FILED
United States Court of Appeal
Tenth Circuit

September 26, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LESLIE SHANNON,

Plaintiff - Appellant,

v.

CHERRY CREEK SCHOOL DISTRICT; DARLA THOMPSON; SCOTT SIEGFRIED; KEVIN WATANABE; CHERRY CREEK SCHOOL DISTRICT BOARD OF EDUCATION; TY VALENTINE,

Defendants - Appellees.

No. 22-1304
(D.C. No. 1:20-CV-03469-WJM-SKC)
(D. Colo.)

ORDER AND JUDGMENT*

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Ms. Leslie Shannon is a Black female who taught at a school in Colorado. Ms. Shannon's teaching contract included a three-year probationary period. In the third year, the school district declined to renew

* Oral argument would not help us decide the appeal, so we have decided the appeal based on the record and the parties' briefs. *See* Fed. R. App. P. 34(a)(2)(C); 10th Cir. R. 34.1(G).

This order and judgment does not constitute binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. But the order and judgment may be cited for persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

Ms. Shannon's contract. She sued, claiming racial discrimination, existence of a hostile work environment, and retaliation. The district court granted summary judgment to the defendants, and we affirm.

1. Standard for appellate review

We conduct de novo review, using the same standard that applied in district court. *Riggs v. AirTran Airways, Inc.*, 497 F.3d 1108, 1114 (10th Cir. 2007). Under that standard, we view the evidence in the light most favorable to the nonmovant (Ms. Shannon). *Id.* Viewing the evidence favorably to Ms. Shannon, we consider whether the defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

2. Claims against the school district and its officials

Ms. Shannon claims the existence of a racially hostile work environment and the commission of racial discrimination and retaliation.[1]

2.1 Ms. Shannon waived her appellate argument involving a racially hostile work environment.

For the claim of a racially hostile work environment, liability would exist only if the racial harassment had been severe or pervasive enough to "create[] an abusive working environment" and "alter[] a term, condition, or privilege of the plaintiff's employment." *Lounds v. Lincare, Inc.*,

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[1] On appeal, Ms. Shannon also alleges a denial of due process. But a claim for the denial of due process didn't appear in the complaint or Ms. Shannon's response to the motion for summary judgment. So this claim was waived. *See Somerlott v. Cherokee Nat. Distribs., Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012).

812 F.3d 1208, 1222 (10th Cir. 2015). In an effort to satisfy this standard, Ms. Shannon relies on racial stereotyping and racially insensitive programming.

Ms. Shannon's allegation of stereotyping stemmed in part from disagreement over a scheduling conflict. Ms. Shannon had scheduled an event that conflicted with the timing of a mandatory meeting with the community. The school principal admonished Ms. Shannon for planning the event at the same time as the community meeting. Ms. Shannon reacted negatively, and the principal allegedly rebuked Ms. Shannon for responding angrily and argumentatively. Ms. Shannon characterizes the rebuke as a resort to racial stereotyping of Black women.

Ms. Shannon also argues that the school's programming showed insensitivity to race by conducting

- equity-focused community meetings on "white privilege" and
- an offensive musical during Black History Month.

Ms. Shannon waived these arguments because she hadn't presented them in district court. The waiver came after the magistrate judge had recommended an award of summary judgment to the defendants. Ms. Shannon objected to the recommendation, but didn't address her claim of a hostile work environment. That omission prevents Ms. Shannon from challenging the grant of summary judgment on this claim. *See Casanova v. Ulibarri*, 595 F.3d 1120, 1123 (10th Cir. 2010).

2.2 Ms. Shannon failed to create a triable fact-issue on her claim of racial discrimination.

Ms. Shannon claimed not only a racially hostile work environment, but also racial discrimination from the nonrenewal of her teaching contract. On this claim, the district court concluded that Ms. Sherman hadn't presented a triable fact-issue on pretext. We agree.

To prove racial discrimination, Ms. Shannon relied on circumstantial evidence. The district court assumed that this evidence had satisfied Ms. Shannon's burden to present a prima facie showing of discrimination. With satisfaction of that burden, the defendants would have needed to present a legitimate nondiscriminatory reason for declining to renew the contract. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019). The defendants satisfied this burden by pointing to concerns about Ms. Shannon's performance and the principal's confidence that a new teacher would do a better job.

The burden would thus have returned to Ms. Shannon to show pretext behind the defendants' explanation. *See id.* For pretext, Ms. Shannon argues that

- the school district lacked documentation for the concerns about her performance,
- she didn't realize that her job was in jeopardy, and
- no one had expressed concern about her performance until she complained to a federal agency.

But Ms. Shannon lacks any evidence for these arguments.

First, the summary-judgment record contains undisputed evidence of the principal's concerns regarding Ms. Shannon's performance. For example, in her first year, the principal

- rated Ms. Shannon as "basic" and "partially proficient" on most of the performance standards and
- stated how she could improve.

R. vol. II, at 87–102. Ms. Shannon appeared to acknowledge the criticisms, asking if she needed to look for a different job. Ms. Shannon obtained similar evaluations in her second and third years of teaching.

Ms. Shannon responds to this evidence by

- relying on a document that she created,
- pointing to the school's failure to create an improvement plan,
- challenging the principal's criticism of the scheduling conflict as racially based, and
- defending her frequent absences and her failure to provide lesson plans to teachers covering her classes.

Ms. Shannon contends that her performance reviews showed professional growth. For this contention, she relies on a document that she created. The district court excluded this document as unauthenticated, and Ms. Shannon does not address admissibility. We thus can't consider the document on the availability of summary judgment. *Foster v. AlliedSignal, Inc.*, 293 F.3d 1187, 1191 n.1 (10th Cir. 2002).

Apart from this document, Ms. Shannon argues that the principal should have created an improvement plan. This argument reflects a misunderstanding of the school district's policy. The policy provided principals with two codes that could apply when the principal declines to renew a probationary teacher with performance issues. One code would reflect "ineffective performance." To use this code, however, the principal had to create an improvement plan. The second code was "other."

The HR department provided principals with guidance, recommending use of the code "other" when a principal

- harbored concern over a teacher's performance and
- wanted to hire from a new pool of applicants.

The HR department suggested use of the code for "ineffective performance" only if the principal had grave concern with a teacher's effectiveness. Based on this guidance from the HR department, the principal used the code "other" when deciding not to renew Ms. Shannon's teaching contract. This code didn't require an improvement plan.[2]

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[2] Ms. Shannon states that the principal coded the reason for nonrenewal as "other" and told her that "the nonrenewal was not due to performance." Appellant's Opening Br. at 2–3 (quoting R. vol. I, at 57–58).

Ms. Shannon argues that use of the "other" code undercuts the criticism of her performance. But this argument conflicts with the summary-judgment evidence, which shows that

- the school district typically used the code for "other" when concerned generally with a teacher's performance,
- the school district used the code for "ineffective performance" only when there were grave concerns with a teacher's effectiveness, and
- the school district's HR department had advised school officials to decline renewal of probationary teachers in the third year whenever there were any performance concerns.

Though Ms. Shannon characterizes the cited performance concerns as "grave," Appellant's Opening Br. at 2, she doesn't point to any evidence that the principal had considered these concerns to be "grave."

Ms. Shannon also complains about comments characterizing herself as angry and argumentative, which are negative stereotypes of Black women. These comments weren't enough to question the principal's belief that she could replace Ms. Shannon with a better teacher. *See Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994) (stating that isolated, ambiguous comments are not enough to show pretext).

Finally, Ms. Shannon argues that her absences didn't violate the school district's policy. But the principal combined concerns over attendance with concern over Ms. Shannon's failure to provide lesson plans to the teachers covering her classes.

Ms. Shannon argues that she sometimes didn't have enough time to leave lesson plans with other teachers. But we view pretext based on how the facts appeared to the decision-maker, who was the school district's principal. *Rivera v. City & Cnty. of Denver*, 365 F.3d 912, 925 (10th Cir. 2004). Though Ms. Shannon defends her failure to leave lesson plans, she doesn't question the genuineness of the principal's frustration with the burden falling on other teachers. So Ms. Shannon's explanation for her own conduct doesn't suggest pretext.

As a result, we conclude that Ms. Shannon failed to create a triable fact-issue on pretext. That failure entitled the defendants to summary judgment on the claim of race-discrimination.

2.3 Ms. Shannon failed to create a triable fact-issue on her retaliation claim.

Ms. Shannon also claims retaliation for her comments to the assistant principal and a complaint to a federal agency. The district court properly concluded that no genuine dispute of material fact existed.

On the retaliation claim, Ms. Shannon had to show a causal link between her protected activity and the adverse action. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019).

Ms. Shannon allegedly complained to the assistant principal about

- the community meetings on the topic of "white privilege" and
- the content of a musical during Black History Month.

The assistant principal said that he would share this concern with the school's trainers, but Ms. Shannon asked the assistant principal not to say anything. The assistant principal testified that he had respected Ms. Shannon's request and hadn't said anything about her complaint.[3] Ms. Shannon accuses the assistant principal of lying.

The district court rejected this accusation for two reasons:

1. The evidence was undisputed that the assistant principal hadn't disclosed these conversations to the principal, who was the decision-maker.

2. Too much time had passed between the conversations with the assistant principal and the decision not to renew the contract.

We agree with the first reason, and Ms. Shannon waived any challenge to the second reason.

The assistant principal testified that he hadn't told the principal what Ms. Shannon said, and the principal testified that no one had told her about the conversations with the assistant principal. In the face of this testimony by both the principal and assistant principal, Ms. Shannon concedes that she lacks any contrary evidence. Given this concession, any reasonable factfinder would find that the assistant principal had not disclosed these conversations to the principal.

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[3] The assistant principal had no role in deciding whether to renew Ms. Shannon's teaching contract.

The court reasoned independently that a causal link couldn't be inferred because too much time had passed between Ms. Shannon's conversations with the assistant principal and the principal's decision not to renew the contract. Ms. Shannon doesn't address this rationale, which would preclude reversal on this claim even if we were to reject the district court's first reason. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1387–88 (10th Cir. 1997).

Ms. Shannon also complains that the principal gave negative comments to a prospective employer in retaliation for the complaint to a federal agency. The district court assumed that Ms. Shannon had presented prima facie evidence of a causal link. This assumption shifted the burden to the defendants to provide a legitimate nonretaliatory reason for the principal to share negative comments with the prospective employer. *See Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019). The defendants satisfied this burden by stating that the principal's usual practice was to provide a reference.[4]

The burden thus returned to Ms. Shannon to show pretext. *See id.* She says that the principal acted maliciously, but doesn't give any reason to

[4] When Ms. Shannon was notified of the nonrenewal, she was told that the principal would provide a reference but not a letter of recommendation.

doubt the principal's explanation that she was following her usual practice.[5] Ms. Shannon thus failed to create a triable fact-issue on pretext.

