DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street Denver, CO 80202	DATE FILED January 17, 2025 5:30 PM FILING ID: 8DDFDD015B8BC CASE NUMBER: 2024CV33593
TRAVIS WEINER, Plaintiff, v. COLORADO OFFICE OF THE STATE PUBLIC DEFENDER; MEGAN RING in her individual and official capacities; and MICHELE NEWELL, in her individual and official capacities. Defendants.	**▲ COURT USE ONLY ▲**
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DEFENDANTS' MOTION TO DISMISS	

Defendant, the Office of the State Public Defender ("OSPD"), through undersigned counsel, hereby moves to dismiss Plaintiff's First Claim for Relief under the State Employee Protection Act under C.R.C.P. 12(b)(1), and moves this Court to set the claim for a *Trinity* hearing, allowing reasonable but limited discovery related to whether Plaintiff can establish subject matter jurisdiction. Defendants Megan Ring and Michele Newell, hereby move to

dismiss Plaintiff's Second Claim for Relief under C.R.C.P. 12(b)(1) and C.R.C.P. 12(b)(5).

RULE 121 CONFERRAL: Undersigned counsel certifies that, per C.R.C.P. 121, § 1-15(8), they have conferred with counsel for Plaintiff, who opposes the relief requested in this Motion.

INTRODUCTION

Plaintiff, Travis Weiner, brings suit against OSPD under the State Employee Protection Act, § 24-50.5-101 et seq., C.R.S. (2024) ("the Whistleblower Act" or "the Act"), and against the Colorado State Public Defender Megan Ring and Deputy Public Defender Michele Newell for alleged violations of Article II, Section 10 of the Colorado Constitution. Plaintiff contends the Whistleblower Act and the Colorado Constitution protected his various communications to the courts. Plaintiff's employment was terminated after filing motions to withdraw from representation of clients on three separate occasions in disregard of state statute and in willful violation of OSPD policies and explicit directives from his supervisors. For the reasons stated herein, Plaintiff's claims must be dismissed.

BACKGROUND AND RELEVANT ALLEGATIONS

Plaintiff worked as a public defender in the Greeley, Colorado office of OSPD. Compl., ¶ 4. In his Complaint, Plaintiff alleges he "aired concerns" regarding the alleged OSPD "workload crises" to his supervisors in "multiple all-office meetings" in 2023. Plaintiff says he told his supervisors and colleagues "they had a legal obligation to address the workload crisis and its effects." *Id.* at ¶ 33. Plaintiff says he also shared his concern "that he was bound to eventually violate a client's right to counsel." *Id.* at ¶ 34. Plaintiff alleges he also met with Ms. Newell in September 2023 and who allegedly informed him the office's "triage strategies" to address workload did not violate the law, but Plaintiff disagreed. *Id.* at ¶¶ 34-35.

On December 23, 2023, and again on January 2, 2024, Plaintiff filed motions seeking to withdraw from two of his client's cases "due to the effects of his excessive workload." *Id.* at ¶ 38. Plaintiff filed his motions to withdraw from representation of his clients despite knowing supervisors must approve such motions. *Id.* at ¶ 37. Plaintiff's signature block in the motions identified him as a "Deputy State Public Defender" and his signature appears below Ms. Ring's name, also identified in the filing in her role as "Colorado State Public Defender." Ex. A p. 31; Ex. B, p. 32.[1] Plaintiff concedes that his motions to withdraw from representation were contrary to a statute providing that "[c]ase overload, lack of resources, and other similar circumstances shall not constitute a 'conflict of interest' warranting the appointment of alternate defense counsel." Compl., ¶ 45 (citing § 21-2-103(1.5)(c), C.R.S. (2024) ("the conflict statute")). Remarkably, Plaintiff asked the court to declare the conflict statute unconstitutional. *Id.* at ¶ 45.

Plaintiff alleges that in these and the third motion to withdraw, discussed further below, he made disclosures and/or spoke on matters of public concern including matters related to OSPD's supposed mismanagement of the alleged public defender workload crisis and a 2024 cyberattack against OSPD. *Id*. at ¶ 94. Plaintiff contends he also disclosed alleged "abuses of authority by Newell, Ring, and other OSPD supervisors," by stating his "workload was between 2.5 and 3 times what experts" conclude one attorney could competently handle and that he was "at risk of providing constitutionally inadequate representation." *Id.* at ¶ 94.

When OSPD learned of the two initial motions to withdraw from representation, Ms.

[1] "Documents referred to in the complaint and central to a plaintiff's claim may be considered by a court on a motion to dismiss without converting the motion to dismiss into a motion for summary judgment, notwithstanding that the documents are not formally incorporated by reference or attached to the complaint." *Titan Indem. Co. v. Travelers Prop. Cas. Co. of Am.,* 181 P.3d 303, 306 (Colo. App. 2007) (citing *Yadon v. Lowry,* 126 P.3d 332, 336 (Colo. App. 2005)).

