THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KARI MacRAE, *Plaintiff*, v. MATTHEW MATTOS, *et al*., *Defendants.*	)	Civil Action Number: 21-11917-DJC

PLAINTIFF KARI MACRAE'S MEMORANDUM OF REASONS IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION.

Defendants' submission fails. Their Statement of Facts consists of 56 paragraphs. Many of the paragraphs do not contain facts but rather summaries or characterizations of deposition questions and answers. If a paragraph does contain an actual fact, often the fact is not material. In many other instances, the "fact" is not supported by the evidence. In addition, of the 56 paragraphs, 38 are disputed.

Defendants' brief fares no better. Relying on flawed, distorted and even nonexistent factual predicates, Defendants attempt to justify their assertion that Ferron, Mattos, and Plummer fired MacRae because her social media posts were and/or would be a disruption to learning. The evidence, however, does not support their argument.

As MacRae sees it, at least seven material facts that underly Defendants' defense are in dispute. They are:

1. Whether MacRae's campaign video factored into Ferron's, Mattos', and Plummer's decision to fire MacRae;

2. Whether MacRae posted the "Track Meet" meme;

3. Whether Ferron, Mattos, and Plummer fired MacRae because her social media posts were or would be a disruption to learning or because they disliked her posts;

4. Whether Ferron, Mattos, and Plummer misinterpreted MacRae's interest in posting the five memes and campaign video;

5. Whether Ferron, Mattos, and Plummer were aware of any teachers' concerns about MacRae's social media posts;

6. Whether MacRae acknowledged that her social media posts may impact the learning environment and students in her classes; and

7. Whether MacRae's social media posts had or would have caused a disruption to learning.

Because a reasonable jury could find for MacRae on each of these questions, Defendants' motion for summary judgment must be denied.

II. BACKGROUND.

This is a civil rights action brought by Kari MacRae against Matthew Ferron, Matthew Mattos, and Hanover Public Schools. In March 2021, MacRae, a resident of Bourne, Massachusetts, decided to run for a seat on the Bourne School Committee. She subsequently filed the necessary paperwork, and her name was placed on the May 2021 ballot. On May 17, 2021, she won her election and was sworn in as a school committee member the next day.

Also in March 2021, MacRae posted four of the relevant memes to TikTok. She posted another one in August 2021. In addition, on May 17, 2021 (election day), MacRae posted a campaign video on TikTok explaining why she ran for the school committee and the issues she hoped to address if she were to be elected. All posts were made under the pseudonymous username nanamacof4. The nanamacof4 profile did not identify MacRae by name. Nor was it associated with her regular email address. Nor did it identify any of MacRae's past, current, or future employers. Moreover, another TikTok user posted a sixth meme and mentioned MacRae's username in the post. If other users searched for MacRae's username, that sixth

meme would appear.

At the end of August 2021 – more than five months after she posted the first four memes and more than three months after she posted the campaign video – MacRae was hired as a math/business teacher at Hanover High School – 45 minutes from Bourne. The Cape Cod Times and the Boston Globe, in September 2021, wrote articles about MacRae's social media posts as they related to her elected position as a Bourne School Committee member. None of the articles referenced Hanover Public Schools or that MacRae was a teacher at Hanover High School.

After the articles were seen by Hanover Public Schools Superintendent Matthew Ferron, Hanover High School Principal Matthew Mattos, and the district's Curriculum Director Matthew Plummer, MacRae was placed on administrative leave, and a purported five-day investigation took place. Ferron, Mattos, and Plummer subsequently decided to fire MacRae, and she was notified of the decision on September 29, 2021. MacRae sued Ferron, Mattos, and the school district for violating her First Amendment rights. Discovery ensued, and Defendants now move for summary judgment.

III. LEGAL ARGUMENT.

A. Summary Judgment Standard.

The summary judgment standard is well known. "The Court grants summary judgment where there is no genuine dispute as to any material fact and the undisputed facts demonstrate that the moving party is entitled to judgment as a matter of law. A fact is material if it carries with it the potential to affect the outcome of the suit under applicable law." *Neural Magic, Inc. v. Meta Platforms, Inc.*, 2023 U.S. Dist. LEXIS 37357, *4 (D. Ma. Jan. 17, 2023) (citations and internal quotations omitted). "The Court views the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Id.* at *5 (citation and internal

quotation omitted).