3. Claims against the school district's superintendent and HR director

Ms. Shannon also sued the school district's superintendent and HR director. The district court granted summary judgment to these individuals, reasoning that they had lacked personal knowledge of Ms. Shannon's employment or involvement in the principal's reference. Ms. Shannon presents no reason to question this reasoning.

4. Claim for tortious interference with contract or business relationships

Ms. Shannon also invoked state law, claiming tortious interference with contract or business relationships. On this claim, the district court declined to exercise supplemental jurisdiction. Ms. Shannon doesn't question this ruling, but she defends this claim on the merits. Because Ms. Shannon doesn't question the decision to decline jurisdiction on this claim, we have no reason to address the merits.

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[5] The principal informed the prospective employer that Ms. Shannon had missed 26 days in one school-year and had failed to submit final learning objectives for the students. But the principal also made positive comments about Ms. Shannon's work.

Affirmed.

Entered for the Court

Robert E. Bacharach
Circuit Judge

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Clerk of Court

Jane K. Castro
Chief Deputy Clerk

September 26, 2023

Miss Leslie M. Shannon
7927 South Kittredge Street
Englewood, CO 80112

RE: 22-1304, Shannon v. Cherry Creek School District, et al
Dist/Ag docket: 1:20-CV-03469-WJM-SKC

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Jonathan Fero

CMW/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Magistrate Judge S. Kato Crews

Civil Action No. 1:20-cv-03469-WJM-SKC

LESLIE SHANNON,

Plaintiff,

v.

CHERRY CREEK SCHOOL DISTRICT,
DARLA THOMPSON,
SCOTT SIEGFRIED,
KEVIN WATANABE,
CHERRY CREEK SCHOOL DISTRICT BOARD OF EDUCATION, and
TY VALENTINE,

Defendants.

RECOMMENDATION REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [DKT. 75]

This recommendation addresses Defendants' Motion for Summary Judgment ("Motion") [Dkt. 75.] District Judge Martinez referred the Motion to the Magistrate Judge. [Dkt.76.] The Court has reviewed the Motion, related briefing, and the entire record. No hearing is necessary.[1] For the reasons stated below, the Court recommends the Motion be GRANTED.

A. JURISDICTION

[1] The issues raised by the Motion are fully briefed, obviating the need for a hearing. *Geear v. Boulder Cmty. Hosp.*, 844 F.2d 764, 766 (10th Cir. 1988) (any hearing requirement for summary judgment motions is satisfied by the court's review of the briefs and supporting materials submitted by the parties).

The Court has jurisdiction over this case under 28 U.S.C. § 1331 (federal question).

B. STANDARD OF REVIEW

The purpose of a summary judgment motion is to assess whether a trial is necessary. *White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant bears the "responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant meets this burden, then the nonmoving party must identify material facts showing there is a genuine dispute for trial. *Id.* at 324. A fact is "material" if it has the potential to affect the outcome of a dispute under applicable law. *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995). An issue is "genuine" if a rational trier of fact could find for the nonmoving party on the evidence presented. *Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000).

In performing this analysis, the factual record and any reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. *Id.* A mere "scintilla of evidence," however, is insufficient to avoid summary judgment. *Turner v. Public Service Co. of Colorado*, 563 F.3d 1136, 1142 (10th Cir. 2009). And conclusory statements and testimony based merely on conjecture or subjective belief

are not competent summary judgment evidence. *Rice v. United States*, 166 F.3d 1088, 1092 (10th Cir. 1999), *cert. denied*, 528 U.S. 933 (1999); *Nutting v. RAM Southwest, Inc.*, 106 F. Supp.2d 1121, 1123 (D. Colo. 2000). Instead, a nonmovant "must proffer facts such that a reasonable jury could find in her favor." *Rice,* 166 F.3d at 1092.

A nonmovant who bears the burden of persuasion at trial may not simply rest upon their pleadings. They must go beyond the pleadings and identify specific facts, supported by admissible evidence in the event of trial, from which a reasonable jury could find for the nonmovant. *Mitchell v. City of Moore, Oklahoma*, 218 F.3d 1190, 1197 (10th Cir. 2000). To accomplish this, the nonmovant must identify facts with reference to affidavits, deposition transcripts, or exhibits incorporated therein. *Id.*

Because Plaintiff is not an attorney the Court construes her filings and related submissions liberally. *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)). Despite this liberal construction, the Court may not construct arguments or legal theories for her in the absence of any reference to those issues in her filings. *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990).

C. BACKGROUND

Leslie Shannon is a Black female educator. [Dkt. 63, p.2.] She has dual masters' degrees in elementary and special education and has spent 18 years working in Title I schools in New York, Florida, and Colorado. [*Id.*] Most recently she was employed as a Science, Technology, Engineering, and Math ("STEM") instructor at Highline Elementary ("Highline") in the Cherry Creek School District ("District").

[*Id.*] This matter arises out of the District's non-renewal of her teaching contract at the end of the 2018 – 2019 academic year. [*See generally*, Dkt. 36.]

Plaintiff brings three claims for relief. First, she claims she was subjected to discrimination and a hostile work environment because of Highline's equity training programs. [*Id.*] Second, she claims Defendants wrongfully terminated her employment and defamed her character in retaliation for her complaints over the training. [*Id.*] Third, she alleges retaliation, defamation of character, and tortious interference based on an employment reference Highland's principal, Darla Thompson ("Thompson"), provided to a prospective employer of Plaintiff. [*Id.*]

Plaintiff brings her discrimination and retaliation claims under Title VII. She also brings a Section 1981 claim (by way of Section 1983) based on post-contract formation discrimination and retaliation.[2] Her state law claims arise under the Colorado Anti-discrimination Act, and include state common law claims for defamation and tortious interference. [Dkt. 36, pp.1-2.] In addition to suing the District and Thompson, Plaintiff asserts her claims variously against the Cherry Creek School District Board of Education ("Board"), the District's Superintendent Scott Siegfried ("Siegfried"), its Director of Human Resources Ty Valentine ("Valentine"), and Highline's Assistant Principal Kevin Watanabe ("Watanabe"). [Dkt. 36, pp.10, 18, and 25.]

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[2] In liberally construing Plaintiff's claims, the Court does not construe them to allege a stand-alone claim under 42 U.S.C. § 1983 because Plaintiff alleges no constitutional violations. Her reference to Section 1983 appears to be solely as the vehicle for her Section 1981 claims.

As required by Fed. R. Civ. P. 56, Defendants supported their Motion with affidavits, deposition testimony, and other admissible evidence. They presented 60 discrete statements of undisputed material facts supported by competent record evidence, thereby meeting their initial burden as the moving party. While Plaintiff denies many of Defendants' statements of undisputed material facts, the bulk of her denials consist of unsubstantiated and conclusory allegations which carry no probative value on summary judgment. *Hasan v. AIG Prop. Cas. Co.*, 935 F.3d 1092, 1098-99 (10th Cir. 2019) (citing *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869, 875 (10th Cir. 2004)). At this stage, a plaintiff is required to "go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial which a rational trier of fact could find for the nonmovant." *Coleman v. Blue Cross Blue Shield of Kan.*, 487 F. Supp.2d 1225, 1232 (D. Kan. 2007) (internal quotations and citation omitted). Accordingly, for purposes of summary judgment, the Court finds as undisputed all facts which Plaintiff failed to properly refute with competent evidence under Rule 56(c)(1).

Moreover, Defendants seek to exclude many of Plaintiff's exhibits because they "are hearsay and cannot be presented in a form that will be admissible at trial." [Dkt. 97, p.1.] "Material that is inadmissible will not be considered on a summary-judgment motion because it would not establish a genuine issue of material fact if offered at trial[.]" *Johnson v. Weld Cty., Colo.*, 594 F.3d 1202, 1209 (10th Cir. 2010) (quoting 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2727, at 497–98 (3d ed. 1998)). For example, trial courts "are constrained

to disregard . . . hearsay on summary judgment when . . . there is a proper objection to its use and the proponent of the testimony can direct us to no applicable exception to the hearsay rule." *Id.* (quoting *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1176 (10th Cir. 2007)). The Court may only consider self-authenticating documents or those supported with "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Law Co., Inc. v. Mohawk Const. and Supply Co., Inc.*, 577 F.3d 1164, 1170 (10th Cir. 2009) (quoting Fed. R. Evid. 901).

In her response, Plaintiff offers no support for the Court to consider the authenticity or admissibility of her various exhibits. The Court has accepted those exhibits submitted with Plaintiffs' response which Defendants further relied on with their reply, effectively stipulating to the authenticity and admissibility of those particular exhibits. However, for purposes of summary judgment, the Court does not consider the following exhibits objected to by Defendants because these exhibits lack proper authentication or suffer admissibility issues under applicable rules of evidence: [Dkts. 85-1, 85-4, 85-5, 85-6, 85-7, 85-10, 85-11, 85-12, 85-13, 85-17, 85-19, 85-20, 85-21, 85-22, and 85-23.]

D. UNDISPUTED MATERIAL FACTS

Highline serves a highly diverse student population in the District, with a significant majority of its students eligible for free and reduced lunches. [Dkt. 75-1, ¶3.] Thompson (Hispanic female) served as Highline's principal from 2014 to 2019. [*Id.* at ¶2.] She initially hired Plaintiff as a STEM teacher for the 2016 – 2017 school year. [*Id.* at ¶4.] Because Plaintiff's prior teaching experience was from outside

Colorado, Thompson offered Plaintiff a teaching contract on a probationary period, meaning her contract was subject to non-renewal on an annual basis for a three year period. [*Id.* at ¶5.]

The District values equity and inclusion in its learning and work environments. [*Id.* at ¶6.] It maintains anti-discrimination policies prohibiting discrimination and retaliation. [Dkt. 75-2, ¶13.] It also fostered a 19-year relationship with Pacific Educational Group ("PEG") to provide equity training to District staff. [*Id.* at ¶3.]

In its Beyond Diversity training, PEG raised the topic of "white privilege" with the stated purpose of "understand[ing] how whiteness or white privilege plays in [the District]," "creating greater consciousness," and building "knowledge and capacity around racism." [Dkt. 75-3, pp.34:19–35:3.] The District used PEG as a resource to "give[ ] language and common understanding so that people can engage in [ ] 'courageous conversations' interracially and intra-racially." [*Id.* at p.6:23–7:1.]

