

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico**

Civil Action No. 1:24-cv-02284-DDD-SBP

KRISTEN FRY,

Plaintiff,

v.

SCHOOL DISTRICT NO. 1 d/b/a DENVER PUBLIC SCHOOLS,
AUON'TAI ANDERSON, HASHIM COATES, SCOTT ESSERMAN,
XOCHITL GAYTAN, MICHELLE QUATTLEBAUM, and MIDIAN
SHOFNER,

Defendants.

ORDER ADOPTING RECOMMENDATION

This case is before me following a Recommendation from Magistrate Judge Timothy P. O'Hara, Doc. 143, that each of the Defendants' Motions to Dismiss be denied. Docs. 35, 97, 100. All Defendants filed timely objections, Docs. 145, 146, 147, which are largely based on attacking the plausibility of Plaintiff's allegations. It may turn out that Plaintiff's allegations are not true or provable, but I agree with Judge O'Hara that Plaintiff's allegations contain enough detail to survive at this early stage. Defendants' objections are overruled and their motions to dismiss are denied.

BACKGROUND

The relevant facts from Plaintiff Kristen Fry's amended complaint, Doc. 8, are laid out at length in Judge O'Hara's recommendation, so I do not reiterate them in their entirety here. *See* Doc. 143 at 2–12. In sum, Plaintiff alleges Defendants formed a conspiracy to retaliate against her

for her protected speech and to dissuade opposition to a disputed policy choice and termination decision. *See* Doc. 8 at ¶ 132. According to the amended complaint, Defendants acted on the basis of a “collective objective ... to suppress political disagreement with their educational and safety policy choices.” *Id.* at ¶ 133. To achieve that goal, Defendants “agreed, both expressly and implicitly, to mistreat” Plaintiff. *Id.* at ¶ 133.

This plan began with Defendants Anderson, Esserman, Coates, and Shofner, who “regularly conferred in private ... to set DPS policy [] and to develop strategies to suppress dissenting voices, including Ms. Fry’s.” *Id.* at ¶ 18. The aim was to deter Plaintiff and others from engaging in “speech and activities in opposition to defendants’ policies.” *Id.* at ¶ 133. Defendants also agreed “to mistreat Ms. Fry as an example to her and to others to deter their speech and activities in opposition to defendants’ policies.” *Id.* Defendants agreed that the mistreatment of Plaintiff “would take multiple forms,” including: (1) falsely accusing Plaintiff of using a racial slur and committing “a hate crime assault during a public school board meeting,” (2) “broadcasting false claims that Ms. Fry was a ‘racist’ or ‘white supremacist,’” (3) filing knowingly false police reports accusing Plaintiff of crimes she did not commit, and (4) “agreeing to give and giving false testimony in support of the false criminal prosecution.” *Id.* at ¶ 134. Plaintiff also alleges Defendants took adverse actions against her to achieve their “broader objective of suppressing dissent,” including denying her open records request for a video that exculpated her in the false criminal prosecution, denying her volunteer status at her children’s school, and prohibiting her from participating in Board of Education elections. *Id.* at ¶¶ 135, 138. Plaintiff points to adverse actions taken against others as well (the school principal and other parents), and acts of interference against dissenting voices that she contends serve as proof of Defendants’ larger objectives. *Id.* at ¶ 138.

In response to Defendants’ alleged actions, Plaintiff filed the current lawsuit on August 19, 2024, bringing claims for First Amendment retaliation, defamation, abuse of process, and malicious prosecution. Doc. 1. The District Defendants (School District No. 1 d/b/a Denver Public Schools, Auon’tai Anderson, Scott Esserman, Xochitl Gaytan, Michelle Quattlebaum) filed a motion to dismiss all claims against them on November 4, 2024. Doc. 35. Pro se Defendants Shofner and Coates filed their own motions to dismiss. Doc. 97, 100.

LEGAL STANDARDS

Objections generally must be filed within fourteen days of entry of the magistrate judge’s recommendation. Fed. R. Civ. P. 72(b). Objections must be “sufficiently specific to focus the district court’s attention on the factual and legal issues that are truly in dispute.” *U.S. v. 2121 E. 30th St., Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). If a timely and sufficiently specific objection has been filed as to a recommendation on a dispositive issue, the Court must resolve that objection under a de novo review. *Id.* at 1059; Fed. R. Civ. P. 72(b)(3)

“A *pro se* litigant’s pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972)). But the court cannot be a *pro se* litigant’s advocate. *See Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008). *Pro se* parties also must “follow the same rules of procedure that govern other litigants.” *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994) (quoting *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir.1992)).

