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Appendix A

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Tenth Circuit

February 22, 2024 Christopher M. Wolpert Clerk of Court

CHUNYI XU, a/k/a David Xu,
Plaintiff - Appellant,

V.

DENVER PUBLIC SCHOOLS, SCHOOL DISTRICT NO. 1,
Defendant - Appellee.

No. 23-1079
(D.C. No. 1:20-CV-03774-RMR-SKC)
(D. Colo.)

ORDER

Before **HARTZ, PHILLIPS,** and **McHUGH,** Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

Appellate Case: 23-1079 Document: 010111002951
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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH COURT

Chunyi Xu, a.k.a. David Xu | Pro Se,
Plaintiff/Petitioner - Appellant,
v. Case No. 23-1079

Appellant's **PETITION FOR REHEARING**

Due Date: 02/20/2024

Denver Public Schools, District No. 1,
Defendant/Respondent - Appellee.

Appellant's Petition For Rehearing

Chunyi Xu, Appellant Pro Se, is not ungrateful to the quick action on 02/06/2024, but certainly was shocked by this worse affirmative termination with NONE validated among my many key substantial material facts, disputed evidence and disclosed exhibits for 5 years starting from 07/28/2018. There have appeared many judgment **errors** including **TIME,** and with unjust **NEGLECT.** Appellant is eager to file this **petition**

for rehearing as some grounds below:

1) Appeal court repeatedly keeps the groundless "insubordinate" (Page 6, 13, 18)

2) Significant **TIMING** errors (Page2, 3, 16)

   -- regarding/. ***FACTUAL BACKGROUND*** "during training", "in late August 2018", "about a week later" (multiple counts, and it was actually in about two months). Seriously (Page 16), "Chino" is not just "perceived", it common sense like ***"N**""*** for African Blacks. Least important, this case does have two crossing clues of Discrimination --- the **surface** is my case while **the deep** was against Mrs. Barbabra Smith, a black.

3) In the disclosures of Colorado Federal Court, EEOC rebuttals had been transferred to Appeal Courts. The pretext and logic reasoning of Discrimination, Retaliation and Hostile work environment were fully proven by my demonstrated table formats for LEAP and RIB. Guitar is full of Math theories. How come a guitar is **irrelevant** to inspire Math students in Arts/Music School (Page 5)?

4) Defendant DPS fabricated tremendous materials including ALL false testimony which shall be penalized as **felony.** My LEAP 35% student growth approved at the year end was good enough data for RIB renewal (Page10 --12) and Summer.

5) Mr. Salem has had a 15 years-long history of abusing staff which I did provide the public internet links in my **Opening** and/or **Answer.** NCAS at Montbello Park had been full of criminal activities. DPS has had more than 200 District-wide lawsuits.

6) I suffered from huge damages/loss because of DPS wrong-doing including exposure of my PII long-time to public access. It's ***unnecessary*** for the Appeal Court to Redact or Restrict in 14 months, which is only for **"review"** (Page 19).

7) At the beginning of case Discovery, Interrogatory and Witness/Disclosure, Plaintiff had provided a 55-minute classroom **teaching video** as well as "Favorite

8) I disagree with the Ill.Discussion on Page 10 till Page 17, including Counsel's D.Q.(Page 20). Mr. Goodstein is Head-Counsel in charge, at least his proceedings shall be disqualified and removed. I'll strive to pursue justice and fairness UP to the Supreme Court.

Wherefore, Appellant Pro Se **prays** and **Petitions for Rehearing** to be granted by the Honorables with my genuine factual Disputes.

Date 2/18/24 Signature David K

Appendix C

Appellate Case: 23-1079 Document: 010111004461
Date Filed: 02/22/2024 Page: 1

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

FILED

United States Court of Appeals Tenth Circuit

February 6, 2024 Christopher M. Wolpert Clerk of Court

CHUNYI XU, a/k/a David Xu,

Plaintiff - Appellant,

v.

DENVER PUBLIC SCHOOLS, SCHOOL DISTRICT NO. 1,

Defendant - Appellee.

No. 23-1079

(D.C. No. 1:20-CV-03774-RMR-SKC)
(D. Colo.)

Appendix C

ORDER AND JUDGMENT*

Before **HARTZ, PHILLIPS,** and **McHUGH,** Circuit Judges.

Chunyi Xu, a/k/a/ David Xu, appearing pro se, appeals the district court's entry of summary judgment in favor of his former employer, Denver Public Schools, School District No. 1 (District), on his claims of employment discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

At Juett's direction, Salem and Schroeder met with Xu and his union representative on December 14, 2018, to discuss student concerns and performance concerns, including Xu's mid-year LEAP score of "not meeting," id. at 374, ¶ 39 (hyphenation and internal quotation marks omitted).2 Salem told Xu that his students complained that they "did not feel valued," "Xu made them feel dumb," and "they did not understand what Xu was teaching them." Id. at 375, ¶¶ 48–49. Xu responded that"NCAS students did not care about their education." Id., ¶ 50. Salem put Xu

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

on a performance improvement plan and told him that if the problems continued, Xu's contract probably would not be renewed for the following school year.

I. FACTUAL BACKGROUND[1]

Xu is Asian, a Chinese national, and a legal permanent resident of the United States. At a District hiring fair in the summer of 2018, Edwin Salem, an Assistant Principal at the District's Noel Community Arts School (NCAS), offered Xu a job teaching math. According to Xu, he was hired to teach 10th grade and above, but during training he was told he would be teaching 9th grade.

Xu had difficulty with classroom management and failed to consistently document student misbehavior in the District's online information system. So, in late August 2018, Salem reassigned Xu to teach 10th grade math and 12th grade financial algebra classes because he thought Xu might do better with older students.

As part of evaluating teachers, the District uses a system called "Leading Effective Academic Practice" (LEAP). R., Vol. 1 at 373, ¶ 29. Two evaluators typically perform a LEAP evaluation, which occurs in

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[1] Although the District cites to the facts as set out in its initial motion for summary judgment and related pleadings, we draw the facts from the District's Renewed Motion for Summary Judgment, Xu's response to that motion, and the District's reply. Except where noted, the facts are undisputed.

the middle and at the end of the school year and includes "informal and formal observations, student growth, and student perception scores." Id., ¶ 31. Xu's LEAP evaluators were Salem and NCAS Math Team Leader Morgan Schroeder. Schroeder observed Xu in the classroom on multiple occasions, noting that students were frequently uncomfortable, confused, frustrated, and off-task. Students also complained to the principal, Rhonda Juett, that they did not understand Xu's teaching, and they told Xu that "he talked too fast and his accent made it hard for them to understand," id. at 374, ¶ 46.

At Juett's direction, Salem and Schroeder met with Xu and his union representative on December 14, 2018, to discuss student concerns and performance concerns, including Xu's mid-year LEAP score of "not meeting," id. at 374, ¶ 39 (hyphenation and internal quotation marks omitted). Salem told Xu that his students complained that they "did not feel valued," "Xu made them feel dumb," and "they did not understand what Xu was teaching them." Id. at 375, ¶¶ 48–49. Xu responded that "NCAS students did not care about their education." Id., ¶ 50. Salem put Xu on a performance improvement plan and told him that if the problems continued, Xu's contract probably would not be renewed for the following school year.

In addition to discussing his performance, Xu told Salem at the December 14 meeting that one of his students had called him a "Chino," which Xu felt was a racist term. Id. at 382, ¶ 134. Xu also reported the comment to the Dean of Students. The

student was moved out of Xu's classroom "about a week later" and "never called Xu a name again." Id., ¶¶ 136–37.

Salem sent Xu an email summarizing what had been discussed at the meeting.