Newell worked quickly to ensure Plaintiff's clients maintained representation. When Ms. Newell learned of Plaintiff's first motion to withdraw filed on December 23, 2023, she "emailed OSPD's court administrator and asked that the case be immediately transferred to her." *Id.* at ¶ 48. Ms. Newell "then moved to have Weiner's motion withdrawn," which the court granted. *Id.* When Ms. Newell learned of Plaintiff's second motion to withdraw filed on January 2, 2024, she "filed a notice in which she informed the court that Weiner's motion was unauthorized." *Id.* at ¶ 49. Ms. Newell then had to transfer the case to another Deputy State Public Defender. *Id.*

As a result of Plaintiff's two motions to withdraw, on January 12, 2024, Ms. Newell issued a Corrective Action to Plaintiff to address his violation of policy and willful disregard of Ms. Newell's instructions. *Id.* at ¶¶ 53-54. The Corrective Action prohibited Plaintiff from moving to withdraw from another client's case without supervisor approval and required Plaintiff to obtain approval before asking the court to declare the conflict statute unconstitutional. *Id.*

Plaintiff made his third motion to withdraw on February 21, 2024, during an appearance in court as a Deputy State Public Defender. *Id.* at ¶ 79. Plaintiff says he requested a special hearing "to address his concerns that the effects of the cyberattack created an impermissible conflict of interest between [Plaintiff] and some of his clients." *Id.* at ¶ 79. Plaintiff says by requesting the hearing, he did not disobey Ms. Newell's directive to not withdraw from representation of his clients. *Id.* at ¶ 81. Plaintiff says he then informed Ms. Newell by email of "his plan and of the upcoming hearing date." *Id.* at ¶ 82. However, as far as Ms. Newell knew, Plaintiff had, in fact, moved to withdraw from another case. Plaintiff informed Ms. Newell of the hearing set "to address *my oral motion to the court (made this morning) to withdraw from these*

cases . . . ." Ex. C[2] (emphasis added). Unlike his first two motions, Plaintiff does not assert he complained to the court of a "workload crisis" or the alleged illegality of "triaging" to address workload, nor does his email suggest he made any similar communications. Compl., ¶¶ 73-82; Ex. C. After the third motion to withdraw, Plaintiff was placed on administrative leave and on February 26, 2024, his employment with OSPD was terminated. Compl., ¶¶ 83, 87.

STANDARD OF REVIEW

A court must dismiss a complaint under C.R.C.P. 12(b)(1) when it lacks jurisdiction over the subject matter. *City of Boulder v. Pub. Serv. Co.*, 996 P.2d 198, 203 (Colo. App. 1999). Courts treat motions to dismiss based on the Colorado Governmental Immunity Act ("CGIA") as a motion to dismiss under Rule 12(b)(1). *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). The plaintiff bears the burden of proving jurisdiction. *Id.* at 930. Whether a claim falls within a CGIA waiver of sovereign immunity is a question of subject matter jurisdiction addressed under C.R.C.P. 12(b)(1). *Ferrel v. Colorado Dep't of Corr.,* 179 P.3d 178, 183 (Colo. App. 2007). The trial court, not the jury, resolves any factual disputes upon which the existence of jurisdiction may turn. *Id.* The trial court may properly determine subject matter jurisdiction over a Whistleblower claim at a *Trinity* hearing. *Id.; see also Tidwell v. City & Cnty. of Denver*, 83 P.3d 75, 86 (Colo. 2003) (when jurisdictional facts are disputed, the trial court should conduct an evidentiary hearing and enter findings of fact).

On a Rule 12(b)(5) motion, the Court accepts all factual allegations in the complaint as true, viewing them in the light most favorable to Plaintiff. However, the court need not accept legal conclusions, or mere conclusory factual allegations, as true. *Denver Post Corp. v. Ritter*,

[2] *See* FN 1.

255 P.3d 1083, 1088 (Colo. 2011). The facts alleged must plausibly state a claim: "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall*, 373 P.3d 588, 589 (Colo. 2016).

ARGUMENT

I. The CGIA bars Plaintiff's claims.

A. The CGIA bars Plaintiff's first claim for relief because Plaintiff cannot establish a violation of the Whistleblower Act.

The CGIA bars Plaintiff's first claim brought pursuant to the Whistleblower Act and against OSPD. In *Ferrel,* 179 P.3d at 183, the Colorado Court of Appeals held the CGIA, §§ 24-10-101 to -120, C.R.S. (2024), applies to Whistleblower Act claims. The CGIA implicates this Court's subject-matter jurisdiction, which must be determined under C.R.C.P. 12(b)(1) prior to trial. *Medina v. State*, 35 P.3d 443, 453 (Colo. 2001); *Trinity*, 848 P.2d at 924-25.

In order to invoke this Court's jurisdiction via the Whistleblower Act, Plaintiff must prove by a preponderance of the evidence: (1) he made an oral or written disclosure of information as defined by the Act; (2) he made a good faith effort to provide notification to his supervisor, appointing authority, or member of the general assembly about the disclosure of information, as required by the Act; (3) he received disciplinary action as defined in the Act; (4) the disciplinary action was administered by his supervisor; and (5) the disciplinary action was administered on account of the disclosure of information. *See* §§ 24-50.5-102 to -103, C.R.S. (2024); *Taylor v. Regents of Univ. of Colo.,* 179 P.3d 246, 247-48 (Colo. App. 2007).

Here, the Court lacks jurisdiction over Plaintiff's Whistleblower claim against OSPD because Plaintiff cannot establish the necessary elements. Specifically, Plaintiff cannot establish he made an oral or written disclosure of information, as defined by the Act; he made a good faith

effort to provide notification to his supervisor, appointing authority, or member of the general assembly about the disclosure of information as required by the Act; or OSPD made employment decisions administered on account of Plaintiff disclosing information.

