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United States Court of Appeals
Tenth Circuit

September 2, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JASMIN DAVIS; BARRY WILSON,

Plaintiffs - Appellants,

v.

STATE OF UTAH; UNIVERSITY OF UTAH; STEPHEN HESS; STEPHEN CORBATO; LISA KUHN; MICHAEL EKSTROM; CAPRICE POST; JIM LIVINGSTON; JOHN NIXON; JEFF HERRING, sued individually and in their official capacities,

Defendants - Appellees.

No. 20-4042
(D.C. No. 2:18-CV-00926-TS)
(D. Utah)

ORDER AND JUDGMENT*

Before **HARTZ**, **MORITZ**, and **EID**, Circuit Judges.

Jasmin Davis and Barry Wilson (collectively, Plaintiffs) appeal two district court orders dismissing their employment-related claims against the State of Utah, the University of Utah (the University), and several University officials. They raise three arguments on appeal, contending that the district court erred in (1) dismissing their First Amendment retaliation claim based on qualified immunity, (2) dismissing

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. But it may be cited for its persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A).

a state-law claim raised by Davis based on the applicable statute of limitations, and (3) denying Wilson's motion to amend as futile because the state-law claim he sought to add to the complaint would likewise be barred by the statute of limitations. We agree with the district court that Plaintiffs' First Amendment allegations fail to satisfy their qualified-immunity burden, and we further agree that Plaintiffs' state-law claims are untimely. We therefore affirm the district court's rulings.

Background[1]

According to the facts alleged in Plaintiffs' third amended complaint, the University is a public entity funded and controlled by the State of Utah. Plaintiffs both worked in the University Information Technology (UIT) department until their employment was terminated, allegedly in retaliation for their reports of wasteful and improper practices within UIT.

Davis began working as UIT's vendor manager in August 2013. "In that position, she was responsible for ensuring all approximately 40,000 staff, students[,] and faculty remained in compliance [with] the software license agreements that she managed for UIT." App. vol. 2, 291. Her job duties "also included overseeing the [Office of Software Licensing] budget, staff, marketing, website, day[-]to[-]day operations, technical support, out[]reach, escalations, vendor negotiations, executive support, reporting[,] and agreement renewals." *Id.* In March 2014, the University

[1] "Because this appeal is from a motion to dismiss, we accept as true all facts as sufficiently alleged in the complaint." *Estate of Lockett ex rel. Lockett v. Fallin*, 841 F.3d 1098, 1104 n.2 (10th Cir. 2016).

promoted Davis to the position of "Associate Director of UIT for Strategic Vendor Partnerships" and "expanded [her role] to include improving cellular coverage for the entire University," which required "collaborat[ing] across all departments of the University." *Id.* at 291–92. The Chief Information Officer (CIO) of UIT also assigned her several special projects, which all "potentially involved some level of waste or misuse of public resources." *Id.* at 292. For instance, the CIO asked Davis to report on the "sale/lease of space" at a location known as "the Downtown Data Center" and to address complaints relating to poor cellular coverage in buildings where distributed antenna systems had been installed by a vendor known as Crown Castle. *Id.*

Wilson initially worked at the University as a contractor, "support[ing] some of Crown Castle['s] systems and regularly interact[ing] with UIT" employees. *Id.* at 294. After some months of working with Wilson as a contractor, Davis recommended that UIT hire him as an employee to assist her with the project aimed at improving cellular coverage. She did so at least in part based on her "concern that vendors such as Crown Castle had been taking advantage of the University[] because UIT lacked employees with the technical ability . . . to ensure [vendors] provided equipment and services in compliance with university purchasing and financial [and] business policies." *Id.* UIT hired Wilson as a probationary employee in July 2014. Like Davis, Wilson was "tasked with addressing the problems" relating to poor coverage in buildings where Crown Castle had installed distributed antenna systems.

Id. at 293. He was also assigned to be "the UIT Fiber Manager" and given the title of "Sr. Product Manager UIT." *Id.* at 295.

While working together for UIT, Plaintiffs became concerned about UIT's handling of certain matters "pertaining to the waste or misuse of public resources," and they allegedly reported these matters to UIT leadership and other individuals and entities.[2] *Id.* Plaintiffs allege that their supervisors were "obviously embarrassed and displeased with [Plaintiffs] for making these reports outside of UIT and their chain of command." *Id.* at 298.

By late 2015, both Plaintiffs had lost their jobs at UIT. Wilson's probationary employment was terminated on December 15, 2014, and a UIT manager informed Davis that UIT would not hire Wilson as a contractor again and did not want him to work for any other University departments. Nevertheless, in July 2015, the University's auxiliary-services group hired Wilson as an independent contractor to oversee the installation of cellphone towers. But on August 25, 2015, a supervisor informed Wilson "that UIT management had discovered he was working for the University again, w[as] displeased and, as a result, [he] could no longer work on these projects." *Id.* at 307. As for Davis, UIT terminated her employment on September 22, 2015, through a one-person reduction in force.

[2] The specific topics and audiences of Plaintiffs' speech are discussed below in our analysis of Plaintiffs' First Amendment claim.

On June 8, 2016, Plaintiffs filed suit in Utah state court, alleging violations of Utah state law against the University, the State of Utah, and various individuals employed by the University (collectively, Defendants). Thereafter, they filed a second amended complaint that included a First Amendment free-speech retaliation claim brought by both Plaintiffs against all Defendants and a claim by Davis that the University and the State of Utah violated her rights under the Utah Protection of Public Employees Act (UPPEA), Utah Code Ann. §§ 67-21-1 to -10.

Defendants removed the action to federal district court and filed a motion to dismiss. Plaintiffs opposed the motion to dismiss, and Wilson sought to add his own UPPEA claim to the complaint.

The district court dismissed all claims in the second amended complaint except Plaintiffs' First Amendment claim against the individual defendants. As pertinent here, the district court concluded that Davis's UPPEA claim was barred by the applicable 180-day statute of limitations, rejecting her arguments that the claim should be considered timely based on either a statutory exception or equitable estoppel. And because the statute of limitations would also apply to Wilson's proposed UPPEA claim, the court denied as futile his request to add such a claim to the complaint.