In addition, once a week teachers attended Professional Learning Community meetings. [Dkt. 75-1, ¶6.] Once a month, these meetings were devoted to equity topics. [*Id.*] Thompson designated several staff members as "equity facilitators" who planned and led each month's equity-focused meeting. [*Id.*] Equity topics included "white privilege" and the negative impacts of implicit bias on students of color. [Dkt. 75-4, ¶8.] Thompson required all teachers to attend the Community meetings, but she was flexible when scheduling conflicts arose. [Dkt. 75-1, ¶7.]

Plaintiff began experiencing problems in her third year at Highline. Her premier STEM project each year was a school-wide balloon launch. [*Id.* at ¶13.] As in the prior year, she planned to practice the balloon launch after school. [Dkt. 75-6, p.40:11-14.] But she planned the practice launch to occur on the same day as a mandatory Community meeting. [*Id.* at pp.46:23-47:3.] Just before the planned community meeting, Plaintiff approached Thompson and explained she would not be attending because she needed to practice the balloon launch. [Dkt. 75-1, ¶13.] The interaction did not go well. Thompson states she "expressed that Shannon should have scheduled the practice around the mandatory PLC meeting." [*Id.*] She claims Plaintiff then raised her voice and became very argumentative. [*Id.*] Concerned about Plaintiff's unprofessionalism, Thompson "called out" the behavior. [*Id.*] Plaintiff, for her part, claims Thompson called her "argumentative and loud" thereby perpetuating negative stereotypes of Black women as angry. [Dkt. 75-6, pp.44:14-46:10.] In the end, Thompson allowed Plaintiff to miss the Community meeting. [Dkt. 75-1, ¶13.]

1. Plaintiff's "Courageous Conversations"

During a meeting with Watanabe (Asian male) in December 2018, Plaintiff told him about her concerns over the equity-focused community meetings. [Dkt. 75-4, ¶9.] She explained she did not like the format of the meetings, which consisted of large group discussions with the entire staff, and that she would feel more comfortable sharing her perspective in smaller groups. [*Id.*] She also told him about her argument with Thompson over the balloon-launch practice, including her belief Thompson promoted negative stereotypes about Black women when she described Plaintiff as

"angry" and "argumentative." [*Id.*] Plaintiff considered this conversation with Watanabe to be a "courageous conversation" where she "spoke her truth[,]" and she asked him not to disclose her concerns out of fear of retaliation. [Dkt. 36, p.22.] Watanabe maintained Plaintiff's confidence and told no one. [Dkt. 75-4, ¶10; *see also* Dkt. 75-1, ¶17.]

In February 2019, Plaintiff was upset the students performed a musical for Black History month that included their singing African American spiritual hymns. [Dkt. 75-1, ¶18.] To the extent Watanabe learned of Plaintiff's concerns,[3] he did not share them with Thompson or anyone else, and Thompson never heard of this concern. [Dkt. 75-4, ¶10; Dkt. 75-1, ¶17.]

2. Plaintiff's Performance

Each year Plaintiff's performance evaluation was completed by a different evaluator. Thompson completed Plaintiff's first-year evaluation. [Dkt. 75-1, ¶8.] It was Thompson's practice to base evaluations, in part, on informal and formal classroom observations followed by meetings where she provided feedback to the teacher. [*Id.*] Thompson observed Plaintiff multiple times, informally and formally, during her first year. [*Id.*] She found Plaintiff did not use STEM-focused classroom materials to maximize instruction time. [*Id.* at ¶9.] She also observed Plaintiff did not differentiate her instruction among grade levels, such that students in the first

[3] Plaintiff alleges she raised this concern in a second meeting with Watanabe in February 2019. Watanabe does not recall this meeting or hearing Plaintiff had concerns over the musical. But because Watanabe was neither the decision-maker, nor involved in the decision to not renew Plaintiff's contract, the Court does not find these disputed facts to be material.

grade were often doing the same activities as those in higher grade levels. [*Id.*] Nor did Plaintiff differentiate her instruction based on individual student needs. [*Id.*] Thompson further observed Plaintiff use a harsh tone with students, which she described as "disrespectful." [*Id.*] Thompson suggested to Plaintiff that she be more thoughtful of her tone when redirecting and correcting students to ensure they were all treated respectfully and fairly. [*Id.*] She also provided Plaintiff her additional observations. [Dkt. 75-5, pp.111:14-112:3.] Plaintiff asked Thompson whether she needed to look for another job for the following year, and Thompson told her no. [*Id.*]

At the end of Plaintiff's first year, Thompson rated her work as "basic" and "partially proficient." [*Id.* at ¶10.] The overall rating, however, passed the "effective" threshold based on applicable state-performance ratings and standardized-test scores. [*Id.*] While Thompson could have non-renewed Plaintiff's contract after the first year, she wanted to give Plaintiff the benefit of the doubt and an opportunity to grow, so she renewed the contract for another term. [*Id.*]

Plaintiff had a different evaluator her second year.[4] That evaluator noted similar concerns to those noted by Thompson the first year. [*Id.* at ¶11.] Plaintiff continued to show a "lack of differentiation and scaffolding" in her instruction accounting for students' different grade levels and needs. [*Id.*] Although there were still concerns with Plaintiff's performance during her second year, Thompson again

[4] Assistant Principal Michelle Colton is listed as the evaluator. [Dkt. 85-3, p.34.] She is not named as a party to the present lawsuit.

renewed the contract because she valued Plaintiff's diversity and she hoped Plaintiff would "show growth" in the third year. [*Id.*]

Watanabe evaluated Plaintiff's performance during her third and final year. [Dkt. 75-4, ¶3.] He observed Plaintiff multiple times, informally and formally. [*Id.* at ¶4.] Overall, he felt Plaintiff was doing the "very bare minimum amount of work to be a classroom teacher." [*Id.* at ¶5.] From his observations, Plaintiff was unprepared for lessons, and she lacked the requisite STEM knowledge. [*Id.*] He further found she did not demonstrate "rigor" in the classroom and her lessons lacked consistency. [*Id.*] For example, Plaintiff often showed videos in class with no apparent connection to STEM, such as the Disney movie *Moana* and the animated television series, *The Magic School Bus*. [*Id.*] As a result, Watanabe directed Plaintiff to provide him the lesson plans for her classes for his review and feedback, but she failed to provide them. [*Id.*]

Watanabe also concluded Plaintiff lacked follow-through. [*Id.* at ¶7.] She committed to teach a science unit for the first-grade teachers but failed to prepare the lesson plans so the teachers taught the unit themselves. [*Id.*] She committed to assist teachers with a school-wide "grab bag" event but called in sick the day she was to instruct them on the project. [*Id.*] She also called in sick the day of the grab bag event and was unavailable to facilitate the event or assist teachers and students with their projects. [*Id.*] She also failed to provide information to Watanabe to complete her evaluation, including her final student learning objectives ("SLOs"). [*Id.* at ¶11; Dkt. 75-5, pp.139:3 – 141:9.]

There were also issues with Plaintiff's attendance in her third year. She was absent 26 school days; 10 of these days due to bereavement leave in February 2019. [Dkt. 75-1, ¶12.] When taking leave, teachers are required to provide lesson plans for the substitute teacher to follow. [Dkt. 75-4, ¶6.] Plaintiff often failed to leave lesson plans, and when she did, they were minimal. [Dkt. 75-1, ¶12; Dkt. 75-4, ¶6.] She also failed to timely request a substitute teacher, often leaving her colleagues to cover her classes. [Dkt. 75-1, ¶12.] This created a significant burden on other teachers and school administration. [*Id.*] Watanabe felt Plaintiff's behavior was "wholly inadequate, contrary to the District's leave procedures, and inconvenienced her colleagues." [Dkt. 75-4, ¶6.]

In December 2018, Watanabe met with Plaintiff for her mid-year review and discussed his concerns about her "lack of rigor, professionalism and conduct." [*Id.* at ¶19.] For her final performance evaluation for the 2018 – 2019 school year, he rated her as "partially effective." [*Id.* at ¶11.; *id.* at p.15.] Dkt. 75-4, p.15.] He determined her performance did not meet the District's expectations and was unsatisfactory. [*Id.* at ¶11.] He shared his concerns about Plaintiff's performance with Thompson, specifically her lack of rigor in her classroom and the lack of differentiation in her lessons. [Dkt. 75-1, ¶14.] He also shared his concerns regarding Plaintiff's failure to obtain substitute teachers, leave substantive lesson plans for them, and her failure to provide him with her final SLOs. [*Id.*]

Watanabe's concerns led Thompson to conclude Plaintiff had not shown sufficient professional growth. [*Id.*] Thompson expected more from a veteran teacher,

believed the students would benefit from more effective STEM instruction, and determined Plaintiff's performance was unlikely to improve. [*Id.* at ¶¶15, 16.] She was also confident she could recruit a more effective teacher from the applicant pool. [*Id.* at ¶16.] Accordingly, Thompson recommended to the Superintendent that Plaintiff's contract not be renewed. [*Id.* at ¶15.] Other than sharing his concerns over Plaintiff's performance (based on his third-year evaluation) with Thompson, Watanabe was not involved in Thompson's non-renewal decision. [Dkt. 75-4, ¶12.]

3. Policy 4173

The policy followed by the District regarding the non-renewal of probationary teachers is contained in the District's collective-bargaining agreement with the teacher's union. [Dkt. 75-12, p.36.] Policy 4173 outlines the process for non-renewing probationary teachers. [Dkt. 75-2, ¶4.] One of the purposes of the probationary status is to afford the District maximum flexibility in hiring personnel. [*Id.*; Dkt. 75-12, p.36.] Based on the policy, building-level administrators, including school principals like Thompson, determine the renewal or non-renewal of probationary teachers' contracts, and provide their recommendation to the Superintendent. [Dkt. 75-2, ¶5.]

Once a recommendation is made to, and affirmed by, the Superintendent, it is then referred to the District's Human Resources Department ("HR") for presentation to the District's Board. [*Id.* at ¶7; Dkt. 75-8, ¶4.] HR does not independently review the propriety of the principal's recommendation as a matter of course; instead, it relies on the principal's professional judgment. [*Id.*; Dkt. 75-2, ¶5.]

