No. 25-1159

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERIK HOLT,
Plaintiff–Appellant

v.

FLORISSANT FIRE PROTECTION DISTRICT, a Colorado non-profit corporation,
Defendant–Appellee.

On Appeal from the United States District Court
for the District of Colorado
The Honorable Nina Y. Wang
Civil Action No. 23-cv-01798-NYW-MDB

APPELLEE'S ANSWER BRIEF

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ORAL ARGUMENT IS NOT REQUESTED.

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

I. BASIS FOR THE DISTRICT COURT'S JURISDICTION

This action was originally commenced in the United States District Court for the District of Colorado (hereinafter "District Court"). The District Court possessed original jurisdiction in this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367.

II. BASIS FOR THE COURT OF APPEALS' JURISDICTION

Holt filed a notice of appeal with the District Court on April 18, 2025, pursuant to Fed. R. App. P. 3(a).

III. TIMELINESS OF APPEAL

The District Court entered its Order granting FFPD's motion for summary judgment on March 28, 2025. (*See* ROA Vol. 2 at 118; *and see* Attachment 1 to Appellee's Answer Brief.) The notice of appeal followed on April 18, 2025. (*See* ROA Vol. 2 at 129.) Pursuant to Fed. R. App. P. 4(a)(1)(A), a party has 30 days following the entry of the appealed judgment or order in which to file a notice of appeal. Holt filed his notice of appeal 21 days after the District Court's Order, and the appeal is therefore timely.

IV. APPEAL IS FROM FINAL ORDER

The District Court's Order granting FFPD's motion for summary judgment disposed of the entire case. The District Court entered its Final Judgment on March 28, 2025, and closed the case. (*See* ROA Vol. 2 at 127; *and see* Attachment 2 to Appellee's Answer Brief.)

STATEMENT OF THE ISSUES

1. Did the District Court correctly grant FFPD's Fed. R. Civ. P. 56(c) Motion for Summary Judgment on the basis that Holt had not engaged in speech protected by the First Amendment?

2. Should FFPD's Fed. R. Civ. P. 56(c) Motion for Summary Judgment have been denied on the basis that there was sufficient evidence of retaliatory intent?

3. Should FFPD's Fed. R. Civ. P. 56(c) Motion for Summary Judgment have been denied on the basis that there were genuine issues of material fact?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Holt asserts that he was wrongfully terminated from his position as Fire Chief at the FFPD on June 22, 2023. On that date, the FFPD Board voted unanimously to terminate Holt's employment for cause. The primary reason Holt was terminated was because of his failure to renew the FFPD's insurance coverage, which resulted in a six-day lapse of insurance coverage. Holt claims this reason is pretext, and that the actual reason for his termination was in retaliation for his cooperation with a criminal investigation about the new Board's alleged conduct during the May 2, 2023, election.

II. COURSE OF PROCEEDINGS

Holt filed his Complaint (ROA Vol. 1 at 6)[1] in this case on July 14, 2023, asserting the following three claims for relief: (1) First Amendment retaliation pursuant to 42 U.S.C. § 1983; (2) ADA retaliation; and (3) wrongful termination in violation of public policy.

On August 11, 2023, FFPD filed a Motion for Partial Dismissal (ROA Vol. 1 at 28), seeking dismissal of Plaintiff's ADA retaliation claim (without prejudice) and state tort claim for wrongful termination in violation of public policy (with prejudice).

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[1] References to the Record on Appeal (Doc. 6-1, 6-2) are by volume and page number (*e.g.*, ROA Vol. 2 at 27).

The Court entered an Order on FFPD's motion on November 7, 2023. (ROA Vol. 1 at 73.) Therein, the Court construed FFPD's motion seeking dismissal of the ADA retaliation claim as a motion to strike pursuant to Rule 12(f), and granted the motion. The Court dismissed the wrongful termination claim without prejudice on the basis of lack of jurisdiction.

