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.

Appeal from the United States District Court
For the District of Colorado
Civil Action No. 22-cv-01636-RM-STV

Honorable Raymond P. Moore, Senior United States District Judge

---

ANSWER BRIEF OF APPELLEE

Jonathan P. Fero, Esq.
Michael Brent Case, Esq.
Semple, Farrington, Everall & Case, P.C.
1120 Lincoln Street, Suite 1308
Denver, CO 80203
Telephone: (303) 595-0941
Facsimile: (303) 861-9608
Counsel for Appellee

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

NOTICE OF PRIOR OR RELATED APPEALS

There are no prior or related appeals to this case.

STATEMENT OF THE CASE

This is an employment case concerning the termination of a school administrator. Plaintiff-Appellant Corey McNellis was an Assistant Principal at Ponderosa High School, a comprehensive public high school within Defendant-Appellee Douglas County School District (the "District" or "DCSD"). McNellis asserted a § 1983 claim against the District for First Amendment free speech retaliation. Also maintaining he was terminated because of his Christian religion, McNellis asserted Title VII and Colorado Anti-Discrimination Act ("CADA") discrimination and retaliation claims against the District. The district court granted the District's motion to dismiss, determining that McNellis failed to state any claim for relief.

STATEMENT OF THE ISSUES

On appeal, McNellis challenges essentially every aspect of the district's court's thorough and sound analysis. The District addresses the following issues:

1. Whether the district court correctly held that McNellis failed to plead a plausible First Amendment Retaliation Claim because: (a) his speech was made pursuant to his official duties; (b) he did not speak on a matter of public concern; and (3) there was no basis to establish that the speech substantially motivated his termination.

2. Whether the district court correctly held that McNellis failed to plausibly plead religious discrimination and retaliation claims under Title VII and CADA because his allegations did not establish treatment less favorable than non-Christians or show a causal connection between protected activity and termination.

STATEMENT OF THE FACTS

As this case was decided on the District's motion to dismiss, the following recitation is based on the allegations in McNellis's Complaint and documents referenced within it.

The District is a Colorado public school district, and it is governed by a Board of Education. (App. 90, ¶ 5). The Board has the authority to make employment decisions. (App. 131).

During the 2020–2021 school year, McNellis was employed as an Assistant Principal and Athletic Director at Ponderosa High School, where his child was a student. One of McNellis's primary job duties was to "coordinate effective communications strategies among the students, the community, the faculty and the administration." (App. 135). McNellis alleged that he was part of Ponderosa's "Administrative Team, which would discuss some aspects of extracurricular activities." (App. 93, ¶ 40). The Administrative Team, which included Principal Tim Ottmann and the other Assistant Principals, met privately once a week to discuss

extracurricular activities. (App. 94, ¶¶ 41–43). "The Administrative Team was not responsible for determining the content of the school plays that were produced by the theater department." (*Id.*, ¶ 44).

On October 2, 2020, Ponderosa Theater Director Kayla Diaz "sent a group email to the entire Ponderosa staff including McNellis regarding the content of a planned school play." (*Id.*, ¶ 50). Diaz had not discussed the play with the Administrative Team prior to sending an "email to the entire Ponderosa staff soliciting feedback." (App. 94–95, ¶¶ 51–52). Diaz's email "informed all staff members that Ponderosa's Theatre Company would be performing *The Laramie Project*," which McNellis claimed "is a religiously charged play that covers distressing material." (App. 95, ¶ 53). The play depicts the aftermath of the 1998 murder of Matthew Shepard in Laramie, Wyoming, and is widely acknowledged to have been a hate crime motivated by Shepard's sexuality. (*Id.*, ¶ 54–55). Diaz's email advised that the play was "generally [recommended for] high school age and up," despite "not [being] a family-friendly show." (*Id.*, ¶ 56–57). Diaz further stated that "it [was] important that [she could] answer any question [the staff] may have and that [the staff was] aware of the nature of the play" so that the staff can support the Theater Department in helping students understand. (*Id.*). The Theater

Department did "not want anyone in the school to believe we are making a statement against anything other than hate and violence." (*Id*.).

