No. 23-1306

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

COREY MCNELLIS,

Plaintiff - Appellant,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of Colorado
No. 1:22-CV-01636
Hon. Raymond P. Moore

BRIEF OF APPELLANT

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Oral Argument Not Requested

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Statement of Prior Related Appeals

There are no prior or related cases.

Statement of Jurisdiction

Plaintiff-Appellant Corey McNellis ("McNellis") asserted violations under 42 U.S.C. § 1983, Title VII of the Civil Rights Act ("Title VII"), and the Colorado Anti-Discrimination Act ("CADA"). The district court's jurisdiction arose under 28 U.S.C. §§ 1331 and 1343 for the federal claims, and 28 U.S.C. § 1367 for the state law claims. This Court has appellate jurisdiction under 28 U.S.C.A. § 1291.

Statement of the Issues

1. Whether the district court generally erred in applying the plausibility standard under Fed. R. Civ. P. 12(b)(6) to the First Amended Complaint.

2. Whether the district court erred in holding that McNellis' speech was made pursuant to his official duties under 42 U.S.C. § 1983.

3. Whether the district court erred in holding that McNellis' speech was not a matter of public concern under 42 U.S.C. § 1983.

4. Whether the district court erred in holding that McNellis' speech was a motivating factor in Defendant's termination decision under 42 U.S.C. § 1983.

5. Whether the district court erred by holding that McNellis failed to establish a prima facie case of discrimination under Title VII and CADA.

6. Whether the district court erred by holding that McNellis failed to establish a prima facie case for retaliation under Title VII and CADA.

Statement of the Case

On July 1, 2022, McNellis initiated this action against Defendant-Appellee Douglas County School District ("DCSC" or the "school district"), and Cathy Franklin, in her individual and official capacity as the Director of Human Resources for Douglas County School District. (App. 13–33.)[1] DCSD and Ms. Franklin filed a Motion to Dismiss on August 30, 2022. (App. 34–63.) On September 20, 2022, McNellis filed his First Amended Complaint in the U.S. District Court for the District of Colorado naming only DCSD as a Defendant and alleging violations under Section 42 U.S.C. § 1983, Title VII, and CADA. (App. 64–109.)

In his First Amended Complaint, McNellis alleged that he was employed by the school district for approximately fourteen (14) years

[1] Citations to the record on appeal, as paginated and contained in the Appendix to Appellant's Brief, filed herewith will be cited as "App. ".

without any disciplinary action. (App. 89–94, ¶¶1, 17–18, 45–46.)[2] On October 2, 2020, McNellis responded to a mass email promoting a play called the Laramie Project, which the school district was promoting to the community. (App. 137–144.) McNellis, who was not responsible for selecting or conducting the play, asked what recourse he might have if he disagreed with the play as a "Dad of a student." (App. 138.) McNellis also expressed his Christian faith and emphasized that his email was sent in his individual capacity. (App. 140–141.)

On October 5, 2020, McNellis was suspended, placed on administrative leave, and subject to further investigation. (App. 97–99, ¶¶67, 70, 80–81, 91.) The school district informed him that he was being suspended and placed on leave because of his "religious comments." (App. 98, ¶¶77–83.) The school district then investigated the emails and, on October 29, 2020, terminated McNellis citing his "emails regarding the Laramie Project." (App. 101, ¶¶113–114.) Upon his termination, the former principal, who was privy to the investigation, admitted that the Laramie Project emails were "the catalyst for [McNellis'] firing." (App. 102, ¶115.)

On October 11, 2022, DCSD filed a second Motion to Dismiss, McNellis filed his Response on November 1, 2022, and the Reply was

[2] Citations to the First Amended Complaint and Jury Demand, as paginated and contained in the Appendix to Appellant's Brief, filed herewith will be cited as "App. _, ¶ _".

filed on November 15, 2022. (App. 112–191.) On August 28, 2023, the district court judge issued its Order on the Motion to Dismiss and dismissed all of McNellis' claims. (App. 192–206); *see also* Attachment 1: District Court Order Filed 08/28/2023; *see* Attachment 2: District Court Judgment Filed 08/28/2023. On September 27, 2023, McNellis filed his Notice of Appeal, which is briefed herein. (App. 207–208.)

Summary of the Argument

The district court generally failed to apply the plausibility pleading standard by "view[ing] the allegations in the light most favorable to [McNellis]." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). The district court's analysis ignores critical allegations and fails to evaluate the Amended Complaint in its entirety along with the exhibits which were attached as part of Defendant's Motion to Dismiss.

With respect to the § 1983 claim, for example, the district court ignored McNellis allegations that commenting on the school play was not part of his responsibilities as an administrator. (App. 94, ¶¶ 43–44.) The district court further held that McNellis failed to establish that his emails were a motivating factor in his termination even though McNellis alleged that the school district told him that his emails were the reason for his termination. (App. 101, ¶¶113–114.) The foregoing

allegation was also corroborated by the former principal, who acknowledged that the emails were the "catalyst for [McNellis'] firing." (App. 102, ¶115.)

With respect to the Title VII and CADA claims, the district court provided little analysis, failed to cite material allegations, and, in turn, summarily concluded that McNellis failed to establish a prima facie case. Because the well-pled allegations in the First Amended Complaint, when read in the context of the entire First Amended Complaint, demonstrate that it is plausible that McNellis was discriminated against based on his his religious views, dismissal of the Title VII and CADA claims is not appropriate. *See Chilcoat v. San Juan Cnty.*, 41 F.4th 1196, 1218 (10th Cir. 2022).

Standard of Review

A Rule 12(b)(6) dismissal is reviewed de novo. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1135 (10th Cir. 2014)

Argument

The district court incorrectly concluded that McNellis failed to nudge his claims across the line from conceivable to plausible based on his claims for retaliation and discrimination under 42 U.S.C. § 1983, Title VII, and CADA. *See Chilcoat*, 41 F.4th at 1218 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A. The Allegations Establish a Plausible Violation of 42 U.S.C. § 1983.