1. Plaintiff did not make oral or written disclosures protected by the Act.

First, OSPD disputes whether Plaintiff's communications fall under the protection of the Whistleblower Act, and if so, which communications. Whether a disclosure falls within the whistleblower statute is a question of fact. *Ferrel,* 179 P.3d at 185 (citing *Lanes v. O'Brien,* 746 P.2d 1366, 1370 (Colo. App. 1987)). "[O]nly certain kinds of disclosures are protected." *Ward v. Indus. Comm'n,* 699 P.2d 960, 967 (Colo. 1985). Thus, if Plaintiff did not make a "disclosure of information" protected by the whistleblower statute, the CGIA would not waive sovereign immunity. *See* § 24-50.5-102(2) (defining "disclosure of information"); *Ferrel*, 179 P.3d at 183. The Court must conduct a *Trinit*y hearing to determine if any of the alleged disclosures meet the Act's definition or were merely unprotected, publicly known and debated policy disagreements (i.e., how to address public defender workloads). *See* Ex. D, Order Granting Motion to Dismiss, *Prestwich v. Colorado Dep't of Educ*., Denver District Court, Case No. 16CV32106. Similarly, while Plaintiff disagreed with some alleged management decisions (triaging cases rather than withdrawing from them), his disagreement does not create a protected disclosure under the Whistleblower Act. *See* Ex. E, Transcript, *Lucci-Wolgamott v. Colorado State Bd. of Land*, Denver District Court, Case No. 05CV6141, p. 8 ("You can be a by-the-book person and you can raise these issues, but once they're addressed, there's no specific right given to an employee to stubbornly insist that they are right and everyone else is wrong."). In addition, the Court must consider whether Plaintiff's motions to withdraw from representation were protected under the

statute, notwithstanding their alleged content. Plaintiff's third motion to withdraw, which precipitated his administrative leave and termination, contained no content remotely invoking a public concern. Compl., ¶¶ 78-82.

2. Plaintiff did not make a good faith effort to provide notification to his supervisor before making the alleged disclosures.[3]

Second, OSPD disputes whether Plaintiff made a good faith effort to provide notification to his supervisor about the disclosure of information, as required by the Whistleblower Act. While Plaintiff contends he made such communications, Plaintiff also acknowledges he did not inform his supervisor in advance of his three motions to withdraw from representation of his clients. *See e.g.*, Compl., ¶¶ 32-36, 48-49, 81-82.

3. Plaintiff's alleged disclosures were not the motivation for his termination.

Third, even if the Court determines Plaintiff made disclosures covered by the Act, the Court must then determine that the protected disclosures were the actual motivation for terminating his employment. Here, Plaintiff was terminated because he withdrew from representation of his clients despite those withdrawals conflicting with state statute, office policy, and his corrective action.[4] While Plaintiff contends his alleged disclosures were a substantial and motivating factor in the termination decision, the Court must make credibility determinations about the reason OSPD terminated Plaintiff's employment. *See Medina,* 35 P.3d

[3] Plaintiff did not have an appointing authority and does not allege he notified the general assembly before making the alleged disclosures.

[4] As the evidence at the *Trinity* hearing will reveal, these withdrawals came after Plaintiff's supervisors repeatedly offered to help Plaintiff manage his cases, offers Plaintiff refused. The evidence will also reflect that, despite Plaintiff's various complaints about his workload and refusal to meaningfully engage in resolution of those complaints, he experienced no adverse employment consequences until he sought to withdraw from representing his clients, putting them in the middle of his employment dispute.

at 452 (The trial court need not treat the facts alleged by the non-moving party as true, and rather than drawing all inferences in the nonmoving party's favor, the court is to "weigh the evidence and satisfy itself as to the existence of its power to hear the case."). For these reasons, the Court must conduct a *Trinity* hearing at which Plaintiff must prove, by a preponderance of the evidence, that he made disclosures protected by the Whistleblower Act, he made a good faith effort to notify his supervisor about the disclosure of information, as required by the Act, and the disclosures were the substantial or motivating causes of employment decisions including his termination. OSPD requests reasonable discovery limited to whether Plaintiff can establish subject matter jurisdiction.

B. The CGIA bars Plaintiff's second claim for relief because he fails to allege, and cannot prove, Ms. Ring and Ms. Newell acted willfully and wantonly.

Plaintiff's second claim for relief, asserting violations of his free speech rights under the Colorado Constitution, sounds in tort, making it subject to the CGIA. Because the claim does not fall within a waived area of immunity, and because Plaintiff does not allege, and cannot prove, Ms. Ring and Ms. Newell acted willfully and wantonly, the claim is barred.

1. Plaintiff's constitutional claim sounds in tort, making it subject to the CGIA.

The CGIA creates immunity for public entities and public employees against all claims that "lie in tort or could lie in tort." § 24-10-106(1), C.R.S. (2024); *Fogg v. Macaluso*, 892 P.2d 271, 273 (Colo. 1995). "[T]he form of the complaint is not determinative" of whether a claim sounds in tort. *Robinson v. Colorado State Lottery Div*., 179 P.3d 998, 1003 (Colo. 2008). Instead, courts should pierce beyond the pleading of a claim and closely examine the nature of the injury and the relief sought. *Id.* at 1004; *Foster v. Bd. of Governors of the Colo. State Univ. Sys. by & on behalf of Colo. State Univ*., 342 P.3d 497, 501 (Colo. App. 2014). Ultimately, the

inquiry turns on the source and nature of the defendant's liability, or the nature of the duty and breach from which liability arises. *Foster*, 342 P.3d at 501 (citing *Colo. Dep't of Transp. v. Brown Grp. Retail, Inc.,* 182 P.3d 687, 690 (Colo. 2008)). "When the injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law, and when the relief seeks to compensate the plaintiff for that injury, the claim likely lies in tort or could lie in tort for purposes of the CGIA." *Robinson*, 179 P.3d at 1003.

