**PRIORITY SEND**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

Case No. EDCV 10-01846 VAP(DTBx) Date: July 7, 2011

Title: WENDY THOMAS, et al. *v.* COUNTY OF RIVERSIDE SHERIFF'S DEPARTMENT, et al.

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PRESENT: HONORABLE VIRGINIA A. PHILLIPS, U.S. DISTRICT JUDGE

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| Marva Dillard<br>Courtroom Deputy | None Present<br>Court Reporter |

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| ATTORNEYS PRESENT FOR PLAINTIFFS: | ATTORNEYS PRESENT FOR DEFENDANTS: |
| None | None |

PROCEEDINGS: MINUTE ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (IN CHAMBERS)

Defendants' motion for summary judgment ("Motion") came before the Court for hearing on June 29, 2011. After reviewing and considering all papers filed in support of, and in opposition to, the Motion, as well as the arguments advanced by counsel at the hearing, the Court GRANTS the Motion in part and DENIES it in part.

## I. BACKGROUND

### A. Factual Background

#### 1. The Parties

Plaintiff Wendy Thomas ("Thomas") has worked for the County of Riverside

Sheriff's Department ("County" or "Sheriff's Department") since 1996 and currently works as a Sheriff's Communications Supervisor. (Compl. ¶¶ 6, 18.) Thomas alleges she has been subjected to "wrongful retaliation" for her participation in labor, union, and political activities. (Id. ¶ 1.) Before the alleged retaliation against her, Thomas "had never been disciplined" and "always had excellent performance evaluations." (Id. ¶¶ 6, 18.)

Plaintiff Service Employees International Union ("SEIU" or the "Union") represents approximately 6,000 of Defendant County's employees. (Compl. ¶ 5.)

Defendant County employs the six individually-named Defendants that remain in the action: Defendant Grotefend is a Sheriff's Captain for the Riverside County Sheriff's Department (Compl. ¶ 9); Defendant Hall is a Chief Deputy for the Riverside County Sheriff's Department (id. ¶ 11); Defendant Schertell is a Lieutenant for the Riverside County Sheriff's Department (id. ¶ 12); Defendant Woods is a Sheriff's Communications Manager for the Riverside County Sheriff's Department (id. ¶ 13); Defendant Gemende is a Sheriff's Communications Manager for the Riverside County Sheriff's Department (id. ¶ 14); and Defendant McArthur is the Director of Employee Relations for the County of Riverside Human Resources Department (id. ¶ 15).

**2. Thomas's Speech and Union Participation**

Beginning in 2008 and continuing to the present, Thomas has participated actively in collective bargaining and other activities with the SEIU, including serving as a negotiator during the 2009 and 2010 contract negotiations and as chief negotiator during the 2011-12 contract negotiations, being elected as SEIU's steward, giving public speeches, speaking with the media about Union issues, and serving as Regional Vice President of the SEIU Executive Board in 2010. (Compl. ¶¶ 6, 19-42, 90; Thomas Decl. ¶¶ 59, 61.)

Since becoming active in the Union, Thomas has spoken publicly on the status of Union negotiations with the County and on issues related to Union interests, including the need for greater collaboration between unions and political partnerships to lobby for "9-1-1 professionals" (Compl. ¶ 33; Thomas Decl. ¶ 64), the need for collaboration between the Union and political and community leaders

(Thomas Decl. ¶ 66), the Union's endorsement of political candidates (Compl. ¶ 33), Union negotiations with the County to raise support for the Union's bargaining positions (id. ¶¶ 24, 25; Thomas Decl. ¶ 29), and Union protests over proposed budget cuts (Compl. ¶ 29; Thomas Decl. ¶ 30.)

Thomas also "prepared and filed approximately 14 grievances on behalf of various [Union] members" (Compl. ¶ 34; Thomas Decl. ¶ 57 (stating that Thomas now has filed a total of 20 grievances)), assisted in filing an unfair labor practices charge with the Public Employee Relations Board ("PERB") related to the County's decision to stop paying automatic salary step increases for certain County employees (Compl. ¶ 35; Thomas Decl. ¶ 60), and assisted in making California Public Record Act requests under California Government Code section 6250 to recover public documents on various subjects (Compl. ¶ 35).

According to Thomas's time sheets, in 2008 she worked a total of 1,748.5 hours for the County, including 107.7 hours of overtime, 246 hours of compensatory time, and 124 hours of vacation time. (Woods Decl. ¶ 6.) In 2009, when Thomas became more actively involved with the SEIU, she worked 1,457 hours for the County, including 319.5 hours of duty-time for union-related activities, 161.6 hours of overtime, 164 hours of compensatory time, and 49 hours of vacation time. (Id.)

**3. Acts of Retaliation Alleged in the Complaint**

In approximately September 2008, Plaintiffs allege Defendant Woods reprimanded Thomas "for talking to supervisory peers about upcoming union issues without obtaining prior approval from Defendant Grotefend." (Compl. ¶ 42.) When Thomas became a member of the SEIU collective bargaining team, Defendant Woods removed Thomas from her position as the Chairperson of the Patrol-Dispatch Committee, a post Thomas had held for several years. (Id. ¶ 44.) Plaintiffs allege Thomas was removed solely because of her Union involvement. (Id.)

In approximately June 2009, Defendants "removed Thomas to a remote work site and provided her a work space that was substandard compared to that given to other supervisory employees at the same facility, even though supervisory office space was available at the time." (Compl. ¶ 45.) Defendant County subjected

Thomas to involuntary transfers three times[1] over a period of less than two years. (Id.)

During the 2009 collective bargaining negotiations, the Sheriff's Dispatch management made several statements referring to Thomas's participation in Union activities, including advising Thomas not to wear her County uniform during negotiations because "her name 'was being tossed around' by the Sheriff's Executive Staff and it was not good." (Compl. ¶ 46.) Defendant Schertell warned Thomas to "just lay low and not do anything to stand out during negotiations" and "to watch who she was talking to about disagreements with Sheriff's Department policies." (Id.) Following these warnings, Thomas requested to be removed from the SEIU contract-bargaining team out of fear of retaliation. (Id. ¶ 47.) Other members of the bargaining team convinced Thomas to remain on the team, however. (Id.)

On May 13, 2009, Defendant Schertell summoned Thomas to his office and told her that Defendant Walker and Defendant Grotefend received a complaint about Thomas's instructions to a Communications and Training Officer to correct a performance evaluation Walker and Grotefend had prepared on a trainee. (Compl. ¶ 46.) Defendant Schertell told Thomas that the manner in which the complaint was being handled was not routine. (Id.)

Around June 1, 2009, during the 2009 collective bargaining negotiations, the Press-Enterprise newspaper published an article about the Sheriff's Department granting pay raises to their executive staff during the 2009 budget crisis. (Compl. ¶ 48.) The article quoted an SEIU member who criticized the decision. (Id.) The following day, Defendant Woods, under the direction of Defendant Grotefend, initiated a personnel investigation of Thomas. (Id.) Woods told Thomas that "although the complaint was vague, it was the best they could come up with at the time." (Id.)

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[1] As noted in Section I(A)(4) infra, Thomas alleges the County again involuntarily transferred her, after the filing of this action. (See Thomas Decl. ¶ 95.)

On June 3, 2009, Defendants removed Thomas from her supervisory responsibilities for trainees assigned to the Desert Dispatch Center. (Compl. ¶ 49.) Defendant Gemende said management felt Thomas was "too busy" during the Union negotiations and so management "thought they would help." (Id.) Plaintiffs allege there had been no complaints regarding Thomas's work before Defendants took this action. (Id.) On June 9, 2009, Defendant Woods told Thomas the SEIU Efficiency Summit had proposed "stupid ideas" for the Sheriff's Department. (Id. ¶ 50.) On July 2, 2009, Defendant Woods said "they just couldn't wait around for Thomas since she was in negotiations" but later admitted she should not have made the comment. (Id. ¶ 51.)

In September 2009, Grotefend removed Thomas from the Uniform Committee and told the Communications Managers that Thomas's Union activities were taking too much time and that he wanted to remove some of her responsibilities. (Compl. ¶ 53.) On September 10, 2009, Defendant Woods discouraged Thomas's co-worker, Debbie Oliva, from attempting to reward Thomas for her participation in Union activities and reprimanded Oliva for using the County electronic mail message ("e-mail") system to solicit donations from Oliva's peers for a "thank you" gift for Thomas. (Id. ¶ 93.)

In October 2009, Defendant Schertell told Thomas that Grotefend "becomes obsessed with things right now and you're his obsession." (Compl. ¶ 54.) Schertell told Thomas that Grotefend's perception was that Thomas "was stretched by her union activities." (Id.) In October 2009, Defendant Grotefend instructed Defendant Schertell to begin tracking and reporting Thomas's use of release time for Union activities on a monthly basis. (Id. ¶¶ 55-56.) Grotefend also attempted to place a monthly eight-hour limit on Thomas's use of paid release time for Union activities. (Id. ¶ 58.) On October 15, 2009, Defendant Woods sent an e-mail to Thomas, and other supervisors, "with such a derogatory tone that other supervisory SEIU members were deterred from voicing complaints or filing grievances out of fear of being singled out and blamed for any change in policy." (Id. ¶ 59.)

On January 12, 2010, Defendant Schertell reprimanded Thomas for interacting

with an elected official and told Thomas that Thomas's actions could be perceived as overly aggressive and overstepping her boundaries. (Compl. ¶ 66.) In February 2010, Defendant Schertell removed Thomas from regular supervisor work schedules and placed her on a new schedule "created by Defendant Schertell for the purpose of tracking" Thomas's union-related activities. (Id. ¶ 72.) On February 2, 2010, Schertell warned Thomas that it was not in her best interest to question a Chief Deputy's decision or to anger "people in high places." (Id. ¶ 68.) Schertell informed Thomas that the Sheriff's Department did not care if the County Human Resources Department approved Thomas's time release, because the Sheriff's Department followed its own interpretation of the Union bargaining agreement. (Id.)

In February 2010, Defendant Hall informed Thomas that she should go through the proper channels and chain of command when she requested information about retroactive pay owed to SEIU members. (Compl. ¶ 73.) In March 2010, Defendant Walker excluded Thomas from Department Directive #10-009 to attend a parity discussion regarding Account Technicians in the Sheriff's Department until SEIU Regional Director Steve Matthews intervened on Thomas's behalf. (Id. ¶ 74.) On March 4, 2010, Defendant Gemende removed Thomas's normal supervisory access to certain e-mail groups. (Id. ¶ 75.) Gemende also excluded Thomas from supervisory information, promotional processes, awards presentations, and supervisor staff meetings. (Id.) On April 9, 2010, Gemende removed Thomas's access to Sheriff's Department computer servers. (Id. ¶ 78.)

In April 2010, Defendant McArthur attempted to exclude Thomas from participating in side bar discussions regarding collective bargaining. (Compl. ¶ 74.) McArthur failed to investigate or initiate an investigation of Thomas's claims against the Sheriff's Department for harassment related to her speech and Union activities. (Id. ¶ 83.)

On September 15, 2010, Defendant Hall referred to Thomas's union role and participation, her internal affairs complaint, and the filing of an unfair labor practices charge with the PERB before advising Thomas that Hall was considering placing restrictions on Thomas's overtime at the Dispatch Center and use of personal break time. (Compl. ¶ 84.) Hall also stated that he was denying Thomas's request to engage in outside employment. (Id.)