McNellis emailed a response to the entire school staff stating, "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 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?" (App. 96, ¶ 59). McNellis subsequently "responded to the emails from the other staff and offered to provide a Christian perspective." (*Id.*, ¶ 64). Those "responses" consisted of three additional emails to the entire Ponderosa staff: (i) at 9:37 p.m., McNellis wrote "As a christian [sic] I would love to collaborate with your project. Please let me know if the love that Jesus can provide will help your play"; (ii) at 9:52 p.m., he wrote "For the record, all of administration does not agree with me on this. I am totally solo. Good night Mustangs!"; and (iii) at 10:27 a.m. the next day, October 3, 2021, he wrote "I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it." (App. 137–143). McNellis sent the emails using his School District email address and used a signature identifying himself as the Ponderosa "Athletic Director/Assistant Principal." (*Id.*). Other staff members also responded to Diaz's email, with one "acknowledging the difficulty of the subject matter and offering to help by providing a 'Social Studies perspective'" and

another indicating that "not everyone has to agree with every ideology that exists, but it is the discourse that is invoked that matters." (App. 96, ¶¶ 62–63).

McNellis's emails were shared with the District's Human Resources Director Cathy Franklin, Director of Schools Daniel Winsor, and Ottmann. (App. 97, ¶ 66). On Saturday, October 5, 2021, Winsor instructed McNellis to stay home the following Monday and, when McNellis asked why, Winsor told McNellis it was "because of his 'religious comments.'" (*Id.*, ¶¶ 67, 69–70). Three days later, Franklin, Winsor, and Ottmann met with McNellis to advise him that he was being placed on leave and that they would be further investigating his emails regarding *The Laramie Project.* (App 99, ¶ 92). While on leave, McNellis "complained to Principal Ottmann that he was being investigated based on his Christian beliefs." (App. 100, ¶ 95). He also complained to several coworkers. (*Id.*, ¶ 96).

During the investigation, the District and Franklin received a complaint from a teacher claiming McNellis was part of a "good ole boys club," that included other male teachers and administrators, including Ottmann, Jarod Nicholson, and Joseph Schubarth, none of which were investigated, placed on leave, or otherwise disciplined based on those allegations. (*Id.*, ¶¶ 101–02). The investigation also uncovered an email indicating McNellis complained about Ponderosa's communications regarding its COVID safety protocols. (App. 101, ¶ 106). McNellis

alleged that other faculty and administrators had the same complaints, but none of them were investigated, placed on leave, or otherwise disciplined. (*Id*., ¶¶ 107–08).

On October 29, 2021, the District terminated McNellis's employment. McNellis's emails regarding *The Laramie Project* were directly cited as the reason for his termination. (*Id*., ¶ 114). After McNellis was terminated and after Ottmann retired, Ottmann wrote a letter to the District stating that he was not the decisionmaker regarding McNellis's termination, but he believed McNellis's religious views played a role. (App. 145–46).

SUMMARY OF THE ARGUMENT

The district court correctly applied the plausibility standard under Fed. R. Civ. P. 12(b)(6) in determining that McNellis's Complaint failed to state claims under § 1981 and Title VII. Specifically, the district court properly determined that McNellis's speech regarding *The Laramie Project* was made pursuant to his official job duties in an ongoing email exchange among Ponderosa staff members. (App 197–99). The district court also properly determined that McNellis's professed disagreement with the play, both as a parent and as a Christian, is a matter of personal, rather than public concern. (App. 199–200). Additionally, the district court properly determined that McNellis's conclusory allegations that his protected speech

substantially motivated the District's decision to terminate his employment were insufficient to state a First Amendment retaliation claim. (App. 200–01).

The district court further correctly held that McNellis failed to plausibly plead religious discrimination and retaliation under Title VII and CADA. Specifically, the district court properly determined that McNellis failed to establish he was treated less favorably than non-Christians at Ponderosa or in the District. (App. 202). Finally, the district court properly determined that McNellis failed to plausibly plead his emails regarding *The Laramie Project* were protected opposition to discrimination and also failed to establish a causal connection between his complaints to Ottmann and other coworkers about the investigation, his suspension, and the District's termination of his employment. (App. 203–04). Dismissal of McNellis's Complaint should be affirmed.