The First Amendment tolerates "only those restrictions that are necessary for [government] employers to operate efficiently and effectively." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Recently, the Supreme Court emphasized that the "threshold inquiry," focuses on the "nature of the speech at issue." *Kennedy v. Bremerton Sch. Dist.*, 142 S.Ct. 2407, 2411 (2022). If a public employee speaks pursuant to his "official duties," the First Amendment "generally will not shield the individual from an employer's control and discipline because that kind of speech is—for constitutional purposes at least—the government's own speech." *Id* (citing *Garcetti*, at 421). On the other hand, if the government employee speaks as a private citizen on a matter of public concern, the free speech inquiry is more complex and requires courts to "engage in a delicate balancing of the competing interests surrounding the speech and its consequences." *Id.*

At the district court level, the parties briefed the Motion to Dismiss by applying the *Garcetti/Pickering* test, and the Court issued its Order relying on the same. (*See* App. 196) (citing *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021) (citing *Garcetti*, 547 U.S. at 417; *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). The *Garcetti/Pickering* test requires the Court to determine whether:

> (1) the speech was made pursuant to the employee's official duties, (2) the speech was made on a matter of public concern, (3) the government's interests as an employer in promoting efficient public service outweigh a plaintiff's free speech interests, (4) the speech was a motivating factor in the adverse employment action, and (5) the same employment decision would have been made without the protected speech.

See Roberts, 16 F.4th at 1381.

Under *Garcetti/Pickering*, "[t]he critical question [] is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *See Lane v. Franks*, 573 U.S. 228, 240 (2014). The inquiry should be undertaken "practical[ly] rather than with a blinkered focus on the terms of some formal and capacious written job description." *Kennedy*, 142 S.Ct. at 2424. "To proceed otherwise would be to allow public employers to use 'excessively broad job descriptions' to subvert the Constitution's protections." *Id.* (citation omitted). "The ultimate question is whether the employee speaks as a citizen or instead as a government employee—an individual acting 'in his or her professional capacity." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007).

1. McNellis Speech was Not Part of His Official Duties.

The Tenth Circuit has "refrained from establishing per se rules for determining whether speech is made pursuant to an employee's official duties," however, it has noted that that speech generally falls outside an employee's official job duties if:

> i. the matter on which the employee speaks is not within the employee's assigned responsibilities;
>
> ii. the employee has no duty to report to the person or entity with whom the employee discusses the issue.

See Davis v. Utah, No. 20–4042, 2021 WL 3930277, at *5 (10th Cir. Sept. 2, 2021); (collecting cases).[3]

Thus, "[i]f the employee *either* speaks on a matter within the employee's assigned responsibilities *or* speaks in accordance with a duty to report, the employee's speech may be unprotected under the first element of the *Garcetti/Pickering* test." *Id* (emphasis in original). Importantly, "[n]ot all speech that occurs at work is made pursuant to an employees official duties[,] … [n]or is the speech about the subject of an employee's work necessarily made pursuant to the employee's official duties." *Id.* at 1204. "The mere fact that a citizen's speech concerns

[3] *See also Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 747 (10th Cir. 2010); *Brammer-Hoelter*, 492 F.3d at 1203–05; *Thomas v. City of Blanchard*, 548 F.3d 1317, 1324–26 (10th Cir. 2008); *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329–32 (10th Cir. 2007).

information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech." *See Lane*, 573 U.S. at 240.

Since there is no issue with respect to McNellis' speech in conjunction with a duty to report, the issue in this case is whether the speech was made as part of McNellis' "assigned responsibilities." *Id.* Contrary to the district court's order, the allegations in McNellis' First Amended Complaint demonstrate that his speech was not part of his assigned responsibilities. (App. 94, ¶44) (McNellis alleged that "[t]he Administrative Team was not responsible for determining the content of the school plays that were produced by the theatre department.") McNellis further explained that the "Administrative Team would not debate, discuss, or otherwise address the issues under their purview in a public forum or with the entire staff at Ponderosa." (App. 94, ¶43.) The district court did not analyze the foregoing allegations, which directly contradict the district court's holding that McNellis' speech was part of his responsibilities. (App. 198.)

The allegations in the First Amended Complaint, and the emails themselves, provide additional context regarding the nature of McNellis' speech as a citizen, not an administrator. McNellis' emails were written in response to an email from the Theatre Teacher & Director indicating that she "selected The Laramie Project for [the] first

production of the year" with the Technical Theatre teacher. (App. 137.)[4] McNellis' statement in response to the foregoing email is telling because he asks about his recourse as a "Dad of a student" if he disagreed with the production. (App. 138.) Although McNellis also mentioned that he was an employee, to the extent there was any ambiguity about the nature of his speech, McNellis followed up and explained that he was acting alone: "[f]or the record, all of administration does not agree with me on this. I am totally solo." (App. 141.) Thus, the allegations in the Amended Complaint demonstrate that McNellis was speaking as a "citizen [] [rather than as a] government employee." *Brammer-Hoelter*, 492 F.3d at 1203.

Addressing the foregoing, the district court elected to draw inferences in favor of Defendant instead of Plaintiff and speculated that McNellis' speech "could reasonably be interpreted to mean that he was speaking as an administrator, albeit one without the full backing of the Administrative Team." (App. 198.) Next, the district court suggested "that commenting on issues related to the show with other Ponderosa staff is generally consistent with the types of activities [McNellis] was paid to do, particularly as a member of the Administrative Team." (App.

[4] The district relied on the emails and a letter from Principal Tim Ottmann in ruling on the Motion to Dismiss. (App. 193, Fn. 1; 203, Fn. 2.) (citing *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013). It does not appear that the district court relied on the job descriptions, which were incorporated into the First Amended Complaint and, thus, cannot be considered.

198.) The district court's holding, in this regard, directly contradicts the allegation that the Administrative Team did not "discuss issues under their purview in a public forum with the entire staff at Ponderosa." (App. 94, ¶¶ 44–45); *see also Brokers' Choice of Am., Inc.*, 757 F.3d at 1136 ("[a]ll well-pled factual allegations are accepted as true.").