The district court permitted Plaintiffs to file a third amended complaint to allege their First Amendment claim with more particularity. But it ultimately dismissed this complaint as well, holding that Plaintiffs' First Amendment claim against the individual defendants failed to satisfy either prong of the qualified-

immunity test. Plaintiffs appeal the district court's orders dismissing their second and third amended complaints.[3]

Analysis

Plaintiffs contest the district court's conclusion that their First Amendment retaliation claim against the individual defendants is barred by qualified immunity. They also challenge the district court's decision to dismiss Davis's UPPEA claim based on the statute of limitations. And they argue that the district court erred in denying Wilson's motion to amend the complaint to add his own UPPEA claim. We address each of these arguments in turn.

I. First Amendment Claim

Plaintiffs argue that the district court erred in dismissing their First Amendment claim as barred by qualified immunity. We review de novo the district court's dismissal of a claim under Federal Rule of Civil Procedure 12(b)(6) based on qualified immunity. *See Lockett*, 841 F.3d at 1106. In so doing, "[w]e accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party." *Moya v. Schollenbarger*, 465 F.3d 444, 455 (10th Cir. 2006) (alteration in original) (quoting *Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1304 (10th Cir. 1998)). Like the district court, we "may consider not only the complaint itself, but also attached exhibits and

[3] Plaintiffs challenge the dismissal of their second amended complaint only as it relates to the UPPEA. They do not appeal the dismissal of other claims alleged in that complaint.

documents incorporated into the complaint by reference." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009) (citations omitted). And "factual allegations that contradict . . . a properly considered document are not well-pleaded facts that the court must accept as true." *Peterson v. Martinez*, 707 F.3d 1197, 1206 (10th Cir. 2013) (omission in original) (quoting *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997)).

"Once an individual defendant asserts qualified immunity, the plaintiff carries a two-part burden to show: (1) that the defendant's actions violated a federal constitutional or statutory right, and, if so, (2) that the right was clearly established at the time of the defendant's unlawful conduct." *Knopf v. Williams*, 884 F.3d 939, 944 (10th Cir. 2018) (quoting *Gutierrez v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016)). "This is a heavy burden. If the plaintiff fails to satisfy either part of the inquiry, the court must grant qualified immunity." *Id.* (quoting *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017)).

To determine if a government employer violated the First Amendment by terminating an employee based on protected speech, "we apply the *Garcetti/Pickering* test." *Id.* at 945; *see also Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). This test requires a court to consider the following five elements:

(1) whether the speech was made pursuant to an employee's official duties;

(2) whether the speech was on a matter of public concern;

> (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests;
>
> (4) whether the protected speech was a motivating factor in the adverse employment action; and
>
> (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Knopf, 884 F.3d at 945 (quoting *Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014)). "The first three elements are issues of law for the court to decide, while the last two are factual issues typically decided by the jury." *Id.* (quoting *Trant*, 754 F.3d at 1165). And "[t]o prevail, a plaintiff must establish all five elements." *Id.* Thus, if the speech fails to satisfy even one of the elements—for instance, if it was made pursuant to the employee's official duties or if it was not on a matter of public concern—it will be unprotected regardless of whether it meets the other elements. *See id.*

The parties' arguments on appeal invoke the first, second, and fourth elements of this test.[4] Before applying these elements to the specific speech at issue in this case, we first provide a general overview of our controlling case law with respect to the relevant elements.

[4] Plaintiffs argue that we can't affirm the district court's decision based on the second element of this test because the district court did not rely on this element and Defendants did not file a cross-appeal. But "we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011). And a cross-appeal is neither necessary nor appropriate when, as here, the appellees were not aggrieved by the district court's judgment. *See Leprino Foods Co. v. Factory Mut. Ins. Co.*, 453 F.3d 1281, 1290 (10th Cir. 2006).

A. General Overview

In applying the first element of the *Garcetti*/*Pickering* test, "[w]e have 'taken a broad view of the meaning of speech that is pursuant to an employee's official duties.'" *Id.* (quoting *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 713 (10th Cir. 2010)). "[I]f an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1203 (10th Cir. 2007). This assessment considers "all the facts and circumstances surrounding the speech and the employment relationship." *Id.* at 1204. The ultimate question is whether the employee was performing a task he or she was paid to perform when he or she spoke. *Knopf*, 884 F.3d at 946. "If so, the 'speech was . . . commissioned by [the] employer,' and it enjoys no First Amendment protection." *Id.* (citation omitted) (quoting *Thomas v. City of Blanchard*, 548 F.3d 1317, 1323 (10th Cir. 2008)).

In applying *Garcetti/Pickering*'s first factor, both parties rely to varying degrees on our decisions in three cases: *Brammer-Hoelter*, *Thomas*, and *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007). In *Brammer-Hoelter*, teachers at the Twin Peaks Charter Academy allegedly experienced retaliation after they discussed their concerns about the Academy with each other, with parents and other members of the public, and with the Academy's board of directors. 492 F.3d at 1198–99. In reviewing the teachers' First Amendment

retaliation claim, we held that "[n]early all of the matters [the teachers] claim they discussed were [statements] made pursuant to their duties as teachers." *Id.* at 1204. As one example, we noted that the teachers' alleged discussions of "the Academy's expectations regarding student behavior" were part of the teachers' duties because "[o]stensibly, as teachers, [they] were expected to regulate the behavior of their students." *Id.* The same was true of the teachers' complaints "that the Academy should spend more money on instructional aids, furniture, and classroom computers," which "were made pursuant to [the teachers'] inherent duty as teachers to ensure they had adequate materials to educate their students." *Id.* "Consequently," we concluded, "statements regarding all of these and similar matters were made pursuant to [the teachers'] official duties and could be freely regulated by the Academy." *Id.* The only speech that satisfied the first step of the *Garcetti/Pickering* analysis was speech that was (1) directed to "ordinary citizens and parents who were not employed by the Academy" *and* (2) related to matters over which the teachers "had no supervisory responsibility and no duty to report," such as staffing levels and the resignations of other teachers. *Id.* at 1205.