On September 17, 2010, Defendant McArthur told Thomas that the Sheriff's Department was afraid of her. (Compl. ¶ 86.) In November 2010, after it was announced that Thomas had been reelected to the SEIU bargaining team, Defendant Grotefend transferred Thomas to another work site. (Id. ¶ 90.)

Thomas's co-worker, Kathy Brown, reported that Grotefend tried to persuade Brown to change a statement about Thomas and wanted the statement "to sound worse than what actually occurred in order to discipline Thomas." (Compl. ¶ 95.) Defendant Schertell ordered Thomas not to participate in further Union activities or to solicit other Sheriff's Department members to assist Thomas with Union activities without his prior knowledge or approval. (Id. ¶ 69.) Schertell told Thomas he "didn't really care what kind of relationship Thomas or SEIU thought they had with higher ranking individuals or elected officials." (Id.)

**4. Alleged Retaliatory Acts After Plaintiffs Filed This Action**

Since filing this action, the County has initiated two new Internal Affairs Investigations against Plaintiff Thomas – one regarding Thomas's misuse of the County's e-mail system and another regarding Thomas allegedly accessing and removing other employees' training records. (Thomas Decl. ¶¶ 91-92 (E-Mail Investigation), 93 (Training Records Investigation).) Thomas admits that she forwarded one e-mail of a personal nature, a dancing baby video, that another County employee forwarded her. (Id. ¶ 92.) She also admits that she commented on and then forwarded another e-mail that a County employee forwarded to her, which contained photographs of mutual friends and County employees at a wedding. (Id.) Thomas contends, however, that other employees either have not been disciplined at all or have not been disciplined to the degree she was for similar conduct. (Id.) Thomas also admits that she included her attorneys on an e-mail exchange regarding the County revoking her previously approved vacation time for 2011, but again questions whether the resulting admonishment, interrogation, and investigation by the County were representative of the County's treatment of other employees. (Id.)

As to the training records investigation, Thomas states that the County misinterpreted her actions. (Thomas Decl. ¶ 93.) Thomas alleges she never took training records from her former office, and instead only retrieved copies of past e-

mails and e-mail attachments she previously had printed, in an effort to address an issue raised in her most recent performance evaluation. (Id.)

On March 4, 2011, Thomas was transferred involuntarily from her chosen graveyard shift to a daytime shift, which caused her to lose compensation for premium pay and placed an additional financial burden on her to obtain childcare. (Thomas Decl. ¶ 95; Grotefend Decl. ¶¶ 9-10, Ex. 2.) In March 2011, Thomas alleges that the Human Resources Department asked Thomas to provide the names and personal e-mail addresses of every County employee to whom she had sent union-related e-mail messages via her personal e-mail account. (Thomas Decl. ¶ 96.) Also in March 2011, the County's chief negotiator, Brian McArthur, "publicly called [Thomas] a liar and challenged [her] integrity" and "made several negative comments about" Thomas's filing of this action. (Id. ¶ 97.)

On May 4, 2011, the County began to remove Thomas from her teaching assignments at the Ben Clark Training Center where she had been teaching courses in Public Safety Communications for Riverside Community College since 2003. (Thomas Decl. ¶ 101.) Thomas estimates this change will deprive her of approximately $9,000.00 per year. (Id.)

Beginning in February 2011, Thomas alleges that Defendants required her to use personal leave time to attend Union meetings, even though the Memorandum of Understanding ("MOU") between SEIU and the County provides for paid release time for one shift per month to attend such meetings. (Thomas Decl. ¶ 103.)

## B. Procedural History

Plaintiffs Thomas and SEIU (collectively, "Plaintiffs") filed a complaint ("Complaint") on December 1, 2010 against Defendants. (Doc. No. 1.) Plaintiffs bring this action against the individually-named Defendants in their individual capacities.

Plaintiffs allege the following claims against all Defendants: (1) violation of 42 U.S.C. § 1983 – deprivation of the First Amendment right to freedom of association; (2) violation of 42 U.S.C. § 1983 – deprivation of the First Amendment right to freedom of speech; and (3) violation of 42 U.S.C. § 1983 – for retaliation on the

basis of protected First Amendment speech and association activities. Plaintiffs seek compensatory and punitive damages, injunctive relief, declaratory relief, and reasonable attorneys' fees. (Compl. at 29-30.)

On January 5, 2011, Defendants filed a motion to dismiss, which the Court granted in part and denied in part. Specifically, the Court: (1) dismissed Defendant Walker; (2) dismissed Defendants Grotefend, Schertell, Hall, Woods, Gemende, and McArthur in their official capacities, though they remain defendants in their individual capacities; and (3) denied the motion to dismiss as to all other Defendants, and on all other grounds.

On May 26, 2011, Plaintiffs filed: (1) the motion for preliminary injunction ("Motion"); (2) a memorandum of points and authorities ("Mem. P. & A."); (3) the declaration of Wendy Thomas ("Thomas Decl.") with Exhibits A through G attached; and (4) the declaration of Steve Matthews ("Matthews Decl.").[2] (Doc. Nos. 32, 33.)

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[2] Defendants object to almost every paragraph in Plaintiffs' supporting declarations with nearly identical objections: irrelevant, lacks foundation, conclusory, speculative, hearsay, best evidence rule. Defendants often fail to specify which portion of the statement they object to or to explain the basis for their objections. Except as described further below, the Court overrules these objections, but has independently considered the admissibility of the evidence underlying the statements, and has not considered irrelevant facts.

Moreover, at its discretion, the Court may consider inadmissible evidence, including hearsay statements, on a motion for preliminary injunction. Flynt Distrib. Co., Inc. v. Harvey, 734 F.2d 1389, 1394 (9th Cir. 1984). In Flynt, the Ninth Circuit reasoned that consideration of hearsay evidence was justified when "the urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial." Id. A court may give inadmissible evidence "some weight, when to do so serves the purpose of preventing irreparable harm before trial." Id.; see also Mullins v. City of New York, 626 F.3d 47, 52 (2nd Cir. 2010) ("The Federal Rules of Evidence do not apply to preliminary injunction hearings.").

Plaintiffs seek an injunction prohibiting Defendants from:

> (1) initiating any new involuntary transfers of Plaintiff Wendy Thomas; (2) continuing with their [Internal Affairs] probes into Thomas on trumped up charges; (3) enforcing two new [Internal Affairs] "gag orders" on Thomas; (4) conducting informal discovery about this lawsuit under the ruse of [Internal Affairs] investigations; and (5) further discriminating and retaliating against SEIU members for exercising their First Amendment rights to participate in union activities, such as serving on bargaining committees and as job site stewards.

(Mot. at 1-2.)

On June 8, 2011, Defendants filed opposition ("Opposition") to the Motion (Doc. No. 39), as well as: (1) the declaration of Richard Coz ("Coz Decl.") (Doc. No. 39-1); (2) the declaration of C. Brandon Ford ("Ford Decl.") (Doc. No. 39-2); (3) the declaration of Rick Hall ("Hall Decl.") (Doc. No. 39-3); (4) the declaration of Larry Grotefend ("Grotefend Decl.") (Doc. No. 39-4); (5) the declaration of Patricia Knudson ("Knudson Decl.") (Doc. No. 39-5); (6) the declaration of Anthony K. Price ("Price Decl.") (Doc. No. 39-6); (7) the declaration of Erick Schertell ("Schertell Decl.") (Doc. No. 39-7); (8) the declaration of Jason Trudeau ("Trudeau Decl.") (Doc. No. 39-8); (9) the declaration of Heather Woods ("Woods Decl.") (Doc. No. 39-9); (10) the declaration of Edward P. Zappia ("Zappia Decl.") (Doc. No. 39-10) with Exhibits 1-51 attached (Doc. Nos. 39-11, 39-12, 39-14); (11) the objections to the Matthews Declaration ("Matthews Decl. Obj.") (Doc. No. 39-15); (12) objections to the Thomas Declaration ("Thomas Decl. Obj.) (Doc. No. 39-16); and (13) the declaration of Brian McArthur ("McArthur Decl.") with Exhibits 1 through 28 attached (Doc. No. 40).

On June 15, 2011, Plaintiffs filed: (1) a reply ("Reply") (Doc. No. 41); (2) a response to Defendants' Objections to the Matthews Declaration ("Pls.' Resp. Matthews Decl. Obj.") (Doc. No. 43); (3) a supplement to the Thomas Declaration ("Thomas Decl. Supp.") (Doc. No. 44); and (4) the declaration of Alan Crowley ("Crowley Decl.") (Doc. No. 45).

## II. LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 24-25, 129 S. Ct. 365 (2008); see also Stormans, Inc. v. Selecky, 586 F.3d 1109, 1126-27 (9th Cir. 2009). "A preliminary injunction is an extraordinary and drastic remedy . . .; it is never awarded as of right." Munaf v. Green, 553 U.S. 674, 689-90 (2008) (citations omitted). Moreover, because a preliminary injunction is an extraordinary remedy, the movant must carry his burden of persuasion by a "clear showing." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); City of Angoon v. Marsh, 749 F.3d 1413, 1415 (9th Cir. 1984).

"Once a party moving for a preliminary injunction has demonstrated that it is likely to succeed on the merits, courts must consider whether the party will suffer irreparable harm absent injunctive relief, and whether the balance of the equities and the public interest favor granting an injunction." United States v. Arizona, ___ F.3d ___, ___, 2010 WL 1346945, at *19 (9th Cir. 2011) (citing Winter, 129 S. Ct. 365). The Ninth Circuit has "stated that an alleged constitutional infringement will often alone constitute irreparable harm." Assoc. Gen. Contractors v. Coal. for Econ. Equity, 950 F.2d 1401, 1412 (9th Cir. 1991) (internal quotation marks omitted); Cal. Pharmacists Ass'n v. Maxwell-Jolly, 563 F.3d 847, 852-53 (9th Cir. 2009) ("[I]t is clear that it would not be equitable or in the public's interest to allow the state . . . to violate the requirements of federal law, especially when there are no adequate remedies available.").

## III. DISCUSSION

### A. Likelihood of Success on the Merits

#### 1. Background

The Supreme Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in a pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

Such protected First Amendment rights "flow to unions" and union members participating in union activities. See Allee v. Medrano, 416 U.S. 802, 820 n.13 (1974).

At the same time, "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (citations omitted); Waters v. Churchill, 511 U.S. 661, 671 (1994) ("[T]he government as employer indeed has far broader powers than does the government as sovereign.").

While a government employee "by necessity must accept certain limitations on his or her freedom," the Supreme Court "has made clear that public employees do not surrender all their First Amendment rights by reason of their employment." Garcetti, 547 U.S. at 417, 418 (citations omitted). Government actions may unconstitutionally infringe upon speech and associational freedoms, such as when the government seeks "to impose penalties or withhold benefits from individuals because of their membership in a disfavored group," Roberts, 468 U.S. 622-23, or when the government infringes on an employee's right to speak as a citizen addressing matters of public concern, Garcetti, 547 U.S. at 417; Connick v. Myers, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government.").

