

APPENDIX

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APPENDIX 1

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RANDEY THOMPSON,

Plaintiff - Appellant,

vs.

CENTRAL VALLEY
SCHOOL DISTRICT NO. 365;
BEN SMALL, Individually as
Superintendent of the Central
Valley School District;
DEBRA LONG, Central
Valley School District No 365
Board of Education and in
their individual capacity
Board of Education Members
and Directors; MYSTI
RENEAU, Central Valley
School District No 365 Board
of Education and in their
individual capacity Board of
Education Members and
Directors; KEITH CLARK,
Central Valley School District
No 365 Board of Education
and in their individual
capacity Board of Education

NO. 24-5263

D.C. No.
2:21-cv-00252-
SAB

OPINION

Members and Directors; TOM
DINGUS, Central Valley
School District No 365 Board
of Education and in their
individual capacity Board of
Education Members and
Directors; CYNTHIA
MCMULLEN, Central Valley
School District No 365 Board
of Education and in their
individual capacity Board of
Education Members and
Directors,

Defendants - Appellees.

Appeal from the United States District Court
For the Eastern District of Washington
Stanley Allen Bastian, District Judge, Presiding

Argued and Submitted September 17, 2025
Seattle, Washington

Filed December 29, 2025

Before: William A. Fletcher, Ronald M. Gould,
and Ana de Alba, Circuit Judges.

Opinion by Judge Gould

SUMMARY*

First Amendment/Retaliation

The panel affirmed the district court's summary judgment for the Central Valley School District ("CVSD") and individual school administrators in a suit brought by Randy Thompson, a former middle school assistant principal, alleging retaliation in violation of the First Amendment.

Thompson was placed on paid administrative leave and subsequently transferred to a teaching position as a result of his posting on Facebook a comment about the Democratic National Convention that used epithets, slurs, and violent language.

Applying the two-step *Pickering* framework, the panel affirmed the district court's conclusion that Thompson made out a *prima facie* First Amendment retaliation claim for private speech he made on a matter of public concern. The panel assumed, without deciding, that a reasonable jury could conclude that placing Thompson on paid administrative leave could constitute an adverse employment action and that the record supported

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

a finding that the Facebook post was a substantial or motivating factor in that decision. However, CVSD sufficiently showed a reasonable prediction of disruption under *Pickering* Step Two. CVSD's interest in creating a safe and inclusive school environment outweighed the public interest commentary contained in Thompson's speech.

Because Thompson's First Amendment rights were not violated, the panel affirmed the district court's finding of qualified immunity in favor of the individual school officials.

COUNSEL

Michael B. Love (argued), Riverside NW Law Group, Spokane, Washington; Robert F. Greer, Megan C. Clark, and Samir Dizdarevic-Miller, Etter McMahon Lamberson Van Wert & Oreskovich, PC, Spokane, Washington; for Plaintiff-Appellant.

Michael E. McFarland, Jr. (argued), Rachel K. Stanley, and Christopher J. Kerley, Evans Craven & Lackie PS, Spokane, Washington, for Defendants-Appellees.

OPINION

GOULD, Circuit Judge:

Randey Thompson, a former assistant principal for Evergreen Middle School in the Central Valley School District (“CVSD”), brought suite for retaliation in violation of the First Amendment after he was placed on paid administrative leave and subsequently transferred to a teaching position as a result of his posting on Facebook a comment about the Democratic National Convention that used epithets, slurs, and violent language.

The district court granted summary judgment in favor of the CVSD and the individual school administrators, concluding that Thompson had made a *prima facie* claim for retaliation, but that the CVSD met its burden of showing that its interests outweighed Thompson’s interests in his post. The district court also concluded that qualified immunity applied to the individual school administrators. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

I. FACTS AND PROCEDURAL HISTORY

A

In August 2020, Randey Thompson was an assistant principal at Evergreen Middle School in the CVSD. After watching the Democratic National Convention, Thompson made a post on his Facebook page. Thompson contends that the post made on his private Facebook page shared his personal comments and opinions only with his

“friends” on Facebook. The post stated verbatim (including its typographical errors):

Demtard convention opens and the only facts spoken were the names. Lie after lie. The fact checkers could retire on Michelle Obama’s rant alone. What s hatefull racists bitch. If you need to lie to try and win you are just shit. If you believe them you are even worse. Wake the fuck up America. You are being played by a fake media, athleats and performers (who are really clueless and flyers with pedophile man) and the former DNC, now just the little bitch of Marxist BLM, Antifa, and Soroas socialist. You are missing out on a great country and the rest of us are sick and tired of your act and going to take you to the woodshed for a proper education. May God help you to pull your heads out of your asses so we will not have too. Time for the red tide. Lets see how long until the FB liberal defenders take this one down.

While scrolling through Facebook, a CVSD employee saw the post on her newsfeed. She took a screenshot of the post and sent it to her sister, another CVSD employee. The sister forwarded the screenshot to a CVSD administrator, who shared the post with another CVSD

administrator, who in turn brought the post to the attention of CVSD Superintendent Ben Small.

Two days after the post was made, on August 19, 2020, Thompson received a phone call from then-Assistant Superintendent Jay Rowell. Rowell asked Thompson if he had made a Facebook post about the Democratic National Convention. Thompson confirmed that he had and told Rowell it was a political post on his private Facebook account and had been sent only to friends and relatives who shared his political beliefs. Thompson emphasized that the post was made on his own time and on his personal device. Rowell then informed Thompson that he was being placed on paid administrative leave effective immediately. Thompson was not allowed on CVSD property, nor was he allowed to contact CVSD employees, teachers, parents, and students. Immediately after this conversation, Thompson deleted the Facebook post.

On the next day, August 20, 2020, the CVSD retained attorney Amy Allen to conduct an independent investigation into the Facebook post. Allen interviewed the employees who had seen the post. Those employees expressed concern about the post because they thought it used hateful language. The employees specifically noted the use of the term “demtard” was highly offensive and potentially harmful to students, families, and community members.

Allen then interviewed CVSD administrators to determine whether this was a unique occurrence or part of a pattern of behavior. One administrator told Allen that, in a presentation to staff, Thompson had referred to current students as “Tide Pod Challenge Kids” and “snowflakes.” Another administrator told Allen that Thompson used the word “short bus” when referring to students enrolled in special education classes. A third administrator told Allen that Thompson, while speaking to a focus group of ten students who self-identified as African-American, asked a Black student if he felt that teachers had treated him differently than “normal” students.

On August 22, 2020, Thompson received a letter from the CVSD dated August 20, 2020, reiterating that he was being placed on administrative leave because of unprofessional conduct and that, while on leave, he was prohibited from having written or verbal contact with students.

