IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 24-cv-02650-RMR-STV

PATRICK HOGARTY,

Plaintiff,

v.

CHERRY CREEK SCHOOL DISTRICT;
CHERRY CREEK SCHOOL DISTRICT BOARD OF EDUCATION;
ANGELA GARLAND, individually and in her official capacity as President for Cherry Creek School District Board of Education;
ANNE EGAN, individually and in her official capacity as Director for District A of Cherry Creek School District Board of Education;
CHRISTOPHER SMITH, individually and in his official capacity as Superintendent of Cherry Creek School District;
ANGIE ZEHNER, individually and in her official capacity as Director of Middle Schools for Cherry Creek School District;
COURTNEY SMITH, individually and in her official capacity as Director of Human Resources for Cherry Creek School District;
LISSA STAAL, individually and in her official capacity as Principal of Campus Middle School; and
RONALD GARCIA Y ORTIZ, individually and in his official capacity as Executive Director of Equity, Culture, and Community Engagement for Cherry Creek School District,

Defendants.

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

CONFERRAL

Undersigned counsel conferred with Plaintiff's counsel, and this motion is opposed.

INTRODUCTION

This is an employment case stemming from Plaintiff Patrick Hogarty's nonrenewal from Cherry Creek School District (the "District"). Hogarty asserts two claims for relief against all Defendants: (1) compelled speech in violation of the First Amendment; and (2) viewpoint discrimination in violation of the First Amendment. Defendants move to dismiss this case pursuant to Fed. R. Civ. P. 12(b)(6). Hogarty fails to state a claim upon which relief may be granted, and the individual defendants are entitled to qualified immunity.

STANDARD OF REVIEW

As the Court noted in *Citizens for Const. Integrity v. United States*, 2021 WL 4241336, at *1 (D. Colo. Aug. 30, 2021) (unpublished):

> 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). The complaint must allege a "plausible" right to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); *see also id.* at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). 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).

RELEVANT FACTUAL ALLEGATIONS

Hogarty began working as a Dean of Students ("Dean") at Campus Middle School ("CMS"), in 2021. Compl., Doc. 1, ¶ 28. The Dean's job qualifications include "the ability to promote and follow the Board of Education policies, District policies, and building and

department procedures, protocols, and guidelines." Ex. 1, Dean Job Description.[1] Deans must "supervise….the well being of all students…and maintain a positive, safe educational environment during and outside of the school day and at school events." *Id.*

Board of Education ("Board") policy AC prohibits discrimination and harassment in the workplace, including racial discrimination. Ex. 2, Policy AC.[2] District "employment policy requires all employees to attend 'Courageous Conversations' training within the first three years of employment, which focuses on 'equity and disrupting whiteness' and is facilitated by Pacific Educational Group." Compl., ¶ 35. Courageous Conversations training (the "Training") was created by the Pacific Educational Group ("PEG"). *Id.* at ¶¶ 39–42. PEG's Training program is a "process to discuss race explicitly in a manner that is intentional, compassionate and sustainable. *Id.* at ¶ 42. CMS also requires employees to meet monthly in "equity pods," where they discuss "race and disproportionality. *Id.* at ¶ 36. District meetings for all deans also include discussions of "race and inequities," and "systemic oppression." *Id.* at ¶ 38.

Hogarty participated in the Training on January 18, 2024. *Id.* at ¶ 45. Hogarty was told that his participation was confidential and would not affect his employment. *Id.* at ¶ 46. During the Training "Hogarty entered a virtual breakout room exercise with one other teacher and" Ronald Garcia Y Ortiz ("Garcia"), the District's Executive Director of Equity,

[1] The Court may take judicial notice of public documents, such as employee job descriptions without converting this motion to one for summary judgment. *Shifrin v. Colorado,* 2010 WL 2943348, *5 (10th Cir. 2010) (citing *Van Woudenbert ex rel Foor v. Gibson,* 211 F.3d 560, 568 (10th Cir. 2006)).

[2] Again, public documents, such as School District policies, are properly considered without converting this motion. *See Shifrin* 2010 WL 2943348 at *5.

Culture, and Community Engagement. *Id.* at ¶¶ 23, 47. During the breakout session, which focused on questions of identity, "what does it mean to be white," and "what experiences define whiteness," when Hogarty asked how he identifies, he stated "that he identifies as an American, that he loves his country, and that he believes it is the greatest country ever founded." *Id.* at ¶ 49.

