

No. COA11-506

IN THE NORTH CAROLINA COURT OF APPEALS

Terri Ginsberg,)
Plaintiff-Appellant,)

v.)

Board of Governors of)
the University of North Carolina,)
Defendant-Appellee.)

From Orange County
Case No. 09-CVS-1789

CLERK OF APPEALS
OF NORTH CAROLINA

2011 JUN 28 AM 7:39

FILED

PLAINTIFF-APPELLANT'S BRIEF

INDEX

TABLE OF CASES AND AUTHORITIES.....	i
ISSUE PRESENTED	1
STATEMENT OF THE CASE	2
STATEMENT OF THE GROUNDS OF APPELLATE REVIEW	3
STATEMENT OF THE FACTS.....	4
ARGUMENT.....	9
I. STANDARD OF REVIEW	9
II. THE TRIAL COURT ERRED IN GRANTING NCSU'S MOTION FOR SUMMARY JUDGMENT ON GINSBERG'S SPEECH CLAIM	10
CONCLUSION	44
CERTIFICATE OF COMPLIANCE	45
CERTIFICATE OF SERVICE	46

TABLE OF CASES AND AUTHORITIES

Cases:

<i>Moody v. Able Outdoor, Inc.</i> , 169 N.C.App. 80, 83, 609 S.E.2d 259, 261 (N.C. App. 2005)	9
<i>Johnson v. Trustees of Durham Tech. Cmty. Coll.</i> , 139 N.C.App. 676, 681, 535 S.E.2d 357, 361 (2000)	9
<i>Creech v. Melnik</i> , 347 N.C. 520, 530, 495 S.E.2d 907, 913 (N.C. 1998)	9
<i>Jackson v. Bair</i> , 851 F.2d 714, 718 -719 (4th Cir. 1988)	10, 11, 20
<i>State v. Arrington</i> , 311 N.C. 633, 643 (1984).....	10
<i>Corum v. University of North Carolina</i> , 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)	10, 18
<i>State v. Jackson</i> , 348 N.C. 644, 648 (1998)	11
<i>Virmani v. Presbyterian Health Services Corp.</i> , 350 N.C. 449, 475 (1999)	11
<i>San Antonio Indep. School District v. Rodriguez</i> , 411 U.S. 1, 37 (1973)...	11
<i>Keyishian v. Board of Regents of University of State of N.Y.</i> , 385 U.S. 589, 603 (1967)	12, 16
<i>Evans v. Cowan</i> , 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (N.C. App. 1999).	12
<i>Warren v. New Hanover County Bd. of Educ.</i> , 104 N.C. App. 522, 526, 410 S.E.2d 232, 234 (N.C. App. 1991).	12
<i>Howell v. Town of Carolina Beach</i> , 106 N.C. App. 410, 419, 417 S.E.2d13 277, 283 (1992)	
<i>Kirby v. City of Elizabeth City, North Carolina</i> , 388 F.3d 440, 446 (4th Cir. 2004)	13
<i>Cromer v. Brown</i> , 88 F.3d 1315, 1326 (4th Cir. 1996)	15, 18
<i>Elrod v. Burns</i> , 427 U.S. 347, 363 (1976).	15

<i>Iglesias v. Wolford</i> , 667 F.Supp.2d 573, 587 (E.D.N.C. 2009).	
<i>Nova University v. Board of Governors of University of North Carolina</i> , 305 N.C. 156, 165-166, 287 S.E.2d 872, 879 (N.C. 1982)	16
<i>Jurgensen v. Fairfax County, Va.</i> , 745 F.2d 868, 880 (4th Cir. 1984).	17
<i>Wieman v. Updegraff</i> , 344 U.S. 183, 197-198 (1952).	17, 18, 24
<i>Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois</i> , 391 U.S. 563, 567, 571 (1968).	16, 17, 18
<i>Emergency Coalition to Defend Educational Travel v. U.S. Dept. of the Treasury</i> , 545 F.3d 4, 12 (D.C. Cir. 2008)	19
<i>East Hartford Ed. Ass'n v. Board of Ed. of Town of East Hartford</i> , 562 F.2d 838, 843 (2d Cir. 1977)	20
<i>Cooper v. Ross</i> , 472 F.Supp. 802, 811 (D.C.Ark. 1979)	20
<i>Moore v. Gaston County Bd. of Ed.</i> , 357 F.Supp. 1037, 1041 (D.C.N.C. 1973).	20
<i>Wilkie v. Robbins</i> , 551 U.S. 537, 556 (2007)	25
<i>McCallum v. North Carolina Co-op. Extension Service</i> , 142 N.C.App. 48, 55, 542 S.E.2d 227, 233-34 (N.C.App. 2001).	25
<i>Ollman v. Toll</i> , 704 F.2d 139, 140 (4th Cir. 1983).	25
<i>Scallet v. Rosenblum</i> , 911 F.Supp. 999, 1013, 1020 (W.D.Va. 1996)	25
<i>Dube v. State University of New York</i> , 900 F.2d 587, 597 (2d Cir. 1990).	26

Coleman v. Quaker Oats Co., 232 F.3d 1271, 1290 (9th Cir. 2000); *Taggart v. Time Inc.*, 924 F.2d 43 (2d Cir. 1991). 26

Rutan v. Republican Party of Illinois, 497 U.S. 62, 73-76 (1990) 27

Blankenship v. Manchin, 471 F.3d 523, 528 (4th Cir. 2006). 27

Goldstein v. Chestnut Ridge, 218 F.3d 337 (4th Cir. 2000) 27

Statutes:

N.C. Const. art. I, § 15. 9, 10, 11, 12

N.C. Const. art IX, § 2 9, 10, 11, 12

N.C. Const. art.I, § 14. 9, 10, 11, 12

Other Authorities:

U.S. Const. amend. I..... 9, 10, 11, 12

No. COA11-506

IN THE NORTH CAROLINA COURT OF APPEALS

Terri Ginsberg,)
Plaintiff-Appellant,)

v.)

From Orange County
Case No. 09-CVS-1789

Board of Governors of)
the University of North Carolina,)
Defendant-Appellee.)

PLAINTIFF-APPELLANT'S BRIEF

ISSUE PRESENTED

- I. Did the trial court err, pursuant to N.C. R. Civ. P. 56, in granting the defendant's Motion for Summary Judgment with respect to the plaintiff's claim that the defendant violated her constitutional right to freedom of speech?

