

# Hernandez v. City of Compton

United States District Court for the Central District of California

February 27, 2026, Decided; February 27, 2026, Filed

CV 25-184-GW-ADSx

## Reporter

2026 U.S. Dist. LEXIS 42573 \*; 2026 LX 86634

Luis Hernandez v. City of Compton, et al.

**Counsel:** [\*1] For City of Compton, a public agency and/or municipal corporation, Ronerick Simpson, an individual and as Fire Chief, Defendants: Gabriella Aerin Kamran, Liebert Cassidy Whitmore, Los Angeles, CA; Paul David Knothe, Liebert Cassidy Whitmore APC, Los Angeles, CA.

For Luis Hernandez, Plaintiff: Derek Glen Thompson, Michael A McGill, Ryan Trotta, Ferrone Law Group, Westlake Village, CA.

For Marc Alexander, Mediator (ADR Panel): Marc D Alexander, LEAD ATTORNEY, Irvine, CA.

**Judges:** GEORGE H. WU, UNITED STATES DISTRICT JUDGE.

**Opinion by:** GEORGE H. WU

## Opinion

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### CIVIL MINUTES - GENERAL

#### PROCEEDINGS: IN CHAMBERS - TENTATIVE RULING ON DEFENDANT CITY OF COMPTON'S MOTION FOR SUMMARY JUDGMENT [34]; and DEFENDANT RONERICK SIMPSON'S MOTION FOR SUMMARY JUDGMENT [35]

Attached hereto is the Court's Tentative Rulings on Defendants' Motions [34, 35], set for hearing on March 2, 2026 at 8:30 a.m.

On January 7, 2025, plaintiff Luis Hernandez ("Hernandez") brought suit against the Fire Chief of the City of Compton Fire Department Ronerick Simpson ("Simpson"), the City of Compton ("City"), and Does 1-10 (collectively, "Defendants"), asserting that he was the subject of discrimination and retaliation for speaking

publicly about issues affecting [\*2] the City's Fire Department. See *generally* Complaint, Docket No. 2. Hernandez brings three claims against Defendants: (1) violation of the First Amendment under 42 U.S.C. § 1983; (2) violation of Cal. Lab. Code § 1102.5; and (3) violation of Cal. Lab. Code §§ 1101, 1102. See *generally id.* Hernandez seeks, *inter alia*, damages, injunctive relief, and attorney's fees. See *id.* On February 3, 2025, Defendants filed an Answer. See Docket No. 10. Jury trial is currently set for May 5, 2026. See Docket No. 33.

Now before the Court are the City's Motion for Summary Judgment ("City MSJ"), see City MSJ, Docket No. 34, and Simpson's Motion for Summary Judgment ("Simpson MSJ"), see Simpson MSJ, Docket No. 35. Hernandez filed oppositions to both motions, see Simpson Opp., Docket No. 41; City Opp, Docket No. 42, and Defendants filed replies, see City Reply, Docket No. 43; Simpson Reply, Docket No. 44. For the reasons stated herein, the Court would **DENY** the Simpson MSJ as to the § 1983 claim against Simpson, **GRANT** the Simpson MSJ as to the state law claims against Simpson, and **GRANT** the City MSJ in its entirety.

### I. Factual Background<sup>1</sup>

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<sup>1</sup> The Court has examined in detail: (1) Defendants' statements of uncontroverted facts, see Docket Nos. 34-1, 35-2; (2) Hernandez's statements of disputed material facts, see Docket Nos. 41-2, 42-2; and (3) Defendants' responses, see Docket Nos. 43-1, 44-1. The Court observes that Defendants' filings are identical to each other and Hernandez's filings are also identical to each other. For the sake of convenience, the Court will reference only one of Defendants' responses to Hernandez's statements of disputed material facts ("SGD"). See SGD, Docket No. 43-1. Any citation to particular paragraphs within the SGD also references all parties' statements and responses to those same paragraphs.

The Court has reviewed the respective parties' asserted factual disputes and has included in this summary only facts that are supported by the cited evidence, altering the proffered

## A. Hernandez's Employment with the City's Fire Department

Hernandez has been a firefighter with the City's Fire Department since March 25, 2002. [\*3] SGD ¶ 1. Hernandez was promoted to Fire Captain in 2007 and to Battalion Chief in 2017. *Id.* ¶¶ 2-3. Simpson has been the Fire Chief of the Fire Department since 2017 and had himself selected Hernandez for a Battalion Chief position. *Id.* ¶¶ 5-6. The Fire Department operates three sequential shifts — A, B, and C — that take place on different days but are otherwise the same. *Id.* ¶ 7. As a Battalion Chief, Hernandez oversaw emergency and nonemergency operations for his shift and supervised firefighters, engineers, and captains. *Id.* ¶ 8. At some point in 2018, Simpson specially appointed Hernandez as Arson Unit Director. *Id.* ¶ 9.

### 1. Disciplinary Action

The first time Hernandez was disciplined during his employment with the City's Fire Department was in 2004 when he was a paramedic. *Id.* ¶ 10; see also Deposition of Luis Hernandez ("Hernandez Depo."), Docket No. 36, Ex. 1, at 61:23-63:15. Hernandez testified that he was orally reprimanded by former Fire Chief Rico Smith for leaving needles behind at the scene after having administered intravenous lines to two gunshot victims. *Id.*

Between late 2024 and early 2025, Hernandez was issued two Notices of Deficiency ("NOD") by Deputy Fire Chief Reginald [\*4] Donald ("Donald"). SGD ¶¶ 11-12. Hernandez received the first NOD in November 2024 because one of his engine captains did not attend a particular City event ("2024 NOD"). SGD ¶ 11. Hernandez concedes that it was his responsibility to ensure his captains attended this event but believes his receipt of the NOD was "unjust" because captains are responsible for checking their e-mails and calendars to "see what's being asked of them." See Hernandez Depo., at 64:7-65:16. Hernandez received the second

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facts if necessary to accurately reflect the uncontroverted evidence. To the extent the cited underlying "undisputed" facts have been disputed, the Court finds that the stated disputes: (1) fail to controvert the proffered "undisputed" facts; (2) dispute the facts on grounds not germane to the below statements; and/or (3) fail to cite evidence in support of the disputing party's position. As such, the Court treats such facts as undisputed. Any proffered facts not included in this ruling were found to be: (1) unsupported by admissible evidence; (2) irrelevant to the Court's present analysis; or (3) some combination thereof.

NOD in January 2025 as a result of his failure to complete a mandatory harassment training by the required deadline ("2025 NOD"). SGD ¶ 12; Docket No. 36, Ex. 5. Hernandez testified that he had been on out on vacation during the month prior, was given an extension of time to complete the training by the City's Human Resources Department ("HR") upon his return, and was thereafter deployed to the Eaton Fire in Altadena, California. See Hernandez Depo., at 66:23-68:6. Following communications between the HR Department and Donald, Hernandez was "assured that [the NOD] was removed" from his file. SGD ¶ 13; Hernandez Depo., at 69:4-70:12.

### 2. Performance Issues

In January 2025, Donald issued Hernandez [\*5] an overall performance rating of "satisfactory" for the period beginning on December 26, 2023 and ending on December 26, 2024. SGD ¶ 14. In his comments, Donald identified various areas for improvement, including effective communication, leadership, and time management. *Id.* Hernandez believes that this evaluation was "unreasonable." *Id.* Hernandez testified that he believed Donald's evaluation was an attempt to "muddy [his] name" because Donald expected to compete against him in the future for the position of Fire Chief. Hernandez Depo., at 82:8-25.

