APPENDIX

TABLE OF APPENDICES

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APPENDIX A
OPINION AND JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of App
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 16, 2026

Christopher M. Wolpert
Clerk of Court

GREGORY MICHAEL MAJERSKY,

Plaintiff- Appellant,

(D.C. No. 1:23-CV-02956-SKC-KAS)

Defendant - Appellee.

No. 25-1102
DENVER PUBLIC SCHOOLS,(D. Colo.)

ORDER AND JUDGMENT'

Before HARTZ, Circuit Judge, LUCERO, Senior Circuit Judge, and PHILLIPS, Circuit Judge.

Gregory Majersky, proceeding pro se, appeals the district court's dismissal of his employment action. Exercising jurisdiction under 28 U.S.C. 1291, we affirm.

Background & Procedural History

Majersky filed his operative complaint in this case in December 2023, [1] making the following factual allegations and raising the following. He worked as a security

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal.

[1] Majersky filed several documents amending his initial complaint.

administrator in Denver Public School's ("DPS") technology services department. His former romantic partner, a woman named Rebecca Sposato, worked as a nurse at a DPS charter school. In 2018, Majersky accused Sposato of abusing their child,

E. M., but no criminal charges were filed against Sposato. Majersky informed DPS and the charter school of Sposato's abuse and continuously complained about her ongoing employment with DPS.

E.M. was involved in a bullying incident in 2023, after which Majersky complained to the school principal about the incident and Sposato's abuse. Majersky filed a complaint in February 2023 about Sposato's continued employment with the school because DPS did not act on the child abuse allegations. Through his position as a security administrator, Majersky then accessed the school principal's email address to see if the principal was attempting to retaliate against him after the bullying incident. Majersky then complained to the U.S. Secret Service about cybersecurity and other technological issues at DPS. [1] He shared his security concerns with other DPS employees, including the network administrator. In March 2023, DPS suspended Majersky's employment pending an investigation into allegations that he improperly accessed personnel email accounts, including those of his supervisor and the school principal. DPS terminated Majersky's employment after the investigation.

Based on these facts, Majersky raised the following claims in his operative complaint against his former employer, DPS: (l) Title VII gender discrimination;

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[1] Majersky made similar complaints about cybersecurity and data breaches in 2021 and 2022.

(2) Title VII retaliation; and (3) retaliation under the No FEAR Act. [2] Following a motion to dismiss from DPS, a magistrate judge recommended that Majersky's operative complaint be dismissed for failure to state a claim. First, it determined that Majersky failed to state a Title VII gender discrimination claim because he did not allege that DPS's general staffing practices were discriminatory; Sposato was not similarly situated to him because they had different positions, engaged in different conduct, and reported to different supervisors. Further, Majersky's complaint alleged that he was suspended and terminated because of his actions in accessing personnel emails, not for discriminatory reasons. Second, the magistrate judge determined that Majersky failed to sufficiently plead a Title VII retaliation claim because Majersky did not allege that DPS was aware that his complaints were in opposition to gender discrimination. Third, the magistrate judge determined that Majersky could not state a No FEAR Act claim because the statute did not create a private right of action and only applied to federal employees.

Majersky filed modified objections to the magistrate judge's recommendation. [3] He argued that he and Sposato were similarly situated because they both worked for DPS and were subject to the same ethics codes and rules of conduct. He argued that "the only discernable and significant difference between [them] is their gender." R. at 457. Majersky also stated that DPS had a history of discriminatory action, which was evidenced by previous lawsuits against it. As to the No FEAR Act claim, Majersky stated that the statute enabled a

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[2] Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, 5 U.S.C. 2301, Pub. L. No. 107-174, 116 Stat. 566.

[3] Majersky filed his initial objections without reading the magistrate judge's recommendation. Accordingly, the district court considered only the modified objections when reviewing the recommendation and Majersky's objections. We do the same.

cause of action "in the spirit of that law and that his duties were under the color of functions alongside and complimentary to federal law enforcement and national security agencies." Id. Majersky provided no legal argument or citations in his objections.

Majersky then filed several motions. These included several motions requesting permission to amend his complaint to add additional claims against DPS, a motion for default judgment, and a motion for summary judgment.

The district court adopted the recommendation over Majersky's objections and dismissed the Title VII claims without prejudice and the No FEAR Act claim with prejudice in March 2025. It noted that Majersky's only specific objections were to the recommendation on his gender discrimination claim and that his objection to the No FEAR Act claim amounted "to little more than a disagreement with the correctness" of the magistrate judge's analysis. Id. at 740. The court found that Sposato was not an appropriate comparator to establish a gender discrimination claim because she worked as a school nurse, under a different supervisor, and was not alleged to have engaged in the same type of conduct as Majersky. It then determined that, though Majersky was not permitted to add new amendments to his complaint through his objections, amendment would be futile because his proposed amendments

provided no details regarding the alleged discrimination and thus would not save his claim. The court dismissed all of Majersky's pending motions as moot.

Standard of Review

"We review the district court's grant of a Rule 12(b)(6) motion to dismiss de novo." Gaddy v. Corp. ofthe President ofthe Church ofJesus Christ ofLatter-

Day Saints, 148 F.4th 1202, 1209 (10th Cir. 2025). "At the Rule stage, we must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Id. at 1209—10 (internal quotation marks omitted).

We construe Majersky's pleadings liberally but do not serve as his advocate. Luo v. Wang, 71 F.4th 1289, 1291 n. 1 (10th Cir. 2023). And we have "repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir.
2005) (internal quotation marks omitted).

