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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

RAY SHELTON,

Plaintiff,

vs.

VIVIAN EKCHIAN, etc., et al.,

Defendants.

Case No. 2:23-cv-10427-CBM-SSC

[*Hon. Consuelo B. Marshall*]

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT AND FOR MORE DEFINITE STATEMENT

Date: June 4, 2024
Time: 10:00 a.m.
Ctrm: 8D

Trial Date: None Set

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I. Introduction

Plaintiff Ray Shelton's Opposition (Dkt. No. 17) exaggerates assertions in his First Amended Complaint (Dkt. No. 11) (FAC) and cites authority that has been overruled or otherwise does not support his contentions. He fails to overcome the showing in Defendants' Motion (Dkt. No. 16) that the FAC should be dismissed with prejudice—he tacitly concedes all 10 "Doe" defendants should be dismissed—and a more definite statement should be ordered, as requested in the Motion.

II. Shelton Fails to Show That His FAC States a § 1983 Claim.

A. His Conclusory Allegations Fail to Establish Essential Elements.

1. Public Concern

The Opposition rests on the FAC's depiction of Glendale Unified School District's (GUSD) so-called "Sex-Change Policies" and a supposed "detailed description of the nature" of Shelton's "opposition" to them. (Dkt. No. 17 at 15.) But the FAC's only depiction of Shelton's speech is that he somehow "expressed" his scientific-based belief that the policies caused "mental, physical, and emotional harm to the children who were being experimented on by adults pursuing a political agenda." (*Id*. at 14, citing FAC ¶ 53.)

The FAC and Opposition say *nothing* about what "words or images" Shelton used (FAC ¶ 84), so it cannot be determined *whether or how* any words or images expressed opposition to specific policies. Instead, Shelton *interprets* his own speech with "labels and conclusions," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), which do not constitute "sufficient factual matter, accepted as true," to establish speech on matters of public concern. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Shelton cites no authority suggesting a pleading need only offer vague and conclusory assertions of ostensibly protected speech to state a § 1983 claim. In each case he cites on this point (none involving pleading challenges, and all decided before *Iqbal* and *Twombly*), *the courts were able to review the speech itself* to assess

whether it addressed a public concern.*

Shelton tacitly concedes that the FAC's conclusory depiction of his speech makes it *impossible* to evaluate whether GUSD's "legitimate administrative interests outweigh the First Amendment interest" in whatever words or images he used. *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir. 1995) (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)). He quotes a district court decision opining that "*Pickering* balancing" is "rarely" performed on a motion to dismiss (Dkt. No 17 at 23, citation omitted), but this misses the point. The FAC alleges that Shelton was accused of "hate speech" (FAC ¶ 62), which is obviously relevant to *Pickering* balancing on assessing the legitimacy of undertaking an investigation—but the balancing analysis *cannot be performed at all* because the FAC is stubbornly silent on Shelton's "words or images" (FAC ¶ 84), thus failing to state a claim.

2. Petitioning

Shelton misrepresents Supreme Court authority in arguing that "complaints to, *or criticism of*, local school boards" constitutes petitioning activity. (Dkt. No. 17 at 15, italics added.) The lone case he cites *never mentions mere* "*criticism of*" government bodies, and does not conflate criticism with actual petitions "to" such entities. Instead, the case involved an alleged antitrust conspiracy to resist highway carriers' applications involving operating rights by bringing "state and federal proceedings"—*i.e.*, *lawsuits and administrative actions*, not mere criticisms of the courts or agencies themselves. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 509 (1972). The Supreme Court held the "right of access to the

* *See Connick v. Myers*, 461 U.S. 138, 149 (1983) (*quoting* portion of questionnaire addressing political pressure on prosecutors); *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 507 (9th Cir. 2004) (*quoting* letter expressing concerns with program for educating students with disabilities); *Lytle v. Wondrash*, 182 F.3d 1083, 1088 (9th Cir. 1999) (citing *jury finding* in prior lawsuit that plaintiff was adversely treated "for publicly criticizing a school education program"; this involved a public concern, but defendants were entitled to qualified immunity under *Pickering* balancing).

