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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

NICHOLAS J. ROBERTS,

Plaintiff - Appellant,

v.

JAMES M. WINDER, individually; ROSIE RIVERA, in her official capacities as the Salt Lake County Sheriff and CEO of the Unified Police Department of Greater Salt Lake; THE UNIFIED POLICE DEPARTMENT OF GREATER SALT LAKE,

Defendants - Appellees.

No. 20-4082

Appeal from the United States District Court
for the District of Utah
(D.C. No. 2:17-CV-00298-DAK)

Robert W. Hughes, Robert W. Hughes Law Office (Jesse C. Trentadue, Suitter Axland, PLLC, with him on the briefs), Salt Lake City, Utah, appearing for Appellant.

Scott Young, Salt Lake City, Utah, appearing for Appellees.

Before **BACHARACH**, **BRISCOE**, and **MURPHY**, Circuit Judges.

BRISCOE, Circuit Judge.

Plaintiff Nicholas Roberts appeals the district court's grant of summary judgment in favor of Defendants James Winder, Rosie Rivera (solely in her official capacity as Salt Lake County Sheriff), and the Unified Police Department of Greater Salt Lake ("UPD") (collectively, "Defendants") on Roberts' 42 U.S.C. § 1983 and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621–34, claims. All of his claims arose from his removal as Range Master-Firearms Instructor ("Range Master"). Roberts also appeals the district court's denial of reconsideration of its prior summary judgment orders.

We have jurisdiction over Roberts' federal and state law claims pursuant to 28 U.S.C. §§ 1331 and 1367, respectively. We AFFIRM the district court's rulings.

I

A. Factual Background

In 1996, the Deputy Sheriff's Merit Service Commission ("Merit Commission"), at the request of then-Sheriff Aaron Kennard, approved the creation "of a specialist position RANGE MASTER." Aplt. App., Vol. 6 at 1298. After a nationwide search and competitive examination, the Merit Commission approved Kennard's request to appoint Roberts as "Range Master Level I, P-17." *Id.* at 1308. In 2005, while still serving as Range Master, Roberts tested for and obtained a merit rank advancement from Deputy to Sergeant.

In 2006, Winder defeated Kennard in an election for Salt Lake County Sheriff. Roberts supported Kennard in that election.

In 2009, merit rank Lieutenants received a pay raise. Roberts did not qualify for that automatic pay raise as Range Master. Roberts requested a pay increase from "Range

Master Specialist P17/P21" to "Range Master Specialist P21/P25." Aplt. App., Vol. 3 at 472. The increased pay range was comparable to that of merit rank Lieutenants.

In 2010, the UPD was created out of the Salt Lake County Deputy Sheriff's office. The UPD is governed by a Board of Directors, with the County Sheriff serving as the UPD's Chief Executive Officer. Accordingly, as Sheriff, Winder served as CEO when the UPD was created. Roberts was transferred from the Sheriff's Office to the UPD with the same merit rank and pay grade.

On March 1, 2017, at Winder's request, Undersheriff Scott Carver and Chief Deputy Shane Hudson met with Roberts and informed him that the Range Master position was being eliminated. Hudson also told Roberts he would be reassigned to patrol duties and his pay would be reduced. On March 8, Roberts was ordered to clean out his desk and leave the Range. On March 9, Roberts, through counsel, sent a letter to Winder objecting to his removal, reassignment, and pay reduction. *See* Aplt. App., Vol. 3 at 263. On March 23, Winder responded to the letter. *See id.* at 306. Winder treated Roberts' letter as a grievance and rejected the grievance. Winder explained the Range Master was subject to transfer under Merit Commission Policy 3140, Range Master was a specialist position, and Roberts' merit rank was "sergeant." *Id.* at 310. Winder concluded by informing Roberts: "You may have a right to appeal this decision; however, the Department reserves the right to contest this appeal because it is a final, non-appealable decision statutorily committed to the discretion of the Sheriff." *Id.* The UPD Board later ratified Winder's decision to remove Roberts as Range Master and

reassign him to patrol duties as a sergeant. *See* Aplt. App., Vol. 1 at 95 (Answer to 2d Am. Compl., ¶ 24).

Winder also assigned Todd Griffiths, a merit rank Lieutenant who is four years younger than Roberts, to oversee the shooting range. Winder then left his position as Salt Lake County Sheriff to become the Moab City Chief of Police. Roberts did not appeal his grievance, and instead filed this complaint in the district court. In June 2017, after Roberts initiated this lawsuit, the UPD conducted two investigations of Roberts' management of the Range. Both investigations described failures in Roberts' performance as Range Master. *See* Aplt. App., Vol. 17 at 3887–94 (containing various deficiencies in training and management).

B. Procedural Background

Roberts' complaint asserted six causes of action: (1) a § 1983 claim for declaratory judgment, restoring him to the position as Range Master; (2) a § 1983 claim for violations of procedural due process under the Fourteenth Amendment; (3) a § 1983 claim for violations of substantive due process under the Fourteenth Amendment; (4) a Utah state law claim for violations of due process under the Utah Constitution; (5) a § 1983 claim for retaliation against protected speech under the First and Fourteenth Amendments; and (6) an ADEA claim for age discrimination.

The district court granted partial summary judgment to Defendants on Roberts' declaratory judgment and due process claims, claims one through four. The district court held that Roberts did not have a property interest in his position as Range Master, and thus his reassignment did not violate due process. Alternatively, the district court held

that Roberts waived his due process claims by failing to appeal Winder's decision to the Merit Commission. The district court did not separately address Roberts' federal and state law due process claims.