Waiver

This court has "adopted a firm waiver rule that provides that the failure to make timely objections to the magistrate judge's] findings or recommendations waives appellate review of both factual and legal questions." United States v. One Parcel ofReal Prop., 73 F.3d 1057, 1059 (10th Cir. 1996) (internal quotation marks omitted). We do not apply the rule "when (1) apro se litigant has not been informed of the time period for objecting and the consequences of failing to object, or when
(2) the interests of justice require review." Morales-Fernandez v. I.N.S., 418 F.3d

1 116, 1 1 19 (10th Cir. 2005) (internal quotation marks omitted). Neither exception applies here. Majersky was properly informed of the time for objecting and the consequences of failing to object, and this case does not present any extenuating circumstances that could potentially implicate the interests ofjustice.

While Majersky did object to the recommendation, his filed objections were general and insufficient to avoid application of the firm waiver rule. See One Parcel ofReal Property, 73 F.3d at 1060. We therefore apply the firm waiver rule to

Majersky's appellate challenges to the district court's decision regarding his Title VII retaliation claim and his No FEAR Act claim because he did not properly raise them before the district court in his objections. Majersky attempted to bring his No FEAR Act challenge in his objections to the recommendation. However, the district court found, and we agree, that this objection lacked specificity and amounted to a general disagreement with the magistrate judge. In any event, he has provided no authority that the No FEAR Act creates a private right of action. See United States v. Garcia, 946 F.3d 1191, 1210 n. 1 1 (10th Cir. 2020) (noting a "party who fails to develop or provide any authority in support of [an] argument [has] waived it" (internal quotation marks omitted)).

We also apply the firm waiver rule to two arguments Majersky presents on appeal but did not raise below regarding his Title VII gender discrimination claim:

(l) the recommendation improperly analyzed Majersky's Title VII gender discrimination claim under Title IX's legal framework; and (2) Majersky should not have been terminated because he had a property interest in his employment. We now turn to the one claim that is not precluded by the firm waiver rule.

Title VII Gender Discrimination

Majersky properly preserved the challenge to his Title V Il gender discrimination claim, and we will address that claim on its merits. [S] "Title VII forbids actions taken on the basis of sex that 'discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment.'"

Clark cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (quoting 42 U.S.C. S 2000e—2(a)(l)). To assert a prima facie case of gender discrimination in the workplace, a plaintiff must ordinarily show that "(l) the victim belongs to a protected class; (2) the victim suffered an adverse employment action; and (3) the challenged action took place under circumstances

giving rise to an inference of discrimination." E.E.O.C. v. PVNF, L.L.C., 487 F.3d 790, 800 (10th Cir. 2007).

Reviewing de novo, we agree with the district court that Majersky failed to plead facts showing that he was terminated based on his gender. Critically, Majersky himself admitted that he engaged in the behavior he was terminated for: he improperly accessed the emails of his supervisor and a school principal, was then

[5] The district court's decision included a reverse-discrimination analysis that has been rendered invalid by the Supreme Court's decision in Ames v. Ohio Dep 't of Youth Servs., 605 U.S. 303, 313 (2025). However, because Majersky still failed to plead facts to show that he was fired for reasons amounting to an inference of discrimination, we affirm. See Amro v. Boeing Co., 232 F.3d 790, 796 (10th Cir. 2000) (stating that we "may affirm the district court for any reason supported by the record").

suspended because of this, and was ultimately terminated because the email hacking amounted to a violation ofDPS policy. Majersky has acknowledged that his own actions were the basis for his termination. He offers no evidence that the circumstances under which he was terminated give rise to an inference of discrimination. See id.

The district court's denial of Majersky's motions as moot

Majersky's final argument on appeal is that the district court's denial of his pending motions for leave to amend, for default judgment, and for summary judgment as moot amounted to a violation of his due process rights. We review these denials for an abuse of discretion. Mengert v. United States, 120 F.4th 696, 717 (10th Cir. 2024) (denial of leave to amend); Ashby v. McKenna, 331 F.3d 1 148, 1 149 (10th Cir. 2003) (denial of motion for default judgment).

The district court did not abuse its discretion here. Majersky's complaint was subject to dismissal, he had already been permitted several opportunities to amend his complaint, and

his motions to amend did not conform to the district court's local rules. See D. Colo. LCivR. 15. I(a) ("A party other than an unrepresented prisoner who files an amended pleading under Fed. R. Civ. P. 15(a)(l) or with the consent of the opposing party shall . . . attach as an exhibit a copy of the amended pleading Foman v. Davis, 371 U.s. 178, 182 (1962) ("[T]he grant or denial of an opportunity to amend is within the discretion of the [d]istrict [c]ourt."). Further, default judgment was not applicable here, as DPS appeared before the district court. See Fed. R. Civ. P. 55(a t failure is shown by affidavit or otherwise, the clerk must enter the party's default."). The denial of Majersky's summary judgment motion vvas also appropriate because the motion was not ripe for adjudication. Additionally, Majersky has since filed a new district court action asserting constitutional claims and the claims he sought to add to this case. See Majersky v. Dew. Pub. Schools, Case No. 25-cv-00703-SKC-KAS. He cannot demonstrate that the district court abused its discretion, nor can he demonstrate that he was harmed by these denials. We reject this argument.

Conclusion

We affirm the district court's decision. We grant Majersky's motion to proceed without prepayment of costs or fees.

Entered for the Court

Gregory A. Phillips Circuit Judge

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

Civil Action No. 1:23.cv.02956-SKC-KAS

GREGORY MICHAEL MAJERSKY,

Plaintiff,

DENVER PUBLIC SCHOOLS,

Defendant.