Xu replied that the summary was correct but told Salem that none of his students were "A" students, all were "far below" grade level, and they did not "want to learn hard at all." *Id.* at 422. Xu also stated he had not "receive[d] enough support." *Id.* Salem then directed Xu to meet with him and Schroeder again to discuss Xu's reply.

At the second meeting, on December 19, "Xu told Salem he could not teach NCAS students because they were not motivated," but that "he could teach the students 'across town' because they were good at math, had parents that were more engaged, had better friends, and lived in a better community." *Id.* at 376, ¶¶ 63–64. Although "Salem became upset, raised his voice, and banged on the table," the meeting ended "amicably with a handshake," and "Salem later apologized to Xu." *Id.*, ¶¶ 65–67. But because of Xu's comments about and interactions with the students, "Salem asked Xu if he thought he was a good fit for NCAS and if teaching was the right career for him." *Id.*, ¶ 68.

At some point, NCAS learned that, due to a lower projected enrollment for the following school year, it would have to eliminate two teaching positions, one of which was in Math. The District calls this process a reduction in building (RIB). All five NCAS high school math teachers were considered for the RIB. Each of them received in advance questions that a committee (comprising Salem, another assistant principal, the Dean of Assessment,

a science teacher, and the Math Ambassador Coordinator) would ask at an interview. In addition to the interview performance, the committee considered each of the teachers' LEAP scores.

The committee unanimously decided to RIB Xu because his interview was the weakest and he had the lowest LEAP scores. Salem was concerned about Xu's reliance on answers to the questions he had typed out beforehand and his inability to elaborate on them. Salem also "did not believe that Xu believed in NCAS's students, or that he wanted to continue to work with them." *Id.* at 377, ¶ 81.

And Salem did not understand how a guitar and a piece of Christian artwork Xu brought to the interview related to teaching math.[8]

On February 8, 2019, Salem notified Xu that he had been selected for the RIB. Salem also informed Xu that the RIB was different from nonrenewal, and Xu could still seek other jobs in the District.

Xu then filed a complaint of race, national origin, and age discrimination with the District. An NCAS human resources partner investigated the complaint and determined that no discrimination had occurred. Xu appealed, but the decision was affirmed.

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[8] In his opposition to summary judgment, Xu denied that the guitar and artwork were irrelevant, contending that they showed "talents consistent with a well-rounded teacher at a school for the arts." R., Vol. 2 at 10, ¶ 78.

Meanwhile, the defendants considered whether to renew Xu's contract with the District. Xu's year-end LEAP score was "not meeting," and over the entire year he received more "not-meeting ratings than any other ratings combined." *Id.* at 379, 95, 97 (internal quotation marks omitted).[9] Salem believed Xu should not be renewed based on several factors: Xu's ineffective classroom management; his failure to establish classroom rituals and routines "despite coaching and feedback"; his year-end LEAP score; his failure "to document student behavioral issues," which Salem perceived as insubordination; and Xu's "derogatory comments" about NCAS students. Id. at 380, ¶¶ 102–04. Juett agreed with Salem, and they decided not to renew Xu's employment. After he was nonrenewed, the District withdrew an offer for him to teach summer school because a nonrenewed teacher is not eligible to teach at a District school for three years.

[9] Xu admitted he received this rating, but he disputed its accuracy. *See* R., Vol. 2 at 7, ¶ 39. Xu also noted that he "scored in the top ten percent of high school math teachers nationwide on the Praxis Exam in 2018, which [the District] received when he applied," he ran NCAS's "Math Club," and he "was selected to the District Math Assessment Committee." *Id.* at 16, ¶¶ 14–15.

I PROCEDURAL BACKGROUND

Xu filed a complaint with the Colorado Civil Rights Division and the Equal Employment Opportunity Commission (EEOC), asserting retaliatory discrimination and discrimination on account of his race, national origin, and age. After the EEOC issued Xu a right-to-sue letter, he filed the district court

action underlying this appeal. In the operative second amended complaint, filed by counsel, Xu advanced claims of discrimination (based on race and national origin) and retaliation under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §§ 1981 and 1983.4 Xu also repeatedly referred to a racially hostile work environment.

The District moved for summary judgment. The district court determined the District had not met its summary-judgment burden and therefore denied the motion. But the court found that the case was not ready for trial, either. It therefore ordered the parties to mediate, with the caveat that if mediation was not fully successful, the court would consider allowing the parties another chance to seek summary judgment. voluntarily dismissing that claim.

After mediation was unsuccessful, the District filed a renewed motion for summary judgment. The district court granted the motion.

First, although the court doubted whether Xu had advanced a discrete hostile work environment claim, the court concluded that he failed to identify any evidence meeting the relevant standard, which requires a showing "that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," and the production of "evidence from which a rational jury could infer that [the employee] was targeted for harassment because of [their] gender, race, or national origin." Sandoval v. City of Boulder, 388 F.3d 1312, 1327 (10th Cir. 2004). The court determined that although Xu pointed "to a number of allegedly discriminatory actions involving

his substantive job functions and teacher evaluation processes, including unannounced observations, increased planning requirements, a lack of computer or paraprofessional support compared to other teachers, and his placement on a performance improvement plan," he had nothing more "than his own subjective belief[] that these acts included elements of discriminatory intimidation, ridicule, or insults." R., Vol. 2 at 487. The court also concluded that there was no record support for Xu's contention that the harassment was pervasive, and that there was no evidence that Salem's outburst and table-banging at the December 19 meeting was "related to race," id. at 488.

The court next considered Xu's discrimination claims under Title VII and §§ 1981 and 1983. Because Xu had no direct evidence of discrimination, the court applied the three-step burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In that framework, the plaintiff must first establish a prima facie case of discrimination. Id. at 802. If the plaintiff does so, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the [challenged adverse employment action]." Id. If the employer meets that burden, the employee must show that the employer's stated reasons are pretext for unlawful discrimination. Id. at 804.

The district court concluded that disputed questions of material fact precluded summary judgment based on the District's argument that Xu could not establish two elements of his prima facie case—(1) that he was qualified and satisfactorily performing his job and (2) that the RIB and

nonrenewal occurred under circumstances giving rise to an inference of discrimination.5 But the court determined that even if Xu could establish a prima facie case of discrimination, he failed to present any competent evidence that the District's proffered reasons for the RIB (interview performance and LEAP scores) and the nonrenewal (performance and conduct concerns) were pretextual.6 The court observed that, based on "'the facts as

5 "In racial discrimination suits, the elements of a plaintiff's case are the same whether that case is brought under §§ 1981 or 1983 or Title VII." Carney v. City & Cnty. of Denver, 534 F.3d 1269, 1273 (10th Cir. 2008) (internal quotation marks omitted).

6 The District conceded that these were adverse employment actions for purposes of Xu's discrimination claim. But the District argued that Xu failed to exhaust his allegations that the District (1) improperly revoked his summer school position after he was nonrenewed and (2) later provided a negative employment they appear to the person making the [employment] decision, not the aggrieved employee[,] [t]he relevant inquiry is not whether the proffered reasons were wise, fair or correct, but whether the employer believed those reasons to be true and acted in good faith upon those beliefs,'" an inquiry that turns on the "employer's 'good faith perception' of the reason for the adverse employment action, not plaintiff's subjective belief." R., Vol. 2 at 495 (first alteration in original) (citation omitted) (quoting Piercy v. Maketa, 480 F.3d 1192, 1200–01 (10th Cir. 2007)).

