MEMORANDUM

To: R. J. Morrison
From: Applicant
Re: Snyder v. Regents of the University of Columbia
Date: January 15, 2014

Statement of Facts

Dr. Norm Snyder is a nephrologist and medical academician who was the former Chair of the Department of Medicine at the School of Medicine of the University of Columbia, a public university. In 2004, the University considered the possibility of moving the School of Medicine to a campus in Palatine, 20 miles away from its present location of Springville, which is also an urban center. This possible transition was subject to extensive debate within the University community. After Dr. Snyder wrote a letter to the editor to the *Star Bulletin*, protesting the plans to relocate the School of Medicine, calling the Regents' expected approval to be "ill-conceived, fiscally reckless, and detrimental to the needs of our indigent citizens." This caused a public protest. The University terminated Dr. Snyder's Chairpersonship on the grounds that his outspoken opposition to the relocation had caused widespread disharmony among the faculty and administration of the University.

Dr. Snyder wishes to seek injunctive relief. This memo discusses the likelihood of obtaining a preliminary injunction based on retaliatory employer action in violation of Dr. Snyder's First Amendment right to free speech under the Columbia Constitution.

Standard for Preliminary Injunction

Under Elkins v. Hamel, Columbia Supreme Court (2007), to obtain a preliminary injunction, a party must demonstrate: (1) a substantial likelihood of prevailing on the merits, (2) irreparable harm in the absence of the injunction, (3) the threatened harm outweighs any damage the injunction may cause to the party opposing it, and (4) the injunction, if issued, will not be adverse to the public interest.

Commented [BH1]: Good statement of the rule.

(1) Whether there is a substantial likelihood of prevailing on the merits

In the public employment context, a public employer may impose some restraints on job-related speech of public employees that would be unconstitutional if applied to the general public. Elkins. To determine whether a public employer's actions impermissible infringe on free-speech rights, Boyer stated a four-part test to evaluate a constitutional claim for First Amendment retaliation. The test is: (1) whether the speech in question involves a matter of public concern, (2) whether the employee's interest in commenting on matters of public concern outweighs the employer's interest in promoting efficient services. If the employee prevails on both parts, the employee must show (3) the speech was a substantial or motivating factor for the adverse employment action. If so, consider (4) whether the government employer has proven that it would have taken the same adverse employment action even in the absence of the protected speech.

Whether Dr. Snyder's speech involved a matter of public concern

When an employee speaks as an employee upon matters only of personal interest or for personal grievance, the speech is not protected. Elkins. Here, Dr. Snyder notes that the University is a public research facility. He was outspoken about the relocation of the School of Medicine to Palatine because the separation would unnecessarily isolate the Med School from its Basic Sciences facilities. From a fiscal standpoint, the citizens of Columbia would not be getting their money's worth. The community would not see a benefit for 40 years. It would also cause inconvenience because people in urban Springville using the medical facilities would have to travel longer distances to areas not supported by public transportation. This would be especially detrimental to the lower-income members of the community. Thus, these concerns are public because they involve a public university and the community at large.

An employee's speech must not merely relate generally to a subject matter that is of public interest but must sufficiently inform the issue as to be helpful to the public in evaluating the government conduct. Elkins. Here, Dr. Snyder addressed these concerns to the public by writing a letter to the *Star Bulletin* paper. This erupted into a public protest, and Dr. Snyder called it "the straw that broke the camel's back" and "the impetus for all the community opposition." Thus, the public was sufficiently informed of the issue for evaluating the public university's conduct.

Receipt of an incidental benefit does not necessarily transform one's speech into purely personal grievances. Harlan v. Yarnell, Columbia Supreme Court (2002). Here, Dr. Snyder may be receiving some incidental benefit because he has spent the last 20-plus years of his career building up the department into one of the best in the country. This likely comes with a reputation to uphold, and successfully opposing the relocation may bring positive attention from the community.

Commented [BH2]: Good job discussing an issue that might be hurtful to Dr. Snyder's case.

However, the court in Harlan held that speech that touches on matters of public concern does not lose protection merely because some personal concerns are included. In Harlan, the plaintiff's speech was deemed to relate to matters of public concern even though he might receive an incidental benefit of what he perceived as improved working conditions. Thus, like in Harlan, Dr. Snyder's will likely not be deemed to be one to express purely personal grievances.

In sum, Dr. Snyder's speech likely involved a matter of public concern since his speech involved a public university and the community at large, the public was sufficiently informed of the issue, and the speech was not for expressing purely personal grievances.