Here, Plaintiff's allegations could support a claim for retaliatory discharge in violation of public policy, which lies in tort. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 104 (Colo. 1992). To state such a claim, a plaintiff must allege the defendant employed them and discharged them in retaliation for exercising a job-related right or performing a statutory duty, or the termination undermined a clear and express public policy. *Kearl v. Portage Envtl., Inc.*, 205 P.3d 496, 499 (Colo. App. 2008). In her role as Colorado State Public Defender, Ms. Ring employed and terminated Plaintiff. Compl., ¶¶ 4-7. Plaintiff alleges Ms. Ring and Ms. Newell were violating ethical and legal duties and abusing their authority regarding the alleged workload crisis, he had a legal duty to make the alleged disclosures to the court, and Ms. Ring and Ms. Newell terminated him for complying with that duty. *Id.* at ¶¶ 5, 32-33, 37, 41, 46. He further alleges his termination violated his free speech rights and the Whistleblower Act, both of which express a clear public policy in favor of encouraging public employees to speak out about abuses of authority and illegal and unethical practices. § 24-50.5-101(1), C.R.S. (2024) ("[T]he people of Colorado are entitled to information about the workings of state government in order . . . to reduce abuses in government authority, and to prevent illegal and unethical practices.").

Had Plaintiff been a private employee, these allegations could support a retaliatory

discharge claim. *Kearl*, 205 P.3d at 499 (plaintiff alleged he was terminated for ongoing complaints consistent with his professional duties to expose fraud); *see also* § 24-10-103(2), C.R.S. (2024) ("'Injury' means . . . injury to a person . . . of whatsoever kind, which, if inflicted by a private person, would lie in tort or could lie in tort regardless of whether that may be the type of action . . . chosen by a claimant."). Moreover, the same set of facts supporting the free speech claim also support the whistleblower claim, which clearly lies in tort. *Ferrel,* 179 P.3d at 183. Accordingly, the free speech claim sounds in tort and is subject to the CGIA.

2. Plaintiff's claim does not fall within a waived area of immunity.

Public employees are immune from tort suits except under the listed limited waivers of sovereign immunity in the CGIA. § 24-10-106(1). Plaintiff's free speech claim does not fall under any of the categories listed in § 24-10-106(1). Consequently, the CGIA bars the claim.

3. Plaintiff fails to allege, and cannot prove, Ms. Ring and Ms. Newell acted willfully and wantonly.

Public employees, like Ms. Ring and Ms. Newell, are immune to tort claims when acting within the scope of their employment, unless the act causing the injury was willful and wanton. § 24-10-118(2)(a), C.R.S. (2024). Willful and wanton conduct is "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to the consequences, or of the rights and safety of others, particularly the plaintiff." *Moody v. Ungerer*, 885 P.2d 200, 205 (Colo. 1994). Such conduct is "wholly disregardful of the rights, feelings, and safety of others . . . at times even imply[ing] an element of evil." *Pettingell v. Moede*, 120 Colo. 484, 491, 271 P.2d 1038, 1042 (1954); *see also Martinez v. Estate of Black*, 379 P.3d 315, 323 (Colo. 2016).

"In any action in which allegations are made that an act or omission of a public employee was willful and wanton, the specific factual basis of such allegations shall be stated in the complaint." *Wilson v. Meyer*, 126 P.3d 276, 282 (Colo. App. 2002) (citing § 24-10-110(5)(a), C.R.S. (2024)). Conclusory allegations are insufficient. *Id.* A complaint must "do more than merely assert" that a public employee's acts or omissions were willful or wanton; it must, at a minimum, also "set forth specific facts to support a reasonable inference" that the employee was consciously aware their acts or omissions created danger or risk to others' safety, and that [they] acted or failed to act, without regard to the danger. *Id.* Plaintiff alleges in only a conclusory fashion that Ms. Ring and Ms. Newell acted willfully and wantonly, Compl., ¶ 123, an allegation the Court need not accept as true. Accordingly, Plaintiff fails to allege facts to support a finding of willful and wanton conduct, and Ms. Ring and Ms. Newell are immune. Thus, the free speech claim must be dismissed for lack of subject matter jurisdiction.

II. Plaintiff's second claim for relief against Defendants Ring and Newell should be dismissed pursuant to C.R.C.P. 12(b)(5).

A. No implied cause of action for damages under the Colorado Constitution exists.

Plaintiff's Second Claim for Relief, which alleges violations of Article II, Section 10 of the Colorado Constitution, must be dismissed because no statutory or implied cause of action for alleged violations of the Colorado Constitution exists. *Bd. of Cnty. Comm'rs of Douglas Cnty. v. Sundheim,* 926 P.2d 545, 547 (Colo. 1996). In *Sundheim,* the Colorado Supreme Court addressed whether it has "the authority to recognize an implied damages action in cases where citizens allege that government entities have violated their state constitutional rights." *Id.* at 547. The Court concluded no such implied cause of action to enforce the Colorado Constitution should be recognized because "where other adequate remedies exist, no implied remedy is necessary." *Id.*

at 553. The court in *Sundheim* based its conclusion, in part, on the fact that "the General Assembly has carefully defined the limits of a private citizens right to redress for the actions of government entities and officials" in the CGIA. *Id.* at 429.

Since *Sundheim*, Colorado courts have held there is no implied cause of action to enforce the Colorado Constitution's provisions where a plaintiff has an existing and adequate alternative remedy. *See e.g., Rodgers v. Bd. of Cnty. Comm'rs of Summit Cnty.,* 363 P.3d 713, 716 (Colo. App. 2013) (same-sex couple homeowners precluded from bringing damages claim against the county under the Colorado and United States Constitutions for due process and equal protection violations where other adequate statutory remedies existed), *rev'd on other grounds,* 355 P.3d 1253 (Colo. 2017); Ex. F, Order Granting Partial Motion to Dismiss, *Raven, et al. v. Polis, et al*, Denver District Court, Case No. 19CV34492.