In September 2020, Rowell conducted “impact interviews” of a sample of Board Members, in-district administrators, in-district teachers, and parents of current CVSD students to determine the potential impact of Thompson’s Facebook post and the incidents reported to Allen by CVSD administrators. Rowell concluded that the interviewees were shocked and concerned about the statements, and many of those interviewed found the Facebook post and the other comments made by Thompson during school

insensitive and detrimental to Thompson's relationship with staff, students, and CVSD community members.

On September 22, 2020, the school Board held a "notice-and-opportunity meeting" to provide Thompson with the opportunity to address the allegations against him, which included his Facebook post and the derogatory comments he made at school that were discovered during investigation.

In the meeting, Thompson initially said that his Facebook was "hacked" and that a hacker made the post.¹ The CVSD retained a forensic investigator who found no evidence of unauthorized use of Thompson's Facebook account, noted that Thompson was reluctant to provide his electronic devices, and reported that Thompson provided only an incomplete history of his Facebook data. Based on the forensic investigator's report, Rowell concluded that Thompson was not being truthful.

On January 21, 2021, the CVSD offered Thompson a voluntary transfer to a teaching position if he signed a release of claims. The

¹ Thompson claimed that he had a slightly differently worded version of the post that he intended to put on his Facebook. While there were minor spelling and word changes in the version Thompson says he intended to post, the word "demtard" and language about taking individuals "to the woodshed for a proper education" were present in both posts.

agreement said that if Thompson signed the release, the CVSD would end its investigation and would not terminate him. Rowell told Thompson and his union representative that the transfer agreement was proposed in part to avoid formally alleging that Thompson lied about his Facebook account being hacked. Thompson rejected the transfer offer.

A second notice-and-opportunity meeting was held on May 6, 2021, to address two new allegations against Thompson. The first new allegation was that Thompson interfered with the CVSD's investigation by deleting his emails and refusing to transfer his data to the forensic examiner. The second new allegation was that Thompson was dishonest when he claimed his Facebook post was hacked. At that hearing, Thompson claimed that he deleted his personal emails as a regular practice but kept anything related to this investigation; that he was reluctant to give the forensic investigator information for his own privacy and to protect his friends; and that he wiped and sold his old devices and could not provide them. He asserted that he had been hacked but admitted that he had no evidence of the alleged hack.

On May 10, 2021, Superintendent Small sent a Notice of Transfer to a Subordinate Position via certified and regular mail to Thompson. The letter identified seven reasons for the transfer: (1) Thompson's behavior as an administrator had disrupted harmony among building staff and

CVSD representatives, to the point that returning him to his prior position supported a reasonable prediction of disruption; (2) his comments were insensitive and contrary to the CVSD's mission of creating an inclusive culture, causing concerns about Thompson's ability to be an administrator promoting the CVSD's best interests; (3) Thompson's behavior, including his lack of inclusiveness, caused decreased confidence of administrators and caused concerns about his willingness to promote and embrace the CVSD's interest in an inclusive learning and working environment; (4) Thompson's behavior interfered with this ability to do his job, especially as a student disciplinarian and staff evaluator; (5) the CVSD believed that Thompson interfered with a CVSD investigation about his behavior and he was not truthful during the investigation; (6) Thompson's response to the CVSD's concerns about his behavior demonstrated a lack of awareness and insight needed for a school administrator; and (7) in balancing the totality of circumstances, the best interests of the CVSD would be served by transferring Thompson from an administrative position to a non-administrative certificated teaching position.

Thompson sued the CVSD and several individual school administrators on August 23, 2021, pursuant to 42 U.S.C. § 1983, alleging in part that his First Amendment rights had been violated. On January 12, 2022, the individual administrators moved for summary judgment on the sole question of qualified immunity. On

February 24, 2022, the district court denied the motion, concluding that there were genuine questions of material fact. On interlocutory appeal, we affirmed the denial of summary judgment. *See Thompson v. Small*, No. 22-35192, 2023 WL 3580744 at *1 (9th Cir. May 22, 2023).

After discovery, the parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of the CVSD. It concluded that although Thompson made out a *prima facie* First Amendment retaliation claim, the CVSD met its burden under *Pickering*. The court determined that the CVSD's interests in fostering a safe and inclusive school environment outweighed Thompson's First Amendment interests, and that the CVSD would have transferred Thompson absent his Facebook post. The district court also found that the individual school administrators were entitled to qualified immunity. Thompson timely appealed.

II. STANDARD OF REVIEW

We review de novo the district court's grant of summary judgment and its determinations of qualified immunity. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013); *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 141 (9th Cir. 2021). "Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material facts." *United States v. JP Morgan Chase Bank Account No. Ending*

8215, 835 F.3d 1159, 1162 (9th Cir. 2016)
(quotation marks omitted).

III. DISCUSSION

We review a public employee's First Amendment retaliation claim against their government employer under the two-step *Pickering* framework. See *Pickering v. Bd. Of Ed. of Twp. High Sch. Dist.* 205, 391 U.S. 563, 568 (1968). At Step One, the plaintiff must show that (1) he spoke on a matter of public concern, (2) he suffered an adverse employment action, and (3) his protected expression was a substantial or motivating factor for the adverse action. *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 721 (9th Cir. 2022). If the plaintiff satisfies Step One, he has established a *prima facie* claim for First Amendment retaliation. The burden then shifts to the public employer at *Pickering* Step Two to demonstrate either: (1) that its legitimate administrative interests in promoting an efficient workplace and avoiding workplace disruption outweigh the plaintiff's First Amendment interests; or (2) alternatively, the government would have taken the same actions absent plaintiff's expressive conduct. *Id.*

A

First, we affirm the district court's conclusion that Thompson made a *prima facie* claim of retaliation for private speech he made on a matter of public concern. "Speech involves a

matter of public concern when it can fairly be considered to relate to ‘any matter of political, social, or other concern to the community.’” *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir. 1995) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)). To determine whether the speech in question was on “a matter of public concern,” we consider the “content, form and context of a given statement, as revealed by the whole record.” *Id.* (quoting *Connick*, 461 U.S. at 147-48).

Thompson’s Facebook post was made on his private Facebook account and criticized the Democratic National Convention. It was private speech on a matter of public concern. We are not persuaded by the CVSD’s arguments that Thompson’s use of slurs or violent language in the Facebook post took the political post outside the realm of public concern.² See *Rankin v. McPherson*, 483 U.S. 378, 387 (1987) (“[T]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”).

Second, we assume, without deciding, that a reasonable jury could conclude that placing

² Because we hold that Thompson’s speech was private speech on a matter of public concern sufficient to establish a *prima facie* claim, we do not reach Thompson’s arguments that the CVSD conceded these *Pickering* elements or that the doctrines of judicial admission or waiver should apply. See *Thompson v. Small*, No. 22-35192, 2023 WL 3580744, at *1 (9th Cir. May 22, 2023).

