APPENDIX TABLE OF CONTENTS

United States Court of Appeals
For the First Circuit

No. 23-1817

KARI MACRAE,
Plaintiff, Appellant,
v.
MATTHEW MATTOS; MATTHEW A. FERRON;
HANOVER PUBLIC SCHOOLS,
Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Denise J. Casper, U.S. District Judge]

Before

Gelpí, Selya, and Thompson,
Circuit Judges.

Michael Bekesha, with whom Judicial Watch, Inc. was on brief, for appellant.

Gregor A. Pagnini, with whom Leonard H. Kesten, Deidre Brennan Regan, and Brody, Hardoon, Perkins & Kesten LLP were on brief, for appellees.

June 28, 2024

THOMPSON, Circuit Judge. Today's appeal was brought by Kari MacRae ("MacRae"), a former teacher at Hanover High School ("Hanover High") in Hanover, Massachusetts, against Hanover High's principal Matthew Mattos ("Mattos"), Hanover High's superintendent Matthew A. Ferron ("Ferron"), and Hanover Public Schools ("the District" and, collectively with Mattos and Ferron, "Defendants"). And here's the CliffsNotes' version of how the parties made it to our bench: MacRae posted six allegedly controversial memes to her personal TikTok account.[1] A few months after posting the first few of the six memes, she interviewed for a teaching position at Hanover High and got the job. Soon after starting there, MacRae's TikTok posts came to light and things hit the proverbial fan. Concluding that to "continu[e] [her] employment in light of [her] social media posts would have a significant negative impact on student learning" at Hanover High, Defendants terminated MacRae's employment.

Positive that Defendants had unconstitutionally retaliated against her for exercising her First Amendment rights, MacRae took them to court. But Defendants didn't agree with her take on things, and

---

[1] For those readers who don't keep up with the social-media trends of the day, "meme" is defined as either "an idea, behavior, style, or usage that spreads from person to person within a culture" or "an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media," Simpson v. Tri-Valley Cmty. Unit Sch. Dist. No. 3, 470 F. Supp. 3d 863, 866 n.3 (C.D. Ill. 2020), and "TikTok is a video-sharing social-media platform," Couture v. Noshirvan, No. 23-cv-340, 2023 WL 8280955, at *1 (M.D. Fla. Nov. 30, 2023).

neither did the district court, which granted their motion for summary judgment. Now on appeal, MacRae implores us to do some course correction and fix what she says the district court got wrong. After taking the time to carefully review both sides' arguments, however, we conclude that the district court got it right. In other words, we affirm, but before explaining our reasons for doing so, a bit of factual and procedural table-setting is in order.

TABLE-SETTING

To begin, we set the table with a factual and procedural summary of how the parties got here. And as this is an appeal of the grant a motion for summary judgment, we lay out the facts in the light kindest to the nonmovant (here, MacRae), drawing all reasonable inferences in her favor but only to the extent such inferences are supported by the record. Hamdallah v. CPC Carolina PR, LLC, 91 F.4th 1, 8 n.1 (1st Cir. 2024). The following facts are uncontested, unless indicated otherwise.

The TikTok Posts

MacRae is a Bourne, Massachusetts resident, who started working as a teacher in 2015 and has held several teaching positions since then. In or around 2019, she created her own personal TikTok account under the username of "NanaMacof4."[2] At different points in 2021, but all prior to her employment at Hanover High, MacRae liked, shared, posted, or

[2] The account itself did not identify MacRae by name or indicate where she worked.

reposted the following six memes using her NanaMacof4 TikTok account:

- A photo of Dr. Rachel Levine, the United States Assistant Secretary for Health and a transgender woman, with text that reads: "'I'm an expert on mental health and food disorders.' . . . says the obese man who thinks he's a woman."
- A text display that reads: "I feel bad for parents nowadays. You have to be able to explain the birds & the bees . . . The bees & the bees . . . The birds & the birds . . . The birds that used to be bees . . . The bees that used to be birds . . . The birds that look like bees . . . Plus bees that look like birds but still got a stinger!!!. . ."
- A photo of a muscular, bearded man wearing a sports bra with text at the top that reads: "Hi my name is Meagan, I'm here for the Girl's track meet." The photo then includes additional text at the bottom that reads: "Equality doesn't always mean equity."[3]

---

[3] At MacRae's deposition, she confirmed that she liked, shared, posted, or reposted all six memes using her NanaMacof4 TikTok account. In a subsequent, sworn declaration, though, she backtracked her deposition testimony as it related to this track meet meme. She clarified that she did not post it herself, but rather another TikTok user posted it and tagged her NanaMacof4 account. Regardless of whether MacRae herself

- A photo of a young and (presumably) white American man with text that reads: "Retirement Plan: 1) Move to Mexico 2) Give up citizenship 3) Come back illegally 4) Set for life!"
- A photo of a panda bear with text that reads: "Dude, racism is stupid. I am black, white, and Asian. But everyone loves me."
- A photo of Thomas Sowell with a quote that reads: "Racism is not dead, but it is on life support -- kept alive by politicians, race hustlers and people who get a sense of superiority by denouncing others as 'racists.'" The photo then includes additional text at the top that reads: "Thank you Mr Sowell!!"

Also in 2021, MacRae ran unchallenged for a seat in her hometown on the Bourne School Committee, which was scheduled to hold an election on May 17, 2021. On election day, MacRae posted a campaign video on her NanaMacof4 TikTok account. In the video, she can be seen discussing her election platform and beliefs as a school board candidate:

> So pretty much the reason why I ran for school board and the reason why I'm

---

posted the track meet meme, it would still appear if someone searched "NanaMacof4" on TikTok, she confirmed that she stood by the views expressed on her TikTok page and in her posts "[o]ne hundred percent," and nothing in the record suggests she ever removed the tag.

> taking on this responsibility is to ensure that students, at least in our town, are not being taught critical race theory. That they're not being taught that the country was built on racism. . . . So . . . they're not being taught that they can choose whether or not they want to be a girl or a boy. . . . It's one thing to include and it's one thing to be inclusive. And it's one thing to educate everybody about everything. It's completely another thing to push your agenda. . . . With me on the school board, that won't happen in our town.[4]

MacRae won the election.

A few months after her election win, in late August 2021, MacRae interviewed with the District's Curriculum Director Matthew Plummer ("Plummer") for a teaching position at Hanover High, a public school in Massachusetts about forty-five minutes away from Bourne. At the time of the interview, Plummer did not know about MacRae's TikTok posts or that she was an elected member of the Bourne School Committee. By letter dated August 25, 2021, the District informed her that she got the job and was set to start teaching math and business courses on September 1, 2021. Among the students MacRae was

---

[4] For those curious readers, the video can be seen here: Massachusetts teacher fired over TikTok school board campaign video on CRT, Fox News (Dec. 2, 2021), https://www.foxnews.com/video/6284889512001[https://perma.cc/MZ2X-TMGQ].

hired to teach were both African American and LGBTQ+[5] students.

The Fallout

On the very same day that MacRae was hired for the position at Hanover High, August 25, 2021, the Bourne School Committee received a letter from a "concerned citizen" complaining about MacRae's TikTok posts. That letter had a domino effect, which ultimately resulted in the termination of MacRae's employment at Hanover High.

During the evening of September 1, 2021 (the same day MacRae started teaching at Hanover High), the Bourne School Committee held an executive session, at which it determined that some of MacRae's TikTok posts violated the core values of Bourne Public Schools. The Bourne School Committee also stated it would have a public resolution at its next meeting to further address the issue and hear a "more formal statement" from MacRae. MacRae did not inform any Defendant about her posts or any of the goings-on related to the Bourne School Committee's September 1, 2021 executive session.

In the following days, the situation worsened. On September 15, 2021, the Bourne School Committee and Committee Chairperson were informed "that the social media posts directed at the LGBTQ population

---

[5] This acronym stands for "'lesbian, gay, bisexual, transgender and queer' with a '+' sign to recognize the limitless sexual orientations and gender identities used by members of the LGBTQ+ community." Macdonald v. Brewer Sch. Dep't, 651 F. Supp. 3d 243, 252 n.2 (D. Me. 2023) (citation omitted) (cleaned up).

had circulated and staff and students were very upset." The Bourne Educators Association also met and voted unanimously "to make a public statement against the comments made by" MacRae.

All of this commotion ended up attracting the attention of the Cape Cod Times, a local newspaper which published an article about MacRae on Friday, September 17, 2021. The article discussed MacRae's social media activity and the reactions thereto from the Bourne School Committee and members of the Bourne community. It also indicated that the Bourne School Committee had scheduled its next meeting for Wednesday, September 22, 2021, during which MacRae and members of the public could make a statement.[6]

By the morning of Monday, September 20, 2021, Plummer caught wind of the Cape Cod Times article

---

[6] Any reader interested in reading the Cape Cod Times article can do so here: Cynthia McCormick, Should a Bourne School Committee member resign because of her TikTok videos? Some say yes, Cape Cod Times (Sept. 17, 2021), https://www.capecodtimes.com/story/news/2021/09/17/kari-macrae-bourn-school-committee- member-tiktok-controversial-lgbtq-critical-race-theory-statements/8367424002/ [https://perma.cc/5V7W-CTA5]. It's also worth noting that the media coverage was not limited to just this one Cape Cod Times article. For example, one publication that also picked up the story prior to MacRae's eventual termination was Boston.com, whose article can be found here: Julia Taliesin, Bourne teachers want school committee member to resign after TikTok posts about race, gender, Boston.com (Sept. 22, 2021), https://www.boston.com/news/local-news/2021/09/22/bourne-teachers-school-committee-resign-tiktok-race-gender/ [https://perma.cc/3K54-KAN5]. MacRae's story also got some airtime on local television.

because Stacey Pereira ("Pereira"), a business teacher at Hanover High, had seen the article over the weekend on her Facebook feed,[7] was concerned about its impact on the students, and brought it to Plummer's attention. Plummer thereafter sent a link to the article to Mattos and Ferron, who (to refresh the memory) are Hanover High's principal and superintendent, respectively. Their response was swift: Later that same morning, Mattos met with MacRae to inform her that Defendants had learned of her social media posts and had chosen to place her on paid administrative leave pending an investigation. Within the first day or so of MacRae's leave, Andrew McLean ("McLean"), a science teacher at Hanover High and Vice President of the Hanover Teacher's Union, overheard some students talking about MacRae's social media posts, but, when asked during a deposition taken a year later, could not recall the exact details of the students' conversation.

