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
The Honorable Raymond P. Moore

Case No. 1:22-cv-01636

REPLY BRIEF OF APPELLANT

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INTRODUCTION

There is no dispute that McNellis' emails related to The Laramie Project were directly cited by Defendant as the reason for his termination. *See* Resp. at 6 (*citing* App. 114). Nevertheless, Defendant argues that that it is not plausible that McNellis' emails, which constitute his protected speech and include his comments about religion, were a motivating factor in his termination. Defendant would have this Court disregard the well-pled facts in the Amended Complaint and draw inferences in favor of Defendant, as opposed to McNellis, and uphold the district court's dismissal under Rule 12. *But see Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 757 F.3d 1125, 1136 (10th Cir. 2014) (the court must view the allegations in the light most favorable to the plaintiff and draw all reasonable inferences in plaintiff's favor).

REPLY ARGUMENT

I. First Amendment Claim

A. Speech Not Pursuant to Official Duties.

Defendant complains about Plaintiff's reliance on *Davis* even though the two-question approach utilized in *Davis* was directly obtained from the Tenth Circuit's prior holdings in *Rohrbough*, *Brammer-Hoelter*, *Thomas*, and *Casey*. *See*

Davis v. Utah, No. 20-4042, 2021 WL 3930277, at *5 (10th Cir. Sept. 2, 2021).[1] Even if this Court were to reject the two-question approach in *Davis*, which it should not, the ultimate question is "fundamentally [] whether the plaintiff speaks as an employee or as a citizen." *See David v. City & Cnty. of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996).

Notably, Defendant ignored the Supreme Court's holding in *Lane* in its Response, which specifically addresses circumstances, like here, where speech arises out of information acquired by virtue of public employment:

> the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question … is whether the speech [] is [] 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). Defendant then cherry-picks individual cases from other jurisdictions and summarily concludes that, because the speech was in the form of a reply-all email (*i.e.*, it was an internal email), the Court should conclude it was employee speech not citizen speech. *See* Resp. at 12-13 (internal citations omitted). Critically, however, the forum of the speech and the speech itself should guide the Court's analysis, not whether the information

[1] *Citing Rohrbough v. Univ. Colo. Hosp. Auth.*, 596 F.3d 741, 747 (10th Cir. 2010); *Brammer-Hoelter v. Twin Peaks Charger Academy*, 492 F.3d 1192, 12093-05 (10th Cir. 2007); *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).

leading to the speech was learned by virtue of public employment. *Lane*, 573 U.S. at 240.

In this case, the speech occurred after-hours and was communicated to employees outside of McNellis' chain of command which weighs in favor of citizen speech. *See* App. 138; *see also Rohrbough*, 596 F.3d at 747 (after hour speech weighs and speech outside of chain of command weighs in favor of showing that the speech is not employee speech). The speech itself also demonstrates that McNellis did not invoke his authority as an administrator: he refers to himself as a "Dad" and employee not as an "administrator," "director," or "assistant principal." *See* App. 138 ("[a]s a Dad of a student here and also as an employee in the school, what is my recourse if I disagree with the production?"). Moreover, McNellis' job duties unequivocally do not include deciding the subject-matter of a school play or commenting on the same. App. 94-95 at ¶¶ 44-45, 51-52.[2] McNellis' question in response to the theater director's email regarding the recourse he has a father further demonstrates that he was not acting in his capacity as an administrator. App. 138.

Critically, McNellis also clarified that he was "acting totally solo." App. 141. Defendant would have this Court reject the plain meaning of McNellis'

[2] Defendant's reliance on Exhibits A and B to the MTD is improper because the documents are not incorporated in the Complaint. *Alexander v. Oklahoma*, 382 F.3d 1206, 1214 (10th Cir. 2004).

speech indicating that he was acting "solo" and instead infer that he was asserting himself as an administrator. *See* Resp. at 12. Respectfully, Defendant's argument defies logic, and it would lead to an arbitrary application of the law. If the courts can simply assume or infer meaning that explicitly contradicts the plain language of protected speech, then there will be no continuity in the law regarding employee and citizen speech. The speech in this case should construed consistent with its plain meaning.

Even if communication strategies related to the content of the play were part of McNellis' job responsibilities, the emails themselves demonstrate that communication strategies were already in place at the time of his speech. App. 137. The theatre department and its student ambassadors had already created and implemented a communication plan which included sending an email to the Ponderosa staff and advertising the play to the general public on the internet. *Id*. Nothing in the emails demonstrates that McNellis is engaging in the development of a communication strategy consistent with his responsibilities as an administrator.