Thompson on paid administrative leave could constitute an adverse employment action given that Thompson was cut off from CVSD property and contact with other CVSD staff, and therefore may have suffered “general stigma.” *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1078-79 (9th Cir. 2013) (“[U]nder some circumstances, placement on administrative leave can constitute an adverse employment action.”).

Third, the record supports that the Facebook post was a substantial or motivating factor in placing Thompson on administrative leave. The CVSD placed Thompson on administrative leave within only a few days after discovering the Facebook post, and the individual administrators’ testimony confirmed that Thompson’s Facebook post was the catalyst to opening the investigation of Thompson’s practices and conduct when he taught at the school. The temporal proximity between the speech and the placement on administrative leave supports Thompson’s prima facie claim for retaliation. *See Anthoine v. N. Cent. Cntys. Consortium*, 605 F.3d 740, 750 (9th Cir. 2010) (evidence that an action was a substantial or motivating factor in an adverse employment action can be found from the fact that the speech and the action were proximate in time, or that the employer expressed opposition to the speech). Furthermore, that the CVSD admitted the Facebook post’s language – including Thompson’s use of the word “demtard” – was the sole reason for Thompson’s placement

on administrative leave supports Thompson's *prima facie* claim for retaliation.

B

We nonetheless affirm the district court's grant of summary judgment in favor of the CVSD because the CVSD met its burden under *Pickering* Step Two. The CVSD was justified in putting Thompson on paid administrative leave because of its reasonable prediction of disruption, and the record supports that the CVSD showed its interests in ensuring its administrators foster a safe and inclusive educational environment outweigh Thompson's claim fails.

The *Pickering* balancing test "recognizes that a government employer has 'broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.'" *Moser v. L.V. Metro. Police Dep't*, 984 F.3d 900, 906 (9th Cir. 2021). When we balance competing interests, we use a "sliding scale" in which the state's burden to justify a particular discharge or adverse employment action "varies depending upon the nature of the employee's expression." *Id.* at 905-06 (quoting *Connick*, 461 U.S. at 150); *see also Hyland v. Wonder*, 972 F.2d 1139, 1139 (9th Cir. 1992) (holding that the government's burden to show disruption "varies with the content of the speech"). The *Pickering* balancing inquiry

ultimately poses a question of law. *Moser*, 984 F.3d at 905.

1. Thompson's First Amendment Interests

We have recognized that although speech about matters of public concern “occupies the highest rung of the hierarchy of First Amendment values,” *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 782 (9th Cir. 2022) (quotation marks omitted), “not all statements of ‘public concern’ are treated equally under the *Pickering* balancing test,” *Moser*, 984 F.3d at 905. That speech touches upon an issue of “public concern” at Step One of the *Pickering* balancing test does not end our “inquiry into the content of [the] speech” for purposes of determining “how much weight to give the government employee’s First Amendment interests” at Step Two. *Moser*, 984 F.3d at 906; *see also Damiano v. Grants Pass Sch. Dist. No. 7*, 140 F.4th 1117, 1140 (9th Cir. 2025).

The “apex” of First Amendment protection is reserved for political speech that addresses problems at the government agency where the employee works. *Moser*, 984 F.3d at 906; *Damiano*, 140 F.4th at 1140. But we have also recognized that the protection afforded to government employee’s speech may be lessened where the speech is derogatory in nature. For instance, we have previously suggested in dicta that “racially charged comments that have no connection to the government employee’s workplace arguably receive less First Amendment

protection under the *Pickering* balancing test [.]” *Id.* at 906 (citing *Grutzmacher v. Howard Cnty.*, 851 F.3d 332 (4th Cir. 2017)). In *Moser*, we cited a Fourth Circuit case, *Grutzmacher v. Howard Cnty.*, for the proposition that derogatory speech that touches on a matter of public concern as a whole, but is unrelated to an individual’s workplace or expertise, might be entitled to less weight under Step Two of the *Pickering* balancing test. But we did not decide precisely how the use of derogatory language in such speech would affect the *Pickering* Step Two analysis because the plaintiff’s use of a derogatory term was not at issue. *Moser*, 984 F.3d at 903 n.1; *see also Hernandez v. City of Phoenix*, 43 F.4th 966, 978-79 (9th Cir. 2022) (“Speech that expresses hostility toward racial or religious minorities may be of particularly low First Amendment value at [Step Two] of the *Pickering* balancing test . . . , but its distasteful character alone does not strip it of all First Amendment protection.” (emphasis added)). Because the derogatory speech is at issue here, we do so now.

Grutzmacher is instructive. In *Grutzmacher*, the Fourth Circuit held that at least some of a county fire department employee’s string of Facebook posts, comments, and “likes” were on a matter of public concern because the posts as a whole addressed gun control. 851 F.3d at 342-43. At issue there, as here, was that some comments that the plaintiff “liked” or used on Facebook were derogatory, racially-charged or violent. *Id.* at 337-38. The *Grutzmacher* court

held that the Pickering balancing test favored the county at Step Two because the plaintiff's Facebook activity was "not of the same ilk" as cases where a government official's speech was "grounded ... in specialized knowledge," and that the county's interest in efficiency and preventing disruption "outweighed the public interest commentary contained in [p]laintiff's Facebook activity. *Id.* at 347-48. We similarly reasoned in *Hernandez v. City of Phoenix*, without deciding, that an employee's speech was of "comparatively low value" under *Pickering* Step Two when the employee's speech addressed a matter of public concern, but did so in a way expressing racial and religious hostility. 43 F.4th at 979.

As in *Grutzmacher* and *Hernandez*, Thompson's Facebook post was not grounded in specialized knowledge, nor based on insight he had gained into the school system while acting as an assistant principal. *See Damiano*, 140 F.4th at 1140 ("[W]e have long recognized 'the importance of allowing teachers to speak out on school matters,' . . . because '[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions' on such matters." (quoting *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 514 (9th Cir. 2004))). Although Thompson's post, read broadly, touched on a matter of public concern, Thompson's use of disability-related slurs like "demtard" and his use of violent language suggesting taking individuals "to the woodshed for a proper education" are not speech entitled to the highest constitutional

protection. *See Hernandez*, 43 F.4th at 979 (remarking that speech expresses hostility toward racial or religious minorities may receive less protection under *Pickering*); *Grutzmacher*, 851 F.3d at 345 (finding that a government employer’s interest in efficiency and preventing disruption outweighed the plaintiff’s interest in speaking in a violent manner regarding gun control). Stated another way, the “demtard” slur was not comparable to speech value to comments of teachers that are based on knowledge they gained as educators. For these reasons, we give Thompson’s interest in his Facebook post speech little weight under *Pickering* Step Two.