B. First Amendment Retaliation Claim.

To prevail on a First Amendment retaliation claim, a public-employee plaintiff must establish that (1) she spoke as a citizen on a matter of public concern; (2) that her interest in commenting upon those matters outweighed the defendant's interests in the efficient performance of its public services; and (3) that her protected speech was a substantial or motivating factor in the defendant's adverse employment action. *Bruce v. Worcester Regional Transit Authority*, 34 F.4th 129, 135 (1st Cir. 2022). Here, there is no dispute that Plaintiff spoke as a citizen on a matter of public concern or that the Defendants fired Plaintiff because of her speech. Defs' Mem. at 13-14. The sole issue before the Court – and the only one on which Defendants moved for summary judgment (Defs' Mot. at 1) – is "the second element, often referred to as the *Pickering* test [or *Pickering* balancing]: balancing the employee and the public's interests in the employee's speech against the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees." *Hussey v. City of Cambridge*, 2022 U.S. Dist. LEXIS 185303, **6-7 (D. Ma. Oct. 11, 2022) (citations and internal quotations omitted).

"Among those [government] interests which may be impaired by an employee's comments are discipline, promoting harmony among co-workers, interference with duties, and the interest in preserving a close working relationship for which personal loyalty and confidence is necessary." *Maymi v. P.R. Ports Authority*, 515 F.3d 20, 26 (1st Cir. 2008) (citing *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)). In addition, to assess the government's interests, "a court should include in its considerations (1) 'the time, place, and manner of the employee's speech,' and (2) 'the employer's motivation in making the adverse employment decision.'"

Decotiis v. Whittemore, 635 F.3d 22, 35 (1st Cir. 2011) (quoting *Davignon v. Hodgson*, 524 F.3d 91, 104 (1st Cir. 2008)).

Although *Pickering balancing* is generally a matter of law for a court to decide (*Bruce*, 34 F.4th at 138), any underlying factual disputes first must be submitted to the jury through special interrogatories or special verdict forms. *See Hayes v. Massachusetts Bay Transportation Authority*, 498 F. Supp. 3d 224, 232-235 (D. Ma. 2020); *see also Lynch v. City of Boston,* 989 F. Supp. 275 (D. Ma. 1997)*; Shands v. Kennett*, 993 F.2d 1337, 1342-1343 (8th Cir. 1993); *Nagel v. City of Jamestown,* 952 F.3d 923, 929 (8th Cir. 2020); *Bennis v. Gable*, 823 F.2d 723, 729, n.6 (3rd Cir. 1987). Once those underlying factual disputes are resolved, the *Pickering* balancing is conducted by the court. *Nagel,* 952 F.3d at 929.

C. Factual Disputes.

As noted above, 68% of the paragraphs in Defendants' Statement of Facts are disputed. In addition, there are at least seven disputed facts that a reasonable jury could resolve in favor of Plaintiff and that would affect the outcome of the *Pickering* balancing. These factual disputes, therefore, must be resolved by a jury before the Court may conduct the ultimate review.

1. MacRae's campaign video factored into Ferron's, Mattos', And Plummer's decision to fire MacRae.

Before the Court may balance MacRae's interests against Defendants' interests, the Court must know what speech is at issue. Here, there is a dispute about which social media posts factored into Ferron's, Mattos's, and Plummer's decision to fire MacRae. The resolution of this dispute is material because identifying the speech at issue will define the level of interest MacRae had in her speech.