At the motion-to-dismiss stage, a court “must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.” *Alvarado v. KOB-TV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation marks omitted).”

“Mere ‘labels and conclusions’ and ‘a formulaic recitation of the elements of a cause of action’ will not suffice.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). So, a court should “disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable.” *Id.*

DISCUSSION

I. Section 1983 Liability

The District Defendants object to Judge O’Hara’s conclusion that Plaintiff plausibly alleged Section 1983 liability against all Defendants. Doc. 145 at 5. They contend this was error because, in their view, there is no factual basis that they participated in the denial of Plaintiff’s open records request or ability to volunteer at her children’s school. *Id.* at 6. The District Defendants also argue that even if Defendants Coates and Shofner were state actors under Section 1983 (which they contend Plaintiff did not plausibly allege and Judge O’Hara erred in finding), they cannot be held liable under Section 1983 based on their relationship with them.¹ *Id.* at 5–6.

Judge O’Hara found that Plaintiff’s allegations were sufficient at this early stage of litigation to maintain her Section 1983 claim. To make that finding, he analyzed Plaintiff’s amended complaint under the Tenth Circuit’s joint-action test, under which the actions of a private actor can be imputed to a state actor when “state officials and private parties have acted in concert in effecting a particular deprivation of constitutional

¹ Defendants Shofner and Coates also object to Judge O’Hara’s finding of Section 1983 liability based on their private conduct. *See* Doc. 146 at 2 (objecting to the joint-action and conspiracy findings); Doc. 147 at 2–4 (same). All defendants’ objections relating to Section 1983 liability are analyzed together.

rights.” Doc. 143 at 18 (quoting *Wittner v. Banner Health*, 720 F.3d 770, 777 (10th Cir. 2013)). Based on the allegations, Judge O’Hara found that the individual District Defendants were state actors during Board meetings, as well as when their personal involvement on the Board “set in motion a series of events that [they] knew or reasonably should have known would cause others to deprive Plaintiff of her constitutional rights.” *Id.* at 17 (quoting *Calderón v. City & Cnty. of Denver*, No. 18-cv-00756-PAB-MEH, 2023 WL 5348396, at *8 (D. Colo. Aug. 21, 2023)). To support that finding, he distinguished between Plaintiff’s conclusory and well-pleaded allegations as to the District Defendants and concluded the amended complaint contained sufficient allegations of a plausible conspiracy. *Id.* at 19.

This was a correct application of law to the allegations. *See Buentello v. Boebert*, 545 F.Supp.3d 912, 916 (D. Colo. 2021) (using the joint-action test to analyze whether the private comments of an individual were in concert with state officials to determine 1983 liability). This is because, in addition to the actions of Defendants Shofner and Coates—private individuals allegedly conspiring with the Board—a municipal government entity can be held liable under Section 1983 if its actions through policy or custom have a direct causal relationship to retaliation against a plaintiff. *See McCook v. Springer Sch. Dist.*, 44 F. App’x 896, 910 (10th Cir. 2002) (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) and related case law). “[I]f an official, who possesses final policymaking authority in a certain area, makes a decision—even if it is specific to a particular situation—that decision constitutes municipal policy for § 1983 purposes.” *Marshall v. Dix*, 640 F.Supp.3d 1033, 1068 (D. Colo. 2022) (quoting *Randle v. City of Aurora*, 69 F.3d 441, 447 (10th Cir. 1995)). Plaintiff’s amended complaint includes several detailed allegations of the District Defendants’ actions toward Plaintiff in their official capacity and how, in joint action with Defendants Shofner and Coates,

they conspired to retaliate against Plaintiff. This is unpacked more below.

A. Conspiracy

Plaintiff's Section 1983 claim is predicated on allegations that Ms. Shofner and Mr. Coates acted as part of a conspiracy with the District Defendants. As Judge O'Hara recognized, that would make the District Defendants conspirators liable under Section 1983 for acts that Defendants Coates or Shofner took in furtherance of the alleged retaliation conspiracy. *Pastore v. Bd. of Cnty. Comm'rs*, 572 F.Supp.3d 1100, 1118 (D.N.M. 2021) (citing *Dixon v. City of Lawton* for the principle of imputed liability in the conspiracy context. 898 F.2d 1443, 1449 n.6 (10th Cir. 1990)). Both the District Defendants and Defendants Shofner and Coates object to this finding and argue Judge O'Hara "erred in inferring a conspiracy, or meeting of minds, based on the individual defendants relationships and/or campaign ties, without any allegations of supporting overt acts." Doc. 145 at 9. I disagree.