Hernandez testified that he "ha[d] been told [he] could be tough on [his subordinates] sometimes as far as the expectations and stuff like that." *Id.* at 75:14-18; SGD ¶ 16. Hernandez confirmed during his deposition that there was friction in his relationship with Simpson and that he "didn't do everything [Simpson] wanted [him] to do" because of disagreements regarding Simpson's treatment of the other firefighters. See Hernandez Depo., at 243:10-244:11; SGD ¶ 17. Hernandez testified that, on one occasion, he took sick leave and went home because he felt unable to "communicate with [Simpson]" during "one of his tirades." Hernandez Depo., at [\*6] 176:6-177:8; SGD ¶ 18.

Regular meetings between Donald and the Battalion Chiefs took place on Mondays, but Donald testified that Hernandez did not attend most of those meetings. Deposition of Reginald Donald ("Donald Depo."), Docket No. 36, Ex. 3, at 21:4-11; SGD ¶ 19. Hernandez indicated, however, that since Donald became the new Deputy Fire Chief, there have been instances where he would call into a meeting only to find out that it had been either cancelled or postponed. Hernandez Depo., at 26:2-5; SGD ¶ 19. Hernandez further testified that he believed he was denied notifications of important

announcements and news of which he became aware only from his subordinates and that such information included, *inter alia*, the hiring of new firefighters and the acquisition of new equipment. SGD ¶¶ 20-22; Hernandez Depo., at 28:11-25.

### 3. Investigations

On April 11, 2024, Hernandez was interviewed as a witness pursuant to a Notice of Investigation ("NOI") he had received on March 28, 2024. SGD ¶ 23; Docket No. 36, Ex. 10. On July 1, 2024, Hernandez received another NOI, indicating this time that he was the subject of administrative investigations into: (1) a civilian's complaint to the City that [\*7] Hernandez was disrespectful toward him; and (2) damage to a Department vehicle during a shift Hernandez had supervised and that was not timely reported to the Fire Chief. SGD ¶ 24. The expectation was for Battalion Chiefs to report any damage to Department vehicles that occurs during a shift they supervise. *Id.* ¶ 25.

At some point in September 2024, Donald "informally" asked Hernandez and other Battalion Chiefs if they knew anything about a drill firefighters had organized at the Compton/Woodley Airport. *Id.* ¶ 26. Hernandez invoked the California Firefighter Bill of Rights, which prompted Donald to issue a formal NOI to Hernandez on September 19, 2024. *Id.* ¶¶ 26-27; Docket No. 36, Ex. 11. Hernandez was neither disciplined nor placed on administrative leave as a consequence of any of these investigations. SGD ¶¶ 28-29.

### **B. Hernandez's Comments at City Council Meetings**

In and around June 2023, the City's Fire Department faced a staffing shortage. *Id.* ¶ 30. On June 20, 2023, Hernandez spoke during the public comment portion of a Compton City Council meeting regarding the effects of the Department's understaffing based on a threat assessment he drafted. *Id.* ¶¶ 31-32.

On approximately January 12, 2024, shortly [\*8] after a Fire Department management meeting, Hernandez informed Simpson that he intended to speak at a City Council meeting regarding the Department's Arson Unit. *Id.* ¶ 33. On the same day, Simpson e-mailed Hernandez to inform him that he was not permitted to speak in a public meeting regarding management decisions without management approval. *Id.* ¶ 34. Four days later, Simpson sent a follow-up email to clarify that his prior email pertained only to specific confidential or private information and that Hernandez was otherwise

free to speak before the City Council. *Id.* There was no City Council meeting between January 12 and January 16, 2024. *Id.* Although Hernandez could not identify precisely when he wanted to speak at a City Council meeting, he testified that he "thought there was a meeting that [he] wanted to speak at." *Id.* ¶ 35; Hernandez Depo., 125:12-18.

On February 20, 2024, Hernandez spoke about the Arson Unit during the public comment portion of a City Council meeting. SGD ¶ 36. Hernandez had identified himself as a City Battalion Chief but was out of uniform when he made his comments to the City Council. *Id.* ¶ 37. Hernandez testified that, following his comments, Simpson called [\*9] him into the Battalion Chief's office on a Saturday night and "was going off on [him]" because "he was upset due to the fact that [Hernandez] spoke." *Id.* ¶ 38; Hernandez Depo., at 101:13-102:2. There was no City Council meeting at which Hernandez believed he was reporting a violation of the law or identified laws he believed the City was violating. SGD ¶ 39.

### **C. Hernandez's Disagreement with Proposed Shift Movements**

Hernandez testified that while Battalion Chiefs used to be "able to determine who gets placed where on [a] shift," that decision now remains with the Deputy Fire Chief. Hernandez Depo., at 136:5-16; SGD ¶ 40. Simpson testified that, as Fire Chief, he is "responsible for shift movements, for the approval of shift movements" but that he "do[esn't] actually do the shift movements." Deposition of Ronerick Simpson ("Simpson Depo."), Docket No. 36, Ex. 2, at 44:5-19. Hernandez testified, however, that Simpson attempted to "move people around" as punishment for voting no confidence against him. Hernandez Depo., 137:12-24; SGD ¶ 40.

On December 5, 2023, Interim Deputy Fire Chief Jim McCombs ("McCombs") e-mailed Hernandez regarding potential shift movements. SGD ¶ 41. Hernandez opposed [\*10] the proposed movements because they appeared to affect only Latino firefighters and those who voted no confidence against Simpson in approximately November 2023. *Id.* ¶ 42. Hernandez testified that he did not believe these proposed shift movements were "illegal" but that he thought they were "unethical, for sure" and "immoral." Hernandez Depo., at 150:4-10. Hernandez suspected McCombs was following Simpson's orders because "everyone on the fire

department knows that Jim McCombs does not make any moves whatsoever without the permission of the fire chief." SGD ¶ 43. On December 7, 2023, Hernandez sent a follow-up e-mail regarding the operational impact of the proposed shift movements. *Id.* ¶ 44. In a meeting with Simpson, Hernandez expressed concern that the proposed shift movements would disrupt the working relationship among personnel assigned to his shift and would not "make sense" because it would have moved senior firefighters to busier stations and newer firefighters to stations with lower call volume. *Id.* ¶ 45.

#### D. Hernandez's Resignation from the Arson Unit

From 2023 through January 16, 2024, Hernandez and four other personnel were assigned to the Arson Unit. *Id.* ¶ 46. The Arson Unit [\*11] performs "origin and cause" investigations along with the engine company that responds to the fire within City limits. *Id.* ¶ 47. The Fire Department allows Arson Unit members to carry firearms for protection. *Id.* ¶ 48.

The Arson Unit has collaborated with other public safety agencies on criminal investigations of arson suspects both within and outside City limits. *Id.* ¶ 49. The Arson Unit has participated, for example, in the Verdugo Task Force, which is a coalition of fire departments that aid each other in arson investigations. *Id.* The City is not a signatory to any agreement with the Verdugo Task Force. *Id.* ¶ 50. Simpson, following consultation with the City Attorney, paused criminal arson investigations outside City limits to review the Verdugo Task Force's operating documents and assess the risk of liability to the City. *Id.* ¶ 51.

On January 16, 2024, Hernandez sent Simpson a letter stating that he and two other members of the Arson Unit were resigning from the special assignment due to Simpson's "systematic dismantling of [their] abilities to perform origin and cause and criminal investigations properly and effectively." *Id.* ¶ 59; Declaration of Derek Thompson ("Thompson Decl."), [\*12] Docket No. 41-1, Ex. 14.