Defendants assert that MacRae was fired because of the six memes that were posted to her TikTok account. Defs' Mem. at 5-10 and 13-18; Defs' SOF at ¶¶ 48-51. However, a

reasonable jury could find that Ferron, Mattos, and Plummer fired MacRae because of the memes and the campaign video – not just the memes. Plf's Resp. to Defs' SOF at ¶¶ 13-14. Whether the video was considered by Ferron, Mattos, and Plummer is material because it is indisputable that the video was created by MacRae as part of her campaign for the Bourne School Committee. As such, the video would be of the highest order of speech and deserving of the highest protection. *See e.g., Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting *Monitor Patriot Company v. Ray*, 401 U.S. 265, 272 (1971); *see also Wood v. Georgia*, 370 U.S. 375, 395 (1962) ("The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance."). If a jury were to conclude that the campaign video was also considered when Ferron, Mattos, and Plummer fired MacRae, such conclusion would impact *Pickering* balancing – i.e., Defendants' interests in firing MacRae would have to be even greater. *Dodge v. Evergreen School District* #114, 56 F.4th 767, 782 (9th Cir. 2022) ("The government's burden in proving disruption varies with the content of the speech. The more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made.") (citation and internal quotations omitted).

2. MacRae did not post the "Track Meet" meme.

MacRae does not dispute that she posted five of the memes. Plf's SOF at ¶ 5. MacRae does dispute that she posted the "Track Meet" meme. *Id.* at ¶ 7. Another TikTok user posted the "Track Meet" meme. *Id*. The user also mentioned MacRae's pseudonymous username in the post. *Id.* The "Track Meet" meme did not appear on MacRae's TikTok page or account. *Id*. at ¶ 8. If someone searched TikTok for MacRae's pseudonymous username, that person would see

the meme as he or she scrolled through the search results because the user who posted it included reference to MacRae's username. *Id*. A reasonable jury could find that MacRae did not post the "Track Meet" meme. This disputed fact is material because Ferron, Mattos, and Plummer all factored this meme into their decision to fire MacRae.

3. Ferron, Mattos, and Plummer fired MacRae because they disliked her social media posts.

Determining Ferron's, Mattos', and Plummer's true motivations for firing MacRae is a quintessential question for the jury. *Hayes*, 498 F. Supp. 3d at 235 (citing *Nieves v. Bartlett*, 139 S. Ct. 1715, 1732 (2019)). In his letter firing MacRae, Mattos stated, "I have determined that continuing your employment in light of your social media posts would have a significant negative impact on student learning at HHS." Defs' SOF at ¶ 18. However, a reasonable jury could find that MacRae was fired because of the content of her social media posts, rather than any alleged actual or speculative disruption they may cause.

Plummer testified that he was "horrified" by MacRae's speech. *Id*. He believed that all six memes together created a "ball of hate," consisting of transphobia, homophobia, and racism.[1] Plf's Resp. to Defs' SOF at ¶ 36. Importantly, Plummer was not alone in despising the content of MacRae's speech. As Defendants admit in their brief, "The Plaintiff's six TikTok memes at issue in this case are unquestionably offensive. As observed by every Hanover employee who testified in the case, they alternately contain themes of homophobia, transphobia and racism. Another of the posts openly derides immigrants." Defs' Mem. at 14. Such fervent objection to MacRae's speech would allow a jury to draw an inference that she was fired for the content of

[1] Not only did MacRae post only five of the memes, but it was the Boston Globe – not MacRae – that created and published the graphic showing the memes side-by-side in a grid. Plf's SOF at ¶ 6. MacRae posted the five memes at different times; therefore, for a user to see the five memes, that user would have had to scroll through all of her posts to see them. *Id*.

her social media posts, rather than any alleged actual or speculative disruption they may cause. *Hayes*, 498 F. Supp. 3d at 233.

There is also extensive evidence that Ferron, Mattos, and Plummer were not genuinely interested in the alleged actual or speculative disruptions by MacRae's social media posts because they decided to fire MacRae without a thorough investigation. *Hayes*, 498 F. Supp. 3d at 234. For example, Ferron and Mattos specifically testified that they did not hear any concerns from Hanover Public Schools' students about MacRae's social media posts and that they did not know whether any students had seen MacRae's social media posts. Plf's Resp. to Defs' SOF at ¶¶ 45, 50-51. In addition, Ferron, Mattos, and Plummer did not seek out student input before making their decision. *Id.* at ¶ 45. Similarly, Ferron and Mattos did not hear from nor speak with any teachers before making their decision. *Id*. at ¶¶ 50-51.