**2. Legal Standard for First Amendment Retaliation Under 42 U.S.C. § 1983**

"Public employees suffer a constitutional violation when they are wrongfully terminated or disciplined for making protected speech." Marable v. Nitchman, 511 F.3d 924, 929 (9th Cir. 2007). A First Amendment retaliation claim against a government employer is analyzed through a sequential five-step inquiry: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state employer had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state employer would have taken the adverse employment action even absent the protected speech.

Huppert v. City of Pittsburg, 574 F.3d 696, 702 (9th Cir. 2009); Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009). The plaintiff bears the burden on the first three steps, but the burden shifts to the defendant at the fourth and fifth steps. See Nichols v. Dancer, 567 F.3d 423, 426 (9th Cir. 2009); Eng, 552 F.3d at 1070-72. Upon the plaintiff making a showing as to the first three factors,

> the burden shifts to the public employer to demonstrate either that, under the balancing test established by Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968), its legitimate administrative interests outweighed [the plaintiff's] First Amendment rights or that, under the mixed motive analysis established by Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977), it would have reached the same decision even in the absence of the plaintiff's protected conduct.

Ulrich v. City & Cnty. of S.F., 308 F.3d 968, 976-77 (9th Cir. 2002).

Here, Plaintiffs argue they are likely to succeed on the merits because there is sufficient evidence supporting their claims that Defendants retaliated against Thomas on the basis of her constitutionally protected activities. (See Mot. at 6, 7-19.) Defendants argue that Plaintiffs are unable to establish a likelihood of success on the merits because Plaintiffs have not met their burden of showing that: (1) Defendants took an adverse employment action against Plaintiff, or (2) retaliation was a substantial or motivating factor behind the adverse employment action. (Opp'n at 20-21.) Moreover, Defendants argue that even if Plaintiff were able to establish a prima facie case of retaliation, (1) the government's legitimate interests outweigh Plaintiff Thomas's First Amendment rights under the Pickering balancing test, and (2) Defendants would have taken the same actions even in the absence of the protected conduct under the Mt. Healthy mixed-motive analysis. (Opp'n at 21-23.)

**a. Whether Thomas Spoke on Matters of Public Concern**

A public employee's speech is protected if the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." Connick, 461 U.S. at 147. Determining whether a matter is one of "public concern" "is not an exact science," and the Ninth Circuit relies "on a

generalized analysis of the nature of the speech." Desrochers v. City of San Bernardino, 572 F.3d 703, 709-10 (9th Cir. 2009) (noting that the Ninth Circuit has rejected "rigid multi-part tests" and refused to "articulate[ ] a precise definition of public concern[,]" instead "defin[ing] the scope of the public concern element broadly and adopt[ing] a liberal construction of what an issude of public concern is under the First Amendment."). Accordingly, a court must examine "the content, form, and context of a given statement, as revealed by the entire record." Connick, 461 U.S. at 147-48.

Generally, "speech involves a matter of public concern when it fairly can be said to relate to any matter of political, social, or other concern to the community." Huppert, 574 F.3d at 703; Eng, 552 F.3d at 1070. In contrast, "speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies is generally not of public concern." Eng, 552 F.3d at 1070 (quotation and citations omitted); Connick, 461 U.S. at 154 (holding that while the First Amendment vests public employees with certain rights, it does not empower them to "constitutionalize the employee grievance."); Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003). The Ninth Circuit has held that courts "can place the speech on a continuum ranging from matters of public concern to matters of purely personal concern . . . . On one end, there is speech that relates to matters of concern to the community, including political or social matters," and on the other end, "there are individual grievances and personnel disputes that are irrelevant to the public's evaluation of governmental agencies." Clairmont v. Sound Mental Health, 632 F.3d 1091, 1103 (9th Cir. 2010). Thus, "the essential question is whether the speech addressed matters of 'public' as opposed to 'personal' interest . . . . based on the content, form, and context of a given statement, as revealed by the whole record . . . ." Desrochers, 572 F.3d at 709.

In its February 10, 2011, Order, the Court found that Plaintiffs sufficiently alleged in their Complaint that "the content, form, and context of Thomas's support a finding that Thomas's speech related to a matter of public concern." (See Doc. No. 21 at 17-19.) Defendants do not challenge Plaintiffs' evidence related to that finding here, and Plaintiffs have produced evidence, in the form of declarations, to support the allegations in the Complaint.

Thomas spoke at public meetings, rallies, to the media, and to the County's Board of Supervisors on various issues including the need for greater collaboration between unions and political partnerships to lobby for "9-1-1 professionals" (Compl. ¶ 33; Thomas Decl. ¶ 64); the need for collaboration between the Union and political and community leaders (Thomas Decl. ¶ 66); the Union's endorsement of political candidates (Compl. ¶ 33); Union negotiations with the County to raise support for the Union's bargaining positions (Compl. ¶¶ 24, 25; Thomas Decl. ¶¶ 26, 29, 37); and Union protests over proposed budget cuts (Compl. ¶ 29). Thomas communicated directly with the media and was interviewed, featured, and quoted in local newspapers, and on a local television news program, a radio talk show, and SEIU's website. (Thomas Decl. ¶¶ 30, 31.) Thomas "prepared and filed approximately 14 grievances on behalf of various [Union] members" (Compl. ¶ 34; Thomas Decl. ¶ 57), assisted in filing an unfair labor practices charge with the PERB over the County's decision to stop paying automatic salary increases to some County employees (id. ¶ 35; Thomas Decl. ¶ 32), and assisted in making California Public Record Act requests under California Government Code § 6250 to recover public documents on various subjects (id.). (See also Thomas Decl. ¶¶ 10, 11, 13, 15, 18, 23.)

As noted in the February 11, 2011, Order, the content of Thomas's speech primarily relates to matters of concern to the community, rather than individual grievances and personnel disputes. See Clairmont, 632 F.3d at 1105 (citing Desrochers, 572 F.3d at 715). The Ninth Circuit has noted that public employee speech is protected when

> it debates the allocation of school funds, Pickering, 391 U.S. at 571-72; criticizes the failure to grant pay raises that may affect the hiring and retention of police officers, McKinley[ v. City of Eloy], 705 F.2d [1110,] 1114 [(9th Cir. 1983)]; questions a city's preparedness to respond to fires due to budget cuts and firefighter layoffs, Gilbrook [v. City of Westminster], 177 F.3d [839,] 866 [(9th Cir. 1999)]; and highlights inappropriate standards affecting patient care at a public hospital, Roth v. Veteran's Admin., 856 F.2d 1401, 1406 (9th Cir. 1988).

Ulrich, 308 F.3d at 978-79. Here, Thomas spoke on issues that would enable members of society to make informed decisions about the operation of their county

government. Though some of Thomas's activities involved the filing of grievances or other complaints against the County, Thomas brought the grievances on behalf of other Union members, not on behalf of herself. Moreover, Thomas's activities were not isolated to filing grievances and complaints; instead, she participated in a broad range of union-related activities and speech. The content of Thomas's speech accordingly supports a finding that her speech related to a public concern.

The form of Thomas's speech also demonstrates that her speech related to a matter of public concern. Desrochers, 572 F.3d at 714-15 & n.17. Although not dispositive, the fact that speech was addressed to a small or limited audience "'weigh[s] against [a] claim of protected speech.'" Id. at 714 (alteration in original) (quoting Roe v. City of San Francisco, 109 F.3d 578, 585 (9th Cir. 1997)); see also Garcetti, 547 U.S. at 420. For example, when speech takes the form of an internal employee grievance, and is not presented to the public, the form "cuts against a finding of public concern." Desrochers, 572 F.3d at 715.

Here, though some of Thomas's speech took the form of internal employee grievances and occurred in private fora or small groups, much of Thomas's speech took place at large public meetings, or in the media. (See Compl. ¶ 24, Thomas Decl. ¶ 30 (Thomas spoke to approximately 600 people at a public rally); Compl. ¶ 25, Thomas Decl. ¶ 29 (Thomas spoke to approximately 750 people about the state of Union negotiations with the County); Compl. ¶ 26, Thomas Decl. ¶ 30 (Thomas participated in a public rally attended by more than 600 people and was quoted by "KABC news, newspaper articles, and SEIU's website"); Compl. ¶ 29; Thomas Decl. ¶ 31 (Thomas was interviewed by a public radio station regarding Union protests); Compl. ¶ 30, Thomas Decl. ¶ 31 (Thomas was master of ceremonies at the SEIU General Membership meeting of over 700 members); Compl. ¶ 33 (Thomas participated in and led political endorsements and Union town hall meetings; Thomas acted as master of ceremonies for the SEIU Vision Conference, which was attended by Union members and over fifty elected officials, economic experts, and community and business leaders).) The form of Thomas's speech therefore supports a determination that her speech related to a matter of public concern.

Finally, as to the context of Thomas's speech, "[w]hen a public employee's contested speech occurs in the context of an internal power struggle or personal

employment grievance, this will militate against a finding of public concern." Clairmont, 632 F.3d at 1104 (citing Desrochers, 572 F.3d at 715); Tucker v. Cal. Dep't of Educ., 97 F.3d 1204, 1210 (9th Cir. 1996)). Here, while the County and the Union arguably are engaged in a "struggle" regarding the collective bargaining agreement, at least some of Thomas's speech was directed to a broad audience and involved more comprehensive issues than a power struggle or grievance. For example, one of the issues Thomas discussed was compensation levels of Sheriff's Department employees, which "undoubtedly affect[s] the ability of a city to attract and retain qualified police personnel . . . ." McKinley, 705 F.2d at 1114. Furthermore, "the interrelationship between city management and its employees is closely connected with 'discipline and morale in the workplace ' – factors that are 'related to the agency's efficient performance of its duties.'" Id. (citing Connick, 461 U.S. at 148, 160 n.2 (Brennan, J. dissenting)). Finally, some of Thomas's speech was "specifically and purposefully directed to the public" through public meetings, interviews with the media, and placing the speech on SEIU's publicly accessible website. See McKinley, 705 F.2d at 1115. Thus, the context of Thomas's speech supports a determination that her speech related to a matter of public concern.

In sum, the Court concludes the content, form, and context of Thomas's speech, as pled in the Complaint and supported by declarations, demonstrate that Thomas's speech related to a matter of public concern.

**b. Whether Plaintiff Thomas Spoke as a Private Citizen or Public Employee**

Neither Plaintiffs nor Defendants address whether Plaintiffs meet their burden of establishing that Thomas spoke as a private citizen.[3] The Court must consider

[3] In failing to address this factor, Plaintiffs appear to adopt the Ninth Circuit's pre-Garcetti test, which has since been rejected by the Supreme Court. In Garcetti, the district court granted summary judgment in a public employer's favor, holding that the employee did not speak as a private citizen because his speech arose pursuant to his employment duties. See Garcetti, 547 U.S. at 415. The Ninth Circuit reversed, holding the employee's speech was inherently a matter of public concern.

this factor independently, however, as the Supreme Court requires that a plaintiff establish that she spoke as a private citizen to prevail on a claim of First Amendment retaliation. See Garcetti, 547 U.S. at 415, 420-22.

A public employee's speech is not protected by the First Amendment when the speech is part of the employee's official job duties. Garcetti, 547 U.S. at 421-23 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."). Whether an employee's disputed speech is part of her official duties presents a mixed question of fact and law. Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1129 (9th Cir. 2008).