Applying that standard, the district court rejected Xu's attempt to show pretext by claiming the District relied on performance and conduct problems that were never brought to his attention. The district court found that factually, the argument was not credible given Xu's LEAP scores, the December 2018 meetings, and Salem's placement of Xu on a performance improvement plan. The court observed that "the undisputed facts demonstrate that the [District] was in fact concerned with [Xu's] job performance throughout his tenure at NCAS." Id. at 496.

Turning to the retaliation claims, the district court concluded that the protected conduct at issue was Xu's complaint to the District about the RIB decision, and therefore the relevant adverse employment action was limited to his nonrenewal. The court then determined that although there were disputed issues of material fact concerning a causal connection between the complaint and the nonrenewal, summary reference. The district court found that Xu had not contested those arguments and therefore had conceded that the revocation of the offer and the alleged negative reference were not adverse employment actions for purposes of his discrimination claim. Xu does not challenge that ruling. judgment was appropriate because the District had provided a nondiscriminatory reason for the nonrenewal, and Xu had not shown pretext. See id. at 498 (citing Est. of Bassatt v. Sch. Dist. No. 1, 775 F.3d 1233, 1238 (10th Cir. 2014) (applying McDonnell Douglas framework to retaliation claim)). The court explained that although the nonrenewal occurred less than two months after Xu filed the

District complaint, "temporal proximity alone is insufficient to show pretext and defeat summary judgment." Id. at 498 (citing Annett v. Univ. of Kan., 371 F.3d 1233, 1240 (10th Cir. 2004)). And, for the same reasons that Xu failed to show pretext for his discrimination claim, the district court concluded that he had not shown the District's "proffered reasons for the non-renewal were pretextual." Id.

The district court entered a separate judgment, awarding the District its costs.

The parties filed a stipulation to the taxation of $2,981.75 in costs associated with deposition transcripts, which the court awarded. Xu filed a timely notice of appeal in which his attorney stated that going forward, Xu would represent himself.

II. DISCUSSION

On appeal, Xu argues that the district court erred in (1) granting summary judgment; (2) handling a motion to restrict access to his personal information; and (3) awarding costs. In his reply brief, he takes issue with some of the District's appellate filings. We address these arguments in order.

A. Grant of summary judgment

We review de novo a district court's decision to grant summary judgment, applying the same standard governing the district court. Rivero v. Bd. of Regents of Univ. of N.M., 950 F.3d 754, 758 (10th Cir. 2020). Summary judgment is proper if "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). "We view all facts and evidence in the light most favorable to the party opposing summary judgment." Craft Smith, LLC v. EC Design, LLC, 969 F.3d 1092, 1099 (10th Cir. 2020) (internal quotation marks omitted). Because counsel represented Xu in the district court, we afford only Xu's pro se appellate filings a liberal construction, but we may not act as his advocate by "constructing arguments and searching the record," Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005).

We address Xu's opening-brief arguments concerning summary judgment by sorting them into six categories: (1) argument concerning application of the McDonnell Douglas framework; (2) argument that the district court improperly considered facts the parties advanced in their summary judgment briefs; (3) factual contentions raised for the first time on appeal; (4) argument regarding irrelevant factual and legal issues; (5) conclusory assertions of discrimination and retaliation; and (6) argument that the district judge was biased against him.

1. Application of McDonnell Douglas framework

Xu appears to contest the district court's decision to apply the McDonnell Douglas framework based on its determination that he failed to present any direct evidence of discrimination. "Direct evidence is evidence from which the trier of fact may conclude,

without inference, that the employment action was undertaken because of the employee's protected status." Sanders v. Sw. Bell Tel., L.P., 544 F.3d 1101, 1105 (10th Cir. 2008). Xu has not identified, nor have we uncovered, any direct evidence that either the RIB or the nonrenewal decision was based on Xu's race or national origin. Thus, the district court was correct in applying the McDonnell Douglas framework.

Xu also points to the district court's determination that there was a disputed issue of material fact whether he was performing his job satisfactorily. He argues this was enough for the case to go to a jury because his job performance is the central issue in this case. But whether an employee was satisfactorily performing his job is an element of a prima facie discrimination case. See Salguero v. City of Clovis, 366 F.3d 1168, 1175 (10th Cir. 2004). And to survive summary judgment, a plaintiff must establish both "a prima facie case and present[] evidence that the defendant's proffered nondiscriminatory reason was pretextual." Randle v. City of Aurora, 69 F.3d 441, 452 n.17 (10th Cir. 1995) (emphasis added). We therefore see no procedural error in the district court's assuming that Xu could establish a prima facie case and then granting summary judgment based on his failure to provide adequate evidence of pretext.

2. District court's handling of facts presented on summary judgment

Xu takes issue with the district court's handling of certain facts. He claims he did not get enough

classroom support; other teachers had more supporters (as many as five) and/or fewer qualifications than he did; there was no evidence supporting the assertion that he failed to consistently document student misbehavior in the District's online system; his LEAP scores were "misinterpreted, considered incorrectly, [and] decided incorrectly," Aplt. Opening Br. at 10; he was not insubordinate; Schroeder was not a proper comparator, and the District "never disclosed" another new math teacher, who was a proper comparator, id. at 12; Xu's advanced algebra course was excluded from his LEAP evaluation; and Xu has excellent qualifications. These alleged facts either lack record support,[10] contradict the record,[11] represent Xu's subjective beliefs (sufficiency of classroom support he received, superiority of his qualifications), or concern whether the District's RIB and nonrenewal decisions were correct or fair (remaining alleged facts). As such, they fail to contradict evidence that the District thought the reasons for its decisions were true and made the decisions in good faith rather than as a pretext for

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[10] The District identified the other new math teacher. *See* R., Vol. 1 at 372, ¶ 11. And Xu admitted that she was considered for the RIB, *id.* at 377, ¶ 73; that she had earned an "effective" rating on her LEAP evaluations, *id.* at 380, ¶ 112; that Salem had no concerns about her performance or conduct, *id.*, ¶ 113; and that, to Salem's knowledge, she had made no "demeaning comments about students," *id.* at 381, ¶ 115. *See* R., Vol. 2 at 10, 3; *id.* at 12, ¶¶ 112–13, 115. The district court discussed whether Schroeder and the other teacher were proper comparators as part of its analysis of whether Xu could make a prima facie showing that the RIB occurred under circumstances giving rise to an inference of discrimination. *See id.* at 494.

[11] Xu admitted he did not consistently document student misbehavior and that Salem considered that failure insubordination. See R., Vol. 2 at 7, ¶ 24 & 12, ¶ 103 (admitting the District's statements of undisputed material fact that "Xu knew that he was supposed to document misbehavior in Infinite Campus, but he did not consistently do so," R., Vol. 1 at 373, ¶ 24, and that Salem considered this insubordination, id. at 380, ¶ 103).

discrimination or retaliation. We therefore see no error in the district court's handling of these facts. Although Xu believes that he was qualified for and satisfactorily performing his job,

7 The District identified the other new math teacher. See R., Vol. 1 at 372, ¶ 11. And Xu admitted that she was considered for the RIB, id. at 377, ¶ 73; that she had earned an "effective" rating on her LEAP evaluations, id. at 380, ¶ 112; that Salem had no concerns about her performance or conduct, id., ¶ 113; and that, to Salem's knowledge, she had made no "demeaning comments about students," id. at 381, ¶ 115. See R., Vol. 2 at 10, ¶ 73; id. at 12, ¶¶ 112–13, 115. The district court discussed whether Schroeder and the other teacher were proper comparators as part of its analysis of whether Xu could make a prima facie showing that the RIB occurred under circumstances giving rise to an inference of discrimination. See id. at 494. 8 Xu admitted he did not consistently document student misbehavior and that Salem considered that failure insubordination. See R., Vol. 2 at 7, ¶ 24 & 12, ¶ 103 (admitting the District's statements of undisputed material fact that "Xu knew that he was supposed to document misbehavior in Infinite Campus, but he did not

consistently do so," R., Vol. 1 at 373, ¶ 24, and that Salem considered this insubordination, id. at 380, ¶ 103). his subjective belief is not the relevant consideration. See Piercy, 480 F.3d at 1200–01. Of course, an employee may demonstrate pretext by showing that "the employer's proffered reason was so inconsistent, implausible, incoherent, or contradictory that it is unworthy of belief." Id. at 1200 (internal quotation marks omitted). But Xu did not make that showing in the district court, and he has not done so on appeal.