The district court denied Defendants' motion for summary judgment on Roberts' First Amendment retaliation claim, claim five. Roberts' ADEA claim, claim six, was not included in that motion for summary judgment.

After further discovery related to his retaliation claim, Roberts moved for reconsideration of the district court's grant of partial summary judgment on claims one through four. In support of his motion, Roberts provided newly discovered evidence that Defendants had failed to produce earlier. The district court ruled that the new evidence did not affect its prior ruling and denied reconsideration.

The district court later granted summary judgment to Defendants on Roberts' remaining First Amendment retaliation and age discrimination claims. The district court determined that Roberts' First Amendment retaliation claim could be based on two instances—Roberts' refusal to support Winder in the 2006 election and Roberts' request for a pay raise in 2009. Applying the *Garcetti/Pickering* test, the district court ruled that Roberts failed to produce evidence showing that either instance was a motivating factor in his reassignment. The district court also held that Roberts' 2009 pay raise request was not protected speech because it was not a matter of public concern. Further, the district court granted the UPD and Rivera summary judgment because Roberts could not identify a custom or policy which would give rise to municipal liability.

The district court also ruled that Roberts' ADEA claim failed because Roberts did not produce evidence showing his age was a but-for cause of his reassignment. Alternatively, the district court ruled that even if Roberts could state a prima facie case, Roberts could not show that Defendants' nondiscriminatory reasons for his reassignment were pretextual. Roberts filed a timely notice of appeal.

II

Summary judgment is warranted when the movant is entitled to "judgment as a matter of law" because there is no "genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). We review the entry of judgment as a matter of law de novo, "applying the same standard for summary judgment that applied in the district court." *Sandoval v. Unum Life Ins. Co. of Am.*, 952 F.3d 1233, 1236 (10th Cir. 2020); *see also Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1180 (10th Cir. 2018) (stating that when reviewing summary judgment "we need not defer to factual findings rendered by the district court") (citation and internal quotation marks omitted). We view the evidence and draw all reasonable inferences in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Government officials sued under 42 U.S.C. § 1983 are entitled to qualified immunity unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). Courts have discretion to decide the order in which they address these two prongs and thus may address the clearly established prong first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "'Clearly established' means that, at the

time of the officer's conduct, the law was 'sufficiently clear' that every 'reasonable official would understand that what he is doing' is unlawful. In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). "It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. Otherwise, the rule is not one that 'every reasonable official' would know." *Id.* at 590 (citation omitted).

Where activity is arguably protected by the First Amendment, the court has "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Citizens for Peace in Space v. City of Colo. Springs*, 477 F.3d 1212, 1219 (10th Cir. 2007).

III

A. Defendants Are Entitled to Summary Judgment on Roberts' Due Process Claims.

1. Roberts Did Not Waive His Substantive Due Process or Pre-Deprivation Procedural Due Process Claims.

"Despite the strong presumption against waiver, 'due process rights may be waived.'" *Pitts v. Bd. of Educ. of U.S.D. 305, Salina, Kan.*, 869 F.2d 555, 557 (10th Cir. 1989) (quoting *Johnson v. U.S. Dep't of Agric.*, 734 F.2d 774, 784 (11th Cir. 1984)) (alterations omitted). A plaintiff may waive his right "to challenge [his due process

rights] in federal court" by a knowing failure to take advantage of the available procedures. *Id.* (citing *Weinrauch v. Park City*, 751 F.2d 357, 360 (10th Cir. 1984)).

In *Pitts*, a school board passed a resolution to not renew the plaintiff's contract as a tenured teacher. The board notified the plaintiff of its intent to not renew his contract and informed him of his procedural rights, including the right to a pre-termination hearing before a special committee. But plaintiff filed his complaint before the special committee met. This court held that by so doing, the plaintiff waived his due process claims. We explained that by filing suit before the special committee hearing was held, "Pitts deprived the school board of the opportunity to provide him with due process, and he gave up his right to test the correctness of the board's decision." *Id.*; *see also Weinrauch*, 751 F.2d at 360 (plaintiff cannot challenge post-impoundment hearing procedures where, instead of challenging the impoundment at a hearing, the plaintiff "improperly took her car from the lot in the attendant's absence").

The district court erred in concluding that this case is analogous to *Pitts*. Here, Winder informed Roberts: "You may have a right to appeal this decision; however, the Department reserves the right to contest this appeal because it is a final, non-appealable decision statutorily committed to the discretion of the Sheriff." Aplt. App., Vol. 3 at 310. Roberts did not appeal the decision, choosing to instead file suit in federal court. The district court held that, by these actions, Roberts waived his due process claims. *Id.*, Vol. 6 at 1138.

The district court's waiver analysis erred in two ways. First, it erred in failing to distinguish Roberts' *substantive* due process claim from his *procedural* due process

claim. Second, the district court erred in failing to distinguish Roberts' rights to *pre-deprivation* process from his rights to *post-deprivation* process.

First, while the district court relied on our decision in *Pitts*, *see* Aplt. App., Vol. 6 at 1137, *Pitts* fails to explain whether it was addressing substantive or procedural due process. Because we have not recognized a substantive due process right in state-created employment, *Pitts* must be read to address a procedural due process claim. Moreover, after *Pitts*, the Supreme Court explained that post-deprivation remedies are not relevant to substantive constitutional claims because "the constitutional violation actionable under § 1983 is complete when the wrongful action is taken." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). Thus, Roberts' failure to participate in post-deprivation proceedings did not waive his substantive due process claim.