#### E. Deputy Fire Chief Promotion

In October 2023, Hernandez applied for the Deputy Fire Chief position. SGD ¶ 60. Hernandez received one of the top three scores on the competitive examination for the Deputy Fire Chief position. *Id.* ¶ 61. The top three scorers are ranked in order of score on the eligibility list for the position and entitled to an interview by the

Department Head. *Id.* ¶ 62. On February 1, 2024, Hernandez was notified by HR that he had successfully passed the examination process for the Deputy Fire Chief position and was ranked first on the promotional eligibility list. See Thompson Decl., Ex. 15.<sup>2</sup> Simpson interviewed Hernandez, Donald, and one other candidate for the Deputy Fire Chief position. *Id.* ¶ 63.

On or about March 19, 2024, Simpson recommended Donald's appointment to the Deputy Fire Chief position. *Id.* ¶ 64. At the time he was selected, Donald met the minimum qualifications for the position and had already been a captain since 2015 and Interim Battalion Chief since 2021. *Id.* ¶¶ 65-66. City Manager Willie Hopkins ("Hopkins") subsequently issued his approval of Simpson's recommended appointment of Donald to Deputy Fire Chief. *Id.* ¶ [\*13] 69.

#### II. Legal Standard

Summary judgment is proper when a movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (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).

While the moving party carries the initial burden, "the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment[, but instead] must set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (internal citations and quotation marks omitted). The nonmoving party must "identify with reasonable particularity the evidence that precludes summary judgment," and if they fail to do so, "courts enter summary judgment in favor of the movant." *Davis v. Pinterest, Inc.*, 601 F. Supp. 3d 514, 522 (N.D. Cal.

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<sup>2</sup> In the SGD, Defendants appear to object to the authenticity of this document. See SGD ¶ 61. Defendants, however, did not include this objection in their Requests for Evidentiary Ruling on Specified Objections, see Docket Nos. 43-2, 44-2. Pursuant to this Court's Standing Order Re Summary Judgment Motions, see Docket No. 38, the Court will disregard this evidentiary objection because it does not comply with this Court's instruction.

2022), *aff'd*, No. 22-15804, 2023 WL 5695992 (9th Cir. Sept. 5, 2023) (quoting *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996)).

A court draws all inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "The opposing party cannot, however, stand on its pleadings or simply assert that it will be able to discredit the movant's evidence at trial," nor can they "rest on mere allegations or denials." *Liberty Mut. Ins. Co. v. Hawaiya Techs., Inc.*, No. 18-cv-00410-HG-(WRP), 2020 WL 3513228, at \*2 (D. Haw. June 29, 2020) (citing [\*14] Fed. R. Civ. P. 56(e) and *T.W.*, 809 F.2d at 630); see also *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009) (nonmovant's "bald assertions or a mere scintilla of evidence in his favor are both insufficient to withstand summary judgment"); *Abbywho, Inc. v. Interscope Recs.*, No. 06-cv-06724-MMM-(JTLx), 2007 WL 9701989, at \*5 (C.D. Cal. Oct. 23, 2007) ("Conclusory, speculative testimony in affidavits and moving papers . . . is insufficient to raise genuine issues of fact and defeat summary judgment.").

When the nonmoving party in a summary judgment motion does not rebut the movant's evidence, the Court treats those arguments as unopposed and "takes its own look at the evidence" to determine whether the moving party is "entitled to judgment as a matter of law." *Adriana's Ins. Servs. Inc. v. Auto Int'l Ins. Agency, Inc.*, 687 F. Supp. 3d 992, 1000 (C.D. Cal. 2023) (internal quotation marks omitted); see also *Kinsale Ins. Co. v. Golden Beginnings, LLC*, 557 F. Supp. 3d 1000, 1005 (C.D. Cal. 2021) ("The Court may grant an unopposed [summary judgment] motion if the movant's papers are themselves sufficient to support the motion and do not on their face reveal a genuine issue of material fact." (internal quotation marks omitted)); *Sound Found. v. SCI Fund II, LLC*, 658 F. Supp. 3d 929, 938 (D. Or. 2023) ("An unopposed motion for summary judgment does not automatically entitle the movant to judgment as a matter of law."); *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950 (9th Cir. 1993) (granting summary judgment is abuse of discretion if "movant's papers are insufficient . . . or on their face reveal a genuine issue of material fact").

### III. Discussion

Hernandez brings claims under 42 U.S.C. § 1983 and Cal. Lab. Code §§ 1101, 1102, and 1102.5 against both the City [\*15] and Simpson. See generally Complaint.

Defendants move for summary judgment as to all claims, asserting that no triable issues of material fact exist. See generally City MSJ; Simpson MSJ. The Court considers each claim in turn.

#### A. Section 1983 Claim

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that he or she was "deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999). A defendant has acted under color of state law where he or she has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). The statute is "a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

"The First Amendment forbids government officials from retaliating against individuals for speaking out." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010) (citations omitted). "To recover under § 1983 for such retaliation, a plaintiff must prove: (1) he engaged in constitutionally protected activity; (2) as a result, he was subjected to adverse action by the defendant that would chill a person of ordinary firmness from [\*16] continuing to engage in the protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action." *Id.* (footnote omitted) (citing *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006)). In the government-employer context, once a plaintiff has made out a prima facie case of First Amendment retaliation, the burden shifts to the government. *Riley's Am. Heritage Farms v. Elsasser*, 32 F.4th 707, 721 (9th Cir. 2022) (citing *Pickering v. Bd. of Ed. Of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568 (1968)). The government can avoid liability by showing (1) "that its 'legitimate administrative interests in promoting efficient service-delivery and avoiding workplace disruption' outweigh the plaintiff's First Amendment interests;" or (2) "that it would have taken the same actions in the absence of the plaintiff's expressive conduct." *Id.* (citations omitted). Applying this framework, the Court considers the viability of Hernandez's § 1983 claim as to each defendant in turn.

## 1. Simpson

### a. *Protected Activity*

"Whether a public employee . . . has engaged in speech protected by the First Amendment breaks down to two inquiries: (1) whether he 'spoke on a matter of public concern,' and (2) whether he 'spoke as a private citizen or public employee.'" *Dodge v. Evergreen Sch. Dist. #114*, 56 F.4th 767, 777 (9th Cir. 2022) (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 961 (9th Cir. 2011)).

#### i. Matter of Public Concern

"Speech addresses an issue of public concern when it can be fairly considered as relating to any [\*17] matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest." *Id.* (internal quotation marks omitted) (quoting *Lane v. Franks*, 573 U.S. 228, 241 (2014)). "What constitutes public concern is 'defined broadly,' based on the 'content, form, and context of a given statement, as revealed by the whole record.'" *Id.* (first quoting *Ulrich v. City & Cnty. of San Francisco*, 308 F.3d 968, 978 (9th Cir. 2002); and then quoting *Johnson v. Multnomah Cnty., Or.*, 48 F.3d 420, 422 (9th Cir. 1995)). "While no single factor is dispositive, 'content is the most important.'" *Id.* (quoting *Thomas v. City of Beaverton*, 379 F.3d 802, 810 (9th Cir. 2004)).

Here, Hernandez's speech consists of his comments at two City Council meetings about the Fire Department's understaffing issues and the Arson Unit.<sup>3</sup> See Simpson Opp. at 6-7. Simpson does not dispute that Hernandez's public comments relate to a matter of public concern. See *id.* at 13. The content of Hernandez's comments, the form in which they took, and the context in which they were given strongly suggest that "this speech is quintessentially a matter of public concern." See *Dodge*, 56 F.4th at 777.