After the completion of discovery, FFPD filed a motion for summary judgment on July 22, 2024 (ROA Vol. 1 at 116), seeking summary judgment in its favor as to the remaining claim for First Amendment retaliation on the basis that the undisputed material facts showed that none of the five elements of the *Garcetti/Pickering*[2] test were satisfied. Holt filed his response to the motion for summary judgment on August 12, 2024. (ROA Vol. 2 at 6.) FFPD filed its reply on September 9, 2024. (ROA Vol. 2 at 96.) The District Court entered an order on March 28, 2025, granting FFPD's motion and dismissing the case. (ROA Vol. 2 at 118, *see also* Attachment 1 to Appellee's Answer Brief.)

[2] *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Bd. of Edu. of Tp. High Sch. Dist. 205, Will Cnty, Ill.*, 391 U.S. 563 (1968).

III. STATEMENT OF FACTS

Holt was first employed by the FFPD as Interim Fire Chief from April 2022 to September 28, 2022, and then as the permanent Fire Chief until his termination on June 22, 2023. (ROA Vol. 1 at 7, ¶ 8.) On May 2, 2023, an election was held for the FFPD Board, which resulted in the election of five non-incumbent candidates. (ROA Vol. 1 at 7–9, ¶¶ 11, 18.) On May 15, 2023, Starla Thompson, the incumbent FFPD President, filed a Complaint of Election Violations in Teller County District Court, alleging election fraud against the non-incumbent candidates and election workers. (ROA Vol. 1 at 9, ¶ 19.)

Holt was contacted by an investigator from the Fourth Judicial District Attorney's Office, Clint Cramer, who asked Holt to provide him with the footage of the election recorded on FFPD's closed-circuit security system. (ROA Vol. 1 at 9, ¶ 22.) On either May 19 or 20, 2023, Holt met with Mr. Cramer and provided him with the surveillance video from the fire station from the day of the election. (ROA Vol. 1 at 118, ¶ 10; *and see* Plaintiff Deposition, ROA Vol. 1 at 171:11–75, 174:6–177:20.) Holt also provided oral statements in response to Mr. Cramer's questions about the video, including "[h]ow far do you think these people were from this position?" and questions of that sort. (ROA Vol. 1 at 176:12–20.) Holt did not tell the newly elected Board members that he had participated in the criminal investigation, and no one else was present at the fire station when Holt met with Mr.

Cramer. (ROA Vol. 1 at 173:12–14.) Holt did not consider himself part of Ms. Thompson's Complaint of Election Violations. (ROA Vol. 1 at 179:13–23.) On June 27, 2023, the Teller County District Court dismissed Ms. Thompson's Complaint of Election Violations with prejudice. (ROA Vol. 1 at 167.)

Holt was terminated for his failure to ensure the timely payment of FFPD's liability insurance, which resulted in a six-day lapse of insurance coverage and a temporary shut down of fire operations. (*See* Notice of Termination, ROA Vol. 1 at 243.)

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Holt's First Amendment retaliation claim on the basis that Holt did not engage in protected speech. The undisputed facts showed that Holt's speech was made pursuant to his official duties and was not private citizen speech on a matter of public concern.

The grant of summary judgment should not be reversed on the basis that there is sufficient evidence of retaliatory motive because the record does not contain sufficient evidence of retaliatory motive and because the FFPD would have terminated Holt in the absence of his speech.

The grant of summary judgment should not be reversed on the basis that there are disputed issues of material fact because there are none. Holt's attempt to raise

disputed issues of material fact fails because he fails to support his contentions with record evidence.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED FFPD'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS THAT HOLT HAD NOT ENGAGED IN PROTECTED ACTIVITY

A. Standard of Review

A district court's grant of summary judgment is reviewed *de novo*. *See Veile v. Martinson*, 258 F.3d 1180, 1184 (10th Cir.2001). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Under this standard, we view the evidence and draw reasonable inferences in the light most favorable to the nonmovant." *Id*.

B. The District Court Correctly Held that Holt's Speech was Made Pursuant to his Official Duties and thus not protected by the First Amendment

"[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick v. Myers*, 461 U.S. 138, 140 (1983). "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti*, 547 U.S. at 417. It is well-settled that a public employer

cannot retaliate against an employee for exercising his constitutional right to free speech. *See Lander v. Summit Cnty. Sch. Dist.*, 109 F. App'x 215, 218 (10th Cir. 2004). "However, the interests of public employees in commenting on matters of public concern must be balanced with the employer's interests 'in promoting the efficiency of the public services it performs through its employees.'" *Leverington v. City of Colo. Springs*, 643 F.3d 719, 723 (10th Cir. 2011) (quoting *Pickering*, 391 U.S. at 568).

