IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

NORMAN WANG, Plaintiff, v. UNIVERSITY OF PITTSBURGH, UNIVERSITY OF PITTSBURGH MEDICAL CENTER, UNIVERSITY OF PITTSBURGH PHYSICIANS, SAMIR SABA, MARK GLADWIN, and KATHRYN BERLACHER, Defendants.	Civil Action No. 2:20-cv-01952 Judge Marilyn J. Horan

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

In this case, disputed issues of material fact exist and preclude summary judgment as to whether the individual defendants, Drs. Mark Gladwin, Samir Saba, and Kathryn Berlacher, violated Dr. Norman Wang's rights under 42 U.S.C. § 1983 and the First Amendment. Although the relationship between the University of Pittsburgh (the "University"), UPMC, and University of Pittsburgh Physicians ("UPP") is extraordinarily complex, it is plain that Dr. Wang can establish that some or all of the actions taken by each of the individual defendants occurred when they were acting as (or with) state actors. Like Dr. Wang, the individual defendants are dual employees. Dr. Gladwin, the Chair of the University's Department of Medicine, was directly involved in the actions that were taken against Dr. Wang. By his own admission, Dr. Gladwin acted as a University employee and, accordingly, under color of state law. Drs. Saba and Berlacher, likewise, acted at least in part on behalf of the University, and, accordingly, they too carried state authority. Once state action is established, the balancing of interests clearly favors Dr. Wang and requires this Court to rule against defendants' effort to resolve this case at summary judgment. Disputed issues of material fact likewise preclude summary judgment as to whether the University, UPMC, and UPP violated the anti-retaliation provisions of Title VII, the Pennsylvania Human Relations Act, and 42 U.S.C. § 1981. There is direct evidence that all three of these defendants retaliated against Dr. Wang because he opposed race discrimination in the graduate medical education programs at the University and UPMC, and the actions they took against Dr. Wang were plainly "materially adverse" in the sense that they "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

STATEMENT OF MATERIAL FACTS

A. The Parties, And How They Are Related To Each Other

1. Defendants The University, UPMC, And UPP

According to its Articles of Incorporation, UPMC exists for the purpose "of operating for the benefit of, to perform the functions of and to carry out the purposes of the University of Pittsburgh of the Commonwealth System of Higher Education." Plaintiff's Responsive Concise Statement of Material Facts, Additional Material Facts ("SOF") ¶ 1. In 1998, the University and UPMC reorganized their relationship pursuant to a set of four relationship agreements – a Reorganization Agreement, an Academic Affiliation Agreement ("Affiliation Agreement"), a Trademark License Agreement, and a Support Services Agreement.[1] These agreements are still in effect. SOF ¶ 2. Pursuant to the Reorganization Agreement, the University appoints one-third of the directors of UPMC, and one of these directors is always the University's Senior Vice Chancellor for the Health Sciences. SOF ¶ 3. Pursuant to the Reorganization Agreement, the clinical practice plans of the School of Medicine faculty physicians were consolidated and transferred to UPP, a wholly-owned subsidiary of UPMC. SOF ¶ 4. The University and UPMC jointly function as an "academic health center" or "academic medical center." Their relationship is that of a partnership. UPMC oversees clinical activity. The University oversees all academic priorities, particularly faculty-based research. SOF ¶ 5.

[1] Earlier in this action, defendants objected to any discovery into the Relationship Agreements on the ground that those agreements were highly confidential, and insisted that even redacted copies be filed under seal. ECF No. 154 (motion to file under seal); ECF 158-3, p. 8 (arguing that the confidential nature of the agreements should bar discovery). It seems that defendants have now abandoned this position, since the University filed the redacted version of the Affiliation Agreement as part of the public record. The same is true of other documents that had previously been designated as Confidential. *See, e.g.*, ECF No. 192-11 (Affiliation Agreement); ECF No. 192-14 (Common Paymaster Agreement (CP2)); *see also* ECF No. 120 (protective order); ECF No. 157 (sealing order).

The Affiliation Agreement defines the operational relationship between and among the University, UPMC, and UPP. SOF ¶ 6. The only express references to graduate medical education found in the Affiliation Agreement are in Section 6.6 ("House Support Staff"). It is here stated that UPMC shall pay the costs of residents, interns, and fellows. SOF ¶ 7. Section 3.4 of the Affiliation Agreement ("Reserved Powers as to Academic Governance") states: "The University reserves to itself authority and responsibility for all matters not specifically transferred to UPMC Health System hereunder, including all traditional matters of University governance such as academic appointments, promotions, tenure, student affairs, curriculum, publications, research, and research integrity policies." SOF ¶ 8. Thus, authority over publications, research, and research integrity is exclusive with the University for dually employed faculty. This language recognizes that the University has a responsibility to defend the academic freedom rights of its faculty members in the context of publications and research. SOF ¶ 9.

The University and UPP participate in a common paymaster mechanism for dually employed faculty, and have entered into two Common Paymaster Agreements, CP1 and CP2. The University acts as common paymaster under CP1, and UPP acts as common paymaster under CP2. For this purpose, dually employed faculty are divided into the categories of Clinician, Academic, and Researcher. Dually employed faculty who spend 50% or more of their time in clinical activities are subject to CP2, but all dually employed faculty must spend at least 10% of their time on academic activities, defined to include teaching and research. SOF ¶ 10.

University employees, even those in the most senior positions, are sometimes uncertain about the exact relationship between the University and UPMC, and do not understand the

relationship. SOF ¶ 11. For example, the employment contracts that doctors in the Heart and Vascular Institute had with UPP specifically provide that the Chair of the University's Department of Medicine would have sole authority to determine the incentive plan (consistent with UPP guidelines) that would provide physicians additional compensation for their clinical work. But the Chair of the University's Department of Medicine during the times relevant here, Dr. Mark Gladwin, testified that he had nothing to do with these incentive plans for anyone in the Heart and Vascular Institute, including Dr. Wang. SOF ¶ 12.

2. Plaintiff Norman Wang

Dr. Norman Wang, an Associate Professor at the School of Medicine, has been dually employed by the University and by UPP since March of 2008. As is the standard practice for dually employed faculty, he has a contract in the form of a letter on University letterhead signed by the University and by UPP (the "Offer Letter"). He has a separate contract with UPP (the "Physician Employment Agreement"). The Physician Employment Agreement incorporates an Exhibit A which has periodically been replaced, most recently in 2019. The Physician Employment Agreement was amended in 2012. SOF ¶ 13. Dr. Wang receives W-2s from both the University and from UPP. He is subject to Common Paymaster Agreement CP2. SOF ¶ 14. According to the Offer Letter, the allocation of Dr. Wang's responsibilities is to be 75% Clinical, 20% Research, and 5% Teaching. Research is work done on behalf of the University. SOF ¶ 15. Dr. Wang is a cardiologist with a specialization in clinical cardiac electrophysiology. He sees patients and performs procedures at certain UPMC hospitals. Since 2008, Dr. Wang has published scores of peer-reviewed articles and abstracts in the field of cardiology. SOF ¶ 16. Until August 2020, Dr. Wang taught medical students, residents, and fellows, during inpatient consulting while on hospital rounds, in the electrophysiology lab, by giving lectures within the

group, and by mentoring research projects. SOF ¶ 17. In 2017, Dr. Wang was appointed as the director of the clinical cardiac electrophysiology fellowship program. There are four fellows in the program. Dr. Wang was promised an additional $25,000 per year in compensation for the directorship, and was to be credited with a 10% reduction in his clinical hour expectations in exchange for running the fellows program. SOF ¶ 18. Dr. Wang reports to one person, Dr. Samir Saba, in both Dr. Wang's University capacity and in Dr. Wang's UPMC capacity. SOF ¶ 19. When Dr. Wang meets with Dr. Saba, he meets him in the same office, regardless of whether they are talking about University business or UPMC business. There is no change in tone, venue, uniform, badges, timing, or anything else that lets Dr. Wang know which supervisory institution Dr. Saba represents at any particular moment. SOF ¶ 20. Until July 31, 2020, Dr. Wang had received positive performance reviews. He was a model employee. SOF ¶ 21.

3. Defendants Samir Saba, Mark Gladwin, And Kathryn Berlacher

Dr. Samir Saba is dually employed by the University and UPP. In his University capacity, he is a Professor of Medicine and the Chief of the Division of Cardiology. The Division of Cardiology is part of the University. In his UPMC capacity, he is a Co-Director of the Heart and Vascular Institute ("HVI"). HVI is a clinical service line combining cardiology, cardiothoracic surgery, and vascular surgery. SOF ¶ 22. In 2020, Dr. Saba reported to Dr. Mark Gladwin in Dr. Saba's University capacity, and to Dr. Steve Shapiro in Dr. Saba's UPMC capacity. SOF ¶ 23. In 2020, Dr. Mark Gladwin was dually employed by the University and UPP. In his University capacity, he was a Professor of Medicine and the Chair of the Department of Medicine. Although there is only one Department of Medicine, the Department is funded by both the University and by UPMC, and Dr. Gladwin had specific areas of

responsibility to the University, and specific areas of responsibility to UPMC. On the University side, Dr. Gladwin was responsible for academic matters, including research. On the UPMC side, Dr. Gladwin was responsible for clinical matters. SOF ¶ 24. HVI was carved out of the Department of Medicine, and was completely outside of Dr. Gladwin's authority. Dr. Gladwin had no authority over HVI (including over Drs. Saba and Berlacher, in their role with HVI or UPMC). SOF ¶ 25. In 2020 (after June 1), Dr. Gladwin reported to Dr. Anantha Shekhar in Dr. Gladwin's University capacity, and to Dr. Steve Shapiro in Dr. Gladwin's UPMC capacity. SOF ¶ 26. Dr. Kathryn Berlacher is dually employed by the University and UPP. In her University capacity, she is an Assistant Professor of Medicine in the Division of Cardiology. In her UPMC capacity, she has various titles including Program Director, Cardiology Fellowship Program, and Subspeciality Education Coordinator, Cardiology. All of these titles are listed on her University faculty profile without any mention of their linkage to UPMC. SOF ¶ 27. Dr. Berlacher has a general supervisorial responsibility over all cardiology fellowship programs, including those (like electrophysiology) that have their own program director. In addition, she is responsible for residents in her role as Subspeciality Education Coordinator. SOF ¶ 28. Dr. Berlacher reports to one person, Dr. Saba, both in her University capacity and in her UPMC capacity. SOF ¶ 29.

4. Dr. Anantha Shekhar

On June 1, 2020, Dr. Anantha Shekhar replaced Dr. Arthur Levine as the University's Senior Vice Chancellor for the Health Sciences and Dean of the School of Medicine. As Senior Vice Chancellor for the Health Sciences, Dr. Shekhar oversees the University's six health sciences schools. He is an officer of the University. He reports to the University's Chancellor and to the University's Board of Trustees. In 2020, the University's Chancellor was Patrick Gallagher. SOF ¶ 30. Dr. Shekhar is not employed by UPMC or UPP. He is, however, a

member of the UPMC board of directors, as well as the boards of directors of several UPMC subsidiaries, including UPP and UPMC Medical Education, the latter of which is a wholly-owned subsidiary of UPMC that employes residents and fellows. SOF ¶ 31. Dr. Shekhar's office is located in Scaife Hall, the home of the School of Medicine. Scaife Hall is physically connected to UPMC Presbyterian hospital. SOF ¶ 32. In 2020, Dr. Shekhar had regular weekly telephone calls with Chancellor Gallagher, typically lasting half an hour. Starting in the first week of August 2020, they discussed the events concerning Dr. Wang, and Chancellor Gallagher would convey this information to the University Board of Trustees. SOF ¶ 33.