Regarding his retaliation claim, Xu contends that the district court's reliance on his District complaint as the relevant protected activity overlooks that he "had gone through all procedures internally or externally since Aug. 2018, including Reporting, [the December 2018] Meetings, [and] Level I & II Grievances." Aplt. Opening Br. at 10–11; see also id. at 16. But he points to no evidence that he complained to the District that any of its employees unlawfully discriminated against him other than by filing his District complaint. We therefore reject this contention of error.

3. Factual contentions presented for the first time on appeal Xu makes several factual allegations that he did not call to the district court's attention: his year-end LEAP score showing "35% good," which qualified him for renewal, was purposely not approved until after his nonrenewal, id. at 10, 22; at the December 19 meeting, Salem orally promised to guarantee Xu's renewal if he made any improvements; Salem intentionally disrupted Xu's

RIB interview by "scream[ing] out at least three times," thereby giving "an explicit signal to everyone in the panel to get rid of [Xu]," id. at 12; and Xu's math students were those Schroeder taught the previous year, and Xu's "data exceeded hers about 10-12% better," id. at 21.

Xu brought none of these contentions to the district court's attention in his opposition to the summary judgment motion, and he has not argued for plain-error review here. He therefore has waived our consideration of these alleged facts. See United States v. Leffler, 942 F.3d 1192, 1196 (10th Cir. 2019) ("When an appellant fails to preserve an issue [by not raising it in the district court] and also fails to make a plain-error argument on appeal, we ordinarily deem the issue waived . . . and decline to review the issue at all").9

4. Irrelevant factual contentions and legal arguments Xu makes much of his initial assignment to teach 9th grade math and his eventual reassignment to 10th and 12th grade classes. He views this all as "deceptive" in light of the promise allegedly made when he was hired that he would be teaching 10th grade and above. See Aplt. Opening Br. at 8, 20. While this may have frustrated Xu, he fails to explain, and we fail to see, how it bears on pretext.

Xu takes issue with the handling of complaints he made about student behavior. See id. at 11, 19 (faulting the District for taking "two months" to remove from his classroom the student who called him a "Chino"); id. at 20 (claiming that a 9 Xu also

claims the District disclosed the existence of a video Schroeder recorded of him teaching a class, but it "only can be put into oral argument that [his] LEAP

was rated incorrectly lower." Aplt. Opening Br. at 13. We fail to understand his point. If he wanted to procure the video and use it in opposition to the District's motion for summary judgment, he could have done so during discovery. student walked on tables in Xu's classroom for five minutes in front of Schroeder, apparently without any disciplinary consequences); id. (asserting that Salem failed to discipline another student who ripped up a test up and threw it in Xu's face after Xu caught him cheating). Setting aside that the student who called him a "Chino" was removed only a week after Xu reported the incident to the Dean of Students,10 Xu offers no theory—and points to no evidence—that unlawful discrimination or retaliation in the RIB or nonrenewal may be implied from the District's handling of these behaviors.

Xu points out that he was the only teacher who did not get a cap and gown to wear at graduation. But when asked at his deposition why this was not just a mistake, he replied that because he had already been nonrenewed, Juett did not want him to attend the graduation. This fact, therefore, has no relevance to

whether the RIB or nonrenewal were discriminatory. Xu argues that Salem, NCAS, and the District are "habitual violators" of Title

VII. Aplt. Opening Br. At 17. Xu offers no record support for his contention, and in any event we see no relevance to what occurred in this case. Xu asserts the District maliciously introduced evidence of his criminal fraud conviction. This occurred when the District opposed Xu's motion in limine to exclude evidence of the conviction and argued that, in the event the case went to trial, 10 Xu admitted that the student was removed only about a week after Xu reported the incident to the Dean of Students[12]. See R., Vol. 1 at 382, ¶¶ 135–36 (motion for summary judgment setting out relevant facts); R., Vol. 2 at 13–14, ¶¶ 135–36 (Xu's response admitting these facts).the evidence was relevant to credibility and damages. See generally R., Vol. 2 at 97–106. But the district court did not discuss, and there is no indication the conviction affected that ruling. We therefore fail to see the relevance of Xu's argument. Xu also takes issue with his attorney's performance in responding to the renewed motion for summary judgment. That issue is not properly raised in this appeal. See Nelson v. Boeing Co., 446 F.3d 1118, 1119 (10th Cir. 2006) (explaining that generally, "ineffective assistance of counsel is not a basis for appeal" in civil cases, even those arising under Title VII). evidence of the fraud conviction in its opinion

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[12] Xu admitted that the student was removed only about a week after Xu reported the incident to the Dean of Students. See R., Vol. 1 at 382, ¶¶ 135–36 (motion for summary judgment setting out relevant facts); R., Vol. 2 at 13–14, ¶¶ 135–36 (Xu's response admitting these facts).

5. Conclusory assertions

Xu makes many conclusory assertions, including that he was "severely demanded [sic], humiliated, harassed, scrutinized, [and] discriminated against," "Juett stalked, and sabotaged [him]," and the District "persecuted [him]," Aplt. Opening Br. at 9; in 2016, 2017, and 2018, NCAS used a RIB regardless of projected enrollment in order "to get rid of the disliked teachers," id. at 12; the District's investigation of his complaint omitted "comparison data and . . . dark story," so it was "a plotted conspiracy," id.; and affidavits the District relied on in support of its motion for summary judgment "have outstanding false statements." id. at 19. He offers no record support for these assertions, nor do we see any. "[C]onclusory allegations—lacking evidentiary support in the record—do not suffice to create a genuine question [regarding] pretext." Salguero, 366 F.3d at 1178.

6. Judicial Bias

Xu argues the district judge was biased because the judge accepted Salem's characterization that Xu was insubordinate when he failed to consistently document student misbehavior, despite that no one had ever told Xu he was insubordinate. But as noted above, Xu admitted the fact that Salem thought Xu was insubordinate, so we fail to see how the district court's reliance on that admitted fact indicates improper bias. In any event, Xu's allegation of bias stems only from the district court's ruling. "Adverse rulings alone do not demonstrate

judicial bias." Bixler v. Foster, 596 F.3d 751, 762 (10th Cir. 2010).

B. Motion to restrict

Attached to the District's response to Xu's motion in limine was an exhibit including Xu's personally identifiable information (PII). Upon realizing this, the District filed a motion to restrict public access to all the exhibits, claiming the disclosure was inadvertent. The district court denied that motion without prejudice because the District failed to comply with a local court rule. However, recognizing the need to protect the information, in the same order the court restricted public access to all the exhibits sua sponte. Shortly after, the court issued its order granting summary judgment. The District then filed a renewed motion to restrict from public view the one exhibit containing Xu's PII. The district court granted that motion.

On appeal, Xu faults the district court for denying the District's first motion to restrict and for failing to restrict public access to his PII. This argument overlooks that although the court denied that motion, it restricted public access to the exhibits sua sponte. Thus, we see no error in the district court's denial of the motion.