STATEMENT OF THE CASE

Terri Ginsberg commenced this constitutional action by the filing of a complaint and the issuance of summons on 8 October 2009. (R pp 2-19). The complaint alleged violation of the plaintiff's freedom of speech, rights of conscience and right to equal protection. (R p 17). The defendant filed a Motion for Summary Judgment on all of the plaintiff's claims on 8 September 2010. (R pp 31-32). The Honorable Shannon R. Joseph, Superior Court Judge, heard arguments on the motion on 25 October 2010. (R p 496). A judgment and order dismissing the case was issued on 1 November 2010 and filed 4 November 2010. (R p 496). The plaintiff filed a notice of appeal on 1 December 2010. (R pp 497-98). The record was settled by agreement of the parties on 19 April 2011. (R p 500). The record was stamped as filed in the Court of Appeals on 28 April 2011 and docketed on 23 May 2011. (R p 1). Transmitted with the Record was the deposition of the plaintiff, Volumes I and II. (R p 499). One of the plaintiff's attorneys, Rima Kapitan, was granted pro hac vice admission to the Court of Appeals on 13 January 2011. (R p 502).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Judge Joseph's order, which entered judgment as a matter of law in favor of the defendant on all of the plaintiff's claims, is a final judgment and appeal is therefore proper pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE FACTS

Appellant Terri Ginsberg ("Ginsberg") was a non-tenure track Teaching Assistant Professor ("TAP") at North Carolina State University ("NCSU") in the Film Studies Program during the 2007-2008 academic year. (R pp 21-22 ¶¶ 10-11). Members of the English Department and Middle East film screening series committee at NCSU, including Marsha Orgeron ("Orgeron"), Devin Orgeron, Akram Khater ("Khater"), Antony Harrison ("Harrison"), Maria Pramaggiore ("Pramaggiore"), and Anna Bigelow ("Bigelow"), strongly encouraged her to apply for a tenure-track position in Film Studies that was to begin in the 2008-2009 academic year. (R pp 144-45). One of the referees listed on Ginsberg's TAP application told her that Harrison and the Orgerons were enthusiastic about her application for the tenure-track position. *Id.* ¶¶ 12(g), (h).

NCSU held a Middle East Film Screening series coordinated by the Film Studies Program and the Middle East Studies Program in the Fall of 2007, which Ginsberg was asked to curate. (Ginsberg Dep Vol. I, 106:6 - 107:10). During her introductory remarks to one of the films, *Ticket to Jerusalem*, which was about a Palestinian film director and his struggles to

show film *Occupied East Jerusalem*, Ginsberg thanked the audience for supporting the screening of alternative viewpoints such as the one in the film. (R pp 112-115, ¶¶ 4-10). Khater and Orgeron became concerned that the audience might infer from the comments that their programs espoused particular political perspectives in relation to the conflict. (R pp 47 ¶¶10-11, 58 ¶ 12, 106-07 ¶ 6). The introduction bothered Orgeron to such an extent that she talked about it to several people, including at minimum Khater, Devin Orgeron, Pramaggiore, and Bigelow. (R pp 106-7 ¶¶ 4-6; 446:3-13).

Orgeron and Khater held a meeting with Ginsberg to discuss her introduction, and Khater, even by Orgeron's account, spoke in a manner that was "forceful and showed frustration on his part" (R p 59, ¶ 17). Orgeron allowed Khater to take the lead in the meeting and did not say very much. (R p 59 ¶ 17). Khater told Ginsberg explicitly during the November 9 meeting that because of her introduction to the *Ticket to Jerusalem* film, there would be no further collaboration in the future between the Film Studies and Middle East Studies Programs. (R p 115 ¶ 11; Ginsberg Dep 219:18-25).

At the meeting, Khater also addressed concerns Ginsberg had raised that the bureaucratic obstacles to payment of their guest speaker, Fuad

Sha'ban, who was of Syrian origin and nationality, and who was Muslim, was aggravating the effect of discriminatory screenings he had faced elsewhere. (R pp 423:2 - 425:13, 426: 16 - 430:21). Khater was "highly offended" by the fact that he interpreted her e-mail as accusing him of discrimination. (R p 48 ¶ 14).

Although Ginsberg played a leading role in the screening series in the Fall of 2007 and suggested all of the films that were shown, after the introduction Orgeron and Khater began steering the screening series committee away from films she sought to show the next semester that they feared would be too political and too controversial. (R pp 47 ¶ 8, 57-58 ¶ 10, 70, 72-75, 77, 106). For example, Khater discouraged films that focused on "political hot spots" and "bleeding edge artistic films that would . . . generally be far beyond the cultural and intellectual grasp of most of our student body." (R pp 75, 81).

Dr. Ginsberg applied for the tenure-track position in Film Studies in October of 2007. (R p 117 ¶ 19). The position vacancy notice called for applicants with "a primary concentration in at least one area of European Cinema, although additional areas of expertise are welcome (other national cinemas, digital media, theory, etc.)" and "an excellent research and

teaching record in the area advertised.” (R p 91). The first document from the search committee deliberations reveals that Ginsberg was listed on the committee’s notes as the first of the “First Tier Candidates.” (R pp 92-98). Suddenly, Ginsberg fell out of favor of the committee and was not listed in either the first or the second tier, but moved to the bottom of the “reject” tier, and was not even granted an interview for the position. (R pp 102-05; R 117 ¶19). The reason listed on the committee’s November 29 notes was that Ginsberg was “now working with Palestinian/Israeli, rank issue raised by [Harrison].” (R p 103). The “rank issue” referred to the fact that “Dr. Ginsberg’s experience and the quantity of her publications exceeded that which normally would be expected of a beginning assistant professor in our department” (R p 61 ¶ 28).

Included in the tier above her were candidates who did not even appear to be in the field of Film Studies, including a candidate about whom the notes said, “is he really film studies?” and another who was “really interesting, but musicologist.” (R pp 103-05). The position was instead offered to a candidate whose publication and teaching records were not nearly as strong as Ginsberg’s, and although this candidate wrote about Holocaust film as well, that scholarship, unlike Dr. Ginsberg’s, did not

challenge Zionism or engage alternative Jewish perspectives. (R pp 116 ¶ 16; 149 ¶16(a)). Ginsberg's contract was not renewed for the next year. (R p 43 ¶ 14).

Ginsberg is an expert in European cinema, and other experts in the field described her anthology on German cinema as the most authoritative single-volume scholarly resource on German cinema ever published. (R pp 120 ¶ 5, 150-51). At the time of her application for the tenure-track position, the search committee knew she had published a book about Holocaust film, an anthology on German film, and was continuing with a book-length work on German cinema (R p 52 ¶ 9; Ginsberg Dep Vol II, 64:12-15). The publication record of Gelley, who was hired for the position, was not as prolific in the area of European film; for example, she had not published any books. (R p 62-63 ¶ 32; 117 ¶ 20).