2. The CVSD’s Interests

For “the government’s interest as an employer in a smoothly-running office” to outweigh “an employee’s [F]irst [A]mendment right[s], [the government] must demonstrate actual, material and substantial disruption, or reasonable predictions of disruption in the workplace.” *Robinson v. York*, 566 F.3d 817, 824 (9th Cir. 2009) (cleaned up). We have determined that the extent of disruption the CVSD must show under *Pickering* Step Two is based on a “sliding scale” when balanced against the weight we give Thompson’s First Amendment interests. *Moser*, 984 F.3d at 905. Because we hold here that Thompson’s First Amendment interests are not entitled to the “apex” of First Amendment protection, the CVSD need not show as much potential disruption to prevail. The CVSD cannot

rely on “mere speculation” or “bare assertions of future conflict” at the summary judgment stage. *See Nichols v. Dancer*, 657 F.3d 929, 933-34 (9th Cir. 2011). Instead, the CVSD must provide evidence sufficient for us to evaluate fully and fairly whether claims or predictions of disruption are reasonable. *Id.*; *see also Craig v. Rich Twp. High Sch. Dist.* 227, 736 F.3d 1110, 1119 (7th Cir. 2013) (“[A]n employer’s assessment of the possible interference caused by the speech must be reasonable—the predictions must be supported with an evidentiary foundation and be more than mere speculation.” (quotation marks and citation omitted)).

The Supreme Court has told us that several factors are relevant to assessing the impact of a public employee’s speech on a public employer’s operations, including:

whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker’s duties or interferes with the regular operation of the enterprise.

Rankin, 483 U.S. at 388.

These factors weigh in favor of the CVSD. The CVSD reasonably predicted that a Facebook post by a school administrator using disability-related slurs and violent language was likely to disrupt CVSD operations. The predictable disruption was intensified and reinforced by Thompson engaging in speech while serving in a public-facing role as an assistant principal that undermined the CVSD's written resolution to foster a safe and supportive educational environment. As an employee of the CVSD, Thompson had a responsibility to uphold the district's formal commitment to equity and inclusion. As evidenced by his Facebook post and workplace comments, Thompson did not uphold his commitment, and we accordingly find that Thompson's derogatory and violent language could substantially disrupt the orderly operation of the school.

Interviewees' statements about Thompson confirmed the CVSD's earlier prediction that the Facebook post was reasonably likely to disrupt school operations. Specifically, other CVSD administrators expressed concern about their ability to work with Thompson based on his language in the Facebook post, and questioned his ability to be in a leadership position. Many interviewees expressed that the disability-related slur and violent language did not reflect the CVSD's core values, negatively portrayed the CVSD, and ran counter to the CVSD's Resolution Recommitting to Equity and Inclusion. Additionally, interviewees confirmed that they

believed Thompson's ability to discipline students would be impacted if students learned of the Facebook post. Ultimately, interviewees questioned Thompson's ability to work effectively with students and parents, or to act as a representative of the school. As such, Thompson's statements can be fairly viewed as creating disharmony among co-workers and detrimentally impacting his close working relationships requiring loyalty and confidence.

Finally, Thompson's position in a public-facing, supervisory role as an assistant principal is relevant in assessing likely disruption. The "extent of an employee's authority and interactions with the public also bears on the degree of government interest in preventing disruption." *Rankin*, 483 U.S. at 392. The government's interest in "avoiding disruption is magnified when the employee asserting [a First Amendment] right serves in a 'confidential, policymaking, or public contact role.'" *Moran v. State of Washington*, 147 F.3d 839, 849 (9th Cir. 1998) (quoting *Rankin*, 483 U.S. at 390-91). And, we have recognized that public school employment "is precisely the type of employment relationship" to which "a wide degree of deference to the employer's judgment is appropriate." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 981 (9th Cir. 1998) (quoting *Connick*, 461 U.S. at 151-52).

The CVSD contended and put forth evidence that Thompson worked in a supervisory and

disciplinary role, and that his comments and language conflict with the CVSD's resolution recommitting the CVSD to equity and inclusion and to "fostering an equitable school culture." Moreover, interviewees raised the specific concern that Thompson engaged in speech inconsistent with the CVSD's values while he served as a representative of the school leadership. Recognizing the "wide degree of deference" we afford the CVSD's judgment when making employment decisions, this evidence sufficiently shows that the CVSD's prediction of disruption from the Facebook post was reasonable and not based on "rank speculation or bald allegation." *Damiano*, 140 F.4th at 1138; *see also Nichols v. Dancer*, 657 F.3d 929, 933-34 (9th Cir. 2011) (holding that "mere speculation" and "bare assertions of future conflict" are insufficient for summary judgment under *Pickering* Step Two); *Brewster*, 149 F.3d at 981.

We hold that the CVSD sufficiently showed a reasonable prediction of disruption under *Pickering* Step Two. Because we give Thompson's speech little weight under the *Pickering* balancing test, we hold that the CVSD's interest in creating a safe and inclusive school environment outweighs the public interest commentary contained in Thompson's speech. In so holding, we caution that the *Pickering* balancing test is a "particularized balancing on the unique facts presented in each case," and we do not suggest that every time employee speech contains slurs or violent language, the government interest will

automatically prevail at *Pickering* Step Two. See *Brewster*, 149 F.3d at 980 (quoting *Voigt v. Savell*, 70 F.3d 1552, 1560-61 (9th Cir. 1995)). Each case should be examined in its unique context, considering the totality of circumstances. We must strive to reach “the most appropriate possible balance of competing interests.” *Connick*, 461 U.S. at 150. In this case, we are particularly mindful of the extreme import of ensuring the maintenance of a safe and supportive school environment where children have a chance to reach their full potential.

Because we conclude that the CVSD met its burden to show that its interests outweigh Thompson’s First Amendment interests, we decline to reach the alternative ground as to whether the CVSD would have taken the same actions absent Thompson’s expressive conduct. *Riley’s*, 32 F.4th at 721. We therefore affirm that the CVSD correctly met its burden under *Pickering* Step Two.

C

Because we hold that Thompson’s First Amendment rights were not violated, we affirm the district court’s finding of qualified immunity in favor of the individual school officials. See *Cuevas v. City of Tulare*, 107 F.4th 894, 898 (9th Cir. 2024) (“Qualified immunity protects government officials from liability under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of

their conduct was clearly established at the time.”
(internal citations and quotation marks omitted)).

IV. CONCLUSION

For the foregoing reasons, we affirm the district court’s grant of summary judgment in favor of the CVSD and affirm the district court’s grant of qualified immunity to the individual school administrators.

AFFIRMED.

APPENDIX 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RANDEY THOMPSON,

Plaintiff,

vs.

CENTRAL VALLEY
SCHOOL DISTRICT NO.
365; BEN SMALL,
individually as
Superintendent of the
Central Valley School
District; CENTRAL VALLEY
SCHOOL DISTRICT NO.
365 BOARD OF
EDUCATION and in their
individual capacity BOARD
OF EDUCATION
MEMBERS and
DIRECTORS DEBRA LONG,
MYSTI RENEAU, KEITH
CLARK, TOM DINGUS, and
CYNTHIA MCMULLEN,

Defendants.