To achieve this balance, the Supreme Court has adopted a five-part test, known as the *Garcetti/Pickering* test, to evaluate a public employee's First Amendment claim. The *Garcetti/Pickering* test is comprised of five elements:

> (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) 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; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Dixon v. Kirkpatrick, 553 F.3d 1294, 1302 (10th Cir. 2009). The first three elements are issues of law for the court to decide, while the last two are factual issues typically decided by the jury. *Id.; but see Cypert v. Indep. Sch. Dist. No. I–050 of Osage Cnty.*, 661 F.3d 477, 483–84 (10th Cir. 2011) (affirming summary judgment for defendants

where plaintiff could not meet evidentiary burden at the fourth step).

Here, the District Court held that the first element was dispositive, and thus did not reach the other four. (ROA Vol. 2 at 123.)

In *Garcetti*, the Supreme Court declined to articulate a formula for determining when a government employee speaks pursuant to his official duties. *See* 547 U.S. at 424–25. However, cases interpreting *Garcetti* have made clear that speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation. *See Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329 (10th Cir. 2007) (noting that when the speech concerns a matter within the employee's "portfolio" it is made "pursuant to her official duties"). This may be true even though the speech concerns an unusual aspect of an employee's job that is not part of his everyday functions. *See Battle v. Bd. of Regents for Georgia*, 468 F.3d 755, 761 n.6 (11th Cir. 2006) (holding that a financial aid counselor's speech to officials about inaccuracies and signs of fraud in student aid files was made pursuant to her official employment responsibilities). Speech is made pursuant to official duties if it is generally consistent with "the type of activities [the employee] was paid to do." *Green v. Bd. of Cnty. Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007).

> An employee's official job description is not dispositive, however, because speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform. The

> ultimate question is whether the employee speaks as a citizen or instead as a government employee—an individual acting "in his or her professional capacity." Consequently, 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 the official duty, the speech is made pursuant to the employee's official duties. At the same time, not all speech that occurs at work is made pursuant to an employee's official duties. Nor is all speech about the subject matter of an employee's work necessarily made pursuant to the employee's official duties. Instead, we must take a practical view of all the facts and circumstances surrounding the speech and the employment relationship.

Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203–04 (10th Cir. 2007) (citations omitted).

Here, Holt's speech consisted of providing the fire station's surveillance video footage to the district attorney investigator upon being asked to do so, and answering some questions about the footage. As held by the District Court, the only reason Holt had access to the video footage was because of his position as Fire Chief. The only reason Holt was asked to provide the video footage was because of his position as Fire Chief. Moreover, as the Executive Officer of the FFPD, Holt would be expected to comply with law enforcement requests for information.

In his Opening Brief, Holt sets forth an argument that he was not in charge of any aspect of the election and thus his speech about the election could not have been made pursuant to his official duties. (Opening Brief at pp. 6–7.) However, FFPD did

not argue, and the District Court did not hold, that Holt was in charge of the election. Rather, it was argued (and held) that Holt's "speech" of providing the video footage and answering certain questions about it fell within Holt's official duties.

Holt also argues that he did not have control over the operation or maintenance of the security system and thus the District Court erred in holding that Holt's provision of the video footage to the district attorney investigator fell within his official duties. Therein, Holt relies on a myriad of facts for which he does not provide any citation to the record. (Opening Brief at p. 9.) Holt's generalized assertion that disputed issues of material fact preclude summary judgment is insufficient to adequately frame and develop an issue to invoke appellate review because of his failure to point to any part of the record on which he relies. *See Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995) (holding that "[w]ithout a specific reference, we will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury") (quotation omitted).

Holt asserts that his "report of potential election fraud" to the district attorney's office was unrelated to his core responsibilities as Fire Chief. (Opening Brief at p. 5.) Holt relies upon *Lane v. Franks*, 573 U.S. 228 (2014), for his assertion that his speech was not made pursuant to his official duties. However, that case addressed whether

the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities. In *Lane*, the Supreme Court held that:

> Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. When the person testifying is a public employee, he may bear separate obligations to his employer—for example, an obligation not to show up to court dressed in an unprofessional manner. But any such obligations as an employee are distinct and independent from the obligation, as a citizen, to speak the truth. That independent obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee.