Wednesday, September 22, 2021 finally arrived and brought with it the Bourne School Committee's meeting. At the meeting, several people presented their concerns regarding MacRae's social media posts, including that "the posts did not create a safe, inclusive or welcoming learning environment within the school community." Among the speakers against the posts was a transgender student who highlighted that MacRae's posts were harmful to himself and any

---

[7] Again, for readers behind on today's social-media trends, Facebook "is a social networking [site] that allows users to communicate by creating Facebook 'pages.'" Ahmed v. Hosting.com, 28 F. Supp. 3d 82, 85 (D. Mass. 2014) (citations omitted) (cleaned up).

other transgender student. Other speakers put forth statistical data regarding the elevated risk of suicide in LGBTQ+ and African American youth. There were also some speakers who voiced support for MacRae. MacRae's supporters expressed their opinions that critical race theory should not be taught in Bourne Public Schools and that the Bourne School Committee was engaging in a "witch hunt" against MacRae. During the meeting, MacRae apologized not for her social media posts, but rather for the media attention her social media posts brought to Bourne Public Schools and the Bourne School Committee. As part of Defendants' investigation into MacRae's social media posts, Ferron tuned in online for part of the Bourne School Committee meeting and discussed it with Plummer and Mattos the next day, September 23, 2021.[8]

Also as part of Defendants' investigation, Mattos interviewed MacRae on September 24, 2021. Ann Galotti ("Galotti"), Hanover High's Math Department Head, and McLean were also in attendance for this interview. During the interview, MacRae received a copy of her TikTok posts and a document containing the District's Mission Statement, Beliefs, and Core Values. The listed Beliefs included "[e]nsur[ing] a safe

---

[8] Also on September 23, 2021, the Cape Cod Times published another article on MacRae, this time recapping the happenings at the Bourne School Committee's September 22, 2021 meeting. Paul Gately, Bourne school board member won't resign over social media posts, Cape Cod Times (September 23, 2021),https://www.capecodtimes.com/story/news/2021/09/23/kari-macrae-wont-resign-bourne-school-committee-over-tik-tok-lgbtq-critical-race-theory/5824685001/ [https://perma.cc/M9UN-JTW3].

learning environment based on respectful relationships." Among the Core Values listed were "[c]ollaborative relationships" and "[r]espect for human differences." The interview involved Mattos asking MacRae a series of questions, including if she could "see how the media coverage may be widespread among students and staff, [and] families of Hanover High School." She "agreed that there w[ere] probably some students and staff that were aware of it."

As Mattos and Ferron were concerned about the potential negative impact MacRae's social media posts would have on staff and students, they decided, with input from Plummer, to terminate her employment. On September 29, 2021, Defendants sent MacRae a termination letter, explaining that "continuing [her] employment in light of [her] social media posts would have a significant negative impact on student learning" at Hanover High.

At some point during all this, TikTok deleted MacRae's NanaMacof4 account for "community standard violations" relating to the posts at issue today.[9]

The Lawsuit

MacRae did not take her termination on the chin. Rather, she filed the instant lawsuit on November 29,

---

[9] Also worth mentioning is that a later effort to recall MacRae from the Bourne School Committee proved unsuccessful due to deficiencies in the recall paperwork. Paul Gately, Unaffirmed signatures de-rail efforts to recall school committee's Kari MacRae, Cape Cod Times (Feb. 15, 2022), https://www.capecodtimes.com/story/news/2022/02/15/cape-cod-kari-macrae-recall-effort-de-railed-bourne-petition-signature-issue/6803511001/ [https://perma.cc/64C7-JA8Q].

2021, and later amended her complaint to assert a single claim against Defendants under 42 U.S.C. § 1983[10] for allegedly retaliating against her for exercising her First Amendment rights. Defendants eventually filed a motion for summary judgment. In their motion, they argued that (1) when applying the First Amendment retaliation framework for claims brought by public employees against their government employers, Defendants' interest in preventing disruption to the learning environment at Hanover High outweighed MacRae's First Amendment interest; and (2) Mattos and Ferron were entitled to qualified immunity.[11]

MacRae, on the other hand, had a much different view of the issues. In her opposition, she argued that (1) the First Amendment retaliation framework for claims brought by public employees against their government employers should not apply here because she posted the memes to her TikTok account before she started the job at Hanover High and, thus, her posts constituted pre-employment speech; (2) even if that framework did apply, there were seven genuine disputes of material fact that precluded the district court from giving Defendants a summary-judgment

---

[10] At the risk of oversimplification, this statute allows a party to seek "money damages against state actors who violate the [federal] Constitution." Quinones-Pimentel v. Cannon, 85 F.4th 63, 68 (1st Cir. 2023).

[11] For those new to all this legal mumbo jumbo, qualified immunity is a judge-created doctrine, which lets public officials off the hook for money damages when they decide open legal questions in reasonable (but ultimately wrong) ways. Ciarametaro v. City of Gloucester, 87 F.4th 83, 87-88 (1st Cir. 2023).

win under that framework,[12] and, regardless, her First Amendment interest outweighed Defendants' interest; and (3) those same genuine disputes of material fact precluded the district court from granting Mattos and Ferron qualified immunity.

For its part, the district court agreed with Defendants' takes on things, concluding that (1) the framework for claims brought by public employees applied; (2) the factual disputes MacRae raised did not amount to genuine disputes of material fact; (3) Defendants' interest in preventing disruption outweighed MacRae's free speech interests; and (4) Mattos and Ferron were entitled to qualified immunity.

Not to be outdone, MacRae filed a timely appeal and brought the case to our attention.

THE MAIN COURSE

With the table set, we turn our attention to the main course: the merits of MacRae's appeal. Remember that MacRae raised only one claim under 42 U.S.C. § 1983 against Defendants for terminating

---

[12] The seven alleged genuine disputes of material fact were (1) whether the TikTok campaign video factored into Defendants' decision to fire MacRae; (2) whether MacRae posted the track meet meme; (3) whether Defendants fired MacRae because they allegedly disliked her TikTok posts (as opposed to for their stated concern regarding disruption to the learning environment); (4) whether Defendants misinterpreted MacRae's intent in posting the memes and video; (5) whether Defendants were aware of any teacher's concerns about MacRae's TikTok posts; (6) whether MacRae acknowledged that her TikTok posts may impact the learning environment at Hanover High; and (7) whether MacRae's TikTok posts caused or would cause a disruption to learning.

her employment and thereby (allegedly) retaliating against her for exercising her First Amendment rights. To state a § 1983 claim, she must make a two-part showing that Defendants acted under color of state law and that they denied her a right secured by the federal Constitution or federal law. Najas Realty, LLC v. Seekonk Water Dist., 821 F.3d 134, 140 (1st Cir. 2016). Because no one disputes that Defendants were acting under color of state law when they let MacRae go, the only real question before us is whether they violated her First Amendment rights in doing so.

As to that question, MacRae essentially makes only two arguments on appeal: The First Amendment retaliation framework for claims brought by public employees does not apply here and, even if it did, Defendants' interest does not outweigh her First Amendment interest.[13] Defendants naturally disagree with both arguments and, as it turns out, so do we. Before explaining why we disagree, though, we press pause to describe our standard of review.

Standard of Review

---

[13] Eagle-eyed readers following along closely will note that conspicuously absent from this list is any challenge on MacRae's part to the district court's determinations that there were no genuine disputes of material fact and that Mattos and Ferron are entitled to qualified immunity. In practice, this means two things. First, any arguments MacRae might have had on those fronts have been waived. Hamdallah, 91 F.4th at 18 n.21. Second, even though MacRae appears to frame her appeal against Defendants collectively, by not challenging the district court's qualified-immunity decision, the only issue before this Court is the entry of summary judgment in favor of the District.

Summary-judgment decisions get de novo review on appeal, which, to speak plainly, just means that we give the arguments and the issues a fresh look without any deference to the district court's reasoning. Hamdallah, 91 F.4th at 16; United States v. Soler-Montalvo, 44 F.4th 1, 7 (1st Cir. 2022). In doing so, the bottom-line questions we must answer are whether there are any genuine disputes of material fact and whether the summary-judgment movants (here, Defendants) are entitled to judgment as a matter of law based on those undisputed facts. Hamdallah, 91 F.4th at 16. Crucially, however, in answering those questions we must examine the facts in the light most favorable to the summary-judgment nonmovant (here, MacRae) and draw all reasonable inferences supported by the record in her favor. Rivera-Corraliza v. Puig-Morales, 794 F.3d 208, 214 (1st Cir. 2015). A dispute is genuine when a reasonable factfinder could come out in favor of the nonmoving party based on the evidence, and a fact is material when there's a chance it could affect the case's ultimate outcome. Hamdallah, 91 F.4th at 16.

The Framework

Our standard of review in place, we first turn our attention to the parties' squabble over whether the First Amendment retaliation framework for claims brought by public employees applies to MacRae's claim. As a refresher, MacRae argues we shouldn't apply that framework, whereas Defendants argue we should. To explain our decision, we'd better start off with an explanation of that framework and its underlying rationale.

The right to speak on matters of public concern is guaranteed by the First Amendment. See U.S. Const. amend. I. And that right is not lost when an individual chooses to work for the government. See Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007). That said, in Garcetti v. Ceballos, the Supreme Court explained that government employers need some leeway in controlling their employees' speech for a variety of reasons:

> Government employers . . . need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services. Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.

547 U.S. 410, 418-19 (2006) (internal citation omitted). Given these considerations, public employees' First Amendment rights "are not absolute," Curran, 509 F.3d at 44, and so public employees "by necessity must accept certain limitations on [their] freedom," Garcetti, 547 U.S. at 418. At the same time, though, they need only accept "those speech restrictions that are necessary for their employers to operate efficiently and effectively." Garcetti, 547 U.S. at 419; see also id. at 418 ("[T]he restrictions [the government entity] imposes must be directed at speech that has some potential to affect the entity's operations.").

The upshot of all this is that, when a state government employer retaliates against its employee for exercising First Amendment rights, that employee can pursue a claim under 42 U.S.C. § 1983. See Bruce v. Worcester Reg'l Transit Auth., 34 F.4th 129, 134-35 (1st Cir. 2022). But, in order to balance the competing interests of the government employer and the employee, such a claim must be pursued under the well-established framework announced by the Supreme Court in Garcetti. 547 U.S. at 418 (describing framework); see Curran, 509 F.3d at 45 (noting Garcetti framework is "consistent with this circuit's prior three-part test").

At step one, we "determin[e] whether the employee spoke as a citizen on a matter of public concern." Garcetti, 547 U.S. at 418. If the employee did not speak as a citizen on a matter of public concern, the inquiry ends there and "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Id. If the employee did speak as a citizen on a matter of public concern, "then the possibility of a First Amendment claim arises" and we move on to step two. Id.

At step two, we must determine "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Id. In answering this question, we "must balance the interests of the employee, as a citizen, in commenting upon matters of concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Davignon v. Hodgson, 524 F.3d 91, 100 (1st Cir. 2008) (citation and internal quotations mark omitted). This

balancing act is commonly referred to as Pickering balancing after the Supreme Court's decision in Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563, 568 (1968), which articulated the original version of the balancing test. If the balancing scales tip in the employer's favor, the inquiry ends there, and the employee's speech is not constitutionally protected. But, if the balancing scales tip in the employee's favor, the employee's speech "is protected speech under the First Amendment" and "[t]he analysis then proceeds to the third step." Ciarametaro, 87 F.4th at 88.

At step three, we determine whether the employee's protected speech "was a substantial or motivating factor in the adverse employment decision." Curran, 509 F.3d at 45. Even if the plaintiff satisfies their burden at all three steps, the employer then has the opportunity "to prove by a preponderance of evidence that 'it would have reached the same decision regarding the adverse employment event even in the absence of the protected conduct.'" Stuart v. City of Framingham, 989 F.3d 29, 35 (1st Cir. 2021) (quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977)) (cleaned up). These three steps balance the opposing goals of "promot[ing] the individual and societal interests that are served when employees speak as citizens on matters of public concern and . . . respect[ing] the needs of government employers attempting to perform their important public functions." Garcetti, 547 U.S. at 420.

