

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

United States District Court
Southern District of Texas
ENTERED

JUN 23 2010

David J. Bradley, Clerk of Court

ANTONIO JUAREZ,
Plaintiff,

v.

**BROWNSVILLE INDEPENDENT
SCHOOL DISTRICT; TRUSTEES
ROLANDO AGUILAR, JOE COLUNGA,
RUBEN CORTEZ, AND RICK ZAYAS;
MIGUEL SALDAÑA; AND
SUPERINTENDENT HECTOR
GONZALES AND HIS SUCCESSORS,
Defendants.**

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CIVIL NO. B-09-14

MEMORANDUM OPINION AND ORDER

Previously, this Court entered an order dismissing certain claims and deferring a ruling on others. (Doc. No. 66.) In particular, the Court deferred rulings on the following claims:

1. Juarez’s § 1983 Fourteenth Amendment Due Process claims against BISD and the individual Defendants, relating to Juarez’s contract nonrenewal;
2. Juarez’s § 1983 First Amendment retaliation claim against the individual Defendants in their personal capacities and BISD, relating to the nonrenewal of Juarez’s employment contract; and
3. Defendants’ related qualified immunity defense to Juarez’s claims.

(Doc. No. 66 at 27.)

The Court also granted Plaintiff’s request to depose Hector Gonzales, the former BISD superintendent, and issued new deadlines including one by which the Plaintiff was to submit summary judgment evidence. (Doc. No. 67.) Consistent with these orders, Plaintiff submitted

additional evidence and a memorandum to the Court that were filed under seal. Defendants BISD and Trustees Aguilar, Colunga, Cortez, and Zayas also filed supplemental material and exhibits in response to Plaintiff's filings.

Having considered the filings of the parties, the Court is of the opinion that the motions for summary judgment on the deferred claims (Doc. Nos. 29, 31)¹ should be GRANTED in part and DENIED in part because genuine issues of fact exist as to whether or not Plaintiff's contract was not renewed due to his protected speech, but the evidence does not raise an issue of material fact as to whether Plaintiff had a property right in continued employment.

I. Background²

A. Insurance Recommendation and Juarez's Reassignment

In the fall of 2008, Plaintiff Antonio Juarez began work for Defendant Brownsville Independent School District ("BISD") as Chief Financial Officer ("CFO"). One of his duties as CFO was to make insurance recommendations to the BISD Board of Trustees. It was in carrying out this duty that Juarez's troubles began. On September 16, 2008, Juarez made a recommendation that the Board select American Administration General ("AAG") as the insurance carrier for Stop Loss coverage. This recommendation formed the basis of initial animosity towards Juarez: according to Gonzales, three of the Trustee Defendants (Colunga, Aguilar, and Cortez) accused Juarez of

¹ These motions were originally filed as motions for dismissal, but were converted by the Magistrate Judge into motions for summary judgment.

² This section is culled from the exhibits submitted by the parties and is recited in a fashion to address the three remaining issues. Facts cited within, however, are not to be taken as findings of fact by this Court.

misinforming the Board regarding the recommendation. Two of the Trustee Defendants (Cortez and Colunga) were adamantly opposed to the AAG recommendation, and after the meeting, both Colunga and Cortez met with Gonzales and said that they had been lied to by Juarez. Gonzales told them he did not think that Juarez had lied, but agreed to “look into it.”

Defendant Cortez requested a consent item be placed on the October 21, 2008 Board Meeting agenda. This item was described as “[d]iscussion and possible action related to the apparent misinformation directed toward the BISD Board Members at the last regularly scheduled Board Meeting.” At the meeting, Cortez spoke about Juarez when this agenda item was addressed.