Moreover, during the purported investigation, Ferron, Mattos, and Plummer did not even inquire about whether MacRae posted the memes, when the memes were posted, how they were shared, or on what social media platform they were posted. *Id*. at ¶¶ 14, 15, 16, 21. Similarly, Ferron and Mattos ignored answers MacRae provided during her interview with Mattos. For example, MacRae explained to Mattos how she had asked her students if there was anything that they wanted to share with her in private and a student discussed the student's preferred pronouns with MacRae. *Id*. at ¶¶ 34, 43, 49, 51. MacRae also informed Mattos that she agreed to use and did use the student's preferred pronouns when she addressed the student. *Id*. Even though these actions demonstrated how MacRae interacted with students in her class, Ferron testified that this information was not important to his decisionmaking because his concern was with "students feeling safe." *Id*.

Although Ferron, Mattos, and Plummer "tr[ied] to keep an open mind as long as [they]

could[,]" a reasonable jury could find that they failed to do so. A reasonable jury could also find that because Ferron, Mattos, and Plummer disliked MacRae's social media posts, they failed to conduct a thorough investigation and predetermined that her posts would cause disruption to the learning environment.

4. Ferron, Mattos, and Plummer misinterpreted MacRae's interests in posting the five memes and campaign video.

Determining MacRae's interests in the social media posts is an issue for a jury to decide. *See Hayes*, 498 F. Supp. 3d at 232; *see also Wagner v. City of Holyoke*, 241 F. Supp. 2d 78, 92-93 (D. Ma. 2003). In addition, her interests are material because the Court must weigh them against the government's interests in firing her.

Defendants labeled the memes and video as a "ball of hate" and assumed that the memes and video were intended to mock, make fun of, or be offensive to certain people. Plf's Resp. to Defs' SOF at ¶ 36. Defendants were mistaken. A reasonable jury could find that MacRae did not post the memes and video to ridicule, mock, or offend anyone but rather to express certain positions about matters of public concern.

MacRae's social media posts were made in the context of her campaign for elected office. In March 2021, while she was deciding whether to run for a seat on the Bourne School Committee, MacRae posted four of the relevant memes on TikTok. Plf's SOF at ¶ 5. On March 16, 2021, she posted the "Retirement Plan" meme, which concerns the United States' broken immigration system. *Id*. MacRae posted the meme because, like many Americans, she is frustrated and upset that individuals may enter the country illegally and still receive public benefits. *See* Plf's Resp. to Defs' SOF at ¶ 42. In fact, Jason L. Riley – a prominent, Black conservative commentator and author – recently opened a Wall Street Journal opinion piece with an almost identical passage:

> Want to attend college free? Here's how.
>
> First, move out of the U.S. and renounce your citizenship. Second, sneak back into the country across the southern border, request asylum and then ask to be sent to New York City, where Mayor Eric Adams has graciously offered to provide tuition, room and board to illegal aliens courtesy of U.S. taxpayers.

Bekesha Decl., Exhibit N. On March 18, 2021, MacRae posted a meme, consisting of a picture of Thomas Sowell and a quote by him, which read, "Racism is not dead, but it is on life support — kept alive by politicians, race hustlers and people who get a sense of superiority by denouncing others as 'racists.'" Plf's SOF at ¶ 5. Sowell is one of the nation's most prominent economists. He is the Rose and Milton Friedman Senior Fellow on Public Policy at the Hoover Institution and writes on economics, history, social policy, ethnicity, and the history of ideas. Bekesha, Decl., Exhibit O. In addition, over the past three decades, Sowell has taught economics at Cornell, Amherst, and UCLA; and was awarded the National Humanities Medal in 2002 by President George W. Bush. *Id*. On March 24, 2021, MacRae posted a meme of a panda bear that she believes is about inclusivity since panda bears are Black, White, and Asian; and everyone loves panda bears. Plf's SOF at ¶ 5. On March 24, 2021, MacRae posted the "Dr. Levine" meme because she believed that the narrative around Admiral Rachel L. Levine appointment as the 17th Assistant Secretary for Health for the U.S. Department of Health and Human Services undermined the advancements made by cisgender women. *Id*.; Plf's Resp. to Defs' SOF at ¶ 35. Specifically, MacRae believes that Dr. Levine should be recognized as the first transgender four-star admiral in the U.S. Public Health Service Commissioned Corps and not the first female in that position. *Id*. Importantly, MacRae is not alone in her views. Bekesha Decl., Exhibit P.

