

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 08-cv-02517-RPM

MURRY L. SALBY,

Plaintiff,

v.

PROVOST PHILIP DISTEFANO,

Defendant.

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**DEFENDANT’S COMBINED MOTION FOR SUMMARY JUDGMENT  
BASED UPON QUALIFIED IMMUNITY  
AND MEMORANDUM BRIEF IN SUPPORT THEREOF**

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Defendant, **PHILIP DISTEFANO**, by his attorneys, **THOMAS S. RICE** and **COURTNEY B. KRAMER** of the law firm **SENER GOLDFARB & RICE, L.L.C.**, and pursuant to Fed.R.Civ.P. 56, hereby moves the Court for an order of summary judgment in his favor dismissing all Plaintiff’s claims against him with prejudice.

**AND IN SUPPORT THEREOF**, Defendant states as follows:

**I. INTRODUCTION**

This case arises out of the employment relationship between Plaintiff Murry L. Salby (“Salby”) and the Regents of the University of Colorado (“University”). During his employment as a Professor at the University, Salby failed to comply with required conflict of interest reporting procedures. After months of lack of communication from Salby followed by vehement denial of deficiencies in his reporting, the Conflict of Interest Committee (“Committee”) recommended disciplinary action against Salby, which Provost Philip DiStefano (“DiStefano”)

accepted pursuant to established University procedures and commensurate with his discretion. Accordingly, the disciplinary action was implemented against Salby in September of 2007.

## **II. STATEMENT OF THE CASE**

Salby filed his Complaint on November 19, 2008 [Doc. # 1] wherein he asserts the following substantive claims:<sup>1</sup>

- Violation of First Amendment. Salby alleges that pursuant to 42 U.S.C. § 1983 the University and DiStefano took adverse disciplinary action against him in retaliation for his exercise of First Amendment protected speech.
- Violation of Fourth Amendment. Salby alleges that pursuant to 42 U.S.C. § 1983 the University and DiStefano violated his Fourth Amendment rights by restricting Salby's access to his research laboratory.
- Violation of C.R.S. § 24.50.5-103. Salby alleges that the University and DiStefano's conduct violated the Colorado Whistleblower Statute, C.R.S. § 24-50.5-103.

DiStefano filed an Answer on January 16, 2009 [Doc. # 12], wherein he asserts the affirmative defense of qualified immunity.<sup>2</sup> DiStefano is entitled to qualified immunity because he acted within his discretionary authority when he accepted the Committee's recommendations for disciplinary action concerning Salby and when he restricted Salby's access to the research lab. DiStefano could not know that it would violate clearly established law for him to take these actions against Salby. As such, DiStefano should be dismissed from this case at the onset of this litigation and prior to the commencement of discovery.

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<sup>1</sup> Salby also seeks punitive damages and attorney fees pursuant to 42 U.S.C. § 1988.

<sup>2</sup> DiStefano submits contemporaneously herewith a Motion to Stay Discovery Pending the Threshold Determination of Qualified Immunity.

### **III. STATEMENT OF UNDISPUTED MATERIAL FACTS**<sup>3</sup>

1. DiStefano is the Provost and Executive Vice Chancellor for Academic Affairs for the Boulder campus of the University and held that position at the time of the events involved in this case. In this position, he is the chief academic officer of the Boulder campus. [*See*, Affidavit of Philip DiStefano, appended hereto as **Ex. A-1**, at ¶¶ 1, 3.]

2. The Provost oversees eight colleges and schools, over 29,000 students, and over 1,000 faculty members. [*See*, **Ex. A-1**, at ¶ 3.]

3. The position description for the Provost and Vice Chancellor of Academic Affairs states that the Provost is responsible for, among other things, “the administration of academic policies and programs, the allocation of resources to assure high quality academic programs, and direction and oversight of the instruction, research and creative work, and outreach activities of the campus.” The Provost assumes responsibility for all academic, arts, and research programs, including research institutes and centers. [*See*, **Ex. A-1**, at ¶ 4; Job description position statement of Provost, appended hereto as **Ex. A-2**.] As part of his job, the Provost is required to make many discretionary decisions on a regular basis. [*See*, **Ex. A-1**, at ¶ 4; **Ex. A-2**.]

4. As appointing authority, the Provost makes final decisions concerning disciplinary measures for tenured faculty. In this regard, the Provost receives recommendations from faculty committees. He has the discretion to then accept, reject, or modify a committee’s recommendations. [*See*, **Ex. A-1**, at ¶¶ 4, 6.]