ORDER

This case arises from Plaintiff Gregory Michael Majersky's allegations that Defendant Denver Public Schools discriminated and retaliated against him in violation of federal law. Dkt. 16. Plaintiff is a male who worked for Defendant as a security administrator in Defendant's department of technology services. Dkt. 28 at

2. Plaintiffs former romantic partner and the mother of his child, Rebecca Sposato, works as a nurse in the Downtown Denver Expeditionary School (DDES), which is one of Defendant's charter schools. Id.

In December 2018, Plaintiff accused Ms. Sposato of abusing their daughter at their home during breakfast. Id. at 3. Although the Denver police concluded Ms.

Sposato had assaulted the child, the district attorney declined to bring charges. Id.

Since that time, Plaintiff has repeatedly complained to DDES and its principal about Ms. Sposato and her continued employment. Id. In January 2023, Plaintiffs daughter was involved in a bullying incident. Id.

Plaintiff complained to the DDES principal about the incident and about Ms. Sposato. Id. On February 8, 2023, Plaintiff further complained about Ms. Sposato and her continued employment to Defendant's Human Resources Department. Id. at 3-4. After this, Plaintiff used his position as a security administrator to access the DDES principal's email and his supervisor's email to see if the principal was going to retaliate against him. Id. at 4.

In addition, starting in August 2021, Plaintiff sent several complaints to the "U.S. Secret Service" about Defendant's cybersecurity, data breaches, and Defendant's initiative to provide internet access to people experiencing homelessness. Id. He also complained to his colleagues about these issues. Id. at 3-4.

In early March 2023, Defendant suspended Plaintiff pending an investigation into allegations he improperly accessed email accounts belonging to the DDES principal and his supervisor. Id. at 4. Defendant terminated Plaintiffs employment on March 13, 2023, purportedly for violating its policies. Id. As a result of these allegations, Plaintiff initiated this case asserting three claims: (1) Title VII sex discrimination; (2) Title VII retaliation; and (3) retaliation in violation of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act). See Dkt. 16. Defendant filed a Motion to Dismiss seeking dismissal of all claims pursuant to Fed. R. Civ. P. 12(b)(6). Dkt. 20.

The Court referred the Motion to Magistrate Judge Kathryn A. Starnella, and on August 30, 2024, Judge Starnella issued her Recommendation that this case be dismissed in its entirety. Dkt. 28. On September 4, 2024, Plaintiff filed objections (Dkt. 32) but before Defendant had an opportunity to respond, Plaintiff filed modified objections (Dkt. 39) on September 10, 2024. Defendant responded to both sets of objections. Dkt. 41. The Court, however, only addresses Plaintiffs modified objections because, for reasons that are not entirely clear, Plaintiff drafted his initial objections without having read Judge Starnella's opinion. To be sure, all the objections in Plaintiffs first filing are directed at Defendant's arguments and actions and do not specify any purported errors in Judge Starnella's reasoning. See Dkt. 32. Thus, the Court considers Plaintiffs second filing to be his operative objections.

Having reviewed the Amended Complaint, Motion, Recommendation, and relevant briefing on these matters, the Court agrees with Judge Starnella's thorough and well-reasoned conclusion that Plaintiff has failed to articulate any claims for relief. Consequently, the Court AFFIRMS and ADOPTS the Recommendation.

LEGAL STANDARDS

1. Review of a Magistrate Judge's Recommendation

"'The filing of objections to a [magistrate judge's] report enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties' dispute,' and gives the district court an opportunity 'to correct any errors immediately.'" United States v. One Parcel of Real Property, 73 F.3d 1057, 1059 (10th Cir. 1996) (cleaned up; citations omitted). "[O]nly an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the [Magistrates] Act . . . ," including judicial efficiency. Id. at 1060.

"[A]lowing parties to litigate fully their case before the magistrate judge] and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act." Cole v. New Mexico, 58 F. App'x 825, 829 (10th Cir. 2003) (unpublished) (citation omitted).

The Court must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. S 636(b)(1)(C). "[A) party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." One Parcel, 73 F.3d at 1060; see also Fed. R. Civ. P. 72(b)(2). "Objections disputing the correctness of the magistrate judge's recommendation, but failing to specify the findings believed to be in error are too general" and may result in a waiver of the objections. Kazarinoff v. Wilson, No. 22-cv-02385-PAB-SKC, 2024 WL 98385, at *2 (D. Colo. Jan. 9, 2024) (quoting Stamtec, Inc. v. Anson, 296 F. App'x 518, 520 (6th Cir. 2008) (unpublished)). And "issues raised for the first time in objections to the magistrate judge's 5 recommendation are deemed waived." ClearOne Commc'ns, Inc. v. Biamp Sys., 653 F.3d 1163, 1185 (10th Cir. 2011) (cleaned up) (quoting Marshall v. Chater, 75 F.3d 1421, 1426-27 (10th Cir. 1996)). When no party files an objection, the district court may review a magistrate judge's recommendation under any standard it deems fit. See Summers v. Utah, 927 F.2d 1165, 1167 (10th Cir. 1991); see also Thomas v. Arn, 474 U.S. 140, 150 (1985). ("It does not appear that Congress intended to require district court review of a [magistrate judge's] factual or legal conclusions, under a de novo or any other standard, when neither party objects to those findings."). In the absence of specific or any objections, the district court reviews the recommendation to satisfy itself that

there is "no clear error on the face of the record." Fed. R. Civ. P. 72(b), 1983 Advisory Committee Notes. This standard of review is something less than a "clearly erroneous or contrary to law" standard, which in turn is less than a de novo review. See Fed. R. Civ. P. 72(a) and (b).