Lane, 573 U.S. at 238–39 (citations omitted).

The speech at issue here is readily distinguishable from the speech in *Lane*, as it was not sworn testimony provided in court. Rather, it was a conversation with an investigator from the district attorney's office about the security camera video footage. Indeed, Holt did not report any potential election fraud to the district attorney's office. He only provided video footage and answered a few questions about certain things depicted in the videos. As held by the District Court, "there is also no argument or evidence in the record that Mr. Holt expressed to Mr. Cramer that he believed violations of election law had occurred." (ROA Vol. 2 at 125.)

Holt also relies on *Casey,* 473 F.3d 1323. In that case, Ms. Casey served as the CEO of the School District's Head Start Program. While so employed, Ms. Casey filed a written complaint with the Attorney General's office that the School Board was violating the Open Meetings Act by making personnel and other decisions in executive session without proper notice and meeting agendas. The court held that, because there was no evidence in the record that Ms. Casey was responsible for the Board's meeting practices, Ms. Casey's complaint to the AG's office fell outside the scope of her job duties. *Id*. at 1332–33. Holt asserts that his speech was like Ms. Casey's because his speech was directed to law enforcement outside of his chain of command. (Opening Brief at p. 5.) However, *Casey* does not hold that whenever an employee speaks to law enforcement, their speech automatically falls outside their official duties for purposes of the *Garcetti/Pickering* analysis. Rather, it was because the content of Ms. Casey's complaint fell outside of her job responsibilities that it was held to be private citizen speech.

Plaintiff also compares his speech to the employee's speech in *Seifert v. Unified Gov't of Wyandotte Cnty.*, 779 F.3d 1141 (10th Cir. 2015). However, like the speech at issue in *Lane*, the employee speech at issue in *Seifert* was sworn testimony, compelled by subpoena, outside the scope of ordinary job responsibilities. Relying upon *Lane*, the court held that Seifert's testimony was protected speech. *Id*. at

1151–53. Holt's speech is distinguishable from Seifert's. As held by the District Court:

> Mr. Holt neither argues, nor adduces any evidence, that he was compelled to meet with Mr. Cramer by subpoena or other order. Similarly, there is no argument or evidence that Mr. Holt was placed under oath or that the substance of Mr. Holt's discussion with Mr. Cramer was made part of a legal proceeding, and the Teller County District Court dismissed Ms. Thompson's Complaint of Election Violations on June 27, 2023.

(ROA Vol. 2 at 124–125.)

Holt also relies on *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022). There, the Court held that a football coach's private prayers made at midfield after games was private citizen speech rather than speech related to his official duties as coach. FFPD asserts that a public employee's private prayers cannot be compared to Holt's speech in this case. Rather, an analogous situation might be if Coach Kennedy had been asked by law enforcement to provide a video of his football practice for a criminal investigation to determine whether a certain player was at practice at the time of the crime the player was suspected of committing. In such a situation, it is hard to imagine that Coach Kennedy's provision of the practice video would be held to be outside the scope of his official duties.

In *Aquilina v. Wrigglesworth*,(W.D. Mich.), *aff'd sub nom. Aquilina v. Wrigglesworth*, 759 F. App'x 340 (6th Cir. 2018), a custodial defendant smuggled a shank into a courtroom and assaulted the prosecutor with it. The courthouse security cameras recorded the entire incident. Judge Aquilina had access to the recording because of her position with the court, and she decided to let a journalist view and copy the recording. The Sheriff conducted an investigation into the release of the video and requested criminal charges be brought against Judge Aquilina, but the prosecutor declined. Judge Aquilina brought an action against the Sheriff, claiming the investigation was retaliation for her providing the courthouse tape to a journalist. The court granted summary judgment in favor of the Sheriff on the basis that Judge Aquilina's release of the video fell within the scope of her official duties, holding that:

> The Court finds that Plaintiff's release of the video falls within the scope of her official responsibilities, and is not speech "as a citizen." Plaintiff had access to the video only by virtue of her official position. The *Lansing State Journal* reporter came to Plaintiff's judicial chambers to request permission to view the footage and make his own recording. Plaintiff had the ability to grant or deny his request only because of her official position. The reporter viewed the footage on court equipment used by Plaintiff and her staff to conduct court business. No one other than court employees had access to the video. Plaintiff did not speak "as a citizen" when she released the video; she spoke as a government official. Under *Garcetti* and its progeny,

> as a matter of law, Plaintiff's speech falls outside constitutional protection.