STANDARD OF REVIEW

Dismissal under Fed. R. Civ. P. 12(b)(6) is generally reviewed de novo. *E.g.*, *Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 336 (10th Cir. 1994). "In reviewing a motion to dismiss, [courts] accept the facts alleged in the complaint as true and view them in the light most favorable to the plaintiff." *Mayfield v. Bethards*, 826 F.3d 1252, 1255 (10th Cir. 2016). A complaint must allege facts sufficient to state a plausible claim for relief on its face—that is, "a plaintiff must plead 'factual

content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1158 (10th Cir. 2018) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

ARGUMENT

I. The District Court Correctly Held that McNellis Failed to Plead a Plausible First Amendment Retaliation Claim.

"When individuals enter into government employment or contracts, they accept certain restrictions on their freedom as part of the deal." *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1878 (2021) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 418–20 (2008)). "Public employees do 'not enjoy the same scope of First Amendment rights as a private citizen.'" *Cory v. City of Basehor*, 631 F. App'x 526, 528 (10th Cir. 2015) (quoting *Rock v. Levinski*, 791 F.3d 1215, 1219 (10th Cir. 2015)). "Because government employers, like private employers, need a significant degree of control over their employees' words and actions, not every restriction on a public employee's speech amounts to a deprivation of First Amendment rights." *Cory*, 631 F. App'x at 528 (quoting *Seifert v. Unified Gov't of Wyandotte Cnty.*, 779 F.3d 1141, 1151 (10th Cir. 2015)).

McNellis's First Amendment claim is analyzed under the well-established *Garcetti/Pickering* test, where a court must determine whether (1) the speech was

made pursuant to an employee's official duties; (2) the speech was 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. *Roberts v. Winder*, 16 F.4th 1367, 1381 (10th Cir. 2021).

A. McNellis's Speech was Pursuant to His Official Duties.

The plaintiff carries the burden to establish that the contested speech was not made pursuant to official duties, which McNellis did not and cannot do here. *Casey v. W. Las Vegas Ind. Sch. Dist.* 473 F.3d 1323, 1328 (10th Cir. 2007). The Tenth Circuit takes a broad view of the meaning of speech that is pursuant to an employee's official duties and has referred to the test as a "heavy barrier" to establishing protected conduct. *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 746 (10th Cir. 2010). "[If] 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 an official duty, the speech is made pursuant to the employee's official duties." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202–03 (10th Cir. 2007). "The guiding principle is that speech is made pursuant to official duties if it involves 'the type of activities that [the employee] was paid to

do.'" *Chavez-Rodriguez v. City of Sante Fe*, 596 F.3d 708, 713 (10th Cir. 2010) (alteration in original) (quoting *Green v. Bd. of Cnty. Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007)). Speech can be within the scope of an employee's official duties even if "the speech concerns an unusual aspect of an employee's job that is not part of [his] everyday functions." *Brammer-Hoelter*, 492 F.3d at 1203. Speech may be made pursuant to an employee's official duties if it "reasonably contributes to or facilitates the employee's performance of the official duty." *Id*.

Whether McNellis's speech was made pursuant to his official duties is a question of law for the court to determine. *Holub v. Gdowski*, 802 F.3d 1149, 1159 (10th Cir. 2015). McNellis cherry-picks language from *Davis v. Utah* regarding factors courts may consider in determining whether an employee's speech is protected, but in this Circuit, the ultimate question is whether the employee was performing a task he or she was paid to perform when they spoke. No. 20-4042, 2021 WL 3930277, at *4 (10th Cir. Sept. 2, 2021) (unpublished).

McNellis's First Amendment claim fails because his speech regarding *The Laramie Project* was made as part of his assigned responsibilities and he was performing a task he was paid to do. The fact that McNellis's Complaint alleged that "[t]he Administrative Team was not responsible for determining the content of the school plays that were produced by the theatre department," (App. 94, ¶ 43), is not

dispositive. Among McNellis's job duties, he was required to "[c]oordinate effective communications strategies among the students, the community, the faculty and the administration." (App. 135). McNellis admits that part of his job duties involved meeting "once a week to discuss any issues that may arise with respect to extracurricular activities." (App. 94, ¶ 42). McNellis's email responses to Ponderosa staff regarding *The Laramie Project* fall squarely within that duty. The stated purpose of Diaz's email was to make staff and administrators aware of the content of the play and prepare them for possible questions they may receive given the topic and substance of the upcoming performance. The email thread was precisely the type of discussion that was usual for McNellis to participate in, *e.g.*, "issues that may arise with respect to extracurricular activities."