In *Thomas*, the plaintiff was fired from his job as a building code inspector after he reported to his supervisors and the Oklahoma State Bureau of Investigation (OSBI) that he had discovered a signed and completed certificate of occupancy in the city clerk's office for a home the mayor had constructed that had not yet undergone a final inspection. 548 F.3d at 1319. We held that the plaintiff's report of the false certificate to his supervisors was reasonably within his official duties but that he

"went well beyond his official responsibilities" when he "report[ed] suspected wrongdoing to the OSBI." *Id.* at 1324–25. We stressed that he "was not hired to detect fraud in connection with the issuance of certificates of occupancy; he was hired to inspect houses." *Id.* at 1324. And because his complaint to his supervisors had resulted in the destruction of the fraudulent certificate, he did not remain in danger of legal liability and therefore had no underlying legal obligation to report the fraud to the OSBI. *Id.* 1325–26.

In *Casey*, the plaintiff was the superintendent of a school district and served as the Chief Executive Officer (CEO) of the district's Head Start program. 473 F.3d at 1325. She discovered that many of the families enrolled in the Head Start program did not actually qualify, and she reported this concern first to the school board and then to federal authorities. *Id.* at 1326. Separately, she warned the school board that it was violating New Mexico's Open Meetings Act; when the board ignored her warnings, she reported their violation to the New Mexico Attorney General's Office. *Id.* After being demoted and eventually terminated, she filed a lawsuit alleging First Amendment retaliation. *Id.* at 1327.

We held that the plaintiff's statements about the Head Start program—both to the school board and to federal officials—fell within the scope of her official duties and were thus unprotected. *Id.* at 1329–31. Specifically, her job duties included informing the school board of "the lawful and proper way to conduct school business." *Id.* at 1329. And as CEO of the Head Start program, she had "a duty to report the [d]istrict's noncompliance to federal authorities because she 'would be

held legally responsible for having knowledge of something that was wrong and not reporting that.'" *Id.* at 1330 (quoting App. 138). As for her statements about the school board's open-meetings violation, her speech to the board was unprotected because she "had a duty to provide candid advice and counsel to the [b]oard." *Id.* at 1332. But her report to the Attorney General's Office was outside the scope of her official duties because she was responsible only for advising the board, not for ensuring that the board followed her advice. *Id.* "[V]ery much unlike the administration of the Head Start program that the [b]oard committed to her care and pursuant to which she had independent responsibilities to the federal government," there was no evidence "suggesting that the [b]oard or any other legal authority ever assigned [her] responsibility for the [b]oard's meeting practices." *Id.*

Thus, although we have "refrained from establishing per se rules for determining whether speech is made pursuant to an employee's official duties," these cases indicate that speech generally falls outside an employee's official job duties and is thus protected under this first element of *Garcetti*/*Pickering* if (1) the matter on which the employee speaks is not within the employee's assigned responsibilities and (2) the employee has no duty to report to the person or entity with whom the employee discusses the issue. *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 747 (10th Cir. 2010); *see also Brammer-Hoelter*, 492 F.3d at 1203–05; *Thomas*, 548 F.3d at 1324–26; *Casey*, 473 F.3d at 1329–32. But if the employee *either* speaks on a matter within the employee's assigned responsibilities *or* speaks in accordance

with a duty to report, the employee's speech may be unprotected under the first element of the *Garcetti*/*Pickering* test.

As for the second element of the *Garcetti*/*Pickering* test, public concern, "the fundamental inquiry is whether the plaintiff speaks as an employee or as a citizen." *David v. City & Cnty. of Denver*, 101 F.3d 1344, 1355 (10th Cir. 1996). So, for example, speech related to an agency's performance of its governmental responsibilities "ordinarily will be regarded as speech on a matter of public concern." *Id.* But "[s]peech relating to internal personnel disputes and working conditions ordinarily will not be viewed as addressing matters of public concern." *Id.* Likewise, complaints that an employee fears retaliation arising from an internal personnel dispute is not a matter of public concern. *See id.* at 1355–56. And even if speech implicates matters of public concern, we must consider the context of the speech, including the speaker's motivations, before concluding that it addresses a matter of public concern. *See Singh v. Cordle*, 936 F.3d 1022, 1035 (10th Cir. 2019). "It is not enough . . . that the public interest was part of the employee's motivation"; rather, "[i]n several cases we have described the relevant legal question as whether the employee's *primary* purpose was to raise a matter of public concern." *Id.*

On the fourth element of the *Garcetti*/*Pickering* test, "plaintiffs bear the burden of establishing both a detrimental employment decision (adverse employment action) and 'causation—that is, that the constitutionally protected speech was a substantial motivating factor in the employer's decision to adversely alter the employee's conditions of employment.'" *Couch v. Bd. of Trs. of Mem'l Hosp. of*

Carbon Cnty., 587 F.3d 1223, 1236 (10th Cir. 2009) (quoting *Maestas v. Segura*, 416 F.3d 1182, 1188 (10th Cir. 2005)). And an employee can't establish causation if the employer made the adverse decision before the employee's speech occurred: "As the Supreme Court has said, employers need not refrain from previously planned actions upon learning that an individual has engaged in protected activity[,] and 'their proceeding along lines previously contemplated, though not yet definitively determined, is no evidence whatever of causality.'" *Nixon v. City & Cnty. of Denver*, 784 F.3d 1364, 1370 (10th Cir. 2015) (quoting *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272 (2001) (per curiam)).

B. Plaintiffs' Speech

With these general principles in mind, we turn to the specific allegations of Plaintiffs' third amended complaint. They identify seven matters that they allegedly reported to various individuals and entities. As explained below, however, we conclude that almost all of this speech was made pursuant to their official duties. And to the extent that any of Plaintiffs' speech was not made pursuant to their official duties, they have failed to satisfy either the public-concern or causation elements of the *Garcetti*/*Pickering* test.

1. Purchase Orders

First, Plaintiffs allege that they discussed irregularities in UIT's handling of purchase orders, particularly UIT's alteration of a purchase order signed by Wilson for a UIT vendor that increased the authorized payment. Plaintiffs allege that they reported this concern to UIT leadership and to the University's Chief Financial

Officer, John Nixon; they do not identify anyone else with whom they discussed this specific concern.