In addition to another meme that she posted in August 2021,[2] MacRae also created and posted, on May 17, 2021 (election day), a video as part of her campaign for the Bourne School Committee. Plf's SOF at ¶ 9. In the video, MacRae communicated with the public about why she was running for office. Plf's Resp. to Defs' SOF at ¶ 5. Specifically, MacRae recorded herself stating that, if elected, she would not allow Bourne schools to teach critical race theory or allow Bourne teachers to teach students that they could choose their gender. *Id*. MacRae believes that teachers are not equipped to advise students struggling with gender dysphoria without the assistance of trained professionals like school psychologists or doctors. *Id*. at ¶¶ 34, 49, 51. In no way whatsoever did MacRae state – or even suggest – that she does not believe individuals have the right to identify as they so choose or go through the gender transition process. *Id.* She simply made a campaign promise that Bourne teachers would not teach a subject they were not adequately trained to teach. *Id*. at ¶¶ 13, 34, 49, 51. Like the other issues she addressed on TikTok, this subject is very much a current topic of public debate. Bekesha, Decl., Exhibit Q.

In sum, a reasonable jury could find that MacRae did not post the five memes and campaign video to ridicule, mock, or offend anyone but rather to express certain positions about matters of public concern.[3]

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[2] As Mattos conceded during his deposition, the "Birds and the Bees" meme is not derogatory towards any individual. It simply attacks the "old-school concept of the birds and the bees." Plf's Resp. to Defs' SOF at ¶ 35. Stated another way, the meme does no more than recognize that conversations about sex and sexuality are a lot more complicated and nuanced than they used to be.

[3] As noted above, Plaintiff did not post the "Track Meet" meme. Plf's SOF at ¶ 7. The meme was posted by another user and that user mentioned MacRae's pseudonymous username in the post. *Id*. Nonetheless, if a jury were to conclude that MacRae did in fact post the third meme, MacRae would assert that her interest in so doing was her concern for how unfair it is for

5. School administration was not aware of any teachers' concerns about MacRae's social media posts.

In his termination letter, Mattos wrote, "concerns were recently brought forward to the Hanover High School administration regarding the impact of your social media posts on your role as a teacher in Hanover." Plf's Resp. to Defs' SOF at ¶ 48. In addition, in their brief Defendants argue, "The posts became a topic of discussion amongst staff, leading to teachers approaching members of the administration with concern." Defs' Mem. At 16. The evidence does not support these assertions.

According to Mattos' deposition testimony, the assertion in the letter referenced purported concerns raised by Stacey Pereria and Maura Aborn. Plf's Resp. to Defs' SOF at ¶¶ 26, 41, 50, 54. However, in her deposition, Pereria testified that she "told [Plummer] that [she] had seen a story come up in [her] Facebook feed about a teacher" and asked "if he was aware" of the story. *Id*. at ¶¶ 45, 50. When Plummer asked Pereria what it was about, she said, "[C]an you just do me a favor: Can you just google it and find it on your own?" *Id*. at ¶¶ 45, 40. In addition, she testified she did not have any other discussions with him or anyone else in the administration about MacRae or her social media posts prior to MacRae being fired. *Id*. at ¶ 26. Similarly, Aborn testified that prior to MacRae being fired, she did not see any of MacRae's social media posts nor did she read any articles about MacRae's social media posts. *Id*. at ¶¶ 45, 50. She also testified that she did not speak to anyone about MacRae's social media posts prior to MacRae being fired. *Id*.

Regarding his conversation with Periera, Plummer did not testify that Pereria raised

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transgender women to compete against cisgender women in women's sports, like track. Plf's Resp. to Defs' SOF at ¶ 35. Again, this is a view held by many, including tennis champion Martina Navratilova. Bekesha Decl., Exhibit R.

concerns to him. He testified, "I think she was concerned. I think that's why she brought it to our attention." *Id*. When asked if he was approached by any teachers who expressed concerns about MacRae continuing to teach at Hanover Public Schools because of her social media posts, Plummer testified, "No." *Id*. A reasonable jury could therefore find that no teacher brought concerns to the administration about the impact of MacRae's social media posts.[4]

6. MacRae did not acknowledge that her social media posts may impact the learning environment and students in her classes.