Notably, the district court did not cite any factual allegations from the First Amended Complaint or any specific content from the emails that would allow it to disregard the foregoing well-pled facts, which establish that McNellis' responsibilities did not include commenting on or selecting the play. *See Brokers' Choice of Am., Inc.*, 757 F.3d at 1136.

Next, the district court concluded that there were no allegations "demonstrating or suggesting that Plaintiff would have been aware of the show—at least at the time of the speech at issue—were it not for his status as a Ponderosa staff member." (App. 197.) However, in *Lane*, the Supreme Court noted that it does not matter whether a "citizen's speech concerns information acquired by virtue of his public employment." *See* 573 U.S. at 240. Instead, the Court should focus on the nature of the speech. In this case the allegations demonstrate that a group of students were conducting outreach to the Ponderosa "community" about the play and the play was already being advertised in a public forum on the internet. (App. 137–138.) Moreover, the email, itself, indicates that information regarding the show was available online at "ponderosatheatre.com." (App. 137.) Even if McNellis learned of the

play by virtue of his employment, the play was already in the public forum for consumption by the Ponderosa community and anyone else who might be interested in the production.

The district court also concluded that there is no allegation that "other parents of Ponderosa students were included as recipients of Ms. Diaz's email," which is also inaccurate as evidenced by the fact that other staff commented on the play in their capacity as parents. (App. 140–142.) Moreover, by advertising the play online and conducting outreach in the community, it stands to reason that other parents of students who attended Ponderosa were aware of the play. (App. 137–138.)

The allegations, coupled with the emails themselves, demonstrate that McNellis was not responsible for selecting the play, directing the play, or producing the play. McNellis was merely commenting on the play as a father and a Christian, which is his prerogative as a parent and not part of his responsibilities as an employee.[5] (App. 94–96,

[5] *See Kennedy*, 142 S.Ct. at 2411 (saying a prayer as a high school football coach was not "instructing players, discussing strategy, encouraging on-filed performance, or engag[ing] in any other speech [that] the District paid him to produce as a coach."); *see also Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018) (whether an employee's speech is made pursuant to his official duties is a fact-intensive inquiry which includes analyzing the, "employee's job description, the frequency with which an employee performs a task, the subject matter of the employee's speech, the recipient of the employee's speech, the legal obligation of the employee to speak – but no single fact is determinative.").

¶¶ 43–44, 51–52, 65; 138–141.) The well-pled facts along with reasonable inferences in McNellis' favor demonstrate that McNellis was not acting as an administrator when he inquired about what recourse he had as a father regarding the play.

2. McNellis' Speech was a Matter of Public Concern.

When analyzing whether speech is a matter of public concern, the Court must analyze "the content, form, and context of a given statement, as revealed by the whole record." *Brammer-Hoelter*, 492 F.3d at 1205 (internal quotes and citations omitted). "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane*, 573 U.S. at 241 (internal quotes and citations omitted). Moreover, in *Gardetto*, the Tenth Circuit noted that the objectives, purposes, and missions of educational institutions are undoubtedly matters of public concern. *Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996).

Ultimately, however, the Court must focus on the facts of each case to determine whether "there is [] evidence that [the] school [] intended to open [the subject of the speech] for public discourse." *See Miles v. Denver Pub. Sch.*, 944 F.2d 773, 776 (10th Cir. 1991). "[A] public forum is not created 'by inaction or by permitting limited discourse, but only

by intentionally opening a nontraditional forum for public discourse.'" *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988)). In other words, the Court must assess whether the school "by policy or practice" demonstrated an intent to create a public forum. *Miles*, at 776

i. The School District Created a Public Forum.

Respectfully, the district court's reliance on *Boring* highlights the importance of evaluating each case based on the factual circumstances. (App. 192–204) (citing *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998)).[6] In *Boring*, unlike this case, there were no allegations that demonstrated that the school intended to create a public forum with respect to discussing the play. The only issue was "whether a public high school teacher has a First Amendment right to participate in the makeup of the school curriculum through the selection and production of a play." *Boring*, at 366. Importantly, in *Boring*, the selection and production of the play was squarely within the teacher's responsibilities, and the Court noted that "dispute with the principal, superintendent of schools and the school board is nothing more than an ordinary employment dispute …" *Id.*

[6] The district court also cited to *Bunger v. Univ. of Okla.*, 95 F.3d 987, 992 (10th Cir. 1996), which has little application to this case as it addressed the question of whether "an administrative counsel in a university is limited to tenured faculty …"

Here, unlike *Boring*, the allegations suggest that the Defendant did, in fact, intend to create a public forum regarding discussions about the play. The play had already been selected when the Theatre Director sent out an email and a group of student ambassadors were conducting outreach to the Ponderosa community about the play. (App. 137–138.) Specifically, the ambassadors were "helping ensure that Ponderosa and our community understand why we chose the show and that our audiences are informed about the nature and topic of the show." (App. 137.) Moreover, the email itself explained that the theatre department was actively promoting and advertising the play to the public in addition to promoting it online. (App. 95, ¶56; 138.) When explaining the purpose of the email, the theatre department specifically noted that the play is designed to generate "discussions … and start a conversation." (App. 95, ¶56; 138.)

The conversations that followed the initial email further demonstrated that the selection of the play was intentionally placed in the public forum. For example, the English I, Creative Writing, and Content Read/Write teacher responded to the original email by stating, "I will be personally inviting other Ponderosa Theater Company alums … I will even invite some other groups like the Gender Sexuality Alliances in DCSD, parents I've met in the DCSD Equity Growth Zone

Community Group, and more." (App. 138.) Thereafter, there was discussion among many of the teachers about the Ponderosa community and the effect of the play on the community. (App. 137–144.)

The foregoing emails, coupled with the allegations in the First Amended Complaint, demonstrate that the school district "intended to open [discussions regarding the play] for public discourse," and there are no allegations that demonstrate that the school district intended to "reserve[] the forum for its intended purpose of teaching [theatre]." *See Miles*, 944 F.2d at 776 (citing *Hazelwood Sch. Dist.*, 484 U.S. at 267) (quoting *Cornelius v. NAACP Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)). The district court generally failed to draw the reasonable inferences from the well-pled facts, which demonstrate that school district intentionally sought to generate "discussions … and start a conversation" about the selection of the Laramie Project. (App. 95, ¶56; 138.)

ii. The Play is a Matter of Public Concern.