B. The Graduate Medical Education Program

Graduate medical education ("GME") concerns the training of residents (including first-year residents, known as "interns") and fellows after their graduation from medical school. Residents and fellows are employees of the graduate medical education program, and work under the supervision of more senior physicians. A residency is more general; a fellowship is more specialized or more advanced. Medical students are not a part of graduate medical education. SOF ¶ 34. At UPMC, residents and fellows are employed by UPMC Medical Education, a wholly-owned subsidiary of UPMC, and are taught by faculty who are dually employed by the University and UPP. SOF ¶ 35. With the exception of a handful of special fellowships, all GME programs must be accredited by the Accreditation Council for Graduate Medical Education ("ACGME"). If a program is not accredited, the graduates cannot sit for a licensing examination. SOF ¶ 36. UPMC Medical Education is listed as the Sponsoring Institution with ACGME. Under ACGME requirements, the Sponsoring Institution must have a Designated Institutional Official ("DIO") and a Graduate Medical Education Committee ("GMEC"). Since 2019, Dr. Gregory Bump has been the DIO and Chair of the GMEC. A dual employee

(University/UPP), Dr. Bump is also the Associate Dean for Graduate Medical Education at the School of Medicine. In this capacity, Dr. Bump reports to the Dean (Dr. Shekhar) at monthly meetings. SOF ¶ 37. There are 155 separate GME programs at UPMC each run by a program director. The program directors, dually employed faculty, must be approved by GMEC and ACGME. SOF ¶ 38. The University maintains multiple pages on its website describing and promoting the GME programs. On these pages, the GME programs are often presented as belonging to or being run by the University. Each program director is responsible for maintaining the University's webpage pertaining to their program. SOF ¶ 39. The GME programs could not be certified without the University affiliation. SOF ¶ 40.

C. Dr. Wang Publishes His Article On Diversity In The Cardiology Workforce In The Journal Of The American Heart Association

In 2019, Dr. Wang was curious about new diversity and inclusion initiatives that were impacting the field of cardiology. SOF ¶ 41. The main initiatives that had caught his attention were the American College of Cardiology ("ACC") Diversity and Inclusion Initiative and the new diversity metric that ACGME had introduced in 2019 and had announced they were going to be using to evaluate GME programs. SOF ¶ 42.

ACC was very involved in graduate medical education. Dr. Berlacher was at this time the ACC Pennsylvania Chapter Governor, and had publicized her support for the ACC's Diversity and Inclusion Initiative in a written interview that was published by the ACC. Dr. Berlacher was prominent on the diversity initiative, both institutionally and nationally, and was the founder of a high school program called "I Look Like a Cardiologist" that was only open to people of certain races (and to women). SOF ¶ 43. The ACGME's new diversity metric was expressed in ACGME's 2019 Common Programs Requirements Section I.C.:

> The program, in partnership with its Sponsoring Institution, must engage in practices that focus on mission-driven, ongoing, systemic recruitment and retention of a diverse and inclusive workforce of residents, fellows (if present), faculty members, senior administrative staff members, and other relevant members of its academic community.
>
> Background and intent: It is expected that the Sponsoring Institution has, and programs implement, policies and procedures related to recruitment and retention of minorities underrepresented in medicine and medical leadership in accordance with the Sponsoring Institution's mission and aims. The program's annual evaluation must include an assessment of the program's efforts to recruit and retain a diverse workforce, as noted in V.C.1c).(5).(c).

SOF ¶ 44. Dr. Wang was concerned that, as had already proven to be the case with the Liaison Committee of Medical Education at the medical school level, the ACGME had the power to impose diversity metrics on graduate medical education programs, which would lead to those programs engaging in illegal discrimination. SOF ¶ 45.

Although no one ever directed him that he should be considering race or gender in selection decisions for cardiology fellows, Dr. Wang was aware of the following statement appearing in the cardiology fellowship 2019 Annual Program Evaluation:

> With regard to the national cardiology workforce, we feel strongly that the future leaders will be both men and women with a range of backgrounds and ethnicities. With this in mind, we focus on recruiting a variety of fellows to the program and try to engage a variety of faculty to be part of the core training. Diversity is central to our mission and we again commit to focusing our efforts and resources to work towards creating a more diverse workforce.

SOF ¶ 46. Other doctors in the cardiology division had expressed concerns to Dr. Wang that discrimination based on race and sex may have been taking place in the selection of fellows. SOF ¶ 47.

Starting in 2018, Dr. Wang starting seeing papers published in the leading journals of American cardiology by prominent people in the field arguing in favor of the conscious use of race and national origin in selection processes for cardiology programs. He decided to write a paper presenting a different perspective – that the programs being created and advocated for were discriminatory and potentially illegal. SOF ¶ 48. Starting around July of 2019, Dr. Wang wrote an academic article on diversity and the cardiology workforce, tracing the history of the use of race and ethnicity as factors in determining admission into medical schools, residency programs, and fellowships. The article asserted that the medical profession had not been successful in reaching its goals of increasing the percentages of underrepresented races and ethnicities in the medical profession generally, and cardiology in particular. It also cited evidence that programs to achieve those goals applied different standards to applications by members of underrepresented races and ethnicities and raised questions about the legality, effectiveness, and wisdom of doing so. The article looked at the ACC's Diversity and Inclusion Initiative and the ACGME's 2019 diversity metric in the context of graduate medical education. Finally, the article opined that the cardiology field might be violating the laws against discrimination in the way it used race as a factor in hiring, recruitment, promotion, and admissions. SOF ¶ 49.

Plaintiff submitted his article to the Journal of the American Heart Association ("JAHA"). JAHA represents that it "is the world's leading open access scientific journal by impact factor." After it went through JAHA's normal review and vetting process, including a review of Plaintiff's cites and sources for accuracy, JAHA agreed to publish Dr. Wang's article as a 17-page "White Paper" under the title, *Diversity, Inclusion, and Equity: Evolution of Race*

and Ethnicity Considerations for the Cardiology Workforce in the United States of America From 1969 to 2019. The article was placed online by JAHA on March 14, 2020, and the final version of the article was included in the April 9, 2020 online issue. SOF ¶ 50.

Dr. Wang's article concludes with the following passage:

> As Fitzgerald envisioned, "We will have succeeded when we no longer think we require black doctors for black patients, chicano doctors for chicano patients, or gay doctors for gay patients, but rather good doctors for all patients." Evolution to strategies that are neutral to race and ethnicity is essential. Ultimately, all who aspire to a profession in medicine and cardiology must be assessed as individuals on the basis of their personal merits, not their racial and ethnic identities.

(Endnotes omitted.) SOF ¶ 51. Dr. Wang did not receive any negative feedback on his article prior to July 31, 2020. SOF ¶ 52.

D. The Defendants Respond To Dr. Wang's Article And To His Opposition To Race Discrimination In The GME Programs At UPMC

On July 29, 2020, Dr. Vaughn Clagette, a University Trustee and a member of the UPMC board of directors, began distributing links to Dr. Wang's JAHA article and demanding that action be taken against Dr. Wang. SOF ¶ 53. The complaint reached Drs. Berlacher and Saba on July 29 and reached Drs. Gladwin and Shekhar on July 30. SOF ¶ 54. They understood that Dr. Wang's article, although expressed at an industry-wide level, was a criticism of affirmative action in graduate medical education at UPMC. SOF ¶ 55.

UPMC was in fact engaging in race discrimination in favor of "underrepresented in medicine" (URM) candidates. Residents and fellows were being selected for the GME programs based on a holistic review process that took race into consideration. The same was true of the selection of faculty for the GME programs. SOF ¶ 56. With respect to cardiology, Dr. Joon Lee,

a former head of the cardiology division, summarized the situation in an email to Dr. Shekhar: "Diversity in the training program has been at the soul of the culture of HVI for many years and the training program has been breaking the mold with nearly 50% women and URM numbers several fold over the average cardiology training program in the country." Dr. Lee later posted the following tweet about Dr. Wang: "this is eerily similar to anti-affirmative action groups using rejected Asian students to sue Harvard in [an] attempt to stop affirmative action admission policy.... We must reject these efforts and work together." SOF ¶ 57.

Dr. Shekhar's initial reaction to the article (as expressed in an email on July 30) was harsh: He found the paper "incredibly offensive and racist (with an added element of resentment from an Asians lens)," and felt "particularly compelled to rebut this repulsive pseudo scholarly article." SOF ¶ 58. Drs. Berlacher, Saba, Gladwin, and Shekhar were parties to emails about Dr. Wang's article on July 30, 2020. Drs. Gladwin and Shekhar spoke by telephone. Dr. Shekhar also spoke with Dr. Saba. SOF ¶ 59. It was not clear in the context of these conversations whether Drs. Berlacher and Saba were discussing the matter in their University capacity or in their UPMC capacity.

Early on Friday, July 31, 2020, Dr. Saba asked Dr. Wang to attend a meeting in Dr. Saba's office at 8:00 a.m. Dr. Berlacher was present for the meeting, along with Drs. Saba and Wang. It was not clear whether Drs. Saba and Berlacher were present in their University capacities or in their UPMC capacities or both. It was also not clear to Dr. Wang whether he had been summoned in his capacity as a University employee or as a UPP employee or both. The meeting lasted about 30 to 40 minutes. SOF ¶ 60. After Dr. Wang walked in, Dr. Saba said that he had become aware of the paper that Dr. Wang had written and was very disturbed by it. Dr.

Saba said that one of the cardiologists in their group, Conrad Smith,[2] had called Dr. Saba the other night and was very upset and almost crying. Dr. Saba then started criticizing the article, saying that people had talked to him about misquotes, and Dr. Saba asserted that the article ascribed certain traits or characteristics to groups. At this point Dr. Berlacher said that Dr. Wang was a racist. Shocked at the accusation, Dr. Wang responded by telling her about his time in Cook County[3] taking care of poor, underrepresented minorities. She responded that he can still be a racist. Dr. Saba then transitioned to talking about the GME programs at UPMC. Dr. Saba said, "You know what we are trying to do here, Norm." Dr. Wang took this to mean that they really were engaging in race discrimination. Dr. Wang responded by talking about what the law required. Dr. Saba asked Dr. Wang what his goal was in writing the paper. Dr. Wang said, "I just wanted us to follow the law." Dr. Saba responded by saying, "laws can change." Dr. Wang spoke to Dr. Berlacher about their contracts with the GME fellows, which say that they don't discriminate based on race and ethnicity. Dr. Berlacher did not respond. They moved on, and Dr. Saba said that, because of Dr. Wang's views in the paper, he could not be program director anymore. Dr. Wang said, "I get it," and something to the effect, "you can fire me too." Dr. Saba responded that they were not going to talk about that today. SOF ¶ 61.