HR provides annual written guidance to principals regarding the non-renewal process. [*Id.* at ¶6.] The guidance for 2018 – 2019 listed five reasons or "codes" for non-renewal: (1) program change or reduction; (2) enrollment decline; (3) program flexibility; (4) ineffective performance; and (5) other. [*Id.*] Thompson was previously informed by HR that non-renewal for "ineffective performance" (Option 4) had "several important legal requirements," such as issuance of a remediation plan and allowance of a reasonable period of time for the teacher to improve. [*Id.*] Non-renewal for "other" (Option 5), however, did not have the same requirements and allowed principals "complete and sole discretion" in hiring "the best teachers possible." [*Id.*] Thus, non-renewal decisions coded as "other" in order to hire from the applicant pool was typically used for general performance issues. [*Id.*] This was because HR advised principals to only code non-renewals as "ineffective performance" if there were "grave concerns" with a teacher's effectiveness and all legal requirements had been met. [*Id.*] HR also advised principals to avoid renewing a teacher's contract in the third year if there were any performance concerns. [*Id.* at ¶10.] Thus, the non-renewal of probationary teachers' contracts after their third year was not uncommon. [*Id.*] Based on this guidance, Thompson coded Plaintiff's non-renewal as "other."[5] [Dkt. 75-1, ¶16.]

4. Thompson Recommends Non-renewal

[5] There is no dispute Plaintiff never received written disciplinary action while at Highline. [Dkt. 75-1, ¶23.]

Thompson met with Plaintiff on April 5, 2019, and told her she was recommending the non-renewal of her contract. [*Id.* at ¶19; Dkt. 85-15, p.1.] Thompson also explained that while she would not write Plaintiff a letter of recommendation, she would provide a reference if contacted by prospective employers. [Dkt. 75-5, p.163:10-15.]

Superintendent Siegfried approved Thompson's recommendation. [Dkt.75-8, ¶4.] He had no personal or first-hand knowledge of the facts or circumstances of either Plaintiff's employment with the District or her non-renewal; he instead relied on Thompson, as he did with all his staff, when approving her non-renewal recommendation. [*Id.* at ¶¶4, 5.] He forwarded the recommendation and his approval on to HR for presentation to, and further approval by, the Board. [Dkt. 75-2, ¶7.] The Board approved the non-renewal on May 2, 2019. [Dkt. 75-2, pp.7-14.]

5. Thompson's Reference

In the Spring of 2019,[6] Thompson received a reference call about Plaintiff from Aurora Public Schools ("APS") for an administrative position. [Dkt. 75-1, ¶21; Dkt. 75-6, pp.74:22-75:1.] Thompson regularly provides job references when she receives such requests about current and former employees. [Dkt. 75-1, ¶21.] During that call, Thompson informed APS that Plaintiff was absent for 26 days during the 2018–19 school year and that she failed to submit her student learning objectives for the year. [*Id.*] She also provided "some positive comments" about Plaintiff's work. [*Id.*] It is

[6] Plaintiff asserts the reference call occurred on or around July 12, 2019. [Dkt. 75-7, p.18:9-10.]

undisputed the information Thompson provided during the reference call was true. [Dkt. 75-1, ¶21; Dkt. 75-5, pp. 139:3-141:9, 209:12-15.] No one, other than Thompson, was involved in the reference provided to APS. [Dkt. 75-, p.22:5–11; Dkt. 85, p.19.]

6. Plaintiff's Complaints

After Thompson notified Plaintiff she was recommending non-renewal, Plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 10, 2019. [Dkt. 1, pp. 36-38.] Plaintiff alleged her contract was not renewed because of her race and in retaliation for protected activity. [*Id.* at p.36.] The District forwarded the EEOC charge to its legal counsel. [Dkt. 75-7, p. 16:3–17.]

Plaintiff also filed an internal grievance on April 16, 2019. [Dkt. 85-15, p.1.] HR interpreted the grievance as claiming Policy 4173 was unfair and Plaintiff was "expressing concerns about cultural differences" without reference to a specific policy violation. [Dkt. 75-7, p.9:9-20.] As a result, HR determined the grievance did not implicate any of the District's anti-discrimination policies and forwarded the grievance to Thompson for her response. [*Id.* at p.15:8-22.] After reviewing Thompson's response, HR determined the non-renewal policy was appropriately followed, and Thompson acted impartially and objectively in administering the policy. [*Id.* at p.15:7-18.] Ultimately, HR determined Plaintiff's grievance was without merit. [*Id.*]

7. Plaintiff's Termination and Second Grievance

On May 2, 2019, the Chief HR Officer provided the District's non-renewal recommendation on the Plaintiff to the Board along with 60 other teachers' non-renewal recommendations. [Dkt. 75-2, ¶12; 75-9, ¶4.] The non-renewal recommendations were presented as a group without reference to any teachers' race or demographic information. [Dkt. 75-2, ¶12.] The Board was provided a list with the teachers' names, work location, position, probationary year (one, two, or three), the principal, and the reason for non-renewal, *i.e.*, options 1-5. [*Id.*; *id.* at p.20.] Without discussion, the Board approved all recommended non-renewals, including Plaintiff's, with a public vote in one combined personnel action. [*Id.* at ¶12.] The Board was unaware Plaintiff had filed an EEOC charge or grievance at the time of the vote. [Dkt. 75-10, p.9:1-22.]

Plaintiff filed a second grievance, this time against Thompson, on July 3, 2019. [Dkt. 75-7, p.17:8-15.] Here she claimed Thompson provided a negative reference to APS in retaliation for Plaintiff's protected activity. [*Id.*] HR determined her claim was not sustainable because, at that point, she was no longer an employee. [*Id.*]

E. ANALYSIS

1. Summary Judgment as to the Board is Appropriate

In relevant part, Plaintiff has sued both the School District and its Board of Directors. Defendants argue suit against both is redundant because the District encompasses the Board. The Court agrees.

The Board is not a separate entity from the District. *Roe v. Karval Sch. Dist. RE23*, Civ. No. 12-cv-00239-WYD-KLM, 2013 WL 1858464, at *7 (D. Colo. May 2,

2013). And in any event, only the District may be sued. *See K.D. by Nipper v. Harrison Sch. Dist. Two*, Civ. No. 17-cv-2391-WJM-NRN, 2018 WL 4467300, at *6 (D. Colo. Sept. 18, 2018) (citing Colo. Rev. Stat. § 22-32-101 "Each regularly organized school district . . . is declared to be a body corporate . . . and in its name it may . . . sue and be sued . . ."). Accordingly, the Court recommends Defendants' Motion be granted insofar as the claims asserted against the Board of Directors.

2. Title VII and Section 1981

Plaintiff's claims allege the District discriminated against her because of her race, subjected her to a hostile work environment, and retaliated against her in violation of Title VII and Section 1981. [*See generally* Dkt. 36.]

Title VII of the Civil Rights Act of 1964 provides a cause of action against employers who "discriminate against any individual with respect to h[er] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin," or who retaliate against a person for opposing an unlawful employment practice. *Hannah v. Cowlishaw*, 628 Fed. App'x 629, 632 (10th Cir. 2016) (citing 42 U.S.C. §§ 2000e–2(a)(1)).

Section 1981 gives "[a]ll persons within the jurisdiction of the United States ... the same right ... to make and enforce contracts." 42 U.S.C. § 1981. Similar to Title VII, it "prohibits not only racial discrimination [in the workplace] but also retaliation against those who oppose [discrimination]." *Hannah,* Fed. App'x at 631-32 (quoting, *Univ. of Texas Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 355 (2013)). Unlike Title VII, Section 1981 does not provide a vehicle for remedying racial discrimination and

retaliation in cases brought against state actors. *See Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 705 (1989). Rather, Section 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by [S]ection 1981 when the claim is pressed against a state actor." *Hannah*, 628 Fed. App'x 629 at 632 (quoting *Jett*, 491 U.S. at 735).

When a case under Title VII and Section 1981 arises out of the same set of facts, the elements for each cause of action are identical. *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1513 (10th Cir. 1997). Thus, to survive summary judgment on a Title VII and Section 1981 race discrimination claim arising from the same facts, a plaintiff may present direct evidence of discrimination, or as here, indirect evidence that satisfies the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under that framework, a plaintiff must first "raise a genuine issue of material fact on each element of the *prima facie* case. . ." *Bekkem v. Wilkie*, 915 F.3d 1258, 1267 (10th Cir. 2019) (internal citations omitted). The burden then "shifts to the employer to offer a legitimate non-discriminatory reason for its employment decision." *Id.* If the employer does so, "the burden then reverts to the plaintiff to show that there is a genuine dispute of material fact as to whether the employer's proffered reason for the challenged action is pretextual – *i.e.*, unworthy of belief." *Id.*

A. Plaintiff Fails to Demonstrate a Genuine Dispute of Material Fact as to the Second and Third Elements of her *Prima Facie* Case of Race Discrimination

To establish a *prima facie* case of race discrimination under Title VII, Plaintiff must show: "(1) [s]he is a member of a racial minority; (2) [s]he suffered an adverse

employment action; and (3) similarly situated employees were treated differently." *Trujillo v. Univ. of Colo. Health Sciences Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). Further, a plaintiff must show racial animus to support a discrimination claim under Section 1981. *Patrick v. Miller*, 953 F.2d 1240, 1250 (10th Cir. 1992) (citing *General Bldg. Contractors Ass'n, Inc. v. Pennsylvania,* 458 U.S. 375, 391 (1982)).

Plaintiff asserts the "prima facie case of racial discrimination has been proven in responses to the statement of facts #1-60[.]" [Dkt. 85, p.24.] But her responses to Defendants' statement of undisputed material facts are only conclusory refutations of those facts. Instead, "it is the responding party's burden [at summary judgment] to ensure that the factual dispute is portrayed with particularity, without ... depending on the trial court to conduct its own search of the record." *Cross v. The Home Depot,* 390 F.3d 1283, 1290 (10th Cir.2004) (quoting *Downes v. Beach,* 587 F.2d 469, 472 (10th Cir.1978)).

Plaintiff contends her being hired on a three-year probationary status evidences discrimination. But she cannot show her probationary status was an adverse employment action because it is undisputed Colorado law required Plaintiff to serve a three-year probationary period, subject to non-renewal, when the District hired her. Colo. Rev. Stat. § 22-63-203(2)(a) ("During the first three school years that a teacher is employed on a full-time continuous bases by a school district, such teacher shall be considered to be a probationary teacher whose employment contract may be subject to [non-renewal] . . ."). And while Plaintiff asserts in her Amended Complaint that a teacher outside her protected class was hired without the required

probationary status, she fails to identify this individual and presents no competent evidence showing they are similarly situated. *See Rivera v. City and County of Denver*, 365 F.3d 912, 922 (10th Cir. 2004) (defining "similarly situated").

Plaintiff also points to Thompson calling her "loud" and "argumentative" as evidence of race discrimination. But she fails to present competent evidence that this single, verbal-altercation with Thompson rose to the level of an adverse employment action. To be sure, it is undisputed Thompson ultimately allowed Plaintiff to miss the equity meeting—which was the cause of their argument—to instead practice the balloon launch. [Dkt.75-1, ¶13; Dkt. 75-6, pp.43:25-47:6.] And Plaintiff again fails to present competent evidence that she was treated less favorably than others similarly situated.