Second, the district court, in considering waiver, did not distinguish between pre- and post-termination process. The district court focused on *Pitts*' holding regarding the "knowingness" of the plaintiff's waiver. Aplt. App., Vol. 6 at 1138. But in *Pitts*, we held the plaintiff waived his procedural due process claim by failing to participate in a hearing "after the board's intent resolution *but before termination* . . . ." 869 F.2d at 556 (emphasis added). In *Weinrauch*, we rejected a plaintiff's challenge to pre-deprivation due process on the merits and applied the waiver solely to the plaintiff's challenge to the "*post*-impoundment hearing procedure provided by the City . . . ." 751 F.2d at 360 (emphasis added).

Unlike the plaintiff in *Pitts*, Roberts fully engaged with and participated in all the pre-termination process he was afforded. And, as in *Weinrauch*, Roberts' failure to

participate in post-deprivation proceedings only waived his procedural due process claim challenging those post-deprivation proceedings. As a result, we must address Roberts' substantive due process and pre-deprivation procedural due process claims on the merits.

2. Roberts Has Not Adequately Briefed His Substantive Due Process Claim.

Under the Fourteenth Amendment, a state may not "depriv[e] a party of 'property without due process of law.'" *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000) (quoting U.S. Const. amend. XIV, § 1). "[T]o prevail on either a procedural or substantive due process claim, a plaintiff must first establish that a defendant's actions deprived plaintiff of a protectible property interest." *Id.* For the purposes of substantive due process, the plaintiff's property interest must be "fundamental." *Hennigh v. City of Shawnee*, 155 F.3d 1249, 1257 (10th Cir. 1998). "We have not decided whether an employee with a property right in state-created employment is protected by the substantive due process clause." *Potts v. Davis Cnty.*, 551 F.3d 1188, 1196 n.1 (10th Cir. 2009).

Even assuming *arguendo* that the Range Master was a Merit position in which Roberts held a property interest, Roberts cites no case law indicating that a Merit position is a "fundamental" property interest. In fact, he fails to even address the standard for a substantive due process claim. Instead, Roberts merely reiterates that "he has a protected property interest," Aplt. Br. at 27, and that Range Master was not an "at-will appointed position." Aplt. Reply at 20. Accordingly, on appeal, Roberts has waived his substantive due process claim. *See N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1173 (10th Cir. 2021) ("Such inadequately briefed

arguments are waived."). Under this court's precedent, Roberts' claim also fails because he has not established a property interest in the position of Range Master, nor has he identified a liberty interest implicated by his transfer. *Brenna v. S. Colo. State Coll.*, 589 F.2d 475, 476 (10th Cir. 1978) ("In order to present a claim of denial of 'substantive' due process by a discharge for arbitrary or capricious reasons, a liberty or property interest must be present to which the protection of due process can attach.").

Alternatively, Defendants are entitled to qualified immunity because Roberts' substantive due process right was not clearly established. *Potts*, 551 F.3d at 1196 n.1 ("We have not decided whether an employee with a property right in state-created employment is protected by the substantive due process clause.").

3. *Defendants Are Entitled to Summary Judgment on Roberts' Procedural Due Process Claim.*

"To determine whether a plaintiff was denied procedural due process, we engage in a two-step inquiry: (1) Did the individual possess a protected interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?" *Hennigh*, 155 F.3d at 1253 (citing *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 577 (10th Cir. 1996)).

a. Roberts Has Not Produced Evidence Showing a Protected Interest.

For the purposes of procedural due process, employees have a protected property interest in their employment "if state statutes or regulations place substantive restrictions on a government actor's ability to make personnel decisions." *Potts*, 551 F.3d at 1192 (quoting *Hennigh*, 155 F.3d at 1253). "Procedural detail in a statute or regulation,

standing alone, is not sufficient to establish a protected property interest in an employment benefit." *Hennigh*, 155 F.3d at 1254. "However, if the statute or regulation places substantive restrictions on the discretion to demote an employee, such as providing that discipline may only be imposed for cause, then a property interest is created." *Id.*

Under Utah law, a "merit system officer holding a permanent appointment may be demoted, reduced in pay, suspended, or discharged" only for cause. U.C.A. § 17-30-18. "A merit system officer may be transferred, without examination, from one position to a similar position in the same class and grade in the same governmental unit." U.C.A. § 17-30-13. The Merit Commission is authorized to "make all necessary rules and regulations" needed for carrying out the provisions of the Deputy Sheriffs—Merit System Act. U.C.A. § 17-30-4. Finally, Merit Commission Policy 3100 establishes four "permanent ranks for Deputy Sheriffs": Deputy, Sergeant, Lieutenant, and Captain. Aplt. App., Vol. 5 at 841. So, for Roberts to have a property interest in the Range Master position, he must establish that he was a merit system officer with a permanent appointment.

The district court correctly held that Roberts did not have a property interest in his position as Range Master. While Roberts was a merit system officer with the rank of Sergeant, he did not hold a permanent appointment as Range Master. Range Master, unlike Sergeant, is not recognized by Merit Commission Policy 3100 as a permanent rank. *Id.* Accordingly, Range Master, unlike Sergeant, was not a permanent appointment. Thus, Roberts held no property interest in his position as Range Master.