Shortly after the meeting with Dr. Wang, Dr. Saba sent emails reporting on what had taken place to Dr. Gladwin [and to UPMC executives] (at 9:47 am – "He stands by his article and would rewrite it even today") and to Dr. Shekhar (at 10:03 am – "How disappointing that

[2]Dr. Conrad Smith, an African American and a senior cardiologist in the division, is the Associate Chief of Cardiology for Diversity, Equity, and Inclusion. SOF ¶ 62.
[3] Dr. Wang did one year of a residency in emergency medicine in Cook County, Illinois, before leaving to pursue cardiology. SOF ¶ 63.

one of our faculty holds these views"). SOF ¶ 64. It was not clear from these two communications whether Dr. Saba was writing in his University capacity or in his UPMC capacity or both. At 12:22 pm, Dr. Saba sent an email about Dr. Wang to two HVI listservs, copying Dr. Gladwin and top UPMC executives, and blind copying Dr. Shekhar. The email announced that Dr. Wang had been removed as program director, and that the views in his paper "do not reflect, in any way, the views of the division of cardiology, the HVI or UPMC." Dr. Saba sent the email "in all of [his] capacities." SOF ¶ 65.

On August 1, 2020, Dr. Saba sent Dr. Wang an email informing him that he was removed as program director "effective immediately." The email explained that Dr. Wang had "made it clear to us that you stand by your position and opinions, as stated in the manuscript." Dr. Saba signed the email with a signature block identifying his roles with the School of Medicine and UPMC. He sent the email on behalf of both entities. SOF ¶ 66.

Emails and discussions about what to do about Dr. Wang continued through the weekend and into the next week. Dr. Berlacher took the position that Dr. Wang was dangerous to the trainees, that "his views are counter to being a physician," and that he should be fired, or, failing that, that he should be cut off from all contact with the trainees. SOF ¶ 67.

With the encouragement of a large group of dually employed faculty, Dr. Berlacher took the lead in posting negative comments about Dr. Wang to Twitter. She posted an initial tweet (on August 2) using the account she used as program director: "@PittCardiology I'm looking at you. What do we stand for? What do you think of this OPINION piece that misinterprets data and misquotes people? @JAHA_AHA this is scientifically invalid and racist." She then replied (also on August 2) to her own tweet using the official Pitt Cardiology Twitter account:

"@PittCardiology stands for diversity equity and inclusion across the board. This article uses misquotes, false interpretations and racist thinking to defend a single person's conclusion. We are outraged that @JAHA_AHA published this shameful and infuriating piece." Other, similar tweets by Dr. Berlacher followed on August 3 and 4. SOF ¶ 68.

For about two weeks, Dr. Wang was the biggest thing on medical Twitter. It was very, very uncomfortable for him to go to work. Colleagues whom he had been friendly with for over ten years just stopped talking to him. He would pass them in the hallway and they wouldn't say anything. For his colleagues (including Drs. Berlacher, Saba, Lee, and others) to be so public with their criticisms on Twitter was not pleasant. SOF ¶ 69. In an email to Dr. Berlacher and others on August 2, 2020, Dr. Saba predicted "that the social environment here will become untenable for Norm and this will lead to him leaving UPMC," and cautioned that there were risks in "pushing from above for Norm to be ostracized." SOF ¶ 70. It was not clear whether Dr. Saba was writing in his University capacity or in his UPMC capacity or both when he wrote to his colleagues on August 2, 2020. On August 3, 2020, Dr. Berlacher received a text from another doctor in the division concerning Dr. Wang: "One more thing crossed my mind... I'm sure you guys are on it is the issue of his overall suicide risk.... it must not be easy to get all this push back and come back to work. Just a thought." SOF ¶ 71.

On August 4, 2020, Drs. Berlacher and Saba (they co-signed the email) sent Dr. Wang an email notifying him that, "[d]ue to [his] recent publications, expressed beliefs and [his] ongoing stance to defend them," he could no longer have any role in medical education:

> Thus, we can no longer have you serve in any medical education role in the institution, specifically pertaining to the general cardiology and electrophysiology fellows, while also including medical students and residents. This relates to any and all

> supervisory and evaluative capacities for trainees, including but not limited to serving as the attending of record on service or during a procedure, teaching didactics, precepting clinics, and mentoring research projects.

Dr. Saba authorized the email in both his University and his UPMC capacities. He obtained Dr. Bump's approval before sending it. SOF ¶ 72. Neither Dr. Berlacher nor Dr. Saba ever spoke with Dr. Wang about how the August 4 email was to be implemented. They delegated the implementation of the email to Dr. Sandeep Jain, Dr. Wang's immediate supervisor. Dr. Wang understood the email to mean that he could have no contact with medical students, residents, or fellows, and for this reason could no longer consult with patients in UPMC's main teaching hospital, UPMC Presbyterian. Dr. Jain agreed, and assigned Dr. Wang to rotations in other hospitals. SOF ¶ 73.

On August 5, 2020, Dr. Saba sent an email to Dr. Barry London, the editor in chief of JAHA, requesting that Dr. Wang's article be withdrawn. There were seven signatories to the email, five doctors affiliated with the University and UPMC, Drs. Saba, Berlacher, Shekhar, Smith, and Clagette, and two doctors who were members of the ACC's Task Force on Diversity and Inclusion, Dr. Quinn Capers of Ohio State and Dr. Pamela Douglas of Duke. Each of the seven signatories approved the email and its attachment. SOF ¶ 74. The August 5 email asserted that Dr. Wang's article contained "blatant scientific falsehoods and misquotes." This statement was false. Dr. Wang's article contains no scientific falsehoods, no misquotes, and only a single, minor error (not a misquote) in one of the source references. SOF ¶ 75. JAHA retracted Dr. Wang's article on August 6, 2020, stating in its published notice that the retraction was at the request of the author's institution. SOF ¶ 76. Dr. Wang's paper was retracted without affording him any kind of say. It is almost unheard of for a paper to be retracted for so little. It is common

practice to write letters to the editor of medical journals pointing out errors in articles. The authors will then be permitted to respond. The articles are not retracted. SOF ¶ 77.

On August 6, 2020, Dr. Shekhar emailed a statement about Dr. Wang's article from his PittMedDean@cm.pitt.edu account to a School of Medicine listserv, and his staff posted the statement to the University's Twitter account. Dr. Shekhar stated that the views expressed in Dr. Wang's article were "against equity and inclusivity," and "do not reflect the values of the University and its School of Medicine." SOF ¶ 78.

On August 6, 2020, Dr. Saba sent an email about Dr. Wang's article to a large group of people including two HVI listservs, Dr. Gladwin, Dr. Shekhar, and others. Dr. Saba stated that the views expressed in Dr. Wang's paper "do not, in any way, reflect the views of the division of cardiology, the Heart and Vascular Institute (HVI), or UPMC," and that Dr. Wang had been "removed . . . from all supervisory and recruiting roles in medical education." Dr. Berlacher was a co-signer of the email. Dr. Gladwin was in agreement with everything that was relayed in the email. SOF ¶ 79. It was not clear from this email whether they were speaking on behalf of the University, UPMC or both.

On August 7, 2020, Dr. Gladwin sent an email about Dr. Wang's article to the entire Department of Medicine from Dr. Gladwin's University email account. Dr. Gladwin announced that the perspective in Dr. Wang's article "was antithetical to our values and deeply hurtful to many of our URM faculty," and that, "We have taken immediate action and removed the person from their [sic] leadership position." SOF ¶ 80. Dr. Gladwin had no supervisory authority over Drs. Saba and Wang in his UPMC capacity because, within UPMC, the Department of Medicine did not supervise cardiology. SOF ¶¶ 81, 83. Dr. Gladwin had supervisory authority over Drs.

Saba and Wang in his School of Medicine capacity because Drs. Saba and Wang were in the Cardiology Division, which was part of the Department of Medicine, and Dr. Gladwin was the Chair of that Department. SOF ¶¶ 82, 84. When Dr. Gladwin wrote that "we" have removed "the person" from "their [sic] leadership position," he was using "the royal we." SOF ¶ 85. Dr. Gladwin was a decision-maker in the decision to impose discipline on Dr. Wang. SOF ¶ 86.

After Dr. Wang was removed as program director, Dr. Bump reviewed a draft annual update for the electrophysiology fellowship that Dr. Wang had prepared for uploading to the ACGME's website (WebADS). Dr. Bump removed Dr. Wang's language on "Diversity" (where Dr. Wang's language had included a nondiscrimination statement) and replaced it with new language describing the program's efforts to achieve diversity, including, *inter alia*, the holistic review of applicants at the time of interview and during ranking, the creation of an outreach program to attract diverse high schoolers into cardiology, and the provision of resource groups that provide affinity experiences for underrepresented residents and faculty. SOF ¶ 87.

E. The University's Tenure And Academic Freedom Committee Intervenes In An Attempt To Defend Dr. Wang's Academic Freedom, The Department Of Education Investigates, And The University Backtracks

Dr. Maria Kovacs is a Professor at the School of Medicine and is the Co-Chair of the University's Tenure and Academic Freedom Committee ("TAFC"). One of the functions of the TAFC is to defend the academic freedom rights of University faculty. SOF ¶ 88. On August 10, 2020, Dr. Kovacs reached out to Dr. Wang and expressed concern with the way he had been treated by the University. She said that she would communicate with the University. She also put Dr. Wang in touch with the American Association of University Professors ("AAUP"). SOF ¶ 89. On August 27, 2020, Dr. Kovacs sent an email to Dr. Shekhar, attaching copies of Dr.

Saba's August 1 email to Dr. Wang and of Dr. Berlacher's August 4 email to Dr. Wang. SOF ¶ 90. Since the August 4 email from Dr. Berlacher to Dr. Wang specifically precluded Dr. Wang from having contact with medical students, Dr. Shekhar was aware of that discipline no later than August 27, 2020. SOF ¶ 91. On September 2, 2020, the AAUP sent a letter concerning Dr. Wang to Chancellor Gallagher, copying Dr. Shekhar, who forwarded the letter to Drs. Gladwin, Saba, and Berlacher. SOF ¶ 92. Dr. Gladwin replied to Dr. Shekhar on September 3, 2020, stating: "Our most challenging position is that his writings directly conflict with our institutional priorities to educate, recruit and retain a diverse workforce and thus we cannot allow him to teach medical students and fellows, and to select residents for EP fellowship." SOF ¶ 93. On September 15, 2020, Dr. Shekhar participated in a Zoom meeting about Dr. Wang with the three members of the TAFC, Dr. Kovacs, Abbe de Vallejo, and Barry Gold. SOF ¶ 94.

On October 7, 2020, the University received a letter from the U.S. Department of Education announcing that the Department had opened an investigation of the University because the Department had learned of facts suggesting the University had improperly targeted Dr. Wang "with a campaign of denunciation and cancellation." In addition, the Department had identified many possible related violations of Federal civil rights law. SOF ¶ 95. That the federal Department of Education had opened an investigation into the University is an indication that the federal government, at least, believed that the University – a state actor – was implicated in the efforts to retaliate against Dr. Wang.