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courts" is "one aspect of the right to petition," *id*. at 510, but the plaintiffs' claims came "within the 'sham' exception" to this right. *Id*. at 516.

Shelton tacitly concedes he never presented a petition to the School Board. He briefly spoke at one Board meeting. He fails to state a § 1983 "petitioning" claim.

3. Adverse Employment Action

Shelton focuses on the Ninth Circuit's definition of adverse action under § 1983 as being "reasonably likely to deter employees from engaging in protected activity." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1078 (9th Cir. 2013) (*en banc*). But he conveniently ignores the principle that this requires a showing "that a reasonable employee would have found the challenged action materially adverse." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) (Title VII retaliation); *see Dahlia*, at 1079 (deriving § 1983 standard from Title VII cases).

Shelton emphasizes *Dahlia*'s holding "that, *under some circumstances*, placement on administrative leave could constitute an adverse employment action." *Dahlia*, at 1078 (italics added). But he does not allege that *his* administrative leave constituted discipline, or that it entailed any loss of pay or other effects similar to those in *Dahlia*. *Id*. at 1079 (leave caused plaintiff to forfeit certain pay, prevented him from taking promotional exam *and* furthering his investigative experience, *and* carried a "general stigma"). Shelton also tacitly concedes that his bare allegations regarding an investigation—the reason for his (concededly paid) administrative leave—do not constitute an adverse employment action. *See Moore v. Garnand*, 83 F.4th 743, 752-53 (9th Cir. 2023) (not cited in Opposition).

Shelton relies heavily on a case where the plaintiff alleged § 1983 retaliation for wearing a "MAGA hat" to two training sessions. *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 772 (9th Cir. 2022). The *Dodge* court found triable issues on whether a school principal engaged in an adverse action through an "entire course of conduct" that included allegedly telling plaintiff "he needed to use 'better judgment' and not have his MAGA hat" the first time he wore it to the school; swearing at him

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and calling him a "racist," "bigot," "homophobe," and "liar" after he wore it a second time; and suggesting "disciplinary action could occur" if he wore the hat yet again, *which plaintiff could have* "*reasonably interpreted … as a threat against his employment*." *Id*. at 779-80 (italics added).

By comparison, the FAC does not—and cannot in good faith—allege that Defendants came close to threatening his employment. The FAC alleges a single email supposedly accusing him of "hate speech"—but does not even allege he was identified by name in the email, let alone otherwise quote or describe the email or attach it as an exhibit. (FAC ¶¶ 9, 62-63.) One email reference to "hate speech" does not compare to "the entire course of conduct" and threat to employment alleged in *Dodge*. *See* 56 F.4th at 779 ("criticism or 'bad mouthing'" itself is not an adverse action). And unlike *Dodge*, where the plaintiff clearly alleged the principal's conduct was motivated solely by his "MAGA hat," *Shelton avoids specifying any words or images* that were labeled as "hate speech."

Shelton's other citations on this point are unavailing. He analogizes his allegations to those in *Allen v. Scribner*, 812 F.2d 426 (9th Cir. 1987), but neglects to mention that the *Allen* plaintiff was *demoted* from a supervisory position to an assignment consisting "primarily of 'trivial clerical tasks,'" *and* was defamed to the media, threatened, intimidated, and harassed (including by "confiscating his phone messages from the press") over a *seven-month period* (January-August 1981). *Id*. at 428-29. Likewise, in *Greisen v. Hanken*, 925 F.3d 1097 (9th Cir. 2019), a police chief was *terminated* after being suspended without pay and subjected to a one-sided gag order, even as the city manager released information and defamed plaintiff to the media to deter and punish him for protected speech. *Id*. at 1104-07, 1114.