The original email demonstrates the public nature of the play as evidenced by the following warning from the Theatre Director:

> Due to language and the content discussed in the show [] this is not a family-friendly show. We are advertising 'For mature audiences' and I would generally recommend high school age and up.

(App. 138.) The Theatre Director's explicit instructions that the play was not recommended for younger audiences acts as a warning to the community about the graphic content discussed in the play. In essence, the school district was providing notice to the Ponderosa community, and specifically parents like McNellis, that they should exercise caution in deciding whether this show is age-appropriate for some families. (App. 138.) The foregoing directly impacts the broader Ponderosa community and is a matter of public concern.

McNellis' emails responding to the Theatre Director further demonstrate that the recipients interpreted the email as opening discussions to the public. McNellis first responded by asking, "… what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?" (App. 138.) Then, approximately fourteen (14) other individuals, some of whom were also in their dual roles as parents and staff, also hit reply all to the Theatre Director's email. (App. 137–144.) Some of the emails indicated that the information about the play was being shared with alums and other organizations within the community. (App. 138.) The nature of the replies demonstrates that the school district created a forum to allow people to share perspectives regarding the selection of the Laramie Project. (App. 137–144); *see also Kennedy*, 142 S. Ct. at 2424 (the Court should take a practical approach when assessing the speech in question).

3. McNellis Speech was a Motivating Factor in his Termination.

With respect to causation, a public employee need only show that the protected speech played a substantial part in the employer's decision to adversely alter the employee's conditions of employment. *Maestas v. Segura*, 416 F.3d 1182, 1188 (10th Cir. 2005). An employee "need not prove his speech was the sole reason for defendant's action." *Id.* (citation omitted). "An employer's knowledge of the protected speech, together with *close* temporal proximity between the speech and challenged action, may be sufficiently probative of causation to withstand summary judgment." *Id.* There is no precise definition of what constitutes a substantial motivating factor, and the Court must assess the circumstances of each particular case. *Id.*

In this case, McNellis sent a total of four emails:

> Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?
>
> As a christian I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play.
>
> For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!

> I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.

(App. 137–144.)

First, after evaluating the emails and the allegations in the First Amended Complaint, the district court reasoned that the following allegation was conclusory: "Defendant directly cited Mr. McNellis' emails regarding the Laramie Project as the reason for his termination." (App. 200.) Respectfully, the foregoing is not a conclusory allegation, it is direct evidence of discrimination. *See Didier v. Abbott Lab'ys*, 614 F.App'x 366, 372 (10th Cir. 2015) ("Direct evidence is evidence that, on its face, demonstrates that the employment decision was reached for discriminatory reasons.") (citing *Danville v. Reg'l Lab Corp.*, 292 F.3d 1246, 1249 (10th Cir. 2002)); *see also* Fed. R. Evid. 801(d)(2). The allegation that school district told McNellis that he was terminated for the emails is admissible to prove that the school district did, in fact, terminate McNellis for the emails, which constitutes protected speech under § 1983.

Even if the Court were to disagree that the Defendant's admission constitutes direct evidence of discrimination, it is circumstantial evidence of discrimination from which the Court should infer that McNellis' speech was a motivating role in McNellis' termination. *See Maestas*, 416 F.3d at 1188. Defendant told McNellis on multiple occasions that the investigation was due to his "religious comments."

(App. 97–98, ¶¶70, 80; 104, ¶127(b); 106, ¶147(b).)[7] Moreover, McNellis had been employed for fourteen (14) years and had never been subject to any discipline until he referenced his religious beliefs. (App. 89–98, ¶¶1, 17–18, 45–46, 70, 79–81.) It is reasonable to infer that McNellis, who had never been subject to discipline in fourteen (14) years, and was being investigated for his "religious comments," was, in fact, terminated for his "religious comments."

Second, the district court reasoned that there are no allegations about "how the decision was made, or even by whom it was made," which is not accurate and unreasonable.[8] (App. 200.) McNellis described in detail how the decision was made by describing his initial suspension, identifying the individuals responsible for investigating him, identifying the substance of the investigation, and identifying specific statements made by the individuals responsible for investigating him. *See generally* App. 89–109; *see also Chilcoat*, 41 F.4th at 1218 ("plaintiff's allegations are read in the context of the entire complaint …").

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[7] This Court has also held that "[a]ctions such as suspensions or terminations are by their nature adverse, even if subsequently withdrawn." *Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998).

[8] Plaintiff's, like McNellis, rarely know with certainty the decision-maker in employment-based actions until after discovery. Here, however, the court can infer that the former principal was, at least aware of the reason for the termination because the board delegated its power to the principal. (App. 90, ¶10; 98, ¶¶77-78.)

Importantly, McNellis alleged that the purpose of the investigation was to "obtain evidence that it could use to support a decision to terminate [him]." (App. 100, ¶100.) In other words, the allegations demonstrate that, in this circumstance, the termination decision was directly tied to the emails, not due to evidence obtained from the investigation.

Accepting the allegations in the First Amended Complaint as true, McNellis provided explicit details regarding: (1) when the decision makers became aware of the speech between Friday, October 2, 2020 and October 5, 2020 (App. 97, ¶66); (2) one of the decision makers suspended McNellis on Saturday, October 3, 2020 because of his "religious comments" (App. 97, ¶67); (3) one of the decision makers informed McNellis they were investigating him and placing him on leave due to his "religious comments" on October 5, 2020 (App. 98 ¶¶77, 80–81); (4) one of the decision makers told McNellis the school district would be investigating the emails related to the Laramie Project (App. 99, ¶91); (5) while on leave, McNellis complained to Defendant that he was being targeted based on his religious beliefs (App. 100, ¶¶95–97); and (6) on October 29, 2020, when terminating him, Defendant told him it was because of the emails related to the Laramie Project. (App. 101, ¶¶113–114.)