2. Treatment of a Pro Se Plaintiffs Pleadings

A pro se litigant's pleadings are construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 840 (10th Cir. 2005). But a pro se litigant must follow the same rules of procedure that govern other litigants, and the Court does not supply additional factual allegations to round out a complaint or construct legal theories on behalf of a pro se litigant. Smith v. United States, 561 F.3d 1090, 1096 (10th Cir. 2009). The Court may excuse a pro se plaintiffs failure to cite proper legal authority, confusion about various legal theories, poor syntax and sentence construction, or unfamiliarity with pleading requirements, but it does not act as the pro se plaintiffs advocate. see Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991).

ANALYSIS

Plaintiff makes specific objections challenging Judge Starnella's conclusions regarding his Title VII sex discrimination claim. See Dkt. 39. He does not make any objections to Judge Starnella's analysis or conclusions regarding his Title ul retaliation claim. And with respect to his claim under the No FEAR Act, Plaintiffs objection amounts to little more than a disagreement with the correctness of Judge Starnella's analysis, which is too general. As a result, Plaintiff has waived de novo review of these parts of the

Recommendation and the Court reviews them only for clear error. Thomas, 474 U.S. at 148-53.

Judge Starnella's Recommendation regarding Plaintiffs Title VII retaliation claim and his No FEAR Act claim is detailed and thorough and contains no clear error on the face of the record. It construes Plaintiffs claims liberally and correctly applies the controlling law. Consequently, the Court affirms and adopts this portion of Judge Starnella's analysis without further comment. [1]

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[1] Plaintiff also states Judge Starnella's use of the term "reverse sex discrimination" demonstrates bias. Dkt. 39 at 2. It does nothing of the sort. "Reverse sex discrimination" is the recognized and accepted legal terminology used to describe a claim of discrimination based on sex when, as here, the plaintiff is male. See e.g., McGarry v. Bd. of Cty. Comm'rs of Cty. of Pitkin, 175 F.3d 1193, 1199 (10th Cir. 1999). 7

Turning to the specific objections, Plaintiff first objects to the magistrate judge's conclusion that Plaintiff and Ms. Sposato are not similarly situated such that her more favorable treatment could constitute evidence of discrimination. Plaintiff argues that he and Ms. Sposato work for the same organization and are subject to the same ethics codes and rules of conduct. Dkt. 39 at 1. As Judge Starnella aptly discussed, however, the law requires more.

While a plaintiff may establish an inference of discrimination by demonstrating the employer treated the plaintiff differently than a similarly situated employee, the plaintiff must also establish the comparator "shares the same supervisor, is subject to the same standards governing performance evaluation and discipline, and has similar relevant

employment circumstances, such as work history." Throupe v. Univ. of Denver, 988 F.3d 1243, 1252 (10th Cir. 2021). Here, Ms. Sposato worked as a school nurse under a different supervisor and is not alleged to have engaged in the same type of conduct as Plaintiff. Thus, Judge Starnella correctly concluded Ms. Sposato is not an appropriate comparator for purposes of establishing a Title VII sex discrimination claim. Plaintiffs objection is overruled.

In his second objection, Plaintiff seemingly concedes Judge Starnella's conclusion that he failed to sufficiently allege background circumstances showing Defendant discriminates against the majority. Instead of challenging this finding, he attempts to amend his pleadings with a number of civil rights complaints filed against Defendant. These efforts are unavailing. First, Plaintiff may not amend his 8 pleadings in such a manner. See Hayes v. %'hitman, 264 F.3d 1017, 1025 (10th Cir. 2001) ("[A] court may not consider allegations or theories [in a response briefl that are inconsistent with those pleaded in the complaint."). And even if he could, these new allegations would not salvage Plaintiffs claim because there are no underlying details regarding the purported incidents of discrimination. To be sure, Plaintiff admits he does not know which, if any, of these cases involve allegations of sex discrimination. Dkt. 39 at 3. Thus, the Court overrules this objection.

For the reasons shared above, the Court OVERRULES Plaintiffs objections to the Recommendation. The Court AFFIRMS and ADOPTS Magistrate Judge Kathryn A. Starnella's Recommendation and ORDERS:

1. Defendant's Motion to Dismiss (Dkt. 20) is GRANTED.
2. Plaintiffs Title VII claims are dismissed without prejudice for failure to state a claim.

3. Plaintiffs claim pursuant to the No FEAR Act is dismissed with prejudice because there is no private cause of action under the statute.
4. The Clerk of the Court shall enter judgment for Defendant on Plaintiffs claims and shall terminate this action.
5. Defendant shall be entitled to an award of costs.

DATED: March 17, 2025.

BY THE COURT:

S. Kato Crews
United States District Judge

APPENDIX C

RECOMMENDATION OF

UNITED STATES MAGISTRATE JUDGE

KATHRYN A. STARNELLA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 23-cv-02956-SKC-KAS

GREGORY MICHAEL MAJERSKY,

Plaintiff,

v.

DENVER PUBLIC SCHOOLS,

Defendant.

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ENTERED BY MAGISTRATE JUDGE KATHRYN A. STARNELLA

This matter is before the Court on Defendant's Motion to Dismiss Employment Discrimination Complaint [#201 [1] (the "Motion"). Plaintiff filed a Response [#26] in opposition to the Motion [#20], and Defendant filed a Reply [#27]. The Motion [#20] has been referred to the undersigned for a Recommendation pursuant to 28 U.S.C. S

1)(BFed. R. P. and D.C.COLO.LCivR 72.1(c)(3). See [#25]. The Court has reviewed the briefs, the entire case file, and the applicable law. For the reasons stated below, the Court RECOMMENDS that the Motion [#20] be GRANTED.

[1] "[#20]" is an example of the convention the Court uses to identify the docket number assigned to a specific paper by the Court's case management and electronic case filing system (CM/ECF). This convention is used throughout this Recommendation.