Then, after the November 2008 Board Meeting, Gonzales spoke with Juarez. Gonzales informed Plaintiff that the Board “was upset with him, and that [Gonzales] was to terminate him” or else Gonzales would “suffer consequences.” He also told Juarez that he did not want to terminate him, and offered him a reassignment if Juarez would resign as CFO. According to his affidavit, Gonzales “understood, and believed [he] was conveying to [Juarez], that if [Juarez] performed satisfactory in his newly assigned position, [Gonzales] would not have a problem to recommend renewal of [Juarez’s] contract in the new position beyond the existing term of the contract although, [Gonzales] never specifically told him that using those words.” On November 24, 2008, Juarez submitted his Notice of Resignation (from the CFO position), which indicated his acceptance of a reassignment and expressed his “desire to seek a superintendent position in Texas in the future.”³

B. Whittemore Grievances

Five days after the September 2008 Board Meeting, Kent Whittemore filed a grievance

³ The Court has received evidence from the Defendants supporting the fact that even though Juarez may have been reassigned in November 2008, his salary was unaffected by the reassignment.

against Juarez, alleging that Juarez had not spoken truthfully at the September 16, 2008 Board meeting regarding whether or not the District's consultant agreed with the insurance recommendation.⁴ The grievances filed by Whittemore eventually totaled two, although they were consolidated. The original grievance accused Juarez of lying; a second concerned Juarez's alleged retaliation against him for filing the first grievance. The consolidated grievance proceeding was initiated at the "Level II" stage because Whittemore claimed it was a whistleblower action.⁵ Following the Level II decision, Whittemore appealed, claiming that the decision did not grant the remedies he sought in his complaints. A Level III hearing was then set for the grievances to be heard by the Board on January 20, 2009.

C. Juarez's Meetings with Brito-Hatcher and Powers

Juarez's affidavit dated May 28, 2009 contains details regarding separate conversations he had with Elizabeth Brito-Hatcher (a BISD employee) and Otis Powers (a former BISD trustee), which took place between December 2008 and January 15, 2009. Two of the conversations—one with Brito-Hatcher and one with Powers—were tape-recorded by Juarez and offered as summary judgment evidence. Both conversations to varying degrees implicate four of the Trustee Defendants

⁴ Juarez suggests in his Complaint that the first Whittemore grievance was filed at the behest of the Trustees as part of their "tactic of setting one employee to grieve against another." (Doc. No. 25 at 5.) There is little evidence to support this claim beyond the suspicious fact that Whittemore, who had no experience in insurance matters, had been transferred to the insurance department from the warehouse department. In any case, the Whittemore grievance in and of itself is not the basis for Juarez's complaint. Rather, as indicated later in this opinion, it was at the Level III hearing concerning the Whittemore grievance that Juarez's attorney informed the Trustees of his report to the FBI, prior to Juarez's contract nonrenewal.

⁵ Grievances pursuant to BISD Policy DGBA generally proceed in three stages, or "levels." A grievance may begin at Level II if it involves a whistleblower complaint. At Level II, appeals of Level I grievances are heard by the Superintendent or a designee. At Level III, appeals of Level II decisions are heard by the Board.

in the alleged conspiracy to have Juarez file a grievance against Superintendent Gonzales. Powers, in particular, indicated that he had spoken to Defendants Colunga, Aguilar, and Zayas about the proposed Juarez grievance against Gonzales.⁶ The message from Powers, which he attributed to various defendants, was that if Juarez would file the grievance against Gonzales and blame Gonzales for the statement about the insurance recommendation, Juarez would get his job back.

Juarez's conversation with Powers also detailed "irregularities" in the Board's contracting procedures—for example, paying a woman without authorizing such payment and then trying to develop a contract to backdate to when they had begun been paying her—and indicated that Juarez had brought up this very case to the Board, questioning its legitimacy. Moreover, Powers noted that such behavior by the Board was not uncommon, saying "[t]hey have always paid people like that, we have more than just her." (Doc. No. 51 at Att. A.)

D. Juarez's Grievance against the Trustees

On January 16, 2009, Juarez filed a grievance alleging that a majority of BISSD had violated the Texas Open Meetings Act, that the Board had conspired in manipulating the insurance bidding procedures, and that current and former Trustees had attempted to engage him in a conspiracy to oust Gonzales. In this same grievance, Juarez communicated his fear that not participating in the conspiracy would result in his termination, and he also sought to rescind his letter of resignation and

⁶ Powers: Here's the thing, the Board hates Hector Gonzales

* * *

Juarez: But how do I handle it [the grievance]?