On October 14, 2020, Dr. Kovacs emailed Dr. Shekhar a memorandum from the TAFC with its follow-up to the meeting of September 15. The memorandum requested, *inter alia*, the full reinstatement of Dr. Wang's teaching and research mentoring responsibilities and a letter of

acknowledgement and apology for the institution's failure to follow due process in connection with the accusations regarding Dr. Wang's published article. SOF ¶ 96. On October 22, 2020, Dr. Shekhar issued a memorandum on University letterhead to School of Medicine Department Chairs, Institute Directors, and Senior Staff entitled, "Personnel and Administrative Actions for Dually Employed School of Medicine Faculty." The memorandum concerns "the importance of distinguishing your roles at UPMC from those at the School of Medicine." The memorandum states: "[T]he University's policies reflect an academic environment in which freedom of speech and academic freedom are valued and afford faculty certain rights and procedural due process. The University, not UPMC, has governance over research, students, and teaching at the School of Medicine." SOF ¶ 97. On October 27, 2020, Dr. Shekhar issued a memorandum on University letterhead to Drs. Gladwin, Saba, and Berlacher entitled, "Clarification about Dr. Norman Wang's Status at the School of Medicine." The memorandum was intended to clarify Dr. Wang's rights as a member of the University faculty. The memorandum states: "At the School of Medicine, Dr. Wang is permitted to teach and to mentor matriculated medical students. He is permitted to conduct research, publish articles, and undertake any other faculty activities." SOF ¶ 98. On October 27, 2020, Dr. Shekhar sent a letter on University letterhead to Dr. Wang captioned, "Your Faculty Status at University of Pittsburgh School of Medicine." The letter states that "there are no restrictions on your ability to teach and mentor matriculated students at the School of Medicine, should you desire to do so going forward. Additionally, you are in no way prohibited from conducting research, publishing articles, representing yourself as a member of the School of Medicine faculty, or undertaking any other faculty activities." SOF ¶ 99. This October 27 letter was the first time that Dr. Shekhar, or anyone else associated with the School

of Medicine, had notified Dr. Wang that he was no longer prohibited from contacting medical students. (Dr. Shekhar had asked Dr. Wang to attend a one-on-one meeting in Dr. Shekhar's office shortly before the date of the letter, and had told Dr. Wang during this meeting that he still had "full privileges" at the School of Medicine.) SOF ¶ 100.

On November 10, 2020, Dr. Shekhar and University Provost Ann Cudd sent a letter on University letterhead responding to the AAUP regarding Dr. Wang. SOF ¶ 101. On November 10, 2020, Dr. Shekhar issued a memorandum on University letterhead responding to the TAFC regarding Dr. Wang. SOF ¶ 102. The only measure that Dr. Shekhar or anyone else ever took to step back from the retaliation that had been imposed on Dr. Wang was that the ban on Dr. Wang's contact with medical students that had been imposed in the August 4 email was lifted. All other retaliatory measures that were taken by the defendants remain in place. SOF ¶ 103.

F. The Ongoing Damage To Dr. Wang

As a consequence of defendants' actions, Dr. Wang: (i) has lost income in the amount of the $25,000 per year that he would have received as program director for the clinical cardiac electrophysiology fellowship (SOF ¶ 104); (ii) has lost income that he would have received from privately-renumerated speaking opportunities (such as with Abbott Laboratories) that are only available to the program director (SOF ¶ 105); (iii) has lost income in an amount in excess of $10,000 per year because his ability to earn the work relative value units (wRVUs) that are used to calculate his Tier II Variable Clinical Salary has been adversely impacted by the hospital rotation reassignments he has been subject to as a result of the ongoing directive that he have no contact with residents or fellows (SOF ¶ 106); (iv) has suffered reputational damages (SOF ¶ 107); and (v) has suffered emotional distress damages (SOF ¶ 108).

THE LEGAL STANDARD FOR SUMMARY JUDGMENT

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment should be granted only if "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). A fact is "material" only if it might affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute of material fact is "genuine" only if the evidence "is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. In deciding a summary judgment motion, all inferences "should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Pastore v. Bell Tel. Co. of Pa.*, 24 F.3d 508, 512 (3d Cir. 1994) (internal quotations omitted). The court's function is not to make credibility determinations, weigh evidence, or draw inferences from the facts. *Anderson*, 477 U.S. at 249. Rather, the court must simply "determine whether there is a genuine issue for trial." *Id.*

ARGUMENT

I. DISPUTED ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE INDIVIDUAL DEFENDANTS VIOLATED DR. WANG'S RIGHTS UNDER 42 U.S.C. § 1983 AND THE FIRST AMENDMENT

To establish a claim under 42 U.S.C. § 1983, the plaintiff must demonstrate that (1) the conduct at issue was committed by a person acting under the color of state law, and (2) the complained of conduct deprived the plaintiff of rights secured under the Constitution or laws of the United States. *Bologa v. Pittston Area Sch. Dist.*, 927 F.3d 742, 753 n.6 (3d Cir. 2019). Disputed issues of material fact exist as to both questions.

A. Dr. Wang Can Establish State Action

The statutory requirement of action "under color of state law" and the "state action" requirement of the Fourteenth Amendment are identical. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982). The test for whether "state action" exists for purposes of 42 U.S.C. § 1983 is dependent on the specific facts and context presented. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001); *Crissman v. Dover Downs Ent.*, 289 F.3d 231, 234 (3d Cir. 2002) (en banc). The principal question is "whether there is such a close nexus between the State and the challenged action that the seemingly private behavior may fairly be treated as that of the State." *Leshko v. Servis*, 423 F.3d 337, 339 (3d Cir. 2005) (internal quotations omitted).

Here, it is acknowledged that the individual defendants were employees of the state. "'State employment is generally sufficient to render the defendant a state actor.'" *West v. Akins,* 487 U.S. 42, 49 (1988) (quoting *Lugar*, 457 U.S. at 936 n.18). To put the matter somewhat differently:

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Griffin v. Maryland, 378 U.S. 130, 135 (1964). A professor employed by a state university is a state actor. *Monninger v. Shippensburg Univ.*, 2016 U.S. Dist. LEXIS 109366, at *49-50 (M.D. Pa. Aug. 16, 2016); *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 744 (2d Cir. 2003).[4] "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the

[4] The University is an instrumentality of the state by virtue of Pennsylvania statute. *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94, 101-102 (3d Cir. 1984).

position given him by the State. Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." *West,* 487 U.S. at 49-50 (internal citations omitted); *see also Lugar*, 457 U.S. at 929 ("the actions of a state officer who exceeds the limits of his authority constitute state action").[5]

Thus, if defendants were using their state authority at all, even if they also were using some other authority, they acted under color of state authority. In the instant matter, there is plenty of evidence to so conclude. Indeed, defendants made no effort to hide that evidence in August 2020. It was only when the TAFC and the federal Department of Education began to ask questions about the University's role in that discipline that defendants (or their attorneys) began to realize the scope of the problem they had and tried to erase the University's fingerprints from the acts. But it was too late.

1. Dr. Gladwin Acted Under Color of State Law

Dr. Gladwin, the Chair of the Department of Medicine at the School of Medicine, was involved in the discipline of Dr. Wang. *See* SOF ¶¶ 24, 53-54, 59, 64-65, 79-80, 85-86, 92-93. We know this because he said so. "*We* have taken immediate action and removed the person from their [sic] leadership position." SOF ¶ 80, ECF No. 192-49, p. 2 (emphasis added). When asked at his deposition why he used "we" he said that he was using the "royal we."[6] SOF ¶ 85,

[5] Third Circuit has outlined three broad tests to determine when a *private party* has acted under color of state authority: "(1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state; (2) whether the private party has acted with the help of or in concert with state officials; and (3) whether the state has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a joint participant in the challenged activity." *Kach v Hose*, 589 F.3d 626, 646 (3d Cir. 2009) (internal quotations omitted).

[6] Gladwin had thirty days to review his deposition transcript and make any changes "in form or substance" pursuant to Fed. R. Civ. P. 30(e). He made no changes to this (or any other) response. ECF No. 187-4, p. 29.

ECF No. 192-4, p. 189. Since the "royal we" is used to mean "I," a reasonable jury could conclude that Gladwin was, in fact, the moving force behind any decision to remove Dr. Wang from the directorship of the electrophysiology fellowship, and Drs. Saba and Berlacher the instruments by which the decision was enforced.[7] Further, when writing to Dr. Shekhar later, he explained that "*we* cannot allow him to teach medical students and fellows, and to select residents for EP fellowship." SOF ¶ 93, Shekhar Dep. Ex. 50, p. 2 (emphasis added). *See also* SOF ¶ 86.

Dr. Gladwin's involvement is important because all agree that he had no authority over Dr. Saba (and Dr. Wang) in his UPMC capacity, but only in his University capacity. SOF ¶¶ 22-26, 81-86. Because Dr. Saba, in his role as Chief of the Division of Cardiology (which was part of the Department of Medicine) at the University, reported to Dr. Gladwin (who was the Chair of the Department of Medicine), he would have every reason to comply with Dr. Gladwin's wishes.

Thus, even if (contrary to fact, as discussed below) Drs. Saba and Berlacher were acting solely on behalf of UPMC in imposing discipline upon Dr. Wang, they acted jointly with a state actor and, thus, were themselves acting under color of state authority. *Kach*, 589 F.3d at 646 (private parties acting in concert with state officials act under color of state authority).

2. Dr. Saba Used His State Authority

At the outset, Dr. Saba's "state action" argument is hindered by the fact that, by his own admission, he had no role in graduate medical education. ECF No.192-6, p. 36 (Saba Dep. Tr

[7] To be sure, Gladwin also denied involvement during his deposition, even in the same answer. When an individual gives contradictory testimony, it is the job of the jury to determine which parts are true and which are not.

35:4-6). Accordingly, he could not have used his UPMC authority to remove Dr. Wang from his role as the program director of the electrophysiology fellowship.

Moreover, a reasonable jury easily could conclude that Dr. Saba used his authority as a state actor to prohibit Dr. Wang from having contact with medical students. Medical students were not part of graduate medical education. Dr. Saba had no responsibility for them in his HVI role, only in his role at the University. They were students at the University. Dr. Saba was the Chief of the Division of Cardiology in the School of Medicine, and Dr. Wang was an Associate Professor in that division. That is, Dr. Saba was Dr. Wang's superior at the University.

Defendants now want to claim that Dr. Saba made a "mistake" (UPMC Brief at 8-9, University Brief at 16), but nobody was saying that in August and September of 2020. To the contrary, Dr. Gladwin's September 3 email to Dr. Shekhar – where both had roles only with the School of Medicine insofar as cardiology was concerned – emphasized that "we" cannot allow Dr. Wang to teach medical students.[8] Only after the TAFC and, more significantly, the federal Department of Education commenced an investigation did anyone suggest a "mistake."

As the Chief of the Division of Cardiology, Dr. Saba's job included the education and teaching of medical students. ECF No. 192-6, p. 21 (Saba Dep. Tr. 20:15-16). Defendants offer no reason why that would not encompass protecting those medical students from a faculty member that he purportedly considered harmful. Nor do they offer evidence, other than their own say so, to support such a limit on his authority.

[8] Defendants try to argue that Dr. Wang, a faculty member at the School of Medicine, never had any contact with medical students or any pedagogic relationship with them. (UPMC Brief at 9, University Brief at 17). This is disputed. SOF ¶ 17. In any event, defendants cannot explain why the August 4 email mentioned medical students if he never had contact with them.