Since the fall of 2007, as a result of the actions discussed herein, Ginsberg has found it "psychologically difficult" to teach about cinematic topics "even remotely connected to the Palestinian-Israeli conflict." (R pp 117-18 ¶ 21).

ARGUMENT

I. STANDARD OF REVIEW

This Court applies a *de novo* standard of review for summary judgment decisions. *Moody v. Able Outdoor, Inc.*, 169 N.C.App. 80, 83, 609 S.E.2d 259, 261 (N.C. App. 2005).

Summary judgment “is a drastic remedy which must be used cautiously so that no party is deprived of trial on a disputed factual issue.” *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C.App. 676, 681, 535 S.E.2d 357, 361 (2000). It is only appropriate where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” Rules Civ. Proc., G.S. § 1A-1, Rule 56.

This motion must be denied where the non-moving party shows a dispute as to one or more material issues. *Johnson v. Trustees of Durham Tech. Cmty. Coll.*, 139 N.C.App. 676, 681, 535 S.E.2d 357, 361 (2000).

Summary judgment is “particularly inappropriate where issues such as motive, intent, and other subjective feelings and reactions are material and where the evidence is subject to conflicting interpretations. *Creech v.*

Melnik, 347 N.C. 520, 530, 495 S.E.2d 907, 913 (N.C. 1998). "Constitutional cases in general pose special problems for the summary judgment procedure, particularly where the ultimate constitutional issues require carefully developed factual predicates for fair resolution." *Jackson v. Bair*, 851 F.2d 714, 718 -719 (4th Cir. 1988).

II. THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S SPEECH CLAIM ON SUMMARY JUDGMENT.

A. North Carolina Constitution affords more protection for fundamental rights than the Federal Constitution.

North Carolina courts often give "great weight" to federal decisions involving constitutional provisions that are "parallel" to those in the state's constitution. *State v. Arrington*, 311 N.C. 633, 643 (1984). However, generally, the North Carolina Constitution "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. University of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Indeed, North Carolina courts "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens..." *Id.* The courts are "not bound by decisions of federal courts, including the

United States Supreme Court” in interpreting the State’s own constitution. *State v. Jackson*, 348 N.C. 644, 648 (1998); *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 475 (1999) (internal quotations removed) (“... state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.”)

There are important considerations that make academic speech protections in North Carolina stronger than the federal protections. Section 15 of the North Carolina Constitution provides, “The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.” N.C. Const. art. I, § 15. Moreover, Article IX further emphasizes the importance of education, which reads, “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.” N.C. Const. art IX, § 2. This grant of fundamental status stands in stark contrast to federal law, which does not protect education as a fundamental right. *San Antonio Indep. School District v. Rodriguez*, 411 U.S. 1, 37 (1973).

Despite the fact that the U.S. Supreme Court does not recognize education as a federal right, it has given academic freedom special

protection because of the central role education plays in advancing and protecting other freedoms. It held that to deny freedom of inquiry and impose any “straight jacket on the intellectual leaders in our colleges and universities” would be to cause “our civilization [to] stagnate and die.”

Keyishian v. Board of Regents of University of State of N.Y., 385 U.S. 589, 603 (1967) (internal quotations omitted).

Since the North Carolina free speech provision guarantees education as a fundamental right, it therefore protects academic freedom to an even higher degree than its federal counterpart.

B. There are questions of material fact as to whether Ginsberg’s constitutional right to freedom of speech was violated.

Section 14 of Article I of the North Carolina Constitution provides, “Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained. . . .” N.C. Const. art.I, § 14. For a constitutional speech claim to be properly advanced, the speech at issue must involve a matter of public concern. *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (N.C. App. 1999). If the speech meets the threshold, the Court must determine whether “the interests of the speaker and the community in the speech outweigh the interests of the employer in

maintaining an efficient workplace.” *Warren v. New Hanover County Bd. of Educ.*, 104 N.C. App. 522, 526, 410 S.E.2d 232, 234 (N.C. App. 1991).

1. The speech in question relates to a matter of great public concern.

“The test for determining whether plaintiff’s expression was one of ‘legitimate public concern’ is whether the matter is one in ‘which free and open debate is vital to informed decisionmaking by the electorate.’” *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 419, 417 S.E.2d 277, 283 (1992) (internal citation removed); *Kirby v. City of Elizabeth City, North Carolina*, 388 F.3d 440, 446 (4th Cir. 2004) (Speech is of public concern when it “involves an issue of social, political, or other interest to a community.”).

a. Appellant’s introductory remarks at the film screening were protected speech.

In its summary judgment motion, NCSU characterized the question of whether Ginsberg’s speech related to a matter of public concern as “debatable” and argued in a footnote that Ginsberg’s introductory statement was arguably an “abstract, academic point,” not a controversial political statement. NCSU did not cite any case law in support of this conclusory argument, and it therefore cannot have served as the basis for

the grant of summary judgment. Although Appellant is therefore not required to address it on appeal, she will do so briefly here.

Ginsberg's introduction to the *Ticket to Jerusalem* film related to issues of great public import. Ginsberg's remarks at the *Ticket to Jerusalem* film were made at a public event which members outside the NCSU community attended. (R p 405 405:3-5). Her remarks had nothing to do with a personal condition of her employment; she was talking about the Palestinian-Israeli conflict. The Chancellor of NCSU and Khater believe the Palestinian-Israeli conflict is an important public issue for the people of North Carolina and the world. (R pp 414:23 - 415:10).

Although Ginsberg's point may well have been abstract and academic, there is no exception within the Constitution's speech protections for abstract academic points. The question is whether her speech had implications for the public interest. Ginsberg's statement had clear political implications. She was thanking the audience for supporting the airing of an independent films that presented alternative Palestinian perspectives. (R pp 112-115, ¶¶ 4-10). The fact that Ginsberg grounded her point in apparatus theory does not detract from its political import.

b. Plaintiff's discrimination complaint falls within the scope of Article I, Sec. XIV.

Ginsberg's complaint to Khater about policies that had a discriminatory effect on guest speakers is a matter of public concern because it involved an issue of social and political interest to the community at large. *See Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996); *see also* (R pp 412:9-10, 429:9-18).

2. NCSU's interest in preventing the appearance of bias and preventing offense to Khater does not outweigh Plaintiff's interest in speaking on a significant matter of public concern.

If speech touches upon a matter of public concern, the court must determine whether "the interests of the speaker and the community in the speech outweigh the interests of the employer in maintaining an efficient workplace." *Warren*, 104 N.C. App. at 526, 410 S.E.2d at 234; *Elrod v. Burns*, 427 U.S. 347, 363 (1976).