Powers: You . . . ah, personally, you have to get Hector back. He told you what to do and why you had to do it. . . . Did I talk to Colunga for you, talked to Aguilar for you, I talked to them all, even Rick Zayas. . . . The only one I don't talk to is Ruben [Cortez] too much. (Doc. No. 51, Att. A)

be restored as CFO. (Doc. No. 25-2.) This grievance was ultimately dismissed at the Level II stage when Juarez and his attorneys refused to participate after objecting to the hearing officer as being one of the complained-of parties in Juarez's grievance. Although Juarez's attorney filed an appeal of the Level II ruling, his request for a Level III hearing was denied.

E. Juarez's Report to the FBI

In Juarez's second affidavit, he states that on January 15, 2009, he met with his attorneys and two FBI agents and disclosed his "belief that the Trustee Defendants were manipulating the bidding process for the District's Stop Gap Insurance Coverage." He also informed them about the meeting he had had with Powers, in which Powers first asked him to file a false grievance against Gonzales, and he played the recording of the Brito-Hatcher conversation for the agents. Then, as described above, Juarez filed his grievance against the Trustee Defendants instead of against Gonzales.

On January 20, 2009, Juarez, the Trustees, and BISD counsel were all present for the Level III hearing on Whittemore's grievances. At this hearing, Juarez's counsel objected on several grounds to the proceeding. He commented that there had been "circumvention of . . . due process in this case through the use of bribery, coercion, and conspiracy . . ." and that there was a report that had wrongfully not been released to Juarez. After outlining several concerns, Juarez's counsel stated that "we feel that any action will be retaliation.⁷ I think the Board is aware that Mr. Juarez has reported this activity to law enforcement agencies."

Following these events, Juarez's original contract as CFO, the position from which he had resigned, was not renewed, and Juarez was also not offered a contract renewal for the reassigned

⁷ Ironically, the current allegation is that the Board's inaction in not renewing Juarez's contract constitutes retaliation.

position of Grants Administrator, which he had occupied following his conversation with Gonzales.

II. Legal Standards

A. Summary Judgment

As noted in this Court's prior opinion that disposed of most of the Plaintiff's claims, the Defendants originally filed motions for dismissal under both Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (*See* Doc. Nos. 29, 31.) The Magistrate Judge then converted the motions into a Rule 56 summary judgment motion. (Doc. No. 52 at 7); FED. R. CIV. P. 12(d). In doing so, the Magistrate Judge gave all parties additional time to revise pleadings and to submit summary judgment proof. Since this Court's prior opinion, the parties have also had additional time to submit further summary judgment proof on the deferred claims.

Summary judgment is appropriate if the "pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2). The nonmoving party must go beyond the pleadings and provide specific facts showing that there is a genuine issue for trial. *Id.* at 56(e)(2); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case. *Celotex*, 477 U.S. at 322–23.

The court should not, in the absence of any proof, assume that the nonmoving party could

or would prove the necessary facts. *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). The nonmoving party's burden "is not satisfied simply by creating some metaphysical doubt as to the material facts or by providing only conclusory allegations, unsubstantiated assertions or merely a scintilla of evidence." *Id.* (citations omitted). A court will resolve factual controversies in favor of the nonmoving party "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Id.*

B. Qualified Immunity

Qualified immunity is a defense that "shield[s] a government official from civil liability for damages based upon the performance of discretionary functions if the official's acts were objectively reasonable in light of then clearly established law." *Thompson v. Upshur County*, 245 F.3d 447, 456 (5th Cir. 2001). At the summary judgment stage, once a government official pleads qualified immunity, the burden shifts to the plaintiff. *Gates v. Texas Dept. of Protective and Regulatory Svcs*, 537 F.3d 404, 419 (5th Cir. 2008). Then, "[t]he plaintiff must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law and that genuine issues of material fact exist regarding the reasonableness of the official's conduct." *Id.* (citing *Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir. 2005)).

