against the Motion. Complaint, ¶ 14. Moreover, Plaintiffs can point to no speech that has been challenged or for which legal sanctions have been sought pursuant to the terms of the severance agreement. Plaintiffs' claims, therefore, should be judged squarely within the analysis outlined by the United States Supreme Court in *Garcetti* and its progeny and followed by the Sixth Circuit. In so holding, the non-disparagement provisions are not subject to strict scrutiny and are not, on their face, unconstitutional as asserted by the Plaintiffs.

III. PLAINTIFFS FAIL TO MEET THEIR BURDEN OF PROOF UNDER THE STANDARD OF REVIEW FOR A MOTION FOR SUMMARY JUDGMENT.

Under *Garcetti*, the Plaintiffs bear the burden of proof and must show "(1) that [their] speech [will be] made as a private citizen, rather than pursuant to her official duties; (2) that [their] speech involve[s] a matter of public concern; and (3) that [their] interests as a citizen in speaking on the matter outweigh[s] the state's interest, as an employer, in 'promoting the efficiency of the public services it performs through its employees.'" *Handy-Clay v. City of Memphis*, 695 F.3d 531, 539 (6th Cir. 2012) (citing *Garcetti* at 417).

Plaintiffs do not even attempt to analyze their claims under *Garcetti*, and, therefore, their motion for summary judgment is inherently deficient. *See generally* Plaintiffs' Memorandum in Support of Their Motion for Summary Judgment. In fact, the Plaintiffs have only articulated concerns related to speech that it is possible that they might make within their official capacity. Complaint ¶¶ 22-23, 29-31. To the extent that it could be construed that any private speech by Plaintiffs is circumscribed by the Non-disparagement Provisions, it is well within the bounds of *Daunt v. Benson*, 956 F.3d 396, 2020 WL 1875175 (6th Cir. Apr. 15, 2020).

CONCLUSION

Plaintiffs have failed to meet their burden of proof under the summary judgment standard in Tennessee and, therefore, Defendant Dr. Shawn Joseph respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of July, 2020, a copy of the foregoing Defendant Dr. Shawn Joseph's Response to Plaintiffs' Motion for Summary Judgment has been delivered via email to the following parties:

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