By comparison, Shelton's FAC merely depicts a (*paid*) administrative leave pending an investigation which caused him to miss his students' graduation but was not allegedly disciplinary, one email that accused him of "hate speech" but is not otherwise quoted or described and did not even allegedly mention him by name, and

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a series of vague labels, conclusions, and adjectives. He cites no authority suggesting this is sufficient to allege an adverse employment action under § 1983.

B. He Inadequately Alleges § 1983 Violations By Specific Individuals.

1. School Board Members

The FAC alleges that the five Defendants who are School Board members "conspired" with Principal Tonoli "regarding the content and publishing of the email," and "reviewed" and "approved" the decisions to remove Shelton "from his classroom and place him on leave"—*but states no facts supporting these conclusions of conspiracy, review, and approval*. (FAC ¶¶ 65-66.)

Rather than demonstrating that these allegations somehow satisfy the *Iqbal/Twombly* pleading standard, Shelton offers more vague conclusions and labels—arguing that the Board Member Defendants were somehow "instrumental in the chain of events" by "ratifying" *unspecified conduct in an unspecified manner*, "creating and enforcing [*unspecified*] policies … intended to chill … speech" in *unspecified* ways, and having "participated and approved the drafting and publication of Tonoli's letter [*sic*]" in *unspecified* ways (even though the FAC only refers to one email in which the Board members "conspired" in *unspecified* ways). (Dkt. No. 17 at 19.) Such "labels and conclusions" are no substitute for "sufficient factual matter." *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

Shelton quotes this Court's statement that the Ninth Circuit "implicitly recognizes" council or board members may be personally liable *for their votes* under some circumstances. *Minister v. Gates*, No. 01-01867-CBM, 2001 WL 1112684, at *3 (C.D. Cal. Sept. 19, 2001) (citing authority holding board members weren't "immune for bad faith decisions to indemnify officers"); *cf. Wood v. Strickland*, 420 U.S. 308, 319-22 (1975) (qualified, not absolute, immunity applies to school board members *for their votes* to expel students, absent subjective bad faith; abrogated on the latter point in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)). *But Shelton does not allege any School Board vote pertaining to him*, so these authorities are inapposite.

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Shelton also cites a case finding sufficient evidence to hold a police chief liable for ratifying Fourth Amendment violations by rejecting all of the plaintiff's many complaints after a deficient investigation, *and* failing to discipline offending officers or establish procedures to prevent recurrence. *Larez v. City of L.A.*, 946 F.2d 630, 646 (9th Cir. 1991). But Shelton alleges no similar conduct by any Board Member Defendant that could constitute "ratification" or anything else. Indeed, the FAC says *nothing* about GUSD's investigation of his conduct at the Board meeting.

"Finally," Shelton notes he seeks "prospective injunctive relief" against the Board Members. (Dkt. No. 17 at 20.) But the lone authority he cites on this point involved a suit against a person "*in his official capacity*." *Choi v. Wolfgang*, No. EDCV 14-01707-VAP (DTBx), 2014 WL 12873338, at *5 (C.D. Cal. Dec. 3, 2014) (italics added). Shelton has no legal or logical basis for suggesting injunctive relief is proper against defendants acting in their *individual capacities*. And he fails to sufficiently allege any Board Members personally violated § 1983. His individual-capacity claims against the Board Member Defendants should be dismissed.

2. Dr. Ekchian, Dr. Watson, and Principal Tonoli

Shelton disregards Defendants' showing that the FAC alleges no facts to support its conclusion that "Tonoli, Ekchian, and Watson" were somehow "responsible" for placing him on administrative leave (*see* Dkt. No. 16 at 21), which itself was not sufficiently alleged as an adverse action (*id*. at 18-20; pp. 4-6, *supra*).

The Opposition *mischaracterizes* the email the FAC attributes to Principal Tonoli in an effort to portray it as "significantly more egregious" than the allegations in *Dodge*. *See* 56 F.4th at 778 (expressly finding plaintiff's "MAGA hat" *wasn't* worn pursuant to his employment duties, contrary to Shelton's suggestions). Shelton falsely asserts the email included "threats" to him (Dkt. No. 17 at 17), *but the FAC alleges no such thing*, does not attach the email, and only quotes two words from it—"hate speech." (FAC ¶¶ 62-64.) The email, as alleged in the FAC, is not an adverse action at all. (*See* Dkt. No. 16 at 18-22; pp. 4-6, *supra*.)