The timing of the foregoing, coupled with the school district's statements during the termination meeting, demonstrate that it is

plausible that McNellis' speech played a substantial part in Defendant's termination decision. *Maestas*, 416 F.3d at 1188. Finally, in addition to all the foregoing, the former principal, who was privy to the investigation, also stated that McNellis' emails were the "catalyst for his firing." (App. 102, ¶115.) Accepting the well-pled facts as true, it is plausible that McNellis' emails, which constitute his protected speech, were a motivating factor in the decision to terminate him.

B. Title VII/CADA Claims

The district court failed to properly analyze the evidence in the First Amended Complaint because it did not consider McNellis' direct evidence of discrimination, failed to properly apply the *McDonnell-Douglas* burden shifting framework in this context, and failed to analyze the evidence that establishes a causal connection between McNellis' complaints of discrimination and his termination.

1. McNellis Established a Prima Facie Case of Discrimination.

First, the allegations in the Amended Complaint contain direct evidence of discrimination. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 (1985). To establish direct evidence of discrimination, "the plaintiff must show that the employer actually relied on …

[religion] in making its decision." *Heim v. State of Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

Here, the school district told McNellis the reason for his suspension was his "religious comments." (App. 97, ¶¶67–71.) Next, after suspending McNellis, the school district told McNellis that it was investigating him due to his "religious comments." (App. 98, ¶¶81–83.) When terminating McNellis, Defendant told McNellis that it was terminating him because of his emails regarding The Laramie Project (App. 101, ¶114). Then, the former Principal, who has knowledge of the investigation, admitted that McNellis was terminated for his "political and religious views." (App. 102, ¶116; 145–146.)

Second, the district court drew numerous inferences in favor of Defendant instead of McNellis and engaged in speculation in favor of Defendant. The district court reasoned:

> Plaintiff's argument [] ignores the possibility that—consistent with the allegations in the Complaint—these individuals could also be Christians who might even have disagreed with Ms. Diaz decision to perform *The Laramie Project* while also believing that Plaintiff's comments were unprofessional and that, coupled with other conduct gleaned from the investigation, his termination was warranted.

(App. 202.)

The district court concluded that McNellis might have been terminated for unprofessional conduct rather than his religious comments. *Id*. The conclusion that McNellis might have been terminated for unprofessional conduct is a question of fact that cannot support dismissal under Rule 12.[9]

Next, McNellis need not demonstrate the religious affiliations of the other similarly situated employee because McNellis was the only individual who disclosed his religious affiliation. (App. 98, ¶76; 137–144); *Hwang v. Kansas State Univ.*, 753 F.3d 1159, 1164 (10th Cir. 2014) (plaintiff need only allege some set of facts that taken together plausibly suggest differential treatment of similarly situated employees.) It is plausible, if not likely, that other administrators did not disclose their religious affiliation, and McNellis' allegations also establish that the other administrators were subject to similar complaints related to the "old boys club" and COVID but not subject to and discipline. (App. 100–101, ¶¶101–111.) Accepting the foregoing as true, which the Court must, McNellis pled facts that demonstrate that it is plausible that he was treated less favorably than his counterparts

[9] Notably, the Amended Complaint demonstrates the opposite of the district court's conclusion: Defendant told McNellis "that nothing [in the emails] was unprofessional, but [Defendant] needed Mr. McNellis to stay home Monday because of his 'religious comments.'" (App. 97, ¶70.)

who did not openly identify as Christian. *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1117 (10th Cir. 2007) (whether employees are similarly situated is ordinarily a "question of fact for the jury.")

In sum, there are numerous allegations in the First Amended Complaint that establish a prima facie case of discrimination. For example, McNellis established that: (1) he is a Christian and a member of a protected class (App. 89–105, ¶¶1, 48, 64, 77, 119, 122, 133, 142); (2) he suffered an adverse employment action (App. 97–101, ¶¶67, 70, 80–81, 87, 98, 113); (3) he was qualified for as an administrator role (App. 89, ¶1); (4) he was treated less favorably than others who did not disclose their status as Christians (App. 98, ¶76; 100–101, ¶¶101–111); and (5) Defendant's decision was premised on McNellis religious beliefs (App. 97–101, ¶¶70, 77, 79–81, 113–114.) Ultimately, the district court's conclusion that it is possible Defendant terminated McNellis for unprofessional conduct required the district court to draw reasonable inferences in Defendant's favor. To wit, it is also plausible that Defendant terminated McNellis based on his "religious comments."

2. McNellis Established a Prima Facie Case of Retaliation.

Finally, regarding McNellis retaliation claim, the district court elected to dismiss the claim because were no "allegations showing a causal connection between [McNellis'] complaints and [McNellis']

firing." Notably, however, there were allegations that numerous employees from Defendant's organization were aware of McNellis' complaints, not just the former Principal. (App. 99, ¶¶95–97.) McNellis alleged that he complained to the principal and others that his suspension and the investigation were related to his religious comments. (App. 97–106, ¶¶71, 82–83, 89, 95–97, 124–125, 127(b), 147(b).) McNellis also alleged that Ponderosa's principal, whom McNellis complained to, took part in the investigation and that the Board delegated its decision-making authority as it pertains to employee decisions to the principal. (App. 90, ¶¶10; 98, ¶¶77–78.) Thus, it stands to reason that Defendant, by way of its principal, terminated McNellis because he complained about being investigated due to his religious beliefs. When reading the Amended Complaint as a whole document, there are sufficient allegations that suggest or allow this Court to infer that Defendant targeted McNellis by investigating him due to his religious beliefs.

Conclusion

This Court should reverse the judgment of the district court for the reasons set forth above.

Statement Regarding Oral Argument

Appellant does not believe that oral argument would assist the Court in analyzing this appeal.

KONTNIK | COHEN, LLC

Respectfully submitted,

Dated: December 22, 2023

By: /s/ Spencer J. Kontnik

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **5,711 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

This is to certify that the foregoing has been served via the Court's ECF filing system in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure, on December 22, 2023 on all registered counsel of record, and has been transmitted to the Clerk of the Court.