Some of Thomas's speech was conveyed within her workplace. In Garcetti, the Supreme Court noted that while the public employee "expressed his views inside his office," that fact was "not dispositive" because "[m]any citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like any member of the general public to hold that all speech within the office is automatically exposed to restriction." 547 U.S. at 420-21 (quotation and internal citation omitted). Moreover, Thomas spoke not only within the workplace, but also, and perhaps primarily, outside of the workplace in public meetings, rallies, conferences, and to the media.

Next, the content of almost all of Thomas's speech concerned employment, i.e., the subject-matter of her speech related to the employment terms and conditions of County employees. The content of the speech "is nondispositive," however, because "[t]he First Amendment protects some expressions related to the

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Id. In reaching this conclusion, the Ninth Circuit did not address whether the employee spoke as a citizen or in accordance with his job duties. See id. The Supreme Court reversed the Ninth Circuit, reasoning that courts must consider whether an employee's speech was made pursuant to his official duties. Id. at 422. Where a court concludes the speech arose pursuant to an employee's duties, the employee cannot prevail under a retaliation theory. Id.

speaker's job." Garcetti, 547 U.S. at 421 (citing Pickering, 391 U.S. at 573). As the Supreme Court noted in Pickering,

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

391 U.S. at 572. "The same is true of many other categories of public employees." Garcetti, 547 U.S. at 421. Thus, under Garcetti, as a County employee Thomas is likely to have views about the working conditions, compensation, and benefits of County workers, and should be able to "speak out freely on such questions without fear of retaliatory dismissal." Pickering, 391 U.S. at 572.

The controlling factor, as the Supreme Court reasoned in Garcetti, is whether Thomas's expressions were made pursuant to her duties as a Sheriff's Communications Supervisor (or other position she held during the events alleged in this action). In Garcetti, a deputy district attorney alleged the government retaliated against him for writing a memorandum that recommended dismissal of a case on the basis of purported governmental misconduct. 547 U.S. at 420-23. The Supreme Court found that the employee wrote the memorandum "because that is part of what he, as a calendar deputy, was employed to do." Id. at 421 ("The significant point is that the memorandum was written pursuant to [the plaintiff's] official duties."). "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." Id. at 421-22 (citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 833 (1995) ("[W]hen the government appropriates public finds to promote a particular policy of its own it is entitled to say what it wishes."). See also Huppert, 574 F.3d at 707-008 (granting qualified immunity because testifying in court is part of a California police officer's official duties). The Supreme Court accordingly concluded that the deputy district attorney could not maintain a retaliation claim. Garcetti, 547 U.S. at 426 ("We reject . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.").

On the other end of the spectrum, in Pickering, the Supreme Court found that a public school teacher spoke as a private citizen when he wrote a letter to a local newspaper criticizing the school board's handling of bond issue proposals and the allocation of resources between academic and athletic programs. 391 U.S. at 565-67, 71-73; Garcetti, 547 U.S. at 421-22 ("Contrast, for example, the expressions made by the speaker in Pickering, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day"); see also Eng, 552 F.3d at 1073 (finding the plaintiff's version of the facts plausibly showed that he spoke as a private citizen because, although he learned about the subject matter of his speech in the course of his employment, he had no official duty to complain about it to the relevant agency).

The facts here are analogous to Pickering and Eng. Like the plaintiffs in those cases, Thomas's speech was not part of her job duties. Thomas's job duties did not require her to advocate for or speak on behalf of the Union. While it appears that the County compensated Thomas for at least some time she spent on union-related activities pursuant to the MOU, Thomas was not compensated by the County for most of the activities at issue. Cf. Rosenberger, 515 U.S. at 833. Furthermore, Thomas's communications were not made as part of her duties as a Sheriff's Communications Supervisor, but rather in connection with her duties as a Union steward, Vice President, and negotiator. Accordingly, the Court finds that Plaintiffs plausibly have shown that Thomas spoke as a private citizen because she did not have a duty to discuss, participate in, or advocate for union-related causes.

**c. Whether the Speech Was a Substantial or Motivating Factor in the Adverse Employment Action**

With respect to the third inquiry, the plaintiff bears the burden of showing the state "took adverse employment action . . . [and that the] speech was a 'substantial or motivating' factor in the adverse action." Freitag v. Ayers, 468 F.3d 528, 543 (9th Cir. 2006) (quoting Coszalter, 320 F.3d at 973); see also Marable, 511 F.3d at 930, n.10 ("It is [the plaintiff]'s burden to show that his constitutionally protected speech was a motivating factor in [the state]'s adverse employment action.").

The plaintiff may offer either direct or circumstantial evidence to demonstrate a defendant's retaliatory motive. Ulrich, 308 F.3d at 980; Allen v. Iranon, 283 F.3d

1070, 1075 (9th Cir. 2002). The plaintiff must present evidence that the defendant had knowledge of the plaintiff's protected speech. Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 928 (9th Cir. 2004); Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750-52 (9th Cir. 2001). Once the defendant's knowledge of the protected speech is shown, a plaintiff may demonstrate a retaliatory motive circumstantially by showing: (1) a sufficient proximity in time between the protected action and the allegedly retaliatory employment decision; (2) that the employer expressed opposition to his speech, either to him or to others; or (3) that the employer's proffered explanations for the adverse employment action were false and pretextual. Alpha Energy, 381 F.3d at 929; Coszalter, 320 F.3d at 977; Ulrich, 308 F.3d at 980; Keyser, 265 F.3d at 751-52. "There is no set time beyond which acts cannot support an inference of retaliation, and there is no set time within which acts necessarily support an inference of retaliation," rather, a court must consider the period of time along with the factual setting and circumstance of the particular case. Coszalter, 320 F.3d at 978.

Plaintiff Thomas has alleged that Defendants took multiple adverse employment actions against her on the basis of her speech. Defendants argue that some of these actions would not themselves constitute adverse employment actions. (See, e.g., Opp'n at 20 ("Absent a retaliatory motive, a 'transfer is not an adverse employment action when it is into a comparable position that does not result in substantial or tangible harm." (citing California state law cases)); ("[W]hen an employer's response includes only minor acts, such as 'bad-mouthing,' that cannot reasonably be expected to deter protected speech[;] such acts do not violate an employee's First Amendment rights." (citing Coszalter, 320 F.3d at 976)).) The parties' dispute lies not with a legal question of whether certain events may be characterized adverse employment actions, but rather (1) whether Defendants actually acted in the manner Thomas alleges, and (2) whether Defendants' actions were motivated by Thomas's speech. The Court accordingly analyzes the parties' evidence related to Defendants' alleged adverse employment actions against Thomas.

**Reprimanding and Removing Thomas from Committee for Meeting with Co-Workers to Discuss Union Issues**

Plaintiff alleges that in the fall of 2008, Thomas spoke with her supervisory

peers following a staff meeting regarding the need for active Union involvement and to elect a Union steward to represent them. (Thomas Decl. ¶ 10.) Thomas's coworkers agreed and expressed their support for Thomas becoming their Union steward. (Id.) Shortly thereafter, Defendant Woods called Plaintiff into Lieutenant John Pingel's ("Pingel") office. (Id.) Woods and Pingel "chastised and reprimanded" Thomas "for talking to the other supervisors about union issues without Captain Larry Grotefend's prior knowledge and/or permission. They specifically instructed [Thomas] not to call a meeting to talk with other co-workers or supervisors about union-related issues without prior notification and approval." (Id.)

Defendants respond that Woods and Pingel spoke with Thomas regarding the meeting because the "attendees were on duty or on overtime, and . . . were required to return to duty or leave[,] otherwise their time would be considered an additional overtime." (Woods Decl. ¶ 2.) At the time Woods and Pingel requested a meeting with Thomas, "neither Pingel nor [Woods] had any knowledge" regarding what Thomas and the supervisors had discussed. (Id.) Woods denies that either she or Pingel reprimanded Thomas; instead, Woods states, "We merely brought to her attention that she should not call an on[-]duty meeting or have other on[-]duty employees attend that meeting without obtaining prior authorization from her supervisors." (Id. ¶ 3.)

Under the MOU, the Union may conduct meetings with represented employees only "before and after work and during lunch periods (non-working time)" and such meetings must "be scheduled through Human Resources." (See, e.g., Zappia Decl., Ex. 50, Art. 32 § 4 (Union Rights-Worksite Access).) Thomas's meeting violated this provision. It appears, at this stage, that Defendants' discussion with Thomas regarding this on-duty meeting was warranted under the MOU, and not a retaliatory act.

A few days after the above discussion with Woods and Pingel during which Thomas revealed that she intended to become a Union steward, Thomas was removed from the Patrol-Dispatch Committee. (Thomas Decl. ¶ 12.) According to Thomas, Woods advised her that she had been removed from the Committee because she had been assigned to the Dispatch Training Unit several months earlier. (Thomas Decl. ¶ 12.) Thomas states that she had been assigned to the

Dispatch Training Unit for several months already and was able to handle both assignments. (Id.) Thomas also contends that she had not been informed of any reports or evidence otherwise. (Id.) Moreover, given the timing of the action, Thomas "felt the Sheriff's Department and its managers were retaliating against [her] by removing [her] from the Patrol-Dispatch Committee that [she] enjoyed and which had put [her] in direct contact with other Department employees throughout the County." (Id. ¶ 12.) Plaintiffs argue that "[t]he timing and pretextual explanation of Defendants' decision to remove Thomas form the Committee shows that retaliation was a substantial or motivating factor in Defendants' decision to remove her from the Patrol Dispatch Committee."

In Coszalter, the Ninth Circuit held that evidence of proximity in time between the protected action and the alleged retaliatory employment decision and evidence that the employer's proffered explanations for the adverse employment actions were pretextual allow a fact finder reasonably to conclude that an employee was disciplined in retaliation for speech. 320 F.3d at 977. Defendants do not address these claims and offer no other explanation for Thomas's removal from the Dispatch-Patrol Committee. In light of Plaintiffs' evidence and the lack of any evidence contradicting it, Plaintiffs have made a "clear showing," at this stage, that

Thomas's speech was a substantial or motivating factor in her removal from the Dispatch-Patrol Committee. See Mazurek, 520 U.S. at 972.

**April 1, 2009, Involuntary Transfer**

On March 26, 2009, Thomas attended the first bargaining session for the new MOU and was elected as the official scribe for the bargaining team. (Thomas Decl. ¶ 18.) Thomas informed Lieutenant Schertell that she would be participating in the bargaining team and that the bargaining sessions were expected to last through June 2009. (Id.) Approximately one week later, on April 1, 2009, Plaintiff Thomas was transferred involuntarily "to a remote worksite" and provided "with a workstation that was substandard compared to that which was provided to other supervisory employees at the same facility." (Id.) Thomas contends that "[t]here was a vacant supervisory office space available in the same building that remained vacant during" the time Thomas worked there. (Id.)