The government must prove that there was justification for the restriction, and that burden "varies depending upon the nature of the employee's expression" as it relates to a matter of public concern. *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 420, 417 S.E.2d 277, 283 (1992) (internal citations removed).

The government must “‘clearly demonstrate’ that the speech...‘substantially interfered’ with official responsibilities.” *Connick*, 461 U.S. at 150. The government cannot meet its burden by merely establishing a legitimate state interest; rather, the “interest advanced must be paramount, one of vital importance.” *Id.* at 362.

When weighing the importance of the employee’s speech, “[a]t the center of the employee's interest is the first amendment protection of the ‘unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Warren*, 104 N.C. App. at 526-27, 410 S.E.2d at 235 (internal citations removed).

In performing the *Connick-Pickering* balancing test, the court may also consider the interests of the larger community. *Iglesias v. Wolford*, 667 F.Supp.2d 573, 587 (E.D.N.C. 2009). As the Supreme Court made clear in *Keyishian* when the hiring and retention of employees alleged to be subversive was challenged,

The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection. . . .The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role

in a democracy that is played by those who guide and train our youth.

Nova University v. Board of Governors of University of North Carolina, 305 N.C. 156, 165-166, 287 S.E.2d 872, 879 (N.C. 1982) (internal quotations removed).

When considering the government's interest in effective fulfillment of its responsibilities to the public, "[t]he essential question is whether plaintiff's expression impedes his or her ability to fulfill the responsibilities of the job." *Howell*, 106 N.C.App. at 420, 417 S.E.2d at 283. The nature of the employee's position is of particular relevance to the weight given to the government's interest in controlling employee behavior. *Jurgensen v. Fairfax County, Va.*, 745 F.2d 868, 880 (4th Cir. 1984).

Because of the importance of professors' role in our democracy and the nature of their position, it is important for the state to "encourage them to exercise their independent judgment" and give them latitude as they carry out their roles. *Wieman v. Updegraff*, 344 U.S. 183, 197-198 (1952).

a. The government's interest in close working relationships

The mere fact that a plaintiff's speech offended an employer or caused it discomfort is not sufficient to overcome a plaintiff's speech rights. *Corum*, 330 N.C. at 776, 413 S.E.2d 276, 286.

When the government asserts a particular interest, it must show that the effect of the speech on the community as a whole or on the university in particular was such that it impeded the asserted interest. *Pickering v. Board of Ed. of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 567, 571 (1968). That showing requires more than an assertion that other employees were angry or uncomfortable. *Id.* at 571.

In Ginsberg's case, NCSU's only discernable interest in suppressing Plaintiff's complaints of discrimination about Fuad Sha'ban is to prevent Khater from being personally offended at being accused of discrimination. NCSU's interest in preventing Khater from being personally offended falls very short of outweighing the public's interest in Ginsberg's speech. *See Connick*, 461 U.S. at 16; *Cromer*, 88 F.3d at 1326.

b. The government's interest in controlling the audience's perception of the M.E. Film Screening Series

Without addressing the importance of Ginsberg's speech, NCSU asserted that its interest in suppressing Plaintiff's introduction to the *Ticket to Jerusalem* film stemmed from its desire to ensure that the audience did not perceive Ginsberg as implying that the M.E. Studies and Film Studies

programs espoused a particular political perspective, thereby ensuring that they maintained an open dialogue. (R p 47 ¶ 11, 58 ¶ 12).

While Appellant agrees that maintaining an open dialogue is important, she does not agree that universities have an important interest in making sure students think their professors and programs are all politically neutral. If universities were permitted to suppress academic speech on that basis, professors would be terrified of making any statements with political implications. *See Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) ("Education is a kind of continuing dialogue, and a dialogue assumes, in the nature of the case, different points of view."). NCSU's interest fails to outweigh the public's interest in hearing Plaintiff's speech because 1) NCSU has not demonstrated that Appellant's speech harmed the interest of maintaining an open dialogue, and 2) Appellant's speech relates to a matter of grave public concern and outweighs any danger that audience members would impute specific political beliefs onto the programs.

Courts are hesitant to allow suppression of protected speech when it is questionable whether a government's stated interest was actually harmed. If the record does not support a factual determination that a

threat to what NCSU characterizes as “open dialogue” has actually materialized or was imminent, the balance cannot tip in favor of the employer. *Jackson*, 851 F.2d at 721-22.

Courts have held that professors have discretion over the manner in which they present the substantive material they were hired to teach. *Emergency Coalition to Defend Educational Travel v. U.S. Dept. of the Treasury*, 545 F.3d 4, 12 (D.C. Cir. 2008) (“Any substantive governmental restriction on Smith's academic lectures would obviously violate the First Amendment.”); *East Hartford Ed. Ass'n v. Board of Ed. of Town of East Hartford*, 562 F.2d 838, 843 (2d Cir. 1977) (“Freedom to teach in the manner of one's choice is a form of academic freedom that is universally recognized. . .”); *Cooper v. Ross*, 472 F.Supp. 802, 811 (D.C.Ark. 1979) (“...in the context of a university classroom, Cooper had a constitutionally protected right simply to inform his students of his personal political and philosophical views.”); *See also Moore v. Gaston County Bd. of Ed.*, 357 F.Supp. 1037, 1041 (D.C.N.C. 1973).

Universities certainly have less of an interest in regulating professors' extracurricular speech.

Here, NCSU interest fails to outweigh Ginsberg's right to control the manner in which she expressed herself at a public, on-campus event. Assuming arguendo that NCSU stated a legitimate state interest in preventing public misperception about the politics of the M.E. Studies program, NCSU has not demonstrated that the court should have found, as a matter of law, that the non-hiring of Ginsberg for the tenure-track position threatened that interest, or that the remedy of excluding her from the University was proportionate.

First, the claims that the main purpose of the film screening series was dialogue, or that hiring Ginsberg to a full-time position would have disrupted or undermined that purpose, are not premises that must be accepted at the summary judgment stage. For one thing, Khater admits that the program did not even hold a discussion after the *Ticket to Jerusalem* film, nor was a discussion planned in this or several other screening series films. (R pp 405:19 - 407:1). Ginsberg herself requested that discussion be held after every film, but Khater and Orgeron told her there would be no discussion. (Ginsberg Dep Vol I 131:22-23, 132:13-16; R p 406:19-21). So, it was Khater and Orgeron, not Ginsberg, who prevented dialogue, since they never planned to have a dialogue in the first place.

The likelihood that Ginsberg's supposed imposition of her views on the audience was a genuine concern is further undermined by the fact that Orgeron admitted Ginsberg did not impose her views on students. (R p 438:14-17). In fact, she commented that Ginsberg, "appears to take her students' thoughts so seriously." (R p 238).