Based on the allegations in the third amended complaint, we conclude that Plaintiffs spoke about UIT's handling of purchase orders pursuant to their official duties. Their allegations show—as Plaintiffs concede in their briefing—that this topic was "related to Wilson's work." Aplt. Br. 14. And UIT's irregular handling of vendors' purchase orders certainly appears related to Davis's broad vendor-management responsibilities. Moreover, even if we were to assume that UIT's handling of purchase orders was outside the scope of Plaintiffs' official job responsibilities, their speech nevertheless fell within their official duties based on their duty to report improper conduct to appropriate University officials. *See Thomas*, 548 F.3d at 1324–26. Indeed, Plaintiffs specifically allege that they reported this issue to their supervisors based on "their responsibility to bring [such] problems with proposed solutions to their supervisors" and then "met with . . . Nixon under a University policy" that "required the escalation of suspected waste or misuse of public resources." App. vol. 2, 296, 316. And they do not allege that they discussed this particular concern with anyone to whom they had no duty to report. Therefore, with respect to Plaintiffs' claim concerning their discussions with UIT officials and Nixon of irregularities in UIT's handling of purchase orders, Plaintiffs have failed to show that they engaged in protected speech under the first prong of the *Garcetti*/*Pickering* test.

2. Utility Billing

Second, Plaintiffs allegedly discovered that Crown Castle, T-Mobile, and Sprint were violating contractual obligations to pay the University for the electricity used to service the companies' transmission equipment. Plaintiffs informed UIT leadership that UIT should be billing these companies for their utility usage and reported the lack of utility billing "to . . . Nixon and then to other officials in other University departments and then even beyond the University." App. vol. 2, 321. The complaint contains no further allegations about the individuals or entities with whom Plaintiffs discussed this concern beyond the University.

Again, this speech again was made pursuant to Plaintiffs' official duties. The allegations in the third amended complaint reflect that this speech concerned Davis's vendor-management responsibilities, and indeed Plaintiffs concede this fact in their opening brief. And the complaint indicates that Wilson was hired in part to ensure that Crown Castle and other vendors "provided equipment and services in compliance with university purchasing and financial [and] business policies." *Id.* at 294. Indeed, Plaintiffs specifically allege that they were both "simply performing the functions for which they had been hired" when they exposed and attempted to correct this billing issue. *Id.* at 322. Like the *Brammer-Hoelter* teachers' speech about "the Academy's expectations regarding student behavior" and its spending "on instructional aids, furniture, and classroom computers," this speech was unprotected because it involved matters within the scope of Plaintiffs' official duties. 492 F.3d at 1204–05. Plaintiffs cannot escape this conclusion by alleging that they "cross[ed] over a line from

reporting as employees within their chain of command to reporting as citizens outside of UIT and the University." App. vol. 2, 322. Whether an employee spoke within his official duties rather than as a citizen is an "issue[] of law for the court to decide," *Knopf*, 884 F.3d at 945 (quoting *Trant*, 754 F.3d at 1165), and Plaintiffs' conclusory assertion that they were speaking as citizens when they discussed this concern outside of the University is a "legal conclusion couched as a factual allegation," which we are not required to consider, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The factual allegations in Plaintiffs' complaint make clear that their speech about utility-billing issues was unprotected because it involved their official duties, a conclusion that is unaffected by the audience of their speech.[5] *See Brammer-Hoelter*, 492 F.3d at 1204–05 (holding that teachers' speech on student behavior and school spending was unprotected even though their audience included individuals to whom they had no formal reporting duties).

3. Distributed Antenna Systems

Third, Plaintiffs disagreed with UIT's decision to continue installing distributed antenna systems, contrary to Plaintiffs' recommendations for resolving

[5] Moreover, given the lack of any particularized allegations regarding what Plaintiffs said to others "beyond the University" about utility billing, Plaintiffs have not met their burden of showing that their "*primary* purpose was to raise a matter of public concern." *Singh*, 936 F.3d at 1035. Nor have they shown that this speech "was a substantial motivating factor" in the University's adverse employment decisions, *Couch*, 587 F.3d at 1236 (quoting *Maestas*, 416 F.3d at 1188). Thus, this speech also is unprotected under the second and fourth elements of the *Garcetti*/*Pickering* analysis. *See Knopf*, 884 F.3d at 945.

problems with cellular coverage on campus. Plaintiffs allege that they discussed this issue with UIT managers and with other University leaders, such as the vice president of the University's facilities department. They do not allege that they reported this concern outside of the University.

These discussions again involved matters within the scope of Plaintiffs' official duties—they were assigned to improve cellular coverage on campus, and they were asked in particular to address complaints associated with the University's prior use of distributed antenna systems. Thus, Plaintiffs were merely performing a task they had been paid to perform when they informed UIT managers and higher-level University leaders that the best way to ensure adequate cellular coverage on campus would be to adopt the master plan developed by Plaintiffs rather than following the former approach of installing distributed antenna systems.[6] *See Knopf*, 884 F.3d at 946. Because this speech was made pursuant to Plaintiffs' official duties, it was unprotected under the first element of the *Garcetti/Pickering* test. *See id.* at 945; *Brammer-Hoelter*, 492 F.3d at 1204–05.

[6] We are unpersuaded by Plaintiffs' argument that their speech to higher-level University officials should be treated differently than their speech to UIT managers. Plaintiffs acknowledged in their third amended complaint that they were asked to "collaborate[] across all departments of the University" to improve cellular coverage and that the higher-level University officials with whom they discussed cellular-coverage issues were involved in this process. App. vol. 2, 291–92. And even if this were not the case, Plaintiffs' speech involved matters within the scope of their official duties and was therefore unprotected regardless of their audience. *See Brammer-Hoelter*, 492 F.3d at 1204–05.