Moreover, even if Roberts did hold a property interest, that interest was not "clearly established" given the ambiguity of the relevant statutes and policies and a lack of guiding caselaw. *See Wesby*, 138 S. Ct. at 589 ("The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." (quoting *al-Kidd*, 563 U.S. at 741 (2011))).

Roberts argues the district court failed to consider (1) the testimony of various parties who allege that Range Master was a merit position, (2) a 2009 analyst memo and other internal policies, and (3) the difference between a "merit" and a "specialist" position. Ultimately, these arguments are unavailing.

First, Roberts asserts the district court erred by failing "to consider the testimony of former officials from both the Sheriff's Office and the Merit Commission, the testimony of Sheriff Kennard and Winder, and Defendants' own documents evidencing that Range Master was a Merit position." Aplt. Br. at 28. The district court held that "[b]ecause the Merit Commission has exclusive authority in classifying what positions have a 'Merit' rank, the only thing that is relevant to the classification of Roberts' former position [as Range Master] is the documents and evidence from the Merit Commission." Aplt. App., Vol. 6 at 1136.

The district court correctly rejected the testimony of former officials and other witnesses. Whether Roberts has a property interest in his position (and whether that interest was clearly established) is a legal question—not a fact question. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985) (property right in continued employment is an issue of state law). Legal questions are resolved by looking at a state's

"statute[s] or regulation[s]." *Hennigh*, 155 F.3d at 1254.[1] Although the officials may have subjectively believed there were restrictions on reassigning the Range Master position, and although those officials may have acted as if such restrictions were in place, the district court correctly found that no statute or regulation actually restricted the Sheriff's discretion as a matter of law.

Additionally, the subjective beliefs of government officials are not relevant to whether Roberts' property interest was clearly established. *See Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021) ("[W]hat the officer defendants subjectively understood or believed the law to be was irrelevant with respect to the clearly-established-law question."). The district court did not err in rejecting this testimony.

Second, Roberts' reliance on a 2009 memo to the Merit Commission fails for similar reasons. *See* Aplt. Br. at 29; *see also* Aplt. App., Vol. 18 at 4323 (Speer Memo). The memo expressed one human resources analyst's opinion. Like the deposition testimony of other witnesses, the opinion expressed in the memo does not determine whether Roberts had a property right as a matter of law, as Roberts' property rights are determined by Utah's statutes and regulations, not witness testimony. *Hennigh*, 155 F.3d at 1254.[2]

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[1] Roberts does not ask us to expand our decision in *Hennigh* to find property interests based on a state's promises or practices, nor does Roberts pursue a promissory estoppel claim.

[2] To the extent the Speer memo is relevant, it does not support Roberts' claim. For example, Roberts points out that, according to the memo, the Range Master Specialist position was initially approved as a "merit allocation with a grade of P17/P21." Aplt. Br. at 29; *see also* Aplt. App., Vol. 18 at 4323. The merit allocation

While the district court erred in rejecting the Sheriff's Office's and the UPD's internal policies, that error was harmless. Internal policies may be "regulation[s] plac[ing] substantive restrictions on the discretion to demote an employee," *Hennigh*, 155 F.3d at 1254, thereby creating a property interest. Here, however, no policy placed such substantive restrictions on the Sheriff's discretion to transfer the Range Master.

Roberts points out two policies he believes do create a property interest: Sheriff Office Policy 1-3-01.01 and UPD Policy 1-3-00.01. Sheriff Office Policy 1-3-01.01 specifies only that the Undersheriff, the Chief Deputy, and the Sheriff's Executive Secretary are appointed, "non-merit employees and serve at the pleasure of the Sheriff." Aplt. App., Vol. 4 at 547. UPD Policy 1-3-00.01 similarly specifies only that the Undersheriff, Deputy Chief, Deputy Chief of Police Services, Chief Financial Officer, Chief Legal Counsel, and Human Resources Director are appointed, "non-merit employees and serve at the pleasure of the Sheriff [with some exceptions not relevant here]." *Id.* at 549. Thus, these policies broaden, rather than limit, the Sheriff's discretion to reassign certain employees.

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does not indicate that the Range Master Specialist was a "permanent appointment" subject to dismissal only for cause. Rather, funding for the position was made available by "a vacant Lieutenant allocation." Aplt. App., Vol. 3 at 339. Roberts also points out that the memo describes a "career ladder." Aplt. Br. at 29; *see also* Aplt. App., Vol. 18 at 4328. Yet, the existence of a career ladder does not constrain the Sheriff's ability to transfer the Range Master; thus, the career ladder does not confer a property right in that position. At most, the career ladder might constrain the Sheriff's ability to change Roberts' *pay grade*, but Roberts does not distinguish his pay grade from his position.

The policies also do not address the Sheriff's discretion as applied to the "Range Master" specifically; in fact, the polices do not address the Range Master at all. Roberts asserts the exclusion of "Range Master" implies it is a non-appointed, merit position. *See* Aplt. Br. at 24 ("If Range Master had been a non-merit position it would have been listed on Policy 1-3-01.01 as an appointed at-will position from which the Sheriff could remove or replace people[.]"). Yet Roberts provides no evidence that the policies are meant to be exhaustive. *See id.* at 31 (citing only witness deposition). In short, although Sheriff's Office or UPD policies could be relevant to whether employees have property interests in their positions, the policies that Roberts cites here do not establish such an interest.