The Tenth Circuit has applied the holding from *Sundheim,* addressing free speech retaliation claims in the employment context. *Arndt v. Koby,* 309 F.3d 1247, 1255 (10th Cir. 2002) *cert. denied*, 538 U.S. 1013 (2003).[5] In *Arndt,* the plaintiff, a former Boulder Police Department detective alleged a violation of her free speech rights based on the police chief's order preventing her from publicly responding to allegedly false media statements about her. *Id.* at 1250. The Court affirmed summary judgment on Arndt's claim brought under the Colorado

[5] Neither the Colorado Supreme Court nor the Colorado Court of Appeals have considered the argument that, after *Sundheim*, a damages claim under Article II, Section 10 of the Colorado Constitution is cognizable. In *Holliday v. Regional Transportation District*, the Colorado Court of Appeals considered RTD Board members' claims alleging RTD's policy prohibiting the dissemination of correspondence unfavorable to RTD violated their free speech rights pursuant to the First Amendment and Article II, Section 10 of the Colorado Constitution. 43 P.3d 676, 680-681 (Colo. App. 2001). The court did not consider whether, after *Sundheim*, an implied right of action exists under Article II, Section 10 of the Colorado Constitution.

Constitution's free speech clause, citing *Sundheim* and holding Section 1983 provided an adequate remedy. *Id.* at 1255. The Court noted that the fact that Arndt ultimately did not prevail on her Section 1983 claim, did not make the remedy any less "available" under *Sundheim. Id.*

Several United States District Court for the District of Colorado cases considering whether, after *Sundheim,* a plaintiff can assert a claim for damages pursuant to Article II, Section 10 of the Colorado Constitution have reached the same conclusion. *See, e.g.*, *Brammer-Hoelter v. Twin Peaks Charter Acad.,* 81 F. Supp. 2d 1090, 1097-98 (D. Colo. 2000) (terminated public school teachers alleging free speech violations had adequate remedies under federal and state law, and thus implication of Colorado constitutional cause of action for damages or declaratory relief was unwarranted); *Vanderhurst v. Colorado Mountain Coll. Dist*., 16 F. Supp. 2d 1297, 1304 (D. Colo. 1998) (terminated employee had no implied cause of action for Colorado Constitution free speech claim because employee had adequate remedies pursuant to U.S. Constitution and breach of contract claims). Courts have likewise rejected implied causes of actions pursuant to other sections of the Colorado constitution. *See, e.g., Mahan v. Huber,* No. 09-CV-00098-PAB-BNB, 2010 WL 749815, at *6 (D. Colo. Mar. 2, 2010); *Greeley Publ'g Co. v. Hergert*, No. 05-cv-00980-EWN-CBS, 2006 WL 1581754, at *15 (D. Colo. June 6, 2006); *Walker v. Bd. of Trustees*, 76 F. Supp. 2d 1105, 1112 (D. Colo. 1999).

Plaintiff seeks monetary damages specifically pursuant to his claim brought under the Colorado Constitution against Ring and Newell. *See* Compl., ¶ 125 and pp. 30-31. Like the plaintiffs in *Arndt*, *Brammer-Hoelter,* and *Vanderhurst*, Plaintiff has other adequate remedies available to him. Plaintiff's available remedies include Section 1983 claims against Newell and Ring and his Whistleblower Act claim. Indeed, the exact same facts support both the

constitutional and whistleblower claims. That Plaintiff might not prevail in bringing the other claims does not make them unavailable. *Arndt,* 309 F.3d at 1255.

Finally, Plaintiff's request for relief only plausibly seeks damages. Although Plaintiff requests "equitable relief," and purports to sue Newell and Ring in their "official capacities," Compl., pp. 30-31, the request for declaratory relief merely restates his claims. He seeks "a declaration that Defendant OSPD violated Weiner's rights under C.R.S.A. § 24-50.5-101 *et seq* and the Colorado Constitution." *Id.* at p. 30. Even if appropriately articulated, declaratory relief is not available in this matter. *See, e.g.*, *Freedom from Religion Found., Inc. v. Romer,* 921 P.2d 84, 88 (Colo. App. 1996) ("To the extent that plaintiffs' claims for . . . declaratory relief specifically seek to redress allegedly unconstitutional actions . . . in conjunction with . . . events that have already occurred[,] we have little difficulty concluding that these claims are moot."). Further, Plaintiff does not specifically seek reinstatement or front pay. Compl., pp. 30-31.

Accordingly, this Court should not recognize an implied cause of action for monetary damages under the Colorado Constitution, and Plaintiff's second claim should be dismissed in its entirety. If the Court determines Plaintiff has appropriately pled a request for equitable relief, dismissal of Plaintiff's second claim to the extent it seeks monetary damages, is appropriate.

B. If a cause of action exists, Plaintiff's claims should be dismissed for failure to state a claim under *Garcetti/Pickering.*