The first step of the analysis is for the court to determine "whether, taken in the light most favorable to the plaintiffs, the facts alleged show that the officer's conduct violated a constitutional right." *Gates*, 537 F.3d at 418 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). If plaintiffs fail to demonstrate that a constitutional right "would have been violated were the allegations established, the inquiry ends." *Id.* If they succeed, the court will then "determine whether the right was clearly

established at the time of the incident at issue.” *Id.* at 419. To be clearly established, the contours of the right must be “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Id.* (citing *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000)).

Then, if the right is clearly established, the court decides “whether the defendant’s conduct was objectively reasonable.” *Id.* In the Fifth Circuit, “an official’s conduct [is] objectively reasonable unless all reasonable officials in the defendant’s circumstances would have then known that the conduct violated the Constitution.” *Id.*

III. Discussion

A. Defendants’ Evidentiary Objections

Defendants object to several of the sealed evidentiary items offered by the Plaintiff. First, they object to Superintendent Gonzales’s statement regarding the contents of an unproduced email as hearsay and failure to produce original documents. Second, they object to Gonzales’s affidavit reporting statements made by Tony Resendez, an attorney for BISD as being privileged. These first two objections are granted.

Third, Defendants object to Juarez’s description of a meeting that occurred between him and Otis Powers on January 5, 2009, as hearsay, and to Juarez’s lack of personal knowledge that Defendant Colunga was on the phone with Powers. The first part of this objection is overruled because evidence indicates that Powers’s statements, to the extent that they are not double hearsay, fall within the co-conspirator rule and by definition are not hearsay. *See* FED. R. EVID. 801(D)(2)(E). A co-conspirator need not actually be a party for the exception to apply. *Cf. United States v.*

Goodman, 605 F.2d 870, 879 (5th Cir. 1979) (holding that co-conspirator rule allowed testimony from unindicted co-conspirator). Moreover, the Court finds that sufficient independent corroborating evidence exists to preliminarily establish that Powers was involved in the alleged conspiracy with the Defendants to oust Superintendent Gonzales and to attempt to recruit Juarez's assistance in that effort.⁸ Therefore, Powers's statement that he was on the phone with Defendant Colunga is admissible as a co-conspirator statement because it is not hearsay. FED. R. EVID. 801(D)(2)(E). To the extent that Powers makes any statements regarding what Defendant Colunga said, the Court takes notice that such statements are hearsay (arguably double hearsay but for the co-conspirator aspect) and the Court grants the Defendants' objection to those statements.

Fourth, Defendants object to Juarez's affidavit attesting to what his attorney said during executive session of a meeting as conclusory and not the "best evidence." No hearsay objection was lodged with respect to this statement. The purpose of the best evidence rule is to "prevent inaccuracy and fraud when attempting to prove the contents of a writing." *United States v. Yamin*, 868 F.2d 130, 134 (5th Cir. 1989) (citing FED. R. EVID. 1001). Therefore, "evidence concerning the contents of oral statements raises no best-evidence problem, even where that statement was taped or transcribed." 31 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 7163 (2000). Here, Juarez's affidavit is offered to prove what was said at the grievance hearing, not the contents of a writing, a recording or a transcript of the hearing. The Court thus overrules the best evidence objection because Juarez had personal knowledge of what transpired at the meeting because of his attendance, and is qualified to make statements regarding

⁸ (See, e.g., Doc. 25, Ex. 5a (Juarez's statement regarding conversation with Brito-Hatcher); Doc. No. 51, Att. A (Brito-Hatcher conversation)).

what happened. The Court will, however, also consider the tape recording of the meeting submitted by Defendants.

B. Fourteenth Amendment Due Process

An essential element of Plaintiff's § 1983 due process claim is that he must have had "a legitimate claim of entitlement" to a property interest that was injured by the Defendants' conduct. *Nunez v. Simms*, 341 F.3d 385, 387 (5th Cir. 2003) (internal quotation omitted); *see also Conner v. Lavaca Hospital District*, 267 F.3d 426, 436–37 (5th Cir. 2001) (citing *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985)). A property interest in a particular benefit may arise if "there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). The existence of a property interest is determined by looking to applicable state law. *Nunez*, 341 F.3d at 387–88.