For these reasons, no reasonable jury could find Plaintiff suffered race-based discrimination to support Plaintiff's Title VII claim, or her Section 1981 claim.

B. Even Assuming Plaintiff Could Establish a *Prima Facie* Case of Race Discrimination Regarding her Non-renewal, her Claim Still Fails for Lack of Competent Evidence of Pretext

Plaintiff also alleges Defendants discriminated against her because of her race when they failed to renew her contract. Defendants offer a legitimate business reason for the non-renewal of her contract, *to wit*, Plaintiff's lack of professional growth over her probationary period.

Plaintiff fails to present competent evidence that Defendants' proffered non-discriminatory reason for the non-renewal of her contract was pretextual. Even construing the record in the light most favorable to Plaintiff, the undisputed material

facts show the District experienced and maintained concerns over her job performance all three years of her probation. Some of those concerns were memorialized in her annual performance reviews her first two years or were discussed and raised internally between Thompson and Watanabe.

For example, Thompson commented in Plaintiff's first-year evaluation: "taking into consideration the different skills and ability level of each grade level will allow [Shannon] to better adjust [her] content, complexity[,] and learning tasks;" "there is opportunity for [Shannon] to further clarify and elaborate interdisciplinary connections for [Shannon's] students across all grade levels;" "[t]he heart of courtesy is respect. An effective teacher treats all students with respect in ALL circumstances;" "[b]e thoughtful with your tone and word choice when redirecting or correcting students;" "[q]uite [*sic*] and private conversations (versus yelling across the room or over a noisy/active room) are a good way to maintain courtesy while addressing the behavior;" and, "it is essential you establish consistent routines and procedures for regrouping students" [Dkt. 85-3, pp.1-11.] Plaintiff's evaluator her second year had similar feedback, including that Plaintiff needed to differentiate her resources to allow access to students at varying ability levels; be more intentional about emphasizing math applications in her lessons; and perform more student assessments to confirm student knowledge and give timely and actionable feedback. [*Id.* at pp.21-33.]

While Plaintiff's final performance evaluation contains no comments, [dkt. 75-4, pp.4-16], Watanabe's affidavit details his concerns surrounding her performance

that third year. Specifically, he says she was "doing the very bare minimum amount of work;" was unprepared for lessons and "did not seem to have the requisite knowledge of the STEM content area;" "did not demonstrate rigor in the classroom. . . lessons lacked consistency;" and she "lacked follow-through." [*Id.* at ¶¶5,7.]

Plaintiff attempts to refute this evidence as pretextual by claiming she was unaware of these performance issues. But her deposition testimony confirms she asked Thompson whether she needed to look for a new job after receiving her first-year evaluation, suggesting she was aware of dissatisfaction with her performance, at least after her first-year review. [Dkt. 75-5, pp.111:14-112:3.] Regardless, whether Plaintiff was aware of the District's dissatisfaction with her job performance, the undisputed facts demonstrate the District was in fact concerned with her job performance throughout her probationary period.

Plaintiff further argues that if her performance was the reason for non-renewal, then it was discriminatory for Thompson to have selected "other" (Option 5) as the reason versus "ineffective performance" (Option 4). But Chief HR Officer Brenda Smith's affidavit confirms Option 4 was used only when there were "grave concerns" with a teacher's performance, and she advised principals that Option 5 allowed them the "complete and sole discretion" to hire "the best teachers possible" from the applicant pool. [Dkt. 75-2, ¶6.] Plaintiff neither argues, nor is there evidence, that the District's concerns over Plaintiff's performance rose to a level of gravity requiring Thompson to select Option 4. And the undisputed material facts show HR

advised principals to recommend non-renewal for third-year probationary teachers if there were *any* performance issues, as there were with Plaintiff. [*Id.* at ¶10.]

Thompson confirms she followed this advice when she selected Option 5 to recommend non-renewal of Plaintiff's contract. [Dkt. 75-1, ¶16.] While the District's practice of using the vague, catchall category of "other" to afford principals the widest discretion possible may be ripe for abuse by the unscrupulous, the relevant inquiry here is not whether the District's proffered reasons are wise, fair, or correct—rather, it is whether the District believed those reasons to be true and acted in good faith upon them.[7] *Piercy v. Maketa*, 480 F.3d 1192, 1200 (10th Cir. 2007). Even taking the undisputed material facts in the light most favorable to Plaintiff, no reasonable jury could find the District's proffered reason for non-renewal of the contract was a pretext for discrimination.

C. Plaintiff Fails to Demonstrate a Genuine Dispute of Material Fact as to the Fourth Element of her *Prima Facie* Case for her Hostile Work Environment Claim

To meet the *prima facie* burden with respect to a hostile work environment claim, Plaintiff must show: (1) she is a member of a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on race; and (4) due to the harassment's severity or pervasiveness, the harassment altered a term,

[7] Plaintiff argues Thompson and Watanabe repeatedly committed perjury in their affidavits submitted in support of the Motion. But these arguments are conclusory, speculative, and are not supported by competent evidence to refute the statements made in them. *See Bones*, 366 F.3d at 875 ("To defeat a motion for summary judgment, evidence . . . must be based on more than mere speculation, conjecture, or surmise.").

condition, or privilege of her employment and created an abusive working environment. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015) (citing *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007)).

Plaintiff targets the District's PEG Beyond Diversity training and Highline's monthly, equity-focused PLC meetings, to support her claim of a hostile work environment. She argues the PEG training promoted "White privilege" and focused on "typical negative stereotypes of Black people." [Dkt. 36, p.13.] She claims these negative stereotypes were then reinforced in the work environment as evidenced by Thompson calling her "loud" and "argumentative," and by the Black History Month musical. [*See generally*, Dkt. 36.]

No doubt Plaintiff considered PEG and Highline's equity training unwelcome harassment—the second element of her claim. But the fourth *prima facie* case element of pervasive or severe standard is a high standard. This is because "Title VII does not establish a general civility code for the workplace and . . . a plaintiff may not predicate a hostile work environment claim on run-of-the-mill boorish, juvenile, or annoying behavior that is not uncommon in American workplaces." *Lounds,* 812 F.3d at 1222. (internal quotations omitted). The standard has both subjective and objective components. *Id.* It is not enough that a plaintiff deems the work environment hostile – the environment must be "so permeated with discriminatory intimidation, ridicule, and insult" that a reasonable person under the same or similar circumstances would deem it hostile. *Id.* The totality of the circumstances is the touchstone of a hostile work environment analysis. *Id.* As such, courts consider a variety of factors, including

the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Sprague v. Thorn Ams. Inc.*, 123 F.3d 1355, 1365 (10th Cir. 1997).

No reasonable jury taking the undisputed material facts here, could find that Plaintiff meets her burden. While Plaintiff may have felt uncomfortable with, and been offended by, either of these trainings' focus on "white privilege," she's proffered no competent evidence on the severity or pervasiveness of these discussions, or evidence the content of these trainings included elements of discriminatory intimidation, ridicule or insults. And while she states these trainings focused on "typical negative stereotypes of Black people," she again proffers no evidence of the severity or pervasiveness of these references, and points to no admissible evidence to support her contention. *Coleman*, 487 F. Supp.2d at 1232 (on summary judgment, the nonmoving party must "go beyond the pleadings and set forth specific facts that would be admissible in evidence in the event of trial which a rational trier of fact could find for the nonmovant").

For these reasons, summary judgment is warranted in favor of Defendants on the hostile work environment claim.

D. Plaintiff's Retaliation Claim Fails for Lack of Competent Evidence of Pretext

Plaintiff asserts her "courageous conversations" with Watanabe were protected activity, and the District retaliated against her for those conversations by not renewing her contract and by Thompson's subsequent, negative reference to a

prospective employer. To establish a *prima facie* case of retaliation, a plaintiff must show (1) she engaged in protected opposition to discrimination; (2) a reasonable employee would have found the employer's alleged retaliatory action to be materially adverse; and (3) a causal connection exists between the protected activity and the materially adverse action. *Robinson v. Dean Foods Co.*, 654 F. Supp. 2d 1268, 1282–83 (D. Colo. 2009).

Regarding Plaintiff's retaliatory non-renewal claim, and as discussed above, Plaintiff has failed to adduce competent evidence of pretext. Even if the Court were to agree her "courageous conversations" with Watanabe equated to protected activity, no causal connection exists between these conversations and Thompson's non-renewal decision four months later, for the reasons discussed above. *See, e.g., O'Neal v. Ferguson Const. Co.*, 237 F.3d 1248, 1253 (10th Cir. 2001); *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999). Moreover, knowledge is key. "An employer's action against an employee cannot be *because of* that employee's protected [activity] unless the employer *knows* the employee has engaged in protected [activity.]" *Petersen v. Utah Dept. of Corrections*, 301 F.3d 1182, 1188 (10th Cir. 2002) (emphasis in the original). It is undisputed Watanabe maintained Plaintiff's confidence and did not share these "courageous conversations" with Thompson who made the initial non-renewal decision. [Dkt. 75-4, ¶9.] Thompson corroborates Watanabe had not shared these conversations with her when she made her decision.[8] [Dkt. 75-1, ¶17.]

[8] *See, supra*, n.7.

In regard to the APS reference call, [9] Plaintiff admits Thompson told APS the truth. [Dkt. 75-5, p.209:7-21; *see also* Dkt. 85, p.19 (Thompson "accurately" told the school about Plaintiff's absences; Thompson also "accurately shared Shannon did not submit her required SLO goals for the year.").] Other than her conclusory statements characterizing Thompson's conduct as acting "with malicious intent," Plaintiff provides no evidence that Thompson's accurate and truthful reference was somehow given in retaliation for Plaintiff's prior conversations with Watanabe. [Dkt. 85, p.19.] *See* Colo. Rev. Stat. § 22-32-109.7(2)(a)-(b) ("Any previous employer of an applicant for employment who provides information to a school district or who makes a recommendation concerning an applicant, whether at the request of the school district or the applicant, shall be immune from civil liability unless: (1) the information is false . . .").

Based on the undisputed material facts, no reasonable jury could conclude the District's or Thompson's actions in not renewing Plaintiff's contract and in providing the employment reference to APS were done in retaliation for any protected activity Plaintiff may have engaged in.

3. Section 1981

A. Plaintiff Fails to Demonstrate a Genuine Dispute of Material Fact as to her *Prima Facie* Case against the Individual Defendants

[9] Plaintiff's contract, though not renewed, ended by its terms on June 30, 2019. [Dkt. 75-1, ¶22.]