There is certainly a question of fact in the record about whether Ginsberg even made the statement that Orgeron and Khater attribute to her. Orgeron claims that Ginsberg was telling the audience "something to the effect" that "their attendance at the film "signaled their support for the Palestinians or the Palestinian cause." (R pp 441:10-17, 448:13-14). There is no indication that any students or members of the general public interpreted the introduction the way NCSU did. (R pp 445:22 - 446:2). In fact, Orgeron could not remember a single instance of a student or member of the general public complaining about Ginsberg's introduction, nor was any such instance mentioned in NCSU's affidavits. (R pp 34-108, 445:22 - 446:2, 447:3-9).

Khater's memory about the content of the statement was admittedly vague: "I'm paraphrasing because I don't recall the exact words -- that by their very presence, the audience is supporting the Palestinians and the

Palestinian cause. (R p 405:9-12). Orgeron's memory was also vague, and she admits Ginsberg would not likely be so simplistic as to believe there's only one Palestinian view or "cause." (R pp 441:18-442:7).

Ginsberg, on the other hand, remembers what she said during the introduction in detail:

I concluded my introduction by thanking the audience for choosing to attend, free of charge, this independent, Palestinian film rather than a mainstream, commercial or Hollywood film; by doing so, I stated, the audience was showing its support for the airing of Palestinian cultural perspectives, especially those which promote Palestinian liberation, and that for this reason, I was very proud to be able to present the film to them, and hoped they would enjoy it.

(R p 114 ¶ 8; Ginsberg Dep Vol I 124:5-9). This statement is consistent with the NCSU's desire to "open up dialogue" about the region. (Orgeron Affid ¶ 14). Ginsberg's version of her introduction is corroborated by Mensch, who adamantly denies that Appellant told the audience they were pro-Palestinian. (R p 121 ¶ 9). The factual dispute on the record is well-summarized in Pramaggiore's affidavit, in which she wrote, "Ginsberg and Orgeron gave me somewhat divergent accounts of what Ginsberg said in her introduction to the film, and they interpreted her remarks differently."

(R p 106 ¶ 5). This Court is not required to accept Orgeron's version of what Ginsberg said.

Khater and other members of the search committee who denied Ginsberg an interview for the tenure-track position were very uncomfortable with associating the views Ginsberg presented with the university.

Orgeron says professors publicly express political opinions "all the time," and according to her there is nothing inappropriate about giving a political opinion at a film screening. (R pp 437:6-12, 439:3-6). But clearly she and Khater were bothered not simply by the fact that she stated an arguably political opinion, but by the subject matter that that opinion addressed. Khater stated that he was worried the audience would impute "bias" to the programs. (Ginsberg Dep Vol II 140:18:24).

Other faculty such as Mensch did not view Ginsberg's introduction as inappropriate. (R p 121 ¶¶ 7-11). As Pramaggiore puts it, "I think it is likely that Orgeron and Khater were being overly cautious about the reputations of their programs and what people would think about the film series." (R pp 106-07 ¶ 6). Khater and Orgeron admitted that Ginsberg was more qualified than they to give the introduction because she was the

expert.¹ So, their interference with and reaction to Ginsberg's introduction is not within the realm of their authority under constitutional free speech protections; it directly violated the *Wieman* requirement that professionals be given discretion within their area of expertise.

NCSU simply does not make a showing that the non-hiring of Ginsberg prevented disruption of "open dialogue," that that interest outweighed Ginsberg's interest in speaking, or that exclusion of Ginsberg from the university was narrowly tailored to the perceived affront to university interests.

3. Appellant's speech was a motivating factor in her reprimand and non-hire for the tenure-track position.

The most recent opinions have held that protected speech must be a "motivating factor" to the retaliatory acts. *Wilkie v. Robbins*, 551 U.S. 537, 556 (2007) (internal citations removed); *McCallum v. North Carolina Co-op. Extension Service*, 142 N.C.App. 48, 55, 542 S.E.2d 227, 233-34 (N.C.App. 2001). The issue of motivation "depends in large part on the credibility of

¹ Khater said Ginsberg should be the one to give the *Ticket to Jerusalem* introduction because she was the expert in the field. (Pl. Doc. 11). Orgeron said she would stay out of the film selection process because it was "way out of [her] area of expertise. (Pl. Doc. 10). She added, though, that she liked "the idea of the films being from different countries and about different subjects." (Pl. Doc. 10).

the witnesses' oral testimony." *Ollman v. Toll*, 704 F.2d 139, 140 (4th Cir. 1983). Courts hesitate to grant summary judgment where motivation is an essential element of the alleged offense. *Scallet v. Rosenblum*, 911 F.Supp. 999, 1013, 1020 (W.D.Va. 1996) (citing *Jones v. Dodson*, 727 F.2d 1329, 1337 (4th Cir.1984)).

Defendant argued that the only way Appellant can demonstrate a question of fact about whether her speech was a motivating factor in the hiring decision is by putting forward direct evidence that it motivated the decision. To the contrary, "evidence of retaliation may often be completely circumstantial" *McCallum*, 142 N.C.App. at 55, 542 S.E.2d at 233-34.

Circumstantial evidence such as changes in behavior can be helpful in determining whether the employment action was influenced by the speech. *Warren*, 104 N.C.App. at 527, 410 S.E.2d at 235.

One situation that raises a suspicion of improper motivation is when there is an indication that the employer is uncomfortable about the controversial nature of the employee's speech. *Dube v. State University of New York*, 900 F.2d 587, 597 (2d Cir. 1990).

Furthermore, courts view with suspicion employer claims that an individual is overqualified. See *Coleman v. Quaker Oats Co.*, 232 F.3d 1271,

1290 (9th Cir. 2000); *Taggart v. Time Inc.*, 924 F.2d 43 (2d Cir. 1991). The “overqualified” concern is particularly bizarre in the academic context, which involves “conversation on the highest level for the very best people you can think of.” *Wieman*, 344 U.S. at 197-198 (internal citations removed).

- a. NCSU’s disciplinary meeting subsequent to her introduction both amounted to an adverse action and directly evidenced NSCU’s motivation.

NCSU previously argued that a reprimand could not constitute an adverse employment action. However, an adverse effect need not rise to the level of a discharge to be actionable, and can be one that is “threatening, coercive, or intimidating so as to intimate that punishment, sanction, or adverse regulatory action will imminently follow.” *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73-76 (1990); *Blankenship v. Manchin*, 471 F.3d 523, 528 (4th Cir. 2006). In the free speech context, an employee must be “... adversely affected in a manner that, at the very least, would tend to chill his exercise of First Amendment rights.” *Goldstein v. Chestnut Ridge*, 218 F.3d 337 (4th Cir. 2000) (citation omitted).