This Court originally deferred ruling on Juarez's Fourteenth Amendment Due Process claim in order to allow him to depose Gonzales and submit evidence concerning whether or not Juarez had a property interest in continued employment with the District. Juarez's objections to the Magistrate Judge's Report and Recommendation had implied that deposing Gonzales could resolve the issue of whether or not Juarez had a property right. (Doc. No. 55 at 3–4.) Based upon the evidence now before the Court, the Court finds that Juarez did not have a property interest in continued employment.

Considering the evidence in the light most favorable to Juarez, the Court could at best infer that Superintendent Gonzales promised to recommend to the Board that Juarez's employment contract with BISD (in the new position as Grants Administrator) be renewed *if* Juarez performed

satisfactorily in his new position as Grants Administrator.⁹ This fact, however, does not demonstrate a “mutually explicit understanding” that Juarez’s contract would actually be renewed. The Fifth Circuit has generally required much more before finding that a property interest exists under the theory of a mutually explicit understanding. *Compare Stapp v. Avoyelles Parish School Board*, 545 F.2d 527 (5th Cir. 1977) (finding a property interest existed where letter from superintendent told plaintiff that if plaintiff expressed willingness to continue on as principal of school, he would be considered under contract by the parish school system, plaintiff had communicated such willingness, and the school board had relied upon plaintiff’s communication) *with Conner*, 267 F.3d 426 (finding no property interest where hospital board of directors adopted a motion to enter into contract with plaintiffs, then rescinded such motion two days after it was adopted, no formal contract agreement was ever reached, and the hospital had not relied upon the motion prior to its rescission).

Since Juarez has not submitted any evidence to indicate that Gonzales’s promise was anything more than that of a conditional promise to make a recommendation, which may or may not have been accepted by the Board, the Court finds that Juarez did not have a legitimate claim of entitlement to continued employment, and he does not have a cognizable property interest for the

⁹ Gonzales states:

On November 19, 2008, I had a lengthy conversation with Mr. Juarez. I told Antonio Juarez that the Board of Trustees was upset with him, and that I was to terminate him or I myself would suffer consequences. I told Mr. Juarez that I did not want to terminate him. I decided to offer Mr. Juarez a reassignment if he would resign as CFO. He agreed to resign and be reassigned. When I had these conversations with Antonio Juarez about resigning and his reassignment, I understood, and believed I was conveying to him, that if he performed satisfactory in his newly assigned position, I would not have a problem to recommend renewal of his contract in the new position beyond the existing term of the contract although, I never specifically told him that using those words.

(Gonzales Affidavit at ¶ 8.)

purposes of his 14th Amendment Due Process claim. Therefore, the Court hereby GRANTS BISD and the Trustee Defendants' motions for dismissal of Juarez's 14th Amendment Due Process claim.¹⁰

C. First Amendment Retaliation

Juarez has alleged that his contract non-renewal was the result of retaliation by the Trustee Defendants due to his report to law enforcement agents of their "conspiratorial actions" and illegal acts. (Doc. No. 25 at 15.) The elements of a First Amendment retaliation claim are: "(1) that the plaintiff suffered an adverse employment decision, (2) the plaintiff's speech involved a matter of public concern, (3) the plaintiff's interest in speaking outweighed the governmental defendant's interest in promoting efficiency, and (4) the protected speech motivated the defendant's conduct." *Kinney v. Weaver*, 367 F.3d 337, 356 (5th Cir. 2004).

In its first opinion on the summary judgment motions, this Court determined that there was sufficient evidence to satisfy the summary judgment standard with regard to the first element of the First Amendment retaliation claim—that the plaintiff's contract non-renewal was an adverse employment decision. In addition, this Court found that there was a genuine issue of material fact as to whether or not the Defendant Trustees caused Plaintiff's contract nonrenewal in retaliation for Plaintiff's report to law enforcement. (Doc. No. 66 at 16–19.) It deferred, however, a full ruling on the retaliation claim (as well as the Trustee Defendants' qualified immunity defense) because it could not be certain based on the record that there were facts sufficient to raise an issue of material fact as

¹⁰ Since the Court decides the Fourteenth Amendment claim on substantive grounds, it need not address the Trustee Defendants' qualified immunity defense with respect to Plaintiff's 14th Amendment claim.

to Juarez's having actually made the alleged protected speech,¹¹ which is an essential element of the claim.