An unlawful conspiracy consists of (1) two or more persons, (2) who agree or act in concert, (3) for an unlawful purpose or by unlawful means, and (4) commit an overt act toward the completion of the unlawful objective. *Wilson v. City of Lafayette*, Nos. 07-cv-01844-EWN-KLM, *et seq.*, 2008 WL 4197742, at *11 (D. Colo. Sept. 10, 2008). Defendants are correct that a plaintiff's allegations of conspiracy must be plausible and a court cannot assume or infer the existence of a conspiracy. *See Lucero v. Safeway, Inc.*, No. 20-cv-03792-MEH, 2022 WL 79860, at *7 (D. Colo. Jan. 7, 2022). Still, because of the inherent difficulty of directly proving a conspiracy, "the Court must proceed with caution in considering a pre-trial dismissal of a § 1983 conspiracy." *Trevino v. Catron Cnty. Sheriff's Dep't*, No. CIV 03-1178 DJS/RLP, 2004 WL 7337998, at *11 (D.N.M. Sept. 14, 2004) (citing *Fisher v. Shamburg*, 624 F.2d 156, 162

(10th Cir. 1980)).

Plaintiff's amended complaint contains several allegations of the District Defendants acting in their official capacity to unlawfully conspire against Plaintiff.² Some examples include Mr. Anderson, a board member from November 2019 to November 2023, characterizing Plaintiff's actions as "unspeakable racism at our board meeting," Doc. 8 at ¶¶ 9, 90–91, the board members "sitting so close [to one another] that they could hear [and not prevent] defendants Shofner and Coates' repeated interruptions," *id.* at ¶ 61, knowledge of Defendant Coates' false allegations against Plaintiff, *id.* at ¶ 93, making false public comments about Plaintiff at a board meeting, *id.* at ¶¶ 86–87, 90, and agreeing to corroborate false allegations of Plaintiff's behavior at a board meeting to the police. *Id.* at ¶ 105. Plaintiff also makes several specific allegations about the relationship between District Defendants and Defendants Shofner and Coates, including that Defendant Coates was a paid consultant, Defendant Shofner was a former appointee to the Board and long-time agent and participant, and both regularly conferred in private to develop strategies to suppress dissenting voices, including Plaintiff's. *See id.* at ¶¶ 14–18. The allegations don't stop there, as Plaintiff

² The District Defendants contend Judge O'Hara erred in finding Plaintiff plausibly alleged municipal liability, confusing it with liability under Section 1983. *See* Doc. 145 at 6–9. But the District Defendants assume too much. Plaintiff's amended complaint does not allege *Monell* liability against Defendants, nor does Judge O'Hara's recommendation analyze it as part of his 12(b)(6) review. In discussing the basis for First Amendment retaliation, Judge O'Hara explicitly states *Monell* liability cannot be determined from the allegations and would require additional fact development. *See* Doc. 143 at 37. Because Plaintiff does not state a claim for vicarious liability and Judge O'Hara does not take it up as part of his recommendation, I need not rule on it in response to the District Defendants' objection.

continues to provide more detail about their shared agenda to terminate a school principal and hatch a conspiracy, advocate for a new disciplinary policy, and silent dissent. *Id.* at ¶¶ 18, 43, 49–51, 61, 66–70, 93.

The Defendants’ objections attack the plausibility of Plaintiff’s allegations to satisfy the Section 1983 and conspiracy standards. *See* Doc. 145 at 9–12; Doc. 146 at 2 (objecting to the joint-action and conspiracy findings); Doc. 147 at 2–4 (same). Again, Plaintiff may lack evidence to support the truth of her allegations, but at this stage, the bar is low, and I agree with Judge O’Hara that the allegations include enough detailed factual support to meet the threshold plausibility standard. *See* Doc. 143 at 14–15, 22, 25–26, 31. Accordingly, the District Defendants’ objections regarding Judge O’Hara’s findings of plausible allegations of Section 1983 liability and conspiracy are overruled.