If the Court recognizes a claim under the Colorado Constitution, Plaintiff's claim should be dismissed as he fails to state a claim under the *Garcetti/Pickering* test. *See, e.g.*, *In re Marriage of Newell,* 192 P.3d 529, 535 (Colo. App. 2008) ("[W]here neither party argues that a conceptual framework different from First Amendment analysis governs the analysis of a free speech issue under the Colorado Constitution, and federal jurisprudence has established a

framework for considering the issue, our analysis may proceed solely under the First Amendment.") While Defendants anticipate Plaintiff will argue the Court should apply an alternative framework, there is no basis to do so. *See Ridgeway v. Kiowa Sch. Dist. C-2,* 794 P.2d 1020, 1022 (Colo. App. 1989) (applying *Pickering* to plaintiff's First Amendment and Colorado Constitutional claims). Neither *Bock v. Westminster Mall Co.*, nor the cases cited therein involved a free speech retaliation claim for damages pursuant to Article II, Section 10 of the Colorado Constitution, or any similar claim. *Bock*, 819 P.2d 55, 59 (Colo. 1991) (considering claim for declaratory and injunctive relief where private shopping mall policy prohibited distribution of political leaflets); *People v. Ford,* 773 P.2d 1059, 1061 (Colo. 1989) (considering constitutionality of state obscenity statute); *Parrish v. Lamm,* 758 P.2d 1356, 1365 (Colo. 1988) (considering declaratory relief challenging a state statute governing certain health care providers' advertisements); *People v. Seven Thirty-Five East Colfax, Inc.,* 697 P.2d 348, 356 (Colo. 1985) (considering constitutionality of state obscenity statute); *People v. Berger,* 185 Colo. 85, 89, 521 P.2d 1244, 1245-46 (1974) (same); *In Re Hearings Concerning Canon 35,* 132 Colo. 591, 594, 296 P.2d 465, 467 (1956) (constitutional challenge to judicial canon excluding press photographers and radio and television operators from courtroom); *Cooper v. People,* 13 Colo. 337, 22 P. 790, 795 (1889) (considering court's contempt power where newspaper articles were allegedly "calculated to interfere with the due administration of justice").

Courts analyze First Amendment claims based on retaliation by an employer under *Garcetti/Pickering. See Churchill v. Univ. of Colorado at Boulder,* 293 P.3d 16, 35 (Colo. App. 2010), *aff'd on other grounds,* 2012 CO 54, 285 P.3d 986 (citing *Pickering v. Bd. of Educ.,* 391 U.S. 563 (1968), *as modified by Garcetti v. Ceballos,* 547 U.S. 410, 418 (2006) and *Dixon v.*

Kirkpatrick, 553 F.3d 1294, 1301-02 (10th Cir. 2009)). The *Garcetti/Pickering* test consists of five elements: whether (1) the speech was made pursuant to an employee's official duties; (2) the speech was on a matter of public concern; (3) the government's interests, as employer, in promoting the efficiency of the public service outweigh the plaintiff's free speech interests; (4) the protected speech was a motivating factor in the adverse employment action; and (5) whether the employer would have reached the same decision in the absence of the protected conduct. *Churchill,* 293 P.3d at 35 (citing *Dixon,* 553 F.3d at 1302); *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1181 (10th Cir. 2018). The first three prongs are legal issues for the court to decide and the last two prongs are factual matters left to the factfinder. *Bailey,* 896 F.3d at 1181.

1. Plaintiff's speech was made pursuant to his official duties.

The plaintiff carries the burden to establish the contested speech was not made pursuant to official duties, which Plaintiff cannot do here. *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1328 (10th Cir. 2007). When an employee speaks pursuant to his official duties, he speaks not as a citizen for First Amendment purposes, and is not protected from discipline from his employer. *Id.* The rule "simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* (quoting *Garcetti*, 547 U.S. at 422).

An employee's official job description is not dispositive in determining whether an employee's speech is 'pursuant to [their] official duties.'" *Brammer-Hoelter*, 492 F.3d at 1203 (quoting *Garcetti*, 547 U.S. at 421). "[If] an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of an official duty, the speech is made pursuant to the employee's official duties." *Id.* at 1202-03. "The guiding principle is that speech is made pursuant to official duties if it

involves 'the type of activities that [the employee] was paid to do.'" *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010) (alteration in original) (quoting *Green v. Bd. of Cnty. Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007)); *see also McNellis v. Douglas Cnty. Sch. Dist*., 116 F.4th 1122, 1136 (10th Cir. 2024). "Official communications" may cause consequences for the government, and "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Green,* 472 F.3d at 801 (citing *Garcetti,* 547 U.S. at 422-23).

Here, Plaintiff made his three motions to withdraw from cases assigned to him as Deputy Public Defender pursuant to his official duties as motions on behalf of clients. On December 23, 2023, and again on January 2, 2024, Plaintiff filed written motions to withdraw from two clients' cases. Compl., ¶ 38. Further demonstrating the communications were made pursuant to his official duties, in each motion, Plaintiff's signature block identified him as a "Deputy State Public Defender" and his signature appears below Ms. Ring's name, also identified in the document as "Colorado State Public Defender." Ex. A, p. 31; Ex. B, p. 32.

Plaintiff made his third motion to withdraw—now also in violation of his Corrective Action—on February 21, 2024, during an appearance in Court as a Deputy Public Defender. Compl., ¶ 79. After the motion, Plaintiff informed his supervisor that, for the third time, he moved to withdraw from representation of cases and clients assigned to him. In Plaintiff's February 21, 2024, email, Plaintiff informed Ms. Newell he had moved to withdraw from

additional cases by informing her of a hearing set "to address [his] *oral motion to the court (made this morning) to withdraw from these cases . . . .*" Ex. C (emphasis added).[6]

Plaintiff's acknowledgement that he needed supervisor approval to move to withdraw under these circumstances, Compl., ¶ 37, further establishes that such motions are part of Plaintiff's official duties. That the motions were unauthorized does not convert them into protected speech. *Green,* 472 F.3d at 800-801 (plaintiff's disagreement with her supervisors regarding the need for a formal testing policy, and her unauthorized obtaining of the confirmation test to prove her point, "inescapably invoke *Garcetti*'s admonishment that government employee's First Amendment rights do 'not invest them with a right to perform their jobs however they see fit.'") (internal citations omitted)

Because Plaintiff's speech was made pursuant to his official duties, it was not protected, and his claim for violation of Article II, Section 10 of the Colorado Constitution, if considered, must be dismissed. The determination that Plaintiff's speech was not protected speech is dispositive, and the Court need not analyze the remaining *Garcetti* factors.