On January 22, 2024, CMS Principal Lisa Staal ("Staal") told Hogarty that Garcia "complained to her" that during the Training, Hogarty failed to "acknowledge what people of color go through" and refused "to admit that America is 'systemically racist'." *Id.* at ¶ 50. Hogarty does not deny that he refused these acknowledgments. Instead, Hogarty complained to Staal and District Director of Middle Schools Angie Zehner that the promised confidentiality was breached by Garcia when he complained about Hogarty's statements and participation in the Training. *Id.* at ¶ 52. During a January 25, 2024, meeting to discuss Hogarty's complaint, Hogarty was told that Garcia told Staal that Hogarty's comments during the Training had "racist undertones." *Id.* at ¶ 54. Thereafter, Staal told Hogarty that she spoke to Garcia and that "Hogarty really doesn't want to be on HR's bad side of Angie Zehner's." *Id.* at ¶ 55.

On March 1, 2024, Staal and District Human Resources Director Courtney Smith "informed Hogarty that his position was being cut for 'budgetary reasons.'" *Id.* at ¶ 56. Several days later, Hogarty told Staal that he believed his position was being eliminated in retaliation for his statements during the Training. *Id.* at ¶ 58. On March 13, 2024, Smith placed Hogarty on paid administrative leave due to "unprofessional conduct." *Id.* at ¶ 60.

ARGUMENT

A. The Board is not subject to suit under Colorado law.

It is redundant to name the Board of Education ("Board") and the District. In Colorado, a school district is the entity subject to suit and encompasses its governing board. COLO. CONST. art. IX, § 15; § 22-32-101 (declaring each school district is a body corporate and in its name it may "sue and be sued"). Consequently, the Board should be dismissed. *Cf. K.D. v. Harrison Sch. Dist.* 2, 2018 WL 4467300, at *6 (D. Colo. Sept. 18, 2018) (dismissing school board where both it and district had been named).

B. Hogarty's First Amendment retaliation claims should be dismissed.

Hogarty asserts Defendants violated his Free Speech rights by compelling his speech and engaging in viewpoint discrimination when it nonrenewed his employment for the 2024-2025 school year, which he alleges was due to comments he made during a Training breakout session. The Tenth Circuit has not considered whether public employees asserting compelled speech and viewpoint discrimination claims do so via a First Amendment retaliation theory, but courts that have considered this question have answered in the affirmative. *See Cochran v. C'th of Atlanta,* 289 F. Supp 3d 1276, 1292–93 (N.D. Ga. 2017) (holding public employees cannot assert viewpoint discrimination claims separate from First Amendment retaliation claims and applying *Garcetti-Pickering* analysis); accord *Dixon v. Univ. of Toledo,* 842 F. Supp. 2d 1044, 1051–52, 1054 (N.D. Ohio 2012); *Kingsley v. Brundige*, 513 F. App'x 492, 499 (6th Cir. 2013); *Caleb v. Grier*, 598 F. App'x 227, 236 (5th Cir. 2015); *Gwinnett v. SW Fla. Reg. Plan. Council,* 4017 F. Supp. 3d 1273, 1279–80 (M.D. Fl. 2019); *LaSalle v. Puerto Rico Elec. Power Auth.,* 144

F. Supp. 3d 274, 278-79 (D. Puerto Rico 2015).

Under the five-part *Garcetti/Pickering* test applicable to employee Free Speech claims, 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. *E.g. McNellis v. Douglas C'nty Sch. Dist.*, 116 F. 4th 1122, 1132 (10th Cir. 2024). The first three steps are decided by the court. *E.g., Id.*

1. **Hogarty pleads that the comments that led to his nonrenewal were made pursuant to his official job duties.**

A public employee's speech made pursuant to his official duties is not protected. *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). The plaintiff carries the burden to establish that the contested speech was not made pursuant to official duties. *Casey v. W. Las Vegas Ind. Sch. Dist.* 473 F.3d 1323, 1328 (10th Cir. 2007).