5. Effective March 20, 2007, the University implemented a new Conflict of Interest and Conflict of Commitment policy. This policy requires faculty members to complete annual

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<sup>3</sup> Cited within the text of this Brief as “SUF.”

Disclosure of External Professional Activity (“DEPA”) forms on-line, which must be revised upon a significant change in outside interests or activities. [See, Affidavit of Russell Moore, appended hereto as **Ex. B-1**, at ¶ 3.]

6. Under the policy, if there are allegations of violations of a policy, they are initially to be resolved at the unit level. Should the unit level be unable to resolve the allegation, it is then referred to the Conflict of Interest Committee, which consists of at least eight faculty members, who are recommended by the Vice Chancellor for Research, the Deans of various colleges of the University, and one member from outside the University. The Committee reviews the matter and makes a report of findings and recommendations for disciplinary action. [See, **Ex. B-1**, at ¶ 8.]

7. Possible sanctions and discipline include, but are not limited to, (a) emphasizing, orally or in writing, to the faculty member his professional responsibilities, (b) oral or written admonition of the faculty member, (c) reassignment, temporarily or permanently, of the faculty member’s office or other work space (with appropriate consent of any academic unit affected), (d) temporary or continuing reduction in salary or privileges of the employee, and (e) freezing research funds or imposing other research restrictions. [See, **Ex. B-1**, at ¶ 9.]

8. Despite multiple requests for completion and advisements of the DEPA requirement, Salby failed to submit a DEPA in 2007. In fact, Salby consistently and deliberately violated the spirit of the University’s conflict of interest policy by refusing to disclose information and insisting no conflicts existed. [See, **Ex. B-1**, at ¶ 4.]

9. Despite sabbatical leave in spring of 2007, Salby was still required to comply with disclosure duties as a member of the faculty of the University, and his failure to do so was considered a violation of the disclosure policy. [See, **Ex. B-1**, at ¶¶ 5-6.]

10. Upon allegations of violations of the policy, the department of Atmospheric and Oceanic Sciences attempted to resolve the matter by eliciting the necessary information. However, such efforts over the course of several months failed. [See, **Ex. B-1**, at ¶ 7.]

11. The Conflict of Interest Committee convened on August 17, 2007, and, upon investigation, found that Salby's inaction constituted a significant violation of the Conflict of Interest policy. On August 20, 2007, the Committee recommended that: (1) the University not submit any requests for funding of research proposals on Salby's behalf; (2) funds in any of Salby's current and active research grants be frozen; and (3) Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences. [See, **Ex. A-1**, at ¶ 7; **Ex. B-1**, at ¶ 10; August 20, 2007 letter from Rodger Kram, Ph.D., appended hereto as **Ex. B-3**.]

12. Associate Vice Chancellor for Research Russell Moore forwarded the Committee's findings and recommendations to Vice Chancellor for Research Stein Sture on August 28, 2007. Vice Chancellor Sture concurred with the Committee's recommendations and forwarded the report to DiStefano on August 31, 2007, as DiStefano was the appointing authority able to enact such action against a tenured faculty member. [See, **Ex. A-1**, at ¶ 5; **Ex. B-1**, at ¶¶ 11-12; August 28, 2007 letter from Russell Moore, appended hereto as **Ex. B-4**; August 31, 2007 letter from Stein Sture, appended hereto as **Ex. B-5**.]

13. DiStefano notified Salby of his acceptance of the Committee's recommendations on September 19, 2007, and of his directive that the recommendations go into effect immediately. DiStefano instructed Salby to provide the conflict of interest information by October 1, 2007, in the absence of which the University would initiate additional disciplinary

action against Salby. [*See*, **Ex. A-1**, at ¶ 7; **Ex. B-1**, at ¶ 13; September 19, 2007 letter from Provost DiStefano, appended hereto as **Ex. B-6**.]

14. The frozen research funds are property of the University because they are under contract between the University and the granting agencies. [*See*, **Ex. A-1**, at ¶ 9.]

15. Salby's former laboratory is owned by the Board of Regents of the University and is allocated at the discretion of the Provost, Deans, and other Vice Chancellors to employees for work-related activities and professional pursuits and are subject to reassignment or revocation upon their discretion. [*See*, **Ex. A-1**, at ¶ 10; Affidavit of Frank Bruno, appended hereto as **Ex. C-1**, at ¶ 3.]