Turning back to MacRae's argument, she urges us to chuck the Supreme Court's nuanced Garcetti framework for claims brought by public employees out

the window and apply, in its stead, the framework for claims brought by private individuals against government entities who retaliate against them. That framework only requires consideration of whether the plaintiff can show that they engaged in constitutionally protected conduct and that there was a causal connection between the constitutionally protected conduct and the allegedly retaliatory response. Najas Realty, LLC, 821 F.3d at 141.[14] Notably, this framework, unlike the Garcetti framework, omits any consideration of the government's interest and, in MacRae's view, is therefore less "government friendly." According to MacRae, we should apply this less "government friendly" framework because "MacRae's speech occurred months before she was employed" by Defendants. Applying the Garcetti framework to pre-employment speech, MacRae warns, would force individuals who may want to eventually work for the government to self-censor. In her view, because social media usage is ubiquitous and can start as early as twelve years old, applying the Garcetti framework to pre-employment speech would allow government employers "to fire employees because of their speech from their teenage years, even if the speech occurred 30 years prior to their employment." Having taken the time to mull over MacRae's arguments, we decline

[14] Najas Realty, LLC, a First Amendment retaliation claim regarding a plaintiff's purchase of land and the defendants' opposition to the plaintiff's plan to develop that land, is not even remotely factually analogous to MacRae's case. 821 F.3d at 137, 139. In fact, this Court has no caselaw on the books applying the framework described in Najas Realty, LLC to a claim such as MacRae's.

her invitation to use the framework for private individuals and opt for the Garcetti framework for public employees. And we do so for several reasons.

To start with the most obvious reason, the allegations at issue here involve a government employer firing its public employee for their speech. As the Garcetti framework is used "[t]o determine whether an adverse employment action against a public employee violates her First Amendment free speech rights," Decotiis v. Whittemore, 635 F.3d 22, 29 (1st Cir. 2011), MacRae's allegations place us squarely within that framework. Indeed, the retaliatory response MacRae complains of -- namely, her termination -- is inexorably linked to the fact that she was a public employee.

Second, the framework MacRae would have us apply involves no consideration of the important government interests articulated in Garcetti. We see no reason (and MacRae has provided none) why the government's interest in the efficient provision of public services would simply evaporate into thin air just because the speech in question occurred prior to the start of employment and the employer did not learn of the purported disruptive speech until after the employee began working for it.

Third, the facts at issue here are a far cry from MacRae's hypothetical of a government employer firing an employee for speech "from their teenage years" that "occurred 30 years prior to their employment." MacRae's pre-employment speech was not nearly as temporally removed from the start of her employment. By MacRae's own recollection, she posted four of the six memes on March 16, 18, 24, and

29, 2021 -- only five months before her late-August-2021 interview and her September 1, 2021 start date. She then posted a fifth meme (again, according to MacRae's own timeline) on August 13, 2021 -- mere weeks before her interview and start date at Hanover High.[15] And don't forget, at the Bourne School Committee's September 22, 2021 meeting (which, to be clear, occurred while MacRae was already employed at Hanover High), she did not apologize for the memes but instead for the media attention her TikTok posts brought to Bourne Public Schools and the Bourne School Committee. This is not to say MacRae should or should not have apologized for her posts but, by failing to express any regrets for the substance of the posts, she essentially reaffirmed the views articulated therein while in a public forum and employed by Defendants. Indeed, at her deposition, MacRae confirmed she still held the views expressed in her posts "[o]ne hundred percent." In our view, therefore, the relatively short period of time between MacRae's posts and the start of her employment counsels in favor of applying the Garcetti framework to the facts at issue here.

Fourth, applying the Garcetti framework to pre-employment speech aligns with the limited caselaw dealing with similar claims. Between the parties' research and our own, we have located only two cases involving alleged First Amendment retaliation for pre-employment speech and, by our reading, both cases applied the Garcetti framework. The first case is Riel v. City of Santa Monica, No. CV 14-04692, 2014

[15] Nowhere does MacRae explain when in 2021 the other TikTok user allegedly tagged her in the track meet meme.

WL 12694159 (C.D. Cal. Sept. 22, 2014). There, Elizabeth Riel ("Riel"), a newly-hired public affairs officer for the City of Santa Monica ("the City"), was fired because she had previously written newspaper articles that were critical of the City. Id. at *1-2. In denying the City's motion to dismiss, the court determined that Riel had stated a valid claim for First Amendment retaliation. Id. at *6-8. Notably, in analyzing the claim, the district court outlined the Garcetti framework (including by citing to that decision) and explicitly balanced the City's interest "in the effective administration of its duties" against Riel's First Amendment rights. Id. at *4, *6-7.

The second case is Cleavenger v. University of Oregon, No. CV 13-1908, 2015 WL 4663304 (D. Or. Aug. 6, 2015), which MacRae argues supports her position because, according to her, the court there supposedly applied the framework for private citizens to pre-employment speech. It did no such thing. There, the plaintiff James Cleavenger ("Cleavenger") claimed the University of Oregon Police Department ("UOPD") terminated him in part because of a pre-employment public speech that was posted to YouTube where he criticized the University of Oregon for providing tasers to UOPD officers. Id. at *2. To analyze Cleavenger's First Amendment retaliation claims, the court noted the analysis required consideration of the following factors:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the

> adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Id. at *6 (quoting Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)). The quoted text mirrors the framework announced in Garcetti and demonstrates that the Cleavenger court believed that framework applied even in the context of pre-employment speech. Moreover, the Cleavenger court cited Garcetti throughout its decision. Id. at *8-9, *14. While the court certainly expressed misgivings about the implications of government retaliation for pre-employment speech, particularly given the advent of the internet, id. at *11-12, nothing in the decision even remotely suggests the framework for public employees' First Amendment retaliation claims should be set aside when the speech at issue is pre-employment speech. To be sure, the parties in that case urged the court to apply the framework for private individuals to Cleavenger's pre-employment speech claim, but the district court did not even bother to mention that framework in its decision.

In sum, on these facts and this particular timeline of events, we see no pressing reason to depart from the Supreme Court's tried-and-true mode of analysis for public employees' First Amendment retaliation claims simply because MacRae posted the memes at most a few months before and at least a few weeks before her government employment.

The Application

Having determined that the Garcetti framework applies, all that is left for us to do is actually apply that framework to the facts at issue here. Both parties agree that MacRae, in posting the memes, spoke as a citizen on a matter of public concern and the memes were a substantial and motivating factor behind Defendants' decision to terminate her employment, thereby satisfying steps one and three of this Court's application of the Garcetti framework. Curran, 509 F.3d at 45. Therefore, the sole issue that remains in dispute is step two -- the Pickering balancing of MacRae's First Amendment interest and Defendants' interest in preventing disruption.

MacRae argues that her First Amendment interest outweighs Defendants' interest and the district court erred in concluding otherwise. Specifically, she argues that (1) a government employer's mere prediction of disruption is insufficient to outweigh an employee's interest in engaging in political speech; (2) the reasonableness of a government employer's prediction of disruption is a question for the jury; and (3) Defendants' prediction of disruption was unreasonable. None of these arguments persuade, and we'll explain why after a quick primer on Pickering balancing.

While the Pickering balancing inquiry is "a matter of law for the court to decide," Bruce, 34 F.4th at 138, it is also a "fact-intensive" inquiry, Fabiano v. Hopkins, 352 F.3d 447, 457 (1st Cir. 2003) (citation and internal quotation marks omitted), demanding "a hard look at the facts of the case, including the nature of the employment and the context in which the

employee spoke," Decotiis, 635 F.3d at 35. At bottom, the analysis "requires a balancing of the value of an employee's speech against the employer's legitimate government interest in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission." Davignon, 524 F.3d at 103 (citation and internal quotation marks omitted) (cleaned up). The government employer's interest must be proportional to the value of the employee's speech; in other words, "the stronger the First Amendment interests in the speech, the stronger the justification the employer must have." Curran, 509 F.3d at 48 (citing Connick v. Myers, 461 U.S. 138, 150 (1983)). In analyzing the government's interest, a court may consider a whole host of factors, including "(1) the time, place, and manner of the employee's speech, and (2) the employer's motivation in making the adverse employment decision." Davignon, 524 F.3d at 104 (citations omitted). If, after taking into account all of these factors, we determine that "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public," Garcetti, 547 U.S. at 418, then the employee's speech is not constitutionally protected and no First Amendment retaliation claim lies.

Against that legal backdrop, we proceed to balance the parties' competing interests. Starting with MacRae, there is no dispute about the content of the memes. Viewing the facts in the light most favorable to MacRae (as we must on summary judgment), some of her memes touched upon hot-button political issues, such as gender identity, racism, and immigration. Accordingly, MacRae's First

Amendment interest in posting the memes would normally weigh in her favor on the Pickering scale because the Supreme "Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Connick, 461 U.S. at 145 (citation and internal quotation marks omitted). Here, though, MacRae's First Amendment interest weighs less than it normally would because some of her memes comment upon such hot-button political issues in a mocking, derogatory, and disparaging manner. See Curran, 509 F.3d at 49 ("Speech done in a vulgar, insulting, and defiant manner is entitled to less weight in the Pickering balancing."); see also Bennett v. Metro. Gov't of Nashville & Davidson Cnty., 977 F.3d 530, 538-39 (6th Cir. 2020) (concluding that "speech . . . couched in terms of political debate" "was not in the 'highest rung' of protected speech" in part because it used an "offensive slur"). For example, the meme about Dr. Rachel Levine was clearly insulting and disparaging when it included the following text: "'I'm an expert on mental health and food disorders.' . . . says the obese man who thinks he's a woman." And you needn't take just our word for it. MacRae herself stated that she could understand how not only the Dr. Rachel Levine meme, but also the track meet meme, could be viewed as derogatory towards transgender people. As such, while MacRae's interest still weighs in her favor, it is not accorded the highest value by the First Amendment.

On the other side of the Pickering balancing scales, we have Defendants' interest in preventing disruption to the learning environment at Hanover

High, which they cited as the reason for MacRae's termination in her termination letter. We have repeatedly recognized that a government employer has a legitimate and "strong interest in 'preventing unnecessary disruptions and inefficiencies in carrying out its public service mission.'" Díaz-Bigio v. Santini, 652 F.3d 45, 53 (1st Cir. 2011) (quoting Guilloty Perez v. Pierluisi, 339 F.3d 43, 52 (1st Cir. 2003)).

MacRae counters that, even if preventing disruption is a legitimate government interest, any such interest Defendants might have had should not weigh heavily in their favor because "no actual disruption took place." On that score, she is both right and wrong. To explain, she is right in the sense that the record includes limited evidence of actual disruption at Hanover High. While some teachers, like McLean and Pereira, were concerned about MacRae's TikTok posts and some students were aware of the posts and discussed them at school, there is no evidence in the record that Defendants received calls or complaints from students, parents, or community members. There is, likewise, no evidence in the record that teachers and administrators had to devote significant school time to addressing disruptions caused by MacRae's posts.[16]

However, MacRae is wrong to suggest that the lack of evidence of actual disruption means

---

[16] In fairness, though, the Cape Cod Times article that first brought attention to MacRae's social media activity was published on Friday, September 17, 2021 and MacRae was placed on leave by that Monday. Accordingly, there was little opportunity in that interim for actual disruption to have occurred at Hanover High.

Defendants' interest in preventing disruption cannot outweigh her First Amendment interest. That is so because "[a]n employer need not show an actual adverse effect in order to terminate an employee under the Garcetti/Pickering test." Curran, 509 F.3d at 49. An employer can rely, instead, on "a speech's potential to disrupt." Davignon, 524 F.3d at 105. And a government employer's reasonable prediction of disruption is afforded significant weight in the Pickering inquiry, even if the speech at issue is on a matter of public concern. Curran, 509 F.3d at 49 (quoting Waters v. Churchill, 511 U.S. 661, 673 (1994)).