2. Some of Plaintiff's communications did not raise public concerns.

Matters of public concern are "those of interest to the community, whether for social, political, or other reasons." *Brammer-Hoelter*, 492 F.3d at 1205 (citing *Lighton v. Univ. of Utah,* 209 F.3d 1213, 1224 (10th Cir. 2000)). "Statements revealing official impropriety usually involve matters of public concern. Conversely, speech that simply airs grievances of a purely personal nature typically does not involve matters of public concern." *Id.* at 1205 (cleaned up). In

[6] *See Titan Indem. Co.,* 181 P.3d at 306 (in ruling on a motion to dismiss, a court may consider "[d]ocuments referred to in the complaint and central to a plaintiff's claim").

deciding what is a matter of public concern, courts must consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers,* 461 U.S. 138, 147-48 (1983). "It is not sufficient that the topic of the speech be of general interest to the public; in addition, what is actually said must meet the public concern threshold." *Burns v. Bd. of Cnty. Comm'rs,* 330 F.3d 1275, 1286 (10th Cir. 2003) (internal quotation omitted).

Here, Plaintiff asserts he made protected communications to his supervisors and then in his motions made to the Court. Even assuming some of Plaintiff's communications addressed public concerns, Plaintiff made them in the course of his official duties and therefore, they were not protected. Further, Plaintiff's allegations regarding his third and last motion to withdraw on February 21, 2024, which precipitated his administrative leave and then termination, do not identify *any* communications therein which remotely implicate a public concern. Compl., ¶¶ 73-82. Plaintiff says he "appeared in court and requested the scheduling of a special hearing to address his concerns that the effects of the cyberattack created an impermissible conflict of interest between Weiner and some of his clients." *Id.* at ¶ 79. Plaintiff says he "disclosed to the court that Newell had already opposed a motion that was functionally identical to the one he might eventually be legally required to make, and that Newell was likely to oppose such a motion again." *Id.* at ¶ 80. Plaintiff states he then informed Ms. Newell of "his plan and of the upcoming hearing date." *Id.* at ¶ 82; Ex. C. Nothing in Plaintiff's allegations suggest Plaintiff sought to raise a public concern with the Court or with Ms. Newell. Rather, Plaintiff communicated about his withdrawal of representation from a single client in two cases due to the temporary effects of a cyberattack on OSPD. Nothing about these communications implicate a matter of public concern.

3. OSPD's interests in promoting the efficiency of public services, outweighs Plaintiff's interests.

The third element of the *Garcetti*/*Pickering* test concerns "whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests." *Duda v. Elder,* 7 F.4th 899, 912-13 (10th Cir. 2021) (citing *Dixon*, 553 F.3d at 1302). The third element must weigh in favor of the plaintiff for the plaintiff to prevail on the First Amendment claim. However, the employer bears the burden on the third element. *See id.* (citing *Brammer-Hoelter,* 492 F.3d at 1207).

The Tenth Circuit has said the "only public employer interest that outweighs the employee's free speech interest is avoiding direct disruption, *by the speech itself*, of the public employer's internal operations and employment relationships." *Trant v. Oklahoma*, 754 F.3d 1158, 1166 (10th Cir. 2014). Relevant considerations include "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." *Brammer-Hoelter* 492 F.3d at 1207 (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)).

When, as here, the adverse action occurred "soon after" the employee's alleged protected speech, the Courts do not require a showing of actual disruption. *See Kent v. Martin*, 252 F.3d 1141, 1146 (10th Cir. 2001). Instead, when the employer's intent in taking an adverse action is "to avoid actual disruption," *id.*, courts will "generally defer to a public employer's reasonable predictions of disruption, as long as the predictions are supported by specific evidence," *Deschenie v. Bd. of Educ. of Cent. Consol. Sch. Dist. No. 22*, 473 F.3d 1271, 1279 (10th Cir. 2007) (quotations omitted). This potential-disruption standard reflects that a public employer

does not "have to wait for speech actually to disrupt core operations before taking action." *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995); *see also Rock v. Levinski*, 791 F.3d 1215, 1220 (10th Cir. 2015).

Here, Plaintiff's corrective action and ultimate termination occurred soon after his alleged speech in the form of motions to withdraw *and* those motions resulted in actual disruption to OSPD's "internal operations and employment relationships." *Trant*, 754 F.3d at 1166 (quotations omitted). First, Plaintiff's motions to withdraw from representation of three clients impeded OSPD's most basic function in providing representation to those it is statutorily obliged to represent. The General Assembly created a statewide system of providing counsel for indigent accused, with the OSPD statutory mandate to serve clients "independently of any political considerations or private interests, provide legal services to indigent persons accused of crime that are commensurate with those available to nonindigents, and conduct the office in accordance with the Colorado rules of professional conduct and with the American bar association standards relating to the administration of criminal justice, the defense function." § 21-1-101(1), C.R.S. (2024). OSPD's interest in fulfilling its statutory mandate cannot be overstated; Plaintiff's motions to withdraw directly interfered with that interest. Plaintiff's failure to notify his supervisors that he intended to file such motions only confounds the issue. Similarly, Plaintiff's motions to withdraw from representation also "impede[d] the performance of the speaker's duties" or in this case, eliminated Plaintiff's duties to represent three clients and potentially left those clients without representation for months. *Brammer-Hoelter*, 492 F.3d at 1207; *see also* Compl., ¶ 39 (explaining that Plaintiff carefully chose which cases to withdraw from to avoid the client sitting in pretrial detention due to delays from obtaining new defense counsel).