#### ii. Public vs. Private Speech

"Speech made by public employees in their official

capacity is not insulated from employer discipline by the First Amendment but speech made in their private capacity as a citizen is." *Brandon v. Maricopa Cnty.*, 849 F.3d 837, 843 (9th Cir. 2017) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)). Whether a plaintiff speaks as a public employee or [\*18] a private citizen "depends on the 'scope and content of [the plaintiff's] job responsibilities.'" *Dodge*, 56 F.4th at 778 (quoting *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011)). "A person speaks in a personal capacity if he had no official duty to make the questioned statements, or if the speech was not the product of perfor[ming] the tasks [he] was paid to perform." *Id.* (alterations in original) (internal quotation marks omitted) (quoting *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1127 n.2 (9th Cir. 2008)). This inquiry "is a mixed question of fact and law." *Posey*, 546 F.3d at 1129.

To determine whether an employee's speech fell within his or her job duties, the Ninth Circuit identified three factors in *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013) (en banc), for consideration: (1) whether the employee confined his communication to his chain of command; (2) the subject matter of the communication; and (3) whether the public employee spoke in direct contravention to his supervisor's orders. *Id.* at 1074-76. An employee's formal job description is not dispositive of whether an employee's speech is within the scope of his job responsibilities because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform." *Garcetti*, 547 U.S. at 424-25.

Here, Hernandez had no official duty to make his comments at the City Council meetings, and he was not required to make them in order [\*19] to perform his job as a Battalion Chief. Simpson asserts, however, that Hernandez spoke in his official capacity because he "spoke before City Council from his perspective as a Battalion Chief and based on his special knowledge of the Department's operations and its day-to-day effects." Simpson MSJ at 18. Simpson explains that Hernandez's "commentary and suggestions regarding Department staffing practices and special assignments (*i.e.*, the Arson Unit) are inextricably intertwined with his duties as a Department management employee." *Id.* at 18-19. Hernandez contends that mere knowledge of "the Fire Department understaffing and Arson Unit . . . from his employment as Battalion Chief does not automatically establish the speech was done as a public employee." Simpson Opp. at 16. The Court would agree with Hernandez based on its consideration of the *Dahlia*

<sup>3</sup>Hernandez claims that he "has spoken at City Council meetings during public comment on at least three different occasions," Simpson Opp. at 7 (citation omitted), but the evidentiary record includes facts about only two meetings: one on June 20, 2023 and the other on February 20, 2024. Hernandez does not discuss when or precisely what he spoke about at the third meeting. See *id.*

factors.

First, Hernandez was clearly communicating outside of his chain of command when he made the comments at-issue. As such, "it is unlikely that he [wa]s speaking pursuant to his duties." *Dahlia*, 735 F.3d at 1074 (citations omitted). Second, while Hernandez's comments to the City Council relate to issues of which he may have only been aware by virtue of his employment [\*20] with the Fire Department, that alone does not necessarily suggest that his comments were made as a public employee. The Supreme Court clarified that "[t]he critical question under *Garcetti*, is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Lane*, 573 U.S. at 240. "[S]peech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Id.* At both City Council meetings, it is undisputed that Hernandez identified himself as a Battalion Chief of the City's Fire Department and that he made his comments while off-duty and not in uniform. See SGD ¶ 37. At the first of the City Council meetings at which Hernandez spoke, on June 20, 2023, Hernandez "reported the effects of the Department's staffing levels and mandatory overtime he observed among the firefighters he supervises, including concerns about errors in service delivery and delayed response times." Simpson MSJ at 16 (citing *id.* ¶ 31). At the second meeting on February 20, 2024, Hernandez "recited the Arson Unit's accomplishments under his professional [\*21] leadership, followed by a request to Council 'to please help us get our Arson Unit back.'" *Id.* (citing SGD ¶ 36). Although the subject matter of Hernandez's comments certainly relates to his paid duties as both a Battalion Chief and a member of the Arson Unit, the act of making his comments publicly to the City Council was not one of them. Finally, even though there is no evidence that Hernandez spoke in direct contravention to Simpson's orders, the Court observes that there is e-mail correspondence that suggests that Hernandez may have been under the impression that he was not permitted by Simpson to "speak about [his] dismantling the arson program" in a public forum such as a City Council meeting. See Docket No. 36, Ex. 13, at 001.

Simpson's reliance on *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), and *Williams v. Dallas Ind. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007), is unavailing. In *Freitag*, the Ninth Circuit held that a corrections officer's "internal reports of inmate sexual misconduct and documentation

of the prison's failure to respond" was not constitutionally protected because she "submitted those reports pursuant to her official duties as a correctional officer and thus not in her capacity as a citizen." *Freitag*, 468 F.3d at 546. Her communications with a state senator and with the state inspector general regarding [\*22] the same subject matter were, however, constitutionally protected because "[i]t was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace." *Id.* "Rather, it was Freitag's responsibility as a citizen to expose such official malfeasance to broader scrutiny." *Id.* (emphasis in original). Contrary to what Simpson appears to suggest, *Freitag* supports Hernandez's position because complaining to the City Council about the alleged failures of the Fire Department under Simpson's leadership was certainly not part of his official tasks as a Battalion Chief of the same department.

In *Williams*, an athletic director and head football coach at a high school wrote a memorandum to the school's principal detailing the issues he had been facing regarding the lack of funds in the school's athletic account. *Williams*, 480 F.3d at 690-91. The Fifth Circuit held that such speech was not constitutionally protected after closely analyzing *Garcetti* and concluding that "[a]ctivities undertaken in the course of performing one's job are activities pursuant to official duties." *Id.* at 693 (citing [\*23] *Garcetti*, 547 U.S. at 421). *Williams* is easily distinguishable because the memorandum at-issue was internal, directed to the employee's supervisor, and concerned issues that were relevant only to the internal operations of the school. Hernandez's comments were clearly external, directed to a governing body that exercises oversight over the Fire Department, and involved alleged issues with the Fire Department that concern the safety of the City's residents.

Accordingly, the Court would find that Hernandez's speech addresses a matter of public concern and that Hernandez spoke as a private citizen rather than in his official capacity as a public employee. As such, Hernandez was engaged in speech protected by the First Amendment.

#### *b. Adverse Action*

To determine if an adverse employment action occurred for purposes of First Amendment retaliation, courts in

the Ninth Circuit apply the "reasonably likely to deter" test. See *Greisen v. Hanken*, 925 F.3d 1097, 1113 (9th Cir. 2019). Under this test, the plaintiff must prove that the employer's action was "reasonably likely to deter employees from engaging in constitutionally protected speech." *Id.* (quoting *Coszalter v. City of Salem*, 320 F.3d 968, 970 (9th Cir. 2003)). "[T]he key question is whether the retaliatory activity would chill or silence a person of ordinary firmness from continuing to speak out." *Dodge*, 56 F.4th at 779 (internal quotation [\*24] marks omitted) (quoting *Blair*, 608 F.3d at 543 n.1). "The precise nature of the retaliation is not critical to the inquiry in First Amendment retaliation cases." *Coszalter*, 320 F.3d at 974.