Defendants contend that the Chief Deputy Hall's responsibility is to make personnel decisions on the basis of what is in the best interest of the "efficient operations of the Department." (Hall Decl. ¶ 2.) In April 2009, Hall ordered the entire training unit, which consisted of five employees including Thomas, to move to a new location "because the Department simply did not have enough space for them at the Dispatch Floor Operations . . . due to increases in . . . hiring and training of dispatch personnel, the subsequent expansion of staff" and expansion of the "911 PSAP operation." (Grotefend Decl. ¶ 4.) Defendants attach credible evidence, in the form of Staff Meeting Minutes from February 11, 2009, showing the decision to move the training team predated Thomas informing management on March 26, 2009, that she planned to participate in the 2009 bargaining negotiations. (Grotefend Decl. ¶ 4, Ex. 1.) Thus, the Court does not find persuasive, at this stage, Plaintiffs' argument that Thomas's April 2009 transfer was in retaliation for her union-related activities.

**Warning Thomas Against Participating in the 2009 MOU Negotiations**

Thomas alleges that five weeks after she was transferred, Schertell admonished Thomas to "lay low" during the MOU negotiations, not question Sheriff's Department policies, no longer wear her uniform in MOU negotiations, and that the executive staff was talking disparagingly about her participation in the MOU negotiations. (Thomas Decl. ¶ 20.) Thomas was so frightened that she attempted to resign from the bargaining team, but was dissuaded from doing so. (Id. ¶¶ 20, 22.)

In Schertell's declaration, he states that he did not tell Thomas not to wear her uniform during negotiations; to the contrary, Schertell alleges Thomas approached him to ask if it was acceptable for her not to wear her uniform to negotiations because it was uncomfortable, even though she technically was on duty. (Schertell Decl. ¶ 2 (emphasis added).) Schertell denies that he told Thomas to lay low, not to question Sheriff's Department policies, that the executive staff was talking disparagingly about Thomas's MOU participation, or that Grotefend was "obsessed" with Thomas. (Id. ¶¶ 3-5.) The only statement Schertell admits making was that Captain Grotefend "believed that [Thomas] was stretched out by her union activities." (Id. ¶ 6.)

The parties' versions of the facts here are sharply in dispute as to whether the adverse action even occurred, and it is difficult, if not impossible, to assess the credibility of Thomas and Schertell on the basis of their declarations. Accordingly, the Court finds Plaintiffs have not made a "clear showing" that Schertell warned Thomas against participating in Union activities. See Mazurek, 520 U.S. at 972.

**June 2009, Personnel Investigation**

In June 2009, a local newspaper, the Press-Enterprise, printed an article that was critical of the Sheriff's Department Executive staff for granting themselves pay raises, while the County simultaneously sought a $50 million reduction in wages and benefits from SEIU members. (Thomas Decl. ¶ 23.) The article quoted another SEIU member, but not Thomas. (Id.) One day later, Grotefend allegedly "initiated an [Internal Affairs] investigation into Thomas." (Mot. at 12; Thomas Decl. ¶ 23.) Thomas alleges that the investigation notice she received did not specify any particular incident, but instead stated that she was being investigated "for a violation involving rude and discourteous behavior." (Id. ¶ 24; Woods Decl. ¶ 4, Ex. 2.) Thomas alleges Woods told her that it "was the best the department could come up with at the time." (Id.) Thomas contends that contrary to County policy, details of the allegations were shared with other employees, including her peers who were not involved in the investigation. (Id.) On September 9, 2009, after MOU negotiations had concluded, Thomas received the investigation report, which determined the allegations against her were "unfounded." (Woods Decl. ¶ 5, Ex. 4.)

Defendants argue that the investigation was not conducted in retaliation for Thomas's speech, but rather "was the result of a seven-page long complaint made against [Thomas and another supervisor] by a former trainee." (Opp'n at 8.) Defendants state that they have a legal obligation to investigate credible allegations of misconduct or rule violations. (Knudson Decl. ¶ 3.) The Sheriff's Department's Professional Standards Bureau ("PSB") "regularly investigates allegations of rules violations against any employee, and has done so in the past." (Id. ¶ 8, Ex. 5.)

Defendants provide the complaint filed by Thomas's former employee and a copy of the personnel investigation notification they provided Thomas. (Woods Decl. ¶ 4, Exs. 1 (Complaint), 2 (Personnel Investigation Notification).) The notification provides a minimal explanation, stating that Thomas is "the focus of a personnel

investigation for a violation involving rude and discourteous behavior." (Wood Decl., Ex. 2.) The notification provides no further information regarding the nature of the allegations against Thomas or the rules or codes of conduct Thomas allegedly violated. (See id.)

While the notice could have provided more information regarding the allegations against Thomas, it appears that Woods communicated with Thomas in some other manner regarding the nature of these allegations, because Thomas sent Woods an e-mail on June 2, 2009, clarifying that the investigation was "100% for issues involving" the former employee. (Woods Decl., Ex. 3.) Thus, it appears that Thomas was aware of the nature of the investigation. Moreover, the Sheriff's Department concluded that the allegations were unfounded on the basis of interviews and after considering the evidence. (Woods Decl., Ex. 4.) Finally, there is no evidence that anyone at the Sheriff's Office believed Thomas was a source for the Press-Enterprise article. Thus, Defendants' argument that the investigation arose in response to a complaint by an employee, and not in retaliation for Thomas's speech, is credible and supported by the evidence submitted.

**Removing Thomas from Challenging Work Assignments and Desired Committees**

Plaintiffs allege that on June 3, 2009, the Department stripped Thomas of her supervisory responsibilities for dispatch trainees. (Thomas Decl. ¶ 25.) Woods allegedly advised Thomas that Woods felt Thomas was too busy during the MOU negotiations. (Id.) Defendants also removed Thomas from the Uniform Committee in September 2009, again stating that Thomas was "too busy for her uniform activities." (Id. ¶ 35.) Thomas alleges that she "always had excellent performance reviews and there had never been any mention to her or her supervisors that her work or supervision of trainees suffered in the slightest due to her involvement in the 2009 MOU negotiations." (Mot. at 13; Thomas Decl. ¶¶ 2, 25.)

Defendants do not address Thomas's allegation that the County stripped her of her supervisory responsibilities for dispatch trainees in June 2009. In light of Plaintiffs' evidence and the lack of any evidence contradicting it, Plaintiffs have made a "clear showing," at this stage, that Thomas's speech was a substantial or motivating factor in the removal of her supervisory responsibilities for dispatch

trainees. See Mazurek, 520 U.S. at 972.

As to the County's decision to remove Thomas from the uniform committee, Defendants state they did so "[b]ecause Thomas's supervisor reported that Thomas's schedule was already filled with her assigned duties in training and her union activities." (Grotefend ¶ 5.) Defendants also submit evidence demonstrating that Thomas took significant leave or used on-duty time for union activities in 2009. (See Woods Decl. ¶ 6 (noting that in 2009 Thomas worked 1,457 hours, 391.5 of which were devoted to union activities).) Defendants also note that in addition to Thomas's union activities, Thomas also serves as an adjunct teacher at the Riverside Community College and took eight days off in 2009 to fulfill her teaching responsibilities. (Woods Decl. ¶ 7.) Finally, Defendants contend that the employee Grotefend assigned to attend the meeting could not attend, so Thomas attended anyway. (Grotefend Decl. ¶ 5.)

On the one hand, Defendants admit that Thomas indeed was removed from the committee because of her union-related activities, but significantly, the County did not do so because of the content of Thomas's speech or the identity of her associations, i.e., that she was negotiating against the County; rather, the County removed Thomas because she was spending significant time away from her job duties. Given the credible evidence submitted by Defendants that Thomas spent significant time on a variety of union and other activities, Plaintiffs have not met their burden of making a "clear showing" that Thomas's speech was a substantial or motivating factor in her removal from the uniform committee. See Mazurek, 520 U.S. at 972.

**Tracking Thomas's Time Spent on Union Activities, Requiring Thomas to Use Personal Leave for Union Activities, and Denying Release Time**

Thomas alleges that a few days after she spoke at a County Board of Supervisors meeting on October 6, 2009, Schertell created a unique time-tracking system solely to track Thomas's time. (Thomas Decl. ¶ 37.) This time-tracking system was not used by any other employees. (Id.) Thomas also alleges that the County began "punitively denying Thomas, and other SEIU members, release time

and refusing to pay for release time in violation of the MOU." (Thomas Decl. ¶¶ 39, 67.) Defendants informed Thomas that if she spent more than eight hours per month on union-related activities, she would have to use her personal leave time. (Id.) Plaintiffs allege that the MOU grants union stewards more than eight hours per month of release time. (Id.)

The 2009-2010 MOU and 2010-2011 MOU provide release time for SEIU Regional Council Meetings as follows:

> Up to eight (8) County employees, who are authorized representatives of SEIU local 721, shall be entitled to be released on one (1) regularly scheduled shift per month for the purpose of traveling to and attending the monthly meeting. Any hours used to attend such meetings which are in excess of those provided under the provisions of this section shall be taken without pay or charged against the appropriate representative's paid leave banks.

(Zappia Decl., Exs. 50, 51, Art. 31 § 10.) As to time spent as a Union steward, the MOU provides that the "County will not pay for, nor shall the Steward be entitled to make any claims for, time spent on Steward business during the Steward's non-regular working hours or for time spend on other union matters . . . ." (Id. § 7.) A steward is "permitted to use accumulated vacation and/or compensatory time [to conduct steward business], provided the use of such time does not result in the payment of overtime during the workweek in question." (Id.)

The 2010-2011 MOU provides additional release time for the SEIU Vice President, the position Thomas holds, to attend the Executive Board Meetings. As with the Regional Council Meeting, members of the executive board are "entitled to be released on one (1) regularly scheduled shift per month for the purpose of traveling to and attending the monthly meeting. Any hours used to attend such meetings which are in excess of those provided under the provisions of this section shall be taken without pay or charged against the appropriate representative's paid leave banks or the employee may remain on the County payroll and SEIU shall be obligated to reimburse the County based on actual costs of salary and benefits. The County will provide the Union with a detained breakdown of these costs and said funds shall be paid by the Union upon receipt of bill." (Zappia Decl., Ex. 51, Art. 31

§ 11.)

Defendants argue that in 2009 Grotefend found it necessary to monitor Thomas's time spent on union-related activities because Thomas "continued to miss substantial time from work for union activities," even after negotiations had concluded. (Opp'n at 10; Grotefend ¶ 6.) Grotefend said he initially was advised by the County's Human Resources Department that Thomas was authorized to use only eight hours of on-duty time per month for union activities. (Id.) The Human Resources Department later advised Grotefend that "there were several banks of time and committees on going [sic] with the union and it could be more than the 8 hours." (Id.) Given the confusion, Grotefend advised his staff "to just monitor the time used and we would coordinate with HR staff to see if it was appropriate use of time per Human Resources." (Id.) As of February 2010, all staff were advised to track time spent on Union activities via the County's electronic payroll system. (Id. ¶ 7.)

Here, it is undisputed that Defendants required Thomas to account for her time in a manner that was different than other employees and Union members. It also appears, however, that the Sheriff's Department experienced some internal confusion regarding the amount of time Thomas was entitled to for Union activities, which may have led to inconsistent application of the MOU to Thomas. It also is undisputed that Thomas took significant amounts of leave for Union activities. Accordingly, Plaintiffs have not met their burden of making a "clear showing" that Thomas's speech was a substantial or motivating factor in the County tracking Thomas's time spent on Union activities, requiring her to use personal leave for Union activities, and denying release time. See Mazurek, 520 U.S. at 972.