Subsequent to Ginsberg’s introduction, the NCSC strongly reprimanded Plaintiff, effectively chilling her right to engage in free speech. Following the M.E. Screening Series, Khater harshly rebuked

Plaintiff for the introduction she gave during the series as well as about her complaint of discrimination, yelling at her to the point where Ginsberg felt she was unsafe. (Ginsberg Dep Vol I 212:1-25, 217:15-25, 219:18-25; R pp 48 ¶ 14, 115 ¶ 11). Khater told her that that because of her introduction, her department could no longer participate in the series, and that she should join the ranks of a professor who had resigned from a different program (Ginsberg Dep Vol I 219:18-25; 220:1-15). Ginsberg subsequently submitted her resignation from the program, and continues to feel the effects of the meeting when she speaks publicly. (Ginsberg Dep Vol II 13:14-25; (R pp 117-18 ¶ 21). A reasonable juror could find that the Defendant's reprimand was threatening, coercive, and intimidating so as to constitute an adverse action. Orgeron failed to interrupt or comment on Khater's berating of Ginsberg. (Ginsberg Dep Vol II 45:12-20, 46:7-10, 73:19-23; R p 115 ¶ 11).

ii. Ginsberg provided circumstantial evidence that NCSU was uncomfortable with her expression of her views after her introduction.

Evidence in the record shows that NCSU's was uncomfortable with the public expression of her point of view. Immediately following Ginsberg's speech, the Oregons, Harrison, and Khater noticeably changed

their attitudes toward Ginsberg. All three of these individuals played a part in denying Ginsberg an interview for the tenure-track position.

Before Ginsberg's remarks at the *Ticket to Jerusalem* screening, these same individuals strongly encouraged Ginsberg to apply for the tenure-track position in film studies. Marsha and Devin Orgeron and Harrison encouraged her to apply several times, both before and after her acceptance of the TAP position, and even before the English department was authorized to begin recruiting for the tenure-track position. (R pp 112 ¶¶ 2-3, 144-45). Orgeron helped Ginsberg find a place to live and she held a welcoming party for Ginsberg, which the English Department had never done for a TAP in the past. (R p 435:1-9). Ginsberg viewed that encouragement as strong enough that she gave up a one-year position at another university that was closer to home to accept the temporary position at NCSU, believing that the following year she would continue teaching in the permanent position. (R p 112 ¶ 3). Appellant was even told she was a top contender for the tenure-track position until her "pro-Palestinian" introduction to *Ticket to Jerusalem* changed Orgeron's mind. (R p 145).

This strong encouragement disappeared completely after the November 9, 2007 meeting. Ginsberg went from being listed on the Search Committee notes as first in the top tier of candidates to not even being granted an interview. (R pp 93, 96, 103, 117 ¶19). Orgeron began speaking negatively about Ginsberg's involvement in the film screening series. (R pp 106-07 P¶ 4-6, 446:3-13). Orgeron also exhibited hostility toward Ginsberg and excluded her from involvement in the European Film Series the following semester. (Ginsberg Dep Vol II 109:11 - 110:4).

NCSU's frequent protestations that that the individuals involved agree completely with Ginsberg's political views are immaterial. The question is not whether they held similar views to Ginsberg about Zionism and/or the Israeli-Palestinian conflict, but whether they prevented her from airing those views publicly on campus. Although Khater claims he and Appellant have "very similar - if not the same - views on the Palestinian/Israeli conflict", he admits he was "concerned about the effect that [her introduction] might have on our programs" (R pp 48, ¶ 14, 49 ¶ 18). Orgeron, moreover, was "uncomfortable" when Ginsberg praised the audience for supporting the airing of a Palestinian liberation perspective. (R p 58 ¶ 13). She and Khater "had the responsibility to

protect the public face of our programs.” (R p 59 ¶16). Although Orgeron wrote about Holocaust film, as did Ginsberg, she stayed away from the topics of Israel and Zionism. (Ginsberg Dep Vol II 59:13-22). She also made an unnecessary characterization of a documentary Ginsberg showed about Zionism as “controversial.”

There were several instances in which Khater and Orgeron expressed discomfort with the films Ginsberg sought to show as part of the film screening series. Khater told Ginsberg the films she wanted to show were too “didactic” and “heavy-handed,” “bleeding edge artistic films that would . . . generally be far beyond the cultural and intellectual grasp of most of our student body.” (R pp 75, 81). Orgeron agreed with him. (Ginsberg Dep Vol I 157:7-22). Khater preferred to show films that were not political and instead focus on films about “social issues” such as “gender in the Middle East, Islam in the Modern World, music, popular culture, etc.” (R p 75).

Furthermore, Orgeron abstained from purchasing many films that were pro-Palestinian or directed by Arabs, Muslims, or Palestinians for Ginsberg’s classes, claiming that she simply could not find the films to purchase online, that the films were only available on VHS, or were too

expensive. (Ginsberg Dep Vol II 86-87; R pp 215-20, 222-24, 229, 232).

Conversely, Orgeron was able to purchase most of the Israeli films requested by Ginsberg for her classes. (R pp 225-28, 229, 230-32). However, most of the films Orgeron claimed she could not find on Amazon.com were available for purchase on Amazon.com for a reasonable price. (R pp 278-318). Her omission only underlines Orgeron's discomfort with what she perceived as the controversial nature of Ginsberg's classes. Indeed, Orgeron felt the course on the Palestinian-Israeli conflict that Ginsberg taught in the spring semester would be an "alien concept to many of our students that they don't really know what they'd be getting into." (R p 233).

Finally, several of NCSU's witnesses seemed uncomfortable with the idea of presenting a Palestinian perspective without a qualifier or opposing view. Although Khater acknowledged that it is appropriate to give the Palestinian narrative greater time because it is largely absent from American media, whenever he gives a speech he presents Israeli views and says, "[T]his is how it is seen from this point, but this is how the Palestinians would view it." (Ginsberg Dep Vol II 14:1-3, 16:12-15).