In response, MacRae offers yet another comeback and one which we previewed above -- namely, that "[a] government employer's mere prediction of disruption is insufficient to outweigh an employee's interest in engaging in political speech." Setting aside the glaring issue that she did not raise this argument below and so it is waived on appeal, Hamdallah, 91 F.4th at 27 n.32, we don't think her argument makes much sense given our caselaw. Quoting the Ninth Circuit's decision in Moser v. Las Vegas Metropolitan Police Department, MacRae argues that "the government cannot rely on mere speculation that an employee's speech will cause disruption" and "bare assertions of future conflict are insufficient to carry the day at the summary judgment stage." 984 F.3d 900, 909 (9th Cir. 2021) (citations omitted). Rather, (and, again, still quoting Moser), MacRae asserts that "[t]he government can meet its burden by showing a reasonable prediction of disruption." Id. at 908-09 (citation and internal quotation marks omitted) (cleaned up). But we see no difference between the

quoted language from Moser and our own caselaw. For example, we have

explained that "[t]he mere incantation of the phrase 'internal harmony in the workplace' is not enough to carry the day," because the "record" must "support . . . allegations that [the] . . . speech . . . could disrupt . . . operations." Davignon, 524 F.3d at 105 (citation and internal quotation marks omitted). In this way, then, mere speculation of disruption has never been enough. Rather, and in line with the Ninth Circuit's Moser decision, we have explained that an employer's prediction of disruption must be reasonable based upon the record. See Bruce, 34 F.4th at 139.

And here, we struggle to see how Defendants' prediction of disruption was anything but reasonable.[17] A brief recap of the facts explains why. MacRae's TikTok posts became the subject of substantial media coverage. Moser, 984 F.3d at 909 ("Courts have accepted a government employer's

[17] To briefly respond to MacRae's contention that the reasonableness of a government employer's prediction of disruption is a question for a jury, it is true that the Pickering inquiry can involve factual disputes for a factfinder but we have explained "the process ultimately embodies a legal determination appropriately made by the court in circumstances in which no genuine dispute exists as to the substance of what the employee said and did." Hennessy v. City of Melrose, 194 F.3d 237, 246 (1st Cir. 1999). Here, no genuine dispute exists as to what MacRae said and did, and recall that MacRae does not argue on appeal that any genuine disputes of material fact remain. And more to the point, this Court has repeatedly evaluated the reasonableness of a government employer's prediction of disruption as a matter of law. See, e.g., Ciarametaro, 87 F.4th at 89-90; Díaz-Bigio, 652 F.3d at 55; Curran, 509 F.3d at 49-50.

predictions of disruption when it provided evidence that the community it serves discovered the speech or would inevitably discover it," such as through media coverage.). Bourne, a town less than an hour's drive away from Hanover, and its school system became embroiled in controversy over the exact same speech at issue here, and the evidence of disruption in Bourne was extraordinary. Id. ("Courts also are more likely to accept a government employer's prediction of future disruption if some disruption has already occurred."). For example, consider the following uncontroverted evidence of disruption: (1) the controversy was a topic at two of the Bourne School Committee's meetings; (2) the Bourne School Committee determined that some of MacRae's TikTok posts violated the core values of Bourne Public Schools; (3) the Bourne School Committee and Committee Chairperson were informed "that the social media posts directed at the LGBTQ population had circulated and staff and students were very upset"; (4) the Bourne Educators Association met in response to the posts and voted unanimously "to make a public statement against the comments made by" MacRae; and (5) at the Bourne School Committee's September 22, 2021 meeting, over a dozen people presented their concerns or support for MacRae.[18]

---

[18] MacRae makes a passing argument that we cannot consider the events in Bourne -- a town a stone's throw away from Hanover -- in assessing the reasonableness of Defendants' prediction of disruption because Mattos testified that he was not influenced by what transpired there and Ferron testified that it did not factor into his decision-making process. We disagree. Even assuming that the events in Bourne did nothing to tip the scales in Mattos' and Ferron's decision-making, the Bourne community's reaction to MacRae's social media posts supports

In addition to the goings-on at Bourne, Defendants had separate reasons specific to Hanover to reasonably predict disruption would ensue. To begin, MacRae had a much more public-facing and, particularly, student-facing role at Hanover being a teacher, than she did at Bourne, where she was just a member of the Bourne School Committee. Next, the Cape Cod Times article was published on Friday, September 17, 2021, and by that Monday, Pereira had seen the article, determined it was about MacRae (despite the article not mentioning her affiliation to Hanover High), and was concerned about the effect her posts would have on the Hanover High student body. McLean also expressed concerns about her posts once he learned about them. Within days of MacRae being placed on administrative leave, McLean overheard students discussing her social media activity. MacRae's classes included LGBTQ+ students whose identities her posts could reasonably be seen to mock. The insulting nature of some of her TikTok posts (at least arguably) conflicted with the District's Belief of "[e]nsur[ing] a safe learning environment based on respectful relationships" and Core Value of "[r]espect[ing] . . . human differences." See Bennett, 977 F.3d at 539-40 (considering speech's potential to "undermine[] the mission of the employer" in Pickering balancing inquiry). And importantly, during MacRae's interview with Mattos, Galotti, and McLean, she "agreed that there w[ere] probably some students and staff that were aware of" her posts. Given the circumstances both at Bourne and at

---

our conclusion that it was objectively reasonable for Defendants to predict that the posts were likely to cause disruption in Hanover.

Hanover, Defendants were eminently reasonable in predicting disruption would be forthcoming if they did not act.

Further supporting this conclusion is the fact that nothing in the record suggests Defendants terminated MacRae's employment because of any personal dislike or disapproval of her posts (as opposed to for their stated concern of the posts' potential to disrupt the learning environment at Hanover High). Mattos, Ferron, and Plummer consistently testified that students would not feel safe or comfortable learning from MacRae, given the potential to perceive some of her posts as transphobic, homophobic, or racist.[19] See Davignon, 524 F.3d at 105 (considering whether government employer suspended employee "out of a legitimate concern that their speech compromised safety" or "because of their pro-union activity" in Pickering balancing inquiry).

MacRae offers two additional retorts, neither of which persuade. First, she argues that Defendants' decision to fire her was made solely based on Mattos', Ferron's, and Plummer's subjective belief that her posts would cause disruption in the classroom. But that argument is plainly untrue. Defendants have pointed to the aforementioned specific facts and circumstances at Bourne and Hanover that support their prediction. Moreover, giving Defendants the benefit of the doubt as it relates to their prediction

---

[19] MacRae appears to agree that Defendants were not motivated by any personal dislike of her posts because, while she argued that this was a genuine dispute of material fact before the district court and the district court ruled against her on that point, she does not challenge that ruling on appeal.

aligns closely with Supreme Court precedent, which explains that our judicial higher-ups "have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large." Waters, 511 U.S. at 673.

Second, MacRae argues that other evidence in the record suggests any prediction of disruption would be mere speculation. For example, she mentions that, during Defendants' investigation, she informed them that she never discussed political issues in the classroom, and she used students' preferred pronouns. We fail to see how either of these facts makes Defendants' prediction of disruption unreasonable. Even though MacRae did not discuss politics in class, the widespread media coverage made the content of her TikTok posts readily accessible. Similarly, the use of students' preferred pronouns doesn't move the needle in MacRae's direction where even she admits some of her posts could be seen as derogatory by LGBTQ+ students. MacRae also argues that, during discovery, Defendants learned that she had a positive relationship with a student in one of her nighttime classes, who is gay and from Cape Verde, despite that student knowing of her social media posts. MacRae, however, points to no evidence in the record that Defendants were aware of this when they decided to terminate her employment.

Ultimately, the record reflects that MacRae, a newly-hired teacher, was hired to educate a diverse population of young students. A few weeks after she started teaching, her social media posts became the subject of extensive media attention, after the

educators of Bourne, a neighboring town, concluded her posts (which appeared to denigrate the identities of some students) would be detrimental to Bourne's school community. Coupled with the undisputed evidence that some Hanover High students and teachers were aware of MacRae's posts and were discussing them, there is ample evidence to conclude that Defendants were reasonably concerned disruption would erupt, just as it did in Bourne. And given the significant weight afforded to a government employer's reasonable prediction of disruption, even when, as here, the speech at issue is on a matter of public concern, Curran, 509 F.3d at 49 (quoting Waters, 511 U.S. at 673), we conclude that Defendants "had an adequate justification for treating [MacRae] differently from any other member of the general public," Garcetti, 547 U.S. at 410, and Defendants' interest outweighs MacRae's. The district court, therefore, was correct in granting Defendants summary judgment.

PARTING WORDS

For the reasons explained above, we affirm the district court. Each party shall bear their own costs.

United States Court of Appeals
For the First Circuit

No. 23-1817

KARI MACRAE,

Plaintiff, Appellant,

v.

MATTHEW MATTOS; MATTHEW A. FERRON; HANOVER PUBLIC SCHOOLS,

Defendants, Appellees.

JUDGMENT

Entered: June 28, 2024

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's judgment is affirmed. Each party shall bear their own costs.

By the Court:

Maria R. Hamilton, Clerk

cc: Michael Bekesha, Leonard H. Kesten, Deidre Brennan Regan, Gregor A. Pagnini

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

KARI MACRAE,	
Plaintiff,	
v.	**Civil Action No. 21-cv-11917-DJC**
MATTHEW MATTOS, MATTHEW A. FERRON, and HANOVER PUBLIC SCHOOLS,	
Defendants.	

MEMORANDUM AND ORDER

CASPER, J. **September 25, 2023**

I. Introduction

Plaintiff Kari MacRae ("MacRae") filed this lawsuit against Defendants Matthew Mattos ("Mattos"), Matthew A. Ferron ("Ferron") and the Hanover Public Schools (the "District," collectively "Defendants") under 42 U.S.C. § 1983, alleging that Defendants retaliated against her for exercising her First Amendment rights. D. 20. Defendants have moved for summary judgment, D. 27, and also to

strike MacRae's affidavit in support of her opposition ("MacRae Affidavit"), D. 40. For the reasons stated below, the Court ALLOWS in part and DENIES in part the motion to strike, D. 40, and ALLOWS the motion for summary judgment, D. 27.

II. Standard of Review

The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." Santiago–Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000) (citation omitted). The movant bears the burden of demonstrating the absence of a genuine issue of material fact. Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000); see Celotex v. Catrett, 477 U.S. 317, 322–23 (1986). If the movant meets its burden, the non-moving party may not rest on the allegations or denials in its pleadings, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986), but must come forward with specific admissible facts showing that there is a genuine issue for trial. See Borges ex rel. S.M.B.W. v. Serrano–Isern, 605 F.3d 1, 5 (1st Cir. 2010). The Court "view[s] the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009).

III. Factual Background

The Court draws the following facts from the parties' statements of undisputed facts and

accompanying exhibits, D. 29, D. 36, D. 37, which are undisputed unless otherwise noted.

A. MacRae's Social Media Posts

MacRae is a Bourne resident who began working as a schoolteacher in 2015. D. 36 ¶ 1. Prior to her employment in the District, MacRae held several teaching positions and operated a TikTok account under the username "NanaMacof4." Id. ¶¶ 1, 15; D. 29-3 at 14. Using that TikTok account, MacRae liked, shared, posted or reposted six memes that are at issue in the present litigation. See D. 36 ¶¶ 14–15; D. 29-3 at 17; D. 29-9. The District characterized the memes, D. 29-9, as "contain[ing] themes of homophobia, transphobia and racism," D. 28 at 14, and MacRae agreed that some could be viewed as derogatory towards transgender people, D. 36 ¶ 35; D. 29-3 at 9, 30-31. MacRae was also preparing to run for the Bourne School Committee which was scheduled to hold an election on May 17, 2021. D. 29-3 at 11; D. 39 ¶¶ 1–3; see D. 29-8. In addition to the six memes, on May 17, 2021, MacRae posted a video to her TikTok account regarding her position as a school board candidate. D. 29-8; D. 37 ¶ 9; see D. 36 ¶ 15. In that video, MacRae expressed her view that critical race theory should not be taught in public schools and that students should not be "taught that they can choose whether or not they want to be a girl or a boy." D. 29-8; see D. 36 ¶ 5. MacRae was elected to the Bourne School Board. D. 29-3 at 11; D. 37 ¶ 4.