Alternatively, even if Roberts did have a property interest, the interest was not clearly established because the policies are ambiguous as to the Range Master position. *Frasier*, 992 F.3d at 1015 (qualified immunity turns on whether an officer "could, as a matter of law, reasonably have believed that his conduct was lawful in light of the clearly established principles governing it") (internal quotations and alterations omitted).[3]

[3] At first blush, *Frasier* seems to be in some tension with *Hennigh*. *Frasier* indicates that internal policies are not relevant to determining a § 1983 defendant's qualified immunity, but *Hennigh* indicates that internal policies are relevant to determining a § 1983 plaintiff's constitutional rights. However, *Frasier* and *Hennigh* address different inquiries. *Frasier* only prohibits consideration of an internal policy as a "valid *interpretive source* of the content of clearly established law." 992 F.3d at 1015 (emphasis added). *Hennigh* illustrates that an internal policy may be the *substantive* source of a protected property interest. Here, the Sheriff's Office and the UPD internal policies do not themselves pertain to the Range Master position, and thus are not substantive sources of the property right. Rather, Roberts relies on those policies solely as interpretative sources. This reliance is impermissible under *Frasier*.

Finally, the parties' focus on whether "Range Master" is a "specialist position" is inapposite. Merit Commission Policy 3140 describes the procedure for creating "specialist positions." A specialist position is defined as "[a] position filled by direct appointment . . . where the position requires peculiar and exceptional qualifications of a scientific, professional, or expert nature." Aplt. App., Vol. 2 at 153. Procedure 5.1.1.2 of Policy 3140 specifies that merit officers who are appointed to specialist positions "maintain two classifications: the permanent merit rank and the appointed specialist classification." *Id.* at 155. "The officer permanent merit rank is attained through appointment from a merit register based on a competitive merit examination; the employee's specialist appointment is based on the qualifications to fill the position." *Id.*

Procedure 5.1.3 authorizes the Sheriff to "reassign the officer to a position within the current category, in accordance with Merit Commission Policy 4400." *Id.* Merit Commission Policy 4400 defines "reassignment" as "the movement of an employee serving in a specialist position back to his/her former category . . . ." Dkt. No. 5-4 at 2 (Merit Commission Policy 4400); *see also id.* at 7 ("The Sheriff may opt at any time to transfer the employee to a position within their current rank. Said transfer may result in a reduction in pay, but will be considered a reassignment and not a demotion.").

But whether the Range Master position is a Specialist position does not determine whether Roberts has a property interest in that position. As Procedure 4400 makes clear, and as the parties seem to agree, the Sheriff has discretion to reassign a Specialist position.

Defendants' assumption, and the crux of this dispute, seems to be that Specialist positions and Merit positions are mutually exclusive. However, that assumption is unsupported by record evidence. Here, as Procedure 5.1.1.2 makes clear, if Range Master is a Specialist position, then Range Master carries separate Merit ranks and specialist classifications. But Procedure 3100 does not describe a separate Merit rank for "Range Master." Roberts identifies no other policy or procedure constraining the Sheriff's discretion to reassign the Range Master. Thus, Roberts did not have a property interest in his Range Master position, regardless of whether it was a "Specialist" position.

b. Roberts Has Not Produced Evidence Showing He Was Denied Adequate Process.

"[A] pretermination 'hearing,' though necessary, need not be elaborate." *Loudermill*, 470 U.S. at 545; *see also West v. Grand Cnty.*, 967 F.2d 362, 368 (10th Cir. 1992) (describing the due process requirements of a pretermination hearing as "not very stringent"). "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* "The Due Process Clause of the United States Constitution entitles each citizen to notice and an opportunity to be heard prior to the deprivation of a fundamental right." *Hennigh*, 155 F.3d at 1256; *see also Hulen v. Yates*, 322 F.3d 1229, 1248 (10th Cir. 2003) ("Applying *Loudermill* to claims of denial of pre-termination procedural rights, this circuit has required only the core of notice and an opportunity to be heard.").

Roberts was afforded sufficient pre-deprivation process. As Roberts concedes, Undersheriff Carver and Chief Deputy Hudson informed Roberts that his rank and pay would be reduced and that he would be reassigned to patrol duties. Aplt. Br. at 21. That meeting provided the minimal requirements of pre-deprivation notice. *See West*, 967 F.2d at 368 ("A brief face-to-face meeting with a supervisor provides sufficient notice and opportunity to respond to satisfy the pretermination due process requirements of *Loudermill*."). Sheriff Winder also provided Roberts' counsel a letter rejecting Roberts' grievance and explaining that Roberts was transferred within his merit rank "under [Winder's] sole discretion as Sheriff." Aplt. App., Vol. 3 at 307. That letter evidenced the minimal requirements of an opportunity to be heard. Thus, Roberts received sufficient pre-deprivation process. *See Hulen*, 322 F.3d at 1248 (finding sufficient pre-deprivation process where plaintiff "was able to meet with the decisionmaker twice, lodged repeated written complaints, and engaged the services of an attorney to attempt to avoid the transfer").

Alternatively, in light of *West* and *Hulen*, the unreasonableness of Defendants' conduct was not "clearly established." *Wesby*, 138 S. Ct. at 589 (unreasonableness must be "beyond debate").