**Removing Thomas from the Dispatch Training Unit Supervisor Position and Transferring Her to a "Closet Office"**

Shortly after Thomas informed Defendants that she would be the lead negotiator for the 2010 MOU negotiations, the Sheriff's Department removed her from her assignment as the Training Unit Supervisor and created "a far inferior" Course Coordinator assignment. (Thomas Decl. ¶¶ 43, 53.) Thomas alleges the Training Unit position generally lasts three years, but that she was removed after only 1.5 years. (Id. ¶¶ 9, 43 (noting that the previous three Dispatch Training

Supervisors held their positions for 3.5, 4.5, and 5.5 years).) Thomas alleges that Captain Coz told her "not to worry" because, "in his experience, involuntary transfers usually only remained in effect until someone else messed up or got on the wrong side of the Sheriff's Administration." (Id. ¶ 55.) One day later, Thomas met with her new supervisor Terry Woods, and he confirmed that Thomas "had been given an increased workload and said [her] new job duties needed to take priority over [her] participation in union activities." (Thomas Decl. ¶ 56.)

Thomas also alleges that she was reassigned to an office that was a small "converted room" with no windows, no ventilation, and inadequate desks and chairs. (Thomas Decl. ¶ 56.) The location of the office "removed [Thomas] from any direct contact or communications with SEIU represented employees and other AOT personnel." (Id.) Thomas "had to take [her] own initiative to try to locate appropriate office furniture from discarded inventory at the County surplus facility." (Id.) Thomas also repeatedly requested that the County install air ventilation, but the Sheriff's Department did not take action from February 2010 to January 2011. (Id.) Only after Thomas moved into another office and another employee moved into Thomas's old office did the County finally repair the ventilation problem. (Id.)

Defendants respond that the decision to remove Thomas from the Dispatch Training Unit Supervisor position "was made for the legitimate interests of the Department." (Opp'n at 11; Hall Decl. ¶ 5.) In the Opposition, Defendants contend that "[i]t is the Department's policy to rotate Communication Officers into and out of the desert locations approximately every two years." (Opp'n at 11.) The evidence Defendants cite to, however, does not state that the Sheriff Department has such a policy. Moreover, Defendants do not address at all Thomas's allegations regarding her transfer to a substandard office with poor working conditions. In light of Plaintiffs' evidence and the lack of any evidence contradicting it, Plaintiffs have made a "clear showing," at this stage, that Thomas's speech was a substantial or motivating factor in her removal from the Dispatch Training Unit Supervisor position and placement in a substandard office. See Mazurek, 520 U.S. at 972.

**January 2011, Involuntary Transfer**

In November 2010, a few days after SEIU announced that Thomas would lead the 2011 MOU negotiations, the Sheriff's Department advised Thomas she was

being transferred from the Course Coordinator assignment back to a regular Dispatch Supervisor position. (Thomas Decl. ¶ 76.) Just before this third transfer, Thoms had filed grievances on behalf of SEIU, testified at a PERB hearing, engaged in numerous public speaking engagements on behalf of SEIU, and was nominated to lead the 2011 MOU negotiations. (Id. ¶¶ 63-66, 72-75.) When Thomas asked her supervisors why she was being transferred after only nine months when she previously had been advised that she would remain in the Course Coordinator assignment for two to three years, Thomas's supervisors stated that they did not know why she was being transferred, they had no choice in the matter, they had no issues with her work performance, and the transfer order came from "higher up" in the administration. (Id. ¶ 77.) Thomas's evaluation from February 10, 2010 to January 27, 2011 rates Thomas's overall effectiveness as "above standard," which is the second-highest rating. (Id. ¶ 104; Ex. G.) Thomas also alleges Defendants

refused to honor her 2011 vacation schedule that had been approved previously. (Id. ¶ 80.)

Defendants do not address Thomas's transfer from the Course Coordinator position to the Dispatch Supervisor position. Instead, Defendants address their reasons for transferring Thomas from the graveyard shift to the day shift, which is a distinct issue. Given the timing and context of Thomas's transfer, as well as the lack of any explanation whatsoever for Thomas's transfer, Plaintiffs have made a "clear showing," at this stage, that Thomas's speech was a substantial or motivating factor in her removal from the Course Coordinator position. See Mazurek, 520 U.S. at 972.

**March 2011, Shift Change**

On or around March 4, 2011, Thomas was transferred involuntarily from her chosen graveyard shift to a day shift, which caused her to lose compensation for premium pay and placed an additional financial burden on her to obtain childcare. (Thomas Decl. ¶ 95; Grotefend Decl. ¶¶ 9-10, Ex. 2.)

Defendants argue that they transferred Thomas from the graveyard shift to the day shift to ensure their operations were running smoothly and efficiently. (Opp'n at 11.) Defendants present evidence that Thomas only worked 171.5 hours of the 252

hours she was scheduled to work during the period from January 27, 2011 to March 11, 2011. (Grotefend Decl. ¶ 10, Ex. 3.) In addition, Thomas had pending leave requests for 48 additional hours through May 4, 2011, which did not include time off for union negotiations. (Id.) The Sheriff's Department "is better equipped to handle and cover Thomas's absences for union negotiations during the day shift." (Id. ¶ 13.) Moreover, Defendants state that the day shift allows Thomas "to schedule and attend SEIU collective bargaining sessions with the County of Riverside during the day." (Id.) Defendants state they attempted to minimize the impact of the transfer on Thomas by allowing her to work four 10-hour shifts, four days a week, whereas the other supervisors assigned to floor operations work 12-hour shifts. (Id. ¶ 14.) Since Thomas was assigned to the day shift, Defendants state that Thomas has taken 142 hours off for union activity, out of 320 hours she was assigned to work, or 44% of her assigned shift hours. (Id. ¶ 15, Ex. 3.) Thomas has requested 60 additional hours to conduct Union negotiations during the remainder of June 2011. (Id.)

Defendants also state that their decision to move Thomas to the day shift was motivated, in part, by Thomas's "absurd" request to conduct bargaining sessions in the evening, starting as late as 8 p.m. and ending as late as 12 a.m. (McArthur Decl. ¶ 5.) Defendants argue that "this request was impossible to comply with, given that most or all of the other 24 members of both parties' bargaining teams work during normal working hours." (Id.; see also Exs. 8, 26.)

Defendants' explanation that they transferred Thomas to the day shift because they were unable to cover her graveyard shifts due to her required absences for union negotiations, is credible and supported by the evidence. McArthur's statement that the decision was in part motivated by Thomas's "absurd" request to schedule MOU negotiations in the late evenings, appears to be a retaliatory basis for transfer. That is, Defendants are not allowed use Thomas's statements during the MOU negotiations to punitively change her shift. While McArthur attempts to suggest the shift change was in Thomas's best interest, her own statements belie this assertion, i.e., Thomas did not want to work the day shift but was forced to do so. Thus, at best, Defendants present evidence of a mixed motive. In light of the evidence that Defendants based their decision, at least in part, on Thomas's request to conduct MOU negotiations in the late evening, Plaintiffs make a "clear showing," that

Thomas's speech was a substantial or motivating factor in Defendants transferring Thomas from the graveyard shift to the day shift. See Mazurek, 520 U.S. at 972.

**Internal Affairs Investigations**

Shortly after filing this action, Plaintiffs assert that Defendants initiated two new Internal Affairs investigations into Thomas and "placed her and her husband under 'gag' orders." (Mot. at 17.) On January 10, 2011, the County informed Thomas she was under investigation for misuse of the County e-mail system. Thomas admits that she forwarded one e-mail of a personal nature, a dancing baby video, that another County employee forwarded to her. (Id. ¶ 92.) She also admits that she commented on and then forwarded another e-mail that a County employee forwarded to her, which contained photographs of mutual friends and County employees at a wedding. (Id.) Thomas contends, however, that other employees either were not disciplined at all or were not disciplined to the degree she was for similar conduct. (Id.) Thomas also admits that she included her attorneys in an e-mail exchange regarding the County's revocation of her previously approved vacation time for 2011, but again questions whether the resulting admonishment, interrogation, and investigation by the County were representative of how the County treats other employees. (Id.) Thomas alleges that she was questioned for four hours regarding her use of e-mail, her role in SEIU, and her involvement in this action. (Id.)

According to Defendants, this investigation "was not initiated by the Department," but rather began when an e-mail "was forwarded to the Department's attention by an employee on or about January 10, 2011." (Knudson Decl. ¶ 5.) Defendants also note that Thomas was disciplined previously for misuse of County e-mail. (Price Decl. ¶¶ 5-6, Exs. 1-2.) Thomas received a written reprimand on May 28, 1997, for "sending personal messages to a patrol deputy [her husband] . . . [which] made references to marriage, cars, movies, books and dating." (Price Decl. ¶ 1, Ex. 1.) Thomas also was disciplined in 2003 for misuse of the e-mail system and received a "counseling memorandum." (Price Decl. ¶ 6.) Though the counseling memorandum was not attached as evidence, Defendants include Thomas's performance evaluation from that time period, which refers to the memorandum. (Id., Ex. 2.) The performance evaluation rated Thomas 2.5 out of 5 in the category of "Judgment," noting, "Thomas is encouraged to use better

judgment when using the CAD mail system . . . . Thomas received a counseling memorandum for her misuse of the CAD mail system." (Id., Ex. 2.)

On March 17, 2011, Thomas was informed that she was the subject of another Internal Affairs investigation and was read her Miranda warnings. (Thomas ¶ 93.) According to Defendants, this investigation was "brought to the Department's attention by an employee in March 2011 and not initiated by the Department." (Knudson Decl. ¶ 6, Ex. 3.) The investigation involves Thomas's alleged "misconduct in the handling of the instructor training file on March 16, 2011." (Id.) Following the investigation, Thomas received a written reprimand – a Notice of Summary of Disciplinary Action – on May 23, 2011. (Id., Ex. 4.) Thomas indicated on the written reprimand that she did not agree that she violated the rules or regulations alleged and did not consent to the action taken. (Id.) Thomas appealed the Notice of Summary of Disciplinary Action on May 30, 2011. (Knudson Decl. ¶ 7, Ex. 5.) Thomas denies these charges and contends the County misinterpreted her actions. (Thomas Decl. ¶ 93.) According to Thomas, she never took training records from the filing cabinet in her former office, and instead only retrieved copies of past e-mails and e-mail attachments that she had printed previously, in an effort to address an issue raised in her most recent performance evaluation. (Id. ¶ 93.)

Given the evidence submitted by Defendants regarding the reasons for the investigations, Plaintiffs have not met their burden of making a "clear showing" that Thomas's speech was a substantial or motivating factor in the initiation of the Internal Affairs investigations against her. See Mazurek, 520 U.S. at 972.