4. Crown Castle Contract

Fourth, Plaintiffs told UIT and University officials that Crown Castle had not provided the cellular coverage it promised, and Plaintiffs recommended that the University negotiate directly with cellular providers instead of using Crown Castle as a middleman. Additionally, after a UIT manager signed a backdated amendment in April 2015 that purported to retroactively extend the Crown Castle contract, Davis raised concerns about the signing process—and the underlying contract—with the University's general counsel and internal auditing department, as well as unspecified "others outside of the University." App. vol. 2, 340.

But again, Plaintiffs specifically allege that they were "tasked with addressing the problems" caused by the Crown Castle contract. *Id.* at 293. Thus, Plaintiffs were both performing a task they had been hired to perform when they spoke to University officials about the deficiencies in Crown Castle's services and made recommendations about the best way to ensure adequate cellular coverage on campus.

As for Davis's speech about the backdated amendment to the Crown Castle contract, her official responsibilities included not only "addressing the problems" that had been caused by Crown Castle, but also negotiating with vendors who were directly affected by the University's relationship with Crown Castle. *Id.* And she objected to the backdated amendment because extending the University's contract with Crown Castle would prolong the problems she had been asked to address and would affect the University's "ability to negotiate" with other vendors. *Id.* at 341.

Therefore, Davis's speech on this topic involved her official duties—that is, it "stemmed from and w[as] the type of activit[y] that she was paid to do." *Green v. Bd. of Cnty. Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007); *see also Brammer-Hoelter*, 492 F.3d at 1204–05. And again, Davis cannot escape this conclusion by citing to the complaint's assertion that she was speaking outside her job duties when she reported this issue outside the University: this is a "legal conclusion couched as a factual allegation," and it is not supported by the facts alleged in the complaint. *Iqbal*, 556 U.S. at 678; *see also Brammer-Hoelter*, 492 F.3d at 1204–05 (holding that speech concerning official job responsibilities was unprotected even though audience included members of public to whom speakers had no formal reporting duty).

5. Downtown Data Center

Fifth, in carrying out her assigned task of reporting on the sale or lease of space at the Downtown Data Center, Davis concluded that it should be sold, and she and Wilson took potential buyers on an ultimately unsuccessful tour of the facility in September 2014. Plaintiffs allege that they reported concerns about the facility to their supervisors; to Billy Hesterman, the vice president of the Utah Taxpayers' Association (an independent watchdog entity); to State Senator Howard Stephenson; and to the Utah State Auditor.

As Plaintiffs concede in their opening brief, the allegations in their third amended complaint "confirm[]" that their speech to their supervisors was within the scope of their official duties, and thus we need not consider this speech as a basis for their First Amendment claim. Aplt. Br. 42.

As for Plaintiffs' alleged speech about the Downtown Data Center with individuals outside of the University, Plaintiffs' third amended complaint and the documents it incorporates by reference paint a different picture of the facts. *See Peterson*, 707 F.3d at 1206 ("[F]actual allegations that contradict . . . a properly considered document are not well-pleaded facts that the court must accept as true." (omission in original) (quoting *GFF Corp.*, 130 F.3d at 1385)). The complaint incorporates by reference the communications Plaintiffs allegedly made to Hesterman and the Utah State Auditor regarding the Downtown Data Center. But the attached documents show that they were submitted only by Wilson, not by Davis, and Wilson did not send them until after his employment had already been terminated in December 2014. Likewise, the complaint elsewhere clarifies that Wilson did not contact Senator Stephenson with Plaintiffs' concerns until January 2015 at the earliest, and the wording of this allegation indicates that Davis did not contact the senator herself.

Thus, regarding Davis, the complaint does not contain a well-pleaded allegation that she reported concerns about the Downtown Data Center to anyone other than her supervisors. The incorporated documents and other factual allegations clarify that only Wilson discussed these concerns with outside entities. Nevertheless, Plaintiffs attempt to attribute Wilson's speech to Davis by alleging that she "participated in all of [Wilson's] reports by assisting [him] but was typically blind copied on emails to protect her employment." App. vol. 2, 303. But Plaintiffs fail to cite any authority to support their suggestion that an employee engages in speech

when the employee "assist[s]" another employee's speech in some unspecified manner or is simply blind copied on another employee's emails. *Id.* Nor are we aware of any such authority. Thus, Davis has failed to allege she made any speech regarding the Data Center to anyone other than her supervisors—speech she concedes was within the scope of her official duties.

And Wilson's speech to Stephenson, Hesterman, and the Utah State Auditor fails to satisfy the fourth element of the *Garcetti*/*Pickering* test because Plaintiffs cannot show "that the constitutionally protected speech was a substantial motivating factor in the employer's decision to adversely alter the employee's conditions of employment." *Couch*, 587 F.3d at 1236 (quoting *Maestas*, 416 F.3d at 1188). Wilson's speech in 2015 could not have caused his termination in December 2014. And although Wilson was briefly hired as a contractor by another department and then terminated again when UIT discovered that he was working on campus, the allegations in the complaint establish that UIT made the decision not to rehire Wilson or to allow him to work for other departments around the time of his initial termination, and it was this decision that caused his second termination. Plaintiffs argue that Wilson's speech could nevertheless have been a substantial motivating factor in his second termination, but they do not explain how his speech could have been a motivating factor in a decision that had already been made. Accordingly, Plaintiffs' claim that the University retaliated against Wilson for his speech to outside individuals and entities fails on the causation element of the *Garcetti*/*Pickering* test.

6. Steering of Purchases

Sixth, Davis allegedly told UIT leadership, the University's internal auditors, the Utah Attorney General, the State Auditor, and the Utah Taxpayers' Association that Lisa Kuhn, a UIT manager, had impermissibly favored Microsoft in violation of the University's purchasing protocols. In particular, Davis thought Kuhn had improperly steered a purchase of a Microsoft data-storage product rather than seeking bids from other companies with similar products. Davis was concerned both because she believed Kuhn had violated University purchasing policies and because Kuhn's actions affected Davis's own ability to negotiate with Microsoft in renewing the overall campus Microsoft agreement. Plaintiffs do not allege that Wilson engaged in protected speech on this issue.

The complaint's allegation that Davis discussed this concern with outside entities while she was employed by the University is again contradicted by the actual communications that are incorporated into the complaint by reference—none of the documents she cites reference this issue. *See Peterson*, 707 F.3d at 1206. Moreover, this topic fell within the scope of Davis's broad vendor-management responsibilities; at a minimum, this topic is sufficiently related to Davis's official duties that her comments on this topic did not constitute protected speech.