Whether Dr. Snyder's interest in commenting on matters of public concern outweighs the University's interest in promoting efficient services

In engaging the balance of interests, courts consider the following factors: (1) whether the speech would or did create problems in maintaining discipline or harmony among coworkers, (2) whether the employment relationship is one where personal loyalty and confidence are necessary, (3) whether the speech impeded the employee's ability to perform his responsibilities, (4) the time, place, and manner of the speech, and (5) whether the matter was one on which debate was vital to informed decision making. Elkins; Harlan.

In weighing the first factor, Dr. Snyder's speech did contribute to widespread disharmony, according to the letter from the University. Several faculty members have expressed to

Chancellor Blake and Dean Simmons that they felt intimidated by Dr. Snyder. This claim is corroborated by the fact that the faculty did not go to Dr. Snyder. Dr. Snyder claims that some people disagree because they are "out to get [him]." However, this does not change the disharmony that was in fact caused as a result of being outspoken. Thus, the speech did create a problem in maintaining harmony among coworkers, however minor it may be.

For the second factor, Dr. Snyder says the departments are somewhat autonomous. Dean Simmons has bimonthly meetings with Department Chairs, and Chancellor Blake and Dr. Snyder see each other very infrequently. Dr. Snyder's relationship seems quite distant and independent. On the other hand, the letter from the University indicates that Dr. Snyder "cannot be trusted to work as part of the team." This seems to suggest that personal loyalty and confidence is necessary. However, the court in Harlan found that the nature of the relationship between the plaintiff professor and his superiors did not necessitate loyalty and confidence. Likewise, the distant nature of Dr. Snyder with the rest of the administration indicates the same. Thus, it likely cannot be said that the employment relationship is one where personal loyalty and confidence are necessary.

For the third factor, Dr. Snyder was willing to bet that the faculty members who signed his petition would say that things continue to run well without his being Chair. Thus, this indicates that the speech did not impede Dr. Snyder's ability to perform his responsibilities.

For the fourth factor, Harlan lends support. The court in Harlan found it noteworthy that the plaintiff's speech occurred through proper channels. He filed charges according to university protocols. He spoke with colleagues privately and in meetings. He aired his concerns directly to the Dean. He then filed a grievance. This is not to say that more public forums are never appropriate. Here, Dr. Snyder used various methods to speak in opposition of the relocation. He wrote a report that he circulated widely among the faculty at the Med School. He presented his position at faculty and university-wide forums. He presented his report and oral testimony at a Regents meeting. He had a petition signed by faculty colleagues opposing the relocation. He wrote a letter to the *Star Bulletin*. While most of the methods were restricted to within the university community, they were still relatively public. Whereas the plaintiff in Harlan used quieter and more surgical methods targeting individuals, Dr. Snyder used widespread methods, such as petitions and presentations to forums and meetings. Moreover, he wrote a letter to a public paper, the *Star Bulletin*. Therefore, although public forums are not inappropriate, the time, place and manner used by Dr. Snyder is likely not in his favor.

For the fifth factor, the Harlan court held that debate was essential to informed decision making because the plaintiff's allegations addressed a matter of public concern involving charges of wrongdoing and malfeasance. Here, the public concern was about inconvenient relocation rather than about malfeasance. However, there were valid concerns involving the community at large that Dr. Snyder mentioned. It would be likely that a debate would be vital to informed decision making. In fact, the public protested when it learned about the potential relocation. It indicates that the public probably would have preferred a discussion before such a decision. Thus, the matter was one on which debate was vital to informed decision making.

In sum, in balancing the factors above, it is more likely than not that Dr. Snyder's interest in commenting on matters of public concern outweighed the University's interest in promoting efficient services.

Whether Dr. Snyder's speech was a substantial or motivating factor for the adverse employment action by the University
Since the first two part of the Boyer test are met, the employee plaintiff must show that the speech was a substantial or motivating factor for the adverse employment action.

Here, the letter from the University says that Dr. Snyder's opinion or his wide and vehement expression of that opinion was irrelevant to the Regents' decision to terminate his Chairpersonship. However, his outspoken opposition of the relocation was a motivation for his termination. Dr. Snyder also suspects that his letter was the impetus for all the community opposition, which caused disharmony among the faculty and administration. Thus, it follows that Dr. Snyder's speech was a substantial and motivating factor for his termination.

Whether the University can prove that it would have taken the same adverse employment action even without Dr. Snyder's speech
Following part three above, the court must consider whether the employer has proven that it would have taken the same adverse employment action even in the absence of the protected speech.