I. Background [2]

Plaintiff proceeds in this matter as a pro se litigant. [1] According to the Second Amended Complaint [#1 61, [2] Plaintiff is a male who began working for Defendant Denver Public Schools on October 8, 2018, as a security administrator in Defendant's department of technology services. Colo. Civil Rights Compl. Against DPS ("CCR Complaint") [#161] at 1. Plaintiffs former romantic partner, Rebecca Sposato ("Sposato"), is a female who works as a nurse at the Downtown Denver

[1] The Court must construe liberally the filings of a pro se litigant. See Haines v. Kerner, 404 U.S. 519, 520-521 (1972). In doing so, the Court should not be the pro se litigant's advocate, nor should the Court "supply additional factual allegations to round out a plaintiffs complaint or construct a legal theory on a plaintiffs behalf." Whitney v. New Mexico, 113 F.3d 1170, 1175 (10th Cir. 1997) (citing Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991)). Further, pro se litigants are subject to the same procedural rules that govern other litigants. Nielsen v. Price, 17 F.3d 1276, 1277 (10th Cir. 1994).

[2] In the Second Amended Complaint [#161, Plaintiff incorporates the exhibits attached to a prior complaint. See [#16] at 3; [#8-1] through [#8-21). D.C.COLO.LCivR 15.1 (b) states, "[ulnless otherwise ordered," proposed amended or supplemental pleadings "shall not incorporate by reference any part of the preceding pleading, including exhibits." (emphasis added). Despite his pro se status, Plaintiff is required to follow the same procedural rules as parties represented by counsel. Sears v. Jefferson cnty. Det. ctr., No. 20-cv-02293-RM-NYW, 2020 WL 4582721, at (D. Colo. Aug. 10, 2020). In this instance, however, the Court has considered the exhibits incorporated by reference in, as well as the documents attached to, the Second Amended Complaint [#161. Commonwealth Prop. Advocs., LLC v. Mortg. Elec. Registration Sys., Inc., 680 F.3d 1194, 1201 (10th Cir. 2011) ("in evaluating a motion to dismiss, [the courtl may consider not only the complaint, but also the attached exhibits and documents incorporated into the complaint by reference.).

Expeditionary School ("DDES"), which is a charter school of Defendant. Statement of Injury and Evidence [#8-11 at 2; CCR Compl.

[2] To resolve the Motion [#201, the Court accepts as true all well-pleaded, as opposed to conclusory, allegations made in Plaintiffs Second Amended Complaint [#161. See Shero v. City of Grove, Okla., 510 F.3d 1196, 1200 (10th Cir. 2007) (citing Bell Atl. corp. v. Twombly, 550 U.S. 544, 570 (2007)). However, to the extent that Plaintiff provides additional allegations or possible new claims in his briefs, the Court notes that a party may not amend his complaint in motion briefing. See, e.g., Kan. Motorcycle Works USA, LLC v. McCloud, 569 F. Supp. 3d 1112, 1127 (D. Kan. 2021) (stating that "a party may not amend its complaint by way of arguments in a brief'); Wilson v. Johnson, No. 19-cv-2279-CMA-NRN, 2020 WL 5815915, at *5 (D. Colo. sept. 30, 2020) (stating that it is '%uell established that Plaintiff may not amend his Complaint by adding factual allegations in response to Defendants' Motion to Dismiss").

[#16-1] at 1. Plaintiff and Ms. Sposato have a daughter, E.M., who is a student at DDES. CCR Complaint [#16-1] at 1.

In December 2018, Plaintiff accused Ms. Sposato of abusing E.M. at their home during breakfast. Statement of Injury and Evidence [#8-1] at 1 ; Abuse Report DPD [#8-2] at 1 1 . An investigation by the Denver Police Department concluded that

Ms. Sposato had assaulted E.M., but the Denver District Attorney declined to file charges against her due to the lack of a likelihood of conviction. Abuse Report DPD [#8-21 at 3, 9. Since that time, Plaintiff has repeatedly complained to DDES and its principal about Ms. Sposato and her continued employment. Statement of Injury and Evidence [#8-1] at 1-2; CCR Comp]. [#16ll at 1-2.

In August 2021, October 2021, and February 2022, Plaintiff complained to the "U.S. Secret Service" about Defendant's cybersecurity and data breaches. See Statement of Injury and Evidence [#8-1]; Email to Secret Service 1 [#8-1 1]; Email to Secret Service 2 [#8-12); Email to Secret Service 3 [#8-13]. He also complained to his colleagues about these issues. Id. One specific issue he complained about to his colleagues was "Chromebook security," which he asserted demonstrated a "lack of concern" by the Manager of the Device Management Team. Statement of Injury and Evidence [#8-1 | at 2; Fear of Chromebook Incompetence [#8-14] at 1 .

In January 2023, E.M. was involved in a bullying incident. Statement of Injury and Evidence [#8-1] at 1-2; CCR Compl. [#16-1] at 1. Plaintiff complained to the principal of DDES about the incident and about Ms. Sposato, in part accusing DDES of ignoring the safety of female students and promoting a "boys will be boys" culture. Statement of Injury and Evidence [#8-1] at 1-2; CCR Compl. at 1. On February 8, 2023, he further

complained to Defendant's Human Resources Department about Ms. Sposato's employment, specifically asserting that Defendant was aware of the child abuse allegations against Ms. Sposato but had done nothing about them. Email to DPS about Rebecca [#8-191. After his February 8, 2023 complaint, Plaintiff used his position as a security administrator to "access[ ) the DDES principal's email and [his]

supervisor's email to check if the principal was attempting to retaliate against [him]" because he was upset about the bullying incident. CCR Compl. [#16-1] at 1.