The Tenth Circuit has "taken a broad view of the meaning of speech that is pursuant to an employee's official duties." *McNellis,* 116 F. 4th at 1133 (internal citations omitted) (holding public school administrator's criticism of extracurricular activity was not protected speech because it was made pursuant to his official job duties). In determining if speech was made pursuant to an employee's official duties, courts analyze the content of the speech and the employee's chosen audience. *Id.* Speech that relates to what an employee is paid to do, and which "contributes to or facilitates the employee's performance" of that duty, is made pursuant to the employee's official duty. *Id.*

Hogarty pleads that participation in the equity Trainings and the related equity pod breakout sessions were **requirements of his job** as a dean at CMS. Compl., ¶¶ 35, 36, 38. Hogarty pleads that during a required breakout session at which the topic of "whiteness" was discussed and at which Hogarty was asked how he identifies, he stated that he identifies "as an American, that he loves his country, and that he believes it is the greatest country ever founded." *Id.* at ¶ 49. Hogarty further asserts that he would not acknowledge "what people of color go through," and refused "to admit that America is 'systemically racist." *Id.* at 50. Hogarty's speech related to his identification as an American, and his refusal to acknowledge racism and systemic racism relate to "what he was paid to do," since they were made during the Training that he pleads was part of his job duties. *See McNellis,* 116 F. 4th at 1133.

The same is true regarding his complaint about confidentiality, as it related to the Training. The "audience" to which Hogarty made the speech also evidences that it was done as part of his official job duties. Hogarty's comments about identifying as an American and his refusal to acknowledge systemic racism were made to his colleagues; specifically, another District teacher engaged in the Training, and Garcia, the District's equity director, who also was engaged in the Training. *See id.*; Compl., ¶¶ 23, 47. His complaint about the lack of confidentiality in his breakout session was also made solely to Staal, her supervisor, Zehner, and Smith. These allegations establish that Hogarty's speech was made pursuant to his job duties. *See McNellis,* 116 F. 4th at 1133.

Also, all the speech about which Hogarty complains was made while he was working, or via District email. This allegation supports that Hogarty's speech was made

pursuant to his job duties. *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). In *McNellis*, the Tenth Circuit held that because the plaintiff's comments referenced a topic he pled he was paid to do, and they were made to his colleagues who were also school district employees, his speech was made pursuant to his official duties, and was not protected by the First Amendment. *See McNellis,* 116 F. 4th at 1133–36. The same is true here.

2. Hogarty's comments during the breakout session and complaints about confidentiality were not a matter of public concern.

Government employees who air personal grievances or express personal feelings do not engage in constitutionally protected speech. *See Wilson v. City of Littleton,* 732 F.2d 765, 768 (10th Cir. 1984) (personal feelings not entitled to First Amendment protection); *Williams v. Gwinnett C'nty Pub. Schs.,* 425 F. App'x 787 (11th Cir. 2011). Hogarty expressed personal feelings about how he identified and complained to his supervisors about a confidentiality breach in the breakout session process.

Williams is instructive. There, the plaintiff, a public school teacher, wrote an essay that he emailed to the entire school staff complaining about a school therapy dog program. In the essay, the teacher "berated" another staff member for bringing a dog to school, complained that her desire to bring the dog did not overcome his allergy to dogs, and asked her to "respect…the fact that [his] rights to eat, and teach, in a place free of pet dander must be acknowledged." *Id.* at 788–89. Williams was fired because of the email. The Eleventh Circuit determined that although the teacher alleged he was complaining for himself and the general public, the context and content of the email evidenced that he

was merely expressing a personal grievance about a school program. *Id.* at 789–90. The court also determined that the teacher's use of the school email system further evidenced that his speech was not protected. *Id.* Here, Hogarty's speech was part of or related to a school program and therefore, was not a matter of public concern. Additionally, his complaint about the lack of confidentiality following the breakout session was about a school program and specific to his participation in a required work training. Neither statement was about a matter of public concern.

3. The District's interest in inclusive education outweighs Hogarty's rights.

Even if Hogarty is somehow deemed to have been speaking as a private citizen on a matter of public concern, he nonetheless has not pled facts to support the third element of *Garcetti/Pickering*. Public employers have a significant interest in denouncing discrimination and racism and promoting equity, such that it supersedes a dissenting employee's rights. *See Dixon,* 842 F. Supp. 2d 1044, 1051–52 (university dean who published opinion article critical of homosexuality and contrary to the rights of homosexuals ran afoul of university's interests in nondiscrimination, and, thus, her First Amendment claims failed); *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1168, 1174 (10th Cir. 2021) (recognizing public employers have a right to denounce racism).