Plaintiffs also argue the "gag orders" contained in investigation notifications were improper because they sought to stifle Thomas's and her husband's speech. (See generally Mot. at 17-19.) Each admonishment differs slightly, but they are substantially similar. The admonishment contained in an Internal Affairs investigation initiated at Thomas's request provides, "You are ordered to not discuss this investigation or any aspect thereof with any persons other than your chosen Union representative or attorney. The intent of this admonishment is to protect the integrity of the personnel investigation and prevent inadvertent/ unnecessary disclosures that could taint the perception of a witness(s) [sic] . . . . Failure to obey the above admonishment shall be considered insubordination. Until completion of

the personnel investigation, this order shall remain in effect until rescinded by the Professional Standards Bureau." (Knudson Decl. ¶ 4, Ex. 1.) The admonishment regarding the e-mail investigation is similar but allows Thomas to discuss the matter with her "legal representative or [her] husband Randall Thomas." (Knudson ¶ 5, Ex. 2.) The admonishment also states that failure to comply "could result in disciplinary action leading up to, and including, termination." (Id.) The admonishment related to the training records investigation orders Thomas "not to discuss this investigation or the allegations with anyone other than your representation." (Knudson Decl. ¶ 6, Ex. 3.)

Defendants contend these admonishments are customary, and do not amount to "gag orders." (Knudson Decl. ¶ 4.) When a personnel investigation is initiated, the County may interview witnesses. (Ford Decl. ¶ 3.) To protect the integrity of the personnel investigation and to prevent inadvertent and unnecessary disclosure that could taint the perception of the witnesses, "admonishments are issued to employees who are known to be the focus of, or witness to, the matter under investigation." (Id. ¶ 3.) "The admonishment is immediately lifted upon the conclusion of the investigation once the complainer employee has signed off [on] the investigation report." (Id.)

During the June 29, 2011, hearing, Plaintiffs expressed concern that Thomas may violate the admonishments inadvertently during negotiations or while discussing other union-related matters. Defendants responded that the admonishments were not intended to prohibit Thomas from speaking on union-related issues, but only to prohibit discussion of the subject matter of the Internal Affairs investigations. In light of the information presented by Plaintiffs' counsel regarding the County's conduct of the ongoing Internal Affairs investigations at the preliminary injunction hearing, as well as the somewhat vague language contained in the admonishments, the Court finds there exists potential for application of the admonishments in a manner that could curb Thomas's protected speech. As Defendants conceded at the hearing that the admonishment should only prohibit discussion of Internal Affairs investigations, the Court deems reasonable Plaintiffs' request to narrow the application of the admonishments.

**Removal of Teaching Duties**

On May 4, 2011, the County began to remove Thomas from her teaching assignments at the Ben Clark Training Center where she had been teaching courses in the Public Safety Communications for Riverside Community College since 2003. (Thomas Decl. ¶ 101.) Thomas estimates this change will deprive her of approximately $9,000.00 per year. (Id.)

Defendants state that they made this change "in order to provide better and more effective training to its employees." (Coz Decl. ¶ 4.) Defendants "hoped to get a larger pool of instructors" so "more people could teach." (Id.) As a result, Defendants modified the teaching schedules of all instructors and reduced some instructors' teaching hours to allow a variety of other instructors with the opportunity to teach. (Id.) "Because Thomas had more assignments than any other instructor, her hours were reduced, [but] Thomas was still left with 72 hours of teaching time in a year." (Id.) Plaintiffs allege that Defendants have not added any new instructors, however. (Thomas Decl. ¶ 101.)

Given the evidence submitted by Defendants regarding the reasons for changing the teaching assignments of all instructors, Plaintiffs have not met their burden of making a "clear showing" that Thomas's speech was a substantial or motivating factor in the removal of some of Thomas's teachings activities. See Mazurek, 520 U.S. at 972.

**Summary**

Taken as a whole, Plaintiffs have satisfied their burden of showing Defendants "took adverse employment action . . . [and that Thomas's] speech was a 'substantial or motivating' factor in the adverse action." Freitag, 468 F.3d at 543. Clearly, Defendants were aware of Thomas's Union role, as well as much of her speech regarding labor issues. Plaintiffs produced both direct and circumstantial evidence to demonstrate Defendants' retaliatory motive. See Ulrich, 308 F.3d 968. As to circumstantial evidence, Plaintiffs demonstrated a nexus between the adverse actions taken and Thomas's speech by showing a proximity in time. Moreover, Plaintiffs presented several instances where Defendants expressed opposition to Thomas's speech. Finally, Plaintiffs demonstrated that at least some of Defendants' proffered explanations for the adverse employment actions lacked credibility. See Alpha Energy, 381 F.3d at 929; Coszalter, 320 F.3d at 977; Ulrich, 308 F.3d at 980;

Keyser, 265 F.3d at 751-52.

**d. Whether the State Employer Had Adequate Justification for Treating the Employee Differently from Other Members of the General Public**

As Plaintiffs have established they are likely to prevail in establishing a prima facie case for retaliation, the government now bears the burden of showing that under the Pickering balancing test, "the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." Garcetti, 547 U.S. at 418. "Although the Pickering balancing inquiry is ultimately a legal question, . . . its resolution often entails underlying factual disputes." Eng, 552 F.3d at 1071. Eng specifically holds that the government must establish that its "legitimate administrative interests outweigh the employee's First Amendment rights." Id. These interests include promoting efficiency and integrity in the discharge of official duties and maintaining proper discipline in the public service. Connick, 461 U.S. at 150-51. "Cases that analyze whether the government's administrative interests outweighed the plaintiff's right to engage in protected speech examine disruption resulting both from the act of speaking and from the content of the speech." Clairmont, 632 F.3d at 1107. Here, Defendants have not established disruption sufficient to outweigh Thomas's First Amendment rights.

In examining whether a public employee's act of speaking disrupted the workplace, the Court must consider "the manner, time, and place in which" the employee's speech took place. Connick, 461 U.S. at 152. In Connick, the fact that the employee's speech took place at the office supported the Court's determination that the speech disrupted the efficiency of the workplace. Id. at 153. The Supreme Court contrasted the situation with that in Pickering, where the employee's speech occurred during the employee's free time away from the office. Id. Here, the majority of Thomas's speech did not take place at the workplace; as noted above, though some of her speech took the form of internal employee grievances within the workplace, much of Thomas's speech took place at large public meetings, or in the media.

The court next considers the related question whether Thomas's speech and associational activities impeded her ability to perform her job duties. See Connick,

461 U.S. at 151. Defendants make no argument and put forth no evidence that Thomas's speech prevented her from fulfilling her other work responsibilities, though they suggest that she spent a significant portion of her time on Union negotiations and other activities. Her performance evaluations during the relevant time period, however, never fell below the second-highest rating of "above standard." (See Thomas Decl., Ex. G.)

Next, the court may consider whether the defendant has presented evidence that the employee's speech interfered with the working relationship in the office. In Connick, the Supreme Court held that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." Id. at 151-52. There, the Court characterized the public employee's speech as "causing a mini-insurrection" and as "an act of insubordination which interfered with working relationships." Id. at 151. To prove that an employee's speech interfered with working relationships, the government must demonstrate "actual, material and substantial disruption, or reasonable predictions of disruption in the workplace." Robinson v. York, 566 F.3d 817, 824 (9th Cir. 2009) (internal quotation marks omitted). Defendants cite no evidence in the record to support such a finding.

Thus, in balancing Thomas's First Amendment rights to participate in union-related speech and associational activities against the justifications proffered by Defendants, the Court finds the administrative interests advanced by Defendants do not outweigh Thomas's First Amendment free speech rights.

**e. Whether the State Employer Would Have Taken the Adverse Employment Action Absent the Protected Speech.**

With respect to the fifth inquiry, a defendant may avoid liability by showing that the employee's protected speech was not a but-for cause of the adverse employment action. Mt. Healthy, 429 U.S. at 287; Eng, 552 F.3d at 1072.

According to the Ninth Circuit,

> This question relates to, but is distinct from, the plaintiff's burden to show the protected conduct was a substantial or motivating factor. It asks

> whether the "adverse employment action was based on protected and unprotected activities," and if the state "would have taken the adverse action if the proper reason alone had existed."

Eng, 552 F.3d at 1072 (quoting Thomas v. City of Beaverton, 379 F.3d 802, 808 (9th Cir. 2004)); Knickerbocker v. City of Stockton, 81 F.3d 907, 911 (9th Cir. 1996); Coszalter, 320 F.3d at 978. Whether the defendant would have taken the same adverse action against the employee irrespective of the protective speech is a question of fact. Robinson, 566 F.3d at 824; Eng, 552 F.3d at 1072 (citing Wagle v. Murray, 560 F.2d 401, 403 (9th Cir. 1977) (per curiam) ("Mt. Healthy indicates the 'trier-of-fact' should determine whether the [adverse employment action] would have occurred without the protected conduct.")); see also Karam v. City of Burbank, 352 F.3d 1188 (9th Cir. 2003).

While this inquiry is separate from the substantial motivation factor, the Court largely addressed these issues in that analysis above. While certain of Defendants' adverse employment actions arose from a mixed motive – for example, Defendants' transfer of Thomas from the graveyard shift to the day shift on the basis of both lawful and unlawful reasons – Defendants took several other actions solely on the basis of Thomas's speech. In reaching that conclusion, the Court considered whether Defendants presented evidence of valid grounds, such as Thomas's performance, for taking the actions.

Plaintiffs sufficiently established through their evidence that Defendants took certain adverse actions on the basis of Thomas's protected speech alone, i.e., that Thomas's speech was the "but-for" cause of Defendants' actions. Aside from the evidence discussed above, Defendants present no further evidence here and accordingly fail to meet their resulting burden of rebutting Plaintiffs' evidence. Thus, the Court concludes that Plaintiffs have met their burden of showing they are likely to succeed on the merits.

**B. Likelihood of Irreparable Harm**

Plaintiffs bear the burden of demonstrating that an irreparable injury is "likely in the absence of an injunction" before a decision on the merits can be rendered." Winter, 129 S. Ct. at 375; Park Village Apartment Tenants Ass'n v. Mortimer Howard Trust, 636 F.3d 1150, 1166 (9th Cir. 2011) ("Plaintiffs must show a likelihood, not a

mere possibility, of irreparable injury.").

Here, Defendants argue that Plaintiffs fail to show irreparable injury and that, in fact, Plaintiffs' injunction seeks to prevent "public officials from exercising their First Amendment and fundamental management rights." (Opp'n at 23.) The latter argument is more appropriately addressed under the balance of the hardships factor in Section III(C) infra. As to the former argument, the Court finds that Plaintiffs have demonstrated a likelihood of irreparable harm, in the form of infringement of Thomas's First Amendment rights and retaliation against her, if an injunction is not granted.

"Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm." Nelson v. Nat'l Aeronautics & Space Admin., 520 F.3d 865, 882 (9th Cir. 2008) (citation omitted); Associated Gen. Contractors v. Coalition for Economic Equity, 950 F.2d, 1401, 1412 (9th Cir. 1991) ("[A]n alleged constitutional infringement will often alone constitute irreparable harm."). "Both [the Ninth Circuit] and the Supreme Court have repeatedly held that 'the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" Klein v. City of San Clemente, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (alteration and citations omitted); Elrod v. Burns, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 973-74 (9th Cir. 2002); S.O.C., Inc. v. Cnty. of Clark, 152 F.3d 1136, 1148 (9th Cir. 1998); Jacobsen v. U.S. Postal Serv., 812 F.2d 1151, 1154 (9th Cir. 1987)).