Next, Defendant ignores that the purpose of the email was specifically designed to generate discussion within the Ponderosa community at large and specifically to "start a conversation." App. 137 (the Ambassador Crew is responsible for "ensur[ing] [] Ponderosa and our community understand why we

chose this show …"). To this end, discussion of the content of the play was clearly not designed to be limited to school staff or to internal communications. The various responses from other staff members demonstrate that the email was, in fact, designed to generate discussion within the wider Ponderosa community regarding the play. App. 137-43. By way of example, no one objected when other teachers indicated they planned to discuss the play with other advocacy groups or Ponderosa alumni. *Id*.

In concluding that McNellis' speech was part of his responsibilities, Defendant relies on *Boring* without any application to the circumstances of this case. *See* Resp. at 15 (*citing Boring v. Buncombe Cnty. Bd. of Educ.*, 136 F.3d 364, 368 (4th Cir. 1998)). Respectfully, the circumstances in *Boring* are distinguishable because McNellis was not responsible for selecting or directing the school play like the teacher in *Boring*. *Id*. Moreover, the school district in *Boring* did not purposefully create a public forum like the theater director in this case. *See* Opening Brief at 14-15.

Notably, Defendant does not cite a single factual allegation from the Amended Complaint which demonstrates that McNellis' speech was made pursuant to his official duties. *See generally* Resp. at 9-15. Defendant's entire argument is premised on Exhibit B to the Motion to Dismiss which was properly excluded from consideration by the district court and which should be excluded

from consideration on appeal. *See supra* n. 2. Even if Exhibit B is considered, the speech at issue in this case demonstrates that McNellis was acting in his personal capacity as a father not as an administrator.

B. Speech Was a Matter of Public Concern.

Defendant concedes that a school play "could have generally been a matter of public concern." Resp. at 16. Respectfully, Defendant's acknowledgement, in this regard, ends the inquiry as this Court has 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); *see also Lane*, 573 U.S. at 241 (discussing issues of public concern).

Defendant attempts to reframe the public concern prong by arguing that McNellis' speech was motivated by his personal beliefs. Resp. at 16. In support of its argument, Defendant relies on *Eisenhour*. *Id*. (*citing Eisenhour v. Weber Cnty.*, 744 F.3d 1220, 1229 (10th Cir. 2014)). Respectfully, *Eisenhour* does not support Defendant's argument. In *Eisenhour*, this Court noted that the "speaker's [] personal motive for a disclosure does not necessarily mean that the speech is not a matter of public concern." *Id*. at 1229 (*citing Deutsch v. Jordan*, 618 F.3d 1093, 1100 (10th Cir. 2010); *see also Wulf v. City of Wichita*, 883 F.2d 842, 860 n. 26 (10th Cir. 1989) (while speech was "linked to some degree to [the plaintiff's] personal dispute with [the defendant] on and to his dissatisfaction with his transfer

to [another] [d]epartment, which he viewed as retaliatory, [the speech also] contain[ed] allegation of public concern.").

Defendant ignores the evidence which demonstrates that Defendant did, in fact, create a public forum. Opening Brief at 15-16. Defendant offers no persuasive counter argument regarding its decision to conduct outreach to the Ponderosa community, promote the play to the public, and "open [discussions regarding the play] for public discourse." *Id*. Defendant relies on abstract conclusions and fails to demonstrate or explain how the allegations in the Amended Complaint show that it "reserve[ed] the forum for its intended purpose of teaching [theatre]." *Id*. (*citing Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991)).

C. Speech Motivated his Termination.

Defendant first argues that McNellis "fails to describe the District's stated reason for terminating his employment," which is simply not true. App. 101 at ¶ 114 (the district stated the reason for his termination was the "emails regarding the Laramie Project."). Next, Defendant argues that the Board is not legally responsible for McNellis termination. *See* Resp. at 17-20. Defendant's argument is unavailing because it ignores the different ways that municipalities may be held liable for a deprivation of a public employees' rights. *See Crowson v. Washington Cnty. Utah*, 983 F.3d 1166, 1184 (10th Cir. 2020) (*citing Waller v. City & County*

of Denver, 932 F.3d 1277, 1283 (10th Cir. 2019). In the Tenth Circuit, a public employee can establish liability by demonstrating:

> (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused.

Crowson v. Washington Cnty. Utah, 983 F.3d 1166, 1184 (10th Cir. 2020).