Id. at 1115. Holt also argues that the District Court failed to give weight to his speech because it was whistle-blowing about election fraud. (Opening Brief at p. 22.) However, there is no whistle-blower exception for speech made by a public official pursuant to his official duties:

> *Garcetti* and its progeny have significantly limited a public employee's protected speech in the workplace. *See Haka v. Lincoln Cty.*, 533 F. Supp. 2d 895, 918–19 (W.D. Wis. 2008) ("[T]he effect of *Garcetti* in this circuit has been devastating for public employees asserting claims for First Amendment retaliation."). As a result, speech about many important issues can be left without constitutional protection, including speech about public corruption, *e.g., Sigsworth* [*v. City of Aurora*], 487 F.3d [506] at 507 [(7th Cir. 2007)], misuse of government funds, *e.g.*, *Renken* [*v. Gregory*], 541 F.3d [769] at 774 [(7th Cir. 2008)], harassment, *e.g., Kubiak* [*v. City of Chicago*], 810 F.3d [476] at 482 [(7th Cir. 2016)], and race discrimination, *e.g., Roake* [*v. Forest Preserve Dist. of Cook Cnty.*], 849 F.3d [342] at 346–47 [(7th Cir. 2017)]. For better or worse, there is no "whistleblower carve-out from the category of unprotected employee speech." *Ulrey* [*v. Reichart*], 941 F.3d [255] at 259 [(7th Cir. 2017)].

Fehlman v. Mankowski, 588 F. Supp. 3d 917, 928 (W.D. Wis. 2022), *aff'd*, 74 F.4th 872 (7th Cir. 2023).

II. THE DISTRICT COURT'S GRANTING OF FFPD'S MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE REVERSED BECAUSE THERE WAS NO EVIDENCE OF RETALIATORY INTENT

A. Standard of Review

In his Opening Brief, Holt argues there is sufficient evidence of retaliatory intent to preclude summary judgment. (Opening Brief at p. 10.) The District Court did not address this element of the *Garcetti/Pickering* test, since it held the first element was not satisfied. However, even if this Court were to hold the first element to be satisfied, it could affirm summary judgment on a different basis – that there is no evidence of retaliatory intent.

B. No Evidence of Retaliatory Intent

At the fourth step of the *Garcetti/Pickering* analysis, the employee must show that the speech was a "substantial factor or a motivating factor in a detrimental employment decision." *Brammer–Hoelter*, 492 F.3d at 1203 (citations omitted). Holt asserts that the temporal proximity between his speech and his termination supports an inference of retaliatory motive. (Opening Brief at p. 10.) Holt also argues the FFPD provided shifting and inconsistent explanations for his termination. (*Id.*)

Here, none of the FFPD Board members even knew about Holt's speech to the criminal investigator. (ROA Vol. 1 at 127, 178:17–22.) Thus, Plaintiff's speech could not have been a factor in his termination. *See Dixon*, 553 F.3d at ~~1294,~~

1301("[i]ndeed, because Ms. Kirkpatrick was apparently unaware of the details of Ms. Dixon's conversation with Dr. Stock at the time of the termination, the termination decision could not have been based on the disclosure of specific confidential information").

In *Cypert,* 661 F.3d 477, Cypert, a former school district employee, claimed that she was terminated in retaliation for protected speech. One basis for Cypert's First Amendment claim was her signature on a petition for a state court grand jury investigation into the activities of district Board members (and, relatedly, the two weekends she spent soliciting signatures for the petition). Another was her involvement in an investigation of the Board President's son for a theft, which occurred at some unspecified time before her employment termination hearing. The district court concluded that Cypert's allegations were insufficient to show protected speech. The only evidence she offered of a specific public statement was her signature on the petition. With regard to that "statement," the court decided she satisfied the first three *Garcetti/Pickering* steps, but failed to establish that her signature on (or involvement with) the petition was a motivating factor behind her termination.