7. Manhole Safety and Security

Seventh, Plaintiffs were concerned that most of the manholes providing access to the University's underground communication infrastructure were not secured and could be accessed by vendors or other individuals without UIT's permission or

knowledge. Plaintiffs were also concerned that University employees, including Wilson's fiber-installation teams, were not adequately trained to safely enter the manholes. They reported these concerns to UIT managers and to relevant University officials and departments, such as the Chief of Police and the Facilities Department. Moreover, after Wilson's employment was terminated in December 2014, he and Davis allegedly reported "their concerns about the infrastructure network problems and the retaliation suffered by . . . Wilson for requiring compliance with University policies to Senator Stephenson, the Huntsman Organization, the Eccles Foundation, the Attorney General's office, the Governor's office, the State Auditor's office, the Utah Taxpayers['] Association, Fox News[,] and KSL News." App. vol. 2, 373–74.

Wilson's pre-termination speech regarding manhole safety and security was unprotected because this issue fell within his official duties: he was charged with managing the University's fiber-optic system, which ran through the underground infrastructure network. *See Brammer-Hoelter*, 492 F.3d at 1203–05; *Casey*, 473 F.3d at 1329–32. And Wilson's post-termination speech was unprotected because it failed to satisfy *Garcetti*/*Pickering*'s causation element, as explained above in connection with his speech about the Downtown Data Center. *See Couch*, 587 F.3d at 1236; *Nixon*, 784 F.3d at 1370.

With respect to Davis's speech about the manhole concerns, the complaint reflects that this speech related to her official responsibilities and her duty to report improprieties to her supervisors and higher-level officials. For instance, one of the topics she discussed with University officials was "what agreements needed to be in

place with vendors before th[e underground infrastructure] network could be accessed and utilized," and this tied into her broad vendor-management responsibilities. App. vol. 2, 373. Indeed, the complaint seems to acknowledge that all of Davis's speech to University officials about this topic was made pursuant to her official duties; it indicates that Plaintiffs only "act[ed] as citizens" when they took this concern outside the University after their attempts to resolve the issue through official channels proved unsuccessful. *Id.*

As for Davis's alleged speech outside of the University, the complaint and the documents it incorporates by reference reflect that she again mainly relies on Wilson's reports to outside entities. But as noted earlier, Davis has not shown that the individual defendants violated her constitutional rights when they allegedly retaliated against her based on Wilson's speech. And the few communications Davis herself made to outside entities do not mention any concerns about manhole safety or security.[7] For instance, Davis's communications with the Huntsman Organization,

[7] The only possible exception is Plaintiffs' alleged communication with the Eccles Foundation. The complaint includes the Eccles Foundation in its list of entities with whom Plaintiffs allegedly discussed their concerns about manhole safety and security and their concerns about the way Wilson was treated by UIT managers. But the complaint does not further clarify the contents of this communication, nor does it specify whether this communication was actually made by Davis rather than Wilson alone. Regardless, we conclude that this communication does not satisfy the fourth element of the *Garcetti/Pickering* test because Plaintiffs do not allege that University officials were aware of Plaintiffs' communication with the Eccles Foundation, and a statement cannot be a substantial motivating factor in an employment decision if the decisionmaker was unaware of the statement. *See Trant*, 754 F.3d at 1166 n.3 (finding no genuine dispute of material fact on fourth

which are incorporated into the complaint by reference, only report that someone in UIT had referred to Wilson as "a cancer." App. vol. 7, 1725. To the extent Davis is arguing that this statement is protected speech, we are unpersuaded because Plaintiffs have not explained why this would involve a matter of public concern. *See David*, 101 F.3d at 1355–56 ("Speech relating to internal personnel disputes and working conditions"—as well as fears of retaliation arising from such speech—"ordinarily will not be viewed as addressing matters of public concern."). Thus, Davis has not shown that she engaged in protected speech with outside individuals or entities.

8. General Allegations

In addition to these seven specific topics, Plaintiffs generally allege that they raised "their concerns over waste and abuse of public resources[] and suspected policy violations by UIT management," as well as "whistleblowing concerns and fears of retaliation," with various University administrators and with individuals and entities outside of the University. App. vol. 2, 298, 300. But these allegations are too vague and conclusory to sustain their qualified-immunity burden. *See Knopf*, 884 F.3d at 944. Absent a specific allegation as to the particular concerns Plaintiffs discussed, we cannot determine whether their speech was made pursuant to their official duties or involved a matter of public concern. *See id.* at 945; *David*, 101 F.3d at 1355; *cf. Brammer-Hoelter*, 492 F.3d at 1204–06 & 1204 n.6 (parsing out speech

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Garcetti/*Pickering* factor because there was no indication decisionmakers were aware of alleged statements); *Rohrbough*, 596 F.3d at 750 (same).

on numerous topics and concluding that "the vast majority of the matters discussed fail to pass the first step of the *Garcetti/Pickering* analysis" and eight of 12 remaining matters failed to pass second step of analysis). Plaintiffs have therefore failed to meet their summary-judgment burden of showing that they engaged in speech protected by the First Amendment.

In sum, all of the speech underlying Plaintiffs' First Amendment retaliation claim was made pursuant to their official duties, did not involve a matter of public concern, or was not a substantial motivating factor in the allegedly retaliatory actions. Accordingly, we affirm the district court's dismissal of Plaintiffs' First Amendment claims based on qualified immunity.

II. Davis's UPPEA Claim

Davis argues that the district court erred in concluding that the statute of limitations barred her UPPEA claim and in declining to apply equitable estoppel to save her claim. "Whether a court properly applied a statute of limitations and the date a statute of limitations accrues under undisputed facts are questions of law we review de novo." *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005) (italics omitted). "We review the district court's refusal to apply the doctrine of equitable estoppel for abuse of discretion." *Spaulding v. United Transp. Union*, 279 F.3d 901, 911 (10th Cir. 2002).