On February 17, 2023, Plaintiff complained to the "U.S. Secret Service" about "very serious lapses in judgment regarding IT and IOT [sic] security that does not just affect [Defendant] but also the Xcel Energy power grid," among other alleged IT issues. Statement of Injuty and Evidence [#8-11 at 2; Email to Secret Service 1 [#8-111 at 1. On the same date, he also expressed concern to other employees of Defendant, particularly the Network Administrator, about some of his IT security concerns. Email to Secret Service 1 [#8-1 11 at 2-4. Plaintiff further complained about Defendant's initiative that would provide wireless access to homeless people, which Plaintiff opposed. Statement of Injury and Evidence [#8-1] at 3; Possible Whistleblowing Event [#8-201. In early March 2023, Defendant suspended Plaintiff pending an investigation into allegations that he improperly accessed the email accounts of the DDES principal and his supervisor. CCR Compla [#16-1]; LOD and Right to Sue Letter [#16-2]. On March 13, 2023, Defendant terminated Plaintiffs employment, purportedly for violating its policies. Id.

As a result of these allegations, Plaintiff asserts three claims: (1) Title Vll sex discrimination; (2) Title Vl! retaliation; and (3) retaliation in violation of the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002, Public Law 107-174,

also known as the No FEAR Act. See [#16] at 2-3. In the present Motion [#20], Defendant seeks dismissal of alf claims for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

Il. Standard of Review

Fed. R. Civ. P. 12(b)(6) permits dismissal of a claim where the plaintiff has "fail[ed] to state a claim upon which relief can be granted." The Rule 12(b)(6) standard tests "the

sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." Mobley v. McCormick, 40 F.3d 337, 340 (10th Cir. 1994). "A complaint must contain 'enough facts to state a claim for relief that is plausible on its face."' Santa Fe All. for Pub. Health & safety v. City of Santa Fe, 993 F.3d 802, 81 1 (10th Cir. 2021) (quoting Bell Al. corp. v. Twombly, 550 U.S. 544, 570 (2007)). "men the complaint includes 'well-pleaded allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."' Carraway v.

state Farm Fire & cas. co., No. 22-1370, 2023 WL 5374393, at *4 (10th Cir. Aug. 22, 2023) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

'%A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not dot,) . . . [n]or does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." Iqbal, 556 U.S. at 678 (internal quotation marks omitted). "[D]ismissal under Rule 12(b)(6) is appropriate if the complaint alone is legally insufficient to state a claim." Brokers' Choice ofAm., Inc. v. NBC Universal, Inc., 861 F.3d 1081, 1104-05 (10th Cir. 2017). "The court's function on a Rule 12(b)(6)motion is not to weigh potential evidence that the parties might present at trial[.]" Sutton

v. Utah state Sch. For the Deaf& Blind, 173 F.3d 1226, 1236 (10th Cir. 1999).

III. Analysis

A. TitleVII

Plaintiff claims that Defendant violated Title Vll by (1) discriminating against him because of his sex; and (2) impermissibly retaliating against him. Second Am. Compl. [#16] at 2-3. It is "an unlawful employment practice for an employer . . . to discharge any individual because of such individual's race, color, religion* sex, or national origin[.]'

42 U.S.C. S 2000e-2(a)(1). When considering whether a plaintiff has plausibly alleged a

Title VII disparate treatment claim, a court considers the allegations within the context of the claim's elements; a court's plausibility determination does not require a plaintiff to establish a prima facie case. Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1050 (10th Cir. 2020) (citing Khalik v. United Air Lines, 671 F.3d 1 188, 1192 (10th Cir. 2012) ("While the 12(b)(6) standard does not require that [a p]laintiff establish a prima facie case in her complaint, the elements of [the) alleged cause of action help to determine whether [a p]laintiff has set forth a plausible claim.")); see also Swierkiewicz v. Sorema N.A., 534 U.S. 506* 515 (2002) (holding that "an employment discrimination plaintiff need not plead a prima facie case of discrimination" to survive a motion to dismiss).

1.Sex Discrimination

Defendant argues that Plaintiffs Title VII sex discrimination claim should be dismissed because: (1) Plaintiff "has not presented evidence that the [Defendant] is an unusual employer that discriminates against males," and (2) Plaintiff "has not presented evidence that he was terminated under circumstances giving rise to an inference of discrimination. "5 Motion [#20] at 5-7.

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[5] Defendant's arguments that Plaintiff "has not presented evidence" misstates the legal standard under which Plaintiffs claims must be evaluated on a Rule 12(b)(6) motion to dismiss. Cf

The Court's critical consideration in Title VII discrimination cases "is whether the plaintiff has demonstrated that the adverse employment action occurred 'under circumstances which give rise to an inference of unlawful discrimination."' Plotke v. White, 405 F.3d 1092, 1100 (10th Cir. 2005) (quoting Kendrick v. Penske Transp. Senzs., Inc., 220 F.3d 1220, 1227 (10th Cir. 2000)). Ordinarily, the elements of a Title VII discrimination claim require a plaintiff to show "that (1) the plaintiff belongs to some protected class, (2)

the plaintiff was qualified for the position or benefit at issue, (3) the plaintiff suffered an adverse employment action, and (4) the plaintiff was treated less favorably than others[.]" Exum v. US. Olympic Comm., 389 F.3d 1130, 1134 (10th Cir. 2004) (citing Kendrick, 220
F.3d at 1220).