NO.NO.
2:21-CV-
00252-SAB

ORDER
GRANTING
DEFENDANTS'
MOTION FOR
SUMMARY
JUDGMENT

Before the Court are Defendants' Motion for
Summary Judgment, ECF No. 71 and Plaintiff's
Motion for Partial Summary Judgment, ECF No.

76. Plaintiff is represented by Michael Love, Megan Clark, Samir Dizdarevic-Miller, and Robert Greer. Defendants are represented by Michael McFarland, Jr., Christopher Kerley, and Rachel Stanley. The motions were heard without oral argument.¹

Defendants ask the Court to grant summary judgment in favor of them because a reasonable jury would not find that Plaintiff suffered a constitutional violation. Defendants assert that Plaintiff's use of derogatory language online and at school did not constitute speech on a matter of public concern; Plaintiff spoke as a public employee; Plaintiff's transfer to a teaching position was not motivated by protected First Amendment speech; Defendants had adequate justification for the transfer; and the reasons for Plaintiff's transfer were not pretextual.

Plaintiff asks the Court to grant summary judgment in favor of him because a reasonable jury could not find that Defendants did not violate his First Amendment rights after they unlawfully retaliated against him by placing him on administrate [sic] leave, investigating and ultimately demoting him because he made a private political Facebook post related to the 2020 Democratic National Convention.

¹ Pursuant to Local Rule 7.1(i)(3)(B)(iii), the Court has determined that oral argument is not warranted.

Motion Standard

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party has the initial burden of showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-moving party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248.

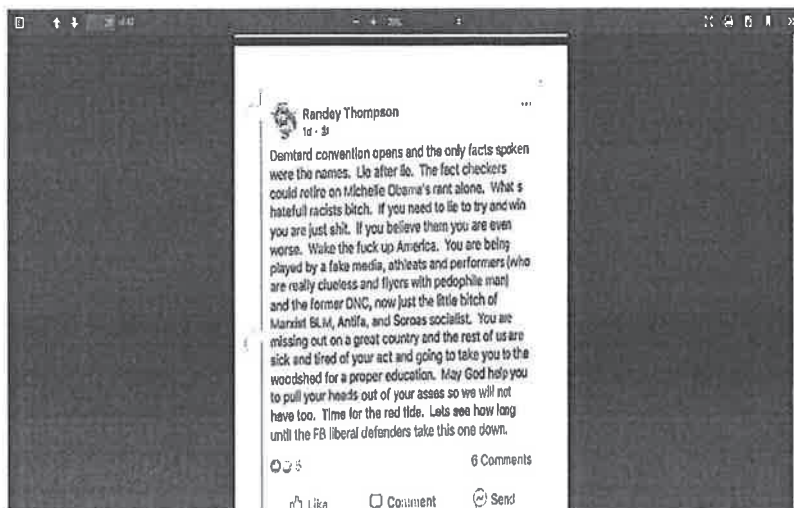
In addition to showing there are no questions of material fact, the moving party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law when the non-moving party fails to make sufficient showing on an essential element of a claim on which the non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party cannot rely on conclusory allegations alone to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). When considering a motion for summary judgment, a court may neither weigh the

evidence nor assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson*, 477 U.S. at 255.

When considering cross motions for summary judgment, the Court views the evidence for each of the motions in the light most favorable to the nonmoving party for that motion and determines whether there are any genuine issues of material fact and whether non-moving party is entitled to judgment as a matter of law. *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 832 (9th Cir. 2002).

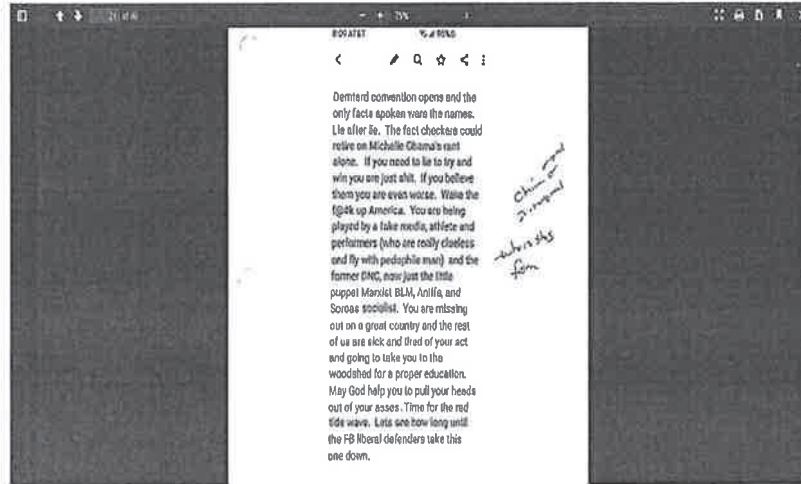
Underlying Facts

In August 2020, Plaintiff, an assistant principal at Evergreen Middle School in the Central Valley School District (CVSD), watched the Democratic National Convention. After watching the convention, he made the following Facebook post:



Plaintiff maintains the post appeared on his private Facebook account. He asserts this post was sent to 12 close conservative Facebook friends, and he did not intend to send the post to other individuals outside these personal friends.

He states that later, the following post was substituted for the original post:



Plaintiff explained that while he posted the second post² his account was hacked and someone else posted the first example of the post to Facebook.

It is undisputed, however, that the first post was seen by a CVSD employee who forwarded it to another employees [sic], who forwarded it to another employee until it was forwarded to CVSD Superintendent Ben Small.

Two days later, in the evening on August 19, 2021, Plaintiff received a phone call from Jay Rowell, Assistant Superintendent of CVSD, asking if he had made a post on his Facebook account about the Democratic National Convention. Plaintiff said that he did. He told Mr. Rowell it was a political post on his private Facebook account, and it had

² This screen shot did not come from Facebook. Rather, Plaintiff was able to find it on his phone.

only been sent to a very few of his close personal friends and relatives who share similar political beliefs, and the post was made on his own computer and on his own free time.

Mr. Rowell informed Plaintiff that he was being placed on administrative leave immediately and he was not allowed on CVSD property and was not allowed to contact CVSD employees, teachers, parents, and students. Plaintiff states he was incredibly humiliated and was terrified that he was going to lose his job and his ability to ever work in education again.

Mr. Rowell indicates in his declaration that he placed Plaintiff on administrative leave due to the use of the word "Demtard," the profanity, and the potential racial overtones and because of the reported concerns from the employees who had either seen or had been forwarded the post. At this point, CVSD had no idea how widely the post had been disseminated.

Right after Plaintiff spoke with Mr. Rowell, he deleted his Facebook post. The next morning, Plaintiff called his union representative, Ty Larsen, to discuss the matter. He also deactivated his Facebook account. Later that day, he checked and his Facebook account was still active, so he deactivated it again. It became active again around 7:00 p.m., so he changed his password, deactivated the account. It stayed down.