With regard to Cypert's involvement in the theft investigation, the court held that the record contained only general allegations failing to identify with particularity

any statements or actions sufficient to satisfy her burden to identify the specific instances of speech underlying her claim. *Id*. at 483 (citing *Craven v. Univ. of Colo. Hosp. Auth*., 260 F.3d 1218, 1226 (10th Cir. 2001)). Thus, the court held that she did not establish the occurrence and/or the content of the speech regarding the investigation sufficiently for the court to even begin the *Garcetti/Pickering* analysis.

With respect to the grand jury petition, Cypert argued the fourth factor was ordinarily a jury question. The court noted that was generally correct, but that summary judgment was appropriate when "there simply is no evidence in the record from which a trier of fact could reasonably conclude the [protected speech] was a motivating factor in [the plaintiff's] termination." *Cypert*, 661 F.3d at 484 (quoting *Rohrbough v. Univ. of Colo.Hosp. Auth*., 596 F.3d 741, 750 (10th Cir. 2010)); *see also Maestas v. Segura*, 416 F.3d 1182, 1188–92 (10th Cir. 2005) (affirming a grant of summary judgment because the plaintiffs failed to present sufficient evidence that their speech was a motivating factor for the adverse employment action). The court held that:

> She showed the Board was aware of the grand jury petition, but failed to show that any Board member was aware of her signature on or involvement with it. She admitted to never speaking to any Board member about the petition or making any statements supporting the petition in the presence of a Board member. In addition, intervening circumstances "tend to undermine any inference of retaliatory motive and weaken the causal link." *Maestas*, 416 F.3d at 1189. The Board's investigation of the

> District's finances and the resulting financial uncertainty at the time of Cypert's due-process hearing were such events.

Cypert, 661 F.3d at 484.

Similarly, in the present case, Holt admitted he never spoke to any FFPD Board member about the criminal investigation or his involvement with it. (*See* ROA Vol. 1 at 178:17–20.) Indeed, the present case is even more clear than *Cypert* because, here, Holt has not even shown that the FFPD Board was aware of the criminal investigation. Indeed, the evidence in the record is that the Board was not aware of the criminal investigation at any time before it terminated Holt's employment. (*See* Deposition of Del Toro, ROA Vol. 1 at 153:1–15.) In addition, there were intervening circumstances between Holt's speech and his termination. Holt's failure to renew FFPD's insurance occurred after his speech.

In *Rohrbough*, 596 F.3d 741, Rohrbough alleged she was terminated from her position as Transplant Coordinator within the Hospital's Heart Transplant Unit in retaliation for reporting a possible heart transplant misallocation and cover-up at the Hospital. She reported information regarding this alleged misallocation and cover-up to the United Network for Organ Sharing ("UNOS"), an entity established by Congress to administer organ transplants. With regard to the fourth step of the *Garcetti/Pickering* analysis, the court held that:

> [T]here simply is no evidence in the record from which a trier of fact could reasonably conclude the UNOS speech

> was a motivating factor in Rohrbough's termination.
>
> Rohrbough's supervisor, Margaret Frueh, testified that she had no knowledge of Rohrbough's UNOS reporting prior to terminating Rohrbough. Specifically, Frueh testified that "[a]t no time during Ms. Rohrbough's employment at the Hospital did I have knowledge of her reports to UNOS regarding the alleged 'heart-switch cover-up.'"

Id. at 750.

Rohrbough argued that she had presented enough evidence for a reasonable jury to infer that her speech was indeed the motivating factor in her termination. Specifically, she contended that Frueh's credibility should be determined by a jury and that discussions regarding the heart transplant continued through the spring and summer of 2003—just before her September 2003 performance evaluation. In rejecting Rohrbough's argument, the court held that:

> The record certainly supports a conclusion that Rohrbough engaged in a number of discussions with a variety of Hospital employees about the alleged misallocation of the heart. This evidence might allow a jury to infer that Frueh knew of Rohrbough's involvement in the incident. However, there is no evidence whatsoever that Rohrbough told Frueh, or any of her other superiors, of her decision to report the incident to UNOS. Accordingly, she has failed to present sufficient evidence for a reasonable trier of fact to find that her communications with UNOS were a motivating factor in her termination.