Xu also claims the District's disclosure was malicious and violated a protective order the court had entered. He therefore proposes the district court should have sanctioned the District for disclosing his PII. But Xu never asked the court to sanction the District, so there is nothing

for us to review. And, assuming the court could have imposed sanctions sua sponte, Xu develops no argument that the court should have done so. We therefore reject Xu's proposition.

C. Award of costs

Xu complains that he should not have to pay costs incident to the taking of depositions, which the district court awarded. But Xu stipulated to those costs through counsel. Although "relief can be granted from a stipulation in order to prevent manifest injustice," United States v. Montgomery, 620 F.2d 753, 757 (10th Cir. 1980) (parentheses and internal quotation marks omitted), Xu merely argues that it would be "irrational" to make him pay for costs incident to Salem's deposition because Salem tried to avoid answering questions about his own

alleged history of misconduct, Aplt. Opening Br. at 9. Nor does Xu's argument reveal any "circumstances tending to negate a finding of informed and voluntary assent" to the stipulation, which is another exception to the "general rule" that courts "enforce stipulations." Montgomery, 620 F.2d at 757 (internal quotation marks omitted). His argument, therefore, is unavailing.

D. Reply brief argument concerning the District's appellate filings

In his reply brief, Xu argues that the District's attorneys should be disqualified because one of them filed an entry of appearance more than fourteen days after the appeal was docketed. We disagree. Counsel for a party must enter an appearance "[w]ithin 14 days after an appeal . . . is filed." 10th Cir. R. 46.1(A). One of the District's attorneys did just that. But "[o]ther attorneys whose names subsequently appear on filed papers must also file written appearances." Id. The other attorney therefore properly entered their appearance after the initial fourteen-day deadline. Xu also takes issue with the District's request for a 30-day extension of time to file its response brief, contends the brief was untimely because it was filed after 5:00 p.m. on the due date, and claims it exceeded the word limit. These arguments are not well taken. The District's request for more time was based on counsel's illness, and a two-judge panel of this court granted the motion. We see no error. The response brief was electronically filed before midnight on the due date, so it was timely. See Fed. R. App. P. 26(a)(4)(B). And the brief complied with the word limit, which excludes portions of a brief that Xu includes (wrongly) in his calculation that the brief was overlength. See Fed. R. App. P. 32(a)(7), (f).

III. CONCLUSION

The district court's judgment is affirmed. The District's Motion to Supplement the Record on Appeal is granted, and the Clerk's Office is directed to supplement the record with ECF Nos. 80, 81, and 97.

Entered for the Court

Carolyn B. McHugh
Circuit Judge

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Judge Regina M. Rodriguez Civil Action No. 20-cv-3774-RMR-SKC CHUNYI XU, aka DAVID XU,

Plaintiff,

v.

DENVER PUBLIC SCHOOLS, SCHOOL DISTRICT NO. 1

Defendant.

ORDER

This matter comes before the Court on the Defendant's Renewed Motion for Summary Judgment, ECF 75. The Plaintiff filed a response, at ECF 78, and the Defendant filed a reply, at ECF 86. The matter has been fully briefed and is ripe for review. For the following reasons, the Defendant's motion is GRANTED.

I. Background[13]

The Plaintiff in this action is a certified teacher who holds a master's degree in physics and computer science. The Plaintiff began his employment with the Defendant, Denver Public Schools, as a high school mathematics teacher at

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[13] The Court relies on the parties' statements of fact in their prior and current summary judgment briefing. See CF Nos. 50, 53, 75, 78. Unless otherwise stated, these facts are undisputed.

Noel Community Arts School ("NCAS") prior to the 2018/2019 school year. The Plaintiff is a permanent resident of the United States and is of Asian race and of Chinese national origin. During the course of his employment, the Plaintiff taught 9th, 10th and 12th grade math. The parties dispute whether the Plaintiff was provided with adequate support while teaching. The Defendant cites to evidence suggesting that the Plaintiff received support through, among other things, scheduled and unannounced observations of his teaching, coaching and feedback sessions, and paraprofessional support in his classroom. The Defendant specifically argues that NCAS Assistant

Principal Edwin Salem and Math Team Lead Morgan Schroeder provided the Plaintiff with support. The Plaintiff argues that he did not receive support. He contends that Schroeder and Salem allowed students to mistreat him without taking any remedial or disciplinary action. The Plaintiff states that Salem and Schroeder told him that he did not fit in and should look for another career. The Parties also dispute whether the Plaintiff performed his job satisfactorily. The Defendant contends that the Plaintiff had difficulties with classroom management. It states that students were frequently off-task in Plaintiff's classroom and that the Plaintiff did not properly document misbehavior in the District's online student information system as directed. The Defendant also contends that the Plaintiff received poor ratings under the District's Leading Effective Academic Practice ("LEAP")

teacher evaluation system throughout the year. The Plaintiff argues that the lack of support impacted his LEAP scores and his end-of-year evaluation was unfair because he believed that the District should not have counted the scores he received from his 9th grade class. The Plaintiff argues that he performed his job adequately, citing to evidence that he scored in the top 10% of high school teachers nationwide on the Praxis exam in 2018, which DPS received when he applied for the position. He also testifies that he ran the Math Club and was selected to the District Math Assessment Committee.

The Defendant has cited to evidence that students in the Plaintiff's classroom complained that they did not understand the material and that the Plaintiff was ineffective. The Plaintiff denies that the complaints had merit and argues that "[t]hose students who applied themselves properly in [his] class liked him and enjoyed the class" and "provided him with positive feedback." ECF 78 at 12. The Plaintiff also states that he was told that his accent was the cause of his alleged teaching difficulties. The Defendant states that the Plaintiff's accent was "raised as a potential explanation for students not understanding him." ECF 75 at 13.

On December 14 and 19, 2018, Salem and Schroeder met with the Plaintiff to discuss student concerns and performance concerns. Salem told the Plaintiff that the school administration "had received many student complaints, that students did not feel valued, and that [Plaintiff] made them feel dumb." ECF 75 at 5. The parties appear to agree

that Salem told the Plaintiff during these meetings that he was "targeting non- renewal." ECF 78 at 12; ECF 86 at 3. The evidence also shows that, during the December 14 meeting, the Plaintiff informed Salem and Schroeder that a student in his class had called him a "Chino." This incident was reported to the Dean of Students, and the student was removed from the Plaintiff's class. Prior to the 2019/2020 school year, the Defendant school district determined that it would need to lay off two NCAS teachers, one in Language Arts and one in Math, due to low projected student enrollment. The lay-off process is called a "Reduction in Building" (RIB). When teaching positions are subject to a RIB, teachers in the department experiencing the RIB participate in an interview by a personnel committee that then votes on which teacher to RIB. The NCAS personnel committee for the 2019 RIB process consisted of Salem, Assistant Principal Jennifer Perea-Anderson, Dean of Assessment Erik Anderson, Science Teacher Elizabeth Nix, and Math Ambassador Coordinator Joya Postlewait. Math teachers considered for the RIB were the Plaintiff, Schroeder, Alexa Desautels, Amy Stiger, and Jeff Astudillo. On February 8, 2019, the Plaintiff was notified that he had been selected for the RIB. A final non-renewal decision, however, had not yet been reached.