The evidence submitted by the parties certainly raises factual issues to the effect that Juarez in fact made a report to law enforcement on issues of public concern, that the Trustees were informed by Juarez's attorney that such report was made, and that after such report was made, Juarez's contract was not renewed. BISD and the Trustees have argued that the evidence on the record regarding their knowledge is not sufficient for them to have known that Juarez engaged in protected speech. (Doc. No. 73 at 13.) This Court cannot say, however, that the evidence does not raise a factual dispute. The record shows that Juarez's attorney, in front of all of the Trustee Defendants and BISD attorneys, argued that he was concerned with the Whittemore grievance proceeding for several reasons, including "the use of bribery, coercion, and conspiracy." Juarez's attorney went on to state concerns regarding the legality of the proceedings, and then explicitly stated "[W]e feel that any action will be retaliation. I think the Board is aware that Mr. Juarez has reported this activity to law enforcement agencies." While not crystal clear, the Court finds that these statements are sufficient to present a factual issue that Juarez had engaged in protected speech and that the Defendants were aware of that fact.

Moreover, given the context in which the statement was made, the Court finds that there is a genuine issue of material fact as to the reason why the Board and Trustees did not renew Juarez's contract, and that the nonrenewal may have been in retaliation against Juarez's protected speech.

¹¹ (See Doc. No. 66 at 14–15.) Neither the Defendants nor this Court disagreed with the Magistrate Judge's determination that, if in fact Juarez had made a statement to the FBI concerning the Trustees' "conspiratorial actions," including treatment of Superintendent Gonzales and manipulation of the insurance coverage bidding process, such a statement would relate to a matter of public concern.

The evidence before the Court indicates that three of the Trustee Defendants (Colunga, Aguilar, and Cortez) were particularly angered by Juarez's recommendation of a particular insurance provider, to the point of accusing Juarez of lying, and that such recommendation was the subject of the first Whittemore grievance. Gonzales's affidavit supports the notion that the entire Board was upset with Juarez regarding that recommendation, and that motivated them to ask Gonzales to fire Juarez. The conversation with Powers suggests, however, that certain Trustees (Colunga, Aguilar, and Zayas) were willing to forgive Juarez if he would file a grievance against Gonzales and place the blame for the insurance recommendation on Gonzales. Both the Brito-Hatcher and Powers conversations support Juarez's claim that there was a conspiracy amongst the Board to oust Gonzales by having certain employees file grievances. The Powers conversation, in particular, suggests that the Board would even give Juarez his old job back in exchange for his filing a grievance against Gonzales.

The day after the Powers conversation took place, Juarez—instead of cooperating with the conspiracy—filed a grievance against the Board, “outing” the alleged conspiracy against Gonzales and complaining about manipulation of the insurance bidding procedures. Four days after that, Juarez's attorney made the disclosure to the full Board of Trustees that “Mr. Juarez has reported this activity to law enforcement agencies.” Given these facts, and making all inferences in favor of the Plaintiff, as this Court must, the Court concludes that there is sufficient evidence to create a fact issue regarding why Juarez's contract was not renewed, and that it is plausible that the Board purposefully did not renew the contract in retaliation against his reporting of their allegedly unlawful conduct to the FBI. Therefore, the Court DENIES the Trustee Defendants' motion to dismiss (converted into a motion for summary judgment) Plaintiff's First Amendment retaliation claim, relating to his contract nonrenewal.

Finally, with respect to the liability of BISD, the Court finds that sufficient evidence exists such that it cannot grant BISD's motion to dismiss (converted to a motion for summary judgment). Evidence submitted to the Court raises an issue that the Board had a policy of coercing employees to take actions to "adversely affect" other employees' employment, and of retaliating against those employees who did not cooperate. An example of evidence of this policy is Gonzales's statement that he was told to either fire Juarez or "suffer consequences" himself. Here, Juarez alleges that his First Amendment rights have been infringed upon because he elected not to cooperate in the Board's policy of coercing employees, which in his case was to "adversely affect" Gonzales's employment. While this Court cannot weigh the accuracy of this claim, Juarez has produced enough evidence to raise a fact issue. Thus, the Court hereby DENIES BISD's motion to dismiss Juarez's First Amendment retaliation claim.

