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CASE NUMBER: 2024CV33593

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, CO 80202 **Plaintiff:** TRAVIS WEINER **v.** **Defendant:** COLORADO OFFICE OF THE STATE PUBLIC DEFENDER; MEGAN RING, in her individual and official capacities; and MICHELE NEWELL, in her individual and official capacities.	**Δ COURT USE ONLY Δ** Case No.: 2024CV33593 Division: 209

ORDER RE: DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND CLAIM

This matter is before the Court on Defendants' Motion to Dismiss, filed January 17, 2025.[1] Having considered the parties' briefing, the relevant legal authorities cited, and being familiar otherwise with record in this case, the Court ORDERS as follows:

FACTS AS ALLEGED IN THE COMPLAINT

1. Defendant Megan Ring is the Colorado State Public Defender, meaning she is the head of the Office of the State Public Defender ("OSPD") and is responsible for all operational, policy, and personnel decisions on behalf of OSPD. Further, Ring is responsible for implementation of OSPD's policies and procedures.

[1] The Court will address the Motion to Dismiss as it relates to Plaintiff's first claim separately.

2. Defendant Michele Newell is the Office Head of the Greeley office OSPD. As such, Newell implements OSPD policies and procedures at the Greeley office.

3. Defendant Colorado OSPD employed Plaintiff Travis Weiner as a public defender in its Greeley office between February 2019 and February 2024.

4. Sometime in 2023, Weiner became concerned with the significant workload he was responsible for as a Public Defender. Weiner believed he was unable to complete discovery review and legal research at a stage which was beneficial to his clients. In some cases, Weiner believed he was unable to complete either of these preliminary tasks prior to advising his clients whether they should take a plea deal.

5. Weiner conducted independent legal research, and concluded incomplete performance of his work duties potentially violated the Colorado Rules of Professional Conduct, C.R.S. § 21-1-101(1), and ABA Defense Function Standard 4-6.1(b). Weiner also read the National Public Defense Workload Study ("Rand Study"), which the ABA and the RAND Corporation published in 2023. The Rand Study included calculations regarding the number of hours a public defender could expect to devote to each type of case while providing "reasonably effective assistance of counsel pursuant to prevailing professional norms." After comparing the Rand Study to his own work, Weiner concluded he carried between 2.5 and 3 times the workload an attorney could competently handle.

6. Concerned his workload was too significant to ensure constitutionally

adequate representation for his clients, Weiner felt legally and ethically obligated to reduce not only his own workload, but also the workload of his colleagues.

7. OSPD policy instructed its attorneys to triage their dockets to reduce workload. Based on his independent legal research, Weiner disagreed with this OSPD policy. At multiple all-office meetings in 2023, he told his colleagues and supervisors he had concluded they all had a legal obligation to withdraw from cases to address the workload crisis and its effects. Furthermore, Weiner informed his supervisors he was concerned he would eventually violate a client's right to counsel. Weiner's supervisors consistently disagreed with him.

8. In September 2023, Weiner met privately with Newell to discuss the workload crisis. Newell stated the OSPD triage strategy did not violate the law. Newell declined to discuss alternative strategies. When Weiner raised the possibility of seeking relief from the court, Newell explained excessive workload was not a legitimate ground for relief per OSPD's policy. Furthermore, Newell stated Weiner would not receive supervisory approval if he attempted to withdraw from a case based on his workload.

9. Believing his legal obligations and professional duties outweighed internal OSPD policies, Weiner moved to withdraw from two cases. Weiner selected cases with clients who were out of custody so any delays his motions brought would not prolong pretrial detention. He also met with each client, explained the potential outcomes of his motion, and obtained informed consent to file the motion to withdraw.