In March 2019, the Plaintiff filed a complaint, alleging that the RIB process was discriminatory. The District assigned a Human Resources employee to investigate the Plaintiff's complaints. The District ultimately determined

that the decision was not discriminatory, and that NCAS had a legitimate reason for choosing the Plaintiff for the RIB. The Plaintiff appealed the decision, which was upheld. NCAS ultimately decided to non-renew the Plaintiff's employment. The Plaintiff was notified on May 21, 2019. The Defendant states that, before his non-renewal, the Plaintiff was offered a position teaching summer school at a different DPS school. When Plaintiff was non-renewed, the summer school offer was withdrawn because he was ineligible for rehire for a three-year period pursuant to District procedure. This case followed. The Plaintiff filed this action on December 23, 2020. The Plaintiff's Second Amended Complaint alleges five causes of action: Title VII discrimination (claim 1), section 1981 and 1983 race discrimination (claim 2), Title VII
retaliation (claim 3), 1981 and 1983 retaliation (claim 4), and ADEA age discrimination (claim 5). ECF 29. On September 9, 2022, the Court denied the Defendant's first Motion for Summary Judgment without prejudice and ordered the parties to mediation. ECF 58. The Plaintiff ultimately agreed to dismiss his age discrimination claim, but the parties were otherwise unable to reach a settlement in this matter. With the Court's leave, the Defendant filed the instant Renewed Motion for Summary Judgment, ECF 75, and seeks dismissal of all remaining claims.

II. Applicable Law

To succeed on a motion for summary judgment, the movant must demonstrate that (1) there is no genuine dispute of material fact; and (2) the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When analyzing a motion for summary judgment, the court must look at the factual record and the reasonable inferences to be drawn from the record in the light most favorable to the non-moving party." Self v. Crum, 439 F.3d 1227, 1230 (10th Cir. 2006). However, the nonmoving party may not simply rest upon its pleadings at this stage; rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 671 (10th Cir. 1998). Ultimately, the Court's inquiry on summary judgment is whether the facts and evidence identified by the parties present "a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. at 249.

II. ANALYSIS

A. Hostile Work Environment

As an initial matter, confusion appears to remain regarding whether the Plaintiff has in fact asserted a hostile work environment claim. The Second Amended Complaint does not allege hostile work environment as an independent cause of action, and the Plaintiff has expressly acknowledged that he has not stated a separate claim for relief based on a hostile work environment. See, e.g., ECF 53 at 12. Counsel for the Plaintiff nonetheless maintains that the race/national origin discrimination claims involve hostile work environment "issues" and would not confirm whether Plaintiff has asserted a hostile work environment claim in connection with the instant motion. The Court is not impressed with counsel's attempts to straddle the fence on this question and continues to harbor doubts that a hostile work environment claim is properly before the Court. Even if the Plaintiff is indeed making a hostile work environment claim, however, the Court grants summary judgment to the Defendant in that regard. Title VII forbids employment discrimination on the basis of race or national origin. Chavez v. New Mexico, 397 F.3d 826, 831 (10th Cir. 2005) (citing 42 U.S.C. § 2000e–2(a)(1)). This includes an employee's claims of a hostile work environment based on race or national origin discrimination. See id. at 831–32.

To survive summary judgment on a claim alleging a racially hostile work environment, the Plaintiff "must show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," and that the victim "was targeted for harassment because of [his] . . . race[ ] or national origin." Sandoval v. City of Boulder, 388 F.3d 1312, 1326–27 (10th Cir. 2004) (quotation omitted); see also Chavez, 397 F.3d at 832. 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 v. Lincare, Inc., 812 F.3d 1208, 1222 (10th Cir. 2015). In determining whether conduct is sufficiently severe or pervasive, the Tenth Circuit considers: "(1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's work performance." Holmes v. Regents of Univ. of Colo., 176 F.3d 488 (Table), 1999 WL 285826, at *7 (10th Cir. May 7, 1999)

(citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)). "[M]ere utterance of an . . . epithet which engenders offensive feelings in a[n] employee, does not sufficiently affect the conditions of employment to implicate Title VII." Harris, 510 U.S. at 21 (internal quotation marks and citations omitted). Rather, in making this hostile work environment determination, a court must "consider the work atmosphere both objectively and subjectively, looking at all the circumstances from the perspective of a reasonable person in the plaintiff's position." Herrera v. Lufkin Indus. Inc., 474 F.3d 675, 680 (10th Cir. 2007).

Here, the Court finds that the Plaintiff has not identified evidence establishing that the workplace was "permeated" with discriminatory intimidation, ridicule, and insult sufficiently severe or pervasive to alter the conditions of his employment. The Plaintiff cites to a number of allegedly discriminatory actions involving his substantive job functions and teacher evaluation processes, including unannounced observations, increased planning requirements, a lack of computer or paraprofessional support compared to other teachers, and his placement on a performance improvement plan. ECF 78 at 15. While the Plaintiff may have felt frustrated with, and been offended by, these occurrences, he has proffered n evidence, other than his own subjective belief, that these acts included elements of discriminatory intimidation, ridicule, or insults. Plaintiff likewise has not met his burden to show that any of the conduct perpetrated by the District was either severe or

pervasive. While the Plaintiff states that the "harassment was pervasive" as it "continued virtually from the date [he] started at [NCAS] until his termination," his bare allegations are unsupported by the record and insufficient to create a question of disputed fact on this issue. ECF 78 at 17. Similarly, Plaintiff fails to point to any evidence that the single "severe episode" he cites—i.e., an incident in which Salem "yelled at [Plaintiff] and banged on the table"—was related to race. Id. In sum, the Plaintiff has not demonstrated that a disputed issue of material fact exists as to whether these incidents, when considered in combination, would be sufficient to "alter the conditions of [his] employment and create an abusive working environment." Chavez, 397 F.3d at 832; see also Boyd v. Presbyterian Hosp., 160 F. Supp. 2d 522, 541–42 (S.D.N.Y. 2001) (holding that while an African–American nurse was subjected to gossip, lowe performance evaluation, and intense scrutiny of her work performance that were annoying, bothersome, and stress-inducing, they did not create a hostile work environment). Accordingly, to the extent that the Plaintiff's claims are predicated on the existence of a hostile work environment, the Defendant is entitled to summary judgment[14].

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14 Because the Court determines that the Plaintiff's allegations fail on the merits, the Court need not address the Defendant's argument that it is entitled to summary judgment on any hostile work environment claim under Title VII because the Plaintiff failed to exhaust his administrative remedies. See ECF 75 at 13–14.

B. Title VII Discrimination Claim (Claim 1) and Race Discrimination Claim (Claim 2)

The Defendant next seeks summary judgment on the Plaintiff's discrimination claims. "In racial discrimination suits, the elements of a plaintiff's case are the same whether that case is brought under §§ 1981 or 1983 or Title VII." Carney v. City & Cnty. of Denver, 534 F.3d 1269, 1273 (10th Cir. 2008). A

plaintiff may prove violation of Title VII or 42 U.S.C. § 1981—the standards are the same—either by direct evidence of discrimination, or by adhering to the burden-shifting framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The Plaintiff here has offered no direct evidence of discrimination, so his claims proceed under the McDonnell Douglas framework.

The McDonnell Douglas framework has three parts. First, the plaintiff must make out a prima facie case. Second, if the plaintiff makes out a prima facie case, the burden shifts to the employer to assert a legitimate nondiscriminatory reason for its actions. If the employer does so, the burden shifts back to the plaintiff to introduce evidence that the stated nondiscriminatory reason is merely a pretext. Mann v. XPO Logistics Freight, Inc., 819 F. App'x 585, 594 (10th Cir. 2020).

The Court first considers whether the Plaintiff

has identified evidence sufficient to support a prima facie case of discrimination. To support his claims for relief, the Plaintiff must identify evidence establishing that (1) he was a member of a protected class; (2) he was qualified and satisfactorily performing his job; and (3) he was terminated or subject to adverse employment action under circumstances giving rise to an inference of discrimination. Salguero v. City of Clovis, 366 F.3d 1168, 1175 (10th Cir. 2004).