In August 2021, MacRae was interviewed by the District's Curriculum Director Matthew Plummer ("Plummer"). D. 36 ¶ 4. On August 25, 2021, the District hired MacRae to teach math and business

classes starting on September 1, 2021. Id. ¶ 6; D. 29-5. The classes MacRae taught included both African American and LGBTQ+ students. D. 36 ¶ 39. On the same day that the District in Hanover hired MacRae, the Bourne School Committee received a complaint from a community member regarding MacRae's social media posts and its executive session "determined that some of the postings violated the core values of the Bourne Public Schools." D. 29-6 at 1; D. 29-7 at 2; see D. 36 ¶¶ 7–8. The Bourne School Committee resolved to address MacRae's social media posts at the next meeting and hear a "more formal statement" from MacRae. D. 29-7 at 2; see D. 36 ¶ 9. In response, the Bourne Educators Association voted unanimously to "make a public statement against the comments made by Ms. MacRae." D. 29-6 at 2; D. 36 ¶ 12 (disputing impact of Bourne School Committee's findings on Defendants and whether some community members supported MacRae, but not vote of Bourne Educators Association). On Friday, September 17, 2021, the Cape Cod Times published an article regarding MacRae's activity on TikTok and her role on the Bourne School Committee. D. 29-8.

B. Defendants' Investigation and MacRae's Termination

By the morning of Monday, September 20, 2021, Ferron, the District's superintendent, became aware of the Cape Cod Times article. D. 36 ¶ 18. Later that morning, the Hanover High School principal Mattos met with MacRae, notified her that the District was aware of her social media posts and placed her on paid administrative leave while the District conducted an investigation. Id. ¶ 19. During the investigation, the District became aware of the six memes associated

with MacRae's TikTok account. Id. ¶ 20. Within a day or so of MacRae being placed on leave, Andrew McLean ("McLean"), a science teacher and vice president of the teacher's union, observed students commenting on MacRae's social media posts, but he could not recall the exact nature of the students' conversation. Id. ¶ 26.

Contemporaneously, on September 22, 2021, the Bourne School Committee held a public meeting wherein multiple individuals discussed their concerns regarding MacRae's social media activity, including public discussion that "the posts did not create a safe, inclusive or welcoming learning environment." Id. ¶¶ 22-23. Several speakers described the harmful impact of MacRae's social media activity on transgender and other LGBTQ children and referenced the elevated risk of suicide for transgender and African American youth. D. 29-6 at 3–6. Some speakers voiced support for MacRae. D. 36 ¶ 23; D. 29-6 at 4–6. Ferron observed part of the Bourne School Committee meeting and spoke about it with Mattos and Plummer the next day. D. 29-1 at 10. Ferron testified that he did not "remember anything coming out of that meeting that really affected [his] decisionmaking process when it came to ultimately coming down to what [the District was] going to do in Hanover." Id.

On September 24, 2021, Mattos convened a meeting between himself, MacRae, Ann Galotti (the Math Department Head), and McLean, as MacRae's union representative. D. 36 ¶ 28. McLean met with MacRae for about fifteen minutes prior to the start of the meeting. Id. ¶ 29. Mattos had written out a series of questions interview questions. Id. ¶ 30. During the interview, he transcribed MacRae's responses to each

question, as best as he could. Id. ¶ 30; D. 29-13. Mattos also provided MacRae with a copy of the District's mission statement which includes "[e]nsur[ing] a safe learning environment based on respectful relationships." D. 36 ¶ 41.[1] The mission statement also listed "Collaborative relationships" and "Respect for human differences" as "Core Values." Id.; D. 29-19.

Ferron and Mattos made the decision to terminate MacRae with input from Plummer. D. 36 ¶ 48. On September 29, 2021, the District issued a termination letter to Plaintiff, explaining that "continuing your employment in light of your social media posts would have a significant negative impact on student learning at HHS." Id. (disputing reasonableness of basis for MacRae's termination and substance of MacRae's admissions during interview, but not content of termination letter); D. 29-17 at 2.

IV. Procedural History

MacRae initiated this action on November 29, 2021, D. 1, and filed an amended complaint on June 23, 2022, asserting a claim for First Amendment retaliation. D. 20. Defendants now move for summary judgment and also to strike the MacRae Affidavit. D. 27; D. 40. The Court heard the parties on the pending

[1] MacRae disputes whether Mattos provided her with a copy of the District's mission statement and cites her deposition testimony. D. 36 ¶ 41 (citing D. 36-1 at 60). The portion of MacRae's deposition testimony cited, however, states that MacRae never received a "handout" containing Mattos's "written questions." D. 29-3 at 40; D. 36-1 at 60. MacRae in fact testified that she received a copy of the District's mission statement during the September 24 meeting. D. 29-3 at 43.

motions and took these matters under advisement. D. 42.

V. Discussion

A. Motion to Strike

Defendants request that this Court strike the MacRae Affidavit, D. 36-2 at 95–96 ("MacRae Aff.") in its entirety because MacRae "seeks to materially alter prior deposition testimony and then rely on the so-called newly realized assertions to state that disputes of fact now exist." D. 40 at 1. "When an interested witness has given clear answers to unambiguous questions [at a deposition], he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed." Flaherty v. Entergy Nuclear Operations, Inc., 946 F.3d 41, 50 (1st Cir. 2019) (alteration in original) (quoting Pena v. Honeywell Int'l, Inc., 923 F.3d 18, 30 (1st Cir. 2019)).

There are three potential conflicts between MacRae's affidavit and deposition testimony. First, MacRae avers that the "Bourne School Committee member election" was "scheduled for May 17, 2022." MacRae Aff. ¶ 3. In her deposition, MacRae testified that the election took place "in May of 2021." D. 29-3 at 11. Given MacRae's deposition testimony and evidence in the record showing that MacRae was a Bourne School Committee member well before May 2022, the Court will strike this portion of the affidavit. See D. 29-7 (listing MacRae as school committee member at September 1, 2021 meeting); D. 29-8 at 1 (reporting in September 2021 that MacRae ran for school committee in May).

Second, MacRae avers that she did not post one of the six memes, the "Track Meet Meme"[2] and that it "was posted by another TikTok user." MacRae Aff. ¶ 9. She further avers that the other TikTok user "tagged" her NanaMacof4 account, thus causing the meme to "appear if someone searched for NanaMacof4 on TikTok." Id. ¶ 10. During her deposition, MacRae testified with regard to all six memes that "[a] couple of them I shared or liked and some of them I reposted" and that she "liked them or shared them or reshared them." D. 29-3 at 17. To the extent that she now is attempting to disavow such testimony as to the Track Meme with any attestation in her affidavit, the Court rejects same. As the MacRae Affidavit, however, does not deny (as she had previously testified), that she liked or shared or reposted the meme in some fashion, the Court need not strike any particular paragraph of the affidavit. See Clapp v. Fanning, No. 18-CV-10426-ADB, 2022 WL 827404, at *2 (D. Mass. Mar. 18, 2022) (declining to "parse through each contested response" in ruling on motion to strike and simply ignoring speculative, conclusory and marginally relevant statements").

Third, Defendants assert that MacRae's averment that she "created and posted the TikTok video on Election Day as part of my campaign," MacRae Aff. ¶ 13, is "another new assertion not raised during her deposition." D. 40 at 2. Defendants note that MacRae testified to posting the video on

---

[2] This meme contains an image of a muscular bearded man wearing a sports bra and shorts under the text, "Hi my name is Meagan. I'm here for the Girl's track meet." The image is captioned "Equality doesn't always mean equity." D. 29-9; D. 29-3 at 17.

anonymously on a "private account" rather than a public account. D. 39 at 4; D. 29-3 at 36. On the other hand, MacRae did not testify that the TikTok video was unrelated to the school board election and Defendants do not dispute the reported timing or content of the video. See D. 29-8 (reporting that MacRae stated "the reason I ran for school board . . . is to ensure that students, at least in our town, are not being taught critical race theory" in TikTok video "on what appeared to be Election Day"). The Court will not strike paragraph 13 of the MacRae Affidavit, but considers in the context of the rest of the record of undisputed, material facts.

Accordingly, the Court allows the motion to strike with regard to the date of the Bourne School Committee election in paragraph three and otherwise denies the motion.

B. First Amendment Retaliation

1. Pickering Balancing Test

"[T]he First Amendment protects (among other things) the right to free speech." Najas Realty, LLC v. Seekonk Water Dist., 821 F.3d 134, 141 (1st Cir. 2016). The First Circuit has set forth a three-part inquiry which governs "whether an adverse employment action against a public employee violates her First Amendment free speech rights." Decotiis v. Whittemore, 635 F.3d 22, 29 (1st Cir. 2011). First, the Court "must determine whether the employee spoke as a citizen on a matter of public concern" and, second, "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it

performs through its employees." Id. (alterations in original) (internal quotation marks and citations omitted). These first two elements are questions of law to be decided by the Court. See Guilloty Perez v. Pierluisi, 339 F.3d 43, 51 (1st Cir. 2003). If they are established, the analysis turns to the third element, wherein "the employee must 'show that the protected expression was a substantial or motivating factor in the adverse employment decision.'" Decotiis, 635 F.3d at 29 (citation omitted).

MacRae contends that the three-part framework should not apply where the government retaliates against an employee for pre-employment speech, as opposed to speech that occurs during employment. D. 35 at 16. MacRae urges the Court to instead adopt a "general standard" wherein "the plaintiff must first show that his conduct was constitutionally protected and, second, he must show proof of a causal connection between the allegedly protected conduct and the supposedly retaliatory response." Id. at 17 (quoting Najas Realty, 821 F.3d at 141 (affirming dismissal of private company's First Amendment claim against town government)). This proposed standard lacks any consideration of the government's interest. Although MacRae faults Defendants for not citing to cases involving pre-employment speech, the only such case identified by MacRae does not support her position. Id. at 16–17 (quoting Cleavenger v. Univ. of Oregon, No. CV 13-1908-DOC, 2015 WL 4663304, at *10–12 (D. Or. Aug. 6, 2015)). In Cleavenger, the government argued that retaliation against pre-employment speech was impossible because an employer could not intend to chill speech which had already ended. Cleavenger, 2015 WL 4663304, at *10.

The district court rejected the government's argument and ruled that an employee plausibly pled retaliation for pre-employment speech where the employer's actions would deter the speech of "those who could apply for government employment . . . lest their words later justify firing without cause." Id. at *11 (alteration in original) (citation omitted). Cleavenger does not suggest that the test for public employees' First Amendment retaliation claims should be set aside for a different standard. See id. at *6 (setting forth standard for balancing public employees' interest in free speech against government interest); see also Riel v. City of Santa Monica, No. CV 14-04692-BRO (JEMX), 2014 WL 12694159, at *1–2, 6–7 (C.D. Cal. Sept. 22, 2014) (balancing plaintiff's interest in pre-employment speech critical of city government against city's interests as her employer). Accordingly, the Court concludes that the well-settled First Circuit three-part framework for evaluating public employees' First Amendment retaliation claims governs here.