First, the Court should evaluate the decision to decision to investigate and suspend McNellis for Twenty-Four (24) days, which itself constitutes an adverse employment action. *See* App. 98 at ¶¶ 77-81 (McNellis was suspended on October 5, 2020), 101 ¶ 113 (McNellis was terminated on October 29, 2020); *see also Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098, 1104 (10th Cir. 1998) ("[a]ctions such as suspensions or terminations are by their nature adverse, even if subsequently withdrawn.").[3] In this case, the suspension, which lasted for nearly a month, directly interfered with McNellis' relationships within Ponderosa and

[3] *See also Annett v. Univ. of Kansas*, 371 F.3d 1233, 1239 (10th Cir. 2004) ("[w]e 'liberally define[] the phrase adverse employment action' and do not limit such actions to 'monetary losses in the form of wages and benefits … we consider acts that carry 'a significant risk of humiliation, damage to reputation, and concomitant harm to future employment prospects.") (internal citations omitted).

negatively impacted his ability to continue as an administrator. Notably, with respect to the suspension, there is no question that, based on the allegations, the Board was aware of the Laramie Project emails and ratified the decision to suspend and investigate McNellis. App. 99 at ¶¶ 85-87 (David Ray was aware of the decision). Thus, the decision to suspend McNellis for nearly a month was both made and ratified by a final policy maker (*i.e.*, David Ray) and dismissal is not appropriate under the third and fourth prongs in *Crowson*. *See Crowson*, 983 F.3d at 1184.

Even if Mr. Ray were not aware of the decision to suspend and investigate McNellis, the Board also authorizes the Superintendent to "handle[] … grievance, complaint and/or due process procedures," and "suspensions." App. 164, 177 ("[t]he superintendent or his/her designee shall be authorized to suspend with pay or place on administrative leave … pending an internal investigation for alleged misconduct.").[4] In other words, the Superintendent, and decision-makers in this case, did not need approval from the Board to suspend McNellis for nearly a month, which itself is an adverse employment action. The Board also authorizes the Superintendent to "[comply with … other termination processes" *Id*. The fact

[4] Again, respectfully, this Court should not consider Defendant's Exhibits A and B to the MTD. *See supra* n. 2. However, to the extent it does, the Board's own policies demonstrate that there is at least a plausible question of fact regarding the widespread policy of the Board to delegate certain responsibilities to its Superintendent. *See* App. 161-177.

that the Board's written policies authorize the Superintendent or its delegee to handle grievances, due process procedures, suspensions, internal investigations, and other termination processes demonstrates that the Board has a widespread practice with respect to the suspension and investigation. *See Crowson*, 983 F.3d at 1184 (dismissal is not appropriate under the second prong).

Second, with respect to the termination decision, again, the allegations demonstrate that Mr. Ray was aware of the basis for the investigation into McNellis. App. 99 at ¶¶ 85-87. Because the Board must approve or ratify a termination decision, it is plausible if not substantially likely that Mr. Ray (and the Board) made the final decision to terminate McNellis based on the "emails regarding the Laramie Project," or at the very least, ratified the decision to terminate McNellis based on the Laramie Project emails. *See Crowson*, 983 F.3d at 1184. Moreover, former principal Ottmann's letter demonstrates that the decision was made through the normal channels, which includes Board approval:

> The contents of the email was eventually the catalyst for his firing…
>
> In my opinion, his firing was unjust and unfair, and unfortunately, even though I was the principal, I couldn't save him because it wasn't my decision to make.

App. 145-46. The foregoing demonstrates that the actions in this case extended beyond the principal, and thus, it is plausible that the termination decision was made by the Board.

In sum, the allegations demonstrate that Defendant told McNellis it terminated him for the emails related to the Laramie Project, the Chairman of the Board was aware of the reason for the investigation in to McNellis, the principal did not have the ability to make the decision to terminate McNellis, and McNellis was, in fact, terminated. Thus, the allegations demonstrate that the Board acted within its legal authority and terminated McNellis based on his protected speech.

II. VII and CADA

Defendant argues that McNellis failed to present direct evidence of discrimination because the letter from former Principal Ottmann is not direct evidence of discrimination. Resp. at 22. However, the direct evidence of discrimination in this case is that Defendant told to McNellis that he was terminated because of his "emails regarding the Laramie Project." Opening Brief at 19; *see also* App. 200. The emails in this case are McNellis' protected speech and include his religious comments. *Id*. Principal Ottmann's letter provides further evidence and support showing that Defendant decision to terminate McNellis was based on his religious comments from the emails. Defendant does not address the allegation that it told McNellis his emails were the reason for his termination when terminating him. As such, this Court should hold that McNellis has presented direct evidence of discrimination and dismissal is not appropriate. *See* Opening Brief at 18-19.