B. Roberts Invited Error as to His State Law Claims.

Roberts asserts that the district court erred in granting summary judgment on his claims under the Utah Constitution by basing its rulings on federal case law applicable to claims brought under the Constitution of the United States. The Utah Supreme Court has held that because the state and federal standards differ when a court is determining

damages for a constitutional violation, "a federal court determination that the material undisputed facts do not give rise to a federal constitutional violation does not preclude a state court from deciding whether those same facts will give rise to a state constitutional violation." *Jensen ex rel. Jensen v. Cunningham*, 250 P.3d 465, 478 (Utah 2011). But Roberts never argues that the state law standards afford him broader protection than the federal standards.

Roberts seems to assert that, because there is some difference he does not explain between Utah law and federal law as regards his constitutional claims, dismissal of his claims brought under the Utah Constitution should have been "without prejudice" and not "with prejudice." *See* Aplt. Reply Br. at 30. This argument might have had some force if Roberts had made such a request before the district court. *See Jensen*, 250 P.3d at 478 (Utah law "dictates an analysis of state constitutional law before addressing any federal constitutional claims"); *see also VR Acquisitions, LLC v. Wasatch Cnty.*, 853 F.3d 1142, 1149 (10th Cir. 2017) ("[W]e conclude that the district court should have simply declined to exercise supplemental jurisdiction over VRA's state-law claims after it dismissed VRA's federal claims."). Not only did Roberts fail to make such a request, he linked his state constitutional claims to federal constitutional caselaw before the district court. *See, e.g.*, Aplt. App., Vol. 3 at 529 (arguing that because "existing remedies under Utah law and equity would not address Roberts' injuries," he is entitled to "general [and] punitive damages to which he is entitled for the violation of his constitutional rights, [and] the costs and attorney fees Roberts has incurred in this action"). Because Roberts "urged the district court to adopt" the same analysis for both his federal and state law claims, "the

invited-error doctrine precludes [Roberts] from arguing that the district court erred in adopting [that] proposition . . . ." *ClearOne Commc'ns, Inc. v. Bowers*, 642 F.3d 735, 771 (10th Cir. 2011).

C. Defendants Have Shown Roberts Would Have Been Removed Even in the Absence of an Improper Motivation.

The district court evaluated Roberts' First Amendment claim under the five-prong *Garcetti/Pickering* test. *See* Aplt. App., Vol. 21 at 5021; *see also Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). Under that test, a court must determine whether (1) the speech was made pursuant to the employee's official duties, (2) the speech was on a matter of public concern, (3) the government's interests as an employer in promoting efficient public service outweigh a plaintiff's free speech interests, (4) the speech was a motivating factor in the adverse employment action, and (5) the same employment decision would have been made without the protected speech. *Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014).

Roberts asserts that the district court should have applied the three-prong "*Anderson*" test. Aplt. Br. at 49 (citing *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 2014)). Under that test, a plaintiff must show: "(1) she engaged in a protected activity; (2) she was subjected to adverse employment action subsequent to or contemporaneous with the protected activity; and (3) a causal connection between the protected activity and the adverse employment action." *Anderson v. Coors Brewing*, 181 F.3d at 1178. "The analytical framework pronounced in *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792, 802–04, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), guides [the *Anderson* test]." *Id.*

Roberts' assertion that *Anderson* (or *McDonnell Douglas*) supplies the appropriate test is without merit. As the district court correctly noted, this circuit has held that "*McDonnell Douglas* has no useful role to play in First Amendment retaliation cases." *Walton v. Powell*, 821 F.3d 1204, 1210 (10th Cir. 2016) (Gorsuch, J.). Instead, "[t]he familiar *Garcetti/Pickering* analysis governs First Amendment retaliation claims." *Trant*, 754 F.3d at 1165 (citing *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007)).[4] Thus, the district court did not err in using the *Garcetti/Pickering* test to analyze Roberts' First Amendment retaliation claim.

But we conclude the district court erred in applying the *Garcetti/Pickering* test at the fourth step. The district court acknowledged at least three witnesses testified that Winder wanted to remove Roberts because Roberts did not support Winder's 2006 election bid. Aplt. App., Vol. 21 at 5023; *see also* Aplt. App., Vol. 6 at 1089 (George

[4] It appears possible Roberts has raised a First Amendment free association claim, rather than a First Amendment speech claim. That is, the essence of Roberts' First Amendment claim is that Winder removed him from the Range Master position because Roberts did not support Winder in the 2006 election and, thereafter, was not sufficiently enthusiastic in his support of Winder's subsequent reelection bids. First Amendment free association retaliation claims are evaluated under the *Elrod*/*Branti* test, not the *Garcetti*/*Pickering* test. *See generally Trujillo v. Huerfano Cnty. Bd. of Cnty. Comm'rs*, 349 F. App'x 355, 359–60 (10th Cir. 2009) (unpublished disposition). This court need not resolve any of the potentially numerous issues surrounding this question because Roberts has never asserted the district court erred in treating his First Amendment claim as a speech-based retaliation claim and, concomitantly, has never asserted the district court erred in failing to apply the *Elrod*/*Branti* test to resolve this First Amendment claim.