Even if McNellis were correct that his job duties did not include determining the content of school plays, they certainly included coordinating effective communications strategies among students, community members and staff—which was the stated purpose of Diaz's email to Ponderosa staff. McNellis's argument that the district court neglected to consider the allegations in his Complaint is meritless. To the contrary, the district court properly considered all the allegations to determine the full context of McNellis's speech. The audience and manner of McNellis's email communication shows that he was speaking in his official capacity. *See Pope v. Carl*,

No. 16-cv-166, 2018 WL 4119938, *7 (E.D. Ky. 2018) (unpublished) (courts consider the audience and setting to determine whether speech is protected). This is bolstered by the fact that McNellis felt compelled to state, "[f]or the record, all of administration does not agree with me on this. I am totally solo," (App. 137–44), revealing that McNellis understood he was speaking as an Assistant Principal and his emails could be interpreted as an official stance of school administration.

Moreover, McNellis's argument that the Ponderosa Administrative Team did not "discuss issues under their purview in a public forum with the entire staff at Ponderosa," (Op. Brief, p. 11), is a red herring. McNellis was directly responding to an issue concerning effective communication strategies regarding the play. It is irrelevant that the play was already being advertised in a public form on the internet as McNellis suggests. To the contrary, McNellis would not have had the opportunity to respond to Diaz's emails unless she sent the communication to Ponderosa's staff and administrators. McNellis necessarily learned about the communication strategy regarding *The Laramie Project* by virtue of his employment at Ponderosa. *See, e.g., Weintraub v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, 593 F.3d 196, 204 (2nd Cir. 2010) (speech through channels only available to those working in school not made as citizen). McNellis's responses to Diaz's email were not made in a public forum but in an internal email thread that only included Ponderosa staff and

administrators. This was "a forum to which he had access because of his position." *See Foley v. Town of Randolph*, 598 F.3d 1, 7–8 (1st Cir. 2010) (referring to Fire Chief voluntarily speaking to press about matters involving Fire Department); *see also Heffernan v. Straub*, 612 F. Supp. 2d 313, 326 (S.D.N.Y. 2009) (holding speech was made pursuant to lieutenant's official duty when "an ordinary citizen not employed by the Fire Bureau would not . . . have the opportunity to convey [his opinion] through the [department radio broadcast] channels that he utilized"), *reconsidered on other grounds*, 655 F.Supp.2d 378 (S.D.N.Y. 2009).

Indeed, the fact that McNellis sent his e-mails to other District employees as internal correspondence, rather than other means used by parents, and otherwise did not publicize his concerns weighs in the District's favor. *Agyeman v. Roosevelt Union Free Sch. Dist.*, 254 F. Supp. 3d 524, 536 (E.D.N.Y. 2017). McNellis did not air his grievances in a public forum such as a Facebook post, public message board, or to the press. *See, e.g.*, *Massaro v. N.Y. City Dep't of Educ.*, 481 F. App'x 653, 655–56 (2d Cir. 2012) ("[T]he district court's conclusion that [the plaintiff] spoke as an employee rather than a private citizen is supported by the facts that she aired her complaints only to several school administrators rather than to the public . . . ."); *McGuire v. City of N.Y.*, No. 12-CV-814, 2015 WL 8489962, at *7 (E.D.N.Y. Dec. 8, 2015) (unpublished) ("Second, [the plaintiff's] speech was made through official

channels. Courts in this circuit have found, that where an employee speaks only through official channels, rather than publicly, they are more likely to be speaking as an employee.").

To the extent McNellis argues that his speech regarding *The Laramie Project* was not *required* by his job description, that is not the test. *See Brammer-Hoelter*, 492 F.3d at 1204 ("Speech is made pursuant to official duties if it is generally consistent with the type of activities an employee was paid to do."). Courts have held that that "speech can be pursuant to a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." *Weintraub*, 593 F.3d at 203 (internal quotation marks omitted); *see also DeHart v. Bd. of Cnty. Comm'rs of Riley Cnty., Kan.*, 463 F. Supp. 3d 1219, 1231 (D. Kan. 2020) (holding public employee's speech was pursuant to his official job duties where he had no legal or official duty to speak out). McNellis's comment that he posed a question "as a dad" of a student does not refute that he was also responding "as an employee," which he readily admitted.

There can be no doubt that the communications regarding *The Laramie Project* concerned McNellis's official job duties because the play was supervised by a faculty member, Diaz; it was intended to be performed by the school's theatre company; and high school theater programming "was obviously intended to impart

particular skills, such as acting, to student participants." *See Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988)). "These factors demonstrate beyond doubt that 'students, parents, and members of the public might reasonably perceive [the production of the play *The Laramie Project*] to bear the imprimatur of the school." *Boring*, 136 F.3d at 368 (quoting *Hazelwood*, 484 U.S. at 271). Accordingly, McNellis's emails were not protected by the First Amendment.