10. In both motions to withdraw, Weiner specifically cited to his excessive workload. He disclosed the discrepancy between his workload and the workload an attorney could competently handle as described in the Rand Study. Weiner also claimed OSPD's triage policy exacerbated the effects of excessive workloads. Weiner suggested OSPD's triage policy was potentially illegal, stating attorneys were forced to prioritize more serious cases to the detriment of clients with less serious cases. Weiner concluded he was unable to provide the effective representation to which his clients were constitutionally entitled and asked the trial court to both allow him to withdraw and to appoint alternate defense counsel ("ADC").

11. Colorado law allows for appointment of ADC in certain instances, including in cases involving conflicts of interest for the OSPD. C.R.S. § 21-2-103(1)(a). However, the statute explicitly provides "[c]ase overload, lack of resources, and other similar circumstances shall not constitute a 'conflict of interest." C.R.S. § 21-2-103(1.5)(c).[2] Weiner argued to the trial court this provision was unconstitutional.

12. Upon learning of Weiner's first motion to withdraw, Newell moved to have Weiner's motions withdrawn. The court granted her motion, and Newell had the case immediately transferred to her. When Weiner filed his second motion to withdraw, Newell filed a notice informing the court Weiner's motion was unauthorized. Later, the case was transferred to one of Weiner's colleagues. Neither of Weiner's motions was

[2] Subsection (1.5)(c) was subsequently repealed and relocated to C.R.S. § 21-2-100.3(2). S.B. 25-275, 75th Gen. Assemb., Reg. Sess. (Colo. 2025).

ever litigated or ruled upon.

13. On January 12, 2024, Weiner met with Newell and another supervisor. Newell acknowledged the workload crisis but explained all OSPD employees were required to abide by the OSPD policy prohibiting withdrawal without supervisor approval. Newell then presented Weiner with a corrective action letter. The letter stated Weiner had violated policy and willfully disregarded Newell's instructions and further laid out a list of directives with which Weiner was obligated to comply. Weiner was forbidden from filing a motion to withdraw without approval from a supervisor, and he was required to obtain Newell's approval prior to challenging the ADC statutes as unconstitutional. The letter concluded failure to follow the expectations stated in the corrective action may lead to further corrective or disciplinary action, including termination.

14. After reviewing the letter, Weiner asked Newell whether OSPD would always refuse withdrawal based on an excessive workload. Newell answered yes. Further, Newell confirmed Weiner would be prevented from filing a motion to withdraw on the grounds of an excessive workload.

15. Weiner took issue with a portion of the corrective action letter which alleged he had not reviewed the substance of his motion with the client or discussed the consequences of the motion, meaning his client was unaware he was moving to withdraw from the case. Newell indicated the meeting was intended to offer a preliminary

opportunity to review the letter, and Weiner could respond to the corrective action in writing.

16. On January 16, 2024, Newell told Weiner there would be no changes made to the corrective action, and he was expected to comply with the expectations as written. Through counsel, Weiner sent a letter to Newell expressing his commitment to public defense but his unwillingness to sign the corrective action letter. Despite asking Newell to advise Weiner about how to proceed, Newell never responded to the letter. Weiner continued to work as a public defender.

17. In February 2024, OSPD's computer systems suffered a cyberattack. As a result, OSPD attorneys were unable to access discovery documents and other client files. One of Weiner's colleagues spoke with Newell and suggested some cases should be transferred to ADC or the inability to review discovery would potentially harm those clients. Newell responded the cyberattack did not create a conflict of interest and no motion to withdraw would be approved on those grounds.

18. Despite Newell's express disapproval, Weiner's colleague subsequently moved to withdraw from at least one case because of the cyberattack. Newell appeared at the hearing on the motion to argue against it. The colleague received no disciplinary action because of the motion.

19. Although Weiner acknowledged the effects the cyberattack created were transient, he felt he faced a conflict between the representation to which his clients were

legally entitled, his legal and professional obligations, and OSPD's directives.

20. On February 21, 2024, Weiner requested the scheduling of a hearing to discuss the effects of the cyberattack and whether it created an impermissible conflict of interest. Weiner stated he would move to withdraw and ask the court to replace him with ADC if the effects of the cyberattack had not abated prior to the date of the special hearing. Weiner's disclosure to the court included Newell's prior opposition to functionally identical motions to withdraw, and explained Newell would likely oppose another such motion. The court set the matter for a March 7, 2024 hearing. Weiner immediately emailed Newell regarding his oral motion and the upcoming hearing date.