Reverse discrimination cases, however, require something more. Argo v. Blue Cross Blue Shield ofKan., Inc., 452 F.3d 1 193, 1201 (10th Cir. 2006). "[Al plaintiff alleging reverse discrimination 'must, in lieu of showing that he belongs to a protected group, establish background circumstances that support an inference that the defendant is one of those unusual employers who discriminates against the majority."' Id. (quoting Notari
v. Denver Water Dep't, 971 F.2d 585, 589 (10th Cir. 1992)). Alternatively, a plaintiff may demonstrate "a reasonable inference that but for [the] plaintiffs status the challenged decision would not have occurred." Notari, 971 F.2d at 590.

Swierkiewicz, 534 U.S. at 515 (noting that the Supreme Court "has never indicated that the requirements for establishing a prima facie case under McDonnell Douglas also apply to the pleading standard"). Plaintiff need not present any evidence at this stage of the proceeding. As noted above, the Rule 12(b)(6) standard tests "the sufficiency of the allegations within the four corners of the complaint after taking those allegations as true." Mobley, 40 F.3d at 340. The Court cannot consider "evidence" outside of the complaint and its attached exhibits when adjudicating a Rule 12(b)(6) unless special circumstances, not implicated here, exist. See Sutton, 173 F.3d at 1236. Nevertheless, the Court has construed Defendant's statements as arguing that Plaintiff has not presented allegations sufficient to support his claims.

Plaintiff alleges that Defendant "openly engages in using gender as a sole basis to determine who is terminated from their position, regardless of the type and severity of the offense committed[.]" Second. Am. Compl. [#16] at In support of the alleged gender discrimination, Plaintiff points to Defendant's treatment of Ms. Sposato, the mother of Plaintiffs daughter. Id.; CCR Compl. [#16-1]. Plaintiff alleges that despite being charged with child abuse for the assault of their daughter, Defendant "never disciplined or discharged [Ms. Sposato], despite the greater severity of her actions." CCR Compl. [#16Il; see also

Second Am. Compl. [#16] at 3 ("CMS. Sposatol kept her job and had no disciplinary action taken against her").

Plaintiff only points to how one other individual was treated and does not make any allegations about Defendant's staffing practices generally, such as Defendant's "workforce composition, hiring practices, or treatment of men more generally." Lewick v. Sampler Stores, Inc., No. 21-1251-DDC-ADM} 2022 WL 2966319, at (D. Kan. July 27, 2022). Thus, Plaintiff has failed to sufficiently allege background circumstances showing that Defendant discriminates against the majority. See id. (stating that, "[i]n cases where courts have held that a plaintiff adequately had alleged 'background circumstances,' the allegations were supported by facts apprising the court of the employer's staffing practices generally") (citing Reynolds v. Sch. Dist. No, 1, 69 F.3d 1523, 1535 (10th Cir. 1995); Perez v. Unified Govt. No. 10-CV-2107-JAR/GLR, 201 1 WL 2038689, at *6 (D. Kan. May 25, 2011)).

Similarly, other than the treatment of Ms. Sposato, Plaintiff has not provided any allegations to support a reasonable probability that, but for his status as a mate, he would not have been terminated. See Second Am. Compl. [#161; CCR Compl. [#16-1]. Plaintiff appears to assert that Ms. Sposato was a similarly situated female employee who was treated more favorably. See id. However, the Court disagrees with this assertion because Plaintiff and Ms. Sposato had different positions and engaged in different conduct* and

Plaintiff does not allege that they reported to the same supervisor. See id.; see also E.E.O. C. v. PVNF, LLC, 487 F.3d 790, 801 (10th Cir. 2007) (stating that "[i]ndividuals are considered 'similarly-situated' when they deal with the same supervisor, are subjected to the same standards governing performance evaluation and discipline,

and have engaged in conduct of 'comparable seriousness'") (citing McGowan v. City of Eufala, 472 F.3d 736, 745 (10th Cir. 2006)). Further, Plaintiff alleges that (1) he improperly accessed the emails of his supervisor and the DDES principal, (2) he was "suspended pending an investigation into [his] actions[,]" and (3) he was terminated because of his violation of Defendant's policies. See CCR Compl. [#16-11 at 1-2. Therefore, Plaintiff has failed to adequately allege that, but for his status as a mate, he would not have been terminated.

Accordingly, the Court finds that Plaintiff has failed to plausibly allege a reverse sex discrimination claim and recommends that Plaintiffs Title VII sex discrimination claim be dismissed without prejudice. See, e.g., Knight v. Mooring Cap. Fund, LLC, 749 F.3d 1 180, 1190 (10th Cir. 2014) (stating that "pro se parties generally should be given leave to amend").

2. Retaliation

Defendant argues that Plaintiffs Title VII retaliation claim should be dismissed because Plaintiff "has not pled facts sufficient to support a prima facie case of retaliation."
Motion [#20) at 7-10.

In addition to forbidding discrimination, Title VII "forbids employers from retaliating against employees for opposing any activity that is unlawful under Title VII." Fassbender v. Correct Care sols, LLC, 890 F.3d 875, 890 (10th Cir. 2018) (citing 42 U.S.C. S 2003e3(a)). A Title VII retaliation claim consists of three elements: "(1) that [the plaintif0 engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between

the protected activity and the materially adverse action." Argo, 452 F.3d at 1202 (internal citations omitted). Further, "these requirements do not change when a plaintiffs underlying opposition is to reverse discrimination—for example, discrimination against men as a class. Title VII makes reverse discrimination unlawful, and employers have no more freedom to retaliate against those who oppose reverse discrimination than any other form of discrimination." Id. However, the absence of a reference to unlawful discrimination in an employee's protected opposition "can preclude a retaliation claim because an employer cannot engage in unlawful retaliation if it does not know that the employee has opposed or is opposing a violation of Title VII." Petersen v. Utah Dep't of Com, 301 F.3d 1182, 1188 (10th Cir. 2002). This is because "[a]n employer's action against an employee cannot be because of that employee's protected opposition unless the employer knows the employee has engaged in protected opposition." Id. (emphasis in original) (citations omitted). Therefore, if Defendant did not know that Plaintiffs complaints were based on an opposition to sex discrimination, which would mean that Defendant did not know Plaintiff was engaging in protected opposition, Plaintiffs retaliation claim is precluded.