In any event, the "mistake" trope is not just wrong, it is irrelevant. Whether Dr. Saba, as Dr. Wang's superior in the School of Medicine, had actual authority to impose a prohibition on contact with medical students is beside the point. A police officer who uses his authority as a police officer to take property improperly cannot win a Section 1983 case when sued by his victim by saying he made a mistake and had no authority to do so. *E.g., Bennis v. Gable*, 823 F.2d 723, 733 n.11 (3d Cir. 1987) (holding that police chief could be held liable for demoting police officers even though mayor had sole authority for police promotions and demotions; "police chief . . . acted under color of state law regardless of whether he had actual authority"); *Basista v. Weir*, 340 F.2d 74, 80 (3d Cir. 1964) ("The statutory words [of Section 1983] . . . do not exclude from the purview of the Civil Rights statutes acts of an official who can show no authority for what he does.").

3. Defendants' Cases Are Inapposite

The defendants point to the case of *Borrell v. Bloomsburg Univ.*, 870 F.3d 154 (3d Cir. 2017). UPMC Brief at 6. *Borrell* concerned a nurse anesthetist program that was jointly operated by a public university (Bloomsburg University) and a private hospital (Geisinger Medical Center) pursuant to a written collaboration agreement. The director of the program, Arthur Richer, a Geisinger nurse anesthetist who had been made a joint employee of Geisinger and Bloomsburg, managed the clinical component of the program. The plaintiff, Angela Borrell, a student in the program, was terminated from the program by Richer because she violated a Geisinger drug and alcohol policy that was applicable to all Geisinger employees and contractors (including clinical students). Borrell claimed constitutional violations. *Borrell,* 870 F.3d at 159-60. The Court of Appeals determined that Richer had not been acting for the state when he terminated Borrell. According to the court, "the pertinent question is whether Richer was

wearing his Geisinger hat or his Bloomsburg hat when he decided to terminate Borrell." *Id.* at 160. On this question, the court concluded that Borrell had been terminated for her violation of a Geisinger policy, and that, pursuant to the terms of the written collaboration agreement, Geisinger retained sole authority to terminate students for noncompliance with Geisinger policies, and did not need to involve Bloomsburg in the decision. Accordingly, there was no state action. *Id.* at 160-62.

The defendants put forward a second case, *Schwartz v. Univ. of Cincinnati College of Med.*, 436 F. Supp. 3d 1030 (S.D. Ohio 2020). UPMC Brief at 6-8. In *Schwartz*, Gene Schwartz was hired as a clinical fellow in an allergy fellowship program jointly operated by a public university, University of Cincinnati College of Medicine, and a private healthcare system, UC Health. Schwartz's employment contract was with UC Health. The contract contained a prohibition on "moonlighting," or engaging in work outside the program. Schwartz was eventually terminated from the program on grounds of moonlighting without permission, and a history of unprofessional behavior. Schwartz sued claiming constitutional violations. Among the defendants were three doctors, Andrew Filak, Kimberly Risma, and David Bernstein, all of whom were employed by UC Health, but who may, at least in the case of Dr. Filak, also have been employed by the College of Medicine; the record as to Risma and Bernstein was acknowledged to be unclear. *Schwartz*, 436 F. Supp. 3d at 1032-36 and n.2. The court determined that Filak, Risma, and Berstein had been acting on behalf of UC Health rather than on behalf of the College of Medicine with respect to the challenged conduct, and therefore there was no state action. *Id.* at 1038-42. Crucial to this outcome was the fact that Schwartz's employment contract was with UC Health, his termination was based on disciplinary rather than

on academic grounds, and his termination mapped directly onto the process for disciplinary misconduct as outlined in the contract's standard terms and conditions. The College of Medicine simply was not involved. *Id.* at 1040.[9]

The facts here are fundamentally different from those present in *Borrell* and *Schwartz*. At the outset, both the plaintiff and the individual defendants in this case were dual employees, and were indisputably employed as faculty by a state university, all being professors of various rank. SOF ¶¶ 13-29. Dr. Wang, moreover, was not subject to punishment for violating any preexisting UPMC or UPP policy. Rather, he was subject to retaliation either: (1) for the content of his published, peer-reviewed academic article or (2) for what he said during his July 31 meeting with Drs. Saba and Berlacher, during which they linked Dr. Wang's published article – which was industry-wide in its approach – to race discrimination that was taking place in the GME programs at UPMC. SOF ¶¶ 53-72. The relationship agreements between the University

[9] The defendants include two additional cases in their citations, but without providing any discussion of those cases, *Untracht v. Fikri*, 454 F. Supp. 2d 289 (W.D. Pa. 2006) and *Thompson v. Robert Wood Johnson Univ. Hosp.*, 2011 U.S. Dist. LEXIS 63980, 2011 WL 2446602 (D.N.J. June 15, 2011). UPMC Brief at 9. These cases have nothing in common with our facts. In *Untracht*, a surgeon, Stephen Untracht, had been granted staff privileges at UPMC Lee Regional Hospital ("Lee") in 1994. In 1999, the hospital credentials committee recommended against his reappointment because of surgical fatalities and questions about his competence. After a probational period, his privileges were revoked. *Untracht*, 454 F. Supp. 2d at 295-301. Untracht sued, alleging (1) that UPMC and Lee were state actors and (2) that several of the doctors involved in the revocation of his privileges were state actors because they were clinical professors at the University of Pittsburgh. The court rejected these arguments, finding that there was no connection between the challenged conduct and the University. *Id.* at 317-20, 323-26. In *Thompson*, two pathologists at Robert Wood Johnson University Hospital arranged for an autopsy to be performed on the body of a fetus that had been aborted at the hospital even though the parents had expressly declined to give their consent for an autopsy. *Thompson*, 2011 U.S. Dist. LEXIS at *3-5. The parents sued, alleging there was state action because the pathologists were employed by the University of Medicine and Dentistry of New Jersey, a state institution. The court rejected this argument, finding that the pathologists were acting as private doctors in connection with medical care sought by private individuals. *Id.* at *13-17.

and UPMC clearly reserve to the University exclusive authority over a faculty member's academic publications. SOF ¶¶ 2-9. Both Drs. Shekhar and Gladwin admitted that this was the case. SOF ¶ 9.

It is impossible, moreover, to explain why Drs. Shekhar and Gladwin were so extensively involved in this matter without recognizing that it involved the interests and responsibilities of the University, not merely those of UPMC and UPP. Dr. Gladwin's role is described in Section I.A.1., above. Dr. Shekhar, the University's Senior Vice Chancellor for the Health Sciences, was directly involved in this matter from July 30, 2020 (when he was first contacted by Dr. Clagette, a University Trustee) until at least November 10, 2020 (when he sent letters about Dr. Wang to the AAUP and to the TAFC). SOF ¶¶ 30-31, 54-55, 58-59, 64-65, 74-75, 78, 90-102. He was aware that Dr. Wang had been prohibited from having contact with medical students since August 27 at the latest (SOF ¶ 91), but did nothing about it until after the federal Department of Education began to investigate. Further, Dr. Shekhar expressly identified Dr. Gladwin as being one of the responsible actors in his memorandum of October 27, 2020, which was directed to Drs. Gladwin, Saba, and Berlacher in their University capacities. SOF ¶ 98.[10] As to Dr. Saba, he repeatedly identified himself as having acted towards Dr. Wang in both his University and his UPMC capacities. At no point did Dr. Saba ever attempt to separate these roles. SOF ¶¶ 19-20, 22-23, 61, 65-66, 72, 74-75, 79, 98. Even Chancellor Gallagher was involved. SOF ¶ 33, *see, e.g.*, ECF No. 192-30, p. 2 (Gallagher email to Dr. Shekhar, July 31, 2020 – "Oof. I'm not sure removing him from his position for a paper is the right action. What are your thoughts?").

[10] Even if Dr. Shekhar had thought that Dr. Gladwin had used his UPMC authority, a jury could conclude that he was mistaken on that point given the plethora of evidence that Dr. Gladwin had no authority over Drs. Saba, Berlacher, and Wang in his UPMC capacity.

Another important point is that Dr. Wang was originally (from August 4 until October 27, 2020) barred from having contact with medical students. SOF ¶¶ 72, 99-100, 103. Defendants acknowledge that medical students fall within the University's jurisdiction, but argue that the inclusion of medical students was a mere mistake, and inconsequential. UPMC Brief 8-9, University Brief at 17.[11] Yet the University only claimed that the inclusion of medical students was a mistake after the TAFC and the federal Department of Education had become involved, and there was a need on the part of the University administration to find some way to retroactively recharacterize the events that had taken place. SOF ¶¶ 88-103. Indeed, the involvement of the TAFC in itself suggests there was state action: as a matter of University governance, it was the TAFC's responsibility to defend the academic freedom rights of University faculty, in this case Dr. Wang. SOF ¶ 88.

Even if this case were solely about the GME programs and nothing else, there would still be state action. The University has insinuated itself into a position of interdependence with UPMC in the operation of the GME programs. *See* SOF ¶¶ 5, 11. The residents and fellows are taught by University faculty. SOF ¶ 35. The programs are advertised on the University website, and are represented on the University's website as being University programs. SOF ¶ 39. The University has an Associate Dean of Graduate Medical Education. SOF ¶ 37. The programs could not be certified without their University affiliation. SOF ¶ 40.

There are other instances of retaliation in this case. (These are listed in the University's Brief at 17-18 and in its SOF ¶ 90, although the University wrongly characterizes them as mere

[11] The individual defendants incorrectly assert that Dr. Wang did not teach medical students. UPMC Brief 9. Dr. Wang did teach medical students, although he did so in a clinical context, or as a mentor on research projects, rather than at the medical school. SOF ¶ 17.

"criticisms" of Dr. Wang's article.)[12] One of these instances is the retraction request that was sent to JAHA on August 5, 2020. Drs. Saba and Berlacher were signatories. But so was Dr. Shekhar. SOF ¶¶ 74-75. Dr. Shekhar's involvement is a clear sign that this was an action on behalf of the University, and that Drs. Saba and Berlacher were acting in their University capacities. The tweets that Dr. Berlacher posted about Dr. Wang, moreover, went to a "@PittCardiology" account, not to a "@UPMCCardiology" account. SOF ¶ 68. Again, the logical inference that must be drawn at this stage of the litigation is that Dr. Berlacher was acting in her University capacity, not her UPMC capacity. Any question about what hat was being worn by any of the individual defendants is a question for the jury.

B. Dr. Wang Can Establish That He Was Deprived Of His Rights Under The First Amendment

On a First Amendment retaliation claim, a plaintiff must prove (1) he engaged in constitutionally protected conduct, (2) the defendant engaged in retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link existed between the conduct and the adverse action. If the plaintiff satisfies these elements, the government may avoid liability if it can show by a preponderance of the evidence that it would

[12] "Dr. Wang has identified the following adverse employment actions that he asserts were taken against him by the University: that he (1) was removed from his role as the director of the fellowship program in clinical cardiac electrophysiology; (2) was forbidden from having contact with any residents or fellows in graduate medical education or with medical students at the University of Pittsburgh School of Medicine; (3) was subject to a campaign of attack against the article he had published; (4) was subject to a campaign to denigrate him and his article before the public and on social media, including the use of Pitt's official @PittCardiology Twitter account; (5) was subject to efforts to ostracize and isolate him within his work environment, in the hopes that he would resign; and that (6) derogatory statements were made against Plaintiff by University employees." University SOF ¶ 89 (cleaned up).

have taken the adverse action even in the absence of the protected conduct. *Bologa*, 927 F.3d at 752; *Palardy v. Twp. of Millburn*, 906 F.3d 76, 80-81 (3d Cir. 2018).