B. McNellis's Speech was Not on a Matter of Public Concern.

McNellis's First Amendment claim further fails under the second prong of the *Garcetti/Pickering* test. As indicated above, Diaz's internal email to Ponderosa staff and administrators was not intended to create a public forum, and McNellis's personal feelings about *The Laramie Project* are not matters of public concern. Matters of public concern are those that "can be fairly considered as relating to any matter of political, social, or other concern to the community." *Withiam v. Baptist Health Care of Okla.*, 98 F.3d 581, 583 (10th Cir. 1996). "It is not enough that its subject matter could in [certain] circumstances, [be] the topic of a communication to the public that might be of general interest. What is actually said on that topic must itself be of public concern." *Wilson v. City of Littleton, Co.*, 732 F.2d 765, 768 (10th Cir. 1984). An employee's personal feeling on a matter that could be of general

interest to the public is not a matter of public concern under the First Amendment. *Id.*

Although the school play could have generally been a matter of public concern, McNellis's statements asking "what is my recourse if I disagree with the production? Was this a heads up to see if everyone is cool?"; "[a]s 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"; and "I understand people support this. Forgive me for having a different viewpoint and the audacity to publicly share it," (App. 137–44), constitute his personal feelings about *The Laramie Project*. McNellis's personal feelings are not a matter of public concern. Such personal grievances are not protected by the First Amendment. *See Eisenhower v. Weber Cnty.*, 744 F.3d 1220, 1228 (10th Cir. 2014) (explaining speech calculated to address personal grievances or concerns is not protected by First Amendment).

The fact that McNellis's emails concern *The Laramie Project,* which itself could be a matter of public concern, does not automatically make his personal inquiries and concerns about the same a matter of public concern. As already discussed, Diaz's internal email to Ponderosa staff and administrators did not create a public forum, even if the play itself was being advertised elsewhere. The context of other messages received by Ponderosa staff, with one teacher offering to provide

a "Social Studies perspective," demonstrate that curriculum-related perspectives were being shared. There are no allegations that members of the public received or responded in Diaz's email thread regarding *The Laramie Project*. Again, McNellis did not communicate his perspective publicly, via a community message board or to the press, further demonstrating that his personal views are not a matter of public concern. Therefore, McNellis's emails were not protected by the First Amendment.

C. McNellis's Speech Did Not Substantially Motivate His Termination.

To state a First Amendment retaliation claim, McNellis also had to allege facts establishing that the "constitutionally protected speech was a substantial motivating factor" for the adverse employment action. *Couch v. Bd. of Trustees of Mem'l Hosp. of Carbon Cnty.*, 587 F.3d 1223, 1236 (10th Cir. 2009). His Complaint lacks factual allegations to establish that his emails were a motivating factor in his firing.

A municipality, including a school district, cannot be held liable for the actions of its employees pursuant to § 1983 under a theory of *respondeat superior*. *Marshall v. Columbia Lea Reg. Hosp.*, 345 F.3d 1157, 1177 (10th Cir. 2003) (citation omitted); *Jett v. Dallas Ind. Sch. Dist.*, 491 U.S. 701, 733 (1989). Instead, a plaintiff must show that the unconstitutional actions of an employee were (1) carried out by an official with final policy making authority with respect to the

challenged action or (2) representative of an official policy or custom of the municipal institution. *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1249 (10th Cir. 1999). In identifying final municipal policymakers, courts must examine state laws and local ordinances or regulations to determine where the statutory law places the responsibility for making law or setting policy in a particular area. *Ledbetter v. City of Topeka, Kan.*, 318 F.3d 1183, 1189 (10th Cir. 2003).

To sustain liability against the District, McNellis's termination must have been enacted pursuant to an official custom or policy of the District or an action carried out by a final policymaker for the District. *See Murrell*, 186 F.3d at 1249; *Marshall*, 345 F.3d at 1177. The only delegation of final policymaking authority that can impose liability on the District is *legal* delegation. *Milligan-Hitt v. Bd. of Trustees, Sheridan Cnty., Sch. Dist. No. 2*, 523 F.3d 1219, 1230 (10th Cir. 2008). Colorado law provides that a school district's board of education has the final policymaking authority to "employ all personnel required to maintain the operations and carry out the education program of the district . . . ." § 22-32-109(1)(f)(I), C.R.S.