Id. at 750.

Similarly, here, there is no evidence whatsoever that Holt told any of the FFPD Board members of his decision to cooperate in the criminal investigation. Indeed, Holt testified that he did *not* tell any of the Board members or anyone else. (*See* Deposition of Plaintiff, ROA Vol. 1 at 178:17–22.)

C. FFPD would have terminated Holt in the absence of the protected speech

Even if Holt was able to establish that his speech was a motivating factor for his termination, the preponderance of the evidence shows that the Board would have terminated Holt even in the absence of his speech. Holt's termination had nothing to do with his speech. Rather, it was for his role in allowing the FFPD's insurance coverage to lapse. (*See* Notice of Termination, ROA Vol. 1 at 243.)

If the employee establishes that his protected speech was a motivating factor in the adverse employment decision, "the burden then shifts to the defendant, who must show by a preponderance of the evidence it would have reached the same employment decision in the absence of the protected activity." *Cragg v. City of Osawatomie, Kan.*, 143 F.3d 1343, 1346 (10th Cir. 1998) (citing *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977)).

This inquiry, also known as the *Mt. Healthy* analysis, arises from the Supreme Court's recognition that a "rule of causation which focuses solely on whether protected conduct played a part" in an adverse employment decision "could place an

employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." *Mt. Healthy*, 429 U.S. at 285; *see also id.* at 286 ("But [a borderline or marginal] candidate ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision."); *Hartman v. Moore*, 547 U.S. 250, 260 (2006) (discussing *Mt. Healthy*) ("If there is a finding that retaliation was not the but-for cause of the discharge, the claim fails for lack of causal connection between unconstitutional motive and resulting harm, despite proof of some retaliatory animus in the official's mind."); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 359 (1995) ("We held [in *Mt. Healthy*] that if the lawful reason alone would have sufficed to justify the firing, the employee could not prevail in a suit against the employer.").

In *Trant v. Oklahoma*, 754 F.3d 1158 (10th Cir. 2014), the court affirmed summary judgment to the employer on the basis that the employer would have fired Trant regardless of his protected speech. Trant claimed that the Board terminated him in retaliation for his statements threatening to reveal information related to a grand jury investigation to authorities. The Board asserted it fired Trant because of sexual

harassment allegations made against him and insubordination. The court held that, "[b]ecause the Board has introduced sufficient undisputed evidence to establish that it would have terminated Trant absent any alleged retaliatory motive, the district court was correct in granting summary judgment for the Board." *Id*. at 1169.

Similarly, in *Couch v. Bd. of Trustees of Mem'l Hosp. of Carbon Cnty*., 587 F.3d 1223 (10th Cir. 2009), the court held that a public hospital had met its burden at the fifth step because it would have taken the same actions against the plaintiff, a staff physician at the hospital, even absent the plaintiff's protected speech. *Id*. at 1244–45. The plaintiff had accused other physicians at the hospital of using alcohol and illegal drugs and forcefully advocated for changes in the hospital's drug and alcohol testing policy. Although the district court had granted summary judgment for the defendants at the fourth step, the Tenth Circuit held that alternate grounds existed at the fifth step of the *Garcetti/Pickering* test. *Id*. The Tenth Circuit concluded the alleged retaliatory conduct—hospital investigations of allegations against the plaintiff concerning disruptive conduct, billing fraud, and patient mistreatment and subsequent corrective actions—was "entirely appropriate" considering the serious allegations against the plaintiff and the recommendations of the investigations. *Id*. at 1245.

In this case, the FFPD Board conducted an investigation into the non-payment of the insurance. (*See* FFPD Investigation Summary, ROA Vol. 1 at 230.) The

investigation showed that Holt was at fault for allowing the insurance to lapse. (*Id.*) By unanimous vote at the June 22, 2023 board meeting, the FFPD Board terminated Holt's employment for cause. (*See* 06-22-23 FFPD Meeting Minutes, ROA Vol. 1 at 235.) Holt was terminated for his "failure to ensure the timely payment of the District's liability insurance when due," which resulted in "injury or damage to the financial or ethical welfare of the District" and demonstrated a failure "to perform at the standard required of the Fire Chief." (*See* ROA Vol. 1 at 243.)