KONTNIK | COHEN, LLC

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COREY MCNELLIS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Civil Action No. 22-cv-01636-RM-STV

COREY MCNELLIS,

Plaintiff,

v.

DOUGLAS COUNTY SCHOOL DISTRICT,

Defendant.

ORDER

This employment dispute is before the Court on Defendant's Motion to Dismiss (ECF No. 34), which has been fully briefed (ECF Nos. 37, 38). For the reasons below, the Motion is granted.

I. LEGAL STANDARD

To defeat a motion to dismiss, the complaint must allege a "plausible" right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007). The plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In evaluating a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court must accept as true all well-pleaded factual allegations in the complaint, view those allegations in the light most favorable to the plaintiff, and draw all reasonable inferences in the plaintiff's favor.

Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1136 (10th Cir. 2014); *Mink v. Knox*, 613 F.3d 995, 1000 (10th Cir. 2010). However, conclusory allegations are insufficient, *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009), and courts "are not bound to accept as true a legal conclusion couched as a factual allegation," *Twombly*, 550 U.S. at 555 (quotation omitted).

II. BACKGROUND

Plaintiff worked at Ponderosa High School, a public school overseen and operated by Defendant, for fourteen years. (ECF No. 24, ¶¶ 7, 17.) At the time he was terminated in October 2020, he had been promoted to the positions of Athletic Director and Assistant Principal, and his child was attending the school. (*Id.* at ¶¶ 39, 47.) In his capacity as Assistant Principal, Plaintiff was part of the Administrative Team—comprised of the Principal, Tim Ottmann, and other Assistant Principals—which met weekly to discuss issues regarding extracurricular activities. (*Id.* at ¶¶ 41, 42.)

On October 2, 2020, Ponderosa's Theatre Director, Kayla Diaz, sent an email to Ponderosa staff about an upcoming school play, *The Laramie Project*. (*Id.* at ¶¶ 50, 53.) The email[1] explained: "*The Laramie Project* is the true story of the impact of a hate crime in a small town, told through interviews with community members and translated into a script." (ECF No. 19-2 at 1.) It further stated: "In 1998, Matthew Shepard, a gay college student, was murdered on the outskirts of Laramie, Wyoming. His death sparked outrage throughout the nation, as well as controversy. There were many contesting opinions and arguments, but in the end, what matters

[1] On a motion to dismiss, "[c]ourts are permitted to review documents referred to in the complaint if the documents are central to the plaintiff's claim and the parties do not dispute the documents' authenticity." *Toone v. Wells Fargo Bank, N.A.*, 716 F.3d 516, 521 (10th Cir. 2013) (quotation omitted). Thus, the Court may consider the email exchange prompted by Diaz's email without converting the Motion into a motion for summary judgment.

to our show is how it affected the Laramie community." (*Id.*) And it included this disclaimer: "Due to language and the content discussed in the show (there is no violence shown, only discussed) this is not a family-friendly show. We are advertising 'For mature audiences' and I would generally recommend high school age and up." (*Id.* at 2.) Due to the COVID pandemic, the show was to be live-streamed. (*Id.* at 1.) The email was sent on a Friday afternoon. (*Id.* at 1.)

Several staff members responded to the email Friday evening and Saturday morning. The responses were generally supportive, and some suggested that the show would complement Ponderosa's anti-bullying program. For example, one recipient responded, "Thank you so for much for deciding to do a show that so closely connects to Ponderosa High School's core values of kindness, empathy, and respect." (*Id.* at 2.) Another responded, "As a history teacher I'm glad to hear that our students are engaging with important historical events across subject areas." (*Id.* at 3.)

Plaintiff responded by sending three emails on Friday evening and another one on Saturday morning, stating as follows:

> Thanks Kayla, I appreciate the email and I really do admire the hard work that you do. As a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?
>
> * * *
>
> As a christian I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play.
>
> * * *
>
> For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!

> * * *
>
> I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it.

(*Id.* at 2, 4, 5, 7.) The emails had the same signature block:

> Corey McNellis
> Athletic Director/Assistant Principal
> Ponderosa High School
> 303-387-4100

(*Id.*)

The emails were shared with Defendant's Human Resources Director, Cathy Franklin; the Director of Schools, Daniel Winsor; and Mr. Ottmann. (ECF No. 24, ¶ 66.) On Saturday, Mr. Winsor called Plaintiff and told him he needed to stay home on Monday because of his "religious comments." (*Id.* at ¶¶ 67, 70.)

The following Monday, Ms. Franklin, Mr. Winsor, and Mr. Ottmann called Plaintiff for a virtual meeting. (*Id.* at ¶ 77.) Plaintiff was informed that he was being placed on leave and investigated due to his religious comments. (*Id.* at ¶¶ 80, 81.) While on leave, Plaintiff complained to Mr. Ottmann and several coworkers that he was being investigated based on his Christian beliefs. (*Id.* at ¶¶ 95, 96.) As part of its investigation, Defendant received a complaint from a teacher claiming Plaintiff was part of a "good ole boys club" that included other male teachers and administrators, including Mr. Ottmann. (*Id.* at ¶ 101.) Defendant also uncovered an email indicating Plaintiff had complained "as a parent" about Ponderosa's communications regarding its COVID safety protocols. (*Id.* at ¶ 106.)

On October 29, 2020, Defendant terminated Plaintiff's employment, citing his emails regarding *The Laramie Project* as the reason for his termination. (*Id.* at ¶¶ 113, 114.)

In his Amended Complaint, Plaintiff alleges that he was discriminated and retaliated against because he is a Christian and that he was fired in retaliation for exercising his First Amendment rights. He asserts claims for (1) discrimination in violation of Title VII; (2) retaliation in violation of Title VII; (3) discrimination in violation of the Colorado Anti-Discrimination Act ("CADA"); (4) retaliation in violation of CADA; and (5) retaliation under 42 U.S.C. § 1983 for exercising his right to free speech under the First Amendment.