McNellis alleged that the District's governing Board of Education delegated "its powers and duties to the Superintendent and administrative team of DCSD" and to "DCSD's employees," including "Ponderosa Principal (Tim Ottmann), DCSD Human Resources Director (Cathy Franklin), and DCSD Director of Schools (Daniel

Winsor).” (App. 90–91, ¶¶ 8–11). That could only be true as a mere factual delegation, which is insufficient. *Milligan-Hitt*, 523 F.3d at 1230. Legally, McNellis’s allegation is not well pled. Only the Board has policymaking authority for the District with respect to employment decisions, and there has been no legal delegation. Pursuant to Board Policy CBA/CBC, the Board has *retained* its authority to review employment decisions by charging the Superintendent to make *recommendations*. (App. 130–31). Such review is a hallmark of retaining final policymaking authority. *See Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995) (individual is not § 1983 final policymaker when decisions are subject to meaningful review). The Amended Complaint describes no scenario rising to the level of a custom or policy, nor does it allege any action by the Board.

McNellis attempts to salvage his claim by alleging that one Board of Education member, David Ray, knew about McNellis’s emails and the following investigation. Yet, McNellis did not allege that Director Ray shared such information with other Board members, developed any retaliatory animus because of that knowledge, or that *The Laramie Project* emails led the Board to retaliate against McNellis. (App. 99, ¶¶ 85–86).

Even assuming Director Ray harbored the requisite knowledge and retaliatory animus, that would be insufficient to support a claim for municipal liability against

a governing board that only acts as a group. There is no allegation that Ray shared his knowledge with other Board members or that the Board considered McNellis's emails when taking some action regarding him. *See Fortner v. Cnty. of El Paso*, No. 15-cv-00644, 2015 WL 10384289, *13 (D. Colo. 2015) (holding single board member's actions cannot bind multimember governing board) (unpublished) (citing *Wragg v. Vill. of Thornton*, 604 F.3d 464, 469 (7th Cir. 2010); *Mason v. Vill. of El Portal*, 240 F.3d 1337, 1340 (11th Cir. 2001)). As a result, there can be no finding that McNellis's speech was a motivating factor in the District's termination of his employment. *See Petersen v. Utah Dep't of Corr.*, 301 F.3d 1182, 1188–89 (10th Cir. 2002) (holding there was no retaliation where alleged retaliator did not know about protected activity).

Additionally, as the district court properly found, McNellis's allegations establish that his emails about *The Laramie Project* prompted the District to suspend him and initiate an investigation into his conduct at Ponderosa. (App. 200). Ottmann, Franklin, and Winsor were alleged to be primarily responsible for the decision to fire McNellis, but it does not follow that because they knew about the emails, McNellis's firing was substantially motivated by what he wrote instead of the other information unearthed during the investigation. McNellis's Complaint fails to describe the District's stated reasons for terminating his employment, and courts are not required

to accept conclusory allegations as to the basis of his termination. As such, McNellis cannot establish the fourth prong of the *Garcetti/Pickering* test, requiring the dismissal of his First Amendment retaliation claim.

To the extent McNellis claims that the District's investigation itself was retaliatory, such an allegation cannot establish a retaliation claim. It is well established that placing an employee on paid administrative leave is not an adverse employment action. *Baker v. City & Cnty. of Denver*, No. 14-cv-02468, 2016 WL 54110, at *5 (D. Colo. Jan. 5, 2016) (unpublished) (citing *Joseph v. Leavitt*, 465 F.3d 87, 91 (2nd Cir. 2006) ("[A]dministrative leave with pay during the pendency of an investigation does not, without more, constitute an adverse employment action.")); *see also Von Gunten v. Maryland*, 243 F.3d 858, 869 (4th Cir. 2001) (holding that "placing [an employee] on administrative leave with pay for a short time to allow investigation" is not adverse action for retaliation purposes). For these reasons, McNellis failed to state a First Amendment retaliation claim.

II. The District Court Correctly Held that McNellis Failed to Plausibly Plead Claims under Title VII and CADA.

Contrary to McNellis's argument, the district court properly considered the allegations in the Complaint to find that he also failed to state discrimination and retaliation claims premised on his religious beliefs. Title VII and CADA claims are

analyzed under the same standard. *See Johnson v. Weld Cnty.*, 594 F.3d 1202, 1219 n.11 (10th Cir. 2010). A plaintiff may prove intentional discrimination "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). Direct evidence is "[e]vidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption." *Shorter v. ICG Holdings, Inc.*, 188 F.3d 1204, 1207 (10th Cir. 1999). In contrast, "statements of personal opinion, even when reflecting a personal bias or prejudice, do not constitute direct evidence of discrimination." *Id*.