16. Neither a professor, nor a department, nor other academic or research unit has any right to or ownership interest in a specific office space. Such space is allocated pursuant to the discretion of the Chancellor, Provost, other Vice Chancellors, and the Deans. Spaces may be reassigned at any time based upon the needs and interests of the University. [*See*, **Ex. A-1**, at ¶ 10; **Ex. C-1**, at ¶¶ 4-5.]

17. This long-standing, written policy regarding allocation of space has been in place since at least 2002. [*See*, **Ex. C-1**, at ¶ 4.]

18. DiStefano understood that the University permitted Salby to remove his personal belongings from the lab. [*See*, **Ex. A-1**, at ¶ 11.]

19. DiStefano did not carry out the actual implementation of the Committee's recommendations. Such implementation was carried out by Associate Vice Chancellor Moore's office and the ATOC department. [*See*, **Ex. A-1**, at ¶ 8; **Ex. B-1**, at ¶ 14.]

20. Before taking the action described above, DiStefano had never met Salby and had only indirect involvement in a single administrative issue years before. DiStefano had no knowledge of Salby's grievances, and his actions taken in response to the conflict of interest issue were wholly unrelated to those grievances. [*See, Ex. A-1*, at ¶ 12.]

#### **IV. STANDARD OF REVIEW**

Summary judgment should be granted where, taking the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *See, Deepwater Investments, Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110-11 (10th Cir. 1991). Upon a motion for summary judgment, the moving party bears the burden of showing the absence of a genuine issue of material fact. *See, Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to produce evidence creating a genuine issue of material fact to be resolved at trial. *See, Vitkus v. Beatrice Co.*, 11 F.3d 1535, 1539 (10th Cir. 1993).

#### **V. ARGUMENT**

##### **A. DiStefano is Entitled to Qualified Immunity.**

DiStefano acted within his official role as Provost at all times relevant to the Complaint, and he is thus entitled to qualified immunity. Qualified immunity protects government officials performing discretionary functions from liability if their conduct violates no "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Only in exceptional cases will government actors have no shield against claims made against them in their individual capacities. *See, Harlow*, 457 U.S. at 818. "[I]nsubstantial lawsuits 'against government officials [should] be resolved *prior to*

*discovery and on summary judgment if possible.” Lewis v. City of Ft. Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, n.2 (1987)) (emphasis added). As set forth herein, the undisputed facts demonstrate that at all relevant times DiStefano was performing discretionary functions. Therefore, he is entitled to qualified immunity and summary judgment should enter in his favor.

**1. *The Concept of Qualified Immunity and Plaintiff’s Burden.***

As the undisputed facts demonstrate, DiStefano acted pursuant to the discretion afforded to him in his capacity as Provost of the University when he accepted the recommendations of the Conflict of Interest Committee concerning Salby and when he restricted Salby’s access to the research lab. Consistent with the well-established purpose behind qualified immunity, DiStefano should be protected from suit and summarily dismissed from this lawsuit at the onset.

Generally, in order to defeat an assertion of qualified immunity, Salby has the burden of proving the following elements by a preponderance of the evidence: (a) DiStefano violated a constitutional or statutory right; and (b) the infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable individual in his position would have known his challenged conduct was illegal. *See, Martinez v. Carr*, 479 F.3d 1292, 1295 (10th Cir. 2007); *see also, Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009) (“The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.”). The qualified immunity analysis is premised on a showing that the official acted within the scope of his discretionary authority when the challenged conduct occurred. *See, Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002).



“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson*, 129 S.Ct. at 815. “The protection of qualified immunity applies regardless of whether the government official’s error is a ‘mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.’” *Id.* Importantly, qualified immunity “not only shields a defendant from liability, but is also intended to protect the defendant from the burdens associated with trial.” *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 645 (10th Cir. 1988). “These burdens include distraction of officials from their governmental responsibilities, the inhibition of discretionary decision making, the deterrence of able people from public service, and the disruptive effects of discovery on governmental operations.” *Hannula*, 907 F.2d at 130.

The Supreme Court has held that:

Because qualified immunity is ‘an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.’ *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis deleted). Indeed, we have made clear that the ‘driving force’ behind creation of the qualified immunity doctrine was a desire to ensure that ‘‘insubstantial claims’ against government officials [will] be resolved prior to discovery.’ *Anderson v. Creighton*, 483 U.S. 635, 640 n. 2 (1987). Accordingly, ‘we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.’ *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*).