21. In response to Weiner's email, Newell placed Weiner on administrative leave for violating the terms of the corrective action. Later that day, Newell informed Weiner of her decision to recommend termination of his employment with OSPD. Newell further informed Weiner he had two days to provide Ring with any information he believed Ring should consider prior to her making a decision about his termination.

22. Through counsel, Weiner sent Ring the letter he had previously sent to Newell following discussion of the corrective action letter. Ring did not respond.

23. On February 26, 2024, Weiner was terminated from his position with OSPD. The termination letter Ring signed stated the reason for termination was Weiner's noncompliance with supervisor directives and expectations as set forth in the corrective action.

LEGAL STANDARD

A. Lack of Subject Matter Jurisdiction

"Subject matter jurisdiction concerns the court's authority to deal with the class of cases in which it renders judgment." *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981). In determining whether a court has subject matter jurisdiction, reference must be made to the nature of the claim (the facts alleged) and the relief sought. *In re Water Rights of Columbine Ass'n*, 993 P.2d 483, 488 (Colo. 2000); *Currier v. Sutherland*, 215 P.3d 1155, 1160 (Colo. App. 2008). The general subject matter jurisdiction of a district court may be limited by an express constraint created by the legislature. *Currier*, 215 P.3d at 1159.

A plaintiff bears the burden of proving a court has subject matter jurisdiction when such jurisdiction is challenged, but a court must accept as true all allegations set forth in the complaint in determining whether a plaintiff has alleged sufficient injury to confer standing. *Marks v. Gessler*, 350 P.3d 883, 899 (Colo. App. 2013); *City of Boulder v. Pub. Serv. Co. of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999). If the plaintiff cannot establish the trial court has subject matter jurisdiction or the court has no power to hear the case, the court must dismiss the action. *See* C.R.C.P. 12(h)(3).

B. Failure to State a Claim

A complaint must state a plausible claim for relief to survive a motion to dismiss under C.R.C.P 12(b)(5). *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016). However, motions to dismiss are disfavored, and may be granted only when, assuming all the

allegations of the complaint are true, and drawing all reasonable inferences in favor of the plaintiff, the plaintiff would still not be entitled to any relief under any cognizable legal theory. *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012); *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1089 (Colo. 2011). Although a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simple provide "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557.

Whether a claim is stated must be determined solely from the complaint. *Dunlap v. Colorado Springs Cablevision, Inc.*, 829 P.2d 1286, 1290 (Colo. 1992). A court may consider only the facts alleged in the pleadings, as well as "documents attached as exhibits or incorporated by reference and matters proper for judicial notice." *Denver Post*, 255 P.3d at 1088.

ANALYSIS

Weiner alleges claims of violation of Colorado's State Employee Protection Act (also known as the Whistleblower Act) against OSPD, and violation of Weiner's freedom of speech under Article II, Section 10 of the Colorado Constitution against Newell and Ring. Defendants sought dismissal of the Whistleblower claim for lack of jurisdiction and requested a *Trinity* hearing. Beginning on January 26, 2026, the Court held a four-day

hearing. The Whistleblower claim, findings of fact and determination of subject matter jurisdiction are forthcoming in a separate order. Defendants also sought dismissal of the free speech claim in its entirety.

A. Weiner's state constitutional free speech claim must be dismissed.

i. Implied Cause of Action for Damages under the Colorado Constitution

Newell and Ring argue Weiner's free speech claim must be dismissed because there is no statutory or implied cause of action for alleged violations of the Colorado Constitution. Weiner responds an implied cause of action exists because there is no other adequate legal remedy to vindicate Weiner's state constitutional rights. Weiner claims the Colorado Constitution affords greater free speech protection than the Federal Constitution, and accordingly, his claim demands analysis under a broader standard. The parties agree no Colorado appellate court has addressed whether, under the current framework for recognition of an implied cause of action, federal free speech protections constitute an adequate legal remedy to vindicate an individual's free speech rights under the State Constitution.