McNellis did not allege direct evidence of discrimination or retaliation, so the *McDonnell Douglas* framework governs. *See Singh v. Cordle*, 936 F.3d 1022, 1042 (10th Cir. 2019). Ottmann's letter stating that McNellis's religious beliefs caused his termination is not direct evidence of discrimination. By Ottmann's own admission, he "couldn't save" McNellis because the termination "wasn't [his] decision to make." (App. 146). Consequently, to state a claim, McNellis had to establish a prima facie case of discrimination, as detailed below. *See E.E.O.C. v. PVNF, L.L.C.*, 487 F.3d 790, 800 (10th Cir. 2007).

A. McNellis Failed to Plead a Religious Discrimination Claim.

To set forth a prima facie case of discrimination, McNellis had to 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 Khalik*, 671 F.3d at 1192. At the outset, McNellis's claims regarding his suspension and subsequent investigation fail to establish a discrimination claim because suspension pending an investigation are not adverse employment actions under Title VII or CADA. *See Baker*, 2016 WL 54110, at *5; *Von Gunten*, 243 F.3d at 869.

McNellis's claim also fails because his allegations do not show he was treated less favorably than other similarly situated non-Christians to give rise to an inference of discrimination. Individuals are considered "similarly situated" for purposes of Title VII "when they deal with the same supervisor, are subjected to the same standards governing performance evaluation and discipline, and have engaged in conduct of 'comparable seriousness.'" *PVNF*, 487 F.3d at 800–01 (quoting *McGowan v. City of Eufala*, 472 F.3d 736, 745 (10th Cir. 2006)). To show disparate treatment, a plaintiff must show that he was similarly situated to his comparators in "all relevant respects," and courts traditionally "compare the relevant employment

circumstances, such as work history and company policies, applicable to the plaintiff and the intended comparable employees." *Id.* (citation omitted).

Here, McNellis failed to allege he was similarly situated to other administrators that made similar complaints related to the "good ole boys club" and COVID comments but were not subject to discipline. (App. 100–01, ¶¶ 101–11). Specifically, McNellis did not allege who the other faculty members or administrators that complained about Ponderosa's COVID safety protocols were. Nor did he allege that Ottmann or the other alleged administrators shared the same supervisor as McNellis, or that they were subject to the same standards governing performance evaluation and discipline.

Additionally, McNellis failed to plead any facts about the religious beliefs held by the decisionmakers in this case, let alone anyone involved in the investigation of his misconduct. McNellis argues that District employees Franklin, Winsor, and Ottmann were all involved in the termination decision, but he does not explain how this could evidence religious discrimination, nor does it. McNellis never alleged in the Complaint that any of those employees are non-Christians who discriminated against him for holding a different belief.

That other administrators did not disclose their religious affiliation cannot bolster his claim. McNellis's allegations failed to establish that colleagues of

different religions or of no religion engaged in the same conduct without repercussions, such that he was unlawfully singled out. *See Ibrahim v. All. for Sustainable Energy*, LLC, 994 F.3d 1193, 1196 (10th Cir. 2021) ("An inference of discrimination can arise from an employer's favoritism toward a similarly situated employee who is not part of the protected class."). Without knowledge of the religious affiliation of his coworkers, McNellis cannot establish that he was treated less favorably than similarly situated non-Christians to state a plausible claim of religious discrimination. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (declaring plaintiff's claims must be supported by sufficient facts so as to make them plausible and entitle plaintiff to relief).

McNellis maintains he states a claim by simply alleging he was terminated after writing emails in which he stated he was a Christian and mentioned Jesus. That is not enough to raise a *plausible* claim of religious discrimination. *Cf. Allison v. Digital Mgmt. Inc.*, No. 13-cv-00760, 2013 WL 5862647, **3–4 (D. Colo. Oct. 13, 2013) (explaining that although plaintiff "was terminated shortly after he placed a scriptural passage on the desk of a supervisor . . . , he fails to explain in any detail how the decision to terminate was plausibly caused by anti-religious animus," and he "has not pointed to any specific discriminatory remarks made by DMI

management or to any instances in which employees outside his protected class were given preferential treatment.") (unpublished).