Here, Plaintiff alleges that "Defendant engaged in retaliatory termination of employment of Plaintiff based solely on hearsay[.]" Second Am. Compl. [#161 at 3. In the Response [#26], Plaintiff clarifies that he is asserting that Defendant terminated him in retaliation for complaining 'Sin the course of conducting the responsibilities of his position," "citing the failure to terminate[ ] Sposato," and "using his First Amendment rights and parental rights regarding the assault on his daughter at DDES[.]" Response [#26] at 6.

However, Plaintiffs complaints to Defendant about Ms. Sposato, the bullying incident involving his daughter, and his IT concerns contain no mention that he was opposing sex discrimination, or any other form of discrimination prohibited by Title VII.

See, e.g. DDES CORA Response [#8-81 at 2-4; Fear of Chromebook Incompetence [#814]; Email Instructing No Response to DPS Data Theft [#8-17]; Email to DPS about Rebecca [#8-191. Plaintiff ultimately filed a complaint of discrimination with the Colorado Civil Rights Division and EEOC. See CCR Compl. [#16-1]. However, this complaint was filed on May 16, 2023, which is after the asserted retaliation, i.e., his termination, occurred on March 13, 2023. See id. The Court thus finds that Plaintiff has failed to sufficiently allege that Defendant was aware that his complaints were in opposition to sex discrimination. Because Plaintiff has not alleged that Defendant knew he was engaging in protected opposition, the Court finds that Plaintiff has not plausibly alleged Title VII retaliation. Accordingly, the Court recommends that Plaintiffs Title VII retaliation claim be dismissed without prejudice. See, e.g., Knight, 749 F.3d at 1190.

B. No FEAR Act

Plaintiff also asserts a claim under the No FEAR Act. Second Am. Compl. [#16] at 2-3. Defendant argues that Plaintiffs No FEAR Act claim should be dismissed for failure to state a claim because the statute "does not create a private right of action and in any event only applies to federal employees." Motion [#20] at 10-11.

The No FEAR Act requires that "Federal agencies be accountable for violations of antidiscrimination and whistleblower protection . [and] that each Federal agency post quarterly on its public Web site, certain statistical data relating to Federal sector equal employment opportunity complaints filed with such agency[.l" Pub. L. No. 107-

174, 116 Stat. 566 (2002). However, the No FEAR Act does not "create a private cause of action or substantive rights for litigants to pursue damages against the federal government, its officers, or employees." Ash v. Buttigieg, No. CIV-22-371-R, 2022 WL

17225732, at *3 (W.D. Okla. Oct. 24, 2022) (emphasis added), afd, No. 22-6195, 2023 WL 6293823 (10th sept. 27, 2023), cen. denied, No. 23-7018, 2024 WL 2805790 (U.s. June 3, 2024) (citing Glaude v. United States, 248 F. App'x 175, 177 (Fed. Cir. 2007); Mallard v. Brennan, No. 1:14-CV-00342-JAW, 2015 WL 2092545, at *9 (D. Me. May 5, 2015)).

Because the No Fear Act provides no private cause of action, Plaintiff does not have a cause of action under the statute. Accordingly, the Court recommends that Plaintiffs No FEAR Act claim be dismissed with prejudice. See, e.g., Sema v. Denver Police Dep't, 58 F.4th 1167, 1172 (10th Cir. 2023) (holding that dismissal with prejudice was appropriate because "an amendment . . . would not change the fact that the statute does not grant [the plaintiff] a private cause of action").

IV. Conclusion

Based on the foregoing,

IT IS HEREBY RECOMMENDED that the Motion [#20] be GRANTED, and that Plaintiffs Title VII claims be DISMISSED without prejudice and his No Fear Act claim be DISMISSED with prejudice.

IT IS FURTHER ORDERED that any party may file objections within 14 days of service of this Recommendation. In relevant part, Fed. R. Civ. P. 72(b)(2) provides that, "within 14 days after being served with a copy of the recommended disposition, a party may serve and file specific written objections to the proposed findings and recommendations. A party may

respond to another party's objections within 14 days after being served with a copy." party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review." United States v. 2121 E. 30th St., 73 F.3d 1057, 1060 (10th Cir. 1996). The objection must be "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute." Id. "[Al party who fails to make a timely objection to the magistrate judge's findings and recommendations waives appellate review of both factual and legal questions." MoralesFernandez v. I-N.S., 418 F.3d 1116, 1119 (10th Cir. 2005).

Dated: August 30, 2024

BY THE COURT:

Kathryn A. Starnella
United States Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
DENIAL OF PETITION FOR REHEARING

FILED
United States Court of Ap
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 27, 2026

Christopher M. Wolpe

Clerk of Court

GREGORY MICHAEL MAJERSKY,

Plaintiff - Appellant,

v. No. 25-1102
(D.C. No. 1:23-CV-02956-SKC-KAS)
DENVER PUBLIC SCHOOLS, (D. Colo.)

Defendant - Appellee.

ORDER

Before **HARTZ**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **PHILLIPS**, Circuit Judge.

Appellant's petition for rehearing is denied.

Entered for the Court

Per Curiam

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