Section 1981 holds individual defendants liable when they are personally involved in the alleged discrimination or where an affirmative link exists to connect their individual conduct to the alleged discrimination. *Howard v. Oklahoma Dep't of Corr.*, 247 F. Supp. 3d 1210, 1226–27 (W.D. Okla. 2017). In the Court's above-analyses of Plaintiff's discrimination, hostile work environment, and retaliation claims, the Court considered each Defendants' actions, individually and in combination, to determine whether the undisputed material facts support Plaintiff's required elements of proof. Because this Court has found no reasonable jury could conclude any Defendants' actions, individually or in combination with others', supports Plaintiff's Title VII claims, the Court finds no individual Defendants' actions support Plaintiff's Section 1981 claims either. *Cf. Hannah*, 628 Fed. App'x at 632 (where district court found liability under Title VII, reversing and remanding to the district court to analyze individual defendant's conduct for violations of Section 1981). Accordingly, the Court recommends dismissing Plaintiff's Section 1981 claims against the individual Defendants.

B. *Monell* Claims

"Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior." *Ashcroft v. Iqbal*, 556 U.S. 556, 676 (2009) (citing *Monell v. Department of Social Services*, 436 U.S. 658, 694-95 (1978)). To establish municipal liability under *Monell*, a plaintiff must show (1) a municipal employee committed a constitutional violation; and (2) a municipal

policy or custom was the moving force behind the constitutional deprivation. *Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004).

Based on this Court's recommendation that no reasonable jury could conclude any individual Defendant violated Section 1981, Plaintiff's *Monell* claim against the District necessarily fails. *See Jett*, 491 U.S. at 736-37 (The district could be liable when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.").

4. Plaintiff's State Law Claims

"Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary." *Thatcher Enters. v. Cache Cnty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990). Plaintiff's remaining claims either arise out of Colorado statutes or are grounded in Colorado common law; no federal laws are implicated by these claims. [*See generally* Dkt. 36.] There is no a compelling reason to maintain jurisdiction over the state claims in light of this Court's recommendation that summary judgment be granted in favor of Defendants on the claims arising under federal law.

F. CONCLUSION

For the foregoing reasons, the Court RECOMMENDS Defendants' Motion be GRANTED in its entirety and that judgment enter in favor of Defendants on all claims asserted against them.[10]

DATED: July 12, 2022.

BY THE COURT:

S. Kato Crews
United States Magistrate Judge

[10] **Be advised the parties have 14 days after service of this recommendation to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72(b). The party filing objections must specifically identify those findings or recommendations to which the objections are made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within 14 days after being served with a copy may bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 20-cv-3469-WJM-SKC

LESLIE SHANNON,

Plaintiff,

v.

CHERRY CREEK SCHOOL DISTRICT,
DARLA THOMPSON,
SCOTT SIEGFRIED,
KEVIN WATANABE,
CHERRY CREEK SCHOOL DISTRICT BOARD OF EDUCATION, and
TY VALENTINE,

Defendants.

ORDER ADOPTING JULY 12, 2022 RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This matter is before the Court on the July 12, 2022 Report and Recommendation of United States Magistrate Judge S. Kato Crews (the "Recommendation") (ECF No. 98) that the Court grant Defendants Cherry Creek School District, Darla Thompson, Scott Siegfried, Kevin Watanabe, Cherry Creek School District Board of Education, and Ty Valentine's (collectively, "Defendants") Motion for Summary Judgment (ECF No. 75). The Recommendation is incorporated herein by reference. *See* 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72(b).

Plaintiff filed an objection to the Recommendation ("Objection") (ECF No. 103), to which Defendants responded ("Response") (ECF No. 106). For the reasons set forth below, Plaintiffs' Objection is overruled and the Recommendation is adopted in its

entirety.

I. BACKGROUND

The Court assumes the parties' familiarity with the facts and procedural history of this action and reproduces only the facts pertinent to this ruling.

A. Lawsuit

Plaintiff, a black female educator, was employed as a Science, Technology, Engineering, and Math ("STEM") instructor at Highline Elementary ("Highline") in the Cherry Creek School District ("District"). (ECF No. 98 at 3.) This lawsuit arises out of the District's non-renewal of her teaching contract at the end of the 2018–2019 academic year. (*Id.*)

Plaintiff brings three claims for relief. First, she claims she was subjected to discrimination and a hostile work environment because of Highline's equity training programs. (*Id.* at 4.) Second, she claims Defendants wrongfully terminated her employment and defamed her character in retaliation for her complaints over the training. (*Id.*) Third, she alleges retaliation, defamation of character, and tortious interference based on an employment reference Highland's principal, Darla Thompson ("Thompson"), provided to a prospective employer of Plaintiff. (*Id.*)

Plaintiff brings her discrimination and retaliation claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2(a)(1). She also brings a Section 1981 claim (by way of Section 1983) based on post-contract formation discrimination and retaliation. Her state law claims arise under the Colorado Anti-discrimination Act, and include state common law claims for defamation and tortious interference. (*Id.*) In addition to suing the District and Thompson, Plaintiff asserts her claims variously against the Cherry Creek School District Board of Education ("Board"), the District's

Superintendent Scott Siegfried, its Director of Human Resources Ty Valentine, and Highline's Assistant Principal Kevin Watanabe. (*Id.*)

B. Recommendation

1. Claims Against the Board and District Are Redundant

In the Recommendation, the Magistrate Judge recommended that the Court grant summary judgment as to the Board because a suit against the District and its Board of Directors is redundant—the District encompasses the Board. (*Id.* at 17.)

2. Title VII and Section 1981

a. *No Prima Facie Case of Race Discrimination Presented*

Next, the Magistrate Judge recommended that the Court grant summary judgment in Defendants' favor because Plaintiff failed to demonstrate a genuine issue of material fact as to the second and third elements of her prima facie case of race discrimination. To establish a prima facie case of race discrimination under Title VII, Plaintiff must show: "(1) [s]he is a member of a racial minority; (2) [s]he suffered an adverse employment action; and (3) similarly situated employees were treated differently." *Trujillo v. Univ. of Colo. Health Scis. Ctr.*, 157 F.3d 1211, 1215 (10th Cir. 1998). Further, a plaintiff must show racial animus to support a discrimination claim under Section 1981. *Patrick v. Miller*, 953 F.2d 1240, 1250 (10th Cir. 1992) (citing *Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 391 (1982)).

Plaintiff asserted as evidence of discrimination the fact that she was hired on a three-year probationary status and that Thompson called her "loud" and "argumentative." (*Id.* at 20–21.) The Magistrate Judge concluded that the hiring of Plaintiff on a three-year probationary period is required under Colorado law, Colorado Revised Statutes § 22-63-203(2(a), and that Plaintiff failed to identify a similarly situated

individual outside her protected class who was hired without probationary status. (*Id.*) Additionally, the Magistrate Judge concluded that Plaintiff failed to present competent evidence that her interaction with Thompson rose to the level of an adverse employment action. (*Id.* at 21.)

b. *No Evidence of Pretext for Race Discrimination*

Even assuming Plaintiff had met her prima facie burden to demonstrate race discrimination in connection with the non-renewal of her contract, the Magistrate Judge found that Plaintiff failed to present competent evidence that Defendants' proffered non-discriminatory reason for the non-renewal of her contract was pretextual. (*Id.* at 21–22.) Construing the facts in Plaintiff's favor, the Magistrate Judge stated that the facts demonstrated that the District experienced and maintained concerns over Plaintiff's job performance during all three years of her probation. (*Id.* at 22 (quoting numerous examples of the District's concerns with Plaintiff's performance).)

Although Plaintiff attempted to refute the numerous examples of the District's concerns regarding her performance by claiming she was unaware of the performance issues, the Magistrate Judge determined that Plaintiff's deposition testimony suggested that she was in fact aware of the District's dissatisfaction with her performance at least after her first-year interview. (*Id.* at 23.) And regardless of whether she was aware, the Magistrate Judge observed that the undisputed evidence showed that the District was concerned with Plaintiff's job performance throughout her probationary period. (*Id.*) While Plaintiff also asserted that it was discriminatory for the District to select the "other" option as the reason for non-renewal, as opposed to the "ineffective performance" option, the Magistrate Judge explained that it was the District's practice to do so in this type of situation. (*Id.* at 23–24.)

c. *No Genuine Dispute of Material Fact as to the Fourth Element of Prima Facie Case for Hostile Work Environment Claim*

To meet the prima facie burden with respect to a hostile work environment claim, Plaintiff must show: (1) she is a member of a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on race; and (4) due to the harassment's severity or pervasiveness, the harassment altered a term, condition, or privilege of her employment and created an abusive working environment. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015) (citing *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007)).

The Magistrate Judge rejected Plaintiff's arguments that Highline's monthly, Pacific Educational Group ("PEG") equity trainings promoted "white privilege" and focused on "typical negative stereotypes of Black people." (ECF No. 98 at 25.) Although Plaintiff considered the trainings unwelcome harassment, the Magistrate Judge highlighted that the fourth element's standard "has both subjective and objective components." (*Id.*) He reiterated that it "is not enough that a plaintiff deems the work environment hostile." (*Id.*) Rather, it must be "so permeated with discriminatory intimidation, ridicule, and insult that a reasonable person under the same or similar circumstances would deem it hostile." (*Id.* (internal quotation marks and citation omitted).)

After a totality of the circumstances analysis, the Magistrate Judge concluded that no reasonable jury could find that Plaintiff met her burden; though she might have felt offended by the trainings, she proffered no competent evidence on the severity or pervasiveness of the discussions, or evidence that the content of the trainings included elements of discriminatory intimidation, ridicule, or insults. (*Id.* at 26.) Plaintiff also

failed to proffer evidence to support her contention that the trainings focused on typical negative stereotypes of Black people. (*Id.*)

d. *No Evidence of Pretext for Retaliation*

To establish a prima facie case of retaliation, a plaintiff must show: (1) she engaged in protected opposition to discrimination; (2) a reasonable employee would have found the employer's alleged retaliatory action to be materially adverse; and (3) a causal connection exists between the protected activity and the materially adverse action. *Robinson v. Dean Foods Co.*, 654 F. Supp. 2d 1268, 1282–83 (D. Colo. 2009).

In December 2018, Plaintiff met with Watanabe and told him about her concerns over the PEG equity-focused meetings, explained she did not like the large group format of the meetings, and told him about an argument she had with Thompson in which Plaintiff states that Thompson promoted negative stereotypes about Black women when she described Plaintiff as "angry" and "argumentative." (ECF No. 98 at 8.) Plaintiff asserts her "courageous conversations" with Watanabe were protected activity, and the District retaliated against her for those conversations by not renewing her contract and by Thompson's subsequent, negative reference to a prospective employer. (*Id.* at 27.)