On August 20, 2020, CVSD retained attorney Amy Allen to perform an independent third-party investigation into the Facebook post. During her investigation, which took place between August 24, 2020 and August 26, 2020, Ms. Allen learned that previously and while on school grounds, Plaintiff referred to Governor Inslee as “Governor Short Bus,” frequently used the term “short bus” when discussing special needs students, asked a Black student whether he felt he had been treated differently than the “normal students, and referred to students in derogatory terms, including “Tide Pod Challenge Kids” and “Snowflakes.”

On August 22, 2020, CVSD sent Plaintiff a letter indicating that he was being placed on administrative leave due to unprofessional conduct. He was instructed that while on leave he was not to report to work or come on any district property unless specifically directed to do so. He was to avoid retaliatory conduct toward others and avoid any contact with others that could be considered an attempt to influence the investigation. He was prohibited from having written or verbal contact with students.

In September 2020, Plaintiff was removed from the School Superintendent's Administrator email list, and as a result he was not made aware of multiple open positions for principals in CVSD and he was not able to apply for positions outside the District because two of the three references would or could no longer supply a recommendation.

From September 8, 2020 to September 15, 2020, Mr. Rowell conducted Impact Interviews to determine the potential impact of Plaintiff's Facebook statements and the statements he made while working at CVSD. He interviewed two Board Members, two in-district administrators, two in-district teachers and two parents of current CVSD students. Mr. Rowell found that overall the interviewees expressed shock and concern about the statements and found these statements to be insensitive and detrimental to Plaintiff's relationship with staff, students and the community.

On September 23, 2020, a Notice and Opportunity hearing was held online with CVSD representatives Jay Rowell, Kent Martin and Sue Brown, along with Plaintiff and union rep Ty Larsen. The two allegations discussed at the meeting were: (1) Plaintiff posted an inappropriate and offensive comment on Facebook recently; and (2) he made derogatory and insensitive comments while at work.

At the meeting, Plaintiff stated he believed he sent the Facebook post to only 12 select friends that share similar political opinions with him and he didn't learn other people outside this group had seen the post until his sister told him two days later. Plaintiff also stated he did not write the Facebook post that was sent to Mr. Small. Rather, he wrote a different, but similar post that did not have any profanity, did not have any spelling errors, and had a few word changes. He believed his friends groups contained a couple of people he had not accepted.

CVSD believed Plaintiff actually posted it to his Facebook page for broad dissemination, rather than Plaintiff “sending” the post to certain people.

Plaintiff stated that he was just sharing his political frustration when he posted the comment; he did not regret making the comments; and he felt comfortable saying what he did within his small group.

Because Plaintiff indicated his Facebook account had been compromised, on October 6, 2020, Mr. Rowell contacted a Forensic Examiner, Joshua Michel, to investigate whether this was true.

Plaintiff responded to CVSD’s allegations in a written document dated October 1, 2020. In it, Plaintiff stated he believed a hacker changed who saw his posts and also changed the post itself. He referred to the post that was ultimately viewed by Mr. Small as the “hacked” post.

Another meeting was scheduled with Mr. Larson, Plaintiff, Mr. Martin and Mr. Rowell for October 22, 2020 so Plaintiff could provide context to his written statement.

On December 15, 2020, Mr. Michel completed his forensic investigation. He found no evidence of unauthorized use of Plaintiff’s Facebook account. Mr. Michel reported that Plaintiff had been very reluctant to provide his electronic devices and Facebook data history. Plaintiff refused to give Mr. Michel his login credentials and after much

resistance provided only an incomplete history of his Facebook data. It appeared to Mr. Michel that Plaintiff was not entirely cooperative or forthcoming with him. Based on this report, Mr. Rowell believed that Plaintiff was not being truthful.

On January 21, 2021, CVSD offered Plaintiff a transfer to a teaching position if he signed a release and agreed to not sue CVSD. It indicated that if he agreed to the transfer, CVSD would end its investigation and not terminate him. He would receive a new contract to begin September 1, 2021, and a supplemental contract for July and August 2021. Mr. Rowell stated that CVSD proposed the Transfer Agreement in part to avoid having to address the allegation that Plaintiff had lied and continued to lie about having his account hacked, which could have possibly led to more serious consequences.

Plaintiff rejected the transfer offer on February 10, 2021.

On April 23, 2021, a Notice and Opportunity hearing was scheduled via Zoom, and when Mr. Rowell saw that Plaintiff's attorneys were accompanying him at the hearing, he refused to go forward that day and rescheduled the meeting.

On May 6, 2021, a Notice and Opportunity hearing was scheduled, and Plaintiff's attorneys did not accompany him. Mr. Rowe, Mr. Martin, Mr. Brown, Plaintiff and Mr. Larsen participated.

At the hearing, Plaintiff was asked about Mr. Michel's report and why he did not cooperate with him. He indicated he believed that a Facebook employee was the one who did the alleged hacking because in the past he has proved the Facebook fact checkers wrong. He believed that Facebook has a habit of "washing" people who disagree with them. He indicated he did not file a "hack claim" with Facebook because he does not believe Facebook cares and Facebook stands to gain financially. Plaintiff acknowledged he was still using Facebook.

On May 17, 2021, Plaintiff received a letter from CVSD dated May 10, 2021 informing him that he was being transferred to a teaching position. The letter identified seven reasons for the transfer: (1) Plaintiff's behavior while serving as an administrator had disrupted harmony among building staff and District representatives, to the point that returning him to a position as an administrator supported a reasonable prediction of disruption; (2) his comments could reasonably be perceived as insensitive at best and contrary to the District's mission of creating an inclusive culture, which cause significant concerns about Plaintiff's ability to be the type of administrator that serves the District's best interests; (3) Plaintiff's behavior, including his lack of inclusiveness, caused a lack of confidence by administrators (and others) and caused concern about his willingness to promote or even embrace the District's interest in an inclusive learning and working environment; (4) Plaintiff's behavior interfered with his ability to do his job, especially as a student disciplinarian and staff

evaluator; (5) there is good reason to believe Plaintiff interfered with a District investigation about his behavior and he was not entirely truthful during the investigation, (6) his response to District concerns about his behavior demonstrate a lack of awareness and insight needed for a school administrator, and (7) in balancing of all circumstances, the overall best interest of the District would be served by transferring Plaintiff from an administrative position to a non-administrative certificated teaching position.

Plaintiff requested a hearing before the CVSD School Board, pursuant to Wash. Rev. code 28A.405.230. Plaintiff met with the CVSD Board on June 14, 2021. At the meeting, Plaintiff asserted that his posts were protected by the First Amendment. On June 25, 2021, Plaintiff received a letter indicating the Board upheld the superintendent's decision to transfer him to a certified teaching position. On June 29, 2021, Plaintiff received a letter indicating he was assigned to teach World History and Health and Fitness at Ridgeline High School, although he was not certified to teach World History.