Both parties rely on *Bd. of Cty. Comm'rs of Douglas Cty. v. Sundheim*, 926 P.2d 545 (Colo. 1996) to support their argument. 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 recognized the General Assembly, in drafting and adopting

the Colorado Governmental Immunity Act ("CGIA"), intended "to balance the rights of aggrieved citizens against legitimate government concerns." *Id.* at 550. Ultimately, the Court concluded "where other adequate remedies exist, no implied remedy is necessary." *Id.* at 553. Because the plaintiffs had adequate statutory remedies available in state and federal law, the court declined to create an implied damages remedy. *Id.*

Newell and Ring argue under *Sundheim* this Court is required to decline recognition of an implied damages remedy because there are other adequate statutory remedies. In support of their argument, Newell and Ring point to a series of federal cases which relied on *Sundheim* declining to recognize an implied state constitutional cause of action because section 1983 provides an adequate remedy. *See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 81 F.Supp.2d 1090, 1097–98 (D. Colo. 2000) (declining to recognize an implied state constitutional cause of action for damages for free speech claims because adequate remedies are available pursuant to section 1983); *Vanderhurst v. Colorado Mountain Coll. Dist.*, 16 F.Supp.2d 1297, 1304 (D. Colo. 1998) (same); *cf. Arndt v. Koby*, 309 F.3d 1247, 1255 (10th Cir. 2002) (noting section 1983 was an available remedy for state constitutional free speech claim, even where the plaintiff did not ultimately prevail on her section 1983 claim). Furthermore, Newell and Ring assert Weiner's Whistleblower Act claim is itself a state statutory remedy.

Weiner, on the other hand, argues under *Sundheim* the Court is required to recognize an implied state constitutional cause of action because there is no adequate

legal remedy. Weiner's argument is based on the assertion the Colorado Constitution offers substantially stronger free speech protection than the First Amendment of the Federal Constitution. *See Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991) ("For more than a century, this Court has held that Article II, Section 10 provides greater protection of free speech than does the First Amendment"). By his reasoning, section 1983 does not provide an adequate legal remedy because the current federal jurisprudence is too restrictive to satisfy the expansive protections the Colorado Constitution offers.

Looking to the federal cases Newell and Ring cite, Weiner identifies the standard articulated in *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Illinois*, 391 U.S. 563 (1968) as the standard for free speech claims under section 1983. Under *Pickering*, courts were required to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. However, the U.S. Supreme Court subsequently limited First Amendment protections for public employee speech in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In *Garcetti*, the Court held the First Amendment does not protect public employees' statements made "pursuant to their official duties." *Id.* at 421. Weiner argues *Garcetti* is less protective of free speech, and the broader standard applied in *Brammer-Hoelter*, *Vanderhurst*, and *Arndt* is no longer applicable. Thus, by his reasoning this

Court should decline to find section 1983 is an adequate alternative.

Ultimately, the Court is persuaded by Newell and Ring's arguments. While Weiner has presented persuasive argument on the general proposition the Colorado Constitution affords greater protection than the First Amendment, he has not supported the contention application of *Garcetti* would deprive him of specific rights under Article II, Section 10 of the Colorado Constitution. Nor does Weiner cite to any law supporting his assertion the Whistleblower Act fails to provide an adequate alternative remedy in state law.

The Court declines to recognize an implied state constitutional cause of action for damages for free speech claims because adequate remedies are available pursuant to Section 1983 and the Whistleblower Act.