Despite these assertions, the Magistrate Judge determined that Plaintiff failed to demonstrate that a causal connection exists between these conversations and Thompson's non-renewal decision four months later. (*Id.*) The undisputed evidence is that Watanabe did not share these "courageous conversations" with Thompson, who made the initial non-renewal decision.

Regarding the reference call between Thompson and Aurora Public Schools ("APS") about Plaintiff, Plaintiff admits that Thompson told APS the truth about her

absences and that she failed to submit required goals for the year. (*Id.* at 28.) The Magistrate Judge found that other than conclusory statements characterizing Thompson's reference as having been given "with malicious intent," Plaintiff failed to show that a genuine issue of material fact exists that the reference was given in retaliation for Plaintiff's conversations with Watanabe. (*Id.*) Thus, based on the undisputed material facts, Defendants were entitled to summary judgment on Plaintiff's retaliation claim, as no reasonable jury could conclude the District's or Thompson's actions in not renewing Plaintiff's contract and in providing the employment reference to APS were done in retaliation for any protected activity Plaintiff may have engaged in. (*Id.*)

C. Section 1981

1. No Genuine Dispute of Material Fact as to Prima Facie Case Against Individual Defendants

Section 1981 holds individual defendants liable when they are personally involved in the alleged racial or ethnic discrimination, or where an affirmative link exists to connect their individual conduct to the alleged discrimination. *Howard v. Okla. Dep't of Corr.*, 247 F. Supp. 3d 1210, 1226–27 (W.D. Okla. 2017). The Magistrate Judge explained that he considered each of Defendant's actions, individually and in combination, to determine whether the undisputed material facts support Plaintiff's required elements of proof. (ECF No. 98 at 29.) Because he found no reasonable jury could conclude that any one of Defendant's actions, individually or in combination with other Defendants, supports Plaintiff's Title VII claims, he also found that no individual Defendant's actions support Plaintiff's Section 1981 claims either, and recommended dismissal of those claims. (*Id.*)

2. *Monell* Claims

"Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior." *Ashcroft v. Iqbal*, 556 U.S. 556, 676 (2009) (citing *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694–95 (1978)). To establish municipal liability under *Monell*, a plaintiff must show: (1) a municipal employee committed a constitutional violation; and (2) a municipal policy or custom was the moving force behind the constitutional deprivation. *Jiron v. City of Lakewood*, 392 F.3d 410, 419 (10th Cir. 2004).

Based on the Magistrate Judge's recommendation that no reasonable jury could conclude any individual Defendant violated Section 1981, he also found that Plaintiff's *Monell* claim against the District necessarily fails. (ECF No. 98 at 30 (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 736–37 (1989)).)

D. State Law Claims

Because he recommended that the Court grant summary judgment in Defendants' favor on all of Plaintiff's federal claims, the Magistrate Judge found that there is "no[t] a compelling reason to maintain jurisdiction over the state claims[.]" (ECF No. 98 at 30.) *See Thatcher Enters. v. Cache Cnty. Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990) ("Notions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary.").

II. STANDARD OF REVIEW

A. Review of a *Pro Se* Plaintiff's Pleadings

The Court must construe a *pro se* plaintiff's pleadings "liberally"—that is, "to a less stringent standard than formal pleadings filed by lawyers." *Smith v. United States*, 561 F.3d 1090, 1096 (10th Cir. 2009). It is not, however, "the proper function of the

district court to assume the role of advocate for the *pro se* litigant." *Id.*; *see also Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989) ("[W]e will not supply additional facts, nor will we construct a legal theory for plaintiff that assumes facts that have not been pleaded.").

B. Rule 72(b) Review of a Magistrate Judge's Recommendation

When a magistrate judge issues a recommendation on a dispositive matter, Federal Rule of Civil Procedure 72(b)(3) requires that the district judge "determine *de novo* any part of the magistrate judge's [recommendation] that has been properly objected to." Fed. R. Civ. P. 73(b)(3). An objection to a recommendation is properly made if it is both timely and specific. *United States v. 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996). An objection is sufficiently specific if it "enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute." *Id.* In conducting its review, "[t]he district court judge may accept, reject, or modify the recommendation; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*

In the absence of a timely and specific objection, "the district court may review a magistrate [judge's] report under any standard it deems appropriate." *Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) (citing *Thomas v. Arn*, 474 U.S. 140, 150 (1985)); *see also* Fed. R. Civ. P. 72 Advisory Committee's Note ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record.").

C. Summary Judgment

Summary judgment is warranted under Federal Rule of Civil Procedure 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–50 (1986). A fact is "material" if, under the relevant substantive law, it is essential to proper disposition of the claim. *Wright ex rel. Trust Co. of Kan. v. Abbott Labs., Inc.*, 259 F.3d 1226, 1231–32 (10th Cir. 2001). An issue is "genuine" if the evidence is such that it might lead a reasonable trier of fact to return a verdict for the nonmoving party. *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997) (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of showing an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "Once the moving party meets this burden, the burden shifts to the nonmoving party to demonstrate a genuine issue for trial on a material matter." *Concrete Works, Inc. v. City & Cnty. of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (citing *Celotex*, 477 U.S. at 325). The nonmoving party may not rest solely on the allegations in the pleadings, but must instead "by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex*, 477 U.S. at 324. The factual record and reasonable inferences therefrom are viewed in the light most favorable to the party opposing summary judgment. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir. 1998) (citing *Concrete Works*, 36 F.3d at 1517).

III. ANALYSIS

Plaintiff's Objection is somewhat rambling, making it difficult to identify what specific portions of the Recommendation to which she objects; rather, she appears to object to most (if not all) of the Magistrate Judge's recommendations and attempts to

support those objections with lengthy recitations of "facts" which she believes demonstrate a genuine dispute of material fact exists for all claims. (*Id.*) Nevertheless, the Court has reviewed the Objection and Response and for the following reasons, adopts the Recommendation in full.

A. Plaintiff's Requests that the Court Review Portions of the Record

At various points in the Objection, Plaintiff asks that the Court "review" or "reexamine" portions of the record because she argues that if the Court does so, the outcome would be in her favor. (*See, e.g.*, ECF No. 103 at 3, 6, 7, 12.) The Court finds that many of these requests are not specific objections to the Recommendation but are merely a request that the Court review the entire record or at least large portions of it. To the extent Plaintiff has raised a specific objection, the Court will review the Recommendation *de novo*; however, to the extent her objections are more general, the Court will review the Recommendation for clear error.

B. Liberal Construal of Plaintiff's Filings and Submissions

In the Recommendation, the Magistrate Judge stated that he construed Plaintiff's filings and related submissions liberally because she is not an attorney. (ECF No. 98 at 3.) Further, he stated that despite the liberal construction, he may not construct arguments or legal theories for her in the absence of reference to those issues in her filings. (*Id.*)

In the Objection, Plaintiff objects to the "Court[']s conclusion of [her] filings and related submissions as merely liberal construction." (ECF No. 103 at 2.) The Court concludes that Plaintiff has misunderstood the meaning of the Magistrate Judge's words, which were a recitation of the summary judgment standard and the requirements a judge abides by in considering documents submitted by a *pro se* party.

To the extent Plaintiff objects to the Magistrate Judge's recitation of the legal standards in this case, the Court overrules that objection.

C. Claims Against the Board

Plaintiff appears to misunderstand the redundancy of her claims against the District and the Board, arguing that the Board is "management" and can be sued. (ECF No. 103 at 11–12.) The Court finds that the Magistrate Judge correctly analyzed this issue and found that the Board is not a proper defendant in this case. *See Roe v. Karval Sch. Dist. RE23*, 2013 WL 1858464, at *7 (D. Colo. May 2, 2013). Therefore, this objection is overruled.

D. Claims of Race Discrimination

Next, the Court addresses Plaintiff's objections to the Magistrate Judge's recommendation that her race discrimination, hostile work environment, and retaliation claims fail. It appears as though Plaintiff objects to the fact that she believes Defendants discriminated against her by "not putting [her] on an improvement plan to provide a means of correcting the alleged work deficiencies, while other teachers were placed on improvement plans,"[1] failing to provide documented complaints from parents or students, and failing to maintain her confidentiality regarding the concerns she raised with Watanabe in her mid-year review conversation. (ECF No. 103 at 5–6.) She states the work environment was "segregated," and she also appears to state that Thompson held "subjective" views of her performance. (*Id.*) She also notes: "Respectfully this should have raised questions from the Courts."[2] (*Id.* at 5.)

[1] Plaintiff cites no evidence or case law to support this statement. (ECF No. 103 at 5.)

[2] To the extent this sentence is an objection, it is not specific enough to require *de novo*

Despite these objections and her more general claims that her teaching contract was not renewed because of her race, Plaintiff acknowledges that in her first-year evaluation, Thompson expressed concerns about her performance (*id.* at 7–8), and in her second-year evaluation, her evaluator, Michelle Colton, had similar concerns about her performance (*id.*). Additionally, in the Recommendation, the Magistrate Judge recounted that in her deposition, Plaintiff asked whether she should look for a new job, suggesting that she was aware of the District's concerns about her performance after her first year. (ECF No. 98 at 23.)

With respect to Plaintiff's assertion that the District failed to provide a performance improvement plan or letter of warning, Defendants point out that her argument has no basis in the law; to the contrary, Colorado law provides that a probationary teacher may be nonrenewed for any reason. (ECF No. 106 at 4 (citing C.R.S. § 22-63-203(4)(a)).) There is no requirement that a probationary teacher receive a performance improvement plan or written warning before nonrenewal, nor is there a requirement that a probationary teacher be provided with an opportunity to improve. (*Id.*) Nonetheless, the Magistrate Judge correctly concluded that even though there is no requirement that it do so, the District provided Plaintiff with multiple opportunities to improve because it renewed her contract twice and only decided to nonrenew at the end of her third probationary year.

The Court also finds Plaintiff's objections to the decision to select "other" instead of "performance" as the reason for nonrenewal are without merit. The selection was not

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review.

pretextual; the evidence shows that Human Resources' recommendations guided the decision to select "other," and Plaintiff failed to produce evidence to refute the proffered reasoning for the selection. (ECF No. 98 at 23.) Therefore, the Court finds that the conclusion in the Recommendation that selecting "other" was not pretextual was proper.

As the Magistrate Judge observed in the Recommendation, the undersigned also concludes that Plaintiff fails to cite admissible evidence to support her contention that the District did not have performance concerns that led to her nonrenewal. Instead, Plaintiff's objections are based on her own subjective beliefs, which the Tenth Circuit has found to be insufficient on summary judgment. *See Aramburu v. The Boeing Co.*, 112 F.3d 1398, 1408 (10th Cir. 1997); *Furr v. Seagate Tech. Inc.*, 82 F.3d 980, 988 (10th Cir. 1996) ("[I]t is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance."). Like the Magistrate Judge found in the Recommendation, the Court finds that Plaintiff did not produce competent, admissible evidence that the reasons for her nonrenewal were pretextual. Therefore, the Court overrules her objections concerning her claims of race discrimination.