First Amendment Retaliation

The First Amendment forbids government employers from retaliating against employees for speaking out on matters of public concern. *Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 391 U.S. 563, 564 (1968). That said, government employers may impose certain restraints on the speech of its

employees that would be unconstitutional if applied to the general public. *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 721 (9th Cir. 2022) (quotation omitted). As the Supreme Court explained, the government has “interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general. *Pickering*, 391 U.S. at 568.

Moreover, when an employee speaks pursuant to their official duties, such speech is not protected by the Constitution. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1067 (9th Cir. 2013). Cases subsequent to *Pickering* have developed a framework to balance the competing interests between the government employer and employee. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527-28 (2022).³

If a plaintiff's retaliation claim is subject to the *Pickering* framework, the Court must apply a two-step burden-shifting approach when reviewing a

³ Recently, the Supreme Court suggested the *Pickering/Garcetti* and related cases analysis proceeds in two steps: first, courts should conduct a threshold inquiry into the nature of the speech at issue and whether the speech was made pursuant to official duties or as a citizen addressing matters of concern; and then, courts should attempt to engage in “a delicate balancing of the competing interests surrounding the speech and its consequences, including considering whether an employee's speech interests are outweighed by the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees. *Id.* at 527-28 (quotation omitted).

motion for summary judgment. *Riley's*, 32 F.4th at 721. First, a plaintiff must establish a prima facie case of retaliation by showing (i) they engaged in expressive conduct that addressed a matter of public concern; (ii) the government employer took an adverse action against them; and (iii) their expressive conduct was a substantial or motivating factor for the adverse action. *Id.* In doing so, the plaintiff must show causation and the defendants' intent. *Id.* In the case of First Amendment retaliation, the plaintiff must show that the government employer acted with a retaliatory motive and that the defendants' "retaliatory animus" was the "but-for" cause of their injury, that is, the adverse action against them would not have been taken absent the retaliatory motive. *Nieves v. Bartlett*, 587 U.S. 391, 389 (2019).

If the plaintiff carries its burden of showing these three elements, the burden shifts to the government employer to show either that its "legitimate administrative interests in promoting efficient service-delivery and avoiding work-place disruption" outweigh the plaintiff's First Amendment interests, or that it would have taken the same actions in the absence of the plaintiff's expressive conduct. *Riley's*, 32 F.4th at 721.

The Supreme Court has recognized several factors in evaluating the impact of an employee's speech on the government agency's operation: (1) whether the statement impairs discipline by superiors or harmony among co-workers; (2) whether the speech has a detrimental impact on

close working relationship for which personal loyalty and confidence are necessary; or (3) whether the speech impeded the performance of the speaker's duties and interferes with the regular operation of the enterprise. *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). While the government can meet its burden by showing a reasonable prediction of disruption, it cannot rely on mere speculation that an employee's speech will cause disruption. *Brewster v. Bd. of Educ. Of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 979 (9th Cir. 1998).

Courts give the government employer's reasonable prediction of disruption greater deference than the justifications used to restrict the public's speech. But "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees' speech." *Rankin*, 483 U.S. at 384.

Thus, an employer must provide some evidence for the court to evaluate whether the government's claims of disruption appear reasonable. *Moser v. Las Vegas Metro. Police Dep't.*, 984 F.3d 900, 909 (9th Cir. 2021) (citing *Craig v. Rich Twp. High Sch. Dist.* 227, 736 F.3d 1110, 1119 (7th Cir. 2013) ("[A]n employer's assessment of the possible interference caused by the speech must be reasonable—the predictions must be supported with an evidentiary foundation and be more than mere speculation." (quotation marks and citation omitted))).

“In the limited context of the Pickering balancing test, courts may consider the content of that speech to determine how much weight to give the employee’s First Amendment interests.” *Moser*, 984 F.3d at 906 (citing to *Connick v. Myers*, 461 U.S. 138, 146-47 (1983)). Thus, a sliding scale may be applied in which the state’s burden in justifying a particular adverse employment action varies depending upon the nature of the employee’s expression. *Moser*, 984 F.3d at 906.

Plaintiff’s Prima Facie Case

In the summary judgment contest, the first step this court must address is whether Plaintiff has established a prima facie case of First Amendment retaliation.⁴

(i) Nature of the Speech

In this regard, the Court finds that Plaintiff’s Facebook post was private speech on a matter of public concern. See *Rankin*, 483 U.S. at 387 (noting that “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.”); *Riley’s*, 32 F.4th at 723 (“There is no genuine issue of disputed fact that Riley engaged in such expressive conduct.

⁴ Because the Court must consider the merits of Plaintiff’s constitutional claim in light of his request for injunctive relief, the Court will determine first whether Plaintiff’s First Amendment rights were violated.

Riley's tweets discussed matters that fall within the core of protected First Amendment activity including politics, religion, and issues of social relations."); see also *Anthoine v. N. Central Counties Consortium*, 605 F.3d 740, 748 (9th Cir. 2010) (noting the public concern inquiry is a question of law).

On the other hand, Plaintiff's alleged speech in referring to Governor Inslee as "Governor Short Bus," frequently using the term "short bus" when discussing special needs students, asking a Black student whether he felt he had been treated differently than "normal students" and referring to students in derogatory terms, including "Tide Pod Challenge Kids" and "Snowflakes" was speech made pursuant to his official duties and therefore, not constitutionally protected speech.

(ii) Adverse Employment Action

It is undisputed that because of the Facebook post, Mr. Small and CVSD placed Plaintiff on paid administrative leave and initiated an internal investigation. In *Dahlia*, the Ninth Circuit recognized that placing an employee on administrative leave may constitute an adverse employment action if such action was "reasonably likely to deter" the employee from engaging in constitutionally protected speech. 735 F.3d at 1079. In *Dahlia*, the Circuit suggested that the inability to take a promotional exam, loss of pay, and opportunities for investigative experience, as well as the general stigma resulting from placement on

administrative leave” would appear “reasonably likely to deter employees from engaging in protected activity.” *Id.*

In this case, Plaintiff asserts that being placed on administrative leave barred him from contacting any fellow coworkers, District employees, parents or students and prohibited him from entering School District properly. There was also a general disgrace associated with being placed on leave. Moreover, Plaintiff was removed from the School District’s Administrator’s email list.

A reasonable jury could find that placing Plaintiff on administrative leave and initiating an investigation because of his Facebook post could constitute an adverse employment action. Thus, Plaintiff has met its burden regarding the second prong of his prima facie case.