Defendants assert that none of the following five alleged actions amount to adverse actions: (1) the 2025 NOD, see SGD ¶ 12; (2) the March 28, 2024, July 1, 2024, and September 19, 2024 NOIs, see *id.* ¶¶ 23-27; (3) the denied notifications of important announcements and news, see *id.* ¶¶ 20-21; (4) the January 15, 2025 performance evaluation, see *id.* ¶ 14; and (5) the deprivation of certain privileges held by members of the Arson Unit leading up to Hernandez's resignation from the special assignment, see *id.* ¶¶ 47-59. City MSJ at 16-20. Hernandez appears to concede that the third, fourth, and fifth actions were not adverse actions by failing to respond to Defendants' arguments regarding these particular actions or to produce any evidence creating a genuine issue of material fact. See Simpson Opp. at 16-18. As such, the issue of whether these alleged actions were adverse employment actions is deemed abandoned. See *Gutowitz v. Transamerica Life Ins. Co.*, 126 F. Supp. 3d 1128, 1154 (C.D. Cal. 2015); *Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D. 313, 336 n.67 (C.D. Cal. 2004) (citing *Resol. Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995), for the proposition that "[t]here is no burden upon the district court to distill every potential argument that could be made based upon the [\*25] materials before it on summary judgment. Rather, the onus is upon the Parties to formulate arguments; grounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned."). Hernandez contends only that his "missed promotional opportunity," the "Notices of Deficiencies," and the "disciplinary investigations" were adverse actions taken against him by Simpson. Simpson Opp. at 17.

To the extent Hernandez is referring to the 2024 NOD and the 2025 NOD, the Court does not find that either constitutes an adverse employment action based on the undisputed facts before it. The 2024 NOD was issued to

Hernandez due to the absence of one of his engine captains from a particular City event. See SGD ¶ 11. The 2025 NOD was issued to Hernandez as a result of his failure to complete a mandatory harassment training by the required deadline. See *id.* ¶ 12. The 2025 NOD was ultimately removed from Hernandez's file when Donald learned from HR that Hernandez was provided an extension to complete the training. See *id.* ¶ 13. Hernandez neither explains nor cites to any supporting authority for his proposition that these NODs "were merely to harass and deter protected future activity, [\*26] which clearly falls within the scope of an adverse action." See Simpson Opp. at 17. Hernandez also does not identify any facts that could suggest to a reasonable jury that the NODs were "designed to retaliate against and chill political expression." *Coszalter*, 320 F.3d at 975 (quoting *Thomas v. Carpenter*, 881 F.2d 828, 829 (9th Cir. 1989)). Moreover, even assuming the NODs were adverse actions, it cannot be disputed that Donald issued both NODs, see SGD ¶¶ 11-12, and there are no facts in the record that would support any argument (had one been made) that Simpson was actually responsible for them.

As to the "disciplinary investigations" or what the Court would assume to be the various NOIs issued between March and September 2024, Defendants assert that these internal investigations "were not adverse actions because they caused no material change in [Hernandez's] terms or conditions of employment." City MSJ at 17 (citation omitted). An adverse employment action for purposes of First Amendment retaliation, however, "need not be severe and it need not be of a certain kind." *Coszalter*, 320 F.3d at 975. "Nor does it matter whether an act of retaliation is in the form of the removal of a benefit or the imposition of a burden." *Id.* Hernandez contends that he "suffered a significant burden when he was subject to sever [sic] [\*27] disciplinary investigations after engaging in protected activity through speaking at City Council meetings" and that such "investigations were done in a harassing manner, with no other purpose . . . than to prod for facts to eventually use against [him] for future discipline." Simpson Opp. at 17. He further explains that he had encountered only one instance of discipline during his employment with the Fire Department before speaking at the City Council meetings. *Id.* Because Hernandez fails to cite to (and the Court fails to locate) any evidence in the record to support his arguments, the Court is unconvinced that the NOIs qualify as adverse employment actions for purposes of his § 1983 claim.

The denial of the Deputy Fire Chief promotion, however,

would qualify as an adverse employment action. To be clear, Defendants do not argue that Simpson's decision to promote Donald instead of Hernandez was not an adverse action. It is undisputed that Hernandez was within the top three scorers of the competitive examination and that he was entitled to an interview for the position of Deputy Fire Chief. See SGD ¶¶ 61-62. As such, Hernandez was one of three candidates interviewed. See *id.* ¶ 63. Hernandez [\*28] produced an e-mail from HR that indicates his "[o]verall examination score" was "87.50" and that his "[p]romotional eligibility list rank" was "1." See Thompson Decl., Ex. 15. Hernandez indicates that while Donald was ultimately selected for the position, Donald "only ever served as an interim Battalion Chief and never passed any examination required for the rank of Battalion Chief." Simpson Opp. at 10 (citing Hernandez Depo., at 241:4-20; Thompson Decl., Ex. 3, at 31:5-10). Hernandez testified that "Chief Simpson made multiple exceptions for [Donald] that he didn't make for anyone else." Hernandez Depo., at 241:12-14. Given that Hernandez was not only eligible for the promotion but also ranked first on the eligibility list, there is certainly a genuine dispute as to whether the promotion was given to Donald instead of Hernandez as retaliation for his speech. The denial of the promotion under these circumstances would be reasonably likely to deter employees like Hernandez from engaging in protected speech.

### c. Causal Relationship

The next critical question is whether Hernandez's protected speech was a "substantial or motivating factor" for the alleged adverse employment action. See *Coszalter*, 320 F.3d at 973. [\*29] To establish this element, the plaintiff must first produce evidence that his employer knew of his speech. See *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 751 (9th Cir. 2001). Without such knowledge, there can be no intent to retaliate. After showing knowledge, the plaintiff must demonstrate that the retaliation caused adverse action. In the absence of direct evidence, circumstantial evidence can establish an inference of retaliatory intent. *Id.* at 752. The plaintiff can produce evidence (1) regarding the proximity in time between the protected speech and the alleged adverse employment action; (2) that his employer expressed opposition to his speech; or (3) that his employer's proffered explanations for the adverse employment action were false and pretextual. *Id.* at 751-52.

Simpson does not dispute that he had knowledge of Hernandez's speech. Simpson asserts that Hernandez's "allegations that Simpson bore retaliatory animus for [Hernandez's] speech at Council meetings are speculative" and that he "alleges no plausible theory as to why [his] speech would cause Simpson to retaliate against him." Simpson MSJ at 20. Hernandez contends in a conclusory manner that he "has established sufficient temporal proximity from the disclosures to the adverse action." Simpson Opp. at 18. Hernandez explains [\*30] that he "made his disclosures on December 5, 2023 and Defendants made their decision regarding the Deputy Chief decision on March 19, 2024." *Id.* Because "[o]nly a few months had accrued between the two actions," Hernandez argues that "Defendants [sic] actions were pretextual." *Id.* Hernandez claims that "[t]his is not based on mere speculation as asserted by [Simpson], as Defendant Simpson has a history of retaliation against members of his Fire Department." *Id.*

It is unclear exactly what Hernandez is referring to with his mention of "disclosures on December 5, 2023." See Simpson Opp. at 18. There is an e-mail chain from December 5, 2023 in which Hernandez wrote that he "believe[d] that th[e] proposed [shift] movement [wa]s unjust and [wa]s in retaliation against Latino personnel and members who voted no confidence on the fire chief." Docket No. 36, Ex. 14, at 002. There is also a letter dated December 13, 2013 that Hernandez addressed to City Manager Jerry Grooms, in which he had requested an "independent[ ] investigation for discrimination and retaliation." Thompson Decl., Ex. 10. In reviewing both documents, the Court would understand Hernandez's position to be that he was denied [\*31] the Deputy Fire Chief position in retaliation for, *inter alia*, his comments about the Fire Department's understaffing issue at the June 20, 2023 City Council meeting. *Id.*; see also Simpson Opp. at 8-9. There is no direct evidence of Simpson's intent to retaliate against Hernandez. The sole piece of evidence Hernandez proffers in support of a causal relationship is the proximity in time of the adverse action to his protected speech. The Court would agree that the denial of the Deputy Fire Chief position was sufficiently proximate in time to Hernandez's protected speech activity to show an inference of causation. *Cf. Coszalter*, 320 F.3d at 977-78 (rejecting a bright-line rule about timing of protected speech retaliation but finding a reasonable inference of retaliation in an adverse action taken between three and eight months after the plaintiff's protected speech).