III. ANALYSIS

Defendant has moved to dismiss each of Plaintiff's claims.

A. First Amendment Retaliation Claim

A public employee's First Amendment claim is assessed using the five-prong *Garcetti/Pickering* test. *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). That test requires the Court to determine whether

> (1) the speech was made pursuant to the employee's official duties, (2) the speech was made on a matter of public concern, (3) the government's interests as an employer in promoting efficient public service outweigh a plaintiff's free speech interests, (4) the speech was a motivating factor in the adverse employment action, and (5) the same employment decision would have been made without the protected speech.

Id. The first three prongs are issues of law to be resolved by the Court, while the last two are ordinarily for the trier of fact. *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 745 (10th Cir. 2010).

Defendant contends that Plaintiff failed to plead sufficient facts to establish the first, second, and fourth prongs of the test, and the Court agrees.

1. Speech Made Pursuant to the Employee's Official Duties

"The Tenth Circuit's decisions addressing the first step of the *Garcetti/Pickering* analysis have taken a broad view of the meaning of speech that is pursuant to an employee's official duties." *Id.* at 746 (quotation omitted). "[I]f an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). Included in this category is speech relating to tasks within an employee's employment responsibilities as well as speech that is generally consistent with the type of activities the employee was paid to do. *See id.* However, "[t]he ultimate question is whether the employee speaks as a citizen or instead as a government employee—an individual acting in his or her professional capacity." *Id.* (quotation omitted). Thus, not all speech about an employee's work or that occurs at work is made pursuant to the employee's official duties. *Id.* at 1204. Courts "must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship." *Id.*

Here, Plaintiff expressed his concerns about *The Laramie Project* "as an employee" in emails that were responses to a staff email sent by Ms. Diaz. (ECF No. 19-2 at 2.) The Complaint does not contain allegations demonstrating or suggesting that Plaintiff would have been aware of the show—at least at the time of the speech at issue—were it not for his status as a Ponderosa staff member. Plaintiff's emails were sent from his district email address and listed his positions of Athletic Director and Assistant Principal in the signature portion, and Plaintiff does not allege that anyone besides Ponderosa staff were the intended recipients of his emails. Thus, this is not a case involving speech in the form of social media posts or statements to news

outlets. *Cf. Cowden v. Bd. of Governors*, 622 F. Supp. 3d 1019, 1031-33 (D. Colo. 2022). The circumstances suggest that commenting on issues related to the show with other Ponderosa staff members is generally consistent with the types of activities Plaintiff was paid to do, particularly as a member of the Administrative Team. These factors all weigh in favor of finding Plaintiff's emails were made pursuant to his official duties.

On the other hand, Plaintiff points out that he also expressed his concerns "[a]s a Dad of a student here." (ECF No. 19-2 at 2.) However, there is no allegation that other parents of Ponderosa students were included as recipients of Ms. Diaz's email, which included a letter addressed, "Dear Staff." (*Id.* at 1.) In the absence of allegations showing that he would have been included in the initial email or had access to this specific email exchange but for his role as an employee, the Court is not persuaded that Plaintiff's reference to his parental status suffices to establish that he was speaking as a private citizen rather than a public employee. *See Rohrbough*, 596 F.3d at 747 (noting that "the employee's chosen audience" and "chosen method of disseminating speech" are appropriately considered when assessing whether speech falls within the scope of the employee's official duties).

Nor does Plaintiff's additional comment that "all of administration does not agree with me on this. I am totally solo" mean that his emails were not made pursuant to his official duties. (ECF No. 19-2 at 5.) Indeed, it could reasonably be interpreted to mean that he was speaking as an administrator, albeit one without the full backing of the Administrative Team. While the comment might also suggest that other Ponderosa employees did not necessarily agree with Plaintiff's viewpoint on presenting *The Laramie Project* at the school, in the context of the ongoing exchange of emails among Ponderosa staff members, it does not demonstrate that

Plaintiff was speaking solely as a private citizen.

Finally, the fact that the emails were sent "after hours" does not move the needle here. *Cf. Brammer-Hoelter*, 492 F.3d at 1205 (concluding that speech that occurred outside the school, after hours, and with ordinary citizens and parents was not within the scope of the plaintiffs' official duties as teachers). Employees commonly read and send work-related emails outside of work hours, and Plaintiff has not alleged that it was remarkable or unusual that Ponderosa employees responded to Ms. Diaz's email "after hours" or that Ponderosa staff members—members of the Administrative Team included—did not regularly discuss work issues via email. And again, the absence of any indication that other parents or other members of the public were included in the email exchange reinforces the notion that the initial email and staff members' responses to it were sent pursuant to the employees' official duties.

Therefore, the Court finds Plaintiff has not alleged facts that would satisfy the first prong of the *Garcetti/Pickering* test.

2. Speech Was Made on a Matter of Public Concern

Regarding the second prong of the test, "[m]atters of concern are those of interest to the community, whether for social, political, or other reasons." *Id.* (quotation omitted). "In determining whether speech pertains to a matter of public concern, the court may consider the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public's interest." *Id.* (quotation omitted).

The fact that *The Laramie Project* itself gives rise to controversy and certainly addresses matters of public concern does not mean Plaintiff's emails about it necessarily rise to the same

level. *See, e.g.*, *Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (finding high school drama teacher's selection of play did not present a matter of public concern). Plaintiff's professed disagreement with the play, both as a parent and as a Christian, is a matter of personal, rather than public concern. Similarly, Plaintiff's professed interest in collaborating with the show is not akin to matters such as elections, illegal conduct by government officials, or restrictions on freedom that have been held to be matters of public concern. *See id.* at 1206. Rather, it is a matter that "does not directly affect the community at large" and may aptly be considered "internal in scope and personal in nature." *Bunger v. Univ. of Okla.*, 95 F.3d 987, 992 (10th Cir. 1996). As a result, the Court finds that Plaintiff's emails do not address a matter of public concern.