Defendants' arguments are wrong for two reasons. First, the "balancing" test they espouse is inapplicable here. Second, even if it were applicable, they entirely ignore the important free speech and academic freedom interests at stake in the balancing.

1. *Pickering* Is Inapplicable

Defendants argue that the *Pickering* balancing test favors them, but they fail to demonstrate why *Pickering* applies in the first place. *Pickering* is applied when a public employer takes an adverse employment action against one of its employees in his/her capacity as an employee. But defendants claim that Dr. Wang was not harmed in his status as a public employee, only as an employee of a private entity. *E.g.*, UPMC Brief at 8. That is, under defendants' own theory regarding Dr. Wang's duties, this is a case where public actors (or private actors acting jointly with public actors) reached out to harm (primarily) a citizen's private employment relationship. This is obvious from defendants' *Pickering* argument. Under *Pickering*, the Court should balance an employee's interest in free speech with the harm to the *public employer's* operations. But defendants say nothing at all about the harm to the operations of the School of Medicine; they speak only to UPMC and graduate medical education, which they claims are not part of the School of Medicine. UPMC Brief at 11-13.

Of course, even defendants must concede that their prohibiting Dr. Wang from having contact with medical students affected his rights as a public employee. But they ignore the fact that the School of Medicine *did* balance the "harms" to itself with Dr. Wang's rights under the First Amendment and academic freedom: and concluded that Dr. Wang's rights outweighed any such (mostly unidentified) harm.

2. Defendants' "Balancing" Ignores Dr. Wang's Interests, And The Public Interest, In His Speech

The test for public employee speech derives from a line of Supreme Court cases starting with *Pickering v. Bd. of Educ. of Township High School Dist.*, 391 U.S. 563 (1968), and later modified by *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Javitz v. Cnty. of Luzerne*, 940 F.3d 858, 863-65 (3d Cir. 2019). The court undertakes a three-prong inquiry: (1) whether the employee spoke as a citizen, (2) whether the statement involved a matter of public concern, and (3) whether the government employer nevertheless had an adequate justification for treating the employee differently from any other member of the general public based on its needs as an employer. *Bologa*, 927 F.3d at 753; *Palardy*, 906 F.3d at 81. The third component of the test is referred to as *Pickering* balancing. *Fenico v. City of Philadelphia*, 70 F.4th 151, 162-64 (3d Cir. 2023). The defendants do not here contest the first two components of the test, only the third. *See* UPMC Brief 9-13. As to the first component, it seems clear that the speech in question was not "ordinarily within the scope" of Dr. Wang's job duties. *Javitz*, 940 F. 3d at 864; *accord Flora v. Cnty. of Luzerne*, 776 F.3d 169, 179 (3d Cir. 2015) (test is whether the speech at issue was outside the scope of the employee's ordinary job responsibilities).[13] As to the second component, it is well established that speech touching on race relations is inherently of public

[13] Although the Third Circuit has yet to address the question, other circuits have held that academic scholarship by university professors is entirely outside the scope of *Garcetti*'s official duty requirement. *Meriwether v. Hartop*, 992 F.3d 492, 504-507 (6th Cir. 2021); *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 562-64 (4th Cir. 2011); *Gorum v. Sessoms*, 561 F.3d 179, 186 n.6 (3d Cir. 2009); *Sudarshan Nelatury v. Pa. State Univ.*, 633 F. Supp. 3d 716, 729 n.2 (W.D. Pa. 2022). This seems especially true here, since defendants claim that the article was nothing more than an opinion piece, not a product of research that he would have done as an Associate Professor specializing in cardiology at the School of Medicine.

concern. *Fenico*, 70 F.4th at 165; *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410, 412-13 (1979).

With respect to the third component, the defendants argue that the "potentially disruptive" impact of Dr. Wang's "overtly racist" speech, which "threatened the psychological safety and well being of the fellows," means that "the goal of upholding UPMC's core values of diversity, equity and inclusion ... vastly outweighed Dr. Wang's interest in the speech at issue." UPMC Brief 11-13. Setting aside for a moment the many disputed issues of material fact, the individual defendants do not correctly describe how *Pickering* balancing – or, for that matter, any other balancing – works. Defendants simply ignore one side of the balancing equation: the value of both Dr. Wang in publishing and the public in reading his views.

Pickering balancing is a "sliding scale in which the amount of disruption a public employer has to tolerate is directly proportional to the importance of the disputed speech to the public." *Fenico*, 70 F.4th at 162 (quoting *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454, 472 (3d Cir. 2015)); *see also id.* at 164 ("the degree of public concern raised dictates the government's burden to show likely disruption"). Speech involving government impropriety occupies the highest rung of First Amendment protection. *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979, 991 (3d Cir. 2014). For this reason, whistleblowing speech will generally be protected regardless of some inevitable, disruptive impact. *Id.* at 991-93; *Czurlanis v. Albanese*, 721 F.2d 98, 107 (3d Cir. 1983) ("it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office"); *Noon v. City of Platte Woods*, 94 F.4th 759, 765-66 (8th Cir. 2024) (same); *Clark v. City of Tucson*, 2000 U.S. App. LEXIS 23326, *9 (9th Cir. 2000)

(same). Likewise, the government will not meet its burden under *Pickering* where "the disruption, if any, was primarily the result, not of the plaintiff's exercise of speech, but of his superior's attempts to suppress it." *Czurlanis*, 721 F.2d at 107; *accord Dougherty*, 772 F.3d at 992; *Clark*, 2000 U.S. App. LEXIS 23326 at *9 ("An employer cannot rely on disruption of its own making."). The First Amendment, moreover, does not recognize a "heckler's veto." "The First Amendment generally does not permit the so-called 'heckler's veto,' i.e., 'allowing the public, with the government's help, to shout down unpopular ideas that stir anger.'" *Munroe*, 805 F.3d at 475 (quoting *Melzer v. Bd. of Educ.*, 336 F.3d 185, 199 (2d Cir. 2003)). This means that "community reaction cannot dictate whether an employee's constitutional rights are protected." *Id.*.

With respect to the facts here, the defendants' assertion that "the views expressed in Dr. Wang's Article were overtly racist" (UPMC Brief at 11) is certainly disputed, and indeed is demonstrably false as a matter of law. SOF ¶¶ 48-51. That Dr. Wang's Article "caused the UPMC and HVI communities indescribable pain" and "caused fellows to feel harassed, bullied, and ostracized" (UPMC Brief at 11) is both disputed and unsupported by admissible evidence.[14] With respect to Dr. Berlacher, her expressed view that the fellows were "less safe" because of Dr. Wang's Article (*see, e.g.*, UPMC Brief at 12 n.1) is fundamentally inconsistent with the First Amendment. It is merely a new fashion for the assertion of a heckler's veto. A message does

[14] Earlier in this action the UPMC Defendants objected to any discovery into the identities of the fellows on the ground that such discovery was "wholly irrelevant," and refused to provide the identities of the fellows. Declaration of J. Robert Renner, ¶ 43, Ex. 42 (Letter from Emilie R. Hammerstein, Esq. dated Dec. 1, 2022, p 9). For them *now* to try to use the reaction of these same fellows to support their case is sharp practice. Defendants should be estopped from relying on evidence concerning fellows whose identities they hid.

not lose its protection under the First Amendment due to the reaction of those who hear it. *Munroe*, 805 F.3d at 475; *Bible Believers v. Wayne County*, 805 F.3d 228, 252 (6th Cir. 2015) (en banc). Whether Dr. Wang's Article "caused outrage in the general population on Twitter" (UPMC Brief at 12) is disputed. Dr. Wang's evidence shows that the alleged "outrage" on Twitter was ginned up by the defendants using the @PittCardiology Twitter account in an attempt to pressure Dr. Wang to resign. SOF ¶¶ 68-71. Indeed, there was no "outrage" at all before defendants began their harassment campaign. Dr. Wang received no negative response to his article prior to July 31, 2020. SOF ¶ 52.

Defendants' argument that they retaliated against Dr. Wang to defend "UPMC's interests in maintaining an environment free from discrimination" (UPMC Brief at 13) is contrary to the evidence. It was Dr. Wang, not defendants, who was defending the principle of racial nondiscrimination. SOF ¶¶ 41-52, 55-57, 87. Indeed, as will be addressed in the following sections, Dr. Wang's actions should be protected not just as a matter of the First Amendment but also under the antiretaliation provisions of federal and state civil rights laws. Defendants claim that they needed to uphold "UPMC's core values of diversity, equity and inclusion" (UPMC Brief at 13), but they nowhere define what these terms mean, how they relate to the nondiscrimination that the law requires, and, most importantly, how Dr. Wang's article was inconsistent with those values After all, the article only criticized illegal discrimination.

And all of this ignores one rather glaring fact. As already noted, the University *did* engage in balancing analysis, albeit belatedly, with respect to the prohibition on contact with medical students. It concluded that Dr. Wang's interest in academic freedom and free speech *outweighed* any harm that the medical students might incur by having contact with Dr. Wang. A

jury could reasonably believe that defendants' contention that older, more mature residents and fellows – who are, after all (and unlike medical students) employees being paid a salary – are far more fragile than medical students, lacks credibility.

With respect to the removal of Dr. Wang from his position as the director of the electrophysiology fellowship program, defendants argue, citing the Second Circuit's opinion in *Faghri v. Univ. of Conn.*, 621 F.3d 92 (2d Cir. 2010), that the program directorship is a high-ranking policymaking position analogous to a university deanship, and that this factor should carry decisive weight in the *Pickering* balancing. UPMC Brief at 12. The directorship simply isn't that high in rank. Dr. Wang only supervised four fellows. SOF ¶ 18. In any event, *Faghri* only posits that a position's having policymaking authority is one factor to consider in the *Pickering* balance, not that it is the end of the inquiry. *Faghri*, 621 F.3d at 97-98. And none of this could explain or justify why the defendants took other retaliatory measures against Dr. Wang, such as barring him from contact with medical students, residents, and fellows, pressuring JAHA to retract his article, or isolating him in his work environment in the hopes that he would resign. *See* footnote 12, *supra* (listing examples of retaliation).

II. DISPUTED ISSUES OF MATERIAL FACT EXIST AS TO WHETHER THE UNIVERSITY, UPMC, AND UPP VIOLATED THE ANTI-RETALIATION PROVISIONS OF TITLE VII AND THE PHRA

A. There Is Direct Evidence That Defendants Retaliated Against Dr. Wang Because He Opposed Race Discrimination In The GME Programs At UPMC

As a remedial statute, Title VII is to be interpreted liberally. *Slagle v. Cty. of Clarion*, 435 F.3d 262, 267 (3d Cir. 2006). Section 704(a) of Title VII makes it unlawful for an employer to retaliate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a). The pertinent language of the

Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. § 955(d), is substantially the same, and in most situations there is no need to differentiate a PHRA claim from a Title VII claim. *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 567 n.4 (3d Cir. 2002).