*d. Pickering Analysis*

Defendants assert that there was a legitimate, non-discriminatory reason for Simpson's decision to promote Donald instead of Hernandez to the position of Deputy Fire Chief. See City MSJ at 21. Defendants claim that Simpson selected Donald "based on his superior interview performance" and because "Donald demonstrated greater preparation [\*32] for the interview, provided more in-depth answers to Simpson's questions, and supported his answers with specific examples." *Id.* (citing SGD ¶ 67). They further explain that "Simpson also valued Donald's proactive approach to community involvement, including his leadership in the Fire Explorer program, which is a significant duty of the Deputy Fire Chief." *Id.* (same). Defendants also identify the "friction in [Hernandez's] relationship with Simpson" and the former's "open disrespect toward Simpson" as additional legitimate reasons for Simpson's refusal to select Hernandez as his second-in-command. *Id.*

While the Court would agree with Defendants that Hernandez's arguments in response are unpersuasive, the Court would nonetheless decline to grant summary judgment on his First Amendment retaliation claim based on its own review of the evidentiary record and the disputed facts in this case. While "Defendants may avoid liability by showing that [Simpson's] protected speech was not a but-for cause of the adverse employment action," the "but-for causation inquiry is . . . purely a question of fact." *Robinson v. York*, 566 F.3d 817, 825 (9th Cir. 2009) (citations omitted). The facts Defendants offer to suggest that Simpson would have made the same decision [\*33] to promote Donald to the Deputy Fire Chief position in the absence of Hernandez's comments at the City Council meeting are clearly disputed, see SGD ¶ 67, and rely largely on Simpson's credibility in order to be established. At this stage, it would be inappropriate for the Court to make credibility determinations or weigh any conflicting evidence. See *T.W.*, 809 F.2d at 630-31. It is, therefore, more appropriate for a jury than this Court to determine whether the decision to promote Donald instead of Hernandez would have occurred without the protected conduct. There is also sufficient evidence in the record that suggests Hernandez's First Amendment claim should be presented to a jury. It cannot be disputed that Hernandez was within the top three scorers of the competitive examination, see SGD ¶ 61, and that he ranked first on the promotional eligibility list based on his examination score, see Thompson Decl., Ex. 15.

Hernandez was also orally reprimanded by Simpson for his comments at a City Council meeting. See SGD ¶ 38. Simpson's decision to promote Donald instead of Hernandez was made less than a month after Hernandez spoke before the City Council about the Arson Unit. In short, there are genuine disputes of material [\*34] fact as to whether Simpson would have acted the same way absent Hernandez's speech.<sup>4</sup>

*e. Qualified Immunity*

Simpson asserts that he is entitled to qualified immunity

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<sup>4</sup>In his reply brief, Simpson argues for the first time that the *Elrod-Branti* rule is applicable here and that, therefore, Hernandez "was entitled to substantially less First Amendment protection as a candidate for the Deputy Fire Chief position." See Simpson Reply at 13-16. This rule refers to "a narrow exception to the First Amendment's protection in cases where the public employee is a policymaker or confidential employee." *DiRuzza v. Cnty. of Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000). Simpson claims that because "[t]he Deputy Fire Chief is a policymaking position subject to the *Elrod-Branti* exception," "[t]he First Amendment does not legally obligate Simpson to promote [Hernandez] to the position of his trusted deputy, on whom he relies to carry out his policy goals, where it is undisputed that [Hernandez] has openly and passionately expressed his disagreement with Simpson and demonstrated an ability to communicate productively with him." Simpson Reply at 16 (citation omitted).

Simpson acknowledges that this Court need not consider new arguments in a reply brief but argues, based on out-of-circuit case law, that this argument based on the *Elrod-Branti* rule is not "new" because "it rebuts matters that plaintiff has put in issue." *Id.* at 14 n.2 (citation omitted). First, the Court disagrees that it should consider this argument merely because the City discussed the relationship between Hernandez and Simpson in its opening brief, see City MSJ at 21, and Hernandez addressed the issue of adverse employment actions taken against him for purposes of his First Amendment retaliation claim, see Simpson Opp. at 16-17. As this argument is newly-raised in Simpson's reply brief, the Court will not consider it. See *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) ("[A]rguments raised for the first time in a reply brief are waived."); *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not consider arguments raised for the first time in a reply brief."). Second, even if the Court were to consider the argument, the Court fails to see the applicability here of the *Elrod-Branti* rule where Simpson makes no argument that Hernandez at the time of his protected speech "held a policymaking position where political affiliation was a 'reasonably appropriate requirement' for the job." *DiRuzza*, 206 F.3d at 1308 (citation omitted).

on Hernandez's § 1983 claim. Simpson MSJ at 22-23. Qualified immunity may shield a government official from liability for civil damages in a § 1983 claim. See *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). "To determine whether qualified immunity applies, we ask whether (1) the plaintiff has plausibly alleged a violation of a constitutional right, and (2) the constitutional right was 'clearly established' at the time of the conduct at issue." *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1018 (9th Cir. 2020). As Hernandez has plausibly alleged a violation of a constitutional right, the Court addresses only the second part of the inquiry.

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). To determine whether the law was clearly established, courts do not "require a case directly on point," but existing precedent must have placed "the constitutional question [\*35] beyond debate." *Id.* When this test is properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* (citation omitted).

Simpson asserts that "there was no existing precedent that established 'beyond debate' that Simpson could not consider [Hernandez's] public comments about internal policy matters squarely within [Hernandez's] managerial responsibilities when deciding whether to promote [him] to the second-highest position in the Department's chain of command." Simpson MSJ at 23. The Court disagrees with Simpson's arguments because he appears to misunderstand what constitutional right must have been "clearly established" for purposes of qualified immunity. The challenged conduct — the denial of the Deputy Fire Chief promotion — took place in 2024. See SGD ¶ 64. Therefore, "at the time [Simpson] acted, both the constitutional protection of employee speech and a First Amendment cause of action for retaliation against protected speech were clearly established." *Coszalter*, 320 F.3d at 979; see also *Garrido v. Cnty. of Los Angeles*, No., at \*13 (C.D. Cal. Sept. 10, 2025) ("[T]here is clearly established law prohibiting public employers and elected officials from retaliating against employees based on their protected speech . . . . This clearly established law prohibits [\*36] various forms of retaliation including . . . denied promotions."). If Hernandez is able to establish his version of the facts at

trial, then Simpson will not be entitled to qualified immunity.

In sum, the Court would **DENY** the Simpson MSJ insofar as it seeks summary judgment on Hernandez's § 1983 claim against Simpson for First Amendment retaliation.

## 2. The City

A municipality can be sued directly under § 1983 for violation of a plaintiff's constitutional rights when such "injury was caused by a municipal policy or custom." *Los Angeles Cnty., Cal. v. Humphries*, 562 U.S. 29, 31 (2010). "In order to establish liability for governmental entities under *Monell*, a plaintiff must prove '(1) that [the plaintiff] possessed a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and, (4) that the policy is the moving force behind the constitutional violation.'" *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (quoting *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997)) (alterations in original). For *Monell* cases, courts require "a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury." *Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 403 (1997). "The plaintiff must also demonstrate that, through its deliberate conduct, [\*37] the municipality was the 'moving force' behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Id.* at 404.