3. Speech Was a Motivating Factor in the Adverse Employment Action

Regarding the fourth prong of the *Garcetti/Pickering* test, the Complaint lacks factual allegations that would establish that Plaintiff's emails were a motivating factor in his firing. Although Plaintiff makes the conclusory assertion that "Defendant directly cited [his] emails regarding The Laramie Project as the reason for his termination" (ECF No. 24, ¶ 114), there are no specific allegations as to how the decision was made, or even by whom it was made. Conclusory allegations are insufficient to survive dismissal. *Cory*, 583 F.3d at 1244. Plaintiff's allegations, taken as true, establish that his emails about *The Laramie Project* prompted Defendant to suspend Plaintiff and begin an investigation into his conduct at Ponderosa. And they establish that Mr. Ottmann, Ms. Franklin, and Mr. Winsor were primarily responsible for the decision to fire him. But it does not follow that simply because these individuals knew about the emails, his firing was "substantially motivated by" the emails as opposed to other

information that might have been gleaned from the investigation. Although the Complaint neglects to recite or describe Defendant's stated reasons for firing him, that does not mean the Court is required to accept Plaintiff's conclusory assertion as to the basis for his termination. Therefore, the Court finds the absence of factual allegations that would establish the fourth prong of the *Garcetti/Pickering* test provides another reason for dismissing Plaintiff's First Amendment retaliation claim.

To the extent Plaintiff contends that the investigation itself was retaliatory, he has not cited any authority for the proposition that a mere investigation can amount to an adverse employment action for the purpose of stating a retaliation claim. Nor does the Complaint contain allegations showing that the investigation amounted to "substantial harassment and abuse" that would support such a claim. *Brammer-Hoelter*, 492 F.3d at 1208.

Accordingly, the Complaint fails to state a First Amendment retaliation claim.

B. Title VII and CADA Discrimination Claims

Because Colorado and federal law apply the same standards to discrimination claims, Plaintiff's Title VII and CADA claims rise or fall together. *See Johnson v. Weld Cnty.*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010). A plaintiff proves such a claim either by direct evidence of discrimination or by following the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012). To set forth a prima facie case of discrimination, Plaintiff must establish that (1) he is a member of a protected class, (2) he suffered an adverse employment action, (3) he qualified for the position at issue, and (4) he was treated less favorably than others not in the protected class. *See id.* If the plaintiff establishes a prima facie case of discrimination, then the burden shifts to the

defendant to produce a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Once the defendant does so, the burden shifts back to the plaintiff to show that the plaintiff's protected status was a determinative factor in the employment decision or that the employer's explanation is a pretext for discrimination. *Id.* The Court finds Plaintiff has failed to plead a prima facie case, so the rest of the burden-shifting framework does not come into play.

Plaintiff's discrimination claims are premised on his protected status as a Christian; therefore, to establish the fourth prong of his prima facie case he needed to plead that he was treated less favorably than non-Christians at Ponderosa or in the school district. Though he alleges in a conclusory fashion that other faculty and administrators engaged in conduct similar to his—such as being part of a "good ole boys club" and complaining about COVID safety protocols—without being investigated, placed on leave, or disciplined, nowhere does he allege that these individuals were non-Christians. Indeed, he fails to plead any facts about the religious beliefs of anyone associated with this case besides himself. Nor does he allege that the conduct of employees that he considers were similarly situated to him was more egregious or even as egregious as his. Although Plaintiff alleges that Mr. Ottmann, Ms. Franklin, and Mr. Winsor were the ones primarily responsible for firing him and that they knew about his emails concerning *The Laramie Project*, that does not amount to proof of religious discrimination. Plaintiff's argument to the contrary ignores the possibility that—consistent with the allegations in the Complaint—these individuals could also be Christians who might even have disagreed with Ms. Diaz's decision to perform *The Laramie Project* themselves while also believing that Plaintiff's comments were unprofessional and that, coupled with other conduct gleaned from the investigation, his termination was warranted. In any event, the allegations fall well short of

establishing the Plaintiff was treated less favorably than non-Christians.

In short, the Court finds Plaintiff's allegations have not nudged his discrimination claims across the line from conceivable to plausible, and therefore they must be dismissed. *See Twombly*, 550 U.S. at 570.

C. Title VII and CADA Retaliation Claims

To state a prima facie Title VII or CADA retaliation claim, Plaintiff must show that (1) he engaged in protected opposition to discrimination, (2) a reasonable employee would have found the challenged action materially adverse, and (3) a causal connection existed between the protected activity and the materially adverse action. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019). Again, the Court finds Plaintiff has failed to set forth allegations establishing a prima face case.

First, Plaintiff's emails about *The Laramie Project* cannot be considered protected opposition to discrimination for purposes of stating a retaliation claim. Plaintiff does not argue otherwise. Second, while his complaints to Mr. Ottmann and other coworkers about the investigation and his suspension might be considered protected opposition to discrimination, there are no allegations showing a causal connection between those complaints and Plaintiff's firing. Plaintiff's conclusory allegations to the contrary are devoid of factual support.

Finally, Plaintiff's reliance on the letter[2] from Mr. Ottmann written after he retired as principal is misplaced. While the letter explains that Plaintiff's emails were the "catalyst" for his firing, nowhere does it state or imply that Plaintiff's firing was causally related to his opposition

[2] The letter is referred to in the Complaint, and Defendant does not dispute its authenticity; therefore, the Court considers it here. *See Toone*, 716 F.3d at 521.

to discrimination. (ECF No. 34-4 at 2.) Moreover, regardless of Mr. Ottmann's opinions about Plaintiff's termination, the letter also states that "it wasn't [Mr. Ottmann's] decision to make." (*Id.*) Under the circumstances, it does not support the theory that Mr. Ottmann or anyone else retaliated against Plaintiff for his protected activity.

Accordingly, the Court finds Plaintiff's allegations fail to state a retaliation claim.

IV. CONCLUSION

Therefore, the Motion to Dismiss (ECF No. 34) is GRANTED, and the Clerk is directed to CLOSE this case.

DATED this 28th day of August, 2023.

BY THE COURT:

RAYMOND P. MOORE
Senior United States District Judge

[redacted]

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District of Colorado

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