Nielsen affidavit, stating "Mr. Winder said that he wanted to replace Nicholas Range Master [sic] because Roberts had not supported Mr. Winder in his political campaign for Sheriff of Salt Lake County"); Aplt. App., Vol. 17 at 3902 (David Scott Kilgrow testifying that Winder's interest in moving Roberts from the Range Master position was a "last-ditch effort to get even with Nick [Roberts]."); Aplt. App., Vol. 18 at 4101 (Beau Babka testifying that Winder's interest in moving Roberts from the Range Master position "was politically motivated"). Despite these witnesses' testimony, the district court found no issue of material fact regarding Winder's motivation for two reasons: "(1) the vast gap between Roberts' protected speech [in 2006] and his transfer from the Range Master position [in 2017]; and (2) Roberts' support for Winder in the 2010 and 2014 elections . . . ." Aplt. App., Vol. 21 at 5024.

The district court erred in discrediting this witness testimony on summary judgment. As the district court recognized, "evidence such as a long delay between the employee's speech and the challenged conduct, or evidence of intervening events, tend to undermine any inference of retaliatory motive and weaken the causal link." *Maestas v. Segura*, 416 F.3d 1182, 1189 (10th Cir. 2005) (internal citations omitted). Yet, the plaintiffs in *Maestas* relied on inferences drawn from circumstantial evidence, including the "temporal proximity between the speech and the challenged action," and "evidence the employer expressed opposition to the employee's speech . . . ." *Id.* at 1189.

Similarly, in other cases, we have held that delays or intervening events may prevent a plaintiff from establishing causation through inferences drawn from circumstantial evidence. *Compare Trant*, 754 F.3d at 1166 n.3 (summary judgment for

defendant proper where the plaintiff could "only argue that there was temporal proximity between [plaintiff's] counsel's statement and [plaintiff's] termination."), *with Walton*, 821 F.3d at 1214 (summary judgment for defendant improper where plaintiff's extensive political affiliations, a news report critical of the plaintiff's appointment, and close temporal proximity "could support an inference not merely that the employer *knew* of the employee's [political] affiliation but *acted* on it") (emphasis in original). Here, no inferences are required because Roberts provided *direct* evidence of a discriminatory motivation—witnesses claiming that Winder acted against Roberts because Roberts did not support Winder's 2006 election bid. And the only way the district court could reject that direct evidence is by weighing the witnesses' credibility—something which is impermissible on summary judgment. *See Anderson v. Liberty Lobby*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

The district court's analysis is more appropriately addressed under the *Garcetti/Pickering* fifth step. This step ensures a plaintiff cannot "prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977). "The relevant question then . . . [is] whether even without the improper motivation the alleged retaliatory action would have occurred." *Trant*, 754

F.3d at 1168 (quoting *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 120 (2d Cir. 2011)).

"Summary judgment is appropriate on the fifth step when 'any reasonable jury would [have found] that [the plaintiff] would have been terminated even absent any desire on the Defendant['s] part to punish him in retaliation for his allegedly protected speech.'" *Id.* at 1167 (quoting *Anemone*, 629 F.3d at 117 (2d Cir. 2011)) (alterations in original). And, perhaps most importantly, at the fifth step, the burden remains with the defendant. *Walton*, 821 F.3d at 1211 ("[A] defendant seeking to prevail at summary judgment must show a reasonable factfinder . . . would have to . . . accept its affirmative defense."). "Unlike in the *McDonnell Douglas* burden-shifting framework, the burden does not shift back to a plaintiff to show pretext in First Amendment retaliation claims." *Dye*, 702 F.3d at 295.

Winder provided several neutral reasons for removing Roberts as Range Master, including Roberts "provid[ing] preferential treatment to the UPD Officers over the Sheriff's Office officers . . . [and] the environment at the Range ma[king] training difficult." Aplt. App., Vol. 7 at 1457 (Winder Decl., ¶ 29). Sheriff Rivera agreed with Winder's assessment and testified that she could not transfer Roberts back to the Range because of his preferential treatment. Aplt. App., Vol. 21 at 4955 ("[Roberts'] approach to it was he treated unified police officers much better than he did the sheriff's side. They all work under office of the sheriff. I need all of them treated the same. It doesn't matter which badge or which patch you wear. And I do not believe Nick is the best

person for that position."); *see also id.* ("I need someone that can bring people together and treat people fairly. . . . I don't believe Nick is the right person for the job.").

Sheriff Rivera's testimony reflected a deep knowledge of the UPD prior to her entry into office. She recounted serious uncontested issues in the Sherriff's Department regarding how Roberts ran the firing range and taught marksmanship. Indeed, Sheriff Rivera testified that Roberts' replacement, Todd Griffiths, succeeded in the job as Range Master because he, unlike Roberts, was able to unify UPD and Sheriff Officers in the operation of the Range. This testimony, considered in the context of the entire record, makes it reasonable to conclude, as a matter of law, that Roberts failed to create an issue of fact as to whether Winder's impermissible motive was a significant motivating cause of Roberts' transfer in April 2017.

Moreover, the eleven-year delay between Roberts' protected speech and the adverse action further supports the district court's conclusion that Roberts would have been removed at that time regardless of whether his speech was a motivating factor.

Roberts claims his performance reviews show otherwise. *See* Aplt. Br. at 60–61. But those performance reviews only describe Roberts' job responsibility as "work[ing] with both the UPD and SO [Sheriff's Office] weapons training . . . ." Aplt. App., Vol. 16 at 3731; *see also id.* at 3732 ("Rangemaster Roberts manages both the UPD and Sheriff's Office firearms."); *id.* at 3734 ("Range Master Roberts trains personnel from the Unified Police Department, the Salt Lake County Sheriff's Office, and several other law enforcement agencies."). His performance reviews do not describe whether Roberts met that duty equally with regards to both offices. And to the extent the performance reviews

are positive, they tend to focus on Roberts' treatment of the UPD officers—not Sheriff's Office officers. *See, e.g.*, *id.* at 3734 ("Range Master Roberts is a valuable resource and a great asset to the Unified Police Department and the law enforcement community."); *id.* 3735 ("[Roberts] is dedicated to maintaining the safety of every member of the UPD."). Considering Rivera's testimony and the absence of contradictory evidence, Defendants have met their burden to show Roberts would have been removed as Range Master even in the absence of any improper motivation.