Khater, knowing that Ginsberg had been on a delegation sponsored by

Faculty for Israeli-Palestinian peace, suggested she go on a trip to Israel sponsored by a group that Khater described as providing “propaganda for the State of Israel” because it “might be helpful for her teaching” (Ginsberg Dep Vol II 27:10-17, 77:21 – 78:6). Orgeron and Bigelow wanted to screen an Israeli film at the screening series in order to, as Orgeron put it, “balance out the perspective of the Palestinian film.” (R p 469 at 18-22; R p 70, 72). Ginsberg agreed and suggested some Israeli productions, but they were not the kind of Israeli films Khater was looking for, because the M.E. Film Screening Series needed to “allow for multiple points of views.” (R p 71, 75). Although Ginsberg is by no means opposed to presenting different perspectives, she does not believe that every Palestinian perspective has to be accompanied by an equal and opposite right-wing Israeli one. Indeed, such a restriction constitutes an unreasonable restriction of her scholarly discretion and academic freedom, and also reveals the underlying discomfort NCSU’s witnesses had with Ginsberg’s substantive views. (R p 116 ¶ 13).

b. The presence of Bennett and Thompson on the Search Committee does not defeat Appellant’s speech claim.

In cases where one or all of the decision-makers were not the same individuals alleged to have discriminatory or retaliatory animus, courts apply general principles of agency law to determine causation. *Staub v. Proctor Hosp.*, 131 S.Ct. 1186, 1191 (2011). In such cases, if a supervisor performs an act motivated by antimilitary animus in order to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable. *Id.* at 1194. Orgeron and Khater freely admit that they were bothered by Ginsberg's statement at the film introduction, as described *supra*. Orgeron also admits that she discussed her displeasure about the introduction with her husband, who was also on the search committee, and that he agreed with her. (R p 446:3-13). Pramaggiore also said Orgeron talked to her about it. (R p 106 ¶ 5). That strong displeasure, combined with the temporal proximity between the film introduction and the non-hire decision,² and the sudden change in attitude toward Ginsberg, is sufficient evidence that their hostility to Ginsberg's speech was a motivating factor in her discharge.

² *Stronach v. Virginia State University*, 631 F.Supp.2d 743, 749 (E.D.Va. 2008) (very close temporal proximity between the evidence of discriminatory intent and the allegedly adverse employment actions can establish causation).

There is also evidence that the Orgerons influenced the two individuals on the search committee who may have not necessarily known about Ginsberg's introduction first-hand. Since Marsha Orgeron was the director of the Film Studies Program, Devin Orgeron was a member of the search committee, and both had worked in the same program as Ginsberg, it is reasonable to assume that Bennett and Thompson would defer to a certain degree to the Orgerons in terms of representing what the hiring priorities of the program were. That reasonable assumption is supported in the record. Bennett faulted Ginsberg with having scholarship that demonstrated "too much focus on Jewish/Israel?" (R p 337). Unlike several of the comments about the other candidates on the list, she framed this comment as a question rather than as a statement. *Id.* Although Orgeron states that she believes Bennett was the first to raise this issue (R p 61 ¶ 28), Bennett's November 19 e-mail is dated subsequent to the November 13 notes which say, "current area of research appropriate to desired area?" (R p 328). She therefore admitted that she was basing her decision on the content of Ginsberg's speech and not on Ginsberg's qualifications for a position on European film. A jury could conclude that Bennett's decision was motivated by impermissible considerations as well and that the

Orgerons' dislike of Ginsberg's speech and outspokenness was the proximate cause of her non-hire. There is even sufficient evidence in the record that Ginsberg would not have been rejected from the position but for the Orgerons' hostility and Harrison's change of heart.

NCSU may also argue that Khater's hostility to Ginsberg's views are immaterial because he had no control of the hiring decision. He had control over the disciplinary meeting of Ginsberg and her involvement in the M.E. Screening Series, however, as argued above. In addition, although Khater did not serve on the Search Committee, Orgeron asked him what he thought of Ginsberg as a colleague and he responded that he did not find her "collegial"³. (R p 416:6-20). Other factors support the idea that Orgeron was heavily influenced by and deferred to Khater. Orgeron changed her mind about whether to bring an Israeli film that Ginsberg suggested be screened on campus after Khater shot it down. (Ginsberg Dep Vol I 225:9 – 226:16). Khater also said they had "more than one" conversation about her remarks at the introduction. (R pp 409:21-410:24).

³ Courts have noted that subjective criteria such as a job applicant's "attitude" have a clear potential for abuse *See Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1506 (4th Cir. 1988).

Finally, there is direct evidence that Ginsberg's speech about the necessity of supporting the screening of Palestinian liberation themes was the motivating factor in the denial of the position; Pramaggiore told Ginsberg shortly after the speech that she had been a top contender for the tenure-track position until her "pro-Palestinian" introduction changed Orgeron's mind. (R pp 145, 147).

c. NCSU's stated reason for declining to hire Ginsberg is unworthy of belief.

NCSU give some alternative reasons for denying Ginsberg an interview for the tenure-track position in film studies, including that 1) Ginsberg was overqualified for the positions because she had more publications than most assistant professors, 2) they had concerns about the publisher of one of her books, and 3) they were looking for a specialist in European film, and although she has expertise in European film, she also demonstrated recent interest in Middle Eastern film. Appellant is able to raise questions of fact about the genuineness of these purported reasons.

Appellant first responds to the claim that Ginsberg was overqualified. First, it is the clear policy of the NCSU that the most qualified professor should get the position. The job announcement itself

emphasized that it was looking for scholars with “excellent research and teaching.” (R p 91). Moreover, NCSU’s “Recruitment and Hiring” policies state, “The goal of the selection process is to find the best available person for the job . . .” and that the “individual selected for the position must be chosen from the pool of the most qualified applicants.” (R p 390; *see also* R pp 490:5-13, 491:12-19).

Harrison, who largely relied on the search committee’s recommendation, claimed that Ginsberg’s impressive record might cause other Assistant Professors “feelings of weirdness.” (R p 40:3-10, 474:18-25). Not only was that concern incongruent with the Department’s initial enthusiasm with Ginsberg’s candidacy, but it is a rather bizarre consideration for a university that seeks to hire the best scholars it can. In addition, Harrison and the Orgerons did not worry when he hired Ginsberg for the TAP position that the more highly-ranked Orgeron, who was her boss, would feel “weirdness.” (R pp 476:20-478:13).