Defendants assert that, during her interview with Mattos, MacRae "acknowledged that her posts may impact the learning environment and students in her class." Defs' Mem. at 16. No such acknowledgment occurred. According to his handwritten notes,[5] Mattos did not ask MacRae about the potential impact of the social media posts. Plf's Resp. to Defs' SOF at ¶ 51. He only asked her about the potential impact of her situation in Bourne. *Id*. Specifically, he asked:

- Are you aware of the local media coverage of your situation in Bourne as a School Committee member?
- Can you see how this media coverage may be widespread among students, staff and families of HHS?
- Given that information, can you see how your situation in Bourne may impact the learning environment of some students within your classes?

Defs' SOF at ¶ 38. In response to the first question, MacRae responded yes. Plf's Resp. to Defs'

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[4] In their brief, Defendants do not identify any teachers who approached members of the administration with concern. MacRae assumes the purported teachers are Pereria and Aborn as they are the only two teachers who Mattos identified during his deposition as raising concerns. Plf's Resp. to Defs' SOF at ¶¶ 45, 50. Similarly, Ferron identified only Pereira and Aborn as bringing concerns to the high school administration's attention, and Plummer testified that no teachers brought concerns to him. *Id*.

[5] During his deposition, Mattos confirmed that he asked the questions as they were written in his notes. Plf's Resp. to Defs' SOF at ¶¶ 38.

SOF at ¶ 38. MacRae does not recall her response to the next question but disputes that she answered "absolutely" as Mattos alleges. *Id*. MacRae believed then – and still does – that it is possible that some students or staff may have seen the media coverage but does not believe it was widespread because no student said anything to her. *Id*. In response to the third question, MacRae did not admit that there would be an impact on the learning environment. *Id*. at ¶ 31. She responded that she could understand why Mattos thought that the situation in Bourne may impact the learning environment in Hanover. *Id*. A reasonable jury could find that MacRae did not acknowledge that her social media posts would impact the learning environment and students in her classes.

7. MacRae's social media posts did not cause and would not have caused a disruption to learning.

Throughout their submission, Defendants assert that they fired MacRae because her social media posts caused and would continue to cause a disruption to learning. Although it is apparent that Defendants generally assert a "disruption" justification for firing MacRae, Defendants do not specify whether they claim to have fired MacRae because of actual or speculative disruption. This shortcoming alone would prevent the Court from granting summary judgment in Defendants' favor. *Dodge*, 56 F.4th at 782. Regardless, a reasonable jury could find that there was no actual or speculative disruption.

a. Actual disruption.

There is no evidence that any actual disruption took place. No students asked MacRae about her social media posts. Plf's Resp. to Defs' SOF at ¶¶ 32, 38. Nor did a student ask any teacher about MacRae's posts. *Id*. at ¶ 45. Only one teacher overheard students talking about MacRae, but the teacher does not recall what the students said. *Id.* at ¶¶ 26, 27, 36, 45. In addition, the teacher testified that the students' discussion did not take away from student

learning. *Id*. at ¶¶ 26, 27, 36, 45. Moreover, the teacher did not tell Ferron, Mattos, or Plummer about overhearing the students' discussion. *Id*. at ¶ 27. Also, no teacher raised any concerns about MacRae's social media posts. *Id*. at ¶ 50. The only teacher to say anything to Ferron, Mattos, or Plummer told Plummer that she saw an article on Facebook and that he should go find it himself. *Id*. at ¶ 45, 51.

b. Speculative disruption.

For many of the same reasons, there is no evidence of speculative disruption. Ferron, Mattos, and Plummer only relied on their own beliefs in concluding that MacRae's social media posts would be a disruption in the classroom. They did not hear any concerns from students or teachers. Plf's Resp. to Defs' SOF at ¶ 45. MacRae did not acknowledge that her social media posts were widespread or that they would have caused a negative impact in the learning environment. *Id*. at ¶¶ 32, 38. Although Defendants justify, in part, their concerns for disruption by pointing to what happened with the Bourne School Committee, Mattos testified that he was not influenced by what transpired there. *Id*. at ¶¶ 12, 20, 23, 25. In fact, he did not watch any of the Bourne School Committee meetings or read any of the minutes from those meetings. *Id*. Similarly, Ferron only watched a portion of one of the Bourne School Committee meetings and testified that it did not factor into his decisionmaking process. *Id*. at ¶¶ 12, 20, 23, 25.