For the purposes of the present motion, Defendants "do not contest, at least at the time the Plaintiff made her TikTok posts in approximately March 2021, that she did so as a private citizen or that her posts were a motivating factor in the decision to terminate the Plaintiff." D. 28 at 13. Instead Defendants argue that Plaintiffs' speech caused a "disruption to teaching and learning" which justified her termination under the second factor. Id. at 13–14.

The second factor, often referred to as the Pickering balancing test, asks "whether the relevant government entity had an adequate justification for treating the employee differently from any other

member of the general public." Bruce v. Worcester Reg'l Transit Auth., 34 F.4th 129, 135 (1st Cir. 2022) (quoting Curran v. Cousins, 509 F.3d 36, 45 (1st Cir. 2007)); Decotiis, 635 F.3d at 35. The Court "attempts to balance the value of an employee's speech—both the employee's own interests and the public's interest in the information the employee seeks to impart—against the employer's legitimate government interest in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission." Decotiis, 635 F.3d at 35 (internal quotation marks and citation omitted). "[T]he stronger the First Amendment interests in the [employee's] speech, the stronger the justification the employer must have." Curran, 509 F.3d at 48 (citing Connick v. Myers, 461 U.S. 138, 150 (1983)). "[I]nsofar as self-interest is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the Pickering balance than speech on matters of public concern intended to serve the public interest." O'Connor v. Steeves, 994 F.2d 905, 915 (1st Cir. 1993). In assessing the governmental interest in preventing disruption, this Court must also consider (1) "the time, place, and manner of the employee's speech," and (2) "the employer's motivation in making the adverse employment decision" when assessing the government's interest. Decotiis, 635 F.3d at 35 (quoting Davignon v. Hodgson, 524 F.3d 91, 104 (1st Cir. 2008)).

Despite MacRae's arguments to the contrary, D. 35 at 17–18, Defendants' asserted interest in preventing disruption is a legitimate government interest. Curran, 509 F.3d at 49 (explaining that employer need not show "actual adverse effect in

order to terminate an employee under the Garcetti/Pickering test" and that "[s]ignificant weight is given to the public employer's 'reasonable predictions of disruption, even when the speech involved is on a matter of public concern'" (citation omitted)); see Bennett v. Metro. Gov't of Nashville & Davidson Cnty., 977 F.3d 530, 541 (6th Cir. 2020) (concluding that termination based on employee's social media post commenting on outcome of presidential election was justified given use of racial slur in post, detrimental impact on working relationships and detraction from public agency's mission to provide unbiased service). Indeed, given the District's stated mission to "[e]nsure a safe learning environment based on respectful relationships" and to maintain "[r]espect for human differences," D. 29-19, it would have a strong interest in preventing employee speech that reflects intolerance of groups of people represented in its student body or staff. See Bonnell v. Lorenzo, 241 F.3d 800, 824 (6th Cir. 2001) (recognizing that "learning institution has a strong interest in preventing" speech "that rises to a level of harassment—whether based on sex, race, ethnicity, or other invidious premise—and which creates a hostile learning environment"); Estock v. City of Westfield, 806 F. Supp. 2d 294, 308 (D. Mass. 2011) (recognizing that public school has "strong interest in preserving a collegial atmosphere, harmonious relations among teachers, and respect for the curriculum"); Nichols v. Univ. of S. Miss., 669 F. Supp. 2d 684, 699 (S.D. Miss. 2009) (ruling that termination of professor was justified where professor's comments regarding sexual orientation and morality violated

university's "sexual orientation harassment/discrimination policy," harmed professor's relationship with gay student and may have harmed professor's relationship with other students and faculty).

MacRae submits that this Court cannot conduct the balancing test until various factual disputes are resolved by a jury. D. 35 at 5. The Court addresses each of these alleged disputes.

2. *MacRae's Alleged Factual Disputes*

a) Whether Defendants factored the TikTok Video into their decision to terminate MacRae

MacRae submits that a factual dispute exists as to whether Defendants considered her TikTok video, which described her platform as a candidate in the May 2021 Bourne School Committee election, in their decision to terminate. D. 35 at 5. As to the materiality of this dispute, MacRae argues that because the TikTok video relates to her campaign for the Bourne School Committee, it is "of the highest order of speech and deserving of the highest protection." D. 35 at 6 (citing Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989)). Where MacRae's First Amendment interests are in her speech are stronger, Defendants' burden to justify her termination becomes more onerous. See Curran, 509 F.3d at 48.

The alleged dispute here, however, is not one of material fact for several reasons. First, the termination letter references the reason for MacRae's termination as the six memes. D. 29-17 at 2

(explaining that "continuing your employment in light of your social media posts would have a significant negative impact on student learning at HHS"). The only reference in that letter to the TikTok video is in reference to MacRae's own comments during the September 24, 2021 meeting. D. 29-17 at 1 (recounting that MacRae "stated that your FaceBook posts were 'liked' or 'tagged,' and were not created directly by you, but that the Tik Tok video clearly was"). Second, even assuming arguendo, that the termination decision was based on the memes and the video, D. 29-2 at 36 (testifying that [t]he decision to terminate Ms. MacRae was based on the memes and the TikTok video"), that fact is not material since the District would have justifiably terminated MacRae based on the memes alone, regardless of any alleged retaliatory motive as to the TikTok video. See Salmon v. Lang, 57 F.4th 296, 312 (1st Cir. 2022) (explaining that but-for causation standard applies to First Amendment retaliation claims); Curran, 509 F.3d at 48–50 (concluding that government's justification was adequate based on violent and offensive portions of plaintiff's internet post even though other portions of post "expressed topics of value in the civil discourse"). Third, the Court's legal analysis would remain the same, that is, the Pickering balancing test would still apply and to extent the TikTok video would be accorded greater First Amendment value because of its connection to MacRae's campaign, the value of the six memes would not be similarly elevated. See Curran, 509 F.3d at 48 (distinguishing between portions of internet post that had public interest value and portions that lacked value); Wright v. Ill. Dep't of Child. & Fam. Servs., 40 F.3d 1492, 1499 (7th

Cir. 1994) (concluding that proper approach was to separately analyze three incidents of speech for which plaintiff was allegedly punished).

Accordingly, this matter of the TikTok video does not present a disputed issue of material fact.

b) Whether MacRae posted the Track Meet Meme

Although MacRae now disputes that she "posted" the Track Meet Meme, D. 35 at 6–7, the resolution of this dispute is not material. That another TikTok user posted the Track Meet Meme and tagged MacRae, MacRae Aff. ¶¶ 10–11, does not contradict MacRae's undisputed deposition testimony that she liked, shared, or reshared each of the six memes, D. 29-3 at 17, such that it was her (at least adopted) speech. Nor did Defendants terminate MacRae based on a mistaken or incorrect assumption that MacRae herself was the original author of any of the six memes. D. 29- 1 at 12; D. 29-2 at 19. Accordingly, there is no dispute of material fact as to this issue.

c) Whether Ferron, Mattos and Plummer misinterpreted MacRae's intent in posting the memes and TikTok video

MacRae argues that her memes and TikTok video were not "intended to mock, make fun of, or be offensive to certain people" but to "express certain positions about matters of public concern." D. 35 at 9. This is not a dispute of material fact, however, especially where the District does not contest, for the purposes of this motion, that MacRae spoke as a private citizen, D. 28 at 13; see Hayes v. Mass. Bay

Transp. Auth., 498 F. Supp. 3d 224, 228 (D. Mass. 2020) (explaining that "nothing turns on whether [employee] harbored subjective racist intent" when evaluating First Amendment retaliation claim since the issue is whether the "termination violated his right of free speech"), but that the Pickering balancing test weighs strongly in its favor. Moreover, the Court need not submit to the jury whether MacRae's speech was motivated by self-interest, animus towards certain groups or a desire to participate in public discourse on a matter of legitimate concern, given that the form and context of MacRae's speech in the memes is undisputed, see Fabiano v. Hopkins, 352 F.3d 447, 454–55 (1st Cir. 2003)(concluding that "form and context of [plaintiff's] expression indicates a subjective intent to contribute to public discourse" and thus speech "addressed a matter of public concern"); O'Connor, 994 F.2d at 915 (weighing plaintiff's "motives for speaking out" in Pickering balance), and the issue in dispute is the balancing of that speech against the District's interest in avoiding disruption.

d) Whether MacRae acknowledged the potential impact of her social media posts during her September 24 interview

MacRae contends that there is a factual dispute as to the substance of her answers during her September 24, 2022 interview with Mattos, D. 35 at 13, as it relates to actual or anticipated disruption caused by her memes. First, MacRae asserts that during her September 24 interview, Mattos sometimes asked MacRae questions regarding her "situation in Bourne" rather than explicitly asking

about MacRae's social media activity. D. 35 at 13. All the evidence in the record indicates that "the local media coverage of [MacRae's] situation in Bourne as a School Committee member" was her social media posts and the local community's reaction thereto. D. 29-6; D. 29- 8; D. 29-13 at 1; D. 29-16 at 1. MacRae offers no explanation as to what her "situation in Bourne" could have referred to other than local media coverage regarding her social media activity. D. 35 at 14.

Second, MacRae asserts that she did not answer "Absolutely" in response to Mattos's question about whether she agreed that media coverage of her situation in Bourne "may be widespread among students, staff and families of HHS." D. 35 at 14; see D. 29-3 at 42 (testifying "I don't think I would have said absolutely, because I don't think it was widespread"). At her deposition, MacRae could not recall what her response was, but disputed the characterization of media coverage as "widespread" in Hanover. D. 29-3 at 42. Even so, MacRae conceded that "there was probably some students and staff that were aware of it." D. 29-3 at 42. In any event, other, uncontroverted evidence shows that at least some Hanover teachers and students were aware of the media coverage early in the week of September 20. D. 29-12 at 9; D. 29-15 at 5.

Third, MacRae disputes the characterization of her response to the question, "Can you see how your situation in Bourne may impact the learning environment of some students within your classes?" D. 35 at 14. MacRae does not appear to dispute the accuracy of Mattos's transcription of her response, "Yes I see what you are saying." D. 29-13 at 2; D. 29-

16 at 1; D. 29-3 at 42 (testifying that "I do recall saying that I can see what he was saying"). According to MacRae, she did not "acknowledge[] her posts may impact the learning environment and students in her class" by making this statement. Id. (citing D. 28 at 16). Instead she only stated "she could understand why Mattos thought that the situation in Bourne may impact the learning environment in Hanover." D. 35 at 14. Even accepting MacRae's characterization of her response, there is not a genuine dispute of material fact that MacRae acknowledged that the District's concern that a potential impact on the learning environment was at least "understand[able]," and that it was possible that District students and staff had seen the media coverage of her posts. D. 35 at 14. Moreover, Defendants do not solely rely upon MacRae's interview statements to establish disruption, but rather upon the entirety of the record which includes undisputed evidence that the risk for disruption existed as discussed further below. D. 29-1 at 8; D. 29-2 at 3, 9–10, 20, 34; D. 29-4 at 10; D. 29-7; D. 29-8; D. 29-12 at 8–9. MacRae has not established a material dispute of fact as to this issue.

e) Whether administrators were aware of any teachers' concerns about MacRae's social media posts

MacRae also argues that a factual dispute exists as to whether Plummer, Mattos or Ferron were aware of any teacher concerns related to the impact of her posts on students or the learning environment. D. 35 at 12.