"In particular, municipalities may be liable under § 1983 for constitutional injuries pursuant to (1) an official policy; (2) a pervasive practice or custom; (3) a failure to train, supervise, or discipline; or (4) a decision or act by a final policymaker. A municipality may not, however, be sued under a respondeat superior theory." *Horton by Horton v. City of Santa Maria*, 915 F.3d 592, 602-03 (9th Cir. 2019). "[P]olicies can include written policies, unwritten customs and practices, failure to train municipal employees on avoiding certain obvious constitutional violations, and, in rare instances, single constitutional violations are so inconsistent with constitutional rights that even such a single instance indicates at least deliberate indifference of the municipality." *Benavidez v. Cnty. of San Diego*, 993 F.3d 1134, 1153 (9th Cir. 2021) (internal citation omitted). "[G]enerally, a single instance of unlawful

conduct is insufficient to state a claim for municipal liability under section 1983." *Id.* at 1154. "A municipality may be held liable on the basis of an unconstitutional [\*38] policy if a plaintiff can prove the existence of a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Johnson v. City of San Jose*, 591 F. Supp. 3d 649, 668 (N.D. Cal. 2022) (internal quotation marks omitted). "Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

First, the parties dispute whether the City has a "longstanding practice or custom" of retaliating against employees for constitutionally protected speech. It is undisputed that Hernandez does not believe Fire Chiefs prior to Simpson engaged in retaliation and that he believes Simpson broke with City custom and tradition by retaliating against him. SGD ¶ 70. The City indicates that Hernandez has not identified any other occasion in which a City employee faced retaliation for speaking or attempting to speak before the City Council. City MSJ at 25. Hernandez contends, without a single reference to the evidentiary record, that "there is systematic practice of retaliation by . . . Simpson" [\*39] based on (1) his retaliation against Local 2216<sup>5</sup> members following their "Vote of No Confidence" against Simpson in November 2023; (2) his retaliation against Hernandez for voicing his concerns at City Council meetings; (3) his selection of Donald instead of Hernandez for the position of Deputy Fire Chief; and (4) the fact that Hernandez was subject to several disciplinary investigations and two NODs "without any cause." City Opp. at 24.

Based on the record and the parties' arguments, the Court would find that Hernandez has not presented sufficient evidence from which it may be reasonably inferred that the City has a *de facto* policy of retaliating against its employees for protected speech. Hernandez identifies no policies that appear to be so persistent, widespread, permanent, and well settled so as to carry the force of law. See *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). While *Simpson* may have had a history of retaliation against

certain employees, there are absolutely no facts in the record that suggest the *City* also has such a history.

Second, the parties dispute whether Simpson "was an official with final policy-making authority." *Gordon v. Cnty. of Orange*, 6 F.4th 961, 974 (9th Cir. 2021). The City indicates that the City Charter grants the City Council with final authority [\*40] to approve Civil Service rules and regulations regarding personnel, subject to the Personnel Board's recommendations. City MSJ at 26 (citing SGD ¶ 68). Hernandez contends that "[i]t is evident that the City delegated authority to Defendant Simpson, who admitted himself he had the final selection in the Deputy Chief decision." City Opp. at 26. Hernandez points to no — and the Court cannot identify any — evidence in the record that Simpson has "final policy-making authority" over the City's employment policy. Simpson's testimony that he is "the last stop" was made in response to a question about his "role in the selection of a deputy chief." See Thompson Decl., Ex. 2, at 72:23-73:4. As the Supreme Court explained, establishing municipal liability on this ground requires showing not only that a particular official "has discretion in the exercise of particular functions" but also that the official is "responsible for establishing final government policy respecting such activity." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1986). As an example of this principle, the Supreme Court stated, "the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy." [\*41] *Id.* at 483 n.12. Where, as here, "county employment policy was set by the [City Council], only that body's decisions would provide a basis for county liability." *Id.* Because the focus of this inquiry is on employment "policy," rather than individual employment decisions, Hernandez's arguments relating to Simpson's role in the hiring process for Deputy Fire Chief are unavailing.

Finally, the parties dispute whether the City Manager who approved Simpson's recommended appointment of Donald to the Deputy Fire Chief position "ratified [Simpson's] unconstitutional decision or action and the basis for it." *Gordon*, F.4th at 974. "To show ratification, a plaintiff must prove that the 'authorized policymakers approve a subordinate's decision and the basis for it.'" *Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)) (citing *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992)). "Accordingly, ratification requires, among other things, knowledge of the alleged constitutional violation." *Id.* (citations omitted). It is

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<sup>5</sup>Hernandez was a member of the "Compton Firefighters, International Association of Firefighters, Local 2216" until his promotion to Battalion Chief in 2017. See City Opp at 6-7.

undisputed that Hopkins signed a Personnel Action Form approving Simpson's recommended appointment of Donald to the Deputy Fire Chief position. See SGD ¶ 69; Docket No. 36, Ex. 22. The City asserts that there is no evidence suggesting that Hopkins knew Simpson's reasons for recommending Donald's appointment [\*42] over the other two candidates he interviewed or that he endorsed Simpson's rationale. City MSJ at 27 (citing *Gillette*, 979 F.2d at 1348). Hernandez contends that Hopkins had knowledge of the alleged First Amendment violation based in part on an e-mail dated January 18, 2024 from Hernandez to Hopkins, among other individuals, regarding his "discrimination and retaliation complaint." City Opp. at 27. The Court has reviewed the Personal Action Form Hopkins signed and does not find sufficient evidence from which a reasonable jury could find that his mere approval of Simpson's recommendation to appoint Donald constitutes "a conscious, affirmative choice" to endorse Simpson's basis for the recommendation. *Gillette*, 979 F.2d at 1347. Hernandez admits that "Hopkins merely signed the requisite paperwork to hire for Deputy Chief, but was not involved in any of the decision making as he never even spoke to Chief Simpson about the Deputy Chief position before signing the document." City Opp. at 25. As such, there is no evidence that Hopkins made a deliberate choice to endorse Simpson's decision and the basis for it.

In sum, viewing the evidence in the light most favorable to Hernandez, the Court would find that no reasonable jury could have found proof of municipal liability. [\*43] Therefore, the Court would **GRANT** the City MSJ insofar as it seeks summary judgment on Hernandez's § 1983 claim against the City for First Amendment retaliation.

## B. State Law Claims<sup>6</sup>

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<sup>6</sup>Hernandez fails to oppose Simpson's arguments regarding his state law claims against Simpson. See Simpson Reply at 8. Hernandez also fails to oppose the City's arguments regarding his claim under Cal. Lab. Code §§ 1101 and 1102 against the City. See City Reply at 8. The Court considers these claims abandoned. See *Hermosillo v. Cnty. of San Bernardino*, No. 5:15-cv-00033-DTB, 2016 WL 10566648, at \*9 (C.D. Cal. Dec. 22, 2016); *Foster v. City of Fresno*, 392 F. Supp. 2d 1140, 1146 n.7 (E.D. Cal. 2005) ("[F]ailure of a party to address a claim in an opposition to a motion for summary judgment may constitute a waiver of that claim"); *Stichting Pensioenfonds ABP v. Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) ("[I]n most circumstances, failure to respond in an opposition brief to an argument put