The Court finds Plaintiffs have demonstrated sufficiently that Defendants have deprived Thomas of her First Amendment rights. As noted above, such deprivations, even for a short period of time, constitute irreparable injury. See Klein, 584 F.3d at 1207-08. Moreover, even aside from the constitutional nature of these violations, Plaintiff Thomas has presented evidence that she has suffered harm: she has been unable to negotiate and express herself freely because of the retaliation against her. (Thomas Decl. ¶ 105.) Moreover, Thomas alleges that she was questioned during the Internal Affairs investigations about this lawsuit and her role in the SEIU. (Id. at 92.) "[O]ut of fear of further retaliation," Thomas declined to act as

a steward for two co-workers who were "being questioned by management." (Id. ¶ 100.) Thomas has avoided appearing in photographs at SEIU events and has chosen to appear on fewer flyers and videos "to reduce her exposure out of fear for her job." (Id. ¶ 105.) Plaintiffs accordingly have demonstrated a likelihood of irreparable harm if injunctive relief is not granted.

**C. Whether the Balance of Equities Tips in Plaintiffs' Favor**

As a preliminary injunction is "an extraordinary remedy," courts "must balance the competing claims of injury and must consider the effect on each part of the granting or withholding of the requested relief." Winter, 129 S. Ct. at 366-67; L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 634 F.2d 1197, 1203 (9th Cir. 1980) (holding that in assessing whether a plaintiff has met this burden, the court has a "duty . . . to balance the interests of all parties and weigh the damage to each."). Plaintiffs bear the burden to establish that "the balance of equities tips in [their] favor." Id. at 374.

Here, the Court finds that the balance of equities tips in Plaintiffs' favor. "[I]n considering the balance of hardships, the district court must take into account the probability that declining to issue the injunction will permit the allegedly unfair labor practices to reach fruition." Paramount Land Co. LP v. Cal. Pistachio Comm'n, 491 F.3d 1003, 1012 (9th Cir. 2007). "By bringing a colorable First Amendment claim, [a movant] certainly raises the specter of irreparable injury," but "simply raising a serious [First Amendment] claim is not enough to tip the hardship scales." Miller v. Cal. Pac. Med. Ctr., 19 F.3d 449, 460 (9th Cir. 1994) (en banc), rev'd on other grounds, Winter, 129 S. Ct. 365 (2008).

As set forth above, Plaintiffs have established that Thomas likely will suffer irreparable harm if an injunction is not granted. Thomas has alleged a range of injuries related to Defendants' retaliatory conduct such as infringement of her First Amendment rights and loss of income. Thomas seeks to exercise her First Amendment rights and perform her job duties without facing such retaliation. Ninth Circuit case law "clearly favors granting preliminary injunctions to a plaintiff . . . who is likely to succeed on the merits of his First Amendment claim." Klein, 584 F.3d at 1208.

On the other hand, Defendants argue that Plaintiffs' requested relief infringes on the "County's First Amendment rights and the interests of the public in the maintenance of efficient government services" and that these hardships "outweigh Plaintiffs' unsupported allegations of retaliation." (Opp'n at 25.) Defendants contend that Plaintiffs' requested relief seeks to:

> (1) enjoin the County from ensuring efficiency of the public service it provides through its employees; (2) . . . enjoin the County from disciplining and transferring its employees in accordance with long-standing policy and departmental needs; (3) . . . transfer management's lawful authority to the Plaintiffs and their union by enjoining employment decisions by all persons which [sic] Plaintiffs believe to be inappropriate.

(Id.)

The Court agrees the scope of Plaintiffs' requested relief is overbroad and accordingly has narrowed the terms of the injunction significantly as discussed in Section III(E) infra. Any resulting hardship to Defendants after these amendments is minimal. The Court accordingly concludes that the balance of hardships sharply tips in Plaintiffs' favor.

**D. Whether the Public Interest Favors Granting the Injunction**

A plaintiff seeking injunctive relief must demonstrate that granting the injunction is in the public interest. Winter, 129 S. Ct. at 374. Plaintiffs bear the initial burden. Stormans, Inc. v. Selecky, 586 F.3d 1109, 1139 (9th Cir. 2009) (citing Winter, 129 S. Ct. at 378). "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero–Barcelo, 456 U.S. 305, 312 (1982). "When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favors granting or denying the preliminary injunction.'" Stormans, 586 F.3d at 1138-39 (quoting Bernhardt v. L.A. Cnty., 339 F.3d 920, 931 (9th Cir. 2003)). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public

interest will be relevant to whether the district court grants the preliminary injunction." Stormans, 586 F.3d at 1139 (citing Sammartano, 303 F.3d at 965); see also Golden Gate Rest. Ass'n v. City & County of S.F., 512 F.3d 1112, 1126 (9th Cir. 2008).

Here, there is a public interest in upholding constitutional free speech. The Ninth Circuit has "consistently recognized the significant public interest in upholding free speech principles," Klein, 584 F.3d at 1208 (quotation omitted), but the public interest in maintaining a free exchange of ideas can be overcome by a "strong showing of other competing public interests." Sammartano, 303 F.3d at 975.

Although the parties here did not address this factor separately, they both make arguments under balance of hardships factor that apply here. For example, Defendants argue that the County's efficiency will be affected adversely if the Court grants Plaintiffs' requested relief. Certainly the public, as well as the County, has an interest in the efficient administration of County business. The public interest, therefore may be affected negatively, if the Court were to grant an overly broad injunction that impaired the County's ability to function efficiently. Similarly, Defendants contend in the Opposition that Plaintiffs' requested relief is impermissibly vague and overboard. (Opp'n at 25.) The Ninth Circuit has held that the public interest is implicated where an injunction "clearly reache[s] non-parties and implicate[s] issues of broader public concern that could have public consequences." Stormans, 586 F.3d at 1139. The Court agrees that most of the relief Plaintiffs have requested is impermissibly overbroad, and accordingly has limited the scope of the injunction as set forth in Section III(E) infra. Given the Court's narrowing of the injunction as discussed below, the Court finds that the injunction will serve the public interest by upholding constitutional free speech principles, without harming the public through inefficiency.

**E. Scope of the Injunction**

"Injunctive relief . . . must be tailored to remedy the specific harm alleged." Lamb-Weston v. McCain Foods, Ltd., 941 F.2d 970, 974 (9th Cir. 1991). "An overbroad injunction is an abuse of discretion." Id.

Here, Plaintiffs seek to enjoin Defendants from:

(1) initiating any new involuntary transfers of Plaintiff Wendy Thomas;
(2) continuing with their [Internal Affairs] probes into Thomas on trumped up charges;
(3) enforcing two new [Internal Affairs] "gag orders" on Thomas;
(4) conducting informal discovery about this lawsuit under the ruse of [Internal Affairs] investigations; and
(5) further discriminating and retaliating against SEIU members for exercising their First Amendment rights to participate in union activities, such as serving on bargaining committees and as job site stewards.

(Mot. at 1-2, 25.)

Although Plaintiffs mention harm suffered by other members of the Union and County employees, Plaintiffs' allegations are vague and the evidence supporting them thin. Plaintiffs' substantiated claims all involve Thomas. The Court accordingly limits the injunction solely to actions taken against Thomas.

Furthermore, as discussed above, Plaintiffs' evidence related to the Internal Investigation claims against Thomas was not sufficient to establish that Defendants investigated Plaintiff Thomas in retaliation for the exercise of her First Amendment rights. Plaintiffs also failed to adduce sufficient evidence to demonstrate that Defendants sought to conduct informal discovery "under the ruse of" the Internal Affairs investigations against Thomas. For these reasons, the Court declines to grant this requested relief.

Plaintiffs also request that the Court enjoin Defendant from "further discriminating and retaliating against SEIU members for exercising their First Amendment rights to participate in union activities such as serving on bargaining committees and as job site stewards." (Mot. at 1-2, 25.) The Court finds this statement overly broad and vague, in that it sweeps non-parties within its ambit and merely requires Defendants to obey the law. As such, the Court DENIES Plaintiffs' request to grant this requested relief.

As noted above, however, given the context – i.e., the timing, nature, and surrounding events – of Thomas's transfers, Plaintiffs have established, at this stage, that Defendants punitively transferred Plaintiff Thomas in retaliation for her union-related speech. Given that Defendants again recently transferred Plaintiff Thomas involuntarily, requiring the County to refrain from doing so for the pendency of this action will result in little, if any, hardship to them. Additionally, Plaintiffs' request to enjoin Defendants from "enforcing two new [Internal Affairs] 'gag orders' on Thomas" is overbroad because the County presented evidence that it has an interest in preventing its employees from discussing the subject matter of Internal Affairs investigations. In light of the County's conduct of the pending investigations, however, the Court finds reasonable Plaintiffs' request to clarify that the County's general admonition that Thomas not discuss her Internal Affairs investigations with others should apply only to the subject matter of those investigations and not to general, union-related speech. Narrowing the injunction as set forth above mitigates the potential harm to Defendants, yet achieves the goal of preserving the status quo until this action may be decided on the merits.

**F. Injunction Bond**

Although under Federal Rule of Civil Procedure 65(c) a bond typically is required upon issuance of a preliminary injunction in federal court, courts in the Ninth Circuit have dispensed with the requirement where there is little or no harm to the party enjoined or where the plaintiffs were unable to afford to post such a bond. See, e.g., Jorgensen v. Cassiday, 320 F.3d 906, 919 (9th Cir. 2003); Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999). Courts also have denied bond requirements where the plaintiff was "pursuing litigation that would vindicate important constitutional rights." Taylor v. Chiang, No. CIV. S-01-2407 WBS GGH, 2007 WL 1628050, at *4 (E.D. Cal. June 1, 2007), vacated on other grounds, 2007 WL 3049645 (E.D. Cal. Oct 18, 2007); Mercer, Fraser Co. v. Cnty. of Humboldt, No. C 08-4098 SI, 2008 WL 4344523, at *2 (N.D. Cal. Sept. 22, 2008) (holding "that the preliminary injunction will require defendant to incur little or no monetary costs and that the injunction is sought to vindicate constitutional rights and the public interest, so no bond or security will be imposed under Fed. R. Civ. Pro. 65(c)."); Doctor John's, Inc. v. City of Sioux City, 305 F. Supp. 2d 1022, 1043-44 (N.D. Iowa 2004) (holding that "[r]equiring a bond to issue before enjoining potentially unconstitutional conduct by a government entity simply seems inappropriate, because the rights

potentially impinged by the governmental entity's actions are of such a gravity that protection of those rights should not be contingent upon an ability to pay); Atlanta v. Metro Rapid Transit Auth., 636 F.2d 1084, 1094 (5th Cir. 1981) (waiving the requirements of Rule 65(c) where plaintiffs seeking to protect citizens from perceived adverse economic and social harms because the plaintiffs were acting in the public interest).

Here, Plaintiffs seek to vindicate important constitutional rights and given the limited scope of the injunction, Defendants will incur little, if any, monetary costs. The Court accordingly waives the bond requirement.

## IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Plaintiffs' Motion in part and DENIES it in part. The Court ORDERS that Defendants are enjoined during the pendency of this action as follows:

(1) from involuntarily transferring Plaintiff Wendy Thomas to other positions, shifts, or work locations; and

(2) from issuing or enforcing any Internal Affairs admonishment or directive, in the course of any County Internal Affairs investigation, prohibiting Plaintiff Wendy Thomas from discussing union-related activities, including but not limited to collective bargaining, contract negotiations, and the MOU between SEIU and the County of Riverside.

**IT IS SO ORDERED.**