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Shelton *mischaracterizes* the letter "from" Dr. Watson as accusing him "of 'misconduct' and [telling] him to have his union representative at the meeting regarding his disciplinary investigation." (Dkt. No. 17 at 20.) In fact, the FAC only *interprets* the letter as being to the "effect" that Shelton "was *under investigation* for unspecified 'misconduct' and was being put on administrative leave pending [*unspecified*] discipline," and "*had a right* to have a union representative present at the meeting." (FAC ¶¶ 59-60, italics added.) *The FAC does not attach or quote from this letter*, and Shelton's shifting interpretations of it illustrate the insufficiency of "factual matter" to state a claim against Dr. Watson. *Iqbal*, 556 U.S. at 678.

The Opposition includes a *new theory* against Dr. Watson that is absent from the FAC: that she supposedly "set in motion" acts such as excluding Shelton from campus, Principal Tonoli's "disparaging email" (which is insufficiently described as previously discussed), and a "retaliatory investigative process" and "damaging information in Plaintiff's personnel file"—*none of which the FAC describes at all*. (*See* FAC ¶¶ 59-61, 65, 67-71.) Shelton cites one footnote regarding potential liability for "setting in motion," *Dahlia*, 735 F.3d at 1078 n.22, *but the FAC offers no supporting factual allegations* for this unpled theory.

As to Dr. Ekchian, the Opposition cites authority allowing a "supervisor" to be liable for subordinates' violations if she "knew of [them] and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Again, however, the FAC does not assert this theory against Dr. Ekchian, and alleges *no facts* to support it. Instead, Shelton cites *after-the-fact remedial actions* Dr. Ekchian allegedly did not take—*e.g.*, failure to "rescind" unspecified actions, "modify" insufficiently-alleged policies, and "remove" unspecified "derogatory information" from Shelton's personnel file. (Dkt. No. 17 at 21, citing FAC ¶¶ 24-26, 61, 78.) But Shelton cites no authority suggesting a supervisor may be personally liable for supposed *failure to remedy* alleged constitutional violations after the fact, as opposed to failing to "prevent them" in the first place. *Taylor*, 880 F.2d at 1045.

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Shelton alleges insufficient facts to state any claim against Principal Tonoli, Dr. Ekchian, or Dr. Watson. They, like the Board Members, should be dismissed.

C. Shelton Can't Overcome Qualified Immunity.

Shelton selectively attacks certain of Defendants' arguments on qualified immunity, but ignores others that are dispositive. In particular, the FAC alleges no facts which would have put any Individual Defendant on notice that Shelton's "words or images"—*none of which are identified or attached to the FAC*—involved a matter of "public concern." (FAC ¶¶ 52-53, 62), or that any Defendant's personal actions caused Shelton to experience an adverse employment action. (*Compare* Dkt. No. 16 at 23-25 *with* Dkt. No. 17 at 26-27.) *By ignoring these points, Shelton should be deemed to have conceded that all Individual Defendants are entitled to qualified immunity*, based on the lack of clearly-established law providing sufficient notice to them on the "public concern" and "adverse action" elements.

Shelton retreats to the general proposition that "controversial political speech cannot be quelled because others may find the speech objectionable." *Dodge*, 56 F.4th at 787. But the speech in *Dodge* was clearly identified as a "MAGA hat," *id*., while *Shelton strains to avoid specifying his own words or images*. Shelton does not attempt to satisfy the "exacting standard" of particularizing clearly-established law to the specific facts of *this* case. *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 611 (2015); *accord Mullenix v. Luna*, 577 U.S. 7, 13 (2015). Qualified immunity is yet another basis for dismissing all Individual Defendants.