At least three teachers, Pereira, McLean and Galotti testified as to their concerns regarding the response of the school community and any disruption to student learning. D. 29-15 at 5–6 (testifying by Pereira that she wanted the District's administrators to "get ahead of" any "community response" or "disruption to student learning"); D. 29-12 at 7 (testifying by McLean that he was concerned that MacRae's posts would be "contentious within our community"); D. 29- 14 at 5–7 (testifying by Galotti that she was "very surprised and saddened" by MacRae's posts and didn't "think [the posts] create[ed] a safe learning environment"). Mattos and Ferron reached the same conclusions as the teachers based on their own experience. See, e.g., D. 29-1 at 3, 8 (describing Ferron's experience as school administrator and testifying "I feel strong that the students would not feel safe or support[ed] in that person's classroom"); D. 29-2 at 16–17 (describing courses Mattos took which informed his understanding of what would be offensive to students and testifying that "I think [one of the memes is] just disparaging towards individual who may perceive themselves to be transgender or identify themselves as transgender"). Even if the Court accepts MacRae's contention about when teachers' concerns were relayed to Mattos and Ferron, such a fact is not material to resolution of her claim. As previously noted, other evidence in the record supports Mattos and Ferron's conclusion that the memes posed a substantial risk of disruption.

f) Whether Ferron, Mattos and Plummer terminated MacRae

because they disliked her social media posts

MacRae asserts a genuine factual dispute exists as to whether her termination was motivated by dislike or disagreement with her social media posts, rather than concern for the negative impact of those posts on student learning. D. 35 at 7–8. MacRae first points to Plummer's testimony that he was "horrified" upon learning of the social media posts and describing the six memes as a "ball of hate" consisting of transphobia, homophobia and racism. D. 35 at 7 (D. 29-4 at 10). The Court notes that a "fervent objection" toward the perceived bigoted nature of MacRae's speech alone would not establish retaliatory animus. See Locurto v. Giuliani, 447 F.3d 159, 180 (2d Cir. 2006) (ruling that mayor's comment that "plaintiffs' speech [w]as 'a disgusting display of racism' does not, without more, mean he fired the plaintiffs in 'retaliation' for engaging in racist speech"). Indeed Plummer explicitly connected his testimony regarding the perceived transphobia and racism to the impact on student learning. D. 29-4 at 10 (testifying that MacRae "should not be in a public high school classroom" because students embodying characteristics targeted by her posts would be in her classroom and "student[s] need[ ] to feel safe and comfortable").

MacRae further objects that Defendants did not seek out student or teacher input or become aware of student or teacher concerns prior to terminating MacRae. D. 35 at 8. The record shows that Ferron, Mattos, and Plummer testified as to their belief that MacRae's social media posts could detract from the District's goal of providing students a safe learning

environment. D. 29-1 at 8, 13; D. 29-2 at 10, 22; D. 29-4 at 10. This testimony is consistent with the reasons listed in MacRae's termination letter and with the values listed in the District's Mission Statement. D. 29- 17; D. 29-19. The fact that Mattos and Ferron were not actively soliciting student and teacher input does not suggest that their stated justification that MacRae's social media posts and the surrounding controversy would negatively impact Hanover students was mere pretext.

MacRae's citation to Hayes is unavailing. Hayes, 498 F. Supp. 3d at 233–34 (concluding that supervisor's failure to call other employees who witnessed plaintiff's speech before termination was evidence indicating that potential workplace disruption was pretextual). Unlike Hayes, which involved a "verbal reaction" in the workplace which was witnessed only by employees who were present, MacRae's speech was publicly available and documented by the local media. That speech had also caused disruption regarding the school system of another town and drawn media attention. D. 29-6; D. 29-7; D. 29-8; D. 29-10. Given that Defendants were concerned about disruption to student learning and interested in maintaining the confidentiality of a personnel matter, their limited solicitation of student and teacher input does not warrant a different outcome. D. 29-1 at 25; D. 29-4 at 9, 16; D. 29-10. Nor does the involvement of senior school administrators, such as the superintendent and principal, in light of the potential media coverage on the District and the administrators' normal job responsibilities. D. 29-1 at 3–4, 7 (testifying that Ferron's responsibilities as superintendent include personnel management); D.

29- 2 at 21 (testifying as to Mattos's experience conducting investigations concerning social media posts that might impact students); cf. Hayes, 498 F. Supp. 3d at 234 (finding that jury could infer pretext where "record does not disclose whether these senior officials would typically be involved in disciplinary action for disruptive behavior").

Finally, MacRae objects that Mattos and Ferron "ignored answers MacRae provided during her interview with Mattos," including that she used a student's preferred pronouns in the classroom. D. 35 at 8. MacRae reportedly also stated in her interview that she did not allow her "personal views" in the classroom and that she "embrace[d] every single child['s] choice." D. 29- 13 at 5; D. 29-16 at 2. At his deposition, Ferron explained that MacRae's anecdote regarding her use of preferred pronouns did not outweigh MacRae's acknowledgment of a potential impact on student learning caused by her posts. D. 29-1 at 22.

Thus, on the record in the instant case, no reasonable factfinder could infer that that Defendants were not focused on the actual or potential effects of MacRae's behavior on the school environment. See Curran, 509 F.3d at 47 n.6 (rejecting argument that underlying motivation for

termination was plaintiff's support of opposition candidate for sheriff as not preserved and not supported by the factual record).

g) Whether MacRae's social media posts would reasonably cause disruption to learning

Finally, MacRae disputes whether any actual disruption took place or whether there was any potential for disruption. D. 35 at 14–16. Whether MacRae's posts caused actual disruption in the Hanover community is material but not dispositive to the Pickering analysis. See Nichols, 669 F. Supp. 2d at 698-99 (granting summary judgment in favor of university where professor's statements in classroom caused one student to feel "awkward" and seek reassignment and had potential to harm relationship with other students as well). It is undisputed that at least some teachers were concerned about the learning environment, D. 29-15 at 5–6; D. 29-12 at 7; but less clear that teachers needed to devote substantial class time to addressing distractions caused by the posts. See D. 29-12 at 9 (testifying that McLean "immediately" moved on from classroom conversations about MacRae and could not speak to students' "mental headspace," but "it was certainly occupying enough of their time for them to be mentioning it"); D. 29-15 at 9 (testifying that Pereira "would nip [student discussion of MacRae] in the bud"); see Durstein v. Alexander, 629 F. Supp. 3d 408, 424 (S.D.W. Va. 2022) (concluding that actual disruption occurred where teacher testified that "students wanted to spend time discussing the tweets" and "explained that they did not feel comfortable being taught by Plaintiff"). Nor were there reports of calls or complaints from parents or other community members. Cf. Durstein, 629 F. Supp. 3d at 424–25 (concluding that Pickering balance tipped in employer's favor where administrators received calls and complaints from

parents, press, current and former students, and fellow teachers).

Defendants, however, "need not 'allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.'" Curran, 509 F.3d at 49 (quoting Connick, 461 U.S. at 152). Defendants have adduced ample evidence to show that MacRae's speech had the potential to disrupt the District's learning environment. Although MacRae objects that "Ferron, Mattos, and Plummer only relied on their own beliefs in concluding that MacRae's social media posts would be a disruption in the classroom," D. 35 at 15, those beliefs were supported by school administrators' training and experience. D. 29-1 at 3, 8; D. 29-2 at 16–17. Moreover, MacRae acknowledged in her September 24, 2022 interview that "she could understand why Mattos thought that the situation in Bourne may impact the learning environment in Hanover." D. 35 at 14. As a teacher, MacRae's role required her to interact with members of the public, including students and parents on a regular basis. See Durstein, 629 F. Supp. 3d at 426 (explaining that "the more the employee's job requires . . . public contact, the greater the state's interest in firing her for expression that offends her employer" and concluding that teacher had "direct contact with members of the public every day"); cf. Johnson v. Ganim, 342 F.3d 105, 115 (2d Cir. 2003) (concluding that factual question existed as to whether the conduct of an employee, a custodian, could lead to potential disruption where he was "not involved in policy-making decisions" and had limited interaction with other employees or the public). Students in

MacRae's classroom and within the District embodied characteristics that MacRae's posts appeared to denigrate. D. 29-2 at 20; D. 29-3 at 19; D. 29-4 at 10; D. 29-12 at 14; D. 36 ¶¶ 34, 48 (disputing reasonableness of Defendants' concern for student safety and learning, but not characteristics of students in MacRae's classroom); see Durstein, 629 F. Supp. 3d at 424–25 (concluding that that "[i]t was reasonable for the Board, reading the tweets that seemingly disparaged Muslim, Jewish, and Black students, and knowing that the student body contained students of this very race and these very religions, to infer that the disparaging comments would cause a serious internal disruption in the school"). Moreover, at least some of MacRae's speech was at odds with the District's stated mission of providing a "safe learning environment based on respectful relationships" and promoting "[r]espect for human differences." D. 29-19; see, e.g., D. 29-9; Nichols, 669 F. Supp. 2d at 699 (concluding that professor's termination did not violate First Amendment where his statements violated university's policy to "foster an environment of respect for the dignity and worth of all members of the university community").

In response, MacRae points to her testimony that she never shared her personal views in the classroom, that she developed a positive relationship with a Cape Verdean, LGBTQ student in Wareham after her termination in Hanover and that transgender students in Wareham did not drop out of her classes. D. 35 at 15–16; see D. 29-3 at 38–39, 42. Moreover, MacRae's comments were made outside the school, prior to her employment by the District. Meagher v.

Andover Sch. Comm., 94 F. Supp. 3d 21, 41 (D. Mass. 2015) (concluding that speech outside of work using private computers and emails was less likely to disrupt workplace).

An employer's "reasonable predictions of disruption even when the speech involved is on a matter of public concern" are entitled to "significant weight." Curran, 509 F.3d at 49 (internal citation and quotation marks omitted). Given the media coverage and controversy surrounding MacRae's posts in Bourne, Mattos and Ferron had a basis for being concerned about a risk to the District's operations given MacRae's memes and the publicity surrounding them. Even if it was before her employment in the District and outside of the classroom, her speech was no longer private and had the potential to bring disruption to her role as a public-facing employee of the District. See Durstein, 629 F. Supp. 3d at 425 (explaining that social media both amplifies speaker's message and increases potential for disruption to employer's interest even where teacher did not seek press coverage of social media posts or identify connection to school district). As to MacRae's experiences in Wareham, no evidence in the record suggests that Defendants were aware of such information when they were deciding whether to terminate MacRae. Even if Mattos and Ferron had been aware of that information, their own determination that a substantial risk of potential disruption existed is supported by the record of undisputed material facts here, which includes teacher concerns, observations that students were aware of MacRae's posts, a contemporaneous controversy in Bourne regarding the very same

speech. D. 29-6; D. 29-7; D. 29-12 at 7; D. 29-14 at 5–7; D. 29-15 at 5–6; see Shepherd v. McGee, 986 F. Supp. 2d 1211, 1220 (D. Or. 2013) (concluding that subsequent disagreement regarding whether plaintiff's social media posts adversely affected her credibility does not show that investigation was unreasonable or render her termination unconstitutional).

Finally, MacRae further argues that Defendants cannot rely on the reaction of the Bourne community to establish potential disruption, because Ferron testified that he did not "learn[] anything new" from watching the Bourne School Committee meeting. D. 29-1 at 11; D. 35 at 15; D. 36 at 10–11. The fact that the Bourne School Committee meeting did not present "anything new" does not mean that it did not reinforce what Ferron's extant concerns regarding the impact of MacRae's speech on student learning. Even accepting MacRae's characterization of Ferron and Mattos's deposition testimony, the events in Bourne still reflect on the reasonableness of Defendants' predictions of the likely impact in Hanover. Snipes v. Volusia Cnty., 704 F. App'x 848, 853 (11th Cir. 2017) (concluding that county manager's "expectations . . . developed over nearly four decades in public service" justified termination where subsequent litigation revealed that local community would have protested failure to take decisive disciplinary action).