*Pearson*, 129 S.Ct. at 815.

DiStefano is entitled to protection from this litigation because he was clearly acting within his discretionary authority, and he is thus entitled to qualified immunity. This Court

should decide as a threshold matter that DiStefano should be summarily dismissed at the onset of this lawsuit.

**a. The Position of Provost.**

The Provost and Executive Vice Chancellor for Academic Affairs is the chief academic officer for the Boulder campus. [SUF at ¶ 1.] DiStefano has held this position since March 2001. [SUF at ¶ 1.] In that capacity, DiStefano is responsible for overseeing eight colleges and schools, over 29,000 students, and more than 1,000 faculty members. [SUF at ¶ 2.] The Provost is also responsible for, *inter alia*, administration of academic policies and programs, the allocation of resources to assure high quality academic programs, and direction and oversight of the instruction, research and creative work, and outreach activities of the campus; the Provost also assumes responsibility for all research programs, including research institutes and centers. [SUF at ¶ 3.] The position of Provost demands oversight of many issues and therefore provides extensive discretion for tasks on a regular basis. [SUF at ¶ 3.]

In this position, the Provost has the right to determine appropriate disciplinary measures of tenure and tenure-track professors. [SUF at ¶ 4.] Under this extensive authority, it is within a Provost's discretion to accept findings of a committee and to implement such recommendations in part or in whole, to fashion a remedy of his own, or to reject the findings altogether, as he deems appropriate. [SUF at ¶ 4.]

Because of the extensive nature of the Provost's responsibilities, delegation to and reliance upon underlying committees is vital. It would be impossible for the Provost to oversee and implement every personnel decision without the aid of such committees. Here, DiStefano relied upon the Committee's recommendations and utilized his discretion to accept same.

DiStefano could not know that it would violate clearly established law for him to accept the recommendations of the Committee.

**b. The Provost's Actions Were Discretionary in Nature and Are Precisely the Type of Conduct Entitling DiStefano to Qualified Immunity.**

To defeat summary judgment, Salby must produce evidence that would allow a trier of fact to find that no reasonable person in DiStefano's position would have thought the facts justified his acts. *See, Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). "The first part of the qualified immunity analysis is to show that the official acted within the scope of his discretionary authority when the challenged conduct occurred." *Vinyard*, 311 F.3d at 1346. Salby may avoid summary judgment "only by pointing to *specific evidence* that the official's actions were improperly motivated." *Subryan v. Regents of the University of Colorado*, 813 F.Supp. 753, 759 (D.Colo. 1993) (internal citation omitted) (emphasis original). The Complaint alleges that DiStefano was Provost of the University at the time the challenged conduct occurred. As such and as set forth herein, DiStefano was operating and acting within the scope of his discretionary authority.

**i. *DiStefano's Acceptance of the Committee's Recommendations Occurred Pursuant to University Policy.***

DiStefano followed University procedure with regard to Salby's disciplinary action at issue. The recommendations for corrective or disciplinary action were provided to DiStefano because he was the highest appointing authority able to enact this type of action against a faculty member. [SUF at ¶ 12.] University procedure requires faculty members to complete DEPA forms, which helps to ensure that conflicts of interest involving a professor's outside professional activities and financial interests are disclosed and managed appropriately to prevent adverse

affects for employees and for the University. [SUF at ¶ 5.] Faculty have a continuing duty to revise these on-line forms upon a significant change in outside interests or activities. [SUF at ¶ 5.] If the conflict cannot be resolved at the unit level, it is referred to the Conflict of Interest Committee, which investigates and considers the matter and then makes a recommendation for action or management to the Provost for a final ruling. [SUF at ¶¶ 4, 6.]

In this case, Salby failed to complete a DEPA in 2007, prior to which he had refused to disclose requested and necessary information, insisting he had no conflicts. [SUF at ¶ 8.] Despite being on sabbatical leave, as a professor of the University, Salby was still required to comply with DEPA reporting procedure. [SUF at ¶ 9.] Failure to submit a DEPA is considered a violation of the disclosure policy, and attempts by the ATOC department to obtain the necessary information from Salby over the course of several months proved unsuccessful. [SUF at ¶¶ 9-10.]