D. Shelton Inadequately Alleges Municipal Liability.

Shelton falsely asserts that in the Ninth Circuit, "a bare allegation" that "conduct conformed to official policy, custom, or practice" defeats a motion to dismiss as to municipal liability under § 1983. *Lee v. City of L.A.*, 250 F.3d 668, 682-83 (9th Cir. 2001) (quoted in Dkt. No. 17 at 24). Shelton neglects to inform this Court that *the Ninth Circuit long ago overruled Lee and other precedent on this point*, and confirmed that under the *Iqbal*/*Twombly* standard (established after *Lee*),

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to state a municipal liability claim under *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 691-94 (1978), a complaint "may not simply recite the elements of a [claim], but must contain *sufficient allegations of underlying facts* to give fair notice and to enable the opposing party to defend itself effectively." *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) (italics added) (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011)); *Ahmed v. County of Santa Clara*, No. 20-CV-05498-LHK, 2021 WL 105620, *7 n.8 (N.D. Cal. Jan. 12, 2021) (noting that after *Iqbal* and *Twombly*, the Ninth Circuit in *AE* overruled *Lee* on this point).

Shelton's arguments on municipal liability, like the FAC's allegations, contain *no underlying facts*, but are entirely vague and conclusory. Shelton quotes the allegation "that 'Defendants' retaliatory conduct against Mr. Shelton conformed to an official policy, custom, or practice.' FAC at ¶ 81." (Dkt. No. 17 at 24.) But the FAC only alleges so-called "Sex-Change Policies." (FAC ¶ 43.) It alleges *no* policy, custom, or practice of "retaliatory conduct" (FAC ¶ 81), and *no facts* that would support the existence of any such policy, custom, or practice, as *AE* requires.

Shelton misleadingly cites the allegation that GUSD "retaliated against individuals and families who opposed the Sex-Change Policies" (*id.*, citing FAC ¶ 78), but the FAC *does not* identify this as a policy, custom, or practice, and offers only *one supposed anecdotal example* where one student was called a "bigot" under mostly-unspecified circumstances (FAC ¶ 80). One single, cryptically-alleged incident obviously does not constitute "a longstanding practice or custom," and Shelton does not allege it was part of "an expressly adopted official policy" or done by a final policymaker. *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004).

Shelton diverts his focus to cases alleging discriminatory speech restrictions, but neglects to mention that his cited cases confirm the *Monell* requirements apply to such claims against municipalities. (Dkt. No. 17 at 24, citing *Hoye v. City of Oakland*, 653 F.3d 835, 855 (9th Cir. 2011), and *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir. 2005).)

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Shelton misleads this Court again by identifying Dr. Ekchian as a "policymaker" (Dkt. No. 17 at 25), while inexcusably ignoring the FAC's judicial admission that *only the School Board collectively* (which did not allegedly include Dr. Ekchian as Superintendent) has "final policymaking" authority for "the actions challenged herein." (FAC ¶¶ 19-20.) Moreover, the discussion above (pp. 2-8) and in Defendants' Motion (Dkt. No. 16 at 16-23, 25-28) shows neither the Board Members nor Dr. Ekchian engaged in any conduct on which liability may be based. Shelton's allegations are insufficient to state a claim under *Monell*.

E. Shelton Inadequately Alleges Conspiracy.

Shelton merely asserts "conspiracy" as a "label" and "conclusion," which is insufficient to state a claim. *Twombly*, 550 U.S. at 555. He identifies *no facts* from which any "meeting of the minds" could be inferred. *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010). The conspiracy count should be dismissed.

III. Conclusion

Plaintiff offers no argument for keeping "Does 1-10" in this case, and no factual basis for suggesting a *Second* Amended Complaint would cure the defects Defendants have identified, in both the original Complaint and FAC. (*See* Dkt. No. 16 at 33-39.) Defendants respectfully ask this Court to grant the instant Motion and dismiss the FAC with prejudice. At a minimum, Shelton's Opposition confirms that a more definite statement should be ordered, as requested in Defendants' Motion.

DATED: May 21, 2024

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