1. **Relevant Adverse Employment Action**

As a threshold matter, the Court considers what actions constitute adverse employment action, such that they may form the basis of a claim for actionable discrimination. The Defendant concedes that the RIB and non-renewal are adverse actions for purposes of the Title VII and 1981 claims.

The Defendant argues, however, that many of the additional actions alleged by the Plaintiff are not actionable. Specifically, Defendant argues that (1) the Plaintiff failed to exhaust his claims under Title VII as to the allegations the Defendant improperly revoked his summer school position in May 2019 and provided him with a negative employment reference later that summer and (2) there is no municipal liability for the revocation of the summer school position and the negative employment reference. Plaintiff does not contest either claim, apparently conceding that such actions cannot form the basis of a viable claim for relief. Thus, to the extent that the Plaintiff's claims are based on the revocation of the summer school

position or claimed interference with his teaching career, those claims fail as a matter of law, and summary judgment is appropriate.

2. **Plaintiff's Job Performance**

To support a prima facie case the Plaintiff must also establish that he performed his job satisfactorily. Factual disputes remain regarding this issue. The Defendant argues that the evidence establishes that the Plaintiff did not perform his job satisfactorily prior to his non-renewal. The Defendant points to evidence that the Plaintiff displayed poor classroom management, that he earned "not-meeting" ratings on his LEAP evaluations, that he was insubordinate, and that he spoke negatively about his students. The Plaintiff has cited to evidence that he satisfactorily performed his job as a math teacher. He points to evidence that he was never terminated or disciplined by Denver Public Schools during his employment, he was instead non-renewed following a RIB process. He has pointed to evidence that he scored in the top 10% of high school teachers nationwide on his Praxis exam. He also has identified evidence that he ran the math club and was selected to the District Math Assessment Committee. Whether the Plaintiff satisfactorily performed his job is a disputed factual question that is appropriately left for the jury. Each party has identified facts in support of their position on this issue, the Defendant has therefore not met its burden at the summary judgment stage. The Court finds that the Defendant is not entitled to summary judgment on Plaintiff's discrimination claim on this basis.

3. **Inference of Discrimination**

The Defendant argues that the Plaintiff separately cannot support a prima facie case because he has not identified evidence giving rise to an inference of discrimination.

As to the RIB, Defendant argues that the undisputed facts reflect that (1) NCAS was required to RIB a math teacher following a projected loss in student enrollment; (2) all teachers in the math department were required to interview for their positions before the school's personnel committee, which was comprised of five members (one of whom was Salem); and (3) the personnel committee followed the same interview format for all five interviewees, including allotting the same amount of time for each interview, asking each interviewee the same questions, and providing the interviewees with those questions ahead of time. ECF 75 at 19. Following that process, the Plaintiff was selected for the RIB by a unanimous vote of the committee. Id. For a plaintiff to show that an employment decision made by a committee is discriminatory, he must produce facts to show that the majority of the committee members were biased against him, or that "one biased member was a substantial influence over the committee's ultimate action " Couch v. Bd. of Trustees of Mem. Hosp., 587 F.3d 1223, 1241 (10th Cir. 2009). Further, discrimination is undermined where a committee applies the same

procedures and standards to all interviewees. See Adams v. Washburn Univ. of Topeka, 66 Fed. Appx. 819, 823 (10th Cir. 2003). Here, it is undisputed that the personnel committee applied the same standards to all math teachers subject to the RIB. Plaintiff's argument that the "Committee . . . presented a classic case of one biased member [i.e., Salem] who had a substantial influence over the committee's ultimate actions," ECF 78 at 19, is unsupported by any evidence beyond Plaintiff's self-serving allegations. Even if the Court were to assume that Salem voted to RIB the Plaintiff based on racial animus, the Plaintiff has not shown that Salem "was a substantial influence over the committee's ultimate action" so as to demonstrate causation. Couch, 587 F.3d at 1241. The fact that Salem was one of two assistant principals on the personnel committee, and the other assistant principal apparently had no direct involvement with the Plaintiff, does not amount to evidence of actual influence. The Plaintiff's mere speculation about Salem's influence is not enough to demonstrate a genuine issue of material fact. See Bullington v. United Air Lines, Inc., 186 F.3d 1301, 1320–21 (10th Cir. 1999) (plaintiff's speculation that supervisor who allegedly had retaliatory animus may have influenced interviewers was insufficient to establish causal connection because "evidence of an opportunity to influence does not amount to evidence of actual influence"), overruled on other grounds by Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). Therefore, the

Plaintiff has failed to provide any evidence establishing that the committee's ultimate decision to RIB the Plaintiff was discriminatory.

As to the remaining questions regarding an inference of discrimination and the Plaintiff's nonrenewal, the parties' arguments center largely on the Plaintiff's performance, which again is in dispute. According to the Defendant, "nonrenewal decisions were based on whether teachers are 'delivering instruction properly,' 'building relationships with students,' acting 'professionally,' and their LEAP scores." ECF 75 at 20. Teachers with unsatisfactory LEAP scores were almost always nonrenewed. Id.
While the parties do not dispute that the Plaintiff had an unsatisfactory LEAP score at the end of the school year, the Plaintiff disputes the District's assertions that his unsatisfactory LEAP score resulted primarily from his poor classroom management skills and that he engaged in unprofessional and insubordinate conduct.

The Parties also specifically dispute whether certain of the other math teachers selected for the RIB, Ms. Desautels and Ms. Schroeder, are proper comparators. The Defendant argues that they are not similarly situated to the Plaintiff, because they performed their jobs satisfactorily while the Plaintiff did not. The Defendant has cited to evidence that Desautels and Schroder are not situated similarly to the Plaintiff because "neither of them earned overall not-meeting ratings on their evaluations, no one knew Schroeder acted inappropriately (and the District does not believe she did), and neither made

derogatory or demeaning comments about students." ECF 75 at 21. The Plaintiff responds that similarly situated employees are those who, like Desautels and Schroder, deal with the same supervisor and are subject to the same standards governing performance evaluations and discipline. ECF No. 78 at 21 (citing Aramburu v. Boeing Company, 112 F.3d 1398, 1404 (10th Cir. 1997)).

Yet again, disputes of material fact preclude a finding on this issue at this stage. The Defendant's arguments rest on a finding that the Plaintiff's job performance was unsatisfactory while that of his alleged comparators was not. The Defendant is not entitled to summary judgment on this basis.

4. **Pretext**

Even assuming Plaintiff could establish a prima facie case of race discrimination regarding his non- renewal, however, Plaintiff fails to present competent evidence that Defendant's proffered reasons for his reduction and non-renewal were pretextual. According to the Defendant, the Plaintiff was "unanimously RIB'd by a committee due to his poor performance in the RIB interview and his unsatisfactory LEAP scores" and "nonrenewed due to performance and conduct concerns." ECF 75 at 24.