To establish a prima facie case of retaliation under Title VII, a plaintiff must tender evidence that: (1) he engaged in activity protected by Title VII; (2) the employer took an adverse employment action against him; and (3) there was a causal connection between his participation in the protected activity and the adverse employment action. *Kengerski v. Harper*, 6 F.4th 531, 536 (3d Cir. 2021); *Moore v. City of Phila.*, 461 F.3d 331, 340-41 (3d Cir. 2006). A plaintiff may prove a retaliation case in one of two ways: either by showing direct evidence of retaliation or by utilizing the *McDonnell Douglas* burden-shifting framework. *Carvalho-Grevious v. Del. State Univ.*, 851 F.3d 249, 257 (3d Cir. 2017); *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015); *Stoud v. Susquehanna Cty.*, 471 F. Supp. 3d 606, 619 (M.D. Pa. 2020). Ultimately, the plaintiff must show by a preponderance of the evidence that there is a but-for causal connection between the adverse employment action and the retaliatory animus. *Carvalho-Grevious*, 851 F.3d at 258.

The first step is to identify the protected opposition activity. Section 704(a) requires only that the plaintiff show that he "opposed *any* practice made an unlawful employment practice by this subchapter" (emphasis added). 42 U.S.C. § 2000e-3(a). In this regard, the Third Circuit recognized in *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130 (3d Cir. 2006) that the opposition clause of Title VII should be given an expansive definition:

> Title VII's opposition clause is triggered by formal EEOC proceedings "as well [as] informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting

> against discrimination by industry or society in general, and expressing support for co-workers who have filed formal charges." (citations omitted). When deciding whether a plaintiff has engaged in opposition conduct, we look to the message being conveyed rather than the means of conveyance.

Curay-Cramer, 450 F.3d at 135 (quoting *Sumner v. U.S. Postal Serv.,* 899 F.2d 203, 209 (2d Cir. 1990)). This language has been followed many times by the District Courts in this circuit.[15] The only limitation is that the opposition "must identify the employer and the practice – if not specifically, at least by context." *Id.* The U.S. Equal Employment Opportunity Commission ("EEOC") has adopted the same broad understanding of opposition activity. EEOC, *Enforcement Guidance on Retaliation and Related Issues* (08-25-2016) at 14-15.[16] Many courts, moreover, have held that Title VII can protect an employee from retaliation by an employer for the employee's having expressed opposition to unlawful employment practices undertaken by a different employer.[17]

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[15] *Stoud*, 471 F. Supp. 3d at 617; *Gibbs v. Brennan*, 2021 U.S. Dist. LEXIS 156129, at *38-39, 2021 WL 3661277 (D.N.J. Aug. 18, 2021); *Emmell v. Phoenixville Hosp. Co., LLC*, 303 F. Supp. 3d 314, 331 (E.D. Pa. 2018); *Scott v. Genesis Healthcare, Inc.*, 2016 U.S. Dist. LEXIS 111262, at *62, 2016 WL 4430650 (E.D. Pa. Aug. 22, 2016); *Gale v. UPMC Horizon*, 2013 U.S. Dist. LEXIS 144377, at *15, 2013 WL 5534238 (W.D. Pa. Oct. 7, 2013); *Senador v. Zober Indus.*, 2009 U.S. Dist. LEXIS 36059, at *31, 2009 WL 1152168 (E.D. Pa. April 28, 2009); *Paul v. UPMC Health Sys.*, 2009 U.S. Dist. LEXIS 19277, at *43, 2009 WL 699943 (W.D. Pa. March 10, 2009).

[16] https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues. The EEOC's interpretation of Title VII is entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Doe v. C.A.R.S. Prot. Plus*, 527 F.3d 358, 364 (3d Cir. 2008).

[17] *Fredriksen v. Consol Energy Inc.*, 2019 U.S. Dist. LEXIS 81193, at *17, 2019 WL 2108099 (W.D. Pa. May 14, 2019) (Horan, J.); *Chatterjee v. Mathematics, Civics & Sciences Charter Sch.*, 2008 U.S. Dist. LEXIS 57514, at *32 n.20, 2008 WL 2929061 (E.D. Pa. July 30, 2008); *Patsakis v. E. Orthodox Found.*, 2006 U.S. Dist. LEXIS 55330, at *34, 2006 WL 2087513 (W.D. Pa. May 17, 2006); *Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1348-49 (11th Cir. 2022).

This Court previously addressed the opposition activity requirement in its August 22, 2023 Memorandum Opinion on the University's Motion to Dismiss the Fourth Amended Complaint. ECF No. 172. The motion was denied in part and granted in part. The motion was granted in the following respect:

> A general complaint about an industry is not a protected employment practice under Title VII. See *Curay-Cramer v. Ursuline Acad. of Wilmington, De., Inc.*, 450 F.3d 130, 137 (3d Cir. 2006). Given the nature of Dr. Wang's article, it cannot serve as the basis for a protected employment activity for any claims under Title VII or the PHRA against the University of Pittsburgh.

ECF No. 172 at 10. The motion was denied in the following respect:

> The pleadings within the Fourth Amended Complaint can be interpreted to mean that the Defendants decided to take the adverse employment actions against Dr. Wang after his July 31, 2020 meeting with Drs. Saba and Berlacher. Based on the allegations within the Fourth Amended Complaint, Dr. Wang sufficiently alleges that the retaliatory actions taken against him were a result of both his JAHA article and his statements made at the July 31, 2020 meeting with Drs. Saba and Berlacher.

ECF No. 172 at 11-12. It should be observed that by its terms the Court's August 22, 2023 Memorandum Opinion only applies to the University, and not to UPMC and UPP, which had not moved to dismiss. ECF No. 172; *see also* ECF No. 173 (the order).

Dr. Wang is opposed to any extension of the Court's August 22 Memorandum Opinion to include UPMC or UPP. The record before the Court today is materially different than it was on the University's motion to dismiss. There is now evidence that Dr. Wang's article was written in the context of his concerns about what he thought was illegal race discrimination being introduced into the GME programs at UPMC. SOF ¶¶ 40-51, 86. Moreover, there is now evidence that the defendants themselves understood Dr. Wang's article to have been written as a

protest against the introduction of race discriminatory measures into the GME programs at UPMC. SOF ¶¶ 54-56, 60, 64, 77-79, 86. On this point it is worth reading the exact language of Dr. Gladwin's deposition transcript:

> Q. So you -- good. You understood his article -- Dr. Wang's article to be a criticism of affirmative action programs?
> A. Yes.
> Q. Including in graduate medical education?
> A. Yes.
> Q. Okay.
> A. The selection of fellows in cardiology.
> Q. Including at UPP?
> A. Yes.

SOF ¶ 54, ECF No. 192-4, pp. 203-204 (Gladwin Dep. Tr. 202:18-203:6). Dr. Gladwin was not alone in this. Consider Dr. Joon Lee, the former head of cardiology, who sent the following email to Dr. Shekhar on August 2, 2020: "Diversity in the training program has been at the soul of the culture of HVI for many years and the training program has been breaking the mold with nearly 50% women and URM numbers several fold over the average cardiology training program in the country." SOF ¶ 56, Shekhar Dep. Ex. 29. Dr. Lee clearly understood Dr. Wang to have opened a fight over affirmative action in the GME programs at UPMC, and Dr. Lee was eager to engage in that fight. SOF ¶ 56. And then there is the July 31, 2020 meeting between Drs. Saba, Berlacher, and Wang. During this meeting, it was Dr. Saba who first drew the connection between Dr. Wang's article and what was taking place at UPMC: "You know what we are trying to do here, Norm." SOF ¶ 60, ECF No. 192-7, pp. 100-101 (Wang Dep. Tr.98:24-99:15), Wang Dec., ¶ 8. Dr. Wang responded by stating his concern that the GME programs at UPMC were violating the law. SOF ¶ 60.

A related problem is that what was said during the July 31 meeting cannot be understood without taking into consideration the content of Dr. Wang's article. The references to race discrimination in the GME programs at UPMC that were made during the July 31 meeting might well be too vague to put the defendants on notice of the protected opposition activity if those remarks were considered in isolation, without taking the article into account. *See* University Brief at 21-22 (making this argument). In reality, however, the article was part of the background to the conversation, and the contents of the article were incorporated by reference into the conversation. The article describes how racial and ethnic preferences were being mandated within GME programs starting with the ACC's Diversity and Inclusion Initiative in 2018 and the ACGME's "workforce diversity" directive in 2019. SOF ¶ 49, ECF No. 192-23, pp. 2-3, 7, 16). Dr. Wang's article was more than "sufficiently specific to put the employer on notice of the specific kind of unlawful discrimination being alleged and complained of." *Laymon v. Honeywell Int'l Inc.*, 645 F. Supp. 3d 443, 459 (W.D. Pa. 2022); *see also Barber v. CSX Distrib. Servs.*, 68 F.3d 694, 702 (3d Cir. 1995) (describing the minimal level of specificity that is required for opposition activity to be protected).

With respect to causation, assuming *arguendo* that the adverse action must be tied to what Dr. Wang said during the July 31 meeting, direct evidence supports the linkage. In his initial email report to Dr. Gladwin immediately following the meeting, Dr. Saba stated: "Met with Norm today. He stands by his article." SOF ¶ 63, ECF No. 192-29, p. 2. In his email to Dr. Wang the next day, in which he notified Dr. Wang that he was being terminated as program director "effective immediately," Dr. Saba explained: "In that meeting, you made it clear to us that *you stand by your positions and opinions*." SOF ¶ 65, ECF No. 192-31, p. 2 (emphasis

added). And in their joint email of August 4 in which Drs. Berlacher and Saba notified Dr. Wang that he was prohibited from having any contact with medical students, residents, or fellows, they explained that their actions were taken "[d]ue to your recent publications, *expressed beliefs and your ongoing stance to defend them*." SOF ¶ 71, ECF No. 192-37, p. 2 (emphasis added). In other words, according to defendants' own emails, there was a causal connection between what Dr. Wang said during the July 31 meeting and the adverse actions that were taken against him. And part of what Dr. Wang said during the meeting was to acknowledge the link between his article and what was taking place at UPMC.

There was, moreover, a very close temporal proximity between the July 31 meeting and the adverse actions that were taken, notably the August 4 imposition of a bar on Dr. Wang's contact with medical students, residents, and fellows. SOF ¶ 72. Such a close temporal proximity would be sufficient by itself to establish a prima facie case of causality. *Blakney v. City of Phila.*, 559 Fed. Appx. 183, 185-86 (3d Cir. 2014); *Jalil v. Avdel Corp.*, 873 F.2d 701, 708 (3d Cir. 1989). Once the defendant's intent has been called into question, summary judgment on causation is improper. *Canada v. Samuel Grossi & Sons, Inc.*, 49 F.4th 340, 347 (3d Cir. 2022); *Jalil*, 873 F.2d at 707.[18]

[18] The UPMC Defendants also argue that they had "legitimate, non-retaliatory" reasons for the adverse actions they took. UPMC Brief at 21-23. But the things they identify as "legitimate" and "non-retaliatory" are all matters that purportedly were caused by Dr. Wang's opposition to their discriminatory practices, *e.g.*, the views he expressed "were contrary to UPMC's diversity, equity, and inclusion initiatives." *Id.* at 21. If defendants in Section 704(a) cases could rely on proffered reasons so obviously connected to opposition to discrimination, that provision would be a dead letter. Notably, none of the cases the UPMC Defendants cite in this section of their brief even involve anti-retaliation provisions, much less ones that would support such a counterintuitive argument.