In considering questions of state law such as "whether state[-]law claims are timely commenced," *United States ex rel. Connor v. Salina Reg'l Health Ctr.*, 543 F.3d 1211, 1224–25 (10th Cir. 2008), *abrogated in part on other grounds by*

Universal Health Servs., Inc. v. United States, 136 S. Ct. 1989 (2016), "[o]ur objective . . . is to reach the same result that would be reached in state court," *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1223 (10th Cir. 2016). If the state supreme court has not directly addressed the issues on appeal, we must attempt to predict how it would rule. *See Beltran v. AuPairCare, Inc.*, 907 F.3d 1240, 1251 (10th Cir. 2018). This analysis is guided by "relevant rulings by other courts of the state because each ruling 'is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.'" *Id.* (quoting *Stickley v. State Farm Mut. Auto. Ins.*, 505 F.3d 1070, 1077 (10th Cir. 2007)).

Moreover, in attempting to predict how the state supreme court would interpret a state statute, we "must apply state rules of statutory construction." *Etherton*, 829 F.3d at 1224 (quoting *United Rentals Nw., Inc. v. Yearout Mech., Inc.*, 573 F.3d 997, 1001 (10th Cir. 2009)). Under Utah law, "[t]he first step of statutory interpretation is to look to the plain language, and '[w]here statutory language is plain and unambiguous, th[e] [c]ourt will not look beyond the same to divine legislative intent.'" *Bryner v. Cardon Outreach, LLC*, 428 P.3d 1096, 1099 (Utah 2018) (second alteration in original) (quoting *Garrard v. Gateway Fin. Servs., Inc.*, 207 P.3d 1227, 1230 (Utah 2009)).

A. The UPPEA's Statute of Limitations

The applicable version of the UPPEA states: "Except as provided in [s]ubsection (1)(b), and subject to [s]ubsections (1)(c) through (e), an employee who

alleges a violation of this chapter may bring a civil action for appropriate injunctive relief, damages, or both, within 180 days after the occurrence of the alleged violation of this chapter." Utah Code Ann. § 67-21-4(1)(a) (2013).[8] Davis does not dispute that she filed her complaint more than 180 days after Defendants allegedly violated her UPPEA rights.

Instead, Davis relies on the exception in subsection (1)(b)(ii) to argue that her claim is timely. This exception sets forth a special rule for "[a]n employee of a state institution of higher education that has adopted a policy described in [Utah Code Ann. §] 67-21-3.7" to handle adverse-action complaints.[9] § 67-21-4(1)(b)(ii). Such an employee "may bring a civil action described in [s]ubsection (1)(a) within 180 days after the day on which the employee has exhausted administrative remedies[] and may not bring a civil action . . . until the employee has exhausted administrative remedies." *Id.*

Although Davis does not focus on the plain language of this statutory exception, that is where our analysis must start. *See Bryner*, 428 P.3d at 1099. Here, the plain terms of the statute make clear that § 67-21-4(1)(b)(ii)'s exception applies

[8] Although the statute was amended in 2018, the parties do not contend that the 2018 amendments apply retroactively to this case; thus, we apply the version of the UPPEA that was in effect when Plaintiffs allegedly experienced retaliation in 2014 and 2015 and when Plaintiffs filed suit in 2016.

[9] Specifically, § 67-21-3.7(1)(a) allows "[a] state institution of higher education" to "adopt a policy to establish an independent personnel board to hear and take action on a complaint alleging adverse action."

only to "[a]n employee of a state institution of higher education that has adopted a policy described in [§] 67-21-3.7." § 67-21-4(1)(b)(ii). And Davis concedes that the University has not adopted a § 67-21-3.7 policy. Therefore, the plain and unambiguous terms of the statute do not permit her to avoid application of the 180-day statute of limitations.

Davis's arguments to the contrary are unpersuasive. First, Davis argues her UPPEA claim should be considered timely because she plausibly alleged that she believed she was subject to the subsection (1)(b)(ii) exception. But the statute of limitations is governed by the law, not by a plaintiff's beliefs. *See Russell Packard Dev., Inc. v. Carson*, 108 P.3d 741, 746 (Utah 2005) (holding that limitations period begins to run as matter of law "when a plaintiff first has actual or constructive knowledge of the relevant facts forming the basis of the cause of action"); *Cooper v. NCS Pearson, Inc.*, 733 F.3d 1013, 1016 (10th Cir. 2013) (recognizing "the legal principle that ignorance of the law does not toll a statute of limitations"). And to the extent Davis argues that the district court was required to simply accept her assertion that her filing was timely, this argument is foreclosed by the principle that a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Wood*, 572 U.S. at 755 n.5 (quoting *Iqbal*, 556 U.S. at 678).

Second, Davis argues that her claim should be considered timely based on the ambiguity created by subsection (1)(b)(ii)'s failure to specify what kinds of "administrative remedies" would subject a UPPEA claim to this particular exception. But even assuming that subsection (1)(b)(ii) is ambiguous in defining the

administrative remedies available to employees of a university that has adopted a § 67-21-3.7 policy, it is unambiguous in providing that this exception only applies to such employees. Because the University does not have a § 67-21-3.7 policy, the subsection (1)(b)(ii) exception is entirely inapplicable to Davis, regardless of how the term "administrative remedies" might be interpreted.

Third, Davis argues that she is entitled to the benefit of the subsection (1)(b)(ii) exception because the University failed to inform her that it did not have a § 67-21-3.7 policy and that her claim would accordingly be governed by the standard 180-day statute of limitations rather than by the exception. But even assuming the University had a duty to provide this information to her, Davis cites no authority suggesting that the failure to provide such information affects the application of the statute of limitations. Nor do we see any language in the statute that would support such a result. And we are not persuaded that the Utah Supreme Court would extend the subsection (1)(b)(ii) exception beyond its plain terms to reach the circumstances of this case. *Cf. Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) ("As a federal court, we are generally reticent to expand state law without clear guidance from its highest court." (quoting *Taylor v. Phelan*, 9 F.3d 882, 887 (10th Cir. 1993))).