To satisfy his burden, Plaintiff must show that each of the Defendant's proffered reasons for his reduction and nonrenewal are pretextual. See Johnson v. Weld County Colo.,

594 F.3d 1202, 1212 (10th Cir. 2010). Pretext can be shown by "weaknesses, implausibilities, inconsistencies, incoherencies, or ontradictions" in the claimed non- discriminatory reason such that a rational trier of fact could find the reason unworthy of belief. Timmerman v. U.S. Bank, N.A., 483 F.3d 1106, 1113 (10th Cir. 2007). "A challenge of pretext requires a court to look at the facts as they appear to the person making the [employment] decision, not the aggrieved employee." Piercy v. Maketa, 480 F.3d 1192, 1200 (10th Cir. 2007). "The relevant inquiry is not whether the proffered reasons were wise, fair or correct, but whether [the employer] believed those reasons to be true and acted in good faith upon those beliefs." Id. Relevant to the issue of pretext is an employer's "good faith perception" of the reason for the adverse employment action, not plaintiff's subjective belief. Id. at 1201. "[M]ere conjecture that [the] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment." Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (quoting Branson v. Price River Coal Co., 853 F.2d 768, 772 (10th Cir.1988)). The Plaintiff attempts to refute the Defendant's cited evidence as pretextual by claiming that he was unaware of these performance issues. As a factual matter, this argument strains credulity given the Plaintiff's low mid-year and end-of-year LEAP scores, the December 2018 meetings with Salem and Shroeder to discuss student and performance concerns, and Plaintiff's placement on a performance improvement plan

("PIP"), among other things. ECF 75 at 4–5. But the Plaintiff's subjective beliefs about his performance are irrelevant in any event.

See Furr v. Seagate Tech. Inc., 82 F. 3d 980, 988 (10th Cir. 1996) ("It is the manager's perception of the employee's performance that is relevant, not plaintiff's subjective evaluation of his own relative performance."). Here, the undisputed facts demonstrate that the Defendant was in fact concerned with the Plaintiff's job performance throughout his tenure at NCAS.

The facts in the record before the Court do not suggest that the Defendant did not believe its proffered reasons for Plaintiff's reduction and non- renewal. Accordingly, as the Plaintiff has failed to establish that the Defendant's reasons for the RIB and non-renewal were pretext for discrimination, the Defendant is entitled to summary judgment on the Plaintiff's discrimination claims.

C. Title VII Retaliation Claim (Claim 3) and 1981 and 1983 Retaliation Claim (Claim 4)

The Defendant additionally seeks summary judgment on the Plaintiff's claims of retaliation.

A plaintiff establishes a prima facie case of retaliation by showing: (1) he or she engaged in protected opposition to discrimination; (2) he or she was subject to adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. Kendrick v. Penske Transp. Servs., Inc., 220 F.3d 1220, 1234 (10th Cir. 2000).

As the Court indicated in its prior Order at ECF 58, the relevant protected conduct is the Plaintiff's April 1, 2019 Complaint, which occurred after the RIB decision but before the non-renewal decision. The relevant adverse employment action is thus limited to the non-renewal decision.

Accordingly, the Plaintiff must identify evidence that his non-renewal was caused by his protected conduct. A causal connection may be shown by "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." O'Neal v. Ferguson Const. Co., 237 F.3d 1248, 1253 (10th Cir. 2001). In arguing that the Plaintiff cannot establish causal connection, Defendant points to evidence that, as early as December 2018, the Plaintiff was told that he was "targeting non-renewal" if the Plaintiff did not improve his performance. ECF 75 at 23. The Defendant cites to Nixon v. City & Cnty. of Denver, 784 F.3d 1364, 1370 (10th Cir. 2015), where the Tenth Circuit instructed that "employers need not refrain from previously planned actions upon learning that an individual has engaged in protected activity and 'their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.'" Thus, the Defendant argues, because the District contemplated non-renewal prior to the Plaintiff's protected activity, his protected activity is not presumed to have caused the nonrenewal.

The record reflects that the non-renewal

decision was communicated to the Plaintiff in May 2019, less than two months after his protected conduct. While the Defendant has cited to facts and case law suggesting that it was permitted to continue its previously planned actions, the Tenth Circuit has also instructed that "a one and one-half month period between protected activity and adverse action may, by itself, establish causation." O'Neal v. Ferguson Const. Co., 237 F.3d 1248, 1253 (10th Cir. 2001). Accordingly, there appear to be facts both supporting and disproving a causal connection here.

However, like a racial discrimination claim, a claim for retaliation based on wrongful termination requires that plaintiff make a showing of pretext if the employer offers a non-discriminatory basis for the action. Est. of Bassatt v. Sch. Dist. No. 1 in the City & Cnty. of Denver, 775 F.3d 1233, 1238 (10th Cir. 2014). While temporal proximity can establish causation for a prima facie case of retaliation, see Singh v. Cordle, 936 F.3d 1022, 1043 (10th Cir. 2019), temporal proximity alone is insufficient to show pretext and defeat summary judgment. Annett v. Univ. of Kansas, 371 F.3d 1233, 1240 (10th Cir. 2004). Assuming, arguendo, that the Plaintiff could make out a prima facie case of retaliation, for the reasons stated above, the Court finds that the Plaintiff has not introduced sufficient evidence to show the Defendant's proffered reasons for the non-renewal were pretextual. The Defendant is therefore entitled to summary judgment on the Plaintiff's retaliation claims.

Appendix E

Colorado-Politics Report Link

1) Report -- The evidence showed Denver Public Schools decided not to renew a math teacher because of his performance, rather than discrimination https://www.coloradopolitics.com/courts/10th- circuit-agrees-dps-teacher-not-terminated-due- to-discrimination/article_f2397d98-c7a1-11ee-af08-a3841da30927.html

The federal appeals court based in Colorado agreed last week that Denver Public Schools did not discriminate against a Chinese-born teacher when it decided against renewing his employment, but rather had legitimate issues with his performance.

Chunyi "David" Xu taught math at Noel Community Arts School in northeast Denver during the 2018-2019 school year. Due to low enrollment projections, the school needed to cut one math position. A committee considered five teachers for non-renewal and ultimately selected Xu.

Xu alleged he was subjected to harassment and bullying, was told that his accent was the problem and was treated worse than non-Asian teachers. He filed suit alleging race and national origin discrimination.

> However, after a trial judge sided with the school district, a three-judge panel of the U.S. Court of Appeals for the 10th Circuit agreed there was no evidence Xu's non-renewal was discriminatory. "Although Xu believes that he was qualified for and

satisfactorily performing his job, his subjective belief is not the relevant consideration," wrote Judge Carolyn B. McHugh in the Feb. 6 order.

Case: Xu v. Denver Public Schools

Decided: February 6, 2024 Jurisdiction: U.S. District Court for Colorado

Ruling: 3-0

Judges: Carolyn B. McHugh (author)

Harris L Hartz

Gregory A. Phillips

Evidence submitted in Xu's lawsuit documented his struggles in the classroom and his poor performance scores. An assistant principal wrote that students reported Xu "makes them feel dumb." After the personnel committee interviewed candidates for nonrenewal and Xu filed a discrimination complaint, a human resources investigator noted committee members "used words such as 'weird' and 'uncomfortable' to describe Mr. Xu's interview."

Xu countered that he experienced a student calling him a racist name and that his evaluators repeatedly pointed out he spoke with an accent. He also alleged the school failed to provide him with support to do his job and the assistant principal told Xu he did not "fit in."

Last year, U.S. District Court Judge Regina M. Rodriguez concluded Xu failed to show how the school district's nonrenewal decision was the product of discrimination.

"Here, the undisputed facts demonstrate that the Defendant was in fact concerned with the Plaintiff's job performance throughout his tenure," she wrote. Although Xu claimed he was subject to differential treatment, "he has proffered no evidence, other than his own subjective belief, that these acts included elements of discriminatory intimidation, ridicule, or insults."

Representing himself on appeal, Xu characterized the nonrenewal process as a "central hoax" and accused the district's lawyers of an "evil motive." He called Noel Community Arts School the "worst school in the DPS district" and argued Rodriguez exhibited bias by crediting the district's claim that he was "insubordinate" — even though Xu's lawyer admitted the assistant principal found him to be insubordinate.

The 10th Circuit panel rejected the allegations of Rodriguez's bias and concluded the evidence showed the school district made its nonrenewal decision in good faith.

The case is Xu v. Denver Public Schools.