(iii) Substantial or Motivating Factor

To show retaliation for the speech was a substantial or motivating fact behind an adverse employment action, a plaintiff can (1) introduce evidence that the speech and adverse action was proximate in time, such that a jury could infer that the action took place in retaliation for the speech; (2) introduce evidence that the employer expressed opposition to the speech; or (3) introduce evidence that the proffered explanations for adverse action were false and pretextual. *Anthoine*, 605 F.3d at 750. This step is purely a question of fact. *Id.*

A reasonable jury could find that Plaintiff was transferred from an administrative position to a teaching position because of his Facebook post. The record is undisputed that he was transferred in part because of his use of the terms “Demtard” his use of profanity, and the potential racial overtones in the Facebook post. Because the entire post is protected speech, this is sufficient to meet the third prong of Plaintiff’s prima facie case.

Burden Shifting

Because Plaintiff has met his burden of establishing a prima facie case, the burden then shifts to Defendants to show its interest in providing a safe and inclusive educational environment outweighs Plaintiff’s First Amendment rights or that it would have made the same decision absent the protected speech.

(iv) Justification for Adverse Employment Action

CVSD asserts it has a legitimate interest in protecting the learning environment at CVSD and ensuring its administrators foster a safe and inclusive educational environment. It argues that Plaintiff’s use of belittling and insulting language undermines the school’s commitment to a safe and supportive learning environment. It provided evidence from its focus groups to support its assertions that Plaintiff’s statements were viewed as insensitive and detrimental to the relationship between staff, students, and the community.

In weighing Plaintiff's First Amendment rights against CVSD's interest in protecting the learning environment at CVSD, the Court applies a sliding scale in which CVSD's burden in justifying the transfer depends on the nature of Plaintiff's speech. *Moser*, 984 F.3d at 906.

Here, in applying the sliding scale, the use of the term "demtard" and other profanities outweighs CVSD interests justifying Plaintiff's transfer and less in favor of Plaintiff's interest in using derogatory terms on Facebook. It provided evidence that supported its concern for disruption and did not rely on mere speculation. Thus, CVSD has met its burden of showing that its legitimate interest in fostering a safe and inclusive educational environment outweighs Plaintiff's First Amendment interest in using the term "demtard" and other derogatory terms in his Facebook post.

As such, Plaintiff cannot show that Defendants violated his First Amendment rights.

(v) Same Action Absent Protected Speech

CVSD has met its burden of showing that it would have taken the same action absent Plaintiff's Facebook speech. "A plaintiff cannot establish unconstitutional retaliation 'if the same decision would have been reached' absent the protected conduct, even if 'protected conduct played a part, substantial or otherwise' in motivating the [school district's] action." *Riley's*, 32 F.4th at 721.

Here, the record is undisputed that CVSD transferred Plaintiff because of Plaintiff's use of derogatory terms in his Facebook post, his alleged derogatory statements made during the course of his employment, his alleged obstructive behavior and perceived dishonesty during the investigation, and his unwillingness to appreciate the negative connotations of the words he used. Notably, the majority of Plaintiff's speech that was the cause of concern for CVSD was not constitutionally protected speech. No reasonable fact finder could find that CVSD transferred Plaintiff because he was critical of the Democratic Convention or the Democratic Party.

No reasonable fact finder could find that Defendants' reasons for transferring him are pretext for violating Plaintiff's First Amendment rights. See *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 752 (9th Cir. 2001) (finding the plaintiff's failure to produce any evidence that the employer expressed opposition to their speech, or that the proffered reasons for the reassignment were false or pretextual, failed to create a genuine issue of material fact on whether the adverse employment action was motivated by the plaintiff's speech).

As such, Plaintiff cannot show that Defendants violated his First Amendment rights.

Qualified Immunity

A Government official is entitled to qualified immunity from a claim for damages unless the plaintiff raises a genuine issue of fact showing (1) “a violation of a constitutional right,” and (2) that the right was “clearly established at the time of [the] defendant’s alleged misconduct.” *Ballentine v. Tucker*, 28 F.4th 54, 61 (9th Cir. 2022) (quotation omitted). The Court may analyze these elements in any order. *Id.*

“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘the contours of a right are sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). It is not necessary that a case is directly on point, instead existing precedent must have placed the statutory and constitutional question beyond debate. *Id.*

The Supreme Court has repeatedly instructed that courts must not define clearly established law at a high level of generality. *Ballentine*, 28 F.4th at 64 (quotation omitted). “The right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official.” *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (quotations omitted); see also *Riley’s*, 32 F.4th at 729 (“The right to be free from First Amendment retaliation cannot be framed as ‘the

general right to be free from retaliation for one's speech.' Rather, the right must be defined at a more specific level tied to the factual and legal context of a given case.")

As the Ninth Circuit observed, "[t]here will rarely be a case that clearly establishes that the plaintiff is entitled to prevail under the fact-sensitive, context specific balancing required by *Pickering*." *Riley's*, 32 F.4th at 729.

Here, the individual Defendants are entitled to qualified immunity because it was not clearly established that transferring an assistant principal to a teaching position after an investigation revealed the assistant principal used derogatory language in a Facebook post, as well as during the course of his employment as a school administrator, where school officials believed the assistant principal lied during the investigation, could violate the assistant principal's First Amendment rights.

More specifically, the Court finds it was not clearly established that placing an employee on administrative leave in response to a Facebook post that contained derogatory language embedded within a political post would constitute an adverse employment action for First Amendment purposes. As *Dahlia* and subsequent case law indicates this is a factually intensive inquiry and Mr. Small was not put on notice that placing Plaintiff on paid administrative leave based on the facts known to him at the time would constitute an adverse employment action. Thus, Mr. Small is entitled to

qualified immunity with respect to his decision to place Plaintiff on administrative leave.

Similarly, it was not clearly established that conducting an investigation after other employees complained about a Facebook post that contained derogatory language would constitute an adverse employment action for First Amendment purposes. Mr. Small is entitled to qualified immunity with respect to his decision to initiate an investigation.

Conclusion

Summary judgment in favor of Defendants is appropriate because Plaintiff has not shown his First Amendment rights were violated when CVSD transferred him from being an assistant principal to being a certified teacher. Additionally, the individual Defendants are entitled to qualified immunity because it was not clearly established under the facts of this case that transferring Plaintiff to a teaching position could violate his First Amendment rights.

Accordingly, IT IS HEREBY ORDERED:

1. Defendants' Motion for Summary Judgment, ECF No. 71, is GRANTED.
2. Plaintiff's Motion for Summary Judgment, ECF No. 76, is DENIED.
3. Plaintiff's Motion to Supplement the Summary Judgment Record, ECF No. 99 and App. 52

Motion to Expedite, ECF No. 103, are DENIED, as moot.

4. All pending motions are terminated.

5. The Clerk of Court is directed to enter judgment in favor of Defendants and against Plaintiff.

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order, forward copies to counsel, and close the file.

DATED this 15th day of August 2024.

/s/ Stanley A. Bastian

Stanley A. Bastian
Chief United States District Judge