Finally, although § 67-21-4(1)(a) contains no tolling provisions, Davis argues that the statute of limitations must be tolled by her filing of a notice of claim in compliance with the Utah Governmental Immunity Act (UGIA), Utah Code Ann. §§ 63G-7-101 to -904. But the Utah Court of Appeals considered and rejected this same argument in *Thorpe v. Washington City*, 243 P.3d 500 (Utah Ct. App. 2010). In

Thorpe, the court recognized that the UPPEA and the UGIA appear to establish different timing requirements, but it concluded that the UPPEA's more specific requirements must govern over the UGIA's more general provisions. *Id.* at 504–06. Accordingly, the court rejected the plaintiff's argument "that submission of a notice of claim under the [U]GIA within the [UPPEA]'s 180-day statutory filing period effectively tolls the requirement for plaintiffs to file a complaint" and held that a UPPEA complaint must be filed within 180 days of a violation regardless of the UGIA's requirement to file a notice of claim. *Id.* The court acknowledged that this interpretation meant "employees wishing to file suit under the [UPPEA] must proceed more quickly than either the [UPPEA] or the [U]GIA would suggest when their respective terms are considered in isolation," but it concluded that this result was dictated by the plain language of both statutes. *Id.* at 506. And Davis presents no persuasive argument that the Utah Supreme Court would decide this issue differently. *See Beltran*, 907 F.3d at 1251.

The district court therefore correctly held that Davis's UPPEA claim was untimely under the plain terms of the applicable statute.

B. Equitable Estoppel

Davis argues in the alternative that the University and the State of Utah must be equitably estopped from asserting the statute of limitations because the University failed to clarify how the statute would apply to her claims.

Equitable estoppel under Utah law has three elements: "(1) an admission, statement, or act inconsistent with the claim afterwards asserted, (2) action by the

other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement, or act.'"[10] *Monarrez v. Utah Dep't of Transp.*, 368 P.3d 846, 859 (Utah 2016) (quoting *Celebrity Club, Inc. v. Utah Liquor Control Comm'n*, 602 P.2d 689, 694 (Utah 1979)). "'[T]he usual rules of estoppel do not apply against' the government, however, and 'courts must be cautious in applying equitable estoppel against the [s]tate.'" *Id.* at 859–60 (first alteration in original) (footnote omitted) (first quoting *Breitling Bros. Constr., Inc. v. Utah Golden Spikers, Inc.*, 597 P.2d 869, 871 (Utah 1979), then quoting *Celebrity Club*, 602 P.2d at 694). The Utah Supreme Court has noted that "[t]he few cases in which Utah courts have permitted estoppel against the government have involved *very specific* written representations," such as a letter expressly telling a liquor-license applicant that it had satisfied a particular requirement that the licensing commission later said had not been met. *Id.* at 860 (alteration in original) (quoting *Anderson v. Pub. Serv. Comm'n of Utah*, 839 P.2d 822, 827 (Utah 1992)). Additionally, "estoppel is applied against the state only 'if necessary to prevent manifest injustice, and the exercise of governmental powers will not be impaired as a result.'" *Id.* (quoting *Celebrity Club*, 602 P.2d at 694).

The district court correctly refused to apply equitable estoppel based on Davis's failure to point to a "*very specific* written representation[]" made by the

[10] Some Utah cases have indicated that a "failure to act" can also trigger equitable estoppel under this test. *See, e.g.*, *Howick v. Salt Lake City Corp.*, 424 P.3d 841, 845 (Utah 2018).

University regarding the statute of limitations. *Id.* Davis argues that the UPPEA itself constitutes this specific written representation, but we are not persuaded that a generally applicable statute drafted by the state legislature constitutes a "very specific" representation by a government employer. *Id.* (emphasis omitted); *cf. id.* at 860–61 (holding that government could not be estopped from asserting UGIA's statute of limitations absent "a specific, written representation directly related to that issue, such as a statement that [plaintiff] had satisfied the [U]GIA's requirements or that the government would not assert the defense in litigation").[11] And because Davis has not pointed to a specific written representation by the University, we need not consider whether her equitable-estoppel arguments would also satisfy the manifest-injustice and impairment-of-governmental-powers requirements for government estoppel. *See id.* at 860.

In sum, Davis's UPPEA claim is untimely under the plain terms of the statute, and she has not shown that her claim falls under a statutory exception or that she is entitled to equitable estoppel. We therefore affirm the district court's dismissal of her UPPEA claim based on the statute of limitations.

[11] We are unpersuaded by Davis's argument that *Monarrez* is distinguishable because the statute at issue in that case was the UGIA rather than the UPPEA. The Utah Supreme Court's explanation of equitable estoppel in *Monarrez* was based on general principles, not on statutory specifics, as evidenced by the fact that none of the precedents it cited arose under the UGIA. *See* 368 P.3d at 859–60.

III. Wilson's Motion to Amend

Wilson asserts that the district court erred in refusing to allow him to amend the complaint to add his UPPEA claim. "We review a district court's denial of leave to amend the complaint for abuse of discretion." *Jensen v. W. Jordan City*, 968 F.3d 1187, 1201–02 (10th Cir. 2020). "[W]hen denial is based on a determination that amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Miller ex rel. S.M. v. Bd. of Educ.*, 565 F.3d 1232, 1249–50 (10th Cir. 2009).

Wilson relies on the same arguments raised by Davis to challenge the district court's futility finding, contending that his asserted UPPEA claim would be timely under the subsection (1)(b)(ii) exception or, alternatively, that the government would be equitably estopped from asserting the statute of limitations as a defense. For the same reasons explained above, we conclude that these arguments lack merit. We therefore affirm the district court's denial of leave to amend based on futility.

Conclusion

The district court correctly dismissed Plaintiffs' First Amendment claim based on qualified immunity because they have not shown that they engaged in protected speech. The district court also correctly held that the statute of limitations barred Davis's UPPEA claim and that neither a statutory exception nor equitable estoppel changed that result. And for the same reasons, the district court did not abuse its discretion in denying Wilson's requested amendment as futile. We therefore affirm

the district court's orders dismissing the second and third amended complaints and denying Wilson's motion to amend.

Entered for the Court

Nancy L. Moritz
Circuit Judge