The district court also correctly held that Roberts' 2009 request for a pay increase was not "a matter of public concern," and thus not protected speech. Aplt. App., Vol. 21 at 5025. "Speech is a matter of public concern if it is 'of interest to the community,' and we 'focus on the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public's interest.'" *Trant*, 754 F.3d at 1165 (quoting *Lighton v. Univ. of Utah*, 209 F.3d 1213, 1205, 1224 (10th Cir. 2000)). Roberts' dispute regarding his own pay was a "personal dispute," and not a matter of "public concern." *See Brammer-Hoelter*, 492 F.3d at 1206 ("Plaintiffs' complaints about their own salaries and bonuses are similarly matters of personal concern.").

D. Because Winder Was Entitled to Summary Judgment, UPD and Rivera Were Also Entitled to Summary Judgment.

Roberts does not assert the UPD or Rivera are independently liable. Instead, Roberts asserts they are liable because they "approved and ratified" his termination. *See* Aplt. Br. at 52; *see also* Aplt. App., Vol. 1 at 95 (Answer at ¶ 24: "Admit the allegation

in ¶ 99 [sic] that the UPD Board approved and ratified Sheriff Winder's decision to eliminate the specialist position of range master and to reassign Plaintiff according to his merit rank."). Because Winder's underlying decision did not violate Roberts' constitutional rights, neither did the UPD's ratification of that decision.

E. Roberts Has Not Made a Prima Facie Case of Age Discrimination.

A claim of age discrimination requires plaintiffs to show they (1) are a member of the class protected by the ADEA, (2) suffered an adverse employment action, (3) were qualified for the employment position at issue, and (4) were treated less favorably than others not in the ADEA protected class. *Jones v. Okla. City Public Schs.*, 617 F.3d 1273, 1279 (10th Cir. 2010). Only if a plaintiff "establishes a prima facie case [does] the burden shift[] to the employer 'to articulate some legitimate, nondiscriminatory reason' for its action." *Rivera v. City and Cnty. of Denver*, 365 F.3d 912, 920 (10th Cir. 2004) (quoting *McDonnell Douglas*, 411 U.S. at 802). "Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination." *Id.* (internal quotation and alterations omitted).

Roberts fails to make a prima facie case. Even if he makes an adequate showing that he meets the first three elements, he fails to show he was treated less favorably than others not in the ADEA protected class. Were he to rely on the age difference between he and his replacement, the age difference must be "sufficiently substantial to raise an inference of age discrimination." *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1058 (10th Cir. 2020). Generally, "an age difference of less than ten years is

not [sufficiently substantial]." *Id.* Here, Roberts was fifty-nine when removed from the Range Master position. Griffiths, his replacement, was fifty-five. That Roberts was replaced by someone only four years his junior does not give rise to an inference of age discrimination.

Roberts does not address the four-year age difference in his briefing, but instead jumps directly to pretext. But we can only reach pretext "if the plaintiff establishes a prima facie case . . . ." *Rivera*, 365 F.3d at 920. The four-year age difference here does not give rise to an inference of discrimination. Further, Roberts had not made any argument regarding how or if he was treated less favorably than others not covered under the ADEA. In light of these failings, we conclude Roberts has not established a prima facie case under the ADEA.

F. The District Court Did Not Abuse Its Discretion in Denying Reconsideration.

"We review a district court's decision denying a motion for reconsideration for abuse of discretion." *Spring Creek Expl. & Prod. Co. v. Hess Bakken Inv., II, LLC*, 887 F.3d 1003, 1024 (10th Cir. 2018) (citation omitted). "Under an abuse of discretion standard, a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Id.* When determining whether to reconsider an interlocutory order, "'the district court is not bound by the strict standards for altering or amending a judgment encompassed in Federal Rules of Civil Procedure 59(e) and 60(b),' which govern a district court's reconsideration of its final

judgments." *Id.* (quoting *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1223 n.2 (10th Cir. 2008)).

The district court did not abuse its discretion. The district court recognized that Roberts sought reconsideration based, in part, on Defendants' failure "to produce documents that Roberts requested during discovery . . . ." Aplt. App., Vol. 18 at 4338. The district court nonetheless denied reconsideration because the newly discovered evidence did not affect its previous ruling. As the district court found, two of the documents—the Sheriff's Office Merit Seniority Lists and the UPD Merit Seniority Lists—were "unofficial lists." *Id.* at 4337. Thus, those lists did not place "substantive restrictions on the discretion to demote an employee . . . ." *Hennigh*, 155 F.3d at 1254. Similarly, the "Notice of Personnel Action" did not place substantive restrictions on Defendants' discretion. As discussed above, while the newly discovered evidence might indicate that "Range Master" was *treated* as a Merit rank, the evidence does not indicate that "Range Master" was, in fact, a Merit rank.

IV

We **AFFIRM** the district court's grant of summary judgment and denial of reconsideration.