A. McNellis Pled a Plausible Religious Discrimination Claim.

Defendant does not contest that McNellis is a member of a protected class or that he was qualified for his position. Resp. at 23. Instead, Defendant argues that (1) McNellis' suspension was not an adverse employment action and (2) McNellis failed to identify similarly situated employees.[5] Resp. at 23. First, as explained above, McNellis' suspension and subsequent investigation were adverse employment actions. *See Roberts*, 149 F.3d at 1104. McNellis was suspended and investigated for nearly a month based on four emails, which clearly impacted his ability to perform his job functions as an administrator. *Id*.

Second, contrary to Defendant's argument, McNellis did more than simply allege he was terminated after writing emails identifying his Christian beliefs. Resp. at 25. McNellis specifically alleged that Defendant told him the decision to suspend him was due to his "religious comments," and the decision to terminate him was due to his "emails," which contained his religious comments. *See* Opening Brief at 23. Defendant also completely ignores the fact that former

[5] Importantly, the *McDonnell-Douglass* framework is not the only way in which an employee can demonstrate circumstantial evidence of discrimination. *See Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1310 (11th Cir. 2023) (holding that the *McDonnell Douglas* framework is one tool and that the framework is not an "inflexible rule); *Purtue v. Wisconsin Dep't of Corr*., 963 F.3d 598, 601–02 (7th Cir. 2020) (holding that a Plaintiff can point to ambiguous or suggestive comments or conduct; better treatment of people similarly situated but for the protected characteristic; and dishonest employer justifications for disparate treatment.)

Principal Ottmann, who had personal knowledge of the investigation, stated that catalyst for McNellis' termination was his decision to share his religious views. *Id*. The foregoing is clearly "circumstantial evidence of discrimination," which should preclude Rule 12 dismissal. *See Berry*, 84 F.4th at 1310.

Regarding similarly situated employees, McNellis pled facts demonstrating that there were at least three (3) other employees who were part of the "good ole boys club," and Defendant received complaints about the same. App. 100 at ¶101. The foregoing employees were all mentioned in the investigation; however, McNellis was the only employee who was personally investigated, suspended, and/or terminated. App. 100-101 at ¶¶101-103, 105-111. McNellis was also the only employee who identified his religious affiliation. App. 101 at ¶105. In circumstances like here, McNellis need not demonstrate the religious affiliations of the other similarly situated employees because he was the only individual who disclosed his religious affiliation. *See Monroe v. Indiana Dep't of Transportation*, 871 F.3d 495, 507 (7th Cir. 2017); *Hwang v, Kansas State Univ.*, 753 F.3d 1159, 1164 (10th Cir. 2014); *see also* Resp. at 24-25 (McNellis was the only individual who disclosed his religious affiliation). Critically, as this court has routinely acknowledged, whether two (2) employees are similarly situated is a question of fact. *See Courage to Change Ranches Holding Co. v. El Paso Cnty*., Colorado, 73

F.4th 1175, 1191 (10th Cir. 2023) (citing *Riggs v. AirTran Airways, Inc*., 497 F.3d 1108, 1117 (10th Cir. 2007)).

Ultimately, the allegations in this case demonstrate that it is plausible that McNellis was suspended, investigated, and ultimately terminated because of his "religious beliefs," and Rule 12 dismissal is not appropriate. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1192-93 (10th Cir. 2021) (a plaintiff need not establish the element(s) of his claim, and a plaintiff need only set forth facts "to make the claims plausible on their face.").

B. McNellis Pled a Plausible Religious Retaliation Claim.

Contrary to Defendant's argument, McNellis complained about his suspension and the subsequent investigation, both of which were based on the "religious comments." App. 100 at ¶¶95-97. Specifically, when he was first suspended McNellis complained to Ms. Franklin, Mr. Winsor, and Principal Ottmann. App. 98-99 at ¶¶77, 80, 81, 93. McNellis also complained to former Principal Ottmann a second time while the investigation was ongoing. App. 100 at ¶¶95-97. Thus, McNellis complained on at least three (3) separate occasions to different administrators/decision-makers and employees about the nature of the investigation as it relates to his religious comments within a month prior to his termination. App 97 at ¶¶67-71; App. 100 at ¶¶95-97. Given the proximity of

McNellis' multiple complaints and his termination dismissal is not appropriate under Rule 12. *See Piercy v. Maketa*, 480 F.3d 1192, 1198 (10th Cir. 2007).

CONCLUSION

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

Respectfully submitted on February 26, 2024.

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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 the brief contains **3378 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, 14-pt Times New Roman.

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Respectfully submitted,

Dated: February 26, 2024

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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 all registered counsel of record, and has been transmitted to the Clerk of the Court.

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