In *Dixon,* the court held a University did not violate the plaintiff's First Amendment rights by terminating her for her homophobic views because those views "could have done serious damage to the university" by "disrupting the human resources department by making homosexual employees uncomfortable or disgruntled…interfere[ing] with the University's interest in diversity…[and] lead[ing] to challenges to her personnel decisions."

Dixon, 842 F. Supp. 2d 1044, 1051–52. Significantly, the court rejected the plaintiff's arguments that these effects were speculative and had not yet happened. *Id.*

Moreover, it is long settled that public school districts have a right to determine and control appropriate school speech. *See Fraser*, 478 U.S. 675 at 681–83 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."). School districts may censor speech and/or compel it so long as its actions are related to a legitimate pedagogical interest. *See Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1231 (10th Cir. 2009) (holding school may censor or compel student speech at graduation). Indeed, the District may insist that its employee deliver "any lawful message" when the speech is made as part of the employee's job duties. *See Willey v. Sweetwater Cnty. Sch. Dist. No. 1 Bd. of Trustees*, 680 F. Supp. 3d 1250, 1286–87 (D. Wyo. 2023).

The District has a significant interest in promoting equity and denouncing racism. It has adopted policies, including Policy AC, that prohibit discrimination and harassment based on race and ethnicity, among other prohibitions. Ex. 2. It was particularly important that Hogarty express equitable views consistent with the District's Training, policies, and practices, as he was a Dean of Students who worked directly with a diverse body of students daily. Ex. 1. Hogarty's failure to denounce racism, and his refusal to acknowledge systemic racism, ran afoul of the District's legitimate interests. Because the District's interest in promoting effective administration and equity outweighs Hogarty's qualified free speech rights, *Garcetti/Pickering* weighs heavily in Defendants' favor.

4. Hogarty failed to allege his speech was a motivating factor in any decision by the District Board of Education, the only entity that can bind the District.

A municipality cannot be held liable for the actions of its employees pursuant to § 1983 under a theory of *respondeat superior*. *E.g. Marshall v. Columbia Lea Reg. Hosp.*, 345 F.3d 1157, 1177 (10th Cir. 2003). Instead, a plaintiff must show 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).

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. 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). To prove "causation" a plaintiff must plead "a direct causal link between the municipal action and the deprivation of federal rights," *Bd. of Bryan Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997), such that the challenged policy or practice is the "moving force" behind the constitutional violation, *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 770 (10th Cir. 2013).

To sustain liability against the District, Hogarty must prove that the allegedly unconstitutional actions were enacted pursuant to an official custom or policy of the District or an action carried out by its governing Board. He fails to do so. Hogarty asserts the District partners with PEG, that the Training is "anti-white, race-based training," and that all employees must participate in the Training. Compl., ¶¶ 67. However, he does not

assert any allegations showing that the District has a policy or practice of terminating or nonrenewing employees who do not participate in the Training, or who do not express the ideals he believes the Training encompasses. While he asserts, "upon information and belief", the District "had a preconceived notion of what speech was and was not permissible", the statement is conclusory; and, in any event, he fails to state that other employees who do not abide by those notions experience discipline.

Hogarty also fails to plead that the Board, which is tasked with all employment decisions in the District, knew about his speech and terminated him for it. Indeed, Hogarty fails to allege any action by the Board at all. This precludes Hogarty from establishing that his speech was a motivating factor in the employment decision by those who could bind the District. *See Bunch v. Ind. Sch. Dist. No. I-050, Osage Cnty.*, 435 F. App'x 784, 789 (10th Cir. 2011), *citing Hinds v. Sprint/United Mgmt. Co.*, 523 F.3d 1187, 1203 (10th Cir. 2008) ("[A plaintiff] must come forward with evidence from which a reasonable factfinder could conclude that those who decided to fire him had knowledge of his protected activity.").

C. The individual Defendants are entitled to qualified immunity.

To establish qualified immunity, a court must decide: (1) whether the facts alleged make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct. *E.g. Herrera v. City of Albuquerque*, 589 F.3d 1064, 1070 (10th Cir. 2009). "With regard to th[e] second [prong], the relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful under the

circumstances presented." *Id*. It is insufficient to merely cite a general proposition of law or to define such law at a "high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *Douglas v. Dobbs*, 419 F.3d 1097, 1101 (10th Cir. 2005) ("Warning against rights asserted at too high a level of generality, the Supreme Court has made clear that the relevant inquiry must be undertaken in the specific context of the case."). A plaintiff must show that the official would have known that his "particular conduct" in the situation he confronted violated a plaintiff's constitutional right. *Id.* It is not enough that a case may exist regarding the same generalized principles; to constitute clearly established law, the cases must be so factually similar that it would put the government official on notice that his or her specific conduct in that situation would violate the plaintiff's rights. *Yeasin v. Durham*, 2018 WL 300553, *5 (10th Cir. 2018).