NCSU also cited the fact that one of her books was published in a non-top-tier press.⁴ This claim is irreconcilable with NCSU’s first claim

⁴ Orgeron had never heard of Cambridge Scholars Publishing, but arrived at the conclusion that it was not top tier because none of the people on the committee had

that she was overqualified; NCSU is saying that she was underqualified and too qualified at the same time. Moreover, it is doubtful that this concern was really a substantial factor in Ginsberg's non-hire. For one thing, Orgeron herself admitted to publishing in at least one lesser quality press, but she did not think that was significant because she had published in several higher quality presses. (R p 464:10 - 465:10). Ginsberg's publication was only one of many publications in highly-ranked presses; in fact, she had more publications in top-tier presses than the candidate who got the position, even by Orgeron's count. (R p 461:10 -4629:6, 465:11 - 466:24). Even the publication at issue was comprised of parts that were published in top-tier academic journals and anthologies. (R p 150). A jury is not required to believe that NCSU was seriously bothered by the fact that one of Ginsberg's books was not published in a (supposedly) less than

heard of the press, did not recognize the scholars publishing in the press, and saw a blog discussion in which people expressed concerns with the press. (R pp 463:16 - 464:9). Therefore, Orgeron admits that she did not use objective criteria in arriving at her conclusion.

prestigious press when Ora Gelley, who got the position, had not published a book at all. (R pp 149-52, 155).⁵

The third, and perhaps most highly emphasized, reason NCSU gave for Ginsberg's non-hire was the allegation that her focus was not in European film. This reason is unworthy of belief for a number of reasons. First, the job announcement called for someone with a primary focus in European film but said "additional areas of expertise are welcome," including expertise in "other national cinemas." (R p 91) Film Studies professors often specialize in more than one area. (R pp 120-21 ¶ 6).

Second, a jury would not be required to believe, as a matter of law, that NCSU was genuine in its view that Ginsberg was not a scholar of European film. While Gelley, the person who was hired for the position, had never published a book or anthology, Ginsberg had published an anthology on German cinema and a monograph on Holocaust film and was otherwise much more qualified for the position.⁶ (R pp 117 ¶ 20, 155, 459:1-

⁵ Pramaggiore "told [Ginsberg] she spoke quite strongly in Department meetings against Dr. Orgeron's refusal to interview me. She told me that although she held nothing against the chosen candidate, Dr. Ora Gelley, she did not think Dr. Gelley shared my qualifications or appropriateness for the position." (R p 117 ¶ 20).

⁶ To Plaintiff's knowledge, it is not disputed that Plaintiff's teaching and service record was far more extensive and more diverse than Gelley's, or that Plaintiff's publication record on European film is exceptional. (Pl. Second Interrog. Resp. 1). Additionally,

23). Orgeron conceded that, to the best of her memory, Ginsberg's monograph on Holocaust film did address some European films. (R pp 459:24 - 460:4). Although Orgeron argues that Holocaust film is not necessarily European, the person Ginsberg would have replaced also taught Holocaust film as well, and moreover European film was not his exclusive focus either. (R pp 34-35 ¶ 7, 345-96).

In any case, surely NCSU does not seriously dispute that Ginsberg's anthology on German cinema was European; it was used in German Studies courses at NCSU and elsewhere. (R pp 242-43, 246-252, 258-60, 262-63). It was described by a reviewer as "the most authoritative single-volume scholarly resource on German Cinema ever published." (R pp 120 ¶ 5, 150-51, 272-73). Even the supposed shift in her scholarly focus to study of Israeli and other Middle Eastern film has a European origin; as Ginsberg

Gelley had never published a book length text focused exclusively on European national cinema, while Plaintiff published an anthology on German national cinema that has been described as one of the most important books in that area. She had also been invited to edit a second anthology on German cinema . (Pl. Interrog. Resp. 19). Also, Ginsberg published a book on Holocaust film that focuses almost exclusively on European films and which has been described by its endorses as groundbreaking and as a harbinger of an entirely new generation of cinema scholarship. *Id.* She also published one of the very few articles on Italian neorealist cinema on homosexual representation, which Richard Dyer—one of the field's top gay film critics, describes as never having been surpassed. (Pl. Interrog. Resp. 19).

pointed out, Zionism began in Europe. (Ginsberg Dep Vol II 129:24 - 130:12).

In addition, Orgeron made a judgment about the likely focus of Ginsberg's future work⁷ that does not seem to have been made until after Ginsberg's introduction to the *Ticket to Jerusalem* film and the meeting about the introduction; the committee raised this issue about Ginsberg's research focus for the first time on November 13, and Ginsberg was initially listed as the top candidate for the position. (R pp 92-98, 470:13-20). Ginsberg communicated through her application that she planned on continuing her work in German cinema. (Ginsberg Dep Vol II 64:10-15). In addition, Bennett's claim that Ginsberg did not even strike her as being in the top twenty candidates is not credible because it contradicts an earlier e-mail she sent listing Ginsberg as her third choice, her only concern being that she was "now working with Palestinian/Israeli" and she had "too much focus on Jewish/Israel." (R pp 99, 103).

⁷ This forecast did in fact turn out to be incorrect, as a review of Ginsberg's current resume demonstrates. (Pl. Docs. 899-906).

These inconsistencies are significant enough that a jury should be permitted to examine the witnesses' credibility with respect to their stated reason for declining to hire Ginsberg.

Further, NCSU is under the misimpression that unless plaintiffs have direct evidence of discrimination, courts cannot second-guess employment decisions. The United States Supreme Court has rejected this view. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 146-47 (U.S. 2000).

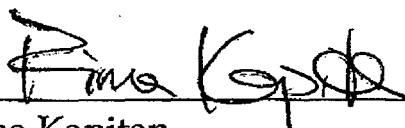
Appellant has shown that her speech was protected, that the public's interest in her speech outweighed the government's stated interests in suppressing it, and that her speech motivated NCSU's adverse employment actions.

CONCLUSION

For all the reasons detailed herein, there are issues of material fact that warrant reversal of the Superior Court's entry of summary judgment. Appellant respectfully requests remand to the Superior Court for trial.

This 24th day of June 2011.

Respectfully Submitted,

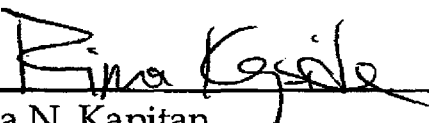


Rima Kapitan
Kapitan Law Office, Ltd.
IL State Bar No. 6286541
300 South Wacker Drive, Suite 1700A
Chicago, IL 60606
(312) 566-9590
rima@kapitanlaw.net

Marty Rosenbluth
Executive Director
NC Immigrant Rights Project
NC State Bar No. 38467
(919) 251-5078
marty@immigrantrightsproject.org
PO Box 926
Durham, NC 27702

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for the Appellant certifies that the foregoing brief, which is prepared using a proportional font, is less than 8,750 words (excluding the cover, index, table of authorities, certificate of service, and this certificate of compliance) as reported by the word-processing software on which it was written.



Rima N. Kapitan
Counsel for the Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a copy of the foregoing brief on counsel for the Appellee by depositing a copy, contained in a first-class postage-paid wrapper or envelope, at an office of the United States Postal Service, addressed as follows:

This the 24th day of June, 2011.

Gary Govert
Special Deputy Attorney General
State of North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602

Respectfully Submitted,



Rima N. Kapitan
Counsel for the Appellant