Plaintiff acknowledges the motions to withdraw further disrupted OSPD operations by requiring his supervisor to intervene to ensure OSPD's clients retained their representation. Plaintiff asserts that when Ms. Newell learned of his first motion to withdraw, she "emailed OSPD's court administrator and asked that the case be immediately transferred to her." Compl., ¶ 48. Ms. Newell "then moved to have Weiner's motion withdrawn, and the court granted Newell's motion." *Id.* When Ms. Newell learned of Plaintiff's second motion to withdraw, she "filed a notice in which she informed the court that Weiner's motion was unauthorized." *Id.* at ¶ 49. Ms. Newell then had to transfer the case to one of Plaintiff's colleagues. *Id.*

Further, it is axiomatic that OSPD has a profound interest in ensuring its Deputy Public Defenders do not file motions contrary to state statute. Plaintiff concedes he knew his motions to withdraw from representation were contrary to the conflict statute, which provides that "[c]ase overload, lack of resources, and other similar circumstances shall not constitute a 'conflict of interest' warranting the appointment of alternate defense counsel." Compl., ¶ 45 (citing § 21-2-103(1.5)(c)). Plaintiff's acknowledgement that he argued in his motions to withdraw that the same state statute, § 21-2-103(1.5)(c), is unconstitutional only further demonstrates the disruption to OSPD's interests and operations. Plaintiff filed these motions signing his name as a "Deputy State Public Defender," and under Ms. Ring's name. Compl., ¶¶ 38, 45; Exs. A, B. Plaintiff's signature as an OSPD representative implied OSPD sanctioned the motions and challenges to the state statute's constitutionality. Courts rely on OSPD to correctly apply the law related to court-appointment of counsel and to engage in an accurate assessment of conflicts of interest.

OSPD's interest in managing communications such as the motions filed by Plaintiff is underscored by *Garcetti's* determination that official speech is not protected. "[S]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission." *Green,* 472 F.3d at 801 (citing *Garcetti,* 547 U.S. at 422-23). OSPD's actions were wholly consistent with this notion.

In comparison, the actual, limited impact on Plaintiff's ability to engage in free speech based on the minimal restrictions imposed on him does not outweigh OSPD's duty to fulfill its statutory mandate and ensure the efficient operations of the office to carry out that mandate.

C. Alternatively, if a cause of action exists, Ms. Ring and Ms. Newell are entitled to qualified immunity as to the free speech claim.

If the Court concludes an implied cause of action for damages for violations of Article II, Section 10 exists, Ms. Ring and Ms. Newell are immune from the claim under the doctrine of qualified immunity. "The purpose of qualified immunity is to shield a government employee from the burdens associated with trial which include distraction from governmental responsibilities, inhibiting discretionary decision making, and the disruptive effects of discovery." *Moody v. Ungerer*, 885 P.2d 200, 202 (Colo. 1994) (citations omitted). When properly applied, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (cleaned up).

To overcome the qualified immunity defense, a plaintiff bears "a heavy two-part burden." *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10th Cir. 1995). A plaintiff must demonstrate two prongs: (1) the facts alleged make out a violation of a constitutional or statutory right, and (2) the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). "[I]f a reasonable [official] might not have

known for certain that the conduct was unlawful—then the [official] is immune from liability." *Ziglar v. Abbasi*, 582 U.S. 120, 152 (2017). For a right to be clearly established, a Supreme Court or Tenth Circuit (or in this case, Colorado appellate court) decision on point, or a clearly established robust weight of authority from other circuits, must exist. *Washington*, 847 F.3d at 1197; *see also Ashcroft*, 563 U.S. at 742. Colorado applies qualified immunity to claims brought under Article II, Section 10 of the Colorado Constitution. *Holliday v. Regional Transportation District*, 43 P.3d 676, 681, 688 (Colo. App. 2001) (analyzing Colo. Const. art. II, § 10 and 42 U.S.C. § 1983 claims under the federal framework and applying qualified immunity).

As detailed above, Plaintiff does not allege facts to support his Colorado Constitution free speech claim, failing to satisfy prong one. That alone entitles Ms. Ring and Ms. Newell to qualified immunity. Even if the Court concludes Plaintiff has adequately stated a claim for relief, Plaintiff cannot meet prong two. Plaintiff alleges Ms. Ring and Ms. Newell, as his employers and supervisors, should be held liable for disciplining and terminating him for speech made entirely in his capacity as a Deputy State Public Defender and officially in Ms. Ring's name. Case law has long established that government employers have the right to "restrict[] speech that owes its existence to a public employee's professional responsibilities" and discipline public employees for violating such restrictions. *Casey*, 473 F.3d at 1328 (citing *Garcetti*, 547 U.S. at 421-22). Because case law clearly establishes that the right at issue does not exist, Ms. Ring and Ms. Newell could not have violated any clearly established right, and Plaintiff cannot satisfy prong two. Thus, the defendants are entitled to qualified immunity and the claim must be dismissed.

CONCLUSION

For the reasons stated herein, Defendant OSPD respectfully seeks a *Trinity* hearing regarding the Court's jurisdiction over Claim One; Defendants Newell and Ring seek dismissal of Claim Two in its entirety.

Respectfully submitted this 17th day of January, 2025.

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CERTIFICATE OF SERVICE

I certify that, on January 17, 2025, a true and correct copy of the foregoing DEFENDANT'S MOTION TO DISMISS was filed and served on the following parties through the Colorado Courts E-Filing System, addressed as follows:

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