A reviewing court may "exercise [its] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id*. "Qualified immunity is applicable unless" the plaintiff can satisfy both prongs of the inquiry. *Id*.

1. Hogarty fails to state a claim against Defendants Garland, Egan, Smith, and Zehner because he fails to allege personal involvement.

To impose liability on an individual under § 1983, Hogarty must plead they were personally involved in the alleged constitutional deprivation. *Foote v. Spiegel,* 118 F.3d 1416 (10th Cir. 1997); *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009). Hogarty fails to allege that individual Board of Education members Garland or Egan were involved in anything related to PEG, his employment at the District, or the alleged retaliation. Paragraphs 17 and 18 are the only ones in which Garland and Egan are

mentioned, and the only allegations are as to their names and titles. This is insufficient to state any constitutional claim against them.[3]

Hogarty fails to plead any specific allegations against Superintendent Smith, either. The few allegations about Smith similarly describe his job title and duties. Compl., ¶¶ 19, 32–34. Hogarty fails to allege that Smith was involved in or even knew about the alleged protected speech or nonrenewal, so he must also be dismissed from the lawsuit.

Finally, Hogarty fails to allege personal involvement by Zehner. Hogarty asserts he complained to Zehner about the lack of promised confidentiality in the Trainings, and that Staal told him he did not want to be on Zehner's "bad side." *Id.* at ¶¶ 52, 55. Hogarty fails to allege that Zehner was involved in the nonrenewal decision or had any concerns with his speech at all. The lack of allegations of personal involvement demand Zehner's dismissal from the lawsuit.

2. The individual Defendants must be dismissed because Hogarty failed to state a claim, as discussed above.

As discussed above, Hogarty's claims fail because he did not engage in constitutionally protected speech. Because he has not plausibly alleged a constitutional deprivation, the individual defendants are entitled to qualified immunity. *See Maestas v. Lujan*, 351 F.3d 1001, 1007 (2003).

[3] Of course, individual or even a minority group of Board members are not authorized to act independently; any policy changes must be adopted by vote during a public meeting. §§ 22-32-103(1), -108(6), C.R.S.; § 24-6-402(8), C.R.S.

3. Hogarty did not plead, nor can he show, that the individual Defendants violated a clearly established right.

Hogarty also cannot show that any of the individuals violated his clearly established rights as there is no caselaw prohibiting government employers from denouncing racism and promoting equity. To the contrary and as discussed above, Tenth Circuit law evidences that it is appropriate for public employers, especially public school districts, to denounce racism and direct speech that comports with their policies. *See VDARE Found.,* 11 F.4th at 1168, 1174; *Fraser*, 478 U.S. 675 at 681–83. It follows that none of the employees involved were on notice that their discussions with Hogarty could lead to a First Amendment violation.

Hogarty pleads that Garcia reported his concerns and perceptions about Hogarty's comments during the Training, as well as his failure to denounce racism and acknowledge systemic racism, to Staal. *VDARE* instructs that Garcia's comments are appropriate speech for a government official. *See id.* Pertinently, there are no allegations that Garcia knew about, condoned, or was involved in Hogarty's nonrenewal or placement on administrative leave.

As to Staal and Courtney Smith, Hogarty pleads they nonrenewed him for his comments during the Training, for his failure to denounce racism and acknowledge systemic racism, and for his complaints about confidentiality. Hogarty also pleads that Smith placed him on administrative leave because he complained about the Trainings and the alleged confidentiality violation. However, in light of *VDARE*, they too were not on notice that their conduct violated Hogarty's rights. *Id.* For the foregoing reasons, all of the individual Defendants are entitled to qualified immunity.

RESPECTFULLY SUBMITTED this 13th day of December, 2024.

SEMPLE, FARRINGTON, EVERALL & CASE, P.C.

By: *s/ Mary B. Gray*

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of December, 2024, a correct copy of the foregoing **MOTION TO DISMISS** was filed and served via CM/ECF to the following:

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