Upon the Committee's investigation, it may recommend various sanctions such as oral or written admonition, temporary or permanent reassignment of the faculty member's office or work space, temporary or continued reduction in privileges, or freezing of research funds and imposing other research restrictions. [SUF at ¶ 7.] While Salby alleges he submitted several grievances between 1997 and 2000, the facts demonstrate that DiStefano was unaware of the subject grievances Salby filed between 1997 and 2000 and does not remember receiving notice of any reference to them. [SUF at ¶ 20.] Accordingly, DiStefano's decision to implement the Committee's recommendations was wholly unrelated to the prior grievances because DiStefano had no knowledge of Salby's activities prior to implementation of this lawsuit. [SUF at ¶ 20.]

DiStefano's discretionary decision to accept the Committee's recommendations were completely unrelated to Salby's grievances. [SUF at ¶ 20.]

DiStefano could not have known that his actions against Salby for reasons unrelated to the grievances would violate clearly established law. To allow the exercise of discretion should not become unlawful conduct which would make DiStefano susceptible to suit for every discretionary act he performs. Such a result would circumvent the purpose of qualified immunity and substantially interfere with his official duties as Provost of the University. As such, DiStefano's actions are precisely those which qualified immunity is intended to protect.

*ii. DiStefano's Discretionary Acceptance of the Committee's Recommendations to Restrict Access to the Research Lab Owned by the University was Reasonable.*

DiStefano's discretionary acceptance of the Committee's recommendations was also reasonable with regard to Salby's claim that he was denied access to his research lab. The workspace at issue is owned and operated by the University; it is provided to employees for work purposes and professional pursuits. [SUF at ¶ 15.] The Provost, Deans, and other Vice Chancellors allocate such space at their discretion. [SUF at ¶¶ 15-16.] Per University policy, a professor has no ownership or proprietary interest in a particular office space. [SUF at ¶ 16.] Space allocation is specified in a written policy, in place since at least 2002. [SUF at ¶ 17.]

**(1) The Undisputed Facts Show that Research Data and Computers Were Owned by the University and/or Sponsoring Agency, Not by Salby.**

DiStefano's discretionary action was reasonable because the property belongs to the University rather than to Salby. [SUF at ¶¶ 15-16.] The University simply restricted access to its facility and equipment allocated to Salby and his research assistant to preclude University

property from being utilized for research purposes. [SUF at ¶¶ 11, 14-16.] The Committee's recommendation stated that "Dr. Salby should be denied access to his research laboratory space in the Department of Atmospheric and Oceanic Sciences." [SUF at ¶ 11.] Indeed, the Committee's recommendation provided a clear and satisfactory rationale for this action, based upon Salby's failure to comply with necessary University reporting policy and procedure, upon which DiStefano also based his acceptance. [SUF at ¶ 11.] The Complaint states that the laboratory contents had been developed by Salby's federal research grants. [See, Complaint at ¶ 9]. Therefore, the alleged confiscation involved research-related University property in the form of frozen research funds because, under University policy, funds developed under contract between the University and the granting agencies are property of the University. [SUF at ¶ 14.]

(2) **The Record is Devoid of Any Evidence that Salby's Personal Items and Papers Were Seized.**

The Complaint asserts conclusory accusations without adequate support. DiStefano himself had no personal role in implementing the recommendation that Salby's access to the research lab be restricted. [SUF at ¶ 19.] Nevertheless, the undisputed facts, *infra*, also show that Salby was invited to claim his personal belongings, [SUF at ¶ 18] and there is no record of repeated requests by Salby for computer files. Attempts to communicate with Salby were impossible, and he often failed to attend his scheduled classes. DiStefano could not have known that his actions to bar Salby from his research lab based on the Committee's recommendations would violate clearly established law. DiStefano believed such space to be University property that is reassignable at the discretion of himself and other University administrators. [SUF at ¶¶ 15-16.] DiStefano believed Salby would have access to this lab in order to collect his personal belongings and would not be seized. [SUF at ¶ 18.]

(3) **The Undisputed Facts Show Salby was Invited to Come to the Lab and Collect Personal Property.**

The undisputed facts negate the Complaint's unsupported allegations. Salby was notified of the University's intention to freeze his access to the laboratory. [SUF at ¶ 13.] DiStefano understood that Salby had been invited to pick up his personal belongings in the laboratory. [SUF at ¶ 18.] Salby's personal belongings did not include research funds or equipment purchased with such funds. [SUF at ¶ 14.]