B. The Actions Taken Against Dr. Wang Were Materially Adverse

The defendants argue that the actions taken against Dr. Wang were not "materially adverse" for purposes of Title VII. UPMC brief at 20-21 n.5, University Brief at 16-18. "[A] plaintiff claiming retaliation under Title VII must show that a reasonable employee would have found the alleged retaliatory actions 'materially adverse' in that they 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Moore*, 461 F.3d at 341 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

It is difficult to take this argument seriously. The actions that were taken against Dr. Wang were certainly not a "mere documentation of ... constructive criticism" (University Brief at 18) nor were they "*de minimus* administrative decisions" (UPMC Brief at 20 n.5). Rather, what took place could have been taken from the Cultural Revolution. In the space of a single week, Dr. Wang was removed as program director (SOF ¶¶ 60, 64-65); was barred from contact with medical students, residents and fellows (SOF ¶¶ 71-72); his colleagues successfully pressured the journal to retract his article based on spurious allegations of "scientific falsehoods and misquotes" (SOF ¶¶ 73-76); he was smeared on Twitter and called a racist (SOF ¶¶ 67-68); he was denied traditional academic due process (SOF ¶¶ 76, 95); and he was isolated in his work environment and professionally shunned in the hopes that he would resign (SOF ¶¶ 68-70). His pay was also cut. SOF ¶ 106. These are all "materially adverse" actions. *See, e.g., Brennan v. Norton*, 350 F.3d 399, 419 (3d Cir. 2003) (retaliatory acts must be more than *de minimis* or trivial); *Szeinbach v. Ohio State Univ.*, 493 Fed. Appx. 690, 694-96 (6th Cir. 2012) (accusing faculty member of research misconduct can be actionable adverse employment action); *McKinney v. Univ. of Pittsburgh*, 2018 U.S. Dist. LEXIS 211753, *18, 2018 WL 6603632 (W.D.

Pa. Dec. 17, 2018) (same, if actual injury results)); *Morrison v. City of Reading*, 2007 U.S. Dist. LEXIS 16942, *26-27, 2007 WL 764034 (E.D. Pa. March 9, 2007) (disparaging comments can form the basis for a retaliation claim when coupled with more concrete action, or the threat of such action); *Lewis v. Ind. Wesleyan Univ.*, 2022 U.S. Dist. LEXIS 119681, *23, 2022 WL 2528414 (N.D. Ind. July 7, 2022) (materially adverse actions can include changes to "employee's current wealth, his career prospects, or changes to work conditions that include humiliating, degrading, unsafe, unhealthy, or otherwise significant negative alteration in the workplace."). And Dr. Wang has clearly suffered damages. SOF ¶¶ 103-107.

The University asserts that "any criticism of Dr. Wang by Dean Shekhar or others" is protected by the First Amendment, and for this reason cannot constitute an adverse employment action under Title VII. University Brief at 19. Dr. Wang does not contend that the abstract statements found in Dr. Shekhar's email to the School of Medicine of August 6, 2020 (SOF ¶ 78, ECF No. 192-47) or in Dr. Gladwin's email to the Department of Medicine of August 7, 2020 (SOF ¶ 80, ECF No. 192-49) themselves in isolation constitute adverse employment actions. They do, however, constitute strong evidence for the involvement of these officials in the adverse employment actions that were taken, and of their endorsement of those actions. *See* footnote 12, *supra* (listing examples of retaliation). Dr. Berlacher's derogatory tweets, on the other hand, pass beyond pure speech into conduct that can be treated as retaliatory harassment under Title VII. *See Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 209-10 (3d Cir. 2001) (exploring the boundary between the First Amendment and civil rights protections); *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995) (same).

Manhattan Institute scholar Heather Mac Donald has written about Dr. Wang's case. She had this to say of Dr. Wang: "Opposition to the preference regime requires a certain reckless courage." H. Mac Donald, *When Race Trumps Merit: How the Pursuit of Equity Sacrifices Excellence, Destroys Beauty, and Threatens Lives* 38 (2023). It should not require Dr. Wang's level of courage to oppose unlawful conduct under Title VII. What was done to Dr. Wang was more than enough to dissuade a reasonable worker from making a charge of discrimination. *Burlington*, 548 U.S. 68.

C. The University Is A Proper Defendant

The University argues that it is not a proper defendant to the Title VII claim because all of the adverse actions were taken by UPMC rather than by the University. University Brief at 12-17. This is the same factual argument that defendants make in the context of state action, and it has already been addressed in Section I.A. above. As the University correctly acknowledges, moreover, two entities may be "co-employers" or "joint employers" of one employee for purposes of Title VII or the PHRA. *Faush v. Tuesday Morning, Inc.*, 808 F.3d 208, 215 (3d Cir. 2015); *Pickney v. Modis, Inc.*, 2022 U.S. Dist. LEXIS 224109, *10-11, 2022 WL 17652698 (E.D. Pa. Dec. 13, 2022). In this situation, the co-employer will be liable if it participates in the discrimination, or if it knows or should have known of the discrimination but fails to take corrective measures within its control. *Burton v. Freescale Semiconductor, Inc.*, 798 F.3d 222, 229 (5th Cir. 2015); *Whitaker v. Milwaukee Cty.*, 772 F.3d 802, 812 (7th Cir. 2014); *Punt v. Kelly Servs.*, 2016 U.S. Dist. LEXIS 1018, *47-48, 2016 WL 67654 (D. Colo. Jan. 6, 2016). Here, disputed issues of material fact exist as to whether the University is liable, either as a direct

participant, or because it failed to take corrective measures within its control. Accordingly, it is not proper to resolve on summary judgment whether the University is a proper defendant.

D. UPMC Is A Proper Defendant

UPMC asserts in a footnote, without supporting authority or explanation, that it is not a proper defendant to the Title VII and PHRA claims because Dr. Wang was employed by UPP rather than by UPMC. UPMC Brief at 13 n.3. The Third Circuit applies the "single employer theory" to consolidate corporate affiliates for purposes of Title VII. [19] *Alvarez v. Advance Auto Parts, Inc.*, 2018 U.S. Dist. LEXIS 147456, *5-6, 2018 WL 4110952 (D.N.J. Aug. 29, 2018); *Anderson v. Finley Catering Co.*, 218 F. Supp. 3d 417, 422 n.2 (E.D. Pa. 2016). Under this theory, a company and its affiliates will be treated as a single employer: (1) when a company has split itself into entities with less than fifteen employees intending to evade Title VII's reach; (2) when a parent company has directed the subsidiary's discriminatory act of which the plaintiff is complaining; or (3) when the two entities' affairs are so interconnected that they collectively caused the discriminatory employment practice. *Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 85-86 (3d Cir. 2003). In this case, the defense witnesses have consistently made no distinction between UPP and UPMC, and have attributed to UPMC – or to the University – the responsibility for the actions that were taken against Dr. Wang. It follows that the second test

[19] On this point, the PHRA uses different, broader language that encompasses aiding and abetting liability, and so the issue of consolidation of affiliates does not arise. *See* 43 Pa. Cons. Stat § 955(e) (providing for aiding and abetting liability); *Hollinghead v. City of York*, 11 F. Supp. 3d 450, 465 (M.D. Pa. March 7, 2014) (addressing this language). On our facts, UPMC is subject to aiding and abetting liability under 43 Pa. Cons. Stat § 955(e), in addition to liability under 43 Pa. Cons. Stat. § 955(d).

expressed in *Nesbit* – a parent directing its subsidiary's acts – applies here. *Nesbit*, 347 F.3d at 86. It is not proper to resolve on summary judgment whether UPMC is a proper defendant.

III. THE SECTION 1981 CLAIM IS SUBJECT TO THE SAME ANALYSIS AS THE TITLE VII & PHRA CLAIMS

Dr. Wang's claim against UPMC for retaliation in violation of 42 U.S.C. § 1981 is subject to the same analysis as his claims under Title VII and the PHRA. *Brown v. J. Kaz, Inc.*, 581 F.3d 175, 181-82 (3d Cir. 2009) ("the substantive elements of a claim under section 1981 are generally identical to the elements of an employment discrimination claim under Title VII."). UPMC argues (UPMC Brief at 17 n.3) that a plaintiff must demonstrate an additional element under section 1981, referring to an isolated statement found in *Estate of Oliva v. N.J. Dep't of Law & Pub. Safety, Div. of State Police*, 604 F.3d 788, 798 (3d Cir. 2010): "In a retaliation case a plaintiff must demonstrate that there had been an underlying section 1981 violation." This statement from *Oliva* is dicta and should not be followed; rather, the correct standard is whether the plaintiff "acted under a good faith, reasonable belief that a violation existed." *Castleberry v. STI Grp.*, 863 F.3d 259, 267 (3d Cir. 2017) (quoting *Daniels v. Sch. Dist. of Phila.*, 776 F.3d 181, 193 (3d Cir. 2015)).[20] Defendants never even argue that Dr. Wang lacked a reasonable, good faith belief that a violation existed. They could not. Here, Dr. Wang was concerned that UPMC was in the process of adopting racially discriminatory hiring practices for its GME programs in response to pressure from ACGME and other groups. SOF ¶¶ 41-51. He was right.

[20] *See* Third Circuit Model Civil Jury Instructions, Instruction 6.1.6 (Elements of a Section 1981 Claim – Retaliation), Comment, pp. 21-23 (Dec. 2023) (explaining *Oliva*); *Wei v. Pa.*, 2016 U.S. Dist. LEXIS 180397, *62-74 (M.D. Pa. Dec. 29, 2016) (same), *rejected in part by* 2019 U.S. Dist. LEXIS 52613 (M.D. Pa. March 28, 2019), *aff'd*, 796 Fed. Appx. 143 (3d Cir. 2020); *Scott v. Genesis Healthcare, Inc.*, 2016 U.S. Dist. LEXIS 111262, *22-24 (E.D. Pa. Aug. 22, 2016) (same); *Claybourne v. HM Ins. Group*, 2015 U.S. Dist. LEXIS 157910, *5-19 (W.D. Pa. Oct. 22, 2015) (same), *adopted by* 2015 U.S. Dist. LEXIS 157905 (W.D. Pa. Nov. 23, 2015).

That is exactly what UPMC was doing. SOF ¶¶ 55-57, 61, 87. Such discrimination in hiring is manifestly illegal. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 600 U.S. 181, 143 S. Ct. 2141, 2161-63 (2023); *Taxman v. Board of Educ.*, 91 F.3d 1547, 1558-64 (3d Cir. 1996) (en banc).

CONCLUSION

For the foregoing reasons, Dr. Wang respectfully requests that the Court deny defendants' motions for summary judgment.

Respectfully submitted,

/s/ J. Robert Renner

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Date: May 14, 2024