A reasonable jury could also find that disruption to learning would not occur if MacRae continued teaching because she never brought her personal views on political issues into the classroom, and she used students' preferred pronouns. *Id*. at ¶¶ 31, 34, 43, 49, 51. During that same period, MacRae was teaching a few high school classes at night in Wareham, Massachusetts. *Id*. at ¶¶ 34, 36, 43, 49, 51. In one of her classes, a student – who was gay and Cape Verdean – approached MacRae and asked her questions about her social media posts. *Id*.

After a discussion, the student told MacRae that the student was glad that they had a conversation, that the student just did not take as fact what she saw in the media about MacRae being racist and homophobic, that the student was initially nervous to have MacRae as a teacher, but that, in the end, MacRae ended up being one of the student's favorite teachers. *Id*. at ¶¶ 34, 36, 43, 49, 51.

Because there is ample evidence in the record to permit a reasonable jury to find that MacRae's social media posts did not cause and would not cause a disruption to learning, summary judgment is not appropriate.

D. The law does not support Defendants' motion.

Even if no material, factual disputes existed, Defendants still would not be entitled to summary judgment. The law does not support MacRae's firing.

Defendants assume that this case fits within the *Garcetti/Connick/Pickering* framework as recognized by the First Circuit in *Decottis*. Def's Mem. at 12-13. None of those cases, however, concerns speech that occurred prior to a plaintiff's employment. Defendants also do not point to a single case in which any court – let alone the Supreme Court or the First Circuit – addresses the standard for resolving a dispute about an adverse employment action resulting from preemployment speech. Determining the proper standard is more than just a law school exercise. It has real consequences.

In *Cleavenger v. University of Oregon*, Judge David O. Carter used the general *First Amendment* retaliation standard in a preemployment speech case instead of applying the *Pickering* balancing test. *Cleavenger v. University of Oregon*, 2015 U.S. Dist. LEXIS 102972, **25-29 (D. Or. Aug. 6, 2015). He reasoned:

> Since the advent of the internet, speech from our past is more accessible than ever. Government employers may access that speech and find, perhaps, an

> opinion article expressing opposition to a war long-ago finished. While the war may be over, the employer's personal distaste for those who speak out against war could have lingered. If that employer, as a result of the article he viewed online, fires the employee for having exercised her First Amendment rights, a First Amendment retaliation claim may lie.

Id. at **28-29. His concern in using the standard for *First Amendment* retaliation cases in the employment context was that, by doing so, it "could open the door to rampant self-censorship, as our past speech is more and more entering the domain of our present." *Id*. at *29. This Court should follow suit. Because MacRae posted the five memes and campaign video before she was employed by Hanover Public Schools, the Court should apply the general standard in which "a plaintiff must first show that his conduct was constitutionally protected and, second, he must show proof of a causal connection between the allegedly protected conduct and the supposedly retaliatory response." *Najas Realty, LLC v. Seekonk Water District*, 821 F.3d 134, 141 (1st Cir. 2016) (citing *Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013)). Because Defendants concede that MacRae engaged in constitutionally protected conduct (i.e., spoke on matters of public concern) and that they fired her because of that activity, Defendants could not prevail.

Assuming *Pickering* balancing does apply – MacRae does not concede that it does – Defendants also assume that their interest "in terminating the Plaintiff based on the disruption to teaching and learning the Plaintiff's posts caused and would have continued to cause if she stayed in her position" is an interest recognized by the courts. Defs' Mem. at 13-14. As noted above, the First Circuit, relying on the Supreme Court's ruling in *Rankin*, has held that the government interests that may be considered as part of the *Pickering* balancing are "discipline, promoting harmony among co-workers, interference with duties, and the interest in preserving a close working relationship for which personal loyalty and confidence is necessary." *Maymi*, 515 F.3d at 26. Obviously, the interests of discipline, promoting harmony among co-workers, and

preserving close working relationships are not at issue. Although it may be asserted that "interference with duties" includes "avoiding disruption," Defendants have not done so. Nor do they cite any case for such a proposition.