### 1. Retaliation Under Cal. Lab. Code § 1102.5

"Section 1102.5 provides whistleblower protections to employees who disclose wrongdoing to authorities." *Lawson v. PPG Architectural Finishes, Inc.*, 12 Cal. 5th 703, 709 (2022). Under the statute, employers are prohibited from "retaliating against an employee for sharing information the employee 'has reasonable cause to believe . . . discloses a violation of state or federal statute' or of 'a local, state, or federal rule or regulation' with a government agency, with a person with authority over the employee, or with another employee who has authority to investigate or correct the violation." *Id.* (quoting Cal. Lab. Code § 1102.5(b)). To assert a claim under § 1102.5(b), a plaintiff must first show, by a preponderance of the evidence, that "(1) the plaintiff engaged in protected activity, (2) the defendant subjected the plaintiff to an adverse employment action, and (3) there is a causal link between the two," such that the employee's whistleblowing was a "contributing factor" to the adverse employment action. *Ross v. Cnty. of Riverside*, 36 Cal. App. 5th 580, 592 (2019); Cal. Lab. Code § 1102.6. Once an employee has made this prima facie showing, the burden shifts to the employer "'to demonstrate [\*44] by clear and convincing evidence' that the alleged adverse employment action would have occurred 'for legitimate, independent reasons' even if the employee had not engaged in protected whistleblowing activities." *Lawson*, 12 Cal. 5th at 712 (quoting Cal. Lab. Code § 1102.6)).

The Court recognizes that, because the City has moved for summary judgment, it carries the initial burden at summary judgment on this state law claim. See *Dep't of Fair Emp. & Hous. v. Lucent Techs., Inc.*, 642 F.3d 728, 745 (9th Cir.2011) ("Generally, 'the plaintiff [has] an initial burden of establishing a prima facie case of discrimination.' When an employer moves for summary judgment, however, the burden is reversed . . . because the defendant who seeks summary judgment bears the initial burden. Thus, '[t]o prevail on summary judgment, [the employer is] required to show either that (1) plaintiff could not establish one of the elements of [the] [state law] claim or (2) there was a legitimate, nondiscriminatory reason for its decision to terminate plaintiff's employment.'" (emphasis in original) (omission

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forward in an opening brief constitutes waiver or abandonment in regard to the uncontested issue."). As such, the Court would **GRANT** the Simpson MSJ insofar as it seeks summary judgment on the state law claims against Simpson and **GRANT** the City MSJ insofar as it seeks summary judgment on the claim under Cal. Lab. Code §§ 1101 and 1102 against the City.

in original) (first, second, third, and fourth alterations in original) (internal citations omitted)).

*a. Protected Activity*

The City asserts that "[i]n each alleged instance of protected activity, [Hernandez] lacked a reasonable belief that [\*45] he was reporting a violation of law." City MSJ at 13. First, the City argues that Hernandez's comments at the June 20, 2023 and February 20, 2024 City Council meetings regarding the Fire Department's understaffing issue and the Arson Unit, respectively, "expressed mere disagreement with City's operational decisions, which are internal policy choices." *Id.* at 14. It is undisputed that Hernandez did not believe he was reporting a violation of the law and did not identify any laws of which he believed the City was in violation when speaking before the City Council. See SGD ¶ 39. Hernandez makes no argument in response. The Court would agree with the City that Hernandez's "speech at both meetings constitutes [his] opinions regarding discretionary decisions and policy choices related to the Department" and that he was, therefore, not engaged in protected activity for purposes of § 1102.5. See City MSJ at 14.

Second, the City argues that Hernandez's December 5, 2023 e-mail regarding proposed shift movements is also "a policy disagreement unprotected by Section 1102.5." *Id.* at 15. In this e-mail addressed to McCombs, Hernandez wrote as follows:

Based on our conversation after receiving this email, I believe that this proposed [\*46] movement is unjust and is in retaliation against Latino personnel and members who voted no confidence on the fire chief. It is also unprecedented that the chief is dictating assignments and not the platoon commander as it has been past practice for at least the last 30 years.

It's obvious that all black firefighters on the A shift or those who supported the chief on the no confidence vote were not moved.

Docket No. 36, Ex. 14, at 002. During his deposition, Hernandez was asked whether he believed that the proposed shift movements were "illegal." Hernandez Depo., at 150:4-5. Hernandez replied, "Not illegal. But once again, unethical, for sure. You know, immoral." *Id.* at 150:6-7. The City also points to Hernandez's testimony that "establish[es] that his concerns with the proposed shift movement constitute a personnel matter, not whistleblowing." City MSJ at 15. He testified that the

proposed shift movement "just didn't make sense to [him]" because it would have moved "veterans" instead of "the younger guys" to the busier stations. Hernandez Depo., at 139:7-12. It is undisputed that these concerns were shared with Simpson in a meeting. See SGD ¶ 45. In another e-mail to McCombs dated two [\*47] days after Hernandez's initial e-mail regarding the proposed shift movements, Hernandez "provid[ed] his thoughts on the shift reassignment proposal after his discussion with McCombs," which "likewise focused on strategic considerations regarding moving particular personnel and did not mention retaliation." City MSJ at 15 (citing *Mueller v. Cnty. of Los Angeles*, 176 Cal. App. 4th 809, 822 (2009)); see also Docket No. 36, Ex. 15, at 001.

Hernandez contends that his December 5, 2023 e-mail "disclos[ed] . . . violations of racial discrimination law and violations of collective bargaining laws." City Opp. at 15. He proceeds to explain why he believes the City violated both the California Fair Employment and Housing Act ("FEHA") and the Meyers-Milias-Brown Act ("MMBA").<sup>7</sup> See *id.* at 15-17. In so doing, Hernandez appears to misunderstand precisely what constitutes protected whistleblowing activity under § 1102.5. As the City argues in response, "extensive authority has expressly required that a Section 1102.5 plaintiff must himself reasonably believe that he is reporting a violation of the law." City Reply at 9-10 (citing *People ex rel. Garcia-Brower v. Kolla's, Inc.*, 14 Cal. 5th 719, 731 (2023), for the proposition that § 1102.5 "does not protect employees who do not believe or who unreasonably believe that the information they are disclosing shows a violation [\*48] of the law"). Hernandez, however, has not offered any facts to dispute his testimony that he did not believe the proposed shift movements were illegal at the time he sent his e-mail and thus fails to raise any genuine dispute of material fact. The Court would conclude, therefore, that the City has met its burden of demonstrating that Hernandez cannot establish a prima facie case of retaliation because he has not produced any evidence that he engaged in a protected activity covered by § 1102.5. See *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1418 (9th Cir. 1988) ("The district judge is not required to comb the record to find some reason to deny a motion for summary judgment.").

Because the Court would find that Hernandez has not presented a triable issue of fact as to whether he

<sup>7</sup> The City argues that Hernandez's "references to FEHA and the MMBA in his Opposition are post-hoc theories that his attorneys crafted during litigation." City Reply at 10.

engaged in protected activity, the Court would **GRANT** the City MSJ insofar as it seeks summary judgment on the § 1102.5 claim against the City.

#### **IV. Evidentiary Objections**

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002); see also *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 385 (9th Cir. 2010) ("A district court's ruling on a motion for summary judgment may only be based on admissible evidence."). In the context of a summary judgment, a district court "must also rule on evidentiary objections that are material [\*49] to its ruling." *Norse v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010).

Defendants filed identical requests for evidentiary rulings on specified objections. See Docket Nos. 43-2,44-2. Because the evidence subject to these objections was not material to the Court's ruling on the motions, Defendants' requests are denied as **MOOT**.

#### **V. Conclusion**

Based on the foregoing discussion, the Court would **DENY** the Simpson MSJ as to the § 1983 claim against Simpson, **GRANT** the Simpson MSJ as to the state law claims against Simpson, and **GRANT** the City MSJ in its entirety.