The Court next addresses Newell and Ring's argument Weiner only plausibly seeks damages, and any request for equitable relief is a mere restatement of his claims without factual support. The Court agrees; Weiner does not request equitable relief such as reinstatement or front pay. Newell and Ring also argue declaratory relief is not available based on the facts of this case. *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"). The Court agrees declaratory judgment as to

Weiner's termination for alleged violations of his free speech rights will not have practical legal effect on the dispute. Similarly, Weiner does not seek a declaration as to any statute that would be applied in future situations. *Cf. Russell v. City of Central*, 892 P.2d 432 (Colo. App. 1995) (declaratory judgment not moot when validity of amendment of general application is challenged). Therefore, the Court considers Weiner's free speech claim to the extent it seeks monetary damages.

ii. Immunity Under the Colorado Governmental Immunity Act

Newell and Ring claim immunity under the CGIA against Weiner's state constitutional claim. Weiner responds the CGIA is irrelevant because an implied state constitutional cause of action would be tantamount to a waiver of statutory governmental immunity. Having determined it would be inappropriate to recognize an implied state constitutional cause of action under the facts of this case, the Court turns to immunity under the CGIA.

The CGIA creates immunity for public entities and employees against all claims which "lie in tort or could lie in tort." C.R.S. § 24-10-106(1). "[T]he form of the complaint is not determinative," of whether a claim sounds in tort, rather, courts should examine the nature of the injury and the relief sought. *Robinson v. Colorado State Lottery Div.*, 179 P.3d 998, 1003–04 (Colo. 2008). When evaluating whether a claim sounds in tort, courts should consider the source and nature of liability, or the nature of the duty and breach from which liability arises. *Foster v. Bd. of Governors of the Colorado State Univ.*

Sys. by and on behalf of Colorado State Univ., 342 P.3d 497, 501 (Colo. App. 2014).

> 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. Although sovereign immunity is waived for specifically enumerated categories of tort claims, none of those exceptions apply herein. C.R.S. § 24-10-106(1).

Immunity under the CGIA is also limited to circumstances where public employees are acting within the scope of their employment, unless the act causing injury was willful or wanton. C.R.S. § 24-10-118(2)(a). 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." C.R.S. § 13-21-102(1)(b). "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." C.R.S. § 24-10-110(5)(a).

Newell and Ring argue the facts of Weiner's constitutional claim could support a common law tort claim for retaliatory discharge in violation of public policy. *See Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (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 when the termination undermined a clear and express public policy. *Kearl v. Portage Env't, Inc.*, 205 P.3d 496,

499 (Colo. App. 2008).

Here, Weiner's allegations support a retaliatory discharge claim. *See Holland v. Bd. of Cty. Comm'rs of Cty. of Douglas*, 883 P.2d 500, 508 (Colo. App. 1994) (affirming dismissal of wrongful discharge claim due to CGIA immunity where state employee alleged, among other claims, violation of First Amendment rights and retaliatory discharge). Weiner has pleaded Ring was his employer and Newell his supervisor. His argument frames his speech as a duty-bound disclosure; based on his subjective belief of the ethical violations effected by the workload crisis, Weiner had a legal duty to disclose his concerns to the court. Weiner also alleges Newell and Ring terminated him as retaliation for complying with his ethical duty. Finally, by alleging his termination violated the Whistleblower Act, Weiner pleaded a violation of the clear public policy in favor of disclosures of abuses of authority and illegal and unethical practices. *See* C.R.S. § 24-50.5-101(1). The Court is persuaded Weiner's free speech claim sounds in tort and is subject to the CGIA.

The Court is unable to discern from the alleged facts how Newell and Ring acted willfully and wantonly. The Court interprets the assertion Newell and Ring acted "intentionally, knowingly, willfully, wantonly, maliciously, and in reckless disregard" of Weiner's constitutional rights as a bald assertion because it is unsupported by the alleged facts.

Thus, the Court determines Weiner's free speech claim does not fall within a

waived area of immunity and the CGIA bars it.

CONCLUSION

Based on the foregoing, the Court GRANTS Defendants' Motion to Dismiss as to Plaintiff's second claim.

DATED: June 24, 2026.

BY THE COURT:

Sarah B. Wallace
District Court Judge