Based upon the foregoing, it is clear that the sum total of DiStefano's involvement in restricting Salby's access to the research lab was his acceptance of the Committee's recommendations and his communication to Salby regarding same. This is precisely the type of discretionary conduct which the doctrine of qualified immunity was meant to shield from suit, and as such, DiStefano should be dismissed from this case at this early stage of the litigation.

c. **Other Similar Cases Support an Award of Qualified Immunity.**

In *Wood v. Strickland*, 40 U.S. 308 (1975), the Supreme Court defined the immunity defense in the specific context of school discipline. The similarities between the discretionary authority exercised by local school authorities in teacher employment matters supports the immunity test stated therein to apply in this case. The Supreme Court held that "a school board member is not immune from liability for damages under U.S.C. § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights." *See, Wood*, 420 U.S. at 322.

The undisputed facts show that DiStefano's actions were in good faith and within his discretion. *See, Bertot v. School Dist. No. 1, Albany County, Wyoming*, 522 F.2d 1171, 1184

(10th Cir. 1975). In *University of Wyoming v. Gressley*, the President of the University recommended Professor Gressley's dismissal as a tenured professor of the University. *See*, 978 P.2d 1146, 1149 (Wyo. 1999). As per University procedure, the faculty senate's Ad Hoc Hearing Committee held a preliminary proceeding and concluded that there existed adequate cause for the professor's dismissal. *See, Gressley*, 978 P2d at 1149. The Board of Trustees sustained the Committee's decision, pursuant to their authority, and the professor's lawsuit followed. *Id.* Among other claims, plaintiff pled that the President was liable because he had instituted the proceedings instead of another administrative officer appointed by the President as required by the applicable rules. *Id.* at 1152. The court held that the President and the Board of Trustees were entitled to qualified immunity because the termination of plaintiff came within the ambit of their discretionary functions. *Id.* at 1151. According to the court, plaintiff could not demonstrate any prejudice on the part of the President sufficient to overcome the defense of qualified immunity. *Id.* at 1152.

Similarly, the Tenth Circuit has held that high ranking individuals at a University are immune from suit. *See, Prebble v. Brodrick*, 535 F.2d 605, 612-13 (10th Cir. 1975). In *Smith v. Losee*, 485 F.2d 334, 344 (10th Cir. 1973) the court had earlier recognized a qualified privilege or immunity for school authorities making decisions on nonrenewal of employment or discharge of instructors. The Tenth Circuit extended this immunity, stating "[w]e are satisfied that such a qualified immunity is available to the defendants in this case, the President, the Trustees and administrative officers of the State University." *Prebble*, 535 F.2d at 612. There, in addition to the applicability of immunity as a defense, the evidence strongly showed a lack of malice or bad faith by the defendants. *Id.* at 613. Under this authority, it is appropriate to dismiss DiStefano at



this juncture in order to further the purpose of qualified immunity. The undisputed facts show that DiStefano acted within his discretion and acted in good faith, without malice.

**d. Salby's Whistleblower Claim.**

If the federal claims are dismissed, this Court should not exercise discretionary jurisdiction over Salby's state whistleblower claim. Federal courts are granted wide discretion to decline to exercise jurisdiction over remaining claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 353 (1988). The Tenth Circuit has held that when federal claims are resolved before trial, the district court should usually decline to exercise jurisdiction over the remaining state law claims. *See, Smith v. City of Enid By and Through Enid City Comm'n*, 149 F.3d 1151, 1156 (10th Cir. 1998); *Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995). Moreover, Salby's claims against the University have already been dismissed based upon Eleventh Amendment immunity and are subject to being refiled in state court.

**VI. CONCLUSION**

DiStefano was acting pursuant to his authority as Provost of the University at all times relevant. In this capacity, his ability to accept the Committee's disciplinary recommendations is purely discretionary and was reasonable under the circumstances. Moreover, DiStefano could not know that it would violate clearly established law for him to accept the recommendations of the Committee. Thus, for the foregoing reasons, DiStefano respectfully requests that the Court dismiss the claims addressed herein pursuant to Fed.R.Civ.P. 56, based on qualified immunity.

Respectfully submitted,

By       s/ Thomas S. Rice        
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By       s/ Courtney B. Kramer        
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on this 25<sup>th</sup> day of February, 2009, I electronically filed a true and exact copy of the above and foregoing **DEFENDANT DiSTEFANO'S COMBINED MOTION FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY AND MEMORANDUM BRIEF IN SUPPORT THEREOF** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

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\_\_\_\_\_  
s/ Stephanie Hood  
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