Nonetheless, even if "avoiding disruption" were a recognized government interest, Defendants still do not prevail. As the First Circuit has held, courts must look to the time, place, and manner of the employee's speech. *Decottis*, 635 F.3d at 35. MacRae posted the five memes and the campaign video months before she became employed by Hanover Public Schools; she posted the memes and video on TikTok using a pseudonymous username; and the five memes and the video all related to MacRae's campaign for a seat on the Bourne School Committee. Each factor heavily weighs in MacRae's favor; and as demonstrated above, the evidence does not show that MacRae's social media posts were or would be a disruption to learning. The competing interests tilt in MacRae's direction.

Finally, it appears that Defendants only rely on one case to support Ferron's, Mattos', and Plummer's decision to fire MacRae: *Hennessy v. City of Melrose*, 194 F.3d 237 (1st Cir. 1999). Defs' Mem. at 17-18. *Hennessy* is entirely inapposite. In *Hennessy*, the adverse action against a student teacher took place after four incidents: a conversation in school with another teacher, which frightened that teacher (194 F.3d at 247); "audible denigration and visible petulance in the learning environment, in front of students and others" (*id*. at 248); calling an art exhibition "disgusting" and "obscene" during class and in front of parents and pupils (*id*.); and "challeng[ing] the propriety of permitting such activities to occur in the public schools and remain[ing] adamant about the moral correctness of his position" during a meeting with the principal. *Id*. As the First Circuit succinctly stated, the adverse action taken against the student teacher "had nothing to do with the content of [his] statements, and everything to do with the

time, place, and manner in which he communicated his sentiments[,]" since all occurred in the school. *Id*. at 249. This simply is not the situation here. Because MacRae posted the five memes and campaign video before she was employed by Hanover Public Schools, she could not have engaged in that speech in Hanover High School like the student teacher in *Hennessey*. The law simply does not justify Defendants' position.

E. Qualified Immunity.

An official is entitled to qualified immunity unless (1) the plaintiff's allegations, if true, establish a constitutional violation, (2) the right was clearly established at the time of the alleged violation, and (3) a reasonable official, similarly situated, would understand that the challenged conduct violated that established right. *Rodriguez-Marin v. Rivera-Gonzalez*, 438 F.3d 72, 83 (1st Cir. 2006). Although all three prongs are matters of law, the third prong must be determined by a jury when there are factual disputes underlying this determination. *Id*. In other words, "pretrial resolution sometimes will be impossible because of a dispute as to material facts. In such a case, the factual issues must be decided by the trier of fact, thereby precluding summary judgment. Only after the facts have been settled can the court determine whether the actions were objectively reasonable so as to fall under the qualified immunity umbrella." *Kelley v. Laforce*, 288 F.3d 1, 7 (1st Cir. 2002) (citations omitted).

As discussed above, at least seven material facts remain in dispute. Because each of those facts underly the *Pickering* balancing, they also underly the third qualified immunity prong. *See e.g., Caraballo-Rivera v. Garcia-Padilla*, 2017 U.S. Dist. LEXIS 165529, *35-38 (D.P.R. Oct. 3, 2017). The Court therefore should refrain from applying the qualified immunity test to the facts of this case until the factual disputes are resolved by a jury. The motion for summary judgment on qualified immunity grounds should be denied.

V. CONCLUSION

For all the reasons stated above, Defendants' motion for summary judgment should be denied.

Dated: March 31, 2023

Respectfully submitted,

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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KARI MacRAE, *Plaintiff*, v. MATTHEW MATTOS, et al., *Defendants.*	)	Civil Action Number: 21-11917-DJC

CERTIFICATE OF SERVICE

I hereby certify that this document and all its attachments were filed through the ECF system and will be electronically sent to the registered participants as identified on the Notice of Electronic Filing (NEF). No paper copies will be sent because there are no identified non-registered participants.

/s/ Michael Bekesha