Here, Dr. Snyder suspects that there are people "out to get [him]." He also mentioned that there was a similar battle over the reorganization of the Health Sciences Center some years ago, which could possibly be a reason for his termination. Based on the University's letter, however, it is much more likely that his termination was due to the outspoken speech that caused widespread disharmony. The administration is unlikely to harbor a grudge from the similar battle from years ago.

Thus, it would be difficult for the University to prove that it would have terminated Dr. Snyder had he not expressed his opinions.

Conclusion: Whether there is a substantial likelihood of prevailing on the merits
The first part of the test set out in Elkin required for preliminary injunction satisfies all four of its subparts (the Boyer test). Therefore, Dr. Snyder has a substantial likelihood of prevailing on the merits.

(2) Whether there would be irreparable harm in the absence of the injunction
Under Elkin, in the employment context, courts disfavor granting preliminary injunctions because injuries often associated with discharge or discipline, such as damage to reputation, financial distress, and difficulty finding other employment, do not constitute irreparable harm.

Here, Dr. Snyder notes various effects his termination might have. He was negotiating with a pharmaceutical company for millions of dollars. His termination would affect future opportunities for research grants and future royalties from licenses. These are monetary effects. On the other hand, he discusses the effect on opportunities for research, publication

opportunities, years of work being wasted, opportunities to conduct clinical trials, organization of research teams, and connection of the University to the pharma company. It's unlikely that another company will step forward at this point. While there is definitely potential monetary harm, there are also intangible damages that would occur as a result of his termination. Thus, there would be irreparable harm without the injunction.

Under Elkin, the party seeking injunctive relief must at least show that there exists some cognizable danger of recurrent violation of its legal rights.

Here, the termination of his Chairpersonship can only happen once. However, there may be future terminations or discipline as Dr. Snyder remains at the University. He takes pride in taking principled positions and speaking his mind on controversial issues. The University may find this to be another cause for disharmony. This is a "cognizable" danger of recurrent violation of Dr. Snyder's right to free expression. Thus, Dr. Snyder can show that there exists some cognizable danger of recurrent violation of his constitutional rights.

Commented [BH3]: Also, even minimal loss of First Amendment rights is irreparable under Elkins.

In sum, there would be irreparable harm without the injunction.

(3) Whether the threatened harm outweighs any damage the injunction may cause to the University

The moving party (plaintiff) must show that his injury is greater than the other party's. Elkins. The court must choose the course of action that will minimize the costs of being mistaken. Elkins.

Here, as discussed under part (2), the termination will incur many potential harm to both Dr. Snyder and the University. This includes negotiations with a company that could increase the University's standing compared to other schools. Dr. Snyder's past and future research on his new method of dialysis will likely be inhibited as a result. The potential harm to the University is relatively small. There would be discord among the administration. However, the Harlan court notes that in a democratic society, healthy levels of dissent and debate are essential to the vitality of institutions. The disharmony among the faculty and administration seems to be a small price to pay to maintain the beneficial research that Dr. Snyder is conducting.

On balance, the termination will cause greater overall harm to both the University and Dr. Snyder. Therefore, the threatened harm outweighs and damage the injunction may cause to the University as a result of disharmony.

(4) Whether the injunction, if issued, will not be adverse to the public interest

The moving party (plaintiff) must show that the injunction, if issued, is not adverse to the public interest. Elkins. The Elkins court recognized that the public has a strong interest in the vindication of an individual's constitutional rights, particularly under the free flow of information under the First Amendment. The public also has an interest in the efficient and dependable operation of public agencies. The court will balance these two interests.

Here, Dr. Snyder is willing to bet that things "continue to run well" without his alleged ineffectiveness as Chair. The public has an interest in efficient and dependable operation of

public agencies, which is likely to continue with or without Dr. Snyder. The public would also desire vindication of Dr. Snyder's right to free expression. The public likely supports his reasons for opposing the relocation (benefit and convenience to the community), as well as his research. This is indicated by the public protest that probably would not have happened without his publication to the *Star Bulletin*.

Therefore, the injunction will not be adverse to the public interest because the injunction would preserve the benefits to the public and still maintain efficient operation of the University.

Conclusion

Dr. Snyder is likely to obtain injunction because, on balance, he meets the four-part standard for obtaining preliminary injunction set forth by Elkins.

ADDITIONAL GRADER COMMENTARY

Hi Brian, This was a detailed and well-written response. You did a particularly good job of describing the applicable legal rules in detail. Your clear issue headings also helped. -Justin