E. Hostile Work Environment

It appears as though Plaintiff argues she was subjected to a hostile work environment because Thompson's alleged verbal assault of Plaintiff as "loud, angry, and argumentative" was a racial stereotype of Black women and because the PEG trainings and materials presented were discriminatory.[3] (ECF No. 103 at 3, 11.) It is

[3] In the Response, Defendants also consider that Plaintiff asserts that Highline's production of an allegedly inappropriate musical for Black History Month constituted a hostile work environment. (ECF No. 106 at 6.) The Court cannot find specific objections regarding the

not clear from the Objection that Plaintiff objects to any specific portion of the Recommendation. In fact, Defendants state in their Response that "Shannon fails to address the recommendation [concerning her hostile work environment claim] in her objections." (ECF No. 106 at 7.) Rather, Defendants state that all Plaintiff does is assert the conclusory allegation that PEG and Highline equity trainings violated District Policy AC-R-6 and asks the Court to review said document, but does not assert that the Magistrate Judge's determination that the trainings were not evidence of a hostile work environment was incorrect. (*Id.* (citing ECF No. 103 at 12).) The Court agrees with Defendants and thus reviews the recommendations of the Magistrate Judge concerning the hostile work environment claim for clear error.

A pervasively hostile work environment is not established "by demonstrating a few isolated incidents of racial enmity or sporadic racial slurs." *Herrera v. Lufkin Indus., Inc.*, 474 F.3d 675, 680 (10th Cir. 2007). "Instead, there must be a steady barrage of opprobrious racial comments." *Id.* "[I]t is not enough that a particular plaintiff deems the work environment hostile; it must also be of the character that it would be deemed hostile by a reasonable employee under the same or similar circumstances." *Lounds*, 812 F.3d at 1222.

In the Recommendation, the Magistrate Judge considered these same circumstances and arguments and concluded that although Plaintiff perceived her work environment to be hostile because of her race, she failed to show that it was objectively hostile, severe, or pervasive, and that it altered the terms and conditions of her employment. (ECF No. 98 at 25.) The Court agrees with the findings in the

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musical in the Objection.

Recommendation. While Plaintiff may have been offended by or uncomfortable with the trainings, Thompson's comments, and the musical, as the Magistrate Judge determined, these incidents did not constitute "intimidation, ridicule, or insults." (ECF No. 98 at 26.) The undisputed evidence demonstrates that the equity trainings adhere to the policy designed to promote workplace equity and nondiscrimination. (*See* ECF No. 75 ¶¶ 5–8.)

Therefore, the Court overrules the Objection with respect to Plaintiff's hostile work environment claim.

F. Retaliation

Plaintiff failed to object to any specific conclusion in the Recommendation with respect to her retaliation claim. (ECF No. 103 at 6, 10–11.) Moreover, she appears to confuse "adverse actions" with "protected opposition to discrimination." (*Id.*) Regardless, the Court liberally construes her Objection to mean that she objects to the Magistrate Judge's conclusion that Thompson's reference to APS and her nonrenewal were not in retaliation for her speaking to Watanabe about the equity trainings in December 2018 and the musical in February 2019[4] (the "courageous conversations").

First, the Court agrees with the Magistrate Judge's conclusion that Plaintiff's December 2018 conversation with Watanabe was too attenuated from when she was

[4] The Magistrate Judge explained that Plaintiff alleged that she raised the concerns regarding the musical in a second meeting with Watanabe in February 2019. (ECF No. 98 at 9 n.3.) However, Watanabe did not recall the meeting or hearing that Plaintiff had concerns over the musical. (*Id.*) Because Watanabe was not the decisionmaker and was not involved in the decision not to renew Plaintiff's contract, the Magistrate Judge did not find these disputed facts to be material. (*Id.*)

The Court agrees with the Magistrate Judge that these disputed facts are not material, and therefore, the Court does not consider any alleged conversations with Watanabe about the musical in reviewing the recommendations concerning the retaliation claim.

notified of her nonrenewal in April 2019 to raise an inference of retaliation. *See Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1395 (10th Cir. 1997) (three- and four-month delays between a protected activity and an adverse employment action are too long to raise an inference of retaliation).

And even more importantly, as Defendants point out in the Response, to prove the causal connection element of a retaliation claim, Plaintiff must show that her complaints to Watanabe were communicated to Thompson. (ECF No. 106 at 7 (citing *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); *Wickman v. Henderson*, 19 Fed. Appx. 740, 742–44 (10th Cir. 2011) (actual knowledge is required for Title VII retaliation claims)).) The Magistrate Judge found, and the Court agrees, that there is no evidence in the record that Thompson—who recommended Plaintiff's nonrenewal and provided the reference to APS—was aware of the conversation with Watanabe. (ECF No. 98 at 27–28.) In fact, the undisputed evidence demonstrates that Watanabe did not tell anyone about the conversation with Plaintiff—at her request—and that Thompson did not know about it. (*See id.* at 9 (citing ECF No. 75-4 ¶ 10 and ECF No. 75-1 ¶ 17).)

For these same reasons, Plaintiff has failed to adduce evidence that Thompson's reference to APS was in retaliation for Plaintiff's comments to Watanabe. Additionally, the undisputed evidence shows that Plaintiff admitted that Thompson told APS the truth. (*See id.* at 28 (citing ECF No. 75-5 at 209:7–21 and ECF No. 85 at 19 (Thompson "accurately" told the school about Plaintiff's absences; Thompson also "accurately shared Shannon did not submit her required SLO goals for the year.")).) There is no

evidence in the record to support Plaintiff's assertion that Thompson "maliciously and tortiously interfered" with her employment prospects with APS. (ECF No. 103 at 5.) The Magistrate Judge found, and the Court agrees, that Plaintiff admitted that she was absent for numerous days in the 2018–2019 school year, and that Thompson told APS that she was concerned about Plaintiff's absences. (ECF No. 98 at 28.)

Plaintiff appears to argue in the Objection that she filed in-house grievances and an EEOC charge, though she does not state the dates on which these events occurred. (ECF No. 103 at 6.) The Recommendation states that her charge of discrimination with the EEOC was filed April 10, 2019 (ECF No. 1 at 36–38), and that her internal grievance was filed on April 16, 2019 (ECF No. 85-15 at 1). She does not state specifically in the Objection that she objects to any conclusions in the Recommendation on this issue, so the Court cannot discern the precise nature of the objection here. (ECF No. 103 at 6.)

Regardless, to the extent that Plaintiff argues in the Objection that her nonrenewal occurred due to her EEOC charge (ECF No. 75 ¶ 52), filed April 10, 2019, and internal grievances[5] (ECF No. 75 ¶ 60), filed after the EEOC charge, the Court concludes that her assertion is completely without merit. (ECF No. 103 at 6.) As Defendants point out, Plaintiff was notified of the nonrenewal recommendation on April 5, 2019, *before* she filed the EEOC charge and grievances. As a result, Defendants could not have retaliated against Plaintiff before she filed the EEOC charge or the

[5] Plaintiff filed a second internal grievance against Thompson on July 3, 2019, claiming Thompson provided a negative reference to APS in retaliation for Plaintiff's protected activity. (ECF No. 98 at 17.) The second grievance also is of no moment in connection with Plaintiff's retaliation claim, as it was filed long after Plaintiff was notified of her nonrenewal and after the Board approved the nonrenewal.

internal grievance.[6] The Court therefore overrules the Objection as to Plaintiff's retaliation claims.

G. Section 1981 Claims

Plaintiff also failed to object to the portion of the Recommendation which recommends that the Court grant Defendants summary judgment on Plaintiff's Section 1981 claims because Plaintiff failed to prove the allegations of her underlying claims. (*See* ECF No. 103; ECF No. 106 at 9–10.) The Court sees no clear error in the Magistrate Judge's reasoning. (ECF No. 98 at 28–29.)

Because the Court agrees with the Magistrate Judge's recommendations that Defendants are entitled to summary judgment on the underlying claims, it adopts that portion of the Recommendation which recommends they are entitled to summary judgment on her Section 1981 claims. (*See id.*)

H. *Monell* Claims

Plaintiff also did not specifically address the Magistrate Judge's recommendation that the Court grant summary judgment in Defendants' favor on Plaintiff's *Monell* claim against the District. (*See* ECF No. 103.) Seeing no clear error in the Magistrate Judge's reasoning, the Court adopts the Magistrate Judge's recommendation that the Court grant summary judgment in the District's favor on Plaintiff's *Monell* claim.

I. State Law Claims

Once again, Plaintiff did not specifically address the Magistrate Judge's recommendation that the Court decline to exercise supplemental jurisdiction over her

[6] The Court notes that the Board approved the nonrenewal recommendation on May 2, 2019, after the EEOC charge and first internal grievance. (ECF No. 98 at 17.) But the critical date is April 5, 2019, when Plaintiff was *notified* of the nonrenewal. (*Id.* at 15.)

state law claims. (*See* ECF No. 103; ECF No. 106 at 10.) Given that the Court has adopted all of the Magistrate Judge's recommendations concerning Plaintiff's federal claims, it also agrees that the proper approach going forward is to decline to exercise supplemental jurisdiction over Plaintiff's state law claims.[7]

IV. CONCLUSION

For the reasons set forth above, the Court ORDERS as follows:

1. Plaintiff's Objection (ECF No. 103) is OVERRULED;
2. The Report and Recommendation (ECF No. 98) is ADOPTED in its entirety;
3. Defendants' Motion for Summary Judgment (ECF No. 75) is GRANTED;
4. The Clerk shall enter judgment in favor of Defendants and against Plaintiff;
5. Each party shall bear their own attorney fees and costs; and
6. The Clerk shall terminate this action.

Dated this 21st day of September, 2022.

BY THE COURT:

William J. Martínez
United States District Judge

[7] Because the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims, the Court need not address the merits of Defendants' arguments concerning those claims.

FILED
United States Court of Appeals
Tenth Circuit

October 23, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LESLIE SHANNON,

Plaintiff - Appellant,

v.

CHERRY CREEK SCHOOL DISTRICT, et al.,

Defendants - Appellees.

No. 22-1304
(D.C. No. 1:20-CV-03469-WJM-SKC)
(D. Colo.)

ORDER

Before **MATHESON**, **BACHARACH**, and **ROSSMAN**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Additional material from this filing is available in the Clerk's Office.