II. First Amendment Retaliation

Plaintiff alleges that the purpose of the Defendants’ conspiracy was to retaliate against her for her protected speech activity and to dissuade opposition to the disputed policy choice and termination decision. *Id.* at ¶ 132. The District Defendants object to Judge O’Hara’s finding that Plaintiff plausibly alleged First Amendment retaliation.³ Doc. 145 at 2. Specifically, the District Defendants argue Judge O’Hara erred by aggregating *de minimis* acts such as Plaintiff’s alleged volunteer revocation and her open records denial, without requiring each act to independently meet the “vigorous standard” to establish a retaliation claim. *Id.* I disagree.

To state a claim of First Amendment retaliation, whether by way of

³ Defendant Shofner also objects to Judge O’Hara’s First Amendment retaliation conclusion on the same basis as the District Defendants. *See* Doc. 146 at 2–3. Given the overlap, the Defendants’ objections are addressed together.

conspiracy or not, Plaintiff must allege (1) she was engaged in constitutionally protected activity, (2) Defendants caused her to suffer injury that would chill a person of ordinary firmness from continuing to engage in that protected activity, and (3) her protected conduct is what substantially motivated the Defendants to take that adverse action against her. *VDARE Found. v. City of Colo. Springs*, 11 F.4th 1151, 1172 (10th Cir. 2021). The adverse action taken by Defendants against Plaintiff must be objectively severe enough to chill a person of ordinary firmness. *McCook*, 44 F. App'x at 904. It is a “vigorous standard”. *VDARE*, 11 F.4th at 1172.

No Defendant disputes Plaintiff was engaged in constitutionally protected activity,⁴ so the first *VDARE* element is satisfied. As to the second and third elements, Plaintiff provides a list of several allegations regarding the District Defendants' actions that, taken as true, *see* Doc. 150 at 9–10, were substantially motivated by Plaintiff's speech and would chill an ordinary person from continuing to engage in that activity. These include targeting Plaintiff for statements she made publicly about Defendants' policies, publishing false claims that Plaintiff assaulted Defendant Coates and directed a racial slur at him, pursuing false criminal charges against Plaintiff, withholding exculpatory evidence, providing false

⁴ Defendant Coates agrees that Plaintiff's comments were protected speech under the First Amendment, but he contends his were also, therefore making the controversy between the two a non-justiciable political disagreement. *See* Doc. 147 at 5–6. Defendant Coates does not specify which of his speech was protected by the First Amendment or cite authority to support his argument. Regardless, a political controversy argument can't be used as an affirmative defense to a First Amendment retaliation claim. *See Temple v. Lower Elkhorn Natural Res. Dist.*, No. 23-CV-3198, 2023 WL 8934916, at *3–4 n.2 (D. Neb. Dec. 27, 2023) (rejecting political question argument in context of First Amendment retaliation claim); *Seum v. Osborne*, 348 F. Supp. 3d 616, 625–26 (E.D. Ky. 2018) (same).

testimony in support of a false criminal prosecution, denying Plaintiff her volunteer status, and prohibiting her from participating in Board elections. *See* Doc. 8 at ¶¶ 3, 135. The District Defendants’ argument that allegations of adverse actions may not be considered in the aggregate is not supported with authority and is counter to the holding of at least one other court. *See Brewer v. Town of Eagle*, 663 F. Supp. 3d 909, 934 (E.D. Wis. 2023) (“[T]he Court may consider ... adverse actions in the aggregate rather than as discrete, isolated items.”). Nor does its logic fit with the purpose of the First Amendment. Accordingly, I agree with Judge O’Hara that Plaintiff has provided sufficient allegations to satisfy the second and third elements of her retaliation claim. The District Defendants’ objection to this claim is therefore overruled.

III. Qualified Immunity

The District Defendants argue Judge O’Hara erred in holding that they are not entitled to dismissal of Plaintiff’s amended complaint based on qualified immunity.⁵ Doc. 145 at 12. A summary judgment motion “is the more common vehicle for asserting a qualified immunity defense.” *Doe v. Jefferson Cnty. Public Schs.*, No. 24-cv-00924-RMR-NRN, 2025 WL 1892444, at *5 (D. Colo. June 17, 2025) (citing *Peterson v. Jensen*, 371 F.3d 1199, 1202 (10th Cir. 2004)). A defendant may assert the defense in a motion to dismiss, though this subjects the motion “to a more challenging standard of review.” *Peterson*, 371 F.3d at 1201. “To survive a motion to dismiss based on qualified immunity, the burden is on the plaintiff to allege sufficient facts that show—when taken as true—the

⁵ Defendant Shofner objects to Judge O’Hara’s finding regarding qualified immunity based on the District Defendants’ same arguments. *See* Doc. 146 at 3. Given the overlap, the Defendants’ objections are addressed together.

defendant plausibly violated his constitutional rights, which were clearly established at the time of violation.” *Hardy v. Rabie*, 147 F.4th 1156, 1163 (10th Cir. 2025). Given, again, that at this early stage her allegations must be taken as true, Plaintiff has done so here.