B. McNellis Failed to Plead a Religious Retaliation Claim.

McNellis's religious retaliation claim was similarly deficient. To state a claim of retaliation, McNellis had to show: (1) he engaged in protected activity; (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. *Hansen v. SkyWest Airlines*, 844 F.3d 914, 925 (10th Cir. 2016) (stating retaliation is analyzed under *McDonnell-Douglas* burden-shifting framework). McNellis also had to show that his protected activities were "a but-for cause" of the alleged adverse action. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2538 (2013). McNellis's subjective belief that he was retaliated against is insufficient to demonstrate retaliation. *Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1408 (10th Cir. 1997).

On appeal, McNellis points to his complaints to Principal Ottmann and "other staff members" as protected activity. (Op. Brief, p. 26). McNellis argues his employment was terminated because he complained about being investigated due to his religious beliefs. (*Id.*). "Opposition to an employer's conduct is protected" by Title VII "only if it is opposition to a 'practice made an unlawful employment

practice by [Title VII].'" *Petersen*, 301 F.3d at 1188. Here, however, McNellis failed to allege facts, which if true, could establish his complaints to Ottmann or "other staff members" was the but-for cause of his termination. To engage in unlawful retaliation, an alleged retaliator must at least know of an employee's protected activity. *See id.* at 1188–89. Ottmann admits he was not a decisionmaker with regard to McNellis's termination, and McNellis does not allege that Ottmann told anyone, much less the decisionmakers, about McNellis's complaint that he was being discriminated against.

Additionally, McNellis's bare assertions that he complained to "other staff members" about his perceived discrimination, without more, are insufficient to establish a retaliation claim under Title VII and CADA. A complaint fails to meet the pleading standard under Rule 8 "if it tenders naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 677–78 (2009) (quoting *Twombly*, 550 U.S. at 555). McNellis fails to identify who the other staff members that he complained to were or what role they may have had in the termination of his employment, if any. As such, McNellis failed to plausibly plead a retaliation claim under Title VII and CADA.

CONCLUSION

As discussed above and in the district court's order, Plaintiff-Appellant Corey

McNellis failed to state either a First Amendment retaliation claim or a state law claim of religious discrimination and retaliation. Defendant-Appellee requests that this Court affirm the district court's order dismissing McNellis's Complaint.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be permitted because discussion of the legal issues may materially assist the Court.

Respectfully submitted this 5th day of February, 2024.

By: *s/ Jonathan P. Fero*
Jonathan P. Fero
Michael Brent Case
Semple, Farrington, Everall & Case, P.C.
1120 Lincoln Street, Suite 1308
Denver, CO 80203
Telephone: (303) 595-0941
Facsimile: (303) 861-9608
jfero@semplelaw.com
bcase@semplelaw.com
Counsel for Appellee

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

I certify that with respect to this brief:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

Date: February 5, 2024

s/ Jonathan P. Fero
Jonathan P. Fero
Michael Brent Case
Semple, Farrington, Everall & Case, P.C.
1120 Lincoln Street, Suite 1308
Denver, CO 80203
Telephone: (303) 595-0941
Facsimile: (303) 861-9608
jfero@semplelaw.com
bcase@semplelaw.com
Counsel for Appellee

CERTIFICATE OF PRIVACY REDACTIONS AND DIGITAL SUBMISSION

I certify that with respect to this brief:

1. All required privacy redactions have been made in compliance with 10th Cir. R. 25.5.

2. Paper copies of the Answer Brief, to be submitted to the Clerk, are exact copies of this ECF submission.

3. This ECF submission was scanned for viruses with the most recent version of the commercial virus scanning program ESET Endpoint Antivirus, version 11.0.2032.0, updated February 5, 2024 and according to that program, is free of viruses.

Date: February 5, 2024

s/ Jonathan P. Fero

Jonathan P. Fero
Michael Brent Case
Semple, Farrington, Everall & Case, P.C.
1120 Lincoln Street, Suite 1308
Denver, CO 80203
Telephone: (303) 595-0941
Facsimile: (303) 861-9608
jfero@semplelaw.com
bcase@semplelaw.com
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2024, I electronically filed the foregoing **ANSWER BRIEF OF APPELLEE** using the court's CM/ECF system which will send notification of such filing to counsel of all parties of record.

s/ Jonathan P. Fero
Jonathan P. Fero
Michael Brent Case
Semple, Farrington, Everall & Case, P.C.
1120 Lincoln Street, Suite 1308
Denver, CO 80203
Telephone: (303) 595-0941
Facsimile: (303) 861-9608
jfero@semplelaw.com
bcase@semplelaw.com
Counsel for Appellee