III. THE DISTRICT COURT CORRECTLY HELD THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT WOULD PRECLUDE SUMMARY JUDGMENT

A. Standard of Review

Although Holt's pro se Opening Brief should be liberally construed by the Court, pro se litigants must follow the same procedural rules as other litigants. *See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). Fed. R. App. P. 28(a)(8)(A) directs an appellant to provide, in his opening brief, an "argument, which must contain ... [his] contentions and the reasons for them, with citations to the authorities and parts of the record on which [he] relies." "[T]he court cannot take on the responsibility of serving as the litigant's attorney in constructing arguments and searching the record." *Garrett*, 425 F.3d at 840.

B. There are no genuine issues of material fact

Holt argues the District Court improperly weighed certain evidence in FFPD's favor. First, he says the District Court "inferred" that he had only made a single report to the district attorney investigator, when there are multiple reports contained in the district attorney's investigation file. (Opening Brief at p. 11.) However, the district attorney's investigation file is not part of the summary judgment record in this case. Thus, any alleged discrepancy in the number of reports made by Holt is not a genuine issue of material fact. *See Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (although our review is de novo, we conduct that review from the perspective of the district court at the time it made its ruling, ordinarily limiting our review to the materials adequately brought to the attention of the district court by the parties).

Second, Holt argues that summary judgment relied on him being the only employee with access to the security footage, but that a third-party vendor held a contract for "services and servers associated with the system." (Opening Brief at p. 11.) Again, Holt fails to cite to the record for this alleged fact. *See Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1248 (10th Cir. 2000) (plaintiffs' argument fails because it is not backed with admissible evidence in the record). Moreover, a third-party vendor would not have been an employee of the FFPD.

Third, Holt argues that the District Court incorrectly stated that Holt was the custodian of the security system, because the third-party vendor was the custodian. (Opening Brief at p. 11.) Again, Holt fails to cite to the record for this alleged fact and thus his argument fails to raise a genuine issue of material fact.

Fourth, Holt argues that the District Court was incorrect when it stated that "there appears to be no other individual whom Mr. Cramer could have directed his inquiry" for the video footage. (Opening Brief at p. 11.) Holt asserts Mr. Cramer could have asked the third-party vendor or any member of the outgoing Board. Again, Holt fails to cite to the record for this alleged fact and thus his argument fails to raise a genuine issue of material fact.

Finally, Holt finds fault with the District Court's statement that "there is also no argument or evidence in the record that Mr. Holt expressed to Mr. Cramer that he believed violations of election law had occurred." Holt argues that, in viewing the facts in the light most favorable to him, the District Court should have "assume[d]" that he met with the district attorney's investigator to testify and provide material evidence for the criminal investigation. (Opening Brief at p. 12.)

At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts. Fed. R. Civ. P. 56(c). It is well settled that, "[w]hen the moving party has carried its

burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 586–587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (footnote omitted). When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Here, the record contains the following deposition testimony of Holt:

> Q. [W]hat oral testimony did you provide?
>
> A. What I described before the break. When he would ask me questions, and I would answer them, similar to how we are right now.
>
> Q. Well, what did he ask you questions about?
>
> A. Who this individual was. If I had – if I could identify who he was pointing to on the screen. "How far do you think these people were from this position?" That is all I can really think of was those sort of questions.

(ROA Vol. 1 at 176:12–20.) There was no genuine dispute about the fact that Holt did *not* report violations of election law to the district attorney investigator. Thus, the

District Court was not required to view that fact in the light most favorable to Holt, and was certainly not required (nor permitted) to make assumptions about facts not in evidence.

CONCLUSION

For the reasons set forth above, FFPD requests that this Court affirm the District Court's grant of summary judgment in favor or FFPD and award such costs as are allowed by law.

STATEMENT REGARDING ORAL ARGUMENT

FFPD does not request oral argument.

Respectfully submitted,

Date: July 21, 2025

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because: this brief contains 29 pages and 6,665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of July, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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