Plaintiff adequately alleged that the District Defendants conspired to violate her First Amendment rights by retaliating against her for her public speech, as explained above. As to whether this right was clearly established at the time of the Defendants’ misconduct, there can be no doubt that it was clearly established that the First Amendment includes the right to be free from adverse action by government officials for speaking about a matter of public concern. *See Tachias v. Sanders*, 130 F.4th 836, 844 (10th Cir. 2025) (finding it was clearly established that a government actor violates a person’s First Amendment right when he or she threatens frivolous litigation in retaliation for that person’s protected speech). The protected speech and alleged retaliation at issue in *Tachias*—criticism of school-related matters and threatened action by the school superintendent in response—bears remarkable similarity to the facts of this case and is dispositive of the issue.

IV. Supplemental Jurisdiction

Because I find Plaintiff’s federal claim should survive, I overrule the District Defendants’ objection that Judge O’Hara erred in deciding to exercise supplemental jurisdiction over Plaintiff’s defamation claim. *See* Doc. 145 at 13.

V. Defamation

Defendant Coates objects to Plaintiff’s defamation claim on the ground that she is a limited-purpose public figure, requiring Plaintiff to plead actual malice (knowledge of falsity or reckless disregard for the truth) to maintain her claim. *See* Doc. 147 at 4. Plaintiff has done just

that.

To state a claim for defamation under Colorado law, Plaintiff must plead that Defendant Coates (1) made a defamatory statement, (2) that was materially false, (3) about Plaintiff, (4) published to a third party, (5) uttered with actual malice, and (6) caused Plaintiff actual or special damages. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1109 (10th Cir. 2017). "Actual malice" is established if the defendant published the statement "with actual knowledge that it was false or with reckless disregard for whether it was true." *Coomer v. Lindell*, No. 22-cv-01129-NYW-SBP, 2024 WL 3989524, at *7 (D. Colo. Aug. 29, 2024).

Plaintiff's allegations against Defendant Coates include the following:

68. Defendant Coates loudly accused Plaintiff during an August 21, 2023 Board hearing of calling him a "ni***er."

...

75. In social media posts, Defendant Coates stated Plaintiff called Coates "'dumb n***er' while 'assaulting' him."

...

77. On a public broadcast, Defendant Coates stated, "I was assaulted at the DPS board meeting . . . [I was] sitting down . . . minding my . . . own business . . . and all of a sudden I feel this pain on my right shoulder, like somebody grabs my shoulder. So I turn, I'm like, 'what the hell? Like who's grabbing me like this?' And I look and I recognize the face and it's the face of Kristen Fry. And so she whispers 'dumb n***er,' and then backs up and I just said, 'did you just call me a n***er?' And so she goes to this theatrics of 'Oh no,' right . . ."

...

85. In an email to the Board, Defendant Coates stated, "a vile racial slur, 'You dumb n***er' escaped from Kristen Fry's lips." In the same email, Defendant Coates stated Plaintiff subjected him to an "unwelcome grip on [his]

shoulder.”

...

97. In a police report, Defendant Coates stated, “On 8/21 I was assaulted while attending a DPS board meeting. . . . [I]t was Kristen Fry (who I have had other encounters with at DPS related events. She then states ‘you dumb n***er.’”

...

112. At another Board hearing in November 2023, Defendant Coates stated Plaintiff “assaulted” him and “called [him] a dumb or a stupid n***er.”

Doc. 8.

Plaintiff provides several allegations throughout her amended complaint that Defendant Coates knew the above statements were false when he made them. *See id.* at ¶¶ 72, 79, 87, 145. Accordingly, her allegations are sufficient to satisfy the pleading standards to maintain her claim for defamation. Defendant Coates’ objection is therefore overruled.

CONCLUSION

It is **ordered** that the Defendants’ objections, **Docs. 145, 146, 147**, are **overruled**;

Judge O’Hara’s Recommendation, **Doc. 143**, is **adopted**; and

Defendants’ Motions to Dismiss, **Docs. 35, 97, 100**, are **denied**.

DATED: September 30, 2025

BY THE COURT:



Daniel D. Domenico
United States District Judge