Although MacRae raises some factual disputes, none are as to material facts as discussed above. The Court thus turns to the application of the Pickering balance in this case.

3. Application of the Pickering Balancing Test

In support of her opposition to the motion for summary judgment, MacRae attaches newspaper opinion pieces and the biography of "one of the nation's most prominent economists," which she asserts show that she is "not alone in her views." D. 35 at 10; D. 36-2 at 74–93. Here, the memes at issue included but were not limited to an image of Assistant Secretary of Health Rachel Levine with the caption: "'I'm an expert on Mental Health and Food Disorders.'… says the Obese Man who thinks he's a woman," D. 29-9; D. 37 ¶ 5; text, interspersed with icons of faces expressing various emotions: "I feel bad for parents nowadays. You have to be able to explain the birds & the bees… The bees & the bees… The birds & the birds… The birds that used to be bees… The bees that used to be birds… The birds that look like bees… Plus bees that look like birds but still got a stinger!!!," D. 29-9; D. 37 ¶ 5; and the Track Meet Meme. "Speech done in a vulgar, insulting and defiant manner is entitled to less weight in the Pickering balance," Curran, 509 F.3d at 49; Bennett, 977 F.3d at 538 (concluding that Facebook post regarding outcome of national election did not deserve "highest rung" of First Amendment protection where post also contained racial epithet). Viewing the record in the light most favorable to the non- movant MacRae, however, arguably are at least some portions of the posts which relate to public debate on immigration policy or racism or gender identity (even if they were disparaging or dismissive of same, see, e.g., image of a young Latino in a hoodie with the caption: "Retirement Plan: 1) Move to Mexico 2) Give up

citizenship 3) Come back illegally 4) Set for life!," D. 29-9) which may be accorded higher value by the First Amendment. See Riley's Am. Heritage Farms v. Elsasser, 32 F.4th 707, 717 (9th Cir. 2022) (concluding that "minor occurrences" of disruption was outweighed by plaintiff's "interest in engaging in controversial, unique political discourse" on his personal social media account).

Even so, the Court finds that Defendants have adduced ample evidence of the potential for disruption to student learning and to the District's mission which adequately justified MacRae's termination. As a public school teacher, contact with the public, including students and parents who may have been part of groups that MacRae's posts disparaged, was part of MacRae's day-to-day responsibilities. See Durstein, 629 F. Supp. 3d at 427. MacRae herself acknowledged that her posts could be viewed as derogatory towards transgender individuals. D. 36 ¶ 35; D. 29-3 at 23, 38. Several colleagues recognized the posts as inconsistent with the District's mission to promote tolerance and respect for human differences. D. 29-1 at 8; D. 29-2 at 7; D. 29-4 at 10; D. 29-12 at 5–7. Moreover, Defendants' concerns regarding the nature of MacRae's posts were directly tied to a risk of disruption in student learning. Mattos, Ferron and other teachers testified that MacRae's posts, and especially posts regarding transgender students, could make students feel unsafe, unwelcome or otherwise distracted from learning. D. 29-1 at 8, 13; D. 29-2 at 7, 10, 16, 21; D. 29-4 at 5, 10–12; D. 29-12 at 5–6; D. 29-14 at 4–7; D. 29-15 at 6. Defendants were entitled to terminate a public-facing employee

who had taken a stance in direct contradiction to the District's stated mission. See Nichols, 669 F. Supp. 2d at 699; Bennett, 977 F.3d at 540.

A greater risk of disruption arose from the growing media attention on MacRae's posts which could have triggered a larger external response in Hanover. The media coverage identified MacRae by name and as a Bourne School Committee member. D. 29-8; D. 29-1 at 7. Members of the Hanover High School community were able to identify MacRae, then a new teacher to the school, as the subject of that media coverage. D. 29-1 at 3, 6; D. 29-2 at 4, 32; D. 29-10; D. 29-12 at 9; D. 29-14 at 5–6. Compare Durstein, 629 F. Supp. 3d at 425 (recognizing disruption where administrators were forced to investigate teacher's social media posts and respond to press inquiries), with Moser v. Las Vegas Metro. Police Dep't, 984 F.3d 900, 910 (9th Cir. 2021) (concluding that record did not support disruption where there was no media coverage, no evidence that anyone other than an anonymous tipster saw police officer's Facebook comment and most people would not have been able to connect police officer's Facebook profile with employment). Even if some parties would have supported MacRae's position or shared her views, the potential for disruption remained. See Estock, 806 F. Supp. 2d at 308 (granting summary judgment to employer where teacher's speech advocating against phase-out of school's HVAC program created hostile parent reaction against supervisors and school system).

The limited evidence of actual disruption does not preclude summary judgment in this case. MacRae was a new teacher who had only taught at most a

couple weeks at Hanover High School when news coverage of her social media posts began circulating. D. 29-14 at 4; D. 36 ¶ 8, 12. Mattos and Ferron immediately removed MacRae from her teaching duties and advised staff to keep the matter confidential. D. 29-10 at 1; D. 36 ¶ 19. School administrators should not be discouraged from taking action to minimize disruption to student learning. See Snipes, 704 F. App'x at 853 (upholding swift termination by county for racially insensitive on Facebook remarks where negative consequences were "reasonably possible" had officer remained employed); Kent v. Martin, 252 F.3d 1141, 1145 (10th Cir. 2001) (explaining that where employer immediately fires employee "predictions of disruption were the only possible evidence of the employer's interest in regulating the expression at the time of the firing" and recognizing that consideration of the "reasonable prediction of disruption [has been] done . . . in the context of a termination soon after the employee's exercise of speech, when the intent of the termination was to avoid actual disruption"). Moreover, Mattos and Ferron were not merely speculating about the potential disruption. MacRae's same speech had caused considerable controversy in Bourne, resulting in a school Board meeting where teachers, students and parents expressed concerns relating to student safety and the learning environment. D. 29-6.

MacRae's argument that distinctions between the present case and Hennessy require the Court to deny summary judgment is unpersuasive. Hennessy v. City of Melrose, 194 F.3d 237 (1st Cir. 1999). Hennessy recognizes the deference this Court must give to a school district's "interest[s] as an employer in

guarding against the impairment of relations among teachers" and "in implementing the curriculum without undue interference." Id. at 247–48. Although this case may not involve the same level of "audible denigration and visible petulance" in the workplace present in Hennessy, id. at 248, the First Circuit has not suggested that Hennessy was a close case or that verbal workplace insubordination was the only constitutional basis on which an employer could terminate an employee for their speech. See id. at 249 (describing deference owed to government as employer to effect efficient operation and concluding that present case "comes within its heartland").

Finally, even if the Court were to consider the TikTok video a basis for MacRae's termination and accord the same greater First Amendment value, her comments regarding transgender students in the video remained in direct conflict with the District's stated mission, garnered media attention and implicated similar concerns regarding the District's ability to create a safe learning environment for all. D. 29-2 at 10, 14; D. 29-8 at 3; see Jantzen v. Hawkins, 188 F.3d 1247, 1258 (10th Cir. 1999) (upholding termination immediately after police officer announced that he was running for sheriff).

For all of these reasons, Defendants are entitled to summary judgment on MacRae's claim.

C. Qualified Immunity

The individual Defendants also claim summary judgment on the basis of qualified immunity. Qualified immunity shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not

violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Pearson v. Callahan, 555 U.S. 223, 231 (2009). In determining whether a government official is entitled to qualified immunity, the Court must determine: (1) "whether the plaintiff's version of the facts makes out a violation of a protected right" and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Alston, 997 F.3d at 50. "The question is not whether the official actually abridged the plaintiff's constitutional rights but, rather, whether the official's conduct was unreasonable, given the state of the law when he acted." Alfano v. Lynch, 847 F.3d 71, 75 (1st Cir. 2017). "[F]or the right to be clearly established, the plaintiff must point to controlling authority or a body of persuasive authority, existing at the time of the incident, that can be said to have provided the defendant with fair warning." Decotiis, 635 F.3d at 37 (internal citation and quotation marks omitted).

Even assuming arguendo that it had been shown that Defendants had violated MacRae's constitutional right, the Court focuses on whether the right MacRae asserts was clearly established at the time of her termination, i.e., the second, requisite prong of the analysis. Punsky v. City of Portland, 54 F4th 62, 66 (1st Cir. 2022). This second prong has two aspects: "whether the legal contours of the right in question were sufficiently clear that a reasonable [official] would have understood that what he was doing violated the right," and "whether in the particular factual context of the case, a reasonable [official]

would have understood that his conduct violated the right." Stamps v. Town of Framingham, 813 F.3d 27, 34 (1st Cir. 2016). Neither element is satisfied here as to Ferron or Mattos. See Diaz-Bigio v. Santini, 652 F.3d 45, 54 (1st Cir. 2011) (recognizing that liability under the "fact-intensive balancing test" required by Pickering "can rarely be considered 'clearly established' for qualified immunity") (internal citation and quotation marks omitted). The legal contours were not sufficiently clear as to the right that MacRae asserts here and reasonable officials could have concluded that MacRae's speech and the associated media coverage posed a risk of disruption to the District's learning environment, which the District would have a strong interest in avoiding. See Bonnell, 241 F.3d at 824. When MacRae's termination occurred in 2021, several federal cases supported the position that a public employee could be terminated for statements on a personal social media account expressing sentiments that call into question the employee's ability to provide public services fairly and equitably, even where the speech is in some way connected to a political opinion. See, e.g., Bennett, 977 F.3d at 545 (concluding that government's "interest in maintaining an effective workplace with employee harmony that serves the public efficiently outweighs [emergency call operator's] interest in incidentally using racially offensive language" in a social media comment related to the 2016 election); Shepherd, 986 F. Supp. 2d at 1214 (ruling that termination of child protective services worker's social media comments disparaging individuals who obtained public assistance was justified where worker's ability to fulfill job duties credibly had been

impaired); see also Connick, 461 U.S. at 147-48 (explaining that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement"). The right that MacRae asserts was not clearly established at the time of Defendants' alleged misconduct, see Punsky, 54 F4th at 67 (concluding that "any reasonable [official] would have objectively believed that his or her actions did not violate appellant's constitutional rights") and, accordingly, Defendants Mattos and Ferron are entitled to qualified immunity.

VI. Conclusion

For the foregoing reasons, the Court DENIES the motion to strike, D. 40, except as to the date of the Bourne School Committee election, which is ALLOWED. The Court ALLOWS Defendants' motion for summary judgment, D. 27.

So Ordered.

/s/ Denise J. Casper
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KARI MACRAE
Plaintiff(s)

CIVIL ACTION
NO.21-11917-DJC

v.

MATTHEW MATTOS, ET AL
Defendant(s)

JUDGMENT IN A CIVIL CASE

CASPER, D.J.

G Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by the Court. In accordance with the Memorandum and Order dated September 25, 2023, D. 43;

IT IS ORDERED AND ADJUDGED

Judgment for the defendants.

Robert M. Farrell, Clerk

Dated: September 25, 2023 /s/ Lisa M. Hourihan
(By) Deputy Clerk

NOTE: The post judgment interest rate effective this date is ___%.

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT
Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.