D. Qualified Immunity

With respect to the qualified immunity defense, the Court finds that, at least at this stage, the Plaintiff has met his burden of overcoming the defense. First, the Court finds that the Trustees' decision to not renew Juarez's contract on the grounds that he reported the Trustees' behavior regarding Gonzales and the insurance bid manipulation to law enforcement would violate a clearly established constitutional right. As the Court determined above, such a report did relate to matters of public concern, and is therefore protected activity under the First Amendment.

The Trustees have maintained that there is no evidence that they made an active decision regarding Juarez's employment, but the Court finds that there is evidence to support the claim that the Trustees were aware of Juarez's desire to get his job as CFO back (expressed in his grievance as well as his conversation with co-conspirator Otis Powers), and that they still allowed his contract

to lapse without considering renewal. Thus, assuming Juarez's circumstantial evidence—supporting the claim that the Trustees intentionally did not offer him a new or renewed contract because of his protected speech—is true, as this Court must, the Court would find that they violated a clearly established constitutional right.

Second, the Court finds that, presuming Plaintiff's circumstantial evidence and theory to be true, the Trustees' actions were objectively unreasonable. There is an issue of fact regarding whether or not the Trustees did retaliate against Juarez because of his protected speech. While the Trustees have argued that the evidence does not conclusively prove they knew Juarez wanted his job back or that they were aware his speech was protected, Juarez has offered evidence to suggest that they (by way of Otis Powers) were aware of his desire to keep working for the District and that they knew of his protected speech based on his counsel's comment at the Whittemore grievance hearing. It would be objectively unreasonable for an official in the Trustees' position (based on the Plaintiff's version of the facts)—knowing that the Plaintiff (a) sought to keep his job and (b) had previously reported the Trustees to law enforcement for conspiring against the Superintendent, violating several state procedural laws, and manipulating insurance bidding procedures—to then not renew the contract *because* of the report to law enforcement. That the Plaintiff has not proven conclusively the Trustees' motivations does not mean that the Trustees should be granted qualified immunity. Rather, it means that a fact issue exists regarding the precise reason why Juarez's contract was not renewed, and as such, this Court cannot grant the Trustees qualified immunity at this stage.¹²

¹² The Court notes that it would be unfair to require the Plaintiff to provide direct proof that the Trustees' motives were intentionally malicious, and in any case, such direct proof is not a requirement in the Fifth Circuit. *See Thompson v. Vickers*, 26 F.3d 603, 608–09 (5th Cir. 1994).

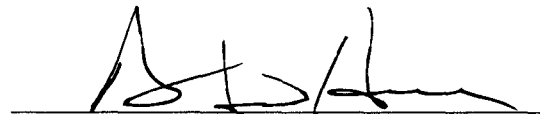
IV. Summary and Order

For the foregoing reasons, it is hereby ordered that:

1. Defendants BISSD, Aguilar, Colunga, Cortez, and Zayas's Motions to Dismiss (converted to motions for summary judgment) Juarez's § 1983 Fourteenth Amendment Due Process claims against BISSD and the individual Defendants, relating to Juarez's contract nonrenewal are GRANTED;
2. Defendants BISSD, Aguilar, Colunga, Cortez, and Zayas's Motions to Dismiss (converted to motions for summary judgment) Juarez's § 1983 First Amendment retaliation claim against the individual Defendants in their personal capacities and BISSD, relating to the nonrenewal of Juarez's employment contract are DENIED; and
3. Defendants Aguilar, Cortez, Colunga, and Zayas's qualified immunity defense to Juarez's First Amendment retaliation claim is DENIED at this time.

Therefore, trial will proceed on Juarez's § 1983 First Amendment retaliation claim against the Trustee Defendants and BISSD.

SIGNED this 23rd day of June, 2010.



Andrew S. Hanen
United States District Judge